



## THE JUDGES LEGAL REASONING ON CHILD WELFARE'S PERSPECTIVE IN THE ḤAḌĀNAH CASES AT BANTEN RELIGIOUS COURTS

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### ARTICLE INFO

**Keywords:**

Child; ḤaḌĀnah; Reasoning; Welfare.

**DOI :**

10.26532/jh.v40i1.36621

### ABSTRACT

*This research analyzes the interpretation of the children welfare values in the juridical, sociological and philosophical perspective towards the judges legal reasoning in the ḥaḍānah cases at Banten Religious Courts. This research is classified as juridical normative research align with the qualitative descriptive data analysis towards the law approach as well as the Religious Courts Decision approach concerning the divorce and custody that had the legal impact for ḥaḍānah. The research result indicates that the ḥaḍānah cases decided by Judges legal reasoning at Banten Religious Court still tend to utilize the legal positivistic considerations. Meanwhile, at the sociological level, it refers to the Article 5 of Law No. 48 of 2009 concerning Judicial Power stipulates that judges must explore, follow, and understand the legal values and society living law as as justice senses. The interpretation of this article depends on the custodian of ḥaḍānah towards the personality (morality) aspect. These includes moral and health aspects as well as the education and nurturing children opportunities aspects. Meanwhile, from the philosophical level, it is demonstrated by the law exploration derived from the Qur'an, Hadith, and fiqh principles that prioritize the children interests based on Maqāṣid al-Shariah.*

### 1. Introduction

The Religious Courts Decisions are included as one of the Islamic law products, alongside with *fiqh*, *fatwa*,<sup>1</sup> and *qānūn*.<sup>2</sup> A court decision is considered to have legal force and binding when it has acquired permanent legal force (*in kracht*),<sup>3</sup> which means that further legal actions are not utilized anymore such as opposition, appeal, and cassation, as well as the legal action timeline has

1 Zainul Hakim., The Role of MUI Fatwas as Islamic Legal Products in Society, *Journal Al-Adālah*, Vol.24 No.2, 2021, page. 105–18.

2 M. Atho Mudzhar., *Fatwas of the Council of Ulama*, Jakarta, INIS, 1993.

3 Roihan A. Rasyid., *Islamic Court Procedure Law*, Jakarta, Raja Grafindo, 2010.

reached the due towards the decision timeline. Several terms used for the process of legal discovery include: *ijtihad*,<sup>4</sup> *legal interpretation*,<sup>5</sup> *legal reasoning*,<sup>6</sup> *rechtsvinding*,<sup>7</sup> and *ratio decidendi*.<sup>8</sup>

The Dynamics Religious Court decision are greatly influenced by modern regulations<sup>9</sup> which have positive developments aspects which can be fair and more benefits.<sup>10</sup> The religious court judges sensitivity in resolving cases is greatly influenced by normative rules from applicable regulations. In cases examining, judging, and deciding aligning with their jurisdiction, judges are required to maintain a professional attitude,<sup>11</sup> as the law justice enforcement is greatly influenced by this factor. The judges professionalism is obtained by always putting attention and following the society dynamic condition as well as the mediation prioritization oriented towards the justice dispute resolution that is resulting in more adaptive decision.<sup>12</sup>

Through the *ex-officio* authority, judges are obliged to carry out these tasks and functions in order to achieve the judicial process goals, namely: to provide the actual legal and justice protection to those who are seeking justice, through a simple, fast, and cost-efficiency judicial process that are fair and enforceable decision.<sup>13</sup> The decisions of the judges panels must include *idee des recht*,<sup>14</sup> which consists of 3 (three) elements, namely justice (*gerechtigheit*),<sup>15</sup> legal certainty (*rechtsicherheit*),<sup>16</sup> and utility (*zweckmassigkeit*).<sup>17</sup> This is in-line with

4 Susi Susanti., Modification of Judicial Ijtihad in Religious Courts and Its Relevance to Islamic Law, *Journal Al-Qisthu*, Vol.17 No.1, 2019, page.27–33.

5 Rizki Perdana Hidayatullah., Discovery by Judges from the Perspective of Maqasid Sharia, *Teraju: Journal of Sharia and Law*, Vol.2 No.1, 2020, page.83–97.

6 Nur Iftitah Istantiana., Legal Reasoning of Judges in Making Decisions on Cases in Court, *Islamadina: Journal of Islamic Thought*, Vol.XVIII No.1, 2017, page.41–56.

7 Muliadi Nur., Rechtsvinding: Legal Discovery (A Comparison of Conventional Legal Discovery Methods and Islamic Law), *Journal of Al-Syir'ah Scientific*, Vol.2 No.1, 2016, page.1–20.

8 Nurbaiti Bahrudin., 'Urf as the Basis of Ratio Decidendi in Decisions of Religious Courts, *Mahkamah: Journal of Islamic Legal Studies*, Vol.7 No.2, 2022, page.262–74.

9 Regulations Issued by the State, Such as: Law Number 16 of 2019 Concerning Amendments to Law Number 1 of 1974 Concerning Marriage, Law Number 50 of 2009 Concerning the Second Amendment to Law Number 7 of 1989 Concerning Religious Courts, Presidential Instruction Number 1 of 1991 Concerning the Compilation of Islamic Law, Law Number 48 of 2008 Concerning Judicial Authority., n.d.

