



PRESERVING CHILD'S FAITH IN MALAYSIAN LAW: A *Maqasidic* Approach

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Abstract: Preserving faith is the most significant goal for Muslims. However, fulfilling these objectives in the best possible way according to the principle of *maqāṣid al-sharī'ah* (the objective of Islamic law) within the framework of the dual system of Malaysian law is challenging. Preserving faith within *maqāṣid al-sharī'ah* discussion provides enormous opportunities for Muslims to nurture and protect their Islamic faith while regulating the laws that prohibit any harmful elements that could jeopardize it. The Federal Constitution of Malaysia guarantees everyone's freedom of religion. However, freedom of religion provided under Malaysian law has restrictions due to the uniqueness of Malaysian history. This article critically discusses the *maqasidic*-approach adopted to preserve Muslim child's faith. This article examines the government's effort to maintain Muslim child's faith concerning the laws and policies of education and Malaysian law on issues linked to the conversion of Muslims to other faiths and vice versa. The court decision on child's religion cases indicates a distinct feature of Muslim and non-Muslims' right to freedom of religion under Malaysian law. There are prospects for utilizing the *maqāṣid al-sharī'ah* framework effectively to promote the preservation of a child's faith in the context of Malaysian law.

Keywords: *Maqāṣid al-sharī'ah*, Freedom of Religion, Preservation of Child's Faith, Islamic Law, Malaysian Law

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Introduction

RELIGIOUS DIVERSITY is a crucial feature of Malaysia. According to the 2020 Census, Malaysia has 32 million people, 20 million are Muslims. Others are Christian (2 million), Buddhist (6 million), Hindu (1 million), other religions (0.28 million), and atheists (0.27 million). Interethnic marriages account for 8 percent (14,231 marriages in 2020) of all marriages in Malaysia (184589).

According to the Department of Statistics, Malaysia, 45754 divorce cases occurred in 2020.¹

The Department of Statistics, however, did not include data about divorce between inter-ethnic couples. Malaysians come from a variety of ethnic backgrounds and religions. Custody battles are often more ferocious between divorced couples when one of the spouses converts to (or leaves) Islam. Malaysia employs a pluralist legal system, English common law, *shariah* law, and native laws. Notwithstanding its openness and modernity, matters regarding personal law for Muslims in Malaysia have been regulated based on Islamic law. Nevertheless, the salience of religion in the legal and challenges in the process have been quite clear in Malaysia in recent years.² After all, court decisions are open to different interpretations by the judges.³

Applying the principle of *maqāṣid al-sharī'ah* (objectives of Islamic law) is not restricted to rules and regulations related to children *per se*. Still, it attempts to utilize this principle in the country's governance. Implementing *maṣlaḥah*-based (public interest) governance and prevention of the *mafsadah* (destruction) will ensure the implementation of good values within Malaysian society. *Maqāṣid al-sharī'ah* Index was implemented in Malaysia in 2014.⁴ Nevertheless, some critics of the implementation are due to the loophole in several aspects.⁵

¹ Media statement for marriage and divorce statistics in Malaysia 2021, Department of Statistics, Malaysia, accessed November 17, 2022, <https://www.dosm.gov.my/v1/index.php?r=column/pdfPrev&id=RWwxcjBJeERmcnNIYnZnYVZYR0VKUT09>

² Dian A. H. Shah, "Law, Religion, and the Social Divide in Asia: Contexts and Challenges," ed. Gerhard Wahlers. Religion. (Konrad Adenauer Stiftung, 2017) accessed November 17, 2022, <http://www.jstor.org/stable/resrep17544.7>.

³ Monica Castillejos-Aragón, "The Roberts Court: An Unconventional 2020 U.S. Supreme Court Term." (Konrad Adenauer Stiftung, 2020) accessed November 17, 2022, <http://www.jstor.org/stable/resrep28909>.

⁴ Azura Abas, "Index to Gauge Nation's Bid to Fulfil Islamic Obligations," *New Straits Times*, August 29, 2014 (Kuala Lumpur: National Archives of Malaysia, 2014), 2.

⁵ Ahmad Fauzi Abdul Hamid, "Is Maqasid al-Shari'a Sufficient? Reflections on Islam in Contemporary Malaysia," *Ulumuna* 24, no.2 (2020): 205-231; Abdul Raheem Taufeeq Abolaji & Farah Salwani Muda @ Ismail, "Maqasid Al-Shari'ah: A Pathway for Protecting Children's Right to Health," *JUUM* 22, (2018):75-84.

This paper examines Malaysian law developments concerning preserving a child's faith according to the *maqāṣid al-sharī'ah* framework within restricted religious freedom in Malaysia. The utmost priority in the decision-making of any cases related to the child, including custody cases, is the principle of the best interest and welfare of the children.⁶ Today, welfare is defined more broadly, including safeguarding children against violence (including violent discipline), abuse, neglect, and exploitation (trafficking).⁷ Malaysian family law is established to provide children with protection, preservation, development, and participation.⁸ From the Islamic perspective, a child's right to all these rights determined within the principle of child's welfare is in line with *maqāṣid al-sharī'ah*. Child welfare is the paramount consideration in both civil and shariah courts in Malaysia, even though the existing statutes on custody still have room for improvement.⁹

Previous cases in Malaysian courts indicate that the judges' verdicts have been challenged, particularly involving parties from different religions. A plethora of examples in the cases reported since the early twentieth century. Most of the entanglement occurred caused of the parents of another faith. Despite its openness and modernity, Islamic law governs the personal laws of Muslims in Malaysia, enforced by shariah courts in each state of

accessed November 17, 2022, <http://journalarticle.ukm.my/13011/1/29236-89708-1-PB.pdf>

⁶ Peter J Pecora, James K. Whittaker, Anthony N. Maluccio, Richard P. Barth and Robert Plotnick Hawthorne, *The Child Welfare Challenge Policy, Practice, and Research*. (New York: Aldine De Gruyter, 2000).

⁷ UNICEF, *Situation Analysis of Women and Children in Malaysia* (Kuala Lumpur: UNICEF, 2020).

⁸ Nurul Izzah Izzati Hashim, Wafaa Yusof & Zuliza Mohd Kusrin, "Pengabaian Kanak-kanak dan Jaminannya Menurut Syarak dan Undang-undang di Malaysia," *Journal of Contemporary Islamic Law* 4, no.1 (2019): 18-28.

⁹ Siti Zaharah Jamaludin & Sridevi Thambapillay, "Children Voices in Custody Cases: A Roar or Whimper", in *Children in Malaysia Selected Contemporary Legal Issues*, ed. Siti Zaharah Jamaludin, Jal Zabdi Mohd Yusoff. Sridevi Thambapillay, Nur Ezaitie Nabihah Mohd Eusofe (Kuala Lumpur: University of Malaya Press, 2018), 31-52; on the development of childrens' welfare in Malaysia, see Noralina Omar, *Kesejahteraan Hidup Kanak-kanak* (Kuala Lumpur: Penerbit UM, 2018), 19-26.

