

## **Riddah as an Obstacle to Hadhanah in the Perspective of Maqāṣid al-Syarī'ah: Analysis of East Jakarta PA Decision No.1700/Pdt.G/2010/PAJT**

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### **Abstract**

*The jurists set several conditions for those entitled to custody of children, one of which is being Muslim. Riddah (leaving Islam) is normatively seen as an obstacle to ḥaḍānah because it is feared that it can affect the child's faith and religious education. This article aims to determine the Maqasid Syariah review of the Judge's rejection of the right of Hadanah for apostate mothers as stated in the Religious Court Decision Number PA Jakarta Timur No.1700/Pdt.G/2010/PAJT. This type of research is Normative research with a Statutory approach. Primary data are the East Jakarta Religious Court Decision Number 1700/Pdt.G/2010/PAJT, as well as laws and Islamic legal provisions related to Hadanah and Riddah, while secondary legal materials are obtained from fiqh literature, books, scientific journals, and relevant scientific works. The data collection technique is documentation, and the analysis is qualitative. The results of this article show that case No. /Pdt. G/2010/2010 / PAJT did not grant Hadanah rights to apostate mothers. In this decision, the judge understood Riddah as an obstacle to Hadanah as a consideration in the Hadanah decision. As discussed in the book Kifayatul Akhyar, as a basis for understanding fiqh, it is a requirement that parents who have the obligation to educate and raise children be Muslim, so that the judge's decision rejects the plaintiff's or appellant's petition if the plaintiff or appellant is an apostate. The Panel of Judges has prioritized hifz al-ddin (dhoruriyat) and hifdz an-nafs (care for the soul) to consider the benefit and best interests of the child.*

*Keywords: Hadhanah, Murtad, Maqashid Sharia.*

### **Abstrak**

Para fuqaha menetapkan sejumlah syarat bagi pihak yang berhak mengasuh anak, salah satunya adalah beragama Islam. Riddah (keluar dari Islam) secara normatif dipandang sebagai penghalang ḥaḍānah karena dikhawatirkan dapat memengaruhi akidah dan pendidikan keagamaan anak. Artikel ini bertujuan untuk mengetahui tinjauan *Maqasid Syariah* tentang penolakan Hakim hak *Hadanah* pada ibu murtad sebagaimana terdapat pada Putusan pengadilan Agama Nomor PA Jakarta Timur No.1700/Pdt.G/2010/PAJT. Jenis penelitian ini adalah penelitian Normatif dengan

pendekatan Undang-undang. Data primer berupa Putusan Pengadilan Agama Jakarta Timur Nomor 1700/Pdt.G/2010/PAJT serta peraturan perundang-undangan dan ketentuan hukum Islam yang berkaitan dengan *Hadanah* dan *Riddah*, sementara bahan hukum sekunder diperoleh dari literatur fiqh, buku, jurnal ilmiah, dan karya ilmiah yang relevan. Teknik pengumpulan data dokumentasi dan di Analisis dilakukan secara kualitatif. Hasil artikel ini menjelaskan bahwa perkara No.1700 / Pdt.G / 2010 / PAJT tidak diberikan hak *Hadanah* bagi ibu murtad. Pada putusan tersebut, hakim memahami *Riddah* sebagai penghalang *Hadanah* sebagai pertimbangan dalam putusan *Hadanah*. Sebagaimana yang dibahas di dalam kitab Kifayatul Akhyar sebagai landasan dalam pemahaman fiqh bahwa syarat orang tua yang memiliki kewajiban dalam mendidik dan membesarkan anak harus beragama Islam sehingga putusan hakim menolak permohonan penggugat atau pembanding yang murtad. Majelis Hakim telah mendahulukan *hifz al- ddin (dhoruriyat)* dan *hifdz an-nafs* (memelihara jiwa) demi mempertimbangkan kemaslahatan dan kepentingan terbaik bagi anak.

Kata kunci: *Hadanah*, Murtad, *Maqosid Syariah*.

