

Part Three: A Study on the Legal Issues of Abandoned Children (Laqit)

Preliminary Topics of Discourse

As one of the most important functions of marriage, reproduction sometimes turns into a serious problem in both individual and social aspects.

Many women and men in a legitimate or illegitimate way and through wanted or unwanted submission to sexual intercourse may provide the way for a baby to be born, whom none of them desired to live on and if it happens to be born, they cannot manage its life due to certain social or economic problems.

Such people can take action in two ways to get rid of this problem: destroying the fetus before birth (abortion), or abandoning the baby after birth, leading to formation of the “abandoned children” phenomenon.

Of course, the role of the natural factors in creating abandoned children is not to be ignored, since some natural disasters such as flood, earthquake, epidemic diseases, war, etc., may cause the death of the parents or even close relatives of the child. It is unfortunately in these circumstances that we encounter the tragic phenomenon of “unattended children”.

Besides the abandoned and unattended children, there is a third group of children called laboring children. These are a group of children who despite enjoying legal guardians and living with them, spend most of their time out of their homes or on the streets in order to earn money for their guardians.

Similarly important is the issue of the fourth group, i.e., “run-away children”, since there are many children who because of poor family conditions leave home and wander about aimlessly, continuing to live in public places in much more unhealthy ways.

Talking about the latter two groups, i.e., “laboring children” and “run-away children” is beyond the scope

of this book, because taking care of the children who have identified protectors, legally rests with their guardians (*wali*) or people such as their father or grandfather. However, a study of the ways in which such children come into being is to be undertaken as a social problem by sociologists.

The jurists have independently studied the issue of the abandoned children in books of jurisprudence concerning *luqata*. *Luqata* means something that someone finds in public places, whether it is property, animal, or human being.^{[1](#)}

Discussing about the found properties and animals and the way to introduce and find their proprietor is again beyond the scope of this book, but talking about the babies abandoned in public places, which in legal terminology are named by three words of *laqit*, *malqut*, and *manbudh*,^{[2](#)} is what we deal with in this chapter.

Of course, it is not to be neglected that many of the rulings set forth about the abandoned children are true for the unattended children too, namely the children who have for natural or social reasons lost their protectors. Thus, among the issues brought up in this chapter, we will talk about both topics – as relevant to the subject.

Laqit refers to any child who is abandoned to its fate, with no one to raise and take care of it.^{[3](#)}

It goes without saying that if the child is old enough to be able to satisfy its own needs and to take care of its own health, this title (*laqit*) does not apply to it, nor do the rulings that we will talk about in the following.^{[4](#)}

Now, if such a child has guardians, it will be handed over to them; otherwise, someone should undertake its custody.

It is also necessary to note that although the term *laqit* does not apply to the grown up people (adults) since they do not need to be taken care of (through custody), if their life is at risk, helping them and saving them from danger is obligatory to everyone.^{[5](#)}

Necessity of Taking Care of the Unattended Children

If we encounter a child in the streets or a public place who does not have a guardian or whose legal guardian has abandoned and this child is wandering about with no shelter, what should we do?

There are three views in the legal texts concerning the duty of the people who encounter such children:

Most of the Shiʿa jurists believe that collecting the abandoned and unattended children and taking care of them is a collective or communal (*kifa'i*) duty, i.e., if one person undertakes it, others will be exempt from this task. However, if no one does, all those who are informed about it while having the possibility to take care of such children, are sinful.^{[6](#)}

Collecting the abandoned children and taking care of them is obligatory, since it is among the benevolent

deeds that God has obliged us to cooperate with one another and commissioned us to act in this respect, as saving one's life is also among the most important duties of every Muslim: ﴿**Cooperate in piety and God wariness, but do not cooperate in sin and aggression.**﴾⁷ ﴿**O you who have faith! Bow down and prostrate yourselves, and worship your Lord, and do good, so that you may be felicitous.**﴾⁸ ﴿**And whoever saves a life is as though he had saved all mankind.**﴾⁹

In addition, if giving food to someone who is starving or keeping people clear of harm is obligatory from a religious perspective, it can be well concluded that collecting the unattended and abandoned children, sheltering them, and fulfilling their needs is obligatory in sight of God.¹⁰

Given these explanations, although collecting children from public places is obligatory, it is indeed a communal duty, because collecting such children is aimed at protecting their lives and fostering and educating them. This goal is achievable by any Muslim who may undertake it; besides, the jurists' consensus (*ijma'*) and reference to the practical principle of disavowal (*bara'a*) would confirm it not to be *ʿayni* (personal duty) and to be *kifa'i* (collective or communal duty).¹¹

The question arises for the jurists who believe collecting the abandoned and unattended children is a communal duty that if someone undertakes this task, can they give up later on or are they obliged to live up to their commitment until the child reaches maturity?

Answering this question involves the doctrinal rather than jurisprudential (legal) research that whether the undertaking that has been communal at the outset can turn into personal so that it is not possible to give it up, or it will remain as a communal duty to be continued.¹²

In contrast to communal obligation, some jurists believe that picking up abandoned children and taking care of them is a praiseworthy and preferably religious act, in which lies otherworldly reward besides its worldly value.

To prove this view, in addition to practical principle of exemption which results in non-obligation of collecting such children, it is emphasized that cooperation in pious deeds which is implied from the verse ﴿**Cooperate in piety and God wariness, but do not cooperate in sin and aggression**﴾¹³ is desirable and not obligatory.¹⁴

To our opinion, there is no doubt that collecting such children and sheltering them is among the good and pious acts which have always been recommended, ﴿**and We revealed to them the performance of good deeds**﴾¹⁵, doing this pious act sometimes become essential and obligatory, since failing to do so may endanger a child's life.

Thus, collecting the abandoned children and taking their custody is a desirable (*mustahab*) act, which will turn into an obligation when their lives are endangered. This obligation can be communal or individual given the child's conditions.¹⁶

In any case, whether picking up and collecting such children is desirable or obligatory, the finder of the child (*multaqit*) is to do their best in safeguarding it in a decent way and fulfill their commitment toward that child either directly or indirectly through someone else, so long as they have not dispensed with their decision. Naturally, whenever in the meantime they failed to continue or by any reason were unwilling to continue this task, they are to leave the child with the judge (Islamic ruler or supportive institutions).[17](#)

Permit Requirement (Asking for Permission): Although special requirements are to be fulfilled for custody of a child which we will deal with later on, collecting the children from the streets or any other public places does not require anyone's consent.[18](#) However, in case of lacking financial, moral, and social qualifications in the finder, the child is taken back from him; for, asking permission from the judge or the Islamic ruler can lead to wasting time and further damage to the child.

Producing a Witness: If someone encounters an infant or child abandoned in a public place, do they need a witness for picking it up from the public passageways? Naturally, if a witness is supposed to bear witness on picking up the child by the finder, they should point out two things:

1. Finding the child by the finder (*multaqit*),
2. The properties and things possibly found along with the child.

It is related from some Shafi'i jurists that the presence of a witness when picking the abandoned child (*laqit*) is obligatory, because such children must remain secure both in terms of life and parentage and this will not be realized except by taking a witness statement.[19](#)

With reference to the principle of exemption and comparing picking up abandoned children to accepting trusts, some jurists have claimed that taking a witness – like when accepting trusts – is not obligatory, and it is possible to proceed to collect them without anyone to be present as witness.[20](#)

A group of jurists also believe that if the finder of the child (*multaqit*) is a just person, there is no need for taking a witness; however, if his or her justice is not evident, taking witness is obligatory, as this would create more trust in that person.[21](#)

Finally, this possibility is also brought up in legal texts that taking a witness for picking up an abandoned child is a desirable action (*mustahab*). It can be a factor in preserving the child's parentage (lineage) and preventing any possible misuse by the person who has found the child. It is possible to increase the possibility of finding the child's parents.[22](#)

To our opinion, although the presence of a witness for collecting and taking custody of abandoned and unattended children is desirable as reason dictates that someone should witness the one picking up the child. Especially when there are personal belongings with that child so that the finder would not get into trouble later on by being accused and suspected by others, this is not obligatory or *mustahab* in a legal sense since we have no valid reason for it. Besides, finding a witness for such a matter is

sometimes impossible and it may at times be so time-consuming that the child's life could be endangered, especially in large cities where due to unfamiliarity with each other, people would usually not agree to witness.

Conditions for the Custody of Abandoned Children

Jurists have set certain conditions to be fulfilled by the person who has found a child and wants to undertake its custody. If they do not meet all or any of the conditions, they are not allowed to undertake this task and in case they have picked up the child, it is taken back from them and left with someone qualified.

It is to be noted that these conditions are valid only for the finder that for whom the finding of the child is a preliminary step toward protecting and safeguarding it, or else, they are not required for the finder who does not have the intention or the ability to undertake such a task. Therefore, the term *multaqit* in the Islamic jurisprudence does not apply to any person who finds a child.

1. Maturity and Intellect: Maturity and intellect are among the general requirements of any obligation; that is why some jurists instead of mentioning those requirements have pointed out that the first requirement for permission to take the custody of a child is maturity of age. Thus, all the reasons that validate maturity and intellect in other obligations would include *iltiqat* (picking up abandoned babies from public passageways) as well.^{[23](#)}

In addition to this, only he can manage someone else's life who can at least manage his own life; naturally, the one who is not qualified to manage his own life will not be able to run someone else's life.

Given this, it is obvious that for validation of these two conditions, there is no need for relating the discussion of custody to the issue of guardianship (*wilaya*),^{[24](#)} for we have no reason for the validity of guardianship in the sense set forth in Shi'a jurisprudence regarding the issue of *hidhanat* and *iltiqat*.

2. Mental Maturity: Mental maturity (*rushd*) is opposite to feeble-mindedness (*safah*), as mentally mature (*rashid*) is opposite to feeble-minded (*safih*). The feeble-minded individual who is referred to as inconsistent and simpleton, is the one who is unable to use their properties rightly and handle them wisely. In contrast, the mentally mature is someone who is capable of making correct use and preventing damage of his or her properties.^{[25](#)}

With reference to this issue, the Holy Qur'an states: ﴿Do not give the feeble-minded your property, which Allah has assigned you to manage: provide for them out of it, and clothe them, and speak to them honorable words. Test the orphans when they reach the age of marriage. Then if you discern in them maturity, deliver to them their property.﴾^{[26](#)}

It is noteworthy that the designation of orphan does not do anything with mental maturity (*rushd*) and the ruling ensued, for although the object of verse 6 of *Surat al-Nisa* and the two traditions narrated by

Hisham and [Abd Allah b. Sanan²⁷](#) is orphan, but as verse 5 of the same *sura* denotes the ruling for not delivering property to the feeble-minded is a general ruling that includes both orphan and non-orphan. Then, reaching the age of maturity is not sufficient for taking hold of one's property; one has to achieve a mental maturity for this purpose, as well.[²⁸](#)

Although we have no reasons in *hadith* collections that explicitly proclaim a person does not need custody when they reach mental maturity, this does not mean that the immature person can do anything except property ownership, since conditionality of such matters as maturity in religious rulings and regulations are not legal and founded; rather, they are exhortative and emphasized according to intellectual stipulation and procedure.

Thus if according to the intellectuals maturity is necessary in other matters except property ownership, it can be judged to be conditional; although legal reasons are silent about it.

Examination of the families whose decisions are intellectually oriented clearly indicates that the newly matured adolescents who enjoy inadequate wisdom cannot be left to themselves to manage their own lives. Rather, they need to be taken care of, a care that needs no specific reason issued by the legislator to prove its necessity, but the intellectuals' practical prescription is sufficient for this purpose.

