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The Disparity Of Judge's Verdict On Child Custody Decision In Aceh Sharia Court

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Abstract: This article aims to explain the difference in the judge's ruling (disparity) related to child custody (*hadhānah*) in the Aceh Sharia Court. This article is field research with a qualitative approach. The research method used is a normative-empirical law phenomenology that compares several judges' verdict on *hadhānah* case in Aceh sharia court. In addition, it also describes that although Indonesia has the same islamic legal product (KHI) but in implementing between one Judge and another can produce a different verdict. The disparity of the judge's decision occurred in some cases in Aceh began from the legal provision that the child could not choose father or mother if the condition had not been *mumayiz*. In the context of the age, the custody is given to his mother. In fact, there is a problem about different verdict by KHI, that is the custody given to the father at the first stage, and custody back to the mother at appeal stage in Sharia Court. The results of the study are; *First*, the disparity of the judge's verdict is a reasonable situation that occurs depending on the explanation of witnesses and the fact-finding in the field. *Second*, the KHI format is not absolute in deciding the cases, it takes other prove so that the Judge invites expert witnesses to consider the verdict. *Third*, consideration of the child's mental, environment, and condition should be a priority to decide on ideal custody.

Keywords: Judge's verdict, Child Custody, Aceh Sharia Court, Islamic Family Law

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Abstrak: Artikel ini bertujuan untuk menjelaskan perbedaan putusan hakim (disparitas) terkait hak asuh anak (hadhānah) pada Mahkamah Syar'iyah Aceh. Artikel ini tergolong dalam penelitian lapangan dengan pendekatan kualitatif. Metode penelitian yang digunakan adalah fenomenologi hukum normatif-empiris yang membandingkan beberapa putusan hakim pada kasus hadhānah Mahkamah Syariah Aceh. Artikel juga mendeskripsikan bahwa meskipun Indonesia memiliki produk hukum Islam yang sama (KHI) namun dalam implementasinya antara Majelis Hakim satu dan yang lainnya bisa menghasilkan putusan yang berbeda. Disparitas putusan hakim yang terjadi pada beberapa kasus di Aceh dimulai dari ketentuan hukum bahwa anak belum bisa memilih ikut siapa (ayah atau ibu) bila kondisinya belum mencapai mumayiz. Pada konteks usia anak yang belum mumayiz maka hak asuh diserahkan pada ibunya. Problema di lapangan, terjadi putusan yang berbeda dengan KHI, salah satunya hak asuh diberikan kepada ayah pada Mahkamah Syar'iyah tingkat pertama, dan hak asuh kembali ke ibu pada Mahkamah Syar'iyah tingkat Banding. Hasil penelitian menemukan; Pertama, disparitas putusan hakim adalah situasi yang wajar terjadi tergantung penjelasan saksi dan fakta temuan di lapangan. Kedua, format KHI tidak bersifat absolut dalam memutuskan perkara, dibutuhkan keilmuan lain sehingga Majelis Hakim mengundang saksi ahli untuk mempertimbangkan putusannya. Ketiga, pertimbangan kondisi, lingkungan dan mental anak seharusnya menjadi prioritas untuk memutuskan hak asuh yang ideal.

Kata Kunci: Disparitas, putusan hakim, hak asuh anak, Mahkamah Syariah Aceh, hukum keluarga Islam

Introduction

Islam is a complex religious teaching, regulating the various of human life basic from principal to optional matters. The truth of Islamic doctrine is a great blessing and Allah Swt ensures that Islam is blessed religion that is mentioned in the Qur'an.¹ The evidence of Islamic doctrine is present in the midst of people indicated from the fact that Allah Swt bequeath the best role model (Prophet Muhammad) who explained the way till it's roots how does live on the right path in this world and so does get hereafter.

¹ Muhammad Sulthon, "Hukum Islam Dan Perubahan Sosial (Studi Epistemologi Hukum Islam Dalam Menjawab Tantangan Zaman)," *Jurnal Ilmiah Universitas Batanghari Jambi* 19, no. 1 (2019), <https://doi.org/10.33087/jiubj.v19i1.548>.

Islam also gives serious attention in regulating and maintaining family problems among society. Family law is an important discourse and has always existed since Adam needed Hawa until today. Therefore, the study of family problems is a dimension that is always interesting and will never fade as a form of human nature.² Friction about the family had already begun when Qabil and Habil fought over the rights of the couple assigned to him. In fact, this conflict led to the first bloodshed on the world.³ This shows that family law is essential to be understood and socialized.

One of the problems in family law is child custody or popularly called *hadhānah*. This custody basically has a domino effect from the previous problem that is divorce.⁴ Although divorce is a common condition, it is actually a serious problem even very hated by Allah Swt. While the most harmed from divorce is the condition and mentality problem of children who are abandoned, especially if they are underage who really need the attention of both parents. So no wonder, a wise couple chooses to stay together for their child no matter what conflict occurs.⁵

Responding to the intricate of the *hadhānah* case in the community, making the warring parties forced to bring the case into the law. Especially in Aceh, this conflict is resolved in the local Sharia Court or the Aceh Sharia Court. Deliberations often resolve family conflicts in Aceh with village officials concerning Islamic customs and laws. If peace has not been found, only then will the case be determined at the sharia court in reality⁶, the parents who often fight for child custody is not over at the local level. Even, they take

² Arif Sugitanata Arif, "Hukum Keluarga Islam Di Brunei Darussalam," *Al-Qadha : Jurnal Hukum Islam Dan Perundang-Undangan* 8, no. 1 (2021), <https://doi.org/10.32505/qadha.v8i1.2275>.

³ Siti Mariyatul Kiptiyah, "Kisah Qabil Dan Habil Dalam Al-Qur'an: Telaah Hermeneutis," *Al-Dzikra: Jurnal Studi Ilmu Al-Qur'an Dan Al-Hadits* 13, no. 1 (2019), <https://doi.org/10.24042/al-dzikra.v13i1.2970>.

