

## HADITH AS LEGAL BASIS IN JUDICIAL DECISIONS: Examining the Application of Hadith in Child Custody Cases at The High Religious Court of Surabaya

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**Abstract:** Dispute over child custody after divorce is one of the competencies of the religious court. Applying hadith regarding custody regulations as one of the considerations of the decision, if used with a proper understanding of the meaning of the hadith, will result in a decision-oriented to realizing the best interests and benefit of the child. This article aims to explain the meaning of the hadith about custody regulations from the perspective of judges at the Surabaya Religious High Court and its application in decisions on child custody cases. Qualitative data were collected using documentation techniques, questionnaires, and interviews with several judges at the High Religious Court in Surabaya. Seven judges were interviewed. The data collected were then analyzed using descriptive and analytical techniques, incorporating both deductive and inductive approaches. The study results show that applying the custody regulations hadith in the PTA judge's decision regarding child custody matters considers the child's condition so that they continue to receive love from both parents. Thus, there are other meanings in understanding hadith besides those developed by hadith expert scholars, especially in the approach used. Judges strive to achieve the goal of benefiting children by applying careful considerations, not only to hadith, fiqh, and applicable statutory provisions, but with a greater emphasis on the interests and benefits of children. The meaning of these judges is also different from some of the opinions developed in fiqh studies regarding the condition of the children being cared for and the requirements for caregivers. The difference is visible because the realities in the field are not the same as the formulation of the provisions in the books of fiqh.

**Keywords:** Hadith, Child Custody, Legal Basis, Religious Court

**Abstrak:** Sengketa hak asuh anak pasca perceraian merupakan salah satu kompetensi peradilan agama. Penerapan hadis tentang hadanah sebagai salah satu

pertimbangan putusan, dengan pemahaman makna hadis yang tepat, akan menghasilkan putusan yang berorientasi pada kepentingan dan kemaslahatan anak. Artikel ini bertujuan menjelaskan makna hadis tentang hadanah dari perspektif hakim di Pengadilan Tinggi Agama Surabaya dan penerapannya dalam putusan perkara hak asuh anak. Pengumpulan data dilakukan dengan teknik dokumentasi, kuesioner dan wawancara dengan tujuh hakim PTA Surabaya. Analisis data menggunakan teknik deskriptif-analitis dengan pola pikir deduktif-induktif. Hasil penelitian menunjukkan, bahwa penerapan hadis hadanah dalam putusan hakim PTA tentang perkara hak asuh anak mempertimbangkan kondisi anak supaya tetap mendapatkan kasih sayang dari kedua orang tuanya. Dengan demikian, ada pemaknaan lain dalam memahami hadis selain yang sudah dikembangkan oleh para ulama ahli hadis, khususnya dalam pendekatan yang digunakan. Hakim berusaha mencapai tujuan kemaslahatan anak dengan menggunakan pertimbangan yang komprehensif, bukan hanya dengan hadis, fiqh dan ketentuan perundangan yang berlaku, tetapi lebih menekankan pada kepentingan dan kemaslahatan anak. Pemaknaan para hakim ini juga berbeda dengan sebagian pendapat yang berkembang dalam kajian fiqh mengenai keadaan anak yang diasuh dan syarat pengasuh. Perbedaan itu tampak, karena realitas di lapangan tidak sama dengan rumusan ketentuan yang ada dalam kitab-kitab fiqh.

**Kata Kunci:** Hadits, Hak Asuh Anak, Dasar Hukum, Pengadilan Agama

## Introduction

One of the consequences of marriage dissolution due to divorce is the issue of child custody, termed "hadanah" in Islamic jurisprudence (fiqh). Although it is the duty and responsibility of parents to care for their children, in cases of divorce, the matter of child custody becomes a critical outcome that must be determined to ascertain who will be responsible for the care of the children in the future. In other words, the issue of hadanah only arises in divorce. Regulations and certainty regarding child custody are crucial as they relate to the physical and spiritual development of a child. Unsurprisingly, disputes over child custody must be resolved in a court of law. As a secondary source of Islamic teachings after the Quran, the hadith is expected to inspire and help address social and religious problems in contemporary society. It is universally agreed that the renewal of Islamic thought or the reactualization of Islamic teachings must refer to the texts that

form the foundation of Islamic teachings. This means that it should not be disconnected from its theological roots, but should also not ignore the sociological conditions of a constantly changing and evolving society, making its understanding dynamic, progressive, and adaptable to changes and developments over time.<sup>1</sup>

Hadiths related to child custody include those narrated by Abū Dāwūd,<sup>3</sup> Nasā'iy,-al<sup>2</sup> Ibn Mājah, Imam al-Bukhārī,<sup>4</sup> Abū Dāwūd,<sup>5</sup>

<sup>1</sup> Abdul Mustaqim, *Paradigma Integrasi-Interkoneksi dalam Memahami Hadith Nabi* (Yogyakarta: Teras, 2009), 6.

<sup>2</sup> Abū Dāwūd, Sulaymān bin al-Ash'ath al-Sijistānī, *Sunan Abī Dāwūd*, Vol. 2 (Beirut: Darul Kutub Al-'ilmiyah, 1996), 150.

<sup>3</sup> Aplikasi Lidwa Pustaka i-software-Kitab 9 Imam Hadis, diakses di <http://Lidwa.com/app>. hadis nomor 3438 dan 3439 pada tanggal 7 Agustus 2020.

<sup>4</sup> Muhammad bin Ismā'il al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, vol. 3 (Semarang : Usaha Keluarga, t.th.), 56-57.

Imām Mālik.<sup>6</sup> Child custody, also referred to as Ḥaḍānah, is an Arabic term commonly used in Islamic law. Most scholars (ulama) believe that in the case of a divorce, the mother is typically given custody of the child, assuming the child has not yet reached the age of mumayyiz (the ability to distinguish right from wrong).<sup>7</sup> For example, judges in Ḥaḍānah cases consider legal, social, and philosophical factors when determining child custody. Legally, judges ensure that child custody is awarded in the best interests of the child, referring to relevant legislation as well as applicable court regulations. Judges also employ a social perspective, examining the ideals of justice within society, as well as utilizing legal concepts derived from the Qur'an, Hadith, and qawa'id fiqhiyyah (jurisprudential principles) as a philosophical foundation to uphold justice in child custody cases.<sup>8</sup>

From the prevailing legislation perspective, child custody regulations are contained in Law Number 1 of 1974. Article 41, letter a of Law Number 1 of 1974 states that "both the mother and father are still obliged to care for and educate their children, solely based on the interests of the child. If there is a dispute regarding child custody, the court will make a decision." Furthermore, Article 45, paragraphs 1 and 2 state that: (1) Both parents are obligated to care for and educate

their children to the best of their ability. (2) The obligations of parents referred to in paragraph (1) of this article apply until the child is married or capable of standing on their own, and these obligations continue even if the marriage between the parents is dissolved.<sup>9</sup>

In addition to the Law, the Compilation of Islamic Law (KHI)<sup>10</sup> also regulates custody regulations, as stated in Article 1 letter g, namely: child custody is the activity of nurturing, caring for, and educating children until they reach adulthood or are capable of standing on their own. Meanwhile, article 105 of the Compilation of Islamic Law states that, in the event of a divorce, a. Custody of children who are not mature (below the age of 12) is the right of the mother; b. Custody of mature children is given to the child, who chooses between the father or mother as the custodian; c. The father bears the costs of care.<sup>11</sup> In addition to Article 105, Article 156 explains a similar concept regarding child custody. In addition to Law No. 1 of 1974 concerning Marriage and the Compilation of Islamic Law, the material legal basis for child custody can also be found in Law No. 4 of

<sup>5</sup> Aplikasi Lidwa Pustaka i-software-Kitab 9 Imam Hadis, diakses di <http://Lidwa.com/app>. Hadis nomor 1940 pada tanggal 7 Agustus 2020.

