

Michelle Lazaran

## **Defining Child Welfare: Comparative Analysis of Chthonic, Islamic, and Serbian Civil Law**

“We must protect families, we must protect children, who have inalienable rights and should be loved, should be taken care of physically and mentally, and should not be brought into the world only to suffer.”

-Indira Gandhi, Former Prime Minister of India<sup>1</sup>

### **I. Introduction**

Historically, child welfare and child rearing were considered a private concern, not to be questioned by the public. That is until the social reform of recent centuries pushed child welfare into the public eye. Social justice movements began acknowledging that just because someone is the primary caretaker of a child, does not mean they always make the best decisions for the child’s health and wellbeing. Thus, child welfare laws were created. Child welfare laws work to promote a child’s best interest by protecting children and preventing abuse and neglect. Under international law, child abuse and neglect are defined as any type of “physical and/or emotional ill-treatment, sexual abuse, neglect, negligence[,] and commercial or other exploitation, which results in actual or potential harm to the child’s health, survival, development[,] or dignity in the context of a relationship of responsibility, trust[,] or power.”<sup>2</sup>

Western legal systems, specifically the United States, were the first to codify laws regarding child welfare and child rights. The aforementioned laws came to be in the late 19<sup>th</sup> century, following the case of minor, Mary Ellen Wilson.<sup>3</sup> In 1874, following her mother’s financial troubles, Mary Ellen was turned over to New York’s Department of Charities and subsequently placed with Francis and Mary Connolly.<sup>4</sup> When a caseworker realized the severity of Mary Ellen’s horrific abuse, she reported the case to the

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<sup>1</sup> ORIANA FALLACI, INTERVIEW WITH HISTORY, (Houghton Mifflin Harcourt ed., 1977).

<sup>2</sup> *Child Maltreatment*, WORLD HEALTH ORGANIZATION (Sept. 19, 2022) <https://www.who.int/news-room/fact-sheets/detail/child-maltreatment>.

<sup>3</sup> See Genevieve Carlton, *Mary Ellen Wilson and the 19<sup>th</sup>-Century Child Abuse Case that Changed History*, ALL THAT IS INTERESTING (Dec. 15, 2022) <https://allthatsinteresting.com/mary-ellen-wilson>.

<sup>4</sup> See *id.*

police.<sup>5</sup> However, at the time, there were no laws against child abuse.<sup>6</sup> Since there were no codified laws, the caseworker asked Henry Bergh, the founder of the American Society for the Prevention of Cruelty to Animals (“ASPCA”), to use animal anti-cruelty laws to protect Mary Ellen because she could be considered “a little animal.”<sup>7</sup> After arguing Mary Ellen’s case, Bergh and ASPCA attorney, Elbridge T. Gerry, founded the New York Society for the Prevention of Cruelty to Children (“NYSPCC”) in December of 1874.<sup>8</sup> While the U.S. was the first nation to pass formal laws regarding child welfare, it would be incorrect to presume that other legal systems had not developed methods or consequences for addressing abuse or neglect of children in their society, especially when individuals violated social norms or expectations of their community.

Various systems had and continue to promote beliefs and constructs about child welfare and the consequences of failing to protect one’s child, even if those laws were not codified into formal rules and regulations. This paper aims to analyze and compare Myanmar’s chthonic legal system, Malaysia’s Islamic legal system, and Serbia’s civil legal system regarding the development of and the current laws concerning child welfare. While all three countries have provisions in their constitutions regarding child welfare, I chose chthonic law because the role of community is extremely influential in this area of law and how they decide what constitutes neglect, abuse, adoption, and custody. Meanwhile, in the Islamic system, religion defines many aspects of life, including family. Finally, I selected the Serbian civil system because of its history as one of the first European countries to codify civil law. Thus, these three systems represent divergent ways of determining what constitutes the best interest of the child.

This particular topic holds meaning for me because of my experience working in child welfare in Chicago, Illinois, and my personal and professional understanding of the long-lasting effects of child abuse and neglect can have on both the child and the community. Moreover, I find the interplay of

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<sup>5</sup> *Id.*

<sup>6</sup> *See id.*

<sup>7</sup> Matthew Wills, *Origins of Child Protection*, JSTOR (Nov. 26, 2022) <https://daily.jstor.org/origins-of-child-protection/>.

<sup>8</sup> *See* Matthew Wills, *supra* note 7; Genevieve Carlton, *supra* note 3.

familial customs and legal obligations in a private manner, such as upbringing children, fascinating. Furthermore, exploring the differences that arise from the lens through which one determines what constitutes abuse and neglect, only adds to the social complexity.

To analyze the child welfare practices of each of these differing systems, *Part II: Chthonic Child Welfare Laws of Myanmar, Subsection A. History of Myanmar's Chthonic Law* explores the development and influences of chthonic law within Myanmar from the periods of colonization until now. Subsection A highlights the cultural influences that geographical disputes also played within the creation of this legal system. *Subsection B. Child Welfare Laws in Myanmar Chthonic Law* expounds upon the specific child welfare laws within the chthonic system. This subsection highlights the objectives and values of Myanmar's chthonic system. *Part III. Islamic Child Welfare Laws of Malaysia, Subsection A. History of Malaysia's Islamic Law* discusses the historical development of Islamic law within Malaysia, including the dispersion of Islamic law through Eurasian trade routes, known as the Silk Road. *Subsection B. Child Welfare Laws in Malaysia's Islamic Law* reflects on how the Qur'an, Sunnah, and current legislation control child welfare objectives and laws. Subsection B also discusses the differences of gender expectations within Malaysia's Islamic child welfare laws.

*Part IV. Civil Child Welfare Laws of Serbia, Subsection A. History of Serbia's Civil Law* analyzes the influences and creation of Serbia's civil law code as one of the first European countries to codify civil law. *Subsection B. Child Welfare Laws in Serbia's Civil Law* explores the creation of the child welfare laws amid arguably recent independence and the continued development of modern family codes. Finally, *Part V. Conclusion* compares and contrasts the use of child welfare laws to effectuate different goals and explores the objectives of the various legal systems and how those goals impact the subsequent outcomes. Overall, the comparison yields varied perspectives, legal approaches, and duties to child welfare under the three legal systems of chthonic law, Islamic law, and civil law.

## II. Chthonic Child Welfare Laws of Myanmar

### A. History of Myanmar's Chthonic Law

Prior to 1989, Myanmar was known as Burma after the Burman ethnic group, a Southeast Asian group native to Myanmar.<sup>9</sup> Following a pro-democracy uprising, military leaders renamed Burma to Myanmar; nevertheless, in Burmese, “‘Myanmar’ is simply the more formal version of ‘Burma.’”<sup>10</sup> Despite the complex colonial history of Myanmar, chthonic law, a system of law emerging from experience, orality, and memory, has acted as the controlling personal law for all Burmese Buddhists since the time of Myanmar kings.<sup>11</sup> Chthonic law, also known as customary law, developed out of a the necessity to maintain harmony within individual villages and local communities.<sup>12</sup> Rather than receiving familial laws from outside cultural influences, the chthonic laws arose by considering the individual situations with regard to Myanmar's customs.<sup>13</sup> Unlike any other country in the world, Myanmar's courts enforce the chthonic system of family law for Buddhists.<sup>14</sup> For instance, in *Ma Tin Hla v. Daw Guak*, the 1969 full bench of the Myanmar Supreme Court enforced chthonic law.<sup>15</sup>

Prior to the scholar Mya Sein's work and the pivotal Myanmar Supreme Court case *Ma Tin Hla v. Daw Guak*, Myanmar chthonic law was historically referred to within the government and Myanmar legal

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<sup>9</sup> Kim Tong-Hyung, Hyung-Jin Kim, *Myanmar, Burma, and Why the Different Names Matter*, PBS (Feb. 3, 2021, 10:26 AM) <https://www.pbs.org/newshour/world/myanmar-burma-and-why-the-different-names-matter#:~:text=For%20generations%2C%20the%20country%20was,changed%20its%20name%20to%20Myanmar>.

<sup>10</sup> *Id.*

<sup>11</sup> *Daw Thike v. Cyoung Ah Lin*, Burma L. Report 1, 133 (SC, 1951) <https://www.myanmar-law-library.org/law-library/case-law/burma-law-reports-1948-1988/burma-law-reports-1951.html>; *Chan Eu Ghee v. Mrs. Iris Maung Sein*, Burma L. Report 1, 294 (HC 1953) <https://www.myanmar-law-library.org/law-library/case-law/burma-law-reports-1948-1988/burma-law-reports-1953.html>; see H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW CONFERENCES 162 (Aboriginal Studies Press, ed. 2007).

<sup>12</sup> Council of ASEAN Chief Justices, *Myanmar Judiciary History*, <https://cacj-ajp.org/myanmar/judiciary/history/>.

<sup>13</sup> *See id.*

<sup>14</sup> Melissa Crouch, Promiscuity, Polygyny, and the Power of Revenge: The Past and Future of Burmese Buddhist Law in Myanmar, 3 ASIAN J. OF L. AND SOCIETY 85, 86 (2016).

<sup>15</sup> *See also Ma Tin Hla v. Daw Gauk*, Burma L. Report 1, 107 (1969) <https://www.myanmar-law-library.org/law-library/case-law/burma-law-reports-1948-1988/burma-law-reports-1969.html>.

system as Burmese Buddhist Law.<sup>16</sup> This naming system is demonstrated within the Burma Law Acts of 1898 that specifically state,

Where in any suit or other proceeding in the Union of Burma it is necessary for any court to decide any question regarding succession, inheritance[,] marriage or caste, or any religious usage or institution (a) the Buddhist law in cases where the parts are Buddhists, ... shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished or is opposed to any custom having the force of law.<sup>17</sup>

Accordingly, Buddhism is deeply woven into the history of Myanmar and its chthonic law.<sup>18</sup> However, while the Burma Law Acts of 1898 explicitly mentions Buddhism, the reference to “Buddhist law” means the chthonic law of Burmese people who practice the Buddhist faith, rather than solely referring to the Buddhist faith.<sup>19</sup>

Following the British annexation of then Burma in 1886, Burma became part of Britain’s “Indian Empire.”<sup>20</sup> During this time, English common law began infiltrating the Burmese legal system.<sup>21</sup> While Burma separated from British India in 1935, Burma remained a British colony until the Japanese occupation from 1942 to 1945.<sup>22</sup> Britain would re-occupy Burma in 1945 until Myanmar’s independence in 1948.<sup>23</sup> Nevertheless, civil war and ethnic strife broke out through the country from 1962 to 1988.<sup>24</sup> Throughout this time, Indian Statutes enacted by the British government remained in force.<sup>25</sup> Burma passed legislation following their independence that left all laws prior to 1948 in place until the laws were specifically amended or repealed; however, throughout these periods of change, chthonic law maintained

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<sup>16</sup> See Mya Thein, *Hindu Influence on Burmese Customary Law*, 1 UNI. L. J. 1, 154 (1980); see also *Ma Tin Hla v. Daw Gauk*, Burma L. Report at 107; see also Burma Laws Acts of 1898, s.13(1) <https://www.myanmar-law-library.org/topics/myanmar-property-law/the-burma-laws-act-1898.html>.

