

PROCEEDINGS OF DIVORCE FOR WOMEN ACCORDING TO FIQH AL-SHAFI'IYYAH AND POSITIVE LAW

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ABSTRACT

Divorce Delegation for Women According to Fiqh Al-Syafi'iyah and Positive Law". This study aims to analyze the position of women as recipients of wakalah in the context of divorce, especially in the practice of divorce. In the perspective of Fiqh Al-Syafi'iyah, divorce is a husband's prerogative that cannot be delegated to women. However, there are different views among scholars regarding the possibility of women becoming representatives in issuing divorce against another person's wife. Meanwhile, in positive law, women and men have the same rights to become legal representatives regardless of gender, so that women can represent their husbands in court proceedings. The research method used is descriptive-analytical with a normative-juridical and comparative approach, as well as library research utilizing various sources from fiqh books and laws. The results of the study show that in the perspective of Fiqh Al-Syafi'iyah, although women do not have the right to divorce, they can act as representatives in some cases with certain provisions. Meanwhile, in positive law, there is no prohibition for women to become legal representatives in divorce cases. The conclusion of this study is that although there are Despite the fundamental differences between Shafi'iyah Fiqh and positive law, there is a similarity in the recognition of women's rights as representatives in divorce proceedings. This research is expected to contribute to further understanding of women's roles in divorce law and their rights in the Indonesian legal system. Keywords: Wakalah Talak, Shafi'iyah Fiqh, Positive Law, Women, Divorce.

Keywords: *Wakalah, Talaq, Women, Fiqh Al-Syafi'iyah, Positive Law*

INTRODUCTION

Divorce is a right that is completely in the hands of the husband after the marriage takes place. A man after entering into a marriage contract has the right to divorce his wife three times, but this is not the case for the wife. In its application, divorce is considered valid if it is pronounced in a conscious state by a husband who is of sound mind and has reached puberty.

By saying the word talaq (such as *Th ā ll ā qtuki*) then the marriage bond between the husband and the wife is immediately severed with a single talaq. The right to pronounce talaq is attached to the person who marries her. If the right to marry a woman to be used as a wife, then the one who has the right to pronounce talaq is the man who marries her.¹

In Surah Al-Ahzab verse 49 it is explained:

عِدَّةٍ مِنْ عَلَيْهِنَ لَكُمْ تَمْسُوهُنَّ أَنْ قَبِلَ مِنْ طَلَّقْتُمُوهُنَّ ثُمَّ الْمُؤْمِنَاتِ نَكَحْتُمْ إِذَا ءَامَنُوا الَّذِينَ يَأْتِيهَا
حَمِيلًا سَرَاحًا وَسَرَّحُوهُنَّ فَمَتَّعُوهُنَّ تَعْتَدُونَهَا

¹Rahmat Hakim, *Islamic Marriage Law*, (Bandung: Pustaka Setia, 2000), p. 155.



Meaning: "O you who believe, when you marry believing women and then divorce them before you have touched them, then there is no obligation on them for you to wait for the period you ask for.

So grant them mut'ah and release them in a way that is "(Al-Ahzab: 49).²

As explained above, divorce is a man's right as a husband. Therefore, he has the right to divorce his wife himself or delegate it to someone else. A divorce delegated by a husband to someone else does not invalidate the husband's rights or prevent him from exercising them whenever he wishes. Law No. 18 of 2003 concerning Advocates explains that advocates are law enforcers with equal standing with other law enforcers. However, although they are all law enforcers, their respective roles and functions differ. While judges represent the interests of the state (the judiciary), prosecutors and police represent the interests of the government (the executive), this is where the advocate's central role lies. Advocates are not included in these circles of power.

However, advocates as law enforcers who carry out their duties and functions independently to represent the interests of the community (clients) and are not influenced by state power (judicial or executive). The duty of an advocate is to provide legal services to the community. If the requirement to become an advocate in Islamic law must be a man, in positive law there is no distinction between genders, both men and women can all become advocates, as long as the requirements are met.³

According to Indonesian positive law, male and female legal representatives are in the same status regardless of whether the woman is married or not. As a party acting on behalf of and for the benefit of the person granting the power of attorney, the person receiving the power of attorney may not do anything that exceeds his or her authority. The granting of power of attorney is not a bilateral act but a unilateral act or a unilateral agreement, so that the person granting the power of attorney can withdraw his or her power of attorney at any time without the consent of the person receiving the power of attorney.⁴

Responding to matters of representation/granting of power of attorney in carrying out legal acts, there is a provision prohibiting the granting of power of attorney due to incompetence or being deemed to be less capable of carrying out representation because it is prohibited for him to carry out the legal act itself. Just as a woman is not allowed to represent someone's marriage, either consent or qobul, because she is prohibited and does not have the right to do that herself. As the hadith states,

المراة ولا تزوج المرأة نفسها فإن الزانية هي التي تزوج نفسها (رواه ابن ماجة).⁵

²Department of Religion of the Republic of Indonesia, *Al-Qur`an and its Translation*, (Bandung: Diponegoro, 2008), p. 675.

³Sartono, Bhekti Suryani, *Basic Principles of the Advocacy Profession*, First Edition (Jakarta: Smart World. 2013), p. 4.

⁴A. Rahmad Rosyadi, *Advocates in the Perspective of Islam and Positive Law*, (Jakarta: Ghalia Indonesia, 2003), p. 80

⁵Al-Hafidz Abi Abdillah Muhammad bin Yazid, *Sunan Ibnu Majah*, Juz. I, (Beirut: Dar al-Fikr,tt), h. 606.



Meaning: "A woman is not allowed to marry another woman; and also a woman is not allowed to marry herself. Because only a woman who commits adultery marries herself." (Narrated by Ibn Majah).

