

Separation of children from their parents in the light of jurisprudence and the reality of Muslim minorities

Sekhane Nadia¹

¹Emir Abdelkader University of Islamic Sciences Constantine (Algeria).

The E-mail Author: nounadia72@gmail.com

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Abstract:

This article discusses the issue of separation of children from their parents in some European countries, focusing on the surrounding circumstances that facilitate understanding of the decision for those who qualify for it. Recognising the importance of taking a close look at the rulings regarding Muslim minorities, given the complex challenges faced by this group of Muslims, fatwas (Islamic legal opinions) should contribute to providing rulings that are in line with their reality, while emphasising the principles and rules of Sharia. The research concludes the importance of using jurisprudence of the situation of Muslim minorities in adapting their legal rulings according to the constants and general principles of Sharia.

Keywords: Child separation, situational jurisprudence, Muslim minorities, custody.

1- Introduction:

The separation of children from their parents is a multifaceted issue with legal, jurisprudential and social implications, particularly for Muslim families living in Western societies. The importance of the issue lies in highlighting the element of reality as a fundamental variable in determining Islamic jurisprudence. In addition to the jurisprudence of the situation, our study includes various aspects, including the rulings on custody, both definitive and speculative, as well as other rulings related to the fixed and variable aspects and the role of time and place. Furthermore, it is essential to consider the specific circumstances of Muslim minorities, emphasising the importance of situational jurisprudence in understanding this phenomenon.

The research problem revolves around the extent to which the jurisprudence of the situation influences the treatment of issues concerning Muslim minorities in

Western societies. How can it be integrated as an approach to Islamic jurisprudence while preserving Islamic values and principles?

It is important to note at the outset that the research does not aim to make a definitive judgement on this issue, as it is a complex area that requires expertise in deduction. The purpose of addressing this issue is to shed light on one of the challenges faced by Muslim minorities in diaspora countries, namely the separation of children from their parents. The focus is on understanding the reality in order to provide appropriate religious guidance, leading to a realistic decision that is appropriate to the time and place, while adhering to the principles and rules of Sharia.

In order to answer the research questions, a descriptive methodology has been adopted to explain the phenomenon on the one hand and to define the concept of jurisprudence of the situation on the other. However, the predominant approach is analytical, as it involves examining the intricacies required to conceptualise this issue, while relying on an incomplete inductive approach by collecting the opinions of scholars on the subject.

The research plan is divided into an introduction and two main sections. The first section focuses on the definition of the concepts, while the second section highlights the contribution of the jurisprudence of the situation in delineating the framework for rulings on this issue. Finally, the conclusion contains the main findings.

2. Definition of the basic concepts:

2.1. Separation of children from their parents: Terminology and connotations

First: Historically

The separation of children from their parents has been a legal and educational issue that has challenged the Muslim community in the West. It arose primarily in countries such as Sweden and Norway, which serve as examples of European nations with significant similarities in their social systems. However, the difference lies in the degree of strictness or leniency in this regard. It is worth noting that child protection laws and organisations working to enforce them, such as 'Socialtjänsten'¹ in Sweden and 'Barnevernet'¹ in Norway, do not exclusively target

¹ - The Social: It is the name of the municipal administration that submits its reports to the Social Committee for each municipality, or any other committee responsible for social work regulated by the Social Services Act in Sweden. [Source: Wikipedia, accessed 16 March 2023].

children from Muslim communities. Western countries have systems that aim to protect children in general, and their role is to monitor parental failings and, if necessary, remove children from their care² and place them in foster care or temporary care families in exchange for financial compensation while waiting for suitable adoptive families to be found³.

The Social Welfare Agency, particularly in Sweden, has the power to remove a child from parental care if there is evidence that the child is at risk of psychological or physical harm. In such cases, the child is administratively placed in a social care institution or foster family until a court decision is made. In some cases, the parents may be warned and placed under supervision if the investigation does not confirm the suspicion.

Recently, complaints from immigrant families about the wrongful removal of their children have raised legal concerns about the effectiveness of the investigation mechanisms used by the Social Welfare Agency. The Children's Welfare Office has the power to immediately remove a child from his or her parents if violations are proven, even if they do not necessarily pose a serious threat to the child's safety⁴.

In carrying out an investigation, social workers must be objective and focus on the importance of the family in the child's life, taking into account cultural differences. Removal of a child should only occur in extreme circumstances. However, testimonies from several people who have experienced the removal of their children confirm that the Social Welfare Agency violates the requirements of children's rights by applying non-transparent standards in assessing the eligibility of parents and their ability to protect their child. The Agency's main concern is child protection, with little emphasis on the right of parents to care for their children, as there is no significant barrier to transferring custody to another family⁵.

¹- Barnevern: The government institution responsible for the protection and care of children in Norway. Barnevern's mission is to ensure that children living in conditions that may harm their health and development receive the necessary help and care, and to ensure that children and young people grow up in a safe environment. [Source: Wikipedia, accessed 16 March 2023].

²- Ghada Al-Rayan, Abduction of children from their families: Protecting or violating their rights and the rights of the family. [Source: alwaneurope.eu, accessed 11 February 2023].

³- Hiba Al-Baghdadi Al-Barazi, Muslim Children: From the hell of war to the hell of freedom, Europe as a model. [Source: al-sabeel.net, accessed 11 February 2023].

