

Legal Reconstruction of *Hadhanah* Rights Due to Divorce in Indonesia from a *Maqashid Syari'ah* Perspective

Muhammad Farid¹⁾ Muhammad Syukri Albani²⁾ & Fauziah Lubis³⁾

¹⁾Universitas Islam Negeri Sumatera Utara, Indonesia, E-mail: m.faridd81@gmail.com

²⁾Universitas Islam Negeri Sumatera Utara, Indonesia, E-mail: syukri_albani@yahoo.co.id

³⁾Universitas Islam Negeri Sumatera Utara, Indonesia, E-mail: fauziahlubis@uinsu.ac.id

Abstract. *The issue of child custody (Hadhanah) following divorce in Indonesia remains a critical legal concern, particularly in ensuring children's welfare. Indonesian regulations, including Law No. 1 of 1974 and the Compilation of Islamic Law (KHI), govern custody based on the child's age and impose an obligation on parents to provide financial support. However, these regulations lack sanctions for parents who neglect their responsibilities, leading to concerns over inadequate care, education, and financial support for children. This study aims to analyze the legal reconstruction of Hadhanah rights from the Maqashid Syari'ah perspective to ensure better child protection. The research employs a library research methodology, examining various legal sources, scholarly works, and judicial decisions to assess the existing legal framework and its implementation in judicial practice. The findings reveal that Indonesian courts typically grant custody to the mother for children who have not yet reached the age of discernment (mumayyiz), following normative legal provisions. However, some judges decide contra legem, prioritizing the child's best interests based on Maqashid Syari'ah. For example, the Padang High Religious Court granted custody to the father, considering the child's welfare. Enforcement of custody decisions involves forcibly placing the child with the designated guardian, while financial support enforcement is executed through asset seizure from non-compliant parents. To enhance child protection, legal reconstruction is necessary through regulatory reforms and judicial discretion. Revisions should include the introduction of sanctions for negligent parents and the establishment of specialized institutions for child welfare. Judicial reform should provide equal custody opportunities for both parents while prioritizing the child's best interests in alignment with Maqashid Syari'ah principles.*

Keywords: *Child; Custody; Hadhanah; Maqashid; Reconstruction.*

1. Introduction

Law, especially that related to the social life of society, must be able to undergo improvements and refinements in line with the social dynamics surrounding it. (Arifuddin Muda Harahap, 2020). This is in line with the spirit of Islamic Law which is flexible and ready to change according to the needs of the times, as reflected in the fiqh principle:

"Yadûru al-Ahkàm Bidauri al-Ahwàl wa al-Zamàn" (the law changes according to changing circumstances and times). This principle is increasingly relevant considering the need for society to adapt to various changes that cannot be avoided.(Tarigan, 2013). Therefore, a clear interpretation of the practice of Islamic law is needed so that it can be a guardian in the adaptation process in society's social life. Islamic law or fiqh is divided into two main areas: the fiqh of worship which regulates human relationships with God (such as prayer, fasting, zakat, and hajj), and the fiqh of muamalah which regulates human relationships with each other (such as obligations, legal sanctions, etc.). Muamalah jurisprudence covers various fields, including family law (al-Ahwàl al-Syakhshiyah), civil, criminal, procedural, constitutional, international and economic law. One important aspect of family law is marriage, divorce, inheritance and child care after divorce(Ali, 2008).

Marriage in Islam is seen as a means of creating peace of mind, calming emotions, and preserving offspring. However, in the course of a household, disputes often arise due to differences in background, customs, education and habits. When disputes cannot be resolved, divorce is the final solution. Even though divorce is considered a way out, it does not necessarily solve all problems, especially regarding the maintenance and support of children after divorce. In many cases, children's rights are often neglected, especially in terms of maintenance (*Hadhanah*) and living. Child care (*Hadhanah*) in Islam refers to the care and education of children who have not yet reached the age of mumayyiz (not yet able to be independent). The scholars agree that *Hadhanah* is an obligation, but they differ in their opinions about who has the right to *Hadhanah* (Pulungan, 2024). The Maliki school, for example, is of the opinion that the right of *Hadhanah* is prioritized for the mother, while the majority of scholars are of the opinion that *Hadhanah* is a shared right between parents and children, with priority given to the interests of the child. The legal basis for child maintenance after divorce is stated in the Qur'an, specifically Surah Al-Baqarah verse 233, which states that mothers should breastfeed their children for two years, and fathers are obliged to provide sustenance and clothing to mothers in a way that is ma'ruf. In addition, Surah Luqman verses 17-19 also outline the obligations of parents in educating children, including establishing prayer, doing good, and being patient. In the context of positive Indonesian law, child maintenance after divorce is regulated in Law Number 16 of 2019 concerning Marriage and the Compilation of Islamic Law (KHI). Article 41 of Law No. 16 of 2019 states that both mothers and fathers remain obliged to maintain and educate children for the benefit of the child. Meanwhile, Article 105 of the KHI emphasizes that the maintenance of children who are not yet mumayyiz (under 12 years old) is the right of the mother, while children who are already mumayyiz can choose between the father or the mother. Maintenance costs are the responsibility of the father.(Pulungan, 2024).

