



- The City Tower, Lt. 12, N1,
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LEGAL OPINION

Nomor: 097/Djatmiko-LO/07/2023

In this case, in our position as independent legal experts from XXXX XXXXXX in the case mentioned above in Indonesia, it is necessary to explain and state the following matters:

- A. It is true that YYYYYYYYYY has chosen to settle his legal dispute at the South Jakarta Religious Court which is part of the Religious Chamber of the Supreme Court of the Republic of Indonesia. This case is not the first time happened in Indonesia. There have been many child custody disputes experienced by ordinary people, officials and artists. The Supreme Court has decided various cases of child custody disputes. Cases of child custody disputes can be resolved in the Religious Courts (for Muslim citizens) or in the District Court (for Indonesian citizens of religions other than Islam). For Muslim citizens, the rules used are the Compilation of Islamic Law and Islamic Jurisprudences, as well as the technical provisions stipulated in the Supreme Court Circular, namely SEMA Number 1 of 2017. The parenting pattern is also given guidelines by judges in accordance with considerations of justice, both from a legal and socio-religious perspectives. This concerns access and the best childcare techniques for both parents and their children.
- B. It is true that the custody dispute between the parties has been decided by the Supreme Court with a Judicial Review through Judicial Review Decision Number 171 PK/Ag/2022 with the winner YYYYYYYYYY. Previously, the Supreme Court had examined legal efforts in the form of cassation with cassation decision Number 311K/Ag/2022 dated April 25 2022 which was won by XXXX XXXXXX. At the appeal level, this dispute was won by XXXX XXXXXX with the decision of the Religious Court Number 182/PDTG/2022/PTA Jk dated 14 October 2022. As for the first level court, this dispute was won by YYYYYYYYYY.
- C. It is true that the case aquo is also under examined by judicial review examination at the Supreme Court of the Republic of Indonesia with Number 11/P/HUM TUM Chamber of the Supreme Court which was registered on 15 May 2023 and distributed on 23 May 2023 with the Assembly as follows: the Chief Dr. H. Yulius, S.H., M.H., Member of Assembles: 1 H. Is Sudaryono, S.H., M.H., 2 Dr. H. Yosran, S.H., M.Hum. and the Alternate Registrar Michael Renaldy Zein, S.H., M.H. However, in our view, judicial review efforts on court decisions are not recognized in the judicial process in Indonesia. Judicial review is only known to test the validity of a legal regulation regarding the presence or absence of vertical synchronization. If the rule under review is under a law, then a judicial review will be carried out by the Supreme Court, while testing a law against the Constitution (Constitution), then the judicial review is conducted by the Constitutional Court. This means that in the case of a dispute over child custody between YYYYYYYYYY versus XXXX XXXXXX, a judicial review of the decision of judicial review cannot be carried out by the Supreme Court or other judicial institutions. The final legal remedy in the judicial process in Indonesia is not a judicial review but a review of court decisions that have permanent legal force. As a note, the Constitutional Court has decided that a judicial review other than a criminal case can only be carried out once as it has been confirmed in the Constitutional Court Decision Number 16/PUU-VIII/2010 concerning reviewing the constitutionality of Article 66 paragraph (1) of the Supreme Court Law and Article 24 paragraph (2) of the Judicial Powers Law.



