AT-TAFRĪQ AL-QADHĀ'Ī AND THE RELIGIOUS COURTS’ AUTHORITY IN DECIDING A DIVORCE

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Abstract: One of the reasons for the broken marriage is a talāq as a husband's prerogative right. However, in some conditions the talāq is not done by the husband even though the marriage relationship has lost its essence and has gone bad. It is called at-tafrīq al-qadba’ī which is a way out for the husband's arbitrariness that the Judge is given the authority to terminate the marriage relationship even without the husband’s willingness. This research used a library research method. This research was normative juridical law research and it was analyzed using descriptive-analytic methods. From this research it was found that the Judiciary was authorized to break the rope of marriage through at-tafrīq al-qadba’ī under certain circumstances to protect the wives’ rights. The authority was not only legally valid in the state law but also had its legitimacy regulated in fiqh.

Keywords: tafrīq, authority, divorce, judge, the religious court
INTRODUCTION

Talāq, which is a term for divorce, is the right of husbands. But due to one or another, the husband is often ignorant to the wife who wants to separate, because for her the relationship between two of them is no longer harmonious and difficult to be fixed. This can be caused by his intention to bind his wife because of his love or unknown bad intentions. Related to this matter Allah SWT has stated:

فَإِمْسَاكٌ بِعْرُوفٍ أَوْ تَسْرِيحٌ بِِِحْسَانٍ

The meaning:

“After that, they can back together in a ma’ruf way or getting divorce well” (QS Al-Baqarah: 229)

Normatively, Allah SWT has implemented the provisions of Sharia to each Muslim. Shariah obligations are then carried out based on their own choice (ikhtiyār) without any intervention or coercion from any party. However, in reality these provisions are often neglected, as a result the obligation to maintain the Shari’ah is left to the judge. The judge is obliged to decide the law based on the Shari’ah and legalize it with the authority (sulṭan) given to him. Therefore, in this case the judge performs his role as al-amr bi al-ma’ruf wa annahyu ‘an al-munkar.

Actually, there are still people questioning the authority of the religious court in deciding the case. They said that the judge did not have the authority to decide a divorce because divorce was the husband's prerogative rights to his wife, so the judge's decision to break the marriage could not be justified.

In the literature of fiqh, especially in the chapter of divorce, the term of at-tafriq al-qadhā’ī as an act of a qādi to authorize a divorce is often found. This discourse shows that the judiciary has the authority recognized by sharia in deciding to break a marriage which is no longer good for the subjects. This also refutes the paradigm in Islam; only the husband is entitled to break the marriage relationship.

Practically, this authority was given to the Religious Courts (Godsdienstige Rechtspraak) as regulated in Law Number 50 Year 2009 concerning the Second Amendment to Law Number 7 of 1989 concerning Religious Courts as one of the judiciaries under the Supreme Court that implements judicial power in Indonesia. One of the authorities of this court was adjudicating marital cases for Muslims.
Based on this reality, the writer considered that it was necessary to study the authority of the Judiciary in deciding a divorce from the perspective of fiqh and law. According to the writer this was urgent to strengthen the position of the judge and also gave an understanding that the decisions or the authority, especially in divorce cases, had legitimacy in the sharia and the law, so that the parties were obligated to obey the decision.

Based on the background, several main problems can be formulated like the followings; (1) what does it mean by at-tafrīq al-qadhāʾi in fiqh terminology? (2) To what extent is the judge's authority to terminate marriages from the perspective of fiqh and the law?

METHOD
This study used a library research method, which emphasized the information from law books, journals, papers, newspapers, and a variety of literature that had a relevant correlation with the problem. From the perspective of its characteristics, this research was categorized as normative juridical legal research. The form of normative juridical research was law research conducted by examining literature. This study was analyzed using a descriptive-analytic method by describing the data to obtain conclusions.

