

**POSITION OF HAKAMAIN IN DIVORCE ON THE REASON OF SYIQAQ
ACCORDING TO LAW NUMBER 50 OF 2009 AMENDMENT OF LAW NUMBER 3
OF 2006 AMENDMENT OF LAW NUMBER 7 OF 1989**

ABDUL ROKHIM

Faculty of Law, University of 17 August 1945

Samarinda

dr.abd.rokhim@gmail.com

Received 5 January 2021; Revised 15 February 2021; Accepted; 15 March 2021

Abstract

The purpose of the marriage is in fact, not a few couples who experience shocks - shocks in building their household, which can eventually find failure in their marriage. Failure to build a household usually ends in divorce. Although the families of both parties have tried to reconcile and improve the couple so that the couple does not experience divorce. One of the reasons for the divorce is due to the couple having quarrels and disputes constantly so that it can not be reconciled. The quarrel between the husband and wife may be due to Nusyuz's wife (disobedient) or it may also be due to the husband behaving badly towards his wife so that the husband and wife can no longer be reconciled. This is as confirmed in the Compilation of Islamic Law in article 116 letter (f) Jo PP No. 19 of 1975 in the Letter (f) that is the occurrence of continuous quarrels, This continuous quarrel in Islamic law is called "syiqaq". Especially in the case of syiqaq in accordance with the provisions of Article 76 paragraph (2) of Law Number 7 of 1989 Amendment to Law Number 3 of 2006 Second Amendment of Law-Law Number 50 of 2009, then the panel of judges may appoint each judge from the family the plaintiff as well as the defendant's family. The jury was asked to be more sensitive to whether there were any indications that the plaintiff and defendant could be reconciled with the presence of the family. From the examination it is intended to be clear to the jury about the reasons for the dispute and quarrel, where the judge makes an intervening decision and sends to each of the plaintiffs and defendants to return with the family at a time determined by the jury.

Keyword: marriage, syiqaq, Compilation of Islamic Law

BACKGROUND

The provisions of Article 1 of the Marriage Law have stated that the purpose of marriage is to form a family, be eternal and prosperous based on the One Godhead. Forming a family means forming the smallest community unit consisting of husband and wife and children, forming a household means forming a union of husband and wife relationships in a container called a common residence. Happy means harmony in the relationship between husband and wife and children in the household, while eternal means that it lasts a lifetime.

Starting from the purpose of marriage, in fact, not a few married couples experience shocks in fostering their household, which in the end can meet failure in their marriage. Failure to start a household usually ends in divorce. Even though the families of both parties have tried to reconcile and improve the married couple so that the couple does not experience a divorce.

One of the reasons for the divorce was that a married couple fought and fought continuously so that they could not be reconciled. This argument of the husband and wife may occur because of Nusyuz's wife (disobedient) or it may also be because the husband behaves badly towards his wife so that the husband and wife cannot be reconciled. This is as confirmed in the Compilation of Islamic Law in article 116 letter (f) Jo PP No. 19 of 1975 in letter (f), namely the occurrence of continuous quarrels, this continuous quarrel in Islamic law is called "syiqaq", which is between husband and wife continually disputes and quarrels and there is no hope of living in harmony again in the household. divorce examination on the basis of syiqaq,

Likewise in Article 134 of the Compilation of Islamic Law it is stated that: "A divorce suit for reasons stated in Article 116 letter (f), can be accepted if it is clear enough to the Religious Court regarding the causes of the dispute and quarrel and after hearing the family and people - people close to the husband and wife. (Zainal Abidin Abu Bakar: 1992),

RESEARCH METHODS

Normative juridical, namely research conducted based on legal materials and by collecting data, studying books in the library and the laws and regulations related to this research.