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- D. Based on the Judicial Review decision by the Supreme Court, from a normative point of view, the case of the dispute over child custody between YYYYYYYYYY and XXXX XXXXXX has a permanent legal force. The efforts to seek justice by XXXX XXXXXX continue to be carried out so that the Judicial Review decision is actually carried out, which is primarily aimed to fulfill the best interests of the child (The Best Interest of Child) as stipulated in the United Nation Convention on The Right of Child which has been ratified by the Presidential Decree Number 36 of 1990 through joint legal custody. Based on the Judicial Review decision, the two parties take care of the three children in shared parenting with the distribution that YYYYYYYYYY has joint rights with the children on school days, namely Monday to Friday. Whereas XXXX XXXXXX has the right to be with the children on Saturdays and Sundays, school holidays and plus national holidays. The implementation of the Judicial Review decision should not result in a violation of law by the efforts of one of the parties, especially YYYYYYYYYY to eliminate XXXX XXXXXX' *hadhanah* rights. If something happens on the other way around, that one of the parents, in this case for example YYYYYYYYYY forbids his children to meet and get affection, let alone incites the children to hate their mother, forbids the children's rights to worship according to their religion (Islam), then this is a violation to the basic rights of children which can be used as an excuse to revoke YYYYYYYYYY's *hadhanah* rights to their children as it has been stipulated in the Law Formulation of the Chamber of Religion number 1 in Supreme Court Circular Letter Number 1 of 191 7. Henceforth, normative provisions regarding child care must be fulfilled as it has been stipulated in the provisions of the Compilation of Islamic Law (KHI) Article 105 letter A which reads "Care for a child who is not yet mumayyiz or not yet 12 (twelve) years old is the right of the mother" and likewise in the Article 156 which reads "Care for a child who is not yet mumayyiz or not yet 12 (twelve) years old is the right of the mother". This provision can no longer be interpreted sociologically as applied to granting custody of children to YYYYYYYYYY.
- E. Even though there were attempts by attorneys from XXXX XXXXXX to submit a Judicial Review of the RI Supreme Court Review Decision, in our view the Supreme Court Review decision regarding the divorce case between XXXX XXXXXX and YYYYYYYYYY has a permanent legal force and it can be enforced. Examination of decisions through judicial review of PK which we call unknown or absent in the process of constitutional law courts (MA and MK) because the last legal remedy in the judicial process in Indonesia is not a judicial review but a judicial review of court decisions that already have the power permanent law, does not prevent the judicial review execution decision as long as the parties, especially children, are prepared or specially prepared. Thus, in accordance with the principles of the international law and its application which consists of the principles of territoriality, nationality, interest, *nebis in idem*, *pacta sunt servanda*, *jus cogens*, inviolability and immunity, the Courts and Law of the Republic of Indonesia have the right to adjudicate, examine cases of disputes over divorce, guardianship or joint property as a result of the marriage between XXXX XXXXXX and YYYYYYYYYY and this means that the court in Singapore has lost the right to re-examine this case.
- F. What is the concept of *hadhanah* in Indonesia: what does it mean when Indonesian courts order that a child be "cared for" by the parents?

Indonesia has not specifically regulated family law yet, but it has substantially been embodied in laws and regulations which contain Islamic law, namely the Law Number 1 of 1974 concerning Marriage, which consists of 14 chapters and 67 articles, Government

Regulation No. 9 of 1975 concerning Implementation of the Law No. 1 of 1974 concerning Marriage, and the Presidential Instruction Number 1 of 1991 concerning KHI which consists of Book I concerning Marriage Law, Book II concerning Inheritance Law and Book III on Waqf Law. 10 The three laws and regulations are sources of material law which is the main reference for family law within the Religious Courts 11 as a court whose authority is to handle family law issues for people who are Muslim. Legal provisions on child custody, especially legal provisions regarding disputes over child custody or commonly referred to as *hadhanah* rights or child care.

Provisions for implementing the Law Number 1 of 1974 concerning Marriage have been regulated for followers of the Islamic religion using the Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law, Although the Compilation of Islamic Law (KHI) is not a law made by the House of Representatives (DPR) and ratified by the president, its position as a compilation of laws must be interpreted as positive Islamic law to implement statutory regulations and it be used as a reference. One of the provisions in the Compilation of Islamic Law is the concept of *hadhanah*, based on the Compilation of Islamic Law it has been determined what *hadhanah* is meant, in what aspects of maintenance *hadhanah* can be given, who can be given *hadhanah*, who *hadhanah* can give, who bear all costs incurred as a result of *hadhanah*, when the implementation of *hadhanah* can be terminated, etc. The following are several articles that regulate *hadhanah* in the Compilation of Islamic Law.

Article 1 letter g

g. Child rearing or hadhonah is the activity of raising, nurturing and educating children until they are adults or able to stand on their own;

When the Indonesian Court orders that a child be "cared for" by parents, it means "care" includes the activities of raising, caring for and educating children until they are adults or able to stand on their own.