DISCUSSION
At-Tafrīq al-Qadhāʾi in Fiqh Literature
Etymologically, at-tafrīq al-qadhāʾi is a washfiya murkab formed from two words in which one of them is an adjective and another is a modified noun. In this case, the writer tried to interpret word by word before explaining the definition of at-tafrīq al-qadhāʾi.

At-tafrīq is a mashdar (basic word) of "farraga" (past tense) which means to separate. In the Arabic vocabulary, the word of at-tafrīq has several terms such as at-tajziʿa or al-qismah which means division, at-tamyiz which means separation, at-tabaddud which means separated, and al-fasblu which means separation. Another term as

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1 Ranny Kautun, Metode Penelitian Untuk Penulisan Skripsi Dan Tesis (Bandung: Taruna Grafika, 2000), 38.
3 Abdul Kadir Muhammad, Hukum dan Penelitian Hukum (Bandung: Citra Aditya Bakti, 2004), 126.
narrated by Sayyid Sabiq is *at-tafrīq* which means to divorce, and in some literature the term al-fiqrah is used. While, *al-qadbā* is etymologically derived from Arabic vocabulary which is a basic word of *qadbā* which means *al-qat`u* or to decide, *al-fazā`lu* means separating and can also mean *al-bukm`u* or law⁵.

Terminologically, the writer had not found a rigid definition from classical Islamic law experts. However, based on the results of the writer's analysis form some contemporary literature, it can be stated that *at-tafrīq al-qadbā`i* is a termination of a marital relationship through a judge's decision based on a wife's claim⁶. In another editorial, Az-Zarqānī⁷ stated that *at-tafrīq* is the termination of a marriage relationship through a judge's decision based on the request of one party (husband or wife). Whereas, based on contemporary literature, *at-tafrīq al-qadbā`i* is:

"Breaking the bond of marriage between husband and wife through a judge's decision based on the request of one party because of *syiqāq, dbarar*, lack of living, or even without the existence of petition from one party but it is carried out for saving the rights of *syara* if one of the parties is in apostasy."⁸

**Criteria of *at-Tafrīq al-Qadhā`i* in Fiqh**

Wahbah Az-Zuhaili⁹ and As-Sayyid Sabiq¹⁰ categorized the situations in which the Court is authorized to break the marriage (*tafrīq*) as the followings: (1) It is when the husband does not support his wife’s life (*`ad`am an-*nafa`qah*), (2) It is because of disgrace (*`a`ib `aw *ılāl*), (3) It is because of disputes and mudharat (*as-syiqāq `aw *adb*bar*), (4) It is because the absence of a husband without any hindrance (*ghāibat az-za`aj bī `alā *udār*), and (5) It is because the husband was in prison (*habs*).

There are other conditions in which the Court is authorized to do *tafrīq*, but these conditions are still erroneous for some *fuqaha* who see part of it as a divorce.

These conditions include; (1) *Taqīq* with

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Khiyār Bulūgh (2) Tafrīq due to different religion, (3) Tafrīq due to li‘ān, (4) Tafrīq due to a broken marriage vow or loss of desirable traits, (5) Tafrīq due to prohibition of milk-suckling mahram relations (radḥā‘ab) and marital relations (mushābarah), (6) Tafrīq due to lack of dowry, and (7) Tafrīq due to husband disappearance (faqīb).

Different from the former, the latter conditions are not widely adopted in the rules of law or qānūn and are only explained in the classical fiqh literature. Therefore, only the first five conditions are described in these discussions.

**Tafrīq due to Lack of Living Fee (‘Adam an-Nafaqah)**

Imam Malik, Imam Syafi‘i, and Imam Ahmad allowed the action of tafrīq (break a marriage) done by judges for a wife’s request if a husband did not give enough living to her, and there was no any wealth belongs to the husband to accomplish the husband’s duty.

