

## GIVING CHILD CUSTODY RIGHT TO THE FATHER, IN CASE THE CHILD HAS NOT MUMAYYIZ (Study of Decisions of Religious Court Judges in South Kalimantan)

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### ABSTRACT

KHI regulates the power of parents against post-divorce children with a 12-year old criterion, because this age the child is considered to have been a mature child. Based on this criterion, children who have not in the age of 12 year old will be under the control of their mother. After passing the age of 12 years old, children are allowed to make their own choices, whether to join mother or father. However, the 12-year old figure is not an absolute number, it will be further regulated based on the criteria of benefits or madarat. As an example of decision No. 0854 / Pdt.G / 2013 / PA BJM. In this decision, it was explained that a child born of a marriage named M. RasyaAndira, aged 6 years, was underage and needed love and guidance, due to his mother's behavior and morals. In order to make sure that the child's mental development would grow well, he was cared for by his father. Judges' consideration in deciding the rights of foster children that fall to his father is certainly with some consideration. This decision will be examined in this study.

**Keywords:** child custody to the child that has not been mumayyiz, judge's consideration

### Introduction

Law Number 1 of 1974 concerning marriage, is a national marriage law that applies univisally. the law has embodied the principles contained in Pancasila and the 1945 Constitution.<sup>1</sup>One of the main objectives of the law is to provide social justice for all Indonesian people, which is a form of protection of human rights, as mandated by the Pancasila values and the 1945 Constitution of the Republic of Indonesia.<sup>2</sup>

Marriage according to Islamic law is "a very strong contract or *miitsaqongholidhon* to obey Allah's commands and carry out it is worship<sup>3</sup>. In the view of Islam, marriage besides being an act of worship, it is also the *sunnah* of Allah and the sunnah of His Messenger. As the sunnah of Allah, marriage is the qudrat and irodad of Allah in the creation of the universe. Marriage is a sunnah of gifts which, if carried out, will be rewarded, but if it is not done it does not get sin but is affirmed because it does not follow the sunnah of the Prophet.<sup>4</sup>

A marriage has the purpose of wanting to build a happy family, *mawaddahwarohmah* and want to get a good future generation. This descent is always desired by everyone who is married because offspring is a generation for their parents.<sup>5</sup>

KHI regulates the power of parents against post-divorce children with a 12-year old criterion, because this age the child is considered to have been a mature child. Based on the 12-year old criteria, children who have not in the age of 12 year old will be under the control of their mother. After passing the age of 12 years old, children are allowed to make their own choices, whether

<sup>1</sup>MuhyidinGunartoAnisMashdurohatunRo'fahSetyowati Ahmad Rofiq, *Disharmony The Concept Of Legal Property Between Migration Law, Islamic Law Compilation, And Islamic Law*, South East Asia Journal of Contemporary Business, Economics and Law, Vol. 13, Issue4(August), ISSN 2289-1560, 2017,page.125.

<sup>2</sup>AnisMashdurohatun, *Constructing And Developing The Social Function Principles In Utilising Copyright Products Related To The Fundamental Rights*, South East Asia Journal of Contemporary Business, Economics and Law, Vol. 7, Issue 4 (Aug.) 2015,page.94.see toI NyomanAdiRimbawan and Sri EndahWahyuningsih, *Ideal Reconstruction Of Crime Liability Of Underage Drivers Causing The Loss Of Life Of Others Based On Values Of Justice.*, *International Journal of Advanced Research*, *Int. J. Adv. Res.* 5(8), 2017. DOI URL: <http://dx.doi.org/10.21474/IJAR01/5278>.

<sup>3</sup>Departemen Agama RI, *KompilasiHukum Islam di Indonesia*, DirektoratJenderalPembinaanKelembagaan Agama Islam: Jakarta, 1997, page. 14.

<sup>4</sup>SyaikhKamil Muhammad 'uwaitdah, *FiqihWanita*, Pustaka al-Kautsar: Jakarta, 1998, page. 375

<sup>5</sup>Ahmad Rafi Baihaqi, *MembangunSyurgaRumahTangga*, Gita Media Press: Surabaya, 2006, page. 8

to join mother or father. However, the 12-year figure is not an absolute number, it will be further regulated based on the criteria of benefits or *madarat*.

