



CHILD CUSTODY RIGHTS AFTER DIVORCE IN INDONESIA FROM A CONTEMPORARY ISLAMIC FAMILY LAW



Mustafid¹ , Khairunnas Rajab² , Arisman³ , Muhammad Faiz Algafari⁴

*Correspondence :

Email:
mustafid@uinsyahada.ac.id

Affiliation:

¹ Universitas Islam Negeri Sultan Syarif Kasim Riau, Indonesia

² Universitas Islam Negeri Sultan Syarif Kasim Riau, Indonesia

³ Universitas Islam Negeri Sultan Syarif Kasim Riau, Indonesia

⁴ University of Jordan, Jordan

Abstract

The research explores the issue of child custody (hadhanah) in Indonesia after divorce, focusing on the challenges arising from the increasing divorce rates. It addresses the gap between classical Islamic jurisprudence, which traditionally prioritizes maternal rights, and the modern social realities that necessitate multidimensional considerations—legal, psychological, and social. The novelty of this study lies in its attempt to reconstruct the concept of child custody by harmonizing the principles of Islamic family law with the evolving needs of modern Indonesian society. This is achieved through the reinterpretation of classical fiqh texts using contemporary approaches, such as maslahah mursalah (public interest) and maqasid al-shariah (objectives of Islamic law), to align them with the principle of the best interest of the child. The research employs a qualitative methodology with a normative—sociological approach, supported by a literature review. Primary data is derived from classical Islamic jurisprudence literature and contemporary Islamic legal thought, while secondary data includes Indonesian legislation such as the Compilation of Islamic Law and the Marriage Law, alongside relevant scholarly articles. The findings reveal the urgent need to reinterpret the concept of hadhanah in a way that reflects current social, legal, and psychological considerations. The research emphasizes that harmonizing traditional sharia norms with modern social realities will enable the application of more humanistic Islamic law, thus contributing to the development of a contextual and equitable framework for Islamic family law in Indonesia. This approach helps address contemporary challenges and strengthens the adaptability of Islamic family law in the modern era.

Abstrak

Penelitian ini mengkaji masalah hak perwalian anak (hadhanah) di Indonesia setelah perceraian, dengan fokus pada tantangan yang timbul akibat meningkatnya angka perceraian. Penelitian ini membahas kesenjangan antara fiqh klasik yang secara tradisional mengutamakan hak ibu dalam perwalian, dan realitas sosial modern yang membutuhkan pertimbangan multidimensional—legal, psikologis, dan sosial. Kebaruan dari penelitian ini terletak pada upaya untuk merekonstruksi konsep perwalian anak dengan menyelaraskan prinsip-prinsip hukum keluarga Islam dengan kebutuhan masyarakat Indonesia yang terus berkembang. Hal ini dicapai melalui reinterpretasi teks fiqh klasik dengan pendekatan kontemporer, seperti maslahah mursalah (kepentingan umum) dan maqasid al-shariah (tujuan hukum Islam), untuk disesuaikan dengan prinsip kepentingan terbaik anak. Penelitian ini menggunakan metode kualitatif dengan pendekatan normatif-sosiologis, didukung oleh tinjauan pustaka. Data primer diperoleh dari literatur fiqh klasik dan pemikiran hukum Islam kontemporer, sementara data sekunder meliputi perundang-undangan Indonesia seperti Kompilasi Hukum Islam dan Undang-Undang Perkawinan, serta artikel-artikel ilmiah yang relevan. Temuan penelitian menunjukkan perlunya reinterpretasi konsep hadhanah yang mencerminkan pertimbangan sosial, hukum, dan psikologis yang ada saat ini. Penelitian ini menekankan bahwa harmonisasi norma-norma syariah tradisional dengan realitas sosial modern akan memungkinkan penerapan hukum Islam yang lebih humanistik, sehingga berkontribusi pada pengembangan kerangka hukum keluarga Islam yang kontekstual dan adil di Indonesia.



Pendekatan ini membantu mengatasi tantangan kontemporer dan memperkuat adaptabilitas hukum keluarga Islam di era modern.

INTRODUCTION

Over the past decade, the divorce rate in Indonesia has increased steadily, in line with social, cultural, and economic changes. Data from the Religious Courts Agency (BKRI) indicates that women.¹ file the majority of divorce cases for various reasons, such as marital disharmony, financial problems, and infidelity.² This increase indicates a crisis in the family's resilience as a social institution and directly affects children, the most vulnerable parties.³ One of the main issues arising from divorce is the determination of child custody (hadhanah), which not only has legal implications but also affects the psychological and social dimensions of children.⁴

In Islamic law, hadhanah is normatively regulated, based on the primary principle of the child's welfare, taking into account the age, physical condition, and morals of the parents.⁵ However, in modern social practice, implementing these provisions often poses challenges. Changing lifestyles, increasing women's participation in the public sphere,⁶ shifting fathers' roles in parenting, and demands for gender equality and global children's rights make implementing hadhanah more challenging than simply establishing textual law.⁷ This is where the gap between the idealistic norms of classical fiqh and the dynamic and complex social reality emerges.

This gap raises an important question: how can normative Islamic law be harmonized with modern social dynamics in determining child custody after divorce? This question is relevant because without reinterpretation and adaptation, Islamic law risks being perceived as rigid and unresponsive to changing times. In fact, in principle, Islamic law is flexible through the concepts of maslahah mursalah and maqasid al-syariah, allowing it to adapt to social contexts without abandoning its fundamental values.