Although these rules have been clearly regulated, in practice there are still several problems. First, there are differences in interpretation between Law No. 16 of 2019 and the KHI. Some judges understand that the rules in the KHI are special rules that must be applied, so that custody of minors is given to the mother, even though the father has more capacity to ensure the growth and development of the child. Second, there are no clear legal sanctions for parents who are negligent in fulfilling their obligations to maintain or provide for children after a divorce. This causes many court decisions regarding child support to not be complied with. In addition, there are cases where judges make legal discoveries (*rechtsvinding*) by deviating from statutory regulations (*contra legem*) in order to protect the interests of children. For example, in the Decision

of the Padang High Religious Court Number 0012 / Pdt.G / 2015 / PTA Pdg., the judge determined the *Hadhanah* rights of children who are not yet mumayyiz to the father, even though the KHI stipulates otherwise. This shows that judges are trying to create justice by considering the interests of the child (Jabbar, 2023).

However, the problem of executing court decisions regarding child support is still a challenge. Many parents, especially fathers, are negligent in fulfilling their child support obligations after divorce. This is exacerbated by the absence of an effective monitoring mechanism to ensure compliance with court decisions. Therefore, a more in-depth study is needed on legal sanctions and guarantees of execution of court decisions regarding child maintenance and support. Changes in the kinship system from an extended family to a nuclear family also affect the responsibility for child maintenance after divorce. (Harith, 2008). In an extended family system, the ex-wife and children can rely on the support of the extended family, while in a small family system, they are vulnerable to neglect, especially if the ex-wife is only a housewife. In this context, *Maqashid Syari'ah* (objectives of sharia) becomes an important perspective for reconstructing *Hadhanah* law. *Maqashid Syari'ah* emphasizes the protection of five main things: religion, soul, mind, descendants, and property. The need to maintain these five things is divided into three levels: *al-Dharuriyyah* (primary), *al-Hajiyyah* (secondary), and *al-Tahsiniyah* (tertiary) (Jauhar, 2009). Post-divorce child care is included in primary needs, because it concerns the protection of life and descendants. Religious Court Judges have a strategic role in creating justice through legal discovery. They are not only bound by statutory regulations, but must also explore the legal values and sense of justice that live in society. In some cases, judges have made legal breakthroughs by deviating from statutory regulations in order to protect the interests of children. This is in line with the spirit of progressive law pioneered by Satjipto Raharjo, which emphasizes the role of law in creating justice and benefits for society.

Research on child care from various aspects has been conducted by several researchers. From the search that the author did both at the Library of the State Islamic University of North Sumatra Medan in particular and other libraries online such as the digital library of the State Islamic University of Sunan Kalijaga (digilib.uin-suka.ac.id), the digital library of the State Islamic University of Syarif Hidayatullah State Islamic University (perpus.uinjkt.ac.id) and others, the author found several written works related to this research as follows:

1. "Child Custody Disputes in Islamic Family Law in Indonesia: A Gender Justice Perspective" (Ahmad Zaenal Fanani, 2014). This study discusses legal provisions related to child custody disputes in Islamic family law in Indonesia. The results of the study indicate that the applicable regulations are not gender-just because they prioritize women in child custody based on gender.
2. "*Hadhanah* Rights After Interfaith Divorce" (Rika Afrida Yanti, Bukittinggi Islamic Institute). This study highlights *Hadhanah* rights in interfaith divorce cases. The conclusion of the study shows that positive Indonesian law and Islamic law have similarities in prioritizing mothers as the primary caregivers for young children who are not yet mumayyiz, because they are considered the best choice for children.
3. "Legal Protection for Children After Divorce in Religious Courts" (Ufie Ahdie, 2011, Brawijaya University). This study highlights legal protection for children after divorce within the competence of Religious Courts. The results of the study

emphasize that related regulations must be able to place the rights and obligations of parents proportionally in order to guarantee the welfare of children.

