

## CHILD'S CUSTODY AFTER DIVORCE: HARMONISATION BETWEEN ISLAMIC AND CIVIL LAWS IN MALAYSIA

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**Abstract.** Malaysia practises diverse child's custody after divorce law. Islamic law binds Muslims and non-Muslims are bound by Civil law. Both laws recognise the best interest of the child as the main consideration in custody. The Shari'ah and Civil courts will use the best interest's factors to determine custody. However, the laws in Malaysia have remained stagnant for the past 30 years. It is therefore important for the laws to undergo legal reforms. Legal reforms should consider harmonisation because the laws share many similar values. They can complement each other to strengthen custody. This article examines the laws and legal reforms through harmonisation in the best interest and the factors. The results show the possibility of the reforms through harmonisation. The laws should recognise joint and sole custody. The best interest should prioritise the child without neglecting the role of the parents, the family members, and the related parties. The factors should be flexible. The courts should also consider other relevant factors to determine custody.

**Keywords:** *sole custody, joint custody, best interest of the child, best interest's factors, custody, access*

### Introduction

Child's custody after divorce involves custody and access. Custody is divided into the child's residence and parental responsibility. Access regulates the child's contact with the party not granted custody. The Shari'ah and Civil courts will apply the best interest of the child in determining custody through the best interest factors. Thus, Islamic and Civil laws prioritise the child over the parents and the other parties (Bond et al., 2008; Al-Zuhayli, 2004; Zaydan, 1993). There are specific principles governing custody. The laws agree on some principles. For instance, the main consideration in custody is the best interest. However, the laws also disagree on some other principles. Islamic law regards religion as an important factor in the issue of the Muslim-converted parent and the non-Muslim parent. The religion of the child is Islam and custody is given to the converted parent. In Islam, the conversion of the child into Islam can be done unilaterally by the Muslim-converted parent. Likewise, if a parent commits apostasy, the other Muslim parent will have custody. Civil law does not regard religion as an important factor. For instance, custody will not change the child's religion unless both parents agree. It is important to note that the laws agree on majority principles and disagree on minority ones (Al-Zuhayli, 2004; Zaydan, 1993).

Malaysia also has Islamic and Civil laws of custody. Islamic law binds Muslims and non-Muslims are bound by Civil law. Conflicts of law sometimes happen and create legal tensions. However, the laws share a similar trait. In custody, the laws have remained stagnant for the past 30 years. The main concern is the possibility of stagnancy affecting the child. The other one is the prospect of harmonisation between the laws strengthening the best interest or known in Malaysia as the welfare of the child (Islamic Family Law (Federal Territories) Act 1984, the states Islamic family law legislation, and the Law Reform (Marriage and Divorce) Act 1976 (Randawar and Rahmat, 2018; Kamaruddin, 2005; Majid, 1999; Ibrahim, 1997). In short, this article

analyses the brief review of custody's principles and laws, and legal reforms through harmonisation between the laws in Malaysia. The nature of this article is doctrinal. This article's significance is to relevant authorities who give importance to the rights of the child.

## **Results and Discussion**

### ***Brief review of principles and law***

The present Islamic and Civil laws on child's custody after divorce in Malaysia are not providing adequate protection to the child (Islamic Family Law (Federal Territories) Act 1984, the states Islamic family law legislations and the Law Reform (Marriage and Divorce) Act 1976). Despite the positive developments, the laws have remained stagnant for the past 30 years. Therefore, legal reforms of the laws are important and can be done through harmonisation. Before discussing harmonisation, an analysis is made on historical developments, the best interest of the child, custody arrangements, the best interest's factors, and social research on custody. Historical developments of the laws reveal continuity and evolution which concern the recognition of the best interest. Islamic law adopts continuity. Continuity means that the law has recognised the best interest since the beginning of Islam. The law also does not recognise parental preference in custody. The Holy Qur'an and the Sunnah of Prophet Muhammad (s.a.w) are the main sources of the law. In the Holy Qur'an, child's suckling is a recommended practice. The mother is encouraged to breastfeed her child for up to two years. Thus, she should have custody and the father should be given access. In the Sunnah, the Hadith states that the mother is prioritised over others to have custody. The child also has the right to choose residence upon reaching a certain age (Sayis, 2006; Al-Tantawi and Muhammad, 1987; Al-Asyqar, 1982). Civil law embraces evolution. Evolution means that the law has taken a long time to recognise the best interest. Before the recognition, the Civil court applied parental preference in custody. The preference prioritised the parents over the child. It also recognised the child as a property and not a human being. The introduction of the best interest was also related to child abuse, birth out of wedlock, legal research, and the continuous criticism of the father's and women's movements. These issues resulted in legal reforms which now recognise the best interest as the main consideration (Wragg, 1998; Cracknell and Wilson, 1990; Cornish and Clark, 1989).

