

Problematics of Post-Divorce Child Custody (*Hadhanah*) from the Perspectives of Islamic Law and Indonesian Positive Law

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A B S T R A C T

This study examines the problems surrounding child custody following divorce, particularly the regulation of *hadhanah* in Islamic law and child custody arrangements under the Indonesian legal system. The central issue addressed in this study is the gap between Religious Court decisions and social realities in the implementation of child custody, where disputes are often not determined by who is most capable of providing proper care, but rather by who has greater power or control over the child. This research employs a normative legal method using statutory and conceptual approaches. Primary data are derived from laws and regulations, while secondary data are obtained from relevant legal literature and collected through library research. The findings reveal two major post-divorce child custody problems: first, both parents insist on obtaining custody, resulting in legal disputes over custodial rights; second, neither parent assumes responsibility for childcare after divorce, as each shifts responsibility to the other. These conditions have serious adverse effects on children's psychological well-being, welfare, and education. This analysis emphasizes a shift in the interpretation and application of child custody law, moving from a formalistic legal approach toward the best interests of the child principle as the primary consideration.

1. Introduction

Children are a trust and a divine gift from God that must be protected, as they possess inherent dignity and fundamental human rights that must be upheld. Through marriage, children are born as the next generation of their parents. The desire to have children is a natural human instinct among married couples, accompanied by a strong aspiration to remain close to their children, guide them, and educate them directly until they reach maturity. In this sense, children constitute a moral and religious responsibility entrusted to parents (Ghufron & Ali, 2020; Sajidin, 2023).

Similarly, children naturally seek closeness to their parents because they depend on affection, attention, emotional support, and guidance. Children require parental care and protection in order to develop the capacity to safeguard themselves in adulthood. Emotional security and affection are among the most fundamental needs of children, as love provides warmth, stability, and psychological comfort. Therefore, parental care characterized by compassion, attention, and emotional support is indispensable for children's well-being (Syukri Saleh, 2025; Ghufron & Ali, 2020). In Islamic legal terminology, *hadhanah* refers to the care, maintenance, and upbringing of children until they reach maturity or are able to live independently. Child custody is a mandatory obligation of both parents toward their minor children. The absence of proper custody and care may result in child neglect, which can severely affect children's development and quality of life (Hifni, 2021; Jauhari, 2022).

Child custody disputes are among the most significant legal and social issues arising from parental divorce. In Payakumbuh City, divorce rates have remained relatively high between 2023 and 2024. Data from the Religious Court of Payakumbuh indicate that from January to December 2023 there were 350 divorce cases, while from January to December 2024 the number increased to 410 cases. Divorce inevitably has serious consequences for children, particularly when they are still at a young and vulnerable age. These conditions underscore the urgency of addressing child custody issues within both legal and social frameworks (Khair, 2020; Mansari, 2023).

Frequent family conflicts often result in children becoming the primary victims. Even after divorce, parental obligations toward children remain intact and cannot be transferred to third parties. Several studies have examined child custody from the perspective of Islamic law, including research on *hadhanah* following divorce and the legal implementation of child custody rights (Hifni, 2021; Jazila, 2023). However, studies specifically addressing the practical and normative problems of post-divorce child custody remain limited. Consequently, this research seeks to complement previous studies by systematizing and reinforcing the legal foundations of child custody in both Islamic law and Indonesian positive law.

This study also aims to encourage families to preserve marital harmony and avoid divorce whenever possible. Nevertheless, when divorce is unavoidable, this research provides a legal framework to help parents understand child custody arrangements under Islamic law and statutory regulations before submitting claims to the court. Therefore, a more focused examination of post-divorce child custody problems and the legal provisions governing *hadhanah* is necessary. This analysis emphasizes a shift in the interpretation and application of child custody law, moving from a rigid formalistic approach toward the *best interests of the child*

principle as the primary legal consideration (Nurrohman & Syamsuddin, 2025; Sunu et al., 2023).

