



## AIM ISSUE PROBLEMS OF TWO DIFFERENT INDONESIAN DIVORCE LAWS: ISLAMIC OR NATIONAL?

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### ABSTRACT

Marriage is a precept of Islam. A marriage is claimed Halal if it has determinate of islamic law. Due to its socio-cultural richness, Indonesia has at least three applied laws; National adopted from Dutch Colonial, Islamic from Holy Quran (Shariah), and Ethnic (Customary). This paper was conducted to find the problems and solution of two different Indonesian divorce laws; one is National and other is Islamic Law.

**Keywords:** Divorce; National; Islamic; Ethnic; laws

### I. INTRODUCTION

The purpose of marriage in Islam is to build a harmonious relationship between husband and wife based on the mawaddah and rahmah in upholding the law of Allah in this earth. Therefore, Islam outlined the signs as a guide in the execution of the Shari'ah.. "A marriage is called Halal when it meets the requirements of the Shari'ah. This kind of provision is in the Islamic law"<sup>1</sup>. Known by the term of Qualification and marriage principle..Efforts to unite two persons who are different from one another in a marriage bond are regulated in the law. "Not only that marriage is the sunnah of the Prophet, that is copying the behavior of the Prophet Muhammad SAW" (Al-khazi, 2011).

The idea of marriage is so noble, causing the involvement of the whole family and relatives and even some members of the community come to give his blessing, besides valuable advice is given so that the marriage can last forever until the end of life, hoping for a life that separates marriage (Ramulyo, 1999) .

Marriage annulment means that any marriage may be cancelled if both parties cannot fulfill the conditions for the marriage. A marriage annulment can only be decided by a court of law.

Families in a straight line of descent and above the husband or wife (For example: father, mother, grandfather etc of husband or wife.) , an authorized/appointed official, and anyone directly possessing legal interest in the marriage may file a request for marriage annulment (Rofiq, 1995).

Any request for marriage annulment may be submitted to a court within the jurisdiction where the marriage was conducted or within the jurisdiction of the residence of the married couple (in accordance with Article 38 (1) Government Regulation No. 9 Year 1975 regarding the Implementing Rules of 1974 Marriage Law) the husband, or the wife. A marriage annulment may be filed for the following reasons:

1. the marriage guardian (wali) is illegal; or
2. the marriage was not attended by two witnesses.
3. The marriage was performed in front of unauthorized marriage registrar.



The right to annul a marriage by a husband or wife based on such reasons becomes null and void if they live together as a married couple and can show the marriage certificate issued by the unauthorized officer of the marriage registry. In this instance the marriage has to be conducted again in order to make it legal (Hadist, 2010).

The husband or wife may request an annulment of their marriage, if the marriage was conducted before an unauthorized officer of a marriage registry, or if the marriage was conducted under a threat that violates the law, or if there is a misunderstanding between the husband and wife.

His/her right will be null and void if the threat has stopped or if the misunderstood party? realizes the situation, but doesn't use his/her right to request for marriage annulment within six (6) months after living together as married couple. Example of a "misunderstood condition" would be if the husband thought the wife was a virgin, but in fact she was not – so I misunderstood about her personal conditions.

Annulment of a marriage commences upon the court decision and is permanent and legal binding and applies as of the time of marriage was conducted. However, such a decision is not retroactively effective to:

1. children born from the marriage;
2. husband or wife acting with good intention, except against joint property, if the annulment is based on a previous marriage. The annulment decision is retroactively effective to the joint property of the parties in the event the marriage was entered and one of the couples was not legally free to marry.
3. a third party, so long as he/she has the rights based on good faith.

Read this article for more information on Marriage Annulments in Indonesia

## II. DEFINITION OF MARRIAGE ACCORDING TO ISLAMIC LAW

Holy Qur'an describes the relationship of a legitimate marriage with an atmosphere full of peace, soothing, reassuring, affectionate, affectionate, mutual trust, mutual understanding of compassion and affection. Be realize a prosperous home life , mawaddah and rahmah are the principles and objectives that are required for marriage and household formation. That's why, the regulation of Islam has been created a matrimony and wedding realtionship as if a pure matrimony and strong and Al Qur'an said Miitsaaqon gholiidhan (Al-khazi, 2011)

Miitsaaqon gholiidhan (strong promise) connected as a bond between husband and wife in a sacred marriage must be maintained harmony and not appropriate to be broken and broken straps that have been pronounced as a strong promise in married life, even though Islamic law is justified by a husband or dropping divorce on a wife, likewise the wife has the right to request divorce by suing in a religious court (Rofiq, 1995).

