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# Child Custody (Hashanah) Law Problems Due to Parents' Divorce

*Problemas de jurisprudencia de custodia de los hijos (Hashanah) debido al divorcio de los padres*

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***ABSTRACT***

This study aims to reveal the nature of law enforcement in the case of Hashanah by looking at the implementation of the Hashanah case decision due to divorce in the religious court. This research uses a legal-empirical research approach. The results suggest that children are not an object that is fought. Research recommendations are the need to re-understand and not to be rigid with normative patterns by building a new paradigm so that law in Indonesia, subsection 105, and paragraph 156 of Compilation of Islamic Law can be up-to-date to answer legal problems of our times.

**Keywords:** Child custody, child status, divorce, Hashanah.

***RESUMEN***

Este estudio tiene como objetivo revelar la naturaleza de la aplicación de la ley en el caso de Hashanah al observar la implementación de la decisión del caso de Hashanah debido a divorcio en el tribunal religioso. Esta investigación utiliza un enfoque de investigación jurídico-empírico. Los resultados sugieren que los niños no son un objeto contra el que se pelea. Las recomendaciones de investigación son la necesidad de volver a comprender y no ser rígidos con los patrones normativos mediante la construcción de un nuevo paradigma para que la ley en Indonesia, la subsección 105 y el párrafo 156 de la Compilación de la ley islámica puedan estar actualizados para responder a problemas de nuestros tiempos.

**Palabras clave:** Custodia de los hijos, estado del hijo, divorcio, Hashanah.

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## *INTRODUCTION*

The renewal of Islamic law in Indonesia, especially the family law, is a necessity. The necessity is due to the demands of the changing times, requirements for the development of science, the influence of economic globalization, the importance of reforms in various fields of law. Also, the impact of renewal of Islamic thought requires that the door of effort (ijtihad) is always open to finding new rules on new issues (Munajat: 2008, pp. 179-203; Fanani: 2015, p. 34).

Referring to Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law, there are at least two subsections that determine child custody, namely paragraphs 105 and 156. Subsection 105 defines child custody in two circumstances. First, when the child is less than 12 years, child custody is determined to the mother. Second, when the child is mumayyiz (age starts at 12 years and above), the child can be given the right to choose to be cared for by their father or mother. Subsection 156 regulates child custody when their biological mother dies by providing an order to take care of the children. Whereas Law No. 7 the year 1989 concerning Religious Courts as amended by Law Number three (3) the year 2006 and Law No. 50 the year 2009 as the second amendment on the Law No. 7 the year 1989 does not provide significant changes regarding the settlement of child custody issues.

It seems that the child custody issues are elementary and will be sufficiently solved by subsection 105 and 156 of the Compilation of Islamic Law. A case between Preederika Yuliana R. bint Erri Rozano Tamara with Rudy Riswanto Purboyo bin Tarmidi Hatmo. The decision of the Supreme Court of the Republic of Indonesia No. 382 K/AG/2012 dated 18 December 2012 has given its legal style in providing legal considerations for child custody beyond what has been stipulated in the Compilation of Islamic Law. One of the verdicts specifies the care of a child named Belvana Elora, who falls to her father. Some problems arise outside the scope of the two subsections. These are below the following legal issues:

1. Child custody when their parents divorced, caused by the wife returning to her original religion (apostasy).
2. There is a possibility of deviation from the written provisions regarding child custody.
3. Child custody is based on the distribution of equal rights, one for the husband and one for the wife.
4. Reassessment of the child's age that can determine the choice of care between mother or father.

This paper will elaborate on how the problems of child custody law in the Religious Courts environment are viewed from various aspects. Especially in terms of normative regulation (Compilation of Islamic Law as applied law), jurisprudential position for subsequent legal cases, as well as sociological and other factors. The Hadhanah Case itself is the Religious Judicial Product in the form of a decision as something more conceptual and significant, namely underlying assumptions that are believed and determined how to view the examined symptoms. The product is a review of the decision related to the process of the judge's decision, which is intended for how law enforcement should be, especially after the case of divorce.

