

**SHARED PARENTING VS SOLE CUSTODY IN MALAYSIAN SHARIAH COURTS:
LESSONS FROM COVID-19**

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ABSTRACT

When it comes to child custody, the predominant standard practised by Malaysian Shariah Courts has always been the best interest of the child. Aside from specific conditions, the custodianship is often granted to the mother. The non-custodial parent, often being the father, is generally given visitation and overnight rights by the court while carrying the duty for child maintenance despite his limited rights. With the global outbreak of Covid-19, family institutions are greatly affected physically, mentally, and financially. The untimely separation of children from their parents under child custody cases raises the question of whether these children's rights are rightfully attended to or not. According to UNICEF, among the children who are profoundly affected by Covid-19 are single-parent children and female-headed households. The situation becomes dire as the consequences of Covid-19 continue to influence the care and child maintenance of a divorcee's child. Hence, this article aims to propose shared parenting as an alternative to ensure child's rights are cared for considering Shariah Courts have no explicit jurisdiction to order for joint custody. Through a doctrinal approach and library research, this article examines the concepts of shared parenting as an 'evolution' to joint custody. The article also discusses prospective benefits and challenges of implementing the idea of shared parenting in Shariah Courts. In conclusion, emphasis on the significance of shared parenting is highlighted as the best and fair solution to attain the best interests of a child at the same time promoting amicable relationships and understanding between divorced couples.

Keywords: shared parenting, sole custody, amicable settlement, family law, COVID-19.

Introduction

In January 2020, a global pandemic known as the COVID-19 caused by coronavirus was confirmed to have reached Malaysia and spread throughout the country at a rapid rate. To control and subdue its outbreak, the Malaysian government has set up a Restrictive Movement Order (*hereinafter referred to as RMO*) to curb the spread of the pandemic. The epidemic has affected not only the social health and economy but also the family institution such as the welfare of children, especially among divorced couples (Sinar Harian, 2020). The RMO phase becomes another compounding factor in determining the viability of the current sole custody approach practised by the Malaysian Shariah Courts.

During this stage, the rights of non-custodial parents are compromised from physically visiting their children. Children's maintenance is greatly affected too due to the COVID-19 situation. These problems thus raised a second question on whether the current Court's Order is efficiently applicable or not during the pandemic or instead, may leave the non-custodial parents vulnerable to the committal proceeding for breaching the court's order.

However, Malaysian legislation has no specific provisions on shared parenting, particularly on equal parental responsibility. The legislation only governs matters concerning child custody, of which of the

provisions refer to parental rights over the children (Suzana, A., Roslina, C.S and Najibah, M. Z., 2017). For the Shariah Courts, the present regulations and the states' Islamic Family Law Enactments do not provide any particular provision to the Shariah Courts when it comes to shared parenting. The situation is likewise for Malaysian Civil Courts. It is no wonder that said the practice is scarce.

In the case of child custody for divorced couples, the Shariah Courts practice the approach of granting sole custody. Generally, the court will appoint either one of the child's parents as the sole custodian for the child while the non-custodial parent will be granted visitation and overnight rights. The visitation right is specified in the Malaysian Islamic Family Law Act's provision while the overnight right is subject to adjudication, often based on the child's age. While this is the common practice, a question arises on whether the current approach is still viable in facing the contemporary Industrial Revolution 4.0 where the era of digitalisation has grown accustomed in the hearts of people.

Through functionalism and doctrinal methodologies, the authors will attempt to determine how far shared parenting can act as an alternative solution to accommodate the Industrial Revolution 4.0 and COVID-19 situations as well as appease and mitigate the current circumstances, including reducing the possibility of committal proceeding for breach of Court's Order. Of course, the study is conducted by taking into account the child's best interest and opinions as part of the deciding factors.

Definition of Shared Parenting

The term shared parenting is defined by Duhaime's Law Dictionary as a situation where a child spends an equal amount of time in the care and home of each of the two separated parents, and the parents share the legal rights in regards to the child. According to Baker and Townsend (1996), shared parenting is a concept, following divorce or separation, mothers and fathers should retain a strong positive parenting role in their children's lives. It includes arrangements where children spend significant amounts of their time living in the homes of both parents. Another perspective can be seen in the United Nation's Convention on the Rights of the Child, specifically in Article 3 and Article 18, which stressed the responsibilities and duties of the parents, and recognition that both parents have common responsibilities in the upbringing of the children, with the idea of recognising the best interest of the children.

