



Practices Of Understanding Marriage And Divorce And Its Legal Consequences On Guardianship, Parenting Of Children, And Distribution Of Assets

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Abstrak

It is natural that humans from birth into the world always have a tendency to live together with other humans in an association of life between a man and a woman who have met these requirements which is called marriage. Marriage is a bond that gives birth to a family as an element in social and state life which is regulated by legal rules, both written (state law) and unwritten (customary law). As a form of anticipation of the possibility of marriage failure, the prospective husband and wife must of course prepare for marriage as thoroughly as possible in the face of a marriage is to enter into a marriage agreement which can be used as a legal means to maintain and protect the rights and obligations of both husband and wife so that they run well when marriage in progress. Based on the research background above, the identification in this study is as follows: 1). what are the factors that influence the prevalence of Underhanded Marriage and Divorce without considering the Legal Consequences by the Actors? 2). what are the next steps in responding to the rise of Underhand Marriage and Divorce so that they can be minimized? In accordance with the background and identification of the problem, the objectives of this study are: 1). to find and analyze the factors that influence the prevalence of Underhand Marriage and Divorce without considering the Legal

¹ some people, writing is only limited to basic human abilities in terms of education, but it is different for this writer that writing has become a tradition every month, now he is an Educator / Lecturer at the Sultan Maulana Hasanudin State Islamic University (UIN) Banten, email : rufahabdullah58@gmail.com

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Consequences by the Actors. 2). to find and analyze future steps in responding to the rise of Marriage and Divorce under the Hand so that they can be minimized. This research approach is a qualitative approach. The qualitative approach is more based on a phenomenological philosophy that prioritizes appreciation (*verstehen*), the qualitative method seeks to understand and interpret the meaning of an event of human behavior interaction in certain situations according to the researcher's own perspective, in this study the researcher tries to describe the factors that encourage people to believe more towards the science of fiqh rather than positive law or legislation. The result of the research is that the divorce handed down by the husband to his wife is legal, although Allah condemns the actions of someone who divorces, in carrying out the life of a husband and wife there may be misunderstandings between husband and wife, one or both of them do not carry out their obligations, do not trust each other. Divorce that is not in accordance with the procedure will have consequences, namely it is not recognized by law and is not protected by law, a divorce that is carried out outside the court will cause difficulties for the wife, or both (husband and wife), the divorce must be before a court hearing, as in Article 39 of the UUP Paragraph (1) of the UUP : Divorce can only be carried out in front of a Court Session after the relevant Court has tried and failed to reconcile the two parties.

Keywords

Marriage, Divorce, and Legal Consequences

Introduction

It is natural that humans from birth into the world always have a tendency to live together with other humans in an association of life between a man and a woman who have met these requirements which is called marriage.

Marriage is a bond that gives birth to a family as an element in social and state life which is regulated by legal rules, both written (*state law*) and unwritten (*customary law*).

Currently the state law that regulates marriage matters is Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law, on the other hand the customary law that regulates marriage from the past until now has not changed, namely customary law that has existed since the time of the ancestors until now. Now which is the unwritten law.

The purpose of marriage According to Law Number 1 of 1974 marriage is:

"The 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 God Yang Maha Esa".

This has been explained in more detail in Article 3 of the Compilation of Islamic Law which states that marriage aims to realize a *sakinah, mawaddah, warrahmah* household life.

Based on the provisions of the article, it is clear that the purpose of marriage is to foster a happy prosperous household and family where both husband and wife can carry the trust and responsibility together, so it can be understood that by carrying out the marriage one will be spared from the temptations of Satan, both temptations and temptations. Through eye sight or through the genitals or lust, lust, and so on.

However, for one reason or another, a married life does not always run smoothly, many things in the future that can be a factor in the journey of marriage will meet many obstacles and problems, there is always the possibility that a marriage that is expected to last forever, actually ends. By way of divorce at a later date.

As a form of anticipation of the possibility of marriage failure, the prospective husband and wife must of course prepare for marriage as thoroughly as possible in the face of a marriage is to enter into a marriage agreement which can be used as a legal means to maintain and protect the rights and obligations of both husband and wife so that they run well when marriage in progress.

The legal basis of the marriage agreement is not mentioned in the Qur'an or Al-Hadith,³ there is no verse in the Koran or Al-Hadith that instructs prospective husband and wife to make a marriage agreement, but also there is no prohibition related to a marriage agreement.

Therefore, the regulation on marriage agreements emerged in Article 29 of the Marriage Law Number 1 of 1974 concerning Marriage and Articles 45 to 52 of the Compilation of Islamic Law Presidential Instruction Number 1 of 1991 which became the legal basis for marriage agreements according to Islamic Law.

The marriage agreement is⁴ the agreement made by the two prospective brides at the time before the marriage took place, and each party promised to obey what was stated and written in the agreement where the agreement was ratified by the marriage registrar.

If the marriage agreement is not legalized by a marriage registrar, then the agreement cannot be said to be a marriage agreement but an ordinary agreement that applies in general.⁵

The agreement is then attached to the marriage certificate and is an inseparable part of the marriage certificate, and the marriage agreement is made by mutual consent or will, made in writing, ratified by civil registration officers, and may not conflict with law, religion and decency.

