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Writing:
Noraida Endut

Copy Editing:
Kay Lyons

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JKR No. 851, Jalan Dewan Bahasa, 50460 Kuala Lumpur.
Tel: 03-2142 6121/2148 3705 Fax: 03-2148 3601
Email: sistersinislam@pd.jaring.my
Website: www.sistersinislam.org.my

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Introduction

Aims and Objectives of Research

Women in Malaysia constantly face problems in getting access to justice in matters pertaining to their marital relationships. These problems increase manifold when matters brought to court involve the issue of children of marriages. Muslim women in the country are overwhelmed with unique problems in issues that concern the guardianship of their children, especially upon divorce. The problems range from the pluralistic nature of the legal system that vests the administration of Islamic justice for Muslims in independent state jurisdictions, to discriminatory substantive provisions on guardianship of children in the variety of legislation regarding the issue. In between, Muslim women face the problems of, inter alia, unclear legal procedures, inconsistent practices in giving reasoned court judgments and unsympathetic or gender-insensitive judges and court officials.

This study was undertaken with a view to facilitating advocacy efforts with regard to the rights of Muslim women to the guardianship of their children, especially upon divorce. In carrying out the study two underlying points were consistently kept in mind. On the one hand, this study tried to find out and understand Islamic jurisprudential provisions pertaining to the issue of this guardianship of children. In doing this, it seeks to discuss the differences the *Syariah* law may put on the meanings of custody and legal guardianship. It also attempted to find out the reasons for the disparities, if any, between the rights of male and female adults to guardianship of their children. The study also considers and discusses how the *Syariah* law views the issue of the interest of the child in relation to guardianship of minor children.

On another level, this study aimed to understand in detail, provisions on custody and legal guardianship contained in various pieces of Islamic family legislation in Malaysia. These provisions were then analysed to see if they are consistent with the underpinning principles on guardianship of minor children under true *Syariah* law. Where inconsistencies occur, suggestions are made on how the legislation can be amended to reflect the essence of *Syariah* that advocates non-discrimination on the basis of gender.

Methodology in Brief

This study focuses on content analyses of available literature and materials. The underlying objectives of the study are understanding the substantive legal aspects of the *Syariah* law on guardianship, comparing it with, and identifying discrepancies in, the substantive law as it applies in Malaysia, and recommending changes to the law where discrepancies occur. The study does not cover the practical and procedural aspects faced by women in getting redress on this issue in the *Syariah* justice system. The latter will be more appropriately scrutinized as a separate and larger study in the future.

One significant limitation to this study that may hinder its optimum contribution is a lack of literature and materials in English or Malay that discuss the jurisprudential issues of

guardianship of minor children in great depth. Since the researcher is inadequately equipped with knowledge of the Arabic language, sources in that language cannot be effectively accessed. Available sources in English and Malay mainly enumerate the laws that shall apply to disputes on guardianship of children upon dissolution of marriage. They often do not provide the basis and underlying principles for such laws. None discusses, for example, the fundamental differences, if any, and the bases for such differences, between physical custody (*hadanah*) and what is termed, in many of the Islamic family laws in Malaysia, legal guardianship.¹

This study is divided into two main Parts. Part 1 reviews *Syariah* jurisprudential issues concerning guardianship. It discusses the various meanings of guardianship, especially in the context of the distinction Muslim jurists have made between *hadanah* (custody) and *wilaya* (guardianship). Part 2 considers the *Syariah* law on guardianship as it is applied in Malaysia. The separate treatment of custody and guardianship is outlined, and the resulting difficulties are discussed. Part 2 also makes proposals for reform of the problematic provisions.

¹ Which, in brief, confers decision-making powers on the welfare of a child in issue, which may be contrary to the wishes or opinions of the person having the physical custody of the child.

Guardianship of Children from the Perspective of the Substantive *Syariah* Law

Introduction

The status and roles of males and females in Islam are said to be equal in importance, but not identical in substance.² Women and men share equal origin in creation:

*O mankind! Be careful of your duty to your Lord, who created you from a single soul, and from it created its mate, and from them twain hath spread abroad a multitude of men and women. Be careful of your duty toward in Whom you claim (your rights) of one another, and toward the wombs (that bore you). Lo! Allah hath been a Watcher over you.*³

Female and male offspring are both gifts from Allah to the humankind:

*To Allah belongs the dominion of the heavens and the earth. He creates what He wills (and plans). He bestows (children) male or female according to His will (and plan), or He bestows both males and females, and He leaves barren whom He will: for he is full of knowledge and power.*⁴

Male and female share equal and complementary religious and ethical obligations and are entitled to equal rewards for them:

*The believers, men and women, are protectors of one another: they enjoin what is just, and forbid what is evil; they observe regular prayers, practise regular charity, and obey Allah and His Messenger. On them will Allah pour His Mercy: for Allah is exalted in Power, Wise.*⁵

In substance, however, many aspects of the status and roles of men and women under the *Syariah* differ, though not necessarily in a discriminatory way, from one another. These aspects mostly concern family lives. Such differences can manifestly be seen in rights and obligations in marriage, divorce and matters related to them.⁶

This Part seeks to identify the differences in the rights and obligations of men and women which may exist in the substance of the *Syariah* law in matters concerning the

² See Lamya Al Faruqi (1988).

³ *Surah an-Nisa 4:1*, translation from Mohammed Marmaduke Pickthall (2001) unless otherwise stated, other translations of the Qur'an are taken from Abdullah Yusuf Ali (1995), *The Meaning of the Quran*, Maryland, Amana Publications.

⁴ The meaning of the Qur'an, *Surah al-Shura*42:49-50.

⁵ The meaning of the Qur'an, *Surah Tawbah* 9:71.

⁶ Detailed discussion on the various aspects of differences and reasons for them under the *Syariah* is beyond the scope of this research. Attention is given only to the significance in the differences, if any, in the rights and obligations in the issue of guardianship of children upon divorce.

guardianship of children upon divorce. It will then discuss the underlying principles for these differences.