In agreement with the above statement, al-Syarbini considers that a woman who is given power of attorney in a marriage contract is not legally valid, both in *ijab* and *qabul*. He even added that it is not valid to make a woman's representative in the matter of *ruju*.⁶

Al-Jaziri stated that a representative is a person who is allowed to do what is ordered by the person who represents, in the sense that all actions that can be done for himself can be done to others. Another condition is that a representative should be a specified person.⁷ Musa Shalih Musyaraf explained that the right to divorce rests with men because men are more likely to desire the longevity of a marriage (husband-wife relationship). Ahmad Al-Shahari echoed this sentiment in his book, *Al-Ahwal Al-Syakhsyiyah*, explaining the secret of divorce, which is a man's right. He stated that women were created with completely different instincts and characteristics than men.⁸

The Shafi'i school of thought provides a description of the requirements for a representative who is given power of attorney. This requirement applies to the person granting the power of attorney, namely by considering the side where he has the right to do for himself what he wants to delegate to another person. This requirement also applies to the representative who is given power of attorney, namely that he is included in the person who has the right to do for himself what he wants to delegate to him.⁹ Based on the above information, the author attempts to research and discuss it with the title: "**Divorce Wakalah in Women According to Shafi'iyah Fiqh and Positive Law**."

RESEARCH METHODS

Referring to the above study, the author used several relevant methods to facilitate and support the collection and analysis of data needed for writing this thesis. In this thesis, the author used the following methods:

1. Types of research

The type of research in this thesis is library research, which is research that utilizes libraries to obtain research data.¹⁰ In this study, the author uses books and manuscripts as data sources, especially regarding divorce and related matters.

This research is *descriptive-analytical-comparative in nature*, meaning the author attempts to describe *the wakalah talak*, then analyzes and compares it from the perspective of *Shafi'iyah fiqh* and positive law. In solving this problem, the author uses a *normative-juridical approach*.

⁶Syamsuddin al-Syarbini, *Mugniy al-Mukhtaj*, Juz. III, (Beirut: Darl Kutub al-Ilmiyah, tt), h. 233.

⁷Abdurrahman al-Jaziri, *Fiqh 'Ala al-Mazāhibu al-Arba'ah...*, h. 160.

⁸Sayyid Muhammad Munir, *'Idadul Maratil Muslimah*, (Surabaya: Pustaka Jaya), h. 50-51.

⁹Abdurrahman al-Jaziri, *Al-Fiqh 'Ala Mazahib Al-Arba'ah*, (Beirut: Dar Al-Fiqr, 1999), h. 132.

¹⁰Sutrisno Hadi, *Metodologi Penelitian Research*, (Yogyakarta: Andi Offset, 1994), h. 9.



- a. *normative* approach is one that views a problem from a formal legal or normative perspective. Formal legal refers to the relationship between halal and haram, permissible and impermissible, and the like. Normative refers to all the teachings contained in *the texts*. ¹¹In this thesis, this approach is used to understand and further explore the authority of lawyers to issue divorce, based on the legal norms used by *Shafi'i scholars*.
- b. The legal approach is one that utilizes applicable legislation. ¹²In this thesis, the author uses Law No. 18 of 2003 concerning Lawyers, and then attempts to find a correlation between the two.

2. Data source

In qualitative research, the primary data sources are words and other data such as documents and other materials. The data sources in this study are divided into two parts: *primary* (main) data sources and *secondary* (supporting) data sources.

The primary data sources that the author used in writing this thesis are:

- a. Various books of *fiqh* Shafi'i school of thought, such as the book *al-Ma h'allī (Kanz al-Rāghibīn 'alā Syar h_Min h_āj al-Thālibīn)*, *Fat h_al-Wahāb*, *H_āsyiah al-Bujairimī 'alā al-Khāthib*, and several other books in the Imam *Shafi'i school of thought*.
- b. Law Number 18 of 2003 concerning Lawyers.

The secondary data sources that the author used in writing this thesis are the Compilation of Islamic Law (KHI), Law Number 1 of 1974 concerning marriage and books that are relevant to the author's discussion.

3. Data collection technique

In data collection efforts, researchers use the documentation method, namely by searching for data from sources in the form of documents, facts, and notes. ¹³The data collection method in literature studies or documentation is carried out by recording files or documents related to the material being discussed. ¹⁴Suharsimi Arikunto explains that the documentation method is by searching for data on things or variables in the form of notes, transcripts, books, inscriptions, and meeting minutes.¹⁵

4. Data Analysis Techniques

The data analysis technique that the author used in compiling this thesis was *qualitative analysis* with an *inductive and comparative instrument approach*.

- a. *analysis*, namely analyzing the products of the thoughts of the scholars of *Islamic jurisprudence al-Shafi'iyah* regarding the wakalah talak in women and Law No. 18 of 2003 concerning Lawyers. Then, a comprehensive conclusion is drawn.
- b. *Comparative analysis*, namely analyzing data of a different nature by

¹¹Abuddin Nata, *Methodology of Islamic Studies*, (Jakarta: Raja Grafindo, 2008), p. 34.

¹²Khoiruddin Nasution, *Introduction to Islamic Studies*, First Edition, (Yogyakarta: ACAdemia Tazzaafa, 2004), p. 141.

¹³Sutrisno Hadi, *Research Methodology*. (Yogyakarta: UGM Publishing Foundation, 1996), p. 36.

¹⁴Soerjono Sukanto, *Sociology: An Introduction*. (Jakarta: Raja Grafindo, 2005), p. 66.

¹⁵Suharsimi Arikunto, *Research Procedures*. (Jakarta: Remaja Rosdakarya, 1997), p. 231.



comparing the two perspectives and then looking for a correlation between the two.¹⁶

5. Data validity

To obtain valid findings and interpretations, it is necessary to examine their credibility by using techniques such as extending the research period, triangulation (using several sources, methods, researchers, theories), holding discussions with colleagues, and tracking the suitability of the results. Furthermore, it is necessary to check whether they can be transferred to other settings (*transferability*), their dependence on the context (*dependability*), and whether or not they can be confirmed with the source (*confirmability*).¹⁷

6. Writing Techniques

Then, regarding writing techniques, after secondary data and primary data have been accumulated systematically, in order to fulfill the requirements for writing this thesis, the author, in compiling this thesis, both the framework and the written text, is guided by the book "*Guidelines for Writing Thesis Proposals and Thesis*". Ummul Ayman Pidie Jaya Islamic College of Science in 2018 "

A. Literature review

Research on divorce has been conducted by previous researchers, such as the results of research conducted by Mustafa Mahmud, entitled *Iqrar Thalaq in Front of the Sharia Court* (Analysis of the Views of Dayah Ulama in Tangse District, Pidie Regency on the Implementation of Marriage Law No. 1 of 1974). He concluded that Marriage Law No. 1 of 1974 has not been applied well in the lives of the people of Tangse District, Pidie Regency.