In fact many decisions of Judge do not comply with the law. This means that there is a decision about the tendency to decide on the rights of children who have not been *mumayyiz* to their father on the grounds that conditions are not possible if cared for by their mother. Referring to Law No.23 year 2002 that child protection is the realization of justice in a society, thus child protection is endeavored in various fields of state life and society. Child protection activities have legal consequences, both in relation to written law and the law is not written. According to ArifGosita, legal certainty is endeavored for the continuity of child protection activities and to prevent fraud which brings undesirable negative consequences in the implementation of protection.<sup>6</sup>

Based on the provisions contained in the KHI (Islamic Law Compilation), in the context of parental power over post-divorce children, parents' power after divorce to the children is basically the responsibility and obligation of parents together to educate and care for children, provided that children are not yet *mumayyiz* or not 12-year-old is in the control of his mother.

Thus this indicates that the mother does not get the right to rise (*hadhanah*) on children, because of some things such as bad behavior, drunkards, gamblers, drug addicts, persecution. As an example of decision No. 0854 / Pdt.G / 2013 / PA BJM.<sup>7</sup>

## Discussion

### The Concept of Hadanah and Child Custody in Compilation of Islamic Law

Globalization as a new form of expansion of capitalism, globalization is not only about economic factors, but also grows and enters a wide area and covers various aspects, including economic and legal aspects that are very influential on human behavior. the reality is that many divorces occur due to economic factors, also in the judge's decision the basis of consideration in deciding the custody of a child who is not yet aged / mature, in addition to the behavior of his parents (in this case the father and mother of the child) are also economic factors<sup>8</sup>.

SayyidSabiq in his book *FiqhSunnah* gives the definition of *hadhanah*, it is to preserve the children who are still small boys or girls who have grown up, but have not *tamyiz* without orders to him, making something that makes his goodness, guarding him, from something that hurts and damages him, educates physical, spiritual and reason to be able to stand alone facing life and bear responsibility.<sup>9</sup>

In the Indonesian Islamic encyclopedia, *Hadhanah* is the task of guarding or caring for babies/young children who have not been able to maintain and regulate themselves. Getting care and education is the right of every child from both parents. Both of the child's parents are the most important for the task, as long as they have the ability to do so.<sup>10</sup>

*Hadhanah* in question is the obligation of parents to care for and educate their children as well as possible. This maintenance covers the problem of education and everything that becomes the child's basic needs.<sup>11</sup>

M. YahyaHarahap in his book *Discussion on National Marriage Law* suggests that the meaning of child care is:

- 1) The responsibility of parents to supervise, provide appropriate services and provide for the living needs of children by parents.
- 2) The responsibility in the form of supervision and service as well as the adequacy of the living life is continuous until the child reaches a legal age limit as an adult who can stand alone<sup>12</sup>

In Amir Syaripuddin's book *Islamic Marriage Law in Indonesia*, there are 2 pillars of *hadhanah*, namely:

- 1) Parenting parents called *hadhin*.
- 2) Children who are cared called *mahdhun*.<sup>13</sup>

Abdul AzisDahlan in the *Encyclopedia of Islamic Law*, mentions general requirements for women and men, namely:

<sup>6</sup>MaidinGultom, *PerlindunganHukumTerhadapAnak; DalamSistemPeradilanPidanaAnak di Indonesia*, RefikaAditama: Bandung, 2006, page. 33.