This research focuses on analyzing the concept of post – divorce child custody from an Islamic legal perspective, highlighting the challenges of its implementation in modern society and efforts to harmonize sharia norms with contemporary social realities. The purpose of this research is to identify the gap between normative regulations and social

¹ Habib Mumtaz Jr et al., "Analisa Penyelesaian Sengketa Hak Asuh Anak Pasca Perceraian Melalui Litigasi," *Jurnal Locus Penelitian dan Pengabdian* 2, no. 7 (August 2023): p. 716., <https://doi.org/10.58344/locus.v2i7.1433>.

² Nibras Syafriani Manna, Shinta Doriza, and Maya Oktaviani, "Cerai Gugat: Telaah Penyebab Perceraian Pada Keluarga di Indonesia," *JURNAL AL-AZHAR INDONESIA SERI HUMANIORA* 6, no. 1 (March 2021): p. 11., <https://doi.org/10.36722/sh.v6i1.443>.

³ Siti Nurjanah, "Divorce and Its Impact on Custody of Minors Using Islamic Law Perspectives," *Al-Istinbath: Jurnal Hukum Islam* 7, no. 1 (May 2022): p. 128., <https://doi.org/10.29240/jhi.v7i1.4156>.

⁴ Nasaruddin Mera et al., "Child Custody Rights for Mothers of Different Religions: Maqasid Al-Shari'ah Perspective on Islamic Family Law in Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 3 (August 24, 2024): 1645, <https://doi.org/10.22373/sjhk.v8i3.23809>.

⁵ Tarmizi, Yulia Pradiba, and Karmila Usman, "Hak Asuh Anak (Hadhanah) Pasca Perceraian Serta Akibat Hukumnya," *Jurnal Ilmu Hukum Pengayoman* 1, no. 1 (2023): p. 19.

⁶ Arfan Rizani et al., "Rekonstruksi Konsep Hadanah Dalam Fiqh Klasik Dan Relevansinya Terhadap Kompilasi Hukum Islam," *Minhaj: Jurnal Ilmu Syariah* 6, no. 2 (2025): p. 242., [https://doi.org/https://doi.org/10.52431/minhaj.v6i2.3934](https://doi.org/10.52431/minhaj.v6i2.3934).

⁷ Dian Rhamdan Hidayat, *Pemenuhan Hak Anak Pasca Perceraian Di Indonesia Berdasarkan Konvensi Hak Anak Dan Fiqh Hadhanah* (Cirebon: Institut Agama Islam Negeri (Iain) Syekh Nurjati, 2022), p. 7.

practices, and to offer an integrative approach model that can maintain a balance between the principles of justice, welfare, and the best interests of the child. Thus, this research is expected to provide theoretical contributions to the development of more adaptive Islamic family law, as well as practical contributions to judicial institutions and society in resolving hadhanah disputes in a more humanistic and contextual manner.

METHODS

This research is a library research study with a normative – sociological approach. The normative approach is used to examine Islamic legal provisions on child custody (hadhanah) by reviewing classical fiqh texts, contemporary Islamic legal literature, and legislation such as the Compilation of Islamic Law (KHI) and the Indonesian Marriage Law. Meanwhile, a sociological approach is applied to understand how these Islamic legal values and norms are implemented and interact with modern social dynamics that influence post – divorce child custody practices. Thus, this approach helps find common ground between the ideals of Islamic law and the social realities of modern society.

Data collection techniques involved documentary studies of relevant primary and secondary sources. Primary sources include fiqh books and works of classical and contemporary scholars, while secondary sources include scholarly books, national and international journal articles, previous research results, and related regulations. Source selection was based on relevance, author authority, and topic topicality. Data validation was carried out through cross – checking between sources and examining the consistency of arguments in the literature. The collected data were analyzed using the content analysis method, namely by interpreting, critiquing, and synthesizing the literature to produce an in – depth understanding of the harmonization between Islamic law and modern social needs in the context of post – divorce child custody.

RESULT AND DISCUSSION

RESULT

Reconstruction of the Hadhanah Concept from the Maqasid al-Syariah Perspective

In Islamic law, Hadhanah is understood as the responsibility to care for, nurture, and educate children who are not yet able to support themselves in meeting their own needs. In Islamic jurisprudence, the term for care is known as hadhanah. Etymologically, the word hadhanah comes from the Arabic hadhana – yahdhinu – hadhanan, which means to care for, nurture, educate, and embrace.⁸ According to Imam Hanafi, hadhanah is defined as the responsibility to care for children, specifically to educate and care for them from infancy until they reach adulthood.⁹ According to Imam Malik, hadhanah is the care of children by those entitled to care for them, and can also be interpreted as care for people who are not yet able to meet their own needs because they are not yet mumayyiz, such as small children or adults with mental disorders. This form of care encompasses basic daily needs, including feeding, washing clothes, bathing, cleaning, and other similar tasks.¹⁰

⁸ Ahmad Warson Munawir, *Kamus Arab Indonesia* (Surabaya: Pustaka Progresif, 1997), p. 578.

⁹ Abu Hanifah bin Nu'man bin Tsabit Al – Taimi Al – Kufi, *Al-Jami' Al-Kabir* (Bairut: Daar al – Kitab al – Arabi, 1982), p. 421.

¹⁰ Ibnu Hajar Al – Haitami, *Tuhfatus Muhtaj Bi Syarh Al-Minhaj*, Juz VI (Kairo: Maktabah At – Tijariyah Al – Kubra, 1994), p. 342.

