

THE PROBLEM OF THE EXECUTION OF CHILD CUSTODY (*HADĀNĀH*) DECISION BY THE RELIGIOUS COURTS IN INDONESIA

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ABSTRACT

This article analyses the problems in the execution of child custody decision by Religious Courts in Indonesia. The implementation of court decisions reflects the court's dignity. However, the victory over child custody decision issued by the Court sometimes only the formality on the paper. Sometimes, the implementation of the court decision is hindered if there is no willingness from the involved parties. This research uses normative legal research method with conceptual approach and field research. This research found that the implementation of child custody decision is prevented by the quality of verdict, inadequate rule of

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execution, and the norm which woman is perceived as the better party to hold child custody rights. In addition, the execution of child custody decision cannot be adequately implemented using Het Herziene Indonesisch Reglement (HIR) solely, but it needs new regulation to accommodate the child interest, lawfully and psychologically.

Keywords: *execution, religious courts, child custody*

INTRODUCTION

Child custody (*ḥaḍānah*) as the impact of divorce often create additional issues. These problems may affect children's growth and the fulfillment of children's rights. Among the problems faced by children are the symptoms of short-term mental health disorders, such as stress, anxiety, and depression, as stated by Jennifer O'Loughlin.⁵ Moreover, it can be worse when there are custody disputes between the parents.

In Indonesia, through Article 45 of Law No. 1 of 1974 (Marriage Law), it states that child custody is carried out by both parents. The term "custody" means nurtures and educates children. This rule is the implementation of the constitutional rights of children which stipulated in the Article 28B paragraph (2) of Constitution of the Republic of Indonesia. The constitutional rights of children guaranteed by the constitution are the right to survival, to grow and develop, and the protection from violence and discrimination. Beside in Marriage Law, the assurance of the constitutional rights of children is also regulated in Law No. 23 of 2002 on Child Protection and *Presidential Instruction* No. 1 of 1991 on the Compilation of Islamic Law (Kompilasi Hukum Islam/KHI).

The parenting paradigm in the context of Islamic law in Indonesia perceives that women are the best to exercise child custody.⁶ However, the obligation to provide a living is still borne by the father. Revocation of child custody rights

⁵ Munaya Nasiri, 'Beda Dampak Perceraian bagi Anak Perempuan dan Laki-laki', *cnnindonesia.com*, <https://www.cnnindonesia.com/gaya-hidup/20160922121057-255-160246/beda-dampak-perceraian-bagi-anak-perempuan-dan-laki-laki>, accessed on 3 January 2019.

⁶ Compilation of Islamic Law (KHI) Article 105 regulates as follows:
"The maintenance of children who have not been *mumayyiz* or are not yet 12 years old is the right of their mother; The maintenance of children who are already *mumayyiz* is handed over to the child to choose between father or mother as the holder of their custody rights; The maintenance fees borne by his father."

from women can be done if she does not have legal competency or conduct *nushūz* (the wife is disobedient to husband). Additionally, Article 49 of Law No. 1 of 1974 (Marriage Law) states that the right to child custody can be revoked if she neglects her obligations to her child and/or behaves badly.

When both parents are deceased, the one who acts as a caregiver is his/her guardian. Article 107 paragraph (4) of KHI states that the guardian is preferable being chosen from the family of the child, or another person who is mature, healthy, fair, honest and well-behaved, or a legal entity.⁷ The *ḥaḍānah*'s right holder is obliged to ensure the physical and spiritual safety of the child while fulfilling the living cost and the custody cost.

In practice, the implementation of child custody provisions as stated above is not an easy task, especially when the court has decided to whom the child custody right is given to. Some fathers do not provide a living for their children because they think the child is under the care of his ex-wife; the father often neglects their responsibility. There were several cases in child custody execution when the losing party refused to give up their child to the winning party. As a result, the ideal execution of the *ḥaḍānah* decision could not be implemented. This is on the contrary to the decisions relating to property rights. The courts can confiscate, sell or ask for assistance from security forces in property execution. Meanwhile, the execution of child custody is different with the execution of property right because the object of execution is human. Therefore, the court decisions are unenforceable in reality, since it does not really have execution power.

In this case, it is important to see how the religious court makes the court decisions. For this reason, research needs to be carried out to provide legal certainty in the implementation of court decisions. Therefore, this research is necessary to be conducted. The main question of this research is to find out how the Religious Court execute the decision of child custody. This question is reinforced by another research question: how does the regulation about the children protection and care after the parental divorce? Thus, this research will answer these two questions.

