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**RIGHTS OF A CHILD: A COMPARATIVE STUDY BETWEEN  
SYARIAH AND CIVIL LAW**

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I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

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## ABSTRAK

Kajian ini membincangkan tentang hak kanak-kanak yang perlu di ketahui oleh semua lapisan masyarakat terutamanya kanak-kanak itu sendiri. Selain itu juga, kajian ini juga membincangkan sejauh mana perlaksananya terhadap kanak-kanak di dalam Islam mahupun sivil. Adakah hak kanak-kanak ini mempunyai pelaksanaan yang sama ataupun tidak. Kajian ini bertujuan untuk membuat perbandingan di antara hak di dalam undang-undang syariah (Islam) dan di dalam undang-undang sivil. Untuk memperolehi maklumat, dua method kajian digunakan iaitu temuramah dan kajian perpustakaan. Disamping itu juga kajian ini bertujuan untuk melihat kedudukan hak kanak-kanak di dalam undang-undang sivil dan Syariah. Kajian ini adalah untuk mengenal pasti masalah yang berkaitan dengan persoalan hak kanak-kanak yang mungkin timbul di dalam kedua-dua sumber undang-undang tersebut. Hasil kajian ini juga menunjukkan bahawa masih banyak perkara yang perlu dibaiki untuk menjamin konsep hak kanak-kanak untuk melindungi kanak-kanak tersebut. dapatlah dilihat bahawa peruntukkan di bawah undang-undang Islam adalah menyeluruh dengan perbincangan terperinci namun terdapat banyak kelemahan di dalam undang Syariah yang perlu dibaiki berbanding undang-undang civil dan pelaksanaan terhadap hak kanak-kanak di dalam undang-undang Syariah (Islam) dan di dalam undang-undang sivil adalah sama akan tetapi ianya berbeza dari segi pelaksanaan, hal ini adalah kerana mengikut pindaan-pindaan serta peredaran zaman dan masyarakat pada masa sekarang.

## ABSTRACT

This researcher discusses about the child's right and that every individual in the community should be alert about it. Besides, this researcher also discusses how far the Syariah and civil laws are concerned with regards to this matter. It has been done purposely to distinguish between the Islamic law and civil law. In getting the input or information for this researcher, two methods have been used, through interviews and analysis from the libraries. Beside that, this academic project is to compare the position of child's rights between civil and Syariah Law. The results from the research show that there are many things that must be improved to determine or ensure the concept of a child's right is truly implemented to protect children. Even though, the provisions under the Islamic law are entirely with the detailed discussions, but in the prospect of Syariah Court are many weaknesses that must be revamped compared with the civil Court and the implementations of child's right in both laws are similar but there are differences in the means of implementing it. The reason is the laws have been changing from time to time and proven by the federal government as long as it does not contradict with the Shariah.

## ملخص البحث

يناقش هذا البحث عن حقوق الأطفال التي يجب أن يعرفها جميع المجتمع وخاصة هؤلاء الأطفال ، وبجانب ذلك، يناقش هذا البحث أيضا عن مبدى تنفيذ هذه الحقوق للأطفال في القانون السلامي أو القانون الدولي، لمعرفة هذه الحقوق بين الأولد من درجه مساواتها وعدمها، ويهدف هذا البحث إلى المقارنة بين القانون الدولي و القانون الإسلامى، والمنهج الذى استعمل الباحثة فى هذا البحث هو المنهج المكتبى ومنهج المقابلة بالأطفال وبجانب الذى، هذا أكاديمي المشروع أن يقارن موقع يمين الطفل بين المدني والقانون الدولي. النتائج من البحث شوّفت بأنّ هناك العديد من الأشياء التي يجب أن تكون محسّنة أن تصمّم أو تضمن مفهوم يمين الطفل حقا أداة تلك أن تحمي أطفال. مع ذلك، الشّروط تحت القانون الإسلامى بالكامل بمناقشة التّفصيل، ولكن في توقع المحكمة الإسلامى هي العديد من الضّعف الذي يجب أن يكون يفحص بدقة مقارنة مع المحكمة الدولي وهذا البحث غد أن تنفيذ حقوق الأطفال من ناحية القانون الدولي يساوى ينتفيدها من ناحية القانون الاسلامى، وإنما وجدا لاختلاف فى أسلوب التنفيذ وذلك بسبب التبديلات و التغيرات وفى الظروف و أصول المجتمع المعاصر.

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# TRANSLITERATION

## 1. Symbol

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ء	,	فأر	fa`r
ب	b	برد	burd
ت	t	تَلّ	tall
ث	th	ثوب	thawb
ج	j	جدار	jidar
ح	h	حليب	halib
خ	kh	خادم	khadim
د	d	ديك	dik
ف	f	فيل	fil
ق	q	قلب	qalb
ك	k	كلام	kalam
ل	l	لبّ	lubb
م	m	مال	mal
ن	n	نجم	najm
هـ	h	هول	hawl
و	w	ورق	waraq
ي	y	يم	yam

## 2. Short vocal

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
_____	a	كتب	kataba
_____	I	علم	'alima
_____	u	غلب	ghuliba

## 3. Long vocal

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ا، ي	a	عالم، فتى	'alima, fata
ي	I	عليم، داعي	'alim, da'I
و	u	علوم، أدعو	'ulum, Ad'u

## 4. Diftong

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
و	aw	نوم	nawm
ي	ay	ليل	layl
يَ	iyy	شافعي	shafi'iyy (lasted)
وَ	uww	علو	'uluww (lasted)

## ABBREVIATION

a.s	‘alayh al-salam
JH	Journal Hukum
MLJ	Malay Law Journal
P	page
Saw	salla Allah ‘alayh wa sallam
Swt	subhanahu wa ta’ala
n.a	no author
n.pl	no place
n.d	no date
npb	no publisher
Vol.	Volume

## CHAPTER ONE

### INTRODUCTION

#### 1.1 BACKGROUND OF RESEARCH

Children are the gifts of marital relation. They are adornment of the house, the beauty of the family, and the guarantee of the continuation of life. That is why Allah has made material affection as the most important thing in this life.