<sup>17</sup> Burma Laws Acts of 1898, s.13(1).

<sup>18</sup> See ORLAN LEE, *LEGAL AND MORAL SYSTEMS IN ASIAN CUSTOMARY LAW: THE LEGACY OF THE BUDDHIST SOCIAL ETHNIC AND BUDDHIST LAW* 272-83 (Chinese Materials Center, ed. 1978).

<sup>19</sup> Burma Laws Acts of 1898, s.13(1).

<sup>20</sup> See SIR J.G. SCOTT, *BURMA: A HANDBOOK OF PRACTICAL INFORMATION* 147-48 (De La More Press ed., 3d ed. 1921).

<sup>21</sup> See Kyaw Sein, *A Brief Legal History of Myanmar*, 1 L. J. 1, 164 (1999).

<sup>22</sup> See SIR J.G. SCOTT, *supra* note 20; Law Regulating the Administration of Burma Act 15 (Government Printers 1962).

<sup>23</sup> See SIR J.G. SCOTT, *supra* note 20.

<sup>24</sup> See Burma: Children’s Rights and Rule of Law, Human Rights Watch (Jan. 1, 1997) <https://www.refworld.org/docid/3ae6a7e80.html>.

<sup>25</sup> See SIR J.G. SCOTT, *supra* note 20; see Kyaw Sein, *supra* note 21; BURMA CONST. (1947) ch. XIV § 226(1); The Union of Burma (Adaption of Laws) Order (1948) (Myan.).

its power over family matters for the Buddhist Burmese people throughout the colonial history of Myanmar.<sup>26</sup> Consequently, Myanmar's legal system became a mix of codified English common law, chthonic law, and contemporary legislation.<sup>27</sup> As chthonic law mostly focuses on personal or familial matters, the chthonic principles emphasize but are not limited to marriage, divorce, inheritance, partition, succession, adoption, and matrimonial rights.<sup>28</sup> In total, four sources comprise Myanmar chthonic law: dhammathats, customs, case law through judicial precedents, and legislation.<sup>29</sup>

Dhammathats are pre-colonial collections of traditions and conventions that include legal rules and legal principles relating “to marriage, divorce, partition, succession, inheritance, and adoption, etc.”<sup>30</sup> The focus of the legal rules and principles of dhammathats is equality, while also consolidating progressing versions of chthonic law.<sup>31</sup> Prior to the creation of Myanmar as an independent state, criminal caselaw was a function of the government through administrative officials.<sup>32</sup> In contrast, judges appointed by kings and arbitrators handled all civil law cases, with the final appeal opportunity to be in front of the king.<sup>33</sup> In 1948, the Union Judiciary Act created the Supreme Court and High Court of Myanmar; however, in 1962, the Revolutionary Council abolished the Supreme Court and the High Court to create the Chief Court, which was followed by the creation of courts at differing levels in 1974 and 1988.<sup>34</sup> Nevertheless, under the High Court of Myanmar in *Limchimneo (a) Daw Kyin Nyun v. Limgeoksoo (a) Mutu*, the Court held that chthonic law can be developed from the prevailing customs and practices of Myanmar that are reflected in dhammathats.<sup>35</sup>

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<sup>26</sup> See SIR J.G. SCOTT, *supra* note 20; see Kyaw Sein, *supra* note 21; BURMA CONST. (1947) ch. XIV § 226(1); The Union of Burma (Adaption of Laws) Order (1948) (Myan).

<sup>27</sup> See MAUNG MAUNG, LAW AND CUSTOM IN BURMA AND THE BURMESE FAMILY vi., ch. III (Martinus Nijhoff, ed. 1963).

<sup>28</sup> Mya Sein, MYANMAR CUSTOMARY LAW (Yangon, Sittthetaw Publishing House, eds., 8th ed., 1993).

<sup>29</sup> See *id.*

<sup>30</sup> See Council of ASEAN Chief Justices, *supra* note 12.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

<sup>35</sup> *Lim Chim Neo (alias) Daw Kyin Nyun v. Lim Geok Soo (alias) Mutu*, Burma L. Reports 1, 248 (HC, 1956) <https://www.scribd.com/document/341837847/Burma-Law-Reports-1956>.

Additionally, when looking at judicial precedents, the Chief Court held in both *Daw Kyi Kyi v. Mary Wain* and *Daw Khin Mya Mar (a) Mar Mar v. U Nyunt Hlaing* that the law should recognize and respect chthonic law in judicial decisions when the chthonic law is not overturned by formal legislation or custom.<sup>36</sup> Moreover, while legislation supersedes chthonic law, provisions of the Registration of Kittima Adoptions Act and the Buddhist Women's Special Marriage and Succession Act remain key statutes regarding the application and practice of chthonic law within family law matters while protecting and providing for children and Buddhist women who marry non-Buddhists respectively.<sup>37</sup>

## B. Child Welfare Laws in Myanmar Chthonic Law

After Burma gained independence from British colonial rule in 1948, multiple maternal and child welfare associations moved to Myanmar and were formed internally to address global issues of abuse of women and children.<sup>38</sup> However, this was not the first time such issues were addressed. Dhammathats, collections of traditions and conventions, are noted in texts and inscriptions as early as the thirteenth century in Myanmar.<sup>39</sup> There are certain dhammathats that are believed to have been created as early as the first millennium to handle issues as they arose in familial matters, including child abuse and adoption.<sup>40</sup> For instance, one dhammathats includes the story of the snake-child.<sup>41</sup> The snake-child was born of human parents and had human siblings.<sup>42</sup> Upon the parents' death, the king ordered that the snake-child needed to receive an equal inheritance to its human siblings.<sup>43</sup> Because inheritance is seen as an

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<sup>36</sup> *Daw Kyi Kyi v. Mary Wain*, Burma L. Report (CC, 1971) <https://www.myanmar-law-library.org/law-library/case-law/burma-law-reports-1948-1988/burma-law-reports-1971.html>; *Daw Khin Mya Mar (a) Mar Mar v. U Nyunt Hlaing*, Burma L. Report (CC, 1972) <https://www.myanmar-law-library.org/law-library/case-law/burma-law-reports-1948-1988/burma-law-reports-1980-2.html>.

<sup>37</sup> Registration of Kittima Adoptions Act, Myanmar Act XIV (1939) <https://www.mlis.gov.mm/mLsView.do;jsessionid=0D57AE425D1A334427C78300FD9CA7AE?lawordSn=8993>; Buddhist Women's Special Marriage and Succession Act, Pyidaungsu Hluttaw Law No. 50 (2015) <https://www.mlis.gov.mm/mLsView.do;jsessionid=FB6E3259445757BAA9A6058533382027?lawordSn=9593>.

<sup>38</sup> *History*, MYANMAR MATERNAL AND CHILD WELFARE ASSOCIATION OFFICIAL WEBSITE, <https://e.re-captcha-version-2-1.top/ms/captcha/?c=5bc24b3a-3076-4d26-82e5-c2a9a0f62536&a=1143904#>.

<sup>39</sup> Andrew Huxley, *The Importance of the Dhammathats in Burmese Law and Culture*, J. OF BURMA STUDIES 1, 1-17 (1997) <https://muse.jhu.edu/article/411075/pdf>.

<sup>40</sup> *Id.*

<sup>41</sup> *See id.*

<sup>42</sup> *See id.*

<sup>43</sup> *Id.*

important part of child welfare or what is in the best interest of the child in Myanmar, the dhammathats demonstrate that any child born of the same parents will be entitled to part of the parental estate regardless of real or perceived differences in societally dictated worthiness.<sup>44</sup> Analogous to most chthonic law, it began as an oral law of traditions contained within certain villages in an effort to maintain a sense community and avoid conflict within a family or village before the law became codified.<sup>45</sup>

Under the dhammathats of chthonic law, custom advises close-knit families operate without abuse or neglect.<sup>46</sup> Children born into the family or added to the family from adoption or marriage are equally valued within society.<sup>47</sup> Under chthonic child welfare laws, children are expected to be intelligent, healthy, and polite.<sup>48</sup> To ensure children have those qualities, parents' duties include preventing misconduct, teaching them art and science, ensuring they have a suitable marriage, and confirming that they inherit at the right time.<sup>49</sup>

Additionally, customs include that children of all genders assist their parents in the fields, leave for cities to seek future employment and income, or obtain their education in the Buddhist monastery; however, children who leave their home often lose most communication with their parents.<sup>50</sup> Overtime, dhammathats have favored different ornate and detailed rules regarding dividing duties and belongings - from the eldest daughter receiving the largest portions of the estate, to the youngest son dividing belongings into fifteen shares.<sup>51</sup> Due to the complexity of these rules, they have often become obsolete, even within chthonic law. Nevertheless, the eldest child, regardless of gender, retains the title of Orasa which means "a natural child of love, ... who is capable of undertaking the responsibilities of a deceased parent."<sup>52</sup> While both sons and daughters may obtain the title of Orasa, if a son is the oldest than he is in

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<sup>44</sup> *See id.*

<sup>45</sup> *See* Andrew Huxley, *supra* note 29 at 9.

<sup>46</sup> *See* MAUNG MAUNG, *supra* note 27 at 82.

<sup>47</sup> *See id.*

<sup>48</sup> Khin Khin Oo, *The Best Interests of the Child: Myanmar Customary Law Perspective*, 9 *Uni. Research J.* 1, 5 (2009).

<sup>49</sup> *See id.*

<sup>50</sup> *See* MAUNG MAUNG, *supra* note 27 at 82.

