
PROTECTION RIGHTS OF CHILDREN IN TERM OF FAMILY RELATIONSHIP FROM ISLAMIC LAW AND MALAYSIAN LAWS: A COMPARATIVE ANALYSIS

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ABSTRACT

Under Islamic law, all human including a child also entitles to *haqq* (right) and can benefit from it as long as not over the limits prohibited by Allah. This study deals with the protection of the rights of children in terms of a family relationship from Islamic law and Malaysian law. Further, the research will elaborate on the issue of whether the rights of children in Malaysian law are in line with Islamic law or not. The research is library research where the issue will be examined from the perspective of the Quran and the Sunnah as the primary sources of Islamic law and follows with the examination of the statute of Malaysian law as well as the decided cases in Malaysia. In addition, the reference also will be made to opinions to compare the rights of children in Islamic and Malaysian law. There are several rights of children relating with family relationships namely the right to lineage, right to suckling, right to maintenance, right of gender equality among siblings, and guardianship rights. It is found that all these rights seem scattered and did not combine in one statute. In fact, there are a lot more rights of children that have not been identifying and highlight in Malaysian law.

Keywords: *Protection Rights of Children, Islamic law, Malaysian laws.*

Introduction

The outbreak of the COVID-19 virus over the world has resulted in the announcement of the movement control order (MCO) by the Government of Malaysia that began on March 18, 2020. Due to that, the majority of the businesses, schools, and work suspended, and all citizens are highly advised to stay at home. As a result, the majority of citizens all day at home during this MCO period. However, from the positive side, this order has built a stronger relationship between the parents and their children. Before this, due to the huge responsibility to earn a living, many parents neglect the rights towards their children.

Children are an asset to the country and the link for the country's development in the future. They are a very important part of society. Child protection refers to preventing and responding to violence, exploitation, and abuse against children, including commercial sexual exploitation, trafficking, child labor, and harmful traditional practices, such as female genital mutilation and child marriage. Child protection, also simply addresses every child's right not to be subjected to harm. Other than the enactment of the Child Act 2001, legislation in Malaysia seems to silence on many rights of children. Furthermore, in general, the legislation in Malaysia does not cover the rights of children since the birth of children. For instance, the right of children to lineages, the right of children to suckling, the right of children to maintenance, the right of gender equality among siblings as well as the right to guardianship. These rights were outlined in Islamic law since the advent of the Prophet Muhammad (PBUH) 1400 years ago (Al-Zuhayli, n.d).

However, many misunderstandings occur nowadays relating to these rights of children especially contained in Malaysian law. They claim that the right of children contained in Malaysian law not clear, not complete, and not in line with the Islamic law approach. For protection to be in total, it is believed

that those children's rights should be made clear in all legislation relating to the protection of their rights. Therefore, this research works based on the premise that Malaysian law and policy is seemed to be inadequate and require further improvement, particularly on children's rights.

Protection of Rights Children in Family Relationship

The family is the nucleus of society. An ideal and great civilization will be achieved only by caring for and nurturing family and its members. This is the primary consideration in Islamic *Shariah* Law. It is for this reason that Islam has been attentive to genealogical clarity and the preservation of the family structure.

Family relationship refers to a Muslim family that consists of a legally married couple and their children. It also includes their parents, siblings, and other relatives. A Muslim family comes into existence through two means, which are blood relationship and marriage. Allah (SWT) says:

“And it is He Who has made man from water: Then He has set up relationships with family and marriage: And your Lord is ever All Powerful (over all things).” (Al-Furqan, 25:54)

There are several rights related to children in terms of family relationships that will be discussed below namely the right to lineage, right to suckling, right to maintenance, right of gender equality among siblings as well as the right to guardianship.

1. Right to Lineage

Islamic Law has accorded special attention, in terms of laws and provisions of the regulation of marriage, divorce, probate and inheritance, wills, and others that are related to the family. Allah Almighty has appointed marriage and has forbidden adultery so that paternity may be set up without uncertainty, ambiguity, or vagueness. So, the child will be referred to his father and vice versa. Through marriage, a woman is held for limited and reserved herself only for her husband. It is prohibited for her to be unfaithful to her husband or to give anyone else a chance to access her body which is exclusively for her husband. Thus, every child born to her in wedlock will be her husband's child, without any need for recognition or public proclamation of the fact by him or a corresponding claim on the part of the mother.