Further determination regarding *hadhanah* is regulated in the Compilation of Islamic Law article:

Article 105

In case of divorce:

- a. The maintenance of a child who is not yet mumayyiz or who is not yet 12 years old is the right of the mother;*
- b. The maintenance of mumayyiz children is left to the child to choose between his father or mother as the holder of his maintenance rights;*
- c. maintenance costs borne by his father.*

Article 156

The consequences of breaking up a marriage due to divorce are:

- a. child who has not been mumayyiz has the right to have hadhanah and his mother, unless his mother has passed away, then his position is replaced by:*
 - 1. the women in a straight line up from the mother;*
 - 2. father;*
 - 3. the women in a straight line up from the father;*

4. *sister of the child concerned;*
 5. *women who are related by blood from the side of the father.*
- b. *children who are already mumayyiz have the right to choose to get hadhanah from their father or mother;*
 - c. *if it turns out that the hadhanah holder cannot guarantee the physical and spiritual safety of the child, even though the maintenance and hadhanah costs have been sufficient, then at the request of the relative concerned the Religious Court may transfer the hadhanah rights to other relatives who also have hadhanah rights;*
 - d. *all hadhanah costs and child support are the responsibility of the father according to his ability, at least until the child is an adult and can take care of himself (21 years);*
 - e. *in the event of a dispute regarding hadhanah and child maintenance, the Religious Court shall render its decision based on letters (a), (b), and (d);*
 - f. *the court may also, bearing in mind the ability of the father, determine the amount of costs for the maintenance and education of children who do not share with him.*

Based on the explanation of letter f above, the court can also, bearing in mind the ability of the father, determine the amount of costs for the maintenance and education of children who are not under his care.

G. Do the Indonesian courts also make rules (patterns) for child rearing?

Regulatory arrangements for such care have been answered in the previous question, whereas in practice several different court rulings have been encountered in regulating childcare fraud. *Hadhanah* decisions are not always left up to the Judge to determine, as for example in case 0142/Pdt.G/2018/PA.Pkp *hadhanah* decision can be determined based on the decision of the peace deed which has been successfully completed after the mediation process. In the amicable agreement it was agreed between the plaintiff and the defendant that it was the plaintiff who obtained the *hadhanah* rights over their children, while the Defendant was responsible for providing child care costs (*hadhanah*), in the form of a minimum of Rp. 700,000, - (seven hundred thousand rupiah) every month until the child is adult or 21 years old. These costs do not cover health and educational costs as well as an increase in living costs of 10% each year. The Panel of Judges in this case accepted the parenting pattern based on the peace deed and considered that the peace agreement was in accordance with the Article 27 paragraphs (1) and (2) of the Supreme Court Regulation Number: 1 of 2016 concerning Mediation Procedures in Courts.

Although cases can be found that regulate *hadhanah* in detail based on the peace deed, often the religious court's decision only gives a brief injunction as an example as follows:

1. Case 362/Pdt.G/2022/PA.Spn with the following orders:
 - Granted the Plaintiff's lawsuit;
 - Divorcing one bain shughro of the Defendant (Junaidi Bin Zulfahri) to the Plaintiff (Surya Nengsih Binti Mhd Jalin);

- Determined the custody of the child (*hadhanah*) named Ladies Tree bin Junaidi, female, born on 23 June 2014 to the plaintiff (Surya Nengsih Binti Mhd Jalin) as the biological mother;
 - Charge the costs of this case to the DIPA of the Sungai Full Religious Court for the 2022 fiscal year;
2. Case 685/Pdt.G/2022/PA.Lt with orders:
- Granted the Plaintiff's lawsuit;
 - Stipulates that the right to care for the child (*hadhanah*) named M. Gilang Ramadan rests with the Plaintiff as the child's biological father;
 - Punish the Defendant and or whoever the party who controls the child named M. Gilang Ramadan to hand him over to the Plaintiff;
 - Charge the Plaintiff to pay court fees in the amount of IDR 495,000 (four hundred ninety five thousand rupiah);
3. Case Number 588/Pdt.G/2021/PA.Smn with the order:
- Granted the Plaintiff's lawsuit;
 - Determine the custody of the named child (*hadhanah*);
 1. ISMAIL ZISHAN KHAN (4 years old)
 2. SAQINA ZISHAN KHAN (1.5 years old)is with the plaintiff as the biological mother of the child;
 - Ordered the plaintiff as the Hadhonah holder to fulfill his obligation to provide access to the defendant to meet his child;
 - Charge the Plaintiff to pay the costs of this case in the amount of IDR 405,000 (four hundred and five thousand rupiah);

