



ORIGINAL ARTICLES

Application of *Maslahah* (interest) in Deciding the Right of *Hadanah* (Custody) of a Child: The Practice in the Syariah Court of Malaysia

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ABSTRACT

Firstly, this article briefly discusses the concept of *maslahah* in Islam. Relevant verses in the Qur'an and hadith of the Prophet Muhammad s.a.w are referred to show that the principle of *maslahah* has strong supportive authorities in Shariah. Secondly, the application of the principle of *maslahah* in custody dispute is deliberated. The application of the divisions of *maslahah* i.e., *dharuriyyah*, *hajjiyyah* and *tahsiniyyah* is presented in detail. Relevant provisions of the Islamic Family Law Act/Enactment and decided cases of the Syariah Court are analysed to study the practice of the principle of child's interest in Malaysia. Thirdly, conclusion is made emphasising on the importance of the Syariah Courts giving due consideration to this principle of *maslahah* in awarding the custody order. The study was mainly based on library research. It used Islamic legal research methodology. The benefit of this methodology is that through the study of the classical schools of legal thought of the Muslim jurists and the reasoning behind their rulings, a proper knowledge concerning the topic of the study has been acquired and this knowledge has been used to analyse the existing law and application of *maslahah* in Malaysia. Islamic legal research methodology is based on the study of the sources of law i.e., the Qur'an and the Sunnah and also other secondary sources of shariah. Basically, it involves a thorough study of the relevant literature on *fiqh*, *tafsir* and hadiths of the Prophet Muhammad of the recognised schools of Islamic law relating to the principle of *maslahah* in custody dispute.

Key words: Maslahah, Shari'ah, Custody, fiqh, Islamic Law

Introduction

In the context of child's custody, the term *hadanah* (custody) refers to the upbringing of a minor child by the mother or by someone who is legally entitled to it. It includes protection, love and care, education, sheltering, management of a child and etc. Generally, in determining who shall be entitled to the custody of a child, the court will first determine who shall give a better care to the child based on the child's interest. Under the Malaysian law, it is a rebuttable presumption that the mother shall be the best person to look after a minor child. However, the practice in the shariah court seems to suggest that the court applied the principle of *maslahah* (interest) of the child and this has become the overriding principle in deciding the right of the custody. Thus, the article will deliberate the concept of *maslahah* in relation to the right of custody of a child in Islamic law. The relevant provisions of the Islamic Family Law Act/Enactment and the practice of the Syariah Courts deliberating this principle of *maslahah* of a child will be the focus of the article. Cases decided at the Syariah Courts will be analysed to study the practice of the principle of child's interest in Malaysia as well as its problems and restrictions. It is hoped that by analysing the current the legal provisions on child's custody and its practice in Malaysia, suggestions and recommendations can be made to further improve this area of law. Hence, the interest of a child as a paramount consideration in awarding child's custody will always be upheld.

The Principle of Maslahah:

The term *maslahah* (interest) is taken from the root word *salaha* or *saluha* which is 'to be good, to repair or to improve' (Ibn Manzur, 1999). Literally, it means 'benefit or interest', i.e., the acquisition of benefit or the rejection of the harm (*mafsadah*) (Imran Ahsan Khan, 2003; Hashim Kamali, 1998). Al-Ghazali (1937) defines *maslahah* as consisting of considerations which secure a benefit and prevent harm but are in the meantime, harmonious with the objectives of the Shari'ah (*maqasid Shar'iyyah*). Any measures which secure these values fall within the scope of *maslahah* and anything that violates them is called *mafsadah*. Majority of Muslim jurists view that *maslahah* is a proper ground for legislation. However, *maslahah* is not a proof in respect of devotional matters (*'ibadah*) and the specific injunctions of the Shari'ah (*muqaddarat*) (Badran, 1984). During the time of the Companions of the Prophet Muhammad s.a.w., they exercised their own *ijtihad* in deciding on the problems

they encountered every day. Examples of *maslahah* during the period of companion are the collection and compilation of al-Quran, the introduction of the land tax, the establishment of prison and the right to inheritance of a woman whose husband had divorced her at the state of impending death (Hashim Kamali, 1998).

