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The Role of Custom in Managing Child Custody: A Juridico-Psychological Analysis in Local Context

Peranan Adat dalam Menguruskan Penjagaan Anak: Satu Analisis Psikologi-Fiqh dalam Konteks Tempatan

Mohd Abbas Abdul Razak,* Sayed Sikandar Shah Haneef,** and Mek Wok Mahmud***

Abstract

Child custody is one of most important matters in managing the after effects of divorce as far as their impact on the child is concerned. Guided by the general principles of the Qur'an and Sunnah on parenting and parental role, classical jurists developed their own theory of managing such impacts in tandem with what was realistically working for their time and environment. With the changes in the pattern of parenting and traditional family structure in societies like Malaysia, it is suggested the *fiqh* of child custody has to be relevantised so as to result in minimizing debilitating after effects of parental separation on the children. The Current practice of mostly awarding the custody to the mother is not a full remedy, thus this study using juridico-psychological methods of analysis argues for finding juridical basis for joint-custody. Data related to the research were collected from print and internet sources. The textual and content-analysis methods were used in interpreting the relevant data. The research findings highlighted that the solution to the problem with regard to child custody should be in line with the modern psychological needs of the child so long it is within the parameters set by the *Shariah* and brings greater benefit to the child. Moreover, if both the parents of the child are Islamic in their orientation of thinking, a joint-custody will be more rewarding towards the child's psychological needs and growth.

Keywords: Child custody, juridico, legal, joint custody, psychological.

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Abstrak

Penjagaan anak adalah salah satu perkara yang paling penting dalam mengatasi kesan perceraian terhadap anak. Berpandukan kepada prinsip-prinsip umum Al-Qur'an dan Sunnah mengenai peranan ibu bapa dalam penjagaan anak, para ahli hukum zaman silam telah menyarankan teori masing-masing ke arah pengurangan impak terhadap anak sesuai dengan zaman dan hal keadaan setempat pada masa itu. Dengan perubahan yang berlaku terhadap corak keibubapaan dan struktur keluarga dari tradisional ke moden seperti hal yang berlaku dalam kalangan masyarakat di Malaysia, disarankan *fiqh* mengenai hak penjagaan anak harus relevan sehingga dapat mengurangkan kesan pemisahan ibu bapa terhadap anak. Amalan semasa yang diguna pakai yang memberi hak keutamaan yang berlebihan kepada pihak ibu dalam penjagaan anak bukanlah suatu penyelesaian yang tuntas. Dengan menggunakan pendekatan juridico-psikologi (hukum dan kaedah psikologi), hasil kajian ini menunjukkan bahawa cara penyelesaian yang terbaik adalah dengan mengambil kira asas perundangan untuk memberi hak penjagaan bersama. Data yang berkaitan dengan kajian ini telah diperolehi dari sumber cetak dan internet. Kaedah analisis teks dan kandungan diguna pakai dalam menafsir data yang relevan dengan kajian ini. Hasil kajian ini menunjukkan bahawa penyelesaian untuk masalah berkenaan dengan hak penjagaan anak harus sesuai dengan keperluan psikologi moden anak itu selagi ianya tidak bertentangan dengan hukum *Syariah* dan membawa manfaat yang lebih besar kepada anak. Lebih-lebih lagi, jika kedua ibu bapa kanak-kanak itu Islamik dari segi orientasi berfikir, maka penjagaan bersama akan lebih bermanfaat terhadap keperluan dan pertumbuhan psikologi kanak-kanak tersebut.

Kata Kunci: Penjagaan anak, perundangsn Fiqh, penjagaan bersama, psikologi.