## **A. Introduction**

The divorce phenomenon in Indonesia over the past decade has shown a significant upward trend, in line with the dynamics of social, cultural, and economic changes that impact people's lives. Data from the Religious Courts shows that the majority of divorce cases are filed by women,<sup>1</sup> with various reasons, such as economic problems, poor communication within the household, the presence of a third party, or infidelity, and social and cultural pressures.<sup>2</sup> This condition indicates that the family, as a social institution, is facing serious challenges in maintaining stability and harmony. The increasing divorce rate not only results in the breakdown of marital relationships but also has complex legal and social implications, particularly regarding the determination of child custody, a crucial and sensitive issue in every divorce decision.

Islamic Sharia has regulated matters relating to *Hadanah*. In classical Fiqh studies, *Hadanah* is grouped by scholars in special chapters. Because it relates to children as weak people who still need care and love, every family hopes that their child will be pious so that they can become an investment for them in the Hereafter. The people most responsible for children's growth, health, and education are parents. Marriage Law No. 1 of 1974 states,

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<sup>1</sup> Habib Mumtaz Jr dkk., "Analisa Penyelesaian Sengketa Hak Asuh Anak Pasca Perceraian Melalui Litigasi," *Jurnal Locus Penelitian dan Pengabdian* 2, no. 7 (2023): hlm. 716., <https://doi.org/10.58344/locus.v2i7.1433>.

<sup>2</sup> Nibras Syafriani Manna dkk., "Ceraai Gugat: Telaah Penyebab Perceraian Pada Keluarga di Indonesia," *Jurnal Al-Azhar Indonesia Seri Humaniora* 6, no. 1 (2021): hlm. 11., <https://doi.org/10.36722/sh.v6i1.443>.

"Marriage is a physical and spiritual bond between a man and a woman as husband and wife to form a happy and eternal family based on the belief in the Almighty God".<sup>3</sup>

Meanwhile, in carrying out Hadonah, you must fulfill the following conditions: Baligh, be of sound mind, able to educate, trustworthy and virtuous, Muslim, the mother has not remarried, and is independent.<sup>4</sup> Of the conditions put forward by Classical Ulama regarding the status of Muslim haaḍin, many people still have different opinions.<sup>5</sup> Islamic school scholars, including the Hanafi, Maliki, Shafi'i, and Hanbali schools, agree that Haadin must have Muslim status. They argue that Hadanah is in power. And there is no power for Kafirs over Muslims, and this becomes a religious slander against their children. This differs from haaḍonah; Madhab scholars hold different views on this matter.<sup>6</sup> The Hanafiah and Malikiyah schools do not require the status of Muslim women to be haaḍinah. At the same time, the Syafiiyah and Hanbali schools require Muslim status. According to those who allow non-believers, because Hadanah is just breastfeeding and caring for small children. The Prophet Muhammad (peace be upon him) once gave a child the freedom to choose between following his Muslim father or his polytheistic mother. The child, it turned out, leaned more toward his mother. The Prophet Muhammad (peace be upon him) then prayed, "O Allah, guide this child and straighten his heart so that he follows his father." Furthermore, child rearing is related to love, and love is no different from religious differences.<sup>7</sup>

However, in contemporary religious judicial practice, the application of Riddah as a barrier to ḥaḍānah is not always absolute. Social developments, increasing awareness of children's rights, and the principle of the best interests of the child encourage judges not only to adhere to the normative texts of classical fiqh but also to consider the child's overall well-being. This creates a dynamic between normative Islamic legal provisions and the social realities faced by children, who are subjects whose rights must be protected.

The East Jakarta Religious Court's decision No. 1700/Pdt.G/2010/PAJT serves as an essential example of how consent is positioned in marriage disputes. The decision demonstrates that judges' considerations are based not only on the parents' religious status but also on the child's protection and best interests. This phenomenon is worth further study because it reflects a paradigm shift in Islamic family law reasoning in Indonesia.

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<sup>3</sup> *Undang-undang perkawinan No 1 Tahun 1974* (Citra Umbara, 2011), hlm. 63.