⁴ Muzakkir Abubakar, "Meningkatnya Cerai Gugat Pada Mahkamah Syar'iyah," *Kanun Jurnal Ilmu Hukum* 22, no. 2 (2020), <https://doi.org/10.24815/kanun.v22i2.16103>.

⁵ Nispul Khoiri and Adelina Nasution, "Ḥadhānah Conflict Resolution through Litigation: Analysis of Sharia Court Decisions in Aceh," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 22, no. 2 (December 5, 2022): 177–98, <https://doi.org/10.18326/ijtihad.v22i2.177-198>.

⁶ Mursyid Djawas and Sri Astuti A. Samad, "Conflict, Traditional, and Family Resistance: The Pattern of Dispute Resolution in Acehese Community According to Islamic Law," *Samarah*, 2020, <https://doi.org/10.22373/sjhk.v4i1.5271>.

appeals to the highest court to win the dispute.⁷ In addition, when at the provincial level it was not completed, there were still those who did Cassation at a higher stage. In this condition, there is often a difference (disparity) of the judge's decision even though the problems and evidence brought are the same.

The disparity of the judge's verdict could have a solutive impact but also appear a new problem. The process of appeal from a regional-level to the provincial level takes a protracted time. Especially, if it has reached the Cassation stage, sometimes the process has made the child feel at home and lives comfortable with his father.⁸ But because the cassation verdict is won by the mother, inevitably the child must be cared for and live by his mother. This condition actually interferes with the mental and development of children, especially if the mother has remarried.⁹

There are several studies regarding judges' decisions regarding child custody (*hadhānah*), such as research conducted by Mansari, which states that a judge's decision primarily determines the determination of child custody after divorce, and it is decided that it must be applicable laws and fulfill children's rights.¹⁰ On the other hand, in Khairul Nasri research, it was stated that the panel of judges at the Padang Religious High Court determined the hadhanah of a child who had not yet been mumayyiz to the father, not the mother, because the judge's decision applied the *ius contra legem* principle to safeguard the goodness and benefit of the child.¹¹

The right of *hadhānah* if parents have left the Islamic religion, according to *Jumhur* scholars, requires Islam for people who want to do hadhanah to achieve the purpose of sharia, namely protecting religion (*hifdz*

⁷ Hani Adhani, "Menakar Konstitusionalitas Syari'at Islam Dan Mahkamah Syar'iyah Di Provinsi Aceh," *Jurnal Konstitusi* 16, no. 3 (2019), <https://doi.org/10.31078/jk1638>.

⁸ Burhanatut Dyana, "Disparitas Putusan Hakim Terhadap Hak-Hak Istri Pasca Cerai Talak Raj' i | 15," *Disparitas Putusan Hakim Terhadap Hak-Hak Istri Pasca Cerai Talak Raj' I* 2, no. 1 (2014).

⁹ C Schenk, "Islamic Leaders and the Legal Geography of Family Law in Aceh, Indonesia," *Geographical Journal* 184, no. 1 (2018): 8–18, <https://doi.org/10.1111/geoj.12202>.

¹⁰ Mansari, "Hak Asuh Anak Pasca Terjadinya Perceraian Orangtua Dalam Putusan Hakim Mahkamah Sya'iyah Banda Aceh," *Gender Equality: International Journal of Child and Gender Studies* 4, no. 1 (2018): 103–24, <https://doi.org/http://dx.doi.org/10.22373/equality.v4i2.4539>.

¹¹ Khairul Nasri, "Penerapan Asas Ius Contra Legem Dalam Penyelesaian Sengketa Hadhanah," *Ijtihad* 34, no. 2 (2019), <https://doi.org/10.15548/ijt.v34i2.11>.

al-Din) and protecting offspring (*hifdz al-Nasl*).¹² This is the same as research which states that the certainty of protecting children's rights in a child's life must be considered despite the parent's conflict.¹³

Based on research that has been conducted on *hadhānah* above focuses more on the provisions of *hadhānah*, both analyzed in Islamic law, law No. 1 of 1974 and the Compilation of Islamic Law, decisions in the Religious Courts, legal protection for child maintenance after divorce, and settlement alternative disputes, especially in Aceh both criminal and civil cases. What is a novelty is the absence of research and studies on the resolution of *hadhānah* conflicts in Aceh by combining research on decisions made at the Syar'iyah Court (litigation) and conflict resolution through village institutions (non-litigation). This will bring up a new concept in resolving hadhanah conflicts, especially in Aceh and generally in the study of Islamic family law in Indonesia.

Research on the disparity of judge's verdict is not new, many researchers have reviewed and written it. What distinguishes this study from other articles is the disparity of judge's verdict that focus on the rule No. 0155/Pdt.G/2016/MS. LGS and rule No. 14/Pdt.G/2016/MS.Tkn that occurred in Aceh 2019 until 2022. According to the zoning, this case compares the disparity of verdict that occurred in the Langsa Sharia Court and Takengon Sharia Court after an appeal to the Aceh sharia court, so that this research becomes unique and has novelty.

In judges' decisions regarding *hadhānah* in several different places, the findings can differ according to the problems faced and the interests of the child's rights; the judge takes an approach in considering the welfare of the child in his decision, sometimes the decision on child custody is handed over to the mother and father, can also be left to the mother or father alone.¹⁴

This article is the result of field research that the author conducted in a qualitative format. The methodology used is the phenomenology of normative-empirical law that compares the verdicts of judges of the Sharia

¹² Ramdan Fawzi, "Hak Hadhanah Dalam Perceraian Karena Pindah Agama Perspektif Hukum Islam," *Tahkim (Jurnal Peradaban Dan Hukum Islam)* 1, no. 2 (2018), <https://doi.org/10.29313/tahkim.v1i2.4106>.

¹³ Abdul Basir Mohamad, Rohanee Machae, and Mutsalim Khareng, "Children's Protection in the Issue of Hadhanah Based on Islamic Family Law and the Law of Thailand," *Asian Social Science* 12, no. 10 (2016), <https://doi.org/10.5539/ass.v12n10>, p18.