Introduction

Child custody is one of the most contested issues in the modern adversarial system of litigation after divorce. The decision as to which one of the parents is more fitting for this task, judicial rulings across the Muslim world including Malaysia has settled in favour of the principle of “what is best for the child’s welfare”. In practice, it is observed that what normally is judicially pronounced to be best for the child, in reality may not prove to be the case. In the Malaysian context, it is suggested that instead of awarding the custody to one-party, it is best that both parents should be charged with the child’s custody not only because that the child later on need another parent for some legal purposes, such as marriage but also a holistic and balanced growth of every child necessitate it if we look at it from a psychological perspective. This study, therefore, examines as to how *fiqh* and psychology can be synthesized to manage custodial issue better.

Conceptual Framework

The term *hadanah* stands for child custody in Islamic law. Literally, the word *hadanah* is derived from the *hadn* (*hadanah* verb) which means: “took, carried in his arms; fondled, fostered, reared and brought up” (The Arabic Lexicon). Technically, it signifies taking charge of a minor child’s care, who cannot independently manage his/her life, protecting him/her against harm, rearing him/her physically, psychologically and mentally as to prepare him/her for assuming adult responsibilities as he/she grows up (Sabiq 2003, vol. 2, p. 227).

Hadanah in principle is a safety measure for the protection of a minor child before he/she can manage life personally unassisted. It has been found that during that period of a child’s growth, a mother’s role is more crucial than of the father. The reason for that is none other than the special bond the mother has on the child and she is more suitable for nurturing the child. Moreover, the mother is gifted with the emotional coping ability to deal with such a psychologically taxing undertaking. The exception to this is when there are reasons on the basis of which it can be presumed that she would not be expected to fully devote herself take care of the child, such as remarrying after the divorce as enunciated in the famous hadith, which forms the foundation for juridical exposition of the law of *hadanah*, “Amr b. Shu’aib on his father’s authority said that his grandfather (Abdullah ibn Amr ibn al-’As) reported: A woman said: Messenger of Allah, my womb is a vessel to this son of mine, my breasts, a water-skin for him, and my lap a guard for him, yet his father has divorced me, and wants to take him away from me. The Messenger of Allah (ﷺ) said: You have more right to him as long as you do not marry” (*Sunan Abi Daud*, number 2276). Expounding the Islamic rationale for prioritizing mother as the care taker, al-Sarakhsi said:” Islam by taking into account what is best for a minor child, distributes the parental care between wife and husband. It assigns legal guardianship to the husband due to the nature of the tasks that it entails, and hands over the responsibly of nurturing of the child to the mother on account of her emotional strength to bear it (n.d., vol. 2, p.107). Juristic discussion as to who will come into the picture once a mother is declared unsuitable for the task is detailed, the delineation of which is beyond the scope of this study (see Sabiq 2003, pp. 228-229). However, what is important is the juristic qualifications or terms of eligibility for the task, the most salient among which in brief are: First, the mother must be a Muslim according to the

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majority but not according to Malikyyah. Negators' main argument¹ is that *hadanah* is the natural right of the minor which not only demands rearing him/her materially and emotionally but also morally (and religiously) and thus the latter objective would be achieved even if the holder of the custody is a non-Muslim. The Malikyyah (even Hanafiyyah, if the mother is a believer of another divine faith), on the other hand, do not stipulate this by arguing that the emotional care of the child is of utmost importance at this stage of the child's life, which no other one provides except the mother. But in case, it is felt that the mother would influence him/her to follow her religion, then a Muslim should be assigned to oversee that it should not happen (Zaidan 2011, vol. 10, p.33). Second, the custody holder should not be a profligate (*fasiq*) according to Shafi'yyah and some Hanabilah by virtue of the fact that such a person cannot be entrusted with the child rearing because of the possibilities like abusing the child or imbuing him/her with bad characters. Representing the opponents, Ibn Qayyim, however, disagrees by maintaining that requiring the uprightness of character on the part of the parent in custody would open the floodgate for rendering many children without parental care. It is an unrealistic proposition which does not have any valid basis. Since the beginning of Islam, it has not been one of the factors on deciding the entitlement for *hadanah*. Had it been the case, those convicted of sexual crimes, wine drinking or having committed other major crimes, his/her children would have been taken away from them (Sabiq, p. 231). Lastly, the custody holder should be able to fulfil the obligation of rearing the child as Sabiq elaborates: "As such, the weak, elderly, blind or partially blind, sick, those whose outside occupations exposes their child to neglect or danger, those leaving in the company of another infected with