### 2.1. Definition of Marriage by the Law

It is stated in Article 1 of Law No. 1 of 1974 that: marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the Godhead of the Almighty. Whereas according to Compilation of Islamic Law (KHI) the definition of marriage written in Article 2 is: marriage according to Islamic law is marriage, which is a very strong contract or *miitsaaqon gholiidhan* to obey God's commands and carry out them is worship (Ramulyo, 1999).



If the purpose of marriage is to create a sakinah, mawaddah and mercy domestic life, and get love and affection, peace of life, <sup>2</sup>and unattainable and only the disputes, quarrels for quarrels, love is left. unfortunately it has been forgotten, the household is like hell, the tranquility of life has vanished, then arises the problem and the undesirable thing is separation or breakup of a household mahligai called divorce which is permitted but Allah SWT does not like it. A very well-known hadith questioning divorce / divorce is narrated by Abu Daud, because illah divorce can change the law. The Apostle said: "There is no lawful thing that God scolds the most except from Thalak.

## 2.2. Definition of divorce according to the terms and law

Divorce is in undersirable event for every husband and wife because divorce will bring the devastation and negative effect to the children who have been born, but if the household cannot be maintained , than the final decision is the divorce, home life aims to from a happy and eternal family know wants or the dream of marriage to end in divorce, but in reality not all marriages can take place perfectly until death separates them, although all efforts have been made to save the marriage, it turns out that in the end the decision is the marriage break up by the court. The final solution in the course of marriage is that this divorce was choose because it was considered as a way to unravel the tangled threads that had taken place on the journey of the household (Hadist, 2010).

According to the term , divorce is “ <sup>3</sup> determine the relationship” according to the syara’ is determine by lafads of Thalak.

Al-Qur’an *An-Nisa*’ 4/130

وَإِنْ يَتَفَرَّقَا يُغْنِ اللَّهُ كُلًّا مِّن سَعَتِهِ وَكَانَ اللَّهُ وَاسِعًا حَكِيمًا ۝١٣٤

## III. .METHODE RELIGIOUS COURT

If a husband desires to divorce or Thalak his wife, and the husband proffer a request to the religious court in residence of pleader orally or textually” around of reasons or cause of desire of the divorce, and asked for a divorce hearing. “ a husband who will thalak his wife and forward to appeal to the religious court of the pleader residence. The petition could be identified by the parties, namely the pleader (Husband) and the termite ( wife) are, name, age, and the residence with the reasons be a divorce ground or thalak , KHI explained divorce just be done in front of religious court after the religious court makes effort and not succed to see if among of them are reconciled.

The compilation of Islamic law (KHI) follows the principle to make it difficult and happened the divorce wheather divorce as possible if based on of some reason and have to do in front of the religious court, the same as the rest in the clause 39 UU No.1of 1974, it contain the imperative that divorce just only be carried out of court, after it has been efforted to pacify of them,. In this rule doesn’t justify the divorce.it’s seen in chapter Claims that



marriage can be broken up by death, divorce and court decisions. This chapter reveals whether or not divorce is permitted but to do the divorce process there are some the terms of the law are to be lived by both the parties. KHI declares the marriage can be broken because by: a. the death, b. divorce, c. court decisions. ( Clause of 113 KHI).

