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Doi: 0.32332/milrev.v3i1.8907

**Dates:**

Received 26 November, 2023

Revised 20 Maret, 2024

Accepted 24 Maret, 2024

Published 04 April, 2024

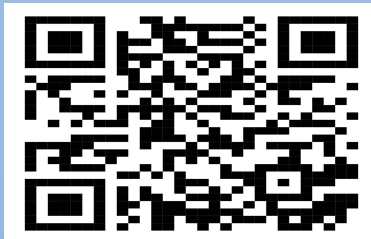
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## CONTEMPORARY ISLAMIC LAW IN INDONESIA: THE FULFILLMENT OF CHILD CUSTODY RIGHTS IN DIVORCE CASES CAUSED BY EARLY MARRIAGE

**Abstract:** : This study aims to analyze the fulfillment of child custody rights in divorce cases due to early marriage using a contemporary Islamic law approach. A marriage license in Indonesia is only allowed to be granted to a man and woman from age 19 and above. The aim is to prevent early marriages which are very vulnerable to divorce due to the psychological immaturity of the couple. For example, Kotagajah Timur was observed to have a common case of divorce among underage people that married due to pregnancy outside of marriage. Therefore, this descriptive-analytical field study was conducted based on a phenomenological method. Moreover, data were collected using observation, interviews, and documentation. The results showed that divorcees from early marriages were unable to fulfill the provisions of Child Custody Rights. This was observed from the fact that the couple did not provide the required child protection after the divorce in addition to the non-fulfillment of other rights such as *Nasab*, *Nafkah*, *Care (Hadhanah)*, and *Child Education Patterns*. Furthermore, the mother is required by the law to have full custody while the father provides living expenses. This requirement is observed to have been ignored because the mother is underage and lacks the maturity to perform the necessary obligations such as caring for and educating the children. Therefore, the children are discovered to be under the care of the parents of the mother.

**Keywords:** Child Custody, Early Marriage, Divorce, Contemporary Islamic Law.

### INTRODUCTION

Marriage is the union of two human beings with several differences in thinking and levels of maturity in

resolving problems.<sup>1</sup> However, this is not the same in the cases of individuals that marry early or are considered not to be old enough for marriage.<sup>2</sup> Early marriage was defined as the union between an immature man and woman<sup>3</sup> which often occurs due to the lack of patience on the part of the prospective bride to proceed to graduate school after completing the elementary phase. Unfortunately, this type of marriage often leads to divorce.<sup>4</sup> This is because maturity is required to form a happy family and is considered very important in marriage.<sup>5</sup> The age for marriage generally varies but the Indonesian legislation requires both the man and woman to be at least 19 years.<sup>6</sup> This is necessary to ensure the bride and groom have met the required age considered mature enough for marriage in order to avoid the high vulnerability of early marriages to divorce.<sup>7</sup>

The trend of early marriage leading to divorce was observed in Kotagajah Timur, Central Lampung Regency. Several underage couples were identified to have entered into early marriages because the woman was pregnant. Most of these marriages ended in divorce mainly due to the mental and emotional immaturity of the couple<sup>8</sup> as well as economic reasons, specifically after the birth of a child.<sup>9</sup> The divorce, in this case, is not based on state

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<sup>1</sup> Ahmad Tholabi Kharlie, "Modernisasi, Tradisi, dan Identitas: Praktik Hukum Keluarga Islam Indonesia," *Studia Islamika* 18, no. 1 (30 April 2011), <https://doi.org/10.15408/sdi.v18i1.444>.

<sup>2</sup> Kamila Angelika Hynek dkk., "The Association between Early Marriage and Mental Disorder among Young Migrant and Non-Migrant Women: A Norwegian Register-Based Study," *BMC Women's Health* 22, no. 1 (27 Juni 2022): 258, <https://doi.org/10.1186/s12905-022-01836-5>.

<sup>3</sup> Mohd Idris Ramulyo, *Hukum Perkawinan Islam* (Jakarta: Bumi Aksara, 2004).

<sup>4</sup> Wardah Nuroniyah, "Cerai Lebe sebagai Inisiatif Lokal dalam Upaya Meminimalisir Praktek Perceraian Liar (Studi Kasus di Desa Cangkring Kabupaten Indramayu)," *AlManahij: Jurnal Kajian Hukum Islam* 14, no. 1 (2 Juni 2020): 113-29, <https://doi.org/10.24090/mnh.v14i1.3739>.

<sup>5</sup> Siti Musawwamah, "The Implementation of PERMA Number 3 of 2017 Concerning The Guidelines For Dealing With Women's Cases on Laws As an Effort of Women Empowerment In The Judiciary in Madura," *ALHUKAM: Jurnal Hukum & Pranata Sosial* 15, no. 1 (27 Juni 2020): 3, <https://doi.org/10.19105/al-lhkam.v15i1.2883>.

<sup>6</sup> Muhammad Fauzudin Faiz, Zezen Zainul Ali, dan Muhammad Taufiq, "Underage Widows and Widowers before the Law: Problem, Contestation and Legal Certainty in Marriage Dispensation," *JURIS (Jurnal Ilmiah Syariah)* 22, no. 2 (15 Desember 2023): 223, <https://doi.org/10.31958/juris.v22i2.9097>.

