

THE RIGHTS OF CHILDREN UNDER AGE POST DIVORCE PARENTS PERSPECTIVE OF CIVIL LAW AND ISLAMIC LAW IN INDONESIA

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ABSTRACT

This study examines the law of neglect and neglect of children by parents, this problem often occurs in society, on the other hand, fighting for children between divorced parents often occurs as if children are property that can be divided and after being divided, the bond is broken parents who do not get custody. The problem of raising children in fiqh terms is called hadhanah, which is defined as caring for small children who do not know and cannot live independently, namely by fulfilling their needs. In relation to the custody of minors as a result of the divorce of both parents given to the mother, this is as regulated in Article 105 of the Compilation of Islamic Law. However, although Article 105 of the Compilation of Islamic Law explains that a child who has not mumayyiz is the right of the mother, it does not mean that the father has no right in the child's growth and development. This research method uses

a qualitative research type, while the approach in this research uses two approaches, namely: the statutory approach and the fact approach. The results of this study are the responsibility of parents to minors in providing a living for their children after divorce according to Islamic law becomes the obligation of male parents, this is as regulated in Article 49 letter d and Article 156 of the Compilation of Islamic Law.

Keywords: *children's rights, post divorce, civil law, Islamic law*

INTRODUCTION

Humans are basically created by God in pairs. Then each self will tend to look for a life partner. Every adult man and woman certainly has the desire to marry so that they can give birth to a new generation. Marriage aims to bind themselves between men and women to form a *sakinah, mawaddah and warahmah* family. (Anriani dan Nurjanah, 2021: 48) As already stated in Law Number 1 of 1974 concerning Marriage, marriage itself has the meaning of an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Godhead. (Tim Penyusun, 2015: 3)

One of the purposes of marriage or marriage is to have children in order to maintain offspring so that the world is not empty of human species. Children are the decoration of life and the successors of descendants who will enliven the world in their mission as caliphs on the earth of Allah SWT (Arifin et al. 2021: 67). Meanwhile, according to Article 1 of Law Number 1 of 1974 concerning Marriage, it is stated that the purpose of marriage itself is to form a happy and eternal family based on the One Godhead.

To achieve a happy family, it is required the love of parents to children. For parents, there are several points that must be considered in giving love to their children. Children must be given a *halal* living, second, parents must be fair to children, and third, children must be given religious education. If these three things are forgotten, then a happy family will not be realized. (Endang Triyanto Pratama, 2022: 18) However, not many married couples are able to maintain the integrity of their household. Many married couples prefer to end the problems that exist in their household by choosing a divorce method.

Divorce is one of the events that can occur in a marriage. Divorce is the abolition of marriage by a judge's decision or the demands of one of the parties to the marriage (Abubakar, 2020: 305). According to Article 38 of Law Number 1 of 1974 concerning Marriage, it has been explained that the termination of

a marriage can be caused by several reasons, namely: death, divorce, court decisions (Novitasari, Latifiani, dan Arifin, 2019: 330). Divorce should not need to be done, because there is still a way of peace between husband and wife if there are differences of opinion in the household. However, if the way of peace is carried out by the two husband and wife who are deadlocked, then the peace effort can be submitted to the peacemaker.

This is in accordance with the Qur'an QS. An-Nisa: 35, which means: "And if you are worried that there is a dispute between the two, then send a hakam (peacemaker) from a male family and a hakam from a female family. If the two hakam intend to make repairs, surely Allah will give taufiq to the husband and wife." Divorce due to divorce has many problems, such as regarding property and child custody. Children in the family are happy bearers for both parents because children give importance to both parents. (Mukhlis, 2020: 226)

One of the things that is not considered in a divorce is child custody. Custody of children is the responsibility of both parents, either when the parents are still living in harmony or when they fail due to divorce. This child care includes various things including education problems, economic problems and other problems that become the basic needs of children. Children are a mandate and gift from God Almighty, who has inherent dignity and worth as a whole human being. (Aidy, 2021: 357) Children as successors to descendants born from legal marriages have legal child positions. Children are an issue that has always been a concern of the community, what is their position and rights in the family and how they should be treated by their parents even in the life of society and the state. However, the phenomenon of neglect and neglect of children is a problem that often occurs in society, on the contrary, the struggle for children between divorced parents often occurs as if children are property that can be divided and after being divided, the bond between parents who do not get rights is broken foster. Even though the problem of the child's position and the obligations of parents to this child has been regulated in various laws and regulations. Like the divorce cases that we see in our environment, for example, the divorce case of a husband and wife couple who have been married for 7 years and have been blessed with a 6 year old and 3 year old child. In the eighth year, a married couple filed for divorce in the Religious Courts.

