

CHILD CUSTODY RIGHTS RESULTING FROM DIVORCE OF INTER-RELIGIOUS FAMILIES FROM A LEGAL PERSPECTIVE ISLAM

HAK ASUH ANAK AKIBAT PERCERAIAN BEDA AGAMA DALAM PERSPEKTIF HUKUM ISLAM

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Abstract

Child custody remains one of the most contested issues in interfaith divorce cases, with polygamy frequently cited as a contributing factor to marital breakdown. These circumstances often result in legal disputes, particularly regarding which party holds the dominant legal authority in custodial matters. This research aims to explore the regulation of child custody in interreligious divorce from the perspectives of Islamic jurisprudence and Indonesian positive law. The research utilizes an integrative methodology that combines normative legal analysis with empirical investigation, utilizing document analysis from several judicial rulings. Legal references include Law Number 1 of 1974 on Marriage, the Compilation of Islamic Law (KHI), and selected fatwas formulated and declared by the Indonesian Council of Ulama (MUI). The analysis draws upon the theory of maslahah (public benefit), justice theory, and the principle of child rights protection. Findings suggest that, in Islamic law, custody of non-mummayiz children (under 12 years of age) is generally granted to the mother, unless disqualified due to specific circumstances such as religious conversion. Conversely, Indonesian national law prioritizes the "best interest of the child" principle when judges determine custody arrangements. Divorce does not nullify a parent's responsibility to provide financial support or uphold moral obligations toward the child. Custody may be reassigned if evidence of neglect or harm arises. Therefore, child custody decisions in interfaith divorces must be guided by a comprehensive consideration of the child's spiritual, emotional, and overall well-being.

Keywords: Child Custody, Interfaith Divorce, Islamic Law, National Law

INTRODUCTION

According to scholars such as Muhammad Sa'id and Armyta Dwi Pratiwi, as cited by Qurrotul Ainiyah and colleagues, the Islamic perspective views marriage not only as a physical bond but also as a form of worship with a spiritual dimension. The primary purpose of this bond is to form a harmonious and loving family, based on the values of Sakinah, Mawaddah, and Rahmah. However, the reality in society shows that not all marriages are able to realize these ideal values. Marriage is a physical and spiritual bond between a man and a woman as husband and wife to form a happy and religious family.¹

¹ Undang-Undang Republik Indonesia Nomor 5 Tahun 1974 Tentang Pokok-Pokok Pemerintah Daerah (Lembaran Negara Tahun 1974 Nomor 38; Tambahan Lembaran Negara Nomor 3037), 1974, pp. 1-52. Lihat Peraturan Pemerintah Republik Indonesia Nomor 9 Tahun 1975 Tentang Pelaksanaan Undang-

Hasbiyallah added that the institution of marriage is not only intended to maintain a stable relationship between partners but also plays a role in fulfilling the individual needs of each party. Marriage law regulates various legal actions of partners as legal subjects within a marriage.

In Islamic teachings, marriage is also seen as fulfilling half of the religious teachings for individuals who meet the requirements for mukallaf (a Muslim legal person). However, in reality, many households experience problems that lead to divorce. One of the most dominant contributing factors, according to data, is the practice of polygamy. The complexity of the problem increases when divorce occurs between couples of different religions. In this context, child custody becomes a crucial and sensitive issue. The three main entities typically involved in resolving this issue are religious institutions, the national legal system, and the judiciary. In Indonesia, judges' views on the legality of interfaith marriages are not uniform. This is due to the large number of couples who enter into interfaith marriages without either party converting. This situation presents complex legal challenges, particularly in guaranteeing the rights of children born from such marriages.

Hasbiyallah stated that living together in a marriage is not only intended to build stability in the interaction between partners, but also to fulfill the needs and interests of each individual. Marriage law is a legal structure that regulates the legal actions and legal outcomes of relationships between men and women. Marriage is a legal act that can only be carried out by individuals who have met the requirements as mukallaf. People who marry have fulfilled half of their religious teachings, and they are also required to believe in Allah SWT. This is in line with the oral teachings conveyed by the Prophet Muhammad SAW. However, in everyday life, couples often face challenges that cause disharmony. Other factors that can lead to divorce, such as polygamy, are recorded as one of the main causes with the highest percentage.²

