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The Adjudication of Divorce Between Fiqh Doctrine and The Authority of Pangadilan Agama: Based on maqashid Syaria Perspective

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Abstract

There is a difference of divorce settlement between the jurisprudence and the authority of the religious court. According to the concept of Jurisprudence, divorce can fall anytime and anywhere, although no one witnesses. However article 115 of the Compilation of Islamic Law (KHI) states that the marriage break can only be done in front of the court, after the judge tried and failed to reconcile both parties. The same thing is also described section 39 of the Marriage Law (UUP). KHI and UUP are the material laws applicable in the Religious Courts. The marriage law has been in effect effectively for 42 years, and KHI is 26 years old. But until now has not done well. This is due to the strong law of fiqh that is embedded in the psyche of Muslims. Another cause is that the Marriage Act is not properly disseminated. Marriage Law is socialized among educated people living in urban areas and in communities that already know the marriage law or the law is still socialized and absorbed by advanced societies.

Keywords: divorce, Jurisprudence, authority, religious court

1. Introduction

In general, the field of marriage is classified by fiqh scholars into the category of mu'amalah, not 'worship. That is, without ignoring the text of the Qur'an and Sunnah that nuzul / wurud (down) and dalalah (show pronunciation) its qath'iy (absolute) in some verses, in the field of munakahat, open the opportunity to conduct ijtihad widely, By looking at socio-cultural changes, which must be in line with maqashid al-syari'ah (the purpose of legal pensyariatan by Allah SWT).

Therefore, although the whole of the classical Jurisprudence books has been thoroughly discussed on the subject of marriage, it must be remembered that the formulation is purposely made only to answer the problems that arise in their day, not to apply to Muslims thoroughly until the end of time. The legal formulation contained in the classical Jurisprudence book is certainly in line with the maqashid al-shari'ah, but certainly, only for the community community at that time. It could be that the same formulation, in part, is irrelevant for now because it is not aligned with maqashid al-syari'ah. (Al-Raisuni 1992, 14-15)

Parallel or inconsistent with *maqashid al-syari'ah* is measured by the extent to which the formulation of the law can apply kemashlahatan and rejects conscience. It can be understood from the definition of maqashid al-shariah itself, namely:

لا ينكر تغير الأحكام بتغير الأزمان

The purpose of the stipulation of syara 'law is for the benefit of the servant. Moving from the above review looks urgency to understand well the difference between shari'ah and fiqh. That is the philosophy, why in most of the sacred texts Allah SWT puts it in a multi-tafsir form (ulama ushul classifies it to *mujmal*, *muthlaq*, and *aam*), that the multi-interpretive texts can accommodate socio-cultural changes that are always moving dynamic. Because, especially the Qur'an, became huda (guidance) for Muslims until the Day of Resurrection. If showing the meaning of the Qur'an is technical guidance, it will be a lot of clues contained in it that has sterile because obsolete. So, simply, judging by its position, in the life of a country in Indonesia, the Qur'an is relatively the same as Pancasila, whose norm in it is general. How many times does TAP change

MPR, Presidential Decree, or even the amendment of the 1945 Constitution-because it adapts to changing conditions, and will not conflict with Pancasila.Etymologically, al-syari'ah means مورد الماء (place of water). (Ibn Mazhur t.th, 213) While in terminology, Dr. Farouk Abu Zeid, as quoted by Amir Syarifuddin, defines the Shari'a with what Allah decreed through the oral word of His Prophet. (Syarifuddin 1997, 2) While al-Fiqh is etymologically al-fahm (understanding) and al-fiqh Terminology is a science by which practical laws of practice can be derived, derived from (digging) detailed syarak's arguments (Khalaf 1978, 11)