The trial for the divorce decision was held at the Religious Court. In the trial, it is likely that the custody of their children will be discussed. But as a mother, of course, she will continue to fight for her right to be able to take care of the baby she has been carrying for 9 months. A child at the beginning of his life until a certain age needs other people in his life, both in physical settings and in the formation of morals. A person who performs hadhanah duties plays

a very important role in his responsibilities after a divorce. (Hifni and Asnawi, 2021: 41)

In accordance with Article 41 of Law Number 1 of 1974 concerning Marriage, it is explained that: “The father is responsible for all the maintenance and education costs needed for the child, if the father is in fact unable to fulfill these obligations, the Court can determine that the mother will share the costs. the” But in practice there are still many parents (fathers) who do not provide a living for their children. Even though one of the obligations of parents (fathers) is to provide for their children. According to Law Number 1 of 1974 concerning Marriage, it explains that: “The age limit for a child who is able to stand alone or as an adult is 21 years, as long as the child is not physically or mentally disabled or has never been married.” In addition to Law Number 1 of 1974 concerning Marriage, the Compilation of Islamic Law (KHI) also regulates the rights and obligations of parents towards their children, as regulated in Article 77, Article 80 paragraph (4), Article 81, Article 98 and Article 106 . Starting from the description of the background of the problem above, the problem in this study can be formulated as follows: “What are the Obligations of Parents Towards Hadhanah Before Mumayyiz After Divorce”.

RESULTS AND DISCUSSION

Islamic law describes the noble nature of the bond formed by two people of different types, namely the marriage bond. The marriage bond in Islamic law is called *mitssaqan ghalidzan*, which is a strong bond of promise (Susanto et al. 2021: 110). Therefore, a marriage bond cannot just happen without going through several provisions. Creating a peaceful home based on love is a dream for every married couple, but it is not easy because many married couples fail and end up in a divorce. Divorce is the end of a marriage that has been fostered by a husband and wife caused by several causes such as death or a court decision (Putri et al. 2022: 22). In this case, divorce is seen as the end of a marital instability where the husband and wife then live separately and are officially recognized by applicable law.

The legal basis for divorce in Law Number 1 of 1974 concerning Marriage is contained in Chapter VIII concerning Dissolution of Marriage and its Consequences Article 38 and Article 39, while in the Compilation of Islamic Law (KHI) in Chapter XVI concerning Dissolution of Marriage Article 113 Article 128. In addition to the codified rules, *fiqh* experts also have different opinions regarding divorce law according to Islam, the most correct opinion among all of them is that which says “forbidden”, except for the right reasons.

Those who think like this are the Hanafi and Hambali groups. As for the reason, namely: Rasulullah SAW said: “Allah curses everyone who likes to marry and divorce”. (Rizem Aizid, 2018: 181) This is because divorce is kufri against Allah’s favor.

While marriage is a blessing and disbelief in favors is haram. So it is not lawful to divorce, except for an emergency. (Hamsa dan Teungku Dirundeng Meulaboh, 2021: 3) Emergency permits divorce if the husband doubts the cleanliness of his wife’s behavior, or has no love for her. The Hambali group explains it in more detail well, which can be summarized as follows: According to Sayyid Sabiq, obligatory divorce is the divorce imposed by the hakam (intermediary), because of the severe division between husband and wife. This happens if the judge is of the opinion that divorce is the only way to stop the division. Haram divorce is divorce without any reason. Because it is detrimental to husband and wife and there is no benefit to be achieved by the act of divorce, so divorce is haram. (Sudarto, 2021: 17)