"Normative legal research, which consists of:

- a. Research on legal principles
- b. Research on legal systematics,
- c. Research on the level of legal synchronization,
- d. Legal and historical research
- e. Comparative law research. "(Bambang Sunggono, 2006: 42)

RESEARCH RESULTS AND DISCUSSION

Hakamain's Position in Divorce on Syiqaq Reasons According to Law Number 50 of 2009 Amendment from Law Number 3 of 2006

Hakamain according to language means two hakam, namely a hakam from the husband's side and a hakam from the wife's side to settle a divorce case on the basis of syiqaq. Meanwhile, according to the Qur'an. The meaning of hakam as explained in Surah An-Nisa 'verse 35: (Syahrizal Abbas, 2009: 44)

وان خفتم شقاق بينهما فابعثوا حكما من اهله وحكما من اهلها ان يريدوا اصلاحا يوفق الله بينهما ان الله كان عليما خبيراً

Translated: "And if you are worried that there will be a dispute between the two of them, then send a peacemaker from a male family and a peacemaker from a female family. If both (the peacemakers) intend to make improvements, surely Allah will give taufik to the husband and wife. Truly, Allah is most observant, all-knowing. "

From the meaning of hakam in the above verse, there are differences among jurisprudence experts, according to Imam Abu Hanifah's opinion, hakamain means the representatives of each husband and wife, because only as a representative, the husband's rights should not drop divorce on the wife's side. Likewise, the rights of the wife should not make khuluk on the husband. Meanwhile, according to Imam Malik, this Hakamain as a judge, as a judge who has the duty to decide, the Hakamain may also make a decision in accordance with their opinion regarding the disputing husband-wife relationship, whether he will issue a divorce decision or he will order the husband- the wife reconciled (Abdul Manan, 2000: 47).

The legal basis for the determination or appointment of these rights can be seen from Article 76

paragraph (2) of Law Number 7 of 1989, amendments to Law Number 3 of 2006, Second Amendment to Law Number 50 of 2009. Also in the Al-Qur'an Surat An-Nisa verse 35, where there is a difference of opinion between whether it is obligatory or not to appoint a hakam from each party of the husband's family and the wife's family, according to Asy-Syafi'i that lifting a hakam from each husband-wife pair is obligatory. This is understood from the existence of the word "send" and the word has an element of affirmation. The word also means in order to mediate a dispute between husband and wife and it is the judge as a government employee who can appoint the appointment of these rights. Mahmud Syaltout also argues that sending a peacemaker is an obligation 'ain (obligation for everyone) of each husband and wife family. This obligation is transferred to the Religious Court when both parties have filed their divorce suit. Meanwhile, according to Ibn Rushd, the appointment of Hakamain is not mandatory but jawaz (allowed). This opinion is also in line with the opinion of M. Yahya Harahap, who said that the appointment of rights is a casuistic action so that it depends on the opinion and judgment of the judge. Even if there is a request from one of the parties or from both parties, it all depends on the opinion and judgment of the judge on which measure is more beneficial in divorce cases on the basis of syiqaq (M. Yahya Harahap, 1989: 271).

Examination and settlement of a divorce suit on the basis of syiqaq must refer to Article 76 of Law Number 7 of 1989 Amendment of Law Number 3 of 2006 Amendment to Second Amendment of Law Number 50 of 2009, first examining witnesses from family or persons. close to husband and wife, after that the Religious Court or the Syar'iyah Court appoints the husband or wife's family or someone else as hakam. Hakam conducts deliberation, the results are submitted to the Religious Court or the Syar'iyah Court as the basis for the verdict.

In Article 38 of Law Number 1 of 1974 concerning Marriage, it is stipulated that a marriage can break up due to death, divorce and on a court decision. Then in Article 39 paragraphs (1) and (2) Law Number 1 of 1974 it is also stated that divorce can only be carried out in front of a Court hearing after the Court (the appointed Panel of Judges) has failed to reconcile the two parties, as well as sufficient reasons for them to divorce because there is no hope of living in harmony in a household, their marriage has really broken. A divorce suit can be filed by the husband or wife on the grounds that have been determined by the prevailing laws and regulations.

