

**HADHANAH PROVISIONS IN INDONESIA AND MALAYSIA FROM
THE PERSPECTIVE OF CHILD DEVELOPMENTAL PSYCHOLOGY
(A Comparative Study of Islamic Law Compilation and the Islamic Family
Law Enactment Number 2 in Selangor 2003)**

THESIS

by:

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SIN 200201110121



**ISLAMIC FAMILY LAW DEPARTMENT
FACULTY OF SHARIA
MAULANA MALIK IBRAHIM STATE ISLAMIC UNIVERSITY
MALANG**

2024

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STATEMENT OF THE AUTHENTICITY

STATEMENT OF THE AUNTENTICITY

In the name of Allah,

With consciousness and responsibility toward the development of science, the writer declares that thesis entitled:

HADHANAH PROVISIONS IN INDONESIA AND MALAYSIA FROM THE PERSPECTIVE OF CHILD DEVELOPMENTAL PSYCHOLOGY

**(Comparative Study between Compilation of Islamic Law and Enactment Number 2 of
2003 Selangor Islamic Family Law)**

Is truly writer's original work which can be legally justified. If this thesis is proven result of duplication or plagiarism from another scientific work, it as precondition of degree will be stated legally invalid.

Malang, February 7th, 2024

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**(A Comparative Study of Islamic Law Compilation and the Islamic Family
Law Enactment Number 2 in Selangor 2003)**

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PERSPECTIVE OF CHILD DEVELOPMENTAL PSYCHOLOGY
(A Comparative Study of Islamic Law Compilation and the Islamic Family Law
Enactment Number 2 in Selangor 2003)**

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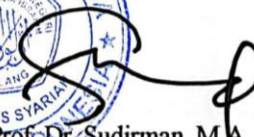

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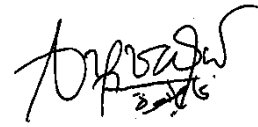
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Malang, February 7, 2024

Author,

A handwritten signature in black ink, appearing to read 'Athirah' with a stylized flourish at the end.

Athirah Saraswati
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MOTTO

وَالْوَالِدَتُ يُرْضَعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ ۖ لِمَنْ أَرَادَ أَنْ يُنِمَّ الرِّضَاعَةَ ۚ وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ
وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ ۚ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا ۚ لَا تُضَارَّ وُلْدَةٌ بِوَلَدِهَا وَلَا مَوْلُودٌ لَهُ بِوَلَدِهِ ۚ وَعَلَى
الْوَارِثِ مِثْلُ ذَلِكَ ۚ فَإِنْ أَرَادَا فِصَالًا عَنْ تَرَاضٍ مِنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا ۚ وَإِنْ أَرَدْتُمْ أَنْ
تَسْتَرْضِعُوا أَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا آتَيْتُم بِالْمَعْرُوفِ ۚ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ بِمَا
تَعْمَلُونَ بَصِيرٌ (البقرة: ٢٣٣)

Mothers shall suckle their children for two whole years; (that is) for those who wish to complete the suckling. The duty of feeding and clothing nursing mothers in a seemly manner is upon the father of the child. No-one should be charged beyond his capacity. A mother should not be made to suffer because of her child, nor should he to whom the child is born (be made to suffer) because of his child. And on the (father's) heir is incumbent the like of that (which was incumbent on the father). If they desire to wean the child by mutual consent and (after) consultation, it is no sin for them; and if ye wish to give your children out to nurse, it is no sin for you, provide that ye pay what is due from you in kindness. Observe your duty to Allah, and know that Allah is Seer of what ye do.

(Al Baqarah: 233)

TRANSLITERATION GUIDENCES

A. General

Transliteration transfers Arabic script into Indonesian (Latin) writing, not Arabic translation into Indonesian. Included in this category are Arabic names from Arabs, while Arabic words from nations other than Arabic are written as the spelling of the national language or as written in the reference book. Writing the text's title in the footnotes and bibliography still uses the provisions of this transliteration.

There are several provisions in transliteration that can be used in writing scientific papers. Whether it is national or international standards or requirements specifically used by certain publishers. The transliteration guideliness used in the scientific work of sharia students of UIN Malang are based on the provisions of the 2022 thesis writing guidelines for the Faculty of Sharia, State Islamic University Maulana Malik Ibrahim Malang, namely transliteration based on the Surat Keputusan Bersama (SKB) of the Minister of Religion and the Minister of Education and Culture of the Republic of Indonesia, January 22, 1998, No. 159/1987 and 0543.b/U/1987, as stated in the A Guide Arabic Transliteration, INIS Fellow 1992.

B. Consonant

Arab	Latin	Arab	Latin
ا	Not Symbolized	ط	ṭ
ب	b	ظ	ẓ
ت	t	ع	‘
ث	th	غ	gh
ج	j	ف	f

ح	h	ق	q
خ	kh	ك	k
د	d	ل	l
ذ	dh	م	m
ر	r	ن	n
ز	Z	و	w
س	S	هـ	h
ش	sh	ء	h
ص	ṣ	ي	y
ض	ḍ		

Hamzah (ء) which is often symbolized by alif, if it is located at the beginning of a word, then in its transliteration follows the vowel, it is not symbolized, but if it is located in the middle or end of a word, it is symbolized by the comma above (ˊ), turning around with a comma (ˋ) to substitute for the ”ع” symbol.

C. Vocal, Long Pronounce, and Diphthong

Every Arabic writing in the form of latin fathah is written with “a”, kasrah with “i”, dlommah with “u”, while the length of each is written in the following way:

Vocal fathah = a

Vocal kasrah = i

Vocal dlommah = u

Long-vocal (a) = Â Example: قال become Qâla

Long-vocal (i) = Î Example: قيل become Qîla

Long-vocal (u) = Û Example: دون become Dûna

Especially for reading ya' Nisbat, it cannot be replaced with “i”, but is still written with “iy” to describe ya' Nisbat in the end. Likewise, for the sound of diphthongs, wawu and ya' after *fathah* wrote with “aw” and “ay”, as in the example below:

Diphthong (aw) = دو Example: قول become Qawlun

Diphthong (ay) = يي Example: خير become Khayrun

D. Ta' Marbutah

Ta' marbûthah translited as “t” in the middle of word, but if Ta' marbûthah in the end of word, it translited as “h” e.g. المدرسة الرسالة become *alrisalat li al-mudarrisah*, or in the standing among two word that in the form of mudhaf and mudlaf ilaih, it transliterated as t and connected to the next word, e.g. في أمان الله become *fi amanillâh*.

E. Auxiliary Verb and Lafadh al-Jalâlah

Auxiliary verb “al” (ال) written with lowercase from, expect if it located in the position and “al” in lafadh al-Jalâlah which located in the middle of two or being or become idhafah, it remove frome writing.

1. Al-Imâm al-Bukhâriy said.
2. Al-Bukhâriy in muqaddimah of his book said.
3. *Masyâ Allah kâna wa mâ lam yasya 'lam yakun.*

F. Indonesian Arabic Names and Words

In principle, every word that comes from Arabic must be written using the translation system. When the name is the Arabic name of an Indonesian or an Arabic Indonesian, no need to write using the system transliteration.

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ABSTRAK

Athirah Saraswati, 200201110121, 2024. Ketentuan Hadhanah di Indonesia dan Malaysia Perspektif Psikologi Perkembangan Anak (Studi Komparasi Kompilasi Hukum Islam dengan Enakmen Undang-Undang Keluarga Islam Selangor 2003). Skripsi. Program Studi Hukum Keluarga Islam. Fakultas Syari'ah. Universitas Islam Negeri Maulana Malik Ibrahim Malang. Pembimbing: Dr. Zaenul Mahmudi, M.A.

Kata Kunci: Hadhanah, Psikologi Perkembangan Anak, Perbandingan

Hadhanah adalah hal yang sangat penting, karena merupakan proses dari pembentukan karakter anak dalam kehidupan. Penetapan usia *mumayyiz* di Indonesia tertuang dalam Kompilasi Hukum Islam dan Negeri Selangor dalam Enakmen Undang-Undang Keluarga Islam Selangor 2003. Implikasi dari penetapan usia *mumayyiz* ini salah satunya ialah anak dapat memilih untuk tinggal dengan salah satu orang tua ketika mereka bercerai. Pada faktanya, kedua peraturan menetapkan ketentuan usia *mumayyiz* yang berbeda. Penulis tertarik untuk melakukan analisis dengan menggunakan teori Psikologi Perkembangan Anak tentang penetapan usia *mumayyiz* ini. Penelitian ini bertujuan untuk melihat manakah usia *mumayyiz* yang lebih ideal diantara Indonesia dan Selangor menurut Psikologi Perkembangan Anak.

Penelitian ini termasuk ke dalam jenis penelitian normatif dengan menggunakan pendekatan perbandingan undang-undang. Bahan hukum yang digunakan ialah primer, sekunder, dan tersier. Teknik pengumpulan data dilakukan melalui studi kepustakaan dari sumber cetak maupun digital dengan metode analisis deskriptif dan diolah dengan penalaran induktif.

Hasil penelitian ini menunjukkan bahwa usia *mumayyiz* menurut Kompilasi Hukum Islam adalah 12 tahun, sedangkan Enakmen Undang-Undang Keluarga Islam Selangor 2003 menetapkan usia *mumayyiz* 7 tahun bagi anak laki-laki dan 9 tahun bagi anak perempuan. Persamaan diantara kedua aturan ini ialah terkait pembagian hak asuh anak, kewajiban nafkah, pengasuhan setelah ibu, hak anak untuk memilih, dan keadaan sosial. Perbedaan dari kedua aturan ini ialah dalam hal kekuatan dasar hukum, penetapan usia *mumayyiz*, syarat-syarat pengasuh, penjagaan atas harta anak, dan pengalihan hak asuh anak. Psikologi Perkembangan menilai bahwa usia yang ideal untuk anak memilih diantara 7 sampai 12 tahun adalah dimulai dari usia 12 tahun, dimana perkembangan anak secara kognitif dan sosial dirasa sudah cukup untuk menentukan pilihan yang baik.

ABSTRACT

Athirah Saraswati, 200201110121, 2024. *Hadhanah Provisions in Indonesia and Malaysia From the Perspektive of Child Developmental Psychology (A Comparative Study of Islamic Law Compilation and the Islamic Family Law Enactment Number 2 in Selangor 2003)*. Thesis. Islamic Family Law Departement. Syari'ah Faculty. State Islamic University Maulana Malik Ibrahim Malang. Supervisor: Dr. Zaenul Mahmudi, M.A.

Keyword: *Hadhanah*, Child Developmental Psychology, Comparative

Hadhanah is a very important matter, because it is a process of character building for children in life. The determination for the age of *mumayyiz* in Indonesia is contained in the Islamic Law Compilation and in Selangor State in Enakmen of Selangor Islamic Family Law 2003. One consequence of determining the age of *mumayyiz* is that the child can choose to live with either parent when they divorce. In fact, the two provisions set a different age of *mumayyiz*. The author is interested in conducting an analysis using the theory of Child Developmental Psychology regarding the determination of the age of *mumayyiz*. This research aims to see which age of *mumayyiz* is more ideal between Indonesia and Selangor according to Child Developmental Psychology.

This research employs normative research using a comparative approach to law. The legal materials used are primary, secondary, and tertiary. Data collection techniques are carried out through literature studies from print and digital sources with descriptive analysis methods and processed with inductive reasoning.

The results of this study indicate that the age of *mumayyiz* according to the Islamic Law Compilation is 12 years old, while the Enactment of the Selangor Islamic Family Law 2003 sets the age of *mumayyiz* at 7 years old for boys and 9 years old for girls. The similarities between these two regulations are related to the sharing of child custody, maintenance obligations, custody after the mother, the child's right to choose, and social circumstances. The differences between these two regulations are in terms of the strength of the legal basis, the determination of the age of *mumayyiz*, the requirements of caregivers, the safeguarding of children's property, and the transfer of child custody. Developmental psychology considers that the ideal age for children to choose between 7 and 12 years old is starting from the age of 12, where the child's cognitive and social development is considered sufficient to make good choices.

ملخص البحث

عاطرة سارسوات, 2024, 200201110121. أحكام الحضانة في إندونيسيا وماليزيا من منظور علم نفس نمو الطفل (دراسة مقارنة بين تجميع الشريعة الإسلامية مع قانون الأسرة الإسلامي في سيلانجور 2003). بحث الرسالة. برنامج دراسة الأحوال الشخصية. كلية الشريعة. الجامعة الإسلامية الحكومية مولانا مالك إبراهيم بمالانج. المشرف: د. زين المحمودي، ماجستير.

الكلمات المفتاحية: الحضانة, علم نفس نمو الطفل, مقارنة.

تعتبر الحضانة مسألة في غاية الأهمية، لأنها عملية بناء شخصية الأطفال في الحياة. ويرد تحديد سن المميز في إندونيسيا في مجموعة الأحكام الإسلامية وفي ولاية سيلانجور في قانون الأسرة الإسلامية في سيلانجور لعام 2003. ومن الآثار المترتبة على تحديد سن المميز أن الطفل يمكن أن يختار العيش مع أحد الأبوين عند طلاقهما. والواقع أن النظامين ينصان على أحكام مختلفة لسن المُمَيِّز. ويهتم المؤلف بإجراء تحليل باستخدام نظرية علم نفس نمو الطفل حول تحديد سن المُمَيِّز. ويهدف هذا البحث إلى معرفة أي سن للمميز أكثر مثالية بين إندونيسيا وسيلانجور وفقاً لعلم نفس نمو الطفل.

يندرج هذا البحث ضمن نوع البحوث المعيارية باستخدام نهج القانون المقارن. والمواد القانونية المستخدمة هي مواد أولية وثانوية وثالثية. وتنفذ تقنيات جمع البيانات من خلال دراسات أدبية من مصادر مطبوعة ورقمية مع أساليب التحليل الوصفي ومعالجتها بالاستدلال الاستقرائي.

