



Judge's Ruling On Child Custody Due To Divorce In Manado Religious Court, Indonesia

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Abstract

This study aims to analyze the basis for the judge's consideration by using "other rules" (read: *ijtihad*) in adjudicating case No. 183/Rev.G/2021/PA. Mdo and 258/Rev.G/2021/PA. Mdo about child custody in the Manado Religious Court, so the decision made really puts forward a sense of justice. The basis for the judge's consideration using *ijtihad* needs to be studied and analyzed in depth because in many cases, judges in deciding child custody cases tend to follow the provisions of the applicable laws and regulations in Indonesia, which are influenced by many legal positivism that views the nature of the law as positive norms in the legal system, namely by using the Compilation of Islamic Law, namely for children who are *mumayyiz* granted the right to choose custody and those who have not been *mumayyiz* are handed over to the mother. This research is a qualitative research with a descriptive approach, and is analyzed using comparative juridical analysis. This study found that the judge's form of *ijtihad* was to have dared to use child protection laws in child custody cases as a legal consideration. The judge's decision under the child protection law succeeded in quelling religious conflicts between two foster parents of different religions in the struggle for custody. The conclusion of this study proves that the judge in the Manado Religious Court has not merely become the mouthpiece of the law, but has become the inventor of the law. This fact can be seen from the two cases tried, which although they are the same case, but received different decisions from the panel of judges.

Keywords: *Ijtihad* Hakim, Child Custody, *Hadhanah*, Child Protection Law, Compilation of Islamic Law, Religious Courts

INTRODUCTION

Divorce cases processed in the Indonesian Religious Court are still rife. Based on data from the Central Statistics Agency (BPS) in 2022 Indonesian Statistics, in 2021 there were 447,743 divorce cases. This figure jumped when compared to the previous five years, where there were 291,677 divorces recorded in 2016. While divorce cases in the context of this study, there were

377 divorce cases in the Manado Religious Court in 2021. Although this data only covers divorces that occur in Muslims, it can be seen that divorce cases in Indonesia are quite high.¹²³

As a result of parental divorce, the most vulnerable parties to neglect are children, they are also often overlooked by the legal process of divorce cases in court. In fact, previous studies have said that children born to parental divorce encounter various problems, especially mental health problems such as depression, anxiety, suicide attempts, suicidal ideation, and distress, as well as consuming alcohol, smoking, and drugs can be estimated. In that context, early studies suggest there needs to be a proper parenting program for children post-divorce. Sandler et al exemplify⁴⁵⁶⁷ the New Beginnings Program-Dads (NBP-Dads) to improve positive interactions with children, improve father-child communication, use effective disciplinary strategies, and skills to protect children from exposure to conflicts between parents.⁸

In many cases, the divorce of parents in court raises various legal problems in the possession of the child, for example about the holder of the right of care, and the rights that the child must receive from his parents. In this context, the panel of judges is obliged to examine and adjudicate every part of the parties' lawsuit, including the demands for the right of control of the child in court. This indicates that judges in court play an important role in determining the parties who are the holders of childcare rights and ensuring that children's rights are acceptable.⁹¹⁰¹¹

In Indonesia, childcare rights have been regulated in applicable laws and regulations. The Religious Court is one of the perpetrators of judicial power for the people seeking justice who are Muslims regarding certain cases as referred to in Law No. 50/2009 concerning the Second Amendment to Law No. 7/1989 concerning Religious Justice. Judicial Power within the Religious Court is exercised by the Religious Court and the High Religious Court culminating in the Supreme Court of the Republic of Indonesia as the Highest State Court.¹²¹³

In Article 49 of the Marriage Law No. 7/1989 as amended by Law No. 3/2006 and the Second Amendment to Law No. 50/2009 on Religious Justice, it is stated that the Religious Court has the duty and authority to examine, decide and resolve cases in the first instance between people who are Muslims in the fields of marriage, inheritance, wills, grants, waqf, zakat, infak, almsgiving, and sharia economy. Article 49 also explains that what is meant by "marriage" is

¹ Bps National, "Number Divorce in Indonesia (2017-2021)," <https://www.bps.go.id/publication/2022/02/25/0a2afea4fab72a5d052cb315/statistik-indonesia-2022.html>

² Bps National, "Sum Marriage, Talak and Divorce, and Cf. (Spouse Marriage) 2014-2016," <https://www.bps.go.id/indicator/27/176/4/jumlah-nikah-talak-dan-cerai-serta-rujuk.html>

³ Bps Province North Sulawesi, "Marriage and Divorce According to Regency/City 2019-2021," <https://sulut.bps.go.id/indicator/12/606/1/jumlah-nikah-talak-dan-cerai.html>

⁴ Jennie E. Brand, Ravaris Moore, Xi Song, and Yu Xie, "Why Does Parental Divorce Lower Children's Educational Attainment? A Causal Mediation Analysis," *Sociological Science* Vol. 5, No. 4 (April 2019): 264-292 // Doi: 10.15195/v6.a11.

⁵ Joyanna Silberg and Stephanie Dallam, "Abusers gaining custody in family courts: A case series of overturned decisions," *Journal of Child Custody* Vol. 16, No. 2 (July 2019): 140-169 // Doi: 10.1080/15379418.2019.1613204.

⁶ Brian D'Onofrio and Robert Emery, "Parental Divorce or Separation and Children's Mental Health," *World Psychiatry* Vol. 18, No. 1 (2019): 100-101 // 10.1002/wps.20590.

⁷ Felicity AuerspergThomas VlasakIvo Ponocny, and Alfred Barthd, "Long-term effects of parental divorce on mental health – A meta-analysis," *Journal of Psychiatric Research* Vol. 119 (December 2019): 107-115 // 10.1016/j.jpsychires.2019.09.011.

⁸ Irwin Sandler, Heather Gunn, Gina Mazza, Jenn-Yun Tein, Sharlene WolchikCady Berkel, Sarah Jones, and Michele Porter, "Effects of a Program to Promote High Quality Parenting by Divorced and Separated Fathers," *Prevention Science* Vol. 19, No. 4 (May 2018): 538-548 // 10.1007/s11121-017-0841-x.

⁹ Yulia Artemyeva, Natalya IvanovskayaValentina Koncheva and Elena Sitkareva, "Current Problems of Concluding an Agreement on the Alimony Payment for Minors in Russia," *Journal of Advanced Research in Law and Economics* Vol. 9, No. 3(33) (2018): 859-869 // 10.14505/jarle.v9.3(33).08.

¹⁰ Bahiyah Ahmad Raihanah H. Azahari, Asthma A. Rahman, and Mazni A. Wahab, "Assessing the Rate of Child Maintenance (Financial Support) from a Shariah Perspective: The case of Malaysia," *Al-Jami'ah: Journal of Islamic Studies* Vol. 58, No. 2 (2020): 293-322 // 10.14421/ajis.2020.582.293-322.

¹¹ H. Abdul Manan, *Application Procedural Law Civil at Judicial Religion* (Jakarta: Gold, 2005), 424.

¹² Musthofa, Thohir Luth, Abdul Rachmad Budiono, and Muhammad Ridwan, "Dualism of Authority on Divorce Registration," *Journal of Law, Policy and Globalization* 39 (2015): 152-164.

¹³ Nadirsyah Hosen, "The Constitutional Court and 'Islamic' Judges in Indonesia," *Australian Journal of Asian Law* Vol. 16, No. 2 (2016): 161-171.

things that are regulated in one or based on the applicable law on marriage, which is carried out according to sharia, including the control of children (child custody lawsuit).¹⁴

However, in the provisions of Indonesian legislation, there are no strict conditions for carrying out hadhanah, namely efforts to provide protection and maintenance to young children until they grow up, but rather look at the responsibilities and obligations of a mother and father to their children both in marital bonds and after divorce. Due to the absence of such provisions, it does not provide explicit arrangements regarding the criteria as a babysitter. It can be seen in Article 41 of the Marriage Law No. 1/1974 on Marriage that as a result of the breakup of the marriage due to divorce: (a) Both the mother and the father are still obliged to maintain and educate their children, solely based on the interests of the child; whenever there is a dispute over the possession of the children, the court gives its decision; (b) The father is responsible for all the costs of the child's maintenance and education; whenever the father is in reality unable to fulfill the obligation, the court may determine that the mother bears the costs.

From the above provisions, it shows that there is no article regulating the custody of the child after divorce is granted to the mother or father. The determination of post-divorce child custody can be seen in detail in the Compilation of Islamic Law (KHI) Article 105, it is explained that in the event of a divorce: (a) The maintenance of a child who has not been¹⁵ mumayyiz or is not yet 12 years old is the right of the mother; (b) The maintenance of a child who has been mumayyiz is handed over to the child to choose between his father or mother as the holder of his right of maintenance; (c) the cost of maintenance is borne by his father.