The children's right is a new issues coming under the Civil and Islamic law. At the international level, it is part of the social responsibility and their awareness about this group's welfare as well as women and folks' welfare.

The history of enacting the civil law relating to this matter is, when they are facing the problems in distributing the family's properties, which is inherited from their father. Therefore, there is a law, which concerns about the children's right.

The 'Majlis Umum' made by United Nation (UN) had declared the enactment of the children's right in 1959. In this declaration, one of the content stated that the right of children should be stressed and concerned by all people as a protection to the child.

Besides, education and guidance should be given to the children, as it is the obligation of the parents to do so. Generally, the rights of children are as follows: give a good name to the baby, give them care and love, fair treatment to all children etc. with the hope, the whole family's members will get the blessed from Allah.

In Islam, the right of the children is based from the Quranic verse and Hadeeth of the Prophet. One verse from the Quran mentioned that:

"ووصينا الإنسان بوالديه، حملته أمه، وهنأ على وهن، وفصأله في  
عأمين أن أشكر لي ولوالديك إلى المصير،"

"And we have enjoined on man (to be good) to his parents: in travail upon travail did his mother bear him, and in years twain was his weaning: (hear the command)..."

Parents are responsible for giving their child appropriate rights and they need to have knowledge about the rights of children that should be given attention. This is related to the rights that should be implemented such as the right to have good and proper names, good lineage, and also the rights to be given good education and so forth.

Meanwhile, the children also should know what kind of rights they deserved for. The children also have their own duty and responsible towards their parents and as a child, they are also given some rights, which are mentioned by Allah and Prophet Muhammad s.a.w in the revelation.

Parents should give fully attention to the rights of their children not only in satisfying their basic human needs that, foods, shelter, education, safety, and also proper clothes but also other rights including the freedom, protection from danger.

In one of the hadith of Rasulullah s.a.w, he explained about the importance of preserving the rights of the children. Rasulullah s.a.w also said that a child is the most important and the most precious element should have in one family. Thus, a family won't be completed without a child. As Rasulullah s.a.w said in a hadith:

"من حق الولد على الوالد أن يحسن أدبه و يحسن اسمه."

"Among the rights of a child to his father is to preserve his manner and also his name."

In this hadith, Rasulullah s.a.w said that a good name and good morality should be given to a child. From this hadith, Islam really stressed on the proper name that should be given to a child and on the morality and manner. People also believed that a proper name reflects the morality of a person.

Besides that, the society or community also play greater role in defending a child's rights. If the rights are abused, then it should be defended by the society including the family. This is important because the society is a big institution that will give big impact in one's life in defending and preserving one's rights. For example, if a child were physically or sexually abused, the society as the responsible institution will fight for the child's justice and defends his or her rights a child and human being. Thus, the role played by the society and the community is very important in order to defend them (the children) if they were abused or being exploited by bad people.

Due to cases happened nowadays, where usually relatively related to children, it is now come into the attention of the authority on their fates. Because of this situation, declarations are made on objectives to protect the rights. For example, the celebration of Children's Day by the whole world considered as one privileges given to the children. It is celebrated by the nations in the world and objectively to give acknowledgements to the world of the importance of a child in one's life.

Efforts done eventually and we can see many acts of the government related to the children's rights. For instances, the Children's Act, in Family Law (Federal Territory) Act 1984 (Act 303) whereby the objectives of this act is to protect the children rights if something happened to them physically, mentally, or sexually.

In this research also, the writer wants to discuss the role of government ruling towards this issue and how the process worked effectively in protecting the children. The writer also wants to know what kind of rights of these children that is should be implemented and what is not.

There are four elements that have been stressed by Islam and they are the rights of life, protection, developmental and being participated in the society. These are added more with other rights that will be discussed in this research further, such as, the rights of fetus in Islamic view. In Islam, fetus's right is really stressed because the fetus has the rights to be alive until it was given birth. Allah s.w.t has strictly prohibited the act of abortion because it is considered as a murder.

Besides that, the writer also makes some comparison between the Civil Law and Shariah Law in terms of the application of rules regarding the children's rights according to both perspectives. Thus, this research will give better understanding to the society what are the importance of a child and the importance for protecting their rights.

By the way, a child must get right from the parents in all aspect.

As a summary, children must get their own rights in all aspect of life. This is why forces the writer to do a research on this issue, Rights of a Child: A Comparative Study between Syariah and Civil Law

## **1.2 OBJECTIVE OF RESEARCH**

I have created certain purposes before I begin to do this assignment. The objectives of this research paper are for:

1. To identify all the Islamic and Western principal about this topic (right of a child)

2. To inform the parents and all the society's members about the right of a child
3. To know how Islam and Western people tackle or handle on this issues.
4. To explore the exact right of a child transaction based on Syariah and Civil law
5. To know the right of parents towards their children

### 1.3 RESEARCH METHODOLOGY

In order to complete the project paper, the writer had done several ways of doing research, which are:

- **Library research** – the research had been done by referring books from University College of Malaysia's library, UKM's library, IIUM's library, UM's library, Islamic Center's library, National's library, etc.
- **Documentation** – it is using the reading materials such as magazines, journals, newspapers, Internet articles, and course works.
- **Data** are obtained through the collection and compilation of written sources. The main sources are the holly Quran and hadith of the prophet Muhammad S.A.W.

## CHAPTER TWO

### THE DEFINITION OF A CHILD

#### 2.1 Preliminary

The objective of marriage in Islam is to have a healthy family where man, his wife or wives, and children live in peace, love and harmony, as it is required in the injunctions of the Quran, to the effect:

Islam is also gives the children the credit of being the best gift for their parents. They are the best helpers of the parents in carrying out religion's affairs and their good heirs after dead. They are the custody and uphold of religious belief and tradition of their parents, for very reason the Prophet Zakariya (a.s.) prayed to almighty Allah to the effect:

"هنالك دعا زكريا ربه قال رب هب لي من لدنك ذرية طيبة إنك سميع الدعاء."

