

Legal Protection of Children After Divorce: A Comparative Study of Islamic Law and the Child Protection Act

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Abstract

This article examines the legal protection of children after divorce through a comparative approach between Islamic law and the Indonesian Child Protection Act. Divorce often has negative consequences for children—psychologically, socially, and economically. Therefore, a legal framework is needed that can guarantee the comprehensive fulfillment of children's rights, even after the termination of parental marital relations. From the perspective of Islamic law, the principle of child protection is rooted in the objectives of sharia (maqāṣid al-sharī'ah), particularly in preserving life (ḥifẓ al-nafs), lineage (ḥifẓ al-nasl), and intellect (ḥifẓ al-'aql). The concepts of ḥaḍānah (custody), the obligation of financial support, and the continuity of emotional roles of parents indicate that Islam places the welfare of the child as a top priority. Meanwhile, Law No. 35 of 2014 guarantees the rights of children after divorce through the principle of the best interest of the child, although its implementation still faces challenges such as weak legal enforcement and lack of supervision in the fulfillment of custody and child support. This article employs a normative-comparative research method and a maqāṣid-based analysis. The findings show the urgency of harmonizing the regulations between the two legal systems to realize a child protection framework that is just, comprehensive, and contextually relevant. The integration of maqāṣid principles into national policy is key to strengthening the child protection system in Indonesia.

I. Introduction

Divorce is a growing social phenomenon in many countries, including Indonesia. Amid various household dynamics, divorce is often the last resort taken by couples when conflicts can no longer be reconciled (Karimuddin 2021). However, behind such decisions lie significant social and psychological consequences, especially for children who become the primary victims of parental separation. Children in post-divorce situations often experience emotional pressure, environmental instability, and the deprivation of their fundamental rights in terms of care, protection, and basic needs fulfillment (Agustin and Bin Mohamad 2018). Thus, legal protection for children after divorce becomes a critical aspect that deserves serious attention from a normative perspective, both within the framework of national law and in the context of Islamic legal thought.

Juridically, Indonesia already possesses legal instruments that specifically regulate child protection, most notably through Law No. 35 of 2014, which amends Law No. 23 of 2002 on Child Protection. This law upholds fundamental principles that prioritize the best interest of the child in all matters involving them, including parental divorce (Yustisia 2010). In addition, Law No. 1 of 1974 on Marriage and the Compilation of Islamic Law (KHI) provide legal foundations on child custody (*ḥaḍānah*), financial maintenance, and parental obligations after divorce (Mansari and Devi 2019; Karimuddin 2019; Mansari and Devi 2019). However, in practice, the legal protection of children post-divorce continues to face several challenges, such as weak law enforcement, limited parental awareness of children's rights, and inconsistencies in decisions issued by religious and civil courts handling divorce cases.

In the context of Islamic law, the protection of children after divorce has been comprehensively regulated since the classical period. The principle of *ḥaḍānah* or child custody in Islam does not merely emphasize biological ties but also considers the welfare and psychological preparedness of the parent in raising the child (Rizky and Moulita 2017; Erica 2022). Islam also firmly upholds the father's obligation to provide financial support for his children even after the marital bond with the mother has ended. The main objective is to ensure the physical and spiritual well-being of the child so they do not become victims of parental discord (Amiriyyah 2015; Lawang 2024). In this respect, the Islamic approach to child protection after divorce is rooted in the principles of *maqāṣid al-sharī'ah*, especially the protection of life (*ḥifẓ al-naḥs*) and lineage (*ḥifẓ al-nasl*) (Ridwansyah et al. 2015).

A comparative study between Islamic law and the Child Protection Act is crucial to examine how these two coexisting legal systems in Indonesia provide protection for children after divorce. Although both share a common orientation—prioritizing the best

interest of the child—they differ in terms of regulatory approaches, principle emphasis, and implementation mechanisms. Islamic law is primarily based on religious normative values and jurisprudential traditions, whereas Indonesian national law is formulated on the basis of modern legal principles and international conventions, such as the Convention on the Rights of the Child. This comparison is not only aimed at identifying theoretical similarities and differences but also at exploring points of convergence and opportunities for harmonization in order to build a more just and comprehensive child protection system.

