

THE IMPLEMENTATION OF *HADHANAH* THEORY ON INDONESIAN CHILDREN RIGHTS PROTECTION

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I. INTRODUCTION

Child's custody in Islamic Law is stated in 38 Surahs and 79 Verses of Koran concerning to children rights. Children are both blessings and mandates from Allah, The Almighty, of whom we must take a good care due to the values, rights, and dignity they have as a member of human race. Children rights are also essential parts of Human Rights which is regulated on The 1945 Constitution of The Republic of Indonesia, under Article 28 B Paragraph (2) as amended by the Second Amendment of 2000. It is stated that, "Every child shall have the right to live, to grow and to develop, and shall have the right to protection from violence and discrimination."

The organization of child protection is conducted based on by *Pancasila* (The Five Principles), The 1945 Constitution, and the basic principles of children rights conventions. Islam states that children are pure seeds which will grow in the recycling process of man's generation, which makes the protection and nursing of children (*hadhanah*) a great responsibility for their parents.

Hadhanah is the principal rights of very young children because young children need the most supervision, protection, and education. It is in their mother's hands *hadhanah* lies. Since Law No. 7 of 1989 on Religious Judicature and *Inpres* (President Instruction) No. 1 of 1991 on Islamic Law Compilation were passed, *Hadhanah* has become the Positive Law in Indonesia and Religious Court is granted the authority to undertake it.

The responsibility for child's care and protection is everyone's duty, including the Government, society, and family. Family (parents) has the greatest responsibility for child's protection.

Children's rights is regulated on Law No. 23 of 2002 on Children Protection. It is stated under 67 articles within it, from Article 4 through Article 71, and some of those articles have already been adapted to Law No. 35 of 2014 on The Amendment of Law No. 23 of 2002 on Child Protection.

Article 106 of Islamic Law Compilation states that: (1) *it is mandatory for parents to cultivate the possessions of young-age children or children of under custody, and highly prohibited to move or take them in pawn unless there is urgent matter for which the children's interest and benefit require it to, or an inevitable condition forces it to;* (2) *parents are accountable for the loss caused by their*

carelessness and mistakes to their mandatory stated under Paragraph (1).

Article 104 states that: (1) *all breast-feeding expenses are at the child's father's risk. If the father is dead, the expense will be imposed to the deceased father's guardian;* (2) *the longest breastfeeding period is two years, and weaning is allowed under the period with the approval of the child's father.* This provision is relevant to what is stated in Koran, on QS. Al-Baqarah (2:233). The Verse then becomes Islamic guideline on child custody.

It is affirmatively stated under the Explanation of Law No. 23 of 2002 that the accountability of parents, family, society, the government, and the country for children guardianship is a series of activity held continuously for the sake of children's rights protection. It should be continual and well-programmed to guarantee the child's physical, mental, and social growth.

Hadhanah Theory should be implemented on child protection as early as possible, starts from the pregnancy period until they reach the age of 18, based on the conception of full, solid, and comprehensive child protection. Therefore, the mandatory of providing child protection should be based on the principles of non-discrimination, what is best for children, the rights of living, sustainability, growth, and appreciation to children's opinions.

II. THE IMPLEMENTATION OF LAW ON CHILDREN RIGHTS PROTECTION

The implementation of *Hadhanah* Theory is the enlightenment to the rights of nursing, caring, and protecting children's rights. Al-Zuhaily stated that *hadhanah* in Islamic law is the rights of educating children for those who are granted the right of caring, nursing, educating, and protecting children who cannot take care of themselves, and keeping them away from destructive things because they are incapable of telling the difference between the good from the bad.¹

Ash-Shan'ani explained that in Islamic Law, child care is known as *Al-Hadhinah*, the infinitive of *Al-Hadhana* which means to take care of and

¹ Wahbah Al Zuhaily, no year, *Al-Fiqh al-Islami wa Adillatuhu*, Chapter 7. Syria, Damascus: Dar el Fikr, Saadullah Al-Jabiri Street, P.O. Box 968, page 897-898.