Meaning: "O my Lord, grant me from thyself nice children".<sup>1</sup>

By this he meant to have those children who would be his religious heirs and carry on the mission of their father. Prophet Zakariya (a.s):

وَأَتَى خِفْتُ الْمَوَالِي مِنْ وِرَآءِي وَكَانَتْ أَمْرَانِي عَاقِرًا فَهَبْ لِي مِنْ لَدُنْكَ وَلِيًّا (5)  
يُرِثْنِي وَيَرِثُ مِنْ آلِ يَعْقُوبَ وَاجْعَلْهُ رَبِّ رَضِيًّا (6)

"O my Lord gives me an heir as from you who will truly represent me fostering of Yaacob and make him, O my Lord one with whom you are pleased".<sup>2</sup>

<sup>1</sup> Al- quran, surah Al- Imran 3: 38

<sup>2</sup> Al-quran, surah Mariyam 19:5-6

Here he wants to have a child who keeps the flame his mission burn that was enkindled by Prophet Yaacob and his family. In fact, pious children are the good means for their parents to be rewarded in this World and the next.

Children are a continuous source of reward to their parents. If their parents die before them, they will continuously be rewarded. It is just like leaving behind big shelter and the credit goes to the people who planted and look after them.<sup>3</sup>

Abu Hurairah r.a narrates the Hadith to the effects:

“When a person die, his period of activity comes to and except three virtuous deeds which he goes on getting the reward from the Almighty till eternity”.

There are:

- 1) “Leaving behind, some virtuous deed which could continue even after hi demise”.
- 2) “The knowledge and information through which people may benefit themselves”
- 3) “Virtuous children who should continue praying for him”.<sup>4</sup>

It is important to mention at the outset that the problems arise out of the legal relationship between parents and their child in Muslim Law, are subsidiary by and large to the major issue of inheritance, indeed the law relating to the parental right over children and the legitimacy of children becomes a feature of litigation in many situations because of the overwhelming importance of the inheritance.

Besides that, the status of legitimacy in Islamic law has very important consequence for the child and his parents. Legitimacy is established either by the birth of a child in a marriage which is *sahih* or *faasid* (but not in a *baatil* marriage) or alternative, through the application the acknowledgement.

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<sup>3</sup> A.Hussain (Ed.), (1979). *Muslim Parent, their rights and duties*.p. 37

<sup>4</sup> Sahih Muslim, *Kitab al-Wariyya*,n.pb, n.pl.

## 2.2 Right

Maybe all of us have different idea about the word “right”, but what is the important, right is an entitlement, which is almost people, does have in their life. For example; everybody’s right to go to school. If someone is denied this right, he cannot read and write as well as other people.<sup>5</sup>

Human right is for all human being including children. Children have their own rights as adults. The United Nation (UN), they have fixed the human right equally to all in order to satisfy them. All countries are respecting and following the right

The United Nation (UN) concerns about the different between adult and child. Children have their own obligatory as they are guided by parents to look after them, to take care of their needs and importance. In 1989, in the United Nation’s convention they had discussed about the rights of children and it is accepted by all the members. All children in this world regardless their races, skin color, and religions should be treated equally.<sup>6</sup>

## 2.3 Family

Family in Islam is a unit in which man and woman live and share their life together according to the Shariah Law. The relationship between the family members should be closed as a garment which is to cover the body. The husband’s honor becomes an integral part of his wife’s honor and vice versa. They share each other’s prosperity and adversity. Thus, in Islam the bridal couple is matched as husband and wife with the presence of witnesses, seeking Allah’s blessing in order to increase the mutual love and compassion between them and agreed to care each other in any situations.<sup>7</sup>

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<sup>5</sup>n.a *Panduan Ringkas Hak anda sebagai seorang kanak-kanak*.n.d.n.pl. n.pb.

<sup>6</sup> Y. Bhg. Dato’ Syed A. Rahman b. Syed Mohd. 2000. “*Anjakan Paradigma Kebajikan Sosial Di Alaf Baru*”. *Social Welfare Journal*. Kuala Lumpur. MISAS advertising. Vol. 22 No. 1.Jun. pp13.

<sup>7</sup> Abdur Rahman I. Doi 1992. *Women in Shari’ah (Ilamic Law)*. Malaysia. A.S NOORDEEN. P.6

The fundamental principle of Islamic marriage is understand and caring by each spouse. In the family, the man is appointed as a leader; meanwhile, wife is assigned to look after the household's needs. Even though, in Islam it stated that man plays more roles in leading his family, it doesn't means that woman or wife has given nothing contribution to take a good care of the family. Everyone is responsible to make the family healthy according to the Islamic Shariah.

The Quran says:

"ولا تتمنوا ما فضل الله به، بعضكم على بعض، للرجل نصيب مما اكتسبوا و للنساء نصيب مما اكتسبن".

And in no wise covet those things in which Allah has bestowed His gifts more freely on some of you than others: to men is allotted what they earn and to women what they earn...(4:32)<sup>8</sup>

According to Oxford dictionary, family means a group of people who are related to each other. Sometimes they used the term family referring to the parents and their children (a nuclear family), including relatives, i.e. grandparents, aunts, uncles, etc. (An extended family)<sup>9</sup>

Based on Law dictionary, family means a group of human being who relates one another. According to the law, family is always correlated with the blood rate, marriage and bringing up the children. In the Rent Act, family is simply means an unmarried couple which is love together like husband and wife.<sup>10</sup>

On the other hand, family is a social unit in society. After the birth of a child, they'll grow up and become an adult which would be a leader in the future. How they would be is determined by how the parents teach their children. Family is not one of the social agents in the society. However, it plays a big role in educate the children physically and mentally as all the members of the family are very close to each other.

<sup>8</sup> Al-quran. Surah An-nisa 4:32

<sup>9</sup> Miranda steel. 2000. *oxford Word power dictionary for Malaysia student*. Malaysia. Fajar Bakti sdn. Bhd. p.243

<sup>10</sup> n.a *Malay Dictionary Law*. 2002. Malaysia. Laser Press sdn. Bhd. Selangor. p. 223.

