

FOR THE SAKE OF PROTECTING RELIGION Apostasy and its Judicial Impact on Muslim's Marital Life in Indonesia¹

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Abstract: This paper discusses the rule of apostasy and its impact on the apostate's legal status. It investigates how Indonesian Islamic family law administers the commit of apostasy and how it would determine the apostate's legal status on his or her marriage and his or her right to custody of child in particular. Deploying socio-legal approach it observes how Muslim judges resolve familial cases related to apostasy at court and to what extent their legal decisions on these issues are shaped by the majority of religious authorities' and their own understanding of the Islamic doctrine of religious protection. It argues that while the Islamic state law has sought to move away from the classical religious rules in the administration of apostasy as to protect human rights, judges find it difficult to renounce the dogma that Muslims must protect their religion from any possible danger other groups of religion would create and that the religious protection is often in conflict with the realization of the right to religious freedom.

Keywords: Family law, apostasy, judicial practice, religious protection, religious freedom, marriage.

¹ The earlier draft of this paper was presented in two international conferences, i.e., an international Conference on 'Religious Diversity and Islamic Identity: Negotiating State Order and Civil Right', held by the Faculty of Sharia and Law, State Islamic University of Sunan Kalijaga Yogyakarta and Recht Faculteit, Göttingen, Germany, in Yogyakarta, 20-22 November 2013, and an International Conference, but with different focus of the preference to *kitab kuning (classical texts)* within judges on 'Dynamic of Indonesia Islamic Studies: Tribute to Prof. Karel Steenbrink and Martin van Bruinessen', held by the Graduate School, State Islamic University of Sunan Kalijaga, Yogyakarta, November 2014.

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Introduction

Muslims believe that religion is one of the matters that according to Islamic doctrine should be protected. Although interpretation on how religion should be protected differs, many view and agree that protection should be made when religion is endangered. The protection of (Islamic) religion is clearly stressed in the issue of the practice of apostasy. For a Muslim who turns his or her faith to another religion and loses his or her faith for no religion, rules are introduced to protect the (Islamic) religion itself.

Under Islamic law, apostasy is deemed to be a crime and is, based on Sunna (Prophetic Tradition), punished by death. Basically none of verses dealing with apostasy provides for the penalty of apostasy in this life, but they condemn it in a very harsh term.³ As Cook argued, although such death punishment is not certain when it became normative particularly referring to the early Abbasid times, it is the accepted punishment in the early stage of Islam.⁴ In regard with the issues of family, when an apostate is a married person, the punishment would relate to his or her status of marriage and extends to other matters, including his or her right to guardianship, custody, and inheritance. The classical Islamic law has devoted its discussion to these issues very lengthily. Indonesia has adopted Islamic law as one element enriching its national laws and puts a number of articles to administer the issue of apostasy. Although the Indonesian law has reformed its rules related to the issue, the classical Islamic texts remain the main reference among judges when dealing with it.

A number of works have been written to discuss the issue of apostasy in both general and specific scopes. Taking Sudan as an object of his study Abdullahi Ahmed al-Na'im discusses the Islamic law of apostasy and relates it to the modern applicability.⁵ He argues that the shari'a law of apostasy is inconsistent with and violates the principle of religious freedom. Reform is thus needed 'to maintain the negative civil law consequences of apostasy'.⁶ Cook discusses apostasy

³ Peters and Devries, 'Apostasy in Islam', *Die Welts des Islams*, 1 at 5 etseq (1976), p. 77.

⁴ David Cook, "Apostasy from Islam: A Historical Perspective", *JSAl*, 31 (2006), p. 276.

⁵ Abdullahi Ahmed al Na'im, 'The Islamic Law of Apostasy and Its Modern Applicability: The Case from Sudan', *Religion*, 16 (1986): pp. 197-224.

⁶ *Ibid.*, p. 216.

using historical sources and examines a number of conversion cases and reasons for Muslims to convert. He notes that there had been changes over centuries about the ways in which apostates acted and he concludes that for several reasons Muslims' attitudes toward apostasy did not develop until the Abbasid time.⁷

In Indonesian context the discussion of the issue of apostasy in Indonesia has been also done in a number of works. Natalia Laskowska, for instance, discusses fatwas on death penalty on apostates and on Ahmadiya case and argues that in practice it seems rare that the apostates were punished and were instead considered to have incited hatred.⁸ In its report on the the impact of blasphemy laws on minority rights in Indonesia, Freedom House argues that the laws are often vaguely worded and are abusedly implemented.⁹ Despite this fact, only have very few papers been written concerning the relationship between the issue of apostasy and Islamic family law problems in Indonesia. Among the papers are those written by two judges of Islamic courts, Mukti Arto and Fachruddin. Arto discusses the procedure of Islamic judiciary and deals with divorce proceedings particularly those petitioned under the ground of apostasy.¹⁰ Employing a similar approach, Fachruddin observes the issue of apostasy as one of divorce grounds listed in the *Kompilasi Hukum Islam di Indonesia* (Indonesia's Compilation of Islamic Law). He argues that there has been vagueness in the regulation on divorce grounds and mentions that the grounds listed do not support to each other and they are overlapped and confusing.¹¹ He criticized the *Kompilasi Hukum Islam* for limiting the practice of apostasy to be used for divorce petition and views that to be taken as a ground of divorce apostasy should not be restricted by the condition of disharmony resulted from apostasy. To him, difference of religion itself is a disharmony within marital life.