In these 3 cases, as examples of *hadhanah* determined by the Panel of Judges without going through an amicable agreement, it was found that the court's decision did not stipulate in detail relating the form or pattern of child care that should be given by the winner of the *hadhanah* right in what form, how much, and the mechanism How the payment of expenses for the care of their child can be regulated with certainty. The Compilation of Islamic Law in Article 105 only stipulates that meeting the child's needs is the responsibility of the father, while the mother's job is to take care of her child. This pattern is also not regulated in the consideration of the panel of judges as an integral part of the verdict. Whereas the Article 156 of the Compilation of Islamic Laws letter f stipulates "The court can also, bearing in mind the ability of the father, determine the amount of costs for the maintenance and education of children whom he must pay for."

- H. Clarify whether the guardianship law of Indonesian Muslims makes a distinction between the concept of custody and the concept of care and control as the guardianship law in Singapore?

Perwalian (*guardianship*) etymologically or linguistically comes from Arabic from the word *wali* and plural from *awliya* which means; friend, client, relative or protector. Guardianship is called *al-walayah* (al-territory), i.e. one who has power or one who manages or who controls something.



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In Islamic jurisprudence literature, guardianship is the complete dominion given by a religion to an adult person to control and protect people or property.

While in the issue of child maintenance (*hadhanah*) and adoption of children, the term often used in the jurisprudence literature of guardianship is the management by adults to the needs of rudimentary children (*ahliyatul-ada'*), either having no ability at all or people whose abilities are less than perfect such as *mumayyiz* until he has not and is not able to act on himself. While people who help manage property and protect people who are not yet or people who are not competent in acting for themselves and the law are called guardians.

Guardianship for children is referred to as a special guardianship that includes guardianship over the care of one's life and property, such as for orphans. Management here is in the sense of accountability of actions, supervision and guardianship in legal terms.

The Islamic guardianship law especially with regard to guardianship in the care of children (*hadhanah*) does not distinguish between the "concept of custody" and the "concept of care and control" as it is applicable in Singapore. If someone has a position as a *hadhanah* holder, his responsibilities include custody duties (children's needs for education, religion, health) as well as care and control (related to children's daily lives such as eating, sharing children's togetherness, transportation, and setting children's sleep hours). The two concepts (custody and care and control) are separated in the Singapore law, in the Islamic law both things become the responsibility (obligation) of parents whether there is or is no divorce. The Judges can decide on children under the age of 12 to be cared for by both parents without distinction in the concept of custody or care and control.

The maintenance or upbringing of children (*hadhanah*) applies between two elements that become pillars in the law, namely the parents who take care of them called *hadhin* and the child who is cared for or *mahdun*. The importance of *Hadhanah* for the future of the child, then a *hadhinah* (caregiver) who handles and organizes it the interests of the little children he take care for is adequacy and ability. The sufficiency and ability of the *hadh* must require that certain conditions are not fulfilled one of them will lose the ability to administer the *hadhanah*.

Abdul Rahman Ghazali (2003: 181) argues that for the benefit of children and their maintenance, conditions are needed for *Hadhinah* and *Hadhin*. The conditions are:

1. Not tied to a job that causes him not to do *hadhanah* well, such as *hadhinah* tied to a job that is far away from the child, or almost all of his time is spent for working.
2. Let him be a believer, that is, puberty, intelligent and not disturbed by memory. *Hadhanah* is a job which is full of responsibility, while a person who is not a believer is some one who cannot account for deeds.

