

Indonesian and German views on the Islamic legal discourse on gender and civil rights

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Apostasy as grounds in divorce cases and child custody disputes in Indonesia

Muhrisun Afandi

This paper focuses on the extent to which religious conversion provides grounds in divorce and child custody disputes in Indonesia, especially within Muslim communities. This study is part of a comprehensive research project on child welfare policies in Indonesia, involving a series of interviews conducted with three groups of participants: Muslim leaders and judges, government officials, and professionals. Issues related to religious conversion per se were not among the principal initial emphases of the larger study and it was quite unexpected that the subject emerged as a major finding of this study, as reflected in the insights and perspectives of the participants, especially religious judges, based on their current experience working with Muslim communities.

It will become evident from this study that apostasy or adherence to a different religion is regarded as valid grounds by most religious judges in divorce cases. Apostasy also provides grounds in cases of child custody disputes. The finding of this study shows that most religious judges base their verdict on religious allegiance rather than the best interests of the child, as most of them will automatically grant custody to the Muslim parent (father or mother) regardless of his or her capacity to provide appropriate parenting for the child. It appears, for example, that an accusation of apostasy can result in a good mother losing custody of her infant; custody very likely will be granted to the Muslim father even though he is proven to be abusive or incapable as a parent. This might place the child at risk.

A. Introduction

Religious conversion is a serious issue in Islam as it has grave implications for the person involved in respect to some important aspects of his or her life, such as parental relationships, inheritance, the validity of marriage, and child custody rights. The complex issues of apostasy in Islamic jurisprudence, moreover, show that some serious infringements of religious freedom, and human rights in general, potentially occur in the application of Muslim legal traditions¹.

¹ Bielefeldt 2000.

Apostasy in Islam, known in Arabic as *irtidād* or *ridda*², is commonly defined as ‘turning away from Islam’ or ‘severing the ties with Islam’.³ There are various synonymous terms commonly used to amplify the scope and definition of apostasy, such as blasphemy, heresy, hypocrisy and unbelief.⁴ These terms might not convey the same meaning as apostasy, yet they appear to be used interchangeably in literature, while in Islamic jurisprudence, as further noted by Saeed & Saeed⁵, the notion of *ridda* combines these different terms.

The term apostate (*murtad*) refers to a Muslim who abandons or renounces his or her religion, whether a person converts to another religion or merely wishes to give up Islam and become an atheist.⁶ However, it seems that the legal implications of apostasy are applied especially to those who convert to another religion. This is among the reasons why in most cases the definition is often simplified into ‘becoming an infidel’ which automatically disentitles the person involved to his or her status and rights as a Muslim.

As is also evident in the texts of the other two Abrahamic religions, Judaism and Christianity, apostasy is regarded in Islamic texts as a punishable crime against Islam.⁷ Referring to various classical tenets of Islamic jurisprudence on *ridda*, some Muslims argue that the blood of a person who converts from Islam is *ḥalāl* (permissible), implying that he or she should be killed.⁸ While apostasy is strongly condemned in some verses of the Quran, controversy arises in some Muslim countries with respect to the penalty that should be applied to apostasy. In fact, there is no clear punishment prescribed for apostasy in the Quran.⁹ Among the provisions commonly used to justify harsh penalties is the Hadith “*man baddala dīnahu faqtulūhu*” (whoever changes his religion, kill him). Thus in some Muslim countries conversion is legally punishable by death, but the validity of the Hadith has been debated among scholars. Rehman¹⁰, for example, argues that the fact that Muhammad did not appear to implement the sentence himself raises questions about the validity of this provision.

It is commonly argued that the concept of religious freedom is, in fact, emphasized in the Quran (2: 256), in which it is clearly stated that “*lā ikrāha fī al-dīn*” (There shall be no compulsion in [acceptance of] the religion). However, it cannot be denied that some other verses, especially those condemning conversion and its related punishments¹¹, stipulate that freedom of religion does not exist in Islam.

2 Clarke 2009: 118.

3 Peters & De-Vries 1976: 2–3.

4 Saeed & Saeed 2004: 36–7.

5 Ibid.: 37.

6 Berger 2003: 721–722.

7 Clarke 2009: 119.

8 Berger 2003; O’Sullivan 2003; Rehman 2010.

9 Clarke 2009: 119.

10 Rehmann 2010.

11 Arzt 2002.

Even for individuals above the age of 18, being entitled to rights as a capable individual does not necessarily mean that they are also entitled to choose his/her own religion. The discourse of religious freedom, on the contrary, is often misinterpreted by some Muslims as giving legitimacy to apostasy. In Middle Eastern communities, as noted by Rajabi-Ardeshiri¹², the issue of religious freedom and apostasy has also been successfully used by the authorities as a political tool for suppressing people's rights to freedom of expression.