Therefore, this study aims to reconstruct the post-divorce *Hadhanah* law in Indonesia with the perspective of *Maqashid Syari'ah*. This study is important to find the right formula in regulating the maintenance and financing of children after divorce, as well as ensuring the execution of court decisions related to this. Thus, the law can function as a tool to realize justice and protect the interests of children as the next generation.

2. Research Methods

This research is included in the type of library research, namely research conducted by reviewing and tracing various literature, both from libraries and other sources. (Dimiyati & Wardiono, 2004). The literature used is not only limited to books, but also includes journals, articles, and encyclopedias. The data sources used in this study consist of three categories. First, primary data sources, namely laws and regulations, decisions of the Religious Court, books, and opinions of experts directly related to the consequences of divorce in the form of child maintenance. Second, secondary data sources, namely the work of experts and literature relevant to the disciplines that support the analysis of the discussion in this study. Third, tertiary data sources, which include theories and works in literature that function as additional references in examining research problems. The data obtained were analyzed using the content analysis method, which is a systematic technique for analyzing and processing message content objectively and quantitatively. This method allows researchers to study and evaluate communication by making valid and replicable inferences, while still paying attention to the context.

3. Results and Discussion

3.1. Reconstruction of Child Care Law Based on Interests

Reconstruction in language means returning to the original state and rearranging. In Islamic law studies in Indonesia, reconstruction is often associated with terminology such as reform, modernization, reactualization, and deconstruction. In Arabic, reconstruction is known as *tarjih*, *ishlâh*, and *tajdîd*. Of the three terms, *ishlâh* and *tajdîd* are more popularly used. *Tajdîd* means rebuilding, reviving, or repairing something so that it can be used as expected. While *ishlâh* is interpreted as repair. In this article, the author uses the word reconstruction with the same meaning as *tajdîd*. According to Bisthâmi Muhammad Sa'îd, *tajdîd* is more appropriate to use in the context of legal discussions because it means renewal, while *ishlâh* is more directed at purification. Yusuf al-Qardhawi explains that *tajdîd* is an effort to return something to its original state so that it appears like new. This is done by strengthening the weak, repairing the worn out, and patching the cracked so that it approaches its original form. *Tajdîd* does not mean remodeling the original form or replacing it with a new one. Likewise, *tajdîd al-din* does not mean changing religion, but rather returning it to the era of the Prophet Muhammad, his companions, and *tabi'in*. (Ridhwani & Lestari, 2023).

In the scope of *tajdîd*, the *ushulliyun* divide the law into two areas, namely the area of *ijtihad* and non-*ijtihad*. The area of *ijtihad* includes laws that have no indication of the text at all and laws that are indicated by the *zhanny* text. While the laws that have been indicated by the *qath'i* text do not provide room for *ijtihad*. The reconstruction of Islamic

law has occurred over a long period of time, adjusting to the conditions, situations, and demands of the times. This is because the norms in classical fiqh books are often unable to provide solutions to new problems that have not occurred at the time the books were written (Ridho & Habibi, 2023). Examples are marriages where the consent is made over the telephone, giving inheritance property to adopted children, or waqf in cash. The state also regulates these matters in statutory regulations to avoid chaos in their implementation.

Ibn al-Qayyim al-Jauziyah in his book *I'lâm al-Muwaqqi'în 'an Rabb al-'âlamîn* states that fatwas can change with changes in times, places, circumstances and intentions. (Jalili, 2020). Islamic law is built for the benefit of humanity and universal goals such as justice, mercy, welfare, and wisdom. These principles must be the basis of all Islamic legal issues. Deviation from these principles means contradicting the ideals of Islamic law. The reconstruction of Islamic law is also influenced by changes in conditions, situations, places, and times. This change is in line with the theory of *qaul al-qadîm* and *qaul al-jadîd* put forward by Imam Syafi'i, who states that law can change due to changes in legal evidence established in certain events. (Supena, 2008). Ijtihad as a method of finding the truth must continue to be implemented because the results of ijtihad are relative, while the truth needs to be brought as close as possible. Therefore, the answer to a new problem must always be new.

The right and obligation to carry out Islamic legal reforms are in the hands of the government, and Muslims are obliged to obey them as long as they do not conflict with the principles of the Qur'an and Sunnah. Ahad Musthafâ al-Marâghi emphasized that laws are enacted for the benefit of humans, and human interests can differ due to differences in time and place. (Zayadi, 2022). If a law is no longer needed, then it is wise to abolish it and replace it with a new law that is more in line with the demands of the times. Muhammad Rasyid Ridha also stated that laws can differ due to differences in time, environment, situation, and conditions. If a law is no longer needed, then the law must be updated according to the situation and conditions of society.

