

The Implementation of Child Custody (*Hadhanah*) After Dissolution of Marriage Due to Divorce (Juridical Analysis in Law Number 35 of 2014 concerning Child Protection and Compilation of Islamic Law)

by

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Abstract

Marriage is a legitimate physical and spiritual bond between a woman and a man which aims to form a *sakinah mawaddah* and *rahmah* household or family in continuing the offspring in the form of the birth of a child. But sometimes some of the families have not been able to realize the goals of the household properly; it is eventually the marriage relationship that failed or could not be maintained any longer. As a result of breaking up a marital relationship due to divorce, it is “control of child custody” unquestionably to one of the separated partners, whether to the mother or the father. Now, the law does not explicitly regulate and in detail, the obligations of who has the right to take care of the child after the marriage is dissolved, whether to the mother or the father. As a reference that can be used as a guide to determine custody of the child after the marriage is broken up, it is found in the Compilation of Islamic Law, precisely in Article 105 which states that the maintenance of the child who is not yet 12 years old (*mumayyiz*) is the right of the mother and also the maintenance of the child after *mumayyiz* left to the child himself to choose whether to the mother or the father.

Keywords: Custody, Children, Divorce, Child protection, etc.

Introduction:

To establish a family in the household, indubitably, begins with marriage/matrimonial between a man (prospective husband) and a woman (prospective wife) to establish life and cohabit by continuing the descendants of children and grandchildren according to applicable regulations

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by Law No. 1 of 1974 concerning marriage. Children are the potential successors of the next generation as a generation milestone to continue the ideals of the nation which of course has a strategic role to ensure family life and the Indonesian nation's generation which starts from the guidance and care of parents. However, sometimes it is seen amid a society that the purpose of marriage has not been achieved in other words failed/broken up or what is often known as "divorce" due to various reasons. Well, if there is a divorce in the household, then the risk after this divorce is dreadful, one of the consequences is the debate about child custody (Prasada and Sapuan, 2017). Parenting discussed with one of the separated couples becomes a struggle whether to that party or the father's side (ex-wife or ex-husband).

This right in child care (*hadhanah*) is often a dispute between the two parties (ex-wife and ex-husband) due to the divorce, so that it sometimes reaches the court table, meaning that child care is one of the most frequently asked issues in religious courts in Indonesia (Pandiangan, 2018).

Literature review:

The literature review summarized the previous research done on the topic as follows:

Understanding Children:

In principle, many people consider that children are invaluable assets and it is a gift and mandate from the Creator Allah SWT (God Almighty) which is entrusted to parents to be protected so that they can become quality human beings and grow useful for the nation, state, society as well as religion. But on the other hand, for example, some people think that the child was born as if it were a burden on them. There are many understandable explanations regarding the meaning or denotation of the word "child". The following is included as a reference to make it easier to understand the meaning of the child:

- i. **Understanding of Children in Civil Law View:** Our understanding of the meaning of children in civil law can be seen in Article 330 of the Civil Code, where this civil law provides an understanding of children, that the child in question is an immature person where someone who is not yet an adult certainly has not reached the legal limit age (age). It is declared as a legal subject following statutory provisions including civil law (Tjitrosudibio, 2014). In this study of civil law, it is known that the definition of a child has a very broad position with various very important roles, and is focused on providing maintenance and protection of the child's civil rights, for example in the distribution of library assets (inheritance), so that children (infants) in the mother's womb (womb) is considered to have been born if the interests of the child so desire as referred to in Article 2 of the Civil Code.
- ii. **Understanding Children in Islamic View:** In the view of Islam, children are entrusted by Allah SWT to parents, society, nation and state. And in the future, it is hoped that it can provide prosperity both in this world and the hereafter as creatures who are *rahmatat lil alamin* and as heirs of Islam. Children can also be interpreted as human beings who have weaknesses (*dhoif servants*) but are always in glory, which of course is under the authority of the will of Allah SWT through the procedures and processes of creation. Therefore, in the view of Islam, children also still have the maturity of a noble life, therefore children must also be treated

following humanity, one of which is required to provide physical and spiritual support to the child so that later the child will grow up to be a good child and have a noble character (*akhlakul karimah*), for example, he can be responsible for himself and his development to achieve the needs of his daily life in the future. The Qur'an explains about children, namely children as jewellery, children as conditioning, children as tests and trials, and children as adversaries/enemies. Article 99 of the KHI also explains that a child is a child born due to legal marriage and the result of direct fertilization from a legal husband and wife outside the womb or born by the wife (Abdurrahman, 2015).

- iii. **Definition of Children in Law:** In Law. No. 35/ 2014 regarding amendments to Law no. 23/2002 concerning Child Protection, it is explained that the child is a mandate and gift from the Divine God Almighty, in which the dignity of a human being has been attached to him. In addition, children are also referred to as buds, potential, the younger generation as the successor to the hopes of the ideals of the nation's struggle, for the sake of the future. In Article 1 of Law no. 23/2002 concerning Child Protection, it is also explained that a child is a person who is not yet 18 (eighteen) years old, and includes children who are still in the womb.

