



Elements of Child Welfare Protection in Islamic Family Law in Southeast Asian Countries

Zaini Nasohah

Universiti Kebangsaan Malaysia, Malaysia

Raihana Zainal Abidin

Universiti Kebangsaan Malaysia, Malaysia

Nur Izzatun Balqish Saharudin

Universiti Kebangsaan Malaysia, Malaysia

Puteri Noraqilah Megat Khairulazwan

Universiti Kebangsaan Malaysia, Malaysia

Fikri

Institut Agama Islam Negeri Parepare, Sulawesi, Indonesia

Email: zbn@ukm.edu.my

Abstract: The welfare of children is one of the key concerns in matters of marriage and divorce. Issues related to child welfare typically arise in custody disputes following divorce. Almost all Islamic family laws in Muslim countries have legal provisions to ensure child welfare. However, these welfare provisions are often considered unclear due to their general nature. This article aims to highlight the elements of child welfare care that are sought to be manifested through Islamic family law provisions in Southeast Asian Muslim countries. A document analysis method, including case judgments, was used to identify the aspects of welfare that are of concern. The analysis found that some Islamic family law provisions in Southeast Asian countries regarding child welfare remain general in nature. Legal practitioners have attempted to outline the elements of child care through interpretations of existing provisions or through the rationale provided in court judgments. Among the identified welfare elements are priority for the mother, the status quo of the current custodian, the child's age, the child's right to choose, the custodian's religion, the custodian's lifestyle, economic status of the custodian, health status of the custodian, the custodian's age, the custodian's behavior, the custodian's place of residence, and access to the child's education. These elements are typically emphasized by disputing parties when presenting evidence to the court.

Keywords: Children, child custody, child welfare, Islamic Family Law, Southeast Asia

Abstrak: Kesejahteraan anak merupakan salah satu hal yang mendapat perhatian dalam perkara perkahwinan dan perceraian. Isu kesejahteraan anak biasanya muncul dalam perselisihan hak penjagaan anak setelah perceraian. Hampir semua undang-undang keluarga Islam di negara-negara Islam memiliki ketentuan hukum untuk memastikan kesejahteraan anak. Namun demikian, elemen-elemen jaminan kesejahteraan tersebut dikatakan masih kurang jelas akibat ketentuan hukum yang bersifat umum. Artikel ini bertujuan untuk mengkaji elemen-elemen penjagaan kesejahteraan anak yang coba diwujudkan melalui ketentuan undang-undang keluarga Islam di negara-negara Islam di Asia Tenggara. Metode analisis dokumen, termasuk putusan pengadilan, digunakan untuk mengidentifikasi aspek-aspek kesejahteraan yang menjadi perhatian. Hasil analisis menunjukkan bahwa sebagian ketentuan undang-undang keluarga Islam di negara-negara Asia Tenggara yang berkaitan dengan kesejahteraan anak masih bersifat umum. Para praktisi hukum berusaha untuk merumuskan elemen-elemen penjagaan anak ini melalui tafsiran terhadap ketentuan yang ada atau melalui alasan-alasan dalam putusan pengadilan. Beberapa elemen kesejahteraan yang diidentifikasi antara lain adalah prioritas kepada ibu, status quo penjaga yang ada, usia anak, hak anak untuk memilih, agama penjaga, gaya hidup penjaga, status ekonomi penjaga, status kesehatan penjaga, usia penjaga, perilaku penjaga, tempat tinggal penjaga, dan akses pendidikan anak. Oleh karena itu, elemen-elemen ini biasanya akan diajukan oleh pihak yang berselisih ketika memberikan keterangan di pengadilan.

Kata Kunci: Anak-anak, jagaan anak, kesejahteraan anak, Undang-undang Keluarga Islam, Asia Tenggara

Introduction

The discussion on child welfare is often closely linked to the issue of child¹ custody, which is known as *hadanah*.² *Hadanah* comes from the Arabic word *al-hidn*, meaning the ribs or chest, referring to the act of placing something on the ribs or lap, as it is customary for a mother to place her child on her lap while breastfeeding, symbolizing the mother's protection and care for her child at that moment.³ According to the *fiqh al-Shafie* terminology, *hadanah* is the act of providing protection and care for a child who is not yet *mumayyiz*⁴ (able to distinguish right from wrong) and not yet independent, offering education, and

¹ Asiah Aqilah Abdul Ghani, "Delays in the Enforcement of Child Support Orders Among Muslims: An Administrative Perspective in Malaysia and Indonesia," *Al-Adalah* 22, no. 1 (2025).

² Hamda Sulfinadia and Jurna Petri Roszi, "Moderation of Madhhabs in West Sumatra Towards Hadhanah of Minors Whose Mothers Remarry," *El-Usrah: Jurnal Hukum Keluarga* 7, no. 2 (2024), p. 789.

³ Wahbah al-Zuhaili, *Fiqh Al-Islam Wa Adillatuhu*, Jld 7, (Damsyik: Dar al Fikr, 2019).

⁴ Sulfinadia and Roszi, "Moderation of Madhhabs in West Sumatra Towards Hadhanah of Minors Whose Mothers Remarry."

safeguarding the child from anything that could harm them.⁵ *Hadanah* is also defined as the care of a young child, whether male or female, after the divorce of their parents.⁶ It can also be understood as the responsibility of parents to supervise, provide good treatment, and fulfill their children's needs, continuing until the child reaches adulthood and is capable of standing on their own.⁷

According to the Kompilasi Hukum Islam (KHI 1991),⁸ in general terms, Article 1(g) defines child custody or *hadanah* as the act of nurturing, protecting, and educating a child until they reach adulthood or become independent. The 1946 Islamic Family Law of Southern Thailand (IFLST 1946), in Article 329, defines the right of custody as the right to raise, care for, and educate children. Furthermore, this right emphasizes the role of the custodian who can offer complete love and provide the best care for the child, particularly in protecting them from harm.