Parental Rights and Obligations in Islam

The rights and obligations of parents over their child arise from the rights of the child over the parents. The first right of the child is said to be her/his parentage.⁷ Since the mother of a child is usually known, the issue of parentage usually concerns establishing the paternity of the father. Once the parentage of a child is established, parental rights and obligations will fall on the persons deemed to be the parents.

The rights of a child over its parents appears to be divided into two fundamental aspects:⁸

1. Rights that concern the physical, mental and spiritual needs of the child.
2. Rights to property and monetary benefits.

These rights may not be mutually exclusive. The obligations of parents in fulfilling these rights may overlap. The first aspect of the rights emphasizes the parents' obligations to provide the physical and spiritual environment for the optimum development of the child into a good adult Muslim. These include emotional and spiritual expectations emanating from child–parent relationships, rights to *hadanah* and guardianship (*wali*).

The second aspect, in essence, provides the means by which the first set of rights may be fulfilled because it ensures that a child is entitled to property or money to pay for the environment required. Thus, while the mother may be deemed the primary person responsible for feeding and ensuring the good health of the child, the father shall predominantly be expected to provide the financial means to achieve these goals. The rights of the child to inheritance are also measures by which the physical, mental and spiritual development of the child can be maintained by her/his guardian upon the death of her/his parents. The rights of a child in Islam over her/his parents or adults responsible for her/him change with her/his age.

Hadanah and Guardianship

Muslim jurists appear to divide the rights and responsibilities of adults with regard to the well-being of their children into *hadanah* and guardianship.

Hadanah refers to the rights and responsibilities of parents or rightful adults to fosterage and physical guardianship of children while they are young.⁹ *Hadanah* may include the rights and responsibilities to provide a child with education,¹⁰ although jurists sometimes categorise education as a guardianship—*wilayat at tarbiyyah*— issue and not that of *hadanah*.¹¹ Although *hadanah* may be seen as either the rights of parents to the custody

⁷ See Jamal J. Nasir (1990).

⁸ See, e.g., Siti Zulaikha Mohd Nor (1989).

⁹ Ibid. See also Jamal J. Nasir (1986).

¹⁰ See, e.g., Levy, Reuben (1971).

¹¹ See Jamal J. Nasir (1986).

of their child or the rights of a child to proper care and upbringing (from which responsibilities of parents or other responsible adults for them arise), jurists agree that the ultimate and paramount considerations in deciding the rights must rest in the welfare of the child.¹²

Muslim jurists, however, generally agree that the rights of *hadanah* are more suitable to be conferred upon women than men, i.e., mothers, grandmothers and so on.¹³ This is based on a hadith of the Prophet, where he said to a divorced wife, “You have the first right to look after [your child] unless you marry”. Too often unfortunately, this hadith has been interpreted as meaning that the mother automatically loses her rights to custody if she marries a man who is not within the prohibited degree of relationship (*muhrim*) to the child, and that custody immediately reverts to the father, regardless of whether he has remarried or not. However, it should be possible to interpret this Hadith as conferring a prior right upon the mother before her remarriage, and if she remarries, than the mother and the father would stand on equal terms as to the right to custody, and the case should be considered on its individual merits.

Another often cited basis for the opinion that it is more suitable for *hadanah* to be conserved upon women than men is the decision of Abu Bakar in the case involving the son of Umar Al Khattab.¹⁴ Umar had a son, Ashim, from an Ansari wife whom he had divorced. During his journey to Quba he found his son playing in the front yard of a mosque and he lifted the child onto the back of his mount. Upon discovering this, the child’s maternal grandmother objected and a dispute ensued over the custody of the child. The dispute was brought to Abu Bakar, who said, “Let the child be with his mother.” Umar did not object to this.

Guardianship in Islam refers to the rights of representation. Guardianship is defined as the “carrying through of a decision affecting a third person whether the latter wishes or not”—taken from the word “*wilaya*” or “*waliya*”.¹⁵ A parent may have the rights to represent or to make decisions for her/his infant child regarding the latter’s person and property. Such rights arise from a duty incumbent upon a parent or a responsible adult on grounds of kinship towards a child or a minor because the latter is a person with an imperfect or, in certain circumstances, no legal capacity.

Jurists appear to be of the opinion that these rights are more suitably vested in fathers than mothers. It is submitted that guardianship of a minor child is not a right per se or in the absolute. It is a measure by which the execution of the responsibilities of *hadanah*, in its wider meaning, may be facilitated. The effective maintenance and nurturing of the physical and mental well-being of children may necessitate parents to make certain decisions about the person or property of the children which the children are legally or mentally ill-equipped to make. Thus, it is logical to presume that a person who is

¹² See, e.g., Mohammad Hashim Kamali (2000). See also Sayid Sabiq (1990).

¹³ See Jamal J. Nasir (1986).

¹⁴ Reported in Imam Malik’s *Muwatta’*. See, e.g., as quoted in Abdul Ghani Azmi Idris (1994).

¹⁵ See Jamal J. Nasir (1986).

entrusted with the physical and spiritual upbringing of a child be given the right to make these decisions.

Treating decision-making and representation rights as separate rights—guardianship—from the rights to foster and nurture a child—*hadanah*—is a mechanism jurists used to guarantee the continued financial maintenance of the child by her/his father.¹⁶ Since provision of *nafaqah* of children is generally agreed to be the responsibility of the father, giving such rights exclusively to the father is thought to further promote this sense of responsibility.

The Qur'an does not make such distinction where upbringing of children is concerned. It does not specifically ordain a mother as the primary *hadinah* of her child, although the provision of material needs and financial maintenance is considered the primary responsibility of male members of the family.¹⁷ The nearest Qur'anic provision that may be used as a basis for assigning the responsibility of *hadanah* of a child primarily to her/his mother may be gauged from *Surah al-Baqarah* 2:233, which translates as:

The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms.

This verse, however, limits the meaning of *hadanah* to the physical fosterage of a child. Moreover, it refers to an aspect of fosterage, i.e. suckling, that only women are able to provide for their children.