¹⁴ Eli Martati and Firdaus Firdaus, "Hak Hadhanah Dalam Putusan Pengadilan Agama," *JURIS (Jurnal Ilmiah Syariah)* 17, no. 2 (2018), <https://doi.org/10.31958/juris.v17i2.1195>.

Court at Langsa and Sharia Court in Takengon. On collecting the data and samples, the author is involved and plunges into the field to explore the phenomenon of judge's verdict directly. In addition, the author also interviewed the informants who involved and present at the trial.

Custody Definition

In fiqh, custody is called *hadhānah*. Etymologically, *hadhānah* comes from Arabic literacy, namely *hadhana-yahdhinu-hadhānan* which means nurturing, caring for, educating, hugging.¹⁵ *Hadhānah* referred to an attitude such as positioning something between the ribs and knees when sitting. The simple condition is to do something, it's similar to the condition of a mother who puts her baby above her knees when breastfeeding. More broadly is a figurative form of the mother's seriousness in protecting and caring for her baby.¹⁶

The definition mentioned by Imam Hanafi about *hadhānah* is a matter of caring for children, in the sense of educating and looking after them from the time when the children need a nanny until they grow up. *Hadhanah* is children's right; educators are not necessarily the rights of educators. If a child wants to choose the right to care for himself, then the child has more freedom to care for himself and care for himself beside his parents. Mothers have more ownership over their children until they grow up and can stand alone in fulfilling daily needs such as eating, drinking, dressing, and bathing. After that, his father has the right to look after him until he is an adult and is not given a choice.¹⁷

Imam Malik *hadhānah* is the maintenance of children for people who have the right to care for them or usually also means caring for or looking after people who are unable to take care of their own needs because they are not *mumayyiz*, such as children, crazy adults, maintenance here includes matters of food, washing clothes, bathing, cleaning, and the like.¹⁸ Mothers have more right to care for daughters until she marries a man and has intercourse with

¹⁵ Ahmad Warson Munawir, "Kamus Arab Indonesia Al Munawir," in *Cetakan 14*, 1997, p.578.

¹⁶ R Machae, "Children's Protection in the Issue of Hadhanah Based on Islamic Family Law and the Law of Thailand," *Global Journal Al-Thaqafah* 6, no. 2 (2016): 73–84, <https://doi.org/10.7187/gjat11520160602>.

¹⁷ Abu Hanifah bin Nu'man bin Tsabit Al-Taimi Al-Kufi, *Al-Jami' Al-Kabir* (Bairut: Daar al-Kitab al-Arabi, 1982), p.421.

¹⁸ Ibnu Hajar Al-Haitami, *Tuhfatul Muhtaj Bi Syarh Al-Minhaj*, Juz VI (Kairo: Maktabah At-Tijariyah Al-Kubra, 1994).

him. For boys, according to the opinion of the famous Imam Maliki, until the child grows up.¹⁹

Imam Syafi'i defines *hadhānah* as placing something near the ribs, such as carrying or putting something on the lap.²⁰ The point is to care for and educate someone who has not been mumayyiz or has lost his intelligence because they cannot do their own thing.²¹

Imam Ahmad ibn Hanbal defines *hadhānah* as parenting, which is more entitled to be the mother of a boy until he is seven years old.²² After that, he may follow his father or remain with his mother. As for a daughter, after seven years old, she continues to stay with her mother; she is not allowed a choice.²³ Abdurrahman al-Jaziri argued that *hadhānah* is caring for and protecting underage humans (children) who still have limitations in thinking and being independent.²⁴ So it is not surprising that al-Jaziri also categorizes *hadhānah* refers to a madman who may need the care and protection of his family.²⁵ In the encyclopedia of Islamic law, *hadhānah* is a verb that describes dependent parenting. Whether it's because of age or his immature mind. Parenting here has been concurrent to efforts to get needs, to protect from danger, provide education and knowledge, and be responsible in various aspects.²⁶

The Legal Basic Of *Hadhānah*

The juridical base that serves as a legal bases for carrying out the *hadhānah* described in Surah at-Tahrim verse 6, which means;

¹⁹ Abu Abdullah Malik Ibn Anas, *Al-Muwaththa* (Kairo: Daar al-Salam, 1996), p.34.

²⁰ Zainuddin bin Abdul Aziz al-Malibari, *Fathul-Mu'in Bi Syarhi Quratul-'Aini* (Bairut: Daar al-Ma'arif, 2001).

²¹ Muhammad Ibn Idris As-Syafi'i, *Al-Umm* (Bairut: Daar al-Fikr, 1992), p.57.

²² Abd al-Hamīd Al-Syarwānī, *Hawāsyī Al-Syarwānī Wa Ibn Qāsim Al-'Ubādī 'alā Tuhfat Al-Muhtāj* (Bairut: Darul Kutub Ilmiyah, 2012).

²³ Ibnu Qudamah, *Al-Umdah Fi Al-Fiqh Ala Madzhab Al-Imam Ahmad Bin Hambal* (Kairo: Daar al-Ma'arif, 1991), p.451.

²⁴ Abdurrahman Al-Jaziri, *Fiqh Al-Madzahib Al-'Arba'ah* (Bairut: Daar al-Fikr, 1998).

²⁵ Husnatul Mahmudah, Juhriati, and Zuhrah, "Hadhanah Anak Pasca Putusan Perceraian (Studi Komparatif Hukum Islam Dan Hukum Positif Indonesia)," *SANGAJI: Jurnal Pemikiran Syariah Dan Hukum* 2, no. 1 (2019), <https://doi.org/10.52266/sangaji.v2i1.263>.

²⁶ Jumni Nelli, "Analisis Tentang Kewajiban Nafkah Keluarga Dalam Pemberlakuan Harta Bersama," *Al-Istinbath: Jurnal Hukum Islam* 2, no. 1 (2017), <https://doi.org/10.29240/jhi.v2i1.195>.