¹ Other arguments are from the legal texts: Construing the verse: "And never will Allah grant to the disbelievers a way (to triumph) over the believers)" (al-Nisa: 141). And the hadith of Rafi' whose wife refused to become Muslim and argued that the custody of her daughter should not be taking away from her. The Prophet hinted to child to choose between her mother and the father, thereupon the child leaned towards the father and hence was awarded the custody (*Sunan Abu Daud*, number 224). Supporters however construed both the evidences differently and more specifically held that in the hadith in question, the fact that the Prophet did not compel the wife to handover the child indicates discounting the mother's belief in Islam as one of the legal terms for *hadanah*.

contagious illnesses and the one sharing the house with someone who hates the child are all ineligible to have a child in custody (p. 230).²

Juristic Customary Management of *Hadana*

The governing ruling of child custody is heavily colored by custom in several respects including, First, the duration of custody with the mother: The majority distinguished between male and female child but differed on its other details, the Hanafiyyah hold that the mother's custody over her male child ends the moment the latter becomes self-reliant as he can manage his daily life without the mother's assistance, while her custody over her female child ends when the latter reaches puberty. Thereafter, it has proved customarily that the father would be more qualified to care for her pubescent daughter during her early adolescence (al-Mirghinani n.d., vol. 2, p. 38). Malikiyyah, on the other hand, view that the mother is a better care-taker of a male child until he attains puberty and of the female child until she marries (al-Hattab 1978, vol. 5, p. 594). The Shafi'yyah regard the age of discernment (*tamyiz*) as a deciding factor for both male and female children to choose between the father and the mother (al-Shirazi 2010, vol. 2, p. 271). The same is the position of Hanabilah with respect to the mother's custody over a male child but for the female child, *tamyiz* marks the end of compulsory return of child's custody to the father on the same 'urf-oriented reasoning as advanced by the Hanafiyyah (Ibn Qudamah n.d., vol. 9, p. 301). It is observed that the fact the Hanafi position in not limiting any age for cessation of a male child's custody to the mother but leaving it to the child's independence is 'urf-oriented which can vary from child to child and changing conditions in time and space (Abu Husayn 2013, p. 200).

Secondly, the right to visitation and its frequency: The classical jurists differed on the frequency of visitation rights by the non-custodial parent which is a question of what they thought was best for the child and the parent in their times ('urfi consideration). Hanafiyyah requires daily visits by another parent irrespective of the sex of the child but outside the custodial home (Ibn 'Abidin 1963, vol. 2, p. 345). Malikiyyah distinguished between minor children and adult ones by holding that the visitation for a minor child should be on daily basis but after puberty once in

² The jurists unanimously agreed that a custody holder should be of sound mind and a grown up individual which is on consonance with what logical sense also require. See Sabiq, p. 229.

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a week by the mother and more frequently by the father to keep an eye on his/her socialization and education (al-Dardir n.d., vol. 2, p. 512). Shafi'iyyah subject the visitation requirement to the sex of the child and that of the custodian. In the case of a female child with the mother, the father can visit her once in two days or more during the day. But if she is with the father, the mother can visit her according to what is determined by *'urf* and *'adah* but not every day. And if she visits her in the house of her ex-husband, she should not stay longer. In the case of a male child being with the mother, he should remain with the mother during the night and be sent to the father during the day for moral upbringing and educational care. But if the child is with the father, he should remain with the father day and night provided that he is sent to spend some time with the mother on the basis of what is customary in a given community. Nevertheless, if the child falls sick, regardless of his/her sex, the mother is more suitable to take charge of his/her bed-care (al-Nawawi 2008, vol. 9, p.104). Hanabilah positon with respect to the male child custodial visitation is the same as the Shafi'iyyah but the female child should remain with the father after the age of seven and the mother still can visit her outside or in the ex-husband's house provided when he is out of the house—because after the divorce the couple are strangers to each other, and the frequency of visitation is left to what is customary in the locality (Ibn Qudamah n.d., vol. 9, p. 303).