In another narration it is said that divorce is hated by Allah SWT, the Messenger of Allah said: The most hated lawful act by Allah is talaq, in another sentence it is stated: “There is nothing that Allah has made lawful but He hates other than divorce”. (Maghfirah dan Gushairi, 2020: 186) Divorce is hated if there is no valid reason, even the Prophet SAW. Calling divorce as a lawful act because it destroys a marriage that contains the virtues recommended by religion. Divorce is sunnah, namely because the wife ignores her obligations to Allah, such as praying and so on, while the husband is unable to force him to carry out his obligations, or the wife lacks shame. (Asni, 2021: 69)

Divorce is a frightening specter for every family. The causes of divorce can vary, including failure to communicate, infidelity, domestic violence, economic problems, early marriage, cultural changes, and so on. (Suri et al. 2020: 184) Divorce will certainly bring legal consequences for both parties and also for children born in marriage. The children must live in a single parent family either with a mother or with only the father. (Nurmila, Azizah, dan Awaludin, 2019: 12). In the event of a divorce, of course, what is very urgent to consider is the issue of child support costs.

The cost of living for a child involves all the necessities of life and needs that apply according to circumstances and places such as food, clothing, housing, education costs and so on. Meanwhile, according to Bahder Johan Nasution and Sri Warjiyati, in Maswandi, that: “In the event of termination of marriage due to divorce, both the mother and father are still obliged to maintain and educate their children solely for the sake of their children, the court will decide who will control the child.”(Maswandi, 2017: 26) The cost

of living is important because children must continue to grow and develop as they should and obtain a proper education for the future of the child.

For this reason, of course, the cost of living for children after a divorce needs to be regulated in laws and regulations. In several laws and regulations, it can be seen several things that regulate the obligations of parents to their children after divorce, namely:

a) Obligations of parents to children after divorce according to Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law

Legally, the obligations between husband and wife will arise if the marriage has been carried out or carried out. In other words, the obligation of a husband or wife will not exist if a man or woman has not married. As for the obligations and rights that are balanced between husband and wife when accompanied by the same obligations, namely the obligation to foster and enforce a household which is expected to be the basis for building a household. (Latupono, 2020: 246) The joint obligation between husband and wife in fostering and establishing a household will fade if the household being built experiences shocks and even more so if it leads to divorce in their household. This matter has previously been regulated in Law Number 1 of 1974 concerning Marriage.

This is as stated in Article 45 and Article 47 of Law Number 1 of 1974 concerning Marriage.

Article 45	<ol style="list-style-type: none">1. <i>“Both parents are obliged to maintain and educate their children as well as possible”.</i>2. <i>“The obligations of parents as referred to in paragraph (1) of this article are valid until the children marry or are independent, which obligations continue even though the marriage between the two is broken.”</i>
Article 47	<ol style="list-style-type: none">1. <i>“Children who have not reached the age of 18 years or have never been married are under the control of their parents as long as they are not deprived of their power”.</i>2. <i>“Parents represent the child regarding legal actions inside and outside the court”.</i>

From several explanations of Law Number 1 of 1974 concerning Marriage above, it can be concluded that Law Number 1 of 1974 concerning Marriage regulates the obligations of parents towards their children even if the household has broken up due to divorce. Parental responsibilities include:

- a) Parents are obliged to maintain and educate their children as well as possible.
- b) Parents represent children regarding legal actions inside and outside the court.

In addition to Law Number 1 of 1974 concerning Marriage, the Compilation of Islamic Law (KHI) also regulates the rights and obligations of parents towards their children, as regulated in Article 77, Article 80 paragraph (4), Article 81, Article 98 and Article 106 .