⁷ Cook, 'Apostasy from Islam, p. 277.

⁸ Natalia Laskowska, 'Apostasy as a Tool to Suppress Dissent: Indonesian Perspective', in *Orientalist*, 2 (2012), pp. 74-84.

⁹ Freedom House, *Policing Belief: The Impact of Blasphemy Laws on Human Rights*, A Freedom House Special Report, October 2010.

¹⁰ Mukti Arto, *Praktek Perkara Perdata pada Pengadilan Agama* (Yogyakarta: Pustaka Pelajar, 1996).

¹¹ Fachruddin, 'Murtad sebagai Alasan Perceraian dan Implementasiya di Pengadilan Agama', in *Mimbar Hukum*, 39, 9 (1998), pp. 12-18.

There have been some other discussions on the issue of apostasy related to marital affairs. Ratno Lukito in his book *Hukum Sakral dan Hukum Sekuler* discusses the issue of faith difference and its connection with the practice of inheritance. He argues that there has been wider interpretation of the rule of inheritance within Muslim judges.¹² Previously Lukito wrote also an article entitled ‘The Enigma of Legal Pluralism in Indonesian Islam: The Case of Interfaith Marriage’ and observed various legal interpretations of the marriage law. He viewed that the government has often been bewildered by the ongoing debate itself and left the issue to be dealt with by legal scholars.¹³ In my previous work, I myself have investigated a number of decisions on the issue of apostasy in the context of divorce. However, I did not put the discussion in a broad context of religious protection but of maintenance of fiqh doctrines within Muslim judges of Indonesia.¹⁴ Recently, Muhrisun has published an article investigating the children’s welfare within the families involving spouses one of whom commits apostasy. He displays rich data on the practice of inter-religious marriage and on Muslim judges’ view on such marriage and on their preference to dissolving marriage and to dismissing the right to child custody from apostates.¹⁵

Although much discussion has been done, only scant attention has been paid to the doctrine of religious protection contained in the rules of familial issues and in practical decisions issued by Muslim judges. Looking at articles prescribed in both the *Kompilasi Hukum Islam* and the Marriage Law of Indonesia relevant Muslim judges decisions, this paper discusses the practice of apostasy and its impact on the apostate’s legal status. It investigates how apostasy would determine

¹² Ratno Lukito, *Hukum Sakral dan Hukum Sekuler: Studi tentang Konflik dan Resolusi dalam Sistem Hukum Indonesia* (Jakarta: Alfabeta, 2008), pp. 437-457.

¹³ Ratno Lukito, ‘The enigma of legal pluralism in Indonesian Islam: the case of interfaith marriage’, *Journal of Islamic Law and Culture*, Vol. 10, No. 2 (2008), pp. 176–187.

¹⁴ Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practices of the Indonesian Islamic Court* (Amsterdam: Amsterdam University Press, 2010).

¹⁵ Muhrisun Afandi, ‘Apostasy as Grounds in Divorce Cases and Child Custody Disputes in Indonesia’, in Noorhaidi Hasan and Fritz Schulze (eds), *Indonesian and German Views on the Islamic Legal Discourse on Gender and Civil Rights* (Germany: Hobert & Co, Gottingen, 2015), pp. 89-107.

the apostate's legal status on his or her marriage and his or her right to custody of child. It shall look at how Islamic law in Indonesia regulates the issues and how Muslim judges resolve familial cases related to apostasy at court and investigate to what extent their legal decision on these issues are shaped by their understanding of the doctrine of religious protection.

The data used in this paper are decisions of Islamic court and notes from interviews and hearing attendance. The data were gathered from two periods of time, from 2004-2006 and from 2011-2012. The decisions collected were read and observed to see the legal reasoning of judges when giving their rulings. They were completed by the notes from my interviews with judges. Deploying socio-legal approach this paper attempts to study how the rules were introduced and how judges interpret the rules and apply them in their rulings and why they follow or deviate from the rules and how their attitudes are intersected with the notion of religious protection.

Apostasy from Islamic Legal Perspective: It's Impact on Marriage

Riddab is an Arabic word to denote apostasy, used interchangeably with the word *irtidad*. However, the usage of these two terms has different emphasis. While *riddab* refers to an act of Muslim's conversion to become an unbeliever, *irtidad* means conversion from Islam to other religions such as Christianity. The one who commits apostasy is called *murtadd*.¹⁶ When one commits apostasy and he or she is in the status of marriage, the question arises on the status of her or his marriage. Does the marriage remain valid according to classical Islamic legal opinions?

To answer the above question, the issue of inter-religious marriage needs first to be investigated. In order to comprehend the law of inter-religious marriage, the discussion of pillars and conditions that determine the validity of marriage needs to be highlighted. Marriage could be conducted and considered to be valid if it meets required pillars and each pillar's conditions. The pillars include spouses (bride and groom), marriage contract, guardian, witnesses, and *mabr* or dowry. Each of these requirements must meet certain conditions. As for the issue of inter religious marriage, the condition of the pillar of 'bride

¹⁶ Samuel M. Zwemer, *The Law of Apostasy in Islam*, www.muhammadanism.org, February 2, 2004, 33.

and groom' needs to be mentioned and the classical Islamic legal doctrine requires that spouses must be free from conditions that would prevent them from marrying to each other, i.e., being in the same blood lineage, having been fed by a same woman, and having been bounded by marital tie of their family member as mother or father in-law. These conditions are described very clearly in the discussion of '*mubharramat*' or groups of female that cannot be married. While these three are clear, a question arises on the issue of religion. Is unity in faith or religion a condition to be met in Islamic marriage; is a Muslim person (male and female) allowed to get married with a non-Muslim person (a male or female)?