<sup>4</sup> Sayyid Sabiq, *Fiqh sunnah* (Pustaka Al-Kautsar, 2015), hlm. 244.

<sup>5</sup> Orang yang mengasuh anak dari laki-laki.

<sup>6</sup> Orang yang mengasuh anak dari perempuan

<sup>7</sup> Wahbah al-Zuhaili, *Fiqh al-Islam Adillatuhu* (Gema Insani, 2011), hlm. 728.

Based on this, this study is essential for analyzing riddah as a barrier to ḥaḍānah from the perspective of Maqāṣid al-Syarī'ah. The maqāṣid approach allows Islamic law to be understood more substantively by placing the protection of religion (ḥifẓ al-dīn), soul (ḥifẓ al-nafs), reason (ḥifẓ al-'aql), and descendants (ḥifẓ al-nasl) as the primary goals. By analyzing East Jakarta PA Decision No. 1700/Pdt.G/2010/PAJT, this article aims to make an academic contribution to the development of Islamic family law that is more oriented towards the best interests of the child.

### **B. Research methods**

This study uses a normative legal research method, with conceptual, statutory, and case approaches. The research data are sourced from primary legal materials in the form of the East Jakarta Religious Court Decision Number 1700/Pdt.G/2010/PAJT as well as laws and regulations and Islamic legal provisions related to ḥaḍānah and riddah, while secondary legal materials are obtained from fiqh literature, books, scientific journals, and relevant scientific works. Data are collected through documentation and analyzed qualitatively by examining the judge's legal considerations, then constructed through the perspective of Maqāṣid al-Syarī'ah to assess the relevance of riddah as a barrier to ḥaḍānah in the context of child protection and best interests.

### **C. Discussion and Research Results**

#### **Hadonah in Islamic Law**

Linguistically, ḥaḍānah comes from the word hidhan, which means something located between the armpit and the navel. Hadana ath-thaa'ir baidhahu means a bird that holds its eggs between its wings and body. Similarly, a mother cradles her child in her arms. Or more precisely, it is said to nurture and educate her child.<sup>8</sup>

In Islamic law, Ḥaḍānah is understood as the responsibility to care for, nurture, and educate children who are not yet able to meet their own needs independently. In Islamic jurisprudence, the term ḥaḍānah derives from the word hadhana, which etymologically means to embrace, care for, and educate, thereby indicating a physical and emotional closeness between the caregiver and the child.<sup>9</sup> According to Imam Hanafi, ḥaḍānah is the obligation to care for and maintain a child from the time they are still very dependent on others until they reach adulthood. At the same time,<sup>10</sup> Imam Malik defines ḥaḍānah as the care by the authorized party for a child or individual who is not yet able to care

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<sup>8</sup> Syakh Kamil Muhammad 'Uwaidah, *Fiqh Wanita* (Pustaka Al Kautsar, 2001), hlm. 482.

<sup>9</sup> Ahmad Warson Munawir, *Kamus Arab Indonesia* (Pustaka Progresif, 1997), hlm. 578.

<sup>10</sup> Abu Hanifah bin Nu'man bin Tsabit Al-Taimi Al-Kufi, *Al-Jami' Al-Kabir* (Daar al-Kitab al-Arabi, 1982), hlm. 421.

for themselves, either because they are not yet mumayyiz or because of a mental disorder. This care includes fulfilling basic daily needs, such as feeding, hygiene, and physical care, as well as the protection and education necessary to ensure the survival and well-being of the person being cared for.<sup>11</sup>

Imam Shafi'i defines ḥaḍānah etymologically as the act of placing something near the ribs, which literally describes the activity of carrying or placing a child on one's lap with full attention, closeness, and affection. This definition emphasizes that ḥaḍānah is not only physical, but also contains emotional and psychological dimensions in child rearing.<sup>12</sup> Meanwhile, Imam Ahmad ibn Hanbal defines ḥaḍānah as the obligation of care, with the provision that the mother has priority in caring for her son until he reaches the age of seven.<sup>13</sup> In line with this view, the Encyclopedia of Islamic Law explains that ḥaḍānah is a form of care required due to age or intellectual immaturity, which includes fulfilling basic needs, protection from various potential dangers, providing education and knowledge, and overall responsibility for all aspects of the child's life to ensure his safety and well-being.<sup>14</sup>