10 Acep Zoni Saeful Mubarak., *Arguments of Maşlahah in Court Decisions*, Cirebon, Nusa Litera Inspirasi, 2019.

11 Liliana Tedjosaputro, *Professional Ethics and Legal Profession*, Semarang, Aneka Ilmu, 2003.

12 Sarjan Kiyai and Zulkarnain Suleman, The Professionalism of Judges in Resolving Inheritance Disputes in the Religious Courts of Limboto, *As-Syams: Journal of Islamic Law*, Vol.1 No.2 2020, page. 94–124.

13 Mukti Arto., *Legal Finding in Islamic Law for the Sake of Justice (Building a Justice and Legal Protection-Based Judiciary System)*, Yogyakarta, Pustaka Pelajar, 2017.

14 Sutiyo., *Methods of Legal Finding and Judicial Power*, Yogyakarta: UII Press, 2012.

15 Rommy Haryono Djojarahardjo., Realizing the Aspect of Justice in Judges' Decisions in Civil Courts, *Media Law and Judiciary Journal*, Vol.5 No.1, 2019, page.88–100.

16 Iskandar Wibawa., Implementation of the Principle of Legal Certainty with Justice Based on the Ideals of Indonesian Law, *Yudisia (Journal of Legal and Islamic Legal Thought)*, Vol.8 No.1, 2017, page.18–44.

17 Sutiyo., *Methods of Legal Finding and Judicial Power*, Yogyakarta: UII Press, 2012.

Gustav Radburch opinion towards the law goals and achievements. The justice needs to take the precedence actions, if there is any law and justice conflict as well as inconsistency in achieving the law goals. According to Radburch, the good law not only guarantees legal certainty but also ensures non discrimination justice and society beneficials.<sup>18</sup> The decisions taken must be honestly and carefully assessed towards the court examination process (fair trial) and based on the moral fairness (moral justice).

One of the matters resolved by the Religious Court Judges about "*ḥaḍānah*" (The children custody rights). *Ḥaḍānah* is an attitude to take care of someone who has not reached the age of discernment (*tamyiz*) and be not able to take care of themselves, and then to provide the education to those persons to become a good person and protect them from any threat that may harm them.<sup>19</sup> According to Wahbah az-Zuhaili, *ḥaḍānah* is collaboration rights between both parents and the children, so if there are any issues regarding *ḥaḍānah*, the priority is the children rights.<sup>20</sup> Disputes over *ḥaḍānah* are often resolved through the non-litigation processes (non-court dispute resolution),<sup>21</sup> namely through alternative dispute resolution as intended by Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. However, many parties propose to proceed the litigation processes dispute resolution (Court dispute resolution) to resolve their issues, namely through judicial institutions.<sup>22</sup>

Data regarding custody cases at Banten Religious Courts within year of 2017 - 2023,<sup>23</sup> reveals the 103 verdicts cases, comprising: 13 from the Banten High Religious Court, 19 from the Serang Religious Court, 5 from the Tangerang Religious Court, 4 from the Tigaraksa Religious Court, 7 from the Cilegon Religious Court, 49 from the Pandeglang Religious Court, and 6 from the Rangkasbitung Religious Court.

Concerning the Banten region's Religious Courts *Ḥaḍānah* custody decision context, the courts judgement will conclude disputes over conflicting parties concerning the children involved. Judges, as legal adjudicators or *rechtsvinder*, are expected not only to conduct laws interpretation from written regulations but also to conduct the legal discovery engagement or "*rechtsvinding*." This legal discovery is carried out utilizing legal reasoning principles, which involves aligning towards the law and concrete facts and, if necessary, supplementing the law.

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18 Heather Leawoods., Gustav Radburch: An Extraordinary Legal Philosopher, *Washington University Journal of Law and Policy*, Vol.2, 2000, page.489–515.

19 Taqyudin Abu Bakar bin Muhammad Al-Husaini., *Kifāyatul Akhyār*, Surabaya, Dar Ilmi, n.d.

20 Wahbah az-Zuhaili., *Al-Fiqhu al-Islāmi Wa Adillatuhu*, Damaskus, Daar Al-Fikr, 1984.

21 Christina NM. Tobing., Legal Consultation Regarding Marital Assets and Child Custody Post-Divorce, *Proceedings of PKM-CSR*, Vol.5, 2022, page.1–8.

22 Neng Ira Sofiana., Resolution of Child Custody Disputes Through Litigation: Study of Case No. 011/Pdt. G/2018/PTA.PIk, *Indonesian Journal of Shariah and Justice (IJSJ)*, Vol.2 No.1, 2022, page.119–38.

23 Until This Research Continued into the Year 2023, a Total of 6 (Six) Verdicts Were Obtained, Which Were Resolved in the Year 2023 despite the Research Focus Being until the Year 2022., n.d.