The major issues addressed in the study of post-divorce *hadhanah* and its legal consequences in Islamic law and Indonesian positive law include custody disputes and the neglect of child maintenance. Custody disputes frequently arise when both parents claim the right to care for the child, often resulting in prolonged litigation. In addition, although custody may be granted to the mother, fathers frequently neglect their obligation to provide child maintenance (*nafaqah hadhanah*) (Yulianti, 2023; Gushairi, 2022). Previous studies have examined related issues, such as research by Yulianti (2023) on child maintenance following divorce from the perspective of Islamic law, which found that a father's obligation to provide maintenance does not automatically constitute debt unless stipulated by a judicial decision. Another study by Syukri Saleh (2025) on post-divorce child custody protection from the perspectives of Islamic law and child psychology concluded that although Islamic jurisprudence and Article 105 of the Compilation of Islamic Law prioritize mothers as custodians of non-*mumayyiz* children, such provisions are dynamic and may be reassigned to ensure the best interests of the child. Indonesian national law reinforces this principle through regulations and jurisprudence emphasizing comprehensive child protection, although implementation continues to face structural, cultural, and legal awareness challenges (Purba & Zahara, 2022).

While previous studies share a common focus on post-divorce *hadhanah*, this research distinguishes itself by concentrating on the evolving interpretation and application of child custody law—specifically the transition from a formalistic legal approach toward a child-centered framework grounded in the *best interests of the child* principle.

2. Method

This study adopts a normative legal research design, focusing on the analysis of legal problems and regulatory frameworks governing child custody (*hadhanah*) following divorce from the perspectives of Islamic law and Indonesian positive law. Normative legal research is employed to examine legal norms, principles, and doctrines that shape the determination and implementation of child custody rights, particularly in post-divorce contexts (Asmendri, 2020; Ramdhan, 2021). This approach is appropriate because the primary objective of the study is not to measure social behavior empirically, but to evaluate the coherence, interpretation, and application of legal rules relating to child custody.

The research applies two main analytical approaches. First, a statutory approach is used to examine laws and regulations governing child custody in Indonesia, including statutes, legal codes, and relevant judicial precedents. This approach enables a systematic analysis of the legal obligations of parents and the authority of courts in deciding child custody cases after divorce (Hifni, 2021; Mansari, 2023). Second, a conceptual approach is employed to analyze the concept of *hadhanah* within Islamic jurisprudence. This approach involves examining classical and contemporary Islamic legal doctrines, Qur'anic verses, prophetic traditions, and scholarly opinions that form the normative basis of child custody in Islamic law (Jauhari, 2022; Jazila, 2023).

The data sources in this study are divided into primary and secondary legal materials. Primary legal materials consist of statutory regulations related to child protection and child

custody, including national legislation and judicial decisions. Secondary legal materials include books, academic journals, theses, and prior research relevant to child custody, Islamic family law, and child protection. All data were collected through systematic library research to ensure analytical depth and doctrinal accuracy (Asmendri, 2020).

Data analysis in this study is conducted using qualitative methods. Qualitative legal analysis emphasizes interpretative reasoning, descriptive explanation, and normative evaluation rather than numerical measurement. Through descriptive and analytical techniques, legal norms are examined to identify inconsistencies, gaps, and shifts in legal interpretation, particularly the transition from a formalistic application of custody rules toward a child-centered approach grounded in the *best interests of the child* principle (Sunu et al., 2023; Nurrohman & Syamsuddin, 2025). This analytical framework allows the study to critically assess both the normative structure and practical implications of child custody law in post-divorce situations.

3. Results and Discussion

3.1. Problematics of Post-Divorce Child Custody

Issues of child custody most commonly arise as a consequence of parental divorce. As parents, both the father and the mother generally seek custody of their child, as custody implies the right and responsibility to live with, care for, and nurture the child. Every child is entitled to health care, social security, and protection in accordance with their physical, psychological, spiritual, and social needs (Khair, 2020; Purba & Zahara, 2022). Although statutory regulations clearly designate one parent as the legal custodian following divorce, such determinations do not eliminate the other parent's right to maintain contact with the child. In practice, however, the implementation of these legal norms often fails to prioritize the child's welfare (Hifni, 2021; Mansari, 2023).

For the protection of children's interests, parental awareness and responsibility in addressing custody arrangements are essential. The absence of cooperation between parents may result in children growing up without adequate care and supervision. Just as marriage creates mutual rights and obligations between spouses, divorce also produces legal consequences not only for the former spouses but, more importantly, for the children born of the marriage. Therefore, post-divorce child custody should be understood as a shared parental responsibility rather than a contested entitlement (Ghufron & Ali, 2020; Jauhari, 2022).