Furthermore, the marriage agreement contains the conditions that must be met by the party making the agreement in the sense that the party who promises to fulfill the specified conditions, then when the marriage agreement has been agreed upon by both parties, then each party is obliged to fulfill it, as long as the

³ Martiman Prodjohamidjojo, *Hukum Perkawinan Indonesia*, Jakarta, Indonesia Legal Centre Publishing, 2002, hlm.30

⁴ Abd Rahman Ghazaly, *Fiqh Munakahat*, Bogor, Kencana, 2003, hlm. 119

⁵ Prof. Dr. Amir Syariffudin, *Hukum Perkawinan Islam di Indonesia*, Jakarta, Kharisma Putra Utama, 2009, hlm. 145

agreement does not exist. Other parties who coerce.⁶

Because the marriage agreement is classified as an engagement that can lead to legal events that bind the parties involved in the agreement, either husband, wife, or third parties, even though marriage agreements in Indonesia are still considered taboo, sensitive, and unethical because some people in the province consider Banten still adheres to the teachings of Islam and Eastern culture.

In essence, the marriage contract is a firm and strong relationship in life and human life, not only between husband and wife and their offspring, but between families. From the harmonious relationship of husband and wife, love, then goodness is transferred to all families of both parties so that it becomes beautiful in all the affairs of each other in carrying out good and preventing all kinds of evil.

In addition, according to Koszman, marriage in general increases health because both husband and wife with that marriage, from a physical and social point of view, are in better condition, and these two things work together to increase the health level of husband and wife.

Physical health is a solid foundation for spiritual development, and a marriage that enhances the standard of health contributes to the growth of the soul and does not hinder the soul in its movement towards progress and nobility.⁷

One of Islam's concerns for family life is the creation of fair and wise regulations, namely regulations that can reduce disputes between husband and wife. There is no one in this world a woman or a man who wants disputes in the household, so that it ends in divorce. However, because squabble after dispute cannot be reconciled anymore, then the whole household will be forced to run aground at the crossroads.

Although divorce is hated, but if there will never be harmony between the two parties, Islam provides several alternatives, including:

1. *First:* Give advice, and teach him a lesson.
2. *Second:* If the first one does not work, then the second step is that the husband may separate himself from his wife, namely not sleeping with his wife.
3. *Third:* If the second one also doesn't work, then the husband may reprimand his wife in a rather harsh way, or if necessary by flicking a little with a non-harmful flick.

In these circumstances, as the author has described in the analysis above, if a husband and wife are still unable to solve problems in their household, even though several alternatives have been attempted, then the efficacious medicine is divorce.

Interestingly, in the midst of the Covid 19 epidemic season, which occurred from 2020 to 2022, currently there are online marriages, and online divorce,

⁶ H A Damanhuri, *Segi Hukum Perjanjian Perkawinan Harta Bersama*, Bandung, Mandar Maju, 2007, hlm.11 5

⁷Yusuf Wibisono, *Monogami Atau Poligami Masalah sepanjang Masa*, Bulan Bintang,1980, Halm : 28

although this phenomenon is very rare in recent years.

Some experts allow and some do not, but in general based on the law that the phenomenon of online marriage and online divorce, in terms of the prospective groom (CPP) and the prospective bride (CPW) are separate (not in one forum) and via virtual is considered invalid in accordance with applicable laws and regulations.

The reason is that a marriage is considered valid if the implementation of the contract is in a face-to-face forum in order to avoid things that can hinder the validity of the marriage, such as the certainty of the existence of the parties involved, as well as in the case of signing the file it will be difficult to carry out because the parties are not actually present in one forum.

On the other hand, what is considered more important is that the officer will declare the marriage valid immediately after the consent is granted and signed immediately, not to mention if there is signal interference and there may be loopholes for error or data manipulation by the parties.

This is what is very worrying if the phenomenon of online marriage and online divorce is still considered legal by some parties. Based on the reality that occurs in society, researchers can capture the problems that occur, namely the number of people who are not aware of the law, such as marriage under the hands, divorce under the hands, children do not have birth certificates.

Based on the background of the research above as well as the absence of other research that raises about marriage between the Baduy and Non-Baduy people, the authors are hereby interested in compiling a research entitled : "Practices Of Understanding Marriage And Divorce And Its Legal Consequences On Guardianship, Parenting Of Children, And Distribution Of **Assets**" To the best of the author's knowledge, no one has researched this research, so this research is the original result of the author's research.

Research Identification

Based on the research background above, the identification in this study is as follows:

1. What are the factors that influence the rise of Underhand Marriage and Divorce without considering the Legal Consequences by the Actors?
2. What are the next steps in responding to the rise of Underhand Marriage and Divorce so that they can be minimized?

Research Purposes

In accordance with the background and identification of the problem, the objectives of this research are:

1. To find and analyze the factors that influence the rise of Underhand Marriage and Divorce without considering the Legal Consequences by the Actors.
2. To find and analyze future steps in responding to the rise of Marriage and

Divorce under the Hands so that they can be minimized.

Research Method

This research approach is a qualitative approach. The qualitative approach is more based on a phenomenological philosophy that prioritizes appreciation (verstehen).⁸ Qualitative methods seek to understand and interpret the meaning of an event of human behavior interaction in certain situations according to the researcher's own perspective.⁹

In this study, the type of research conducted is descriptive, aiming to create a systematic, factual, and accurate description of the facts and characteristics of the population.¹⁰ Where the research will produce and process descriptive data, such as interview transcripts, field notes, and so on. Descriptive research is research that aims to make a description or joke about situations or events.¹¹

In this sense, descriptive research is the accumulation of basic data that simply does not need to find or explain relationships, try hypotheses, make predictions, or find these things.¹² In this study, the researcher tries to describe the factors that encourage people to believe in fiqh more than positive law or legislation.

Theory

A. Definition of divorce/divorce

In language, talak means the termination of the bond, while according to the term, talak means the severance of the marriage rope. According to Al-Jaziri in the comparison of schools of thought, divorce is:

"Divorce is breaking the ties of marriage or reducing the release of the bonds by using certain words".