Research regarding judges' legal reasoning in a case has been extensively conducted, as demonstrated by studies conducted by Rohmawati and Ahmad Rofiq. Their research delineates three typologies of legal reasoning concerning the biological parentage of a child: first, pragmatic judges who do not provide legal certainty to the biological child; second, conservative judges who establish civil relationships between biological children and their mothers; and third, progressive judges who provide proportional legal protection to biological children.<sup>24</sup> Hasbuddin Khalid et al. conducted research on the nature of Legal Reasoning in judges' rulings in Civil Cases, aiming to scientifically explore the truth regarding the enforcement of norms based on Law No. 48 of 2009 Article 1 Paragraph 1 concerning Judicial Authority.<sup>25</sup> Furthermore, Muhammad Isna Wahyudi's research indicates two types of arguments used by judges concerning child protection in cases involving parental disputes: first, legal reasoning based on deductive-doctrinal arguments, and second, legal reasoning based on *maslahah* (public interest).<sup>26</sup> Referring to several studies that have been carried out by previous researchers, this research does not have the same title or case as the results of the research that the researchers conducted. This research focuses on the judge's considerations in *ḥaḍānah* cases which will be studied based on the perspective of the interests of children's education and welfare, with research locations in Religious Courts throughout the Banten region.

Based on the argumentative reasons above, the researcher tries to reveal and dig deeper into the values of child protection in the decisions of *ḥaḍānah* cases in the Religious Courts in the Banten Region. The judge's legal reasoning in the *ḥaḍānah* case at the Banten Religious Court contributes to the idea that the legal discovery by the panel of judges in the *ḥaḍānah* case is capable of becoming a legal rule for the parties involved in the case in particular, as well as providing legal certainty for the object of the case, namely the child, in getting guaranteed legal protection. . Because in the process, apart from adhering to the legal positivism school of thought, the panel of judges also made efforts to contextualize the law based on the best interests of the child. This research is also very important to carry out updates in civil law in Indonesia.

## **2. Research Methods**

This research is categorized as normative juridical research that means qualitative analysis. It refers to the legal norms research found in the legislation and court decisions, as well as prevails and developed norms within the society. This research data analysis is qualitative and descriptive, conducted by identifying and sorting primary legal materials towards the judicial decisions

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24 Rohmawati and Ahmad Rofiq., Legal Reasonings of Religious Court Judges in Deciding the Origin of Children: A Study on the Protection of Biological Children's Civil Rights, *Ijtihad: Journal of Discourse on Islamic Law and Humanity*, Vol. 21 No.1, 2021, page.1–19.

25 Hasbuddin Khalid, Sufirman Rahman, and Hardianto Djanggih., Legal Reasoning in Judges' Decisions in Civil Cases, *Journal of Law and Sustainable Development*, Vol.12 No.1, 2024

26 Wahyuddin., Menakar Efektivitas Dakwah Melalui Media Sosial, *Osfpreprints*, 2020, <https://osf.io/wmrjxj>.

from three categorical: juridical, sociological, and philosophical. Subsequently, the results of the identification from analysis of these three categorical is compared with the criteria for child protection as stipulated in various laws and regulations.

The research utilizes both statutory and cases approaches. The statutory approach involves the various laws and prevailing regulations interpretation in Indonesia concerning the child protection, including: Law No. 4 of 1979 concerning Children Welfare, Presidential Decree Number 1 of 1991 concerning the Islamic Law compilation, Law No. 39 of 1999 concerning Human Rights, Law No. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage, and *Ḥaḍānah* cases verdicts from Banten Religious Court within of 2017 - 2023. The focus mainly to the *ratio decidendi* or reasoning approach, which is the judges panel consideration to decide their legal decision. The researcher analyzes the *Ḥaḍānah* case verdicts at Banten Religious Court within year of 2017-2023, and further confirms the findings through interviews with the Banten Religious Court judges panels or relevant authorities appointed to represent them.

### **3. Results And Discussion**

#### **3.1. The *Ḥaḍānah* in the Positive Law Perspective in Indonesia**

In terms Indonesia formal and legal affirmation, there are terminology differences regarding *ḥaḍānah*, which means the children custody. Referring to the Marriage Law stipulates the terms as the children caring and education. Meanwhile, in Law 35 of 2014 as an amendment to Law No. 23 of 2002, it is referred to as children protection.

*Ḥaḍānah* or custody in the perspective of Islamic Law Compilation occupies one of several concepts of providing the protection with very clear regulations. Since the child existing in the mother's womb, he/she already has had *ahliyah wujub naqishah*,<sup>27</sup> that is ownership of the applicable rights. The fetus has the right to own the legacy,<sup>28</sup> *Waqf*, and others as well as the lineage from the biological parents. All these rights are effectively applicable once they are born.<sup>29</sup>

The Islamic Law compilation states that what is meant by children nurturing or *ḥaḍānah* is the activity of providing the nurture, care, and education for a child until they reach adulthood or can stand on their own.<sup>30</sup> Thus, there are three key terms in the child nurturing, namely: nurturing the child, caring for the child, and educating the child. In essence, child nurturing is the collaboration responsibility of both parents.<sup>31</sup>

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27 Ali Hasballah., *Uṣul Al-Tasyri' al-Islāmi*, Kairo, Dar al-Ma'arif, 1971

