

Intellectual Discourse

Volume 28

Number 2

2020



International Islamic University Malaysia
<http://journals.iium.edu.my/intdiscourse/index.php/islam>

Intellectual Discourse

Volume 28

Number 2

2020

Editor

Ishtiaq Hossain (Malaysia)

Associate Editors

Anke Iman Bouzenita (Oman)
Khairil Izamin Ahmad (Malaysia)
Saodah Wok (Malaysia)

Book Review Editor

Mohd. Helmi Bin Mohd Sobri

Editorial Board

Abdul Kabir Hussain Solihu (Nigeria)

Badri Najib Zubir (Malaysia)

Daniel J. Christie (USA)

Habibul H. Khondker (UAE)

Hazizan Md. Noon (Malaysia)

Hussain Mutalib (Singapore)

Ibrahim M. Zein (Qatar)

James D. Frankel (China)

Kenneth Christie (Canada)

Nor Faridah Abdul Manaf (Malaysia)

Rahmah Bt Ahmad H. Osman
(Malaysia)

Serdar Demirel (Turkey)

Syed Farid Alatas (Singapore)

Thameem Ushama (Malaysia)

International Advisory Board

Anis Malik Thoha (Indonesia)

Chandra Muzaffar (Malaysia)

Fahimul Quadir (Canada)

Habib Zafarullah (Australia)

John O. Voll (USA)

Muhammad al-Ghazali (Pakistan)

Muhammad K. Khalifa (Qatar)

Redzuan Othman (Malaysia)

Founding Editor

Afar Afaq Ansari (USA)

Intellectual Discourse is a highly respected, academic refereed journal of the International Islamic University Malaysia (IIUM). It is published twice a year by the IIUM Press, IIUM, and contains reflections, articles, research notes and review articles representing the disciplines, methods and viewpoints of the Muslim world.

Intellectual Discourse is abstracted in *SCOPUS*, *ProQuest*, *International Political Science Abstracts*, *Peace Research Abstracts Journal*, *Muslim World Book Review*, *Bibliography of Asian Studies*, *Index Islamicus*, *Religious and Theological Abstracts*, *ATLA Religion Database*, *MyCite*, *ISC* and *EBSCO*.

ISSN 0128-4878 (Print); ISSN 2289-5639 (Online)

<http://journals.iium.edu.my/intdiscourse/index.php/islam>

Email: intdiscourse@iium.edu.my; intdiscourse@yahoo.com

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>

Intellectual Discourse
Vol. 28, No. 2, 2020

Contents

<i>Note from the Editor</i>	357
Research Articles	
The Link between Coronavirus and Darwin according to Pervez Hoodbhoy: A Critical Response <i>Osman Bakar</i>	365
The Politics of Manipulation: Malaysia 2018-2020 <i>Abdul Rashid Moten</i>	387
The Theoretical Framework for Measuring Key Intangible Performance (KIP) in Research and Publication Using Maqāṣid al-Sharī'ah (MS) <i>Luqman Zakariyah, Mohammed Farid Ali al-Fijawi, Rahmah Binti Ahmad H. Osman, Shukran Abd Rahman & Suhaimi Mhd. Sarif</i>	409
The Concept of Ghulūw in Islam: An Analysis on Its Manifestations and Causes in The Modern World <i>Mohammad Yusri Yubhi Bin Md Yusoff, Thameem Ushama & Adibah Abdul Rahim</i>	433
Transgressing the Terms of Covenant in the Islamic Jurisprudence of International Relations: The Cases of Socotra and Cyprus in Comparison <i>Anke Iman Bouzenita</i>	459
Preventive Measures for a Healthy Life: Towards an Islamic Perspective with Reference to COVID-19 <i>M. Hedayatul Islam, Md Saidul Islam & Fadzli Adam</i>	487

The Effects of Japanese Occupation in Sabah: During and After World War II (1941-1963) <i>Rosdianah Binti Yacho & Arshad Islam</i>	511
Non-Parental Child Custody Rights: A Comparative Perspective <i>Daleleer Kaur Randawar & Akbar Kamarudin @ Abdul Shukor</i>	529
Political Communication and Election Campaigning on Instagram During the 14th Malaysian General Election <i>Kamaruzzaman Abdul Manan, Shafizan Mohamad & Muhamad Mat Yakim</i>	555
ASEAN, China and the South China Sea Territorial Disputes: Analysis of Conflict Management Strategies <i>Siti Noralia Mustaza & Mohd Irwan Syazli Saidin</i>	577
Quality Assurance in Higher Education in the Maldives: Are We Listening to the Students? <i>Mariyam Shahuneeza Naseer & Dawood Abdulmalek Yahya Al-Hidabi</i>	599
Going to Hell or Heaven? An Analysis of Malaysian Muslims' Perspectives on Extremism in Religion <i>Rabi'ah Aminudin, Izzuddin M. Jaafar & Elmira Akhmetova</i>	623
Challenges of the Multinational Federation: The Case of Malaysia, 2008-2020 <i>Abdul Aqmar Ahmad Tajudin & Mohammad Agus Yusoff</i>	649
Ongoing Persecution of the Rohingya: A History of Periodic Ethnic Cleansings and Genocides <i>Arifa Sarmin</i>	675
Managing Women's Matter: A Cross-Cultural Study of Doctor-Patient Relationship in Pakistan and Malaysia <i>Adeela Rehman & Nurazzura Mohamad Diah</i>	697

Can U.S. Aid and Assistance Continue Playing
a Soft Power Role in the Muslim World?
*Abdullahi Ayoade Ahmad, Mohd Afandi Bin Salleh &
Abdul Majid Hafiz Bin Mohamed* 715

Leadership Characteristic Features: An Ethical Review from the
Perspective of the Qur'an and the Sunnah
Hamda Binti Khalifah Almuheiri & Mohammed Abdullais 737

The Bureaucratic Corruption Leading to the Fall of Bengal
(1700-1757)
Md. Abul Bashar 757

Research Notes

The Threat of Terrorism in the Malang Region, Indonesia
*Gonda Yumitro, Elfatih Abdullahi Abdelsalam, Ishtiaq Hossain
& Syaza Farhana Mohamad Shukri* 779

COVID-19 and Rohingya Refugee Camps in Bangladesh
AKM Ahsan Ullah, Mallik Akram Hossain & Diotima Chatteraj 793

Conference Report

The 9th International Conference on Business, Relations, and
Diplomacy (ICOBIRD 2020)
Lili Yuyadi Arnakim 807

Non-Parental Child Custody Rights: A Comparative Perspective

Daleleer Kaur Randawar*
Akbar Kamarudin @ Abdul Shukor**

Abstract: Child custody in Malaysia, significant among divorced parents, stresses that the courts determine custody rights based on the best interests and welfare of the child. However, there are occasions when other important individuals play a major role in a child's life aside from the parents and they may include an aunt, uncle, stepfather, grandparent, foster parent and/or step-parent. This article examines child custody disputes by investigating the circumstances in which the court awards the right of custody of a child to a non-parent in Malaysia. A comparative legal research methodology is employed to analyse this aspect in the perspective of Civil and Islamic laws. The findings of this paper propose several comprehensive policies and guidelines which can assist the courts in awarding rights to non-parent caregivers who have played a vital role in raising children in the absence of their biological parents.

Keywords: child custody; non-parent; rights, dispute

Abstrak: Penjagaan anak-anak adalah masalah yang sangat ketara di kalangan ibu bapa yang bercerai. Mahkamah biasanya menentukan isu hak penjagaan anak-anak berdasarkan kepentingan dan kebajikan terbaik anak-anak. Walau bagaimanapun, kadang-kadang ada pihak lain yang juga memainkan peranan penting dalam kehidupan anak-anak

* Associate Professor, Faculty of Law, Universiti Teknologi Mara (UiTM).
Email: dolly_uitm@yahoo.com

** Senior Lecturer, Faculty of Law, Universiti Teknologi Mara (UiTM). Email:
akbaruitm@gmail.com

selain daripada ibu bapa. Pihak ini boleh merangkumi ibu saudara, bapa saudara, ayah tiri, datuk, nenek, ibu bapa angkat dan ibu bapa tiri. Artikel ini meneliti pertikaian hak penjagaan anak-anak dengan mengkaji situasi di mana mahkamah memberikan hak penjagaan anak-anak kepada pihak bukan ibu bapa di Malaysia. Metodologi penyelidikan undang-undang perbandingan digunakan dalam membandingkan kedudukan hak penjagaan antara perspektif undang-undang Sivil dan Islam. Hasil penemuan penulisan ini menunjukkan beberapa dasar dan garis panduan yang komprehensif yang dapat membantu mahkamah memberikan hak kepada pihak pengasuh bukan ibu bapa yang telah memainkan peranan penting dalam membesarkan anak-anak semasa ibu bapa kandungnya tidak hadir.

