

AL-ITQĀN

JOURNAL OF ISLAMIC SCIENCES AND COMPARATIVE STUDIES

Volume No. 2

Issue No. 2

June 2018

EDITOR IN-CHIEF

Dr. Wan Mohd Azam Mohd Amin

MANAGING EDITOR

Dr. Masitoh Ahmad

EDITORIAL BOARD

Dr. Muhammad Afifi al-Akiti, Oxford

Dr. Muhammad Kamal Hassan, IIUM

Dr. Syed Arabi Aidid, IIUM.

Dr. Hassan Basri Mat Dahan, Universiti Sains Islam Malaysia,
Nilai, Negeri Sembilan

Dr. Kamaruzaman Yusuff, Universiti Malaysia Sarawak,
Kota Semarahan, Kucing.

Dr. Kamar Oniah, IIUM.

Dr. Mumtaz Ali, IIUM.

Dr. Siti Akmar, Universiti Institut Teknologi MARA, Shah Alam
Dr. Thameem Ushama, IIUM.

INTERNATIONAL ADVISORY BOARD

Dr. Muhammad Afifi al-Akiti, Oxford University, UK
Dr. Abdullah M. al-Syarqawi, Cairo University, Egypt.
Dr. Abdul Kabir Hussain Solihu, Kwara State University, Nigeria.
Dr. Anis Ahmad, Riphah International University, Islamabad.
Dr. ASM Shihabuddin, Uttara University, Dhakka, Bangladesh.
Dr. Fatimah Abdullah, Sabahattin Zaim University, Turkey.
Dr. Ibrahim M. Zein, Qatar Foundation, Qatar.
Dr. Khalid Yahya, Temple University, USA.

© 2017 IIUM Press, International Islamic University Malaysia. All rights reserved.
eISSN:26008432

Correspondence

Managing Editor, *Al-Itqān*
Research Management Centre, RMC
International Islamic University Malaysia
P.O Box 10, 50728 Kuala Lumpur, Malaysia
Tel: +603 6196 5558
Website: <http://journals.iium.edu.my/al-itqan/index.php/alitqan/index>
Email: al-itqan@iium.edu.my

Published by:
IIUM Press, International Islamic University Malaysia
P.O. Box 10, 50728 Kuala Lumpur, Malaysia
Phone (+603) 6196-5014, Fax: (+603) 6196-6298
Website: <http://iiumpress.iium.edu.my/bookshop>

Table of Contents

An Evaluation of The Implementation of <i>Shari'ah</i> Law of Malaysia in Protecting the Rights of a Child	5-19
<i>Mahamad Naser Disa</i>	
Recapturing the Meaning of <i>Akhlāq Islāmiyyah</i> : An Analysis of the Article “Akhlak” in the <i>Encyclopedia of Islam</i>	21-39
<i>Amilah Awang Abd Rahman</i>	
Irfan Abdul Hameed Fattah’s Discourse on Religious Thought in Response to The Challenges of Modernity	41-55
<i>Adibah Abdul Rahim</i>	
The Chinese Mahayana Buddhist Community in Kuala Lumpur and Selangor	57-82
<i>Nur Suriya Mohd Nor</i>	
Cash <i>Waqf</i> in Sustaining Of Indonesian Society “In Legal & Economic Perspective”	85-99
<i>Sukarmi</i>	
<i>Argo Victoria</i>	
A Preliminary Survey of Issues of Shiism in Malaysia with Special Reference to the State of Malacca.	101-129
<i>Hamzah Jantan</i>	
<i>W Mohd Azam Mohd Amin</i>	
<i>Amilah Awang Abd Rahman</i>	
Political Salafism in Malaysia	131-146
<i>Maslee Malik</i>	
An Analysis of the Conceptual Framework of <i>al-Hākimiyyah</i> of Sayyid Quṭb	147-167
<i>Ibrahim ‘Abd Allāh al-Bannā</i>	
<i>Noor Amali Mohd Daud</i>	

Author Guidelines

1. Manuscript article can be either in English, Malay or Arabic using software Microsoft office (Word, and Excel), Font 12 Times New Roman. Only tables, figures and appendix can be written using Font 10, Times New Roman.
2. If there is a usage of Quranic verses or Hadith from Prophet P.B.U.H., it only needs to be done by translation only.
3. The manuscript should be in 1.5 single spacing and justified, with the margin of 2.5cm.
4. Article needs to have a title and author's name and second author's name along with the full address (institution's or university's address, e-mail, handphone's number, office's number, fax together with the second author's details).
5. Every article must include an 'abstract in Malay and English. The length of the abstract is no more than 150 words including 5 keywords.
6. The length of each article must not exceed 6000 words.
7. The Arabic words in manuscript should be in a transliterated form.
8. Reference for each article must be written according to **Chicago Manual**.
9. Notification Letter :
10. Letter of Acceptance – editorial board will send an e-mail to the author to notify that the manuscript is received.
11. Letter of Acceptance/Rejection for Publication – editorial board will send a letter by an e-mail to the author to notify if the manuscript judged by the panels is approved or declined to be published.
12. Letter of Publication – editorial board will send a letter by e-mail to the author if the article has been judged, repaired, and corrected to be published in the college's journal.
13. Certificate of Appreciation– editorial board will send a certificate of appreciation by mail to the authors who have sent their articles.

