

# EXECUTION OF RELEGIOUS JUDICIARY IN CHILD CUSTODY

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## EXECUTION OF RELIGIOUS JUDICIARY IN CHILD CUSTODY

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### 1

#### ABSTRACT

Religious Courts are one of the state courts with the jurisdiction to resolve civil disputes including cases of child custody for Muslims but several pros and cons have been attached to the execution or final settlement stage. This study was conducted to determine the legal basis for the execution of child custody and legal action required in a situation the child is hidden or unwilling to be under the plaintiff's care or control. It was conducted as normative legal research with a focus on the secondary data obtained from religious courts' decisions on child custody cases. Both primary and secondary data were collected and analyzed qualitatively using legislation, case, and analysis approaches. The results showed the execution is usually basically to ensure a better future for the child. This, therefore, means it is possible to execute the decision of the religious court regarding child custody voluntarily and based on kinship.

**Keywords:** Execution, Religious Courts, Child Custody

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### 1. INTRODUCTION

The Religious Court is one of the civil court bodies established for Indonesian Muslims to resolve disputes in line with the absolute competence provided by Article 49 of Law Number 3 of 2006 concerning Religious Courts. This was further explained by Mark E Cammack and R Michael Feener that:

*The organization and powers of the Islamic branch of the Indonesian judiciary are outlined in the Religious Judicature Act that was passed in 1989. The Act provides for the existence of first instance courts, called peradilan agama, in every district (Kabupaten) and municipality (kotamadya), and for an Islamic appeals court, called peradilan Tinggi agama, in every province.<sup>1</sup>*

Moreover, concerning the procedural law, it was also stated that the

*Applicable procedural law in the court of Religion under article 54 Act No 7 year 1989 was the Law of civil procedural of the court of general jurisdiction and procedural law that is stipulated in the Act No 7 year 1989. The applicable*

*procedural law in general court is as had been set in HIR, RBg, and Book IV of Civil Law book (BW)<sup>2</sup>*

The process of examining cases in the Religious Courts starts from a lawsuit or petition and the trial ends with a decision or stipulation by a judge as stated in Article 60 of Law Number 5 Year 2009. What is meant by Decision is a judge's statement which is written in written form and pronounced by the judge in a trial of a lawsuit based on the existence of a dispute, whereas referred to as Determination is a judge's statement which is stated in written form and pronounced by the judge in a hearing on the trial of the petition. So what distinguishes between the decision and the decision at the time the case is submitted to court. If it starts with a lawsuit then finally it is called a verdict and if it is with an application then the end is a decision.

However, the decisions of the court need to be followed up to implementation or execution to establish that a party actually won the case. This means the struggle to obtain justice and reclaim

<sup>4</sup>

<sup>1</sup> Mark E Cammack and R Michael Feener, *The Islamic Legal System in Indonesia, Pacific Rim Law And Policy Journal* Vol 21 No 1, p. 21

<sup>28</sup>

[www.psychologyandeducation.net](http://www.psychologyandeducation.net)

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<sup>2</sup>Rahmida Erliyani, *Legal Standing Of Woman as Witness in Evidenti system of Legal Procedural in The Court of Religion* Journal of Law, Policy and Globalization, Vol.53,2016.p. 216.

rights requires the losing party to implement the decision as evident in the execution of judges' decisions by the legal apparatus in religious courts. The inability to execute the decision makes it lose its meaning and effectiveness. In this case, the plaintiff certainly does not want the an-sich decision but craves all the contents are implemented to provide benefits in addition to justice and legal certainty.<sup>3</sup>

It is important to note that not all disputes resolved before the Religious Courts are easily and smoothly executed. An example of this is the child custody case which is also classified under the absolute competence of religious justice. Children are the responsibility of both parents because they are provided as a gift from Allah SWT to be maintained and protected. They also have basic rights as human beings which are recognized and protected by the constitution because of their significant importance in sustaining the existence of families and countries. Therefore, there is a need for guaranteed care for a child by those charged with the responsibility.

