

HADHANAH DISPUTE SETTLEMENT PROCESS DUE TO AVOID WIFE ACCORDING TO WAHBAH AL-ZUHAILI AND ITS RELEVANCE TO ISLAMIC LAW IN INDONESIA

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Abstract

In Islam, marriage between a Muslim man and a non-Muslim woman is absolutely prohibited. If in a marriage there is a divorce because the wife is out of her religious belief (apostasy), then there is a dispute over the authority of whether the wife can carry out maintenance in the form of care for her child or not.

This type of research is library research, namely research that uses books as a source of data. By emphasizing on searching and studying literature or literature related to the Wahbah Al-Zuhaili concept of wife's apostasy as a reason for loss of rights Hadanah. Through the primary literature of the book Wahbah Al-Zuhaili, as well as Wahbah Al-Zuhaili's ijtihad by describing data related to the concept

*The majority of mazhab scholars allow infidel wives to perform hadhanah on the grounds that mothers have more love for their children. However, Wahbah Az-Zuhaili in his book *Fiqhul Islami waadilatuhu*, argues that the right to hadhanah is not stipulated for an apostate wife. Based on the explanation above, the main problem raised in this thesis is how the concept of hadhanah according to Wahbah Az-Zuhaili,*

Keywords: Hadhanah, and Islamic Law in Indonesia.

1. INTRODUCTION

Marriage in Islamic law is not merely a civil matter, but a sacred bond (mi>tsaqan gali>d}an) associated with faith and belief in Allah. In the Compilation of Islamic Law in article 2 it is stated that marriage in Islamic law is called a marriage which means a very strong contract or mi>tsaqan gali>d}anto obey Allah's commands and carry them out is worship.

Marriage aims to create a harmonious household life saki>nah, mawaddah and warah}mah. One of the purposes of marriage is to produce offspring. Children are one of the goals of a marriage or marriage whose presence is highly expected by

parents. Children are gifts and mandates from God to parents who must be looked after, cared for and educated properly.

The best education for a child is when he is under the care of his parents: father and mother, who raise him with love and affection and give him a good education, so that he will thrive and be healthy physically, as well as his intelligence, high morals, and the refinement of his feelings.

In general, divorce is the main cause of child custody disputes, there are not a few cases of divorce with stories of very serious feud between husband and wife after the divorce with various reasons made in order to be declared the winner of the child custody holder. (*Hadanah*) although not a few also the interests of children who become neglected.

Child custody (*Hadanah*) it could fall into the hands of the father or mother. But what is certain is that it is not easy for one of the parties who does not win a case decision in child custody if his wish is not in accordance with the existing reality. problem *Hadanah* only applies when there is a divorce between husband and wife. If a marriage bond is still ongoing, then the responsibility and obligation for the child becomes the joint responsibility of the father and mother. The father who acts as the head of the family is obliged to earn a living and the mother acts as an *umm madrasa lilulad*.

Islamic law (juridical-formal) in Indonesia has not been regulated in a standard way regarding rights *Hadanah* for apostate wives. In Islamic law in Indonesia (juridical-formal), such as Law no. 1 of 1974 regarding the term marriage is not yet known *Hadanah*. However, regarding the obligations of parents towards their children after a divorce has been regulated. Then terms *Hadanah* recently appeared in the Compilation of Islamic Law (KHI) with definitions; parenting, nurturing and educating children to adulthood or being able to stand alone. With the concept of Wahbah Al-Zuhaili about *Hadanah* for an apostate wife, by considering *maslahah* what is there might be relevant to Islamic law in Indonesia. Therefore, from the above background it is interesting to study in depth by conducting scientific research on the legal position of rights *Hadanah* because the apostate wife complied Wahbah Al-Zuhaili and its relevance to Islamic law in Indonesia.

2. METHOD

This type of research is library research, namely research that uses books as a source of data. By emphasizing on searching and studying literature or literature related to the Wahbah Al-Zuhaili concept of wife's apostasy as a reason for loss of rights *Hadanah*. Through the primary literature of the book Wahbah Al-Zuhaili, as well as Wahbah Al-Zuhaili's ijtihad by describing data related to the concept of Wahbah Al-Zuhaili regarding the wife's apostasy as the reason for the loss of rights *Hadanah*, to then analyze the factors that influence Wahbah Al-Zuhaili's thinking in this research problem and its relevance to Islamic law in Indonesia.

3. RESULT AND DISCUSSION

1. Understanding *Hadanah*

In Islam raising children is called *hadana*. What is meant by *Hadanah* child rearing is the activity of nurturing, nurturing and educating children until they are adults or able to stand on their own. The maintenance of children is taken from the understanding of the Arabic term "*Hidana*" or can also be read "*Hadanah*" which comes from the word *al-hidnu* which mean: side, sides, directions, stomach, ribs, limbs from the armpits to the hips, and putting something on the ribs or lap, because when breastfeeding their child, the mother puts it on her lap or side of her ribs, which seems to protect and care for her child.