An Evaluation of the Implementation of Sharī'ah Law in Malaysia in Protecting the Rights of Children

Mahamad Naser bin Disa*

Abstract

This research is an observation of the implementation of Islamic law (*Sharī'ah*) among the Malay Muslims in the Sharī'ah courts (*Mahkamah Syariah*) of Malaysia. The author emphasizes on the roles of Islamic law that are related to the protection of the rights of children, especially those who were born out of wedlock among Malaysian Muslims. By employing the qualitative methodology, the author critically analyses some issues on the rights of children in Islam, comparing them with other acts and provisions of laws and their relation to the implementation in Islamic courts of Malaysia. The findings indicate that the rights of children born out of wedlock are covered under the Islamic laws of Malaysia. However, the implementation of Islamic laws pertaining to rights of children in Malaysia draws criticisms from many groups that include local and international ones.

Keywords: *Sharī'ah*, children rights, Islamic courts, Muslim, Malaysia.

Introduction

Islam puts the interests of a child as a core value. Consistent with its holistic nature, the *Sharī'ah* should be appreciated in a larger picture, taking into consideration all aspects to produce a well-balanced outcome. Having said that, an issue is to be evaluated based on many factors, not just one specific area. For example, in discussing the rights of a child, the rights of Allah and other surrounding factors should be taken into consideration. Unfortunately, there have been misconceptions about the *Sharī'ah* rulings on certain matters concerning children's rights which have created some doubts in relation to the protective aspect of children welfare. The most popular yardstick to determine violation of any right has always been the Universal Declaration of

* Professor Dato', Faculty of Law and International Relations, University of Sultan Zainal Abidin (UNISZA), Terengganu/ Chief Executive Officer (CEO), Islamic Strategic Research Institute Malaysia (IKSIM), Kuala Lumpur. Email address: naserdisa@unisza.edu.my/ naser.disa@iksim.my

Human Rights (UDHR). In the case of children, the Convention on Rights of Children (CRC) takes the lead in determining what justice for children means. Its aims appear to be noble but the Malaysian society must consider its proposition with reservation. For example, for the past few years, the Universal Periodic Reviews (UPR) have noted that there is discrimination against Muslim children whereby the legal regime in Malaysia discriminates against Muslim children born out of wedlock by enforcing a bar against attributing legal paternity to the biological father and that child marriage is disproportionately affecting girls as the minimum legal age for marriage is set lower for girls than for boys in the local laws.¹

Apart from the UPR reports, there have been great discussions across the nation about freedom of religion and freedom of expression, particularly on the issues of hijab on children and freedom to not be bounded to a certain religion until they reach the age of majority. Though generally the call for justice for children is praiseworthy, certain non-governmental organizations and individuals have misrepresented the call. The cause for children's rights within Malaysia has been knowingly or unknowingly hijacked by interest groups espousing Islamophobia and anti-*Shari'ah* campaigns under the guise of protecting human rights. It is respectfully observed that one of the weaknesses of the post-modern mind is its single-minded pretence of universalism when in fact the underlying premise of post-modernism is self-serving. For the purpose of this paper, the advocates of this thought are referred to as the liberal-universalists. They seek to import such purported universalism into Malaysia by challenging the value systems rooted in the *Shari'ah*.² The proposition of universalism has been the promise of upliftment of the dignity of human kind and the protection of human rights.

This paper addresses the issues raised concerning violation of the rights of a child upon application of *Shari'ah* laws. It is hoped that this paper will enlighten readers about the wisdom behind the misunderstood *Shari'ah* rulings on the rights of a child with a view to debunk the stereotype about

¹ Child Rights Coalition Malaysia, "Status Report on Children's Rights in Malaysia", December 2012, https://www.unicef.org/malaysia/Report_on_Childrens_Rights_.pdf, accessed October 1, 2017.

² The terminology of *Shari'ah* referred to in this article is a Malaysian version of Islamic Laws that is practiced in Islamic courts (*Mahkamah Syariah*) of Malaysia. This article is an improved and modified version of a working paper presented at the International Conference on Child and Humanitarian Law Theme "Social Challenges and International Conflicts" on 8-9 October 2017 at UNISZA, Kampus Gong Badak, Kuala Terengganu, Terengganu.

the so-called *Sharī'ah* threats, particularly, to children's welfare.

Violation of Childrens' Rights from the Perspective of the Liberal-Universalists: A Misleading Narrative

Islamophobia has given rise to many claims that *Sharī'ah* laws are violating especially the rights of women and children. The Islamic view on human rights, namely the Cairo Declaration of Human Rights, is not accepted as being part of the idea of universal human rights.¹ The idea of justice according to the liberal-universalists is very much narrowed on one particular area, mostly based on the CRC, instead of appreciating the *Sharī'ah* system as a whole. Consequently, the liberal-universalist campaigners' narrative has opposed almost every effort to uphold and empower the *Sharī'ah* legal system.