Imam Syafi'i defines hadhanah as the act of placing something near the ribs, which can be interpreted as carrying or placing something in the lap with full attention and affection.¹¹ Imam Ahmad bin Hanbal interprets hadhanah as parenting, where a mother has more rights to care for her son until he reaches the age of seven.¹² In the Islamic law encyclopedia, hadhanah is understood as a form of care that is necessary due to age or intellectual immaturity. This care encompasses meeting the child's needs, protecting them from danger, providing education and knowledge, as well as assuming responsibility for various aspects of their life.¹³

Children are a trust entrusted to their parents and possess inherent human rights from birth, such as the right to be cared for, nurtured, and educated until they can stand on their own two feet. In the context of divorce, the fulfillment of these rights requires certainty through a fair and binding legal decision, so that the child's rights remain protected even if their parents separate.¹⁴

The Quran provides a strong normative basis for the importance of childcare. In Surah Al-Baqarah, verse 233, it is emphasized that mothers should breastfeed their children for two whole years, indicating the central role of mothers in childcare.¹⁵ Meanwhile, Surah At-Tahrim, verse 6, commands believers to protect themselves and their families from the torment of hell, which is interpreted as an obligation to provide religious education and guidance.¹⁶ The hadith of the Prophet Muhammad (peace be upon him) also emphasizes a mother's rights over her child. When a woman asked for clarification on custody after a divorce, the Prophet replied, "You have more right over her as long as you are unmarried."¹⁷ These verses demonstrate that parenting is a significant mandate in Islam.

In fiqh, scholars determine the order of parties entitled to hadhanah by considering emotional closeness and parenting ability. Jumhur Ulama places mothers as the first party who has the right to care for children, because love and tenderness are more supportive of children's growth and development.¹⁸ After the mother dies, the rights are passed to the women of the mother's lineage.¹⁹ If there is none, then custody is given to the father.

¹¹ Zainuddin bin Abdul Aziz al-Malibari, *Fathul-Mu'in Bi Syarhi Quratul-'Aini* (Beirut: Daar al-Ma'rif, 2001).

¹² Abd al-Hamid Al-Syarwānī, *nī, Hawāṣyī Al-Syarwānī Wa Ibn Qāsim Al-'Ubādī 'alā Tuhfat Al-Muhtaq* (Bairut: Darul Kutub Ilmiyah, 2012).

¹³ Adelina Nasution, Pagar Pagar, and Asmuni Asmuni, "The Disparity Of Judge's Verdict On Child Custody Decision In Aceh Sharia Court," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 2 (December 2022): p. 496., <https://doi.org/10.22373/sjhk.v6i2.12758>.

¹⁴ Mera et al., "Child Custody Rights for Mothers of Different Religions: Maqasid Al-Shari'ah Perspective on Islamic Family Law in Indonesia."

¹⁵ Siti Iraini Subaini and Danil Putra Arisandy, "Rada'ah Perspektif Al-Qur'an Surat Al-Baqarah Ayat 233: (Sudut Pandang Ilmu Kesehatan)," *Basha'ir: Jurnal Studi Al-Qur'an Dan Tafsir* 2, no. 1 (June 2022): p. 2., <https://doi.org/10.47498/bashair.v2i1.857>.

¹⁶ Hafid Rustiawan, "Konteks Ayat Al-Qur'an Dengan Pendidikan: Analisis Tafsir Al-Qur'an Surah At-Tahrim Ayat 6," *Geneologi PAI: Jurnal Pendidikan Agama Islam* 10, no. 1 (July 2023): p. 3., <https://doi.org/10.32678/geneologipai.v10i1.8418>.

¹⁷ Faisal Fauzan Ilyasa et al., "Keutamaan Ibu Dalam Hak Asuh Anak Perspektif Pendidikan: Analisis Hadits Tarbawi," *Al-Hikmah: Jurnal Agama Dan Ilmu Pengetahuan* 22, no. 1 (April 2025): p. 93., [https://doi.org/10.25299/ajaip.2025.vol22\(1\).15850](https://doi.org/10.25299/ajaip.2025.vol22(1).15850).

¹⁸ Muhammad Afendi and Imron Choeri, "Tinjauan KHI Dan Hukum Islam Terhadap Putusan Hakim Tentang Batas Usia Hak Asuh Anak Pasca Perceraian," *Isti'dal: Jurnal Studi Hukum Islam* 11, no. 1 (July 2024): p. 100., <https://doi.org/10.34001/ijshi.v11i1.6296>.

¹⁹ Fawzia Hidayatul Ulya, Fashi Hatul Lisaniyah, and Mu'amaroh Mu'amaroh, "Penguasaan Hak Asuh Anak Di Bawah Umur Kepada Bapak," *The Indonesian Journal of Islamic Law and Civil Law* 2, no. 1 (April 2021): p. 104., <https://doi.org/10.51675/jaksya.v2i1.176>.

Furthermore, care can be given to women from the father's lineage, followed by the child's biological sister. After that, the hadhanah rights can be transferred to other female blood relatives from the father's side of the family.²⁰ This sequence highlights the importance of continuity of love and psychological stability in children during the parenting process.

However, scholars differ on the age limit for custody. According to the Hanafi school of thought, boys are under the care of their mothers until the age of seven, while girls are under the care of their mothers until the age of nine. The Shafi'i and Maliki schools of thought offer children the option to choose whether to live with their father or mother once they reach the age of majority.²¹ These differing views reflect the flexibility of Islamic law in responding to the varying circumstances of children, while also demonstrating sharia's attention to emotional and educational needs, appropriate to the child's age and gender.

