

JUDICIAL CONSIDERATIONS ON THE PROTECTION OF WIVES' AND CHILDREN'S RIGHTS IN ISLAMIC FAMILY LAW AFTER DIVORCE (A STUDY OF COURT DECISION NUMBER 1127/PDT.G/2024/PA.TGM)



1* Engkos Saeful Kholiq, 2Bambang Hartono

^{1,2}Program Studi Magister Hukum, Universitas Bandar Lampung - Indonesia

e-mail:

¹*eful_1@yahoo.co.id (corresponding author)

²bambang.hartono@ubl.ac.id

ABSTRACT

Divorce in Islamic family law not only terminates the marital relationship but also gives rise to legal consequences concerning the fulfillment of the rights of wives and children after divorce. Therefore, judicial considerations play a strategic role in realizing justice, legal certainty, and legal utility. This thesis aims to analyze judges' considerations in providing protection for the rights of wives and children after divorce in Decision Number 1127/Pdt.G/2024/PA.Tgm by using the perspectives of justice theory and maqāṣid al-sharī'ah. This research employs a normative juridical method with a case study approach supported by empirical data obtained through interviews and documentation. The data sources consist of primary, secondary, and tertiary legal materials collected through library research and field research, which are then analyzed using descriptive qualitative methods. The results show that the judges' considerations in the decision are not only based on positive legal provisions such as Law Number 1 of 1974 on Marriage and the Compilation of Islamic Law, but also reflect the principles of distributive justice in the proportional distribution of the rights of wives and children, as well as corrective justice in restoring losses arising from the dissolution of marriage. From the perspective of maqāṣid al-sharī'ah, the protection of rights to maintenance, ḥaḍānah, mut'ah, and child care is directed toward safeguarding religion (ḥifẓ al-dīn), life (ḥifẓ al-nafs), lineage (ḥifẓ al-nasl), and property (ḥifẓ al-māl). The implementation of the decision still encounters obstacles in terms of evidentiary issues, the compliance of the parties, and the effectiveness of enforcement. Therefore, it is necessary to optimize the role of judges in exploring substantive justice and the objectives of Islamic law so that the protection of the rights of wives and children after divorce can be effectively realized in the practice of the Religious Courts.

Keywords: *Judicial Considerations; Distributive and Corrective Justice; Maqāṣid Al Sharī'ah; Rights of Wives and Children; Islamic Family Law*

INTRODUCTION

The family justice system in Indonesia is fundamentally oriented toward safeguarding the best interests of the child, particularly in cases concerning child custody following divorce. This principle reflects the recognition that children are legal subjects in a vulnerable phase of physical, psychological, and social development, and that judicial decisions concerning custody arrangements have long-term consequences for their well-being and future development. Accordingly, child custody disputes cannot be resolved solely through formal legal reasoning, but require a substantive assessment of the child's real living conditions and caregiving environment.

The authority of the Religious Courts to adjudicate child custody disputes is regulated under Law Number 1 of 1974 on Marriage, the Compilation of Islamic Law (KHI), and Article 49 of Law Number 7 of 1989 on the Religious Courts, as amended by Law Number 3 of 2006 and Law Number 50 of 2009. In practice, however, judges often encounter limitations in the facts presented during hearings, as documentary evidence and witness testimony are frequently insufficient to fully capture the child's psychological condition and daily caregiving circumstances. This situation requires judges to adopt an active role in uncovering material truth to ensure that judicial decisions genuinely protect the rights and interests of the child.

One legal instrument available to judges in discovering material truth is local inspection (*descente*), as provided under Article 153 HIR and Article 180 RBg, and reinforced by Supreme Court Circular Letter (SEMA) Number 7 of 2001. Normatively, local inspection is primarily intended for physical objects. Nevertheless, in Religious Court Decision Number 1127/Pdt.G/2024/PA.Tgm, the judge conducted a local inspection directly on the child in order to assess the child's condition and the suitability of the caregiving environment. This judicial practice represents a significant development in the application of *descente* within child custody cases.

The implementation of local inspection involving the child reflects a shift from a rigid formalistic approach toward a substantive and child-centered judicial paradigm. In this context, the child is no longer treated merely as an object of dispute between parents, but as the central subject whose welfare must be prioritized. Through local inspection, judges are able to obtain objective and firsthand information regarding the child's living environment, emotional stability, and patterns of care elements that cannot be comprehensively revealed through written evidence or witness testimony alone.

