

## Domination Of Islamic Fiqh Doctrine On Positive Law Concerning Divorce Maqashid Sharia Perspective

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### Abstract

*Divorce is the breaking of the marriage bond due to a problem in the household. In its application, especially in the city of Parepare, there is still a polemic regarding the understanding between the determination of talaq. Therefore, the authors are interested in researching and examining how the provisions of divorce in the fiqh of Imam Shafi'i and the positive law applicable in Indonesia and the dominance of Islamic fiqh doctrine on positive law regarding the fall of divorce using the Maqashid Sharia perspective. The purpose of this study aims to describe the regulation of divorce and to analyse the dominance of Islamic fiqh doctrine on positive law in the study of the perceptions of religious figures in Parepare city about the occurrence of divorce from the perspective of Maqashid Sharia. The method used by the authors in this research is based on the*



*field reserch method. The results of this study indicate that divorce according to positive law in Indonesia dominates the validity of talaq determination due to the guidance of KHI and applicable laws.*

**Keywords:** Divorce, Religious Figures, Maqashid Syariah.

## INTRODUCTION

Divorce is permissible in Islam but it is an act hated by Allah Almighty. Divorce is carried out when the problems arising between husband and wife at home cannot be resolved by other means. In the process of implementation, the community has a dualistic understanding. The aspect of divorce or talaq is the husband's right, so the husband is free to drop whenever and wherever he wants. This happened after the couple had made various considerations and peace efforts. Such provisions can be found in the fiqh of Imam madzhab, among which is the fiqh of Imam Shafi'i. This type of provision is considered legitimate by the community, and the priests of his sect have long understood it. (Nasution, 2018)

The compilation of Islamic Law (KHI) does not regulate the definition of divorce, but issues related to divorce are regulated in Articles 113-148 of the compilation of Islamic Law (KHI). From this article we can see that the divorce process is not easy because it requires strong reasons and these reasons must be really concrete and in accordance with the provisions of the law. This is affirmed in Article 115 of the Codification of Islamic Law (KHI). A divorce can only be finalized before the trial after the court has been unable to reconcile the parties. Based on Article 115 of the IHL The Meaning of Divorce in the IHL The Oath of Talaq That Must Be Brought in Court, If the promise of talaq is pronounced outside the main court, then the talaq is considered void and becomes a talaq that is not legally binding.

Along with the KHI (Compilation of Islamic Law) in Law Number 1 of 1974 concerning Marriage does not have a specific definition of divorce. In the Marriage Law, the principle of marriage is that the purpose of marriage is to build a happy and lasting family, (siti hajar, 2018) Divorce should be prohibited, but the Marriage Law provides loopholes meaning that the law does not prohibit it enough to complicate divorce for couples who want to end the marriage. In the Divorce Law, it is only justified on the basis stipulated in the Marriage Law, based on Article 19 PP No. 9 of 1975, where Law No. Article 1974 concerning Marriage states that divorce occurs due to causes stipulated in the law, meaning that divorce cannot be justified only for unclear reasons.



Also explained in article 39, Divorce can only be legalized in court when the competent court has tried to reconcile both parties. Based on this explanation, it can be concluded that according to the KHI and the Marriage Law, divorce/talaq must be carried out before the court and must be justified for concrete reasons as regulated by the Law (Riska Diana, M Roji Iskandar, 2017)

In the Parepare area itself is still a difference and there are also usually those who misinterpret the word divorce / talaq, because there is still very little public knowledge about it. In Parepare not a few people think that divorce can occur or the end of marriage in the words of the husband who indicate that a wife has been talaq, for example with the sentence "... Go home to Ta's parents.." and there are many more words that actually show the ditalaq of a wife.

With the difference or dualism towards divorce / talaq, researchers are interested in researching and examining how the divorce provisions in Imam Shafi'i fiqh and positive law apply in Indonesia and the dominance of Islamic fiqh doctrine over positive law regarding the fall of divorce using the perspective of Maqashid Sharia.

