

LAW RECONSTRUCTION ON THE REASON OF DIVORCE IN ISLAMIC MARRIAGE LAW IN INDONESIA BASED ON MAQASHID SYARI'AH

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ABSTRACT

Marriage is the beginning of a life together between a man and a woman as husband and wife, while divorce is the end of together life with a husband and wife. Everyone wants his/her marriage to remain intact throughout his/her lifetime. However, there are many marriages ended up with a divorce. The higher divorce rate in every Religious Court certainly is not something that should be expected. Religious Courts tend to easily agree on divorce lawsuits, especially on the grounds of divorce using Article 116 letter (f) in the Compilation of Islamic Law (KHI). It needs to be reviewed because it is not in line with the objectives of Islamic Shari'a (maqashid syari'ah) that has been enacted. An ideal form a happy family should be disqualified by divorce with only reasonable grounds for firecrackers, of course this is unfair.

Keywords: Marriage, Divorce, *Maqashid Syari'ah*

I. INTRODUCTION

Marriage is expected to bring peace of mind because the sense of affection and biological needs can be expressed properly. After marriage takes place, rights and obligations arise between husband and wife. A husband as the head of the family is responsible for his wife and his children. On the other hand, the wife as a housewife is responsible for the atmosphere of household life. However, this difference of responsibility does not mean in rights and position.

When a person establishes a marriage contract in the presence of *ijab qabul*, the couple will imagine about happiness, pleasure, and inner tranquility¹. In fact, sometimes the reality can be different. Although many marriages work, not a few marriages end up in divorce, or at least the marriage goes unharmed as expected². Especially with the more advanced and complex life in the present, then the problem of household life is increasing, both internal family problems and social conditions surrounding. Sometimes married couples fail in establishing peaceful and harmony at homes, because they are different in character and will, different from life goals and ideals, making them particularly vulnerable to divorce.

II. RESEARCH METHODS

The researcher used the paradigm of constructivism in this study. The paradigm of constructivism is chosen by considering that law is a social reality, then the truth depends on how society interprets. Besides through the paradigm constructivism, the researchers wanted to conduct an objective study related data accurately, then constructed through legal concepts that live tested again strength.

Approach method used was socio legal research. The study of socio legal research is a study that "integrates" the study of doctrinal law with social studies. This combination is based on the belief that the rule of law never works in a vacuum field. The rule of law works in a space full of value systems, dominant interests, not neutral. Therefore, in the study of socio legal research, there is a textual study of the articles in the rule of law.

Furthermore, a sharp analysis was done whether the rules in the society can realize justice, the stability of life and prosperity in the community. For that reason, social research was conducted for accuracy and achievement of truth based on paradigm. Social research can then be concluded that the rules of law can provide justice or not.³

The type of research conducted was descriptive analytical. Analytical descriptive research is a study that attempts to describe both current and previous condition / reality of the research conducted and then analyzed it comprehensively.

The effort to illustrate will not only aim to know, but to explain the true position of the focus of the issues discussed. The thing to note is to understand the problem not only from the point of view of social reality, but the actualization of the social reality of the law in its effect on the expected social engineering.

¹ Mahdiah, *Pedoman Praktis Permasalahan Hukum Perkawinan dan Kewarisan*, Jakarta: Pustaka Panjimas, 1994, page. 29.

² Mahfudli Shali, *Menuju Rumah Tangga Harmonis*, Pekalongan: TB. Bahagia, 1995, page. 79.

³ Mahfudli Shali, *Menuju Rumah Tangga Harmonis*, Pekalongan: TB. Bahagia, 1995, page. 79.