The Supreme Court has taken the stance to establish child custody when a married couple divorces and the wife returns to her original religion. The children are determined by their care to the father with consideration for the sake of maintaining the child's faith (Irsyad: 2001, p. 2). As an example, decision No. 382K/AG/2012 in which the Supreme Court's decision can be concluded that the issue of religion (term in Islam is aqeedah) is a requirement to determine whether it is the mother's right or not on custody and caring for her child who is not mumayyiz yet.

The consideration of aqidah as the feasibility to take care of children is a consideration from the point of Islamic law (shar' i). It is one of the purposes of Islam law (so-called maqasidusy shari'a that means Islamic shari'a objectives), namely maintaining the integrity of the religion of Islam with the support of several Hadiths of the Prophet. However, it needs to be examined from a normative juridical point of view, the Supreme Court's consideration has at least deviated from the two legal provisions. Subsection 105 Presidential Instruction No. 1 the year 1991 concerning the Compilation of Islamic Law that determines the care of children under the age of 12 years is in the care of their mothers, without ever addressing the problems of their mother's religion. As a comparison of subsection 116 at letter (h), it states that divorce due to apostasy can be carried out if it turns

out that apostasy will cause discord in the household. In the understanding of legal interpretation/a contrario, when the apostasy does not create a family breakdown or post-divorce the child is in cared and good condition; the wife has the right to take care of the child under the auspices of a legal marriage or in a legal divorce. Therefore, a married couple (after divorce) still has the right to take care of their child, even though one of them is an apostate.

Provisions of the Human Rights law contained in Law Number 39 of 1999 concerns Human Rights subsection 51 paragraph (2). After the marriage is terminated, a woman has the same rights and responsibilities as her ex-husband for all matters relating to her children, the best interests of the child should be taken into account.

Judges pay more attention to the interests or problems faced by the parties concerned rather than the law. Judges basically cannot violate the law; they must not violate the system; they must think of an oriented system. However, if there is a conflict between legal certainty and justice in certain circumstances, the interests of the parties should be prioritized (Mertokusumo: 2014, p.12).

Discourse on legal certainty and justice always leads to the attitude of the judge to see a legitimate source position of the legislation from a broader perspective that is always motivated by the applicable legal system. Legal certainty and justice are two factors that support each other in maintaining harmony between the interests in society. Legal certainty is more general, reflected in the form of rules and general rules, while justice is more specific because it is respectful for individuals in society (Soekanto: 1991, p. 10).

During this time, a judge, even more, the first-rate judge (judex fact), is almost impossible to violate existing legislation. Because if it is done, besides, he breaks the provisions of the regulation; also, he has violated several previous judges' decisions that always put the constitution as a source of law. By presenting some notes, Bagir Manan (Manan: 2006, p. 3), the former Chief Justice of the Republic of Indonesia, considers that the Indonesian legal system is not appropriately classified as a continental legal system or a civic legal system, or a codified legal system (Manan: 2006, p. 3). According to the flow of law, it is known as legalism, which identifies the decree with the constitution. On the other hand, there is the Anglo-Saxon legal system, a common-law with a free legal flow that opposes the first. Essentially a common law is a judge-made law, which means a regulation that is established by the judges and defended by the power granted to the judges' precedents (Gilissen & Gorle: 2005, p. 17).

Juridically, the Indonesian legal tradition is another combination of the European Continental and Anglo-Saxon legal systems (Rismawati: 2018, pp. 73-93). This can be known by comparing subsection 50 verse (1) and subsection 5 verse (1) of Constitution Number 48 the Year 2009 concerning Judicial Power. Subsection 50 verse (1) states that all court decisions must contain the reasons and grounds for the decision itself, including specific subclasses of the relevant laws and regulations or unwritten legal sources that are used as the basis for judging.

The necessity to carry the subsection of law shows that the commandment is used as the primary source of law as in the continental European tradition. In contrast, the obligation to carry an unwritten source of law is an Anglo-Saxon style (Rismawati: 2018, pp. 73-93). This is also emphasized in subsection 5 verse (1) of Law Number 48, the Year 2009, which requires judges to explore, follow and understand the legal values and a sense of justice that lives in the community. It is because the legal system in Indonesia is at two different poles (continental Europe and Anglo-Saxon). Hence, it is necessary to ask if judges face an unusual situation that occurs between the rules of law and the values that live in a society or with jurisprudence. Therefore, it is necessary to examine the regulations in the conventional law system, the conflict between common law and statute law. Statute law prevails when there is a difference between jurisprudence with statutory provisions, the decree will get rid of jurisprudence (Kamil & Fauzan: 2004, p. 1).