- Legal Reconstruction Due to Divorce Regarding Child Maintenance

In Indonesian positive law, the rules on child maintenance due to divorce are an area of ijtihad that needs to be reconstructed. Al-Syâthibi stated that the first requirement for a mujtahid is to understand the *Maqashid Syari'ah* comprehensively. Musfir bin Ali Al-Qahthany in his book *Manhaj Istimbâth Ahkâm al-Nawâzil al-Fiqhiyyah al-Mu'âshirah* emphasized that a mujtahid must maintain the *Maqashid Syari'ah* when determining contemporary law. The benefit in question is the benefit desired by the Shari'a (Allah and His Messenger), not based on human lust. (Wijaya, 2015). This benefit must refer to the Qur'an, Sunnah, and ijma'. Benefits that do not have references to the three sources are called *al-masâlih al-gharibah* and cannot be used as evidence. Based on the analysis of child maintenance provisions in Law No. 1 of 1974 and the Compilation of Islamic Law (KHI), the author offers two forms of legal reconstruction, namely reconstruction through revision of the material of laws and regulations and reconstruction through judge's decisions.

- Legal Reconstruction with Revision of Positive Legal Material

Article 18 letter h of Law No. 12 of 2011 concerning the Formation of Legislation states that the preparation of draft laws must be based on the aspirations and legal needs of the community. Therefore, positive legal material needs to be changed in accordance with the aspirations and needs of the community. Changes to laws are made by the government together with the People's Representative Council (DPR) in accordance with the mandate of Article 20 of Law No. 12 of 2011. However, changes to laws require a lot of time and money. In addition to revising laws, changes to positive legal material can also be made through judicial review. Judicial review is the authority of the judicial institution to test the validity and enforceability of legal products against the constitution. According to Jimly Asshiddiqie, judicial review is an effort by the judicial institution to test legal products stipulated by the legislature, executive, or judiciary in order to apply the principle of checks and balances. However, judicial review only has the authority to state whether or not a regulation is in conflict with higher regulations, and cannot add new provisions (Asshiddiqie, 2022).

- The Concept of Criminalization in Islamic Law

In Islamic law, crime is known as *jinayah* or *jarimah*. *Jinayah* can be interpreted broadly as all actions that are prohibited by *sharia*, whether related to life, property or anything else. Narrowly, *jinayah* is a *sharia* prohibition which is threatened with the law of *had* or *ta'zir*. An act can be called a criminal act if it fulfills three elements: the formal element (the existence of a text that prohibits it), the material element (the presence of actual action or inaction), and the moral element (the perpetrator is a person who is competent in law, namely *themukallaf*). Laws and sanctions in Islam aim to maintain human benefit, both in this world and in the afterlife. For example, to preserve the soul, Allah forbids killing and prescribes *qishash* or *diyat* sanctions (SM Sari, 2023). To preserve offspring, Allah forbids adultery and establishes sanctions of flogging or stoning. Legal sanctions can also be determined by the ruler based on the public interest, such as imprisonment or fines.

The principles of punishment in Islam include:

- 1) Punishment must be able to prevent someone from committing sin, both preventively and repressively.
- 2) The limits of punishment depend on the needs of the public interest.
- 3) Punishment is not for revenge, but for the benefit of the perpetrator.
- 4) Punishment is the last resort to prevent sin.

Based on this concept, negligence in implementing court decisions regarding child maintenance is worthy of being made a criminal object because it can cause harm, namely the absence of guarantees for child maintenance.

3.2. Reconstruction of Child Maintenance Law Due to Divorce in KHI

Child custody, or *Hadhanah*, is a form of Allah SWT's mercy and love for His servants (Rosita et al., 2023). This custody is also a gift given by God to humans, especially to parents, as the most noble and most loving creatures to their children. Child custody is a natural right entrusted by God to the hearts of both parents, especially the mother, who naturally has a strong spiritual bond with her child. Through this role, parents are expected to provide affection and good education to their children, so that

children can grow into loving individuals and have noble morals. In Islam, caring for children who are not yet adults is considered an obligation, because neglecting it can endanger the child's future. Children have the right to be cared for by their parents, and parents have a great responsibility in ensuring the growth and development of children physically, mentally, and spiritually. However, in many divorce cases, child custody is often a source of dispute between husband and wife. Both parties usually feel entitled to custody, so that conflict arises over who should take care of the child. This issue not only concerns the interests of the parents, but also the welfare of the child, namely where the child will feel more comfortable and safe, whether with the mother or the father. Divorce itself has a significant impact on the child's life, especially because the home environment plays an important role in shaping the child's personality and future. A home filled with affection and Islamic values will shape the child into a tolerant and good person, while a home full of conflict can produce a deviant and problematic person.(Nasution, 2018).