Furthermore, the issue of child protection after divorce is not merely a legal matter; it is closely related to social, cultural, and psychological dimensions (Khumaera, Hannani, and Rusdi 2023). Hence, a sound legal framework must be capable of integratively addressing these aspects. In practice, courts often focus solely on custody rulings without monitoring their execution or imposing adequate sanctions on parents who neglect their financial obligations. This highlights the urgency of reassessing the effectiveness of national legal regulations in safeguarding children post-divorce, while also considering the preventive and solution-oriented contributions of Islamic law to this issue.

Based on the aforementioned background, this article aims to examine and analyze the legal protection of children after divorce through a comparative approach between Islamic law and the Child Protection Act in Indonesia. This study is expected to contribute conceptually to the development of child protection theory and provide normative recommendations for the improvement of the national legal system to become more responsive to the needs of children affected by divorce.

II. Method

This study employs a normative juridical approach combined with a comparative legal method (Faisar Ananda and Watni Marpaung 2016), aiming to analyze and compare the legal provisions regarding child protection after divorce from the perspectives of Islamic law and the Child Protection Act in Indonesia. This approach is chosen due to the research's focus on prevailing legal norms, as well as how these norms are formulated, implemented, and potentially harmonized across two legal systems. Normative juridical research is grounded in literature studies of statutory regulations, legal doctrines, fatwas of Islamic scholars, and relevant jurisprudence.

The primary data sources in this research consist of primary and secondary legal materials (Endah Marendah Ratnaningtyas et al. 2023). Primary legal materials include Law No. 35 of 2014 on Child Protection, Law No. 1 of 1974 on Marriage, and the Compilation of Islamic Law (KHI). In addition, Islamic legal sources such as the Qur'an, hadiths, and the

opinions of jurists from various schools of thought concerning the concepts of ḥaḍānah (custody) and child support are also examined. Meanwhile, secondary legal materials encompass scholarly literature, previous research findings, journal articles, and international legal documents such as the Convention on the Rights of the Child.

The analytical technique used is descriptive-comparative analysis, which involves systematically describing the content and legal principles of each system and then comparing them to identify similarities, differences, and normative intersections. The results of this analysis are expected to provide a comprehensive overview of the effectiveness and completeness of each legal system in offering protection for children after divorce, as well as recommendations for the harmonization and improvement of legal policies in Indonesia.

III. Result and Discussion

The Principle of Child Protection According to Maqāṣid al-Sharī'ah

Child protection in Islamic law cannot be separated from the broader framework of maqāṣid al-sharī'ah, the essential objectives of Islamic law aimed at ensuring human well-being. In this context, maqāṣid al-sharī'ah serves both as a normative foundation and an ethical methodology in designing and implementing laws that relate to children's lives, whether under normal conditions or in vulnerable situations such as post-divorce. Child protection should not be interpreted textually alone, but as an integral effort to uphold human dignity from an early age so that children grow and develop in a safe, healthy, and dignified environment (Lawang 2022; Lawang, Fahmi, and Amruzi 2023).

Generally, classical scholars such as al-Ghazālī and al-Shāṭibī identified five main objectives of the sharia: the protection of religion (ḥifẓ al-dīn), life (ḥifẓ al-nafs), intellect (ḥifẓ al-'aql), lineage (ḥifẓ al-nasl), and wealth (ḥifẓ al-māl). In the context of child protection, at least three objectives are directly relevant—ḥifẓ al-nafs, ḥifẓ al-nasl, and ḥifẓ al-'aql. Ḥifẓ al-nafs requires the protection of a child's physical and mental safety; ḥifẓ al-nasl emphasizes the preservation of lineage and moral upbringing; and ḥifẓ al-'aql ensures children's rights to quality education so they grow into rational and responsible individuals (Akmal, Jafar, and Lawang 2023; Ridwan 2020).