<sup>7</sup> Abubakir M. Saleh dkk., "Exploring Iraqi People's Perception about Early Marriage: A Qualitative Study," *BMC Women's Health* 22, no. 1 (29 September 2022): 393, <https://doi.org/10.1186/s12905-022-01980-y>.

<sup>8</sup> Sodabeh Alinejhad dkk., "Association of Demographic, Social, and Personality Factors with Early Versus Late Divorce in Women: A Cross Sectional Study in Ilam, West of Iran," *Shiraz E-Medical Journal* 20, no. 10 (16 September 2019), <https://doi.org/10.5812/semj.85705>.

<sup>9</sup> Jessica Allen dkk., "Social Determinants of Mental Health," *International Review of Psychiatry* 26, no. 4 (Agustus 2014): 392-407, <https://doi.org/10.3109/09540261.2014.928270>.

law which requires fulfilling post-divorce rights. Therefore, it is interesting to comprehensively examine the fulfillment of children's rights after divorce from early marriage in the location.

The review of the facts of the existing literature led to the classification of several studies into different categories. The first was on early marriage and divorce which included a legal review of early marriage and divorce,<sup>10</sup> the effect of underage marriage on divorce rates<sup>11</sup>, the impact of underage marriage on the occurrence of divorce<sup>12</sup>, early marriage and the impact of divorce in rural areas<sup>13</sup>, the impact of early marriage on reproductive health<sup>14</sup>, and the effect of underage marriage on divorce rates<sup>15</sup>. The second was on child custody after divorce, including child rights cases in divorce: analysis of Supreme Court decisions<sup>16</sup>, child care, and post-divorce property division<sup>17</sup>, parenting patterns for elementary-age children after divorce from an Islamic perspective<sup>18</sup>, protection against neglect of child custody as a result of divorce<sup>19</sup>, legality of control of minors' custody (*hadhanah*) to the father

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<sup>10</sup> Erika Fitriani dan Winsheryly Tan, "Tinjauan Hukum Tentang Pernikahan Dini dan Perceraian," *JUSTITIA: Jurnal Ilmu Hukum dan Humaniora* 9 (4), no. 4 (2022): 2083-95, <http://dx.doi.org/10.31604/justitia.v9i4.2083-2095>.

<sup>11</sup> Muhammad Fahrezi dan Nunung Nurwati, "Pengaruh Perkawinan di Bawah Umur terhadap Tingkat Perceraian," *Prosiding Penelitian & Pengabdian Kepada Masyarakat* 7, no. 1 (2020): 80-89, <https://doi.org/10.24198/jppm.v7i1.28142>.

<sup>12</sup> Lismi Salis dan Endang Heriyani, "Dampak Perkawinan di Bawah Umur Terhadap Terjadinya Perceraian," *MLS: Media of Law and Sharia* 4, no. 1 (2022): 34-50, <https://doi.org/10.18196/mls.v4i1.17186>.

<sup>13</sup> Yelia Ahya Robby dan Ela Siti Fauziah, "Pernikahan Usia Dini dan Dampak Perceraian di Pedesaan," *Istinbath: Jurnal Penelitian Hukum Islam* 16, no. 1 (2021): 115-34, <https://doi.org/10.36667/istinbath.v16i1.283>.

<sup>14</sup> Shafa Yuandina Sekarayu dan Nunung Nurwati, "Dampak Pernikahan Usia Dini Terhadap Kesehatan Reproduksi," *Jurnal Pengabdian dan Penelitian Kepada Masyarakat (JPPM)* 2, no. 1 (2021): 37-45, <https://doi.org/10.24198/jppm.v2i1.33436>.

<sup>15</sup> Mohamad Abdul Azis dan M Avriza Virmansyah, "Pengaruh Perkawinan di Bawah Umur terhadap Tingkat Perceraian," *Al-Ihath: Jurnal Bimbingan dan Konseling Islam* 2, no. 1 (2022): 42-57, <https://doi.org/10.53915/jbki.v2i1.166>.

<sup>16</sup> Aldella Ayu Putri dan Mohamad Fajri Mekka Putra, "Perkara Hak Anak dalam Perceraian: Analisis Putusan Mahkamah Agung," *Jurnal Kertha Semaya* 11, no. 8 (2023): 1811-23, <https://doi.org/10.24843/KS.2023.v11.i08.p06>.

<sup>17</sup> Agustin Hanafi dan Novan Satria, "Pengasuhan Anak dan Pembagian Harta Pasca Perceraian," *Seulanga: Jurnal Pendidikan Anak* 4, no. 1 (2023): 17-25, <https://doi.org/10.47766/seulanga.v4i1.1452>.

<sup>18</sup> Ibrahim Maulana Syahid Nur 'Ala, Tutik Hamidah, dan Tulus Setiyono, "Pola Pengasuhan Anak Usia Dasar Pasca Perceraian dalam Perspektif Islam," *ALASASIYYA: Journal Basic of Education (AJBE)* 7, no. 1 (2022): 1-10, <http://dx.doi.org/10.24269/ajbe.v7i1.6416>.