Based on the foregoing analysis, post-divorce child custody problems may be categorized into two main forms. First, both parents insist on obtaining custody and are unwilling to compromise, resulting in prolonged custody disputes that must be resolved through judicial intervention. Second, in contrast, neither parent assumes responsibility for childcare after divorce, as each shifts responsibility to the other. This situation leads to child neglect, adversely affecting children's psychological well-being, welfare, and access to education (Yulianti, 2023; Gushairi, 2022). Consequently, the enforcement of parental obligations toward children after divorce must be strengthened through both religious norms and positive law (Syukri Saleh, 2025).

Moreover, public understanding of parental responsibilities after divorce remains limited, particularly among divorced parents who tend to perceive children's rights merely in

terms of financial support. Legal principles governing the fulfillment of children's rights after divorce are often inadequately implemented, as reflected in the continued failure to fully enforce child protection regulations. Therefore, systematic efforts are required to address post-divorce custody problems, including legal education, socialization, and counseling aimed at increasing public awareness of *hadhanah* and child custody obligations (Purba & Zahara, 2022; Sunu et al., 2023).

In the Indonesian context, post-divorce *hadhanah* constitutes a complex legal issue because it operates within two complementary yet distinct legal systems: Islamic law and positive law. Conflicts frequently arise when parents pursue custody based on personal interests rather than the *best interests of the child*. Specific problems include custody disputes that escalate into litigation and the neglect of child maintenance obligations. Even when custody is granted to the mother, fathers often fail to fulfill their duty to provide child maintenance (*nafaqah hadhanah*) (Hifni, 2021; Mansari, 2023). As a solution, both Islamic law and Indonesian positive law emphasize the *best interests of the child* as the fundamental principle governing child custody decisions. Despite the dissolution of marriage, parental obligations to nurture, protect, and educate children remain continuous and indivisible (Jazila, 2023; Sunu et al., 2023).

3.2. *Hadhanah* after Divorce According to Islamic Law

The legal foundation of child custody (*hadhanah*) in Islamic law is derived primarily from the Qur'an and the Sunnah. One of the principal Qur'anic bases is found in Qur'an, Surah al-Baqarah (2:233), which stipulates that mothers are obliged to breastfeed their children for two complete years for those who wish to complete the period of nursing, while fathers are responsible for providing food and clothing to the mothers in a proper and equitable manner (*bi al-ma'ruf*). This provision indicates that children are entitled to maternal care and breastfeeding for at least the first two years of life, even in cases where divorce has occurred. Accordingly, Islamic law prioritizes the mother's right to custody of children under the age of two, as children at this stage are in critical need of maternal nurturing and breastfeeding (Jauhari, 2022; Hifni, 2021).

Another normative foundation of *hadhanah* is found in Qur'an, Surah al-Tahrim (66:6), which commands believers to protect themselves and their families from the Fire. This verse underscores the parental obligation to safeguard family members, including children, by ensuring their physical, moral, and spiritual well-being. In this context, child care and upbringing are not merely social responsibilities but constitute religious obligations aimed at protecting children from harm and moral neglect (Sajidin, 2023; Ghufroon & Ali, 2020).

Islamic law unequivocally considers the care of young children to be mandatory. Neglecting child care is regarded as exposing children to serious harm and endangerment. This principle is further reinforced by prophetic traditions, which emphasize the mother's right and responsibility to nurture her children physically, intellectually, and morally, while preparing them for future life. Thus, *hadhanah* is conceived as a comprehensive responsibility encompassing physical care, emotional support, moral guidance, and education (Jazila, 2023; Syukri Saleh, 2025).

Islamic jurisprudence also establishes an order of priority among individuals entitled to child custody, encompassing both female and male relatives. This classification is based on

degrees of proximity and suitability, similar to the principle applied in Islamic inheritance law. Such prioritization becomes particularly significant in post-divorce situations where disputes over custody arise or when children risk being neglected due to parental conflict (Zulkarnain, 2023; Kusmayanti, 2020).

Furthermore, Islamic law determines the duration of *hadhanah* by reference to the child's developmental capacity rather than rigid statutory age limits. Custody generally ends when the child reaches the stage of *tamyīz*, namely the ability to distinguish between right and wrong and to independently manage basic personal needs such as eating, dressing, and personal hygiene. Once a child reaches this stage, he or she may be granted the right to choose whether to reside with the mother or the father (Hifni, 2021; Jazila, 2023).