“O you who believe, preserve yourself and your family from the fire of hell with its fuel from men and stones. The guards were the rough angels again hard. They do not disobey God by what He commands and always do what he is commanded.”

The above verse instructs that, the form of keeping the family has a basic principle of piety towards Allah Swt. When a servant has a spirit of piety in him, then it will be reflected in carrying out other commands including caring for and responsible for a child.²⁷ Caring for a family is not the same as maintaining animals or plants. Maintaining here has a special emphasis in the religious dimension of keeping the family from the despotic deeds to avoid the fire of hell. This condition does not exist in animals so does plants.

The verse related to *hadhānah* is also mentioned in Surat Al-Baqarah verse 233, which means;

"Mothers are asked to breastfeed their children within two years, for those who want to perfect (time) breastfeeding. Father is obliged to meet the needs of food and clothing through a decent way (halal). A person is not burdened, but according to his ability. Neither is a mother to suffer by her child nor is her father made to suffer by her child. Same with the heirs. If both want to wean (before two full years) by mutual consent and deliberation (husband and wife), neither is charged with sin. If he wants to feed his son (to others), then also innocent when given the right (payment) properly. Fear Allah and understand that Allah is all-seeing what you do."

It explains that both parents must be willing (obligatory) in caring for their children until they grow and develop properly. Parents are commanded by Allah swt to take care of their children who have not been *mumayiz*.²⁸ Allah commands to every mother for breastfeeding their children less than two years, and their father is responsible for supporting them both according to their ability.

Another legal bases about *hadhānah* is also explained in the Hadith, where a husband and wife divorce with one child, when her husband wants to seek custody of the child, the woman comes to the Prophet Muhammad and says; *O Messenger, this is my son, I am the one who conceived him, I am the*

²⁷ Muhammad Roni and M. Anzaikhan, "Pembentukan Keluarga Shaleh Dalam Komunikasi Islam: Studi Komparasi Penafsiran Al-Qur'an," *Al-Hikmah Media Dakwah, Komunikasi, Sosial Dan Kebudayaan* 12, no. 1 (2021), <https://doi.org/10.32505/hikmah.v12i1.2825>.

²⁸ Ibnu Rozali, "Konsep Memberi Nafkah Bagi Keluarga Dalam Islam," *Jurnal Intelektualita: Keislaman, Sosial Dan Sains* 6, no. 2 (2017), <https://doi.org/10.19109/intelektualita.v6i2.1605>.

one who nursed him, my lap protects him. His father wanted to take it from me because we were divorced. Prophet Muhammad Saw replied; *You have the right to take care of him as long as you are not married again.*”²⁹

The hadith explains that the parents are actually entitled to take care of her child rather than the father as long as the mother has not remarried another man. A mother is prioritized more than a father because she understands the children needs and able to care for and educate children, mother is more patient in caring for children and also has more time than fathers because her job is at home.

Based on the Qur'anic verses and Hadith above which are used as legal basis rule of *hadhānah*. it is taken a crucial idea about *hadhānah* to take care for the life of child (both in the world and in the hereafter), because nurturing and caring for children is an obligation for parents, as well as in providing knowledge and education.³⁰ The obligation will continue until the child is considered an adult and able to live himself (puberty).

Order of People Who Have *Hadhānah*

Talking about custody certainly can not be separated from the friction of reception or rejection. Since the child is a complete ethnicity (not something that can be separated or divided like an inanimate object), then there are certain provisions that make it a priority.³¹ The most important order to the last related to child custody (*hadhānah*) as follows;

- a. According to Hanafiyah: Mother, grandmother of child of the maternal line, grandmother of the child of the father line, sister, aunt of the maternal line, child of sisters line, son of brothers, aunt of father line, then ashobah as is the order in inheritance;
- b. According to Malikiyah: Mother, grandmother of mother line, grandmother from father line up, sister, aunt of father, and daughter from the side of brother. Next is the one who obtains a will (trust) to maintain;

²⁹ Abu Daud Sulaiman bin Asya'ts as Sajastani, *Sunan Abi Daud, Kitab Al Janaiz*, 2000.

³⁰ Elimartati, “Hukum Istri Mencari Nafkah Dalam Tinjauan Maqashid Syariah,” *Islam Transformatif: Journal of Islamic Studies* 2, no. 2 (2018), <https://doi.org/10.30983/it.v2i2.757>.

³¹ Wirda Hairani dan Syawaluddin Islami, “Problematisasi Mediasi Dalam Kasus Perceraian Di Mahkamah Syar'iyah Langsa,” *Al-Qadha* 5, no. 1 (2019), <https://doi.org/10.32505/qadha.v5i1.959>.

- c. According to Shafi'iyah: Mother, grandmother of the child of the maternal line, grandmother of the child of the father line, grandfather of the child of the mother, sister, aunt of the maternal line, son of a brother, daughter of a sister, aunt of the father line, then each person included the mahram who is entitled to inheritance as anhabah as a mechanism in the arrangement of inheritance. This provision has similarities with the Hanafiyyah;
- d. According to Hanabilah: mother, grandmother of the child of the maternal line, grandfather of the child and mother of grandfather, sister of his parents, sister of mother's side, sister from the father's side, aunt of the line of both parents, daughter of the brother, daughter of uncle of father, then is a closer relative.³²

Period Of *Hadhānah*

The provision of *hadhānah* time are not explained in the Qur'an or Hadith, so to determine the *hadhānah*, Fiqh scholar perform ijthad based on legal rules taken based on the Qur'an and Hadith.³³ The fuqaha agreed that custody (*hadhānah*) began from birth (baby) to *mumayyiz* condition. Furthermore, this *mumayyiz* condition that has a difference of views. The period of *hadhānah* is divided into two periods, namely: before *mumayyiz* and after *mumayyiz*.