⁷ Article 156 KHI further regulate that when the parent is deceased or incompetent to carry out the child custody, the one who entitled to the custody right is:
a) women in a straight line from the mother;
b) father;
c) women in a straight up line from the father;
d) sister of the child; women who have blood-line to the line of the mother;
e) relatives of women who have blood-line according to the side line from Father.

To answer the research question above, this research is conducted in three steps. The first step is by conducting a critical study of the legislation and decisions of the Religious Courts relating to *ḥaḍānah* and execution. Second, to conduct in-depth interviews with judges in the Religious Court. Third, to conduct the Focus Group Discussion with child researchers, judges, and State institutions that take care of children which in this case is P2TP2A.⁸

CHILD CUSTODY IN ISLAMIC PERSPECTIVE

The birth of a child is a legal affair. When a child is born, even when he/she still in the womb, he/she has become a subject of law, as in the case of inheritance.⁹ Parents have obligation to fulfill every child's rights. Some experts say that the rights that must be given by parents to children are the *ḥaḍānah* rights, *raḍā'ah* rights, the rights of living cost, and guardianship rights.¹⁰ Additionally, Wahbah al-Zuḥaylī added one more right, namely: *naṣab* rights (descendants), *radha* rights (breastfeeding), *ḥaḍānah* rights (maintenance), *walāyah* rights (guardian), and right of living (alimentation).¹¹ In this article, the main focus is *ḥaḍānah* right.

Etymologically, the word *ḥaḍānah* means “*al-janb*”, has the meaning “on the side” or “under the armpit”. It can also mean “putting something near the ribs like carrying it”.¹² The children must be cared for and educated because they cannot fulfil their own needs yet. In Islam, parents must take care of

⁸ P2TP2A (Pusat Pelayanan Terpadu Pemberdayaan Perempuan dan Anak/P2TP2A) or integrated services centre of the women and children empowerment is an integrated activity founded Ministry of women empowerment and child protection and provide services for the Indonesian people, mainly women and children victims of violence acts.

⁹ Deasy Caroline Moch. Dja'is, 'Pelaksanaan Eksekusi Nafkah Anak di Pengadilan Agama,' *Jurnal Mimbar Hukum, Jakarta, Al-Hikmah dan Ditbinbapera Islam*, vol. 42 (1999): 39.

¹⁰ Satria Effendi, 'Makna, Urgensi dan Kedudukan Nasab dalam Perspektif Hukum Keluarga Islam,' *Jurnal Mimbar Hukum, Jakarta, Al-Hikmah dan Ditbinbapera Islam*, vol. 42 (1999): 7-19.

¹¹ Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuh*, vol. 10 (Dimashq: Dār al-Fikr, t.t.), 7245.

¹² Krik Agustian, 'Tinjauan Analitis Pasal 105 Kompilasi Hukum Islam tentang Hak *Hadhanah* dan Batasan Umur *Mumayyiz*,' <http://www.pta-jambi.go.id/attachments/article/1688/Artikel%20Korik%20ttg%20hadhanah.doc>, accessed on 11 November 2018.

children from birth until they can provide their own needs. The obligation of parents to provide the living cost is known as terms *ḥaḍānah*.

The *ḥaḍānah* rights emerge when a marriage is terminated between a husband and wife due to death or divorce. Muhammad ibn Ibrahim¹³ said there were three goals from *ḥaḍānah*, namely:

- a) Assuring their food, clothing, cleanliness and comfort in their sleep.
- b) Educating for their better life in the world and the hereafter.
- c) Protecting from things that will hurt them by supervising their activities, supervising where they live, and supervising them at their bedtime and wake up time.

In general, child custody is carried out by mother and female families from the matrilineal lineage, especially in the case of children who are not *mumayyiz* yet. Especially for infant children who are still in the breastfeeding period, the custody right is given to the mother.¹⁴ The reason why mothers are chosen because when the child is sick, the parents who are most entitled to care for him are mothers, since the mother has more patience than the father.¹⁵ The child can be treated at his father's house if the mother allowed it, but if not, then the child will be treated at his mother's house. However, it should be noted that both of them should not fall into *khalwah*.¹⁶

The child custody right can be revoked from the mother if the mother remarries, suffers from diseases that make them unable to be a custodian (such as become insane or diseases that can spread to children), or make long trips (become *musāfir*). When these three reasons disappear, the child custody right goes back to the mother. As known in the fiqh jurisprudence, "if the hinderer is lost, then the prohibition is returns".¹⁷ In terms of the reasons for women getting married, the Shāfi'ī and Ḥanbalī schools said that when the women is divorced, the custody right will return automatically to her without waiting for

¹³ Ibrāhīm Ibn Muḥammad, *Hawashī 'ala Multaqa al-Abhar fī Fiqh 'ala Madhhab al-Ḥanafī*, vol. 3 (Lubnān: Dār al-Kutub al-'Ilmiyyah, 1971), 256.