Muhammad Sa'id and Armyta Dwi Pratiwi in Qurrotul Ainiyah, Qurrotul A'yun, and Lailiyatur Rohmah. The three main institutions involved in resolving conflicts related to interfaith marriages include religious institutions, Indonesian national law, and the judiciary. Each has a distinct role in determining the validity of a marriage based on varying religious backgrounds. In Indonesia, judges have varying views on the validity of this type of marriage. Marriages between people of different faiths typically occur when both men and women adhere to their own beliefs without converting. However, this type of marriage often raises a number of issues, particularly those related to children's rights. This is because children born from such a marriage have legal rights that must be guaranteed and protected.³

Habisyallah stated that one of the fundamental challenges in the legal structure in Indonesia lies in the issue of child care, especially in the context of divorce between couples of different religions. This relates to the child's right to receive love, education, and protection, which is the responsibility of parents in accordance with Islamic law and state law. Referring to Article 105 of the Compilation of Islamic Law (KHI), the responsibility for caring for children who have not reached the age of mumayyiz, namely

Undang Nomor 1 Tahun 1974 Tentang Perkawinan (Menteri Sekretasi Negara, www.djpp.depkumham.go.id, 1975).

² Putri Handayani and Ishak Syairozi, 'Konsep Pendidikan Menurut K.H. Hasbiyallah', *Indonesian Research Journal On Education*, 2022, 30-37.

³ Qurrotul Ainiyah, Qurrotul A'yun, and Lailiyatur Rohmah, 'Pemahaman Alumni Assunniyyah Tentang Hak Dan Kewajiban Suami Istri Berbasis Kitab Uquduljain', *Mabahits : Jurnal Hukum Keluarga*, 4.01 (2023), 1-10 <<https://ejournal.inaifas.ac.id/index.php/Mabahits>>.

under 12 years old, is principally given to the mother as the most authorized party in caring for the child at that stage of development, unless living with the mother would endanger the child's physical or mental condition.

Divorce can affect various matters, including the division of joint assets, child custody, and other legal issues. From an Islamic legal perspective, the father remains responsible for protecting the child from all threats. Meanwhile, unmarried children under the age of twelve will be raised by their mother, even if the parents are divorced. Children also have the right to choose their care. Divorce due to religious differences also increases the complexity of determining custody. Religion often becomes a source of legal and social issues, especially when it comes to determining the most appropriate parent.

In the process of determining custody, religious aspects, safety, and the child's welfare must be seriously considered. Therefore, in-depth research is needed to understand how Islamic law and the Indonesian legal system determine child custody provisions in divorce cases involving couples of different religions. The right to custody of children from interfaith marriages falls to the mother's side and above – grandmothers from the mother's side, father's side, and biological sisters, sisters from the same mother, then aunts from the mother's side and aunts from the father's side.⁴

In Islamic teachings, both men and women are prohibited from marrying partners who are not Muslim, as stated in Q.S. Al-Baqarah 221. This is also emphasized in Article 40 letter c of the Compilation of Islamic Law (KHI), which prohibits marriage between Muslim men and non-Muslim women, as well as Article 44 of the KHI, which states that Muslim women are not allowed to marry non-Muslim men.⁵

In addition, the Indonesian Ulema Council (MUI) fatwa No. 4 of 2005 confirms that marriage bonds between individuals who adhere to different religions are not recognized as valid and are considered to be contrary to the principles of Islamic teachings, so they are categorized as prohibited (haram) acts according to the provisions of sharia law.⁶ The Indonesian Ulema Council (MUI) has issued an opinion that interfaith marriage is not permitted. This opinion is based on:⁷

1. Surah Al-Baqarah verse 221 provides guidelines regarding the prohibition of marriage with non-Muslims.
2. Surah Al-Mumtahanah, verse 10, is also one of the foundations in discussing interfaith marriages.
3. Surah Al-Maidah verse 5 provides an exception by allowing Muslim men to marry women from among the people of the book, but with certain conditions.
4. Hadith narrated by Tabrani: "A person who is married has guarded half of his faith, so he should fear Allah to guard the other half."
5. The words of the Prophet Muhammad (peace and blessings of Allaah be upon him) as narrated by Aswad bin Sura'i: "Every child is born pure until he pronounces it with his own tongue. So, it is his parents who make him a Jew, a Christian, or a Zoroastrian."
6. Hadith narrated by Bukhari, Muslim, al-Nasa'I, Abu Dawud, Ibn Majah: "A woman is married for four (4) reasons, namely her wealth, her lineage, her beauty, and

⁴ Andes Robensyah, Yaswirman, and Nani Mulyati, 'Diskon Vonis Mati: Tinjauan Hukum Pidana Islam Terhadap Putusan Mahkamah Agung Tentang Kasus Ferdy Sambo', *Al-Qisthu: Jurnal Kajian Ilmu-Ilmu Hukum*, 21.1 (2023), 82-95 <<https://doi.org/10.32694/qst.v21i1.2963>>.

