

ISLAMIC LAW AND ELDER CARE IN THE CENTRAL ASIAN *EDGEN* SYSTEM

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ABSTRACT

There is no uniform Islamic law of elder care. Instead, the Qur’ān and Hadith, the fundamental building blocks of Islamic law, create general obligations to support aged parents that each Islamic society must specifically produce in practice. Before Islam swept Central Asia, nomads developed an elder-care tradition that thrives to this day in the former Soviet States of Kazakhstan (population 17 million), Kyrgyzstan (5.7 million), Tajikistan (8 million), Turkmenistan (5.2 million), and Uzbekistan (30 million). In many instances, Islamic law inclines toward adopting local customs and traditions so long as these practices do not conflict with fundamental Islamic law principles. Islamic law’s openness to local influence is stymied in the Central Asian example because the *edgen* system that undergirds Central Asian elder care directly conflicts with the Islamic law of inheritance allotments. This article explains the *edgen* system and how it conflicts with Islamic law. A prominent contemporary Central Asian Islamic scholar’s legal opinions illustrate a device in Islamic law called *hiylah*, or a legal ruse. Through this ruse, Central Asian families are able to maintain traditional elder care practices while also complying with Islamic law. Nevertheless, as the article concludes, the Central Asian elder-care system is based on unpaid female labor and female disinheritance. Female inheritance is a central feature of Islamic law. Yet, the *edgen* tradition puts women at a disadvantage in terms of labor and inheritance that Islamic law seeks to avoid.

INTRODUCTION: ELDER CARE AND THE *EDGEN* IN ISLAMIC CENTRAL ASIA

The first challenge in writing about the Islamic law of elder care is discovering an Islamic law of elder care. In the Qur’ān and well-proven hadith,¹ there are relatively few general references to elders outside of a kinship relationship.² Thus, it is difficult to say that Islamic law contains well-developed explicit doctrines regarding elder care outside of a general duty to give elderly people

1 The most prized source of Islamic law is a direct pronouncement from the Qur’ān. Next in terms of weight of evidence is a rule based on the words or actions of the Prophet known as the hadith and the sunnah. The term *hadith* is based on the three-letter root *h-d-th*, meaning “to pronounce” or “speak.” The term *sunnah* is based on the three-letter root *s-n-n*, meaning “to act” or “perform.” Together, sunnah and hadith make up the prophetic traditions. An entire portion of Islamic law known as *isnād* is devoted to the proper proving of hadith and sunnah. Proving is effected by showing a direct line from the reporter to the Prophet. For a further discussion of the sources of Islamic law and their uses, see Wael Hallaq, *Shari’a: Theory, Practice, Transformation* (Cambridge: Cambridge University Press, 2009), particularly chapter 1; see also, Muhammad Sallām Madkur, “Introduction to Islamic Law,” trans. Beverly Moran and Rahimjon Abdugafurov (unpublished manuscript, 2007). A further discussion of the sources of Islamic law is below in the section “Islamic Law of Elder Care and Inheritance.”

2 The following are prophetic traditions about the elderly in general, that is, without reference to kinship relations:

respect and poor people charity. Collections of Islamic legal opinions, or *fatwā*, opine on elder care under two primary topic headings: (1) *nafaqah*, the allotment of financial resources and caring for children, wives, parents, and grandparents; and (2) *‘ilm al-farā’id*, the science of inheritance law. In both of these cases, however, elder care is incidental to the larger concerns, not the focus of the collected opinions.

Although a legal system might appear to have nothing to offer on a particular question, in our case, elder care, people often find ways to use whatever the legal system offers in order to achieve their goals. An example from the United States might illustrate this point. Prior to the creation of elder law regulations, social security, and Medicaid, elders in the United States who needed care often promised younger people a future bequest in exchange for that care.³ The elderly were able to make the bargain of present care for future inheritance because Anglo-American law allows testators to bequeath their property without constraint.

Islamic law’s strict inheritance system seemingly forecloses the popular option in Anglo-American law of asking a younger person, whether relative or friend, to provide care to an elder today in exchange for the promise of future inheritance from the older person’s estate in the future. In contrast to Anglo-American law, Islamic law denies testators free transfer. Instead, the Qur’ān allots at least two thirds of a Muslim’s estate without regard to testator intent. Thus, although the term *Wasīyyah* is often translated into English as the legal equivalent of “will,” the concept of a “last will and testament” as understood in Anglo-American law has limited application in the Islamic law setting.⁴ Rather than emphasize testator intent, Islamic law binds the faithful to allot their possessions in specific amounts, depending on kinship relationship.⁵

Anas b. Malik narrated: “An older man came to talk to the prophet, and the people were hesitant to make room for him. The Prophet said: ‘He is not one of us who does not have mercy on our young and does not respect our elders.’”

Muhammad ‘Isāal-Tirmidhī, *Jāmi’ al-Tirmidhī* (Riyadh: Dar al-Salam, 2007), 4:37, chapter 15, hadith number 1919.

Al-Hasan narrated from Abu Hurayrah that the Prophet said: “The rider gives the *Salam* to the walking person, and the walking person to the sitting person and the few to the many.” Ibn Al-Muthanna added in his narration “And the young one gives the *Salam* to the elder.”

Ibid., 5:95, chapter 14, hadith number 2703. Other sources refer to the oldest men leading prayers and speaking first at gatherings.

3 See, for example, Hendrik Hartog, *Someday All This Will Be Yours: A History of Inheritance and Old Age* (Cambridge: Harvard University Press, 2012).