Lastly, implication of relocation after divorce: The jurists based on what could be in the interest of the child, put some restrictions on the movement of the mother if the child is in her custody. The Hanafiyyah hold that if the mother marries with the child's father in her town and moves with him to another province, in the event of a divorce the mother has the right to go back to her hometown with the child. The reason is that the husband by marrying a non-local has implicitly agreed that the wife can go to her hometown once separated. But if she was married in the village and moved with her husband to town, upon divorce, she cannot take the child back to the village and loses her right of custody because of its harmful consequences for the child in terms of socialization and lack of amenities there (al-Kasani 1982, vol. 5, p. 217). Malikiyyah, on the other hand, hold that the mother cannot relocate with the child if the place is far away from the residences of the child's father and other guardians (*awliya*). But the exception is when she travels for trade purposes or pilgrimage (Sahnun 1994, vol. 2, p. 259). The Shafi'iyyah postulated that if the mother travels temporarily for fulfilling a need such as

business or pilgrimage, her custody to the child would be unaffected provided that the child is in the care of some trustworthy people in her place of residence. However, if she wants to relocate, then the custody should be given to the father as he is best suited to bring him/her up (al-Shirbini 1982, vol. 3, p. 600). Hanabilah maintain a more strict view by holding that regardless of the assurance about the safety of child in the event of a relocation, the mother would lose the right of custody over the child provided that the place is equal or more than the distance of shortening *salah* from the place where the child's father and male relatives reside (Ibn Qudamah n.d., vol. 9, p. 305).

It has been observed that the issues raised by the classical jurists as above, were greatly impacted by the circumstances that prevailed then. In the current context, in some communities physical distance has lost its significance, and villages are as prosperous as cities and towns in terms of amenities and safety, hence these changing factors need to be taken into account when awarding custody to the mother by the courts (Abu Husayn 2013, p. 205). Nevertheless, we believe that the physical proximity of the child to the father (as the father figure) still cannot be taken lightly for the balanced and harmonious development of the child in terms of guiding him/her through the turbulence of formidable challenges as he/she matures to adulthood.

Management of Post-Divorce Effects on Child Upbringing from a Psychological Perspective

If classical jurists exerted their mind for minimizing the after effects of divorce on a child's emotional, physical and intellectual well-being, on the basis of what was the state of the art in their communities during their epoch, a psychological analysis of the issue is needed in the context of Malaysia in our time.

Divorce among Muslims in Malaysia

Malaysia is one of the countries in the region of Southeast Asia that is developing rapidly. It started as an agrarian base country to one now that embraces modern science and technology for its economic growth. Fast pace of urbanization, industrialization and modernization has changed the traditional lifestyle and cultural values among many young Malaysians of today, particularly the Malay Muslims. In addition to this, globalization and social media usage have also contributed to the changing of the mindset of the Malays. The Malays who were once well-

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known for their patience and perseverance are now losing these qualities during this time of modernization. Divorce is one of the obvious things that one can notice where the change of mindset of the Malays has taken place. The divorce rate among the Malays is quite alarming that requires an in-depth study as to why young people file for divorce so soon after a marriage has taken place. In the last few years, the statistics on divorce among Muslims are always on the rise. According to the press release from the Department of Statistics, the number of divorce among Muslims increased from 39,709 in 2017 to 40,269 in 2018 (Press Release on marriage and divorce statistics, Malaysia, 2019, Malaysian Department of Statistics). Other reports on Muslim divorce rate in Malaysia indicate an upward trend of increase in spite of the many pre-marriage courses conducted by the religious authorities and NGO's in all states in the country (Nadia Saiful Bahari, 28th June, 2019). Many who go through problems in their marriages do not even want to go for counseling or a compromise with their spouses. Needless to say such couples have yet to settle the cost incurred for their marriage preparation. Saddled with the financial burden, a separation between couples can affect them badly psychologically, more so if they have had children through the marriage. As an innocent party in a marriage, children will be caught between their parents who are taking different directions in their lives. Not having a complete family and missing a mother or father can lead children of divorced parents into many problems; like rebellious attitude, imbalanced personality, low self-esteem, poor academic performance, etc. (Norhayati & Zaidah 2016, pp.150-160).