In the Compilation of Islamic Law, article 1 states that child care, or hadhanah, is the activity of caring for, nurturing, and educating children until they are adults or able to stand on their own.<sup>15</sup>

The Quran provides a strong normative foundation for the urgency of childcare in Islam. In Surah Al-Baqarah, verse 233, Allah emphasizes the obligation of mothers to breastfeed their children for two whole years, demonstrating the strategic role of mothers in nurturing and fulfilling children's initial needs.<sup>16</sup> Furthermore, Surah At-Tahrim, verse 6, commands believers to protect themselves and their families from the torment of hell, which scholars interpret as an obligation to provide education, moral

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<sup>11</sup> Ibnu Hajar Al-Haitami, *Tuhfatul Muhtaj Bi Syarh Al-Minhaj, Juz VI* (Maktabah At-Tijariyah Al-Kubra, 1994), hlm. 342.

<sup>12</sup> Zainuddin bin Abdul Aziz al-Malibari, *Fathul-Mu'in Bi Syarhi Quratul-'Aini* (Daar al-Ma'arif, 2001), hlm. 321.

<sup>13</sup> Abd al-Hamid Al-Syarwānī, *Hawāsyī Al-Syarwānī Wa Ibn Qāsim Al-'Ubādī 'alā Tuhfat Al-Muhtāj* (Darul Kutub Ilmiyah, 2012), hlm. 412.

<sup>14</sup> Adelina Nasution dkk., "The Disparity Of Judge's Verdict On Child Custody Decision In Aceh Sharia Court," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 6, no. 2 (2022): hlm. 496., <https://doi.org/10.22373/sjhk.v6i2.12758>.

<sup>15</sup> Tim Redaksi, *Kompilasi Hukum Islam* (Nuansa Aulia, 2009), hlm. 92.

<sup>16</sup> Siti Iraini Subaini dan Danil Putra Arisandy, "Rada'ah Perspektif Al-Qur'an Surat Al-Baqarah Ayat 233: (Sudut Pandang Ilmu Kesehatan)," *Basha'ir: Jurnal Studi Al-Qur'an Dan Tafsir* 2, no. 1 (2022): hlm. 2., <https://doi.org/10.47498/bashair.v2i1.857>.

development, and religious guidance within the family environment.<sup>17</sup> Reinforcement of this principle is also found in the hadith of the Prophet Muhammad, when he emphasized a mother's priority rights over her child after divorce, saying, "You have more right over him as long as you are unmarried." All of these verses emphasize that childcare is not merely a biological responsibility but a significant trust encompassing physical, moral, and spiritual aspects in Islam.<sup>18</sup>

In the process of *hadanah* from infancy to puberty, there is a term called *hadin*. *Hadin* or *hadinah* is the term used for someone who carries out *hadanah* duties, namely the task of caring for, nurturing, or educating a baby or small child from birth until they can feed themselves, dress themselves, and distinguish between what is harmful to them.<sup>19</sup>

In carrying out *hadanah*, the following conditions must be met: Puberty, Sound mind, Able to educate, Trustworthy and virtuous, Muslim, the mother has not remarried, and Free.<sup>20</sup> These conditions apply generally to both men and women; *hadanah* is invalidated by the presence of any of the above obstacles or by failure to fulfill any of them. Scholars agree that a mother has more rights over her young child than a father does. A mother has a much greater right to educate her child than a father because she is more experienced and more patient.<sup>21</sup> The evidence underlying this is a hadith narrated by Abdullah bin Amr: From Abdullah Ibn Amr, there was a woman who said: O Messenger of Allah, indeed my child is my womb that carried him, my breast that gave him drink, and my lap that protected him. But his father, who divorced me, wants to take him from me. So the Messenger of Allah, *sallallahu 'alaihi wa sallam*, said to her: "You have more rights over him as long as you are not married".<sup>22</sup>