Malaysia.¹⁰ Meanwhile, civil law or indigenous laws regulate non-Muslims. Due to Malaysia's unique dual law system, tensions will likely occur, such as in cases of child custody between parents of different religions, namely Muslim and non-Muslim. The shariah and civil court judges' verdict is most likely subject to criticism. Thus, *maqāṣid al-sharī'ah* is a perfect guideline for ensuring the judgment is delivered according to Islamic principles.¹¹ The constructive role of Islamic ethics in communal affairs is further enhanced by the shariah promoting what is defined as the right and suppressing what is considered wrong in a binding religious obligation on both the individual and the community.¹²

In summary, *maqāṣid al-sharī'ah* is crucial in Malaysia as it could be a guideline in determining the child's best interest. Also, a medium that offers justice to all parties involved in the conflict. The argument comes from the understanding that the principle in the *maqāṣid al-sharī'ah* would assess the level of necessity, the scope of achieving the purpose, the people included in the process, and the level of universality.

The *Maqāṣid al-sharī'ah* of Preserving Faith

Discussions about preserving Muslims' faith (religion), whether they are adults or minors, fall under the purview of *maqāṣid al-sharī'ah*. Allal al-Fasi (d.1964) defined *maqāṣid al-sharī'ah* as "the hidden meanings (*al-asrār*) and wisdom that the Lawgiver has taken into account in the enactment of all *shariah* ordinances."¹³

¹⁰ Report Situation Analysis of Women and Children in Malaysia, UNICEF, (Kuala Lumpur: United Nations Children Fund Malaysia Country Office, 2020), 63.

¹¹ Setiawan Gunardi, "Maqasid Syariah dan Aplikasinya dalam Bermuamalah antara Muslim dan Bukan Muslim," *International Research Journal of Syariah, Muamalat and Islam* 1, no.2 (2019): 31-39.

¹² Lukman Thaib, *Islamic Political Representation in Malaysia*. (Kuala Lumpur: Penerbit Universiti Malaya, 2005), 212.

¹³ Mohammad Hashim Kamali, "Maqasid al-Syariah and Ijtihad as Instruments of Civilisational Renewal," Occasional Paper Series 20, (London: The International Institute of Islamic Thought and International Institute of Advanced Islamic Studies, 2012), 6. accessed October 15, 2022, https://www.muslimlibrary.com/dl/books/English_Maqasid_alShariah_Ijtihad_and_Civilisational_Renewal.pdf

The word *maqāṣid al-sharī'ah* is a well-known term for Muslims and some non-Muslims in Malaysia. Thus, this article will use the term *maqāṣid al-sharī'ah*, commonly used in Bahasa Malaysia. Also, the term *maqāṣid al-sharī'ah* in Arabic will be used while discussing the word within the meaning of Islamic jurisprudence. In linguistic terms in the Arabic language, *maqāṣid al-sharī'ah* is made up of two words: *maqāṣid* and *al-sharī'ah*. The plural form of the *maqāṣid* (singular *maqsad*) means purpose, objectives, principle, intent, goal, and end.¹⁴ The term *al-sharī'ah* denotes the Islamic revealed law, founded on the Quranic teachings and prophetic traditions (*hadīth* and *sunnah*), guiding Muslims on how to perform their duties in daily life.¹⁵

Legal rulings (fatwa) were derived from interpreting these primary sources through a process known as *ijtihād* (the counsel of judges on a specific case/independent legal reasoning; literally, an effort by the jurists). The understanding of the process and rulings derived from specific *dalīl* is known as *fiqh*, which is open to differing views and opinions on branches of knowledge. Thus, *maqāṣid al-sharī'ah* refers to Islamic law principles that encompass the wisdom of rulings behind Islamic law. It also refers to good ends that the laws aim to achieve by blocking or opening specific means.¹⁶

These objectives of Islamic law are explicitly or implicitly contained in the Quranic texts and prophetic traditions concerning all aspects of Islamic law, such as rulings on personal ritual, transaction, family, criminal, politic, constitution, administration, and international affairs, among many others. The knowledge of *maqāṣid al-sharī'ah* is a prerequisite for someone eligible for the rank of *mujtahid* (authoritative interpreter of Islamic law).¹⁷ It is critical for Muslims that any regulations or laws imposed on them

¹⁴ Shams al-Dīn Ibn Qayyim, *I'lām al-Muwaqqi'īn*, vol. 3. ed. Taha Abdul Rauf Sa'ad (Bayrūt: Dār al-Jil, 1973), 3.

¹⁵ Ibn Manzūr, *Lisān al-'Arab*, vol.5 (al-Qāhirah: Dār al-Hadīth, 2003), 83.

¹⁶ Jasser Auda, *Maqasid al-Syariah as Philosophy of Islamic Law: A Systems Approach* (London, Herndon: The International Institute of Islamic Thought, 2010), 1.

¹⁷ Mohammad Hashim Kamali, "Maqasid al-Syariah: The Objectives of Islamic Law," *Islamic Studies* 38, no.2 (1999): 203.

are following Islamic law. When expressing their thoughts on specific legal judgments, those who do not understand Islamic law's overall spirit and purpose, which is ingrained in every passage of the Quran and prophetic tradition, risk making mistakes.

Theoretical understanding of the concept of *maqāsid al-sharī'ah* has gone through several stages. Early scholars who contributed to the theory of *al-maqāsid al-sharī'ah* emphasized the importance of fulfillment of some good (*maṣlahah*) and avoidance of some mischief (*mafsadah*). One of the earliest proponents of *al-maqāsid* theory, 'Abd al-Mālik al-Juwaynī (d.478 AH/ 1085 CE), had, used the term *al-maqāsid* and *al-masālih al-'āmmah* (public interests) interchangeably. He suggested that Islamic law aims to protect (*al-'ismah*) people's faith, souls, minds, private parts, and money. Al-Juwaynī's disciple Abu Hamīd al-Ghazalī (d. 505 AH/1111 CE) believed that *al-maqāsid* categories belonged under the umbrella of *al-masālih al-mursalah* (public interests).¹⁸ He also suggested a fundamental rule based on the order of necessities, which means that the higher-order necessities should prioritize lower-order necessities if they generate opposite implications in practical cases.¹⁹ Abū Ishaq Al-Shātībī (d.790 AH/ 1388 CE), in his *al-Muwāfaqāt*, used the same terminology that al-Juwaynī and al-Ghazalī developed on *al-maqāsid*. He considered *al-maqāsid* to be the fundamentals of religion, basic rules of the law, and universals of belief.²⁰ Jasser Auda criticized the theory of classical *al-maqāsid* by the early scholars as hierarchical and narrow. Auda proposed a new *al-maqāsid* theory that emphasizes human development as the main target of *maṣlahah* (public interest). He suggests the systems approach, characterized by its cognitive nature, interconnectedness, wholeness, openness, multidimensionality, and purposefulness.²¹

The discussion of the *al-maqāsid al-sharī'ah* in this article will take place within traditional classifications of *maqāsid* that are

¹⁸ Auda, *Maqasid*, 2.

¹⁹ Auda, *Maqasid*, 18.

²⁰ Auda, *Maqasid*, 21.

²¹ Auda, *Maqasid*, 21-55.

divided into three primary levels: necessities (*darūriyyāt*), needs (*hājīyyāt*), and luxuries (*taḥsīniyyāt*). The first level, necessities (*darūriyyāt*), is divided into faith preservation (*al-dīn*), life preservation (*al-naḥs*), reason preservation (*al-'aql*), progeny preservation (*al-nasl/al-nasb*), and wealth preservation (*al-māl*). The objectives of these rulings (*darūriyyāt*) are so indispensable that life is impossible without them. Preserving faith, life, reason, progeny, and wealth is two folds – from inside and outside.²² In this article, I will focus on the preservation of faith.

