

**RÉSUMÉ SUCCINCT DU SÉMINAIRE INTERNATIONAL INTITULÉ  
« PERSPECTIVES JURIDIQUES ISLAMIQUES SUR LES CONFLITS FAMILIAUX  
TRANSFRONTIÈRES IMPLIQUANT DES ENFANTS », TENU LE 7 AVRIL 2014  
(PRÉSENTATIONS LIMINAIRES COMPRISES)**

*Distribué lors du séminaire et présenté au Conseil par  
William R. Crosbie, co-Président du Groupe de travail sur la médiation*

**(DISPONIBLE EN ANGLAIS UNIQUEMENT)**

\* \* \*

**BRIEF SUMMARY OF THE INTERNATIONAL SEMINAR  
"ISLAMIC LEGAL PERSPECTIVES ON CROSS-BORDER FAMILY  
DISPUTES INVOLVING CHILDREN" HELD ON 7 APRIL 2014  
INCLUDING KEYNOTE PRESENTATIONS**

*Distributed during the seminar and presented to the Council by  
William R. Crosbie, co-Chair of the Working Party on Mediation*

*Document d'information No 4 d'avril 2014  
à l'attention du Conseil d'avril 2014  
sur les affaires générales et la politique de la Conférence*

*Information Document No 4 of April 2014  
for the attention of the Council of April 2014  
on General Affairs and Policy of the Conference*



Foreign Affairs, Trade and  
Development Canada

Affaires étrangères, Commerce  
et Développement Canada



## **INTERNATIONAL SEMINAR**

### **Islamic Legal Perspectives on Cross-Border Family Disputes Involving Children**

***Monday 7 April 2014, The Hague, the Netherlands***

On 7 April 2014, representatives from States, as well as judges, representatives from regional and non-governmental organisations and experts from academia met at The Hague for the seminar "Islamic Legal Perspectives on Cross-Border Family Disputes Involving Children". The seminar was organised by the Government of Canada and the Permanent Bureau of the Hague Conference on Private International Law, and hosted by the Netherlands Ministry of Foreign Affairs.

The objective of the seminar was to further encourage international dialogue on cross-border family disputes in order to secure better protection mechanisms for children in situations where the relevant Hague Children's Conventions do not apply.

The seminar also marked the tenth anniversary of the Malta Process that was launched at a first so-called "Malta Conference" held in St. Julian's, Malta in 2004.

The Malta Process is a dialogue between Contracting States to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (the 1980 Child Abduction Convention) and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (the 1996 Child Protection Convention) and non-Contracting States with Sharia-based or influenced legal systems.

The Malta Process aims at improving State co-operation in order to assist with resolving difficult cross-border family law disputes in situations where the relevant international legal framework is not applicable. It seeks in particular to improve child protection between the relevant States by ensuring that the child's right to have continuing contact with both parents is supported (even though they live in different States) and by combating international child abduction.

In 2009, following a recommendation by the participants at the third Malta Conference, the Working Party on Mediation was established to promote the development of mediation structures. The objective was to give individuals involved in cases to which no international legal framework applies some assistance, in the interim, by encouraging the use of mediation.

The Working Party on Mediation developed the "Principles for the establishment of mediation structures in the context of the Malta Process" (the Principles) that call, among others, for the establishment of a Central Contact Point for international family mediation in each State. This Central Contact Point is intended to facilitate the provision of information on available mediation services in the respective jurisdictions, access to mediation, and information regarding other important related issues, such as relevant legal information. Some States have already taken measures to implement the Principles in their jurisdictions and have designated Central Contact Points (Australia, France, Germany, Pakistan, Slovakia and the United States of America).

The discussions in the Malta Process and in the Working Party on Mediation are guided by the relevant international legal framework, in particular the *United Nations Convention on the Rights of the Child* of 1989 (the UNCRC), the 1980 Child Abduction Convention, the 1996 Child Protection Convention, as well as relevant regional instruments, such as the Organisation of the Islamic Cooperation's Covenant on the Rights of the Child in Islam.

The 1980 Child Abduction and the 1996 Child Protection Conventions enshrine the same fundamental principles set out or implicit in the UNCRC, such as:

- the best interests of the child as a primary consideration in all actions concerning children;
- the right of a child whose parents reside in different States to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contact with both parents;
- the obligation of States to take measures to combat the illicit transfer and non-return of children abroad;
- the opportunity for a child to learn, to know and respect the culture and tradition of both parents.

It has been noted that all of these principles are also underlying principles of Sharia law.

An overview of the Islamic perspective on how to solve cross-border family disputes involving children was explained in particular in the keynote speech given by Professor Zaleha Kamaruddin from Malaysia (available at Annex 1) as well as by Judge Mohammad Al Natsheh, from Jordan and Dr Arik Jeop, from Malaysia in the following panel session.

The value of alternative dispute resolution mechanisms, in particular mediation, in solving international family conflicts was elaborated in the keynote speech given by Judge Annette Olland (available at Annex 2) from the Netherlands and discussed in the panel that followed with Alison Shalaby (Reunite, UK), Dr Umar Oseni, Malaysia and Ms Els Prins (International Child Abduction Center, Netherlands). These speakers presented the efforts their States or organisation has undertaken to promote and facilitate mediation in international family conflicts, such as international child abduction cases.

At the end of the seminar, Mr William Crosbie, Canada summed up the discussion and reflected on the Way Forward including in the Malta Process and its Working Party on Mediation.

He emphasised the value of the Malta Process as a unique process to bring together Contracting States to selected Hague Family Law Conventions and non-Contracting States whose legal systems are based on or influenced by Sharia. The Working Party on Mediation will continue to promote practical solutions through the creation of Central Contact Points and the use of mediation to facilitate the resolution of difficult cross-border family conflicts involving children.

It is hoped that more countries will support the work of the Working Party on Mediation and undertake efforts to implement the Principles. The ultimate goal is that these practical measures will yield solutions in difficult cross-border family conflicts involving children, including disputes about custody and access.

The Working Party on Mediation will continue to organise regional seminars, including in South East Asia, in the Gulf Region and the Maghreb.

## **ANNEXES**



Ministry of Foreign Affairs of the Netherlands



Foreign Affairs, Trade and  
Development Canada      Affaires étrangères, Commerce  
et Développement Canada

## **INTERNATIONAL SEMINAR**

### **Islamic Legal Perspectives on Cross-Border Family Disputes Involving Children**

**Monday, 7 April 2014, The Hague, The Netherlands**

## **KEYNOTE PRESENTATION I**

### **ISLAMIC LEGAL PERSPECTIVES ON CROSS-BORDER FAMILY DISPUTES INVOLVING CHILDREN**

**Prof. Dato' Sri Dr. Zaleha Kamaruddin**

Rector and Professor of Islamic Family Law  
International Islamic University Malaysia

## ISLAMIC LEGAL PERSPECTIVES ON CROSS-BORDER FAMILY DISPUTES INVOLVING CHILDREN

Prof. Dato' Sri Dr. Zaleha Kamaruddin

### 1. INTRODUCTION

It is an honour to be invited to deliver a keynote speech on “Islamic Legal Perspectives on Cross-Border Family Disputes Involving Children”. I would like to put on record my heartfelt gratitude to the organizers of this international seminar which is being hosted by Canada (co-Chair of the Working Party on Mediation) in cooperation with the Permanent Bureau of the Hague Conference on Private International Law and the Netherlands Ministry of Foreign Affairs.

I would like to begin with some clarifications regarding the nature of Shari'ah and Islamic law. I have defined Shari'ah elsewhere as the totality of guidance that God has revealed to Prophet Muhammad (PBUH)<sup>1</sup> as found in the Qur'an and Sunnah<sup>2</sup> relating to all aspects of life.<sup>3</sup> Shari'ah is an all-encompassing religio-legal paradigm that regulates the lives of Muslims in two main types of relationships – the vertical and horizontal relationships. As such it is broadly classified into two categories: *ibadaat* (acts of worship) and *muamalat* (civil obligations).<sup>4</sup> There is a vertical relationship between a human being and his or her creator with specific rules regulating such a divine relationship. This is generally classified as the first limb of the Shari'ah known as *ibadat* or acts of worship. The default rule for rituals or practices that fall under the *ibadaat* category is a total conviction which prohibits any form of innovation, aberration or amendments. On the other hand, the second limb consists of *muamalat* which simply means civil obligations; and this gives the idea of a horizontal relationship among human beings which is also regulated by the law to a large extent. Issues relating to marriage and family law generally (*munakahaat*) are classified under *muamalat*.