There are two periods for children in relation to *Hadanah*: the period before *mumayyiz* and the *mumayyiz* period. The period before *mumayyiz*, namely from the time of birth until the age of seven or eight years. At this time, a child cannot differentiate between what is beneficial and what is dangerous

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<sup>17</sup> Hafid Rustiawan dan Hasbullah, "Konteks Ayat Al-Qur'an dengan Pendidikan: Analisis Tafsir al-Qur'an Surah At-Tahrim Ayat 6," *Geneologi PAI: Jurnal Pendidikan Agama Islam* 10, no. 1 (2023): hlm. 3., <https://doi.org/10.32678/geneologipai.v10i1.8418>.

<sup>18</sup> Faisal Fauzan Ilyasa dkk., "Keutamaan Ibu dalam Hak Asuh Anak Perspektif Pendidikan: Analisis Hadits Tarbawi," *Al-Hikmah: Jurnal Agama dan Ilmu Pengetahuan* 22, no. 1 (2025): hlm. 93., [https://doi.org/10.25299/ajaip.2025.vol22\(1\).15850](https://doi.org/10.25299/ajaip.2025.vol22(1).15850).

<sup>19</sup> Satria Effendi M. Zein, *Problematisa Hukum Keluarga Islam Kontemporer Analisis Yurisprudensi Dengan Pendekatan Ushuliyah* (Jakarta: Kencana, 2004), 220.

<sup>20</sup> Sabiq Sayyid, *Fiqh Sunnah, Jilid 5* (PT. Al-Ma'arif, 1987), hlm. 244.

<sup>21</sup> 'Uwaidah, *Fiqh Wanita*, hlm. 483.

<sup>22</sup> Ibnu Hajar Al-Asqalani, *Bulughul Maram dan Dalil-Dalil Hukum, alih bahasa oleh Khalifaturrahman dan Haer Haeruddin* (Gema Insani, 2013), hlm. 510.

for them. In this period, scholars concluded that the mother had more rights over the child to perform hadhanah.

The mumayyiz period spans from age seven to maturity. At this time, a child can differentiate between what is dangerous and what is beneficial to himself. Therefore, he is considered capable of making his own choice between following his mother and his father.<sup>23</sup> According to the Shafi'i school of thought, there are no specific limits to upbringing. The child remains with his mother until he can decide whether to live with his mother or his father. According to the Maliki school of thought, the period of upbringing for boys is from birth until puberty, while for girls, it is until marriage. According to the Hambali school of thought, the period of custody for boys and girls is seven years, after which the child is told to choose whether to live with his mother or father; he lives with the person he chooses.

#### **Hadonah in Indonesian Positive Law**

In the Compilation of Islamic Law, Article 98, paragraph 1 states that the age limit for a child who can stand alone or is an adult is 21 years, as long as the child is not physically or mentally disabled or has never been married.<sup>24</sup> Hadonah ends when the child has grown up, can stand alone, and can take care of their basic needs. Childcare Patterns According to Hadhanah, it is the duty of parents to look after, care for, or educate a baby or small child from birth until he can look after and manage himself.<sup>25</sup>

Regulations regarding child custody are also regulated in Law Number 23 of 2012 concerning Child Protection, Article 1 of which states: Number 1: A child is a person under 18 (eighteen) years of age, including unborn children.

Number 2: Child protection is all activities aimed at guaranteeing and protecting children's rights so that they can live, grow, develop, and participate optimally in accordance with human dignity and honor, and receive protection from violence and discrimination.

Number 11: Custody is the authority of parents to care for, educate, nurture, foster, protect, and develop children in accordance with their religion and their abilities, talents, and interests.

In Article 1, paragraph 2 of Law Number 4 of 1979 concerning Child Welfare, namely: a person who has not reached the age of 21 (twenty-one) years has never been married. Article 1, paragraph 1(a), of Law Number 4 of 1979 concerning Child Welfare defines child welfare: "Child welfare is a

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<sup>23</sup> Satria Effendi M. Zein, *Problematika Hukum*, hlm. 181.