The narrative of the liberal-universalists appears to be cyclical and thereby has become somewhat predictable. It begins with an unfair allegation, an imagining of a vicious cycle caused by the *Sharī'ah*. This is apparently based on selective and narrow representations of the application of Islamic law and its alleged infringement of human rights in a few circumstances. First, when it imposes moral policing for offences which are regarded as personal sins such as *khalwat*,² fornication (*zinā*), gambling, drinking liquor and cross-dressing. Seemingly, free mixing among grown-up boys and girls is not viewed as an immoral conduct but rather an exercise of freedom and privacy.³ This can be seen when there was unrest upon the announcement of the private member's bill to amend the *Sharī'ah* Court (Criminal Jurisdiction) 1965 [Act 355] which seeks to increase the sentencing power of the *Sharī'ah* courts for criminal offences.⁴

Second, when children are born out of wedlock, the *Sharī'ah* is said to be unfair to classify them as illegitimate (*anak tak sah taraf*) and in placing the responsibility (and by implication, the blame) solely on the mother, causing the biological father to abscond after having

¹ "Increasing powers of Syariah Courts may lead to violation of human rights in Malaysia", May 31, 2016, <http://www.sistersinislam.org.my/print.php?news.1431>, <http://iheu.org/islamic-law-vs-human-rights/>, accessed September, 29 2017.

² An illegal close proximity of two individual of different sexes in an isolated place as defined by the Islamic law of Malaysia.

³ "Here Come the Malaysian Morality Police", *The Diplomat*, accessed September 30, 2017, <http://thediplomat.com/2017/02/here-come-the-malaysian-morality-police/>.

⁴ Razak Ahmad, "Malaysian must stand Firm against RUU355 says G25," *The Star Online*, May 3 2017, <http://www.thestar.com.my/news/nation/2017/05/03/malaysians-must-stand-firm-against-ruu355-says-g25-hadis-bill-a-back-door-way-of-imposing-hudud-on-p/>.

impregnated his child's mother. On the issues of paternity and inheritance, the *Sharī'ah* is to be blamed for punishing the children for the sins of their parents by putting them through the shame of not being allowed to bear the name of the biological father or inherit from him. If the child is a female, she is required to cover her '*aurah*' even before her biological father upon attaining her age of puberty and denied the right to have him as the *wālī* (official guardian) for her marriage. This *Sharī'ah* ruling is believed to be violating Article 2 of the CRC for discriminating Muslim children born out of wedlock and Article 7 for depriving the right of the child to be registered after birth and named after his/her biological father.

Many comments were expressed through newspaper articles and blogs, either celebrating the recent Court of Appeal judgement¹ on the issue of attribution of paternity, or criticising the unfairness of the conservative rulings on point.² The recent judgement was said to be a bold landmark ruling, turning the corner in favour of such completely innocent children who are said to endure the consequences of their parents' mistakes, sins or victimization. Some eager writers have even gone to the extent of suggesting that this ruling contributes to baby dumping and murder instead of deterring promiscuity and further misconducts while justifying the irresponsible act as being part of human nature to be wired to sexual activities.³

Ironically, while addressing the issues relating to the rights of illegitimate children which are partly caused by teenage pregnancies, child marriage is not regarded as part of the solution. In fact, it is viewed as a problem and should be criminalized. The local laws regulating

¹ "The Child v The National Registration Department and others [2017] Civil Appeal No. W-01(A)-365-09/2016, CLJ Shariah, July, 2017 [http://www.shariahlaw.com/public/ext_high_cases_preview.asp?cn=\[CIVIL%20APPEAL%20NO: %20W-01\(A\)-365-09-2016\]&id=10](http://www.shariahlaw.com/public/ext_high_cases_preview.asp?cn=[CIVIL%20APPEAL%20NO:%20W-01(A)-365-09-2016]&id=10)", accessed September 30, 2017.

² "Sisters in Islam hails Judgement against NRD as Islamic", *FMT News*, July 27, 2017, <http://www.freemalaysiatoday.com/category/nation/2017/07/27/sisters-in-islam-hails-judgment-against-nrd-as-islamic/>, See also "Sisters in Islam lauds landmark appellate court judgement Children Born out, *The New Straits Times*, July 27, 2017 <https://www.nst.com.my/news/nation/2017/07/261527/sisters-islam-lauds-landmark-appellate-court-judgment-children-born-out>. See also "Sisters in Islam welcomes the decision of the Court of Appeal", Sisters in Islam, July 27, 2017, <http://www.sistersinislam.org.my/news.php?item.1492.8>, accessed September 30, 2017.

³ Erni Mahyuni, "Stop Calling Babies Illegitimate if You Don't Want Baby Dumping, *The Malay Mail*, March 29, 2017. <http://www.themalaymailonline.com/opinion/erna-mahyuni/article/stop-calling-babies-illegitimate-if-you-dont-wantbabydumping#iThDpug6tbxSj5QD.97>.

minimum age for marriage, especially for Muslims¹ are said to have blatantly violated the CRC which calls for the abolishment of traditional practices prejudicial to the health of children² and prohibits from permitting or giving validity to a marriage between persons who have not attained their majority.³ Child marriage is also linked to other children's rights, such as the right to express their views freely, the right to protection from all forms of abuse and the right to be protected from harmful traditional practices.

Thus, to avoid the vicious cycle, the children's rights to freedom of religion and freedom of expression are being advocated to liberate the children from being controlled by religion. One such effort is the movement to stop hijab among children,⁴ which is consistent with the anti-Sharī'ah movement in the West.⁵ Those allegations and movements are justified as an effort towards a secular nation where Sharī'ah is perceived as not progressive and preventing the nation from moving forward. On issues relating to children's right to freedom of religion, where one of the parents converts to Islam, the liberal-universalists are proud to fight for the children's right to maintain the existing faith upon divorce because unilateral conversion is seen to deprive the right of the child under Article 14 of the CRC.

