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## The Legal and Cultural Provisions regarding Hadana Conflict and the Limits of the State in Contemporary Aceh, Indonesia

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### Abstract

This research discusses the hadanah (childcare) practice after divorce, using the Acehese community in Indonesia as a case study. The purpose is to show the contestation between non-litigation and litigation mechanisms of resolving the hadanah conflict in the community. A qualitative approach was used with three regions in Aceh as case studies, namely Aceh Taminga, East Aceh, and Langsa City, with the normative-empirical legal phenomenology. Subsequently, the results showed the Acehese community's tendency to choose non-litigation mechanisms in resolving the hadanah conflict, as they are considered more in line with their character, which upholds customs and culture. The research concluded that the use of a non-litigation mechanism in solving post-divorce childcare disputes indicates the limitations of the state regarding Islamic law that is in harmony with the traditions and cultural conditions of the community.

**Keywords:** Hadana, Islamic Law, Divorce Conflict, Aceh

### Abstrak

Tulisan ini membahas praktik hadanah (pengasuhan anak) paska perceraian dengan studi kasus pada masyarakat Aceh di Indonesia. Tulisan bertujuan menunjukkan kontestasi yang terjadi dalam masyarakat Aceh dalam penyelesaian konflik hadanah antara melalui mekanisme non-litigasi dan litigasi. Artikel ini menggunakan pendekatan kualitatif dengan studi kasus pada tiga daerah di Aceh yakni Aceh Taminga, Aceh Timur dan Kota Langsa. Metode penelitian yang digunakan adalah fenomenologi hukum normatif-empiris. Tulisan menemukan kecenderungan masyarakat Aceh untuk memilih jalan non-mitigasi dalam penyelesaian konflik hadanah karena mekanisme tersebut dinilai lebih sesuai dengan karakter masyarakat Aceh yang menjunjung tinggi adat dan budaya. Tulisan pada akhirnya menyimpulkan bahwa penggunaan mekanisme nonlitigasi dalam penyelesaian sengketa pengasuhan anak paska perceraian mengindikasikan keterbatasan negara dalam penerapan hadana berdasarkan hukum Islam yang selaras dengan tradisi dan kondisi kultural masyarakat.

**Keywords:** Hadanah, Hukum Islam, Konflik Perceraian, Aceh

### Introduction

The process of having a *sakinah* (peaceful) family is not easy because many problems cause a marriage to end. Marriages are expected to form happy families, but many end in divorce. This is a lawful act hated by Allah SWT and the last alternative of a husband and wife once their marriage can no longer be maintained.<sup>1</sup> Being the last alternative means that various methods and techniques have been attempted to find peace between husband and wife through the *hakam* (peacemaker) of both parties as well as the steps taught in the Qur'an and Hadith.

Subsequently, the occurrence of a divorce will cause new problems to arise as a legal consequence, such as dividing joint properties, *iddah* support, and *hadanah* for children. The *hadanah* problem arises when a husband or wife feels more capable of fulfilling the interests of their child and refuses to surrender due to principal

<sup>1</sup>Arif Sugitanata, "Hukum Keluarga Islam di Brunei Darussalam (Studi Analisis Terhadap Pembaharuan Hukum Islam)" 8, No. 1 (2021): 1–12.

considerations from the perspective of both parties. In such cases, one of the solutions is to determine the *hadanah* rights issued in the divorce process.<sup>2</sup>

The *hadanah* conflict requires a solution to prevent prolongation, which may lead to suffering for parents and children, waste time and energy, and cause the involved parties to incur costs. A solution is also required to prevent the problem from triggering disputes between ex-husbands and wives after their divorce. In addition, this method is expected to bind the parties, particularly the ex-husband and wife, in its implementation.

Meanwhile, the *hadanah* conflict solution in Aceh is conducted through litigation and non-litigation methods in customary courts. These courts, as part of the traditional rights of community units, are still alive and practiced. This is a sociological fact that is unfortunately unrecognized in the legal politics of judicial power.<sup>3</sup>

Besides *hadanah*, another right is the child support obligation, which is imposed on the father by the Syar'iyah Court's decision.<sup>4</sup> Ironically, this decision cannot be implemented optimally in cases where many child support rights are still ignored. Even on implementation, the procedure is still insufficient to provide the living costs needed by the child and is not fit with the contents of the decision.

The determination of the child support from judges varies because there are no clear standards or explicit and definite laws in deciding the nominal amount and the father's socio-economic conditions. Hence, a situation where there is bad faith from the father will result in minimal fulfillment or neglect of the children's rights.<sup>5</sup> Therefore, researching the *hadanah* conflict solution is very important for protecting children that are victims of their parent's divorce. By making considerations for their benefit, attaining justice for the child will be expected through litigation decisions and non-litigation solutions.

Meanwhile, the approach used in this research involved case studies related to the *hadanah* conflict in Aceh, including those resolved by non-litigation or customary mechanisms and litigation methods. This research is a normative-empirical legal type, where the normative aspect assesses a standardized law that has become a guideline for the Acehese community. Then, the empirical aspect is a form of legal contextualization of information related to customary conflict solutions. The sample comprised various informants from Aceh Tamiang, East Aceh, and Langsa City.

