

# Hadhanah praktice in Aceh

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***Hadanah Practice in Aceh:***  
**Arguments for Choosing a Conflict Resolution Mechanism and Its Social Implications**

**Abstract**

This paper discusses *hadanah* practice in Muslim communities based on a case study in Aceh, Indonesia. This paper focuses on an argument for choosing a custody conflict resolution mechanism that occurs due to divorce of a husband and wife. This study used a qualitative approach with data sources collected through in-depth interviews with families who are currently or have gone through process of litigation or non-litigation *hadanah* conflict resolution. Author explores Acehnese people's arguments in choosing a non-litigation solution, both from economic, customary, legal understanding, awareness, distance and time. The result shows that the choice of mechanism for resolving *hadanah* conflict in Acehnese society is part of negotiation process between national law, Islamic law, and local context of Aceh. This study concludes that children still suffered from loss of reciprocal relationship from their parents for development of soul and mental although the *hadanah* resolution finished well.

**Keywords:** *hadanah*, conflict resolution, litigation, non-litigation.

**Abstrak**

Tulisan ini membahas praktik hadhanah pada masyarakat Muslim berdasarkan studi kasus di Aceh, Indonesia. Tulisan berfokus pada argumentasi pemilihan mekanisme resolusi konflik pengasuhan anak yang terjadi akibat perceraian sepasang suami-istri. Penelitian menggunakan pendekatan kualitatif dengan sumber data dikumpulkan melalui wawancara mendalam terhadap keluarga yang sedang atau pernah menjalani proses penyelesaian konflik hadhanah secara litigasi atau non-litigasi. Penulis mengeksplorasi argumentasi masyarakat Aceh dalam memilih penyelesaian konflik hadhanah secara non-litigasi baik dari aspek ekonomi, adat, pemahaman dan kesadaran hukum, serta aspek jarak dan waktu. Tulisan menemukan bahwa pilihan mekanisme penyelesaian konflik hadhanah dalam masyarakat Aceh merupakan bagian dari proses negosiasi antara hukum nasional, hukum Islam dan konteks lokalita Aceh. Tulisan ini pada akhirnya menyimpulkan bahwa meskipun suatu mekanisme penyelesaian konflik hadhanah yang dipilih dilandasi pada mekanisme yang dianggap terbaik, anak tetap menjadi pihak yang dirugikan akibat konflik perdata diantara kedua orang tua mereka.

**Kata kunci:** Hadhanah, resolusi konflik, litigation, non-litigation.

## 1. Introduction

Islam is a religion that regulates all dimensions of human life, whether it is a matter of marriage or divorce. When a husband and wife are legally divorced, it does not necessarily mean that they do not have responsibility anymore, especially if they have already had children. Islam regulates post-divorce issues in such a way, starting from the *iddah*, inheritance, palimony, and most importantly, regarding child custody. The divorce issues in Aceh have a particular institution called a *Sharia* Court as a legal body to ensure the proceeding is applied as regulated and is as fair as possible [1].

After the divorce is sentenced by the judge, another conflict may emerge between husband and wife and sometimes with parents, namely the dispute over the rights of *hadanah*. The conflict sometimes becomes a long polemic, and it is often due to parents' demand of the child. Both parents will claim they have neglected their obligations as parents and accuse their spouse of having ignored to be responsible for the children. Consequences, the condition influencing the child's mental and psychological with any bad behaviors that the father or the mother has done to claim custody. The child's best demands must be a primary consideration.

The Aceh community said that decisions of the *Sharia* Court sometimes did not overcome the roots of divorce issues, and it was quite time-consuming when resolving it. In addition, the condition requires a large amount of money and causes Acehese society to look for other alternatives, namely conflict resolution outside the formal judicial process. Even though laws regulate that the legal system of *hadanah* disputes has to be carried out in court (litigation), most Acehese still resolves *hadanah* conflicts through non-litigation because it is more effective and appropriate with the community. Deciding traditional institutions in Aceh is regulated in *Qanun Aceh No. 10, 2008* concerning on Traditional Institutions [2].

*Maslahah* theory is one of the ideas that has become a part of laws in Islamic history as guidance for current generations in law studies, law developments, and administrations [3]. Moreover, this is an Islamic law actualization such as the *Sharia* Court, which is given official authority by the state to provide justice to the areas under their jurisdiction. Therefore, benefit as the essence of *Maqashid Sharia* must be an essential consideration for judges when sentencing their decisions.

According to Imam al-Syatibi, Islamic laws aim to achieve goodness and reject meanness. The whole *taklif*, which is reflected in the concept of *al-ahkam al-khamzah* (*wajib, sunnah, mubah, makruh, and haram*), belongs to benefits of the world and the hereafter. *Maslahah* has been used as the main consideration, yet it also involves many concerns related to issues about *hadanah* based on the *dharuriyah al-khamsah* framework as an elaboration from *maqashid sharia* concerning the five main points, recognized as defending religion (*hifz ad-din*), saving soul (*hifz al-nafs*), keeping mind

(*hifz al-aql*), nurturing offspring (*hifz al-nasl*), and managing wealth (*hifz al-mal*). Those five main points must be maintained because if there is a mistake that affects this *dharuriyah implementation*, it will give various consequences far beyond these five guidelines [4].

Regarding the *hadanah* resolution directly related to children as divorce victims, those five above-mentioned elements must be fulfilled. Based on several cases that have been judged in the *Sharia* Court the decisions regarding *custody*, family living, and children's benefits [5]. However, in practice, there are still many fathers who do not provide a living for their children. Therefore, the main element of *maslahah* as the goal of *Sharia implementation* is not achieved. Inability to provide a living by a father disobeys those five essential elements, especially saving soul (*hifz al-nafs*), keeping mind (*hifz al-aql*), and nurturing offspring (*hifz al-nasl*), because all the provisions of the *syara'* set by Allah SWT are for the benefit of humankind in this world and the hereafter.