Many people try to give the exact definition of a family, but the definition is hard to be interpreted. In the West, marriage can be defined as having parents and a house, besides some other basic needs to live as a family. When there is a couple of men and women either having a marital status or not, live together and get a child they consider it as a family.

## 2.4 Definition of a child

**Literally:** according to the common law, a child attains his majority at the age of 21. However, referring to the latest committee's recommendation, as enacted in the Section 1 (1) of the Family Law Reform Act 1969, the age of majority is 18.<sup>11</sup>

A child as known as minor or infant can be defined as a person who is below the age of 18.<sup>12</sup>

According to the section 2, a 'child' means an unmarried person under the age of 21 including a female who has been divorced in this range of ages. For a male, he has to be below 21 years old and unmarried yet. Male who has been divorced in the range of these ages does not consider as a child anymore.<sup>13</sup>

Child of the marriage can be divided into four categories, which are:

1. A child of both parties to the marriage
2. A child of one side to the marriage. I.e. children of the husband or children of the wife, and he is accepted to be as part of the new family.
3. An illegitimate child
4. An adopted child.<sup>14</sup>

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<sup>11</sup> P.M Bromley & N.V Lowe, 1992. *Bromley's Family Law*, Eight edition, Butterwoths London, Dubin Edinburgh, Butter worth & co. (Publishers) Ltd. 1992.

<sup>12</sup> This is definition of "child" under section 105(1) of the Child Act 1989.

<sup>13</sup> Professor Dr, Mimi Kamariah Majid, 1999, *Family Law In Malaysia*, Malayan Law Journal Snd. Bhd. Butterwoths Asia 1999.p. 227.

<sup>14</sup> Legal Research Board, *Law Reform (Marriage and Divorce) Act 1976 (Act 164) & Rules*, International Law Book Services.

In Malaysian law also means child is male or female Saud to be a person age of 18.

## 2.5 Definition of a child among Ulama' and Fuqaha'

The terms of a child always apply in a Fiqh books, which means *sabiy*, *ghulam*, and *saghir* for male and *sabiyyah*, *jariyyah*, and *saghirah* for female.<sup>15</sup>

The words above indirectly mentioned about their appearance (physiology), for example *sighar* (junior) or *sighar as-sinn* (young) or *siba* (young or junior). A child is an individual that does not completely perfect or mature in their appearance (physiology) and intellectuality.

According to the Islamic Syariah, if a person which is not baligh yet, he is called a child (*al-sabiy or ghulam*). Ali b. Abi Talib and Aishah (r.a) narrated the hadeeth:

“There are three people, which they are not including as the responsibilities under their activities or deeds. Firstly, they are who is sleeping until they wake up. Second, kids until they are come with dreams (baligh) and lastly, a person who is and or insane”.<sup>16</sup>

This hadeeth stated that a child is a person who is not an adult (a person who comes under the age of baligh)

The process of bringing up the children differs to each person based on their physical and mental level. To be an adult, a child must follow the 2 ways of physiology. According to the Fuqaha', it has two different level of *tamyiz*, which means the children are in the period of growing up.

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<sup>15</sup> See for using words by: Jalal al-Din A'bd al-Rahman al-Suyuti, *al-Ashbah wa al-Naza'ir fi Qawa'id wa Furu' al-Shafi'iyah*, al-Halbi, Kaherah (t.t). p. 240-247.

<sup>16</sup> Abu Dawud, Sulaiman Abi daud, publisher with, *al-Hyafiz al-Mundhari*, Mukhtasar Sunan Abi Dawud, Sajtani, sunan Abi dawud, Beirut, 1980, Kitab a-Hudud, vol. 6 p. 232, al-Bokhuri and al-Darimi.

## 2.6 TAMYIZ

Tamyiz is comes from Arabic root word, *mayyaza, yumayyizu*, which means a person is able to differentiate something,<sup>17</sup>

According to the Fuqaha' point of view, the definition is various. It means a person who can eat, drink and sacred by himself. On the other hand, child means a person who can understand and answer any questions.

From the other point of view, they describe a child as a person who knows something like good and bad. meanwhile, the others said a person who can differentiate between right and left hand. The last opinion refers to one hadith, Mu'adh b. Khubayb al-Juhani narrated:

“Someone asked the Prophet s.a.w about the time of child essential ask to pray, hence the Prophet answers: when he or she get to differ between left and right arm”.<sup>18</sup>

According to Abu Zahrah, all Fuqaha' give the meaning of tamyiz, understanding the contract of sell and buy, understanding the principle of buying things and the most important is understanding what seller and buyer is about.<sup>19</sup>

As the conclusion, it means a person understands what did him say and everything by himself, not depending on others.

## 2.7 THE PHYSIOLOGY GROWING LEVEL

The appearance of *tamyiz* did not completely perfect at one time only. It has their own process to be an adult with the different level of time.

<sup>17</sup> *Majma' al-Lughah al-Arabiyyah, al-Mu'jam al-Wasit*, Dar al-Ma'aruf, Kaherah, 1973/1393H: al-Munjid Fih al-lughah wa al-A'lam, Dar al-Mashreq, Berut, under the word: *mayaza*.

<sup>18</sup> Abu Dawud, *Kitab al-salah*, vol. 1, p. 271.

<sup>19</sup> Muhammad Abu Zahrah, *al-Jarimah wa al-Ughubah (al-Jarimah)*. Dar al-Fikr al-Arabi, Kaherah, (t.t) p. 462.