From the above narrative, it has yet to be seen, for all its universalism, how far the value system of Universal Human Rights accommodates the value system of the *Sharī'ah*. If the said value system purports to be truly universal, then it should permit the *Sharī'ah* to exist and be respected as the dominion of a free Muslim people. On this point, even the UDHR was criticised for its failure to respect cultural differences in drafting the UDHR, which settled on a universal standard.⁶

¹ "Minimum Age of Marriage", section 8 of Act 303 Islamic Family Law (Federal Territory) Act 1984. Incorporating latest amendment - P.U.(A) 247/2002.

² Article 24(3) of the *Convention on the Rights of the Child*, 1989.

³ Article 16(2) of the *Convention on the Rights of the Child*, 1989.

⁴ "Projek Londeh Tudung Muslimah", July 22, 2017, *Menara.my*, <https://www.menara.my/projek-londeh-tudung-muslimah/>, accessed September 30, 2017.

⁵ "The hijab is not for children. It was right to drop these distasteful images", *The Guardian News*, <https://www.theguardian.com/global/commentisfree/2017/aug/15/hijab-not-children-drop-images-transport-for-london-road-safety-campaign>, Accessed September 30, 2017.

⁶ Statement on Human Rights, American Anthropologists New Series, Volume 49, No.4, October-December 1947, p. 539. AJM Milne, *Human Rights and Human Diversity: An Essay in the Philosophy of Human Rights*, (London: The Mac Millan Press, 1986), p. 3-4.

The Role of the Sharī'ah System in Protecting the Rights of a Child

The *Sharī'ah* shall be taken as the definitive source of social interests because Islam enjoys a unique and exalted position by the Federal Constitution.¹ The *Sharī'ah* is an immutable value system that has been developed and refined for centuries based on verified foundations of the materials in Al-Qur'an and the Sunnah. Underlying every ruling in the implementation of *Sharī'ah* laws in Malaysia is the protection of children, which is affirmed by the unique and exalted position of Islam. The role of the *Sharī'ah* system in protecting the rights of a child can be illustrated with several examples. First, through the ruling on nasab or attribution of paternity where it permits attribution of paternity only to a child conceived within a period of a valid marriage. This ruling has been codified in Section 110 of the Islamic Family Law Act 1984 [Act 303]. The wisdom behind this ruling is to be understood within the whole structure of the *Sharī'ah* and its *maqāṣid* (objectives). The *Sharī'ah* guarantees the child's right to have a lineage and be the product of legitimate wedlock. Simultaneously, the *Sharī'ah* commands Muslims to stay away from shameful deeds, whether openly or secretly.² Allah has warned "Come not near to *al-Fawāḥish* (shameful sins, illegal sexual intercourse) whether committed openly or secretly..." Then Allah says, "and it is He who has created man from water, and has appointed for him kindred by blood and kindred by marriage..."³ Therefore, it is the substantive right of every child to be born from a valid marriage. This means any consenting *bāligh* (puberty age) individual who causes the child to be born out of wedlock is responsible for violating such child's right by putting him/her through shame and social stigma of being illegitimate and depriving him/her of his/her right to grow up in a traditional family structure.

Therefore, the *Sharī'ah* law is just and fair because it establishes that attribution of lineage is such an important value that it is only recognised legally if it is based on conception during the existence of a valid marriage. The value of preserving lineage ranks high in the value chain in the *Sharī'ah* system because the recognition of lineage is the anchor for many other rights such as inheritance and guardianship (*wālī*). It is important to preserve the ruling that the illegitimate child does not inherit or bear the name of the biological father so that it does not cause chaos to the *nasab* of the entire

¹ Article 3(1), *Federal Constitution*.

² "Islam and Children", Unicef Publication, https://www.unicef.org/malaysia/resources_publications_islam-and-children.html, accessed on September 30, 2017.

³ Al-Qur'an, Sūrah Al-Furqān: 45.

Muslim community¹. It is just unfortunate that the damaging effect to the nasab caused by recognizing the identity of a child as legitimate is more significant compared to the shame that the illegitimate child has to endure.

The argument by liberal-universalists that denoting “*bin Abdullah*” would cause “*aib*” or shamefulness upon the child is highly questionable as it is the duty of the government to educate society not to discriminate or stigmatise children of unlawful conjugations, especially when the biological parents having a consensual conjugation did not think it is shameful to commit such crime but now wish to cover the “*aib*” or suppress the shame of the sinful act on themselves. The real violators therefore are those thinking mature (*bāligh*) individuals who have not only violated the right of the child but also the right of Allah. The point of social stigma against children born out of wedlock is very much based on the prejudices of individuals in society and has no basis in Islam. In fact, Islam enjoins treating children whose father is unknown as brothers in religion.² However, based on the assumption that children born out of wedlock face social stigmatisation, civil society as a whole has a central role to play to educate the public and dispel myths. A *Sharī’ah*-centric society that also respects the *Sharī’ah* does not ostracise children born out of the moral failings of one or both biological parents.