Child welfare is a key issue that is given considerable attention in Islamic family law. The laws enacted and amended are intended to safeguard the welfare of children and emphasize their rights. This is because the children's rights will be protected from any potential form of neglect.⁹ Additionally, these laws aim to ensure that their basic needs, such as food, shelter, and education, are met. Proper fulfillment of child custody rights contributes to the formation of the character and behavior of a prosperous younger generation.

The principle of child welfare is strongly emphasized by courts¹⁰ when making decisions regarding custody disputes. Section 87(2) of the Selangor Islamic Family Law Enactment (2003) stipulates that when considering the custody of a child, the welfare of the child must be prioritized. This means that

⁵ Al. Setiyawan Gunardi, et. al., "Hadhanah Menurut Mazhab Syafie dan Mazhab Hanafi Serta Undang-Undang Keluarga Islam di Malaysia: Tinjauan Awal," in , *E-Proceeding 3rd International Conference of The Postgraduate Students and Academics In Sharia And Law 2020 (3rd INPAC 2020)*, p. 270–79.

⁶ Nur Zulfah Md Abdul Salam, "Kebajikan Anak Dalam Kes Hadanah Di Mahkamah Sharia," *Jurnal Sultan Alauddin Sulaiman Shah* 6, no. 1 (2019).

⁷ Intan Baueja Ratu, "Hak Asuh Anak Menurut Undang-Undang No.1 Tahun 1974 Tentang Perkahwinan (Analisis Pendekatan Komparatif), Tesis Fal, Syari'ah Dan Hukum, UIN Alauddin Makassar." (2018); Erfaniah Zuhriah et al., "Dimensions of The Islamic Law and Human Rights in The Protection of Children from Convicted Parents," *De Jure: Jurnal Hukum Dan Syar'iah* 16, no. 2 (2024), p. 432–55.

⁸ Arne Huzaimah and M. Tamudin, "Material Rights of Children in Guardianship Maqashid Al Sharia Perspective," *Nurani: Jurnal Kajian Syari'ah Dan Masyarakat* 24, no. 1 (2024), p. 181–98.

⁹ Nurul Izzah Izzati Hashim, et. al., "Child Neglect and Legal Protection According to Shariah and Law in Malaysia," *Journal of Contemporary Islamic Law* 4, no. 1 (2019); Zuhriah et al., "Dimensions of The Islamic Law and Human Rights in The Protection of Children from Convicted Parents."

¹⁰ Aziz, N.A. et.al, "Harm 'Darar' in Polygamous Marriage: Analyzing The Legal Framework in Malaysia and Indonesia," *Ahkam: Jurnal Ilmu Syariah* 25, no. 1 (2025).

the interests of the child take precedence over the rights or interests of other parties, including the parents.¹¹ A similar provision can be found in Section 93(2) of Chapter 217 of the Brunei Islamic Family Law Act (Revised 2012). The structure and content of the provisions in the Islamic Family Law of Brunei Darussalam can be considered similar to those found in the Islamic Family Laws of the states in Malaysia.

Child Welfare in Islamic Family Law

Islamic law places great emphasis on the welfare of children within the family institution.¹² This is typically referred to as the *maslahah* (welfare) of the child. In the modern context, this guarantee of *maslahah*¹³ is translated into legal provisions. As such, all countries with a Muslim majority population have their own Islamic family law¹⁴ provisions that ensure child welfare.¹⁵ The purpose of these laws is to provide a clear reference and guidance for legal practitioners in resolving disputes, particularly when conflicts arise over child custody decisions. Clear evidence is needed to help the court make the right decision and benefit the parties involved.¹⁶ What distinguishes these laws is whether the element of *maslahah* is explicitly stated in detailed provisions or if interpretation is required for more general provisions. This article will analyze Islamic family law in Malaysia, Indonesia, and Brunei Darussalam, with a focus also on Islamic family law in Thailand, which represents a country with a Muslim minority.

The reference to Islamic family law in Malaysia in this article is based on the Selangor State Islamic Family Law Enactment 2003 (SIFLE 2003), which includes provisions related to child custody in Part VII. In Indonesia, the relevant provisions for child custody are contained in Law No. 1 of 1974 (On Marriage) and the Kompilasi Hukum Islam 1991 (KHI 1991). The provisions related to custody in Law No. 1 of 1974 are general, while the more detailed regulations are found in the KHI 1991, specifically in Articles 98, 105, 106, and 156. The 1946

¹¹ Zanariah Noor, "Aplikasi Prinsip Kebajikan Kanak-Kanak Dalam Kes Hadanah," *Malaysian Journal of Syariah and Law* 2, no. 1 (2010), p. 63–93.

¹² Zaini Nasohah, "Dynamics of Islamic Family Law in Facing Current Challenges in Southeast Asia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 1 (2024), p. 1.

¹³ Zahrl Mubarrak, et. al. "The Urgency of the Islamic Law and Contemporary Societal Challenges: The Flexibility of Al-Maslahah in Determining the Hierarchy of Maqāṣid Al Shari'ah," *El-Usrah: Jurnal Hukum Keluarga* 8, no. 1 (2025).

¹⁴ Sheila Fakhria et al., "Securing Muslim Children's Civil Rights: Debate on State Legal Policy towards The Issuance of Family Cards for Unregistered Marriage Couples," *El-Mashlahah* 14, no. 2 (2024), p. 303–22.

¹⁵ Aayesha Rafiq, "Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)," *International Journal of Humanities and Social Science* 4, no. 5 (n.d.).

¹⁶ Zaini Nasohah and Mahfuzah Abd Shukor, "Faktor Luar Kawalan Dalam Penentuan Status Talak Tiga Sekali Lafaz Di Mahkamah Syariah," *Malaysian Journal of Syariah and Law* 6, no. 3 (2018), p. 41–48.

Islamic Family Law of Southern Thailand (IFLST 1946) serves as the legal reference for child custody in Thailand. Meanwhile, in Brunei Darussalam, the reference is the Emergency Order (Islamic Family Law) 1999 (IFL 1999) and Chapter 217 – The Islamic Family Law Act of Brunei (Revised 2012) (IFLAB 2012).