The data presented in Table shows several applications for child custody in divorce lawsuit in the Banjarmasin Religious Affairs court in 2016 with 1,644 cases consisting of 369 Talaq and 1,275 petitions.<sup>4</sup>

Table 1. Different types and number of cases in Religious Court (PA) of Banjarmasin in 2016

NO	Cases	Number
1	Divorce (Talaq Divorce)	369
2	Perceraian (petition divorce)	1275
3	Child's mastery	6
4	Joint Treasures	14
5	Application for permission for polygamy	10
6	Prevention of marriage	0
7	Marriage Rejection	0
8	Cancellation of marriage	1

<sup>3</sup> Triana Sofiani, (2004), *Efektivitas Eksekusi Nafkah Anak di Pengadilan Agama*, Research Journal, p. 72

<sup>4</sup> Data on Banjarmasin Religious Court, South Kalimantan Indonesia.

9	Revocation of Parental Power	2
10	Application for Trusteeship	39
11	Children's Origins	92
12	Marriage isbat	221
13	Mating Dispensation	38
14	Marital permission	0
15	Application for Guardian Adhol	4
16	Waqf	0
17	Case of Inheritance	7
18	Bequest	2
19	Determination of Heirs	125
20	Others (adoption, marriage isbat lawsuit, the rectification of marriage certificate)	126
	<b>SUM</b>	<b>2332</b>

31

This table is compiled based on data from the Banjarmasin City Religious Court in 2016.<sup>5</sup>

The question of child custody is very rarely raised in most of these cases because it is mostly settled as a family matter but an exception was observed in Case No. 0382/Pdt.G/2009/PA.Bjm filed at the Banjarmasin Religious Court regarding child custody. The petition was filed after a decision has been made on the divorce suit between the Plaintiff (a mother/ex-wife) and the Defendant (ex-husband) to fight for the child's custody which, according to the verdict, fell on the mother (ex-wife) but the child in the mastery of ex-husband (the father).

Divorce confuses children, especially in selecting which of the parents to live with, and the differences in the desires of the parents to have the custody also lead to several legal issues which are taken to court in the form of disputes. Meanwhile, the inability to peacefully resolve this dispute through mediation procedures usually require settlement with a court decision using the litigation path. The problem observed with this process is the unwillingness of the defeated party to voluntarily surrender the child after the verdict has been handed down by the court and this

<sup>5</sup> ibid

usually leads to the execution procedure. This is expected to be in line with the procedural law stipulated in the HIR or RBg but the process is not specifically regulated by this provision and this is mostly used by the defeated party or its attorney to reject the implementation of the decision.

The legal force obtained from the court ruling in a child custody case usually compels the defendant to transfer the child's custody to the plaintiff. In a situation this decision is not implemented voluntarily by the defendant or the related parties, efforts are required to be made by the court based on the plaintiff's request to execute the judgment. The problem relating to the decision on child custody is determining whether it is permissible to execute child custody and understand the legal basis. Moreover, in a situation the child in question is hidden or unwilling to be under the plaintiff's control or care, it becomes difficult for the court decisions to be implemented. Now the question is "Is it possible to take legal action in such circumstances?"

## 2. RESEARCH METHODS

This was a juridical-normative research<sup>6</sup> with the focus on secondary data by describing the execution of religious courts concerning child custody cases through the application of the Law, case, and analysis approaches.<sup>7</sup> The legal materials used in this study consisted of three legal materials including the primary, secondary, and tertiary. The primary aspect was the main subject of this research while the secondary ones were obtained from doctrines, theories, opinions of existing legal experts in literature including textbooks, journals, scientific papers, and information in print and electronic media. The tertiary legal materials were retrieved from Indonesian public dictionaries, English-Indonesian dictionaries, legal dictionaries, and encyclopedias explaining criminal judge

<sup>6</sup> Ronny Hanitijo Soemitro, (1998), *Metodologi Penelitian Hukum dan Jurimetri*, Third Matter, ed. Revision, (Jakarta: Ghalia Indonesia), p. 11.