In the post-divorce period, children often face increased vulnerability. They may suffer from the loss of dual parental roles, emotional disorientation, or even physical and psychological neglect. Within the maqāṣid framework, such conditions constitute forms of mafsadah (harm), which contradict the core principles of Islamic law. Thus, Islamic jurisprudence offers various rulings to ensure child protection—such as ḥaḍānah

(custody), the obligation of child support, and the right of visitation for non-custodial parents. The ultimate goal is to ensure that despite the dissolution of marriage, parental responsibility for the child continues fully and justly (Nugraheni, C, and Luthfiyah 2013).

The concept of *ḥaḍānah* in Islamic law, for example, strongly favors the best interests of the child. Under normal circumstances, custody is primarily granted to the mother based on emotional, psychological, and biological considerations. However, sharia also allows for flexibility by considering *aḥliyyah* (eligibility) and *maṣlaḥah* (benefit) for the child. This indicates that the *maqāṣid* principle is not rigid but rather adaptive to social contexts and the real needs of the child. If the mother is deemed unfit for custody, the right may be transferred to the father or another trustworthy party. This is a real-world application of *ḥifẓ al-nafs* and *ḥifẓ al-nasl*, where the child's safety and future are prioritized (Mansari and Devi 2019).

In addition to custody, Islam obliges the father as the financial guardian to provide for the child even after divorce. This obligation does not terminate with the dissolution of the marriage, as *nafaqat al-awlād* (child support) is part of his paternal duty, not merely marital responsibility. From the *maqāṣid* perspective, this aligns with *ḥifẓ al-māl*, ensuring the child is not subjected to poverty due to parental negligence. In certain cases, the state may act as *walī al-amr* (guardian authority) to fulfill the child's needs if the father is unable or unwilling to do so. Here, *maqāṣid* provides legitimacy for state intervention to uphold the child's welfare (Karimuddin 2019; Karimuddin and Abdullah 2021; Abdullah Lawang et al. 2024).

An important critique in implementing child protection principles based on *maqāṣid* is the insufficient translation of these values into binding positive law. In many cases, Islamic law is treated merely as a moral or ethical norm rather than as a legally binding norm. In fact, *maqāṣid al-sharī'ah* can serve as a basis for formulating responsive national legislation on child protection. For example, in several religious court decisions, judges still tend to prioritize formal-legal aspects over *maqāṣid*-based considerations, such as the child's psychological balance and long-term interest. Therefore, a reorientation of the judicial paradigm in Indonesia's Islamic courts is needed, one that is more rooted in *maqāṣid*, rather than rigid classical jurisprudence.

In the context of a modern legal state, *maqāṣid al-sharī'ah* can also function as a bridge between Islamic law and international child rights norms. For instance, the "best interest of the child" principle in the Convention on the Rights of the Child (CRC) aligns with the Islamic concept of *al-maṣlaḥah al-mursalah*. Both prioritize the child's welfare as the highest legal consideration. Hence, it is crucial for policymakers and scholars to formulate

constructive integration between maqāṣid principles and positive law so that Indonesia's national legal system can build a comprehensive child protection system grounded in substantive justice (Gunawan 2017; Rangkuti 2017).

Furthermore, maqāṣid embodies a progressive dimension relevant to contemporary challenges. Today's child protection concerns extend beyond custody and support to include mental health, inclusive education, protection from digital exploitation, and restorative justice in violence cases. All of these require an expanded understanding of maqāṣid, moving beyond classical texts and exploring it as an adaptive value system responsive to contemporary realities. In this way, maqāṣid can serve as an ethical and legal paradigm for addressing post-divorce child issues holistically (Akmal et al. 2023).

In conclusion, maqāṣid al-sharī'ah provides a strong and flexible normative framework for designing principles of child protection, particularly in vulnerable situations such as after divorce. It emphasizes not only formal legal aspects but also promotes human dignity, justice, and social responsibility. Therefore, actualizing maqāṣid in the context of child protection must be continuously strengthened through renewed Islamic legal thought, integration with the national legal system, and the collective awareness of the Muslim community on the importance of nurturing future generations in a safe, dignified, and compassionate environment.