According to Hukama' (physician), in the process to be an adult, all the children have to gone through these two steps. Each step requires seven years.<sup>20</sup>

1) Before mumayyiz

In this level, it starts from the birth of the baby up to seven years old. Usually, in this age they cannot differentiate yet what is good or bad. In this case, he or she is called as children which are not mumayyiz (according to the Arabic term, it is called *al-sabiy ghayr al-mumayyiz*)

2) mumayyiz

In this level, it starts when the age of the child is completely seven years. All the Fuqaha' agreed with the definition. It is strongly supported by one of the hadeeth of the Prophet which is narrated by Abd al-Malik b. al-Rabi' b. Sabrah:

“Teach or asked the children to pray when they are seven and buffet them if they refused and ten years old”.<sup>21</sup>

The child in this age is called as child of *mumayyiz* (Arabic term: *al-sabiy al-mumayyiz*). In this level, they start thinking and are able to differentiate between good or bad.<sup>22</sup>

According to the Fuqaha' they refer the word *tamyiz* is only for a child. An adult they called as a person who can think perfectly (*'aqil*) and differentiate all things clearly.

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<sup>20</sup> .Ibn Nujaym p. 50.

<sup>21</sup> Abu Dawud ,*Kitab al-Tahrah*, vo9l. 1 p.270, Abu Isa Muhammad bin Isa bin Surah al-Sali al-Tirmidhi, Sahih al-Tirmidhi, Dar al- Kitab al-Arabi, Beirut, (t.t). Kitab al-Salah, vol. 2 p. 198.

<sup>22</sup> Muhammad bin Ali bin Muhammad al-Shawkani, *Irshad al-Fuhul ila Tahqiq al-Haq min Il al-Usul*, Dar al-Ma'rifah, Beirut, 1399H/1979, p. 11.

## CHAPTER THREE

### A Child' Rights In Islamic Law (Syariah)

#### 3.1 Preliminary

Marriage does not function as a way to satisfy one's *nafs* per se. It is also to produce descendants for a couple of husband and wife. Producing lineage is the aim for couples in marriage and this aim runs down for generations to continue the lineage of men in this world.

Having a child is undoubtedly a craving for married couples as the lineage not only functions as the descendant of their generation, but also as a family's symbols of happiness and joy. Allah said in the Quran:

" المال و البنون زينه الحياة الدنيا " <sup>23</sup>

Meaning: "Treasure and children are life's decorations."

Aside from that, anyone bestowed a child by Allah means he or she is given a great joy that has to be thanked for. Allah explained in the Quran:

" ذرني وما خلقت، وحيد و جعلت له مالا ممدودا، و بنين شهودا " <sup>24</sup>

Meaning: "Let Me act on those who I have created alone. And I create for him a lot of property, and children that are always by his side."

Islam concerns on the children's position in a household. Children ought to be born as a perfect and kind human being. Preparations in producing a generation of good children have to be prepared even before the child is born. That is why we can see

<sup>23</sup> Quran, Surah Al-Kahfi 46

<sup>24</sup> Quran, Al-Mudasir 11-13

Islam encourages those who want to build a family to find a good couple as to produce a generation of good children.

As children have to be given good care and guidance, Islam underlines a few important matters regarding their rights that are to be fulfilled and obligated by their parents.

In this case, the writer will extract the children's rights through Islam's perspective and this chapter will also present civil laws regarding the children's rights that are to be fulfilled and known by people from all levels including the children themselves.

### **3.2 Right of fetus before his or her birth under Syariah Law.**

Literally, fetus means a pregnant woman, which has a clot of congealed blood in her womb.<sup>25</sup> And fetus according to the Fuqaha' is just the same as its technical meaning, which means sperm and ovum are met. Then, there will be a conception between them. Consequently, zygote is created. In this situation, Islamic syariah are very concern about the creation of the foetus. Therefore, there are certain parts in the Islamic Syariah concerning about this, which are:

1. Right to life
2. Giving nourishment to the pregnant women
3. Abortion according to the Syariah
4. Illegitimate daughter
- 5. The right of foetus on property or wealth.<sup>26</sup>**

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<sup>25</sup> Ustaz Dr. Abdul Aziz Mukhimar Abd Hadi. 1997. *Hak kanak-kanak Perbandingan Di antara Undang-Undang Syariah dan undang-undang sivil*. n.pl. Majlis Nasyir Al-Alami.p 29.

<sup>26</sup> *ibid.* p 30.

### 3.2.1 Right of life.

According to the Islamic Syariah, foetus has the right to live. And the Syariah prohibits it in Islam to kill or to abort him without any valid reason, which is permissible. It is agreed by the most of the Fuqaha', the abortion of fetus is strongly prohibit unless there are certain cases that force us to abort the baby. However, there are no differences from the Islamic point of view regarding to this matter even it comes from the mother of foetus or not or it is not caused by the laws of Shariah. Islam strictly prohibited the foetus from any inheritance when the inheritor is the pluck fruit. The prophet mentioned it in his hadith,

حَدِيثُ عَبْدِ اللَّهِ بْنِ مَسْعُودٍ رَضِيَ اللَّهُ عَنْهُ قَالَ : سَأَلْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ أَيُّ الذَّنْبِ أَعْظَمُ عِنْدَ اللَّهِ قَالَ أَنْ تَجْعَلَ لِلَّهِ نَدًّا وَهُوَ خَلَقَكَ قَالَ قُلْتُ لَهُ إِنَّ ذَلِكَ لَعَظِيمٌ قَالَ قُلْتُ ثُمَّ أَيٌّ قَالَ ثُمَّ أَنْ تَقْتُلَ وَلَدَكَ مَخَافَةَ أَنْ يَطْعَمَ مَعَكَ قَالَ قُلْتُ ثُمَّ أَيٌّ قَالَ ثُمَّ أَنْ تُزَانِيَ حَلِيلَةَ جَارِكَ

'Abdullah bin Mas'ud, may Allah be pleased with him, reported: I asked Allah's Messenger (may peace be upon him): Which sin is the gravest with Allah? He (the Holy Prophet) replied: That you associate a partner with Allah, while it is Him Who has created you. He (the reporter) said: I told him (the Holy Prophet): Verily it is indeed grave. He (the reporter) said: I asked him what the next (gravest sin) was. He (the Holy Prophet) replied: That you kill your child out of fear that he shall join you in food. He (the reporter) said: I asked (him) what the next (gravest sin) was. He (the Holy Prophet) observed: Then (the next gravest sin) is that you commit adultery with the wife of your neighbor<sup>27</sup>

This Quranic verse above shows us that abortion is permissible in Islam in certain circumstances. And, according to the Sunnah, there are certain levels of abortion as what had mentioned by Abdul Rahman in the Sahih Muslim, the Prophet s.a.w said that:

<sup>27</sup> Bukhari.n.d. *sahih bukhari*. (CD Rom).n,pb. Bab Kitab Iman. Juz'2 #4117.