Maslahah is supported by the authorities in the Qur'an and hadith of Prophet Muhammad s.a.w. In Surah al-Anbiya' verse 107, Allah SWT says to the effect that "We have not sent but a mercy for all creatures." There is Hadith of the Prophet Muhammad s.a.w which says, "*La dharar wa la dharar*" which means "harm is neither inflicted nor tolerated" (Abi Abdullah, 1998). Najm al-Din al-Tufi, a prominent Hanbali jurist authorises recourse to *maslahah* with or without the existence of a *nass*. He argues that the hadith '*la dharar wa la dharar*' enables the *maslahah* to take precedence over all other consideration (Hashim Kamali, 1998). However, he precludes devotional matters, specific injunction and prescribed penalties from the scope of *maslahah* as these matters can only be established by *nass* and *ijma'*. He is of the view that in transactions and temporal affairs, if the texts conform to the *maslahah* of the people in a particular case, they should be applied forthwith, but if they oppose it, the *maslahah* should take precedence over them. This is because in these areas, *maslahah* constitutes the goal. The rules of Shari'ah on these matters have been enacted in order to secure the interest of the people, and thus, when there is a conflict between a *maslahah* and *nass*, the hadith "*la dharar wa la dharar*" dictates that the former must take priority (Hashim Kamali, 1998).

Under the principle of *maslahah*, for the ruling based on *maslahah* to be valid, there are conditions to be observed. The conditions are firstly, *maslahah* must be genuine (*haqiqiyyah*), secondly, it must be general (*kulliyah*) and lastly, it must not in conflict with the *nusus* (Badran, 1984). Imam Malik ibn Anas however, added two other more conditions of *maslahah* i.e., *Maslahah* must be rational and acceptable to the people of sound intellect and it must prevent or remove hardship from the people (Imran Ahsan Khan, 2003).

The principle of *maslahah* is applied in the Syariah Courts in Malaysia. So far, the practice in the Syariah Courts seems to suggest that the courts applied the principle of *maslahah* (interest) of the child and this has become the overriding principle in deciding the right of the custody. Thus, the article deliberates the concept of *maslahah* in relation to the right of custody of a child in Islamic law and the law in Malaysia.

Application of Maslahah in Hadanah (Custody Disputes):

The concept of *maslahah* is very relevant and applicable in relation to the right of custody of a child in Islamic law. In Islamic jurisprudence, *maslahah* according to the degree of priority can be divided into three and these three divisions of *maslahah* are discussed in detail below;

- i) *Maslahah al-Dharuriyyat* (the essential)
- ii) *Maslahah al-Hajiyyat* (the complementary)
- iii) *Maslahah al-Tahsiniyyat* (the embellishment)

Maslahah al-Dharuriyyah:

Maslahah al-dharuriyyah refers to *maslahah* on which the lives of the people depend and their neglect leads to total disruption and chaos (Imran Ahsan Khan, 2003). It consists of five essential *maslahah* namely: religion, life, intellect (mind), lineage and property. These five essential *maslahah* must be promoted and protected for the interest of human being (Hashim Kamali, 1998; Imran Ahsan Khan, 2003). In relation to the right of custody of the child, the discussion focuses on the four *maqasid syar'iyyah* only that is religion, life, intellect and property.

Maslahah to Protect Religion:

In Islam, it is a condition in the case of custody of the child that the custodian (*hadinah*) must be a Muslim in order to protect the religion of the child i.e., Islam. In any case of conversion to Islam by either parent, majority of the Muslim jurist requires that the custody of the child should be given to the Muslim parent. The Shafi'is and the Hanbalis schools clearly emphasize on this requirement. The basis of this *maslahah* is clearly stipulated in the Qur'an, where Allah SWT says to the effect that:

"... and never will Allah grant to the disbelievers a way (to triumph) over the disbelievers" (The Qur'an: al-Nisa'; 141)

This verse expressly denies non-Muslims any authority over Muslims. In relation to child custody, the jurists argued that the words '*... grant a way ...*' in this verse means guardianship or authority (Zulkifli Muda, 2004). It was further stressed that since *al-Hadanah* or custody is part of guardianship as of guardianship of property and marriage, thus, it is wrong for non-Muslims to be given the right of guardianship over Muslim child (Zulkifli Muda, 2004). There is a fear that the child who is put under the custody of non-Muslims might be brought up following their way of life (Zahraa and Abdul Malek, 1998).