In essence, there is a great deal of flexibility in issues relating to this second category of Shari'ah. The flexibility is reflected in the often-quoted Islamic legal maxim which provides that: “the default rule or norm with regards to things generally is permissibility” (*al-aslu fil-*

---

<sup>1</sup> Peace Be Upon Him – a term often used by Muslims in reverence of a Prophet of God.

<sup>2</sup> Sunnah is an all-encompassing concept which comprises binding historical precedents of the Prophet Muhammad which are derived from his express speech, actions, and tacit approvals. It is considered as the second source of Shariah after the Qur'an.

<sup>3</sup> Zaleha Kamaruddin, Mohd Naim bin Haji Mokhtar and Siti Zalkhah Md. Nor, “Assessing the Working Draft of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance: Malaysian Shari'ah Perspective”, *Malaysian Journal of Syariah and Law*, vol. 2 (2010), pp. 95-118, fn. 2 of p. 96.

<sup>4</sup> Some other Muslim jurists have given additional categories of Shari'ah a: (i) *Ibadaat* (rituals or acts of worship), (ii) *Munakahat* (marriage or family laws), (iii) *Muamalat* (civil obligations), (iv) *Jinayat* (offences, crimes and punishments).

*ashyaa' al-ibahah*).<sup>5</sup> Permissibility remains the default rules in all issues that fall under the *muamalat* category and will prevail in all situations until there is evidence to the contrary from the legal texts (*nusus*) of either the Qur'an or Sunnah. Therefore, in espousing the Islamic legal perspectives on cross-border child custody disputes, it is important to keep in mind the flexibility accorded to matters relating to marriage and the family in Islamic law. Though there are specific rules regulating almost every aspect of family law in Islamic law, there is still a high degree of flexibility in the interpretation of Sharī'ah which in turn has been codified in some Muslim countries as Islamic law, particularly when it comes to contextualizing the fundamental principles.

The flexibility of Islamic legal principles on family disputes is a major feature of private international law. Article 9 (3) of the United Nations Convention on the Rights of the Child 1989 which secures a child's right to maintain on a regular basis personal relations and direct contact with both parents in situations of separation. It is pertinent to note that Islamic law requires both parents to ensure a dignified, and seamless separation which must not prejudice the rights of the child.

The international family law is still tainted with some modicum of uncertainties when jurisdictional issues put the child in a delicate situation amidst legal complexities. In his "Introduction", Todd Heine aptly captures the current state of international family law with particular reference to cross-border disputes:

International family law reflects deeply personal stories about children, parents, and courts. Most cross-border cases, however, showcase a dry protagonist: jurisdiction. Jurisdiction can be complex in a modern, mobile, multicultural world and may involve national, international, interstate, intergovernmental, and state law. Determining jurisdiction can present a legal maze.<sup>6</sup>

Being an integral part of the international family law framework, Islamic family law also suffers from such complexities coupled with its internal legal pluralism which presents varying interpretations of basic Islamic concepts in different regions across the world. But one underlying thread that runs through the entire Islamic corpus juris is "Liberality in post-divorce issues" and "The Best Interest of the Child" which are encapsulated in an authoritative legal text of the Qur'an:

And if you divorce them before you have touched (had a sexual relation with) them, and you have appointed unto them the Mahr (bridal money given by the husbands to his wife at the time of marriage), then pay half of that (Mahr), unless they (the women) agree to forego it, or he (the

---

<sup>5</sup> 'Abd al-Wahhab Abu Sulayman, "An-Nazariyyah wal-Qawa'id fil-Fiqh al-Islami", *Mujallah Jamai'ah al-Malik 'Abdal-'Aziz*, No.2, May 1978.

<sup>6</sup> Todd Heine, "Home State, Cross-Border Custody, and Habitual Residence Jurisdiction: Time for a Temporal Standard in International Family Law," *Annual Survey of International & Comparative Law*: Vol. 17, No. 1, p. 10.

husband), in whose hands is the marriage tie, agrees to forego and give her full appointed Mahr. And to forego and give (her the full Mahr) is nearer to At-Taqwa (piety, righteousness, etc.). And do not forget liberality between yourselves. Truly, Allah is All-Seer of what you do.<sup>7</sup>

With emphasis on the part of the verse which says: “do not forget liberality between yourselves”, a further interpretation of this clause indicates the need to ensure liberality in issues involving bridal gift. This interpretation can be extended to other post-divorce matters such as the protection of the children who are the fruits of such marital union. Parting in kindness is an integral part of the Qur’anic rules relating to divorce and post-divorce matters.<sup>8</sup> Therefore, this keynote speech will therefore expound on these two themes of “Liberality in post-divorce issues” and “The Best Interest of the Child” which are two shared values in modern family law. The underlying Islamic legal issues relating to cross-border family disputes vis-à-vis the centrality of the position of children caught in such legal tangles will be addressed. Generally, I would like to situate the issue of cross-border family disputes involving children within the Islamic legal context.

## **2. CHILDREN AND THE REMOTE CAUSES OF CROSS-BORDER FAMILY DISPUTES**

I will begin with two scenarios that often trigger cross-border family disputes among Muslim communities in the West. Imagine a Muslim couple who have a matured daughter who is of marriageable age by all standards. They migrated to Canada thirty (30) years ago from Egypt. The father prefers an arranged marriage with the son of an old friend back home in Egypt while the mother insists that their daughter should be given the free-will to make her choice in Canada or elsewhere due to cultural differences. This seemingly trivial issue suddenly becomes a heated debate in the family, and this debate becomes a family dispute. Eventually, the couple had to part ways during their 30<sup>th</sup> marriage anniversary when the marriage hit the rocks. This aggravated the plight of their only daughter who will now cope with two different dilemmas – her right to make her choice, and her parent’s divorce.

Another common scenario is a situation where a Dutch lady converts to Islam and marries a Malaysian Muslim guy. Three years into the marriage, there are marital issues which lead to a divorce while there is already a two-year old son. The son is unilaterally taken away by the mother to Netherlands. The guy now seeks the return of the child to Malaysia while the wife wishes to remain with the child in Netherlands. How do we then apply the best interests principle in order to protect the child? This question will be answered later in this keynote speech.

As indicated in the above two scenarios, children are always at the centre of marital discords which in some cases trigger cross-border disputes involving custody. In essence,

---

<sup>7</sup> Qur’an 2: 237.

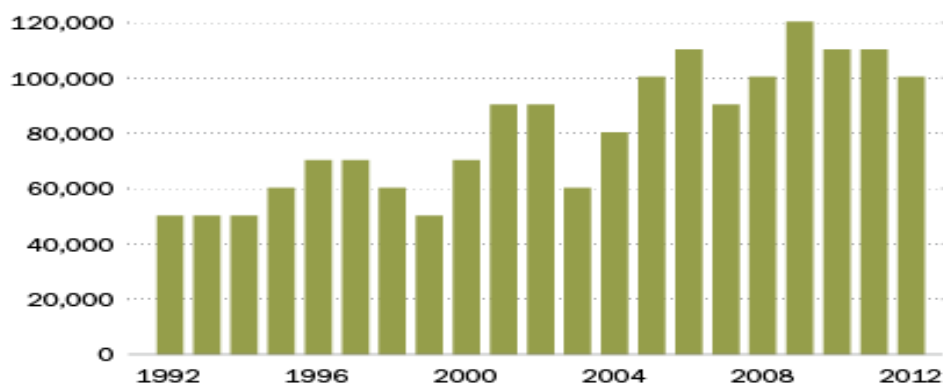
<sup>8</sup> See Qur’an 33:49 which provides: “O You who have believed, when you marry believing women and then divorce them before you have touched them, then there is not for you any waiting period to count concerning them. So provide for them and give them a gracious release”.



as Schnitzer-Reese puts it, “[w]hen cultures clash, the legal ramifications are serious—and seriously difficult to navigate”.<sup>9</sup> Hence, there is a need to ensure a proper legal framework protecting the best interest of the child and giving substantial access to both parents as part of the general welfare of the child.

It is pertinent to note that the modern world is very dynamic and globalized. Major cities like New York, Toronto, Amsterdam, London, and Berlin are now cosmopolitan cities where people of different socio-cultural and religious backgrounds live and work. With special emphasis on the Muslim population, most of the Muslims in such big cities are 3<sup>rd</sup> and 4<sup>th</sup> generation migrants. For instance, according to a Pew Research Centre Report of 2007, nearly two-thirds of adult Muslims in the United States were born elsewhere, mostly in countries within the Muslim world, broadly defined.<sup>10</sup> In fact, between 1992 and 2012, about 1.7 million Muslims became legal permanent residents in the U.S. through migration from their original countries of origin. The number of Muslims who acquired legal permanent residency in the U.S. within this period is presented in Figure 1.<sup>11</sup>

**Muslim Legal Permanent Residents, 1992-2012**



Sources: Pew Research Center estimates based on data from the Office of Immigration Statistics—Department of Homeland Security (1992-2012), New Immigrant Survey (2003) and Pew Research Center’s “The Global Religious Landscape” (2012)

PEW RESEARCH CENTER

Most other cosmopolitan cities across the world also face the increasing number of immigrants from the Muslim world. Such a dynamic and increasingly volatile situation requires a careful and constructive framework that would address the needs and yearnings of such minority communities.