Based on serious readings and analysis of relevant literature and previous research, studies of child custody decisions resolved in religious courts as well as studies of judges' considerations in deciding child custody claims have been conducted by many scholars and early researchers from a variety of different perspectives. Nurlaelawati is one of the scholars who focused her studies on the experiences of Muslim women in the Indonesian Religious Court in obtaining child custody from a gender equality perspective. Her research goes from the fact that there are many mothers who have lost custody as complained by the Indonesian Child Protection Agency. Nurlaelawati said the issue of gender equality in the division of rights between men and women is relevant to the issue of guardianship, further concluding that although various legal efforts have been made to protect women's rights, there are still many who cannot obtain rights after divorce, including custody as stipulated in the law. Another only with Nurlaelawati looking at from the perspective of gender equality, Gallala-Arndt's study of the impact of religion on child custody disputes in Muslim jurisdictions and in other jurisdictions featuring Muslim minorities in the Middle East and the Southeast Asian region. More specifically, it examines the restrictions on custody of non-Muslim mothers in interfaith custody disputes. Gallala-Arndt's analysis leads to the conclusion that non-Muslim maternal custody is limited in substance and time. Furthermore, by comparing and exploring how this issue is handled in two Western jurisdictions, the United States and Germany. The article suggests that religious freedom be reviewed in Muslim jurisdictions and that religious education be reformed to allow for more open-mindedness to change perceptions of the best interests of children in Muslim society. The goal is that religious believers are based on freedom of choice, thus allowing the best interests of the child to be determined without the understanding that the child adheres to a particular religion, in this case Islam.¹⁶¹⁷

Another study on childcare was conducted by Wahyudi. He focused on four religious court rulings on the legal status of children, particularly child inheritance, after a Constitutional Court ruling on the legal status of children out of wedlock that sparked controversy over the lack of explanation for the term 'civil law relationship with biological father'. Using the approach of legal philosophy, both in law and Islamic law, with a focus on legal reasoning used by judges in decisions regarding the inheritance rights of children, it is found that there are two types of legal

¹⁴ Alfitri, "Legal Reform Project, Access to Justice and Gender Equity in Indonesia," *Indonesian Journal of International Law* Vol. 9, No. 2 (January 2012): 292-308 // DOI: 10.17304/ijil.vol9.2.348.

¹⁵ Court Regal RI, Instructions President Number 1 Year 1991 Compilation Islamic Law (Jakarta: Director General Body Judicial Religion, 2015), 55.

¹⁶ Euis Nurlaelawati, "The legal fate of Indonesian Muslim Women in Court: Divorce and Child Custody": 353-368; in: Tim Lindsey and Helen PausackerEds. *Religion, Law and Intolerance in Indonesia* (London: Routledge, 2016).

¹⁷ Imen Gallala-Arndt, "The Impact of Religion in Interreligious Custody Disputes: Middle Eastern and Southeast Asian Approaches," *The American Journal of Comparative Law* Vol. 63, No. 4 (October 2015): 829-858 // 10.5131/AJCL.2015.0025

reasoning used by judges, namely doctrinal-deductive-based legal reasoning and *maslahah*. Wahyudi argues that the use of doctrinal-deductive legal reasoning by judges has not benefited the child whereas *maslahah*-based legal reasoning by judges has led to better protection of the rights of the child.¹⁸

From the various studies above, on the one hand, it shows that there are many problems in child custody decisions that are resolved in court. On the other hand, the study of the judge's *ijtihad* in deciding child custody cases has not been seen or escaped previous studies. On that basis, the purpose of this article is to analyze the basis for the judge's consideration by using the *ijtihad* method in deciding two cases, namely case Number: 183/Rev.G/2021/PA. Mdo and 258/Rev.G/2021/PA. Mdo on child custody in the Manado Religious Court. We assume that some provisional recommendations can be drawn from juridical analysis and the basis of judges' consideration using the *ijtihad* method in making decisions. The judge's *ijtihad* can be said to be "another rule" in making decisions that provide a sense of justice in the issue of custody of unborn children.

The article is based on comparative juridical analysis, and uses qualitative methods with a descriptive approach. This contribution is addressed to interested Religious Court professionals, judges, and scholars in the humanities and social sciences.

In general, the discussion of this article is organized into five parts. First, describe the child custody lawsuit case Number: 183/Rev.G/2021/PA. Mdo and Number: 258/Rev.G/2021/PA. Mdo to find out the context or sitting of the case that is one of the focuses of the discussion in this article.

Second, presenting the basic theories and concepts of judges' considerations that are commonly used in deciding cases. The basis of the judge's consideration of philosophical, juridical, and sociological aspects is presented. This is important as a basis for analysis to find out the basis for the judge's consideration in deciding the two child custody lawsuit cases filed by the plaintiffs. Third, explain the concept of child custody (*hadhanah*) in a theoretical and legal perspective. Theoretical explanations related to child rights, child custody, childcare due to divorce, and childcare from a positive legal perspective in Indonesia, are all available in this section.

Fourth, reveal the judge's considerations in deciding two cases regarding child custody at the Manado Religious Court, namely case Number: 183/Pdt.G/2021/PA. Mdo and Number: 258/Rev.G/2021/PA. Mdo.

In the fifth section, presents a juridical analysis related to the judge's consideration in the case of a child custody lawsuit.

RESULTS AND DISCUSSION

DESCRIPTION OF THE CHILD CUSTODY LAWSUIT CASE IN THE MANADO RELIGIOUS COURT

In summary, there are two cases of child custody lawsuits in the Manado Religious Court that are the focus of this research, namely case Number 183/Pdt.G/2021/PA. Mdo and No. 258/Rev.G/2021/PA. Mdo. The two sittings of the case are described as follows:

First, case No. 183/Rev.G/2021/PA. Mdo. This child custody lawsuit case was filed by the Plaintiff (father) who had divorced his wife in May 2015 officially at the Manado Religious Court. While in marriage, the plaintiff and his wife were blessed with 2 children. The first child is a 12-year-old boy (already *mumayyiz*), while the second child is a 10-year-old girl (not yet *mumayyiz*). After the divorce, the two children were taken care of by the plaintiff's ex-wife. The plaintiff's ex-wife was a convert. After the divorce, the plaintiff's ex-wife had returned to her native religion (Protestant Christianity), and invited her two children to be baptized. The plaintiff's two children, who were originally born Islamic, later followed his ex-wife's religion, which was Protestant Christianity. In December 2020, the plaintiff's ex-wife passed away and the plaintiff's two children were taken care of by the deceased's mother (defendant) who was non-Muslim. The plaintiff was about to pick up his two children at the defendant's residence, but the defendant did not want to hand over, and even seemed to want to separate the plaintiff from his children. This is what underlies the plaintiff to file a child custody lawsuit at the Manado Religious Court.

¹⁸ Mohammed I. Wahyudi, "Judges' Legal Reasoning on Child Protection: Analysis of Religious Courts' Decisions on the Case of Child Parentage," *Al-Jami'ah: Journal of Islamic Studies* Vol. 55, No. 1 (2017): 127-154 // 10.14421/ajis.2017.55.1.127-154.

Second, case No. 258/Rev.G/2021/PA. Mdo. This child custody lawsuit case was filed by the father (plaintiff) against his ex-wife (defendant). The plaintiff and defendant have officially divorced at the Manado Religious Court in June 2021. During the marriage, the plaintiff and defendant were blessed with 1 child aged 4 years (not yet mumayyiz). After the divorce the child was taken care of and lived with the defendant. The reason the plaintiff applied for custody of the child was because the defendant placed the child in the house of the defendant's parents which was small in size and lived in or occupied by approximately 10 family members. This condition causes the child's lifestyle to become irregular, even to the point of falling ill. In addition, there were defendants' actions/bad faith that limited the plaintiff's relationship with his child. The defendant's actions are very detrimental to the plaintiff's right to jointly establish a sense of comfort between a father and son, and even the defendant's actions can have a bad impact on the child's future psychic and mental development process. This is what underlies the plaintiff to file a child custody lawsuit at the Manado Religious Court.