4 For more details, see Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 173–74.

5 Qur’ān 4.11 and 4.12 directly relate to inheritance:

Allah charges you concerning (the provision for) your children: to the male the equal of the portion of two females, and if there be women more than two, and then theirs is two-thirds of the inheritance, and if there be one (only) than the half. And to his parents, a sixth of the inheritance, if he has a son; and if he has no son, and his parents are his heirs, then to his mother appertains the third; and if he has brothers, then to his mother appertains the sixth, after any legacy he may have bequeathed, or debt (he has been paid). Your parents or your children: you know not which of them is nearer unto you in usefulness. It is an injunction from Allah. Lo! Allah is Knower, Wise. (4.11)

And unto you belongs half of that which your wives leave, if they have no child; but if they have a child then unto you the fourth of that which they leave, after any legacy they may have bequeathed, or debt (they may have contracted, has been paid). And unto them belongs the fourth of that which you leave if you have no child, but if

Yet, despite the obstacles created by Islamic law's strict allotment system, devout Muslims throughout Central Asia⁶ routinely obtain their long-term elder care through keeping their youngest son, known as the *edgen*, at home, where he supports his parents throughout their retirement years, even paying for their funeral expenses and a series of afterlife rituals.⁷ In exchange for their care, parents compensate the *edgen* by leaving him all their property at their death despite the Qur'ānic stipulation that each child receive strict inheritance shares—with sons receiving twice the allotments of daughters.⁸

In order to examine this alternate system of inheritance, in place in Central Asia since at least the time of Alexander the Great, in the fourth century BCE, this article examines fatwās issued by and to contemporary Uzbek Muslims. These fatwās illustrate how Central Asian Islamic jurists employ a legal method known as *ḥiyālah*, or legal ruse, in order to exploit the difference in Islamic law between a lifetime gift and inheritance. Through this particular legal maneuver, Central Asians maintain a pre-Islamic system of elder care that is, nonetheless, acknowledged as Islamic by all involved. The fatwās bolster a system of elder care that is nominally the responsibility of the youngest son, the *edgen*, but in ways that arguably end up placing women at a distinct disadvantage.

The contemporary Central Asian fatwās and the elder care practices presented in this article raise at least three questions of importance to Islamic law:

1. Is Islamic law static and uniform? Inquiry into Islamic law as static or dynamic, diverse or uniform, goes beyond the question of how Islamic law treats elders. The question of whether Islamic law is static is part of a controversy among scholars and jurists of Islamic law about the so-called closing of the doors to *ijtihād*, which, as detailed below, is creative use of evidentiary sources.⁹ The view that Islamic law stopped accepting creativity and interpretation came to the United States through Joseph Schacht's *Introduction to Islamic Law*, which served as the standard understanding of Islamic law among American legal academics for much of the last half of the twentieth century.¹⁰ Beginning at the end of the twentieth century, the belief that Islamic law closed the doors to *ijtihād* was disputed by many authors, including Wael Hallaq. Since then a significant part of many contemporary writings on Islamic law address the question of whether the article's findings support the idea of a closed legal system or give evidence that Islamic law is not static.

you have a child then the eighth of that which you leave, after any legacy you may have bequeathed, or debt (you may have contracted, has been paid). And if a man or a woman has a distant heir (having left neither parent nor child), and he (or she) has a brother or a sister (only on the mother's side), then to each of the two (the brother and the sister) the sixth, and if they be more than two, then they shall be sharers in the third, after any legacy that may have been bequeathed or a debt (contracted) not injuring (the heirs by willing away more than a third of the heritage) has been paid. A commandment from Allah. Allah is Knower, Indulgent. (4.12)

These and all subsequent quotations from the Qur'an are from Muhammad Marmaduke Pickthall's translation, *The Meaning of the Glorious Qu'ran*, rev. ed. (Beltsville: Amana Publications, 2006), unless otherwise noted.

6 Central Asia refers to the five former Soviet Republics of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan. Each of these nations has a majority-Muslim population primarily belonging to the Ḥanafī school of Sunni Islam. This article takes as its case study Uzbekistan.

7 See Proceedings of O.S.R.A.S., v. XIV, 207, as cited in Valentin A. Riasanovsky, *Fundamental Principles of Mongol Law* (Bloomington: Indiana University Publications, 1965), 39. The youngest son becomes responsible for taking care of parents and their life-cycle ceremonies, including funeral and funeral ceremonies, even after they pass away. Some such ceremonies could continue for years.

8 Ibid.

9 See discussion in Schacht, *Introduction to Islamic Law*, 70–73.

10 Ibid. 70.

In the context of inheritance allotments, the question of whether Islamic Law is uniform arises from a fundamental rule: where the Qur’ān and hadith are clear, every Muslim is bound. Islamic law cannot simply ignore regional and cultural differences between practitioners where the Qur’ān and hadith are in accord. Instead, if one set of Muslims uses one set of rules for inheritance (or any other directive contained in the Qur’ān and hadith) and another group applies a different formula, those differences require explanation and reconciliation. Often this work is effected by a doctrine, called *‘urf*, that allows local practices to count as Islamic law when those practices do not conflict with Islamic law. As is discussed later, *‘urf* is not available to explain Central Asian elder-law practices.

2. Does the Central Asian practice of inheritance flowing to only one child—particularly the youngest son—demonstrate a creative legal practice, but one that undercuts other fundamental Islamic principles, such as inheritance rights for women?
3. How does the legal assignment of elder-care responsibility to the edgen square with the practical reality that most of the actual elder care work is done by women in Central Asian cultures, and what effects does this female work obligation have on women’s political rights and social equality?

This article presents the story of an elder-care system that has survived the advent and demise of some of the most powerful empires on earth through creative legal interpretation that reconciled Islamic law and local custom. But Central Asia achieved this reconciliation of pre-Islamic and Islamic law in part through the ongoing exploitation of female labor and the denial of female financial protection through inheritance rights.

