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Child Protection in Homecare and Child Care Services Without Permit: A Sharia Economic Legal Perspective (Analysis Of Contracts, Gharar, And Maslahah)

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Abstract: *This research analyzes the practice of homecare services and childcare centers (TPA) operating without official permits from the perspective of Islamic economic law. Using a normative juridical approach that combines normative analysis of fiqh muamalah with library research on relevant legislation and legal literature, this research finds that: first, the contract (akad) of illegal childcare services contains significant elements of gharar (uncertainty) in terms of service quality, caregiver qualifications, and accountability mechanisms, making it problematic under sharia economic law principles; second, the absence of the state as regulator constitutes a neglect of the hisbah (market supervision) function required by sharia; third, maslahah analysis shows that the mafsadat caused by illegal childcare services far exceeds its economic benefits; and fourth, existing sharia consumer protection mechanisms do not yet explicitly cover childcare services. This research recommends the development of childcare service contract standards based on Islamic economic law principles and integrated into the national regulatory system.*

Abstrak: Penelitian ini menganalisis praktik layanan homecare dan tempat penitipan anak (TPA) yang beroperasi tanpa izin resmi dari perspektif hukum ekonomi syariah. Menggunakan pendekatan yuridis normatif yang memadukan analisis normatif fiqh muamalah dengan kajian kepustakaan terhadap peraturan perundang-undangan yang berlaku, penelitian ini menemukan bahwa: pertama, akad layanan penitipan anak ilegal mengandung unsur gharar (ketidakjelasan) yang signifikan dalam aspek kualitas layanan, kualifikasi pengasuh, dan mekanisme pertanggungjawaban, sehingga bermasalah menurut prinsip-prinsip hukum ekonomi syariah; kedua, ketidakhadiran negara sebagai regulator merupakan kelalaian terhadap fungsi hisbah (pengawasan pasar) yang diwajibkan oleh syariah; ketiga, analisis maslahah menunjukkan bahwa mafsadat yang diakibatkan oleh layanan penitipan anak ilegal jauh melebihi manfaat ekonomisnya; dan keempat, mekanisme perlindungan konsumen syariah yang ada belum secara eksplisit mencakup layanan penitipan anak. Penelitian ini merekomendasikan pengembangan standar akad layanan penitipan anak yang berbasis prinsip-prinsip hukum ekonomi syariah dan diintegrasikan ke dalam sistem regulasi nasional.

Keywords: *Sharia Economic Law; Ijarah Contract; Gharar; Maslahah; Hisbah; Childcare Center; Sharia Consumer Protection*

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Introduction

The development of the service-based economy in Indonesia over the past two decades has given rise to various new business models in the childcare and care sector. Homecare services (childcare in the user's home) and daycare centers (TPA) have now developed into a service industry with significant transaction value. Data from the Ministry of Manpower (2023) indicates that the number of workers in the childcare sector has reached more than 2.5 million, making it one of the fastest-growing service sub-sectors. Behind this growth lies a fundamental problem that has not received adequate attention from a sharia economic law perspective. Most homecare and TPA services in Indonesia, particularly small and medium-sized ones, operate semi-formally or even illegally without official permits. This situation not only raises positive legal issues but also poses serious problems from the perspective of Islamic jurisprudence (fiqh muamalah) and sharia economic law. In the tradition of Islamic jurisprudence (fiqh muamalah), every economic transaction must adhere to principles that ensure fairness, transparency, and protection for all parties involved, especially the most vulnerable. Illegal childcare services operating without clear standards and adequate accountability mechanisms have the potential to violate several fundamental principles of Islamic economic law, including the prohibition of gharar (unclearness), the obligation to be transparent in contracts, and the principle of maslahah (benefit).

The primary concern of this research is that in childcare services, the party most impacted by these illegal practices is the child, who is not directly involved in the contract but bears all the risks associated with its implementation. This situation creates a unique ethical and legal dimension from the perspective of Islamic economic law, where the protection of vulnerable third parties is an essential consideration. This research aims to examine the issue of illegal homecare and childcare services from the perspective of Islamic economic law, specifically through an analysis of contracts, gharar, maslahah, and hisbah. Using a normative juridical approach, this research examines applicable legal norms and formulates comprehensive recommendations based on primary, secondary, and tertiary legal materials.