This is based on the saying of Allah SWT at QS al-Baqarah verse 229 which stated, "Then endure (protect) her in a good way or divorce her in a good way too". In other verses Allah also said, "And do not keep her for bad so that you harm her" (QS al-Baṣarrah verse 231). Related to this verse the faqīb argued that there was no more dangerous badness than not giving a wife living support. Among the principal principles in Islamic law was the principle of lā dbarar wa lā dbirār or the prohibition of endangering oneself or others.

Another argument based on a narration from Abu Zinad said, "I asked Said Ibn Al-Musayyib about husbands who had nothing to support their wives, could they be divorced? said Said Ibn Al-Musayyib: Yes. Then I asked again: Was it Sunnah? Then he replied: Yes, it was Sunnah (that was the Sunnah of the Prophet Muhammad)".

In another narration it is said that Umar Bin Khattab RA wrote his war leaders about the husbands who had left their wives. In his letter, he ordered them to support his wives or divorce them. And if a divorce was chosen they should pay for the previous necessities they had neglected.

The muftis differed on the type of talāq that the Judge decided due to the lack of a husband’s income. The Shafi‘iyah and

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12Sabiq, Fiqh al-Sunnah, 2:186.
14Az-Zuhaili, 8:488.
the Hanabilah argued that the tafrīq by a qādib due to lack of income is fasakh. Whereas, among the Maliki Madhhab schools stated that tafrīq was talāq raṭi. In this case, the faqih who gave tafrīq due to lack of income must be implemented through a judge's decision. That was because the separation was based on ḥijab and it could not be done except through a judge's decision as a form of dispute resolution15.

**Tafrīq due to Disgrace (‘Ilal)**

Physical or mental disability or illness is one obstacle to gain family harmony at home. This is because in interacting, the husband and wife will feel an obstacle; so that, one of the parties, either husband or wife, is unable to do her or his obligations. These rights and duties can cause problems in the middle of the household, because the husband is unable to provide his wife's living satisfaction, such as daily needs, clothes, and so on. The wife who is not patient enough to deal with the problems and does not want to think about the financial problem will cause a fight. If the husband has a sexual disease (such as being impotent), he will be unable to get along with his wife normally. In this case, the wife who is unhappy and unable to control her sexual desire will be in crisis, because having intercourse without any legalized marriage process is prohibited in the teachings of Islam16.

Based on those conditions, jumbūr al-‘ulamā thought that the disability of one party could be used as an excuse to ask for a divorce. Furthermore, the majority of scholars besides Hanafi schools stated that each husband and wife had the right to ask for a divorce in the form of fasakh if one of the parties has one of the diseases. This was based on the argument that both men and women were equal in having the impatience to get along with their partners who suffer from one of the diseases.

The husbands were allowed to ask for fasakh without using talāq, because by giving talāq, the husband must carry the risk by paying some dowries if the talāq was dropped after intercourse (ba‘da ad-dakhūl), or paying it half if the divorce was done before (qabla ad-dakhūl). Whereas, if a divorce was caused by a disgrace or a defect, the husband was not required to pay half of the dowry when the fasakh occurred before

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intercourse (qabla ad-dukhūl). If the fasakh occurred after intercourse (ba’da ad-dukhūl), even though the scholars agreed that the husband must pay dowry, but in the opinion of the Malikiyah, Hanabilah, and Shafi’iyah, the husband was justified in demanding compensation for the dowry to the woman guardian such as her father or siblings because they had hidden their weaknesses. A divorced wife due to disease had no right to get a living or a place to live\textsuperscript{17}.

The Hanafi and Maliki schools stated that fīrqah due to disability or disgrace was called talāq ba’in and had to be done through a judge's decision. Whereas, Syafi’i and Hambali schools stated that such tafriq was called fasakh, not talāq\textsuperscript{18}.

**Tafriq due to Syiqaq or Dharar**

It was allowed and even recommended for the wife to ask for divorce to the judge if in her marriage there were dangerous things, so the relationship between the two can no longer be fixed as stated by Imam Malik, as such as family violence, bullying, verbal abuse, including the husband’s coercion to do something bad\textsuperscript{19}.