With the background of the study, the researcher limits the problems to be included in this study as follows. First, what are the divorce provisions in Imam Shafi'i fiqh and Positive Law in Indonesia? Second, is there a dominance of Islamic fiqh doctrine over positive law on the study of perceptions of religious leaders in the city of Parepare about the fall of divorce from the perspective of Maqashid Sharia?

In this study using qualitative research with the field research method, is a type of research carried out directly to the object of research then data collection is carried out from the results of field research, which is collected in accordance with the facts found in the field.

The purpose of the study of dominance of divorce / talaq aims to describe the provisions of divorce in the fiqh of Imam Shafi'i and Positive Law in Indonesia and to analyze the dominance of Islamic fiqh doctrine over positive law to study the perception of religious figures in the city of Parepare about the fall of divorce from the perspective of Maqashid Sharia

## **DISCUSSION**

### **Divorce in the Authority of Shafi'i Fiqh and Positive Law**

According to the Imam Shafi'i madhhab, divorce is the release of bonds, liberation, or release without restraint. According to the term is the end of the marriage bond by talaq or the like or breaking the marriage bond directly or by special pronouncement. If a husband is going through a divorce, several things must be considered, including harmony and divorce



requirements. Divorce is the main element that must be present in a divorce, and the implementation of a divorce depends on the existence and completeness of the elements involved. (Safrizal and M A Karimuddin, 2020) The pillars of talaq and the terms of talaq are divided into five according to the Shafi'iyyah way (2011) Zuhaili and Fikih, namely: First, the One who brought down Talaq. The person who is mentalaq must be a person who is puberty and can choose. Second, the utterance/intent in talaq (i.e. the utterance that is said, even if it does not mean that way. Therefore, the word talaq of jurists who keep saying it is not implemented). Third, the object of talaq / the existence of the object of rejection (The object of talaq is a wife who is bound to a legal marriage, even though intercourse has not occurred). Fourth, there is power over the object of talaq (Shafi'iyyah scholars argue, if a husband says to a woman who is not his wife (if I marry you, it means you are a divorced woman), then talaq is also invalid. According to him, even conditional expressions are not valid, because women are not under his power). Fifth, The Word That Makes Talaq Happen (Marriage must end with divorce stated orally or in writing, in Arabic or any other language, or in a letter. Language can be spoken openly or in a satirical way)

The provision of talaq in the Madhhab of Imam Shafi'i basically refers to surah At-Thalaq verse 1:

يَا أَيُّهَا النَّبِيُّ إِذَا طَلَقْتُمُ النِّسَاءَ فَطَلِّقُوهُنَّ لِعَدَّتِهِنَّ وَأَحْصُوا الْعِدَّةَ وَاتَّقُوا اللَّهَ رَبَّكُمْ لَا تُخْرِجُوهُنَّ مِنْ بُيُوتِهِنَّ وَلَا يَخْرُجْنَ إِلَّا أَنْ يَأْتِيَنَّ بِفَحِشَةٍ مُبَيَّنَةٍ وَتِلْكَ حُدُودُ اللَّهِ وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَقَدْ ظَلَمَ نَفْسَهُ لَا تَدْرِي لَعَلَّ اللَّهَ يُحْدِثُ بَعْدَ ذَلِكَ أَمْرًا

Translation:

"O Prophet, when you divorce your wives, you should divorce them when they can (face) their iddah (which is reasonable) and count the time of iddah and fear Allah your Lord. Do not take them out of their homes, and let them not (be allowed) to go out unless they do clear evil deeds. These are the laws of God, and whoever breaks God's laws has done evil to himself. You do not know that perhaps God will do after that something new."