<sup>19</sup> Vina Mareta dan Muh Jufri Achmad, "Perlindungan Terhadap Pengabaian Hak Asuh Anak Akibat Perceraian," *Bureaucracy Journal : Indonesia Journal of Law and Social-Political Governance* 2, no. 1 (2022): 484-502, <https://doi.org/10.53363/bureau.v2i1.146>.

after divorce<sup>20</sup>, and control of minors' custody to the father<sup>21</sup>. Therefore, the present study focuses on the impact of early marriage divorce on the fulfillment of child custody based on contemporary Islamic law in Indonesia. The aim is to provide answers and information on how child custody rights are fulfilled by underage couples after divorce from early marriage.

## RESEARCH METHODOLOGY

The descriptive-analytical field study was conducted using a phenomenological method. Data were obtained from primary and secondary sources through interviews, documentation, and observation. Semi-structured interviews were applied to 7 informants, consisting of 3 perpetrators, 3 parents, and 1 neighbor with questions focused on a. the age of getting married, b. years in marriage, c. reasons for divorce, d. fulfillment of parenting obligations after divorce, and e. family relationship with ex-husband. Data retrieved were analyzed using qualitative methods in the form of a deductive mindset, which focused more on special cases than general theories, using positive law theory and contemporary Islamic law.

## RESULTS AND DISCUSSION

### The Concept of the Child in Indonesian Legislation and Islamic Law

Article 42 of Law No. 1 of 1974 Chapter IX on the Status of Children defines a legitimate child as a child born in or as a result of a legal marriage. Article 43 further states that 1) children born out of wedlock only have a civil relationship with their mother and her family and 2) the position of the child mentioned in paragraph (1) is further regulated through government law. Moreover, Article 44 states that 1) a husband may deny the legitimacy of a child born to the wife where there is proof of adultery and that the child is

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<sup>20</sup> Irfan Islami dan Aini Sahara, "Legalitas Penguasaan Hak Asuh Anak dibawah Umur (Hadhanah) kepada Bapak Pasca Perceraian," *Al-Qadau: Jurnal Peradilan dan Hukum Keluarga Islam* 6, no. 2 (2019): 181-94, <https://doi.org/10.24252/al-qadau.v6i2.10715>.

<sup>21</sup> Fawzia Hidayatul Ulya, Fashi Hatul Lisaniyah, dan Mu'amaroh, "Penguasaan Hak Asuh Anak di Bawah Umur kepada Bapak," *The Indonesian Journal of Islamic Law and Civil Law* 2, no. 1 (2021): 101-17, <https://doi.org/10.51675/jaksya.v2i1.176>.

the result of such act and 2) the court shall give a decision on the legitimacy of the child at the request of any interested party.<sup>22</sup>

Law No. 35 of 2014 on Child Protection provides Four Obligations and Responsibilities of Parents and Family. Article 26 states 1) the rights of children and the obligations of parents to include a) caring for, nurturing, educating, and protecting children, b) developing children based on their abilities, talents, and interests, c) preventing child marriage, and, d) providing character education and instilling ethical values in children. It also provides that 2) when parents are absent, whereabouts are unknown, or for some reason are unable to carry out the obligations and responsibilities, the provisions in paragraph a may be transferred to the family, which shall be implemented based on the laws and regulations. Moreover, Article 27 states that 1) each child needs to have an identity from the moment of birth, 2) the identity as referred to in paragraph (1) shall be stated in the birth certificate, and 3) the provision of the birth certificate is based the evidence from a person that witnessed and/or assisted in the birth process. The Article continues that 4) in the case of a child whose birth process is unknown and the whereabouts of the parent cannot be determined, the birth certificate should be based on the statement of the person that found him/her and is equipped with the police investigation report.<sup>23</sup>

The provision of Article 98 of the Compilation of Islamic Law Chapter XIV on Child Maintenance states that 1) the age limit of independence for a child or considered mature is 21 years, as long as the child is not physically or mentally disabled or has never entered into marriage. 2) The parents shall represent the child regarding all legal actions inside and outside the court, and 3) the religious court may appoint a close relative that is capable of fulfilling this obligation when both parents are incapable. Article 99 further defines a legitimate child as 1) a child born in or as a result of a valid marriage and 2) the result of fertilization of a legitimate wife outside the womb and born to the wife. In Article 100, a child born out of wedlock shall only have a *nasab* relationship with his/her mother and his/her mother's family.<sup>24</sup>

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<sup>22</sup> “Undang-undang No. 1 Tahun 1974,” t.t.

<sup>23</sup> “Undang-undang No. 35 Tahun 2014,” t.t.

<sup>24</sup> Intruksi Presiden, *Kompilasi Hukum Islam*, No 1, 1991.

A child is stated in the applicable law of Indonesia to be any individual under the age of 18 years and is allowed to have certain rights from birth. There are also laws promulgated to regulate the obligations and rights of children from a divorced marriage to be fulfilled by the parents. For example, Article 45 of Law Number 1 Year 1974, Chapter X concerning Rights and Obligations between Parents and Children states that 1) both parents are obliged to maintain and educate the children as well as possible and 2) the obligations of the parents referred to in paragraph (1) of this article shall apply until the child is married or able to stand on his own, even if the marriage between the parents is terminated. Moreover, Article 47 states that 1) children who have not reached the age of 18 (eighteen) years or have never entered into marriage are under the authority of the parents as long as they are not deprived of their authority and 2) parents are required to represent the child regarding all legal actions in and out of court.<sup>25</sup> This shows that the rights and obligations of parents towards children according to Law Number 1 of 1974 include the maintenance and provision of education for children until adulthood.