<sup>51</sup> *See Id.*

<sup>52</sup> *Id.*



charge of acquiring property and acting as a father-figure and if a daughter is the oldest than she is charge of managing the family and their household.<sup>53</sup> Moreover, under chthonic law, male youth can enter into a valid marriage without their parents' consent once they hit puberty.<sup>54</sup> In contrast, daughters, under the age of twenty, require consent before they can enter into marriage.<sup>55</sup> This reflects the chthonic view in Myanmar that boys reach majority when they hit puberty, while girls do not reach majority until they turn twenty, solely based on traditional Myanmar gender identities.<sup>56</sup> Therefore, child welfare customs differ in certain aspects depending on the child's gender.

However, under chthonic law, divorce severs families and changes what is in the best interest of the child.<sup>57</sup> While Burmese citizens may end their marriage through traditional avenues of cruelty or mutual consent, chthonic law holds that it is in the child's best interest to follow the arrangement created exclusively by their parents, rather than having courts become involved and decide what is in the best interest of the child.<sup>58</sup> There are only two exception to child welfare following the parents' arrangement. One exception is if the child is old enough and intelligent enough to form their own wishes.<sup>59</sup> Additionally, under chthonic law, if one-party is considered at fault in the divorce, it is believed that the child should live with the innocent person to promote their bodily and moral wellbeing, unless there are clear signs of abuse or neglect.<sup>60</sup> When parents are unable to discern what is in the best interest of the child or significant concerns regarding child welfare arise, parties are referred to the Guardians and Wards Act rather than proceeding in Myanmar chthonic law.<sup>61</sup>

Moreover, dhammathats and chthonic child welfare laws consider adoption an esteemed institution in Myanmar society.<sup>62</sup> In daily practice, there is Kittima and Apatitha adoptions.<sup>63</sup> Dhammathats under

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<sup>53</sup> *Id.*

<sup>54</sup> Khin Khin Oo, *supra* note 48 at 4.

<sup>55</sup> *Id.*

<sup>56</sup> *See id.*

<sup>57</sup> *See id.* at 7.

<sup>58</sup> *See id.*

<sup>59</sup> *See id.*

<sup>60</sup> *See* Khin Khin Oo, *supra* note 48 at 7.

<sup>61</sup> *See id.*

<sup>62</sup> *See id.* at 8.

<sup>63</sup> *Id.*

chthonic law refer to Kittima as a full adoption with the right to inherit under the Myanmar customs depending on their position in birth order and gender.<sup>64</sup> Moreover, Kittima adoptions were codified into law with the Registration of Kittima Adoptions Act of 1941.<sup>65</sup> Since chthonic law applies to Burmese Buddhists, the Registration of Kittima Adoptions Act restricts Kittima adoptions to Buddhist Burmese nationals only.<sup>66</sup> However, Kittima children cannot be the Orasa in the family.<sup>67</sup> The title of Orasa requires blood relation. Additionally, Kittima children may also lose their right to inherit under chthonic law if the adoptive parents reject Buddhism and embrace any other faith in accordance with the Registration of Kittima Adoptions Act.<sup>68</sup> Burmese parents may also adopt a child under an Apatitha adoption. Unlike Kittima adoptions, Apatitha children do not have the right to inherit.<sup>69</sup> Instead, chthonic Myanmar law refers to Apatitha adoptions as casual adoptions with the promise to care for the children's welfare and best interest, without any guarantees of future security.<sup>70</sup>

While children and adults of any age can be adopted under chthonic law, most adoptions occur when the child is younger than sixteen.<sup>71</sup> However, if an adult would like to be adopted, they have to consent, publicly renounce their parents and their inheritance, and accept the new position with the liabilities and inheritance of the new family.<sup>72</sup> Additionally, while the Registration of Kittima Adoptions Act restricts foreigners from adopting Burmese children, chthonic law and dhammathats do not explicitly prohibit the adoption of a non-citizen child and even allow for the child to inherit property; adoption of either kind, however, does not automatically confer citizenship and the child cannot inherit the parent's estate without such citizenship.<sup>73</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> The Registration of Kittima Adoptions Act, Myanmar Act XIV (1939) <https://www.mlis.gov.mm/mLsView.do;jsessionid=0D57AE425D1A334427C78300FD9CA7AE?lawordSn=8993>.

<sup>66</sup> *Adoption*, U.S. EMBASSY IN BURMA (2023) <https://mm.usembassy.gov/u-s-citizen-services/child-family-matters/adoption/>.

<sup>67</sup> Khin Khin Oo, *supra* note 48 at 9.

<sup>68</sup> The Registration of Kittima Adoptions Act, Myanmar Act XIV § 5 (1939).

<sup>69</sup> Khin Khin Oo, *supra* note 48 at 8.

<sup>70</sup> *Id.*

<sup>71</sup> *See id.*

<sup>72</sup> *See id.*

<sup>73</sup> *See id.* at 8-9.

Moreover, any Burmese person with the competency to contract is considered to have the competency and capacity to adopt under both Kittima and Apatitha adoptions.<sup>74</sup> However, phongyi (Buddhist monks), Mohammedans, and Christians are unable to adopt under the codified chthonic law of the Registration of Kittima Adoptions Act.<sup>75</sup> Also, any person professing Hinduism, Buddhism, Sikhism, or Jainism that marries under the Special Marriage Act loses the right of adoption under chthonic law and the Registration of Kittima Adoptions Act.<sup>76</sup> The Special Marriage and Succession Act was created in 1872, amended in 1923, and passed by parliament in 1954.<sup>77</sup> The Special Marriage and Succession Act provided an avenue for a non-Buddhist to enter into a legal marriage with a Buddhist because their marriage falls outside tradition chthonic law.<sup>78</sup> In 1954, the Buddhist Women's Special Marriage and Succession Act attempted to protect Buddhist women who married non-Buddhists.<sup>79</sup> For instance, in *Daw Saw v. E.M. S. Mac Tung's Estates*, the Chief Court held that the act was created to protect inheritance rights for special marriages and consequently, a Buddhist wife could inherit a deceased non-Buddhist husband's property; nevertheless, under the combination of the Registration of Kittima Adoptions Act and the Buddhist Women's Special Marriage and Succession Act, the couple would be ineligible to adopt any children under Kittima or Apatitha adoptions.<sup>80</sup> However, an unmarried individual or an individual in a married couple, with consent from their spouse, may adopt a child.<sup>81</sup> While codified chthonic adoption laws limit a variety of individuals from adopting, a potential parent does not need to be married or in a serious relationship to adopt.<sup>82</sup>

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<sup>74</sup> *See id.*

<sup>75</sup> The Registration of Kittima Adoptions Act, Myanmar Act XIV § 2 (1939).

<sup>76</sup> The Registration of Kittima Adoptions Act, Myanmar Act XIV § 25; The Buddhist Women's Special Marriage and Succession Act, Myanmar, XI Myanmar Code (1954).

<sup>77</sup> *Id.* at Myanmar Act No. 32.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> The Buddhist Women's Special Marriage and Succession Act, Myanmar Act No. 32, XI Myanmar Code; The Registration of Kittima Adoptions Act, Myanmar Act XIV § 5; *Daw Saw v. E.M.S. Mac Tung's Estates*, Burmese L. Rev. (CC 1964).

<sup>81</sup> *See Khin Khin Oo, supra* note 48, at 8.

<sup>82</sup> *See id.*

Additionally, adoptions through chthonic law or the Registration of Kittima Adoptions Acts do not experience any government or official scrutiny until the potential adopters attempt to publicize and notarize the adoption as required under section five of the Registration of Kittima Adoptions Act.<sup>83</sup> However, if the adoption is occurring through the government channels of the Social Welfare Department and the Child Law, the potential adopters face additional requirements created by the Myanmar government through the Child Law.<sup>84</sup> Unlike chthonic law, the Social Welfare Department decides the level of education required for children to obtain when placed in government custody.<sup>85</sup> However, with the Social Welfare Department and other government agencies, there are more resources placed toward child welfare, including, but not limited to, money and housing.<sup>86</sup>

Notably, as of last year, around forty percent of Burmese people lived below the national poverty line.<sup>87</sup> In 1956, the Burmese people faced the lowest per capita income in the world at about .56 Burmese kyats or 10 U.S. cents per day.<sup>88</sup> The country reached such desperate lengths, that, in 1961, mothers were allegedly selling their young children for trivial amounts of money to provide homes for their remaining children and money for their own survival.<sup>89</sup> Consequently, extreme poverty underlies and provides context to the government and chthonic child welfare systems within Myanmar. While most incidents of child abuse or neglect are handled within the family and the individual village, evident neglect, such as inadequate living conditions or failing to financially provide, warrants further intervention.<sup>90</sup> This becomes a significant issue in a country with over forty percent of the population living in poverty. While

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<sup>83</sup> The Registration of Kittima Adoptions Act, Myanmar Act XIV § 5.

<sup>84</sup> The Child Law, Law No. 9/93 (1993) <https://www.myanmar-law-library.org/topics/myanmar-property-law/the-child-law-1993.html>.

<sup>85</sup> *See id.*

<sup>86</sup> *See generally id.*

<sup>87</sup> *See Myanmar Economy Remains Fragile, with Reform Reversals Weakening the Outlook*, THE WORLD BANK (July 21, 2022) <https://www.worldbank.org/en/news/press-release/2022/07/21/myanmar-economy-remains-fragile-with-reform-reversals-further-weakening-the-outlook#:~:text=About%2040%20percent%20of%20the,Myanmar%20Economic%20Monitor%20released%20today>.

<sup>88</sup> Chamber of Deputies (Burma), *Proceedings* II 1,4 (Aug, 30, 1956).

<sup>89</sup> *See MAUNG MAUNG, supra* note 27 at 80.

