



## FAMILY JURISPRUDENCE REORIENTATION IN FACING GLOBALIZATION CHALLENGES IN INDONESIA

(Study of the Protection of Children's Rights)

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**Abstract.** *The number of cases of violence against children that occur is considered as one indicator of the poor quality of child protection in Indonesia. The existence of children who have not been able to live independently certainly needs people as a place of refuge. The efforts to protect children's rights are a very important and urgent matter to discuss. Important and urgent considering that in recent years we have often been treated to various news and information about various acts of violence against children carried out by people who should be responsible for protecting these children. Islamic discourse and family law literature on the protection of children's rights is still very little to be found. Islamic Compilation of Law (KHI) and Indonesian Marriage Law No. 1 of 1974 does not explicitly discuss the protection of the rights of children to legal sanctions for violators of children's rights in their articles. Likewise with some classical Jurisprudence literature does not concretely discuss the protection of children's rights and legal sanctions for violators of children's rights. This certainly has an impact on understanding and practices that occur in the community towards the pattern of protection of children's rights. This study will look at the concept and the development of child rights protection in Islamic family law and it's concrete effort of Islamic family law in the protection of children's rights. This qualitative research method is a socio-legal study with a case approach. The findings of this study are in fact, many children are neglected in their lives, both in families who are still intact, father and mother, especially in families whose parents are separated (divorced). Child protection in Indonesia has not been comprehensively accommodated, this is because many children still do not get their rights. The factors include the lack of the role of parents regarding their obligations related to the rights of their children.*

**Keywords:** *Family Jurisprudence, Globalization Challenge, Children's Right*

### INTRODUCTION

The number of cases of violence against children that occur in Indonesia is considered as one indicator of the poor quality of child protection. The existence of

children who have not been able to live independently certainly needs people as a place of refuge.<sup>1</sup>

Law Number 23 of 2002 concerning Child Protection states that the State guarantees the welfare of every citizen, including the protection of children's rights which are human rights. Based on the Child Protection Act, children have the right to get the widest opportunity to grow and develop optimally, both physically, mentally and socially, and have good character.

The efforts to protect children's rights are a very important and urgent issue to discuss. Important and urgent considering that in recent years we have often been treated to various news and information about various acts of violence against children carried out by people who should be responsible for protecting these children.

In order to do it all, it is necessary to carry out escort efforts through legal protection, as an effort to realize child welfare by providing guarantees for the protection of their rights. Because children's rights are part of human rights that must be guaranteed, protected, and fulfilled by parents, family, society, government, and the state.

While there are very few discourses and Islamic family law literature on the protection of children's rights. KHI and Law No. 1 of 1974 does not explicitly discuss the protection of the rights of children to legal sanctions for violators of children's rights in their articles. Likewise with some classical Jurisprudence literature does not concretely discuss the protection of children's rights and legal sanctions for violators of children's rights. This certainly has an impact on understanding and practices that occur in the community towards the pattern of protection of children's rights.

Islamic family law in Indonesia referred to in this study are the rules and laws contained in the family law that apply and are guided and live and develop in the Indonesian Muslim community (the living law). Islamic family law products contained

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<sup>1</sup>Dikdik M. Arief Mansur dan Elisatris Gultom, *Urgensi Perlindungan Korban Kejahatan Antara Norma dan Realitas* (Cet. I; Jakarta: PT. Raja Grafindo Persada, 2007), p.122.

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in the Compilation of Islamic Law (KHI)<sup>2</sup> and the marriage law contained in Law no. 1 of 1974<sup>3</sup>.

As a law that applies to Muslim communities in Indonesia, then Islamic family law in this case KHI and Law No. 1 of 1974 needs to be reviewed and reformulated in its significance in the matter of protecting children from acts of exploitation and neglect in the present. This is related to the elasticity of Islamic family law with the principle of *Salih li Kulli Zaman wa Makan* and the principle of *al-Hukmu Yadurru ma'al Illati Wujudan wa'Adaman* requires analogies and new interpretations that are appropriate to the contemporary context and become a solution to the phenomenon of crime current child. Normative anticipation based on urgent Islamic family law is urgently needed, because acts of violence against children are often characterized by acts of sadistic treatment, inhumanity, or no longer feeling of affection for the perpetrators.

