

Juristic Preference or *Istihsan* in the Judgment of Shariah Court in Malaysia

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Introduction

Interpretation of legal texts or law statutes is inevitable in any legal system given the fact that the wording of the law should be flexible to deal with changing circumstances. But at the same time the law should not be too specific that will make its implementation or enforcement difficult or rigid. Many factors may contribute to understanding of the meaning of the law, principally intention of the legislature. In most legal system, the court of law is given the task to interpret the law when there is a dispute as to its meaning arisen or even when in the case there is now statutory provisions of the law. Although the general perception that Islamic law is destined to be eternally fixed in its provisions because its religious and doctrinaire character, close examination shows that its detailed provisions have constantly been subject to changes and modifications of social and political undercurrents. This process continues up until today even in the field of family law which some consider to be the last bastion of the Islamic Shari'ah *par excellence*.¹

Muslim society and state always have the passion to demonstrate their loyal observance to the Shariah Law as expounded by the past scholars as a sign of religious continuity and spirit of a single community or *ummah*. It is therefore quite frequent that the ulama or Islamic scholars have never hesitated to blame their political ruler for their neglect of the Sharia law.² As in case of Malaysia as well as in Brunei the school of Shafi'i and the theological doctrine of Ash'ari is declared to be official and no other

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¹ Ziba Mir-Hosseini, *Marriage On Trial: A Study of Islamic Family Law* (I B Tauris, 2nd revised ed) 12.

² Joseph Schacht, 'Islamic Law in Contemporary States' (1959) 8(1-4) *The American Journal of Comparative Law* 133.

interpretation is allowed particularly the latter to be disseminated among the Muslim public, although it is not an offence to practice other than the above school and doctrine in private. As such in Malaysia the use of *ijtihad* or fresh interpretation of the text is rare and attempt of doing is perceived with cynicism however elegant and subtle the exercise may be. Nonetheless behind the scene, the effect of fresh interpretation of the text from time to time appears to substitute the teaching of the past scholars. In the field of Islamic banking and finance in Malaysia, some verdicts of the Shafi'i school of law are ignored and it is only used whence the expedience presents itself and this is also true in other sphere of law namely family and social relations and habits.³ The means and mechanic to achieve this is not necessarily *ijtihad*, as it will be discussed below but rather through methods some of which are hitherto considered controversial in the Shafi'i school are employed to achieve the resultant effect of fresh interpretation.⁴ The use of these methods can be seen in the legislations and also in the decision of the courts. Using examples from the judgment of the Shariah Courts in Malaysia, this article aims to demonstrate the changing facets of Shariah law as decided by the Shariah judges in Malaysia.

Juristic Preference or *Istihsan* in Islamic Law

Istihsan is one of the sources in Islamic law that is accepted by most of schools of law, but is strongly opposed by al-Shafi'i (d. 820). The concept of *Istihsan* is formulated by the supporter of this concept in order to avoid the total dependency on the explicit understanding of the texts or *Zahir al-Nas* either from the Qur'an, *Sunnah* or *Ijma'* (Consensus). It is also developed to avoid the excessive use of *Qiyas* (analogy) that can upset the principle of *Maslahah* (public interest) in the application of a particular law. The word *Istihsan* from the language point of view is an Arabic word derived from the word *al-husn* which means good which is the opposite meaning of *al-qubh* which means bad. The word is used to express of decorating or improving or considering something to be good.⁵ There is however a disagreement among the scholars as to its technical definition which is due to their disagreement on the acceptance of *Istihsan* itself as a source of law. For scholars who reject the validity of *Istihsan*, consider it as free reasoning without the guidance from the texts which is prohibited.

Naturally the supporters of *Istihsan* rejected this by maintaining that it is a comparison among the sources of Islamic law with the objective to choose the much stronger in authority and most beneficial to mankind. This definition is offered by Hanafi jurist al-Karkhi (d.952) and was

³ The recent Malaysian Central Bank Directive on September 2012 on the use of *Bay' al-'Inah* as permitted in the Shafi'i school, although still allowing its use in the financial and banking products has put conditions and restrictions almost amounted to its discontinuance.

⁴ Many have been discussed in the employment of these methods. See notably J N D Anderson, *Law Reform in the Muslim World* (Athlone Press, 1970) 34ff.

⁵ Zayn al-Din Muhammad bin Abi Bakr bin 'Abd al-Qadir Al-Razi, *Mukhtar al-Sihhah* (Maktabah Lubnan Nasyirun, 1995) 167.

recognized by most of the scholars as the best and the most comprehensive definition of *Istihsan*.⁶ However, al-Karkhi's definition does not include *Maslahah* which is the main reason for scholars to use *Istihsan* as indicated by Maliki jurist al-Shatibi (d.1388).⁷ Combining between Karkhi definition and *Maslahah* of Shatibi the technical meaning of *Istihsan* can be best described as an effort to arrive at a legal solution which is different through the use of *Qiyas* because there is a stronger case or evidence to relieve or to avoid hardship. The effect of this definition in substance is not uncommon to the Shafi'is as avoidance of hardship is a core and centre of the Shariah principles. What that is objected here to the Shafi'is is to discard of *Qiyas* or legal analogy in favor of reasoning based on *Istihsan*. To the Shafi'is a relief from the provision of the Shariah law based on hardship is permissible not because of reasoning but of the texts which provide an exception to the rule of law. As such the basis for such legal solution ultimately must be from the authority of the texts. From technical point of view the Shafi'is scholars achieved this through the use of legal maxims or *qawa'id fiqhiyyah*. Through the support of the legal texts not only from the Qur'an and Sunnah but also from decisions of the early Caliphs and companions known as *qawl sahabi* together with the combination of the rulings in actual cases of the law, many practical answers and solutions were given in form of these legal maxims.