⁴- Hiba Al-Baghdadi Al-Barazi, Muslim Children: From the hell of war to the hell of freedom, Europe as a model. [Source: al-sabeel.net].

⁵- Hiba Al-Baghdadi Al-Barazi, Muslim Children: From the hell of war to the hell of freedom, Europe as a model. [Source: al-sabeel.net].

Some published surveys mention that Sweden applies the law on transfer of custody extensively, as the procedure is decided by a committee rather than by the judiciary. The committee's decision is influenced by the opinion of the social worker, and the social worker's powers extend to abruptly removing children from their parents or taking them from their homes and schools without prior notice to the parents. This approach is unjustifiably arbitrary from a legal point of view¹.

Second: Reasons for separating children from their parents in the West:

The apparent reasons for separating children from their parents serve as a legal pretext for the West, especially towards Muslims. However, the reality confirms that there are underlying factors that contribute to this phenomenon, including

- Fundamental differences between Western and Islamic law: In Western legal systems, the child is considered a separate entity from the parents, and thus the rights of the state in child custody outweigh the rights of the parents. Consequently, the law applies to any child on European soil, regardless of nationality. However, immigrants are more vulnerable to the threat of custody transfer for a number of reasons, including their limited knowledge of the law, religious and cultural differences and poverty.

- Pre-existing racist stereotypes of immigrants among some officials and residents, leading to harsher treatment.

- Europe's integration policies focus on assimilating individuals into society rather than helping them to adapt, taking into account their different needs and cultures. As the continent's population ages, it needs immigrants and their children more than immigrants need it. However, their policies still tend towards assimilation or departure.

In addition, there are legal reasons that the West uses to deal with this dilemma, including neglect and reports from neighbours about the poor conditions of the children, as well as cases of physical and verbal abuse, cases of assault or sexual exploitation, and parents' illness or inability to care for their children². Poverty remains one of the main reasons for the removal of Muslim children.

2.2 The meaning and determinants of the Fiqh of Reality:

¹- Hiba Al-Baghdadi Al-Barazi, Muslim Children: From the hell of war to the hell of freedom, Europe as a model. [Source: al-sabeel.net].

²- Al-Fayruzabadi, Al-Qamus Al-Muhit, Al-Resalah Establishment, Beirut, 2005, p. 1250.

First: Definition of the Fiqh of Reality

Linguistically, "fiqh" refers to knowledge and understanding, meaning perception. In the context of religious knowledge¹, it occupies a prominent position. Technically, it is defined as "the knowledge of practical legal rulings derived from their evidence and presented in detail"².

Linguistically, "reality" indicates the occurrence or fall of something. It is said that something "happened" or "occurred", implying its descent or occurrence. It can also mean the fall or occurrence of something³. In the technical sense, contemporary scholars have tried to define it. One prominent scholar, Abd al-Majid al-Najjar, describes it as "the way people live their lives in various aspects, including patterns of life, customs, traditions, emerging issues and events"⁴.

In the explanation of the compound term, it has been stated that the Fiqh of Reality is "the deep understanding of what revolves around people's lives, what confronts them⁵ and what guides them". It can also be defined as "the precise and penetrating understanding of what is happening in the living environment and the surrounding sphere"⁶.

Dr Al-Qaradawi states that the Fiqh of Reality is "based on the study of the actual conditions of life, a thorough and comprehensive study of all aspects of the subject, based on the most accurate information, detailed data and statistics"⁷. It is therefore based on

- Understanding the impact of natural environmental factors: The environment plays a major role in shaping judgements and perceptions.
- Social dynamics: This refers to the relationships that bind individuals together in religious, economic, political, family and cultural terms, as they reflect on individuals, influence their actions and words, and ultimately affect the formulation of judgements.

¹- Mohammed bin Al-Hassan Al-Jaafari, Noble Thought in the History of Islamic Jurisprudence, Dar Al-Kutub Al-Ilmiyah, Beirut, 1995, vol. 1, p. 61.

²- Ibn Faris, Dictionary of Language Metrics, Dar Al-Fikr, Beirut, vol. 6, p. 133.

³- Abdul Majeed Al-Najjar, Understanding and Application of Religious Jurisprudence, Cordoba Publications, Algeria, 3rd edition, 2006, p. 55.

⁴- Ahmed Bououd, The Jurisprudence of Reality: Principles and Regulations, Dar Al-Salam, Cairo, 2006, p. 42.

⁵- Al-Shahid Al-Bousheki, The Jurisprudence of the Nation's Reality: A Study in Concept, Haraa Magazine, Issue 33, November-December 2012, p. 13.

⁶- Yusuf al-Qaradawi, Priorities of the Islamic Movement in the Coming Stage, Wahba Library, Cairo, 2nd edition, 1991, p. 30.

⁷- Ahmed Bououd, The Jurisprudence of Reality: Principles and Regulations, pp. 22-29.

- To explore the depths of the human psyche: Since people are at the centre of reality, it is important to understand how individuals adapt to or shape their environment¹.
- Use the results of the human sciences and their methodologies: Sciences such as psychology, sociology, economics, statistics and others can be used to diagnose reality. However, the usefulness of these sciences depends on the compatibility of their findings with our Shariah². Researchers read them to extract what does not contradict their religion, fits their current situation, and addresses the issues they seek to resolve³.