وتظهر نتائج هذه الدراسة أن سن المحضون وفقاً لمجمع الشريعة الإسلامية هو 12 سنة، بينما يحدد قانون الأسرة الإسلامي في سيلانجور لعام 2003 سن المحضون بـ 7 سنوات للذكور و 9 سنوات للإناث. وتتعلق أوجه التشابه بين هاتين اللائحتين بتقسيم حضانة الطفل، والتزامات النفقة، والرعاية بعد الأم، وحق الطفل في الاختيار، والظروف الاجتماعية. أما أوجه الاختلاف بين هاتين اللائحتين فهي من حيث قوة الأساس القانوني، وتحديد سن الحضانة، ومتطلبات الحاضنين، وصيانة ممتلكات الطفل، ونقل حضانة الطفل. ويعتبر علم النفس التنموي أن السن المثالي لاختيار الطفل بين 7 سنوات و 12 سنة يبدأ من سن 12 سنة، حيث يعتبر النمو المعرفي والاجتماعي للطفل كافياً لحسن الاختيار.

CHAPTER I

INTRODUCTION

A. Background of Study

Hadhanah is an important thing in family life, because it is the foundation of children in living in society later. Some important aspects in the implementation of *hadhanah* that must be considered are related to the age limit of *hadhanah* obligations on children or the age limit of children said to be *mumayyiz* and how *hadhanah* on children whose parents are divorced.

Some examples are like the divorce case of Venna Melinda and Ivan Fadilla in Indonesia, both of whom are public figures. Their divorce case became the public spotlight because they had been married for 18 years and had 2 children, namely Varrell Bramasta who was 17 years old and Athalla Naufal who was 14 years old at the time of the divorce decision. The South Jakarta Religious Court's judge decided that child custody fell to both of them, considering the age of the two children who had reached the age of *mumayyiz*.¹

Another case related to child custody battles occurred with Indonesian public figures Tsania Marwa and Atalarik Syach who divorced in August 2017. The divorce verdict stated that the custody of their two children, the first a 5 years old boy and the second a 2 years old girl or not

¹ Rizky Aditya Saputra, "Venna Melinda Dan Ivan Fadilla Resmi Bercerai," March 2014, <https://www.liputan6.com/showbiz/read/2024410/venna-melinda-dan-ivan-fadilla-resmi-bercerai>.

yet *mumayyiz*, went to Atalarik. Tsania as the mother also filed a lawsuit in March 2019 and the Cibonong Religious Court's decision in September 2019 partially granted the claim by giving custody of the girl to Tsania and the boy remained in Atalarik's hands. Furthermore, Atalarik appealed again for their two children, but in February 2021 the Cibonong Religious Court decided on the custody of the two children to Tsania because the two children were still under 12 years old. Even so, Atalarik still did not want to give his children to Tsania so that there was a forced pick-up in April 2021 by Tsania and also Court officials but was not successful and actually regretted the attitude of the court officials for not considering the psychological aspects of his children.² Until now, the two children still live with Atalarik, and Tsania said she had not been able to bring her child because it was prohibited, but Atalarik denied it by saying that he had never prohibited the meeting of mother and child since the beginning of the divorce.³

Next, a case of juvenile delinquency due to parental divorce experienced by a child with the initials AS (name disguised by previous researchers) in Kolongan Village, Kalawat Sub-District, Minahasa Regency, aged 15 years which has entered the age of *mumayyiz*. The AS child was found to often commit negative actions such as consuming

² Pramesti Rizki, February 2022, <https://www.tribunnews.com/seleb/2022/02/08/5-tahun-tak-bisa-kumpul-dengan-kedua-anaknya-tsania-marwa-sempat-stress-aku-dalam-tahap-menerima>.

³ Corry Wenas, Desember 2022, <https://www.grid.id/read/043607217/atarik-bantah-batasi-anak-anaknya-bertemu-dengan-tsania-marwa-dari-awal-gak-pernah-melarang?page=all>.

alcohol, smoking, and stealing. He also felt neglected by his parents for leaving him, which also had an impact on the child's violent and naughty behavior in his environment so that he was shunned by the surrounding community and lost interest in learning. The child does this to cover up his disappointment with his parents.⁴

Another case in Malaysia is the presence of a *mumayyiz* child in the mediation process of the parents' divorce. In the case of Nor Atiqah and Adam, the officer called their 14 years old son to the mediation process to give his views on his upbringing and to give the child a choice. The boy then expressed his desire to live with his mother rather than his father, due to his father's non-Muslim family.⁵

Then, in the case of Julisafarina's divorce from Mohd Jamil, both parties have agreed to call their 13 years old daughter and 7 years old son to attend the mediation process through the google meet application due to covid 19. Both children agreed to choose to be taken care of by the mother and the father still has the right to visit them according to the mutually agreed time as long as it does not interfere with the children's learning activities.⁶

⁴ Julio M. J. Ukoli, Joffie H. Mandang, and Great E. Kaumbur, "DINAMIKA PSIKOLOGIS REMAJA AWAL KORBAN PERCERAIAN ORANG TUA YANG MELAKUKAN KENAKALAN REMAJA DI MINAHASA UTARA," *PSIKOPEDIA* 1, no. 1 (December 15, 2022): 48–50, <https://doi.org/10.53682/pj.v1i1.1751>.

⁵ Shanizah Ngatiman, Nurhidayah Muhammad Hashim, and Zuliza Mohd Kusrin, "THE PRESENCE OF MUMAIYIZ CHILDREN IN MAKING A CHOICE IN HADHANAH CASES: A STUDY OF THE PRACTICE OF MAJLIS SULH IN SELANGOR SHARIAH COURT" 31, no. 2 (2023): 42.

⁶ Ngatiman, Hashim, and Kusrin, 42.

Another case relating to the transfer of child custody in Selangor was between Abdul Shakir bin Sheikh Abdul Kadir and Norhayati binti Harun, who were divorced in 2006 and their child Siti Syarah who was 9 years old and the custody of the child fell to both of them. The mother later married a foreigner and settled abroad, so the ex-husband demanded that the child live with him. The ex-wife requested that the child choose who to live with. The judge then considered giving the child a choice of *hadhanah* rights between the two parents considering that the child had reached the age of *mumayyiz*. The judge then decided that the child would live with his father because it was her choice and in view of the mother's inability to carry out *hadhanah*.⁷

These cases show the role of children in determining custody when their parents divorce. Children who have reached the age of *mumayyiz* can make their own choice to live with one of their parents. The judge also has a big role in considering the age and ability of the child to choose between the two parents. Seeing the magnitude of the child's role, it is interesting to see the perspective of child development psychology related to the ability and capacity of children in deciding important things in their lives.

The governments of Indonesia and Selangor have issued provisions governing the implementation of *hadhanah* for children. Indonesia contains provisions on *hadhanah* in Presidential Instruction Number 1 of 1991 concerning the Islamic law compilation while the State of Selangor contains

⁷ “KES_KES_HADHANAH.Pdf, <http://fsu.usim.edu.my/wp-content/uploads/2019/09/Kes-Kes-Hadhanah-Di-Mahkamah-Syariah-MCM.pdf>” n.d.

provisions on *hadhanah* in Enactment Number 2 of 2003 Selangor Islamic Family Law. However, there are differences in terms of legal force and the provisions contained in the application of *hadhanah* from each regulation.

Previously, the Indonesian government had regulated matters relating to domestic life in Law Number 1 Year 1974 on Marriage, including childcare. The matters regulated in this law include divorce, the rights and obligations of parents and children, the position of children, as well as guardianship and power of attorney over children and do not discuss in detail the age limit of *mumayyiz*. The author then finds that the rules regarding this matter are contained in the Islamic Law Compilation, so that it can be used as a comparison with the Enakmen of the Selangor Islamic Family Law which also contains provisions regarding the age of *mumayyiz*.

One of the differences in provisions that have been highlighted in relation to *hadhanah* is in terms of determining the age of the child who is considered capable of distinguishing between good and bad or at what age the child can be said to be *mumayyiz*. This *mumayyiz* age limit has implications for several things, one of which is when the parents divorce. This includes how the division of duties in custody after divorce. Both the Islamic law compilation and Enactment Number 2 of 2003 Selangor Islamic Family Law, each has regulated these provisions.

Basically, Indonesia and Malaysia have different forms of state and legal systems. Indonesia's state form is a Republic, while Malaysia implements a Federal or Monarchical state form which affects the use of

legal systems in both countries. The legal system adopted by Indonesia is a Dutch colonial legacy, namely civil law or Continental Europe which is still growing, developing and influencing various existing legal concepts.⁸ Meanwhile, the legal system adopted by Malaysia is common law which is a British legacy that spread to the Malay peninsula and left a permanent legacy in the political field and legal institutions in Malaysia. But Malaysia retains Malay customary law which has a direct link to its feudal background, inseparable from the British legal ethos, culture, traditions and philosophy.⁹

These differences, according to the author, are important to be studied further in order to add insight to parents in terms of *hadhanah* to children, in order to produce a family that is *sakinah*, *mawaddah*, *warahmah* as the main purpose of marriage. The author also focuses this research on how child developmental psychology views the appropriate and good age of *hadhanah* for children by considering aspects of *maslahah* for children.

B. Problem of Study

Based on the background that has been described, the problems that will be discussed in this research are:

1. What are the similarities and differences between the *hadhanah* provisions in Islamic Law Compilation and Islamic Family Law Enactment Number 2 in Selangor 2003?

⁸ Firdaus Muhamad Iqbal, "KONTRIBUSI SISTEM CIVIL LAW (EROPA KONTINENTAL) TERHADAP PERKEMBANGAN SISTEM HUKUM DI INDONESIA," *Jurnal Dialektika Hukum* 4, no. 2 (December 15, 2022): 193, <https://doi.org/10.36859/jdh.v4i2.1120>.

⁹ Narulita Yusron, trans., *Perbandingan Sistem Hukum* (Jakarta: Nusa Media, 2010), 179.

2. What is the Child Developmental Psychology's View of the Age of *Mumayyiz* Determination in the Islamic Law Compilation and the Islamic Family Law Enactment Number 2 in Selangor 2003?

C. Objective of Study

Based on the problem formulation above, the objectives of this research are as follows:

1. To explain the similarities and differences between *hadhanah* provisions in Islamic Law Compilation and Islamic Family Law Enactment Number 2 in Selangor 2003.
2. To find out the view of child developmental psychology regarding the determination of the age of *mumayyiz* in the Islamic Law Compilation and Islamic Family Law Enactment Number 2 in Selangor 2003.

D. Significance of the Study

1. Theoretical Significances

This research is expected to increase knowledge for the academic community at the Faculty of Sharia in particular and Maulana Malik Ibrahim State Islamic University Malang in general. This research is also expected to provide information for the wider community about how the comparison of custody provisions according to the Islamic Law Compilation in Indonesia and Enactment Number 2 of 2003 Selangor Islamic Family Law, and can be used as a reference for further research.

2. Practical Significances

The results of this research in the form of a thesis are used as a requirement to obtain a Bachelor of Law degree at the Faculty of Sharia, Maulana Malik Ibrahim State Islamic University Malang.

E. Definitions of Key Terms

In order to provide understanding to readers, the author presents several understandings related to the title of this research:

1. *Hadhanah* Provisions

Hadhanah provisions in this research means the mandatory age of *hadhanah* or the age at which a child can be said to be *mumayyiz* in each regulation. This has implications for the determination of child custody after the divorce of both parents, because children who are *mumayyiz* can choose with whom they live and how they are received and the psychological impact on the child.

2. Perspective of Child Developmental Psychology

Perspective of child developmental psychology used by author as an analytical knife to find which provision is more ideal between the Islamic Law Compilation and Enactment 2 Year 2003 of the Selangor State Islamic Family Law to be applied.

F. Research Method

1. Type of Research

This research is included in the type of normative legal research or literature review because this research is carried out using literature in the

form of books, journals, books of fiqh, etc. Terry Hutchinson states that normative legal research can also be called doctrinal legal research, which is research that provides a systematic explanation of the rules governing a particular legal category, analyzes the relationship between regulations, and explains areas of difficulty and may predict future development. Normative legal research serves to provide juridical argumentation when there is a vacuum, vagueness, and conflict of norms. Normative legal research also plays a role in maintaining the critical aspect of legal science.¹⁰

Peter Mahmud Marzuki explains that normative legal research is a process of looking for legal regulations, legal principles, or legal doctrines that can provide answers to the legal problems at hand. Meanwhile, Soerjono Soekanto and Sri Mamudji describe normative legal research as a form of legal research conducted through an investigation of library sources or secondary data alone.¹¹

The object of this research is to compare the similarities and differences of *hadhanah* provisions in Indonesia and Selangor, Malaysia. The provision of *hadhanah* in Indonesia is regulated in the Islamic Law Compilation while in Selangor, Malaysia it is regulated in Enactment Number 2 of 2003 Selangor Islamic Family Law. This research belongs to

¹⁰ Djulaeka, Devi Rahayu, *Buku Ajar Metode Penelitian Hukum* (Surabaya: Scopindo, 2019), https://www.google.co.id/books/edition/BUKU_AJAR/aIrUDwAAQBAJ?hl=en&gbpv=1&dq=metodologi+penelitian+hukum+normatif&printsec=frontcover.

¹¹ Imam Jalaludin dkk, *Metodologi Penelitian Hukum* (Serang: Sada Kurnia Pustaka, 2023), https://www.google.co.id/books/edition/Metodologi_Penelitian_Hukum/6OO8EAAAQBAJ?hl=en&gbpv=1&dq=metodologi+penelitian+hukum+normatif+soekanto&printsec=frontcover&bsh=ri mc/1.

the normative research type because it discusses how the regulation of a particular matter, which in this research is *hadhanah* in Indonesia and the State of Selangor in Malaysia. This research also compares how the similarities and differences of the two regulations and will be further analyzed using the perspective of child developmental psychology to find which provisions are more ideal to apply. Therefore, based on the definition of normative research that has been described previously, this research is very appropriate to be categorized into normative research.

