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Analysis Of The Concept Of Taklik Talak According To The Syafi'i School Of Thought And Law No. 1 Of 1974

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Abstract:

This research examines the concept of taklik talak from the perspective of the Shafi'i School of Thought. It compares it with the provisions in Law No. 1 of 1974 concerning Marriage in Indonesia. Taklik talak is a conditional agreement pronounced by the husband after the marriage contract, which stipulates the fall for divorce if the wife violates certain conditions. In the Syafi'i Mazhab, taklik talak is automatic if the conditions are met, without requiring a judicial process. Meanwhile, in the Indonesian legal system, the implementation of talaq must be approved by a religious court to be considered legally valid. This research employs a qualitative approach, utilizing a literature study method, and examines classical sources within the Syafi'i School of Thought, as well as relevant van't legislation in Indonesia. The research results reveal similarities in purpose, specifically in their use as a means of protecting women's rights in marriage. However, both have fundamental differences in the aspects of implementation and legal force between the two legal systems. This study is expected to contribute to the harmonization between Islamic law and positive law, serving as a reference for academics and legal practitioners in handling divorce cases related to talaq.

Keywords: *Taklik Talak*; Syafi'i School; Law No. 1 of 1974; Islamic Law; Divorce.

A. INTRODUCTION

Household life in principle must be based on mawaddah, rahmah, and love, meaning that husband and wife must play their respective roles and complement each other. Marriage aims to achieve a perfect union between husband and wife, serving as a solid foundation to create a bond of brotherhood between the family and the wife's family.

In domestic life, it is inseparable from what is called problems, quarrels between husband and wife. Many people can overcome these problems, but many problems that arise in married life lead to divorce. Divorce is the separation of husband and wife who have entered into marriage; there is no marriage, so there will be no divorce from an Islamic perspective.

Imam Syafi'i said: "Talak is a break in the relationship that the husband pronounces on his wife, whether in the form of a firm word or a word that resembles a divorce and is intended by the husband as a divorce. Similarly, if the husband gives his

wife a divorce to divorce herself, or if he gives his wife a divorce to someone else, this is the same as if he had divorced his wife himself, because everything happens at his command.” (Indriyani, n.d.)

However, divorce can be caused by a taklik made by the husband against the wife. Taklik talak is an agreement pronounced by the husband after the marriage contract, in which the husband promises to divorce his wife if she violates certain agreed-upon conditions.

From the perspective of the Syafi'i Mazhab, taklik talak is considered a valid mu'allaq talak as long as it meets the requirements of clear sighah (wording) and is delivered voluntarily. Imam Syafi'i, in the book *al-Umm*, emphasizes that violating the conditions set causes the divorce to fall directly, without the need for court decisions. (Elyanur, 2017)

Imam An-Nawawi in *Al-Majmu' Syarh al-Muhadzdzab* states that “If a husband links his divorce to a condition, then if the condition occurs, the divorce falls as stated, and this is according to the saheeh view in the Syafi'i school of thought. (Nawawi, 2003). Imam Al-Mawardi also explains this in *Al-Hawi al-Kabir*, stating that divorce associated with a condition is valid as long as the condition is not contrary to Islamic law. (Mawardi, 1999).

B. METHODS

This research is a literature review that encompasses various types of library research. Library research is a type of research where data collection involves gathering information from different literature sources. The literature studied is not limited to books, but also includes documentation materials, magazines, journals, and newspapers. The emphasis of library research is to identify various theories, laws, arguments, principles, opinions, ideas, and other relevant sources that can be used to analyze and solve the problem under study. (Sarjono. DD, 2008).

The approach used in this research is qualitative, involving the examination of library materials comprising primary and secondary legal sources, from which conclusions are drawn regarding the answers to the problems studied. Qualitative research is an approach that produces descriptive data in the form of written words from observed people who are not categorized into terms used in quantitative research. (Saifuddin Azmar, 2001).

