

**Reinterpretation of Article 105 of the KHI: Pesantren as Institutional Hadhanah for Neglected Children****Mochamad Faisal<sup>1</sup>, Syailendra Sabdo Djati<sup>2</sup>**<sup>1,2</sup> Islamic Family Law Study Program, Imam Syafi'i College of Islamic Studies, Indonesia**Article History**

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**Abstract:** Childcare (*hadhanah*) in Indonesian Islamic family law remains predominantly constructed within biological family relationships, particularly through Article 105 of the Compilation of Islamic Law (KHI), which places parental figures as the primary holders of custodial rights. This construction becomes problematic when parents and extended family members are unable to provide adequate care for neglected children. **Purpose:** This study aims to analyze the legal position of Article 105 of the KHI and the scope for its reinterpretation concerning non-family caregiving institutions, examine the juridical and Islamic legal foundations that may support pesantren as alternative caregiving institutions, and formulate a normative construction of *institutional hadhanah*.

**Methodology:** This study employs normative legal research with a library research design, using statute and conceptual approaches. Primary legal materials include Articles 105 and 156 of the KHI, Law Number 35 of 2014 on Child Protection, Law Number 18 of 2019 on Pesantren, and Government Regulation Number 44 of 2017 on the Implementation of Child Care. The materials were analyzed through descriptive-analytical, textual, systematic, and teleological interpretation. **Findings:** The study finds that Article 105 remains the principal legal basis for parental *hadhanah*, but a systematic interpretation with Article 156 and child-protection regulations provides normative space for alternative caregiving when family-based care fails. Pesantren may be considered within this framework, but their status as *hadhanah* institutions is not automatically recognized under existing law. The proposed model requires five institutional *ahliyyah* criteria: legal legitimacy, adequate caregiving facilities, pedagogical and psychological competence, reliable child monitoring, and communication with biological families.

**Implications:** The model requires judicial authorization, periodic supervision, and clearer regulatory standards to ensure accountability and protection of the child's best interests.

**Originality:** The novelty of this study lies in developing *institutional hadhanah* as an institutional-functional reinterpretation of Article 105 of the KHI by integrating Islamic family law, *maqashid al-shari'ah*, child-protection principles, and the institutional characteristics of pesantren.

**Keywords:** *Hadhanah*; Article 105 KHI; Pesantren; Institutional Hadhanah; Maqashid al-Shari'ah; Child Protection

**INTRODUCTION**

Childcare issues cannot always be resolved within the biological family environment. Children may lose adequate care due to divorce, the death of a parent, neglect, family conflict, economic limitations, or the inability of parents to fulfill their caregiving responsibilities. Under such circumstances, placing children solely on the basis of biological relationships may potentially conflict with their best interests. Islamic boarding schools (*pesantren*) possess institutional characteristics that are relevant to examine as an alternative form of care because they not only provide religious education but also establish communal living through character development, fulfillment of daily needs, supervision, and assistance for students. Fahham (2020) demonstrates that pesantren education integrates caregiving patterns, character formation, and child protection. State recognition through Law Number 18 of 2019 has also strengthened the position of pesantren as institutions of education, religious propagation, and community empowerment, although such recognition does not automatically establish pesantren as holders of *hadhanah* rights (Panut et al., 2021).

In Indonesian Islamic family law, *hadhanah* is primarily regulated under Article 105 of the Compilation of Islamic Law (KHI), which stipulates that the care of a child who has not reached the age of *mumayyiz* or is under 12 years old is the right of the mother, while a child who has reached the age of *mumayyiz* is given the opportunity to choose between the father or mother as the holder of custodial rights; the costs of care remain the responsibility of the father. This provision indicates that the normative construction of *hadhanah*

in the KHI remains oriented toward the relationship between children and their biological parents (Suryantoro, 2024). However, its application is not absolute because the determination of custody must consider the caregiver's ability to ensure the child's welfare and best interests (Nurrohman & Syamsuddin, 2025). Fiqh literature also views *hadhanah* not merely as the right to live with a child, but as the obligation to care for, protect, educate, and fulfill the child's needs based on the principle of benefit (*mashlahah al-makhdhun*) (Multazam, 2024). The caregiver's ability, trustworthiness, health, and competence are important elements in determining eligibility to perform *hadhanah* (Al-Jaziri, 2003; Al-Kasani, 2003).