<sup>6</sup> Jalāl al-Din 'Abd al-Raḥmān al-Suyūṭī, *Tanwīr al-Hawālik* (Beirut: Dār al-Fikr, 2004), 696.

<sup>7</sup> Abd Rahman Dahlan et al, "Women's Post-Divorce Rights in Malaysian and Indonesian's Court Decisions" *AHKAM* 23, no. 1, (2023), 198. <https://doi.org/10.15408/ajis.v23i1.27967>

<sup>8</sup> Khairuddin, Badri, and Nurul Auliyana, "Pertimbangan Hakim Terhadap Putusan Nafkah Pasca Perceraian (Analisis Putusan Mahkamah Syar'iyah Aceh Nomor 01/Pdt.G/2019/Ms.Aceh)," *El-Ussrah* 3, no. 2 (2020).

<sup>9</sup> Law Number 1 of 1974 concerning Marriage and its amendments, Law Number 16 of 2019, Article 45.

<sup>10</sup> See the background of the preparation of the Compilation of Islamic law in, Abdurrahman, *Kompilasi Hukum Islam di Indonesia* (Jakarta : Akademika Pressindo, 1992), 15. The formulation of the KHI was carried out by a Project Implementation Team appointed by the Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia and the Minister of Religion of the Republic of Indonesia No. 07/KMA/1985 and No. 25 of 1985 dated March 25, 1985, chaired by Prof. Bustanul Arifin (while serving as the Deputy Chief Justice of the Supreme Court of the Republic of Indonesia). According to Bustanul Arifin, the KHI was prepared with the aim of unifying the law and as an effort to make the decision of the judges of the Religious Court as a decree that has the same legal force as General Court decision.

<sup>11</sup> Compilation of Islamic Law in Indonesia, Article 105.

1979 concerning Child Welfare and Law No. 23 of 2002 concerning Child Protection. Based on preliminary observations, several judgments by judges of the High Religious Court of Surabaya regarding child custody do not use hadiths as a legal source in their legal considerations. Most decisions are based on applicable regulations and references to Islamic jurisprudence texts, such as in Decision Number 39/Pdt.G/2011/PTA. Sby.<sup>12</sup> However, in Decision Number 333/Pdt.G/2012/PTA. Sby, the judge cited the material legal basis in Indonesia and statements from legal experts.<sup>13</sup>

From the examples of two judgments by the Surabaya High Religious Court mentioned above, it can be inferred that the application of hadiths is not mandatory in deciding child custody cases, even though previous hadiths provide guidance that could be considered as legal considerations by judges. This is also reinforced by the statement of the chairperson of the Surabaya High Religious Court, who noted that, in handling child custody cases, the primary consideration is the child's interest, not the parents'.<sup>14</sup> However, when using the Quran or hadiths as a legal source, judges must take them into account in their legal considerations. Indeed, judges have the freedom to decide cases, including the legal considerations used. However, by not applying hadiths as a legal source in decisions where legal provisions may still be found in hadiths, it certainly raises issues regarding the existence of religious courts as Islamic courts in Indonesia, as one of the distinctions between Islamic courts and other courts is the application of hadiths as one of the legal sources, alongside the Quran. Therefore, this article further examines the use of hadith about *Hadanah* by judges at the Surabaya High Religious Court and how it is applied

in their decisions. Previous research on child custody can be categorized into three main areas. First, conduct research using a case approach to inform decisions of Religious Courts. Researchers such as Ahmad Syahrus Sikti, Nora Eka Putri, Nirmayani Laksani Putri Pulungan, Hanum Megasari, Ridwan Jamal, and Wafda Firyal have examined this topic. Second, research with a conceptual approach. Ahmad Zaenal Fanani,<sup>15</sup> Iman Jauhari,<sup>16</sup> Muhammad Hifni, Asnawi,<sup>17</sup> and David Idris Habibi<sup>18</sup> researched this theme using a third socio-legal approach. Dakwatul Chairah,<sup>19</sup> Nur Fika Hayuhana,<sup>20</sup> Ayu Ajeng Anjani,<sup>21</sup> and Raudhatul Jannah<sup>22</sup> explored

<sup>15</sup> Ahmad Zaenal Fanani discussed gender inequality in childcare in articles 105 and 156 of the Compilation of Islamic Law. In the article, it is concluded that parenting is only based on the gender or domestic sphere of women, not on the ability to educate and teach, attitudes of moral and social responsibility. Ahmad Zaenal Fanani, "Sengketa Hak Asuh Anak dalam Hukum Keluarga Islam di Indonesia Perspektif Keadilan Jender" (Disertasi--Program Pascasarjana Universitas 17 Agustus 1945, Surabaya, 2014).

<sup>16</sup> Iman Jauhari, "Kewajiban Nafkah Hadanah Dan Rada'ah Terhadap Anak Di Indonesia," *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 46, no. 2 (July 1, 2012), <https://doi.org/10.14421/ajish.v46i2.48>.

<sup>17</sup> Mohammad Hifni and Asnawi, "Problematika Hak Asuh Anak Dalam Perspektif Hukum Islam Dan Hukum Positif," *Jurnal Res Justitia: Jurnal Ilmu Hukum* 1, no. 1 (January 23, 2021): 39-57, <https://doi.org/10.46306/rj.v1i1.4>.

<sup>18</sup> David Idris Habibie, "Tinjauan Maqasid Asy-Syari'ah Imam Asy-Syatibi Terhadap Hak Asuh Anak (Hadanah) Pada Ibu Yang Murta'd" (skripsi, UIN Sunan Kalijaga Yogyakarta, 2009), <https://digilib.uin-suka.ac.id/id/eprint/4441/>.

<sup>19</sup> Dakwatul Chairah, "Hak Mut'ah, Hadanah dan Harta Bersama Bagi Perempuan Pasca Cerai Menurut Pandangan Nyai di Pesantren Jawa Timur". (Disertasi--Program Pascasarjana IAIN Sunan Ampel, Surabaya, 2011).

<sup>20</sup> Nur Fika Hayuhana, "Tinjauan Kompilasi Hukum Islam Terhadap Hadanah Oleh Wali Asuh Di Desa Ngindeng Kecamatan Sawoo Kabupaten Ponorogo" (diploma, IAIN Ponorogo, 2021).

<sup>21</sup> Ayu Ajeng Anjani, "Pola Asuh Anak Di Pantu Asuhan Perspektif Hadanah (Studi Di Pantu

<sup>12</sup> Decision Number 39/Pdt.G/2011/PTA. Sby.

<sup>13</sup> Decision Number 333/Pdt.G/2012/PTA. Sby.

<sup>14</sup> Rum Nessa, *Wawancara*, Surabaya, 4 Oktober 2013.

this theme. Based on the above research results, this study differs in terms of its problem object, perspective, and disciplinary field. This study examines the significance of hadith in child custody decisions made by judges at the Surabaya High Religious Court. The perspective used is the opinions of judges at the Surabaya High Religious Court regarding the meaning of the hadith *Hadanah*. The discipline field examined falls within the domain of family law hadith.

## Method

This is a qualitative research study employing a non-experimental design, which utilizes two primary instruments: document review and literature review. The primary data for this study comprises documents of decisions from the Surabaya High Religious Court and information gathered through interviews with judges at the Surabaya High Religious Court. Secondary data are taken from library materials or documents in books related to this research. This study uses three data collection techniques: Documentation of decisions from the Surabaya High Religious Court regarding child custody, questionnaires containing a list of questions to be answered by judges at the Surabaya High Religious Court based on their knowledge and experience in deciding child custody cases,<sup>23</sup> And interviews.<sup>24</sup> Interviews were conducted with judges at the Surabaya High Religious Court.

