Introduction

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
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> Convention on the Rights of the Child, art. 3, para. 1

The title of this book, *Child Custody in Islamic Law*, generally refers to Islamic law in the Sunni tradition. I focus on Sunni Islamic juristic discourse, especially in early modern Egypt, as well as Ottoman-Egyptian court practice to write a history of the concept of the best interests of the child in early modern Egypt based on a reading of both juristic discourses and court practices. These earlier discourses and practices are juxtaposed with those dominating contemporary Egyptian law as a result of modernity. The contemporary discourses of the child's best interests represent a hybrid of both Islamic and Euro-American modes of lawmaking. This book examines overall themes relating to child custody and guardianship, and concentrates on pivotal points of continuity and change, as well as tensions and incompatibility between premodern Islamic law and the child-centered modern international standard of the best interests of the child as the main principle that drives decisions concerning children in many jurisdictions across the world. One of the main questions this book addresses is whether there was a concept similar to the Euro-American concept of the best interests of the child (henceforth the best interests standard) in early modern Egyptian juristic discourse and practice. This comparative aspect, where scholars try to see how certain historically prevalent religious concepts overlapped or varied from modern legal discourses, has already been done, for instance, in the Jewish tradition but not

with regard to Sunni Islam, rendering this investigation groundbreaking in this regard.[1]

In the Euro-American legal historiographical imaginary, there is an inherent teleological vision of progress, the result of the hard labor of Euro-American lawyers, legislators, and feminist organizations, whose combined efforts produced the best-interests-of-the-child standard. The main achievements of this standard were (1) making the determination of custody *child-centered*; (2) bringing into focus the individual needs of each child; and (3) utilizing social science research in determining what is best for each child on a case-by-case basis. The best interests standard, where each child's best interests are determined by the judge, cannot escape being culturally contingent, especially since legislators in many Western jurisdictions offer little guidance to judges on what exactly constitutes the child's best interests, allowing social perceptions to shape such a standard more dynamically.[2] Historical research dealing with countries such as England, France, and the United States, to mention a few, has shown that the maturation of the modern concept of the best interests of the child in Euro-America was the result of a long and nonlinear process of evolution wherein two main approaches persisted. In early modern England, for instance, one approach defined the child's welfare in the negative, wherein judges were only allowed to interfere with the father's absolute common law right to custody when the child's physical or moral health was seriously threatened. Absent gross abuse, judges generally awarded full custody and guardianship rights to fathers.

In the Sunni Islamic legal tradition, the situation was similar among many jurists whose presumptive rules – themselves justified through

[1] More recently, similar comparative work has been done between Jewish and American tort law theories. Yuval Sinai and Benjamin Shmueli, "Calabresi's and Maimonides's Tort Law Theories-A Comparative Analysis and a Preliminary Sketch of a Modern Model of Differential Pluralistic Tort Liability Based on the Two Theories," *Yale Journal of Law & the Humanities* 26: 1 (2015).

[2] On the concept of the best interests of the child and its inherent indeterminacy, see Abdullahi An-Na'im, "Cultural Transformation and Normative Consensus on the Best Interests of the Child," *International Journal of Law, Policy and the Family* 8:1 (1994): 62–81; Philip Alston, *UNICEF, and International Child Development Centre, The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford; New York: Clarendon Press; Oxford University Press, 1994); Philip Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights," *International Journal of Law, Policy and the Family* 8:1 (1994): 1–25; Stephen Parker, "The Best Interests of the Child – Principles and Problems," *International Journal of Law, Policy and the Family* 8:1 (1994): 26–41; John Eekelaar, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism," *International Journal of Law, Policy and the Family* 8:1 (1994): 42–61.

welfare of children discourse as well as paternal rights – were based on a host of calculations such as the child's age and gender, the mother's marital status, and the parents' religious affiliation and lifestyle choices. These presumptive rules were only abandoned when the child was in danger of being subjected to gross abuse or serious harm. We shall call this narrow, negatively defined approach the *basic interests approach* or simply the *child welfare approach*. Both of these terms refer to a general concern for the well-being of children, but they fall short of the technical meaning of the best interests of the child as it is often understood in international law. The *best interests approach* defines the child's welfare positively, in terms of who provides the best care for a given child, without relying on presumptive rules for all children based on the gender and age of the child, and the marital status or religious affiliation of the parent. Without drawing a distinction between these terms, one may fall into the trap of always equating conceptualizations of premodern Islamic juristic discussions of the welfare of the child with modern Euro-American and Muslim nation-state legislation about the best interests of the child. One must caution here that this bifurcation of rules between a concern for the basic interests of the child when there is a conflict with the rights of custodians and a wider, positive focus on the best interests of the child was not the only factor determining rules of custody. The final rules often obtained nuance from a matrix of social practices, hermeneutic commitments,[3] and methodological approaches that go beyond this distinction.