According to Abu Zakaria Al-Ansari in his book Fathul Wahab, he defines divorce as:

"Untie the ropes of the marriage contract with the word divorce and the like".¹³

Al-Mahalli stated that from several definitions contained in the book of fiqh, there are three ¹⁴ The key words that show the essence of divorce are :

1. The word let go, or open or leave, means that divorce is releasing something that has been related all this time, namely the marriage bond.
2. The word marital bond which means that divorce ends the marital

⁸Husain Usman, Purnomo Setiady Akbar, *Metodologi Penelitian Sosial*, PT. Bumi Aksara, Jakarta, 2000, halm: 81

⁹*Ibid*

¹⁰Sumardi Suryabrata, *Metodologi Penelitian*, PT. Grafindo Persada, Jakarta, 1998, halm: 18-19

¹¹*Ibid*

¹²*Ibid*

¹³Ghazali, Abdul Rahman, *Fiqh Munakahat*, Cet. I, Kencana, Bogor 2003, halm: 212

¹⁴Amir Syarifudin, *Hukum Perkawinan Islam di Indonesia antara fiqh Munakahat dan Undang-undang Perkawinan*, Cet.I, Kencana, Jakarta,2006, halm: 198

relationship that has occurred so far, if the marriage bond allows the relationship between husband and wife, then after the bond has been opened, the status of husband and wife returns to its original state, which is haram.

3. The word with lafadz tha-laqa and the same meaning as it implies that the breakup of a marriage through a speech and the words used are the words divorce, it is not called the termination of the marriage, if it is not by the way the speech is pronounced, such as breaking up due to death.

The word thalaq in Arabic comes from the word thalaqa-Yathliqu-thalaqan, which means releasing or unraveling the ropes, whether the ropes are concrete, such as horse straps, or abstract, such as marriage ties.

In the Encyclopedia of Islamic Law¹⁵ It is explained that the word divorce (Ar, at-talaq, release and leave a bond), divorce in Islamic law between husband and wife is at the will of the husband. Divorce in Islam is the last solution that will be taken by husband and wife in ending household turmoil.

Abdurrahman al-Jaziri¹⁶ bahasa adalah "*lepasnya suatu ikatan* menjelaskan bahwa pengertian talak menurut", while according to the term it is "loss of marriage" in the sense of loss of the marriage contract so that it is no longer lawful to have a relationship like husband and wife. Whereas Al-san'ani madalah¹⁷ gives the meaning of divorce according to the language of "*releasing a solid bond*", while according to the term syara' divorce is the release of the marriage contract.

The Compilation of Islamic Law confirms that divorce is a husband's pledge before a religious court hearing to be one of the reasons for the termination of a marriage in the manner as referred to in Articles: 129, 130 and 131 of the KHI. In Islam, in principle, divorce is prohibited, it can be seen in the sign of Rasulullah SAW¹⁸ that divorce or divorce is a lawful act but is hated by Allah swt.

The lawful act which Allah hates the most is divorce (*divorce*), the Hadith narrated by Abu Dawud, Ibn Majah, and Al-Hakim, from Ibn Umar. The above hadith is a last alternative after several attempts were made to prevent divorce from happening. Islam provides an alternative that occurs in household life that is experiencing shock, namely:

The occurrence of Nusuz from the wife

An alternative to dealing with a nusyuz wife is to say in Q.S. An-Nisa (4) verse 34 as follows:

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ ۚ فَالصَّالِحَاتُ قَانِتَاتٌ لِّلْغَيْبِ بِمَا حَفِظَ اللَّهُ
وَالَّتِي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ وَاهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَاصْرَبُوهُنَّ ۚ فَإِنِ اطَّعْتُمْ فَلَا تَبْغُوا عَلَيْهِنَّ سَبِيلًا ۗ إِنَّ اللَّهَ كَانَ عَلِيمًا كَبِيرًا ۗ

"The men are the leaders for the women, because Allah has made some of them (men) superior to others (women), and because they (men) have spent part

¹⁵Ensiklopedi Hukum Islam, /Editor, Abdul Aziz Dahlan, et al, Cet,I, Ichtiar Baru, Van Hoeve, Jakarta 1996, halm: 1776

¹⁶Abdurrahman al-Jaziri, *al-Fiqh 'Ala Madzahib al-Arba'ah*, jilid IV, Beirut, Dar al-Fikr 2003, halm:216

¹⁷*Ibid*

¹⁸Jalal Al-Din al-Suyuthi, *al-Jami'al-Saghir*, juz. 1, Al-Ma'arif, halm:5

of their wealth. Therefore, a pious woman is one who obeys Allah and takes care of herself when her husband is not around, because Allah has taken care of (them). Women whom you are worried about, so advise them and separate them in their beds, and beat them. Then if they obey you, then do not look for ways to trouble them. Verily Allah is Most High, Most Great". (Q.S, An-Nisa (4): 34)

The instructions, if we detail them, are :

The wife is given advice about the various negative and positive possibilities, from that action, especially if it comes to divorce, and most importantly to return to being on good terms with her husband. If the first attempt in the form of giving advice does not work, then the second step is to separate the wife's bed from the husband's bed, even though it is still in the same house. This method is intended so that in the solitude of sleep, he thinks about the advantages and disadvantages with all the consequences of his actions.

