

# **THE PROTECTION OF CHILD CUSTODY POST-DIVORCE BASED ON THE THEORY OF JUSTICE**

by: Meilan Lestari, Syafrinaldi, Abd Thalib

Doctor of Laws Program, Islamic University of Riau

## **Abstract**

Every human being needs justice for himself and his life. Justice is equal proportion, not one-sided, balanced and taking sides with the right, adhering to the truth, supposedly, not being arbitrary towards others and fulfilling the rights and duties towards other human beings including children.

Children are a mandate entrusted by Allah to both parents who should be nurtured, educated, treated, and cared for with love, because children are the future successors of the family and a great responsibility for both parents.

Child Custody is also known as Hadhanah, Hadhanah is the nurturing of a young child after a divorce. Divorce is the breakup of the physical and mental relationship between husband and wife, which causes the children to be separated from their father or mother, however, it should not decrease the attention and love for the children and meet the rights of the children they need in terms of educating, nursing, monitoring and providing livelihoods for children, because children are victims of their parents' divorce.

Children are the sole responsibility of both parents, and the fulfilment of their right to education and nursing is something that needs special attention. The responsibility to care for and educate children lies with both parents, even if a court decision decides that the child's rights should be given to one of the parents.

**Key Words:** Child Custody Post-Divorce

## A. Introduction

Children are entrusted by Allah Subhanawata'ala to their parents, who must be nurtured, educated, cared for, and raised with love, not only formally but also religiously, by instilling religious values in them. Children are the ones who will continue the family identity, as the family is the first education for children (Madrasatul Ula). The goodness or badness of a child depends on the education they receive at home, namely the education from both parents.

A child is someone who is not yet mature and cannot stand alone in meeting their life needs, namely a child who is under 18 (eighteen) years old, including a child still in the womb. This is stated in Article 1 paragraph (1) of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection.

Every child born into a family must be nurtured to the best of their ability and kept away from things that contradict religious values. Nurturing is known by the term Hadhanah.

Hadhanah, etymologically understood as "beside" or "under the armpit", while terminologically, it refers to the act of safeguarding a child who is not yet capable of caring for themselves from potential harm since they are unable to take care of themselves.<sup>1</sup>

According to Asa Shan'ani, Hadhanah involves nurturing someone (a child) who is not independent, educating them, and caring for them to prevent any harm from befalling them. On the other hand, according to Amir Syarifudin, Hadhanah is the custody of young children after a marriage dissolution.<sup>2</sup>

Surah At-Tahrim (66:6) in the Qur'an states:

"O you who have believed, protect yourselves and your families from a Fire whose fuel is people and stones, over which are [appointed] angels, harsh and severe; they do not disobey Allah in what He commands them but do what they are commanded." (Quran, Surah At-Tahrim, 66:6)

"Hai orang-orang yang beriman, peliharalah dirimu dan keluargamu dari api neraka yang bahan bakarnya adalah manusia dan batu, penjaganya malaikat-malaikat yang kasar, keras, dan tidak mendurhakai Allâh terhadap apa yang diperintahkan-Nya kepada mereka dan selalu mengerjakan apa yang diperintahkan.(At-Tahrîm : 6 )

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<sup>1</sup> Ramdan Fawzi, 'Rights of Custody in Divorce Due to Religious Differences: Islamic Law Perspective', Journal of Civilization and Islamic Law, Vol. 1, No. 2, October 2018.

<sup>2</sup> Mardani, 'Islamic Family Law in Indonesia', Prenadamedia Group, Jakarta, 2016, page: 127.

Allah commands every individual to obey all His commandments and to refrain from all that He has prohibited in order to safeguard oneself and one's family, including children and spouse, from the hellfire whose fuel is made of humans and stones for those who believe.

Based on the aforementioned, Hadhanah entails the guardianship of children who are not yet mature and cannot stand on their own. Therefore, there is a need for supervision, education, and protection from both parents to ensure that the child is shielded from anything that may jeopardize their future, even if the parents are divorced.

