

**APOSTASY: THE LEGAL EFFECT OF THE CUSTODY OF
CHILDREN**

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**APOSTASY: THE LEGAL EFFECT OF THE CUSTODY OF
CHILDREN**

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Academic Project Report submitted in fulfillment for the degree of
BACHELOR OF SYARIAH AND JUDICIARY

**PERPUSTAKAAN
UNIVERSITI SAINS ISLAM MALAYSIA**

Faculty of Syariah and Laws
ISLAMIC SCIENCE UNIVERSITY OF MALAYSIA
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May 2007


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I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

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ACKNOWLEDGEMENT

Foremost, all praises be to Allah Subhanahu Wata'ala who has revealed Islam to guide us in life and sent us the most noble Prophet Muhammad Sallahu A'laihi wassalam to guide us to understand Law and its applications.

With great pleasure, I would like to take this opportunity to thank to everyone who has either directly or indirectly helped me in writing and finishing this project paper and appreciation is due to Encik Zulkifli Hasan, supervisor of this academic project for his continued support and guidance during the research.

Equally important, thanks are due to the following dean of faculty Prof. Abdul Samat Musa for their continued support and guidance in completing this academic project. I extend my appreciation to my entire lecturer at Islamic Science University of Malaysia, your help in this thesis would never be forgotten.

Not forgetting to the Staff and Librarians of USIM, UIAM and Islamic Religious Department Library, which help me to gather the information and cooperation in completing this academic project.

Special thanks I dedicate to my parents and my colleagues, who have assisted and guided me directly or indirectly. May Allah bless you.

ABSTRAK

Kajian ilmiah ini menekankan tentang hak jagaan anak ke atas seseorang yang telah murtad. Isu murtad bukanlah suatu perkara yang baru dalam sistem perundangan Islam dan negara. Ianya berlaku sejak kedatangan Islam lagi. Namun begitu sejak kebelakangan ini isu murtad sering dikaitkan dengan isu hak jagaan anak. Pertikaian sebegini memerlukan kajian yang mendalam untuk mengenal pasti pihak yang berhak ke atas hak jagaan anak tersebut. Sistem perundangan Islam telah menetapkan beberapa garis panduan bagi melayakkan seseorang itu layak menjadi penjaga selepas berlaku perceraian. Antara perkara yang dititik beratkan dalam melantik penjaga adalah seseorang itu mestilah beragama Islam. Para fuqaha juga tidak menolak bahawa berkemampuan dalam memberikan kebajikan untuk anak merupakan salah satu syarat yang penting. Dalam kajian ilmiah ini, penulis telah menggunakan kaedah kajian perpustakaan. Penulis juga turut mengupas dengan lebih lanjut berkenaan kelayakkan hak jagaan anak bagi suami atau isteri yang telah keluar dari agama Islam berdasarkan undang-undang Islam dan sistem perundangan yang sedia ada di Malaysia.

ABSTRACT

This academic project emphasize on the issue regarding to the right of custody of children among the apostate. Apostasy is not a new issue in Islamic Law and Malaysian Law. It happened since the coming of Islamic doctrine in this country. However, the case of apostasy relates to the custody of children is become a big issue lately. The disputation needs a research attentively to determine the party who ought to obtain the right of the custody. Islamic Law system provides guidelines to qualify a person as a guardian of his children after divorce. According to the Islamic law, the person shall be Muslim as a condition to be a guardian. The Muslim Jurists also accept that a person's ability to provide welfare and interest for their children is one of the main conditions. In this academic research, the writer uses library research methodology. The writer also detailed on the right of custody to the apostate whether the husband or the wife based on the Islamic law and Malaysian law.

ملخص البحث

هذا البحث العلمي أعد يناكيد القضايا التي تختص بخصوص الحضانة لدى المرتد. الإرتداد ليس قضية غريبة في القانون الإسلامي والقانون الماليزي. وقد حدث ذلك منذ ظهور المذهب الإسلامي في الفطرة الماضية. وفي هذا العصر تعلقت القضايا الإرتداد بالقضايا الأخرى تعلقا مستمرا. وخاصة يقوم حضانة الإرتداد، والترعات التي وقصت بخصوص هذه المسألة ينبغي فيها ودراستها برقة لإثبات الطرف الذي يتهد بحضانة الأولاد. وقد قرر القانون الإسلامي التوجهات التي ينبغي مقابته لتعيين حاضن على الأولاد بعد وقوع الطلاق. واشترط الإسلام عدة شروط الحضانة لمصلحة الأولاد. وقد الفهد رجال القانون الإسلامي أن القدرة على تزويد وإضافة إلى ذلك. وقد إستخدم المؤلف في هذا البحث العلمي دراسة المكتبية. أن هذا البحث العلمي فرتصين الحضانة طبقا على القانون الإسلامي والقانون الماليزي.

