

Prologue

Among the social units, family is the smallest and at the same time, the most important unit that comes into being through creating a marriage bond between a man and a woman.

Although marriage has various functions, from among them reproduction, which is motivated by perpetuation of generations, enjoys a distinguished place.

In order for such a function to be realized, three essential components, i.e. father, mother, and child, are required to form an entity. The type of relationship they have, the way they interact, and their reciprocal duties have been open to discussion in legal systems of both civilized and uncivilized societies and are still seriously pursued.

Islamic legal system, like other legal systems, has not been exempted from this issue. Given its integrity and thoroughness, the true religion of Islam has studied this issue from different perspectives.

Apart from many verses (*ayas*) focusing on matrimonial issues (marriage) and separation of couples from each other (divorce), the Holy Qur'an has discussed such issues as pregnancy, breastfeeding, and their related problems in four different *verses*.

In *hadith* collections, too, there are many traditions related to us from the *Ahl al-Bayt* (A.S.) dealing with the children's rights.

Similarly, great Shi'a jurists have on various occasions addressed the issues concerning mothers and children; however, they have started up an independent chapter to this end. Researchers may study the legal views on breastfeeding and custody of children within the following sources:

1. *Kitab al-Nikah*, the issues concerning two discourses of suckling (*ridha*) and guardians of marriage contract (*awliya' al- \mathring{a} qd*),
2. *Kitab al-Talaq*, concerning pregnant woman's waiting period (*idda*) after divorce),

3. *Kitab al-Luqata*, concerning human foundling (*luqata*),
4. *Kitab al-Hudud*, concerning implementation of legal punishment (*hadd*) upon pregnant and suckling women as well as implementation of legal punishment for apostacy upon an underage person,
5. *Kitab al-Makasib*, concerning [receiving] wages for obligatory tasks,
6. *Kitab al-Itq* and *Kitab al-Bay*, concerning separation of a child from its mother,
7. *Kitab al-Taharat*, concerning dependency (*taba'iyya*).

In any case, for further information of the respected reader on the details of the research performed concerning the problems of children's rights in Islamic jurisprudence, the following explanations need to be made.

Research Methodology

Since I wished to make perfect and comprehensive information available to the reader, I spent a whole year with much perseverance undertaking the following steps respectively:

Studying Legal Texts

To this end, I consulted most of the Shi'i legal texts extant from 1st/7th century up to the present, in which the issues about children were implicitly or independently discussed and their subjects have been topically catalogued and classified.

Since the core of discussion in the present book is the status of children's rights in Islamic jurisprudence with a focus on the Shi'a school, the detailed study of the legal opinions of other Islamic schools was ruled out; however, in order to avoid ruining the inclusiveness of the research, the views of the Sunni jurists have been briefly and selectively extracted from the main legal texts of each of the Sunni schools and occasionally from the texts of the latter periods and put to discussion within the related discourses.

Studying the Exegetic Texts

Of all the verses of the Qur'an, in only four verses such topics as pregnancy, breastfeeding and the related issues have been brought up and talked about. [1](#)

In order to attain a correct understanding of the meaning of these verses and thereby obtain appropriate legal rulings from them, it is essential to become acquainted with the viewpoints of the interpreters and whatever presented in their exegetical texts concerning them. Therefore, I delved into almost all the Shi'i exegetical texts regardless of the language – either Persian or Arabic – and the major Sunni exegetical sources irrespective of their religious approach.

It goes without saying that the probabilities existing in exegetical books are too diverse and numerous to be trusted, particularly when most of them – without having any historical or narrative foundation – are the products of their devisers' thinking. Thus, it was not deemed sufficient to merely quote the probabilities set forth; rather, it was undertaken to critically review and assess them as well, and only one out of all the existing probabilities was selected according to the reasons and evidences explained in the book.

Study of the Narrative Texts

In order to legally evaluate an issue, the most essential thing to do is to find the traditions proportionate to that issue and to examine the authenticity of their chain of transmission and their meaning.

