



# CONTRA LEGEM HADHANAH POST DIVORCE AGAINST CHILDREN WHO HAVE NOT BEEN MUMAYYIZ (ANALYSIS OF DECISION No. 361/Pdt.G/2018/PA.Dps)

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## Article Info

### Keywords:

*Contra legem, hadhanah, mumayyiz.*

## ABSTRACT

This study discusses the application of contra legem in the custody (hadhanah) decision following a divorce involving a child who has not yet reached the age of discernment (non-mumayyiz), with a focus on Decision No. 361/Pdt.G/2018/PA.Dps. The research concentrates on three main aspects: the custody rights of non-mumayyiz children, the impact of divorce on caregiving responsibilities, and the legal conflict in the application of custody laws. The method used is normative juridical research, emphasizing the analysis of statutory regulations, legal literature, and relevant legal concepts. The data sources include primary, secondary, and tertiary legal materials. The analysis is conducted qualitatively using juridical, sociological, and shar'i approaches. The findings indicate that Decision No. 361/Pdt.G/2018/PA.Dps is contra legem, deviating from the default legal provisions that assign hadhanah to either the father or the mother. However, within the framework of Maqāṣid al-Sharī'ah, custody was granted to the maternal grandmother based on legitimate shar'i grounds. Although the mother was deemed nasyuz (disobedient), and the father had a history of domestic violence, the court prioritized the child's emotional welfare and stability. Therefore, placing the child with the maternal grandmother was considered the most appropriate choice to protect the child's maṣlaḥah (best interest) and fulfill the objectives of Islamic law (maqāṣid al-sharī'ah). The decision aimed to safeguard the child's life and intellect (ḥifẓ al-nafs and ḥifẓ al-'aql). The 'illah qawiyah (strong legal reasoning) in this case lies in the fact that both parents were deemed unfit, leading the judge to assign custody to the nearest capable relative – the maternal grandmother.

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## 1. INTRODUCTION

One of the crucial aspects after divorce is regarding child custody or what is known in Islamic law as hadanah. In this case, Islamic law and positive law in Indonesia have provided clear provisions regarding who has the right to care for children after divorce (Rifai, 2011; Dalimunthe et al., 2024). In KHI Article 115 states that only divorces that are recognized are divorces carried out in front of a Religious Court session after the Religious Court has tried and failed to reconcile the two parties. The consequences of a divorce will also have legal impacts, such as the division of joint assets (Djatmiati, 2013). The problem of contra

legem hadanah after divorce for children who are not yet mumayyiz is a legal issue where a court decision or the practice of taking child custody (hadanah) is in conflict with the text of the applicable law explicitly, especially when it concerns the custody of children who have not yet reached mumayyiz age (not yet able to differentiate between good and bad, usually under 12 years of age).

In accordance with the provisions of Article 105 of the Compilation of Islamic Law (KHI), the right to care for children who are not mumayyiz or under 12 years of age rests with the mother, unless there is a legally justifiable reason for the transfer. This provision also aligns with the principle of child protection, where the child's emotional and psychological needs are prioritized for the best interests of the child.

In a legal context, "Contra Legem" refers to an action, decision, or interpretation that explicitly contradicts the applicable statutory text. However, in practice, not all contra legem actions are justified. There are certain limitations to ensure legal certainty and the rule of law are not compromised. Similar to the limitations of contra legem in law, in judicial practice, court decisions often deviate from these provisions, such as granting the right to custody to the father even though the child is not yet of legal age and no special circumstances exist that would cause the mother to lose custody. This type of decision raises legal issues because it contradicts explicitly established norms. Therefore, it can be categorized as a form of contra legem, that is, a decision that contradicts written law (Ahmad, 2022).

Contra legem can only be justified in extraordinary circumstances and under strict conditions. It must not ignore the principles of the rule of law and must maintain legal certainty, justice, and the general validity of the law (Rizani, 2023). Law No. 4 of 2004 in conjunction with Law No. 48 of 2009 concerning judicial power, as stipulated in Article 5 paragraph (1), explains that a judge must be able to explore, understand, and adhere to the legal values and justice that exist within society. A judge's decision is a discovery of law (Hasbi Ash-Shiddiqy, 2015). This means that a judge's decision is a process of *ijtihad* (intelligence) and legal exploration by the judge in deciding a case, which must be conducted in accordance with legal theory (Satjipto, 2009). A judge's decision must consider all aspects of legal, philosophical, and sociological norms, with an orientation toward legal justice, moral justice, and social justice (Ali, 2017).