In the context of Indonesia, as is also the case in such Muslim countries as Malaysia¹³ and Egypt¹⁴, 'apostasy usually becomes a legal issue only with regard to its consequences'¹⁵, particularly in terms of personal status. There are no reports that capital punishment for conversion has been carried out in Indonesia, but the fact remains that Islamic practices in Indonesia stipulate legal consequences for those who are involved which affect, for example, their marital status and their child custody rights, which are discussed in this paper.

B. Overview of the study

This paper is drawn from a comprehensive research project on child welfare policies in Indonesia, as part of a PhD project undertaken at Monash University (Melbourne, Australia). Issues related to religious conversion in particular were not among the principal initial emphases of the larger study. However, the subject emerged as an important finding of this study, as reflected in the insights and perspectives of the participants based on their current experience working with Muslim communities.

A qualitative approach was employed in this research, using a series of interviews conducted with three groups of participants: Muslim leaders and religious judges, government officials, and professionals. For the purpose of this paper, however, discussion focuses on the interviews conducted with four participants from the group of Muslim leaders and religious judges relating to the extent to which religious conversion provides grounds in divorce and child custody disputes in Indonesia, especially within Muslim communities. Two participants were recruited from religious courts in Yogyakarta, while the other two judges work at religious courts in Central Java and West Java. For confidentiality reasons, the participants are referred to as P1, P2, P3, and P4.

The interviews were conducted in Indonesian but expressions from such other languages as Arabic, Javanese and other local languages were also involved. The English translation of the transcripts adheres as closely as possible to the original Indonesian versions. In this case, some structural and grammatical errors in the tran-

12 Rajabi-Ardeshiri 2009.

13 Kirby 2008.

14 Berger 2003; O'Sullivan 2003; Johansen 2003.

15 Berger 2003: 725.

scripts, such as missing subjects, verbs, or objects in some sentences are left as they are in the Indonesian versions.¹⁶

C. Interreligious marriage and apostasy issues

Interreligious marriage is not recognized in the Indonesian Marriage Law (Law No.1/1974). Indeed, this was underlined by the government in 1991 through a presidential instruction (No.1/1991) on the Indonesia compendium of Islamic law, known as KHI (*Kompilasi Hukum Islam*). Articles 40 and 44 of this compendium emphasize that it is forbidden for Muslims, men and women, to marry non-Muslims. In line with the provisions of the marriage law and the compendium, the Indonesian Council of Ulama (*Majlis Ulama Indonesia*) has also issued verdicts in 1980 and 2005 emphasizing that interreligious marriage is forbidden.

The compendium itself, which is regarded as a modern version of Islamic law in Indonesia, was intended to be a reformed version of Indonesian Islamic law developed in response to disputes over interpretations of Islamic law among religious judges in a number of Indonesian provinces.¹⁷ It provides codes to guide Indonesian Islamic courts on such issues as marriage, inheritance, and endowment. A number of human rights activists criticized some articles of the compendium related to interreligious marriage and some other issues as being more conservative than the existing marriage law.

In fact, there are disputes among Muslim jurists and scholars with respect to the extent to which interreligious marriage is forbidden in Islam.¹⁸ As noted by Ghazali¹⁹, there are three major perspectives of *'ulamā'* on the matter of interreligious marriage. The first perspective holds that interreligious marriage is forbidden totally for Muslim men and women, without exception. This opinion is based on provisions of the Quran, especially *al-Baqara* [2]: 221, *al-Mumtahana* [60]: 10, and *al-Mā'ida* [5]: 5. Furthermore, *'ulamā'* who share this perspective make reference to the response given by Umar ibn Khattab to these Quranic provisions. Narratives relate that Umar ibn Khattab, one of the caliphs, decided to divorce his two wives who were non-Muslims, Binti Abi Umayyah ibn Mughirah and Ummu Kulthum binti Amr ibn Jarwal, following the revelation of *al-Mā'ida* [5]: 5.²⁰ The decision made by Umar

16 In order to make the quoted transcripts more understandable, parentheses '()' and square brackets '[]' are used to enclose explanatory and missing materials. Parentheses are used to include translations or explanations of specific terms, additional information, and clarification, while square brackets are used to enclose missing material in the quoted transcript, such as missing subject, verb, or object. The square brackets are especially intended to indicate modifications that have been made to the original text for grammatical purposes.