Therefore, included among those who are in need of custody are the feeble-minded and intellectually underprivileged people who do not enjoy the required mental health and maturity to run their own lives.

It goes without saying that even if the feeble-minded reach their maturity, they have to remain under protection of their guardians; thus, they will not be able to undertake running another person's life.[²⁹](#)

Conclusion: If what is meant by *iltiqat* is picking up a baby from the street and handing it over to the unattended-children care centers, a feeble-minded person will be able to do this. However, if it means undertaking the responsibility for taking care of the baby, we should note that only he could take care of a child who is at least able to take care of his own life, and the feeble-minded person does not enjoy this ability. And the fact that according to the Holy Qur'an leaving the properties of an orphan at his or her own disposal is, besides maturity, contingent on mental maturity does not mean that the feeble-minded require a guardian only in financial matters and can undertake their own life affairs in non-financial matters as well.

For this reasons, claiming that a child's custody can be entrusted to a feeble-minded person but not letting him or her to interfere with the child's financial affairs,[³⁰](#) is not legally justified.

3. Justice: In some jurisprudential texts, enjoyment of justice is regarded as one of the requirements of the finder of the above-mentioned child.

The word justice (*ʿidalat*) is conceptually opposite to tyranny (*zulm* = injustice), but in legal texts its opposite is iniquity (*fisq*), although some have regarded it as higher than not committing sins and defined

it as a kind of perpetual self-restraining (innate disposition).[31](#)

If we translate justice as not committing sins, then being just equals not being sinful or reprobate (*fasiq*). but if we translate it as innate quality and moral disposition, then not being sinful cannot be regarded as equivalent to being just, as there is a third state to them that although a person does not have the habit of self-restrain, he or she does not commit any sins in some instances, either.[32](#)

Some jurists have regarded as precautionary the existence of justice in the finder of the child[33](#); some believe that justice is not valid because child custody is not safekeeping to require justice and if it does, being a Muslim by itself encompasses being trustworthy, as well. Besides, permitting a non-Muslim person to undertake the custody of a Muslim child, the practical principle of exemption, and inclusiveness of traditions indicate the invalidity of justice, too.[34](#)

Finally, the possibility has also been proposed that if a child has some properties of his own, the one who proceeds to pick up the child has to be just, since the breach of trust is strongly probable; but if the child lacks properties, justice is not valid.[35](#)

Irrespective of the third theory, which is not evidenced by any proof, the other two theories can be reconciled, since although leaving the child with someone who has a disposition of justice is precautionary; there is no reason for observing it. Moreover, some proofs can be given according to which we do not need to make sure of such a level of piety. Since, sometimes we can trust someone who, despite lack of certain desirable features, is certainly able to protect the child by paying enough affection and care in managing its affairs to the extent that a just person may not enjoy such ability. However, it does not mean that we can leave a child with a reprobate (*fasiq*) person.[36](#)

To our opinion – as we already said in the discussion about the custody of parents – enjoyment of moral competence of the finder of the child (*multaqit*) is among the most fundamental requirements of leaving the child's custody to them. Since the legitimacy of *iltiqat* in Islamic jurisprudence is for its protection of the life and psychophysical health of the children whose parents have for some reasons shunned their duty in undertaking their care and abandoned them in public passageways. Now, how would it be possible to leave the child with someone who would inflict serious physical or moral damages on it?

Is it reasonable to give the child's custody to someone who due to moral corruption and lack of sufficient religious commitments would misuse them in various ways, or at least provide the ground for sins in them?

Thus, if the finder of the child is a reprobate (*fasiq*) person or happen to become so later on, the Islamic ruler (the judge of the institutions in charge) would take over the child from him or her, since the *fasiq* is not legally trustworthy. *Fasiq* is a wrongdoer (*zalim*), and trusting their wrongdoing is not permissible according to the holy verse: **﴿And do not incline toward the wrongdoers, lest the Fire should touch you﴾**,[37](#) as it can lead to the miseducation of the child.[38](#)

But if the finder's state is unclear or only apparently seems trustworthy, although in some legal texts it is considered permissible to give the child's custody to them,^{[39](#)} to our opinion, so long as we are not reassured that the child's physical and moral soundness is taken care of, we cannot leave the child with them. To prove such a claim we do not need any particular reason, since the attitude and procedure of the intellectuals, which is undoubtedly confirmed by the Holy Lawmaker (the Prophet – S.A.W.), is that not everyone should be trusted with the education of one's child.

How would a religion that does not deem it permissible to leave a child with a wet nurse who is familiarly, ideologically, or intellectually unhealthy and regards it as inappropriate to leave one's property to a thoughtless person, would allow it to leave a child to someone who we know does not have the required competence, or at least we do not know whether he has it or not?^{[40](#)}

Can we not hold the words of Imam al-Baqir (A.S.) as a model to follow, who said: "Whoever trusts an untrustworthy person there is no proof for them with God"? In addition, should we not take heed of the message that the Imam would always impart by saying: "A trustworthy person never betrays you, but that you have trusted a betrayer [to be betrayed]".^{[41](#)}

Perhaps it has been for the importance of the issue of the unattended children that some jurists have distinguished between *luqata* and *laqit* and emphasized giving the custody of such children to a non-reprobate person, while casting doubt on the necessity of entrusting property to a non-probate person, because there are no supportive procedures to prevent misuse of children like the ones existing concerning the prevention of misuse of property by untrustworthy people. Similarly, some jurists deem it necessary for achieving more reassurance to take someone as witness over a person who finds an abandoned child, even though the finder is a trustworthy person.^{[42](#)}

4. Islam: Being a Muslim is among the requirements stipulated in some legal texts for the finder (*multaqit*) of the abandoned child.

The question has been raised by the Shi'a jurists as to whether a non-Muslim can pick up an abandoned Muslim child from the streets and undertake its custody. Besides, can a non-Muslim undertake to manage the life of a Muslim child?

Some believe that only a Muslim is allowed to collect and take care of unattended children, since a non-Muslim may provide the ground for the deviation of the child by influencing its beliefs and faith.^{[43](#)}

In contrast, some also believe that being a Muslim is not a condition for such a task, because two basic goals legitimize the collection of the abandoned children: fulfilling the child's basic and natural needs and providing for its educational requirements, both of which can be afforded by a non-Muslim person, too. Furthermore, the application of the proofs for *iltiqat* encompasses the two hypotheses of the *multaqit* (finder of the abandoned child) as being a Muslim or non-Muslim. If we are doubtful about the permission of leaving the child's custody to a non-Muslim, we should know that the practical principle of exemption denotes its permission, whether the child is a Muslim or a non-Muslim.^{[44](#)}

A third view is also brought up in legal texts and its followers believe that even though a non-Muslim cannot take care of a Muslim child, they can take care of a non-Muslim child.

It is emphasized that custody is a kind of guardianship (*wilaya*) and the non-Muslim cannot have guardianship over a Muslim according to the verse **﴿and Allah will never provide the faithless any way [to prevail] over the faithful.﴾**⁴⁵ So the non-Muslim cannot take care of a Muslim child. In addition to that, the non-Muslim can have a great impact on a child's tendency toward a doctrine other than Islam, as the same has also been brought up concerning the marriage of a Muslim woman to a non-Muslim man.⁴⁶

A non-Muslim can undertake to pick up and hold the custody of a non-Muslim child because the guardianship of a non-Muslim over a non-Muslim is permissible and there is no obstacle to undertake such a task. When a child is non-Muslim, there is no such issue of negative impact on the child's beliefs; and if we doubt about the permissibility of this task, the exemption principle signifies its permissibility.⁴⁷

Since the critical review of each of these reasons would lengthen the discussion, we suffice it to say that to our opinion Islam is the main requirement for collecting and undertaking the custody of abandoned and unattended children, because:

There is not the slightest doubt in that a non-Muslim can fulfill the material and psychological needs of an unattended child as much as, or sometimes even better than, a Muslim can, for the non-Muslims are well-capable of this responsibility for their own children. However, it has to be noted that satisfying the children's physical and emotional needs alone for taking care of them is not enough, for living with one or more persons by itself provides a suitable ground for compliance and modeling, a context that has a great and undeniable impact on the child's behavior and beliefs.

The Holy Prophet (S.A.W.) of Islam has described this impressionability as follows: "No child is born except according to its inner nature [Islam]; then, it is its parents who rear it as a Jew, a Christian, or a Magus."⁴⁸ Accordingly, it can be well understood that trying to preserve the Monotheistic inner nature and preventing it from deviation is not only decent and praiseworthy but an indisputable task for any Muslim, as well.⁴⁹

With this consideration in mind, there remains no room for dividing children into Muslim and non-Muslim. That is because the title "non-Muslim" is applied to the child who is found in non-Muslim settlements, otherwise, such a child has neither reached a mature age to have selected a specific religion out of his/her own investigation, nor he/she has specific parents so that the title Jewish-born or Christian-born, etc., is true for him/her.

Thus, if we find a child in such a circumstance and can leave it with a Muslim, the latter is more preferable to a non-Muslim. However, if we find a Jewish-born or Christian-born child abandoned in the street who lacks a guardian in all aspects, then it is not clear whether its being a Christian-born is a license for leaving its custody to the church.

It goes without saying that this matter does not contradict the right of non-Muslim parents in taking care of their own child, for our discussion concerns a situation in which undertaking the guardianship of a child is a legislative matter and requires passing a law by the legislator. However, every parent naturally undertakes their child's life simply by fulfillment of generic relation between them and their child without needing any conventional right; and it is obvious that in generic matters it is the external fulfillment of an action that is functional rather than the conventional matters such as acceptance of a specific religion.

Therefore, like the Muslim parents, the non-Muslim parents can undertake their own child's care and nothing can deny them this generic right. However, this right can be restricted to specific limitations and conditioned on special conditions when it is entrusted to someone through passing a law so that not all people can exploit it.

5. Financial Capacity: Should the finder of an abandoned or unattended child (*multaqit*) enjoy financial capacity besides other requirements, to be able to take the custody of the child?

Answering this question is possible when it is clarified how the expenses for the child would be provided during the time the finder undertakes its care.

Undoubtedly, paying for the expenses of the child's care is not upon the finder. Rather, if the child owns property, the expenses will be paid thereby, but if the child does not have such property, the Islamic state (public treasury) is responsible for paying for the expenses and in case of the government's non-existence or inability to pay for it, provision of expenses will be upon the well-to-do class or the public. Thus, in all these assumptions, the finder's financial capacity cannot be a condition.[50](#)

However, if we assume that the provision of the child's expenses is not possible by any of the above means, the finder of the child is obliged to pay for the expenses by him/herself. It is natural that in such circumstances the finder's financial capacity is the basic requirement for accepting the responsibility of the unattended child's custody.

Anyhow, the financial capacity of the child's finder can be an advantage for them for in this case they can provide more welfare for the child, which in turn can have a significant role in its growth. Thus, it is not unlikely to claim that in equal circumstances the one who is more well-to-do has priority in undertaking the child's care.[51](#)

6. Residence Constancy: Does the permanent or temporary change of residence of the person who takes care of an unattended or abandoned child have any impact on the child's care process?

Some argue that the finder of the child is regarded as its guardian, has the right to make decisions for the child, and is allowed to move their residence along with the child to avoid harming it; furthermore, the practical principle of exemption does confirm the permissibility of the move.[52](#)

In contrast, arguing that the child's distancing from the place it was abandoned will in itself reduce the chance for finding its probable relatives, some believe that moving the child's residence is not

permissible and the finder is permitted to hold its custody so long as they do not move it from that place to another.[53](#)

Finally, some have also commented on this issue considering the finder's moral characteristic as well as the type of the place that the child is moved onto.