<sup>24</sup> Redaksi, *Kompilasi Hukum Islam*, hlm. 98.

<sup>25</sup> Satria Effendi M. Zein, *Problematika Hukum Keluarga Islam Kontemporer.*, hlm. 166

system of life and livelihood that can guarantee normal growth and development both spiritually, physically, and socially."<sup>26</sup>

### **Maqāsid al-Syarī'ah in Child Protection**

Allah establishes His laws in religion to realize the welfare of human life, both in this world and in the hereafter. The purpose of Allah and His Messenger in formulating Islamic laws is called maqashid sharia. Etymologically, maqashid sharia consists of two words, namely maqohsid and sharia. Maqashid is the plural of maqashid, meaning intention or purpose. Sharia means the teachings, rules, and provisions of Allah to His servants to achieve prosperity in this world and the hereafter.<sup>27</sup> This purpose can be traced in the verses of the Qur'an and the Sunnah of the Prophet, serving as a logical basis for the formulation of a law oriented towards the welfare of humanity.<sup>28</sup>

Maslahat comes from the Arabic word which means something that brings goodness. Maslahat (general welfare) is that which is absolute. According to Imam Ar-Razi, benefit is an action that has been directed by Shari' (Allah) to His servants in order to maintain and protect their religion, their souls, the minds of their descendants and their property. This benefit can be realized if the five main elements can be realized and maintained.<sup>29</sup> The five main elements are religion, soul, reason, lineage and wealth. In an effort to realize and maintain the five main elements of maqashid al-syari'ah, it is divided into three levels, namely: Maqashid al-daruriyat, Maqashid al-hajiyat and Maqashid al-tahsinat.<sup>30</sup>

The five needs of religion, life, reason, posterity, and wealth are an inseparable whole. If any one of them is deliberately neglected, it will create inequality in human life. Humans can only live well if these five needs are adequately met, which is often referred to as maslahah or welfare.<sup>31</sup>

Regarding the application of maqashid-sharia in determining the law for each action and problem faced by humans, this can be viewed from two perspectives: first, the levels differ (the same basic elements). In cases like this, namely when one benefit clashes with another benefit at a different level. In

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<sup>26</sup> Penjelasan Pasal 1 ayat 2 Undang-Undang Nomor 4 Tahun 1979 tentang Kesejahteraan Anak.

<sup>27</sup> Agustianto Mingka, *Maqashid Syariah Dalam Ekonomi dan Keuangan Syariah*, Jakarta: Iqtishad Publishing, 2013, 38.

<sup>28</sup> Satria Efendi, *Ushul Fiqh. cet 1* (Prenada Media, 2005), hlm. 233.

<sup>29</sup> Fathurrahman Djamil, *Filsafat Hukum Islam Bagian Pertama* (Jakarta: Logos Wacana Ilmu, 1997), hlm. 124.

<sup>30</sup> Al-syatibi, *al-Muwafaqat fi Ushul al-syari'ah*, Jilid I (Kairo: Mustafa Muhammad, t.th.), hlm. 21.

<sup>31</sup> Abu Zahra. *Ushul Fiqh Cet. ke-6*, (Jakarta: Pustaka Firdaus, 2000), hlm. 11



this case, the first level, daruriyyat, must take precedence over the second level, hajiyyat, and the third level, tahsiniyyat.<sup>32</sup> Therefore, understanding the order of the above levels of benefit is very important, especially when applied to a legal product.

Second: The level is the same (different main elements) as for the resolution of cases of the same rank, such as the level of daruriyyat with daruriyyat, hajiyyat with hajiyyat, and tahsiniyyat with tahsiniyyat, with different main elements. So it is possible to solve it by first resolving the problem according to a priority scale based on a standard order: religion, soul, reason, lineage, and wealth. For example, a person is justified in drinking alcoholic beverages, which basically destroy the mind, if his life is threatened because he does not drink that drink. In this case, maintaining the soul must be prioritized over maintaining the mind.