First, the period before *mumayyiz*. This period starts from the age of 1-7 years. The reason *mumayyiz* says is an aspect of mind that does not yet understand between harm and benefits to oneself. At that age, the majority of scholars agree that mother is more entitled to care for the child.³⁴

Second, the *mumayyiz* period. *Mumayyiz* is a time when a child experiences maturity of thinking, characterized by the condition of the child who understands to choose something brings benefit and bad effect to him. The number scale of agreed majority of scholars is the age of 7 years until the

³² Fakhurrrazi dan Noufa Istianah, "Hak Asuh Anak : Suatu Analisa Terhadap Putusan Mahkamah Syar'iyah Langsa Tentang Pengalihan Hak Asuh Anak," *Al-Qadha : Jurnal Hukum Islam Dan Perundang-Undangan* 4, no. 1 (2017), <https://doi.org/10.32505/qadha.v4i1.178>.

³³ Arifin Abdullah and Siti Nursyafiqah Binti Ismail, "Faktor-Faktor Gugurnya Hak Hadhanah Kepada Ibu (Analisis Enakmen Keluarga Islam Pulau Pinang No. 5 Tahun 2004 Ditinjau Menurut Kajian Fiqh)," *El-USRAH: Jurnal Hukum Keluarga* 1, no. 1 (2019), <https://doi.org/10.22373/ujhk.v1i1.5565>.

³⁴ Irfan Islami and Aini Sahara, "Legalitas Penguasaan Hak Asuh Anak Dibawah Umur (Hadhanah) Kepada Bapak Pasca Perceraian," *Adil: Jurnal Hukum* 10, no. 1 (2019), <https://doi.org/10.33476/ajl.v10i1.1070>.

child is called *baligh*.³⁵ The reason of children's understanding in choosing bad or good is he can determine who is best for himself to be wise in choosing his father or mother without any coercion or intimidation from anyone. The basic of law is hadith which means:

*"A woman asked: "O Messenger of Allah, my husband wants to go with my son, while he (my son) is very helpful to me and brings me drinking water from abi'inbah lake." Then he approached, the Prophet said: "O little boy, this is your father and this is your mother, hold the hand of one of them, whichever one you want." Then the child took his mother's hand, and then the woman went with her son."*³⁶

Although the hadith above does not mention the age of the child, but the child's ability to choose is a form of identification from *mumayyiz*. The age of child based on the hadith is scholar's interpretation on child's condition who is able to draw or take water in the lake. Then, this condition refers to child's age about 7 years.³⁷ Furthermore, the child is given the right to choose good parenting for himself.³⁸ Explicitly, *hadhānah* is finished when a child getting adult and can bring himself to life. Specifically, for a daughter the custody ends when she is married, while for the boy ends when he already has an income (work).³⁹

Principally, the period of *hadhānah* ends when the child no longer needs maintenance, or he can stand alone. Provisions for women when she is married, but for men if he is already working.⁴⁰

³⁵ A N Sholeh, "The Awareness of Islamic Law as a Spiritual Factor in Family Resilience and Parenting Quality During the Covid-19 Era," *Journal of Indonesian Islam* 15, no. 2 (2021): 329–58, <https://doi.org/10.15642/JIIS.2021.15.2.329-358>.

³⁶ Abu Abdullah Muhammad ibn Ismail Al-Bukhari, *Shahih Al-Bukhari* (Bairut: Daar al-Fikr, 2003), 1342.

³⁷ E Banus and B De Jose Maria, "Chronic Pain in Children: A Forgotten Problem?," *Regional Anesthesia and Pain Medicine* 41, no. 5 (2016).

³⁸ Ana Septia Rahman, "Peranan Wanita Karier Dalam Keluarga, Pola Asuh Dan Pendidikan Anak (Studi Kasus Pada Wanita Karier Pada Jl. Angrek Rt 002/018 Pondok Benda Pamulang Tangerang Selatan).," *Jenius (Jurnal Ilmiah Manajemen Sumber Daya Manusia)* 1, no. 2 (2018), <https://doi.org/10.32493/jjsdm.v1i2.928>.

³⁹ K Nasution, "Implementation Of Indonesian Islamic Family Law To Guarantee Children's Rights," *Al-Jami'ah* 59, no. 2 (2021): 347–74, <https://doi.org/10.14421/ajis.2021.592.347-374>.

⁴⁰ A N Cruz, "Discrimination of Women in Islamic Family Law and Public Order," *Cuadernos de Derecho Transnacional* 12, no. 1 (2020): 286–318, <https://doi.org/10.20318/cdt.2020.5190>.

Chapter 1 letter (g) of KHI mentioned that *hadhānah* is a parenting, nurturing and educating activity of child until adult or stand alone. Article 105 mentions more detail about *hadhānah*, namely:

1. Taking care a child who has not been *mumayyiz* or haven't reach 12 years old is his mother right.
2. Taking care of the child who has been *mumayyiz* is given to child to for choosing between father or mother as the holder of his parenting rights.
3. Taking care expenses are responsible by his father.⁴¹

Chapter 105 explained the choice of parents in caring for and taking care of their children. Letter (a) instructs so clearly that a child under the age of 12 *hadhānah* is his/her mother right. Conversely, if the child is already 12 years old then child decides the choice, whether to follow father or mother. Although the child is getting care by his/her mother, his/her father is still obliged to fulfill of his/his child needed whether his/her mother able or not in making a living independently.⁴²

Taking from the provisions in chapter 156, especially the letter (c) of KHI above, it can be concluded that the custody prioritizes strongly the condition of child safety both mentally and physically. That means, it is not only determines financially, but children mental and psychology must be considered.⁴³ In practice at trial before a judge makes a decision, such cases must be proven by presenting witnesses. Through the presentation of the witnesses, the judge will look for the facts arising in the trial, to give a decision that embodies the values of justice.

However, mother as a priority in *hadhānah* also does not apply absolutely (forever), there are certain circumstances and concrete causes so that custody is not handed over to her. Based on the cases that using as research samples against the verdict of judges at the Sharia Court in Aceh, due to the busyness of mother as civil servants and also still studying in verdict Number 0155 / Pdt.G / 2016 / MS. LGS, and the mother has remarried in verdict No.

