



UDC 34

## REASSESSING CHILD CUSTODY AFTER APOSTASY IN INDONESIA: A MAQASID AL-SHARI'AH AND COMPARATIVE HUMAN RIGHTS ANALYSIS

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### ABSTRACT

This article examines the ontological foundations of post-apostasy child custody (*ḥaḍānah*) disputes in Indonesia, focusing on the structural tension between classical Islamic legal doctrine and the universalist ontology of human rights law. In prevailing normative practice, apostasy is frequently constructed as an essential legal attribute that automatically disqualifies a parent from custodial rights, based on a rigid interpretation of Article 105 of the Compilation of Islamic Law. This approach presupposes a static conception of legal subjectivity, wherein religious identity functions as the primary determinant of parental fitness. Such an ontology fundamentally conflicts with the child-centered normative order embodied in the principle of the *Best Interests of the Child*, as mandated by the Child Protection Law and the Convention on the Rights of the Child (CRC).

### KEY WORDS

Apostasy, child custody, Maqāsid al-Sharī'ah, Islamic family law.

The protection of children's rights constitutes a universal legal norm that is globally recognized as the highest priority in all family law disputes. The principle of the *Best Interests of the Child* (BIOC) has become a cornerstone of international legal instruments, most notably the Convention on the Rights of the Child (CRC), which obliges states to ensure that a child's physical, psychological, and moral well-being is not compromised by parental legal conflicts (Mujahid, 2020). However, the implementation of this principle often encounters significant complexity when confronted with religious legal doctrines in countries characterized by plural legal systems. In this context, discourse surrounding apostasy (*riddah*), or the change of religion by one parent, emerges as one of the most critical issues generating tension between individual human rights and the supremacy of religious law in the determination of child custody (*ḥaḍānah*).

In classical Islamic jurisprudence, the qualification of a caregiver (*ḥāḍin*) is closely linked to religious integrity. The majority of *fuqahā'* maintain that religious congruence between parent and child constitutes an absolute requirement for custodial rights, premised on the argument that apostasy poses a threat to the child's faith and spiritual security (Al-Rawi, 2021). This view situates apostasy not merely as a private matter, but as a legal disqualification that automatically nullifies an individual's right to care for their child. In the contemporary era, however, this rigid interpretation has increasingly been challenged by legal scholars who argue that the primary concern of Islamic law should be the protection of life (*ḥifz al-nafs*) and the overall welfare of the child, rather than the imposition of sanctions based on parental theological choices.

Indonesia, as a state with a dual legal system, offers a distinctive arena of contestation in addressing such disputes. On the one hand, Article 105 of the Compilation of Islamic Law (KHI) is frequently interpreted by judges in the Religious Courts as mandating the award of custody to a Muslim parent in order to safeguard the child's religion. On the other hand, Law No. 35 of 2014 on Child Protection explicitly adopts the principles of non-discrimination and the best interests of the child, irrespective of religious background (Nurlaelawati, 2023). This normative dualism generates legal uncertainty, whereby religious identity often supersedes an assessment of a parent's actual caregiving capacity (Assegaf, 2022).

Previous studies have largely examined apostasy either through the lens of human rights discourse or from a purely theological perspective. However, a significant research gap



remains in the literature regarding how these normative conflicts may be reconciled through an integrative legal approach. Although a trend toward judicial progressivism can be observed in several Supreme Court decisions that increasingly prioritize the psychological well-being of the child over religious formalism, consistent standards and a coherent legal doctrine capable of bridging these competing interests remain largely absent (Kamali, 2021). This situation calls for a legal reconceptualization that does not rely solely on normative textualism, but instead employs the framework of *Maqāṣid al-Sharī'ah* to recognize child protection as an integral objective of the law itself.