Based on the above definition can be understood that between shari'ah and al-fiqh very different. The Shari'ah is all that Allah decrees, whereas al-fiqh is a ready-made legal formulation unearthed from its source, namely the Qur'an and Sunnah, and has the possibility of change if the circumstances surrounding it change, as long as it is in line with maqashid al-syari ' Ah. A law is said to be in line with maqashid al-shari'ah if it is in accordance with the wishes of the legislator and the purpose of revelation and to give the benefit of beings and the standard is jalb al-mashalih wa dar` al-mafasid (which can bring benefits and can reject harm). (Al-Khadimiy 1998, 32)

In line with that context, a new Jurisprudence emerged in Indonesia, passed

through Presidential Instruction No. 1 of 1991, called KHI. This KHI is called the Islamic law of Indonesia. That is, after going through a very comprehensive assessment by looking at the kemashlahatan aspect which became the objective of legal arrangement by the experts, by dissecting dozens of books of classical Jurisprudence and conducting comparative studies to some Middle East countries, the legal formulation contained in the KHI is viewed as law That are relevant to apply, at a minimum, in Indonesia. As long as the rules are regulated in the KHI, the same rules in classical Jurisprudence, temporarily, are not enforced until the conditions surrounding them are the same as those surrounding the formulation of the classical fiqh (stored as a treasure of Islamic legal scholarship). This is in line with the method:

الغاية التي وضعت الشريعة لأجل تحقيقها لمصلحة العباد

The legal formulation changes with the changing of time. (Al-Barkati 1986, 113)

UU no. Law No. 1 of 1974 on Marriage enacted on 2 January 1974 and became effective on October 1, 1975, including the old law (42 years), without any amendment except for several judicial review by the Constitutional Court Decision. One can speculate on why the Marriage Law lasts a long time. (Mudzhar 2015, 1) This is because: First, perhaps the public feels it is still sufficient to answer the current development. Secondly, it may also be that the status quo between those who want to keep the law and those who want to change it. For those who want to defend it especially from conservative religious figures of Islam see that the contents of the law is relatively close to Islamic law. Some also assume that the UUP is the embodiment of Islam in the field of marriage law. For them, re-opening the UUP and revising it would remove the material from Islamic law and fall into the hands of liberals and secularists. As for those who want to change it, his ideas have already appeared to be like the circulation of draft counters of the UUP and the petition for judicial review by various parties on various articles of the law. This paper focuses on the discussion: what is the perspective of maqashid shari'a towards the settlement of divorce between the jurisprudence and the authority of the religious court?

2. Divorce According to the Concept of Jurisprudence

Talak is taken from the word *talaka-yathliqu thalaaqan*. Talak language means unbinding and releasing. (Asy-Syarbaini t.tt, 279) The scholars gave the definition of divorce according to the term with different editors, among them put forward by Wahbah az-Zuhailiy, divorce is to abort the marriage relationship by using the pronunciation of talak and the like. Meanwhile, according to Abu Zahrah, divorce is lifting the marriage contract at that time or in the future with pronunciation of talak or with a word that is with it. (Zahrah 1998, 326) As for the legal basis of divorce, among which are contained in the word of Allah SWT in the Qur'an Surat al-Baqarah: 229 and at-Talak: 1.

Divorce or divorce is the last solution the husband and wife will take in ending the household problem. There are several requirements that must be fulfilled for the occurrence of divorce, which is as follows:

1) The husband who will divorce his wife, is required to have grown up, healthy mind, and not pronounce talak in a state of necessity.
2) The wife to be divorced, under the control of a man who will divorce her or still be married to her.
3) Shighat talak, the occurrence of divorce when the husband who will divorce his wife was uttered a certain speech that states his wife out of power.

According to Amir Syarifuddin, there are some things that need to be considered but not discussed specifically by the scholars in the terms of divorce, among which is the approval of the wife who will dialak, the reasons for dropping divorce and the necessity of a witness. (Syarifuddin, Hukum Perkawinan Islam di Indonesia: Antara Fikih Munakahat dan Undang-undang Perkawinan 2006, 214)

The fiqh scholars divide the divorce into two kinds, namely in terms of how to drop it and in terms of husband may refer to his wife. First, in terms of overthrowing it, divorce is divided into sunni talents and bid'i talak. Talak sunni is the divorce of husbands according to the instructions taught by Islam, namely:

1. Mentalak wife gradually, starting with talak one, two and three and interspersed with the iddah period.
2. Wives to be divorced in a holy state and not yet digauli
3. The wife has been obviously in a state of pregnancy.