This research formulates the following problems: (1) What are the characteristics of contracts in homecare and TPA services, and do contracts in unlicensed services meet the requirements for validity according to Islamic economic law? (2) How is the analysis of gharar for illegal homecare and TPA services and its implications according to muamalah fiqh? (3) How is the analysis of maslahah for the phenomenon of illegal childcare services and the state's obligations (hisbah) in handling them? (4) How is the reconstruction of childcare service regulations based on Islamic economic law principles?

Literature Review

The Concept of Contract in Islamic Fiqh

A contract (akad) is the core of every transaction in Islamic economic law. Al-Kasani, in Bada'i Al-Sana'i, defines a contract as a bond or agreement formed through ijab (offer) and qabul (acceptance), which gives rise to legal consequences for the contracting parties (Al-Kasani, 2000). In contemporary Islamic economic law, a contract is understood more broadly as any valid agreement between two or more parties that aims to establish certain rights and obligations. For a contract to be valid, Islamic economic law requires the fulfillment of four pillars of a contract: (a) the existence of contracting parties (aqidain) who meet the requirements of legal capacity; (b) the existence of a contract object (mahallul aqd) that is lawful, clear, and capable of being transferred; (c) a valid acceptance and acceptance (sighat al-aqd) occurs; and (d) the purpose of the contract (maudhu' al-aqd) does not conflict with sharia (Ibn Rushd, 2004).

In addition to the pillars, the contract must also fulfill various valid requirements related to clarity, honesty, voluntariness, and compliance with applicable legal provisions. In the context of childcare services, the most relevant contract is the ijarah ala al-amal (wages for work or services) contract. Ijarah is defined as a contract for the transfer of the right to use a service for a specified period of time in exchange for payment of an agreed-upon wage (Al-Zuhaili, 2004). In addition to ijarah, the dimension of the wakalah contract is also relevant, given that the service provider acts as the parent's representative in carrying out the caregiving function. The combination of these two types of contracts creates a layered structure of legal responsibility for childcare providers.

The Principle of Prohibition of Gharar in Transactions

Gharar literally means danger, uncertainty, or deception. In Islamic jurisprudence (fiqh muamalah), gharar is defined as uncertainty inherent in a contract regarding the form or nature of the object of the contract, potentially causing loss to one of the parties. The legal basis for the prohibition of gharar is a hadith of the Prophet Muhammad (peace be upon him), narrated by Muslim, stating that the Prophet (peace be upon him) forbade transactions involving gharar. Scholars divide gharar into two categories based on its severity: major gharar (fahisy), which invalidates the contract, and minor gharar (yasir), which is tolerable and does not invalidate the contract. Factors considered in determining the degree of gharar include: whether the uncertainty is essential to the object of the contract, whether there is a way to eliminate the gharar, and whether the gharar poses a significant risk of loss (Al-Darir, 1997). In contemporary Islamic economic law, the principle of the prohibition of gharar has been developed into a comprehensive consumer protection framework. DSN-MUI Fatwa No. 04/DSN-MUI/IV/2000 emphasizes that every sharia transaction must be free from gharar, which could harm any party involved. This principle applies to all types of transactions, not just financial transactions but also services, including childcare services.

The Concept of Maslahah and Mafsadat in Sharia Economic Law

Maslahah (benefit) is one of the most fundamental concepts in Islamic economic law, serving as a criterion for evaluating every economic activity. Al-Ghazali defined maslahah as the effort to maintain and realize the objectives of sharia, which encompass the preservation of five essential elements: religion (din), life (nafs), reason (aql), posterity (nasl), and wealth (mal). Any economic activity that supports the preservation of these five essential elements is considered to have maslahah, while any that threatens them is considered to contain mafsadat (Al-Ghazali, 1997). In the context of childcare services, the analysis of maslahah and mafsadat becomes particularly relevant. From a maslahah perspective, childcare services contribute to increased economic productivity by enabling parents, particularly mothers, to participate in the workforce. From a mafsadat perspective, substandard and unlicensed services can threaten the safety and well-being of children in their care, posing a threat to the hifdz al-nafs and hifdz al-nasl. The Islamic jurisprudence principle that preventing harm takes precedence over achieving benefit provides clear guidance in this situation. When illegal childcare services pose a greater risk of harm than benefit, Sharia law encourages their elimination or strict regulation to prevent the resulting harm.