17 Hallaq, 2009; Butt, 2010.

18 Eid 2005: 46–7.

19 Ghazali 2012.

20 Ibid.; see also Mawdoodi 1983:12.

ibn Khattab is considered as a strong reference for the position that interreligious marriage is strongly forbidden in Islam.

The second perspective believes that interreligious marriage is recognized in Islam when a Muslim man marries a non-Muslim from *ahl al-kitāb* (people of the book), referring to Jewish and Christian women who believe in God and a divine scripture.²¹ This perspective refers to *al-Mā'ida* [5]: 5, 6, which stipulates that such an exception is permitted in Islam with respect to interreligious marriage. 'Ulamā' from this second perspective believe that *al-Mā'ida* [5]: 5, which was revealed later than the two other verses (*al-Baqara* [2]: 221, *al-Mumtahana* [60]: 10), was meant to expand on or amend the total prohibition of interreligious marriage.²²

Those expressing the third perspective believe that the exception mentioned in *al-Mā'ida* [5]: 5 is not merely for Muslim men but also for women who are allowed to marry a non-Muslim, especially *ahl al-kitāb*. This perspective refers to the marriage of the two daughters of Muhammad, Zainab and Ruqayyah. Zainab was married to Abū al-ʿĀṣ while Ruqayya was married to ʿUtba ibn Abī Lahab. Both marriages took place before the development of Islamic law. The fact that Muhammad himself did not require his daughters to renew their marriage following the introduction of Islamic marriage law is used by some scholars to justify the position that interreligious marriage is not prohibited even for Muslim women.²³

Among these three perspectives it appears that the second view, that the only form of interfaith marriage recognized in Islam is that of a Muslim man to a woman from *ahl al-kitāb*, is the most widely held opinion among Muslims.²⁴ However, most Muslim jurists highlight the importance of maintaining a distinction between the permissibility of interreligious marriage with its advisability. Even though some jurists believe that such a marriage is lawful, most emphasize that interreligious marriage is not advisable in Islam. Among the common reasons for discouraging interreligious marriage is the religion of the children. Jurists are concerned that, in the case of divorce, children from an interreligious marriage will be at risk of being brought up in a religious tradition other than Islam.²⁵

The provision that Muslim men can marry non-Muslims while the women may marry only Muslim men is considered gender biased and unfair to women. The claim of some scholars, such as Mawdoodi²⁶, that when a Muslim woman marries a non-Muslim man it will be virtually a certainty that she will be disconnected from Islamic traditions, while her children will almost certainly be raised in a non-Islamic tradition, might be irrelevant in the contemporary context of Muslim society in Indonesia. The concept that the husband is the head of the family who has virtually total authority over his wife has changed in the context of contemporary Indonesian

21 Eid 2005: 46.

22 Ghazali 2012.

23 Ibid.

24 Eid 2005: 46; Aini 2008.

25 Eid 2005: 53.

26 Mawdoodi 1983.

communities. The debate over the authority of husbands is more serious in communities where Muslims form a minority group, such as in the United States. As noted by Eid, ‘Muslim women are more likely to have difficulty in finding a suitable husband since allowing the men to intermarry will reduce the number of available Muslim men’.²⁷

The argument that intermarriage is allowed only for Muslim men and not for Muslim women in order to ensure that children will not fall into the custody of non-Muslim parents might be seen to be appropriate only in the context of patriarchal Muslim societies in which the father is considered the sole religious guardian of the children. However, this argument has less validity in the context of Western societies. In the case of Muslim communities in the United States, as noted by Eid²⁸, fathers cannot always claim to be the sole religious guardian of their children since, in divorce cases, civil courts will most likely grant the child custody to mothers. This means that allowing Muslim men to marry non-Muslim women can have the result of allowing children to be brought up by non-Muslim mothers, which is contrary to the position of most Islamic jurists.