⁵ Putri Handayani and Syairozi.

⁶ Putri Handayani and Syairozi.

⁷ Bagas1010, 'Apa Hukumnya Seorang Muslim Nikah Dengan Beda Agama - Brainly', *Brainly.Co.Id* (Jakarta, September 2018), p. di akses 2 Mei 2025.

her religion." Therefore, choose a woman who has religion, and surely you will be lucky.

7. Fiqh Principles: avoiding harm is prioritized over gaining benefit.

In response to the phenomenon of interfaith marriage, the Indonesian Ulema Council (MUI) has issued two fatwas that explicitly regulate these provisions:⁸

1. That marriage between couples who come from different religious backgrounds is declared invalid and prohibited according to Islamic law.
2. Based on the opinion that is considered strong (qaul mu'tamad), marriage between a Muslim man and a woman who comes from the Ahlul Kitab community is also categorized as an act that is forbidden and has no validity according to Islamic law.

To maintain peace in family life, the Indonesian Ulema Council (MUI) issued a fatwa regarding interfaith marriage. Article 2, paragraphs 1 and 2, outline that the Marriage Law states that a marriage is considered valid if it is conducted in accordance with each individual's religion and beliefs and is based on their respective laws. Furthermore, the law stipulates that every marriage must be registered in accordance with applicable law.

The basic principles of human freedom and dignity guaranteed by international and national law also encompass children's rights, which apply from pregnancy through birth. Children have the right to optimal growth and development, both physically, mentally, and socially, and these rights are protected by the existing legal system. Children also have the right to be guaranteed safety from all forms of violence and discrimination. Efforts to protect these rights are aimed at ensuring that children can develop into individuals who are beneficial to the state, religion, and their families in the future. Child protection is part of the responsibility to ensure that children continue to live, grow, and develop optimally and contribute actively to social life in accordance with humanitarian principles. Protecting children's rights is crucial. Children need to be protected from all types of mistreatment, whether from others or from their own families, whether directly or indirectly.

Consequently, parents need to create a sense of security and comfort for their children. However, the reality is that violence against children, especially by parents, is still common. In situations of child custody in divorced couples of different religions, it is important to note that parents' obligations to care for and educate their children remain in effect even after the divorce. Furthermore, the article affirms that the court has the authority to decide in cases related to child custody. "The right to custody of a child who is not yet mumayyiz (age 12 years old) belongs to the mother, while for a child who is mumayyiz (age 12 years old), it is left to the child to choose between the father or mother as the holder of the right to custody".⁹

Muhammad Husni Abdullah Pakarti In Ali Syahputra's case, a mother's right to care for her child is lost if it is proven that the mother has changed her religion and adopted another faith. Children's religious rights are protected in interfaith divorces by ensuring that children are raised in accordance with their religious beliefs. The court can also decide how to divide the costs of the child's education and maintenance. This study aims to identify and analyze legal provisions regarding child custody from a legal and Islamic

⁸ Bagas1010.

⁹ *Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan*, 1974. Pasal 41 huruf a dan Pasal 105 *Kompilasi Hukum Islam (Instruksi Presiden No. 1 Tahun 1991)*, 1991.

perspective, as well as to understand how children's religious rights are protected in divorces involving different religions.¹⁰ Sayuti Tahlil stated that three points of view need to be considered in marriage:¹¹

1. Marriage is "mitsaaqaan ghaaliizhan", which indicates that marriage is a very solid agreement.
2. Marriage in social terms – the status of married people is higher than that of single people. Before marriage regulations, women could have more than one wife without restrictions and could do nothing. However, now polygamy is only permitted for four (4) people under certain conditions.
3. Marriage in the Islamic perspective: the religious view of marriage is very crucial because marriage is considered a sacred institution in religion.

There are three (3) marriage systems in Indonesia, namely Endogamy, Exogamy, and Eleutherogamy. Endogamy is a marriage carried out with people from the same group. Exogamy is the opposite, namely marriage with people from outside the group, and Eleutherogamy is a free marriage system, meaning there are no special rules. The custody of children who divorce from parents of different religions, according to legal rules, is the obligation of the father and mother. In addition, the article also emphasizes that the court will make a decision in disputes regarding the control of children.¹²

It is crucial to preserve children's rights. They must be protected from violence, whether experienced directly or indirectly, from family members or others, as they are the generation that will contribute to the future. Parents need to protect their children so they feel safe and comfortable, yet many cases of parental violence against children persist. Because parents are the most important part of the family, they must meet all of their children's needs, both physical and emotional, to safeguard their rights. Therefore, parents have a greater obligation to protect their children. Society is also responsible for safeguarding these children's rights, at least while they live in their parents' homes.