### The Concept of *Hadanah* in Islamic Law

Simply put, *hadanah* is the care or maintenance of a child after a divorce. It is based on the child's age, alongside other indicators, such as independence, health, mental maturity, or other reasons, until a child is free from dependence on parental support.<sup>6</sup>

*Hadanah*, in this context, has a different dimension from the orientation of education (*tarbiyah*). Although education is more directed at nurturing and educating

<sup>2</sup>Achmad Mul<sup>25</sup>, "HADHANAH DALAM ISLAM (Hak Peng<sup>16</sup>han Anak Dalam Sektor Pendidikan Rumah)," *SAP (Susunan Artikel Pendidikan)* 2, No. 2 (2017): 165–73, <https://doi.org/10.30998/Sap.V2i2.2089>.

<sup>3</sup>Reza Maulana Mansari, "Kepastian Hukum Terhadap Pengasuhan Anak Mumayiz Pasca Perceraian Kajian Putusan Nomor 175/PDT.G/2011/MS-BNA," *Jurnal Yudisial* 11 (2018): 55–74.

<sup>4</sup>Husnatul Mahmudah, Juhriati Juhriati, And Zuhrah Zuhrah, "Hadhanah Anak Pasca Putusan Perceraian (Studi Komparatif Hukum Islam Dan Hukum Positif Indonesia)," *SANGAJI: Jurnal Pemikiran Syariah Dan Hukum* 2, No. 1 (2019): 57–88, <https://doi.org/10.52266/Sangaji.V2i1.263>.

<sup>5</sup>Muhammad Irvan Hidayana, "JURIDICAL ANALYSIS OF CHILDREN PROTECTION POST" 8, No. 30 (2020).

<sup>6</sup>Zainal Arifin, "Pelaksanaan Eksekusi Hadhanah Bagi Pasangan Yang Bercerai Di Pengadilan Aga<sup>4</sup> Curup Tahun 2016," *Al-Istinbath: Jurnal Hukum Islam* 3, No. 1 (2018): 23, <https://doi.org/10.29240/Jhi.V3i1.367>.

children in the study of science, post-divorce *hadanah* is more complex. It is more encompassing, ranging from material, physical, economic responsibilities, attention, affection, and even education.<sup>7</sup>The easiest way to explain the difference between the two is the blood relationship between parents and children. *Hadanah* in the education dimension is only limited to the professional working relationship between a teacher and the students.

Some reasons children are included in *hadanah* are the need for care due to an illness or accident, mental or spiritual disorders from within or environmental pressures, living supports and costs, and education and housing. These are some of the many reasons divorced parents are obliged to support their children even though the family is not officially together anymore.<sup>8</sup>

The legal basis for *hadanah* is contained in Allah SWT's stated in the Qur'an, which means "*And let those [executors and guardians] fear [injustice] as if they [themselves] had left weak offspring behind and feared for them. Therefore, let them fear Allāh and speak words of appropriate justice.*" (Surah An-Nisa: 9). Based on this verse, weak children or humans are those lacking in various aspects, such as physical, mental, and spiritual.

Another verse states that "*O believers! Protect yourselves and your families from a Fire whose fuel is people and stones, overseen by formidable and severe angels, who never disobey whatever Allah orders—always doing as commanded.*" (Surah At-Tahrim: 6). Based on the verse above, Allah SWT ordered believers to protect every family member from the fire of hell by executing all His commands and avoiding all prohibitions. Since children are included in the family environment, parents or relatives should educate them to avoid the torments of hellfire.

Caring for the family means nurturing and educating the members to become Muslims that are useful for religion. The scholars stipulate that the *hadanah* law is obligatory, even while in the marriage. Its legal basis follows Allah's commands, "*Mothers should suckle their children for two whole years if they wish to complete the term, and clothing and maintenance should be fairly borne by the father. No one should be burdened with more than they can bear: no mother shall be made to suffer harm on account of her child, nor any father on account of his. The same duty is incumbent on the father's heir. If by mutual consent and consultation, the couple wishes to wean [the child], they will not be blamed, nor will there be any blame if you wish to engage a wet nurse, provided you agree fairly. Be mindful of God, knowing that He sees everything you do.*" (Surah Al-Baqarah: 233)

Based on the above verse, parents are obliged to prepare for the growth, development, and health of their children. Allah SWT commands parents to care for their children that are not yet *mumayyiz* (the age at which children can distinguish between good and bad) and mothers to suckle their children for two years.<sup>9</sup> Meanwhile, the father is obligated to adequately provide for them and is allowed to take other women to suckle their children by giving them proper wages. Also, Allah indicates that mothers and fathers should not suffer because of their children. This is intended to make parents fulfill their obligations according to their abilities. Following the inability of either parent to do so, the responsibility can be transferred to a family that can afford the care.

<sup>7</sup>Firdaus Elin<sup>22</sup>ati, "HAK HADHANAH DALAM PUTUSAN PENGADILAN AGAMA Elimartati 1 , Firdaus 2 1," *Jurnal Ilmiah Syar'iah* 17, No. 2 (2018): 11.

<sup>8</sup>Choirunnisa Nur Novitasari, Dian Latifiani, And Ridwan Arifin, "Analisis Hukum Islam Terhadap Faktor Putusnya Tali Perkawinan," *Samarah* 3, No. 2 (2019): 322-41, <https://doi.org/10.22373/Sjkh.V3i2.4441>.