Generally speaking, there are three opinions maintained among Islamic legal scholars on the issue. First is the opinion that stresses the validity of marriage between spouses adhering to Islam. Second is the opinion that underlines the possibility of marriage between a Muslim man and a non-Muslim woman. Third is the view that accentuates the impossibility of marriage between a non-Muslim man and a Muslim woman. The legality of marriage between a Muslim man and a non-Muslim woman is however envisaged only under some conditions. The conditions are particularly related to the non-Muslim party, the female. It is specified that the prospective bride must believe in sacred texts called *al-kitab* or that she must be *abl al-kitab*. In this regard, it is noted that there are three categories of non-Muslim, i.e., non-Muslim bride believing in goods or materials such as stone, non-Muslim bride believing in religion with quasi sacred text such as Majusi, and non-Muslim bride believing in sacred text called *ablu al-kitab*,¹⁷ such as Christians and Jews. Although few, like Abu Daud, consider inter-religious marriage between a Muslim man and non-Muslim woman with quasi sacred scripture as lawful,¹⁸ jurists in general accept only the marriage between a Muslim man and non-Muslim woman in the third category.¹⁹ Jurists, in fact, agreed to outlaw a Muslim man and a Muslim woman to marry a non-Muslim woman and a non-Muslim

¹⁷ Sayyid Sabiq, *Fiqh al-Sunnah* (Beirut: Dar al-Fathi, 1990), p. 13.

¹⁸ Abd al-Rahman al-Jaziri, *Al-Fiqh alā madhāhib al-arba'ah* (Beirut: Dar al-Fikr, 1996), p. 61.

¹⁹ See Wahbah Zuhayli, *al-Fiqh al-Islāmiyy wa Adillatuhu* (Damaskus: Dar al-Fikr, 1984), Vol. 10, p. 151. However it must be noted that the allowance of such marriage is for Shafi'ite limited to women who hold pure kitab and who have not been contaminated by other false doctrines (*al-kitābiyah al-khālishah*).

man that believe in materials such as stone and they categorized them as *musyrik*.²⁰ The legal base of their ban is the verse that reads that it is forbidden for a Muslim man to marry a Musyrik woman, although she attracts you and it is not allowed for a Muslim woman to marry a Musyrik man although he interests you a lot (al-Baqarah/2: 5).²¹

When the legal opinions of the scholars on the issue of inter-religious marriage is clear, the above question of whether or not the marriage of the couples one of which commits apostasy remains valid. Basically, an easy conclusion from the above discussion can be drawn to answer the question, implying that marriage maintained by couples one of whom becomes apostate is considered legal or valid as long as the apostate turns to one of religions with sacred texts. However, the question might not be answered so easily and for clear and secure discussion on the issue, detailed opinions of the scholars need to be explored. In dealing with the status of such marriage, a number of questions are put forward in classical fiqh texts like that of Abdu al-Rahman al-Juzairi who addressed some following questions: is the validity of marriage between two spouses annulled provided one of them commits apostasy? Is the apostasy committed by bride or groom considered similar? And what are the pronouncements and the deeds that would be concluded infidelity or apostasy?²²

The discussion on the status of marriage of apostate spouse puts an emphasis on its effect on the validity of marriage. The effect has very much depended on the party who commits the apostasy. It means that the legal status of marriages where it is the bride that commits apostasy will be different from that of the marriage where it is the groom who commits apostasy. Hanafites differentiate the legal status of marriages where the apostate is bride and where the apostate is the groom. They maintained that the marriage is to be annulled directly provided the groom (male) commits apostasy. The arguments goes in line with the consensus of the scholars that inter-religious marriage is only permitted between a Muslim man and a non-Muslim woman and they stated that it is impossible for a Muslim bride to be controlled by a non-muslim groom. Although they have clear opinion on the above case, they proposed three opinions on the case of apostate bride

²⁰ Abu Zahrah, *al-Aḥwāl al-Syakhṣiyyah*, (Cairo: Dar al-Fikr, 1957), p. 112.

²¹ Ibid., p. 113. See also Wahbah Zuhayly, *al-Fiqh al-Islāmiyy wa Adillatuhu*, p. 151.

²² al-Jaziri, *Al Fiqh ala al-Madhabib al Arba'a*, p. 171.

(female). First is that the marriage is abrogated in natural apostasy; second is the marriage is not abrogated, but it can be taken as a ground for dissolving the marriage, and the bride is considered as slave for her husband due to her deed. Malikites share the same idea with Hanafites. In different way, Shafi'ites and Hanabilites put the consummation of marriage as a basis to define the legal status of the marriage, and hence differentiate the effect of the apostasy committed before and after sexual intercourse. To their views, the marriage is annulled automatically if apostasy is committed when sexual intercourse is done. Nevertheless, the annulment is not directly completed and its completion is due to the expiration of waiting period. In other word, the marriage is considered to be 'off' for some while. The marriage is annulled only if the apostate bride or groom remains to stick firmly to his act of apostasy. Therefore, the marriage is continued if the apostate reconverts to Islam during waiting period.²³

Apostasy within Marriage: Indonesian Perspective

Apostasy is a rare practice among Indonesian Muslims in general. However, a survey found a number of practices of massive apostasy in certain local areas where Christian propagators launched and run their missionary activities.²⁴ Sources indicate that, although rare, as stated above, conversion between recognised religious groups does occur and although it is permitted by law in Indonesia, it remains an extremely controversial issue. And while national government respected religious freedom and no rule in Indonesian laws about the sanction for Muslims committing apostasy is made, the impact or sanction of apostasy to marital status is regulated and interfaith relationships and marriages continue to be a source of contention.