Furthermore, in the talaq provisions of Madzhab Imam Shafi'i based on Surah At-Thalaq Verse 2 gives an explanation of the witness in divorce as in the word of Allah:

فَإِذَا بَلَغَ أَجَلَهنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ وَأَشْهَدُوا ذَوِي عَدْلٍ مِّنْكُمْ وَأَقِيمُوا الشَّهَادَةَ لِلَّهِ ذَٰلِكُمْ يُوعَظُ بِهِ مَنِ كَانَ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَمَنْ يَتَّقِ اللَّهَ يَجْعَلْ لَهُ مَخْرَجًا

Translation:

"When they are nearing the end of their iddah, then refer to them well or deliver them well and testify with two just witnesses among you and establish that testimony for Allah's sake. Thus



is taught with it those who believe in Allah and the Hereafter. Whoever fears Allah will surely find out for him”.

According to Imam Shafi', Allah (swt) asks to present witnesses in divorce cases and the minimum number of witnesses is two. This shows that the provision of witnesses is two people. If perfect to him, the testimony of less than two people is unacceptable, because what is imperfect does not equal perfect, cannot be forced upon another person unless it is based on what he does with it destined. to seize the source of his wealth. Looking at Imam Shafi'i's view above regarding talaq witnesses, it can be concluded that talaq outside the law is valid provided that the parties to talaq are present with at least two male witnesses. However, if there are fewer than two witnesses and there are no male witnesses, the extrajudicial divorce is considered void.( Muhammad bin Idri, 2009).

As the researcher pointed out earlier, Imam Shafi'i's opinion about talaq witnesses, if considered explicitly, does not refer to the validity of talaq outside the court process, but is implied in it. According to Imam Syafi, an out-of-court divorce with two witnesses is legal, but not in accordance with Indonesian law. However, to ensure legal protection for divorced couples, it is advisable to get a divorce in court.

According to Article 38 of 1974, divorce means the breakup of marriage. Marriage is an inner birth bond between a man and a woman as husband and wife with the aim of forming and fostering a happy and eternal family based on the divinity of the Almighty. Therefore, divorce is the breakdown of the relationship between a man and a woman and the end of the family bond between a man and a woman(Latifah Ratnawaty,2017).

Divorce in Article 38 and Article 39 of Law No. 1 of 1974 which has been described in PP No. 9 of 1975, includes the following: First, Article 14 to Article 18 of PP No. 9 of 1975 "That is divorce Talaq divorce, which is a divorce whose divorce application is submitted to the religious court at the will of the husband and is considered to have occurred and is valid since the divorce was declared in a religious court hearing with all its legal consequences". Second, Article 20 to Article 36 which reads "Divorce lawsuit is a divorce whose wife has filed a divorce lawsuit on application to the religious court and is considered to have occurred and is final with all legal consequences after the religious court decision ends. has permanent legal force".

Furthermore, it is stipulated that divorce can only be carried out if it fulfills the reasons contained in chapter III article 39 which reads; 1. Proceedings can only be held in front of the court after the court concerned has tried and failed to reconcile the two parties. 2. To carry out the



marriage there must be sufficient reason, that between the husband and wife cannot live in harmony as husband and wife. 3. The procedure for divorce before the court is regulated in separate laws and regulations.

Regarding the basis for divorce in the 1974 Marriage Law, Article 38 states that marriage can end in death, divorce, and determination. Breakup of Marriage Because One Partner Dies That is, if one spouse dies, then the marriage ends in death. Or, if one spouse dies, the marriage is void. The breakup of marriage due to separation of husband and wife means the breakup of marriage with divorce when husband and wife separate. Divorce can occur instantly or temporarily by using the word talaq or other similar words.

### **Maqashid Sharia Divorce**

Basically all the laws that God makes lead to the good of man, God establishes a law that always considers the good of his people. Maqashid sharia aims at three levels: al-daaruriyat, al-hajiyah, al-tahsyniyat. Al-Daruriyat ranks high, meaning the ultimate goal. Because if these needs are not met, humanity cannot survive, or at least their lives will be disrupted. The second level is al-hajiyah, or maslahah, which aims to save people and save them from hardship, but without the fulfillment of al-hajiyah, there is no harm. The third level is al-tahsyniyat. That is, it only contains manners and customs carried out by humans as a complement to the previous two levels.( Fenni Febiana,, 2018).