From the perspective of evidentiary law, the results of local inspection possess free evidentiary value (*vrij bewijskracht*), which may subsequently form judicial presumption in the judge's reasoning process. Although such results are not binding evidence, they play a crucial role in strengthening the judge's conviction when determining which party is most suitable to be granted custody. Consequently, local inspection functions as a complementary evidentiary instrument that enhances judicial accuracy and fairness in child custody decisions.

Despite its importance, the implementation of local inspection involving children faces several challenges, particularly the absence of specific technical regulations governing its procedures, scope, and limitations. This regulatory gap may lead to inconsistencies in judicial practice and raise concerns regarding legal certainty and the protection of children's rights. Therefore, clearer procedural guidelines are necessary to ensure that local inspection in child custody cases is conducted uniformly, professionally, and in accordance with child protection principles.

This study aims to analyze judicial considerations in applying local inspection

(*descente*) in child custody cases and to examine the legal status and influence of local inspection results within the evidentiary process to guarantee the best interests of the child. By doing so, this research seeks to contribute to the development of a more responsive, progressive, and child-oriented family justice system in Indonesia.

LITERATURE REVIEW

Studies on judicial authority and procedural mechanisms in civil proceedings, particularly in family law disputes, have been extensively discussed in Indonesian legal scholarship. Ali (2010) emphasizes that judges are not merely executors of statutory norms but are legal actors who actively interpret and apply the law to achieve justice. Judicial reasoning, therefore, is not mechanical in nature, but involves logical interpretation, moral consideration, and sensitivity to social realities. This perspective is particularly relevant in child custody disputes, where formal evidence often fails to fully reflect the actual conditions experienced by the child.

Judicial Authority and Legal Discovery in Civil Proceedings

Judicial authority forms the basis for judges to actively seek material truth in resolving cases. According to Ali (2010), judges are legal discoverers (*rechtsvinder*) who are authorized to interpret legal norms when positive law does not explicitly regulate a particular situation. This authority allows judges to adopt procedural initiatives when the facts presented by the parties are insufficient to ensure substantive justice.

Suadi (2023) explains that legal discovery by judges involves a hermeneutical process, in which legal texts are interpreted by considering social context, moral values, and empirical realities. In child custody cases, this approach becomes essential because judicial decisions directly affect the physical, psychological, and social development of the child. Consequently, judges are justified in utilizing procedural instruments beyond conventional evidentiary tools to obtain a comprehensive understanding of the factual circumstances.

The Active Role of Judges in Civil Procedure

The theory of the active judge in civil proceedings underscores that judges are not passive arbiters who merely assess evidence presented by the parties. Sunarto (2019) asserts that judges are obliged to explore, follow, and understand the values of justice living within society. This obligation legitimizes judicial initiatives aimed at uncovering material truth, especially when formal procedural mechanisms prove inadequate.

Manan (2016) and Harahap (2017) argue that civil procedural law grants judge discretionary authority to employ procedural instruments such as local inspection (*descente*) to clarify disputed facts. In child custody disputes, the use of *descente* enables judges to directly observe factual conditions related to the child's living environment and caregiving arrangements, which cannot be fully revealed through documentary evidence or witness testimony alone.

Local Inspection (*Descente*) and Evidentiary Value

Local inspection (*descente*) is regulated under Article 153 HIR and Article 180 RBg, and further reinforced by Supreme Court Circular Letter (SEMA) Number 7 of 2001. Normatively, *descente* is primarily intended for the examination of physical objects related to a dispute. However, legal doctrine recognizes that its function is to assist judges in discovering material truth when other forms of evidence are insufficient.

According to Lubis (2021) and Harahap (2017), the results of *descente* possess

free evidentiary value (*vrij bewijskracht*), meaning that their probative force depends on the judge's assessment and conviction. Although not binding, *descente* results may strengthen judicial reasoning and serve as a basis for judicial presumption (*persangkaan hakim*) when aligned with other evidence. In the context of child custody cases, this evidentiary function allows judges to assess caregiving suitability based on direct observation.

Child Protection and the Best Interests of the Child

The principle of the best interests of the child constitutes a fundamental consideration in resolving child custody disputes. Teguh (2018) and Supeno (2010) emphasize that children are vulnerable legal subjects who require special protection due to their dependency and developmental stage. Accordingly, all judicial decisions affecting children must prioritize their welfare, dignity, and future development.