Islamic and Civil laws recognise the best interest as the main consideration in custody. Conceptually, the best interest prioritises the child without neglecting the parents and the other related parties. Thus, custody is inclusive and not exclusive. For instance, custody may be given to the other related parties if the parents are not qualified to have custody. This arrangement will ensure the child has a good upbringing. The other related parties may include the family members, the non-family members, and the authority (Randawar et al., 2020; Gallo, 2004; Masson et al., 2003; Al-Kasani and Ibn Mas'ud, 1986). Custody arrangements are divided into sole and joint custody. Sole custody means that one party will have custody and the other party will be granted access. The party granted custody will have the child's residence and parental responsibility. The party awarded access will only have a continuous relationship with the child through contact. Joint custody, in contrast, recognises the sharing of custody. Normally, the parties will share parental responsibility. The sharing of residence and access may occur based on the facts of the cases (Douglas, 2004; Bozzomo, 2002).

Islamic law recognises the sharing of parental responsibility. However, it is silent on the sharing of residence and access. The evidence suggests that the child will live with a parent and have contact with the other parent. However, there is no evidence prohibiting the sharing of residence and access. This implies that the law may allow such sharing if it is in line with the best interest (Al-Kasani and Ibn Mas'ud, 1986). Civil law recognises that residence and parental responsibilities, as well as access, may be shared among the parties if it is in line with the best interest (Edwards, 2006).

Some Muslim countries, including England, and Australia recognise joint custody as the main practice and sole custody as an alternative. Alternative means that the courts will apply sole custody if joint custody fails to protect the child. In the United States of America and Canada, federal laws recognise sole and joint custody as long as they are within the best interest. The states and provinces also have the option to choose either sole or joint custody as the main practice. For instance, some states and provinces recognise joint custody as the main practice and sole custody as an alternative (Parkinson, 2006; Kharofa, 2004; Samarah, 2002; Diduck and Kaganas, 2000; Nasir, 1990; Ali, 1965;). Islamic and Civil laws recognise the best interest's factors that interpret the best interest in custody. The factors concern the child, the parents, and the other related parties. They are varied and determine residence, parental responsibilities, and access. The role of the factors is to guide the Shari'ah and Civil courts to be consistent and avoid biased decisions. Although the laws mention the factors, the courts can also consider other factors that are in line with the best interest. Social research on custody reveals the application of the laws and their effect on society. The main focus of the research is sole custody. The findings highlight that custody is mostly awarded to the mother. This arrangement also reveals some problems that affect the child and the other parties (Lamanna and Riedmann, 2003; Coltrane and Collins, 2001; Lauer and Lauer, 1991;).

In short, the laws in Malaysia recognise the best interest known as the welfare of the child as the main consideration. The laws recognise sole custody as the main practice. It means that the courts will automatically grant sole custody if it is in line with the welfare of the child. This is despite the problems suggested by social research on sole custody. The main practice of sole custody means that the party granted custody will decide on the upbringing and education of the child. The courts will only grant joint custody if there is an application for it made by the parties and joint custody is in line with the welfare of the child. The recognition of Islamic law in Malaysia on the party granted custody having the final say on the child's upbringing and education is a new idea. Thus, this practice departs from the general practice of the law which agrees that parental responsibility must be shared among the parties (Islamic Family Law (Federal Territories) Act 1984, the states Islamic family law legislations and the Law Reform (Marriage and Divorce) Act 1976 (Randawar and Rahmat, 2018; Kamaruddin, 2005; Majid, 1999; Ibrahim, 1997).