¹⁴ This requirement can be seen in Surah al-Baqarah article 232 and al-Ṭalāq article 2.

¹⁵ Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuh*, vol. 10, 7321.

¹⁶ Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuh*, vol. 10, 7321.

¹⁷ Kementrian Wakaf dan Keislaman, *al-Mawsu'ah al-Kuwaytiyah*, vol. 17 (Kuwait: Kementrian Wakaf dan Keislaman, 1447H), 312-313.

the *'iddah* period, whether it is *talāq raj'ī* or *talāq bā'in*.¹⁸ On the other hand, the Ḥanafī school of thought says the *ḥaḍānah* right return to the woman again when the *'iddah* period is over. Meanwhile, several Muslim scholars have a different opinion whether the *khul'* or *nushūz*¹⁹ of woman can be a reason for terminating their child custody.²⁰

Some scholars argue that the transfer of custody rights from the mother is not to the father, but her younger siblings. However, it must be kept in mind that the transfer of child custody from father to mother must fulfill two conditions according to Mālikī school, namely:

- a) Bad things will not happen when the child is separated from his/her mother
- b) Father must be able to take care of children²¹

For divorced parents, both of them have the rights to visiting their children.²² The *'ulamā* agreed on this right since the aim is for good relationship (*ṣilah al-raḥīm*) between them. Ḥanafī scholars say the visitation can be done by asking children to leave the house in a place where their parents can see him/her every day. The limit of visitation according to this school is once a month, as practised in Egypt, but can also be done once a week. The Mālikī School says that if a child is still an infant, his parents can see his/her every day, and if he/she is a teenager, it can be done once a week. The Shāfi'ī and Ḥanbalī schools say that for children who are already *mumayyiz*, they can choose at any time to visit their parents.²³

In Egypt, based on Law Number 25 of 1992, the child custody right for boys is up to seven years while girls have up to nine years. Meanwhile in Syria, based on Article 146 1975 Law, it is regulated that the limitation of *ḥaḍānah* is nine years for boys and eleven years for girls.²⁴

¹⁸ There are two kinds of divorce, *talāq raj'ī* and *talāq bā'in*. When the husband says explicitly, "You are divorced/you are now a divorcee/ I divorce you." This divorce is *raj'ī*, and the husband and wife still can reconcile if it is stated only one or two times. However, if the words is stated three times, then it becomes *talāq bā'in* (the big divorce), which means a husband and wife is divorce forever and cannot reunite again before the wife is marrying another man.

¹⁹ *Khul'* or *nushūz* means when wife disobedience to her husband or when husband neglect his obligations as husband.

²⁰ Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuh*, vol. 9, 7031.

²¹ Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuh*, vol. 9, 7031.

²² Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuh*, vol. 10, 7320.

²³ Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuh*, vol. 10, 7320.

²⁴ Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuh*, vol. 10, 7325.

THE RULES FOR CHILD CUSTODY IN THE REGULATION IN INDONESIA

Law No. 1 of 1974 on Marriage, Law No. 7 of 1989 on the Religious Courts, Law No. 23 of 2002 on Child Protection, and Compilation of Indonesian Islamic Law in 1991 did not specify the terms *ḥaḍānah*. However, substantively, the *ḥaḍānah* means childcare, or referred to parental care according to the Child Protection Law. It has been explicitly mentioned in and becomes part of family law.²⁵

Child custody is closely related to the protection of children's rights. Child custody cases can arise after someone files a divorce lawsuit against their partner. Although almost all parents do not want to be separated from their children, in reality, the marriage does not always last forever. Therefore, child custody claims in general included in a divorce lawsuit between husband and wife who have children.

In addition, child custody claims can also be carried out separately. This is because, in order to obtain custody of children, one must go through the litigation process to create legal certainty.²⁶ Arif Gosita states that legal certainty was sought for children for the continuation of child protection activities and to prevent fraud that can cause undesirable negative consequences in the implementation of protection.²⁷

Child custody is regulated in the Indonesian Civil Code (KUHPerdata) in First Book about People in Chapters X, XII, and XIV. In the civil law perspective, the one who most entitled to maintain and take care of the children as a result of divorce is their parents. The loss of power as parents or guardian does not mean that they are free from their obligation to give allowance according to their income in order to fund the maintenance and education of their children.²⁸ In Article 231 of the Indonesian Civil Code, it is explained that, "the termination of marriage in the case of divorce will not

²⁵ Pengadilan Agama Purworejo, 'Seputar Eksekusi Putusan Hadhanah,' <http://pa-purworejo.go.id/web/seputar-eksekusi-putusan-hadhanah/>, accessed on 11 November 2018.