The method of data analysis in this research is descriptive-analytical, aiming to describe the judgments of judges at the Surabaya High Religious Court regarding child custody related to the application of hadith. This includes defining the results of interviews with judges regarding the meaning of hadith related to child custody, which are then analyzed with a deductive-inductive mindset.<sup>25</sup>

## Child Custody in Islamic Jurisprudence

*Hadanah* comes from the word *al-ḥiḍn*, which means the side or embracing the side. Linguistically, *ḥadanah* means placing something near the rib, in the lap, or between the armpit and the chest. It is interpreted in this way because a mother, when breastfeeding her child, places them in her lap as if she is protecting and nurturing them. Therefore, *ḥadanah* is a term that refers to the upbringing and care of a child from birth until they are capable of standing on their own to take care of themselves.<sup>26</sup> According to Islamic jurists (*fuqaha*), the definition of *ḥadanah* is the care of young children, both boys, and girls, or those who are older but not yet mature (*mumayyiz*), meaning they cannot care for themselves in matters that may endanger them, by providing what is good for them, educating them physically, spiritually, and intellectually so they can stand on their own and fulfill their responsibilities in life.<sup>27</sup>

Caring for young children and those not yet mature is obligatory because neglecting this responsibility would expose them to dangers and threaten their safety. Care is a

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Asuhan Ittihadul Inayah Ponorogo)" (diploma, IAIN Ponorogo, 2022).

<sup>22</sup> Raudhatul Jannah, "Hadanah Pada Ibu Yang Berstatus Narapidana (Studi Kasus Di Lembaga Pemasarakatan Perempuan Kelas IIA Martapura) - IDR UIN Antasari Banjarmasin," accessed October 14, 2023, <https://idr.uin-antasari.ac.id/24647/>.

<sup>23</sup> Suharsimi Arikunto, *Manajemen Penelitian* (Jakarta: Rineke Cipta, 1993), 134-136. Dalam penelitian ini yang digunakan adalah kuesioner campuran.

<sup>24</sup> Burhan Ashshofa, *Metode Penelitian Hukum* (Jakarta: Rineke Cipta, 1998), 96.

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<sup>25</sup> Idri, *Epistemologi Ilmu Pengetahuan, ilmu Hadis, dan ilmu Hukum Islam* (Jakarta: Prenada media Group, 2015), 304.

<sup>26</sup> Zakiah Daradjat, *Ilmu Fiqih Jilid II* (Yogyakarta: Dana Bhakti Wakaf, 1995), 157.

<sup>27</sup> Andi Darna, "Perkembangan Hukum Islam Di Indonesia: Konsep Fiqih Sosial Dan Implementasinya Dalam Hukum Keluarga," *El-Ussrah* 4, no. 1 (2021), <https://doi.org/10.22373/ujhk.v4i1.8780>.

fundamental right for young children and those not yet mature, as they require supervision, protection, guardianship, education, and someone to manage their affairs. The obligation of hadanah is equated with the commitment to provide for their maintenance.<sup>28</sup> There are two pillars of hadanah: *ḥādīn* (the caretaker) and *maḥḍūn* (the child being cared for). Suppose a judge decides that either the father or the mother will act as the custodian; in that case, they must meet specific criteria: being mature, of sound mind, a Muslim, just, trustworthy, and having the capability.<sup>29</sup> As for the conditions for the child being cared for, they must still be young and unable to manage their own lives, and their mental capacity should not allow them to act independently, even if they have reached adulthood, such as in the case of someone with an intellectual disability.<sup>30</sup>

If a mother is unable to care for her child, according to Imam Abu Hanifah, custody is transferred to the child's maternal grandmother, maternal great-grandmother, maternal aunt, paternal aunt, a female child of a maternal aunt, and so forth up to the maternal and paternal great-aunts. On the other hand, Imam Malik states that custody rights are sequentially given to the mother, maternal grandmother, maternal great-grandmother, paternal half-sister, maternal half-sister, paternal grandmother, and so on.<sup>31</sup> According to Imam Shafi'i, custody rights are granted to the mother, maternal grandmother, and their descendants, provided they are all the child's heirs. Only after them would the father, maternal grandfather, maternal great-grandmother,

and so forth, who are also heirs, be considered. Imam Ahmad believes custody rights are sequentially held by the mother, maternal grandmother, maternal great-grandmother, father, maternal grandfather, paternal grandfather, full sister, maternal half-sister, paternal half-sister, paternal aunts, and so on.

If two people who happen to be of the same kinship level are entitled to custody, such as two sisters, two aunts, two uncles, and so on, priority is given to the one with the best character and the most loving nature. However, if both are equal in this regard, priority is given to the older of the two. This also applies if there are three or more people at the same level of kinship.

Scholars agree that the custody period starts from birth until the child reaches the age of discernment (*mumayyiz*). Differences arise when determining the numerical age of discernment. In this matter, Imam Abu Hanifa states that the custody period is seven years for boys and nine years for girls. Imam Malik opines that the custody period for boys is from birth until they reach puberty, while for girls, it is until they marry.

A different opinion is given by Imam Shafi'i, who states that there is no fixed duration for custody. The child remains with the mother until they can choose whether to stay with the mother or the father. If the child reaches this stage, they can choose who to live with, including staying with the mother at night and the father during the day, which is acceptable. According to Imam Ahmad, the custody period for both boys and girls is seven years. After that, the child can choose whether to live with the mother or the father. Once the choice is made, the child must live with the selected parent. A boy is allowed to choose under two conditions:<sup>32</sup> Both parents

<sup>28</sup> Shams al-Dīn Muhammad ibn Muhammad al-Khaṭīb, *Mughni al-Muḥṭāj* Vol. 5 (Kairo: Maktabah al-Taufiqiyyah, t.th), 195.

<sup>29</sup> al-Zuhāily, *Mausū'ah*, 67. al-Jazīri, *Kitāb al-Fiqh 'ala madhahib al-Arba'ah*, Vol. 4 (Beirut: Dar al-Fikr, 1996), 519-520.

<sup>30</sup> Mohd. Idris Ramulyo, *Hukum Perkawinan Islam* (Jakarta: Bumi Aksara, 1999), 93.

<sup>31</sup> al-Khaṭīb, *Mughni*, 158-201.

<sup>32</sup> Ibn Qudāmah al-Maqdisiy, *al-Mughni*, Vol. 2 (Cairo: Dār al-Ḥadīth, 2004), 252-253.

are equally capable of caring for him, and the child is not mentally disabled. If one parent is deemed unfit, custody is granted to the fit parent. If the child is mentally disabled, custody is awarded to the mother without the need for the child's choice.

According to Hanbali scholars, girls' right to choose is forfeited when the father has a stronger claim to custody. This contrasts with Shafi'i scholars, who maintain that girls still have the right to choose with whom to live, as the purpose of custody is the child's welfare.

If a person's right to custody is forfeited due to an impediment and the impediment is subsequently removed, the question arises as to whether the right to custody can be reinstated. In this matter, scholars differ. Maliki scholars argue that if the right to custody is forfeited due to an excuse such as illness, danger, relocation, or the like, and these excuses are no longer present, the right to custody is restored. This is based on the principle that once the impediment is removed, what was previously prohibited becomes permissible again.<sup>33</sup>

Hanafi, Shafi'i, and Hanbali scholars agree that if the right to custody is forfeited due to an impediment and subsequently removed, it can be reinstated, regardless of whether the impediment was caused by an excuse or the person's actions, such as marriage or immoral behavior.<sup>34</sup> Imam Shafi'i and Imam Ahmad state that relinquishing the right to custody is the mother's right, allowing her to relinquish it whenever she wishes. If the mother refuses her right to custody, she

cannot be forced to accept it. According to a narration from Imam Malik, scholars do not agree with forcing a custodian to accept their right to custody. Thus, the right to custody is forfeited under the condition that the person is aware of their right, knows that their silence or failure to claim the right may result in its forfeiture, and a year has passed since they became aware of their right to custody.<sup>35</sup> Among Hanafi scholars, there is a difference of opinion, with the stronger view being that custody is the child's right. Therefore, a mother cannot forfeit or relinquish the child's rights.<sup>36</sup>

### Sources of Law for Religious Courts

The sources of law for religious courts consist of material and formal sources. According to Sudikno Mertokusumo, the material sources of law refer to the sources from which the material is derived. These material sources help shape the law, including social relationships, political power dynamics, marital relationships, inheritance law, wills, and gifts.<sup>37</sup> Among the material sources of law for religious courts are the Qur'an, Hadith, and fiqh books that have not yet become positive law. Formal sources are often referred to as procedural law, which aims to uphold material law. Article 54 of Law No. 7 of 1989 states that the procedural law applicable in religious courts is the civil procedural law used in general courts, except as explicitly provided for in this law.