These three goals are the goals of the existence of Maqashid sharia, which is structured to meet human needs to facilitate people's lives. In Maqashid sharia there are 5 main things or commonly called al-daruriyat al-khamsah that must be maintained, namely(Zainuddin Sunarto, 2019): 1. Hifzh al-din (keeping religion) 2. Hifzh al-Nafs (Nurturing the Soul). 3. Hifzh al-Aql (nurturing reason) 4. Hifzh al-nasl (nurturing offspring). 5. Hifzh al-Mal (Keeping Treasures).

Al-Daruriyat al-khamsah or the above five basic needs are basic needs, and therefore must be fulfilled by striving for the good of the world and the Hereafter. If these five are not reached, there will be damage according to the unmet level. The greater the level, the greater the damage caused.

Regarding the divorce, the Indonesian Ulema Council held an Ijtima Ulama Commission IV Fatwa Indonesia Session which was held on June 29 to July 2, 2012 at Pondok Cipasung, Tasikmalaya, West Java, namely:

1. Divorce outside the law is valid if there are shari'i grounds whose truth can be proven in court.



2. Iddah talaq is counted from the moment the husband recites talaq.
3. For the sake of legal certainty, extrajudicial divorce must be referred to the Religious Court (Ikhbar).
4. For the benefit and to prevent negative impact or damage (saddan li al-dzari'ah), the divorce must be settled at a hearing by a religious court.
5. The Religious Court's ruling on talaq after talaq outside the court serves as evidence of the fall of talaq.

Ibn Shahrur further regarding the maqashid of shari'ah explained that the maqasid of shari'ah is not only limited to maqashid al-khamsah more than that, namely the procedures or efforts taken by shari'a to realize the purpose of human goals that are beneficial in order to maintain the general benefits in actions or procedures in human life. Furthermore, Ibn Shahrur explained that maqashid shari'ah must be based on al-fitrah (natural naruli of religion), al-samahah (tolerance), al-musawah (egalitarian), and al-hurriyah (freedom of action).

Based on these considerations, divorce must go through a settlement process in court, where the divorce is settled by the husband who swears talaq before the court, and the divorce case is decided by a judge. Divorce or talaq conducted outside the court will be declared void. Divorce actually affects a wide interest, which concerns peace in the family, the fate of children whose parents divorced, and therefore a broader concern, namely social certainty about whether the couple has separated or not, whether they are still married couples or not. Therefore, divorce should not be done carelessly. Preferably, it should be made in such a way that benefit and order can be realized in society.

The Prophet Muhammad (peace be upon him) said: "A halal thing that is most hated by Allah Almighty is Talak (HR. Abu Dawud and al-Baihaqi)". Based on the hadith that divorce should not be taken lightly or underestimated, because although divorce is legal, it is hated by Allah, as evidenced by the fact that divorce can only be done with sufficient legal foundations. It must also be proven by judicial review whether these grounds have been met. For this reason, modern Islamic law requires divorce proceedings through the courts, for example as stipulated in the Compilation of Islamic Law in Indonesia (Article 115). Divorce occurs when the divorce is announced before the court process (KHI, Article 123). (Karim Faiz and Ahmad, 2022)

In fact, in the fiqh of Madzhab Imam Shafi'i, husbands are given extensive rights to impose talaq, resulting in divorce anytime, anywhere. This situation is viewed from the point of protecting family interests, the certainty of law and public order does not bring benefits, even causing many



losses, especially for women (wives). Therefore, for the sake of realizing benefit, divorce must be settled through the court. So there is actually a legal shift here from the husband's ability to force a divorce anytime, anywhere, to the obligation to divorce before a court hearing for the benefit.