BASIC THEORIES AND CONCEPTS OF JUDGES' CONSIDERATIONS IN DECIDING CASES

Consideration is the basis of the decision, which contains the reasons of the judge as a form of accountability to the community, therefore it must have objective value. Considerations in civil judgments are divided into two, namely consideration of sitting cases and considerations of law. The consideration of sitting a case is to describe briefly but clearly the chronology of sitting the case, starting from the attempted peace (mediation), the arguments of the lawsuit / application, the answers of the defendant, replies, duplication of evidence and witnesses, as well as the conclusions of the parties. In the case of child custody, a local examination (¹⁹20Descente) is carried out to see the condition of the child's living environment. On the consideration of the sitting of the case describes how the judge in constating the arguments or events put forward by the parties. Meanwhile, legal considerations are related to the description of how the judge in multiplying facts or events, the judge's assessment of the facts submitted by the plaintiff and defendant, and contains the legal basis used by the judge in assessing the facts and deciding the case, both written and unwritten law.²¹

The legal basis used by religious court judges in deciding cases is state legislation and shari'a law'. State legislation is arranged according to the order of degree by taking into account the principles, types, and hierarchy of laws and regulations, while the legal basis of shari'a' is taken from the Qur'an, hadith, and ²²qaul fuqaha', which are translated into legal language.²³

The Supreme Court of the Republic of Indonesia as the highest body implementing judicial power in charge of religious justice has determined that judges' decisions must consider juridical, philosophical, and sociological aspects, so that the justice to be achieved, realized and accounted for in judges' decisions is justice oriented towards legal justice, moral justice, and community justice. The juridical aspect is the first and foremost aspect by relying on the applicable law. The philosophical aspect is the aspect that is intrinsic to truth and justice. According to John Rawls, justice is as the main virtue in social institutions as is truth in the system of thought. While the sociological aspect is to consider the cultural values that live in society. The application of philosophical and sociological aspects, requires a great deal of experience and knowledge and wisdom capable of following the values in a neglected society. Obviously its application is very difficult because it is not tied to the system. The inclusion of these three elements is nothing but so that the verdict is considered fair and accepted by the community.²⁴²⁵

In making a decision, the judge must contain an *idée des recht*, which includes justice (*gerechtigheit*), legal certainty (*rechtsicherheit*), and expediency (*zwechtmassigkeit*). All three elements must be applied proportionally. But in judicial practice, it is very difficult for judges to accommodate all three principles in a single ruling. If it is likened to a line, the judge in examining

¹⁹ Bambang Sugeng and Sujayadi, *Procedural Law Civil and Document Litigation Case Civil* (Jakarta: Gold, 2011), 12.

²⁰ Sudikno Mertokusumo, *Law Amanner Perdata Indonesian* (Yogyakarta: Liberty, 2009), 223.

²¹ A. Mukti Arto, *Practice Case Civil at Court Religion* (Yogyakarta: Pustaka Student, 2011), 263-264.

²² Roihan A. Rasyid, *Procedural Law Judicial Ammonia* (Jakarta: PT. Grafindo Persada, 1995), 207.

²³ Peter Mahmud Marzuki, *Research Law* (Jakarta: Gold Prenada Media Group, 2010), 97.

²⁴ John Rawls, "A Theory of Justice": 229-234; in: Harry J. Gensler, Earl W. Spurgin, James Swindal Eds. *Ethics - Contemporary Readings* (London: Routledge, 2003).

²⁵ Ahmad Rifai, *Discovery By the Judge Deep Perspective Law Progressive* (Jakarta: Light Grafika, 2010), 126-127.

and deciding a case is between two boundary points in the line, which stand at the point of justice and legal certainty, while the point of expediency is between the two. The emphasis on legal certainty, tends to maintain the norms of written law rather than positive law, while the emphasis on the principle of justice, means that judges must consider the laws that live in society, which consist of customs and unwritten legal provisions. The nature of Christman's justice is divided into three types, namely the theory of retributive, corrective and distributive justice. However, in general, the theory of justice is divided into two kinds, namely the theory of retributive and distributive justice. Retributive justice is justice related to the occurrence of wrongdoing. Distributive justice, that is, justice related to the distribution of²⁶²⁷ benefits and burdens. In distributive justice, there are disagreements regarding the content of the principle of justice that regulates the division of rights and obligations in society. As for the application of justice in the judge's decision, that is, it must be based on the principles that can be accounted for, both intuitively and rationally. The emphasis on the principle of expediency is more nuanced to the economic aspect, with the rationale that the law exists for man, so the purpose of the law must be useful to society.²⁸²⁹

Finding the law in a case that is being examined by a judge is the most difficult thing to do. Because, every law as a source of law, is static and cannot keep up with the development of society, thus creating an empty space to be filled. For this reason, the judge in every decision always makes legal discoveries, because the language of the law is always too poor for human thought which is much nuanced.³⁰³¹³²

Judges in carrying out the functions and powers of judicial power, in order to be able to pass judgments containing a sense of justice of society, for which they must be removed from the shackles of rigidity from the entanglement of the spokesperson of the law according to the formulation of dead words. That is, judges should be given the freedom to animate the formulation of dead words in legislation. Therefore, judges must be free and independent in matters of interpreting the formulation of laws with various interpretation methodologies taught by the "doctrine of legal science; seeking and exploring, and formulating legal rules and principles in the midst of the development of changes in people's legal consciousness in accordance with changes in place, time, and circumstances, and the authority to conduct *contra legem* if the provisions in the law conflict with propriety, public order, and are not in accordance with the developing circumstances in society. So that the verdict handed down by the judge is in accordance with the values of Pancasila and the 1945 Constitution, as well as philosophical values.³³³⁴

In addition to being guided by written law, judges are also required to find the law by digging into the law based on the facts and events revealed from the plaintiff and defendant, as well as evidence submitted by the parties to the trial. In finding that, the judge must concatenate and quantify the facts and events in order for concrete facts and events to be found. To further constitute, establish its laws and provide justice for the litigants.³⁵³⁶

Judges are given the subjective right to decide cases related to legal vacuum and legal interpretation based on the most basic considerations of benefit as long as they do not deviate from the main principle of Islamic law as in the Qur'an Surah al-Nisa verse 58, namely legal justice. Every judge in deciding a case in court according to Muhammad Sulaiman al-Asyqar, is not justified in leaning towards either party only because of kinship, friendship, position,

²⁶ Bambang Sutiyo, *Method Discovery Law - Attempt Realize The Law Certainly and Fairness* (Yogyakarta: UII Press, 2006), 6.

²⁷ John P. Christman, *Social and Political Philosophy - A Contemporary Introduction* (London: Routledge, 2002), 60-61.

²⁸ Jean-Fabien Spitz, "John Rawls and the Question of Social Justice," *Etudes* Vol. 414, No. 1 (January 2011): 55-65 // Doi: 10.3917/etu.4141.0055.

²⁹ Ahmad Rifai, *Supra* note 25, 135.

³⁰ H. Abdul Manan, *Supra* note 11, 278.

³¹ Ahmad Rifai, *Supra* note 25, 25.

³² H. Abdul Manan, *Supra* note 11, 279.

³³ Ahmad Kamil and M. Fauzan, *Rules Law Jurisprudence* (Jakarta: Gold, 2008), 31-32.

³⁴ Ahmad Kamil, *Philosophy Freedom Judge* (Jakarta: Gold, 2012), 306.

³⁵ H. Abdul Manan, *Supra* note 11, 278.

³⁶ Sudikno Mertokusumo, *Supra* note 20, 87-89.

nepotism, primordialism, collusion, and other reasons. Similarly, Wahbah al-Zuhaili said³⁷ judges and guardians are required to be fair in deciding cases, not justified and the law is illegitimate in deciding cases on grounds beyond the certainty and fairness of the law or deviating from the applicable qanun provisions as stipulated by the Qur'an and Sunah, because so is an act of zalim against man.³⁹

In deciding cases in court, judges are given the authority to perform *ijtihad*, that is, to exert their power or ability to produce *syara'* law from the postulates of *syara'* as in the hadith of the Prophet Muhammad SAW., narrated by Ahmad Ibn Hambal. This hadith is the basis for the judge's obligation to use⁴⁰⁴¹ *ijtihad* in examining, adjudicating, and deciding cases if the legal basis is not found in the Qur'an, Sunah, or laws and regulations. This teaching is also embraced by the legal system in Indonesia, in Article 10 paragraph (1) of Law No. 48/2009 on Judicial Power explains that courts are prohibited from refusing to examine, adjudicate, and decide a case filed under the pretext that the law does not exist or is not clear, but is obliged to examine and adjudicate it. Furthermore, Article 5 paragraph (1) of the Law orders that judges and constitutional judges must explore, follow and understand the values of the law and the sense of justice that lives in society.

The benchmark of the truth of the judge's *ijtihad* is the accuracy of providing justice, certainty, and expediency to the parties, such as providing punishment for those who apply *zalim*, or deciding who is the holder of child custody in a child custody dispute. The judge's *ijtihad* starts from sitting the case by reading the arguments of the plaintiff's suit, the defendant's answer, the plaintiff's replies and the defendant's duplication, examining the reconvening (demands) filed by the defendants, examining the evidence submitted by the parties until it reaches the deliberation stage of the panel of judges before passing judgment.