Many verses in the Qur'an enjoin mutual responsibilities and prohibit unfair treatment by parents in the issues concerning the well-being of their children. The subsequent parts of *Surah al-Baqarah* 2:233 demonstrate this, as can be seen in their meanings:

No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child. Nor father on account of his child, an heir shall be chargeable in the same way.

If they both decide on weaning by mutual consent, and after due consultation, there is no blame on them. If ye decide on a foster-mother for your offspring there is no blame on you. Provided ye pay (the mother) what ye offered, on equitable terms. But fear Allah and know that Allah sees well what ye do.

Responsibilities for the well-being of children that go beyond the physical fosterage are also enjoined upon both male and female parents. This may be gauged, for instance, from the meaning of *Surah al-Tahrim* 66:6:

*O ye who believe! Save yourselves **and your families** [emphasis added] from a Fire whose fuel is Men and Stones, over which are (appointed) angels stern*

¹⁶ See Mohammad Hashim Kamal (2000).

¹⁷ See The Holy Qur'an, *Surah an-Nisa* 4:34.

(and) severe, who flinch not (from executing) the Commands they receive from Allah, but do (precisely) what they are commanded.

The verse indicates that both men and women are responsible for guarding members of their families from committing sins that will lead them to be punished in the Hereafter. Thus, the upbringing of a child to become a good Muslim entails physical and spiritual guidance and education in which both parents must play a role. This mutual role is further affirmed in the hadith transmitted by al-Bukhari, which translates as:¹⁸

Every child is born in the fitrah [nature] (that is clean and free from taint or sin), it is its parents who brings it up to become a Jew, a Christian or a Fire-worshipper.

Mutual responsibilities and accountability of parents in the matters concerning the welfare of their children are also in line with these Qur'anic provisions:

And their Lord hath accepted of them: "Never will I suffer to be lost the work of any of you, be he male or female: ye are members, one of another...."

The believers, men and women, are protectors, of one another: they enjoin what is just, and forbid what is evil; they observe regular prayers, practise regular charity, and obey Allah and His Messenger. On them will Allah pour His Mercy: for Allah is exalted in Power, Wise.¹⁹

The special bond between a mother and her child, mainly speculated to be the result of the natural and biological connection during pregnancy, is probably a sound basis to assign women the primary role of *hadinah* (custodian) of their children. This, however, must not negate the role of fathers in this respect. The assignation must also not serve to limit the role of mothers in child-rearing to that of the physical and emotional care of infants while leaving important decision-making on the person and property of the children exclusively to fathers. Today, such limitation and distinction are especially detrimental to women upon separation or divorce because of the ensuing complexities in their relationship with their estranged or former husbands. Women who suffered violence at the hands of their former husbands, for example, may face practical and psychological problems in getting consent required by the law from those husbands in matters relating to registration of identity cards and school education of children in their custody.

Since foremost in the Qur'anic provisions are injunctions for mutual co-operation in the execution of responsibilities concerning the welfare of the family, the issue of guardianship of children must also be seen in this light. *Hadanah* must be seen in a wider context than mere physical fosterage of a child. It includes emotional and mental development of the infant which, in modern terms, includes the provision of proper education and training of the child. Such provision requires the *hadinah* to deal with various legal and administrative processes for which she/he has to act either as a *wali*

¹⁸ Translated from the quote in Abdul Ghani Azmi Idris (1994).

¹⁹ The meaning of the Qur'an, *Surah al-Tawbah* 9:71.

(guardian) or a representative of the minor person. Thus, a *hadinah* must also be vested with the sole or shared rights to guardianship. The rights may be shared with the person who is legally and practically responsible for the provision of material and financial maintenance of the child—in most cases, the father. Where the *hadinah* also effectively plays this latter role because the person entrusted with such responsibility has failed in his duty, it is submitted that the rights of guardianship must be vested solely in the *hadinah*.

The Interest of the Child

The natural and biological connection that results in the special bond between mothers and children is still considered to be a valid reason for preferring mothers as *hadinah*. Muslim jurists agree that until a certain age, the *hadanah* of an infant shall, first and foremost, lie with its mother who fulfils the requirements for qualification as *hadinah*. The schools of thought or *madhahib* differ on the length of time such rights shall subsist. For Shafi'i, they exist until the child reach the age of *mumaiyiz* (age of discernment) or the age where she/he can physically take care of herself/himself. Some Hanafi jurists determine the age as seven for boys and nine for girls.

Upon the attainment of the appropriate age, the main consideration in giving the rights of *hadanah* to either of the parents must be the interest of the child. Under the *Syariah*, the interest of the child may be determined by asking the child herself/himself, or at the discretion of the court.

The basis for allowing a child to choose a parent who may have custody over her/him is the *hadith*²⁰ in which a woman came to the Rasulullah and said, “O Prophet! My husband wants to take away my son, although he (my son) gives me comfort and brings me water from the well of Abu Inabah.” The Prophet called upon the child and proclaimed, “Here is your father and here is your mother; make a choice between the two whomsoever you want.” The child then touched the hand of his mother and went away with her.

The choice made by a child as regards custody does not negate certain rights the non-custodial parent has over the child. Under Shafi'i, if a boy chooses to live with his mother, she shall have full-time custody over him at night. During the day, his father shall have the right to have access to him to educate him with worldly and spiritual matters.²¹ If a girl chooses to live with her mother, the latter shall have custody over child full-time but her father shall have visitation rights.²² The civil laws also provide for the rights of reasonable access or visitation of the non-custodial parent.

It is submitted that the preference of the child is solicited where both parents are of equal capabilities and the ability of the child to make informed choices is presumed. Where the court determines that a parent may influence a child in a detrimental manner, it may

²⁰ As translated and summarised from the quote in Abdul Ghani Azmi Idris (1994).

²¹ See Siti Zulaikha Mohd Nor (1989).

²² Ibid.

enforce its own decision. This is manifested in a report of Ibn Taimiyah in *Nailul-Authar*.²³

A mother and a father were in dispute over the custody of their son in front of a judge and the judge allowed the child to choose between the parents and the child chose his father. The mother said to the judge: “Ask him why he chooses his father.” And the judge asked the boy that question. The child answered: “Every day my mother sends me to school and the *fiqh* teacher would scold me whereas my father lets me play with other children.” The judge then said to the mother: “Your have more rights over your son.”