ISLAMIC LAW OF ELDER CARE AND INHERITANCE

By the tenth century CE, Islamic jurists generally agreed that deriving legal opinions begins with the Qur’ān, so that opinions based on the Qur’ān have higher standing than those based on other sources of law.¹¹ If the Qur’ān is silent, then the jurist turns to the hadith, which are, as noted earlier, the traditions of the Prophet Muhammad.¹² When both the Qur’ān and hadith are unclear or silent, Islamic jurists developed other sources to support their legal opinions. As noted above, this process of deriving legal rules using sources other than clear statements from the Qur’ān and hadith is called *ijtihād*, or utmost effort. The term *ijtihād* describes the jurist’s creative use of approved evidentiary sources to produce a legal opinion.¹³

11 Madkur, “Introduction to Islamic Law,” 10–15.
 12 The hadith are classified based on their authenticity. The most authentic prophetic tradition has a complete chain of informants relating directly back to the Prophet (*isnād*). Traditions that lack a fully proven *isnād* are subject to doubt and might be rejected as distorted or fraudulent.
 13 The methods used by Islamic jurists to perform *ijtihād* include

- *ijmā’*, or community (if a community of Muslim scholars unanimously agreed upon a legal question, this agreement rises to the level of Qur’ān and Hadith);
- *qiyās*, or method of deriving law through analogy;
- *istihsān*, or making a decision based on what is good for the community at large;
- *maṣlaḥah al-mursalah*, or a common good;
- *‘urf*, or a local tradition;
- *shar’ un min qablinā*, or laws of religions before Islam (of Judaism and Christianity);
- *madhhab ṣaḥābi*, or opinions of the companions of the Prophet; and
- *ṣadd ḍara’i*, or preventing evil.

The Qur'ān imposes an obligation to respect the elderly without regard to kinship. Nevertheless, although all elders deserve respect, within the Qur'ān parents are the central object of a faithful Muslim's attention. Indeed, several Qur'ānic verses place respect and care for parents directly after obedience to God. Specifically, the Qur'ān states "Your Lord has decreed, that you worship none save Him, and (that you show) kindness to the parents. If one of them or both attain to old age with you, say not 'Fie' unto them nor repulse them, but speak unto them a gracious word."¹⁴ It further instructs readers to "be good to the parents and next of kin," to "show kindness unto your parents," and that "your Lord has commanded that you shall not serve (any) but Him, and goodness to your parents."¹⁵ These verses emphasize parental care as a sacred obligation, especially toward mothers, as in the passages that read:

And We have enjoined upon man concerning his parents—His mother bears him in weakness upon weakness, and his weaning is in two years—Give thanks unto Me and unto you parents. Unto me is the journeying.¹⁶

And We have commanded unto man kindness toward parents. His mother bears him with reluctance, and brings him forth with reluctance, and bearing of him and the weaning of him is thirty months, till, when he attains full strength and reaches forty years. He says: My Lord! Arouse me that I may give thanks for the favors wherewith You have favored me and my parents, and that I may do right acceptable unto You. And be gracious unto me in the matter of my seed. Lo! I have turned unto You repentant, and lo! I am of the Muslims.¹⁷

The hadith echo the Qur'ān by giving parents high status and making their care a sacred act that bears on the believer's corporeal and spiritual life.¹⁸ As in the Qur'ān, the hadith identify care of one's parents as a sacred responsibility akin to worship. One such hadith states:

Abdullah bin 'Umar said: "A man came to the Prophet seeking permission to go for *jihād*. So the Prophet said: 'Do you have parents (living)?' He said: 'Yes.' The Prophet said: 'Then it is for them that you should perform *jihād*.'"¹⁹

Another hadith makes the argument that a child's first duty is to her parents through a pointed repetition of the obligation:

Bahz ibn Hakim's grandfather said, "I asked, 'Messenger of Allah, to whom should I be dutiful?' 'Your mother,' he replied. I asked, 'Then whom?' 'Your mother,' he replied. I asked, 'Then whom?' 'Your mother,'

¹⁴ Qur'ān 17:23; Pickthall, p. 253.

¹⁵ Qur'an 75; Qur'ān 6:151; Pickthall pp. 126–27; and 17:23; Pickthall, p. 253.

¹⁶ Qur'ān 31:14; Pickthall, p. 388.

¹⁷ Qur'ān 46:15; Pickthall, p. 491.

¹⁸ This prophetic tradition, for instance, states:

Abu Umamah Al-Ansārī narrated from 'Abdullah b. Unays Al-Juhnī who said: "The Messenger of God said: 'Indeed among the worst of the major sins is *Shirk* [idolatry] with Allah, disobeying the parents, the false oath, and no one insists on taking an oath in which he swears, including the like of a wing of a mosquito (of falsehood) in it—except that a spot is placed in his heart until the Day of Judgment.'"

'Isā al-Tirmidhī, *English translation of "Jāmi' al-Tirmidhī,"* trans. Abu Khaliyl (Riyadh: Dar al-Salam, 2007), 5:334, chapters on the Qur'ānic exegesis, hadith number 3020.

¹⁹ *Ibid.*, chapter 2, hadith number 1671, 3:416.

he replied. I asked, ‘Then whom?’ ‘Your mother,’ he replied. I asked, ‘Then to whom should I be dutiful?’ ‘Your father,’ he replied, ‘and then the next closest relative and then the next.’”²⁰

Yet another hadith speaks of the duty in terms of the reward that fulfilling ones duty to parents brings, stating:

If any Muslim obeys God regarding his parents, God will open two gates of the Garden for him. If there is only one parent, then one gate will be opened. If one of them is angry, then God will not be pleased with him until that parent is pleased with him. He was asked, “‘Even if they wrong him?’ ‘Even if they wrong him’ he [the prophet] replied.”²¹

Thus, while the Qu’rān and hadith have much to say on the issue of respect for one’s elders and providing them good treatment and care, there are no specific provisions for how this care should be provided. As a result, different Muslim majority societies have developed different practices for ensuring that elders are cared for in their old age. In Central Asia, a pre-Islamic tradition of elder care was retained among the majority of the population following their adoption of Islam.