However, it is also possible for the judge to deviate from the provisions of the legislation or known as contra legem, provided that the legal considerations must be sufficiently clear and sharp by considering various aspects of legal life (Kamil & Fauzan: 2004, p. 1).

This view will help the second problem concerning the possibility of some deviations from the normative provisions regarding childcare disputes. The first is child custody based on the same division. This possibility occurs when a divorced couple has two or more children. If this happens, then the approach taken is not just a normative approach that determines childcare based on the age factor (subsection 105 of the Compilation of Islamic Law). Still, the authority must also be considered and the desire of both parties (divorced husband and wife) to take care of their children (Budiman: 2014, pp. 1-30).

Legalism provides a syllogism law style that is juridische syllogism (Qamar et al.: 2017, p. 50). It is a logical deduction from a broad formulation that will enforce the provisions of subsection 105 of the Compilation of Islamic Law by determining the two children directly in the care of their mothers. Within this situation, a father should never expect to be able to take care of his child because the law has determined so. So far, deviation from the provisions of Article 105 of the Compilation of Islamic Law is only possible when the husband and wife agree to share the authority in taking care of their children (Dirdjosisworo: 2013, p. 12). This agreement is part of the contractvrijheid freedom of contract following subsection 1338 of Burgerlijk Wetboek will be at the same value as the law of Pacta Suntervanda (Badrulzaman: 1983, p. 31).

Even though it deviates from the provisions of subsection 105 Presidential Instruction Number 1 the year, 1991 of Compilation of Islamic Law, Hadhanah case with two or more children, a judge who resolves a childcare dispute by giving direct rights without the agreement of the parties to the father to take care of one of his children will be closer to justice actions. In turn, appreciation for individuals shown through the judge's gesture will be felt as fairness for the father who both have a share in producing offspring, of course for the vice versa, is very unfair when a divorced couple and have two or more children (under age). The care of the two children is determined by the mother.

The second legal issue is a review of the age requirement that has the right to choose for caring under the mother or father. Determination of the age of 12 years in Article 105 Compilation of Islamic law is a determination of agreement so-called ijma' that is determined by scholars in Indonesia so-called Indonesia communis opinion doctoral.

As a comparison, the classical branch of Islam science, the so-called fiqh which divides between the care of girls and boys. In the child custody for a son, according to Imam Abu Hanifah, the boy can choose to be cared for by his mother or father when he is seven years old, while according to Imam Malik, his mother has more right to care for him until the child's first tooth (tooth alter). While the care of a daughter, according to Imam Syafi'I, the child has the right to choose. While according to Imam Abu Hanifah, the mother has a more significant right to take care of the child until she reaches her mature age. Imam Ahmad bin Hanbal states that a mother has a greater right to take care of her child until the child is nine years old, according to Imam Malik, when a child first time lost teeth. Usually, 6 - 8 years old (Al-Hamdani: 2002, p. 10)

The existence of child custody legal institutions is because the child has not been able to stand alone or, in Islamic legal terms, is called Hashanah. Consequently, when the child is considered are capable of being independent, the child's care will depend on the choice of the child itself, whether the child chooses the father or the mother. According to Abdul Manan (Manan: 2005, p. 2), the measurement used is rational, so-called tamyiz, and able to be independent; for example, they can eat by themselves, taking a bath by themselves, and so on (Manan: 2005, p. 2). The problem that arises is on what age for a child can be said to be already mumayyiz. Compilation of Islamic Law believes the age of 12 years is the mumayyiz starts, and it is the time to determine the child's right to choose for custody for them, whether from the mother or the father.