<sup>7</sup> Peter Mahmud Marzuki, (2005), *Penelitian Hukum*, Jakarta: Prenada Media, p. 93.

decisions, criminal justice system, and criminal procedural law, specifically relating to the subject matter. These materials were analyzed using descriptive qualitative analysis and interpreted with grammatical, systematic, and futuristic interpretations.<sup>8</sup>

## 3. RESULTS AND DISCUSSION

### 3.1 Definition of Execution and Legal Foundation for Child Custody

According to Subekti, execution means ensuring decisions implemented by the court cannot be changed or obeyed voluntarily by the disputing party. This, therefore, means the losing party inevitably has to comply with the decision voluntarily instead of being forced using the public power such as the police and, in extreme cases, the military or armed forces.<sup>9</sup>

Abdul Manan defined the implementation of judicial decisions or executions as the process of ensuring court decisions have permanent legal force and this has been discovered to be the ultimate goal in any dispute. This means these decisions are inviolable.<sup>10</sup>

Meanwhile the meaning of execution is in the Black's Law Dictionary,

<sup>3</sup> To finish, accomplish, make complete, fulfill. To perform; obey the injunctions of. To make; as to execute a deed, which includes signing, sealing, and delivery. To perform; carry out according to its terms; as to execute a contract. To fulfill the purpose of; to obey; to perform the commands of; as to execute a writ. A statute is said to execute a use where it transmutes the equitable interest of the cestui que use into a legal estate of the same nature, and makes him tenant of the land accordingly, in lieu of the feoffee to uses or

<sup>8</sup> Soejono dan Abdurrahman, (2003), *Metode Penelitian Hukum*, Jakarta: Rineka Cipta, p. 23.

<sup>9</sup> Subekti, (1998), *Hukum Acara Perdata*, cet. 3, Bandung: Bina Cipta, p.130.

<sup>10</sup> Abdul Manan, (2016), *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama*, Kencana, 2016, Jakarta, p.16.

trustee, whose estate, on the other hand, is at the same moment annihilated.<sup>11</sup>

In the cases associated with child custody, the legal bases are as follow:

Article 41, letters a and b of Law Number 1 of 1974 concerning Marriage:

As a result of a marriage breakup due to divorce: Whether the mother or father remains obliged to care for and educate the children, solely based on the interests of the child, whenever there is a dispute regarding the custody of children, the Court makes a decision.

The father is responsible for all the maintenance and education costs needed by the child, if in fact, the father cannot give the obligation, the court can determine that he should bear the cost.

As a comparison, it can be seen as stated by Martha Hayes Sampson,

*In accordance with the 'new' Cypriot family law (Parents and Children Law), the term 'custody' and/or 'custodial rights' has been replaced by the term 'parental care' and/or 'parental rights'. Thus, 'parental care' is the term used in Cyprus for the responsibilities of parents for children and includes such duties as determination of name upbringing, residence, overseeing, training, and teaching. It also includes the duty to manage the child's property and to represent the child in any legal action or case involving its person or property. Martha Hayes Sampson Cypriot law presumes joint parental care of any child born of the marriage, which is the duty and right of each parent to exercise.*<sup>12</sup>

Article 24, paragraph (2) Government Regulation Number 9 of 1975:

(1) During the divorce proceedings at the request of the plaintiff or the defendant or based on consideration of the dangers that may be caused,

the court may permit the husband and wife not to live in one house.

(2) During the divorce proceedings at the request of the plaintiff or defendant, the Court may:

Determine the livelihood that must be borne by the husband

Determine the things that need to ensure the care and education of children;

Determine the things that are necessary to guarantee the maintenance of the goods which are the joint rights of the husband and wife or the items which are the right of the husband or the items which are the wife's rights.

Article 105, letters a, b, and c. Article 156 compilation of Islamic Law,

Article 105

In the event of a divorce:

The care of children who are not yet *mumayyiz* or who are not yet 12 years old is their mother's right;

The care of a child who has already been *mumayyiz* is left to the child to choose between the father or mother as the holder of the right to maintain it;

maintenance costs are borne by the father.