If the second step does not change the wife's stance for nusyuz, then the third step is to teach her a lesson, or in the language of the Qur'an hitting her, or more accurately educating her.¹⁹ The occurrence of nusyuz from the husband. In Q.S. An-Nisa (4) verse 128 states:

وَإِنِ امْرَأَةٌ خَافَتْ مِنْ بَعْضِهَا نُشُورًا أَوْ إِعْرَاضًا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يُصْلِحَا بَيْنَهُمَا صُلْحًا وَالصُّلْحُ خَيْرٌ وَأُخْبِرَتِ
الْأَنْفُسُ الشُّحَّ وَإِنْ تُحْسِنُوا وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا

"And if a woman is worried about nusyuz or the indifference of her husband, then there is nothing wrong with both of them making real peace, and peace is better (for them) even though humans are by nature stingy. And if you get along with your wife well and take care of yourself (from nusyuz and indifference), then surely Allah is Knowing of what you do". (Q.S.An-Nisa (4): 128)

In the Qur'an there is an explanation that the path taken if the husband of nusyuz, such as indifferent, does not want to have intercourse and does not want to fulfill his obligations, then peace efforts can be made by the wife giving up her rights temporarily, so that her husband is willing to return to his wife well.

According to Suyuti, this verse is used as the basis for formulating the procedures and conditions for taklik talak as a form of marriage agreement, meaning to anticipate and at the same time as a way to resolve if the husband commits nusyuz.²⁰ Whereas according to the general formulation of fiqh the law is permissibility or ibahah, ironically in Indonesia taklik talak is always contained in the marriage registration letter, so it seems as if it has been treated as something that is mandatory, something that is always there.

In the author's opinion, it is better to follow the advice of the Qur'an to make al-Shulhu or the peace agreement. The form is also formulated in the form of taklik talak, but the form and method should be improved more clearly so that it really is more of an agreement between two parties, trying to be clearer than the current situation which seems to be a problem for the husband only, while the

¹⁹Ahmad Rofik, *hukum Perdata Islam di Indonesia*, Cetakan pertama, Rajagrafindo Prsada, jakarta, 2013, halm: 215

²⁰Sajuti Thalib, *hukum kekeluargaan indonesia*, Cet, 4, UI Pres, Jakarta 1986, halm: 94

wife is considered to have agreed with the agreement. Alone,²¹ therefore, the existence of taklik talak, or other marriage agreements is an alternative in order to solve the problem, if you do nusyuz.

The occurrence of disputes / disputes between husband and wife

In the Qur'an it is called the term Shiqaq, in this case, the Qur'an gives instructions in Q.S. An-Nisa (4) verse 35 reads:

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا ۚ إِنَّ يُرِيدَا إِصْلَاحًا يُوَفِّقُ اللَّهُ بَيْنَهُمَا ۗ إِنَّ اللَّهَ كَانَ
وَإِنْ عَزَمُوا الطَّلَاقَ فَإِنَّ اللَّهَ سَمِيعٌ عَلِيمٌ . عَلِيمًا خَبِيرًا

"And if you fear that there will be a dispute between the two, then send a hakam from a male family and a hakam from a female family. If the two judges intend to make repairs, Allah will surely give taufik to the husband and wife, indeed Allah is All-Knowing, All-Knowing." (Q.S. An-Nisa (4): 35)

The appointment of hakam from both parties is expected to be able to make peace and repair to resolve the dispute between the two parties, husband and wife, if for some reason, the appointed hakam is unable to carry out its duties, try again by appointing another judge. In this case, in Indonesia, there is a Marriage Advisory Board and Divorce Settlement (BP4) whose duties and functions are to carry out the duties of an arbitrator (arbitrator) to reconcile disputing husband and wife, or in certain cases to advise prospective husbands and wives who are planning a marriage.

The occurrence of one of the parties committing adultery (Fakhisah)

Leading to mutual accusations between the two of them, as for the alternative solution is to prove the accusations charged, by means of li'an as mentioned earlier, Li'an has actually entered the gate of breaking up the marriage, and even forever, because the result of li'an is the occurrence of talak ba'in kubra.

Based on the description above for the three possibilities number one, two, and three alternative solutions aimed at stemming the marriage from breaking up, except if the efforts made fail, while the fourth possibility is li'an because one of them commits fahisyah, moreover it is proven to have committed adultery, Then the solution will obviously break the marriage ties.²²

The Law of Divorce

Harmonious domestic relations are the ideals of all married couples, and are the Sunnah of the Prophet, but what can I say, a household that is always filled with quarrels every day and cannot be maintained, then Islam opens the door for divorce, even though divorce is hated by Allah swt. The original law of divorce is permissible, but because of certain circumstances and in certain situations, the law of divorce is divided into several types, namely mandatory, divorce becomes

²¹*Ibid*, halm: 4-5

²²Ahmad Rofiq, *Hukum Perdata Islam di Indonesia, Op-cit*, halm: 217

mandatory if the divorce is handed down by the hakam (intermediary) i.e. if there is a dispute between husband and wife, while two The judge who takes care of the two cases has deemed it necessary for both of them to get a divorce.

In addition, divorce is also mandatory for the husband at the request of the wife in the event that the husband is unable to fulfill his wife's rights and fulfills his obligations as a husband, such as a husband who is unable to visit his wife. In this case, the wife has the right to demand divorce from her husband, and the husband is obliged to comply with the wife's demands, do not let the wife hang around, like a prang who is hanged, which is not released but his rights are not guaranteed.²³ According to Hanabilah scholars²⁴ Divorce can become obligatory in two ways :

1. There is a dispute between husband and wife (syiqaq), which can no longer be reconciled, while two judges who take care of their case take divorce.

2. When a husband takes an oath ('ila), not to have intercourse with his wife for ever, or for four consecutive months, then the law of divorce becomes obligatory for him, because, how is it possible for marital happiness to be realized if after the marriage contract, the husband swears not to give his wife a living.

Allah says in Q.S. Al-Baqarah (2) verses 226-227²⁵ which reads:

لِّلَّذِينَ يُؤَلُّونَ مِن نِّسَابِهِمْ تَرَبُّصُ أَرْبَعَةِ أَشْهُرٍ فَإِن فَاءُوا فَإِنَّ اللَّهَ غَفُورٌ رَّحِيمٌ

"To those who ilaa' their wives are given a respite of four months (forever). Then if they return (to their wives), then surely Allah is Forgiving, Most Merciful. And if they insist (set on) talak, then surely Allah is All-Hearing, All-Knowing".