Thus, the judge carries out the mandate, which is a test of honesty in deciding the cases he examines and tries, so that the judge must meet the requirements as a judge as well as a *mujtahid*, especially regarding decisions based on the essential values of Islamic law. This concept of judge is a duty, and from the embodiment of *al-Hakim*, Allah Almighty, the Most Just and Wise. That is, if their duties and functions are carried out in accordance with the provisions of the applicable laws and regulations, then the reward for judges is doubled, and the guarantee is heaven, but if the judge does not do justice, the threat is hellfire.

THE CONCEPT OF CHILD CUSTODY IN A THEORETICAL AND POSITIVE LEGAL PERSPECTIVE IN INDONESIA

In Islam, the right of childcare is known as *hadhanah*, which jurists define as the maintenance of a child who is young or who is already old but has not been *mumayyiz* without command thereof, providing something that makes his good, guarding against something that hurts and damages him, educating his physique, *ruhani*, and reason, in order to be able to stand alone in the face of life and bear responsibility. Islam imposes custody due to divorce as a form of providing the best for the child.⁴²

While in positive law in Indonesia, childcare has been widely regulated. Article 41 of Law No. 1/1974 on Marriage explains that both parents are obliged to take care of the interests of the child which includes livelihood and education, as well as maintenance costs. However, in the event of a dispute over the control of the child, the court may decide that all the costs of the child's maintenance and education are the responsibility of the father, but if the father is unable to fulfill the obligation, then the court may determine that the mother bears the costs. That is, the court may require the former husband to provide the cost of subsistence and/or determine something of an obligation for the former wife.

In PP No. 9/1975 concerning the Implementation of Law No. 1/1974, child custody is not regulated, but article 24 paragraph (2) states that during the course of a divorce lawsuit on the application of the plaintiff or defendant, the court can determine the living that must be borne by the husband; determine the necessary matters to guarantee the maintenance and education

³⁷ R.H.A. Soenarjo, et al., *The Qur'an and Translation* (Jakarta: Department Religion RI, 2003), 156.

³⁸ Muhammad Solomon al-Asyqar, *Interpretation Zuhdah al-Tafsir min Fabio al-Qadir* (Islamic University of Medina, 1998), 243.

³⁹ Wahbah al-Zuhaili, *Tafsir al-Wajiz* (Beirut: Daar al-Fikr, 1989), 145.

⁴⁰ Abdul Wahab Khallaf, *Ilm al-Ushul al-Fiqh* (Kuwait: Daar al-Qalam, 1978), 216.

⁴¹ Ahmad Ibn Hambal, *Musnad Ahmad ibn Hambal*, Juz 5 (Beirut: Al-Maktabah Al-Islamiyah, n.d.), 236.

⁴² Sayyid Sabiq, *Fiqh al-Sunnah*, Juz II (Beirut: Daar al-Fikr, 1983).

of the child; and determine the matters necessary to guarantee the preservation of the goods to which the husband and wife are jointly entitled or the goods to which the husband is entitled or the goods to which the wife is entitled.

A divorce gives rise to obligations that must be accepted by the husband and wife in addition to both obtaining rights as regulated by law. The Compilation of Islamic Law (KHI) expressly regulates the issue of child custody in Articles 105 and 156. Article 105 of the KHI states that the maintenance of a child who is not yet 12 years old (not yet mumayyiz) is the right of the mother, while for a child who is mumayyiz it is left to the child to choose between the father or mother. While the maintenance costs were borne by his father. However, if the mother is absent or dies, then the power over the child is taken from: (1) The women in a straight line up from the mother; (2) Father; (3) Women in a straight line up from the father; (4) The sister of the child concerned; (5) The women of inbred relatives according to the side line of the father.

Thus, in the event of a dispute about the upbringing of the child, the court may decide under Article 156 letter (a) on the upbringing of the child if the mother is absent or dies, Article 156 letter (b) on the right of the hadhanah of the child who is mumayyiz to choose to join the father or mother, and Article 156 letter (d) on the obligation of the father to bear the costs of the hadhanah and the livelihood of the child until the age of 21 years.

Regarding the importance of child custody in order to achieve the desired goal, namely good child development, Article 51 paragraph (2) of Law No. 39/1999 states that after the breakup of a marriage a woman has the same rights and responsibilities as her ex-husband for all matters related to her children with due regard to the best interests of the child.

In the context above, the role of parents in fostering child development is needed. This is also as stipulated in Article 26 of Law No. 23/2002 concerning Child Protection, it is stated about the importance of the role of parents in nurturing, maintaining, educating, and protecting children; fostering children according to their abilities, talents, and interests; and prevent the occurrence of marriage at the age of children. However, if the parents are absent, their whereabouts are unknown, or for some reason, cannot carry out their obligations and responsibilities, then the obligations and responsibilities pass to the family in accordance with the provisions of the laws and regulations.

Furthermore, in Article 14 paragraph (1) of Law No. 23/2002 it is stated that every child has the right to be cared for by his own parents, unless there is a valid reason and/or rule of law showing that the separation is in the best interest of the child and is a final consideration. While in paragraph (2) it is said that in the event of separation as referred to in paragraph (1), the child shall still have the right to meet in person and have permanent personal contact with both parents; obtaining nurturing, nurturing, education, and protection for the growth and development process of both parents according to their abilities, talents, and interests; obtaining life financing from both parents; and obtaining other child rights.

Article 30 on the power of custody of the child can be revoked if as a parent neglects responsibility for the welfare of the child as intended by Article 26. However, the revocation of the right of care does not necessarily eliminate the blood relationship between the child and the parent, and does not abolish the obligation of the parent to finance the child's livelihood in accordance with his ability as referred to in Article 32. The rights and obligations of the child, in detail are regulated in Law No. 23/2002 Article 4 to Article 18, where all of these articles explain the rights that must be received as a child.

Law No. 23/2002 also regulates the protection of children's religion as in Articles 42 and 43. Article 42 paragraph (1) states that every child gets protection to worship according to his religion, while Article 42 paragraph (2) states that before the child can make his choice, the child's religion follows his parents. Meanwhile, Article 43 paragraph (1) states that the state, government, society, family, parents, guardians, and social institutions, guarantee the protection of children in carrying out their religion, while Article 43 paragraph (2) states that the protection of children in embracing their religion as referred to in paragraph (1) includes; fostering, guiding, and practicing religious teachings for children.

JUDGE'S CONSIDERATION OF DECIDING CHILD CUSTODY CASE AT MANADO RELIGIOUS COURT

After going through the trial stage, in the end, two cases of child custody lawsuits were filed by the plaintiffs, which although the lawsuits were the same but received different verdicts from the panel of judges of the Manado Religious Court.

In case No. 183/Rev.G/2021/PA. Mdo, his suit was granted by a panel of judges with various legal considerations as follows:⁴³

- a) That this case is a child custody lawsuit case that is the result of divorce law, then based on Article 49 paragraph (1) letter (a) of Law No. 7/1989 on Religious Justice and Article 49 letter (a) of Law No. 3/2006 on Amendments to Law No. 7/1989, this case becomes the absolute authority of the Religious Court;
- b) That under the provisions of Article 73 paragraph (1) of Law No. 7/1989 as amended by Law No. 50/2009, the plaintiff is an interested party in this case (*persona standi in iudicio*), so that the plaintiff has a legal standi in this case;
- c) That the Plaintiff and Defendant have followed the mediation process with the mediator of the Manado Religious Court Judge, but based on the mediator's report dated September 7, 2021, but the mediation was unsuccessful. Thus, in the examination of cases *a quo* has complied with the provisions of Articles 4 and 7 of pma RI No. 1/2016 concerning Mediation Procedures in Courts;
- d) That the plaintiff has submitted evidence in the form of a letter, so that it has met the formal and material requirements;
- e) That the plaintiff had presented 2 witnesses and the testimony of the two plaintiff witnesses materially corresponded to each other that the plaintiff and his wife had divorced in 2015 and since the occurrence of the divorce, the plaintiff's two children were taken care of by his ex-wife. That in 2020 the plaintiff's ex-wife passed away and the plaintiff's two children were taken care of by the deceased's mother (defendant) who was non-Muslim. The testimony of the two witnesses is relevant to the arguments of the plaintiff and has met the formal and material requirements, so that the testimony of the two witnesses has the power of admissible proof;
- f) That the Defendant has submitted evidence of a letter that has met the formal and material requirements;
- g) That in addition to the evidence of the letter, the defendant presented 2 witnesses and the testimony of the witnesses was materially inconsistent regarding the plaintiff's two children till now being cared for by the defendant, properly cared for, schooled and it is true that both of the plaintiff's children have been baptized;
- h) That both of the defendant's witnesses confirmed the plaintiff had a debt to the defendant's family and the debt was used to finance the plaintiff's child from marriage to his first wife;
- i) That the panel of judges considered the legal facts present in the trial by concluding the legal fact that since the plaintiff's ex-wife passed away, the two children were in the care of the defendant and both children had been properly baptized. While in the care of the defendant, the children were well maintained and schooled;
- a) That the panel of judges had conducted a local inquest hearing by going to the place of residence of the defendant to see firsthand the condition of the child and asking for the opinion of the child on whom he wished to be cared for;
- b) That Law No. 35/2014 on Amendments to Law No. 23/2002 on Child Protection Article 7 Paragraph (1) expressly states that "Every child has the right to know his parents, be raised and cared for by his own parents." The provisions regarding the right of the child to know who his parents are in the sense of their origins are intended to avoid the disconnection of genealogy and blood relationship between the child and his biological parents, while the right to be raised and nurtured by his parents is intended so that the child can obey and respect his parents;
- c) That the first child of the plaintiff was found to have been 12 years and 7 months old (*mumayyiz*), then under Article 105 letters (a) and (b) of the KHI, the panel of judges had heard his opinion regarding who was concerned to be taken care of and he stated that he would follow his father (the plaintiff);
- d) That the second child is 11 years and 2 months old, according to Article 105 letter (a) of the KHI is considered not to be *mumayyiz*, but based on the results of the local examination the child has given his opinion regarding to whom he will be taken care of and the panel of judges held that if the child wants to live with his father because his mother has died, then the opinion of the child should be heard because the interests of the child want otherwise. The opinion of this panel of judges is in line with the opinion of Wahbah Zuhaily (professor of Islamic