This principle is reinforced by statutory provisions, including Law Number 1 of 1974 on Marriage, Law Number 35 of 2014 on Child Protection, and the Compilation of Islamic Law, which governs *hadhanah* (child custody) in Religious Courts. Within this framework, the application of *descente* involving the child can be theoretically justified as a judicial effort to directly assess conditions relevant to the child's best interests, provided that such examination is conducted professionally and proportionally.

Legal Effectiveness in Child Custody Decisions

Soekanto (2018) explains that the effectiveness of law is influenced by legal substance, law enforcement, facilities, societal factors, and legal culture. In child custody cases, the effectiveness of judicial decisions depends on the accuracy and completeness of factual findings that form the basis of judicial reasoning.

The utilization of *descente* reflects an effort to enhance legal effectiveness by bridging the gap between normative legal provisions and empirical reality. Through direct observation, judges are able to issue decisions that are not only procedurally valid but also substantively responsive to the actual conditions of the child. However, the absence of specific technical regulations governing the implementation of *descente* in child custody cases may result in inconsistent judicial practices, thereby raising concerns regarding legal certainty and uniformity of law.

METHOD

This study employs a descriptive and analytical legal research approach to examine judicial considerations in applying local inspection (*descente*) in child custody cases adjudicated by the Religious Court. This approach is used to analyze how judges interpret and apply procedural law, exercise judicial discretion, and assess the evidentiary value of *descente* in order to ensure the best interest of the child in civil proceedings.

The research was conducted at the Tanggamus Religious Court as an institution vested with authority to adjudicate child custody disputes arising from divorce. The selection of this research location is based on the existence of Religious Court Decision Number 1127/Pdt.G/2024/PA.Tgm, in which the panel of judges conducted a local inspection (*descente*) directly involving the child to assess caregiving conditions and the child's living environment. This decision provides an empirical basis to examine the extension of *descente* beyond its conventional application to physical objects.

The data used in this research consist of primary and secondary data. Primary data were obtained through in-depth interviews with judges of the Tanggamus Religious

Court and relevant court officials. These interviews were conducted to explore judicial reasoning, legal considerations, and practical motivations underlying the implementation of *descente* in child custody cases, particularly in situations where documentary evidence and witness testimony were deemed insufficient to reveal material truth.

Secondary data were derived from statutory regulations, judicial decisions, and legal documents relevant to civil procedural law and child protection. These include the Civil Procedure Code (HIR and RBg), Supreme Court Circular Letter (SEMA) Number 7 of 2001 concerning Local Inspection, Law Number 1 of 1974 on Marriage, Law Number 35 of 2014 on Child Protection, the Compilation of Islamic Law, and Religious Court Decision Number 1127/Pdt.G/2024/PA.Tgm. In addition, academic literature on judicial authority, evidence law, and child protection was used to support the legal analysis.

Data collection was conducted through document study and interviews. The collected data were analyzed qualitatively using a descriptive-analytical method by systematically organizing legal materials, interpreting judicial considerations, and assessing the legal status and evidentiary strength of local inspection results. This method enables a comprehensive understanding of the function of *descente* as a judicial instrument in discovering material truth and safeguarding the best interest of the child in child custody determinations.

RESULTS AND DISCUSSION

Regulation of the Protection of the Rights of Wives and Children After Divorce in Decision Number 1127/Pdt.G/2024/PA.Tgm

Decision of the Tanggamus Religious Court Number 1127/Pdt.G/2024/PA.Tgm demonstrates that the protection of the rights of wives and children after divorce constitutes an integral part of the settlement of divorce by *talak* cases. Divorce is not merely regarded as the termination of a marital relationship, but also generates legal consequences in the form of obligations of the husband toward his former wife and children, which must be fulfilled in order to ensure justice and public benefit.

Based on the facts revealed during the trial, this case originated from the breakdown of the marital relationship caused by continuous disputes and conflicts, particularly related to economic problems and unhealthy communication patterns. Such conditions fulfilled the elements of a broken marriage, meaning that the objectives of marriage as stipulated in Article 1 of Law Number 1 of 1974 and Article 3 of the Compilation of Islamic Law could no longer be achieved. Accordingly, the Panel of Judges granted the petition for divorce by *talak* by imposing one revocable divorce (*talak satu raj'i*) against the Respondent.