Islamic law in Indonesia administers that marriage could be conducted only by couples adhering to same religion. The Law of Marriage No. 1/1974 that applies to all citizens of Indonesia regardless of their religions regulates that marriage could be conducted if it meets the requirements specified in the law and fits with their religious faith.²⁵ The *Kompilasi Hukum Islam*, which stands as a substantive law of the Islamic court and which applies to only Muslim, sets the same rule.

²³ Ibid., p. 54.

²⁴ Melissa Crouch, *Law and Religion: Conflict and the Court in Indonesia* (London and New York: Routledge, 2014).

²⁵ See the Law of Marriage No. 1/1974.

It even stresses through its articles that one of the requirements for marriage is the unity of religion. Article 40 clearly administers this and states that it is prohibited for a man to marry a woman under certain conditions.²⁶ First is the condition where a woman is bound to a marriage with a man. Second is the condition where a woman is within a waiting period after divorce. Third is the condition where a woman is not a Muslim. Another article regulates the prohibition of a woman to marry a non-Muslim man. It says that a Muslim woman is not allowed to marry a non-Muslim man. These two articles demonstrate that Indonesia, quite different from some other Muslim countries that allow a Muslim man to marry a non-Muslim woman, forbids inter-religious marriage of both sides.²⁷

In line with these regulations, Indonesia therefore regulates that conversion might become one of the grounds under which marriage cannot be maintained. Basically, through the *Kompilasi Hukum Islam*, Indonesia does not automatically dissolve the marriage of a couple if one of them commits apostasy. In fact, the *Kompilasi Hukum Islam* puts apostasy as one of the grounds under which divorce can be petitioned at court. This is clearly found in article 116 of the *Kompilasi Hukum Islam* which specifies grounds that could be presented for divorce and puts apostasy as one of the grounds as listed in the last point.²⁸ This denotes that apostasy has an equal position as other grounds for divorce. What is regulated in Indonesia is quite different from what Malaysia administers. Malaysia does not regulate that apostasy can automatically dissolve marriage and the provision of Law Reform Act (Marriage and Divorce) 1976 only acknowledged a petition made by a non-Muslim spouse. Therefore, if one spouse has converted to Islam, the other party who has not so converted may petition for a divorce. When a non-Muslim spouse did not file a petition of dissolution of marriage, after the other spouse leaves the faith and embraces Islam, the marriage will be declared as still valid and legal.²⁹

²⁶ The *Kompilasi Hukum Islam*, art. 40.

²⁷ The *Kompilasi Hukum Islam*, art. 44.

²⁸ See the *Kompilasi Hukum Islam*, art. 161.

²⁹ Jasni bin Sulong, 'The Implication of Religious Conversions toward Muslims' Inheritance under Malaysian Law', in *International Journal of Liberal Arts and Social Sciences*, 2, 9 (2014), pp. 122-135.

Interesting also is that there is an additional clause to the word ‘apostasy’ in article 116 of the *Kompilasi Hukum Islam* as to limit the apostasy that could be taken as the ground for divorce. The clause attached informs that the apostasy that could be taken as ground for divorce is the apostasy that results in disharmony within marriage. The clause aims to stress that not all apostasy can be brought by a spouse to break his or her marriage. It is the apostasy that results in disharmony within marriage that can be presented by couple to end their marriage. Valuing that what is written in law is to give freedom to couples to decide the fate of their marriage, a question arises of whether judges follow the rule. In the following section I shall discuss the effect of apostasy on the status of marriage in Indonesia. I shall also investigate the effect of apostasy on other familial legal issues, custody in particular.

Religious Protection in Indonesian’s Legal Practice: Cases of Divorce and Custody

The doctrine of religious protection is very clear in Islamic legal rules. Of the five ultimate goals of the sharia (*maqasid al-shari’a*) the first is religious protection. It is in this context of religious protection that the Islamic family law in Indonesia administers the effect of apostasy on a Muslim couple’s legal status of marriage and their rights to custody.

Divorce, Inevitable in Faith Disarray?

The *Kompilasi Hukum Islam* apparently wanted to place apostasy in the same position as the other grounds for divorce mentioned above and therefore, as I argued elsewhere, to give the couples the freedom to decide whether or not their marriage should continue.³⁰ In so doing, it seems that the *Kompilasi Hukum Islam* does not intend to dissolve a marriage at the precise moment one of the parties commits apostasy. Religious freedom is assumed to be implemented in this regard and the *Kompilasi Hukum Islam* authorizes relevant parties to decide the fate of their marriage. Nevertheless, a number of judges who are inclined to refer to the legal doctrine of the *fiqh* books still consider that a divorce between couple automatically occurs at a time when one party in marriage commits apostasy and not with the time the divorce decision

³⁰ Nurlaelawati, *Modernization, Tradition and Identity*, p. 157.

is issued.³¹ They also ignore the clause attached in the relevant article which stresses the element of disharmony resulting from the act of apostasy and therefore are inclined to stress the act of apostasy itself.

