

Child Custody in Divorce: A Review of Islamic Law Against Modern Court Practice

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ABSTRACT

This study also aims to evaluate the extent to which Islamic law can be applied or accommodated in the modern justice system in Indonesia. The method used is a normative legal approach, with a literature review of legal sources, such as Islamic legal texts, court decisions, and Indonesian laws and regulations relating to child custody. The main data were obtained from books, journals, scientific articles, and relevant court decisions. Data analysis was carried out by examining the application of Islamic legal principles related to child custody in modern court practices in Indonesia. This study also uses comparative analysis to compare Islamic legal principles with Indonesian positive law. The results of the study show that although Islamic law provides clear principles regarding child custody, modern court practices are often not fully in accordance with these principles. The courts prioritize positive law, although the welfare of the child remains the main consideration. Therefore, harmonization between Islamic law and positive law is needed so that court decisions are fairer and in accordance with the values of Muslim society. This study emphasizes the importance of integrating Islamic legal principles into the Indonesian justice system to ensure decisions that are in the best interests of the child.

INTRODUCTION

Marriage in Islam is based on the principle of permanence, which means that marriage is expected to last a lifetime and be full of affection and commitment. However, in the practice of household life, there are often incompatibilities between husband and wife. This incompatibility can be caused by various factors, such as differences in views, habits, or communication problems (Zaelani, AQ 2022). If this

incompatibility is allowed to drag on without any attempt to resolve it, it can have a negative impact on both parties and the family as a whole. These negative impacts can be in the form of stress, emotional tension, and even more serious conflicts. In addition, unresolved incompatibilities can also make it difficult to achieve a life of *sakinah* (calm), *mawaddah* (full of love), and *rahmah* (full of affection), which are the main goals of marriage in Islam (Situmorang, PA 2019).

Therefore, it is important for couples to try to resolve existing incompatibilities in a good and wise manner. This can be done through open communication, mutual understanding, and efforts to find solutions together. If necessary, couples can also seek help from third parties, such as marriage counselors or religious figures, to help resolve existing problems. Thus, it is hoped that the marriage can remain lasting and harmonious in accordance with Islamic principles. To overcome these negative impacts, Islam provides a final solution through divorce or *talaq*. *Talaq* is a method used to end a marriage when all efforts to resolve the conflict have failed (Sarkowi, et al. 2022). The legal basis for *talaq* is found in several surahs of the Qur'an, which provide guidance on the procedures and ethics of divorce. By following this guide, it is hoped that the divorce process can be carried out fairly and wisely, and consider the interests of all parties involved. The legal basis for *talaq* is stated in the verse of the Qur'an, Surah *Talaq* verse 1:

يَا أَيُّهَا النَّبِيُّ إِذَا طَلَّقْتُمُ النِّسَاءَ فَطَلِّقُوهُنَّ لِعَدَّتِهِنَّ وَأَحْصُوا الْعِدَّةَ وَاتَّقُوا اللَّهَ رَبَّكُمْ لَا تُخْرِجُوهُنَّ مِنْ بُيُوتِهِنَّ وَلَا يَخْرُجْنَ إِلَّا أَنْ يَأْتِيَنَّ بِفَاحِشَةٍ مُبَيِّنَةٍ وَتِلْكَ حُدُودُ اللَّهِ وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَقَدْ ظَلَمَ نَفْسَهُ لَا تَدْرِي لَعَلَّ اللَّهَ يُحْدِثُ بَعْدَ ذَلِكَ أَمْرًا

Artinya: Wahai Nabi, apabila kamu menceraikan istri-istrimu, hendaklah kamu ceraikan mereka pada waktu mereka dapat (menghadapi) idahnya (yang wajar), dan hitunglah waktu idah itu, serta bertakwalah kepada Allah Tuhanmu. Janganlah kamu keluarkan mereka dari rumahnya dan janganlah (diizinkan) keluar kecuali jika mereka mengerjakan perbuatan keji yang jelas. Itulah hukum-hukum Allah. Siapa melanggar hukum-hukum Allah, maka sungguh, dia telah berbuat zalim terhadap dirinya sendiri. Kamu tidak mengetahui boleh jadi setelah itu Allah mengadakan suatu ketentuan yang baru.