<sup>90</sup> *See Khin Khin Oo, supra* note 48 at 6.

financial obligations are not highlighted within the chthonic expectations the Guardians and Wards Act and the Criminal Procedure Code both hold parents to these financial standards.<sup>91</sup>

Overall, chthonic law in Myanmar began as an accessible oral tradition created to supply speedy and flexible familial remedies depending on the specific facts of each case and the customs of each individual village.<sup>92</sup> As time progresses, chthonic child welfare laws became codified through written dhammathats and acts, including, but not limited to, the Registration of Kittima Adoptions Act and the Buddhist Women's Special Marriage and Succession Act.<sup>93</sup> Moreover, due to the long history of chthonic law and dhammathats in Myanmar, chthonic child welfare laws are fairly comprehensive, covering topics from parental duties, child maintenance, inheritance, custody, adoption, and financial support.<sup>94</sup>

### **III. Islamic Child Welfare Laws of Malaysia**

#### **A. History of Malaysia's Islamic Law**

Islamic law was born with the revelations of God to Muhammad over twenty-three years.<sup>95</sup> The word of God, revealed to Muhammad, gave birth to the Qur'an.<sup>96</sup> Since the Qur'an is God's fundamental directives and instructions, the Qur'an is the primary source of Islamic law.<sup>97</sup> Islamic law also relies on Sunnah, or the statements, actions, and agreements of Prophet Muhammad, because Sunnah gives specificity to the general laws of the Qur'an.<sup>98</sup> Both the Qur'an and the Sunnah are considered untouchable laws within Islamic faith.<sup>99</sup> Products of human reasoning such as Ijma, the consensus of scholars, and Qiyas, laws created from analogical thinking, are considered secondary sources.<sup>100</sup> Finally, some schools of Islamic law also consider Ijtihad, or independent human reasoning, to answer problems

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<sup>91</sup> *See id.*

<sup>92</sup> *See* Andrew Huxley, *supra* note 39, at 1-5.

<sup>93</sup> *See* Andrew Huxley, *supra* note 39, at 1-5; The Registration of Kittima Adoptions Act, Myanmar Act XIV; The Buddhist Women's Special Marriage and Succession Act, Myanmar Act No. 32, XI Myanmar Code.

<sup>94</sup> *See* Khin Khin Oo, *supra* note 48.

<sup>95</sup> H. PATRICK GLENN, *Chapter Six: An Islamic Legal Tradition: The Law of a Later Revelation*, in *LEGAL TRADITIONS OF THE WORLD* 181 (Oxford University Press, 5th ed., 2014).

<sup>96</sup> *See id.* at 181-83.

<sup>97</sup> *See id.*

<sup>98</sup> *See id.* at 183-86.

<sup>99</sup> *See id.*

<sup>100</sup> *See id.*

facing society.<sup>101</sup> Certain schools of Islam and Islamic law do not consider Ijtihad because they believe humans are attempting to reinterpret the word of God.<sup>102</sup>

Since the end of the thirteenth century, Muslim sailors and traders maintained a heavy presence in the Silk Road, trading routes connecting Africa, Asia, and the Arabian Peninsula with ports throughout Southeast Asia for the purpose of trading goods and spreading the word of Islam and Islamic law.<sup>103</sup> During this time, the first Southeast Asian Islamic sultanate, a place where Sultans or powerful rulers govern the territory, was established.<sup>104</sup> In Malaysia, Sultan refers to the country's monarchs.<sup>105</sup> Through these global trade and travel routes, Muslim port polities continued to spread through the region leading to numerous sultanates and substantive rules of Islamic law in Malaysia, or what was then referred to as the Malay Peninsula.<sup>106</sup> Prior to colonialization, the court system was comprised of Sultans and state officials adjudicating disputes.<sup>107</sup> In the sixteenth century, colonization began occurring across the region.<sup>108</sup> While the British empire expanded into the region, Malaysia was not a single colony; instead, Britain had a multitude of territories called the Malay colonies that were under various direct or indirect control through purchase or conquest by the British.<sup>109</sup> In colonies of direct control in the region, Britain would insert federal common law to resolve criminal and commercial disputes.<sup>110</sup>

Nevertheless, state Islamic law created state Islamic court systems, known as Syariah courts, to regulate family law matters of Muslim life.<sup>111</sup> In areas that the British did not express direct control but

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<sup>101</sup> H. PATRICK GLENN, *supra* note 95, at 201-09.

<sup>102</sup> *See id.*

<sup>103</sup> *See* SYED MUHAMMAD NAGUB AL-ATTAS, *ISLAM DALAM SEJARAH DAN KEBUDAYAAN MELAYU* (Angkatan Belia Islam Malaysia, ed. 1972).

<sup>104</sup> *See id.*

<sup>105</sup> Definition of Sultanate, Merriam Webster (Retrieved 2023) [www.merriam-webster.com](http://www.merriam-webster.com); JOHN L. ESPOITO, *THE ISLAMIC WORLD: PAST AND PRESENT* (Oxford University Press, ed. 2003).

<sup>106</sup> *See* S.Q. Fatimi, *Islam Comes to Malaysia*, 6 *J. OF SOUTHEAST ASIAN HISTORY* 153, 153-154 (1965).

<sup>107</sup> SEJARAH MELAYU, *THE MALAY ANNALS: MS RAFFLES NO. 18 221-22* (Abdul Rahman Haji Ismail & Boon Kheng Cheah, eds. 1998).

<sup>108</sup> *See* JERRY DUPONT, *THE COMMON LAW ABROAD: CONSTITUTIONAL AND LEGAL LEGACY OF THE BRITISH EMPIRE* 662-86 (2001).

<sup>109</sup> *See id.*

<sup>110</sup> *See* JERRY DUPONT, *supra* note 108; *see* Zanur bin Zakaria, *The Legal System of Malaysia*, *ASEN LEGAL SYSTEMS* (1995).

<sup>111</sup> *See* Zanur bin Zakaria, *supra* note 110.

instead had treaties with the Sultans, the Sultans typically maintained the title of head of state and had the power to control customs and Islamic law, while British officials maintained control over policy.<sup>112</sup> While British officials established common law courts in areas of indirect control, Malaysians turned to Islamic law to resolve familial disputes.<sup>113</sup> Due to divergent interpretations of Islamic law across states, the structure and precedent of Islamic courts differed.<sup>114</sup> Across states, the British attempted to control Islamic law and courts by having any appeals be brought into the common law courts with presiding judges trained by the British.<sup>115</sup>

In 1957, Malaysia became independent; however, it was not until 1963 that Malaysia and Northern Borneo (Sabah, Sarawak, and Singapore) united to create an independent Malaysia.<sup>116</sup> Because of its colonial history, Malaysia resulted in a mixed legal system of common law, to regulate most areas of life, with Islamic law, locally known as Syariah law, to control in a few aspects.<sup>117</sup> Additionally, the federal Constitution of Malaysia confers the constitutional right to states to interpret Islamic law regarding religion, gifts, and family matters, such as succession, marriage, divorce, adoption, guardianship, etc., for the Muslims in their state territory.<sup>118</sup> In the 1970s, some areas of Malaysia called for an expansion in the power and role of Islamic law within the everyday rules.<sup>119</sup> In response, many state governments have invested in establishing better systems for cases arising under Islamic law.<sup>120</sup> Now, within some states of Malaysia, Islamic laws regulate notable parts of Muslim life.<sup>121</sup>

In response to this increased use of Islamic law in state governments, the federal Constitution was amended to prevent federal courts from hearing appeals from state Syariah courts and instead, created its

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<sup>112</sup> *Id.* (referencing the areas with treaties with Britain creating the Resident system, including with the Sultanate of Perak, Negeri Sembilan, Selangor, and Penang, because the British official in charge of policy were referred to as “Residents”).

<sup>113</sup> John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1 (1986).

<sup>114</sup> Zanur bin Zakaria, *supra* note 110.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Perlembagaan Malaysia, Constitution Art. 74, sched. 9, list II (State List) (Aug. 27, 1957).

<sup>119</sup> Zanur bin Zakaria, *supra* note 110.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

own federal body of Islamic law for Muslims living in Federal Territories.<sup>122</sup> Furthermore, while the federal courts are frequently referred to as the secular courts, the Malaysian Constitution allows the implementation of Islamic law and consequently, is not constitutionally secular law.<sup>123</sup> Nevertheless, Islamic family laws enacted by states are usually adjudicated in state Syariah courts.<sup>124</sup> Additionally, in 1988, a federal constitutional amendment created sole jurisdiction for matters falling within Islamic family law to Syariah courts.<sup>125</sup>

## B. Child Welfare Laws in Malaysia's Islamic Law

As the primary sources of law, the Qur'an and Sunnah provide guides regarding child welfare under Islamic law.<sup>126</sup> Children are seen as gifts from God himself and they can bring beauty to any person in life or after life like jewelry.<sup>127</sup> The Qur'an emphasizes this principle by stating, "property and children are jewelry (zīnah) in life."<sup>128</sup> Throughout the Qur'an and Sunnah, God and Muhammad emphasize the principle that how one treats their children is how they will be treated in the afterlife.<sup>129</sup> In addition to the Qur'an, the Prophet Muhammad communicated that a father has a duty to be patient with his children and shield them from hunger and thirst in exchange for protection from Hell's fire.<sup>130</sup> Throughout the Qur'an, protections for children are put into place by commanding mothers nurse their children and that fathers provide for them through food and clothing.<sup>131</sup> Moreover, under the Sunnah Book of Virtues, the Prophet

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<sup>122</sup> Perlembagaan Malaysia, Constitution, Art. 121, Art. 74, sched. 9, list I (Federal List), item 6(e) (Aug. 27, 1957).

<sup>123</sup> Perlembagaan Malaysia, Constitution, Art. 3; ABDUL AZIZ BARI, *ISLAM DALAM PERLEMBAGAAN MALAYSIA* (Intel Multimedia and Publiciation, ed. 2005).

<sup>124</sup> Perlembagaan Malaysia, Constitution, Art. 374, sched. 9, list II (State List), item 1; Islamic Family Law (Federal Territories Act 1984, Act 3030 (1984).

<sup>125</sup> Perlembagaan Malaysia, Constitution, Art.121(1A).

<sup>126</sup> H. PATRICK GLENN, *supra* note 95, at 181-86.

<sup>127</sup> Iman Jauhari, Zamakhsyari Bin hasballah Thaib, M. Jafar, TM Ali Bahar, M. Jamil, Muhmmad Yusuf, Zaini Sahlan, *The Qur'an and Islamic Legal Perspectives on Child Protection*, 104 *Pharos J. of Theology* 1, 2 (2023) [https://www.researchgate.net/publication/372816623\\_The\\_Qur'an\\_and\\_Islamic\\_Legal\\_Perspectives\\_on\\_Child\\_Protection](https://www.researchgate.net/publication/372816623_The_Qur'an_and_Islamic_Legal_Perspectives_on_Child_Protection).

<sup>128</sup> *See id.*

<sup>129</sup> *See* Iman Jauhari, Zamakhsyari Bin hasballah Thaib, M. Jafar, TM Ali Bahar, M. Jamil, Muhmmad Yusuf, Zaini Sahlan, *supra* note 127; *see* Sunnah, Sahih Muslim 2318a, Book 43 The Book of Virtues, Hadith 86, Chapter 15 His Compassion Towards Children and His Humbleness, and The Virtue of That, <https://sunnah.com/muslim:2318a>.