(Q.S. al-Bakarah (2): 226-227)

Likewise the opinion of the Hambali group²⁶ said that divorce is sometimes obligatory, sometimes haram, sometimes permissible, and sometimes Sunnah. Divorce is Sunnah because the wife ignores her obligations to Allah, such as: praying and so on, even though the husband is not able to force her to carry out her obligations, or the wife lacks shame.

Furthermore, Imam Ahmad said that a husband should not hold his wife like this, because it can reduce the husband's faith, does not make his bed safe from his corrupt actions, and can throw him a child who is not his own flesh and blood. In this case the husband is not wrong to act harshly on his wife, so that she will redeem herself by returning her dowry for divorce. Allah says in Q.S. An-Nisa (4) Paragraph 19 as follows:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا يَحِلُّ لَكُمْ أَنْ تَرْتُوا النِّسَاءَ كَرْهًا ۗ وَلَا تَعْضَلُوهُنَّ لِتَذْهَبُوا بِبَعْضِ مَا آتَيْنَهُنَّ إِلَّا أَنْ يَأْتِيَنَّ بِغَاسِقَةٍ مِّنْهُنَّ ۚ وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ ۚ فَإِنْ كَرِهْتُمُوهُنَّ فَعَسَى أَنْ تَكْرَهُوا شَيْئًا وَيَجْعَلَ اللَّهُ فِيهِ خَيْرًا كَثِيرًا

"O you who believe, it is not lawful for you to inherit women by force and do not trouble them because you want to take back some of what you have given them, unless they do a real heinous job. And get along with them properly. Then

²³Ghazali, Abdurrahman, *Op-Cit*, halm:214

²⁴*Ibid*

²⁵Meng-ila' istri maksudnya bersumpah tidak akan mencampuri istri. Dengan sumpah ini seorang istri menderita, karena tidak dicampuridan tidak pula diceraiakan. Dengan turunnya ayat ini, maka suami setelah empat bulan harus memilih antara kembali mencampuri istrinya lagi dengan membayar kafarat sumpah, atau menceraikan.

²⁶Sayyid Sabiq, *Op-Cit*, halm: 12

if you don't like them, (then be patient) because maybe you don't like something, even though Allah has made it a lot of goodness". (Q.S. An-Nisa (4):19)

Types Of Divorce

Here are some types of divorce ²⁷ what all Muslims need to know is as follows:

1. **Talak Sunnah**, According to Ibn Qudamah, divorce is due to the division between husband and wife that is already heavy, and when the wife leaves the house asking for khulu' because she wants to be free from danger.
2. **Talak Haram**, namely divorce without reason, forbidden because it is detrimental to both (husband and wife), and there is no benefit that will be achieved by the act of divorce. So divorce is haram, just like it is forbidden to destroy property.
3. **Mubah**, allowed when there is a need. For example, because of the wife's bad morals and lack of association which only brings mudharab and keeps them away from the purpose of marriage. It is permissible to do it if there is a need for a divorce and no parties are harmed by the divorce, while the benefits are also there.²⁸

After all the efforts and approaches have failed, then it is permissible for the husband to take the last method prescribed by Islam, as a response to reality, an answer to an emergency situation, and a solution to problems that can only be resolved by divorce.

Hasan Ayyub said in his book on family fiqh, that the makruh divorce is the divorce which is done without any demands and needs. Some scholars say that this makruh divorce is divided into two parts, among others:

1. *First*: that the divorce is forbidden, because it can cause harm to himself, as well as to his wife, and does not bring any benefit. Divorce is the same as the act of destroying or wasting wealth for nothing. This is based on the hadith of Rasulullah SAW :

"You can't give harm to others and you can't repay harm with harm again."

2. *Second*: stating that such divorce is permissible.

This is based on the words of the Prophet Muhammad as follows:

"The thing that Allah hates the most is divorce".

Divorce is hated, because it is done without any demands and reasons that allow it. And because such divorce can annul a marriage that results in goodness which is indeed Sunnah, so that divorce becomes makruh law.²⁹

Divorce can be viewed from the point of view of the time when the divorce was handed down, it is divided into three types, namely:

²⁷Sayyid Sabiq, *Op-Cit*

²⁸Ayyub, Syeh Hasan, terjemah, Abdul Ghoffar, *Fiqh Keluarga*, Cet. I, Pustaka Al-kautsar, jakarta, 2004, halm: 209

²⁹Ayyub, *Op-Cit*

Sunni Divorce

Divorce is based on the Sunnah of the Prophet, namely if a husband divorced his wife who had divorced with one divorce at a sacred time, before having intercourse. Allah says in Q.S. Al-Baqarah (2) verse 229:

الطَّلَاقُ مَرَّتَيْنِ ۖ فَاِمْسَاكٌ بِمَعْرُوفٍ اَوْ تَسْرِيْحٌ بِاِحْسَانٍ ۗ وَلَا يَجِلُّ لَكُمْ اَنْ تَاْخُذُوْا مِمَّا اَنْتُمْ مُّوْحٰنٌ بِهَا ۗ اِلَّا اَنْ يَّخَافَا
اَلَّا يُعِيْمَا حُدُوْدَ اللّٰهِ ۗ فَاِنْ خِفْتُمْ اَلَّا يُعِيْمَا حُدُوْدَ اللّٰهِ ۗ فَلَا جُنَاحَ عَلَيْهِمَا فِیْمَا اَفْتَدْتُمْ بِهٖ ۗ تِلْكَ حُدُوْدُ اللّٰهِ فَلَا تَعْتَدُوْهَا ۗ وَمَنْ يَتَعَدَّ
حُدُوْدَ اللّٰهِ فَاُولٰٓئِكَ هُمُ الظّٰلِمُوْنَ