Protecting the wife's rights after divorce, the Panel of Judges legally based its considerations on Article 149 and Article 152 of the Compilation of Islamic Law, which regulate the husband's obligation to provide *iddah* maintenance, outstanding maintenance (*nafkah madhiyah*), and *mut'ah*, provided that the wife is not proven to have committed *nusyuz*. Based on the evidence presented at trial, the Respondent was not proven to have committed *nusyuz*, and therefore was legally entitled to the fulfillment of these rights.

The Panel of Judges did not automatically grant the entire amount requested in the reconventional claim. The determination of the amount of *iddah* maintenance, *nafkah madhiyah*, and *mut'ah* was carried out by taking into account the economic capacity of the Petitioner in reconvention, resulting in an amount lower than that initially claimed. This consideration reflects a sociological and utilitarian approach

aimed at ensuring that the decision is realistically enforceable (executable) and does not become a non-executable judgment.

From the perspective of distributive and corrective justice theories, this decision indicates an effort by the judges to distribute rights proportionally and to correct imbalances arising from divorce. However, an overly dominant reliance on the husband's economic capacity may potentially reduce the sense of justice for the wife, particularly if insufficient consideration is given to the wife's contribution during the marriage, the duration of the marriage, and the psychological and social losses suffered as a result of the divorce.

Judicial Considerations Regarding the Protection of Children's Rights After Divorce (Hadhanah)

The protection of children's rights in Decision Number 1127/Pdt.G/2024/PA.Tgm occupies a crucial position, given that divorce does not extinguish parental obligations toward children. The determination of child custody (*hadhanah*) must be based on the principle of the best interest of the child, as mandated by Law Number 1 of 1974, the Compilation of Islamic Law, and Law Number 35 of 2014 on Child Protection.

Normatively, Article 105 letter (a) of the Compilation of Islamic Law stipulates that custody of a child who has not yet reached the age of discernment (*mumayyiz*) rests with the mother. However, in this case, the Panel of Judges did not apply this provision textually, but instead adopted a substantive approach by assessing the eligibility and suitability (*ahliyyah*) of each parent to assume custody.

Based on the facts established at trial, the Panel of Judges found indications of psychological instability on the part of the Respondent, as well as a history of violence against the child related to emotional disturbances following childbirth. These findings constituted the primary considerations in determining that granting custody to the mother could potentially endanger the child's physical and mental safety. Consequently, custody of the child was awarded to the Petitioner as the biological father, while still granting the mother broad access to maintain contact with the child in order to preserve the child's emotional bonds.

The judges' considerations in this case are consistent with the theory of *maqashid al-shari'ah*, particularly the protection of life (*hifz al-nafs*), intellect (*hifz al-'aql*), and lineage (*hifz al-nasl*). The determination of custody was not based solely on parental status, but on the assurance of optimal growth and development of the child, encompassing physical, mental, and social aspects.

The judicial considerations in this case reflect the application of law that is oriented not only toward normative legal certainty, but also toward substantive justice and public benefit. The protection of the rights of wives and children after divorce is positioned as the primary objective of the judgment, thereby demonstrating that the Religious Court does not merely resolve marital disputes, but also ensures the continued protection of the most vulnerable parties affected by divorce.

CONCLUSIONS AND SUGGESTIONS

This study concludes that the regulation of the protection of the rights of wives and children after divorce, as reflected in Decision Number 1127/Pdt.G/2024/PA.Tgm of the Tanggamus Religious Court, demonstrates the application of normative legal frameworks governing post-divorce obligations based on Law Number 1 of 1974 on Marriage, the Compilation of Islamic Law, and child protection regulations, which emphasize the responsibility of former husbands to fulfill maintenance, child support,

and other post-divorce obligations. The judicial considerations in this decision reflect an effort to realize substantive justice by ensuring that wives and children, as vulnerable legal subjects, continue to receive legal protection to prevent socio-economic vulnerability and to safeguard the child's growth and development after divorce.

However, the effectiveness of such protection remains dependent on the clarity of judicial orders, the enforceability of post-divorce obligations, and the good faith compliance of the obligated party. Therefore, this study suggests the need for clearer judicial formulations regarding the amount, mechanism, and duration of post-divorce maintenance and child support, stronger integration of child protection and gender justice principles in judicial reasoning, improved coordination between Religious Courts and enforcement institutions to ensure compliance with court decisions, and further research on the effectiveness of enforcement mechanisms to strengthen sustainable legal protection for wives and children in post-divorce contexts.

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