On this basis, if the finder of the child is a really trustworthy and just person, he is entitled to take the child with them, but if they are apparently trustworthy and just, they do not have the right to move the child away since there is the possibility of misuse.[54](#)

In some legal text, the issue of moving the child in relation to the type of place that it is supposed to be moved onto is examined, such as move from town to desert, town to village, from town to town, and finally, the nomadic life.

It is noteworthy here that most of these matters have been brought up by Muhaqqiq Tusi and [ؒ]Allama Hilli, with the legal judgments (*fatawa*) of the Sunni scholars playing a significant role in their formation.[55](#)

To our opinion, none of the stated reasons can prove or disprove the permissibility of transfer or move of the child in general. What is of importance to us is the child's interests. It is to be noted whether the child's move is helpful in its physical and mental growth or not. If the answer is yes, this move is permissible; otherwise, it is not. In order to become more assured of this, the realization of its helpfulness and the way it should be carried out can be left upon the organization that is in charge of control and care of the families who take the custody of such children.

It is not unlikely, of course, that like the late Shahid (Awwal), we give a legal judgment (*fatwa*) that the child had better not be taken from a city to a village and from a village to the desert, so that its living condition does not worsen, its kinship bonds remain more preserved, and its physical health care can be pursued more easily.[56](#)

7. Gender: Among the questions asked about the finder of the child is the impact of their gender; is it necessary for the finder to be a man? Or can a woman also take the abandoned child's custody simply by finding it?

[ؒ]Allama Hilli claims that although affection is stronger in women, the men's physical superiority and their higher strength makes them more reliable to be entrusted with a child's custody. Ahmad Ardabili, known as Muhaqqiq, also claims that if the child is a girl, a woman has priority over a man in undertaking her custody, because women are kinder and are more mentally prepared to take care of a child.[57](#)

To our mind, there is no gender advantage in taking care of the child as what is important is the benefit and interests that the child receives.

Legal Issues of Abandoned Children

Legal issues of the unattended children are examinable from two perspectives; one is identifying the proprietor and the degree of proprietorship of the property found along with the children and the other is provision of the expenses for their care and determining the required sources for that purpose.

Property Found along with the Abandoned Children

The children who are abandoned in one of the public places usually have some objects with them. Who do these objects legally belong to?

Although there is disagreement among the jurists concerning the proprietorship of some of the objects, there is no doubt that since the child, like adults, is entitled to take possession of objects, it has ownership over what it has dominance over.[58](#)

The objects used by the abandoned child such as the clothes it is wearing, the blanket covering it, the cloth wrapped around it, etc., are undoubtedly among the child's belongings.[59](#)

There are two different opinions concerning the proprietorship of the objects found around the abandoned child; some regard them as belonging to the child and some believe that they do not belong to the child.[60](#)

If some objects are hidden under or around the place where the child is abandoned, can one by finding those objects judge them as the child's belongings?

Some believe that if these objects are buried in a piece of land that belongs to the child, the buried objects belong to the child as well; otherwise, their simply being buried around the child does not necessarily mean they belong to it.[61](#)

But if there is a written note with the child indicating that a specific property belongs to this child, can this note be trusted and accordingly judged to the child's proprietorship of the belonging?

By accepting the note as an indication of proprietorship, some judge the property as belonging to the child; and some, by doubting it to be an indication, judge it as not belonging to the child.[62](#)

To our opinion, the belongings used by the child or found with it are undoubtedly regarded as its properties, such as the clothes it is wearing, garments somehow relating to it (bedcover, sheet, blanket, mattress, and the like); ornaments that are with the child, and the stuff around it (such as hammock, baby carriage, and the like), and generally all the things that are customarily said to belong to a child.[63](#)

However, what are found around the child do not belong to it, unless there exists valid and reliable evidence as to the child's ownership of them or they are in a place dedicated to the child.[64](#)

Providing for the Abandoned Children's Living Expenses

Among the most important issues concerning the abandoned (unattended) children is the provision of their living expenses.

The question is raised by most of the jurists as to who would commit to provide for the child's living expenses once its custody is taken by the person who has found it.

In case the child has sufficient financial means, provision of its living expenses, like other people, is not obligatory on anyone else and its material needs are fulfilled through its own assets.[65](#)

Although the jurists are unanimous about this ruling in and by itself, they disagree concerning how it is to be implemented; for, the jurists have raised the question as to whether the finder of the child is permitted to directly take from the child's property and use it to provide for the living expenses of the child or they require permission from certain authorities (Islamic judge) for taking from the child's property.[66](#)

Some believe that the finder of the child can without needing to ask permission from any authority such as the orphan's guardian, use the child's property to provide for its living expenses.[67](#)

In contrast, most of the Shi'a jurists believe that the finder of the child cannot undertake to use the child's property to provide for its living expenses without asking from the Islamic ruler.

Accordingly, if the Islamic ruler is present and one can ask permission from him for this purpose, the finder of the child can provide for the child's expenses using its own property, since education, custody, and *infaq* (giving away in charity) require a kind of guardianship which is among the responsibilities of the father, grandfather, the executor (*wasī*), and the Islamic ruler. Besides, usufruct (*tasarruf*) is possible only by having general or specific guardianship, whereas the finder of the child (*multaqit*) does not enjoy any of these two types of guardianship.

Therefore, if the finder appropriates the child's property except in necessary cases without permission from the Islamic ruler, they will stand responsible for it proportionate to the amount they have appropriated and they are obliged to refund it.[68](#)

In this case the Islamic ruler can give permission to the finder to spend from the child's property, as he can also leave the child's property to a trusted person and specify certain amount of the property for the child's expenses.[69](#)

But if the Islamic ruler does not exist or access to him is not possible, the finder can use the child's property to provide for its expenses as *hisba* (accountability).[70](#)

To our opinion, if we scrutinize the arguments of both proponents of the independence and non-independence of the child's finder (*multaqit*), we would find out that the core of their discussion is the existence or non-existence of the *multaqit's* guardianship over the abandoned child ; however, we

explained at the outset of the discussion that custody (*hidhanat*) means taking care of the child and that guardianship in the concept used in jurisprudence has nothing to do with its actualization or veracity.

It is clear that if the issue of guardianship is no longer under consideration, no room is left for discussion about asking permission from the Islamic ruler and the like; thus, for the same reason that the finder of the child is permitted to undertake the custody of the child, they are also permitted to appropriate the child's property to actualize the custody.

The point that is to be taken into consideration is the trustworthiness of the finder of the child, as we already explained that taking the custody of a child is the acceptance of a kind of trust and safekeeping a trust requires some qualification, without which it is not possible to accept the trust.

Thus, if the finder of the child is trustworthy and thereby permissible to adopt the child, then there is no difference between the child and its property.

If the finder is trustworthy, the issue of their surety (*dhamam*) is no longer an option unless they have not correctly fulfilled their duties (by going to extremes), in which case they will definitely stand accountable whether they have appropriated the child's property by the Islamic ruler's permission or without it.

It is also to be noted that as confirmation of the finder's trustworthiness requires being done by an authority that is in charge of this task, confirmation of correct and pertinent expenditure of the child's property by the finder also requires a supervisory system to prevent the finder from probable shortcomings (going to extremes) and care be taken that the child's interests are in all cases secured. It is obvious that the realization of such a matter does not necessarily require asking permission from the Islamic ruler if the ruler is meant to be an Infallible Imam or his special deputy,^{[71](#)} let alone that the title of ruler includes the jurist (general deputy) and other than him; for, we have no reason for its validity except for the prophetic tradition that says: "Sultan is guardian of the one who does not have a guardian"^{[72](#)} which, given the studies done, is a part of a tradition that ʿA'isha has narrated from the Holy Prophet (S.A.W.) concerning a woman's getting married without permission of her guardian.^{[73](#)}

Despite the debates of the Sunnis themselves over the chain of transmission (*sanad*) and the non-acceptance of its content by the Shiʿa jurists, this tradition has been first related by ʿAllama Hilli during jurisprudential discussions and without mentioning its *sanad*.^{[74](#)}

In addition to this, although some have claimed that what is meant in this tradition by Sultan is the Infallible Imam or his specific and general deputies and for the same reason they have resorted to it to prove the guardianship of jurisprudence (*wilayat-i faqih*),^{[75](#)} to our opinion what is meant by Sultan is the Infallible Imam or his specific deputy and inclusion of others such as the Shiʿa jurist during the occultation age requires another reason that may regard the jurists as deputies of the Infallible Imams in all issues.^{[76](#)}

Therefore, there is no reason for the necessity of asking permission from the Islamic ruler (the jurist during the occultation age) to spend from the child's properties, and if we are doubtful of the necessity to

ask permission from the Islamic ruler (*faqih*), the principle of exemption (*bara'a*) proves it unnecessary;^{[77](#)} although caution demands to ask permission for this purpose from the jurist or the supervisory organizations that have been established to this end.

Since most of the unattended children who are abandoned in public places have no properties or money with them so that their livelihood is thereby taken care of, the question has been raised by our jurists as to how the living expenses of such children is to be provided.

A group of the Shi'a jurists have set forth the possibility – which is somehow influenced by the Sunni views – that the living expenses of such children are to be provided and paid by the public treasury,^{[78](#)} as there is no doubt that such a task is in the interest of the public; and since the assets of such people would be transferred to the public treasury after their death in case they have no blood relatives or relatives by marriage, the government is obliged to provide for their living costs now that they are in need of help.^{[79](#)}

Naturally, if the state's public budget does not respond to the living expenses of such children or there are more important expenses for the government to cover, then the people are required to provide for these expenses as collective obligation.

Such public collaboration can be carried out in two forms of loan or alms, which in the first form; the child should pay back its previous living expenses after reaching maturity and earning a livelihood. But as for the second form, it does not have to pay back the expenses.^{[80](#)}

In contrast, some jurists have suggested that the government has no duty in paying for the living expenses of such children and their expenses have to be provided for through non-governmental sources.^{[81](#)} To this end, three ways have been suggested: granting a loan; using the budget at the disposal of the Imam; and provision by the one who is taking care of the child (*multaqit*).

Apart from the option of granting loan, which has no legal foundation, raising the issue of the budget at the disposal of the Imam is based on the notion that we consider a specific budget for the Infallible Imam (A.S.) other than the public treasury, as he is the heir to the people who have no heir and as he receives certain share of the *khums* (one fifth tax); but the Imam's treasury seems to be no different from the public treasury, but this dichotomy is resulting from the fact that after the demise of the Holy Prophet (S.A.W.) some illegally took over the rule and prevented the Infallible Imams from involving in running the state's affairs.^{[82](#)}

Similarly, obliging the person who is taking care of the abandoned child (*multaqit*) to provide for its living expenses does not sound right, because, in order to undertake the provision of other people's living expenses there must exist a kinship bond or marital relation between them, which are characterized in tradition texts as father, mother, spouse, and children, none of which applies to an abandoned child whom someone has found in public places.

Besides, compelling the finder of the child to pay for its living expenses causes reluctance in people to collect abandoned children because this will double their commitment, i.e., both undertaking the child's custody (*hidhanat*) and providing for its living expenses (*nafaqa*).

