

THE PROBLEMATICS OF DIVORCE BEFORE JUDGES THE PERSPECTIVE OF ISLAMIC LAW COMPILATION AND MADZHAB SYAFI'I

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Abstract: Indonesia is a legal-based country in which all regulations refer to applicable as well as unapplied human actions. In terms of law enforcement, marriage has indicated many problems which trigger divorce. The study aims to analyze the validity of divorce before judges from the perspective of Islamic Law Compilation and Madzhab Syafi'I. Furthermore, the study makes an analysis of iddah period determination based on Islamic Law Compilation and from the perspective of Madzhab Syafi'i using the content analysis method. The study concludes that according to Islamic Law Compilation all divorces in Indonesia must go through a court of law. Thus, whether or not a marriage is legal, this provision is inconsistent with the 2012 Indonesian ulema' consensus and with the perspective of madzhab Syafi'i as only 7 things lead to divorce, and four (4) of the cases refer to: the husband's irresponsibility for family's needs for a living, the wife receives permanent harm, physical and mental disabilities, husband's unclear departure. In those four cases, the wife can apply for divorce before the court despite the husband's ignorance. Furthermore, 3 more cases become the absolute authority of the court to resolve such as divorce due to *illa'*, divorce due to *li'an*, divorce due to *zhihar*.

Keywords: Divorce, KHI, Syafi'I Madzhab

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Abstrak: Indonesia merupakan negara hukum yang segala peraturannya mengacu pada perbuatan manusia yang berlaku maupun yang tidak berlaku. Dari sisi penegakan hukum, perkawinan terindikasi banyak masalah yang memicu terjadinya perceraian. Penelitian ini bertujuan untuk menganalisis keabsahan perceraian di hadapan hakim dari perspektif Kompilasi Hukum Islam dan Madzhab Syafi'i. Selanjutnya penelitian ini membuat analisis penetapan masa iddah berdasarkan Kompilasi Hukum Islam dan perspektif Madzhab Syafi'i dengan menggunakan metode analisis isi. Studi ini menyimpulkan bahwa menurut Kompilasi Hukum Islam semua perceraian di Indonesia harus melalui pengadilan. Dengan demikian, sah atau tidaknya suatu perkawinan, ketentuan ini tidak sesuai dengan ijma ulama Indonesia tahun 2012 dan pandangan madzhab Syafi'i karena hanya 7 hal yang menyebabkan perceraian, dan 4 (empat) kasus merujuk pada: suami tidak bertanggung jawab atas kebutuhan hidup keluarga, istri dirugikan secara permanen, cacat fisik dan mental, kepergian suami yang tidak jelas. Dalam empat kasus tersebut, istri dapat mengajukan cerai di depan pengadilan meskipun suami tidak mengetahuinya. Selanjutnya 3 perkara lagi yang menjadi kewenangan mutlak pengadilan untuk menyelesaikannya seperti talak karena illa', talak karena li'an, talak karena zihar.

Kata kunci: Perceraian, KHI, Madzhab Syafi'i

Introduction

Indonesia is a united country with the republican form of government and a presidential government system. The people hold the highest authority of its sovereignty which must be implemented according to its laws. The constitution has stated that Indonesia is a state

of the law with Pancasila as the nation's ideology to unite all religious people in the Republic of Indonesia.

Law refers to regulations regarding human applicable and unapplied actions. Thus, the law refers to matters of instructions and prohibitions¹. Law is to produce prosperity, benefit, safety, and the rules of conduct in people's lives. The law has a compelling state for obedient and ignorant people in which sanctions and punishments will still be applicable. Law² is an essential infrastructure to change human behavior in life.

In addition, the law does not only refer to legible, visible, and comprehensible guidelines and provisions, but it should also be implemented, applied, and obeyed in any case and any condition for people's needs for the sake of laws' effective implementation.

Humans are social creatures who need another under any circumstances. In other words, human beings cannot live alone. They must socially live in groups one of which is living in marriage as it is important to live with

¹ Prodjodikoro, Wirjono. 2003. *Perbuatan Melanggar Hukum*. Bandung: CV Bandar Maju.

² Sudikno. 2010. *Hukum Acara Perdata Indonesia*. Yogyakarta: Universitas Atma Jaya.

the opposite sex; living a happy life and having offspring through marriage.

In relation to marriage regulations, the Republic of Indonesia provides the law in Law No. 1 of 1974³ on marriage, with the implementation based on PP. No. 9 of 1975 on the Implementation of Marriage Law⁴. The marriage law resulted in some other marriage laws which have been used to be a guide and reference applied to all Indonesian citizens, are now inapplicable⁵. Hence, such a particular law is supported by Presidential Instruction Number 1 of 1991 on Islamic Law Compilation (KHI)⁶, Inpres (Presidential Instruction) as a refinement regulation of the marriage law in Indonesia.

However, marriage does not always provide happiness. Life complications also come to accompany mankind. Thus, debates and disputes punctuate the husband and wife relationship on daily basis, and divorce eventually becomes the final alternative to terminate the

³ UU No. 1 Tahun 1974 Tentang perkawinan.

⁴ PP. No. 9 Tahun 1975 Tentang pelaksanaan UU No 1 Tahun 1974.

⁵ Soemiyati. 1982. *Hukum Perkawinan Islam dan Undang-undang Perkawinan*. Yogyakarta: Liberty.

⁶ Intruksi President No. 1 Tahun 1991 Tentang Kompilasi Hukum Islam.

husband and wife's marital bond which is valid according to Islamic law.

Law does not take divorce as unlawful issue despite the fact that, referring to Al-Qur'an, it is makruh (lawful but not a good action). In addition, some scholars suggested that divorce (talaq) is a lawful action but hated by Allah, God the Al-Mighty. Furthermore, some scholars permit divorce to be implemented in consideration of its goodness as well as its weakness in a marriage. In terms of jurisprudence, divorce has been regulated in verse 38 letter b Regulation No. 1 in 1974 and verse 113 Islamic Law Compilation (KHI)⁷. Both regulations suggested that marriage can be broken due to some issues such as proposed divorce or other circumstances.

Basically, according to PP. No. 9 of 1975⁸ on the implementation of Law No. 1 of 1974⁹, divorce is divided into two types namely divorce and contested (proposed) divorce. In addition, article 115 of Islamic Law Compilation (KHI) stated that divorce can only be declared before judges in the Religious Court. Yet, in fact, in relation to

⁷ UU No. 1 Tahun 1974 Tentang perkawinan.

⁸ PP. No. 9 Tahun 1975 Tentang pelaksanaan UU No 1 Tahun 1974.