Several studies have demonstrated the development of a legal approach that places the best interests of the child as the primary consideration in resolving *hadhanah* disputes. Haryati and Fakhria (2025) found that the application of Article 105 of the KHI may be carried out flexibly when the caregiver's circumstances do not support the child's welfare. Tarmizi et al. (2023) also identified custody disputes and child neglect as major problems following divorce and opened the possibility of involving other parties when parents and family members are unable to perform caregiving functions. Puspitasari et al. (2024) emphasized the compatibility between the concept of *hadhanah* and the Child Protection Law in placing child protection as the primary orientation. Nevertheless, these studies have not specifically constructed pesantren as alternative caregiving institutions. Subhan and Kamal (2025) have connected pesantren with child protection based on the *hadhanah* jurisprudence of the Shafi'i School, but they have not systematically formulated the position of pesantren in relation to Article 105 of the KHI, the limits of their authority, or the institutional requirements that must be fulfilled. This gap indicates the need to reinterpret Article 105 of the KHI through a systematic and teleological approach by integrating Islamic family law, the principles of *maqashid al-shari'ah*, and child protection law. This reinterpretation is directed toward developing the concept of *institutional hadhanah*, namely a caregiving model that enables an institution to perform caregiving functions when the biological family is unable to guarantee the child's best interests, without severing the child's relationship with the biological family. The principles of protecting life (*hifzh al-nafs*), intellect (*hifzh al-'aql*), and lineage (*hifzh al-nasl*) may serve as normative foundations for this construction (Al-Ghazali, 1997; Al-Syatibi, 2003).

Based on this gap, this study aims to analyze the position of Article 105 of the KHI and the scope for its reinterpretation concerning caregiving by non-family institutions; examine the positive legal foundations and Islamic legal values that may support the position of pesantren as alternative caregiving institutions; and formulate a construction of *institutional hadhanah* based on the principle of the best interests of the child. The novelty of this study lies in expanding the perspective of *hadhanah* from an individual-biological approach toward an institutional-functional approach by positioning pesantren as the primary object of analysis. Theoretically, this study is expected to contribute to the development of Islamic family law, particularly by broadening the understanding of the subjects and functions of caregiving. Practically, this study is expected to provide a conceptual basis for establishing alternative caregiving policies that offer more adaptive protection for neglected children in Indonesia.

## RESEARCH METHOD

This study employed normative legal research using a library research design to examine the legal construction of *hadhanah* under Indonesian Islamic family law and to formulate the normative possibility of recognizing pesantren as alternative caregiving institutions. Normative legal research was selected because the study did not seek to measure empirical caregiving practices in particular pesantren, but rather to examine, interpret, and reconstruct legal norms related to child custody, child protection, and the institutional position of pesantren. The analysis therefore focused on the relationship between Article 105 of the Compilation of Islamic Law (KHI), child-protection regulations, pesantren regulations, and Islamic legal doctrines concerning *hadhanah*. This approach was considered appropriate because previous studies indicate that the implementation of *hadhanah* in Indonesia continues to develop toward greater emphasis on the welfare and best interests of the child (Haryati & Fakhria, 2025; Maula, 2025).

The study applied two primary approaches, namely the statute approach and the conceptual approach. The statute approach was used to examine the normative content, scope, and relationship among Article 105 and Article 156 of the KHI, Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 on Child Protection, Law Number 18 of 2019 concerning Pesantren, Government Regulation Number 44 of 2017 concerning the Implementation of Child Care, and other relevant legal provisions. These legal instruments were examined to determine whether the existing legal framework provides interpretative space for caregiving arrangements beyond biological parents and close relatives. The conceptual approach was subsequently applied to analyze the concepts of *hadhanah*, *mashlahah al-makhdhun*, *ahliyyah*, *maqashid*

*al-shari'ah*, and the best interests of the child. The conceptual analysis also considered the institutional characteristics of pesantren as recognized within the Indonesian legal system (Panut et al., 2021; Puspitasari et al., 2024).