⁴³ Document Verdict Case Lawsuit Rights Foster Child Number 183/Rev.G/2021/Pa. Mdo

jurisprudence at the Syrian University of Damascus) that the right of hadhanah is the right of association between mother, father and son. In the event of a conflict between these three persons (in this case the defendant as his grandmother), then the priority is the right of the child to be cared for. In a sense, it is left to the child to choose who will nurture him. This opinion can be understood the interests of the child are above all else;

- e) That even though the plaintiff has been designated as the custody holder (hadhanah) of his two children, the plaintiff still gives access to the defendant as the grandmother of the two children to visit and pour out affection to the two children as long as it does not interfere with the child's activities, mental development, and physical, spiritual and intellectual growth;
- f) That the panel of judges decided in the judgment by granting the plaintiff's suit, which was to establish the right of childcare (hadhanah) rest with the plaintiff as the biological father, and sentenced the defendant to hand over the two children to the plaintiff.

In contrast to the first case, in case No. 258/Rev.G/2021/PA. Mdo, his suit was rejected by a panel of judges with various legal considerations as follows:⁴⁴

- a) That this case is a child custody lawsuit case that is the result of divorce law, then based on Article 49 paragraph (1) letter (a) of Law No. 7/1989 on Religious Justice and Article 49 letter (a) of Law No. 3/2006 on Amendments to Law No. 7/1989, this case becomes the absolute authority of the Religious Court;
- b) That under the provisions of Article 73 paragraph (1) of Law No. 7/1989 as amended by Law No. 50/2009, the plaintiff is an interested party in this case (persona standi in iudicio), so that the plaintiff has a legal standi in this case;
- c) That the panel of judges had advised the plaintiff and the defendant to resolve the issue of child custody in a familial manner but to no avail. In addition, the panel of judges has provided the widest possible opportunity to resolve and end the dispute by means of deliberation and consensus through a mediation forum, but it is still unsuccessful. Thus, it has complied with the provisions of Articles 4 and 7 of pma RI No. 1/2016 concerning Mediation Procedures in Courts;
- d) That the plaintiff had filed evidence of letters marked P.1 to P.17, the evidence was sufficiently stamped and had been dinezegelen, not refuted by the defendant. The evidence has met formal and material requirements, and has perfect and binding force;
- e) That the plaintiff has presented 2 witnesses before the hearing, and the testimony of those witnesses is materially in conflict with each other, and meets the material requirements so that it can be further considered;
- f) That the defendant has presented 2 witnesses and the testimony of the witnesses is materially inconsistent with each other and relevant to the arguments of the defendant's answer;
- g) That on the basis of the arguments of the plaintiff's suit supported by the testimony of the witnesses of the plaintiff and the defendant, it is evident that after the divorce the child was taken care of by the defendant as his biological mother and lived in the house of the defendant's parents, and the child was properly cared for;
- h) That the defendant worked as a teacher at the Islamic Centre School and became a recitation teacher at the Al Hidayah mosque;
- i) That on the basis of the testimony of the witnesses of the plaintiff and the defendant it has been evident that the defendant was a mother who loved her child, the child was schooled at the Play Group Islamic Center, where the defendant taught and the child learned to recite with the defendant at the Al Hidayah mosque;
- j) That on the basis of the testimony of the witnesses on the part of the plaintiff and the defendant, it has been evident that as long as the child was taken care of by the defendant, the defendant and his family never prevented the plaintiff from coming to visit and bring the child overnight at the plaintiff's house;
- k) That the legal consequences after the occurrence of divorce related to the maintenance of children have been regulated in Article 41 letter (a) of Law No. 1/1974 on Marriage and Article 156 letter (a) of KHI, that the issue of hadhanah rights after the occurrence of divorce and after the death of the parents /mother is closely related to the benefit and interests of the child. Thus, the child care lawsuit in the lawsuit must be based on the principle of the best

⁴⁴ Document Verdict Case Lawsuit Rights Foster Child Number 258/Rev.G/2021/Pa. Mdo

interest of the child under Law No. 35/2014 on Amendments to Law No. 23/2002 on Child Protection;

- l) That the hadhanah norms contained in Islamic jurisprudence, the mother is given priority to have the right of hadhanah over the father as in the hadith it is explained that a woman came to face the Messenger of Allah and complained about her problem, "O Messenger of Allah, my son was with me, I was the one who conceived him in my womb, then I who kept it in my lap, and I gave him a drink with my milk, then his father divorced me, then intended to pull this child from me". Then then the Messenger of Allah SAW. said to him: "You are more entitled to it, as long as you are not married" (Narrated by Abu Dawud);
- m) That the norms contained in Islamic jurisprudence as aforesaid, are adopted in their entirety by KHI Article 105 letter (a): The maintenance of a child who is not yet 12 years old (not yet mumayyiz) is the right of his mother;
- n) That the plaintiff could not prove the defendant had bad behaviors such as drunkenness, prostitution, drugs, and so on, even from the testimony of the witnesses it is evident that the defendant was a teacher at the Islamic Center and a teacher of recitation.
- o) That the panel of judges dismissed the plaintiff's suit and determined the child to be in the care of the defendant as his biological mother;
- p) That the obligation of both parents in fostering the child is valid continuously even though both parents are broken off their marriages, then to protect and maintain their mental health and so on, to each party especially the plaintiff who does not hold the right of hadhanah is given the right to visit, inviting in a broad sense towards the child mentioned above as long as it does not interfere with the interests of the child so that the inner relationship between the child and his parents is not broken.

Based on the summary results of the decisions of the two cases above, there are three important things that the panel of judges uses in deciding a case. First, the panel of judges looks at the facts or events that occurred in the case, which then produces knowledge or an overview of the problems in child custody. Second, the panel of judges used theory in deciding cases so that the verdicts were directed and found a causal relationship with each other. Third, the panel of judges decides with values, which is a normative device to serve as a guideline as a solution to the problem.

In case No. 183/Rev.G/2021/PA. Mdo, the panel of judges made legal considerations based on juridical norms by referring to KHI Article 105 letter (b) that the maintenance of a child who has been mumayyiz is handed over to the child to choose between the father or mother as the holder of the right of his maintenance, while for the second child who has not been mumayyiz, the judge commits a deviation (*contra legem*) against the legal norms by conducting *ijtihad* and considering the rules *dar-u al-mafasid wa jalb al-mashalih* (avoiding damage and attracting benefit), then the child is assigned his upbringing to his father.⁴⁵

The judge in deciding the above case, does not only refer to the legislation, but also the benefit of the child, especially regarding the apostasy of the child who must be saved. Similarly, Marhumah said custody of two children was given to her father, with⁴⁶ the consideration of mumayyiz's first child. For a second child who is not yet mumayyiz, even though the KHI regulates it, but because the biological mother is dead and the child is taken care of by his non-Muslim grandmother, the panel of judges refers to the Child Protection Law, that the right of the child to be heard. After listening, the child chooses to be taken care of by his father.⁴⁷

While in case No. 258/Rev.G/2021/PA. Mdo, the consideration of the panel of judges is in accordance with the applicable rules of procedural law and is guided by the laws and regulations, namely Articles 41 and 45 of the Marriage Law No. 1/1974 and KHI. According to H. Mukhtar Tayib, the judge's ruling granting custody of the child to his mother was in accordance with the spirit of Article 105 (a) of the KHI. Tayib added that during the course of the trial, the plaintiff could not prove his arguments that the child was not well maintained. Instead, the testimony of the plaintiff's witnesses convinced the judge that the defendant and his family had never

⁴⁵ M. Ainur Rifqi and A. Halil Thahir, "Interpretation Maqasidi; Building Interpretation Paradigm Based on Mashlahah," *Millah: Journal Study Religion* Vol. 18, No. 2 (2019): 335-356 // DOI: 10.20885/millah.vol18.iss2.art7.