⁹ UU No. 1 Tahun 1974 Tentang perkawinan.

Islamic family law in Indonesia several provisions misled to Islamic law principles, especially in the perspective of Madzhab among fiqh scholars. Article 115 of Islamic Law Compilation (KHI)¹⁰ also suggested that all divorces are considered valid when declared before court after unsuccessful mediation for them.

Pre-Research

Based on the research background, the author made a divorce validity analysis before judges based on Islamic law compilation and from the perspective of Madzhab Syafi'i.

Research Method

The researchers use research of normative legal with a literature approach and with content analysis using data source documentation and data analysis technique.

Discussion

In verse 117 of Islamic Law Compilation (KHI), it is suggested that "Divorce is husband and wife's commitment before judges in Religious Court¹¹ to break

¹⁰ UU No. 1 Tahun 1974 Tentang perkawinan.

¹¹ Khisni, Akhmad. 2011. *Hukum Peradilan Agama*. Semarang: Unissula Press.

down their marriage complying with verse 129, 130, and 131¹². Thus, such a commitment has the authority to break down the marriage with appropriate efforts. Divorce is basically the husband's prerogative right as he can make the declaration of divorce anytime, anywhere, and under any circumstances with clear or implied statements.

In Indonesia, the right to declare the divorce is essentially onto the husband of whether divorce talak or contested divorce which still fundamentally apply and develop in the society and within the Religious Court. However, in the concept of Islamic Law Compilation (KHI), husband and wife have an equal legal position to file the divorce to the Religious Court¹³. Likewise, rujuk (remarried or return to the previous spouse) refers to the same phenomenon according to the Islamic Law compilation (KHI)¹⁴ in which in case of both wish for rujuk. In other words, wife may accept or reject her ex-husband's request for rujuk.

¹² PP. No. 9 Tahun 1975 Tentang pelaksanaan UU No 1 Tahun 1974.

¹³ Lubis, Sulaikin. 2008. *Hukum Acara Perdata Peradilan Agama di Indonesia*. Jakarta: Kencana.

¹⁴ UU No. 1 Tahun 1974 Tentang perkawinan.

Article 115 of Islamic Law Compilation (KHI) stated that *"Divorce can only be carried out before court after the Religious Court's efforts to reconcile the two parties but to no avail."* Such a provision has previously been regulated in article 39 paragraph (1) of Law Number 1 Year 1974 concerning Marriage stating that, "Divorce can only be carried out before court after its efforts to reconcile the two parties but to no avail."¹⁵

Thus, divorce is not a simple issue in Indonesia as it should go through several procedures with good reasons. In addition, divorce cannot only be declared through written statement but it should also be verbally declared before religious court through a trial, even according to Islamic Law Compilation (KHI) a divorce declared by a husband outside the Religious Court is considered invalid and cannot be justified as valid. In other words, the utterance of a divorce can be justified and be pronounced to be valid when declared before Judges in the Religious Court, either in the form of divorce or proposed divorce after previous failed efforts of reconciliation.

¹⁵ UU No. 1 Tahun 1974 Tentang perkawinan.

Moreover, positive aspects of divorce being considered valid when declared before Religious Court is that it is obviously in favour of women according to article 115 of Islamic Law Compilation (KHI) especially when men violate the wives's personal rights. Furthermore, to empower women after divorce, Judges can convey wife's rights during the iddah¹⁶ period as well their right upon economical supports as long as she did not receive it during the marriage. Moreover, judges can also share wealth and property of marriage after divorce (gono-gini) equally.

The provisions in Islamic Law Compilation (KHI) are not only inconsistent with the perspective madhhabs, but also contradict the perspective of Indonesian ulemas, for instance: Ijma' ulama' Indonesia in 2012¹⁷ on masail fihiyyah mu'ashirah stating that a divorce declared outside the court is legally valid, with lawful (shar'i) reasons and supported by the court with the husband and

¹⁶ Ali, Moh. "Perkawinan tanpa menunggu berakhirnya Idah bagi perempuan yang bercerai di bawah tangan perspektif konstruksi social: Case Study in the village of Landak, Tanah Merah subdistrict, Bangkalan Regency, Madura." Masters, Universitas Islam Negeri Maulana Malik Ibrahim, 2017. <http://etheses.uin-malang.ac.id/10236/>.

¹⁷ Himpunan Keputusan Ijma' Ulama' Komisi Fatwa Seindonesia Tahun 2012.

his wife as witnesses. In addition, Madzhab Shafi'i suggested in books as what follows:

Regarding the location of divorce declaration, it is the husband's absolute right according to strong authority (valid law of shari'a). In fact, most of scholars agree that divorce is the husband's essential authority in which he can declare anytime, anywhere, and almost under any circumstances. Thus, Islamic law does not tolerate contested divorce (divorce proposed through a court law). Yet, in fact, as the society has developed legal updates seem to be desperately required according to the society's needs.

Thus, with regard to the validity of declared divorce before Judges, some scholars of Shafi'iyah suggested in some books of fiqh such as the book of Fiqhul Manhaji 'Ala Madzhab As-Syafi'I, the book of Fiqh Sunnah and the book of Fiqh Islam Wa Adillatuhu that divorce declared before judges in the court was valid as explored in the book of Al-Umm Juz 6 by madzhab Shafi'i as what follows:

قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ عَنْهُ : إِذَا تَزَوَّجَ الرَّجُلُ الْمَرْءَةَ فَلَمْ يَدْخُلْ بِهَا أَوْ كَانَتْ مِمَّنْ نَحِيضٌ أَوْ لَا نَحِيضٌ، فَلَا سُنَّةَ فِي الطَّلَاقِ فِيهَا، إِلَّا أَنْ الطَّلَاقَ يَقَعُ مَتَى طَلَّقَهَا، فَيُطَلِّقُهَا مَتَى شَاءَ. فَإِنْ قَالَ لَهَا : أَنْتَ طَالِقٌ لِسُنَّةٍ، أَوْ أَنْتَ طَالِقٌ لِلْبِدْعَةِ، أَوْ أَنْتَ طَالِقٌ لَا لِسُنَّةٍ وَلَا لِلْبِدْعَةِ، طَلَّقْتَ مَكَانَهَا.