protect a baby (*hadhanah ash-shabiyya*). The terminology of *hadhanah* means to nurse young children who cannot stand on their own, support their education, and protect them from endangering their lives.² Mughniyah said that *hadhanah* has nothing to do with children guidance relating to either marriage or wealth. *Hadhanah* is but matters of educating and nursing children that it requires the presence of a nursing woman to take care of them until they are of age.³

It is crucial to carry out *Hadhanah*, therefore one who is willing to conduct it must have the necessary capability and sufficiency, and should fulfill the following conditions:

1. Being sensible
Nursing children should be taken care of sanely. An insensible person has no right to take care of children nursing.
2. Being of age.
Underage individuals live under the protection and supervision of their guardian, and for this reason, they are not allowed to carry out *Hadhanah* as they cannot even take care of themselves, and they still need the help of a grown-up.
3. Having the required skill and capability
People having problem with short-sightedness, blindness, infectious disease, ageing, and temper control are not valid to nurse and protect children, so they are not allowed to carry out *hadhanah* even though they are the closest relative of the children;
4. Being trustworthy and noble
A dishonest person is not a safe shelter for nursing children due to the nature of children who like to imitate so there is possibility they will grow dreadfully as the result of their copying the bad personalities of their nursing parents;
5. Being a good Muslim
The scholars of *mazaheeb* have different opinion about this. According to Imamiyah and Syafii, *al-Kafiroon* (the infidels) are unlawfully allowed to nurse Muslim children, while other *mazhab* Imams see no hazard in it. Imam Hanafi stated that a person's apostasy drops his/her nursing right;
6. Not being re-married

Children under two years old should live with their mother. However, if a widow or divorced woman is married to another man (re-married) her right of *hadhanah* drops.

7. Being a free man (not a slave)

A slave must spend most of his life time on taking care of his master's work and chores, so he barely has time for child-nursing.⁴

Ibnu Qoyyim, as quoted by Sayyid Sabiq, stated that:

"Being fair should not be one of the requirements of conducting hadhanah since it will not be easy to fulfill. If it were, there would be many forsaken children, which results in greater problems. Moreover, Ibnu Qoyyim said that his friends did not prohibit a dissenter from educating and nursing his children, or from marrying a different person during his guardian period. There are many dissenters who still honor their children's dignity. Islam has never revoked a child from his nursing parents nor from a dissenter. It is only the students of Imam Ahmad and Imam Syafii who considered 'being fair' as the requirement a parent should fulfill to conduct Hadhanah (to nurse a child)."

The period of *Hadhanah* stops when the child no longer needs support, is fully grown-up, and is able to live and take care of his needs on his own. The point is that the measurement used in assessing children being independent is *tamyeez* (being more than two years of age) and being able to do things themselves, such as eat and take a bath on their own. The Mazhab of Hanafi stated that nursing age is 7 years for boys and 9 years for girls. On this case, Imam Syafii, as quoted by Muhammad Jawad Mughniyah, explained that:

"There is no definite limitation to Hadhanah, a child must stay with his mother until he/she is able to decide whether to live with his/her mother or father. When the time has come, the child may decide on his/her free will. If he/she chooses both, there should be a raffle, and if heshe does not say a thing,

² Ash Shan'ani, 1995, *Subulus Salam*, translated by Abubakar Muhammad, Chapter 3. Surabaya: Al-Ikhlās, page 819.

³ Muhammad Jawad Mughniyah, 1994, *Al-Fiqh A'la Ma Zahibil Khamsah*, translated by Afif Muhammad. Jakarta: Basrie Press, page 133.

⁴ Abdul Manan, 2003, *Aneka Masalah Hukum Material Dalam Praktek Peradilan Agama*, Editor: Iman Jauhari. Medan: Pustaka Bangsa Press, page 80.

he/she should stay with his/her mother.”⁵

As for *Hadhanah cost*, Muslim scholars are in different point of view. There is still argument about the urgency of giving *Hadhanah cost* to the person conducting it. Imam Syafii dan Imam Hambali explained that:

“The nursing woman has the right of getting paid for her service, even though she is the birth mother of the child. If the child is in possession of wealth, the payment is made from the child’s wealth. And if he/she owns no possession, his/her father or his/her guardian is held accountable for his/her nursing expenses.”