²⁶ Indonesia, *Marriage Law*, Law No. 1 of 1974, LN No. 1 of 1974, TLN No. 3019, Article. 41 item a.

²⁷ Maidin Gultom, *Perlindungan Hukum Terhadap Anak; dalam Sistem Peradilan Pidana Anak di Indonesia* (Bandung: Refika Aditama, 2006), 33.

²⁸ Soedaryo Soimin, *Kitab undang-Undang Hukum Perdata* (Jakarta: Sinar Grafika, 2007), 72.

cause the children born from the marriage to lose the benefits that have been guaranteed for them by the law or by the nuptial agreement of their parents”.²⁹

The definition of custody cannot be found in Law Number 1 of 1974 on Marriage (Marriage Law). Meanwhile in Law No. 35 of 2014 on amendments to Law Number 23 of 2002 on Child Protection (Child Protection Act), but it is explained that Foster Children are, “children who are taken care by someone or an institution to be given guidance, care, nourish, education, and health because their parents or one of their parents are unable to assure their growth in a reasonable manner”.³⁰ The Child Protection Law also explained about Fostering Power (Kuasa Asuh), which is “parents to caring, educating, nurturing, fostering, protecting, and growing the children according to religion he/she adheres to and according to his/her abilities, talents, and interests.”³¹

It is necessary to emphasize that if there is a dispute over the child custody after a divorce occurs, then the obligation of one of the parties which do not obtain the custody of the child based on the judge’s decision does not end because of that. The Marriage Law states that in case of the termination of marriage due to divorce, both the father and mother still have the obligation to maintain and educate their children, solely based on the best interest of the child.³² It is reiterated in Article 45 paragraph (1) of Law Number 1 of 1974 (Marriage Law) that, “Both parents are obliged to maintain and educate their children as well as possible.”³³ As in the next paragraph, the provisions that bind parents to fulfill their obligations to nurture and educate their children will remain valid until the child marries or can stand alone by themselves. Moreover, it was emphasized that these obligations are still applicable even though the marriage between parents is over.³⁴

The Marriage Law shows that both male and female parents have the equal opportunity to take care for their children, yet it depends on the decision of the judge who must consider the best interest of the child. This shows that the Marriage Law does not regulate who is most entitled to custody of children, but with whom the rights of the child can be fulfilled properly.

²⁹ Indonesia, *Kitab Undang-Undang Hukum Perdata*, Article 231.

³⁰ Indonesia, Law on Amendments to Law Number 23 of 2002 on Child Protection, Law No. 35 of 2014, LN No. 297 Year 2014, TLN No. 5606, Article 1 paragraph 10.

³¹ Indonesia, Law on Amendments to Law Number 23 of 2002 on Child Protection, Law No. 35 of 2014, LN No. 297 Year 2014, TLN No. 5606, Article 1 paragraph 11.

³² Indonesia, Marriage Law, Article 41 item a.

³³ Article 45 paragraph (1) of Law Number 1 of 1974 (Marriage Law).

³⁴ Article 45 paragraph (2) of Law Number 1 of 1974 (Marriage Law).

In the Child Protection Law, it is explained that, “Every child has the right to be cared for by his own parents, unless there are reasons and or legal rules that indicate that the separation is for the best interest of the child and is the final consideration”.³⁵ In the explanation, the word “separation” refers to the consequences of divorce and other situations such as children left by their parents to work abroad, and children whose parents are detained or imprisoned.³⁶ In other words, the Child Protection Law implicitly states that even if there is a divorce, the claim over child custody is not always filed.

For those who adhere to Islam, the Compilation of Islamic Law is one of the references for the Religious Court judges to settle the *ḥaḍānah* lawsuit case. In Article 77 paragraph (3), KHI mentioned that “Husbands and wives bear the obligation to take care for their children, both physically and spiritually growth, and intelligence and religious education.”³⁷ Article 105 of KHI explains that in the event of a divorce: a) maintenance of children who have not been *mumayyiz* or do not reach 12 years old yet is the right of their mother; b) maintenance of *mumayyiz* children is determined by children’s choice to choose between their father or mother as the custodians of their custody rights; and c) maintenance costs borne by his/her father. The cost of caring for children is clarified further in Article 149 letter d of KHI, which state, “If the marriage is terminated due to divorce, the ex-husband is obliged to give *ḥaḍānah* fees for his children who have not reached 21 (twenty-one) years.”³⁸