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GLOSSARY

Ahadith	Plural of hadith of the Prophet Muhammad s.a.w.
a.s.	Abbreviation of “Alaihi Al-Salam” meaning “upon him the peace”. Only observed for prophets other than Muhammad s.a.w.
ayah	Sign
ayat	Plural of ayah, verses of the Quran.
Baligh	Of the age majority
Da’wah	Change, claim or accusation
Diyah	Compensation paid causing death
‘ibadah	Devotion or worship
‘ilm al-qadi	Personal knowledge of a judge
Fatwa	Opinion upon a point of law
Fiqh	Jurisprudence
Fuqaha	Islamic jurists
Had	a specific form of punishment laid down in the Quran
Hadith	Saying of the Prophet Muhammad s.a.w.
Hudud	Several specific crimes and punishment laid down in the Quran
Hujjah	Argument
Hukum	Legal rule
Iddah	Period of divorce
Ijma’	Consensus of opinion of the Ulama
Ijtihad	Extracting legal rules from the original sources
Imam	Leader
Jahiliyyah	Ignorance, i.e. the period before Islam embraced by the Arabs
Hadhanah	Custody or guardianship of children
Kaffarah	Expiation
Kitabi	Jews and Christians
Mazahib	Schools of jurisprudence
Mukallaf	Persons with full legal competence
Nas shar’i	Authority

Nasab	Patterning or lineage
Nafkah	Maintenance
Qadi	Judge
Qias	Analogical reasoning
r.a.	Abbreviation of “Radhi Allahu ‘An Hu” meaning “upon him the blessing of Allah s.w.t.”
s.a.w.	Abbreviation of “Sallallahu ‘Alaihi wa Salam” meaning “peace be upon him”. it is compulsory for a Muslim to utter his blessing whenever he hears the Prophet Muhammad’s name being mentioned
Shar’i	Legally recognized by the shariah
Sunnah	Saying, deeds and approvals of the prophet s.a.w.
Surah	Chapter of the Quran. The number preceding colon denotes the chapter number while the numbers after the colon denote the verse number
‘ulama	Plural of ‘alim, Islamic jurist
Ummah	the global Muslim community
Wajib	Mandatory or obligatory
Wali	Legal guardian
Zakah	a tax levied on every competent Muslim

ARABIC WORDS TRANSLITERATION SYSTEM

TRANSLITERATION

1. Alphabet

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Trasliteration</u>
ء	,	فأر	fa`r
ب	b	برد	burd
ت	t	تَلّ	tall
ث	th	ثوب	thawb
ج	j	جدر	jidâr
ح	h	حليب	ḥalīb
خ	kh	خادم	khâdim
د	d	ديك	dīk
ذ	dh	ذهب	dhahab
ر	r	رفيق	rafīq
ز	z	زميل	zamīl
س	s	سلام	salām
ش	sh	شعب	shab
ص	ṣ	صخر	ṣakhr
ض	ḍ	ضيق	ḍayq
ط	ṭ	طالب	ṭālib
ظ	ẓ	ظالم	ẓālim
ع	‘	عقل	‘aql
غ	gh	غلام	ghulām
ف	f	فيل	fil
ق	q	قلب	qalb
ك	k	كلام	kalām
ل	l	لَبّ	lubb
م	m	مال	mâl
ن	n	نجم	najm
ه	h	هول	hawl
و	w	ورق	waraq
ي	y	يَمّ	yamm

2. Short Vowel

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ا	a	كُتِبَ	kataba
ي	i	عَلِمَ	'alima
و	u	غُلِبَ	ghuliba

3. Long Vowel

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ي، ا	ā	عالم، فتى	'ālim, fatā
ي	ī	عليم، داعي	'ālīm, dā'ī
و	ū	علوم، أدعو	'ulūm, Ad'ū

4. Diphthong

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
و	aw	نوم	nawm
ي	ay	ليل	layl
يَ	iyy	شافعي	shāfī'iyy (ending)
وَّ	uww	علوَّ	'uluww (ending)

5. Exemptions

5.1 Arabic letter ء (hamzah) ound at the beginning of a word is transliterated to the letter “a” and not to ‘.

Example: أكبر transliterated to: akbar (not ‘akbar)

5.2 Arabic letter ة (ta’ marbutah) ound in a word without ال (al) which is coupled with another word that contains ال (al) at the beginning of it is transliterated to the letter “t”.