Divorce signifies the dissolution of both the physical and spiritual connection between a husband and wife in building a happy and lasting household (family) based on the Oneness of God.

Based on Article 38 of Law Number 1 of 1974 concerning marriage, the dissolution of marriage can occur due to the death of either spouse, which is the will of Allah, divorce initiated by either spouse, or through a court decision.

Divorce is permissible but highly discouraged in Islam because it not only affects the husband and wife but also has significant repercussions for the children. Children are the primary victims of their parents' divorce as they may lose the complete love and care of both parents.

Consequences of Marriage Dissolution Due to Divorce are as follows:

1. Both the mother and father remain obligated to nurture and educate their children, solely based on the children's interests. In case of disputes regarding child custody, the court will render its decision.
2. The father is responsible for all expenses related to the maintenance and education of the child. If the father is unable to fulfill this obligation, the court may determine that the mother should share these expenses.
3. The court may compel the former husband to provide livelihood expenses and/or determine certain obligations for the former wife.<sup>3</sup>

Divorce is the least desirable event in a marriage because it severs the strong and sacred bond between both parties, namely the husband and wife. However, despite this, divorce is permitted in Sharia law, provided it is conducted in a proper manner.<sup>4</sup>

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<sup>3</sup> Nurhadi, 'Resolution of Disputes over Custody Rights of Minors Post-Divorce', CV. Mandar Maju, March 1, 2021, page: 5.

<sup>4</sup> Ramdan Fawzi, "Rights of Custody in Divorce Due to Religious Conversion: Islamic Legal Perspective," *Journal of Civilization and Islamic Law*, Volume 1, Number 2, October 2018.

Based on the above:

stated in the Al-Quran, Surah At-Thalaq verse (65), which means:

"O Prophet, when you [Muslims] divorce women, divorce them for their [waiting] period and keep count of the waiting period, and fear Allah, your Lord. Do not turn them out of their [husbands'] houses, nor should they [themselves] leave [during that period] unless they are committing a clear immorality. And those are the limits [set by] Allah. And whoever transgresses the limits of Allah has certainly wronged himself. You know not; perhaps Allah will bring about after that a [different] matter."

"Hai Nabi apabila engkau menceraikan Istri-Istrimu, maka hendaklah kamu ceraikan mereka pada waktu mereka dapat menghadapi iddahnya yang wajar, dan hitunglah waktu Iddah itu, serta bertakwalah kepada Allah Tuhanmu"

The issue addressed in this writing is to determine how post-divorce Hadhanah rights are protected from the perspective of justice theory. The objective of this writing is to understand the protection of post-divorce Hadhanah rights for children from the viewpoint of justice theory, as parents bear full responsibility for their children, not only in terms of financial support but also in terms of care (Hadhanah). Care encompasses supervision, education, and nurturing.

## **B. Materials and Research Methods**

### **1. Protection of Post-Divorce Hadhanah Rights for Children**

Humans are social beings, creatures who live in societies; they cannot live alone but need others (zoon Politicon) to continue their lives in this world.

Humans are created by Allah Subhanawata'ala to live in pairs, as husband and wife, and between them, there is a desire to live together in a marital relationship. This biological urge can be channeled correctly through "marriage bonds". In marriage, spouses will find peace in a loving, merciful, and gentle atmosphere. A life filled with such pleasure is a precious gift from Allah SWT to every human being.<sup>5</sup>

According to Article 2 of the Compilation of Islamic Law, marriage is a very strong covenant or mittsaqan ghalidzan to obey the command of Allah, and fulfilling it is an act of worship. Meanwhile, according to Article 1 of Law Number 1 of 1974 concerning Marriage, marriage is the physical and spiritual bond between

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<sup>5</sup> Anton Afrizal Candra, "Efforts to Protect Children in Hadhanah Cases," Journal of Human Rights (Jurnal HAM), Volume 13, Number 2, August 2022.

a man and a woman with the aim of forming a happy and lasting household (family) based on the Oneness of God.

Marriage is a sacred bond between a man and a woman in building a household as husband and wife to establish a happy and everlasting family, namely to create a family that is Sakinah, Mawaddah, Warahmah based on Sharia with the aim of having descendants.