<sup>9</sup>alsabila Firdausia, "Hadhanah In The Concept Of Compilation Of Islamic Law And Law," *Nurani: Jurnal Kajian Syari'ah Dan Masyarakat* 20, No. 2 (2020): 317-22, <https://doi.org/10.19109/Nurani.V20i2.4849>.

As for the *hadanah* in the hadith, "O Messenger of Allah, it is my stomach that bears him, my milk that gives him water, and my lap that protects him. However, his father, who divorced me, wanted to snatch him from me. Thus, the Messenger of Allah said to her: "You are more entitled to him as long as you are not married" (Narrated by Abu Dawud).

The hadith above explains that a mother is more entitled to take care of her child than the father as long as she has not remarried. According to this hadith, the mother is preferred over the father because she is more understanding and capable of nurturing and educating the child. Also, her patience during care is greater, and she has more time, hence this consideration is made for the child's benefit.

Based on the Qur'an and Hadith verses above as the legal bases, an important idea from the *hadanah* is to save the lives of children in the world and the hereafter because their care is the parents' obligation. Parents who neglect their children's education sin, especially the little ones that still need their care.<sup>10</sup>

### Pillars and Conditions of Hadanah

There are two pillars in performing *hadanah*. The first is *hadhin* (nurturing parents), referring to parents that can maintain and provide education, thereby protecting the children's rights in continuing their lives. The second is *mahdhun* (nurtured child), which signifies that a child has the right to be fed with breast milk as food after birth. Islam provides for the pattern of regulation within two years before weaning..<sup>11</sup>

Several conditions need to be fulfilled by *hadhin* and *hadhinah* candidates to ensure the child's benefit. The *first* is having common sense, where the *hadanah* right is given to people with common sense because the job requires responsibility. Meanwhile, people without common sense should not handle *hadanah* because they cannot care for themselves, let alone others. The *second* condition is maturity. Since the child still needs someone to take care of him<sup>12</sup>, an adult capable of performing this task is necessary.

The *third* is the ability to educate and care for the child, including maintaining morals, education, health, and any property owned. Then, the *fourth* is being trustworthy and virtuous. Cheaters are unsafe for children and cannot be trusted to fulfill their obligations properly, as the child may imitate or behave fraudulently like the caregiver. The *fifth* condition is Islam, as Muslim children should not be cared for by non-Muslim caregivers. This is because *hadanah* is a matter of guardianship, and Allah SWT does not allow Muslims to be under the guardianship of disbelievers.<sup>13</sup>

Regarding the conditions above, there are differences of opinion among the priests of schools of thought necessitating Islam as a condition for being *hadhin* or *hadhinah*. Many scholars agree that Muslim children should not be cared for by non-Muslim caregivers because the disbelievers have no power over believers, and the child may disbelieve. Allah says that;

"Those (hypocrites) who wait and watch about you; if you gain a victory from Allah, they say: "Were we not with you," but if the disbelievers gain a success,

<sup>10</sup>Oleh Lalu And Muhammad Ariadi, "Abstrak Prolog Hadhanah Dalam Kajian Fikih" 8, No. 2 (2016): 78–95.

<sup>11</sup>Kemi Funmilayo Omotesho Et Al., "Adoption Of Innovation Through Joint Asset Acquisition: The Case Of Women Rice Processor Groups In Nigeria," *Pertanika Journal Of Social Sciences And Humanities* 29, No. 2 (2021): 771–84, <https://doi.org/10.47836/Pjssh.29.2.02>.

<sup>12</sup>Iman Jauhari, "INTERNATIONAL CONFERENCE OF ASEAN PERSPECTIVE AND POLICY THE IMPLEMENTATION OF HADHANAH THEORY ON INDONESIAN CHILDREN RIGHTS PROTECTION," 2000, 897–98.

<sup>13</sup>Lina Kushidayati, "Legal Reasoning Perempuan Dalam Perkara Gugat Cerai Di Pengadilan Agama Kudus Tahun 2014," *Yudisia* 6, No. 1 (2015): 141–59.

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they say (to them): "Did we not gain mastery over you and did we not protect you from the believers?" Allah will judge between you (all) on the Day of Resurrection. And never will Allah grant to the disbelievers a way (to triumph) over the believers." (Surah An-Nisa: 141)

The sixth is that the mother has not remarried. A mother who remarries another man loses her *hadanah* right. This is because the man may not love and care for the child's interests properly, and the mother will likely pay more attention to her new husband and sacrifice her biological child. However, remarriage to a man that is closely related to the child, such as an uncle from the father's family, will prevent her from losing these rights. This is because the uncle is entitled to *hadanah* and will love and pay attention to his rights because of his close relationship and kinship with the child. Finally, the seventh condition is independence. A slave is not allowed to raise the child because he is too busy with the master's affairs.<sup>14</sup>

Based on the conditions regarding *hadanah*, the benefit of the child's life can be guaranteed. These conditions are very important in supporting the achievement of the *hadanah* goals because childhood is the most significant period of development. It is the beginning of physical and intellectual growth and development, character formation, alongside the cultivation of noble values and religiosity for children to prepare for their future. Therefore, the inability to fulfill any of these conditions means one's right to becoming *hadhinah* or *hadhin* will be lost.