Consequently, all the traditions narrated from the infallible and virtuous *Ahl al-Bayt* (A.S.) concerning the issues discussed in this book were compiled as per their relation to the subject and made use of with regard to their authenticity and validity.

Compilation Methodology

In order to compile material for this book the following procedures have been respectively employed:

Stating the Jurist's Opinions

At first, the issues were brought up according to the views presented in legal sources and the explanations given by earlier jurists, with the references being footnoted in terms of their importance.

Selecting

Once the issue was brought up, if I accepted what the great jurists had previously stated, the matter was stated with reference to legal books, without referring to my own view.

However, in case I did not agree with a matter, I stated my opinion independently; although I have tried to mention it in the footnote if I happened to find someone agreeing with my opinion.

Of course, it needs to be noted that in selecting a legal view, its being generally accepted or unaccepted among the jurists has not been considered a *sine qua non*; thus, sometimes the view selected is not much advocated in legal books.

For instance, to our opinion breastfeeding a baby within the first twenty one months of its birth is obligatory for a mother, although the renowned majority of the jurists have given legal judgment (*fatwa*) for its preference or excellence. Also, to my opinion, as long as the couple remains in marriage bond, the wife cannot demand wage from her husband for breastfeeding her child, as receiving wage is only endorsed when the couple are divorced, although again the renowned majority of the jurists agree on its

permissibility.

Content

Given the above explanations, the information obtained has been classified in terms of content and categorized in three sections:

Studying Legal Problems of Breastfeeding Children (Ridhaﷻ)

In the first part of the book the following issues are discussed in 8 chapters: the legal standing of mother's milk in Islamic texts; the length of breastfeeding; mother's duties during breastfeeding period; father's duties during breastfeeding period; parents' reciprocative duties during breastfeeding period; duties of the father's successors during breastfeeding period; how to wean a baby; how to hire a wet nurse.

Studying Legal Problems of Custody of Children (Hidhanat)

The second part begins with a preface about the legal standing of fostering children in the Holy Qur'an and then the following issues are discussed in four sections: preliminary discourses; processes of fostering children; qualifications for fostering children; parents' relationships during fostering period.

Studying Legal Problems of Foundling Children (Laqit)

The second part consists of the following issues: preliminary discourses; qualifications for fostering foundling children; legal problems of foundling children; penal problems concerning foundling children; disagreement over foundling children; kinship relation with the foundling children; figurative kinship.

Conclusions

Given the great importance of the research made about children, the conclusions drawn in this research are summarized in the following items for the reader:

Breastfeeding and Suckling (Ridhaﷻ)

- Mother's milk is the best for the baby.
- The period for pregnancy and breastfeeding is to sum up to 30 months.
- The mother is obliged to breastfeed her baby for 21 months; however, it is recommended to continue this period up to 24 months.
- In normal conditions it is not obligatory for the mother to breastfeed her baby beyond 21 months.

- Breastfeeding is an obligatory act, but the mother cannot be forced to do that.
- After the separation of a couple, if the man wants her ex-wife to breastfeed their baby for a full 24 months, the mother is obliged to complete the breastfeeding period.
- After separation from her husband, the woman cannot shun from breastfeeding her baby, but she can demand wages for it.
- From the beginning of breastfeeding, the mother can demand for wages proportionate to the amount of breastfeeding.
- What is meant by wages is the provision of mother's food and clothing during breastfeeding period.
- The provision of mother's food and clothing during breastfeeding period is undertaken by the father and in proportion to his financial capacity.
- The husband and the wife would both agree on the amount of the wages.
- In normal conditions, the father is not obliged to provide for the expenses of breastfeeding beyond 21 months.
- A husband may pay her wife for breastfeeding during their matrimony, but he cannot be obliged to do so.
- Breastfeeding a baby (*ridha*) is different from its custody (*hidhanat*); receiving wages for breastfeeding does include its custody.
- During the period a mother is obliged to breastfeed her baby, she is not permitted to use supplementary foods or animal milk instead of her own milk.
- The term “breastfeeding one's baby” is true only when the mother feed the baby from her own breasts.
- If a woman agrees to breastfeed a baby for a lower wage than the wage its mother has demanded and the mother does not accept that wage (*ta'asur*), the father can take the baby from the mother and leave it to that woman.
- The wife and the husband should not hurt each other by using the child as bait after separation.
- The inheritors of the father after his death have the same responsibilities towards the child and its mother as the father would have had if he had been alive.
- In order to complete the breastfeeding period, as the father can ask the mother to breastfeed the baby, he can hire a wet nurse, too.
- Decision about weaning the child lies with the parents.