Post-Divorce Child Protection in Islamic Law

Islamic law regards marriage as a sacred institution intended to create tranquility (sakinah), affection (mawaddah), and mercy (rahmah) within family life. Nevertheless, Islam provides space for couples to terminate their marital relationship through divorce (ṭalāq) when it no longer brings benefit (maṣlaḥah) and instead causes prolonged harm (maḍarrah). In this regard, Islam not only regulates divorce procedures but also prescribes various legal provisions to ensure that the child—as the most vulnerable party—continues to receive protection, love, and fulfillment of rights in a fair and sustainable manner (Iswandi 2021).

One of the central concepts in Islamic law related to post-divorce child protection is ḥaḍānah, or child custody. Etymologically, ḥaḍānah means to embrace or nurture with love. Terminologically, it refers to the duty of caring for, educating, and protecting a child who is not yet capable of managing their own physical and psychological needs. In Islam, ḥaḍānah is not merely a parental right but a responsibility that must be fulfilled for the benefit of the child. Therefore, in the aftermath of divorce, the determination of custody is not solely based on biological rights, but on who is most capable of providing the best care and

protection for the child (Amiriyyah 2015).

The majority of scholars from the Shāfi'ī, Mālikī, and Ḥanbalī schools maintain that custody of a non-mumayyiz child should primarily be granted to the mother. This view is grounded in the assumption that the mother has a stronger emotional bond and caregiving capacity, particularly during the early developmental stages. However, this right is not absolute. If the mother is found to be morally, ethically, or physically unfit, custody may be transferred to the father or another guardian. This illustrates that Islamic law is flexible and places strong emphasis on the child's welfare (*maṣlaḥah al-maḥḍūn*), rather than merely advocating for parental rights. This principle forms the backbone of child protection in Islam—placing the child's needs and interests above all adult interests (Wardani, Suhariadi, and Sugiarti 2022; Bahri 2015).

Apart from ḥaḍānah, another important aspect of post-divorce child protection is the obligation of financial support (*nafaqat*). Islam firmly obligates the father to continue providing for his children even after separation from their mother. This obligation remains and is not nullified by divorce. This is emphasized in QS. al-Baqarah [2]: 233: "The father shall bear the cost of the mother's food and clothing on a reasonable basis." This verse is interpreted as a confirmation that the father retains economic responsibility for his children and their mother during the period of custody, including in post-divorce circumstances. Moreover, the Prophet Muhammad (peace be upon him) stated that it is sufficient sin for a person to neglect those under his care (Nasution and Jazuli 2020).

Nevertheless, in practice, there are numerous post-divorce cases where fathers fail to fulfill their financial obligations toward their children. Many mothers are consequently burdened with dual roles as caregivers and breadwinners. This situation reveals a gap between the ideal normative framework of Islamic law and its factual implementation in society (Karimuddin Abdullah Lawang 2014). To address this issue, the state—through religious courts or relevant institutions—should take a more active role in upholding the principles of Islamic justice, ensuring the fulfillment of children's rights through effective legal mechanisms, such as enforceable court rulings.

Islam also pays attention to the psychological and spiritual rights of children after divorce. One manifestation of this is the provision for visitation rights for the non-custodial parent. Islam does not sever the child's relationship with either parent, even after divorce. In this context, Islam emphasizes the importance of continuous parental roles—both father and mother—in moral guidance, education, and character formation. If one party obstructs visitation or communication without a valid Islamic reason, such action may be considered unjust and a violation of the child's rights. Hence, in child protection after divorce, Islamic

law prioritizes a balance between responsibility and emotional access to the child.

Normatively, Islam builds a holistic and preventive child protection system. Through the principles of *maqāṣid al-sharī'ah*, Islam places child protection within the broader objectives of safeguarding life (*ḥifẓ al-naḥs*) and lineage (*ḥifẓ al-nasl*). This protection is not only individual but also social and structural. Society and the state are expected to participate in ensuring the safety, education, and well-being of children, especially those affected by divorce. This can be realized through family education, religious fatwas that guide the community, and public policies oriented toward child justice (Akmal et al. 2023).