Example: مكتبة الإمام transliterated to: maktabah al-imām

However if the Arabic letter ة (ta’ marbutah) found in a word with ال (al), in a single word or in the last word in a sentence, it is transliterated to the letter “h”.

Example: المكتبة الأهلية transliterated to: al-maktabah al-ahliyah

قلعة qal’ah

دار وهبة dār wahbah

ABBREVIATION

AS	‘alayh al-salām
Act	Akta
A.H	After Hijrah
CLJ	Current Law Journal
comp.	compiler/compiled by
d	death
Def.	definition
Dr.	doctor
ed.	editor/edition/edited by
Etc	et cetera, and so on
H	hijriyyah
Hj.	Haji
Ibid, ibid	ibidem, in the same place
i.e	that is to say
ISA	Internal Security Act
JH	Journal Hukum
LRA	Law Reform Act Marriage and Divorce
M	mīlādiyyah
MLJ	Malayan Law Journal
Prof.	Professor
S	Section
Sdn. Bhd.	Sendirian Berhad
Trans.	Translator or translated by
n.a	no author/no artist
narr.	narrated by
n.d	no date/no year
n.pb.	No publisher
n.pl.	No place
p.	page
pp.	pages
perf.	performers
RA	radiya Allāh ‘anhu/ ‘anhā / ‘anhum
Rev.	review/revision of
SAW	salla Allāh alayh wa sallam
SWT	subhānahu wa ta’ālā
trans.	translator/ translated by
v	versus
VCD	video cd
vers.	version
vol.	volume
writ.	written by

RESEARCH PROPOSAL

RESEARCH PROPOSAL

1.1 Introduction

Islamic law has a unique system of settling disputes among its believers by executing a law which gives equal opportunity to both the parties. The main objective of Islam is to maintain justice among human being regardless of their wealth, culture, race and religion. The Islamic concept of justice can be seen through that of the Prophet of Muhammad S.A.W. in his judgment and the command of Allah S.W.T. This order of Allah and the practice of the Prophet have been followed by Muslims to settle the disputes arising among them.

Islamic law is a universal in character and its scope and guaranteed the all of people's right. It applies to all mankind Muslims or non-Muslims. The practicing the other minority religion is recognized in our country so long as it does not interfere of provokes other beliefs. Mutual understanding among the believers form different religion would contribute to a harmony society.

Justice however, cannot be done without the existence of a judiciary system. Accordingly, the system through the law s decides how the trial should be conducted, whether appearance of both parties and only one party appears especially when both parties have a children and the one spouse party whether husband or wife had apostate. In this case are very complicated phenomena in our country.

This phenomenon is incriminating a lot of views of Islamic Jurist or scholars and the provisions under Islamic Law and Malaysian Law. This paper will discuss the legal effect of custody of children or *hadhanah* when the one spouse party became apostate.

1.2 Background of the Research

Freedom of religion is considered to be the personal right of among person. Malaysia is a multi-racial and multi-religions nation. Islam is declared as the religion of the Federation by the Federal Constitution. According to Article 3 of the Federal Constitution state that Islam is the religion of the federation however according to article 11 discuss about the right of every citizen to profess and practice his religion but other believers cannot be propagate it among Muslims.

However, the certain conflict issues in our country is happened in matrimonial cases including when the one side party apostate or *murtad* from Islam and they also have conflict to determine the right to became a custodian of her or his children. The conflict jurisdiction between civil court and syariah court also will be discussing in this academic project. It will be discussing based on article 121(1A) which is relating the jurisdiction of Syariah court especially in matrimonial matters.

According to the appropriate field of the power that is wields, this academic project could be focuses on the exclusive provision according to Islamic law and Malaysian law through the cases which is handing by Syariah Court and Civil Court in Malaysia pertaining the right of custody of children or *hadhanah*.