While the scholars of fiqh (which is a reference for the Compilation of Islamic Law) do not establish it, they tend to disagree. It is Imam Ahmad bin Hanballah who determines that the highest age limit is nine years to decide whether a child has been mumayyiz or not. In overcoming this, it is necessary to use the restrictive interpretation method of limiting meaning or the rechtsvervijning reasoning method of narrowing definition (Manan: 2013, pp. 189-202). Along with this method, the age limitation, 12 years old as the age of Mumayyiz in the Compilation of Islamic Law, must be interpreted as the final deadline for a child to be said as not mumayyiz. In other words, a child after the age of 12 years, or a child must have been noted as mumayyiz.

On the one hand, a child age less than 12 years old can be judged by the judge whether the child considered mumayyiz or not. Therefore the determination of mumayyiz by Compilation of Islamic Law with a 12-year age limit is not an absolute limitation. A judge who resolves the custody dispute of children under the age of 12 can assess whether the child is mumayyiz or not. The decision will determine the next judge's demeanor to give the child the right to choose to be fostered care by the mother or the father. The judge's attitude was not categorized as a deviation of law because besides being supported by the opinion of the scholars, it was also possible from interpreting the law.

On the other hand, it seems very appropriate to pay attention to the thought of a law that is developed in America (Anglo Saxon), a good lawyer is a law that is under the rule that lives in society (Rasjidi & Rasjidi, 2001). The age factor cannot be used as a standard to determine the mental and physical development of a child. Therefore, the action of the judge must assess the child's mumayyiz, both mental, physical, and the views of the community around.

## *METHODOLOGY*

This study is socio-legal research that uses a normative and empirical legal approach because it is aimed at legal norms that are scattered in various laws and regulations that are relevant with the object understudied, While the legal practice with an emphasis on the facts of juridical in the field. Therefore, this writing is a type of combination writing (mix legal research) that tries to combine normative literature with legal writing. The authors focus on observing the effectiveness of the implementation of post-divorce child custody by conducting a direct preview at the Religious Court by conducting interviews and observations in it.

## *RESULTS*

### Law Enforcement of the Case of Hashanah (Child Custody) Due to Divorce in the Religious Courts

Divorce is not an obstacle for children to obtain custody right for both themselves and their parents. One barrier that becomes a striking fear for the children is their parents' divorce because when a divorce occurs, the children will be the primary victim. Divorced parents must keep thinking about how to help children to overcome the suffering caused by the separation of their parents. Parents are the first people responsible for giving the rights of their offspring as a result of a divorce based on the concept of justice (Misnianto: 2015, pp. 3-3). It is often the realization children's rights tasks are interrupted by the will of the husband and the wife, as well as their outside will.

On the one hand, a divorce, especially in divorced, although can be a heart relief for both parties. On the other hand, there are consequences where it is a bitter experience for the child. Children want a form of justice in law enforcement; longing for divorce cases submitted to the court taken by professional judges with high moral integrity. Hence, they can give decisions from legal aspects certainty based on procedural justice, legal justice dimensions, moral justice, and social justice. It is the main goal to be achieved from the process of solving any dispute in court (Swantoro et al.: 2017, pp. 189-204).

1. Targets and Objectives of the Implementation of Hadhanah Verdict Case.

The implementation of the Hashanah verdict in the religious court, especially in the area of the Makassar High Religious Court, can be analyzed within 10 (ten) decisions, one of the decisions of the Polewali Religious Court, as follows:

"In childcare cases, we are as law enforcers, especially judges, generally consider that in carrying out the Hashanah verdict case, we must pay attention to the needs and psychological aspects of the child. It is to avoid the difficulty of carrying out the execution; the judge can punish the party (the loser) for paying

dwangsom (money that should be paid), as referred to subsection 606 Rv. letters (a) and (b), and based on the results of the National Work Meeting of the Supreme Court of the Republic of Indonesia in 2012."

The need for the adoption of dwangsom or astringe (money that should be paid) is additional punishment in the judge's decision for the person convicted to pay a sum of money. Other than what has been stated in the leading law with the intention that he is willing to carry out the basic sentence properly on time. Dwangsom is regulated in subsection 606 a and 606 b B.Rv., which began to be used by Raad Van Justitie and Hoegerechtteshof in 1938; indeed, they were not mentioned in detail in Dutch East Indies civil and criminal procedural law, namely HIR and RBg.