### ***Legal reforms through harmonisation***

Islamic and Civil laws of child custody after divorce in Malaysia should undergo legal reforms through harmonisation (Islamic Family Law (Federal Territories) Act 1984, the state Islamic family law legislations, and the Law Reform (Marriage and Divorce) Act 1976). Harmonisation means learning from each other and sharing of common ideas without compromising established beliefs and principles. The reforms must be in line with the best interest of the child and the best interest's factors. Thus,

discussions on the reforms concern the reinterpretation of the best interest and the factors.

### ***Reinterpretation of best interest of child***

The local context will influence the reinterpretation of the best interest of the child. As for Islamic law, the reinterpretation must adhere to the general principles of the law. Islamic and Civil laws advocate the priority of the child without neglecting the parents and the other related parties. The best interest is known in the laws as the welfare of the child as stated in the Islamic Family Law (Federal Territories) Act 1984, the states' Islamic family law legislations, and the Law Reform (Marriage and Divorce) Act 1976. The best interest concerns custody i.e. residence and parental responsibility, and access. As stated earlier, residence and parental responsibilities may be granted to one party through sole custody and more than one party through joint custody. In sole custody, parental responsibility are not shared upon divorce. The court will award them to one of the parties. The court's order on this matter is temporary and can be varied from time to time based on the facts of the cases. Joint custody advocates the sharing of parental responsibility. Each party has an important role in the education and upbringing of the child. The parents have their important roles and so too the family members, the non-family members, the society, and also the government. A priority is given to the parents because of the biological link between them and the child. Therefore, the parents have to play a bigger role than the other parties in executing parental responsibilities.

The best way is for the parties to share parental responsibility. The court should award the sharing of parental responsibilities to the parties automatically. For instance, the parents should decide the children's education and upbringing. However, some situations may prohibit the sharing of parental responsibilities. For instance, the father may reside overseas and he might not be able to decide on emergency matters such as health. Thus, the mother must decide promptly on the matter. In certain situations, the courts should grant the sharing of parental responsibility to the other parties. However, the parents should be prioritised over others. The court's order on the matter should be temporary and can be varied from time to time. In residence and access, Islamic law agrees that the child should have contact with more than one party. The parent and the child's relatives should be permitted to exercise access. However, the is silent on the idea of the child living with more than one party (Al-Khin et al., 2011; Najdi, 1989). It means that the child will live with both parents after divorce. Therefore, the child should be allowed to live with more than one party if it is in line with the best interest. This practice depends on the laws of the states because Islamic law is a state matter in Malaysia. Civil law unlike Islamic law, recognises the right of the child to live and have contact with more than one party. As in the case of parental responsibility, the court's order on the matter should be temporary and can be varied from time to time (Harris et al., 2023; Shannon, 2011).

Therefore, Malaysia should incorporate joint custody into the laws (Islamic Family Law (Federal Territories) Act 1984, the state Islamic family law legislations, and the Law Reform (Marriage and Divorce) Act 1976). Joint custody should be an automatic presumption when there is a petition for custody. It also means the sharing of parental responsibilities, residence, and access. The parties who can petition for joint custody should include the parents, the family members, the non-family members, the society, and the government. A priority should be given to the parents because of the biological link between them and the child. Sole custody should remain as an alternative to joint

custody if it fails to determine custody. For instance, residence and parental responsibilities should not be awarded to the party who has committed abuses on the child. The nature of the court's order on the matters should remain as temporary in nature which can be varied from time to time.

### ***Reinterpretation of best interest's factors***

The process of reinterpretation should also be done on the best interest's factors. The factors interpret the best interest of the child and serve as guidance for the courts to determine the child's custody after divorce. They will ensure the courts are consistent in their decisions and minimise the potential of biased decisions. The scope of the factors should be viewed based on the laws. Islamic and Civil law may agree on some scopes and differ on others. In Islamic law, there are well-defined factors. The factors are established through the understanding of the views of the schools of thought (Al-Kasani and Ibn Mas'ud, 1986). The first factor is the fitness of the party having the child's residence. The party could involve the parents, the family members, the non-family members, and the government. A priority is given to the parents because of their biological link with the child. The party must also satisfy conditions involving age, sanity, personal status, ability to provide the child with education, trustworthiness, good conduct, religion, and marital status. For instance, in religion, the party must be a Muslim because custody is a social and religious act. The second factor is the views of the parents and the other related parties. It deals with two issues. The first issue is the right of the party to reject having residence. The second issue is the right of the party to claim payments for having a residence. The third factor is the ability of the party having residence to allow the other parent and the other related parties to exercise access. It involves two issues. The first issue is the child's relocation. The second issue is the right of the party to have access. The fourth factor is the wish of the child. It determines whether the child has the right to choose to live with the parents and the other related parties.