⁴¹ Renita Ivana and Diana Tantri Cahyaningsih, "Dasar Pertimbangan Hakim Terhadap Putusan Perceraian Dengan Pemberian Hak Asuh Anak Kepada Bapak," *Jurnal Privat Law* 8, no. 2 (2020), <https://doi.org/10.20961/privat.v8i2.48423>.

⁴² Anjar S C Nugraheni, Diana Tantri C, and Zeni Luthfiyah, "Komparasi Hak Asuh Dan Hak Nafkah Anak Dalam Putusan- Putusan Perceraian Di Pengadilan Negeri Dan Pengadilan Agama Kota Surakarta," *Yustisia Jurnal Hukum* 2, no. 3 (2013), <https://doi.org/10.20961/yustisia.v2i3.10158>.

⁴³ Ismiati, "Perceraian Orangtua Dan Problem Psikologis Anak," *At-Taujih : Bimbingan Dan Konseling Islam* 1, no. 1 (2018), <https://doi.org/10.22373/taujih.v1i1.7188>.

14/Pdt.G/2016/MS. The legal considerations used by the judges in deciding the cases are described as follows:

Verdict No. 0155/Pdt.G/2016/MS. LGS

The plaintiff is (wife) and Defendant (husband), married with marriage certificate number: 796/22/XI/2007. Their marriage was having two children aged 4 years and 7 years.⁴⁴ After 10 years of divorce, the father (husband) has right to take care the two children. In this case the judge rejected the plaintiff's (wife)'s lawsuit, the judge's consideration of dismissing the lawsuit was:

Wives who work as ASN often bring children to work, which causes the child's rest time and play time disappear. Furthermore, the wife is still studying at STIM Pase Langsa. This condition makes the judge that the mother does not have enough time for her children. In addition, while doing college, the wife lives in a rented house with her college friends. According to Judges this is an environment that is not ideal for children growth and it is feared that the child's mental and psychological will be disturbed.

Based on chapter 105 letter b KHI, childcare that has been *mumayyiz* allowed is determined on the choice of children.⁴⁵ But because the situation of the child in this incident is considered not yet *mumayyiz* then the wishes of the wife as a plaintiff are judged not based on the provisions of the law. Likewise with the witnesses presented, they were unable to describe the specifics and measurable about the negligence of the husband (defendant) in caring for the children.⁴⁶

After divorce, their children get a good education, together with their father, so this becomes a support that the husband has custody requirements with chapter 9 number (1) of Law No. 23 of 2002 where every child is entitled to get education and teaching in developing his personal intelligence level accordance with his interests and talents.⁴⁷

⁴⁴ Adelina Nasution and Ismail Fahmi Arrauf Nasution, "Customary Law Approaches to Ḥaḍānah Disputes in Aceh: Arguments and Social Implications," *Ahkam: Jurnal Ilmu Syariah* 21, no. 2 (2021).

⁴⁵ S Rahmawati, "Mainstreaming of Gender Equality in Islamic Family Law: Opportunities and Challenges," *Samarah* 4, no. 2 (2020): 360–74, <https://doi.org/10.22373/sjnk.v4i2.8110>.

⁴⁶ Interview with Mr. Sayed Sofyan, SH., M.H, March 25, 2021

⁴⁷ D S Powers, "The Development of Islamic Law and Society in the Maghrib: Qāḍīs, Muftīs and Family Law," *The Development of Islamic Law and Society in the Maghrib: Qāḍīs, Muftīs and Family Law*, 2022, 1–584, <https://doi.org/10.4324/9781003278917>.

Based on witness statements and evidence gathered, father and son have an affinity. So do children and grandmothers who have a harmonious closeness. Moreover, in this case the first child is already study in elementary school and the second child is in paud school with his grandmother (defendant's mother).

The plaintiff did not accept the verdict of judge in Langsa Sharia Court, then the Plaintiff appealed with the verdict number 98 / Pdt.G / 2016 / MS-Aceh, a lawsuit of *hadhānah* between the wife and the husband. The appeal decision is to overturn the verdict of the Sharia Langsa Court. No. 0155/pdt. G/2016/MS-Lgs Dated August 22, 2016 AD, by handing over custody of the child to her biological mother.⁴⁸

The judge's decision in custody is in accordance with the provisions in KHI that custody of children who have not been *mumayyiz* is handed over to the mother. Still, this provision can change if the mother does not meet the requirements as *hadhānah*, the judge hands over custody of children who have not been *mumayyiz* to the father.⁴⁹

The consideration of judges at the Sharia Aceh Court is where at the trial in the Court of Sharia Langsa judges charged the Plaintiff to prove that defendant was negligent in parenting, through the information of two witnesses who were unable to prove that defendant negligent in childcare, then this is one of the reasons to reject the plaintiff lawsuit.

Aceh Sharia Court argued that the legal considerations put forward by the judges were considered wrong and there is no relation with the provisions of the law applicable in chapter 105 letter (a) compilation of Islamic law stipulates that if the situation in divorce, custody of children who have not been *mumayyiz* (not getting 12 years old yet) is mother right.

The judge's decision at the sharia court of first instance to hand over child custody to the father, if the case is appealed to the Aceh syar'iyah court, the decision may change according to the judge's consideration.⁵⁰

After the divorce of the two children are in care of defendant so that The Plaintiff has never been given the right to take care for the two children, so the legal rule that because the two children were taken over their rights by defendant then he/she has actually deprived the comparator of the right to care for their two children. So, the judges of Langsa Sharia Court should not

⁴⁸ Nasution and Nasution, "Customary Law Approaches to *Hadānah* Disputes in Aceh: Arguments and Social Implications."

⁴⁹ Interview with Mr. Royan Bawon S. HI, April 15, 2022.

⁵⁰ Interview with Mr. Hasanuddin, S.H.I., M. Ag, October 15, 2021.

consider the aspect of children closeness with the husband (Defendant) on basic condition of the two children who live with the husband.