Fathers' obligation to provide a proper life for their children is emphasized in Islam even though they are in poor condition but able to work [6]. Looking at a low level of this realization, society and government have a responsibility for ensuring children's living. To save these children, a state should provide facilities and accessibilities for them, specifically ensuring their growth and development optimally.

## **2. *Hadanah* Model in Aceh**

Resolving the *hadanah* dispute in Aceh is divided into two, litigation and non-litigation. The litigation model is a formal resolution involving certain institutions granted as a legal system to find a solution to family problems and any other so. In contrast, a non-litigation method is to resolve the dispute by a cultural institution and Gampong forum. In *hadanah* litigation, judges consider children for the good because the victims are them. Therefore, it is a must to take children's life as an essential aspect to primarily focus on, consistent to set laws as mainly for benefits.

Most often, Aceh culture in resolving *hadanah* disputes relies on forum discussion principles. This is purposed to avoid social problems in society and results in harmony for divorced spouses to still maintain good communication as well as two ex-family relationships. No-vault divorce has been being practiced in its society for several centuries before [7]. They have felt that resolving conflicts peacefully has brought them living in harmony, justice, fairness, and maintained togetherness values in their community. In this way, locals solve every conflict fast without ignoring togetherness values and individual rights.

A non-litigation method in resolving *hadanah* disputes is considered more effective and efficient, not harming children's psychology due to their parent's divorce as a result of prioritizing more on children's need and eliminating parents' ego. Judges' perspectives in their decisions in a court are

based on several articles in the Indonesian legal constitution of marriage. The laws also have guaranteed and protected law rights for *hadanah*. It is written in the legal constitution number 1, 1974 about marriage in chapter 41 and 45, also in Islamic laws compilations chapter 105 and 156. Based on those, it is clear that children have a right to protection and nurturing. In fact, judges do not always sentence their decision by constitution because the benefit of the children is the main consideration [8].

Resolving *hadanah* disputes and providing finance for children in either litigation or non-litigation has not fully been guaranteed by-laws. After the final decision from Sharia Court and Gampong forum, many fathers do not fulfill the demands of their children, such as money for nurturing, education, living, and other supporting facilities which they significantly need to live. The irony, there is no legal rule punishes them.

### **3. The Right to Become *Hadin* or *Hadinah* in Aceh**

A provision in Islamic law compilations chapter 105 states that nurturing children before the age of 7 is the mother's responsibility. Judges in *Sharia* Court when determining the dispute refers to Islamic rules, Islamic law compilations, and law on child protection, although sometimes not do the judges always sentence that this *hadanah* for the children is on mothers. This is determined by to whom the children will be benefited.

Judges give their different suggestions on their law considerations which are later used to make final decisions. In this certain case, we dug some information to some chosen informants based on their knowledge and experiences about judges' perspectives to conclude their final statements, especially in *hadanah* disputes in the Sharia Court.

"...the essential consideration is what best is for the children. Islamic law compilations chapter 105 (KHI) is taken into account when the case is a common dispute, and the couple is not harming children's mental, morals, and so on. Besides, the reference also comes from the law on children protection as well as jurisprudence from the Indonesian supreme court (Interview with Mr. Hamzah Hakim at the Idi Sharia Court, October 15, 2019)."

In *Sharia* Court practice, decisions related to *hadanah* refer to children's demand which is also written in law on children protection number 23, 2002, as well as a jurisprudence released by supreme court number 110 K/AG/2007 giving a reasonable decision. It is all about nurturing, not only seen as who has a right but it should be seen by the fact that who is ready to provide the kids best and does not harm them. In other words, what demands the kids' needs is more prioritized than who has more rights to raise them. In this case, judges do not encourage the court to apply chapter 105 of Islamic law

compilations [9]. This chapter is only purposed to a pre-divorce couple having no harmful problems between them. In case a dispute occurs, judges will sentence a decision regarding what is best for victim children.

Islamic law regulates that a mother must nurture kids under 12-year-old, but it can be ignored, and this right is given to a father [10]. However, there was a case numbered 0155/pdt.G/2016/MS.LGS, which considered the kids' urgency. It supports the interviews conducted before about what consideration was taken into account, that is:

"According to me, the main reference is Islamic law compilations and law on children protection. However, as a fact in the court when a child has long lived with his father and felt comfortable to live with his father, the final decision says that the right comes to his father."

It is one more time mentioned that still Islamic law compilation and law on children protection are the main reference, but it can be denied due to children's urgency. The interviewee continued to state that:

"In the trial, judges listened to the witnesses invited, followed by written evidence or other facts that might have been given by litigants. Besides Islamic laws, some principles should have been paid attention to, like justice, benefits, and legal standing. Those three principles must not have to be eliminated when a decision was being made. If only legal standing was concerned on a mother that should have nurtured her children in the trial, it was no guarantee that the children did not hurt, and it would harm their mental".

Based on the interview, it is proven that judges carefully considered their decision by examining the facts and evidence exposed in the trial about whether or not the parents behaved well. Also, it included matters related to children's psychology, material and non-material [11]. In the court, judges also took those three important principles to look at, justice, benefits, and legal standing. A case may be sentenced on a legal standing basis, yet it can seriously harm the children. Therefore, it needs a wise decision by judges.

#### **4. Judge's Consideration**

*Hadanah* disputes done by parents often do not protect children's rights and demand as regulated in law on children protection. This dispute ruins the children either their rights or their development. Moreover, it will be more destructive when the children are forced, locked, physically harassed by pulling them, and other physically harmful actions. It is clear that ignoring children's rights ruled on the law on children protection, chapter 4, 13, 16, 19 verses (1) and (2), is out of the law [12].

Judges are not strict when implementing a law to resolving *hadanah* since the demand of the children is vital. The issue itself concerns what children need, not what a mother or father wants. To sentence cases in Sharia Court, if the kids are below 12-years-old, they will be nurtured by their

mother, while there were several cases sentenced that a father had the right by carefully examining children's demands [13].