Article 104 of Chapter XIV on Child Maintenance as presented in Compilation of Islamic Law shows that 1) all the costs of breastfeeding the child are borne by the father. If the father has died, then the costs of breastfeeding shall be borne by the person who is obliged to provide for the father or his guardian. It further states that 2) breastfeeding shall be for a maximum of two years and may be weaned within less than two years with the consent of the father and mother. The provision of Article 105 also states that, in the event of divorce, 1) the maintenance of children who are not yet *mumayyiz* or not yet 12 years old is the right of the mother, 2) the maintenance of children who have *mumayyiz* is left to the child to choose between the father or mother as the holder of the maintenance rights, and 3) the cost of maintenance shall be borne by the father. Moreover, Article 106 states that 1) parents are obliged to care for and develop the property of their children who are minors or under guardianship and are not allowed to transfer or mortgage it except for urgent needs if the interests and interests of the child require it or an unavoidable fact. It also

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<sup>25</sup> "Undang-undang No. 1 Tahun 1974."

provides that 2) parents shall be liable for any loss incurred as a result of the fault or negligence of the obligations mentioned in paragraph (1).<sup>26</sup>

The Islamic Law Compilation on child maintenance comprehensively covers the obligations of parents towards children after divorce as observed in the need for the father to be responsible for the education costs, care, and needs of the children.<sup>27</sup> Moreover, contemporary Islamic law provides some rights to every child born into the world which are required to be fulfilled by the parents. These rights are explained as follows:<sup>28</sup>

- a. *Nasab*: A child born into the world has the right of *nasab* as explained in the Qur'an Surah Al-Furqon verse 54 to serve as a means to glorify human honor. The process requires the presence of three elements, including father, mother, and child to achieve *nasab* bond. Therefore, *nasab* is interpreted as the birth of a child after sexual intercourse between husband and wife in a legal marriage.
- b. Breastfeeding (*Radha'ah*): Mothers are required to breastfeed children for two full years and those without the ability to fulfill this requirement can ask others to assist through the concept of *Radha'ah* (breastfed) child.
- c. Care (*Hadhanah*): Care is a right for every child due to the need for someone to look after, protect, and fulfill their needs and education. However, a mother has a greater obligation to provide care than anyone else.<sup>29</sup> It is stated that young children need other people to fulfill all their needs and are entitled to the right of care or maintenance (*hadhanah*).<sup>30</sup> The placement of more emphasis on the mother to fulfill this right is based on the hadith of Rasulullah SAW narrated by Abu Hurairah that "You (mother) are more entitled to take care of the child as long as you have not

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<sup>26</sup> Intruksi Presiden, *Kompilasi Hukum Islam*.

<sup>27</sup> Aslati dkk., "Utilizing Science and Maqāṣid Al-Sharī'ah in Resolving Contemporary Issues of Islamic Family Law," *Al-Manahij: Jurnal Kajian Hukum Islam* 18, no. 1 (2024): 17–36, <https://doi.org/10.24090/mnh.v18i1.10571>.

<sup>28</sup> Abdul Majid Muhammad Mathlub dan Al Wazif Fi Ahkam Al Usroh Al Islamiyah, *Panduan Hukum Keluarga Sakinah*, 1 ed. (Solo: Era Media, 2005).

<sup>29</sup> Sayyid Sabiq, *Fiqh Sunnah, Jilid 4* (t.t.: PT. Tinta Abadi Gemilang, 2013).

<sup>30</sup> Pengadilan Tinggi Agama Kalimantan Tengah dkk., "Penerapan Kompilasi Hukum Islam pada Peradilan Agama dalam Perkara Hadhonah dan Eksekusi Putusannya," *Millah* 20, no. 2 (28 Februari 2021): 275–300, <https://doi.org/10.20885/millah.vol20.iss2.art4>.



remarried".<sup>31</sup> Moreover, in the absence of anyone to fulfill the rights stated, the child is expected to only depend on the mother in order to have appropriate education and teaching.<sup>32</sup>

The education required to be provided to the children according to Islam is the religious understanding through life experiences from childhood, in the family, at school, and in the community. This is based on the belief that the acquisition of more religious experience and elements can lead to the exhibition of better religious attitudes, behavior, and life. Moreover, the methods applied by parents for the training process can influence the development of personality in the children.<sup>33</sup> Some basic morals are required to be emphasized during the process of educating the children such as manners, politeness, and associating with good friends. Therefore, the patterns designed to be implemented in training children according to Islam are stated as follows:

- a. Religious Development: a) Cultivating and maturing the faith in Allah as well as Love for Allah and His Messenger in the hearts of children. This can be achieved by teaching the basics of religion such as the introduction of the creator, the signs of His power, His creatures, and the prophets in order to grow the great love for Allah and His Messenger in the heart of the children as well as to explain the law of halal and haram. b) Getting the children used to performing several worship activities such as prayer<sup>34</sup>, fasting, going to the Mosque, memorizing the Qur'an and Hadiths, and ensuring the girls wear hijab based on Shari'a.<sup>35</sup>
- b. Fostering morals: Akhlak (*al-Khuluq*) is temperament (*as-Sajiyah*) and *tabi'at* (*at-Tahab*). This shows that there is a need for moral guidance to ensure the social

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<sup>31</sup> Abu Daud, *Kitab At-Thalaq, Bab Man Ahaqqu Bihwaladd, No. 1938*, Edisi II (Software Maktabah Syamila, t.t.).