D. Children’s Freedom of Religion

The Convention on the Rights of the Child (hereafter CRC) is the first legally binding international regulation “that includes an explicit reference to Islamic law”²⁹. The fact that the CRC has been overwhelmingly ratified by Muslim countries, in which all states that are parties under the Organization of Islamic Cooperation (hereinafter OIC³⁰), including Indonesia, have positively responded to the convention³¹ is considered as a positive step towards the development of adequate child welfare systems in Muslim societies. The support of the OIC for the implementation of the CRC in Muslim societies was further underscored by the development of the Covenant on the Rights of the Child in Islam³² which was officially adopted by member states of the OIC in 2005 at the summit of their foreign ministers in 2005.

With regard to children’s freedom of religion in the context of Indonesia, in addition to Article 14 of the CRC concerning children’s right to freedom of thought and conscience and freedom of religion, Article 18 (2) of the International Covenant

27 Eid 2005: 48.

28 Ibid.

29 Hashemi 2007: 196.

30 The Organization of Islamic Cooperation (OIC), formerly referred to as the Organization of the Islamic Conference (OIC) founded in 1971, is the largest world organisation of Muslim countries. To date OIC has a membership of 57 states and other states as observers. The Organisation is considered to be relatively unstructured, as the principal institution of the OIC is the conference of foreign ministers (Shaikh 1992; Haynes 2001; Marshall 2010).

31 Syed 1998: 359.

32 Mosaffa 2011.

on Civil and Political Rights (hereafter ICCPR), which was ratified by Indonesia in 2005 by Law No.12/2005, also applies. This article of the ICCPR asserts that no one shall be subjected to coercion that would impair his or her freedom to have or to adopt a religion or belief of his or her choice.

The Indonesian Child Protection Law (No.23/2002), Article 42 [1], further emphasizes the freedom of children to express and perform their chosen religion. At the same time, however, Article 42 [2] of the law implies that a child's religion is the religion of the child's parents, implying in turn that children's freedom of religion does not really exist. The law also does not address directly the issue of interreligious marriage; there is no clear provision with regard to who should be the religious guardian of the child, the father or the mother.

The implementation of the provisions bearing on children's freedom of religion has been problematic. There appears to be a common belief that protecting children in the path of Islam is ultimately an obligation not only for the parents but also for the Muslim community in general. This is among the reasons why controversies arise among Muslims in Indonesia in response to government policies concerning such issues as adoption, guardianship, and foster parenting. Controversies occur concerning the freedom of religion of adopted children and those under the care of non-Islamic institutions and orphanages, based on the fact that parents and institutions from different cultural and religious backgrounds might adopt or take care of a Muslim child. In fact, religious issues surrounding adoption and foster parenting were among the issues that were discussed intensively during the debate of the enactment of the Indonesian Child Protection Law (No.23/2002), when differing perspectives on cultures and religious issues were expressed by members of the legislative assembly.

It is asserted by Langlaude³³, referring to 'will theory', that recognition of children's rights entails "powers of enforcement and waiver that the child does not always have"³⁴. Therefore, the concept of granting or recognizing freedom for children to choose their religion or to make their own religious judgments is even more difficult in such religious communities as in Indonesia. The concept that children enjoy rights as independent individuals is not well accepted in society. This appears to be among the principal reasons why fully implementing such legally binding international regulations concerning children's freedom of religion as the CRC has been problematic in Muslim countries³⁵, regardless of the fact that the CRC, as noted above, has been overwhelmingly ratified by Muslim countries, including Indonesia.

Reservations made by some Muslim countries, including Indonesia, to Article 14 of the CRC concerning children's right to freedom of thought and conscience and freedom of religion has exacerbated the difficulties that some Muslim countries face in incorporating principles related to the best interests of the child in their existing

33 Langlaude 2008.

34 Ibid.: 478.

35 Langlaude 2007: 2008.

regulations. As noted by Syed, it is of serious concern that Muslim countries, by adopting the approach of ‘declaration and reservation’³⁶, are formally addressing only a few fundamental issues regarding children’s rights addressed by the Convention. They are not necessarily interested in fully incorporating the Convention into domestic legislation. As noted by McLean³⁷, such collective reservations clearly show that the religious dimension might pose a serious threat to the ratification and implementation of the CRC and other related international conventions in the Muslim world.³⁸ In this case, Islamic law seems to be commonly used by Muslim countries as an excuse to breach the treaty on the basis that their reservations to the CRC justify only conditional application of the Convention.