Moreover, in the book of al-umm, madzhab Shafi'i suggested that in case of a man marries a woman with no sexual intercourse, yet in fact she is capable to get menstruation or not menstruating, the Sunnah does not have sufficient authority for divorce. Therefore, the husband can declare the divorce anytime and anywhere he wishes to. Thus, in case of the husband says to his wife "I divorce you according to the Sunnah" or "I divorce you according to bid'ah" or "I divorce you not according to the Sunnah and not according to bid'ah," then she is divorced at that time. In another case, Madhhab Shafi'i suggested in the book as what follows:

قَالَ : وَلَوْ تَزَوَّجَ رَجُلٌ امْرَأَةً وَدَخَلَ بِهَا وَحَمَلَتْ فَقَالَ لَهَا : أَنْتَ طَالِقٌ لِسُنَّةٍ أَوْ لِلْبِدْعَةِ، أَوْ بِلَا سُنَّةٍ وَلَا بِدْعَةٍ، كَانَتْ مِثْلَ الْمَرْأَةِ الَّتِي لَمْ يَدْخُلْ بِهَا، لَا تَخْتَلِفُ هِيَ: وَهِيَ فِي شَيْءٍ مِمَّا يَقَعُ بِهِ الطَّلَاقُ عَلَيْهَا حِينَ يَتَكَلَّمُ بِهِ.

Madzhab Syafi'i stated that in case of a muslim (male) married a muslimat (female). They normally have sexual intercourse until she gets pregnant, but he divorces

her the next day and states "I divorce you based on sunnah or bid'ah," then she just like a woman of no previous sexual intercourse with him. In addition, no difference identified between such an occasion and another previous occasion regarding the divorce declaration that is at the moment of the husband declares his divorce. However, from another referencial event, Madzhab Syafi'i suggested that:

قَالَ : وَلَوْ تَزَوَّجَ امْرَأَةً وَدَخَلَ بِهَا وَأَصَابَهَا، وَكَانَتْ مِمَّنْ لَا تَحِيضُ مِنْ صَغِيرٍ أَوْ
كَبِيرٍ، فَقَالَ لَهَا : أَنْتَ طَالِقٌ لِّلسُّنَّةِ، فَهِيَ مِثْلُ الْمُرَاتِنِ قَبْلَهَا لَا يَخْتَلِفُ ذَلِكَ فِي وَفُوعِ
الطَّلَاقِ عَلَيْهَا حِينَ يَتَكَلَّمُ بِهِ.

In another case, Madhhab Shafi'I suggested that in case of a man has married a woman and he normally has intercourse with her, but she does not show her menstruation due to her young age or even too old, and he says to her "I divorce you according to the Sunnah", then the wife is considered to be in the same position as the two previous women mentioned above, and no particular difference related to divorce declaration, which is at the moment the husband declares the divorce.

However, another case came up that Madhhab Shafi'i mentioned in book saying as what follows:

قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ عَنْهُ : إِذَا كَانَ الرَّوْجُ عَنِ امْرَأَتِهِ فَأَرَادَ أَنْ يُطْلِقَهَا لِلسَّنَةِ كَتَبَ إِلَيْهَا : " إِذَا آتَاكَ كِتَابِي هَذَا وَقَدْ حَضَّتْ بَعْدَ خُرُوجِي مِنْ عِنْدِكَ، فَإِنْ كُنْتُ طَاهِرًا فَأَنْتَ طَالِقٌ " وَإِنْ كَانَ عِلْمٌ إِنَّهَا قَدْ حَاضَتْ قَبْلَ أَنْ يَخْرُجَ وَلَمْ يَمَسَّهَا بَعْدَ الطُّهُرِ. يَقَعُ عَلَى كُلِّ وَاحِدَةٍ مِنْهُنَّ حِينَ تَرَى الطُّهُرَ وَقَبْلَ الْغُسْلِ.

In case of the husband is in a different place for the divorce declaration, Madhhab Shafi'i suggested that he can write a letter to his wife stating, for instance: "If this letter comes to you while you have menstruated since I left you, so that when you finish your menstruation, you are divorced." Nevertheless, in case of the husband confirms his wife menstruation before his departure yet in fact they have not had time to have sexual intercourse after she completed her menstruation, then the divorce has presumably been declared even though she has not completed her menstruation by body wash. In addition, another case came which Madhhab Shafi'i explored in the book saying as what follows:

مَا جَاءَ فِي الطَّلَاقِ إِلَى وَقْتٍ مِنَ الزَّمَانِ. قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ عَنْهُ : إِذَا قَالَ الرَّجُلُ لِامْرَأَتِهِ : أَنْتَ طَالِقٌ غَدًا، فَإِنْ طَلَعَ الْفَجْرُ مِنْ ذَلِكَ الْيَوْمِ فَهِيَ طَالِقٌ. وَكَذَلِكَ إِنْ قَالَ لَهَا : أَنْتَ طَالِقٌ فِي غُرَّةِ شَهْرٍ كَذَا وَكَذَا، فَإِذَا رَأَى غُرَّةَ شَهْرٍ كَذَا وَكَذَا، فَتَبْتَكَ غُرَّتَهُ.

Regarding a divorce with a due date, madzhab Shaafi'i suggested that in case of a husband says to his wife "you are divorced tomorrow," it means that from early in the the wife is already divorced. It also comes true when the husband states: "you are divorced at the beginning of the month" which means that the beginning of the month is the time when the divorce applies. In another case, madzhab Shafi'i states what follows:

الطَّلَاقُ بِالْوَقْتِ الَّذِي قَدْ مَضَى، قَالَ الشَّافِعِيُّ رَضِيَ اللَّهُ عَنْهُ : وَإِذَا قَالَ لِامْرَأَتِهِ : أَنْتَ طَالِقٌ أَمْسَ، أَوْ طَالِقٌ عَامَ أَوَّلٍ، أَوْ طَالِقٌ فِي الشَّهْرِ الْمَاضِي، أَوْ فِي الْجُمُعَةِ الْمَاضِيَّةِ، ثُمَّ مَتَى أَوْ حَرَسَ، فَهِيَ طَالِقٌ السَّاعَةَ وَتَعَتَدَ مِنْ سَاعَتِهَا. وَقَوْلُهُ طَالِقٌ فِي وَقْتٍ قَدْ مَضَى، يُرِيدُ إِيقَاعَهُ الْأَنْ مُحَالًا.

With regard to divorce with the time that has passed, madzhab Shafi'i suggested that in case of a husband says to his wife "You were divorced yesterday, or you were divorced at the beginning of the year, or you were divorced last month, or you were divorced last

Friday," then he eventually dies or could not talk, the wife is automatically divorced since such a particular time and she should get through 'iddah¹⁸ time, due to the husband's previous divorce declaration.