### **The Fiqh Doctrine of Divorce According to Religious Figures of Parepare City**

The fiqh of Imam Shafi'i Madzhab as described above is a "grounded" fiqh in Indonesia. Likewise especially in Parepare City. The doctrine of divorce carried out by religious leaders in Parepare City seems to have a dichotomy between the Fiqh Madzhab Imam Syafi'i and the Positive Law on Divorce in Indonesia.

The assumption was then elaborated and proved by researchers as in interviews with religious leaders in the city of Parepare, Ustadz Syharuddin Zainur, Lc., M. Ag as Penghulu and Ustadz Zainal Abidin, S. Ag., M. Sos as religious counsellors, the source said that actually in Parepare City the Islamic law on divorce has been implemented, because how can marriage occur if Islamic law has not yet applied but only a few of them understand about the rule, Be it in terms of determining talaq, iddah and so on.

Socialization in the community is still very minimal so that many people in Parepare City usually misinterpret the divorce. According to both if a husband mentalaq his wife, then at that time talaq falls to him, but in accordance with the law in force in Indonesia regulated in the Marriage Law No. 1 of 1974, such a talaq model is not yet valid in the eyes of the law, he explained why actually the Law does not authorize such divorce while the previous Fiqh Ulama had authorized divorce. According to him, the law actually legalizes such things is nothing but for the good and benefit, because actually marriage aims to form a happy, harmonious, and prosperous family, not a marriage that leads to divorce.

....أَبْغَضُ الْحَلَالِ إِلَى اللَّهِ الطَّلَاقُ

Translation:

"... The halal deed that Allah hates so much is talaq". (H.R.Abū Dāwud, Ibn Majah).

According to him, it has been clearly explained that divorce is an act that is hated by God, which is why in our country it is very strict about the reasons that justify granting divorce. Because divorce is very contrary to the purpose of marriage. Divorce will only be granted on accurate and justifiable grounds.

This doctrine then became the basis for determining the fall of divorce for married couples



even without going through the courts. This is as corroborated by the opinion of Ustadz Syharuddin Zainur, Lc., M. Ag who states that when the husband firmly or figuratively utters talaq to his wife even though he has not received a decision from the Religious court or has not even submitted a divorce proposal to the Religious Court, the divorce status has fallen. This opinion and doctrine continues to be carried out in counseling to the community with the aim that the husband must be careful in saying words that mean talaq / divorce to his wife.

Based on interviews with the two sources above, it is also stated that the applicable divorce is the fiqh law of the Shafi'i madhhab, while the provisions in positive law are to obtain legality in terms of divorce. Furthermore, Ustadz Zainal Abidin, S. Ag., M. Sos explained that many divorce practices are "under" religious courts. That is, the case of a couple who have been legally divorced even though they have not received a religious court decision. This shows the data that in the city of Parepare is dominated by the fiqh of the Imam Shafi'i madhhab and there is a dichotomy between Fiqh Law and Positive Huku. The interviewee when interviewed whether it was legal when the husband uttered the phrase "I divorce you" even though it was not before the Religious Court, the source clearly said the law was valid and talaq fell.

#### The Negative Impact of Shafi'iyah Fiqh Domination Over Positive Law

According to Imam Shafi'i Allah (swt) has commanded to present. Witnesses in talaq and reference matters while mentioning the minimum number of witnesses two people. Thus, this shows that the perfection of testimony in the matter of talaq and reference is composed of two persons. If such is perfection for him, then no testimony is received if there are less than two persons, because something that does not reach perfection is not equal to perfection itself. In addition, we cannot assign one's rights over others except on the basis of what we are commanded to serve as a source of decree.

His opinion is based on the word of Allah Almighty in QS. Ath-Thalaq (65): 2.