Let us now turn to child custody in Islamic juristic discourse in the premodern period, that is, prior to the early nineteenth century for Middle Eastern jurisdictions. Premodern Muslim jurists drew a clear distinction between the nurturing and upkeep of a child, or "custody" (*ḥaḍāna*), and caring for the child's education, discipline, general acculturation, and managing her or his property, known as "guardianship" (*wilāya*). These two terms are similar to "physical custody" and "legal custody" in some US jurisdictions, where physical custody refers to where and with whom the child resides, and legal custody refers to the person or persons who make decisions about the child's education, healthcare, and religious instruction. In this book, I examine both *ḥaḍāna* and *wilāya* as they relate

[3] Based on Iser's premise that the text imposes some logical constraints, a semi-objective view of hermeneutics and reception, one would argue that the textual sources on child custody, which were limited to a few reports, must have placed limited constraints on jurists. On hermeneutics, see further Terry Eagleton, *Literary Theory: An Introduction* (Minneapolis: University of Minnesota Press, 1983).

to the welfare of the child, both in premodern Islamic juristic discourse and Ottoman-Egyptian court practice.

In premodern Islamic legal discourse, jurists used many words to refer to the well-being of the child, but they did not use them consistently as technical terms in all discussions of custody. These terms include "the benefit of the child" (*manfaʿat al-walad*), "the welfare of the child" (*maṣlaḥat al-walad*), and "the good fortune of the child" (*ḥaẓẓ al-walad*).[4] These terms were not necessarily used by jurists to denote an overriding principle to be applied by judges in the narrow sense of the best interests of a given child in a particular historical context in the same way that technical legal terms such as "best interests of the child" (*maṣlaḥat al-ṭifl*" or *maṣlaḥat al-maḥḍūn*) are sometimes used in modern state legislation.

In order to locate the logic of child custody lawmaking in premodern Islamic law, I will focus on three main avenues, namely (1) finding explicit discussions of whether custody is a right of the custodian or the child; (2) exploring the rationalizations advanced by jurists to justify different rules; and (3) examining court decisions to theorize child welfare considerations. It is therefore necessary to link the macrodiscussion of whether child custody is a right of the custodian or the ward to discussions of the justifications of different microrules of positive law. Through juristic justifications, we can gauge how much impact considerations of the welfare of the child had on lawmaking.

Jurists assumed that child custody law was designed to promote the welfare of children. According to jurists, wards, custodians, and guardians have interlocking rights and the latter two have duties. When a conflict of rights arises, the child's most *basic interests* (as opposed to her or his *best interests*, such as simply who can provide the best care) are prioritized by all jurists to avoid risking the child's physical health or moral uprightness. Jurists assigned the physical and moral well-being of the child the highest value in times of conflict between the child's right to be cared for and the custodial parent's right to assume custody. This is the minimum threshold of the child's interests supported by all Sunni jurists, regardless of where they stand on the issue of whether custody is a right of the ward or of the custodian.

To give an example, some jurists argued that certain forms of bad morality do not justify taking a child away from his or her mother (more

[4] Muwaffaq al-Dīn Ibn Qudāma al-Maqdisī, *Al-Mughnī*, ed. Rāʾid b. Ṣabrī b. Abī ʿAlafa (Beirut: Bayt al-Afkār al-Dawliyya, 2004), 2:2007–2008; Ibn Qayyim al-Jawziyya, *Zād Al-Maʿād Fī Hudā Khayr Al-ʿIbād*, ed. Shuʿayb al-Arnaʾūṭ and ʿAbd al-Qādir al-Arnaʾūṭ, 3rd edn. (Beirut: Muʾassasat al-Risāla, 1998), 5:392.