Kata kunci: hak penjagaan anak; bukan ibu bapa; hak, pertikaian

Introduction

Parents are a major decisive factor in the custody and visitation rights of children. However, based on circumstances, non-parents can also have similar rights as long as their genuine interest in the child's welfare can be proven. The court, in any custody battle, will decide in the best interests of the child on aspects pertaining to custody rights, visiting arrangements and place of residence. Parness and Timko (2018) explained notwithstanding the rights of birth, marital, biological, and adoptive parents involving the care, custody, and control of their children, childcare interests are increasingly recognized in the United States for *de facto* parents as well as nonparents, including grandparents and stepparents. Bernet (1983) discussed a different circumstance, which has become common, in which the child who has been in therapy becomes the object of a custody dispute between his parents. Sieber (2016) emphasised that, in order to protect the best interests of children, all states in the US should permit step-parents to obtain the status of a psychological parent. Debele (2007) also concurred that it is pertinent to make a change in the treatment of third parties seeking custody, placement, or access to children as these have become more common in the typical family law practice due to the dramatic changes occurring within a family set-up in our present society.

In Malaysia, foster care is recognised and accepted as an alternative means of child protection services (Azizah, 2014). Family well-being is important as it reflects an individual's perception of his or her position in life in the context of the cultural and values systems in which he or she lives and in relation to the goals, expectation, standards and concerns which are present (Rahim, 2016). As such, this article aims to analyse the broader legal framework of non-parental rights of child custody by comparing the perspectives between the Muslims and non-Muslims in Malaysia on this issue.

Methodology

This paper adopts a doctrinal analysis of primary and secondary sources which deals with child custody. The comparative analysis approach is adopted to differentiate the applicable laws and guidelines in the Muslim and non-Muslim perspective in order to improvise on the shortcomings and deficiencies of the law pertaining to child custody in Malaysia. This study adopts a critical analysis approach of the existing legislation. (Gawas, 2017). The paper aims to explore, revise and improve the concept, theory, principles, and application of law on non-parental custody and visitation rights in Malaysia. The research employs a discrete method of legalistic analysis which highlights legal problems and issues (Hutchinson & Duncan, 2012). Subsequently, court cases are analysed to explore issues on child custody involving third parties or non-parents in Malaysia. Primary and secondary data, such as relevant statutes and court cases in Malaysia in the civil and Islamic perspectives, are also scrutinised along with books, articles, documents and internet sources.

Dual Family Legal System

The civil and Sharī'ah courts exist in a dual court structure following Malaysia's independence in an effort to ensure that there would be a federal secular legal system in the form of the civil courts, as well as a religious forum for Muslims under which to dispense Islamic personal and family law (Tew, 2011). The civil law or the secular law applicable to Non-Muslims and Muslims consists of the common law of England and the English rules of equity which were partially codified into legislation. (Subramaniam, 2018). The Federal Constitution is the supreme law of Malaysia and many statutes have been enacted to complement the principles of the constitution to help maintain law and

order in the country (Subramaniam, 2018). The Sharī‘ah court does not fall under the federal court structure; instead it is in a separate hierarchy, administered by the state under stipulated jurisdiction and power over persons professing the religion of Islam only (Ismail, 2015). All states have exercised the power yielded by the constitution to legislate on matters related to Islam, and every state has established the Sharī‘ah court to adjudicate disputes based on Islamic legislation (Shuaib, 2012). More importantly, apart from the Islamic legislations, the Sharī‘ah court commonly adjudicates disputes based on the principles of *uṣūl al-fiqh* and *fiqh* of the schools of thought under *Ahli Sunnah Wa Al-Jamā‘ah* namely, the Ḥanafīs, the Mālikīs, the Shāfi‘īs, and the Ḥanbalīs. Thus, both the Islamic law and the Sharī‘ah court in general prioritise the school of the Shāfi‘īs in the administration of family law.

Legal Principle under the Civil Law

Non-Muslim marriages are governed by the Law Reform (Marriage and Divorce) Act 1976 (LRA 1976). Under the LRA 1976 issues pertaining to protection of children have been largely dealt with under Part VII. The court under section 88(1) of the LRA 1976 may at any time order to place a child in the custody of his or her father or his or her mother, and under exceptional circumstances to any other relative of the child. Section 88(1) LRA 1976 reads:

The court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.

With reference to decisions regarding whose custody a child should be placed under, section 88(2) (a) and (b) of the LRA 1976 states that the paramount consideration shall be the welfare of the child, in which the courts shall have regard to the wishes of the parents of the child and the wishes of the child, where he or she is of an age to express an independent opinion.

With regards to right of access, under section 89(2) (c) the court may provide for a child to visit a parent denied custody or any member of the family of a parent as the court may consider judicious. Likewise, under section 89(2)(d) LRA 1976, the court may provide a parent or any

member of the family of a parent the right of access to the child at such times and with such frequency as the court may consider reasonable. In addition to the LRA, section 11 Guardianship of Infants Act 1961 (GIA 1961) also primarily looks into the welfare of the infant when deciding on the guardianship of an infant.

In the case of *Helen Ho Quee Neo V Lim Pui Hen* [1974] 2 MLJ 51 it was held that the expression “custody” does not mean an indivisible whole. Instead it is divisible into constituent elements which would enable the court to give care and control of a child to one parent and to give access and the remaining constituent elements of custody to the other. Hence, when deciding on custody and right of access the court takes into consideration the welfare of the child. Generally, right of access or visitation is awarded to the non-custodial parent, as this is a parental right mandatory to both the parents. Only under exceptional circumstances will a non-custodial parent be denied the right of access or visitation.

In the case of *Masam v Salina Saropa & Anor* [1974] 2 MLJ 59, the appellant, an unmarried mother, surrendered her child into the custody of the respondents (foster parents) when the child (born 28.8.70) was 9 days old. The appellant in 1972 was legally married and wished to take the child to Australia with her husband, an Australian resident. The respondents (foster parents) repelled the claim. Proceedings were thereupon taken by the appellant, but her claim was dismissed. She, therefore, appealed to the High Court. The lower court was satisfied that the mother had never shown and had never had the slightest interest in the infant apart from giving him some presents. The respondents (foster parents), however, showered care and affection on the infant.

The court in the case of *Masam v Salina Saropa & Anor*, dismissed the mother’s appeal and explained that the first and paramount consideration was the welfare of the child, to which all other considerations were subordinate. These subordinate considerations include the mother’s wishes and the fact that she was the natural mother. The court further explained that a child’s future happiness and sense of security are central and the effect of a change of custody is worthy of critical attention, but the fact that change of custody may unsettle the mind of the infant is only a circumstance to be considered and ought not to be regarded as a complete bar to any change.

In *Amarapathi a/p Periasamy v Muniandy a/l Periasamy* [2006] MLJU 220 which involves an appeal of a family dispute, the case is centred on the right to custody of a twelve-year-old minor, Lishalina (“the child”) who is the daughter of the respondent. The appellant is the younger sister of the respondent and the child, her niece. Although the appellant has been married for over fifteen years, she was not blessed with a child of her own. Her married brother, the respondent, fathered four children of whom the child is one. She was born on 21st January 1994 and is the third child among her siblings - two brothers and a sister. It is not disputed that when the child was only 3½ months old, the respondent had surrendered the care and custody of the child to the appellant in the belief and hope that by taking care of the child, the appellant would be able to conceive a child of her own. That did not materialise and for over eleven years the appellant showered love and affection on the child, fed and clothed her, provided for her health care and education and treated her as if she were her own child.

