

## Review of Fiqh Legal and Positive Law Regarding Divorce Procedure

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### ABSTRACT

This research explains the review of fiqh legal and positive law regarding the procedures for divorce. the purpose of writing this article is to provide education, information and advocacy to readers so that divorce is carried out in a civilized manner by adhering to fiqh legal procedures and positive law. this type of research is qualitative legal research and normative legal research, namely what we know as library law research, namely legal articles that are carried out by researching based on materials sourced from the literature. the data sources used by the author in this article include primary legal materials, namely applicable laws and regulations which provide a description of primary legal materials in the form of commentaries, general books, journals, documents and other references related to this article. the results of writing this article are: first, the husband has the authority to give talaq or divorce his wife if the problem at hand has no way of solving the problem. second, husband and wife should always prioritize peaceful mediation and avoid conflicts that can trigger household damage. third, divorce should follow the legal mechanism of fiqh and positive law according to existing regulations.

## **INTRODUCTION**

Islamic Shari'ah makes the relationship between husband and wife in marriage as a sacred and sturdy relationship, as the Qur'an gives the term that relationship which means: "How are you going to take it back, even though some of you have been associating (mixed) with others as husband and wife, they (your wives) have taken from you a strong agreement." Every act that takes the marital relationship for granted and ignores it is highly despised by Islam, because this act can eliminate the goodness and benefit of the husband and wife. Therefore, the husband and wife are obliged to maintain the connection of the marital ties, and it is not appropriate for them to try to damage and break the ties. Even though in Islamic law a husband is given the right to drop divorce, marriage has sacred values in religion, because it has the principle that marriage is forever filled with compassion and loving love between partners. Therefore, the Islamic religion forbids marriage with the aim of temporarily or for a certain time just to let go of lust. Every marriage must have desires and goals, therefore there are many goals of the marriage, but in essence the aim of the marriage is to form a happy and eternal family based on Belief in the One and Only God, this is in accordance with Law number 1 of 1974 concerning Marriage in article 1.1 As for the Compilation of Islamic Law, marriage aims to create a household life that is *sakinah*, *mawaddah* and *rahmah*. Law Number 1 of 1974 Concerning Marriage regulates marriage for its citizens, this is reflected in the meaning of the marriage stated in Article 2 paragraph 1 which reads, Marriage is legal, if it is carried out according to the laws of each religion and belief. Meanwhile, in the Compilation of Islamic Law, it is explained that marriage is a very strong contract or *mitsaqon gholidhan* to obey Allah's commands and carry it out as worship. Every human being longs for a happy marriage, by realizing the ideals so that a happy family is formed. However, many of these marriages are just dreams and not as expected because many married couples fight only because of small problems, which then become big fights that not a few end in divorce..(PUTRA, 2017)

The purpose of marriage in Islam is to fulfill God's instructions in order to establish a harmonious, prosperous and happy family. Harmony in carrying out the rights and obligations of members of a prosperous family means creating peace of mind and body due to the fulfillment of the needs of life both physically and mentally, so that happiness and affection arise between family members. The feeling of love and affection in this family will also be felt in society or the *ummah* so that an *ummah* is formed that is filled with love and affection. The purpose of the marriage they wanted was not achieved properly, for various reasons. Is it because of incompatibility or because of other factors such as not having children, but basically from these various reasons we have to think clearly whether offspring or children have an important role in the meaning of marriage. Because if we look back at the purpose of marriage, what is desired from marriage is that there are many goals, such as fulfilling religious instructions in order to build a harmonious, prosperous and happy family. But if there is no reason whatsoever or the reason is unreasonable, then such a divorce means that he has disobeyed the favors that Allah has given him and has been mean to his wife. Therefore divorce (*talak*) is hated by Allah. Islam allows husbands and wives to divorce, of

course with certain reasons, even though divorce is hated by Allah SWT. Divorce (Thalaq) is an Islamic teaching in marriage, but it is hated by Allah even though it is lawful (permissible), because divorce means that the purpose of marriage fades and is not achieved. Divorce in Islam is not something that is often done between husband and wife. is no longer harmonious, but when there is a dispute between the two parties, the husband or wife delegates a peacemaker (hakam). This hakam serves to bridge the possibility of rebuilding the household, as well as breaking up husband-wife quarrels so that the integrity of the household mahligai marriage can continue until the end of their lives. petition for divorce-thalaq, or the wife's initiative to sue her husband for divorce. In the Compilation of Islamic Law (KHI) it is generally explained that divorce is regulated in articles 113 to 148 in the chapter on the dissolution of marriages.(Ramadhani, 2009)