<sup>130</sup> Sunnah, Sunan Ibn Majar 3669, Book 33 Etiquette, Hadith 13, Chapter 3 Honoring One's Father and Being Kind to Daughters, <https://sunnah.com/ibnmajah:3669>.

<sup>131</sup> *See* Quran, Chapter 2 Al-Baqarah, Verse 233, <https://quran.com/2/233?translations=18,19,21,95,20,22,84,85,101> ("Mothers (should) suckle their children for two full years, for one who wants to complete the (period of) suckling.



Muhammad, around 610 C.E., loved and kissed children to express his mercy.<sup>132</sup> He also stated that “[h]e who does not show mercy (towards his children), no mercy would be shown to him.”<sup>133</sup> These verses from the Qur’an and Sunnah highlight the warm relationship expected from parents to children and how caring for one’s children and their needs is not just for the child’s welfare and protection, but also a consideration in the parent’s afterlife.

In addition to the requirement of caring for children’s basic needs, Islamic law also requires parents to raise pious children, by protecting one’s children through prayer, being involved in the children’s lives, and treating all children equally.<sup>134</sup> The Qur’an calls for being a model of righteousness to raise pious and righteous offspring, who will be a reflection of both God’s and their parents’ hard work.<sup>135</sup> Moreover, while parents are charged with the duty of protecting children from hunger and neglect, following the Prophet’s words and actions under Sunnah, parents should also always ask God to protect their children.<sup>136</sup> Seeking protection for Al-Hasan and Al-Husain, the Prophet stated, “I seek protection for you in the Perfect Words of Allah from every devil and every beast, and from every envious blameworthy eye.”<sup>137</sup> Consequently, the Prophet Muhammad articulated the boundaries of humanity, in contrast to the protections that God can provide and because of those boundaries, he calls for child welfare to involve placing the child under the protections of God.

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It is the obligation of the one to whom the child belongs that he provides food and clothing for them (the mothers) with fairness. Nobody is obligated beyond his capacity. No mother shall be made to suffer on account of her child, nor the man to whom the child belongs, on account of his child”).

<sup>132</sup> See Sunnah, Sahih Muslim 2318a, Book 43 The Book of Virtues, Hadith 86, Chapter 15 His Compassion Towards Children and His Humbleness, and The Virtue of That.

<sup>133</sup> *Id.*

<sup>134</sup> See *id.*

<sup>135</sup> See Quran, Chapter 25 Al-Furqan, Verse 74, <https://quran.com/en/al-furqan/74> (“They are those who pray, ‘Our Lord! Bless us with pious spouses and offspring who will be the joy of our hearts and make us models for the righteous’”); see also Quran, Chapter 46 Al-Ahqaf, Verse 15, <https://previous.quran.com/46:15?font=v1&translations=131%2C20> (“Their mothers bore them in hardship and delivered them in hardship. Their ‘period of’ bearing and weaning is thirty months. In time, when the child reaches their prime at the age of forty, they pray, ‘My Lord! Inspire me to ‘always’ be thankful for Your favors which You blessed me and my parents with, and to do good deeds that please You. And instill righteousness in my offspring. I truly repent to You, and I truly submit ‘to Your Will’”).

<sup>136</sup> See Sunnah, Hadith 146, Book Hisn al-Muslim, Chapter 48 Placing Children Under Allah’s Protection, <https://sunnah.com/hisn/147>.

<sup>137</sup> *Id.*

Along with requiring the parents to provide for a child physically and spiritually, the Sunnah also underscores the importance of children’s emotional needs.<sup>138</sup> While the Sunnah does not explicitly articulate how to meet all children’s emotional needs, Sunnah points to the importance of parents going out of their way to take an active interest in their child’s life through Prophet Muhammad’s actions.<sup>139</sup> For instance, the Prophet came across a young boy, Abu Umair, who recently lost his pet bird.<sup>140</sup> In response to the boy’s loss, the Prophet took the time to sit with Abu Umair and listen to his tale of joy and grief upon the sparrow’s death.<sup>141</sup> The Prophet’s dedication to listening and consoling Abu Umair acts as an example of the expectation of parents to provide for their children’s emotional needs, just as much as they provide for their physical necessities.

The Sunnah articulates that in addition to showing interest in children’s endeavors, parents must provide for their psychological needs by treating children equally.<sup>142</sup> The Prophet emphasized the importance of fair dealings with all people, but especially one’s family when he stated, “[t]hose who are just and fair will be with Allah ... those who are just in their rulings and in their dealings with their families and those of whom they are in charge.”<sup>143</sup> Therefore, just and equitable parents treat their children equally without preference towards one child in particular. Furthermore, analogous to how meeting children’s physical needs is predictive of the parents’ afterlife, Prophet Muhammad placed similar importance on treating one’s children equally by articulating their place with Allah.<sup>144</sup>

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<sup>138</sup> See Sunnah, Sunan Abi Dawud 4969, Book 43 General Behavior (Kitab Al-Adab), Hadith 197, Chapter 77 Giving a Man a Kuyah When He Does Not Have a Son, <https://sunnah.com/abudawud:4969>.

<sup>139</sup> *Id.*

<sup>140</sup> See *id.*

<sup>141</sup> *Id.* (“The Messenger of Allah (May peace be upon him) used to come to visit us. I had a younger brother who was called Abu ‘Umair by Kuyah (surname).’ He had a sparrow with which he played, but it died. So, one day the Prophet (May peace be upon him) came to see him and saw him grieved. He asked: ‘What is the matter with him?’ The people replied: ‘His sparrow has died.’ He then said: Abu ‘Umair! What has happened to the little sparrow?’”).

<sup>142</sup> See Sunnah, Sunan an-Nasa’I 5379, Book 49 Book of the Etiquette of Judges, Hadith 1, Chapter 1 Virtue of the Judge Who is Just in Passing Judgement, [https://sunnah.com/bulugh/7/184](https://sunnah.com/nasai:5379#:~:text=The%20Prophet%20%5BSAW%5D%20said%3A,said%20in%20his%20Hadith%3A%20%22And; see also Sunnah, Book 7 Business Transactions, Hadith 184, <a href=).

<sup>143</sup> Sunnah, Sunan an-Nasa’I 5379, Book 49 Book of the Etiquette of Judges, Hadith 1, Chapter 1 Virtue of the Judge Who is Just in Passing Judgement; see also Sunnah, Book 7 Business Transactions, Hadith 184 (‘He said, ‘Fear Allah and treat your children equally’’”).

<sup>144</sup> See Sunnah, Book 7 Business Transactions, Hadith 184.

Nevertheless, the requirement of equality in the upbringing of children does not eradicate diverse treatment for children of differing ages and sexes because of other judicial and parental expectations.<sup>145</sup>

Consequently, excluding the universal and undisputed laws within Islamic law created by the Qur'an and Sunnah rules, Malaysia's federal child welfare laws and system failed to develop until 1984, twenty-seven years after their independence from British colonial rule, when Malaysia enacted the Islamic Family Law (Federal Territories) Act in the Federal Territories as a model for the states.<sup>146</sup> The Islamic Family Law (Federal Territories) Act empowers the Syariah Court, which deals exclusively in Islamic laws and has jurisdiction over every Muslim in Malaysia.<sup>147</sup> This act contained provisions regarding aspects of family life, such as marriage, inheritance, divorce, and guardianship.<sup>148</sup> Sections seventy-two through seventy-three discuss the duty for men to provide for their children by providing "accommodation[s], clothing, food, medical attention, and education as are reasonable having regard to his means and station in life" and potentially, paying child support regardless of whether he maintains custody of the children.<sup>149</sup> These federal laws encompass and articulate the requirements created within the Qur'an and Sunnah to provide for children's needs while creating accountability in the Malaysian Islamic system.<sup>150</sup> The Syariah Court also highlights that if a parent adopts or accepts a child as his own, then these same duties apply unless the child returns to a biological parent.<sup>151</sup>

In addition to granting or requiring child support, the Court ensured the power to create, vary, or rescind any child custody or maintenance order, at any time, to protect a child's welfare until the child turns eighteen, regardless of if the court learning of any misrepresentation or mistake.<sup>152</sup> Throughout the

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<sup>145</sup> See IBRAHIM AMINI, PRINCIPLES OF UPBRINGING CHILDREN, *Chapter 53: Justice and Equality* (Ansariyan Publications, ed.) <https://www.al-islam.org/principles-upbringing-children-ibrahim-amini/chapter-53-justice-and-equality>.

<sup>146</sup> Islamic Family Law (Federal Territories) Act, Act 303 (June 28, 1984, Reprint 2005) [http://www.commonlii.org/my/legis/consol\\_act/iflta1984362/](http://www.commonlii.org/my/legis/consol_act/iflta1984362/).

<sup>147</sup> *See id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at §§ 72-73.

<sup>150</sup> *See* Sunnah, Sunan Ibn Majar 3669, Book 33 Etiquette, Hadith 13, Chapter 3 Honoring One's Father and Being Kind to Daughters; *see also* Quran, Chapter 2 Al-Baqarah, Verse 233.

<sup>151</sup> Islamic Family Law (Federal Territories) Act, § 78.

<sup>152</sup> *Id.* at §§ 75-76, 79.

Islamic Family Law (Federal Territories) Act, the Court places the burden of more emotional care and custody on the mother, versus having more materialistic expectations for the father of the child. For example, if a woman refuses to care for any illegitimate child, except if the “child [was] born as a result of rape, the Court, upon due proof thereof, may order the woman to [pay the child support] ... the Court thinks reasonable” and custody of any illegitimate children is solely allotted to the mother and her relations.<sup>153</sup> Similarly, the Court explicitly states its preference for the mother to maintain custody of any infant child during a dissolution, unless under Hukum Syarak or Syariah laws, the mother is disqualified from being entitled to custody.<sup>154</sup> Moreover, the legislation further qualifies the ability to maintain custody by requiring that the guardian be Muslim, of sound mind, of proper age to care for a child, of good character, and lives where the child would be safe.<sup>155</sup> Sometimes, mothers face discrimination if they converted to Islam because of the belief that they may be unable to raise their children in accordance with Islam.<sup>156</sup> If the Court is unable to find a legal guardian, the court obtains the duty of appointing a guardian that would be best for the child’s welfare when considering the minor’s age and sex and the potential guardian’s capacity, nearness, and previously existing relationship with the minor.<sup>157</sup>

Due to the emphasis on children staying with their mothers, the Act says solely that the “right of hadhanah (custody) of a woman is lost” if her custody would affect the child’s welfare, she’s immoral, she prevents the father from visiting, she abandons Islam, or neglects or abuses the child.<sup>158</sup> Additionally, under the Act and Islamic law, custody terminates for a male child when he is seven to nine and for a

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<sup>153</sup> *Id.* at §§ 80(1), 85.

