

# JURNAL AL-QADĀ'U

PERADILAN dan HUKUM KELUARGA ISLAM

## *Settlement of the Hadhanah Dispute After Divorce of a Husband and Wife of Different Ethnicities in Indonesia (Case Study of Rao Pasaman)*

Penyelesaian Sengketa Hadhanah Setelah Terjadi Perceraian Suami Isteri yang Berbeda Etnis di Indonesia (Studi Kasus Rao Pasaman)

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Info Artikel	Abstract
<p><b>Received*</b> September 29, 2022</p> <p><b>1st Revision*</b> November 20, 2022</p> <p><b>2nd Revision*</b> Desember 07, 2022</p> <p><b>Approved*</b> Desember 15, 2022</p>	<p><i>Post-divorce child care disputes between husband and wife of different ethnicities, namely Minangkabau and Tapanuli. The purpose of this discussion is to find the factors causing the emergence of differences in child custody rights and an analysis of Islamic law on the hadhanah dispute that occurred between the two ethnic Minangkabau and Tapanuli in Rao Pasaman. This research is a type of qualitative research using an ethnographic approach, where the author conducts interviews, observations and documentation studies on aspects or targets of the research subject. It turns out that in the author's findings in resolving the hadhanah dispute after a different ethnic divorce occurred in Rao Pasaman, it was the Minangkabau ethnic who wanted to resolve the dispute through the courts, while the Tapanuli ethnic only settled up to the non-litigation stage, namely through the village head (ninik mamak and hatobangon) without being resolved through a legal route. litigation (Religious Court). From the perspective of Islamic law, the settlement of the hadhanah dispute in Rao Pasaman does not use Islamic guidance. This is because in Rao Pasaman the majority of the people are Tapanuli while the Minangkabau people have become a minority</i></p> <p><i>Keyword: Dispute, Hadhanah, Ethnic, Minangkabau, Tapanuli</i></p> <p><i>Sengketa pengasuhan anak pasca perceraian antara suami isteri yang berbeda etnis yaitu Minangkabau dengan Tapanuli. Tujuan pembahasan ini untuk menemukan faktor penyebab munculnya perbedaan hak asuh anak dan analisa hukum Islam terhadap sengketa hadhanah yang terjadi antara dua etnis Minangkabau dan Tapanuli di Rao Pasaman. Penelitian ini merupakan jenis penelitian kualitatif dengan menggunakan pendekatan etnografi dan yuridis normative, dimana penulis melakukan wawancara, observasi dan studi dokumentasi kepada aspek atau sasaran dari subjek penelitian. Ternyata dalam temuan penulis dalam penyelesaian sengketa hadhanah setelah terjadi perceraian beda etnis di Rao Pasaman adalah etnis Minangkabau ingin menyelesaikan persengketaan melewati jalan pengadilan, sedangkan etnis Tapanuli hanya menyelesaikan sampai pada tahap non litigasi yaitu melalui</i></p>

*Kepala Desa (ninik mamak dan hatobangon) tanpa diselesaikan melalui jalur litigasi (Pengadilan Agama). Dari aspek pandangan hukum Islam terhadap penyelesaian sengketa hadhanah di Rao pasaman tidak memakai tuntunan Islam. Hal ini karena di Rao Pasaman mayoritas masyarakatnya adalah Tapanuli sedangkan masyarakat Minangkabau telah menjadi minoritas*

*Kata Kunci: Sengketa, Hadhanah, Etnis, Minangkabau, Tapanuli*

## A. PRELIMINARY

One of the keys to the progress of a nation and a country is mutual affection, love, and respect between parents and children. Children are the product of the desire of each parent. Children are a country's resource, their fingers are the instruments for the progress of a country. Mentally broken children will trigger the destruction of a country. There are times when children can no longer be cared for by both parents, namely when the marriage bond is broken (divorce), be it a life divorce or a death divorce.<sup>1</sup> A broken marriage means that the relationship or bond that is both spiritual and physical has ended for both husband and wife. Marriage disintegration is generally caused by four things, namely one of the spouses dies, *Talaq*, *Khulu'* and *Fasakh*.<sup>2</sup>