According to Roslina Che Soh (2011), shared parenting is a concept where both father and mother retain their parental role and presence in the aspect of physical care and decision making such as the arrangement of time of the children spent in either of the parents' home, usually after the divorce or separation period. Another aspect that outlines the principle of shared parenting is the shared responsibility of these four domains: children upbringing, household chores, bread-winning and providing maintenance, and father and mother's 'me-time'. There is also a fine line between shared parenting and sole parenting with the right of visitation for the non-custodial parent (Suzana A. et al., 2017).

While the definition may vary from different perspectives, it can, however, be divided into two most common classification of shared parenting. The first one is joint physical custody, and the other is joint legal custody (Folberg, 1984). Joint physical custody is the position where children have to live on equal time, or at least what is considered as an equal amount of time with both of their parents. On the other hand, joint legal custody emphasis the right and duty of both parents in deciding the upbringing of their children.

Hence, shared parenting, either by any or both of the elements mentioned above, can be defined as a form of child custody arrangement, usually after divorce, where parents share a considerable amount of time raising the children and share equal responsibility as well as duty on the upbringing of children. Shared parenting seems to promote active participation and presence of both of the parent while ensuring the children's rights and welfare will be protected, in any event of negligence from either parent.

In raising the children, two elements need to be fulfilled. First is the constant care through custody such as education, attention, self-care and such until the child is mature enough to take care of themselves.

Second is the duty to provide sustenance for the children, which later extended to the physical need such as shelter and other monetary support. Traditionally, the custodian duty will fall into the hand of the mother, and the burden of providing maintenance falls under the father's responsibility.

Nonetheless, thanks to the 20th century's Suffrage and the feminist activism, the international community no longer adhere to the primitive notion of a gender-based role such as the mother must be the person who is responsible for the upbringing of the child and father is tasked in providing maintenance (Thakuria, 2018). The line got even more blurry in the current century with the introduction and development of new terms such as career mom¹ and stay-at-home dad². The duty of upbringing the children is now considered as shared duty and responsibility. In fact, the tasks should no longer be assigned to any particular gender. Instead, as the title suggest, as forms of shared parenting, where the parents take equitable responsibilities instead of what is opine by the community.

Due to the global pandemic COVID-19, the proposition for shared parenting is rather imperative as the world is evidently facing a current economic recession on a worldwide scale. Also, the closing of boundaries on both local and national borders has led to the separation of family members. Thus, shared parenting is not just a situational solution, but should be accepted as a way of raising their children too.

Shared Parenting from the Islamic Perspective

A matter that needs to be addressed in advance is the distinction between the custodianship and guardianship. Generally, both terms establish a legal relationship between the children and their respective parents. However, these terms are not necessarily the same. The literal term of 'custodianship' can be translated as *Hadhanah*, which means the duty of children's upbringing (Faizunnessa Taru, March 2016). In contrast, the expression of 'guardianship' refers to *Wilayah*, which is the 'the duty of overseeing,' including physical protection and properties.

To integrate the concept of shared parenting with the established principle of *Hadhanah* in Islam, the authors outline four (4) criteria that need to be satisfied. The following elements will be based on Islamic evidence. The first criterion of shared parenting from the Islamic perspective is the mutual understanding of both parents that it is their sacred duty and obligation (*amanah*) to take care of their children well-being. The criterion can be observed in Allah's decree in verse 15 of *Surah al-Taghabun*:

﴿١٥﴾ إِنَّمَا أَمْوَالُكُمْ وَأَوْلَادُكُمْ فِتْنَةٌ وَاللَّهُ عِنْدَهُ أَجْرٌ عَظِيمٌ

"Your wealth and your children are but a trial, and Allah has with Him a great reward."

The verse above shows us that the child is a shared responsibility of both father and mother without any distinction. This verse also indicates that children may come in the form of trials and tribulation, where some parents may exceed the boundary of what is permissible just to fulfil their desires as well as their children's (Muhammad Sulaiman Al-Asyqar, *n.d.*) Hence, both parents should take responsibilities toward their children and not act as if the children were personal properties.

As a universal religion, Islam has put a specific warning regarding the relationship of both parents in a child's upbringing. By breaking down the exegesis of verse 233 of *Surah Al-Baqarah*, more characteristic of shared parenting can be inferred.