There are a number of reasons that make a married couple decide to divorce. Based on Article 209 of the Civil Code, the reasons for divorce are limited as follows: first, committing adultery, second, leaving the shared residence in bad faith, third, being sentenced to five years in prison or other law, fourth, causing serious injury or abuse, fifth, physical disability that prevents obligations, sixth, continuous disputes. In Islamic law, there are types of divorce such as talak, syiqaq, khulu, fasakh, fahisar, zhihar, li'an, and riddah. Talak is divorce from the husband, syiqaq is divorce due to continuous conflict, khulu is divorce at the request of the wife with ransom, fasakh is divorce by the judge for certain reasons, fahisyar is a major sinful behavior that can be a reason for divorce, zhihar is the husband equating his wife with his mahram, li'an is divorce due to

¹⁰ Ali Syahputra, 'Perkawinan Beda Agama Dalam Undang-Undang Perkawinan Dan Hak Asasi Manusia', *Jurnal At-Taahdzib*, 12.1 (2024), 1-7 <<https://doi.org/10.61181/at-tahdzib.v12i1.327>>. lihat *Kompilasi Hukum Islam (Instruksi Presiden No. 1 Tahun 1991)*. Pasal 105

¹¹ Putri Azzahra Febriani Sastra, Rosnidar Sembiring, and Idha Aprilyana Sembiring, 'Perjanjian Bagi Hasil (Maro) Dalam Pemeliharaan Ternak Kambing (Studi Di Kota Kisaran Kabupaten Asahan)', *Buletin Konstitusi*, 3.2 (2022), 56-71.

¹² Beranda, 'Jika Terjadi Perceraian Dari Pernikahan Beda Agama, Bagaimana Dengan Hak Asuh Anak?', *Halo JPN* (Jakarta, January 2024), p. Di akses 15 April 2025. Lihat Pasal 41 huruf a *Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan, Lembaran Negara RI Tahun 1974 Nomor 1, Mimbar Keadilan* (Menteri Negara Sekretariat Negara, 1974).

accusations of adultery without evidence, riddah is divorce because one of the husbands apostatizes.¹³

Review of articles by researchers and those by others have differences, even though the titles are similar; there are many differences in several articles, such as Afif Musyaffa (2024),¹⁴ Muhammad Husni Abdulah Pakarti (2020).¹⁵ They place more emphasis on formal legalistic aspects or only prioritize studies on national positive law. And even previous researchers mostly prioritize the position of children in state law without paying attention to the principles of (benefit), happiness, and the views of the schools of thought in Islam comprehensively. Meanwhile, the researcher has a more integrative approach, which means combining normative and empirical approaches and conducting interviews with several judges to serve as references and increase the strength of primary data, and strengthen the validity of the research. Meanwhile, the researcher also analyzed in detail related to the MUI fatwas, verses of the Quran, and the opinions of scholars from four (4) schools of thought in determining who is most-worthy of custody in the case of interfaith divorce. Of course, this provides an advantage because it creates an understanding that is not only focused on written regulations, but also on moral values and logic that have developed within the Muslim community in Indonesia. This is a significant point of difference because:

1. The data used is more lively, contextual, and reflects the reality of legal practice in the field.
2. Although this research does not use the verdict as a case study, it links the judges' opinions with the Compilation of Islamic Law (KHI).

This method enhances the richness of Islamic legal research by providing a direct perspective from the actors in the religious justice system, not just standard texts. Researchers have successfully demonstrated that the law is not simply black and white as written in statutes, but also varies according to how judges understand and consider each case, particularly in sensitive matters such as interfaith divorce.

This research uses a normative juridical approach, a method that views law as applicable norms or rules. These norms include basic legal principles, statutory regulations, and court decisions. The data collection process was conducted through a literature review of legal sources, including primary, secondary, and tertiary sources. Primary legal materials consist of Law Number 1 of 1974 concerning Marriage, Law Number 23 of 2002 concerning Child Protection, and the Compilation of Islamic Law (KHI). Secondary legal materials include literature, scientific articles, and expert opinions. Tertiary legal materials include legal dictionaries, encyclopedias, and other online sources that support the analysis of legal terms used in this research.