<sup>9</sup> Ericka A. Schnitzer-Reese, International Child Abduction to non-Hague Convention Countries: The need for an International Family Court, 2 *Nw. J. Int’l Hum. Rts.* 1 (2004), p. 3

<sup>10</sup> Pew Research Center, Muslim Americans: Middle Class and Mostly Mainstream (Washington, DC, Pew Research Center: 2007)

<sup>11</sup> Pew Research Center, The Religious Affiliation of U.S. Immigrants: Majority Christian, Rising Share of Other Faiths, (Washington, DC, Pew Research Center: 2013), available at <http://www.pewforum.org/2013/05/17/the-religious-affiliation-of-us-immigrants/#muslim>

In addressing the remote causes of cross-border family disputes, particularly those involving children, there is a need to understand the underlying causes which will proffer a way forward towards achieving the golden principle of the “best interest of the child”. With particular reference to the Muslims, some of the remote causes of cross-border family disputes include socio-cultural differences, periodic domestic violence, and abduction.<sup>12</sup> Brunilda Pali and Sandra Voet have identified not less than fifteen (15) factors that influence parental abduction:

- i. fear for the child's safety and the perception that the child was being harmed
- ii. unhappiness with the court decision concerning custody and visitation,
- iii. reaction to the other parent's abduction-related threats and actions,
- iv. reaction to domestic violence, drug and alcohol problems, including mental health problems
- v. revenge against the other parent and a desire to punish him/her,
- vi. unresolved anger over the breakup,
- vii. desire to be pursued by the left-behind parent like during courtship,
- viii. merging psychologically with the child to an unhealthy degree,
- ix. a desire to always be with the child,
- x. pressure from other members of extended family,
- xi. anger over the new marriage or relationship of the left behind parent,
- xii. abducting the children to one's own homeland in order to ensure that they are raised in accordance with one's own religion or norms,
- xiii. one parent is left in a foreign environment without support, feeling disenfranchised from the society, and separation and divorce intensify their sense of alienation,
- xiv. failing to value the other parent's relationship with the child.
- xv. facilitating factors, like dual citizenship of the child, support from other family members, ability to travel.<sup>13</sup>

Though the list is not exhaustive, most of the factors are representative of many cross-border family disputes that have found their ways into the courts.

---

<sup>12</sup> Zaleha Kamaruddin and Umar A. Oseni, “Between Ideals and Reality: Violence against Women and the Real Image of Women in Islam”, *The Journal of Oriental Philosophy*, vol. 23 (2013), pp. 166-180.

<sup>13</sup> Brunilda Pali and Sandra Voet, *Family Mediation In International Family Conflicts: The European Context*, (Leuven: Institute of Criminology, Katholieke Universiteit Leuven, 2013), p. 17.

### 3. CHILDREN, CROSS-BORDER FAMILY DISPUTES AND THE ISLAMIC LEGAL PERSPECTIVES

In order to situate the discussion on cross-border family disputes within the Islamic legal perspectives, one may explore the different jurisprudential views on custody of children and possible ways to resolve such puzzle in a way and manner that would promote the best interest of the children.

#### 3.1 Internal Legal Pluralism in Islamic Law

It might be necessary to clarify from the onset that though the primary sources of Islamic law are, to a large extent, the same across the Muslim world, there are varying degrees of interpretation in different Muslim communities across the world. This has led to different practices which are sometimes tainted with cultural norms. Such internal pluralism exists within the Muslim world. Even within the Sunni jurisprudence, there is a great deal of internal legal pluralism which has snowballed into more pragmatic approach in the interpretation and application of Islamic law among modern scholars. This brings to the fore core principles such as *takhayyur* (choice or eclecticism) and *talfiq* (patching together of legal rules) are being employed by modern Shari'ah scholars to interpret the law for the benefit of all. In essence, such internal legal pluralism might assist in applying fundamental legal rules to modern issues.

The internal legal pluralism operates on two different but related levels. The first pluralism is found in the different interpretations proffered by each of the schools of Islamic jurisprudence on issues relating to custody of children.<sup>14</sup> In addition, the second level of internal pluralism operates among the modern Muslim states. Muslim countries have different legal background and social order which might be part of their colonial legacies defined by the peculiarities of each of the jurisdictions. Numerous legal and customary rules of Muslim states have led to some sort of jurisprudential mutation which have transformed the face of Islamic law in action and triggered some controversies on the real nature of Islamic law.

#### 3.2 Views of Muslim Jurists on Child Custody and Parental Abduction

With the above general background on the internal legal pluralism in Islamic law, it is therefore appropriate to examine the views of the four major Sunni schools on child custody and parental abduction. I will begin within a matter on which Muslim scholars have unanimously agreed regarding the custody of a child. But before this, it is important to distinguish between "custody" (*hadānah*) and "guardianship" (*wilāyah*) in Islamic law. The relationship between the two concepts can be explained thus:

The relationship between *hadānah* and guardianship (*wilāyah*) can be seen as a complex structure of rights and duties distributed between the entitled person(s). The main distinction between the two concepts is that *hadānah* is more related to the emotional taking care of and nursing of

---

<sup>14</sup> There are four major schools of Islamic jurisprudence among the Sunnis.

the infant, whereas *wilayah* is more concerned with decisions that in some way or another affect the child's present and future welfare. The exercise of *hadanah*, therefore, cannot be effectively undertaken without physically living with the child, whereas the exercise of *wilayah* can be performed from a remote distance, whether or not the guardian is living with the child. According to Islamic Law, *wilayah*, generally speaking, is a male-oriented function. *Hadanah*, on the other hand, is a more female-oriented function.<sup>15</sup>

The mere fact that the father retains the right to guardianship which, in a way, is even a form of legal duty imposed on him, suggests that in all situations, equal access to the child is contemplated by the law. This argument is further reinforced by the special role assigned to the mother, which relates to custody.

### 3.2.1 How Does Islamic Law Define Custody of a Child?

One needs to understand the definition or description Muslim scholars have proffered in demystifying the whole concept of child custody. Having an idea of the nature of child custody in Islamic law and how Muslim jurists have conceptualized it will prepare a good basis for the adoption of best practices in modern Muslim states. Without mincing words, a number of scholars have defined child custody as the creation of an enabling environment for a child that has not reached the age of discernment through proper care and protection which ultimately encompasses all reasonable positive dispositions that will bring about raising such child with his or her best interest.<sup>16</sup> Therefore, historical precedents in Islam point to the fact that whenever the issue of custody of a child crops up, whether in the Sharī'ah courts or before learned muftis, the best interest of the child is always paramount.<sup>17</sup> For this reason, Ibn Qudamah reemphasized the objective of custody of a child where he rightly observed that given the fact that custody is aimed at taking care of the child, it must not be given in a way that will be detrimental to the welfare and religious commitment of such child.<sup>18</sup> This makes a case for the paramount need to study historical legal precedents of the past in order to understand the current realities in the Muslim world, and ultimately strategize for the future through the promotion of best practices that are not only a re-enactment of core Sharī'ah principles, but also promotes the best interest of the child.

### 3.2.2 Child Custody: Preference to the Mother

The custody of a child who has not reached the age of discernment belongs to the mother in Islamic law. However, there is an exception to this rule which is to the effect that if such

---

<sup>15</sup> Mahdi Zahraa and Normi A. Malek, "The Concept of Custody in Islamic Law", *Arab Law Quarterly*, Vol. 13, No. 2 (1998), pp. 155-177, p. 157.

<sup>16</sup> *Rawdat al-Taalibeen* (9/98).

<sup>17</sup> *Al-Rawd al-Murbi'* (3/251).

