

Analysis of Judges' Considerations in Deciding Child Care Case Against Apostate Wife

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ABSTRACT

The study focuses on analysis of the judge's consideration in deciding the case of child care against the wife who converted to religion other than Islam. The study is a descriptive research by nature. It employs different data collection techniques while adopting qualitative approach in its data analysis. The setting of the study is at Parigi Religious Court. The findings of the study show that The judges have paid attention to the juridical, philosophical and sociological aspects that reflect the principles of legal certainty, justice and expediency in giving decisions. In addition, the judge's basic consideration in granting the divorce suit was based on the assumption that if in a conflicting household atmosphere, according to the judge, divorce was the best solution to avoid greater harm on the grounds that the purpose of marriage was to realize harmonious family.

ARTICLE INFORMATION

Keywords:

Child care, *hadhanah*,
apostasy, judge
consideration

1. Introduction

Divorce is a disgraceful act and is hated by Allah, but it can be done if the marriage can no longer be maintained. However, divorce must still have reasons as regulated by law. In terms of fiqh, it is called *talaq*, which means "to break the bond, cancel the agreement," or *furqah* which means "divorce"¹ These two words are used by the experts of Islamic law as a term which means divorce between husband and wife.

Talaq has general and special meaning. In general meaning, *talak* is all kinds of divorce either imposed by the husband, handed down by the judge, or divorce that falls automatically or divorce due to the death of one of the husband or wife. In a special sense, *talaq* is a divorce that is only imposed by the husband.²

Besides *talaq*, another form of divorce is *fasakh*, which comes from Arabic, which etymologically means "to cancel". Terminologically, *fasakh* means the cancellation of the marriage bond by the Religious Court based on the demands of the wife or husband which is justified by the Religious Court, or because the marriage has violated the marriage law. The factors that lead to *fasakh* include: *syiqaq* (quarrel), disability, inability of the husband to provide a

living, violating the agreement in marriage, and husband being lost.

The law does not allow divorce by way of consensus between husband and wife, but there must be a valid reason. Divorce has resulted to the children who are still underaged, namely parental authority can be turned into custody. If the marriage is decided by a judge, it must also regulate the guardianship of underaged children, and the determination of the guardian by the judge is carried out after hearing about the family from the father and mother who are closely related to the child.

Divorce is not only a disaster for married couples, but also a disaster for the psychology of their children. Divorce, whatever the reason, is something that has a negative impact on children. At that time the child can no longer feel the love at once from both parents, even though the love of both parents is an important element for the mental development of a child.³

If a divorce occurs, especially for couples who already have children, it will result in the end of parental power and turn into custody. The problem arises as to which of the parents is more entitled to the child, to carry out the *hadhanah* task.

Therefore, if the marriage is terminated by the judge, it is necessary to regulate the custody of the children born from the marriage. *Hadhanah* is the right to take care of small children, both male and female or those who are mentally unsound. Children who have grown up and have a healthy mind are

¹ See Rusli Rusli, "Hermeneutical Reading of *Talāq*," *HUNAEA: Jurnal Studia Islamika* 12, no. 2 (2016): 209-229.

²Wasman and Wardah Nuroniyah, *Hukum Perkawinan Islam di Indonesia: Perbandingan Fiqih dan Hukum Positif* (Yogyakarta: CV Mitra Utama, 2011), 33.

³*Ibid.*

not included in the *hadhanah*. Provisions regarding *hadhanah* due to the divorce of their parents are regulated in the Compilation of Islamic Law in Article 105.

Parents certainly play an important role in the physical and spiritual safety of children. Therefore, one of the requirements for *hadhanah* holders is to be Muslim (not apostate). However, in several existing cases, such as the case with the Parigi Religious Court Decision on Case NO.117/Pdt.G/2016/PA.Prgi, that is, the divorce between AD and E, who before marriage, were Protestant Christian. But when she was about to marry AD, E became a convert and the two of them married according to Islam in Parigi. During their marriage, both of them were blessed with a daughter named F. However, E later converted to Protestantism or apostasy. They were separated, and the problem emerged regarding the right of *hadhanah*.