In previous discussion, the writer had discussed about type of tafriq including at-tafriq li ad-dharar. Dharar was defined by Wahbah Az-Zuhaili\textsuperscript{20} as the following:

The meaning:


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Derived from those words, when a wife submitted a divorce request to the Court, and she was able to prove the danger (dharar) in her marital relationship, the judge had the authority to drop the divorce for the wife. In this case the tafriq carried out because syiqaq was talak bain, and was first talak as stated by the Malikiyah.

**Tafriq due to the Husband Disappearance (Ghāibat az-Zauj)**

It was permitted to do tafriq because of the absence of the husband according to the Maliki and Hambali schools. A wife could ask a judge to give a divorce due to her husband's disappearance even though she was wealthy. However, several conditions must be met: (1) the absence of a husband was not due to an acceptable obstacle, (2) the wife felt in danger (dharar) in the absence of her husband, (3) the absence of her husband because he was outside the area where the wife was, and (4) it had been 1 (one) year since the wife felt in danger (dharar). If the absence of the husband was caused by something like studying, trading, or even assignments abroad, etc., then tafriq was not justified.

The right reason to have tafriq in this cause that the wife felt in danger (dhararun balīgh). Therefore, the danger should be eliminated as stated by the Prophet Muhammad SAW:

لا ضرر ولا ضرار

The meaning:

“Must not harm, and also must not make people in harm.”

Moreover, Umar Bin Khattab RA had ever written a letter to a group of men who left their wives and he told them to support their wives’ life expenses or divorce them.

The other faqib disagreed for the long time of the husband’s absence so that the judge could decide the divorce (tafriq). The Malikiyah fiqabā in their opinion stated that the maximum limit for the husband’s absence either due to obstacle or not was 1 (one) year or more. However, in one of the other madzhab the maximum limit was 3 (three) years. Furthermore, the judge could immediately decide the divorce if the wife submit a divorce request while the husband was unknown (majhūl). If the husband’s position was known, the judge should send a letter containing a warning to return, or

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22Kuwait, al-Maun‘īd al-Fiqḥiyah al-Kuwaitiyah, 29:56.
give living support to his wife, or even divorce her within a specified period. If the letter was ignored by the husband, the judge could decide the divorce of the two couples. In this case divorce that was given by the judge was called talāq ba’in and every tafrīq carried out by the judge became talāq ba’in unless the tafrīq was caused by ilāl and the absence of husband’s support.

The scholars who stated the existence of tafrīq due to the absence of the husband agreed that the termination of the marriage must be carried out through a judge’s decision. That was because the act of tafrīq (separation) was ijtihad and it could not be executed without a judge’s decision.

Regarding the type of talāq, the scholars had different opinions. Hanabilah stated that firqah in the absence of the husband was a fasakh. In contrast to the Maliki schools, the talāq decided by judges was talāq ba’in. The Causes of at-Tafrīq al-Qadhā’i and the Reasons for Divorce based on Law

The reasons for allowing tafrīq and its conditions as such as (1) when the husband does not give living support for his wife (‘adam an-nafaqah), (2) because of disgrace/scandal (aib aw ilāl), (3) because of quarrels and mudharat (as-siyiqāq aw ad-dharar) (4) Because of the disappearance of the husband without any reason (ghāibat az-‘anji bi lā ‘nḏr), and (5) because the husband is in prison (habs). Even though it was not the opinion of the majority of fuqaha, it was ijtihad of the Maliki schools.

In this case, Imam Maliki stated that when a wife felt insecure because of the detention of her husband, then she complained to the judge, the judge was allowed to divorce the husband on the wife’s behalf. The minimum detention period set by the jurists was a year. Regarding the type of firqah (termination of marriage) was almost similar to tafrīq due to the disappearance of the husband. The talāq was talāq ba’in and every tafrīq done by the judge became talāq ba’in except tafrīq caused by ilāl and the absence of husband’s living support.