While the talkative bid'i is the talak that is passed by the husband through the ways that are not recognized by the Islamic Shari'ah, namely: 1. Mentalak wife with three divorces at once. 2. Mentalak wife in the state of menstruation and childbirth. 3. Destroyed divorce to wife in holy state but already digauli. In terms of whether or not the husband reconciled with his wife, then divorce divides into talak *raj'i* and talak *bain*. Talak *raj'i* is the one and two talak which is suamai to his wife, who has been pursued without compensation. During the iddah period the husband is entitled to

reconcile without a new marriage agreement and without paying the dowry. Talak bain is the husband who was sentenced to his wife, where the husband is entitled to return to his wife but with a new marriage contract and dowry

.

3. Divorce Based on the Authority of the Religious Courts

One of the jurisdictions of the Religious court is to settle divorce cases. The rules on divorce are explained UUP and rules are detailed in KHI. In line with the principle or principle of Marriage Law complicate the occurrence of divorce, where divorce can only be done before the court, after the court concerned and unsuccessful to reconcile the two sides (Marriage Law article 39, article 65 jo article 115 KHI). Furthermore section 39 of the Marriage Law explains:

1) A divorce can only be conducted before a court hearing after the court has tried and failed to reconcile the parties;
2) To divorce there must be enough reason that the husband and wife will not be able to live in harmony as husband and wife; 3) The divorce proceedings before the court are governed by their own rules of procedure.

The marriage settlement as described above is regulated by KHI in Chapter XVI on Marriage Breakup. Article 114, for example, divides the divorce into two parts, divorce caused by divorce and divorce caused by divorce suits. Divorce is the pledge of the husband in the presence of the religious court which is one of the reasons for the breaking of marriage (KHI article 117). Whereas a divorce suit is filed by his wife or legal counsel to a religious court which in his jurisdiction occupies the plaintiff's residence unless the wife leaves the joint residence without the husband's consent.

Furthermore, KHI also explains the reasons for divorce described in article 116 below:

a) One party commits adultery or becomes a drunkard, compactor, etc. that is difficult to cure.
b) One party leaves the other for 2 (two) consecutive years without the other party's permission without a valid reason or for anything other
c) than his or her ability.
d) One party is sentenced to 5 (five) years imprisonment or a heavier sentence after marriage takes place.
e) Either party has committed serious atrocities or torture which endangers the other party.
f) One party gets a disability or illness with the consequences of not being able to perform obligations as husband and wife.
g) Between husband and wife continuous disputes and quarrels and no hope of living in harmony again in the household.
h) The husband violated taklik talak
i) Religious transfers or apostates that cause unfairness in the household.

From the above rules it is understood that divorce can only be done before a religious court, after the court fails to reconcile the two parties. Divorce to wife outside religious court is not considered divorced by KHI. Consequently in the case of a divorced husband two (2) times outside the religious court hearing, then filing divorce divorce to the religious court, the judge will decide to fall one divorce. The aborted one is based on the rules of KHI in article 115, that a divorce can only be made before a court hearing. Based on the above description was until now still many Muslims who do not want to choose the path of divorce settlement in court or have no reason enough to conduct a divorce in court. They take a shortcut that is a divorce outside a religious court or termed a wild divorce. This is because such divorce is legitimate according to religion or jurisprudence. Such cases are found everywhere, leaving a lot of legal issues.

Problems arise when a person who has been divorced outside the court requires evidence of authentic divorce issued by a religious court. An authentic divorce certificate can be obtained after applying for divorce to a religious court and must recite divorce or divorce. The word of divorce (divorce) uttered in court and the amount of alakt that had been uttered outside the court, the question arises, how many amounts of talak already spoken by the husband. Another issue that arises is when the divorced woman's marriage ends, the deadline for divorce in a religious court or a divorce outside the religious court, can occur outside the court of court has expired, but in the religious court has not been exhausted. In this condition comes the problem again, whether the divorced husband can refer to his ex-wife or not.

