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The Maqasid-Based Dimension of Awarding and Withdrawing Custody from a Non-Muslim Mother
A Comparative Study in Light of Islamic Jurisprudential Schools, Algerian Legislation and Judicial Practice

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Abstract

After marital separation, custody becomes one of the principal legal concerns because children are particularly vulnerable owing to their young age, physical fragility and developing mental capacity. Islamic jurisprudence and positive law generally give the mother priority in custody because of her close relationship with the child and her capacity for care and compassion. This priority, however, is subject to conditions, including the requirement that the child be raised in accordance with the applicable religious framework. The issue becomes particularly complex where the mother is non-Muslim, and becomes more sensitive where she is a foreign national seeking to relocate permanently with the child to a country in which the child's religious environment may differ from that of the father. This study examines whether religious difference between the custodian and the child affects the mother's priority in custody. It adopts inductive, analytical and comparative methods and approaches the issue through the objectives of Islamic law (maqasid al-Sharia), with particular attention to the objective of preserving religion (hifz al-din). The study examines divergent positions within Islamic jurisprudence and the relevant provisions of Algerian family law, together with Algerian judicial practice.

Keywords: custody; religious difference; non-Muslim mother; preservation of religion; child's best interests;

Introduction

Children constitute an essential part of every society and represent its future. Islamic jurisprudence and positive legislation therefore seek to protect the child's life, stability and development by promoting physical, intellectual and moral development and by ensuring an appropriate balance between rights and duties. Within the Islamic legal perspective adopted in this

study, religious upbringing occupies a central place in the protection of the child and in the fulfilment of the objectives of Islamic law[1].

Islamic law places particular emphasis on educating children in sound belief, obedience to parents, good conduct and respect for others. In principle, parents are the persons most closely connected with this responsibility. Yet the marital relationship may end through divorce or death, leaving children in need of continuing care and upbringing. Custody must then be entrusted to a person capable of providing appropriate care, and the mother is ordinarily given priority because of her closer emotional and practical relationship with the child[2].

The difficulty becomes more pronounced where the custodial mother is not Muslim. It becomes even more sensitive in cases arising from mixed marriages where the mother seeks to move permanently with the child to her country of origin. The legal problem then involves a balance between the child's relationship with the mother, the practical requirements of custody, the child's religious identity and the child's best interests.

The central question is therefore whether religious difference between the custodian and the child affects the mother's priority to exercise custody. To address this question, the study uses an inductive method to identify the principal jurisprudential positions, an analytical method to examine the relevant Algerian legal provisions and judicial decisions, and a comparative method to place these positions alongside one another. The study is divided into two main sections: the first addresses the permissibility of custody by a non-Muslim mother in Islamic jurisprudence and Algerian law; the second examines restrictive jurisprudential approaches and the judicial discretion available to protect the child's religious identity and best interests.

Section One: Jurisprudential and Legal Foundations of Custody by a Non-Muslim Mother

1. Jurisprudential Approaches to Custody by a Non-Muslim Mother

Muslim jurists agree in principle that the mother has a privileged position in custody when the relevant conditions are satisfied. They nevertheless differ as to whether religious unity between the custodian and the child is itself a condition for custody. One group considers that a non-Muslim mother should not have custody of a Muslim child because of the risk to the child's religious identity, while another group permits such custody where the child is not exposed to demonstrable harm[3].

The Maliki school does not treat Islam as an absolute condition for the mother's entitlement to custody. Where a Muslim man is separated from a non-Muslim wife, the mother may retain custody provided that the other conditions of custody are satisfied. The position is supported,

1 The Qur'an, Ali Imran 3:19; al-Dhariyat 51:56.

2 'Abd al-Karim Zaydan, al-Madkhal li-Dirasat al-Shari'ah al-Islamiyyah (2nd edn, al-Matba'ah al-'Arabiyyah, Baghdad 1966) 39.