25 Az-Zuhaili, 8:509.
26 Kuwait, al-Munṣ‘ūb al-Fiqhiyyah al-Kuwaiyyah, 29:64.
imprisonment (habs) had become a source of law in determining the reasons for divorce.

Act number 19 of Government Regulation No. 9 year 1975 about the Implementation of Law No. 1 of 1974 concerning marriage regulated as the followings; (1) one of the parties committed adultery or became a heavy drunkard, compactor, gambler, and et cetera, (2) one of the parties left another party for 2 (two) continuously without permission from the partner, and valid reasons or because of other things beyond ability, (3) one of the parties got a 5 (five) year imprisonment or a more severe sentence after the marriage, (4) one of the parties committed atrocities or severe persecution that endangers the other party, (5) one of the parties had a physical and psychological disability or illness to carry out the duties as a husband or a wife, (6) there was a continuous quarrel between the husband and the wife without a chance to live together in harmony, (7) the husband violated the sentence of talāq, and (8) there was an act of apostasy causing disharmony in the household. These reasons were almost the same as tafriq with a few additions.

Among Talāq, Khulū’, Fasakh and Tafrīq

Terminologically, talāq, khulū’, fasakh and tafriq could be distinguished as followings; (1) talāq was eliminating the marriage ties either in present or in the future with a special lafadz or others, (2) khulū’ was eliminating marriage ownership using lafadz khulū’ or others by the obligation for the wife to pay iwadh, (3) fasakh was the breaking of the marriage ties
that causes marriage contract elimination and the laws from it, and (4) tafrīq was the termination of the marriage bond between a husband and a wife through a judge's decision based on the request of one of the parties because of syiqāq, dharar, the absence of living support, or even without a request from one of the parties but it was done to save the rights of syara' if one party was in the act of apostasy.

Wahbah Az-Zuhaili said that at-tafrīq was different from talāq, which happened because of choice and the willingness of the husband. Whereas, tafrīq was done through a judge's decision based on a lawsuit by the wife. This was to make a possibility for a wife to break the marriage if talāq and khulu’ cannot be done.

At-tafrīq al-qadba’i could be in the form of talāq caused by the absence of the husband's living support, ilāl (oath not to have intercourse with his wife), physical disability, syiqāq between the husband and wife, imprisonment for the husband (habs) or also due to ta’assuf (right disorientation done by the husband such as giving talāq a moment before death). It could also in the form of fasakh such as tafrīq because of the broken vow, also it was tafrīq because of the apostasy, or one of them changed to be Muslim.

CONCLUSION

The law of marriage and divorce for Islam in Indonesia was a diyāni law, which was developed as a qadba’ī law based on Islamic politics or as-siyāsah asy-syar’iyah. It had been proven in Law No. 1 year 1974, act number 49 of Law No. 7 year 1989, Law No. 3 year 2006, Law No. 50 year 2009, act number 39 of Law No. 1 year 1974. At-tafrīq al-qadba’i in fiqh literature was an authority granted by the sharia to the judges. The reasons for the existence of such authority were the husband lack of living support to his wife (‘adām an-nafqah), the existence of disgrace or scandal (‘āib aw ilāl), the disputes and mudharat (as-siyāq aw ad-dharar), the absence of husband without any acceptable reason (ghaibat az-zauj bilā ‘udzr), and the imprisonment of the husband (habs), or other shari’a reasons. Based on these matters, every judge's decision must be obeyed because of the ilzam (binding) on him. The binding characteristic was

31Az-Zuhaili, Mansū‘ab al-Fiqh al-Islāmī wa al-Qadhāyā al-Mu‘ashrā, 8:486.
32Az-Zuhaili, 8:487.
acceptable in Shari’a, and it was legalized by the government.

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