Thus, the ability to provide effective education to a child is an important consideration for deeming a parent a suitable *hadinah* even when the child prefers otherwise.

²³ As translated from the quote in Abdul Ghani Azmi Idris (1994).

Provisions on *Hadanah* and Guardianship under Malaysian Islamic Law

Introduction

This Part aims to look into legislative provisions on the issue of *hadanah* and guardianship of Muslim children in Malaysia. To provide a proper understanding of the position of Islamic law in Malaysia, the plural nature of the Malaysian legal system is first described. The major discussion in this Part concerns the substance of the legal provisions on custody and guardianship. Proposals for reform of the relevant statutes to improve the situation of parties in custody and guardianship cases are also laid out.

Pluralism

Pluralism in the Malaysian legal system has at least two characteristics.²⁴ On the one hand, legal history has resulted in a legal system that treats Muslims and non-Muslims differently in certain matters. In Sabah and Sarawak, this situation is compounded as Bumiputeras²⁵ are treated under a separate set of rules for stated matters. On the other hand, pluralism is manifested in the administration of the *Syariah* law. Each State legislates and administers its own set of Islamic laws for matters over which the Constitution gives it exclusive jurisdiction.

The separate jurisdiction of the *Syariah* Courts and the ordinary courts, which results in the different treatment of Muslims and non-Muslims, is entrenched in Article 121(1A) of the Constitution. It states:

The courts referred to in Clause (1) [the High Court] shall have no jurisdiction in respect of any matter within the jurisdiction of the *Syariah* Courts.

Matters for which the *Syariah* Courts shall have jurisdiction in cases of dispute are matters for which the State legislature shall have exclusive jurisdiction. These matters are listed in the State List in the Ninth Schedule of the Constitution. They include:

Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and interstate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gift ... creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of *Syariah* courts which shall have jurisdiction only over persons professing the

²⁴ For a more detailed discussion on *Malaysia's legal pluralism and its impact on Muslim women*, see Noraida Endut (2000).

²⁵ Natives of Sabah and Sarawak as defined in Articles 161A(6) and (7) of the Federal Constitution.

religion of Islam and in respect only of any matters included in this paragraph

....

It is clear from this provision, therefore, that matters relating to *hadanah* and guardianship of Muslims are matters that are legislated and administered at the State level. Muslims cannot be bound by legislation on guardianship passed at Federal level unless the State adopts the legislation through a State law. This significantly complicates any effort towards law reform pertaining to guardianship issues.

Substantive Provisions on Guardianship Issues in Islamic Family Law

Although each State has its own Islamic Family Law legislation, which must be implemented exclusively and separately from other States, many provisions in the legislation are identical or similar in the various States. Rules on *hadanah* and guardianship are examples of such provisions. For the purpose of this study, therefore, the Islamic Family Law (Federal Territories) Act 1984 (hereinafter, the IFLA) is used when referring to the provisions.

Syariah law in Malaysia adheres to the separation between rights of *hadanah* and guardianship although both are provided for in the legislation under the main title of *Guardianship*. Sections 81–87 of the IFLA are concerned with the rights to *hadanah*. The word *hadanah* is used interchangeably with the word custody.

Hadanah

Section 81, headed “persons entitled to custody”, provides:

1. Subject to section 82, the mother shall be of all persons the best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution.
2. Where the Court is of the opinion that the mother is disqualified under *Hukum Syara*,²⁶ from having the right to *hadanah* or custody of her children, the right shall, subject to subsection (3), pass to one of the following persons in the following order of preference, that is to say:
 - (a) the maternal grandmother, how-high-soever;
 - (b) the father;
 - (c) the paternal grandmother, how-high-soever;
 - (d) the full sister;
 - (e) the uterine sister;
 - (f) the sanguine sister;
 - (g) the full sister’s daughter;
 - (h) the uterine sister’s daughter;
 - (i) the sanguine sister’s daughter;
 - (j) the maternal aunt;
 - (k) the paternal aunt;

²⁶ Islamic law according to any recognised *madhab* (school of law). See IFLA, s2.

- (l) the male relatives who could be their heirs as *'asabah* or residuaries:
provided that the custody of such person does not affect the welfare of the child.
3. No man shall have a right to the custody of a female child unless he is a *muhrim*, that is to say he stands to her within the prohibited degree of relationship.
 4. Subject to sections 82 and 84, where there are several persons of the same line or degree, all equally qualified and willing to take charge of the child, the custody shall be entrusted to the one most virtuous who shows the greatest tenderness to the child, and where all are equally virtuous, then the senior among them in age shall have the priority.

Section 86 of the IFLA enumerates the power of the court to make orders regarding custody. It provides

1. Notwithstanding section 81, the Court may at any time by order choose to place a child in the custody of any one of the persons mentioned therein or, where there are exceptional circumstances making it undesirable that the child be entrusted to any one of those persons, the Court may by order place the child in the custody of any other person or of any association the objects of which include child welfare.
2. In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and, subject to that consideration, the Court shall have regard to:
 - (a) the wishes of the parents of the child; and
 - (b) the wishes of the child, where he or she is of an age to express an independent opinion.
3. It shall be a rebuttable presumption that it is for the good of a child during his or her infancy to be with his or her mother, but in deciding whether the presumption applies to the facts of any particular case, the Court shall have regard to the undesirability of disturbing the life of a child by changes of custody.
4. Where there are two or more children of a marriage, the Court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently.
5. The Court may, if necessary, make an interim order to place the child in the custody of any person or institution or association and the order shall forthwith be enforced and continue to be enforced until the Court makes an order for custody.