This is evident in the rarity of residents performing the *iqrar talaq* (divorce declaration) before the Sharia Court. Generally, Islamic scholars (ulama) in Tangse sub-district, Pidie Regency, support the implementation of *the iqrar talaq process* before the Sharia Court. In this regard, the ulama do not reject Marriage Law No. 1 of 1974, as it aims to ensure legal certainty. Many husbands perform divorces at home but never report it to the Sharia Court.¹⁸

Research on divorce has also been conducted by Zuhri A. Gani, namely *Denial of Divorce* (comparative study between *Fiqh Syāfi'iyah* and Positive Law). In this research, he concluded that according to *Fiqh Syāfi'iyah*, denying the divorce agreement will lead to one divorce being imposed on the wife, and that will happen automatically. Meanwhile, according to Positive Law, denial of the divorce agreement will also lead to one divorce being imposed on the wife, but with the provision that the wife must submit the matter to the Religious Court /Shari'iah Court . After that, the judge will decide on the one divorce agreement accompanied by payment of ' *iwadh* ' by the wife to the court according to the

¹⁶M. Burhan Bungin, *Qualitative Research on Communication, Economics, Public Policy and Other Social Sciences*, 1st Edition, 1st Edition, (Jakarta: Kencana, 2007), p. 153.

¹⁷Suharsimi Arikunto, *Research Procedures ...*, p. 239.

¹⁸Mustafa Mahmud, *Iqrar Thalaq in Front of the Sharia Court (Analysis of the Views of Dayah Ulama in Tangse District, Pidie Regency on the Implementation of Marriage Law No. 1 of 1974)* , Thesis, SAS, STAI Al-Aziziyah, 2010, unpublished.



applicable provisions. The difference between the two, according to *Fiqh Syāfi'iyah* fell by itself (in the form of something that was accepted), whereas according to Positive Law, divorce fell with the decision of the Judge in Court.¹⁹

Similar research has also been conducted by Muhammad Qudrah, namely, " *The Position of Witnesses in Divorce Cases According to the Compilation of Islamic Law and Shafi'iyah Fiqh* ." In this thesis, he concluded that According to the Compilation of Islamic Law, in resolving divorce cases, the plaintiff must bring witnesses to court; the court can only accept the lawsuit after hearing the witnesses' testimony. Meanwhile, in Islamic jurisprudence (*fiqh*), According to *Shafi'i jurisprudence* , resolving divorce cases where the root of the problem is *khulu'* does not require witness testimony. Therefore, when a husband performs *khulu'* with his wife, it is not required to be in front of witnesses, which in *Shafi'i jurisprudence* does not mention the presence of witnesses, because as soon as the husband utters *the shighat* (phrase of *khulu'*), the husband can be declared to have legally performed *khulu'*. If we observe the entire explanation above, both the discussion in the Compilation of Islamic Law (KHI) and *fiqh Syāfi'iyah* , then between the two there is a fundamental difference, namely the witness's role is not in the main issue, but the witness's role is in the *furū'* of the issue, namely ' *iwadh* or compensation.²⁰

It can be said that no previous research has specifically discussed the *wakalah talak* (religious divorce) for women according to *Shafi'i jurisprudence* and positive law. Therefore, it is deemed necessary to conduct specific research on this issue by compiling a thesis entitled " *Wakalah Talak for Women According to Shafi'i Jurisprudence and Positive Law* ."

RESULTS AND DISCUSSION

A. View *Fiqh al-Syāfi'iyah* Regarding the Position of Women as Recipients of *Wakalah Talak*

In *Fiqh al-Syāfi'iyah* was taught about the form of delegating affairs to other parties, which later became known as the term *wakalah* . That is, one form of action that contains contracts and agreements in which each party must fulfill their respective rights and obligations to implement the demands of the contract and agreement.

According to *al-Syāfi'iyah Fiqh* , regarding the role of a woman to be a representative of a person to divorce his wife, there is a conflict of opinion among fellow *al-Syāfi'iyah scholars* , as contained in the concept of *perwakalah* in the book *al-Muhadzdzab* by Abi Ishaq al-Syairazi, They differed on the woman's authorization to divorce another. Some of them said it is f. Some of them said it is permissible, just as it is permissible to authorize her to divorce herself²¹.not permissible because she does not have the power to divorce

¹⁹Zuhri A. Gani, *Denial of Taklik Talak (comparative study between Shafi'iyah Fiqh and Positive Law)* , Thesis, SAS, STAI Al-Aziziyah, 2009, not published.

²⁰Muhammad Qudrah, *The Position of Witnesses in Divorce Cases According to the Compilation of Islamic Law and Shafi'iyah Fiqh* , Thesis, SAS, STAI Al-Aziziyah, 2012, unpublished.

²¹Abi Ishaq asy-Syairazi, *al-Muhadzdzab fī Fiqhi al-Imam al-Syāfi'ī* , Juz. II, (Beirut: Dar al-Fikr, 2000), h. 162.



Artinya: "The pendulum for the ulama mengenai pemberian *wakalah* kepada perempuan dalam menjatuhkan talak terhadap orang plain, sebahagian ulama berpendapat boleh memberikan kuasa pada persoalan talak perempuan, sedangkan sebahagian yang plain tidak boleh karena perempuan "Tidak memiliki hak talak."