Divorce in a family is not an easy decision, especially when it involves children who still need attention and affection from both parents (Ariani, AI 2019). In a situation like this, it is important for both parents to maintain good communication and provide emotional support to the children. Parents should try to remain present in their children's lives, even though they no longer live together. This can be done by setting regular visitation times, participating in children's school and extracurricular activities, and maintaining a positive relationship with their ex-partner for the sake of the children (Astuti, 2020). In addition, parents also need to provide honest and age-appropriate explanations about the situation. Children need to feel safe and know that they are still loved by both of their parents, even though their family is changing. Support from extended family, friends, and professionals such as counselors or psychologists can also help children and parents deal with the divorce process. With the right approach, it is

hoped that children can adjust to these changes and still feel loved and supported by both of their parents. One of the most critical issues in divorce is the issue of child custody (Subagia, IN 2021). In Indonesia, legal practices in resolving child custody disputes have developed along with the increasingly modern judicial system. However, are these practices in line with the principles of Islamic law that prioritize child welfare as the basis for decision making? In Islamic law, child custody is known as "hadanah", which is regulated in various fiqh books. However, decisions regarding child custody often involve subjective considerations from the court, which may differ from the Islamic legal approach that emphasizes child protection (Fauzan, A., & Hamzah, M. 2024).

In Islamic law, child custody after divorce is known as hadhanah. Hadhanah is the right and obligation to care for, educate, and protect children who have not reached adulthood. The main principle in hadhanah is the best interests of the child, which must be the main priority in every decision taken by the court (Berliana, H. 2021). This condition is further complicated considering that in practice, modern courts in Indonesia mostly follow positive legal procedures regulated in the Civil Code (KUHPer) and other applicable laws, which sometimes conflict with the principles of Islamic law. On the other hand, there is an assumption that in many cases, courts tend to prioritize decisions based on fulfilling the rights of parents to have custody of children, rather than focusing on the best interests of the child. Therefore, it is important to conduct a more in-depth study of the implementation of Islamic law on child custody in divorce and its comparison with modern court practices in Indonesia (Darmalaksana, W. 2022).

Talking about legal certainty, legal certainty is a provision of norms that must be clear to the holder of hadhanah. In this context, hadhanah refers to child custody after divorce. Legal certainty is very important to ensure that child custody is regulated clearly and fairly (Febriyani, F. 2024). Disputes about hadhanah must pay attention to the provisions of Article 41 of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage and Article 156 of the Compilation of Islamic Law. Article 41 of Law No. 16 of 2019 regulates the rights and obligations of parents towards children after divorce, including child custody. Meanwhile, Article 156 of the Compilation of Islamic Law provides further guidance on hadhanah in the context of Islamic law (Muizzudin, AH, & Anwar, MW 2023).

The determination of hadhanah must always look at the best interests of the child, not the interests of the father or mother. This means that decisions regarding child custody must be based on what is best for the child's welfare and development, including emotional needs, education, and a stable environment (Efendi, Z. 2020). Thus, legal certainty in determining hadhanah can help ensure that children involved in divorce get the support and protection they need to grow and develop properly.

The importance of this study is also inseparable from the increasing number of divorce cases filed in court, involving child custody, both in urban and rural communities (Litehua, A. 2020). This study is important because child custody is one of the most sensitive and complex aspects of the divorce process. Decisions regarding child custody can have a major impact on the welfare and development of children. Therefore, it is important to understand how courts decide child custody and what factors are considered in the process (Anam, MA, & Farida, YE 2023). In addition, this study can also help identify gaps and challenges in the existing legal system, as well as provide recommendations for improvement. Thus, this study is not only useful for legal practitioners, but also for the wider community who may face similar situations. This

requires law enforcers to be able to fairly and wisely decide child custody cases, considering that the consequences of these decisions will have a long-term impact on the child's development in the future. Law enforcers must ensure that the decisions taken truly prioritize the best interests of the child. This includes listening to the child's views, if possible, and considering the ability of both parents to provide the necessary care and support. In addition, law enforcement must also consider factors such as a history of domestic violence, financial stability, and support from the extended family (Hasanah, CA 2025).

In previous studies, it was explained that the fulfillment of children's rights must be considered properly, both in situations of intact husband and wife relationships and after divorce. There are consequences for parents who are negligent in carrying out hadhanah obligations, namely the revocation of parental control rights over the child (Triyanita, LS, & Prananingtyas, P. 2023).

. With a fair and wise approach, law enforcement can help create a safe and supportive environment for children, so that they can grow and develop well even though their parents are divorced. The right decision in a child custody case can have a long-term positive impact on the child's future development. The right decision in a child custody case can have a long-term positive impact on the child's future development (Holid, M. 2024). In addition, the phenomenon of globalization also influences the family law system, including Islamic law and court practices. In the context of Indonesian law, especially in divorce cases, the approach taken by the court may be more influenced by positive law and developing international standards. This is where it is important to understand how Islamic law can play a role in providing clear guidance in determining child custody, especially to ensure that the principle of child protection remains a top priority in every decision taken by the court (Azizul Hakim, A. 2024).