In Malaysia, it is provided under section 82 (a) of the Islamic Family Law Act, 1984 (IFLA) that one of the conditions of a person entitled to the custody of the child is a Muslim. Thus, when there is a dispute over the custody of the child between a non-Muslim and Muslim parent the custody shall be awarded to the Muslim parent. This is in order to protect the religion of Islam and the religion of Islam is given special status under Article 3 of the Malaysian Federal Constitution. The requirement that the custodian must be a Muslim is highly emphasised in the Islamic Family Law Act/Enactment. It is further supported with another requirement which also stipulates in the Act where it declares that the right to child's custody is lost if the custodian mother renounces her religion of Islam (Section 83(d) of the Islamic Family Law Act, 1984). This condition is based on the assumption that religion is associated with good character of a person, which is another important condition stipulated in the Islamic Family Law Act (Najibah Mohd Zin, 2007).

In general, the Malaysian Syariah Courts highly emphasise on religion and religious values as the main consideration for determining the welfare of the child. For example, in *Tunku Mahmood Shah v Noor Faridah Sutherland*, the Syariah Court was presented with a claim of a mother for custodial rights of her thirteen and ten year old daughters as she, who was a Muslim convert, renounced her religion of Islam after the divorce. The father took the eldest daughter with him whilst the youngest remained with the mother, as there was no agreement as to their custody after the divorce. The father argued that the mother has no capacity as custodian or *hadhinah* since she subsequently married another man. The court nevertheless gave the custody, care and control of both children to the paternal grandmother who was earlier included as the second plaintiff. The court's decision in giving the custody to the Muslim custodian was based on the welfare of the child in which it is to safeguard the religious belief and upbringing of the children particularly the elder sister. The court acknowledged the wishes of the elder sister as she had obtained the sufficient age to choose, but since the paramount consideration is her welfare, the court made the order as prescribed.

Similarly, in *Ex-Parte Application of Zaimas bt Ibrahim*, the Shariah High court awarded the custody of two children to the mother after the court was satisfied that the father had apostatised. Again, in the case of *Faridah v Mohd Firdaus Abdullah @ Jettle Francis*, the custodial rights were given to the maternal grandmother, who was a Muslim by birth as the court was satisfied that the behaviour of the converted father was unreasonable and the children may be influenced to behave in a non-Islamic manner. In this case, the court allowed the application of the mother to make her mother as a party in the custodial proceedings involving her two daughters. Subsequently, the custody of two female children was awarded to the maternal grandmother because the mother was considered to be disqualified as *hadinah* or custodian as she was already married to another man. The court did not grant the custody to the converted father as he had behaved in un-Islamic manner, which would affect the welfare of the child.

Another important qualification for *hadanah* is having a good Islamic character. This requirement is further supported by another provision of the IFLA which stipulates that a mother will lose her custodial right if she openly indulges in immoral activities (Section 83(b) of the Islamic Family Law Act, 1984). Observation from decided cases reveals that the Syariah Courts construe by good conduct to mean a person who is not *fasiq*. This concurs with the view of the classical Muslim jurists which disqualifies a *fasiq* person for *Hadanah* (Wahbah Zuhaily, 2001).

In *Khairul Huda Carol Abdullah v Shahrudin Hj. Yasin* (Case no. 23/86, Seremban Syariah Court), for instance, the father was found not to have a good character from Islamic standard of morality for he did not know even how to perform his prayer (*solat*). Besides, he also consumed alcoholic drinks which are forbidden in Islam. For this reason, the courts ruled that he is not qualified for the custody of his son. The court, nevertheless, awarded the converted mother only temporary custody since she intended to return to her home country, Australia, and that in the court's opinion this country is not conducive for the child to grow up as a good Muslim. The permanent custodial order was given to the father's family. A similar rule is also stipulated in *Rahanim bt Mohd Yobe v Adnan bin Ahmad* case (1994) 9 JH 216, where the mother's conduct was put into question as she was alleged of not performing daily prayers and fasting during *Ramadan*. The allegation however was proven baseless and therefore she was granted a right for the custody of her child.