METHOD

¹³ Nehemia O and others, 'Pemenuhan Syarat Cerai Menurut Undang- Undang Nomor 1 Tahun 1974 Tentang Perkawinan Dalam Kasus Penelantaran Istri Yang Berdampak Pada Perceraian Serta Rasa Keadila Penggugat, Studi Kasus Putusan Pengadilan Negeri Kupang Nomor 79/Pdt.G/2021PN KPG', 1.1 (2023), 84.

¹⁴ Afif Musyaffa A.M, 'Hak Asuh Anak Akibat Perceraian Pasangan Beda Agama (Studi Putusam Perkara Pengadilan Negeri BanjarBaru Nomor 62/PDT/G/2019/PN BJB)' (Universitas Lampung, 2024).

¹⁵ Muhammad Husni, Abdulah Pakarti, and Universitas Muhammadiyah Bandung, 'Perlindungan Hak Anak Dalam Perceraian Menurut Hukum Islam', 1.November (2023), 1-20. "Perlindungan Hak Anak Dalam Perceraian Menurut Hukum Keluarga Islam" (2020)

Penelitian menggunakan metode yuridis normatif, yaitu suatu metode yang memandang hukum sebagai seperangkat norma yang memiliki sifat mengikat dan berfungsi sebagai pedoman perilaku dalam kehidupan sosial. Pendekatan ini menitikberatkan pada asas-asas dasar hukum, perangkat regulasi yang termuat dalam peraturan perundang-undangan, serta preseden hukum yang tercermin dalam putusan-putusan pengadilan. Pengumpulan data dilakukan melalui studi kepustakaan dengan memanfaatkan berbagai sumber hukum yang diklasifikasikan menjadi tiga jenis, yakni sumber primer, sekunder, dan tersier. Sumber primer mencakup Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan, Undang-Undang Nomor 23 Tahun 2002 yang diperbaharui dengan UU No. 35 Tahun 2014 tentang Perlindungan Anak, serta Kompilasi Hukum Islam (KHI). Sementara itu, bahan hukum sekunder berupa buku-buku ilmiah, artikel akademik, dan pandangan para pakar. Adapun bahan hukum tersier meliputi kamus hukum, ensiklopedia, serta sumber-sumber daring yang relevan untuk memperjelas pemahaman terhadap istilah-istilah hukum yang digunakan dalam analisis.

DISCUSSION or RESULTS/FINDINGS

The findings of this study indicate that the basic principles in determining child custody rights according to Islamic law are based on the principle of the child's welfare (*mashlahah al-tifl*), with a primary focus on the religious, educational, health, and overall welfare aspects of the child.

Based on Article 105 of the Compilation of Islamic Law (KHI), custody of a child who has not reached the age of *mumayyiz* is generally handed over to the mother, unless the mother does not meet the specified qualifications, as stated in Article 156, letter c of the KHI, such as differences in beliefs or conditions that could endanger the child physically or psychologically. In the national legal system, the court decides custody by considering the evidence and facts presented by both parties to determine who is most suitable to carry out the responsibility of custody.¹⁶

Divorce cases between couples of different religions often give rise to complex legal dynamics, particularly when one party converts to another religion. In such circumstances, judges must consider the child's beliefs, emotional stability, and mental and physical condition as the basis for determining custody rights. If the party previously holding custody responsibilities is found to be no longer suitable, the court may transfer it to another party who is more qualified. Under civil law, parental rights and obligations towards children begin at birth and apply until the child reaches adulthood or marries. In a matrilineal kinship system, the mother's role is crucial, not only in terms of inheritance but also in the care and upbringing of children. Several factors contribute to the common causes of interfaith marriages, including:¹⁷

- a) Intense social interaction in a pluralistic society;
- b) Low individual understanding of the teachings of their respective religions;
- c) Family background, including parenting patterns and traditions that develop within the household environment, and individual freedom to choose a life partner as part of human rights.

¹⁶ *Kompilasi Hukum Islam (Instruksi Presiden No. 1 Tahun 1991)*.

¹⁷ Ratih Dheviana Yunisari, Tri; Suhariningsih; Puru, 'Bentuk Perlindungan Terhadap Anak Akibat Perkawinan Beda Agama Yang Tidak Dicatat Studi Dalam Perspektif Pasal 2 Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan)', *Jurnal Hukum*, 2021, 1-18.