C. RESULT AND DISCUSSIONS

1. The Concept of Talak According to the Syafi'i School of Thought.

In the *Al-Munjid* dictionary, taklik can be interpreted as “to depend on the result of the content of the amount called *jaza'* (effect) with the content of another amount called the condition.” (Safrizal, 2023) Taklik talak is derived from two syllables, namely the words taklik and talak. Etymologically, it means hanging something on something or making it dependent on something.

Taklik Talak as a Transfer of Rights. In classical fiqh literature, the meaning of taklik talak refers to the husband's divorce being suspended on the wife. Where the husband gives a warning to his wife who is nusyuz (insubordinate), for example, the husband said to his wife, who often left the house to meet other men: "If you still meet that man, then the moment you meet him, my one-time divorce will fall on you". If the wife continues to meet the man, then the husband's divorce falls on the wife. Islam gives the right to divorce to men, because men have the ambition to maintain the marriage rope. Just as men are charged with paying the dowry and providing for the needs of the wife, both while she is in his charge (being a wife) and after divorce (mut'ah money). So if a man wants to divorce and then remarry, the costs that men must bear will be huge. Moreover, men also tend to have a more patient mind and way of thinking when dealing with their wives' temperaments, so that when something happens to their wives, the husbands are less likely to consider divorce.

a. The Law of Taklik Talak According to the Syafi'i Mazhab

Regarding the law of talaq, the scholars still differ in their opinions. Some of them allow it, while others reject the use of talaq in marriage. Until now, these differences of opinion persist and influence the development of Islamic law due to the variety and nature of the talaq itself. Additionally, some scholars dispute the existence of talaq al-talak, arguing that there is no basis for it in the Qur'an and Hadith.

Wahbah Zuhaili explains that there are three opinions about the law of talak, namely:

Firstly, according to the majority of scholars from the Maliki, Hanafi, Syafi'i, and Hanbali schools, talak is valid if the conditions are met. This is based on QS. Al-Baqarah[2]: 229. In this verse, there is no difference between a continuous divorce (munjiz) and a suspended divorce (muallaq), and there are no signs that indicate a specific type of divorce (mutlaq). In reality, there were many talik talak during the time of the Companions of the Prophet SAW, as narrated by Imam Baihaqi:

عَنْ ابْنِ مَسْعُودٍ فِي رَجُلٍ قَالَ لِامْرَأَتِهِ: إِنَّ فَعْلَتَ كَذَا وَكَذَا، فَمَيِّ طَالِقٌ، فَفَعَلَتْهُ، فَقَالَ هِيَ وَاحِدَةٌ، وَهُوَ أَحَقُّ بِهَا

"Ibn Masud reported that a man said to his wife: If she does such and such, she is divorced, and then she does it, so Ibn Masuud said: She is one divorcee, and her husband has more right to her" (narrated by Imam Baihaqi).

Secondly, according to the Maliki, Syafi'i, Hanafi, Hanabilah, and Muhammad Yusuf Musa schools of thought, the talak pronounced by the husband can cause the husband's divorce to the wife if it meets the following conditions:

- a. That which is promised is something that does not yet exist when the taklik is pronounced, but may occur in the future.
- b. At the time the talaq is pronounced, the object of the talaq (wife) has already become the legal wife of the talaq pronouncer.
- c. At the time the talak is pronounced, the husband and wife are in the assembly.

Third, according to the scholars of Zahiriyah and Syi'ah Imamiyah, the law of taklik talak, whether qasami or syartī, is not valid. Zahiriyah and Shi'a Imamiyah scholars argue that taklik talak is an oath, and oaths to other than Allah SWT. not allowed, Rasulullah SAW said:

مَنْ كَانَ حَالِفًا فَلَا يَحْلِفُ إِلَّا بِاللَّهِ. رواه أبو عبيد

Whoever swears should not swear by anything other than Allah.

Then they said, 'There is no divorce except what Allah has commanded.' And there is no oath except what Allah has commanded. So the oath used for divorce is not a command of Allah.

Hence, they say: 'There is no basis either from the Qur'an and Hadith that explains about talaq al-talaq. In this case, Prof. Dr. Wahbah Zuhaili argues that the naming of the taklik talak with yamin (oath) is only limited to majaz, in terms of the rules of the oath to Allah, namely encouraging doing something or leaving something, and strengthening the news. The hadith mentioned above does not contain the meaning of talaq talak. While the one narrated by Thawus still requires interpretation, it cannot be used as evidence.