Secondly, the *Sharī’ah* system protects the rights of a child through its ruling on child marriage. Islam also condemns forced or early marriages that are potentially harmful to the physical or social conditions of very young brides or grooms who are also young adolescents. Islam also condemns cases where girls are forced to marry much older men and that they are treated as objects or commodities as families try to escape poverty. Not to mention, marrying off a girl to the rapist who committed the heinous crime against her. However, it is not fair to stereotype that all child marriages are harmful and result in a negative outcome. Section 8 of the Act 303 which sets the minimum age of 18 and 16 for male and female respectively, is perceived by the liberal-universalists as unsafe and therefore, it has been proposed that the minimum age of marriage be increased. In fact, there is even a call to criminalize child marriage.

While it is true that some cases of child marriage have invariably led

¹ “Bin/Binti bapa biologi boleh cetus kekeliruan”, *Berita Harian Online*, August 30, 2017, <https://www.bharian.com.my/berita/nasional/2017/08/307864/binbinti-bapa-biologi-boleh-cetus-kekeliruan>.

² Al-Qur’ān, Sūrah Al-Aḥzāb: 5.

to social and health problems, there is no proof that the marriages approved by the *Sharī'ah* courts for Muslim teenagers are directly related to the harmful effects of teenage pregnancies and baby dumping. A blanket policy on fixed ages, without assessing other factors such as maturity and family support, may instead increase cases of sex out of wedlock amongst those below the legal age. This may result in more teenage pregnancies, and this time, without a registered and a responsible husband. There might also be more statutory rape cases of older teenagers when these can be avoided if the two consenting parties are allowed to enter a lawful marriage.¹

Child marriage does not promise to solve all problems any more than adult marriage promises to solve all problems, but at the outset the rights of parties in a valid marriage are recognised and enforceable by the *Sharī'ah* courts. Furthermore, legalised marriages imbue legal protection on the parties, for example, protection orders under the Domestic Violence Act 1994 [Act 521] which, and rightly so, do not confer such protections upon boyfriends, flirts and dates. This is one of the gaps in the argumentation of the liberal-universalist wing; whereas their narrative seems to admit that teens are having sex younger and younger and becoming more and more exposed, they fail to match the remedial power of the *Sharī'ah* courts in making orders to safeguard the rights of the parties and child within the framework of child marriage. The divorce rates and reproductive health issues which emerge from a child marriage, though a valid concern, is a problem that can find its solution through a better revised pre-marriage course, parenting courses, or regular visits to a gynaecologist or obstetrician. If the candidates are not eligible to be married due to lack of maturity or other circumstances such as poverty or elements of exploitation, we trust the Sharī judges will do their part to prevent a future evil. It turns out that child marriage is a right for a Muslim girl when she is ready and deserving protection from a good husband. This means the law to ban child marriage would then deprive her of a right conferred by the *Sharī'ah* to be protected by a husband and start a family.

Thirdly, the role of the *Sharī'ah* system in protecting the rights of a child can be seen through the amendment of the Law Reform Act (Marriage and Divorce) 1976 [Act 164] where among the most important impact of the amendment is that it has avoided chaos that may have been caused by a

¹ “Be fair to children, protect institution of marriage”, *Malaysiakini*, October 9, 2013, <https://www.malaysiakini.com/letters/243429#UVZgFIPysCOcpKI.99>, accessed September 28, 2017.

controversial proposal, i.e. the inclusion of Clause 88A to the earlier proposal (hereinafter referred to as “the Bill”). The Bill, if materialized, could have prevented a converting parent to unilaterally convert a child into Islam upon divorce. However, it did not materialize because it is not consistent with the *Sharī‘ah*. Other provisions such as amendment to Section 51(1) reflects the spirit of the *Sharī‘ah* in that it ends the limbo of a converting spouse to file for divorce petition and other ancillary relief in the civil court. This effort of removing hardship that would drag for years and affect spouses and children is indeed praiseworthy in the eyes of *Sharī‘ah*. Apart from that, the fact that the converting spouse will still be governed by Act 164 pending the settlement of the case, is a form of check and balance to ensure the converting spouse, especially in the case of a husband, to evade all responsibilities upon his conversion to Islam. This would also safeguard the non-converting spouse and children from being victims of abandonment. On the issue of ḥaḍānah or custody, the best interest of a child is definitely a primary consideration.

The amendment truly has depicted the spirit of *Sharī‘ah* that the best interest of the child is considered. The passing of the amendment shows that the interest of the child is not inimical to the position of Islam as the religion of the Federation. Had Islam been as oppressive and regressive as it is often painted to be by the liberal-universalists, the welfare of the children from the civil law marriage would be neglected. On the other hand, the amendment ensures the children’s welfare is safeguarded when the next-of-kin of the converting spouse gets a share of the matrimonial property, inter alia, to meet the needs of the children. This again shows that Islam is not biased and Malaysia practises fairness through its *Sharī‘ah* legal system which exists parallel to the civil law system.