The Priority of Mothers and Female Guardians as Those Entitled to Custody Rights for Young Children

For children¹⁷ under the age of discernment (*mumayyiz*), the mother is the person most entitled to custody, whether the marriage is still intact or after a divorce.¹⁸ According to al-Khin et al,¹⁹ the mother has more rights than the father in caring for a young child due to her inherent qualities of love and patience in bearing the responsibility of nurturing and educating the child. Mothers tend to be gentler in caring for and educating their children, in addition to being able to provide the love and affection that young children need.

Section 82(1) of the SIFLE 2003 states that the mother is the most entitled person to care for her young child, both during the marriage and after its dissolution. The same is stated in IFLST 335. Meanwhile, the KHI 1991, Chapter XIV on Child Custody, Article 105 specifies that children who are eligible for custody under the mother's care are those who have not reached the age of discernment (*mumayyiz*) or who are under 12 years old.

However, the court is not absolutely bound to place custody with the mother, as Section 82(2) of the SIFLE 2003 states that if the court believes the mother has lost her eligibility, the custody rights will shift to the following parties in order of priority, provided that the custody arrangement does not affect the child's welfare. The order of priority is as follows:

- (a) the maternal grandmother, how-high-soever;
- (b) the father.
- (c) the paternal grandmother, how-high-soever;.
- (d) the full sister;
- (e) the uterine sister;
- (f) the sanguine sister;
- (g) the full sister's daughter;
- (h) the uterine sister's daughter;
- (i) the sanguine sister's daughter;

¹⁷ Huzaimah and M. Tamudin, "Material Rights of Children in Guardianship Maqashid Al Sharia Perspective."

¹⁸ Rosdalina Bukido et al., "Divorce Among Female Muslim Civil Servants: Legal Perspectives in Indonesia," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 25, no. 1 (2025), p. 85–116.

¹⁹ 'Ali al-Syarbaji Mustafa al-Khin, Mustafa al-Bugha, "Al-Fiqh Al-Manhaji," in *Terj. Zulkifli Mohamad Al-Bakri, Edisi Ke-3*. (Putrajaya: JAKIM, 2016).

- (j) the maternal aunt;
- (k) the paternal aunt;
- (l) the male relatives who could be their heirs as asabah or residuaries.

The KHI 1991, Chapter XIV, Article 156 also provides similar provisions, but the list of parties entitled to custody after the mother is shorter, containing only the top six parties, as outlined in Section 82(2) of the SIFLE 2003. However, the IFLST 1946 ranks the eligible parties for custody differently than Malaysia and Indonesia, even though both follow the Shafi'i school of thought. It places female siblings as the first entitled parties to custody after the mother, while Malaysia and Indonesia prioritize the maternal grandmother or maternal great-grandmother to take on the responsibility if the mother is unfit or absent. The IFLST 1946 also includes the paternal grandfather among the eligible custodians, after the paternal grandmother. Meanwhile, the legal provisions in Brunei are similar to those in Malaysia, except for part (b), where priority is given to the father. In Brunei, the law instead grants custody to the father and male heirs if no female heirs are available, as outlined in Section 88(2) of the IFL 1999.

One similarity across the legal provisions of all four countries is that women are given priority as custodians in place of the mother. The wisdom behind prioritizing women in child custody is that, generally, women are gentler and patient in caring for and educating children and are more capable of providing the affection that children need.

In the case of *Rosnah v Mohamed Nor*, the facts showed that after the death of a young girl's father, her uncle took the child from the mother's custody, claiming that the father had appointed him as the guardian and trustee of the child. The mother then applied for custody, and the court ultimately granted custody to the mother, as the court believed that in cases of dispute, priority for custody should be given to the mother.²⁰ In a case in Pattani,²¹ Thailand, the Pattani Provincial Court decided to grant custody of five children to their maternal aunt, as the children were not under the care of anyone else.²²

Maintaining the Status Quo of Child Custody

Maintaining childcare to the existing party without any changes is important because a young child will feel safe, comfortable and happy living with the caregiver who has nurtured him since childhood. The court also prioritizes guardians who are more knowledgeable about the needs and interests of children.

²⁰ Zanariah Noor, "Isu-Isu Berbangkit Dari Hak Hadanah Dan Hak Perwalian Anak," *Shariah Journal* 20, no. 1 (2012).

²¹ "Kes Sivil Mahkamah Pattani No. 278/2549." (n.d.).

²² Abdul Basir Mohamad, Rohanee Machae, and Mutsalim Khareng, "Children's Protection in the Issue of Hadhanah Based on Islamic Family Law and the Law of Thailand," *Asian Social Science* 12, no. 10 (2016), p. 18.

Surely, a guardian who has nurtured a child since childhood will know more about the care of the child.

The need to maintain the status quo of child custody is outlined in the laws of custody in Malaysia and Brunei Darussalam, as stated in Section 87 of SIFLE 2003 and Section 93 (3) (IFLAB 2012): “It is a rebuttable presumption that it is in the best interest of a young child to remain with his or her mother. However, in deciding whether this presumption applies to the facts of a particular case, the Court must give due consideration to the negative impact on the child's life caused by frequent changes in custody.”

This provision indicates that a child does not necessarily have to be placed under the custody of the mother, especially when the child has not lived with the mother since infancy, but has been living or growing up with another caregiver, such as the grandmother or aunt. Therefore, the court takes seriously the need to avoid disrupting the child's life by changing their caregiver.