حَدِيثُ عَبْدِ اللَّهِ بْنِ مَسْعُودٍ رَضِيَ اللَّهُ عَنْهُ قَالَ : حَدَّثَنَا رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَهُوَ الصَّادِقُ الْمَصْدُوقُ إِنَّ أَحَدَكُمْ يُجْمَعُ خَلْقُهُ فِي بَطْنِ أُمِّهِ أَرْبَعِينَ يَوْمًا ثُمَّ يَكُونُ فِي ذَلِكَ عَلَقَةً مِثْلَ ذَلِكَ ثُمَّ يَكُونُ فِي ذَلِكَ مُضْغَةً مِثْلَ ذَلِكَ ثُمَّ يُرْسَلُ الْمَلَكُ فَيَنْفُخُ فِيهِ الرُّوحَ وَيُؤَمِّرُ بِأَرْبَعِ كَلِمَاتٍ بَكَّتَبَ رِزْقَهُ وَأَجَلَهُ وَعَمَلَهُ وَشَقِيٍّ أَوْ سَعِيدٍ فَوَالَّذِي لَا إِلَهَ غَيْرُهُ إِنَّ أَحَدَكُمْ لَيَعْمَلُ بِعَمَلِ أَهْلِ الْجَنَّةِ حَتَّى مَا يَكُونُ بَيْنَهُ وَبَيْنَهَا إِلَّا ذِرَاعٌ فَيَسْبِقُ عَلَيْهِ الْكِتَابُ فَيَعْمَلُ بِعَمَلِ أَهْلِ النَّارِ فَيَدْخُلُهَا وَإِنْ أَحَدَكُمْ لَيَعْمَلُ بِعَمَلِ أَهْلِ النَّارِ حَتَّى مَا يَكُونُ بَيْنَهُ وَبَيْنَهَا إِلَّا ذِرَاعٌ فَيَسْبِقُ عَلَيْهِ الْكِتَابُ فَيَعْمَلُ بِعَمَلِ أَهْلِ الْجَنَّةِ فَيَدْخُلُهَا

“Every one of you is placed as (a drop of) sperm in the mother’s womb in 40 days, then it becomes a clot of congealed blood within 40 days, then the clot turns to be a (foetus) lump in 40 days too, then Allah sent down the Malaikat came to him with 4 orders besides them. He is asked to write about his rizq, life, deeds, and his luck either good or not. Then the Malaikat blew spirit into the baby’s body.”<sup>28</sup>

Fuqaha’ have divided the laws of abortion into 3 levels:

1. Before the baby is 40 days
2. After he is enough 40 days and before his age is completely 4 months
3. After he is 4 months until he is born<sup>29</sup>

### 3.2.2 First level: Baby before his age 40 days

Fetus exists when there is millions of sperms that come from penis move towards vagina and try to pierce into ovum through the uterus within 40 minutes. During this process, there are a lot of sperm died. When a sperm mixes with an ovum, the conception process occurs. From the Fuqaha’ point of view, at this stage it is forbidden to abort the foetus even from the father, mother or even from someone else. This is simply because it Creates the harm to the foetus. There is certain cases abortion is allowable such as if the pregnancy will hurt the mother. So in this case, the

<sup>28</sup> Al-Bukhari n.d. *The beginning of Creation Hadith*.n.pb. bab book destiny. #2969.

<sup>29</sup> Ustaz Dr. Abdul Aziz Mukhimar Abd Hadi. 1997. *Hak kanak-kanak Perbandingan Di antara Undang-Undang Syariah dan undang-undang sivil*. n.pl. Majlis Nasyir Al-Alam p.32-356.

mother has an option either to abort apart of it whether totally abort the foetus or separately.<sup>30</sup>

### **3.2.3 Second level: Baby at the age between 40 days to 120 days**

In this age, the baby's heart is created and his spirit is blown into his soul. Abortion is strictly prohibited in this period and it is considered as a sinful act based on Hadeeth of the Prophet. However, according to the Zaidiyah scholars, this act is permissible due to the permission of the husband and the baby reaches the age of 40 days. If the husband does not give the permission to do so, then she cannot kill the baby as the baby has the right to live.<sup>31</sup>

According to the Fuqaha', abortion is prohibited. As what have been told in the first level just now, we are not allowed to kill the foetus at his/her age of 40 days. However, when the mother gets the permission to do so, then it is permissible in Islam.

It is clearly showed that abortion is not allowed in Islam unless the mother has concrete reason to do so and she gets permission from her husband, parents or others who are qualified. It is because the baby (foetus) has the right to live.

### **3.2.4 Third level: Between 4 months up to his/her birth**

In this level, the features of the baby are clearly seen. His eyes, ears, nose, mouth, fingers are completely created, even his brain works well. As what have been told by the Prophet (pbuh), in this age, spirit had been blown into his body. However, part of their life is still based on their mother's life, which means their souls are part of their mothers. In addition, this spirit/soul cannot be possessed by anyone except by the permission of Allah. As mentioned in the Quran:

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<sup>30</sup> *ibid.* p.32

<sup>31</sup> Ustaz Dr. Abdul Aziz Mukhimar Abd Hadi. 1997. *Hak kanak-kanak Perbandingan Di antara Undang-Undang Syariah dan undang-undang sivil.* p.33

"يسألونك عن الروح من أمر ربي وما أوتيتم من العلم إلا قليلا."