The legal materials consisted of primary, secondary, and tertiary materials. Primary legal materials included the KHI, particularly Articles 105 and 156, Law Number 35 of 2014 on Child Protection, Law Number 18 of 2019 on Pesantren, Government Regulation Number 44 of 2017 on the Implementation of Child Care, and relevant provisions concerning the jurisdiction of the Religious Courts. Classical Islamic jurisprudential works were also used as normative doctrinal materials to identify the principles and qualifications governing *hadhanah*, including discussions concerning caregiver eligibility, benefit, protection, and responsibility (Al-Jaziri, 2003; Al-Kasani, 2003). The *maqashid al-shari'ah* framework was examined primarily through the works of Al-Ghazali (1997) and Al-Syatibi (2003). Secondary legal materials consisted of scholarly journal articles, academic books, dissertations, theses, and previous studies addressing child custody, child protection, Islamic family law, and the social and educational functions of pesantren. Tertiary materials, including legal dictionaries and supporting reference materials, were used only to clarify terminology and conceptual meanings where necessary.

Legal materials were collected through documentary study by identifying, classifying, and reviewing sources according to their relevance to the research questions. The materials were organized into three analytical categories: first, legal norms governing *hadhanah* and the transfer of caregiving responsibilities; second, legal and Islamic jurisprudential foundations concerning child protection and the eligibility of caregivers; and third, legal provisions and scholarly discussions concerning the institutional functions of pesantren. The collected materials were then compared to identify normative compatibility, regulatory limitations, and potential gaps between the individual-based construction of *hadhanah* under the KHI and the broader child-protection framework. Previous studies were used comparatively to distinguish the present research from studies focusing primarily on custody disputes between parents, particularly those conducted by Tarmizi et al. (2023), Puspitasari et al. (2024), and Haryati and Fakhria (2025).

The analysis was conducted using descriptive-analytical techniques combined with textual, systematic, and teleological legal interpretation. Textual interpretation was applied to determine the explicit meaning and normative limits of Articles 105 and 156 of the KHI. Systematic interpretation was used to examine these provisions in relation to child-protection legislation, pesantren regulation, and the broader legal framework governing alternative care. Teleological interpretation was employed to assess the provisions according to the purposes of *hadhanah*, particularly the protection and welfare of the child and the principle of the best interests of the child. The findings from these stages were subsequently synthesized with the principles of *mashlahah al-makhdhun* and *maqashid al-shari'ah* to construct the concept of *institutional hadhanah*. This construction was not intended to assert that all pesantren automatically possess legal status as *hadhanah* institutions under existing law; rather, it was used to formulate the normative requirements, institutional eligibility criteria (*ahliyyah*), judicial mechanisms, and legal reforms necessary for qualified pesantren to be considered as alternative caregiving institutions.

## RESULT AND DISCUSSION

### The Legal Position of Article 105 of the KHI and Its Reinterpretation for Non-Family Institutions

The normative analysis demonstrates that Article 105 of the KHI occupies a central position in determining post-divorce childcare arrangements for Muslim families in Indonesia. The provision distinguishes custody according to the child's level of maturity: a child who has not reached *mumayyiz* or is under 12 years of age is principally placed under the mother's care, whereas a child who has reached *mumayyiz* may choose whether to remain under the care of the father or the mother. The financial responsibility for the child remains with the father. This formulation reflects the incorporation of classical Islamic jurisprudential principles into Indonesian Islamic family law and confirms that the prevailing construction of *hadhanah* is primarily organized around individual family members rather than institutional caregivers (Djafar & Suleman, 2025; Munthe & Dasopang, 2026).