on this in Chapter 2), as long as there was no danger to the child's life or religion. In other words, most jurists would not take away custody from a custodial mother upon the request of the father even if he could provide the best care for a given child. These rules may be seen as violating the best interests of the child in favor of the rights of the custodial parent. Conversely, allowing the child to choose the parent with whom he or she wishes to reside upon reaching the age of discernment (*tamyīz*),[5] as is the case in the Shāfiʿī and Ḥanbalī schools, represents a juristic best interests approach, which transcends the basic needs of children. In this case, the child's decision is presumably driven by a sense of comfort with and attachment to one parent more than the other. One could argue that the child's needs are prioritized over those of the father in this case, for the father may never have any right to custody should the child choose to continue living with his mother until puberty, according to Shāfiʿī law. As we shall see, some of the rules of jurists were based on a basic interests approach (defined negatively as the absence of gross abuse), while others based their rules on a best interests approach (defined positively as the *accrual of benefits*, not only the *avoidance of harm*, such as soliciting the child's preferences), which resembles the modern Euro-American concept of the best interests of the child. Despite the presumed *origins* of these rules as being based on a negative or positive definition of child welfare, once they were established as the law of the different Sunni schools after the dominance of legal conformism (*taqlīd*), they were assumed by most jurists to be universal in their application. They were deemed to represent the *welfare* of all children at all times, rather than looking at the best interests of a particular child at a particular moment. Thus, even though many of the justifications may have originated from a best interests ethos, once they were frozen in the age of *taqlīd* as the school doctrines, they ceased to be compatible with the best interests of the child as they are understood in international law.

Whether child custody is a right of the child or the custodian can be misleading because although jurists who consider custody to be a right of the child are more likely to maximize considerations of the best interests of the child over the rights of the custodian, there is not always a consistent correlation between the jurist's position on who has the right of custody and the positive rules of the various questions of age of custody transfer,

[5] This is also the age at which to start systematic education. On the age of discernment, see further Avner Giladi, *Children of Islam: Concepts of Childhood in Medieval Muslim Society* (New York: St. Martin's Press, 1992), 52–54.

visitations, travel, guardianship, and so on (more on this in Chapter 2). Although conceptualizations of the threshold at which jurists were willing to privilege the child's interests over those of the custodian must have played a role in Islamic positive laws on custody, there are many interlocking factors that were equally, if not more, important. These include the practices of early Muslim communities and/or hermeneutic restrictions such as the existence of famous prophetic traditions denying women custody upon remarriage, and the collective interpretation within the school unit. What complicates this question further is that it is often hard to gauge where a particular jurist stands on the question of who has the right of custody. It is sometimes equally hard to gauge what the predominant school position is and how strong the minority position is. The Mālikī school is a case in point. We see many references to Mālik and some very important Mālikī authorities considering child custody to be a right of the child, all while asserting that the Mālikī dominant position is the exact opposite. It is unlikely that the Mālikī dominant position that custody is a right of the custodian had always been such, given the views of Mālik himself.

This book aims to investigate the logic of both Islamic juristic discourse and Ottoman court practice in the early modern period and the ways in which these discourses and practices offer non-Euro-American "strange parallels" and idiosyncrasies.[6] My contention is that early modern (and medieval) Islamic juristic discourse contains both a narrow and a broad notion of child welfare. Both the narrow and broad notions were cited by jurists in justifications of their various child custody and guardianship rules. With the dominance of legal conformism (*taqlīd*), most jurists treated custody and guardianship norms as presumptive rules that were assumed to dominate adjudication with little discretion left for judges, except in cases of serious harm to the child. In actual court practice in Ottoman Egypt, the situation was different. Judges allowed families to agree on any child custody arrangements that they deemed fit, even when the arrangements violated the discourse of jurists not only in the official Ḥanafī school but also according to the majority of Sunni jurists. Between 1517 and the middle of the seventeenth century, parents were able to enter into private separation deeds, according to which women were able to travel with their children and remarry without losing custody. Some women were even able to have veto power over the father's exclusive guardianship rights (both of person and property). They were also able

[6] Lieberman, *Strange Parallels*, 2:xxi–117.

to preempt the father's prerogative to take the children with him if he relocated to another town. These private separation deeds, which were notarized by Ottoman-Egyptian judges, were binding. There is hardly an Egyptian court register of the sixteenth or first half of the seventeenth century where such agreements did not appear in such a formulaic manner as to suggest that they were happening on a large scale. These agreements were taking place in Mamluk Egypt and continued during the Ottoman period until the second half of the seventeenth century, with the last case I found coming from 1670. After this date, no such agreements appear in a large sample numbering over 17,200 divorce cases, approximately 600 cases of which deal with custody and guardianship issues.