The provisions in the KHI show that parental authority over children after divorce is related to marital validation and validation of parental divorce. Then, parental authority over children is basically the responsibility and obligation of both parents together through education and child care, by the provision that children who have not been *mumayyiz* (approximately 12 years) are under their mother’s custody.³⁹

Article 156 of KHI explains that if the mother has died, and the child has not been *mumayyiz* yet, the Motherposition as guardian is replaced by:⁴⁰

- 1) Women in a straight line from the mother;
- 2) Father;

³⁵ Indonesia, Law on Amendments to Law Number 23 of 2002 on Child Protection, Article 14 paragraph (1).

³⁶ Explanation of Article 14 paragraph (1).

³⁷ Indonesia, *Islamic Law Compilation*, Article 77 paragraph (3).

³⁸ Indonesia, *Islamic Law Compilation*, Article 149 item d.

³⁹ Indonesia, *Islamic Law Compilation*, Article 105.

⁴⁰ Indonesia, *Islamic Law Compilation*, Article 156.

- 3) Women in a straight up line from the father;
- 4) Sister of the child;
- 5) Women who have blood-line to the side line of the mother;
- 6) Relatives of women who have blood-line according to the side line from Father.

From the articles related to *ḥaḍānah* in KHI, it can be concluded that the material and non-material maintenance are two things that cannot be separated.⁴¹

In Indonesia where the doctrine of child custody is less developed, not many people give their concern about this issue. While in Australia there is a kind of presumption or basic reference where the share parenting or best interest of the child becomes the initial presumption to decide whether it is possible for the child to be take cared of together or not. The development of the childcare doctrine influences the law enforcement process, both in terms of handling and court decisions aspects. If the collective care is not possible, child custody is taken by one of the parties. Then, it will be decided on how the parents who do not get child custody to communicate with their children. However, there are no considerations and instructions for such provision in Indonesia.

CHILD CUSTODY EXECUTION IN INDONESIA: THE CHALLENGES AHEAD

Execution has the same meaning as the term “exercise ruling” (*ten uitvoer leggings van vonnissen*), which is to implement “forcibly” a court decision with the help of general forces if the losing party (executed or the defendant) does not want to conduct it voluntarily. In other words, the execution of a verdict is forced act against the party who lost the case.⁴² In another sense, execution means carrying out a court decision that has a permanent legal force (*inkraht*). The court verdict must be executed is a decision containing an order to one party to pay a sum of money or also the implementation of a judge’s decision to order the emptying of objects (for instance on the land dispute), while the losing party does not want to carry out the decision voluntarily so that it requires a forced effort from the court to implement it.⁴³

⁴¹ Fitri Wahyuni, ‘Analisis Yuridis terhadap Hak Asuh Anak dalam Putusan Nomor 489/PDT.G/2011/PA.SBY tentang Cerai Gugat Bersyarat,’ (Disertasi Sarjana, UIN Sunan Ampel Surabaya, 2014), 31.

⁴² M. Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata* (Jakarta: Gramedia, 1988), 5.

⁴³ Abdul Manan, *Penerapan Hukum Acara Perdata di Lingkungan Pengadilan Agama* (Jakarta: Penerbit Kencana, 2005), 313.

Every individual has their own interests. Sometimes, their interests may create conflict in community life, which will result in legal disputes in the end. Legal disputes can be interpreted as disputes regarding something that is regulated by law and causes legal consequences. In the Indonesian legal system, this legal dispute can be resolved through two options. Parties who feel aggrieved in the dispute must seek applicable procedures to regain their rights, namely through litigation or Alternative Dispute Resolution (ADR), such as dispute resolution through peace settlement between the disputing parties.⁴⁴

The dispute settlement through Alternative Dispute Resolution (ADR) often cannot accommodate the interests of the disputing parties, thus the litigation procedure by submitting a lawsuit to the court is the last choice by the disputing parties to obtain their rights or defend their rights. At the end of this process, the judge issues a decision as a final conclusion as a form of problems resolution which contains certain orders to the losing party in the trial. The result from decision must be carried out by the loser party, but often the party who has the obligation disclaims the decision issued by the court. Referring to this condition, the execution of judicial's decision is available to force the losing party to carry out a decision from the court that issues a decision at the request of the winning party.

In carrying out the executions, courts need to pay attention to various principles, namely:

*a) The judge's decision that will be executed must acquire a permanent legal force (in kracht van gewijsde)*⁴⁵

This means that in the judge's decision there is a definite legal relationship between the parties that must be fulfilled by the defendant.