"Divorce (which can be referenced) twice. After that, you can refer again in a good way or divorce in a good way. It is not lawful for you to take back anything from what you have given them, unless they fear that they will not be able to keep Allah's laws. If you are worried that both (husband and wife) cannot keep Allah's laws, then there is no sin on either of them regarding the payment given by the wife to redeem herself. These are the laws of Allah, so do not transgress them. Whoever transgresses the laws of their Allah those are the wrongdoers". (Q.S. Al-baqarah (2) ayat 229)

In the case at the time of the Messenger of Allah, Abdullah bin Umar divorced his wife during menstruation, Then Umar bin Khattab asked the Prophet about this, he replied:

"Order him (your child) to refer back. After that, let him divorce his wife while she is pure or pregnant" **HR. Bukhari, Muslim dan turmuzi.**

The scholars from among the companion's use this hadith, and the scholars are of the opinion that if the husband is mentally ill, his wife is in a state of purity. So that includes Sunni divorce, as well as the opinion of Imam Shafi'i and Ahmad bin Hanbal. As for Sufyan Ats-Tsauri and Ishak, they are of the opinion that triple divorce is not a Sunni divorce, unless the triple divorce is carried out one by one until it reaches three times.

Some scholars argue that it is called Sunni divorce if the husband divorces his wife once every month with one divorce. Imam Nawawi stated: Some of the experts on Dzahir are of the opinion that if a husband is mentally pregnant, his wife is menstruating, then the divorce is invalid. Because it is not permitted for him at the time of his mental, so it resembles the divorce that is done to a woman who is not his wife.³⁰

Bid'ah Divorce

Bid'ah divorce is divorce that violates religious provisions, such as mental divorce three times in one word, or divorce three times separately in one place, for example a husband says: you are rejected, you are rejected.

Or a husband mentally abuses his wife where his wife is menstruating or parturition, or holy has gathered with her husband. The scholars agree that the divorce of bid'ah is unlawful, and the perpetrator is sinful.³¹ The characteristics of

³⁰Syaikh kamil Muhammad Ubaidah, *Op-Cit*, halm: 438

³¹Sayyid sabiq, *Op-Cit*, halm: 45

bid'ah divorce are:

- a. If a husband divorces his wife while she is menstruating or giving birth.
- b. When he is in a holy state, while he has intercourse with her during that holy period.

A husband divorces three of his wives in one sentence with three sentences at a time, such as by saying, he has divorced me, then I divorced and then I divorced. The Messenger of Allah narrated that there was a man who broke his three wives in one sentence, then he said to him; "Do you want to play with Allah's book, while I am still in your midst? Hadith narrated by An-Nasa'i and Ibn Kathir say, that this isnad hadith is jayyid.³²

The opinion of Hanafi, the majority of jurists from the Maliki, Shafi'i, servant and Zaidiyah schools is that the divorce of bid'ah falls (legitimate) even though the person who does it is sinful because it violates the Shari'ah, but the result is the same (legitimate) between the Sunni and the bid'ah mentalists. Ah, it's like a person who prays with stolen cloth, his prayer is valid, but his act is a sin, because he steals.³³

Procedures For Divorce According To Islam

Islam is a religion that does not like divorce, because marriage is a final decision to reach a sakinah, mawaddah and rahmah household, but Islam does not close tightly to divorce, because domestic conflicts cannot be resolved, divorce is an alternative, because Therefore, Islam provides several procedures for divorce, including :

1. Husband gives advice, educates and gives lessons.
2. If the second step doesn't work, then the husband may separate himself in his sleep or separate the bed.
3. If the second step can't change the wife's behavior, then the third step is to give a hard and firm warning.

Allah says in Q.S. An-Nisa (4) verse 34 as follows:

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ ۗ فَالصَّالِحَاتُ قَانِتَاتٌ حَافِظَاتٌ لِّلْغَيْبِ بِمَا حَفِظَ اللَّهُ ۗ وَالَّتِي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ وَاهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَاصْرَبُوهُنَّ ۗ فَإِنِ اطَّعْتُمْ فَلَا تَبْغُوا عَلَيْهِنَّ سَبِيلاً ۗ إِنَّ اللَّهَ كَانَ عَلِيماً كَبِيرًا

"The men are the leaders for the women, because Allah has made some of them (men) superior to others (women), and because they (men) have spent part of their wealth. Therefore, a pious woman is one who obeys Allah and takes care of herself when her husband is not around, because Allah has taken care of (them). Women whom you are worried about, so advise them and separate them in their beds, and beat them. Then if they obey you, then do not look for ways to trouble them. Verily Allah is Most High, Most Great". (Q.S, An-Nisa (4): 34)

The verse shows that the husband can give advice to his wife, if the wife does things that are not indecent, her husband does not want. The husband is the

³²Syaikh Kamil, *Op-Cit*, halm: 439

³³Peunoh Daly, *OP-Cit*, halm:277

leader in the household, so he is expected to be authoritative in front of his wife's eyes. While a good wife always listens to her husband's advice. If what Nusuz is worried about is from her husband, then what should take precedence is deliberation between husband and wife as Allah says in Q.S.An-Nisa (4) verse 128: *وَإِن امْرَأَةٌ خَافَتْ مِنْ بَعْلِهَا نُشُورًا أَوْ إِعْرَاضًا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يُصْلِحَا بَيْنَهُمَا صُلْحًا وَالصُّلْحُ خَيْرٌ وَأُحْضِرَتِ الْأَنْفُسُ الشُّحَّ: وَإِنْ تُحْسِنُوا وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا*