Finally, the *Sharī‘ah* system protects the rights of a child through the enforcement of the *Sharī‘ah* Offences Act 1997 [Act 559] which covers both aspects, i.e. crime (*jināyah*) and *sin* (*jarīmah*) and regulates the moral (*akhlāq*) of the Muslims. This has basis in the *Sharī‘ah* as it is a right of a child to be raised in a crime free and morally civilised society. Upholding and protecting such right do not require parental responsibility solely, but also a collective obligation (*farḍ kifāyah*) of the community where the state legislative and executive institutions and the institutions of civil society have a role to play in supporting and protecting the rights of the child. The Prophet (pbuh) mentioned that “Nothing a parent may award his (or her) child is better than a good upbringing,” and that “Each of you is a shepherd, and each of you is

accountable for his or her flock.”¹

Act 559 regulates certain crimes and moral offences such as *khalwat*, *zinā*, gambling and cross-dressing, and offences relating to the Islamic faith (*'aqīdah*) such as teaching false doctrine and teaching without *tawliyah* (official certification from the State's King). This part of discussion will assume that the objective of Act 559 will be better achieved if the *Sharī'ah* Offences Act (Criminal Jurisdiction) 1965 [Act 355] which provides for a sentencing limit for a *Sharī'ah* court be amended to a higher ceiling. It is important to note that Act 559 cannot serve as an effective deterrence if the current sentence is not increased. Act 355 is a separate law which provides for the *Sharī'ah* courts a sentencing jurisdiction with a limitation of a 3-year imprisonment, five strokes of rotan and a fine of RM6,000. This limit has not changed for many years and has been widely viewed as inadequate. It is expected that an increase in the sentencing will improve the efficacy of the Islamic criminal justice system as a whole because the level of professionalism will also increase. It is also important to note that this amendment, if materialized, will enable the *Sharī'ah* courts to impose a higher sentence for the offence of non-payment of maintenance for ex-wife and children.

It is expected that the proposed higher sentence through amending Act 355 would actually benefit every child in three ways:

- (a) The right of a child to his/her welfare is safeguarded when the father wilfully neglects to pay maintenance to the child or the child's mother under the Islamic Family Law Act 1984 [Act 303]. A child needs to feel safe and protected when the law provides for a grave consequence for a drunkard or a gambler² father who abuses the child and the child's mother.³ Therefore, the increased penalty would enhance the deterrence effect against the commission of such vices which contributes to social problems within the family, which may cause instability in the home and affect the mental and emotional health of the children. It is unfortunate that the universal-liberalists are against the

¹ Narrated by al-Bukhārī in his *Saḥīḥ*, *Kitāb Al-Jum'ah* (Book of Friday), chapter “Friday in villages and towns,” 1, p. 248. Hadīth 893.

² “Gambling”, Sections 18, 19 Act 559 *Sharī'ah* Criminal Offences (Federal Territories) Act 1997. Incorporating latest amendment - P.U. (A) 251/2002.

³ “III-Treatment of wife”, Section 127 Act 303 Islamic Family Law (Federal Territory) Act 1984.

- proposal to strengthen the *Sharī'ah* court system,¹ even if such strengthening could protect the right of a child by more effectively punishing adulterers and drunkards. Surely, a society that condones such vices is unsafe for the well-being of children;
- (b) to uphold the child's right to have a decent upbringing in a crime-free society. Most of the offences, if not directly, indirectly affect the welfare and prevent a decent upbringing of a child. A child needs to grow up in an environment that promotes *amar ma'rūf nahy munkar* through enforcement of law, namely for offences like cross-dressing and *khalwat*, alongside carrying out *tarbiyyah* for the society from a tender age. To illustrate further, enforcement of *Sharī'ah* laws against cross-dressers is of particular importance in the identity debate because proliferation of gay rights and gay identity diminishes the conduciveness of a healthy environment for children to be raised. The child would be bombarded with competing values of the parents and society on the one hand versus gay identity and other counter-cultural values on the other. Apart from that, identity confusion may lead to tension and stress for youth who have reached puberty and are beginning to understand their gender roles and sexual development. It is thus pertinent for the *Sharī'ah* legal system to be developed and enforced consistently to support the rights of the child, who remains a pawn in the contest of gay ideologies;
- (c) when it regulates the teachings of Islam, it upholds the right of children to proper education and protects children from being exposed to the risk of misleading doctrines and ideology threats such as pluralism, secularism and liberalism (whose campaigners are dead set against moral policing of personal sins) that could lead them to compromising certain core values of the original *Sharī'ah* teachings or even to a certain extent, going astray into the path of atheism. Regulation of tauliah among religious instructors and lecturers is a must to ensure that the right of the child to proper education is upheld and not abused, what more with the growing threat of the IS/ISIS (Islamic State of Iraq and Syria) movement that threatens to radicalise Muslim youth worldwide. Offences relating to the sanctity of Islamic teachings

¹ "Malaysians must stand firm against RUU355, says G25", *The Star Online*, May 3, 2017, <http://www.thestar.com.my/news/nation/2017/05/03/malaysians-must-stand-firm-against-ruu355-says-g25-hadis-bill-a-back-door-way-of-imposing-hudud-on-p/>, accessed on September 30, 2017.

and *'aqīdah* are also better enforced with higher criminal sentence. It is only logical because if a person claims that he is the rightful Yang di-Pertuan Agong or he is threatening to displace the government, he is liable under the Penal Code for the death penalty or life imprisonment. However, if the same man claims he is god or a prophet or threatens to displace the religious establishment, he will only face a lenient sentence under the present law. What would a child think?