⁴⁶ Interview personal with Satrio AM Karim (Judge Court Manado Religion), (Manado, 10 March 2022).

⁴⁷ Interview personal with Marhumah (Head Council Judge Court Manado Religion), (Manado, 10 March 2022).

obstructed the plaintiff if he wanted to meet the child and invite him to spend the night. The panel of judges also saw the defendant's track record of having good behavior as a teacher and teacher. So far, the child has been comfortable living with the defendant, so there is no reason for the judge to transfer the right of childcare to the plaintiff.⁴⁸

JURIDICAL ANALYSIS OF THE JUDGE'S CONSIDERATIONS IN CHILD CUSTODY LAWSUIT CASES

The law is not a final scheme but changes as people's social thoughts and practices develop. There are several juridical analyses to look at the judge's consideration in deciding child custody cases at the Manado Religious Court.⁴⁹

First, normative juridical analysis. In case No. 183/Rev.G/2021/PA. Mdo, the judge has ruled plaintiff (father) as the custody holder of his two children. In the course of the trial it was proved that the fact that the mother (the plaintiff's ex-wife) had passed away in 2020 and since then the two children have been taken care of by the defendant (the ex-wife's biological mother) who is non-Muslim. Child care by the father/father in the KHI is the second option for the panel of judges after the mother is judged to be unable or unable to be given custody of the child or declared to have died as stated in Article 156 of the KHI point (c) it is stated that the father can become a caregiver if the mother has passed away and the women in a straight line up from the mother are no longer there.

Article 49 paragraph (1) of the Marriage Law also explains that the power of one of the parents can be revoked in order to prioritize the interests of the child. It can be analogous that a mother or father in the event of a divorce between the two then one of those who has hadhanah rights for her child (in this case a mother) can be removed if she no longer has an element of interest for the child. Article 14 of Law No. 23/2002 on Child Protection also explains that every child has the right to be cared for by his own parents, unless there is a valid reason and/or rule of law indicating that the separation is in the best interest of the child and is a final consideration. In that context, the maintenance of the child prioritizes not only the fulfillment of his material needs, but also love and affection, education, health, and others, which are the determining factors for the formation of the child's personality. The quality of communication between the child and the parents is absolutely necessary.⁵⁰

Everyone who has the right to hadhanah should have a sense of compassion, patience, desire, and time to carry out the task. In Article 156 of the KHI, the right of hadhanah of the child not yet mumayyiz is the right of the mother, and can be replaced by the father if the mother has passed away and the women in the straight line up from the mother are gone. According to Roman law which had a lot of influence on French law, and through Dutch law all the way to Indonesia and entered into the Civil Code (*Burgerlijk Wetboek*) it is explained that children are under the power of their father. Originally, this power was unlimited and it can be said that the life and death of the child is within the power of the father. Gradually, this power became less, but it was still large compared to his mother's power.⁵¹

With the existence of child legislation, the power of the father is changed to the power of parents (mother and father), and by the decision of the judge, parental power can be released or dismissed from the right of childcare. In transferring custody of children to fathers, judges have several considerations so that their decisions do not deviate from applicable regulations in Indonesia. However, textually, Positive Law in Indonesia does not regulate the transfer of⁵² hadhanah to his father. Article 156 of the KHI explains that the right of hadhanah is given to the mother and can be replaced if she dies. This article also explains that the father can replace the mother's position if the mother is deceased and the women in the straight line up from the mother are also gone.

The KHI does not regulate the disenfranchisement of a mother's hadhanah rights, but in this case it can be used as an arrangement regarding the removal of guardianship rights. In the Civil Code in Indonesia, it is explained that custody, the right to educate, nurture and so on are

⁴⁸ Interview personal with H. Mukhtar Tayib (Head Council Judge Court Manado Religion), (Manado, 10 March 2022).

⁴⁹ Doyle P. Johnson, *Sociological Theory - Classical Founders and Contemporary Perspectives* (New York: John Wiley & Sons, 1981), 257-258.

⁵⁰ H.S. Al-Hamdani, *Treatise Marry* (Jakarta: Pustaka Amani, 1989), 192.

⁵¹ Martiman Prodjohamidjodjo, *Law Marriage Indonesian* (Jakarta: ILC Publishing, 2002), 65.

⁵² Amiur Nuruddin, *Law Civil Islam in Indonesia* (Jakarta: Gold, 2004), 292.

included in the category of guardianship rights. A person may be withdrawn, appointed, and removed from his/her status as guardian if he or she has certain traits. Article 109 of the KHI states that "a Religious Court may revoke the guardianship of a person or legal entity, and transfer it to another party at the request of his relatives if the guardian is a drunkard, gambler, spender, insane and or neglects or abuses his rights and authority as a guardian for the benefit of the person under his guardianship". Parental power can be revoked or transferred if there are reasons that demand such transfer as in Article 49 of Law No. 1/1974 on Marriage. Article 14 of the Child Protection Law also makes it clear that every child has the right to be cared for by his or her own parents, unless there is a valid reason or rule of law showing that the separation is in the best interest of the child and is an up-to-date consideration.⁵³

In Law No. 1/1974 on Marriage, it also regulates hadhanah. Article 41 letter (a) states that "both mothers and fathers remain obliged to care for and educate their children, solely on the basis of the interests of the child". Obviously, this article offends the interests of the child, and the interests of the child become the most important factor defeating other factors.

Normative juridical considerations of the panel of judges in case No. 183/Rev.G/2021/PA. Mdo by establishing custody of minors to his father in addition to being guided by article 105 (b) of the KHI as well as Law No. 23/2002 as amended by Law No. 35/2014 on Child Protection that "Child protection is all activities to guarantee and protect children and their rights in order to live, grow, develop, and participate, optimally in accordance with the dignity and dignity of humanity, and have protection from violence and discrimination". Furthermore, Article 2 states that "The implementation of child protection is based on Pancasila and is based on the 1945 Constitution of the Republic of Indonesia and the basic principles of the Convention on the Rights of the Child including: non-discrimination, the best interests of the child, the right to life, survival, and development; and respect for the opinion of the child".

Appreciation of children's opinions is respecting the rights of children to be listened to in accordance with Article 10 of Law No. 35/2014. Child protection emphasizes absolutely the principle of the best interest of the child. The child has the right to be cared for by the most competent party and meet his best interests. The determination of the party is not based on the biological nature of the parents but rather the assessment of their portfolio in carrying out the parenting role. Thus, philosophically emphasize to *jalb al-mashalih wa dar-u al-mafasid* (attracting benefit and abandoning emergencies).

From the above articles, the right of hadhanah must pay attention to the interests of a child. If the hadhanah right to be given to the mother no longer exists, then it can be given to the father. Factors that cause hadhanah rights to be granted to the father, include: (1) Prioritizing the interests of the child; (2) Mothers have unmoral traits; (3) Refers to the interests of the child according to the Child Protection Law; (4) Referring to Article 109 of the KHI on the Revocation of Trusts; (5) Non-fulfillment of the conditions of a mother to obtain the right of hadhanah. Since the Law does not clearly explain the factors of hadhanah delegation, these five factors are the considerations.

Meanwhile, in case No. 258/Rev.G/2021/PA. Mdo, the judge ruled the Defendant (mother) as the custody holder of 1 (one) of her underage children (not yet mumayyiz). In the course of the trial the Plaintiff (father) was unable to prove the arguments of his suit and there were no things that could abort the defendant as the custodian of the child because it was not proven that the defendant had bad behavior, it was precisely from the testimony of the witnesses that the defendant proved the defendant's track record/portfolio as a loving mother, took good care of her child and was a teacher at the Islamic Center and concurrently as a teacher of recitation.

The transfer of custody of minors to the mother (defendant), by the panel of judges considered from many factors behind it, namely psychological factors, closeness between mother and child, and mother has tenderness, is smarter, more patient, and more in love with her children, so as to give more affection and attention to her child. In addition, the mother is the first school for her children.