¹ Career Mom: Also known as working mothers, as a label, refer to women who are mothers and who work outside the home for income in addition to the work they perform at home in raising their children. See also: Encyclopedia of Children Health. Access through <http://www.healthofchildren.com/U-Z/Working-Mothers.html>

² Stay-at-home Dad: A father who is the daily, primary caregiver of his children under age 18. See also: National At-Home Dad Network. Access through <https://www.athomedad.org/media-resources/statistics/>

وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُنَمِّمَ الرِّضَاعَةَ وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ
 وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا لَا تُضَارَّ وَالِدَةٌ بِوَلَدِهَا وَلَا مَوْلُودٌ لَهُ
 بِوَلَدِهِ وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ فَإِنْ أَرَادَا فِصَالًا عَنْ تَرَاضٍ مِنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا وَإِنْ
 أَرَدْتُمْ أَنْ نَسْتَرْضِعُوا أَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا آتَيْتُم بِالْمَعْرُوفِ وَأَنْتُمْ وَاللَّهُ
 وَأَعْلَمُونَ أَنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ ﴿١٣٣﴾

The first part of the verse: "*Mothers may breastfeed their children two complete years for whoever wishes to complete the nursing [period]. Upon the father is the mothers' provision and their clothing according to what is acceptable.*" enlighten us with the knowledge that mother's duty to provide sustenance for the children, while the father's task is to provide sufficient provision for the mother so that the mother can breastfeed the child comfortably. As shared parenting advocates for shared duty and responsibilities, one perspective that has been refined in Islamic Law is the fact that some responsibilities are assigned based on the equity of father and mother. The verse also specifies that the mother's provision is prepared due to the nursing period, showing that the mother will attain her right in the event of a divorce.

In this part, the second criterion that can be drawn is that although shared parenting aims to share the responsibilities, the assigned duties of nursing the child and providing maintenance must remain constant to the mother and father respectively in executing shared parenting. The responsibilities should not be a burden to the parent and should only be based on their capabilities. The following part of the verse refers to the meaning below:

"No person is charged with more than his capacity. No mother should be harmed through her child, and no father through his child,"

Said verse shows us the third criteria in shared parenting which is; in implementing shared parenting, no parent should be harmed in any way. For instance, the mother should not leave her child less than two years old under the father's custodianship with the intention to release herself from the duty of breastfeeding and nursing and placing hardship upon the child's father. In return, the father should not harm the mother as well, such as taking away the child and separate him or her from the mother to inflict grievance. Both examples show us that neither parent should be separated, let alone been harm caused by their children.

The threat of prohibition of separating one family member from another can be seen in the following *Sunnah* narrated by Abu Ayyub as he heard the Messenger of Allah (ﷺ):

"Whoever separates between a mother and her child, then Allah will separate between him and his beloved on the Day of Judgement."

Imam At-Tarmizi stated that in the line of Ali (*ibn Abi Talib*) this Hadith is *Hassan Gharib* and based on this narration, the Companions of Prophet dislike the practice of separating the mother from the child, the father from the son, and brothers (Jami' at-Tirmidhi, No. 1566). Continuing on verse 233 of *Surah Al-Baqarah*;

"And upon the [father's] heir is [a duty] like that [of the father]. And if they both desire weaning through mutual consent from both of them and consultation, there is no blame upon either of them. And if you wish to have your children nursed by a substitute, there is no blame upon you as long as you give payment according to what is acceptable. And fear Allah and know that Allah is Seeing of what you do."

The verse also states that the heir of the father is obliged to fulfil the children's needs during the father's absence.

Another thing that is notable from that verse is that in the event both of the parents decide to wean and introduce new food to their baby (the children), both parents' consideration should be taken into account and exercise consultation (*musyawarah*). However, the weaning in this verse is interconnected to the earlier phrase of the verse on breastfeeding. In that sense, both parents should consult all the decisions made by parents for their children for the best interest of the children.

According to Ibn Hajar al-Asqalani (*n.a*), the three parameters that should be discussed between the parents based on the verse above are; (1) the duration of the breastfeeding and weaning, (2) the willingness of the mother or her substitute to breastfeeding the child, and (3) consensus on the reward for the person who feeds the children. From these parameters, a fourth criterion is detected whereby the parents should discuss any decision made for the children, which closely resembles the principle of joint legal custody.