The high court dismissed the appellant’s application for custody as in her capacity as a guardian, the appellant is unable to make a claim under sections 2,3,5 and 11 of the Guardianship of Infants Act 1961 to have a superior right of custody of the child to the exclusion of the respondent, the child’s natural father. The high court stressed that a custody order under section 88(1) of the LRA can only be obtained against a “child of the marriage” where the parents have commenced matrimonial proceedings against each other, in which *inter alia* seeks an order for custody and as such the disputants before the court must be the child’s biological parents. As the appellant is not the birth parent of the child, she cannot take advantage of section 88(1).

The appellant appealed to the court of appeal which concurred with the findings of the high court, thus dismissing the appellant’s petition. The appellant’s counsel clung firmly to the word ‘relative’ in section 88(1) of the 1976 Act to support his contention and cited that the word ‘relative’ empowers the court to grant a custody order to the appellant in her capacity as a foster parent. He argued that there are exceptional circumstances to warrant such an order. The court rejected this argument explaining that when the court finds that the responsibility of custody cannot be given to either parent due to the exceptional circumstances prevailing in any given case, the court is then compelled to select a relative to whom custody can be entrusted.

Undeterred the appellant took the appeal to the Federal Court. The Federal Court had the liberty to interview the child in the absence of the appellant and the respondent. The court felt that at the age of 12, the child would be in a position to voice her preference and since she had not been interviewed by either the High Court or the Court of Appeal, the Federal Court felt that her input would appropriately guide the court in its decision-making process during the proceedings. During the interview, the child candidly chose to be with her parents and siblings.

The child has been living with her parents and siblings, aged 18, 15 and 11 for the past 1½ years in Jitra, Kedah. She attends a local government school and at the end of the year will be sitting for her Standard 6 Government Examination. Although the respondent is a bread seller, there is no evidence to suggest that he is unable to support his non-working wife and his four school going children.

Moreover, it must not be forgotten that the respondent is the natural father of the child and when he parted with her in 1994 and allowed the appellant to nurture and care for the child, it was with the fervent belief, however misguided, that the appellant would be blessed with an issue of her own. As such the surrender of the child to the appellant lacked the element of permanency. No attempts were also made by the appellant to formally and legally adopt the child. As more than eleven years have passed, and the appellant has yet to conceive a child of her own, it is only right and proper that the child be returned to her natural parents where she will be able to lead a more fulfilling life surrounded by the love and affection of her own parents and the companionship of her own siblings. These considerations resulted in the appellant having no lawful right to force the respondent to return the child to her and hence, her appeal was dismissed with costs.

Legal Principle under the Islamic Law

Child custody after divorce involving non-parents for the Muslims in Malaysia could be viewed under two perspectives, namely substantive and procedural. Substantive refers to the views of the four schools of *fiqh* under *Ahli Sunnah Wa Al-Jamā'ah* (the Ḥanafīs, the Mālikīs, the Shāfi'īs, and the Ḥanbalīs). On the other hand, the procedural perspective elucidates the legal practice in Malaysia which prioritises the rules and regulations stipulated by the school of the Shāfi'īs.

Under the substantive perspective, reference could be made to the Holy Qur'an, the Sunnah of the Prophet Muhammad (PBUH), the rulings of the jurists among the Ṣaḥābah (RA), and the views of the jurists of the four schools of *fiqh*. In the Holy Qur'an and the Sunnah, the evidence concerning the right of non-parents in child custody is implicit. Verse 233, Surah al-Baqarah of the Holy Qur'an, addresses the legal responsibility of the child being breastfed. Some commentaries of this verse explain that breast-feeding should continue in spite of a divorce in order to protect the best interests of the child (Classical scholars: Al-Alusi (d. 127H); Al-Qurthubi (d. 671H); Modern scholar: Al-Sabuni, 2001). Therefore, in child custody, the mother is rightfully the best person to live with and care for the child because she has maternal love for the child compared to others and this is strengthened through breastfeeding (Al-Qurthubi (d. 671H)). This verse indirectly questions the right of the non-parents to child custody because non-parents will have to prove that they are suitable candidates to look after the child's best interests.

In the Sunnah, the petition for who should have the custody of the daughter of Hamzah was a major concern. Among the parties seeking child custody were 'Ali, Zayd, Ja'far, and the maternal aunt. The Prophet Muhammad (PBUH) decided that the daughter should be placed the custody of the aunt as he ranked her equal to the mother (Abu Dawud (d. 275H); Al-'Asqalani (d. 852H)).

The rulings of the jurists among the Ṣaḥābah provide insight on the right of the non-parents to child custody. Two angles of the rulings were described/explained. The first ruling concerns Caliph Abu Bakr al-Siddiq (RA), who had to rule whether the child should be under the custody of the father, 'Umar al-Khattab (RA) or the grandmother. Due to a biological link, the child should have a closer relationship with the father than with the grandmother who is the relative of the child. Hence, priority should be given to the father more so than to the grandmother in child custody. However, Abu Bakr (RA) ruled that the child should be under the custody of the grandmother and ordered 'Umar (RA) to continue providing for the child with *nafaqah* (Al-Bayhaqi (d. 458H)). The main reason behind the ruling was that Abu Bakr (RA) believed that the grandmother could offer the child more love and care than 'Umar (RA). *Nafaqah* is listed as one of the criteria covering the best interests of the child (Zaydan, 1992a; Zaydan, 1985b).

The second ruling concerns Caliph ‘Ali ibn Abi Talib (RA) who had to rule on a case involving a child named ‘Umarat al-Jarami. This case defined two narrations. Under the first narration, ‘Ali (RA) ruled that ‘Umarat could choose either to be under the custody of the mother or the paternal uncle. The ruling was an extension of the ruling made by the Prophet Muhammad (PBUH) concerning the child’s father and mother. The Prophet (PBUH) bequeathed the child the right to choose to be under the custody of the father or the mother. In recognising the right of the paternal uncle to claim child custody, the main focus was to protect the best interests of ‘Umarat. In this case, ‘Umarat also informed ‘Ali (RA) that he had a younger sibling. ‘Ali (RA) assured ‘Umarat that his sibling would be given the same right to make choices when he reached a similar age. Under the second narration, ‘Umarat was granted by ‘Ali (RA) the right to choose to be under the custody of the mother or the paternal uncle during the age of seven or eight years (Classical scholars: Al-Bayhaqi (d. 458H); Al-‘Asqalani (d. 852H); Modern scholars: Al-A’zami, 2000; Tanzil-Ur-Rahman, 1978). In essence, ‘Ali’s (RA) assurance imposed restrictions on ‘Umarat to choose to be under the custody of either party. The ruling of ‘Ali (RA) also established a fact that after reaching a certain age, ‘Umarat was recognised as being mature to make the right decision on child custody. Therefore, it should be established that the ruling was made by ‘Ali (RA) to protect the best interests of ‘Umarat in child custody.

As for the views of the four schools of *fiqh*, the main discussion delves on the best interests’ or factors to be considered in child custody. The pertinent factor concerning the right of the non-parents in child custody is the ability of the adopter(s) to safeguard the child’s best interests.

The four schools of *fiqh* concur that women are prioritised over men. This means that women in general should be allowed to reside with the child in child custody. Under the categories of women, the parties who can claim child custody include the mother, the grandmothers, the child’s sisters, the child’s aunts, and the daughters of the child’s sisters (Classical scholars: Al-Kasani (d. 587H); Ibn Qudamah (d. 620H); Al-Nawawi (d. 676H); Al-Zarqani (d. 1099H); Modern scholars: Al-Zuhayli, 2004a; Al-Zuhayli, 2000b). In terms of priority, the mother should generally be allowed to have child custody and this is followed

by the other parties. More importantly, the categories recognise the right of non-parents female parties to reside with the child during custody.