Article 156

As a result of a marriage breakup due to divorce: children who are not yet *mumayyiz* are entitled to *hadhanah* and their mother, except if the mother has passed away, then the position is placed by:

women in a straight line up from a mother;

father;

women in a straight line up from the father;

sister of the child concerned;

blood relatives according to the side lines of the father.

children who are already *mumayyiz* have the right to choose to get a gift from their father or mother; if the holder of the *hadhanah* is apparently unable to guarantee physical and spiritual safety, even though the cost of living and *hadhanah* is sufficient, at the request of the relative concerned,

<sup>11</sup> Soejono dan Abdurrahman, (2003), *Metode Penelitian Hukum*, Jakarta: Rineka Cipta, p. 2

<sup>12</sup> Martha Hayes Sampson, *Enforcement of Family Law Judgment in The European Union*, dalam T.M.C. Asser Instituut, *Comparative study on enforcement procedures of family rights*.

the Religious Court can transfer the rights to other relatives who have the right of *Hadhanah* as well; all the costs of *hadhanah* and child support are the responsibility of the father according to his ability, at least until the child is able to take care of himself as an adult (21 years)

in the event of a dispute concerning the *Hadhanah* and the livelihood of the child, the Religious Court shall render its decision based on the letters (a), (b), and (d);

the court can also keep in mind its ability to determine the total costs for the care and education of children who do not participate in it.

Article 66 paragraph (5) of Law No. 7 of 1989.

The requests for child domination, child living, wife's living, and property with husband and wife can be submitted together with divorce requests or after the divorce pledge is pronounced.

### Purpose of Execution

The ultimate goal of justice seekers is to ensure all their rights trampled upon by other parties are returned through the implementation of the judge's decision. This is also known as execution and it involves the losing parties fulfilling the obligations set out in the decision. It is, therefore, conducted:

1. Voluntarily by the disputing parties,
2. Forcibly using state instruments, especially in a situation the losing party is unwilling to comply voluntarily.

Based on Law Number 7 of 1989, the Religious Court has the authority to enforce its decisions without the assistance of the District Court.

### Types of Execution

According to Sudikno Mertokusumo, it is possible to execute decisions using three methods, among others:<sup>13</sup>

Execution Based on Article 196 HIR and Article 208 Rbg in the form of paying a sum of money.

The reluctance of an individual to voluntarily comply with a decision requiring a sum of money to be paid usually leads to legal confiscation and auctioning of the collateral to obtain the amount decided by the judge to be paid and all costs associated with the implementation of the decision.

In a situation the confiscation has not previously been conducted, the execution is continued until a large number of the movable property has been arrogated and if the amount obtained is not sufficient to settle the sum decided by the judge and the implementation costs, more immovable property belonging to the defeated party is to be confiscated. This is known as the exclusionary confiscation.

Execution Based on Article 225 of the HIR and Article 259 of the Rule in the form of an action

The provisions of Article 225 of the HIR regulate some special cases. For example, an individual sentenced to do certain work but not willing to do cannot be forced by the judge to do the work but it is possible<sup>29</sup> to replace the actions with a sum of money based on the decision of the previous judge. Meanwhile, the assessment of the magnitude<sup>30</sup> of this replacement is under the authority of the Chair of the Religious Court concerned.

Therefore, the original judge's decision is assumed to no longer be valid or withdrawn while the Chair of the Religious Court leading the execution replaces it with another decision in a closed session.

Decision based on Article 1033 Rv. which compels a party to vacate a fixed object. This is also known as the real execution.

Article 1033 Rv. provides for a real execution such that a verdict is ordered to empty an immovable object. In the court practice, the defendant is first reprimanded and later asked to empty and hand over the immovable object to the plaintiff which is the winning party.

Sulaikin Lubis et al. also added Real Execution in the form of auction sales contained in Article 200 paragraph (1) HIR and Article 218 paragraph (2)

<sup>13</sup>Sudikno Mertokusumo, (1993), *Hukum Acara Perdata Indonesia*, Yogyakarta: Liberty, p. 31.