The sources of law for religious courts are as follows:

1. HIR (*Het Herziene Inlandsche Reglement*), also known as RIB (Regulation for Indonesia, revised). HIR originates from IR (*Inlandsche Reglement*), published in the state gazette No. 16. 57/1848 (Regulation on exercising police duties,

<sup>33</sup> al-Jaziri, *Kitāb*, 522-523. It is different if the position of the case is a mother who has the right of hadanah, then she remarries a man and has had a marital relationship, but then divorces or dies divorced, then her right to hadanah cannot be returned, even though the barrier is no longer there. Considering that the fall of the right to hadanah at the beginning was caused by himself, not by uduzur.

<sup>34</sup> al-Khatīb, *Mughni*, 456.

<sup>35</sup> al-Zuhailiy, *Mausū'ah*, 72-73.

<sup>36</sup> al-Jaziri, *Kitāb*, 520-521.

<sup>37</sup> Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia* (Yogyakarta: Liberty, 2009), 6.

civil adjudication, and criminal prosecution for the indigenous and foreign Easterners in Java and Madura).<sup>38</sup> Based on the gazette's title, HIR is divided into criminal and civil rules for indigenous and foreign Easterners in Java and Madura. The criminal laws are contained in Articles 1 to 114, and the civil rules are in Articles 115 to 246.

2. Rbg (*Rechts Reglement Buitengewesten*), or Regulation for the Outer Regions, means outside Java and Madura. This provision is the legal rule for Indigenous and foreign Easterners outside Java and Madura who are litigating the land road.<sup>39</sup>
3. B.Rv. This regulation was enacted on May 1, 1848, and was subsequently published in the state gazette, No. 52, 1847. B.Rv is a regulation containing civil procedural law provisions specifically for Europeans and those equated with them for litigation in the *Landraad van Justitie and Residentie Gerecht*. In practice, B.Rv is used for arbitration issues.<sup>40</sup>
4. The BW (*Burgerlijk Wetboek*), also known in Indonesian as the Civil Code (KUHPerdata), includes sources of civil procedural law, particularly in Book IV on evidence, which is contained in Articles 1856 to 1993.<sup>41</sup>
5. Legislation
  - a. Law No. 14 of 1970 on Basic Provisions of Judicial Power, amended by Law No. 35 of 1999, and declared invalid with the issuance of Law No. 4 of 2004 as a replacement. This law was revoked and replaced by Law No. 48 of 2009 on Judicial Power.
  - b. Law No. 1 of 1974 on Marriage (later amended by Law No. 16 of 2019 on Marriage).
  - c. Law No. 14 of 1985 was amended and refined by Law No. 5 of 2004. In 2009, this law was further refined by Law No. 3 of 2009, as interpreted by the Supreme Court.
  - d. Law No. 7 of 1989, amended and refined by Law No. 3 of 2006 and further amended by Law No. 50 of 2009 on Religious Courts.
  - e. Presidential Instruction No. 1 of 1991 on disseminating the Compilation of Islamic Law consists of three books: Marriage Law, Inheritance Law, and Charity.
6. Supreme Court Circulars (SEMA). SEMA are instructions from the Supreme Court to judges regarding civil procedural law and material civil law, which can be used as procedural law in the practice of courts in dealing with legal issues faced by judges. However, SEMA does not bind judges in the same way as laws do.
7. Jurisprudence. According to Fockema Andrea, as cited by Lilik Mulyadi, jurisprudence refers to the systematic collection of Supreme Court and high court decisions followed by other judges in making similar matters.
8. Doctrine or Scholarly Knowledge. According to Sudikno Mertokusumo, doctrine or scholarly knowledge is also a source of procedural law, allowing judges to explore civil procedural law. This doctrine is not law itself but a source of law.<sup>42</sup>

Before the enactment of Law No. 1 of 1974 on Marriage and Law No. 7 of 1989 on Religious Courts, there were no official regulations governing procedural law in religious courts. Judges in Religious Courts used fiqh as the basis for examining and adjudicating cases in court, resulting in differences in the application of the law

<sup>38</sup> M. Taufik Makaro, *Pokok-pokok Hukum Acara Perdata* (Jakarta: PT. Rineka Cipta, 2004), 12.

<sup>39</sup> Manan, *Penerapan*, 8.

<sup>40</sup> A. Mukti Arto, *Praktik Perkara Perdata pada Pengadilan Agama* (Yogyakarta: Pustaka Pelajar, 1996), 14.

<sup>41</sup> Ahmad Mujahidin, *Pembaharuan Hukum Acara Peradilan Agama* (Bogor: Ghalia Indonesia, 2012), 49.

<sup>42</sup> Manan, *Penerapan*, 11.

between one religious court and another.<sup>43</sup>Based on the Circular Letter of the Bureau of Religious Courts of the Ministry of Religious Affairs No. B/1/1735 dated February 18, 1958, as an implementer of Government Regulation No. 45 of 1957 on the Establishment of Religious Courts outside Java and Madura, it was stated that to achieve uniformity in examining and deciding cases, judges in religious courts were encouraged to use some procedural law guidelines derived from fiqh books: *al-Bājūrīy*, *Fath al-Mu'īn*, *al-Sharqāwīy 'alā at-Tahrīr*, *al-Qalyūbī/Maḥalli*, *Fath al Wahhāb* dan *sharhnya*, *Tuḥfah*, *Targhīb al-Mushtāq*, *Qawānin al-Shar'īyyah li al-Sayyid bin Yaḥyā*, *Qawānin al-Shar'īyyah li al-Sayyid Ṣadaqah Daḥlān*, *Shamsūrī fi al-Farāīd*, *Bughyat al-Mustarshidīn*, *al-Fiqh 'alā Madzāhi al-Arba'ah*, *Mughnī al-Muḥtāj*.

### The Utilization of Hadith Concerning Hadanah at the High Religious Court of Surabaya

The Surabaya High Religious Court's various decisions regarding child custody, especially in the last three years (2017, 2018, 2019), do not include the application of the child custody hadith. In 2017, six decisions on child custody granted child custody to the mother because the child was not yet mummy or not yet 12 years old. The legal considerations used by the judges were positive law and fiqh. In this case, the nature of the decisions largely reinforced the decisions of the first-instance courts. In 2018, ten decisions were made on Madinah, six of which granted child custody to the mother and four to the father. The legal considerations used by the judges were positive law and fiqh. Some decisions reinforced the first-instance court's decision,

while others annulled it by adjudicating the case themselves using the appellate authority held by the PTA.

In 2019, six decisions regarding child custody were made, with varying outcomes: three granted child custody to the mother, one granted custody to the father, and two granted joint custody to both the mother and the father. The legal considerations used by the judges were positive law and fiqh, except for one child custody decision that awarded custody to the mother, which used hadith, positive law, and fiqh. The nature of the decisions either reinforced or annulled the first-instance court's decision. Decisions granting joint custody to both parents were made because several children were involved. The custody of the oldest child was given to the father, while the custody of the younger child or children, who were not yet mature or under 12 years old, was given to the mother. The application of the child custody hadith in the 2019 Surabaya High Religious Court decision can be found in Case Number 462/Pdt.G/2019/PTA.Sby. In that decision, the hadith applied by the judge is:

من فرق بين والدة وولدها فرق الله بينه وبين احبته يوم القيامة (رواه احمد والترمذي)

“Whoever separates a mother from her child, Allah will separate him from his loved ones on the Day of Judgment. (Narrated by Ahmad and Tirmidhi).<sup>44</sup>

Al-Tirmidhī narrates the text of the above hadith. It has been narrated by several

<sup>43</sup> A. Basiq Jalil, *Peradilan Agama di Indonesia, Gemuruh Politik Hukum (Hukum Islam, Hukum Barat, Hukum Adat dalam Rentang Sejarah bersama Pasang Surut Lembaga Peradilan hingga Lahirnya Peradilan Syariah Islam Aceh* (Jakarta: t.p., 2006), 151.

