

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

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Abstrak: Diantara sebab terputusnya tali pernikahan adalah dikarenakan talak yang merupakan hak prerogatif suami. Namun dalam beberapa kondisi, ternyata talak tidak kunjung dijatuhkan oleh suami meski hubungan pernikahan telah hilang kemaslahatannya bahkan membawa kepada kemudharatan. *At-tafriq al-qadhā'i* yang merupakan jalan keluar dari kesewenangan suami dimana Hakim diberi kewenangan untuk memutuskan hubungan pernikahan tersebut meski tanpa adanya kerelaan dari pihak suami. Penelitian ini menggunakan metode penelitian pustaka (library research). Sedangkan bila dilihat dari sifatnya, penelitian ini termasuk penelitian hukum yuridis normatif yang dianalisis dengan menggunakan metode deskriptif analitik. Dari penelitian ini dapat dinyatakan bahwa Peradilan berwenang untuk memutus tali pernikahan melalui *at-tafriq al-qadhā'i* dalam keadaan tertentu dalam rangka melindungi hak-hak istri. Bahwa kewenangan tersebut selain sah secara hukum Negara, ia juga memiliki legitimasinya sendiri yang diatur dalam fikih.

Kata kunci: tafriq, kewenangan, perceraian, hakim, pengadilan agama

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-tafriq al-qadhā'i* 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-tafriq al-qadhā'i* 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: tafriq, 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:

فَأَمْسَاكَ بِمَعْرُوفٍ أَوْ تَسْرِيحٍ بِإِحْسَانٍ

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'a is left to the judge. The judge is obliged to decide the law based on the Shari'a and legalize it with the authority (*sulṭah*) given to him. Therefore, in this case the judge

performs his role as *al-amr bi al-ma'ruf wa an-nahyu '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-tafrīq al-qadhā'i* as an act of a *qādhi* 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-tafriq al-qadhā'i* 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 problem¹.

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 literature². This study was analyzed using a descriptive-analytic method by describing the data to obtain conclusions³.

DISCUSSION

At-Tafriq al-Qadhā'i in Fiqh Literature

Etymologically, *at-tafriq al-qadhā'i* 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-tafriq al-qadhā'i*.

At-tafriq is a *mashdar* (basic word) of "*farrāqa*" (past tense) which means to separate. In the Arabic vocabulary, the word of *at-tafriq* has several terms such as *at-tajzi'ah* or *al-qismah* which means division, *at-tamyiz* which means separation, *at-tabaddud* which means separated, and *al-fashlu* which means separation⁴. Another term as

¹Ranny Kautun, *Metode Penelitian Untuk Penulisan Skripsi Dan Tesis* (Bandung: Taruna Grafika, 2000), 38.

²Soerjono Soekanto, *Penelitian Hukum Normatif Suatu Tujuan Singkat* (Jakarta: Rajawali Press, 1985), 15.

³Abdul Kadir Muhammad, *Hukum dan Penelitian Hukum* (Bandung: Citra Aditya Bakti, 2004), 126.

⁴Abu Jaib Sa'di, *al-Qāmus al-Fiqhī Lughatan Washbilāban* (Damaskus: Dār al-Fikr, 1988), 283.

narrated by Sayyid Sabiq is *at-taṭliq* which means to divorce, and in some literature the term *al-firqah* is used. While, *al-qadhā* is etymologically derived from Arabic vocabulary which is a basic word of *qadhā* which means *al-qat'u* or to decide, *al-fashlu* means separating and can also mean *al-hukmu* 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 from some contemporary literature, it can be stated that *at-tafrīq al-qadhā'i* is a termination of a marital relationship through a judge's decision based on a wife's claim⁶. In another editorial, Az-Zarqani⁷ 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-qadhā'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*, *dharar*, 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-Sayid 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 (*'adam an-nafaqah*), (2) It is because of disgrace (*'aib aw ilāl*) (3) It is because of disputes and mudharat (*as-syiqāq aw ad-dharar*) (4) It is because the absence of a husband without any hindrance (*ghaibat az-zauj bi lā 'udzur*), 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) *Tafrīq* with

⁵Muhammad Ibn Mukarram Al-Mishri Ibnu Manzhar, *Lisān al-Arab* (Beirut: Mu'assasah at-Tarikh al-'Arabī, Dār Ihya at-Turats al-'Arabī, 1993), 283.

⁶Al-Imam Muhammad Amin Ibnu Abidin, *Radd al-Mukhtār 'alā ad-Durr al-Mukhtār Syarh Tanwīr al-Absār*, vol. 4 (Beirut: Dār al-Kutub al-'Ilmiyyah, 1994), 184.