The preferential position granted to the mother, however, should not be understood as an unconditional custodial entitlement. The broader development of Islamic family law indicates that the child's welfare constitutes a substantive limitation on parental custody. The application of Article 105 may therefore depart from its textual preference when the designated caregiver is unable to guarantee the child's physical, psychological, moral, or social welfare. Studies of custody adjudication have demonstrated a movement from a parent-centered understanding of custody toward a child-centered approach in which the best

interests of the child constitute an essential judicial consideration (Nurrohman & Syamsuddin, 2025; Sihombing, 2025). This development is significant because it establishes that biological status does not independently determine the substantive eligibility of a caregiver.

The possibility of transferring care beyond the immediate parent-child relationship becomes clearer when Article 105 is systematically interpreted together with Article 156 of the KHI. The latter regulates circumstances in which the person holding *hadhanah* is unable to guarantee the physical and spiritual safety of the child and allows the Religious Court to intervene in determining an alternative caregiver. Although the hierarchy of substitute caregivers continues to prioritize relatives, the provision demonstrates that *hadhanah* is not an irrevocable right attached exclusively to the biological parent. Ulya et al. (2021) similarly indicate that the determination of custody may be redirected when the designated caregiver fails to satisfy the requirements necessary to protect the child. Consequently, the legal significance of Article 156 lies in its potential to complement Article 105 by providing a normative basis for moving from an automatic familial preference toward an assessment of actual caregiving capacity.

This interpretation does not mean that Article 156 expressly recognizes *pesantren* or other non-family institutions as holders of *hadhanah*. Such a conclusion would exceed the explicit wording of the KHI. Rather, the relationship between Articles 105 and 156 creates an interpretative space for reconsidering the exclusivity of individual-biological caregiving when the family is unable to fulfill its protective function. The distinction is crucial: under the existing legal framework, institutional *hadhanah* remains a normative construction rather than an expressly codified legal status. Accordingly, the proposed involvement of *pesantren* should be understood as *ius constituendum* derived from a systematic and teleological interpretation of existing child-custody norms, rather than as an automatic consequence of *ius constitutum*. From the perspective of Islamic jurisprudence, such reinterpretation is consistent with the substantive orientation of *hadhanah*. Classical *fiqh* does not conceptualize childcare merely as possession of the child, but as an obligation to protect a person who is unable to independently protect and manage his or her interests. The concept is closely connected with *mashlahah al-makhdhun*—the welfare and benefit of the child under care. Ibn Qudamah (1997) emphasizes the protective and educational dimensions of childcare, while Al-Jaziri (2003) identifies the caregiver's competence and trustworthiness as substantive conditions for carrying out *hadhanah*. Thus, the decisive issue is not solely who possesses the closest biological relationship with the child, but whether the caregiver possesses the necessary capacity (*ahliyyah*) to perform the functions required by *hadhanah*.

This substantive orientation can also be situated within *maqashid al-shari'ah*. Al-Ghazali (1997) and Al-Syatibi (2003) conceptualize the protection of fundamental human interests through the preservation of religion, life, intellect, lineage, and property. In the context of childcare, the principles of *hifz al-nafs* (حفظ النفس), *hifz al-'aql* (حفظ العقل), and *hifz al-nasl* (حفظ النسل) are particularly relevant. *Hifzh al-nafs* requires the protection of the child's physical safety and survival; *hifzh al-'aql* supports education and intellectual development; and *hifzh al-nasl* protects lineage, family identity, and continuity of familial relationships. These principles indicate that any reinterpretation of *hadhanah* must simultaneously guarantee the child's safety and development while avoiding unnecessary disruption of the child's biological and legal family relationships.

Accordingly, reinterpretation of Article 105 should not be framed as eliminating parental priority, but as establishing a protective exception where the family structure has substantially failed to secure the child's welfare. This interpretation is consistent with the principle of the best interests of the child contained in the broader Indonesian child-protection framework (Tang, 2019). The proposed shift is therefore from an exclusively *person-centered* model toward a conditional *function-centered* model. Under this construction, biological parents remain the primary caregivers, while institutional intervention becomes relevant only when parental and familial care is unavailable, unsafe, or objectively inadequate.