From some divorce explorations through events conveyed by Madzhab Shafi'i in the book of Al-Umm, divorce, thus, should necessarily be declared before court for its validity. However, the husband, by all means, can declare the divorce, and at the moment the divorce has been declared, it is legally valid. Thus, it is obviously stated that divorce is not necessarily declared before the Religious Court. Nevertheless, researchers suggested that the government should also realize the religious law stipulated by Madzhab or scholars so that when husband and wife have confirmed that the divorce has been declared, the Religious Court can only legalize and reconfirm the divorce.

However, in certain cases the judge or the Religious Court has their rights and authority to decide and declare

¹⁸ Ali, Mohammad, Siti Sariroh, and Rumawi Rumawi. "Social Construction of Widow's Marital Rights without Finishing Waiting Period (Idah) in Indonesia." *Studia Iuridica Lublinensia* 30, no. 5 (December 17, 2021): 13-28. <https://doi.org/10.17951/sil.2021.30.5.13-28>.

divorce for them as explained in the book of fiqh sunnah¹⁹, fiqh islam wa adillatuhu²⁰, such as 1), No economical (or lack of) supports for the wife, 2), The husband harms the wife, 3), Disability, 4), The husband's departure (the wife is left), 5), iilaa', 6), li'an, 7), zhihar. Problems of number 5,6, and 7 will be explored and examined with regard to the perspective of Madzhab Shafi'i as what follows:

النَّطْلِيُّ لِعَدَمِ النَّفَقَةِ: ذَهَبَ الْإِمَامُ مَالِكٌ وَالشَّافِعِيُّ وَأَحْمَدُ إِلَى جَوَازِ التَّفْرِيقِ لِعَدَمِ
النَّفَقَةِ بِحُكْمِ الْقَاضِي إِذَا طَلَبَتْهُ الزَّوْجَةُ وَلَيْسَ لَهُ مَالٌ ظَاهِرٌ وَاسْتَدْلُوا لِمَذْهَبِهِمْ بِمَا
يَأْتِي: 1. أَنَّ الزَّوْجَ مُكَلِّفٌ بِأَنْ يَمْسَكَ زَوْجَتَهُ بِالْمَعْرُوفِ أَوْ يَسْرِجَهَا وَيَطْلُقَهَا
بِإِحْسَانٍ. 2. إِنَّ اللَّهَ تَعَالَى (الْبَقَرَةُ 229), 3. وَإِذَا كَانَ مِنَ الْمَقْرَّرِ أَنْ يَفْرِقَ الْقَاضِي
مِنْ أَجْلِ الْعَيْبِ بِالزَّوْجِ فَإِنَّ عَدَمَ الْإِنْفَاقِ أَشَدُّ إِيْدَاءً لِلزَّوْجَةِ وَظَلْمًا لَهَا مِنْ
وُجُودِ عَيْبٍ بِالزَّوْجِ فَكَانَ لِعَدَمِ التَّفْرِيقِ لِعَدَمِ الْإِنْفَاقِ .

Madzhab Maliki, Madzhab Shafi'i and Ahmad have explored divorce due to no economical supports can be proposed to judge. In addition, with this particular circumstance confirming that the husband has no sufficient or lack of wealth or property to meet wife's

¹⁹ Sabiq, Sayyid. 2004. *Fiqh Sunah*. Kairo: Darul Hadits.

²⁰ Al-Zuhaili, Wahbah. 1984. *Al-Fiqh Al-Islami Wa Adillatuhu*. Damaskus: Dar Al-Fikr.

needs, such madzhab explored several reasons such as 1). As the husband, in fact, is obliged to take good care of his wife and can divorce her with an appropriate action, 2). Referring to the words of Allah—God the Almighty (Al-Baqarah verse 229), 3). In case of the husband's disability, the judge can confirm the divorce. In addition, divorce due to lack of economical supports is actually more harmful for the wife rather than a divorce out of disability. Therefore, the judge can allow divorce out of or lack of the husband's no economical supports.

Thus, according to Madzhab Syafi'i, divorce out of no economical supports can be the major reason for divorce before the court which will eventually be decided by judges as it has a valid and legal authority, the Qur'an. In addition, the husband as the leader should indeed play a pivotal role and responsibility in the family tha is to fulfill the family's needs. Moreover, Madzhab Shafi'i provided it with qiyasan (logical basis) that fiqh scholars agreed on divorce due to mental and physical disability. In fact, the fiqh scholars put a premium on economical supports rather than disability as lack of economical

supports have worse impact than disability which will likely harm the whole family.

However, no economical supports merely refers to the absence of primary things such as food, clothing, shelter, and even worse the husband does not want to give and to make any efforts to meet the family's (wife's) needs. Furthermore, such a stipulation was supported by madzhab with the strong authority explained in the Al-Qur'an Surah Al-Baqarah 229. In addition, the researchers previously suggested that no economical supports was also reinforced by the book of Fiqh entitled *Islam Wa Adillatuhu*²¹ as follows:

الْمَبْحَثُ الْأَوَّلُ التَّفْرِيقُ لِعَدَمِ الْإِنْفَاقِ: أَخَذَ الْقَانُونُ فِي مِصْرَ وَسُورِيَةَ، يُجَوِّزُ التَّفْرِيقَ الْقَضَائِيَّ بَيْنَ الزَّوْجَيْنِ، عَمَلًا بِمَذْهَبِ الْجُمْهُورِ غَيْرِ الْحَنْفِيَّةِ. وَذَكَرَ الشَّافِعِيَّةُ وَالْحَنَابِلَةُ أَنَّ الْفِرْقَةَ لِأَجْلِ النَّفَقَةِ لَا تُجُوزُ إِلَّا بِحُكْمِ الْحَاكِمِ. لِأَنَّهُ فَسَخَ مُخْتَلَفٌ فِيهِ، فَأَفْتَقَرَ إِلَى الْحَاكِمِ كَالْفَسْخِ بِالْعِنَّةِ، وَلَا يُجُوزُ لَهُ التَّفْرِيقُ إِلَّا بِطَلَبِ الْمَرْأَةِ ذَلِكَ لِأَنَّهُ لِحَقِّهَا، فَلَمْ يَجْزْ مِنْ غَيْرِ طَلَبِهَا كَالْفَسْخِ لِلْعِنَّةِ فَإِذَا فَرَّقَ الْحَاكِمُ بَيْنَهُمَا فَهُوَ فَسَخٌ لَارْجَعَةٌ لِلزَّوْجِ فِيهِ.