On custody appeal verdict is handed back to the mother. In fact, the child condition is good with his father. it should not be forced to give custody to his mother. Although, the applicable provisions in contrary, because if it is forced will degrade the child mentally, this also violates child protection laws. The child's ability to adapt his new environment is not as easy as an adult, if the child has grown up naturally and does not get significant threats while in his father's care, then according to the author of the decision of Langsa Sharia Court which establishes custody to the father more acceptable for child benefit.

Verdict No. 14/Pdt.G/2016/MS.Tkn

The plaintiff is wife (name disguised) and the Defendant is husband (disguised name) has been married with a marriage certificate quote Number: 128/19/VII/2012. During the marriage, the plaintiff and the defendant were blessed with a child born on December 21, 2012 (age 3 years).

The plaintiff asked the judge of Takengon Sharia Court to decide the child remained with plaintiff, because defendant had remarried. The consideration of judges in deciding this case is: psychologically the custody is essentially pointed at child interest, both in aspects of physical growth, spiritual, intellectual prowess and religious development left to his biological mother.⁵¹

After the judge examined the facts at the trial, the plaintiff was found to have remarried another man and had a baby that was approximately 3 months old, which invalidated her right to care for the child. The defendant taking care her in good health, the child even cried in fear, does not want to see and being held by his mother (Plaintiff) at the trial.

The main consideration in *hadhānah* matter is the child benefit and mother does not have right normatively, even though the child has not been *mumayiz*. Because, it has been proven that the child has lived quietly and peacefully with his father. Based on the provisions of chapter 156 letter (c and e) compilation of Islamic law and chapter 39 paragraph 1 of Law No. 23 of 2002 on Child Protection, the assembly concluded that the plaintiff's claim could not be granted and stipulated that the child was in defendant's *hadhānah*.

⁵¹ Abdullah and Ismail, "Faktor-Faktor Gugurnya Hak Hadhanah Kepada Ibu (Analisis Enakmen Keluarga Islam Pulau Pinang No. 5 Tahun 2004 Ditinjau Menurut Kajian Fiqh)."

The plaintiff did not accept the decision of judge in Takengon Sharia Court, then he take appeal with the verdict Number: 96 / Pdt.G / 2016 / MS-Aceh. Comparison is the wife used to be as Plaintiff. And defendant is the husband used to be as defendant. The consideration of the judges is:

Taking the consideration of the judges in Takengon Sharia Court, the Judges of Aceh Sharia Court expressed their disagreement and changed the ruling. Because defendant and Comparison have both remarried, then for the child benefit must be seen who is better upbringing between mother and father.

The Panel of Judges of Takengon Sharia Court did not consider the statement from defendant witnesses who said that when witnesses escorted defendant to take the child in kindergarten school, the child cried. This shows *qarinah* that a child when he sees a person he has never seen, of course he cry. So, his cried when seing his mother or father who feels foreign for him cannot be used as a basic or establishing his mother as a custody holder.

Based on these considerations, Aceh Sharia Court tried for itself that the judge granted the Comparison/Plaintiff's lawsuit for the entirety, establishing the Comparison / Plaintiff as the holder of *hadhānah* for the child.

The consideration of judge in both cases by handing over custody of child who has not been *mumayiz* to the father is child benefit and interest. the mother does not have right normatively. Based on above *hadhānah*. At the first-level Sharia Court of judge verdict did not follow the provisions of KHI by handing over custody to his father.

Based on Mr. Hamzah opinion that the first referral is KHI in deciding the case of child custody and child protection law. But, in the decision must relate with the case in the trial, if the child has been with the father for a long time and feels comfortable with the father, then the best decision of the child is better to stay with the father.⁵²

The decision of child custody considers the sense of comfort for the child, if the child is comfortable living with the father, then the child is better off staying with the father. He also continued his statement that, in the trial, the witnesses presented to the trial, then the written evidence, or there may be other facts presented by the litigant. In addition to KHI there are principles that must be considered, namely the principles of justice, expediency, and legal certainty, the three principles cannot be separated in taking decisions. If for example in the trial the judge only sees the legal certainty of the child

⁵² Interview with Mr. Hasanuddin, S.H.I., M. Ag, October 15, 2021.

joining the mother by not considering the legal facts that occur in the trial, it is feared that the verdict will dezoimi the child, and his physical disturbed.⁵³

Based on that opinion, the judge must consider his verdict based on the facts and evidence revealed at the trial regarding the good bad parenting patterns of parents to the child. In his consideration the judge must pay attention to the principle of justice, expediency and also legal certainty, the three principles should not be separated. A case may be decided based on legal certainty, but it turns out that the decision gives the child the best judgment, so the judge's best consideration is needed.⁵⁴

The legal consideration of the judges in these cases is chapter 105 letter (a) and chapter 156 letter (a) Compilation of Islamic Law that the child who has not *mumayiz*, his custody is submitted to his mother, but in case at the first level based on witnesses and facts in court the judge applies the principle of *contra legem*. The judge's consideration in the case is child benefit and care which is his priority in accordance with Law No. 23 of 2002 on child protection.

Based on the verdicts on that case, the judge found difference verdict in the same case even though in essence the panel of judges determines everything for benefit of the child. But, to determine the best interests. the judge giving difference legal consideration by looking at the facts in the trial.⁵⁵

First-rate judge in verdict No. 0155/Pdt.G/2016/MS.LGS and Verdict No. 14/Pdt.G/2016/MS. Furthermore, he blamed his ability to dig up legal sources outside the provisions of the KHI.⁵⁶ This is seen the consideration of the judge in decision that it is worth considering the child confort. While on appeal verdicts, it is more formalistic approach by using chapter 105 Compilation of Islamic Law, chapter 49 paragraph 1 letter (a) and (b) Law No. 1 of 1974 and chapter 45 of Law No. 1 of 1974.

In these cases, the judge made a legal discovery at the first level where custody of the child who has not been *mumayiz* submitted to the father, by applying a method of systematic interpretation (logical) to chapter 105 letter (a) KHI, namely by interpreting the laws and regulations by connecting with

⁵³ Interview with Mr. Hasanuddin, S.H.I., M. Ag, October 15, 2021.