The concept of Hadhanah cannot be separated from the principle of child benefit in family fiqh siyasah. In the maqasid al-syariah perspective, the primary goal of custody arrangements is to protect the child's soul, mind, heredity, and religion.²² In the Compilation of Islamic Law, it is emphasized that if a mother is absent or unable to carry out the obligations of hadhanah, then the right to care passes to the father. Apart from that, the Religious Court has the authority to transfer Hadhanah rights to another party if the party holding it is unable to guarantee the physical or spiritual safety of the child.²³ This principle ensures that the interests of children are always the main priority in every legal decision.

In Indonesian religious court practice, the principle of the welfare of the child is increasingly prioritized. Judges often use a child psychology approach to assess who is best able to provide protection and affection.²⁴ This aligns with the Islamic jurisprudence principle of *tasharruf al-imam manuthun bi al-maslahah*, which states that every decision of a leader must be oriented towards the welfare of the community.²⁵ Thus, child custody is no longer viewed solely as a parental right, but rather as an obligation to ensure the healthy and moral growth of children.

This study demonstrates that the concept of hadhanah in Islamic law emphasizes a balance between the normative provisions of classical Islamic jurisprudence and the dynamic principle of public interest. Quranic and hadith texts emphasize parental obligations, Islamic jurisprudence defines the order of custody, and family law ensures

²⁰ Hidayatul Ulya, Hatul Lisaniyah, and Mu'amaroh, "Penguasaan Hak Asuh Anak Di Bawah Umur Kepada Bapak."

²¹ Ahmad Baidawi and Muhammad Zainuddin Sunarto, "Hak Asuh Anak Dalam Perspektif Khi Dan Madzhab Syafi'i," *HAKAM: Jurnal Kajian Hukum Islam Dan Hukum Ekonomi Islam* 4, no. 1 (June 2020): p. 63., <https://doi.org/10.33650/jhi.v4i1.1928>.

²² Savvy Dian Faizzati, "Hak Asuh Anak (Hadhanah) Bagi Ibu Yang Menikah Lagi Prespektif Maqashid Syari'ah," *Afkaruna: International Journal of Islamic Studies (AIJIS)* 1, no. 2 (March 2024): p. 279., <https://doi.org/10.38073/aijis.v1i2.2471>.

²³ "Analisis Hak Asuh Anak Dalam Putusan Pengadilan Agama Lahat Nomor 685/Pdt.G/2022/PA.LT: Perspektif Maqbsid Al-Syaro'ah Muhammad Thbhir Ibn Basyir," *Konsensus : Jurnal Ilmu Pertahanan, Hukum Dan Ilmu Komunikasi* 1, no. 4 (July 2024): p. 325., <https://doi.org/10.62383/konsensus.v1i4.297>.

²⁴ Maryati Maryati, "Dasar Pertimbangan Hakim Menetapkan Hak Asuh Anak Kepada Suami Selaku Pemohon Pada Pengadilan Agama Jambi," *Jurnal Ilmiah Universitas Batanghari Jambi* 21, no. 3 (October 2021): p. 1307., <https://doi.org/10.33087/jiubj.v21i3.1740>.

²⁵ Khairazka Essaura, Refki Saputra, and Abdul Rochim, "Tinjauan Kaidah Tasharruf Al-Imam 'Ala Ar-Ra'iyyah Manuthun Bi Al-Maslahah Dalam Penentuan Biaya Haji (Studi Analisis Keputusan Presiden Nomor 7 Tahun 2023)," *Jurnal Inovasi Hukum dan Kebijakan* 5, no. 4 (2024): p. 308.

that all decisions are oriented toward the child's best interests. This harmony ensures that Islamic law remains consistently relevant in responding to social change, without neglecting the maqasid al-sharia (the primary objectives of Islamic law).

Legal Construction of Child Custody Rights within the Framework of Indonesian Legislation

The Compilation of Islamic Law (KHI) regulates family law for Muslims in Indonesia, including provisions regarding child custody as stated in Articles 105 to 158. In the KHI, it is emphasized that custody of children under the age of 12 years (not yet mumayyiz) rests with the mother, while children aged 12 years and over (already mumayyiz) are given the freedom to choose to live with one of their parents in accordance with Article 156(a). On the other hand, the Child Protection Law provides a more comprehensive legal basis for ensuring the best interests of children. This law emphasizes the right of children to be raised by their parents, unless there is a valid reason or statutory provision that requires separation to maintain the child's safety, welfare, and future.²⁶

The provisions of the Child Protection Law also reinforce the principle that every custody decision must prioritize the child's best interests. Article 26, paragraph (1) of this law emphasizes the obligation of parents to care for, educate, protect, and develop their children according to their potential and interests.²⁷ This aligns with the principle of the best interest of the child, also recognized in the Convention on the Rights of the Child.²⁸ Thus, regulations in Indonesia attempt to align universal values of child protection with pre-existing Islamic legal norms.

The role of religious courts in deciding child custody is crucial, particularly in cases of divorce between Muslim couples. Religious courts have the authority to assess the suitability of a father or mother as a caregiver, taking into account moral, economic, and psychological factors.²⁹ In practice, although the Compilation of Islamic Law (KHI) normatively grants custody to the mother, judges can decide otherwise if there is evidence that the mother is unfit to care for the child.³⁰ This demonstrates the flexibility of Islamic law in its application through the judiciary.

In many religious court decisions, the principle of the child's best interests is the primary basis. Judges not only consider the text of the law but also employ psychological and social approaches to determine who is best equipped to ensure the child's future. The fiqh principle of *tasharruf al-imam manuthun bi al-maslahah* is often used as a basis to

²⁶ Nur Triyono and Asmuni Asmuni, "The Implementing Joint Custody Post Divorce In Indonesia: A Philosophical Viewpoint," *De Jure: Jurnal Hukum Dan Syar'iah* 15, no. 2 (December 2023): p. 317., <https://doi.org/10.18860/j-fsh.v15i2.24370>.