This is reflected in the Holy Quran, in Surah Ar-Rum, verse 21, which states:

"And of His signs is that He created for you from yourselves mates that you may find tranquility in them; and He placed between you affection and mercy. Indeed in that are signs for a people who give thought."

“Dan di antara tanda-tanda (kebesaran)-Nya ialah Dia menciptakan pasangan-pasangan untukmu dari jenismu sendiri, agar kamu cenderung dan merasa tenteram kepadanya, dan Dia menjadikan di antara rasa kasih dan sayang. Sungguh, pada yang demikian itu benar-benar terdapat tanda-tanda (kebesaran Allah) bagi kaum yang berpikir. “

This verse explains the significance of creating a harmonious marital life between husband and wife. Only through love and compassion can marriage be peaceful and enduring. Having a peaceful life, spouses are expected to fulfill the next purpose of marriage, which is "to produce righteous offspring and to always pray for their parents." Offspring that bring happiness are "those who soothe the heart and bring joy," which in Quranic terms are referred to as "qurrata 'ayyunin."<sup>6</sup>

Marriage is an encouraged act by the Prophet Muhammad for those who are mentally and spiritually capable, and it is a long-lasting worship that must be undertaken with sincerity and patience. This is reflected in the Hadith recorded by Bukhari, Muslim, Tirmidhi, and others, which states:

“Wahai para pemuda Barangsiapa di antara kalian berkemampuan untuk menikah, maka menikahlah, karena nikah itu lebih menundukkan pandangan, dan lebih membentengi farji (kemaluan). Dan barangsiapa yang tidak mampu, maka hendaklah ia shaum (puasa), karena shaum itu dapat membentengi dirinya.” (HR Bukhari, Muslim, Tirmidzi, dan lainnya).”

Marriage is the only legitimate means to build a household and raise offspring, in line with human nature. Marriage essentially brings together two individuals of opposite genders who have similar interests and life perspectives, with the goal of realizing a family life that is Sakinah, Mawaddah, Warahmah.<sup>7</sup>

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<sup>6</sup> Anton Afrizal Candra, "Efforts to Protect Children in Hadhanah Cases," *Journal of Human Rights (Jurnal HAM)*, Volume 13, Number 2, August 2023.

<sup>7</sup> Dahwadin et al., "Divorce in the Legal System of Indonesia," *Mangku Bumi*, Central Java, 2018, pages 2 and 3.

A marriage is not solely based on desire but must also consider the goals to be achieved within the marriage. The purpose of marriage is to:<sup>8</sup>

1. Establish a happy and lasting family.
2. Form a family or household that is happy, harmonious, full of love, and mercy (*sakinah, mawaddah, warohmah*).
3. To obey the command of Allah to obtain legitimate offspring within society, by establishing a peaceful and orderly household.
4. To fulfill the natural human need for companionship between men and women in order to create a happy family based on love and compassion, and to obtain legitimate offspring within society by adhering to the regulations set by Shariah.

One of the purposes of marriage is to establish a happy and enduring family, filled with love and mercy bestowed by Allah SWT, namely a household that is Sakinah, Mawaddah, Warohmah.

However, in practice, the relationship between a man and a woman as a married couple is often "spiced up" with various disputes, such as disagreements in opinions and life philosophies between the two individuals, and the emergence of domestic violence (mostly perpetrated by men against women), thus becoming a "boomerang" in the sustainability of family life for a woman who plays the role of a wife in a family. Furthermore, if this continues, marriage will become an invisible "prison" for a woman in fulfilling her role freely as a wife, often resulting in divorce.<sup>9</sup>

Divorce is the termination of a marital bond, permitted by religion in emergency situations where the marriage cannot be continued.<sup>10</sup> According to experts in Islamic jurisprudence, the term divorce is referred to using the phrase "thalaq", which linguistically means "untying, nullifying an agreement".<sup>11</sup> In Islamic law, divorce is considered the last resort for a couple experiencing disputes within their household. Divorce is considered "halal" (permissible) but greatly disliked by Allah Subhanahu wa Ta'ala. In other words, although divorce is detested by Allah Subhanahu wa Ta'ala, it remains the final alternative and is still permitted to be carried out by a couple experiencing discord in their household.<sup>12</sup> In Islam,

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<sup>8</sup> Mardani, "Islamic Family Law in Indonesia," Prenadamedia Group, 2016, pages 26-28.