However, in reality, a judge adjudicating a case is often faced with difficult choices (Salim, 2013). The judge must be able to hear, see, and understand every complaint submitted by the parties to the case and then render a just decision. When faced with such a situation, the judge can act using the principle of contra legem. Divorce is a legal event that not only impacts the husband and wife but also has serious consequences for the children of the marriage, especially in terms of custody or hadhanah. In the context of Islamic law and the Compilation of Islamic Law (KHI), children who are not yet mature (unable to distinguish between right and wrong, usually under the age of 12) should be cared for by their mothers, as stipulated in Article 105 letter a of the KHI.

However, in practice, not all court decisions adhere to this normative provision (Salim, 2013). One example is Decision No. 361/Pdt.G/2018/PA.Dps, in which the Denpasar Religious Court ruled that custody of a child who is still under the age of majority (mumayyiz) is granted not to the mother, but to the father. This raises legal questions, as it appears to contradict the textual content of the articles in the Compilation of Islamic Law (KHI), and could therefore be categorized as contra legem. In the decision, the judge considered the mother (plaintiff) unfit to be a caregiver, based on allegations of inappropriate behavior, alleged infidelity, and neglect of the child (Kadir, 2013). Meanwhile, the father (defendant) was deemed more morally and socially stable and capable of providing more appropriate protection and care. However, the father was legally disabled because he committed domestic violence (Huda, 2013).

This ruling demonstrates that the judge used his authority to make legal discoveries (*rechtvinding*) by overriding written regulations for the benefit of the child, as stipulated in Article 5 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power. However, if the father commits domestic violence (KDRT), for example, by being temperamental and unable to control his emotions, then when angry he tends to vent his anger by throwing temper tantrums, throwing or breaking objects around him, and even frequently hitting his wife when angry. This condition constitutes a serious moral flaw and can be grounds for transferring child custody to another party, including the mother's family, for the benefit of the child (Mertokusumo, 2009). Therefore, child custody can be transferred to the closest relative other than the father if both parents are unable to care for the child or there is a legal flaw in the child's custody rights (Aulia, 2020). Situations such as this reflect the dynamics in the application of the law, where the law often shifts from normative texts to considerations of the child's benefit.

## 2. RESEARCH METHOD

This type of research is Normative Juridical, which is a study of the Law and Judge's Decisions Regarding the Custody of Children Who Have Not Yet Mumayyiz from Divorce Results. This type of research is normative juridical, the method used is legal literature research. Combined with the library research

method, it is used to dig up documents sourced from related sources. The initial step that the author took in analyzing this data was organizing the data in the form of arranging, sorting and grouping data according to categories, processing objectives and analyzing the collected data using the analytical descriptive method, namely a method that emphasizes providing a new picture of the collected data.

### 3. RESULTS AND ANALYSIS

#### *Rechtsvinding Legal Discovery by Judges in Finding Law*

Rechtsvinding is the process of legal discovery by judges in deciding a case that is not explicitly regulated in law. In this context, judges not only apply the law (law application), but also discover the law (law finding) based on principles of justice, social norms, jurisprudence, doctrine, and legal principles (Al Rasyid, 2020). Rechtsvinding means "discovering the law," especially when written legal norms do not provide a clear answer to a specific case. Judges conduct rechtsvinding to: Fill legal vacuums (rechtvacuum), Overcome legal ambiguities (rechtsvervaging), and Ensure legal certainty and justice in new cases. Legal discovery (rechtsvinding) is the process by which judges seek, interpret, and apply legal norms to a case for which the written law does not yet clearly regulate the law, in order to achieve substantial justice. As stated in Article 5 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power states: "Judges are obliged to explore, follow, and understand the legal values and sense of justice that exist in society (Bustami, 1999)."

Judges may not refuse to examine and adjudicate a case on the grounds that the law is absent or unclear (Article 10 paragraph 1 of Law No. 48/2009). The methods or sources of legal reasoning are: legal interpretation (interpretation of the law), grammatical (language), systematic, historical, sociological, and teleological (purpose of the law). Applying similar legal rules to cases not yet regulated (Dalimunthe et al., 2024). Argumentum a contrario: Drawing legal conclusions from contradictory facts. In jurisprudence: Previous judicial decisions serve as a reference. Legal reasoning reflects the judge's active and progressive role in upholding justice. This process is crucial in an open legal system, such as Indonesia, which not only adheres to legal positivism but also recognizes the values of justice and unwritten law in society.

As stipulated in Law Number 48 of 2009 concerning Judicial Power: Article 5 paragraph (1): "Judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that exist in society." Article 10 paragraph (1): "The court is prohibited from refusing to examine, try, and decide on a case filed on the grounds that the law is absent or unclear, but is obligated to examine and try it." In the Indonesian legal system, judges play a role that is not merely passive as implementers of the law, but also active as legal discoverers (rechtsvinder), especially in cases that are not clearly regulated or when applicable legal norms are not specific enough to resolve a dispute.