The Prophet (PBUH) said,

“The boy is for (the owner of) the bed and the stone are for the person who commits illegal sexual intercourse.” (Al-Bukhari: no. 6818)

The word lineage is derived from the Arabic term which is *Al-Nisbah*, *Al-Nusbah*, *Al-Nasab*, which means kinship. There are derived from *Al-Intisab*. *Al-Nusbah* means name. *Al-Nasab* is the father, country, or occupation. *Ansab* is plural for *Al-Nasab* (Ibn Manzur, n.d).

Ibn Arabi defines lineage as the blending of sperms between male and female according to Islamic law. If the blending of sperms between males and females is using any prohibition manner, the newborn is not eligible to lineage (Ibn Manzur, n.d).

Islam safeguards lineage by prohibiting *zina* and legal adoption, thus keeping the family line unambiguously defined without any foreign element entering into it. Thus, marriage is a religious obligation, ethical protection, and social need. Islam takes a generally engaging position to sexual relations, it upbraids it like particular religions nor does it license it uninhibitedly. Islam urges us to control and direct our desires, whatever they may be with the objective that we stay fair and not get the opportunity to be like animals.

The Holy Quran says,

“Marry those among you who are single, or the virtuous ones among yourselves, male or female: if they are in poverty, Allah will give them means out of His grace: for Allah encompasseth all, and he knoweth all things.” (Al-Nur, 24:32)

The Prophet (PBUH) said;

“Marriage is part of my sunnah, and whoever does not follow my sunnah has nothing to do with me. Get married, for I will boast of your great numbers before the nations. Whoever has the means, let him get married, and whoever does not, then he should fast for it will diminish his desire.” (Ibn Majah: no. 1919).

It is prohibited for the husband to deny his paternity of any child born by his wife during the length of their marriage based on mere suspicion, a sudden idea, or an insidious talk. However, on the facts, which have become obvious, he is persuaded that his wife has deceived him, the *Shariah* of Islam has does not force him to nurture up a child who he accepts not to be his child. An exit from this predicament referred to in Islamic law as *li'an*, is given by the *Shariah*. If a man is persuaded or unequivocally suspects, even though without having evidence, that his wife has had sexual relations with another man and is conveying his youngster, he can take the case to a Muslim judge (*Qadi*). The *Qadi* will ask the man and his wife to conjure the scourge of Allah on each other in the way recommended in Surah al-Nur.

Allah Almighty said:

“And for those who launch a charge against their spouses, and have (in support) no evidence but their own, - their solitary evidence (can be received) if they bear witness four times (with an oath) by Allah that they are solemnly telling the truth; And the fifth (oath) (should be) that they solemnly invoke the curse of Allah on themselves if they tell a lie. But it would avert the punishment from the wife, if she bears witness four times (with an oath) By Allah, that (her husband) is telling a lie; And the fifth (oath) should be that she solemnly invokes the wrath of Allah on herself if (her accuser) is telling the truth.” (Surah Al-Nur, 24: 6-9)

Sahl said, “I attended this before the Messenger of Allah (PBUH). Afterward the *Sunnah* about those who invoked curses on each other was established that they (the spouses) were separated from each other and they would never be united.” (Abi Dawud, no. 2250)

From the Islamic perspective, it is clear that every child is born with a right of lineage. This right is exclusive and nobody can deny it from any child.

In Malaysian law, the right of children not being specified and altogether in one single statute. However, it can be found in numerous statutes and not be well-arranged. For the right of lineage, there are several acts contained and highlight this right. In Section 2 of Islamic Family Law (Federal Territories Act) 1984 (IFLA), "*nasab*" means descent based on lawful blood relationship. Section 110 discussed the ascription of paternity where a child is born to a woman who is married to a man more than six *qamariah* months from the date of the marriage or within four *qamariah* years after the dissolution of the marriage either by the death of the man or by divorce, the woman not having remarried, the *nasab* or paternity of the child is established in the man, but the man, by way of *li'an* or imprecation, disavow or disclaim the child before the Court.