3 Wahbah al-Zuhayli, Mawsu'at al-Fiqh al-Islami wa al-Qadaya al-Mu'asirah, vol 8 (3rd edn, Dar al-Fikr al-Mu'asir, Beirut 2013) 688.

among other considerations, by the report concerning Rafi‘ ibn Sinan, in which a disagreement arose between a Muslim father and a non-Muslim mother over the custody of their young daughter. The report is invoked by this jurisprudential approach as evidence that religious difference does not automatically extinguish the mother’s custody rights[4].

The Maliki approach nevertheless recognises safeguards. The non-Muslim mother should not expose the child to prohibited food or practices harmful to the child’s religious upbringing. Where a genuine risk is established, appropriate supervision or intervention may be considered[5].

Abu Zahra likewise states that religious unity is not necessarily a prerequisite for custody. He gives the example of a Muslim man who divorces a Christian woman and has a daughter: the child follows the father’s religion, while custody may remain with the Christian mother because maternal compassion continues. He nevertheless identifies circumstances in which custody may be lost, particularly where the child reaches an age at which religious differences can be understood and the mother may influence the child, or where the mother’s conduct demonstrates a lack of trustworthiness in relation to the child’s upbringing[6] .

The Hanafi position similarly recognises the right of a Christian or other woman from the People of the Book to exercise custody during the child’s early years. Islam is therefore not treated as an absolute condition. The child may remain with the custodian until an age at which the child becomes capable of understanding religious distinctions; however, where there is a real fear that the child will be taken to places of worship contrary to the child’s religious upbringing or will become accustomed to disbelief, custody may be withdrawn even before that stage[7].

Ibn Hazm’s discussion in al-Muhalla is also cited for the proposition that a young child may remain with a non-Muslim mother while the child remains dependent upon her, particularly during infancy. These approaches demonstrate that the jurisprudential debate cannot be reduced to a single rule: early childhood, actual risk, the child’s ability to understand religion and the conduct of the custodian are relevant considerations[8].

2. Entitlement of a Non-Muslim Mother to Custody under Algerian Law and Judicial Practice

Article 62 of the Algerian Family Code defines custody as the care of the child, education and upbringing according to the father’s religion. This provision gives the child’s religious

4 ’Abd al-Rahman al-Gharyani, al-Fiqh al-Maliki wa Adillatuhu, vol 3 (Mu’assasat Rayan) 161.

5 Wahbah al-Zuhayli, Mawsu‘at al-Fiqh al-Islami wa al-Qadaya al-Mu‘asirah, vol 8 (3rd edn, Dar al-Fikr al-Mu‘asir, Beirut 2013) 688.

6 Muhammad Abu Zahrah, al-Ahwal al-Shakhsiyyah (3rd edn, Cairo 1957) 408.

7 ’Abd al-Karim Zaydan, al-Mufassal fi Ahkam al-Mar’ah wa al-Bayt al-Muslim fi al-Shari‘ah al-Islamiyyah, vol 10 (1st edn, Mu’assasat al-Risalah, Beirut 1993) 34.

8 Ibn Hazm, al-Muhalla bi al-Athar, ed ’Abd al-Ghafur Sulayman al-Bandari (1st edn, Dar al-Kutub al-’Ilmiyyah, Beirut 2002) 143.

upbringing an explicit place within the legal concept of custody. At the same time, the provision does not expressly formulate the mother's Islam as an independent absolute condition for custody[9].

Article 64 gives priority in custody to the mother under the statutory order of custodial entitlement, while Article 67 provides for loss of custody where the custodian fails to satisfy the statutory conditions. The combined reading of these provisions indicates that maternal priority is important but not unconditional. The court must consider whether the legal conditions continue to be fulfilled and whether the child's interests are protected[10].

Algerian judicial practice has also addressed cases involving religious difference and relocation abroad. In Case No 52207, decided on 2 January 1989 by the Personal Status Chamber of the former Supreme Council, the dispute concerned a Muslim father and a mother residing in France. The lower court had awarded custody to the mother, relying in part on the emotional relationship with the children. The higher judicial reasoning placed emphasis on the consequences of relocation to France, including the effect on the children's upbringing according to the father's religion and the practical difficulty of maintaining effective paternal visitation and supervision. The reasoning does not establish that the mother's foreign nationality or non-Muslim status alone automatically determines custody; rather, the circumstances of residence and the child's upbringing were central to the assessment[11].