One of the reasons for divorce as referred to in Article 19 letter (f) of Government Regulation Number 9 of 1975 is that between husbands and wives continually disputes and quarrels and there is no hope of living in harmony again in the household. Then in Article 22 paragraph (2) it is stated that the divorce suit for reasons as stated in Article 19 letter (f) of Government Regulation Number 9 of 1975 can only be accepted if it is clear enough to the Court regarding the causes of the dispute and dispute and after hearing the family and people close to the husband and wife who filed for the divorce.

In the Practice of Religious Courts, the reasons for divorce as stated in Article 19 letter (f) of Government Regulation Number 9 of 1975 are not always referred to as syiqaq. It is said by syiqaq that if the divorce suit is based on the reason that there has been a dispute that contains dangerous elements and has not yet reached the emergency level, then this cannot be said to be syiqaq. The latter is a lawsuit filed by one of the parties on the grounds of arguments and arguments on the grounds of another divorce, such as one party committing adultery, drunkenness and gambling. Regarding these matters, the breakdown of marriage can be in the form of divorce and it can be done by a court decision.

Then regarding the requirements to become a Hakamain, there are several opinions including, according to Ibn Rusyid that a Hakamain is implied to be someone who is wise, baligh, fair and Muslim. There are also those who think that they must be men and know the problems between husband and wife who are at odds. Whereas in the book Fiqh Munakahat, it is mentioned about the requirements to become Hakamain, namely: (Mukhtar Zamzami, 2002: 77)

1. Be fair between the disputing parties.
2. Making peace between the two husbands and wives sincerely.
3. Respected by both husband and wife.
4. One should side with the persecuted, if the other party does not want to make peace.

With regard to the stipulation or appointment of rights which are part of the peaceful effort required by law, the Religious Courts (appointed panel of judges) must be guided by three categories:

1. Peace efforts made by a judge examining a case carried out in every trial as long as the case is decided, this effort is absolutely imperative,
2. Peace efforts made by a mediator which is usually called mediation, provided that this effort can be done if both parties are present at the trial, this effort is imperative.
3. Peace efforts made by Hakamain, both from the husband's family and the wife's or other people agreed by both, are optional.

Especially in syiqaq cases in accordance with the provisions of Article 76 paragraph (2) of Law Number 7 of 1989 Amendment to Law Number 3 of 2006 Amendment to Second Law Number 50 of 2009, the panel of judges can raise the rights of each of the family parties. the plaintiff or the defendant's family. The panel of judges is demanded to be more sensitive whether there are indications that the plaintiff and defendant can make peace with the presence of their family. The examination was intended to make it clear to the panel of judges about the causes of the dispute and dispute, in which the judge made an interlocutory decision and sent to the respective parties, the plaintiff and the defendant, to return with their families at the time determined by the panel of judges.

Law Number 3 of 2006 The Second Amendment of Law Number 50 of 2009 stipulates that the procedures for examining divorce cases are based on syiqaq reasons, that after hearing the testimony of witnesses who come from the family of husband and wife or people close to both of them about the nature of In a husband-wife dispute, the judge can appoint one or more members of the family of each party or other people to become legal rights.

Hakam as referred to above, is as contained in the explanation of Article 76 paragraph (2) of Law Number 7 of 1989 Amendment to Law Number 3 of 2006 Amendment to Second Law Number 50 of 2009, namely: "Hakam is a person who determined by the Court from the husband's family or the wife's family or other parties to seek efforts to resolve disputes against syiqaq ". (Zainal Abidin Abu Bakar: 2000)

The appointment of this hakam is an incidental act by the judge, intended to seek efforts to resolve the dispute over divorce cases on the basis of syiqaq. Then to be able to understand the application when the appointment of rights and those who are authorized to lift rights must refer to Article 76 paragraph (2) above. According to the provisions of this article, the time for the appointment of the hakam in a divorce case on the basis of syiqaq is after the examination process has passed the witness examination stage. Therefore, the court can only raise the right after the witness examination has been carried out.