Imam Hanafi and other Fuqahaa in *Mazhab of Imamiyah* stated that:

If the child parents are no longer bound in marriage, nor in the period of iddah (a waiting period before a widow or divorced woman may remarry) of talak raj’ee (revocable divorce), the nursing mother must be paid for her service.”⁶

The amount of *Hadhanah cost* is based on the local situation and condition. However, a judge may interfere if there is a dispute about it. The payment should cover nursing fee, home-staying fee, child’s basic needs expense, education fee, the *Hadhanah cost*, and other necessary expenses.

Law No. 1 of 1974 Article 41 on Marriage states that divorce results in:

1. Parents (father and mother) still have the obligation to nurse and educate their children for the sake of their children, and the court would decide on children’s interest disputes;
2. The father is accountable for all his children nursing and education expenses, if he is incapable of paying them, the court would then decide the expenses to be shared between them;
3. The court is also capable of charging the ex-husband for his former wife’s living cost and/or determining a certain mandatory to him.

The above article focuses on ex-husband’s financial obligation and responsibility if he has the capability. On the connection to this, the Complication of Law on Article 105 elaborately

explains about husband and wife’s matters after divorce. The article states that:

1. The right of child nursing during *mumayyiz* periode (under two years old) belongs to the child’s mother;
2. The right of child nursing after *mumayyiz* period ends is on the child’s hand, he is to choose either his mother or his father holds the right;
3. The nursing cost is paid by the child’s father.

Thus, the law states that *hadhanah* of children under *mumayyiz* period after divorce is their mother’s responsibility, while any cost caused by *hadhanah* is paid by their father. The responsibility of paying children basic expenses is still on their father’s hand even after divorce. This stipulation is based on Article 34 of Law No. 1 of 1974 on Marriage, which states that:

“It is mandatory for husband to cover all expenses of his family life. If he declines his responsibility, his ex-wife, who happens to bear the family burden after divorce, has the right to request the Court to command her ex-husband to pay sufficient money for hadhanah cost. Therefore, the cost can be compelled by law under the judicial decision of Religious Court.”

Child nursing is then regulated on Chapter II Articles 7 through 18 of *Qanun* (Islamic laws) of 2018 on Child Protection, and the child has the full right of being nursed by either his parent, his guardian, local authority, or central government until the nursing period (*hadhanah*) is conducted completely.

III. CONCLUSION

Government interference as well as family, school, and society plays important role in assuring the fulfillment of children’s rights. Children of divorced parents would obtain their rights, which are protected by law, only if the following elements exist, they are:

1. Strong social and economy background which support family and children;
2. Culture value which help ideal children growth and development; and
3. Solidarity of society members which helps to improve children life.

Law protection for children is also regulated on Article 22 of Law No. 35 of 2014 on The Amendment of Law No. 23 of 2002 on Child Protection, which states that the Country, the

⁵ Muhammad Jawab Muqhnayah, 1994. *Op. Cit*, page 136.

⁶ *Ibid.* page 137.

Government, and the local authority share obligation and responsibility for providing instruments, infrastructures, and human resource to organize child protection.

Parents are compelled to protect their children from improper things, and to put religious directives on top priority, since young children are subject to imitation. They speak and behave the way their neighborhood speaks and behaves. And for this reason, educating children does not involve only oral advice but also direct action. It is hoped that if parents cherish good personality, their children will be good persons in the future. It is due to the good things they acquire from their parents such as:

1. Tawheed values;
2. Salah education;
3. Moral lessons; and
4. Fairness and honesty.

Parents shall be held accountable for their children education before Allah The Almighty on the Judgment Day, for they are the next generation on whom we trust the fate of Islam in the future, and the next caliphs on Earth. Therefore, if children are well-educated, their parents will live happily in the world and the hereafter. On the contrary, neglecting parents will lead miserable lives, here in this world and the hereafter.

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