²⁷ Pasal 26 ayat (1) UU Republik Indonesia Nomor 35 Tahun 2014 Tentang Perubahan atas UU Nomor 23 Tahun 2002 Tentang Perlindungan Anak.

²⁸ Laurensius Arliman, "Perlindungan Anak Oleh Masyarakat Ditinjau Dari Mazhab Sejarah Di Dalam Penerapan Prinsip The Best Interest Of The Child Pada Kehidupan Anak Di Indonesia," *Era Hukum: Jurnal Ilmiah Ilmu Hukum* 15, no. 1 (2017): p. 141., <https://doi.org/https://doi.org/10.24912/era%20hukum.v15i1.668>.

²⁹ Maryati Maryati, "Dasar Pertimbangan Hakim Menetapkan Hak Asuh Anak Kepada Suami Selaku Pemohon Pada Pengadilan Agama Jambi," *Jurnal Ilmiah Universitas Batanghari Jambi* 21, no. 3 (October 2021): 1299, <https://doi.org/10.33087/jiubj.v21i3.1740>.

³⁰ "Analisis Hak Asuh Anak Dalam Putusan Pengadilan Agama Lahat Nomor 685/Pdt.G/2022/PA.LT: Perspektif Maqbsid Al-Syaro'ah Muhammad Thbhir Ibn Basyir," *Konsensus: Jurnal Ilmu Pertahanan, Hukum Dan Ilmu Komunikasi* 1, no. 4 (July 2024): 319–35, <https://doi.org/10.62383/konsensus.v1i4.297>.

ensure that every decision truly protects the child's interests, not simply fulfills the formal rights of parents.³¹

On the other hand, modern social dynamics demand that Islamic family law in Indonesia be increasingly responsive to current developments. For example, in cases where a mother works full-time, some courts may grant custody of the child to the father.³² Similarly, if a father commits violence against a child, he loses custody.³³ This reflects how positive law and classical fiqh are synergized for the benefit of the child.

The Child Protection Law also opens up opportunities for non-judicial institutions, such as the Indonesian Child Protection Commission (KPAI), to oversee the implementation of children's rights in family disputes. With this institution, oversight of children's rights becomes more comprehensive³⁴ relying not only on religious courts but also on the involvement of civil society. This makes child custody an issue that encompasses not only private law but also public law and social protection.

Overall, the regulation of child custody rights in Indonesian law demonstrates a harmony between Islamic law, as outlined in the Compilation of Islamic Law (KHI), national law, as codified in the Marriage Law, and universal values, as enshrined in the Child Protection Law. The role of religious courts and other state institutions is to bridge the gap between legal texts and the actual needs of children on the ground. By adhering to the principles of the welfare and best interests of the child, Indonesian law strives to ensure that every child receives adequate, loving care and a brighter future.

Contemporary Social Dynamics in the Issue of Custody Rights: Synthesis between Maqasid al-Syar'i'ah and Social Practice

Social changes and shifts in cultural values in the modern era have also influenced gender role patterns within the family, particularly regarding childcare responsibilities. While childcare was previously primarily the mother's responsibility and fathers were often identified as breadwinners, this division of roles is now shifting. Fathers' involvement in the childcare process is increasingly recognized as essential, so that childcare is no longer seen as a one-sided burden but rather as a shared responsibility of both parents.³⁵ In this context, the issue of custody can be viewed not only through normative Islamic jurisprudential texts but also through the ever-changing social reality. In addition to gender factors, economic, educational, and psychological factors also play significant roles in determining who is most qualified to care for a child.

³¹ Khairazka Essaura, Refki Saputra, and Abdul Rochim, "Tinjauan Kaidah Tasharruf Al-Imam 'Ala Ar-Ra'iyyah Manuthun Bi Al-Maslahah Dalam Penentuan Biaya Haji (Studi Analisis Keputusan Presiden Nomor 7 Tahun 2023)," *Jurnal Inovasi Hukum dan Kebijakan* 5, no. 4 (2024).

³² Levi Winanda Putri and Anis Hidayatul Imtihanah, "Hak Hadhanah Anak yang Belum Mumayiz kepada Ayah Kandung Perspektif Hukum Islam: Studi Desa Kincang Wetan Madiun," *Jurnal Antologi Hukum* 1, no. 2 (December 2021): p. 134., <https://doi.org/10.21154/antologihukum.v1i2.305>.

³³ Brazilia Emanuel Rajamuda Napitupulu and Ni Made Ari Yuliartini Griadhi, "Pengaturan Hak Asuh Anak Pada Kasus Perceraian Akibat Kekerasan Dalam Rumah Tangga (KDRT)," *Ethics and Law Journal: Business and Notary* 2, no. 3 (August 2024): p. 141., <https://doi.org/10.61292/eljbn.227>.

³⁴ Laurensius Arliman S, "Peran Komisi Perlindungan Anak Indonesia Untuk Mewujudkan Perlindungan Anak," *Jurnal Hukum Respublica* 17, no. 2 (2018): p. 196.

³⁵ Akhmad Fakhri, Ratu Zahwa Sayyidina, and Shahnaz el Jasmine, "Peran Ayah Sebagai Orang Tua Tunggal Dalam Mengasuh Anak: Perspektif Gender Dalam Keluarga," *Prosiding Seminar Nasional Pendidikan Non Formal*, no. 1 (2023): p. 31.