The *maqṣad* of *hifz al-dīn*, or preserving the faith, is one of the goals of Islamic law (Islam). Thus, belief in Allah (God), angels, messengers, the day of Judgment, and *qadā'* (the divine decree that consists of the complete judgment forever) and *qadr* (the divine measurement referring to the particulars of the judgment and its details) is a fundamental principle that all Muslims should embrace. The Muslims must perform personal obligations (*fard al-'ayn*) such as daily prayer, fasting during Ramadan, and *hajj* (pilgrimage) to protect the faith from within. Muslims should not engage in anything bound to mar the purity of the Islamic faith. Preserving religion and protecting it is the most critical aspect of the Muslim's life. It is why human beings were created and placed on this earth. In addition to rules ensuring the establishment of faith as mentioned above, another set of rules exists to protect it against destruction, such as prescribing the duty of *jihad* (holy war), which is obligatory to the Muslims when there is an external attack on their land.²³

At the same time, Islam recognizes religious freedom (*al-hurriyyah al-dīniyyah*), a fundamental right affirmed in the Quranic verse al-Baqarah, 256, "There is no coercion in religion." This verse prohibits the coerced conversion of non-Muslims to Islam and protects the rights of religious minorities in Muslim countries. According to the Islamic tenet of freedom of belief, everyone has the right to freely choose their religion or way of life. Anyone with

²² Mohammad Munir, "The Protection of Women and Children in Islamic Law and International Humanitarian Law: A Critique of John Kelsay," *Hamdard Islamicus* 27, no.3 (2002): 69.

²³ Munir, "The Protection," 69.

sufficient mental capacity can follow any religion or belief they choose. This freedom to choose religion, however, only applies to non-Muslims because Muslims are not allowed to convert to other religions - the reason why instilling fundamental understandings of the pillars of Islam is essential for the Muslim community.

Preserving Child's Faith under Islamic Law

Given the importance of preserving one's faith, it is essential to note that all aspects of Islamic legal rulings emphasize the superiority of faith and religion over other elements. The concept of *fitrah* is one aspect that promotes faith's primary role in one's life. *Fitrah* (in the Arabic language) refers to primordial human nature and the fact that humans are born with an innate desire for *tawhīd* (Oneness), which is Islam. Thus, according to Islamic law, a child in their natural state is considered a Muslim.²⁴ In other words, every child is born a Muslim with a natural predisposition to become a Muslim. Everyone would be a Muslim without environmental differences or external influences (such as parents or society). According to this concept, Islam acknowledges that all children, whether born of Muslim or non-Muslim parents, enter paradise if they die before reaching the age of *tamyīz* (discretion). Thus, a deviant man has only his parents to blame for his wrongdoings if they failed to teach his children fundamental Islamic knowledge and the *sunnah* of the Prophet (p.b.u.h) when they were young.²⁵ Based on this concept, a foundling (a child of unknown descent), known as *al-laḡīt* in Arabic, found in a Muslim-majority country, is considered a Muslim.²⁶

Thus, per Islamic legal maxim (*qawā'id fiqhīyyah*) الْقَائِلُ تَابِعُ meaning, "the ruling for a follower is the same as the followed,"²⁷ A

²⁴ Muḥammad bin Hibbān bin Aḥmad bin Hibbān bin Mu'adh bin Ma'bad bin Sa'īd bin Shahīd, *Sahīh*, vol.1, (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1987), 169-170.

²⁵ Ibn Qayyim al-Jawziyyah, *Tuḥfah al-Mawdūd bi Aḥkām al-Mawlūd* (Bayrūt: Dār Ibn Hazm, 2000), 211.

²⁶ Shams al-Dīn Muḥammad al-Ramlī, *Nihāyah al-Muḥtāj ilā Sharḥ al-Minhāj*, vol. 5 (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1993), 454.

²⁷ Al-Suyyūṭī, *al-Ashbāh wa al-Nazāir*, (Bangkok: Maktabah wa Matba'ah al-Nahdi wa Awlādihi, n.d), 130-131.

child is considered a Muslim if their parents are Muslim. Once a child is identified as a Muslim, they will be protected under Islamic law. The child is regarded as a Muslim by default when the child's parents convert to Islam. However, if only one parent embraces Islam, a conflict may arise. Muslim jurists have conflicting views on this issue. According to Abu Hanifah and Ahmad Ibn Hanbal, the child is considered a Muslim by the parent who converted to Islam, regardless of whether it is the mother or father.²⁸

This decision is based on the Quranic verse, al-Nisa':141 "*And never will Allah give the disbelievers over the believers a way [to overcome them].*" Based on a natural guardian and a paternalistic stance, the Malikites believe that the child's religion only follows the father, regardless of his religious status.²⁹

A family, community, and state must preserve and protect a child's religion and identity because it is the only way to nourish a Muslim's soul and guide them down the right path, fulfilling their duty as the vicegerent of the earth—an ultimate goal of every human being. Every Muslim must worship Allah through daily prayer (*salāh*), fasting during Ramadan, and *hajj* (for those who can).³⁰

However, this personal ritual is not the only aspect of the Islamic law that Muslims value. It also pervades the public sphere, where the state supports Muslims in carrying out their religious duties while also implementing state law to punish deviant Muslims, such as those who wish to convert to another religion.³¹ The objective of the law is to protect Islam from being mocked by those who take it for granted by committing apostasy. The same is true for the duty of holy war, imposed on Muslim men when there

²⁸ Ibn Qayyim al-Jawziyyah, *Aḥkām Ahl al-Dhimmah*, vol.2 (Bayrūt: Dār al-ʿIlm li al-Malāyīn, 1994), 507.

²⁹ al-Jawziyyah, *Aḥkam*, 507.

³⁰ Abī al-Ḥusayn Muslim bin al-Ḥajjaj al-Qushairiy al-Naysābūrī, *Ṣaḥīḥ Muslim*, vol.2 (Riyad: Dar Taybah, 2006), 25.

³¹ Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, vol.7 (Dimashq: Dār al-Fikr al-Muʿāsir, 1997), 5580-5582.

is an external attack on Islam.³² The duty to protect Islam is the highest objective of Islamic law (*maqāsid al-sharī'ah*).

Inculcating fundamental knowledge of Islam (*fard al-'ayn*) - principles of faith, pillars of Islam, basic rulings of Islamic law, and reciting the Quran according to its rules from an early age is essential to foster a child's Islamic faith. This fundamental understanding is regarded as the foundation of the Islamic faith. A child should also be accustomed to loving Allah's Messenger, Prophet Muhammad, his family, relatives, companions, ancient Islamic leaders, and conquerors.³³

The first few years of a child's life are significant since they shape the rest of the child's existence. During the early years of a child's life, the Prophet Muhammad advised instilling the principles of faith and the pillars of Islam in their mind. Parents should teach their children to utter the word *la ilaha illa Allah* (there is no God but Allah) from the very beginning of their life, indicating the significance of instilling the understanding of *tawhīd* in Muslims. It is believed that a child raised in a virtuous environment, a faithful environment, will grow up with unwavering faith and distinguished manners.³⁴ According to al-Ghazali, a prominent Muslim scholar, education imparted during childhood is like engraving on a stone, the stone may break up but the engraving remains.³⁵

Although young children, notably those who have yet to reach puberty, may not have an in-depth understanding of fundamental Islamic knowledge, they are at least familiar with the concept. They will understand and easily practice Islamic personal practices once they reach puberty, usually during the teen years, because they have been trained to do so since they were young. Learning the doctrine of *tawhīd* of the Islamic faith, Islamic

³² Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, vol.8 (Dimashq: Dār al-Fikr al-Mu'āsir, 1997), 5848.