<sup>44</sup> Abu 'Isa Muhammad bin 'Isa bin Sawrah al-Tirmidhi, *Sunan al-Tirmidhi* (Birut: Dar al-Kutub al-'Ilmiyyah, 2019), 401. See also in the Lidwa Pustaka i-software-Kitab 9 Imam Hadith Application, accessible at <http://Lidwa.com/app>. Hadith number 1491 narrated by al-Tirmidhi in *Sunan al-Tirmidhi*, hadith number 22401 narrated by Ahmad in the book *Musnad Ahmad Ibn Hanbal*, hadith number 2241 narrated by Ibn Majah in *Sunan Ibn Majah* and hadith number 2368 narrated by al-Darimi in *Sunan al-Darimi*.

scholars, with each chain containing a narrator deemed weak by scholars, except in the narration of al-Dārimī, making the hadith hasan (good).<sup>45</sup> Textually, it can be understood from the hadith that the Prophet Muhammad (peace be upon him) issued a warning or threat to anyone who tries to separate a mother from her child, stating that Allah will separate them from their loved ones on the Day of Judgment. Linguistically, the word “man” in the hadith means general, applying to anyone. It could be a judge, a relative of the mother or father, someone else, an authority figure, or anyone with any motive trying to separate a mother from her child.

Furthermore, the term “*wālidah*” in the hadith means a woman who gives birth or a mother. Although linguistically it means that, it should be noted that “*wālidah*” can also mean a slave woman who gave birth to her master’s child, in the context of slavery at that time. The intended meaning of “*wālidah*” aligns with the opinion of Imam Malik, who stated that a free man who has a child with a slave woman, the mother is more entitled to custody as long as she has not been sold. However, if she has been sold, then the father is more entitled to custody, based on the generality of the hadith “do not separate a child from its mother” and the above hadith “whoever separates a mother from her child, Allah will separate them from their loved ones on the Day of Judgment.”<sup>46</sup>

Analyzing the text, the meaning of the hadith tends to reinforce the hadith of

<sup>45</sup> Ibid. In the sanad narration of al-Tirmidhi and Ahmad there is a narrator named Huyayy bin 'Abd Allah who is considered problematic by al-Bukhari and al-Nasa'iy. In the sanad narration of Ibn Majah, there is a narrator named 'Amir bin 'Abd Allah who is considered *kathir al-ghalat* by al-Bukhari, and another narrator named Ibrahim bin Isma'il who is considered *da'if* by 6 scholars who criticize the hadith. See in the appendix of takhrij.

<sup>46</sup> al-Bassam, *Taudih*, Vol. 5, 63-64.

hadanah granted to the mother, which explicitly points to the mother, meaning the wife of the husband who has a disputed child custody. The hadith in question is narrated by 'Abd Allāh bin 'Amr:

حَدَّثَنَا مُحَمَّدُ بْنُ خَالِدٍ السُّلَمِيُّ، حَدَّثَنَا الْوَلِيدُ، عَنْ أَبِي عَمْرٍو يَغْنِي الْأَوْزَاعِيَّ، حَدَّثَنِي عَمْرُو بْنُ شُعَيْبٍ، عَنْ أَبِيهِ، عَنْ جَدِّهِ عَبْدِ اللَّهِ بْنِ عَمْرٍو، أَنَّ امْرَأَةً قَالَتْ: يَا رَسُولَ اللَّهِ، إِنَّ ابْنِي كَانَ بَطْنِي لَهُ وَعَاءٌ وَتُدْيِي لَهُ سِقَاءٌ وَحَجْرِي لَهُ حِوَاءٌ، وَإِنَّ أَبَاهُ طَلَّقَنِي وَأَرَادَ أَنْ يَنْتَزِعَهُ مِنِّي، فَقَالَ لَهَا رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: أَنْتِ أَحَقُّ بِهِ مَا لَمْ تَنْكِحِي.

“Mahmūd bin Khālid al-Sullamī narrated to us, al-Walīd narrated to us from Abū 'Amr – al-Awzā'ī--, 'Amr bin Shu'ayb narrated to me from his father from his grandfather, 'Abd Allāh bin 'Amr, that a woman said: "O Messenger of Allah, my son, my womb was his container, my breast was his drink, and my lap was his shelter, but his father divorced me and wants to take him away from me." The Messenger of Allah (peace be upon him) said to her: "You are more entitled to him as long as you do not remarry.”<sup>47</sup>

The above hadith, classified as hasan and considered sahih by al-Hākim, indicates that a mother is more suitable for the custody of her child when the father wants to take the child away from her. The hadith guides why custody should be given to the mother, mentioning specific attributes that assure anyone, particularly the judge (in this case, the Prophet Muhammad), that the mother has closeness, gentleness, and affection, offering more benefits than the father for a young child. The Prophet Muhammad established and decided the law according to the circumstances experienced by the mother. This serves as a reminder that the primary reasons and objectives for enacting a law are rooted in human nature.<sup>48</sup>

If there is a hadith that is textually clear and graded as hasan or sahih, why apply another hadith that, from a linguistic perspective,

<sup>47</sup> al-Sijistani, *Sunan Abu Dawud*, Vol. 2, 150.

<sup>48</sup> al-Maghrabi, *al-Badr*, 267.

still allows for different interpretations? It would be more appropriate if the hadith applied as a legal consideration is the one mentioned above, or other hadiths with similar meanings, such as the hadith narrated by Abu Hurayrah, classified as sahih. The hadith narrated by al-Nasā'iy is:

أَخْبَرَنَا مُحَمَّدُ بْنُ عَبْدِ الْأَعْلَى قَالَ: حَدَّثَنَا خَالِدٌ قَالَ: حَدَّثَنَا ابْنُ جُرَيْجٍ قَالَ: أَخْبَرَنِي زِيَادٌ عَنْ هِلَالِ بْنِ أُسَامَةَ عَنْ أَبِي مَيْمُونَةَ قَالَ: بَيْنَا أَنَا عِنْدَ أَبِي هُرَيْرَةَ فَقَالَ: إِنَّ امْرَأَةً جَاءَتْ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَقَالَتْ: فِدَاكَ أَبِي وَأُمِّي إِنَّ زَوْجِي يُرِيدُ أَنْ يَذْهَبَ بِابْنِي وَقَدْ نَفَعَنِي وَسَقَانِي مِنْ بَيْرِ أَبِي عَيْنَةَ فَجَاءَ زَوْجُهَا وَقَالَ: مَنْ يُخَاصِمُنِي فِي ابْنِي فَقَالَ: (يَا غُلَامُ هَذَا أَبُوكَ وَهَذِهِ أُمُّكَ فَخُذْ بِيَدِ أَيِّهِمَا شِئْتَ). فَأَخَذَ بِيَدِ أُمِّهِ فَأَنْطَلَقَتْ بِهِ.<sup>49</sup>

"Muhammad bin 'Abd al-A'lā narrated to us, Khālid narrated to us, Ibnu Juraij narrated to us, Ziyād narrated to me from Hilāl bin Usāmah from Abū Maymūnah, who said, "While I was with Abū Hurayrah, he said, 'A woman came to the Messenger of Allah (peace be upon him) and said, 'May my parents be sacrificed for you, my husband wants to take my child away, and the child has been beneficial to me, bringing me water from the well of Abū 'Inabah.' Then her husband came and said, 'Who disputes with me regarding my child?' The Prophet (peace be upon him) said, 'O child, this is your father, and this is your mother, so take the hand of whichever one you want.' The child took his mother's hand, and she left with him."