Judges' consideration to decide *hadanah* in *Sharia* Court is based on Islamic law (KHI) chapter 105 (a). This law states in a divorce that the right to nurture the children before *mumayyiz* or (kids over 12-years-old) is to their mothers. Meanwhile, nurturing children who have been *mumayyiz* depends on the children themselves to choose between their mother or father as someone who has the rights. In case their mother cannot ensure their safety physically and mentally, the custody will be given to their father to nurture, as mentioned in chapter 156 (c).

Besides considering Islamic laws chapter 105 (a) and chapter 156 (c), another consideration used is law number 23, 2002 chapter 2 (b). This law states that the performance of children protection is principled by Pancasila and based on the Republic of Indonesia's Constitution as well as foundation principles of children's rights convention covering: (a) non-discrimination (b) children's demands (c) rights to live, sustainable life, and development (d) respect for children [11].

Judges have to seriously consider the appropriateness of a mother to have *custody* for children who have not been a *mummayiz*. The custody concept in Islamic law is not much different from the concept brought by general rules. This law states that judges need to look carefully at parent's behavior (for example, a mother does not work till late in the night, and she must prioritize her relation to her children rather than business outside of the home, etc.). It also includes matters related to the need of the children, either their psychology or material and non-material. Islamic laws chapter 229 states that to solve litigation brought to the court, judges must pay attention to law values in society. Therefore, that decision is suitable and consistent with justice. A judge stated an opinion about legal consideration to decide why he gives custody to a father.

"Actually, as a judge, I prefer to choose a verdict suitable with Islamic laws and laws on children protection, and pre-adult children are indeed given to their mother, but if the children do not feel comfortable living with their mother, and the mother has already left children for a quite long time, it means that when *hadanah* rights came to their mother, we harm them because so far the children have been living comfortably with their father (Interview with Mr. Hamzah Hakim on Mahkamah Syar'iyah, October 2019)"

Regarding the interviews, it is concluded that judges decide custody not only by Islamic laws and common laws, but they also saw how close the children were with their parent. If children have lived comfortably with their father, judges decided that the father would receive the right to nurture them [14]. This is called "*contra legem*" which is in contrast with Islamic laws. So far, denying Islamic laws chapter 105 was possibly taken when a husband and a wife agreed to divide the rights to nurture the children only. The judges did fairer if giving custody to the father, although this judgment is out of

Islamic laws chapter 105.

### **5. Rights for Providing**

The number of wives filing for divorce is much higher in most divorce cases. In absentia decision often occurs in Sharia Court, even judge more often takes it's than other cases. In a judicial divorce, when a husband does not come to court as a consequence, a wife will find it difficult to ask for her rights and her children's rights. However, not everyone understands this condition.

Many of the divorce cases being sued by *Sharia* Courts from 2016 to 2018 were judicial divorces. The decisions were sentenced in absentia, which in the decision stated that mothers nurtured their children. Therefore, a father did not provide for living and education anymore. Even though custody is given to a wife, the husband is still obliged to provide for his child. These decisions have taken into account what is best for the child. However, the implementation of the decision has not been fully implemented, and many neglects this obligation after the divorce. The money given by the husband is not enough to meet the needs of the children [6].

A fatwa from Aceh Consultative Council of Ulama (later called MPU) number 2, 2015 states that a *talaq* (divorce declaration) outside of the Court is legal. This is proven by a high number of talak which happened outside of the court. This causes more negative impacts on children because they need a right to living and proper education [15]. Therefore, a wife cannot sue a legal divorce to *Sharia* Court to get her rights.

Usually, a father does not obey the law handed down by the judge in the form of an obligation to give money to his child. This incident is even more massive if the divorce is carried out outside the legal system. This requires the personal awareness of a husband to provide children's rights. No matter how judiciously judges decide litigation and non-litigation by local councils without a father's legal and emotional attention [16].

In *talaq* divorce, when a wife does not come to a trial, a decision is still made up, and problems related to rights for providing are discussed outside of the court. In reality, even though it is clear and legal that judges have announced their statements, many husbands still do not obey them [17]. In a case a husband does not come to the trial, it will finish quickly because judges only listen to a claimant. Normally, the trial will be held for 4 to 5 times, while in a case sentenced by *verstek*, in absentia, trials will only be held for 2 times.

Based on judges in charge to process a divorce claim in Sharia Court, many cases are purposed to achieve a divorce certificate because Gampong does not provide it. To ease the process, they set a condition as if a wife claims a divorce, although, in reality, a husband claims divorce firsthand. When a trial is held, a husband does not come to fulfill the judges' invitation until the



second call [10].

Another factor is that the defendant did not come to court because of another schedule urgency. As long as petition contains a claim for judges to sentence a divorce within any law consequences, nothing to worry about for another side (husband) unless he does not want a divorce [18]. This goes differently if petition contains *hadanah* and share joint property, that a defendant will see it as an urgency to defend his rights.

In law, it is allowed for judges to decide by *verstek* in a case as well as for deciding *hadanah* at once. Though it is legal, in practice this often leads to a problem. Due to his absence, a husband does not know the budget allocated, or it is possible that the amount of money is not suitable with his earnings, and other factors that result in more suffering in children caused by their parents' divorce. Children do not only have affection from both parents, but they also have no financial security.

Personal awareness from a father is really needed to help realize children's rights from their parents. Wise judgements by the judges mean nothing if it is accompanied by awareness and conscience from a father. A judgement or sentence does not affect if there is no willingness from a father to obey it. Due to this, he plays an important role to support his children to reach their rights.

Many divorce cases do not mention rights for *hadanah*. If in petition there is no claim on *hadanah* and rights for providing, judges cannot do much because principles of civil laws are passive and *ultra petita*. This means that judges are only allowed to judge and examine a claim from each side, while *ultra petita* means that a judge is not allowed to examine and judge more than the claims.