This research is also very relevant considering the rampant debate on the separation between religious norms and state law in family arrangements. In this case, child custody in divorce is the main focus, which is often seen as a gray area between Islamic law and state law. Therefore, this research focuses on how Islamic law provides guidance in deciding child custody cases, and how it is implemented in the modern justice system that applies in Indonesia.

METHODOLOGY

This study uses a normative legal approach, where the data used is a literature review from various legal sources, such as Islamic legal texts, court decisions, and laws and regulations in force in Indonesia related to child custody in divorce (Kulsum, SSU 2024). This method aims to examine existing legal norms and relate them to the implementation of legal practices in court. In the context of this study, the main data sources were obtained from books, journals, scientific articles, and relevant court decisions. In data analysis, the author will examine how the principles of Islamic law related to child custody are applied in modern court practice (Tripa, S. 2019). This is done by mapping the regulations and fatwas that regulate child custody according to Islam, and comparing them with existing court practices, both at the religious court and district court levels. In addition, this analysis also pays attention to normative and practical aspects in the application of Islamic law in Indonesia, which is often faced with the reality of positive law and the challenges of the modern justice system. This research method also uses comparative analysis techniques, namely comparing the

principles of Islamic law with the rules of positive Indonesian law relating to child custody. This study aims to explore the differences and similarities between the two, and to evaluate the extent to which Islamic law can be applied or accommodated in the modern justice system in Indonesia.

RESULTS AND DISCUSSION

1. The Concept of Child Custody in Islamic Law

a. Definition of hadhanah

Hadhanah is a term in Islamic law that refers to the rights and obligations to care for, educate and protect children who have not yet reached adulthood. Hadhanah covers various aspects of child care, including physical, emotional, and educational needs. The main principle in hadhanah is the best interests of the child, which must be the main priority in every decision taken by the court or parents (Puspitasari, et al. 2024). In the context of divorce, hadhanah is usually given to the mother, especially if the child is under 12 years old (not yet mumayyiz). However, if there are strong reasons, such as the mother's inability to care for the child or moral and health reasons, the right to hadhanah can be given to the father or other eligible relatives. After the child reaches mumayyiz age, the child is given the freedom to choose to live with his father or mother (Berliana, H. 2021). Hadhanah aims to ensure that children get the care and support they need to grow and develop well, even if their parents divorce. Thus, hadhanah is an important concept in Islamic law which emphasizes the protection and welfare of children (Furqon, M. 2024).

b. Basic principles of hadhanah in the Qur'an and Hadith

The basic principles of hadhanah in the Qur'an and Hadith emphasize the importance of caring for, educating and protecting children. The main principle in hadhanah is to ensure the best interests of the child. All decisions taken must be based on what is best for the child's welfare and development (Febriyani, F. 2024). The Qur'an and Hadith emphasize that parents have an obligation to care for and educate their children, including providing the love, education and protection necessary for them to grow and develop well. In many cases, hadhanah rights are given to the mother, especially if the child is under 12 years old (not yet mumayyiz), because mothers have an important role in the care and education of children at an early age (Anwar, MRI, & Yuni, LA 2024) . The principles of justice and balance are also very important in hadhanah, which means that the rights and obligations of parents must be regulated fairly, and decisions regarding hadhanah must consider the balance between the rights of the mother and father. The Qur'an and Hadith also emphasize the importance of protecting children from all forms of harm, including violence and neglect (Mustaring, RB 2023). Parents and communities have a responsibility to ensure that children grow up in a safe and supportive environment. Principles Consultation and deliberation are also recommended in decision-making regarding hadhanah, which means that parents and related parties must discuss and find the best solution together for the sake of the child. By following these principles, it is hoped that hadhanah can be implemented fairly and wisely, and ensure that children get the care and support they need to grow and develop properly in accordance with Islamic teachings. verses of the Qur'an or surahs and hadiths that explain (Noprita, A. 2023).