In Civil law, the factors are subjective. The factors concern the child, the parents, and the other related parties. They include the relationships between the child, the parents, and the other related parties, the child's primary caretaker, domestic violence, and the health, safety, and welfare of the child. Besides, the fitness of the parents and others to provide parental responsibilities, the child's potential residence, the child's cultural background, and the relationship each parent had with the child during the marriage. A concern is also placed on the child's wishes and feelings, the effect on the child due to separation from the parents or the other party, the desirability as well as the effect of changes in the existing arrangements for the care of the child. The factors are not final. The courts must also determine other related factors that fit into the best interest (Randawar et al., 2020; Gallo, 2004; Masson et al., 2003). Therefore, the laws in Malaysia should consider having unified provisions regulating the factors. The nature of the factors is not final and the Shari'ah and Civil courts must determine other related factors. Islamic law could adopt the relevant factors under Civil law. Civil law can also do the same thing. The most important fact is that the factors are in line with the best interest as advocated by the laws.

In Islamic law, the incorporation of all the factors as stated in the views of the schools into the law should be implemented. The law should continue to recognise the views of the Shafi'is as the main reference and the views of the other schools as alternatives to the reference. The issues should concern the party having residence, the

conditions of the party, the rights of the party to reject residence and claim payments. The relocation of the child, the right of the party having access, and the right of the child to choose to reside with the parents or the other related parties must be taken into account (Kamaruddin, 2005; Majid, 1999; Ibrahim, 1997). In Civil law, the scope of the factors should concern the child, the parents, and the other related parties. In connection to the child, the factors should concentrate on the relationships between the child, the parents, and other related parties, the child's potential residence, the child's cultural and religious background as well as the health, safety, and welfare of the child. Other factors include the child's wish and feelings, the effect on the child resulted from the separation from the parents or the other party, as well as the desirability and effect of changes in the existing arrangements. As for the parents and the other related parties, the factors should concern the fitness of the parents and other related parties (Randawar and Rahmat, 2018; Kamaruddin, 2005; Majid, 1999; Ibrahim, 1997). Six issues need to be considered for the reform of the laws. The six issues are the party having residence, the religion of the parties and the child, safety and health, the relocation of the child, the views and wishes of the child, and access.

### ***Party having child's residence***

The laws in Malaysia should consider whether the child's residence is awarded to specific parties or any other parties. They should also consider priority in granting residence. The current position of the laws is to grant residence to specific parties such as the parents, the family members, the non-family members, and finally the government. The question remains whether the non-family members could also have residence. The Shari'ah and Civil courts should determine whether they are committed to having both residence and parental responsibilities for the child. There should be a priority considered by the courts in granting residence. The parents should be prioritised over others due to their biological link to the child. The other question is whether the parents should have an equal-standing residence. In Islamic law, the law generally advocates religious equality. The views of the schools of thought favour the mother to have residence over others including the father. The other views prioritise the maternal grandmother over the father if the mother is disqualified from having residence. The mother has the advantage over others on this matter. Since the views unanimously agree that the mother should first have residence, consideration should be given to grant it to the father instead of the grandmother if the mother is disqualified. There are no explicit evidence that prohibits this practice. The Shari'ah court should uphold the best interest of the child and be flexible in determining residence (Al-Marghinani, 2000). In Civil law, the parents are equal in claiming residence. The equality is based on the best interest. The law does not have any religious restrictions concerning the matter. Instead, it applies the norms and customs acceptable in the present society (Douglas, 2004; Bozzomo, 2002).