2. Literature Review

2.1 Child Custody in Islamic Law

Child rearing in Islam is called *hadhanah*.⁴ Etymologically, *hadhanah* means "beside" or "under the armpit". Terminologically, *hadhanah* means caring for and educating someone who is not yet *mumayyiz* or who has lost his

intelligence, because they cannot fulfill their own needs.⁵

The term of *fiqh* which refersto the same purpose is *kafalah* which means "maintenance" of young children after the breakup of marriage. Fiqh talks about this because the separation between husband and wife results in children, who need help from their father and/or mother.⁶

The scholars agree that the law of nurturing, educating and caring for children is obligatory. However, they differ in whether this *hadhanah* is the right of the parents (especially the mother) or the right of the child. Hanafi and Maliki scholars argue that the right of *hadhanah* becomes the right of the mother so that she can abort her right, but according to the majority of scholars, *hadhanah* is a shared right between parents and children. According to Wahbah al-Zuhaily, *hadhanah* rights are shared rights between mother, father and child. If there is a fight, then the rights or interests of the child come first.⁷

Islamic jurists agree that the mother is the most entitled to perform *hadhanah*, but they differ in other matters, especially about the length of a mother's upbringing, which has the right after mother, and the conditions for being a nanny. As long as there is nothing that prevents her from taking care of the

⁴ See Rusli Rusli, "Fikih Perlindungan Anak: Tinjauan Atas Konsep Rada'ah Dan Hadanah Sebagai Bentuk Pencegahan Kekerasan Terhadap Anak," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 6, no. 2 (2006).

⁵Amiur Nuruddin and Azhari Akmal Tarigan, *Hukum Perdata Islam di Indonesia (Studi Kritis Perkembangan Hukum Islam dari Fikih, UU No. 1/1974 sampai KHI)*, 2nd Edition (Jakarta: Kencana, 2004), 293.

⁶*Ibid.*,

⁷Abdul Aziz Dahlan, *Ensiklopedi Hukum Islam* (Jakarta: Ikhtiar Baru van Hoepe, 1999), 415.

e-ISSN: 2715-4580

p-ISSN: 2715-8268

children, then the mother must carry out *hadhanah*, unless there is an obstacle that prevents her from carrying out *hadhanah*, then the rights of child care pass to someone else in the mother's relatives in a straight line upward.⁸

According to the Hanafi school of thought, a child should not be asked to choose. The mother is more important to her children until she is able to meet her own needs, and if the child is able to stand on his own, then the father has more rights over sons and mothers have rights over daughters. This opinion is in accordance with the opinion of Imam Malik.

The author of *Al-Huda al-Nabawi* argues that in fact the best thing is not to do elections or lotteries, unless an election or lottery is carried out, it can bring benefits to the children he cares for. If the mother is more capable of taking care of the children than his father, then the *hadhanah* right is given to the mother, because the mother is usually more responsible for her child.⁹

2.2. Child Custody in State Law

Facts show that many marriages have broken up because of the domestic turmoil that hit them. As a result of the dissolution of the marriage, not a few children born from that marriage endured prolonged suffering. Various legal problems arise in the control of children if they are divorced. For example, who must take care of their children, what rights should be given by

parents to their children, the Panel of Judges is obliged to examine and adjudicate every part of the claim of the parties, including the claim for child custody rights.¹⁰

After the divorce, and unless a court decision orders otherwise, both parents have legal custody of their children. Prior to divorce, parents may request temporary custody. However, this does not guarantee that the child will continue to live with one of the parents after the divorce. Divorce courts rarely order a child to transfer from one parent to the other unless the first parent is unable to do that.

The court can grant custody to one parent, both parents, or not at all. Custody for one parent means that the parent has the responsibility to raise the children. Joint custody means that the children live with one parent but both parents have the same responsibility for making decisions about their upbringing, meaning that both parents remain responsible for decisions about school, health, housing, and all that matters about children. Sometimes, joint custody means that a child takes turns living with the parent.

If the parents seeking divorce are happy that the children are living with the others, neither of them may seek custody of the court. If there is no claim for custody, both parents are still legally responsible for the children, although in practice almost all decisions are made by the parents living with the child.¹¹

⁸Abdul Manan, *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama*, 4th edition (Jakarta: Kencana, 2006), 425.

⁹*Ibid*, 428.

¹⁰*Ibid*, 424.