- If a mother shuns breastfeeding her baby, she would lose her right for its custody in the first two years of its life.

Child Custody

- What is meant by custody is taking care of the child; deciding on instances counted as taking care is subject to conventional understanding.
- Parents' custody of the child is their natural and unconditional right, which is created as soon as the filial relationship is realized, is not transferable to others, and cannot be relinquished.
- As the parents have the right to take care of their own child, the child has also the right to be taken care of and raised by its parents.
- Child custody is a father's intrinsic duty, which is transferred to the mother for a limited (at most seven years) period.
- Mother's priority in breastfeeding and taking care of her baby in its first two years of life is on the condition that she does not receive wages for this or the wages she demands do not exceed what the others demand.
- After separation from her husband, the woman has the right to take care of her child, whether it is a boy or a girl, up to the age of seven.
- The mother can receive wages for breastfeeding her baby, but not for taking care of it.
- In case of mother's death while holding the custody of her child, this duty is transferred to the child's father.
- When the father dies while holding the custody of his child, this duty is transferred to his successor, i.e., the child's paternal grandfather or his executor (*wasī*).
- Guardianship of a child is different from its custody; this duty lies with the father, paternal grandfather, executor (*wasī*) of each one of them, and Islamic ruler, respectively.
- Taking care of a child after its parents' death lies with its paternal grandfather, his specified executor, and then the Islamic ruler.
- A non-Muslim mother has the right to take care of her child.
- Mother's chronic insanity inhibits her from the custody of her child.
- Mother's periodic insanity does not inhibit her custody over the child in case she is able to fulfill her duties of taking care of the child and the number of its recurrence is very few and not too lengthy.

- Mother's marriage during her child's first seven years of life nullifies her custody over her child, whether her marriage takes place during her ex-husband's lifetime or after his death and whether her second husband agrees with taking care of the child or not.
- Mother's separation from her second husband does not restore her right of custody.
- Mother has to be trustworthy for the custody of her child; namely, she must not misappropriate or fall short of the issues related to her child's life.
- Mother is required to be morally qualified to be allowed the custody of her child.
- Change of the child's residence is permitted in case it does not have negative impacts on its life trend, physical, mental, educational well-being, and moral conduct.
- When the mother is suffering a contagious disease, she cannot undertake her child's custody so long as she is not cured.
- When the mother is suffering from a chronic disease so that she is not able to take care of her child even with the help of others, her right to custody remains valid; however, when it is by no means possible for the mother to take care of the child, this right is voided.
- The parents share the conditions for custody, except in case of the mother's marriage.
- When the terms and qualifications for custody are lost during infancy, mother's right to custody is transferred to the father.
- When the father loses the qualifications for his child's custody, it is transferred to the paternal grandfather and then to their executor.
- If the father regains the required qualifications for his child's custody, it is entrusted to him.
- If the mother regains the required qualifications for her child's custody, it is transferred to her for the first seven years of the child's life, except in case of marriage.
- While the child is living with its father, the latter must not inhibit the mother from meeting her child, and if the child gets sick, he must not prevent the mother from nursing it. In addition, when either the mother or the child dies, the father must not prevent the other from taking part in the mourning ceremony.
- Once reaching maturity, the child's custody is terminated and it can make its own decisions, with no difference in this injunction between a boy and a girl (whether virgin or non-virgin).