Al-Jaziri stated that a representative is required to be a person who is allowed to do the actions as ordered by the person representing, in the sense that all actions that are allowed to be done for oneself can be done to others. Another condition is that a representative should be a specified person.²² One of the bases used as legitimacy in a representation contract is that the person who is the representative or the one representing is able to take legal action against himself, and the representative is able to work in accordance with the provisions set by the person representing. Based on the statement above, the presence of women in representation to represent divorce to others or to be a legal representative is a matter that is disputed by scholars.

Divorce is the sole right of a man (husband), *Fiqh al-Syāfi'iyah* provides several reasons for divorce being the husband's prerogative. This is because men are ambitious to preserve their marriage, which involves significant expense. Therefore, if they decide to divorce and remarry, it will require significant financial resources. Furthermore, they are responsible for providing their wives with a living and a divorce gift. Furthermore, men are more rational and patient in dealing with their wives' temperaments, making it less difficult for them to pronounce the word "talaq." Conversely, women are quicker to anger, more hasty, and less likely to bear the burden of divorce.

Musa Shalih Musyaraf added that the right to divorce rests with men because men are more likely to desire the longevity of a marriage (husband-wife relationship). Ahmad Al-Shahari echoed this sentiment in his book, *Al-Ahwal Al-Syakhsyiyah*, explaining the secret of divorce, which is a man's right. He stated that women were created with completely different instincts and characteristics than men.²³

Women are inherently overly emotional. This trait is commendable in some ways, encouraging the kind and affectionate behavior they long for, from a patient mother who consistently nurtures and provides guidance. However, in other situations, it can lead to disaster. When angry, even a trivial matter can be viewed as serious, even leading to brutality. They are less able to think through the consequences, whether they are harmful or not, beneficial or not. And, if a woman has the right to divorce, it will certainly be driven by instinct. She thinks that this will bring happiness, but often what she presents is disaster. She added that this doesn't mean men don't have feelings, but rather that this is a virtue of human

²²Abdurrahman al-Jaziri, *Fiqh 'Ala al-Mazāhibu al-Arba'ah...*, h. 160.

²³Sayyid Muhammad Munir, *'Idadul Maratil Muslimah*, (Surabaya: Pustaka Jaya), h. 50-51.



nature.²⁴

Despite the above reality, the phenomenon of granting power of attorney to another person to act as one's representative is commonplace, even in marriage cases. This phenomenon can be found in Religious Courts, which are the institutions authorized to resolve marriage cases. The majority of files received by Religious Courts for processing involve marital disputes, including divorce petitions and lawsuits.

This encourages the involvement of others in disputes, as a way to streamline the process and reduce time. For example, a lawyer, according to his or her abilities, is required to act as a representative for the case assigned to him or her.

In divorce cases, a representative receives a form of power of attorney through *taukil* (a term in Islamic jurisprudence), with the sole responsibility being to provide assistance, defense, and legal consultation services, in accordance with the provisions assigned to him. He is not required to exercise any authority beyond his jurisdiction, such as accepting a *wakalah* (divorce) decree, which is a male prerogative.

Regarding representatives acting as power of attorney for the declaration of divorce, *Shafi'iyah Islamic jurisprudence*, based on one opinion, states that a woman is not legally authorized to act as a representative for a man (husband) in divorcing his wife. Therefore, if a divorce is pronounced, it is invalid (null). This means that a woman is not legally authorized to act as a representative for or on behalf of another person. This reasoning stems from the fact that women are considered to have no authority and are incompetent in dissolving their own marriage ties. This is because women are unable to dissolve their own marriage ties.²⁵

Al-Qurtubi in *Bidayāt al-Mujtahid* states:

Conditions of the agent: He should not be prohibited by Sharia from the actions for which he was authorized. It is not valid to authorize a boy, an insane person, or a woman to conclude a by authorizing her to „marriage contract, neither directly nor through an intermediary, i.e.²⁶ conclude the marriage contract

Artinya: “Syarat wakil itu harus orang yang secara yuridis tidak terhalang bertindak hukum dalam urusan yang dikuasakan kepadanya. Karena tidak sah wakil terhadap anak yang belum dewasa, orang gila dan perempuan, baik itu untuk namanya sendiri, maupun “Untuk nama suami pemegang akad pernikahan.”

The reasons above contain the statement that women do not can be a representative of her husband or another person to say the vows divorce. Because women

²⁴Muhammad Kamil, *Fiqh Wanita*, (Semarang: As- Syifa, tt), h. 390.

²⁵Abi Ishaq asy-Syairazi, *al-Muhadzdzab fī Fiqh al-Imam asy-Syīfī* ..., h. 162.

²⁶Abdul Walid Muhammad Al-Qurtubi, *Bidayāt al-Mujtahid*, (Beirut: Dar al-kutub al-Ilmiyah, tt), h. 301.



are considered unable to untie the knot marriage. Meanwhile, the marriage bond can only be broken if it is the husband who has the initiative to sever the marriage ties.

This statement seems to depict that the husband has a greater role in take a stand in his marriage. However, Islamic law allows women to file for divorce, where this term known as *khulu'*. This indicates that women also have the right to release and break the bonds of marriage.

Although the right to divorce rests with the husband, Islam still allows women the right to file a divorce petition, which indirectly forces the husband to relinquish his word. In other words, a woman can take legal action with her husband's consent.

On the other hand, the *jurists* classify the giving of *wakalah* by the husband to someone else for his wife through three ways, among others:

- Taukīl*, i.e. the husband gives power to another person to act to divorce his wife, such as by saying "I delegate to you in divorcing my wife".
- Tafwid*, that is, handing over the affairs of divorce to the wife, so that she can divorce herself.
- Risālah*, which is the transmission of the word of divorce to a messenger, such as a husband to another person: "Go to Fatimah, and tell her that your husband says to you: choose yourself."²⁷

This shows that there is justification regarding the ability of a husband to hand over the power to another person to impose divorce, even on his wife. This indication has implications for a woman's ability to act as a representative in a divorce case.