In terms of shared parenting, the classical scholars have provided an outline whereby the non-custodial parent is allowed to visit their child whilst the child is under the care of the custodian parent. Although there are disagreements about visitation intervals and locations which are based on the child's gender, age and current custodian, there is a consensus opinion among the scholars regarding shared parenting that demands active roles from both parents. While there are disagreements in terms of visitation interval and location which is based on the children's gender, age, and current custodian, there is one opinion on the shared parenting, which demands the active role of both parents (Wahbah Al-Zuhaili, 2007, 77-78).

Shafie and Hanbali Schools agreed that if the child custody falls into the hand of the father, the father has no authority to prevent the mother from visiting her child. On the other hand, if the mother is the custodian, the child will have their nightly bedding at their mother's home but live with their father during the daytime for educational purposes (Wahbah Al-Zuhaili, 2007, 78). However, the practicality of the father as an educator becomes a redundant point in the modern day with the existence of public schools and the fact that educating children is not necessarily the father's duty. Nonetheless, classical Muslim scholars do discuss the active participation of both parents in the child's daily activities.

Aside from joint physical custody, classical Muslim scholars also touched on another aspect of shared parenting, particularly the shared responsibility in providing maintenance and sustenance. The Shafie School prescribes to the opinion that if the child's father no longer exists or is incapable of providing the maintenance, the mother is responsible for providing for the children next after the paternal grandfather based on the order of priority.

The Practice of Child Custody Cases in Malaysian Shariah Courts

The best interest of the child has always been the central theme of child custody arrangements. It is the factor that not only Malaysian Shariah Courts take into paramount consideration, but by other courts globally as well. As it stands today, the Shariah Courts' administrative jurisdiction is confined to Muslims' personal affairs (Article 121 (1A), Federal Constitution). In the case of children upbringing, the courts have power over the issues of child custody (*hadhanah*) and child maintenance. The courts practice the sole custody approach to adjudicate custody disputes. Through a court order, sole custody is awarded to the parent who is considered better and more fit in the child. The custodian parent gains child custody while the non-custodial parent is granted visitation and overnight rights.

Sections 81 until Section 87 of the Islamic Family Law Act (Federal Territories) 1984 (*after this referred to as IFLA*) have provided several provisions regarding matters related to persons entitled to child custody, qualifications necessary for child custody as well as visitation rights. The sections also include circumstances on how the right of child custody is lost, duration of child custody, and custody of illegitimate children, the court's power to make orders for custody and whereby court orders are subject to conditions. Compared to the Malaysian Civil Courts, there is a stark contrast whereby religion becomes the primary criterion for Shariah courts in determining the child's welfare for child custody cases. Such is not the case in the Civil Courts (Mohamed Azam Mohamed Adil and Rafeah Saidon, 2017).

In determining sole custody, Nur Zulfah (2018) explained that there are five elements evaluated by the judge before adjudicating, namely, (1) retaining the status quo of the children, (2) fulfillment of the children's essential, (3) attitude and morality of the custodian, (4) the emotional status of the child, and (5) the choice of the child. However, these factors are not in the form of written law, and since Shariah Courts do not practice the principle of *stare decisis*, they are only used on a case-by-case basis as they are not construed. At the same time, these elements may act independently or together as compounding factors. Conveniently, they are open to a judge's discretion to make judgement in trials.

Subject to Section 82, there is a presumption mentioned in Section 81(1) of IFLA, stating that the mother shall be of all persons the best person entitled to the custody of her infant children during the connubial relationship as well as after its dissolution. The presumption is made based on the mother's loving and caring nature towards her children. According to Nur Zulfah (2019), a mother's bond with her child is unique and different from the bond between the father and the child. A mother's sacrifice of bearing the hardships throughout the pregnancy until the child's birth is also another reason why mothers are deemed best suited to care for the child. In contrast, fathers are presumed as beings not genetically fit for parenting and that they contribute only through economic support for the children's growth and development.

In the current practice, Shariah practitioners/judges are confined to a literal translation of Section 86 of IFLA when it comes to child custody. Section 86(1) of IFLA specifically stated as follow:

Section 86. Power of the Court to make order for custody.

*"(1) Notwithstanding section 81, the Court may at any time by order choose to place a child in the custody of **any one of the persons** mentioned therein or, where there are exceptional circumstances making it undesirable that the child be entrusted to any one of those persons, the Court may by order place the child in the custody of any other person or of any association the objects of which include child welfare."*

The literal translation of the phrase 'any one of the person' puts the tunnel vision and limits the adjudication by the court. It also transposes into single-parenting custody with the right of visitation for the non-custodial parent as mentioned above.