The aim of these legal maxims are to assist a Qadi (judge) or Mufti to provide answer based on public interest or *maslahah*, avoidance of hardship or *masyaqqah*, elimination of harm or *darar* and appreciation of habits and norms or *adat*. The final effect on the use of these maxims is similar to that *istihsan* although in contracts to the Hanafis, the Shafi'is do not consider the maxims as the source of the law but rather a rule or guide in providing the solution to legal problems. Justification to support the use of legal maxims is that every rule in the Shariah must be formulated to achieve the objectives or *maqasid* of the Shariah. For this reason and since the use of legal maxims is widespread in all Islamic legal schools including that of the Shi'is, some scholars view that legal maxims are used quite aggressively to resolve problems that normally thought can be settled through *ijtihad*.⁸ It appears that the use of legal maxims in the recent development of Islamic law is so refreshing and efficient simply because the broad and all-encompassing principles of *maqasid* and *maslahah* underpinning the maxims in solving practical issues and problems.

⁶ See Sulayman bin 'Abd al-Qawi bin al-Karim Al-Tufi, *Syarh Mukhtasar al-Rawdah* (Mu'assasah al-Risalah, 1987) vol 3, 190; 'Abd al-Wahhab Khalaf, *Masadir al-Tasyri' al-Islami fi ma la Nassa fih* (Dar al-Qalam, 2005) 93; Mustafa Ahmad al-Zarqa', *Al-Istislah wa al-Masalih al-Mursalalah fi al-Syari'ah al-Islamiyyah wa Usuli Fiqhiha* (Dar al-Qalam) 23.

⁷ Abu 'Ishaq Ibrahim bin Musa Al-Syatibi, *Al-Muwafaqat* (Dar Ibn 'Affan, 1997) vol 5, 194.

⁸ Muhammad Hashim Kamali, 'Legal Maxims and Other Genres of Literature in Islamic Jurisprudence' (2006) 20(1) *Arab Law Quarterly* 79.

Cases Reported in the Jurnal Hukum for the Year 2005-2009

Following the example of the Civil Courts which maintain law report as a source of unwritten law, the Shariah Courts in Malaysia also started to compile its judgment officially since 1980 in a Journal known as *Jurnal Hukum* (or Law Journal). The reporting of cases having Shariah issues tried in the Civil Court has actually been made by the Malayan Law Journal (MLJ) long before the *Jurnal Hukum* was published since British colonial times. Nevertheless, reports of the MLJ were used solely for the purpose of the Civil Courts and only acquired attention of the Shariah judges off late. The purpose of this compilation of cases decided in the Shariah Courts in the *Jurnal Hukum*, in contrast to law reports in MLJ, is not to make these reports as an authoritative source of law that is binding to the Shariah Court since in the Shariah, a judge is free to decide as according to the merit of the case even though there was precisely the same case in fact and law in the past. The compilation or reporting of the Shariah court judgments was rather for the purpose of education, training and research both for the junior Shariah judges and academics. It is this sense quite similar to the legal system of European countries and most of the Arab countries. Overtime the reports also serve as guidance for the lower Shariah courts, especially decision coming from the Shariah Appeal and High Court.

In Malaysia the practice and culture of the Civil Courts have a very strong influenced upon the Shariah Courts especially in terms of procedures, court manners and ethics. Even the Chief Justice of the Civil Court once made a remark that the Shariah Court has been civilized by the Civil Court. Because of this trend, reports of Shariah Courts decision are also published by professional law reports such as Malayan Law Journal in a special edition known as Syariah Law Reports. It is also published by publisher Current Law Journal known as the same. The current article will only use law reports from the *Jurnal Hukum* since it is the oldest and official publication of the Shariah Courts. The authors have selected the cases reported in the *Jurnal Hukum* by limiting the judgments made by Appeal and High Shariah Court judges from the Federal Territory of Kuala Lumpur, Selangor, Penang and Negeri Sembilan. The reason for limiting the cases from these four states as for representative purpose of the whole cases reported.

From statistical point of view eighty reported cases reported were selected from the time span of February 2005 to June 2009. Out of these cases, thirty one cases were from the Federal Territory of Kuala Lumpur, twenty one from Selangor, nine from Penang, and nineteen from Negeri Sembilan. Out of 80 cases examined, only eight cases were discovered to have judgments applying the principle of *Istihsan* which represents ten percent of the total cases. Of these eight cases, three were from Negeri Sembilan, two from Penang and Selangor respectively and one from Federal Territory. Table 1 below shows the distribution of cases by state and information about the cases using *Istihsan*.