III. RESULT AND DISCUSSION

Marriage in Islam is not merely an ordinary covenant contract relationship, but as a very strong contract (الصليغ. اقامت) to obey God's command and perform it is worship. Marriage is full of requirements with values and aims to realize the life of a household *sakinah*, *mawadah* and *rahmah* (peace, love and compassion).⁴

It is as mentioned in Q.S. Ar-Rum (30) verse 21:

What It Means: and among His Signs is He created for you wives of your kind, that ye may be secure and inclined unto him, and made him of you compassion and love. Verily in that are really signs for the minds of the minds. (Q.S. Ar-Rum: 21).⁵

The constitutional juridical in Indonesia, marriage is regulated in the Marriage Law (Act No. 1/1974) in Article 1 as follows: Marriage is the inner birth bond between a man and a woman as husband and wife in order to form a family (home ladder) is happy and eternal based on Belief in the One Supreme.⁶

The Marriage Act has the principle of complicating the occurrence of divorce. Thus, when there are people who want to divorce, there must be caused by strong reasons submitted to the Religious Courts to convince the judge that their marriage is not maintained, so the best way is divorce. Islam in principle also prohibits divorce even if the divorce is still allowed when in the household it is untenable, as the Prophet SAW says that "A lawful deed most hated by Allah is divorce." (Narrated by Abu Dawud, Ibn Majah, and Al Judge of Ibn Umar).⁷

Divorce in Islamic law is in principle prohibited, it can be seen in the Prophet's cue that divorce is the most lawful deed that God hates⁸. Divorce is a lawful act and there are some who are angered by Allah and the one who is most wraths is divorce. The word "hated" is "*majaz*" which means no reward, no self-approach to God in the act. The Hadith is as a proposition that it is really good to avoid divorce as long as there is a way out.⁹

Based on the above facts, the researchers were interested to analyze the legal considerations in the decision of the Panel of Judges of the Religious Courts which granted the plaintiff's claim in its entirety by only giving consideration to Article 19 letter (f) PP. 9 Year 1975 Jo Article 116 letter (f) Compilation of Islamic Law.

In Indonesia, the laws governing marriage issues are contained in Law No. 1 of 1974 enacted on 2 January 1974 and reinforced by the issuance of PP no. 9 of 1975. The provisions governing divorce are possible by reason of *syiqaq* contained in article 19 of PP No. 9 of 1975 Jo. KHI (Compilation of Islamic Law) article 116.

Article 39 paragraph 2 of Law Number 1 Year 1974 states "To make divorce there must be enough reason that between husband and wife will not live in harmony as husband and wife."¹⁰

On the other hand, in the Compilation of Islamic Law (KHI) issued through INPRES (Presidential Instruction) No. 1 of 1991 dated June 10, 1991 which is made a material law in the environment of the Religious Court on the Compilation of Islamic Law. Divorce may occur due to reasons as follows:

- a. One of the sides of adultery or become a drunkard, compactor, gambler and others that are difficult to cure.
- b. One party leaves the other for 2 (two) consecutive years without the permission of the other party and for no legitimate reason or because of anything other than his or her ability.
- c. One party is sentenced to 5 (five) years imprisonment or a heavier sentence after marriage takes place
- d. One party commits atrocities or severe abuse which endangers the other party.
- e. One party gets a disability or illness with the consequences of not being able to perform his duties as a husband or wife.
- f. Between husband and wife continuous disputes and quarrels and no hope of living in harmony again in the household.
- g. Husband broke the *taklik-talak*.
- h. Religious transfers or apostates that cause unfairness in the household.

Preparedness of Islamic Law Compilation (KHI) in the above matter is no doubt, let alone reference source is not small. Thus, although the existence of divorce law in the Compilation of Islamic Law (KHI) can be said is a representation of the Islamic Law (Fiqh Law). However, its existence still gets a big test from the legal intellectuals who struggle to position Islamic Laws really provide comfort for Muslims in Indonesia for different reasons.

⁴ Abdurrahman, *Kompilasi Hukum Islam di Indonesia*, Jakarta: Akademika Pressindo, 1995, page. 114.