3. Wanting to have the ability to do *hadhanah*.
4. Should ensure the maintenance and education of children, especially those related to ethics. People who can corrupt children's ethics, such as adulterers, thieves, do not deserve to perform *hadhanah*.
5. Let the *hadhinah* not marry a man who has no mahram relationship with the child. If she marries a man who has a mahram relationship with the child, then the *hadhinah* has the right to perform the *hadhanah*, just as she married the child's uncle and so on.
6. *Hadhinah* should be one who does not hate the child. If there is a person who hates the child, it is feared that the child will be in misery".

Religious equality is not a requirement for *hadhinah* unless it is feared that it will turn children away from Islam. Because the important thing in *hadhanah* is that *hadhinah* have a sense of love and affection for children and are willing to take care of children as well as possible.

What happens if a hadhanah holder then converts to a religion other than Islam and forbids his children to recite and observe the Islamic law, such as praying and wearing hijab? In this case, of course, the requirement of religious equality is important considering that hadhanah holders are feared to turn away children from Islam. For this reason, in relation to the custody dispute between YYYYYYYYY and XXXX XXXXXX, XXXX XXXXXX can ask the Court to revoke or cancel YYYYYYYYY's custody of his three mumayyis children (under 12 years old).

While in the Islamic Law Compilation the issue of child maintenance (*hadhanah*) is regulated in the third part about the consequences of divorce of the Article 156.

Article 156.

Consequences of Divorce

The consequences of the breakup of marriage due to divorce are:

- a. *A child who has not been mumayyiz is entitled to a hadhanah from his mother, unless the mother has died, then his position is replaced by:*
 1. *The women are in a straight line up the mother;*
 2. *Father;*
 3. *The women are in a straight line up from the father;*
 4. *The sister of the child concerned;*
 5. *Women are blood relatives according to the side line of the mother;*
 6. *Conscious relative women according to the side line of the father;*
- b. *A child who has been mumayyiz has the right to choose to get hadhanah from his father or mother;*



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- c. *If the holder of the hadhanah is found to be unable to guarantee the physical and spiritual safety of the child, even though the cost of living and the hadhanah has been met, then at the request of the relative concerned the Religious Court may transfer the right of hadhanah to another relative who has the right of hadhanah as well;*
- d. *All expenses and child support shall be the responsibility of the father according to his ability, at least until the child is an adult able to take care of himself (21 years).*

Specifically, the law in Indonesia does not categorize *hadhanah* into custody, care and control, but in fact the *hadhanah* itself already includes custody, care and control, because basically a child custody or *hadhanah* according to the Article 1 letter g of the Compilation of the Islamic Law is the activity of raising, nurturing and educating children until they are adults or they are able to stand on their own. Furthermore, the Religious Courts in Indonesia have never specified these 3 activities because they are too complex to be compartmentalized. Based on our understanding, the law in Singapore emphasizes this distribution in the custody scheme, namely by making health, religious and educational decisions carried out simultaneously by both parents until the child reaches the age of independence, but full of care and control are given only to the mother. This is the difference of from *hadhanah* in Indonesia, if we look at the legal concept of *hadhanah* in Indonesia from a positivism point of view, the mechanism for caring for children who are not yet 12 years old is fully given to the mother according to the Article 105 letter a of the Compilation of Islamic Law, while the Article 105 letter c of the Compilation of Islamic Law regulates that all costs arising from maintenance are given by the father. Based on the above information, it can be concluded that in Islamic guardianship law of the concept of custody and care and control are not different.

Thus, this expert's opinion was prepared with the hope that it can be used as an evidence in the framework of explaining a legal case that is being disputed by the parties.