R.Bg.<sup>14</sup> regarding how to sell confiscated goods while conducting real executions in the form of auction sales, the contents of the main provisions include:

Sales are conducted with the assistance of the Auction Office.

The order of goods to be auctioned is appointed by the affected auction person if he wants.

In a situation the amount to be paid according to the decision and the cost of implementing the award are deemed to have been reached, the auction is immediately terminated while remaining items are immediately returned to those affected by the auction.

Before the auction, the properties need to be first announced according to local customs and are allowed to be auctioned 8 days after confiscation.

In the case of an immovable object, there is a need for an announcement twice in 15 days.

In the case of an immovable property that worth more than Rp. 1,000, the announcement needs to be made in a newspaper published in the city not later than 14 days before the auction.

In the case the auction price has been paid, the buyer is given a receipt for the full price and, besides, the right to the immovable property is transferred to the buyer.

The person affected by the auction and his family and relatives is required to surrender the immovable property blankly to the buyer.

In the world of justice, several conditions determine executable decisions and some of them are as follow:

Decisions with permanent legal force.

A decision fundamentally becomes executable after it has obtained permanent legal force due to the definite, fixed, and certain legal relationship it establishes between the parties or litigants. This makes it compulsory for the convicted party to obey and fulfill the content of the decision either voluntarily or by force with the help of public power. So as long as the decision does not have

22

<sup>14</sup> Sulaikin Lubis, (2008), *Hukum Acara Perdata Peradilan Agama Di Indonesia*, Jakarta: Kencana.

permanent legal force, the execution effort cannot be implemented. It is important to note that it is possible to request for the execution from the date the permanent legal force has been obtained and the defeated part is not willing to obey and fulfill the decision voluntarily. There are, however, certain exemptions where it is possible to implement execution without the decision having a permanent legal force based on the law and they include:

Implementation of Decisions and Merta, Decisions That Can Be Implemented First (*uitvoerbaar bij voorraad*)

The provisions of Article 180, paragraph (1) of the HIR, state that executions can be conducted by a court against a court decision even if the decision in question has not yet obtained permanent legal force. This article gives the Plaintiff the right to submit an application to implement the award first, even if the defendant appeals.

Implementation of Provisional Decisions

The provisions of Article 180 paragraph (1) of the HIR also recognize the provisions of the provision such that the temporary first claim precedes the decision of the case and in a situation, the judge grants the lawsuit or claim for the provision, it is possible to implement the decision before the subject matter is decided.

Deed of Peace.

The provisions in Article 130 HIR show the peace certificate made before a judge can be implemented as a decision with permanent legal force. The peace deed has an executorial power from the day it was made even though it is not a court decision.

Execution of Grosse Deed

The provisions of Article 224 HIR make it possible to execute Grosse Deed in order to fulfill the contents of the agreement made by the parties because it has been associated with executive power.<sup>15</sup>

13

<sup>15</sup> Rudini Silaban, *Pelaksanaan Putusan Hakim (Eksekusi)*, article was posted on September 29, 2009, from <http://rudini76ban.wordpress.com/2009/09/29/%E2%80%9C9Cpelaksanaan-putusan-hakim-eksekusi%E2%80%9D/>

### Decisions Not Voluntary

In a situation the losing party fails to voluntarily comply with the verdict even though a warning (*aan maning*) has been given by the head of the Religious Court, it is possible to implement the contents of the decision in two ways which are:

#### Voluntary

The losing party implements the contents of the court's decision on its own by complying with the legal relationship imposed without coercion from any party. This means the contents of the decision have been completed and there is no for any forceful actions or execution. Moreover, in order to guarantee a voluntary implementation, the minutes of voluntary fulfillment of the decision should be prepared by the court in the presence of two witnesses at the place it was fulfilled and signed by the court clerk, two witnesses, and both parties to serve as the evidence to guide the judge in the future. The advantage of complying voluntarily with a decision is to avoid the burden of execution costs and moral losses.