Hisbah as an Instrument of Sharia Economic Supervision

In Islamic tradition, hisbah is a market oversight institution tasked with ensuring that economic activities are conducted in accordance with sharia principles and do not harm the public interest. Ibn Taymiyyah, in Al-Hisbah fil Islam, explains that the functions of hisbah include: enjoining what is right and forbidding what is wrong in the economic sphere, ensuring the quality of traded goods and services, and protecting consumers from deceptive or harmful practices (Ibn Taymiyyah, 2004). In the modern economic context, the function of hisbah is implemented through government regulation and oversight of economic activity. Supervisory bodies such as the

Financial Services Authority (OJK) for the financial sector, the Food and Drug Monitoring Agency (BPOM) for the food sector, and regional technical agencies for various other sectors can be understood as modern manifestations of the hisbah institution. In the context of childcare services, the social services agency, tasked with issuing permits and supervising childcare centers (TPA), implements the hisbah function in the childcare sector. The government's failure to exercise its hisbah function regarding illegal childcare services thus constitutes a serious omission from the perspective of Islamic economic law. The state's obligation to protect its citizens from losses resulting from substandard economic practices is an integral part of the concept of hisbah that cannot be ignored.

Method

This research uses a normative legal research approach that examines law as norms, doctrines, and principles through library research. Primary legal materials include the Quran, hadith, and classical and contemporary books on Islamic jurisprudence (*fiqh muamalah*). Secondary legal materials include statutory regulations, fatwas from the National Sharia Council (DSN-MUI), and academic literature on Islamic economic law. Tertiary legal materials include legal dictionaries, Islamic jurisprudence (fiqh) encyclopedias, and other sources that serve to explain and complement primary and secondary legal materials. The analysis is conducted prescriptively using a statute approach, a conceptual approach based on Islamic jurisprudence (fiqh muamalah) doctrine, and a comparative approach between national positive law and the principles of Islamic economic law

Results and Discussion

Analysis of Agreements in Illegal Homecare and Childcare Centers Services

Homecare and childcare services can be categorized into several overlapping types of contracts, according to Islamic jurisprudence. The most common contract is ijarah ala al-amal, where the service provider provides childcare services and the service user pays a fee (ujrah) for those services. In this scheme, the benefit transferred is the caregiving service, while the child is the object of the service, not a direct party to the contract. The wakalah (protection) dimension of the wakalah contract arises when the parent implicitly delegates caregiving responsibilities to the service provider during the care period. As the representative, the service provider assumes responsibilities aligned with the muwakkil (parent) for the child's care and protection. Failure by the representative to fulfill this mandate has significant legal consequences within the framework of Islamic jurisprudence. Furthermore, the dhaman (guarantee or assurance) dimension of the contract can also be identified, which arises in the context of the service provider's responsibility for the safety of the child entrusted to them. A service provider who accepts a child for care has essentially received a trust (amanah) that must be safeguarded. If a child suffers a loss due to the negligence of the service provider, then from the perspective of muamalah fiqh, the service provider is responsible for covering the loss based on the principle of dhaman al-yad.

Pillars and Conditions of the Contract

An assessment of the validity of illegal childcare contracts under Sharia economic law yielded findings that require in-depth study. From a formal perspective, the pillars of the contract appear to be met: there are parties to the contract, the object of the contract is caregiving services, and the agreement between the two parties. However, a more in-depth analysis reveals problems at the level of the contract's validity requirements. *First,* the requirement for the service provider's skills and competence. In ijarah ala al-amal, the service provider must possess sufficient skills and competence to perform the agreed-upon services. When illegal childcare providers lack verified competency standards, serious questions arise regarding the fulfillment of this requirement. Based on a review of various applicable technical regulations, the government-established childcare competency standards require measurable formal training and certification, a requirement that unlicensed service providers cannot, by law, meet.