Classical Islamic jurists differ regarding the specific duration of *hadhanah*. Imām al-Shāfi'ī and Iṣḥāq hold that the custody period lasts until approximately seven or eight years of age. Ḥanafī jurists and al-Thawrī assert that the mother has priority in caring for a son until he is able to eat and dress independently, and for a daughter until she reaches puberty, after which custody shifts to the father. Imām Mālik maintains that the mother is entitled to custody of a daughter until marriage, while the father retains custody of a son until puberty. The Ḥanbalī school, by contrast, holds that custody for both sons and daughters lasts until the age of seven, after which the child is permitted to choose between the parents (Zulkarnain, 2023; Jazila, 2023).

The *mumayyiz* stage generally spans from around seven years of age until puberty. At this stage, a child is considered capable of recognizing personal interests and potential harm, thereby justifying the right to choose between parents. This principle is supported by a hadith narrated by Abu Hurairah, recounting a case in which the Prophet Muhammad allowed a child to choose between his mother and father following their dispute. The child chose to remain with the mother, illustrating that Islamic law acknowledges the agency of a *mumayyiz* child in determining custodial arrangements (Ghufron & Ali, 2020; Syukri Saleh, 2025).

3.3. *Hadhanah* after Divorce under Indonesian Laws and Regulations

Child custody following divorce in Indonesia is governed by several statutory regulations and judicial precedents that collectively emphasize the protection and welfare of children. One of the principal legal instruments is Law No. 35 of 2014 on Child Protection, particularly Articles 7(1), 14, 26, and 33, which affirm that children have the right to be cared for, nurtured, educated, and protected by their parents. These provisions underline that parental responsibilities toward children do not cease upon divorce and that the state bears an obligation to ensure the fulfillment of children's fundamental rights (Khair, 2020; Purba & Zahara, 2022).

Judicial practice further clarifies the application of these statutory norms. The Supreme Court Decision No. 126 K/Pdt/2001 dated 28 August 2003 established that in cases of divorce, custody of underage children should, in principle, be entrusted to the parent closest to and most emotionally connected with the child, namely the mother. Similarly, Supreme Court Decision No. 102 K/Sip/1973 dated 24 April 1975 affirmed that, based on established jurisprudence concerning child guardianship, priority should generally be given to the biological mother, particularly for young children. This preference is grounded in the

consideration of the child's best interests, unless there is clear evidence demonstrating that the mother is unfit to care for the child (Mansari, 2023; Hifni, 2021).

In addition to statutory law and jurisprudence, the Compilation of Islamic Law (*Kompilasi Hukum Islam*) provides specific guidance on child custody in Article 105. It stipulates that: (1) custody of children who have not yet reached the *mumayyiz* stage, or who are under the age of twelve, is the right of the mother; (2) custody of children who have reached the *mumayyiz* stage is determined by the child's own choice between the father and the mother; and (3) the financial responsibility for child maintenance remains the obligation of the father. These provisions reflect a legal framework that balances parental rights with the developmental needs and agency of the child (Jazila, 2023; Jauhari, 2022).

The application of Article 105 has also been examined in empirical legal studies. One such case, analyzed by Ajeng Widanengsih, involved a mother who initially held custody of her child but was deemed negligent due to her behavior, including frequently returning home late, leaving the child in the care of neighbors, and failing to ensure the child's continued education. On this basis, the father filed a petition before the Religious Court seeking a transfer of custody. The court ultimately granted custody to the father, considering his greater attentiveness, emotional care, and ability to provide a safer and more stable environment for the child (Mansari, 2023; Kusmayanti, 2020).

This case illustrates that custody determinations under Indonesian law are not absolute but conditional upon the custodial parent's ability to fulfill parental responsibilities. A transfer of custody may occur when the parent holding custody is found to be incapable of providing proper care or when their behavior is deemed detrimental to the child's physical, emotional, or educational development. Thus, Indonesian law reinforces the principle that child custody decisions must ultimately be guided by the *best interests of the child*, rather than by formal entitlement alone (Sunu et al., 2023; Syukri Saleh, 2025).