<sup>9</sup> Santoso, "The Nature of Marriage According to Marriage Law, Islamic Law, and Customary Law," Yudisia: Journal of Legal Thought and Islamic Law, 7.2 (2016).

<sup>10</sup> M. Irfan Syaifuddin, "The Validity of Divorce Through Social Media: Perspective of Islamic Law," Journal of Islamic Family Law, 5.2 (2020).

<sup>11</sup> M. Vhize Jenna Afif El Imami and Amrullah Hayatudin, "Analysis of Child Custody Due to the Covid-19 Pandemic from the Perspective of Islamic Family Law," Journal of Islamic Family Law Research (JRHKI), 2.2 (2022).

<sup>12</sup> Muzakkir Abubakar, "Increased Divorce in the Sharia Court," Kanun: Journal of Legal Sciences, 22.2 (2020).

divorce is the right of both parties involved in the marriage. In other words, divorce is not only the right of a husband but also the right of a wife, allowing the wife to initiate a khulu' divorce when she feels unable to continue her married life. From a positive law perspective, khulu' divorce is equated with divorce by lawsuit.<sup>13</sup> As for the Marriage Law, there are two types of divorce: divorce by lawsuit (the dissolution of marriage due to a lawsuit filed by the wife in court) and divorce by "talak" (the dissolution of marriage because the husband desires divorce and submits a request to the court).<sup>14</sup>

The termination of marriage is caused by the will of the following parties:

1. Termination of marriage due to the will of Allah Himself through the death of the husband or wife.
2. Termination of marriage due to the husband's will, where the husband declares divorce from his wife.
3. Termination of marriage due to the wife's will, who sees no more compatibility between them.
4. Termination of marriage due to the will of the Judge as a third party, who sees that the husband and wife cannot be reconciled to continue their marital relationship.<sup>15</sup>

Divorce is an event that is highly undesirable in marriage, as it severs the strong and sacred bond between the two parties. However, divorce is permitted by Shariah under the condition that it is carried out in a proper manner. As explained in the Quran, Surah at-Thalaq [65], which means:

: “ Hai Nabi, apabila kamu menceraikan isteri-isterimu maka hendaklah kamu ceraikan mereka pada waktu mereka dapat (menghadapi) iddahnya (yang wajar) dan hitunglah waktu iddah itu serta bertakwalah kepada Allah Tuhanmu...”<sup>16</sup>

Divorce is a part of the institution of marriage that precedes it. Marriage marks the beginning of a life together between a man and a woman as husband and wife, while divorce signifies the end of the shared life between them. Everyone

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<sup>13</sup> Isnawati Rais, "The High Rate of Divorce Petitions (Khulu') in Indonesia: A Critical Analysis of the Causes and Alternative Solutions to Overcome Them," *Al-'Adalah*, 11.1 (2014).

<sup>14</sup> I Gusti Agung Ketut Bagus Adi Putra and others, "Unacceptable Lawsuit (Niet Ontvankelijke Verklaard) in Divorce Petitions in Badung Religious Courts," *Journal of Legal Construction*, 1.2 (2020).

<sup>15</sup> Anita Marwinana, "Protection of Women's Rights Post-Divorce (A Study of Decisions of the Palopo Religious Court)," *Journal of Social-Religious Research*, Vol. 1, No. 1, April 2016.