The first explanation: divorce for lack of economical supports. Laws in Egypt and in Syria allows divorce before

²¹ Al-Zuhaili, Wahbah. 1984. *Al-Fiqh Al-Islami Wa Adillatuhu*. Damaskus: Dar Al-Fikr.

judges or court. This action complies with the opinion of the majority of scholars beyond from Madzhab Hanafi, Madzhab Shafi'I, and Madzhab Hambili suggesting that divorce with no particular economical supports and maintenance is not allowed unless supported by strong judge's decision as such kind of divorce (*fasahk*) is still in disputes among scholars.

Therefore, they need a judge to rule as ssuch *fasahk* and *li'an* cases. Divorce is not permissible except under the woman's (wife) request, as such a divorce is a matter of unfulfilled rights. In case of judges separate the husband and wife, this is the marriage annulment, in which husband and wife cannot many reconciliationbased on Surah At-Thalaq verse 7 as saying:

لِيُنْفِقْ ذُو سَعَةٍ مِّنْ سَعَتِهِ قَلِيٌّ وَمَنْ قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنْفِقْ مِمَّا آتَاهُ اللَّهُ قَلِيًّا .

Meaning: Those who have economical capability and those who do not should spend from their wealth given by Allah.

Therefore, Madzhab Shafi'i suggested that divorce is not permitted in case of no economical supports, but under two conditions such as 1), the woman proposes a

divorce to the court, 2), Judges have clearly decided of legalized divorce. However, another issue of divorce can also be proposed to the court as explained in the book of Shafi'iyah as follows:

النَّطْلِيُّ لِلضَّرُورِ: دَهَبَ الْإِمَامُ مَالِكٌ إِنَّ لِلزَّوْجَةِ أَنْ تَطْلُبَ مِنَ الْقَاضِي التَّفْرِيقَ، إِذَا أَدَعَتْ إِضْرَارَ الزَّوْجِ بِهَا إِضْرَارًا لَا يَسْتِطَاعُ مَعَهُ دَوَامَ الْعُشْرَةِ بَيْنَ أُمَّتَيْهِمَا، مِثْلَ ضَرْبِهَا، أَوْ سَبِّهَا، أَوْ إِيْدَانِهَا، بِأَيِّ نَوْعٍ مِنْ أَنْوَاعِ الْإِيْدَاءِ الَّذِي لَا يَطِاقُ، أَوْ إِكْرَاهِهَا عَلَى مُنْكَرٍ مِنَ الْقَوْلِ أَوْ الْفِعْلِ، فَإِذَا ثَبَّتَتْ دَعْوَاهَا لِدَى الْقَاضِي بَيِّنَةَ الزَّوْجِ، أَوْ اعْتِرَافَ الزَّوْجِ، وَكَانَ الْإِيْدَاءُ مِمَّا لَا يَطِاقُ مَعَهُ دَوَامَ الْعُشْرَةِ بَيْنَ أُمَّتَيْهِمَا، وَعَجَزَ الْقَاضِي عَنِ الْإِصْلَاحِ بَيْنَهُمَا، طَلَّقَهَا طَلْقَةً بَائِنَةً.

Second, divorce out of harm to the wife. Madzhab Maliki argued that the wife can file this particular case for divorce to the court. In case of the wife has stated that her husband has harmed her that she cannot survive living with him due to, for instance, his stinginess, swearing, or even frequent Domestic Violence.

With wide range of harms, the wife can no longer withstand the behavior of the husband. Thus, in case of the wife can submit all reports (for instance: through the wife's explanation or the husband's confession), the court can decide that the marriage cannot be continued due to

Domestic Violence (KDRT) and the court in this case loses mediation (a way to reconcile the couple), divorce ba'in can be awarded to the wife. Madhhab Shafi'i then suggested further statement as follows:

وَمِثْلُهُ مَذْهَبُ أَحْمَدَ: وَخَالَفَ فِي ذَلِكَ أَبُو حَنِيفَةَ وَالشَّافِعِي، فَلَمْ يَذْهَبَا إِلَى الطَّرِيقِ بِسَبَبِ الضَّرُورِ، لِإِمْكَانِ إِزْلَتِهِ بِالتَّعْرِيزِ وَعَدَمِ إِجْبَارِهَا عَلَى طَاعَتِهِ. ذَهَبَ أَبُو حَنِيفَةَ وَأَحْمَدَ وَالشَّافِعِي، فِي أَحَدِ قَوْلَيْهِ، إِلَى أَنَّهُ لَيْسَى لِلْحُكْمَيْنِ أَنْ يَطْلُقَا إِلَّا أَنْ يَجْعَلَ الزَّوْجُ ذَلِكَ إِلَيْهِمَا. وَقَالَ مَالِكٌ وَالشَّافِعِي: إِنْ رَأَى الْأَصْلَاحَ بِعَوَضٍ أَوْ بِغَيْرِ عَوَضٍ جَازَ، وَإِنْ رَأَى الْأَخْلُوعَ جَازَ، وَإِنْ رَأَى الَّذِي مِنْ قَبْلِ الزَّوْجِ الطَّلَاقَ طَلَّقَ، وَلَا يَحْتَاجُ إِلَى إِذْنِ الزَّوْجِ فِي الطَّلَاقِ، وَهَذَا مَبْنِيٌّ عَلَى أَنَّهُمَا حُكْمَانِ لَاوَكِيلَانِ.

Imam Ahmad agreed with such a statement even though Abu Hanifah and Madhhab Shafi'i rejected it with the argument that divorce cannot be declared on the grounds of harm as it can be resolved through ta'zir punishment in which wife is allowed to show temporary disobedience toward her husband. Madhhab Maliki and Shafi'i explore it by taking two qadhis statements in relation to compensation provision, or in relation to taking khulu' then the disobedience is allowed. However, in case of the husband's family's suggestion that divorce is better then it divorce can directly be declared without

the husband's permission but based on two judges and not the representatives.