### Children's Rights in Islam

Children's rights are an obligation to be fulfilled by every married individual to ensure children grow and develop properly.<sup>15</sup> The first is the right from the father and mother. Every parent instinctively loves and cares for their children due to a very strong inner bonding. This is explained in Surah al-Kahf verse 46.

The second is the right to be attributed to the father. A child should obtain clear recognition of his parents' lineage and be attributed to his father. Another right from the father is to acquire an education, good advice, and affection.<sup>16</sup> In addition, the mother has the responsibility to provide education and guidance to ensure the child becomes a person of faith and noble character.

Third, the right to life. Although this is the most basic right, many children are being killed and abandoned by their parents nowadays. During the Jahiliyah period, many children were killed for fear of poverty, especially girls, who were considered a disgrace to the family. Therefore, Islam came to prohibit the practice of killing by conferring the right to life for every baby, and Allah SWT also threatens those that violate it. This is based on Surah al-Isra 'verse 3.<sup>13</sup>

The fourth is the right to maintenance. A child has the right to receive proper care from his parents, such as food, clothing, and living support, according to his needs. Meanwhile, a father should provide his family with proper food, housing, and clothing to protect them from various diseases.

<sup>14</sup>Nurhotia Harahap, "Perwalian Anak Dalam Tinjauan Kompilasi Hukum Islam," *Jurnal El-Qanuniy: Jurnal Ilmu-Ilmu Kesyariahan Dan Pranata Sosial* 4, No. 1 (2018): 116–29, <https://doi.org/10.24952/El-Qonuniy.V4i1.1831>.

<sup>15</sup>Susara J. Nortjé-Meyer, "The Wife As Stranger In The Family," *HTS Teologiese Studies / Theological Studies* 75, No. 3 (2019): 1–7, <https://doi.org/10.4102/Hts.V75i3.5655>.

<sup>16</sup>Suciati Suciati, "ISLAMIC EDUCATION OF CHILDREN WITH PARENTS AS INDONESIAN MIGRANT WORKERS (Case Study In Karangwotan Village, Pati, Central Java)," *QIJIS (Qudus International Journal Of Islamic Studies)* 4, No. 2 (2016): 137, <https://doi.org/10.21043/Qijis.V4i2.1767>.

## Living support and *Hadanah*

The provision of living support is the husband's responsibility, though divorced, and is given until the child becomes an adult or can live independently. This support is given by husbands to their divorced wives as Allah says, "*And for the divorced women, maintenance (should be provided) in fairness (on a reasonable basis). This is a duty on the pious (owners of taqwa).*" (Surah Al-Baqarah: 241)

*Hadanah* support is the responsibility of parents through supervision, service, and continuous maintenance until the child can live independently. Childcare costs are the same as breastfeeding wages,<sup>17</sup> and both are part of the obligation to provide living support, as explained subsequently. First, a wife is eligible to receive living support, providing she is still bound by marriage to the husband or is in the *iddah* period after getting divorced. This is as the word of Allah SWT in Surah al-Baqarah verse 233.

Second, a mother that has passed her *iddah* period is no longer entitled to receive living support from her ex-husband. However, she will be given the cost of breastfeeding from her child's father, says Allah SWT in Surah At-Talaq verse 6. Third, any person other than the mother caring for the child is entitled to receive the living costs because they are bound by the task of providing care.<sup>18</sup> However, a caregiver may be reluctant in performing his obligations or only care for the child because a reasonable fee is paid, while other people voluntarily care at no cost. In such cases, the child's care can be handed over to the voluntary caregiver.

Essentially, a father is obliged to provide sufficient food and clothing for the nursing mother (wife) to ensure she can best serve the child's needs. The verse explains that attributing a child to the father does not mean the mother does not have any rights. Hence, the expenditure should be given according to what is *ma'ruf* (common, proper, or good) and commensurate with women. The obligation or burden imposed on a mother or father for their child is limited to their ability and does not bring difficulties.<sup>19</sup>

Also, the obligation to provide living support for a child still holds for a poor father with insufficient income that can work. Instead, the mother can be ordered to care for the living support costs of the child, providing she has sufficient income, and it can be calculated as a father's debt to be collected when he is able.

The father is obliged to pay breastfeeding, *hadanah* wages, and the cost of renting a house or equipment in cases where the mother does not have a home or a place to raise the child. He is also obliged to pay the salary or provide a caregiver in the event that the mother needs one, and he can do so. This is not included in the child's special living support section, such as eating, drinking, sleeping, medicine, and other essential needs. However, this salary is only necessary when the caregiver cares for the child.<sup>20</sup>

Generally, the obligation to provide living support and pay the child's costs is the father's responsibility as the family head. This is necessary because obtaining

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<sup>17</sup>Ananias K. Nyanjaya And Maake J. Masango, "The Plight Of Absent Fathers Caused By Migrant Work: Its Traumatic Impact On Adolescent Male Children In Zimbabwe," *HTS Theologiese Studies / Theological Studies* 68, No. 1 (2012): 1–10, <https://doi.org/10.4102/Hts.V68i1.1004>.