Under the categories of men, the Ḥanafīs, the Shāfi'īs, and the Ḥanbalīs explain that the child should be under the custody of the father and this is followed by the paternal grandfather (Classical scholars: Al-Ghazali (d. 505H); Al-Maraghinani (d. 593H); Al-Sa'di (d. 885H); Modern scholars: Al-Zuhayli, 2004a; Al-Zuhayli, 2000b; Zaydan, 1992a; Zaydan, 1985b). They also approve that the child's brothers be allowed to reside with the child in child custody followed by the child's half-brothers from the same father, the sons of the child's brothers, the sons of the child's half-brothers from the same father, the child's paternal uncles, the child's paternal uncles from the same father, the sons of the child's brothers, and the sons of the child's half-brothers from the same father (Classical scholars: Al-Nawawi (d. 676H); Ibn al-Mulaqqan (d. 804H); Modern scholars: Al-Zuhayli, 2004a; Al-Zuhayli, 2000b; Zaydan, 1992a; Zaydan, 1985b). The Ḥanafīs specify that the child should next reside with the maternal grandfather of the mother's father in child custody followed by the child's half-brothers from the same mother, the sons of the child's half-brothers from the same mother, the paternal uncles from the same mother, the maternal uncles, the maternal uncles from the same father, and the maternal uncles from the same mother (Classical scholars: Al-Maraghinani (d. 593H); Modern scholars: Al-Zuhayli, 2004a; Al-Zuhayli, 2000b; Samarah, 2002; Zaydan, 1992a; Zaydan, 1985b).

The Ḥanbalīs indicate that after the paternal grandfather, the child should be under the custody of the child's brothers followed by the son of the child's brothers, the paternal uncles, the sons of the paternal uncles, the father's paternal uncles, the sons of the father's paternal uncles, the paternal grandfather's paternal uncles, and the sons of the paternal grandfather's paternal uncles (Classical scholars: Ibn Qudamah (d. 620H); Al-Sa'di (d. 885H); Modern scholars: Al-Zuhayli, 2004a; Al-Zuhayli, 2000b; Samarah, 2002; Zaydan, 1992a; Zaydan, 1985b). They do not only explain that the child should next reside with the grandfather of the mother's father followed by the child's half-brothers from the same mother, and the mother's brothers, but also recognise the role of a judge to identify other qualified Muslims to have child custody. The Mālikīs insist that before the child resides with other men, the child should be under the custody of those based on testacy announced by the

testator followed by the child's brothers, the child's half-brothers from the same father or mother, the paternal grandfathers, the sons of the child's brothers, the paternal uncles, and the sons of the paternal uncles (Classical scholars: Al-Zarqani (d. 1099 H); Al-Dasuqi (d. 1230 H); Al-Sharnubi (d. 1348 H); Modern scholars: Al-Zuhayli, 2004a; Al-Zuhayli, 2000b; Samarah, 2002; Zaydan, 1992a; Zaydan, 1985b).

The categories of women and men who may reside with the child in child custody manifest several important principles. The four school of *fiqh* in general advocate that the child should firstly be placed under the custody of the categories of women. The categories of men to reside with the child only happens when the categories of women are disqualified from having child custody. The Shāfi'īs specifically narrates three situations, namely when there is only the existence of women, when there is only the existence of men, and when there is the existence of both women and men. Under the existence of women, the categories of women are functional in determining who should reside with the child during custody. The same situation applies to men. However, there are some modifications to the hierarchy if both women and men are pursuing custody rights. The child should firstly be under the custody of the mother followed by the maternal grandmother, the father, the paternal grandmother, the paternal grandfather, the paternal grandfather's mother, the child's sisters, the child's sisters from the same father, the child's sisters from the same mother, the child's brothers, the child's brothers from the same father, the child's brothers from the same mother, the child's maternal aunts, the child's maternal aunts from the same father, the child's maternal aunts from the same mother, the daughters of the sisters, the daughters of the brothers, the daughters of the sisters, the sons of the child's brothers, the sons of the child's brothers from the same father, the sons of the child's brothers from the same mother, the child's paternal aunts, the child's paternal aunts from the same father, the child's paternal aunts from the same mother, the child's paternal uncles, the child's paternal uncles from the same father, the child's paternal uncles from the same mother, the daughters of the child's maternal aunts, the daughters of the child's maternal aunts from the same father, the daughters of the child's maternal aunts from the same mother, the daughters of the child's maternal uncles, the daughters of the child's maternal uncles from the same father, the daughters of the child's maternal uncles from the same mother, the daughters of the

child's paternal aunts, the daughters of the child's paternal aunts from the same father, the daughters of the child's paternal aunts from the same mother, the daughters of the child's paternal aunts from the same mother, the daughters of the child's paternal uncles, the daughters of the child's paternal uncles from the same father, the daughters of the child's paternal uncles from the same mother, the sons of the paternal uncles, the sons of the paternal uncles from the same father, and the sons of the paternal uncles from the same mother (Classical scholars: Al-Shirazi (d. 476H); Al-Nawawi (d. 676 H); Ibn al-Mulaqqan (d. 804 H); Al-Ghazali (d. 505 H); Al-Haytami (d. 974 H); Al-Sharbayni (d. 977H); Modern scholars: Al-Zuhayli, 2004a; Al-Zuhayli, 2000b; Samarah, 2002; Zaydan, 1992a; Zaydan, 1985b; Al-Khin, al-Bagha, and al-Sharnaji, 1987).

The four schools of *fiqh* in general distinguish between family and non-family members of the child. Priority should be given to the family members to reside with the child in child custody because of their close relationships with the child. The family members are recognised to be greater providers of love and care for the child. Closer family members of the child should be first allowed to have child custody instead of remote family members. If there are non-existent family members, the child should be allowed to be under the custody of non-family members with the best interests of the child becoming central. The four schools of *fiqh* also recognise that there are parties who have no family relationships with the child but are able to give the child more love and care. However, there are some restrictions in dealing with child custody involving male family and non-family members. If the case involves a female child, she should initially be under the custody of men who are her *mahram* - being close to her within the prohibited degrees of relationship and who cannot under any situation contract a marriage with her: they include the father, the grandfather, the brothers, and the uncles (Classical scholars: Al-Maraghinani (d. 593H); Al-Nawawi (d. 676 H); Ibn Muflih (d. 884 H); Ibn Najim (d. 970 H); Al-Sharbayni (d. 977H); Al-Harawi (d. 1014 H); Al-Zarqani (d. 1099 H); Al-Dasuqi (d. 1230 H); Modern scholars: Al-Zuhayli, 2004a; Al-Zuhayli, 2000b; Samarah, 2002; Zaydan, 1992a; Zaydan, 1985b). The sons of the uncles cannot have child custody involving a female child because they are not within the prohibited degrees of relationship and can contract a marriage with her (Ali and Khan, note 5). If such a person does not exist,

the Ḥanafīs stress that the judge should grant other qualified persons in particular women to reside with the female child in child custody with the child's best interests given priority (Classical scholars; Ibn Najim (d. 970 H); Al-Harawi (d. 1014 H); Modern scholars: Al-Zuhayli, 2004a; Al-Zuhayli, 2000b; Samarah, 2002; Zaydan, 1992a; Zaydan, 1985b; Al-Ghunaymi, (n.d)). The Shāfi'īs and the Ḥanbalīs only require that the female child be under the custody of women who fulfil the conditions of the party awarded with child custody under the Islamic law (Classical scholars: Al-Nawawi (d. 676 H); Ibn Muflih (d. 884 H); Al-Sa'di (d. 885 H); Al-Haytami (d. 974 H); Al-Sharbayni (d. 977H); Modern scholars: Al-Bassam, 2005; Al-Zuhayli, 2004a; Al-Zuhayli, 2000b; Samarah, 2002; Zaydan, 1992a; Zaydan, 1985b).

It is, therefore, established that the four schools of *fiqh* recognise the Islamic law with regards to the right of the non-parents in child custody who involve the family and non-family members. In terms of priority, the family members should be considered first in child custody and this is followed by non-family members. A pertinent issue to be also considered is gender and *mahram*. The principle of allowing the female child to be under the custody of men who are her *mahram* is to protect the best interest of the child. The status of *mahram* means the men are not allowed to marry her. Thus, the men are mostly related to her such as her male siblings, uncles, and nephews. This close relationships enables them to protect and provide more care for her than the other parties. Another issue is the flexibility granted to the Sharī'ah judge. Since the major criteria for child custody lists priority, the judge is required to ensure that his decision in child custody applications reflect the best interests of the child. In Islam, the best interests of the child centres on a combination of private and public responsibilities.