It is obvious that with the increase of responsibility, people's participation in such tasks will decrease, which in turn would lead to inflicting harm on such children and in case we suspect obligatoriness of *infaq* on the finder of the child, we can repudiate its probable obligatoriness by implementing the practical principle of legal exemption.[83](#)

To our opinion, in order to determine whose duty it is to pay for the living expenses of abandoned (unattended) children, we should see what motivation lies behind picking up (*iltiqat*) the child from the public passageways.

If the motivation behind picking up abandoned children is merely protecting their health and after picking up they will be handed over to the police centers or establishments dedicated to this purpose (e.g., orphanage), the duty of providing for their living expenses rests with the Islamic state and no one else has any commitment in this respect, irrespective of the child being a Muslim or a non-Muslim.[84](#)

However, if the finders of the child have undertaken the child's custody and adopted it as their stepchild with the coordination of the supervisory establishments – as explained during previous discussions – then providing for the living expenses of that child would be upon the finders; for if not logically, but normally and conventionally it is upon them to provide for the living expenses of the child they have agreed to adopt.[85](#)

For this reason, when someone picks up a child from the streets or takes it over from the center for collecting these children in order to adopt it as a stepchild, they implicitly accept all exigencies and consequences of such an undertaking, which include providing for the food, clothing, hygiene, and medical treatment as well as the education and marriage of that child, just like any father and mother who normally undertake such tasks for their children in ordinary circumstances, without having any right to refund their expenses in the future.[86](#)

The exception is that, since accepting the responsibility of taking care of a child is a primitive commitment and the finder of the child can, depending on their ability or willingness, refuse to accept some of the exigencies and consequences, they restrict fulfilling their responsibility to a specific time or task, in which case they are obliged to fulfill their commitment proportionate to the extent of their responsibility.

In this case, the finder can accept only the supportive aspects of custody provided that the child's expenses are undertaken by someone else; or, supposing that the finder is paying the expenses too, they may reserve the right to refund it after the child reaches maturity and is able to pay back those expenses.[87](#)

In any case, to prove the permissibility of refunding the expenses of taking care of the child in this latter presumption (intention of recourse), we can rely on the traditions related by ʿAzami, Madaʿini, Muthanna, and Muhammad b. Ahmad.[88](#)

Disagreement in Expenses for the Custody of Abandoned Children

If we suppose that we cannot supply for the expenses of such children through any governmental or non-governmental sources and the finder of the child is ready to undertake to pay for these expenses provided that they are refunded, then it is argued that if the abandoned child, after achieving financial means and ability to pay back what the finder had spent for it, disagrees with the finder over the amount of refund, what has to be done to resolve the disagreement?

The disagreement of the finder and the found is to be viewed in two ways:

First, disagreement over the expenditure itself: If the finder of the child (*multaqit*) claims to have spent a sum of money for its livelihood but the abandoned child (*laqit*) denies such expenses, the claims of the finder is accepted, since it is obvious that the child's growth would not have been possible without expenditure, whether this disagreement is over the spending from the child's own property or from the finder's property.[89](#)

Second, disagreement over the amount of expenditure: If the amount of money that the finder reports to have spent for the child is not accepted by the found (*laqit*) but this amount is equivalent to the conventional expenditure of taking care of a child, then the finder's report will be accepted because it is assumed that since the finder of the child has been a trustworthy person, the child's custody has been entrusted to him or her; thus his claim in this respect is accepted.[90](#)

However, if the finder demands an amount higher than the conventional or claims to have spent from the child's own property and the child, after reaching maturity, disclaims that amount of expenditure, the child's claim is accepted, because the finder of the child himself admits having gone to excess and the practical principle necessitates the child (*laqit*)'s non-commitment (non-indebtedness) to the expenditure excessive to the convention.[91](#)

To our opinion, since entrusting a child's custody to its finder has to be supervised by the Islamic state, the supervisory institution would monitor the way the living expenses of the child are provided for, just as it keeps under its surveillance the finder's moral soundness and the child's psychophysical health.

Therefore, if the finder of the child, who also undertakes the child's custody, is an honest and trustworthy person and the supervisory institution would approve his actions as right, then his claiming as to the amount of the child's living expenses will be accepted, whether supplied from the child's properties or from his own; otherwise, the child's finder has to present trustworthy documents to prove his claim. Of course, it is obvious that the child's claiming no expenses have been paid for its maintenance is triable only when there has been another source for providing its living expenses.

Penal Problems of Abandoned Children

Penal problems of the abandoned (unattended) children are examinable from two perspectives:

Crime against Abandoned Children

Among the problems discussed in Islamic jurisprudence is the crime against the abandoned (unattended) children and the examination of its penal and legal aspects.

This discussion is brought up since in Islamic law physical injuries to other people are divided into two parts of deliberate and erroneous, depending on the perpetrator's intention. In deliberate crimes, the one who is the victim of a crime (*mujanna ʿalay*) and in case of death, his or her inheritors have the right to inflict the same criminal act (*qisas*) with the same degree and intensity on the criminal (*jani*), or receive damages (*diya*) in case it is done mistakenly and without premeditation, depending on the intensity and the place of injury.

As for the crime against children, if the child has a natural guardian (father or paternal grandfather), its guardian can, depending on the type of crime and the observance of his or the child's expedience, retaliate by *qisas*, receive *diya*, or forgive the criminal without receiving money or by receiving money as much as he deems appropriate. In case the criminal act results in the murder of the child, he can ask for *qisas* or be content with receiving *diya*.

The question is raised by the jurists that if a child does not have a guardian, who will make decisions on the above cases?

We will examine the juridical and penal aspects of this issue in regard to the type of the crime and the punishment in the following four forms:

First, deliberate crime leading to death: If someone kills a human being on purpose and with criminal premeditation, his/her inheritor or inheritors (blood avengers) can punish and kill the murderer in retaliation (*qisas*) on the conditions explained in legal books:

﴿**Do not kill a soul [whose life] Allah has made inviolable, except with due cause, and whoever is killed wrongfully, We have certainly given his heir an authority**⁹²﴾

Now, if someone killed an abandoned (unattended child), whose responsibility would it be to make decision about *qisas* or forgiveness of the criminal? And in case of forgiveness, who would the money taken thereby belong to?

Some jurists believe that making decision in this respect rests with the Infallible Imam (A.S.), who can have the criminal killed through *qisas* as he can forgive him and receive the blood money, which he will spend on what is in the Muslims' interests,⁹³

﴿But if one is granted any extenuation by his brother, let the follow up [for the blood-money] be honorable, and let the payment to him be with kindness. That is a remission from your Lord and a mercy.﴾⁹⁴

A group of jurists also believe that the Imam (A.S.) is the successor to the inheritor and to the guardian of the murdered person and like the guardian can forgive the murderer by receiving some money; or forgive him without receiving any money; so, the Infallible Imam (A.S.) has the right to show Islamic affection to the murderer without receiving any money.⁹⁵

Muhaqqiq Hilli and some of the Shafi'i jurists believe that the Imam can – like in other instances – only punish the murderer in *qisas*, because forgiveness of the criminal is contrary to the Muslim's interest.⁹⁶

Second, erroneous crime leading to death: If someone causes another's death in a non-criminal act and without predetermination (erroneous murder), he has to pay blood money.⁹⁷ Therefore, the one who causes the death of abandoned (unattended) children has to pay the blood money; and according to the Sunni jurists this blood money is to be deposited to the public treasury, and according to the Shi'a jurists it is handed over to the Infallible Imam (A.S.) to spend it wherever he deems necessary.⁹⁸

Third, premeditated crime leading to bodily retaliation (*qisas* on the body): if someone by means of a criminal act causes maiming, fracture, rupture, and the like to a person's body, they have to be retaliated (by *qisas*), unless the one to whom the crime has been inflicted consents to forgive without compensation or with compensation.

Now, what should be done if someone inflicts such a crime on an abandoned (unattended) child? Some jurists maintain that since making decision in this respect is left with the very person who had been the victim of the crime, we must wait for the child to reach maturity so that he or she may decide accordingly, since one of the purposes of *qisas* is to pacify the anger of the person who has been the victim of a crime and this purpose is fulfilled through *qisas* or receiving blood money by the blood avenger.

Therefore, as the father cannot retaliate or forgive the criminal before his child reaches maturity, so also is the Imam (A.S.) not permitted to do so, either.⁹⁹

Since such a view requires imprisonment of the criminal until the child reaches maturity and there is no permit for imprisonment which in itself is an independent punishment, this view has been criticized.¹⁰⁰

Muhaqqiq Tusi believes that if a child has reason and power of discrimination, we must wait for the child to reach maturity, since it is the child's right to wish to revenge. However, if the child is feeble-minded and insolvent (*mu'asir*), his or her guardian shall take blood money instead of retaliation (*qisas*); and if the child is well-to-do (*mawsir*), blood money cannot be received for him/her.¹⁰¹

The reason for this distinction is the difference made between the child and the insane concerning *qisas*

in legal texts. According to some jurists, a guardian (*wali*) can make decision about crime against an insane person, but he is not permitted to do so in relation to a child; he has to wait for the child to reach maturity. It is because the length of time to wait for the child to reach maturity is specified, but this time is not distinct for the insane person, as it is not clear when he/she would recover his/her mental health. [102](#)

It is also mentioned in legal texts that since the Infallible Imam is the guardian (*wali*) of the unattended children and the guardian can ask for *qisas* on behalf of the one over whom he practices *wilaya* (*muwalla* عنه *alayh*), the Imam or his deputy can retaliate the criminal in *qisas* in the best interest of the child or forgive him in lieu of *diya*. There is no reason postponing this for the child to reach maturity, especially when this postponement may remove the conditions for *qisas* or receiving *diya*. [103](#)

Fourth, erroneous or deliberate crime not leading to bodily retaliation (*qisas* on the body): If someone does something unintentionally resulting in damaging another's body or deliberately inflict an injury on another person whose retaliation (*qisas*) is not possible, he/she has to pay *diya* for this infliction.

As for crime against a child, this *diya* shall go to the child's guardian, and as the abandoned (unattended) child's guardian is the Infallible Imam (A.S.), he shall receive the *diya* for the crime against the child. [104](#)

It is to be noted that in all these four instances performing *qisas* or receiving *diya* for the deliberate or erroneous crime, if in the best interest of the child, rests with the Imam (A.S.). However, the finder or the person who takes care of the child (*multaqit*) does not have any rights and cannot make any decision in this respect, since they have no guardianship over the child. [105](#)

Abandoned Children's Offenses

Among the most important issues, concerning the abandoned (unattended) children is the offenses committed by them and the legal and penal responsibilities that ensue.

Although this issue is not restricted to the abandoned (unattended) children and includes all children, since someone must undertake their responsibility, the issue becomes doubly important.

First, erroneous offenses: If the child erroneously commits an offense that entails *diya* as punishment, such as murder, beating, and injuring, its paternal kinsmen (*ʿaqila*) are obliged to undertake to pay off.

Since what is meant by "paternal kinsmen" is the father as well as the mature, wise, and wealthy men among the paternal relatives of an individual, [106](#) and there exist no such people for the abandoned (unattended) children, thus someone has to substitute for the child's paternal kinsmen.

According to the Sunnis an unattended child's *ʿaqila* is the government; however, to the Shi'a jurists it is the Infallible Imam (A.S.) [107](#), unless when the Infallible Imam is also in charge of the state, then the government would undertake such a duty.