In order for the *Hadhanah* process to run well, cooperation and mutual understanding are needed between both parents, especially if they are still in a harmonious marriage (*sakinah* and *mawaddah*).(Son, 2021). However, even if a divorce occurs, the responsibility to raise and educate children remains the responsibility of both parents. Islam stipulates that the father is responsible for meeting the child's material needs, such as living expenses, while the mother has the main role in daily care. However, both parents must work together to ensure that the child's needs, both physical and emotional, are met properly. These needs include education, food, clothing, shelter, and the love and attention that the child needs to grow and develop optimally. In the Compilation of Islamic Law (KHI), child custody is regulated in detail. According to Article 105 of the KHI, the maintenance of a child who is not yet mumayyiz (under the age of 12) is the mother's right. Meanwhile, for children who are already mumayyiz, the child is given the right to choose whether to live with the father or mother. However, the cost of maintenance remains the responsibility of the father.(Nasution, 2018). This shows that although mothers have the primary right to care for children, fathers must not let go and must still fulfill their obligations in financing the needs of their children. KHI also emphasizes that child care includes all needs that support the development of children, both primary needs such as food and clothing, and secondary needs such as education and health.

Imam Syafi'i and Imam Hanbali have similar views regarding child custody. They argue that the mother is the party who has the most right to care for the child, especially if the child is still young. If the mother is unable or absent, custody can be transferred to the closest family member, such as the maternal grandmother, father, or grandfather. If there is no family who can care for the child, then the responsibility can be taken over by the government. In addition, Imam Syafi'i and Imam Hanbali also stated that the mother or caregiver has the right to receive wages for the care provided, especially if the child has his own property. If the child does not have property, then the cost of care becomes the responsibility of the father or the party who is obliged to provide a living.(Fanani, 2017).Differences of opinion among ulama regarding child custody can be summed up in several points. First, if both parents are reluctant to care for the child, they can be forced to do so as long as there is no other party who can replace their role. Second, if there is another woman who has the right to care for the child, such as the maternal grandmother, then the mother should not be forced to care for the child. Third, according to the Hanafi Madzhab, if a wife demands a divorce (*khuluk*) on the condition

that the child will be cared for by the husband, then the khuluk is valid, but the requirement for child care by the husband is considered invalid because child care is the mother's obligation. However, most ulama do not agree with the Hanafi Madzhab. They argue that the right to child custody is a collective right that cannot be waived. If a divorce occurs, the child has the right to live with the mother until he is old enough to choose whether he wants to live with his father or mother (WP Sari, 2023).

KHI emphasizes the importance of child care in Islam, both when parents are still married and after divorce. Child care includes all needs that support the growth and development of children, both physically, mentally, and spiritually. KHI also regulates in detail the obligations of parents in meeting the needs of children, including the costs of breastfeeding and care. According to Article 104 of KHI, the cost of breastfeeding is the responsibility of the father. If the father has died, the costs are borne by the person who is obliged to provide support, such as a guardian or close family. Breastfeeding can be done for up to two years, and weaning can be done before two years with the consent of both parents. Article 105 of the KHI stipulates that in cases of divorce, children who are not yet mumayyiz (under 12 years old) are under the custody of the mother, while children who are already mumayyiz can choose to live with their father or mother. However, maintenance costs remain the responsibility of the father. This rule is intended to ensure that children do not become victims in parental disputes. (Son, 2021). KHI emphasizes that the interests of the child must come first, and parents should not fight over custody of the child for personal gain. Instead, they should work together to ensure that the child receives the best care.

KHI also reflects the principle of *Maqashid Syari'ah*, namely the purpose of implementing Islamic law to protect religion, reason, soul, descendants, and property. In the context of child care, these five goals are included in efforts to ensure that children grow up in a good environment, receive a decent education, and are protected physically and emotionally. Thus, child care is not only a moral responsibility, but also a religious obligation that must be fulfilled by every parent. (Nasution, 2018). Overall, KHI and the views of Islamic jurisprudence scholars emphasize that child custody is a major responsibility that must be borne by both parents. Although in cases of divorce custody is usually given to the mother, the father still has an obligation to meet the child's material needs. This shows that Islam is very concerned about the welfare and future of children, and prioritizes the interests of children in every decision made. Therefore, parents are expected to work together and support each other in fulfilling their responsibilities towards their children, for the best interests of the child and his future.