<sup>16</sup> Ramdan Fawzi, "Rights of Custody in Divorce Due to Religious Differences," *Journal of Civilization and Islamic Law*, Vol. 1, No. 2, October 2018.

desires their marriage to remain intact throughout their lifetime. However, many marriages, despite being built with effort, end in divorce.<sup>17</sup>

A marriage that ends in divorce between a husband and wife does not absolve parents of their obligations towards their children but necessitates the fulfillment of Hadhanah (care). In this regard, both husband and wife bear the consequences of divorce. One legal consequence of the dissolution of marriage is that the husband is obligated to provide for his children.<sup>18</sup>

Children are a trust and the greatest blessing bestowed by Allah Subhanawata'la upon their parents. They represent the continuation of the family identity, and parents have a duty to nurture, educate, and safeguard the children granted to them by Allah Subhanawata'ala, which is also known as Hadhanah.

According to Asa Shan'ani, Hadhanah involves nurturing someone (a child) who cannot be independent, educating them, and protecting them from anything that may harm them, while according to Amir Syarifudin, Hadhanah is the care of children who are still young after the dissolution of marriage.<sup>19</sup>

Based on Article 45 paragraphs (1) and (2) of Law Number 1 of 1974 concerning Marriage, which states that:

(1) Both parents are obliged to nurture and educate their children to the best of their ability.

(2) The parents' obligation applies until the child is married or capable of standing on their own. This obligation continues even if the marriage between the parents is dissolved.

Parents are fully responsible for the care of their children, as it is an absolute obligation that cannot be denied, as children have the right to be nurtured, educated, and protected.

The obligation of parents towards their children does not only exist during the marriage but continues even after the parents have divorced.

The care of children (Hadhanah) is fundamentally the responsibility of both parents, whether they are living harmoniously or when their marriage fails due to divorce.

The care of children (Hadhanah) in the Compilation of Islamic Law is detailed further in Article 105, which states that: The care of children who are not yet mumayyiz or under the age of 12 (twelve) years is the right of the mother, while

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<sup>17</sup> Nurjana Antareng, "Protection of Children's Maintenance Rights After Divorce According to Islamic Law Perspective: A Study of Religious Courts," *Lex et Societatis*, Vol. VI, No. 4, June 2018.

<sup>18</sup> Ramlan, "Parental Responsibility for Custody Rights and Child Maintenance Post-Divorce," *Journal of Gender and Child Studies*, Vol. 1, No. 1, June 2021.

<sup>19</sup> Mardani, "Islamic Family Law in Indonesia," Prenadamedia Group, Jakarta, 2016, page: 127.



the care of children who are mumayyiz is left to the child to choose between the father or mother as the holder of their care rights, and the cost of care is borne by the father.

The divorce of parents does not absolve them of their responsibility towards their children, as both parents have a responsibility for the care and livelihood of their children, as children are a trust entrusted by Allah SWT to their parents.

## 2. The research method

The research method in this study is the type of Normative Legal Research, utilizing the technique of document study or literature review. Additionally, the author also utilizes various legal materials, including primary legal sources such as legislation related to the research object, and secondary legal sources such as examining books, articles, and journals.

## C. Results and Discussion

The care and upbringing of children in Islamic law encompass both hadhanah and kafalah. According to Wahbah Az-Zuhayli, hadhanah, in Shariah, involves providing education to a child by the person with custody or guardianship, ensuring the child's needs are met as they are not yet capable of self-sufficiency, such as young children and mentally incapacitated adults. This guardianship includes overseeing their behavior, regulating their meals, clothing, sleep, hygiene, bathing, and laundering their clothes at specific times, and more.

Children have fundamental rights as stated in Article 2 of Law Number 4 of 1979 concerning Child Welfare, which asserts that children have the right to welfare, care, nurturing, and guidance based on compassion both within their families and in specialized care to grow and develop normally. They have the right to services to develop their abilities and social life in accordance with the nation's culture and personality, to become good and useful citizens, and the right to protection and preservation, both during pregnancy and after birth. Children have the right to protection from environmental hazards that may endanger or inhibit their growth and development.