## METHODS OF RESEARCH

This study employs normative legal research, commonly referred to as doctrinal research, to examine law as a coherent structure of norms, principles, and doctrines. The choice of this method is grounded in the argument that child custody disputes arising from apostasy in Indonesia are rooted in ontological and epistemological conflicts between religious legal norms and the national regulatory framework (Smits, 2017). Given that the primary focus of this research lies in the synchronization of legal texts and the reconciliation of competing principles, the normative method is considered the most authoritative approach for generating prescriptive solutions to existing legal uncertainty (Marzuki, 2021).

To address the complexity of this issue, the study simultaneously integrates two principal approaches: the statute approach and the conceptual approach. Through the statute approach, the author systematically examines Indonesia's regulatory hierarchy, ranging from the 1945 Constitution to the Child Protection Law and the Compilation of Islamic Law (KHI), in order to identify legal gaps that frequently trigger inconsistency in judicial decisions.

Subsequently, the conceptual approach is employed to move beyond the textual limitations of statutory provisions by engaging broader legal doctrines. The author constructs a theoretical framework that connects the principle of the Best Interests of the Child (BIOC) within international law to the doctrine of *Maqāṣid al-Sharī'ah*, particularly the protection of life (*ḥifẓ al-nafs*) and the protection of religion (*ḥifẓ al-dīn*) (Hutchinson, 2012). This integration seeks to develop a welfare-based child custody model that transcends the formal religious identity of parents.

The data utilized in this study are derived exclusively from secondary legal materials, including primary legal sources such as national and international legal instruments, as well as secondary sources comprising academic literature and international journal articles published within the past five years. All legal materials are analyzed using a qualitative-prescriptive method and deductive reasoning, moving from universal legal principles to domestic normative realities in order to produce a solution-oriented legal reconstruction (Smits, 2018). Through this methodological framework, the study is not merely descriptive-analytical, but also contributes substantively to credible legal reform efforts for legal practitioners and scholars at the global level.

## RESULTS AND DISCUSSION

The principle of the Best Interests of the Child (BIOC) did not emerge in a normative vacuum; rather, it represents the crystallization of a paradigmatic shift in legal thought from paternalistic authority (*patria potestas*) toward the recognition of children's individual rights as autonomous legal subjects. Historically, this doctrine is rooted in the principle of *parens patriae*, under which the state assumes the role of ultimate guardian for those unable to protect themselves. In contemporary legal scholarship, BIOC is widely understood as an *open-textured concept*, granting judges broad discretion to assess a child's physical, emotional, and spiritual needs on a case-by-case basis. However, this elasticity functions as a double-edged sword: while it allows flexibility, it also opens space for subjective judicial bias, including religious bias. In plural societies such as Indonesia, interpretations of BIOC



are often trapped in a dichotomy between secular welfare (education, health, and physical comfort) and eschatological welfare (faith and salvation in the hereafter) (Mujahid, 2020).

In classical Islamic law, *ḥaḍānah* is defined as the obligation to protect children from harm and to nurture them into morally upright individuals. The requirement that a caregiver (*ḥāḍin*) be Muslim in Shāfiʿī fiqh—dominant in Indonesia—is grounded in the argument that custody constitutes a form of guardianship (*wilāyah*) and religious education. Within this theocentric framework, apostasy is construed as a moral and theological failure that inherently undermines one’s competence to serve as a role model for a child (Al-Rawi, 2021). However, when examined through an anthropocentric lens, a fundamental question arises: does a mother’s biological and psychological capacity to love and care for her child instantaneously disappear upon a change in belief? Contemporary scholarly discourse increasingly distinguishes between the “parent’s right to custody” and the “child’s right to receive optimal care.” If the forced separation of a child from an apostate parent results in psychological harm, then the law has failed to achieve its protective purpose (Nurlaelawati, 2023).