As for child maintenance cases, section 73 of IFLA 1984 states that 'man' when brought to section 72, will shift the duty of the father to the grandfather or on the father-side uncle (*al-khala*). This statement seemingly implies as if the mother, or other related women, has no monetary obligation towards her children.

As discussed prior, the guardianship of the children is entirely on separated jurisdiction. In Section 88 of IFLA, it is specified that regardless of who attains the *hadhanah* right, the father shall be the first and primary natural guardian of the person and property of his minor child. In the event where a father is absent, the custody will be passed to the child's grandfather, or any elected executor, with the conditions that the person is a Muslim, an adult, sane, and worthy of trust. Under this provision, it is safe to say that the concepts of *Hadhanah* and *Wilayah* are well distinct in the current law of Malaysia.

Although it seems that sole-custody is mainly practised in Shariah Courts, sole-custody is a myth and shared parenting is the reality. Whether the parents are together or divorced, the right and responsibility of the parents would always come in two. There is a huge indication that the Shariah courts hold high regards towards child-custody-related cases settled through amicable settlements. Most importantly, although there is no explicit jurisdiction for the judge to order for shared parenting; those are several current legislations under the jurisdiction of Shariah courts that indirectly provide room for shared parenting through consent judgment to take place.

Resolving Child Custody Conflicts through Amicable Settlements (*Sulh*)

In conformity with section 99 of the Shariah Court Civil Procedure (Federal Territories) Act 1998 (*hereinafter* referred to as SCCPA), disputing parties are encouraged to practice *sulh* at any stage of the

court proceedings in Malaysian Shariah Courts while Section 94 of the same Act states that at any time of the proceeding, both parties can opt for settlement. In Malaysian Shariah courts, the mandatory *sulh* process is complementary to the Shariah jurisdiction system because of the advantages that it offers. It does not only save time but is also cost-efficient as the process only requires a registration fee of RM8.00 for filing a summon (Nurah Sabahiah, 2013).

The emphasis and encouragement on amicable settlements can also be seen in Practice Direction Number 2 Year 2012 on the Settlement Agreement/Consensus by Syarie Counsel or Litigants. It states that any dispute that is settled through amicable settlement before registering at the court shall not be referred to the mandatory *Sulh* process. In this case, the disputing parties are often conflicting couples who file for a divorce. Before going through a court trial, the Court Registrar will first ascertain whether the registered case is suitable or not to first go through the *sulh* process. If it is so, a date will be set within 21 days after the application is made (Nurah Sabahiah, 2013).

Raihanah Azahari (2004) explained that the process will be conducted by *sulh* officers in a *sulh* proceeding. Because of its confidential nature, only the *sulh* officer and disputing parties may be present throughout the process. In a secured and confidential environment, the *sulh* officer will assist disputing/divorced couples in discussing arising matters amicably, and this often includes the matter of child custody. Parents can discuss comfortably, sincerely and objectively to resolve the arising issues with professional assistance.

Through the teachings of the Quran, Shafi Fazaluddin (2016) reported that attitudes related to reconciliation such as positive-thinking, differentiation and externalisation are important to restrict the detrimental effect of negative behaviours. With these in mind, it is not impossible for shared parenting to be agreed between the parents if the *sulh* proceeding is executed in an amicable and understanding manner when discussing the best interests of the child.

In the case where shared parenting does appear as part of the amicable agreement, a draft will be made and sent to the Shariah judge. Finally, the judge will enforce the *sulh* agreement as a court order. The order is only enforceable if both parties have signed the agreement before the Shariah judge. The judge will then pass judgment and Order of Approval by signing and sealing the draft order. Indirectly, the approach of shared parenting through amicable settlements (*sulh*) is secured as either parent may be subject to punishment if he or she violates the court order (Section 10, Act 559). For this approach, it is important to note that shared parenting can only be enforced through consent judgement where both parents of the child consent to this agreement and the judge will later enforce the said agreement.

On a case where shared parenting through consent judgement does not happen, the Shariah courts indirectly give room for it to take place. Section 75 of IFLA grants the judges' power to vary the order for custody or maintenance of a child, as mentioned below:

"The Court may, on the application of any interested person, at any time and from time to time vary, or at any time rescind, any order for the custody or maintenance of a child, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances."

Also, Section 76 of IFLA grants Shariah judges the power to vary agreement for custody or maintenance of a child. The provision is stated as follow:

"The Court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child, whether such agreement was made before or after the appointed date, notwithstanding any provision to the contrary in the agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do."