⁵ Departemen Agama RI Dirjen Bimas Islam Direktorat Urusan Agama Islam Dan Pembinaan Syariah, *Al-Qur'an dan Terjemahnya*, Jakarta: CV. Nala Dana, 2007, page. 572

⁶ S. Supto Ajie (ed.), *UU. Perkawinan* (UU. No. 1 Tahun 1974), Semarang: CV. Aneka Ilmu, 1990, page. 1.

⁷ Al hafid Ibn Hajar Al Asqolani, *Bulughul Marom*, Semarang: Toha Putra, page. 223.

⁸ Ahmad Rofiq, *Hukum Islam*, page. 268. (baca juga: Abu Yahya Zakaria al-Anshari, Fath al-Wahab, Juz II, Semarang: Toha Putra, t.th, page. 72)

⁹ As Shan'ani, *Subulus Salam*, Surabaya: Al-Hidayah, Juz 3, T. th., page. 168. (baca juga: Syaikh Hasan Ayyub, Fiqih Keluarga, Jakarta: Pustaka Al Kautsar, 2008, page. 248-249)

¹⁰ *Undang-Undang Perkawinan di Indonesia*, Surabaya: Arkola, T.th, page. 11.

The provisions of the preceding article illustrate that the Indonesian Fiqh Law (KHI) positioned the state as an important part in the formulation of a legal product, although the Compilation of Islamic Law is the legal unification of fiqh with reference to the books of the Imams of *Madhab* (school) and its followers. However, the basis of the State based on the Law and Pancasila remains the primary consideration.

The debate surrounding Islamic Law in Indonesia is primarily related to the Islamic private law, in fact has not found the right formula and ideal. In addition to the Islamic Civil Law has become a reference for the adherents living in Indonesia. In this case, the Compilation of Islamic Law (KHI) is enacted through Presidential Instruction No. 1 Year 1991. However, on the other hand normative references of Islamic Law (Law fiqh) still exist among Muslims in Indonesia.

On the other hand, the initiation of codification/unification of fiqh law is an effort to necessitate the harmony and equality of legal for the Indonesian nation. However, the problem is the fact that the Compilation of Islamic Law (KHI) is not in totality collect, embed and consider the *maqashid* of sharia in it either from the point of the Law nor the spirit he aspired to. This raises the dualism of Laws taking place in these two sources (KHI & Fiqh Law). Therefore, the two options (KHI & Fiqh Law) are what then need a satisfactory answer to the Muslim community in Indonesia, because it does not close the possibility of Muslim society remain uneasy about the existence of such formulation.

Difference on the law of divorce between *maqashid shariah* and Presidential Regulation KHI is one illustration that the codification of fiqh law has not yet entered into the safe zone of its perfection. This problem cannot be considered mediocre, because as an Indonesian nation that is Muslim will be stuck in anxiety that can interfere with psychology, and security of Muslim is in vulnerable time long enough. So that Law codification is really accepted by the public not only as a normative and enforcement, even more than that Indonesia's Muslim nation is really satisfied, and not cause anxiety that eventually enforcement of the Law can be realized well and perfect.

The weaknesses of regulation on the reasons for divorce in Islamic marriage law in Indonesia are another article besides Article 19 letter (f) PP. 9 Year 1975 Jo. Article 116 letter (f) KHI is not considered its existence because this article becomes the foundation of the reason of each plaintiff/applicant who wishes to file a divorce case in the Religious Courts. In addition, Article 19 letter (f) PP. 9 Year 1975 Jo. Article 116 letter (f) Compilation of Islamic Law is considered too easy to prove before the court session compared to other articles, and there is still a gap that is too wide in Article 19 letter (f) PP. 9 Year 1975 Jo. Article 116 letter (f) KHI to facilitate married couples divorce and break marital ties, It is certainly unfair for *maqashid shari'a* itself that seeks to maximize the implementation of *Shari'a* that bring prosperity for the people.