In contrast to the above-mentioned *jurists*, *Imam Hanafī* stated that women may act as representatives in the declaration of divorce, and the divorce rendered is legally valid. This group also permits *wakalah* in the form of *tafwīd* divorce, where the husband grants his wife the right to divorce herself, and the divorce rendered is legally valid. This stems from his view that women may be witnesses in divorce cases and that women may take legal action to dissolve their marriages, as well as because women have the power to free slaves.²⁸

Sementara itu Imam al-Nawawī dalam kitabnya *Raudhah al-Thālibin* menyatakan mengenai keberadaan perempuan sebagai wakil dalam perkara perceraian:

he most correct It is permissible to authorize a woman to divorce someone else, according to t²⁹.opinion, just as it is permissible for her to divorce herself

Artinya: "Menurut pendapat yang kuat, menjadikan wakil terhadap orang perempuan dalam menalak orang lain adalah sah sebagaimana ia sah menalak dirinya sendiri."

This will be followed by Imam al-Rafī'i:

It is permissible to delegate a woman to divorce another person's wife, according to the more correct of the two opinions. It is also permissible for a husband to delegate the divorce of his

²⁷Wahbah al-Zuhaili, *al-Fiqh al-Islam wa Adillatuhu*, Juz. IV, (Egypt: Dar Al-Fiqr, 1997), p. 392.

²⁸Abdurrahman al-Jaziri, *Fiqh 'Ala al-Mazāhibu al-Arba'ah* ..., p. 114.

²⁹Abi Zakariyyah Yahya Al-Nawawī, *Raudhatu al-Thālibin* ..., h. 93.



³⁰. wife to her

It means: "According to the strong opinion of both parties, it is permissible to give a woman the power to divorce another person's wife just as it is permissible for a husband to give his wife a divorce to a woman."

Meanwhile, Khatib Syarbaini stated that the existence of women as representatives in divorce cases is an exception, namely the form of representation acts outside the general habit, as the expression says:

Facebook: ، ومنها توكيل المرأة في طلاق غيرها.³¹

This means: "A person who is not authorized to act directly for himself is also not authorized to be appointed as a representative. There are several exceptions to this, one of which is granting a woman *the power to divorce another person's wife*."

Based on the explanation above, a woman can legally be appointed as a representative. in divorce cases, because she legally divorced herself in the matter of *tafwid* talak. This statement indicates that women are allowed to participate in marriage matters, in divorce disputes. It also does not rule out the possibility that women, in their position as representatives in divorce, can represent their husbands in the reading of the talak vows. Although, in essence, the existence of women as representatives of the talak vows is a practice that can be said to be relatively new, because according to custom, it is not yet reflected in real society.

Regarding the opinion that allows the act of delegating the divorce to another party, provided there is the husband's consent, it turns out that there are no specific provisions regarding who is allowed to be a representative in the divorce declaration, but only in general it is permitted to delegate the divorce to another party. This permission does not imply any priority regarding who has the right to be a representative, whether male or female, this shows that there is an opportunity if both are equally allowed to represent the divorce declaration.

Because the nature of the statement does not indicate any specific provisions, this indicates that a lawyer is permitted to act as a representative for the divorce declaration, in other words, as a substitute for the husband in reciting the divorce declaration to the wife.

On the other hand, it is stated that a person has the authority to be a representative of another person, including: *First*, it is stipulated that the person who represents, including a person who is sane, if he is a mad person or an idiot or a child who cannot differentiate, then the representative agreement is invalid as stated in the book *Fat hu al-Wahāb Syar h Manhaj at-Thullāb*:

³² God willing

³⁰al-Imam Abi Qasim 'Abd al-Karim Ibn Muhammad al-Rafi'i, *Fat hu al-'Aziz al-Syar hu al-Wajiz* , Juz. II, (Maktabah Syamilah), p. 17.

³¹Khatib Syarbaini, *Mughni Al-Mu h crown* ..., h. 299.



This means: "Indeed, it is not valid to represent a child, a mad person, or a person who is intoxicated."

This certainly does not conflict with the psychological condition of a representative, because both physically and mentally it supports the quality and capabilities, in carrying out his functions and duties. *Second*, a representative is required to be a person who is permitted carry out actions, as ordered by the representative, for himself Alone. This means that all actions that can be done for him, then he can do it for other people. Another requirement is that there should be a representative is a designated person.³³

Looking back at the second requirement, which provides an overview of the permissibility of granting power of attorney provided the person is capable of taking legal action against themselves, provides another view, that in reality, women, whoever they are, cannot be the power of attorney to pronounce the divorce vow from the man. However, this can be answered by the statement of Khatib Syarbaini in his book *Mughnī Al- Muh̄taj*, as the author has mentioned above, namely that it is permissible because it is an exception.³⁴

In relation to the above conditions, as a representative, his/her working methods are limited by the demands of the person representing him/her, without reducing or exaggerating, basically only limited to the matter that is the object disputes, for example in divorce matters. Of course, as a person who has rights as a legal subject, then this also applies to a representative.

Regarding the statement that a representative should be a designated person. It is logical and natural to appoint someone as a representative to help resolve a case, a representative or power of attorney is given a trustee is a person who has acceptability, quality and capability which is beyond doubt, because this is the measure that is used as a benchmark.

B. The Position of Women as *Wakalah recipients* Divorce According to Positive Law

The term *wakalah*, well-known in *Shafi'i jurisprudence*, which contains an agreement between a representative and a *muwakkil*, later evolved into a more familiar meaning, namely the term attorney or lawyer, whose function is to provide legal defense, or legal advisor. The difference in these terms does not have a significant difference, but refers to the similarity of function, both actively, namely when a lawyer provides defense, including when exercising power of attorney in resolving a case. While passively, namely when a lawyer only provides certain legal advice, either verbally or in writing.³⁵

A lawyer appointed to assist in resolving a problem is required to exercise

³²Zakariya al-Ansariy, *Fat h̄u al-Wahāb Syar h̄Manhaj at-Thullāb* ..., p. 372.

³³Khatib Syarbaini, *Mughnī Al-Mu h̄taj* ..., p. 299.

³⁴Khatib Syarbaini, *Mughnī Al-Mu h̄taj* ..., p. 299.