<sup>32</sup> Sabiq, *Fiqh Sunnah, Jilid 4*.

<sup>33</sup> Abdullah Nashin Ulwan, *Pendidikan Anak dalam Islam* (Jakarta: Pusaka Amani, 1995).

<sup>34</sup> Muhammad Nur Abdul Hafizh Suwaid, *Mendidik Anak Bersama Nabi* (Solo: PT. Pustaka Arafa, 2004).

<sup>35</sup> Haya Binti Mubarak Al-Barik, *Ensiklopedi Wanita Muslim* (Bekasi: PT. Darul Falah, 2010).



movement of the children is truly straight because the process of moving from an attempted *tabi'at* to one that just flows is difficult.<sup>36</sup>

Several bad attitudes and behaviors are spreading among children in society which requires focusing on those growing up to become adolescents and considered difficult to control.<sup>37</sup> Some of these bad behaviors include a) lying which is the worst because it is the key to evil and provides opportunities for different ugly attitude, b) stealing is no less dangerous than lying, as well as c) reproach and scorn considered unacceptable based on reason.<sup>38</sup>

### **Factors Influencing Divorce Due to Early Marriage: Discord and Lack of Maturity**

Single parents are required to have the responsibility of caring for, educating, and guiding the children. The parent can either be the father or mother of the child with a good influence on the children.<sup>39</sup> Single mothers do not usually have a partner and are alone after separation from husbands, either due to divorce or death. The status is also for men that have been previously married but separated, either due to divorce or death. Meanwhile, the cultural frame exempts men from the status, leading to the designation of women as single parents.<sup>40</sup> This shows that single mothers are mostly required to educate, care for, and guide children alone.

Marriage is a sacred act, in Kotagajah Timur Village, Kotagajah Sub-District, Central Lampung Regency but several early marriages are observed to have led to divorce. According to Mrs. RN, the parent of RI, her son was divorced because of frequent disputes between the two parties associated with differences of opinion and the lack of capacity to meet the needs of the wife.

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<sup>36</sup> Suwaid, *Mendidik Anak Bersama Nabi*.

<sup>37</sup> Al-Barik, *Ensiklopedi Wanita Muslim*.

<sup>38</sup> Al-Barik.

<sup>39</sup> Deni Maryani, "Upaya Ibu Sebagai Orang Tua Tunggal dalam Mendidik Anak Usia Dini di Desa Permu Bawah Kecamatan Kepahiang Kabupaten Kepahiang," *repository.unib.ac.id* (Universitas Bengkulu, 2014).

<sup>40</sup> Ahmad Munif, *Kebangkitan Kaum Janda: Akar Teologis-Spiritual Kaum Papa* (Yogyakarta: Pustaka Pelajar, 2009).

“Actually, as a parent, I have advised them, but the same problem is being repeated. For childcare, we met with both families and agreed that the care of the child was left to the mother because the child was still young and needed a mother.”<sup>41</sup>

The information from Mrs. WT, the parent of SI, showed that her child divorced because of frequent disputes, her husband being a drunkard, coming home at night, and lack of responsibility towards the wife. This was explained further in the following excerpt:

“As a parent, I have often advised my child to tell her husband to change because there are no more young people that can keep playing here and there looking for fun. They also need to reduce their bad habits because they now have responsibilities to fulfill. Maybe he is just like that because every time my child says good things, he doesn't accept it and always prioritizes his happiness without thinking about the small family. Then the peak happened when he came home drunk and my child reprimanded him. There was an argument, the husband dropped the divorce and refused to come home since then without any news. The care of the children is entrusted to us by the husband and his family.”<sup>42</sup>

According to Mrs. TM, the parents of RA, there are frequent disputes in her child's marriage which led to oral arguments. The woman also stated that the husband is usually angry without any clear reason and often comes home late at night.

“I, as a parent, have often advised my child to be patient and endure the marriage but I noticed she was no longer strong enough to cope. The situation led to the divorce and I asked the husband's family to allow the wife to have custody of the child because he still needs the care of his mother.”<sup>43</sup>

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<sup>41</sup> “Interview with Mrs. RN, parents of Mrs. RI, Kotagajah Timur Community on December 10, 2019.” t.t.

<sup>42</sup> “Interview with Mrs. WT, parents of Mrs. SI, East Kotagajah Community on December 12, 2019.” t.t.

<sup>43</sup> “Interview with Mrs. TM, parents of Mrs. RA, Kotagajah Timur Community on December 11, 2019.” t.t.

The opinion of the people in the surrounding area was assessed and the response from the neighbor, Mrs. YN, was found to be different from the information conveyed by Mrs. TM. It was stated that the divorce between the couple was due to frequent disputes as well as the lack of maturity on the part of the wife and her frequent demands from the husband.

“The husband of RA is a responsible man because I know he works hard to meet the needs of the wife and that’s the reason he comes home in the night. However, he could not meet up with the high demand of the wife, leading to the divorce.”<sup>44</sup>

### **Fulfillment of Children's Rights after Divorce from Early Marriage**

Every child has rights required to be fulfilled by both parents but those related to *Hadhanah* after the divorce have not been satisfied due to some motives such as economic pressure, lack of employment, and personal problems, thereby leading to the neglect of the child. This was observed from the responses provided to the questions related to the fulfillment of parenting after divorce in the study area.