Where custody of an infant is disputed against the mother, the courts have, in many cases, presumed her primary rights to custody as long as she retains the qualifications for becoming a *hadinah* as set out by Syariah.²⁷ In the case of *Rosnah v Mohamed Nor*,²⁸ a girl's father had died and she lived with the surviving parent. An uncle came to her house to take her away, alleging that before his death her father had appointed him as her trustee and guardian. The mother applied for custody in the court. The Kadi held that the mother had a better right to custody. This decision was upheld by the Appeal Board, which dismissed the uncle's claim.

In the case of *Mansor v Che Pah*,²⁹ after the parties had divorced the children had gone to live with the defendant (mother). The two elder children were aged nine and eight while the youngest was two years of age. Later, the father decided to apply for custody of all three children. At the time, the elder children had reached *mumaiyiz* (the age of discernment) but the youngest child was still a breastfed infant. The court allowed the elder children to choose with whom they would like to live and they chose to remain with the mother. The Kadi awarded custody of the third child to the mother based on a *hadith* that stipulated a mother had a better right to the custody of her infant child.

In the case of *Zaliha v Rahmat*,³⁰ upon divorce the couple each obtained custody of one of their two children. The plaintiff had custody of her two-year-old son while the defendant had custody of his elder boy, aged four years and nine months. Subsequently, the plaintiff claimed custody of the elder son. The Kadi allowed the claim on the basis that a mother had a better right to the *hadanah* of her child who had not yet reached *mumaiyiz*. The court instructed the defendant to hand over the boy to his mother.

Case law shows that in deciding custody cases between Muslims, judges in Malaysia have constantly considered the welfare of the child as the basis for giving custody to parties.

In *Mohamed v Aminah*,³¹ a father sought custody over his children who had been living with their maternal grandmother since before the parents were divorced. During the subsistence of the couple's marriage, the wife had left the matrimonial home with the children to live with her mother. After she was divorced from her husband, she married another man and the children had continued to live with their grandmother.

The civil court held that it was in the best interest of the children for them to continue to stay under the care of the grandmother even though their mother had remarried. The father's claim for custody was denied. In the case, it was also decided that where the *madhab* (legal school of thought) of a child could not be ascertained in order to apply the relevant rules regarding her/his custody, the ultimate consideration must be what was best for the child as a Muslim child.

²⁷ See, e.g., s82 of the IFLA. This section is discussed in a subsequent part.

²⁸ [1975] 1 JH (1)42.

²⁹ [1975] 2 JH 261.

³⁰ [1975] 5 JH 316.

³¹ [1951] MLJ 146.

In *Myriam v Mohamed Arif*,³² the High Court held that under both English law and Islamic law, the paramount consideration in deciding the custody of a child of divorced parents must be the welfare of the child. Where there was more than one child, the interest of each individual child must be considered. The court held this to be true even where such consideration would cause the custody of the children to be split between the parents.

In that case, at the time of divorce the court had recorded a consent order giving custody of the children from the marriage, an eight-year-old girl and a three-year-old boy, to the defendant (the father). The plaintiff mother later remarried a man not within the prohibited degree of marriage with the female child. The plaintiff then applied for the rights to the custody of both her children.

The court, in interpreting the meaning of section 45(g) of the Selangor Administration of Islamic Law Enactment 1952, decided that the Guardianship of Infants Act 1961 shall apply to the case as long as the relevant provisions were not contradictory to Islamic law or Malay customs. The court deemed that the welfare of the child was a consideration that was not contrary to the principles of Islamic law. Based on this consideration, it decided to award custody of the girl to the father and of the boy, until he was seven or eight, to the mother. It also gave reasonable visitation and temporary custodial rights (during school holidays) over each child to both parents.

In the cases of *Wan Abdul Aziz v Siti Aishah*³³ and *Wan Abdul Aziz v Siti Aishah*,³⁴ custody of children was also divided between the parents after the arrangement was considered to be in the best interest of each child. Both cases concerned the same parties. The parties had married while both were studying in Australia. They had two girls Wan Halimatul Tasma (WHT) and Wan Anita Kartini (WAK). In 1973, a few years after they had returned to Malaysia, the parties separated. WHT remained with the respondent (mother) while WAK was taken to live with the applicant (father) and his mother. In 1974, the couple divorced by mutual consent.

The first case was an appeal against an order made by the *Kadi's* Court for custody of WAK to be given to the respondent. It was preceded by a claim for custody of the child by the respondent. The respondent, who at the time of the claim had not remarried, had claimed custody over WAK who was aged four. The applicant at this time had remarried. The *Kadi's* Court awarded custody of WAK to the respondent on the basis that she had primary rights to the custody of her child and fulfilled the requirements for exercising such rights.

On appeal by the applicant, the Appeal Board set aside the decision of the court of first instance, in effect allowing the father to retain his custody over WAK. The Board decided that:

³² [1971] 1 *MLJ* 265.

³³ [1975] 1 *JH* 47.

³⁴ [1977] 1 *JH* 50.

According to the evidence it is clear that [WAK] began to live under the care and custody of her father Wan Abdul Aziz and her grandmother Hajjah Wan Zabidah from the time she was aged two years and three months and it was only after she had lived there for over a year and a half that her mother took steps to claim custody and at this date (7th June 1975) [WAK] had stayed with Hajjah Wan Zabidah for over two and a half years, that is a period in which [WAK] had got used to and to love her grandmother. Because of this the Appeal Board feels that it would seriously affect her feelings if she was separated from her grandmother.

The basis and aim of custody is the interest and welfare of the child who is to be looked after and this is the fundamental right of the child. The right must prevail over the right of a person who claims the custody.... In this case there is no evidence to show that the welfare of the child has been affected by her staying under the care of Hajjah Wan Zabidah and under the control of her father Wan Abdul Aziz.

In the second case, the applicant asked for the right to the custody of the elder daughter, WHT, who had then reached the age of nine. At the time this claim was made, the respondent had remarried. Based on the decision of the Appeal Board in the first case, the *Kadi* denied the application, holding that it was in the best interest of the child for her to remain with her mother and maternal grandmother. The Board of Appeal upheld this decision and dismissed the applicant's appeal.