Law no. 1 of 1974 on Marriage and Compilation of Islamic Law which is taqnin of Islamic law in Indonesia, which is a material law in the Religious Courts. The birth of Law no. 1 Year 1974 on Marriage that applies to all Indonesian people on January 2, 1974, it turns out through a long process. Demands on this matter have been started since the First Women's Congress of 1928. The issues that became the center of attention of the women's movement at that time were: 1. Forced Marriage, 2. Polygamy. 3. Divorce is arbitrary. The coveted improvements are primarily for indigenous Indonesian Muslims, whose rights and obligations in marriage are not provided for in the written law.

The marriage law of indigenous Indonesians who are Muslim listed in the jurisprudence books, according to the Indonesian legal system can not be categorized in the category of written law.

The desire to compile the Islamic jurisprudence in compilation was felt increasingly urgent. The compilation of this compilation is not only based on the need for uniform reference of legal decisions in the Religious Courts (PA) in Indonesia, but also based on the necessity of the fulfillment of the instruments of a court of Islamic jurisprudence used in the courts.

KHI was born with several considerations, among others that:

1. Before the birth of the Marriage Law, marriage of Muslims has been regulated by religious law, either before independence or after. The religious law referred to here is the jurisprudence of munakahat. When viewed in terms of material derived from the school of Shafi'i, because most Muslims in Indonesia are actually practicing the Shafi'i school in the whole religious amaliah.
2. With the issuance of the Marriage Law, then the Marriage Law is declared valid for all Indonesian citizens who are mostly Muslim. Under article 66 of the Marriage Law, munakahat jurisprudence material so far as has been regulated in the Marriage Law is declared no longer valid. But article 66 also means that munakahat jurisprudence material which has not been regulated by the Marriage Law is still valid. There is still a lot of munakahat jurisprudence material that has been practiced in arranging the marriage of Indonesian Muslims not regulated in the Marriage Law.
3. From the other side of the jurisprudence of munakahat even though using munakahat fiqh one particular school of Syafi'iyah, have found different opinions among the scholars of Shafi'iyah itself. Especially if it extends outside the Shafi'i school, almost in all the material there are different scholars' views. Issue a different opinion in the fatwa is still possible. But deciding cases with different opinions is very troublesome and causes legal uncertainty.
4. The purpose of the formulation of the Compilation of Islamic Law (KHI) in Indonesia is to prepare uniform guidelines (unikatif) for Religious Court judges and become a positive law that must be obeyed by all Indonesian citizens who are Muslims. This indicates that there is no more confusion about religious court decisions.
5.

4. Completion of Divorce Perspective Maqashid Syari'ah

As mentioned in article 1 of Law no. 1 Year 1974 that the purpose of marriage is to form a happy, eternal family based on the One Godhead. While in the language of Compilation of Islamic Law (KHI) is called *mitsaqan ghalizan* (strong bond). But in reality it is often a marriage that runs aground in the middle of the road causing the breakup of marriage, either because of death, divorce or court decision. Article 38 of the Marriage Law states: marriage may be terminated due to: a. Death, b. Divorce and c. Upon a court decision. Related to the divorce cause, the Marriage Law provides standard, detailed and very clear rules.