The Compilation of Islamic Law explained that the divorce (breakup of marriage) above, one of the reasons for the permissibility of divorce is that one party has a disability or illness with the consequence of not being able to carry out the obligations as husband/ wife. None of the two legal sources explain the permissibility of divorce on the grounds of impotence or not having children. Even though this can be included in point e of article 116 KHI, this is still debatable, because if marriage without children can be used as a reason for divorce, many couples will experience divorce. In addressing the issue of reasons for divorce, there is a difference between fiqh and positive law reviews regarding whether impotence in men can be used as a reason for divorce. Meanwhile, at the present time medical science is progressing so that it can be a means to overcome these problems. Because divorce can have huge legal consequences.

## RESEARCH METHODS

In writing this article, the author uses qualitative legal research and normative legal research, namely what we know as library law research, namely legal articles that are carried out by researching based on materials sourced from the literature. The data sources used by the author of the article in this writing include primary legal materials (binding legal materials), namely the applicable laws and regulations relating to the issues in this article. secondary law, namely legal material that provides a description of primary legal material, among others; commentaries, general books, journals, documents and other references related to this article Tertiary legal materials, namely legal materials that provide instructions and explanations of primary and secondary legal materials, such as dictionaries and other reference materials that support the writing of this article . As for the data collection technique in writing this article, the authors used library research or literature study, while the data analysis technique used was a qualitative comparative technique, namely providing a comparative review of fiqh and positive law on existing problems.(Yulmina, 2019)

## RESULTS AND DISCUSSION

### 1. *Pledge of Divorce*

Pledge comes from classical Arabic, comes from the word qarra which means cold or fixed, comes from mashdar iqrar which means confession or obedience. Pledge can also be interpreted as a contract or promise. In the Big Indonesian Dictionary, a pledge is a solemn promise, a promise with an oath. Pledge according to language means itsbat which means to establish. According to syara, the pledge means recognition of what is being charged. It can be concluded that the pledge is proof, or it can also be referred to as self-witness. From the several meanings and definitions above, the pledge of divorce can be concluded as the pronouncement of a husband's oath or confession before a Religious Court session which aims to break or eliminate the marital ties between husband and wife in accordance with Islamic law. After the fall of divorce, a wife is no longer lawful for her husband, and reduces the number of divorces for a husband from three to two, then from two to one, and from one the right to divorce is lost, namely divorce that occurs in raj'i divorce (Nasution, 2018)

### 2. *Pillars and Conditions*

Pillars are the main elements that must be present in divorce, because divorce is realized depending on the completeness of the elements in question. There are four pillars of divorce, namely the husband, because the husband has the right to divorce. With the conditions of reason, baligh and of their own volition. The wife, the conditions for a divorced wife are that she is still under the protection of the husband's power and the wife's position must be based on a valid marriage contract. Sighat Talak, a lafadz uttered by the husband indicating divorce, either in a sharih (obvious) or kinayah (innuendo) manner. Qashdu (intentionally), that the utterance of divorce was meant for divorce, not for any other purpose. Procedures for Divorce Pledges in the Religious Courts In Government Regulation No. 9 of 1975 Articles 14 to 18, the procedure for a husband who will divorce his wife has been regulated. First, the husband submits a letter to the court where he lives, the letter contains a notification that he intends to divorce his wife accompanied by reasons and asks the court to hold a hearing regarding this need. (Article 14). After the Court receives the notification letter, the Court then studies the contents of the letter and summons the parties, namely the husband and wife no later than 30 days after receiving the letter to request an explanation regarding the divorce application. (Article 15) The court decides to hold a hearing if indeed the reasons put forward are in accordance with the reasons for the divorce which have been stipulated in Article 19 PP No.9 of 1975, and the two are no longer able to be reconciled and unable to live in harmony in the house ladder. (Article 16)(Zuhra, 2018)