A key critique of the implementation of child protection within Islamic legal frameworks is the weak supervision over the enforcement of *ḥaḍānah* and financial obligations. In many cases, custody rulings remain merely formal documents, without ensuring the actual fulfillment of the child's rights. It is not uncommon for judges to focus more on formal legal aspects than on deeply considering the child's welfare based on a *maqāṣidī* approach. Therefore, a contextual and *maqāṣid*-based jurisprudential approach must be strengthened so that Islamic law does not become confined to textualism but can offer concrete solutions to contemporary social realities (Karimuddin 2021).

Furthermore, there is an urgent need for contemporary *ijtihād* (independent legal reasoning) that considers the evolving social realities of modern Muslim families, such as women's dual roles, joint custody models, and the child's participatory rights in choosing their caregiver. Such *ijtihād* must remain within the framework of *maqāṣid*, yet respond to current dynamics without compromising the values of justice, compassion, and responsibility that form the foundation of Islamic law. In this way, Islamic law will remain relevant and capable of offering a humanistic and just system of child protection—not only in the past but also for the future.

From the above discussion, it can be concluded that post-divorce child protection in Islamic law is based on universal principles such as justice, compassion, and responsibility, which are translated into the duties of custody, financial support, and comprehensive fulfillment of children's rights. However, to actualize these principles, there must be a revitalization of *maqāṣid*-based jurisprudential approaches, contextual reform of Islamic family law, and state commitment to safeguarding the rights of children affected by divorce. Only through such efforts can Islam serve not only as a normative legal system but also as an applicable and solution-oriented framework for protecting the future of the Muslim generation.

Post-Divorce Child Protection in the Child Protection Law

Indonesia's Child Protection Law is a legal product that embodies the state's commitment to guaranteeing children's rights as an integral part of human rights. Law No. 35 of 2014, which amends Law No. 23 of 2002 and is hereinafter referred to as the Child Protection Law, serves as a legal framework designed to protect children from all forms of violence, neglect, exploitation, and discrimination, including those occurring within the family context following divorce. In this scope, children—as the most vulnerable party following the dissolution of a household—require legal guarantees to ensure their optimal physical, mental, spiritual, social, and emotional development (Sirait 2017).

The provisions of the Child Protection Law explicitly affirm that every child has the right to care, education, protection, and welfare without discrimination, including when their parents are divorced. Article 26 paragraph (1) letter b states that parents are obligated and responsible for caring for, maintaining, educating, and protecting their children. This indicates that divorce does not eliminate the fundamental responsibilities of parents toward their children. However, in practice, implementing these provisions often faces challenges, particularly in monitoring the fulfillment of custody and financial support obligations, which are frequently neglected by one party after divorce.

A crucial issue is the weak enforcement mechanisms related to the post-divorce obligations of either the father or mother, especially in providing financial support and exercising custody rights. Even when courts issue rulings obligating one party to bear the child's living costs, many of these decisions are not properly enforced. The lack of firm legal enforcement results in many children practically losing their rights, despite normative legal guarantees. This reflects a serious gap between legal texts and the social realities faced by children affected by divorce (Agustin and Bin Mohamad 2018).

The Child Protection Law has, in fact, introduced a progressive principle through the approach of the best interest of the child as a core foundation. This principle is enshrined in Articles 4 and 21, which state that children have the right to live, grow, and develop and to receive protection from violence and discrimination. The child's best interest must serve as the primary consideration in every decision made by state institutions, parents, or other parties dealing with children. Unfortunately, in judicial practice, this principle has not been fully internalized or used as a central consideration in rulings related to custody and the division of parental responsibilities after divorce. Many court decisions remain overly legalistic, neglecting the child's psychological, social, and emotional dimensions.

The child protection provisions in this law are further supported by the establishment of child protection institutions such as the Indonesian Child Protection

Commission (KPAI), which is mandated to monitor the implementation of child protection in various sectors, including within the family. However, the effectiveness of this institution is often hindered by its administrative rather than judicial nature, rendering it unable to compel violators to comply directly with legal rulings. In the context of post-divorce child protection, this means KPAI can only issue recommendations without the authority to enforce court decisions involving children's rights (Kurniawati and Matang 2023).