In the Evidence Act 1950, Section 112 stated that the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

In the case of *Wan Khairi Bin Wan Azmi lwn Farah Nurliliana Binti Jauhari [2012] 35 JH 166*, the court, in this case, had decided the paternity of the child to his own father who is an applicant. In *Ismail bin Ishak lwn. Kalam binti Mamat [1995] 10 JH 41*, the divorce has taken place on 28.9.1985, and 4 years later on 23.9.1989 the baby was born. The applicant denied the paternity of the child, but the respondent claims that *ruju'* has taken place after the divorce. Since there is no evidence that *ruju'* has taken place, the court decided that the baby is not a child of the applicant.

2. Right to Suckling

Rada'ah is an Arabic word rooted from *rada'a*. It is a noun that means 'sucking breast and drink its milk' (Ibn Manzur, n.d). Generally, it is an act of sucking milk from the breast (Ibn Al-Hamam Al-Hanafi, 1995). According to Ibn 'Abidin, it is an act of drinking milk from the udder or human breast (Ibn Abidin, 1992).

Legally, suckling is affected when a woman's milk or anything that is originated from human milk reached the infant's stomach or his/her brain through mouth or nose, with certain conditions (Al-Dusuqi, 2003). This definition is what has been defined by the majority school of *fiqh*, although there are some differences in certain criteria. The Hanafis for instance, use the word sucking (Ibn Al-Hamam Al-Hanafi, 1995) while the Malikis illustrate more in the manner of how the milk reached the infant's stomach whether through pouring neck, snuffing, or injection, as long as it is converted into food and nutrition for the infant (Al-Dusuqi, 2003). If in any case, the milk reached the infant's brain, it may also construct a legal suckling session, as mentioned by the Shafi'is, together with any food that is originated from human milk (Al-Sharbini, 1997) as long as it reaches the infant's *jawf*. The Hanbalis, on the other hand, specifically mentioned the nursing period, which is two years, and agrees with the Shafi'is on the milk that has to turn into cheese may also consider as suckling (Al-Bahuti, 1997).

Lane's Lexicon defines *rada'ah* as the suckling which occasions interdiction of marriage is that of an infant when hungry, not of a child that is grown up, or that consequent upon hunger which is stopped by the milk in the time of infancy of the child, not when the child's hunger is only to be stopped by solid food (Edward William Lane, 1968).

Breastfeeding is encouraged in Islam, to be given to a new-born baby within two years. Allah said:

"The mothers shall give such to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall be Treated unfairly on account of her child. Nor father on account of his child, an heir shall be chargeable in the same way. If they both decide on weaning, by mutual consent, and after due consultation, there is no blame on them. If you decide on a foster-mother for your offspring, there is no blame on you, provided the pay (the mother) what you offered, on equitable terms." (Al-Baqarah, 2: 233)

The verse in Surah Al-Baqarah deals with suckling as a right of the infant and duty for the parents to be performed.

The legality of suckling also supported by the Sunnah of the Prophet (PBUH) when the Prophet (PBUH) postponed the punishment for Al-Ghamidiyyah to enable her to suckle her infant. This happened when a woman came to the Prophet and asked the Prophet (PBUH) to purify her as what has the Prophet (PBUH) done to Ma'iz. However, the Prophet (PBUH) did not punish her until she has delivered the baby, and until the infant is weaning. Then only the Prophet (PBUH) punished her (Sahih Muslim, 1392H). This hadith signifies that suckling is upon the mother despite her conditions, but the postponement by the Prophet (PBUH) signifies her duty to suckle her infant (Al-'Usaili, 2005) as well as the right of the infant.

In addition, the Muslim jurists are unanimous that suckling is a religious duty of the mother to feed the baby whether in a connubial relationship or after divorce (Ibn Al-Hamam Al-Hanafi, 1995).

