

AN ANALYSIS ON THE ISSUES OF THE RIGHTS OF SPOUSES IN THE ISLAMIC FAMILY LAW IN MALAYSIA

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Abstract

This paper intends to analyze problems regarding mutual rights of Muslims married couple in Malaysia. It has drawn the attention of many researchers to carry out studies on this issue since there have been accusations and complaints on the implementation of the Islamic Family Law (IFL) by the Syariah Court, which is said to have discriminated the wife/women of their rights. The qualitative approach research employed interviews and content analysis as method of study on the Islamic Family Law as well as on the documented cases. The results of the research showed that among the most disputable cases were matters related to polygamy, fasakh, jointly acquired property and children custodian. Conversely, all data were analyzed by using the qualitative data analysis, concluded that the Islamic Family Law in Malaysia has infact implemented the concept of equality.

Keywords: rights, Islamic family law, married, issue,

1.0 Introduction

Justice is the core principle of any form of legislations including the Islamic family law. In Malaysia, the purpose of Islamic family law is to protect the right of an individual regardless of gender, family lineage, status, ethnicity and etc (Abdul Jalil Borhan, 1998). It is legislated based on the Islamic Syariah revelations. Allah SWT says,

And now have We set thee (O Muhammad) on a clear road of (Our)
commandment; so follow it, and follow not the whims of those who know
not. (al-Quran, al-Jathiyah,
25:18)

The verse above clearly indicates that the Islamic Syariah is complete and perfect. All believers are commanded to oblige and forbidden to go astray as the ignorant. In this context, the Islamic family law is legislated to fulfill all the commands of Allah SWT in the holy Quran and the Islamic tradition, and will always be free of any known forms of discriminations.

Every Muslim, men and women, have their respective rights and these entrusted obligations must be fulfilled to whom they are due to. Allah says:

Lo! Allah commandeth you that ye restore deposits to their owners, and, if
ye judge between mankind, that ye judge justly. Lo! comely is this which
Allah admonisheth you. Lo! Allah is ever Hearer, Seer.
(al-Quran, al-Nisa', 5: 58)

There is much evidence regarding denial of rights between spouses that cause argument which threaten a marriage and eventually lead to divorce. According to Mohammed Yusoff Hussein, a research conducted by the Department of Islamic Development Malaysia (JAKIM) showed that the main factors that lead to divorce were irresponsible attitude (21%), irreconcilable differences (19.23%) and drug abused (13.77%). Other contributing factors were unfaithfulness (13%), family interference (12%), financial problem (19.23%), domestic violence (7%), and sexual problem (5%). Othman Mustapha (2010) concluded that a study conducted in 2008 showed that marriages of ten years and below have high tendency to end in divorce. Meanwhile, the study by JAKIM in 2007 found that 59.9% marriages in the same critical period ended with the same circumstances, with 32.2% for marriages of up to 5 years and 27.7% for 6 to 10 years. He added that there were 135,136 registered marriages and 27,116 recorded divorce cases in the year 2009 (Harian Metro 8 December 2010; I Luv Islam, 10-16 December 2010). The above statistics showed that marriages ended in divorce are the consequences of irresponsible spouses who failed to perform the entrusted obligations.

2.0 Problem Statement

There are several prevalent issues in the Islamic Family Law (IFL) in Malaysia with regards to the problems of Muslim married couples that require special attentions. Firstly, there are accusations of discrimination of the IFL against Muslim women, and secondly, allegations of unfair rulings of the Syariah Courts on Muslim women. In spite of these allegations, the Syariah Court performs its duty in favour of the women instead of men in reality.

Several local NGOs have made demands, lodged complaints and expressed dissatisfactory remarks that the IFL has deliberately discriminated the Muslim women (Sisters in Islam, 2000). These allegations eventually had forced the Cabinet to withhold the amended Islamic Family Law (Federal Territories) 2005 from being enacted, even though the Parliament has passed the Bill on 22 December 2006 (Utusan Malaysia, 18 January 2006). They added that the amendments to the Act will further discriminate Muslim women, and husbands will tend to abuse their wives' rights. The amendments such as items related to polygamy, order for dissolution of marriage (*fasakh*), jointly acquired property etc. are allegedly to instigate injustice on women. They also claimed that the practice of gender neutral to be implemented in the amended IFL will benefit the husbands over the wives (Sisters In Islam, 2005 (a), (b) dan (c)). As of the completion of this study, the postponement of the Act has already reached its sixth years and in fact it is costing the women the very justice that they were looking for.