Understanding *Hadana* terminologically many scholars have formulated it with various meanings. Among them according to 'Abdurrahman al-Jaziri, *Hadanah* is to guard young children, the weak, and the insane from all harm to the best of our abilities and take good care of them. According to Wahbah Al-Zuhaili, that is, protecting people who cannot protect themselves from things that can hurt them because they are incompetent ('adami tamyiz) such as small children and people who are insane.

Al-Sayyid Sabiq defines *Hadanah* as taking care of children who are still small boys and girls and are already big but not yet *mumayyiz*, without commands from him, provides something that makes him good, protects him from something that hurts and damages him, educates his body, spirit and mind, so that he is able to stand alone in facing life and bear responsibility.

2. Legal basis *Hadanah*

Hadanah Legal (childcare) is mandatory, because children who still need care will be in danger if they don't get good care and care, so children must be taken care of so they don't harm them. In addition, he must also continue to be given a living and be saved from all things that can damage him.

Children are a mandate from Allah, which if not cared for and educated properly, will bring slander and even prolonged misery in the hereafter. Allah has ordered believers to protect themselves and their families from the fires of hell by educating and nurturing them so that they become people who carry out Allah's commands and stay away from His prohibitions. Children are included as one of the family members, so keeping them from the fire of hell is a child's right that must be carried out by their parents. Allah said in QS At-Tahri>m/66:6.

يَا أَيُّهَا الَّذِينَ آمَنُوا قِيظَم نَارًا وَقُودُهَا النَّاسُ وَالْحِجَارَةُ عَلَيْهَا مَلَائِكَةٌ غِلَظٌ شِدَادٌ لَا يَعْصُونَ اللَّهَ مَا أَمَرَهُمْ وَيَفْعَلُونَ مَا يُؤْمَرُونَ ٦

Translation:

“O you who believe, protect yourselves and your families from the fires of hell whose fuel is humans and stones; guardians of angels who are rough, hard, and do not disobey Allah in what He commands them and always do what is commanded.”

Every child is obliged to receive protection and care from his family by directing them to carry out God's commands and prohibitions.

3. Wahbah Al-Zuhaili's Views About *Hadanah* because of the Apostate Wife

According to Wahbah Al-Zuhaili, that is educating and nurturing people who cannot take care of themselves from things that can hurt them because they are incompetent like small children and crazy people. As for Wahbah Al-Zuhaili and the majority of scholars agree that women are more entitled to exercise child custody (*hadanah*) compared to men, because they are more compassionate, patient in caring for, patient and more intense in guarding it, it's just that each one differs in determining which order is more important.

In his book *Fiqhul Islami waadilatuhu* it is explained that infidels have no right to manage someone's child Islam because infidels have no power over Muslims. In addition, there is also a fear of disbelief against the child. However, Hanafiyyah and

Malikiyyah scholars do not require that people who care for children must be Muslim. According to them, non-Muslim religious or religious religious people may become *ha>d}ina* or caretaker, whether she is her own mother or someone else.

Rasulullah saw. himself once gave freedom to a child to choose between following his Muslim father or his polytheistic mother. And it turns out that the child is more inclined to his mother. Rasulullah SAW then prayed, "O Allah, give instructions to the child, and straighten the child's heart so that he follows his father." And again, because caring for a child is related to affection and affection is no different from religious differences.

However, they differed on the length of time the child was cared for by *ha>d}ina* non-Muslim women.

Hanafiyyah believes that the child goes with him until he is able to think about religious matters, that is, at the age of seven or if the child's religion is indeed threatened because being together *h}a>d}ina* non-Muslim, that is *ifh}a>d}ina* start instill religious education that he embraces in the child, or invites the child to his place of worship, or teaches the child to drink liquor and eat pork.

Malikiyyah is of the opinion that the child stays with her for the duration of the term *h}ad}a>nah* according to the Shari'a, however, non-Muslim women who care for them may not serve liquor and pork to the child. And if there is concern that there will be abuse, the family may give the right to supervise fellow Muslims so that they look after the child.

The reason a person cannot exercise the right to care for children is because that person is an apostate or an infidel. Allah SWT. has explained the characteristics of people who disbelieve or apostate in QS Al-Baqarah/2: 217.

...وَمَنْ يَرْتَدِدْ مِنْكُمْ عَنْ دِينِهِ فَيَمُتْ وَهُوَ كَافِرٌ فَأُولَٰئِكَ حَبِطَتْ أَعْمَالُهُمْ
فِي الدُّنْيَا وَالْآخِرَةِ ۖ وَأُولَٰئِكَ أَصْحَابُ النَّارِ ۖ هُمْ فِيهَا خَالِدُونَ ٢١٧

Tanslation:

"... Whoever among you apostates from his religion, then he dies in disbelief, then they are the ones whose deeds in this world and in the hereafter are in vain, and they are the inhabitants of hell, they will abide therein forever."