Table 1: Reported Cases Using *Istihsan*

NO.	STATE	NUMBER OF CASES EXAMINED	NUMBER OF CASES USING <i>ISTIHSAN</i>	CASE DESCRIPTION USING <i>ISTIHSAN</i>
1	Negeri Sembilan	19 case	3 case	<i>Radziah binti Ibrahim</i> <i>v</i> <i>Peter R. Gottschalk</i> (Application for an <i>ex-parte</i> order to obtain temporary custody)
				<i>Noraishah bt Ahmad</i> <i>v</i> <i>Omar bin Jusoh and six others</i> (Claimation of jointly acquaired property)
				<i>Sabariah binti Md Tan</i> <i>v</i> <i>Busu bin Md Tan</i> (Claimation of jointly acquaired property)
2	Pulau Pinang	9 cases	2 cases	<i>Zarina Hashim</i> <i>v</i> <i>Jamaluddin bin Saidon</i> (Claimation of child custody, child maintenance and jointly acquaired property)
				<i>Ibrahim bin Hj. Ishak</i> <i>v</i> <i>Anuar bin Ahmad and two others</i> (A request from plaintiffs to visit and bring the daughter and grandchildren home twice a week)
3	Selangor	21 Cases	2 Cases	<i>Maryam binti Abdullah</i> <i>v</i> <i>Hithir bin Rashid</i> (Claiming to reverse the previous court order of child custody and child maintenance)
				<i>Mustapha bin Ismail</i> claiming the distribution of the inheritance property of the deceased Che Fatimah binti Abdul Razak. (Compulsory Will)

Table 3.1, Continued.

4	The Federal Territory of Kuala Lumpur	31 Cases	1 Case	<i>Mazitah binti Hussin v Rahiman bin Selamat</i> (Application to extend the interim order of injunction)
	Total	80 Cases	8 Cases	

Source: *Jurnal Hukum* Volume 19 Part I & II; Volume 20 Part I & II; Volume 21 Part I & II; Volume 22 Part I & II; Volume 23 Part I & II; Volume 24 Part I & II; Volume 25 Part I & II; Volume 26 Part I & II; Volume 27 Part I & II; Volume 28 Part I & II.

Analysis the Cases of *Istihsan*

The judgments in the above eight cases did not state explicitly that the concept of *Istihsan* was used. This is well understood as the judges are trained in Shafi'i school will avoid using *Istihsan* in his judgment. Nevertheless reading through the justification of the judgments made one cannot escape but to conclude that the principle of *Istihsan* was used. For the purpose of expediency the issues in the judgments have been categorized into six topics for analysis. These topics are (a) judgment in the absence of the defendant or *ex-parte*, (b) child maintenance, (c) jointly acquired property during marriage, (d) obligatory bequest, (e) visitation's rights and (f) injunction order.

Judgment in the Absence of the Defendant and the Ex-Parte Judgment

Judgment or decision of the court must in full presence of both plaintiff and defendant. This is the rule in the Shariah law based on the hadith of the Prophet narrated from 'Ali bin Abi Talib (d.661) that instructed a Muslim judge to hear arguments from both disputing parties before dispensing judgment.⁹ Nevertheless in another hadith the Prophet was reported to give judgment to Hind bint 'Utbah, wife of Abu Sufyan in the latter's absence.¹⁰ It was reported that Caliph 'Umar and Caliph 'Uthman decided the same.¹¹ It was later a settled law that the judge is permitted to declare judgment in the absence of defendant. The basis of this is *Istihsan* based on the hadith. The permissibility of this judgment is also based on *Qiyas* or analogy

⁹ Abu al-'Ala' Muhammad bin 'Abd al-Rahman Al-Mubarakfuri, *Tuhfah al-Ahwazi* (Al-Maktabah al-Salafiyah, 1963) vol 4, 561.

¹⁰ Ahmad bin 'Ali al-'Asqalani Ibn Hajar, *Fath al-Bari Syarh al-Sahih al-Bukhari* (Bayt al-Afkar al-Dawliyyah, 2006) vol 2, 2399.

¹¹ Syams al-Din Muhammad bin al-Khatib al-Syirbini Al-Khatib, *Mughni al-Muhtaj* (Dar al-Ma'rifah, 1997) vol 4, 542.

whereby jurists agree that judgments can be made for a minor or a deceased as well as against an absconded defendant in their absence. In addition, through reasoning if the judge is not permitted from making a judgment in the absence of the defendant while the plaintiff has produced all the necessary evidence to support the claim, the situation can be considered as denying the rights of the plaintiff. It is also contrary to the responsibilities of a judge to grant and protect the rights of a citizen.¹²

