

## Perspective Hadhanah Concept Analysis Study Law Number 23 of 2002 About Child Protection

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DOI : <https://doi.org/10.61796/jheaa.v3i1.1591>



### Sections Info

#### Article history:

Submitted: October 15, 2025

Final Revised: October 31, 2025

Accepted: November 23, 2025

Published: November 28, 2025

#### Keywords:

Hadhanah

Law number 23 of 2002

Child protection

Parenting

Children's rights

### ABSTRACT

**Objective:** The purpose of this writing is to analyze hadhanah from the perspective of Law Number 23 of 2002 concerning child protection. **Method:** The writing of this research is based on library research, namely using library materials as the main data source. **Results:** There is no law that explicitly and clearly regulates the obligation of child custody to be given to the biological mother or biological father after a divorce. In Law Number 23 of 2002 concerning Child Protection, Article 3 states that child protection aims to ensure the fulfillment of children's rights so that they can live, grow, develop, and participate optimally in accordance with human dignity and dignity, and receive protection from violence and discrimination, in order to realize Indonesian children who are qualified, have noble morals, and are prosperous. There are various reasons that may make parents unable or unwilling to provide for their children. Some common causes or factors that cause parents not to fulfill their obligations to their children include economic factors, personal relationships, or other legal problems. Parenting has a very urgent role in shaping children's development and well-being. One of these urgencies is the formation of children's character so that they become children who are useful for their nation and state. **Novelty:** Every child has the right to receive health services and social security according to their physical, mental, spiritual and social needs. Fulfillment of children's basic rights is an integral part of implementing the fulfillment of human rights.

## INTRODUCTION

A sakinah household in the sense of being complete (perfect) will not be realized without having children in the household. Children are household jewels that will contribute to or even determine whether a family is happy or not. The position of children in a family is so important, it is not surprising that Islamic law provides special rules regarding how to handle children, which is usually called hadhanah. Hadhanah is a need or obligation for the benefit of the child. So whether their parents are married or divorced, children still have the right to receive attention from both parents [1].

According to a research journal conducted by Achmad Muhajir with the title: Hadhanah in Islam (Child Care Rights in the Home Education Sector), the activity of caring for (educating children) is called hadhanah. Hadhanah is a form of God's love for His servants, namely by caring for children born from the mother's womb. Because childcare is also a manifestation of various forms of nobility given by God to humans who are the most noble creatures and are His gift to humans compared to other creatures [2].

There are many verses in the Qur'an and hadith of the Prophet Muhammad SAW which explain the obligations of parents towards their children, including QS Al-Baqarah verse 233: "Mothers should breastfeed their children for two full years, that is, for those who want

*to complete breastfeeding. And it is the father's obligation to feed and clothe the mothers in a virtuous manner. A person is not burdened except according to the level of his ability. Let not a mother suffer misery because of her child and a father because of his child, and the heirs are also obliged to do so. If both of them want to wean (before two years) with their consent and deliberation, then there is no sin on either of them. And if you want your child to be breastfed by someone else, then there is no sin for you if you pay according to what is appropriate. "Be fearful of Allah and know that Allah is All-Seeing of what you do" ( QS. Al-Baqarah: 233).*

This verse explains that it is the obligation of a father to feed and clothe mothers if the mother of the children they breastfeed has divorced. Women who are divorced sometimes have a baby child, this child may be neglected because the mother does not want to breastfeed her baby in order to take revenge on the father who divorced her. With this obligation, children who are born are guaranteed good physical growth and mental development. In Islamic law, the care of children after a divorce between husband and wife is a priority that falls to the mother who has the most right to care for them until the child reaches the age of majority. *tamyiz*. This is based on the hadith narrated by Ahmad and Abu Daud; *"That a woman said, O Messenger of Allah, indeed my child, it is my stomach that contains him, and it is my milk that has become his drink and it is my lap that protects him. But the father has divorced me and wants to keep my child away from my side." So the Messenger of Allah said, You are the one who has more right to the child, as long as he is not married to someone else."* (HR. Ahmad, Abu Daud and validated by Imam Alhakim).

hadith is evidence that a mother has more right to raise her child, if the father wants to take him from her. The woman in this hadith also mentions special qualities for a woman that strengthen her priority in caring for her own children. Even the Prophet Muhammad SAW established and decided the law according to the mother's wishes. This reminds us that the main reasons and objectives are taken into consideration in establishing laws, because they arise from human nature.