Second, deliberate offenses: If committing an offense is after the child reaches maturity, then he will be punished in *qisas* like other people and in case of the victim's consent, he may pay *diya*. But, if the child commits an offense before reaching maturity, since the child's deliberate offense amounts to mere erroneous offense, paying *diya* is upon its *ʿaqila*, i.e., the Infallible Imam (A.S.). [108](#)

Of course, the possibility is brought up in some legal texts that the payment of *diya* will rest upon the child until after maturity to pay it himself. [109](#)

Third, quasi-deliberate offense: What is meant by quasi-deliberate, also known as *ʿamd al-khata'* (intentional blunder), is a state in which a person intentionally does something but what ensues is not what he had intended (intentional in action and erroneous in purpose). For instance, he beats someone intentionally with a tool, which is mostly not a killing tool but the victim dies thereby.

According to the Shi'a jurists, *diya* in quasi-deliberate offense will be paid for through the criminal's own property; therefore, by this presumption, the damage resulted from the criminal act of the abandoned child is to be paid for through his own property. [110](#)

Disagreement on the Custody of Abandoned Children

If we accept that finding and collecting a child from the public places create a right for the finder (*multaqit*) to undertake its custody, then the question arises as to if there are two or more finders who claim such a right, who can be entitled to take its custody?

There are three criteria presented in legal books to answer this question.

First criterion, examining the evidence (*bayyina*): A group of jurists believe that in order to verify the claim of those who claim having found the child and having priority for its custody, their documentary evidence has to be examined.

If we presume that only one of the two persons has a document or evidence for his/her claim, the child's custody is to be entrusted to that same person. However, if both of them are able to present evidence to prove their claim, it is to be verified whether their evidence points to the time of finding the child or without referring to the time, it just asserts that the child has been found by a particular person.

In case the documents each one of them presents does not refer to the time of the finding or if both refer to a specific time, these documents will lose their legal value and will be rejected. Nevertheless, if any of these documents report a different time for the finding of the child by an individual, the child's custody will be entrusted to the one who declare an earlier time.

It is obvious that if the content of the documents are different, with one reporting a specific time for finding the child and the other just pointing out the finding of the child by an individual without referring to the time, the child's custody will be entrusted to the one whose documents determine a specific time.

Naturally, if none of the claimants of finding the child can present supporting documents to prove their

claim, then the Islamic ruler will, as he deems it advisable, determine someone to undertake the custody. [111](#)

Second criterion, examining the individuals' features: According to some jurists, in order to solve this disagreement the claimants' differences in four features of religion, wealth, justice, and type of residence are to be examined.

In case of their equality in these features, lots must be drawn to decide who would take the child's custody, since leaving the child's custody to both of them would cause detriment to the child. [112](#) However, in case of inequality, a Muslim has priority over a non-Muslim, a trustworthy (just) Muslim over an impious Muslim, rich over poor, and a townsman over a villager. [113](#)

It is to be remembered that from the viewpoint of most jurists the gender of the claimants of picking up the child accords them no privilege and neither a man nor a woman have priority over each other in this respect. Although a woman is more successful than a man in managing the child's affairs and her emotional aspects are stronger, the man has more ability in maintaining the child's life. [114](#)

Third criterion, examining the child's situation: The proponents of this theory believe that if none of the two claimants did anything for picking up and taking care of the child, making decision about the child's custody would rest with the Islamic ruler. [115](#)

But if both have attempted to pick up the child, the child's custody would be entrusted to the one who is sufficiently qualified to undertake this task and if both are equally qualified, the decision as to who should the child be entrusted to is made by means of drawing lots, the judge's decision, or letting the child to decide. Since entrusting the child to both of them or taking turns (*muhayat*) in taking care of the child, would inflict harm on it. [116](#)

In our opinion and as we previously mentioned, finding a child and picking it up from public places does not entail any right for the finder. Therefore, the one who finds a child has to hand it over to the institutions in charge of undertaking the life of such children.

After examining the individual and social competence of the person who asks for a child's custody and considering the child's interests, the institution hands over the child's custody to that person temporarily or for a limited period whether that same person has found the child or someone else has.

Of course, the child's desire to live with a certain person when it has found power of discrimination can also be one of the factors effective in the child's interests.

Thus, presenting documents as to who has first found the child or examining the features of the individuals claiming to have found the child alone do not have any impact on entrusting the child to an individual, just as the finder's gender has no effect in this respect.

Kinship Relationship with the Abandoned Children

A child being left in public places provides an opportunity for a number of people with different motivations to claim the found child to be theirs.

Since this claim can have an impressive impact on the life process of the child, its verification is one of the most important issues concerning the unattended children.

Claiming a Blood Relation to the Child

Talking about blood relation to a child is examinable in three ways:

1. Claiming paternal relationship with the child

If someone who has found the child claims that the child is his or hers, a group of the jurists maintain that their claim suffices to prove paternal relation. The reason is that this confession does not harm anybody, as it is helpful to the child in that someone undertakes its responsibility, and it is a natural course of events (in agreement to the apparent state of affairs) as in normal circumstances no one takes care of another's child.¹¹⁷ In contrast, some Sunni jurists have been quoted to say that such a claim is not acceptable, since in normal conditions no one abandons one's own child in public places to require picking it up later.¹¹⁸

However, some jurists, relying on the fact that the child does not enjoy a recognized parentage and adopting it does not do any harm to others, believe that if someone other than the finder of the child claims that the found child belongs to him, such a claim is acceptable although no evidence (*bayyina*) is available to prove it, in case the age of the child and that of the claimant is such that the child can normally be regarded as his or her child.¹¹⁹

In contrast, Muhaqqiq al-Hilli maintains that this claim is not accepted unless the child itself accepts the existence of such a relation. On that basis, proving the paternal relation between an individual and the abandoned (unattended) child will depend on two factors: the claim of the claimant and the acceptance of this claim by the child after reaching maturity.¹²⁰

In the third case, two individuals – none of whom has had any role in picking up the child from public places as well as taking care of it – may claim to have a paternal relation to the child.

It is clear that in this case, only the confession of the one who can present evidence (*bayyina*) to prove his claim will be taken into consideration. If we presume that both of them can present evidence for such a claim, there are other ways in earlier Shi'ī and Sunni jurisprudential texts that can be referred to, such as physical resemblance between the man claiming to be the father and the child or drawing lots.¹²¹

Finally, this may be claimed by the finder of the child on one hand and another person on the other, in which case, if they have contradicting documents, as in the previous case, there will be two ways for the

Shi'i and Sunni jurists to tackle the problem. [122](#)

In any case, wherever a man claims to have a blood relation to a child and his claim is also accepted, the child will be regarded as his; but such a claim does not mean that the man's wife is the child's mother, too, even though that man claims such a relation, unless his wife accepts this claim as well. [123](#)

2. Claiming maternal relationship with the child

Independent study of this issue despite its close similarity to the previous one, i.e., proving a paternal relationship with a child, is because some jurists believe that there is no difference between a man and a woman in proving to have a blood relation with the child. As the man's confession is accepted, so also is the woman's, and the child is joined by her. [124](#) In contrast, however, some contend that the method for proving the claim of a man and a woman to have a parental (paternal and maternal) relationship with the child is different for each.

Although a man's confession and claim suffices for the child to join him, a woman's confession to this end is not sufficient and she has to present evidence for her claim. That's because knowledge about the existence of a maternal-filial relation between a woman and a man is something which can be proved by observation since there are always some people present at the child-birth who can bear witness; but for a man's claim as to being a child's father such a witnessing is not possible. [125](#)

Therefore, if the woman can provide evidence for her claim, the child would be regarded as hers and her husband's, provided that it would be likely for her to have given birth to that child and the evidence can prove that the child has been born to her while she had been that man's wife. [126](#)

And finally, the possibility has also been set forth that if the woman has a husband, her claim that the child is hers is not accepted; but if she does not have a husband, her claim is accepted because it is not possible for the child to belong to the woman but not to her husband; in other words, it is not possible for the woman to be the child's mother but her husband would not. [127](#)

In any case, if two women claim that each of them is the abandoned child's mother, genealogically the child belongs to the woman who can present evidence for her claim, and if both of them have evidence for their claims, then due to contradiction the mother will be determined through casting lots. [128](#)

3. Claiming parental relationship with the child

If a couple, (a man and a woman) claim that the abandoned (unattended) child is theirs; the child genealogically belongs to both of them, since there is no incompatibility between these two claims. [129](#)

Denial of Blood Relation by the Child

Among the issues set forth about kinship relationship with unattended children is the child's acceptance or denial of kinship after reaching maturity.

The question is raised by the jurists as to what has to be done if after reaching maturity this child denies having any blood relation with the person who has had a parental claim on the child.

Some Shi'ī jurists contend that the child's rejection (denial) after reaching maturity has no legal effect, unless he/she can provide some evidence for his/her claim. [130](#)

So far, we brought up the views of Shi'ī jurists and lawyers concerning the claim to have kinship relation with unattended children based on admitting or rejecting to admit the existence of kinship relation with the child.

To our opinion, however, there is no reason for the validity of claiming (admitting) about proof of parental relation with the child, whether the claimant is the finder of the child or someone else, just as it makes no difference whether the finder is a man or a woman.

At present, since a physician or a midwife in the hospital or a health care center carries out any childbirth in a city or village, the identity of the parents would be confirmed by means of the report provided by that center. Besides, in normal conditions, the child's national identity specifications based on the report presented by the center in which the childbirth is carried out is registered in the parents' national identity cards; and, in return, the specifications of the child's parents are registered in a national identity card that is issued for the child, as well.

Therefore, if a person – whether a man or a woman has found the child or someone else has – claims that the child is theirs, they have to present the required documents to prove their claim. Moreover, if we suppose that for any reason it is not possible to present such documents, their claim can be verified according to the child's blood group and that of the claimant, as well as through genetic tests and DNA information.

Therefore, if there are more than one person – two men, two women, or a man and a woman – claiming such a relation to the child, the required documents are to be scrutinized as explained above.

Conclusion: Proving the paternal or maternal relation to the child is in itself a proof of the maternal or paternal relation to it, too. That is to say, if it is clarified that a man is the child's father, it can be readily perceived whether his wife is the child's mother or not. The child's claim after reaching maturity to accept or reject the above-mentioned relation is similarly examinable; the claimant's religion or beliefs do not have any impact on the process of examining his or her relation to the child.

Figurative Kinship with Abandoned Children

There is no doubt that the legal rights resulting from kinship is to be fulfilled only when there is a type of blood relation or a relation by marriage between the individuals, that is why adoption as asserted by the Qur'an lacks any legal impacts –

﴿... nor has he made your adopted sons your sons. These are mere utterances of your mouths. But Allah speaks the truth and He guides to the way.﴾;[131](#)

however, according to Islamic jurisprudence in order to enjoy some of the legal rights, a kind of figurative kinship can be established between individuals without any blood relation or a relation by marriage existing between them, known as *wila'* (alliance).

The contract of figurative kinship (*wila'*) has two reciprocal legal impacts: 1. Inheritance, 2. Compensation of inadvertent financial damages. A person who lacks relations would agree that after their death their properties be transferred to another person (inheritance), provided that if in their lifetime they cause damage to others inadvertently, the other party would undertake to pay for it (alliance guarantee of offense – *wila' dhiman jarira*). [132](#)

The issue of *wila'* is brought up along with the issues concerning the abandoned (unattended children) in order to determine whether they would involuntarily and in their own rights achieve figurative kinship when they reach maturity, since they have no identified kinship and have no clear kinship with anyone.

Naturally, this issue is raised in case such a person [the abandoned child] is not voluntarily concluding a contract of figurative kinship (*wila' dhiman jarira*) with another person, since, like everybody else, he/she too can conclude such a contract with whomever he/she wishes and impart his/her alliance to that person, [133](#) even though that person (*multaqit*) is the one who had found him/her in childhood and had undertaken his/her custody up to the age of maturity. [134](#)

The important question, however, is whether the finder of the child and the one who is undertaking the child's custody is naturally undertaking its guardianship, too.