Hence, Madzhab Shafi'i previously suggested that divorce should not be declared and the judge has no right to even declare divorce on the ground of harm as it can be resolved through punishment (can be in the form of multiple economical supports) to prevent the husband from harming the wife. In addition, Madzhab Shafi'i suggested that divorce can be declared by at least 2 judges (not deputy judge) on condition when the husband wants the case to be resolved by the court or the husband himself proposes it. Another issue can also be proposed to the court for divorce as explained in the book of the Shafi'iyah as follows:

الْمُبْحَثُ الثَّانِ بِالْغُيُوبِ أَوْ بِالْعِلَلِ: وَ فِي التَّفْرِيقِ بِسَبَبِ الْعَيْبِ يُعْفَى الرَّجُلُ مِنْ
نِصْفِ الْمَهْرِ قَبْلَ الدُّخُولِ لَهَا الْمُسَمَى بِالْإِتِّفَاقِ. لَكِنْ يَرْجَعُ الزَّوْجُ عِنْدَ الْمَالِكِيَّةِ
وَالْحَنَابِلَةِ وَالشَّافِعِيَّةِ بِالْمَهْرِ بَعْدَ الدُّخُولِ عَلَى وِلِيِّ الزَّوْجَةِ كَالْأَبِ وَالْأَخِ لِتَدْلِيْسِهِ
بِكَيْفِيَّةٍ وَلَا سَكْنَى لَهَا وَلَا نَفَقَةً. رَأْيُ مَالِكٍ وَالشَّافِعِيَّةِ: يَفْسَحُ النِّكَاحُ مِنْ أَبِي وَاحِدٍ
مِنَ الزَّوْجَيْنِ إِذَا وُجِدَ فِي الْأَخْرَعَيْنِ مِنَ الْغُيُوبِ التَّنَاسُلَةَ (الْجِنْسِيَّةَ), أَوْ الْغُيُوبِ
الْمُنْفَرَةِ مِنْ جُنُونٍ أَوْ جَدَامٍ أَوْ بَرَصٍ.

Second, divorce out of disability. In this case, husband is free from his obligation to provide half of the mahr given at the moment of marriage before sexual intercourse was conducted or otherwise, the divorce occurs after sexual intercourse, the wife must get the mahr musamma according to some fuqaha's (fiqh scholars) agreement.

However, madzhab Maliki, Hambali, and Shafi'i suggested that even after intercourse, the husband still has the right to ask for the mahr back from the woman's parents or representative as the man was considered to deceived due to the disability. Furthermore, the wife does not deserve for housing and daily economical supports or expenses during iddah that she will undergo.

Moreover, scholars of madzhab Maliki and Shafi'i suggested that any party (husband or wife) can apply such a divorce in case of disability of sexual organs or other disabilities that will likely prevent them from communicating in the society such as madness and leprosy. Nevertheless, madzhab Shafi'I has a different statement as what follows:

وَالْعَيُوبُ عِنْدَ الشَّافِعِيَّةِ سَبْعَةٌ، وَهِيَ: الْجَبُّ، وَالْعَنَةُ، وَالْجُنُونُ، وَالْجَذَامُ، وَالْبَرَصُ،
وَالرَّتْقُ، وَالْقَرْنُ، وَيُمْكِنُ أَنْ يَكُونَ فِي كُلِّ مِنَ الزَّوْجَيْنِ خَمْسَةٌ، الْأَوْلَانِ فِي الرَّجُلِ
وَالْأَخِيرَانِ فِي الْمَرْأَةِ، وَالثَّلَاثَةُ الْوَسْطَى مُشْتَرَكَةٌ بَيْنَهُمَا، وَلَا فَسْخَ بِالْبَحْرِ، وَالضَّانِ،
وَالِاسْتِحَاضَةَ، وَالْقُرُوحَ السِّيَالَةَ، وَالْعَمَى، وَالرَّمَانَةَ، وَالْبَالَةَ، وَالْحَصَاءَ، وَالْإِفْضَاءَ،
وَلَا يَكُونُهُ يَتَعَوَّطُ عِنْدَ الْجَمَاعِ، لِأَنَّهُ هَذِهِ الْأُمُورُ لَا تَفُوتُ مَقْصُودُ النِّكَاحِ.

Madzhab Shafi'i explored seven physical or mental disabilities that allow divorce before the court such as broken penis, impotence, insanity, leprosy, flesh or bone that covers the vagina. Five out of seven disabilities belong to men and women, the first two belong to men, and the other two belong to women, and another three belong to both men and women.

Madzhab Shafi'i suggested that divorce is not allowed on the ground of body and armpit odor, istihadah (vaginal bleeding), wounds pus, chronic diseases, wet out circumcision, one vaginal and urethral opening, and feces discharge during intercourse. The reason that such circumstances cannot be the reasons for divorce decided by the judge is that those cases do not fail the purpose of marriage.

Some fuqaha (fiqh scholars) have agreed that divorce basically cannot be proposed to the court due to one's disability, as mahr can become the big issue. The fuqaha' suggested that half of the mahr becomes the wife's right in case of no sexual intercourse during the marriage, but sexual intercourse occurs, then the wife is entitled to the mahr musamma. However, madzhab Maliki, Hambali, and Shafi'i once suggested on a different occasion that even with sexual intercourse, the man has the right to demand back the dowry and is also not entitled to provide alimony, for example, or some of the husband's property, as the husband is considered to have been deceived. Nevertheless, another issue can also be proposed to the court for divorce as explained in the book of the Shafi'iyah as what follows:

الْمَبْحَثُ الْخَامِسُ التَّفْرِيقُ لِلْعَيْبَةِ. فَقَالَ الْحَنْفِيُّ وَالشَّافِعِيُّ، لَيْسَ لِلزَّوْجَةِ الْحَقُّ فِي طَلَبِ التَّفْرِيقِ بِسَبَبِ عَيْبَةِ الزَّوْجِ عَنْهَا، وَإِنْ طَالَتْ عَيْبَتُهُ لِعَدَمِ قِيَامِ الدَّلِيلِ الشَّرْعِيِّ عَلَى حَقِّ التَّفْرِيقِ، وَلِأَنَّ سَبَبَ التَّفْرِيقِ لَمْ يَتَحَقَّقْ، فَإِنْ كَانَ مَوْضِعُهُ مَعْلُومًا بَعَثَ الْحَاكِمُ لِحُكْمِ بَلَدِهِ، فَيُلْزَمُ بِدَفْعِ النَّفَقَةِ.

Fifth, Madzhab Hanafi and Shafi'I suggested that divorce due to the husband's departure. In other words, the wife does not have the right to file a complaint and

request a divorce due to the departure of the husband from his wife, even if it is for a long time, as no Shari'a rules for that. However, in case of no clear information and the court finds the husband's whereabouts, then the court imposes a penalty in the form of adequate payment for his wife.