There is a difference in divorce settlement between fikh doctrine and the authority of the religious court. When further analyzed the matter of the Marriage Law and compared with munakahat jurisprudence material, there are three forms:

1. Matter of marriage law is fully absorb and take from book of fiqh. For example the provisions on marriage barriers, both nasab obstacles, mushaharah and obstacles sepususuan.
2. Matter of marriage law is not contained or arranged in jurisprudence but is acceptable because it is not contradictory with jurisprudence. For example about having to register for marriage officially.
3. Matter of marriage law is different and contradictory with jurisprudence material. For example, the provisions on the minimum marriage limit. The Marriage Law sets the age limit for men to marry to 19 and women 16 years. (Syarifuddin, Islamic Marriage Law in Indonesia: between Fikih Munakahat and Marriage Law 2006, 48)

The existence of these differences, Muslims in dealing with the marriage law, is divided into three groups. First, do not recognize the Marriage Law as a rule of fiqh. They continue to run and adhere to the jurisprudence law. Although there is a KHI that governs the settlement of divorce, they are running jurisprudence, this is due to the strong understanding of jurisprudence embedded in his soul.

Second, recognize the Marriage Law as a law that must be adapted in its position as a citizen, and at the same time as a Muslim person still recognizes and implements jurisprudence. There is a dualism of the understanding of community groups in this form. According to them, the case is legitimate according to religion, but it is deviant or illegitimate according to state regulations. For example, a person who makes a marriage in front of the penghulu by fulfilling the terms and conditions as set forth in the book of fiqh, but not registered to the Marriage Officer set by the state. According to them, marriage in the form is legitimately religious, but has no legal force. Law no. 1 of 1974 also explains in article 2 verse 1 that marriage is lawful

if done according to the law of their respective religion and belief. This community group does not comply with the sound of paragraph 2 of the Marriage Law that each marriage is recorded according to the applicable legislation. For this group it appears that the Marriage Law as far as the material is not contrary to the law of fiqh is obligatory to be followed and adjusted.

Thirdly, groups that behave and regard the Marriage Law as a legitimate state law regulate the marriage of Muslims in Indonesia. For this group the Marriage Law to the extent that regulates the marriage matters of Muslims is the jurisprudence of munakahat in its new and prevailing form in Indonesia while the jurisprudence remains in effect as far as it is not regulated in the Marriage Law. For this group the law can develop according to the culture and needs of the people who run it and the Marriage Law is the law of fiqh in the form of its latest development.

In the concept of ushul al-fqh, the presence or absence of (open or not) field of ijtihad on an issue, not seen from the side; Whether the scholars have agreed or not? But seen from side; Whether to show the text either in terms of *nuzul / wurud* (the certainty of arrival to us) or in terms of dalalah (show its meaning) -nya *qath'iy* (absolute) or *zhanniy* (relative). If the text *qath'iy* then means there is no opportunity to do ijtihad on the issue, but if the text is zhanniy then it means there is a chance to do ijtihad. As far as the author's view, there is no qath'iy text ijtihad by the KHI formulator. It is only in the texts of the zhanniy that the reinterpretation (reinterpretation) of the KHI formulations is made.

A very complicated issue arises when one and two divorces are done at home or outside the religious court, then to obtain the divorce legality divorced by the wife in the religious court. If this question is asked to the court or a judge they will answer one, only the divorce is spoken in court without regard to what happens outside the court. However, if the use of the concept of jurisprudence munakahat or asked to ulama, they will answer that happened outside the court is legitimate, and coupled with the divorce word spoken in the religious court.

Extra-divorce occurs in Minangkabau society, the case seems to be endless and phenomenal. The following is an overview of cases of non-court divorce occurring in West Sumatera society, snowboll sampling. (Sulfinadia 2016, 246). This can be seen from the following table:

Table
Divorce Outside the Religious

No	*District Name*	*Number of Cases*
1	Luhak Agam	17
2	Luhak Tanah Datar	15
3	Luhak Lima Puluh Kota	18
4	Pariaman	11
5	Padang	13
6	Pesisir Selatan	17
7	Solok	20
8	Dharmasraya	12
Number		123

Based on the above table shows that the case of divorce outside the religious court almost evenly occurred in each area that made the location of this study which reached 123 cases. This case occurs due to various reasons, among which the material legislation on marriage is different from the jurisprudence material. According to the concept of jurisprudence that divorce can be done anytime and anywhere and can even be done without any cause. When understood the concept of Jurisprudence is apparently while whistling divorce can fall. Meanwhile, according to the rules of the applicable legislation, the divorce just fell when done before the religious court after the judge tried and failed to reconcile the parties. The divorce provisions stipulate that a new divorce may be brought to a religious court if there are causes that allow it. That is, the divorce can not be done in any place and for no reason to allow it.