Based on that, the problem that occurs in this writing is divorce. Divorce caused the breaking of the physical and mental bond between husband and wife. Divorce has many consequences, one of which is Hadhanah. Hadhanah is an act of empowerment, teaching children to be self-sufficient. If there is a divorce, it is the mother who has authority over the children up to mumayyiz. If a woman's parent dies, she will be replaced by her grandmother, and if her grandmother is gone, then she will be replaced by her mother's younger sister (her mother's sister). If there are no offspring from the mother's line, it is the father's line that has the right to take care of them. Then, if the male parent dies, the grandmother (the father's parent) will replace it, if they also pass away, then hadhanah must be taken over by the father's closest family.<sup>3</sup>

It is different from what happened in the Minangkabau border area, in Rao Pasaman there were different ethnic marriages (Minangkabau and Tapanuli), where there was a divorce both for life and death divorce, then custody was fully controlled by the father's. Separation is the climax of the terrible resolution of marriage, occurs when a couple at a point of conflict is not ready to find answers that can satisfy both husband and wife. Custody of children in Minangkabau customs differs greatly from Tapanuli customs. Marriage between ethnicities is a different kind of racial marriage.<sup>4</sup>

In general, the purpose of this paper is to reveal factors that caused the emergence of differences in child custody and analyze them with Islamic and National law in relation

<sup>1</sup> Nibras Syafriani Manna, *Cerai Gugat: Tela'ah Penyebab Perceraian Pada Keluarga di Indonesia*, Jurnal Al-Azhar Indonesia Seri Humaniora, Vol. 6, No. 1, Maret 2021, h.11

<sup>2</sup> Khoiri, *Status Talak (Telaah Hukum Islam dan Hukum Nasional)*, Jurnal Qiyas: Hukum Islam dan Peradilan, Vol. 7, No. 1, April 2022, h. 109

<sup>3</sup> Ahmad Zaenal Fanani, *Sengketa Hak Asuh Anak Dalam Hukum Keluarga Prespektif Keadilan Jender*, Jurnal Muslim Heritage, Vol. 2, No.1, 2017, h. 159

<sup>4</sup> Aguswita Wahyuni, Nurman S, *Dampak Perkawinan Adat Antar Etnis Mandailing dengan Etnis Minangkabau Terhadap Kekerabatan dan Hak Waris Anak di Kabupaten Pasaman*, Journal of Civic Education, Vol 2 No. 5 2019, h. 382

to Hadhanah disputes that occurred between two ethnic Minangkabau and Tapanuli in Rao Pasaman. For more details to be able to find out and identify the Hadhanah settlements of the different ethnic divorces. The product that this article wants to produce is a scientific publication in national journals.

## **B. RESEARCH METHODS**

This study uses qualitative research methods using normative juridical and ethnographic approaches. Ethnography is more than just a social sciences, it also requires learning from society and understanding a way of life from the point of view of the indigenous population.<sup>5</sup>

The normative juridical approach is to study or analyze data in the form of legal materials, especially primary and secondary legal materials.<sup>6</sup> The research location is in Rao Pasaman, which consists of 3 districts, namely Rao, North Rao, and South Rao. The reason the author chooses that location is that seeing there is often a dispute over childcare post-divorce between a different ethnic husband and wife from Minangkabau and Tapanuli, the writer feels interested in examining this phenomenon.

Primary data is direct information obtained through interviews with informants who are considered to know the information and problems researched in depth and can be trusted to be a valid source of data. Secondary data obtained through books, magazines, and journals.

Data triangulation and technical triangulation are two types of triangulation used by researchers to obtain reliable data. Similar or identical data will be more reliable if it comes from different data sources in data triangulation. When compared with comparative data collected from other sources, the data obtained from one source can be verified. To obtain the same or comparable data, triangulation of methods is done by utilizing various methods or approaches to data collection.