For example, Mrs. RI that married at the age of 15 and was in the marriage for approximately 1 year stated that she divorced due to the less responsible behavior of her husband and the frequency of arguments. This was confirmed through the following excerpt:

“I still depend on both of my parents in meeting my daily needs, because I am only a junior high school graduate who has difficulty finding a job with an ex-husband that never sends money for the needs of his child. I have focused more on taking care of my children and my needs through the assistance of my parents.”<sup>45</sup>

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<sup>44</sup> “Interview with Mrs. YN, Mrs. RA’s neighbor, East Kotagajah community on December 12, 2019.” t.t.

<sup>45</sup> “Interview with Mrs. RI, East Kotagajah Community on December 10, 2019.” t.t.

The response from the neighbors showed that RI was very good at parenting even though she was still relatively young. It was also stated that she used to interact with neighbors without being awkward before the marriage and had become quieter.<sup>46</sup>

According to Mrs. RA, she was married at the age of 15, blessed with one child, and built a household for less than a year which ended in divorce due to a lack of harmony, frequent differences of opinion, and fights. I depend on my parents to meet my daily needs.<sup>47</sup> However, the response from Mrs. YN, a neighbor, showed that RA was less responsible as often left the child to play with friends her age. It was further stated that the child was being mostly raised by the parents of RA, even breast milk was replaced with formula milk.<sup>48</sup>

The results showed that Mrs. SI got married at the age of 15, was blessed with one child, and was in the marriage for less than 2 years. The marriage was stated to have ended in divorce due to lack of responsibility, economic constraints, and frequent physical violence of the husband. This was confirmed in the following excerpts:

“I depend on my parents to fulfill my daily needs and those of my child. I also have difficulties in educating my child because I am divorced. I have to combine work with the provision of care but the child still lacks the attention needed. This is because I spent more time at work while the child stays with my parents (Mrs. WT).”<sup>49</sup>

The statement was confirmed by the neighbors that the child is mostly with the mother of SI. This was stated to have increased the closeness or inner bond of the child to the grandmother. The neighbor also reported that breast milk was often replaced with formula milk for the child.<sup>50</sup>

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<sup>46</sup> “Interview with Mrs. RI’s neighbor, East Kotagajah community on December 11, 2019.” t.t.

<sup>47</sup> “Interview with Mrs. RA, East Kotagajah Community on December 11, 2019.” t.t.

<sup>48</sup> “Interview with Mrs. YN, Mrs. RA’s neighbor, East Kotagajah community on December 12, 2019.”

<sup>49</sup> “Interview with Mrs. SI, East Kotagajah Community on December 12, 2019.” t.t.

<sup>50</sup> “Interview with neighbors and close people, East Kotagajah Community on 13 December 2019.”

## Fulfillment of Children's Rights Due to Early Marriage in Contemporary Islamic Law

Children are defined in Law No. 35 of 2014 and the Convention on the Rights of the Child as any individual under the age of 18.<sup>51</sup> However, this is different from the minimum of 19 years required in the Marriage Law to be joined together as a couple. The people in the age limit are considered to have the maturity of mind and body to enter into marriage with full knowledge of the purpose as well as to produce healthy and quality offspring.<sup>52</sup> Moreover, children are gifts in the family and are considered the buds with the potential to serve as the younger generation of successors to the ideals of the nation's struggle. This shows the importance of providing adequate rights for the children to grow and develop optimally. An example is the assurance of custody to protect and guarantee growth and development. In Indonesian law, child custody is regulated in the Marriage Law and both parents are obliged to maintain and educate the children effectively<sup>53</sup> up to the period of entering a marriage.<sup>54</sup>

The Compilation of Islamic Law shows that child maintenance is the responsibility of the father. It further states that the cost of breastfeeding should be borne by the person obliged to provide for the father or the guardian in a situation where the father is dead. Breastfeeding is an activity required to be conducted for a maximum of two years or less depending on the consent of the father and mother. Moreover, in the event of divorce, the law places the custody of children that are not yet *mumayyiz* or younger than 12 years old under the authority of the mother. The children above 12 years old are allowed to choose the preferred parent while the cost of maintenance is to be borne by the father.<sup>55</sup>

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<sup>51</sup> "Undang-undang No. 35 Tahun 2014."

<sup>52</sup> "Perubahan norma dalam Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan," peraturan.bpk.go.id, 2019, <https://peraturan.bpk.go.id/Details/122740/uu-no-16-tahun-2019>.

<sup>53</sup> Suci Ramadhan dan Jm. Muslimin, "Indonesian Religious Court Decisions on Child Custody Cases: Between Positivism and Progressive Legal Thought," *JURIS (Jurnal Ilmiah Syariah)* 21, no. 1 (10 Juni 2022): 89, <https://doi.org/10.31958/juris.v21i1.5723>.

<sup>54</sup> "Undang-undang No. 1 Tahun 1974."

<sup>55</sup> Intruksi Presiden, *Kompilasi Hukum Islam*.