These private separation deeds were binding against the almost unanimous Ḥanafī position, which completely rejected many such agreements as contrary to the welfare of the child based on their presumptive rules of what benefits all children of all times. The Ḥanafīs assumed, for instance, that all boys must not live with their mothers beyond the age of ten, lest they internalize feminine dispositions. Allowing families to agree on any custody arrangement contradicting the rules of author-jurists, as long as the welfare of a given child was not harmed, represented a unique vision of the child's welfare; the Mālikīs, for example, did not justify or perhaps even imagine the types of agreements that were notarized in Ottoman Egypt.[7]

Some of these agreements appear in *shurūṭ* works, where sample separation deeds are presented, such as al-Asyūṭī's (d. 880/1475) *Jawāhir al-ʿUqūd wa-Muʿīn al-Quḍāh wa'l-Muwaqqiʿīn wa'l-Shuhūd* (*The Pearls of Contracts: Manual for Judges, Scribes, and Witnesses*).[8] These contract formula manuals presented contracts in the four Sunni schools, each formula satisfying the specific school's applicable rules, and were followed in Ottoman Egypt, with some of the formulas appearing almost verbatim. By the second half of the seventeenth century, the Ḥanafī position dominated and private separation deeds were no longer binding, while the more problematic agreements completely disappeared from the court registers.

With the Ḥanafization policy of the nineteenth century, the system of child custody became more rigid. This rigidity coexisted with the revival of

[7] Abū al-ʿAbbās Aḥmad b. Yaḥyā al-Wansharīsī, *Al-Manhaj Al-Fāʾiq Wa'l-Manhal Al-Rāʾiq Wa'l-Maʿnā Al-Lāʾiq Bi-Ādāb Al-Muwaththiq Wa-Aḥkām Al-Wathāʾiq*, ed. ʿAbd al-Raḥmān b. Ḥammūd b. ʿAbd al-Raḥmān al-Aṭram (Dubai: Dār al-Buḥūth li'l-Dirāsāt al-Islāmiyya, 2005), 2:565–566.

[8] Shams al-Dīn Muḥammad b. Aḥmad al-Minhājī al-Asyūṭī, *Jawāhir Al-ʿUqūd Wa-Muʿīn Al-Quḍāh Wa'l-Muwaqqiʿīn Wa'l-Shuhūd*, ed. Musʿad ʿAbd al-Ḥamīd Muḥammad Saʿdanī (Beirut: Dār al-Kutub al-ʿIlmiyya, 1996), 2:89–99.

the strand of thought on child custody that defined the welfare of the child more broadly. This approach began to dominate legal thinking on child custody toward the end of the nineteenth century, with the rise of a new hybrid family ideology where mothers were assumed to be the nourishers of children. In 1929, influenced by the domestic ideology and the new emphasis on the nuclear family, Egypt started a process of legislation in a bid to minimize the rigidity of Ḥanafī law. Judges were given greater discretion in child custody arrangements, and the child's age requiring female custody was raised successively over the course of the twentieth and early twenty-first centuries, mirroring Euro-American nineteenth- and early twentieth-century values, as well as international child-welfare conventions.

In my discussions of child custody and guardianship, whether in juristic discourses or court practices, I focus on eight main themes that should give us a good, albeit not an exhaustive idea, of the ways in which custody and guardianship interacted with child welfare. These themes are (1) age and gender; (2) the mother's marital status; (3) the custodian's lifestyle; (4) the custodian's religious affiliation; (5) visitation rights; (6) relocation with the ward; (7) maintenance; and (8) guardianship. Due to the comparative nature of this project, both implicitly and explicitly, it is fitting to start this book with a brief historical overview of the evolution of child custody jurisprudence in a few Western jurisdictions (Chapter 1). Chapter 2 establishes the centrality of the child's welfare in premodern juristic discourse. I then pose the question of whether Ottoman-Egyptian judges were permitted to exercise a level of discretion in their rulings whereby they could assess the child's best interests (Chapters 3 and 4). Chapter 5 covers Egyptian child custody law during the period of 1801–1929, while Chapter 6 discusses the age of codification of Islamic child custody law from 1929 to 2014, which often responded to changes in Euro-American and international law. But before we embark on our journey, it is fitting to investigate a few important threads, the first of which are the political implications of this study, especially in the context of Islamophobia, and questions of cultural imperialism or specificity and exceptionalism.