## **C. RESULT AND DISCUSSION**

### **Definition of Hadhanah**

*Hadhanah* comes from *mashdar* the word *hadhnuash-shabiy* “parenting” or “foster child”, holding it on the side, chest, or arms are not considered to provide care (*hadhn*). Provide care in this context refers to activities such as eating, dressing, sleeping, cleaning, using the restroom, and doing laundry.<sup>7</sup>

According to *etimologis*, *hadhanah* is “beside or under the armpit”. According to its phrase, *Hadhanah* is the right to take care of and teach children who are not *mumayyiz* until they are self-sufficient.<sup>8</sup> Fiqh cleric provides a definition that is caring for children who are not *mumayyiz* yet, providing all necessities, providing spiritual and physical protection so that they are independent and strong in living on the surface of the earth

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<sup>5</sup> Spradley, James P, *Metode Etnografi*. (Yogyakarta: PT Tiara Wacana Yogya, 1997), h.67

<sup>6</sup> Soemitro, R.H. 1990. *Metodologi Penelitian Hukum*. (Jakarta: Ghalia Indonesia, 1990), h. 26-27

<sup>7</sup> Elimartati dan Firdaus, *Hak Hadhanah dalam Putusan Pengadilan Agama*. Jurnal Ilmiah Syari'ah, 2019, h. 17

<sup>8</sup> Rahmat, Hakim. *Hukum Perkawinan Islam*. (Bandung: Pustaka Setia, 2000), h. 67

wisely. *Hadhanah* means to stand by the side of the child. The implication is controlling, directing, and supervising everything that cannot be under the child's supervision.<sup>9</sup>

### Law Basis of Hadhanah

In Surah al-Baqarah verse 233, Allah SWT establishes the legal basis for child rearing as follows:

وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُنِيبَ الرِّضَاعَةَ ۖ وَعَلَى الْمَوْلُودِ لَهُ ۖ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ ۚ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا ۚ لَا تُضَارَّ وَالِدَةٌ ۖ وَلَا مَوْلُودٌ لَهُ ۚ بِوَالِدِهِ ۚ وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ ۚ فَإِنْ أَرَادَا فِصَالًا عَنْ تَرَاضٍ مِنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا ۚ وَإِنْ أَرَدْتُمْ أَنْ تَسْتَرْضِعُوا أَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا ۖ اتَّيْتُمْ بِالْمَعْرُوفِ ۚ وَاتَّقُوا اللَّهَ ۖ وَعَلِمُوا أَنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ (البقرة:2:233)

*“Mothers may nurse their infants for two whole years, for those who desire to complete the nursing period. It is the duty of the father to provide for them and clothe them in a proper manner. No soul shall be burdened beyond its capacity. No mother shall be harmed on account of her child, and no father shall be harmed on account of his child. The same duty rests upon the heir. If the couple desire weaning, by mutual consent and consultation, they commit no error by doing so. You commit no error by hiring nursing mothers, as long as you pay them fairly. And be wary of God, and know that God is Seeing what you do”.* (al-Baqarah:233)

Likewise with the words of Rasulullah SAW about raising children:

عَنْ عَبْدِ اللَّهِ ابْنِ عُمَرَ أَنَّ أُمَّرَةَ قَالَتْ : يَا رَسُولَ اللَّهِ ص . م ، إِنَّ ابْنِي هَذَا ان بَطْنِي لَهُ و عَاءٌ وَحَجْرِي لَهُ حِوَاءٌ وَتَدْيِي لَهُ سِقَاءٌ وَرَعَمَ أَبُوهُ أَنَّهُ يَنْزِعُهُ مِنْ فِقَالٍ أَنْتِ أَحَقُّ بِهِ مَالَم تَنْكِحِي (رواه أحمد وأبو داود)

*“According to Abdullah bin Amr, the mother asked: "O Messenger of Allah, for this child, my stomach is his house, my stomach is his shelter, and my water (milk) is his drink. But suddenly his dad believes he has the right to take it from me." As long as you're not connected to anyone else, you're more than qualified for it.”* (Ahmad and Abu Hurairah)

### Terms of Hadhanah

The conditions that have been explained before must meet the parameters mentioned above, which have been carefully set:<sup>10</sup>

- a. Healthy mind and soul. Those who lack mental capacity should avoid dealing with *hadhanah*.