¹¹Mitchell, *Dilema Perceraian*, Trans. Budinah Joesoef (Jakarta: Arcan, 1992), 91.

e-ISSN: 2715-4580

p-ISSN: 2715-8268

The Marriage Law mentions the law on child care, but the law on child care has not been regulated in Government Regulation Number 9 of 1975 in a detailed manner. Therefore, the issue of child care (*hadhanah*) could not be applied effectively so that judges in the Religious Courts at that time still used the *hadhanah* law mentioned in fiqh books when deciding cases related to child care. Only after Law Number 7 of 1989 concerning the Religious Courts was enacted, and Presidential Instruction Number 1 of 1991 concerning the dissemination of the Compilation of Islamic Law was enacted, the issue of child care became a positive law in Indonesia and the Religious Courts were given the authority to become the institution for its resolution.

So, in detail can be explained that the rights and obligations of parents towards children may include providing protection, education, representing children in all legal actions for those who are eighteen years of age and under and have never been married.

This power authorizes the parents to represent their children in carrying out legal actions inside and outside the court. Meanwhile, regarding the maintenance of the child's wealth, it is regulated in Article 48 of the Marriage Law which states:

" Parents are not allowed to transfer rights or mortgage fixed assets owned by their child who does not yet reach eighteen years old or has never been married, unless the child wishes."¹²

¹²The Marriage Law No. 1 Year 1974 Article 48.

This article aims to provide protection for the child's fixed assets from the actions of parents that may harm the child.

In the Civil Code, it is stated that parents (father and mother) have power over their immature children as long as they are both bound by marriage bonds. This is called "parental power", which is regulated in several articles of the Civil Code.

Article 300 states that except in the case of an acquittal or dismissal and in the event that the provisions regarding the separation are applied, the power is exercised by the father himself. If the father is beyond the possibility of exercising parental authority, then it is the mother who does it.¹³

In addition, in Article 102 of the Compilation of Islamic Law it is stated: (1) parents are obliged to develop the property of their children who are not yet mature or under guardianship, and are not allowed to transfer or pawn them except for urgent needs if the interests and benefits of the child required or something unavoidable; (2) parents are responsible for the losses due to the errors and omissions from the obligations referred to in paragraph one above.¹⁴

Parenting is caring for and guiding children so that they can be independent. It is carried out through continuous guidance, maintenance, care and

¹³<https://dalamislam.com/hukum-islam/hukum-hak-asuh-anak-dalam-agama-islam>, Accessed 14 April 2019.

¹⁴Manan, *Penerapan*, 429.

education, as well as providing facilities for the child, all of which are carried out to ensure optimal child development, physically, mentally, spiritually and socially.

Family plays an important role in strengthening mental development of children, building and educating their children. The role of parents is very influential on the lives of their children in the future. The responsibilities and obligations that parents bear towards their children are to nurture and educate their children in order that they stand alone.

2.3 The Meaning of Apostasy in Islam

The word *murtad* comes from the word *irtadda* which means "to convert". But the word *irtidad* is specifically used in the sense of "converting to disbelief". The people who convert are called *murtad* (apostates).¹⁵

In *Ensiklopedi Hukum Islam*, it is stated that apostasy means conversion from Islam to disbelief, either by intention, speech or action; whether with the intention of joking, hostile attitude or belief. This include, for example, believing that Allah does not exist, Muhammad's apostleship is not true, justifying an unlawful act such as adultery, drinking liquor, and being tyrannical or forbidding what is lawful, such as buying and selling, marriage or refusing or denying the obligations of Islamic teachings, such as praying five

times a day, fasting and zakat or showing behavior that shows that the person concerned has left the religion of Islam.¹⁶

Muslim scholars argue that apostasy is a sin, and is only considered valid if it fulfills such conditions as leaving the religion of Islam. They argued that indicators that show an attitude of apostasy can be in the form of actions, attitude, words, and beliefs.

A Muslim is basically not considered to be out of Islam or an apostate unless his heart feels free with his religion other than Islam, and he has truly embraced that religion, but what is in his heart is something unseen that cannot be known except by Allah. Therefore, there must be an action or behavior that explains what is hidden in a person's heart, with strong and uninterpretable evidence.¹⁷

3. Methodology

This study uses qualitative approach^{18/19} investigating the judges'

¹⁶Dahlan, *Ensiklopedi*, 1233.