COMPETING INTERPRETATIONS: ISLAMIC LAW, CENTRAL ASIAN CUSTOMARY LAW, AND THE EDGEN

By the seventh century CE, Muslim armies had swept across North Africa to the West and the Indian subcontinent and China to the East.²² As is true of many colonial empires, these Muslim conquerors of Central Asia sometimes imposed their law and sometimes left local law in place.

20 Muhammad ibn Ismail al-Bukhari, *Imam Bukhari’s Book of Muslim Morals and Manners*, trans. Yusuf Talal DeLorenzo (Alexandria, VA: Al-Saadawi Publications, 1997), 2–3.

21 Ibid. The kind treatment of parents has rewards. One hadith reads:

“Every righteous child who casts a look of mercy and affection upon his parents shall be granted, for every look of his, rewards equivalent to that of an accepted *Hajj*.” Those around the Prophet questioned: “O’ Prophet of God! Even if he were to look at them a hundred times a day?” The Messenger of God (peace be upon him and his family) replied: “Indeed! God is the Greatest and Most Kind.” Just as pilgrimage cleanses a Muslim of his sins and enables him to go to Paradise, kind treatment of parents also ensures entrance into heaven. Thus, another *hādith* advises: “One, who follows the orders of God with regards to obeying parents, shall have two doors of Paradise opened up for him. And if there happens to be only one parent, one door of Paradise shall open up for him.”

Indeed, God himself derives pleasure from a parent’s contentment.

Ibid., internal citations omitted.

Riḍā is a popular concept among Muslims. For example, when a name of an important person, not a prophet, is mentioned, a Muslim should say “May God be pleased with him.” As it contains three Arabic root letters, *r*, *d*, and *w*, some scholars translate *Riḍā* as *pleasure*, others as *blessing*, or *contentment*.

This Qur’ānic verse shows God’s contentment with the faithful:

Their reward with their Lord is gardens of perpetuity beneath which rivers flow, abiding therein forever; Allah is well pleased with them and they are well pleased with Him; that is for him who fears his Lord.

Qur’ān 98:8. This quote is taken from *The Holy Qur’an*, trans. M. H. Shakir (New York, Tahrike Tarsal Qur’an, Inc., 1983), available through the University of Michigan Library at <http://quod.lib.umich.edu/k/koran/browse.html>.

22 See Albert Hourani, *A History of the Arab Peoples* (Cambridge: Belknap Press, 1991).

The edgen tradition, which existed before the Arab invasions of Central Asia, was one of the local customs that survived throughout the first four centuries of Muslim rule.²³

Four centuries after the Arab occupation, the Mongol invasion brought the Great Yasa to Central Asia and reinforced edgen tradition. The Great Yasa is known as the law of the Mongols,²⁴ and it is said to have come directly from Genghis Khan as he drove West through Asia bringing the law of the nomads with him.²⁵ The Great Yasa brought an inheritance scheme that was more in line with Central Asian customary law, including the edgen tradition, than was the Islamic law that had ruled the area for the past four hundred years. In fact, the Great Yasa and Central Asian customary inheritance law were remarkably similar in that they focused on children supporting their parents throughout the parents' lives in exchange for the parents' home and lands when the parents died.²⁶

Despite the arrival of the Great Yasa to Central Asia, Islamic law continued to be part of Central Asian society, including the edgen system as incorporated into Islamic law. Nevertheless, in light of the differences in inheritance principles between the two systems, this development begs the question of how these two inheritance schemes became reconciled.²⁷

One possibility is through the practice of *ijtihād*, or legal creativity.²⁸ As described above, *ijtihād* is the formation of an opinion by a jurist using juridical creativity based in accepted sources of Islamic law. As noted, the method of *ijtihād* called *'urf* makes room for local practice within Islamic law if that local practice does not contradict established Islamic principles. Nonetheless, given their vastly different and conflicting rules for dividing estates—Central Asian customary law directing the entire bequest to the youngest son and Islamic law requiring strictly defined shares among children with sons receiving twice the allotment of daughters—*'urf* could not resolve the conflict between Islamic law and Central Asian inheritance customs. Neither *'urf* nor other forms of *ijtihād* could overturn Islamic inheritance allotments because those portions are clearly stated within the Qur'ān, and *ijtihād* is a method of deriving legal rules only in cases where there is not clear guidance from the Qur'ān and hadith.

If Islamic jurists were not able to incorporate the edgen tradition through the legal creativity of *ijtihād*, then how did the tradition both survive and come to be considered “Islamic” by Central Asian Muslims? In the next section, we examine three Uzbek fatwās that show how Islamic jurists are using an alternate form of reasoning called *hīyilah*, or legal ruse, to maintain the edgen system within Islamic law.

23 Riasanovsky, *Mongol Law*, 10.

24 George Lane, *Daily Life in the Mongol Empire* (Westport: Greenwood Press, 2009), 205–26.

25 D. O. Morgan, “The ‘Great Yāsā of Chingiz Khān’ and Mongol Law in the Īlkhānate,” *Bulletin of the School of Oriental and African Studies* 49, no. 1 (1986): 163–76.

26 On the similarities of the Great Yasa and Central Asian customs, see Riasanovsky, *Mongol Law*, 10–39.

27 As Leila Ahmed writes in the case of Central Asia, Islam “did not bring radical change but a continuity and accentuation of the life-styles already in place.” Leila Ahmed, *Women and Gender in Islam* (New Haven: Yale University Press, 1992), 33.

28 It is also arguable that, during the period of Mongol rule the doors of *ijtihād* closed as Islamic scholars in Central Asia abandoned practices of *ijtihād* in favor of *taqlīd*, an interpretive method that emphasized the reproduction of earlier opinions as opposed to creating new law. The movement from *ijtihād* to *taqlīd* occurred earlier in other parts of the Muslim world. See Schacht, *An Introduction to Islamic Law*, 70–71. The thesis that the doors of *ijtihād* ever actually closed is, however, disputed. See Wael B. Hallaq, “Was the Gate of *Ijtihad* Closed?” *International Journal of Middle East Studies* 16, no. 1 (1984): 3–41; Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001).