<sup>9</sup> Ayyub, *Fikih Keluarga*. (Jakarta Timur: Pustaka al-Kautsar, 2005), h. 90

<sup>10</sup> Sayyid Sabiq, *Fiqh Sunnah jilid 4 “Ditahqiq oleh ahli waris: Muhammad Sayyid Sabiq”*. (Jakarta: Pena Pundi Aksara, 2010), h. 65

- b. Adult (*baligh*)
- c. Can teach children. The transfer of this right to those who are blind or have poor eyesight is not permitted. In addition, it should not be given to elderly people who actually need other people's help.
- d. Reliable, awesome, and trustworthy. Parental rights cannot be given to a bad woman. Therefore, she was unfit to take care of the children at that time, if such a woman remained the guardian of the children, then the child would develop morally according to his or her lifestyle or that of his or her parents.
- e. *Muslimah*. Considering that parents will try to educate their children according to their religious teachings, this will greatly affect the child's religion in this case.
- f. This only applies to mothers who are married to men from outside their children's families, not to women who are not yet married. The consequence is that, according to the ijthihad cleric, *Hadlin's* influence still prevails.<sup>11</sup>
- g. Free or independent. The childminder must be free of slavery.

### **Duration of Childcare**

Hadhanah ends when a child is strong enough to fend for himself and no longer needs assistance, meaning that he is able to meet his own basic needs to eat, drink, and have clothing. There is no explicitly defined time limit for stopping time in this situation. However, there are indications that can help understand this. Hadhanah ends when the child grows up and does not depend on his mother's care.<sup>12</sup>

Maliki believes that raising a boy should start at birth and continue until puberty, which is marked by wet dreams (*ihtilam*). Women, on the other hand, are when they marry. They adopted the premise of the argument, such as Imam Ahmad's claim that he was paraphrasing the words of Rasulullah SAW. "O Messenger of Allah, in fact, my child occupies the space in my stomach where his womb is. My milk became his food and drink, and my lap became his bed then he broke away from me and tried to get rid of my son" and Allah's Prophet replied, "You are more entitled to your child while you are not married."<sup>13</sup>

According to Imam Syafi'i, time cannot be determined with certainty. Someone's baby stays with the wife forever until they have time to consider their options. "From Abu Hurairah, when the Prophet came across a woman who said, "Actually, my husband wants to take my child," the hadith verses say. Then Prophet said, "These are the hands of your mother and father. Choose the hand wherever you like, and the child is holding his mother's hand."<sup>14</sup>

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<sup>11</sup> M. Satria Effendi Zein, *Problematika Hukum Keluarga Islam Kontemporer*. Jakarta: Prenada Media Grup, 2010), h.60

<sup>12</sup> Sayyid Sabiq, *Fiqh Sunnah jilid 2*. (Jakarta: Al-I'tishom, 2008), h. 30

<sup>13</sup> Sayyid Sabiq, *Fiqh Sunnah jilid 2*, h. 30

<sup>14</sup> Achmad Muhajir, *Jurnal SAP Vol. 2 No. 2 Desember, 2008*

According to Imam Hambali, the father fulfills the qualifications without having to make a decision for a very long time, while the mother is better prepared to accompany him for up to 108 months.<sup>15</sup> As a result, the daughter, whether she is small or large and whether she is crippled or insane, belongs entirely to her mother because she needs constant care and attention. The mother is much wiser in this matter than the father.<sup>16</sup>

### Barrier Factors of *Hadhanah*

Even though custody rights are with the mother, there are several factors that can harm the rights of mothers, and they sometimes do not have the choice to devote their full attention to their children:

- a. Slave. Children could not be looked after by nannies who were still alive as slaves.
- b. Nurturing cannot occur when the caregiver leaves and does not return.
- c. If the guardian has a dangerous disease, such as madness, leprosy, etc.
- d. Infidel. The caregiver cannot be someone from different beliefs.
- e. A nanny remarries.<sup>17</sup>

### *Hadhanah* in Minangkabau

According to the customary system, the hadhanah provision is that if there is news that a husband and wife have divorced, the husband will report this to the *mamak* wife's, then the *mamak* of the house will tell the *niniek mamak* (traditional figure). Then the *niniek mamak* authorizes the *mamak* of the house to inform about child custody before the husband leaves the house. After a divorce, the child is brought up by the mother and educated until adulthood, the task of the ex-husband is to provide money as much as possible for the livelihood of his children.