Allegation of discrimination against Muslim women regarding the enforcement of the IFL was brought up along with biased verdicts on the Syariah court cases. One of the cases was *Faridah Dato' Talib vs Mohd Habibullah Mahmood* (1992)¹, which took the Syariah Court seven years to reach a verdict. The Syariah Court finally decided that her marriage cannot be dissolved and the rulings had caused the plaintiff to suffer emotionally and financially (Zaleha Kamaruddin, 1998). In another case that is yet to be solved until this day since it was filed in the year 2000 is *Ida Hayati Binti Taufik vs Ahmad Shukri Bin Kasim*² case, in which the plaintiff filed demands to her rights of maintenance, children's maintenance and debt. In Aida Melly case, the plaintiff had to wait seven distressful years for the Syariah Court to reach a decision, not only after the intervention of NGO's and the attention given by the Sultan Selangor (al Islam, 2009). All these cases portrayed that IFL as unjust and heavily in favor of the men over women.

¹ Faridah Dato' Talib vs Mohd Habibullah Mahmood (1992) 2 MLJ 793.

² Case file 1341/24/4/2000, case fail 1341/26/4/2000 and case fail 1341/24/5/2000. Telephone interview with Syarie lawyer of those cases, Mr. Nor Azmi Bin Mohd Ariff at 3.15 p.m 29th July 2008

Still, are all these discriminatory allegations brought forward by the women groups true? Have they pointed out that the Islamic enactment drifted away from the justice principles? Mohamad Isa Abd Ralip (2009) said the Syariah Court has been bombarded with negative remarks such as working very slowly, being unprofessional and practicing gender bias which definitely have tarnished the image of the Court. In reality, both genders involved in cases related to denial of rights and responsibilities. There were also cases reported wherein wives do not fulfill their responsibilities, abused their husband etc. and seems like the numbers are rising (Harian Metro. 24 January 2011 (a) (b) dan (c)). Thus, the amendment to the IFL (FT) 2006 which allow the husband to obtain *fasakh* or order for the dissolution of marriage is rationalized in today's situation.

In short, the rights of men in the Islamic Family Law are not being emphasized. Does this mean that men consider themselves to be discriminated? According to Md Akhir Haji Yaacob and Siti Zalikha Md Noor (1989), even though the Islamic Family Law has been enacted, it does not fully guarantee a harmonious marriage since it is only a form of social control. Therefore, Zaleha Kamaruddin (2001) suggested that further intensive researches on the enactment of IFL are needed to help and protect women in Malaysia. So, this study was conducted to analyze the substantive justice aspect of the Islamic family law in Malaysia in regards to the rights of both husbands and wives. Analysis on reported cases in court was also conducted. In addition, problems regarding to the rights of husbands in the enactment are identified in an effort to maintain the justice principles of the law.

3.0 Research Question

How far the Islamic Family Law in Malaysia has fulfilled the rights of husbands and wives based on the verdicts reached by the Syariah Court.

4.0 Research Objective

The study intended to analyse the rights of husband and wives as stated in the Islamic Family Law based on the rulings of the Syariah Court cases.

5.0 Research Method

The study adopted a qualitative research method in an attempt to achieve the research objectives. There are several qualitative methods that can be used such as analysing data from documents, records, interview, direct observation, participated observation and physical artifact (Robert K. Yin, 2003). Researchers adopted archival study because of it is suitable to the concept and objectives of the study to be achieved. According to Sabitha (2005), this form of study enables researcher to retrieve data from any available information. An interview was conducted among 6 subjects selected from six institutions (those who have authority and expert in Islamic family law). It consisted of a few unstructured questions including general (i.e. determined before the interview session) and specific (i.e. determined during the session based on emerging issue) questions.

Content analysis was carried out on the rights of married couple as stated in the Islamic Family Law and on the documented Syariah Court cases. This study is based on qualitative research approach whereby besides using content analysis method, descriptive comparison method was used as well. In data analyzing, the researchers has adopted the method of Qualitative Data Analysis.