The core of this legal transformation lies in the reorientation of *Maqāṣid al-Sharīʿah*. Traditionally, the protection of religion (*ḥifẓ al-dīn*) has been placed at the apex of the *ḍarūriyyāt* hierarchy, often invoked to justify discrimination against apostates. Progressive Islamic legal thought, advanced by scholars such as Jasser Auda and Mohammad Hashim Kamali, advocates a systemic approach. In custody disputes, *ḥifẓ al-dīn* should not be narrowly construed as the exclusion of non-Muslim parents, but rather as ensuring a child’s access to religious values within a nurturing and compassionate environment (Kamali, 2020). When the protection of religion is pursued through means that undermine the protection of life (*ḥifẓ al-nafs*)—such as trauma induced by forced separation—the very essence of the Sharīʿah is compromised. Accordingly, BIOC can be integrated into *Maqāṣid* as a manifestation of the protection of lineage (*ḥifẓ al-nas*) and life, with the child’s psychological well-being serving as a key parameter for the validity of legal judgments (Auda, 2021).

Indonesia’s complexity is shaped by the unique status of the Compilation of Islamic Law (KHI), which, although not a statute in the formal sense, exercises binding practical authority within the Religious Courts. Article 105 of the KHI, which grants custody of minor children (*mumayyiz*) to the mother, is frequently overridden by Article 156(a) when the mother is deemed apostate. This is where theological legal certainty collides with substantive legal justice. The Indonesian Constitution guarantees freedom of religion (Article 29) and the child’s right to protection from violence and discrimination (Article 28B). The literature indicates that the Supreme Court has increasingly engaged in judicial activism by disregarding religious uniformity requirements where it is proven that an apostate mother remains capable of ensuring the child’s Islamic religious education or where the child’s psychological interests are demonstrably more urgent. This phenomenon signals a shift from rule-bound adjudication toward a principle-based jurisprudence grounded in substantive justice (Assegaf, 2022).

From a doctrinal perspective, child custody disputes following parental apostasy in Indonesia are primarily rooted in normative disharmony between religiously derived regulations and rights-based child protection legislation. Article 105(a) of the Compilation of Islamic Law (*Kompilasi Hukum Islam* [KHI]) affirms that custody of a child who has not reached discernment (*mumayyiz*) or the age of twelve is vested in the mother (Presidential Instruction No. 1 of 1991). Nonetheless, this entitlement is frequently negated through the application of Article 156(c) of the KHI, which requires the custodian to guarantee both the physical and spiritual welfare of the child. In judicial practice, a mother’s apostasy is often interpreted as an inherent inability to safeguard the child’s spiritual well-being, thereby legitimizing the transfer of custody to a father who remains Muslim.

Such reasoning, however, sits uneasily within Indonesia’s constitutional and statutory hierarchy. Under the principle of *lex superior derogat legi inferior*, norms of higher legal authority must prevail over subordinate regulations. Law No. 35 of 2014 on Child Protection expressly incorporates the foundational principles of the Convention on the Rights of the Child (CRC), including non-discrimination, the best interests of the child, and the child’s right



to survival and development. Given that the KHI derives its authority solely from a presidential instruction, its application cannot lawfully override statutory guarantees of child welfare. Disqualifying a mother from custody solely on the basis of religious conversion, absent concrete evidence of neglect or harm, therefore constitutes a form of indirect discrimination inconsistent with both constitutional guarantees and statutory child protection norms (Nurlaelawati, 2023).

Contemporary Islamic legal thought increasingly reconceptualizes *ḥaḍānah* from a framework of parental entitlement to one of child-centered responsibility. While classical *fuqahā'* generally required religious congruence between custodian and child, progressive interpretations emphasize a functional assessment of caregiving capacity rather than theological conformity. This shift reflects a broader reorientation within *Maqāṣid al-Sharī'ah*, particularly the prioritization of the protection of life (*ḥifẓ al-nafs*) and human dignity.

Within this paradigm, apostasy cannot be presumed to extinguish maternal affection or caregiving competence. Legal scholarship has consistently underscored that the welfare of the child must be evaluated holistically, encompassing emotional stability, psychological health, and continuity of care. Where the forced separation of a child from their primary caregiver results in demonstrable psychological harm, such an outcome contradicts the humanitarian ethos of Islamic law itself. Treating religious conversion as a quasi-civil sanction that automatically revokes custodial rights risks subordinating the child's welfare to abstract moral judgments, a position increasingly challenged within both Islamic jurisprudence and comparative family law discourse (Kamali, 2021).