<sup>20</sup>In Grobbelaar, "Doing Theology With Children: Some Challenges For Adult Theologians," *HTS Theologiese Studies / Theological Studies* 75, No. 1 (2019): 1–10, <https://doi.org/10.4102/Hts.V75i1.5636>.

<sup>19</sup>Risपालman And Muhammad Iman Islami, "Upaya Pemerintah Kota Banda Aceh Dalam Melindungi Anak Penyandang Disabilitas," *Samarah* 3, No. 2 (2019): 491–514, <https://doi.org/10.22373/Sjkh.V3i2.4940>.

<sup>20</sup>Sulaiman Tamba, "Media Komunikasi Dan Informasi Hukum Dan Masyarakat Child Protection In Islam Is Known As Hadhanah. Hadhanah Is A Child Care Method Through Normative Approach (Legal Research), Which Is Based On The Facts In The Field That Are Questionable, Carried Out By Applicable Laws And Regulations. A Neglected Begging Under The Red Lights. But, The Neglected Children Also Include Children Whose Needs Are Not Fulfilled As Stipulated In The Law. Child Care Is Ultimately The JURNAL HUKUM KAIDAH Media Komunikasi Dan Informasi Hukum Dan Masyarakat," N.D.

physical, spiritual, and social welfare will be difficult for the child fulfilling the living costs. Meanwhile, the government set a regulation, particularly the Head of the State Civil Service Administration Agency (BAKN) Circular Letter Number 08/SE/1983 point 19, for civil servants to ensure the fulfillment of the child's livelihood. The regulation stipulates that a civil servant who divorces is obliged to give part of his salary to support his ex-wife and child as a bond of responsibilities after the divorce.

### **Hadanah in Positive Law in Indonesia**

The legal protection for Indonesian children is stated in Article 28 B paragraph (2) of the 1945 Constitution that "every child has the right to survive, grow, develop, and be protected from violence and discrimination." Every child has the right to survival, meaning they are entitled to obtain living costs from the people obliged to provide. They also have the right to grow, develop, and be cared for by a responsible person. Furthermore, every child should be protected from violence and discrimination, meaning they have the right to obtain legal protection from authorized persons.<sup>21</sup>

Law Number 1 of 1974 does not stipulate *hadanah* definitively but specifies the obligation of parents to care for their children. Articles 42-45 explain that parents are obliged to adequately maintain and educate their children aged below 18 years until they are married or live independently.

The *hadanah* cost is borne by the father, and this responsibility does not disappear even after being divorced. This is based on Article 34, paragraph (1) of Law Number 1 of 1974 on Marriage, which explains that the husband should fulfill and finance all the costs needed in his household. In cases where these responsibilities are denied, and the ex-wife is burdened with them, the local Religious Court is asked to punish the ex-husband to pay the *hadanah* cost deemed appropriate. Therefore, the payment can be enforced by law based on the decision of the Court.<sup>22</sup>

According to Article 41 of the Law, there is a difference between material care and nurturing responsibilities. This article focuses more on the material obligations and responsibilities that are the burden of the husband or ex-husband, providing he is capable. Therefore, the *hadanah* for the child who is not yet *mumayyiz* is handed over to the mother after the divorce, while the maintenance costs remain the father's responsibility.<sup>23</sup>

The provisions for child custody in Law Number 1 of 1974, explained in article 45 paragraph (1), state that both parents should maintain and educate their children as well as possible. These obligations, according to paragraph (2), will continue even after the marriage ends.<sup>24</sup> Hence, the law explains that in the event of a divorce, the child's care remains the responsibility of both parents. However, it does not provide a clear description in the case of a dispute or struggle over child custody, in contrast to the Islamic Law Compilation (KHI), which is more detailed. Based on Article 47 of the Marriage Law, children that are below 18 years or unmarried are under the authority of their parents, as long as their authority is not revoked.

Also, the contents of Article 49 of Law No. 1 of 1974 generally favor the benefits of the child, though they are still limited to material interests and do not affect

<sup>21</sup>R Zainul Mushthofa And Siti Aminah, "IMPLEMENTASI PASAL 149 (D) KOMPILASI HUKUM ISLAM TENTANG KEWAJIBAN AYAH DALAM MEMBERIKAN BIAYA HADHANAH BAGI ANAK DI BAWAH USIA 21 TAHUN" XIV, No. 2 (2019): 1-20.

<sup>22</sup>Zulfan Efendi, "Pelaksanaan Eksekusi Hak Asuh Anak (Hadhanah) Terhadap Isteri Yang Murtag Dalam Perkara Nomor: 398/P.Dt.G/2013/PA.Pbr Di Pengadilan Agama Pekanbaru," *Teraju* 2, No. 01 (2020): 1-34, <https://doi.org/10.35961/Teraju.V2i01.62>.

<sup>23</sup>Firdausia, "Hadhanah In The Concept Of Compilation Of Islamic Law And Law."

<sup>24</sup>Asni Asni, "Putusan Serta Merta Dalam Perkara Hadhanah Di Pengadilan Agama Dalam Rangka Perlindungan Anak," 2021, 67-82.



the non-material aspect. Meanwhile, the powers of parents that are incompetent in performing their obligations of caring and educating their children can be revoked by a decision of the Syar'iyah Court.<sup>25</sup> The revocation is because the parents neglect their obligations to their children and are badly behaved.