According to the Imam Malik school of thought, the *hadhanah period* ends when a man has *Ihtilam* (dream), while the *hadhanah period* for a woman is after she reaches marriageable age, but when the mother is in the period of Iddah, then she has more rights over her daughter until she remarries, otherwise it is better for her daughter to be entrusted to her father/aunt's brother as her guardian. Meanwhile, according to the Shafi'i school of thought, age *hadhanah* for both men and women until the age of seven or eight years, then he has the right to choose who he will live with [3].

According to Law Number 23 of 2002 concerning Child Protection, Articles 4-6, that 1) [4]. Every child has the right to live, grow, develop, and participate fairly in accordance with human dignity and worth, and to receive protection from violence and discrimination. 2). Every child has the right to a name as a form of identity and citizenship status, and 3). Every child has the right to worship according to their religion, to think, and to express themselves according to their level of intelligence and age, under the guidance of their parents.

The government itself has issued Law Number 35 of 2014 as an amendment to Law 23 of 2002 concerning Child Protection, which requires efforts to be made by the

government as referred to in Article 21 paragraph (4) Regional Governments are obliged and responsible for implementing and supporting national policies in the implementation of Child Protection in the regions [4], [5].

Violence against women and children is a global problem that has become ingrained in culture, economy and society. In fact, every parent has committed violence against their child, even though it is often considered normal, such as pulling the child's hair and glaring at them. Even the smallest violence a child experiences can have an impact on the child's physical and psychological well-being. One form of chronic violence that often occurs is sexual violence. Many cases of sexual acts that occur are not revealed because the perpetrators often deny it to avoid being ridiculed by the social environment. The Ministry of Women's Empowerment and Child Protection (Kemen PPPA) noted that reports of violence against women and children have increased over the past three years. "Based on the PPA Symphony (Online Information System for the Protection of Women and Children) throughout 2019-2021, there was an increase in reporting of cases of violence against women and children.

## RESEARCH METHOD

Research is based on library research, which utilizes library materials as the primary data source [6]. This research, or research that finds its object by gathering information from the library, particularly texts such as books, encyclopedias, scientific journals, newspapers, magazines, and other documents [7]. Primary data is data obtained from the object being studied. Based on the data obtained to compile and analyze the collected data, the author used the Descriptive Analytical method [8]. The Descriptive Analytical method works by analyzing the researched data by presenting the data, then obtaining conclusions [9]. The author used this Descriptive Analytical method to track and analyze the research discussion. The data sources in this writing refer to primary sources in the form of Compilations of Islamic Law, books, articles and other things that can be used as a basis for a scientific work.

Literature research can be said to be a research method in which in the process of searching, collecting and analyzing data sources to be processed and presented in the form of a Literature Research report with various topics needed, both education, socio-culture, and others. Citing or documenting the sources used in this research has two purposes, it gives proper credit to the authors of the references used, and allows readers to learn more by mentally reviewing the sources that have been listed as references in this journal.

## RESULTS AND DISCUSSION

### A. The Concept of Hadhanah

#### 1. Definition and Evidence of Hadhanah

"Hadhanah " comes from Arabic which means, among other things: Caring for, educating, organizing, taking care of all the interests of children who are not yet mumayyiz (not yet able to differentiate between good and bad things or actions for

themselves) [10]. This understanding is in line with the opinion expressed by Sayid Sabiq that hadhanah is taking care of young children, men or women or those who are not yet mature without the will of anyone, protecting them from anything that hurts and damages them, educating them physically and spiritually so that they are able to stand alone in facing life and shouldering their responsibilities [11].

Hadhanah in fiqh terms is basically the concept of caring for children as a result of divorce. Etymologically, hadhanah means close or near. The use of this word is essentially an effort to bring together small children so that they become close and intimate. The terminological definition of hadhanah is caring for or safeguarding the interests of young children, both boys and girls, because they are not yet independent [12]. The legal basis for hadhanah is as stated in the word of Allah SWT, namely: *"O you who believe, protect yourselves and your families from the fire of hell whose fuel is people and stones; whose guardians are angels who are rough, tough, and do not disobey Allah in what He commands them and always do what they are commanded."* (QS. At-Tahrim: 6).

It is clear that in this verse parents are commanded by Allah SWT. to protect his family from hellfire, by trying to ensure that all members of his family carry out God's commands and stay away from his prohibitions, and in this verse what is called family is a child [13].