For an amount of money to provide, judges focus on children's necessities, father's income, and readiness to give. Though a father earns much, and he is only willing to give a certain amount of money, judges will decide it as an amount of father's willingness based on *ex officio* as in *petitum subsides*. The perspective taken in this case is that it will be more beneficial for children when a father agrees to the amount of money being given despite the father's disobedience to fulfill his obligation. Therefore, it is much better to sentence the amount of money that is not exceeding the father's capability.

Fathers often do not know or comply with court decisions regarding the obligation to pay for their children's living [19].

Information from other informants stated that a married couple did not take legal action in the Sharia Court regarding the right to support because the child felt embarrassed if his parents' problems were widely known. In addition, if a father still ignores his obligation, a mother sees that this is only a useless effort [20]. When it is taken to Sharia Court, they consider this is only to expand conflicts, so the best way taken is to remain calm, although a mother knows that her ex-husband can fulfill the demands of their children.

Factors contributing to this disobedience in *hadanah* are poor economy, faith, and religious knowledge in a family. Lack of communication due to geographical barriers also plays a vital role.

In Sidodadi Village, some informants said that:

"...never mom, even he never dropped by to see his child. Fortunately, I am able to pay all tuition and living costs myself by selling snacks. Sometimes my mother gave me money because the money I earn is not enough to cover all the cost... (Interview with Mrs. Rika, resident of Gampong Sidodadi, July 15, 2019)"

The same information was also spoken by Mrs. Rahma:

"...after divorce, my ex-husband never even once gave money to the children. Then I lived with my parents. Perhaps, my parents feel pity for my children, so that my mother and father help provide living cost for my children... (Interview with Mrs. Rahma, resident of Gampong Sidodadi, July 15, 2019)"

Likewise, Mrs. Intan, she said:

"My ex-husband never gave allowance to his child, even he never dropped by to see the child. I think divorce give a negative financial effect on my child, that a father as a family leader is supposed to be responsible for fulfilling his child's demands. Now I don't know where he has gone. To myself, when asked about the solution like it or not I have to work hard for living my child, but sometimes my father helps me... (Interview with Mrs. Intan, resident of Gampong Sidorejo, July 18, 2019)"

Unlike the case above, according to Linda's confession that:

"I got divorced with my ex-husband without conflict because he had been with a better woman according to him. My ex-husband and I agreed to get a divorce in Sharia Court, and till today we have both communicate well. About financial providing for children after divorce, my ex-husband transfers money around Rp.500.000 to Rp.1.000.000 every month. I think it is adequate to fulfill the demands because my child is still in elementary school. I also work as a part-time teacher to fulfill my child's needs (Interview with Mrs. Linda, resident of Sidodadi, July 15, 2019)."

According to Mr. Anto about child's financial responsibility, he says:

"Concerning money for child's living after divorce, I assume it depends on the parents. Often, they made an agreement about it after divorce, but there are also several numbers of fathers who do not take responsibility, and most of the children are nurtured by their mothers. Frequently, there is a conflict that can be a factor for parents to not be responsible for providing his children after divorce (Interview with Mr. Anto, resident of Tuha Peut Gampong Sideroje, August 5, 2019). "

From the interviews above, it is concluded that divorce implications considerably influence children's living. the best solution is that a mother as a single parent has to make an effort to earn for her children. More often, grandmother and grandfather help to support children's needs when they see that a mother is difficult to earn for living.

From several cases above, children's income after divorce no longer comes from their father. Lack of good communication by both parents is a factor contributing to this issue emerging. Most children are nurtured by their mothers and most fathers do not provide financial security, even it is rare to see their children. Few of them still give money to their children, but it is not adequate, less than children's demands nowadays.

Law enforcement about providing children as divorce victims still does not run well. This is in line with a statement from Mr. Arif says:

"... in Seulalah Village, many villagers do not understand regulations which rule money to provide as a result of divorce, that laws regulating children's rights as well as parents' obligation as written in Islamic laws and laws on children protection and other regulations are not effectively applied in society. As a matter of fact in society that after divorce, mothers nurture their children, and their fathers do not support and provide their children anymore... (Interview with Mr. Arif, resident of Tuha Peut Gampong Seulalah, August 8, 2019)."

Similarly, another interviewee also says that:

"Concerning on what society understands about the rules regulated children is crucially inadequate, mom, moreover, for those who are not well-educated, resulting in limited knowledge about any regulations ruling about children's rights. It is also supported by a lack of awareness in society about the laws themselves. In addition, poor economy and religious understanding contribute to this failure, failed to provide children's living by both parents (Interview with Mr. Abdul, resident of Tuha Peut Sidorejo, August 5, 2019)."

Regarding local public figures above, it is concluded that law enforcement in society has not applied smoothly. Lack of knowledge about laws as well as less awareness in society becomes a reason why this has not been effectively implemented. It is supposed to be sustainable socialization and control about the constitution and laws related to rights and orders between parents and children.

## **6. Factors Influencing What Law Preference the Aceh Choose to Resolve *Hadanah* Disputes**

Based on the research, people prefer non-litigation solutions to resolve their *hadanah* conflicts. The community chooses the forms of dispute resolution by non-litigation because they are following customs and culture and based on the rules established in Aceh [21]. commitment and support from the government to realize justice and the community's welfare by paying attention to the laws that live in society.

The Fatwa of the Ulama Consultative Council (UCC) No. 2 of 2005 was the driving factor for conflict resolution to be carried out in Gampong [22]. The fatwa reads:

"Reminding that the Sharia Court needs to give the Keuchik and Mukim (and their respective Tuha) opportunities to resolve disputes through peace before being examined by the Sharia Court."