فَإِذَا بَلَغَ آجِلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ وَأَشْهَدُوا ذَوِي عَدْلٍ مِّنكُمْ وَأَقِيمُوا الشَّهَادَةَ لِلَّهِ إِنَّكُم تَوْعَدُ بِهِ  
مَنْ كَانَ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ه وََمَنْ يَتَّقِ اللَّهَ يَجْعَلْ لَهُ مَخْرَجًا

Translation:

"When they are near the end of their testimony, refer to them well or deliver them well and testify with two of your just witnesses, and establish that testimony for God's sake. Such is admonished to those of you who have faith in God and the last days. He who fears Allah will open a way out for him."

If we look at Imam Shafi'i's opinion above regarding the witness inside talaq can be



concluded that divorce performed outside the trial is valid, As long as the party to the divorce presents witnesses consisting of at least 2 male person. But as long as the witness is less than 2 people and not a man then The out-of-court divorce was said to be invalid. As the author has said before, Imam Shafi'i's opinion regarding witnesses in talaq, when viewed explicitly, does not mention the validity of divorce outside the court, but is implicitly interconnected. Divorce conducted outside the court in Imam Shafi'i's opinion is valid if there are two witnesses, but according to applicable law in Indonesia is invalid.

This is as stated in the KHI discussed by the author earlier, because all matters related to marriage to divorce must be recorded in every authorized institution. Divorce done before the court can provide permanent legal protection for ex-wives and their children. The rights of ex-wives and children can be fulfilled because they have permanent legal force. Meanwhile, divorces carried out outside the court cannot provide legal certainty for ex-wives and their children. This also prevents the ex-husband or ex-wife from entering into a subsequent marriage legally under applicable state law.

Based on the author's analysis of the validity of divorce outside the court, it can be concluded that although the majority of Indonesian society is Shafi'iyah madzhab. However, regarding the rules regarding divorce do not entirely use the opinion of Imam Shafi'i, it can be seen that there is a difference between article 115 in the KHI and the opinion of Imam Shafi'i regarding witnesses in talaq that the author has discussed earlier.

In that article the KHI took Imam Hanafi's opinion regarding witnesses in talaq. Where in this case Imam Hanafi interprets sura At-Thalaq [65]:2 as quoted by M. Quraish Shihab saying in his tafseer that this testimony to talaq, "Understanding it in the commandments of the sunnah". Then from another narration attributed to Imam Shafi'i, Ahmad, and Malik that, "The commandment is as a mandatory command for reference and not for divorce".

Basically, there is certainly a disadvantage to the impact of dualism between Shafi'iyah fiqh and positive law in the case of divorce. This is stated in the KHI and the Marriage Law which have been discussed by previous researchers. This is because everything related to marriage and divorce must be recorded by all relevant agencies. Divorce in court can provide lasting legal protection for ex-wives and their children. The rights of ex-wives and children can be fulfilled because they have permanent legal force. However, extrajudicial divorce cannot provide legal certainty for the ex-wife and children. It also means that an ex-husband or ex-wife cannot legally enter into further marriages under current state law.



So it is very clear that divorce is dominated by Shafi'iyah fiqh there will be many negative impacts caused, ranging from the invalidity of divorce in the eyes of positive law, unclear rights of wives and children, and difficult access to all needs related to the need for evidence of divorce administration.

## **CONCLUSION**

According to researchers regarding the validity of divorce before the court is valid because it is based on the Law and has regulated its provisions in the Compilation of Islamic Law (KHI) and there are many laws that support these provisions. However, if viewed from a different lens, for example in Islamic law in the form of, ijtima ulama, conformity in the book of fiqh, especially in the fiqh book of Imam Shafi'i there is no compatibility or there is absolutely no conformity that states that the talaq spoken by the husband of the law is valid whether it is done blatantly, satire, or done directly or through letters.

According to researchers, based on the results of interviews with religious leaders in Parepare City, the validity of divorce is dominated by positive law because according to the rules that have been explained that even though it is legal according to Islamic law, in this case Shafi'iyah fiqh has legalized it, but in positive law or law it is invalid because it is not done in front of the court. Considering that now all things done must be in accordance with the rules set by the Law.

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