Minangkabau is also known as the largest race that adheres to the mother's lineage, which is called matrilineal. The Gadang house, the framework of this relationship, contains important components not only for the father, mother, and children but also for the *dunsanak* from the mother's side as a whole.<sup>18</sup>

Minangkabau adheres to the framework of matrilineal family relations. In the Minangkabau tribe, the entire mother's family plays a role in the upbringing.. Therefore, raising children is not only the mother's responsibility but involves the support of the mother's relatives, such as *Mamak* (mother's siblings), who are in charge of caring for the nephews (*kamanakan*). The mother's older siblings are named Mamak, as they say "*anak dipangku, kamanakan dibimbiang*" in fact, apart from really focusing on the baby, also the nephew.

As shown by the custom in Minangkabau, someone who has a partner, then at that time the husband will live/live in the wife's residence. In Minangkabau custom it is called *Urang Sumando*, the relationship between the couple, and the extended family of the couple lasts for as long as the marriage bond. The husband does not have control over the

<sup>15</sup> Sayyid Sabiq, *Fiqh Sunnah jilid 2*, h. 30

<sup>16</sup> Humaizah Tahido Yanggo, *Fikih Perempuan Kontemporer*. (Jakarta: Ghailia Indonesia, 2013), h. 70

<sup>17</sup> Ayyub, *Fikih Keluarga*. h. 90

<sup>18</sup> Chandra, J. S., *Notions of critical thinking in Javanese*, 2004, h. 45

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wife's house, especially in inheritance, because *Urang Sumando* resembles the dust of *Diateh Tunggua*, and *Tibo* winds of dust are gone. If there is separation, the husband comes out only with body clothes. But there is also a husband who has a good influence on the wife's family so that his opinion can be heard, a husband like this is called *Sumando Niniak Mamak*.<sup>19</sup>

### **Hadhanah in Tapanuli**

In the Tapanuli community, which uses patrilineal kinship, it is explained regarding child custody after a divorce that the child does not go with the mother or the mother's family but remains with the father, whether divorce is alive or divorce is caused by death.<sup>20</sup> Patrilineal is a family kinship relationship in which the child unilaterally connects himself to his father and all male lineages.

The form of marriage in Tapanuli is exogamy, which means having to use an honest marriage system whereby the prospective husband gives the prospective wife a certain amount of money. The bride moves and joins her husband's legal alliance as a substitute for being released from her father's legal alliance, relatives (family name, tribe) of the prospective husband give gifts of money or goods to relatives of the prospective wife honestly. After marriage, the woman is under the authority of the husband's relatives and is also responsible for his life and death. He also has legal standing and lives a relatively peaceful life. Just as the wife's property brought into the marriage is all under the husband's jurisdiction, her children and descendants continue the husband's bloodline.

### **Hadhanah According to Law Number 1 Year 1974 and the Compilation of Islamic Law**

According to Law of the Republic of Indonesia Number 1 Year 1974, Article 41 clause (1) and (2), there are legal consequences that can befall children in the event of divorce, including:

- a. If there is a dispute over child control, the court makes its decision. However, both mothers and fathers are still required to raise and educate their children solely for the best interests of the children.
- b. If the father is actually unable to take care of these responsibilities, the court may decide that the mother is also responsible for paying these costs.

The Compilation of Islamic Law (CIL) offers a more thorough explanation of this. CIL contains at least two articles, 105 and 156, which regulate child care. The Compilation of Islamic Law distinguishes two stages of child development in relation to parenting, the first being before *mumayyiz* or when the child is unable to distinguish between what is good for him, and what is bad alone from birth to age 21 years.

If there is a divorce, see Article 105 see paragraphs A and C:

- a. Mothers have the right to provide for children who are not *mumayyiz* yet or 12 years old.