In Malaysia the permission to declare judgment *in absentia* is already provided in the Shariah Civil Procedure Law as will be shown below. Nevertheless it is quite interesting to see grounds made by the court to permit such a judgment. Thus in the case of *Zarina bt Hashim versus Jamaluddin bin Saidon*¹³ involving the claims of child custody, child maintenance and jointly acquired property, the defendant failed to appear in all of the proceedings. The court decided to proceed with the trial by referring to section 121(1)(b) Penang Shariah Court Civil Procedure Enactment No.6/2004. In addition to this provision of the law, the court was of the view that if the summon was fully served to the defendant and by refusing to attend or answer the claims shall indicate that the defendant had admitted to the allegations put to him. This is based on the maxim of Islamic jurisprudence that silence in the matter that a person must speak is a confession.¹⁴ The court also refers to the Shafi'i's manuals of *I'alah al-Talibin*¹⁵ and *Mughni al-Muhtaj*¹⁶ that permit the court to make judgments to the defendant who is absent on condition that the plaintiff has to produce evidence for each allegations and claims. The judge also stressed that the court is a place to obtain the rights by disputing parties. Therefore, the court shall perform its inherent responsibility to declare judgment in the interest of justice.¹⁷

The same argument was also presented in the case of *Maryam binti Abdullah versus Hithir bin Rashid*¹⁸ involving application to change previous court order on child custody and maintenance. However in contrast to the above case, the defendant was not present in the early stage of the proceedings. The judge initially postponed the case due to incomplete process of serving the summon to the defendant. After this had been satisfied the Court proceeded with the trial without the presence of the defendant by referring to section 121(1)(b) of the Selangor Syariah Court Civil Procedure Enactment No.4/2003. The court also refers

¹² Ibid.

¹³ *Zarina bt Hashim v Jamaluddin bin Saidon* (2007) 23(1) JH 143 ('Zarina').

¹⁴ (السُّكُوتُ فِي مَعْرَضِ الْخَاجَةِ بَيَانٌ), refer to Ahmad bin Muhammad Al-Zarqa', *Syarah al-Qawa'id al-Fiqhiyyah* (Dar al-Qalam, 1989) 341.

¹⁵ Abu Bakr 'Uthman bin Muhammad Syata al-Dimyati al-Bakri, *Hasyiyah I'alah al-Talibin* (Dar al-Kutub al-'Ilmiyyah, 1995) vol 4, 238.

¹⁶ Al-Khatib, above n 11, 542.

¹⁷ *Zarina* (2007) 23(1) JH 143.

¹⁸ *Maryam binti Abdullah v Hithir bin Rashid* (2005) 19(2) JH 242 ('Maryam').

to Shafi'i manual *I'anaḥ al-Talibin*.¹⁹ The judge maintains that the decision to proceed with the trial is consistent with the maxim of Islamic jurisprudence (الضَّرَرُ لَا يُزَالُ بِالضَّرَرِ)²⁰ which means the harm cannot be eliminated by causing harm to others and the maxim (أَرْبَعَابُ أَلْفِ الضَّرَرَيْنِ)²¹ which means implementing one of the lesser harm.²²

A similar position is also expounded in the case of *Radziah binti Ibrahim versus Peter R Gottschalk@Yusuff bin Abdullah*.²³ In this case, the applicant applied from court an *ex-parte* order for temporary custody of a child. The applicant requested that this case must be heard quickly because she was worried that the respondent would take away her daughter from her based on intimidations and threats made by the respondent. When judgment was made, the judge has stated in advance that any dispute shall be heard from both sides, so that, each party can give their evidence to ensure fairness to all. However, there are exceptions from this principle if there is element of hardship (*masyaqqah*) or harm (*darar*) that may occur if the original law was to be followed. The judge in this case allowed the *ex-parte* application based on two principles of *masyaqqah* and *darar* which allowed the obligation to be exempted.²⁴ Based on these principles, the original rule of law was set aside to remove the hardship or harm to human being. In this case, it was further reasoned by judge that there exists element fears for the safety of child, as there were threats from the respondent to bring back his daughter overseas at any time and addition to the allegation by the applicant that the respondent is not a practicing Muslim. All these claims form a basis for a potential harm to the child.²⁵ The reasoning of this judgment is similar to that of *Istihsan*.

Child Maintenance as a Debt

The Shariah law prescribes that a father has the responsibility to provide maintenance to his children as provided in the Quran.²⁶ The verse also indicates the duty of a father to compensate his wife for service of breastfeeding to his children and this also true to other ancillary payment as required by the children.²⁷ In addition to the verse, the hadith allows the child's mother to take the property of her husband for the purpose child

¹⁹ Al Bakri, above n 15, 391-2.

²⁰ Salih bin Ghanim, *Al-Qawa'id al-Fiqhiyyah al-Kubra wa ma Tafarra'a 'anha* (Dar al-Balnasiyyah, 1996) 512.

²¹ Ibid, 528.

²² *Maryam* (2005) 19(2) JH 242.

²³ *Radziah binti Ibrahim v Peter R. Gottschalk@Yusuff bin Abdullah* (2009) 27(2) JH 259 ('*Radziah*').

²⁴ Ghanim, above n 20, 247.

²⁵ *Radziah* (2009) 27(2) JH 259.

²⁶ Al-Qur'an 65:6.