Legally, children born to couples with different religious backgrounds are still recognized as legitimate if the interfaith marriage has fulfilled the requirements of each religion and is officially registered with the marriage registration agency. This is in accordance with Article 42 of the Marriage Law, which states that a legitimate child is a child born from a legal marriage as regulated in Article 2 paragraph (2). However, the legal status of interfaith marriages can give rise to a number of legal consequences, including in the areas of inheritance and child custody rights. For example, in a situation where a husband is Muslim while his wife and children are non-Muslim, then under Islamic law, there are obstacles to inheritance, because religious differences become a barrier to mutual inheritance. Similarly, in matters of custody, complex disputes can arise.

Article 39, paragraph (2) of the Marriage Law, which is strengthened by the provisions of Article 19 of Government Regulation Number 9 of 1975 concerning the Implementation of the Marriage Law, states that a change in religion by one of the parties cannot necessarily be used as the sole reason for divorce. However, from the perspective of Islamic law as regulated in Article 116 letter h of the Compilation of Islamic Law (KHI), a change of religion (apostasy) that causes disharmony in household life can be used as a basis for one of the parties to file for divorce.

Furthermore, Article 28E paragraphs (1) and (2) of the amended 1945 Constitution of the Republic of Indonesia affirm that the state guarantees the freedom of every individual to embrace a religion and practice their religion according to their beliefs. The principle of Belief in One Almighty God is the main foundation in guaranteeing the right to freedom of religion in Indonesia. In this case, freedom is interpreted as the personal right of individuals to determine their beliefs and practice their religion without state intervention, because in essence, religion is a personal matter that is within the realm of the individual, not the authority of the state.¹⁸

Hadhanah and Child Custody

1. Hadhana

Draft happiness encompasses the obligations and responsibilities of raising and caring for children, encompassing physical, mental, intellectual, and spiritual aspects. In the Indonesian legal system, both parents legally have an equal role in providing protection and guidance to children. Etymologically, the term happiness comes from the root word *hadhana*–*yadunu*–*hadhanatan*, which in meaning refers to the act of caring for, nurturing, or embracing a child as a form of protection and affection.

The definition of a child in this context is linked to a specific age limit. According to the provisions of the Compilation of Islamic Law, the age limit for child care is adulthood. Although both parents are responsible for caring for children, Islam places greater emphasis on the mother.

Al-Jurjawi emphasized the importance of mothers in caring for children. One difference is that women's roles differ from men's in social aspects. Children's education and affection are primarily given to their mothers. In this context, the mother's role is crucial during childhood. Unlike fathers, mothers interact more frequently with their children and are more knowledgeable about aspects such as clothing, food, drink, and

¹⁸ Murhaeningsih, Muhammad Ikhwan, and Gisha Dilova, 'Akibat Hukum Penetapan Pengesahan Perkawinan (Itsbat Nikah) Terhadap Perkawinan Tidak Tercatat Di Pengadilan Agama Pulau Punjung', *Pagaruyuang Law Journal*, 8.1 (2024), 136–54.

health. Hadhanah in Islamic jurisprudence refers to protecting children from physical and mental risks, ensuring their safety and hygiene, and supporting them in the learning process until they are able to live independently as Muslims. Legal experts have determined that childcare, or hadhanah, is an obligation according to sharia (Quran 2:232) in providing for the family and children in a lawful and good manne.¹⁹

1. Hak Asuh Anak

Child protection is an essential aspect for the well-being of children, both in this worldly life and the hereafter, regardless of the religious background or citizenship status of one or both parents.²⁰ The mother's responsibility is to take care of children under the age of 12 or who are not yet mumayyiz. While the father's responsibility is in terms of providing sustenance and taking care of the family and childre.²¹ If the couple divorces, the burden of child care and education costs remains the responsibility of the father and mother proportionally.²²

The policy of fostering boys up to the age of seven and girls up to the age of nine is based on psychological and developmental considerations. Boys, by the age of seven, generally demonstrate independent abilities in understanding social norms, ethics, and environmental interactions. Meanwhile, girls tend to require longer-term protection, so custody is transferred to the father after the age of nine, unless there is evidence of child abuse. In that case, custody can be transferred to another party based on a court order.²³

It should be noted that the aforementioned ages vary depending on the country and context. In Muslim countries such as Egypt, Syria, Malaysia, Pakistan (including India), Tunisia, Indonesia, and others, the age limit for single children ranges from 12 to 18 or 21 years. Referring to verse 223 of Al-Baqarah, which states that the father must provide maintenance and the mother must breastfeed the child for two years, it is implied that care is the mother's responsibility. A mother is not permitted to demand both types of maintenance. However, a father should not overcharge for the care of his child, as the mother has already expended energy on herself and the child she is breastfeeding.²⁴