Second, the requirement for clarity of the contract object. The quality of the ijarah object must be ascertainable (ma'lum) to prevent gharar (unlawful assumption of rights) that could harm the service user. Illegal landfill services generally lack written service standards that can be used by service users to assess the quality of the service they will receive. This situation indicates an element of jahala (ignorance of the specifications of the contract object) that could potentially invalidate the contract. *Third,* the legality requirement. Contemporary scholars argue that contracts that violate applicable laws and regulations in a country cannot be considered valid from a sharia perspective if those regulations do not conflict with sharia and are intended for the public good. The TPA licensing provisions established by the Indonesian government are clearly regulations aimed at protecting the public interest and do not conflict with sharia. Therefore, contracts with service providers that violate these licensing provisions are problematic from a sharia perspective (Qardhawi, 2000).

Legal Implications of the Invalidity of the Contract

If a contract is declared fasid (damaged but not absolutely void) or batil (absolutely void) according to sharia economic law, various legal implications arise that need to be taken into account. In the Hanafi school of thought, a distinction is made between fasid contracts and vanity contracts: fasid contracts can still be saved by eliminating the elements that cause them to be false, while vanity contracts cannot be saved at all (Al-Kasani, 2000). In the context of illegal TPA services, existing contracts can be categorized as fasid contracts because their inadequacy stems from external factors (uncertainty and unclear standards) which theoretically can be corrected by obtaining permits and establishing clear service standards. The implications of this facilitation include: first, service providers are not entitled to receive full ujrah if they are proven not to provide services as they should; second, the losses experienced by children due to the service provider's negligence must be borne by the service provider; and third, existing agreements can be considered not binding under sharia law until existing defects are corrected.

Analysis Of Gharar And Maslahah In Illegal Child Care Services

Identification of Forms of Gharar

An analysis of illegal homecare and childcare services identified at least four significant forms of gharar (unclear service provider qualifications). In ijarah services, service users have the right to know the relevant qualifications of the service provider before the contract is concluded. In illegal childcare services, the lack of a standardized mechanism for verifying the caregiver's qualifications leaves service users unable to ensure the competence of the person caring for their child. The second gharar is gharar fi al-jaudah (unclear service quality). The absence of written and verifiable minimum service standards in illegal childcare services leaves service users uncertain about the quality of the service they will receive. Normatively, the absence of standard operating procedure (SOP) documents required by Minister of Social Affairs Regulation Number 20 of 2019 means that parents using the services have no means to measure and assess the quality of care for their children.

The third gharar is gharar fi al-mas'uliyyah (unclear accountability mechanisms). Illegal childcare services generally lack clear accountability mechanisms in the event of incidents that harm children. The absence of comprehensive written contracts, the absence of insurance, and the absence of a formal complaint mechanism create conditions where service users lack legal certainty regarding their rights in the event of harm. The fourth gharar is gharar fi al-istimrar (uncertainty regarding the continuity of services). Illegal childcare services are vulnerable to sudden closure without adequate notice because they are not bound by regulatory mechanisms that require closure notification. This creates uncertainty that can cause serious harm to parents who rely on these services for their daily childcare needs.

As explained, assessing the level of gharar contained in a contract determines whether it invalidates the contract or is tolerable. Al-Darir (1997) formulated several criteria for determining whether gharar falls into the fahisy category: (1) the gharar concerns an essential aspect of the contract; (2) there is no pressing need (hajah) that justifies the gharar's existence; and (3) the gharar could give rise to disputes between the contracting parties. Using these criteria, the gharar contained in illegal childcare contracts can be categorized as fahisy gharar. First, the identified gharar concerns essential aspects: the quality of service and the qualifications of the caregiver are essential in childcare contracts given their direct impact on the child's safety. Second, there is no hajah justification for the lack of clarity, as minimum standards for childcare services can be easily established and communicated. Third, this lack of clarity has the potential to significantly lead to disputes when incidents that harm the child occur. Thus, based on the analysis of muamalah fiqh, the gharar contained in illegal childcare service contracts falls into the category of fahisy, which legally affects the validity of the contract. This condition provides a strong sharia basis for demands for transparency, standardization, and licensing of childcare services.