Jakarta, 26th July 2023
Jurist,

**Jurist Doctor. Wahyu Prijo Djatmiko, Prof. Jurist Doctor. Suteki, S.H., M.Hum.
S.H., M.Hum., M.Sc**

PENDAPAT HUKUM (*LEGAL OPINION*) KASUS PEMBUNUHAN BEGAL DI WILAYAH HUKUM POLRES MALANG

A. POSISI KASUS:

Bahwa telah terjadi pembunuhan terhadap terduga begal (G) yang dilakukan oleh anak (ZA, 17 th, menikah). Adapun *summarized sequential order of legal events* (peristiwa hukum) tersebut dapat digambarkan sebagai berikut:

1. Bahwa ZA (**TSK Pasal 338 subs Pasal 351 Ayat (2) KUHP**) dengan teman wanitanya di ladang tebu dihampiri oleh G (korban meninggal) dan M.
2. Bahwa ZA diminta untuk menyerahkan barang yang dimilikinya kepada G dan M, namun ZA tidak mau.

3. Bahwa kemudian G dan M mengancam akan memperkosa teman wanita ZA bila dia tidak menyerahkan semua barang miliknya tersebut.
4. Bahwa pada saat yang bertempo cepat ZA mengambil pisau dari bagasi motornya dan sambil berteriak menusukkan pisau tersebut langsung tepat ke dada G dengan sekali tusukan yang mematikan.
5. Bahwa setelah terjadi penusukan G dan M berlari menjauh, ZA serta merta mengejar M untuk (diduga) melakukan tindakan yang sama seperti yang telah dilakukan terhadap G namun tidak berhasil.
6. Bahwa alasan ZA melakukan penusukan karena ancaman verbal yang diucapkan oleh G.
7. Bahwa dalam peristiwa *a quo* G dan M tidak membawa senjata (*unarmed*) dan tidak melaksanakan kekerasan terlebih dahulu.

B. ISU DAN ANALISIS HUKUM

1. Bahwa analisis secara komprehensif perlu dilakukan oleh Penyidik untuk mengungkap fenomena dibalik kejadian itu.
2. Bahwa di dalam hukum Polisi perlu melakukan analisis dengan pendekatan *socio legal* untuk melengkapi SOP dan norma positif baku yang telah ditetapkan. Analisis *socio legal* dapat berupa analisis psikokriminologi, psikososial, sosial ekonomi dll.
3. Bahwa penetapan status tersangka terhadap ZA oleh penyidik unit PPA Polres Malang merupakan langkah yang tepat karena ZA telah melakukan tindak pidana pembunuhan (kejahatan yang paling serius terhadap kemanusiaan).
4. Bahwa pembunuhan merupakan kejahatan yang sangat berat dan dianggap sebagai perbuatan yang tidak berkemanusiaan. Oleh karena

itu dengan menetapkan ZA sebagai tersangka, pihak kepolisian berusaha untuk mewujudkan perlindungan kepentingan hukum atas kejahatan terhadap nyawa (*misdrijven tegen het leven*).

5. Bahwa penetapan ZA sebagai tersangka adalah sah karena penyidik telah memiliki bukti permulaan yang cukup (**Pasal 1, angka 14 UU no 8 tahun 1981 tentang HAP**). Adanya dalih untuk melindungi diri dan orang lain perlu dibuktikan lebih lanjut dengan berbagai analisa ilmiah yang terpadu (pendekatan *socio legal*) untuk mengungkap fakta yang sebenarnya dalam peristiwa *a quo*.
6. Bahwa apabila Polisi membebaskan seseorang yang disangka dengan bukti permulaan yang cukup telah melakukan tindak pidana pembunuhan itu terbebas dari segala pertanggungjawaban pidana, maka hal tersebut akan menjadi preseden

buruk bagi Polri dalam mengemban fungsi utama tugas pokoknya sebagaimana amar **Pasal 13 UU No. 2 tahun 2002 tentang Kepolisian Negara)** yang menyatakan bahwa Polisi bertugas untuk memelihara HARKAMTIBMAS, menegakan hukum, dan memberikan perlindungan, pengayoman dan pelayanan kepada masyarakat.