²⁷ Al-Khatib, above n 11, vol 3, 585.

maintenance if the father failed to do so as shown above in the case of Hind bint 'Utbah. However, the duty of the father to provide maintenance to his children is dependent on his ability to provide such maintenance. This is based on the hadith of the Prophet narrated from Jabir (d. 697).²⁸ Nevertheless, if the child owns property or capable of earning on their own, a poor father will not be asked to maintain his child. This is also based on the hadith which enjoins Muslim to provide adequate means of livelihood to oneself and his family as to best of his abilities.²⁹ However the flexibilities of the law are usually taken advantage by some irresponsible father and thus resulting in the mother to suffer the burden of providing the needs of the children. As rule once maintenance is paid to a child from whatever source it may be, normally by the wife, the father is no longer liable to pay them. To maintain this rule will make wife suffers and releasing the father from his responsibility on the grounds of poverty. Thus it is in the interest of the wife and the children that any payment made by wife or other sources should be considered as a debt to the husband. In this situation, a judge can order the father to pay the maintenance of his children. If the father still does not perform this obligation, the maintenance will be considered as a debt and is due to be claimed in the court by a competent plaintiff.

Thus in the case of *Zarina bt Hashim versus Jamaluddin bin Saidon*,³⁰ the plaintiff claimed to the court for child maintenance amounting to RM12,000 (or USD4,000) from the defendant. The plaintiff had earlier obtained an interim order for custody of the child and the maintenance order amounting to RM300 (USD100) per month. However, the defendant had ignored the order and cause the plaintiff to bear all expenses of the children which should be the duty of the defendant. After the court satisfied with the arguments and documents submitted by the plaintiffs, it was declared that the amount of RM12,000 of unpaid maintenance is a debt owed by the defendant to the plaintiff. The defendant was ordered by the court the pay such amount. The power to make an order is actually contained in section 70 of the Penang Islamic Family Law Enactment 2004 which provides that the maintenance can only be considered as debt and can be claimed if there is an order from the court. In addition to the provision of the law the court referred to Shafi'i manual *Mughni al-Muhtaj* and comparative fiqh book *al-Fiqh 'ala al-Madhahib al-Arba'ah* which state that the maintenance cannot become debt until after the judge made compulsory the maintenance or the father himself allow the maintenance to be owed.³¹

²⁸ Abu al-Husayn Muslim bin al-Hajjaj al-Naysaburi Muslim, *Sahih Muslim* (Dar al-Mughni, 1998) 499.

²⁹ Ibn Hajar, above n 10, 2399.

³⁰ *Zarina* (2007) 23(I) JH 143.

³¹ 'Abd al-Rahman Al-Jaziri, *Kitab al-Fiqh 'ala al-Madhahib al-'Arba'ah* (Dar al-Kutub al-'Ilmiyyah, 1990) vol 4, 514; Al-Khatib, above n 11, vol 3, 588.

Jointly Acquired Property or Harta Sepencarian

The rule in the acquisition of property in the Shariah law is through recognized means such as sale contract, gift, inheritance etc based the verse of the Quran³² and hadith.³³ Islamic Shariah does recognize the principle of contract sanctity of which no third party is allowed to claim. The Malay custom of *Harta Sepencarian* on the other hand allows spouse, upon divorce or death of either party, to claim property acquired during their marriage, although they are not directly involved in the acquisition of the property as a co-purchaser or co-sharer etc. Many discussions have been made by scholars to justify the permissibility of this customary practice.³⁴ It has been maintained that the practice is analogous to the topics of *mata' al-bayt* (home appliances) or *mal al-zawjayn* (property of husband and wife) discussed in the fiqh manuals.³⁵ The issues discussed under these topics are related to a dispute by the spouse to properties acquired during marriage of which the ownership is not properly determined. Thus Shafi'i in his *al-Umm* discussed dispute between husband and wife on the ownership of house appliances in which they have lived. To solve this problem, Shafi'i was of the opinion that the appliances shall be divided equally between them.³⁶

In other schools of law, on the other hand, view the division of the property should be based on the nature and type of the property. Thus according to Malik (d.796), as quoted in *al-Mudawwanah*, if the property is more suitable to be owned by a man, it is given to the husband and *vice-versa*.³⁷ This opinion was also agreed by Abu Hanifah (d.767) and Muhammad Ibn al-Hasan (d.805), as quoted by al-Sarakhsi (d.1056) in his *al-Mabsut* with the provision that both husband and wife are still alive. If both or either one is dead, the rights to the property will be returned to both heirs.³⁸ Ibn Qudamah also solves the dispute in the same manner with the exception for a property that is suitable to be owned by both parties where he views that the property should be divided equally between husband and wife and not solely belongs to the husband alone.³⁹

³² Qur'an 1:275.

³³ Abu 'Abdillah Muhammad bin Yazid Ibn Majah, *Sunan Ibn Majah* (Maktabah al-Ma'arif) 376.

³⁴ See Ahmad Ibrahim, *Undang-Undang Keluarga Islam di Malaysia* (Malayan Law Journal, 1999) 232-3, 239-40; M B Hooker, *Islamic Law in South-East Asia* (Oxford University Press, 1984) 161-3.

³⁵ Suwaid bin Tapah, *Konsep dan Amalan Pembahagian Harta Sepencarian Orang-Orang Islam di Malaysia [The Concept and Practice of The Distribution of Muslims' Jointly Acquired Property in Malaysia]* (PhD Thesis, University of Malaya, 1996) 122.