Violence against children can only be resolved when in the community there is a common understanding that violence against children will endanger children and their survival. Education at any level is not justified by violent ways.<sup>4</sup>

Research on family *fiqh* re-orientation in facing the challenges of globalization in Indonesia (a study of child rights protection) is very important to do considering that the existence of children as a continuation of the development of religious mission and state mission comes from a family. Family as the smallest unit of society must be able to provide protection of rights to children. Neglect of children's rights is one form of lack

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<sup>2</sup> Compilation of Islamic Law, then called KHI, is the material law of the court in the religious court in Indonesia, which was issued through Presidential Instruction in 1991. KHI consists of 3 chapters, marriage, inheritance and representation represented in 229 articles. The chapter on the rules of marriage includes 19 problems, including the basis of marriage, engagement, marriage terms and conditions, dowry, prohibition of marriage, marriage agreements, and marriage during pregnancy, polygamy, marriage prevention, marriage cancellation, marital rights and obligations, wealth in marriage, maintenance children, guardianship, and interruption of marriage, due to the breakup of marriage, reconciliation and iddah. The chapter on inheritance addresses five problems, including heirs, inheritance, problems raised 'awl and radd, testaments and grants. The chapter on representatives represents the functions, elements, conditions, procedures and recording of waqf, residence and supervision of property rights.

<sup>3</sup> In Indonesia, all provisions regarding marriage and divorce for Indonesian people are reformed through the Marriage Law No. 1 of 1974 which took effect on October 1, 1975. This Act supersedes Law No. 22 of 1946 concerning Marriage Registration, Divorce and Referral in conjunction with the Law of the Republic of Indonesia No. 32 of 1954. See Department of Information Republic of Indonesia, The Indonesian Marriage Law, (Jakarta: Department of Information Republic of Indonesia, 1975), p. 15.

<sup>4</sup> <http://www.beritasatu.com/investor/443095-perlindungan-anak-berbasis-keluarga.html>

of protection given by the father and mother as the founding family for children. Protection against child neglect needs to be escorted by the enforcement of rules that protect it, because children are weak and vulnerable to exploitative treatment of adults. In the hands of children, the hope is that life will be more prosperous for nation and religion tomorrow. Children are the budding, potential, and future generations of the ideals of the nation's struggle, which have a strategic role and have special characteristics and characteristics that guarantee the continuity of the existence of the nation and state in the future.

To realize child welfare and protection, institutional support and legislation are needed that can guarantee its implementation, it is necessary to formulate the concept of protecting the rights of children in Islamic family law, how the development of the protection of children's rights in Islamic family law and how concrete Islamic family law is protected child rights?

## **LITERATURE REVIEW**

### **The Implementation of Islamic Family Law in Indonesia**

The implementation of Islamic family law in Indonesia is divided into 2 parts; first is the formally valid juridical law, second, is normative applicable law.<sup>5</sup> Islamic law that applies formally juridical is a part of Islamic law that regulates human relations with other human beings and objects in society called muamalah. This part of Islamic law becomes a positive law based on or because it is appointed by the laws and regulations.

Whereas the normatively applicable part of Islamic law has sanctions or social equivalents. Its implementation depends on the strong awareness of the Muslim community. This normative Islamic law does not require the assistance of state administrators to implement it, among these laws are worship, fasting, zakat and pilgrimage.<sup>6</sup>

As a social institution, Islamic law can be expected to have two functions, first as social control, and second as new values and processes of social change. As social control Islamic law is placed as a blue print from God. While as a new value and the process of

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<sup>5</sup> M. Daud Ali, *The Position of Islamic Law in the Indonesian Legal System*, dalam *Islam and Society in Southeast Asia*, edited by Taufiq Abdullah, et. all, (Singapore: ISEAS, 1983), p. 189-190.

<sup>6</sup> *Ibid.*

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social change of Islamic law is more a product of history which in certain limits is placed as a justification for the demands of social, cultural and political change. So that in this context Islamic law must be more accommodating to the problems of the people without losing its basic principles. Because if not then Islamic law will experience sterility of function and lose its actuality.

- a. *Protection of the Rights of the Child in Islamic Family Law*
- b. *Right to get protection*
- c. *Right to Life and Growth*
- d. *The Right to Obtain Education and Teaching*
- e. *Right to get livelihood and inheritance*
- f. *Right to Equivalent Treatment (non-discrimination)*

## **METHODOLOGY**

From the type of research and the nature of the problem raised, this study uses qualitative methods for data collection techniques, analysis and reports. Some important references and principles that form the basis for this qualitative method are as follows:

1. *Holistic approach*, this approach is important to get as complete information as possible without limiting the discussion to limited objects, or certain variables. This approach can immediately show complete data settings, so that no impression arises such as narrowing or decapitating data into separate variables, but all selected data units are still seen as part of the whole that is in a system. Therefore, with this holistic approach it is possible for researchers to investigate social reality as a whole, without something being removed as is often done in other studies. So the essence of this research is to deeply comprehend the meaning or meaning of events.
2. The principle of discovery of theory from the scene, meaning that the process of formulating a research design is not intended to test a theory, but to find a theory of the subject under study. Here researchers identify themselves and unite a sense of thought and feeling with the community so that they can understand the information captured as it is. The important thing about this principle is the use of the emotional approach in an effort to understand social realities from the perspective of language and social reason or research subjects.