2. Research Approach

This research uses a comparative approach, because it will compare how the provisions of *hadhanah* according to applicable law in Indonesia and the State of Selangor. The comparative legal approach is one way in normative research to compare the law of one institution with the law of another institution. From this comparison, elements of differences and similarities can be found from both due to differences in climate, atmosphere and history of each nation concerned with different legal systems.¹² This approach is used so that researchers can find similarities and differences between the Islamic Law Compilation and Enactment Number 2 of 2003 Selangor Islamic Family Law in terms of regulating *hadhanah*.

¹² Jhonny Ibrahim, *Teori Dan Metodologi Penelitian Hukum Normatif* (Malang: Bayumedia, 2007), 313.

3. Legal Material

Normative legal research writing uses data collection techniques by conducting literature studies on legal materials. The legal materials referred to in normative legal research can be divided into three groups, namely primary legal materials, secondary legal materials, and tertiary legal materials.¹³

a. Primary Legal Material

Primary legal materials are legal materials that are authoritative or have authority. Primary legal materials consist of legislation, official records or minutes in the making of legislation and judicial decisions. Specifically, this research uses legal materials in the form of Presidential Instruction Number 1 of 1991 concerning the Islamic Law Compilation, and Enactment Number 2 of 2003 Selangor Islamic Family Law.¹⁴

b. Secondary Legal Materials

Secondary legal materials are legal materials in the form of all law-related publications including textbooks, legal dictionaries, legal journals, and comments on court decisions.¹⁵ The books used are those that contain the basic principles of legal science and the classic views of scholars and scholars related to the issues discussed which is about the application of *hadhanah*, including fiqh and psychology books.

¹³ Soerjono Soekanto, Sri Mamudji, *Penelitian Hukum Normatif* (Jakarta: Raja Grafindo Persada, 2006), 33.

¹⁴ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2021), 181.

¹⁵ Marzuki, *Penelitian Hukum*, 183.

c. Tertiary Legal Materials

Soerjono Soekanto classifies tertiary legal materials as legal and non-legal tertiary. Tertiary legal materials are books, legal dictionaries, legal encyclopedias, legal magazines, and others, while non-legal tertiary materials include books, journals, and discussions that come from outside the legal field such as sociology, economics, politics, philosophy, and others.¹⁶ Peter Marzuki explained that non-legal materials that can be used to support primary and secondary legal materials are books on political science, economics, philosophy, sociology, culture, non-legal research, and non-legal journals as long as they have relevance to the research topic.¹⁷

4. Legal Material Collection

The data collection method used in this research is a descriptive analysis method, namely by collecting legal materials in the form of laws and regulations, judges' decisions, law books, previous research from both Indonesia and Malaysia which have relevance to the research topic.¹⁸

5. Analysis of Material

The data in this research is processed by using deductive reasoning on legal materials that have been collected systematically, namely selecting legal materials based on their classification so that they can be arranged in sequence. In addition, the descriptive method is used to describe the results of the research in order to answer the problems in this research.

¹⁶ Soerjono Soekanto, Sri Mamudji, *Suatu Tinjauan Singkat*, 33.

¹⁷ Marzuki, *Penelitian Hukum*, 183–184.

¹⁸ Peter Mahmud Marzuki, 238–139.

G. Previous Study

Previous research is a research that has been completed by researchers before the author, the purpose of the existence of previous research is as a reference in research by looking at the differences and similarities between research written by the author and research that has previously been conducted based on studies in the discussion of research. As a comparison, the author takes several studies that have similarities in the type of problem and discussion with the aim of proving that this research has not been carried out by previous researchers. So the author found several research results related to the discussion that will be researched, among others:

First, 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)”. Thesis of Islamic Family Law Study Program, Faculty of Sharia, Maulana Malik Ibrahim State Islamic University Malang 2017. This thesis contains a discussion of the comparison of *hadhanah* rules in Indonesia and the State of Malacca based on the regulations that apply in both. The research method used in this research is normative juridical with a comparative approach. The result of this research is that there are differences in the legal power of *hadhanah* in Indonesia and Melaka, and there are differences in several aspects of the legal determination.

Second, Arie Angga Saputra. “Pemeliharaan Anak (*Hadhanah*) Terhadap Orang Tua Yang Berbeda Agama Di Kuwait Dan Indonesia”. Thesis of Family Law Study Program, Faculty of Sharia and Law, Syarif Hidayatullah State Islamic University Jakarta 2022. This thesis contains a discussion of how the regulation of *hadhanah* against parents of different religions in Kuwait and Indonesia, then what influences the formation of family law legislation specifically discussing child custody (*hadhanah*) in Kuwait and Indonesia, and the factors that cause differences in *hadhanah* against parents of different religions in Kuwait and Indonesia. The research method used is a literature review with a comparative approach. The results of this study indicate that there are differences in the provisions of *hadhanah* for parents of different religions, Kuwait clearly regulates the differences in religion of parents (*hadhanah* holders) in the custody of their children, namely in article 192 of Law No. 51 of 1984 concerning al-Ahwal al-Syakhsyah explicitly explaining that a non-Muslim mother is entitled to custody while in Indonesia according to the Marriage Law and Islamic Law Compilation does not clearly regulate the *hadhanah* of parents of different religions. However, both give a clear emphasis that the caregiver is a person who can be trusted in matters of maintenance and moral education in children. The factor that causes the difference in the law of the two is the difference in the mazhab adopted, Kuwait adheres to the Maliki mazhab while Indonesia adheres to the Shafi'i mazhab.

Third, Ahmat Taufik Hidayat, “Pelaksanaan *Hadhanah* Panti Asuhan Perspektif *Maqashid Syariah* Jasser Auda (Studi Panti Asuhan Assidiqi Asy-Syuhada Kelurahan Pandanwangi Kecamatan Blimbing Kota Malang). Magister Thesis of Master of Islamic Family Law Study Program, Faculty of Sharia, Maulana Malik Ibrahim State Islamic University Malang 2021. This thesis contains a discussion of how the care of children who are in foster care and its effect on children and analyzes the implementation of *hadhanah* from the perspective of *maqashid sharia* Jasser Auda. This type of research is empirical research. The results of this study indicate that the Assidiqi Asy-Syuhada Orphanage, Pandanwangi Village, Blimbing Subdistrict, Malang City has provided care to all children with the fulfillment of adequate education, protection and health rights. The influence on children is also good as seen from their independence and fulfillment of good responsibilities. The implementation of *hadhanah* in this place has also been in accordance with the six categories of Jaseer Auda's cognitive character.

Forth, Badriyah, “Pertimbangan Hakim di Indonesia dan Malaysia dalam Memberikan Hak *Hadânah* Kepada Ayah Perspektif *Maslahah* dan Keadilan Gender”. Magister Thesis of Family Law Master Study Program, Faculty of Sharia and Law, Syarif Hidayatullah State Islamic University Jakarta 2022. This research contains discussions related to how the consideration of judges in making decisions on custody of children who are not yet *mumayyiz* to fathers in Indonesia and Malaysia. This type of research

is normative with juridical comparison and uses a case approach by analyzing the judge's argument in making a decision. The results of this research are that first, the argument of the plaintiff and the defendant is the incompetence of each party in custody, second, not all decisions on custody cases in the Indonesian Religious Courts are based on the principle of *maslahah* in contrast to the Malaysian Sharia Court, and the reason for the judge to give custody to the father is the best interests of the child. Third, the female presiding judge has a more intolerant attitude towards women who cannot prove their primacy towards children.

Fifth, Nihlatusshoimah, “Hak Hadhanah Anak yang Belum *Mumayyiz* kepada Ayah Kandung (Menurut Pasal 105 Kompilasi Hukum Islam dan Pasal 10 Undang-Undang Nomor 23 Tahun 2001 tentang Perlindungan Anak”. Thesis of Islamic Family Law Study Program, Faculty of Sharia, Maulana Malik Ibrahim State Islamic University Malang 2010. This research discusses how the scientific reasons for determining the age of *mumayyiz* is 12 years old according to Islamic Law Compilation, juristic implications for children, and legal analysis of Islamic Law Compilation and Law Number 23 of 2002 concerning Child Protection against children who are not yet *mumayyiz* in determining *hadhanah* for their choice of biological father. This research uses normative legal research methods with statutory and comparative approaches. The results of this study indicate that Islamic law views children aged six years as capable of understanding their environment and can determine their choice to be cared for by their father,

as long as the father meets the requirements and the mother does not. This is reinforced by Article 10 of Law Number 23 of 2002 concerning child protection which explains that children can express their opinions according to their respective intelligence.

Previous Research Table

No.	Author	Research Title	Similarities	Differences
1.	Fathur Rahman (Thesis of Islamic Family Law Study Program, Faculty of Sharia, Maulana Malik Ibrahim State Islamic University Malang 2017)	“The Regulation of Hadlanah in Indonesia and Malaysia (Comparative Study of Islamic Law Compilation and Islamic Family Law (State of Malacca) Enactment 2002)”.	- Using normative research with a comparative approach - The core of the discussion is both about hadhanah regulation	Comparing the Islamic Law Compilation with Enakmen Negeri Melaka while the author compares the Islamic Law Compilation with Enakmen Negeri Selangor which there are differences in the provisions in Melaka and Selangor.
2.	Arie Angga Saputra (Thesis of Family Law Study Program, Faculty of Sharia and Law, Syarif Hidayatullah State Islamic University Jakarta 2022)	“Pemeliharaan Anak (<i>Hadhanah</i>) Terhadap Orang Tua Yang Berbeda Agama Di Kuwait Dan Indonesia”.	The main point of discussion is the comparison of hadhanah laws in two different countries.	Comparing the custody provisions of children from parents with different religions in Indonesia and Kuwait, while the author compares the provisions of the age of <i>mumayyiz</i> in Indonesia and the State of Selangor.
3.	Ahmat Taufik Hidayat (Magister Thesis of Master of Islamic Family	“Pelaksanaan <i>Hadhanah</i> Panti Asuhan Perspektif <i>Maqashid Syariah</i>	Discusses how hadhanah is practiced in Indonesia	Using empirical research, while the author uses normative research.

No.	Author	Research Title	Similarities	Differences
	Law Study Program, Faculty of Sharia, Maulana Malik Ibrahim State Islamic University Malang 2021)	Jasser Auda (Studi Panti Asuhan Assidiqi Asy-Syuhada Kelurahan Pandanwangi Kecamatan Blimbing Kota Malang)".		2. Analyzing the application of hadhanah in one of the orphanages, while the author analyzes the Indonesian and Selangor regulations on hadhanah from the perspective of child developmental psychology.
4.	Badriyah (Magister Thesis of Family Law Master Study Program, Faculty of Sharia and Law, Syarif Hidayatullah State Islamic University Jakarta 2022)	"Pertimbangan Hakim di Indonesia dan Malaysia dalam Memberikan Hak <i>Hadânah</i> Kepada Ayah Perspektif <i>Maslahah</i> dan Keadilan Gender".	1. Using normative research with a comparative approach	1. Comparing judges' decisions on the determination of child custody in Indonesia and Malaysia while the author compares <i>hadhanah</i> regulations in Indonesia and Selangor.
5.	Nihlatusshoimah (Thesis of Islamic Family Law Study Program, Faculty of Sharia, Maulana Malik Ibrahim State Islamic University Malang 2010)	"Hak Hadhanah Anak yang Belum <i>Mumayyiz</i> kepada Ayah Kandung (Menurut Pasal 105 Kompilasi Hukum Islam dan Pasal 10 Undang-Undang Nomor 23 Tahun 2001 tentang Perlindungan Anak)".	1. Comparing hadhanah provisions between two regulations	1. Comparing the Islamic Law Compilation with the Child Protection Law, while the author compares the Islamic Law Compilation with Enakmen Negeri Selangor.

Table 1

H. Structure of Discussion

In writing this research, the author will divide it into 5 sub-sections using the following systematics:

CHAPTER I INTRODUCTION

This thesis begins with an introduction that examines the background of the problems raised by the author, problem formulation, research objectives, theoretical framework, research methods, and writing systematics that serve to provide an overview of the research to be carried out.

CHAPTER II LITERATURE REVIEW

This section contains a comprehensive presentation of the theory related to this research, namely the theory of comparative law which will be used as an analytical knife in examining the problems taken.

CHAPTER III DISCUSSIONS OF RESEARCH FINDINGS

This section contains an explanation of the results of the research conducted by the author including how the provisions of *hadhanah* in the Islamic Law Compilation and Year 2003 Islamic Family Law Enactment 2 in Selangor and how the differences and similarities of the two provisions and the things behind the differences are analyzed using the perspective of child developmental psychology.

CHAPTER IV CONCLUTION AND SUGGESTION

The closing section contains conclusions from the results of research conducted by the author. There are also suggestions that contain academic

suggestions for institutions and researchers themselves as well as future research.

CHAPTER II

LITERATURE REVIEW

A. *Hadhanah*

The word *Hadhanah* according to Shaykh Hasan Ayyub in his book "Family Fiqh" comes from the word *hadlana* which means placing something between the armpits and the navel. This definition applies equally to mother animals who protect their children and humans who protect their children in their arms. More precisely *hadhanah* means maintenance and education by guarding, leading, and regulating all things that children are not yet able to regulate themselves.¹⁹

Etymologically the word *hadhanah* is similar to the word *al-janb* which means beside or under the armpit, it can also mean putting something near the ribs, like carrying and putting something in the lap. The intention is to take care of a child who is not yet *mumayyiz* or not yet capable of acting legally, including adults who lose their minds, because they are not yet able to do a need independently. In terminology, Zahabi explains that *hadhanah* is education provided by people who are entitled to small children to improve their personality at a certain age where the child cannot do it himself.²⁰

¹⁹ Muhammad Farid, "Metode Istimbath hukum Imam Mazhab tentang Hadhanah," *Al-Gharra Jurnal Ilmu Hukum Dan Hukum Islam* 1, no. 1 (2023): 15.

²⁰ R Zainul Mushthofa and Siti Aminah, "Implementasi Pasal 149 (D) Kompilasi Hukum Islam Tentang Kewajiban Ayah Dalam Memberikan Biaya Hadhanah Bagi Anak Di Bawah Usia 21 Tahun," *Jurnal Ummul Qura*, no. 2 (2019): 4.