The Supreme Court, as the highest court, has the authority to conduct legal discoveries (rechtsvinding), including determining who is legally entitled to be examined in cassation or judicial review cases. This legal discovery often serves as a source of jurisprudence and complements gaps in national law. The Supreme Court (MA) is the highest state court and has the authority to appeal against final court decisions. Judicial review authority. Supervisory authority over lower courts. Normative function through decisions that create jurisprudence. One form of a judge's active authority is ex officio authority, which is authority that can be exercised without the parties' request, based on the principles of justice and public interest. This authority is particularly relevant in cases of hadhanah for children who are not yet mumayyiz, where the child's interests must be the primary consideration (Amir, 2006).

In hadhanah cases, although the mother is prioritized as the guardian of a child who is not yet mumayyiz (Article 105 of the Compilation of Islamic Law), the judge has ex officio authority to deviate from this normative provision if there are reasons that better guarantee the child's best interests. For example, if the mother is proven morally, psychologically, or economically incapable of providing adequate care, the judge may assign hadhanah to the father or a more suitable third party, even if this is not explicitly requested in the lawsuit.

#### *Analysis of Contra Legem in the Decision on Hadanah for Children Who Have Not Yet Been Mumayyiz from the Perspective of Maqahid Syariah and in the Decision Analysis of Decision No. 361/Pdt.G/2018/PA.Dps*

Post-divorce child custody, also known as hadhanah, is a crucial issue in Islamic family matters handled by the Religious Courts. Normative provisions, as stipulated in Article 105 of the Compilation of Islamic Law (KHI), stipulate that hadhanah for children who are not yet legally married is automatically awarded to the mother, assuming the mother is more deserving and has a stronger emotional bond with the child at an early age.

Child protection can be implemented directly or indirectly. Direct means that activities are directly directed at the child who is the target of a direct violation. Such activities can include protecting the child from various external and internal threats, such as educating, fostering, and accompanying the child in various ways. Indirect child protection means activities not directly directed at the child, but rather at others who carry out or are involved in child protection efforts.

Based on Law No. 23 of 2002 concerning Child Protection also mentions the rights and obligations of children, in this law child protection is given greater priority, where this must still be done even if the mother or father in dispute is one of them has beliefs outside of Islam, or between them are of different nations, but in deciding on the child's choice must look at the welfare of the child which in this case is not only the welfare of the world but also the end of this world, namely the afterlife.

Regarding the custody of minor children, Article 229, Chapter X, concerning Dissolution of Marriage in general, of the Civil Code states: "After deciding on a divorce, and having heard or legally summoned the parents or blood relatives or relatives by marriage of the minor children, the District Court will determine which of the two parents will assume guardianship over each child, unless both parents are dismissed or removed from parental authority, taking into account previous judicial decisions that may have dismissed or removed them from parental authority (Jalalludin, 2010)."

However, in judicial practice, not all cases can be resolved solely by adhering to normative texts. There are certain situations where judges need to deviate from statutory provisions or even classical Islamic jurisprudence. In this context, judges can make legal discoveries (*rechtsvinding*) through a *contra legem* approach, namely deciding the case differently from the provisions of positive law, in order to fulfill the principles of justice and welfare, especially for children who are the object of *hadhanah*.

This approach aligns with the principle of *maqāṣid sharia*, which emphasizes the protection of the five main goals of sharia: religion (*dīn*), soul (*nafs*), reason (*‘aql*), offspring (*nasl*), and property (*māl*). In *hadhanah* cases, an orientation towards the benefit of the child (the best interest of the child) is the main basis for judges to assess who is most deserving of custody, regardless of existing normative provisions. One concrete example of the application of *contra legem* in *hadhanah* cases is Decision no. 361/Pdt.G/2018/PA.Dps, which is the material of study in this paper. Through juridical analysis and *maqāṣid syarīah*, this article aims to examine how judges use their authority to deviate from positive legal norms in order to protect the rights and future of children who are not yet *mumayyiz*.

*Contra legem* means that the judge overrides the provisions of the law (for example Article 105(a) of the Compilation of Islamic Law) if these norms conflict with the benefit of the child. According to Khairul Nasri (PTA Padang), the transfer of custody to the father is a clear example of the adherence to norms for the best interests of the child. Jurisprudence, such as that in the Padang Religious Court No. 1291/Pdt.G/2017/PA.Mt, also demonstrates judges overriding Article 105 of the Compilation of Islamic Law through contextual reasoning to support the child's interests. In *Maqāṣid Syarīah*, this study focuses on the preservation of five fundamental values: religion (*ḥifẓ al-dīn*), life (*ḥifẓ al-nafs*), reason, lineage (*ḥifẓ al-nasl*), and property. In decisions that deviate from the Hadith/KHI norms, judges are believed to have considered *maslahah al-āmmah* (the welfare of the child) to ensure the child's well-being, including psychological, educational, and religious aspects (Kholil et al., 2024).