³⁶ Muhammad bin 'Idris Al-Syafi'i, *al-Umm* (Dar al-Fikr, 1983) vol 5, 103.

³⁷ Malik bin Anas, *al-Mudawwanah al-Kubra* (Dar al-Hadith, 2005) vol 2, 389.

³⁸ Muhammad bin Ahmad Syams al-A'immah Al-Sarakhsi, *al-Mabsut* (Dar al-Ma'rifah, 1986) vol 6, 213.

³⁹ 'Abdullah bin Ahmad Muwaffaq al-Din Ibn Qudamah, *al-Mughni* (Dar al-Hadith, 2004) vol 14, 245.

The writer of the Shafi'i manual *Bughyah al-Mustarsyidin* of the eighteenth century Southeast Asia while following the view of Shafi'i maintains that the ownership of the property should be withheld until the real owner can be determined based on the evidence or confession of the party. If the evidence is not forthcoming the property will be divided equally between husband and wife.⁴⁰

It is obvious that above discussions of the jurists is different from the Malay customary practice of *Harta Sepencarian*, as they were in relation to the mixed property between husband and wife in which both claims to acquire it through recognized legal means. Nevertheless the legislature and Shariah courts in Malaysia, since the colonial time up to present date, as well Islamic scholars consider *Harta Sepencarian* as part of the Islamic Family law under the principle of '*adat*'⁴¹ or custom as it is beneficial to the spouses and generally consonant with the verse of the Quran which states that both men and women are equally rewarded for what they have earned.⁴² Thus the Negeri Sembilan Islamic Family Law Enactment 2003 in section 2(1) defines jointly acquired property during marriage or known in local as *Harta Sepencarian* as a property acquired by husband and wife either directly or indirectly during the marriage period in accordance with the conditions specified by Shariah. Under the law both husband and wife has the right to claim *Harta Sepencarian* upon divorce or death of either partner. The task of the court is discover whether there is evidence of contribution by both parties either directly or indirectly towards the acquisition of the property.

Thus in the case *Sabariah binti Md Tan versus Busu bin Md Tan*,⁴³ plaintiff claimed, among others for a declaration of a house and two parcels of land as a jointly acquired property. Plaintiff also claimed that any benefit obtained from the land and monthly pensions paid by the Federal Land Development Authority (FELDA) is to be equally divided. The court agreed with the claims and found evidence of direct and indirect contributions on part of the plaintiff in the property. Among the contributions made by the plaintiff on all the assets acquired by the defendant was through the joint participation of defendant and plaintiff's in the FELDA program. All the lands and the house were acquired by the defendant after they were both accepted to participate in FELDA as marriage is a condition set by FELDA for acceptance to participate in this program. Plaintiff also performed her household duties such as taking care of the children, the needs of husband and doing other outside jobs to increase the family income. All these were considered by the court as an

⁴⁰ 'Abd al-Rahman bin Muhammad Ba'lawi, *Bughyah al-Mustarsyidin* (Dar al-Kutub al-Ilmiyyah, 1998) 358-9.

⁴¹ Ghanim, above n 20, 325.

⁴² Qur'an 4:32.

⁴³ *Sabariah binti Md Tan v Busu bin Md Tan* (2009) 27(2) JH 303 ('*Sabariah*).

indirect contribution from the plaintiff in helping the defendant to obtain the assets.⁴⁴

In the case of *Noraishah bt. Ahmad versus Omar bin Jusoh and six others*, the plaintiff requested the court to declare the property or the value of the property listed by the plaintiff in the assets of the deceased as jointly acquired property. Defendants are the legal heirs of plaintiff former husband who is a deceased. Although the case was settled as the defendants agree to the claim, the court still requires evidence from the plaintiff to support her claim. Among of the evidence presented is that the plaintiff had made several loans for the convenience and comfort of the deceased, such as a hire purchase agreement to purchase a car, a housing loan and monthly payment on the use of credit card for the convenience and needs of their households.⁴⁵

Based on the above cases, the findings of the court on the indirect contribution of the plaintiffs which is non contractual can be considered as the basis of co-ownership of a property in marriage. However, the principles of Shariah on the acquisition of property are not taken into account in order to appreciate the Malay customary practice of *Harta Sepencarian*. Although the court and the legislation have not specifically justified their reasons based on *Istihsan*, the result speaks for the use of *Istihsan* by 'Urf or custom.

Obligatory Bequest

Under the Shariah, it is a settled law by the majority of Muslim jurists that making a bequest to family members who are not legal heirs, within the permitted one third of the estate, is recommended and not compulsory.⁴⁶ It was however obligatory in early Islam in but it was then abrogated.⁴⁷ Because of this, there was a debate among Islamic jurists on the status of bequest in Islam to argue that making bequest is compulsory in the Shariah. Taking this dissenting opinion, through legislation in Muslim countries starting in Egypt in 1943 provision was made to provide orphaned grandchildren who are excluded from the inheritance receiving maximum one third of the deceased estate through a bequest which is presumed obligatory on part of the deceased to have been made to the benefit of the grandchildren. This kind of bequest is technically known as *Wasiyyah Wajibah*. The rational of this kind of bequest as being discussed elsewhere is the fear that these orphaned children after being excluded from the inheritance will be left without support and thus becoming poor and

⁴⁴ *Sabariah* (2009) 27(2) JH 303.