Referring to the traditions related by ʿAzrāmī and the prophetic tradition, some jurists contend that the child's guardianship (*wila'*) after maturity would be upon its finder, unless they wish to leave their guardianship to another person, in which case they have to pay back all the expenses that the finder had spent for them since finding them up to the time they reached maturity. [135](#) The result of such an issue, as related by Ibn Junayd, is that if they cannot pay back the expenses that the finder had paid for them, their guardianship and the inheritance would belong to the person who had found them at childhood and taken care of. [136](#)

To our opinion, the finder of the child does not have any natural guardianship over the child, [137](#) because we explained before that the custody of an abandoned child with unlimited responsibility would normally require the payment of its living expenses as well. If this acceptance of responsibility is restricted to and contingent on some conditions including the refunding of the expenses spent for the child, it is upon the Islamic government to provide for those expenses; thus, there remains no right for the finder of the child to undertake the found child's guardianship accordingly.

However, after maturity, the abandoned children (*laqit*) had better leave their guardianship to the person

who had taken care of them for years.

1. Faydh, ʿAli Ridha, *Mabadi-yi Fiqh wa Usul*, 4th edition, Tehran University Publication, 1410/1990, p. 338.
2. These three words are used with the same meaning, but perhaps these names are applied to babies in their different states of being, because first they are abandoned in a public place, hence called *manbudh*, and then found by someone, thus called *laqit*. For more information, see: Tusi, Abu Jaʿfar Muhammad b. Hasan, *Al-Mabsut*, 3/336; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, *Al-Durus*, 3/73.
3. ʿAmili, Shaykh Baha al-Din, *Al-Jamiʿ al-ʿAbbasi*, Farahani Publication, Tehran, n.d., p. 251; it is to be noted that other definitions have also been given for *laqit* in legal texts as follows: Muhaqqiq Hilli, *Sharaʿi al-Islam*, 4/799; Yusufi, Hasan b. Abi Talib, *Kashf al-Rumuz*, 2/406; ʿAllama Hilli, *Tadhkirat al-Fuqaha*, 2/270; idem, *Tahrir al-Ahkam*, 1/247 and 2/123; idem, *Idhah al-Fawa'id*, 2/135; Khwansari, Sayyid Ahmad, *Jamiʿ al-Madarik*, 5/249; ʿAmili al-Fuqʿani, Zayn al-Din Abu al-Qasim, *Al-Durr al-Mandhud fi Maʿrifat Sigh al-Niyat wa al-Iqaʿat wa al-Uqud*, ed. Muhammad Barakat, *Maktibat al-Imam al-ʿAsr*, Shiraz, 1st edition, 1418/1997; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, *Al-Durus*, 3/73; Shahid Awwal, Muhammad b. Makki ʿAmili, *Al-Lumʿat al-Damishqiyya*, p. 206; Sabziwari, Muhammad Baqir b. Mu'min, *Kifayat al-Ahkam*, p. 234; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, *Al-Rawdhat al-Bihiyya*, 7/66; Tabataba'i, Sayyid ʿAli, *Riyadh al-Masa'il*, 2/323.
4. Although *laqit* does not solely apply to babies (infants), it includes all the children in various age groups. However, the question has been raised in legal texts as to whether or not this title includes the discerning children (*mumayyiz*) and the adolescents who have approached maturity (*marahiq*), as well. For more information, see: Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, *Masalik al-Afham*, 8/462; Ardabili, Mawla Ahmad, *Majmaʿ al-Fa'ida*, 1/393–394; Karaki, ʿAli b. Husayn, *Jamiʿ al-Maqasid*, 6/97.
5. See: ʿAllama Hilli, *Tadhkirat al-Fuqaha*, 2/270.
6. ʿAllama Hilli, *Irshad al-Adhhan*, 2/441; ʿAllama Hilli, *Tahrir al-Ahkam*, 1/247 and 2/123; ʿAllama Hilli, *Tabsirat al-Mutiʿallimin*, p. 142; ʿAmili al-Fuqʿani, Zayn al-Din Abu al-Qasim, *Al-Durr al-Mandhud fi Maʿrifat Sigh al-Niyat wa al-Iqaʿat wa al-Uqud*, ed. Muhammad Barakat, *Maktibat al-Imam al-ʿAsr*, Shiraz, 1st edition, 1418/1997; *Al-Jamiʿ li al-Sharaʿi*, p. 356.
7. Q. 5: 2.
8. Q. 22: 77.
9. Q. 5: 32.
10. For more information on how to refer to these issues as evidence as well as the criticism on them, see: Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, *Al-Durus*, 3/76; Tusi, Abu Jaʿfar Muhammad b. Hasan, *Al-Mabsut*, 3/336; Tabataba'i, Sayyid ʿAli, *Riyadh al-Masa'il*, 2/323–324; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, *Masalik al-Afham*, 12/471; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, *Al-Rawdhat al-Bihiyya*, 7/77; Ardabili, Mawla Ahmad, *Majmaʿ al-Fa'ida*, 10/409.
11. ʿAllama Hilli, *Tadhkirat al-Fuqaha*, 2/270.
12. This issue has been examined in two books: first, *Kitab-i Jihad (Siyar)*, explaining the difference between learning sciences and making jihad despite the fact that both are communal duties; second: the *Kitab-i Luqata* explaining what we are currently discussing. See: ʿAllama Hilli, *Tadhkirat al-Fuqaha*, 1/408 and 2/271; idem, *Idhah al-Fawa'id*, 11/123 and 38/175.
13. Q. 5: 2.
14. Muhaqqiq Hilli, *Sharaʿi al-Islam*, 4/800; Ibn Fahd Hilli, *Al-Muhadhdhab al-Bariʿ*, 4/297; Khwansari, Sayyid Ahmad, *Jamiʿ al-Madarik*, 5/249; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, *Al-Rawdhat al-Bihiyya*, 7/77; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, *Masalik al-Afham*, 12/472.
15. Q. 21: 73.
16. Ardabili, Mawla Ahmad, *Majmaʿ al-Fa'ida*, 10/409; Sabziwari, Muhammad Baqir b. Mu'min, *Kifayat al-Ahkam*, p. 234; Tabataba'i, Sayyid ʿAli, *Riyadh al-Masa'il*, 2/324.
17. Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, *Al-Durus*, 3/76; ʿAmili (Shahid idem, *Al-Rawdhat al-Bihiyya*, 7/75; ʿAllama Hilli, *Tadhkirat al-Fuqaha*, 2/271; idem, *Idhah al-Fawa'id*, 2/139.
18. Ibid, 2/140; Karaki, ʿAli b. Husayn, *Jamiʿ al-Maqasid*, 7/139..

19. See: ʿAllama Hilli, Tadhkirat al-Fuqaha, 2/270.
20. Idem, Tahrir al-Ahkam, 1/247 and 2/123; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 12/473; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, 7/78; Muhaqqiq Hilli, Sharaʿi al-Islam, 4/801.
21. ʿAllama Hilli, Tadhkirat al-Fuqaha, 2/627.
22. Shahid Awwal, Muhammad b. Makki ʿAmili, Al-Lumʿat al-Damishqiyya, p. 206; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, 3/76.
23. Muhaqqiq Hilli, Sharaʿi al-Islam, 4/799; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, 3/75; ʿAmili al-Fuqʿani, Zayn al-Din Abu al-Qasim, Al-Durr al-Mandhud fi Maʿrifat Sigh al-Niyyat wa al-Iqaʿat wa al-Uqud, ed. Muhammad Barakat, Maktibat al-Imam al-ʿAsr, Shiraz, 1st edition, 1418/1997; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, 7/69; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, 2/406; ʿAllama Hilli, Tadhkirat al-Fuqaha, 2/270..
24. Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 12/464; Riyadh al-Masaʿil, 2/323; Khwansari, Sayyid Ahmad, Jamiʿ al-Madarik, fi Sharh al-Mukhtasar al-Nafi, ed. ʿAli Akbar Ghaffari, 7 vols, 2nd edition, Tehran, Saduq Publication, 1397/1977, 5/251.
25. See: Fathullah, Dr. Ahmad, Muʿjam-i Alfadh al-Fiqh al-Jaʿfari, p. 229; Qalʿaji, Muhammad, Muʿjam Lughat al-Fuqaha, 2nd edition, Dar al-Nafaʿis, Riyadh, 1408/1988, p. 222 and 245; Abu Habib Saʿdi, Al-Qamus al-Fiqhi, 2nd edition, Dar al-Fikr, Damascus, 1408/1988.
26. Q. 2: 5–6.
27. Kulayni, Muhammad b. Yaʿqub, Al-Kafi, 7/68, No. 2; Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, 9/182, No. 731.
28. Shahid Awwal, Muhammad b. Makki ʿAmili, Al-Qawaʿid wa al-Fawaʿid, 2/41 and 173; Miqdad Siyuri Nadhd al-Qawaʿid al-Fiqhiyya, p. 91 and 321; Maraghi, Mir ʿAbd al-Fattah, Al-ʿAnawin al-Fiqhiyya, 2 vols. 1st edition, Nashr-i Islami Publication, Qum, 1417/1997, 2/685–686 and 738.
29. Although with these explanations there is no need for criticizing and reviewing the views and arguments of the proponents and opponents of the veracity of iltiqat (picking up abandoned babies from public passageways) by the feeble-minded, there are two contrasting views in legal texts for the validity and invalidity of mental maturity. For more information of the reasons of each of these viewpoints and their criticism, see: Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, 3/76; Karaki, ʿAli b. Husayn, Jamiʿ al-Maqasid, 6/109; Tabatabaʿi, Sayyid ʿAli, Riyadh al-Masaʿil, 2/323; Ardabili, Mawla Ahmad, Majmaʿ al-Faʿida, 10/402; Wahid Bihbahani, Muhammad Baqir, Hashiya Majmaʿ al-Faʿida wa al-Burhan, 1st edition, ʿAllama Wahid Bihbahani Institute, 1417/1996p. 583; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 12/465; ʿAllama Hilli, Idhah al-Fawaʿid, 2/138; ʿAllama Hilli, Tadhkirat al-Fuqaha, 2/271.
30. Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, 7/70.
31. For more information, see: ʿAllama Hilli, Idhah al-Fawaʿid, 1/149; Ardabili, Mawla Ahmad, Majmaʿ al-Faʿida, 12/311; Al-Wasila ila Nail al-Fadhila, p. 230; Makki, Muhammad b. Mansur, Al-Saraʿir, 1/280; Naraqi, Ahmad, Mustanad al-Shiʿa fi Ahkam al-Shariʿa, 19 vols. 1st edition, Al al-Bayt Institute, Mashhad, 1415/1995. 18/74; Al-ʿUrwat al-Wuthqa, 1/10; Ansari, Kitab al-Tahara, p. 402.
32. Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 8/424.
33. Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihiyya, 7/73.
34. ʿAllama Hilli, Tadhkirat al-Fuqaha, 2/270; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, 3/75; Ardabili, Mawla Ahmad, Majmaʿ al-Faʿida, 10/400.
35. Karaki, ʿAli b. Husayn, Jamiʿ al-Maqasid, 6/108.
36. Ardabili, Mawla Ahmad, Majmaʿ al-Faʿida, 10/402.
37. Q. 11: 113.
38. Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, 3/338; ʿAllama Hilli, Qawaʿid al-Ahkam, 2/201; ʿAllama Hilli, Tahrir al-Ahkam, 1/123; Muhaqqiq Hilli, Sharaʿi al-Islam, 4/800.
39. Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, 3/76; ʿAllama Hilli, Tadhkirat al-Fuqaha, 2/271; Karaki, ʿAli b. Husayn, Jamiʿ al-Maqasid, 6/108; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, 2/406.
40. Hurr ʿAmili, Muhammad Hasan, Wasaʿil al-Shiʿa, 15/184–188 and 6/230–234.
41. Kulayni, Muhammad b. Yaʿqub, Al-Kafi, 5/299, No. 3–4.
42. ʿAllama Hilli, Tadhkirat al-Fuqaha, 2/270; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, 3/338.