<sup>18</sup> *Al-Mughni* (8/190).

mother has remarried, then she loses such pre-eminence in the right to custody according to the unanimous opinion of Muslim scholars.<sup>19</sup> The justification for such rule and the exception is found in a prophetic precedent narrated by ‘Abdullah bin ‘Amr who reported that a woman said: “O Messenger of Allah, my womb was a vessel for this son of mine, and my breasts gave him to drink, and my lap was a refuge for him, but his father has divorced me and he wants to take him away from me.” The Messenger of Allah said to her: “You have more right to him so long as you do not remarry.”<sup>20</sup> The reason behind such rule, as explained by Muslim scholars, is that at that particular age, a minor needs proper care and compassion which requires the attention of a mother or someone in her position to nurture the child. Once the woman remarries, conflict of interest sets in and it might be difficult for such a woman to strike a fair balance between her duty as a mother and her role as a wife to her new husband. However, the Maliki School in Islamic jurisprudence contend that if a woman remarries and she has the custody of a child from her former husband, and the latter is aware of that fact but sleeps over his right of objection for a period of one year, he loses the right to custody forever.<sup>21</sup>

It is important to add that Islamic law places a mandatory responsibility on the shoulders of men. Fathers are responsible for the maintenance of their families, particularly the children, regardless of the fact whether the spouses are still married or divorced. Hence, even after divorce, the father is completely responsible for the financial maintenance of the child. The implication of this rule, which is based on the unanimous position of the Muslim scholars, is that there is always a point of interaction between the parents even after divorce notwithstanding the position of the law on who has the custody of the child.<sup>22</sup> In fact, Muslim scholars are also unanimous on the view that maintenance of the child is the responsibility of the father to the extent that a divorced woman can claim from her ex-husband payment for breastfeeding the child. Ibn Qudamah emphasized that: [The expenses for] breastfeeding the child are to be borne by the father only, and he has no right to force the mother to breastfeed [the child] if she is divorced, and we know of no difference of opinion concerning that.”<sup>23</sup> Accordingly, when it comes to determining the exact amount of such expenses, it has been suggested by scholars that the prevailing rates should be used as a standard.<sup>24</sup> Ibn Qudamah clarified this point when he observed that: “If

---

<sup>19</sup> al-Kaafi by Ibn ‘Abd al-Barr (1/296); al-Mughni (8/194).

<sup>20</sup> Narrated by Ahmad (6707) and Abu Dawood (2276); classed as hasan by al-Albaani in Saheeh Abi Dawood, and classed as saheeh by Ibn Katheer in Irshaad al-Faqeeh (2/250).

<sup>21</sup> Salih ‘Abd al-Sami’ Al-Azhari, *Jawahir al-Iklil* (Commentary on Khalil’s Mukhtasar), vol. 1, p. 409.

<sup>22</sup> Maintenance of children, which is the sole responsibility of the father, is an all-encompassing phrase. It includes food and drink, accommodation, clothing, education and any other thing the child might need in his or her formative stages in life. This is why Muslim scholars emphasize on what is reasonable in child upbringing when it comes to issue of maintenance. A clear directive is given in Qur’an 65: 7 which reads: “Let the rich man spend according to his means; and the man whose resources are restricted, let him spend according to what God has given him. God puts no burden on any person beyond what He has given him. God will grant after hardship, ease.”

<sup>23</sup> al-Mughni (11/430).

<sup>24</sup> Ibn Taimiyyah has clarified this issue and emphasized that the ex-wife is entitled to such payment according to the consensus of the Muslim scholars. He premised his argument on an authoritative legal text from the

the mother asks for payment at the usual rate for breastfeeding him, she is more entitled to that, whether the father finds someone else to breastfeed him for free or not.”<sup>25</sup>

The above position is codified under the respective State Enactments on Islamic Family Law in Malaysia. For instance, section 81(1) of the Islamic Family Law Act 1984 of the Federal Territories in Malaysia provides that: “Subject to section 82, the mother shall be of all persons the best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution.” So, both during the marriage and after divorce, the mother is given pre-eminence subject to the exceptions enumerated in section 82. To this end, section 82 provides the qualifications necessary for custody: “A person to whom belongs the upbringing of a child, shall be entitled to exercise the right of *hadhanah* if— (a) she is a Muslim; (b) she is of sound mind; (c) she is of an age that qualifies her to bestow on the child the care, love, and affection that the child may need; (d) she is of good conduct from the standpoint of Islamic morality; and (e) she lives in a place where the child may not undergo any risk morally or physically.”<sup>26</sup>

### 3.2.3 Parental Abduction: The Islamic Legal Viewpoint

Even though child abduction, particularly with the cross-border colouration as prevalent across the world nowadays, was not originally a problem during the early period of Islam, there are however general rules that regulate related issues. One important point to note here is that the rule of abduction in the general sense which involves a stranger is not applicable to parental abduction.<sup>27</sup> While some western countries such as Netherlands criminalize parental abduction, there is no rule in the Shari’ah that considers such act a crime. As a matter of fact, what constitutes a crime under the Shari’ah is clearly delineated by the law. Issues relating to an unauthorised removal of a child by a parent who does not have custody might be classified under the discretionary punishments generally referred to as *ta’zir*. So, specific rules may be transposed from the general sources of Shari’ah to regulate the increasing spate of parental abduction. In spite of the fact that many Muslim countries are considered safe haven for child abduction for obvious reasons,<sup>28</sup> parental abduction is not in any way supported by the Shari’ah. In the real sense of it, prohibition of access to a caring parent violates one of the major five higher objectives of the Shari’ah.<sup>29</sup>

---

Qur’an which provides: “Then if they give suck to the children for you, give them their due payment”. Qur’an 65:6.

<sup>25</sup> *Al-Mughni* (11/431).

<sup>26</sup> Section 83 however provides for how the right of custody is lost: The right of *hadhanah* of a woman is lost— (a) by her marriage with a person not related to the child within the prohibited degrees if her custody in such case will affect the welfare of the child but her right to custody will revert if the marriage is dissolved; (b) by her gross and open immorality; (c) by her changing her residence so as to prevent the father from exercising the necessary supervision over the child, except that a divorced wife may take her own child to her birth-place; (d) by her abjuration of Islam; (e) by her neglect of or cruelty to the child.”

<sup>27</sup> There are specific rules on *hirabah* which are applied to cases of criminal abduction in Islamic law.

<sup>28</sup> **Maureen Dabbagh, *Parental Kidnapping in America: An Historical and Cultural Analysis*, United States: McFarland, 2001, p. 58.**

<sup>29</sup> **Kristine Uhlman, “Overview of Shari’a and Prevalent Customs In Islamic Societies - Divorce and Child Custody”, Expert Law, January 2004, [http://www.expertlaw.com/library/family\\_law/islamic\\_custody-3.html#110](http://www.expertlaw.com/library/family_law/islamic_custody-3.html#110) (accessed on 3rd April 2014).**

### 3.2.4 Custody Disputes Involving Cross-border Issues

When it comes to cross-border family disputes involving a child, who has more right to custody in Islamic law? Depending on the specific scenario, the Sharī'ah rules applicable to cross-border disputes involving child custody are summarised thus:

1. If one of the parents intends to travel temporarily without changing his or her habitual residence, then the parent who is staying put has more right to the child.
2. If one of them wants to change his or her habitual residence by travelling to another city, and the new city or the route is considered unsafe for the best interest of the child, then the parent who is staying put has more right to the child.
3. If one of them wants to relocate to another part the same city, and the city and the route is safe, the father has right to the child than the mother, regardless of whether the one who is moving is the father or the mother.
4. If both parents are relocating to the same place or city, then the mother should retain custody.
5. If the place is nearby so that the father and child may see one another every day, then the mother should retain custody.<sup>30</sup>

The default rule remains that equal access should be granted to the parents while women generally have more right to custody of children subject to the exceptions discussed earlier. Denying access to one's child through whatever means is considered a serious sin in Islam. Maintaining ties of kinship is a core Islamic principle which is endorsed by both the Qur'an and Sunnah. The excellence of maintaining ties of kinship, which includes, unfettered access to one's child, is explained in the following prophetic precedent. A man once came to the Prophet Muhammad and said to him: "The Messenger of God, I have relatives with whom I maintain ties while they cut me off. I am good to them while they are bad to me. They behave foolishly towards me while I am forbearing towards them." The Prophet replied: 'If things are as you said, it is as if you were putting hot ashes on them and you will not lack a supporter against them from God as long as you continue to do that.'<sup>31</sup> In a similar narration, the Prophet once announced to his companions while emphasizing the need to maintain the ties of kinship (*rahim*): "God, the Almighty and Exalted said: 'I am the Merciful (*ar-Rahman*). I have created ties of kinship and derived a name for it from My Name. If anyone maintains ties of kinship, I maintain connection with

---

<sup>30</sup> Muhammad Anwar, *Wilaayat al-Mar'ah fi'l-Fiqh al-Islami*, Riyadh: Dar Balansiyah lil-Nashr wa-al-Tawzi, n.d., p. 692. (The book is based on the author's Master Thesis).