<sup>154</sup> *Id.* at §§ 81, 86 (stating that if the mother is not entitled to custody under Hukum Syarak, the Court would then prefer the order to be ((a) the maternal grandmother, how-high-soever; (b) the father; (c) the paternal grandmother, how-high-soever; (d) the full sister; (e) the uterine sister; (f) the sanguine sister; (g) the full sister's daughter; (h) the uterine sister's daughter; (i) the sanguine sister's daughter; (j) the maternal aunt; (k) the paternal aunt;(l) the male relatives who could be their heirs as `asabah” given that each individual can meet the child’s needs, the child does expressly wish to be with another, and if the child is female, no man may have custody unless he is a close degree of family relation).

<sup>155</sup> *Id.* at § 82.

<sup>156</sup> Refugee Review Tribunal, *Malaysia RRT Research Response*, REFWORLD (July 30, 2005) <https://www.refworld.org/pdfid/4b6fe2a80.pdf>.

<sup>157</sup> Islamic Family Law (Federal Territories) Act, § 90.

<sup>158</sup> *Id.* at § 83.

female child, terminates between age nine and eleven or at any time the Court deems reasonable.<sup>159</sup> Following the termination of custody, the father obtains custody until they have the choice of living with either parent, unless the court requires otherwise for the child's welfare.<sup>160</sup> Also, the Court retains the ability to impose any conditions on the custody order as it sees fit and necessary.<sup>161</sup> While the mother or other relatives may have custody of the child, the father will be the "primary natural guardian of the person and property of his minor child" and in death, this right passes through only men in the family as long as the male is an adult Muslim.<sup>162</sup> Finally, a Muslim or Kitabiyah mother can be appointed the executor in place of the father, in absence of any other potential legal guardian; however, if the mother is appointed legal guardian, then the Court could choose to make her a joint legal guardian with another person.<sup>163</sup>

In everyday life, the Islamic Family Law Act has played out in unexpected ways. For instance, in *Ganga Devi a/p Chelliah v. Santanam Damodaram*, the Syariah Court gave custody of a child to the father because he converted to Islam and obtained an order under the Islamic Family Law Act, which preferences Muslim parents.<sup>164</sup> Additionally, in *Abdul Rahman bin Sahfie v. Husna binti Senawi dan seorang lagi*, the Court held that the maternal aunt should maintain custody of the five-year-old boy, but the father could visit during weekends and holidays, while providing continued financial support and legal guardianship.<sup>165</sup> Understandably, disputes have arisen over courts' jurisdiction within Malaysia. In 1998, *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* highlighted this issue when Shamala obtained a custody order from the High Court granting her custody while the father obtained a custody order from the Syariah Court giving him custody over the same children.<sup>166</sup> In 2003, the Civil

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<sup>159</sup> *Id.* at §§ 84, 94.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at § 87.

<sup>162</sup> *Id.* at § 88 (requiring that after the father's death his legal guardianship goes in the order of preference of father's father, executor appointed by will, executor's executor, father's father's executor, and finally, father's father's executor).

<sup>163</sup> Islamic Family Law (Federal Territories) Act, §§ 91, 92.

<sup>164</sup> L. Teoh, 'Understanding Islamic Jurisprudence', *News*, COUNCIL OF CHURCHES OF MALAYSIAN (2003).

<sup>165</sup> See Refugee Review Tribunal, *supra* note 156.

<sup>166</sup> *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor*, 2 Malayan L. J. 648, 648-660 (HC 2004).

Court held that Shamala maintained custody over the children because the Syariah Court does not have jurisdiction over a non-Muslim; nevertheless, the Civil Court also does not have jurisdiction to declare the father's conversion of the minors to Islam nullified because that falls exclusively under the Syariah Court's jurisdiction.<sup>167</sup> The final judgment in 2004 granted joint custody to the mother and father, but required that the mother not feed the children pork or attempt to teach them her faith.<sup>168</sup> Consequently, due to the development of child welfare in Malaysia, courts must balance both the jurisdiction over these issues and the best potential solution for the issue at hand.

Overall, Islamic law developed from the Qur'an and Sunnah as laws from God and the Prophet Muhammad with the objectives of education, justice, public good, and not creating any future harm.<sup>169</sup> Within Malaysia, Islamic child welfare laws were further codified in the Islamic Family Law (Federal Territories) Act to invoke the objectives of furthering Islamic religion and culture onto the future generations while providing for children's physical and emotional needs.<sup>170</sup> Therefore, due to the continual focus on the Qur'an, Sunnah, and objectives of Islam within Islamic law, child welfare highlights the idea of children as a blessing, affectionate parent-child relationships, and the parental duty to provide for their physical and emotional needs.<sup>171</sup>

#### **IV. Civil Child Welfare Laws of Serbia**

##### **A. History of Serbia's Civil Law**

Adopted in 1844 and modeled after Austria's Civil Code, Serbian Civil Code was the fourth civil code to be written in Europe.<sup>172</sup> The Civil Code followed the adoption of Serbia's constitution in 1835 and their struggle for freedom from the Ottoman Empire's occupation.<sup>173</sup> The Civil Code incorporated specific

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<sup>167</sup> *See id.*

<sup>168</sup> *See id.*

<sup>169</sup> H. PATRICK GLENN, *supra* note 95, at 181-86.

<sup>170</sup> *See generally* Islamic Family Law (Federal Territories) Act (emphasizing the variety of articles within the Act calling for child welfare in both physical and emotional needs).

<sup>171</sup> H. PATRICK GLENN, *supra* note 95, at 181-86.

<sup>172</sup> Emilija Stankovic, *The Serbian Civil Code- Fourth Codification in Europe*, UNIVERSITY OF SOUTH AFRICA PRESS 881, 881 (2014) <https://www.scielo.org.za/pdf/funda/v20n2/36.pdf> (following the civil codes of France, Austria, and Holland).

<sup>173</sup> *Id.* at 884.

features of traditional Serbian family and social relationships to create their civil family and inheritance law.<sup>174</sup> Jovan Hadzic drafted most of the code and was an influential figure in the drafting of the Serbian Criminal Code of the same year.<sup>175</sup> Both pieces of legislation demonstrate heavy influences of Roman and Byzantine law, cultural traditions, and the Austrian Civil Code of 1811.<sup>176</sup> Critics have argued that the code was heavily modelled on Austria's code without substantial consideration to Serbian social and historical developments, except in family law.<sup>177</sup> Nevertheless, the code contained 950 articles and remained in effect until 1946.<sup>178</sup> Once it went out of effect in 1946, these codes continued to be used until the adoption of separate laws for individual fields within civil law.<sup>179</sup> Following the secession of Montenegro from the Republic of Serbia in 2003, Serbia attained its current borders and government structure in 2006.<sup>180</sup> The newly independent state adopted a new constitution in October of 2006 with a preamble, 206 articles, 11 parts, and 2 amendments.<sup>181</sup> Additionally, the Serbian government drafted a Civil Code in 2010 for codification, but as of 2023, the code is not enacted.<sup>182</sup>

Furthermore, under the Ministry of Justice, Serbia's current court system creates courts within two categories, either general jurisdiction courts, called Basic Court, High Court, Appellate Court, and Supreme Court of Cassation, or courts of specialized jurisdiction, called Administrative Court, Misdemeanor Court, Misdemeanor Appellate Court, Commercial Court, and Commercial Appellate Court.<sup>183</sup> All civil cases, such as property disputes, family law, employment cases, or common disputes

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<sup>174</sup> *Id.* at 881.

<sup>175</sup> *Id.* at 881-82.

<sup>176</sup> *Id.* at 881-82.

<sup>177</sup> Emilija Stankovic, *supra* note 172, at 886.

<sup>178</sup> Marija Ampovska & Risto Ilioski, *The Process of Civil Law Codification in Western Balkans*, 347:340.134 УДК. (JS.UGD.EDU) 5, 10 (Jan. 10, 2019).

<sup>179</sup> *Id.*

<sup>180</sup> Linda Tashbook & Marko Zivanov, *Legal Research in Serbia*, GLOBALEX (2020)

<https://www.nyulawglobal.org/globalex/Serbia1.html#:~:text=Currently%2C%20Serbia%20doesn't%20have,version%20is%20still%20not%20enacted.>

<sup>181</sup> *Serbia's New Constitution: Democracy Going Backwards*, INTERNATIONAL CRISIS GROUP (Nov. 8, 2006) <https://www.crisisgroup.org/europe-central-asia/balkans/serbia/serbia-s-new-constitution-democracy-going-backwards>; *Serbia 2006*, CONSTITUTE (2006) [https://www.constituteproject.org/constitution/Serbia\\_2006](https://www.constituteproject.org/constitution/Serbia_2006).

<sup>182</sup> Linda Tashbook & Marko Zivanov, *supra* note 180; *Preliminary Draft of the Civil Code of the Republic of Serbia – Text of Regulations*, PARAGRAF (2019) [https://www.paragraf.rs/nacrti\\_i\\_predlozi/280519-prednacr-gradjanskog-zakonika-republike-srbije.html](https://www.paragraf.rs/nacrti_i_predlozi/280519-prednacr-gradjanskog-zakonika-republike-srbije.html).