It seems that our people today are oblivious of the Prophet's stand on divorce when he said: "Among lawful things, divorce is most hated by Allah." (Reported by Abu Dawud). Though divorce is not an encouraged thing in Islam, it is the last resort after counseling and all compromises between the spouses have failed. It is the only best option left, if any one party in a marriage endeavors physical and psychological abuse. Besides that, the *shariah* also allows one to divorce the spouse if the partner has gone missing for too long without any trace or for conducting serious offences under the religious laws. Divorce due to trivial reasons like; different personality type, one is not equally competent to the other, etc. are not truly valid reasons under which a divorce should take place. Under such circumstances, those who go through a crisis period in their marriages should reflect on the teachings of the Qur'an and Sunnah on how to find an amicable solution to solve the issues within the marriage and

not simply give up and opt for a divorce. Young idealistic Muslims, who enter into a marriage contract with the hope of getting a spouse of a great Islamic character like the ones they have read in the biographies of the Prophets and pious Muslims, should not opt for a divorce if they do not get one. As committed Muslims, they should not give up so easily and try to work on the marriage and educate the spouse on all the qualities of a wife or husband in Islam that one should have. Philosophically looking at the subject on marriage, one should realize that after all, marriage is a companionship and journey of a lifetime with a spouse and one should be prepared to face the joy and happiness in it and the trials and tribulations that come along as the marriage progresses and matures (Shahina Siddiqui, 2020).

Psychological Impact on Children of Divorced Parents

A home is the first school (*madrasah al-awwaliyyah*) for children in learning all positive values, attitude, language, human emotions, etc. They learn not only through inculcation of knowledge from people of the household but also through mistakes they make during early childhood for not abiding the rules and regulations set by the family and school. In their process of growing up, they try by all possible means not to repeat such mistakes later in their lives. Traditionally, in all societies in the world, parents become their first teachers. Each parent has something to contribute to the growth and development of the child. Whatever children learn during their tender age will be deeply ingrained in their psyche. With regard to the growth of the child, al-Ghazali once said that the child is like an uncut diamond in the hands of the parents (Jerrahi Order of America, 2014). Like the diamond cutter who works to bring the glitter from the uncut and unpolished diamond, parents too through education and nurturing religious and moral values, bring the best out of the child to be manifested in their behavior, attitude and personality. Psychologists believe that whatever learned and experienced during childhood are very difficult to be undone and forgotten. They entail the child all throughout his or her life.

Since parents have a huge impact on children's growth from childhood to adulthood and later into maturity, it is important that they should be provided with a peaceful and conducive environment that helps them in their intellectual, social, emotional, psychological and spiritual developments. In an ideal situation, children learn and emulate some of the characteristics and personality traits of their parents. The father can

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be a role-model in terms of discipline, time management, goal-setting, assertiveness, etc. While the mother can be a symbol of love, passion, compassion, patience, perseverance, persistence, etc. for their children. Under a normal circumstance, by inheriting the good qualities from both their parents, children will have a healthy growth in terms of body, mind and spirit (Shrier, 2014).

Conversely, when divorce takes place, the aforementioned ideal development of children will be hampered. Separation not only affects parents who chose divorce to end their marriage but their children as well. There is a great possibility for children of divorced parents to undergo some sort of emotional and psychological distress. Those children, who are not able to handle the situation and emotion well, will end up in problems that might affect their performance in school and life. It is pretty much normal for such children to lack in self-confidence, life motivation, social interaction, etc. In some serious cases, they might even get involved in some deviant behavior and substance usage (Sillekens & Notten, 2020).