The family members should have residence if both parents are disqualified from having it. There are three main considerations namely, experience, biological relationships, and the combination of experience and the relationships. In experience, the family members should have adequate experience to execute parental responsibilities. For instance, the grandmother should have residence instead of the female sibling because of her experience. In biological relationships, the degree of relationships between the child and the family members should be considered. If the claim for residence is between the grandmother and the sibling, it should be awarded to

the sibling because of her biological relationship with the child. In the combination of the experience and the relationships, it provides an option to the courts to determine residence based on the best interest. The courts have to balance between the experience and the relationships that the family members have with the child. Therefore, Malaysian laws should specify which option should be used to grant residence to the family members. A consideration should be made to the experience and the biological relationships. The experience of executing parental responsibility is crucial whereas the existence of the biological relationships alone is less vital. The laws should emphasise more on the experience. The family members who have the experience should be prioritised over the family members who do not have the experience. Residence should be awarded to the grandparents followed by uncles, aunts, siblings, and the other relatives provided that they have the experience. The question now remains on gender preference. For instance, if there is a petition residence made by the grandfather and grandmother, who should live with the child if both have the experience? In this case, residence should be awarded to the grandmother because women are more affectionate than men in executing parental responsibilities. To minimise a potential gender bias, the male family member should have a female assistant if he is awarded residence. The question remains whether the same condition should apply to the female family member. The condition should only be imposed when she has daily arrangements which may affect her duties to take care of the child.

The non-family members should be considered to have residence if the parents and the family members are disqualified from having it. The courts should prioritise experience before awarding residence to the family members. The other factors are the relationship between the non-family member and the child and their strong desire to take care of the child. If the female and male non-family members claiming residence have adequate and equal experience, the female non-family member should have it. If the non-family member is a man, he should have a female assistant. Likewise, the same condition should be imposed on the female non-family member if she is preoccupied with many arrangements denying her ample time to take care of the child. The government should be the last party to have residence if the parents, the family members, and the non-family members are disqualified from having it. The laws in Malaysia should recognise that the government has an essential role although matters concerning the upbringing of the child are generally considered as a private matter. The government should have a pivotal role and ought to be given the right to have residence.

### ***Religion of parties and child***

The religion of the party having the child's residence and the child should be the same. The child's religion should be protected despite his age and maturity. Problems occur when the party professes other religions. The best solution is for the child to live with the party professing his or her religion. If the child professes the religion of Islam, the child should live with the Muslim party. The above solution will cause problems when the parents are the parties applying for residence. It involves a parent converting to a new religion whereas the other parent remains in the original religion. It could also involve the converted parent who converts the child to the new religion while the other parent still professes the original religion. Later, both parents file a divorce petition and then claim for residence. The courts could grant residence to the party that professes the child's religion. However, both parents could feel that they should determine the child's religion. Should the law of a country require parental consent for the child's conversion,

the child cannot convert to a new religion without consent. If the law requires only the consent of one parent, the child may convert to the new religion through consent. The above solution is practical under Islamic law. In Malaysia, the law states that a Muslim who converts to another religion, loses the right to have residence. The law also regards the child as a Muslim. For instance, if one of the parents converts to another religion, he or she cannot live with the child. The Muslim parent or the other related Muslim parties will have residence.

Islamic law also provides solutions for the Muslim convert concerning residence and the child's religion. There are two views. First, if one of the parents converts to Islam, the religion of the child should be Islam. Residence should be awarded to the Muslim convert parent. Second, the conversion of one of the parents to Islam does not automatically mean that he or she lives with the child. The non-Muslim parent could be awarded residence. There are restrictions on the religion of the child. The first solution is that the child should live with the non-Muslim parent until the child starts thinking of other religions. The child should be separated from the non-Muslim parent. The second solution states that the child may live with the non-Muslim parent. However, the non-Muslim parent should not expose the child to negative and prohibited environments such as drinking liquor and consuming pork. The two solutions are measures to protect the future religion of the child, i.e. Islam (Al-Marghinani, 2000). Islamic and civil laws in Malaysia should co-operate with each if the application involves a Muslim convert parent and a non-Muslim parent. If the law of a country indicates that the child only needs the consent of one parent to choose a religion, the Muslim parent should have residence. If the law of a country regulates that the child needs the consent of both parents, the courts should compel the parents to have a proper legal agreement. The agreement should contain important conditions. First, the parent having residence should not influence the child to hate the religion of the other parent. For instance, if the child lives with the non-Muslim parent, he or she should not influence the child to hate Islam. The non-Muslim parent should not expose the child to negative and prohibited environments such as drinking liquor, consuming pork, and other prohibited activities. Second, the Muslim parent should exercise frequent access. The purpose of this access is for the Muslim parent to introduce the child to Islam. The rationale is fair as the non-Muslim parent who spends most of the time with the child is presumed to introduce the child to his or her religion. Third, the child should be allowed to choose his religion after reaching a certain age limit at his own will.