28 Ali ash-Shabuni., *Islamic Inheritance Law*, Depok, PT. Fathan Prima Media, 2013.

29 Abdur Rozak Kusein., *Child Rights in Islam, Revised Edition*, Jakarta, Fikahati Aneska, 2015.

30 Muhammad Amin Summa., *Islamic Family Law in the Islamic World*, Jakarta, Raja Grafindo Persada, 2005.

31 Sahal Mahfudz., *Solutions to the Problems of the Ummah*, Surabaya, LTN NU East Java, 2003).

The legal basis regarding the husband and wife obligations in terms of child nurturing is stipulated in Article 77 Paragraph (3) of the Compilation of Islamic Law, which states: "*Husband and wife have the obligation to nurture and care for their children, both in terms of physical, spiritual growth, as well as their intelligence and religious education.*" This article reflects the legal provisions derived from the *Qur'anic* evidence, *Surah An-Nisa*, verse 9. Nurturing young children is obligatory, as neglecting it would expose young children to the danger of destruction. "*Ḥaḍānah*" (care and nurturing) is a right for young children because they still need supervision, care, and someone to manage their affairs from those who educate them. In this regard, it is primarily the mother's duty to perform *ḥaḍānah*.<sup>32</sup>

From a normative juridical perspective, children receive protection and guarantees under the marriage regulations of Indonesia.<sup>33</sup> However, Law No. 1 of 1974 does not provide a clear stipulation if there is any children custody dispute, whether it should be granted to the father or mother.<sup>34</sup> Parents are fully responsible for the supervision, providing necessary caring, and providing the living needs according to their capacity and capability continuously until the child reaches the legal age limit as an adult and be able to stand on their own.<sup>35</sup>

The Marriage Law contains various articles that regulate the guarantee of children rights and protection, even when the marriage between the parents has ended, it should not be a reason to neglect the child care. This provision refers to the Article 41, which states: (1) Both the mother and father remain obliged to care and educate their children, solely based on the child interests consideration. If there is any child custody dispute, the court has the right to conduct the decision; (2) The father is responsible for all expenses necessary for the nurturing and education of the child. If the father is unable to fulfill this obligation, the court may determine that he must share the expenses; (3) The court may require the former husband to provide living expenses and/or determine certain obligations for the former wife.

Furthermore, in order to provide the child rights for guarantees and protection, both parents are obliged for caring and educating their children to their best abilities.<sup>36</sup> These provisions are found in Article 45 of the Marriage Law, which states: (1) Both parents are obliged to care and educate their children to their best abilities; (2) The parents obligation as referred to in paragraph (1) of this article applies until the child gets married or can stand on their own, and this obligation continues even if the marriage between the parents ends.

*Ḥaḍānah* in Law No. 4 of 1979 concerning Child Welfare guarantees the children's welfare realization through their basic needs fulfillments. Efforts for

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32 Tihami and Sahari., *Fiqh Munakahat: Comprehensive Study of Marriage Jurisprudence* Jakarta, Rajawali Pers, 2012.

33 Irma Setyowati Soemitro., *Legal Aspects of Child Protection*, Jakarta, Bumi Aksara, 2010.

34 Abdul Ghofur Anshori., *Islamic Marriage Law (Perspectives of Islamic Jurisprudence and Positive Law)*, Yogyakarta, UII Press, 2011.

35 Yahya Harahap., *National Marriage Law*, Medan, CV Zahir Trading CO, 1975.

36 Soemiyati., *Islamic Marriage Law and Marriage Legislation*, Yogyakarta, Liberty, 2009.

child welfare in the law include guidance, development, prevention, and rehabilitation.

The understanding of economic aspects children nurturing leads to the concept of child welfare as stipulated in Law No. 4 of 1979 concerning Child Welfare. That is, children have the right to get the nurturing and protection, both during pregnancy and in a community environment that may hinder or endanger their growing process. Thus, children will no longer become victims of the economic incapacity of families, societies, nations, or states.<sup>37</sup>

The reality is that in society, there are still existing of the children experiencing obstacles in their spiritual, physical, social, and economic welfare, requiring special services. It is explained in Article 1 of Law No. 4 of 1979 concerning Child Welfare that the types of dichotomy regarding children who require guarantees of rights from the state include: children who are unable, children who are abandoned,<sup>38</sup> children who have behavioral issues,<sup>39</sup> and children with spiritual and/or physical disabilities.<sup>40</sup> Therefore, the welfare of children referred to is an order of life and livelihood for children that can guarantee their growth and development in a proper manner, both spiritually, physically, and socially. Comprehensive legal regulations regarding children's rights are found in Chapter II, Article 2 to Article 8 of Law No. 4 of 1979 concerning Child Welfare.

In normal conditions, a child lives with their parents, namely their biological father and mother. However, sometimes a child no longer has parents, resulting in the child becoming abandoned. This state of abandonment can also be caused by other factors such as poverty or because the parents neglect their duties, thereby preventing the child's rights from being properly fulfilled. Children's rights to welfare are regulated in Chapter II of Law No. 4 of 1979. These rights include: the right to welfare, care, custody, and guidance; the right to access the services; the right to access the maintenance and protection; the right to access the environmental protection; the right to receive first aid; the right to receive caring; the right to receive assistance; and the right to receive special services.

*Ḥaḍānah* in Law No. 39 of 1999 concerning Human Rights is a set of naturally inherent rights and humans existency as creatures of the One Almighty God and is His gift that must be respected, upheld, and protected by the state, law, government, and every individual for the dignity and protection of human dignity and nobility.