Pekanbaru Religious Court Study No. 1747/Pdt.G/2022/PA.Pbr emphasizes that the judge chooses the father based on *maslahah* for the child, in accordance with *maqāṣid syarīah* even though it is contrary to Hadith/KHI. If the judge hands over the *hadhanah* of the child who has not yet *mumayyiz* to the father or another party even though it is contrary to Article 105(a) of the Compilation of Islamic Law, it shows the application of *contra legem*. *Contra Legem* is a legal instrument that allows judges to deviate from legal provisions in order to ensure the child's primary interests. So from the *Maqāṣid* Perspective, Sharia supports this step because it upholds the basic values of *Sharīah* if the text norms are not in accordance with the aim of protecting children. In Decision No.361/Pdt.G/2018/PA.Dps, it is necessary to verify a copy of the decision for an in-depth analysis of whether the judge strictly applies *contra legem* and aligns the decision with *Maqāṣid Syarīah* principles (Harianto et al., 2023).

According to some Islamic jurisprudence (*fiqh*), the grandfather only comes into play after the aforementioned women. If there are no suitable relatives, then: Custody can be transferred to the state or a child protection agency, through a court decision. According to the *Maqasid Sharia* (*Maqasid Sharia*), the state is obligated to protect children from harm (*hifz al-nafs* & *hifz al-nasl*).

The strengthening of the child custody rights imposed on the Plaintiff through Article 156 of the Compilation of Islamic Law, as mentioned above, contradicts the considerations of the Panel of Judges at the Religious Court. The reasoning is that this article essentially explains the separation that occurs between husband and wife due to divorce (divorce). Meanwhile, the child custody dispute between the grandmother (Plaintiff) and the father (Defendant) began with the wife being incapable of caring for the child and the

mother being unable to care for the child. Therefore, with the death of the Defendant's wife, the responsibility for the father's (Defendant) care automatically fell on her.

In case 361/2018, the judge ruled that even though the mother was a nusyuz (inheritance) and the father had a history of domestic violence, protecting the child's well-being, particularly emotional well-being and stability, was prioritized. Therefore, placing the child with the maternal grandmother was an option to protect the *maṣlaḥah* (obligatory) and fulfill the *maqāṣid* (obligatory) of sharia.

#### 4. CONCLUSION

The application of children's *hadhanah* rights based on *munakahat fiqh* places the mother as the party who has the most right to care for children who are not yet *mumayyiz* after a divorce, based on sharia arguments and the views of the majority of *ulama*. This right is not absolute, because it can be transferred if the mother does not meet the eligibility requirements such as being trustworthy, being a Muslim, and being physically and mentally able to care for the child. The main principle in *hadhanah* is the benefit of the child (*mashlahah al-mahdhûn*), not solely the rights of the parents. In the legal context in Indonesia, this provision is in line with the Compilation of Islamic Law, although in practice deviant decisions (*contra legem*) are still found, which require confirmation of norms and consistent implementation for the best protection for children. The trial process for transferring the *hadhanah* rights of a child who is not yet *mumayyiz* to the father is carried out through a lawsuit to the Religious Court by the father on the grounds that the mother is no longer fit or capable of carrying out the obligations of *hadhanah*. In the trial process, the judge will examine the evidence and witnesses, and consider the principle of the best interests of the child. In this case, the father is also legally flawed in the child's *ahadanah* rights. Although according to Islamic law and the Compilation of Islamic Law, the mother or father has greater rights over a child who is not yet *mumayyiz*, if it is proven that care by the mother or father no longer guarantees the child's welfare, the court can decide to transfer the *hadhanah* rights to the family, while still considering the family's readiness and suitability to care for and raise the child. The judge's *ex officio* authority in deciding civil cases is the judge's right to take certain legal actions without having to be requested by the parties, in order to uphold justice and the public interest, including the protection of children or weaker parties. In the context of civil cases, especially regarding *hadhanah*, the judge can determine matters not explicitly requested in the lawsuit, such as determining child custody, even though it was not requested, if this is deemed important to ensure the child's welfare. This authority stems from the principle of active judges in civil procedural law in Indonesia and aims to ensure that decisions not only fulfill formal aspects, but also reflect a sense of justice and legal protection in substance.

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