A child deserves justice and has rights to their survival and life. Justice entails impartiality, fairness, siding with what is right, adhering to truth, appropriateness, and not being arbitrary towards children to fulfill their rights and obligations

Based on Aristotle's Theory of Justice, fundamentally, this view of justice involves granting equal rights, but not equality. Aristotle distinguishes equal rights according to proportional rights. Equal rights are seen as a common container for humanity. This implies that everyone is equal before the law.<sup>20</sup>

In accordance with Aristotle's theory of justice, every human being has the same rights as a human being and as a citizen under the law, including children. This is reflected in the Consideration of the Republic of Indonesia Law Number 35 of 2014 letter (b), which considers every child entitled to survival, growth, and development, as well as protection from violence and discrimination as mandated by the 1945 Constitution of the Republic of Indonesia, Article 28 B paragraph (2).

Children are entrusted by Allah SWT to their parents, who bear full responsibility for them, as they are the future of the family and must be nurtured and educated not only formally but also religiously, introducing them to religious values. This is stipulated in Law Number 1 of 1974, Article 45 paragraphs (1) and (2), which state that both parents are obliged to care for and educate their children to the best of their ability, and this obligation continues even if the marriage between the parents is dissolved.

The dissolution of marriage does not absolve parents of their responsibility towards their children, as children are a trust and blessing given by Allah SWT, and they must be cared for, educated, and protected to the best of their ability, as children are the greatest asset to their parents.

According to Hans Kelsen's theory, as a branch of positivism, absolute justice originates from nature, either inherent in the essence of an object, derived from human reasoning, or the will of God.<sup>21</sup> In this context, Kelsen's Theory of Justice can be observed in human life, where Allah entrusts humans with children, who are greatly anticipated and become a goal in marriage. These children must be nurtured, educated, and cared for by both parents, even if they are divorced.

Regarding the consequences of marriage dissolution due to divorce, Article 41 of Law Number 1 of 1974 stipulates that both the mother and father remain obligated to care for and educate their children, solely for the benefit of the children. In case of disputes regarding child custody, the court makes the decision. The father is responsible for the expenses required for the child's care and education. If the father is unable to fulfill this obligation, the court may determine that the mother shares the expenses. Additionally, the court may require the ex-husband to provide living expenses or determine other obligations for the ex-wife.

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<sup>20</sup> Marwan Effendy, "Legal Theory from the Perspective of Policy, Comparison, and Harmonization of Criminal Law," Gaung Persada Press Group, 2014, page: 75.

<sup>21</sup> Marwan Effendy, "Legal Theory from the Perspective of Policy, Comparison, and Harmonization of Criminal Law," Gaung Persada Press Group, 2014, page: 80.

The position of husband and wife is equal. The husband must regard his wife as a life partner. Their relationship is one of partnership and cooperation, not like that of an employer and servant. They both have obligations to fulfill and rights that must not be neglected. Each must understand their role and responsibilities equally.<sup>22</sup>

#### **D. Conclusion and Recommendations**

##### **1. Conclusion**

Children are a trust entrusted by Allah Subhanawata'ala to their parents to be nurtured, educated, and cared for, because children are precious trusts from Allah Subhanawata'ala as the heirs of the family's identity, known as hadhanah. Hadhanah encompasses the care, education, and protection of young children who are unable to care for themselves. Viewed from Aristotle's Theory of Justice, based on the author's writing, it is stated that every human being has the same rights as a human being and as a citizen in the eyes of the law, including children. Meanwhile, viewed from Hans Kelsen's theory, it can be seen in human life, where Allah Subhanawata'ala entrusts parents with children who are highly anticipated and serve as a goal in marriage, which must be nurtured, educated, and protected by both parents even if they are divorced.

##### **2. Recommendations**

In this academic work, the author provides recommendations to divorced parents. Even though the marital relationship has ended between the husband and wife, parental responsibilities must still be fulfilled. These responsibilities include care, education, supervision, and ensuring that children receive their right to maintenance from their parents, particularly from the father, as children are trusts and blessings given by Allah Subhanawata'ala to both parents.

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<sup>22</sup> Anton Afrizal Candra, *Upaya Perlindungan Anak Terhadap Perkara Hadhanah*, Jurnal Ham, Volume 13, Nomor 2, Agustus 2023

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