Article 77	<ol style="list-style-type: none"> 1. <i>“Husband and wife bear a noble obligation to uphold a sakinah, mawaddah and warahmah household which is the basic foundation of the composition of society”.</i> 2. <i>“Husband and wife bear the obligation to care for and care for their children, both regarding their physical, spiritual and intellectual growth and religious education”.</i>
Article 80 paragraph (4)	<i>“The husband bears household expenses, treatment costs and medical expenses for his wife and children according to his income ability”.</i>
Article 81	<i>“The husband is obliged to provide a place of residence for his wife and children”.</i>
Article 98	<ol style="list-style-type: none"> 1. <i>“The age limit for a child who is able to stand alone or as an adult is 21 years as long as the child is not physically or mentally disabled or has never been married”.</i> 2. <i>“The parents represent the child regarding all legal actions inside and outside the court”.</i> 3. <i>“The religious court may appoint one of the closest relatives who is able to fulfill this obligation if both parents are unable”.</i>
Article 106	<ol style="list-style-type: none"> 1. <i>“Parents are obliged to care for and develop the assets of their children who are immature or under guardianship, and are not allowed to transfer or pawn them except for urgent needs if the interests and benefits of the child so desire or a fact that can no longer be avoided”.</i> 2. <i>“Parents are responsible for losses incurred due to errors and omissions from the obligations referred to in paragraph (1)”.</i>

The basis of the father’s obligation to provide for the child is not only because of kinship relations but also because of the condition of the child who

is not yet independent and in need of spending, his life depends on the existence of a party who is responsible for ensuring his livelihood. The people who are closest to the child are the father and mother, if the mother is responsible for taking care of the child at home, then the father is responsible for earning a living for his child.

b) Obligations of parents towards children after divorce according to Islamic Law

In the view of Islamic teachings towards children placing children in a noble position. Children get a special position and place in the Qur'an and Al-Hadith (Antareng, 2018: 57). Therefore, in the view of Islam, the child must be treated humanely, given education, teaching, skills and morality so that the child will be responsible for socializing himself to meet the needs of life in the future.

If the wife is divorced from her husband, while both of them have children who do not understand the benefit of themselves or are not yet mumayyiz (12 years old), then the child's mother has the right to educate and care for the child, but the child's maintenance is still borne by the father. (Umul Khair, 2020: 295) This is in line with the words of the Prophet Muhammad which means:

“The Messenger of Allah said to the woman: “You are the one who has more right to educate your child as long as you are not married to someone else”. History of Abu Dawud and Al Hakim. (Maghfirah dan Gushairi, 2020, p. 192)

In Islamic law, the emergence of the obligation to provide a living by male parents (fathers) to their children after a divorce is due to hereditary causes (nasab). This determination can be found in the Hadith of the Prophet Muhammad which means:

“Abu Sofyan's wife complained to the Messenger of Allah, she said: Abu Sofyan is a miser, he does not give me and my son anything other than what I take without him knowing, is there anything that harms me? He replied: Take it from his wealth well, just to meet your needs and your children. Agree on the Hadith Experts”. (Musthafa Khalid, 2017: 248)

According to Islamic law, the child's sustenance is borne by the father, while the mother is burdened with the task of breastfeeding her child and caring for him. This division of tasks is in accordance with the conditions and functions of each father and mother. Ibn Qudamah said that the obligation to

provide maintenance for children has been determined based on the Qur'an, as-Sunnah and Ijma'. (Abdul Rahman Ghazaly, 2019: 207) In the Qur'an, it can be seen in Surah Ath-Thalaq verse 6 and Surah Al-Baqarah verse 233, as the word of Allah SWT in QS. Ath-Thalaq verse 6 means: "Then if they breastfeed your (children) for you, then give them their wages." Further in QS. Al-Baqarah verse 233: Meaning: "Mothers should breastfeed their children for two whole years, that is, for those who want to perfect breastfeeding. And it is the duty of the father to feed and clothe the mothers in a ma'ruf way." Thus, it is obligatory for a father to provide a living for his child as a form of his responsibility as a parent.

Abdullah bin Umar R.A. said: I heard the Messenger of Allah (SAW) say:

"Each of you is a leader, and every leader will be held accountable for those he leads. Imam is a leader who will be held accountable for his people. A husband is a leader and will be held accountable for his family. A wife is the leader in the household affairs of her husband, and will be held accountable for the household affairs. A servant is a leader in the affairs of his master's property, and will be held accountable for the affairs of his responsibility."
(HR. Al-Bukhari No. 844 dan Muslim No. 1829).