Second, the importance of the Fiqh of Reality:

- A deep study and understanding of reality leads to a mature understanding of religion. This is because the application of a legal ruling to a specific situation can only be achieved by understanding the circumstances and conditions surrounding that reality.
- It assists in the issuance of informed fatwas (religious rulings) on emerging issues and developments, thereby enabling the optimal implementation of the provisions of the Shariah.
- It helps to achieve human welfare and prevent harm. The proper application of Shariah cannot be achieved unless it is in harmony with the circumstances and conditions of the people. This is a divine principle in His creation⁴.
- It promotes positive contemporisation based on fundamental principles while keeping pace with developments. This allows for a close connection between tradition and modernity, where principles remain steadfast while life continues to evolve⁵.

Third: Principles of Fiqh of Reality:

¹- Fatima Zuhairi, The Jurisprudence of Reality among Female Religious Guides in Algeria, Field Study on a Sample of Guides in Constantine Governorate, Al-Maiyar Magazine, Issue 42, June 2017, p. 264.

²- Attayeb Barghouth, Islamic Call and the Social Equation, Dar Al-Baath, Algeria, 1st edition, p. 131.

³- Mohammed Nasiruddin Al-Albani, Questions and Answers on the Jurisprudence of Reality, Islamic Library, Jordan, p. 15.

⁴- Iyad Kamel Al-Zibari, Consideration of the Jurisprudence of Reality in the Application of Islamic Law, [Source: alhiwarmagazine.blogspot.com, accessed 11 February 2023].

⁵- Issam Al-Bashir, Regarding the Jurisprudence of Reality: [Source: iumsonline.org, accessed on 11 February 2023].

- Caution against diluting the textual sources of the Shariah under the pretext of accommodating reality.
- Distinguishing between what requires permanence and what allows for change in determining rulings. This is a principle established by the scholars of Usul al-Fiqh (Principles of Islamic Jurisprudence). Jurisprudential rulings are subject to change, but final rulings cannot be changed. However, the practical application of fiqh to emerging issues and developments is not an easy task and requires an experienced jurist.
- Avoid the rigidity of relying solely on past fatwas (religious rulings) and applying them to current situations, despite changing circumstances and evolving customs. This rigidity is contrary to the dynamism of the Shariah¹.

2.3: The concept of Muslim minorities

First: Definition of Muslim minorities:

1. Definition of minorities: The term "minorities" is a modern concept imported from Western culture as a result of interactions with Western civilisation. The word "minority" is a translation of the term "minorite", which originally referred to the black minority². Later, the term came to be associated with the cultural identity of a group that is distinct from the identity of the society in which it lives. Over time, the term has taken on social, political and religious dimensions.

Minority has been defined as "a national, ethnic³, religious or linguistic group that is distinct from other groups within a sovereign state⁴". It can also be defined as "any human group in a country that differs from the majority in terms of religion, sect, race, language or other distinguishing factors"⁵.

Abdullah bin Bayyah sees minorities as human groups with distinct characteristics that exist within a larger, more populous group but have less influence or

¹- Mohammed Rawas Qalaji and Hamed Qunibi, Dictionary of Jurists' Language, Dar Al-Nafais for Printing, Publishing and Distribution, 2nd edition, 1408 AH - 1988, p. 84.

²- Ethnicity: A racial or religious grouping aimed at classifying human groups on the basis of belonging to a particular race or origin, known for racial discrimination. [Source: Ahmed Mukhtar Omar et al, Contemporary Arabic Language Dictionary, Alam Al-Kutub, 1st edition, 1429 AH - 2008 AD, Vol. 1, p. 331].

³- Jamal al-Din Atiya, Towards a New Jurisprudence for Minorities, Dar Al-Salam, n.d., pp. 7-8.

⁴- Yusuf al-Qaradawi, On the Jurisprudence of Muslim Minorities, Dar Al-Shorouk, 1st edition, 1422 AH - 2001 AD, p. 15.

⁵- Abdullah bin Biya, The Art of Issuing Fatwas and the Jurisprudence of Minorities, Dar Al-Manhal, Beirut, 1st edition, 1428 AH - 2007 AD, p. 223.

representation¹. The term refers to two elements: the numerical minority living within a larger society and its distinctive characteristics in terms of culture or ethnicity².

2. Definition of the descriptive compound: The term "Muslim minority" gained prominence in the early 15th century with the establishment of Islamic organisations concerned with the situation of Muslim communities in Western countries. The focus on the term increased with the rise of migration to foreign countries and the intensification of their religious, political, social, cultural and economic challenges. They are defined as "individuals who consider themselves, or are considered by others, to have certain characteristics and qualities that distinguish them from other groups within a society and enable them to develop their own cultural behaviour within that framework"³.

The definition emphasises the coexistence of citizens within a society where they differ from the majority in certain distinguishing characteristics. Thus, they can also be described as "a group of people living within a society who differ from the majority by their affiliation to Islam in terms of faith, law and way of life, irrespective of their ethnic, linguistic or cultural origins"⁴.

The essence of the difference lies in the fact that this category lives within a larger group and is distinguished by its adherence to Islam, which constitutes its distinctiveness.