The children nurturing, which is the obligation of parents, must be fulfilled because failing to conduct the children nurturing by providing for their needs,

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37 Tedy Sudrajat., Law Protection Towards Children as a Part of Human Rights in the Perspective of Indonesian Family Law, *Kanun Journal of Legal Studies*, Vol.13 No.54, 2019, page. 111–132.

38 It Is a Child Whose Parents, for Some Reason, Neglect Their Responsibilities, Resulting in the Child's Needs Not Being Adequately Met, Whether Spiritually, Physically, or Socially., n.d.

39 It Is a Child Who Exhibits Deviant Behavior from Societal Norms, n.d.

40 It Is a Child Who Experiences Spiritual and/or Physical Barriers That Disrupt Their Growth and Development in a Reasonable Manner, n.d.

especially religious provisions, not only harms the child concerned but also causes significant losses to both parents because this is part of the fundamental rights that must be received by the child.<sup>41</sup>

Article 52 paragraph (2) of Law No. 39 of 1999 concerning Human Rights asserts that: "The children rights are human rights, and for their interests, the rights of children are recognized and protected by law, even when the child is in the womb." The purpose of this article signifies legal certainty in regulating the protection of children that must be carried out by parents, families, society, and even the state.

Meanwhile, Article 58 paragraph (1) affirms that: "Every child has the right to legal protection from all physical or mental violence, neglect, maltreatment, and sexual abuse while under the care of parents or guardians, or any other responsible party for the child care." The state also guarantees every child to receive legal protection from all forms of physical or mental violence, neglect, maltreatment, and sexual abuse while under the care of parents or guardians, or any other responsible party for the care of the child.<sup>42</sup>

*Hadānah* in Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection. The state upholds the rights of children as marked by the guarantee of protection and fulfillment of children's rights in the 1945 Constitutional and several provisions of national and international regulations. This guarantee is reinforced through the ratification of international conventions on children's rights, namely the ratification of the Convention on the Rights of the Child through Presidential Decree Number 36 of 1990 concerning the Ratification of the Convention On The Rights Of The Child.<sup>43</sup> The Convention on the Rights of the Child (CRC) represents a significant advancement after the world witnessed the fate of children in various countries who did not receive their rights and were not protected due to being victims of wars, political conflicts, natural disasters, or the neglectful attitudes of authorities in a country. The CRC establishment required a lengthy process involving child activists, both individuals and international organizations. It began in 1923 and culminated in the adoption of the Convention on November 30, 1989. Meanwhile, Indonesia ratified it on August 25, 1990, through Presidential Decree Number 36 of 1990. The fundamental principles related to child protection in this law include:<sup>44</sup>

3.1.1 Non-discrimination. Child protection is carried out in accordance with the fundamental principles outlined in the Convention on the Rights of the Child, ensuring that all children are treated equally without discrimination.

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41 Ahmad Rofiq., *Hukum Perdata Islam Di Indonesia*, Jakarta, Raja Grafindo Persada, 2013.

42 Raissa Lestari and Yuli Fachri., Implementasi Konvensi Internasional Tentang Hak Anak (Convention on The Rights of The Child) Di Indonesia, *Jurnal Jom Fisip UNRI*, Vol.4 No.2, 2017, page.5–6.

43 Mohammad Joni and Zulchana., *Aspek Hukum Perlindungan Anak Perspektif Konvensi Hak Anak*, Bandung, Citra Aditya Bakti, 2012.

44 I Gede Arya B. Wiranata and Muladi., *Hak Asasi Manusia: Hakekat, Konsep Dan Implikasinya Dalam Pespektif Hukum Dan Masyarakat*, Bandung, PT. Refika Aditama, 2005.



- 3.1.2 The best interest of the child. In all actions concerning children undertaken by the government, society, legislative bodies, and judiciary, the best interests of the child must be a primary consideration.
- 3.1.3 The right to life, survival, and development. These three rights are the most fundamental human rights for children and must be protected by the state, government, family, and parents.
- 3.1.4 Recognition of the child's opinion. It is the respect for the rights to participate and express their opinions in decision-making processes concerning matters that affect their lives.

The purpose of child protection in this law is to ensure the fulfillment of children's rights so that they can live, grow, develop, and participate optimally in accordance with their nature and human dignity, as well as to receive protection from violence and discrimination, thereby realizing Indonesian children who are of high quality, noble character, and prosperous.<sup>45</sup>

### **3.2. The Judges Legal Reasoning in *Ḥaḍānah* Cases from Children Welfare's Perspective Interests**

The Pandeglang Religious Court, which examines and assesses certain cases at the first level in a panel of judges' session, has decided the case verdicts of Accumulated Divorce Petitions.<sup>46</sup> The Pandeglang Religious Court, which examines and assesses specific cases at the first level in a judges panel session, has reviewed the documents related to this case, hearing session for the Plaintiff and the Defendant in the court session, and considered all the evidence presented by the Plaintiff. The Plaintiff filed for divorce on March 2, 2020, which was registered at the Pandeglang Religious Court Clerk's Office under Case Register Number 312/Pdt.G/2020/PA.Pdlg, with the following main arguments:

The Plaintiff and the Defendant were married on June 22, 2014, as recorded by the Marriage Registrar Officer of the Pandeglang District Religious Office, as stated in Marriage Certificate Extract Number: 417/75/VI/2014 dated June 23, 2014. After the marriage, the Plaintiff and the Defendant resided at the Plaintiff's parents' house in Pandeglang District. During their marriage, the Plaintiff and the Defendant lived harmoniously as husband and wife and were blessed with 1 (one) child born in Pandeglang on May 2, 2016.