Example of Shared Parenting Cases in Malaysia

In a child custody claim; Summon No.: 14700-028-XXXX-2018 (unreported), the plaintiff (mother) who worked as a flight attendant offered an agreement to the defendant (father) for joint custody. In the agreement, the plaintiff suggested that whenever she has time off or is not on duty, the child will live with her. In return, the defendant will be responsible for the child's welfare whenever the plaintiff is on duty. From this case, it is clear that joint physical custody does not necessarily demand strict time allocation of and between day and night, such as a day with the mother for another day with the father. Instead, the duty and responsibility to care for the child are shared accordingly based on the parents' capabilities and availabilities.

Also, the application of shared parenting is not only limited to the father-mother dynamic. In the case of Variation of Consent Judgement; Summon No.: 10300-026-XXXX-2017 (unreported), the divorced couple had initially agreed for joint custody over the child. Unfortunately, the settlement agreement backfired as the father continues to fail to carry out his responsibilities as a co-custodian. Over time, the plaintiff 1 (mother) finally decided to sue the defendant (father) and strip his right of joint custody for exposing the child to a bad environment when he was caught committing *khalwat* (close proximity) with another woman while the child is present at the same house. As a result, the court ordered a variation of 'shared parenting' through consent judgement. The court also appointed the plaintiff 2 whom is the mother's mother of the child, i.e. the child's grandmother, as the co-custodian instead of the father. This case indicates that joint custody is not only an alternative mechanism between the child's mother and father but is open to close family members as well.

The above cases reflect the practice of shared parenting in the Malaysian Syariah Court even though there is no clear provision provided under Islamic law Enactment, as mentioned before. These cases may also indicate that those provisions on custody are indirectly applicable when matters come to specific application or agreement on joint custody or shared parenting. Based on the explanations above, Malaysian Shariah courts can exercise the shared parenting approach with the current legislation available. The alternative, however, can only be achieved by consent judgment through amicable settlements (*sulh*), thus proving the need for specific provisions on shared parenting.

The Need for Shared-Parenting in Malaysian Shariah Court

There is a contemplation on whether shared parenting is necessary or not to be inserted in the Malaysian Shariah legislation. For this situation, it is essential to trace back and identify the 'cause-and-effect' for it. As mentioned before, child custody cases in Shariah courts often end with sole custody as a court order. The custodian parent gains the custody of the child while the non-custodial parent gains visitation and overnight rights.

The situation becomes an issue when the custodial parent hinders and impedes the rights of the non-custodial parent or in cases where the non-custodial parent exceeds the limited time stipulated in the court order (Sano, Richards, and Zvonkovic, 2008). The latter may cause order disobedience and contempt of court (MalaysiaKini, 4th September 2019). The quarrels between the divorced couples in these situations are detrimental to the children. Not only has that, children often become victims in these situations as they are mistreated as a trophy in the eyes of their parents. The children's environment and ways of upbringing will also be mentally affected as they are forced to listen to negative conversations between their parents.

In worse cases, the children are treated as a bargaining chip for both parents (Solotoff, 2008). For instance, the father will not comply with the child's maintenance Order if the mother disagrees with the visitation rights set by the father. The mistreatment of children being treated as bargaining chips also occurs in cases for ancillary claims for post-divorce. All of these circumstances will not only compromise the child's right for maintenance but are also not conducive for the child. Most importantly, these forms of situations will no doubt threaten the best interests and well-being of the child. To put it simply, the push for amicable settlements and shared parenting is crucial to preserve the sanctity of family institutions.

Why COVID-19 is the Pushing Factor for Shared Parenting

While it is undeniable that families in the society are restricted from meeting each other due to the RMO, and that family meetings are partly responsible for the spread of COVID-19, the situations during the outbreak have highlighted why COVID-19 becomes the pushing factor for shared parenting. The most apparent reason and highest indicator are that family institutions are greatly affected physically, mentally, and financially. These reasons can be divided into two main factors; the financial factor and emotional factor.