In this verse, parents are commanded by Allah SWT to protect their families from the fires of hell, by trying to ensure that all family members carry out Allah's commands and stop Allah's prohibitions, including family members in this verse, namely children. The relationship between parents and children in this case is an obligatory relationship that cannot be broken or hindered by any circumstances, whether due to divorce or one of them dying, does not cause the termination of obligations towards their children, this is also in accordance with QS. Al-Baqarah verse 233. From this verse, it can be understood that a father is obliged to provide for his wife and children [14], whereas in the care of children after a divorce between husband and wife, apparently the priority falls to the mother who has the most right to care for them.

## **2. Those Who Have the Right to Perform Hadhanah**

The care and custody of young children is the responsibility of the following people: According to the ulama a mother has the right to be the caretaker of a boy until he is 7 years old and a girl until she reaches puberty. In this case, the Shia sect is up to 2 years old, while women are up to 7 years old. After this specified age, the father is only a guardian who ensures the welfare of his children if the father dies, then his successor becomes their legal guardian even if the small child is in the care of the mother, but the father must not neglect his responsibility in supervising the children in the care of the mother [15].

The care and protection of young children is the responsibility of the following people: According to Islamic scholars, a mother has the right to care for a boy until he is 7 years old and a girl until she reaches puberty. In this case, the Shia school of thought up to 2 years old, while girls up to 7 years old. After this specified age, the father is only a guardian who ensures the welfare of his children if the father dies, then his successor

becomes their legal guardian even if the child is under the care of the mother, but the father must not neglect his responsibility in supervising the children under the care of the mother. If the mother is gone, for example if she dies or is declared incompetent according to sharia [15], then the care of sons and daughters is handed over to the sisters in the following order of priority:

- a. Mother's mother.
- b. Father's mother.
- c. maternal grandmother.
- d. paternal grandmother.
- e. Sisters from father and mother.
- f. Half-sister.
- g. The daughter of her father's and mother's half-sisters.
- h. The daughter of one mother's sisters.
- i. Aunt from the same father and mother.
- j. Aunt from the same mother.
- k. Aunt from the same father and mother.

If the mother is absent, or she is declared incompetent and there is no one worthy, then the responsibility for care is handed over to the male family in the following order:

- a. Father.
- b. The closest grandfather.
- c. Brothers from the same father and mother.
- d. Brothers and other relatives from the father's side, starting from the closest side.

If there are no legal guardians, then Qodhi or the court will appoint a person who will be the guardian to protect the assets of the minor child.

### **3. Conditions for Hadhanah**

For the benefit of the child and his/her maintenance, conditions for hadhinah and hadhin are required. The conditions for hadhinah are (Tihami & Sahrani, 2010: 221), namely [13]:

- a. Not being tied to a job that causes him not to do his hadhanah well, such as having to be tied to a job that is far from the child's place, or almost all of his time is spent working.
- b. He should be a man of mukallaf, that is, he has reached maturity, is wise, and his memory is not disturbed. Hadhanah is a job that is full of responsibility, while a person who is not mukallaf is a person who cannot take responsibility for his actions.
- c. Must have the ability to carry out hadhanah.
- d. It should be able to guarantee the care and education of children, especially those related to character. People who can damage a child's character, such as adulterers, thieves, are not worthy of having hadhanah.
- e. Hadhinah should not marry a man who is not related to the child. If she marries a man who is in a mahram relationship with the child, then the hadhinah carries out hadhanah, just like she marries the child's uncle and so on.

f. Hadhinah should be someone who does not hate the child. If the hadhinah is someone who hates the child, it is feared that the child will be in misery.

Equality of religion is not a requirement for hadhinah, unless it is feared that it will turn the child away from Islam. Because what is important in hadhanah is that hadhinah has a feeling of love and affection for children, and is willing to take care of children as well as possible. If the education and care of the child is a boy, the same religion and hadhinah are required for the child. Because men who are allowed to be hadhin are men who have an inheritance relationship with the child. After the legal basis is realized, of course the caregiver becomes a factor in the ability or propriety to look after their child, so there must be certain conditions, (Pasha, 2002: 304), namely [16]:

- a. Be sensible, because crazy people are not allowed to handle and organize hadhanah.
- b. Freedom, because a slave has more or less power over the child and the interests of the child are given more to the master.
- c. Being Muslim, because this matter is for the sake of the religion he believes in or a matter of guardianship which Allah does not permit for infidels.
- d. Trustworthy.
- e. another man for his mother.
- f. Living with their children, if one of them leaves, the father has more rights because he is protecting his lineage.
- g. Adult, because even a small child is mumayyiz but he needs someone else to take care of him.
- h. Able to educate, if serious illness or reprehensible behavior then endanger the child's life and instead be neglected in his hands.