There is still a dualism of thought; in this case, some argue that it is not feasible to apply to the Hashanah case. The reason that the context is different from compensation (Subsection 225 HIR) or payment in civil law, where in the level of law enforcement, the case of Hashanah is not a matter of an object that are contested for their rights, whether or not they have rights to disputed objects. Still, it is more to the issue of being willing or not willing to take care of the children that should not be forced so that the children get a form of fundamental justice. There are some reasons why dwangsom should be applied to the children in case of Hashanah verdict, they are:

1. As a strategic step in the case to prevent the parties from carrying out decisions and prevent empty decisions (ilusoir).
2. It is only an additional sentence if the main sentence is not me yet, so the violations of dwangsom can be executed.
3. As psychological pressure, hence, willingly carry out the decision.

Subsection 225 HIR, paragraph 259 R.Bg., namely a lawsuit to carry out an agreement based on subsection 1267 of the Civil Code textbook (KUH), can be used as a basis in a decision that contains dwangsom guidance. Therefore, the plaintiff, who demanded on the Hashanah, can submit dwangsom advice (subsection 606 a B. Rv) based on a clear posita (reason of the demands itself). As stated by 1) the amount of dwangsom not related to the claim for payment of a sum of money; 2) the dwangsom guidance is stated clearly and explicitly in petitum (something that is asked for to be granted); 3) The panel of judges examining the supervision of a Hashanah which includes dwangsom must pay attention to whether it is worthy of being accepted by looking at the economic conditions of who will carry out the dwangsom; 4) including whether the dwangsom is worth or not in the case of being examined in the sense of legal ground or not claiming dwangsom itself (2016).

The Hashanah decision execution with or without dwangsom can be analyzed from the explanation of H. Muh. Basyir Makka, the Registrar of the Sidrap Religious Court as follows:

"So far, if there is a decision in a Hashanah case with dwangsom which has been decided by a panel of judges, the parties to the dispute could accept gracefully, even we are as executors of the execution of the decision, have never carried out a forced execution on a Hashanah case."

Likewise, what was said by Nox Apollo, Bailiff of the Makassar Religious Court stated that:

"As a bailiff of Makassar Religious Court, those who carry out the contents of the decision. Suppose there is a request for execution that is granted either with or without dwangsom in the field for every decision of the Makassar Religious Court. Generally, the decision of the Hashanah case is carried out willingly by the parties who litigate Until now".

As the verdict on the Hashanah case that has been stated by the litigant. Namely: Jeani Sam Astri Binti Sambas, age 28, Islam, last education is High School, Employment of Suraco Abadi Yamaha Motorbike Employees, residence in Pelita Road IV, Path 5, No. 29, Neighborhood Association 002, Citizens Association 004, Ballaparang Village, Rappocini District, Makassar City. She said that she was the wife (defendant). Between the plaintiff and defendant had divorced as husband and wife in the Makassar Religious Court on September 20, 2016, and during the marriage relationship between them has been blessed with three children, namely: Putri Alya Zahra, date of birth August 23, 2008 (age eight years); Nabila Rihadatul Aisya, date of birth September 1, 2010 (age six years); Muh. Basudewa Firman, date of birth December 13, 2014 (two years old).

The problem of children, after being decided by the Religious Court, we still obey the decision of the Religious Court following the judge's order, carry it out willingly.

The concept of giving benefit and fairness of children's rights has been started to become a consideration that can be seen in one of the decisions of the Makassar Religious Court. The panel of judges considering the wishes of the parties, where the plaintiff's (husband) desires are approved by the defendant (ex-wife). The plaintiff able to meet their children, the plaintiff is required to maintain the health of these children. However, the defendant is keeping the children under her care, partly because the children are underage or not mumayyiz yet. And considering the subsection one (1) letter (g), the compilation of Islamic Law called "Hashanah" is the caring for children, namely the activities of caring for and educating children to adulthood or being able to be independent.