It seems that the requirement of having good Islamic conduct is interwoven with the condition of being Muslim. This is actually to ensure that the child's interest particularly in religious upbringing is well safeguarded.

Maslahah to Protect Life:

Generally, a child needs protection as it depends on other for its life. In Islam, the protection of the child begins even before he or she is born. From the period of pregnancy, both parents are already obliged to give their utmost attention to observing fully their duties towards their expected child and taking all necessary measures to safeguard the foetus from any kind of harm (Al-Azhar University, 2005). The life of the unborn child and the physical integrity of every infant are clearly recognised in the Qur'an.

“Kill not your children because of poverty. We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin” (The Qur’an: Surah al-Isra’; 31).

This verse indicates that the killing of children due to fear of becoming poor is prohibited and regarded as a major sin. This is because having many children will not render a person to be in poverty, but it is Allah SWT as the ultimate Provider and Sustainer, will determine one’s *rizq* (Sayyid Qutub, n.d.). Furthermore, it is a Shari’ah based duty that a human being should abstain from doing anything that might lead to harming own self or other human being. In one *hadith* the Prophet (p.b.u.h.) is reported to have said:

“There should be neither harming nor reciprocating harm” (Abi Abdullah M. Yazid, 1998).

The mother must safeguard her foetus and take all necessary steps in order to prevent termination of her pregnancy. For instance, she is under no duty to fast during the month of *Ramadan*, if by so doing it can harm her foetus (Al-Azhar University, 2005). This is clearly stated in a *hadith* of the Prophet:

“Allah SWT has exempted the traveller from observing the fast and licensed him (or her) to cut prayer to a half. Pregnant women and breastfeeding women have been licensed to break the fast” (Abdul Karim Zaydan, 2000).

Like mother, the father is also not immune from this duty. He is also duty bound to ensure the welfare of the unborn child. This can be done for instance, by treating his wife well, particularly during her pregnancy. The Qur’an commanded the husband to provide sufficient maintenance to his pregnant wife until she delivers even if they are separated. It states:

“And if they are pregnant, then spend on them until they deliver” (the Qur’an: al-Talaq; 6).

The husband’s responsibility in providing the wife who bears and delivers his child may provide more incentive to the wife to take the utmost care of the unborn baby.

Maslahah to Protect Intellect:

The protection of intellect denotes protection that relates to physical and emotional development of a child. The capability of the parents to provide for physical and emotional needs of the child is vital as it will ensure that the welfare of the child is best served during the custody period. Mother is assumed to be the best person to provide physical and emotional needs of the child especially during the first two years of the child’s life. This assumption is based on a Qur’anic verse (al-Baqarah; 233), which indicates that Allah SWT has ordained breastfeeding to be a fundamental duty of the mother within the period of two years, notwithstanding separation had occurred between the parents. The purpose of this injunction is to safeguard the interests of the child, as this initial two years period of an infant is most vital time for his health, faculty and spiritual development (Sayyid, Qutub, n.d.). In addition, breastfeeding is also important for the interests of the infant child particularly during this period as it is scientifically proven that the mother’s milk is the best milk for a child. Medical research shows that mother’s milk satisfies babies’ nutritional needs and protects it against possible infections. See for example, reports on these findings in “High-Risk Newborn: The Benefits of Mother’s Own Milk,”(University of Utah Health Sciences Center)

Thus, in the event of divorce, the mother would be given the first right of custody if the child under disputes is still below the age of discernment. In other words, the interest of the minor child is assumed to be best served when he or she is under the custodianship of the mother.