Sections 82 and 83 lay out the qualifications necessary for a *hadinah* and how the right to *hadanah* may be lost. Section 82 provides:

A person to whom belongs the upbringing of a child shall be entitled to exercise the right of *hadanah* if :

- (a) she is a Muslim;
- (b) she is of sound mind;
- (c) she is of an age that qualifies her to bestow on the child the care, love and affection that the child may need;
- (d) she is of good conduct from the standpoint of Islamic morality; and
- (e) she lives in a place where the child may not undergo any risk morally or physically.

Section 83, on the other hand, provides:

The right of *hadanah* of a woman is lost:

- (a) by her marriage with a person not related to the child within the prohibited degrees if her custody in such case will affect the welfare of the child but her right to custody will revert if the marriage is dissolved;

- (b) by her gross and open immorality;
- (c) by her changing her residence so as to prevent the father from exercising the necessary supervision over the child, except that a divorced wife may take her own child to her birth-place;
- (d) by her abjuration of Islam;
- (e) by her neglect of or cruelty to the child.

The requirement that a *hadinah* must be a Muslim is the consensus of all of the schools of law except Hanafi. Hanafi is of the opinion that as long as a child is of the age that she/he does not yet require religious instruction and education, non-Muslim mothers may be allowed custody over her/him.³⁵

Although the list of persons who may be entitled to *hadanah* of a child set out in section 81(2) contains people of both the male and female sexes, the gendered language of section 82 and 83 appears to presuppose that a *hadinah* is a woman. This results in a situation whereby, in certain circumstances, men are exempt from losing a right to custody as there is no specific provision regarding the circumstances as to when a man who has custody of a child shall lose the right to such custody. Subsection (a) of section 83, for example, may be argued to allow a father who has custody over his child to retain the right even where he marries a person who may cause detriment to the child.

The specific protection of a father's right of access to his child in section 83(c), on the other hand, may be interpreted as precluding the reciprocal right of a mother in a situation where the father has custody as there is no specific provision for the protection of a mother's right to have access to her child. Thus, it may be argued that a father with custody may change residence in order to prevent the mother from having access to her child. It is submitted, however, that such interpretation must not have been the intention of the legislature. The gendered language was due to a preconceived idea that the parent having the custody would be the mother and the parent having access would be the father. It is submitted that it is prudent for the legislature to amend these sections to avoid future confusions. Thus, the qualifications of a *hadinah* and grounds for losing *hadanah* as enumerated in sections 82 and 83 must apply to a *hadinah* of either sex. It is submitted that it is prudent for the legislature to amend these sections to avoid future confusion. A proposal for reform is discussed in a subsequent section of this Part.

It should be noted that where a parent who has custody over a child remarries and the other parent applies for custody, the courts would still inquire into the best interest of the child when making decisions to vary custody orders. This can be seen in the two cases of *Wan Abdul Aziz v Siti Aishah* as already cited above. Several other cases also demonstrate this view.

In the case of *Ahmad v Aishah*,³⁶ at the time of divorce the parties had three children aged ten months, two years and four years. Upon divorce, the custody of the two younger children was given to the respondent mother and that of the eldest child to the applicant

³⁵ See, e.g., Siti Zulaikha Mohd Nor (1989).

³⁶ [1977] 1 *JH* (1) 55.

father. The respondent subsequently applied for custody of the eldest child. The applicant had remarried and had a child with his new wife.

The court of first instance gave judgment for the respondent on the basis that the Syariah had deemed mothers to be the best persons to be in charge of their infant children. The Appeal Board agreed with the *Kadi*'s decision. The Board distinguished the case from *Wan Abdul Aziz v Aishah*. It postulated that in the present case the child was being looked after by his stepmother whereas in *Wan Abdul Aziz* the primary caregiver had been the child's paternal grandmother and thus ties between the child and the *hadinah* in the latter case were stronger. The Board was of the opinion that the mother in this case would be the better person to take care of the child as opposed to his stepmother, who had already had a child of her own.

In *Harun v Che Gayah*,³⁷ it was decided that the right to custody may prevail over the right of guardianship if it is in the best interest of the child. In that case, the parties had divorced in 1970 and the custody of their only daughter was given to the respondent mother who lived in a rural part of the State. The respondent had then remarried. The appellant father later took the child from the respondent and registered her in a school in the State capital. The respondent then took the child from the school and back to her hometown. The appellant applied for custody.

The *Kadi* decided against the appellant after he had asked the child to make a choice between the parents and she chose to live with the respondent. The *Kadi* also held that the child had been living with her mother since she was very young and must have developed a very close and special bond with the parent. Separating her from her mother would affect her emotionally and this in turn might affect her in school. The *Kadi* further held that it would also be in the best interest of the child to go to school in her mother's hometown since students from rural areas had better chances of qualifying for government-assisted boarding schools than those from the urban areas. On appeal, the Board upheld the *Kadi*'s decision but varied the custody order by giving the right to the respondent's mother (the girl's maternal grandmother) on the ground that the respondent had remarried.

In the case of *Mohamed v Azizah*,³⁸ the respondent mother had filed a claim against the appellant father for maintenance of their eight-year-old daughter. In a counter-claim, the appellant argued that the child should be put under his custody because the respondent had now remarried. The court decided it to be in the best interest of the child for her to remain in her mother's custody. The child had lived with her mother since the divorce in 1971. The respondent had agreed to this arrangement and up until the alleged date in this case had been paying her maintenance. She had developed a special bond with her mother and had expressly maintained that she did not want to stay with her father. She had also done well in school while living under the care of her mother. Separation from her mother would foreseeably affect her emotionally and might disrupt her achievement in school. On appeal, this decision was upheld.

³⁷ [1975] 1 *JH* (1) 66.

³⁸ [1979] 1 *JH* (1) 79.

A parent's right to custody may still subsist even though she/he has earlier agreed to give it up if the court deems it in the best interest of the child to restore the right. In *Mohamad Salleh v Azizah*,³⁹ the respondent mother had applied for the custody of her four children, aged between 39 days and five years old, who had been in the care of her former husband. Upon divorce, she had signed an agreement for the custody to be given to the applicant father. She contended that at the time of signing the agreement she had been in a weak state because she had just given birth to the youngest child.