43. Wahid Bihbahani, Hashiya Majma' al-Fa'ida, p. 582.
44. Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Durus, 3/75; Tabataba'i, Sayyid 'Ali, Riyadh al-Masa'il, 2/324; Ibn Fahd Hilli, Ibn Fahd Hilli, Al-Muhadhdhab al-Bari', 4/297 and 295; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, 2/406.
45. Q. 4: 141.
46. See: Kulayni, Muhammad b. Ya'qub, Al-Kafi, 5/348, No. 1 and 351, No. 156; Tamimi, Nu'man b. Muhammad, Da'aim al-Islam, 2/199, No. 732; Ibn Babuwayh Qummi, 'Illal al-Shara'i', 2 vols. Maktabat Haydariyya, 1386/1966. 2/503, No. 1; Rawandi, Fadhlullah, al-Nawadir, ed. Sa'id Ridha 'Ali 'Askari, 1st edition, Dar al-Hadith, 1407/1987.
47. Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Durus, 3/75; 'Amili al-Fuq'ani, Zayn al-Din Abu al-Qasim, Al-Durr al-Mandhud fi Ma'rifat Sigh al-Niyyat wa al-Iqa'at wa al-Uqud, ed. Muhammad Barakat, Maktabat al-Imam al-'Asr, Shiraz, 1st edition, 1418/1997; 'Allama Hilli, Tadhkirat al-Fuqaha, 2/270; 'Allama Hilli, Tahrir al-Ahkam, 2/123; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Rawdhat al-Bihiyya, 7/72; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, 12/466-467; Khu'i, Kitab al-Nikah, 2/311; Khwansari, Sayyid Ahmad, Jami' al-Madarik, 5/251 and 4/476; Ibn Fahd Hilli, Ibn Fahd Hilli, Al-Muhadhdhab al-Bari', 4/295; Ardabili, Mawla Ahmad, Majma' al-Fa'ida, 10/398; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. 234.
48. Ibn Babuwayh Qummi, Man la Yahdhuru al-Faqih, 2/49, No. 1668.
49. Karaki, 'Ali b. Husayn, Jami' al-Maqasid, 6/102; Wahid Bihbahani, Hashiya Majma' al-Fa'ida, p. 582.
50. 'Allama Hilli, Tadhkirat al-Fuqaha, 2/271; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Durus, 3/76.
51. Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 5/224.
52. Karaki, 'Ali b. Husayn, Jami' al-Maqasid, 7/129 and 6/111.
53. 'Allama Hilli, Idhah al-Fawa'id, 2/139.
54. Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Durus, 3/76; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 3/345; 'Allama Hilli, Tadhkirat al-Fuqaha, 2/271.
55. Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 3/340-341; 'Allama Hilli, Tadhkirat al-Fuqaha, 2/271-272; Muhaqqiq Hilli, Shara'i al-Islam, 4/800.
56. Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Durus, 3/77.
57. 'Allama Hilli, Tadhkirat al-Fuqaha, 2/271; Ardabili, Mawla Ahmad, Majma' al-Fa'ida, 10/429.
58. Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, 12/472.
59. Muhaqqiq Hilli, Shara'i al-Islam, 4/800; Al-Jami' li al-Shara'i', p. 356; 'Allama Hilli, Irshad al-Adhhan, 1/441.
60. Al-Jami' li al-Shara'i', p. 357; 'Allama Hilli, Idhah al-Fawa'id, 2/139; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Durus, 3/74; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Rawdhat al-Bihiyya, 7/77-78; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, 12/473.
61. 'Allama Hilli, Tadhkirat al-Fuqaha, 2/272; also, for information about the Sunnis's view in this regard see: Ibn Babuwayh Qummi, Al-Muqni, , 6/409; Al-Sharh al-Kabir, 6/407.
62. Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Al-Durus, 3/74; 'Allama Hilli, Tadhkirat al-Fuqaha, 2/272; Shahid Thani, Zayn al-Din b. 'Ali 'Amili, Masalik al-Afham, 12/473; 'Allama Hilli, Idhah al-Fawa'id, 2/140.
63. 'Allama Hilli, Tadhkirat al-Fuqaha, 2/272; Shahid Awwal, Muhammad b. Makki 'Amili, Al-Lum'at al-Damishqiyya, p. 206.
64. Muhaqqiq Hilli, Shara'i al-Islam, 4/801; Al-Jami' li al-Shara'i', p. 356; Ardabili, Mawla Ahmad, Majma' al-Fa'ida, 1/422.
65. Tusi, Abu Ja'far Muhammad b. Hasan Al-Mabsut, 3/338; 'Allama Hilli, Tadhkirat al-Fuqaha, 2/272.
66. It is to be remembered that the child's properties are divisible into two types: 1. the properties that belong to the child because of its being a foundling (laqit), like what is endowed to the unattended children or someone has stated in their will for this purpose, 2. the properties that the child is a private proprietor of, such as clothes, blanket, jewelry, cash money, hammock, tent, and the like. For more information, see: 'Allama Hilli, Tadhkirat al-Fuqaha, 2/272; idem, Tahrir al-Ahkam, 2/124.
67. 'Allama Hilli, Tadhkirat al-Fuqaha, 2/273; Ardabili, Mawla Ahmad, Majma' al-Fa'ida, 10/417-418.
68. 'Allama Hilli, Irshad al-Adhhan, 1/441; idem, Tahrir al-Ahkam, 2/123; idem, Idhah al-Fawa'id, 2/140; Karaki, 'Ali b. Husayn, Jami' al-Maqasid, 6/112; Sabziwari, Muhammad Baqir b. Mu'min, Kifayat al-Ahkam, p. 235; Tabataba'i, Sayyid

Ali, Riyadh al-Masa'il, 2/325.

69. Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 3/338–339; Allama Hilli, Tadhkirat al-Fuqaha, 2/273.

70. Shahid Thani, Zayn al-Din b. Ali Amili, Masalik al-Afham, 12/474; Muhaqqiq Hilli, Shara'i al-Islam, 4/801; Hilli, Yahya b. Sa'id, Al-Jami li al-Shara'i, Sayyid al-Shuhada Publication, Qum. 1405/1985, p. 356; Ardabili, Mawla Ahmad, Majma al-Fa'ida, 8/260.

71. Not needing to ask permission from an Infallible Imam does not mean disclaiming guardianship, because the Infallible Imams, following the Holy Prophet of Islam (S. A.W.), have innate superiority as well as generic and legislative guardianship. For an example, we can refer to the traditions concerning the divorce of the insane. See: Kulayni, Muhammad b. Ya'qub, Al-Kafi, 6/125, No. 1–2; Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, 8/75, No. 253.

72. Ibn Tamimi, Ahmad b. Ali, Musnad Abi Ya'la Musili, ed. Husayn Salim Hasan, 13 vols. Dar al-Ma'mun li al-Turath, n.d.

73. Suyuti, Jalal al-Din, Al-Jami al-Saqir fi Ahadith al-Bashir al-Nadhir, 2 vols. 1st edition, Dar al-Fikr, Beirut, 1401/1981, 1/457, No. 29630; Abi Dawud, Sunan, 1/462, No. 2083; Dar Qutni, Ali b. Umar, Sunan Dar Qutni, 4 vols. 1st edition, Dar al-Kutub al-Ilmiyya, Beirut, 1417/1996, 3/158; Ibn Tamimi, Musnad Abi Ya'la Musili, 8/191, No. 4749.

74. Zayali, Jamal al-Din, Nasb al-Rayat al-Ahadith al-Hidaya, 6 vols. 1st edition, Dar al-Hadith, Cairo, 1415/1995., 3/362; Allama Hilli, Tadhkirat al-Fuqaha, 2/277.

75. Ibid., 2/592; Najafi, Muhammad Hasan, Jawahir, 28/430; Fadhil Hindi, Muhammad b. Hasan, Kashf al-Litham, 2/15; Naraqi, Ahmad, Mustanad al-Shi'a fi Ahkam al-Shari'a, 16/143; Naraqi, Ahmad, Awa'id al-Ayyam fi Qawa'id al-Ahkam wa Muhimmat Masa'il al-Halal wa al-Haram, 3rd edition, Qum, Basirati Library, 1408/1987, p. 200; Tabataba'i, Sayyid Ali, Riyadh al-Masa'il, 2/81.

76. Ansari, Shaykh Murtadha, Kitab al-Nikah, Baqiri Publication, Qum, 1415/1995, p. 152; Khwansari, Sayyid Ahmad, Jami al-Madarik, 4/165.

77. Khwansari, Sayyid Ahmad, Jami al-Madarik, 22/293.

78. Hilli, Yahya b. Sa'id, Al-Jami li al-Shara'i, p. 357; Allama Hilli, Tahrir al-Ahkam, 1/123.

79. Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 3/339; Allama Hilli, Tadhkirat al-Fuqaha, 2/272.

80. Shahid Thani, Zayn al-Din b. Ali Amili, Al-Durus, 3/74; Karaki, Ali b. Husayn, Jami al-Maqasid, 6/115 and 117; Amili (Shahid Thani), Zayn al-Din b. Ali, Masalik al-Afham, 12/467; Amili (Shahid Thani), Zayn al-Din b. Ali, Al-Rawdhat al-Bihiyya, 7/75.

81. Allama Hilli, Tadhkirat al-Fuqaha, 2/272.

82. Khwansari, Sayyid Ahmad, Jami al-Madarik, 5/253; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 4/70 and 6/25; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Khilaf, 4/5, issue 1, and 4/22, issue 145, and 4/23, issue 15, and 5/209, issue 87; Allama Hilli, Mukhtalaf al-Shi'a, 6/106; Makki, Muhammad b. Mansur, Al-Sara'ir, 3/272 and 337; Shahid Thani, Zayn al-Din b. Ali Amili, Masalik al-Afham, 13/40; Najafi, Muhammad Hasan, Jawahir, 38/139 and 39/44; Amili al-Fuqani, Zayn al-Din Abu al-Qasim, Al-Durr al-Mandhud fi Ma'rifat Sigh al-Niyyat wa al-Iqa'at wa al-Uqud, ed. Muhammad Barakat, Maktibat al-Imam al-Asr, Shiraz, 1st edition, 1418/1997.

83. Allama Hilli, Tadhkirat al-Fuqaha, 2/271–272; idem, Tahrir al-Ahkam, 2/123; Ardabili, Mawla Ahmad, Majma al-Fa'ida, 10/416; Ibn Babuwayh Qummi, Man la Yahdhuru al-Faqih, 3/105, No. 3424; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Istibsar fi Makhtalafa min al-Akhbar, ed. Sayyid Hasan al-Khirsan, 4 vols. 4th edition, Dar al-Kutub al-Islamiyya, Tehran, 1405/1985 ; Ibn Babuwayh Qummi, Illal al-Shara'i, 2/371, No. 1; Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, 6/293, No. 815.