<sup>7</sup>Banjarmasin Religion Court verdict number 0854/Pdt.G/2013/PA BJM

<sup>8</sup>AnisMashdurohatun, M. Ali Mansyur, Product Capabilities Dynamic On Industrial Design Carved Wood In Small And Medium Enterprises(Smes) Jepara Furniture In Promoting The Protection Of Intellectual Property Right. *International Journal of Applied Engineering Research* ISSN 0973-4562 Volume 12, Number 19 (2017). page 8217, to see AryaniWitasariAnisMashdurohatunGunarto Amin Purnawan Ahmad Rofiq, *Reconstruction Of Authority Of Arbitration Institution In Business Dispute Settlement Based On The Value Of Justice*, South East Asia Journal of Contemporary Business, Economics and Law, Vol. 14, Issue6(December) ISSN 2289-1560, 2017. page.16

<sup>9</sup>SayyidSabiq, *FiqhSunnah*, Penterjemah Mohammad Thalib, JudulAsliFiqhassunnah, (Bandung: PT al-Ma'arif, cet. ke-8, 1980), page. 173.

<sup>10</sup>Nasution,dkk,ed, *Ensiklopedi Islam Indonesia* (Jakarta: Djambatan,1992),p 269.

<sup>11</sup> Amir NuruddindanAzhariAkmalTarian, *HukumPerdata Islam di Indonesia*,...page. 293

<sup>12</sup>YahyaHarahap, *HukumPerkawinanNasional*, (Medan: CV Zahir Trading CO,1975), page. 204.

<sup>13</sup> Amir Syaripuddin, *HukumPerkawinan Islam Di Indonesia*, (Kencana: Prenada Media, cet. ke-3, 2006), page. 328.

- a) Balig
- b) Understanding
- c) Having the ability to care for, care for and educate children.
- d) Can be trusted to hold amanakh and be of good character.
- e) Must be Muslim.<sup>14</sup>

According to Abdurrahman Ghazali in the book *fiqhmunakahat* explained about the period of child custody (hadhanah) that is:

1) Period before mumayyiz

This period is when a new child is born until the age of seven or eight years old. At this time the child of a child has not yet been mumayyiz or has not been able to distinguish between what is beneficial and dangerous for him.<sup>15</sup>

A child at the beginning of his life until a certain age requires someone else to help him in his life, such as eating, clothing, cleaning himself, even to the arrangement of wake and sleep, therefore, the person who looks after him needs to have compassion, patience and desire so the child is good (pious) later. Those who have conditions like this are women. Concretely the *ulema* shows that from the mother's side they are more entitled to children, then to do hadhanah (caring for child).<sup>16</sup>

Besides that, the mother better understands the needs of children during this time and is more able to pay attention to her love. Likewise, children really need the presence of the mother nearby.

2) Mumayyiz Period

Mumayyiz's period is from the age of 7 years old until the baligh (mature). At this time a child has simply been able to distinguish between the good and the bad that befell him, and the child in this condition has grown his mind simply.<sup>17</sup>

Shaykh Hasan Ayyub in his book the family fiqh describes the arrangement of families who have the right to care for children after a divorce between husband and wife. As the right to first care is given to the mother, the fiqh experts conclude that the mother's family of a child is more entitled than the father's family.

If the child no longer has a female relative including the muhrimor the child has it but is not able to do the hadhanah then move to the male asabah of the muhrim above, in accordance with the order in inheritance law.

Compilation of Islamic Law in detail regulates the power of parents towards children by using the term "child care" in Article 98 to 112, where Article 107 to Article 112 specifically regulates guardianship. In Compilation of Islamic Law, there is an Article that regulates the hadanah, including:

Article 98

- 1) The age limit for a child who is able to stand alone or is an adult is 21 years, as long as the child is not physically or mentally flawed or has never married.
- 2) His/her parents represent the child regarding all legal acts inside and outside the Court.
- 3) The Religious Court can appoint one of the closest relatives who is able to fulfill this obligation if the two parents cannot afford it.<sup>18</sup>

Article 105

In the event of a divorce:

- a) The caring of a child who is not yet pregnant or not yet 12 years old is the right of his mother;
- b) The maintenance of a child who has been mumayyiz is left to the child to choose between his father or mother as the holder of his care rights;
- c) Maintenance costs are borne by his father

In the Compilation of Islamic Law also explained the sequences of anyone who has the right to care for children, namely in article 156 letter (a)