But the UCC's fatwa is not a very decisive factor. Other things that can influence the community to resolve their conflicts by non-litigation in the Gampong are as follows:

### **6.1. Lack of Understanding the Law Factors**

The fact is that the public does not understand and know exactly how to make a claim on the *Sharia* Court. The public does not know more about the complicated issues that can be resolved at the *Sharia* Court. Lack of knowledge about the law makes more people avoid problems dealing with the law in court [23]. Less awareness about makes a lawsuit to the *Sharia* Court is because it has never done socialization to the community. This may lead to public ignorance of the existence of the *Sharia* Court, especially people who are far from the place. Lack of knowledge and understanding of the community about the enactment of laws and regulations to guarantee their rights, and in the end, people prefer to solve their problems privately.

"People know about the existence of a sharia court. However, people are lazy to make a lawsuit to the Saria Court because they do not understand how to make a claim in the Sharia Court, and they are afraid to have problems in the court, especially those far from urban areas (Interview with Mr. JM, resident of Tuha Peut Simpang Jernih, September 23, 2019)."

Based on the informant's explanation that the community does not understand the filing of cases. Therefore, they often act independently in dealing with legal problems by customary agreement of the parties. Moreover, most rural communities do not understand the existing legal rules. It is also influenced by the distance which is out of the reach of law enforcement officers.

### **6.2. Economic Factor**

It has been explained that most of the Gampong residents in Aceh work as farmers, planters, and fishermen. From their income as farmers and fishermen, some people only have enough to meet their daily needs. Some of them only work as farm laborers who only rely on labor in exchange for their daily needs [24]. The public's understanding is that dealing with the *Sharia* Court is expensive. Although the cost of the case is inexpensive but the transportation cost to the the *Sharia* Court's location is expensive for poor people who live in rural areas.

The long-distance between the villages and the *Sharia* Court, coupled with the condition of some damaged roads, is the reason why people prefer conflict resolution through non-litigation. Economic difficulty is an essential factor for people to choose to resolve disputes through non-litigation [25]. The costs for the judicial process are expensive and increase when one party loses and has to pay fines, administrative costs, and others.

The number of expenses accounted for with proof of expenditure can be calculated as court costs (trial examination fees and execution costs). Evidence of the expenditure of court fees considered

valid is evidence issued by the Sharia Court in the form of a receipt. Apart from expenses that are not accompanied by valid evidence, they cannot be charged as court fees. It is not justified to extend the validity of expenses based on evidence issued by other agencies outside the *Sharia* Court [26].

As for how much fee is required, it depends on the distance from the residence. It can also be influenced by the length of the process of a case. The longer the case is completed, the more costs are incurred. Then regarding the cost of the case at the *Sharia* Court, it has been regulated in Articles 89 to 91 of the Law on Religious Courts No. 7 of 1989 and in more detail is explained in the [guidelines for the implementation of duties and administration of the Religious Courts Book II Revised 2013 Edition](#). Costs include [27].

1. Registrar fees and stamp duty
2. Witness fee, expert witness, interpreter including oath fee
3. Local examination fees and other judge's actions
4. The cost of inviting the litigants
5. The cost of implementing the decision and so on

The exception to this principle is that those who cannot pay court fees can sue for free (*prodeo*) by obtaining permission to be released from paying court fees. The condition is to submit a certificate of incapacity from *Kaushik*, known to the sub-district head of domicile. Even though there are provisions regarding *rodeos*, they still find it difficult to pay for other fees. While many people in Aceh are classified as poor people [28], and have limited income for living.

### **6.3. Socio-Cultural Factors**

In terms of social life, the community upholds and respects their customary law in various aspects of life, both in marriage and other family events. The Aceh value brotherhood and togetherness; that harmony and deliberation are the order in social life. The implementation of a culture of deliberation has taken place a long time in Acehnese society [27]. Another thing that is also used as an excuse for the community is their perception that peace can only be obtained through conflict resolution in the *gampong*. If the claim has been submitted to the *Sharia* Court, then right and wrong when deciding a case are prioritized.

In addition, the public also assumes that only strong, smart, and rich people can afford to hire a lawyer who will win their case in the *Sharia* Court [29]. As it is understood that the culture of the community in family matters related to marriage, divorce, and reconciliation is still seen as a personal problem, an internal family problem, that they feel ashamed if other people or many people know their family problems.

#### **6.4. Customary factor**

Custom is an Indonesian identity as well as the Aceh, who still strongly uphold their customs. All orders of community life are sourced from customs, including in resolving conflicts that occur in the community. It has become a habit that many people still get divorced outside the Sharia Court because it is very taboo if custody is resolved in the Sharia Court. For this reason, the community chooses a non-litigation solution by appointing a third party to resolve their conflict [30].

The Aceh do not like litigation if a problem cannot be resolved within the family. They asked for *Keuchik* and *Tuha Peut* as reconciliation in the Gampong [29]. The judges' decision is accepted sincerely by the community as a form to maintain his honor, dignity, and authority. No one feels lost and harmed in solving problems, or feels lost and defeated because the settlement is based on custom and *Sharia*.

Law is part of the culture of society so that it cannot be separated from the soul and way of its people's thinking. Moreover, it also is a spiritual structure of society. Therefore, in legal research, elements of culture cannot be ignored because the law is under the culture of a society [31].

However, the Islamic laws and child protection laws face obstacles due to the habits and culture of the people who are indifferent to the law. The fact occurring is that it becomes community's culture when parents get divorced. They do not responsible for living their children. At worse, the children are mostly nurtured by the mothers. It seems that the fathers do not support their children anymore.

#### **6.5. Legal Awareness Factor**

Legal awareness is essential for a successful implementation of legal regulations, both provisions that have been regulated in Islamic law and state law. Every citizen should have legal awareness, especially if the level of legal awareness of the community is low. It is difficult for a law to be enforced or effectively applied. When lawmakers launch regulations that are not in accordance with the community's legal awareness or not suitable with their feelings, there will be resistance from the community. The greater the conflict between the rules and awareness, the more difficult it is to enforce them [32].