Second: Solving the problem by considering other aspects, for example, examining the scope of the benefit itself or the existence of other factors that strengthen one of the benefits that must be prioritized. There is something that may need to be underlined, namely the benefit of the soul (hifzh al-nafs). Preserving the soul at that level is the second main element, after preserving religion. However, in practice, when it is to be stipulated in a legal provision, it is not ordered immediately in accordance with the standard order. As Mastuhu writes in Fathurrahman Djamil, the standardization of the order of the theory of maqoshid sharia is still subject to change, because upon re-examining the five primary elements, preserving the soul is central to worldly life.<sup>33</sup>

#### **Analysis of the Decision of the East Jakarta Religious Court No. 1700/Pdt.G/2010/PAJT**

East Jakarta District Court No. 1700/Pdt.G/2010/PAJT. This decision is a divorce decision involving a hadhanah case. The decision states that Mindo is the plaintiff and Daryono is the defendant. The two were married at the Religious Affairs Office (KUA). In this marriage, they were blessed with two children: the first, born on August 10, 1999, and the second, born on December 23, 2001. Both children from this marriage have embraced Islam since their birth until now.<sup>34</sup>

The plaintiff filed a lawsuit on August 30, 2010. The reason for the lawsuit was an emotional outburst and his coming home late at night for

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<sup>32</sup> Fathurrahman Djamil, *Filsafat Hukum Islam Bagian Pertama* (Jakarta: Logos Wacana Ilmu, 1997), hlm. 132.

<sup>33</sup> Fathurrahman Djamil, *Filsafat....*, hlm. 133

<sup>34</sup> Putusan Pengadilan Agama Jakarta Timur No. 1700/Pdt.G/2010/PAJT.

unclear reasons, which were feared to be an excuse to vent his anger on the defendant's and plaintiff's children. With evidence in April 2004, the plaintiff had asked where he had been when he came home in the middle of the night, however, the defendant immediately became angry and hit the plaintiff until his cheek/face was swollen and this was known by a witness who was the defendant's younger brother so that the plaintiff could not stand living in the same house and took his two children with him. In 2005, the defendant took his eldest child after finding out the plaintiff's address. Finally, the plaintiff did not see his child for three years.

On April 11, 2011, the Defendant filed a rebuttal against the Plaintiff, stating that the Defendant rejected the Plaintiff's reasons, namely that the emotional and quarrels that occurred because of the Plaintiff's late return were the reasons. The reason was instead that the Defendant often provided maintenance, and the Plaintiff was the one who often committed violence against the Defendant. Another piece of evidence was that after the Plaintiff gave birth to her first child, she returned to her original religion of Protestant Christianity. This was the Defendant's reason for divorcing the Plaintiff because of different religions. In addition, there were Bibles in the Plaintiff's house, celebrating Christmas and engaging in Protestant Christian worship. The Plaintiff was also proven to have invited the Defendant and her two children to follow his Protestant Christian religion, both in worship, understanding, and forcing them to go to the Tiberias Church in Semanggi. The Defendant's request to reject the marriage with the Plaintiff was due to the consequences of the marriage, namely, children and joint property, and another reason was that the Plaintiff was also an apostate. In addition, his request was entitled to have hadhanah from the Defendant.

The judge decided that the right to hadhanah in this decision was given to the Defendant, namely to the husband as the Muslim father with the consideration that the Plaintiff as the mother returned to her native religion of Protestant Christianity and was not responsible for her children in the religious sector, as proven when the Plaintiff took her children to Medan and entrusted them to her Christian family and tried to send her children to a Christian school. Apart from that, it turned out that the Plaintiff was also untrustworthy and a suspect in a criminal offense, with a fine and a 2-year, 6-month imprisonment, which made it impossible for the Plaintiff to care for her children. The right of hadhanah was granted to the Defendant because the husband was found responsible, and at the time the lawsuit was filed, the children were being cared for by the Defendant. The defendant also sends his children to an Islamic school. It is with these considerations that the judge in

this decision did not grant the plaintiff the right of hadhanah to the apostate mother.