The court held that the agreement had been contrary to *Syariah*. Under the *Syariah*, the primary rights to custody of infants and children below the age of *mumaiyiz* are presumed to be the mother's. In this case, it was in the best interest of the children, especially the youngest, who was still within the age of infants who need suckling, to be in the care of their mother. Moreover, nothing in the facts had led the court to believe that the respondent was not qualified to have the custody rights. The applicant's appeal was dismissed.

Guardianship of Person and Property

One significant problem with the provisions on custody and guardianship of children in the IFLA is its provision for the exclusive and unconditional rights of fathers to make decisions about the person and property of their children. This is clearly manifested in section 88 of the IFLA, which states:

(1) Although the right to *hadamah* or custody of the child may be vested in some other person, the father shall be the **first and primary natural guardian** [emphasis added] of the person and property of his minor child, and where he is dead, the legal guardianship devolves upon one of the following persons in the following order of preference, that is to say:

- (a) the father's father;
- (b) the executor appointed by the father's will;
- (c) the father's executor's executor;
- (d) the father's father's executor;
- (e) the father's father's executor's executor,

provided that he is a Muslim, an adult, sane and worthy of trust.

(2) The father shall have, at all times, the amplest power to make by will such dispositions as he thinks best relative to the guardianship of his minor children and the protection of their interests, provided that he is in full possession of his senses.

(3) Subsection (1) shall not apply where the terms and conditions of the instruments vesting the property in the minor expressly exclude the persons

³⁹ [1984] 4 *JH* 212.

mentioned therein from exercising guardianship over the property, and in the case the Court shall appoint a guardian of the property of the minor.

(4) A person shall, for the purposes of guardianship of person and property, be deemed to be a minor unless he or she has completed the age of eighteen years.

The rights of a mother to make decisions about the person and property of her children are only limited to the rights as a testamentary guardian. This means that the mother cannot be the guardian of her child unless she is appointed as guardian under the father's will or by an order of the court. This is provided in section 91, which stipulates:

A mother, whether a Muslim or a *Kitabiyah*, may be validly appointed executrix of the father, and in that case she may exercise her powers as testamentary guardian or, in the absence of a legal guardian, she may be appointed legal guardian by the Court, but in the absence of such appointment she shall not deal with the minor's property.

Unlike *hadinah*,⁴⁰ the IFLA does not list out conditions for the qualifications and grounds for losing such qualifications in the case of a legal guardian.

In practical terms, the granting of exclusive guardianship rights to fathers has translated into many problems for women who have custody of their children upon divorce. Based on the guardianship rights, application for passports, registration of children for school, application for identity cards and other matters that require the consent and signature of legal guardians become difficult in the case of errant or vengeful fathers.

Giving exclusive rights without providing conditions for varying them goes against the concept of justice because it leaves the situation open to abuse. Although guardianship in its wider meaning may be seen as either the rights of parents or of the children, the final analysis must be that it is the rights of children against parents or responsible adults. Minor children are deemed legally ill equipped to carry out certain day-to-day transactions, which is why the law entrusts responsible adults to act for them. Thus, guardianship is also a responsibility and not a right per se and must be qualified with conditions that ensure the interest of the child is optimally upheld.

In fact, guardianship should be regarded more as a duty and responsibility on the part of the parents. The "right" that is of primary importance is the right of the child to have its best interests considered.

If the main justification for granting this exclusive right is the fact that fathers have the primary duties of maintaining and providing security for their children,⁴¹ there is a pressing need to review the law in contemporary situations. In many cases today, mothers who have custody of their children have to, and willingly, use their own resources to

⁴⁰ See sections 82 and 83 of the IFLA.

⁴¹ See, e.g., Mohammad Hashim Kamali (2000).

provide for the children because their former husbands have been neglectful in their duties. In cases of domestic violence and child abuse mothers have had to ensure the safety of their children from the children's own father and this requires the ability to make decisions on the person and property of their children (e.g. about changing schools and obtaining travel documents).

Proposals for Reform

Reform of the law on custody and guardianship must take into account contemporary societal phenomena and thus reflect suitable solutions. Many rules on the issues of custody and guardianship are not provisions that are stipulated directly from the Qur'an, but are derived through Islamic scholarly processes. Thus, contemporary Muslim jurists must not be apprehensive about modifying these rules and should not feel hindered from creating alternative rules that are applicable to modern-day situations through similar intellectual methods. They must feel encouraged, for instance, to use the source methodologies of deriving legal rulings of *fiqh* in the Syariah. One way is through *ijtihad*, which may be described as a "creative but disciplined intellectual effort to derive legal rulings from [the Qur'an and hadith] **while taking into consideration the variables imposed by the fluctuating circumstances of Muslim society**" [emphasis added].⁴²

In the IFLA and the corresponding Islamic Family Law Enactments of the various States in Malaysia, relevant sections need to be amended to provide justice for the parties. In the case of custody, a few aspects may be looked into for amendment. Under section 81 a few additions to the present provisions may be useful to facilitate fairer resolutions to custody issues. This includes a provision granting the rights of guardianship to the parent who has custody of a child. Another addition is an express provision for visitation rights of non-custodial parents. Proposed amendments are set out in Appendix 1. The qualifications of a *hadinah* and the grounds for losing such qualifications must be also modified to reflect gender-neutral elements. Proposed amendments for sections 82 and 83 are set out in Appendix 2.

The relevant sections on guardianship must be amended to include the equal rights of mothers to guardianship of their children, especially if the children are in their legal custody. The law for non-Muslims in Malaysia effected this change when the Guardianship of Infants Act 1961 was amended. The Act now gives both non-Muslim parents equal rights in the issues of custody and guardianship of their children. The relevant section 5 of the Act now reads:

1. In relation to custody or upbringing of an infant or the administration of any property belonging or held in trust for an infant or the application of the income of any such property, a mother shall have **the same rights and authority as the law allows** [emphasis added] to a father, and the rights and authority of mother and father shall be equal.

⁴² Taha Jabir al Alwani (1993).