The majority of scholars agree that the conditions of hadhanah such as being intelligent, trustworthy, mature, able to educate and avoiding things that are prohibited are part of hadhanah.

#### **4. Hadhanah Period**

There are no verses in the Koran and Hadith that explain explicitly the issue of hadhanah, there are only signs that explain these verses. Therefore, the ulama make their own ijtihad decisions based on these signs. In principle, the end of hadhanah is when a child no longer feels the need for care, has reached maturity, and can be independent, or has reached maturity. The end of hadhanah for girls is marriage, while for boys it is when they have a job (already working). Imam Shafi'i is of the opinion that there is no clear limit on when there is an end to child management (hadhanah). However, when a child begins to understand, he is given the right to choose whether to be raised or cared for by his father or mother, even if the choice falls on his mother, it remains the father's burden [12].

#### **5. Hadhanah Wages**

hadhanah wages such as breastfeeding, as long as she is still the child's wife, or is still in her iddah period. Because in this condition he is still being supported, and after his Iddah period, he is entitled to wages just like his right to breast-feeding wages, Allah SWT, says in Surah At-Thalaq verse 6. Because, a woman who has reached her Iddah

period is equated with someone who works for another person, and the child's father is obliged to pay these wages. The wisdom of hadahanah is that mothers are the first priority in raising their children because of the love and special qualities of a mother. However, a father can become like a mother if something undesirable happens and it is possible that a father will also be the opposite towards his child (affection and tenderness towards his child) [17].

#### **B. *Hadhanah* Analysis According to Law Number 23 of 2002 concerning Child Protection**

According to Law Number 23 of 2002 concerning Child Protection, 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 honor, and receive protection from violence and discrimination [4]. Child protection aims to ensure the fulfillment of children's rights so that they can live, grow, develop, and participate optimally in accordance with human dignity and honor, and receive protection from violence and discrimination, in order to realize Indonesian children who are qualified, have noble character, and are prosperous. Every child has the right to be cared for by their own parents, unless there are valid reasons and/or legal regulations showing that the separation is in the best interests of the child and is the final consideration.

According to Law Number 23 of 2002 concerning Child Protection, Article 16, (1) Every child has the right to receive protection from being the target of abuse, torture, or inhumane punishment. (2) Every child has the right to obtain freedom in accordance with the law. (3) Arrest, detention, or criminal imprisonment of children is only carried out in accordance with applicable law and can only be carried out as a last resort. Article 18 states that every child who is a victim or perpetrator of a crime has the right to receive legal assistance and other assistance [4].

Article 21 According to Law Number 23 of 2002 concerning Child Protection, the State and government are obliged and responsible for respecting and guaranteeing the human rights of every child without distinction of tribe, religion, race, class, gender, ethnicity, culture and language, legal status of the child, birth order of the child, and physical and/or mental condition. Article 22 also states that the State and government are obliged and responsible for providing support in the form of facilities and infrastructure in the implementation of child protection. Meanwhile, Article 23 states that (1) The State and government guarantee the protection, care and welfare of children by paying attention to the rights and obligations of parents, guardians or other people who are legally responsible for the child. (2) The State and government supervise the implementation of child protection.

The description of children's rights stated in the articles of the Child Protection Law above is very detailed and covers various aspects of a child's life: physical, spiritual, mental, spiritual, and social, as well as their protection from all forms of violence, deviation, and discrimination. Therefore, it is understandable that child protection is the obligation and responsibility of all parties: parents, family, society, government, and the

state, because child protection efforts cover a broad area, including the domestic and public areas. From the description above, it can be seen that the rights and obligations of children in the Child Protection Law are related to the perspective used by this Law in viewing the status of a child, namely as part of Indonesian citizens, as a mandate from God, and as the next generation of the nation. Therefore, children's rights also cover a very broad scope, both children's rights related to their status as citizens, as a mandate from God to which is inherent dignity and worth as a whole human being, and as the next generation of the nation's ideals. These rights also concern various aspects of life: education, health, religion, law, politics, social, and culture. Likewise, a child's obligations are not only in relation to his parents and family, but also to friends, teachers, guardians, society, homeland, nation and state.