Around January 2016, the marital life between the Plaintiff and the Defendant began to become discordant due to continuous disputes and arguments that were difficult to reconcile, caused by, among other things: the Defendant's failures to provide adequate maintenance because of laziness to work, thus relying on the Plaintiff's parents to meet the daily needs of the Plaintiff and the Defendant; and the Defendant's tendency to speak rudely and once threatened to kill the Plaintiff. The culmination of the breakdown of the marital relationship between the Plaintiff and the Defendant occurred around August 2018, resulting in their separation. The marital relationship between the Plaintiff and

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45 Bagir Manan., *Perkembangan Pemikiran Dan Pengaturan Hak Asasi Manusia Di Indonesia*, Bandung, PT. Alumni, 2006).

46 Linda Azizah., Analysis of Divorce in the Compilation of Islamic Law, *Journal Al-'Adalah*, Vol.X No.4, 2017, page.415–22.

the Defendant could no longer be further continued and was difficult to sustain. Regarding the child who is still a minor, it is appropriate for the Plaintiff to be designated as the custody right owner of the child's welfare. As of now, the child resides with the Plaintiff. The Plaintiff is willing to bear the costs incurred in this case in accordance with applicable regulations.

The considerations of the Pandeglang Religious Court judges in examining, adjudicating, and resolving this Accumulated Divorce Petition case are as follows: On the scheduled hearing session date, both the Plaintiff and the Defendant appeared in court in person, and the Judges Panel attempted to reconcile the parties but was unsuccessful. Subsequently, the Panel instructed both parties to continue with the mediation process<sup>47</sup> Through the Mediator Judge, the Pandeglang Religious Court attempted to reach an amicable agreement but was unsuccessful. The Panel of Judges continued to endeavor to reconcile the Plaintiff to maintain harmony and uphold the integrity of the marriage with the Defendant, but these efforts were in vain. Subsequently, the examination proceeded with the reading of the Plaintiff's petition, which was maintained by the Plaintiff. In response to the Plaintiff's petition, the Defendant stated intentions to provide a written response but failed to appear or send a representative to the hearing thereafter. To strengthen the arguments of the petition, the Plaintiff submitted written evidence in the form of documents and presented witnesses in court.

The juridical considerations of the panel of judges in this Accumulated Divorce Petition verdict can be seen in the following facts. The consideration of the efforts of the judges panel to reconcile both parties by providing advice and appointing a Mediator Judge to dissuade them from pursuing divorce, despite being unsuccessful, is a proper step. Formally, the primary duty of a judge in resolving a case is to reconcile both parties, as stated in Article 130 paragraph (1) of the Indonesian Civil Code, which states that judges must attempt to reconcile both parties before proceeding with the case examination. If the judge successfully reconciles both parties, a peace agreement is drawn up and agreed upon by both parties.<sup>48</sup> Because a peace agreement carries legally binding force (*inkracht van gewijsde*), however, in this case, the judge was unable to achieve reconciliation,<sup>49</sup> thus, it becomes a reason to proceed to the next stage of the trial. This provision is based on Supreme Court Regulation of the Republic of Indonesia Number 1 of 2016 concerning Mediation Procedures in Courts.

The grounds for the Plaintiff's divorce are in accordance with the provisions of Article 39 paragraph (2) of Law No. 1 of 1974 concerning Marriage Law, in conjunction with Article 19 letter f of Government Regulation Number 9 of 1975

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47 Mardalena Hanifah., Juridical Study: Mediation as an Alternative Dispute Resolution in Civil Court Proceedings, *ADHAPER Civil Procedure Law Journal*, Vol.2 No.1, 2016, page.1–13.

48 I Gede Arya Agus Pratama., Settlement of Disputes over the Division of Joint Assets Used as Debt Collateral Through Peace Agreements, *Analogi Hukum Journal*, Vol.2 No.2, 2020, page. 165–169.

49 Naila Salsabila., The Role of Mediation in Reconciliation Efforts of Household in the Religious Court of Cianjur, *Al-Usrah Journal of Family Law*, Vol.5 No.2, 2022, page.388–397.

concerning the Law procedures from the Number 1 of 1974 concerning Marriage law, and Article 116 letter f of Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law. Based on the considerations above-mentioned, the judges panel concludes that the Plaintiff's petition is justified and not contrary to the law; therefore, it should be granted by issuing a *talak satu ba'in sughra* (minor divorce)<sup>50</sup> the Defendant against the Plaintiff.