Comprehensive Maslahah-Mafsadat Analysis

An analysis of the benefits and disadvantages of illegal childcare services yields a fairly clear assessment. From a benefit perspective, illegal childcare services offer several positive contributions: (1) they enable parents, particularly mothers, to participate in the labor market, thereby contributing to the family and national economy; (2) they provide more affordable services than formal childcare centers; and (3) they offer greater flexibility in terms of operating hours and care mechanisms. However, the resulting benefits are far more serious and impact more fundamental issues. The first benefit is the threat to the well-being of children in their care. The numerous cases of violence, neglect, and even death of children in illegal childcare centers are concrete evidence of this threat. The second benefit is the threat to the well-being of children, namely the quality of growth and development of children, the nation's future generation. Poor-quality care during critical periods of child development has long-term impacts on children's cognitive, emotional, and social capacities. The third mafsadat is a threat to the financial security of service users. The absence of a clear accountability mechanism for illegal services places service users in a financially vulnerable position when losses occur due to the service provider. The fourth mafsadat is a negative impact on the social order (hifdz al-din) in the form of normalizing legal violations and low ethical standards in the provision of social services. Based on the Islamic jurisprudence principle of dar'ul mafasid muqaddam ala jalbil masalih and considering that the resulting mafsadat concerns more essential matters (life and offspring) than the resulting maslahah (economic benefit), sharia analysis supports the elimination or strict regulation of substandard and unlicensed childcare services.

Hisbah And The State's Obligations In Regulation Of Child Care Services

The institution of hisbah in Islam encompasses three main components: al-amr bil ma'ruf (enjoining what is good), al-nahy 'an al-munkar (forbidding what is evil), and al-iltizam bil 'adl (upholding justice). In the context of childcare services, the function of hisbah requires the government to: (1) establish minimum standards for childcare services that ensure the safety and well-being of children (al-amr bil ma'ruf); (2) prevent the operation of childcare services that do not meet these standards (al-nahy 'an al-munkar); and (3) ensure a fair accountability mechanism for all parties involved (al-iltizam bil 'adl).

In the modern context, the muhtasib (executor of hisbah) is a government official with supervisory authority in the field of social services, in this case the social services department at the provincial and district/city levels. However, based on a review of applicable laws and regulations, the existing supervisory mechanisms remain passive and responsive, not reflecting the proactive nature mandated by both the concept of hisbah in Sharia and the technical regulations governing the operation of child welfare institutions. Consequently, they cannot optimally carry out their hisbah function. Al-Mawardi, in Al-Ahkam Al-Sultaniyyah, emphasizes that the muhtasib (religious leader) is obligated to proactively supervise all forms of transactions that could harm the community and must not wait until such harm actually occurs before taking action (Al-Mawardi, 1985). This preventive principle is particularly relevant in the context of supervising childcare services, where the consequences of negligent supervision can be very serious and irreparable harm, namely injury or death to the child.

Sharia Consumer Protection Mechanism for Childcare Services

Sharia economic law provides several consumer protection mechanisms that can be applied to childcare services. *First,* khiyar al-'ayb (the right to cancel a contract due to defects). In ijarah (leasing), the service user has the right to cancel the contract if an unforeseen defect (aib) is discovered in the service. If a childcare service is proven to not meet the required quality standards, the service user can claim this defect, justifying the cancellation of the contract and the return of the ujrah (price). *Second*, dhaman al-itlaf (liability for damages). A service provider who, through negligence, causes harm to a child in their care is obligated to cover the loss based on the principle of dhaman al-itlaf in Islamic jurisprudence. This principle aligns with positive law provisions regarding the civil liability of service providers, but has a stronger ethical dimension within the Sharia framework. *Third*, transparency and honesty in the contract (al-amanah wa al-sidq). Sharia economic law requires each party to the contract to be transparent and honest about their capacity and capabilities. TPA service providers who offer childcare services without adequate competence and standards can be considered to have committed tadlis (fraud), which is one of the most serious forms of violation of muamalah principles.