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<sup>19</sup> Datoek Toeah, *Tambo Alam Minangkabau*. (Bukittinggi: CV. Pustaka Indonesia, 1989), h. 50

<sup>20</sup> Bushar Muhammad, *Pokok-Pokok Hukum Adat*. (Jakarta. Pradaya Paramita, 2006), h. 25

b. Her father foots the bill for childcare.<sup>21</sup>

According to Article 156, a child who is not yet 12 years old and not mumuayiz yet has the right to receive care from his mother. The court can decide on the amount of child support and educational expenses, taking into account the father's capacity. Based on the Compilation of Islamic Law explanation, it is clear that the child is being cared for by the mother, not the father. The father is only responsible for earning a living to cover the child's living expenses after the divorce until the child is independent.

### Causes of *Hadhanah* Fall to Father in Rao Pasaman

Child custody in the Minangkabau Ethnic perspective states that it is fully in the hands of the mother and the mother's side. This provision applies to the Minangkabau Kingdom itself, starting from the time when Islam had not yet entered the realm of Minangkabau. However, the Minang people prioritize *raso* and *pareso*, the problem of feeling more dominant is the strong and powerful feeling of *padusi* (female). The word woman actually has a beautiful meaning, in its journey the word woman in every region of Indonesia experiences semantic degradation in everyday conversation. The word for women in Minangkabau is called *Par-ampu-an*. The origin of the word is *ampu* or *empu* which means expert, support, and support (pole). Coupled with the affixes *per* and *an*, the affix *per* means the calling word, and then *an* means the result of the action. Woman means support, an expert or a place to lean on.

The magnitude of the role and the beautiful meaning of women in the Minangkabau ethnicity—having great feeling skills (loving), providing a place to rest for tired and tired bodies when the husband returns home to earn a living—calms the heart, and removes the feeling of fatigue. The collapse of the building was caused by the cracking of the pillars. Even in a country, the pillars are women. Until the result of a woman's actions if she is able to place her position as a *Per-empu-an* then Rasulullah SAW stated that heaven is under the feet of mothers. So only women have competence in raising children.

The Tapanuli ethnic in Rao Pasaman are immigrants from South Tapanuli. They are the origin of Batak descent who are in South Tapanuli, of the Mandailing and Angkola Batak race living in the South Tapanuli district (the capital of Padang Sidempuan) and the Mandailing Natal district (often abbreviated as Madina with the capital Penyabungan). In Rao Pasaman they are called the Tapanuli people. There are also people called the Mandailing people. These two titles are actually the same because of one descendant of the Batak ethnicity. All Batak people use and adhere to the exogamy marriage system. The framework of the relationship adopted by this race is patrilineal, implying that the Batak race adheres to the father's lineage. Within this framework, boys and girls have various rights and commitments to the group.

Child custody is interpreted as the right of the husband after the divorce to care for, educate, and finance the child. The child comes from the water emitted by the husband into the womb of the wife. Traditionally, the child does not belong to the mother but belongs to the father, and the authority in caring for children after a divorce occurs when the child is fully taken, controlled, and owned by the father, not the mother. Because

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<sup>21</sup> Departemen Agama, *Kompilasi Hukum Islam*. Direktorat Kelembagaan Agama Islam, 1997/1998, h. 7



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a child exists because of the sperm of its father, no man will not have children. Women are only used to bearing children. Traditionally, men are the top priority in the attainment of children. As a result, the child is completely taken over by the husband following a divorce, according to Tapanuli's custom.