6.0 Results and Discussion

Study was conducted on text of the Islamic Family Law of all the states in Malaysia and analysed provisions on the rights of married couple. Based on the interview, subjects have pointed out that certain provisions of the rights of married couple, in the IFLs, were disputed and contested in the

Syariah court by divorcing spouses. There are provisions that have also been criticized heavily on the grounds of injustice and inequality by some of the local women's group.

Table 1

Right/Provision	No./Frequency
Fasakh (Order of Marriage Dissolution)	6
Polygamy	5
<i>Harta sepencarian</i> (Jointly Acquired Property)	4
<i>Hadhanah</i> (Child Custody)	4
<i>Nusyuz</i> (Disobedience)	1
Nafkah (Maintenance)	2
Inheritance	1
Marriage without consent	2
<i>Wali hakim</i>	1
<i>Wali enggan</i>	1
Divorce	2
<i>Mutaah</i> (Consolatory Gift)	1
<i>Taklik</i> (Stipulation)	1

Analysis of Rights

Source: Interview

Out of the thirteen rights that were listed (refer Table 1), only four will be analysed based on their frequency which are polygamy, fasakh, jointly acquired property and *hadhanah*. Researchers also analysed documented Syariah cases from journals for further discussion.

6.1 Polygamy

Polygamy has always been a major issue for the women's group and NGOs. Plenty of memorandums related to polygamy have been submitted to the government as signs of protest. The antagonists of polygamy claimed that its legislation discriminates and abuses the wife. Furthermore, it will cause mistreatment to all the wives involved. Therefore, many have suggested stringent conditions to polygamy. It seems like such suggestions attempt to prevent Muslim men from practicing polygamy.

Research findings indicated that every states in Malaysia has legislated procedures to practice polygamy based on the IFL. Basically, every polygamy marriage must go through certain procedures and obtain the permission of the Syariah Court beforehand. However, there are differences in the provisions on polygamy, for example in Terengganu; a man is only require to a get a written permission from a Syariah judge. Whereas in other states, the applicant faces strict conditions in order to obtain the judge's permission such as his presence, his current wife, his future wife, *wali* (guardian) of the future wife and other involving individuals. In the state of Perlis, only the applicant must present, while in the Federal Territories, the attendance of both the applicant and his current wife are compulsory during the hearings before a Syariah judge.

Apart from the above, the amendments to the existing polygamy provisions are being constricted and improvised to achieve the actual purpose of polygamy according to Syariah Law. The court will evaluate whether the polygamy application is necessary and needed by the applicant. As for that, there were cases where applications were rejected because failure to fulfil the two required criterias. For example, in the case of *Ruzaini Hassan*³, the applicant's request was turned down by the court because his income did not suffice him for practicing polygamy even though his current wife supported the application. The justification on his polygamy application, to prevent licentious conduct, was also rejected by the court as such conduct can be prevented with his existing intimate relation to the current wife. In another situation, in the case of *Aishah Abdul Rauf vs Wan Mohd Yusof Othman*⁴, the hearing judge accepted the wife's appeal and denied permission for the husband to practice polygamy even though he is financially qualified but fall short of other required conditions. There were also cases where the Syariah Court granted polygamy permissions despite protest from the wives, as the applicants managed to fulfil all the required conditions. In the case of *Shafri bin Jamaluddin vs Kuning Binti Kassim*⁵ for example, the judge ruled that the applicant to pay monthly maintenance of RM1500.00 to his wife and children.

This research found that the Syariah Court has provided room for justice and equality to any discontented wives to appeal against the Court's permission for the husband to practice polygamy. Almost certainly, the judge may overlook at certain conditions during the first hearing. Findings also indicated that, in most appeal cases, the wives were on the triumphant side. Among the cases was *Ayisha Begum Abdul Kadir vs Maideen Nainamusa*⁶, the appellant challenged her husband capability to provide maintenance and fair treatment to both two wives, the court accepted her appeal. In another case, *Rajamah Mohamad vs Abdul Wahab Long*⁷, the appellant argued that the husband provided false monthly personal income during the permission for polygamy hearing. The court accepted the plaintiff's appeal as the defendant failed to fulfil the necessary and the required polygamy conditions.

In addition, the findings indicated that the Syariah Court prioritizes the welfare of the wives before approving polygamy. For that reason, most of the appeal cases were won by the wives and permission for polygamy by the ruling judge was annulled. Likewise, in cases where permission for polygamy was granted, the judge will ensure that the wives are guaranteed to receive their existing rights like monthly maintenance. For instance, refer to *Shafri bin Jamaluddin vs Kuning Binti Kassim*⁸.