THREE FATWĀS ON THE EDGEN TRADITION

A fatwā is a genre in Islamic law consisting of an opinion from a jurist to a believer issued at the believer’s request. Authors, their scribes, or students, often compile fatwās into collections. Some fatwās’ influence continue for centuries while new fatwās continually emerge as Muslims ask their religious leaders for answers on matters unheard of in past generations.

As discussed previously, because the Qur’ān explicitly mandates how an estate’s assets are distributed, Islamic law appears to foreclose the option of trading present care for future prospects.²⁹ Yet, today Central Asians who strongly identify as Muslims routinely employ traditional inheritance practices that contradict the Islamic law prescribed inheritance allotments. Instead of bequeathing strictly designated shares to their children as required by the Qur’ān, parents ensure their own long-term care by exchanging future inheritance to the youngest son for present elder care.

The three fatwās reproduced below demonstrate how Uzbek Islamic jurists shift attention from the Qur’ānic rules of inheritance and towards the Qur’ānic rules of gifts in order to produce opinions that uphold the culturally appropriate pre-Islamic result without resort to *ijtihād*. What the Uzbek jurists employ instead of *ijtihād* in the form of ‘urf, which was foreclosed to them because of the vast differences between Islamic and traditional inheritance rules, is *ḥiylah*, legal ruse.

Ḥiylah originates in the Ḥanafī madhhab, or school of Islamic jurisprudence, which is by far the dominant school of Islamic jurisprudence in Central Asia. Linguistic translations of the term *ḥiylah* include *trickery*, *deception*, and *stratagem*. The Ḥanafī definition contemplates an opinion in which the jurist does not reveal his legal method to the inquirer but strives to aid the believer by providing a beneficial solution.³⁰ Originally, *ḥiylah* was criticized by other Sunni schools such as the Ḥanbalī and the Shāfi‘ī. In later legal literature, a few jurists from other schools (*madhhabs*) began to employ *ḥiylah*, so that the method spread beyond the Ḥanafī madhhab.

Joseph Schacht described *ḥiylah* as

[T]he use of legal means for extra-legal ends, ends that could not, whether they themselves were legal or illegal, be achieved directly with the means provided by the sharī‘ah. The “legal devices” enabled persons who would otherwise, under the pressure of circumstances, have had to act against the provisions of the sacred Law, to arrive at the desired result while actually conforming to the letter of the law. For instance, the Koran prohibits interest, and this religious prohibition was strong enough to make popular opinion unwilling to transgress it openly and directly, while at the same time there was an imperative demand for the giving and taking of interest in commercial life. In order to satisfy this need, and at the same time to observe the letter of the religious prohibition, a number of devices were developed. One consisted of giving real property as a security for the debt and allowing the creditor to use it, so that its use represented the interest; this transaction forms a close parallel to the sale with the right of redemption.³¹

In the case of Central Asian inheritance practices, an imam might employ *ḥiylah* in order to meet both the requirements of Islamic law and the cultural need to preserve the edgen system, since it is the only elder care system that is viable, available, and enforceable, if only through community and family pressures in many Central Asian contexts.³² The three fatwās below, offered by an Uzbek

29 For verses detailing the distribution of the estate, see note 5.

30 Schacht, *An Introduction to Islamic Law*, 78–82.

31 *Ibid.*, 78–79.

32 It is important to note that the Central Asian elder-care system described in this article is not always (or ever) ideal. There are many incentives within the system for the youngest son and his family to harm or deprive the elderly

imam, avoid placing the parents' house and properties within Islamic inheritance by instead classifying the transfers as gifts.³³ Each opinion is a type of legal ruse that supports the pre-Islamic inheritance system. These three fatwās are quite typical and representative in their reasoning and their results. Although the fatwās explicitly acknowledge the inheritance allotments spelled out in detail in the Qur'ān, they use *hiylah* in order to legitimize passing the parents' estate to the youngest son although that result directly contradicts the clearly prescribed Islamic Inheritance system.

First Fatwā: Equal but Gendered Allotments Required by Law

This fatwā sets up the Islamic Law rule that children have strictly designated inheritance shares with sons receiving twice the allotments of daughters.

Question:

If deceased parents failed to allot their property in accordance with Islamic inheritance law, is the estate divided equally among the parents' surviving sons and daughters?

Answer:

What is allotted during life is not inheritance, and is not subject to the Qur'ānic verses regarding the distribution of property on death. Instead property passed during life is a gift [*hadiyyah, hibah*].

Property that is left after death is subject to allotment in accordance with the rules of inheritance. The child's share of inheritance differs as between sons and daughters: to one son, the shares of two daughters are given. In the Noble Qur'ān it is stated as "to each man, shares of two women will be given."³⁴

Second Fatwā: Legal Ruse and the Creative Distinction between Gift and Bequest

In this fatwā the distinction between the making of gifts and bequests is elaborated.

Question:

We are four brothers and a sister. Our father is alive.

Our father helped us all to have families and houses, except my youngest brother, who is in my parents' house.

First question:

Are the houses that our father built for us considered inheritance or a gift?

Second question:

If my father dies [may God give him a long life] should three brothers and a sister receive inheritance from the house of my father?

Answer:

Whatever is given while alive is considered a gift.

parents, and the parents may leave the youngest son and his family with very little. Rafis Abazov, *Culture and Customs of the Central Asian Republics* (Westport: Greenwood Press, 2007).

33 These fatwās come from two websites, mainly for Uzbek-speaking Muslims, that provide such legal opinions, *Islom.uz* (in Uzbek) and *Fiqh.uz* (in Uzbek). Muhammad Sadiq Muhammad Yusuf, former mufti of Central Asia, was the key person who answered all the questions before his death in 2015. His legal opinions are still available through these websites. Rahimjon Abdugafurov translated the three fatwās from Uzbek.