So, the rights of children in the family, as the smallest unit in society, which plays a very important role in the formation of a larger society. The rights of children in the family, can be seen from the provisions regarding the obligations of parents and families towards children (because the rights of one party are the obligations of another party). Although the rights of children described above are quite numerous, it turns out that the obligations of families and parents are not as many as the details of the rights of children. Article 26 paragraph 1 states that parents are obliged and responsible for: 1). Caring for, maintaining, educating, and protecting children; 2). Developing children according to their abilities, talents, and interests; 3). Preventing marriage at a young age. There are significant things that are not formulated in this Law related to the obligations of parents to their children in religious matters.

Article 26 paragraph (1) above, does not mention at all the provisions regarding the obligation of parents to educate and guide, as well as provide guidance to their children in matters of religion. Furthermore, Article 43 of this Law states that parents (as well as families, guardians, social institutions, society, government and the state) must guarantee the protection of children in embracing their religion. In this way, children are given "freedom" to choose and practice their religion. In fact, under Islamic law, parents are obligated to instill and provide religious education to their children. The first verse of the Quran, as the basis of Islamic law, commands everyone to protect themselves and their families from the torment of hellfire by carrying out all of God's commands. Islamic law, meanwhile, places great emphasis on the care and protection of children. This can be seen in several Quranic and Hadith texts concerning children's rights, which serve as the basis for implementing child protection, as the essence of child protection is the fulfillment of children's rights [18].

According to the author's analysis, Law Number 23 of 2002 has a positive aim to protect the rights and welfare of children. It's important to note that the pros and cons of a particular law can vary greatly depending on the perspective of an individual, group, or background. Here are some arguments that might arise in discussions regarding child protection laws:



1. Protection of Children's Rights: These laws may be designed to protect children's rights, including the right to live, grow and develop in a safe and healthy environment.
2. Prevention of Exploitation: These laws may include provisions to prevent the exploitation of children, such as child labor, child trafficking, or other forms of exploitation.
3. Raising Awareness and Education: With this law, the public and related parties can be given awareness and education regarding children's rights and child protection responsibilities.
4. Handling of Cases of Violence or Neglect: This law may provide a more effective legal framework for handling cases of violence or neglect against children.

Meanwhile, the things that give rise to the contradictions in the above law are as follows, namely:

1. Potential Violation of Parental Rights: Some people may worry that child protection laws may give government or agency excessive authority to interfere with parental rights and decisions.
2. Lack of Effective Implementation: While laws may be enacted with good intentions, there may be a lack of effective implementation on the ground, which may diminish their positive impact.
3. Administrative Burden: Some individuals or groups may complain that child protection laws add administrative burdens, especially for agencies or individuals who must comply with certain requirements.

Regulations that are too strict or loose: Sometimes, certain communities or groups may argue that the regulations in the law are too strict and restrictive, or conversely, too loose and do not provide adequate protection.

## CONCLUSION

**Fundamental Finding :** Hadhanah is the care of children for people who have the right to look after them. Maintenance here means providing guarantees regarding food, clothing, sleep, cleanliness, and so on. Hadhanah is a need or obligation for the benefit of the child. So whether their parents have a bond or are divorced, children still have the right to receive attention from both parents. This hadhanah is a form of channeling a Muslim's love for his descendants. The law of hadhanah is mandatory in Islam. Because, a child who is not cared for will be threatened with the safety of his body and soul.

**Implication :** Regarding who has the right to manage the hadhanah, scholars have different opinions regarding this issue. Legal provisions regarding child custody rights in family law in Indonesia can be seen in Law Number 23 of 2002 concerning child protection. A child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb. In principle, the legal rules in Indonesia regarding hadhanah rights are that fathers and mothers have equal rights to care for, care for, finance and educate their children. If there is a dispute regarding hadhanah rights, the granting of hadhanah rights must prioritize the interests of the child, not the interests of the father

and mother. **Limitation** : It is important to note that views on the pros and cons of Law Number 23 of 2002 concerning Child Protection can vary greatly depending on the perspective of the individual, group, or background. **Future Research** : Future studies are expected to explore in greater depth the diverse perspectives surrounding Law Number 23 of 2002 concerning Child Protection, considering how different cultural, social, and religious backgrounds influence interpretations of hadhanah and the implementation of child custody regulations in Indonesia.

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