Case No 457038, decided on 10 September 2002 and published in the Supreme Court Review No 2 of 2008, is particularly relevant to the distinction between nationality and religious identity. The acquisition of French nationality by the mother was not treated as proof, by itself, that she had abandoned Islam. The court required evidence establishing the alleged change in religious identity, and the mother retained custody of her five children[12].

Section Two: Preservation of the Child's Religion, Judicial Discretion and International Relocation

1. Jurisprudential Restrictions on Custody Based on Preservation of Religion

A second group of jurists adopts a more restrictive approach to custody by a non-Muslim mother of a Muslim child. The principal concern is the preservation of the child's religious identity. Within this approach, custody is understood not merely as physical care but also as a form of daily authority and influence over the child. Because the child is exposed to the custodian's conduct, beliefs and practices, a religiously different custodian may, according to this view, create a risk that the child will become accustomed to another religious environment[13].

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9 Law No 84-11 of 9 June 1984, Algerian Family Code, Official Gazette No 24 (12 June 1984), art 62.

10 Law No 84-11 of 9 June 1984, Algerian Family Code, Official Gazette No 24 (12 June 1984), arts 64 and 67.

11 Supreme Court, Personal Status Chamber, Case No 52207, decision of 2 January 1989, Judicial Review No 4 (1990) 74–76.

12 Supreme Court, Personal Status Chamber, Case No 457038, decision of 10 September 2002, Supreme Court Review No 2 (2008) 313–316.

13 Ibn al-Qayyim al-Jawziyyah, Zad al-Ma'ad fi Hady Khayr al-'Ibad, vol 5, ed Shu'ayb al-Arna'ut and 'Abd al-Qadir al-Arna'ut (3rd edn, Mu'assasat al-Risalah 1998).

The Shafi'i and Hanbali approaches are generally presented in the study as more restrictive in this respect. Their reasoning focuses on the principle that a non-Muslim should not exercise a form of authority over a Muslim child where such authority threatens the child's religious identity. The Ja'fari position is also discussed as supporting a restrictive approach. These positions should be understood as jurisprudential arguments rather than as a single uncontested rule applicable in every factual setting[14].

The objective of preserving religion (hifz al-din) provides the maqasid-based framework used by the authors to explain this restrictive position. The concern is not simply the formal religious status of the custodian but the concrete consequences of the custodial environment for the child's religious formation. Consequently, the child's age, degree of understanding, actual conduct of the custodian and surrounding social environment may affect the assessment.

2. Judicial Discretion, International Relocation and the Child's Best Interests

The question of relocation abroad adds a separate dimension to custody disputes. The classical jurisprudential discussions cited in the study generally pay attention to distance because a move may deprive the other parent of meaningful access, visitation and supervision. The concern may arise whether the destination is a Muslim or non-Muslim country; the relevant issue is the practical effect of the move on parental contact and the child's upbringing.

Algerian law gives the judge an important role in assessing relocation. Article 69 permits the competent family judge to consider a request to move with the child to a foreign country, after hearing the other party and giving reasons that relate to the child's interests. Judicial review mechanisms remain available against the decision. Read together with Article 67, the provisions indicate that the continued exercise of custody depends upon compliance with the statutory conditions and that relocation may become relevant where it materially affects those conditions or the child's interests[15].

The study identifies a difficult conflict between different dimensions of the child's interests. A child of Algerian parents living abroad may benefit educationally or socially from remaining in the country of residence, while the parents may disagree about religious upbringing. Conversely, returning the child to Algeria may protect one aspect of the child's religious environment while creating educational or economic difficulties. The judicial task is therefore fact-sensitive and requires attention to the child's concrete circumstances rather than an abstract assumption based solely on nationality or residence.

The article proposes several practical mechanisms for addressing these situations. One proposal is to establish specialised offices within Algerian consulates, involving qualified religious personnel, to support Islamic education where custody is awarded to a non-Muslim mother.