³³ Abdullah Nasih Ulwan, *Child Education in Islam*, trans. M.Mahmoud Ghali, Kamal Abdul-Ghani, A. Shafik Elkhatib, Ali Sha'ban & M. Ash-Shahhat al-Gindi. (Cairo: Dar al-Salam, 2004), 73.

³⁴ Ulwan, *Child Education*, 72-3.

³⁵ Moulana Moosa Ibn Ahmed Olgar, *Upbringing of Children* (New Delhi: Idara Isha'at-E-Diniyat, 1995), 85.

personal practices, and Islamic manners is critical for preparing children to be good Muslims. They could easily fulfill all of the requirements imposed by God's decree. They are expected to acquire knowledge and be morally transformed by it. These obligations, if fulfilled, impacted their lives at various points. Muslims should ensure that their children receive an Islamic education to be nourished and prepared on all levels - spiritually, intellectually, and physically to fulfill their obligations as His servants and vicegerents on earth. According to Muslims, knowledge's goal must be "recognizing God's proper place in the order of being and existence."³⁶ Thus, to foster this spiritual development to be an obedient servant of Allah, a child is instructed to perform the prayer, even at the very young age of seven years.³⁷ Hence, any doctrine other than Islam should not be introduced to the child. According to Shafi'ites and Hanbalites, a non-Muslim mother is considered unqualified to become a *hādīnah* (custodian) of a young child upon divorce because *hadānah* (custody) is a form of authority or control, and a non-Muslim should not have authority or power over a Muslim. They quoted the Quran, saying, "... And Allah will never give the disbelievers a way over the believers." ³⁸

The objective of *hadānah* is to ensure the child's welfare in all aspects of their lives, and preserving their religion is of the utmost importance. Thus, giving a non-Muslim physical custody of a child would jeopardize their faith because the non-Muslim custodian would instill a non-Muslim way of life and expose the child to another religion, as mentioned in the prophetic saying, "*Every child is born in a state of fitrah. His parents then make him a Jew, a Christian, or a Magian (fire worshipper).*"³⁹

³⁶ Ahmad Fauzi Abdul Hamid, *Islamic Education in Malaysia*, RSIS Monograph No.8, S. Rajaratnam School of International Studies, (Singapore: Nanyang Technological University, 2010), 8.

³⁷ Abī Dāwūd, *Sunan*, vol.1 (Kāfūr: Matba'ah al-Majīdī, 1375H), 70.

³⁸ al-Nisā' 4: 141.

³⁹ Ibn Hibbān, *Sahīh*, 169-170.

In contrast, the Malikites⁴⁰ and Hanafites⁴¹ believed that a non-Muslim mother is entitled to *hadānah* of a young child as long as she is not an apostate. This *hadānah* right would be granted to her only if it was guaranteed that the food provided for the child is *halāl* and that the child would not be exposed to anything contrary to Islamic decree. If there is reason to believe the mother will not fulfill these requirements, she cannot be the *hādinah*. Instead, the child would be given to other parties entitled to *hadānah*.⁴² By the time the child reached the age of *tamyīz*, their physical custody would be transferred to their Muslim father so that he could teach the child Islamic teachings and protect them from corruption.⁴³

As previously stated, Islamic law prioritizes the superiority of Islam over other religions. As a result, a child's conversion to Islam is valid, but a child's conversion from Islam to another religion is invalid, according to most jurists.⁴⁴ Islamic law recognizes a non-Muslim child's right to embrace Islam as long as they understand the consequences of their actions and when they have the mental capacity (*al-'aql*) to understand their choice. However, classical Islamic jurists differ on what age they could legally embrace Islam. Most jurists, except the Shafi'ites, view that a child could embrace Islam when they are a *mumayyiz* (a child with discernment). According to Imam Ahmad, a child's conversion is considered valid when they are seven.⁴⁵ This opinion is based on the prophetic saying, "*Teach (or instruct) the child to pray when he is seven years old and beat him when he is ten years old.*"⁴⁶ Understanding how to pray can only be internalized when a child

⁴⁰ Shams al-Dīn Shaykh Muḥammad al-Dusūqī, *Hāshiyah al-Dusūqī alā al-Sharḥ al-Kabīr*, vol.2. (al-Qāhirah: Maktabah Zahran, n.d), 529.

⁴¹ Abī Bakr bin Mas'ūd al-Kasānī, *Badāi' al-Sanāi' fī Tartīb al-Sharāi'*, vol.4. (Misr: Matba'ah al-Jamāliyah, 1910M/1328H), 42; Burhān al-Dīn Abī al-Ḥasan 'Alī bin Abī Bakar bin 'Abd al-Jalīl al-Rashdānī al-Marghīnānī, *al-Hidāyah Sharḥ Bidāyah al-Mubtadā*, vol.2 (Misr: Maktabah Mustafā al-Bābī al-Ḥalabī, n.d), 38.

⁴² al-Dusūqī, *Hāshiyah*, 529.

⁴³ Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, vol.10 (Dimashq: Dār al-Fikr al-Mu'āsir, 1997), 7306-7307.

⁴⁴ al-Zuhaylī, *al-Fiqh al-Islāmī*, vol.10, 5578.

⁴⁵ Abī Muḥammad 'Abdī Llah bin Aḥmad bin Maḥmūd Ibn Qudāmah, *al-Mughnī wa al-Sharḥ al-Kabīr*, vol.10 (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 1969), 90.

⁴⁶ Abī Dāwūd, *Sunan*, vol.1 (Kāfūr: Matba'ah al-Majīdī, 1375H), 70.

can think and discern at the age of seven.⁴⁷ It also indicated that the praying performed by a *mumayyiz* is accepted and rewarded by Allah when they are seven years old. Thus, the pronouncements of *shahādah* at this age would also be accepted.⁴⁸ However, there is a view that even the conversion of a five-year-old child to Islam is acceptable, as suggested by Ibn Abī Syaybah because 'Alī bin Abī Tālib embraced Islam when he was five years old.⁴⁹ On the other hand, Abu Hanīfah stated that the minimum age for a person to claim to be a Muslim is ten years old.⁵⁰ According to al-Kharqī, he suggested two conditions be met before accepting such a claim from a child. To begin with, they must be at least ten years old. This view is based on a prophetic saying about instructing the child at seven to perform obligatory prayer and beating them as punishment if they refuse at the age of ten. Second, the child must understand Islam, the fact that Allah is the only God and Muhammad is His Prophet.⁵¹ According to al-Shafi'i and Zufar, the proclamation of Islam can only be accepted if the person has reached puberty (*bulūgh*). Therefore, a child's conversion to Islam is invalid. This view is based on the prophetic saying, "*The pen has been lifted from three: from the sleeper until he wakes up; from the minor until he grows up; and from the insane until he comes back to his senses or recovers.*"⁵² Ibn Qudamah, on the other hand, holds that there is no age limit for a child to embrace Islam because a person is born in a *fitrah*. Islam is for everyone, adult or child. Thus, it is not appropriate to prohibit someone, including a child, from embracing a religion of truth, Islam, because the Prophet p.b.u.h never denied anyone's proclamation of the *shahādah*, whether they were children or adults.⁵³ He argued that the previously mentioned prophetic saying illustrates that while a child's positive deeds are recognized and rewarded, their mistakes

⁴⁷ Ibn Qudāmah, *al-Mughnī*, vol.10, 88.