The proposed legal co-operation may invite criticisms from some quarters of the society, particularly the Muslim scholars. The fact that there are diverse views on the matter requires tolerance. The basis of the co-operation is based on the views stating that residence should be awarded the non-Muslim party if he or she is qualified to have it. The solution to the views specifies that the child should remain with the non-Muslim party until the child starts thinking of other religions. The child should not be exposed to negative and prohibited activities such as drinking liquor and consuming pork. If the two situations occur, the child should be separated from the non-Muslim party or should remain with the party with some monitoring arrangements to protect the future religion of the child which is Islam. Although the views intend to protect the religion of the child and at the same time manifest a belief that parental responsibility go beyond the boundaries of religion, the situation exposes the child to other religions. Even though there are separation and monitoring systems available, there is no guarantee that the child could remain a committed Muslim even after the custody is transferred from the



non-Muslim parent to the Muslim parent. If the proposed legal cooperation is rejected, there should be a decision made by the lawmakers on the matter. There could be a legal referendum conducted in the society to uncover the best solution to the matter. The option that the society has is to vote for awarding the jurisdiction to deal with the matter, either through the Shari'ah courts or the Civil court. The result of the referendum should determine the matter once and for all. Although the result of the referendum may not satisfy everyone, a decision should be made on the matter even if the decision is not popular. This situation is unavoidable because although Malaysia is a majority Muslim country but the dominant legal system is the Civil legal system and the Islamic legal system falls under the state's jurisdictions.

### ***Safety and health***

Islamic and Civil laws in Malaysia should view safety and health concerns as the rights of the child, the parents, and the other related parties. The Shari'ah and Civil courts should consider the wishes and feelings of the parents and the other related parties if there is evidence of abuse or violence. Sufferers of abuse or violence are not only the child but also the party involved in child custody after divorce. The abuses or the violence affect the rights of the child and the party. Therefore, they should have effects on the existing orders of the courts. The courts should vary the orders in promoting the best interests of the child ranging from the transfer of the child's residence and the termination or postponement of access. For instance, if there is evidence of violence committed by the party having contact with the child, the courts should suspend access for a certain period and order him to undergo treatment. The courts should then allow access if, after the treatment, the party abstains from committing the violence again. The party should be allowed to continue having contact with the child as usual.

### ***Relocation of child***

Islamic and Civil laws should establish that the relocation of the child is based on the best interest of the child. Relocation should not affect parental responsibility in education, love, and care. It should also not affect the continuous relationship between the child and the parents and the other related parties. Moreover, it should not affect the ability of the parties to execute parental responsibility (McKenzie, 2006; Spon-Smith, 2004). The Shari'ah and Civil courts should consider the issue of consent. The parents should normally consent to relocation. If the party is the mother and she wants to relocate with the child, the father should consent to the relocation. The same practice should apply to the non-parent party. Consent should not be considered as the exclusive right of the parents. It should be subjected to the best interest. The courts should overrule the consent of the parents if it contradicts their best interest. Therefore, the courts should determine the distance under the proposed relocation which may affect parental responsibility and access. If the distance is too far and affects parental responsibility and access, the courts should not allow relocation. If the party insists on relocation, the courts should consider the transfer of the child's residence from him to the other party. If the relocating party returns to reside again in the current child's residence, he should be allowed to claim again residence. The courts should also determine the proposed relocation by the party awarded with access. Even though relocation does not involve the transfer of the residence of the child, the courts should

have the jurisdiction not to allow the relocation if it affects parental responsibility and also access.