Furthermore, children have the right to a minimum of basic education as required by the law.<sup>56</sup>

Contemporary Islamic law further states that every child born into the world has some rights, including *nasab*, breastfeeding (*Radha'a*), and care (*Hadhanah*), which are required by the parents to fulfill. The process of educating the children also requires focusing on *akhlak* in addition to teaching the provision of wealth. Some of the activities required to be completed include developing religious understanding and fostering the morals of the children.<sup>57</sup> However, the rights of the child extend beyond marriage and are mandated to be fulfilled and maintained in the event of divorce.<sup>58</sup> This shows that parents are not exempted from the obligation even during the occurrence of divorce.<sup>59</sup>

The results showed that the rights of children were fulfilled through different methods after divorce in East Kotagajah. This was observed in the fulfillment of the obligation by grandparents in some cases due to the difficulties experienced by the single mother to secure a job and the irresponsibility of the ex-husband.<sup>60</sup> The rights were also found to be less optimally fulfilled in several other cases. This was identified in the situation where parents from divorce due to early marriage prefer playing with friends in their age range rather than focusing on the child.<sup>61</sup> The situation was observed to a disadvantage of early marriage,<sup>62</sup> leading to the shift of responsibility to the grandparents that often replace breast milk with formula milk. The trend showed that the *hadānah* pattern in the study

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<sup>56</sup> Muhammad Faisal Hamdani, "Hukum Keluarga Islam dalam Perspektif HAM Universal (UDHR) dan HAM Islam (UIDHR)," *AHKAM: Jurnal Ilmu Syariah* 16, no. 1 (28 Januari 2016), <https://doi.org/10.15408/ajis.v16i1.2892>.

<sup>57</sup> Adugnaw Zeleke Alem dkk., "Spatial Distribution and Determinants of Early Marriage among Married Women in Ethiopia: A Spatial and Multilevel Analysis," *BMC Women's Health* 20, no. 1 (Desember 2020): 207, <https://doi.org/10.1186/s12905-020-01070-x>.

<sup>58</sup> Alinejhad dkk., "Association of Demographic, Social, and Personality Factors with Early Versus Late Divorce in Women."

<sup>59</sup> Nuroniyah, "Cerai Lebe sebagai Inisiatif Lokal dalam Upaya Meminimalisir Praktek Perceraian Liar (Studi Kasus di Desa Cangkring Kabupaten Indramayu)."

<sup>60</sup> Matthijs Kalmijn dan Marjolein Broese Van Groenou, "Differential Effects of Divorce on Social Integration," *Journal of Social and Personal Relationships* 22, no. 4 (Agustus 2005): 455-76, <https://doi.org/10.1177/0265407505054516>.

<sup>61</sup> Hynek dkk., "The Association between Early Marriage and Mental Disorder among Young Migrant and Non-Migrant Women."

<sup>62</sup> Saleh dkk., "Exploring Iraqi People's Perception about Early Marriage."

area was mostly fulfilled by the mother while the remaining aspects were provided by the father and third parties such as grandparents.<sup>63</sup>

The explanation from the results showed the existence of a discrepancy in the implementation of post-divorce childcare based on positive and contemporary Islamic laws. For example, fiqh experts agreed that caring for and educating children is an obligation. The experts further defined child custody as an effort to care for and protect children, both boys and girls, from any form of harm or danger and improve their physical as well as mental and intellectual abilities to ensure appropriate development of life and fulfillment of responsibilities. Moreover, Allah SWT requires that the mother has custody because the gender is believed to be gentler and has the capacity to educate and provide excellent attention than the father.<sup>64</sup>

*Maqashid* Sharia scholars agreed that the provision of benefits and avoidance of elements of harm or danger should be prioritized in cases of child custody.<sup>65</sup> This shows that the parent with the capacity to ensure no harm to the child should be allowed to take custody of the child. Moreover, when both parents do not have the capacity to take care of the child due to economic factors or divorce,<sup>66</sup> the right should be granted to the maternal grandmother. The purpose is to ensure more care and affection for the child and to avoid loss of adaptation that can occur due to continuous change of custody. It is important to state that *Shari'ah* does not intend to show a preference for a guardian based on kinship but rather on the individual considered to be better and more capable. The action is the

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<sup>63</sup> Fauzi Fauzi, "Suwar al-ḥadānah ba'da al-ṭalāq fī Aceh al-Wuṣṭā," *Studia Islamika* 24, no. 1 (21 April 2017): 99–150, <https://doi.org/10.15408/sdi.v24i1.4189>.

<sup>64</sup> Lilis Setiawati dkk., "Penguasaan Kakek pada Hak Asuh Anak di Bawah Umur dalam Perspektif Maqashid Syariah," *At-Tahdzib: Jurnal Studi Islam dan Mu'amalah* 11, no. 2 (2023): 44–51, <https://doi.org/10.61181/at-tahdzib.v11i2.312>.

<sup>65</sup> A. Gad Makhlouf, "The Doctrinal Development of Contemporary Islamic Law: Fiqh Academies as an Institutional Framework," *Oxford Journal of Law and Religion* 10, no. 3 (2021): 464–86, <https://doi.org/10.1093/ojlr/rwac005>.