Mothers who raise children in the absence of a father figure

Naturally, women well befit the position of a homemaker. In terms of food preparation, laundry, house maintenance and other household chores to a certain extent can be well handled by mothers in the absence of their husbands due to divorce. Beside this natural gift of the mothers, counselors are too familiar in listening to mothers who face problems in raising children in the absence of a father figure in the family. In most cases, such mothers face difficulties in disciplining their children, particularly the boys. Absence of the father figure in the family makes male children to think they are the man of the house. With such a feeling in them, boys do not pay heed to whatever communicated to them by their mothers. In Malaysia, many disciplinary problems arise among boys raised by mothers. There are cases where boys go loitering after school and end up committing petty crimes. On the other hand, girls feel unsecured to move around outside the household when there are no fathers to stand as a shield for the family in case of an emergency (Michael Kismet, 2018).

Fathers who raise children in the absence of a mother figure

After a divorce has taken place, single and responsible fathers will be able to cater for the needs of their children by raising enough

money to meet many of the physical needs of the family; like food, clothing, shelter, education, etc. This role of the father is possible because of his mobility as male to move around regardless day or night. In terms of children's age group, most divorced fathers are more competent in handling children who are school goers between the age of 7 and 12. The same cannot be true when it comes to age anything below 7; toddlers and infants. They might face a difficulty in handling infants who require a lot of attention. Naturally, men are not gifted with the ability to handle the tedious demands of infants. Tantrums shown by infants are very difficult for fathers to handle except for a few. Furthermore, handling infants and toddlers requires a lot of skills, patience, and more so it is a duty that demands a lot of time of the single fathers. Compared to men, women are better suited for such a position. Besides that, single fathers will have a hard time when their daughters come to age of puberty. It will be a lot easier for mothers to explain matters related to puberty and menstrual cycle compared to fathers. Perhaps if it is in the West, due to their openness in discussing matters related to sexuality, fathers might not face such an embarrassing situation in explaining to the daughters about issues related to women, but definitely in Malaysia and in most Muslim countries, it will be a thing out of the norm for fathers to do so. In cases where fathers lost their wives and chose not to get married again, normally they seek the help of the aunties of their daughters to explain to them women issues (Parker 2020).

Child Custody in Malaysia

In an unavoidable situation, when a divorce takes place under the *Shariah* court in Malaysia, the mother has the prerogative to be the custodian over the child/children (Mohamed Azam, 2017). Like Malaysia, Egypt and many other Muslim countries give the same privilege to the mother with regard to child custody. Surprisingly, the West too gives preference to the mother over the father. In agreement, in the Islamic and the Western contexts, the mother is seen more suitable in her capacity to educate and nurture good behavior in the child. Moreover, the emotional attachment that the mother has for her child when compared to that of the father, goes way back ever since the day she first conceived the baby. Upon conceiving, during the gestation period of nine months, she goes through endless difficulties. Out of love for her child, a mother endures all pain during the prenatal, labour and postnatal stages (Surah Luqman: 14). It is an undisputable fact that many communities of the world re-

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ardless of Muslim or not, believe that no one understands the child better than the womb that conceived it. In some special cases, when the number of children involved in a divorce is big, the custody is divided (split custody) between the mother and father. A few children will be put under the custody of the mother and a few others will be under the father. In such a situation, it is painful to see even the siblings are divided and going on separate ways. As they grow up in life, the bonding and love among the siblings in a divided custody weakens and in some worse cases they become strangers to one another. Such is the painful situation when a divided custodianship takes place.