At the international level, the principle of the best interests of the child is firmly entrenched in Article 3(1) of the Convention on the Rights of the Child, which mandates that the child's best interests be a primary consideration in all actions affecting children (United Nations General Assembly, 1989). As a State Party, Indonesia is obliged not only to ratify the CRC formally, but also to internalize its principles within domestic judicial reasoning.

Comparative jurisprudence from the European Court of Human Rights (ECHR) provides persuasive interpretive guidance on the intersection between child custody and the right to respect for family life under Article 8 of the European Convention on Human Rights. The ECHR has consistently held that interference with parent-child relationships must be justified by compelling reasons and supported by evidence demonstrating necessity and proportionality. Biological and emotional bonds are recognized as core elements of family life and cannot be disrupted solely on the basis of abstract religious or ideological considerations.

Viewed through this comparative lens, the automatic removal of a child from a mother's custody solely due to apostasy—absent evidence of neglect, abuse, or tangible harm—fails to meet internationally accepted proportionality standards. Such practices risk transforming religious difference into a presumption of parental unfitness, a position increasingly rejected in CRC-oriented and ECHR jurisprudence. Strengthening Indonesia's compliance with international child protection norms therefore requires a decisive shift from identity-based custody determinations toward a welfare-centered evaluative framework grounded in empirically verifiable criteria, including emotional attachment, environmental stability, and psychological well-being (Mujahid, 2020).

By aligning domestic judicial practice with CRC principles and comparative human rights jurisprudence, Indonesia may position itself not as an outlier among plural legal systems, but as a jurisdiction capable of harmonizing religious legal traditions with evolving international standards on child protection and family life. Such harmonization affirms that safeguarding the child's welfare and preserving family unity are not antithetical to religious values, but rather integral to a coherent, rights-based legal order.

## CONCLUSION

This article affirms that child custody disputes following apostasy in Indonesia reflect a structural tension between classical Islamic legal doctrines, national legal norms, and international standards of child rights protection. The practice of automatically disqualifying



parents who change their religion—particularly mothers—demonstrates the dominance of a formalistic normative approach that privileges theological identity over the child's actual welfare. Such an approach not only generates legal uncertainty within Indonesia's plural legal system, but also risks contravening the principles of non-discrimination and the Best Interests of the Child (BIOC) as guaranteed by the Child Protection Law and the Convention on the Rights of the Child (CRC).

Through a comparative analysis, this article shows that developments in international jurisprudence, particularly within the case law of the European Court of Human Rights (ECHR), have shifted the paradigm of child custody from an identity-based model toward a welfare- and proportionality-oriented approach. The right to family life is understood as a biological and emotional relationship that cannot be severed solely on the basis of moral or religious assumptions, absent empirical evidence of harm to the child.

Within the framework of Islamic law, a reconstruction grounded in *Maqāṣid al-Sharī'ah* offers a reconciliatory path that is both normatively legitimate and substantively protective. The protection of religion (*ḥifẓ al-dīn*) cannot be divorced from the protection of life and the child's psychological well-being (*ḥifẓ al-nafs*), as well as the protection of lineage (*ḥifẓ al-nasl*). Accordingly, apostasy should not be positioned as the sole determinative factor in the revocation of custody, but rather as one element to be assessed proportionately within the framework of the child's best interests.

As a normative implication, this article recommends the adoption of a welfare-based child custody paradigm within the practice of Indonesia's religious courts. This approach requires judges to evaluate actual caregiving capacity, emotional stability, and the child's psychological interests in concrete terms, rather than relying exclusively on religious formalities. Such harmonization not only strengthens Indonesia's compliance with the CRC from a comparative law perspective, but also affirms that child protection constitutes a fundamental objective consistent with the values of justice embedded in both Islamic law and modern human rights jurisprudence.

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