The first factor is the financial factor. In her e-newsletter, UNICEF Malaysia stresses that children of daily wage earners, children of single parents and women-headed household are among the most at risk against the effects of COVID-19. The risks include poverty, child labour and less access to nutritious food and quality healthcare (UNICEF Malaysia, 2020). The fact is further supported by a study conducted by Department of Statistics, Malaysia (DOSM) on the impact of the implementation of RMO and effects of COVID on the economy reported that the overall household expenses decreased by 55% and only 6% responded that they are less financially affected during the MCO period. 53% of the respondents were greatly affected (Harakah Daily, 10th April 2020). The situation becomes dire as the consequences of COVID-19 continue to influence the care and child maintenance of a divorcee's child. Research conducted by the United Nations (UN), UNFPA & UNICEF shows that low-income families are affected by COVID-19. The report states that low-income families with women as head of families suffer the worst – with a higher unemployment rate and a much more pessimistic view of the prospect for recovery in the next six months (Bernama Online, 25th August 2020).

The second factor is the emotional factor. Throughout the RMO period, Malaysian parents admitted to being more concerned about the pandemic compared to managing the family's welfare, consequently affecting children and making them more sensitive (Rahima Dahlan, 2020). For child custody cases in Shariah Courts, the children and their non-custodial parents have been separated for far too long due to the RMO. There are even cases where children made rash decisions and 'run away' to meet their father whom they missed (Faris Fuad, 2020). Even before the RMO, there are cases where the custodial parent abuses the custodial right granted by the court and interferes with the non-custodial parent's visitation cases. Whether the act is done before or after a court order has been issued makes little difference as unresolved disputes may lead to problems such as fathers kidnapping their children (Muhammad Afham, 2019).

Overall, the untimely separation of children from their parents under child custody cases raises the question of whether these children's rights are rightfully attended to or not. Hence, this study aims to emphasise shared parenting as an alternative to deal with the consequences of COVID-19, particularly in the case of child custody and maintenance. The following discussion is limited to the application of Shariah law in Malaysian Shariah Courts, where the obligations and liabilities of the parents are stipulated in the IFLA.

The Challenges in Executing Shared Parenting in Shariah Court

This part of the study aims to determine whether shared parenting is the best form of post-divorce parenting by addressing the challenges in its execution under the Shariah legislation. The challenges of shared parenting can be divided into two; the external challenges and the internal challenges.

External Challenges

The external challenges are the challenges that do not include any active player in executing the shared parenting, i.e. the legislation, the judiciary, and the family institution. One external challenge for the execution of shared parenting is that there is no ideological standard of any kind or any empirical measurement to evaluate the extent of its effectiveness. Still, one indication that may shed light on the current situation is the fact that the practice of shared parenting has significantly expanded compared to past decades. The advocacy and movement of shared parenting can be seen as an organised body (Heine, 2016). Nonetheless, there is no conclusive evidence to prove the statement that shared parenting is the best solution since studying comparative family law demands compatibility in various aspects such as social, cultural, and religious aspects. And as discussed prior, even the classical scholar

acknowledges the shared duty, responsibility, and rights in certain features such as providing maintenance.

Internal Challenges:

The internal challenges are elaborated as follow:

- i) There is no explicit provision for shared parenting in Malaysia

Legislatively, section 87 of the Islamic Family Law (Federal Territories) Act is the only provision that stresses on the non-custodial parent's rights. There is no standing law in Malaysia in any form for shared parenting in terms of joint legal custody or joint physical custody. Nonetheless, shared parenting is viable through consent judgment via *sulh*. However, this fact limits judges from making judgements in the form of shared parenting since there is no explicit provision that allows a judge to do so without having to rely on consent judgement.

- ii) The success rate of shared parenting relies solely on the cooperation of both disputing parties

As explained prior, a simple way to encourage the practice of shared parenting in Shariah courts without the need for any new or changed form of legislation is through the *sulh* approach. In a *sulh* session, the parties attempt to settle their disputes amicably with the help of a neutral third party known as the mediator or *sulh* officer. For child custody cases, the parents may resort to the concept of shared parenting where both parents carry equal responsibility for the child. The approach of shared parenting through *sulh* can be seen in an unreported case of Siti Nabila Ismail v Mohd Faisal Wahid where both parents are cooperative and were able to produce an agreement for the children's best interests. However, shared parenting based on *sulh* agreements possesses one shortcoming. Because the nature of *sulh* is voluntary and without force, shared parenting could only be achieved through consent judgement. Without proper provisions, the court has no authority to order for shared parenting as a court order unless both parents agree to it. For the time being, this is the only available approach to enforce shared parenting in the Shariah courts.

- iii) A contradiction between children's right to voice opinion versus the consensus of the parents in the application of shared parenting.