#### **6.6. Distance and Time Factor**

Usually, resolving cases at the *Sharia* Court is time-consuming because they have to undergo several trials. In contrast, resolving problems carried in Gampong officials are directly overcome. The position of the *Sharia* Court, which is located in the district or city capital, makes it difficult for justice seekers who are living in remote areas to visit it. Considering the distance, they have to travel very far and difficult [33]. In addition, there are still many new districts due to the division of

territories that the *Sharia* Court has not yet established. The territorial's objective condition is one of the problems that hinder justice seekers from obtaining legal and justice services from the *Sharia* Court.

The trial time, which consumes a great deal of time and is very complicated, is also the reason why people choose to resolve disputes outside of *sharia* court. The litigation process at the *Sharia* Court from the stage from submitting a lawsuit to the judge's final decision must be followed. This has been regulated according to the applicable laws and regulations [18].

The litigation procedure at the *Sharia* Court is divided into two stages. First is the stage relating to the administration of the claim submitting. This process is started from the day when the lawsuit is submitted (registered in the register) until the day of the trial is determined. The second is the stage of starting the trial case process until the judge's decision is handed down and even until the execution [34]. The step-by-step litigation procedure certainly takes quite a long time, sometimes up to months and even years, if it reaches the level of cassation. People are reluctant to submit their lawsuit to the *Sharia* Court and prefer to take a relatively easy route due to the length of the litigation procedure.

The community does not want to deal with the *Sharia* Court because they have to attend several trials. At the same time, they have to work to meet their daily needs. By working every day, their lives are fulfilled but limited, especially if they have to take a day off to attend the trial at the *Sharia* Court. Finally, people seemingly do not pay much attention to the legal provisions as written in-laws because of their limited finance [35].

Although there are principles in the trial process, namely simple, fast and low cost the judge can seek to resolve the case amicably. Therefore, the problem will be resolved quickly, and the costs incurred will be fewer. The fact is not all civil law cases in court can be applied as simple, fast, and low costs [36]. This principle can be applied to neither complicated nor complex issues, such as divorce cases, inheritance, joint property, civil servant divorce, *hadanah* rights, and others. When facing a complicated case, it will take a long time to solve it.

The length of the trial also be influenced by both parties and by the *Sharia* Court. It is feared that the summoning process will take a long time if the litigants live far away. Another problem is many cases come in at the same time. Therefore, the officer will call them at different times as scheduling. Those are some of the factors that cause the length of the process from one case to another case.

## **7. Impact on Society's Choice of Law**

The impact on the community's choice of law in resolving *hadanah* disputes in Aceh is divided into two, the positive impact and the negative impact.

### **7.1. Positive Impact**

The positive impacts obtained by non-litigation conflict resolution are: First, deliberation and consensus. The philosophical values that live and develop continuously are maintained by indigenous peoples as their value of deliberation (win-win solution); there is no win or lose. The conflict resolution process is resolved through deliberation between the parties by using the services of a third party as an intermediary. This third party was chosen from among *Tuha Peut*, *Keuchik*, and Gampong *imam* [37].

Second, prioritizing community harmony. This way does not cause resentment, eliminates hostility, and maintains harmony among society. Two parties having a conflict, after reconciled by the Gampong apparatus through a traditional procession, will shake hands, and the grudge between them will disappear [38]. The choice of conflict resolution through traditional institutions, especially at the Gampong level, is due to the community's desire to resolve conflicts peacefully without involving the judiciary. The concept of resolving conflicts in customary institutions can be categorized as a problem-solving adjusted to the traditions and culture of the Aceh.

Third, the settlement process is faster, easier and cheaper. Resolving does not require a long time, and it can be done within days, weeks, or months. In the Gampong trial, the costs are lower than resolving through the courts because the cost of the Gampong court is not yet commercial, with principles of humanity and kinship. In addition, the government, through the provincial and district/city MAA allocates funds for each problem to be solved by the Gampong. Time efficiency in the process of resolving cases is very much determined by the parties. Parties who have good Islamic faith when resolving conflicts will shorten the trial process [18].

Fourth, conflict resolution is based on religious, customary, and cultural values. In the Aceh community, the power of customary decisions, apart from being regulated in state laws and regulations, is also strengthened by regional regulations, both provincial and district/municipal *qanuns* [39]. In addition to laws and rules, the thing that has a significant influence is local customs. The people of Aceh are obedient and devoted to the applicable customary provisions, including the peace decision where the community carries out according to the agreement. Another reason for determining community obedience is respect for leaders and community leaders, especially for religious leaders (*ulama*) who have sought peace.

The diversity of laws in Indonesia, especially family law, cannot be separated from the openness of society to the spread of foreign cultures. The practice of more than one law by the community (customary law, Islamic law, and Western law) is called legal pluralism [40]. Islam and local culture collaborate in judging legal cases. The position of custom and religion in society occupies a very important place. The community sees two legal cultures as an integrated concept because religion and



culture are a unity that is difficult to separate.

## **7.2. Negative Impact**

A negative impact with non-litigation conflict resolution is when the results of village meeting decisions are not considered as legal standing. In fact, the decision is important to be documented as an official report that can be stored as an archive in the *Geuchik* office or the *Tuha peut* office. One day, if needed as written evidence, there is a note as evidence that can be recommended by the conflicting party [2]. No decisions record has been taken in every attempt to settle the law through Gampong deliberation. Consequently, this raise concerns that there will be legal loopholes in the future and invite irresponsible parties to take advantage of these administrative weaknesses.

The recording of conflicts over resolving *hadanah* is very rare. This is due to the community's habit of calling the Gampong *imam* or *Tuha peut* to his house witnessed by the family, and it is rarely resolved in the office. If it is about inheritance and land issues, the records will be archived at the *Tuha Peut* Office or the *Geuchik* Office.