From the macro perspective, it is hoped that the value-infused legal framework supports the existing social structure of Muslim society in this country, which is increasingly under threat from numerous sides, including unbridled Internet penetration, information overload and globalisation. The structure of the Muslim society forms a protective and nurturing cradle that insulates the growing child in an increasingly hostile world. The rights of the child include the right to a proper education, and given the pervasive nature of the Internet and its negative influence, it is very fitting that the *Sharī'ah* enforces laws to regulate the content of public decency and conduct. Deterrence as a basis for criminal law has a great impact on the society because, provided it is enforced regularly by the enforcement agencies, it would reduce the occurrence of offences like fornication or adultery, and Penal Code offences like rape, kidnapping, extortion and other social ills, not to mention the proliferation of innocent children born out of those offences. Therefore, a stronger *Sharī'ah* penalty system through the amendment of Act 355 will better represent society's abhorrence to the offences.¹

Conclusion

The protection given by the *Sharī'ah* is well-rounded by addressing the roots of social ills even if they appear inexpedient or another inconvenient truth. It also recognises the intrinsic dignity of the individual and forbids us from humiliating ourselves below the standard fitting for a human being. The cycle perpetuated by the liberal-universalist discourse, entangles itself. For example, the upsurge of interest by certain groups in the anti-khalwat laws campaign, anti-child marriage and legitimizing the illegitimate children, would as a logical

¹ "It's all about the children, not selfish adults", *The Australian*, July 23, 2011. <http://www.theaustralian.com.au/opinion/its-all-about-the-children-not-selfish-adults/news-story/9abb1cd23ad5894486107c7c064344a8>, accessed September 30, 2017.

extension end up legalizing abortion as a right. The liberal-universalist advocates are very vocal against using “*bin Abdullah*” for illegitimate children because of the alleged stigma from society.

This same group of liberal-universalists does not seem to mind the same children being raised by Lesbian Gay Bisexual and Transgender (LGBT) parents and facing stigma from society. The slippery slope of the liberal-universalist human right campaigners is sometimes direct and sometimes incremental; either way they manipulate language to the most absurd extremes to challenge all existing conventions. However, in the long run, even their best arguments run them in entanglements. Society and the legislature need to take a firm stand; a value judgement has been made against homosexuality and transgender as lifestyle choices. These are determined to be alien, undesirable and rejected, thus justifying enhanced criminal sanctions. To support this point, the case of the Australian woman who reviewed her life with some sorrow where she suffered a depressing upbringing in the home of two lesbian parents.¹

We have seen how allegedly personal rights and allegedly fundamental liberties such as the right to abortion, the right to public nudity, the right to prostitution, gay marriage and many others, remain contentious issues of moral and value judgements of certain other countries made by their respective legislatures. They legislate the law based on what they consider suitable for their own societies. Therefore, it is justified for Malay Muslim legislature to make the necessary amendment to give enhanced effect to penal laws to fulfil the will of the people and the religious duty of the State in order to protect and safeguard our children’s right to a decent upbringing with high moral values. This becomes even more necessary given the special position of Islam in the Federal Constitution.

References

- Al-Qur’ān al-Karīm, Holy Quran Yusuf Ali Translation 1946 edition, https://archive.org/details/HolyQurAnYusufAliTranslation1946Edition_201508
- AJM Milne, *Human Rights and Human Diversity: An Essay in the Philosophy of Human Rights*, (London: The Mac Millan Press. 1986).
- Amina Lone, *The hijab is not for children. It was right to drop these distasteful images*, The Guardian News, August 15, 2017, accessed on September 27, 2017 at <https://www.theguardian.com/global/commentisfree/2017/aug/15/hijab-not-children-drop-images-transport-for-london-road-safety-campaign>

- “Be fair to children, protect institution of marriage”, *Malaysia kini*, October 9, 2013, accessed on September 28, 2017 at <https://www.malaysiakini.com/letters/243429#IUVZgFIPysCOcpK>
- al-Bukhārī, Abū ‘Abd Allāh Muḥammad ibn Ismā‘īl ibn Ibrāhīm ibn al-Mughīrah ibn Bardizbah al-Ju‘fī al-Bukhārī, *Ṣaḥīḥ Al-Bukhārī*, Vol.3, (Saudi Arabia: Darussalam, 1997).
- “Bin/Binti bapa biologi boleh cetus kekeliruan”, *Berita Harian Online*, August 30, 2017, accessed on September 29, 2017 at, <https://www.bharian.com.my/berita/nasional/2017/08/307864/binbinti-bapa-biologi-boleh-cetus-kekeliruan>.
- Child Rights Coalition Malaysia, “Status Report on Children’s Rights in Malaysia”, December 2012, accessed on October 1, 2017 https://www.unicef.org/malaysia/Report_on_Childrens_Rights.pdf
- Erni Mahyuni, “Stop Calling Babies Illegitimate if You Don’t Want Baby Dumping”, *The Malay Mail*, March 29, 2017, accessed on September 30, 2017 at <http://www.themalaymailonline.com/opinion/erna-mahyuni/article/stop-calling-babies-illegitimate-if-you-dont-want-baby-dumping#iThDpug6tbxSj5QD.97>
- Government of Malaysia, (2010), *Federal Constitution of Malaysia*, [http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Constitution%20\(BI%20text\).pdf](http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Constitution%20(BI%20text).pdf)
- Government of Malaysia, (2002), Islamic Family Law Act 1984 [Act 303] in Law of Malaysia:, http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_act_lib.nsf/858a0729306dc24748257651000e16c5/1d314361e2750042482569810025f0fc?OpenDocument.
- Government of Malaysia, (1997), *Sharī'ah Criminal Offences Act 1997 [Act 559]* in Law of Malaysia:, http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_act_lib.nsf/58a07206dc24748257651000e16c5/bced11b697691518c8256826002aaa20?OpenDocument
- “Here Come the Malaysian Morality Police”, *The Diplomat*, accessed on September 30, 2017 at <http://thediplomat.com/2017/02/here-come-the-malaysian-morality-police/>
- International Humanist Ethical Union, “Islamic Law Vs Human Right”, accessed on September 30, 2017 at <http://iheu.org/islamic-law-vs-human-rights/>
- “It’s all about the children, not selfish adults”, *The Australian*, July 23, 2011, accessed September 30, 2017 at:, <http://www.theaustralian.com.au/opinion/its-all-about-the-children-not-selfish-adults/news-story/9abb1cd23ad5894486107c7c064344a8>
- “Malaysians must stand firm against RUU355, says G25”, *The Star Online*, May 3, 2017, accessed September 30, 2017 at:, <http://www.thestar.com.my/news/nation/2017/05/03/malaysians-must-stand-firm-against-ruu355-says-g25-hadis-bill-a-back-door-way-of-imposing-hudud-on-p/>
- “Projek Londeh Tudung Muslimah”, Menara. My, accessed on September 27, 2017 at <https://www.menara.my/projek-londeh-tudung-muslimah/>
- Razak Ahmad, “Malaysian must stand Firm against RUU355 says G25”, *The Star Online*, May 3 2017, accessed September 30, 2017.