¹⁷A. Djazuli, *Kaidah-Kaidah Fikih* (Jakarta: Kencana, 2006), 53-54.

¹⁸ Nurdin, N., & Yusuf, K. (2020). Knowledge management lifecycle in Islamic bank: the case of syariah banks in Indonesia. *International Journal of Knowledge Management Studies*, 11(1), 59-80. <https://doi.org/10.1504/ijkms.2020.105073>; See also Rusli Rusli, "Pendekatan Fenomenologi Dalam Studi Agama Konsep, Kritik Dan Aplikasi," *Islamica: Jurnal Studi Keislaman* 2, no. 2 (2008): 141-153.

¹⁹ Nurdin, N. (2018). Institutional Arrangements in E-Government Implementation and Use: A Case Study From Indonesian Local Government. *International Journal of Electronic Government Research (IJEGR)*, 14(2), 44-63. <https://doi.org/10.4018/ijegr.2018040104>

e-ISSN: 2715-4580

p-ISSN: 2715-8268

¹⁵Kalang Jayadi, *Putusnya Perkawinan Karena Perceraian Akibat Perpindahan Agama di Jakarta Selatan*" (Thesis: Universitas Diponegoro, 2008), 58.

decision on child care cases against apostasy wives. This study was carried out in Parigi religious court in Central Sulawesi Indonesia. Data were collected through field observation, in-depth interviewees²⁰ with the judges. Written materials were also used to analyze the case. We also interviewed divorced families with apostasy cases. Data analysis consists of several procedures which included reduction and verification techniques with various data sources.²¹ The reduced data is then analyzed reflecting on theoretical concepts used in this study²².

4. Result and Discussion

4.2 *Legal Basis for Deciding Child Custody Case against Murtaf Wife*

The Parigi Religious Court decides many cases of litigation and divorce. If there is a divorce between husband and wife, a case of child care often arises. It is common that a struggle for child custody will eventually result in a lawsuit. The child being contested is not only a young

child but also an adult child. If the child contested is an adult, the child is given the freedom to choose whether to join his mother or father; but if the child is still not adult or is not yet 12 years old, there is a struggle between mother and father because at that age the child is still vulnerable to the surrounding environment. In the case of a child who has not been *mumayyiz*, Article 105 letter (a) of the Compilation of Islamic Law stipulates that the maintenance of a child who has not been *mumayyiz* or has not reached the age of 12 years is the right of the mother.

The problem becomes more complicated when the mother converted to the other religion (apostasy). This is the case in the Parigi Religious Court Decision Number 0117/Pdt.G/2016/PA.Prgi dated 16 August 2016. Nor Hasanuddin, a judge at the Parigi Religious Court said that:

The judge in his decision stipulates that the *hadhanah* (custodial rights) of a child who is still breastfeeding remains with the mother, even though the mother is proven apostate, until the child reaches the age of 7 years. The consideration is *maqasid sharia*, which is to make sure the child is safe and stays healthy.²³

In addition, the reason that strengthens the granting of *hadhanah* rights to the mother, according to Mr. Hadrat Uzair, the Registrar of the Religious Court, is

²⁰ Nurdin, N. (2021). A Collective Action In Indonesia Local E-Government Implementation Success. *International Journal Of Scientific & Technology Research*, 10(2), 160-166.

²¹ Muslih, Imam, Nurdin, Nurdin, & Marzuki, Marzuki. (2020). Effectiveness of Marriage Services Through Information System Management (SIMKAH) at Palu City Religious Court *International Journal Of Contemporary Islamic Law And Society*, 2(1), 20-35.

²² Iqbal, M., Rusli, R., & Musyahidah, M. (2019). Management Strategies of Professional Zakat Funds for Mustahiq Family Welfare By Amil Zakat Body *International Journal Of Contemporary Islamic Law And Society*, 1(1), 39-51.

²³ Interview with Nur Hasanuddin, Judge, Parigi Religious Court, 20 December 2020.