3.3. Legal Concept of Child Maintenance Due to Divorce Through *Maqashid Syari'ah*

Hadhanah, from the perspective of Fiqh experts, is an effort to protect children from all dangers that may threaten them, both physically and spiritually. The goal is to maintain security, cleanliness, and provide education until the child is able to be independent in living life as a Muslim. *Hadhanah* is an obligation for parents, because without good care, children are at risk of being neglected and their lives being wasted. Fiqh scholars agree that caring for and educating children is the primary responsibility of parents, especially when the child is still young, because neglect can damage the child's future and even threaten the existence of their souls. (Rosita et al., 2023).

Linguistically, *Hadhanah* comes from the word *hadhana*, which means placing something between the armpit and navel. This term is also used to describe female birds that incubate their eggs between their wings and body. In a human context, *Hadhanah* refers to the care and education of children, especially those who are not yet able to take care of themselves (Mahmudah et al., 2018). This task includes looking after, leading, and organizing everything that children cannot yet manage themselves. *Hadhanah* involves two main elements: *hadhin* (caregiver) and *mahdhun* (child being cared for). Both must meet certain requirements for the care to be valid and effective. Scholars provide various definitions of *Hadhanah*. According to Fuqaha Hanafiah, *Hadhanah* is an effort to educate children by someone who has the right to care for them. Meanwhile, Shafi'iyah scholars define it as an effort to educate people who are unable to take care of themselves, including cleaning their bodies, washing clothes and caring for young children. Sayyid Sabiq emphasized that *Hadhanah* is taking care of small children or people who lack intelligence, who are not yet able to differentiate between good and bad, and cannot take care of themselves. The goal is to protect children from danger, educate them physically, mentally and intellectually, so that they can live independently and responsibly (Rosita et al., 2023).

Hadhanah law is obligatory, as regulated in the Al-Qur'an Surah Al-Baqarah (2) verse 233: "And it is the father's obligation to provide for them and clothe them in an appropriate manner."

This verse emphasizes that parents, especially fathers, are responsible for meeting the needs of their children, including in terms of care. This obligation does not only apply during marriage, but also after divorce. If parents divorce, child care can be given to one party, either the mother or the father, depending on the ability and suitability of the conditions that have been set.

The requirements to become a caregiver (*hadhin*) include:

- 1) Adults: Minors are considered incapable of carrying out caregiving duties.
- 2) Sound minded: People who lack common sense, like idiots, are incapable of raising children.
- 3) Muslim: Most scholars agree that caregivers must be Muslim to ensure that children are raised in Islamic values.
- 4) Fair: The caregiver must practice religion well and avoid major sins.
- 5) Trustworthy and virtuous: The caregiver must be trustworthy and have good morals.
- 6) Able to educate: Caregivers must be physically and mentally healthy to be able to care for children well.
- 7) Freedom: Slaves were not allowed to raise children due to time constraints and their responsibilities to their masters.

Meanwhile, the requirements for children being cared for (*mahdhun*) are:

- 1) Not yet mumayyiz: Children who are still small and unable to take care of themselves.
- 2) Mentally retarded: A child who has mental limitations, such as an idiot, even though he is an adult.

Hadhanah aims to ensure the benefit of children's lives, especially during their growth and development. Childhood is a critical period in the formation of character, reason and religious values. Islam requires caring for children until they are able to be independent, because leaving children without care can endanger their future. In this context, there is harmony between the Marriage Law, the Compilation of Islamic Law (KHI), and *Maqashid Syari'ah*, which both emphasize the importance of benefit as the main orientation in determining *Hadhanah* rights.(Darna, 2021).

Maqashid Syari'ah plays an important role in determining *Hadhanah* rights. According to Imam As-Syatibi, *Maqashid Syari'ah* aims to protect five main things (*al-Kulliyah al-Khamsah*): religion, soul, mind, lineage and property. These five principles are the basis for establishing laws relating to child care. For example, if there is a conflict between physical needs (*hifzu an-Nafs*) and religious needs (*hifzu ad-Din*), then priority is given to maintaining religion, because religion is considered the main foundation in the life of a Muslim(Jauhar, 2009). In cases of divorce, *Hadhanah* rights often become a dispute between father and mother. According to the Compilation of Islamic Law Article 156 point (a), children who are not mumayyiz should be raised by their mother, unless the mother does not meet the requirements or has died. However, in practice, the judge can decide to grant *Hadhanah* rights to the father if this is deemed more in line with *Maqashid Syari'ah* principles, especially in terms of protecting the child's religion, reason and soul. For example, if the mother has bad morals or is inconsistent in practicing her religion, the judge may decide to give the father *Hadhanah* rights.