Besides, in order to safeguard the welfare of the existing wife; supposedly the husband is allowed to practice polygamy, she is allowed the right to own any jointly acquired properties. Previously, this right is only eligible after dissolution of a marriage or upon the death of a husband. Now, it can be done during a marriage. The amendment and renewal of the IFL is updated and improvised from time to time. Justice without bias is very crucial for all as explained by Abdul Jalil Borhan (1998). The amendment is not only beneficial to the wife to own the jointly acquired properties but also to the husband during their marriage.

³ 2004 CLJ (Sya) pp. 405-420

⁴ 2004 CLJ (Sya) pp. 27-38

⁵ Seremban Syariah High Court (Case Mal No. 03-14-99P) *Jurnal Hukum Jld XV Bhg II Syawal* 1423 H/Dec 2002.

⁶ 2004 CLJ (Sya) pp. 46-57

⁷ 2004 CLJ (Sya) pp. 233-241

⁸ Seremban Syariah High Court, (Case Mal No. 03-14-99P) *Jurnal Hukum Jld XV Bhg II Syawal* 1423 H/Dec 2002.

6.2 Dissolution of marriage or *Fasakh*

IFL. Study found that all states in Malaysia contain *fasakh* clauses in their respective IFL. This is also one of the hardest methods of marriage dissolution because of its lengthy trial period and exhausts much resource on both husband and wife. Rulings can only be achieved once the judge is satisfied with all the facts and arguments presented by the parties concerned. Based on the studied subject, it was found that, *talaq*, another form of divorce is the most encouraged method in Islam because it is consensual in nature and performed voluntarily by both husband and wife. *Talaq* cases are very straightforward and the court can easily pass a verdict. Meanwhile, in *fasakh* divorce, each opposing spouse is required to prove the offense of the other one. Regularly, *fasakh* divorce case takes a very long time to settle, and there were cases like the case of *Abdul Hanif Abdullah vs Rabbiah Bibi Labhu*⁹ which lasted for 7 years. However, some *fasakh* cases were short because of solid arguments and concrete facts presented during a trial satisfies the hearing judge to pass an appreciative verdict.

Substantially, this study identified that *fasakh* divorce can be filed by any husbands or wives. With the exception for Terengganu and the Federal Territories, which use the term 'wife or any married women', other states use the term 'husband or wife' to indicate that both husband and wife have the rights to *fasakh* divorce. The same situation applies in Perlis that use the term 'any married person'. There are provisions on reasons to file for *fasakh* divorce in the IFL. The research showed that the wives produced more reasons of *fasakh* divorce than the men.

Some of the grounds of *fasakh* from the wife are negligence or failure of the husband to provide for her maintenance for a period of three months; failure of the husband to perform, without reasonable cause, his marital obligations (*nafkah batin*) for a period of one year and etc. While the husband can use reasons like, the wife has been missing for a period of more than a year; the wife fail to perform, without reasonable cause, her marital obligations (*nafkah batin*) for a period of one year and etc. The provisions of *fasakh* provide rights and justice to both husbands and wives from being ill-treated by their respective spouses.

In general, *fasakh* is synonymously known as the women's right; however, the amendments to the IFL equalize the husbands' right to file for *fasakh* divorce on irresponsible wives. The term 'husband or wife' used in the *fasakh* clause clearly indicates the men right to *fasakh* on permissible and justified grounds. The amendment on *fasakh* clause is appropriate as the women nowadays have achieved a parallel status in all aspects of life and career. Cases on betrayal and cheating wives frequent the mainstream media. Therefore such provision grants the right to husband on the probable of the wife to commit *nusyuz* (disobedience). For example, in the case of *Maimunah Inalhage vs Abdullah Bin Hussin*¹⁰, where the plaintiff's claim on *mutaah* (consolatory gift) was rejected by the Court because she failed to prove the husband's irresponsible conducts. On the contrary, the court found that it was the plaintiff who had behaved irresponsibly.