⁴⁸ Ibn Qayyim, *Tuhfah*, 230.

⁴⁹ *Ibid.*, 253.

⁵⁰ Ibn Qudāmah, *al-Mughnī*, vol. 10, 88.

⁵¹ *Ibid.*, 89-90.

⁵² *Ibid.*, 88.

⁵³ *Ibid.*, 89.

or misdeeds are not held accountable in the Hereafter.⁵⁴ Ibn Qudāmah 's view was consistent with that of Ibn Qayyim, who stated that it is against Islamic teaching to deny anyone, including a child, to follow the right path seeking rewards and paradise as commanded by Allah.⁵⁵ Ibn Hajar al-'Asqalānī, who holds the same view regarding the validity of a child's conversion to Islam, added that a young Jewish boy who used to serve the Prophet (p.b.u.h) became sick, so the Prophet (p.b.u.h) visited him. He sat next to him and asked him to accept Islam. The boy turned to face his father, sitting nearby; the latter told him to obey Abu-l-Qāsim, and the boy accepted Islam. "*Praise be to Allah who saved the boy from Hellfire,*" said the Prophet (p.b.u.h).⁵⁶ When commenting on this *hadīth*, Ibn Hajar al-'Asqalānī stated that he agrees with the opinion that the child's *shahādah* is valid and that this *hadīth* indicates the permissibility of preaching about Islam to children and proving the validity of the child's conversion to Islam.⁵⁷

The discussion about a child's apostasy among classical jurists is also based on the mental capacity of a child. According to the majority of the jurists (except the Shafi'ites), a child's apostasy is valid if they are a *mumayyiz*, but an apostate *mumayyiz* child would not be punished.⁵⁸ The Shafi'ites, on the other hand, opined that a *mumayyiz* child's apostasy is invalid because they are not accountable for any misdeed or sin, as mentioned in the prophetic saying, "*The pen has been lifted from three: from the sleeper until he wakes up; from the minor until he grows up; and from the insane until he comes back to his senses or recovers.*"⁵⁹ It follows that for Shafi'ites, the age of puberty is a critical criterion for assessing the validity of a person's conversion to Islam or apostasy. And for the majority of jurists, *tamyīz* serves as the standard for the validity of someone's conversion to or departure from Islam. The difference is that an adult would be held responsible for punishment, whereas a

⁵⁴ Ibn Qudāmah, *al-Mughnī*, vol. 10, 89.

⁵⁵ Ibn Qayyim, *Aḥkām*, 905.

⁵⁶ Ibn Hajar al-'Asqalani, *Fathul Baari: Penjelasan Shahih al-Bukhari*, vol.7 (Jakarta: Pustaka Azzam, 2004), 341.

⁵⁷ al-'Asqalani, *Fathul Baari*, 343.

⁵⁸ al-Zuhaylī, *al-Fiqh al-Islāmī*, vol.7, 5579.

⁵⁹ *Ibid.*, 5579.

mumayyiz child would not be penalized for leaving Islam. Regarding these two opposing viewpoints held by these two groups, al-Zuhaylī stated that he agreed with the majority of jurists regarding the validity of a child's conversion to Islam at the age of *tamyīz*, and held the same view as the Shafi'ites on the issue of child's apostasy as invalid.⁶⁰

The conflict in determining a child's religion does not arise when both parents are of the same religion because their parents' religion determines a child's religion. But, if one of the child's non-Muslim parents converts to Islam, what is the status of the child's religion in Islamic law? According to the majority of jurists, such as Shafi'ites, Hanafites, and Hanbalites, when a parent converts to Islam, either the mother or father, the child adopts that faith because "*Islam is superior and should never be surpassed.*"⁶¹ The Malikites view that the child will follow the father's religion regardless of religious status because of his paternalistic nature. Thus, if the mother converts to Islam, the child, like the father, remains non-Muslim; if the father converts to Islam, the child becomes a Muslim by default.⁶² On the other hand, Al-Thawrī contends that in such instances, the child should be given a choice to follow either the father's or the mother's religion.⁶³

The *Maqāṣidic* – Approach to Preserving Children's Faith in Malaysian Law

According to Malaysian law, no specific legal clause states that a Muslim's religious beliefs, including that of a child, must be upheld within the principle of *maqāṣid al-sharī'ah*. However, this preservation is implicitly embedded in some legal measures prioritizing Islam in Malaysia over other religions. The fact that Islam is recognized as Malaysia's official religion, as stated in Article 3 of the Constitution, indicates the significance of Islam and its predominance, even within the country's hybrid secular and

⁶⁰ al-Zuhaylī, *al-Fiqh al-Islāmī*, vol.7, 5579.

⁶¹ Abd al-Karīm Zaidān, *al-Mufasssal fī Ahkam al-Mar'ah wa al-Bayt al-Muslim fī al-Sharī'ah al-Islāmiyyah*, vol.9, (Bayrūt: Mu'assasah al-Risālah, 1994), 446.

⁶² Badrān Abu al-Aynayn Badrān, *al-'Alāqah al Ijtīmā'iyah baina al-Muslimīn wa ghayr al-Muslimīn*, Iskandariyah: Mu'assasah Shabāb al-Jāmi'ah, 1984), 165-166.

⁶³ *Ibid.*, 166.

religious legal system. It is not surprising that Islam has been given priority above other religions practiced in Malaysia, considering that Islam was the religion of the majority of the population in this region for many centuries before the invasion of the Western colonialists in the 16th century.⁶⁴ Because civil law encompasses a broader range of jurisprudence, the superiority of Islam in Malaysia is not absolute. But the *maqāṣidic*-approach to preserve the Muslim faith may be realized through judicial interpretation of the law,⁶⁵ by taking advantage of the status of Islam under Article 3 of the Constitution.

Article 3(1) of the Constitution is not meaningless, despite Malaysia's limited application of Islamic law. It serves a broader and deeper purpose than just designating the official federal religion. It is important to emphasize two critical implications: 1) The establishment of Islamic institutions to further the Islamic faith with financial assistance from national or state funds.⁶⁶ For instance, the Department of Islamic Progress of Malaysia (Jabatan Kemajuan Islam Malaysia - JAKIM) and state Islamic religious departments were established with strong support from the federal and state governments to cater to matters regarding Islamic affairs in each state of Malaysia.⁶⁷ 2) The restrictions of the propagation of doctrines among persons professing Islam. Article 11 (4) of the Constitution has vested state authority through the state legislature to codify laws to control the propagation of non-Islamic beliefs among Muslims. The Control and Restriction of the Propagation of Non-Islamic (Terengganu) Enactment 1980 is an example of such a statute. At first glance, these restrictions imposed on non-Muslims were discriminatory regarding freedom of religion. Still, as mentioned earlier, practicing freedom of religion is not absolute in Malaysia. The limits of freedom of

⁶⁴ Tun Mohamed Suffian, *An Introduction to the Constitution of Malaysia* (Kuala Lumpur: Government Printer, 1976), 45.