Reconstruction of Regulations Based on Sharia Economic Law

Based on an analysis of Islamic economic law, this study formulates several principles that should serve as the foundation for reconstructing childcare regulations in Indonesia. The first principle is the principle of al-'adalah (justice), which demands regulations that provide equal protection for all parties involved, with a priority on protecting children as the most vulnerable. The second principle is the principle of al-amanah (trust), which demands effective licensing and oversight mechanisms as a means of verifying that service providers deserve the trust of parents to care for their children. The third principle is the principle of al-maslahah al-'ammah (public benefit), which justifies state intervention in regulating childcare services to protect the interests of children and society as a whole. The fourth principle is the principle of al-syafafiyyah (transparency), which demands mechanisms that ensure parents have sufficient information to make informed decisions about the childcare services they choose. Implementation of these principles in concrete regulations could include: mandatory childcare service contract standards, mandatory competency certification for caregivers, a public information system regarding licensed childcare centers, and a sharia-based mediation mechanism for dispute resolution.

Policy Recommendations Based On Sharia Economic Law

Standardization of Child Care Service Contracts

The National Sharia Council (DSN-MUI) needs to formulate comprehensive child care service contract standards based on the principles of Islamic economic law. These contract standards should include: (1) a transparency clause regarding the qualifications of caregivers; (2) clear and measurable service specifications; (3) a fair accountability mechanism; (4) emergency procedures; and (5) an effective dispute resolution mechanism. These contract standards can serve as a reference for the government in formulating standard child care service agreements that must be used by all service providers.

Strengthening the Hisbah System through Digital Technology

The digital era opens up opportunities to strengthen the hisbah function in overseeing child care services through the use of information technology. Developing an integrated information system containing data on all licensed child care institutions (TPA), caregiver profiles and competency certifications, and service track records can significantly increase transparency and accountability in child care services. This platform can also serve as an effective public complaints channel. From a Sharia economic law perspective, utilizing technology to strengthen the hisbah function is a recommended form of contemporary ijtihad. The principle of al-mashlahah al-mursalah (benefit not contained in the text but not contradicting sharia) can serve as the basis for developing this technology-based supervisory instrument.

Establishment of a Sharia Mediation Institution for Childcare Service Disputes

Sharia economic law recommends dispute resolution through deliberation and mediation before resorting to litigation. The establishment of a Sharia mediation institution specifically handling childcare service disputes is a relevant recommendation from this perspective. This institution could operate under the auspices of the National Sharia Arbitration Board (BASYARNAS) or collaborate with Religious Courts that already have expertise in family law and sharia economics. This Sharia mediation mechanism would not only provide faster and more affordable resolutions than litigation, but also allow for more comprehensive resolutions, taking into account moral and ethical aspects that cannot always be accommodated by the formal justice system.

Conclusion

This study concludes that illegal homecare and childcare services in Indonesia pose serious problems from a sharia economic law perspective. First, illegal childcare contracts contain various elements of gharar fahisy (non-conforming) principles, particularly related to caregiver qualifications, service standards, and accountability mechanisms, which, under sharia economic law, affect the validity of the contract. Second, the analysis of benefits and disadvantages (maslahah and mafsadat) shows that the harm caused by illegal services to children's safety and welfare far outweighs the economic benefits. Third, the government's indecisiveness in carrying out its hisbah (legality) function regarding illegal childcare services constitutes a neglect of its sharia obligation to protect the public interest, particularly children, who are the most vulnerable group. These findings confirm that sharia economic law provides a comprehensive and relevant analytical and normative framework for examining and responding to the problem of illegal childcare services. Integrating sharia economic law principles into regulatory reforms for childcare services is a strategic step that can substantively strengthen child protection.

This study recommends: (1) DSN-MUI to formulate sharia contract standards and guidelines for childcare services that can be adopted by the government; (2) the government to develop an integrated information system based on digital hisbah for monitoring childcare services; (3) the National Sharia Arbitration Board (BASYARNAS) to develop special mediation procedures for childcare service disputes; (4) academics of sharia economic law to continue developing studies that connect the principles of classical muamalah fiqh with contemporary socio-economic problems; and (5) the public to be more careful in choosing childcare services by considering relevant aspects according to sharia economic law.

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