E. A Muslim for marriage, an apostate for divorce

Despite the fact that interreligious marriage is not recognized in the Indonesian Marriage Law and is forbidden according to the compendium of Islamic law, it is in fact commonly practiced in Indonesian society. A variety of strategies are adopted by interreligious couples to ensure that their marriage is legalized in the country, including having their marriage registered outside Indonesia. This is among the reasons why the actual number of interreligious couples in Indonesia is difficult to identify; it is believed to be higher than the number recognized in government data. Another reason why the actual number is difficult to identify is because it is common for couples in Indonesia to convert ‘temporarily’ to another religion prior to the marriage, simply to have their marriage legalized. Some of them will return to their own religion following the marriage. To cite one example from interviews:

P2: I had one case recently. Interreligious couple, been married for 13 years and have five children, two boys and three girls. The wife is a Catholic and the man is a decent Muslim. They have their marriage registered here in this [religious] court. They were both registered as Muslims when they got married. You know, [the wife] temporarily converted to Islam prior to her marriage. In the ID, up till now, the wife remains registered as a Muslim, yet she has never been a Muslim at all. She was back to her religion even right after the marriage. Nothing has changed with her before and after the marriage.

Some cases of this kind come to light in court when the religious identities of couples are revealed in the course of applying for the dissolution of a marriage or for child custody. As further shared by P2:

P2: ... for 13 years, they both enjoyed a happy marriage, actually. Both their boys are Muslims while the girls follow their mom, going to Catholic

36 Syed 1998: 360.

37 McLean 1999.

38 see also Duncan 1999.

[Church] every Sunday. From what I learned, different religion was not the main reason why they decided to divorce. The real issue raised in the mediation process was that the wife had an affair with a man from her office, a Muslim too. The husband used the issue of different religion mainly as he knows well that it would be a solid ground for him to divorce his wife.

'Temporary' religious conversions like this might not fit the definition of *ridda* (apostasy), of 'turning away from Islam' or 'severing the ties with Islam'³⁹ since their act does not involve turning from or to certain theological beliefs or constitute theological insubordination. The 'apostate' couples were merely employing a shortcut to get around the marriage law that does not provide for interreligious marriage.

The Indonesian marriage law does not include any provision stipulating that conversion from or to Islam determines the validity of a marriage or can provide grounds for dissolving a marriage. However, according to Islamic jurisprudence, religious conversion or choosing a different religion provides grounds for divorce.⁴⁰ All judges participating in this study held the belief that religious conversion or apostasy is regarded as a valid reason to dissolve a marriage.

P3: ...if the reason [for divorce] is because one of them has converted from Islam, then it won't be any question for me as a judge – divorce. The only thing that we have to find out here is whether it is true that one of them is an apostate.

The complexities in the practice of interreligious marriage in Indonesia have raised serious questions regarding the compatibility of some provisions within the family law with contemporary issues, including the discourse on human rights. P1, for example, asserts that the amendment of the Indonesian marriage law is necessary as some provisions are irrelevant to the contemporary context of Muslim society in Indonesia.

P1: ...I don't know why it is so difficult to amend this [marriage] law. The society has changed tremendously since 1974. We need an update, we certainly need to address some contemporary issues which are not accommodated in the law we have now.

However, some other judges do not appear to see any serious problem within the family law. For example, P4 argues that religious freedom and interreligious marriage are entirely separate issues in Indonesia.

P4: The main Islamic principle in marriage is between man and woman from the same religion, between Muslims ... We do not accommodate interreligious marriages. Yet, for me, it has nothing to do with freedom of religion.

39 Peters & De-Vries 1976: 2–3.

40 Berger 2003: 723; Hak 2012.

People might change their religion ten times a day if they want, they have all the rights to do so, so please just do it. If that is your decision, then you have to take all the consequences.

The same opinion is shared by P3:

P3: If they know well that it (interreligious marriage) is forbidden then why they still do it. Why now they ask for solution when they face problems and difficulties. They simply ignore Islam when they decided to get married. They were hiding from us and played some tricks to get married, but now they will come to us for help. If I have to give an answer I would rather tell them '*kono urusi dewe*' (Javanese: deal with it yourself).

The responses given by the religious judges highlight that freedom of religion is not seen to be applicable in Indonesia in the context of marriage. Conversion from Islam, or even an accusation of apostasy, is regarded as solid grounds by religious judges to dissolve a marriage. Laws and regulations concerning religious freedom, including Law No.12/2005 (ratification of the ICCPR), are not even referred to by the judges in their verdicts in response to issues related to apostasy and interreligious marriage. Indeed, some provisions of the marriage law and the compendium of Islamic law are at odds with contemporary human rights discourse.