Second: The specificity of minority situations

The specificity of the circumstances calls for specific considerations. With this point, I would like to emphasise what most contemporary scholars have focused on when dealing with developments concerning Muslim minorities. The reality of their coexistence with non-Muslims and their subjection to Western legal authority requires careful consideration when issuing religious judgments and clarifying their rulings. The following aspects should be considered:

¹- Abdul Majeed Al-Najjar, Consequences of Actions and Their Impact on the Jurisprudence of Minorities, paper presented at the Ninth Session of the European Council for Fatwa and Research, Jumada Al-Awwal 1423 AH - July 2002 AD, France, p. 13.

²- Mohammed Amara, Islam and Minorities: Past, Present and Future, Al-Shorouk International Library, Cairo, 1st edition, 1423 AH - 2003 AD, p. 7.

³- Amal Yousef Omar Al-Qawasmi, Jurisprudence of Muslim Minorities in Personal Status Issues, Dar Al-Nafais, Jordan, 1st edition, 1435 AH - 2014 AD, p. 20.

⁴- Abdul Majeed Al-Najjar, Consequences of Actions and Their Impact on the Jurisprudence of Minorities, p. 16.

1. The specificity of vulnerability: This vulnerability is primarily psychological. These minorities have, for the most part, moved from their Islamic environment to an unfamiliar cultural and social environment. This transition can lead to a sense of cultural and social alienation. In addition, economic vulnerability is widespread, as they often work as labourers or artisans, which affects their way of life. It also negatively affects their ability to integrate into the unfamiliar system.

Political and social vulnerability is also evident, as they generally have little influence on political decisions in the countries where they live. The same applies to their social status, as these minorities lack influential social institutions. Their integration in public social institutions is weak. As a result, Muslim minorities in the West suffer from political and social weakness to the extent that their presence is barely noticeable¹.

2. The specificity of compliance: In Western countries, the law is highly respected, both in the collective consciousness and in enforcement circles. As a result, the rule of law is seen as a fundamental principle on which their culture and civilisation are built. Consequently, any individual or group residing or holding citizenship in these countries, regardless of their racial, religious or cultural background, becomes subject to the authority of the law. Thus, the law is applied to Muslim minorities with the same severity as it is applied to other members of society, whether citizens or residents. These laws often conflict with the principles that make up the identity of Muslims. The minority is obliged to comply with them if it wishes to continue to live in these countries.

The legal domination of the Muslim minority as a result of their non-compliance with their contractual obligations represents a unique situation among Muslims in general. They are subject to the authority of non-Islamic law, which is the natural condition for the organisation of a Muslim's life. In Western countries, Muslims find themselves in a contradiction between their reality and the demands of their identity. This is a special circumstance in the life of the Muslim minority that must be taken into account in the interpretation of the law².

3. Separation of children between the demands of reality and the achievement of family goals

3.1. The fixed and variable aspects of family law

¹- The same reference, p. 17.

²- Al-Khawalda, Nasser Ahmed, Rustom Rasmi Abdul Malik, Family and Child Upbringing, Dar Al-Fikr, Oman, 1st edition, 2010, p. 16.

Firstly, the family as the fundamental refuge for children:

The family is the cornerstone for building society, as emphasised by all religions. Islam, in particular, is characterised by great care for the family. Allah says: "Verily We have given trust to the heavens and the earth and the mountains" (Surah Al-Ahzab, 72), and one of the meanings of trust is trust between parents and children.

The family is the primary nurturing environment for the social education of children. Prioritising education within the home, and particularly the mother's education in the early years, is of great importance. It ensures that parents are adequately prepared to guide children into the future by providing values, stability, security and moral, emotional and religious education¹.

The presence of parents in children's lives means care, protection and nurturing.

Children need to feel that there is protection, care and guidance.

This is undoubtedly different from what they would experience in any alternative family because the parental bond is completely different from any other bond.

The mother embodies total grace and sacrifice, while the father is total support. Deprivation of parents can have serious psychological and social effects on the child, leading to various problems such as difficulties in forming and maintaining relationships, feelings of insecurity, a sense of not belonging, psychological disorders, anxiety, depression and isolation. The family is the foundation for every child.

Second: The extent of stability and change in family law

- **The scope of stability:** This includes final decisions and areas of consensus. In these areas there is no room for development or personal interpretation², and disagreement is not permitted for those who have the knowledge. The areas of stability in family law include marriage contracts, inheritance, forbidden relationships and the noble ethical values that bind family relationships. These areas are considered to be permanent principles that will not change until the end of time.

¹- Magdy Mohammed Ashour, *The Constant and the Variable in the Thought of Imam Abu Ishaq al-Shatibi*, Dar Al-Buhuth for Islamic Studies and Heritage Revival, Dubai, 1st edition, 2002, p. 19.

²- Magdy Mohammed Ashour, *The Constant and the Variable in the Thought of Imam Abu Ishaq al-Shatibi*, p. 20.

- **The extent of change:** This includes jurisprudence based on analogy and public interest. Any matter that does not have conclusive evidence from a valid text or explicit consensus¹ falls into the category of changeable rulings. Changeable rulings can occur in two situations:

- When there is a text: In this case, the interpretation of the text and the understanding of its intended meaning is subject to personal judgement. The application of texts is not automatic, but depends on the specific circumstances in which the text is applied². This is what we call the activation of the jurisprudence of reality.