### Analysis of Hadhanah Disputes that Happened between Two Ethnic Minangkabau and Tapanuli in Rao Pasaman

Islam at its most basic level assigns the obligation to nurture, support, and teach children to mothers and fathers. This obligation lasts until the child reaches legal age as an individual who is capable of dealing with his own problems.<sup>22</sup> Most Fiqh experts agree to provide care to the mother and the mother's family if the mother is unable to do so when she is sick.<sup>23</sup> Rasulullah SAW declared:

أَخْبَرَنَا أَبُو عَاصِمٍ حَدَّثَنَا ابْنُ جُرَيْجٍ قَالَ أَخْبَرَنِي زِيَادُ بْنُ سَعْدٍ عَنْ هِلَالِ بْنِ أُسَامَةَ عَنْ أَبِي مَيْمُونَةَ سُلَيْمَانَ مَوْلَى لِأَهْلِ الْمَدِينَةِ قَالَ كُنْتُ عِنْدَ أَبِي هُرَيْرَةَ فَجَاءَتْهُ امْرَأَةٌ فَقَالَتْ إِنَّ زَوْجِي يُرِيدُ أَنْ يَذْهَبَ بِوَلَدِي فَقَالَ أَبُو هُرَيْرَةَ كُنْتُ عِنْدَ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ إِذْ جَاءَتْهُ امْرَأَةٌ فَقَالَتْ إِنَّ زَوْجِي يُرِيدُ أَنْ يَذْهَبَ بِوَلَدِي أَوْ بَابْنِي وَقَدْ نَفَعَنِي وَسَقَانِي مِنْ بَيْتِ أَبِي عِنْبَةَ فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ اسْتَهَمَا أَوْ قَالَ تَسَاهَمَا أَبُو عَاصِمٍ الشَّاكُّ فَجَاءَ زَوْجُهَا فَقَالَ مَنْ يُخَاصِمُنِي فِي وَلَدِي أَوْ فِي ابْنِي فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَا غُلَامُ هَذَا أَبُوكَ وَهَذِهِ أُمُّكَ فَخُذْ بِيَدِ أَيْتَهُمَا شِئْتَ وَقَدْ قَالَ أَبُو عَاصِمٍ فَاتَّبَعَ أُيْتَهُمَا شِئْتَ فَأَخَذَ بِيَدِ أُمِّهِ فَأَنْطَلَقَتْ بِهِ (رواه الدارمي)

*A former slave who now lives in Medina said: "After telling us Abu 'Asim had told us Ibn Juraij, he said; he told me Ziyad bin Sa'd from Hilal bin Usamah from Abu Maimunah Sulaiman: I was once at Abu Hurairah's house, then a woman came to him and said, "Indeed my husband is going to take my child." When I was with the Prophet, sallallahu 'alaihi wa sallam, a woman approached me and said, "My husband wants to travel with my son, or your son, but my son has been helping me and always fetching water from the Abu'Inabah well." Then her husband came and asked, "Who is who will fight me against my son?" Rasulullah shallallahu 'alaihi wasallam replied, "O little child, this is your father and this is your mother, hold the hand of which one of the two you want!" The child finally took his mother's hand, and then the woman took his hand. Abu 'Ashim questioned the hadith's editorial. (H.R. Dharimi)*

<sup>22</sup> Yahya Harahap, *Hukum Perkawinan Nasional: Pembebasan berdasarkan Undang-Undang no 1 tahun 1974. Peraturan Pemerintah no 9 tahun 1975.* h. 37

<sup>23</sup> Azhari Akmal. Tarigan, *Hukum Perdata Islam di Indonesia.* (Jakarta: Prenada Media, 2004), h.33

The confirmation from the words of Rasulullah SAW is very clear and obvious that after the divorce, the mother will have the legal responsibility to raise the child. Hanafi and Maliki believe that *hadhanah* is a mother's right. In this view, the principle of legal certainty is also applied to provide certainty in a *hadhanah* dispute.<sup>24</sup>

Legal experts conclude that the mother's family of the child has stronger rights than the father's family because the mother is someone who has parental responsibilities. The following individuals are eligible to be cared for: a maternal grandmother, sibling, mother's sister, father's sister, mother's biological daughter, mother's daughter from the same father, mother's biological sister, mother's sister (aunt), sibling father's daughter (uncle), father's sister's daughter, brother's daughter, mother's brother's daughter, and mother's granddaughter, respectively.<sup>25</sup>

In the author's opinion, the Minangkabau ethnic *hadhanah* system adheres to the principles of Islamic law, which states that *hadhanah* must be performed by the mother's family in the presence of the father's relatives. The sequence is as follows: Mom comes first. *Hadhanah* rights are given to mothers (grandmothers) and above if there are obstacles that prevent them from getting priority (for example, because one of the conditions is not fulfilled). Brother's daughters, maternal brother's daughters, and brother's daughters all have the same father coming next: parent's sister, paternal sister, maternal niece, a niece from the mother's side, siblings from the mother's side, and nephews from the father's side. Then came the aunts who shared the same mother, aunts from the same mother, and aunts from the same father.