#### **Analysis of Decisions from the Perspective of Maqāṣid al-Syarī'ah**

One of the conditions that must be fulfilled by people who have the right to become caregivers is that they are Muslim. This condition is found in the book *Kifayatul Akhyar*, which explains the conditions for those who carry out hadhanah: there are seven types:

وَشَرَائِطُ الْحَضَانَةِ سَبْعَةٌ الْعَقْلُ وَالْحُرِّيَّةُ وَالِدِّينُ وَالْعِفَّةُ وَالْأَمَانَةُ وَالْخُلُوفُ مِنْ زَوْجٍ وَالْإِقَامَةُ فَإِنْ اخْتَلَّ شَرْطٌ سَقَطَ (كِفَايَةُ الْأَخْيَارِ)<sup>35</sup>

Regarding the provisions of Article 105, there is an exception. If it is proven that the hadhin party has apostatized, their hadhanah rights are waived. This is in accordance with Supreme Court Jurisprudence No. 210/k/AG/1996, which states that religion is a condition for waiving a mother's hadhanah rights over her child who has not yet reached the age of mumayyiz..

In East Jakarta District Court Decision No. 1700/Pdt.G/2010/PAJT, a husband and wife who were of different religions before marriage converted to Islam during the marriage ceremony, regardless of whether the conversion was merely a requirement for the marriage. This was done voluntarily and without coercion from any party. In this case, the husband is Muslim, and the wife returned to her former Christian religion.

Article 156 of the Islamic Law (KHI) explains that the right to custody due to divorce is a mother's right to custody if her child has not reached the age of consent. However, this only applies if the parents are Muslim. According to academic research, a mother has more parental rights than a father over a small child. A mother has a much greater right to send her child to school than a father, given her greater knowledge and patience. According to legal experts, one of the parents may leave if it is in the child's best interests. Then choose the person closest to the child, and then choose the man legally entitled to care for the child from among the men. When it comes to issues like this, researchers have different perspectives on the proper order, depending on the benefits required.

The provisions on children's religion are also set out in Article 42 of Law no. 23 of 2002, which states that if a child's religion has not been chosen, they must follow the religion of their parents upon marriage. In East Jakarta PA No.1700/Pdt.G/2010/PAJT, the judge considered riddah, considering the

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Nikmatul

Kamila,

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Plaintiff's situation as a Christian mother and trying to send her child to a Christian school, and the child's Muslim status.

The judge in East Jakarta District Court No. 1700/Pdt.G/2010/PAJT viewed the apostate mother as being denied the right to have hadhanah, which is in the best interests of the child. The judge prioritized religious protection (hifzuddin) over the protection of the soul (hifzunnafs) in terms of affection and moral improvement. This is evident from the plaintiff's willingness to send her child to a non-Islamic school. Meanwhile, the Muslim defendant was able to send her child to an Islamic school. In this case, the researcher observes that the judge's decision in East Jakarta District Court No. 1700/Pdt.G/2010/PAJT to reject the plaintiff, the apostate mother, was in accordance with Maqasid Syariah because the apostate mother did not meet the requirements for a caregiver and would threaten the child's religion.

#### **D. Conclusion**

Riddah as an obstacle to hadhanah is stated in Islamic law: among the conditions for hadhanah is that you must be Muslim (according to the Shafi'iyah and Hanabilah sects). Law Number 23 of 2002, Article 6, concerning child protection, can be understood to mean that child care must be in accordance with the religion they adhere to. The judge at East Jakarta PA No.1700/Pdt.G/2010/PAJT understood Riddah as an obstacle to hadhanah as a consideration in the Hadanah decision. As also discussed in the book Kifayatul Akhyar, which serves as a basis for understanding fiqh, the condition for parents who have the obligation to educate and raise children is that they be Muslim. The judge's decision at PA East Jakarta No.1700/Pdt.G/2010/PAJT rejected the plaintiff's mother as being in accordance with Maqasid Syariah because the apostate mother did not meet the requirements for a caregiver and would threaten the child's religion.

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