Although the hadith is textual, it suggests that the child in the hadith could already help his mother, implying that the child was discerning (mumayiz). The child was then asked to choose between his father and mother. The child decided to be with the mother. However, when connecting this hadith with the clause of Article 105(a), precisely the phrase "...or under the age of 12

years is the mother's right," the application of this hadith is more appropriate.

According to the author's analysis, there are possibly two reasons for the application of the ḥadīth on child custody by Aḥmad and al-Tirmidhī in Decision Number 462: First, because the legal content of the ḥadīth on child custody narrated by 'Abd Allāh bin 'Amr has been adopted as a legal provision as stipulated in Article 150(a) and Article 156(a) of the Compilation of Islamic Law (KHI), which states that a child whose custody is disputed is not yet discerning or under 12 years old. Indeed, the child whose custody is disputed is under 12 years old and can be considered too young to be discerning. Two children are in dispute in the decision; the first is six years old, and the second is 3.5 years old. The application of another ḥadīth is used to strengthen the existing provision further. However, the application of this other ḥadīth is still debatable from an interpretive standpoint, namely the generality of the ḥadīth concerning the subject mentioned in the ḥadīth which is not directed to whom, also the meaning of the word "wālidah" which is not necessarily referring to the biological mother and the legitimate wife of a husband, and the context of the ḥadīth which does not explicitly guide the occurrence of child custody disputes. Suppose the aim is only to strengthen the ḥadīth adopted as a legal provision further. In that case, the application of the ḥadīth narrated by Abu Hurayrah is more appropriate because it does not contain debatable interpretations regarding the subject designated as the custodian (namely, the biological mother and the legitimate wife of the husband) and the child who is still under 12 years old. Second, the application of the ḥadīth narrated by Imam Aḥmad and al-Tirmidhī shows the idealism of the judge, indicating that the High Religious Court differs from the Religious Court. If the previous decision of the Religious Court did not apply the

<sup>49</sup> The Lidwa Pustaka i-software-Kitab 9 Imam Hadith application, accessed at <http://Lidwa.com/app>. Hadith number 3439 narrated by al-Nasa'iy on August 7, 2020.

ḥadīth, then in the appeal decision, the High Religious Court applies the ḥadīth, making the considerations of the decision stronger, more numerous, and more substantial compared to the decision of the Religious Court. Furthermore, this idealism of the judge also demonstrates that the High Religious Court, as a judicial body for Muslims, is consistent in applying the Prophet's ḥadīth as a source of Islamic law. This reason aligns with the opinion of some high judges in the interview results, stating that applying ḥadīth in a decision can give the impression that the decision genuinely follows Islamic law and simultaneously provides a different nuance compared to decisions in other judicial environments.

The ḥadīth applied in the decision is less popular compared to the ḥadīth on child custody narrated by 'Abd Allāh bin 'Amr and Abu Hurayrah, both in terms of text and context. The text is still unclear regarding the subject and object of the issue. The ḥadīth applied is not found in the discussion of child custody in the Sunan al-Tirmidhī, which is the reference. The ḥadīth is found in the debate about prisoners of war in the book al-Siyar. Namely, it is not permissible to separate a mother from her child (*bayna al-wālidah wa waladīhā*), a child from his father (*bayna al-walad wa al-wālid*), and among siblings (*bayna al-Mahwah*).<sup>50</sup> In terms of context, it remains general and is not explicitly related to the issue of child custody. The incorrect application of the ḥadīth in terms of text and context is feared to cause the understanding that the derivation of legal reasoning from the ḥadīth by the judge in deciding child custody cases is considered as "*al-istidlāl fī ghayr maḥallih*" because the ḥadīth has general characteristics ('ām).<sup>51</sup>

<sup>50</sup> al-Tirmidhi, *Sunan*, 401.

<sup>51</sup> One of the characteristics of *the 'am passage* is the one that contains *the recitation of isim sharat* (in the hadith; *Man Farraqa..*). Khallaf, *'Ilm*, 183. In this book, it is stated that every *word 'am*, including as

However, regardless of the accuracy of deriving ḥadīth from the source books, applying the ḥadīth to child custody in the decision can be meaningful both textually and contextually, even though some bias remains. The substance of applying the ḥadīth is that child custody is given to the mother because, emotionally, the mother has a closer relationship with the minor child. Likewise, the small child feels closer and more comfortable with the mother. From the perspective of fiqh, the legal considerations in the child custody decision given to the mother for a child who is not yet discerning or under 12 years old align with the opinions of fiqh scholars. Some essential points from the legal considerations related to fiqh in the decision are:

### **1. The person entitled to custody and the child being cared for.**

In the decision, it is stated that child custody is given to the mother with the consideration that: "Psychologically, the most important physical care for a child is the mother's affection, especially if the child is not yet discerning, the mother acts as a bond of emotional and affectionate ties with the child, which tends to exceed the father's affection. The child feels the pain of separation from the mother more severely than separation from the father, and the mother's nurturing touch, which is usually only possessed by the mother, will better ensure the child's mental development and growth. Moreover, the mother's feelings cannot be compared to material things such as the father's income."<sup>52</sup>

Scholars agree that custody of a child who is not yet discerning is given to the mother as long as the mother meets the requirements

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in the hadith, is actually made according to the language to indicate the encompassing of the whole unit. If the *word* is used in a way other than the meaning that is covered, then *the word* means *majazi*, that there must be *qarinah* or instructions that can show the true meaning.

<sup>52</sup> Decision Number 462/Pdt.G/2019/PTA.Sby.

as a custodian.<sup>53</sup> In the decision, custody is given to the mother because the mother is considered to meet the requirements as a custodian. Incidentally, the mother, who has been granted custody, works as a teacher, which ensures the continuity of the child's education within the family.

## 2. The period and place of hadanah.

Specifically, the decision does not specify the age at which the mother will hold custody, nor does it mention the location of custody. However, if custody is automatically given to the mother, the period of custody typically lasts until the child is able to be independent. Similarly, the place of custody generally follows the mother, who is usually the primary caregiver of the child.

## 3. The cost of child custody

The decision states that the issue of costs, including maintenance, is the father's responsibility. This consideration is based on the father's obligation and responsibility, both during the marriage and after the divorce, to provide for and support the child financially.

## 4. The right to visit the child

The decision states that the father has the right to meet his child. The mother is not allowed to prevent or deny access to the father to meet his child in the child's interest. The decision also states that if the mother denies access, the father can file a lawsuit for the revocation of custody, according to SEMA Number 1 of 2017. Scholars agree that the parent who does not receive custody still has the right to visit the child. This is so that the bond of kinship can be maintained. There is a difference of opinion regarding the method of visiting, with the Ḥanafiyah scholars believing that visiting involves taking the child out so that he can see and spend time with them on a daily basis. The maximum limit for visiting is once a week.

The Mālikiyyah scholars state that a person can visit their child every day if the child is still young, while for an older child, once a week. If for educational purposes, he can visit his child periodically.<sup>54</sup> From the perspective of applying the existing legal provisions, the decision applies Article 45 of Law Number 1 of 1974 on Marriage, Law Number 23 of 2002 and its amendments, Law Number 35 of 2014 on Child Protection, Article 105(a), and Article 156(f) of KHI, SEMA Number 1 of 2017 and Law Number 7 of 1989 on Religious Courts and the first amendment of Law Number 3 of 2006 and the second amendment of Law Number 50 of 2009. Considering the various points above, both from the ḥadīth, fiqh, and applicable legal provisions, as stated in the decision considerations, must be oriented towards the child's best interests.