<sup>183</sup> *Id.*

between individuals, are heard by the Basic Courts.<sup>184</sup> When individuals appeal cases, the cases typically go from Basic Courts to the High Courts.<sup>185</sup> Therefore, Serbian civil law principal sources include the Serbian Constitution, statutes, ministerial laws, and learned commentary, while using the split courts of general or specialized jurisdiction.<sup>186</sup>

## B. Child Welfare Laws in Serbia's Civil Law

In 2005, Serbia adopted a new Family Law Act that focused on the rights of children; however, it never explicitly defined family.<sup>187</sup> The Act states that it governs “marriage, parent-child relations, adoption, fosterage, guardianship, support, property relations in the family, protection from violence, [and] proceedings regarding family relations.”<sup>188</sup> While the Act never prohibits child abuse, article six articulates that it is the state’s duty to protect and promote the rights of all children.<sup>189</sup> Furthermore, children are guaranteed the right to be taken care of by their parents, regardless of their status as an adopted child or a child born out of wedlock.<sup>190</sup> Similarly, if the child does not have parental care, the state obtains the duty of providing equivalent protection.<sup>191</sup> Moreover, social service is in charge of guardianship authority for the state.<sup>192</sup>

In promoting child welfare, article twelve articulates the prohibition of domestic violence in accordance with state statute and article sixty-eight protects against any form of physical, economic, sexual, or psychological exploitation of children.<sup>193</sup> Similarly, article twenty-five prohibits marriage between an adult and minor under eighteen, unless the court concludes a minor who is at least sixteen maintains the necessary maturity for marriage.<sup>194</sup> Moreover, if the state determines it is in the best interest

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Linda Tashbook & Marko Zivanov, *supra* note 180.

<sup>187</sup> Marija Petrović, Nevena Vučković Šahović, & Ivana Stevanović, *Child Rights in Serbia in 2005*, CHILD RIGHTS CENTER (2006) [https://cpd.org.rs/wp-content/uploads/2017/11/prava\\_deteta\\_u\\_srbiji\\_2005\\_en.pdf](https://cpd.org.rs/wp-content/uploads/2017/11/prava_deteta_u_srbiji_2005_en.pdf).

<sup>188</sup> Family Law Act, Part One Basic Provisions, Art. 1 (2005) <https://azil.rs/en/wp-content/uploads/2017/04/family-act-serbia.pdf>.

<sup>189</sup> *Id.* at Art. 6.

<sup>190</sup> *Id.* at Art. 7.

<sup>191</sup> *Id.* at Art. 8.

<sup>192</sup> *Id.* at Art. 14.

<sup>193</sup> *Id.* at Art. 12, Art. 86.

<sup>194</sup> *Id.* at Art. 25.



of the child to no longer live with their parents, then a social service institution will step in; however, at fifteen or older, the child can choose where they would like to live, including with parents the state may have previously deemed not in the child's best interest.<sup>195</sup> When a child is in the custody of a state institution, the Court can limit the contact between the child and either or both of their parents if the contact is not in the child's best interest, until the age of fifteen.<sup>196</sup> Analogously, children have a right to education until the age of fifteen, at which point they may decide whether to attend secondary school.<sup>197</sup> In addition to listing children's positive rights, the Act also articulates the duties of parents raising children. Parents have the duty to not leave children of pre-school age unsupervised, not subject their children to humiliating actions and punishments, provide their children with an elementary education, and create a relationship based on love, trust, and respect to protect the best interests of a child.<sup>198</sup>

Overall, the Act calls for parents to maintain their duty to take care of the child, including custody, upbringing, education, legal representation, and maintenance. Therefore, if a parent fails to meet those duties or exploits their status as parent by abusing the child in any capacity, instigating, or accosting the child into criminal actions, neglecting their child's needs, endangering their child, or creating unlivable conditions, the court can deprive or temporarily deprive the parent or parents of their rights and duties as parents.<sup>199</sup>

Additionally, unlike Myanmar's chthonic law adoptions, only minors can be adopted under Serbia's civil law, and in order to be adopted, the child must be at least three months old.<sup>200</sup> However, Serbia's Family Law Act places restrictions on who can adopt and who can be adopted. For instance, a blood relative "in [a] straight line may not be adopted."<sup>201</sup> Therefore, brothers cannot adopt sisters and sisters cannot adopt brothers, even if they only share one biological parent.<sup>202</sup> Also, adult guardians cannot adopt

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<sup>195</sup> Family Law Act, Part Two Child Under Parents Care, Art. 62.

<sup>196</sup> *Id.* at Art. 63.

<sup>197</sup> *Id.* at Art. 65.

<sup>198</sup> *Id.* at Art. 72-74.

<sup>199</sup> *Id.* at Art. 84-85.

<sup>200</sup> *Id.* at Art. 93.

<sup>201</sup> Family Law Act, Part Four Adoption, Art. 95.

<sup>202</sup> *Id.*

their child wards from the court.<sup>203</sup> Furthermore, the Act requires any living parents' consent before the child can be adopted and they have thirty days to rescind their consent for the adoption.<sup>204</sup> Adoptions with children who previously lived with biological parents who have been fully deprived of their parental rights or parents who have failed to create livable conditions within one year of their child's life do not require parental consent for the adoption to proceed.<sup>205</sup> If the child is under the care of the state, the guardian must consent to the adoption and if the child is over ten years old, the child themselves can consent to the adoption.<sup>206</sup>

Under Serbian civil law, anyone eighteen or older may adopt, but there is a preference for individuals between twenty-one and forty-five and if someone older than forty-five or younger than eighteen wishes to adopt, they must get approval from the minister of family protection affairs.<sup>207</sup> Additionally, any potential adopter cannot be deprived of their parental rights via court ruling, cannot be the spouse of someone who is deprived of their parental rights via court, cannot suffer from any illness that would inhibit taking care of the child, and they cannot be the spouse of someone who suffers from any illness that would detrimentally effect the child.<sup>208</sup> Once the adoption is complete, the biological parents lose their parental rights and duties and the adopter is then given the parental duties and rights of taking care of the child, including custody, upbringing, education, legal representation, and maintenance.<sup>209</sup> However, adoptions can also be terminated and nullified under the Family Law Act. An adoption can be terminated if the adopters or the child die.<sup>210</sup> In contrast, the adoption will be nullified and void if the adoption failed to meet the requirements or was only given under duress or error.<sup>211</sup> Once the adoption is terminated or

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<sup>203</sup> *Id.* at Art. 96-97.

<sup>204</sup> *Id.* at Art. 98.

<sup>205</sup> *Id.* at Art. 99.

<sup>206</sup> *Id.* at 100-01.

<sup>207</sup> Family Law Act, Part Four Adoption, Art. 103.

<sup>208</sup> *Id.* at Art. 104.

<sup>209</sup> *Id.* at Art. 107-08.

<sup>210</sup> *Id.* at Art. 109.

<sup>211</sup> *Id.* at Art. 110-11.

found nullified, the state and guardianship authority gain custody of the child until they reach eighteen or are adopted again.<sup>212</sup>

Unlike the requirements of adopters, potential foster parents or guardians have a substantially lower bar to meet. Fostering is not designated for a specific amount of time, but instead can be as short as a weekend or holiday to as long as months or years.<sup>213</sup> Moreover, fostering could be free or with consideration, dependent on the individual's situation and the instructions from the minister competent for family protection affairs.<sup>214</sup> Only minors may be placed into foster care and a foster parent is analyzed based on their psychophysical, educational, socio-economic, and legal status.<sup>215</sup> Additionally, because the Family Law Act calls for siblings to remain together in foster care, the social welfare organization must discern if a foster parent can take all the siblings, as required by the Act.<sup>216</sup> Similar to the adoption rules under the Act, to foster, the fostering guardian must obtain parental consent or if the child is older than ten, the child can consent to fostering.<sup>217</sup>

General eligibility for foster parents requires that the individual be in the child's best interest and able to care for their needs.<sup>218</sup> The best interest of the child standard for foster parents matches the standard for biological and adoptive parents.<sup>219</sup> Foster parents have a duty to provide for the child by protecting them, educating them, preparing them for adulthood, maintaining personal contact, and respecting them.<sup>220</sup> Also analogous to biological and adoptive parents or guardians, fostering can be terminated for a variety of reasons. If the child ages out of the system at eighteen, acquires full business capacity before eighteen, is adopted, the child or foster parent die, or the foster parent fails to meet the foster agreement, fostering can

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<sup>212</sup> *Id.* at Art. 112.

<sup>213</sup> Family Law Act, Part Four Fostering, Art. 113.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at Art. 114-15.

<sup>216</sup> *Id.* at 116.

<sup>217</sup> *Id.* at 117-19.

<sup>218</sup> Family Law Act, Part Four Fostering, Art. 121.

<sup>219</sup> *Id.* at Art. 122-23.

<sup>220</sup> *Id.*

be terminated.<sup>221</sup> A guardian can also rescind a fostering agreement if the fostering fails to meet the child's best interest and place them with a parent or a guardian depending on the situation.<sup>222</sup>

Guardians must be individuals with the ability to perform the duties of guardianship and have consented to taking on the role of a guardian.<sup>223</sup> Additionally, like guardianship under biological parents, adoptive parents, and foster parents, children over the age of ten can have a say in who is appointed by the court as their guardian.<sup>224</sup> A guardian can be removed and/or will not be appointed by the court if they are fully or partially deprived of business capacity or parental rights, their interests are or become adverse to the child's best interests, and a previous personal relationship exists between the guardian and the ward that would inhibit the guardian from performing their duties.<sup>225</sup> Guardians can be appointed to multiple children, if it is in the best interest of all involved.<sup>226</sup> As the guardian, they are tasked with looking after the child's welfare and best interest. In doing so, they may terminate or change the child's school, assist in choosing the child's job, intervene in medical decisions, assisting with the minor's legal matters, and representing the minor however else necessary with permission from the guardianship authority.<sup>227</sup>

In addition to looking after the child's interests, guardians must submit reports of their actions on behalf of the minor and the minor's housing conditions, health, education, and personality.<sup>228</sup> The guardian will be compensated for their work, primarily from the child's income.<sup>229</sup> If the guardian, at any time, begins abusing or neglecting their role, guardianship authority may relieve them of their obligations within thirty days of establishing their inability to continue as guardian or within sixty days of being requested to be relieved by the guardian.<sup>230</sup> The ward or minor can file a complaint against their guardian and the guardianship authority must respond to the complaint within eight days of its receipt.<sup>231</sup> Moreover,

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<sup>221</sup> *Id.* at Art. 124.

<sup>222</sup> *Id.* at Art. 125-26.

<sup>223</sup> *Id.* at Part Six Guardianship, Art. 127-29.

<sup>224</sup> Family Law Act, Part Six Guardianship, Art. 129.

<sup>225</sup> *Id.* at Art. 131.

<sup>226</sup> *Id.* at Art. 132.

<sup>227</sup> *Id.* at Art. 140-41.

<sup>228</sup> *Id.* at Art. 145.