<sup>31</sup> This prophet precedent was narrated by Abu Hurairah and related by Al-Bukhari. See Adab al-Mufrad

him, and I shall cut off anyone who cuts them off.”<sup>32</sup> There are other numerous prophetic precedents on this subject matter which all point to the fact that any deliberate action by someone to prevent a parent from having access to his or her child might warrant spiritual sanctions from the religious perspective. It is on this basis modern Muslim jurists are required to come up with appropriate Sharī’ah rules that will curtail the hydra-headed menace of cross-border parental child abduction.

### **3.3 Child Custody Issues in Islamic Law: Religion and Habitual Residence**

At this juncture, it may be helpful to examine specific rules relating to some controversial issues that have triggered the seemingly unending conundrum on cross-border family disputes relating to custody of child. Different rules apply to various circumstances depending on the habitual residence (domicile) or religion of the parties involved. For the purpose of this presentation, “difference of religion” means a situation where one of the couple is a Muslim while the other is a non-Muslim. There is also a general assumption here that excludes instances of concurrent habitual residences in two different states. The views expressed here are derived from the views of the majority of Muslim jurists.

#### *3.3.1 Parents of the Same Religion and the Same Habitual Residence*

Against the background of the general principle that gives custody to the woman, a scenario of couple of the same religion and nationality which presupposes that they reside in the same country would ordinarily lead to the conclusion that the woman should have the custody. On this issue, Imam Al-Shafi’i observed that: “When the parents are divorced and both of them are in one city or state, the mother has the best entitlement towards her child as long as she does not re-marry and the child is still an infant. If the child has reached the age of seven or eight years old and he is mentally sane, then the child has the choice to choose his guardianship either with his father or the mother and the child has to stay with the guardian he chooses.”<sup>33</sup>

#### *3.3.2 Parents of the Same Religion with Different Habitual Residences*

For parents of the same religion with different habitual residences who are involved in cross-border child custody disputes, the default rule applies to the effect that the woman has the custody of the child if the necessary conditions explained are met.<sup>34</sup> Provided the

---

<sup>32</sup> This prophetic precedent was narrated by Abdur-Rahman bin ‘Awf and related by Al-Bukhari. See the chapter on “Ties of Kinship” in Al-Bukhair, *Al-Adab al-Mufrad Al-Bukhari*, trans. Aisha Bewley

<sup>33</sup> Imam Al-Shafie, *Kitab Al-Um*, Vol. 3, Beirut, Labanon: Darul Ma’rifah, p. 92.

<sup>34</sup> The general rules have been explained thus: “Women have more right to custody of children than men; in principle custody belongs to them, because they are more compassionate and more kind, and they know better how to raise small children, and they are more patient in dealing with the difficulties involved. The mother has more right to custody of her child, whether it is a boy or a girl, so long as she does not re-marry and so long as she meets the conditions of custody. This is according to scholarly consensus.

The conditions of custody are: being accountable (i.e., an adult of sound mind etc.), being free (as opposed to being a slave), being of good character, being a Muslim if the child concerned is a Muslim, and being able to



city or country in which the woman lives is conducive to the proper upbringing of the child and the woman has not re-married in a manner that would prejudice the child, custody of the child will ordinarily be granted to her. But if she takes the child out of such jurisdiction preventing the father from having access to the child, then she might lose such a right to custody.

### *3.3.3 Parents of Different Religions and Habitual Residences*

Issues of custody involving parents of different religion and habitual residences are somehow complex because the Sharī'ah is premised on divine law of Islam. While different habitual residences might not trigger further debates, difference in religion would necessitate what might be referred to as the "religiously-based 'best interests' standard".<sup>35</sup> This fact remains undisputable when it comes to the way and manner a court in a Muslim-majority country is expected to treat such a dispute. The reason for this is not far-fetched. Muslims believe they have their unique values for proper child upbringing which must be considered when determining or interpreting the best interests standard.<sup>36</sup> The good thing is that there are more converging points between the Sharī'ah standards and the conventional rule of best interests of the child. These are areas we should emphasize on in the move towards harmonising the different legal standards for a more acceptable international framework.

### *3.3.4 Parents of Different Religions but of the Same Habitual Residence*

The same rules that apply to parents of different religions and habitual residences apply to this scenario. Once the woman is qualified based on the rules discussed earlier, she has the custody because she has more right to custody. Once she converts into any other religion other than Islam, she loses her right to custody for the reasons mentioned earlier. However, regardless of the religion of the woman, issues relating to equal access are considered sacrosanct in Islamic law. As a mandatory Qur'anic rule, a woman must be granted unfettered access to her child regardless of her religious beliefs.<sup>37</sup> This does not

---

fulfil all obligations towards the child. The mother should not be married to a person who is a stranger (i.e., not related) to the child. If one of these conditions is not fulfilled and there is an impediment such as insanity or having remarried, etc., the woman loses such preeminence in the right to custody, but if that impediment is removed, then the right to custody is restored. But it is best to pay attention to the interests of the child, because his rights come first." See Anwar, *Wilaayat al-Mar'ah fi'l-Fiqh al-Islami*, p. 692.

<sup>35</sup> Monica E. Henderson, "U.S. State Court Review of Islamic Law Custody Decrees-When Are Islamic Custody Decrees in the Child's Best Interest?", 36 *Brandeis J. Fam. L.* (1998), 423, 426-28.

<sup>36</sup> Lara Cardin, "The Hague Convention on the Civil Aspects of International Child Abduction As Applied to Non Signatory Nations: Getting to Square One", 20 *HOUS. J. INT'L L.* (1997), 141, 157-158.

<sup>37</sup> The basis of this principle is found in different legal texts of the Qur'an. For instance, Qur'an 31: 14-15 provide: "And We have enjoined upon man [care] for his parents. His mother carried him, [increasing her] in weakness upon weakness, and his weaning is in two years. Be grateful to Me and to your parents; to Me is the [final] destination. But if they endeavor to make you associate with Me that of which you have no knowledge, do not obey them but accompany them in [this] world with appropriate kindness and follow the way of those who turn back to Me [in repentance]. Then to Me will be your return, and I will inform you about what you used to do."

mean she has the custody but she must not be prevented from having access to her own child.

### 3.4 Revisiting the Issue of Religion in the Modern Context

In international child abduction and cross-border family disputes relating to the custody of the child, one of the main issues that often trigger judicial controversies in Muslim states is religion. Therefore, it is pertinent to closely examine the diverging views of Muslim jurists on religion (or being a Muslim) as a major condition of custodianship (*ahl al-hadanah*). The general rule in Islamic law is that both male and female prospective custodian must fulfil certain fundamental conditions in order to be given the custody of a child. According to the Muslim jurists, the conditions are legal capacity, trustworthiness, ability to take care of the child, Muslim, residence, and marriage restrictions.<sup>38</sup>

With regards to the religion of the prospective custodian, the general rule is that he or she must be a Muslim. It is believed the child under the custody of a non-Muslim might not be brought in the proper Islamic way.<sup>39</sup> This has been raised in a number of decisions of Shariah Courts in Muslim countries, particularly when a case involves a cross-border custody dispute where one of the parties is domiciled in a western country. Since custody in Islamic law is given to a party for the overall welfare of the child, it is believed if such child is brought up under a non-Muslim or in a non-Islamic environment, he or she will be exposed to religious harm and negative influences of such societies.<sup>40</sup> On the basis of this argument, the Hanbali School of Islamic jurisprudence specifically requires that the custodian must be a Muslim.<sup>41</sup>

Nevertheless, there is a contrary view which takes into consideration some other factors, with particular reference to the mother of the child. The three major schools – Hanafis, Malikis, and Zahiris – contend that a non-Muslim mother may have the right to custody of a child provided such a child is not subjected to either physical or religious harm that might prejudice his or her proper upbringing. This contrary position however considers only the *kitabiyah* (Christians and Jews) and *majousiyah* (Zoroastrians) women as having such right to custody. The basis of their view is found in a prophetic tradition narrated by ‘Abdul Hamid bin Ja’far from his father who also heard it from his grandfather called Rafi’ bin Sinan. When he embraced Islam, the wife refused to do the same. And she went to the Prophet and said: “This is my daughter. She has stopped suckling milk.” Rafi’

---

<sup>38</sup> Zahraa and Malek, “The Concept of Custody in Islamic Law”, p. 168.

<sup>39</sup> It is believed a non-Muslim cannot be a custodian of a Muslim child. This view relies on the following verse: “... and never will Allah give the disbelievers over the believers a way [to overcome them].” See Qur’an 4: 141.