In **IFLA 1984**, Malaysia adopts the law on the prohibition of marriage between foster relatives. **Section 2** defines suckling or fosterage as 'the suckling of a baby up to sufficiency by a woman who is not its natural mother for at least five times during the first two years of its life'. In the relation to the effect of suckling on marriage prohibition, the relevant portion of that law is **Section 9 (3) of the IFLA** which provides that 'no man or woman, as the case may be, shall, on the ground of fosterage, marry any woman or any man connected with him or her through some act of suckling where, if it had been instead an act of procreation, the woman or man would have been within the prohibited degrees of consanguinity or affinity'.

Furthermore, this provision, which deals with fosterage, follows the hadith of the Prophet (PBUH) to the effect 'fosterage makes unlawful what consanguinity makes unlawful' (The Annotated Statutes of Malaysia, 2010). Thus, it is clear that Malaysia also applies the law about marriage prohibition through suckling.

However, it is the only provision that provides law on suckling as the law in Malaysia remains silent in matters about suckling as a right of the infant to be performed by the parents and matters associated with the wages for fosterage in the case of suckling divorcee, as well as suckling mother.

3. Right to Maintenance

Al-Nafaqah is derived from *Al-Infaq* which means spending money (Ibn Manzur, 2008). Allah Almighty said in Holy Qur'an:

"And when they are told, "Spend ye of (the bounties) with which Allah has provided you." (Yasin, 36:47)

Nafaqat is plural for *Al-Nafaqah*. Literally, *Nafaqah* is anything that is man spends on his family. Technically, *Nafaqah* is the adequacy of daily needs such as food, clothing, and housing (Ibn Abidin, 1992).

A father must provide *nafaqah* to his children. Allah Almighty said:

"But he shall bear the cost of their food and clothing on equitable terms." (Al-Baqarah, 2:233)

This means that the father bears the expenses of his child because of the birth of the child, as he is obligatory to bear expenses of his wife of delivery of the child. It is narrated from 'Aisha;

Hind binti 'Utbah said to the Messenger of Allah, "Abu Sufyan is a miserly man and I need to take some money of his wealth." The Messenger of Allah (PBUH) said,

"Take reasonably what is sufficient for you and your children." Sahih al-Bukhari, no. 7180)

Based on the traditions of the Messenger of Allah, is clear evident that *nafaqah* is obligatory upon a man on his wife and children (Al-Zuhayli, n.d).

Allah Almighty said in Holy Qur'an;

"And if they suckle your (offspring), give them their recompense." (Surah Al-Talaq, 65:6)

The majority of Muslim scholars say that the *nafaqah* is compulsory to children, grandchildren, and any descendants. This *nafaqah* is limited to expenses and not the inheritance. In contrast, Imam Malik said that the *nafaqah* is compulsory to children only as shows by the Quranic verse (Al-Zuhayli, n.d).

'Abd Allah bin 'Amr reported the Messenger of Allah (PBUH) as saying:

"It is sufficient sin for a man that he neglects him whom he maintains." (Sunan Abi Dawud, no. 1692)

Muslim jurists are agreed that the father is compulsory to provide expenses for his children if the father is present, solvent, and can work. The obligatory is on him and no others. Apart from it, the father is part of his children either biologically or physically. Therefore, the expenses on his children like expenses on himself (Al-Zuhayli, n.d). If the father does not exist or is poor and unable to work due to illness or old age, or so on, the responsibility to provide expenses bear on the above descendants either men or females. This is the view of Al-Hanafiyah. Al-Malikiyah said the responsibility of providing expenses is on the father only and no others. The Prophet (PBUH) did not ask the man to provide expenses to others, other than what he said.