In the case of *Wan Abdul Aziz v Siti Aisyah*,²³ the facts of the case showed that the child had been under the custody of the paternal grandmother since the parents' divorce when the child was two years old. The child's mother filed for custody when the child was almost 4 years old. Given these circumstances, the court maintained the status quo of the child's custody with the grandmother in order to protect the child's emotional well-being, ensuring that the child was not disturbed by frequent changes in custody.²⁴

Considerations of the Child's Wishes and Desires for a Child Who Is Mumayyiz

Traditionally, a child reaches the age of *mumayyiz* (able to distinguish right from wrong) at the age of 7. At this age, they are capable of making decisions, including choosing whether to live with their father or mother. Typically, a child will feel more comfortable living with the person who loves them more and cares for their welfare. This is based on a hadith narrated by Abu Hurairah (RA), which means: “The Prophet gave the choice to a young boy to choose between his father and his mother.”²⁵

However, this choice is not final, as it is possible that a child may feel comfortable with one parent due to the latter being overly lenient, neglecting essential aspects of the child's well-being, such as religion, health, and education. Therefore, the court will also consider the child's welfare alongside their preferences. This right must be exercised carefully, ensuring that the child's basic needs are respected.²⁶

²³ “(1975) 1 JH 47” (n.d.).

²⁴ Noor, “Aplikasi Prinsip Kebajikan Kanak-Kanak dalam Kes Hadanah.”

²⁵ Al-Tirmidzi, *Sunan Al-Tirmidzi*, 1357., n.d.

²⁶ Roslina Che Soh, “Children's Participation In Custody And Access Proceedings,” *IJUM Law Journal* 22, no. 1 (1970).

Section 85 (1) and (2) of SIFLE 2003 stipulates that custody will end when a boy reaches the age of 7 and a girl reaches the age of 9, but it may be extended to 9 years for boys and 11 years for girls if the court finds it appropriate. After this period, custody generally passes to the father. If the child reaches the age of *mumayyiz*, they have the right to choose whether to live with the mother or father, unless the court decides otherwise. Islamic family law provisions in Brunei Darussalam do not specify a custody period, but custody rights pass to the father if the mother loses her right to custody. However, the provision for a *mumayyiz* child's right to choose is similar to that in Malaysia.²⁷ As mentioned in Section 87 (2) SIFLE 2003: "To decide with whom a child should be placed, the primary consideration is the child's welfare, and subject to this consideration, the Court must also take into account:

- (a) The wishes of the child's parents; and
- (b) The wishes of the child, if the child is of an age to express their opinion."

The right of a *mumayyiz* child to make a choice is also stated in Articles 105 and 156(b) of KHI 1991. The age of *mumayyiz* under KHI 1991 is set at 12 years. This age limit is higher than the one determined by scholars. Furthermore, KHI 1991 does not distinguish between the genders when setting the age for *mumayyiz*. The determination of *mumayyiz* at 12 years is not an absolute limit. This means that once a child reaches 12 years old, they are considered *mumayyiz*. Moreover, children under the age of 12 are always regarded as not yet *mumayyiz*, according to judicial rulings.²⁸

IFLST 1946, Article 337 also addresses the issue of a *mumayyiz* child's right to choose their custodian. However, it further elaborates that if a child chooses to stay with both parents, a voting system will be applied to determine who will have custody. IFLST Article 338 also mentions that if a child does not choose anyone as a custodian, the mother will automatically have the custodial right.

In Case No. 10400-028-0172-2015 (Case No. 19) at the Sharia High Court of Selangor, which involved a custody dispute over three *mumayyiz* male children aged 16, 12, and 10, the court granted custody to the mother after hearing the views of the three children, who chose to live with her. However, the father appealed, arguing that the mother had lost her right to custody due to her relationship with another man. Despite this, the appeal panel upheld the decision

²⁷ "Akta Undang-Undang Keluarga Brunei – Chapter 91 (Semakan 2012)." (n.d.).

²⁸ Fathur Rahman, "The Regulation of Hadhanah in Indonesia and Malaysia (Comparative Study of Islamic Law Compilation and Islamic Family Law (State of Malacca) Enactment 2002), Tesis, Al-Ahwal Al-Syakhshiyyah Department, Sharia Faculty, Maulana Malik Ibrahim State Islamic U" (2017).

to grant custody to the mother, taking into account the voices and views of the children.²⁹

Religion, Morality, and Caregiver's Lifestyle as Eligibility Criteria for Guardianship

The primary responsibility of parents is to educate and shape their children into practicing Muslims who are knowledgeable about their faith, responsible, and possess good moral character. Thus, those who can demonstrate their ability to provide a good Islamic environment and education are generally seen as those capable of ensuring the welfare of children. Therefore, the requirement for a caregiver to be Muslim is rooted in the importance placed by Islamic law on Islamic education. Scholars have also discussed that an individual who takes on the responsibility of caring for and raising children must possess noble character. If a caregiver is of poor character, the child will likely face the same moral issues. As stated in a hadith narrated by Abu Hurairah (ra): "The Prophet (peace be upon him) said: Every child is born in a state of fitrah (natural disposition). It is his parents who make him a Jew, a Christian, or a Zoroastrian."³⁰

The 87th Muzakarah of the National Fatwa Committee of the Malaysian Islamic Religious Affairs Council (23-25 June 2009) discussed the religious status of a minor child after one of the parents converts to Islam. The meeting concluded that the majority of scholars agreed that when one parent converts to Islam, the religious status of the minor child is automatically Islam, and custody of the child should be entrusted to the Muslim parent. Therefore, the meeting concluded that when one parent (either mother or father) converts to Islam, the religious status of the child is immediately recognized as Muslim.

This fatwa aligns with Section 83 of the SIFLE 2003, which outlines the eligibility requirements for guardianship, including being Muslim and exhibiting good Islamic moral conduct. Section 82(4) of SIFLE 2003 states that if multiple parties are equally qualified and agree to care for a child, the guardianship should be entrusted to the one who displays the highest degree of affection for the child. If all parties have similar qualities, the oldest among them is given priority. Section 84 of SIFLE 2003 specifies that a woman's guardianship right may be revoked if she behaves in an overtly immoral manner or if she renounces Islam.