In this case, it is also necessary to look at the legal principles regarding the responsibility for child support costs after a divorce in the Presidential Instruction of the Republic of Indonesia No. 1 of 1991 concerning the Compilation of Islamic Law.

Article 105	<p>In the event of a divorce:</p> <ol style="list-style-type: none"> 1. "Care for children who are not yet mumayyiz or not yet 12 years old is the right of the mother". 2. "Maintenance of a child who has mumayyiz is left to the child to choose between his father or mother as the holder of the right of maintenance". 3. "The cost of maintenance is borne by the father".
Article 149 letter d	<p>If the marriage breaks up due to divorce, then the ex-husband is obliged to provide hadhanah fees for his children who have not reached the age of 21 years.</p>

Article 156	<p>The consequences of breaking up a marriage due to divorce are:</p> <ol style="list-style-type: none">1. <i>“A child who has not been mumayyiz has the right to receive hadhanah from his mother, unless his mother has died”, then his position is replaced by:</i><ol style="list-style-type: none">a. <i>a. women in a straight line upward from the mother;</i>b. <i>b. father;</i>c. <i>c. women in a straight line upward from the father;</i>d. <i>d. the sister of the child concerned;</i>e. <i>e. women who are blood relatives according to the maternal side;</i>f. <i>f. women who are blood relatives according to the side line from the father.</i>2. <i>“Children who are mumayyiz have the right to choose to get hadhanah from their father or mother”; If the hadhanah holder turns out to be unable to guarantee the physical and spiritual safety of the child, even though the cost of living and hadhanah has been fulfilled, then at the request of the relative concerned, the Religious Court may transfer the hadhanah right to another relative who has the hadhanah right too.</i>3. <i>“All hadhanah costs and child support are borne by the father according to his ability, at least until the child is an adult and can take care of himself (21 years old)</i>4. <i>“In the event of a dispute regarding hadhanah and child support, the Religious Court shall give its decision based on letters (a), (b), (c), and (d)”.</i>5. <i>“The court may also by considering the ability of the father to determine the amount of costs for the maintenance and education of children who do not participate in him”.</i>
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If the above-mentioned provisions are considered, then the legal principle that regulates the child’s living expenses after a divorce essentially imposes that obligation on the male parent (father). If in the family the parents are kind, harmonious and loving, then the child will get a positive element of his personality and if the parents are religious and obedient in carrying out

religion in everyday life, then the child will get religious experience which is an element in his personality.

The responsibility of parents for the welfare of children includes the obligation to maintain and educate children in such a way, so that children can grow and develop into intelligent, healthy people, devoted to their parents, have noble character, fear God Almighty and are willing, and have the ability to continue the ideals of the nation based on Pancasila. Child care also implies a parent's responsibility to supervise, provide appropriate services and meet the needs of the child's life from his parents, the obligation to take care of the child is permanent until the child is able to stand alone.

CONCLUSION

From the description that has been put forward in the analysis above, some conclusions can be drawn as follows:

That the custody of a minor (before mumayyiz/before the age of 12) due to the divorce of his parents is given to his mother, this is as regulated in Article 105 of the Compilation of Islamic Law. However, although Article 105 of the Compilation of Islamic Law explains that a child who has not mumayyiz is the right of the mother, it does not mean that the father has no right in the child's growth and development.

That the responsibility of parents to minors (before mumayyiz/before the age of 12 years) in providing a living for their children after divorce according to Islamic law becomes the obligation of the male parent (father), this is as regulated in Article 49 letter d and Article 156 Compilation of Islamic Law.

The suggestions that can be given by the author based on the conclusions are as follows:

The male parent (father) should still be responsible for providing the child's living expenses even after the divorce, considering that the child's income is to support the child's life until he is an adult and because it is a lineage from his father.

Divorced parents should not prioritize selfish attitudes, so that they are negligent in carrying out their obligations to care for and provide for their children, considering that children are their descendants and are a mandate from Allah SWT given to parents. If parents ignore their responsibilities towards their children, it means the same as ignoring the mandate of Allah SWT.

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