The Zahiriyah and Shi'a Imamiyah also rely on a hadith narrated by Ibn Hazm and Ibn Qayyim al-Jauziyah:

الْحَلْفُ بِالطَّلَاقِ لَيْسَ بِشَيْءٍ

The oath used for divorce is invalid.

Hence, they say: 'There is no basis either from the Qur'an and Hadith that explains about talaq al-talaq. In this case, Prof. Dr. Wahbah Zuhaili argues that the naming of the taklik talak with yamin (oath) is only limited to majaz, in terms of the rules of the oath to Allah, namely encouraging doing something or leaving something, and strengthening the news. The hadith mentioned above does not contain the meaning of talaq talak. While the one narrated by Thawus still requires interpretation, it cannot be used as evidence.(Basri, 2020)

b. Types of Taklik Talak According to the Syafi'i Mazhab

Sayid Sabiq explained that the marriage agreement in the form of taklik talak has two forms: first, taklik qasami, which is a taklik intended as a promise, as it implies completing a task, leaving an action, or confirming news.

Second, taklik syartī, which is a taklik that is intended to impose divorce when the conditions of the taklik have been fulfilled.

The two forms of talaq talak above can be distinguished by the words spoken by the husband. In taklik qasami, the one who does the work is the husband (mutāliq), the wife (mutālaqah), or someone else.

An example of a taklik talak qasami done by the husband: "If I go to so-and-so's house, then you are divorced". Example of taklik talak qasami done by the wife: "If you

enter so-and-so's house, you are divorced". Example of taklik talak qasami executed by another person: "If so-and-so visits you, you are divorced." (Yusuf & Chaer, 2017).

In taklik talak syarṭi, the husband proposes a condition with the intention that if the condition is fulfilled, the husband's divorce to his wife will fall. In taklik talak syarṭi, it is not based on a person's occupation. Example: 'If the sun rises, then you are divorced.

c. Implementation of Taklik Talak According to the Syafi'i Mazhab

The implementation of talaq in the Syafi'i school of thought refers to the conditions set by the husband for the wife relating to divorce. Taklik talak is usually expressed in the form of a statement or promise made by the husband, which, if violated by the wife, the husband has the right to impose divorce.

Shaykh Abi Bakar Syatta, in his book entitled I'anat AlThalibin, explains that taklik talak is valid as long as the conditions set are possible and not contrary to Islamic law. If the husband pronounces taklik talak with certain conditions, and these conditions are met, the divorce is considered to be automatic. This shows that in the Syafi'i Mazhab, violation of the terms of talaq by the husband can lead to divorce without the need for court proceedings.

According to Sheikh Zainuddin Malibari, in his book Fathul Muin, it is stated that if someone hangs the divorce on a condition, such as saying "if you enter the house, then you are divorced." A divorce that is dependent on a particular condition will take effect when that condition is fulfilled. This shows that in the Shafi'i Mazhab, talaq talak is recognized as a valid form of divorce and can be executed without the need for court proceedings. This opinion is similar to that of Sheikh Ibn Qosim in the book Tausyih 'Ala Ibni Qasim, who emphasizes that taklik talak is valid as long as the condition set is something that may occur and does not contradict Islamic law. If the husband utters a talaq talak with certain conditions, and these conditions are met, then the divorce is considered to fall automatically. This shows that in the Syafi'i Mazhab, violation of the terms of talaq by the husband can lead to divorce without the need for court proceedings.

2. The Concept of Taklik Talak According to Law No. 1 of 1974.

Law Number 1 of 1974 on Marriage does not explicitly mention the term taklik talak, but this concept is still recognized in legal practice in Indonesia, especially in the religious courts. Taklik talak is primarily regulated and applied by the Compilation of Islamic Law (KHI) and technical regulations issued by the Ministry of Religious Affairs. Although there is no specific article in this law that directly discusses talaq, this law provides space for customs, religions, and beliefs as a basis for regulating marriage.

a. Implementation of Taklik Talak according to Law No. 1 of 1974.