84. Al-Muqni'a, p. 648; Tusi, Muhammad b. al-Hasan Al-Nihaya, p.322; Ibn Barraji Trablusi, Qazi Abd al-Aziz, Al-Muhadhdhab, 2/569; Al-Wasila ila Nail al-Fadhila, p. 277; Makki, Muhammad b. Mansur, Al-Sara'ir, 2/107; Allama Hilli, Tadhkirat al-Fuqaha, 2/276.

85. Perhaps it is for this consideration that the jurists have claimed that custody demands infaq (giving away in charity); for more information, see: Karaki, Ali b. Husayn, Jami al-Maqasid, 6/109.

86. Ardabili, Mawla Ahmad, Majma al-Fa'ida, 10/420; Makki, Muhammad b. Mansur, Al-Sara'ir, 2/107.

87. Muhaqqiq Hilli, Shara'i al-Islam, 4/800; Yusufi, Hasan b. Abi Talib, Kashf al-Rumuz, 2/407; Allama Hilli, Irshad al-Adhhan, 1/441; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 3/339; Khwansari, Sayyid Ahmad, Jami al-Madarik,

- [88.](#) Kulayni, Muhammad b. Ya'qub, Al-Kafi, 5/225, No. 3–4; Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, 7/78, No. 337; Ibn Babuwayh Qummi, Man la Yahdhuru al-Faqih, 3/145, No. 3532.
- [89.](#) Muhaqqiq Hilli, Shara'i al-Islam, 4/802; Allama Hilli, Tadhkirat al-Fuqaha, 2/273.
- [90.](#) Allama Hilli, Irshad al-Adhhan, 1/441; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 3/339; Shahid Thani, Zayn al-Din b. Ali Amili, Masalik al-Afham, 12/487.
- [91.](#) Karaki, Ali b. Husayn, Jami al-Maqasid, 6/117; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 3/339; Muhaqqiq Hilli, Shara'i al-Islam, 4/803; Allama Hilli, Tadhkirat al-Fuqaha, 2/273; also, for more views see: Al-Jami li al-Shara'i, p. 357; Shahid Thani, Zayn al-Din b. Ali Amili, Al-Durus, 3/77.
- [92.](#) Q. 17: 33.
- [93.](#) Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 3/346.
- [94.](#) Q. 2: 178.
- [95.](#) Al-Jami li al-Shara'i, p. 358; Allama Hilli, Tadhkirat al-Fuqaha, 2/276; Shahid Thani, Zayn al-Din b. Ali Amili, Al-Durus, 3/80.
- [96.](#) Muhaqqiq Hilli, Shara'i al-Islam, 4/801; Allama Hilli, Tadhkirat al-Fuqaha, 2/277.
- [97.](#) It is to be noted that in the erroneous murder the criminal's paternal kinsmen (aqila) would pay the blood money; see: Al-Jami li al-Shara'i, p. 358.
- [98.](#) Muhaqqiq Hilli, Shara'i al-Islam, 4/801; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 3/346; Allama Hilli, Tadhkirat al-Fuqaha, 2/276.
- [99.](#) Al-Jami li al-Shara'i, p. 358; Allama Hilli, Idhah al-Fawa'id, 2/143; Karaki, Ali b. Husayn, Jami al-Maqasid, 4/126; Muhaqqiq Hilli, Shara'i al-Islam, 4/801–802.
- [100.](#) Shahid Thani, Zayn al-Din b. Ali Amili, Masalik al-Afham, 12/479.
- [101.](#) Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 3/346.
- [102.](#) Allama Hilli, Idhah al-Fawa'id, 2/143.
- [103.](#) Karaki, Ali b. Husayn, Jami al-Maqasid, 6/124; Ardabili, Mawla Ahmad, Majma al-Fa'ida, 10/423; Allama Hilli, Tadhkirat al-Fuqaha, 2/277; idem, Tahrir al-Ahkam, 2/124; idem, Irshad al-Adhhan, 1/441; Shahid Thani, Zayn al-Din b. Ali Amili, Al-Rawdhat al-Bihiyya, 7/79; idem, Masalik al-Afham, 12/478.
- [104.](#) Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 3/346; Allama Hilli, Tadhkirat al-Fuqaha, 2/276.
- [105.](#) Muhaqqiq Hilli, Shara'i al-Islam, 4/802.
- [106.](#) Faydh, Ali Ridha, Mabadi-yi Fiqh wa Usul, p. 315.
- [107.](#) Ibn Barraji Tarablusi, Qadhi Abd al-Aziz, Jawahir al-Fiqh, ed. Ibrahim Bahaduri. 1st edition, Muassisa-yi Nashr-i Islami, Qum, 1411/1990, p. 145–146, issue 513; Allama Hilli, Tadhkirat al-Fuqaha, 2/276; Al-Jami li al-Shara'i, p. 358; Muhaqqiq Hilli, Shara'i al-Islam, 4/801; Shahid Thani, Zayn al-Din b. Ali Amili, Al-Durus, 3/79.
- [108.](#) Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 3/345–346; Allama Hilli, Irshad al-Adhhan, 1/441; Karaki, Ali b. Husayn, Jami al-Maqasid fi Sharh al-Qawa'id, 6/124; Shahid Thani, Zayn al-Din b. Ali Amili, Al-Rawdhat al-Bihiyya, 7/78; Shahid Thani, Zayn al-Din b. Ali Amili, Masalik al-Afham, 12/477.
- [109.](#) See: Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 3/346.
- [110.](#) Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 7/115; Muhaqqiq Hilli, Shara'i al-Islam, 4/801; 2/124; Allama Hilli, Idhah al-Fawa'id, 2/142; Shahid Thani, Zayn al-Din b. Ali Amili, Masalik al-Afham, 12/477.
- [111.](#) Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 3/348–349.
- [112.](#) Muhaqqiq Hilli, Shara'i, 4/803; Shahid Thani, Zayn al-Din b. Ali Amili, Al-Rawdhat al-Bihiyya, 7/80.
- [113.](#) Al-Jami li al-Shara'i, p. 357; Shahid Thani, Zayn al-Din b. Ali Amili, Al-Durus, 3/73; Allama Hilli, Tadhkirat al-Fuqaha, 2/271.
- [114.](#) Idem, Tahrir al-Ahkam, 2/123; Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 3/340; Shahid Thani, Zayn al-Din b. Ali Amili, Al-Durus, 3/74.
- [115.](#) Karaki, Ali b. Husayn, Jami al-Maqasid, 6/99; Allama Hilli, Tadhkirat al-Fuqaha, 2/271.
- [116.](#) Idem, Tahrir al-Ahkam, 2/123; Shahid Thani, Zayn al-Din b. Ali Amili, Al-Durus, 3/73.
- [117.](#) Tusi, Abu Ja'far Muhammad b. Hasan, Al-Mabsut, 3/347.

- [118.](#) [ʿAllama Hilli, Tadhkirat al-Fuqaha, 2/277.](#)
- [119.](#) [ʿAllama Hilli, Irshad al-Adhhan, 1/441; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 12/483; ʿAllama Hilli, Tadhkirat al-Fuqaha, 2/277; Karaki, ʿAli b. Husayn, Jamiʿ al-Maqasid, 6/118; Ardabili, Mawla Ahmad, Majmaʿ al-Faʿida, 10/425; Wahid Bihbahani, Muhammad Baqir, Hashiya Majmaʿ al-Faʿida, p. 588.](#)
- [120.](#) [Muhaqqiq Hilli, Sharaʿi al-Islam, 4/802.](#)
- [121.](#) [Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, 3/347 and 350; Ibn Zuhra Hilli, Ghunyat al-Nuzuʿ, p. 304; ʿAllama Hilli, Mukhtalaf al-Shiʿa, 6/107; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Khilaf, 3/596, issue 25; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 12/483; Karaki, ʿAli b. Husayn, Jamiʿ al-Maqasid, 6/103; Ibn Qudama, Al-Mughni, 6/430; Al-Sharh al-Kabir, 6/435; Bani, Muhammad Nasir al-Din, Irwaʿ al-Ghalil fi Takhrij Ahadith Minar al-Sabil, 8 vol., Al-Maktab al-Islami, Beirut, 1405/1985.](#)
- [122.](#) [Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, 3/8 Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, 3/347/348; ʿAllama Hilli, Tadhkirat al-Fuqaha, 2/278–279.](#)
- [123.](#) [Idem, Tahrir al-Ahkam, 2/124.](#)
- [124.](#) [Muhaqqiq Hilli, Sharaʿi al-Islam, 4/802; Ardabili, Mawla Ahmad, Majmaʿ al-Faʿida, 10/426.](#)
- [125.](#) [ʿAllama Hilli, Mukhtalaf al-Shiʿa, 6/110; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 12/483; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, 3/350.](#)
- [126.](#) [ʿAllama Hilli, Tadhkirat al-Fuqaha, 2/278.](#)
- [127.](#) [Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, 3/350; ʿAllama Hilli, Tadhkirat al-Fuqaha, 2/278.](#)
- [128.](#) [Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, 3/351; ʿAllama Hilli, Tadhkirat al-Fuqaha, 2/280.](#)
- [129.](#) [Ibid.](#)
- [130.](#) [ʿAllama Hilli, Idhah al-Fawaʿid, 2/140; Al-Jamiʿ al-ʿAbbasi, p. 252; Ardabili, Mawla Ahmad, Majmaʿ al-Faʿida, 10/426.](#)
- [131.](#) [Q. 33: 4.](#)
- [132.](#) [Wilaʾ is fulfilled in three ways: wilaʾ ʿitq \(alliance of slave emancipation\), wilaʾ Imam \(alliance of Imam\), and vilaʾ dhiman jarira \(alliance guarantee of offense\); for more information see: Fathullah, Dr. Ahmad, Muʿjam-i Alfadh al-Fiqh al-Jaʿfari, p. 452.](#)
- [133.](#) [Daylami, Hamzat b. ʿAbd al-ʿAziz, Al-Marasim al-ʿAlawiyya fi Ahkam al-Nabuwwiyya, ed. Muhsin Husayni Amini, Ahl al-Bayt World Association, Qum, 1414/1993, p. 208; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Nihaya, p. 323; ʿAllama Hilli, Tadhkirat al-Fuqaha, 2/285; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Masalik al-Afham, 12/468.](#)
- [134.](#) [To prove this issue two narrations by Hurayz and the narration by Madaʿini can be referred to; see: Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, 8/227, No. 820; Kulayni, Muhammad b. Yaʿqub, Al-Kafi, 5/224, No. 2.](#)
- [135.](#) [Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Mabsut, 3/347; Tusi, Abu Jaʿfar Muhammad b. Hasan, Al-Khilaf, 3/594, issue 21; Tusi, Muhammad b. Hasan, Tahdhib al-Ahkam, 7/78, No. 336; Ibn Abi Jumhur Ahsaʾi, ʿAwali al-Liʿali, 1/225, No. 116.](#)
- [136.](#) [See: ʿAllama Hilli, Mukhtalaf al-Shiʿa, 6/106.](#)
- [137.](#) [Al-Muqniʿa, p. 648; Muhaqqiq Hilli, Sharaʿi al-Islam, 4/800; ʿAllama Hilli, Tadhkirat al-Fuqaha, 2/285; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Durus, 3/81; Shahid Thani, Zayn al-Din b. ʿAli ʿAmili, Al-Rawdhat al-Bihyya, 7/77.](#)

Source URL:

<https://www.al-islam.org/child-custody-islamic-jurisprudence-saeid-nazari-tavakkoli/part-three-study-legal-issues-abandoned#comment-0>