Family law is considered the core of sharia among Indonesian Muslims and any attempt to change this law always triggers controversy. Some Muslims consider family law to be sacred so that any proposed changes to this law are often translated as corrupting the core of the religion. This may have contributed to a lack of discussion about such contemporary issues as interreligious marriage, freedom of religion, and human rights in general even among religious judges. Judges often display ambivalent attitudes in response to human rights issues. On one hand, they declare that, by virtue of their strategic position, they are duty-bound to protect the rights of civilians, particularly those who are victims of injustice, yet on the other hand they tend to use Islamic provisions to refuse the application of human rights principles.

Furthermore, such an ambivalent approach has been a common phenomenon in Muslim countries in relation to human rights principles⁴¹, by which sharia provisions are used as grounds for refusing to implement human rights principles in their domestic legislation.⁴² Muslim countries, on the one hand, seem to be prepared to accommodate the modern concept of human rights, but on the other hand, attempt to preserve their traditional Islamic law.⁴³ The same case also occurs in the implementation of the ICPPR in Indonesia. Despite the positive response to the covenant when it was ratified through Law No.12/2005, implementation of the convention within domestic policies and programs in Indonesia has been problematic.

41 Arzt 1990; Bielefeldt 2000.

42 see also Arzt 1996.

43 Bielefeldt 1995; 2000.

F. Custody disputes and violation of children's rights

With respect to child custody and guardianship in Islam following the separation or divorce of the parents, fundamental rules vary among schools of Islamic jurisprudence (*fiqh*). However, there is general agreement among the schools of Islamic law, not only among the four major Sunni schools but also among the Shiites⁴⁴, that the mother has the priority claim to child custody.⁴⁵ As also noted by Pearl⁴⁶, the core principles are the same in all schools, by which the responsibility for a child in his or her early life falls to the mother and the responsibility will be the father's in his or her later life. All schools, however, hold that the mother will lose her priority claim for custody if she remarries.^{47,48}

In the discourse of children's rights and human rights in general, the Islamic concept of custody, which gives priority to the mother in cases of divorce, is regarded as among the landmarks of children's and women's rights in Islam. This provision is commonly used to support the argument that the concept of preventing a separation between a mother and her infant was incorporated into Islamic law even before international legislation was developed to address this issue. Furthermore, the provision is often used as an argument to deny that gender discrimination exists in Islamic family law.⁴⁹

P3: It has been far before the international society even thinks about child welfare, we in Islam have had developed a strong concept of how children and women have to be protected ... the importance of breastfeeding, prioritizing custodial rights of the mother, children have their rights as independent individuals ... [T]hese show that our concept is actually more advanced than the international convention itself.

The question remains whether the Islamic norms for prioritizing a mother for child custody can really justify the position that a strong concept of protecting the rights of women and children is embedded in Islam. Regardless of the custody status of a child, there is agreement among schools of Islamic law that the father is responsible to provide financial support for the maintenance and education of the child.⁵⁰ However, there are strong indications from the findings of this study that some fathers take advantage of the poor enforcement of this provision in Indonesia. The lack of

44 Ebrahimi 2005; Goolam 2006: 127.

45 Coulson, 1964: 96; Davis 1985; Moosa 1998; Nasir 2002.

46 Pearl 1998.

47 Nasir 2002; Goolam 2006.

48 This condition is referred to a Hadith narrated by Abu Daud and Hakim: 'You (the wife) have the first right to the child as long as you do not marry' (Sunan Abu Daud, *Kitab at Talaq* (2): 616–617).

49 Hoballah 2006; Goolam 2006.

50 Nasir 2002; Ebrahimi 2005; Hashemi 2007.

enforcement has made it easy for them to neglect their obligation to provide financial support for their children after divorce.

In practice, the argument that the Islamic concept of child custody is advantageous for women appears to be a fallacy. Giving the priority to women for child custody does not always mean that women and children are advantaged. With poor law enforcement in Indonesia, winning child custody in the court can be a disaster for some women, as it might mean they have to struggle themselves to support their children. On the contrary, losing child custody might be used by some fathers to justify their denial of their responsibilities to provide financial support for their children and their ex-wives.

P1: Some women end up struggling by themselves to support their children as their ex-husbands are simply neglectful, especially when they (ex-husbands) finally marry other women and have new families.