Justice in Islam is justice along with the word of God, fulfilling the principles of propriety, not harming others, being able to save oneself and must be born of good faith. Thus, justice in Islam bases on moral-ethical principles and always seeks to realize substantial justice by realizing the happiness of life and the inner life, and the happiness in the world and the hereafter for individuals as well as groups. His enemies have stated the importance of the value of justice in the rule of social life. Thus, citing the view of Ibn Taymiyya who stated that if the affairs of this world are governed by justice, then society will be healthy, even if there is a moral ritual of the rulers. And if the affairs of this world are governed by tyranny, then society will collapse, regardless of the personal acquisition of the rulers will certainly be rewarded and self-accounted in the hereafter. Then the affairs of the world will be upright with justice, even if there is no religion; and will collapse because of injustice, even with Islam.¹¹

Marriage will foster a sense of love and affection between both married couples. From their hearts will be emitted sources of noble feelings and touch. It is clear that in these feelings there is a noble influence and positive outcome in nurturing children, watching for their benefit, and rising with them to a peaceful and secure life, facing a bright and glorious future.

That is all social benefits born of marriage. The researcher saw a connection between these various benefits with child education, family improvement and regeneration. Therefore, it is not surprising that the Islamic Shari'ah commands, advocates, and loves marriage. It is true what the Messenger of Allah SAW:

عَنْ عَبْدِ اللَّهِ بْنِ عَمْرٍو، أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، قَالَ: «الدُّنْيَا

Meaning: "From Abdullah bin Amr the Messenger of Allah (peace be upon him) said: This world is a jewelry, and the best of jewelry is a virtuous woman." (Muslim)¹²

The conclusion that can be taken to answer whether to tighten divorce in accordance with *maqasid al-syari'ah*, the answer is the principle of exchanging or tightening divorce adopted by Law no. 1 Year 1974 About Marriage is in accordance with the central idea *maqasid syari'ah* that benefit. In other words, the principle of exchanging divorce is in order to preserve the five pillars (maqasid al-khamsah):

- a. hifdz al-din, guarantee freedom of religion;

¹¹ Mahmutarom HR, *Rekonstruksi Konsep Keadilan. (Studi tentang perlindungan korban tindak pidana terhadap nyawa dalam hukum positif, hukum Islam, konstruksi masyarakat dan instrumen internasional)*, Badan penerbit Diponegoro, Semarang 2009, page 54.

¹² Al-Imam Abul Husain Muslim ibn al-Hajjaj al-Qusyairi an-Naisaburi, *Sahih Muslim*, Juz II, Mesir: Tijariah Kubra, t.th, page. 1090.

- b. hifdz al-nafs, maintain survival;
- c. hifdz al-'aql, assures creativity of thought;
- d. hifdz al-nasl, assure offspring and honor;
- e. hifdz al-mal, property ownership, property, and wealth.

Conclusion from the above description gave birth to a new concept of divorce in Government Regulation No. 9 Year 1975 and Compilation of Islamic Law (KHI) based on *maqashid syariah*.¹³

IV. CONCLUSION

The new construction of regulation on the reasons for divorce in Islamic marriage law in Indonesia based *maqashid shari'ah* as set forth in Article 19 letter (f) PP. 9 Year 1975 Jo. Article 116 letter (f) Compilation of Islamic Law which reads "between husband and wife continuously disputes and quarrels and no longer harmonious life expectancy in the household" is formulated into "between husband and wife continuously disputes and quarrels that endanger the other party and resulting in the destruction of religion, soul, mind, ancestry, and property that can be proven before the court".

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¹³ Juhaya S. Praja, *Teori Hukum dan Aplikasinya*, Bandung: Pustaka Setia, 2011, page. 78. Lihat juga Tjun Surjaman (editor), *Hukum Islam di Indonesia: Pemikiran dan Praktek*, Bandung: Remaja Rosdakarya, 1991, page. 240-242.