Under the procedural perspective, child custody under the Islamic law in Malaysia falls under the administration of the States and Federal Territories. Each State and Federal Territory has Islamic family law legislations governing child custody. However, the main model of legislation which becomes a point of reference for all the States is the Islamic Family Law (Federal Territories) Act 1984 (IFLA 1984). This Act is applicable to all Federal Territories in Malaysia. Basically, the IFLA 1984 recognises the best interests of the child as the main point of consideration when determining child custody. However, it uses the

term ‘the welfare of the child’ which is equivalent to the best interests of the child (Section 86 (2), IFLA 1984).

The term ‘the welfare of the child’ is further recognised by the Sharī‘ah courts. In *Wan Abdul Aziz v. Siti Aishah* (1975) 1 J.H. (1) 47, the court stresses that the aim of child custody is to protect the welfare of the child and this aspect should be recognised as the basic right of the child. In this case, the Appeal Board held that the custody of the girl be handed over to the grandmother and the father. In *Harun v. Che Gayah* (1975) 1 J.H. (1) 66, the court specifies that the welfare principle should take precedence over the rights, interest, and welfare of the parties applying for child custody. In Harun’s case, the custody for the girl was given to the mother and visitation rights to the father since the girl was brought up by the mother from her childhood whereas the father had done so for a month. The term precedence specifies a desired preference by the court to prioritise the best interest of the child in cases pertaining to child custody.

The courts also recognise that child custody will not affect *nafaqah*. This means that the party who is obliged to provide the child with *nafaqah* must continue to do so even though the party does not obtain custody.

In *Khalid v. Halimah* (1978) 1 J.H. (1) 69, the court ordered the father to provide *nafaqah* for the children residing with the mother involving a total sum of RM 170 a month. In *Mazlina Mustafa v. Mohd Lazee Dorani* [2006] 4 Sh.L.R. 136, the court stipulated that *nafaqah* for the children be between RM 600 and RM 1,300, and this is to be paid by the father. In *Norzaini Alias v. Mohamad Sharif Mohamad Taib* [2006] 4 Sh.L.R. 153, the father was ordered to provide *nafaqah* for the child amounting to RM 200 a month. In *Aidorra Ibrahim v. Azman Abdul Jalil* [2008] 2 Sh.L.R. 140, the court ordered the father to provide *nafaqah* for the children on a monthly basis amounting to RM 600 and to pay up the arrears of RM 12,750 through attachment of earning through the employer. In *Alias Mat Sam v. Hanami Kassan* [2008] 2 Sh.L.R. 103, the court ordered the father to provide *nafaqah* for his children each month and the sum involved was RM 400 to be paid through attachment of earning through the employer. In *Zainip Ahmad v. Abdul Aziz Hussain* [2008] 1 Sh.L.R. 105, the court ordered the father to be sentenced to four months imprisonment because of his failure to provide *nafaqah* for

his five children. The father's deliberate resignation from his job was a violation of the court order which had earlier directed that payment be made via attachment of earnings through his previous employer. In *Muhammad Zaiman Jarmin v. Norasiah Majid* [2009] 2 Sh.L.R. 153, the father applied to change the order requiring him to provide *nafaqah* for the three children at RM 450 per month. The Shari'ah court reduced the amount to RM 330 per month in view of his employment and income status. In *Noorhayati Muhammad Kushairi v. Mazlin Aris* [2009] 4 Sh.L.R. 158, the court ordered the father to pay RM 29, 050 in arrears of *nafaqah* for the five children. The payment would be made through monthly instalments of RM 2,000. The court rejected the plea of bankruptcy as an excuse for not honouring payments based on the Islamic law. In *Rohana Ahmad v. Mohd Faizal Ismail* [2009] 3 Sh.L.R. 92, the father was ordered to provide *nafaqah* for the three children amounting to RM 300 per-month. The court states that the *nafaqah* should be based on the capacity of the person responsible to provide it in accordance with the Islamic law. In *Murshida Mustakim v. Hassim Abdullah* [2009] 1 Sh.L.R. 59, the court postponed the sentencing of the father who failed to provide *nafaqah* for the children for a period of five months with assurance of RM 2,000 deposited into the father's account. The account book was to be surrendered to the court for safe keeping with one surety. In *Nora Ahmad v. Zabarni Chik* [2009] 1 Sh.L.R. 178, the mother applied for *nafaqah* - a monthly amount of RM 2,400 and a yearly amount of RM 4,800. The court rejected her application since the father was not rich. Instead, the father was ordered to pay RM 1,160 monthly and RM 1,800 annually.

The IFLA 1984 also cites the best interests' factors as guidance for the courts to interpret the welfare of the child. The relevant factor is the party granted by the courts with child custody. The factor recognises the parents and also the non-parents claim for child custody. The non-parents encompass family members and non-family members. The law stipulates that the mother should be the best person to obtain child custody (Section 81(1), IFLA 1984) (Ahmad, 1997a, Ahmad, 1984b; Mimi Kamariah, 1999; Zaleha, 2005). If the mother is disqualified from having child custody, it should be granted to other family members such as the maternal grandmother - how-high-so ever, followed by the father, the paternal grandmother, how-high-so ever, the full sister, the uterine sister, the sanguine sister, the full sister's daughter, the uterine sister's

daughter, the sanguine sister's daughter, the maternal aunt, the paternal aunt, and the male relatives who could be their heirs as residuary (Section 81(1), IFLA 1984). The law also recognises the right of non-family members to claim child custody if the courts establish that there are exceptional circumstances making it undesirable for biological parents to be awarded custody (Section 86 (1), IFLA 1984).

The IFLA 1984 also stipulates four restrictions for the courts when determining who should be the best person to gain child custody. The first restriction is that if the child concerned is a female, child custody should not be awarded to the male party who does not fall within the prohibited degrees of relationship which can contract a marriage with her (Section 81(3), IFLA 1984). On the other hand, the second restriction is a situation involving several parties who are equally qualified to have child custody. There is a clear approach on the matter in which child custody should be awarded to the one most virtuous who exhibits the most affection on the child. In the event of all parties being equally virtuous, the law specifies that child custody be awarded to the senior among them in terms of age (Section 81(4), IFLA 1984). The third restriction concerns a rebuttable presumption. The presumption explains that for the good of the child during infancy, he/she should be placed under the custody of the mother after divorce. The law also empowers the court to apply the presumption in cases after having regard to the undesirability of disturbing the life of the child by the transfer of child custody (Section 86 (3), IFLA 1984). The fourth restriction concerns the award of child custody involving one or more children by the court. The court is not obliged to place the children under the custody of the same party. The main consideration that the courts should reflect on when determining the selection centres on the welfare of the child (Section 86 (4), IFLA 1984).

The IFLA 1984 also provides for the court to consider five conditions. The conditions are that the party should be a Muslim, of sound mind, of an age that enables him to provide the child with love, care, and affection that the child may need, of good conduct from the standpoint of the Islamic morality, and reside in a place in which the child is not exposed to moral decay or physical risks (Section 82, IFLA 1984).

The courts in dealing with the party having child custody embrace

a flexible approach in determining who should be the best person to have child custody. The courts do not only consider the parents but also family members and non-family members in custody rights. The courts acknowledge that priority should be given to the mother if she is deemed fit to reside with the child during custody.

In *Rosnah v. Mohamed Nor* (1975) 1 J.H. (1) 42, child custody involving the female child was awarded to the mother as she had more right to it than the uncle. In *Ahmad v. Aishah* (1977) 1 J.H. (1) 55, child custody was awarded to the mother even though prior to the application the child had resided with the father and the stepmother. Thus, priority is given to the mother who has the right to child custody more than the stepmother. In *Maryam Abdullah v. Hithir Rashid* (2005) 19 J.H. (2) 242, child custody involving the two children was awarded to the mother. The father was granted visitation rights. Thus, the father would need to contact the mother before meeting the children. In *Faridah Hanim Omar v. Abd. Latiff Ashaari* (2006) 22 J.H. (1) 27, the court awarded child custody involving the three children aged 19, 14, and 12 years old to the mother and the father obtained visitation rights. In *Noor Liza H.A. Latif v. Mohammad Asri Ismail* (2006) 22 J.H. (2) 191, the mother was granted child custody involving the two daughters and the father gained visitation rights. In *Umi Nizan Ahmad Awang v. Nor Hamiruddin Abu Hassan* (2009) 29 J.H. (2) 259, child custody was awarded to the mother and the father attained visitation rights. Thus, based on the evidence provided, the mother is considered as the most suitable person to obtain child custody. In *Amirul Azizan Abd Rahim v. Faizah Fazlina Rosli* [2010] 1 Sh.L.R. 51, the court awarded a temporary order of child custody involving two children aged one year and 11 months and 10 months to the mother. Visitation rights were granted to the father fortnightly. He would take the children on Saturday and return them on Sunday.