In this perspective also, the right of custody of children (*hadhanah*) has to discuss based on act and Enactment where, what are section of the Act provided. The academic project paper is also based on the Islamic Family Law (Federal Territories) and others Enactment.

1.3 Statement of Problem

The issue will be discussing in this research are two scopes. Firstly, what is the Islamic law says about apostasy, different views by Islamic Jurists pertaining punishment of apostasy, the characteristic of apostasy and whether the Malaysian law has provided the procedure to profess or apostate to convert another religion. The issue in this research will be determining whether the apostate has the right under the provisions in Islamic law and Malaysian law in family matters especially in custody right.

Secondly, what are the Islamic law said and a Malaysian law said about the right of custody of children, the provision by Qur'an and Sunnah and the views by Islamic jurists relating qualification, condition and the provision by act in Malaysian Law to become a custodian.

This academic project also will be support by cases relating apostasy and custody of children (*hadhanah*) which is can be describe the position of apostate person whether he has a right to become a custodian or not after he convert to another religion. Beside that, the writer tries to define the religion of a child according to views by Islamic Jurists and provision.

In Islamic laws also have are views pertaining the apostasy or *murtad* and the right of custody of children or *hadhanah*. This paper also will be discussing it based on the verses of Qur'an and hadith says about the apostasy and the right of custody of children.

1.4 Aim of the Research

The aim of this academic project is to provide a comprehensive study and research relating to apostasy, custody of children (*hadhanah*) and the legal effect when the a spouse party became apostate. Its also will be examine the right and

position to become a custodian when the one side party was apostate according to Islamic views and Malaysian Law provision.

1.5 Objective of the Research

The main objectives are to have better understanding on the concept of apostasy or *murtad* and custody of children before the Islamic law and Malaysian law. It will be explore the characteristic of apostasy, the qualifications to become a custodian after the parties divorced and the position whether apostate has a right to become a custodian base on the Islamic law views and Malaysian law provision.

On the other hand, this paper will give the awareness and main knowledge to the public to emphasize on family matters and the issues of apostate in Malaysia.

The academic project also will expose the parents to responsible to rights of their children which is provided in the Islamic law and Malaysian law.

Apostasy is the criminal offence in Islamic law. Beside that, this research will examine the legal effect of custody of children when the one spouse party becomes apostate according the issue of apostasy in Malaysia.

1.6 Definition of Term

The Arabic equivalent for apostasy is *riddah* or *irtidad* from the root *radd* which, among other connotation, has the meaning to retract, to retire, to withdraw from or fall back from. In the context of Islamic Jurisprudence it is equated with renunciation or abandonment of Islam by one who professes Islamic Faith. The apostate is called *Murtad*.¹

¹ Muhammad Iqbal Siddiqi. 1985. *The Panel Law of Islam*. Pakistan: Kazi Publication. p. 95.

Hadhanah comes from the word “*Hidhan*” which means flank, the side of a body between ribs and hip.² According to *Hukum Syarak*, it means taking care of a person who is unable to look after himself such as children, an insane person, an idiot or those who have not attained the age of discretion.³

1.7 Scope of the Research

The study is limited to the discussion of the legal effect of custody of children when the one side party is apostate. In this study, the writer tends to discuss the position and the right to each parties either husband or wife may become a custodian of her or his children. It can be determine by the provision by al-Quran, as-Sunnah and the views by Islamic Jurists. It also involved the qualification and condition under the provisions in Islamic Law and Malaysian Law.

1.8 Research Methodology

In undertaking this academic project, the writer has employed one of method of research only, which is obtaining information from secondary data. Secondary data, in the question are available in the library. Several libraries have been visited to collect the information.

The libraries are follows, Islamic Science University of Malaysia (ISUM) library, and Islamic International University of Malaysia (IIUM) library, National University of Malaysia, Islamic Centre and National Library.

² Sayid Sabiq. 1990. *Fiqh Sunnah*. (Trans). By Mahyuddin Syaf. Second edition. Kuala Lumpur: Victoria agency. Vol 8. p. 160.

³ Dr. Siti Zulaikhah Md Noor. 1999. “*Beberapa Aspek Dalam Hadhanah*”. *Jurnal Hukum*, Kuala Lumpur. p. 146.

1.9 Research Design

Firstly, in order to examine the level of knowledge of society about the topic, the writer has using the three main methods. The first method is using the documentation method though collecting data with using some document which are relate for this research as well as the electronic media (internet) and so on.