⁴⁵ *Noraishah bt Ahmad v Omar bin Jusoh and 6 others* (2008) 26(1) JH 97.

⁴⁶ Wahbah al-Zuhayli, *al-Fiqh al-Islami wa Adillatuhu* (Dar al-Fikr, 1985) vol 8, 10-11.

⁴⁷ Abu 'Abdillah Ahmad bin Muhammad bin Hanbal, *Musnad al-Imam Ahmad bin Hanbal* (Mu'assasah al-Risalah, 2001) vol 45, 475.

destitute.⁴⁸ Such a provision has been adopted in Malaysia in section 27(1)(2)(3) Selangor Muslim Wills Enactment No. 4, 1999.

Thus in case of *Mustapha bin Ismail in the distribution of the inheritance of the deceased Che Fatimah binti Abdul Razak*,⁴⁹ the Kuala Lumpur Shariah High Court after decided the legal heirs to the estate made an order of obligatory bequest to grandchildren whose father predeceased the deceased as provided by the Selangor Muslim Will Enactment No.4/1999. The court in support of the law justified that jurists like Sa'id ibn al-Musayyab (d.715), Hasan al-Basri (d.728), Ishaq bin Rahawaih (d.853), Dawud al-Zahiri (d.883), Ibn Jarir (d.923), Ibn Hazm (d.1064) and others are of the view that making bequest to close family members who are excluded from the inheritance is mandatory based on the verse of the Quran as quoted above. Although it is against the view of majority but the ruler or government based on the principle of public interest can decree to the reverse.⁵⁰ Again as mentioned above this justification is producing the law based on *Istihsan*.

The Right to Visit Children and Grandchildren

Islam strongly encourages good relation among family members and relatives so that life will be more comfortable and pleasant as enjoined in the Quran.⁵¹ There are also many hadith from the Prophet relating to the duty of preserving this relationship⁵² and stern warning for those who trying to destroy it.⁵³ Good relationship among relatives means doing good to close family members in matters that are permitted by Islam. This includes looking after the family members and visiting them. It is wrong and prohibited for any Muslim who tries to prevent this relationship especially of meeting or visiting one's child or grandchild.⁵⁴ Nevertheless, there were instances where the Court made an order preventing certain family members to visit child and grandchild for the interest of family unity. Thus in the case of *Ibrahim bin Hj. Ishak and one other versus Anuar bin Ahmad and two others*⁵⁵ the court rejected

⁴⁸ See, eg, 'Abd al-Ghaffar Ibrahim Salih, *Ahkam al-Mirath wa al-Wasiyyah wa al-Waqf* (Matba'ah Jami'ah al-Qahirah, 1987) 212; Asnawil G Ronsing, *Islamic Law on Succession* (University Book Centre-Mindanao State University) 20-2; Muhammad Taha Abu al-'Ula Khalifah, *Ahkam al-Mawarith Dirasah Tabbiqiyah* (Dar al-Salam) 630-1.

⁴⁹ *Mustapha bin Ismail in the distribution of the inheritance of the deceased Che Fatimah bint Abdul Razak* (2009) 28(1) JH 55.

⁵⁰ Jalal al-Din 'Abd al-Rahman bin Abi Bakr Al-Suyuti, *al-Asybah wa al-Naza'ir* (Dar al-Kutub al-'Ilmiyyah) 121.

⁵¹ Qur'an 4:36.

⁵² Muslim, above n 28, 1383.

⁵³ Ibid.

⁵⁴ Hajar, above n 10, vol 1, 1690.

⁵⁵ *Ibrahim bin Hj. Ishak and one other v Anuar bin Ahmad and two others* (2005) 19(2) JH 234.

application by plaintiffs to visit their daughter and granddaughter. Plaintiff's daughter is defendant's wife and the granddaughters in question are defendant's children under his custody. The court based on two police reports submitted and evidence from the witnesses found that the first plaintiff had attacked defendant at his work place and his house was thrown with stones, wood and steel.

In justifying the decision, the court was of the view that plaintiff's application to see and take his daughter and grandchildren back home in a tense mood should not be allowed. There is no intimacy between the plaintiff and the defendant and even more, the plaintiff wish to take revenge against the defendant. On this basis, the court decided to reject the application submitted by plaintiff. The court is of the view that the decision is to avoid quarrels and hostilities that will divide this family. The court considers that the defendant is entitled to defend his right for not to obey the plaintiff to ensure that the good family relationship will be return to normal. This decision is issued, as asserted by the court, based on *Maslahah* for the benefit of defendant in preserving his family and reframing greater harms if the conflict continues.