Most of the *fasakh* cases, as the researcher referred to, were filed by the wives against their husbands. The court will only pass a verdict once the hearing judge is satisfied with facts and statement given against a defendant. In the case of *Rasnah Binti Arifin vs Shafri Bin Khalid*¹¹ the court permitted the *fasakh* divorce filed by the wife on the ground that the husband had failed to provide *nafkah zahir* and *nafkah batin* (material need and sexual need) for two years. The plaintiff's testimonials were *syahadah* (authentic) and *bayyinah* (supported) by the children. Besides that, interviews conducted

⁹ 2004 CLJ (Sya) pp. 1-16

¹⁰ Maimunah Inalhage vs Abdullah Bin Hussin, JH 1410/1990, Jil VII, Part 1, p. 88

¹¹ Butterworth Syariah Court, Penang, Case mal No. 03-125/2000, *Jurnal Hukum Jld XV Bhg II Syawal* 1423/Dec 2002.

on the research subject showed that some *nusyuz* (irresponsibilities) cases were committed by the husbands. This fact tallies with the JAKIM statistics (2007) that indicates 21 percent of divorce is due to irresponsibilities.

The result of the interview conducted with the subject explained the rationale of allowing *fasakh* divorce to be filed by either husband or wife. Those who were convicted on the charged of *nusyuz* are deprived of certain rights, consequences of their own offense. If the divorce is caused by the husband then the wife will retain all her rights after the marriage dissolution. Conversely, should the wife instigate the divorce then she will lose certain rights such as *mutaah* (consolatory gift) right. However, not all of her rights, after the divorce, will be denied by the court.

Researchers also presumed that the provisions of divorce were not properly disseminated to the public. The IFL infact offers options for a husband to divorce his wife using methods of *talaq*, *fasakh* or *khuluq*. In a *nusyuz* wife case, it is advisable for the husband to divorce her using the *talaq* method. The researchers agreed that this form of divorce is the most discretionary in nature. While *faskh* divorce is very complicated; and tend to expose personal affairs in a marriage. However, *fasakh* is useful to educate *nusyuz* or cheating wives because they will be denied of certain rights since they are the ones who initiated the divorce.

6.3 Jointly Acquired Property

The right to jointly acquired properties is legislated in the Islamic Family Law in all states in Malaysia. Study found that previously, this right only applies in the event of divorce or death of a spouse. The term '*harta sepencarian*' (jointly acquired property) is clearly used in its current provision under the IFL. However, the states of Perlis, Terengganu, Sarawak and the Federal Territories still maintain the term '*harta sepencarian*'. For the rest of the remaining states in Malaysia, the provision of jointly acquired property is generally placed under Section 59 and the exclusive clause for jointly acquired property has been suspended in the amendment.

The latest amendments to the IFL indicated that the term '*harta sepencarian*' has been added under Section 23 (polygamy), in most of the Malaysian states IFL. Only the states of Perlis, Terengganu, Sarawak and the Federal Territories excluded this term from the polygamy clauses. The rationale for putting the term '*harta sepencarian*' under polygamy clause is to enable the respective properties to be divided whilst the marriage still longs. For example, in the event of polygamy, the husband and wife may divide their jointly acquired properties between them prior to the husband polygamy practice. However, study conducted on cases in journals does not indicate such occurrence. Most of the cases analysed, showed that wives tend to seek nullification of the husband application to practice polygamy as in the case of *Ayisha Begum Abdul Kadir vs Maideen Nainamusa*¹². Whereas in the case of successful polygamy applications, the court ordered the husband to retain the maintenance to the first wife and their children as in the case of *Shafri bin Jamaluddin vs Kuning Binti Kassim*¹³.

The amendments showed that a polygamist is also entitled to the rights of jointly acquired property as the first wife. Contemporarily, such amendment is fair and just not only to the husband but also to the first wife who may have a career and contributed financially in acquiring some of the properties involved. However, as of this study, the researcher did not find any documented cases of polygamist filing for his right to jointly acquiring properties against the wives. Cases related to this right only existed on matters of divorce or death of a spouse and involving complainants of either a husband or

¹² 2004 CLJ (Sya) pp. 46-57

¹³ Seremban Syariah High Court, (Case Mal Bilangan 03-14-99P) Jurnal *Hukum Jld XV Bhg II Syawal* 1423 H/Dec 2002.

a wife. In matters of jointly acquired properties, every wife has the right to claim ownership even during a marriage; regardless of time frame, and whether the contribution was in the form of monetary or morale. In the case of *Zaiton Binti Abdullah vs Zailan Bin Abas and Six Others*¹⁴, the plaintiff filed claims of ownership on the jointly acquired property against her late husband and children. The court finally decided that the plaintiff was entitled to own ½ of the jointly acquired properties while the other half will be divided according to the process of inheritance. The court had considered the plaintiff's contributions during her marriage.