7. Fakta ZA masih dibawah umur harus dipahami dengan cermat karena yang bersangkutan telah berumur 17 tahun dan telah menikah.
8. Bahwa apabila Polisi tidak cermat dengan membebaskan tersangka dari pertanggungjawaban pidana karena yang bersangkutan masih dibawah umur dan/atau karena demi membela diri (*noodweer*) maka Polri telah mengabaikan tupoksinya sebagaimana amanat **Pasal 13 UU a quo**. Hal ini tentu akan memiliki *multiplying effects*, negatif yang

berdimensi luas terutama dalam meniadakan maraknya budaya main hakim sendiri (*vigilante justice*) dikalangan remaja serta masyarakat luas.

9. Bahwa perlu digali secara komprehensif alasan ZA membawa pisau, jenis dan kegunaan teknisnya.
10. Bahwa proses membela diri harus dibarengi dengan adanya ancaman riil dari si penyerang. Terlebih jika belum diketahui apakah si penyerang bersenjata atau tidak bersenjata (*unarmed*).
11. Mengenai ancaman pemerkosaan yang dilakukan oleh G, memang memiliki kemungkinan bisa terjadi karena lokasi ancaman ada di daerah Kebun Tebu yang sepi. Namun, untuk melakukan pemerkosaan dengan kondisi 2 orang berhadapan dengan 2 orang relatif sulit. Jadi ahli berpendapat bahwa ancaman tersebut

memiliki prosentase kemungkinan terjadi yang tidak mutlak.

12. Bahwa tindakan membela diri dengan menusukkan sebuah pisau langsung tepat ke dada G (jantung), merupakan tindakan sengaja yang berniat (*mens rea*) untuk mematikan dan bukan untuk melumpuhkan/melemahkan.
13. Bahwa dalam menerapkan peraturan hukum, penyidik sebaiknya memperhatikan konteks bukan hanya bertumpu pada teks (*moral reading* bukan hanya sekedar *text reading*). Hukum sebagai institusi sosial diciptakan demi mewujudkan tertib dan harmoni sosial. Oleh alasan demi pembelajaran dan kemaslahatan masyarakat luas ini, tindakan Penyidik Unit PPA Polres Malang membebaskan pertanggungjawaban pidana pada ZA dengan **Pasal 338 subs Pasal 351 Ayat (2) KUHP** merupakan langkah yang tepat sekali

yakni dengan mendepankan asas kemanfaatan hukum (*legal puposiveness*).

C. KESIMPULAN DAN REKOMENDASI HUKUM

Bahwa berdasarkan isu dan analisis hukum di atas saya menyimpulkan:

KESIMPULAN

1. Bahwa penanganan kasus *a quo* oleh Unit PPA Polres Malang adalah sudah tepat sesuai tupoksi Polri (**Pasal 1, angka 14 UU no 8 tahun 1981 tentang HAP dan Pasal 66 Ayat (1) dan (2) PERKAP 12 tahun 2009**).
2. Bahwa alasan ZA masih di bawah umur dan membunuh karena membela diri (**Pasal 49 KUHP**) tidak bisa digunakan sebagai pembenar alasan penghapus sifat melawan hukum yang membebaskan tersangka dari pertanggung jawaban pidana karena

- peristiwa tersebut berkaitan dengan perampasan nyawa seseorang.
3. Bahwa hukum pada prinsipnya adalah melindungi entitas yang paling menderita yang dalam hal ini si korban pembunuhan.
 4. Bahwa penetapan kasus tersangka pada ZA merupakan wujud upaya preventif Polri untuk meniadakan budaya main hakim sendiri (*vigilante justice/eigenrichting*) yang sedang marak ditengah masyarakat kita. Terutama di kalangan anak-anak/remaja.
 5. Bahwa pembelaan diri ZA dengan membunuh merupakan pembelaan diri/respon yang berlebihan (*noodweer exces*) yang tidak bisa dibenarkan.

REKOMENDASI :

Bahwa demi kemaslahatan kemanusiaan dan demi keamanan sebaiknya ZA diamankan di *safe house* untuk menghindari hal-hal yang tidak

diinginkan dan demi mengurangi tekanan psikologis yang mungkin terjadi akibat dari perbuatannya.

Nganjuk, 17 September 2019

Hormat saya,

Ahli Hukum Pidana

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