- <http://www.thestar.com.my/news/nation/2017/05/03/malaysians-must-stand-firm-against-ruu355-says-g25-hadis-bill-a-back-door-way-of-imposing-hudud-on-p/>
- Sisters in Islam, “Increasing powers of Syariah Courts may lead to violation of human rights in Malaysia”, May 31, 2016, accessed September 29, 2017.
<http://www.sistersinislam.org.my/print.php?news.1431>
- Sisters in Islam, “Sisters in Islam welcomes the Decision of the Court of Appeal”, July 27, 2017, accessed June 14, 2018.
<http://www.sistersinislam.org.my/news.php?item.1492.8>.
- “Sisters in Islam hails Judgement against NRD as Islamic”, *FMT News*, July 27, 2017, accessed September 30, 2017.
<http://www.freemalaysiatoday.com/category/nation/2017/07/27/sisters-in-islam-hails-judgment-against-nrd-as-islamic/>
- “Sisters in Islam lauds landmark appellate court judgement Born out, *The New Straits Times*, July 27, 2017, accessed September 30, 2017.
<https://www.nst.com.my/news/nation/2017/07/261527/sisters-islam-lauds-landmark-appellate-court-judgment-children-born-out>
- “The Child v The National Registration Department and others [2017] Civil Appeal No. W-01(A)-365-09/2016, *CLJ Shariah*, July, 2017, accessed September 30, 2017.
[http://www.shariahlaw.com/public/ext_high_cases_preview.asp?cn=\[CIVIL%20APPEAL%20NO:%20W-01\(A\)-365-09-2016\]&id=10](http://www.shariahlaw.com/public/ext_high_cases_preview.asp?cn=[CIVIL%20APPEAL%20NO:%20W-01(A)-365-09-2016]&id=10)”
- “Think of the Child’s Best Interest”, *The Star Online*, July 31, 2017, accessed September 30, 2017.
<http://www.thestar.com.my/opinion/letters/2017/07/31/think-of-the-childs-best-interest/>
- al-Tirmidhī, Abū ‘Īsā Muḥammad ibn ‘Īsā as-Sulamī aḍ-Ḍarīr al-Būghī al-Tirmidhī, (2007), *Jāmi‘ Al-Tirmidhī*, Vol. 4, (Riyadh: Darussalam, 2007)
- Uniceff Malaysia, “Islam and Children, accessed September 30, 2017.
https://www.unicef.org/malaysia/resources_publications_islam-and-children.html.
- United Nation Human Right, (1989), *Convention on the Rights of the Child 1989*, accessed September 30, 2017.
<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

AL-ITQĀN

JOURNAL OF ISLAMIC SCIENCES AND COMPARATIVE STUDIES

Volume No. 2

Issue No.

June 2018

EDITOR IN-CHIEF

Dr. Wan Mohd Azam Mohd Amin

MANAGING EDITOR

Dr. Masitoh Ahmad

EDITORIAL BOARD

Dr. Muhammad Afifi al-Akiti, Oxford

Dr. Muhammad Kamal Hassan, IIUM

Dr. Syed Arabi Aidid, IIUM.

Dr. Hassan Basri Mat Dahan, Universiti Sains Islam Malaysia,
Nilai, Negeri Sembilan.

Dr. Kamaruzaman Yusuff, Universiti Malaysia Sarawak,
Kota Semarahan, Kucing.

Dr. Kamar Oniah, IIUM.

Dr. Mumtaz Ali, IIUM.

Dr. Siti Akmar, Universiti Institut Teknologi MARA, Shah Alam

Dr. Thameem Ushama, IIUM.