.. The defendant does not care and is not responsible for his wife and child.²⁴

Regarding the reasons for the decision on *hadhanah* rights given to the plaintiff who in fact has changed her beliefs, is the following:

“...to protect and maintain the rights of children who are not yet *mumayyiz* (adult), such as the right to grow and develop, the right to get protection, the right to get love from parents, the right to get education and others.”²⁵

In its consideration, the Supreme Court of the Republic of Indonesia emphasized that the child in question is still two years old, and he/she needs the care and love of his biological mother. However, because the biological mother is proven to have returned her previous religion (apostasy), then in order to maintain the child's welfare, especially in terms of character building and faith in the future, the *hadhanah* rights of the biological mother need to be limited until the child is reaches 7 years old, and so on. The right of child care is transferred to her biological father without limiting his biological mother's right to meet and express affection for her child.

In accordance with the Compilation of Islamic Law article 105, letter (a)

“It is the mother's right to take care of a child who is not yet *mumayyiz*/not yet 12 years old”²⁶

Based on the interview, the judge in deciding the *hadhanah* case at the Parigi Religious Court was based on the best interests of the child as stated in the Child Protection Act no. 23 of 2002 and also the Human Rights Law no. 39 of 1999. He also did not impose his will on the provisions of Article 105 (a) of the Compilation of Islamic Law which stipulates that “care for children who are not yet *mumayyiz*/not yet 12 years old is the right of the mother”. Because the Compilation of Islamic Law Article 105 can be used when in reasonable circumstances and there is no dispute between mother and father.

In the event of a dispute, the judge will decide the case based on the best interests of the child, based on jurisprudence number 110 K/AG/2007 which is one of the sources of law used by judges in the Religious Courts related to the Supreme Court decision which provides reasons for *hadhanah* decision, namely that regarding maintenance, it is not only seen from who has the most right, but must look at the fact that the child must join who does not give damage to the child; in other words, the priority is the interests of the child, not who perform the child care.

The judge's consideration which is also used in deciding *hadhanah* decision is jurisprudence. In the jurisprudence, it is cited that the Supreme Court considers that the issue of child care is the benefit

²⁴ Interview with Hadrat Uzair, the Registrar, Parigi Religious Court, 14 December 2020.

²⁵ Interview with Zuhairah Zunnurain, Judge, Parigi Religious Court, 17 December 2020.

²⁶Kompilasi Hukum Islam pasal 105 huruf (a).

and interest of the child, not merely those who are normatively most entitled to.

Besides judges referring to the Compilation of Islamic Law, judges generally consider their decisions based on the facts and evidence revealed in court regarding the good and bad parenting patterns of parents to the child, including in this case the behavior of the parents and matters related to the interests of the child both psychologically, materially and non-materially. In Article 229 of the Compilation of Islamic Law it is stated that:

“Judges in resolving the cases submitted to them must pay serious attention to the legal values that live in society, so that their decisions are in accordance with a sense of justice.”

In the decision of the *Hadhanah* case with the case number No.117/Pdt.G/2016/PA.Prgi, there is a judge’s consideration in deciding the case, that come out of the Compilation of Islamic Law which is a source of law for judges in deciding a case, namely the rules of the Compilation of Islamic Law Article 105 letter a which reads “care for a child who is not yet *mumayyiz* or not yet 12 years old is the right of the mother”.

Karena dalam putusan tersebut menerangkan bahwa hak pemeliharaan dan pengasuhan anak yang masih berusia 7 berada dibawah pengasuhan ibu. Apabila ibu dapat membuktikan bahwa ayah dari anak tersebut tidak berhak untuk memelihara anak tersebut, maka Hakim dapat menetapkan anak

yang belum dewasa atau belum berumur 12 (dua belas) tahun berada dalam penguasaan ibunya.

4.2 Sociological Analysis

Sociologically, law is a reflection of values that are believed by the community as an institution in society’s life²⁷ and the aspirations of the people, and made as a reference in anticipating social, economic and political developments in the future.²⁸

Thus, law is not only a static norm that only prioritizes certainty and order, but also has the ability to make thinking dynamic, and to manipulate people’s behavior in achieving goals. In the perspective of Islamic law, the law is able to create and direct social change in society.

This is based on the fact that Islamic law contains two dimensions; first, namely Islamic law rooted in *qath’i* (absolute) texts, universally applicable and becoming a unifying principle and patterning the activities of Muslims worldwide; and second, Islamic law rooted in *zhanni* (relative) texts which are the area of *ijtihadi*, whose products are called *fiqh*. In this second sense, Muslims can apply Islamic law

²⁷ Ermawati, E., Musyahidah, S., & Nurdin, N. (2021). Muslim Society Perspective on Islamic Banking Corporate Social Responsibility in Indonesia (Based On Qur’an and Hadits Economic Themes). *International Journal of Business and Management Review*, 9(3), 29-40.