The Messenger of Allah said: “*Give charity*”. A man said: 'O Messenger of Allah, I have a Dinar.' He said: “*Spend it on yourself.*” He said: 'I have another.' He said: “*Spend it on your wife.*” He said: 'I have another.' He said: “*Spend it on your son.*” He said: 'I have another.' He said: “*Spend it on your servant.*” He said: 'I have another.' He said: “*You know best (what to do with it).*” (Sunan an-Nasa'i, no. 2535)

Al-Shafieyah said the responsibility to provide the expenses for the children bear on the mother if the father no exists or physical inability. Allah Almighty said;

“*No mother shall be treated unfairly on account of her child.*” (Al-Baqarah, 2:233)

The Muslim jurists are agreed that amount of maintenance for children is determined by the condition of the father and his salary in the country. This is because the maintenance of children is determined by the daily needs of the child. For example, food, drink, clothing, shelter, breastfeeding, and others. The Messenger of Allah (PBUH) said to Hind;

“*Take reasonably what is sufficient for you and your children.*” (Sahih al-Bukhari, no. 7180).

From the hadith, the amount of maintenance for wife and children are ‘reasonably sufficient’ as determined by Prophet (PBUH) (al-Zuhayli, n.d).

On the issue of the illegitimate child, a father is not bound to maintain his illegitimate children, only in Hanafi, a mother is under a legal obligation to support her illegitimate minor children. Apart from children, those would-be heirs of a Muslim who are within prohibited and up to marriage, in the case of females, to be maintained by him or her (Fyzee, 1974). Thus, a brother must maintain his minor brother and unmarried sister.

In Malaysian Law, Section 72(1) of IFLA 1984 specifies that the father must maintain his children whether they are in his custody or the custody of another person, as it is reasonable having regards to his means and station in life or paying the cost incurred. Maintenance according to the provision includes accommodation, food medical attention, and education. However, Subsection 2 of the same provision stated that not only if the father is unable to maintain, but if he is also dead or his whereabouts are unknown, the duty shall shift to the male person liable under *hukum syara'* namely the paternal grandfather and the uncles. The duty to maintain will not transfer to the mother even though she has the means as the responsibility shall be transferred to the male persons liable under *hukum syara'*.

The duration of the maintenance order is spelled out in Section 79 of the IFLA. Generally, the order expires on the child attaining the age of 18 years old (Mimi Kamariah, 1999). The court may, however, extend the order to cover such a further period if it thinks reasonable, to enable the child to pursue further, higher education, or training (Section 80(b), IFLA 1984). The court may do so on the application of the child or any other person. This provision is very much welcome as it reflects reality (Nora Abdul Hak, et al.,) Apart from that, Section 73 deals with the power of the Court to order maintenance for children and Section 78 explains the duty to maintain child accepted as a member of the family, where a man has accepted a child who is not his child as a member of his family, it shall be his duty to maintain the child while he or she remains a child, so far as the parents of the child fail to do so. Section 80 deals with the duty to maintain illegitimate children. If a woman neglects or refuses to maintain her illegitimate child who is unable to maintain himself or herself, other than a child born as a result of rape, the Court, upon due proof thereof, may order the woman to make such monthly allowance as the Court thinks reasonable.

For the issue of neglect the child without the maintenance, Section 31 and 33 in the Child Act 2001 deal with the ill-treatment, neglect, abandonment, or exposure of children and the offense to leave a child without reasonable supervision

In the case of *Norzaini binti Alias lwn. Mohd Sharif bin Mohd Taib [2001] 16 JH 101*, the applicant claimed the maintenance of the child since the respondent who is a real father to the child did not give the maintenance to the child since his birth until 13 years old. The court ordered the defendant to pay the maintenance to the child RM 200 per month. The case of *Mohd Hassan bin M. Ghazali lwn Siti Sharidza binti Mohd. Sidque [2004] 18 JH 269* is an appeal case because the appellant did not satisfy

that he must pay the maintenance to his three sons with a total sum of RM 1100 per month. The court accepted the appeal and reduced the sum to RM 700 per month.