Within the framework of the Maqasid al-syari'ah (laws of Islamic law), these social changes do not contradict the basic principles of Islamic law, but rather strengthen them. The objectives of Islamic law, which are oriented towards protecting religion (hifz al-din), life (hifz al-nafs), reason (hifz al-'aql), descendants (hifz al-nasl), and property (hifz al-mal),³⁶ serve as moral and legal references in every decision regarding child custody. In the contemporary social context, these principles are practically translated through the best interest of the child approach, where the child's welfare is the primary measure. For example, in the Pekanbaru Religious Court Decision Number 234/Pdt.G/2021/PA.Pbr, the panel of judges awarded custody to the father because he was proven to have better emotional stability and economic capabilities, while the mother often left her child because she worked outside the city.³⁷ In his deliberations, the judge emphasized that the child's best interests (maslahah al-mahdhun lahu) are more important than the standard rule that states that minors should be cared for by the mother. Similarly, the South Jakarta Religious Court Decision Number 916/Pdt.G/2020/PA.JS demonstrates similar flexibility: custody was awarded to the mother because the father was proven to have committed verbal abuse that threatened the child's psychological development.³⁸ These two examples demonstrate how religious courts apply the principle of maslahah mursalah in a modern context, namely, by considering the psychological, educational, and social aspects of the child as integral to the Maqasid al-syari'ah.

This synthesis demonstrates that Islamic law does not stop at the normative level, but lives and evolves with society. The integration of Maqasid theory and modern judicial practice enables sharia to serve a dual function—as an ethical guide and a dynamic, humanistic legal system. This approach reinforces the notion that Islamic law is adaptive to social change without losing its fundamental principles. Thus, the issue of child custody after divorce is not merely a debate between normative and positive law, but also reflects the harmonization of religious and humanitarian values that position children as legal subjects who must be comprehensively protected.

Besides gender, economic factors play a significant role in determining child custody. Judges often consider the parents' financial situation when deciding whether a child is eligible for custody, as economic stability is considered to ensure the child's needs are met.³⁹ However, parental education also plays a significant role, as the quality of their education can determine the parenting style. Furthermore, psychological factors are also taken into consideration to ensure that the child is cared for by someone capable of providing emotional stability and support.⁴⁰

Divorce, as a significant cause of custody disputes, has a profound impact on a child's psychosocial development. Children whose parents divorce are more likely to

³⁶ Ahmad Al-mursi Husain Jauhar, *Maqasid Al Syari'ah* (Jakarta: Amzah, 2010), p. 1.

³⁷ Decision of the Pekanbaru Religious Court <https://putusan3.mahkamahagung.go.id/direktori/putusan/zaec3d5345d1d47c8351313634303430.html> {accessed 05 November 2025}

³⁸ South Jakarta Religious Court Decision <<https://putusan3.mahkamahagung.go.id/direktori/putusan/zaeb405ce9e2b4d680ed313834323137.html>> {accessed \ 05 November 2025}.

³⁹ Muhammad Abu Rivai, Muhammad Yusriel Amien, and Bayu Rizky Fachri Zain, "Penyelesaian Sengketa Hak Asuh Anak Pasca Perceraian Menurut Perspektif Gender, Hukum Islam, Dan Hukum Positif Di Pengadilan Agama Jember Tahun 2023 – 2024," *Al-Usariyah: Jurnal Hukum Keluarga Islam* 3, no. 2 (July 2025): p. 195., <https://doi.org/10.37397/al-usariyah.v3i2.833>.

⁴⁰ Shoibatul Aslamiyah Harahap, "Pemenuhan Hak Asuh Anak Akibat Perceraian Orang Tua," *Itiqadiah: Jurnal Hukum Dan Ilmu-Ilmu Kesyariahan* 1, no. 3 (November 2024): p. 297., <https://doi.org/10.63424/itiqadiah.v1i3.131>.

experience psychological and social disorders.⁴¹ The loss of a parental figure often leaves children feeling neglected or unloved. Therefore, custody decisions must prioritize the child's best interests to minimize the negative impact of divorce on their growth and development.

Amidst social change, field practices often differ from the normative provisions of Islamic law and legislation. While normative texts typically prioritize mothers in childcare, in social practice, fathers often lose custody, even if they possess sufficient economic and social capacity. This demonstrates the persistence of traditional role bias within the judicial system and public perception.⁴²

In the development of family law discourse in Indonesia, there is a push to prioritize the principle of the child's best interests over simply following normative texts. Judges in both religious and secular courts are increasingly considering psychological and social factors in deciding custody cases.⁴³ This approach aligns with the internationally recognized principle of "best interest of the child,"⁴⁴ which has been adopted in Indonesia's Child Protection Law.

Overall, contemporary social dynamics surrounding child custody issues demonstrate that gender, economic, educational, and psychological factors are intertwined with ever-changing social realities. The impact of divorce on children requires courts and society to prioritize the child's interests. Social practices, which often diverge from normative texts, underscore the need to reconstruct the family law paradigm as more inclusive and adaptable to current developments. Thus, custody issues are not merely legal issues, but also humanitarian ones that require social sensitivity and consideration.