Section 86(3) of IFLA 1984 clearly provides a rebuttable presumption that it is good for a child below the age of seven years to be with the mother. The application of this presumption has been reflected in many Syariah Courts’ decisions. In *Zaliha v Rahmat* (1975) 5 JH 306, the parties had two children aged two years and four months, and four years respectively. At the time of divorce, the eldest remained with the father while the youngest with the mother. The mother claimed custody of the eldest child. Considering that the child is still not *mumayyiz*, the court granted the custody to her.

Similarly, in *Ahmad v Aishah* (1980) 1 JH (1) 55, the court granted the custody of the eldest child to the mother based on the same principle. In this case, the parties had three children; aged ten months, two years, and four years respectively at the time of the divorce. The eldest remained with the father, while the youngest two with the mother. The father remarried and had a child with his second wife. The mother claimed custody of the eldest child and succeeded in her claim on the ground that the child was still under the age of *mumayyiz*, and that Islamic law presumes the mother to be the best person to look after the child as long as she did not remarry. The father appealed but was later dismissed by the Board of Appeal, because it was for the best interests of the child to be looked after by her mother rather than stepmother who had no custodial right over the child.

In *Zawiyah v Ruslan*, the parties were divorced and had a three years old girl. The chief judge gave custody of the child to the mother until she was seven years old, applying the general rule of custody laid down by *Shafi’i* school which emphasises the right of the mother to the custody of an infant child, while lapsing when the child reaches the age of seven years. Despite the fact that mother is more entitled to the custody of her infant child, the father as the natural guardian of the child, is still given the duty and right to determine major decisions

in the child's life such as education, religious upbringing and medical consent. Such obligations continue irrespective whether or not the child lives together with him.

Thus, the *maslahah* or interest of the child is still protected as the law generally stipulates that the parents are equally responsible for the upbringing of their child irrespective of their separation. This is actually aimed to safeguard the physical and mental development of the child so that he or she can perfectly grow.

Maslahah to Protect Property:

Protection of property denotes the guardian's authority over the management of the child's property. Under Islamic law, guardianship in general refers to an authority possessed and exercisable by a certain person over another and his property. All jurists agree that the father is the natural guardian of the child, being liable to provide maintenance of his child and has general supervision over the child's upbringing and its property (Wahbah Zuhaili, 2001). *Maslahah* to protect the child's property will be relevant in *hadanah* if there is a mismanagement of the said property by the guardian, which may affect the interests of the child. The IFLA 1984 generally provides that the father is the guardian of the child's property but such duty is subject to several conditions including being a Muslim and trustworthy (Section 88(1) and (2) of the Islamic Family Law Act, 1984). These conditions are most important as to avoid any misappropriation of the child's property in the future and thus, will safeguard the interest of the child in its property. Should the father (guardian) be an irresponsible or untrustworthy person such as abusing his child's property, his right to custody is withdrawn.

Maslahah al-Hajiyat (complementary):

Maslahah al-Hajiyat is supplementary to the five essential values whose neglect leads to hardship in the life of the community although not to its collapse (Hashim Kamali, 1998). For example, the concession granted to the sick people that are elderly and travelers are not to observe fast and may shorten the prayer. The importance of documentation to prove legal right is also example of *maslahah al-hajiyat* (Hashim Kamali, 1998).

In the case of *hadanah*, this type of *maslahah* aims at ensuring the comfortable life of a child and repelling hardship from the child such as providing healthy meals and comfortable accommodation for the child to live in. All these are important to ensure that child needs are fulfilled. Based on this *maslahah*, it is the court's responsibility that the custody of the child is awarded to the right person who is in the position to fulfill such needs of the child.

Section 87(2) (a) of IFLA generally stipulates this requirement, in which the court when making a custody order, must consider the place where the child is to live and as to the manner of education that the child will receive. In other words, the incapability of the custodian to provide sufficient and comfortable home or place to live, will affect the child's development and interests. In the case of *Tunku Fazlinda Tunku Khalil v Azhar Sidek*, the Syariah High court granted the custody of two children to the mother, who is a kindergarten owner as it was satisfied that the mother may provide stable and comfortable place to live as compared to the father who works as a lorry driver. The father was only able to rent a room in a double storey house which was also rented by a Chinese couple. Similarly, in *Safura Badruddin v Azhar Ariffin* the court made a comparison between the two places owned by each parent respectively and decided to award the custody of the children to the defendant father as the mother's place was a rented room of a house which was shared with another family.