#### **Juridical and Islamic Legal Foundations for Pesantren as Alternative Hadhanah Institutions**

The second finding concerns the normative position of *pesantren* within the intersection of Islamic family law, child-protection law, and *pesantren* regulation. Law Number 18 of 2019 recognizes *pesantren* as institutions that perform educational, religious propagation, and community-empowerment functions. This statutory recognition strengthens the institutional position of *pesantren* within the Indonesian legal system and confirms that *pesantren* cannot be understood solely as informal religious educational communities (Panut et al., 2021). The caregiving characteristics of *pesantren* are also reflected in their residential educational structure, in which students may receive education, supervision, character formation, and daily assistance within a communal environment (Fahham, 2020).

Nevertheless, Law Number 18 of 2019 does not expressly designate pesantren as child-care institutions or holders of *hadhanah*. Its legal significance for this study therefore lies not in directly conferring custodial authority, but in establishing the institutional legitimacy necessary for considering qualified pesantren within a broader alternative-care framework. This distinction prevents an overextension of the Pesantren Law. State recognition of an institution's educational and social functions provides one component of institutional legitimacy, whereas authority to exercise *hadhanah* requires additional legal standards related specifically to child protection, caregiving competence, accountability, and judicial supervision.

Law Number 35 of 2014 on Child Protection provides another normative dimension because it places child protection within a collective framework involving parents, families, communities, government, and the state. This approach corresponds with the understanding that protecting children cannot always depend exclusively on the nuclear family. Puspitasari et al. (2024) identify substantive compatibility between Islamic *hadhanah* and Indonesian child-protection law because both are ultimately directed toward the fulfillment and protection of children's interests. Consequently, when parental and extended-family care fails, the child-protection framework provides a conceptual basis for involving other qualified actors, although the specific legal status of pesantren as a custodial institution still requires explicit procedural and normative construction.

Government Regulation Number 44 of 2017 concerning the Implementation of Child Care is relevant to this construction because it places alternative care within a regulated child-protection framework. The significance of this regulation is that institutional care cannot be reduced to the physical placement of a child in a residential institution. It must be linked to legal responsibility, supervision, the fulfillment of children's rights, and the maintenance of appropriate relationships with their families. Studies concerning the implementation of alternative childcare regulation also indicate the importance of institutional accountability when children are placed outside parental care (Anggraini, 2022). Therefore, if pesantren are to be considered within an *institutional hadhanah* model, their religious or educational identity alone cannot constitute sufficient legal qualification.

The Islamic legal foundation strengthens this functional approach. The concept of *hadhanah* (الحضانة) is derived from *al-ḥiḍn* (الجِذْن), referring to the side or embrace through which protection and closeness are provided. Substantively, *hadhanah* encompasses protection, education, maintenance, and assistance for children who have not achieved independence (Basri, 2024). Classical jurisprudential doctrine consequently places emphasis on the qualifications of the *hāḍin* (الحاضن), or caregiver, rather than biological connection alone. The fundamental consideration is whether the caregiver can preserve the child's religion, life, intellect, morality, and welfare (Al-Jaziri, 2003; Ibn Qudamah, 1997).

This orientation can be expressed through the legal maxim of welfare underlying the present construction: *mashlahah al-makhdhun* (مصلحة المحضون), namely the welfare of the child receiving care. The principle implies that the legal determination of a caregiver must ultimately serve the interests of the child rather than the competing interests of adults. When biological parents cannot provide safe and adequate care, maintaining an exclusively genealogical model despite demonstrable harm would contradict the protective objective of *hadhanah*. In this context, *maqashid al-shari'ah* provides a normative framework for assessing whether an alternative institution possesses the capacity to preserve the essential interests of the child (Al-Ghazali, 1997; Al-Syatibi, 2003).