*b) The Judge's Decision that will be Executed must be Punitive (Condemnatoir)*⁴⁶

This means that the verdict is realized from the existence of cases in the form of *yursdictio contentiosa*, which characterized by dispute cases where there are a plaintiff and a defendant, and the examination process is opposite between the plaintiff and the defendant (contradictoir).

⁴⁴ Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia* (Yogyakarta: Cahaya Atma Pustaka, 2013), 1.

⁴⁵ Retnowulan dan Iskandar Oeripkartawinata, *Hukum Acara Perdata dalam Teori dan Praktek* (Bandung: CV Mandar Maju, 1955), 130.

⁴⁶ M. Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, 13.

For instance, the ruling in court decision is as follows: Punish or order to “surrender” something; Punish or order to “emptying” a plot of land or house; Punish or order to “do” a certain action; Punish or order the “termination” of an act or condition; Punish or order to “make” payment of some money.

c) The Judge’s Decision was not carried out Voluntarily

The defendant as the losing party in the case was obviously not willing to carry out the decision voluntarily. On the contrary, if the defendant is willing to execute the court decision voluntarily, then the execution is no longer needed automatically.

d) Execution must be following the Court Ruling

The point is, what is sounded by the verdict, that is what will be executed. The success of the execution is determined by the clarity of the decision itself based on legal considerations as a judge’s argument.

Basically, there are two forms of execution in terms of the objectives to be achieved by the legal relationship stated in the court’s decision, which is doing a real action; thus this kind of execution is called “real execution”, and making a payment of some money. This type of execution is known as “execution of money payments”.⁴⁷

Likewise, in the practice of religious courts there are two types of executions namely (1) real execution as stipulated in Article 200 paragraph (11) of HIR/ Article 218 paragraph (2) of R.Bg, and Article 1033 of Rv, which includes submission of emptying, demolition, distribution and doing something; (2) execution of payment of a sum of money through an auction or executorial verkoop, as stated in of 200 HIR/Article 215 of R.Bg.⁴⁸ The following part will explain the two types of execution:

1. Real Execution

Real execution is an execution that punishes the losing party in a case to do a certain act, such as handing over an item, clearing land or building, dismantling it, stopping a certain act and others. This execution can be carried out directly with real actions in accordance with the court ruling without going through the auction process.

⁴⁷ M. Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, 20.

⁴⁸ Abdul Manan, *Penerapan Hukum Acara Perdata di Lingkungan Pengadilan Agama*, 316.

2. Execution of Payment of Amount of Money

Execution of payment of money is an execution that requires the losing party to pay a sum of money (Article 196 of HIR/208 R.Bg). This execution is the opposite of real execution, where in this type, execution cannot be done directly in accordance with the court ruling as in real execution but must go through the auction process first because the object that will be executed is something that can be valued by money.

Regarding the execution of *ḥaḍānah*, Article 54 of Law Number 7 of 1989 (Religious Court Law) states that, “The procedural law that applies to courts within the scope of Religious Courts is the Civil Procedure Law which applies to Public Courts, except those specifically regulated in this Law”. The *ḥaḍānah* lawsuit can be carried out independently, through a divorce or independent guardianship. For independent guardianship, usually, children are already in the control of the mother. However, for the sake of passport application and for children to be taken abroad, immigration usually requires a court decision.⁴⁹

If a *ḥaḍānah* lawsuit is legally binding, then the decision must be executed and the petition for the execution must be requested. In civil cases, the judge is passively waiting for the request, thus the initiative to submit a claim for rights is left to the concerned parties. If the concerned parties do not carry out the *ḥaḍānah* decision, then one party can file a request for execution.

There are differences of opinion regarding the implementation of the *ḥaḍānah* execution decision. One side argues that a decision on a *ḥaḍānah* case is declaratory (stipulated), therefore the execution is different with the execution of objects, even the execution of this decision cannot be carried out. In fact, the implementation of children custody is only voluntary, because there is no forced effort.⁵⁰ Another opinion argues that since the *ḥaḍānah* verdict is punitive (condemnatoir), thus the court decision of children custody can be executed by using a forced effort from the court.⁵¹

The legal basis of *ḥaḍānah* execution is stated in HIR (for Java region) and R, Bg (for the region outside Java). The execution of *ḥaḍānah* must be

⁴⁹ RA Didin Dliyauddin, ‘Pelaksanaan Eksekusi Sengketa Hadhanah di Pengadilan Agama Cikarang,’ (Disertasi Sarjana, Universitas Islam Negeri Syarif Hidayatullah, Jakarta, 2014), 54.