In connection with the foregoing, M. Yahya Harahap said that the appointment of this Hakam is a casuistic action, depending on the opinion and judgment of the judge. Meanwhile, according to HM Yusuf Ilyas, the law of appointing rights is mandatory, and if there is a relief so that the appointment of rights is not mandatory only because of rukhsah (relief), it is due to the difficulty of having certain individuals that do not apply generally to everyone.¹This is based on the absolute necessity to reconcile a husband and wife who are going to divorce by each judge, while for judges generally do not have sufficient time to carry out the reconciliation, nor do they have sufficient expertise (professionalism) in that field. So that the appointment of this law is an absolute and routine activity for judges at each trial of divorce cases on the basis of syiqaq. (HM Yusuf Ilyas, 1999)

Furthermore, regarding the position and function of the rights according to the explanation of Article 76 paragraph (2) of Law Number 7 of 1989 amendments to Law Number 3 of 2006, the second amendment of Law Number 50 of 2009 as mentioned above, is limited only to seeking settlement efforts. disputes between husband and wife. This position and function are not accompanied by the authority to impose a decision, this means that after the judiciary tries to find a settlement of disputes and quarrels between husband and wife, then the position and function and role of the rights stop and end there.

In connection with the foregoing, if you look at and pay attention to the fact that is developing in the midst of society, there are still conflicts and differences of opinion, so that the Jumhur Ulama is of the opinion that the rights referred to here are the same as the judges, therefore rights can punish (decide) the case. Its authority is not limited to seeking efforts to resolve husband-wife disputes, but is followed by the power to impose decisions.

CLOSING

CONCLUSIONS

Especially in syiqaq cases in accordance with the provisions of Article 76 paragraph (2) of Law Number 7 of 1989 Amendment to Law Number 3 of 2006 Amendment to Second Law Number 50 of

2009, the panel of judges can raise the rights of each of the family parties. the plaintiff or the defendant's family. The panel of judges is demanded to be more sensitive whether there are indications that the plaintiff and defendant can make peace with the presence of their family. The examination was intended to make it clear to the panel of judges about the causes of the dispute and dispute, in which the judge made an interlocutory decision and sent to the respective parties, the plaintiff and the defendant, to return with their families at the time determined by the panel of judges.

Hakam as referred to above, is as contained in the explanation of Article 76 paragraph (2) of Law Number 7 of 1989 Amendment to Law Number 3 of 2006 Amendment to Second Law Number 50 of 2009, namely: "Hakam is a person who determined by the Court from the husband's family or the wife's family or other parties to seek efforts to resolve disputes against syiqaq.

BIBLIOGRAPHY

- Abbas, Syahrizal. *Mediation in the Perspective of Sharia Law, Customary Law and National Law*. Jakarta: Kencana, 2009.
- Abu Bakr, Zainal Abidin. *Collection of Laws and Regulations in the PA Environment*, PTA. Surabaya: Dirbinbapera, 1992.
- Harahap, M. Yahya. *Position of Authority and Procedure of Religious Courts*. Jakarta: Pustaka Kartini, 1989.
- Ilyas, M. Yusuf. "Improving Legal Functions in Handling Divorce Cases". *Forum of Law*, No. 41, Jakarta: Al Hikmah, 1999.
- Manan, Abdul. *Application of Civil Procedure Law in the Religious Courts*. Jakarta: Al Hikmah, 2000.
- Saifullah, Muhammad. *Tracing the Historical Roots of Legal Aid in Islam*, Semarang: IAIN Walisongo, 2002.
- Zamzami, Mukhtar. "Dynamics of Settlement of Divorce Cases in Religious Courts and their Implications". *Forum of Law*, No. 56, Jakarta: Al Hikmah and Ditbinpera, 2002.

Paragraph

Qur'an Surah An-Nisa '(4): 35

Legislation

- Presidential Instruction Number 1 of 1991 concerning Compilation of Islamic Law (KHI)
- Supreme Court of the Republic of Indonesia. *Guidelines for Implementation and Administration of Religious Courts Book II, Revised Edition 2010*. Jakarta: Dirjen Badilag, 2010.
- Law Number 1 of 1974 Concerning Marriage
- Law Number 50 of 2009 Amendment from Law Number 3 of 2006 Amendment from Law Number 7 of 1989 concerning Religious Courts