**Judges' consideration in child custody**

In the context of the application of custody of children who have not been mumayyiz, there have been a number of cases that have fallen on fathers. Here the court must choose and determine who between the two parents are equally entitled to carry out maintenance, for this reason the Court must examine carefully who among them is better to take care of the child's interests.<sup>19</sup>

Judge seriously considering For example, because of some things such as bad behavior, drunkards, gamblers, drug addicts, persecution, custody does not refer to mother but father. As an example of decision No. 0854 / Pdt.G / 2013 / PA BJM.<sup>20</sup>

<sup>14</sup> Abdul Azis Dahlan, *Ensiklopedi Huku Islam*, (Jakarta: Ichtiar Baru Van Heove, cet. ke-3, 1999), page. 417.

<sup>15</sup> Abdul Rahman Ghazaly, *Fiqh Munakahat*, (Jakarta: Pranada Media Group, cet. ke-3, 2003), page. 185

<sup>16</sup> Ibid

<sup>17</sup> Ibid, page. 186

<sup>18</sup> Compilation of Islamic Law. See also Adib Bahari, *Prosedur Gugatan Cerai + Pembagian Harta Gono Gini + Hak Asuh Anak*, Pustaka Yustisia, Yogyakarta, 2012, page. 166.

<sup>19</sup> M. Yahya Harahap, *Hukum Perkawinan Nasional*, (Medan: Zahir Trading, 1975), h. 159.

<sup>20</sup> Banjarmasin Religion Court verdict number 0854/Pdt.G/2013/PA BJM

In this decision it was explained that a child born of a marriage named M. RA, aged 6 years, was underage and needed love and guidance, due to his mother's behavior and morals, and in order to make sure that this child's mental development would grow well, it was decided to give child custody to his father.

Judges' consideration in deciding the rights of a child foster child who falls to his father is certainly with several considerations, such as:

- a) Her mother often has relationships with other men (cheating)
- b) His mother is too hard on children
- c) His mother often goes to discotheques
- d) His mother is often drunk
- e) His mother often uses illegal drugs.

Furthermore, the decision Number 381 / PDT.G / 2017 / PA.BJB for more details related to this decision, it will be explained in full, especially in relation to judges' considerations. Considering, that the plaintiff in his lawsuit dated September 6, 2017, has filed a hadhanah lawsuit that has been registered at the Registrar of the Banjarbaru Religion Court with Number 381/Pdt.G/2017/PA.Bjb, dated September 6, 2017. Child custody was given to the father with reasons are:

1. Mothers often leave and abandon these three children to go for a long time between 1 (one) month to 2 (two) months without being known where she was;
2. The mother went to seek "income" but what work does the Plaintiff do not know;
3. Mothers often say they go out of town or Java, but at the same time they are still in the Banjarbaru hotel;
4. Mother admitted working in the field of car rental and buying and selling scrap metal, but it was not clear where it was;
5. The child is left as is so thin and lacking in nutrition, because he expected the first child ( a Senior High School Student) to take care of his brother and the second child is still in elementary school if at night, and if the afternoon is handed over to others to be cared;

### Children as Center for Decisions

The law is a set of life instructions (orders and prohibitions) that regulate the rules in a society, and should be obeyed by the members of the community concerned, because violations of the instructions of life can lead to actions from the community government.<sup>21</sup> According to SitiMudhahMulia, the law is normative rules governing patterns of human behavior. The law does not grow in a vacuum (empty), but grows out of public awareness that requires a joint rule.<sup>22</sup> While Islamic law by TM.Hasbi Ash Shiddieqy as quoted by Ismail Muhammad Syah was formulated as a collection of the efforts of legal experts to implement shari'ah on the needs of society.<sup>23</sup>

Justice here relates to the existence of custody of children who have not mumayyizfallen on their mothers. In fact, the position of men and women in the household is as vital. This is what becomes a problem where many cases do not provide justice for the child. For example, in South Kalimantan, there is a decision that gives rights to fathers, because they are considered fairer.