Application for Injunction against the Husband

Relation between husband and wife in Islamic law is based on certain rights and obligations. A husband is enjoined by the Quran to treat his wife with kindness whether by action or by speech.⁵⁶ A similar message is also reported in the hadith which says "*The best among you is the best to his family and I was the best to my family*".⁵⁷ Among the husband's obligations towards his wife, as quoted by al-Qurtubi (d.1273) when interpreting the above verse is to pay dower and maintenance to his wife, not frowning his wife for no reason, not speaking to his wife in a harsh manner and not to disclose his tendency to other woman other than his wife.⁵⁸ For these duties, Islamic jurists using the Quranic verse⁵⁹ consider husband as the leader of the household to his wife and children.⁶⁰ This also means that the husband has full access and authority over his family and no one has the right to deny it. In fact one who prevents the husband from performing his responsibilities is committing a great sin.

This is the law that needs to be held by all parties when there is no urgent or pressing matter to change it. The decision of the Shariah court is otherwise. Thus in the case of *Mazitah binti Ibrahim versus Rahiman bin Selamat*⁶¹, the court allowed an application to extend the

⁵⁶ Qur'an 4:19.

⁵⁷ Majah, above n 33, 342.

⁵⁸ Muhammad bin Ahmad Al-Qurtubi, *al-Jami' li Ahkam al-Qur'an* (Dar 'Alam al-Kutub, 2003) vol 5, 97.

⁵⁹ Qur'an 4:34.

⁶⁰ Wahbah al-Zuhayli, *al-Tafsir al-Munir* (Dar al-Fikr al-Mu'asir, 1997) vol 5, 54-5.

⁶¹ *Mazitah binti Ibrahim v Rahiman bin Selamat* (2008) 27(1) JH 157.

validity of *ex-parte* interim order, previously obtained by the applicant, to refrain the respondent from trespassing, forcing and acting with hostility against the applicant. The respondent is also ordered to refrain from doing a list of things which among other from approaching the applicant within 100 meters while their divorce proceeding is in progress. Nevertheless the court rejected application that the respondent will observe the same to the children and their maid.

Legally speaking, the court has discretionary power to grant any interim order on any terms as it deems fit based on section 197 (a) of the Shariah Court Civil Procedure (Federal Territories) Act 1998. As such it is matter of establishing the facts to the case that warrants such an order that the court needs to do. It is has been accepted and argued in many places in Malaysia that *ex-parte* interim injunction order is based on necessity or *darurah*⁶² in order to avoid harm or *darar*.⁶³ This power is also provided in section 107 of the Islamic Family Law (Federal Territories) Act 1984 whereby the court can grant an injunction or prohibition order to parties of whom their divorce proceedings is in progress. Although there is no specific mentioning that the power to grants such an order is based on *Istihsan*, it is obvious that the original law that the husband should not be prevented from living with his family members especially wife and children is disregarded. This is indeed a hallmark of *Istihsan* which can be categorized as *Istihsan by Maslahah*.

Conclusion

The results of the studies on the cases reported in the *Jurnal Hukum* show that the principle of *Istihsan* is directly employed in the judgments of the Shariah Courts in Malaysia. As much as the court desires to apply the principles of Quran and Sunnah as against the rules discussed in the fiqh manuals, which a noble effort in itself, these are only incidental to the articles of the law which provide for such an application as it has been shown above. This is hardly a case of innovation and reinterpretation of texts of the law as some researcher may want to argue.⁶⁴ It is therefore the farmers of the legislation which incorporate the application of these principles who are actually the innovator. The courts in all instances of the cases observed above are merely establishing the facts of the cases so that these principles can be properly applied. From the theoretical classification of *Istihsan*, all of the cases, except two, employed what that is known as *Istihsan by Maslahah* or public interest. However, it should be noted here that *Maslahah* alone is not sufficient to abandon the original law.

⁶² Ghazali Jaapar, *The Concept and Application of Equity in Islamic Law and The Shari'ah Courts in Malaysia* (PhD Thesis, University of Birmingham, 2005) 292-3.

⁶³ Based on the hadith reported by Ibn Majah, above n 33, 400; see also Ghanim, above n 20, 493.

⁶⁴ For discussion on this matter see Ramizan Wan Muhamad, 'Shariah Court Judges and Judicial Creativity (*Ijtihad*) in Malaysia and Thailand: A Comparative Study' (2009) 29(1) *Journal of Muslim Minority Affairs* 127-39.

It must be supported by other evidence either from the Quran or the Sunnah, even though in general and this is duly observed by the Shariah Courts. The rest of the classification is by Sunnah and 'Urf or custom. The latter is probably the most notable contribution of the Malaysia Shariah law as it is cannot be found elsewhere outside the Malay Archipelago,⁶⁵ although numerous customary practices are absorbed to become part of the Shariah law in the rest of the Muslim world. In conclusion, the findings of the above discussion can portray a general impression that the use of *Istihsan* was accepted indirectly in the Islamic judicial system in Malaysia and this actually support the claim that the Shafi'is finally yielded to the practical solution offered by *Istihsan* albeit indirectly.

⁶⁵ M B Hooker argues that there has been a movement in Southeast Asia, especially in Indonesia to formulate a new kind of fiqh that appreciates the local needs. As some of the customary practices are common in both countries in Malaysia and Indonesia especially the Harta *Sepencarian*, it is consequential to apply this statement to Malaysia. See M B Hooker, *Indonesian Shariah: Defining a National School of Islamic Law* (Institute of Southeast Asian Studies, 2008), 40-41 and introductory section.