⁷Muhammad Ibn Abdul Baqi Ibn Yusuf Az-Zarqani, *Syarh az-Zarqāni 'Alā Muwatttha' al-Imām Mālik*, vol. 3 (Beirut: Dār al-Kutub al-'Ilmiyyah, 1990), 277.

⁸Kementerian Wakaf dan Urusan Agama Kuwait, *al-Mausū'ah al-Fiqhiyah al-Kuwaityah*, vol. 29 (Kuwait: Thibā'ah Dzāt al-Salāsīl, 1983), 6.

⁹Wahbah az-Zuhaili, *Mausū'ah al-Fiqh al-Islāmi Wa al-Qadhāya al-Mu'ashirah*, vol. 8 (Damaskus: Dār al-Fikr, 2010), 487.

¹⁰As-Sayyid Sabiq, *Fiqh Al-Sunnah*, vol. 2 (Kairo: al-Fath li al-'Ilām al-'Arabī, Dār Mishr li at-Thibā'ah, n.d.), 186.

Khiyār Bulūgh (2) *Tafriq* due to different religion, (3) *Tafriq* due to *li'an*, (4) *Tafriq* due to a broken marriage vow or loss of desirable traits, (5) *Tafriq* due to prohibition of milk-suckling mahram relations (*radhā'ah*) and marital relations (*mushāharah*), (6) *Tafriq* due to lack of dowry, and (7) *Tafriq* due to husband disappearance (*faqd*)¹¹.

Different from the formers, 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.

***Tafriq* due to Lack of Living Fee ('*Adam an-Nafaqah*)**

Imam Malik, Imam Syafi'i, and Imam Ahmad allowed the action of *tafriq* (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 duty¹².

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-Baqarah verse 231). Related to this verse the *faqih* 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 dharar wa lā dhirār* or the prohibition of endangering oneself or others¹³.

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 neglected¹⁴.

The muftis differed on the type of talāqs that the Judge decided due to the lack of a husband's income. The *Shafi'iyah* and

¹¹Kuwait, *al-Mausū'ah al-Fiqhiyah al-Kuwaitiyah*, 29:77.

¹²Sabiq, *Fiqh al-Sunnah*, 2:186.

¹³Az-Zuhaili, *Mausū'ah al-Fiqh al-Islāmī wa al-Qadhāyā al-Mu'āshirah*, 8:488.

¹⁴Az-Zuhaili, 8:488.

the *Hanabilah* argued that the *tafriq* by a *qādhi* due to lack of income is *fasakh*. Whereas, among the Maliki Madhhab schools stated that *tafriq* was *talāq raj'i*. In this case, the *faqih* who gave *tafriq* due to lack of income must be implemented through a judge's decision. That was because the separation was based on *ijtihad* and it could not be done except through a judge's decision as a form of dispute resolution¹⁵.

***Tafriq* due to Disgrace ('*Ila*)**

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 Hanafī 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-dukhūl*), or paying it half if the divorce was done before (*qabla ad-dukhūl*). 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

¹⁵Kuwait, *al-Mausū'ah al-Fiqhiyah al-Kuwaitiyah*, 29:61.

¹⁶Firdaweri, *Hukum Islam tentang Fasakh Nikah karena Ketidakmampuan Suami Memenuhi Kewajibannya*, (Jakarta: CV. Pedoman Ilmu Jaya, 1988), 2.

intercourse (*qabla ad-dukbū*). If the *fasakh* occurred after intercourse (*ba'da ad-dukbū*), 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 live¹⁷.

The Hanafi and Maliki schools stated that *firqah* 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*¹⁸.

Tafrīq due to Syiqāq 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 bad¹⁹.

In previous discussion, the writer had discussed about type of *tafriq* including *at-tafrīq li ad-dharar*. *Dharar* was defined by Wahbah Az-Zuhaili²⁰ as the following:

إيذاء الزوج لزوجته بالقول أو بالفعل، كالشتم
المقذع والتقييح المخل بالكرامة، والضرب المبرح والحمل
على فعل ما حرم الله، والإعراض والهجر من غير سبب
يبينه ونحوه

The meaning:

“The violence from the husband to his wife with words or actions as such as verbal abuse, humiliation, physical abuse, invitations to do what is prohibited by Allah SWT, and ignorance and turning away without valid reasons and others.”

All Malikiyah dan Imam Ahmad allowed judges to decide a divorce because of its bad effects²¹.

This was based on the words of the Prophet Muhammad:

لا ضرر ولا ضرار

The meaning:

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

¹⁷M. Zein Satria Effendi, *Problematika Hukum Keluarga Islam Kontemporer, Analisis Yurisprudensi dengan Pendekatan Ushuliyah* (Jakarta: Kencana, 2004), 132.

¹⁸Kuwait, *al-Mausū'ah al-Fiqhiyah al-Kuwaitiyah*, 29:76.

¹⁹Sabiq, *Fiqh al-Sunnah*, 2:187.