This includes parents who neglect or are incompetent at their obligations to their children due to long prison sentences, chronic illnesses, insanity, and travel for an unknown period. Meanwhile, all inappropriate behaviors of caregivers and educators should set good examples.

Due to the revocation, the parent's power to exercise control over their child is lost. A father whose power is revoked is no longer entitled to provide care, maintenance, education, or represent the child inside and outside the court. Therefore, the mother has the right to care for the child and control his maintenance and education. Based on Article 49 paragraph (2) of Law Number 1 of 1974, his *hadanah* cost remains permanently attached, though his power over the child has been revoked.<sup>26</sup>

### **Hadanah in the Islamic Law Compilation**

The discussion of *hadanah* in the Islamic Law Compilation (KHI) is inseparable from the deliberation of classical and modern thinkers or scholars. KHI is a collection of ideas from fiqh experts used as references in resolving cases in religious courts. According to KHI Article 1 letter (g), *hadanah* or childcare is an activity of nurturing, caring for, and educating a child until he is an adult or independent.<sup>27</sup>

Article 105 letter (a) of the KHI states that "in the event of a divorce, the maintenance of a child who is not yet *mumayyiz* or below 12 years old is the mother's right." In this context, KHI uses reasons for the habits and prevalence of children in their mothers' care, especially those under the age of 12 years. Hence, this article describes the choices of parents in caring for and maintaining their children. Letter (a) states that the *hadanah* rights of a child below age 12 fall to the mother. Meanwhile, a child aged 12 years old does not automatically become under the father's custody but is allowed to choose between both parents. However, all childcare costs are borne by the father, though the mother may provide living support for the child

Although the *hadanah* period is not explicit in the KHI, an understanding of the general provisions defined in the introduction shows that an age limit is specified, namely until the child is an adult and can live independently. The considerations of an adult in the KHI perspective can be seen in chapter XIV Child care, article 98.<sup>28</sup>

Furthermore, the article implies that both parents should educate and equip their children with knowledge. Article 98 paragraph 1 also explains that the age limit for a child who is independent or an adult is 21 years, provided the individual is not physically or mentally disabled and has never been married. At that age, the child is considered an adult that can care for himself. Conversely, a child who has married is considered an adult, meaning the parents have no obligations to provide maintenance or care.

In this case, the understanding in determining the *hadanah* period is different, according to the KHI. Previously, article 105 explained that children that have not

<sup>25</sup>Kushidayati, "Legal Reasoning Perempuan Dalam Perkara Gugat Cerai Di Pengadilan Agama Kudus Tahun 2014."

<sup>26</sup>Muslim Pohan, "FENOMENA DAN FAKTOR PERKAWINAN SEMARGA ( Studi Kasus Terhadap Masyarakat Batak Mandailing Di Yogyakarta )" 8, No. 1 (2021): 67-84.

<sup>27</sup>Jurnal Hukum Keluarga And Hukum Islam Volume, "Http://Jurnal.Arraniry.Ac.Id/Index.Php/Samarah" 1, No. 2 (2017).

<sup>28</sup>Arifin, "Pelaksanaan Eksekusi Hadhanah Bagi Pasangan Yang Bercerai Di Pengadilan Agama Curup Tahun 2016."

*mumayyiz* are in their mother's care, while those that have or are 12 years old are allowed to choose their caregiver. The age limit of *mumayyiz* means that the *hadanah* period is 12 years, not 21. Conversely, the KHI article shows that the limit is adulthood or when the child can live independently, and an adult's age, according to Article 98, is 21 years.<sup>29</sup>

However, the explanation of the *hadanah* limit by KHI at age 21 years is overall care. At that age, children can run their lives without help from others, as they can work and support themselves as well as even get married. Therefore, the custody rights end with the marriage. The differences stated by each legal subsystem regarding the child's age limit do not significantly show the age gap. This age difference does not have a significant level from one legal field to another or children as the subjects to related parties in the legal circle resulting from actions in favor of the concerned child.<sup>30</sup>

The determination of *mumayyiz* by KHI at an age limit of 12 years is not absolute. In resolving disputes over the care of children under 12, a judge can assess one that is *mumayyiz*. The assessment will determine the attitude of the next judge in allowing the child to choose care by his mother or father. Therefore, the judge's attitude is not categorized as a legal deviation because it is supported by scholars' opinions as well as the perspective of legal interpretation. Meanwhile, considering the legal school developing in America (Anglo Saxon), which states that "the good laws are fit for those that live in society," seems appropriate. The age factor cannot be used as a standard to determine the psychological and physical development of a child. Hence, the judge's attitude is needed to assess the *mumayyiz* of a child from the mental and physical aspects, alongside the perspectives of the surrounding community.<sup>31</sup>

Generally, the criteria for a person to become a holder of *hadanah* rights are stated in Article 156 of the KHI. Based on the provisions, this article<sup>17</sup>, especially letter (c), can be concluded as an important criterion in determining the ability of parents to care for or lose their rights over their children. This is based on the guarantee of children's physical and spiritual safety. Article 156 regulates the sequence of a child after the biological mother dies by ordering the parties entitled to care for him, which comprises women in a straight line from the mother and father. These include women in a straight line upward from the father, sisters of the child, alongside women who are blood relatives from the mother's side, and then the father's side.