⁵⁴ Nyoto Nyoto et al., "Pemenuhan Hak Anak Pasca Perceraian Orang Tua," *Jurnal Darussalam: Jurnal Pendidikan, Komunikasi Dan Pemikiran Hukum Islam* 11, no. 2 (2020), <https://doi.org/10.30739/darussalam.v11i2.626>.

⁵⁵ A A An-Na'im, "The Postcolonial Fallacy of 'Islamic' Family Law," *The Cambridge Companion to Comparative Family Law*, 2019, 254-79, <https://doi.org/10.1017/9781316711750.011>.

⁵⁶ Interview with Mr. T. Mufardisshadri, S.H.I., M.H, January 2, 2021

the rule of law (other laws) or with entire legal system.⁵⁷ The law is seen as a union or as a regulatory system. A rule is not seen as a single rule, but a part of a whole system.

The difference between the panel of judges verdict at the first level and appeal stage based on the above cases, revealing the facts in the trial about custody, judge also uses multidisipler interpretation, which is a method of interpretation carried out by judge on basic of its consideration of various studies in understanding outside the science of law. Judges need the support of other disciplines to be able to provide benefits to children.⁵⁸ Judges in deciding hadhanah cases in their decisions consider *maqāshid syar'iyah*, psychological aspects, the interests of children's fundamental rights and *mashlahah*. So no wonder, covering up this deficiency usually the judge will present expert witnesses who understand in the field of science beyond the understanding of the judge.

On the decision No. 14/Pdt.G/2016/MS.Tkn where judge decided custody was submitted to the father after considering the statements of witnesses at the trial, but at the appeal stage Number 96 / Pdt.G / 2016 / MS. Aceh judges ruled custody returned to the mother on the consideration that the crying of a child who saw her mother or father who felt foreign to her could not be used as a measure not to establish her mother as a custody holder.⁵⁹

In this case, the judge should bring other experts to the trial such as psychologists. Because, the role of psychology also determines the success of child custody.⁶⁰ The relevance of psychology as a supporting medium on the law serves in explaining concretely related to human attitudes and behavior. This is in line with the philosophy of law that seeks to regulate and control humans.

The results of medical analysis from psychologists can provide an overview to the judge of the child's mental state. Psychologists can help the child to express what he feels, what he wants after both parents divorce and

⁵⁷ M. Taufan Perdana Putra and M. Alfaris, "Reality of Indonesian Marriage Law Concerning Post-Divorce Child Custody," *Radiant* 2, no. 2 (2021), <https://doi.org/10.52187/rdt.v2i2.50>.

⁵⁸ Nilgun Ongider, "Effects of Divorce on Children," *Psikiyatride Guncel Yaklasimlar - Current Approaches in Psychiatry* 5, no. 2 (2013), <https://doi.org/10.5455/cap.20130510>.

⁵⁹ Interview with Mrs. Syakdiah, S.HI., M.H, January 2, 2021

⁶⁰ Anna Garriga and Fulvia Pennoni, "The Causal Effects of Parental Divorce and Parental Temporary Separation on Children's Cognitive Abilities and Psychological Well-Being According to Parental Relationship Quality," *Social Indicators Research* 161, no. 2-3 (2022), <https://doi.org/10.1007/s11205-020-02428-2>.

want to be cared for by whom, if the child can be presented at the trial. In addition to analyzing the child's psyche, psychologists can also help to find out the psychic condition of the divorced parent. The mental condition of parents can be seen scientifically, related to readiness to care for children later, both physically and spiritually.

The use of varied methods in the interpretation of legal sources can result in different verdict. So, it is very common if the same case obtains a different result because of the character of the judge's interpretation. In short, although the goal is same. It is for child needed and benefit which are actually focus on the child's condition. it is necessary to ask for other opinion and other disciplines to support decisions that will protect the future of these children.

Conclusion

The disparity of the judge's verdict on *hadhānah* case in the Sharia Court at Takengon experienced a long stage up to the level of Cassation. The result verdict of the Sharia Court in Takengon, custody fell to the wife because the child was still 3 years old, when the appeal process to the Aceh Sharia Court, custody fell on the husband because the wife had remarried. At the cassation stage, the Supreme Court decided that custody of the child returned to the wife's side because the husband was also proven to have remarried. This is done on the consideration that it will be more difficult for children to live with their stepmother than stepfathers while in their respective homes. The reason because quantitatively, the mother is the more dominant at home with the child.

Novelty or uniqueness that exists in this finding is seen in similarity results of the verdict that the plaintiff will win custody of the child to the extent which he seeks to obtain it. This shows that even the conflict will essentially be won by those who insist on obtaining custody of their children by not stopping at a single verdict. The authors concluded that, the objective dimension of the verdict is still far from expectations. It should not be the plaintiff or defendant (parent) who is the point of concern of the judge, but rather the benefit of the child in terms of mental and phsycology. You could say this stage was missed because the judge did not involve expert witnesses to find out the phsycological condition of the child who contested custody. Judges must and must, in deciding *hadhānah* cases in their decisions by taking into account maqashid syar'iyah, psychological aspects, and the interests of the fundamental rights of children and mashlahah, in addition to being by applicable laws

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Interview

Interview with Mr. T. Mufardisshadri, S.H.I., M.H is the chairman of the Mahkamah Syar'iyah Langsa, January 2, 2021

Interview with Mr. Royan Bawon, S.H.I is a judge at the Mahkamah Syar'iyah Langsa, April 15, 2022.

Interview with Mr. Hasanuddin, S.H.I., M. Ag is the chairman of the Mahkamah Syar'iyah Idi, October 15, 2021.

Interview with Mrs. Syakdiah, S.H.I., M.H judge at the Mahkamah Syar'iyah Takengon, January 2, 2021

Interview with Mr. Sayed Sofyan, SH., M.H is the chairman of the Mahkamah Syar'iyah Lhoksukon, March 25, 2021