In fact a number of judges viewed that a petition of divorce on the grounds of apostasy does not acquire any attempts for reconciliation. Mukti Arto, for example, argues that the difference in religious faith between the couple will automatically result in disharmony and advises that what judges should do is to advise the apostate to return to Islam.³² Furthermore, they strongly suggest that the clause 'resulting in disharmony in the marital life' attached to the word '*murtad*/apostasy' found in Article 116 (h) be eliminated, as it makes the rule itself vague. To them, the essence of the clause has been covered in the same Article (116: f), which mentions continuous quarrelling as one of the grounds for divorce and argue that should the clause be maintained, the aim of Point (h) is obscured; it is apostasy or disharmony to be considered. Since they consider that apostasy can stand by itself as adequate grounds for the judges to end the marital relationship of a couple, they are accordingly not burdened by the necessity of proving the evidence of disharmony resulting from the act of apostasy.

As I discussed elsewhere, one case of apostasy in the religious court of Rangkasbitung implies that reconciliation is not to be striven for in a divorce sought when one party in marriage has become apostate and that the difference of religious faith is the strongest motivation which led the judges to comply with the petition. It is recorded in the judgment that a man petitioned for divorce because he claimed that he had frequent disagreements with his wife, and they had been separated since April 2003. It is also recorded that the husband admitted since January 2004 to have reverted to his former religion, Christianity, which he had embraced before marrying his wife. The wife, who contested the husband's petition, stated that not everything her husband had stated was true, and that she still wanted to save her marriage although the husband had reverted to his former religion. In dealing with this case, the judges decided to terminate the marriage. What is of interest is that in their legal considerations they clearly emphasize the apostasy of the husband, attested to by the fact that since January 2004 the husband had been active in one of the churches

³¹ Ibid., p. 158.

³² Ibid.

in Rangkasbitung. They then referred to Article 116 (h) of the Kompilasi Hukum Islam, which mentions that apostasy constitutes one of the valid grounds for divorce. It also cited the legal text from *al-mubadhdhab*, Vol. 2, p. 54, which states, “If a couple or one of each becomes an apostate, the marriage is to be annulled... if the apostasy occurs after a sexual relationship has been commenced, the divorce occurs after the expiry of the *iddah* period.” In giving such a judgment, the judges ignore the objection of the wife contesting the husband’s petition and had adduced the act of apostasy as the main grounds for divorce, whereas it was clear that the apostasy had basically been committed after the couple had been involved in arguments for a long time and had separated. They did not even seem to consider the possibility that, by stating that he had reconverted to Christianity, the husband had merely intended to back up his petition and ensure that it was granted.

Records demonstrate that apostasy has been a popular ground for marriage dissolution. In the periods before the *Kompilasi Hukum Islam* and the Marriage Law were issued, many cases demonstrate that the judges in the religious courts accepted apostasy as a condition which could break up a marriage automatically, a position relevant to the *fiqh* doctrine applied at the time. Many women have reportedly admitted that they had committed apostasy to rid themselves of their husbands. They took this strategy as women had at that time difficulty to petition for divorce. Their attempts were indeed successful. Pijfer recorded some cases in Demak in early 19 century where a number of Muslim wives took a strategy of admitting to have converted in order to be divorced. Interestingly, as Pijfer noted, their acts were approved by some ‘ulama. This phenomenon had led the regent of Demak to issue a circular letter discouraging Muslim women to play with the word of apostasy.³³ The same position was also adopted by judges of the religious courts after 1974, which however tends to run counter to the Marriage Law, as it does not categorize apostasy into the group of the grounds on which the divorce can be granted. This tendency continued to strengthen after the issuing of the *Kompilasi Hukum Islam* in which apostasy is considered as a valid ground for, but not automatically confirming, the dissolution of a marriage.

³³ See C.F. Pijfer, *Fragmenta Islamica, Studien over Het islamisme in Nederlandsch-Indie* (Leiden: E.J. Brill, 1934). See also, Nurlaelawati, *Modernization, Tradition and Identity*, p. 159 (note 79).

Despite that the written law has put apostasy as a private issue whose impact could be negotiated by relevant parties, in practical level it is considered to be an insult toward religion (Islam) which affects the religiosity of others. Therefore, judges thought that as soon as it is presented to court by a spouse as a ground for his or her divorce petition, apostasy should be treated as automatic ground for divorce regardless of the absence of disharmony within couple.³⁴ To them, religious difference is disharmony itself and saw therefore disharmony is a situation where couples have been in different direction in not only spousal but also religious life. What they assumed might be pertinent with the concept of harmony which, in fact, is defined as an ordered relationship linked to three aspects of sociocultural context, namely culture, spirituality and mental health.³⁵ Arguing that the difference in faith is an indication of disordered relationship within family, particularly spouses, in spiritual aspect, divorce is therefore inevitable. Other Muslim countries apply similar regulation in regard to apostasy and in almost all Muslim countries, in conversion the laws of patriarchy are superseded by the laws of religious affiliation.³⁶ Recently to relate to this practice and tendency, a new draft of the Marriage Law to be submitted to Parliament by the Ministry of Religious Affairs has adopted the dominant position of judges towards this issue, and removes the clause and states that apostasy alone, without being limited to the existence of disharmony, can break marriages.³⁷

³⁴ Interview with judges of Islamic court of Rangkasbitung and Serang, September 2012.