However, in the *hadhanah* system of the Tapanuli ethnicity, the direction is very different. From what is written in Islamic law, *hadlin* (the person who has the right to care for the child) is the father/father of the child. This is outside the rules of Allah and Rasulullah, even though the Tapanuli ethnicity claims to be a citizen who embraces Islam.

Taqiyuddin An-Nabhany emphasized that Islam is a religion revealed to Muhammad SAW to regulate human relations with Allah SWT, fellow human beings, and oneself.<sup>26</sup> Islam is a religion that maintains unshakable moral and ethical guidelines for all its adherents. In accordance with the rules of *syara'*, namely as follows:

الأَصْلُ فِي الْأَفْعَالِ التَّقْيِيدُ بِحُكْمِ اللَّهِ

“In the beginning, *Syara* law regulated human behavior.”<sup>27</sup>

Based on the rules above, *Syara's* Law always regulates how humans should behave. After divorce, a woman has more rights than a father in terms of *hadhanah* rights, according to the theoretical notion of *hadhanah* in Islam. This happens if children born to married couples have not yet developed, because immature children cannot decide and make choices (father or mother). Furthermore, mothers have a better understanding of what their children need and want from a psychological standpoint than fathers do in prepubescent children.

Dahlan, Abdul Aziz. *Ensiklopedi Hukum Islam*. (Jakarta: Ikhtiar Barui Van Hoepe, 1999), h. 32<sup>24</sup>

Kamil Muhamad. Uwaidah, (terjemah) Abdul Gofur, *Fiqih Wanita*. Jakarta: Al Kautsar, 2006), h. 52<sup>25</sup>

Taqiyuddin. An-Nabhany, *Nizhomu al-Islam*. Bogor. Thoriqul Izzah, 2005),. cet. Ke-5 h. 56<sup>26</sup>

‘Atho’ bin Khalil. 2000. *Taisir al-Ushul ila al-Wushul*. Beirut. Dar al-Ummah. Cet. 2<sup>27</sup>

Based on the basis regarding the view of hadhanah by Law No. 1 Year 1974 and the Compilation of Islamic Law can be the author of an analysis regarding child custody because the disputes do not reach the realm of law/court but only non-litigation which can be resolved in the realm of outside Religious Courts. The Tapanuli ethnicity has become the majority in Rao Pasaman, while the Minangkabau ethnicity is now a minority, so the hadhanah system now spontaneously uses the Tapanuli hadhanah. In theory, child custody disputes are to be resolved using the concepts of Islamic law and positive law, which both provide a solution that the caregiver after divorce is the mother, while the father's right is to provide living expenses until the child is an adult or independent.

## **D. CLOSING**

### **Conclusion**

The causes of child custody in Rao Pasaman fell to the father because the residents were Tapanuli, while the Minangkabau were a minority so more *hadhanah* went to the father. Even though the Rao Pasaman area is an overseas land of the Minangkabau people who use the customary philosophy of *adat basandi syara', syara' basandi kitabullah*, but instead they are a minority in their own land. The *hadhanah* dispute after the divorce of different ethnicities in Rao Pasaman where the Minangkabau ethnic wanted to resolve the dispute through the courts, while the Tapanuli ethnic only resolved it up to the non-litigation stage, through the village heads (*Ninik Mamak* and *Hatobangon*) without using settlement in a litigation way (Religion Court). From the perspective of Islamic law, the settlement of child custody disputes in Rao Pasaman does not use Islamic guidance.

### **Recommendation**

Based on the researcher's conclusions, it is hoped that this research can be used as a foundation for future research on the resolution of child custody disputes of different ethnicities, and that future researchers can examine child custody disputes with other ethnicities.

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