"They asked you about the spirit and answer that it is Allah's matter and your knowledge is too little and it is limited"<sup>32</sup>

When the Baby (foetus) is completely 4 months, thus, the spirit is in their body and Fuqaha' agreed that in this period, abortion is prohibited unless there are certain interest, and it is permissible to do so. In conclusion, in all levels, abortion is not allowed in Islam, unless there comes certain situation which the mother to abort/kill her baby and it is approved by the Syariah. Due to the Syariah, abortion is not allowed as the foetus has the right to live. Nobody have any right to abort or kill the baby even his or her parents.

### 3.2.5 Give *nafqah* to the pregnant mother.

In Islam, it is the right of a wife to get *nafqah* from her husband especially during her pregnancy. Islamic Syariah plays its role to take care of pregnant women including giving them *nafqah*. It is clearly stated in the Quran:

"أسكنوهن من حيث سكنتم من وجدكم، ولا تضاروهن لتضيقوا  
عليهن، وإن كن أولات فأنفقوا عليهن حتى يضعن حملهن."

"Let the women live (in 'iddah) in the same style as you live, according to your means: annoy them not, so as to restrict them. And if they carry (life in their wombs), then spends (your substance) on them until they deliver their burden..."<sup>33</sup>

Giving *nafqah* to the pregnant women is an obligation to the husbands, if the wife disloyal to her husband, then, the task is no more obliged upon him.

<sup>32</sup> Al-Quran, al-isra' 17:85

<sup>33</sup> Al-Quran, surah al-Talaq verse 6

Therefore, it is necessary to the husband to prepare all the needs of his wife, foods, home, clothes, including her medicine and anything, which is needed by the mother and her baby.

As the baby (foetus) is now in the process of growing in his/her mother's womb, therefore, they also needs their physical necessities such as food which is enough with all vitamins, protein, etc.. It is the responsible of the father to prepare all those things for his baby.

### 3.3 The Choosing Of A Good Name

This right is one of the responsibilities that a father holds. With the choosing of a good name, it is hoped that in the future, the child will not insulted with the name that he bears. In one of the Hadith, Rasulullah S.A.W said:

"من حق الولد على الوالد أن يحسن أدبه ويحسن اسمه"<sup>34</sup>

"Among a child's rights to be uphold by the father is to beautify the child's demeanor and name."

The Hadith above clearly depicted that giving a good name to a child is a responsibility endorsed to the child's father.

Truly, Hadith Rasulullah S.A.W allocates giving a child a good name in a high priority. Muslims call upon the names of their friends and liking the names. The Prophet said in one of his Hadith:

"من حق المؤمن على أخيه أن يسمه بأحب أسمائه"<sup>35</sup>

In this case, Allah said in the Quran:

<sup>34</sup> Riwayat al-Baihaqi in *Shu'ab al-Iman* and al-'Iragi in *Hamish Ihya' Ulum al-Din* 2:217, see Dr. Mustafa Abd. Al-Wahid p. 78.

<sup>35</sup> Dr. Abdul Aziz Mukhmar Abdul Hadi. *Hak Kanak-kanak Perbandingan Antara Syariah Islamiah dan Undang-undang*. 1997. Majlis Al-Nasyar Al-Alami. P. 49

"...ولا تلمزوا أنفسكم ولا تنابزوا بالألقاب بئس الإسم القسوق

بعد الإيمان..."

'O ye who believe! Let not some men among you laugh at others: it may be that the (latter) are better than the (former): nor let some women laugh at others: it may be that the (latter) are better than the (former): nor defame nor be sarcastic to each other, nor call each other by (offensive) nicknames: ill-seeming is a name connoting wickedness, (to be used of one) after he has believed: and those who do not desist are (indeed) doing wrong".<sup>36</sup>

In Allah's words, it is clearly stated that giving good names to children is essential in life. This fact is strengthened with Rasulullah S.A.W's saying, pointing out that giving a good name to a child is of importance.

It is most imperative in choosing a name for a child. In this context, the writer will narrate a story on name giving in today's community. There was a couple of husband and wife. The wife had chosen a good name for their child as to exercise the child's right. Unfortunately, the husband did not like the name given by the wife and changed the name of the child to a name that is despised by Allah, that was *firun*. There is another incident similar to this one where a father named his son by the name of *lahab*, hoping that the child will be bestowed with the name of Abu Lahab and be called Abu Lahab.<sup>37</sup> In the Quran, Allah said:

"تبت يد أبي لهب وتب"

Meaning: "May both of Abu Lahab's hands perish and verily that he will perish."<sup>38</sup>

Turning back to the narration, where the man does not remember Allah, does not pray and fast, when his children are to be married, he willingly or unwillingly uses this

<sup>36</sup> Quran, Surah Al-Hujrat, Verse 11

<sup>37</sup> Dr, Yusuff Al-Qardawi. 1996. *Fatwa Terkini Wanita dan Keluarga Islam*. Pustaka Syuhada. 251-252.

<sup>38</sup> Quran Surah Al-Lahab verse 1

name with it meaning although children is the trustee from Allah. As Allah has mentioned in His Guidance Book,

"و الذين هم لأمتهم وعهدهم رعون"<sup>39</sup>

Meaning: "And whom nourish their trustee and promises"

Truly, Rasulullah S.A.W commanded parents to give their child a name by the seventh day of the baby's birth. From Ibnu Qayim, it is stated that giving names to children is the parent's right. Hence, when naming their child, it has to be named with the *son of (bin)* to the father<sup>40</sup>. The child's name must lean on the father's name, not the mother's. Allah said in the Quran:

" ادعوهم لأبائهم هو اقسط عند الله "

Meaning: "Call them by their father's (name). It is more just with Allah."<sup>41</sup>

The child is to lean on the father by lineage and name.

In Shariah Islamiyah, choosing a good name for a child is the child's right that has to be obliged by the parents. This is so as it is for the good of the child. Hence, the Syariah Islamiyah concerns choosing a good name for the child.