<sup>40</sup> This position is premised on prophetic saying which was reported thus: “It was narrated from Abu Hurayrah (may Allaah be pleased with him) that the Messenger of Allaah (peace and blessings of Allaah be upon him) said: “Every child is born in a state of fitrah (the natural state of man, i.e., Islam), then his parents make him into a Jew or a Christian or a Magian.” See *English Translation of Sahih Muslim compiled by Imam Abul Hussain Muslim Ibn Al-Hajjaj*, Trans. Nasiruddin Al-Khattab. (Riyadh: Darussalam, 2007), vol. 7, pp. 32-34. Book 46, Chapter 6. Hadith Nos.: 6755, 6757, 6758, 6759, 6760, 6761. Specifically, see *Kitab al-Qadr*. Different variations of the hadith are contained in pp. 32-34.

<sup>41</sup> Ibn Qudamah, p. 613.

said, “This is my daughter”. The Prophet told Rafi’, “Sit over there”. And the Prophet said to the woman, “Sit over the other place”. The Prophet placed the child in the middle between the parents and told the parents: “Call the child towards you”. The child was inclined to the mother. And the Prophet prayed, “O Allah, give guidance to the child”. The Prophet’s prayer was answered, and then the child was inclined to the father, and he was the guardian for the child.”<sup>42</sup> Since the right of choice was giving to the child in this narration, the proponents of this view believe custody can be given to a non-Muslim mother.

The modern approach to the interpretation of Islamic law allows for the consideration of the overarching principle of *maslahah* (public interest) which is the basis of the flexibility of Islamic legal rules. Modern scholars do no longer stick to the views of a particular school of Islamic thought, as the doors to independent legal reasoning (*ijtihad*) by qualified scholars are wide open. The views of Hanafis, Malikis, and Zahiris may be taken into consideration when deciding complex child custody disputes if the child is still in his or her formative stages and might not be able to distinguish between what is right or wrong. What such a child needs at this stage is good care of a close relative such as the mother.

#### 4. FROM THE SHARĪ’AH COURTS: PERSPECTIVES ON CROSS-BORDER CHILD CUSTODY CASES

With the general principles relating to custody issues under the Sharī’ah in mind, let’s examine some related cases decided by the Sharī’ah Court. The focus here is the cases decided by the Sharī’ah courts in Malaysia and Singapore, and not related cases coming before courts in western countries. But the focus here will be cases involving cross-border child custody disputes. Meanwhile, it is important to begin with a case that involved intra-jurisdiction family dispute involving the custody of a child where a Sharī’ah Court in Malaysia emphasized the general Sharī’ah principles of “equal access” and “best interests of the child”. This was the position of the court in the recent of *Sulaiman bin Mahmud v. Zalina bt Muda*<sup>43</sup> decided by the Sharī’ah High Court in Terengganu, Malaysia. The facts of the case reveal the efforts made by the father to have some access to his daughter during the annual Islamic festival who was under the legal custody of the mother. Since the daughter of the couple was already 13, the issue of guardianship was raised and not custody. It was apparent that the daughter chose the guardianship of the mother, which the court upheld. The court therefore observed that:

To bring the child out of the control of the guardian at any reasonable time provided that it does not harm the child's physical, mental and education, and upon prior permission of the guardian, is a way to strengthen the bondage between them. The feelings, desires and needs of the child herself need to be considered ...<sup>44</sup>

---

<sup>42</sup> Related by Abu Dawud.

<sup>43</sup> [2014] 1 SHLR 59.

<sup>44</sup> Ibid, p. 70.

It is thus clear that the court considered the best interest of the child to grant equal access to the parents. This is related to a relevant provision in Islamic Family Law Act of 1984 which provides that: “In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and, subject to that consideration, the Court shall have regard to— (a) the wishes of the parents of the child; and (b) the wishes of the child, where he or she is of an age to express an independent opinion.”

On this point, the court held in *Sulaiman bin Mahmud* case that:

The plaintiff and defendant were jointly responsible for the upbringing of the child so that she could serve, respect, be kind, loyal and responsible to her parents. The plaintiff should always be allowed to contact the child through any means with a view of inculcating noble character in her. The defendant, while nurturing the moral of the child, should also allow the plaintiff to do the same. If both the parents are responsible in the nurturing of the child's moral values then the request of the plaintiff as in this claim would not have arisen. The plaintiff's request could be achieved by contacting the child directly, without coercion, and reasoning with her and the defendant in such a case has merely to follow the wishes of the child.<sup>45</sup>

The above position may also be applied in cross-border family disputes involving custody issues.

It might be interest you to note that there are more complex cases involving many jurisdictions. One of such multi-jurisdictional cases is *Abdollah Naghash Souratgar v. Lee Jen Fair*<sup>46</sup> which saw the parties contesting issues of custody of their only child in courts of three different countries – Singapore, Malaysia and finally, United States of America. Though this case was not ultimately decided by a Shari’ah court, it however went through the Shari’ah Court in Malaysia in its early stage. The summary of the facts of the case is given below:

The boy at the center of this case, now four-year-old Shayan, was born in Singapore in January 2009 to Lee and Souratgar, who are both residents of that country. Souratgar is an Iranian national who has owned a business in Singapore since 1989. Lee is a Malaysian national who worked as an airline attendant, saleswoman, and retail manager in Singapore. She converted to Islam, Souratgar's faith, just prior to their marriage in Singapore in 2007. Shayan is a citizen of Malaysia with Malaysian and Iranian passports.

---

<sup>45</sup> Ibid, p. 72.

<sup>46</sup> 720 F.3d 96 (2nd Cir. 2013)

The parties' marital relationship has been stormy. At the district court hearing, they traded accusations and denials of domestic abuse. Souratgar accused Lee, among other things, of biting him, repeatedly threatening him with a knife and chopper, having suicidal tendencies, and inflicting injuries on herself. Lee asserted in her testimony more serious allegations—that Souratgar repeatedly slapped, beat, shook, and kicked her, and that he forced her to perform sex acts against her will.<sup>47</sup>

Lee filed an ex parte application in the Singapore High Court in April 2011 when their son was two years old on the assumption that Souratgar would take their son out of the country and permanently cut her off from their child. The court granted the application and issued an ex parte order in on May 16, 2011. The order directed the Souratgar to immediately handover their son's passports and other personal documents to Lee. Souratgar was also barred from removing the son from Singapore without the approval of the court and the consent of the mother. Though Souratgar complied with the order, he however denied the charges; and as such, he cross-applied for the sole custody of the child. During the pendency of the custody proceedings, Lee left the marital home with their son without disclosing their whereabouts to Souratgar. But he later traced them to Malaysia where he was denied access to their son. As a result of this Souratgar filed a custody application at the Shariah Court in Malaysia where they were both granted a joint custody in July 2011. On appeal, Lee obtained a dismissal of that joint custody order on the ground of lack of jurisdiction.

Lee later took their son to Singapore where the custody proceedings resumed at the Singapore Court. There was an attempt to mediate the custody dispute on 14<sup>th</sup> July 2011 when the mediation session was held. Both parents were barred from removing their son from Singapore without the consent of the other. The court further ordered interim supervised visitation for the father for two hours every week which was to take place at the Centre for Family Harmony in Singapore. There was another mediation session on 16<sup>th</sup> February 2012 where both parties agreed that to have the custody case decided by the Shariah Court of Singapore. This was a consent order made by the Singapore Subordinate Court. During this period, Lee had the custody of their son but Souratgar managed to get his visitation time doubled.

In a dramatic turn of events, Lee removed their son from Singapore on 20<sup>th</sup> May 2012 which was a clear violation of the Singapore Subordinate Court's order. Lee and their son were later located at Dutchess County in New York which prompted Souratgar to immediately file an ex parte application in the District Court under the Hague Convention to repatriate their son to Singapore. The District Court applied the Convention and ordered immediate repatriation of Shayan to Singapore. Lee appealed to the United States Court of Appeals, Second Circuit, in an unsuccessful appeal. The Court of Appeal affirmed the decision of the District Court by stating clearly that the lower court correctly applied the Convention.

---

<sup>47</sup> Ibid.