4. Right of Gender Equality Among Siblings

A father must treat all his children equally especially in the matter of giving gifts. Accordingly, he is prohibited from bestowing more favors on some of his children than on others without any necessity or valid reason, since this will produce jealousy and may even arouse enmity and hatred among them. This applies equally to the mother. An-Nu'man bin Bashir (May Allah be pleased with them) said: The Prophet (PBUH) said:

“Be mindful of your obligation to Allah and do justice in respect of your children.” (Riyad as-Salihin, no. 1773)

The story behind this *hadith* is that the wife of Bashir bin Sa'd al-Ansari requested her husband to give a gift of a garden or a slave to her son, al-Nu'man bin Bashir. She asked Bashir to go to the Prophet (PBUH) and request him to be a witness. Bashir went to him, saying, "The daughter of such and such—meaning his wife—has asked me to give a slave to her son." "Does he have brothers?" the Prophet (PBUH) asked. "Yes," he replied. "Did you give the same to each of them?" inquired the Prophet (PBUH). "No," said Bashir. The Prophet (PBUH) then said, "Fear Allah, and be just between your children." (Al-Bukhari, no. 2587)

Islam teaches us the principle of treating our children with justice, and treating children justly usually means treating them equally. The Prophet (PBUH) declared the father unjust because he gave one child a gift without giving an equal gift to the others. In this case, treating the children unequally was the same as treating them unjustly.

Therefore, fathers and mothers should always show equal love for their children. Being equal in material things, like clothing, gifts, and treats is certainly a very important part of it. It is also crucial to make sure not to show favoritism in the time and attention given to anyone of them. It is to make sure that our children feel that they are equally loved and esteemed. Islam condemns all kinds of biases and injustices and indeed, favoritism is a kind of injustice. A person is not being just if he shows favoritism. Allah said:

“Verily, Allah enjoins justice, and doing good, and giving (help) to kith and kin.” (Surah An-Nahl, 16:90)

In Malaysian Law, there is no specific act to deal with the right of gender equality among siblings. In the United Nations Convention on the Rights of the Child (UNCRC), Malaysia has ratified Article 2 on the to be protected from discrimination. In the Distribution Act 1958, Section 5 stated that there shall be no distinction between those who are related to the deceased person through his father and those who are related to him through his mother, nor between those who are related to him by the full blood and those who are related by the half-blood, nor between those who were born in his lifetime and those who at the date of his death was only conceived in the womb but who have subsequently been born alive.

5. Rights to Guardianship

The term *hadanah* in Islamic law refers to the upbringing of a minor child by the mother or by someone who is legally entitled to it. The Arabic root of the word *hadanah* literally means to hold in one's arms, to embrace, and to place on the lap. A broader definition of the word refers to nursing, bringing up and raising a child. The concept of *hadanah*, therefore, refers to taking physical care of a child who is not able to do so by him/herself. It includes protection, love and care, education, and shelter. In this context, *Hadanah* does not entail any legal responsibility or rights over the child. Legal and financial guardianship is referred to by the term *wilayah*, and has different rules in Islamic law.

The Qur'an did not address the question of *hadanah* directly, but general guidelines can be found in verses such as “*And whatever the Messenger has given you take, and whatever he has forbidden you refrain from.*” (Al-Hasyr, 59:7)

There are, however, numerous hadiths that dealt with the issue, in one instance, for example, a woman came to the prophet and complained that her husband divorced her and wishes to take her child away from her. She said: “Messenger of God, this is my son, my womb contained him, my lap held him, and my breasts nurtured him, but his father divorced me and wishes to take him away from me. The Prophet (PBUH) said: “*You have the first right to him as long as you do not remarry.*” (Hadis Hasan) (Sunan Abi Dawood, no. 2276)

Subsequently, records of the *sahabah* show that the mother was always given preference over the father in matters of *hadanah* in the early stages of her children's life. In an interesting incident, Abu Bakr, the first *khalifah*, ruled in favor of Omar's ex-wife, Um 'Assim, and granted her the custody of her child saying: “I heard the Prophet say: a mother should not be separated from her child.” (Al-Bayhaqi, 2008)

Needless to say that the emphasis in dealing with all *hadanah* matters is in the best interest of the child. Giving priority to the mother is therefore based on the assumption that it serves the child's best interest, the mother is the best at nurturing her child and meeting his/her needs. Muslim scholars have been so driven by the child's best interest that they concluded that *hadanah* is the right of the child, not the parents. Subsequently, it falls on the shoulders of the parent who is best qualified to meet the physical, emotional, and educational needs of the child, the mother is better qualified during the early stages of life. The Shafi'is parted from this view and decided that it is a joint right of the mother and the child.