Study also showed that on most cases of jointly acquired property, that had been allowed by the court, were filed by the wives. For instance in the case of *Semah Binti Daud vs Hassan Bin Awang*¹⁵, in which the plaintiff's appeal was accepted and she received 1/3 of the nett amount sales of a jointly owned house; and the hearing cost was borne by the respondent. There were cases of jointly acquired properties filed by husbands that were rejected by the court based on facts presented rather than discriminating any gender. In the case of *Nik Mansor Nik Ali vs Tuan Hafsah Tuan Man*¹⁶, for instance, the court decided to reject the claims of plaintiff on jointly acquired properties because the court had considered the properties involved as *hibah* (gifts). The plaintiff had previously given two houses to his children, sold the automobile and transferred his Tabung Haji savings to his wife as gift. The court has carefully evaluated all facts and arguments presented by the opposing sides before making a decision on the jointly acquired property cases. In the case of *Ahmad Fikri Mahmud vs Habibah Muhammad*¹⁷, the court rejected the plaintiff's claim on a jointly acquired house because the defendant provides solid arguments along with *qarinah* (circumstantial) evidence in the form of receipt of purchase of the house. However, in this case, the court did not evaluate the morale contribution of the husband while acquiring the property. Basically, if the wife is the claimant, the court will determine both her explicit and implicit contributions (morale) on a jointly acquired property.

When it comes to deciding the amount to be awarded on a jointly acquired property, the court based the decision on facts of the case. All explicit contributions will receive ½ of the property amount as in the case of *Ahmad Fikri Mahmud vs Habibah Muhammad*¹⁸ where the defendant successfully proven her contribution in the jointly acquired property. Whereas in the case of *Norsiah Arshad vs Marsum Paing*¹⁹, the court granted 1/3 of the property amount, considering the plaintiff's implicit contribution during her 7 years marriage.

Basically, the study on the documented court cases showed that all claims on jointly acquired property filed by the wives were allowed by the court. The amount to be awarded is based on the types of contribution given in acquiring the property. This is a right of women as they have been faithful partners to their husband during their marriage. However, in such cases involving men as plaintiff, the court does not take into account the men's implicit or morale contribution while acquiring the property with reference to cases like *Ahmad Fikri Mahmud vs Habibah Muhammad*²⁰. But in claim cases of the wives, if she failed to produce explicit contribution to the jointly acquired property the court will only grant her 1/3 of the property amount as a consideration of her implicit contribution.

¹⁴ Kuala Terengganu Syariah, Summon Case No. 11200-071-21-2003, *Jurnal Hukum Jil XXII Bil II* 1427H.

¹⁵ Kota Bharu Syariah Appeal Court, Appeal Case mal No: 03000-017-0004-2008, *Jurnal Hukum Jil. 26* Part 2 1429H.

¹⁶ 2007 CLJ (Sya) pp. 219-229

¹⁷ 2007 CLJ (Sya) pp. 340-351

¹⁸ 2007 CLJ (Sya) pp. 340-351

¹⁹ 2005 CLJ (Sya) pp. 214-228

²⁰ 2007 CLJ (Sya) pp 340-351

6.4 Hadhanah (Children Custodian)

Child custody is the most common dispute between divorcing spouses especially if the separation is a nonreciprocal. Analysis on the provision of the IFL clearly stated that child custody is an exclusive right of the mother in the event of a divorce (Section 82). It is mandated under the Syariah Jurisprudence and the IFL, meanwhile the father is granted the right to visit the child/children. However, there is a limit to this right because there are provisions under the IFL that revokes it. Among the matters that nullify a mother's right to child custody are remarrying a different man that is not muhrim to the child, having excessive ill demeanors and etc (Section 84). In reality, most *hadhanah* dispute cases occur on the ground of who is more eligible to the right.