3. Formulation of inferences and theoretical propositions using thinking methods in which from a number of data found general conclusions are drawn. This way of thinking is very different from the quantitative method approach which relies more on deductive thinking.

Collecting, processing and analyzing data takes place simultaneously and processes without strict linear rules by doing it in a cycle (cycle). This technique is very relevant to the purpose of this research, due to this way a comprehensive understanding of data can be done.

#### *The Location of the research*

This research will be conducted in North Sumatra and Nanggroe Aceh Darussalam Provinces. These two regions are provinces that are in Sumatra and geographically very close and bordering, and are provinces with Muslim populations with an unbalanced portion. Nanggroe Aceh Darussalam as a province that received the nickname sarambi Mecca due to the history of the entry and development of Islam in the past, has a history of standing and developing the Malay Muslim kingdom to East Sumatra, which has a greater number of Muslim communities in quantity compared to North Sumatra.

#### *The Sources of Research Data*

By using the technique of *purposive sampling*<sup>7</sup> and *snowball sampling*,<sup>8</sup> the researcher recruited the subject and informant for those who have been found their categories and characteristics as follows:

- a. Informant, consist of the experts of Islamic family law
- b. Informant, from the experts of psychology.

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<sup>7</sup> *Sampling purposive* is a sampling technique with certain considerations. the selection of a group of subjects in purposive sampling was based on certain characteristics which were considered to have a close relationship with the characteristics of the population that were previously known, in other words the sample units contacted were adjusted to certain criteria applied based on the research objectives. See Sugiyono, Quantitative, Qualitative Research Methods and R and D, (Bandung Alfabeta, 2001), p. 61

<sup>8</sup> *Snowball sampling* is the technique of determining samples that are initially small in number, then this sample is told to choose friends to be sampled so on, so that the number of samples is increasing. Like a snowball rolling more and more the bigger. See Sugiyono, *ibid*.

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- c. Informant, consist of the experts of Children eduaction
- d. Informant, those who work at the children protection institutions
- e. Informant, consist of Muslim society.

***The Procedure of Collecting Data***

**Observation**

The observation technique used is disguised observation and non-participant, where the researcher only acts as an observer and is not directly involved in the activities carried out by the research subject. Three levels of observation (descriptive observation), directed (focused), and selected (selected observation) - will be carried out to get an accurate, objective and detailed description of reality relating to the problems of the activities and roles of women activists in the family and community. This observation method will also be used as a cross-analysis of data obtained through interviews.

***Interview and Focus Group Discussion (FGD)***

This study uses in-depth interviews with semi structured interviews. This technique was chosen because researchers want to control the information that they want to obtain from the subject and informants of the research while opening the possibility of the emergence of follow-up questions when the interview takes place. With this technique, researchers will be provided with an interview guide containing a questionnaire to be developed when conducting interviews with research subjects.

***Documentation and Literature Study***

This research also includes tracking relevant information and data or that can help researchers understand women's participation in decision making. This search is carried out on different sources such as books, documents, news and articles published in magazines or newspapers, monographs, research reports, scientific journals, online publications on websites and so on.

## Data Analysis

Qualitative data obtained from interviews and document / literature studies were analyzed qualitatively. The process of data analysis includes three stages that are carried out in a cycle that is data reduction, data display and conclusion drawing. Transcripts of interviews and field notes will be reduced, coded and categorized based on their type and relevance in answering research questions. The selected data is displayed to facilitate the process of interpretation / meaning and conclusion.

## FINDING AND DISCUSSION

### The Issues of Children's Rights in Informants' Views

#### The Children's Right

Children's rights are all things that must be obtained or received by the child and if not obtained, the child has the right to claim that right. In this case, the parents, family, community and government must fulfill, guarantee and protect. In Article 1 (paragraph 1) and (2) of Law No. 23 of 2002 concerning Child Protection, it is said that what is meant by (paragraph 1). Child is a person who is not 18 (eighteen) years old, including a child who is still in the womb; (verse 2). Child protection is all activities to guarantee and protect children and their rights so that they can live, grow, develop, and participate optimally in accordance with human dignity and receive protection from violence and discrimination.