Muslim Sunni schools of legal thought differ on the age limit of *hadanah*. Here again, as in other instances where women's status and rights are an issue, cultural influences have transcended Quranic principles in shaping Muslim scholars' understanding and rulings. The Hanafis, for instance, ruled that in case the mother has the *hadanah* of her children, she keeps her daughter until the age of nine, at which age the girl becomes the object of sexual desire for men and needs her father's protection. Worst yet, the Hanbalis define the age limit of *hadanah* for the girl at seven, at which age her *hadanah* goes to the father. The latter is in their view more trusted to protect and preserve his daughter until she gets married. Surprisingly, the Malikis differ from both views and rule that the girl stays with her mother until she marries. Their reasoning, however, falls in the same patriarchal trap as they justify their ruling by the fact that the mother is more likely to understand her daughter's needs as she steps into womanhood and teaches her the skills that would enable her to be a good wife. Only the Shafi'is steer away from this line of thinking and state that the child, female or male, stays with his/her mother until the age of seven, at which age they can choose whether to stay with the mother or live with their father. Modern scholars generally agree that the age limit for the mother's *hadanah* is seven years for boys and nine for girls, after which they move to their father's care.

In case the mother wishes to remarry, most Sunni scholars rule that she lose her right of *hadanah*, which moves to the next female in line unless she marries someone related to her child, his/her paternal uncle for instance. This puts the mother in a difficult situation, as she has to choose between her children and starting a new life for herself. Imam Ibn Hanbal slightly parts from this view and rules that in case the mother remarries, the boy's *hadanah* goes to the father, but the girl stays in the care of her mother (Ibn al-Qayyim, n.d). They justify their ruling by the fact that caring for children is a big responsibility that no man will tolerate sharing his wife's attention with her children from a previous marriage. However, this consensus has been questioned by two great Muslim scholars, first, al-Hasan al-Basri, states that the mother keeps the right to the *hadanah* of her children, male and female, regardless of whether she remarries or not (Ibn Abi Shaybah al 'Absi, 2006). The second scholar, Ibn Hasm al Andalussi, engages in a long counter-argumentation to refute the arguments used to rob the mother of her right to care for her children and yet have a new life for herself. He starts by the strong affirmation that: “The mother is more entitled to the *hadanah* of her young son and young daughter until they reach puberty and they are mentally able and physically fit whether she (the mother) is a free woman or a slave, got remarried or not, and whether the father lives in the same city or moves to a different one” (Ibn Hazm, 1900). After this strong introduction, he exposes the flaws in the Muslim scholars' consensus about this issue. Not only there are no valid arguments from the Qur'an or Sunnah that

support their position, but to the opposite, there are verses and hadiths that support the mother's right to keep her children's *hadanah* even in the event of her remarriage.

First, the Qur'an says:

“*Mothers shall suckle their children for two full years.*” (Al-Baqarah, 2:233)

It, therefore, the mother's divine right to keep their children for the whole breastfeeding period regardless of whether they remarry or not and it is not permissible for anyone to take away a right granted by Allah.

Second, many hadiths imply that mothers are entitled to their children's *hadanah* even after they remarry. In one instance, the stepfather of Anas ibn Malik came to the prophet and asked him to take Anas as a personal assistant. Anas was ten years old at the time and he was living with his mother and her husband Abu Talhah, the stepfather in question. In another instance, hadith shows that Umm Salamah married the prophet and yet kept her children from her previous marriage with her. Finally, there is no hadith *sahih* [authentic hadith] stating that the mother loses her children's *hadanah* if she remarries (Ibn Hazm, 1900). As to the hadiths that are usually quoted to support the argument that the mother's remarriage cancels out her right to *hadanah*, Ibn Hazm dismisses them for obvious flaws in the chain of narration or the credibility of narrators, including the record involving Abu Bakr and Omar. He then concludes: “We, therefore, state that the mother's remarriage does not cancel out her right to *hadanah* provided she is trustworthy and her new husband is trustworthy as well and this is supported by the texts to which we referred” (Ibn Hazm, 1900).