The consideration of the panel of judges of the Manado Religious Court is through a juridical view that normatively, a child should be taken care of by both parents, even if they are divorced. But in practice, joint custody is difficult. Joint custody requires both parents to be competent in parenting. The distance where one parent lives far from school and the child's friends can also cause problems, not to mention the problem of time sharing between the two parents in

⁵³ Ahmad Rofiq, *Law Civil Islam in Indonesia* (Jakarta: Hawk Press, 2013), 202.

parenting, and the most important thing is that joint custody requires communication, cooperation, and coordination between the two parents. Such conditions are certainly difficult for divorced parents to meet.

After divorce with a court decision arises sole custody which is considered better for the child in realizing certainty and stability in the implementation of child custody. In addition, it can protect the child in his infancy from conflicts that often arise if the two parents who are hostile to each other and have to share custody still often interact in arranging visit schedules and in making decisions about the child. Parent relationships that are hostile and involve many conflicts are associated with emotional disturbances and poorer long-term settlement abilities in the child.⁵⁴ The affirmation of the custody of the child after the divorce is stated in Article 41 letter (a) of Law No. 1/1974 that the result of the breakup of the marriage due to divorce is that either the father or mother is still obliged to maintain and educate their children, solely based on the interests of the child, if there is a dispute regarding the control of the child, the court gives its decision. However, the responsibility for the costs arising from the maintenance and education, according to letter (b), is the responsibility of the father, if the father is unable to fulfill these responsibilities then the mother can be burdened with the responsibility to bear the child's expenses.

In the KHI, there are two articles that determine childcare, namely Article 105 and Article 156. As contained in Articles 105 and 156 of the KHI that in the event of a divorce: (1) The maintenance of a child who is not yet mumayyiz or not yet 12 years old is the right of the mother; (2) The maintenance of the child who is mumayyiz is left to the child to choose between his father or mother as the holder of the right of maintenance; (3) The maintenance costs are borne by his father. However, understand the consideration of the panel of judges as reads Article 49 of Law No. 1/1974 that: (1) One or both parents may be deprived of their power over a child or more for a certain time at the request of the other parent, the child's family in a straight line upwards, and the adult sibling or the authorized official by decision of the Court in matters of: (a) He grossly neglected his obligations towards his son; (b) He misbehaved very badly. 2) Even if the parents are deprived of their power, they are still obliged to give the child maintenance costs. The article has a dynamic of judges' considerations in handling cases of care for minors. The only rule that states expressly and clearly regarding post-divorce child custody is contained in the KHI which in its articles uses the term child care and describes material and nonmaterial care.

The judges' consideration of child custody after divorce is part of the theory of functional legal dynamics. Therefore, the law is constructed rationally, so that it is able to play a role in reforming society. The law at a practical level requires the initiative of the framers of the law to make legal discoveries in order to direct and anticipate the negative impacts of social changes that occur in society, then the law has played a role in directing society to a better life. The law serves as a protection of human interests.⁵⁵

The legal dynamics related to the judge's consideration in deciding the custody holder of minors is a process of changes in the order of social life, including changes in attitudes, mindsets, and behaviors. With this dynamic, society will tend to act on a shift in values in the order of life, which has implications for the creation of a new order. Dynamics are consequences and will occur within a group of people in the world without exception as long as the human being interacts. Likewise with the laws adopted by these community groups, so that legal awareness is formed regarding the future of children.^{56,57}

The judge's consideration indicated that the law has three main roles, as a means of social control, a means of smoothing the process of social interaction, and a means of creating certain circumstances. In this context, the presence of law is to protect and advance the values upheld by society, as well as as a value system that as a whole is covered by a basic norm. Thus, the law must be seen as a societal institution that functions to meet social needs, and as a process

⁵⁴ Muhammad Isna Wahyudi, *Updates Law Civil Islam - Approach and Application* (Bandung: Mandar Forward, 2014), 151-152.

⁵⁵ Mochtar Kusumaatmadja, *Introduction Ilmu Law - Introduction First Room Range Enactment Science Law* (Bandung: Alumni, 2000), 12.

⁵⁶ Department Education and Culture, *Dictionary Big Indonesian* (Jakarta: Hall Library, 2003), 265.

⁵⁷ M. Quraish Shihab, *Grounding al-Qur'an - Function and The Role of Revelation deep Life Community* (London: Mizan, 1995), 245-246.

(⁵⁸⁵⁹⁶⁰law in action) that it distinguishes from written law. The law is a social institution or a tool for building society. Law is a tool of social engineering. This basic norm is used as a guide for law enforcement. As a value system, such basic norms are a source of value and a limiter in the application of laws.⁶¹

With these considerations, and as the embodiment of certain values, the law always embodies the values of justice, where human beings are treated equally in the eyes of the law. So that the first value that must be guaranteed by law is the value of justice. Thus similarity is a state between people in which human beings are treated equally in the same situation. The law is also the institutional of human togetherness, as social beings, human beings must essentially live together.

Judges as enforcers of law and justice are obliged to explore, follow, and understand the legal values that live in society because of the right to opinion, *ijtihad* with their beliefs. At the time the judge has to hold an opinion, then his conviction is at stake because it concerns the lives of others. Thus law enforcement becomes an important part of ensuring certainty, order, and protection of the law.⁶²

Secondly, empirical juridical analysis. In case No. 183/Rev.G/2021/PA. Mdo, the judge's consideration of deciding and assigning the holder of custody of the child to his parents is guided by the basic norms in the form of legal rules, which serve as a transcendental-logical condition for the enactment of the entire legal system, as well as the formation of a legal order in its hierarchical structure. The judge's consideration in this case is about legal certainty, a legal decision based on normatively applicable law according to the provisions of the law that is definitely and logically. In providing legal certainty, legal justice must be realized as an effort to achieve legal goals. The realization of legal certainty is law enforcement with the principle of equality and equity. Laws without the value of certainty will lose substance and provide no benefit to universal human values.⁶³⁶⁴⁶⁵⁶⁶

Juridically sociologically, a mother has the right to take care of her underage child until she is independent at the age of 12. This means that mothers are given heavy responsibilities and are protected by laws and regulations, thus their childcare rights are very strong. However, if a mother is unable to carry out her obligations properly, then the child will become a victim, so it is not justified that her mother's behavior adversely affects her child. So the judge with various considerations decided and determined that the right of childcare fell to his father even though he was a minor. This consideration is part of just and civilized social justice and humanity, because justice is the principle, principle, and purpose of all laws that exist on the face of the earth. Justice becomes in the name of the decisions of the panel of judges and the judiciary.

Justice is laying down the essence of the law and the purpose of the law. Practically speaking, justice relates to rights and obligations in proportion. While justice is philosophically the application of law in courts to litigants, civil or criminal with a variety of actions in question. If the legislation has not been able to accommodate all the primary legal interests contained in society for the sake of justice, it is necessary to restore the mission of legal justice from the ground norm as well as the constitutional norm. Without justice, certainty and order of the law, then the law becomes frightening. According to Notohamidjojo, there are three kinds of justice, namely creative justice (⁶⁷⁶⁸*iustitia creativa*), protective justice (*iustitia protetiva*) and social justice (*iustitia socia*).⁶⁹

⁵⁸ Firm Prasetyo and Abdul H. Barkatullah, *Philosophy, Theory and Science Law* (Jakarta: RajaGrafindo Persada, 2013), p. 227.

⁵⁹ Satjipto Rahardjo, *Sociology Law - Development Method and Choice Problem* (Yogyakarta: Bell Publishing, 2010), 66.

⁶⁰ Esmi Sane, *Institutions Law - A Tstudy Sociological* (Semarang: Suryandaru Main, 2005), 80.

⁶¹ *Ibid.* 80.

⁶² Jimly Asshiddiqie, *Constitutional Law and the Pillars Democracy* (Jakarta: Constitution Press, 2005), 216.

⁶³ Theo Huijbers, *Philosophy Law Deep Trajectory History* (Yogyakarta: Kanisius, 2005), 150.

⁶⁴ Hans Kelsen, *Theory Law Pure - Basics Science Law Normative* (London: Nusamedia, 2019), 244.

⁶⁵ Christine ST. Kansil, *Dictionary Term Law* (Jakarta: Gramedia Pustaka, 2009), 385.

⁶⁶ *Ibid.* 386.

⁶⁷ Yovita A. Suggestion and Bernard L. Tanya, *Morality Law* (Yogyakarta: Bell Publishing, 2014), 48.

⁶⁸ Anthon F. Susanto, *Science Non Law Systematic - Foundation Philosophy Development Science Indonesian Law* (Yogyakarta: Bell Publishing, 2010), 138.

⁶⁹ Oeripan Notohamidjojo, *Problem of Justice* (Semarang: Water Amerta, 1971).