³⁵Abdul Aziz Dahlan, *Encyclopedia of Islamic Law*, Volume VI, (Jakarta: Ikhtiar Baru Van Hoeve, 1996), p. 193.



professionalism, as this embodies the quality, acceptability, and capability of a legal expert. ³⁶A lawyer's role in the courts is not much different from their function and duties as a representative, namely to strive to optimally meet a client's demands, by providing assistance, from the submission of application documents to the completion of the litigation process, even until the application is granted and a final decision is made.

Beyond that, a lawyer is a profession that provides legal services to the public. In carrying out their duties, they can act as a companion, legal *advisor*, or attorney on behalf of their clients. A lawyer is a noble profession because they can act as mediators for disputing parties, particularly in civil cases, which are the absolute competence of the judicial system. They can also act as facilitators in seeking the truth and upholding justice, defending human rights, and providing free and independent legal representation.³⁷

The transfer of personal affairs to another party for and on their behalf is known in positive law as the Grant of Power of Attorney. The definition of power of attorney in Indonesian terminology is the authority over something to determine (rule, represent, manage, and so on) something, or the person who is entrusted with the authority.³⁸

According to positive law, the definition of power of attorney is as stated in Article 1792 of the Civil Code, which states, Granting power of attorney is an agreement by which a person gives power to another person, who accepts it for and on his behalf in carrying out said affairs.³⁹ Subekti defines power as an agreement where one party give an order to another party to do something legal action, which order was received recently.⁴⁰

Furthermore, in the judicial system, parties intending to litigate in court do not have to handle their own affairs. However, they may be assisted or represented by their attorney if desired. As stipulated in Article 123 of the HIR, which reads:

"If desired, both parties can be assisted or represented by a power of attorney, who is authorized to do so by a special Power of Attorney, unless the person granting the power of attorney is present, the plaintiff can grant the power of attorney in a letter of request signed by him and entered according to the first paragraph of article 118 or if the lawsuit is made orally according to article 120, then in this last case, such must be stated in the notes made in this lawsuit letter."

The ability to use power of attorney in proceedings in judicial institutions, also based on articles 35 and 37 of Law No. 14 of 1970 which states that:

- a. Every person involved in a case has the right to obtain legal assistance.
- b. In providing legal assistance, legal advisors help facilitate the resolution of cases by upholding *pencasila*, law and justice.⁴¹

³⁶Luhut M. Pangaribuan, *Lawyer and Contemp of Court* ..., p. 14.

³⁷Luhut M. Pangaribuan, *Lawyer and Contemp of Court* ..., p. 15.

³⁸Department of Education and Culture, *Big Indonesian Dictionary*, (Jakarta: Gema Insani Press, 2002), p. 533.

³⁹Tjitrosudibyo and Subekti, *Civil Code*, (Jakarta: Pradya Paramita, 1994), p. 382.

⁴⁰Subekti, *Principles of Civil Law*, (Jakarta: Intermasa, 1994), p. 167.

⁴¹Abdul Manan, *Application of Civil Procedure Law...*, p. 452.



In line with the definition of legal power above, a lawyer's function is:

- a. As a delegate who must act for the person who gave the power of attorney
- b. As a representative who acts for and on behalf of the person being represented
- c. Helping people who ask for help

In the judicial system, legal services are provided to assist parties in court proceedings. They are commonly known as advocates, solicitors, legal advisors, and so on. They all play a role in providing legal services to their clients. These services can include legal consultations, legal aid, exercising power of attorney, representing, assisting, defending, and carrying out other legal actions in the client's legal interests.⁴²

In court proceedings, legal counsel functions:

- a. Represent fully if the principal is not present at the hearing.
- b. Accompany the granting party if both are present at the trial.⁴³

The existence of a lawyer or legal representative not only has an important role for people who need legal assistance, more than that, a lawyer or legal representative helps and makes it easier for the judge to carry out the trial process, because with the presence of a legal advisor, the litigation process in court will be more appropriate and in accordance with the provisions stated in Article 4 paragraph 2 which states: The trial is carried out simply, quickly and at low cost.

Apart from that, he can act as an attorney for the parties to the case or representatives of the plaintiffs/applicants and defendants/respondents are a person which fulfills the following requirements, among others:

- a. Must have a special power of attorney in accordance with Article 123 paragraph (1) HIR or article 147 paragraph (1) Rbg.
- b. Appointed as a proxy or representative in the record of the lawsuit when filed orally as stated in article 123 paragraph (1) HIR or article 147 verse (1) of the Rbg.
- c. Appointed as a power of attorney or representative in the Letter of Claim.
- d. Appointed to the plaintiff as a power of attorney/representative in the hearing as follows referred to in article 123 paragraph (1) of the HIR or article 147 paragraph (1) of the Rbg.
- e. Meets the requirements in the Minister of Justice Regulation No. 1 of 1965 dated 28 May 1985 Jo Decision of the Minister of Justice No. 23 Jo 14/2/11 dated October 7, 1965 About Pokrol.
- f. Has been registered as a lawyer or practicing lawyer.⁴⁴

There are several types of power of attorney that are used to help the parties litigation in court, namely:

- a. Lawyer
- b. Practicing Attorney
- c. Lecturer from LBH Faculty of Law

⁴²Drafting Team, *Law No. 18 of 2003 concerning Advocates*, Article 1, (1 and 2).

⁴³Mukti Arto, *Civil Case Practice in Religious Courts*, (Yogyakarta: Pustaka Pelajar, 2003), p. 54.

⁴⁴Raihan A. Rasyid, *Religious Court Procedure*, (Jakarta: Raja Grafindo Persada, 1995), pp. 61-62.