"And if a woman is worried about nusyuz or the indifference of her husband, then there is nothing wrong with both of them making real peace, and peace is better (for them) even though humans are by nature stingy. And if you get along with your wife well and take care of yourself (from nusyuz and indifference), then surely Allah is Knowing of what you do". (Q.S.An-Nisa (4) Ayat 128)

If the husband and wife are always not in harmony, divorce is not the solution, but what resolves is the two parents, from each husband and wife like God in his word :

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِنْ أَهْلِهِ وَحَكَمًا مِنْ أَهْلِهَا ۚ إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا ۗ إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا

"And if you fear that there will be a dispute between the two, then send a hakam from a male family and a hakam from a female family. If the two judges intend to make repairs, Allah will surely give taufik to the husband and wife, indeed Allah is All-Knowing, All-Knowing." (Q.S. An-Nisa (4) ayat 35)

The verse above, An-Nisa 35 continues from the previous verse 34 of An-Nisa, in verse 34 Allah explains the ways in which husbands deal with or teach their wives who do not carry out their obligations as wives, if the verse 34 has been carried out, the dispute continues. culminates, the husband should not be in a hurry to drop the divorce, but raise two hakam as described in verse 35 above, who act as conciliators between two husbands and wives who are in dispute.³⁴ Fiqh experts have different opinions in responding to the meaning of hakam, among others, namely :

1. Imam Abu Hanifah, some followers of Imam Hambali, and qaul qadim of Imam Shafi'i, explained that Hakam means representative. As with the representative, the hakam may not impose divorce on the wife before obtaining the consent of the husband. Likewise hakam from the wife's side, it is not allowed to hold khuluk before getting approval from the wife.

2. The opinion of Imam Malik, some followers of Imam Hambali, and from the qaul Jadid of Imam Shafi'i said: Hakam as a judge, then Hakam may make a decision according to the opinion of both of them regarding the husband and wife relationship that is in dispute, whether he will give a divorce decision. Or he will order the two of them to reconcile again.

3. According to the first opinion who raised the judge, it was the husband's side and the wife's side, because paragraph 35 above is addressed to them.

While the second opinion is strengthened by the actions of Ali bin Abi Talib's friend, narrated by Ibn Jarir at-Tabari from Ubaidah, he said, a woman had come to Ali bin Abi Talib with her husband and each party was accompanied by a group

³⁴Kamal Mukhtar, *Ibid*

of people who presented their rights. Then Ali said to the two judges, do you know what you must do?

Your obligation is: If you both think to bring them together, then collect them, if you think that you should divorce them, then divorce them. The woman said, "I am willing to Allah whether to be won or lost. The husband replied: As for divorce, I am not ready, Ali said: "You are lying, by Allah you should not leave this place, until you are content with the book of Allah Almighty, whether it is profitable for you or not.³⁵

Islam really doesn't like divorce, that's why even though both husband and wife are divorced, they are not divorced, why? Because there is still an iddah, or period of thinking, whether the divorce will be continued, or will it be reconciled, for that the occurrence of divorce in Islam is not easy.

Discussion

Underhand Divorce Law According to Fiqh

Divorce handed down by a husband to his wife is legal, even though Allah condemns the actions of someone who divorces. In carrying out the life of husband and wife, there may be misunderstandings between husband and wife, one or both of them do not carry out their obligations, do not trust each other, and so on.

In this situation, sometimes it can be resolved and overcome, so that the husband and wife relationship can get back together as he aspires. However, sometimes the couple even causes hatred, cruelty, and constant quarrels between husband and wife. Continuing the marriage in such circumstances will damage the family relationship, not only between the husband and wife, but will also damage the relationship, not to forget it will also affect the personality of the child and offspring in the future.

In order to keep family relations from becoming too fractured and severe, Islam opens the door for divorce, for married couples who have failed in fostering the ark of their household. It should be understood that with this divorce, it does not mean that Islam likes divorce, but divorce as a solution to freedom from confinement and the grip of tug of war between husband and wife.

According to Mukhtar Yahya³⁶ In his lecture on "The position of women in Islam" which was quoted by Kamal Mukhtar in his book "Principles of Islamic Law on Marriage" he said that divorce was prescribed not as understood by most Muslims. Talaq is prescribed as a medicine, and as a way out for a difficulty that cannot be solved anymore, or as a remedy for a serious disease for which there is no other cure.

So divorce is one solution, to give freedom that has been shackled between husband and wife, therefore the divorce handed down by the husband to his wife is valid, after several things have been considered. as long as the husband is in a

³⁵*Ibid*,

³⁶Kamal Mukhtar dalam bukunya "Asas-asas Hukum Islam tentang Perkawinan", dalam halaman: 158

conscious state, in the sense that he is not in a state, such as drunk, angry, forced.

From the start of the husband dropping the divorce in front of his wife, the ex-wife has started to calculate the iddah number. However, the husband still has the right to refer to the wife he has divorced, as long as the wife is still in a state of iddah. The word of God in Q.S. Al-Baqarah (2) verse 231 reads :

وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ سَرَخُوهُنَّ بِمَعْرُوفٍ وَلَا تُمْسِكُوهُنَّ ضِرَارًا لِّتَعْتَدُوا ۚ وَمَنْ يَفْعَلْ
ذَلِكَ فَقَدْ ظَلَمَ نَفْسَهُ ۚ وَلَا تَتَّخِذُوا آيَاتِ اللَّهِ هُزُوعًا وَادْكُرُوا نِعْمَتَ اللَّهِ عَلَيْكُمْ وَمَا أَنْزَلَ عَلَيْكُمْ مِنَ الْكِتَابِ وَالْحِكْمَةِ لِيُعْظَمَ بِهِ
ۚ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ بِكُلِّ شَيْءٍ عَلِيمٌ ۝