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14 Ibn al-Qayyim al-Jawziyyah, Zad al-Ma'ad fi Hady Khayr al-'Ibad, vol 5, ed Shu'ayb al-Arna'ut and 'Abd al-Qadir al-Arna'ut (3rd edn, Mu'assasat al-Risalah 1998).

15 Law No 84-11 of 9 June 1984, Algerian Family Code, Official Gazette No 24 (12 June 1984), art 69, as amended and supplemented by Ordinance No 05-02 of 27 February 2005.

Another proposal is to include appropriate contractual arrangements in mixed-marriage agreements, subject to the applicable law, concerning the child's religious education and access to qualified educational support. The study also suggests that where both parents live abroad and the father is genuinely able to monitor and participate in the child's upbringing, custody should not automatically be withdrawn solely because of residence abroad.

A further issue arises where a Muslim father dies and the non-Muslim mother remains the custodian in Algeria without relatives capable of monitoring the child's religious upbringing. The study raises the question whether the Public Prosecutor or juvenile judge could intervene if the legal conditions for intervention in child-protection matters are satisfied. This is presented as an area requiring legislative clarification rather than as an assertion that an intervention is automatically available in every such case[16].

Finally, the study discusses the position attributed to Sheikh Ahmad Hamani concerning marriage to Christian women. His advice is presented as cautionary and linked to the possible effect of the mother's religious environment on children. At the same time, the article recognises the classical Islamic-law permission for Muslim men to marry chaste women from the People of the Book, subject to the relevant conditions[17].

Conclusion

The analysis demonstrates that Islamic jurisprudence contains more than one approach to custody by a non-Muslim mother. One approach permits custody during the child's early years where the mother is capable of providing care and no concrete harm to the child's religious upbringing is established. Another approach gives greater weight to the preservation of the child's religious identity and regards religious difference as a potential obstacle where the child's beliefs may be endangered.

Algerian family law does not make religious unity between custodian and child an express absolute condition. Article 62 nevertheless requires upbringing according to the father's religion, while Articles 67 and 69 allow the legal consequences of failure to satisfy custody conditions and the implications of relocation to be considered. Algerian judicial practice cited in the article shows particular attention to the child's religious upbringing, the practical possibility of paternal supervision and the consequences of relocation abroad[18].

The study therefore concludes, within its own legal and maqasid-based framework, that the assessment of custody should remain connected to the child's concrete interests and religious upbringing. Nationality should not be treated as proof of religious identity, and relocation should be examined through its actual consequences for the child and the relationship with the other parent.

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16 Sana Amari, al-Aliyyat al-Qanuniyyah wa al-Qada'iyyah li-Himayat al-Mahdun fi Qanun al-Usrah al-Jaza'iri (PhD thesis, University of Biskra 2021–2022) 141.

17 Ahmad Hamani, fatwa dated 24 April 1985 (4 Sha'ban 1405 AH), cited in the source article, pp 29–31.

18 Law No 84-11 of 9 June 1984, Algerian Family Code, arts 62, 67 and 69.

Recommendations

• Clarify the statutory conditions of custody, particularly Article 62, including the legal consequences attached to failure to ensure the child's upbringing according to the legally applicable religious framework.

• Clarify the treatment of apostasy separately from acquisition of a foreign nationality, so that nationality alone is not treated as evidence of a change in religious identity.

• Consider revising or supplementing the bilateral legal framework governing mixed marriages and custody between Algeria and France, particularly with regard to religious upbringing, access and international relocation.

• Consider additional bilateral or multilateral arrangements with countries in which Algerian nationals frequently reside, addressing cross-border custody and the child's continuing relationship with both parents.

• Provide clearer statutory guidance on the role of the competent judge in balancing religious upbringing, education, residence, parental access and the child's best interests.

• Consider specialised consular support mechanisms, where legally and institutionally appropriate, to facilitate the child's religious and cultural education when custody is exercised abroad.

• Strengthen coordination among competent public institutions, civil-society organisations and qualified religious and educational bodies in protecting children's rights and supporting families involved in cross-border custody disputes.

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