Maslahah Tahsiniyyat (embellishment):

Maslahah tahsiniyyat refers to interests that provide additional rules that lead to the moral and spiritual progress of the individual and society (Imran, 2003). The observance of cleanliness in personal appearance and *ibadah*, avoiding extravagance in consumption and moral virtues are the examples of this type of *maslahah*. Imran (2003) in his book says that this *maslahah* tell us that there is a moral shell around the necessities and supporting needs provided by Shari'ah. Thus, morality goes hand in hand with the law.

In relation to custody, the custodian is encouraged to provide more than the basic needs of a child in order to further improve the child's quality of life. This is to ensure that the child may grow up in a better, comfortable and healthy life and will definitely preserve the *maslahah* of the child. The application of this *maslahah* can be seen in the previous mentioned case, *Safura v Azhar Ariffin*. In this case, the Syariah judge had to decide which parent may provide a suitable and comfortable home for the child. The custody of the child was given to the father as the court satisfied that he is able to provide better place of living compared to the mother, who was only rented a room in a house which was occupied by another family.

The meaning of embellishment (*tahsiniyyah*) also refers to the quality of the person who is entitled to the child's custody. In Islam, the person must be physically and emotionally qualified to ensure that the child's needs are fulfilled during the period of custody. It is in the child's best interests that the parent is of good moral

character so that the child will grow up as a good moral person. Islam emphasizes on the importance of good morality and conduct of the parent who shall have the custody of the child. Thus, a parent that is involved in drug abuse and a physically violent person is not qualified to be the custodian for the child. Islam does not tolerate violence and a violent parent will not be able to ensure that the welfare of the child is provided.

Thus, Shari'ah requires that the parent/custodian is of a trustworthy person and of good morality/conduct. The parent who is not trustworthy and not having good morality/conduct such as a drunkard, adulterer or openly indulging in immoral activities will not be able to educate the child with good *akhlaq*/conduct. According to *Ibn Abidin*, if the child is old enough to understand the bad behaviour of the parent, he should be taken away to protect him from such bad conduct of the parent (*Ibn Abidin*, n.d.). Thus, any parent who is not of good morality will have his or her right to child custody forfeited. Section 82 (d) of the IFLA 1984 clearly provides that the custodian must be a person of good *akhlaq*. This requirement is further supported by another provision of the Act which stressed upon the capability of the custodian to bestow care, love and affection to the child (Section 82 (c) of the Islamic Family Law Act, 1984). In the case of *K v S* (1990) 7 JH 162, the father of the child appealed to the court for the custody of the child be granted to him as there was evidence that the child had been raped and consequently been infected with STD. It was agreed then that the custody of the child be transferred from the mother to the father for the best interest of the child that she must be saved from an abusive and violent environment.

Conclusion:

Maslahah involves considerations that are necessary to protect and promote the objectives of shariah and/or avoid their abuses/malpractices. The above describes the applications of *maslahah* as shown by the cases decided in the Syariah Court with reference to the welfare of the child in custody dispute. Generally, it seems that current practices in the Syariah Court comply with the principle of *maslahah*. There are, however, observations/opinions that interpretations of texts of Shariah can be broader and more appropriate in relation to contemporary situations. Thus, it will be a significant improvement in the effort to serve justice if the court and those in authority adopt a more open approach, firstly, in recognizing and applying the opinions of schools of thought (*mazahib*). For instance, currently the right of a divorced mother to custody of her child is forfeited if she remarries. It should be provided under the Act that the right of the mother will not be forfeited if the new family environment is still the best for the child. As practised in a number of countries, there are involvements of expert(s) in related disciplines such as psychologist, counselor and/or welfare officer. It is suggested that this should also be considered if appropriate or beneficial to the best interest of the child. Lastly, it must not be overlooked of the role of mediation (*sulh*) which should be the initial or parallel effort in trying to arrive at the same i.e., the best interest of the child.

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