### ***Wishes and views of child***

In the wishes and views of the child, Islamic and Civil laws should determine two issues. The first issue is the right of the child to choose to live with the parents or other related parties during the duration of child custody. The laws should recognise the right of the child to choose. However, the right is qualified and not absolute. Qualified means that the child may choose his or her residence upon reaching the age of maturity. The age of maturity enables him or her to freely express personal opinions. The age of maturity requires the child to know the reasons and consequences behind the right. If the child does not fulfill the conditions, the Shari'ah and Civil courts should override his wishes based on the best interest of the child (Randawar et al., 2020; Masson et al., 2008; Gallo, 2004; Al-Kasani and Ibn Mas'ud, 1986).

### ***Importance of access***

Islamic and Civil laws should recognise that the party needs to have adequate and frequent access to execute parental responsibility and pay child maintenance. The party having the child's residence should allow the father or the guardians to make arrangements for the child to attend school. Access is also important because it allows the father and the other related parties to ensure child maintenance is used for the benefit of the child. The Shari'ah and Civil courts should determine the duration of access based on distances between the child's residence and the residence of the party having access. Thus, if the distance is near, the child should have frequent access with the party.

### **Conclusion**

The above discussions are important because Islamic and Civil law manifest agreements in many areas although there are disagreements in some areas of child's custody after divorce. The disagreements of the laws exist in determining the religion of the child and the party having custody. The principle in Islamic law is strict i.e. the religion of the child is Islam. If a parent of the child converts to Islam, the religion of the child is Islam. If a parent commits apostasy, the religion of the child is Islam. If a parent commits apostasy, child custody is given to the other Muslim party. If a parent converts to Islam, a minority view allows the child to live with the non-converting parent with the condition that the child must be allowed to live a Muslim life. The agreements of the laws exist in many areas. The laws recognise the best interest of the child as the main consideration in custody, the best interest's factors to interpret the best interest, and sole as well as joint custody. It is also a fact that the laws need to undergo legal reforms through harmonisation. It means that the laws can learn from each other in guiding the courts to determine custody. Thus, it is not a shame for Civil law to adopt ideas from Islamic law and vice versa. The courts should also adopt the same approach because in the end, the purpose of custody is to protect and prioritise the child. The laws need to recognise that in custody, emotions and sentiments exist compared to other legal principles. Thus, they must not be restrictive but open to new ideas for the betterment of the child, the parents, and the other related parties. They should be inspired by the

previous legal works of the jurists. For instance, in Islamic law, the previous jurists have extensively executed the process of *ijtihad* in expanding custody principles. In short, legal reforms through harmonisation between the laws are a real possibility if all related parties think and care for the child's rights. Thus, the child's rights are an important policy of the government.

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### **REFERENCES**

- [1] Al-Asyqar, U.S. (1982): *Tarikh al-Fiqh al-Islami*. – Kuwait: Maktabah al-Falah 136p.
- [2] Ali, S.A. (1965): *Mohammedan Law: The law relating to succession and status*. – All Pakistan Legal Decisions 640p.
- [3] Al-Kasani, A.U.A.B., Ibn Mas'ud, B. (1986): *Bada'i al-Sana'i fi Tartib al-Shara'i*. – Beirut: Dar al-Kutub al-Ilmiyyah 5: 185p.
- [4] Al-Khin, M., al-Bakri, Z.M., al-Bugha, M., Al-Syarbaji, A. (2011): *al-Fiqh al-manhajji: Mazhab al-Syafie*. – Jabatan Kemajuan Islam Malaysia (JAKIM) 494p.
- [5] Al-Marghinani, B. (2000): *Al-Hidayah: Sharh Bidayat al-Mubtadi*. – Pakistan: MaktabahRashidiyyah 1560p.
- [6] Al-Tantawi, M.M., Muhammad, M. (1987): *Al-madkhal ila'l-fiqh al-Islami tarikh al-tashri' wa masadiruhu wa'l-nazariyyat al-fiqhiyyah*. – Cairo: Maktabah Wahbah 348p.
- [7] Al-Zuhayli, W. (2004): *Al-fiqh al-Islami wa adillatuhu*. – Damascus: Dar al-Fikr 45p.
- [8] Bozzomo, J.W. (2002): *Joint Legal Custody: A Parent's Constitutional Right in a Reorganized Family*. – *Hofstra Law Review* 31(2): 547-585.
- [9] Bond, T., Black, J.M., Bridge, J. (2008): *Family Law 2008*. – Oxford University Press, USA 640p.
- [10] Coltrane, S., Collins, R. (2001): *Sociology of marriage & the family: Gender, love, and property*. – Cengage Learning 656p.
- [11] Cornish, W.R., Clark, G.N. (1989): *Law and society in England 1750-1950*. – London: Sweet & Maxwell 690p.
- [12] Cracknell, D.G., Wilson, C.H. (1990): *Roman Law: Origins and Influence*. – HLT Publications 200p.
- [13] Diduck, A., Kaganas, F. (2000): *Family law, gender and the state*. – Bloomsbury Publishing 870p.
- [14] Douglas, G. (2004): *An introduction to family law*. – Oxford University Press 228p.
- [15] Edwards, J. (2006): *Presumption of Shared Residence-a Conundrum for the Government or the Judiciary?* – *FAMILY LAW-BRISTOL* 5p.
- [16] Gallo, N.R. (2004): *Introduction to family law*. – USA: Thomson 513p.
- [17] Harris, L.J., Carbone, J.R., Rebouché, R. (2023): *Family law*. – Aspen Publishing 846p.
- [18] Ibrahim, A. (1997): *Family law in Malaysia*. – *Malayan Law Journal Sdn. Bhd.* 401p.
- [19] Kamaruddin, Z. (2005): *Divorce laws in Malaysia*. – *Malayan Law Journal Sdn. Bhd.* 229p.