The following are several verses from the Qur'an and Hadith that explain hadhanah and child custody:

1. Surah Al-Baqarah (2:233):

وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُتِمَّ الرَّضَاعَةَ ۗ وَعَلَى الْمَوْلُودِ لَهُ ۖ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ ۚ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا ۚ لَا تُضَارَّ وَالِدَةٌ بِوَلَدِهَا وَلَا مَوْلُودٌ لَهُ بِوَالِدِهِ ۚ وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ ۚ فَإِنْ أَرَادَا فِصَالًا عَنْ تَرَاضٍ مِنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا ۚ وَإِنْ أَرَدْتُمْ أَنْ تَسْتَرْضِعُوا أَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا اتَّيْتُمْ بِالْمَعْرُوفِ ۚ وَاتَّقُوا اللَّهَ ۚ وَعَلِمُوا أَنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ ﴿٢٣٣﴾

Artinya: Ibu-ibu hendaklah menyusui anak-anaknya selama dua tahun penuh, bagi yang ingin menyempurnakan penyusuan. Kewajiban ayah menanggung makan dan pakaian mereka dengan cara yang patut. Seseorang tidak dibebani, kecuali sesuai dengan kemampuannya. Janganlah seorang ibu dibuat menderita karena anaknya dan jangan pula ayahnya dibuat menderita karena anaknya. Ahli waris pun seperti itu pula. Apabila keduanya ingin menyapih (sebelum dua tahun) berdasarkan persetujuan dan musyawarah antara keduanya, tidak ada dosa atas keduanya. Apabila kamu ingin menyusukan anakmu (kepada orang lain), tidak ada dosa bagimu jika kamu memberikan pembayaran dengan cara yang patut. Bertakwalah kepada Allah dan ketahuilah bahwa sesungguhnya Allah Maha Melihat apa yang kamu kerjakan (Surah Al-Baqarah (2:233))

2. Surah At-Talaq (65:6):

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ وَلَا تُضَارُّوهُنَّ لِتُضَيِّقُوا عَلَيْهِنَّ وَإِنْ كُنَّ أُولِي حَمْلٍ فَأَنْفِقُوا عَلَيْهِنَّ حَتَّى يَضَعْنَ حَمْلَهُنَّ فَإِنْ أَرْضَعْنَ لَكُمْ فَانْتُوهُنَّ أَجُورَهُنَّ وَأُتْمِرُوا بَيْنَكُمْ بِمَعْرُوفٍ ۚ وَإِنْ تَعَاَسَرْتُمْ فاسترضعوا له الأخرى ﴿٦﴾

Artinya: Tempatkanlah mereka (para istri yang dicerai) di mana kamu bertempat tinggal menurut kemampuanmu dan janganlah kamu menyusahkan mereka untuk menyempitkan (hati) mereka. Jika mereka (para istri yang dicerai) itu sedang hamil, maka berikanlah kepada mereka nafkahnya sampai mereka melahirkan, kemudian jika mereka menyusukan (anak-anak)-mu maka berikanlah imbalannya kepada mereka; dan musyawarahkanlah di antara kamu (segala sesuatu) dengan baik; dan jika kamu sama-sama menemui kesulitan (dalam hal penyusuan), maka perempuan lain boleh menyusukan (anak itu) untuknya (Surah At-Talaq (65:6))

1. Hadith narrated by Abu Dawud:

كَفَى بِالْمَرْءِ إِثْمًا أَنْ يُضَيِّعَ مَنْ يَفُوتُ

Artinya: "Cukuplah seseorang itu berdosa jika ia menyalah-nyaiakan orang yang menjadi tanggungannya." (HR Abu Daud-Ibnu Hibban)

In Islamic law, child custody is basically intended to protect and ensure the welfare of children who are victims of divorce. Islamic law stipulates that child custody must be given to the parent who is considered most capable and worthy of educating and caring for the child, with the primary consideration being the child's best interests. In this case, the mother is usually considered the primary party in providing custody of young children, especially children under the age of seven, in accordance with the teachings of fiqh. However, this custody is not an absolute right and can change along with the growth and development of the child (Darmawan, 2024).

2. Islamic Legal Regulations on Child Custody

The Compilation of Islamic Law (KHI) is one of the sources of law used in Indonesia to regulate various aspects of the lives of Muslims, including child custody after divorce (Suryantoro, DD 2024). The following are some important provisions in the KHI regarding child custody:

- Article 105:
 1. The maintenance of children who are not yet mumayyiz (not yet 12 years old) is the mother's right.
 2. The maintenance of a child who has mumayyiz is handed over to the child to choose between the father or mother as the holder of maintenance rights.
 3. The cost of maintaining the child is borne by the father.
(Muizzudin, AH, & Anwar, MW 2023).

- Article 156:
 1. In the event of a divorce, the mother is the party who has the most right to care for children who are not yet mumayyiz, unless there is a strong reason not to do so.
 2. If the holder of hadhanah (custodial rights) cannot guarantee the physical and spiritual safety of the child, the court can transfer the rights of hadhanah to another entitled relative.
(Holid, M. 2024).