³⁵ Patricia Michelle Eng Hui Yapa and Boon Huat Tanb, 'Families' Experience of Harmony and Disharmony in Systemic Psychotherapy and Its Effects on Family Life', in *Journal of Family Therapy*, 33, 3 (2011).

³⁶ See Judith Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge: Cambridge University Press, 2008) and Lynn Welchmann, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam: Amsterdam University Press, 2007).

³⁷ See Draft Hukum Materiil Peradilan Agama (Bidang Perkawinan) being proposed to Parliament for it to be nationally discussed and therefore to be nationally enacted as a law.

Preserving ‘best interest for the child’ religiously’: no custody for apostate³⁸

Another issue that is impacted by the act of apostasy is the issue of custody after divorce. It is administered that when parents separate children aged below 12 would go with their mothers and those above 12 can choose one parent with which they will live.³⁹ In Indonesian religious court, custody cases can be resolved in two judicial procedures as a separated file or as integrated case with divorce file. The cases are mostly brought by women where they can face two kinds of problems: first to lose the legal right to become custodian of their children of the age below 12 and secondly to be not able to execute courts’ decisions giving them the right to become custodians. In the first case, the problem arises particularly when the man argues that the divorce petitions are motivated by the wife’s behavior, including wives’ leaving home for work and their religious impiety.⁴⁰ Some judgements in my collections clearly demonstrated the existence of these two kinds of issue.

As in other courts, in Indonesian religious courts judges’ decisions about the cases of custody generally stressed the best interest of children, but the rulings rest on the perception of individual judges as to what constitutes the best of children.⁴¹ The notion of the best interest of children is highly stressed in the Convention of Right of Child (CRC).⁴² It refers to the idea that children should be best protected in terms of financial, physical and psychological aspects and

³⁸ This issue has been discussed in my other article, ‘The Legal Fate of Muslim Women in Indonesia,’ in Tim Lindsey and Helen Paushacker (eds), *Religion, Law and Intolerance in Indonesia* (New York: Routledge Press, 2016).

³⁹ See *Kompilasi Hukum Islam*, art. 105.

⁴⁰ Nurlaelawati, ‘Sharia-based Laws in Indonesia: The Legal Position of Women and Children’, in Kees van Dijk, *Regime, Change, and Democracy: The Case of Indonesia* (Leiden: Leiden University Press, 2015), and idem, ‘The Legal Fate of Muslim Women in Indonesia: Divorce and Child Custody’, in Tim Lindsey and Helen Paushacker, *Religion, Law and Intolerance in Indonesia* (New York: Routledge Press, 2016).

⁴¹ Nurlaelawati, ‘The Legal Fate of Muslim Women in Indonesia’, 2015.

⁴² Article 16 (1) of ICRC states: States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

therefore to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child. However, since every case has different character and nature, it is difficult to draw the general principle or preposition and the factors or reasons for awarding or dismissing custody are varied.

Therefore, although judges, for example, agree with the rule awarding greater right to mother as mentioned above and mostly follow it, in practice, judges often conclude that, as the choice of giving the right of custody to one of the divorced parties aims to ensure the welfare of the children, it is not always good to give all mothers this responsibility without due consideration. Based on the notion of the best interest for the children, conversion of the mother to another religion is taken as a reason by judges to rob a mother's right to custody.⁴³ The judges' tendency to put religion in a very high esteem in awarding the right to custody basically effects to both men and women, but the fact that the state law awards mother greater right has disadvantaged women more. Therefore, although the laws of religious affiliation have mounted in this case of custody related to conversion, gender inequality which results from the laws of patriarchy takes its form. One recent case, involving a woman who after divorce dated with a non-Muslim man, clearly demonstrates the prevailing practice where the mother was dismissed from her right to custody of her 8 years old son.⁴⁴ Although the mother fought for her right and filed the case to the highest stage, appealing to Supreme Court and referred to two principles of the protection of the children's rights, namely non-discrimination and the best interest of the child, she failed to obtain the right. Assuming that her dating with a non-Muslim man might have contaminated the religion of the mother, the Supreme Court strengthened the rulings of the lower courts and argued that religion (Islam) is a prerequisite for one to be awarded right to custody of a Muslim child.

In another case, the religious court of Serang gave the right to custody of the children younger than twelve to their father on the basis of the consideration that the mother was not pious in her religion and

⁴³ Interview with judges of Islamic courts of Serang and Tangerang, September 2012. For the same view on this, see Muhrisun, 'Apostasy as Grounds in Divorce Cases and Child Custody Disputes in Indonesia', pp. 89-107.