If the mother is disqualified from having child custody, the courts will consider other qualified parties such as the father or the grandmother. In *Faridah Daud & Anor v. Mohd Firdaus Abdullah @ Jettle Francis* (2004) 17 J.H. (1) 25, the grandmother was awarded child custody for the two female children. The mother and the father obtained visitation rights. The main reason for the decision was that the mother had married a person not related to the children. The nature of employment of the father prevented him from loving and caring for the children adequately.

In *Azizi Ramli & Kiah Man v. Wan Sharinee Wan Yahya & Zainab Hashim* (2004) 8 J.H. (1) 39, the court awarded the father child custody involving the two children. The mother obtained visitation rights and she was allowed to have overnight contact for ten days a month with the children. The main reason for the decision was based on the fact that the mother had remarried and the spouse was not related to the children. In *Mohd Radhi Haji Che Daud v. Khadijah Yaacob* (2004) 17 J.H. (1) 19, child custody was awarded to the father and the grandmother because prior to the application, the children had resided with them for three years. In *Nurfarhani Uma Abdullah v. Muhammad Noor Manoranjan Abdullah* (2007) 24 J.H. (2) 281, child custody involving the daughter was awarded to the father by the court. During appeal, the court granted a retrial. The court had decided on this based on the ex-parte application made by the father. Thus, the mother was not given opportunities to put forward her arguments related to the application. In *Fazeya Hassan Ahmed Moustafa v. Suzeiri A. Samad* (2008) 25 J.H. (1) 73, the court awarded child custody involving the four children to the father and the mother obtained visitation rights. The mother was denied child custody because she was living an immoral life and practising immoral behaviours which could affect the children. In *Fakriah Yusoff v. Zulkifli Ismail* [2009] 1 Sh.L.R. 86, the mother obtained child custody and visitation rights was awarded to the father. The father failed to prove that the mother was of bad character which would disqualify her from gaining custody.

The courts also recognise that priority should be given to the family members than non-family members when determining child custody. For instance, in *Ahmad v Aishah*, based on the welfare of the child, priority should be given to the mother more than the stepmother even though initially the child may have resided with the father and the stepmother (Ahmad, 1997a, Ahmad, 1984b).

It is, therefore, established that the Islamic law in Malaysia recognises the right of non-parents in child custody. This is similar to the recognition given by the four schools of *fiqh* and the Islamic law in general. Another important principle that the law in Malaysia prioritises is the right of family members over non-family members in child custody. Most importantly, the court is given flexibility to take into consideration the welfare of the child which represents the best interests of the child in cases concerning child custody.

Discussion

It is undeniable that the best interests of a child are always paramount for the courts when deciding on child custody after a divorce. Meyer (2006) opined that child custody should not be primarily about the rights of parents. There are also other individuals who qualify for these rights and they involve family members and non-family members. It is, therefore, important to recognise that the rights, interests, and welfare of the child are prioritised over those of the parents, the family members and the non-family members (Ahmad, 1997a, Ahmad, 1984b; Mimi Kamariah, 1999; Zaleha, 2005; Akbar, 2013). This conceptual similarity is stressed in the civil, and Islamic laws, the civil, and the Shari'ah courts in Malaysia. Thus, both the civil and Islamic laws in general recognise such conceptual similarity. No doubt the courts in particular prefer to award custody to the child's parent but under exceptional cases the courts can grant custody to non-parents when the court finds that neither biological parent is able to care for the child adequately or is unfit. However, for a non-parent, it may be challenging to gain custody of a child with the presence of a biology parent. Schlam (2000) is of the opinion that what is crucial is whether third parties must meet a "one-part" balancing test (proof that the child's "best interests" lie with custody in a third party as compared to a parent) or a "two-part" test (proof of parental "unfitness," then proof of the child's "best interests"). Kline (2009) too supports that the non-parent must bear the burden of showing "extraordinary circumstances" and "best interest" to a degree beyond the inadequate preponderance of standard evidence.

In determining the dispute of custody between a parent and non-parent, the main primary concern is always the best interests of the child and in Malaysia this is referred to as the welfare of the child. Ali, Shaari, Ismail and Abu Bakar (2017) justified that the doctrine of a child's best interests and welfare of the child carry the same objective; it is, therefore, paramount to ensure that the child excels and has a good upbringing. Hence, in both the Civil and Islamic perspective the non-parent's rights to child custody are taken into consideration concurrently with the best interests and the welfare of a child. The laws do not deny the right of a non-parent who is qualified to have child custody instead of a parent who is not qualified. For instance, a non-parent, the maternal grandmother should be given child custody instead of a parent if the mother leads an immoral life which could affect the child's upbringing.

Both the Civil and Islamic laws in general and in Malaysia do not limit the lists of non-parents who can claim child custody. Since the best interests of the child or the welfare of the child encompass a wide and flexible concept, the courts may exercise flexibility when determining child custody. This does not mean that the courts are obliged to automatically grant child custody to a parent. If the parties to child custody applications involve parents and non-parents, the courts must ensure that decisions made regarding child custody are based on the best interests and welfare of the child.

Conclusion

This article has elucidated that child's best interests are given priority when determining child custody. The child's best interests manifest uniformity between the Civil and Islamic laws in the substantive and procedural perspectives. Both laws recognise the right of the non-parents in child custody. However, the Civil and Shari'ah courts only awards child custody to a non-parent if there is evidence that a custody award to the parents is not in the child's best interests. This concept of priority recognises the biological relationship that the child has with its parents. However, it has been noted that a child's best interests can override the interest of parents in cases with disputes between the parents and the stranger and third party. Undeniably, although the final decision is based on a child's best interests, this right is still restricted based on the age of the child; the court in balancing this may step in when the child's right causes conflict between the parent and non-parent. Thus, when determining child custody, the courts do not only face legal setbacks but also emotional anguish due to the decisions made.

References

Civil Law Literature

- Ali, A., Shaari, N., Ismail, N. & Siti Zariikh Sofiah Abu Bakar, S.Z.F (2017) guardianship and custody of divorced couple's children under UNCRC Vs Malaysian Law: welfare of the children or best interest of the child. *International Journal for Studies on Children, Women, Elderly And Disabled*, Vol. 2, 38-43

- Bernet, W. (1983). Child psychiatry and law: The therapist's role in child custody disputes. *Journal of the American Academy of Child Psychiatry*, 22 (2), 180-183.
- Debele, G.A. (2007). Custody and parenting by persons other than biological parents: When non-traditional family law collides with the Constitution, *North Dakota Law Review*, 83(1227), 1228-1272 https://law.und.edu/_files/docs/ndlr/pdf/issues/83/4/83ndlr1227.pdf
- Farid S. Shuaib (2012) The Islamic Legal System in Malaysia, *Pacific Rim Law & Policy Journal*, Vol. 21, (1),85-113.
- Gawas, G.M. (2017). Doctrinal Legal Research Method a Guiding Principle in Reforming the Law and Legal System towards the Research Development. *International Journal of Law*. Vol. 3; (5) September,128-130. www.lawjournals.org
- Hutchinson, T. & Duncan, N. (2012). Defining and Describing What We Do: Doctrinal Legal Research. *Deakin Law Review*. Vol. 17,(1), 83-119. <https://doi.org/10.21153/dlr2012vol17no1art70>
- Ismail S.Z., (2015). At the foot of the Sultan: The Dynamic Application of Sharī'ah in Malaysia, *Electronic Journal of Islamic and Middle Eastern Law (EJIMEL)*, Vol.3, .69-81 <http://www.ejmel.uzh.ch>
- Kline, W.B. (2009). Non-Parent Visitation in Louisiana: A Post-Troxel View of Article 136. *Louisiana Law Review*. Vol.69,(2), 471-507 <https://digitalcommons.law.lsu.edu/lalrev/vol69/iss2/9>
- M. A. R. Abu Rahim, (2016). A measurement of family well-being in Malaysian adolescent: demographic differences. *Journal of Advanced Research in Social and Behavioural Sciences*. 2(1), 7-23. http://www.akademiabaru.com/doc/ARSBSV2_N1_P7_23.pdf
- Meyer, D.D.(2006) The Constitutional Rights Of Non-Custodial Parents. *Hofstra Law Review*. Vol. 35,1461-1494
- Mohd, A. (2014). Children foster care law and practice: What Malaysia can learn from foster care (Ihtidhan) in Jordan. *IJUM Law Journal*, 22(2). <https://doi.org/10.31436/iiumlj.v22i2.138>
- Parness, J.A. & Matthew, T.(2018). De facto parent and non-parent child support orders, *American University Law Review* 67(3) <http://digitalcommons.wcl.american.edu/aulr/vol67/iss3/3>
- Schlam L., (2000). Third Party Custody Disputes in Minnesota: Overcoming the "Natural Rights" of Parents or Pursuing the "Best Interests" of Children?. *William Mitchell Law Review*. Vol. 26, (3), Article 9, 733-774. <http://open.mitchellhamline.edu/wmlr/vol26/iss3/9>

