



Research Paper

Assessing and Criticizing Bases of Depriving Non-Muslim's Custody Over Muslim

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Abstract

In some jurisprudential sources, conditions are mentioned for male and female claimants of legal custody (hāqīn and hāqīna), one of which is "Islam", meaning if one of the parents is non-Muslim and the child is Muslim, and the parent loses custody of the child. Shi'ite jurists mostly approve this opinion while Sunni schools are divided upon this issue. Some Sunni scholars do not consider Islam as a condition; some consider it to be different for the hāqīn and the hāqīna, and some agree with the Shi'a. The proponents of this ruling have cited the verse of nafi-i sabīl, the verse of 'izzat and the hadith of the superiority of Muslims over non-Muslims (hadith 'uluw). There are fundamental criticisms of these citations; both verses cannot be considered the basis of this ruling, as well as, the 'uluw hadith, in addition to being weak in terms of its sanad (chain of transmitters), is referred to the superiority of the power of Islamic thought and ethics, as has been discussed in independent researches. Additionally, viewing custody as guardianship and extending the rulings of the guardianship to it is a matter of deliberation. Custody is a right that cannot be denied except with a valid reason. The emotional and mental damage inflicted upon the child under custody (maḥḍūn) is a further damage through the implementation of this sentence. It may lead to desecration of religion and turning away from it. On the other hand, the philosophy behind this ruling, i.e. impressionability, is degraded in many ways. This research aims to investigate the validity of the foundations of this ruling and criticize them, using library sources based on the critical descriptive-analytical method.

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Extended Abstract

1- Introduction

Custody (*hidāna*) is one of the most important issues in family law. "What are the conditions for the custody of a child by the parents" and "What factors deprive each one of the parents of this right" are examples of questions being always discussed by jurists and legal experts. Referring to jurisprudential texts proves that religion plays an important role in granting or denying custody, i.e. one of the conditions for parents to be allowed to take care of a child is being a Muslim; if both or one of the parents is non-Muslim while the child is Muslim, he/she does not have the right to take care of the child.

This condition for custody is mentioned in many Shi'ite and Sunni jurisprudence sources. However, there are differences among Islamic sects. For example, some consider this condition acceptable only for the father. The reasoning provided by the jurists is that since the child is influenced by the parents, non-Muslim's custody causes him/her to become a non-Muslim.

As for the Civil Code of Iran, this condition is not seen there and the law is silent on it. Some interpret this silence as a sign of the lawmakers' doubts about its validity. However, a group says that according to the general instruction of "wherever the law is silent on an issue, the judge must refer to jurisprudence in issuing a verdict," so the law also accepts this condition.

Since this condition is not compatible with the interest of the child and in today's society it can face challenges in such a way that religion is accused, this research seeks to answer the questions, "What sources do refer to the parents' condition of being a Muslim?" and "How is the validity of these sources and what criticisms (both religious and intellectual-moral) are for applying it?"

2-Method

The above-mentioned three basic questions faced by this research are as follows: The first question refers to the origin, the second refers to the evaluation of the documents, and the third refers to the criticisms of this view. Therefore, the method utilized here includes a combination of three main parts: firstly it takes a glance at the different opinions of Muslim schools' jurists (description). Secondly, it goes on to extract their documents. These documents are then separately explained and assessed based on a scientific method. In other words, the documents are presented to the Qur'an, authentic hadiths, reason and moral principles to determine the degree of agreement or disagreement with these sources (analysis). Thirdly, the documents are criticized by referring to reliable sources (criticism). Therefore, the method applied here is the descriptive-analytical method with a critical approach.

3-Result

The study of the jurists' views of Islamic schools shows that in the issue of depriving a non-Muslim of custody over a Muslim, although there is a consensus on the importance of the religion of the parents, who are in charge of custody, there are serious differences of opinion regarding the quality of applying the condition of parents' religion and deprivation of custody.

The jurists who believe in depriving non-Muslims of custody over Muslims bring up proof to defend their opinion, including the verse of *nafy-i sabīl*, the verse of *'izzat*, the hadith of the superiority of Muslims over non-Muslims, and finally, a customary reason, which is the possibility of being influenced. That is, the child may imitate the religion of his/her non-Muslim parents so that he would renounce Islam.

All four invocations of the jurists are defiled: None of the above verses and



hadith can be used as the basis for the ruling of depriving of custody because the central message of none of them is the depriving non-Muslims of their natural rights. As for "being influenced", there are many examples which contradict it.

Presenting this ruling to the Qur'an, Sunnah, reason and ethics will confront it with serious challenges. The Qur'an mentions the dignity of all human beings regardless of their religion. Denying the rights of parents is not compatible with the moral principle of justice. Most importantly, ignoring the interest of the child, which is recommended in many hadiths, is one of the results of applying this opinion.

4-Conclusion

It could be concluded that what has been done regarding this ruling is that they could not interpret the cited verses and hadith correctly; it is unacceptable to refer to them in issuing this ruling. The verse of *nafy-i sabīl* speaks of the disbelievers' lack of control over the Muslims on the Day of Resurrection, and the hadith of *'uluw* (superiority) emphasizes the supremacy of Islamic thought.

Ignoring the ruling principles, when issuing jurisprudential opinions, is another damage that has been inflicted here. Custody is the natural right of parents. Deprivation of this right requires very strong reasons, which are not available in this case. Depriving the custody of parents who behave decently with the child and do not fail to take care of their affairs just

because of the difference in religion causes a violation of dignity.

Additionally, the interest of the child requires that the most compassionate people, i.e. the parents, take custody of the child. Also, today the custom of society, which plays an important role in jurisprudence, absolutely does not accept such a method; rather, it causes the weakness of religion.

The weakness of the documents and the foundations of this ruling on one hand and the strength of the criticisms on it on the other make it face with serious challenges, especially in today's milieu. Considering these points, it is advisable that the legislators clarify the silence of the law by asserting the non-deprivation of custody.

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6- Authors' contribution

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7- Conflict of Interest

The authors declared no conflict of interest