In addition to filing for divorce, the Plaintiff also seeks custody rights over the child born to the Plaintiff and the Defendant in Pandeglang on May 2, 2016, to be granted to the Plaintiff. This will be considered as follows:

Based on Article 105 letter a of Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law, the care of a non-*mumayyiz* child is the right of its mother. Based on Article 41 letter a of Law No. 1 of 1974 in conjunction with Article 105 and Article 156 letter a of Presidential Instruction Number 1 of 1991 concerning the Islamic Law compilation, and in accordance with the sharia justification which is then adopted as the opinion of the panel of judges, meaning as follows: "If a man conduct divorce to his wife, and they have a child from their marriage, the wife has more rights to the child custody",<sup>51</sup> Therefore, the Plaintiff, being a divorced wife and having a non-*mumayyiz* child, is more entitled as the custodian of the child. The judges panel concludes that the child custody should be granted to the Plaintiff, while still providing an opportunity for the Defendant to communicate with and express affection towards the child.

As this case falls under the domain of marriage, pursuant to Article 89 paragraph (1) of Law No. 7 of 1989 concerning Religious Courts as amended by Law No. 3 of 2006 and Law No. 50 of 2009, the court costs must be borne by the Plaintiff. The panel of judges imposes court costs on the Plaintiff in the amount of IDR 586,000.00 (five hundred eighty-six thousand Rupiah).

The sociological considerations of the panel of judges in this Accumulated Divorce Petition verdict are evident in the following facts: the Plaintiff and the Defendant were married on June 22, 2014; they have been separated since August 2018 until now, with no reunification occurring during this period; there has been discord and frequent disputes between the Plaintiff and the Defendant, often due to economic issues, with the Defendant frequently using rude words towards the Plaintiff. While family members attempted to reconcile the Plaintiff and the Defendant, their efforts were unsuccessful.

The household situation of the Plaintiff and the Defendant, as described above, indicates their marriage breakdown, with no emotional connection or remaining mutual dependency, it is even difficult for them to build an ideal household. Given these circumstances and the legal fact that family members attempted to reconcile them without success, it is very not possible for the Plaintiff and the

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50 Eva Komalasari., Wife's Rights during the Waiting Period (Iddah) of Talak Bain According to the Four Schools of Thought and the Compilation of Islamic Law, *Tambusai Education Journal*, Vol.6 No.2, 2022, page.16144–16151.

51 Ibrahim bin Muhammad Bajuri., *Hasyiatul Bajuri 'ala Ibnu al-Qasim Ghazi*, Kairo, Isa al-Babi al-Halabi, 2017.

Defendant to reunite harmoniously. Thus, the marriage objectives, as stipulated in the Article 1 of Law No. 1 of 1974 concerning Marriage law and the Quranic concept of creating a happy and eternal family (*sakinah, mawaddah, and rahmah*), cannot be realized. Continuing or forcing such a marriage could potentially lead to greater harm and prolonged suffering for both the Plaintiff and the Defendant.

Therefore, the considerations above-mentioned fulfill the provisions of Article 39 of Law No. 1 of 1974 concerning Marriage in conjunction with Article 22 paragraph (2) of Government Regulation Number 9 of 1975 concerning the Implementation of Law No. 1 of 1974.

The sociological considerations of the judges panel affirmed that the Plaintiff's request, supported by witness testimonies from both the Plaintiff and the Defendant, establishes that the Plaintiff and the Defendant's household has fractured. Hence, the household between the Plaintiff and the Defendant can no longer fulfill their obligations as husband and wife.

In addition to the divorce filing, the Plaintiff also filed a child custody claim to the Plaintiff as the child was born from biological parents as plaintiff and the Defendant in Pandeglang on May 2, 2016, to be granted to the Plaintiff. The child has been living with the Plaintiff since the Defendant separated from the Plaintiff.

Two witnesses presented by the Plaintiff testified that the child born to the Plaintiff and the Defendant in Pandeglang on May 2, 2016, has been under the Plaintiff care since the separation from the Defendant, with the Plaintiff demonstrating love, trustworthiness, responsibility, and proper upbringing. It is a legal fact that the Defendant failed to provide adequate maintenance due to laziness, resulting in the Plaintiff's parents meeting the daily needs of both the Plaintiff and the Defendant. Additionally, the Defendant's abusive language and threats towards the Plaintiff were considered. Despite the separation between the Plaintiff and the Defendant, the child has not been neglected, as the Plaintiff has been able to care for, nurture, and raise the child. Therefore, the decision to grant custody of the child to the Plaintiff as the biological mother ensures legal certainty, justice, and benefits for the child.

The philosophical considerations presented by the judges panel in this Accumulated Divorce Petition case are as follows: based on legal facts proving that the Plaintiff and the Defendant were a married couple who made a sacred marriage vow with the intention of forming a happy and loving family, the Plaintiff and the Defendant are obliged to love, respect, remain faithful, support each other emotionally and physically, maintain each other's honor, and cooperate in raising and nurturing their children in terms of physical, spiritual, and intellectual growth, as well as religious education.<sup>52</sup>

However, the reality is that the household of the Plaintiff and the Defendant is contrary to the legal facts considered above because they frequently experience

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52 Article 33 of Law Number 1 of 1974 in Conjunction with Article 77 of the Islamic Law Compilation (KHI), n.d.

disputes and arguments, leading to their separation and demonstrating no intention from either party to reconcile and improve their marriage. According to the panel of judges, this indicates continuous discord between the Plaintiff and the Defendant.