⁶⁵ Shamrahayu A. Aziz, "Maqasid Al-Syariah dalam Perlembagaan Persekutuan: Satu Perbahasan Awal," *KANUN* 28, no.2 (2016): 280.

⁶⁶ Federal Constitution, Article 12 (2).

⁶⁷ Asyraf Hj. Ab Rahman, Wan Ibrahim Wan Ahmad, and Hammadah Hj Ab Rahman, "Non-Formal Religious Education in Malay Muslim Community in Terengganu Malaysia," *Mediterranean Journal of Social Sciences* 6, no.3 (2015): 190.

religion are also imposed on Muslims, who are prohibited from renouncing the faith of Islam and converting to other religions.⁶⁸ Islam is the official religion of the Federation. Thus, these restrictions are considered appropriate to preserve the sanctity of Islam.⁶⁹

There is no contention about how to raise children in Muslim families since parents are free to choose how to raise their children. While some Muslim parents who want their children to grow up to be devoted Muslims try to teach them the religion at home, other Muslim parents prefer a secular upbringing and neglect their duties of teaching religion at home. However, all Muslim children in Malaysia must study Islamic education once they enroll in government-funded elementary and secondary schools, including those that are vernacular (such as Chinese and Tamil). When five or more pupils profess the Islamic religion, such pupils shall be given religious teaching in Islam by teachers approved by the State Authority.⁷⁰

Islamic Education is one of the subjects of national examination certification in Malaysian mainstream education. The government instructed that Islamic education be made compulsory for all Muslim students in all government schools. They were taught Islamic subjects for the first eleven years, i.e., six years at the elementary level and five years at the secondary level. The government of Malaysia envisioned that Muslim students who learned and adhered to the national curriculum would be able to: correctly and fluently recite the final chapter of the Quran (*juz 'amma*), memorize some verses that are frequently recited during daily prayer and worship, understand the meaning of some verses; understand the significance of faith in religious belief; apply *fardu ain* (basic Islamic rituals), and understand when *fardu kifayah* is applicable; understand the story of the Prophet

⁶⁸ Mohamed Azam Mohamed Adil, "Restrictions in Freedom of Religion in Malaysia: A Conceptual Analysis with Special Reference to the Law of Apostasy, *Muslim World Journal of Human Rights* 4, no.2 (2007):14.

⁶⁹ Zuliza Mohd Kusrin, Zaini Nasohah, Mohd al-Adib Samuri and Mat Noor Mat Zain, "Legal Provisions and Restrictions on the Propagation of Non-Islamic Religions among Muslims in Malaysia," *Kajian Malaysia*, 31, no.2 (2013): 2.

⁷⁰ Education Act 1991, s.50.

Muhammad life as the foundation for human civilization and growth; upholding moral principles in daily conduct, and being able to read and write *jawi* (classic Malay writings that use Arabic characters) – national cultural heritage.⁷¹ The j-QAF program was launched in 2005 to enhance Muslim children's religious awareness and commitment to their daily religious responsibilities. The abbreviation j-QAF stands for *Jawi*, *Quran*, *Arabic*, and *Fard Ain*. There are four teaching models and one curricular model in this program. They are the *Bestari Solat* (prayer perfection) model, the *Khatam Qur'an* (completion of the Quran), the *Tasmi'* (memorization and recitation), and the *Jawi* reintroduction class model.⁷² Parents may also send their children to non-government schools run by organizations such as ABIM (Angkatan Belia Islam, or Muslim Youth Movement) or JIM (Persatuan Jemaah Islam Malaysia, or Organization of the Congregation for Reform Malaysia), which are viewed as having a stronger tendency to harmonize Islamic values and worldview with the rest of society. It was an attempt to harmonize basic Islamic teaching and contemporary challenges.⁷³

The requirement that every Muslim student in primary and secondary school attend Islamic education classes supersedes the parental right to choose the subjects for their children. In the case of *Noorliyana Yasira Mohd Noor v. Menteri Pendidikan Malaysia*,⁷⁴ the applicant's father had asked his daughter to be excused from attending a school-based Islamic religious class. The applicant did not participate in Islamic religious courses when she was in years four and five of a Chinese elementary school and was not given a grade for the mandatory course "Perkara Asas Fardhu Ain" (or "PAFA"), which covers fundamental Islamic practices. The

⁷¹ Sidek Baba, Johdi Mohamad Salleh, Tareq M. Zayed & Ridwan Harris, "Historical Development of Islamic Integrated Education in Malaysia since 15th Century: Current Needs for the Globalized World," *History of Education & Children's Literature* 8, no.2 (2018): 17-18.

⁷² Mohd. Shuhaimi Ishak & Osman Chuah Abdullah, "Islamic Education in Malaysia: A Study of History and Development," *Religious Education* 108, no. 3 (2013): 303.

⁷³ Ishak & Abdullah, "Islamic Education in Malaysia," 305.

⁷⁴ [2007] 2 MLJ 65.

applicant, however, took morality lessons (which are provided for non-Muslim students). The applicant then moved to another school in standard six. The applicant's parents requested that her exemption from religious classes be maintained. When UPSR results were released, it was stated on her result slip that she failed her PAFA subject. She filed a *certiorari* request to remove the failing grade from her result statement and a *mandamus* request to get a new result statement. The applicant admitted that the real reason for the application for exemption in attending the religious studies classes, including PAFA, was that the teachings in the religious class in school contradicted the belief and understanding of the applicant's father and family. However, the court denied her application on the ground that Islam was a mandatory subject in the national curriculum for Muslim students. Islamic studies, which included PAFA, was one of the core subjects for Muslim students. The judge added that the court should not impede matters related to the national curriculum established by the Education Ministry. The applicant should be ready to be bound by the rules and curriculum set by the school, given that she was the one who opted to attend a government school. The applicant was not allowed to dictate which disciplines or core subjects she wanted to learn and which she didn't.

While Muslim children attend Islamic education classes, non-Muslim children, on the other hand, must participate in moral education classes. It should be noted that it does not mean that non-Muslim children are prohibited from attending Islamic education classes. They are allowed to do so with the written consent of their parents.⁷⁵ Muslim children (and also includes adult Muslims), on the other hand, are forbidden to be exposed to different religious teachings other than Islam,⁷⁶ even with the consent of their parents. The constitution makes it very clear that despite having freedom of religion, which includes the right to profess and practice for non-Muslims, they are not allowed to propagate or spread their non-Islamic religious teachings to

⁷⁵ Education Act 1991, s.51 (b).

⁷⁶ The Federal Constitution of Malaysia, Article 11 (4).

Muslims.⁷⁷ And also for the Muslims, they are not legally allowed to convert to a religion other than Islam.⁷⁸

In a nutshell, it could be said that freedom of religion is provided under the Constitution, but it is not absolute. There are legal restrictions and limitations for Muslims and non-Muslims practicing their faith. These restrictions regarding the Islamic religion are basically to protect and preserve Islam and Muslims in the best way possible within pluralistic Malaysian society.