#### **IV. DIVORCE OUTSIDE THE COURT**

The phenomenon of cracking or failure of a marriage to the distruction of household causes vary greatly, such as infidelity, economic factors, forced marriages or early marriages. Why do many marriage or domestic life in Indonesia take place under an error mentality like this? This answer because many marriages are fostered or built on n o foundation or religiou, maturity and responsibilty. The lack of religious k nowledge, especially islam is blind to the provisions in syaria which has a long lastin g negative impact, maturity is a closely relative to the responsibility i9n human life. The law interprets and view once level of maturity as a paremeter that can state that a person is capable of law or is capable of carrying out of legal action. The Republic is a state of law a definite law to regulate marriage and divorce namely compilation of Islamic law (KHI) both of which adhere to the prnciple that: divorce can only be done before a court, what if divorce is conducted outside?the court? Is this divorce or not

Back to the prob lem is low of knowledge about Islam, The blindness of Syariah Islam will bring long negative impact . KHI Explained: Thalak is Agreement of husband in front of assembly of judge as a reason the end of a marriage, Many happened in our Islam society , declare of thalak is caused of problem in a household without an evidence and it's not infront of the court,

- a. How is the law?
- b. Is it illegitimate based on syariah, or
- c. Is it illegitimate based on Country requirement or KHI?

The position of compilation of islamic low (KHI) on state law (positive) in the case of divorce, that divorce is regulated by compilation of islamic law (KHI) originating in islamic law and the application of compilation of islamic law beside of presidential instruction NO.RI.1.of 1991 dated june 10, 1991. Concerning the dissemination of compilation of islamic law (KHI), but the regulation in islamic law on divorce is not in line which compilation of islamic law (KHI), although it is sourced from islamic law. According to islamic law, if a husband says the word divorce to his wife, than the law is valid, According to the compilation of islamic law (KHI) The prounouncement of thalak is coniderated valid if it is done before a court hearing. If the husband has dropped divorce on the wife, due to their ignorance according to thge majority of scholars who say the thalak that are pronounced both seriously and the jokingly and lafadz come out shorih (firmly) and who say the husband to his wife than the divorce false or is legally valid.

Actually this problem in society for some people because of the low knowledge of religion, especially islam blind to the provision in Syariah. For example, due to quarrels, and controlled emotion arises or request for divorce from a wife who repeatedly insistenly, this often happens will trigger the onset of the word divorce from the husband, and compilation of islamic law (KHI), the divorce invaled, because it was done not before the court, then divorce will be easily pronounced (repeatedly) by the husband to his wife what is the rulling if they still life together as husband and wife. The opinion of Mr.Arso a member of the north



sumatra MUI and a farmer employee of Medan High Court of Religion, said that: “pronouncement of divorce / divorce carried outside the court is legal according to the islamic law only but is invalid according to what is applicable in the republic of indonesia. Administratively they must report to the religious court that there husband divorce/ divorce between them, here the role of the religious court is highly expected in this matter”<sup>5</sup>. The religious court must try to recconcile, by mediating between the two parties or processing the divorce.

Often happened in our society who doesn't enough knowledge of islam about this, after lafadz of thalak then they will be togahther with the divorce reason isn't valid cause doesn't have evidence of the divorce, as Mr. Arso explaines that pronouncement of divorce / divorce carried outside the court is legal, For the society whose doesn't understand about the law. What is the condition will creat a sins that is not realized or Allah would like to forgive their sins which is in category doesn't Understand laws Of Allah.

The issue is the differences between islamic law and compilation of islamic law (KHI) regarding the validity or illegality of the issue of divorce in regulation in the republic of Indonesia, this is very detrimental to the public those who do not know how to regulate before law in islamic. The requirements of country wants to there a report as administrative when the divorce happend, so that has administrative discipline about the problem of religious court. This problem is not only the responsibility of the state but also the responsibility of the Indonesian people, namely Ulamas and Dai-dai, society because this is an issue of islamic law that must be accounted for in the world and the hereafter. This problem not only an assignment of our Country, but a work or assignment all of us, the most important for our theologian, missionaries to take counseling people about divorce, because this is a islamic law problems and will be rewarded by the Almighty, for all the wrongs that have been done. and also with this problem, Government has given full of attention for the problem related to the religion espesially islam, to save and peace in society.

#### **IV. CONCLUSION.**

The problems of the differences perspective between islamic law with KHI or rules of marriage around legal or illegal about Thalak outside of court is not a conflict in a regulation of our beloved Republic of Indonesia. The state demands administrative entry when the divorce happened. There a administrative discipline about problem related to the court. This problem not only an assignment of our Country, but a work or assignment all of us, the most important for our theologian, missionaries to take counseling people about divorce, because this is a islamic law problems and will be rewarded by the Almighty, for all the wrongs that have been done.

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