⁵⁰ RA Didin Dliyauddin, ‘Pelaksanaan Eksekusi Sengketa Hadhanah di Pengadilan Agama Cikarang,’ 69.

⁵¹ RA Didin Dliyauddin, ‘Pelaksanaan Eksekusi Sengketa Hadhanah di Pengadilan Agama Cikarang,’ 69.

carried out according to the procedure. If the execution is not carried out in accordance with the established legal procedures, the execution is not valid and must be repeated.⁵²

Article 180 of HIR also explained that the Chairperson of the Court can order the verdict to be carried out first even if there is an appeal. Article 64 of the Law on the Religious Courts stipulates that for court decisions which are appealed (*banding*) or higher appealed (*cassation*), the execution is postponed by law, except in the case where the court ruling states that the ruling can be carried out even though there is resistance or appeal.⁵³

Execution of *ḥaḍānah* decisions is not strictly regulated in the HIR-RBg, or other laws and regulations that specifically applied to the Religious Courts. The absence of a law that specifically regulates the execution of *ḥaḍānah* decisions does not mean that the decision of the *ḥaḍānah* is not enforceable, yet it must be carried out based on generally accepted rules of law.⁵⁴

Referring to the types of executions, the execution of *ḥaḍānah* decisions can be classified into the first type of execution (real execution: doing something). However, the execution of *ḥaḍānah* decisions often have significant obstacles because of the object of the case is human, thus the success rate is quite low compared to execution in the field of property law.⁵⁵

In practice, there are several difficulties faced by the court when executing the *ḥaḍānah* verdict. The following are three problems that arise in the implementation of the *ḥaḍānah* decision, namely:⁵⁶

a) Legal Vacuum Issue

Since the execution of the *ḥaḍānah* verdict does not have a specific legal rule, this means there is the legal vacuum of procedural law that must be fulfilled by law through the judicial discretion as judge's rights given by the law. The

⁵² RA Didin Dliyauddin, 'Pelaksanaan Eksekusi Sengketa Hadhanah di Pengadilan Agama Cikarang,' 437.

⁵³ Indonesia, Law of the Religious Courts, Law No. 7 of 1989, LN No. 49 Year 1989, TLN No. 3400, Article 64.

⁵⁴ Indonesia, Law of the Religious Courts, Law No. 7 of 1989, LN No. 49 Year 1989, TLN No. 3400, Article 64.

⁵⁵ Indonesia, Law of the Religious Courts, Law No. 7 of 1989, LN No. 49 Year 1989, TLN No. 3400, Article 64.

⁵⁶ Indonesia, Law of the Religious Courts, Law No. 7 of 1989, LN No. 49 Year 1989, TLN No. 3400, Article 64.

Religious Courts as the Law of Court are bound by the basic principle of judicial power that: “the court should not reject the case that was submitted to it under the excuse that the law does not exist or is unclear, but it obliged to examine and adjudicate it (Article 16 paragraph (1) Law No. 4 of 2004). Therefore, judges are obliged to explore, follow, and understand the legal values and sense of justice that lives in society. (Article 28 paragraph (1) of Law No.4 of 2004). In this context, it includes the efforts to implement or execute the court decisions. However, indeed, the freedom of judges to explore this law seems to have raised concerns among legal experts.

To this day, the execution of the *ḥaḍānah* verdict is still debatable among the expert. Some legal experts say that children cannot be executed, while others argue that the *ḥaḍānah* ruling can be executed. Legal experts who are against the execution of children argue that the existing jurisprudence regarding executions is only available in the field of the law of property, and not in the context of people as the object. Therefore, the execution of a child is against with the custom and norms, thus there is no execution. Moreover, the decision is declaratory. Additionally, in reality, the practice shows that the execution of children is only voluntary, meaning that there is no forced effort to execute the decision.

On the other side, the legal experts who in favour of the execution of children argue that the development of the law nowadays stipulates that the case of children custody whose decisions are condemnatory, if it already has permanent legal force, then the decision can be executed. The court has the authority to use forced efforts to implement this decision. Therefore, for a child who is under the care by one of his/her parents who is not entitled to custody as a result of a divorce decision or a divorce request, the Religious Court can take the child by force and give him/her to one of the parents who has the custody right to take care for him/her.⁵⁷ In our opinion, the last option is the most appropriate to the current era because it assures the legal certainty, a sense of justice and expediency.

b) Psychological Aspect of the Child

It is important to consider the psychological aspects solely for the best interests of children when deciding child custody rights. Therefore, the Judge with the sharpness of his intuition and his sense of justice, and after observing and

⁵⁷ Abdul Manan, *Penerapan Hukum Acara Perdata di Lingkungan Pengadilan Agama*, 436.

carefully examining all the facts in the trial, should make efforts optimally to determine the fairest decision.