⁴⁴ Decision No. 382 K/AG/MA/2012.

that all the members of her family were non-Muslims. As a basis for its decision, it mentioned the legal doctrine from al-Bajūrī's *Hashbiya Kifayat al-Akhyar*, Vol. 3, 203 stating that "... there is no right to custody for the mother who is religiously deviant." Related to this is that basically the *kompilasi* stipulates that custody of children should be first passed to women on the mother's side if the mother is deemed incapable. However, the fact that familial relationships are so close in Indonesia as it applies mostly bilateral system of kinship⁴⁵ provides a foundation for some judges to give the right of custody directly to the father, as giving it to, for example, an aunt or grandparent on the mother's side can mean in effect still giving it to the mother. It seems that such a decision was taken to ensure that the custody of the children, particularly in the case where the mother and her family have become religiously deviant (*fasiq*) or apostate, lies in the right hands and that the demands of the best interest have been satisfied.⁴⁶

Between Religious Protection and Right to Freedom of Religion

As stated above, while government basically respected religious freedom, interfaith relationship continues to be a source of conflict in Indonesia. Pressure from society and family is often inevitable as shown by the cases discussed above, being varied depending on the religious rigidity of family members. Basically, in regard with the rule of custody, the *Kompilasi Hukum Islam* indeed administers that to guarantee the safety of the children physically and spiritually, a religious court can transfer the right of custody from one nominee to others. Although it is not clear whether the spiritual aspects to be guaranteed or protected also include (Islamic) religion, judges in the religious courts interpret that this is so, and the spiritual safety of the children emphasized by them also has a bearing on religious interests of the children, This also applies to the case of *mumayyiz* children (those who have reached maturity or those, according to the *Kompilasi*,

⁴⁵ It is also interesting that this kinship system is also detrimental to divorce decision by wives and could be considered as external factor of divorcing. For the extensive discussion on this see Euis Nurlaelawati, 'Muslim Women in Indonesian Religious Court: Reforms, Strategies and Pronouncement of Divorce', *Journal of Islamic Law and Society*, 20, 3 (Leiden: Brill, June 2013).

⁴⁶ Nurlaelawati, *Modernization, Tradition and Identity*, p. 145.

aged twelve or older),⁴⁷ and their decision to live with the parent of different religion would be therefore ignored.

Such this legal attitude of judges demonstrates that although a number of reforms have been introduced religious doctrines remained to be maintained in a very high esteem. It therefore often turned out that the practice of Islamic family law often conflicts with current international human right norms and standards regarding the equality and the protection of dignity of all human beings and their religious freedom.⁴⁸ In fact, the *Kompilasi Hukum Islam* does not at any level provide a base of protecting human right to freedom of religion which a parent could refer when petitioning for their right to custody and for maintaining their marital bond. Nevertheless, as Indonesia has ratified a number of relevant international covenants, including ICCPR, CEDAW, and CRC, they could take them as their legal basis. In fact, The ICCPR which was ratified by Indonesia in 2006 states that no one shall be subject to coercion which would impair (his or her) freedom to have or adopt a religion or belief of his (or her) choice (ICCPR art 18).⁴⁹ To clarify the article, UN HRC, general comment No. 22 was issued and states that governments can limit the right of freedom of religion only when it is necessary to protect public safety, public order, health, or the fundamental rights and freedom of others. Any restriction must be non discriminatory and proportionate.⁵⁰ Above all these international legal standards have been ratified by Indonesia and to follow of their ratification Indonesia enacted several laws including the Law No. 23/2002 on the Protection of the Children Rights and the Law No. 23/2004 on the Elimintaion of all Forms of Violence against Women.

What a litigant as discussed above did when mentioning the principles provided in CRC to be refered to in the resolution of her custody case shows that some litigants have known the application of

⁴⁷ For further discussion on this issue, see Euis Nurlaelawati, *Modernization, Tradition, and Identity*, pp. 145-146.

⁴⁸ Iris Boussiakou, 'Religious Freedom and Minority Rights in Greece: the case of the Muslim minority in western Thrace', *GreeSE Paper* No 21, Hellenic Observatory Papers on Greece and Southeast Europe (December 2008), See also Bassam, 'Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations', *Human Rights Quarterly*, Vol. 16, No. 2 (May, 1994), pp. 277-299, p. 1994.

⁴⁹ Article 18 of ICCPR.

⁵⁰ General Comment No. 22, UN HRC.

such principle. Unfortunately, however, the judges, although also aware of the existence of the principles, have been reluctant to incorporate it in their decisions.⁵¹ This, to my view, is in line with the fact that, as many put it, the right to convert from Islam to another religion is held by only a minority of Muslim scholars and that the view of religious freedom is not shared by the vast majority of Muslim scholars both past as well as present. In fact, while the litigant and her lawyer strongly argued that requirement on Islamic faith for one to be awarded the right to custody violates the right of freedom to religion judges have been very firm about their interpretation of religious protection and have ignored their legal and constitutional argument.⁵² It seems therefore very clear that the state has limited the right to freedom of one's religious conviction and that human rights are determined or restricted by the principle of a particular religion. In this context, we could also opine that the principle of religious protection can supersede those introduced by CRC, including the principle of non-discrimination.

The incompatibility of the religious freedom with the precept of religious protection in practical level is, I would say, intersected with Muslims' threatened feeling of the danger of Christianisation agenda that they think to still run in Indonesia. Therefore, although the state law has sought to move away from the classical religious rules in the administration of apostasy case as to avoid discrimination and manifest the right to religious freedom, it remains difficult for the judges to renounce the dogma that Muslims must protect their religion from any possible hazard. Such is, as Crouch observed, also evident in the case of the children protection related to the proselytization and its limit, Crouch proposed the same argument of the religious protection and stated that there has been entrenched stereotypes and suspicion of Christian activities in Indonesia and that is, she stated, 'because Christian schools are perceived by Muslims as a deceptive means of proselytizing Muslim children, seeking converts and therefore

⁵¹ See also Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Cambridge: Islamic Texts Society, 1997), Mahmoud Ayoub, "Religious Freedom and the Law of Apostasy in Islam," *Islamochristiana* 20 (1994), and Yohanan Friedmann, *Tolerance and Coercion in Islam*, (Cambridge: Cambridge University Press, 2003).