The Qur'an Surah At-Tahrim (66:6) also emphasizes the responsibility of parents in protecting the family from the fire of hell: "*O you who believe, protect yourselves and your families from the fire of hell whose fuel is people and stones; the guardians are angels who are rough, hard, and do not disobey Allah in what He commands them and always do what they are commanded.*"

This verse emphasizes the importance of good parenting to ensure the child's safety, both in this world and in the hereafter.

Apart from that, the Hadith narrated by Bukhari states: "Every child is born in a state of purity (fitrah), it is his parents who will make him a Jew, Christian or Magian."

This hadith shows that the caregiver has a great influence on the child's religion and beliefs. Therefore, the caregiver's religion is an important factor in determining the right to *Hadhanah*. In the international context, the Convention on the Rights of the Child (CRC) also emphasizes the importance of the best interests of the child. Article 3 (2) of the CRC states that the state must ensure the protection and care necessary for the welfare of the child, taking into account the rights and obligations of the parents or legal guardians. Article 18 (1) of the CRC emphasizes that parents have the primary responsibility for the upbringing and development of the child, with the child's best interests as the main priority. However, in certain cases, judges can use the principle of

ius contra legem to make decisions that are contrary to the law if they are considered more in accordance with the child's interests. For example, if the mother is unable to provide good care, the judge can decide to grant the right to *Hadhanah* to the father, even though this is contrary to the general rule that gives priority to the mother (Nasution, 2018).

In determining *Hadhanah* rights, the judge must also consider hifzu al-Aql (maintenance of reason). Reason is the source of knowledge and the ability to distinguish between good and bad. Therefore, caregivers must be able to provide good education and protect children from things that can damage their minds, such as alcohol or other negative influences. *Hadhanah* is a very important obligation in Islam, with the main aim of ensuring the welfare of children. The principles of *Maqashid Syari'ah*, such as the maintenance of religion, soul, mind, lineage and property, are the basis for determining *Hadhanah* rights. Although the general rule gives priority to the mother, the judge can decide to give *Hadhanah* rights to the father or another party if this is deemed more in line with the principle of benefit. This shows the flexibility of Islamic law in adapting to existing needs and conditions, while still maintaining the main goal of sharia, namely human benefit. (Fitrotun, 2022).

4. Conclusion

The conclusion of this study shows that the law on child maintenance due to divorce in Indonesia is regulated in Law No. 1 of 1974 and the Compilation of Islamic Law (KHI), which regulates custody based on the child's age and the obligation to provide support. However, these two regulations do not include sanctions for negligent parents, so there is no guarantee of proper maintenance, education, and support for children. In judicial practice, some judges decide cases normatively in accordance with regulations that grant custody to mothers for children who are not yet mumayyiz. However, there are also judges who decide contra legem, such as the decision of the Padang High Religious Court which grants custody to fathers based on the child's best interests in accordance with the *Maqashid Syari'ah* Concept. The execution of the custody decision is carried out by forcibly taking the child, while the execution of support is carried out through the confiscation of the property of the negligent party. To improve this system, legal reconstruction is needed through regulatory revisions and legal findings by judges. Revisions can include adding sanctions for parents who do not fulfill their obligations and the establishment of special institutions that handle child maintenance. Reconstruction through a judge's decision can be carried out by providing equal opportunities for father and mother in custody, while still prioritizing the interests of the child in accordance with *Maqashid Syari'ah* principles.

5. References

- Ali, Z. (2008). *Pelaksanaan hukum waris di Indonesia*.
- Arifuddin Muda Harahap. (2020). *Buku Pengantar Hukum Ketenagakerjaan*. Literasi Nusantara.
- Asshiddiqie, J. (2022). *Penguatan Sistem Pemerintahan dan Peradilan*. Sinar Grafika.
- Darna, A. (2021). Perkembangan Hukum Islam Di Indonesia: Konsep Fiqih Sosial dan Implementasinya dalam Hukum Keluarga. In *EI-USRAH: Jurnal Hukum Keluarga* (Vol. 4, Issue 1, p. 90). Universitas Islam Negeri Ar-Raniry. <https://doi.org/10.22373/ujhk.v4i1.8780>