The restrictions of this propagation had been enacted in several states, for instance, in Terengganu. The Control and Restriction of the Propagation of Non-Islamic (Terengganu) Enactment 1980, under s.5, clearly states that it is an offense to subject a Muslim under eighteen years to influences of non-Islamic religion. Those who committed these offenses are liable on conviction to imprisonment for a term not less than one year and not exceeding eight years or a fine not exceeding fifty thousand ringgit or both. This prohibition applies if the subject of propagation is an adult Muslim.⁷⁹ In an attempt to preserve the Islamic faith among Muslim children, Muslim parents or guardians have restrictions on giving away their child under their care to a non-Muslim. Those found guilty will face a maximum fine of 5,000 ringgit, a maximum sentence of three years in prison, or a combination of the two.⁸⁰

By regulating the individuals permitted to preach, Muslims are protected from being vulnerable to non-Muslim missionaries and exposed to deviant Islamic doctrine. Before preaching anywhere within the states, Muslim preachers must get a "*surat tauliah*" (letter of authorization) from the state religion departments.⁸¹ Therefore, in Malaysia, only those with appropriate academic backgrounds and adhering to *sunni* Islamic schools of

⁷⁷ The Federal Constitution of Malaysia, Article 11 (4).

⁷⁸ *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Anor* [2004] 6 CLJ 242; *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Ors* [2007] 4 MLJ 585.

⁷⁹ Control and Restriction of the Propagation of Non-Islamic (Terengganu) Enactment 1980, s.6.

⁸⁰ Syariah Criminal Offence (Selangor) Enactment 1995, s. 35.

⁸¹ For example, Administration of the Religion of Islam (State of Selangor) Enactment 2003, s.118

thought (as opposed to *shia* and other Islamic deviant beliefs) are permitted to preach. Without the "*surat tauliah*," it is illegal to teach the religion of Islam or any component of Islamic religious teachings. If found guilty, offenders face fines of up to 3,000 ringgit, up to two years in prison, or a combination of the two.⁸²

Briefly stated, this entire circumstance points to Islam's unique status under Malaysian legislation, which permits broad application to indoctrinate the Islamic religion into Muslim children and offers them sufficient opportunities to practice their faith from a young age. And at the same time, it prohibited any other religious teachings from propagating among Muslims. Any methods to influence Muslim children to other religions are not allowed under any circumstances under Malaysian law. Though it does not explicitly mention that *maqāṣid al-sharī'ah* is applied within Malaysian law, it inherently exists alongside any legal measures that provide ample choices for Muslims to develop their spiritual beliefs and legal prohibition to preserve their faith.

In contrast to Islamic jurisprudence, which, as indicated in this article's earlier section, accepts a child's conversion to Islam, Malaysian law does not let children choose their religion. Their parents essentially make the decisions. It should be noted that Islamic jurisprudence and Malaysian law have different definitions of what constitutes a "child." Puberty (*al-bulūgh*) is an indicator for a person to be considered an adult, regardless of their age under Islamic jurisprudence, but in Malaysia, anyone under the age of eighteen is considered a child⁸³ regardless of ethnicity or religion. Thus, the concept of *al-bulūgh* as prescribed under classical Islamic jurisprudence as an indicator of the age of majority, is not applicable in Malaysia, even for Muslims. Article 12 (4) of the constitution clearly states that a person under eighteen should have their religion decided by their parent or guardian. The right of parents or guardians to determine their child's religion is also provided under s.3, Guardianship of Infants Act 1961. Both father and mother are given equal guardianship rights.

⁸² Administration of the Religion of Islam (Selangor) Enactment 2003, s.119.

⁸³ Child Act 2001, s.2.

The right to decide a child's religion must be exercised by both parents jointly unless one parent has died.

Despite the right to freedom of religion granted to Malaysian citizens under Article 11 of the Constitution, Article 12 (4) overrides that article. It gives parents the right to choose a religion for their children. As a result, a child does not have the right to choose their religion or type of education. They could only do so with their parents' or guardians' permission. Thus, even if a child of non-Muslim parents has reached the age of majority under Islamic jurisprudence, they are not free to convert to Islam without their parent's permission under Malaysian law. In accordance with the provision in the constitution, the administration of Islamic law enactments provides, *inter alia*, that a person who is not a Muslim may convert to Islam if he is of sound mind and has attained the age of eighteen years or, if he has not reached the age of eighteen years, his parents or guardians consent to his conversion.⁸⁴

In *Re Chee Peng Quek*,⁸⁵ the parents' authority to refuse their child's conversion to Islam was emphasized. In this case, a sixteen-year-old Chinese girl converted to Islam without her parents' permission. The father requested from the court a declaration that he, as the child's father and legal guardian, has the authority to control his child's religious beliefs and that she be raised as a Buddhist. The court granted his application. This judgment was later on referred to in Susie Teoh's case. In *Re Susie Teoh; Teoh Eng Huat vs Kadhi of Pasir Mas Kelantan & Majlis Ugama Islam & Adat Istiadat Melayu Kelantan*,⁸⁶ a seventeen-year-old and eight months girl converted to Islam. Her father filed a declaration stating that as the father, he has the authority under Infant Guardianship 1971 and Article 12 (4) of the Constitution to decide his daughter's religion, education, and upbringing. The Supreme Court approved his application.

⁸⁴ Administration of Islamic Law (Federal Territories) Act 1993, s. 95(b) (Act 505).

⁸⁵ [1963] 1 MLJ lxxix.

⁸⁶ [1990] 2 CLJ 11; See also *Teoh Eng Huat v. Kadhi of Pasir Mas Kelantan & Anor* [1986] 2 MLJ 228.

The issue of a child converting to Islam is not recent in Malaysia. It has been reported that the same problem caused turmoil in Malay society during the British administration in Malaya in the 1950s. In *Re Maria Huberdina Hertogh; Adrianus Petrus Hertogh and Anor v Aminah binte Mohamed & Ors*,⁸⁷ a Dutch girl whose biological parents were Catholics was brought up as a Muslim by her Malay adoptive mother since she was four. When the application was filed in court, the girl was thirteen years old, married under Islamic law to a Malay Muslim man, according to Islamic law, and the girl herself wanted to become a Muslim. Despite the girl's wish to become a Muslim and the fact that she had been practicing Islam since living with her adoptive mother, the court ruled that she was not legally a Muslim because her biological Christian father, who was entitled to decide on her religion, education, and upbringing, had never consented to her conversion to Islam.

When the child and his parent or guardian disagree on the child's religion, it is obvious who would win because, in such cases, the parent or guardian usually has the upper hand. However, the issue of whether the consent of one parent (singular) or both parents (plural) is required for the conversion of minor children has come to the forefront in recent years, and there are inconsistent verdicts on this matter. In the case of *Chang Ah Mee v. Jabatan Hal Ehwal Agama Islam & Ors*,⁸⁸ the husband converted to Islam and registered their two-year-old daughter as Muslim without the mother's permission. The mother claimed that the conversion was invalid since, according to the Sabah Administration of Islamic Law Enactment, a minor's conversion required the parents' (plural) approval. The respondent argued that Article 12 (4) of the constitution states that the decision about the religion of a person below eighteen years of age must be made by his parents or guardian. Given that the phrase "parent" (in the singular) appears in the constitution's language, the mother or the father can choose their child's religion, even without the other

⁸⁷ (1951) 17 MLJ 12; See also, *Re Maria Huberdina Hertogh; Inche Mansor Adabi vs Adrianus Petrus Hertog & Anor* (1951) 17 MLJ 164.