3.4. Comparative Analysis Between Islamic Law and Indonesian Positive Law on Post-Divorce Child Custody

The legal determination of child custody following divorce is a crucial aspect of family law that draws significant attention from both normative and practical perspectives in Indonesia. Both Islamic law and Indonesian positive law provide normative frameworks for addressing child custody (*hadhanah*), yet their conceptual foundations, legal sources, and application mechanisms demonstrate distinctive characteristics alongside notable overlaps. This comparative analysis explores these similarities and differences with particular emphasis on the principle of *best interests of the child*, the respective legal sources, the role of judicial discretion, and how custody rights are allocated and interpreted.

3.4.1. Legal Foundations and Normative Sources

3.4.1.1. Islamic Law

Islamic law conceptualizes child custody (*hadhanah*) as an integral part of parental responsibility grounded in religious, moral, and social obligations. Rather than framing custody as an individual right attached to parents, classical Islamic jurisprudence predominantly treats *hadhanah* as a duty (*taklif*) owed to the child, with the ultimate objective of safeguarding the child's physical, emotional, moral, and spiritual well-being. Although the Qur'an does not explicitly regulate *hadhanah* in a technical legal sense, its normative

foundations are derived from broader Qur'anic injunctions concerning parental care, nurturing, and family protection.

One of the principal textual bases is Qur'an 2:233, which mandates that mothers breastfeed their children for two full years for those who wish to complete the nursing period, while fathers are obliged to provide financial support in a manner deemed appropriate (*bi al-ma'rūf*). This verse establishes a dual framework of responsibility: maternal caregiving and paternal financial maintenance. Importantly, these obligations are not nullified by divorce, indicating that the dissolution of marriage does not sever parental duties toward children. In this sense, early childhood care, particularly during infancy, is closely associated with the mother due to biological and nurturing considerations, while the father remains responsible for ensuring the material conditions necessary for the child's upbringing.

Another significant normative source is Qur'an 66:6, which commands believers to protect themselves and their families from harm. This verse is widely interpreted by jurists as a moral and legal imperative for parents to ensure the holistic protection of their children, encompassing not only physical safety but also moral and spiritual development. Contemporary scholars argue that this verse provides a foundational ethical framework for child protection within Islamic law, reinforcing the idea that *hadhanah* serves the best interests of the child rather than parental authority per se (Multazam, 2024).

Classical *fiqh* literature further systematizes *hadhanah* through detailed juristic elaborations. The majority of jurists agree that mothers have priority in custody during a child's early years, particularly before the child reaches the *mumayyiz* stage, when they are capable of basic self-care and moral discernment. This preference is justified by assumptions about maternal tenderness, emotional proximity, and attentiveness during formative developmental phases. However, Islamic jurisprudence does not adopt a monolithic position. Each of the major schools of law – Hanafi, Shafi'i, Maliki, and Hanbali – proposes different temporal limits for maternal custody, ranging from a fixed number of years to the attainment of puberty, especially for female children. Despite these variations, all schools converge on one central principle: custody arrangements must prioritize the child's welfare and prevent harm (*darar*). Thus, Islamic law embeds flexibility and contextual assessment within its normative framework, allowing custody to be transferred if the custodial parent is deemed unfit or if the child's interests are compromised.

3.4.1.2. Indonesian Positive Law

In contrast to the religiously grounded structure of Islamic law, Indonesian positive law regulates child custody primarily through statutory instruments, judicial decisions, and codified legal principles. The core normative foundation is Law No. 35 of 2014 on Child Protection, which adopts a rights-based approach to child welfare. This law explicitly recognizes children as rights-bearing subjects entitled to care, protection, education, and development, irrespective of their parents' marital status. It obliges both parents to continue fulfilling their responsibilities after divorce and authorizes state intervention when parental neglect or abuse occurs.

Several provisions within this law emphasize that parental authority is conditional upon the fulfillment of children's rights. If parents fail to provide adequate care or protection, the law allows for alternative guardianship arrangements, underscoring the state's role as the

ultimate guarantor of child welfare. This framework aligns Indonesian child protection law with international norms, particularly the principle of the best interests of the child, which has become a central interpretive standard in judicial practice.

Judicial decisions further operationalize these statutory principles. Courts in Indonesia, particularly religious courts handling Muslim family law cases, increasingly emphasize substantive justice over formalistic entitlement. Custody determinations are guided not solely by parental status but by considerations such as emotional attachment, caregiving capacity, psychological stability, and the child's living environment (Nurrohman & Syamsuddin, 2025). This judicial orientation reflects a shift toward child-centered adjudication, even when it requires deviating from traditional presumptions.