The implementation of talaq in the Indonesian national legal system is not explicitly mentioned in Law Number 1 of 1974 concerning Marriage. However, the principles underlying the regulation of divorce in the law still provide space for the existence of talaq, especially in the context of protecting the rights of wives. Article 39

paragraph (1) states that divorce can only be carried out before a court session, and paragraph (2) stipulates that divorce can only be justified if there are sufficient reasons that the husband and wife will not be able to live together as husband and wife. On this basis, a violation of the talaq talak pledge can be used as grounds for filing a divorce petition with the religious court.

Although not listed in Law No. 1 of 1974, the implementation of talaq is strengthened through the existence of the Compilation of Islamic Law (KHI), which was enacted through Presidential Instruction No. 1 of 1991. Article 45 of the KHI states that a husband can pronounce talaq after the marriage contract, and if he violates the contents of the talaq, the wife has the right to file a lawsuit with the religious court. Thus, the KHI serves as the legal basis for enforcing talak in the Islamic family law system in Indonesia, particularly in the spiritual courts. (Haris, 2013).

3. Comparison of Taklik Talak According to the Syafi'i Mazhab and Law No. 1 of 1974.

Based on the discussion above, it can be understood that, according to the Syafi'i Mazhab and Law No. 1 of 1974, there are several differences and similarities between the two. The comparison is as follows:

The concept of taklik talak, according to the Syafi'i Mazhab and Law No. 1 of 1974, shares similarities in that it provides a form of protection for wives; however, both approaches differ in their application and implementation of taklik talak. In the Shafi'i School of Thought, talak al-talak is considered valid if the conditions set by the husband during the marriage contract are met. Talak will fall automatically without re-pronunciation from the husband if the required conditions occur. This aims to provide clarity and legal certainty in the marriage relationship.

In contrast to the Syafi'i Mazhab, Law No. 1 of 1974 concerning Marriage does not explicitly regulate the practice of talaq. However, the provisions related to divorce in this law allow divorce on grounds similar to talaq, but the process must be judicial. Article 39, paragraph (2) of this law states that divorce can only be carried out if there are sufficient reasons, such as the absence of a harmonious life between husband and wife, and violations of the talaq talak conditions must be proven in court.

D. CONCLUSION

Based on the results of the research that the researchers have described in the chapters above regarding the analysis of the concept of taklik talak according to the Shafi'i madhhab and Law No. 1 of 1974, it can be concluded:

1. The concept of taklik talak according to the Shafi'i school of thought
In the implementation of talaq talak according to the Shafi'i school of thought, the husband has the right to impose divorce whenever he wants. Talaq is a form of divorce that is associated with a condition. If the condition is fulfilled, the divorce will be granted automatically without a court hearing. Shafi'i scholars permit this talaq talak, provided that it does

not contain jahalah (uncertainty) and does not contradict the principles of Sharia. In the books 'I'ana al thalibin' and 'Fathul muin', it is explained that a husband can rely on an event or action of the wife, and if this occurs, then the divorce becomes valid.

2. The concept of taklik talak according to Law No. 1 of 1974

The concept of implementing Talak in the Compilation of Islamic law differs from the Syafi'i Madzhab. Although Law No. 1 of 1974 does not explicitly mention the term taklik talak. The substance of this practice is accommodated in the provisions of the articles on divorce. KHI explicitly regulates the implementation of talaq in articles 45-52, where a wife harmed by the husband's breach of the promise can file a case with the religious court. If it is proven, then the divorce can be declared null and void.

3. Comparison of the concept of taklik talak according to the Shafi'i school of thought and Law No. 1 of 1974.

In terms of implementation, according to the Syafi'i Mazhab, the implementation of taklik talak, which is dependent on a condition, will take effect automatically if the condition is met, without the need for a court process. Whereas in Law No. 1 of 1974, a wife must apply to the religious court, must follow the trial process, and must obtain permission from the Religious Court in the area where they are domiciled. Talak is declared valid if a judge decides it through an evidentiary process.

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