Subsequently, the writer also using the some books of Islamic laws and Malaysia laws, beside that the work of *Fiqh* and current laws book that relate to the background of the topic.

1.10 Literature Review

Abdul Qadir 'Oudah Shahed (1991) in his book “Criminal law of Islam Volume 3” stated the meaning of apostasy (*murtad*). According to him an apostate (*murtad*) may be defined as Muslim who renounces the faith of Islam. In other word apostasy in the *Syariah* terminology applies to a Muslim alone. If a non-Muslim renounces his religion, he is not treated as an apostate (*murtad*).⁴ According to Syafe'i school apostasy means adherence to Islam by intending to do so, by saying something which would cause one to fall into disbelief, or by action. No difference here is to be observed between whether this was done with the intention and satire or through conviction.⁵

According to Mohammad Hashim Kamali (2003) in his book entitled “Islamic Law in Malaysia Issues and Development” describe that child custody (*hadhanah*) is recognized in Islamic law for a purpose mainly of care and custody of infant. It is a form of guardianship (*wilayah*) which primarily belongs to the mother and failing her other female relatives who are capable and willing to assume it.⁶ In another chapter he

⁴ Abdul Qadir Oudah Shahed. 1991. *Criminal of Islam*. Kaherah: International Islamic Publishers. p. 257.

⁵ Farid Sufian, Tajul Aris Ahmad Bustami & Mohd Hisham Mohd Kamal. 2001. *Administration of Islamic Law in Malaysia*. Kuala Lumpur: Malayan Law Journal. p.110.

⁶ Mohammad Hashim Kamali. 2003. *Islamic law in Malaysia Issue and Developments*. Kuala Lumpur: Ilmiah Publishers. p. 105.

also describe the current situation relate with the apostasy cases among the Muslim which is sensitive issue. On 22 October NorAishah renounced Islam in the presence of Commissioner of Oath. She then left her parental home to live with her fiancé's parents. NorAishah own Family and relative were "saddened and shocked" with her renunciation of Islam just as it angered certain quarters of the Muslim community to see what they considered to be a violation of the Muslim society in Malaysia.⁷

Haji Sa'id Haji Ibrahim (1996) in his book entitled "Qanun Jinayah Syar'iyah dan Sistem Kehakiman Dalam Perundangan Islam Berdasarkan Quran dan Hadith" stated that apostasy (*murtad*) can be made by three subjects. Whether through believe (*Itikad*), by action (*fe'el*) and by word (*kaul*).⁸ According to the Bill of Kelantan Syariah Criminal Code 11 section 23(1) provides:

"*Irtidat* is any act done or any word uttered by a Muslim who is *mukallaf*, being act or word which according to *Syariah* Law, effects or which is against the *aqidah* (believe) in Islamic religion: provided that such act is done or such word is uttered intentionally, voluntarily and knowingly without any compulsion by anyone or by circumstances."⁹

In Part III: "Crimes and Punishments of Syariah: the Islamic Law", Professor Doi (2000) on his book stated that apostasy or *Al-Riddah* means rejection of the religion of Islam in favor of any other religion either through an action or through words of mouth. The act of apostasy thus puts an end to one's adherence to Islam. When one rejects the fundamental principles of faith (*iman*) like faith in the Existence of Allah or the Messenger ship of His Prophet Muhammad as contained in the contempt statement of Islam, the *Kalimah al-shahadah*. Similarly the rejection of the belief in the Qur'an as the Book of Allah or the belief of the message contained in it, or the belief in the Day of Resurrection, or Reward and the Punishment of Allah will all amount to apostasy. The rejection of the obligatory ritual practices like prayers (*Salat*), *Zakat* (giving of the poor-rate), Fasting in the month of Ramadan (*siyam*), and Hajj

⁷ Mohammad Hashim Kamali. 2003. *Islamic law in Malaysia Issue and Developments*, p. 203.

⁸ Haji Sa'id Haji Ibrahim. 1996. *Qanun Jinayah Syar'iyah dan Sistem kehakiman Dalam Perundangan Islam Berdasarkan Quran dan Hadith*. Kuala Lumpur: Darul Ma'rifah, p. 117.

⁹ Malaysia. n.d. Bill of Kelantan Syariah Criminal Code 11. Section 23(1).