Even so, in examining child custody claims, it is necessary to consider the psychological aspects of children. Judges, if necessary, can hear “expert witnesses” from psychologists, especially those involved in the Indonesian Child Protection Commission (KPAI). This procedure is intended to dig deeper another aspect of the psychology of child development which aims solely for the best interests of the child to be considered in the decision-making process. Consequently, the verdicts will guarantee the benefits in addition to the legal certainty and justice. In addition, it is necessary to pay attention to the protection of children and the future of children, especially regarding education and health of children. Additionally, the faith aspect also influences the children.⁵⁸

c) The Legal Procedure for Execution

In order to guarantee the validity of the execution of the *ḥaḍānah* verdict, the execution must go through applicable legal procedures and fulfill the execution requirements. If the execution is not carried out in accordance with the procedures and requirements set, the execution is invalid and must be repeated.

The chronological procedure and requirements for the execution of *ḥaḍānah* decisions can be specified as follows:

- i) The *ḥaḍānah* decision has permanent legal force;
- ii) The losing party does not want to implement the *ḥaḍānah* decision voluntarily;
- iii) The winning party (the plaintiff) file an application for execution to the Religious Court which issue decision on the *ḥaḍānah* case;
- iv) The Religious Courts have decided an anmaning session;
- v) Has passed the deadline or warning period in accordance with Article 207 of R.Bg;
- vi) The Chairperson of the Religious Court issues an order of execution;
- vii) The execution takes place at the place of the convicted execution to hand over the child;
- viii) The execution is assisted by two witnesses who fulfill the elements referred to in Article 210 paragraph (2) of R.Bg;

⁵⁸ Based on Interview with Hj. Muraya (Head of the West Jakarta Religious Court).

- ix) The bailiff takes the child well, politely and in accordance with the customs in society. If the child is not handed over voluntarily, the execution is carried out by force;
- x) The bailiff makes an official report signed by the bailiff and two witnesses and creates five copies of the report.⁵⁹

Another problem is giving a living cost. Custody is inseparable from the right to living cost. There are an issue of determining the amount of income since the court must consider the parent's abilities and a decent standard of living. For example, there is an example of a father who works as meatball seller who ordered to give a living cost, but it turned out that he could not afford to give a living cost to his child. Then, the judge gives a reduction after seeing that the previously demanded cost is irrational. Moreover, the next principle is the execution. Another difficulty faced in the custody because the nature of livelihood rights is sustainable. Therefore, it is necessary to find an alternative resolution of child custody disputes. Nowadays, the choice of dispute settlement is only through the court. In addition, the related rules about this issue are also inadequate.

On the other hand, there is no external mechanism to guarantee the implementation of decisions. In Australia, there are government institutions that ensure parents to pay their children's living cost. For example, when A was ordered by the court to pay for the child's living cost, A can pay for it through a credit card and the institution distributes it to his child. Another example in America, a father who does not pay for a child living cost cannot extend his driver license, etc. However, in Indonesia, the court has limitations in intervene the request and does not have the power outside the request. The last problem is that Indonesia does not have a payment system to support children living cost.⁶⁰

CONCLUSION

From the discussion above, it can be concluded that the execution of a child custody decision is constrained due to three factors; first, the quality of the decision, second, inadequate guidelines for implementation, and inadequate legislation and institutions, and the last is paradigms in determining child

⁵⁹ RA Didin Dliyauddin, 'Pelaksanaan Eksekusi Sengketa Hadhanah di Pengadilan Agama Cikarang,' 73.

⁶⁰ Muhammad Noor (Judicial Judge on Law and Public Relations Bureau/Special Staff on Secretary of the Supreme Court of Republic Indonesia) on Focus Group Discussion, 9 October 2018.

custody decisions are limited. Knowledge of judges regarding the consideration for the benefits of children, such as the psychological aspects of child care will determine the execution or implementation of judges' decision.

To guarantee the rights and legal protection for children, the legal rules for the execution of children is necessary, and it is important to provide alternatives to resolving disputes over child custody rights. The determination of *ḥadānah* must pay attention to psychological aspect of the child, not enough by solely perceive women as the party who can take care for children. Child custody implementation must consider the best interests of the child. In addition, the government needs to establish specific rules for child custody execution and other family rights.

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