A distinctive feature of the Indonesian legal system is the Compilation of Islamic Law (*Kompilasi Hukum Islam* – KHI), which functions as a hybrid normative source bridging Islamic jurisprudence and state law. Article 105 KHI codifies rules on *hadhanah* by stipulating maternal custody for children who are not yet *mumayyiz* or under the age of twelve, granting *mumayyiz* children the right to choose between parents, and assigning financial responsibility for child maintenance to the father. Through this codification, Islamic legal norms are translated into a form compatible with statutory governance and judicial enforcement.

Overall, while Islamic law derives its authority from divine revelation and classical jurisprudence, and Indonesian positive law relies on statutes and judicial interpretation, both systems converge on a shared normative commitment: ensuring the protection and best interests of the child. Their interaction within the Indonesian legal context demonstrates not opposition but complementarity, providing a pluralistic yet coherent framework for resolving post-divorce custody disputes.

3.4.2. Principles Guiding Custody Decisions

3.4.2.1. Best Interests of the Child

The *best interests of the child* principle functions as a central normative anchor within both legal systems, though its conceptual nuance and practical application may vary. Under Indonesian positive law, custody decisions emphasize child welfare in its totality, including psychological, social, educational, and physical needs. Judges in religious courts exercise discretion not merely by slavishly applying codified rules but by progressively interpreting the law to meet children's broader well-being. For example, judges may consider parental capabilities, emotional bonds, living environments, and the child's expressed preferences when determining custody allocations.

Islamic law similarly prioritizes child welfare, but frames it within the objectives of *maqāṣid al-sharī'ah* – the higher purposes of Islamic law – which include preserving lineage (*hifz al-nasl*), life (*hifz al-nafs*), and dignity. The *best interests* doctrine is increasingly interpreted as consonant with these objectives, guiding judges toward custody decisions that do not merely follow hierarchical rules but attend to children's emotional and developmental needs. Research shows that Indonesian religious courts often integrate *best interests* considerations alongside traditional fiqh norms, allowing for normative flexibility that aligns Islamic family law with contemporary child-centered standards.

3.4.2.2. Age and Custodial Rights

The age of the child constitutes a crucial and shared determinant in both Islamic law and Indonesian positive law in resolving issues of post-divorce child custody. In Islamic jurisprudence, the concept of *tamyīz* serves as a functional benchmark rather than a rigid numerical threshold. A child is considered *mumayyiz* when they possess sufficient cognitive and emotional capacity to distinguish between beneficial and harmful choices and to manage basic personal needs independently. Classical jurists generally place this stage around the age of seven, although some schools of Islamic law extend maternal custody until puberty, particularly for female children. Once the child reaches *tamyīz*, Islamic law grants the child the right to express a preference regarding which parent to live with, reflecting an early recognition of children's autonomy within the framework of parental responsibility.

Indonesian positive law similarly acknowledges the importance of age and developmental capacity in custody determinations, albeit through more formalized statutory standards. The Compilation of Islamic Law, for instance, establishes the age of twelve as a reference point for determining whether a child may choose between parents. Beyond statutory provisions, judicial practice increasingly incorporates psychological assessments and social considerations to evaluate the child's best interests. Courts may consider the child's expressed wishes, emotional attachments, and living conditions, provided such preferences do not conflict with the child's overall welfare. Thus, while Islamic law emphasizes functional maturity and moral discernment, Indonesian positive law blends age-based thresholds with judicial discretion, illustrating a complementary approach that prioritizes the child's best interests over formal parental entitlements.

3.4.3. Judicial Discretion and Implementation

Despite shared priorities, the mechanisms through which custody is determined show distinctive operational differences. Under Indonesian positive law, judges have broad authority to interpret statutes, evaluate evidence, and determine custody based on empirical considerations such as parental behavior, living conditions, and child welfare outcomes. This discretionary power is reinforced by statutory mandates that entrust courts with adjudicatory responsibility aimed at substantive justice.

Islamic law, when implemented in Indonesian religious courts, traditionally provides structured custodial hierarchies derived from *fiqh* schools of thought. However, increasing integration of welfare principles and *maqāṣid* reasoning allows judges to tailor decisions to individual case contexts. Cases where custody shifts from mother to father due to demonstrated maternal inability or neglect exemplify how Islamic legal reasoning operates flexibly when child welfare supersedes doctrinal hierarchies.