⁸⁸ [2003] 1 CLJ 458.

spouse's approval. The High Court ruled that the Constitution does not discriminate between the sexes. The term "parent" in Article 12 (4) refers to both the father and mother. It was held that the father's unilateral conversion of the child is null and void.

Nedunchelian v. Nurshafiqah,⁸⁹ is another comparable case. Without her husband's permission, the mother converted to Islam, and her four children to Islam. The father cited the *Chang Ah Mee*⁹⁰ ruling in support of his claim that Article 12(4) of the Constitution should be interpreted to require the consent of both parents. The High Court, on the other hand, construed the word "parent" in Article 12(4) in a different way, holding that only one parent's (single) permission is required for the conversion of the children. The court cited the Federal Constitution in Bahasa Malaysia (the national language), stating that "*ibu bapa*" refers to a single parent as opposed to both parents or "*kedua ibu bapa*." Since the Federal Constitution in *Bahasa Malaysia* is the authoritative text, the word parent should be interpreted in a way consistent with how the word "*ibu bapa*" is meant to be understood. The High Court also emphasized that under Article 121 1A, matters relating to conversion to Islam are within the jurisdiction of the shariah courts, and civil law has no jurisdiction. The High Court dismissed the father's application.

The question of the validity of the unilateral conversion of a minor was once again called into question in *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors.*⁹¹ In this case, the husband converted to Islam in March 2009 and, the following month changed the religion of his three minor children (aged 12 years, 11 years, and 11 months) to Islam without the wife's consent. The shariah court awarded the husband custody of the three children. The wife sought, *inter alia*, the cancellation of the conversion certificates of the children by the Registrar of Muallaf, in the alternative, a declaration that the certificates were null and void. The defendants argued that under Article 12(4) of the

⁸⁹ *Nedunchelian V. Uthiradam v. Nurshafiqah Mah Singai Annals & Ors* [2005] 2 CLJ 306.

⁹⁰ [2003] 1 CLJ 458.

⁹¹ [2013] 5 MLJ 552.

Constitution, the religion of a person under eighteen years of age could only be changed by a parent alone and that the civil courts had no jurisdiction to review the matter once the children were registered as Muslims. The High Court allowed the mother's application and held that the certificates issued by the registrar had no legal effect due to non-compliance with section 96 of the Enactment.

The issue of the validity of the conversion certificates was re-emphasized in the Federal Court in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other Appeals*.⁹² It was held that the registrar had no authority to issue the certificates of conversion of the children to Islam as Sections 96 and 106 (b) of Perak Enactment were not complied with. The conversion certificates were issued without the appellant's consent, thus contravening Article 12(4) of the Constitution and sections 5 and 11 of the Guardianship of Infants Act 1961. The conversion certificates are void. The father's action to unilaterally convert the children without the mother's consent was considered to interfere with family life.

The most recent case, however, indicated a different approach taken by the judge. In this case, Loh Siew Hong (mother) applied to the High Court to nullify the unilateral conversion to Islam by one party (father) of her three children. The judge, however, ruled that the children are Muslims, based on the fact that the applicant, during the trial, did not deny the assertion by her former husband that the children continued professing the religion of Islam in performing daily "*subuh*" prayers when they were under her custody. Their eagerness to practice Islamic rituals, including the ambition of one of the children to become a syari'e lawyer, was sufficient proof that they were Muslims. Even if the certificates of conversion were not (considered) conclusive proof, because of their unilateral nature, the 'force of the evidence' would suggest that the three children continued professing the religion of Islam.

⁹² [2018] 1 MLJ 545.

There is no evidence that the children had converted to Hindu religion.⁹³

Suffice it to say that children under eighteen do not have the right to decide on their religion. It is the right of the parents to decide in what religion they shall be brought up. The conflict between mother and father to unilaterally decide the religion of their children born in a non-Islamic marriage, especially if they have just converted to Islam, is not simple.

Special attention to *inter alia*, Islamic religious commitment among disputing Muslim parents over child custody could be noted in custody cases in shariah courts. It was noted that the court will lean towards the party that demonstrates their commitment to the Islamic faith or ability to provide the children with a decent Islamic upbringing.⁹⁴ Islamic family law stipulates that a person must satisfy several criteria before being granted custody by the shariah court: he must be a Muslim, of sound mind, of an age where he can provide the child with the care, love, and affection that he needs, and he must display good behavior in accordance with Islamic morality. Additionally, he must reside where the child can live in a safe place, morally and physically. A parent or guardian who is not a good Muslim and cannot provide a proper Islamic environment for the child might lose custody. A parent or guardian who does not have good Islamic manners is considered unsuitable for child custody, especially if he converts from Islam to another religion (*murtad*).⁹⁵

In the case of *Tunku Mahmood Shah bin Tunku Mohammed v. Noor Faridah Sutherland Abdullah*,⁹⁶ the court awarded custody to the father, even though it is a general principle in Islam that the mother has the best right of all persons to have custody of her

⁹³ "Loh Siew Hong loses bid to quash kids' conversion to Islam," 11th May 2023, *Free Malaysia Today*, accessed May 26, 2023, <https://www.freemalaysiatoday.com/category/nation/2023/05/11/loh-siew-hong-loses-bid-to-quash-kids-conversion-to-islam/>

⁹⁴ Zanariah Noor, "Agama dan Akhlak: Satu Analisa Kelayakan Pengasuh dalam Kes Hadanah," *Jurnal Syariah* 12, no.1 (2004): 68.

⁹⁵ Islamic Family Law (Federal Territory) Act 1984, s.83 (b) (d); Islamic Family Law (State of Selangor) Enactment 2003, s.84 (b) (d).

⁹⁶ [1996] JH (1) 227.

young children. The father was able to convince the court that he could give the children a decent Islamic upbringing in Malaysia. In contrast, the mother, an American convert, was still accustomed to Western culture, and her capacity to give the children a good Islamic education was still questionable. The consideration of Islam and the religious commitment of both parties was based on the principle of child welfare from an Islamic perspective. The primary objective is to safeguard the child's Islamic faith. Although the court did not refer to the *maqāṣidic* - approach of *hifz al-din*, it was tacitly incorporated into every ruling made by the shari'a judges.

Conclusion

In conclusion, the discussion on preserving a child's faith in Malaysia must be approached with a more complex and ambivalent view but requires an intricate understanding of the country's social demography dynamics. Muslims are governed by two sets of laws that place them in a complicated position *vis-à-vis* one another. Children descended from a converted parent face a far more complex situation than children born into a Muslim family. A glimpse of the Malaysian constitution suggests that the government's control in these matters is consistent with the children's rights to retain their parents' religion. In summary, although it is a state religion, Islam has no absolute privileges in court decisions. However, within the Malaysian legal setting that has given Islam a unique position within the Constitution, it allows interpretations of laws that ensure the preservation of Muslim children's faith within the *maqāṣid al-sharī'ah* framework to the greatest extent possible.

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