On the scheduled hearing session date, both the Plaintiff and the Defendant appeared in court in person, and the Panel of Judges attempted to reconcile the parties but was unsuccessful. Subsequently, the Panel instructed both parties to undergo mediation through the Mediator Judge of the Pandeglang Religious Court, but they also failed to reach a peaceful agreement.

If the Plaintiff and the Defendant are forced to remain bound in marriage, it will not result in harmony but rather emotional suffering for both parties, especially for the Plaintiff. This should be prevented, as per the *fiqh* principle adopted as the judges panel opinion, which states: "Rejecting harm takes precedence over bringing benefit".<sup>53</sup>

The divorce impact, whether the married couple has children or not, can be illustrated as follows: (1) Each former spouse lives separately and is free to remarry. Divorce brings juridical consequences related to status. The former husband is referred to as a widower, and the former wife is referred to as a widow. (2) If the divorcing couple has children, the philosophical impact is the breakdown of the family's protective shelter for the children. The concept of family, once a haven where children receive love and care from parents, is suddenly disrupted due to divorce. Children lose their safe living environment, leading to mental upheaval.

The decision of the judges panel to grant custody of the child to the mother is a decision that aligns with the principle of benefit. Psychologically, this decision serves the child's interests because the child has been under the care of the Plaintiff, their biological mother, and under the supervision of the Plaintiff's family and relatives. However, from the perspective of justice and legal certainty, this decision still does not fully serve the best interests of the child. Because the material support from the Defendant, their biological father, as reflected in Article 105 letter c of the Compilation of Islamic Law (KHI), has not been considered by the judge in issuing a decision regarding child support.

Based on the judge's considerations from juridical, sociological, and philosophical aspects in the Accumulated Divorce Petition case above, an analysis of the decision from the perspective of the standard of a decent life for the child's interests can be outlined as follows. Islam has designated the responsible party for providing family maintenance as fathers or husbands. Men are obliged to provide maintenance for their wives and children according to customary practices. The Prophet Muhammad explained: "You should feed her when you eat, clothe her when you dress, and not strike her face, insult her, or

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53 Zainuddin bin Ibrahim bin Muhammad., *Al-Asybah Wa an-Nadzoir 'ala Mazhabi Abi Hanifah* Beirut, Dar al-Kitab al-'Ilmiah, 1999.

separate from her except in the house" (Narrated by Abu Dawud and Ibn Majah).<sup>54</sup>

Neglecting family needs is a crime because it causes suffering to the wife and children and can even plunge them into harm due to lack of food, clothing, shelter, etc. The Prophet Muhammad said, "It is enough sin for a husband to neglect those under his care" (Narrated by Abu Dawud and Nasa'i).<sup>55</sup>

The decree of Pandeglang Religious Court judges panel, which ruled on the child born in Pandeglang on May 2, 2016, to be under the custody (*ḥaḍānah*) of the Plaintiff with the obligation for the Plaintiff to provide opportunities for the Defendant to meet with the child at any time, is fair from a psychological perspective for the child because the child still has the possibility of receiving affection from the Defendant as their biological father. However, from the perspective of ensuring a decent standard of living for the child, this decision does not apply the principle of legal certainty because it does not stipulate anything regarding child support.

#### **4. Conclusion**

The judges legal reasoning in *ḥaḍānah* cases at Banten Religious Court from the child protection perspective at the juridical level refers to Article 41 and Article 45 of Law No. 1 of 1974 in conjunction with the Law No. 16 of 2019 concerning Marriage law, and Law No. 23 of 2002 in conjunction with Law No. 35 of 2014 concerning Child Protection. In addition to the legal provisions in these two laws, judges also used the Jurisprudence of the Supreme Court, Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Court, and Supreme Court Circular Number 1 of 2017 Regarding the Implementation of the Formulation of the Results of the Supreme Court Plenary Session in 2017 as Guidelines for the Implementation of Courts Duties. The judge's considerations at this juridical level provide legal certainty for children to obtain guarantees of custody protection based on the best interests of the child. Meanwhile, at the sociological level, it refers to the provisions of Article 5 of Law No. 48 of 2009 concerning Judicial Power, which states that judges must explore, follow, and understand legal values and the sense of living law justice in society. Practical legal provisions are contextually applied by judges, including: Interpreting *ḥaḍānah* legal provisions; Contextualizing *ḥaḍānah* legal provisions; Prioritizing the best child interest; Prioritizing family aspects; Exploring the track record of parents and children; Summoning relevant parties for testimony in court; and conducting on-site inspections (*decente*). Meanwhile, at the philosophical level, it is demonstrated by the exploration of laws derived from the Qur'an, Hadith, and *fiqh* *qawa'id*.

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54 Abu Daud Sulaiman, *Sunan Abi Daud*, Beirut, Maktabah al-Ashriyyah, n.d.

55 Abu Daud Sulaiman, *Sunan Abi Daud*, Juz II, Beirut, Maktabah al-Ashriyyah, page.132.

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*Until This Research Continued into the Of 2023, a Total of 6 (Six) Verdicts Were Obtained, Which Were Resolved in the Of 2023 despite the Research Focus Being until the Of 2022., n.d.*

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