The Child Protection Law also upholds the right of children to express their views in accordance with their age and maturity, as regulated in Article 10. This is particularly important in divorce cases, where children of sufficient age should be involved in determining their custody arrangements and interactions with both parents. However, in Indonesia's judicial practice, children's participation is often neglected or treated as mere formality. Yet, the principle of child participation is crucial to prevent psychological distress caused by decisions that contradict the child's comfort and preferences.

Another fundamental critique of the Child Protection Law in divorce contexts is the lack of specific and technical regulations regarding the procedures for implementing custody, financial support, and visitation rights post-divorce. The civil procedural laws used in both religious and general courts primarily focus on formalizing the divorce and determining rights distribution, but do not ensure continuous monitoring of their implementation. As a result, many children are formally placed under the custody of one parent but, in reality, do not receive proper care or even suffer parental alienation.

Another weakness that deserves attention is the insufficient integration between the Child Protection Law and the religious court system in divorce cases. Although Islamic law, through the Compilation of Islamic Law (KHI), regulates *ḥaḍānah* and child maintenance, there is no operational regulatory bridge integrating these two legal regimes. For example, in custody rulings, religious courts do not automatically coordinate with child protection institutions. This results in fragmented and non-holistic legal processes. Therefore, enhanced inter-agency synergy and policy reform are needed to ensure that child protection becomes not only normative but also tangibly experienced by affected children.

On the other hand, it is worth appreciating that the Child Protection Law carries a broad and child-oriented protection spirit. The state's efforts to expand protection coverage through regional regulations (Local Child Protection Laws), child protection task forces, and child-friendly spaces in various institutions are positive steps. However, in the context of divorce, these initiatives have yet to address the root problems—namely, weak implementation and monitoring of post-divorce parental obligations. Therefore, policy reform should focus on strengthening enforcement mechanisms, imposing strict sanctions

on child neglect, and developing technical guidelines for post-divorce parenting (Mumbunan 2013).

As a final note, post-divorce child protection under the Child Protection Law is part of the state's constitutional mandate to ensure every child's optimal development. However, implementing this mandate continues to face significant challenges, including weak law enforcement, minimal institutional coordination, and an underdeveloped legal culture supportive of children's rights. Systemic efforts involving all stakeholders—including courts, child protection institutions, religious leaders, and civil society—are necessary to ensure that every child, including those affected by divorce, receives full protection, love, and rights. Thus, child protection will not remain a mere legal norm but will become a living reality within Indonesian society.

IV. Conclusion

Legal protection for children after divorce is a crucial aspect of safeguarding fundamental rights that must not be diminished under any circumstances. In Islamic law, the principles of child protection are grounded in *maqāṣid al-sharī'ah*, particularly the protection of life (*ḥifẓ al-nafs*), lineage (*ḥifẓ al-nasl*), and intellect (*ḥifẓ al-'aql*). Concepts such as *ḥaḍānah* (custody), financial obligations (*nafaqat*), and the preservation of emotional and spiritual rights indicate that Islamic law places child welfare as a primary concern, even after marital dissolution. The flexibility in determining custody and the continuity of parental responsibilities reflect Islam's adaptive approach to the best interests of the child.

Meanwhile, the Indonesian Child Protection Law provides a strong normative foundation for the fulfillment and protection of children's rights post-divorce through the principle of the best interest of the child. However, the implementation of these norms faces several obstacles, including weak enforcement of court decisions, lack of oversight on custody and maintenance execution, and insufficient child participation in decision-making processes. The lack of harmonization between the Child Protection Law and the religious court system further complicates holistic child protection efforts.

Therefore, harmonization between Islamic law and national law is essential, especially regarding post-divorce child protection. A *maqāṣid*-based approach can serve as an effective bridge in building a just, comprehensive, and responsive child protection system aligned with contemporary needs. Only through such efforts can the state fulfill its constitutional mandate to ensure every child's right to live, grow, and develop optimally—even in the aftermath of parental separation.

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