This kind of case should have been resolved through mediation in the first place rather than crossing different continents across the world to resolve a family dispute involving the custody of their only child. The two mediation sessions the parties conducted in Singapore would have led to some mutually beneficial settlement terms. From the Islamic perspective, the first thing a mediator does is to apply some sort of psychotherapy where the religious convictions of the parties are carefully tapped into to get them settle the dispute in an amicable way. A mediator must study that unique feature that binds the couple. The faith or religious premium plays an important role in mediation involving Muslim parties.<sup>48</sup>

The process of mediation is clearly described in the Qur'an as the default mechanism for resolving family-related disputes. This is clearly explained in Qur'an 4, verse 35 which provides:

And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted [with all things].<sup>49</sup>

This verse relates more to family mediation and arbitration as established in the Qur'an. In the exegesis of the verses by Ibn Kathir, he emphasized that the interpretation given by the jurists is to the effect that in the event of marital discord, it is the duty of the judge or family head to refer the parties (husband and wife) to a trusted third party who evaluates the dispute and guide the disputants to a negotiated settlement. It is usual to appoint reliable personalities from the two families to assist the couple in reaching an amicable settlement. According to Ibn Kathir, the jurists opine that when estrangement occurs between the husband and wife, the judge refers them to a trusted person who examines their case in order to stop any wrongs committed between them.<sup>50</sup> The emphasis on, and preference for, *sulh* in marital disputes is further explained in the following verse:

If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange *an amicable settlement between themselves; and such settlement is best*; Even though men's souls are swayed by greed. But if ye do good and practise self-restraint, Allah is well-acquainted with all that ye do.<sup>51</sup>

---

<sup>48</sup> Nora Abdul Hak and Umar A. Oseni, "Syariah Court-annexed Mediation in Malaysia – Some Problems and Prospects". *Asian Journal on Mediation* [2011], pp. 1 – 10.

<sup>49</sup> Qur'an 4:35.

<sup>50</sup> Ibn Kathîr, AbË al-FidË ImËm al-DËn IsmË'Ël, *TafsËr al-Qur' Ën al-KarËm*, edited by SËmË b. MuËammad SalËmah, RiyËdh: DËr Al-Tayyibah, 1999/1420, vol. 7 at 375.

<sup>51</sup> Qur'an 4: 128. (Emphasis added)

## **5. OUR LATEST EFFORTS IN ENHANCING BETTER PROTECTION MECHANISM FOR CHILDREN**

At the moment, we are developing an online platform for instant counselling for estranged couples which might also include an effective dispute management protocol to ensure the family institution is better reinforced to serve its original purpose rather than dealing with post-divorce issues. We call it the **efamilylawexpert.com**. Though this online platform is being implemented in phases, one of the major focuses for the future phase is how to effectively utilize it for the best interest of the child through the adoption of online mediation in cross-border family disputes involving custody issues. We are not unmindful of the fact that the courts are always the last resort for issues involving custody of child. However, providing an online platform for the estranged couples to reflect on the best settlement that would provide a better protection mechanism for the children through the facilitation of a third party neutral who conducts the online mediation is paramount. If such an online process is successful, then cross-border custody cases going to the courts will be drastically reduced in the long run except in extreme cases where either of the parties is not ready to submit to online mediation.

## **6. CONCLUSION: THE WAY FORWARD**

The way forward for solving cross-border family disputes involving children within the Islamic legal framework is contained in the following recommendations:

### ***1. Understanding exclusion, Promoting inclusion***

There is a need for a more inclusive international convention that takes into consideration the diverse traditions of such actors among the major world legal systems. In doing this, the first step is to understand exclusion, i.e. to examine why Muslims often feel marginalized when an international convention is against their religious values. Why are many Muslim states not ratifying the conventions? It is necessary to probe into the remote cause of this legal puzzle. This is in line with a famous sacred tradition of Islam where it is reported that Almighty God said: “Know Me before you worship Me. How can he who does not know Me worship Me correctly”.<sup>52</sup> This underscores the importance of understanding exclusion in order to draw up some action plans to promote inclusion. Understanding a problem is definitely the first step in finding a suitable solution to it. This will require in-depth research into the root cause of the problem and this might require setting aside some research grants to understand why such exclusion, be it self-exclusion or values-driven exclusion, is prevalent among the Muslim states.

So in order to promote more inclusiveness and encourage the sense of belonging, Muslim states should be positively engaged for some sort of way forward out of the present legal controversies. Being an increasingly globalized world, there is a need to

---

<sup>52</sup> Hadith Qudsi.

come up with sustainable frameworks to cater for rising number of cross-cultural marriages and the consequential incidences of cross-border family disputes involving children. Barely one month ago, the Law Society of the United Kingdom issued the Sharia Succession Rules 2014 which is expected to reduce the number of family disputes relating to intergenerational transfer of property based on Muslim property law.<sup>53</sup>

## **2. Exploring the Diverse Shariah Interpretations**

Islamic law has continuously and in a resilient manner reemphasized its relevance beyond the Muslim world. The diversity in Islamic law is worth exploring in the move towards establishing acceptable global standards for cross-border family disputes. The internal legal pluralism in Islamic law will allow for a close examination of some views of Muslim jurists that do not contradict best practices on legal reforms in cross-border family disputes. For instance, principles such as *takhayyur* (choice or eclecticism) and *talfiq* (patching together of legal rules) should be employed by modern Muslim jurists to emphasize the modern relevance of Islamic law in an increasingly globalized world where people inter-marry across borders. For example, the views of the Malikis, Hanafis, and Zahiris, on the permissibility of giving custody to a non-Muslim mother<sup>54</sup>, provided the child is not be exposed to either physical or religious harm, should be closely considered and interpreted in the light of developments in modern cosmopolitan states.

## **3. Exploring the Sulh Framework**

In Islamic law, *sulh* or mediation is the default rule in dispute settlement. In fact, the Qur'an expressly prescribes a multi-tiered process that consists of counselling, mediation and arbitration in marital disputes. At the international level, the process of mediation and its unique value in ensuring a win-win settlement are universal. We have to explore further details on how mediation can play its role effectively in resolving cross-border family disputes involving children. The 'child first' policy should catalyse the mediation sessions in order to arrive at mutually beneficial settlements. Mediation is part of every culture, as it is a universal method of resolving disputes; and as such, it might not be affected by theories of cultural relativism.

A natural corollary to the *sulh* framework is capacity building on mediation. Mediators should be trained at the international level on specific areas such as cross-border parental abduction. Training-of-Trainers workshops for mediators specializing in cross-border family disputes is also necessary. The governments of various countries, particularly the Muslim states, should be involved in these initiatives to give the process the much-needed legitimacy. The Government-to-Government (G-to-G) initiatives on mediation would take into consideration the specific values of the parties involved in the mediation process. At

---

<sup>53</sup> The Sharia Succession Rules was released on 13<sup>th</sup> March 2014. It is available on the Law Society, UK website at <http://www.lawsociety.org.uk/advice/practice-notes/sharia-succession-rules/>

<sup>54</sup> The definition of non-Muslim mother here is restricted to a woman who is a *kitabiyah* (from amongst the People of the Book) such as Christians and Jews).



the International Islamic University Malaysia, we have introduced a programme on mediation for religious leaders to promote inter-religious understanding.

#### ***4. Harmonising Diverging Principles***

There is a need for more focused discussions on how to harmonise diverging principles which are often due to the diverse cultural backgrounds of countries across the world. With particular reference to the Muslim world, efforts should be initiated to commence the process of harmonisation of laws which is expected to get more buy-in for any international convention that regulates cross-border family disputes. An action plan will be required to make the buy-in process work. A short-term, medium-term, and long-term plans for this initiative are necessary to see the development of a more inclusive international legal regime on cross-border family disputes relating to children.

#### ***5. Establishing an Action Plan Committee***

An effective buy-in process is the way forward in dealing with the non-Hague contracting states such as those in the Muslim world. There is a need to establish an Action Plan Committee which should consist of members from the academic to spearhead the research along this area, and practitioners as well to link research endeavours to policy issues. This will involve a three stage process: identifying the values in such traditions that agree with best practices, harmonising the diverging principles, and drawing up some common guidelines, standards or regulations on cross-border family disputes involving children in the Muslim world, broadly defined. An Action Plan Committee is required to spearhead these lofty ideals for a more peaceful world – at least for the smallest unit of the society: the family.

### **Keynote Presentation of Annette C. Olland**

***(Senior judge, Family Law and International Child Protection Division of the District Court of The Hague, and International Hague Network Judge for the Netherlands)***

Thank you for inviting me to contribute to this Seminar "*Islamic Legal Perspective on Cross-border Family Disputes Involving Children*".

#### **Introduction**

I will be happy to tell the audience about the significance of mediation in the proceedings before the District Court of The Hague in child abduction cases.

When I accepted the invitation to give this presentation I immediately remarked that I have no specific knowledge or experience with Islamic legal perspectives on cross-border family disputes.

This does not mean that we never handle cases of parents and children with an Islamic background. It turns out that our standard method works well both in 'Hague' and 'non-Hague', and in 'Islamic' and 'non-Islamic' cases.