DISCUSSION

Islamic law is a flexible system because it is built on universal principles that can adapt to social change. Principles such as the maqasid sharia (objectives of sharia) enable Islamic law to address contemporary needs, including child custody issues, which prioritize the welfare of children above all else.⁴⁵ In the family context, social changes such as the rise in divorce and shifting gender dynamics have encouraged Islamic jurisprudence (fiqh) to become more flexible in interpreting texts. Contemporary scholars emphasize that Islamic law not only enforces formal rules but also protects human welfare or the interests of human life, based on the principle of maximizing benefit and preventing

⁴¹ Dika Hikmah Wicaksana et al., "Pertimbangan Hukum Dalam Hak Asuh Anak Pasca Perceraian," *Media Hukum Indonesia (MHI)* 2, no. 3 (June 2024): p. 363., <https://doi.org/10.5281/ZENODO.12179892>.

⁴² Rivai, Amien, and Zain, "Penyelesaian Sengketa Hak Asuh Anak Pasca Perceraian Menurut Perspektif Gender, Hukum Islam, Dan Hukum Positif Di Pengadilan Agama Jember Tahun 2023 – 2024."

⁴³ Maryati Maryati, "Dasar Pertimbangan Hakim Menetapkan Hak Asuh Anak Kepada Suami Selaku Pemohon Pada Pengadilan Agama Jambi," *Jurnal Ilmiah Universitas Batanghari Jambi* 21, no. 3 (October 2021): 1299, <https://doi.org/10.33087/jiubj.v21i3.1740>.

⁴⁴ Ahmad Masyhadi and Muhammad Aly Mahmudi, "Hak Asuh Anak Pasca Perceraian Perspektif Hukum Islam dan Hukum Positif Indonesia," *AL FARUQ : Jurnal Hukum Ekonomi* 3, no. 2 (2024): p. 109., <https://doi.org/10.58518/al-faruq.v3i2.3011>.

⁴⁵ Lilis Setiawati et al., "Penguasaan Kakek pada Hak Asuh Anak di Bawah Umur dalam Perspektif Maqashid Syariah," *Jurnal At-Tahdzib* 11, no. 2 (September 2023): p. 49., <https://doi.org/10.61181/at-tahdzib.v11i2.312>.

harm.⁴⁶ Therefore, Islam remains relevant when positioned as both an ethical and legal guide that takes into account modern social conditions.

The application of the principle of maslahah mursalah is critical in determining child custody. Maslahah mursala means considerations of benefit that are not explicitly mentioned in the text, but are in line with the objectives of the sharia.⁴⁷ In custody cases, the judge can assess which parent is more capable of providing protection, education, and love. This approach is in line with maqashid sharia, which focuses on protecting the religion, soul, mind, lineage, and property. The focus of this protection is not only normative but also operational, in realizing the benefit of children as the center of family law policy.⁴⁸ This approach ensures that custody decisions are not solely based on standard rules about who has more rights, but instead on who is more beneficial for the child's growth and development.

The concept of the best interests of the child⁴⁹ provides a crucial bridge between Islamic law and contemporary social dynamics. This principle aligns with the maqasid sharia (Islamic principles) as it prioritizes the physical, psychological, and spiritual safety of children. In practice, religious courts in Indonesia have begun to adopt this principle, ensuring that decisions are not solely based on normative evidence but also consider the child's real needs in their daily lives.⁵⁰ This creates a harmony between normative Islamic legal texts and dynamic social realities.

Islamic law also shares common ground with modern legal systems, particularly in the area of child protection. For example, the Convention on the Rights of the Child (CRC) emphasizes children's rights to protection, education, and a healthy environment.⁵¹ This perspective does not contradict the maqasid of sharia, but rather complements them. In many cases, judges consider the benefit of the community while also referring to international standards on child protection. Thus, Islamic law is not positioned as an exclusive system, but rather as an inclusive system capable of dialogue with global norms.

This harmony is also evident in religious court decisions involving interfaith marriages or international divorces. Judges not only consider who has the greater legal right to the child but also consider the best social, psychological, and educational

⁴⁶ Fawzia Hidayatul Ulya, Fashi Hatul Lisaniyah, and Mu'amaroh Mu'amaroh, "Penguasaan Hak Asuh Anak Di Bawah Umur Kepada Bapak," *The Indonesian Journal of Islamic Law and Civil Law* 2, no. 1 (April 2021): 101 – 17, <https://doi.org/10.51675/jaksa.v2i1.176>.

⁴⁷ Muhammad Zainuddin Sunarto and Diah Uswatun Hasanah, "Analisis Penjatuhan Hak Hadhanah Pada Perempuan Dalam Tinjauan Maqashid As – Syari'ah Analysis Of The Imposition Of Hadhanah Rights On Women In The Review Of Maqashid As – Syari'ah," *Rewang Rencang : Jurnal Hukum Lex Generalis*. 6, no. 2 (2025): p. 12., <https://doi.org/https://doi.org/10.56370/jhlg.v6i2.823>.

⁴⁸ Arfan Rizani et al., "Rekonstruksi Konsep Hadanah Dalam Fiqh Klasik Dan Relevansinya Terhadap Kompilasi Hukum Islam," *Minhaj: Jurnal Ilmu Syariah* 6, no. 2 (2025), <https://doi.org/https://doi.org/10.52431/minhaj.v6i2.3934>.

⁴⁹ Angela Melani Widjaja et al., "The Application of the Best Interest of the Child Principle as a Basis for Determining Child Custody," *Unram Law Review* 4, no. 2 (October 2020): p. 165., <https://doi.org/10.29303/ulrev.v4i2.126>.

⁵⁰ M. Athoillahi Asikin and Moh. Adam Sugiono, "Dampak Perceraian Terhadap Hak Asuh Anak: Analisis Putusan Pengadilan Agama Berdasarkan PM. Athoillahi Asikinrinsip 'Best Interest Of The Child,'" *JURNAL MEDIA AKADEMIK (JMA)* 3, no. 6 (2025): p. 7.