- [20] Kharofa, A. (2004): *Islamic family law: A comparative study with other religions*. – International Law Book Services 340p.
- [21] Lamanna, M.A., Riedmann, A.C. (2003): *Marriages and families: Making choices in a diverse society*. – Wadsworth Publishing 700p.
- [22] Lauer, R.H., Lauer, J.C. (1991): *The quest for intimacy*. – Wm. C. Brown Publishers 619p.
- [23] Majid, M.K. (1999): *Family law in Malaysia*. – Malaysian Law Journal Sdn. Bhd. 413p.
- [24] Masson, J.M., Bailey-Harris, R., Probert, R. (2008): *Cretney's Principles of Family Law*. – Sweet & Maxwell 917p.
- [25] McKenzie, P.A. (2006): *Nowhere to Run: Custody, Relocation, and Domestic Violence in Florida*. – *Nova Law Review* 31(2): 355-374.
- [26] Najdi, U.A. (1989): *Hidayat al-Raghib li Sharh 'Umdat al-Talib*. – Jabatan Kemajuan Islam Malaysia 1274p.
- [27] Nasir, J.J. (Ed.) (1990): *The Islamic law of personal status*. – Brill Archive 272p.
- [28] Parkinson, P. (2006): *Decision-making about the best interests of the child: The impact of the two tiers*. – *Australian Journal of Family Law* 20(2): 179-192.
- [29] Randawar, D.K., Kamarudin, A., Shukor, A. (2020): *Non-Parental Child Custody Rights: A Comparative Perspective*. – *Intellectual Discourse* 28(2): 529-553.
- [30] Randawar, D.K., Rahmat, N.E. (2018): *Akbar Kamarudin@ Abdul Shukor*. – *Family Law in Malaysia*, Malaysia: Lexis-Nexis 300p.
- [31] Samarah, M. (2002): *Ahkam wa athar al-zawjiyyah*. – Jordan, Al-Dar al-Ilmiyyah al-Dawliyyah 273p.
- [32] Sayis, M.A. (2006): *Tarikh al-Fiqh al-Islami*. – Dar al-Kutub al-'Ilmiyah 159p.
- [33] Shannon, G. (Ed.) (2011): *Family law*. – Oxford University Press, USA 366p.
- [34] Spon-Smith, R. (2004): *Relocation Revisited*. – *FAMILY LAW-BRISTOL* 34: 191-198.
- [35] Wragg, T. (1998): *Family law*. – London: Pitman Publishing 152p.
- [36] Zaydān, A.A.K. (1993): *Al-Mufaṣṣal fī Aḥkām al-Mar'ah wa Bayt al-Muslim fī al-Sharī'ah al-Islāmiyyah*. – Beirut: Mu'assat al-Risalah 522p.