- Dimiyati, K., & Wardiono, K. (2004). Metode Penelitian Hukum. *Surakarta: Fakultas Hukum Universitas Muhammadiyah Surakarta*.
- Fanani, A. Z. (2017). Sengketa Hak Asuh Anak Dalam Hukum Keluarga Perspektif Keadilan Jender. *Muslim Heritage, 2*(1), 153–176.
- Fitrotun, S. (2022). Perlindungan Anak Dalam UU Nomor 35 Tahun 2014 dalam Perspektif Fikih *Hadhanah*. *Istidal: Jurnal Studi Hukum Islam, 9*(1), 83–97.
- Harits, I. A. (2008). Pranata Keluarga Muslim dalam Sistem Keekerabatan Parental Sunda. *Ilmu Dakwah: Academic Journal for Homiletic Studies, 4*(11), 150–176.
- Jabbar, F. (2023). *Problematika Pelaksanaan Eksekusi Terhadap Putusan Hak Asuh Anak Perkara Nomor: 566/Pdt. G/2021/PA. Prg Perspektif Keadilan dan Gender di Pengadilan Agama Pinrang (dibimbing oleh H. Sudirman L dan Fikri)*. IAIN PAREPARE.
- Jalili, I. (2020). *Eksistensi Sadd adz-Dzari'ah dalam Ushul Fiqh: Kajian Pemikiran Ibnu Qayyim al-Jauziyyah (w. 751 H/1350 M)*. Lakeisha.
- Jauhar, A. al-M. H. (2009). *Maqashid Al-Syariah Fi Al-Islam. Translation. Khikmawati, Maqashid Syari'ah*. Jakarta: Amzah.
- Mahmudah, H., Juhriati, J., & Zuhrah, Z. (2018). *Hadhanah Anak Pasca Putusan Perceraian (Studi Komparatif Hukum Islam dan Hukum Positif Indonesia)*. *Sangaji: Jurnal Pemikiran Syariah Dan Hukum, 2*(1), 57–88.
- Nasution, N. A. (2018). *Hak Asuh Anak (Hadhanah) Yang Belum Mumayyiz Kepada Ayah Kandungnya (Studi Kasus 0055/PDT/G/2013/PA Sibolga)*. IAIN Padangsidimpuan.
- Pulungan, K. S. (2024). Hak Anak Pasca Perceraian Menurut Perspektif Hukum Islam Dan Hukum Positif Indonesia. *Al-Ma'lumat: Jurnal Ilmu-Ilmu Keislaman, 2*(2), 62–71.
- Putra, G. R. A. (2021). Hak Asuh Anak Dalam Keluarga Perspektif Keadilan Gender. In *Adalah* (Vol. 5, Issue 2). LP2M Universitas Islam Negeri (UIN) Syarif Hidayatullah Jakarta. <https://doi.org/10.15408/adalah.v5i2.19387>
- Ridho, H., & Habibi, D. F. (2023). Al-Turast Wa Al-Tajdid; Telaah Atas Pemikiran Hasan Hanafi Tentang Tradisi Dan Pembaharuan Ajaran Islam di Era Digital. *Indonesian Journal of Cyber Education, 1*(1), 40–53.
- Ridhwani, I., & Lestari, Y. (2023). Rekonstruksi Kebijakan Publik dan hukum Islam Terkait Gender dalam Mencapai SDGs. *Pro Justicia: Jurnal Hukum Dan Sosial, 3*(1), 37–52.
- Rosita, R., Diananda, A., Budiana, I., Aprianif, A., Khasanah, L., & Al-Hilal, Y. (2023). *HADHANAH (Pengasuhan Dan Pendidikan Anak Dalam Perspektif Islam)*.
- Sari, S. M. (2023). *Fiqih Jinayah (Pengantar Memahami Hukum Pidana Islam)*. PT. Sonpedia Publishing Indonesia.
- Sari, W. P. (2023). Hak Asuh Anak Dibawah Umur Akibat Perceraian. *UNJA Journal of Legal Studies, 1*(1), 181–195.
- Supena, I. (2008). Epistemologi Hukum Islam dalam Pandangan Hermeneutika Fazlurrahman. *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum, 42*(2).
- Tarigan, A. A. (2013). *Sejarah Sosial Hukum Islam: Dinamika Fikih Pada Abad Pertengahan*.
- Wijaya, A. (2015). Cara Memahami *Maqashid Al-Syari'ah*. *Al Daulah: Jurnal Hukum Pidana Dan Ketatanegaraan, 4*(2), 344–353.
- Zayadi, Z. (2022). *Penerapan Teori Nasikh dan Mansukh Mahmoud Muhammed Taha Padaayat-Ayat Kebebasan Beragama*. Institut PTIQ Jakarta.