### 3. *Trial Stages*

At the first trial, the two parties were reconciled by the judge, the husband and wife had to come personally (Article 82 of Law No. 7 of 1989). If the judge cannot reconcile, the judge obliges the parties (husband and wife) to go through a mediation process (Article 3 paragraph (1) PERMA No.2 of 2003). Then if the mediation is not successful, then it is continued with the reading of the request letter, then the answer from the respondent, replica, duplicate, proof, and conclusion. And prior to the evidentiary process, the respondent can submit a counterclaim or counterclaim. Then if the application is not accepted, then the applicant can submit a new application. If the request is granted and the decision has permanent legal force, then the court will then determine the hearing to witness the divorce pledge. The grace period given for witnessing the divorce pledge is six months after the decision has permanent legal force, if more than that the husband or his attorney does not carry out the hearing to witness the divorce pledge within the allotted time, the legal force of the determination is void and the divorce is not valid. can be resubmitted based on the same legal reasons (Article 70 paragraph (6) UUN No. 7 of 1989). After the divorce witness hearing is held, then the Head of Court will make a statement that the divorce has occurred, then the letter will be sent to the Registrar Officer at the place where the divorce occurred to hold the divorce record. (Article 17). Then the clerk is obliged to provide a divorce certificate to the parties no later than seven days after the determination of the divorce pledge (Article 84 paragraph (4) of Law No. 7 of 1989) "Divorce takes place from the time the divorce was declared before the court hearing". (Article 18)(Muhsin, 2021)

### 4. *Perspective of Fiqh and Law*

The existence of an advocate/legal attorney depends on their role and authority. Regarding the role and authority of a lawyer, we must look at the rules in the positive law that applies in Indonesia and fiqh books. Advocates/lawyers in Islam enter into the concept of al-wakalah. Al-wakalah itself has been defined by each fiqh expert, as has been described in the previous Chapter II which basically terminologically has the same meaning. The legal content in alwakalah can be divided into two as explained in the pillars and conditions of wakalah. Legal subject, there are two legal subjects namely the authorizing agent and the person receiving the power of attorney. The legal object is the rights and authority delegated to be represented. This has also been agreed upon by fiqh experts, in this case the recipients of the power of attorney must act in accordance with their rights and authorities as given by the authorizer. The power of attorney also may not act on his own behalf, but must act on behalf of the power of attorney. The regulation is also in line with Article 1792 of the Law of Agreement which reads: "Granting of power is an agreement by which a person

gives power to another person, who receives it, to carry out an affair on his behalf." Article 1797 BW reads: "The person in power is not allowed to do anything that goes beyond his power. Article 1799 BW: "The person giving the power of attorney can directly sue the person with whom the power of attorney has acted in his position and demand from him the fulfillment of his agreement". In Islamic law, the condition for the representative itself is not stated that a representative must be a man. Representative applies to people who are intelligent as well as mature and capable of acting legally and vice does not apply to people who have lost their memory and children who have not yet passed mumayyiz. Legal competence is also called al-ahliyah which means eligibility. Therefore, legal competence is defined as a person's eligibility to accept the law and act legally or as "a person's eligibility to accept rights and obligations and to be recognized for his actions according to sharia law." Divorce is the husband's right. Therefore a husband may impose divorce on his wife directly, may hand it over to his wife (tafwidh) and/or delegate someone else to impose divorce on his wife (tawkil). Tafwidh (التفويض) is the delegation of rights given by a husband to his wife to divorce himself. Tafwidh that has been delegated by a husband to his wife cannot be revoked by his divorce rights, meaning that the power that has been given by a husband to his wife in civil procedural law is absolute power. The jurists discuss the matter of tafwidh based on: Surat al-Ahzab verse 28 which means: "O prophet, say to your wives: "If you all want the life of the world and its adornments, then let me give you mut'ah and I will divorce you by Asbabunnuzul from the verse above is due to the presence of some of the Prophet's wives who asked the Prophet for excessive living, until finally the letter al-Ahzab verses 28-29 was revealed as Abi Salamah narrates in a hadith which means: "From Abu Salamah bin Abdurrahman, he said : "In fact the wife of the Prophet SAW, Aisha ra told her that Rasulullah SAW had come to her when Allah ordered (him) to give choices to his wives. Then Rasulullah SAW started it to me saying: "Indeed I remind you of one thing, but you don't in a hurry to decide until you ask your parents for consideration." Even though he knew that my parents would not order me to divorce him. Aisyah ra said: Then he recited the two verses, namely surah al-Ahzab verses 28-29 until they were perfect. Then I said to him: Why should I ask my parents for consideration in this matter? Indeed, I want Allah, His messenger and the hereafter. Then the verse becomes the basis for the development of legal thinking regarding the granting of power of attorney.(Ramadhani, 2009)