Fiqh scholars define *hadhanah* as the care of young children, both male and female, or those who have grown up but are not yet able to provide something related to their good, keeping them from something that hurts and damages them. Sayyid Sabiq also explained that *hadhanah* is taking care of young children, both men and women or children who are grown up but not yet *mumayyiz* without the will of anyone, guarding against something that hurts and damages them, educating physically and spiritually so that they are able to stand alone to face life and assume their responsibilities.²¹

B. Islamic Law Compilation

1. The Definition of the Islamic Law Compilation

The word compilation itself has not been used and found widely in Indonesia. Another word that has a similar meaning and is commonly used in Indonesia is codification. In practice, codification has fundamental differences with compilation. The formation of a book of laws or statutes, which in Dutch is called *wet* or *wetboek*, goes through a special procedure and is binding at the level of certain laws and regulations applicable in Indonesia. In contrast to the compilation, which has a variety of legal materials and the procedure for making it does not refer to certain rules of the level of legislation.

²¹ R. Zainul, Siti Aminah, "Implementasi Pasal 149 (D) Kompilasi Hukum Islam Tentang Kewajiban Ayah Dalam Memberikan Biaya Hadhanah Bagi Anak Di Bawah Usia 21 Tahun", *Ummul Quro*, no.2(2023), 4-5

The term compilation is taken from the Latin *compilare* which means to collect together, such as collecting regulations that are scattered everywhere. According to the Complete Indonesian-English English-Indonesian Dictionary by S.Wojowasito and WJS Poerwadarminta, it is stated that the word compilation means an organized framework and excerpts from other books. Based on this, it can be concluded that compilation is a collection activity of various written materials taken from various books / writings on a particular issue.

The Islamic Law Compilation is a summary of various legal opinions in various books written by Fiqh scholars that can be used as a reference in the Religious Courts to be compiled. These legal materials are processed through certain methods and then formulated in a form similar to other laws and regulations. This material is then determined to be valid by Presidential Decree in Presidential Instruction Number 1 of 1991 to be used by Religious Court Judges in examining, adjudicating, and deciding a case.²²

The Islamic Law Compilation describes the provisions of *hadhanah* in Chapter XIV on Child Maintenance, starting from Articles 98 to 106 which contain provisions related to the age limit of adulthood, child validity, child origin, breastfeeding, divorce conditions, and parental obligations during the *hadhanah* period.

²² Mahkamah Agung RI, *Himpunan Peraturan Perundang-Undangan Yang Berkaitan Dengan Kompilasi Hukum Islam Dengan Pengertian Dalam Pembahasannya*, (Jakarta, 2011), 1–5.

2. Position of the Islamic Law Compilation in Indonesia

The compilation of the Islamic Law Compilation began in 1985, initiated by the Supreme Court and the Ministry of Religious Affairs. The Supreme Court as the highest institution is tasked with conducting technical judicial guidance to all courts in Indonesia, including the Religious Courts. In its guidance, the Supreme Court saw several shortcomings in the Religious Courts, namely the legal basis whose existence was not uniform and not strong, and the absence of a clear legal book used as a guide in resolving cases. Thus the birth of Presidential Instruction No. 1 of 1991 issued by the President of the Republic of Indonesia to the Minister of Religious Affairs which contains an order to distribute the Islamic Law Compilation consisting of 3 chapters or books; Book I on Marriage, Book II on Inheritance Law and Book III on Trust Law and is the first codification of Islamic law in Indonesia.²³

The Chief Justice of the Supreme Court and the Minister of Religious Affairs on 21 March 1985 socialized the Islamic Law Compilation with the aim of becoming written guidelines for judges in Religious Courts throughout Indonesia. This was welcomed and supported by the scholars who then discussed it to produce *ijma'*. The availability of the Islamic Law Compilation is considered as the government's response to public unrest due to the various decisions of the Religious Courts for the

²³ Asep Ajidin, "Politik Hukum Kompilasi Hukum Islam (KHI) Dalam Sistem Hukum Nasional," *Mediation: Journal of Law*, 4, 1 (Desember 2022): 46.

same case. The Islamic Law Compilation is a legal product dedicated to uniting the various fiqh products scattered in various classical fiqh literature. The birth of the Islamic Law Compilation is divided into two phases, namely the phase of inventorying the main material that becomes the content of the Islamic Law Compilation and the phase of forming the Islamic Law Compilation by adding material derived from Islamic law sources to the legislation in force in Indonesia.²⁴

In addition to the Islamic Law Compilation, the Indonesian government has also made several other regulations, such as Law Number 1 of 1974 concerning Marriage, Law Number 7 of 1989 concerning Religious Courts, and other regulations. The presence of the Islamic Law Compilation is inseparable from the reality and conditions of the contents of the national legal system consisting of the main colonial legislation, customary law, Islamic law, and the law of national legislation products. When the Islamic Law Compilation was not yet widely disseminated, there was no definite clarity regarding what legal material could be used by the Religious Courts to investigate and adjudicate cases of Muslims. Law Number 7 of 1989 concerning Religious Courts that had been passed at that time could not be realized properly.²⁵

²⁴ Fajar Sugianto, Denny Ardhi Wibowo, and Tomy Michael, "KEDUDUKAN INSTRUKSI PRESIDEN REPUBLIK INDONESIA NOMOR 1 TAHUN 1991 TENTANG PENYEBARLUASAN KOMPILASI HUKUM ISLAM DALAM SISTEM HUKUM KEWARISAN INDONESIA," *Jurnal Aktual Justice* 5, no. 1 (June 8, 2020): 26–27, <https://doi.org/10.47329/aktualjustice.v5i1.518>.

²⁵ Ajidin, "Politik Hukum Kompilasi Hukum Islam (KHI) Dalam Sistem Hukum Nasional," 48–49.

The cooperation between the Supreme Court and the Religious Courts was stipulated in a joint decree dated March 21, 1985 No.07/KMA/1985 and Joint Decree No.25 of 1985 concerning the Appointment of the Implementation of the Islamic Law Development Project, with consideration of several things, among others:²⁶

- a) In accordance with the regulatory function of the Supreme Court of Indonesia towards the running of the judiciary in all spheres of justice in Indonesia, especially the Religious Courts, it is necessary to formulate a Islamic Law Compilation which is used as positive law in the Religious Courts.
- b) In order to improve the smoothness of tasks, synchronization, and administrative order in the development of Islamic law through jurisprudence, it is deemed necessary to form a project team consisting of officials of the Supreme Court and the Ministry of Religious Affairs.

Another opinion states that there are three considerations for the birth of the Islamic Law Compilation, among others:

- a) The regulation of Muslim marriages in Indonesia before the birth of the Marriage Law was regulated by religious law which when viewed in terms of its material, came from the shafi'i madhhab.

²⁶ Imanuddin, "KEDUDUKAN KOMPILASI HUKUM ISLAM (KHI) SEBAGAI NORMATIVE CONSIDERATIONS HAKIM PENGADILAN AGAMA," *Jurnal Waqfa* 11, no. 3 (2020): 5.

- b) The formalization of the Marriage Law, which applies to all religions in Indonesia, attracts attention because it does not contain all marriage material as in fiqh munakahat.
- c) The provisions contained in fiqh munakahat also come from various madhhabs, giving rise to different opinions. So the Islamic Law Compilation was born in order to unite some of these opinions into a collection of Islamic law.

The Minister of Religious Affairs mentioned that this is both an opportunity and a challenge for Islamic scholars and Islamic law experts, whether Islamic law can be applied in Indonesia or not. Islamic observer Dr. Mitsoo Nakamura regards this compilation project as very strategic and important for Muslims.²⁷ This long process of compiling the Islamic Law Compilation then resulted in Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Islamic Law Compilation with a date stamped June 10, 1991 issued by the President of the Republic of Indonesia Soeharto by giving instructions to the Minister of Religious Affairs to disseminate the Islamic Law Compilation and implement these provisions properly and responsibly. Forty days later, the Minister of Religious Affairs issued Decree of the Minister of Religious Affairs of the Republic of Indonesia Number 154 of 1991 concerning The Implementation of the

²⁷ RI, *Himpunan Peraturan Perundang-Undangan Yang Berkaitan Dengan Kompilasi Hukum Islam Dengan Pengertian Dalam Pembahasannya*, 21.

Presidential Instruction of the Republic of Indonesia Number 1 Year 1991 dated June 10, 1991 which was enacted on June 22, 1991.²⁸

Musdah Mulia explained in general three main objectives of Islamic family law reform in various countries; first, as a binding legal unification in order to reduce the disputes of various schools of Islamic law, second, to improve the status of women, third, as a response to the advancement of the times that affect all aspects of human life.²⁹

Attamimi explained that the legal basis of the Presidential Instruction is Article 4 paragraph (1) of the 1945 Constitution, the President's power to hold the power of state government. The preamble to the instruction implicitly states that this compilation can be used as a guideline in solving problems related to the fields contained in the Islamic Law Compilation, by the Religious Courts and the people who need it. Based on this, the position of this compilation is only as guidelines and it is not further explained what is meant by guidelines here.³⁰

Basically, the Islamic Law Compilation can be used as legal material in solving problems in the Religious Courts or Syar'iyah Courts faced by Muslims. The phrase can be used implies that it is not obligatory to use or in other words, the Islamic Law Compilation is not obliged to be used by judges as legal material to decide problems or cases in the Religious Courts.

²⁸ Mustafa, "EKSISTENSI KOMPILASI HUKUM ISLAM DAN PROBLEMATIKA PENERAPANNYA DI INDONESIA," *ARJIS* 1, no. 1 (February 2022): 56.

²⁹ "KEDUDUKAN KOMPILASI HUKUM ISLAM (KHI) SEBAGAI NORMATIVE CONSIDERATIONS HAKIM PENGADILAN AGAMA," 8.

³⁰ RI, *Himpunan Peraturan Perundang-Undangan Yang Berkaitan Dengan Kompilasi Hukum Islam Dengan Pengertian Dalam Pembahasannya*, 36.

The Islamic Law Compilation as a result of *Ijma'* from the scholars in the national legislation system is included as an unwritten law that is recognized but not imposed for its existence.³¹ This is precisely not in accordance with what is stated in the background of the preparation of the Islamic Law Compilation, therefore the word guidelines here should mean demands or instructions that must be used by the Religious Courts and the Society.

Based on the above explanation, the Islamic Law Compilation which is the product of a Presidential Instruction is not included in the scope of mandatory regulations for the society. Therefore, it is not wrong if judges in the Religious Courts may not use the Islamic Law Compilation as legal material in making case decisions.

3. *Hadhanah* Provisions in the Islamic Law Compilation

a. Age of Adulthood

The Islamic Law Compilation states in article 98 that the limit for a child to be said to be able to stand alone or become an adult is 21 years old, provided that the child is not physically disabled and has never entered into marriage. Parents represent their minor children in all affairs and actions within the law and outside the court and the Religious Court can appoint another person as a substitute for parents who are unable to do so.

³¹ Sugianto, Wibowo, and Michael, "KEDUDUKAN INSTRUKSI PRESIDEN REPUBLIK INDONESIA NOMOR 1 TAHUN 1991 TENTANG PENYEBARLUASAN KOMPILASI HUKUM ISLAM DALAM SISTEM HUKUM KEWARISAN INDONESIA," 26.

b. Child Validity

A legitimate child according to the Islamic Law Compilation is mentioned in article 99 that a child born within the bonds of a valid marriage is a legitimate child as well. Article 100 mentions that children born outside the marriage of their parents, the child only has a nasab relationship with the mother and the mother's family. Based on Article 101, if the husband denies the validity of the child while the wife does not deny it, the denial can be confirmed by doing li'an. Article 102 further explains that a husband who wants to deny the legitimacy of a child born to his wife can file a lawsuit with the Religious Court within 180 days after the child is born or 360 days after the breakup of the marriage or when the husband finds out that his wife gave birth and is in a place where it is possible to file the case with the Religious Court. A denial filed after the deadline may be rejected by the Religious Court.

c. Origin of the Child

Article 103 mentions that the evidence used to prove the origin of a child is a birth certificate or other evidence, and if there is none, the Religious Court can issue a determination on the origin of a child after conducting an investigation based on valid evidence. This judge's decision then becomes a reference for the Population and Civil Registration Office to produce an official birth certificate.

d. Breastfeeding and Maintenance

Article 104 explains that the father is responsible for all the costs of breastfeeding and if he dies, the burden is placed on the person who is responsible for providing maintenance for the father or the guardian of the father. The breastfeeding period is two years and they can be weaned earlier with the consent of both parents.

e. Transfer of Custody

Article 105 Islamic Law Compilation explains that in the case of divorce, the maintenance of children who are not yet *mumayyiz* or not aged 12 years falls into the hands of the mother and if they are *mumayyiz* then they can choose between their father and mother but the maintenance costs are still borne by the father. Furthermore, the parties who are entitled to replace the mother after death in child maintenance are explained in article 156 that the order is; women in the mother's straight line up, father, women in the father's straight line up, the child's sister, and female relatives from the father's side line.

Mumayyiz children have the opportunity to choose hadhanah from their father or mother. In the situation where the hadhanah holder is apparently unable to ensure the physical and spiritual safety of the child even though the maintenance is fulfilled, at the request of the relative concerned, the Religious Court can transfer the hadhanah rights to another person who is also entitled. All hadhanah expenses are the responsibility of the father according to his ability until the child is grown up and able to take

care of himself or twenty-one years old. All disputes regarding hadhanah and the amount of child maintenance and education are decided by the Religious Court. The Religious Court also has the right to determine the amount of child maintenance costs based on the father's ability.

f. Children's Property

Parents have an obligation to care for and develop the property of their children who have not entered adulthood or are under forgiveness and are prohibited from transferring and mortgaging it unless there is an urgent and important need for the benefit of the child. Parents are also responsible for any losses incurred due to negligence of the obligation to safeguard the property. This is stated in Article 106.

C. Islamic Family Law Enactment Number 2 in Selangor 2003

1. Definition of Islamic Family Law Enactment Number 2 in Selangor 2003

The word enactment comes from the English enactment used by a Western jurist Karl E. Weick to denote the idea that a particular phenomenon (such as an organization) is created by its talk or communication activities. Karl E. Weick is considered the most influential thinker of his generation in the field of organizational studies. Through his writings, he has greatly influenced how organization theory is studied and taught.