²⁸Amrullah Ahmad, SF et.al, *Dimensi Hukum Islam dalam Sistem Hukum Nasional* (Jakarta: Gema Insani, 1966), ix.

differently, according to the context of the problems they face.²⁹

In Indonesia, as in other countries where the majority of the population is Muslim, sociologically and culturally, Islamic law never dies and is always present in the lives of Muslims in any political system, whether during the colonial period, during the independence period, or today.

In subsequent developments, the law in Indonesia was then divided into two, namely normative Islamic law, which relates to aspects of pure worship, and formal juridical Islamic law, which relates to muamalat aspects, especially in the civil and criminal fields, which have become part of positive law in Indonesia.

Although the two aspects are still different in their application, both of them can be implemented simultaneously in Indonesia as stated in Article 29 paragraph 2 of the 1945 Constitution. Thus, it can be concluded that the essence of Islamic law in Indonesia is the laws that live in society, both those that are normative and formal juridical concrete in the form of laws, clerical fatwas,³⁰ and court decisions, in this case the decisions of the religious courts.³¹

Considerations are the basis for decisions. In the consideration, included

in the section of the decision the reasons for the judge in making such a decision, so that it has an objective value.³² The considerations in civil decisions are divided into two; considerations about legal issues³³ or legal events and considerations about the law.

The considerations describe briefly and clearly and chronologically about the case, starting from the effort to reconcile, the arguments of the lawsuit, the defendant's answers, the reply and rejoinder, evidence, and witnesses, as well as the conclusions of the parties, which describe how the judge establish the arguments of the lawsuit or events proposed by the parties. While legal considerations describe how the judge qualify facts or events, assess the submitted facts, both from the plaintiff and the defendant and contains the legal basis - written and unwritten -- used by the judges in assessing facts and deciding cases.³⁴

The legal basis used by judges in deciding cases is state legislation and

²⁹Ahmad, *Dimensi Hukum Islam*, ix.

³⁰ R. Rusli, "Progressive Salafism in Online Fatwa," *Al-Jami'ah* 52, no. 1 (2014): 205-229; Rusli Rusli, "TIPOLOGI FATWA DI ERA MODERN: DARI OFFLINE KE ONLINE," *HUNafa: Jurnal Studia Islamika* 8, no. 2 (2011): 269-306.

³¹Jamal D. Rahmat, *Wacana Baru Fiqih Sosial* (Bandung: Mizan, 1977), 177.

³²Bambang Sugeng A. S. and Sujayadi, *Hukum Acara Perdata dan Dokumen Litigasi Perkara Perdata* (Jakarta: Kencana, 2011), 12.

³³ In a more study see Rusli Rusli, "Wahdah Islamiyyah Palu: On Contemporary Islamic Legal Issues In The Internet," *Hunafa: Jurnal Studia Islamika* (2017); See also Rusli Rusli, "An Analysis of Islamic Feminism in Indonesia: Reconstruction of Islamic Legal Issues on Gender Relations," *Hunafa: Jurnal Studia Islamika* 3, no. 1 (2006): 1-12, <https://www.jurnalhunafa.org/index.php/hunafa/article/view/239>;

³⁴Arto, *Praktek Perkara*, 263-264.

sharia law.³⁵ State laws and regulations are arranged in order of degree by taking into account the principles, types and hierarchy of laws and regulations.³⁶ While the basis of sharia law, by looking for it from the Qur'an, hadith, statements of Muslim jurists (*fuqaha*), which is translated into legal language.³⁷

5. Conclusions

The judges have paid attention to the juridical, philosophical and sociological aspects that reflect the principles of legal certainty, justice and expediency in giving decisions. In addition, the judge's basic consideration in granting the divorce suit was based on the assumption that if in a conflicting household atmosphere, according to the judge, divorce was the best solution to avoid greater harm on the grounds that the purpose of marriage was to realize harmonious family.

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³⁵Roihan A. Rasyid, *Hukum Acara Peradilan Agama* (Jakarta: PT Raja Grafindo Persada, 2007), 207.

³⁶Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2010), 97.

³⁷Rasyid, *Hukum Acara*, 207.

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