-When there is no specific text: In this situation, new rules can be derived on the basis of analogy, public interest, consensus or customary practice. These jurisprudential rulings are not fixed because they are based on personal judgement, which is subject to conjecture. The decision may also be based on reasons, interests or customs that may change with time and circumstances. It is therefore the new family matters, which have no direct textual reference, that represent the most significant aspect of instability.

The distinction between stable and changeable rulings is based on the consideration of the interests on which the rulings of Islamic law are based. If the interest is stable and does not change with the variation of people, time or place, then the ruling remains stable and does not change.

If the interest is variable and changes with the people, time or place, then the rulings are subject to change, taking into account the circumstances and the interests of the people within this change.

Third, the criteria for understanding stability and change

In the field of family law and others, scholars have established criteria for understanding the concepts of stability and change in decisions. Some of these criteria are:

- The strength of the connection between the judicial decision and its legal objective: The closer the legal decision is to its overall objective, the more it tends to be stable and less prone to change.

¹- Al-Shatibi, "The Compatibilities in the Fundamentals of Islamic Law", edited by Mohammed al-Iskandari and Adnan Darwish, Dar Al-Kutub Al-Arabi, 1st edition, 1422 AH, p. 725.

²- Hassan Ali Akbarian, "The Constant and the Variable in Textual Evidence: A Study of the Mechanisms of Jurisprudential Ijtihad", Beirut, Civilization Center for the Development of Islamic Thought, 1st edition, 2013, p. 51.

- Consensus on the case law: If there is a consensus, it indicates certainty and the decision becomes final. Conversely, if there is a difference of opinion or disagreement among the majority of scholars, the ruling becomes changeable¹. Thus, what is considered stable in jurisprudence is the consideration of the majority opinion, which is subject to change in many legal issues, including matters of guardianship.
- The linguistic implication of the legal text indicating the negation of possibility: This includes precise and definitive wording as well as explanatory language. For example, numerical expressions imply certainty and finality.
- Legal rulings that are necessarily known from religion: These rulings are definitive because they are widely transmitted and have achieved absolute consensus, such as the permissibility of marriage, the prohibition of adultery, and the obligation to be kind to one's parents.
- Any law that is based on customs and traditions is subject to change: Stable legal rulings are based on the efforts of jurists who take into account the interests and customs of people, which vary with time and place².

Based on the above discussion, it is necessary to distinguish between family rulings that are fixed by Islamic law and cannot be violated, and those that are fixed by juristic interpretation and are subject to change according to changing interests and customs. Conjectural juridical rulings are subject to change, while definitive rulings derived from conclusive texts can change according to changing circumstances. The principle remains theoretically stable, and the ruling applied to the specific situation becomes conjectural in practical application, because the application is based on conjecture and removes the quality of certainty³.

3.2 The following factors should be taken into account when deciding on the separation of children from their parents:

Firstly, the issue of child custody falls under the concept of guardianship: Guardianship refers to a person's legal authority to make appropriate decisions

¹- At-Tayyib Al-Manwar, "Family Laws between the Constant and the Variable: A Study on the Marital Issues of Marriage and Divorce in Diaspora Countries", International Second Forum on the Latest Developments in Family Law, 24-25 October 2018, University of El-Oued, Algeria, p. 1130.

²- Safiah Al-Jafari, "The Constant and the Variable in Legal Decisions: The Wife's Leaving of Her Home and Her Obligation to Cover in Front of Strangers 2- a Jurisprudential Study", Arab Network for Research and Publishing, Lebanon, 1st edition, 2014, pp. 46, 78.

³- Abdul Karim Zidan, "Detailed Rulings on Women and the Muslim Household", Al-Resalah Foundation, Beirut, 1st edition, 1993, vol. 6, p. 339.

about themselves, their property and others¹. From birth, people are subject to three types of guardianship. The first is legal guardianship, which is primarily the responsibility of the mother. The second is self-guardianship, which applies to a child who has reached the age of majority, as well as to persons who are insane or mentally incapacitated, and to unmarried women and adult men who are unable to protect themselves. The third is the guardianship of property². The scope of each type of guardianship should be explained in order to address our topic.

- Guardianship of education and protection: This is for people who are dependent and need someone to look after their welfare. In the case of children, this is often referred to as custody. This aspect of guardianship is more complex and there are differing views among legal experts. Of particular relevance to our discussion is the classification of guardians. Lawyers have ranked guardians according to the best interests of the child, with women being preferred because they are more compassionate and patient. Most jurists consider custody to be mandatory for women. Custody can also be granted to men, but women are generally more suitable because of their natural inclination to care for children. In the early stages, custody is granted to the mother or a female relative who replaces her. In the later stages, custody is granted to the father, and this is known as guardianship of protection and care³.

The study of child custody in terms of its rightful claimants leads to the conclusion that there is no specific textual evidence, either from the Qur'an or the Sunnah, that determines custodial rights apart from the mother. This is based on the statement of the Prophet Muhammad (peace be upon him): "You are more entitled to it"⁴. This is because the mother possesses unique qualities of affection and compassion that are not found in other relatives of the child. Therefore, the mother has the primary right of custody unless there are valid reasons to the contrary.