## **8. Conclusions**

The *hadanah* model in Aceh is divided into two, namely litigation (through courts or *sharia* courts) and non-litigation (through local customs). The issue is not only limited to who has the right to child custody. It is how the parent (a husband and wife who have separated) deal with children's rights. Some of them are the right to be loved and cared for, the right to be protected, the right to be educated, the right to have a responsible person to deal with administrative needs, and so on. Although the litigation rules are packaged in such a way regarding the rights and parents' obligations after a divorce to their children, their implementations are often contradictory. This later becomes the main reason why the Aceh prefer to resolve the *hadanah* conflict with the non-litigation method.

Another factor makes the non-litigation model more preferred is due to lack of public understanding of *hadanah* laws. Problems and mechanisms through formal institutions are considered complicated manners, especially for ordinary people who find it easier to understand simple solutions. In addition, economic factors are also put into consideration. The resolving process of child custody in litigation requires expensive costs and takes a relatively long time. This makes people feel lost, especially those who have very limited income. Therefore, the resolution of the *hadanah* conflict by Gampong deliberation is the most ideal way for the Aceh. This is because the result is more applicable and effective, and this way minimizes losses.

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## **References**

- [1] Asni, A. (2021). Putusan Serta Merta dalam Perkara Hadhanah di Pengadilan Agama dalam Rangka Perlindungan Anak.
- [2] Junaidy, A. B. (2017). Pengasuhan Anak Menurut Hukum Islam. *Al-Hukama'*, 7(1), 76–99. <https://doi.org/10.15642/alhukama.2017.7.1.76-99>.
- [3] Tono, S. (2005). Pemikiran Dan Kajian Teori Hukum Islam Menurut Al-Syatibi. *Al-Mawarid, Edisi XIII*, 102–109.
- [4] Tono, S. (2005). Pemikiran Dan Kajian Teori Hukum Islam Menurut Al-Syatibi. *Al-Mawarid, Edisi XIII*, 102–109.
- [5] Rispalman, & Islami, M. I. (2019). Upaya pemerintah kota Banda Aceh dalam melindungi anak penyandang disabilitas. *Samarah*, 3(2), 491–514. <https://doi.org/10.22373/sjhc.v3i2.4940>.
- [6] Nelli, J. (2017). Analisis Tentang Kewajiban Nafkah Keluarga Dalam Pemberlakuan Harta Bersama. *Al-Istinbath : Jurnal Hukum Islam*, 2(1), 29. <https://doi.org/10.29240/jhi.v2i1.195>.
- [7] Amalia, N., Mukhlis, M., & Yusrizal, Y. (2018). Model Penyelesaian Sengketa Dan Peradilan Adat Di Aceh. *Jurnal Hukum Ius Quia Iustum*, 25(1), 159–179. <https://doi.org/10.20885/iustum.vol25.iss1.art8>.
- [8] Firdausia, S. (2020). Hadhanah in the Concept of Compilation of Islamic Law and Law. *Nurani: Jurnal Kajian Syari'ah Dan Masyarakat*, 20(2), 317–322. <https://doi.org/10.19109/nurani.v20i2.4849>.
- [9] Mansari, R. M. (2018). Kepastian Hukum Terhadap Pengasuhan Anak Mumayiz Pasca Perceraian Kajian Putusan Nomor 175/PDT.G/2011/MS-BNA. *Jurnal Yudisial*, 11, 55–74.
- [10] Novitasari, C. N., Latifiani, D., & Arifin, R. (2019). Analisis hukum Islam terhadap faktor putusnya tali perkawinan. *Samarah*, 3(2), 322–341. <https://doi.org/10.22373/sjhc.v3i2.4441>.
- [11] Mushthofa, R. Z., & Aminah, S. (2019). Implementasi Pasal 149 (D) Kompilasi Hukum Islam Tentang Kewajiban Ayah dalam Memberikan Biaya Hadhanah Bagi Anak di Bawah Usia 21 Tahun. *XIV*(2), 1–20.
- [12] Nuruddin, A., & Tarigan, A. A. (2004). *Amiur Nuruddin, Azhari Akmal Tarigan, 2004, Hukum Perdata Islam di Indonesia, Jakarta: Prenada Media . Hal: 45. 1. 2*(1), 1–20.
- [13] Pane, E. (2016). Eksistensi Mahkamah Syar'iyah Sebagai Perwujudan Kekuasaan Kehakiman. *Al-'Adalah*.
- [14] Harahap, N. (2018). Perwalian Anak Dalam Tinjauan Kompilasi Hukum Islam. *Jurnal El-Qanuniy: Jurnal Ilmu-Ilmu Kesyarifan Dan Pranata Sosial*, 4(1), 116–129.