Malaysia uses the word enactment to refer to the statutory process of which it is a part and is the agreement that will be the implementation of

the law. In its development, from around 1950 to 1970, there has been attention paid to the formulation of Enactment Perundangan Islam Negeri-Negeri in the form of a compilation. Enactments that had previously been issued separately were brought together in a master enactment. Each country has published its own enactments with different legal content.³² This Selangor Islamic Family Law Enactment applies to all Muslims residing in the State of Selangor and Muslims who are Selangor citizens but not residing in the State of Selangor.

Enactment Number 2 Year 2003 of the Selangor State Islamic Family Law contains several provisions related to Islamic family issues, one of which will be discussed further in this study is about *Penjagaan*. This chapter on Guardianship is contained in Part VII, starting from sections 82 to 88 on *Hadhanah* or Guardianship of Children and sections 89 to 105 on Guardianship of Persons and Property or the transfer of *hadhanah* rights to others.

2. Position of Islamic Family Law Enactment Number 2 in Selangor 2003

Before the British entered Malaysia, the prevailing law was Islamic law mixed with customary law. In 1880 the British recognized the existence of Islamic marriage and divorce laws by introducing the Mohammedan Marriage Ordinance, No.V of 1880 to be enforced in the Straits States (Pulau Pinang, Malacca and Singapore) and the Registration of

³² Mohamad Hakim, "Implementasi Enakmen Undang-Undang Keluarga Islam Negeri Pulau Pinang 2004 Mengenai Batas Umur Pernikahan (Studi Kasus Di Mahkamah Rendah Syari'ah Bukit Mertajam Pulau Pinang)" (Undergraduate Thesis Universitas Islam Negeri Ar-Raniry Darussalam, 2016).

Muhammadan Marriages and Divorces Enactment 1885 for the allied Malay states (Perak, Selangor, Negerisembilan and Pahang). The non-allied Malay states or dependent states (Kelantan, Terengganu, Perils, Kedah and Johor) enacted The Divorce Regulation of 1907.³³

In its application, the Monarchy is the most important part of the enactment of Islamic law in Malaysia, although there are still negative views about this. There are several paradigms regarding Islamic law in Malaysia; firstly, the integralistic paradigm which is an understanding that the role of religion and the state must be united in strengthening the Islamic legislative system where the head of the state is the holder of religious and political power based on the concept of God's justice. Second, the secularistic paradigm which strongly rejects the concept of unification of religion and politics and assumes that state affairs in the political field need to be separated from religious interests and rejects religious considerations in determining a state principle. Third, the symbiotic paradigm which views the existence of a reciprocal relationship between religion and the state, religion needs a state that helps it develop and vice versa.³⁴

The Enactment Number 2 of the Selangor Islamic Family Act 2003 is an Act was originally derived from the Registration of Muhammadan Marriages and Divorces Enactment 1885 which has been compiled in the form of Enakmen Pentadbiran Undang-Undang Islam Selangor 1952,

³³ Yufi Wiyos, "POLITIK (LEGISLASI) HUKUM ISLAM DI MALAYSIA," *IAIN Raden Intan*, n.d., 127.

³⁴ Wiyos, 127–28.

further packaged between 1976 to 1980 before the establishment of Enakmen Keluarga Islam Selangor 1984 and finally became Enakmen Keluarga Islam Selangor 2003. The drafting of this law has been made throughout Malaysia since 1980, where the Malaysian government created the Jawatankuasa Teknikal Undang-Undang Syarak and Sivil which was chaired by Prof. Ahmad Ibrahim, a renowned legislative expert in Malaysia and Singapore.³⁵

An important aspect that was included in the process of drafting the Islamic family law in Malaysia was the polygamy law which followed the concept of the 1960 Pakistan Islamic Family Law Ordinance. The result of the studies conducted by this institution was the adoption of Islamic family law in all Malaysian states, beginning with the Kelantan Islamic Family Code in 1983 and in Selangor in 1984. The Selangor Islamic Family Enakmen of 1984 contains nine main sections, including marriage, registration of marriage, witnesses to the marriage contract, registration of marriage, dissolution of marriage, maintenance of wife, children and others, custody rights (hadhanah), marriage outside the state, child welfare and other sanctions.³⁶

In 2001, there was an effort to harmonize Islamic family law throughout Malaysia with the decision of Majlis Raja-Raja on March 23,

³⁵ Ismail Hassan, "STUDI KOMPERATIF TENTANG HUKUM POLIGAMI MENURUT ENAKMEN KELUARGA ISLAM SELANGOR 2003 DAN AMLA SINGAPURA 2001" (Undergraduate Thesis Universitas Islam Negeri Sultan Syarif Kasim Riau, 2018), 12, <https://repository.uin-suska.ac.id/17429/>.

³⁶ Hassan, 13.

2001 with the content that all Islamic laws including the Islamic Religious Pentadbiran Act, Islamic Family Act, Syariah Court Information Act, Jenayah Procedure Act and Mal Procedure Act throughout Malaysia were harmonized.³⁷

3. *Hadhanah* Provisions in Islamic Family Law Enactment Number 2 in Selangor 2003

a. Maintenance Obligation

Child maintenance in section 73 is explained that it is an obligation of the father unless there is another decision from the court. Whether the child is in the care of the father or someone else in terms of housing, clothing, food, medicine, and good education in accordance with the needs of the child and the ability of the father to finance. If the father dies or his whereabouts are unknown, another person who is in accordance with Sharia is obliged to take responsibility.

b. People Who are Entitled to do *Hadhanah*

Section 82 explains that it is the mother who has the most right to look after her child whether there is still a marital bond or not. If the court decides that the mother is unfit to look after the child then the right of custody is transferred to the following order of parties; maternal grandmother and above, father, paternal grandmother and above, brothers or sisters of the same mother, brothers or sisters of the same mother, brothers or sisters of the same father, daughters of sisters of the same mother,

³⁷ Hassan, 13.

daughters of sisters of the same mother, daughters of sisters of the same father, aunts of the mother, and aunts of the father. This guardianship must take into account the welfare of the child.

In the case of all these guardians, if there are several people at the same level who have the criteria as in sections 83 and 85, the one who loves the child the most is chosen, and if all of them have noble qualities, the oldest is chosen. It is also explained that a man cannot be the guardian of a girl unless he is the mahram of the girl.

c. Requirements for *Hadhanah*

Section 83 explains that a person has the right to educate a child if he is a Muslim, has a perfect mind, is old enough to provide care for the child and the love that the child needs, behaves well and has good character, and has a place to live that can protect the child from bad things that affect the child physically and mentally.

d. Loss of *Hadhanah* Rights

A woman who has the right to care for a child can lose this right under section 84 if she; marries a man who is not related to the child, behaves very badly and publicly, changes her address with the aim of preventing the biological father from meeting the child to fulfill his rights and obligations, leaves the Islamic religion, and neglects or mistreats the child.

e. *Hadhanah* Period

According to section 85, a boy is entitled to receive care until he is seven years old and a girl nine years old, but at the request of the caregiver the court may determine the period of care for a boy until the age of nine years and a girl eleven years. At the end of the custody period, a child who is *mumayyiz* can choose whether to live with his mother or father unless the court decides otherwise. Children born outside of a legal marriage have the right to be cared for by the mother and the mother's family.

f. Custody of Innocent Children

Under section 86 the right of custody of innocent children is to the mother and the mother's siblings.

g. Authority of the Court in Determining the Right of Custody

Section 87 explains the circumstances under which custody of a child may be transferred to another person as set out in several paragraphs. Paragraph 1 explains that the court has the right to order the transfer of custody of the child to another person as stated in section 83, but if there is something detrimental to the child if it is left to these people, then the court can appoint someone other than that to take care of the child by considering the interests of the child. Paragraph 2 explains that in order to decide which party has the right to care for the child, the court must consider the wishes of the father and mother and the wishes of the child when it has reached an age where it can express its own opinion. Paragraph 3 explains that the court must consider the condition of the child in terms of transferring his/her

parental rights. Paragraph 4 explains that where there are two children in the household, the upbringing of both does not have to be concurrent in one party but considers the good of each child. Paragraph 5 explains that the court may order a particular institution to take care of the child through the granting of power of attorney.

h. Order of the Court to Obey the Requirements of Parenting

Section 88 subsection 1 explains that a parenting order must take into account the requirements given by the court in determining who is entitled to parenting. Paragraph 2 explains that the conditions of care can also regulate the conditions of residence, may temporarily surrender the right of care to another person, arrange a meeting schedule for the child who wants to meet with his parents, arrange a meeting schedule for parents who want to meet with their children, and a person who is given the right of care may not take the child out of Malaysia.

i. Persons Entitled to Custody

Section 89 subsection 1 explains that although parental rights can fall to another person, the father is the actual caregiver of the child so that in the event of his death, parental rights fall to the paternal grandfather, the guardian appointed under the father's will, the guardian of the father's guardian, the guardian of the paternal grandfather, the guardian of the guardian of the paternal grandfather provided that they are Muslims, adults, not deprived of reason and health, and trustworthy. Paragraph 2 explains that the biological father is the most entitled to determine what is good and

provide good protection for his children consciously. Paragraph 3 explains that paragraph 1 does not apply if there is a condition that explicitly states that the person is unable to carry out the judge's decision until the court appoints someone else to look after the child's property. Paragraph 4 explains that the person who has the right to take care of the child's property is at least eighteen years old.

j. Appointment of Caregiver by the Court

Section 91 paragraph 1 explains that if no caregivers are found in accordance with the preceding provisions, the Court is obliged to select another person to look after and protect the children and their property by considering the good of the child. Paragraph 2 explains that in considering the good of the child the court shall take into account the age and sex of the child, as well as the character and ability of the person who will receive the right of care and how he relates to the child, and shall also take into consideration the wishes of the child, the deceased parents of the child, and the relationship of the substitute caregiver with the child who is willing to take care of him.

k. Appointment of Mother as Custodian by Wasiat

According to section 92, a mother can be legally appointed as the guardian of the father in terms of property and can exercise her power of care through the father's will, if there are no persons entitled to care for the children under the Act then the mother can be appointed as the guardian by

the Court, and if the mother is not officially appointed by the Court, then she cannot manage the children's property.

l. Custodian with the Mother

Section 93 mentions that if the Court appoints the mother as the caretaker of the children, the Court may also appoint another person to look after the children and their property with the mother.

m. Dismissal of Custodian

Section 95 explains that the Court has the right to revoke the parenting rights of a caregiver if found to be bad in the future and may appoint another person as a replacement.

n. Limitation of Rights for Court Appointed Guardians

According to section 97 sub-section 1, a guardian appointed by the Court without the approval of the Court shall not sell, mortgage, pledge, exchange or otherwise remove ownership of the child's property and tax the child's land within a period of one year. Paragraph 2 explains that if property is removed in the manner described in paragraph 1, the Court shall order the custodian to return the property to the child. Paragraph 3 emphasizes that the Court should not make a decision on the case of paragraph 2 except for the benefit of the child.

o. Care of Orphan Children

Section 103 explains that if the father or grandfather of the child dies without making a will as to who will look after the child, either from the family or local officials and those who have rights as written in the Child

Protection Act 1991, then the child may be brought to the Court and a custodian will be appointed for the child and his property.

p. Court Entitled to Receive Advice on Custody

Section 104 explains that in matters relating to the raising of children the Court may accept advice from persons experienced in the raising of children but is not obliged to follow it.

D. Developmental Psychology of Child

Psychology comes from the Greek language which means the science that studies the soul, both regarding the kinds of symptoms, processes, and backgrounds. The soul is an abstract spiritual life force that is the driving force and regulator of personal actions. Developmental psychology is understood as the changes experienced by individuals or organisms towards their level of maturity that take place systematically, progressively, and continuously, both concerning physical and spiritual matters.³⁸

Another source states that psychology is defined as a science that investigates and discusses mental or mental processes and human actions or behaviors to interact with their environment. Development shows a certain process, namely a process that goes forward and cannot be repeated. In its development, humans experience many changes that are permanent and

³⁸ Alvi Parnawi, *Psikologi Perkembangan* (Sleman: Deepublish, 2021), 1–3, https://books.google.co.id/books?hl=en&lr=&id=bWo-EAAAQBAJ&oi=fnd&pg=PP1&dq=psikologi+perkembangan+remaja&ots=JcXXeEUckX&sig=H8bnhGYp5JUXK47L01ScfQ3vrig&redir_esc=y#v=onepage&q=psikologi%20perkembangan%20remaja&f=false.

cannot be repeated. Developmental psychology is formulated as a science that discusses the psyche and behavior of humans who are in a stage of development, from conception to old age and beyond based on growth, maturity, learning, and experience. Dra. Kartini Karotno in her book explains that developmental psychology is a science that studies human behavior starting from the infant period, play children, school children, adolescence, to the adolescent period before adulthood.³⁹

On another aspect, Al Ghazali classified spiritual development consisting of reason, lust, soul, and spirit into four levels:

- a. Childhood (2 to 6 years). The concept of divinity is taught to children through objects or paintings, as well as applying values and manners in habits.
- b. Late childhood (7 to 12 years). The child's spiritual readiness has begun to stabilize, so that it is allowed to study religion through formal education and begin to practice the pillars of Islam.
- c. Early adolescence (12 to 15 years). Has been able to understand the concept of sin and reward conceptually where the environment has a big role in spiritual development.

³⁹ Kayyis Fithri Ajhuri, *Psikologi Perkembangan* (Penebar Media Pustaka, 2019), 2–5, http://repository.iaiponorogo.ac.id/489/2/LAYOUT%20Buku%20Kayyis_cetak.pdf.