¹- Mohammed Abu Zahra, "Guardianship over the Self", Dar Al-Fikr Al-Arabi, p. 6. Mohammed Abu Zahra, "Personal Status", Dar Al-Fikr Al-Arabi, 3rd edition, 1957, p. 458.

²- Abdul Qadir bin Harzallah, "The summary of marriage and divorce laws in Islamic jurisprudence and Algerian family law according to its latest amendment", published by Dar Al-Khaldounia, Algeria, 1st edition, 2007, page 365.

³- Narrated by Abu Dawood in his Sunan, no. 2276, and by Ahmad in his Musnad, no. 6707.

⁴- See: Al-Kasani, (The miracles of craftsmanship in arranging the laws), published by Dar Al-Kutub Al-Ilmiyyah, Lebanon, 2nd edition, 1986, volume 4, pages 41-42. Al-Dardir, "Al-Sharh al-Kabir" (The Great Commentary), published by Dar Ihya' al-Kutub al-Arabiyyah, Lebanon, 1119 AH, volume 2, page 526. Ibn Qudamah, "Al-Sharh al-Kabir" (The Grand Commentary), published by Dar Al-Hijrah for Printing, Publishing and Distribution, Egypt, 1st edition, 1996, volume 24, page 456.

Scholars also agree that women have priority in custody because of their greater tenderness, patience and attachment to children. However, they disagree on the ranking of other relatives after the mother and maternal grandmother. The jurisprudential references on this issue are very diverse and contradictory. They also differ in the conditions for exercising parental authority, and there are many details about them¹. The most important of these conditions is that the custodian should be a free adult, mentally competent, capable of fulfilling the responsibilities of custody, trustworthy and an adherent of Islam. This last condition is the most relevant to our topic² as it raises questions about the placement of a non-Muslim foster family in the care of a Muslim child. There is disagreement among legal scholars on this issue. The reason for the disagreement is based on the narration of Abu Hurairah (may Allah be pleased with him) that the Prophet (peace be upon him) said: "Every newborn is born with fitrah (natural disposition), and then his parents make him a Jew, a Christian, or a Magian"³. Scholars have mentioned different interpretations of fitrah, with some attributing it to Islam. Therefore, the mention of the parents in the Hadith becomes a decisive factor in most cases⁴.

¹- Hanafi school of thought: The requirement of religious unity is not necessary for the establishment of this right. They justified its legitimacy by arguing that custody is based on compassion, which is not affected by religious differences. However, they conditioned the custody of the child with her until she reaches the age of discernment or until there is a fear that she may adopt disbelief. If this happens, her custody is terminated. As for men, one of the conditions is kinship, so custody is established only for male relatives. Religious differences prevent the establishment of kinship according to the Hanafi school. See: Al-Kasani, "Bada'i al-Sana'i fi Tartib al-Shara'i", volume 4, pages 41-43.

- Maliki school of thought: This school generally holds that being a Muslim is not a prerequisite for custody, whether the custodian is male or female. However, if there is a fear of corruption of the child, for example if the guardian raises the child according to her religion, she is included in a group of Muslims to serve as guardians over her, and custody is not transferred to others. Ibn Wahb is reported to have a different opinion, as he believes that a non-Muslim woman should not have custody because if a Muslim woman is praised by a human being, she loses custody, so a non-Muslim woman is more deserving. This view was supported by Al-Lakhmi because it is better and safer for the child. See: Al-Dasuqi, "Hashiyah al-Dasuqi 'ala al-Sharh al-Kabir", volume 2, page 529.

- Shafi'i school of thought: There is no custody for a non-Muslim over a Muslim because he has no authority over the Muslim and may lead him astray in his religion. Since the wicked person has no custody according to the Shafi'i school, the non-Muslim is even more deserving. See: Al-Shirbini, "Mughni al-Muhtaj", volume 3, page 455.

Hanbali school of thought: Custody for a non-Muslim over a Muslim is not established because a non-Muslim has no guardianship over a Muslim. Since custody is not established for an evil person, the non-Muslim takes precedence because his harm is greater. They can lead the child astray from his religion by teaching him disbelief and embellishing it for him and bringing him up on it. Custody is established for the best interest of the child, so it is not legislated in a way that would lead to their destruction and the destruction of their religion. See: Ibn Qudamah, "Al-Mughni", volume 8, page 238.

²- Reported by Al-Bukhari in his Sahih, Book of Funerals, chapter: If a child embraces Islam and then dies, should prayer be offered for him? Hadith number: 1359.

³- Ibn Hajar al-Asqalani, "Fath al-Bari Sharh Sahih al-Bukhari", compiled by Muhammad Fuad Abdul-Baqi, Dar al-Risalah al-Alamiyyah, vol. 3, p. 219.

⁴- Ibn Hajar, "Fath al-Bari", vol. 3, p. 249.

It should be emphasised that the education and upbringing of a Muslim child by a non-Muslim guardian may result in a change in the fitrah (natural disposition) mentioned in the Hadith, which many scholars believe refers either to Islam or to the potential for accepting Islam and receiving the principles of the true religion¹.