34 Muhammad Sadiq Muhammad Yusuf, "Is Inheritance Divided Equally between Daughter and Son?" *Islom.uz*, accessed August 2, 2015, <http://islom.uz/content/view/1038/138/>.

After a person's death his properties are allotted in accordance with the Qur'an. If your father gives the house to the youngest son as a gift, then the other children have no right to that property through inheritance.³⁵

Third Fatwā: Reconciling Customary Law and Islam

This fatwā reconciles the pre-Islamic customary result with Islamic law.³⁶

Question:

I am a father of eight children, three daughters and five sons. I thank God that I helped them all to have houses and families. I helped four of my sons to get houses and I also helped them in the weddings of their children. I have not helped my fifth son to have a house. That is why I am planning to give my own house and properties to my fifth son as an inheritance share. Is what I am doing correct?

Answer:

Give it as a gift. Inheritance is a property that is given posthumously.³⁷

As Joseph Schacht described, the three fatwās above each employ *hiylah* by taking two explicit rules within Islamic law—the law of inheritance and the law of gifts—and combining them. The result is to enable families, who would otherwise, have to violate Islamic law, to arrive at the desired result while actually conforming to the letter of Islamic law.

ISLAMIC LAW AND ELDER CARE: LESSONS FROM CENTRAL ASIA

Having reviewed how the edgen tradition comes to be incorporated into Islamic law in Central Asia despite the apparent tension between inheritance rights under the edgen tradition and those under traditional understandings of Islamic law, we now turn to the themes of the three questions posed in the introduction: (1) stasis and creativity, (2) universality and context, and (3) gender.

Creative Avoidance of Stasis

These fatwās are, first of all, significant for the question raised in the introduction about whether Islamic law is static. Although the Qur'an mandates equal inheritance shares between children—with sons receiving twice the allotments of daughters—the three fatwās all provide legal support for a system that favors the caretaker youngest son over his siblings. The three fatwās thus raise the question of whether Islamic law is frozen in these cases or, as seems more likely, that the jurists appear to follow the letter of the law while actually supporting a completely different customary inheritance system through their use of *hiylah*.

In the scenarios addressed in the three fatwās above, Uzbek imams honor *shari'ah* and *fiqh*, understanding, while applying creative reasoning to a centuries-old problem: the interplay of custom

35 Muhammad Sodiq Muhammad Yusuf, "About Inheritance," *Islom.uz*, accessed August 2, 2015, <http://savollar.islom.uz/smf/index.php/topic,29781.o.html>.

36 In this regard, please note that believers who request fatwās do not expect the Imam to recite generally known cultural facts. Thus, we would not expect the Imam to recite the conflict between gifts and inheritance in the context of the edgen tradition.

37 Muhammad Sodiq Muhammad Yusuf, "Giving the House to the Youngest Son?" *Islom.uz*, accessed August 5, 2012, <http://savollar.islom.uz/smf/index.php/topic,30019.o.html>.

and Islamic law.³⁸ The inheritance system supported by the three fatwās adheres to the letter of Islamic law on several fronts. First, the Central Asian inheritance system reported in the fatwās meets the exact letter of Islamic law by taking advantage of the difference between rules for gifts and rules for inheritance. By advising transfers of property to the youngest son during the father’s life, the imams circumvent the requirement of strict allotments to siblings—with sons receiving twice the allotments of daughters—and allow the edgen tradition to comport with Islamic requirements. Next, the Central Asian inheritance system as reported in the fatwās meets one of Islamic law’s primary objectives: transparency. Gifts passed from fathers to youngest sons during the father’s life are known to all family members, who have the opportunity to object openly during the father’s life. Contrast the Anglo-American inheritance system, in which bequests are often unknown until after the testator has died, the ability to discover intent directly is closed, and a challenge is often complicated and costly. Finally, the three fatwās exhibit sophisticated legal reasoning long sanctioned by the Ḥanafī madhhab. By using Islamic law’s distinctions between gifts and inheritance, the imams allow the people’s long held customs to flourish within Islamic law.

For those interested in the law and society movement, the edgen system is an example of legal pluralism. John Griffiths describes legal pluralism as

the omnipresent, normal situation in human society—is one in which law and legal institutions are not all subsumable within one “system” but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another, so that the “law” which is actually effective on the “ground floor” of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism.³⁹

In other words:

Legal pluralism refers to the deceptively simple idea that in any one geographical space defined by the conventional boundaries of a nation state, there is more than one “law” or legal system.⁴⁰

The overlay of the edgen system on Islamic law in countries that also have their own state sponsored law is an example of legal pluralism. The state does not enforce Islamic law in Central Asia, nor does it enforce the edgen system. Rather, the people’s felt need for elder care that complies with their religion creates their need that the imam answers with *ḥiyālah*.

A Challenge to Uniformity

A second question of importance to Islamic law that these contemporary Central Asian fatwās raise is whether Islamic law is uniform in matters that the Qur’ān and hadith explicitly address. Islamic law requires uniform legal doctrines without regard to local practices when the Qur’ān and hadith are in explicit accord. The Central Asian people who use the inheritance system portrayed in this article accept the system as Islamic. The mere fact that the people involved rely on approval from religious leaders for their contemplated transfers demonstrates how seriously these believers wish to comply with their faith. Yet the act of parents transferring all of their property to the

38 Madkur, “Introduction to Islamic Law,” 23. Fiqh is the science of deriving Islamic law from the sacred texts.

39 John Griffiths, “What is Legal Pluralism?” *Journal of Legal Pluralism and Unofficial Law* 24 (1986): 39.

40 Margaret Davies, “Legal Pluralism,” *Oxford Handbook of Empirical Legal Research*, ed. Peter Cane and Herbert Kritzer (New York: Oxford University Press, 2010), 805.