The concept of *al-maṣlaḥah al-mursalah* (المصلحة المرسلة) is also relevant to the proposed institutional development. The absence of an explicit classical model equivalent to the modern pesantren as a formal holder of custody does not necessarily prevent the development of an institutional caregiving mechanism when such a mechanism is necessary to protect children and does not contradict established principles of Islamic law. In this context, the institutional model is not intended to replace the family as the normal locus of *hadhanah*, but to respond to circumstances in which the conventional hierarchy of caregivers cannot achieve the substantive objective of child protection.

The role of the state is equally important. Ibn al-Qayyim al-Jawziyyah (2002), in discussing *al-siyāsah al-shar'īyyah* (السياسة الشرعية), places justice and public welfare at the center of legitimate governance. Applied to child protection, this principle supports state intervention when children lose effective parental protection. The involvement of religious and social institutions may therefore be normatively justified where it operates under state supervision and serves the child's welfare. This construction is compatible

with the contemporary understanding of public policy based on *maṣlaḥah*, in which government institutions bear responsibility for developing legal mechanisms capable of protecting vulnerable groups (Hertanto et al., 2026).

The available literature also indicates that pesantren possess characteristics potentially compatible with caregiving functions. Mi'roj and Waluyo (2024) discuss pesantren-based arrangements for orphaned and homeless children, while Subhan and Kamal (2025) specifically connect pesantren-based child protection with the jurisprudence of *hadhanah*. These findings provide supporting context for the normative argument developed in this study. They do not, however, establish that every pesantren possesses adequate caregiving capacity. The diversity of pesantren in institutional resources, facilities, human resources, and governance requires individual assessment rather than general legal presumption.

Accordingly, the normative legitimacy of pesantren as alternative caregivers is multidimensional. It requires the intersection of statutory institutional recognition, child-protection standards, Islamic legal principles, and demonstrable caregiving capacity. A pesantren could only function as a collective caregiver or *hāḍin mu'tabar* (حاضن معتبر) under the proposed model if it satisfies legal and substantive eligibility requirements. This qualification is essential to distinguish pesantren that merely perform educational functions from institutions that possess the resources and accountability necessary to undertake comprehensive childcare.

### Construction of Institutional Hadhanah through the Reinterpretation of Article 105 of the KHI

The third finding is the construction of *institutional hadhanah* as a normative model for reconciling the family-centered formulation of Article 105 with circumstances in which biological and extended-family care cannot guarantee the child's welfare. The analysis shows that Article 105 should remain the starting point of *hadhanah* because parental care constitutes the primary structure recognized by the KHI. Institutional care should therefore operate according to the principle of subsidiarity: it becomes relevant only after an assessment establishes that parental or appropriate familial care is unavailable, unsafe, or incapable of fulfilling the child's fundamental interests.

This construction differs from an interpretation that directly substitutes pesantren for parents. Instead, *institutional hadhanah* is conceptualized as a legally supervised delegation of caregiving functions. The biological family relationship, lineage, and parental obligations are not automatically terminated. This distinction is particularly important from the perspective of *hifẓ al-nasl* (حفظ النسل), because institutional placement should not erase the child's lineage or unnecessarily sever family relationships. The institution assumes specified caregiving responsibilities, whereas the legal identity of the child and relevant continuing obligations of the biological parents remain protected.

The normative model requires strict institutional eligibility or *ahliyyah* (الأهلية). The original construction developed in this study identifies five principal parameters: institutional legality, adequate caregiving facilities, pedagogical and psychological capacity, a reliable child-monitoring system, and an open mechanism of communication with the biological family. These parameters are necessary because pesantren differ substantially in organizational structure and resources. Institutional recognition under the Pesantren Law alone cannot demonstrate competence to perform comprehensive childcare. The five-dimensional assessment therefore functions as a legal boundary between educational pesantren and pesantren that may qualify for an additional alternative-care mandate (Amalia, 2025). The need for such differentiation is also consistent with literature emphasizing the importance of child-protection functions within pesantren (Subhan & Kamal, 2025).