- Sieber, K. (2016). Custody Involving a Non-Parent: The Rights of Step-Parents Under the De Facto and Psychological Parent Doctrines, Submitted in partial fulfillment of the requirements of the King Scholar Program Michigan State University College of Law. <https://www.law.msu.edu/king/2015-2016/Sieber.pdf>
- Subramaniam M.S., (2018). Judicial Dilemma: Secular or syariah for inter-faith family disputes in Malaysia, Discussion Paper No.15, Center for Asian Legal Exchange (CALE), Nagoya University, Japan. http://cale.law.nagoya-u.ac.jp/_userdata/CALE%20Discussion%20PaperNo15.pdf
- Tew Y., (2011). The Malaysian legal system: A tale of two courts, Georgetown Law Faculty Publications and Other Works. 1922, 3-7 <https://scholarship.law.georgetown.edu/facpub/1922>

Classical Islamic Law Literature

- Abu Dawud, Sulayman ibn al-Ash'ath (d. 275 H). (2001). *Sunan Abi Dawud* (ed. Al-Khalidi, Muhammad 'Abd al-'Aziz). Beirut: Dar al-Kutub al-'Alamiyyah.
- Al-'Asqalani, Ahmad ibn Hajar (d. 852 H). (1998). *Talkhis al-habir fi takhrij ahadith al-rafi'i al-kabir* (ed. 'Abd al-Mawjud, 'Adil Ahmad & Mu'awwad, 'Ali Muhammad. Vol. 4). Beirut: Dar al-Kutub al-'Alamiyyah.
- Al-'Asqalani, Ahmad ibn Hajar (d. 852 H). (2002). *Fath al-bari sharh sahih al-Bukhari* (eds. Ibn Baz, 'Abd al-'Aziz & 'Abd al-Baqi, Muhammad Fu'ad. Vol. 7). Beirut: Dar al-Kutub al-'Alamiyyah.
- Al-Alusi, Shihab al-Din al-Sayyid Mahmud (d. 127 H). (2001). *Ruh al-ma'ani fi tafsir al-Qur'an al-'azim wa 'l-sab' al-mathani* (ed. 'Atiyyah, 'Ali 'Abd al-Bari. Vol. 1). Beirut: Dar al-Kutub al-'Alamiyyah.
- Al-Bayhaqi, Abu Bakr Ahmad ibn al-Husin (d. 458 H). (1999). *Al-sunan al-kubra* (ed. 'Ata', Muhammad Abd al-Qadir. Vol. 8). Beirut: Dar al-Kutub al-'Alamiyyah.
- Al-Bayhaqi, Ahmad ibn al-Husin (d. 458 H). (1996). *Kitab al-sunan al-saghir* (ed. 'Abd al-Shafi, 'Abd al-Salam & Qabani, Ahmad. Vol. 2). Beirut: Dar al-Kutub al-'Alamiyyah.
- Al-Dasuqi, Muhammad ibn Ahmad (d. 1230 H). (1996). *Hashiyat al-Dasuqi 'ala sharh al-kabir* (Vol. 3). Beirut: Dar al-Kutub al-'Alamiyyah.
- Al-Ghazali, Muhammad ibn Muhammad (d. 505 H). (1997). *Al-wajiz fi fiqh al-imam al-Shāfi'ī* (eds. Mu'awwad, 'Ali & 'Abd al-Mawjud, 'Adil. Vol. 2). Beirut: Dar al-Arqam.

- Al-Ghazali, Muhammad ibn Muhammad (d. 505 H). (2001). *Al-wasit fi al-madhhab* (ed. Ibn 'Abd al-Rahim, Abu 'Amru 'l-Husayn 'Umar. Vol. 4). Beirut: Dar al-Kutub al-'Alamiyyah.
- Al-Harawi, 'Ali ibn Muhammad (d. 1014 H). (2005). *Fath babi 'l-'inayah fi sharh kitab al-niqayah* (Vol. 3). Beirut: Dar Ihya' al-Turath al-'Arabi.
- Al-Haytami, Ahmad ibn Hajar (d. 974 H). (2001). *Tuhfat al-muhtaj bi sharh al-minhaj* (ed. 'Umar, 'Abd Allah Mahmud Muhammad. Vol. 3). Beirut: Dar al-Kutub al-'Alamiyyah.
- Al-Kasani, Abu Bakr ibn Mas'ud (d. 587 H). (1997). *Bada'i' al-sana'i' fi tartib al-Shara'i'* (eds. Mu'awwad, 'Ali Muhammad & Ahmad, 'Adil. Vol. 5). Beirut: Dar al-Kutub al-'Alamiyyah.
- Al-Maraghinani, 'Ali ibn Abi Bakr (d. 593 H). (2000). *Al-hidayah sharh bidayat al-mubtadi* (ed. Qamir, Muhammad & Hafiz, Hafiz 'Ashir. Vol. 2). Egypt: Dar al-Salam.
- Al-Nawawi, Abu Yahya ibn Sharf (d. 676 H). (2000). *Rawdat al-Talibin* (eds. Ahmad, 'Adil & Mu'awwad, 'Ali Muhammad. Vol. 6). Beirut: Dar al-Kutub al-'Alamiyyah.
- Al-Nawawi, Abu Yahya ibn Sharf (d. 676 H). (2001). *Kitab al-majmu'* (ed. Al-Muti'I, Muhammad Najib. Vol. 20). Beirut: Dar Ihya' al-Turath al-'Arabi.
- Al-Qurtubi, Muhammad ibn Ahmad (d. 671 H). (2003). *Al-jami' li ahkam al-Qur'an* (Vol. 3). Beirut: Dar al-Fikr.
- Al-Sa'di, 'Ali ibn Sulayman (d. 885 H). (1997). *Al-insaffi ma'rifat al-rajih min al-khilaf 'ala madhhab al-imam Ahmad ibn Hanbal* (ed. Isma'il, Abu 'Abd Allah Muhammad Hasan. Vol. 9). Beirut: Dar al-Kutub al-'Alamiyyah.
- Al-Sa'di, 'Ali ibn Sulayman (d. 885 H). (2004). *'Umdat al-talib wa muqna' al-raghib* (eds. Isma'il, Muhammad Hasan & al-Maziri, Ahmad Farid). Beirut: Dar al-Kutub al-'Alamiyyah.
- Al-Sharbayni, Muhammad ibn Muhammad al-Khatib (d. 977H). (2000). *Mughni 'l-muhtaj ila ma'rifah ma'ani al-faz al-minhaj* (eds. Mu'awwad, 'Ali Muhammad & 'Abd al-Mawjud, 'Adil Ahmad. Vol. 5). Beirut: Dar al-Kutub al-'Alamiyyah.
- Al-Sharnubi, Abd al-Majid ibn Ibrahim (d. 1348 H). (1998). *Taqrib al-ma'ani 'ala matn al-risalah li ibn Abi Zayd al-Qayrawani fi madhhab al-imam Malik* (ed. 'Ali, 'Abd al-Warith Muhammad). Beirut: Dar al-Kutub al-'Alamiyyah.
- Al-Shirazi, Ibrahim ibn 'Ali (d. 476 H). (1996). *Kitab al-tanbih fi 'l-fiqh al-Shafi'i*. Beirut: Dar al-Fikr.
- Al-Zarqani, 'Abd al-Baq'a ibn Yusuf (d. 1099 H). (n.d.). *Sharh al-Zarqani 'ala mukhtasar sidi Khalil* (Vol. 4). Beirut: Dar al-Kutub al-'Alamiyyah.

