



A SOCIO-LEGAL STUDY ON FATHERS' VISITATION
RIGHTS AFTER DIVORCE IN MALAYSIA

BY

AKBAR BIN KAMARUDIN @ ABDUL SHUKOR

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Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia

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ABSTRACT

Generally, the law relating to custody and visitation rights after divorce recognises the best interests of the child as the main consideration. The interests is adopted through sole or joint custody. Although Malaysia recognises the interests through sole custody, the recognition actually represents thirty years of non-legal development. The non-legal development demonstrates failure on part of Malaysia to follow some countries which have executed legal reforms based on social reality. These countries have adopted joint custody in resolving problems arising from sole custody based on recent studies. Under sole custody, the mother is mostly awarded with custody of the child. It means that the mother obtains the residence of the child and parental responsibility as well as care for the child. Visitation rights are mostly awarded to the father. The main problem arising from sole custody is the lack of contact between the child and the father. The other problem concerns child-support obligation. Common cited reasons of these problems include parental remarriage, financial status, negligence, responsibility as well as care for the child, and geographical distance. Some may argue as to whether Malaysia is facing the same problems which require the legal reforms. Thus, this study attempts to answer the argument. Although this study discusses and analyses legal history, theories, and practices under Civil and Islamic laws with specific references to Malaysia, it also involves those based on the Malaysian sample. The sample includes the patterns of the decisions of the Civil and Shariah courts, experiences, and challenges faced by the parents and the children through the quantitative (1302 court cases) and qualitative (19 informants) methods. Legal history highlights the recognition of the best interests of the child as the main consideration. Legal theories and practices focus on how the interests is interpreted through the best interest factors. This study confirms patterns made by the recent studies concerning the dominance of sole custody. Under sole custody, custody of the child is mostly awarded to the mother and the father is mostly granted with visitation rights. The lack of contact between the child and the father is also the main problem under sole custody. Common reasons behind this problem include remarriage, financial status, and parental negligence. Apart from these patterns, the most important trend is the recognition of joint custody based on facts of the case. Some court cases establish the willingness of the judges to award joint custody although Malaysia recognises sole custody. The informants generally believe that joint custody should also be recognised based on facts of the case. The attitudes of the judges and the informants should demonstrate the necessity of Malaysia to also adopt the legal reforms as executed by these countries based on social reality. The reality should also be considered as strengthening further the best interests of the child as the main consideration.

ملخص البحث

إن القانون المتعلق بحقوق الحضانة والزيارة بعد الطلاق عموماً يعترف المصالح الفضلى للطفل بوصفها الاعتبار الرئيسي. واعتمدت المصالح من خلال ترتيبات حضانة الوحد أو المشتركة. وعلى الرغم من أن ماليزيا تدرك مصالحها من خلال ترتيبات حضانة الوحد، فإن الاعتراف يمثل في الواقع ثلاثين عاماً من التنمية غير القانونية. والوضع غير القانوني يشير إلى فشل ماليزيا في متابعة بعض البلدان التي قامت بإصلاحات قانونية استناداً إلى الواقع الاجتماعي. وقد اعتمدت هذه البلدان ترتيبات الحضانة المشتركة في حل المشاكل الناشئة عن ترتيبات حضانة الوحد على أساس الدراسات التي أجريت مؤخراً. وبموجب ترتيبات حضانة الوحد تمنح الأم المطلقة حق حضانة الطفل في معظمها. فهذا يعني أن الأم المطلقة يحصل على الإقامة للطفل، وتحمل مسؤولية رعاية الطفل بعد الطلاق، وبمنح حق الزيارة للأب في معظمها. والمشكلة الرئيسية التي تنشأ من ترتيبات حضانة الوحد هي عدم وجود اتصال بين الطفل والأب المطلق. والمشكلة الأخرى تتعلق بمسؤولية دعم الأطفال. وأسباب هذه المشاكل غالباً تشمل زواج والديه بزواج جديد، والوضع المالي، والإهمال، والمسؤولية العائلية، والرعاية للطفل، والبعد الجغرافي. قد يتساءل البعض حول ما إذا كان ماليزيا يواجه نفس المشاكل التي تتطلب إصلاحات قانونية. وبالتالي، فإن هذه الدراسة تحاول الجواب على هذه المشكلة. وعلى الرغم من أن هذه الدراسة تناقش وتحلل التاريخ القانوني والنظريات والممارسات في إطار القوانين المدنية والإسلامية مع إشارات محددة إلى ماليزيا، فإنه ينطوي أيضاً على العينة الماليزية. وهذه العينة تتضمن أنماط من قرارات المحاكم المدنية والشرعية، والخبرات، والتحديات التي يواجهها الآباء والأمهات المطلقات والأطفال من خلال أساليب الكمية (19 المخبرين) والنوعية (القضايا المعروضة على المحاكم 1302). ويسلط التاريخ القانوني الضوء على الاعتراف بالمصالح الفضلى للطفل بوصفها الاعتبار الرئيسي. وتركز النظريات والممارسات القانونية على كيفية تفسير المصالح من خلال عوامل المصالح الفضلى. وهذه الدراسة تؤكد الأنماط التي أدلى بها

الدراسات التي أجريت مؤخرا بشأن السيطرة على ترتيبات حضانة الوعيد. وفي إطار الترتيبات، يتم منح حضانة الطفل للأم المطلقة في معظمها ويتم منح الأب حقوق الزيارة. وعدم وجود اتصال بين الطفل والأب أيضا هو المشكلة الرئيسية في إطار هذه الترتيبات. والأسباب الشائعة وراء هذه المشكلة تشمل الزواج من زوج جديد، والوضع المالي، وإهمال الوالدين. وبصرف النظر عن هذه الأنماط، فإن الاتجاه الأكثر أهمية هو الاعتراف بترتيبات الحضانة المشتركة استنادا إلى وقائع القضية. وبعض القضايا المعروضة على المحاكم تشير إلى استعداد القضاة في منح حق الحضانة المشتركة على الرغم من أن ماليزيا تقر ترتيبات حضانة الوعيد فقط بناء على وقائع القضية. والمخبرين عموما يعتقدون أن ترتيبات الحضانة المشتركة ينبغي أن تكون على أساس وقائع القضية. وهذه المواقف من القضاة والمخبرين تشير إلى أنه من الضروري، أن تتخذ ماليزيا أيضا الإصلاحات القانونية التي تنفذها هذه الدول على أساس الواقع الاجتماعي. وهذا الواقع ينبغي أيضا أن تعتبر مواصلة تعزيز المصالح الفضلى للطفل بوصفها الاعتبار الرئيسي.

APPROVAL PAGE

The thesis of Akbar bin Kamarudin @ Abdul Shukor has been approved by the following:

Zaleha Kamaruddin
Supervisor

Azizah Mohd.
Co-Supervisor

Normi Abdul Malek
Internal Examiner

Mohd. Na'im Mokhtar
External Examiner

Amir Akramin Shafie
Chairman

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

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I dedicate this thesis firstly to my late mother, Hajjah Fauziah binti Abdul Rashid who has inspired me in significant ways, more than she will ever know; secondly to Nurasyikin, Ahmad Adli, and Nur Amani for their patience and generosity throughout.

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