youngest son differs from the inheritance allotments contained in the Qur’ān and hadith just as the Central Asian example differs from practices in other parts of the Muslim world.⁴¹

Different Muslim communities are experimenting with culturally specific solutions to the problem of elder care. To the west of Central Asia, in the Arab Middle East, Radwa Elsaman and Mohamed ‘Arafa report that some Muslim countries contemplate international conventions on human rights as the basis for state-sponsored elder-care systems. Nevertheless, Elsaman and ‘Arafa also report that these conventions are silent on elder care.⁴² Instead, the conventions emphasize human rights concerns that apply to the elderly such as the right to health care or the right to physical safety. As with the Central Asian example, Elsaman and ‘Arafa find that Arab governments rely on family to provide most elder care.⁴³ To the east of Central Asia, Bowen reports that Indonesia’s inheritance system restricts lifetime gifts.⁴⁴ The Indonesian legislature hoped that restrictions on lifetime gifts would discourage people from trying to avoid the required Islamic inheritance allotments. By restricting lifetime gifts, the Indonesian legislature undercut self-help elder-care systems. Accordingly, the elder care example does not support uniformity in the Islamic law of elder care.

Rather, the Central Asian example supports the observation that legal pluralism comes from many sources both within and outside the nation state. Islam explicitly seeks to overlay the nation state and local practice with religious law. The nation state also has a strong interest in filling the legal landscape with its own rules and procedures. The Central Asian edgen system of elder care subverts both religious law and state law with a unique scheme that answers the universal question—how to care for the elderly—with decidedly local solutions.

A Gendered Paradox

To understand the issue of gender equity created by the edgen tradition, it may be helpful to revisit, briefly, how the system functions. In the most pleasant and hopeful version of the edgen story, strong families with many children prepare each child in turn to enter adult life. The family gives each male a healthy childhood along with full support until marriage. Before marriage, the family gives each son all the financial support required to marry, including education and the *mahr*, or dowry, which goes directly to the bride for her financial protection. After marriage, the family supports the young couple until the birth of their first child when the new family moves into a house provided by the husband’s parents. Throughout the couple’s life, the in-laws intercede with monies for grandchildren, marriages, households, etc. During their married lives, new brides and young mothers are financially protected by the *mahr* they received at their marriage,

41 See, for example, Radwa S. Elsaman and Mohamed A. ‘Arafa, “The Rights of the Elderly in the Arab Middle East: Islamic Theory versus Arab Practice,” *Marquette Elder’s Advisor* 14, no. 1 (2012), article 4: 1–53. Elsaman and ‘Arafa describe how a number of Muslim countries have signed onto international conventions that contain the roots of a state-sponsored elder-care system. *Ibid.* John R. Bowen reports that Indonesia has adopted an inheritance system that restricts the use of gifts as a means of avoiding the required inheritance allotments. See John R. Bowen, “‘You May Not Give It Away’: How Social Norms Shape Islamic Law in Contemporary Indonesian Jurisprudence,” *Islamic Law and Society* 5, no. 3 (1998): 382–408. Joseph Schacht notes in *An Introduction to Islamic Law* that inheritance is one part of Islamic law that is often supplanted by local rules and customs. Schacht, *An Introduction to Islamic Law*, 76–77.

42 See Elsaman and ‘Arafa, “The Rights of the Elderly in the Arab Middle East,” 32.

43 *Ibid.*, 12–16.

44 See Bowen, “‘You May Not Give It Away,’” 387.

their husbands', fathers', or brother's financial support, and a share of their parents' estate through Islamic inheritance allotments.

The edgen receives all the benefits conferred on his elder brothers except the new house after the birth of his first child. Instead of leaving the parental home as his elder siblings before him, the edgen remains at home to tend to his parents for the rest of their lives. Then, after a long and healthy life with many grandchildren and great grandchildren all receiving financial help from the parents and grandparents, the elderly couple dies, the edgen inherits their home and lands, and all is right with the world.⁴⁵

Under the more realistic version of the edgen system, most elder care is performed by women who support the system through their labor and the loss of their Islamic financial protections. Women often become the de facto caregivers, performing the actual work that is expected of the edgen. Because the system removes the financial protections for women usually guaranteed under Islamic law by marriage and inheritance, many women have no opportunity to remove themselves from this role of servitude.

In the first instance, an edgen's wife becomes his parents' caretaker.⁴⁶ Within extended family units, young brides often carry a large load of family responsibilities, including working outside the home, performing all housework within the home, and caring for her in-laws for at least the portion of her married life before the birth of her first child.⁴⁷ Indeed, if she is the wife of an edgen, she will spend the rest of her in-laws' lives performing elder care.⁴⁸

As noted, under traditional Islamic law principals, a married woman receives financial protection in the form of mahr, the money the young bride receives from her husband's family. However, in poor and middle-class households, a woman is rarely allowed to keep her mahr. Instead, the bride's father will often take her mahr and pay the money to her brother's betrothed, so that her father can fulfill his mahr obligation and her brother can get married. Accordingly, the young bride of an edgen can find herself without mahr and in perpetual servitude to her in-laws. Even if her own parents are in need, she has no time to give them.⁴⁹

As the years go by a woman's next opportunity for financial support comes in the form of a daughter's right to inherit from her parents. The edgen tradition overtakes that right as each sister is left without any inheritance because her parents' property goes to the youngest son. Although parents give their sons mahr for the bride, food and shelter for the first years of marriage, and a house after the birth of the first child, parents often leave their departing daughters without any of the three financial protections that the Qur'an and hadith specifically require. As discussed throughout this article, this denial of inheritance rights to daughters contravenes Islamic inheritance law requirements.