Despite the jurisprudential differences on this issue, the prevailing view is that there must be unity of religion in custody. If there are several guardians, the Muslim guardian takes precedence over others, even if they are far away. Non-Muslim custodians have no right to custody if a Muslim custodian is available. However, the priority given to both parents in custody is not absolute, but rather based on achieving security. The child has a greater need for the father's knowledge, protection and provision of material and spiritual support.

In conclusion, Islamic law considers the best interests of the child as a priority and facilitates the means for their proper upbringing to achieve the goals of family stability and protection of their religion. However, all of this depends on an enabling environment for Muslims. If the legal system in non-Muslim societies is followed, Muslims have no authority and no choice but to abide by the prevailing legal authority.

- **Guardianship of the person:** This complements the upbringing of the child, which begins with custody and includes safeguarding and protecting the child after he or she has reached the age of majority. It also includes arranging the marriage of a minor, with differing views on the ranking of male relatives, but it begins with puberty and paternity, and when custody ends, the child is placed under the guardianship of the legal guardian.

- **Guardianship of property:** It is established for those who are deemed incapable due to their young age, mental incapacity or insanity. It may be original, derived from the Shari'ah, or acquired by delegation from the natural guardian after their death or termination of their guardianship due to disqualification. It includes guardianship (wasiyyah) and guardianship of property (qawama) within the parameters set by the jurists².

¹- Abdul Wahab Khalaf, "Personal Status Laws in Islamic Sharia", Dar al-Qalam for Publishing and Distribution, Kuwait, 2nd edition, 1410 AH - 1990 AD, pp. 195, 222.

²- Radia Qasabaya, Abdul Rahman Redad, "Problems of Custody of Minors in Light of the Objectives Related to Preserving Progeny - The Issuance of Custody as a Model", Journal of Sharia and Economics, Volume 8, Issue 15, June 2019, pp. 83-84.

All the details mentioned are based on interpretations and inferences from textual evidence, some of which is definitive and some of which is speculative, making it clear that the elements of the issue are subject to research and are debated² on the basis of both definitive and speculative evidence.

Second: Considering the reality of Muslim minorities as the basis for examining the issue.

When a jurist applies the laws of the Shariah to specific issues and moves from the realm of theory to the realm of application, he must take into account reality with precision. In this context, the jurist relies on several considerations:

- Correct application of the text to reality: It is necessary to consider the family laws, especially the custody laws, recognising that there are differences among scholars regarding their details. It is therefore important to examine their constants and variables and to consider the influence of time and place.

- Considering the understanding of reality as a prelude to the creation of the jurisprudence of reality: The jurist passes through two stages in this process. The first stage is the stage of understanding, which involves gathering data on the issue under consideration and understanding its details in terms of time and place. The circumstances of this era may not encompass what existed in previous eras, and the place of the issue may be characterised by a weak position for Muslims who are subject to the laws of the countries in which they reside. The second stage is the stage of jurisprudence and application, which involves sorting out the rulings related to guardianship, determining the organising thread indicated by the Shari'a and how to apply it to the new circumstances, and finally formulating an appropriate ruling for the issue.

- Consideration of legal sovereignty: As we have experienced, Muslim minorities live in societies governed by non-Islamic laws, many of which contradict our comprehensive Shari'a, whether in regulating individual or collective life. These legal sovereignties are binding on anyone engaged in transactions within their jurisdiction, and any violation can result in severe penalties, including deportation¹.

We must also not overlook the derogatory or hostile views that are often directed at the Muslim community as a whole. This can be a reason for administrative and procedural rejection of this non-compliant group. It is worthy of legal

¹- Abdel Majeed Al-Najjar, "The Objectives of Sharia in Family Law Directing the Muslim Family Laws in the West", European Council for Fatwa and Research, France, pp. 4-5.

consideration to examine the conditions and implications of minority situations and to assess the appropriate Shari'a rulings to achieve the interest that is the purpose of all rulings¹. This is what those who have made efforts in the jurisprudence of Muslim minorities have emphasised by applying the principles of facilitation. This is why their jurisprudence is called the jurisprudence of licence (fiqh al-tarkhīs).

Third, invoking the principles of Sharia in relation to the reality of Muslim minorities.

The principles that can be used to determine the ruling in this matter include those related to the principles of preference (tarjih) and those related to the principles of facilitation (taysir). Some of the important principles that can be considered in this context are as follows:

- The aim of Sharia is to preserve its objectives by establishing the welfare of individuals in this life and the hereafter². The preservation of the child's religion when placed in the care of a non-Muslim foster family is of paramount importance. Research in countries that have adopted this approach shows that there are families who make fostering their profession, known as 'foster families' or 'care families'. Although their laws lay down strict conditions that the foster family must meet, including maintaining a link with the child's original environment, reality often contradicts this³. The first thing that is undermined in the child's personality is the teachings of their religion.

- The principles related to conflict of interest and harm: When there is a conflict of interests, the stronger interests should be preferred to the weaker ones. It is in the child's interest to remain in the care of his or her parents in order to receive emotional care, while the interest of good material care can be found in an alternative family. However, this interest conflicts with the harm of psychological instability, the loss of parental affection, the warmth of spiritual aspects with relatives who foster kinship ties, and the Islamic principles and values instilled in them. The loss of all this can lead to an individual being cut off from his Islamic upbringing and developing an unhealthy personality, even if all material aspects of life are provided for.