- Ibn al-Mulaqqan, ‘Umar ibn ‘Ali (d. 804 H). (2001). *‘Ujlat al-muhtaj ila tawjih al-minhaj* (ed. al-Badrani, ‘Izz al-Din Hisham ibn ‘Abd al-Karim. Vol. 4). Jordan: Dar al-Kitab.
- Ibn Muflih, Ibrahim ibn Muhammad (d. 884 H). (1997). *Al-mubdi’ sharh al-muqni’* (ed. Ismail, Muhammad Hasan. Vol. 4). Beirut: Dar al-Kutub al-‘Alamiyyah.
- Ibn Najim, Zayn al-Din ibn Ibrahim (d. 970 H). (2002). *Al-bahr al-ra’iq sharh kanz al-daqa’iq* (ed. al-Dimashqi, Ahmad ‘Izzu ‘Inayah. Vol. 4). Beirut: Dar Ihya’ al-Turath al-‘Arabi.
- Ibn Qudamah, Muhammad ‘Abd Allah ibn Ahmad (d. 620 H). (2004). *Al-mughni* (eds. Muhammad Sharf al-Din Khattab, al-Sayyid Muhammad al-Sayyid & Sadiq, Sayyid Ibrahim. Vol. 3). Cairo: Dar al-Hadith.

Non-Classical Islamic Law Literature

- Ahmad Ibrahim. (1984). *Family law in Malaysia and Singapore*. Singapore: Malayan Law Journal.
- Ahmad Ibrahim. (1997). *Family law in Malaysia* (3rd ed.). Malaysia: Malayan Law Journal Sdn. Bhd.
- Akbar Kamarudin @ Abdul Shukor. (2013). “A Socio-Legal Study on Fathers’ Visitation Rights after Divorce in Malaysia”. Ph.d Dissertation. IIUM: Malaysia.
- Al-A’zami, Muhammad Diya’ al-Rahman, (2001). *Al-minnah al-kubra sharh wa takhrij al-sunan al-kubra* (Vol. 6). Beirut: Maktabat al-Rushd.
- Al-Bassam, ‘Abd Allah ibn ‘Abd al-Rahman. (2005). *Nayl al-ma’arib fi tahdib sharh ‘umdat al-talib* (ed. Ibn ‘Abd Allah, Bassam. Vol. 4). Riyadh: Dar al-Mayman.
- Al-Ghunaymi, ‘Abd al-Ghani. (n.d.). *Al-lubab fi sharh al-kitab* (Vol. 3). Beirut: Maktabah al-‘Alamiyyah.
- Al-Khin, Mustafa Sa’id, al-Bagha, Mustafa, & al-Sharnaji, ‘Ali. (1987). *Al-fiqh al-manhaji ‘ala madhhab al-imam al-Shāfi’ī* (Vol. 4). Damascus: Matba’at al-Sabah.
- Al-Sabuni, Muhammad ‘Ali. (2001). *Rawa’i’ al-bayan tafsir ayat al-ahkam min al-Qur’an* (Vol. 1). Beirut: Dar Ihya’ al-Turath al-‘Arabi.
- Al-Zuhayli, Wahbah. (2000). *Al-fiqh al-Mālikī ‘l-muyassar ahkam al-usrah* (Vol. 3). Damascus: Dar al-Kalam al-Tayyib.
- Al-Zuhayli, Wahbah. (2004). *Al-fiqh al-Islami wa adillatuhu* (4th ed. Vol. 10). Damascus: Dar al-Fikr, 2004.
- Mimi Kamariah Majid. (1999). *Family Law in Malaysia*. Malaysia: Malayan Law Journal Sdn. Bhd.

- Samarah, Muhammad. (2002). *Ahkam wa athar al-zawjiyyah*. Jordan: Al-Dar al-‘Alamiyyah al-Dawliyyah.
- Tanzil-Ur-Rahman. (1978). *A code of Muslim personal law* (Vol. 1). Karachi: Islamic Publishers.
- Zaleha Kamarudin. (2005). *Divorce laws in Malaysia*. Malaysia: Malayan Law Journal Sdn. Bhd.
- Zaydan, ‘Abd al-Karim. (1985). *Al-madkhal li dirasat al-Shari’ah al-Islamiyyah* (8th ed.). Beirut: Mu’assat al-Risalah.
- Zaydan, ‘Abd al-Karim. (1992). *Al-mufasssal fi ahkam al-mar’ah wa ’l-bayt al-Muslim fi ’l-Shari’ah al-Islamiyyah* (Vol. 10). Beirut: Mu’assat al-Risalah.

In This Issue

Note from the Editor

Research Articles

Osman Bakar

The Link between Coronavirus and Darwin according to Pervez Hoodbhoy: A Critical Response

Abdul Rashid Moten

The Politics of Manipulation: Malaysia 2018-2020

Luqman Zakariyah, Mohammed Farid Ali al-Fijawi, Rahmah Binti Ahmad H. Osman, Shukran Abd Rahman & Suhaimi Mhd. Sarif

The Theoretical Framework for Measuring Key Intangible Performance (KIP) in Research and Publication Using Maqāṣid al-Sharī'ah (MS)

Mohammad Yusri Yubhi Bin Md Yusoff, Thameem Ushama & Adibah Abdul Rahim

The Concept of Ghulūw in Islam: An Analysis on Its Manifestations and Causes in The Modern World

Anke Iman Bouzenita

Transgressing the Terms of Covenant in the Islamic Jurisprudence of International Relations: The Cases of Socotra and Cyprus in Comparison

M. Hedayatul Islam, Md Saidul Islam & Fadzli Adam

Preventive Measures for a Healthy Life: Towards an Islamic Perspective with Reference to COVID-19

Rosdianah Binti Yacho & Arshad Islam

The Effects of Japanese Occupation in Sabah: During and After World War II (1941-1963)

Daleeer Kaur Randawar & Akbar Kamarudin @ Abdul Shukor

Non-Parental Child Custody Rights: A Comparative Perspective

Kamaruzzaman Abdul Manan, Shafizan Mohamad & Muhamad Mat Yakim

Political Communication and Election Campaigning on Instagram During the 14th Malaysian General Election

Siti Noralia Mustaza & Mohd Irwan Syazli Saidin

ASEAN, China and the South China Sea Territorial Disputes: Analysis of Conflict Management Strategies

Mariyam Shahuneeza Naseer & Dawood Abdulmalek Yahya Al-Hidabi

Quality Assurance in Higher Education in the Maldives: Are We Listening to the Students?

Rabi'ah Aminudin, Izzuddin M. Jaafar & Elmira Akhmetova

Going to Hell or Heaven? An Analysis of Malaysian Muslims' Perspectives on Extremism in Religion

Abdul Aqmar Ahmad Tajudin & Mohammad Agus Yusoff

Challenges of the Multinational Federation: The Case of Malaysia, 2008-2020

Arifa Sarmin

Ongoing Persecution of the Rohingya: A History of Periodic Ethnic Cleansings and Genocides

Adeela Rehman & Nurazzura Mohamad Diah

Managing Women's Matter: A Cross-Cultural Study of Doctor-Patient Relationship in Pakistan and Malaysia

Abdullahi Ayoade Ahmad, Mohd Afandi Bin Salleh & Abdul Majid Hafiz Bin Mohamed

Can U.S. Aid and Assistance Continue Playing a Soft Power Role in the Muslim World?

Hamda Binti Khalifah Almuheiri & Mohammed Abdullais

Leadership Characteristic Features: An Ethical Review from the Perspective of the Qur'an and the Sunnah

Md. Abul Bashar

The Bureaucratic Corruption Leading to the Fall of Bengal (1700-1757)

Research Notes

Conference Report

ISSN 0128-4878 (Print)

ISSN 2289-5639 (Online)