2. The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.

The Act was also amended to give the surviving parent first consideration in the case where the parent who has legal guardianship has died. The new section 6 of the Act provides:

1. On the death of a parent of an infant, the surviving parent, if any, shall, subject to this Act, be guardian to the infant either alone or jointly with any guardian appointed by the deceased parent, and
 - (a) if no guardian has been appointed by the deceased parent; or
 - (b) in the event of the death of or refusal to act of the guardian or guardians appointed by the deceased parent,the Court may, if it thinks fit, appoint a guardian to act jointly with the surviving parent.

In the case of guardianship, the IFLA and its counterparts may be amended by several mechanisms to circumvent the pluralism issue. If a State legislature feels that the relevant amendments to the Guardianship of Infants Act 1961 provide sufficient bases for Islamic law on guardianship, it may adopt the relevant sections. It can do this in two ways. One is to repeal current relevant sections and legislate in the IFLA that the relevant sections of the Guardianship of Infants Act 1961 shall be applied to Muslims on issues of guardianship. Another is to replace current relevant provisions in the IFLA with the wording of the relevant sections of the Guardianship of Infants Act.

An alternative proposal for the amendment of the relevant sections on guardianship in the IFLA is contained in Appendix 3. The proposed amendment requires the rights of guardianship to be mutually shared between parents. The proposal also includes grounds on which either parent may lose guardianship rights.

Conclusion

In the context of the nuclear family, parents have rights over their children just as children have reciprocal rights. In promoting the physical and spiritual growth and development of children, however, children have greater rights than their parents. The rights of parents over their children in this context arise from the duties that the children's rights create. The Qur'an enjoins co-operation and consultation in the management of familial affairs. Husbands and wives are mutually responsible for caring for the physical and spiritual well-being of members of their families, especially their children.

In exercising the rights and carrying out the duties of parents over children, the ultimate consideration must be the best interest of the children, looked at individually. Since a child has equal interests in her/his relationship with either of her/his parents, provisions in the law that discriminate one parent from the other must be seen as detrimental to ensuring that the welfare of the child is being optimally taken care of.

Appendix 1: Proposed Amendment to the IFLA, Section 81

These clauses are to be inserted into the current provisions:

81. Persons entitled to the custody of a child

- (1A) The person entitled to the custody of her or his infant shall also be entitled, either solely or jointly with the other parent or any other person appointed by the court, to the guardianship of that infant.

- (1B) The Court may, on application by the relevant party, issue an order allowing a parent who does not have, or who has lost, custody over her or his child to exercise visitation rights according to terms and conditions agreed upon between both parents of the child or determined by the Court.

Appendix 2: Proposed Amendments to the IFLA, Sections 82 and 83

82. Qualifications necessary for custody

A person to whom belongs the upbringing of a child shall be entitled to exercise the right of *hadanah* if:

- (a) she/he is a Muslim;
- (b) she/he is of sound mind;
- (c) she/he is of an age that qualifies her/him to bestow on the child the care, love and affection that the child may need;
- (d) she/he is of good conduct from the standpoint of Islamic morality; and
- (e) she/he lives in a place where the child may not undergo any risk morally or physically.

83. How a right of custody is lost

The right of *hadanah* of a person is lost:

- (a) in the case of a woman and a female child, by her marriage with a person not related to the child within the prohibited degrees if her custody in such case will affect the welfare of the child, but her right to custody will revert if the marriage is dissolved;

- (aa) in the case of a man, by his marriage where at the outset the Court has reason to believe the marriage will affect the welfare of the child but his right will revert if the marriage is dissolved;
- (b) by her/his gross and open immorality;
- (c) by her/his changing her/his residence so as to prevent a parent who does not have custody from exercising the necessary and reasonable supervision over the child, except that a parent who has custody may take her/his child to a place where she/he ordinarily resides;
- (d) by her/his abjuration of Islam;
- (e) by her/his neglect and cruelty to the child;
- (f) where it is proven that while in her/his care, the child is being subjected to abuse.

Appendix 3: Proposed Amendments to the IFLA, Section 88

Where the legislature decides to adopt relevant provisions in the Guardianship of Infants Act 1961, section 88 may be replaced by this provision:

88A. Application of the Guardianship of Infants Act 1961

In so far as it is not contrary to Hukum Syara', the provisions and future amendments in the Guardianship of Infants Act 1961 with regard to the rights of

parents to the guardianship of their child may be applied where it is deemed just and in the best interests of the child.

Proposed amendment where the Guardianship of Infants Act 1961 is not adopted (only amended sections are included):

88. Persons entitled to guardianship

- (1) Although the right to *hadanah* or the custody of the child may be vested in some other person, the father and mother shall equally be the primary natural guardians of the person or property of their minor child.
- (2) On the death of a parent of an infant, the surviving parent, if any, shall, subject to this act, be guardian to the infant either alone or jointly with any guardian appointed by the deceased parent, and –
 - (a) if no guardian has been appointed by the deceased parent;
or
 - (b) in the event of the death of or refusal to act of the guardian or guardians appointed by the deceased parent,
the Court may, if it thinks fit, appoint a guardian to act jointly with the surviving parent.
- (3) If both parents are dead, and only one of them had appointed a testamentary guardian, the Court may, if it thinks fit, appoint another guardian to act jointly with the testamentary guardian.
- (4) If both parents are dead, and no testamentary guardian was appointed or is willing to act, the Court shall, after having regard to the best interests of the child, appoint one or more adult persons it thinks fit as legal guardians.

(5) The right of a person to the legal guardianship of a child is lost -

(a) where she/he becomes insane;

(b) by her/his gross and open immorality;

(c) where the Court deems that she/he is no longer worthy of trust;

(d) where she/he has been guilty of a criminal offence;

(e) where she/he changes her/his residence and the Court deems this to adversely affect her/his ability to carry out her/his duties as a legal guardian.

(6) The legal guardian shall have the power that is reasonable, subject to scrutiny by the Court, to make such dispositions as he thinks best relative to the guardianship of her/his minor children and the protection of their interests.

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