Basic Understanding of Child Custody:

Child care, in Arabic terms, is called "*hadhanah*". *Hadhanah* in civil law is known as "caregiving" or "guardianship". Custody rights are the rights of a child from their parents, and vice versa, child custody is the obligation and responsibility of parents to their children. This is also explained in Law no. 1 of 1974 to be precise Article 45 paragraph (1, 2). The word "parenting" is also the same as parental power (*ouderlijke macht*) (Subekti, 2021), as long as both parents are bound by marriage (Soedharyo, 2002). Another *persi* in Law No. 35 of 2014 concerning amendments to Law no. 23 of 2002 concerning child protection, where child protection is a real embodiment of justice in society which is pursued in various fields of social, state and national life that brings legal consequences, both written and unwritten with the three basic provisions for the implementation of child protection are the philosophical basis, the ethical basis, and the juridical basis (Gultom, 2014). Where this child protection can be carried out directly aimed at the child as a target to be protected and can also be done indirectly with the help of others.

There are so many children's rights that actually must be fulfilled for their survival and life, including those stated in Law no. 4 of 1979 concerning the welfare of children, such as welfare rights, care/guidance, care, services, maintenance and protection, comfort and environmental protection, and others. Furthermore, Law no. 39/1999 on Human Rights (HAM) states that children's rights include the right to protection, the right to live, maintain and improve their standard of living, the right to name and citizenship status, the right to worship according to the religion they adhere to, the right to be raised, cared for and educated, the right to obtain legal protection, the right to social services and social security, as well as other rights. On the other hand, the child protection law also mentions many children's rights including, among others, the right to life, growth, development, the right to obtain teaching and education, the right to religion, the right to have an opinion, and others.

Discussion:

Following important points emerged out as discussion:

- i. **Choice of parties who are entitled to take care of children:** A child in his life, from birth in this world until a certain age needs other people to help his life starting from eating, drinking, dressing, playing, sleeping, waking up, cleaning himself, and all other activities. Therefore it is necessary to take care that has a sense of love, patience and sincerity as well as the desire for the child to grow and develop into a good child. The following is an illustration of parenting in various aspects in this table;

Table 1: Parenting in various aspects²

Regarding child custody in several aspects		
Civil Law/Marriage Law	UU No. 35/2014	Islamic Law Compilation
Article 41 husband and wife who are divorced are still obliged to maintain and educate their children	Custody is synonymous with child protection	In Article 105 (a) and Article 156 (a) it is stated that the custody of a child who has not been <i>mumayyiz</i> is the right of the mother.

If viewed from the details of this table, it can be understood that the custody of this child who is not yet *mumayyiz* under the age of 12 years is the right of the mother, which is under the Compilation of Islamic Law, precisely in Article 105, based on this article, the right to care for child falls to his mother. Meanwhile, according to Law No. 1 of 1974 concerning marriage in Article 45, it is stated that both parents are obliged to maintain and educate their children as well as possible, of course during the marital relationship. So, what about child custody after the marital relationship is broken? Questions like this can be answered in the equivalent content of Article 41 of Law no. 1 of 1974, that in point (a) it is stated that both the mother and the father are still obliged to maintain and educate their children solely based on the interests of the child. This means that this law does not also regulate explicitly nor specifically for who has the right to obtain custody of the child who is still under the age of 12 years, but this law regulates that both the mother and the father are still obligated to take care of him and educate him (Yusuf, 2014).

However, custody of the child can also be transferred to the father if the mother has died and in other conditions as described in Article 156 (c) of the KHI, where a mother can lose custody of one of them if the mother is in charge of custody of her child cannot guarantee the safety and the future of their children. Based on this provision, the father can also get custody of a child under the age of 12 (twelve) years when the mother is proven to be unreasonable to care for her child, for example, such as the mother's behaviour is not good, the mother is in prison, and the mother also cannot guarantee the safety of the child.

- ii. **Legal Consequences for a Father if He Doesn't Support His Child after the Dissolution of Marriage Due to Divorce:** Being a father is not as easy as one might imagine at first glance about fathers. The name father is a gift as well as a mandate that must be accounted for by a father who has become his responsibility to meet the needs/needs of his children, both in the form of material needs and the attention and affection he gives to children. However, ironically, there are still many father figures who only prioritize their interests, and this category of fathers

² Source, processed by the author

is often seen as neglectful and even completely unconcerned about what is the responsibility of their children. Even though they (the parents) are divorced and live separately, the parents and the children are separated, and then the father is still obliged to provide a living for the child until the child becomes an adult and can live independently in living his life.

Indeed, in reality, divorce will harm children's lives such as neglect, but this can still be minimized if the separated parents continue to give attention and love, including fulfilling their life needs which are the obligations of a father, even making children suffer. If there is no attention and love from parents, especially if a father is never responsible at all, that should be his obligation. Even if the child lives with his mother, who is very well off, or the position of the mother has also remarried, where the needs of herself and her child care provided by her new husband (the stepfather of the child), it means that the biological father's obligation will not be erased to continue to provide for him to his son.