The provisions of Article 156 (b), which allow children to choose, need to be considered by judges in deciding cases. Generally, the judge's carelessness without considering this choice may cause problems in the future, such as the absence of legal certainty for the child.<sup>32</sup> Although Article 156 is very clear, it is not necessarily perfect. The article guarantees rights, especially for minors when their parents divorce. However, a problem arises in occasions where the father is irresponsible or incapable of financing the *hadanah*, as the purpose of creating the article was to guarantee children's rights.

### Non-Litigation Solutions of the *Hadanah* Conflict in Aceh

The Acehnese community has a specialty in the social law field, which corresponds with their cultural life. One of the habits in the Aceh community is to resolve various problems and disputes through village deliberations. The community

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<sup>29</sup>Jurnal Hukum Keluarga And Hukum Islam Volume, "Http://Jurnal.Arraniry.Ac.Id/Index.Php/Samarah" 2, No. 1 (2018).

<sup>30</sup>Elimartati, "HAK HADHANAH DALAM PUTUSAN PENGADILAN AGAMA Elimartati 1, Firdaus 2 1."

<sup>31</sup>Muzdalifah M Rahman, "Mental Health: Islamic Perspective," *QIJS (Qudus International Journal Of Islamic Studies)* 3, No. 1 (2015): 54–71.

<sup>32</sup>Lalu And Ariadi, "Abstrak Prolog Hadhanah Dalam Kajian Fikih."

life is inseparable from customs, where, although written regulations are rarely found, the implementation of customs obeys Islamic law.

Consequently, this research found that hadanah cases were more often resolved by non-litigation mechanisms. This can be seen from the few cases that went to the Syar'iyah Court from 2016-2018, as explained by an informant below:

"...hadanah cases may go to the Syar'iyah Court because there are no issues regarding child custody or they do not wish to make a fuss about children. The reason may also be that the community does not understand their rights because they only know the traditional gampong institutions...." (As Hakim, Kuala Simpang, 2019).

According to this information, the few cases submitted to the Syar'iyah Court were because no problems were encountered regarding hadanah in the community. After all, children in the event of a divorce are cared for by their mother. Furthermore, children may be unaware of their rights in the Syar'iyah Court because they only know that resolving conflicts is the task of customary institutions.<sup>33</sup>

Several patterns of conflict solutions are implemented by non-litigation mechanisms. The *first* is a private solution executed by the husband and wife without involving other parties, which ends by handing over the children's rights to either party. Most people desire that family conflicts are resolved internally and should not be known to the public.

The *second* solution involves the family of the husband and wife, other close members, and the mosque imam or *tuha peut*. Conversely, the *third* is through *Duek Ureung Tuha*, a limited deliberation with community leaders to resolve conflicts based on the two parties' reports.<sup>34</sup> The pattern of settlement is gradual, where the injured party (party 1) reports to the chief about a dispute with the second party. Then, the first party is asked to explain the main problem in detail so as to find a solution. At other times, the same approach is conducted for the second party. After understanding the essence of the case and their wishes, the chief and his apparatus determine the schedule for deliberation and summons the two parties to attend based on the predetermined schedule.

Subsequently, the deliberation is performed according to a predetermined schedule, usually at night after the *Isha* prayer at the concerned village halls chosen in the agreement. This village deliberation is attended by the two parties and their respective families and is organized by the *chief*, *imam*, traditional, and other community leaders..<sup>35</sup>

The method of resolving disputes at the village level has no specific procedure. Appropriate with local customs, the deliberation or meeting is led by the chief, beginning with greetings to show respect and asking for prayers to resolve the problems properly. Then, the two parties are asked to explain the problem in turn. After the problem is clear, the chief asks the opinion of the traditional and community leaders, alongside both parties, about the solution of the problem. The best solution for both parties is then considered<sup>36</sup>, followed by a village decision after being accepted. Therefore, the problem ends, and the parties shake hands as a sign of forgiveness.

<sup>33</sup>Misran And R. M. Dian Murdiana, "Pandangan Tengku Gampong Tentang Wali Fasik Dalam Pernikahan (Studi Kasus Di KUA Kecamatan Blangpidie, Abdy),"  
*Samarah* 3, No. 2 (2019): 478-90, <https://doi.org/10.22373/sjhc.v3i2.4398>.

<sup>34</sup>Asni, "Putusan Serta Merta Dalam Perkara Hadhanah Di Pengadilan Agama Dalam Rangka Perlindungan Anak."

<sup>35</sup>Putusan Hakim Et Al., "Vol. 4, No. 2, September 2018 | 103" 4, No. 1 (2018): 103-24.

<sup>36</sup>Muhammad Sahlán, "Pengamatan Sosiologis Tentang Perceraian Di Aceh," *Jurnal Substantia* 14, No. 1 (2012): 88-97.

*Fourth*, the solution through gampong courts. This is the customary court followed by the village apparatus and conducted in the *meunasah* or mosque. This stage is implemented in situations where peace cannot be realized at the village level and the chief reports to the *gampong*.<sup>37</sup> Subsequently, the *keuchik* and other officials hold a meeting to find the best solution to resolve the dispute based on the chief's report. Then, the trial schedule is determined, according to the peace deliberation, which is held at the *gampong* level.