The study conducted found that the right of *hadhanah* is granted to the mother after divorce. For example, in the case *Noonita Kamaruddin vs Faeiz Yeop*²¹, the wife was granted the right of custody after divorce while the father was given the right to visit. Like other custodial battle cases, the mother is entitled to have the right to *hadhanah* after marriage dissolution. This is because the wife has fulfilled all the necessary conditions regulated by court. Another example is in the case of *Hafizah Indra Binti Abdullah vs Jamaluddin Bin Eusoff*²², the mother was granted the custody because she has sufficient conditions to be the *Hadhinah* (caregiver) as required by the IFL. Moreover, there was no contest from the defendant. Meanwhile in the case of *Nurfarhani Uma Binti Abdullah vs Muhammad Noor Manoranjan Bin Abdulah*²³, she made an appeal to the court to retract the custodianship granted to her ex-husband because the appellant was absence during the trial. The court granted a retrial because the husband did not declare an *istizhar* vow during the last trial. Likewise, in the case of *Noor Liza Abd Latiff vs Mohammad Asri Ismail*²⁴, the child custodianship was granted to the mother as the defendant failed to turn up and testify against the mother's credibility as the *hadhinah*.

There were cases where mothers lost the right of *hadhanah* to the fathers. The main reason in such situation is because the mother has lost the qualifications under Section 84, as in the case of *Mohd Radhi Hj Che Daud vs Khadijah Yaacob*²⁵. After the couple divorced, the child was under the care of the plaintiff's mother for three years, since both the divorced parents were occupied with their studies. As for that reason, *hadhanah* was granted to the father as the court found and satisfied that the child's welfare is in capable hands.

In another case of *Noonita Kamaruddin vs Faeiz Yeop*²⁶, the mother's *hadhanah* right was withdrawn as the mother remarried a man that has no *muhrim* relation to the child. After four years the child living with the father, the mother made an appeal on her right to guardianship. The child, 10 years old and mumayyiz, had chosen to stay with both parents. Therefore, the court decide that the father retains his guardianship and the mother was given the visiting right of every two weeks monthly and during school holidays. The cases presented above showed that *hadhanah* is a woman's right until she lost the qualifications as the *hadhinah*.

²¹ 2004 CLJ (Sya) pp 198-208

²² Penang Syariah High Court, Case Mal 07100-028-0032-2001, 07100-021-0033-2001, 07100-024-0034-2001, 07100-017-0035-2001, *Jurnal Hukum Jld XXII Bhg 1*, 1427H.

²³ Penang Court of Appeal, Appeal Case Mal: 07100-028-0001-2005, *Jurnal Hukum Jld 24 Bhg 2*, 1428H.

²⁴ 2007 CLJ (Sya) pp. 478-495

²⁵ 2005 CLJ (Sya) pp. 187-197

²⁶ 2004 CLJ (Sya) pp. 198-208

Study indicated that both parents claim the qualification to be the *hadhinah*, but the court emphasizes on the children's welfare. For example, in the case of *Faridah Hanim Omar vs Abd Latiff Ashaari*²⁷, *hadhanah* was granted to the mother even though her children have reached the age of 12, 14 and 19 years old. Despite the expiry period of *hadhanah*, the mother still fulfills the conditions of the Syariah Law; besides there is no protest from the father. The same condition occurred in the case of *Mohd Radhi Hj Che Daud vs Khadijah Yaacob*²⁸, *hadhanah* right were awarded to the father, even though the children were under the care of the plaintiff's mother. The court taking into account the welfare of the children and considered the 3 years of close relations the children have with their grandmother, Mariam Bt Che Mamat. The same decision was ruled in the case of *Noonita Kamaruddin vs Faeiz Yeop*²⁹. The guardianship was given to the father, since he has cared his children for four years before the mother challenged the decision. The mother however was awarded the right to visiting the children biweekly a month and during school holidays.

7.0 Conclusion

Analysis on several selected rights showed that the IFL and the syariah institute have performed equal justice on all spouses. This statement was clearly demonstrated in the analysed court cases and the verdicts reached by the syariah courts. Thus, all claims and disputes on the rights of Muslim married couples are properly treated with justice as legislated in the IFL. Consequently, the outcomes of the analysis have purged the allegations of gender discrimination practice in the Syariah Jurisprudence and the Syariah Court hearings. However, efforts to improve the implementation of gender equality in the IFL are encouraged and welcomed to ensure that rights of each Muslim individual are secured and updated from time to time within the context of Syariah Jurisprudence.

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