Thus, one striking part of the Central Asian inheritance system of elder care is that it directly undercuts what Islamic scholars and many Muslims identify as one of its most important contributions to the ancient world: heightened respect for women. The first fatwā reported above shows the importance of respect for women as part of Islamic self-consciousness. Directly after explaining that the Qur'an requires strict allotments of inheritance to children without regard to whether the children are in financial need and whether the children took care of their parents, the imam continues:

45 Riasanovsky, *Fundamental Principles of Mongol Law*, 39.

46 For more information on Uzbek women's roles, see "Culture of Uzbekistan," Countries and Their Cultures, World Culture Encyclopedia, <http://www.everyculture.com/To-Z/Uzbekistan.html>.

47 Riasanovsky, *Fundamental Principles of Mongol Law*, 88.

48 *Ibid.*, 88.

49 See Abazov, *Culture and Customs*.

Here God the Most High has established a great justice through *shari'ah*. Until Islam and even today in many countries, there is no inheritance to women. Islam demonstrates its appreciation of women through inheritance allotments.

It is said that in order to be just in the giving of inheritance the Qur'an takes note that sons are responsible for their parents' lifelong care, including looking after them, serving them, burying them, and meeting other expenditures. In addition, sons are also responsible for making a family, including giving mahr so that their own sons may marry, paying for the wedding party, and providing general financial support. In addition to that, it is the son's responsibility to care for his sisters when they are in financial need. Fathers protect daughters before marriage and husbands protect wives after marriage. Mahr and other wedding gifts protect married daughters in addition to their lack of financial responsibility. In light these legal responsibilities of men in families, *shari'ah* specifies that inheritance after the death of the parents is to be applied so that a son receives the shares of two daughters.⁵⁰

The imam's explanation of the inheritance allotments confirms that the daughter's share is a material expression of female right rather than of female need. The imam tells us that since fathers and husbands support daughters throughout their lives, female inheritance rights are not necessary for women's financial support, but rather Islamic law provides inheritance to daughters as a matter of right.

The daughters' inheritance shares under Islam serve a different purpose than financial support alone. By establishing a female right to inheritance, Islam sends a signal to the world that females are deserving of respect not just in words but also in property rights. When we understand the Islamic inheritance allotments to daughters as a sign of respect, then the fatwas support for Central Asian inheritance practices becomes more than clever lawyering that helps everyone equally. Instead, the fatwas place the provision of elder care above the material rights of women. Although the imams claim that female inheritance rights are important, they undercut female inheritance when they support a traditional inheritance system that they know will leave females doing all the elder-care work and losing their inheritance rights as well.

There is a gendered paradox in a system that places responsibility for elder care securely in the hands of men, namely the youngest son, the *edgen*, but in ways that end up disadvantaging women, who do the bulk of the actual elder-care work. The reality is that females often leave the family home with nothing. As noted, the Islamic mahr is as likely to go to the father in order to pay a brother's marriage fees as to go to the bride for her financial protection. Without inheritance, female family members lose two of the most important financial provisions that operate in their favor through the Qur'an and hadith.

Perhaps the primary argument against legal ruse is that when the Qur'an and hadith are explicit, God himself has spoken. The basis and justification for legal creativity is, above all, to do good for the people. This is an argument against Central Asian legal creativity in the arena of elder care. The *edgen* system, by placing the locus of responsibility for elder care in the youngest male son, ends up in practice pitting two cherished groups against one another. The *edgen* system burdens women in order to benefit the elderly.

CONCLUSION: OF EDGENS, IJTIHĀD, AND DISINHERITED DAUGHTERS

The Qur'an and the hadith are the foundation of Islamic law. When the Qur'an and hadith demand that Muslims respect the elderly and give poor people charity, they provide the moral underpinning

⁵⁰ Muhammad Yusuf, "Is Inheritance Divided Equally?"

for an Islamic elder care system. Despite these injunctions to provide the elderly with care, neither the Qur'ān nor hadith explain how to provide elder care. Accordingly, despite the Islamic claim to universality, every Muslim society must look beyond the explicit recitations found in Qur'ān and hadith in order to uncover its own Islamic elder care system. From this need comes an invitation to *hiylah*, legal ruse.

The Central Asian elder-care system aptly illustrates indigenous law surviving for millennia, even in opposition to a wide variety of empires. The flourishing *edgen* elder-care system is particularly interesting given the population's clear commitment to Islamic practice and Islamic dominance of the entire region. The manipulations of Islamic law around the *edgen* system show both how devoted Central Asians are to Islamic teachings and how Central Asian Muslims seek out religious support from their imams for their traditional practices. In turn, Central Asian religious leaders structure their advice in order to assure believers of their Islamic compliance.

The *edgen* system demonstrates that Islamic law is neither frozen nor universal. Contemporary Central Asian Islamic jurists use *hiylah* in order to maintain an indigenous elder care system for the benefit of their Muslim practitioners. These manipulations offer more proof in support of the contemporary notion that Islamic law, at least as practiced in early twenty-first-century Central Asia, is not frozen. Further, Central Asian Islamic jurists support an indigenous elder-care system that differs from those in other Muslim regions. Hence, in the case of elder care, Islamic law is neither frozen nor universal.

Nevertheless, the Islamic leaders' support for the *edgen* tradition also presents a further question of Islamic law: Should an elder-care system rest primarily on the shoulders of female labor and female disinheritance? As practiced in Central Asia, the *edgen* tradition relies on female labor and disinherited daughters. The very core of Islamic self-consciousness includes the assertion that Islam changed the world by changing the view of women. The required inheritance allotment to daughters materially illustrates Islam's commitment to women. In contrast, the *edgen* tradition places women at economic peril while taking advantage of their labor. One result of the *edgen* tradition—elder care for parents— supports the goals of Islamic law. A second corresponding result of the *edgen* tradition—elder care created and supported by unpaid female work and disinheritance—is in opposition to the Islamic goal of respect towards women as shown in the female inheritance allotments. This remains a problem for the *edgen* system going forward.

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