## Judges' Interpretation of Hadith on Child Custody in Custody Cases

According to the judges of the PTA Surabaya, the hadith of the Prophet Muhammad (PBUH) is considered a material source of law used as guidance and reference in deciding various cases, including child custody cases. This is evident from the responses in the questionnaires and interviews with PTA Surabaya judges, who consider the hadith as a source and basis of law. Some judges regard hadith as a source of law, while others see it as a legal basis. None of the judges believes that hadith is merely supplementary to the decisions of the Prophet. Interestingly, the judges also mentioned that having a hadith in every judicial decision is not mandatory. Logically, if hadith were a source or basis of law, it should be reflected in every legal consideration within the judge's decision. Ideally, as a source and basis of law, judges should strive to use and apply hadith appropriately according to the case's subject matter, including the accuracy and

<sup>53</sup> al-Khaṭīb, *Mughni*, Vol. 5, 158-201. Lihat juga dalam al-Shirazi, *al-Muhadhdhab*, Vol. 3, 166.

<sup>54</sup> al-Khaṭīb, *Mughni*, 202-205.

understanding of the hadith's meaning being applied.

From another logical perspective, the applicable laws and regulations that serve as the source of law for religious courts do not mandate the use of hadith in every judicial decision. It should be noted that religious courts, although termed Islamic courts because only Muslims can litigate there, are limited in scope. They handle specific cases within their absolute competence, as outlined in Law No. 7 of 1989 and its amendments, thus making it unnecessary to rely on hadith in every judicial decision.

This creates a gap that makes it somewhat challenging to understand the position of hadith as a source or basis of law and its implementation in judicial practice. However, from this other logical perspective, the reason for not using hadith in every decision becomes clear. Nevertheless, the Surabaya High Religious Court decisions consistently use applicable legal sources within the religious court environment. When asked if the quality of hadith, such as *ṣaḥīḥ*, *ḥasan*, and *ḍa'īf*, is considered when applying it, all judges unanimously answered yes. This means that the quality of a hadith is considered if a hadith is to be applied. However, most decisions in *ḥadānah* cases use *fiqh* and applicable legal regulations. The influence of *fiqh* in *ḥadānah* decisions is very prominent. All judges interviewed in this research have previously decided on *ḥadānah* cases either as judges in religious courts or religious high courts.

According to the judges, any legal consideration, whether from hadith, *fiqh*, or applicable legal regulations, must solely benefit and serve the welfare of the child. This principle seems to be a key phrase or motto in deciding *ḥadānah* cases. The focus is not on who gets custody, though the caregiver's capability is still evaluated, but on ensuring the child's physical and mental

well-being.<sup>55</sup> If analyzed deeply, the sources of law and legal considerations are merely instruments to ensure that judicial decisions provide a sense of justice and legal certainty. However, as an institution of law enforcement and justice, sources and legal considerations are vital in achieving justice and legal certainty. Judges have different opinions about interpreting the hadith on *ḥadānah*. Some believe that the hadith can be applied textually if its meaning aligns with the child's interests and welfare. Others think it should be applied contextually to ensure the decision is in the child's best interests and welfare. Interviews revealed a dynamic understanding and interpretation of the hadith on child custody among judges. This dynamic means that the meaning of hadith can be textual, contextual, or both as long as it serves the child's interests and welfare. Hadith can be applied textually if it fulfills the welfare principle and does not conflict with law and decency. It can also be applied contextually if other factors demand it for the child's welfare.<sup>56</sup> Another judge argues that the application of hadith on *ḥadānah* tends to be contextual, aligning with the child's interests and welfare. Judge AC opines that hadith application can be both textual and contextual. If the text is clear, using hadith commentary books is unnecessary. Judge Bsn believes that hadith application can solely be textual because the child's interest is the primary consideration. From the questionnaire responses and interviews with the Surabaya High Religious Court judges regarding the meaning of hadith on *ḥadānah*, no other interpretation besides textual and contextual was found, although a dynamic of opinions exists regarding the tendency towards textual or contextual understanding. No intertextual

<sup>55</sup> Eli Martati and Firdaus Firdaus, "Hak Hadhanah Dalam Putusan Pengadilan Agama," *JURIS (Jurnal Ilmiah Syariah)* 17, no. 2 (2018), <https://doi.org/10.31958/juris.v17i2.1195>.

<sup>56</sup> AR, *Interview*, PTA Surabaya, Selasa, 18 Februari 2010.

understanding term is developed in the dynamic opinions of the Surabaya High Religious Court judges. However, some judges believe that using hadith commentary books is necessary to understand the hadith's meaning to be applied in decisions. The responses in the questionnaires and interviews show consistency in the answers or responses given by the judges concerning the meaning of hadith on *ḥaḍānah*.

In addition to using hadith, the Surabaya High Religious Court judges also refer to fiqh books when deciding child custody cases, including *I'ānaṭ al-Ṭālibīn*, *al-Bājūriy*, *al-Fiqh al-Islāmiy wa Adillatuh*, *Mizān al-Sha'rāniy*, *Kifāyāt al-Akhyār*, and others. These fiqh books indicate that judges strive to elaborate on the explanation of the hadith text by the provisions within Islamic sharia. One commonly used reference by the Surabaya High Religious Court judges in deciding child custody cases is the explanation found in *Kitab I'ānat al-Ṭālibīn*, Volume IV, page 101.<sup>57</sup> Although only one judge's decision applies hadith on *ḥaḍānah* – Decision No. 462/Pdt.G/2019/PTA, Sby – it shows that judges tend to understand hadith using various interpretive methods, both textual, contextual, and intertextual.

Textually, the hadith text in the decision is interpreted literally, meaning that child custody is given to the mother because of the word "*walidah*," which means the woman who gave birth (mother). However, in a broader sense, "*walidah*" can refer to a woman who gives birth and "occupies" the mother's position. Textually, the word "*walidah*" also has associations with slavery, which can mean a woman who gives birth to the employer's child, as previously discussed in the analysis. Similarly, in its context, it is not directly related to the issue of child custody. Nevertheless, the application of this

hadith aligns with and reinforces another hadith narrated by Abu Dawood:

أَنْتِ أَحَقُّ بِهِ مَا لَمْ تَنْكِحِي<sup>58</sup>

"You (mother) have more right to the child as long as you do not remarry".

Despite the textual application of hadith in Decision No. 462, the hadith can also be given contextual and intertextual meanings. The application of the hadith in this decision demonstrates that judges employ contextual understanding methods, as the applied hadith aligns with another hadith narrated by Abū Dāwūd, which provides background to the Prophet Muhammad's decision to grant child custody to the mother.

Implicitly, judges also apply an intertextual understanding method in Decision No. 462 by linking the hadith text in the decision with another hadith on *ḥaḍānah* (narrated by Abū Dāwūd) that has been adopted into fiqh.<sup>59</sup> And KHI Article 105 (a), "Custody of a child who has not reached the age of *tamyiz* or 12 years old is the mother's right. Although the hadith in Decision No. 462 appears to stand alone, it must be understood as a necessary approach because, substantively, the provision regarding child custody for children under *tamyiz* is regulated in KHI.

These various interpretive methods align with the judges' views that both textual and contextual applications of hadith can be employed, including multiple approaches such as historical, sociological, and psychological, because the primary goal is the child's welfare, both spiritually and mentally. Ideally, it is impossible to apply various methods and approaches to understand hadith because what is needed is the application of hadith as one of the legal considerations. However, if analyzed, it becomes clear that textual and contextual

<sup>57</sup> Abu Bakr 'Uthman bin Muhammad Shato al-Dimyatiy al-Bakriy, *I'ānat al-Talibin*, Vol. 4 (Surabaya : Assalam, t.th.), 101.

<sup>58</sup> al-Sijistani, *Sunan Abu Dawud*, Vol. 2, 150.

<sup>59</sup> al-Jaziri, *Kitāb*, Vol. 4, 515. In this case, the scholars agree that the right to *ḥaḍānah* is given to the mother.

meanings can be applied to understanding the hadith on child custody.