- d. Adolescence (15 to 20 years). Have a strong grip on religion and question the spiritual aspect logically. Sometimes there is a sense of doubt, anxiety, and suspicion about spiritual matters.⁴⁰

The concept of analysis using the perspective of child developmental psychology is carried out by considering aspects of benefit to children. This needs to be considered considering that the purpose of this research is to understand which provisions are more ideally applied by considering aspects of benefit to children. *Maslahah* in this discussion refers to good things that are useful and provide benefits to children. Al-Buthi in his book *Dawabit al-Maslahah fi ash-Syaroah al-Islamiyyah* defines *maslahah* as a benefit that can be taken pleasure, or an action that can prevent badness that produces pleasure. This pleasure can be felt directly, because it is a *fitrah* that humans always want to achieve.⁴¹

The consideration of this *maslahah* is to fulfill the rights of children in the implementation of *hadhanah*. Ibn Qayyum explained that the protection of children's rights is all efforts and prayers made in protecting and fulfilling the needs of children's *fitrah* in every phase of their development to get closer to Allah. Some of the rights that must be fulfilled are pre-birth conception protection, spiritual protection, physical and psychological protection, and protection of human glory. These aspects of

⁴⁰ Andi Thahir, *Psikologi Perkembangan*, n.d., 4–5, <http://repository.radenintan.ac.id/10894/1/BUKU%20DARAS%20PSIKOLOGI%20PERKEMBANGAN.pdf>.

⁴¹ Zaenol Hasan, “TEORI MASLAHAH DALAM EKONOMI ISLAM (FIKIH MUAMALAH),” *Al Itmamy* 4, no. 2 (2022): 58.

protection must still be considered by the parents after divorce so that they do not harm the child.⁴²

⁴² Lailan Rafiqah, Sudirman Johan M, and Jumni Nelli, “Konsep Ibnu Qayyim Al Jauziyah Tentang Perlindungan Hak Anak Dalam Keluarga,” *Al Himayah* 4, no. 1 (March 2020): 14.

CHAPTER III

HADHANAH PROVISIONS IN INDONESIA AND MALAYSIA FROM THE PERSPECTIVE OF CHILD DEVELOPMENTAL PSYCHOLOGY

A. Similarities and Differences of Hadhanah Provisions in Presidential Instruction No. 1 of 1991 on the Islamic Law Compilation and Enactment Number 2 of 2003 Selangor Islamic Family Law

The Muslim population in Malaysia currently stands at 63.5% and Indonesia at 86.7% of the total population.⁴³ Therefore, Indonesia and Malaysia are known as countries that are dominated by Islamic culture. The large number of Muslims in both countries has led to a life full of Islamic elements, thus encouraging the governments of both countries to form various regulations based on Islamic law.

The large number of Muslims living in these two countries has an impact on the number of Islamic legal products that both countries produce.⁴⁴ Malaysia itself is a country that makes Islam the official religion of the federation as written in Article 3 paragraph 1 of the 1957 Malaysian Constitution.⁴⁵ One of the legal products that have a big role in Muslim life is the Islamic Law Compilation in Indonesia and the 2003 Selangor Islamic Family Law Enakmen in Malaysia which regulates several important matters related to life from an Islamic perspective, including the provisions

⁴³ Cindy Mutia, "Populasi Muslim Indonesia Terbanyak Di Asia Tenggara, Berapa Jumlahnya?," Oktober 2023, <https://databoks.katadata.co.id/datapublish/2023/10/19/populasi-muslim-indonesia-terbanyak-di-asia-tenggara-berapa-jumlahnya>.

⁴⁴ "Ajaran Islam Banyak Diadopsi Oleh Hukum Indonesia," Agustus 2020, <https://www.unpad.ac.id/2020/08/ajaran-islam-banyak-diadopsi-oleh-hukum-indonesia/#:~:text=Beberapa%20peraturan%20perundang%2Dundangan%20di,dalam%20penerapan%20hukum%20di%20Indonesia>.

⁴⁵ Ramli Makatungkang, "Penerapan Hukum Islam Di Malaysia," *Jurnal Ilmiah Al-Syir'ah*, n.d., 7, <https://dx.doi.org/10.30984/as.v1i1.186>.

regarding *Hadhanah*. Regarding the provisions of *hadhanah*, the two countries have some differences related to its arrangement and implications. Here are some aspects that are important to discuss regarding the comparison of *hadhanah* provisions in Indonesia and Malaysia.

1. Similarities of *Hadhanah* Provisions in Indonesia and Selangor

a. Sharing of Child Custody

Indonesia and Selangor have similarities on how the division of child custody after parental divorce. The Religious Courts in Indonesia and the Shari'ah Court in Selangor have an obligation to make decisions regarding child custody. After divorce, it is the mother who has the right to take care of children who have not reached the age of *mumayyiz*. As stated in the Islamic Law Compilation article 105 point a:

“Dalam hal terjadinya perceraian:

- a. Pemeliharaan anak yang belum *mumayyiz* atau blm berumur 12 tahun adalah hak ibunya;”

Selangor Islamic Family Law also mentioned it in section number 82:

“(1) Tertakluk kepada seksyen 83, ibu adalah yang paling berhak dari segala orang bagi menjaga anak kecilnya dalam masa ibu itu masih dalam perkahwinan dan juga selepas perkahwinannya dibubarkan.”

Imam Syafi'i explains that if a husband has divorced his wife and has a child, then the wife has the rights to take care of their child until the child is seven years old as long as his ex-wife has not remarried another

man. After the age of seven, the child can choose to live with his father or mother as he wishes.⁴⁶

It is mentioned in a hadith narrated by Abu Daud:

عَنْ عَمْرِو بْنِ شُعَيْبٍ , عَنْ أَبِيهِ , عَنْ جَدِّهِ , قَالَ: جَاءَتْ امْرَأَةٌ إِلَى النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ , فَقَالَتْ: إِنَّ ابْنِي هَذَا كَانَ بَطْنِي لَهُ وَعَاءٌ , وَحَجْرِي لَهُ حِوَاءٌ , وَتَدْيِي لَهُ سِقَاءٌ , وَإِنَّ أَبَاهُ يُرِيدُ أَنْ يَنْتَزِعَهُ مِنِّي قَالَ: «لَا أَنْتِ أَحَقُّ بِهِ مَا لَمْ تَزَوَّجِي (رواه أبو داود)

Meaning: Abu Daud narrated from 'Amr bin Shuaib from his father from his grandfather saying "A woman came complaining to the Messenger of Allah (SAW) saying 'O Messenger of Allah, I have made my womb as a place for her to grow, my milk as her drink, my lap as her shelter. Her father has divorced me and suddenly he wants to take her away from me?" The Messenger of Allah said: 'You have more right to her as long as you have not remarried'. (HR. Abu Daud.)⁴⁷

b. Father's Maintenance Obligation

During the custody period, the obligation to provide maintenance lies with the father of the child, for when he is still bound by marriage or is no longer bound by marriage to the mother. As mentioned in the Islamic Law Compilation article 80:

“(4) sesuai dengan penghasislannya suami menanggung :
a.nafkah, kiswah dan tempat kediaman bagi isteri;
b.biaya rumah tangga, biaya perawatan dan biaya pengobatan bagi isteri dan anak;
c. biaya pendidikan bagi anak”

⁴⁶ Mustafa Dieb Al Bigha, *Fiqh Lengkap Imam Syafi'i*, 1st ed. (Yogyakarta: Hikam Pustaka, 2020), 247.

⁴⁷ Al Bigha, 247.

Also mentioned in article 105:

“Dalam hal terjadinya perceraian:

..... c. biaya pemeliharaan ditanggung oleh ayahnya.”

Selangor Islamic Family Law rule the same in section 73:

“(1) Kecuali jika sesuatu perjanjian atau suatu perintah Mahkamah memeruntukkan selainnya, maka adalah menjadi kewajiban seorang lelaki menanggung nafkah anaknya, sama ada anak itu berada dalam jagaannya atau dalam jagaan seseorang lain, sama ada dengan mengadakan bagi mereka tempat tinggal, pakaian, makanan, perubatan dan pelajaran sebagaimana yang munasabah memandang kepada kemampuan dan taaraf kehidupannya atau dengan membayar kosnya.”

c. Custody After Mother

As mentioned before, after the parents are divorced, the mother has more rights over the child's hadhanah. In certain circumstances that do not allow the mother to do so, the right of hadhanah can be transferred to another party. The Islamic Law Compilation in Article 156 states:

“Akibat putusya perkawinan karena perceraian ialah :

- a. anak yang belum *mumayyiz* berhak mendapatkan hadhanah dan ibunya, kecuali bila ibunya telah meninggal dunia, maka kedudukannya digantikan oleh:
 1. wanita-wanita dalam garis lurus ke atas dari ibu;
 2. ayah;
 3. wanita-wanita dalam garis lurus ke atas dari ayah;
 4. saudara perempuan dari anak yang bersangkutan;
 5. wanita-wanita kerabat sedarah menurut garis samping dari ayah.”

The explanation about it also mentioned in Selangor Islamic Family Law section 82:

“(2) Jika Mahkamah berpendapat bahawa ibu adalah hilang kelayakan di bawah Hukum Syarak dari mempunyai hak terhadap hadhanah atau penjagaan anaknya, maka hak itu, tertakluk kepada subseksyen (3), hendaklah berpindah kepada salah seorang yang berikut mengikut susunan keutamaan yang berikut, iaitu

- (a) nenek sebelah ibu hingga ke atas;
 - (b) bapa;
 - (c) nenek sebelah bapa hingga ke atas;
 - (d) kakak atau adik perempuan seibu sebapa;
 - (e) kakak atau adik perempuan seibu;
 - (f) kakak atau adik perempuan sebapa;
 - (g) anak perempuan dari kakak atau adik perempuan seibu sebapa;
 - (h) anak perempuan dari kakak atau adik perempuan seibu;
 - (i) anak perempuan dari kakak atau adik perempuan sebapa;
 - (j) emak saudara sebelah ibu;
 - (k) emak saudara sebelah bapa;
 - (l) waris lelaki yang boleh menjadi warisnya sebagai 'asabah atau residuari:
- Dengan syarat penjagaan orang demikian tidak menjejaskan kebajikan kanak-kanak itu."

As the hadith narrated by Imam Bukhori mention that meaning:

"From Al-Baraa bin Azib r.a that the Prophet SAW has decided in the case of a daughter by Hamzah (in the case of babysitting) for his aunt (his mother's younger sister), and he said "The aunt takes the place of the mother." This hadith shows that the mother's sister is superior to the father of the child in terms of caring for and educating a young child.⁴⁸

d. Granting the Child Right to Vote

At the time of the divorce of the child's parents by the Religious Court and Sharia Court, the judge has the right to give the child who has reached the age of *mumayyiz* the opportunity to choose to live with his father or mother. In this regard, there is another hadith narrated by At-Tirmidhi:

⁴⁸ Ibnu Mas'ud and Zainal Abidin, *Fiqh Madzhab Suafi'i (Edisi Lengkap) Buku 2: Muamalat, Munakahat, Jinayat* (Bandung: Pustaka Setia, 2007), 417.

عَنْ أَبِي مَيْمُونَةَ سُلَيْمَانَ مَوْلَى لِأَهْلِ الْمَدِينَةِ قَالَ كُنْتُ عِنْدَ أَبِي هُرَيْرَةَ فَجَاءَتْهُ امْرَأَةٌ فَقَالَتْ
 إِنَّ زَوْجِي يُرِيدُ أَنْ يَذْهَبَ بِوَلَدِي فَقَالَ أَبُو هُرَيْرَةَ كُنْتُ عِنْدَ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ
 إِذْ جَاءَتْهُ امْرَأَةٌ فَقَالَتْ إِنَّ زَوْجِي يُرِيدُ أَنْ يَذْهَبَ بِوَلَدِي أَوْ بَابْنِي وَقَدْ نَفَعَنِي وَسَقَانِي مِنْ
 بئرِ أَبِي عَنَبَةَ فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ اسْتَهِمَا أَوْ قَالَ تَسَاهَمَا أَبُو عَاصِمٍ
 الشَّكُّ فَجَاءَ زَوْجُهَا فَقَالَ مَنْ يُخَاصِمُنِي فِي وَلَدِي أَوْ فِي ابْنِي فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ
 عَلَيْهِ وَسَلَّمَ يَا عَلَامُ هَذَا أَبُوكَ وَهَذِهِ أُمُّكَ فَخُذْ بِيَدِ أَيْتَهُمَا شِئْتَ وَقَدْ قَالَ أَبُو عَاصِمٍ فَاتَّبَعَ
 أَيْتَهُمَا شِئْتَ فَأَخَذَ بِيَدِ أُمِّهِ فَأَنْطَلَقَتْ بِهِ (رواه الترمذی)

Meaning: From [Abu Maimunah Sulaiman] a former slave of the residents of Medina, he said: I was in the house of Abu Hurayrah when a woman came to him and said: "My husband wants to leave with my son." [Abu Hurairah] then said: "I was with the Messenger of Allah (peace and blessings of Allah be upon him) when a woman came to him and said: "My husband wants to leave with my son - or sons - and my son has benefited me and always fetches water from Abu 'Inabah's well." Then the Messenger of Allah (peace and blessings of Allah be upon him) said: "Let the two of you draw lots." -Or he said: "You should draw lots for each other." Abu 'Ashim was doubtful about the wording of the hadith- Then her husband came and said: "Who will fight me for my son?" The Messenger of Allah (peace and blessings of Allah be upon him) said: "O child, this is your father and this is your mother, take the hand of whichever of the two of them you wish!" The child finally took the hand of his mother, then the woman left with her child." (HR. At Tirmidhi)⁴⁹

This provisions was mentioned in Cimpilation of Islamic Law article

105:

“Dalam hal terjadinya perceraian :

- a. Pemeliharaan anak yang belum *mumayyiz* atau belum berumur 12 tahun adalah hak ibunya;
- b. Pemeliharaan anak yang sudah *mumayyiz* diserahkan kepada anak untuk memilih diantara ayah atau ibunya sebagai pemegang hak pemeliharaanya;

⁴⁹ Musthafa Diib Al-Bugha, *Fikih Islam Lengkap*, 1st ed. (Surakarta: Media Zikir, 2010), 417.

c. biaya pemeliharaan and tanggung oleh ayahnya.”