In Indonesia, however, this requirement for a guardian to be Muslim is not explicitly stated in the law. The Kompilasi Hukum Islam (KHI) 1991 does not

²⁹ Shanizah Ngatiman, Nurhidayah Muhammad Hashim, and Rafeah Saidon, "Pandangan Kanak-Kanak Dalam Kes Hadhanah Di Mahkamah Syariah Di Negeri Selangor," *Journal of Fatwa Management and Research* 26, no. 2 (2021), p. 334–46.

³⁰ Muslim, *Sahih Muslim*, n.d.

address the issue of guardianship if one parent renounces Islam.³¹ However, it is generally accepted that the religion of the guardian must match the religion of the child to maintain consistency in upbringing. This is outlined in Article 31(4) of the 2022 Child Protection Law, which states:

"The individual responsible for the custody of the child, as referred to in Article 31(3), must have the same religion as the child to be cared for."

As for the morality of the caregiver, the 1974 Marriage Law (Law No. 1/1974) in Article 49 states that one or both parents may lose their guardianship rights temporarily if requested by other family members due to neglect of their duties or immoral behavior.

In the case of the IFLST 1946 (Islamic Family Law), the provisions in Article 322 clearly state that the guardian must be Muslim. However, if no suitable Muslim guardian is available, Article 334 allows for a non-Muslim guardian, provided the person is rational, honest, sincere, not hypocritical, and affectionate towards the child. According to Rohanee Machae et al. (2016), non-Muslims can be considered for guardianship if they fulfill these qualities and do not negatively impact the child in any religious or other matters.

For cases in Malaysia's Sharia Courts, the guardianship of children is unlikely to be awarded to a non-Muslim, as the Islamic Family Law clearly requires the guardian to be Muslim. However, in cases where there is a dispute over guardianship involving a non-Muslim parent who has converted to Islam, the Civil Court has ruled in the past that the custody of the child may be awarded to the non-Muslim parent. Section 51(2) of the 1976 Law Reform (Marriage and Divorce) Act allows the Civil Court to decide custody cases based on what it deems in the best interests of the child, regardless of the religious affiliation of the parents.³²

In the case of *Izwan Abdullah v Deepa Subramaniam* (2016),³³ the Federal Court of Malaysia granted custody of one of the children to the parent who had converted to Islam, after allowing the children to express their views. The court ruled that even if one party to a marriage converts to Islam, the Civil Court still has the authority to decide child custody, considering various factors, including the child's welfare, rather than religious affiliation alone.

In the Indonesian case *35/Pdt.G/2012/PA.Bik*, the father, who was a Muslim and had good moral character, was granted custody of the children because the mother was planning to convert to a non-Islamic religion and had engaged in immoral behavior, including living with a non-mahram man and

³¹ Miftahus Sholehudin et al., "Cancellation of Marriage Due to Apostasy in Islamic Law and Human Rights: A Comparative Analysis of Indonesia and Malaysia," *De Jure: Jurnal Hukum Dan Syar'iah* 17, no. 1 (2025), p. 33–51.

³² Zanariah Noor, "Agama Dan Akhlak: Satu Analisa Kelayakan Pengasuh Dalam Kes Hadanah," *Jurnal Sharia* 12, no. 1 (n.d.).

³³ "Civil Appeal NO: 02(f)-5-01-2015 & 02(f)-6-01-2015." (n.d.).

committing adultery. The father was deemed fit to care for the children, especially since the mother had neglected them by leaving them with their grandmother.³⁴ On the other hand, in *1/Pdt.G/2013/PA.Mur*, despite the father being a Muslim, he was deemed unfit to care for the children due to neglect, while the mother, who had converted to Catholicism but maintained good moral character, was awarded custody.

Child Maintenance

A father is responsible for financially supporting his children.³⁵ If the father is not present, the grandfather takes on this responsibility, and so on. Section 73(1) of SIFLE 2003 states that a father has the obligation to provide for his child's upkeep. This includes expenses for housing, clothing, food, medical care, and education. This provision clearly establishes the father's duty to support his children, whether they are in his care or under the care of another.³⁶

Section 73(2) of SIFLE 2003 specifies that if the father is deceased, the obligation to maintain the child passes to the person responsible according to Sharia law. This obligation also applies if the father's whereabouts are unknown or if he is unable to provide for the child. The child's maintenance is required until they reach adulthood, which is defined as 18 years of age unless the child has a physical or mental disability or is unmarried (for a girl), as stated in Section 80. The adulthood age established by SIFLE 2003 differs from the Sharia definition, which is until the child reaches puberty.

In Indonesia, KHI 1991 addresses the father's obligation for child maintenance under Article 105(c) and Article 156(d). Article 105(c) states: "The maintenance expenses are borne by the father." Article 156(d) further clarifies that "all costs for child maintenance and guardianship are the responsibility of the father according to his ability, at least until the child reaches adulthood and is able to take care of themselves (21 years old)." These provisions indicate that child support remains the father's responsibility even after a divorce or remarriage. Article 98(1) of KHI 1991 specifies that the maintenance period ends when the child is able to care for themselves or reaches adulthood (21 years old), provided the child has no physical or mental disabilities or has not married.

According to IFLST 1946, even after divorce, custody is generally given to the mother and her family (as outlined in Article 335). However, the

³⁴ Muhammad Khoirur Rofiq, "Pemberian Hak Asuh Anak Dalam Perceraian Karena Peralihan Agama (Murtad)," *Journal of Islamic Studies and Humanities* 6, no. 2 (, 2021), p. 97–110.

³⁵ Asiah Aqilah Abdul Ghani, "Delays in the Enforcement of Child Support Orders Among Muslims: An Administrative Perspective in Malaysia and Indonesia."

³⁶ Rahman, "The Regulation of Hadhanah in Indonesia and Malaysia (Comparative Study of Islamic Law Compilation and Islamic Family Law (State of Malacca) Enactment 2002), Tesis, Al-Ahwal Al-Syakhshiyah Department, Sharia Faculty, Maulana Malik Ibrahim State Islamic."

responsibility for financial support, asset management, education, and all matters related to the child post-divorce remains with the father, grandfather, or male ancestors on the father's side, as per Article 321.