3.4.4. Similarities and Differences

3.4.4.1. Similarities

- **Child Welfare Priority:** Both legal systems seek to protect and promote the welfare of children post-divorce. Islamic jurisprudence emphasizes nurture and protection in accordance with religious norms, while Indonesian positive law articulates welfare through statutory rights and judicial adjudication.
- **Age-Related Considerations:** In both frameworks, the age and developmental capacity of the child influence custody arrangements, particularly concerning maternal priority during early childhood.

- **Judicial Role:** Judges in both systems are pivotal in interpreting normative provisions and ensuring that custody decisions align with the child's welfare and best interests.

3.4.4.2. Differences

- **Source of Law:** Islamic custody norms originate from religious texts and classical jurisprudence, while Indonesian positive law relies on codified statutes and legal codes supplemented by judicial interpretation.
- **Recognition of Religious Norms:** Islamic law explicitly integrates *maqāṣid* and fiqh classifications, whereas Indonesian positive law applies a secular rights-based approach with influences from international child protection standards.
- **Application Mechanisms:** In Islamic jurisprudence, custodial hierarchies are more prescriptive, while Indonesian positive law grants broader judicial discretion in balancing competing welfare considerations.

Although divergent in legal sources and methodologies, both Islamic law and Indonesian positive law increasingly converge around the principle of focusing on the *best interests of the child*. This convergence reflects a broader jurisprudential trend toward child-centered legal reasoning that transcends doctrinal boundaries. By integrating *maqāṣid* values with statutory child protection principles, Indonesian religious courts exemplify how hybrid legal systems can adapt to contemporary welfare imperatives while maintaining normative coherence.

Indonesian child custody law thus operates within a hybrid model, where Islamic doctrinal elements inform normative substance, and statutory provisions guide procedural application. The synergy between these legal norms enhances the robustness of child custody adjudication, ensuring that decisions not only fulfill religious obligations but also uphold legal rights and social welfare standards. Veterating this comparative analysis, it becomes evident that harmonizing religious legal principles with contemporary welfare frameworks offers a path toward more nuanced, just, and child-centered custody outcomes.

4. Conclusion

This study concludes that there are two primary and recurrent problems in the implementation of child custody (*hadhanah*) following divorce. First, both parents—whether the former husband or wife—often insist on obtaining custody of the child, with neither party willing to compromise. As a result, custody disputes frequently escalate into protracted legal conflicts that must be resolved through the courts. Second, an equally serious but often overlooked problem arises when neither parent assumes responsibility for the child after divorce, as each parent shifts the burden of care to the other. This situation leads to neglect that has detrimental consequences for the child's psychological well-being, as well as the fulfillment of the child's basic needs, including welfare, education, and emotional security.

In practice, these problems are further compounded by several structural challenges, such as disputes over physical control of the child, difficulties in enforcing court decisions on custody, unilateral transfers of caregiving—particularly when the mother remarries—and the frequent failure of fathers to fulfill their obligation to provide child maintenance. These realities indicate a significant gap between normative legal provisions and their practical implementation.

From the perspective of Islamic law, the legal foundation of *hadhanah* is rooted in Qur'an al-Baqarah (2):233, which affirms that children who have not yet reached the age of two remain under the care of their mothers, particularly in relation to nurturing and breastfeeding, while fathers bear the responsibility of financial support. Islamic law also recognizes a limit to *hadhanah* based on the child's developmental capacity. Once a child reaches the stage of *mumayyiz*—that is, capable of distinguishing right from wrong and independently managing basic personal needs—the child is granted the right to choose whether to live with the mother or the father.

Juridically, child custody in Indonesia is regulated under Law No. 35 of 2014 on Child Protection, particularly Articles 7(1), 14, 26, and 33, which emphasize that parents are obligated to nurture, care for, educate, and protect their children. When parents or family members fail to fulfill these responsibilities, the law allows for the appointment of another individual or legal entity to act in the child's best interests. Ultimately, both Islamic law and Indonesian positive law converge on a fundamental principle: the rights and welfare of the child—encompassing survival, development, and proper care—must take precedence over the personal interests or conflicts of divorced parents.

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