P2: The common problem that occurs after divorce is that after three or four months some husbands fail to give financial support for the children as decided in the court verdict. It is sad as there is no good control from the police or court in responding to this case ... [N]o action can be carried out unless [the mother] brings the case to the police or the court.

Moreover, based on arguments given by most Muslim jurists, it appears that the custodial priority for a mother is mainly based on her responsibility to take care of the child, especially when there is an infant who needs breastfeeding⁵¹, and is not based on the principle that a mother can be a sole guardian of her child. As noted above, the custodial rights will fall to the father in the later life of the children.

Two full years is the period of breastfeeding recommended in the Quran (2: 233) and Hadith which, as noted by Giladi⁵², was also the tradition in Middle Eastern societies before Islam. This appears to be the main reason why separation between a mother and her infant is prevented in Islam and that a mother is prioritized for child custody in cases of divorce. This implies that the rights of a mother for child custody are limited to the context of a child's physical custody. In fact, there will be a transfer of parental rights and responsibilities in the later life of the child, from physical custody of an infant given to the mother (*hadāna*) into a child guardianship (*wilāya*) given to the father.⁵³

The strong emphasis on breastfeeding in Islam, moreover, often stipulates oppression against mothers who, for some reasons, are unable to perform their duty. Mother's failure in performing her duty of breastfeeding her infant is commonly

51 Nasir 2002: 158–160.

52 Giladi 1999: 9.

53 Pearl 1998: 87; see also Ebrahimi 2005: 463.

stigmatised as against nature.⁵⁴ In cases of divorce, the failure of a mother to breast-feed her child will likely contribute to her failure to be granted child custody.

P3: There are ways to find out whether she (a mother) is a capable good mother or not. It is commonly assumed that every mother will automatically love her children. Don't get it wrong, not all mothers are capable of doing parental duties. For example, some mothers show their unwillingness to breast-feed their infants. They care about their beauty and careers more than their infants. You won't regard them as good mothers, will you?

The reality is that, in some Muslim communities, a marriage is often defined as a contract in which the husband assumes power⁵⁵ as a 'quasi-purchaser' of the wife.⁵⁶ The patriarchal system of marriage forces women to devote themselves to their husbands' authority and obliges women to breastfeed their children. The belief is that the actual owner of the milk is the husband, while the wife is often seen simply as 'the milk hostess'.⁵⁷ In fact, the majority of Muslim prominent jurists, including the Shafiis, the Hanafis, and the Hanbalis⁵⁸, give strong emphasis to the concept that the husband is the one who is entrusted with full responsibilities for the wellbeing of his wife and his children and has the right to an assurance that the infants will get the benefit of breast milk.

Issues related to child custody become more complex when interreligious marriages or issues of apostasy are involved. In cases of child custody disputes among interreligious couples, it appears from the responses given by the judges interviewed that Islamic norms regarding the division of responsibilities between father and mother can easily be neglected, since the primary focus of a verdict relates to the children's religion. In such cases, judges might simply disregard the best interests of the child as most of them will automatically grant custody to the Muslim parent (father or mother) regardless of their capacity to provide appropriate parenting for the child.

P2: It is clear in the Islamic provision that a child born from interreligious marriage, for any reason, has to be kept Muslim. In the case of divorce, the custody has to be given to the Muslim parent (father or mother). It is against the most important provision in Islam if a child is given to the non-Muslim parent.

P1: In divorce cases involving interreligious couple, most religious judges will grant the child custody to the Muslim parent, husband or wife, as that is the mainstream understanding among judges toward Islamic provision of child custody, in which a child has to be under the care of Muslim parent.

54 Al-Minawi 1993; Giladi 1998; Mohd 2011.

55 Mulia & Cammack 2007.

56 Coulson 1964: 15.

57 Giladi 1998: 116.

58 al-Nawawī 1995: 52; al-Tabarī 1995 [2]: 495; Mohd 2011: 658.

The arguments given by the judges above raise serious concerns regarding a ‘collective denial’⁵⁹ among some religious judges in Indonesia of the fact that the verdicts regarding the custody of children from interreligious marriage, which is almost invariably given to the Muslim parent (father or mother) regardless of his or her parental competence, constitutes a serious violation of children’s rights. It appears that most religious judges base their verdict on religious allegiance rather than the best interests of the child, as they ignore the plight of children who might be placed at risk by being given over to the custody of a parent who might be abusive or incapable.