In the case of *Hurbai v Usman* (PLD 1963), the father sought custody, claiming the mother was unfit because of her work as a servant. The judge emphasized that poverty alone should not prevent the mother from being awarded custody. The judge also affirmed that the responsibility for providing education and maintenance for the children lies with the father, even if the children live with the mother. The court ruled that custody should remain with the mother, as her willingness to work as a servant demonstrated her commitment to supporting herself and her children.³⁷

Safe Housing and Access to Education for Children

Safe housing and access to quality education are critical for a child's development. This is because housing and education are fundamental needs that guarantee future well-being. The person entitled to care for a child must reside in the place where the child lives. For example, if a mother travels for a specific purpose³⁸ and cannot take her child along, she must entrust the child to the grandmother during her absence. However, if a guardian relocates with no intention of returning, the right to guardianship does not end as long as the route taken and the destination are safe.³⁹

Section 83(e) of the SIFLE 2003 outlines that one of the eligibility requirements for a guardian is that they must live in a place where the child is unlikely to face any negative moral or physical consequences. Section 88(1) provides that a guardianship order can be made subject to any conditions the court deems necessary, and that the order confers the guardian the right to decide all matters relating to the child's education. Subsection 88(2)(a) specifies that a guardianship order can include conditions regarding the child's place of residence and educational arrangements.

The Indonesian Marriage Law No. 1/1974 and KHI 1991 do not specifically address issues of housing and education in terms of child custody and welfare. However, in Law No. 23 of 2002 on Child Protection, Article 9(1) clarifies that every child has the right to receive education and instruction for their personal development and intellectual growth, in accordance with their interests and talents.

According to the IFLST 1946, Article 339 provides that the benefits the child currently and in the future will gain are decisive in determining who has the right to live with the child when the parents are living separately. However, the

³⁷ Noor, "Isu-Isu Berbangkit Dari Hak Hadanah Dan Hak Perwalian Anak."

³⁸ Ahmad bin Muhammad Husni et al., "Family Problems - Wife's Work - and Its Solution in the Light of Maqasid Shariah," *Asian Social Science* 11, no. 18 (2015).

³⁹ Mustafa al-Khin, Mustafa al-Bugha, "Al-Fiqh Al-Manhaji."

responsibility for providing appropriate education lies with the father, as the guardian or trustee, not the mother as the caretaker. As stated in Article 321, the father, paternal grandfather, paternal great-grandfather, or someone appointed by the father or grandfather is the primary person to hold guardianship. Similarly, if someone other than the mother is the guardian, the responsibility for providing education falls to the guardian's trustee, not the caretaker.

In the case of *Safura binti Badarudin v Azhar bin Arifin*,⁴⁰ the court rejected the mother's application for temporary custody. The judge explained that the child's welfare should be considered based on factors such as living conditions, environment, place of study, time spent with family, and the child's social interactions. These factors affect the child's well-being. To qualify for custody, the parent must demonstrate that the child's welfare has been adequately provided for. The judge concluded that the defendant was more suitable to have custody, as the living arrangement provided by the defendant did not mix with unrelated people, whereas the plaintiff rented a room with other families, which was less suitable for the child's development, especially socially.

In the case of *Nong Azman Shah v. Ahood Thamar Bade'i*,⁴¹ involving a Malaysian father and an Iraqi mother, custody was awarded to the father. The court denied the mother's claim for sole custody, as the mother's Iraqi citizenship and her residence in Kuwait made her situation less favorable for providing the child's education. The court also considered the safety of the children, noting that Malaysia was free from the Gulf War, unlike Iraq and Kuwait.

In case No. 0155/Pdt.G/2016/MS. LGS, the mother (plaintiff) and father (defendant) had two children aged 4 and 7. The father was granted custody as the mother was working in the ASN and often brought the children to work with her, in addition to continuing her studies. This situation meant that the mother could not devote sufficient time to her children. Moreover, the mother was living in a rented house with her university friends, which was not an ideal environment for the children's growth. The court judged that this situation was not conducive to the children's mental health.⁴²

Possibility of Custody Loss if the Mother Remarries

According to the general principle, a mother or female guardian loses custody of her children if she remarries a man who is not mahram (i.e., someone who is not closely related to the child). This is based on a Hadith of the Prophet Muhammad (PBUH), which means, "You have more rights to the child as long as you are not married." Custody is restored if the marriage is dissolved through

⁴⁰ "(1999) JH XIII (2) 237." (n.d.).

⁴¹ "[1996] 1 JH 165" (n.d.).

⁴² 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 (2022), p. 890.

death or divorce. If the mother remarries, the child may have to live with a stranger who might resent the child's presence, as the new husband might view the child as taking time and attention away from the wife. Placing the child in such an environment⁴³ can have negative effects.⁴⁴

However, according to al-Khin et al.,⁴⁵ in the Shafi'i school of thought, remarriage does not automatically revoke the mother's custody in two circumstances:

1. The child's biological father and stepfather agree that the child will live with the mother.
2. The new husband of the mother is a relative of the child and has a right to guardianship, even if the familial connection is distant. In such cases, the mother's right to custody is not forfeited if the husband agrees to care for the child, as the stepfather has a right to guardianship over the child.

Subsection 84(a) of the SIFLE 2003 stipulates that if a female guardian marries a man who is not a mahram to the child, the guardianship right is forfeited. This right is only restored if the marriage is dissolved. However, the same provision notes that a mother's remarriage may not automatically end her custody if it does not negatively affect the child's interests. This is not explicitly stated in Indonesian and Thai laws but can be seen in court decisions.