The trial is held at the *meunasah* by presenting the parties after the *keuchik* and *gampong* officials listen to the problems, and the witnesses hear the considerations of the officials and community leaders. Then, the *keuchik*, as peace judges, consult by asking about the acceptance of the decision. Once it is accepted, the peace process is completed by firmly stating the decision, and a letter is drawn up and signed by the parties, the *keuchik*, *tua peuteu*, and *imam meunasah*.

There are still conflict solution methods in the *gampong* that are different from the provisions in the customary courts. In resolving conflicts, the *keuchik*, *tua peuteu*, and *imam gampong* have fairly important roles. Moreover, according to Qanun Number 7 of 2000 concerning the implementation of traditional life, the *keuchik* and *imam meunasah* are the leaders of meetings and forums aimed at resolving conflicts that occur in the *gampong*.

The characteristic of customary law is conflict's solution by peaceful means through the deliberation of both parties. This principle is highly respected and more often implemented by *gampong* officials. Generally, the practices are solution patterns that adopt Islamic law but are translated into Aceh customary law.

### **The Solution of the *Hadanah* Conflict in Aceh by Litigation**

Besides the traditional *hadanah* conflict resolution, litigation mechanisms are used, in this case through the Syar'iyah Court, because customary courts were unable to proffer solutions. The parties do not accept the customary decisions and seek legal certainty through the Syar'iyah Court because the lawsuit is intended to provide a more preferable decision.<sup>38</sup>

Generally, the Syar'iyah Court *hadanah* lawsuits viewed from the side of the plaintiff's interests have two possible forms of claims. First, only to determine, according to the law, that the *hadanah* rights are in his/her control, while the child is in their custody and mastery. This claim is filed on occasions where there is a strong indication that the plaintiff wishes to seize the child but cannot guarantee the best development. Hence, this is intended to prevent them from taking the child for granted.<sup>39</sup> Second, the plaintiff is interested in getting the child from the defendant's control and back in their care.

The determination of *hadanah* is usually decided at the same time as the divorce decision from both parents because a case can be filed simultaneously and separately. However, the trial process remains the same, as explained by an informant:

*"...Custody lawsuits usually accumulate with divorce because they can be filed together or separated. The process is like an ordinary trial, hence are rarely filed separately"* (Afwan, Panitera Mahkamah Syariah Idi, 2019).

<sup>37</sup>Jauhari, "INTERNATIONAL CONFERENCE OF ASEAN PERSPECTIVE AND POLICY THE IMPLEMENTATION OF HADHANAH THEORY ON INDONESIAN CHILDREN RIGHTS PROTECTION."

<sup>38</sup>Mursyid Djawas And Riska Fajrina, "Efektifitas Lembaga Perlindungan Anak Terlantar: Studi Pada 4nti Asuhan Suci Hati Di Meulaboh, Kabupaten Aceh Barat," *Samarah* 3, No. 2 (2019): 296-321, <https://doi.org/10.22373/Sjhc.V3i2.4904>.

<sup>39</sup>Arifin, "Pelaksanaan Eksekusi Hadhonah Bagi Pasangan Yang Bercerai Di Pengadilan Agama Curup Tahun 2016."

Based on the informant's explanation of the Idi Syar'iyah Court, *hadanah* lawsuits are combined with divorce cases. Even when uncombined, the judge can remind the parties about the *hadanah* rights.<sup>40</sup>Hence, a lawsuit can be added or changed in cases where the *petitum* for divorce previously only contained a claim regarding the dissolution of the marriage. Then, the opposing party, which is the defendant, can file a counterclaim in response to the main lawsuit.

Reconvention is the accumulation of two demands, which aim to save costs, simplify procedures, and avoid conflicting decisions since court fees will not be required.<sup>41</sup>Although *hadanah* conflicts are submitted independently to the Syar'iyah Court, such cases are very few. However, the parties can file a new *hadanah* lawsuit to the Syar'iyah Court when there is an *in kracht* judge's decision regarding the marriage termination.

### Conclusion

The concept of *hadanah* has a legal basis in Islam and positive law in Indonesia. Although the provisions are explained in the Compilation of Islamic Law, they are not explicit. This shows that the attention of both parents to their children is very important even after an official divorce. Children have rights that should be fulfilled by parents, especially fathers in terms of meeting economic, physical, educational, and affection needs. This may result in a serious problem for children that are left behind, especially concerning collaboration between the parents since they are no longer together.

Therefore, *hadanah* concepts have various offers of custody to ensure children's rights are still fulfilled. The common problem is the father's awareness in caring for the child's livelihood after the divorce. This reality makes child custody taken by third parties, such as relatives and families, that are willing to care voluntarily. Furthermore, there are two models of the *hadanah* conflict solution after divorce in Aceh. These are the solution by non-litigation and litigation mechanisms. In terms of quantity, the non-litigation model is more attractive because the people's character prioritizes the resolution of community disputes or conflicts by deliberation.

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<sup>40</sup>Muhajir, "HADHANAH DALAM ISLAM (Hak Pengasuhan Anak Dalam Sektor Pendidikan Rumah)."

<sup>41</sup>Muhammad Nasir, "ULIM DALAM PERSPEKTIF HUKUM ISLAM DAN HUKUM ADAT" 8, No. 1 (2021): 33–49.

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