Custody of the Abandoned Children

- What is meant by an abandoned child (foundling) is the girl or the boy who has had no specified

guardian when found, whether a suckling or a non-suckling, provided that it is not near maturity.

- Adopting and taking care of the abandoned children is a preferable religious act, which will become obligatory if their life is endangered. This obligation can on certain conditions be individual or shared.
- There is no need for asking permission from any authority for adopting an abandoned child, although some conditions must be observed for its custody.
- There is no need for asking someone to act as witness for finding an abandoned child; however, it is better to have a witness.
- The finder of an abandoned child only undertakes to take care of the child and does not have any guardianship (*wilaya*) over the child.
- The underage, insane, and feeble-minded who are in need of custody themselves cannot undertake the custody of an unattended child, although they can pick the abandoned baby from public places and hand it over to the related institutions.
- Finding an abandoned child does not create any right for the finder.
- Decision about the custody of an abandoned child to be entrusted to someone is made by a specific organization that examines the required qualifications of the person for this purpose.
- There is no need for justice in its technical meaning (the habit of avoiding sins) for taking care of an unattended child; however, the person is required to be morally qualified.
- Being a Muslim is a condition for the custody of a child, whether the child is a Muslim or a non-Muslim; however, the validity of the faith (being a Shi'a) is not far from truth, either.
- The non-Muslim and Muslim individuals with corrupt faith cannot take the custody of an unattended child.
- The custody of a non-Muslim abandoned child (found in non-Muslim settlements) is entrusted to a Muslim person.
- Financial capability is not a prerequisite for the custody of an unattended child, although among several people with equal qualifications, being wealthy is a privilege.
- Moving the residence of an unattended child is subject to the best physical and mental interest of the child.
- Being a man or a woman does not have any effect on the permission for the custody of an abandoned child.

- The property used by or carried along with the child belongs to it.
- The properties [found] around the abandoned child do not belong to it, unless there are valid evidences proving otherwise, or when they lie in a place dedicated to the child.
- The one who takes care of the abandoned child can use the child's property to provide for its living expenses without needing to ask permission from the Islamic ruler.
- An overseer is required to be around for supervising the correct expenditure of the child's property.
- If the finder of the child picks it up from the street just for the purpose of saving its life, provision of its living expenses lies with Islamic government.
- If the finder of the child collects it from the streets for taking care of it with unlimited responsibility, provision of the child's expenses is upon the finder.
- If the finder of the child collects it from the streets for taking care of it with limited responsibility, provision of the child's expenses is subject to the kind of the finder's undertaking, i.e., free care or care on the condition that the expenses are paid back after the child's maturity.
- In case the finder of the child undertakes to provide for the child's living expenses on the condition that he would be paid back later on and when the child reaches maturity there arises disagreement between them on the amount of the expenses, then if the overseer confirms the finder's claim, his claim would be accepted, whether he spends from the child's property or from his own; otherwise he has to provide evidence to prove his claim.
- In a deliberate or inadvertent crime perpetrated against abandoned children, whether leading to death or injury, decision about retaliation (*qisas*), pardon, or receiving blood money (*diyya*) is to be made by the Infallible Imam (Islamic government).
- Proof of parental relation to an abandoned (unattended) child is not possible merely by claim; rather, referring to their national identification records is needed to prove it.
- In case the parental relation to the abandoned child cannot be proved, medico-scientific procedures are to be exploited.
- Acceptance or denial of kinship with someone by the child after maturity is not valid by itself.
- The religion of the claimant of kinship with the abandoned child is not effective in accepting or rejecting its claim.
- The finder of the abandoned child or the one who takes care of it does not have any natural (*qahri*) guardianship (*wila'*) over it.

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September 29, 2002

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1. The Qur'an, with an English Paraphrase, tr. Sayyid 'Ali Quli Qara'i, the Center for Translation of the Holy Qur'an, Qum, 2003 (= Q.), 2: 233; 31: 14; 46: 15; 65: 6.

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