#### Execution

This is implemented in the form of a forced action when the losing party does not want to execute the verdict voluntarily. The court can send a court clerk to implement the execution, and in some other cases, the public force with the defendant having to pay an execution fee which is currently relatively expensive and also bear a significant moral burden.

### Decisions executed as Condemnatory

These are the rulings or dictum containing the element of "Punishment" while those without it are non-executable. They are, however, divided into three types including:

- a) Condemnatory's Decision which is the sentence in the ruling that reads "Punishing and so on",
- b) Declaratory's Decision which declares a situation legal according to the law, and
- c) Constitutive Decisions which is the ruling that is used to create a new situation.

Execution by order and under the leadership of the Chair of the Religious Court

This principle is regulated in Article 195 paragraph (1) of the HIR and it states that in a situation a decision is examined and decided in the first instance by a Religious Court, the execution is under the orders and leadership of the Chair of the Religious Court concerned and implemented by the Registrar or bailiff as outlined in the form of a decree. Meanwhile, the formal requirements for the execution are not adequate without a letter. The order of execution according to Article 197 paragraph (1) of the HIR needs to be with a letter of determination, not verbally permitted and this is an imperative condition. This form is very compatible with the objectives of law enforcement, certainty, and accountability due to the fact that the stipulation letter clearly and comprehensively states the limits of the execution to be implemented by the clerk and also make the supervision easy for the judge.

### Problem Analysis

Several discussions have been made on the issue of executing religious court decisions regarding child custody in order to maintain the continuity of education and care of children concerned until they grow up and become independent. For example, Sayid Sabiq<sup>16</sup> argues that the *Hadhanah* involves taking care of small boys and girls as well as grown-up ones without *mumayyiz* by protecting them from things capable of damaging their body, spirit, and minds, ensuring they are able to stand alone to face life challenges and take responsibility as an adult. The existence of a legal arrangement for the children's survival is to safeguard their development, meet their needs for food and clothing at a certain age, guarantee their future, and also to make efforts towards humanizing them.

The jurisprudence commonly used to determine custody is the Decision of the Supreme Court of the Republic of Indonesia No. 102 K / Sip / 1973 dated April 24, 1975, regarding the guardianship of children. According to the standard, biological

<sup>16</sup> Sayyid Sabiq, (2013), *Fiqh Sunnah*, volume 4 of mold II, Jakarta: Tinta Abadi Gemilang.



mothers are preferred, especially for young children, with their special interests in them being the criterion, unless it is proven they are incapable of taking care of the child. Meanwhile, the Supreme Court Jurisprudence Rule Number 126K/PDT/2001 states that in the case of a divorce, a child under the age of maintenance should be handed over to the closest person that is familiar with the child, the mother. However, in one of the decisions of the Bekasi Religious Court with Number: 354/Pdt.G/2007/PA.Bks, the Panel of Judges decided to give the custody to the father (the Petitioner) because the mother (Respondent) was proved to have the following attributes:

Not trustworthy and lacks the will to educate children

Does not have the ability to maintain the growth, education, and comfort of the children

Does not have the ability to maintain the benefit and interests of the children.

The general consideration in determining the party most entitled to obtain the custody is the welfare of the children in order to ensure their rights to grow and develop both physically and psychologically are guaranteed. The decision is in no way related to the benefits of any of the parents or other parties. The resolution of custody disputes in religious courts is often faced with deadlock because the ruling is only a type of paper tiger not usually implemented by the litigants.

Several opinions have been observed among legal experts concerning the problems of implementing child custody decisions with each classified as either pros or cons. The "Promising Opinion Stating" in Article 259 paragraph (1) R. Bg and Article 319hBW shows the execution of a child's mastery is justified in the interest of the child. In addition, the pros also view the mastery of the child with a conditional break and permanent legal force requires an executable decision. The court has the right to enforce the decision and this is in line with the opinion of The Supreme Court of the Republic of Indonesia, through Team E, that the possession of a child is enforceable effort and, in the case of a hindrance to the execution, a conviction can be established using Article 216

(1) KUHP. Moreover, Article 319 of the Civil Code states if a party in control of minors refuses to surrender them, then those allowed by the court's decision to take custody has the legal right to ask the court, through the bailiff, to enforce the execution of the decision.