The first parameter, institutional legality, requires a pesantren to possess recognized organizational status and comply with the relevant regulatory requirements. Legal recognition is necessary to establish accountability and identify the institution responsible for the child. The second parameter concerns adequate facilities. Institutional *hadhanah* requires more than educational classrooms and dormitories; the institution must be capable of providing safe accommodation, sanitation, nutrition, healthcare access, and spaces compatible with the child's developmental needs. The relevance of adequate facilities is reinforced by studies demonstrating that the quality of pesantren infrastructure, including sanitation, varies among institutions (Nuurussyahba, 2025).

The third parameter concerns human-resource competence. Caregivers should not only possess religious or pedagogical knowledge but also sufficient competence to understand child development, psychological needs, protection from violence, and mechanisms for responding to children in vulnerable circumstances.

The fourth parameter requires a documented monitoring and evaluation system covering the child's physical health, education, psychological condition, social development, and safety. The fifth parameter is continuing communication with parents, guardians, or appropriate family members. This requirement is central to preventing institutional placement from becoming an unjustified permanent separation between the child and the biological family.

The proposed *ahliyyah* criteria therefore transform the classical individual qualification of the *hāḍin* into institutional standards. Classical requirements such as competence, trustworthiness, ability to protect, and commitment to the child's welfare are not abandoned; rather, they are translated into governance, facilities, professional capacity, monitoring, and accountability at the institutional level. This transformation represents the central conceptual contribution of *institutional hadhanah*: the substantive requirements of classical *hadhanah* remain operative even though the organizational form of the caregiver changes from an individual to an institution.

A formal judicial mechanism is necessary to prevent institutional placement from occurring solely through private agreement or unilateral institutional decision. The original article proposes the involvement of the Religious Court as the legal mechanism through which the circumstances of the parents, the child's interests, and the eligibility of the proposed institution can be assessed. Such judicial involvement is consistent with the broader role of the Religious Courts in Muslim family-law disputes and with the need to prevent arbitrary transfer of caregiving authority (Anam, 2024; Nurrohman & Syamsuddin, 2025). However, the present study treats the specific procedural form of such authorization as a proposed legal construction requiring further regulatory clarification rather than assuming that existing legislation already provides a complete procedural pathway for transferring *hadhanah* directly to *pesantren*.

Within the proposed framework, judicial assessment should be based on the best interests of the child rather than institutional preference. Relevant considerations would include the reasons for parental inability, the availability of suitable relatives, the child's condition and opinion according to age and maturity, the institution's compliance with the *ahliyyah* criteria, the duration and scope of placement, and arrangements for continued family contact. The decision should also establish mechanisms for periodic review because institutional care should not automatically be regarded as permanent when family circumstances can be restored.

This framework produces a three-level legal construction. At the first level, Article 105 of the KHI remains the *lex fundamentalis* for parental *hadhanah*. At the second level, Article 156 and child-protection legislation provide the normative basis for intervention when the designated caregiver cannot protect the child. At the third level, *institutional hadhanah* functions as a proposed legal development for situations in which neither parental nor appropriate familial care can adequately secure the child's welfare. The model therefore does not negate the KHI; it extends its protective rationale through systematic and teleological interpretation.

The construction also requires legislative reform. Judicial interpretation alone may resolve individual cases, but it cannot provide uniform standards for institutional *hadhanah*. Explicit regulation is necessary to define eligible institutions, establish the five *ahliyyah* parameters, determine the competent authorities, regulate the relationship between *pesantren* and biological guardians, establish monitoring mechanisms, and provide procedures for terminating or reviewing institutional care. The original article similarly identifies legislative amendment as necessary to create systemic legal certainty rather than relying exclusively on judicial interpretation.