3. Comparison between Islamic legal principles and modern court practice

a. Principles of Islamic Law:

In Islamic law, the best interests of the child are the main principle in determining custody. This is reflected in various verses of the Qur'an and Hadith which emphasize the importance of caring for, educating and protecting children. Islamic law gives mothers the right to hadhanah for children who are not yet mumayyiz (not yet 12 years old). Once the child reaches mumayyiz age, the child is given the freedom to choose to live with his father or mother. Parents have an obligation to care for and

educate their children, including providing the love, education and protection necessary for them to grow and develop well. The principles of justice and balance are very important in hadhanah, which means that the rights and obligations of parents must be regulated fairly (Puspitasari, et al. 2024).

b. Modern Court Practice:

Modern courts have clear procedures for filing child custody claims, including filing a lawsuit, mediation, evidentiary hearings, and court decisions. Judges consider a variety of factors in deciding child custody, including the child's emotional and physical needs, the parent's ability to provide care, and a stable environment for the child. Modern courts often try to reconcile the two parties through mediation before proceeding to an evidentiary hearing. If one party does not comply with the court's decision, the injured party can file a petition for execution of the decision with the court (Zainal, 2023).

c. Comparison and Compatibility:

Both Islamic legal principles and modern court practice emphasize the best interests of the child as the primary priority in determining custody. Islamic law grants the mother the right to hadhanah for a child who is not yet mumayyiz, while modern courts consider a variety of factors in deciding custody, including the ability of the mother and father to care for the child. Both legal systems emphasize the obligation of parents to care for and educate their children. The principles of justice and balance are recognized in both legal systems, although the approaches and procedures may differ (Dewi, H. 2024).

Modern court practices in Indonesia, although based on positive legal principles, often consider more complex factors in determining child custody. Indonesian courts, both religious and district courts, usually prioritize fair custody division between the two parents, based on factors such as economic capacity, mental stability, and the parents' ability to provide good education and care for the child. However, in many cases, the courts are more inclined to grant custody to the mother, especially if the child is still young, which is more in line with Islamic legal customs (Riza, F., & Sibarani, FA 2021).

The fundamental difference between Islamic law and modern court practice regarding child custody lies in the subjective considerations held by each court. In Islamic law, the main principle that is used as a basis is child protection, which can lead to a decision on custody being given to the party who is more capable of providing good care. However, in modern courts, decisions regarding child custody tend to look more at the balance of the rights of both parents in gaining access to the child, which can sometimes ignore the best interests of the child itself (Nufus, H. 2021).

In some divorce cases in Indonesia, the decisions of religious courts and district courts can differ, depending on each judge's interpretation of the applicable positive law and the religious norms referred to. For example, although Islamic law gives custody of children to the mother, modern courts can transfer these rights to the father on the grounds that the father is considered more capable of providing a better life for the child. Decisions like this often cause controversy, especially if the child is still young and has a strong emotional bond with their mother.

In addition, the implementation of Islamic law in court practice in Indonesia also faces challenges related to judges' awareness of the importance of applying Islamic principles in child custody decisions. Some judges may prioritize the interpretation of positive law, while others strive to uphold religious norms in every decision they make. This is a challenge in itself in ensuring that court decisions continue to reflect the welfare of children as the main priority. The importance of harmonization between Islamic law and positive law in resolving child custody cases leads to the need for reform in the family court system in Indonesia. The existence of regulations that better accommodate the principles of justice, both in the context of Islamic law and positive law, is expected to produce fairer decisions that are in the best interests of children. In this context, education for judges about the importance of integration between religious norms and state law is vital.

CONCLUSION

Based on the results of the study, it can be concluded that although Islamic law provides clear principles regarding child custody, the implementation of modern court practices in Indonesia is often not fully in accordance with these principles. Courts tend to prioritize positive legal factors in determining child custody, although the welfare of the child remains the main consideration. This means that in many cases, court decisions are based more on generally applicable legal rules, without always considering the principles taught in Islamic law. In addition, this study shows that harmonization between Islamic law and positive law is urgently needed to ensure that court decisions not only accommodate parental rights, but also ensure that the best interests of the child remain the main focus in every decision taken. This harmonization is important because it can help reduce the inconsistency between the principles of Islamic law and modern court practices, so that the decisions taken are fairer and in accordance with the values adopted by the Muslim community in Indonesia. This study also highlights the importance of the Indonesian justice system to pay more attention to aspects of Islamic law in deciding child custody disputes. By considering the principles of Islamic law, it is hoped that court decisions can be more in favor of the best interests of the child and create better justice. Therefore, it is important for judges and legal practitioners to understand and integrate the principles of Islamic law in the decision-making process regarding child custody, in order to create a more harmonious and just justice system for all parties involved.

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