Hence, Madzhab Shafi'i confirmed that a judge cannot dissolve marriage (divorce) as long as the husband has good reason for his departure to a clear destination. Another issues can also be proposed to the court for divorce as explained in the book of the Shafi'iyah as follows:

الْمُبْحَثُ السَّابِعُ التَّفْرِيقُ بِالْإِيلَاءِ: وَعَرَفَهُ الشَّافِعِيَّةُ: بِأَنَّهُ حَلَفَ زَوْجٌ يَصِيحُ طَلْقَهُ عَلَى الْإِمْتِنَاعِ مِنْ وَطْءِ زَوْجَتِهِ مُطْلَقًا, أَوْ فَوْقَ أَرْبَعَةِ أَشْهُرٍ, سَوَاءً فِي الْمَذْهَبِ الْجَدِيدِ أَمَّا كَانَ حَلْفًا بِاللَّهِ أَمْ بِصِفَةٍ مِنْ صِفَاتِهِ, أَمْ بِالْيَمِينِ بِالطَّلَاقِ مِثْلُ: إِنْ وَطَّئْتُكَ الْجَدِيدِ أَوْ ضَرَّتْكَ طَالِقٌ, لِأَنَّهُ يَمِينٌ يَلْزَمُهُ بِالْحَنْتِ فِيهَا حَقٌّ, فَصَحَّ بِهِ الْإِيلَاءُ, كَالْيَمِينِ بِاللَّهِ عَزَّ وَجَلَّ, أَمْ بِنَدْرٍ مِثْلُ: إِنْ وَطَّئْتُكَ فَلَيْتَهُ عَلَى صَلَاةٍ أَوْ صَوْمٍ أَوْ حَجٍّ. وَذَلِكَ وَفَاقًا لِلْمَالِكِيَّةِ, وَصَرِيحُ الْإِيلَاءِ عِنْدَ الشَّافِعِيَّةِ: الْحَلْفُ عَلَى تَرْكِ الْوَطْءِ أَوْ الْجَمَاعِ أَوْ إِفْتِضَاضِ الْبُكْرِ وَنَحْوِهِ ذَلِكَ.

Seventh, Madhhab Shafi'i suggested that the divorce out of Iilaa' is that it is a valid oath, and she is eventually

divorced when the husband does not at all—or in the period of four months—have sexual intercourse with her. However, a new perspective has suggested that this oath must be carried out by mentioning and attributing in the name of Allah with verbally committing to declare the divorce.

He states, for instance: If I have sexual intercourse with you, then you or your mistress will be divorced, because this is an oath that stipulates that a person must fulfill his rights, so in this case his *iilaa'* is valid, such as using the name of Allah. The same applies to vows, such as saying: If I have intercourse with you, then by Allah I must pray, or fast, or perform the Hajj, which is the view of the Maalikis. In addition, it is included in *iilaa'* according to the Shafi'i Madhhab is an oath to forgo intercourse, or conjugal intercourse, or breaking one's virginity, or other circumstances.

Thus, Madzhab Shafi'i allows the judge to declare a divorce on a person who made an oath to his wife by mentioning the name of and or attributes of Allah with the intention and purpose of the words *lobtarkan* it does

not want to be with her anymore or do not want to have relations anymore, and this kind of thing in the book fathul qarib is included in the divorce kinayah (divorce conducted through implied words). Another issue can also be proposed to the court for divorce, as explained in the Shafi'iyah book as follows:

الْمُبْحَاثُ الثَّامِنُ التَّفْرِيقُ اللَّعَانِ وَسَبَبِهِ: وَعَرَفَهُ الشَّافِعِيُّ، بِأَنَّهُ كَلِمَاتٌ مَعْلُومَةٌ جُعِلَتْ حُجَّةً لِلْمُضْطَّرِّ إِلَى قَذْفٍ مِنْ لَطَخَ فِرَاشَهُ وَالْحَقُّ الْعَارِبُ أَوْ إِلَى نَفْيِ وُلْدٍ. وَسَبَبُ اللَّعَانِ أَمْرَانِ: بِأَنَّهُ أَحَدُهُمَا قَذْفُ الرَّجُلِ زَوْجَتَهُ قَذْفًا يُوجِبُ حَدَّ الزَّوْنِ لَوْ قَذَفَ أَجْنَبِيَّةً، وَالثَّانِ نَفْيُ الْحَمَلِ أَوْ الْوَلَدِ وَلَوْ مِنْ وَطْءِ شُبَّهَةٍ أَوْ نِكَاحٍ فَاسِدٍ.

The eighth, about divorce out of li'an and its causes. Madzhab Shafi'i suggested that li'an is a discourse used by someone as an excuse to accuse someone else to have sexual intercourse with his / her spouse and caused him shame and / or rejected child as the result of the adultery. Li'an is made up from two conditions: 1). A husband accusing his wife of an act for which she is liable to the hadd punishment of adultery, even if the accusation is made against a woman who is not his wife; 2). A man rejects his wife's pregnancy, or rejected the child, even if it is due to unlawful or fake sexual intercourse.

Hence, madzhab Syafi'i suggested that a divorce can be proposed to court in case of husbands' witness of his wife's adultery with another man. Furthermore, the husband can also reject the child as not the result of their sexual intercourse as religion prohibits such unlawful action as it belongs to adultery (zina) muhsan with the punishment of stone-throwing to death. Such Madzhab Syafi'i statement is based on Surah An-Nur verses 6, 7, 8, as saying:

وَالَّذِينَ يَرْمُونَ أَزْوَاجَهُمْ وَلَمْ يَكُنْ لَهُمْ شُهَدَاءُ إِلَّا أَنْفُسُهُمْ فَشَهَادَةُ أَحَدِهِمْ
 أَرْبَعٌ شَهَدَاتٍ بِاللَّهِ لَا إِنَّهُ لَمِنَ الصَّادِقِينَ (6) وَالْخَامِسَةَ أَنَّ لَعْنَتَ اللَّهِ عَلَيْهِ إِنْ كَانَ
 مِنَ الْكَاذِبِينَ (7) وَيَدْرُؤُا عَنْهَا الْعَذَابَ أَنْ تَشْهَدَ أَرْبَعٌ شَهَدَاتٍ بِاللَّهِ لَا إِنَّهُ لَمِنَ
 الصَّادِقِينَ (8).

Meaning: 6. And those who accuse their wives of committing adultery but with no witnesses except themselves, then their testimony should be taken in the name of Allah, to confirm their classification as true, 7. And the fifth oath explores that Allah's curse will befall them in case of their lies, 8. And the wife is prevented from punishment after her four swears in the name of Allah, that her husband is truly a liar.