From the opinions of these scholars it can be concluded that the power of divorce which is given to women either for themselves or others, basically the scholars allow it. This opinion also does not conflict with positive law in Indonesia, according to him so far there is no provision that a woman is prohibited from becoming a proxy in divorce cases in statutory regulations. Article 1798 BW states that: "Women and minors can be appointed as proxies, but the person giving the power of attorney does not have a lawsuit against minors". to act as a representative for pronouncing his client's divorce pledge. As stated in Article 70 paragraphs (3) and (4) of Law No. 7 of 1989 concerning the Religious Courts that after the decision has obtained permanent legal force, the Court determines the day for the hearing to witness the divorce pledge, by summoning the husband and wife or their representatives to attend the hearing . In that trial the husband or his representative who is given special power in an authentic deed to pronounce the divorce vow, pronounces the divorce vow in the presence of the wife or her attorney. So it can be concluded, there is no representative in Islamic law (fiqh) or positive law forbidding divorce pledge cases by women advocates.(Elyanur, 2017)

#### 5. *Divorce Due to Sexual Dysfunction*

Impotence or impotence in the Marriage Act No. 1 of 1974 concerning marriage and PP No. 9 of 1975 concerning the implementation of marriage, Law No. 1 of 1974 does not explicitly state that impotence or impotence can be used as a separate reason for divorce. But if we look at article 39 point 2 of Law No. 1 of 1974 it says "to carry out a divorce there must be sufficient reasons, that between husband and wife will not be able to live in harmony as husband and wife. This is based on article 34 point 3 namely "if a husband or wife neglects their respective obligations they can file a lawsuit with the court". If we underline the words neglecting obligations, many meanings can be drawn from these words. In terms of household obligations it can mean obligations to the body or obligations to the spiritual, obligations to the spiritual here are like fulfilling biological needs. If the obligations of biological needs are not met, it will be very feared that it will affect the harmony of the household. So if that happens, and one of the parties wants to separate, then the reason for the disharmony can be used as a reason for divorce.(Manna et al., 2021)

## CONCLUSIONS

The word talak is the same as divorce, the word divorce means to divorce, divorce is the event of breaking up a husband and wife relationship which is regulated according to institutionalized procedures to regulate it. With this understanding, the word divorce means the same as divorce or divorce, the terms divorce and divorce are also commonly used in Indonesian by our society with the same meaning. A husband divorces his wife because there is no way out to

solve the problem so it is hoped that divorce will be able to solve the problem but divorce must be done in a civilized manner by prioritizing etiquette values and always prioritizing fiqh legal procedures and positive law so that the divorce carried out has a meaningful meaning and has the force of law. In writing this article, the author requests readers to always maintain the integrity of the household by not creating chaos at home and not triggering husband and wife conflicts. As an academic, the author requests fellow prospective writers to always develop human resources to develop the country by continue to provide the best works to the nation and state with articles with Islamic family law disciplines. The author would like to thank all parties who have contributed from near and far, and supported until the results of this manuscript could be completed, especially to the head of STAI Aceh Tamiang, the head of the Islamic Criminal Law Study Program and the Academic Community who fully gave encouragement and trust in carrying out this research . The author believes that with the guidance and instructions of these figures, the author will continue to innovate and be creative in providing works for the nation and state.

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