From the perspective of Islamic legal theory, such reform represents an attempt to maintain the purpose of the law while adapting its institutional mechanism. The shift from individual to institutional caregiving does not alter the essential purpose of *hadhanah*, namely *ri'āyat al-maḥḍūn* (رعاية المحضون)—the protection and proper care of the child. What changes is the legal form through which that responsibility may be performed when conventional family structures fail. The model consequently combines *mashlahah al-maḥḍūn* (مصلحة المحضون), *maqashid al-shari'ah* (مقاصد الشريعة), *al-maṣlaḥah al-mursalah* (المصلحة المرسلة), and the contemporary principle of the best interests of the child within a single normative framework.

Nevertheless, the proposed model also presents implementation challenges. Cultural perceptions continue to place childcare primarily within the nuclear family, while the institutional capacity of *pesantren* varies considerably. Potential overlap between the authority of biological guardians and institutional caregivers

may also generate legal disputes if the scope of each party's responsibility is not clearly defined. The original study accordingly identifies institutional standardization, accreditation, and clarification of the relationship between guardians and institutional caregivers as necessary components of implementation. Overall, the analysis indicates that the principal contribution of reinterpreting Article 105 is not the immediate declaration that pesantren are legally recognized *hadhanah* institutions. Rather, its contribution lies in constructing a normative pathway through which qualified pesantren may be incorporated into an alternative-care system when family-based care fails. The resulting model shifts the focus from biological status alone toward functional capacity while retaining parental priority, lineage protection, judicial supervision, and the best interests of the child. In this sense, *institutional hadhanah* constitutes a proposed synthesis between Indonesian Islamic family law, contemporary child-protection principles, and the objectives of Islamic law.

## CONCLUSION

This study concludes that Article 105 of the Compilation of Islamic Law (KHI) remains the principal normative basis for determining *hadhanah* in Indonesian Islamic family law, but its predominantly individual-biological orientation does not fully address situations in which parents and the extended family are unable to provide adequate care. A systematic interpretation of Article 105 together with Article 156 of the KHI and the broader child-protection framework indicates normative space for developing alternative caregiving arrangements based on the best interests of the child. This reinterpretation does not eliminate parental priority or automatically confer custodial authority on non-family institutions. Rather, it shifts the focus of *hadhanah* from biological status alone toward the substantive capacity of the caregiver to ensure protection, education, welfare, and continuity of the child's familial identity.

Pesantren may be normatively considered within this alternative-care framework because their institutional, educational, religious, and social functions provide characteristics potentially compatible with comprehensive caregiving. However, Law Number 18 of 2019 on Pesantren does not expressly designate pesantren as legal holders of *hadhanah*. Their potential recognition must therefore be understood as a proposed legal construction rather than an existing automatic legal status. From the perspective of Islamic law, this construction is supported by *mashlahah al-makhdhun* (مصلحة المحضون), *maqashid al-shari'ah* (الأهلية), particularly *hifz al-nafs* (حفظ النفس), *hifz al-'aql* (حفظ العقل), and *hifz al-nasl* (حفظ النسل), as well as *al-maṣlaḥah al-mursalah* (المصلحة المرسلة). These principles establish the welfare and protection of the child as the substantive foundation for determining whether alternative caregiving is justified.

The principal contribution of this study is the formulation of *institutional hadhanah* as an institutional-functional extension of the conventional individual model of *hadhanah*. Under this construction, a pesantren may only be considered an alternative caregiver when parental and appropriate familial care cannot adequately secure the child's interests and when the institution satisfies strict *ahliyyah* (الأهلية) requirements. These requirements comprise institutional legality, adequate caregiving facilities, pedagogical and psychological competence, a reliable child-monitoring system, and mechanisms for maintaining communication with the biological family. Formal authorization and periodic supervision are also required to ensure accountability, prevent arbitrary transfer of caregiving authority, and preserve the child's lineage and continuing family relationships. Consequently, the sustainable implementation of *institutional hadhanah* requires clearer legislative regulation concerning eligible institutions, judicial procedures, institutional standards, supervisory mechanisms, and the division of responsibilities between biological guardians and institutional caregivers. Future studies should empirically evaluate the caregiving capacity of pesantren and examine judicial practices concerning alternative child care in order to test the practical applicability of this normative model.

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