The father is responsible and obliged to pay for the education and maintenance of his child. If it turns out that the father is unable to fulfil his obligations at all, then the court may decide on the mother to participate in financing the child. Regarding the amount of the fee determined to finance the needs of the children, it is adjusted to the economic condition of the father. If the father has economic maturity, then the father is obliged to provide costs to his child according to what is needed by the child. Likewise, vice versa, if the father is not able to pay for his child's life, then the mother is the one who pays for it.

Even parents who are in the process of divorce should still be responsible for their children according to Government Regulation Number 9 of 1975 Article 24 that in the divorce process between husband and wife cannot be used as an excuse for the husband to be negligent in his duty to provide a living.

- iii. **Judges Need Consideration in Determining Custody After Dissolution of Marriage Due to Divorce:** One of the obligations of parents is to maintain, protect, educate and nurture children until the child is an adult. Similarly, the obligations of parents when a divorce occurs, it does not mean that the obligations of parents to their children are lost, such as caring for and raising the child, meaning that these obligations will continue until the child is mature and independent. In terms of child care, three things need to be known, namely taking care of the child's entire body from all things that can harm the child, providing proper housing, clothing and food, and providing education according to his abilities (Basuki, 2005).

Other aspects, for example regarding the economy and other things needed by children, must be given to them (Rofiq, 2000). It is often the problem will be who has the right to determine the custody of the child. Sometimes in determining the person who has the right to take care of the child after the divorce, it is also necessary to determine the verdict/decision of the judge, in other words, that the judge's consideration in determining custody of the child after the divorce is, of course, one of the demands from the plaintiff through the petitum, for the sake of the child. The determination of the mother as the ruler/caregiver of the child does not conflict with the applicable regulations as long as it can guarantee the best interests of the child, where the mother has the right to take care of her.

Therefore, the determination of the right to care, whether it is a judge's decision or in the form of a policy made by the government, must be based on the best interests of the child. Decisions made by judges when carrying out their duties in the Court of course have legal consequences for each decision made. So, to ensure the best care (protection) of the child, every judge's decision must consider all aspects that affect the future of the child with the aim that the child is given to people who have the right to care for and accept him following the provisions of Islamic law.

Aspects that should be studied during the trial process must look at the skills of a caregiver. This is very important to know by presenting several witnesses at the trial. Before the judge gives up custody, the judge must be very careful in paying attention to the opportunities and spaciousness of a caregiver's time. Even though there are legal rules listed in the compilation of Islamic law, the mother is more entitled to take care of the child if the child is not yet *mumayyiz* (Mujahidin, 2008). The basic legal arrangement shows that the mother, in this case, is the person who has the right to take care of the child, although at the level of the judge's decision there are differences.

In principle, regarding custody, the judge's decision is always in favour of the mother, but it does not rule out the possibility that the judge also sometimes gives child custody decisions to the father. The granting of a custody decision like this is of course due to the findings of the facts presented at the trial by the parties, where the judge's basic considerations in granting post-child custody are always based on careful consideration and do not conflict with the rules. On the other hand, court decisions must also contain details of reasons as the basis for certain articles in the regulations or unwritten sources of law can be used as the basis for adjudicating, meaning that the principles contained in a decision are clear and detailed reasons and basis for the decision and must contain clear articles (Syarif, 2015).

Apart from that, custody is assigned to the Plaintiff, because the child has been *mumayyiz*, but it is different if the child has been *mumayyiz*, it is also explained in the provisions of Article 105 letter (b) compilation of Islamic law, which states that for the maintenance of a child who has been *mumayyiz*, it is handed over to the child to choose whether his father or mother is the holder of the right of care for him". And following the provisions of Article 156 letter (b) of the Compilation of Islamic Law, which states that "a child who is *mumayyiz* has the right to choose to get *hadhanah* from his father and mother.

Conclusion:

Based on the explanation that has been described previously, it can be concluded that the implementation of child care after the marital relationship due to divorce is not explained in detail particularly on who has more right to control child custody. However, as a basis for understanding this custody right when the marriage relationship is terminated due to divorce, there are several provisions and rules regarding this, including that under Article 105 point (a) the Compilation of Islamic Law (KHI) states that children aged before 12 years old (*mumayyiz*) his custody fell to his mother. Furthermore, in Article 41 of Law no. 1 of 1974 in point (a), it is stated that both the mother and the father are still obliged to maintain and educate their children solely based on the

interests of the child. This means that this law also does not specifically regulate who is entitled to obtain custody of the child who is still under the age of 12 years, but this law regulates that both the mother and the father are still obliged to maintain and educate them. Thus this conclusion can be detailed in the exposure of this article, hopefully, the presentation in this paper can provide benefits for the reader.

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