In the case 0679/Pdt. G/2014/PA TnK, the mother originally had custody of her 12-year-old child, but after remarrying, she gave less attention to the child, which affected the child's performance. The court ruled that the father's custody would better serve the child's welfare, as he was more able to provide time, attention, and safety. The mother had violated one of the conditions of custody by remarrying.⁴⁶

The question of whether a child's welfare is harmed depends on the facts of each case, as determined by the judge. The principle of prioritizing the child's welfare remains the key consideration in custody cases. In the case *IHH v MARTMY* (Case Mal No. 07100-028-0257-2009), the mother argued that the father's unemployment meant he was unfit to care for the child. She claimed that, despite her remarriage, she could offer better care and education for the child, and her new husband was supportive. The court granted her custody, with the father receiving visitation rights.⁴⁷

⁴³ Noor, "Aplikasi Prinsip Kebajikan Kanak-Kanak Dalam Kes Hadanah."

⁴⁴ Faiz Adnan, "Ibu Menangis Tidak Dapat Hak Hadhanah Selepas Bercerai. <https://Peguamsyariefas.Com.My/Hak-Hadhanah-Selepas-Bercerai/>, 2017. [Access on 8 November 2023], n.d.

⁴⁵ Mustafa al-Khin, Mustafa al-Bugha, "Al-Fiqh Al-Manhaji."

⁴⁶ Meita Djohan Oe, "Hak Asuh Anak Akibat Perceraian (Studi Perkara Nomor 0679/Pdt.G/2014/PA TnK)," *Jurnal Ilmu Hukum Pranata Hukum* 11, no. 1 (2016).

⁴⁷ Azwani Elias, "Kajian Kes Hadanah Dari Tahun 2007-2011 Di Mahkamah Tinggi Sharia, Pulau Pinang, Jabatan Pengajian Islam, Fakulti Sains Kemanusiaan, Universiti Pendidikan Sultan Idris. Mualim," 2012.

Probability of Child Abuse Occurrence

The Ministry of Health Malaysia classifies child abuse into four types: physical abuse, sexual abuse, emotional abuse, and neglect.⁴⁸ Any guardian found to have committed any of these forms of abuse will lose their guardianship rights, as such actions are contrary to the purpose of guardianship, which is to ensure the welfare of the child. The rationale for the removal of guardianship rights is also because a guardian who abuses a child, if sentenced to imprisonment, would face physical barriers to fulfilling their duties as a guardian. Therefore, it is essential that the child be placed under the care of someone else who can properly carry out the guardian's role. In cases where the guardian is only sentenced to corporal punishment or fines, and not imprisonment, guardianship rights are still revoked and transferred to a more qualified individual, as it is unreasonable to leave a child who has been mistreated by a parent or guardian in their care.⁴⁹

Section 83 (d) of the SIFLE 2003 stipulates that a caregiver must demonstrate good moral conduct in accordance with Islamic principles. This means that abusive and inconsiderate behavior by a guardian does not meet the required criteria. Section 83(e) further mandates that a guardian must reside in a place where the child is not exposed to any harm, whether moral or physical. Therefore, if there is a potential for harm, the child should not be entrusted to individuals or environments that would expose them to danger or risk. Additionally, Section 84(e) states that the right to guardianship is forfeited when the guardian neglects their duties or mistreats the child.

Article 49 of Law No. 1 of 1974 (Concerning Marriage) explains the revocation of child custody rights due to neglect of duties or immoral behavior by the guardian. The KHI Article 156(c) complements the explanation in Law No. 1 of 1974, stating that a guardian's right to custody can be revoked if they are unable to ensure the child's physical and spiritual safety, even if financial support and guardianship obligations have been met.

In the case of *MAM v. SJ* (Sharia Lower Court of the Federal Territories, Case No. 40/1986), the fact that the father frequently beat and abused the child, leading the child to run away from home, was accepted by the court as grounds for revoking the father's guardianship rights. The custody was transferred to the mother.⁵⁰

⁴⁸ Irene Cheah, "Penderaan Kanak-Kanak, [Http://Www.Myhealth.Gov.My/Penderaan-Kanak-Kanak/](http://Www.Myhealth.Gov.My/Penderaan-Kanak-Kanak/), 2020. (Access on 1 November 2023)," n.d.

⁴⁹ Zanariah Noor, "Penderaan Kanak-Kanak Oleh Ibu Bapa Atau Penjaga Dan Implikasinya Mengikut Undang-Undang Sivil Dan Undang-Undang Keluarga Islam Di Malaysia," *Jurnal Perspektif*, 7, no. 2 (2015), p. 70.

⁵⁰ Noor.

Granting Visiting Rights to Parties Without Custody Rights

Children who are in the care of one party cannot be prevented from meeting with the other party, unless there is a court order for specific reasons. The right of *hadanah* (custody) granted to a guardian or caregiver is not a form of ownership over the child by that party. Children in the process of growing up require the supervision and guidance of both parents. Similarly, parents have the right to meet and monitor the child's life⁵¹ to ensure that the emotional and relational bond within the family is not severed, and that proper supervision and oversight of the child's life can be carried out. Therefore, preventing children from meeting those who love them and whom they love is an injustice and abuse towards both parties.⁵²

According to the Shafi'i school of thought, if a boy chooses to live with his mother, he is required to stay with her at night, and during the day, his father may take him to school or teach him about life to prepare the child with the experiences and skills necessary for independence. If a boy who has reached the age of discernment (*mumayyiz*) chooses to live with his father, he is allowed to visit his mother. On the other hand, for girls, the mother is required to leave her home to visit her child, as it is assumed that the mother is better suited to care for a daughter. Visits can occur once every two days.⁵³

In the SIFLE 2003, provisions for visitation are stipulated in Section 88(c), which states that when a court order for custody is made, the court may include provisions for the child to visit the parent who does not have custody, or someone from the family of the deceased or non-custodial parent, at a time and duration deemed appropriate and reasonable by the court. Section 88(d) further provides that the court has the authority to allow the non-custodial parent or family member to meet with the child at a time and frequency deemed appropriate. Section 84(c) stipulates that denying access may result in a woman losing her custody rights if she changes her residence to prevent the father from exercising the necessary supervision over the child. Changing residence is only allowed in cases involving a woman who has been divorced and returns to her place of birth.