These provisions recognize the party currently holding the children and those permitted by the court decision to take the custody as shown in the first and second sentences and this means it is justified to make legal remedies, including asking for the execution of the decision.

The contradictory opinion believes the execution should not be implemented because in order not to force the child and during the process endanger his or her mentality (Article 33 HIR). It was also argued that the jurisprudence related to execution only applies to the law of objects, not people. Moreover, the declaratory's decisions are only allowed to provide a determination of rights and cannot be executed through a forced effort. It is also known in the legal philosophy that children are not sharable objects, therefore, the decisions concerning them are expected to be voluntary in order to benefit them.

These arguments, therefore, show the execution of a child custody decision generates disputes. Some legal experts are of the opinion it is executable while others argue it is not. Those believing it is not executable based their argument on the grounds that the existing jurisprudence is only in the realm of material law, not people. Therefore, it is in accordance with the prevailing norms and this means there is no execution and that the verdict is declaratory. Meanwhile, those supporting execution believe the law adopted lately stipulates the decisions associated with the problem of children's mastery are condemnatory and this means it is executable as long as it has permanent legal force. The court has the authority to use force to implement its decision and this means the Religious Court can forcefully transfer the custody of a child from a parent to another

with the right ability to provide adequate care due to divorce decision or divorce petition.<sup>17</sup>

Apart from the pros and cons opinions of legal experts, careful observation shows the actual execution of a child custody decision is in line with the provisions of Article 319 h of the Civil Code alenia two which states that if a party in control of minors refuses to surrender them, then those allowed by the court's decision to take custody has the legal right to ask the court, through the bailiff, to enforce the execution of the decision. A deep analysis further showed the legal bases for the drawback and these include:

- a. Existence of a legal vacuum regarding the execution of a child custody decision
- b. The need to meet the procedural legal requirements for execution

The problem of a legal vacuum

There is no rule of law specifically formulated to deal with the execution of decisions on child custody and this means there is a void in procedural law. Therefore, there is a need for legal construction through legal discovery by the judges (the principle of *ius curia novit*). The Religious Court, as a state court, is bound by the principal principle of judicial power that "the court may not reject a case submitted to it on the pretext that the law does not exist or is unclear, but it is obligatory to examine and try it" (Ps. 16 paragraph (1) of Law No. 20/2004). This means the judge needs to explore, follow, and understand the legal values and sense of justice of the community (Ps. 28 paragraph (1) of Law No. 4 of 2004). In this context and other efforts to implement or execute the contents of court decisions where there are no provisions in the HIR and R. Bg articles regulating the execution of the custody, this method is expected to be applied.

Execution Law

For the execution of the child custody decision to be legal according to the law, it needs to be implemented through the applicable procedural

law and meet appropriate conditions otherwise, it is invalid and needs to be repeated.

The requirements are as follows:

The decision on custody of the child is condemnatory

The child custody decision has permanent legal force

The losing party is not willing to implement the decision voluntarily

The winning party submits an application for execution to the Religious Court which decides the child custody case

The Religious Court has set a hearing session

The grace period or warning was exceeded in accordance with article 207 R.Bg

The Chair of the Religious Court issued an execution order

The execution was implemented at the place the petition was initiated and the sentence to hand over the child was made

The execution was assisted by two witnesses that fulfilled the elements as mentioned in Article 210 paragraph (2) of the RBg.

The clerk took the child in a good, polite manner and adhered to the prevailing customs, if not voluntarily handed over then it was forcibly handed over

The minutes of the execution was signed by the bailiff along with two witnesses with duplicates.

#### 4. CONCLUSION

The decisions of Religious Courts concerning child custody can be executed but the process is expected to be conducted voluntarily in a family way with wisdom and by paying attention to local customs. The inability to implement the decision properly triggers the enforcement of the decision. Meanwhile, the court's ruling on child custody is expected to be in the interests of the child.

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<sup>17</sup> Abdul Manan, *Op. Cit.*, p. 436

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