4. Relevance of Wahbah Al-Zuhaili's Views to Islamic Law in Indonesia

Islamic law is a law that lives in Indonesian Muslim society and coexists with other laws, which in the course of the long history of legal politics, various terms, concepts and doctrines of Islamic law have experienced fluctuations and developments from time to time.

In subsequent developments, Islamic law must deal with the reality of the demands of Muslims as the subject and at the same time the object of the law. Even in its most extreme form Islamic law faces a dilemma. The potency highly dependent on its ability to respond to the demands of these developments.

The word 'relevance' comes from the word 'relevant'; it means hooked, related, or useful directly. The use of the word relevant here is intended to be related and directly useful as well as its relation to Islamic law in Indonesia. Islamic law referred to in this discussion are all laws and regulations related to Islamic law *had*nah, namely Law No. 1 of 1974 concerning Marriage, Compilation of Islamic Law (hereinafter abbreviated as KHI), and Law Number 7 of 1989 jo. Law Number 3 of 2006 concerning Religious Courts.

In the history of the formation of Islamic legal rules that exist in Indonesian laws and regulations, this cannot be separated from the thoughts of scholars contained in fiqh books, in other words referring to the *ijtihad* of previous scholars. By not looking at *onesects* it just means that the benchmark in Islamic law in Indonesia is conformity with cultural values in Indonesia.

ViewsSyaafi'i Acceptance in Indonesia can be proven by looking at the process of forming Islamic law regulations in Indonesia from the beginning, where the books *Syaafi'i* is used as one of the references in making decisions in the jurisprudence of judges at the Religious Courts, namely based on the circular letter of the Bureau of the Religious Courts No. B/1/735 dated 18 February 1985 as executor of Government Regulation no. 45 of 1957 concerning the establishment of a Religious Court/Shari'ah Court outside Java and Madura.

The existence of these guidelines is actually not to limit judges in doing *ijtihad* but rather as an effort to obtain legal unity that has not been codified. The existence of this circular letter provides greater certainty in carrying out *ijtihad* on a problem it faces by focusing on the existing benefits. But in its development, there is still uncertainty in making decisions caused by differences of opinion on each issue. To overcome this, it is necessary to have a law book that collects all applied laws that apply to the environment of the Religious Courts which can be used as a guide by judges in carrying out their duties, so that there is guaranteed unity and legal certainty.

Consciously or unconsciously, demands to solve legal problems that are always developing in society will always be needed. Therefore, it is also required to try to solve the problem with the assumption that the problem that has just been solved will always be accompanied by a new problem that immediately demands a solution.

In this case the author will try to describe one case of Islamic law. Islamic law referred to in this discussion are all laws and regulations related to Islamic law *had* *nah*, namely Law No. 1 of 1974 concerning Marriage, Compilation of Islamic Law (hereinafter abbreviated as KHI), and Law Number 7 of 1989 jo. Law Number 3 of 2006 concerning Religious Courts.

Law No. 1 of 1974 and Compilation of Islamic Law as material law for the environment of the Religious Courts as well as Law Number 7 of 1989 jo. Law Number 3 of 2006 concerning Religious Courts has not provided a limited answer to legal issues in determining child care when both parents are divorced, especially in terms of how to care for children when both parents are divorced then the wife or mother of the child he will care for leaving Islam (apostasy).

As in the Marriage Law No. 1 of 1974 globally has actually explained the rules regarding the maintenance of these children which are strung together with the consequences of breaking up a marriage. However, the Marriage Law No. 1 of 1974 which is one of the products of Islamic law in Indonesia which is used as a reference by the Religious Courts in deciding cases, in this case regarding *how* *ad* *nah* because apostate wives have not been regulated in a strict and detailed manner. Then in Law Number 7 of 1989 jo. Law Number 3 of 2006 concerning the Religious Courts, in which the Religious Courts have absolute authority in adjudicating and resolving issues regarding the determination of child maintenance based on Islamic law has not been regulated explicitly and in detail.

Even after the issuance of Law No. 3 of 2006 still does not provide significant changes regarding the resolution of child care issues, especially those related to *rights* *ad* *nah* if the apostate wife has not been regulated in a strict and detailed manner. Likewise, KHI as a rule that is considered as Indonesian *fiqh* should not reduce and eliminate normative traits and values. For example, in KHI, especially in Chapter XIV on raising children, all matters relating to child care should be explained *had* *nah*, such as the person who is entitled to care for, costs, period of care and terms of child care.