Selangor Islamic Family Law also mentioned in section 85:

“(2) Setelah tamatnya hak hadinah, penjagaan adalah turun kepada bapa, dan jika kanak-kanak itu telah mencapai umur kecerdikan (*mumaiyiz*), maka kanak-kanak itu adalah berhak memilih untuk tinggal dengan sama ada ibu atau bapanya, melainkan jika Mahkamah memerintahkan selainnya.”

In this context, it is important to consider the welfare of the child's life after the parents divorce. The impact of parental divorce is to give a special burden to the child's psychology.⁵⁰

e. Social Conditions of Both Countries

The differences that occur in the determination of *hadhanah* provisions, especially in terms of the age of *mumayyiz* in Indonesia and Malaysia, are based on differences in the reform of Islamic legal products that occurred in both. The legal system adopted by Indonesia is civil law as a legacy of Dutch colonization while Malaysia adopted the common law system as a legacy of British colonization.⁵¹ The difference in legal systems is what makes the two countries produce different legal products.

Long time before, the *Syafi'i* Mazhab that developed in Indonesia was the result of the process of the entry of Islam in Indonesia around the seventh century brought by Islamic traders from Gujarat and Malabar as loyal adherents of the *Syafi'i* Mazhab. There are various kinds of

⁵⁰ Putri Erika and Hestty Krisnani, “Analisis Dampak Perceraian Orang Tua Terhadap Anak Remaja,” *Focus: Jurnal Pekerjaan Sosial* 6 (2019): 109, <https://doi.org/10.24198/focus.v4i2>.

⁵¹ Dian Ekawati, “Model of Indonesian Legal System,” *Jurnal Kewarganegaraan* 7 (Desember 2023): 2038, <https://doi.org/10.31316/jk.v7i2.5585>.

information about the entry of Islam into Malaysia from China, Campa, and India through Malacca.⁵² Different historical and cultural factors make differences in the implications of the preparation of legal products so that the determination of the age of *mumayyiz* in each country is different. Basically, both Indonesia and Malaysia generally follow the Syafi'i madhhab, although it does not rule out the possibility of other madhhabs adopted by the people in the two countries.⁵³

Malaysia is known as a country that sticks to the doctrines of Ahli Sunnah wal Jamaah, which is supported by various kinds of information on legislation, especially those that state Islam as the official religion. Therefore, all Islamic legislation and legal actions taken in Malaysia must be based on Ahli Sunnah wal Jamaah.⁵⁴ In particular, the drafting of the Selangor Islamic Family Law Enactment used the Qur'an and Hadith as the main references based on the interpretations of the well-known and well-known madhhabs with the Shafi'i madhhab being the main reference madhhab in accordance with the habit of most Malaysians including judges in the Syariah Court. This is in line with the goal of Islamic Shari'ah to provide convenience and benefit and reject harm and hardship in realizing

⁵² Saifullah, *Sejarah Kebudayaan Islam Di Asia Tenggara*, 1st ed. (Yogyakarta: Pustaka Pelajar, 2010), 40.

⁵³ Azhar Abdullah et al., "Malaysia as a Madhhab Country: A Preliminary Discussion," *Rabbanica*, Mei 2022, 171.

⁵⁴ Abdullah et al., 174.

laws that are not too rigid and in conformity with the current conditions of society.⁵⁵

Meanwhile in Indonesia, there is no single statement that explains that the official religion in Indonesia is Islam, where Indonesia has the Pancasila ideology as a reference for religious life.⁵⁶ As mentioned earlier that the Shafi'i madhhab entered Indonesia along with the entry of Islam in Indonesia, over time the Shafi'i madhhab has been spreading and developing rapidly. This is due to the Shafi'i madhhab which has harmony with the personality of the Indonesian people so that makes it exist and live in the middle of the Indonesian Muslim society.⁵⁷

The Islamic Law Compilation as a legal product in Indonesia was born from the ijtihad of Islamic law experts in Indonesia. The Syafi'i madhhab has a dominant influence in the drafting of the Islamic Law Compilation, but still uses other madhhabs as references. In other words, the Islamic Law Compilation exists as a form of Islamic law that has an Indonesian perspective and not only adopts the provisions of fiqh but contains Islamic law that does not yet exist in the previous fiqh books.⁵⁸

⁵⁵ Nora'nan Bahari, "Penggubalan Dan Peruntukan Enakmen Undang-Undang Keluarga Islam Selangor 1984: Satu Analisis," *Jurnal Syariah* 6 (n.d.): 12.

⁵⁶ Nora Listiawati, "Ideologi Pancasila: Pengertian, Fungsi, Makna, Dan Dimensi," June 2023, <https://pid.kepri.polri.go.id/ideologi-pancasila-pengertian-fungsi-makna-dan-dimensi/>.

⁵⁷ Anny Nailatur Rohmah and Ashif Az Zafi, "Jejak Eksistensi Mazhab Syafi'i di Indonesia," *Jurnal Tamaddun : Jurnal Sejarah dan Kebudayaan Islam* 8, no. 1 (May 12, 2020): 190, <https://doi.org/10.24235/tamaddun.v8i1.6325>.

⁵⁸ Khairul Umam, "Penyerapan Fiqh Madzhab Syafi'i dalam Penyusunan Kompilasi Hukum Islam," *De Jure: Jurnal Hukum dan Syar'iah* 9, no. 2 (December 30, 2017): 125, <https://doi.org/10.18860/j-fsh.v9i2.6991>.

In this context, the differences in religious culture and state administration that have influenced the preparation of laws in the two countries by adjusting their respective needs and foundations so that they can be implemented according to their needs, produce different legal products.

Comparative Table

No.	Aspect	Similarities
1.	Sharing of Child Custody	Both rules give priority to the mother as the child's guardian after divorce.
2.	The Obligation of Nafkah	Both rules oblige the father to provide for the child within or outside the marriage.
3.	Custody After Mother	Both rules prioritize women of the mother's line as caregivers or helpers.
4.	Child's Right to Choose	Both rules give the <i>Mumayyiz</i> child the right to choose his or her caregiver.
5.	Social Conditions	The two countries share a common background of the introduction of Islam and the strong influence of the Shafi'i school of thought.

Table 2

2. Differences *Hadhanah* Provisions in Indonesia and Selangor

a. Legal Basic

Legal basic refers to the foundation or source of law used to regulate a legal issue.⁵⁹ The legal basis is important in resolving legal issues fairly by applicable provisions. The implication of a law must be based on a legal product that has legal force as a guarantee that the law used is correct and appropriate.

In this regard, the Islamic Law Compilation and the Selangor Islamic Family Law Enakmen as the legal basis for the application of *hadhanah* have different legal powers. It should be understood that basically a rule of law is sourced from everything that is ultimately binding and compelling.⁶⁰ Indonesia has a hierarchy of laws and regulations contained in Law Number 12 of 2011 concerning the Establishment of Laws and Regulations. Article 7 paragraphs (1) and (2) of the law explicitly mention the hierarchy of binding laws and regulations, including:

- a. 1945 Constitution
- b. Decree of the People's Consultative Assembly
- c. Law / Government Regulation in Substituting for Law
- d. Government Regulation
- e. Presidential Regulation
- f. Provincial Regional Regulation
- g. Regency Regional Regulation

⁵⁹ "Hukum Dasar Dan Dasar Hukum," November 2021, <https://bantuanhukum-sbm.com/artikel-hukum-dasar-dan-dasar-hukum>.

⁶⁰ Fence Wantu, *Pengantar Ilmu Hukum*, 1st ed. (Gorontalo: Revina Cendekia, 2015), 18.

The Islamic Law Compilation as a result of Ijma' of Indonesian scholars in the national legislation system is included in written law which is recognized but its validity is not enforced.⁶¹ Based on these provisions, the Islamic Law Compilation, which is one of the legal bases for hadhanah in Indonesia, still does not have binding legal force for the entire community and has not become a legal material that must be used by the Religious Courts in deciding hadhanah cases and is only a reference.

The provision of hadhanah is also contained in Law Number 1 Year 1974 concerning Marriage which has binding legal force because of its status as a law. The provisions of hadhanah in the marriage law are not explicitly mentioned, only implied in several chapters and articles relating to the position of children, the rights and obligations of parents and children, divorce, and guardianship.⁶²

The Malaysian government follows a federation system with a division of territory into thirteen states. Each state has its own laws that are binding on the people of that state.⁶³ The Selangor Islamic Family Law Enactment only applies to Muslims who are clearly Muslims and are deemed to be Muslims living in Selangor and who are Selangor citizens

⁶¹ Sugianto, Wibowo, and Michael, "KEDUDUKAN INSTRUKSI PRESIDEN REPUBLIK INDONESIA NOMOR 1 TAHUN 1991 TENTANG PENYEBARLUASAN KOMPILASI HUKUM ISLAM DALAM SISTEM HUKUM KEWARISAN INDONESIA," 26.

⁶² "Undang-Undang Perkawinan" (1974).

⁶³ Kholis Bidayati Kholis, Muhammad Alwi Al Maliki Alwi, and Suci Ramadhan Suci, "DINAMIKA PEMBAHARUAN HUKUM KELUARGA ISLAM DI NEGARA MUSLIM (STUDI ATAS NEGARA MALAYSIA DAN BRUNEI DARUSSALAM)," *ADHKI: Journal of Islamic Family Law* 3, no. 1 (August 8, 2021): 45, <https://doi.org/10.37876/adhki.v3i1.45>.

even though they do not live in Selangor.⁶⁴ The Enactment of the Selangor Islamic Family Law 2003 as the legal basis for the application of hadhanah provisions was the result of a long process of Islamic law reform in Malaysia and Selangor in particular.⁶⁵ This shows that the regulation has binding legal certainty in its application to all hadhanah cases resolved by the court.

Enactment of the Selangor Islamic Family Law contains provisions on hadhanah in section seven on Guardianship which contains twenty-six sections or articles discussing parenting to guardianship.⁶⁶ This large number of articles provides a very clear description of the problems that may happen in childcare and is a standard reference for every judge in the court to decide a case related to childcare issues.

b. Decisions Age of *Mumayyiz*

With the number of articles regulating the provisions of hadhanah contained in the Islamic Law Compilation and the Enakmen of the Islamic Family Law, a comparison of the provisions of the two will be discussed. The first aspect is about the age limit of *mumayyiz*. The age limit of *mumayyiz* is important for all Muslim families to know because it has great implications for the development of children.

As the provisions regarding the age of *mumayyiz* contained in the Islamic Law Compilation chapter XVI article 105 which reads:

“Dalam hal terjadinya perceraian:

⁶⁴ Bahari, “Penggubalan Dan Peruntukan Enakmen Undang-Undang Keluarga Islam Selangor 1984: Satu Analisis,” 16.

⁶⁵ Nurdian, “PENGATURAN HADHANAH DI INDONESIA DAN MALAYSIA,” (Undergraduate Thesis Universitas Islam Negeri Syarif Hidayatullah, 2023): 45.

⁶⁶ “Enakmen Undang-Undang Keluarga Islam Selangor” (2003).

- a. Pemeliharaan anak yang belum *mumayyiz* atau belum berumur 12 tahun adalah hal ibunya;
- b. Pemeliharaan anak yang sudah *mumayyiz* diserahkan kepada anak untuk memilih diantara ayah atau ibunya sebagaipemegang hak pemeliharaannya;
- c. Biaya pemeliharaan ditanggung oleh ayahnya”.⁶⁷

Based on this, it can be understood that the age of *mumayyiz* according to the Islamic Law Compilation is 12 years old, and has a major part in determining custody in the case of divorce between parents.

Meanwhile, the State of Selangor set out this rule in the Enakmen of the Selangor Islamic Family Law 2003 which explains the provisions regarding the age of *mumayyiz* in Section 85 on the Duration of Custody which reads:

- (1) Hak hadinah bagi menjaga seseorang kanak-kanak adalah tamat setelah kanak-kanak itu mencapai umur tujuh tahun, jika kanak-kanak itu lelaki, dan umur sembilan tahun, jika kanak-kanak itu perempuan, tetapi Mahkamah boleh, atas permohonan hadinah, membenarkan dia menjaga kanak-kanak itu sehingga kanak-kanak itu mencapai umur sembilan tahun, jika kanak-kanak itu lelaki, dan umur sebelas tahun, jika kanak-kanak itu perempuan.
- (2) Setelah tamatnya hak hadinah, penjagaan adalah turun kepada bapa, dan jika kanak-kanak itu telah mencapai umur kecerdikan (*mumaiyiz*), maka kanak-kanak itu adalah berhak memilih untuk tinggal dengan sama ada ibu atau bapanya, melainkan jika Mahkamah memerintahkan selainnya.⁶⁸

Based on this provision, it can be understood that the age of *mumayyiz* according to the Enactment of the Islamic Family Law is seven years old for boys and nine years old for girls, and if needed, they can file a lawsuit with the court with the provision that boys are nine years old and girls are eleven years old. It can also be understood that if the child has

⁶⁷ “Kompilasi Hukum Islam” (1991).

⁶⁸ Enakmen Undang-Undang Keluarga Islam Selangor.

reached the age of *mumayyiz* then he/she has the right to determine whether to live with his/her father or mother.

Sayyid Sabiq in his book explains that the standard for a child to be said as *mumayyiz* is when he is able to fulfill his basic needs such as eating, wearing his own clothes, and maintaining personal hygiene. A child is said to be *mumayyiz* when he no longer needs the care of a custodian and has been able to fulfill his primary needs independently, which means that the child's *hadhanah* period ends. The fatwa issued by the Hanafi school of thought and other scholars explains that the *hadhanah* period is said to end when the boy is seven years old and the girl is nine years old because the girl will also learn how to take care of the kid like the way women used to do.⁶⁹

Based on these opinions, it can be understood that Indonesia and Selangor apply different provisions in determining the age of *mumayyiz*. Consideration of all aspects of the child's welfare is the main point in determining the age of *mumayyiz*. The judge, in this case also has a big role during the judicial process to decide the best choice for the child.

c. Guardian's Requirments

here are several requirements for the wife who will take care of her child, such as being rational, independent, Muslim, able to maintain her honor as a woman, trusted, living in a defined area, and not married. After the age of seven or *mumayyiz*, the child can choose to be cared for by his

⁶⁹ Sayyid Sabiq, *Fiqh As-Sunnah (Jilid 3)*, 3rd ed., 3 (Sukoharjo: Insan Kamil Solo, 2020), 153.

father or mother according to his wishes.⁷⁰ The Selangor Islamic Family Law Enactment has regulated this in section 83 which states in general terms the requirements that must be met by those who have the right to care for children:

“Seseorang yang mempunyai hak mendidik seseorang kanak-kanak, adalah berhak menjalankan hak terhadap hadhanah jika

- (a) dia adalah seorang Islam;
- (b) dia adalah sempurna akal;
- (c) dia berumur yang melayakkan dia memberi kepada kanak-kanak itu jagaan dan kasih sayang yang mungkin diperlukan oleh kanak-kanak itu;
- (d) dia berkelakuan baik dari segi akhlak Islamiah; dan
- (e) dia tinggal di tempat di mana kanak-kanak itu tidak mungkin menghadapi apa-apa akibat buruk dari segi akhlak atau jasmani.”