Regarding judges' decisions to grant child custody to the father without relying on the hadith on child custody, as seen in some PTA decisions, the reasons include:

1. The mother is unfit due to religious reasons, such as apostasy, making her unable to maintain the child's faith. Scholars agree that this aligns with the caregiver's qualifications.
2. The mother remarries, based on the hadith:  

أَنْتِ أَحَقُّ بِهِ مَا لَمْ تَنْكِحِي<sup>60</sup>
3. The mother is unsuitable due to her behavior. This means the mother's conduct does not reflect good morals for her child; for example, she frequently returns home late because she works as a nightclub bouncer or spends time alone with men who are not her close relatives.
4. The child has reached *the age of 12* and can choose to live with the father.

The custody transfer from mother to father is based on the mother's inability to meet the caregiver's qualifications. Custody can be given to the father based on the following hadith:

أَخْبَرَنَا مُحَمَّدُ بْنُ غَيْلَانَ قَالَ حَدَّثَنَا عَبْدُ الرَّزَّاقِ قَالَ حَدَّثَنَا سُفْيَانُ عَنْ عُمَانَ بْنِ أَبِي عَبْدِ الْحَمِيدِ بْنِ سَلَمَةَ الْأَنْصَارِيِّ عَنْ أَبِيهِ عَنْ جَدِّهِ أَنَّهُ أَسْلَمَ وَأَبَتْهُ امْرَأَتُهُ أَنْ تُسَلِّمَ فَجَاءَ ابْنُ هُمَا صَغِيرًا لَمْ يَبْلُغِ الْخُلْمَ فَأَجْلَسَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ الْأَبَ هَاهُنَا وَالْأُمَّ هَاهُنَا ثُمَّ خَبَرَهُ فَقَالَ اللَّهُمَّ اهْدِهِ فَذَهَبَ إِلَى أَبِيهِ

"Narrated to us by Mahmoud bin Ghailan, who said, narrated to us by 'Abd al-Razzaq, who said, narrated to us by Sufyan from 'Uthman al-Batti from 'Abd al-Hamid bin Salamah al-Ansari from his father from his grandfather, that he embraced Islam but his wife refused to embrace Islam. Then, their young child, who had not reached puberty, came. The Prophet (SAW) then placed the father here and the mother there, and then asked the child to choose between them. The

Prophet (SAW) said, "O Allah, guide him." The child then chose his father."<sup>61</sup> Regarding custody rulings granted to parties other than the mother and father, judges first consider whether such decisions truly serve the child's best interests before making a decision. They also assess why the child's parents are deemed unfit to have custody rights. In some decisions of the Court of Appeal, custody has been granted to grandparents from either the mother's or father's side who reside in the same household as the child's mother or father. This custody is not solely granted to the grandparent. Still, it is considered based on the longstanding proximity of the child to their grandparent, especially when the child has been predominantly cared for by them during the parents' absence due to work. In determining custody matters, the judges of the Court of Appeal prioritize the welfare and interests of the child. This includes applying the textual and contextual meanings of hadith so that the rulings reflect three main principles: adherence to principles of justice, utility, and legal certainty. Considerations for the contextual interpretation of hadith can be observed in commentaries that explain them, as well as in the ethical and religious aspects of both parents, thereby ensuring the preservation of religious obligations.

The steps taken by the judges of the Surabaya Court of Appeal align with the practices of Prophet Muhammad, who established and decided laws based on the circumstances faced by his community. This serves as a reminder that the primary reasons and goals considered when establishing a law are rooted in human nature.<sup>62</sup> Referring to Law No. 23 of 2002 on Child Protection, subsequently amended by Law No. 35 of 2014, Article 26 states that

<sup>61</sup> The Lidwa Pustaka i-software-Kitab 9 Imam Hadith application, accessed at <http://Lidwa.com/app>. Hadith number 3438 narrated by al-Nasa'iy on August 7, 2020.

<sup>62</sup> al-Maghrabi, *al-Badr*, 267.

<sup>60</sup> al-Sijistani, *Sunan Abu Dawud*, Vol. 2, 150.

parents have a complete obligation and responsibility to nurture, care for, educate, protect, and develop their children according to their talents, abilities, and interests. Additionally, parents must prevent child marriages. Therefore, considerations of the child's welfare must encompass these aspects. Based on the explanation above, it can be understood that the contextual meaning of the hadith regarding custody in child custody cases, as interpreted by the judges of the Surabaya High Religious Court, is paramount. This is evident from the rulings and opinions of the judges, who are oriented towards the interests and welfare of the child. To ensure these interests and welfare are met, judges examine various aspects to determine which parent, whether the mother, father, or someone else, is more deserving of custody. This requires careful observation and assessment of the child's emotional and psychological well-being, their educational needs, and physical and mental health, to ensure their overall growth and development.

Although hadith is a source of Islamic law and a basis for resolving Islamic legal issues, judges must thoroughly understand formal and substantive legal sources applicable within the religious judicial framework. This allows hadith to be considered part of substantive legal sources adopted into fiqh and the Compilation of Islamic Law (KHI). Judges understand that hadith regarding custody can be applied to child custody issues in Indonesia, primarily when studied in conjunction with commentaries on the hadith texts, ensuring accurate application. The *ijtihad* (legal reasoning) performed by judges in deciding child custody cases signifies that they are not merely automatons applying the law. *Ijtihad* is conducted based on their capability to present rational

foundations and achieve the child's welfare, thereby minimizing unrest and discontent.<sup>63</sup>

The method of understanding judges apply in interpreting hadith can be considered accommodative, utilizing a contextual approach that depends on and prioritizes the interests and welfare of the child. This approach appears consistent with hadith texts on custody, which vary depending on the circumstances during the Prophet's time when custody decisions were made. The child's welfare becomes the primary goal in determining to whom custody rights should be granted, rather than focusing solely on whether it should be the father, mother, or someone else. Including hadith on custody in decisions issued by the Surabaya Court of Appeal adds an Islamic dimension, distinguishing them from other judicial rulings. Therefore, judges of the Surabaya Court of Appeal should consider incorporating more hadith on custody into their decisions and understanding their meanings through commentaries, ensuring that the application of hadith on custody enhances the Islamic nature and enforceability of their rulings compared to other judicial environments.

## Conclusion

The application of the hadith on child custody in the rulings of judges at the Surabaya Court of Appeal (PTA) regarding child custody cases considers the child's circumstances to ensure they continue to receive affection from both parents, especially the mother, for children who are still minors or under the age of 12. Applying the hadith on custody does not stand alone but complements and relates to considerations of fiqh (Islamic

<sup>63</sup> Suci Ramadhan and J. M. Muslimin, "Indonesian Religious Court Decisions on Child Custody Cases: Between Positivism and Progressive Legal Thought," *Juris: Jurnal Ilmiah Syariah* 21, no. 1 (2022): 89-100, <https://doi.org/10.31958/juris.v21i1.5723>.

jurisprudence) and favorable legal provisions. According to the Surabaya High Religious Court judges, the meaning of the hadith on custody in child custody cases is contextual, as the primary objective of any ruling is the welfare and best interests of the child. Custody rights may be granted to the mother, father, or another party, but they must always ensure the child's welfare and best interests. The theoretical implications of this research suggest that there are alternative interpretations of understanding hadith beyond those developed by hadith scholars, particularly in the approaches used. This study demonstrates that hadith can be interpreted through a welfare approach, as, in essence, hadith, including legal hadith, serves as a legal source to establish and achieve legal objectives—in this case, the welfare of the child. This research expands the existing interpretations of hadith by incorporating a welfare approach, as judges strive to achieve the welfare goals of the child through comprehensive considerations, not relying solely on hadith, fiqh, and applicable legal provisions, but also emphasizing the interests and welfare of the child.

The Surabaya Court of Appeal judges' interpretation of the hadith, using a welfare approach, automatically benefits the parents or caregivers involved. The judge's interpretation of hadith in deciding child custody disputes differs from some opinions prevalent in fiqh studies concerning the conditions under which a child is cared for and the qualifications of caregivers. This difference arises because real-life situations often differ from the formulations found in traditional fiqh texts.

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