⁵² For the detailed case, see Nurlaelawati, 'Legal Fate of Muslim Women in Indonesia'.

threatening the future of the Muslim community'.⁵³ Therefore, despite that there have been a number of legal attempts to protect minority groups' rights many remained grieved. In addition, as I stated elsewhere, although courts' judges are bound by the state law, they still place a high priority on religious values when they come to interpret those laws, and this can result in the failure of the elimination of discrimination.

Above all, the majority of judges of the Islamic court have so far viewed that they have been provided with special substantial references and consider that such references as the Law No. 23/2002 on the Protection of the Children Rights and the Law No. 23/2004 on the Elimintaion of all Forms of Violence against Women, which, as noted above, were issued to implement concretely the ratification of CRC and CEDAW, are not their primary references.⁵⁴ In fact, they rarely, if not never, refer to them.⁵⁵ Such this attitude might be because Indonesia has not taken an appropriate way to follow the ratification. Different from, for an example, Morocco that made direct reforms in *Mudawwana*, the special reference of the Muslim judges, to follow its ratification of the two international covenants, Indonesia issued new laws as the two laws mentioned above.⁵⁶ Therefore, if Muslim judges in Morocco could easily comprehend and refer to the new laws which adapt to the rules covered in CRC and CEDAW as the reformed rules were incorporated in and added to the *Mudawwana*, their previous legal reference, Muslim judges in Indonesia are challenged to refer to the new laws, besides the previously existing laws, the Law of Marriage and the *Kompilasi Hukum Islam*. Given that they are new laws, many judges

⁵³ Crouch, *Law and Religion: Conflict and the Court in Indonesia*, p. 96. For more modern discussions of this issue and of opinions of some scholars, see Abdullah Saeed and Hassan Saeed, *Freedom of Religion, Apostasy and Islam* (Michigan: Ashgate, 2004) and Mahmoud Ayoub, "Religious Freedom, pp. 73-91.

⁵⁴ Interview with judges of Serang, Tangerang and Depok, September 2012.

⁵⁵ See Hotnida and Dewi Sukarti, 'Law in Action: Analisis Implementasi UU No. 23 Tahun 2002 pada Putusan Hakim dalam Perkara Hadhanah di Pengadilan Agama', *Jurnal Alqalam: Jurnal Keagamaan dan Kemasyarakatan* (Lemlit IAIN Sultan Maulana Hasanuddin Banten 2010) Vol. 27, No. 2.

⁵⁶ See John Hursh, 'Advancing Women's Rights through Islamic Law: The Example of Morocco', *Berkeley Journal of Gender Law and Justice*, 22 (June 2012), pp. 252-305. See also Euis Nurlaelawati and Muhrisun, 'Islam and Children's Right: The Implementation of the Best Interest of the Child in Indonesia and Morocco', *A Research Report*, The Minsitry of Religious Affairs, Jakarta, 2016.

have not yet been aware of their existence and deemed themselves to be not bound by those newly issued laws.

Conclusion

From the discussion above, a number of conclusions could be drawn. First is that Indonesian Islamic law has to some extent made reforms on rules of apostasy related to the issue of family. For an example, if in classical legal doctrines apostasy is considered to be an automatic ground for marriage dissolution, the *Kompilasi Hukum Islam* puts it as one of divorce grounds, implying that marriage may be continued if no party takes the practice of apostasy of one spouse to court as divorce grounds. The choice of whether to maintain or dissolve marriage is given to the spouses. The freedom is strengthened by the character of apostasy where the Indonesian law would not terminate the marriage should there has been no disharmony resulting from apostasy. The rule of custody does not clearly specify the criteria of custodian. In term of religion, for an example, the *Kompilasi Hukum Islam* has not listed Islamic religion or being Muslim as one of the conditions upon which mother or father could be awarded the right to custody. The mention of the notion of the best interest of the child seems to be deemed sufficient to represent the objective of the protection of the right of the child.

Second is that such those reforms have nonetheless not been evenly understood and implemented by Muslim judges. The freedom of the spouse to decide the fate of their marriage has not been evenly considered by Muslim judges and most of them considered apostasy itself as ground for divorce. As a result almost all divorces petitioned under the ground of apostasy were approved. The same holds also true for the case of custody. Muslim judges often robbed the right of non-Muslim parents, mostly mothers, to custody, of the children aged 12 who according to the rule should be cared of by their mothers. By doing this these judges wanted to protect religion (Islamic) from the hazard that would be created. It is safe to argue that when (Islamic) religion is challenged and endangered protection would be made. A non-Muslim custodian is therefore dismissed from the right to custody, as to those judges awarding the right to custody of the child to the non-Muslim parent would disturb and endanger the (Islamic) religiosity of the child.

Third is that although courts' judges are bound by the state law, they still place a high priority on religious values when they come to

interpret those laws, and this can result in the failure of the elimination of discrimination and of the protection of the rights of the persons to such discussed familial issues as marriage, divorce and child custody. []

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