According to the IFLST 1946, if the father has custody of a son, he cannot prevent the son from meeting his mother. However, if the child in custody is a daughter, the father may prevent her from meeting her mother, but cannot prevent

⁵¹ Fakhria et al., "Securing Muslim Children's Civil Rights: Debate on State Legal Policy towards The Issuance of Family Cards for Unregistered Marriage Couples"; Yusrial Yusrial Atika Fitri, Muchlis Bahar, Zainal Azwar, M. Hidayat Ediz, "Divorce Lawsuit Due to Impotence Perspective Maslahat Theory: Case Study of the Andoolo Religious Court Decision, Southeast Sulawesi," *El-Usrah: Jurnal Hukum Keluarga* 7, no. 1 (2024).

⁵² Zanariah Noor, "Penafian Akses: Rujukan Kepada Kes-Kes Yang DiPutuskan Di Mahkamah Sharia Di Malaysia," *Jurnal Sharia* 22, no. 2 (2014).

⁵³ Noor.

the mother from visiting her daughter. If the son or daughter is ill and under the father's care, the mother has the right to take the child to live with her.⁵⁴

Any party who violates a court order related to visitation rights can be penalized for contempt of court. For example, on September 4, 2019, the Sharia High Court in Kuala Lumpur sentenced a mother to seven days in prison after granting a committal application (for contempt of court) filed by her ex-husband when the woman changed the date of her children's visitation.⁵⁵

From the discussion above, several key elements of child welfare, as outlined in family law in the countries analyzed, can be identified. These elements include the priority of the mother, the status quo of the current custodian, the child's right to choose, the religious status of the custodian, the custodian's lifestyle, economic capacity of the custodian, the custodian's morals, the custodian's health status, the ability of the custodian to provide a safe home, and the ability to provide both formal and informal educational facilities.

The analysis also indicates that some of the legal provisions related to child welfare are still general in nature. Therefore, in cases referred to the court, judges must analyze each general guideline provided in family law provisions individually. This causes the potential for differences in the approach and conclusions of the courts regarding child welfare. For example, in Malaysia, the provision in Section 85 of SIFLE 2003, which allows children to choose with whom they wish to live, is general. This provision does not provide clear guidance on how judges should ask questions to gather the child's views. According to Shanizah,⁵⁶ from 40 cases referred to the Sharia High Court of Selangor and the Sharia Court of Appeal of Selangor, almost all cases did not indicate the emotional state of the children during the interview sessions, nor whether the questions asked were considered sensitive to the children involved. Therefore, it is advisable to establish specific guidelines, such as a list of suitable questions for judges to ask children, as well as the need to consider the emotional state of the children during proceedings. These guidelines can be issued in the form of Practice Directions from the Court. This is important to ensure that decisions made genuinely protect the welfare of the child. A similar approach should also be taken for Islamic family law in other countries.

In Indonesia, Law No. 1 of 1974 and the *Kompilasi Hukum Islam* (KHI) only provide general provisions on child custody rights, without clearly and specifically outlining them. There are few articles that explain this matter. Most

⁵⁴ Mohamad, Machae, and Khareng, "Children's Protection in the Issue of Hadhanah Based on Islamic Family Law and the Law of Thailand."

⁵⁵ Tuty Haryanti Ahmad Rodzi, "Bekas Isteri SM Faisal DiPenjara 7 Hari. <https://www.bharian.com.my/Berita/Nasional/2022/06/970370/Bekas-Isteri-Sm-Faisal-Dipenjara-7-Hari>, [Access on 5 November 2023]," *Berita Harian Online*, 2022.

⁵⁶ Shanizah Ngatiman, Nurhidayah Muhammad Hashim, and Rafeah Saidon, "Pandangan Kanak-Kanak Dalam Kes Hadhanah Di Mahkamah Syariah Di Negeri Selangor."

cases in Indonesia are decided based on the judge's decision, and the provisions only serve as a guide for the Religious Court in making its decisions. For example, Article 49 of Law No. 1 of 1974 only mentions that neglecting duties towards a child is one of the reasons for the revocation of custody rights, while in KHI, Article 156 only explains the causes for the loss of custody rights, such as failing to ensure the child's physical and spiritual safety. These provisions do not detail the specific forms of neglect. For instance, neglect by a mother due to remarriage is not mentioned in Indonesia's provisions. Therefore, the Religious Courts need to establish more specific and detailed laws on child custody (*hadanah*) and create clearer guidelines for making decisions in a transparent manner. This will also provide guidance to the public in making assessments.

Meanwhile, in Thailand, most Family Court decisions related to Islamic law are made not based on legal provisions but through the judgment and wisdom of Dato' Yutitam, an Islamic judge and advisor to the civil judges in Thailand. Dato' Yutitam has extensive knowledge of Islamic law and broad authority in deciding on matters concerning Muslims in Southern Thailand. Any decision related to Islamic law is invalid unless supervised by Dato' Yutitam himself.⁵⁷ To this day, there is no detailed legal provision in Thailand that ensures the protection of children's welfare in child custody disputes. The provisions in the IFLST 1946 only provide general jurisdictional authority. Therefore, a detailed written law needs to be drafted to facilitate legal practitioners in handling cases involving the protection of children's welfare.

Conclusion

The elements of child welfare are key factors that need to be identified to ensure the child's well-being is preserved. It cannot be denied that some of these welfare elements are abstract and difficult to measure. Therefore, great care is required, especially from parties with the authority to resolve child custody conflicts. This article identifies eight elements contained in existing legal provisions, whether explicitly or implicitly, to safeguard the physical, mental, and spiritual welfare of children. Since some of these elements are implicit and found in general legal provisions, it is appropriate for these laws to be more detailed. Furthermore, such detailing could take the form of guidelines for the courts to confidently identify the necessary elements in each case involving the child's welfare.

⁵⁷ Mahamatayuding Samah, Raihanah Abdullah, Mohd Norhusairi Mat Hussin, and Nahid Ferdousi, Dato' Yutitam in the Civil Court System of Thailand, *AHKAM* 23 (1) (2023), p. 121.

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