- d. ABR legal officer
- e. Incidental Power
- f. Prosecutor.⁴⁵

Meanwhile, those who can provide legal aid in Religious Courts, as stipulated in Article 5 of Minister of Religion Regulation No. 1 of 1983, include: lawyers, legal counselors, and special attorneys. To become a legal aid provider, the following requirements must be met:

- a. Indonesian citizens
- b. Have faith in God Almighty
- c. Embracing and practicing Pancasila
- d. Embracing Islamic law
- e. Have good morals
- f. Honest and fair
- g. The minimum age is 21 years, as stated in article 6 of Permenag RI No. 1 Year 1983 Regarding the Provision of Legal Aid in Religious Courts.⁴⁶

As for the requirements as a lawyer as listed in article 3 paragraph (1) of Law No. 18 of 2003 About Lawyers which reads as follows:

- a. Citizens of the Republic of Indonesia
- b. Living in Indonesia
- c. Not have the status of a civil servant or State official
- d. At least 25 years old
- e. Bachelor of Laws degree
- f. Pass the exam held by the legal organization
- g. Internship for at least 2 years continuously at a lawyer's office
- h. Never been convicted of a crime that is punishable by 5 years in prison
- i. Behave well, be honest, be responsible, be fair and have high integrity.⁴⁷

From the various regulations above, it is clear that lawyers play a significant role in the process of resolving disputes through the courts. Therefore, this researcher will provide a description of the practice of lawyers in divorce cases, which occurs within the Religious Courts or the Sharia Courts. This is certainly in accordance with the various regulations mentioned above.

Under Indonesian law, divorce disputes are categorized as civil matters. That is, they are legal matters between one person and another. As per the principles of civil law, a person who goes to civil court does not have to resolve the matter; they can appoint an attorney to act in their stead. Therefore, in a divorce case, the petitioner (husband) can appoint an attorney to divorce his wife (in cases of divorce by talaq).

According to Law No. 1 Year 1974 article 38 mentions that the dissolution of marriage can be caused by, among other things, because: a. Death, b. divorce, c. by court order. As for the termination of marriage due to divorce, it can only be done in front of a court session, after the court in question has tried and failed to reconcile both parties. Law No. 7 of 1989 clearly differentiates the divorce on 2 types, namely:

- a. Divorce by divorce, namely divorce at the will of the Muslim husband who wants to divorce his wife by submitting an application to the Court to hold a

⁴⁵Mukti Arto, *Civil Case Practice in Religious Courts ...*, p. 51.

⁴⁶Mukti Arto, *Civil Case Practice in Religious Courts...*, p. 63.

⁴⁷Article 3 paragraph (1) of Law No. 18 of 2003 concerning Lawyers.



hearing to witness the declaration of divorce.

- b. Divorce suit, that is divorce against the will of the wife against her husband by filing a divorce suit in court.

The dichotomous classification above is based on the active nature of submitting a divorce application or lawsuit to the court, and is a typical husband's status according to Islamic law where the husband has the right to divorce his wife.

In practice, in religious courts, divorce proceedings are no different from civil proceedings in general. It is not absolutely necessary for the petitioner, plaintiff, and respondent, or defendant, to attend the hearing *in person*. Both the petitioner, plaintiff, and respondent, or defendant, may be represented by an attorney. This must be supported by a special power of attorney.

The resolution of divorce cases in religious courts goes through two stages, namely:

- a. The case examination stage until the case is decided by the panel of judges.
- b. The trial stage is to witness the divorce vow.

The procedure for examining divorce cases using power of attorney is the same as the procedure for examining cases submitted and attended directly by the parties. This means that the examination of the case must go through the existing stages of the trial. The stages of the trial are:

- a. The level of identity inspection of the parties
- b. Stage of peace efforts
- c. If the reconciliation effort fails, then continue with the reading of the lawsuit, then continue with the reply, rejoinder, rerejoinder, rejoinder and so on.
- d. Level of proof
- e. Conclusion level
- f. Decision stage.⁴⁸

As a note, in the stage of checking the identity of the parties, if both parties use the services of a power of attorney, then in this stage the judge also checks the identity of the power of attorney and the power of attorney as proof of appointment, because the application or lawsuit can fail midway, only because the power of attorney is not perfect. The formal requirements for the validity of a special power of attorney, generally applicable to handling divorce cases in court, are guided by the provisions of Article 123 HIR paragraph (3) Article 147 Rbg Jo. MA Circular Letter No. 01/1971 dated January 23, 1971, namely :

- a. Must be in written form
- b. State the identities of the parties to the case
- c. State the main points of the dispute
- d. Detailing the limits of authority that can be exercised by the power of attorney.⁴⁹

In principle, the divorce proceedings, although voluntary, are similar to those of a divorce suit. After the petition is filed, the petition is reviewed, and within a maximum of

⁴⁸Umar Said, *Position and Procedural Law of Religious Courts in Indonesia*, (Surabaya: Cempaka, 2002), p. 143.

⁴⁹Muhammad Abdul Kadir, *Indonesian Civil Procedure Law*, (Bandung: Citra Aditya Bakti, 2000), p. 72.



30 days, the panel chairman and the appointed judge set a hearing date to hear explanations from the Petitioner and Respondent. Mediation is then attempted, and the parties must be present in person; they cannot be represented by their respective attorneys. If this is successful, the petition is withdrawn; if unsuccessful, the hearing proceeds. Ultimately, the court will issue a ruling granting the petition, through the execution of a divorce oath, which is scheduled for a specific time. A divorce decree is not legally binding unless the petitioner (husband, in a divorce case) is witnessed, where the petitioner (husband, in a divorce case) pronounces the divorce oath before the panel of judges. The panel of judges then issues a ruling, and from that date, the marriage between the two is dissolved until the ruling becomes legally binding.⁵⁰

After the decision has permanent legal force, the Religious Court then sets the date for the hearing to witness the divorce pledge in a "determination" by summoning the parties (their representatives) to attend the hearing, after which this determination cannot be appealed or cassated.

At the stage of the divorce oath witnessing trial, the law determines that both litigants must appear in person at the trial, as in a trial. However, if the applicant cannot attend the trial in person, the law provides a solution by opening the possibility for the applicant to appoint a proxy with a special power of attorney, which is made in the form of an authentic deed. Similarly, the defendant can also appoint a representative, but the absence of the wife or her legal representative does not affect the trial, because the divorce oath can be pronounced by the husband with or without the wife present.