Based on data in the field, it can be explained that children's rights in the perspective of the community that must be protected are<sup>9</sup>:

1. *The rights of Custody*
2. *The rights of love,*
3. *The rights of Inheritance*
4. *The rights of decent living (the right to get a birth certificate etc.)*
5. *Developmental rights (rest, play etc.)*
6. *The right of protection (Protecting rights from violence and so on)*
7. *The right to participate (the right to consult)*
8. *The rights of education*

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<sup>9</sup> The result of interview with the informant and FGD in the field

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9. *The right of living*
10. *The rights of welfare*
11. *The rights of Health, clean water, diseases and viruses*
12. *The rights of Socio-economic,*
13. *Right to religious norms,*
14. *Children's health rights*

**The Child Protection in Muslim Families in Indonesia**

In general, people really understand that Islamic law is very concerned with the existence of regulations regarding children's rights in the family. the protection of children's rights in the family is a necessity carried out by parents and their families. Violence against children will have an impact on family behavior, not only for children but also for all other members of the family. The concept of protecting the rights of children in Islamic family law will be applied well in Muslim society, if Islamic family law provides legal and legal consequences to the smallest unit of society namely family and state.

The types of violence that often occur in children in the family; they are:

To alienate children.

- Indifferent or uncaring attitude.
- Sexual violence.
- Bad influence.
- Giving influence to terror.

Regarding violence against children in the family, based on the data obtained there are several ways to protect children's rights in the household, as the informant stated:

- Doing together activities from small things to big things.
- Conduct deliberations in the family.
- Educate in a reasonable manner.
- Does not make children alone in sadness.
- Refreshing which greatly affects trauma in children, the family will slowly disappear.
- No physical violence.

### **The Implementation and Development of the Children Protection Act in Indonesia**

Protection of children's rights has been contained in several laws in Indonesia, but the fact that Indonesian children have not been protected as written down has even been stated in the birth of the PA Law. This is proven by the fact that there are still many cases of violence against children in Indonesia which are considered as one indicator of the poor quality of the child protection law in Indonesia. any violence against children not only creates legal consequences, there are social consequences, and there are also psychological consequences, if there is no punishment the social or psychological impact will be important for us to realize, for example when I slap a child, it will there are 3 consequences, namely legal, social, and psychological.

Theoretically, children receive protection and guarantees in the Indonesian Marriage Regulations. Even in other products of non-codified Islamic legal thought, such as fiqh, fatwa and interpretation, children also receive protection and guarantee of rights. But not so in reality, many children who have been neglected in their lives, both in families who are still intact, father and mother, especially in families whose parents are separated (divorced).

Child protection in Indonesia has not been comprehensively accommodated, this is because many children still do not get their rights. The factors include the lack of parental roles regarding their obligations related to the rights of their children. Implementation and Development of Child Protection in Indonesia is still considered poor and ineffective by informants.

### **The Factors of Violence against Children**

- a. Factor lack of family attention (father and mother) to the rights and obligations of children. Parents are not too aware of the lack of family in providing life insurance for children. Parents underestimate the guarantee of life to children, most children are free to do activities, what children like, so children feel right and do things that are not good are considered good.
- b. Economic factors a crucial problem in protecting children's rights is decent life and education. This is related to the many conditions of the poor, which means that many children do not feel a decent life. Neglect of children still

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happens a lot in Indonesia. We can see this in everyday life. As a child is forced to help with the family economy, the child is told to sell, beg, the child is cut off from school / education

- c. Factors of Legal Rules that are not in favor of children's needs and government policies and concerns that are impartial. Government regulations also do not accommodate all the rights of the child as a whole. Efforts to protect children's rights are a very important and urgent issue to discuss. Important and urgent considering that in recent years we have often been treated to various news and information about various acts of violence against children carried out by people who should be responsible for protecting these children.

## CONCLUSION

Children's rights are all things that must be obtained or received by the child and if not obtained, the child has the right to claim that right. In this case those who must fulfill, guarantee and protect are parents, family, community and government.

The discourse and Islamic family law literature on the protection of children's rights are still very little to be found. KHI and Law No. 1 of 1974 does not explicitly discuss the protection of the rights of children to legal sanctions for violators of children's rights in their articles. Likewise with some classical Jurisprudence literature does not concretely discuss the protection of children's rights and legal sanctions for violators of children's rights. This certainly has an impact on understanding and practices that occur in the community towards the pattern of protection of children's rights.

Normative anticipation based on urgent Islamic family law is urgently needed, because acts of violence against children are often characterized by acts of sadistic treatment, inhumanity, or no longer feeling of affection for the perpetrators.

As a law that applies to Muslim communities in Indonesia, then Islamic family law in this case KHI and Law No. 1 of 1974 needs to be reviewed and reformulated in terms of the protection of children from the act of exploitation and neglect in the present by the establishment of strict rules about the obligation to share property as soon as possible and incorporate adultery inclusion in criminal law, to increase protection

children and conveying to the community this is very important so that children's rights are not neglected

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