²⁰Az-Zuhaili, *Mausū'ah al-Fiqh al-Islāmī wa al-Qadhāyā al-Mu'āshirah*, 8:502.

²¹Sabiq, *Fiqh al-Sunnah*, 2:188.

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 *talāq bain*, and was first *talāq* as stated by the Malikiyah²².

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

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 justified²³

The right reason to have *tafriq* in this cause that the wife felt in danger (*dhararun baligh*). 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 them²⁴.

The other *fāqih* disagreed for the long time of the husband's absence so that the judge could decide the divorce (*tafriq*). The Malikiyah *fuqahā* 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

²²Kuwait, *al-Mausū'ah al-Fiqhiyah al-Kuwaitiyah*, 29:56.

²³Sabiq, *Fiqh al-Sunnah*, 2:189.

²⁴Az-Zuhaili, *Mausū'ah al-Fiqh al-Islāmi wa al-Qadhāyā al-Mu'ashirah*, 8:507.

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 *tafriq* carried out by the judge became *talāq ba'in* unless the *tafriq* was caused by *ilāl* and the absence of husband's support²⁵.

The scholars who stated the existence of *tafriq* 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 *tafriq* (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 bair*²⁶.

Tafrīq due to Husband in Imprisonment (Habs)

Previously, the writer had discussed one of the reasons for allowing the judge to decide a divorce was when the husband was

in prison (*habs*). Even though it was not the opinion of the majority of *fuqaha*, it was *ijtihad* of the Maliki schools²⁷. 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 year²⁸. Regarding the type of *firqah* (termination of marriage) was almost similar to *tafriq* due to the disappearance of the husband. The *talāq* was *talāq ba'in* and every *tafriq* done by the judge became *talāq ba'in* except *tafriq* caused by *ilāl* and the absence of husband's living support²⁹.

The Causes of at-Tafrīq al-Qadhā'i and the Reasons for Divorce based on Law

The reasons for allowing *tafriq* 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-syiqāq aw ad-dharar*) (4) Because of the disappearance of the husband without any reason (*ghāibat az-zauj bi lā 'udzur*), and (5) because the husband is in

²⁵Az-Zuhaili, 8:509.

²⁶Kuwait, *al-Mausū'ah al-Fiqhiyah al-Kuwaitiyah*, 29:64.

²⁷Sabiq, *Fiqh al-Sunnah*, 2:190.

²⁸Kuwait, *al-Mausū'ah al-Fiqhiyah al-Kuwaitiyah*, 29:66.

²⁹Az-Zuhaili, *Mausū'ah al-Fiqh al-Islāmi wa al-Qadhāyā al-Mu'ashirah*, 8:509.

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 partner, (5) one of the parties had a physical disability or illness making disable to carry out the duties as a husband or a wife, and (6) there was a continuous quarrel between the husband and the wife without a chance to live together in harmony.

Act number 116 of Islamic Law Compilations stated that divorce could occur because of these reasons (1) one of the parties committed adultery or became a heavy drunkard, compactor, gambler, and others, (2) one of the parties left the partner

for 2 (two) years continuously without permission and a valid reason 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 *tafrīq* with a few additions.

Among *Talāq*, *Khulū'*, *Fasakh* and *Tafrīq*

Terminologically, *talāq*, *khulū'*, *fasakh* and *tafrīq* 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 *inadh*, (3) *fasakh* was the breaking of the marriage ties

that causes marriage contract elimination and the laws from it, and (4) *tafriq* 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 apostasy³⁰.

Wahbah Az-Zuhaili said that *at-tafriq* was different from *talāq*, which happened because of choice and the willingness of the husband. Whereas, *tafriq* 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 done³¹.

At-tafriq al-qadhā'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 *tafriq* because of the

broken vow, also it was *tafriq* because of the apostasy, or one of them changed to be Muslim³².

CONCLUSION

The law of marriage and divorce for Islam in Indonesia was a *dīyāni* law, which was developed as a *qadhā'i* law based on Islamic politics or *as-siyāsah asy-syar'īyyah*. 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-tafriq al-qadhā'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 (*'adam an-nafaqah*), the existence of disgrace or scandal (*'aib aw ilāl*), the disputes and mudharat (*as-syiqāq aw ad-dharar*), the absence of husband without any acceptable reason (*ghāibat az-zanj 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 *ilzām* (binding) on him. The binding characteristic was

³⁰Kuwait, *al-Mausū'ah al-Fiqhīyah al-Kuwaitīyah*, 29:5–6.

³¹Az-Zuhaili, *Mausū'ah al-Fiqh al-Islāmi wa al-Qadhāyah al-Mu'ashirah*, 8:486.

³²Az-Zuhaili, 8:487.

acceptable in Shari'a, and it was legalized by the government.

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