Another issue was detected and divorce can be proposed before the court as described in the books of Syafi'iyah as saying:

الْمُبْحَاثُ النَّاسُ التَّفْرِيقُ بِسَبَبِ الظَّهَارِ: وَعَرَفَهُ الشَّافِعِيُّ، بِأَنَّهُ تَشْبِيهُ الزَّوْجَةِ غَيْرِ
الْبَائِنِ بِأَنَّيْ لَمْ تَكُنْ حَلَالًا عَلَى التَّأْيِيدِ، فَلَا يَصِحُّ مِنْ صَبِيٍّ وَمَجْنُونٍ وَمَعْمَى عَلَيْهِ
وَلَا مِنْ مَكْرُوهٍ، وَيَصِحُّ مِنْ ذَمِيٍّ لِعُمُومِ آيَةِ الظَّهَارِ، وَلَا يَصِحُّ تَسْبِيهُ الزَّوْجَةِ بِغَيْرِ
مُحْرَمَةٍ عَلَى التَّأْيِيدِ، فَلَوْ شَبَّهَهَا بِأَجْنَبِيَّةٍ وَمُطَلَّقَةٍ، وَأَخْتِ زَوْجَةٍ، وَأَبٍ لِلْمُظَاهَرِ،
وَمَلَاعِنَةٍ لَهُ وَمَجُوسِيَّةٍ وَمُرْتَدَّةٍ فَكَلَامُهُ لَعَوٌّ، لِأَنَّ التَّلَاثَةَ الْأُولَى لَا يَشْتَبِهَنَّ الْأُمَّ فِي
التَّحْرِيمِ الْمُؤَيَّدِ.

The ninth, about divorce out of zihar. Madzhab Syafi'i suggested that zihar is basically an undivorced wife but considered to be an permanent unlawful woman for the husband to have sex with. Thus, zihar is not permitted to be carried out by young children, insane persons, fainted persons, or forced persons. In addition, zihar is legal to conduct dhimmi persons based on specific verses on zihar. Furthermore, zihar also refers to another / strange woman who is considered to be like his divorced wife, or the wife's sister, the father who performs zihar, the wife who performs li'an, the female majuzi, the apostate.

Thus, in case of zihar (sexual intercourse) is conducted, it is useless, as the first three persons mentioned are not the same as the biological mother in that permanent prohibition. This is based on the interpretation of Allah's words in Surah Al-Ahzab verse 4, as quoted as saying:

مَا جَعَلَ اللَّهُ لِرَجُلٍ مِنْ قَلْبَيْنِ فِي جَوْفِهِ جَ وَمَا جَعَلَ أَرْوَاجَكُمْ أَلْيَ تَظْهَرُونَ
مِنْهُنَّ أُمَّهَاتِكُمْ جَ وَمَا جَعَلَ أَدْعِيَاءَكُمْ أَبْنَاءَكُمْ قَلَى دَلِكُمْ قَوْلُكُمْ بِأَفْوَاهِكُمْ قَلَى وَاللَّهِ
يَقُولُ الْحَقَّ وَهُوَ يَهْدَى السَّبِيلَ.

Meaning: Allah does not make two hearts in man's chest, nor does He make the woman whom you have fornicated (wives) as your mothers, nor does He make your adopted children as your own kids, it is only in your words of mouth. Allah speaks the truth and He shows the right way.

Thus, madzhab Shafi'i allows judges to declare divorce as it has been explained in the Qur'an. In addition, zihar is an act carried out by a husband to his wife to consider his wife as permanent woman forbidden to marry such as our biological mothers, siblings, aunts from

the father's or mother's side. In fact, books of fiqh put such a case as part of talak kinayah (insinuation).

Hence, according to main fiqh book of most scholars called the book *Al-Umm* and or the book *Fiqhul Manhaji 'Ala Madzhab As-Syafi'i'*²² suggested that divorce is the husband's absolute right. The husband can declare divorce, by all means, anywhere, anytime, even when both live in a long-distance relationship and the divorce is declared through a letter, SMS (short message system), whatsapp Chat, FB Chat, and other media. Hence, once divorce is declared, the marriage is basically broken (divorce) despite the wife's rejection. In other words, the book confirms that divorce does not have to be conducted before the court for its legality as Madzhab Syafi'i clearly suggested.

However, Syafiiyah has explored the issue of divorce with consideration that the law can change according to place, situation, and conditions. In addition, the book of *Fiqh Sunnah* and the book of *Islamic Fiqh, Wa Adillatuhu*²³ suggested women have deserves to file

²² As-Syafi'i, Muhammad Bin Idris. 2001. *Kitab Al-Umm* Juz 6. Beirut: Dar Al-Fikr.

²³ Al-Zuhaili, Wahbah. 1984. *Al-Fiqh Al-Islami Wa Adillatuhu*. Damaskus: Dar Al-Fikr.

problems that occur in their marriages to propose divorce to the qadhi or the Religious Court with the following case:

- 1). No economical supports,
- 2). Harm towards the wife,
- 3). Disability,
- 4). The husband's departure with no specific reasons.

Nevertheless, in case of husband has declared the divorce, it is valid in relation to the previous exploration. However, in case of the husband does not want to divorce or has not declared the divorce, such a case is under the authority of the Religious Court of whether or not they are divorced.

In a different case though, the Syafiiyah argued that in cases of witnesses or confessions (from both husband and wife) are desperately required, the following phenomenon should also occur:

- 1). Divorce out of *illa'*,
- 2). Divorce out of *li'an*,
- 3). Divorce out of *Zhihar*.

The Shafiyah confirms these three cases as under the absolute right of judges and the Religious Courts to deal with as they are truly experts in such cases.

Conclusion

Hence, divorce before judges is valid according to state law complying with article 115 of the Islamic Law Compilation (KHI) and supported by Law No. 48 of 2009 regarding judicial enforcement. However, it is considered to be against Indonesian ulama' Ijtima' (Scholars' unanimous decision) as well as books of fiqh books under Madzhab Shafi'i or the Shafi'iyah such as kitab al-umm²⁴, fiqhul manhaji 'ala madzhab shafi'i, fiqh sunnah, and Fiqh Islam Wa Adillatuhu²⁵ suggesting that a divorce declared by the husband is valid despite its direct or indirect declaration, or through indirect personal messages, either in person or by letter.

The book's exploration refers to 7 cases that trigger divorces; coming in 4 categories (cases) in which the husband is unwilling or has not declared the divorce, and

²⁴ As-Syafi'i, Muhammad Bin Idris. 2001. *Kitab Al-Umm* Juz 6. Beirut: Dar Al-Fikr.

²⁵ Al-Zuhaili, Wahbah. 1984. *Al-Fiqh Al-Islami Wa Adillatuhu*. Damaskus: Dar Al-Fikr.

the woman (wife) may, thus, apply the divorce before the court, with the following conditions; 1). The husband does not provide economic and mental support for the family, 2). The husband harms the wife, 3). Physical and mental disability, 4). The husband leaves the wife for unclear reasons. The other three cases are within the absolute authority of the court to resolve such as 1). Divorce out of illa', 2). Divorce out of li'an, 3). Divorce out of zhihar.

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Misnanto

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