It is interesting as all religious judges participating in this study emphasize the belief that the concept of religious freedom does exist in Islam. However, at the same time they also argue that the concept is not applicable in the context of parents and children. Furthermore, all the judges, including those who appear to have progressive views, emphasize that freedom of religion as mentioned in the CRC is not applicable in the context of Muslim communities in Indonesia.

P3: There is a very strong concept of religious freedom in Islam, yet this is not applicable in the context of parents and children as parents are obliged to keep their children in the way of Allah.

P4, furthermore, emphasizes this belief by explaining that making a child a good Muslim is the most important obligation of every Muslim parent. Indeed, it is commonly believed among Muslims that Muslim parents are strongly obliged to keep their children as Muslims.⁶⁰

P4: Teaching religion, making children good Muslims, is one of the most important responsibilities of Muslim [parents], so the Western idea of giving freedom for children to choose their own religion, which may be different from their parents’, is not acceptable in Islam. Parents need to make every possible effort to keep their children Muslims. They have to work hard for it ... As mentioned in some verses [of the Quran] that it is the parent that first will be dragged to hell, not their children, for sins committed by their children resulting from their failure in teaching Islam to the children.

The threat of being ‘dragged to hell’ has made some Muslim parents, especially those from interreligious marriages, particularly fearful of failing to keep their children in their custody. Some Muslims will take these warnings more seriously than the others. In some cases, the threat of being ‘dragged to hell’ results in serious depression. P1 described how a mother suffers a serious depression following her failure in her battle with her non-Muslim husband for child custody as she believes that she deserves serious punishment for her failure in saving her child in the path of Allah.

59 Beckett 1996: 61.

60 Hashemi 2007.

P1: ... She told me that she finally realized that it is a big sin for her to marry non-Muslim, yet she even feels more guilty as she believes that she has failed in protecting her son from hell ... She believes that it will be a big sin for her as she let her son to follow [the religion of] her ex-husband, which is other than Islam.

It is evident that most religious judges, as reflected from their responses in connection with some of issues discussed above, are more closely bound to *fiqh* (Islamic jurisprudence) than to state laws. Even though the judges do not explicitly oppose the enforcement of state law, their verdicts show that they are bound by state law only when it is seen to conform to religious values and provisions. In cases where state law is not compatible with Islamic provisions, as in the case of custodial rights for parents from interreligious marriage, they will reject and oppose the enforcement of the state law.

Unfortunately, the system of religious courts in Indonesia is not equipped with a mechanism to review and monitor the competence of religious judges with regard to contemporary discourse of children's rights and human rights in general. Moreover, as further noted by Ka'bah⁶¹, there has never been an evaluation of the extent to which verdicts issued by judges in religious courts are based on the spirit of Islamic law itself as derived from the Quran and Hadith. The recent transformation of religious courts in Aceh into Sharia courts⁶², on the contrary, shows that religious courts and judges may pose serious obstacles to government attempts to promote human rights principles in the future.

G. Conclusion

The findings of this study show that apostasy or adherence to a different religion is regarded as valid grounds for divorce by most religious judges in divorce cases in Indonesia. This is among the reasons why an accusation of apostasy appears to be commonly used by couples to dissolve their marriage, especially in religious courts. Apostasy also provides grounds in cases of child custody disputes. The responses given by the judges illustrate how most religious judges base their verdicts on religious allegiance rather than on the best interests of the child or on human rights principles in general. Most of them appear to automatically grant custody to the Muslim parent (father or mother) regardless of their capacity to provide appropriate parenting for the child, which might place the child at risk.

Furthermore, the interviews highlight the fact that religious judges can hold a very strategic position, through their verdicts, in addressing problems related to violations of children's rights and human rights in general. Unfortunately, a lack of sufficient knowledge concerning child welfare has rendered their significant roles

61 Ka'bah 2007.

62 Lindsey & Hooker 2007; Feener et al. 2011.

counterproductive, as their verdicts can be detrimental to the promotion of human rights principles in society. Moreover, as noted above, some verdicts of the religious judges reflect their ambivalent attitude in response to human rights issues. These judges see themselves as duty-bound to promote human rights and public welfare. However, at the same time they tend to use Islamic provisions to refuse the application of human rights principles. It is not an exaggeration to argue that the introduction of modern discourse on children's rights, and human rights in general, to Muslim communities in Indonesia might be seen as an attempt to introduce modernity into the Islamic world. Serious debates will always persist while success in finding an intersection between the two discourses – Islam and human rights – remains elusive.

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