That based on the investigator's investigation both in the Marriage Law No. 1 of 1974 and the Compilation of Islamic Law and Law Number 7 of 1989 jo. Law Number 3 of 2006 concerning the Religious Courts, is imperfect because it has not stated in detail the Muslim requirements for caregivers and how *hadanah* for apostate wives.

However, in the KHI in the third part regarding the consequences of divorce in article 156 letter c it states "If the holder *hadanah* turns out that it cannot guarantee the physical and spiritual safety of the child, even though the cost of living and *hadanah* has been fulfilled, then at the request of the family concerned the Religious Court can transfer rights *hadanah* to other relatives who have rights *hadanah* also".

Religion is one of the five *daruriyyat*, which must be maintained and defended optimally. For the defense allowed to do things that are prohibited under normal circumstances. It stands to reason that the Qur'an talks a lot about apostasy with all its implications. So if a person leaves (becomes *kufr*) after he converts to Islam it will have very big implications for the laws after he has apostatized, because all legal actions will always be related to each other when the initial action is related to the next action. This also applies to problems *shad* *hadanah*.

Imam Jalaludin 'Abd ar-Rahman Ibn Abi Bakr as-Suyuti in his book *al-Asybah wa al-Nazair* says:

الحریم له حکم ما هو حریم له

That is, guarding something that is unlawful is obligatory because something that is unlawful will have implications for other things that are unlawful if it is not guarded, so that guarding the area of that *haraam* is also obligatory.

Therefore, it is necessary to look again at what is stated in the Compilation of Islamic Law which states that if the mother is a person who is more entitled to be a holder of *hadanah* it turns out that it cannot guarantee the child's spiritual safety or endanger the child's faith, because it is feared that the mother's apostasy will have an impact on the child's religion.

Based on this, it can be seen that KHI rules are based on *sadd al-Zari'ah* (prevention of dangerous things) in seeking legal advice, because seeking and taking law is not an easy matter and must have solid foundations regarding the theory of issuing law from propositions, one of which is the use of rules related to the law. So from the provisions of article 156 letter c in the Compilation of Islamic Law regarding guaranteeing the physical and spiritual safety

of children in this case called the child's faith or religion, the authors conclude that the Compilation of Islamic Law uses the sadd al-Zari'ah theory.

Basically, the purpose of enacting a law is to maintain benefit and at the same time avoid damage both in this world and in the hereafter. All kinds of legal cases, both those explicitly regulated in the Qur'an and Hadith, as well as those produced through *ijtihad*, must start from that goal. All methods used to find the law, boil down to the effort of discovery *maslahat*.

Returning to the Islamic Law Compilation policy which requires holders *hadanah* that is, it must be able to guarantee the child's spiritual safety, in this case it is also called the child's faith or religion, if viewed from the point of view of sadd al-Zari'ah, the provisions of the Compilation of Islamic Law regarding the requirements for perpetrators *hadanah* this can be justified, because according to the Compilation of Islamic Law "if the holder *hadanah* turns out that it cannot guarantee the physical and spiritual safety of the child, even though the cost of living and *hadanah* has been fulfilled, then at the request of the family concerned the Religious Court can transfer the right *hadanah* to other relatives who have right *hadanah* also". From here, it can be concluded that the sadd az-zari'ah method is more oriented to the consequences of one's actions, namely the negative consequences that arise and is also preventive.

So, with reference to the opinion of Wahbah Al-Zuhaili which does not allow an apostate mother to do so *Hadanah* for fear of affecting the child's religion. Of course, reasons are not given the right *Hadanah* to the apostate mother this is a reason for benefit. According to the compiler, the reason for *maslahat* is also used by the Compilation of Islamic Law to cover permissibility *Hadanah* for this apostate wife with the method of *ijtihad* Saad al-zari'ah. So, from some of the arguments above, the authors conclude that there is relevance between Wahbah Al-Zuhaili's opinion and one of the Islamic laws in this discussion, namely the Compilation of Islamic Law in relation to human rights *hadanah* because the wife is an apostate.

CONCLUSION

Based on the presentation and analysis of Wahbah Al-Zuhaili's views on child custody (*hadanah*) because of apostate wives and their relevance to Islamic law in Indonesia, the authors can conclude the following: Infidels have no right to administer *hadanah* children of Muslims because infidels have no power over Muslims, Wahbah Al-Zuhaili forbids a wife

who is infidel (apostate or of a different religion) *h}ad}}a>nah* due to fear of affecting the child's faith or religion, the relevance of the concept of child custody of Wahbah Al-Zuhaili to Islamic Law in Indonesia, namely the views of Wahbah Al-Zuhaili and the Compilation of Islamic Law, both both use the *sadd al-Zari'ah* method in determining child custody because the wife is an apostate. This is to prevent the danger of apostasy from children who are raised by an apostate wife.

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