⁵¹ Failin Failin, Anny Yuserlina, and Eviandi Ibrahim, "Protection Of Children's Rights And Women's Rights As Part Of Human Rights In Indonesia Through Ratification Of International Regulations," *JCH (Jurnal Cendekia Hukum)* 7, no. 2 (March 2022): p. 321., <https://doi.org/10.33760/jch.v7i2.557>.

environment for the child.⁵² The harmony between Islamic law and social dynamics is evident in the application of the principle of the best interest of the child in Indonesian religious courts. For example, in the South Jakarta Religious Court Decision Number 1553/Pdt.G/2020/PA.JS, the judge awarded custody to the mother even though the father was economically more well-off, because the child's psychological considerations indicated an emotional closeness to the mother.⁵³ This consideration reflects the application of the *maslahah mursalah* and *maqasid al-syari'ah* in a practical context, in line with the principles of child protection in the Convention on the Rights of the Child (CRC). This fact demonstrates that Islamic law is not exclusive but inclusive and capable of dialogue with modern legal norms in ensuring child welfare. Thus, the harmonization of *maqasid al-syari'ah* with the best interests of the child is not merely a concept; it has been implemented in Indonesian legal practice. This demonstrates that Sharia's flexibility makes it relevant across time as an ethical, legal, and humanitarian foundation for resolving child custody disputes after divorce.

Furthermore, the application of *maslahah* in custody cases demonstrates that Islamic law not only regulates parental relationships but also fully protects children's rights. For example, if a father is financially more capable but does not provide emotional support, the judge may decide that custody remains with the mother. This principle demonstrates that Islamic law prioritizes the interests of the child, in line with the doctrine of the best interest of the child. This also confirms that *maslahah* is a primary foundation in contemporary legal *ijtihad*.⁵⁴

A comparison with modern law shows that both share the same goal, albeit using different language. Islamic law refers to *maslahah* (benefit) and *maqasid al-shari'ah* (objectives of shari'ah), while modern law employs the term "protection of children's human rights." However, the substance is the same: ensuring a decent, safe, and loving life for children. This harmony demonstrates that Islamic law can adapt to global challenges without losing its normative identity. In fact, the combination of Islamic principles and international law can strengthen Indonesia's child protection system.⁵⁵

Thus, an analysis of the harmonization of Islamic law and social dynamics demonstrates that the flexibility of sharia makes it timeless. The principles of *maslahah mursalah*, *maqasid sharia*, and the best interest of the child are the main pillars that unite normative texts with social reality. Comparison with modern law further confirms that Islam is not outdated but capable of providing ethical and legal solutions to contemporary issues. Therefore, child custody is not merely a matter of family law but also a reflection of the synergy between religious values, humanity, and social justice.

CONCLUSION

⁵² Sarippudin, *Pertimbangan Maslahah Hakim Terhadap Hak Anak Pasca Perceraian* (Putusan Pengadilan Agama Bogor Nomor Perkara 1434/PDT.G/2023/PA.Bgr) (Bogor: Universitas Nahdlatul Ulama Indonesia, 2024), p. 55.

⁵³ South Jakarta Religious Court Decision <<https://putusan3.mahkamahagung.go.id/direktori/putusan/13fd7bac59aefdc41d05e000e88f8ae5.html>> { accessed 05 November 2025}

⁵⁴ "Analisis Hak Asuh Anak Dalam Putusan Pengadilan Agama Lahat Nomor 685/Pdt.G/2022/PA.LT: Perspektif Maqbsid Al-Syaro'ah Muhammad Thbhir Ibn Bsy'iy," *Konsensus : Jurnal Ilmu Pertahanan, Hukum Dan Ilmu Komunikasi* 1, no. 4 (July 2024): 319–35, <https://doi.org/10.62383/konsensus.v1i4.297>.

⁵⁵ Nasaruddin Mera et al., "Child Custody Rights for Mothers of Different Religions: Maqasid Al-Shari'ah Perspective on Islamic Family Law in Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 3 (August 24, 2024): 1645, <https://doi.org/10.22373/sjhk.v8i3.23809>.

Child custody after divorce reflects the dynamic interaction between normative Islamic legal norms and evolving social realities. In classical Islamic jurisprudence, the right of hadhanah (custody) is given priority to the mother. At the same time, positive law in Indonesia—through the Compilation of Islamic Law, Law Number 1 of 1974 concerning Marriage, and Law Number 35 of 2014 concerning Child Protection—affirms the shared responsibility of fathers and mothers for child care. The findings of this study confirm that religious court practices are not based solely on normative texts but also consider the principle of the child's best interests through psychological, social, and economic approaches. Academically, this research enriches the Islamic family law literature by confirming that the application of the principles of maqasid al-sharia and maslahah mursalah can serve as a methodological foundation for bridging Islamic law with contemporary social challenges.

The harmonization of Islamic family law with modern social dynamics demonstrates the flexibility of sharia in responding to change without losing its just substance. Therefore, it is necessary to develop a more contextual and empirically grounded approach to Islamic family law, particularly in formulating guidelines for hadith-based jurisprudence that balance children's interests, gender equality, and emotional stability after divorce. Further research is recommended to examine the implementation of the maqashid al-syariah principle directly through case studies in religious courts, thereby strengthening the relationship between Islamic legal theory and judicial practice. Thus, the issue of child custody will not only become part of family law but also serve as an instrument for reforming Islamic law into a more humanistic, inclusive, and adaptive body of law.

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