Meanwhile, the Islamic Law Compilation implicitly mentions the requirements of caregivers in the guardianship chapter, where the role of the guardian is the same as the caregiver in terms of taking care of the child when the caregivers are unable to care for the child. Article 107 states:

- (4) Wali sedapat-dapatnya diambil dari keluarga anak tersebut atau oranglain yang sudah dewasa, berpiiran sehat, adil, jujur dan berkelakuan baik, atau badan hukum.”

d. Guardian of Children's Property

Property owned by children who are not old enough must be guarded and maintained by the adults around them. The child is not allowed to take care of his property because he is not yet capable in this matter. Based on what is stated in the Islamic Law Compilation 106, it is stated that:

⁷⁰ Ron Shaham, *Family and The Courts in Modern Egypt : A Study Based on Decisions by The Shari'a Courts 1900-1955* (New York: Koninklijke Brill, 1997), 178.

“(1) Orang tua berkewajiban merawat dan mengembangkan harta anaknya yang belum dewasa atau dibawah pengampunan, dan tidak diperbolehkan memindahkan atau menggadaikannya kecuali karena keperluan yang mendesak jika kepentingan dan keselamatan anak itu menghendaki atau suatu kenyataan yang tidak dapat dihindarkan lagi.
 (2) Orang tua bertanggung jawab atas kerugian yang ditimbulkan karena kesalahan dan kelalaian dari kewajiban tersebut pada ayat (1)”

And mentioned in Selangor Islamic Family Law section 89 that:

“(1) Sungguhpun hak terhadap hadhanah atau penjagaan anak mungkin terletak pada seseorang lain, bapa adalah penjaga hakiki yang pertama dan utama bagi diri dan harta anaknya yang belum dewasa,....”

e. Transfer of Child Guardian

The role of a guardian for a child is very important, considering that a guardian has the same role as a parent. The Islamic Law Compilation explains that if parents are unable to take care of their children then it can be transferred to the guardian of the child, as mentioned in Article 107:

“(1) Perwalian hanya terhadap anak yang belum mencapai umur 21 tahun dan atau belum pernah melangsungkan perkawinan.
 (2) Perwalian meliputi perwalian terhadap diri dan harta kekayaannya.
 (3) Bila wali tidak mampu berbuat atau lalai melaksanakan tugas perwaliannya, maka pengadilan Agama dapat menunjuk salah seorang kerabat untukbertindak sebagai wali atas permohonan kerabat tersebut.
”

And article 108:

“Orang tua dapat mewasiatkan kepada seseorang atau badan hukum untuk melakukan perwalian atas diri dan kekayaan anak atau anak-anaknya sesudah ia meninggal dunia.”

The Enakmen of the Islamic Family Law also mentions the parties who can take over guardianship of the father in section 89:

“....dan apabila bapa telah mati, maka hak di sisi undang-undang bagi menjaga anaknya itu adalah turun kepada salah seorang yang berikut mengikut susunan keutamaan yang berikut, iaitu

- (a) datuk lelaki di sebelah bapa;
 - (b) wasi yang dilantik menurut wasiat bapa;
 - (c) wasi kepada wasi bapa;
 - (d) wasi datuk lelaki di sebelah bapa;
 - (e) wasi kepada wasi datuk di sebelah bapa,
- dengan syarat bahawa dia adalah seorang Islam, seorang dewasa, adalah siuman, dan boleh dipercayai.”

Comparative Table

No.	Aspect	Differences
1.	Legal Basis	Indonesia rules Hadhanah in Islamic Law Compilation that has no binding on society. Selangor rules it in Enactmen 2 2003 Selangor Islamic Family Law and it is binding to all the society of Selangor.
2.	Age of <i>Mumayyiz</i> Regulation	Indonesia said that <i>mumayyiz</i> 's age is 12 while Selangor said it is 7 for boys and 9 for girls.
3.	Requirements of Caregivers	Selangor specifies the requirements of caregivers in detail while Indonesia only implies it.
4.	Safeguarding of the Child's Property	Indonesia stipulates that both parents must maintain the child's property while Selangor stipulates that the father is most responsible for the child's property.
5.	Transfer of Guardianship over the Child	Indonesia stipulates that the Religious Court may appoint another person as the guardian of the child if the parents are incapacitated, whereas Selangor has

		determined the order of the persons entitled to receive custody.
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Table 3

B. Child Developmental Psychology's View of the Age of *Mumayyiz* Determination in the Islamic Law Compilation and the Islamic Family Law Enactment Number 2 in Selangor

Based on the previous explanation, it has been mentioned that the age of *mumayyiz* according to the two regulations is seven years old to twelve years old. According to developmental psychology, this age is the end of childhood or the transition from childhood to early adolescence.⁷¹ At this time children are not emotionally stable and still have a sense of instability in determining something.

Developmental psychology considers that human age in the form of numbers cannot be equated with human age from a psychological perspective. A child who is the same age as others does not necessarily have the same character, character, personality, and attitude in dealing with events. In this discussion, the analysis is based on the views of cognitive developmental psychology and psychosocial development.

Another perspective from the psychological aspect that is important about determining the age of *mumayyiz* is the psychosocial development of children. Children aged six to twelve years old belong to late childhood to

⁷¹ John Santrock, *Perkembangan Masa Hidup*, 13th ed., vol. 1 (Jakarta: Erlangga, 2018), 18.

early adolescence and are a critical period of human development.⁷² According to Erick Erikson, a psychologist, child psychosocial development refers to the interaction between psychological and social aspects of child development and is categorized into eight phases of development.⁷³

Psychosocial development is also interpreted as a learning process for individuals to adapt to the norms and rules that exist in their environment which involves feelings, emotions, and personality.⁷⁴ Children aged six to twelve years are at the phase of trying to achieve goals and success and will feel self-condemnation when they fail.

The psychological theory of cognitive development by Jean Piaget explains that at the age of seven to eleven years, a child is in the concrete operational phase.⁷⁵ At this age, children are able to recognize the happenings that occur around them, and can respond according to their preferences. Children are also able to classify things that are around them, but have not been able to solve the problems that occur. If there are things that make the child uncomfortable, then he will respond by showing certain behaviors to invite the attention of the people around him.

⁷² Elizabeth Hurlock, *Psikologi Perkembangan*, 5th ed. (Jakarta: Erlangga, n.d.), 146.

⁷³ Ellen, "Perkembangan Psikososial Erikson," n.d., <https://psychology.binus.ac.id/2022/11/28/perkembangan-psikososial-erikson/>.

⁷⁴ Izzatur Rusuli, "PSIKOSOSIAL REMAJA: SEBUAH SINTESA TEORI ERICK ERIKSON DENGAN KONSEP ISLAM," *Jurnal As-Salam* 6 (June 2022): 88, <https://doi.org/10.37249/assalam.v6i1.384>.

⁷⁵ Leny Marinda, "TEORI PERKEMBANGAN KOGNITIF JEAN PIAGET DAN PROBLEMATIKANYA PADA ANAK USIA SEKOLAH DASAR," *An-Nisa' : Jurnal Kajian Perempuan dan Keislaman* 13, no. 1 (April 18, 2020): 124, <https://doi.org/10.35719/annisa.v13i1.26>.

In the concrete operational stage, children learn the rules of conservation and use simple logic in solving various problems whenever dealing with real objects. The reasoning used by children at this stage is logical reasoning replacing previous intuitive thinking.⁷⁶ Children at this age are only able to think systematically about objects and happenings around them that are concrete.

The next stage of cognitive development is the formal operational stage which occurs at the age of eleven or twelve years to eighteen years. At this age children have entered adolescence and have been able to understand various aspects of a problem that can be solved at the same time.⁷⁷ At this phase, inductive reasoning is needed in decision-making by adolescents.

Decision-making using inductive reasoning is based on past experience and the conclusion is based on what is felt to be the best of all available options.⁷⁸ Children tend to have more stable emotions than the age at the previous phase and provide a more controlled response to the things around them. One of the implications of determining the age of *mumayyiz* is that the child has the right to choose with whom he will live when his parents divorce. So by looking at the phases of cognitive development, the

⁷⁶ Rafiq Kurniawan and Yudi Rahman, "TEORI BELAJAR KOGNITIF Membedah Psikologi Belajar Jean Piaget," *Taqofah: Jurnal Pendidikan Islam* 3 (June 2019): 8, <https://doi.org/10.58883/tsaqofah.v3i2.78>.

⁷⁷ Alon Mandimpu Nainggolan and Adventrianis Daeli, "Analisis Teori Perkembangan Kognitif Jean Piaget dan Implikasinya bagi Pembelajaran," *Journal of Psychology "Humanlight"* 2, no. 1 (August 24, 2021): 39, <https://doi.org/10.51667/jph.v2i1.554>.

⁷⁸ Robert Solso, Otto Maclin, and Kimberly Maclin, *Psikologi Kognitif*, 8th ed. (Sidoarjo: Gelora Aksara Pratama, 2007), 415.

more ideal for children to decide on their choices is when they are in the formal operational phase, which is at the age of eleven to eighteen years.

Psychosocial views also support this, which is explained that children twelve years old to eighteen years old are at the stage of starting to identify themselves and care about how others see them.⁷⁹ Seeing this, it seems that children twelve years old and above already have a better understanding of themselves and also their environment than the age below, so they have more rational thinking.

In order to consider aspects of the child's welfare and for the goodness of the child in fulfilling his/her needs both spiritually and physically, the governments of Indonesia and Selangor State determine certain age limits for children who are considered capable or *mumayyiz*. Indonesia determines the age of *mumayyiz* as twelve years old, which according to the theory of developmental psychology is in late childhood and early adolescence. Meanwhile, the State of Selangor determines the age of *mumayyiz* for boys is seven years old and girls are nine years old, which according to the theory of developmental psychology is included in the middle to late childhood.

Therefore, developmental psychology does not set a certain age for a child to be considered fully capable, but only provides a general description of how the child is at a certain age range. So then, it is the adults

⁷⁹ Fauziah Nasution et al., "Perkembangan Psikososial Kanak-Kanak Pertengahan," *Edu Society* 3 (2023): 1181, <https://doi.org/10.56832/edu.v3i3.421>.

around the child who can determine what level of ability the child has reached, and how adults should respond to the child.

This is found in the theory of developmental psychology in order to avoid misjudgment of each child. So in terms of the topic under discussion in this research, the provisions of the two countries which then authorize the court judge to determine whether or not a child is *mumayyiz* in a case is appropriate. This is because during the judicial process, it is the judge who knows the child's condition and situation, so that he or she can make a decision by considering the welfare of each child.

CHAPTER IV

CONCLUTIONS AND SUGGESTIONS

A. Conclutions

1. Some of the similarities between the Compilation of Islamic Law and the Selangor Islamic Family Law Enakmen are in terms of the division of custody after divorce, the obligation of maintenance, care after the mother, the right of children who have *mumayyiz* to choose, and the social conditions of the two countries that influence the formation of rules. Some differences in the provisions between the Islamic Law Compilation and the Selangor Islamic Family Law Enactment are in terms of the legal basic of each regulation, the determination of the age of *mumayyiz*, the requirements of caregivers, the safeguarding of children's property, and the transfer of child custody after the father.
2. Child developmental psychology argues that twelve years old is the starting point for a child's cognitive development to be able to make good decisions. Therefore, the age of twelve in the Islamic Law Compilation is preferable to the seven and nine years old in the Enakmen of the Selangor Islamic Family Law for children to be considered *mumayyiz*. Developmental psychology also states that each child has different personal development so that the determination of the child's right to choose must pay attention to the child's situation and consider the aspects of the benefit of the child so that it can have a good impact..

B. Suggestions

Based on the conclusions that have been obtained, the author proposes to update the Islamic Law Compilation so that it can be applied thoroughly in Indonesia. The author also suggests a review of the Selangor Islamic Family Law Enactment 2003 regarding the determination of the age of *mumayyiz*. The author also recommends the public in general and readers in particular to be more straightforward in responding to the provisions that apply and keep the proper behavior as the law provides.

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Family Law)

No.	Day/Date	Subject of Consultation	Signature
1.	Mon, 09/18/2023	Mini Proposal Consultation	
2.	Mon, 09/25/2023	Proposal Manuscript Consultation	
3.	Mon, 10/02/2023	Revised Proposal Discussion	
4.	Wed, 10/04/2023	Revised Manuscript Translation	
5.	Sat, 10/28/2023	Post-Seminar Consultation	
6.	Thu, 11/09/2023	Chapter I-III Consultation	
7.	Tue, 11/14/2023	Problem Analysis Consultation	
8.	Wed, 12/13/2023	Interview Result Consultation	
9.	Thu, 01/11/2024	Revised Chapter III	
10.	Tue, 01/23/2024	Revised Conclusion	

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Formal Education :

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2007-2008 SDN 41 Wosi Manokwari

2008-2012 SD YAPIS 02 Manokwari

2012-2015 Mts. Darunnajah Jakarta

2015-2018 MA Darunnajah Jakarta

Non-Formal Education

2012-2018 Darunnajah Islamic Boarding School

2018-2018 Ma'had Qur'an MataQu Bogor

2018-2020 PTQ MD Fathahillah Ciamis