“If you divorce your wives, and they are nearing the end of their iddah, then either refer to them in an acceptable way, or divorce them in an acceptable way (too). do not refer to them to cause harm, for by doing so you persecute them. whoever does this, then indeed he has wronged himself. do not make the laws of Allah a game, and remember Allah's favor on you and what Allah has revealed to you, namely the Book and the Wisdom (As Sunnah). Allah teaches you by what He has sent down. and fear Allah and know that Allah is Knower of all things”. (Q.S. Al-Baqarah (2): 231)

Divorce Law According to Legislation

In Law Number 1 of 1974 concerning Marriage, it does not only regulate marriage, but also regulates divorce, and in 1991 Presidential Instruction Number 1991 concerning the Compilation of Islamic Law was issued. One thing that must be recognized is that the field of marriage in Islamic law has a complex problem that is not simple, therefore the handling and settlement of marital disputes, especially divorce, should not involve government/state policies.³⁷

This is because the household is part of the smallest unit of a country. If the state is orderly, harmonious, moral, programmed, neat, it will show the cohesiveness of the state with the community itself. In Government Regulation of the Republic of Indonesia Number 9 Year 1975 Article 14, states: a husband who has married according to Islam, will divorce his wife submits a letter to the Court at his place of residence, which contains a notification that he intends to divorce his wife accompanied by the reasons and asks for a divorce. to the Court to hold a hearing for that purpose.

Then it is also regulated in Article 115 of the KHI that: Divorce can only be carried out in front of a Religious Court trial after the Religious Court has tried and failed to reconcile the two parties. And the procedure for divorce is regulated separately in several articles of legislation, the existence of such legislation means that divorce must be handed down before a court session, otherwise the divorce is legally invalid.

Researchers have looked at several articles that have explained about the divorce procedure, then a person is not valid to carry out his divorce because it is not in accordance with the procedures that have been proclaimed by the

³⁷H.M. Anshary, *Op-Cit*, halm: 74

government, because the existence of KHI is the result of the hard work of the ulama and umaro who are persistent in solving household cases, especially in terms of divorce, it would be nice if all the children of this nation submit to the laws that have been set by the government as is the case with this divorce.

Divorce that is not in accordance with the procedure will have consequences, namely it is not recognized by law and is not protected by law, a divorce that is carried out outside the court will cause difficulties for the wife, or both (husband and wife), as is the case with :

1. Iddah livelihood.
2. Madiah's livelihood.
3. Mut'ah income.
4. Share Assets.

Therefore, divorce cannot be carried out haphazardly, on the contrary, arrangements must be made in such a way as to realize benefit and order in society. Divorce must be before a court session, as in Article 39 UUUP Paragraph (1) UUUP: Divorce can only be carried out in front of a court session after the court concerned has tried and failed to reconcile the two parties.

Likewise, it is stated in Article 115 of the Compilation of Islamic Law: Divorce can only be carried out in front of a Religious Court trial after the Religious Court has tried and failed to reconcile the two parties. And the ex-wife's iddah calculates the iddah / waiting period after the judge knocks the hammer at the trial by saying one divorce.

For the sake of realizing the benefit, divorce must be processed through a court trial, this kind of legal change is legal and is in accordance with the rule of law: "*It is undeniable that changes in law are caused by changing times*".³⁸

Impact of Enactment of Legislation

The positive impact of the enactment of the law is that the wife's rights during the iddah period are fulfilled, among others:

1. Giving a proper mut'ah to his ex-wife, either in the form of money or goods, unless the ex-wife is qobla ad-dukhul.
2. Giving a living, food and kiswah to the ex-wife during the iddah, unless the ex-wife has been sentenced to talak ba'in or nusyuz and is not pregnant.
3. Pay off the dowry that is still owed in full, and half if qobla addukhul.
4. Providing hadhanah fees for their children who have not reached the age of 21 years.³⁹

Conclusion

From the results of the discussions described in the previous chapters, the

³⁸Mustafa Ahmad al-Zarqa, *al-Madkhal al-Fikhi al-Amy*, Cet 1X, Juz 1, Dar al-fikr, Beirut, 1968, halm: 368

³⁹Perhatikan Pasal 149 KHI

following conclusions can be drawn:

1. Divorce handed down by a husband to his wife is legal, even though Allah condemns the actions of someone who divorces. In carrying out the life of husband and wife, there may be misunderstandings between husband and wife, one or both of them do not carry out their obligations, do not trust each other, and so on.

In this situation, sometimes it can be resolved and overcome, so that the husband and wife relationship can get back together as he aspires. However, sometimes the couple even causes hatred, cruelty, and constant quarrels between husband and wife. Continuing the marriage in such circumstances will damage the family relationship, not only between the husband and wife, but will also damage the relationship, not to forget it will also affect the personality of the child and offspring in the future.

2. Researchers have looked at several articles that have explained about the divorce procedure, then a person is not valid to carry out his divorce because it is not in accordance with the procedures that have been proclaimed by the government, because the existence of KHI is the result of the hard work of the ulama and umaro who are persistent in solving household cases, especially in terms of divorce, it would be nice if all the children of this nation were subject to the laws that have been set by the government as is the case with this divorce.

Divorce that is not in accordance with the procedure will have consequences, namely it is not recognized by law and is not protected by law, a divorce that is carried out outside the court will cause difficulties for the wife, or both (husband and wife).

Divorce must be before a court session, as in Article 39 UUUP Paragraph (1) UUUP: Divorce can only be carried out in front of a court session after the court concerned has tried and failed to reconcile the two parties.

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