<sup>229</sup> *Id.* at Art. 146.

<sup>230</sup> Family Law Act, Part Six Guardianship, Art. 136.

<sup>231</sup> *Id.* at Art. 340.

guardianship is terminated once the minor turns eighteen, the minor acquires full business capacity, the minor is adopted, if the minor returns to their parents, or if the child dies.<sup>232</sup> Unlike biological, adoptive, or foster parents, if the guardian dies, the guardianship does not end but is instead assigned to a new guardian.<sup>233</sup>

Moreover, along with explicitly prohibiting domestic violence against children in article twelve, article two hundred further expounds upon prohibiting domestic violence of any kind, including physical, sexual, or mental abuse, against any family member including parents, spouses, former spouses, children, or any other blood relative.<sup>234</sup> In response to acts of domestic violence, the court can enact protective measures such as temporary or permanent restraining orders, evicting individuals from the family home, and/or mandatory treatment or counseling, depending on the circumstances.<sup>235</sup> Additionally, any measures put into place by the court can be prolonged based on their duration, if necessary, or can be terminated prematurely if the reasons for the protective measures cease to exist.<sup>236</sup> Overall, the Family Law Act proscribes rules and regulations regarding marriage, child and parent relations, adoptions, foster care, and protection against domestic violence.<sup>237</sup> This Act created the basis for furthering children's rights, placing child welfare at the forefront of Serbia's civil law agenda and requiring the state to take steps to protect children from abuse and neglect.

In 2006, the Serbian Constitution articulated the rights of children, which include the right to a name and protection from psychological, physical, economic, or any other type of abuse, regardless of their status as traditional, guardian, foster, adopted, or a child born out of wedlock.<sup>238</sup> Analogous to the Family Law Act, the Serbian Constitution also highlights parents' duties to educate, support, and protect their

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<sup>232</sup> *Id.* at Art. 148.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at Part Nine Protection from Domestic Violence, Art. 200.

<sup>235</sup> *Id.* at Art. 201.

<sup>236</sup> Family Law Act, Part Nine Protection from Domestic Violence, Art. 202-03.

<sup>237</sup> *See generally* Family Law Act (2005).

<sup>238</sup> *Serbia Constitution*, Art. 64 Rights of the Child, CONSTITUTE (2006) [https://www.constituteproject.org/constitution/Serbia\\_2006](https://www.constituteproject.org/constitution/Serbia_2006).

children and the court's ability to revoke any parental rights if they fail to uphold the set standard.<sup>239</sup> Moreover, the Constitution states that the municipality shall be responsible for upholding and enforcing child welfare.<sup>240</sup> Following the Constitution and Family Law Act, Serbia also enacted the 2011 Social Welfare Act based on the United Nations Convention on the Rights of the Child ("CRC").<sup>241</sup> The CRC is considered one of the most internationally commended achievements in child welfare because its protections range from a broad shield of the best interests of the child and allowing children to form and express their own views, to more specific protections like the right to education.<sup>242</sup> In total, the CRC contains fifty-four articles emphasizing the principles of non-discrimination, best interests, survival, and views of children for the first time in an international convention.<sup>243</sup> In 2000, the United Nations General Assembly implemented an additional two protocols to the CRC that focused on protecting children from sexual exploitation and joining armed conflicts.<sup>244</sup> Again, in 2011, the United Nations General Assembly adopted another Optional Protocol to the CRC that created a procedure for filing violations of the CRC.<sup>245</sup>

Serbia's Social Welfare Act provides for the social welfare of children by ensuring social protection services that focus solely on children's health, security, and living conditions.<sup>246</sup> The Act also requires and funds the creation of services and institutions, including services providing for children who have experienced abuse or neglect and the regulatory institution the Chamber of Social Welfare.<sup>247</sup> The Chamber of Social Welfare employs licensed professionals and service providers in social welfare, such as case managers, foster care advisers, care workers, counsellors, and lawyers.<sup>248</sup> Article 40 creates groups

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<sup>239</sup> *Id.* at Art. 65 Rights and Duties of Parents.

<sup>240</sup> *Id.* at Art. 190 Competence of Municipality.

<sup>241</sup> PAT DOLAN & NICK FROST, CHILD WELFARE AND SERBIA ON THE PATH TOWARDS EUROPEAN INTEGRATION FROM: THE ROUTLEDGE HANDBOOK OF GLOBAL CHILD WELFARE 1, 179 (Nevenka Žegarac, ed., Feb. 16, 2017); Law on Social Welfare, Official Gazette of RS, No. 24 (2011).

<sup>242</sup> See General Assembly, *Convention on the Rights of the Child*, United Nations (Nov. 20, 1989) <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

<sup>243</sup> See *id.*

<sup>244</sup> See *Timeline of Child Rights*, UNICEF (2015) <https://www.unicef.org/child-rights-convention/history-child-rights>.

<sup>245</sup> See *id.*

<sup>246</sup> PAT DOLAN & NICK FROST, *supra* note 241, at 179.

<sup>247</sup> *Id.* at 179-80.

<sup>248</sup> *Id.* at 180.

for assessment and planning services to highlight the needs of guardians, foster parents, and adoptive parents.<sup>249</sup> The funding for welfare institutions, adoption, and foster care typically comes from the state budget, while local governments fund required services, such as shelters and counseling services.<sup>250</sup> Moreover, it also creates daily services for daycare and drop-in shelters, in addition to the counseling and accommodation services.<sup>251</sup> Therefore, the Law on Social Welfare improved the protection of children by developing a network of community services for children. As of 2016, Serbia developed a network of centers for social work in every municipality in addition to some residential institutions across Serbia.<sup>252</sup>

Due to civil law's focus on individual rights and separation of secular and religious law, Serbia's child welfare laws focus on the children's and parent's rights, or positive rights, that lead to a life without abuse or neglect. Moreover, like most civil law that is written in black letter law, child welfare laws were codified through the Family Law Act, the Serbian Constitution, and the Social Welfare Act, creating rigid legal control of the issue and subsequent punishment for failing to adhere to the set legal standard. Consequently, Serbian child welfare laws highlight the idea of children having the right to education, housing, basic needs, and a life without abuse or neglect.

## **V. Conclusion**

While superficially child welfare laws seem to have developed in the Western world with the League of Nations adopting the Geneva Declaration on the Rights of the Child in 1924 and the creation of New York Children Aid Society in 1850s,<sup>253</sup> the child welfare laws in Myanmar's chthonic system, Malaysia's Islamic system, and Serbia's civil system demonstrate that these societies have historically valued similar goals and ideals of how to raise and protect children. While Serbia was the first to have codified child welfare laws with their 1844 Serbian Civil Code that developed into the 2005 Family Law Act, chthonic

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> PAT DOLAN & NICK FROST, *supra* note 241 at 182.

<sup>253</sup> See *Timeline of Child Rights*, *supra* note 244; see also Genevieve Carlton, *Mary Ellen Wilson and the 19<sup>th</sup>-Century Child Abuse Case that Changed History*, ALL THAT IS INTERESTING (Dec. 15, 2022) <https://allthatsinteresting.com/mary-ellen-wilson>,

tradition provides comprehensive oral rules regarding child welfare, such as parental duties, child maintenance, inheritance, custody, adoption, and financial support. Chthonic tradition focuses on preserving community peace and harmony within familial relationships. Notably, these chthonic child welfare laws place a heightened focus on inheritance and the importance of inheritance being in the child's best interest, in a way the other two systems did not. Similar to the ideals behind protecting children from neglect and abuse, this legal system framed inheritance as a way to set children up for a successful future life and ability to take care of their own future children. Consequently, while both the Islamic Malaysian and civil Serbian system had laws about inheritance and the ability to inherit, chthonic law categorizes such laws as a necessary function of child welfare. Nevertheless, prominent values within chthonic law also became apparent in the other two systems.

For instance, both the Islamic legal system and the chthonic legal system emphasize the importance of close and warm family relationships. Consequently, both systems focus on the public good of the community and creating a family environment that supports that public good. However, the Malaysian Islamic system intertwines the idea of public good with religion and the continued practice and spread of Islam, while Myanmar's chthonic law considers public good to be promoting the welfare of the community. Moreover, while Myanmar's child welfare law focuses on inheritance in alignment with their objectives of protecting the community and its future, the Malaysian Islamic law system requires parental duties such as praying for children to achieve the objective of promoting and protecting the public good, which is analogous to promoting Islam. Within Islamic law, the object of justice is frequently viewed similarly to karma, meaning that things unfold as they are meant to because there is a right and a wrong. Many of the child welfare and Sunnah Islamic laws that illustrate the consequences, including both legal action and facing hell's fire in the afterlife, demonstrate this idea of justice. However, unlike Serbian civil law and Myanmar chthonic law, the Islamic child welfare laws carry traditional views of gender roles within society.

With all their differences, the three systems similarly place a large emphasis on adoptions and who can adopt under law. While each system has different requirements for what constitutes the child's best



interest when it comes to adoption, all three systems highlight the goal of obtaining what's best for the child. For instance, Myanmar differentiates between diverse types of adoptions; Kittima adoptions require the child be adopted exclusively by Burmese Buddhists, while children can be adopted under Apatitha adoptions by individuals from other countries and other faiths. However, Kittima adoptions retain that critical right to inherit and Apatitha adoptions do not. Analogously, Malaysian Islamic law requires the adopter(s) to be of the Islam faith with good moral character. Notably, Serbian's civil requirements differ. Instead of a certain nationality or religious faith, in order to adopt under Serbian civil law, the adopters cannot have a previous court holding of being unfit to parent. Instead of the community, civil law, as demonstrated through child welfare laws, focuses on individuals' rights, and separated secular and religious law. With the hierarchical and formalized Serbian system, local and traditional ways of life become subject to this legal regulation, in contrast to Myanmar's more flexible system.

Notably, while there are distinctions between the individual systems' goals and specific laws to achieve those goals, all three systems, at least within child welfare laws, have significant overlap. This could be because of the history of colonization that dominated all three countries, the continued globalization of the world, or because ultimately, these laws seek to codify morality and define abuse and neglect in a way that is universally understood. What is seen as moral, just, and of paramount importance to a child's wellbeing is directly influenced by cultural, historical, and religious expectations, as well as by the separation- or lack thereof- of religion and matters of the state. While each culture, religion, and country have different ways to define the best interest of the child, they share the common goal of codifying and enforcing how parents should treat their children so that they are healthy and well-adapted members of society.