I will now tell you a little bit more about how we mixed cross-border mediation into our proceedings before the Court.

#### **The 1980 Hague Convention: prompt return of the child**

The aim of the 1980 Hague Convention is to secure the prompt return of a child who has been wrongfully removed from his country of origin or who is being wrongfully retained in another country, not being his country of origin.

The time between the child's abduction and his or her return should be as short as possible. In practice, however, this period may last rather long. This is usually caused, among others, by long proceedings before the Courts.

In the past, this period of proceedings including the proceedings before the Court of Appeal and before the Dutch Supreme Court, could last 18 months or more. 18 months or more during which the child doesn't see the left-behind parent and lives in total insecurity about where, in which country, he or she will grow up. And if, in the end, the child will have to return to the country of origin, the return will be all the more difficult.

So this practice was generally not in the child's interest and leads to a lot of criticism from several parties and institutions. This led to a change of the Dutch International Child Abduction Implementation Act that came into force on 1 January 2012. This amended act aimed to considerably speed up the return proceedings.

### **Cross-border mediation in 1980 Hague Child Abduction Cases**

At the same time, experiences in the United Kingdom, Germany and France made very clear that mediation could play an important role in solving cases of international child abduction.

On 1 November 2009 the District Court of The Hague started a pilot program on cross-border mediation in international child abduction cases. This was done together with the Ministry of Justice, the Dutch Central Authority, the Dutch Center of International Child Abduction, the bar of lawyers and specialised family mediators.

A special education for professional cross-border mediators was organised. The Ministry of Justice funded the mediation and the District Court of The Hague introduced a new method of hearing these cases, the so-called 'six weeks scheme' or 'pressure cooker method'.

All this led to a greater number of successful mediations and considerably shorter proceedings. The lawyers played an important role, stimulating their clients to participate in the cross-border mediation. Several lawyers have recently banded together to form an association of specialised child abduction lawyers.

### **The 'new' return proceedings as from 1 January 2012 at the District Court of The Hague**

The 'new' return proceedings as from 1 January 2012, do not take more than six weeks all together. In these six weeks there are three stages:

- the pre-trial review
- cross-border mediation
- hearing by a full court

The rules of the 1980 Hague Convention on Child Abduction and the return proceedings, including the six-week scheme, are applied both in 'Hague' and 'non-Hague' cases.

### ***Pre-trial review***

The pre-trial review takes place within two weeks from the completion of the application to return and is conducted by a single judge with extensive experience in the field of international child abduction.

At this pre-trial review, the judge will identify the issues being disputed by the parties and the legal matters at stake.

The judge will also assess whether the parties need to submit any more documents or evidence with a view to possible full court hearing at a later stage.

This is done to ensure that a second hearing – at first instance – will also be the last.

Finally, the judge will explore, together with the parties, the possibilities of contact between the left-behind parent and the children at a very short notice (we usually talk about 'this afternoon' or 'tomorrow', 'this weekend').

You must take in account that there is one left-behind parent in the court room (in the example: the father from Canada) that has travelled all the way to the Netherlands especially for the hearing and has not seen his or her child for a long time – generally for several months. The abducting parent (in the example: the mother), is now living in the Netherlands and is having and seeing the child full-time. The pre-trial review judge will therefore put a lot of effort in getting parties to make visiting arrangements between the father and the child during the time that he is in the Netherlands for the hearing and/or the mediation.

In almost all the cases, the parents settle for a contact at short notice. My experience is that once the parents have settled for contact between the left-behind parent and children, this is a big relief for the left behind parent.

The left-behind parent might experience: *'OK, my child is living in another country now, but nevertheless I can spend time with my child(ren)'* instead of *'I lost my child and I will never see it again'*.

The abducting parent is confronted with the emotions of the left-behind parent. He or she will – usually for the first time – see his or her pain and might think *'of course, after all he or she is the father of my child and my child should see his mum or dad again'*.

These experiences of both parents will make the minds are more open for amicable solutions. They can start to let go of their 'black-or-white-scenario':

*'I will lose my child'*

vs

*'The child will stay with me forever'*

and start to think in scenarios with different shades of grey:

*'I want to see my child a few weeks a year and talk to my child on the phone twice a week'*

or:

*'The child will live with me but it is important that he or she has regular contact with the other parent'*.

All this makes the minds more set for the exploration of the possibility of cross-border mediation.

The judge will then introduce the possibility of cross-border mediation. The judge will explain what mediation can bring. The judge reminds the parties that if they continue the proceedings, it will be a 'black or white'-scenario with the risk of 100% loss for both parties.

The judge might already try to seduce the parties to think in alternatives by asking 'what-if' questions:

- Examples of questions to the left-behind parent:

*'What if the child will return to your country, how often would you allow the other parent to see your child?'*

*'What if the child will not return to your country, how often would you like to see your child?'*

- Examples of questions to the abducting parent:

*'What if the child will return to the country of origin, how often would you want to see the child?'*

*'What if the child will stay with you, how often could he or she see the other parent?'*

These questions invite both parents to reflect on the situation where he or she does not get what he or she wants from the judge. They start to realise that they have their faith in their own hands, when they open the dialogue with the other parent to explore all possible kinds of 'shades of grey'.

We have been using this practice since 2010. My experience is that most lawyers have already prepared their clients for these questions. Most people are aware of the implications of an international child abduction and the importance of mediation.

Nowadays, about 65 to 70 % of the cases are referred to mediation. Later on I will give you some more statistics.

The International Child Abduction Center is an organisation for the support of both abducting and left behind parents. Parents can contact them with all kinds of questions.

They offer all kinds of support. They have a list of specialised international child abduction lawyers. They inform parties about the possibility of cross-border mediation at an early stage.

They also cooperate with the Court of The Hague in the six-week mediation-scheme. As soon as a request is filed at the Court, the Court informs the Center about the case, the parties, their nationalities and backgrounds.

The Center 'manages' the mediation process. Every weekend they have a couple of specialised cross-border mediators available. And if necessary and possible, on other days of the week also. They always send a mediation-officer to be present outside the court room at the moment of the pre-trial review.

I will now tell some more about the practicalities around the referral to mediation.

The pre-trial review is always, if possible, held on a Thursday.

A mediation-officer from the International Child Abduction Center (NL) is present outside the court room and thus immediately available to discuss the practicalities and formalities with the parties.

For each case, the International Child Abduction Centre will offer two specialised cross-border mediators, preferably one psychologist and one lawyer.

In the ideal situation, they also offer one mediator with the cultural background and language of one of the parties, and the other mediator with the cultural background and language of the other party.

The mediation scheme consists of 3 mediation sessions within 2 to 4 consecutive days, including Saturday.

Mostly there will be one session on Friday, one on Saturday and one on Monday. Parents can consult their family members and lawyers at any time during the mediation.

A psychologist will talk with the children, also with children of a very young age. The psychologist will write a report of this 'voice of the child'. The mediators will read this report to the parents during the mediation. Thus the parents become aware of the point of view of the child in the situation. It seduces them to think from the perspective of the child, and not from their own perspective.

#### *Full mediation agreement*

The best result is met when parents make a full mediation agreement, including arrangements on the child's habitual residence and visiting rights of the non-residing parent.

#### *Mirror agreement*

In most of the cases, the parents do not reach agreement on the child's habitual residence. In that case the court will have to decide upon the return or non-return of

the child. But in case of a mirror agreement, parents make arrangements on the visiting rights of both parents, depending on the child's habitual residence.

Most agreements can be inserted into court arrangements.

Even in cases where no or no full settlement could be reached, it appears that parents tried to get on speaking terms with each other again and aimed to come to an amicable settlement of their disputes. In the majority of cases mediation has also helped to de-escalate the disputes. This is a major advantage for both parents and children.

If the parents do not take part in cross-border mediation talks, or if they do not reach an agreement in mediation, there will be a second hearing before a full court (3 judges).

This full court hearing will take place within two weeks after the mediation, or, when there has been no mediation, within two weeks from the pre-trial review.

The judge that did the pre-trial review will not sit in this full court.

The full-court will decide within two weeks from the hearing upon the return or non-return of the child.

It turns out that the pre-trial review judge refers the majority of the cases to mediation. About one third of the cases referred to mediation results in full settlements. Another third results in partial settlements and in the remaining third of the cases no agreement could be reached.

## **Finally**

Cases of child abduction are bitter and sad. But let me end with a positive remark. The professional players in the field – lawyers, judges, mediators – can have a positive effect on parents and thus on the children involved, by stimulating them to go into cross-border mediation talks.

Agreements made in mediation are more often complied with, and it considerably improves the relationship between the parents.

Thank you.