Meanwhile, in case No. 258/Rev.G/2021/PA. Mdo, applicatively, the judge's consideration relates to judicial power. Judges can take arbitrary actions but judges remain bound by the existing legal rules. The issue of judge freedom needs to be connected with the way the judge finds the law based on his beliefs by reflecting on jurisprudence and expert opinion. Therefore, the position of the judge is impartial or impartial in his consideration and judgment.⁷⁰

Judges must decide cases based on law, truth, and justice. In order for the judge's decision to be taken fairly and objectively based on the law, in addition to the examination must be carried out in a hearing that is open to the public (unless the law specifies otherwise), the judge must also make legal considerations that are used to decide his case by exploring the legal values that live in society. Similarly, in the event that the law/statute is unclear or has not regulated it and especially in the case of the enactment of customary law or unwritten law. Therefore, a good judge's ruling must be able to meet two requirements. First, it meets theoretical needs, namely focusing on legal facts and their considerations that can be accounted for in terms of legal science. In fact, not infrequently, a judge's ruling can form a jurisprudence, which can determine a new law (source of law). Second, it meets practical needs, namely that judges' decisions are expected to resolve legal disputes that can be accepted by the disputant and the general public. Thus, the task of the judge becomes more onerous because it will determine the content and face of the law, as well as justice in society.⁷¹

In the above context, the judge must find the law himself and/or create it to complement the existing law. In deciding a case, the judge must have his own initiative in finding the law, because the judge must not reject the case on the grounds that the law does not exist, is incomplete or the law is vague. For this reason, judges must equip themselves with legal science, legal theory, legal philosophy, and legal sociology. Judges should not read the law only normatively but are required to be able to look at the law comprehensively, including about the holder of custody of a minor to his father who puts forward consideration of the interests of the child.⁷²

Judges must apply the law in accordance with laws and regulations that cover two aspects of the law. First, the judge must first use the written law, but if the written law turns out to be insufficient, it takes the role of the judge to perform, seek, and find the law himself from other sources of law such as jurisprudence, doctrine, treaties, customs or unwritten laws. On the other hand, judges in Indonesia have the right to carry out legal discovery (*rechtsvinding*) and the creation or formation of laws (*Rechts schcpping*) and not just a mouthpiece of the law (*rechtstoepassing*) based on Article 5 of Law No. 48/2009 on Judicial Power.

Third, philosophical juridical analysis. In case No. 183/Rev.G/2021/PA. Mdo, the judge's consideration in establishing custody of a minor is not always given to a mother. Juridically philosophically, Indonesian judges have the obligation or right to make legal discovery and legal creation through *ijtihad*, so that their decisions are in accordance with the law and the sense of justice of the community. This provision applies to all judges in the judicial environment, and within the scope of judges of the first instance, appeals and cassations.

The law written in the form of legislation as a manifestation of the principle of legality is indeed more guaranteeing legal certainty, but the law as a political product is not easy to change quickly following changes in society. On the other hand, in such a complex and dynamic modern life, the legal problems faced by society are increasingly numerous and diverse that demand immediate resolution. Therefore, the discovery and creation of laws by judges in judicial proceedings must be carried out on certain principles and principles, which form the basis as well as signposts for judges in applying their freedom in finding and creating laws.

Philosophically, the judge's consideration in relation to child custody holders is a court decision that aims to protect the litigants, even in general to protect all citizens with the principle of balance between the requirements prescribed by the law and the interests of the litigants. In civil cases, especially child custody, it is necessary to pay attention to the balance of interests for the plaintiff, defendant and child. Instrumental in obtaining the best possible verdict, the judge may undertake an artistic approach determined by intuition rather than the judge's knowledge in the sentencing of the verdict. Judges can also decide cases with a systematic scientific approach, which is not solely based on intuition but must be complemented by insight and legal science. Finally, judges can use an experiential approach.

⁷⁰ Jennet Kirkpatrick, "Fairness has a Face - Neutrality and Descriptive Representation on Courts," *Politics, Groups, and Identities* Vol. 8, No. 4 (June 2020): 803-811 // Doi: 10.1080/21565503.2020.1782951.

⁷¹ Ahmad Rifai, *Supra* note 25, 20.

⁷² Wildan S. Mustofa, *Code Ethics Judge* (Jakarta: Gold, 2017), 98.

Meanwhile, in case No. 258/Rev.G/2021/PA. Mdo, the judge applied the ratio decidendi. This consideration is the basis for the judge that the decision by considering all aspects related to the subject matter of the disputed case, then seeks laws and regulations that are relevant to the subject matter of the case as the legal basis for the rendering of the judgment, and the judge's consideration is based on a clear motivation to uphold the law and provide justice for the litigants. In this context, the judge's discretion is indispensable. This aspect emphasizes that the government, society, families and parents are responsible for guiding, fostering, educating and protecting children, so that one day they can become useful human beings for all parties.

The decision of the child custody holder both to his father and his mother is based on juridical, empirical, and philosophical reasons. Its main footing is the principle of benefit (*maslahah mursalah*) which is derived from the Qur'an and Sunah. Thus, the judge's consideration in deciding cases that are guided by benefit as a legal method that considers the existence of benefits that have general access, as well as unlimited and bound interests. In other words, *maslahah mursalah* is an interest that is decided freely, but is bound by the concept of sharia. Sharia is appointed to provide benefits to the community, and serves to provide expediency and prevent damage.

In consideration of legal benefits, the judge's ruling on child custody holders has juridically philosophically applied the principle of Islamic law, namely benefit based on the rules of the proposed *fiqh jalb al-mashalih wa dar-u al-mafasid*, which relates to *hifdz al-nafsi* and *hifdz al-nasl*. This principle of benefit is in line with the best interests of children as in Law No. 35/2014 on Child Protection. Several postulates relating to children can be found in Islamic literature, some of which are the Qur'an surah al-Thalaq verse 6, al-Baqarah verse 233, and at-Tahrim verse 6, as well as the Hadith of the Prophet narrated by Tirmizi and Abu David.

The judge's consideration in deciding the holder of custody of the child shows that the law is part of human policy, legal order is embodied in the form of a state with the basis of legal expediency, so that any legal dogmatics tries through certain interpretation techniques to apply the text of the law which at first glance cannot be applied to situations of concrete problems. The expediency of the law raises questions about the usability of interpretation techniques, about the logically coercive nature of interpretation reasoning and the like, which gives rise to the principle of benefit by negating emergency for man as a subject of law.

The legal expediency approach functionally looks at the law in terms of its function, way of working, and its appreciation of legal awareness in society. So the legal theory is divided into two. First, normative legal theory, which is a theory that is widely embraced by positivism, utilitarianism, legism, and natural law. This theory focuses on written law that uses universal legal logic to understand, develop, and achieve existing norms in particular legal norms. Second, Sociological/Empirical Law, which is a theory widely embraced by adherents of historical understanding, pragmatic realism, and sociological schools. This theory emphasizes unwritten laws in society, does not prioritize logic too much, but rather accepts the social structure and behavior of society as it is, and is local to describe legal phenomena without emphasizing values.

CONCLUSION

Based on the results and discussion, the legal arguments on which the judges are based in deciding child custody lawsuits due to parental divorce are not only a matter of who has the right to care, but prioritize a sense of justice to the litigants in particular, and society in general. The judge's consideration of deciding the holder of child custody in the Manado Religious Court case No. 183/Pdt.G/2021/PA. Mdo can be understood that the panel of judges in assigning the first custody of the child (*mumayyiz*) to the father refers to the provisions of the Compilation of Islamic Law, including against his second child who is (not yet *mumayyiz*) guided by Law No. 35/2014 on Child Protection. The child protection law emphasizes absolutely the principle of the best interests of the child in the sense that the child has the right to be cared for by the party who is most competent to meet his best interests. Meanwhile, in case No. 285/Rev.G/2021/PA. Mdo, the judge assigned child custody to his mother based on the Compilation of Islamic Law and Law No. 35/2014 on Child Protection. In that context, the determination of custody holders is not determined based on the biological nature of the parent's gender, but rather based on an assessment of each parent's portfolio and track record in carrying out the parenting role.

Juridical analysis of the judge's consideration in deciding child custody lawsuit cases shows that the custody of minors is not always assigned to their mothers as stipulated in the Compilation of Islamic Law, this shows that juridically philosophically, Indonesian judges have the freedom to

deviate from the existing rule of law (*contra legem*) by making legal discovery or the creation of the law through the *ijtihad* process so that the verdict is in accordance with the law, a sense of justice, and solely in the best interests of the child. This dynamic of judges' consideration philosophically emphasizes the *jalb al-mashalih* and *dar-u al-mafasid* (attracting benefit and abandoning the emergency).

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