If a wife divorces or separates from her husband during the iddah raj'i period, she retains the right to receive maintenance to support the needs of the children under her care. Furthermore, the children are also entitled to adequate housing until they reach adulthood. This demonstrates that the husband is obligated to provide financial support for their children, even if they are not yet divorced. Therefore, it is natural in many Islamic countries that parents and

¹⁹ Nayla Berlianti Puspawati, 'Analisis Putusan Tentang Pembagian Royalti Yang Dijadikan Harta Bersama (Gono-Gini) Studi Kasus Putusan Nomor 1622/PDT.G/2023/PA.JB', *Jurnal Ilmu Hukum, Humaniora Dan Politik*, 4.4 (2024), 896-903 <<https://doi.org/10.38035/jihhp.v4i4.2107>>.

²⁰ *Undang-Undang Republik Indonesia Nomor 23 Tahun 2002 Tentang Perlindungan Anak*, 2002.

²¹ *Instruksi Presiden Republik Indonesia Nomor 1 Tahun 1991 Tentang Penyebarluasan Kompilasi Hukum Islam*, 1991. Pasal 104 ayat (1) dan Pasal 105 lihat Pasal 41 huruf a *Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan, Lembaran Negara RI Tahun 1974 Nomor 1*.

²² *Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan, Lembaran Negara RI Tahun 1974 Nomor 1*. Pasal 41 huruf b

²³ 'Hak Asuh Anak Dalam Perkawinan Beda Agama', *Kumparan.Com* (Jakarta, November 2022), p. Di akses 5 Mei 2025.

²⁴ Nopan Wiranata, Ismail Ismail, and Alimni Alimni, 'Tinjauan Hukum Perkawinan Islam Berdasarkan Sejarah Pembentukannya', *El-Ussrah*, 5.2 (2022), 318-27 <<https://doi.org/10.22373/ujhk.v5i2.15623>>.

children share mutual responsibilities, depending on their circumstances and abilities. In addition to the religious affiliation of the parents who will raise the child, the parents' attitudes must also be considered. Not only does religious similarity play a role in determining the ideal parenting style for the father or mother, but there are also various other factors that ultimately aim to ensure the child's best interests. Regarding financing, if child custody is granted to the mother, this does not automatically remove the father's obligation to provide for the child's financial needs.

Women have the right to custody of children beyond the father in the event of a divorce, provided there are no specific obstacles, such as mental disorders. Because both parents have equal rights over children, there is no guarantee that a child who is legally married will not request custody, allowing parents to re-address the issue of child custody. In the event of an interfaith marriage and the child is under 12 years old, the mother has the right to custody of the child, while the father is obliged to pay child support, education, and health care for the child's benefit - unless the mother is non-Muslim.²⁵

Based on the results of interviews with 3 judges, the first judge from Mr. Drs. Aminudin Hadhanah has been determined by the Compilation of Islamic Law that children who have not reached the age of mumayyiz, meaning 12 years old, still have the right of their biological mother as a caregiver, we must strengthen the power of Islam in Q.S An-Nisa verse 141 "that Allah will not let the infidels destroy Islam, the number of people who embrace Islam" because parents are very influential in teaching Islam to their children, the ability to care for children, even though of course if we are sure that the path of sustenance will run smoothly, socially they must still be obliged to carry out their obligations to teach children the teachings of Islam, if they do not know, they can ask for help to put their children in an Islamic school, if psychologically the child remains Muslim, the child will be calm from the start because from the beginning Islam and we must teach Islam. Customary law will not conflict with Islam.

The second judge was Mr. Drs. Amri, S.H., M.H. Regarding the custody of children who divorce due to different religions, it can be concluded that according to the applicable laws and KHI, it turns out that the interests of the child are prioritized even though they have different religions, not the interests of the parents, because basically we see that being with parents who are Muslim is better, so that is what is prioritized so that they can continue to direct their children according to the religion chosen by the child, for example, if Islam is chosen, in the future they will be directed towards Islam, but there must be evidence. Because the child is still clean according to Islam. Child disputes are governed by rules in foreign countries where the child must follow the religion of his father (patrilineal). Parents should also not force their children's religion, as their role is crucial. According to the law, the mother is closer to the child. The first person entitled to custody is the father and the mother. If both are disabled, the child can be entrusted to the father's or mother's family. Someone must be there to look after the child if the father is busy working out of town. A change in a child's religion cannot be done by the father or mother, either through their ID card or administrative documents. Changing a parent's religion is also their right and does not affect the child's custody rights.