Thus, the law provides the possibility for a power of attorney to pronounce the oath of divorce. However, in order for a power of attorney to have the quality to pronounce the oath of divorce, it must be based on a special power of attorney in the form of an authentic deed. These provisions are regulated as in Article 70 of the Religious Court Law No. 7 of 1989 which reads:

- 1) After the determination has permanent legal force, the Court determines the date of the Divorce Pledge Testimony Hearing, by summoning the husband and wife to attend the hearing.
- 2) In that meeting, the husband or his representative who is specifically authorized in an authentic deed to pronounce the oath of divorce attended by the wife or her representative.
- 3) If the wife has made the summons legally or properly, but does not come to appear in person or does not send her representative, then the husband or his representative can pronounce the oath of divorce without the presence of the wife or her authority.

Practice in Religious courts states that this special letter Apart from being in the form of an authentic deed, the wording also clearly indicates the power of attorney to pronounce the vow of divorce, even the words of the vow of divorce are written complete in the power of attorney in question. This is intended to mean that the power of attorney

⁵⁰Mukti Arto, *Civil Case Practice in Religious Courts* ..., pp. 220-221.



This special provision is legally valid, because these two elements are requirements formal validity of power of attorney. If one of the elements is not fulfilled, it will result in on the inability of a power of attorney to pronounce the divorce vow.

Law No. 18 of 2003 concerning Lawyers does not specify any gender requirements for lawyers conducting court proceedings. Similarly, Minister of Religion Regulation No. 1 of 1983 concerning the Provision of Legal Aid in Religious Courts does not prohibit women from representing parties in court.⁵¹

Therefore, it can be concluded that, from the perspective of religious court procedural law, a person who meets the requirements to practice as an attorney in court, particularly in divorce cases, can be appointed as an attorney or representative for the applicant (husband), both during the application submission stage, the litigation process, and the witnessing of the divorce declaration. This appointment must be accompanied by a special power of attorney.

Thus, a woman appointed as an attorney can act for and on behalf of her husband, in assisting in resolving the petitioner's case, in accordance with the petitioner's (husband's) demands. The legal action taken by the attorney in this divorce case is equal and equivalent in value to the action taken by the husband himself. The description above implies that the attorney/attorney, does not rule out the possibility of being authorized to pronounce the divorce vow on behalf of the husband, if this falls within his authority as stated in the power of attorney.

C. Similarities and Differences regarding *Wakalah* Divorce in Women Between *Fiqh al-Syafi'iyah* and Positive Law.

1. Equality

Based on the explanation above according to the view of *fiqh al-Syafi'iyah* and positive law regarding the *wakalah* talak for a woman, there are similarities between the two, that according to *fiqh al-Syafi'iyah* a woman is legally appointed as a representative. In divorce cases, as she is legally entitled to divorce herself in the case of *tafwid* talaq. Although, in essence, the existence of women as representatives in issuing divorces is a relatively new practice, as it is not yet reflected in society according to custom.

Meanwhile, according to positive law, regarding the legality of delegating the divorce to another party, there are no specific provisions regarding who is permitted to act as a representative in the divorce declaration, but rather, it is generally permitted to delegate the divorce to another party. This permission does not imply any priority regarding who is entitled to act as a representative, whether male or female; this indicates that there is an opportunity for both parties to be equally permitted to represent in pronouncing the divorce.

Despite the various opinions of scholars who have different opinions about the permissibility of women as representatives of the divorce vow, it can be concluded that women have the authority as a representative, especially in divorce cases. Furthermore, related to the authority of a lawyer as a proxy for the divorce vow, he can be a substitute

⁵¹ Abdul Aziz Dahlan, *Encyclopedia of Islamic Law...*, p. 197.



for the reader of the divorce vow, because his position in this case is as the party who repeats the husband's statement to divorce the wife before the panel of judges, through the takrir contract. Moreover, if based on the strong opinion in *Fiqh al-Syāfi'iyyah*, regarding the authority of a woman's power as a proxy for the divorce vow is an exception, namely a form of power that is indeed applicable outside the usual, then it is permissible for a lawyer to be a substitute in issuing the divorce.

2. Difference

Law No. 18 of 2003 concerning Lawyers does not specify any gender requirements for lawyers conducting court proceedings. Similarly, Minister of Religion Regulation No. 1 of 1983 concerning the Provision of Legal Aid in Religious Courts does not prohibit women from representing parties in court.

Therefore, it can be concluded that from the perspective of religious court procedural law, a person who meets the requirements as an attorney in practicing in a court environment, especially in divorce cases, can be appointed as an attorney or representative of the applicant (husband), both in the application submission stage, then the litigation process until the execution of the witnessing of the divorce vow.

Meanwhile, in *fiqh al-Syafi'iyyah* the power to dissolve a divorce on a woman or to make a woman the power to pronounce a divorce is an exception to the general provision of a representative, because basically the only matters that can be represented are those that can be done by the representative himself, so here there is a difference between *fiqh al-Syafi'iyyah* and positive law.

CONCLUSION

Based on the description that the author has presented in the previous chapter, some conclusions can be drawn as follows:

1. According to a strong opinion in *fiqh al-Syāfi'iyyah* a woman can act as a representative of a husband to pronounce talaq on his wife. Meanwhile, according to positive law the role of a female lawyer as a representative to pronounce talaq, can act for and on behalf of the husband, so that the legal action taken by a female lawyer in this divorce case is of equal value to the action taken by the husband.
2. Based on the strong opinion in *the fiqh al-Syāfi'iyyah*, there is a similarity regarding the authority of a woman who acts as a representative in issuing a divorce between *the fiqh al-Syāfi'iyyah* and positive law. The difference between the two is that the scholars of *fiqh al-Syāfi'iyyah* clearly state that the permission of a woman to act as a representative in issuing a divorce is an exception to the general procedures and provisions of wakalah, because women cannot issue a divorce for themselves. Meanwhile, in positive law there is no mention whatsoever regarding women acting as representatives in issuing a divorce, but only mentions the authority of lawyers in general.

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