The phenomenon that occurs in society, divorce can happen anytime and anywhere, and without having to watch the person. For example, there is a husband who left a piece of paper that essentially divorced. Understanding like this they understand from the concept of divorce according to jurisprudence munakahat, reinforced by the talak is the absolute right of the husband, and the husband may use his rights anytime and anywhere, without having to be witnessed. Coupled with Munakahat Jurisprudence does not regulate the cause of divorce. Different munakahat jurisprudence material with legislation about marriage related to divorce and divorce causes the dualism of the understanding of society. It seems that the reluctance of some people to consider the KHI as Islamic law of Indonesia, because 1) The discovery in the KHI are some formulations of law that have never been formulated in classical jurisprudence because the conditions have not wanted it, 2) Unlike the opinion of scholars that he knows, 3) In contrast to the opinion of the majority of scholars but due to the limitations of reference then he considers it a scholar deal, or 4) Unlike the classical scholar's opinion. In terms of the ushul al-fqh concept, whether or not there is an open field of ijtihad on an issue, not from the side; Whether the scholars have agreed or not? But seen from side; Whether to show the text either in terms of nuzul /

wurud (the certainty of arrival to us) or in terms of dalalah (show its meaning) -nya qath'iy (absolute) or zhanniy (relative). If the text qath'iy then means there is no opportunity to do ijtihad on the issue, but if the text is zhanniy then it means there is a chance to do ijtihad. As far as the author's view, there is no qath'iy text ijtihad by the KHI formulator. It is only in the texts of the zhanniy that the reinterpretation (reinterpretation) of the KHI formulations is made.

The overall reluctance, especially rooted in the mistake in understanding the difference between shari'ah and fiqh, so the determination of the law is not based on the view of maqashid al-syari'ah. As a result, the formulation of Jurisprudence in the classic book was regarded as standard, as did the Shari'ah (*al-nushush al-muqaddasah* / sacred texts). It is as if the door of ijtihad, they say, has been closed. In addition, it is also rooted in the erroneous understanding of KHI's position in the Islamic legal system. If the position of the KHI in the Islamic legal system is not yet proportional in the understanding of the people, the muballigh, the law enforcement officers, then the law of Islam that is validly legal in the country of Indonesia, will not run effectively. Let's not look at his position, which from the point of view of his serial number in the hierarchy of legislation in Indonesia somewhere, has been passed into law anyway, if the position of KHI in the Islamic legal system is not right in our understanding, it will continue to run and Is half-hearted and we will always hear the phrase that divides between Islamic law and mere state / administrative law. In line with the above reviews it is seen that the Law and Compilations of Islamic Law have a number of spaces that can still be refined both in terms of content and in terms of substance. The Marriage Law as a state law should meet the criteria of law or regulation, law enforcement, facilities that support, there is a regulated society and there are sanctions. The Marriage Law has no legal sanction, the consequence is that when there are people who violate the marriage rules as regulated by the law, no legal sanction is granted.

5. Conclusions

The settlement of divorce between the juristic doctrine and the authority of the religious court from the perspective of the maqashid shari'ah shows that:

1) The settlement of divorce as stipulated in the Compilation of Islamic Law is a reinterpretation done by the drafters of the KHI of the zhanniy texts, drawn up in accordance with the changes and developments of the zamanyang in line with the above mentioned fiqh sqf.
2) There should be an equalizing effort between fiqh and the Compilation of Islamic Law, in order to avoid the dualism between the two rules. Efforts to resemble the understanding between the jurisprudence of munakahat and the legislation on marriage, backed by the material of both laws are the same as myatat fiqh, there are different and not even listed in the book of fiqh. The familiarity of understanding is mainly related to divorce outside the court.

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