### 3.4 Custody

Sometimes a household crumbles even when the children in it still need guidance, upbringing and care from their parents. In this situation, who has the right to hold custody? This is the discussion brought out by the *fuqaha* with the term *hadanah*. Truly, the education and welfare of children are an obligation affixed on

<sup>39</sup> Quran, Surah Al-Ma'arij Verse 32

<sup>40</sup> Dr. Abdul Aziz Mukhimar Abdul Hadi. *Hak Kanak-kanak Perbandingan Antara Syariah Islamiah dan Undang-undang*. 1997. Majlis Al-Nasyar Al-Alami. p. 50

<sup>41</sup> Quran, Surah Al-Ahzab. Verse 5:33

their parents. *Hadanah* arises when a married couple divorces. Following the divorce, there usually arises a dispute between the parents to get hold of the custody of the children. There are laws and conditions regarding the custody.<sup>42</sup>

In here, *hadanah* can be defined as the custody of children that are still young and unable to handle them, be it boy or girl after their parents divorced. Who has the right to take care of them? The father? The mother? Who?

In this discussion, the writer will focus on younger children, as this is the group that is focused in *hadanah*. Children who have reached the state of puberty have the right to choose with whom they want to stay with – the father, the mother, or the guardian.<sup>43</sup>

In Syariah, custody is defined as “the caring for the infant during the period when the infant cannot do without the woman who have the lawful right to bring it up in a prohibited degree”. Under the Islamic law, custody is regarded as the right of a child and the duty of the parents, especially of the mother. The child needs someone to look after him or her and to cater his or her needs. If the child is of a tender age, the mother is the best person to look after the child.

In the Kelantan case of *Ahmad v Aishah*<sup>44</sup> the parties had three children aged 10 months, two years and four years at the divorce. It appeared that after the divorce in 1975, the two younger children remained with the mother while the eldest child remained with the father. The father had remarried again and the second wife had given birth to a child. The mother claimed custody of the eldest child and she succeeded in the Kadi’s court. The Kadi relied on the Hadith to the effect that the mother is more loving and capable to look after the child and is entitled to the custody, as long as she has not remarried. The Kadi also referred to the *Iinah at-Talibin* and the *Fiqh us Sunnah* and finally referred to the case where the caliph Abu

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<sup>42</sup> Mat saad b. Abd Rahman. 1993. *Undang-undang Keluarga Islam Aturan Perkahwinan Suatu Pendekatan Amalan Semasa*. HIZBI. p121.

<sup>43</sup> Dr. Muhammad Aklah Al-Ibrahim, Dr. Muhammad Auwad Al-Huzaimah, Mustafa Ahmad Najib. 1419-1998. *Maktabah Risalah Uman Urdon*. P.186.

<sup>44</sup> (1977) 1 JH (1) 55

Bakar ordered Umar to give up the custody of his child to the maternal grandmother of the child.

In Johor, in the event of divorce, the children shall be given into custody (*hadanah*) in accordance with the Syara' Law (*Hukum Syarak*) to whichever party decided by the court. Whoever contravenes the decision of the court shall be guilty of an offense and may be sentenced to a fine not exceeding RM500 or imprisonment not exceeding 3 months or both. The court shall return the children into custody as decided.<sup>45</sup>

In this case, the mother is the best person entitled to the custody of a child whether the mother is still in marriage or divorced. The responsibility of the mother will continue until the child reaches the state of *mumaiyiz* (intelligence).

The following original sources of the law on *hadanah* have been cited in the case of Nooranita bte Kamaruddin vs. Faiez bin Yeop<sup>46</sup> Ahmad. The Holy Quran in surah al-Baqarah (2:233) stated in effect:

"و الولدت يرضعن اولاد لمن حولين كاملين لمن اراد أن يتم الرضاعة وعلى المولود له رزقهن وكسوتهن بالمعروف لا تكلف نفس إلا وسعها لا تضار ولدة بولدها ولا مولود له بولده وعلى الوارث مثل ذلك فإن اراد فصلا عن تراض منهما وتشاور فلا جناح عليهما."

Meaning: "The mother shall give suck to their offspring for two whole years; if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear.

No mother shall be treated unfairly on account of her child nor father on account of his child."<sup>47</sup>

<sup>45</sup> *Johor Administration of Islamic Enactment 1998*, S. 237

<sup>46</sup> Mimi Kamariah Abd Majid. MLJ 1999. *Family Law In Malaysia*. The Butter worth Asia. p. 295.

<sup>47</sup> Al-Quran, Surah Al-Baqarah verse 2:233.

In one Hadith, it was reported as follows:

ما روى أن امرأة جاءت إلى رسول الله صلى الله عليه وسلم فقالت: " يارسول الله: " إن إبنتي هذا كان بطني له دعاء، وحجري له حواء، وثدي له سقاء، وأن أباه طلقني وأراد أن بتزعه متني رسول الله صلى الله عليه وسلم " انت أحق به ما لم تتزوجي "

Meaning: A woman said: "O Prophet! My womb is a vessel for this son of mine, my breasts a water-skin for him and my lap is a refuge for him, yet his father has divorced me and wants to take him away from me." The Prophet S.A.W said: "You have more right to him as long as you do not marry."<sup>48</sup>

The Islamic FL (Federal Territories) Act 1984 Section 81 (1) laid down a general rule that the mother who fulfills the qualifications in Section 82 shall be the best person entitled to the custody of her infant children either during a marriage relationship or after its dissolution (divorced).

Subsection (2) then lists down the order of preference for persons bearing the right to *hadanah* whenever the mother is considered to be disqualified from the custody of a child under the Syara' Law (*Hukum Syarak*) by the court. The order of preference includes:

- a) The maternal grandmother, no matter how high
- b) The father
- c) The paternal grandfather, no matter how high
- d) The full sister
- e) The uterine sister
- f) The sanguine sister
- g) The full sister's daughter

<sup>48</sup> Dr. Muhammad Aklah Al-Ibrahim, Dr. Muhammad Auwad Al-Huzaimah, Mustafa Ahmad Najib. 1419-1998. Maktabah Risalah Uman Urdon. p.186.