Subsection 1, number 11 of Law No. 23 of 2002 as amended by Law No. 35 of 2014 concerning Child Protection, namely "parental power to nurture, educate, develop, protect, and grow children per their religious beliefs and abilities, talents, and interests. That what is meant by an adult or independent is when the child reaches 21 years old, as determined in the Law No. 4 of 1979 chapter I, subsection one concerning Child Welfare. In Chapter, I paragraph 1 number (12) of Law No. 23 of 2012, as amended by Law No. 35 of 2014 concerning Child Protection, stated that children's rights are part of human rights that must be guaranteed, protected, and fulfilled by parents, families, communities, governments, and countries.

## *DISCUSSION*

Likewise in case number 756 / Pdt.G / 2017 / PA.Mks. the Hashanah case was decided on July 31, 2017, at the Makassar Religious Court, with the rules as follows:

1. Granting the plaintiff's claim;
2. Stating that the plaintiff and defendant's children are:

2.1) Aiman Rezky Talia, born on April 24, 2004;
2.2) Aqilah Ratu Talia, born on November 6, 2005;
2.3)Alifa Ratu Talia, born on September 5, 2008;
2.4) Anugerah Rezky Talia, born on May 21, 2011;

3. Declaring the plaintiff and defendant's children named respectively:
3.1) Aqilah Ratu Talia;
3.2) Alifa Ratu Talia,
3.3) Rezky Talia Award,

Fall in plaintiff's care/maintenance;

4. To declare the plaintiff and defendant's child named Aiman Rezky Talia, born on April 24, 2004, given to the child himself to choose to live together, whether to the plaintiff (his mother) or the defendant (his father);
5. Sentencing the defendant to hand over the child named Anugerah Rezky Talia to the Plaintiff;
6. Giving punishment to the defendant to provide the children with living for the Plaintiff, each for one child, a minimum sum of money 500,000 IDR (five hundred thousand rupiahs) every month, from the time the decision is read out until the child-adult and can stand on his own;
7. Charging the plaintiff to pay the court fee of 611,000 IDR (six hundred and eleven thousand rupiahs);

For the parties after dropping out of the case, it is rarely the case of forced child executions, by applying to execution to the Makassar Religious Court, following the results of an interview with the plaintiff (ex-defendant's wife), claiming to be named: Dahlia, ST., M.Pd. Binti H. Dahlan, age 39 years old, Islam, government worker, residence at BTN. Ranggong Sakinah, Block A, No. 1 A, Tamangapa Urban Village, Manggala District, Makassar City. The plaintiff is the legal wife of the defendant, married on Sunday, April 6,

2003, and was blessed with four children, on June 18, 2012, between the plaintiff and the defendant divorced in the Religious Court Makassar. After divorce, the second child (Aqilah Ratu Talia) and the third child (Alifa Ratu Talia) are in the plaintiff. The first child (Aiman Rezky Talia) and the fourth child (Anugerah Rezky Talia) are in the defendant, but because the children are still underage, so they are all set to their mother while their living cost from his father. It turned out that the Judge's verdict had been handed down under the order of the decision, so we are as the litigants, accepted it.

Furthermore, after hearing the explanation from the plaintiff, what was the opinion of the defendant (the plaintiff's ex-husband's) in the interview he claimed himself with this name: Tawakkal Talib, ST., MM. Bin Drs. H. Abd. Muttalib, age 39 years old, Islam, postgraduate, government worker, residence at BTN. Graha Mutiara Asri, No. B 2, Taeng Village, Pallangga District, Gowa Regency, he stated that the responsibility for law enforcement efforts is seen as a manifestation of justice for the children. The defendant agreed with the Makassar Religious Court's decision. Between the plaintiff and defendant, he agreed with the division of tasks of caring for their children since they both busy working as civil servants. Considering the condition of the plaintiff who lives alone without her family and to ease the plaintiff's burden, the child under the defendant's caring is being taken care of his life needs. Also, he obtains proper attention from the defendant or from other family parties so that physically and psychologically, there is nothing to worry about.

It is essential for the defendant to have high awareness, acknowledged his responsibility as a father to support his children, but adjusted to the limits of the defendant's ability and the reasonableness of his salary. The defendant gives their joint assets solely for children's needs, including one (1) housing unit, one (1) car, a motorcycle, savings, and deposits. That the defendant obeys and refers to Government Regulation (PP) Number 10 of 1983 Jo. PP No. 45 of 1990 subsection 8 paragraph (1 & 2) concerning divorce gives 1/3 of salary for children. With this Regulation, Defendant is willing to support the children, which is 1/3 of the defendant's salary, which is IDR 2,000,000 (two million rupiahs) every month for his four children.