²⁵ Nopan Wiranata, Ismail Ismail, and Alimni Alimni, 'Tinjauan Hukum Perkawinan Islam Berdasarkan Sejarah Pembentukannya', *El-Ussrah*, 5.2 (2022), 318-27 <<https://doi.org/10.22373/ujhk.v5i2.15623>>.

The third judge is Mr. Muhammad Nurmadani, S.Ag.Children, by law, when still under 12 years old, the court will determine. If they are over 12 years old, based on marriage law and child protection laws, children have the right to choose, so above 12 years old, the most important thing is what is best for the child. In Islam, if the parents are married and then return to their previous religion, they have committed adultery. Meanwhile, legally, a marriage cannot be divorced, the child cannot be owned because of different religions, the mother and child must choose which religion they will adhere to, and the child's human rights are still protected.

Maintenance also has no legal effect. According to Islamic law, a father is obliged to provide for a child, but if the father is unable to, the mother can replace him. If someone forces a child, it is against the law and can be prosecuted. Forcing someone to convert to another religion can violate the law and is called racism, because religion is a basic human right that is inherent to everyone. If someone apostatizes, what will be considered is not the religion of the parents but what is best for the child. The court also regulates not the interests of the father or the mother of a different religion, but how to save the child, such as education, health, and also his religion. According to Islamic law, if someone has changed religion, the marriage is broken or officially declared *fasiq*. It must be declared by a religious court because the divorce must be officially registered and recognized by the state. Even if divorce has been declared repeatedly, it will never be recognized.

And the religious court will determine whether this incident will trigger domestic disputes or damage the household. If there are no problems, it is each of their respective responsibilities. Parents do not have the right to change their child's religion. If the parents force them to do so, they can be punished (for falsifying their identity). There are other reasons for parents to have their parental rights revoked, namely neglecting their children, entrusting them to others, but not taking care of them; these are reasons for revoking parental rights, so not everyone has the right.

Interviews served as a guideline for inclusion in the Compilation of Islamic Law. How interviews with several judges directly served as a primary source for assessing decision-making practices. In the context of Affirming Child Custody Authority in the context of divorce between couples with differing religious beliefs, the judges outlined the legal-practical approach used in making their decisions.

Children also need to be raised mentally and spiritually. Marriages involving people of different faiths are often rejected by society. This statement is proven by the fatwa regulation Number: 4/MUNAS VII/MUI/8/2005 which states that even though the majority of Indonesian society is Muslim, interfaith marriages are still prohibited. Marriages involving different faiths are strictly prohibited in Christianity. Children state that children have the right to receive welfare, care, nurturing, and loving guidance from their families and from foster care institutions, to support normal growth and development.

From these various regulations, it is clear that parents, society, and the state have a shared responsibility to guarantee and protect children's rights, including the right to life. Although rare, interfaith marriages are still practiced by a small number of people. With Indonesia's ratification of the Convention on the Rights of the Child, the state is now obliged to automatically protect children, regardless of their legal status, religion, physical or mental health, or other circumstances. All children, including those born of

mixed marriages and those following different religions, have the right to state protection.²⁶

CONCLUSION

Based on the provisions contained in the Compilation of Islamic Law (KHI), custody of children resulting from an interfaith divorce who are under 12 years of age is principally granted to the mother, unless there are certain circumstances that endanger the child physically or psychologically. This view aligns with the opinion of judges, who emphasize that continuity of education and the instilling of religious values are priority elements in determining custody rights. Even though the marriage has ended, the father's obligation to provide child support must still be fulfilled.

In practice, religious aspects often become a source of problems in custody arrangements, both from an Islamic legal perspective and within the national legal system. Therefore, in resolving child custody cases resulting from interfaith divorce, judicial considerations must be carried out comprehensively, taking into account the spiritual dimension, the child's psychological condition, and aspects of their welfare. Article 156 letter c of the Compilation of Islamic Law (KHI) provides the legal basis for the court to revoke custody rights from a mother if she is proven unable to guarantee the child's complete safety and health. The primary principle in post-divorce child placement remains oriented towards the child's best interests comprehensively.

The father's obligation to bear the costs of child support continues even after the marriage has ended. Meanwhile, religion is a significant factor that can give rise to polemics in determining custody rights. Both under Indonesian national law and within the framework of Islamic law, this issue demands a comprehensive judicial review. Based on the provisions of Article 156, letter c of the Compilation of Islamic Law, it is stated that custody authority can be transferred to another party if there is a legally valid reason. from the mother if she is unable to guarantee the physical and mental health of the child, and the court has the authority to decide the transfer of custody rights to the closest relative who is deemed more suitable

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