The above findings prove that the existence of the Compilation of Islamic Law article does not necessarily provide absolute protection to children. The basic principle that becomes a foothold in maintaining child custody rights is the benefit of the child without regard to the rights of the mother or father. And the Applicant is quite capable, full of responsibility and has the ability in financial terms to finance the needs of the child. In this ruling, it is clear that based on the considerations of the Panel of Judges that the child of the Petitioner and the Respondent who became the foothold in maintaining child custody is more social and useful living in a residence together with the Petitioner and stating that the child rights holder is assigned to the Applicant as his own biological father.

On that basis the judge in making a legal decision must be based on mature considerations that can be accounted for normatively and sociologically-philosophically. This is where the relevance is to the principle of benefit as the goal of Islamic law (*maqâshid al-syari'ah*). Especially considering the judge's decision (court) is one of the four products of Islamic law in Indonesia besides jurisprudence, laws and fatwas. Therefore the judge's decision has a very important position and must always get its own attention.

Especially with regard to decisions in the South Kalimantan Religious Court, looking at judges' considerations as explained, researchers could map that these considerations include legal considerations (material and formal), consideration of facts revealed at trial and benefit considerations.

Moreover Islam is a religion in the form of a regulation of life which is a source of grace and happiness for all Muslims. Humans are sent down along with the rules of their lives so that there are no collisions and imbalances. Clashes and imbalances exist when humans begin to dump Islam as a rule in their lives.

Caring for children is very important because Islam places two main foundations for children's problems. First, the position and rights of children, second, coaching throughout their growth. The care of children in Islamic Law is better known as *hadhanah*,

<sup>21</sup>E. Utrecht, *Pengantardalam Hukum Indonesia*, (Jakarta: BalaiBukuLhtiar, 1966), p.13.

<sup>22</sup>SitiMudhahMulia, "Pembaruan Hukum Keluarga Islam di Indonesia", dalam Komaruddin Hidayat dan Ahmad Gaus AF (Editor), *Islam Negara dan Civil Society*, (Jakarta: Paramadina, 2005), . 302.

<sup>23</sup>Ismail Muhammad Syah, *Filsafat Hukum Islam*, (Jakarta: BumiAksara, 1992), p. 19

which means the maintenance of big boys or girls, but not yet called tamiyiz from something that hurts and damages them, educates physically, spiritually and intellectually to be able to stand alone facing life and assume responsibility.

In determining the right to care for a child after the divorce, both according to the ulama and the Compilation of Islamic Law both stipulate that childcare rights are given to his mother, as long as they fulfill the stipulated conditions. Even though you are a party who has the right to care for your child, this does not rule out the possibility for you to obtain the right if the mother as the right holder ignores her duty or performs actions that can cancel the custody she obtained.

In practice, it is not certain that the child will join his mother or ex-wife in divorce. This is based on the reason, the Judge considers his decision based on the facts and evidence revealed in the trial regarding the good and bad parenting pattern of the child to the child, including in this case the behavior of the parents both father and mother and matters related to the interests of the child both psychologically, materially and non-materially.

Therefore, what matters is very important for the husband and wife parties to provide legal arguments at the trial in order to get child custody. But all of that will certainly depend on the judge's policy and the extent to which the judge can consider the facts and evidence revealed at the trial which rests on the interests of the children born from the marriage.

### Conclusion

Especially with regard to decisions in the South Kalimantan Religious Court, looking at judges' considerations as explained, researchers could map that these considerations include legal considerations (material and formal), consideration of facts revealed at trial and benefit considerations.

Moreover, Islam is a religion in the form of a regulation of life which is a source of grace and happiness for all Muslims. Humans are sent down along with the rules of their lives so that there are no collisions and imbalances. Clashes and imbalances exist when humans begin to dump Islam as a rule in their lives.

Thus, legal considerations that are usually applied in the related decisions have a perspective on sharia and the prosecution based on children's interests. Also spurred on the Marriage Law Article 42 letter a. In Compilation of Islamic Law on Articles 105 & 156, Article 5 paragraph (1) of Law No. 48 year 2009 concerning Judicial Power.

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