¹- Abdel Majeed Al-Najjar, "Consequences of Actions and Their Impact on Minority Jurisprudence", pp. 21, 22.

²- Al-Shatibi, "Al-Muwafaqat", vol. 2, p. 9.

³- Khaled Salama, "Withdrawing Child Custody from Their Parents in Germany, Causes and Procedures," accessed at <https://www.dw.com/ar>, accessed 14/7/2023.

The observer of this issue finds that the principle of blocking the means (sadd al-dharai‘) is one of the most important principles to consider. The original principle is to close the paths and avenues that lead to forbidden actions. The disconnection of children from their religious teachings and their separation from their culture and Islamic identity is one of the greatest harms that must be prevented. However, this result is in contradiction with the laws of the country that forcibly takes the child, leaving the parents no choice. Is this situation a necessity or a temporary refuge that requires accepting the current circumstances until conditions and circumstances change?

What has been said reflects the consideration of the scholars of maqasid (objectives of Islamic law) in examining the consequences of actions. It is very important in this context and a jurist should not overlook or neglect it. Interests are not equal, just as harms are not equal. Therefore, the degree of regulation should be based on the degree of interest to be achieved or the degree of harm to be prevented¹.

Considering the principles of facilitation in the light of the convergence of interests and harms, and based on what has been determined by the scholars of Maqasid² on the means of resolving conflicts between them, and taking into account the conditions of Muslims living in non-Muslim countries, many scholars who have made efforts in the field of contemporary Muslim minorities, such as Yusuf al-Qaradawi (may Allah have mercy on him), Abdullah bin Bayyah, and Abdul Majid al-Najjar, have concluded that their rulings fall within the framework of what is necessary to alleviate hardship or what is required by necessity or need. It should be noted that most contemporary fiqh issues, whether those that have been addressed by scholars or those that are still subject to discussion and interpretation, pose challenges in assessing necessity and the ruling that follows from it. Does necessity attach to it and thus determine its ruling, or does it not? This is an area that puzzles many.

Those who have been involved in issuing fatwas on the issues of Muslim minorities, including scholars like us, have found that time and place play a prominent role in changing rulings.

Islamic Sharia is characterised by flexibility and realism, and changing fatwas with the change of time and place is a well-established practice recognised by

¹- Abdullah bin Bayyah, "The Making of Fatwas and the Jurisprudence of Minorities," page 336.

²- Al-Shatibi, "The Harmonisation", volume 2, page 121. Volume 5, page 300.

scholars. This is to give priority to a legitimate interest that was not predominant at a particular time, or to prevent a harm that did not exist in earlier times. The time itself does not change, but what changes are the circumstances of the people of that time and the interests on which the decisions are based and the harms that the Shari'a seeks to prevent¹.

Scholars have given various reasons for alleviating hardship, including general distress. Muslims in this era face challenges and vulnerability in non-Muslim societies, which necessitates easing their rulings. Especially since there is no denial of disagreement and independent reasoning (ijtihad), as long as there is no definitive textual evidence or consensus on a particular matter, ijtihad is acceptable in it².

4. Conclusion:

- The implementation of Islamic rulings must accurately reflect people's realities and circumstances, taking into account changes in the environment in which Muslims live, as these changes have an impact on the formulation of rulings.
- There is an urgent need for a practical understanding of family issues for Muslim minorities, given the pressures that families face in the West, which pose significant challenges to their religious, behavioural and overall value systems.
- Fiqh Al-Waqi' (Jurisprudence of Reality) is a term that reflects the problematic nature of theorising the rulings for this category and explains their concerns. Despite the rich Islamic jurisprudential heritage with its abundant rulings, this category has its own specificity in terms of context and place, which needs to be taken into account when formulating its rulings, such as on the issue of forcible separation of children.
- The concept of specificity is controversial, both in terms of reality and jurisprudence. According to proponents of minority jurisprudence, it is the result of the dominant civilisation that shapes the relationship between Muslims and the West, the specificity of legal obligation, as Muslim minorities are obliged to deal with the systems and laws of society, and finally the specificity of psychological vulnerability and cultural pressure.
- Dealing with the jurisprudence of reality should take into account the circumstances of minorities, examining the issues and their development, realising

¹- Abdullah bin Bayyah, "The Making of Fatwas and the Jurisprudence of Minorities", pages 245, 248, 249.

²- Ibn al-Qayyim, "Informing the Ignorant", volume 3, page 365.

interests or preventing harm, and the consequences of the ruling in the long run. It is a complex task that requires a comprehensive understanding of all the circumstances involved, whether in fully understanding them or in applying the decision while taking into account the circumstances of minorities.

- The element of reality is a pillar of reasoning in this matter, and the implementation process cannot be carried out without considering it. Its consideration is linked to seeking expertise in various fields in order to refine the perception that leads to the appropriate decision.

- There are three elements that govern our issue: detailed evidence related to guardianship issues, general and jurisprudential principles, and the reality of Muslim minorities.- Finally, I call on Islamic institutions in the countries of the diaspora to pay more attention to courses and activities in the field of family issues, to provide rehabilitation and training programmes, and to support Muslim families and their cohesion and financial solidarity so that they are not vulnerable to unjust Western laws.

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