What has been decided on the Hashanah case by the verdict can be carried out willingly. Based on the Interview, there is no problem in taking care of children. The awareness possessed by the parties who are part of the mindset and "shy" culture prevailing in the people of South Sulawesi (Idrus: 2014).

The reflection of the mindset and culture of the community in childcare issues because dynamic legal changes must continue to occur in law enforcement, especially in the case of Hashanah, as required by the Law No. 48 of 2009 concerning Judicial Power stated in subsection 5 verse (1). These considerations have not thoroughly explored community habits. Judges only concern with the formal law as the following considerations:

1. Upon the claim of the plaintiff regarding the plaintiff's and defendant's children who are still underage, their maintenance is handed over to the plaintiff because the children have a stronger emotional relationship and relationship with the mother.

2. Based on subsection 105 letters (a) Compilation of Islamic Law, the care of children under 12 years old (not mumayyiz yet) falls to their mother. Hence, the plaintiff's hold the rights holder as Hashanah can be granted. However, the defendant has the right to meet his child. The children's names are respectively: Aqilah Ratu Talia, born on November 6, 2005; Alifa Ratu Talia, born on September 5, 2008; and Anugerah Rezky Talia, born on May 21, 2011. They are underage (under 12 years old).

3. Although the care of the child is with the plaintiff, following the provisions of subsection 105 Letter (c) and subsection 149 letters (d) Compilation of Islamic Law, the defendant must bear the livelihood or cost of maintaining the child.

4. The plaintiff requires an amount of 6,000,000 IDR (six million rupiahs) for the four children each month that Defendant must give to the Plaintiff. The claim regarding the future income for the plaintiff's children.

5. According to subsection 156 letters (d). The father supports all the costs of Hashanah and children's living according to his ability until the children are becoming an adult and can take care of themselves.

6. Considering that by taking into account the defendant's economic capabilities as it is considered above, according to the provisions of subsection 80 paragraph (4) letter (c) Compilation of Islamic Law, and as evidence of P5 and P6 proposed by the plaintiff, it is fair and appropriate for the defendant to be punished for

giving a minimum of 500,000 IDR (five hundred thousand rupiahs) to his children.

7. In South and West Sulawesi society, childcare is part of Bugis culture (one of a tribe in Makassar) that still upholds the culture of "Siri na pacce." It means that a married couple who have been blessed with children without childcare, both parents are still in harmony in fostering the household or divorced, is intoxicating. If the child is abandoned due to divorce, both parents become not part of the culture of Siri na pacce itself. It is very embarrassing and disabled when children are confronted. This culture and mindset must be maintained because it is formally not contrary to laws and regulations, and even supports each other between culture and the applicable rules itself.

The beautiful local wisdom in Indonesia (Indriani et al.: 2019, pp. 1126-1130), in this case, is a cultural term "siri na pacce" should be strengthened by Constitution Law. It is aligned with the Law Number 1 of 1974 concerning to Marriage; Law Number 4 of 1979 concerning to Child Welfare; Law Number 7 of 1989 about Religious Courts that have been amended by Law Number 3 of 2006, and the second amendment to Law Number 50 of 2009; also Law Number 23 of 2002 concerning to Child Protection as amended by Law Number 35 of 2014. With those considerations of such justice will be felt by the father, the mother, and the children, this is the real hope of the society.

## *CONCLUSION*

The essence of law enforcement in the Hashanah case in the religious court was realized. The construction of the Judgment of the Religious Court was not only by formal and material legal approaches. But also, by using the path of the local wisdom of the people of South Sulawesi, namely the concept of Siri'. The judge establishes it by making decisions that are equitable for the child. Despite enforcement, the law carries out childcare rights. The goals and objectives are to achieve the idea of parental responsibility. Children are not an object, at least the children could feel if the parents' divorce as if it has never occurred. Love for children should have never changed but for the sake of the realization of the benefit and justice of children's rights itself.

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