Cultural Imperialism and the Hegemony of Human Rights Discourses

The notion of the best interests of the child, the basis of international conventions regulating the welfare of children, which have become an essential standard in many modern Muslim-majority countries, cannot

escape being comparative since it has been presented as a Euro-American product exported into other countries through international treaties backed by Western hegemons. One of the objectives of the comparative aspect of this monograph is to free Islamic law from its "historiographic ghetto," to use Victor Lieberman's words in reference to Southeast Asia, as well as challenge European exceptionalism by arguing for comparability and overlaps, rather than reinforce dichotomies between legal cultures that "evolved" organically to accommodate child rights, and others that were mere recipients of legal innovation.[9]

The comparative approach shows that despite the absence of clear cultural or material links between early modern England and the United States on the one hand and early modern Egypt on the other, one finds similar processes of accommodation of child welfare in the courts. This comparative approach can be deeply problematic, as it considers Western conceptualizations of the best interests of the child as the yardstick by which to judge how countries respect children's rights. This is arguably another hegemonic discourse in which Western nations, through their influence on international law standards, set the parameters of the discussion, overlooking cultural specificities and communal approaches to children's welfare that go beyond the interests of each particular child. In a word, it privileges the individual over the collective, and therefore some have rejected it as a Western tool of cultural imperialism. For example, Jād al-Ḥaqq, Egypt's late rector of al-Azhar, had some reservations about certain stipulations of the Convention on the Civil Aspects of International Child Abductions (CCACA), as an attempt to maintain a sense of cultural purity.[10] Others, as we shall see in Chapter 6, have embraced this discourse as part of the modern promise of progress.

While acknowledging that the welfare of the child is the underlying logic behind the entire system of Islamic child custody law, opponents of the best interests standard often assume that this welfare had already been determined by jurists in immutable general rules linked to such factors as gender, age, and lifestyle choices. These cultural purists – not only with respect to child custody but also regarding human rights discourses more broadly – often exaggerate cultural difference. Ironically, they have found allies in scholars forging a postmodernist critique of liberalism,

[9] Victor B. Lieberman, *Strange Parallels: Southeast Asia in Global Context, c 800–1830: Volume 2 Mainland Mirrors: Europe, Japan, China, South Asia, and the Islands* (New York: Cambridge University Press, 2013), 2:xxi, 2.

[10] Dār al-Iftāʾ al-Miṣriyya, *Al-Fatāwā Al-Islāmiyya Min Dār Al-Iftāʾ Al-Miṣriyya* (Cairo: Maṭbaʿat Dār al-Kutub wa'l-Wathāʾiq al-Qawmiyya, 2012), 13:221–230.

secularization, and enlightenment discourses, which they cogently argue were often manipulated and instrumentalized in the service of empire and Euro-American neo-imperialism. The association between these discourses and postcolonial authoritarian regimes on the one hand, and between them and Euro-American neocolonialism on the other, especially in the context of post-9/11 warmongering, places the proponents of these discourses in a precarious situation. Nothing is more telling about the tension inherent in engaging in discussions of human rights in an accommodationist mode than the debate that erupted over the Palestinian hip-hop group DAM's song about honor killing when Lila Abu Lughd and Maya Mikdashi charged that the group succumbed to an international machine that blames only tradition for people's problems.[11] In other words, the projects of scholars critical of the way in which minority rights, women's rights, or queer rights were manipulated as tools of neo-imperialism often coalesce with purist approaches to tradition within Islamic law. The second approach, which we may call "modernist," buys into the discourse of modernity and some forms of liberalism and seeks to find sites of compatibility between Islamic law and international conventions. It is in this spirit that I frame this discussion, while being sensitive to the theoretical and political implications of this project, but also of the support it receives in Muslim jurisdictions, as evidenced by the internal critical readings of tradition aimed at accommodating human rights discourses.

Both approaches and their concomitant critiques warrant further interventions, but this is not the objective of this study. My objective is not prescriptive in that it does not claim that the best interests standard *should* be followed by Muslim societies on philosophical grounds or that Muslim nations *should* resist the discursive and international law tyranny of Euro-America, which aims to make the legal systems of these Muslim nations in its own image. It is rather a descriptive study that seeks to understand *how* premodern juristic discourses and practices compare to the best interests standard. Certainly, choosing to study this topic may be itself seen as

[11] On the debate over the hip-hop group's dealing with honor crimes, see Rochelle Terman, "Islamophobia, Feminism and the Politics of Critique," *Theory, Culture & Society Theory, Culture & Society*, 2015. On the charge that secular Arabs became proxies of a secular project, see Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton, NJ: Princeton University Press, 2015), 79. On the Euro-American exportation of gay identity in the Arab world, see Joseph A. Massad, *Desiring Arabs* (Chicago, IL: University of Chicago Press, 2008), 160–190; Rosalind C. Morris and Gayatri Chakravorty Spivak, *Can the Subaltern Speak?: Reflections on the History of an Idea* (New York: Columbia University Press, 2010).