<sup>66</sup> Allen dkk., "Social Determinants of Mental Health."



manifestation of the principle of *maslahah* which focuses on attracting good and rejecting evil in married life from the perspective of Islamic law.<sup>67</sup>

Imam As-Syatibi uses the word *al-maslahat* while al-Syatibi uses the term *maqashid sharia* to represent "what is revealed by Allah (*sharia*) has a *maqashid* (purpose) to realize the benefit of every human being both in the life of the world and the hereafter". Moreover, the granting of custody to grandmothers requires a connection with the aspect of *hifz al-nafs* or maintaining the soul. This is because the preservation of the soul is expressed as upholding human dignity and defending human rights.<sup>68</sup> Child custody is expected to be granted to the party that has an affection for the child, without any intention of mistreatment. Maternal grandmothers granted custody need to educate and care for the child and have the capacity to pay for the schooling fee. In terms of age, the individual is expected to have a healthy body and be economically qualified to satisfy *hifz al-nafs* and meet the *daruriyat* level required to provide the basic needs for the child in East Kotagajah. Grandmothers also need to have the ability to protect the offspring (*hifz al-nasl*) in addition to *hifz al-nafs*. The concept is related to the protection of the family and children need the care from the parents starting from the womb to the age of 18 classified as the period to have a family as well as maintain rights and dignity. This showed that children under 18 years old are basically still under the obligation of parents and need to be well cared for.

Grandmothers can be granted child custody due to divorce, lack of readiness, as well as inadequate physical and economic abilities of the mother to provide the care needed. The purpose is to avoid the harm that can be experienced by the child in line with the *maslahah* provided in Islam that "if there are two conflicting *mafsadah*, then the greater *mafsadah* and the lesser *mafsadah* should be taken".<sup>69</sup> Therefore, the biological and psychological conditions of the child need to be maintained by the grandmother. This was confirmed by the results that the grandmothers should be carefully considered in granting

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<sup>67</sup> Ahmad Ropei dkk., "MANAGING 'BALIGH' IN FOUR MUSLIM COUNTRIES: Egypt, Tunisia, Pakistan, and Indonesia on the Minimum Age for Marriage," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 16, no. 1 (30 Juni 2023): 112, <https://doi.org/10.14421/ahwal.2023.16106>.

<sup>68</sup> Jasser Auda, *Memahami Maqasid Syariah: Peranan Maqasid Dalam Pembaharuan Islam Kontemporer*, Terj. Marwan Bukhari Bin A. Hamid (Malaysia: PTS Islamika SDN BHD, 2014).

<sup>69</sup> Duski Ibrahim, *Al-Qawa'id Al-Fiqhiyah (Kiadah-Kiadah Fiqih)* (Palembang: Noer Fikri, 2019).

child custody. According to *masqashid* sharia, *maslahah* is certainly good for the child to eliminate *mudharat*, avoid neglect, and ensure the needs are satisfied. The elements associated with the provision of care include religious commitment, education, love, physical health, and economic capacity.

*Hadhanah* pattern was observed to be mostly associated with the mother while the other aspects were provided by the father and third parties such as grandparents. It was also found that the divorce caused due to a quarrel between husband and wife had a negative impact on the *hadhanah* pattern such as the older child bearing the burden of the younger siblings.<sup>70</sup> Meanwhile, the divorce caused by a disagreement on the philosophy of life or certain principles had a positive effect. Scholars have agreed that mothers are more entitled to the care of primary-age children due to the difference in parenting patterns compared to fathers. Moreover, a mother has more ability to provide a sense of security and comfort during the growth and development of primary-age children. The gender also has the capacity to hold the trust and responsibility during the formation of *adab* and character of primary-age children. This can be *uswah hasanah* to educate the children to become good Muslims in the future, as explained in Surah at-Tahrim verse 6 and Surah al-Baqarah verse 233.<sup>71</sup>

## CONCLUSION

In conclusion, child custody rights caused by divorce from early marriage in Kotagajah Timur Village have not been fulfilled according to positive and contemporary Islamic laws. This was observed in the lack of commitment of some families to implement the mandates and provisions contained in positive laws after divorce from early marriage. Some of these laws include Articles 45 and 47 of Law Number 1 of 1974, CHAPTER X concerning rights and obligations between parents and children, and Articles 104, 105, and 106 of the Compilation of Islamic Law, CHAPTER XIV concerning child

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<sup>70</sup> Fauzi, "Suwar al-hadhanah ba'da al-talaq fi Aceh al-Wusta," *Studia Islamika* 24, no. 1 (2017): 99-150, <http://dx.doi.org/10.15408/sdi.v24i1.4189>.

<sup>71</sup> Maulana Syahid Nur 'Ala, Hamidah, dan Setiyono, "Pola Pengasuhan Anak Usia Dasar Pasca Perceraian dalam Perspektif Islam.":1-10.

maintenance. Meanwhile, contemporary Islamic law requires that every child born into the world has rights required by the parents to fulfill such as *nasab*, *hadhanah*, and *radha'a*. The law also regulates the pattern of education to be provided which is focused on both religious and moral development.

Positive and contemporary Islamic laws both allow the mother to have full custody of a minor child after divorce and the cost of living is charged to the father but these provisions are observed to have been ignored. This is because the mothers are underage and considered immature to perform the required obligations such as caring for and educating the children. Moreover, some mothers work to make ends meet and this leads to the neglect of the maternal affection for the children, leaving the responsibility or burden to their parents.

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