- [15] Syaidun, S. (2019). Tinjauan Hukum Islam Terhadap Nafkah Keluarga Dari Istri Yang Bekerja. *Al-Mabsut: Jurnal Studi Islam Dan Sosial*, 13(1), 89–104.
- [16] Rozali, I. (2017). Konsep Memberi Nafkah bagi Keluarga dalam Islam. *Jurnal Intelektualita: Keislaman, Sosial Dan Sains*, 6(2), 189–202. <https://doi.org/10.19109/intelektualita.v6i2.1605>.
- [17] Dewi, G. (2009). Kewenangan Pengadilan Agama (Mahkamah Syar'iyah) Di Nad Dalam Melakukan Eksekusi Sanksi Pidana Islam (Hukum Jinayat) Menurut Ketentuan Hukum Dan Sistem Peradilan Di Indonesia. *Jurnal Hukum & Pembangunan*, 237. <https://doi.org/10.21143/jhp.vol0.no0.190>.
- [18] Cahyani, T. D. C., & Komariah, K. (2018). Upaya Hukum Permohonan Eksekusi Terhadap Putusan Nafkah Hadhanah (Studi Pelaksanaan Putusan Terhadap Putusan Pengadilan Agama Nomor : 0957/Pdt.G/2014/PA.MLG). *Jurnal Ilmiah Hukum LEGALITY*, 25(1), 114. <https://doi.org/10.22219/jihl.v25i1.5994>.
- [19] Aini, Q., Khosiah, A., & Sa'adah, S. L. (2016). Mahkamah Syari'ah di Nanggroe Aceh Darussalam: Dalam Lintas Sejarah dan Eksistensinya. *YUDISIA: Jurnal Pemikiran Hukum Dan Hukum Islam*, 7.
- [20] Adhani, H. (2019). Menakar Konstitusionalitas Syari'at Islam dan Mahkamah Syar'iyah di Provinsi Aceh. *Jurnal Konstitusi*, 16(3), 606. <https://doi.org/10.31078/jk1638>.
- [21] Grobbelaar, J. (2019). Doing theology with children: Some challenges for adult theologians. *HTS Theologiese Studies / Theological Studies*, 75(1), 1–10. <https://doi.org/10.4102/hts.v75i1.5636>.
- [22] Pemerintah Aceh. (2009). Qanun No. 2 2009 Ttg MPU. *Pemerintah Aceh*, 1–24.
- [23] Abubakar, M. (2020). Meningkatnya Cerai Gugat. *Kanun Jurnal Ilmu Hukum*, 22(2), 301–32.
- [24] Jum'addi. (2018). Strategi Majelis Adat Aceh (Maa) Dalam Melestarikan Budaya Aceh. *Al-Idarah: Jurnal Manajemen Dan Administrasi Islam*, 2(2), 147–166.
- [25] Nurhanifa, D., Tjoetra, A., & Ikhsan, I. (2019). Pemberdayaan Ekonomi Masyarakat Melalui Dana Desa : Sebuah Kebijakan Pemerintah Aceh Barat. *Jurnal Public Policy*, 5(2), 108. <https://doi.org/10.35308/jpp.v5i2.1122>.
- [26] Nuruddin, A., & Tarigan, A. A. (2004). *Amiur Nuruddin, Azhari Akmal Tarigan, 2004, Hukum Perdata Islam di Indonesia, Jakarta: Prenada Media . Hal: 45. 1. 2(1), 1–20*.
- [27] Djawas, M., & Fajrina, R. (2019). Efektifitas lembaga perlindungan anak terlantar: Studi pada Panti Asuhan Suci Hati di Meulaboh, Kabupaten Aceh Barat. *Samarah*, 3(2), 296–321. <https://doi.org/10.22373/sjhc.v3i2.4904>.
- [28] Afif. (2019) Data BPS: Angka Kemiskinan di Aceh Terbesar di Sumatera. <https://www.merdeka.com/peristiwa/data-bps-angka-kemiskinan-di-aceh-terbesar-di-sumatera.html> (accessed Aug. 08, 2021).
- [29] Noviana, N. (2018). *Integritas Kearifan Lokal Budaya Tradisi Peusijek. 1, 29–3*.
- [30] Husin, T. (2015). Penyelesaian Sengketa/Perselisihan Secara Adat Gampong di Aceh. *Kanun: Jurnal Ilmu Hukum*, 17(3), 511–532. <https://doi.org/10.24815/kanun.v17i3.6085>.
- [31] Sofyanto, K. (2018). Perlindungan Hukum Hak Kekayaan Intelektual atas Pengetahuan Tradisional terhadap Perolehan Manfaat Ekonomi. *Kanun Jurnal Ilmu Hukum*, 20(1), 149–162. <https://doi.org/10.24815/kanun.v20i1.9832>.
- [32] Soekanto, S., & Taneko, S. B. (2002). *Hukum adat Indonesia*. Jakarta: RajaGrafindo Persada.
- [33] Aceh, D. L., & Islam, S. (2019). *Penegakan Syariat Islam di Aceh dalam Perspektif HAM. VII(November), 15–39*.
- [34] Misran, & Dian Murdiana, R. M. (2019). Pandangan tengku gampong tentang wali fasik dalam pernikahan (Studi kasus di KUA Kecamatan Blangpidie, Abdya). *Samarah*, 3(2), 478–490. <https://doi.org/10.22373/sjhc.v3i2.4398>.
- [35] Kushidayati, L. (2015). Legal Reasoning Perempuan dalam Perkara Gugat Cerai di Pengadilan Agama Kudus Tahun 2014. *Yudisia*, 6(1), 141–159.

- [36] Arifin, Z. (2018). Pelaksanaan Eksekusi Hadhonah Bagi Pasangan Yang Bercerai Di Pengadilan Agama Curup Tahun 2016. *Al-Istinbath: Jurnal Hukum Islam*, 3(1), 23. <https://doi.org/10.29240/jhi.v3i1.367>.
- [37] Muhajir, A. (2017). Hadhanah Dalam Islam (Hak Pengasuhan Anak dalam Sektor Pendidikan Rumah). *SAP (Susunan Artikel Pendidikan)*, 2(2), 165–173. <https://doi.org/10.30998/sap.v2i2.2089>.
- [38] Sahlan, M. (2012). Pengamatan Sosiologis Tentang Perceraian di Aceh. *Jurnal Substantia*, 14(1), 88–97.
- [39] Rahman, S. (2019). *STUDI KASUS PUTUSAN MAHKAMAH SYAR 'IYAH BANDA ACEH NOMOR 0200 / Pdt . G / 2015 / MS-BNA TENTANG HAK ASUH ANAK OLEH AYAH SETELAH PERCERAIAN STUDY CASE DECISION OF THE MAHKAMAH SYAR 'IYAH BANDA ACEH NUMBER 0200 / Pdt . G / 2015 / MS-BNA ON THE RIGHTS OF C. 3(3)*, 663–674.
- [40] Bowen, J. R. (2003). *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning*. Cambridge: Cambridge University Press.

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