On the issue of the custody illegitimate child, it is the duty of the mother. Apart from children, those would-be heirs of a Muslim who are within prohibited and up to marriage, in the case of females, to take care of him or her (Fyzee, 1974).

In the Malaysian Law context, ‘guardianship’ should not be confused with ‘custody’. A guardianship is one who has power over a child's upbringing, care, discipline, and religion. Custody refers to the state of having certain rights over a child, which rights may include care and control of the child. A parent may be granted custody of a child whilst the other parent may be granted its care and control (Mimi Kamariah, 1999).

It may be noted that in Islamic law, primary guardianship also belongs to the father. For example, s. 88(1) of the IFLA 1984 provides:

“Although the right to *hadanah* or the custody of the child may be vested in some other person, the father shall be the first and primary natural guardian of the person and property of his minor child ...”

The position is somewhat different if a child is illegitimate. At common law, the putative father has no rights over the child. Parental rights in terms of custody and control over such a child lie with its natural mother from birth and subsist until the court orders otherwise. Islamic law adopts the same view. In the IFLA 1984, it is provided in s 85 as follows: “The custody of the illegitimate children appertains exclusively to the mother and her relations.”

Interestingly, it would appear that Islamic law, while regarding the father as 'the first and primary natural guardian of the person and property of his minor child' as provided in Section 88(1) IFLA 1984, the law also regards the mother as the appropriate party to take custody of her child, subject to certain qualifications as stated in Section 82 IFLA 1984:

By virtue of Section 81 IFLA 1984, even where the mother is by law disqualified from having the right to *hadanah* or custody of her children, the right is not taken over by the father. In order of preference, the maternal grandmother takes precedence over the father. By virtue of Section 84 IFLA 1984, the mother's right (that is, *hadanah's* right) to custody terminates upon a male child attaining the age of seven years and the female child attaining the age of nine years, but this may be extended at the discretion of the Syariah Court to nine and eleven years, respectively, upon application by the mother.

After the termination of the right of the *hadinah*, 'the custody devolves upon the father, and if the child has reached the age of discernment (*mumaiyiz*)', such child has the choice of living with either of the parents, unless the court orders otherwise. The right of an orphan also has been highlighted in section 102 of the IFLA 1984. Moreover, in the Child Act 2001, Chapter 2 has discussed in detail of this right in the light of temporary custody.

Abdul Rahman lwn Husna dan Seorang Lagi [1998] 12 JH 221 is an appeal case. Whereat the first stage, after the appellant was a divorce with his wife, the custody of the child has been given to his wife. At that time, the child was nearly two years old. Then his ex-wife married again and the appellant claimed the right of custody but the decision cannot be made until the child reached nine years old. During that time, the child was taken care of by her aunty. During the hearing, the child said she wanted to live with her aunty and the court decided the child based on *maslahah* and interest of the child. However, the appellant still can visit the child.

In *Safura b. Badaruddin lwn. Azhar b. Arifin [1998] 13 JH 237*, during the divorce process, both parties agreed that the custody right will be given to the defendant and the plaintiff have the right to visit the child. Nevertheless, in the end, the plaintiff refuses to give the child and claim the right of full custody. The court has decided the right of custody to be given to the father.

Conclusion

By having a deep analysis of all of the rights of the children in Malaysian law that has been discussed above, we can conclude that all these rights seem scattered and did not combine in one statute. Besides, there are a lot more of the rights of the children that have not been identifying and highlight in the Malaysian law. Therefore, the research also should be a need concerning other rights of children such example in terms of their fundamental rights. The relevant authorities also should actively conduct a programme so that the family relationship between the parents and their children is getting stronger. As discussed above, the emphasis for the development of the essential skills for law graduates requires a well-planned teaching methodologies. The broad array of pedagogical approaches which integrate the teaching and learning theory, doctrinal and practical aspects of law with context-based instruction using simulated cases, teamwork and various other activities will enhance the prospect of producing the law graduates that meet the contemporary challenges. Other aspects such as collaboration with law practitioners as well as the greater use of legal clinic will facilitates the students' retention and learning experience.

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