Joint Custodianship of Children of Divorce will be the Best Option

The aforementioned discussion has shed light that divorce is not a thing encouraged in Islam. Nevertheless, it is the only option left when all other avenues are closed. Raising children by a single divorced parent has its own problems. Since parents have gone in different directions and children are caught in the middle, this section of the paper would like to explore and put forward some suggestions and perhaps the best option for all parties involved after a divorce has taken place.

Early Muslim scholars have spoken on their views on child custody in accordance with their time and culture. Some had given much weightage to the father as best suited for the role, while others preferred the mother. Although what had been written by classical Muslim scholars on child custody have their own merits in relation to the time and local customs of the scholars, present views should take into consideration the context of the modern time and cultural practices of the region in the world. In the Malaysian context, it is a moderate Muslim country with its diverse race and religious population. Moreover, in Malaysia most parents are well educated and have tertiary education. Not only that, most parents (father and mother) are either working or involved in some sort of business.

In analyzing the view put forward by some classical Muslim jurists who are of the opinion that the mother is the best choice for the custodianship of children below the age of 7 and the girls until they are married is in consonance with the proposition put forward by modern psychology.

In an ideal situation after divorce, whereby both parents are reasonably good practicing Muslims, a joint custodianship seems to be the

best option in raising children who are emotionally, spiritually and psychologically stable and normal. Chances are great for children of such parents to emulate or inherit the good qualities of both parents. Contrarily, there is a possibility that the absence of a parent either father or mother in a small or big way may affect such children. In order to be more professional and to produce better result in the upbringing of their children, divorced parents either one or both should not talk ill of the other to their children. In large number of cases not only in the Muslim world but also in the West, divorced parents make negative remarks of the other who is a father or mother to the children in the hope of winning all the love, respect and admiration for the sacrifices he or she does compared to the other.

In the Malaysian context, in most divorced cases, children mainly stay with their mother while the father goes missing in their lives. Mothers in the beginning, who feel comfortable with the arrangements of the separation, later go through countless difficulties in raising their children into adulthood. In most cases, they face financial difficulties in giving proper education and fulfilling other physical and emotional needs of the children. Such mothers only think of bringing back the divorced husband into their children's lives during some major events that happen in the family. In some cases, fathers are sought after as a *wali* (one who has the right to give the consent) for the daughters when a marriage is taking place in the family.

Another thing that is important in a joint custodianship is the visiting and meeting of parents with their children. Neither the mother nor father should be deprived of the right in spending time together with his or her children. If this right is denied to either one of the parents then there is a great possibility that the children might not truly know and understand their divorced father or mother. More than that, the chances of the children to love and appreciate what their separated father or mother is doing will be become slim.

All the above good suggestions are not recommended if one of the parents is involved in drugs or some criminal activities under the law. In such a case, meeting such a parent can adversely affect the upbringing, personality and emotion of the children.

Conclusion and recommendation

From the above analysis it is cogently clear that classical jurists have captured divine wisdom in stressing the rightful place of mother

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during the formative stage of child upbringing when they unanimously agreed with the Prophetic dicta that the mother is most qualified to take charge of child until she reaches the age of *tamyiz*. Nevertheless, their verdict varied if such a mother assumes another commitment which render her incapable of giving full attention to the child or her presence can be seen detrimental to the moral upbringing of the child, in which case the issue is one of choice from among the juristic opinions, on the basis of empirical evidence or reality on the ground (‘*urf wa al-waqi*’). This is in line with what psychology also proposes. Juristic opinion varies once the child is above the age of seven, but what is obvious is that the classical jurists have not explored the idea of joint custody but instead proposed the right of visitation to the non-custodial parent in accordance with ethics of such meetings. In their environments that might have sufficed for given opportunity to both the parents to contribute to and be involved in the wholesome grooming of the child. In the Malaysian context, it seems that the attitude towards the child after the intense battle for post-divorce reliefs and child custody between the separating parents would definitely leave their marks on the children and if not managed ethically would antagonize the children towards the losing party of the custody. Hence, it is for the local jurists to work out for the joint custody if it would be a viable option.

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