The importance of a child's best interests is outlined in Section 86 of IFLA 1984. Besides the tedious procedure of gathering and hearing from both parents and child, there is another judgement dilemma faced by the judges. In the event of reconciliation of both litigants through a consent judgement, the judge will usually take the words of both parties and their agreement into Court's Order as per Section 94 of SCCPA. The issue is, however, the room for the children to voice out their opinion to what they believe is best for them. Due to this factor, an oscillation of dilemma between the parents' consensus and the children's desire will continue to exist.

- iv) Evaluation of opinions from both the parents and child becomes time-consuming

In previous studies, getting some control in their living conditions and providing flexible conditions that could be changed to suit their commitments have been 'significantly linked' with how satisfied children are with those arrangements. Existing research has also shown that children find it challenging to propose changes to their living arrangements once they are in place, mainly in high conflict cases. The reason is that children are worried that expressing their desires to alter a parenting arrangement may show disloyalty to the other parent and re-ignite parental conflicts (Monica Campo et al., 2012). Understanding this fact, court judges continue to interview the children personally and ask for their opinions even though a child's view is not a requirement to determine the rights of child custody in court jurisdiction (Nora'syikin Hamzah and Raihanah Abdullah, 2018). Obtaining the children's opinion also matters as studies have also shown that parents' views may be ambivalent to children's views thus may backfire against the best interests of the child. To ensure the best interests of the child is maximised, the courts would have to spend an indefinite amount of time for the mother, father and child. As it is, Shariah courts still suffer from a backlog of cases and have been dealing with it well

thanks to the mediation approach. For this reason, the Shariah courts' administration needs a right and proper time allocation to execute the evaluation.

v) The applicability of shared parenting in non-conducive household

The final challenge of the shared parenting by consensus of both parents is that the judges not have room to check whether the household is conducive enough for the raising of the children. Because of this situation, there is a need for sufficient provision to ensure the judge will always take into account the conduciveness of the household in shared parenting cases. The issue, such as the characteristic of both custodians, must be thoroughly examined. If this is not the case, there will be another proceeding that will cause difficulties such as the case mentioned above, where the mother had to replace her co-custodian from her former husband to her mother.

Is Shared Parenting Practical in Malaysian Shariah Courts?

Currently, the approach of shared parenting is undoubtedly possible to be conducted by the Shariah courts through *sulh*, which is also known as mediation. At the same, it is vital to take into consideration the children's preference and opinion. This condition has often been ignored in deciding the shared parenting cases. According to Nor'asyikin Hamzah and Raihanah Abdullah (2018), children's voice is often overlooked in mediation cases unless the case goes through court trials. Unlike in court trials, judges do not interview the child in question to seek his opinions to determine court order.

To enhance the success rate of shared-parenting, couples who separated in a conflicted manner are advised to come up with a coping strategy to avoid further complications in the future. A coping strategy may be defined as the specific behavioural and psychological efforts that people employ to master tolerance and to minimise the impact of stressful events (Lazarus, 1984). Just as counselling is found to be a well-known mechanism for single parenting support (Siti Rafiah and Sakinah Salleh, 2013), divorced couples may also resort to counselling when the occasion arises.

Most importantly, divorced couples are implored to develop the spirits of understanding and forgiving with a sound mind as Allah SWT has decreed in surah *al-Ma'idah*, verse 8:

"O believers! Stand-up firmly by the Commandments of Allah, bearing witness with justice and let not the enmity of any people incite you that you should not do justice. Do justice that is nearer to piety and fear Allah, undoubtedly, Allah is aware of your doings."

Another relevant condition is to consider is the status of both parents. Both parents must meet the requirements set by section 82 of IFLA (Federal Territories) 1984 concerning the necessary qualifications for custody. The qualifications, also subject to the parents' agreement and court's approval, are required to ensure that the shared parenting approach is not misused or misguided. Such can be the cases in families with a history of domestic violence.

Conclusion

In conclusion, there is a presumption commonly exists in court trials where the mother is the best person entitled to gain child custody, especially if the child is an infant unless specific conditions are met. Nevertheless, it is of utmost important to take into consideration the role of a father in a child's upbringing. The idea of shared parenting is brought forward in this article not only as a coping mechanism to deal with the consequences of COVID-19 but as an alternative for the Muslim family institutions, as well as a step forward for the Malaysian Shariah courts to secure the best interests of the future generation. Authorities and responsible parties are highly encouraged to take into consideration the importance, advantages and challenges of shared parenting discussed in this article to establish shared parenting in the family settlement system and ensure that the best interests of the child are secured.

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