APPLICATION OF NO-FAULT DIVORCE LEGAL RULES AS A BASIS FOR JUDGES CONSIDERATIONS: A CASE STUDY OF INDONESIA

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Abstract: No-Fault Divorce is a legal rule in divorce, implying a couple who wants to divorce without proof of their cause or reason in court. The concept first appeared in California in 1970 and has been used in Indonesia as legal material for judges considering divorce cases. They assert that there is no match between the two or a difference that cannot be compromised. No-Fault Divorce is considered following the values contained in the fiqh. However, employing No-Fault Divorce as the primary consideration of judges in deciding divorce cases or generalizing each divorce case using this rule of law is inconsistent with the purpose of marriage (maqāṣid) in fiqh. The method used a descriptive comparative study, which qualitatively analyzed by comparing the legal principle concept of No-Fault Divorce and its use in religious courts in Indonesia with the values originating from the fiqh mazhab. The study object was several judges' decisions having the legal rules of No-Fault Divorce and scholars' books of fiqh mazhab. The legal rule of No-Fault Divorce is less relevant and contradicts the values of fiqh though it can accelerate the judicial process. Knowing the cause of divorce without generalizing the issue will make the judicial process more apparent so that a judge's legal justice can be seen. In general, the divorce decision will be used as a basis for determining other judgments related to family matters, such as determining child custody and common property rights. Divorce is not a trivial action without basis since marriage is sacred in religion and Indonesian society.

Keywords: No-Fault Divorce, Judges Consideration, Fiqh Mazhab.

Abstrak: No-Fault Divorce adalah suatu kaidah hukum dalam perceraian yang mengandung maksud bahwa ketika suatu pasangan ingin bercerai, maka keduanya tidak perlu membuktikan sebab atau alasan mereka bercerai didepan pengadilan. Mereka cukup menegaskan bahwa di antara keduanya sudah tidak ada kecocokan, atau terdapat perbedaan yang tidak dapat dikompromikan lagi. Paham ini pertama sekali muncul di California tahun 1970 dan telah digunakan di Indonesia sebagai salah satu pertimbangan hukum materiil hakim dalam perkara perceraian. Penggunaan kaidah hukum No-Fault Divorce sebagai salah satu penguat pertimbangan hakim dianggap sejalan atau sesuai dengan nilai-nilai yang terkandung dalam fiqh mazhab. Namun demikian menjadikan No-Fault Divorce sebagai pertimbangan utama hakim dalam memutuskan perkara perceraian atau menyamaratakan setiap kasus perceraian dengan menggunakan kaidah
hukum ini dianggap tidak sejalan dengan tujuan pensyariatan (maqāṣid) pernikahan dalam fiqh. Metode yang digunakan dalam penelitian ini deskriptif komparatif yang dianalisis secara kualitatif dengan cara membandingkan pemahaman konsep kaidah hukum No-Fault Divorce dan penggunannya pada Pengadilan Agama di Indonesia dengan nilai-nilai yang terkandung dalam fiqh mazhab. Data yang menjadi objek penelitian adalah beberapa putusan hakim yang mencantumkan langsung kaidah hukum No-Fault Divorce dan kitab-kitab fiqh mazhab karya ulama. Kaidah hukum No-Fault Divorce ini kurang relevan dan sejalan dengan nilai-nilai fiqh meskipun dapat mempercepat proses peradilan. Bagaimanapun mengetahui sebab perceraian tanpa menyamaratkan persoalan akan lebih jelas proses mengapa putusan itu diberlakukan dan dan lebih jelas siapa yang salah dan siapa yang benar sehingga terlihat keadilan hukum dari suatu putusan. Karena biasanya putusan perceraan ini akan menjadi dasar bagi penetapan putusan lain terkait dengan hak-hak dalam keluarga seperti hak penetapan hak asuh anak maupun harta bersama dan lain sebagainya. Lebih dari itu terjadinya perceraan bukanlah hal yang sepele yang tanpa dasar, karena pernikahan merupakan suatu yang sakral dalam agama dan dalam masyarakat Indonesia.

**Kata Kunci:** No-Fault Divorce, Pertimbangan Hakim, Fiqh Mazhab

**Introduction**

Many reasons and factors lead to divorce. The validity of these factors or reasons must be examined as stipulated in the act and Islamic Law. The use of general law application gives human beings a sense of justice, security, and peace. This law aims to protect the married couple's honor by preventing talaq (part of the husband's right, a form of divorce under Islamic law), divorce, or another form of divorce (part of the wife's right) from occurring carelessly.\(^1\)

In making a legal decision, judges must have legal references in various forms, such as laws, supreme court jurisprudence, and legal rule. In addition to being a procedure that the judge must pass, this action is also an attempt to produce a fair verdict. Furthermore, every judge’s decision in Islam is closely related to Islamic ethics (derived from the Quran and the hadiths of the Prophet), which uphold the values of justice and truth. This research analyzed a concept of legal rules recently used as a reference in divorce cases, namely the Rule of No-Fault Divorce.

This study only focuses on a singular reason for divorce cause, whose verdict can be imposed using No-Fault Divorce. It can be used when husband and wife can no longer reconcile disputes or quarrels. This situation seems to provide an opportunity for the judge not to have to decide who is guilty so the guilty party does not lose the right to file for divorce.\(^2\)

In addition, the purpose of a Procedural Law is to determine the law of a case, the actual law between the two litigants, and how it should be. The court or judge must seek the truth of the matter and the correctness of how it is resolved to produce justice. This practice aims to achieve the law’s primary purpose, not to harm one of the litigants.

Therefore, in applying the legal rule of No-Fault Divorce, the judge should consider whether this rule is following the Islamic values desired in achieving a verdict or vice versa. For this reason, this research will limit the impact of the application of the No-Fault Divorce legal rule in the Religious Court / Sharia Court and how is the legal rule of No-Fault Divorce in the view of the fiqh.

The research examines the rules of No-Fault Divorce and its application in judges’ decisions in religious courts. Thirty-three divorce decisions used the legal rule of No-Fault Divorce from 2011-2020 as one of the judges’ considerations at the Religious Courts in Sumatra and Java.

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\(^2\) KHI Article 31 paragraph (2) states, "Each party has the right to carry out legal acts". Article 34 subsection (3) states, "If the husband or wife shirks her obligations, each may file a suit with the Court. Then the KHI also regulates extensively the rights and obligations of husband and wife, which are almost entirely contained in Articles 77 to 82. These rules refer to the fiqh books, which generally follow the opinion of jumhur ulama, especially shafi'iyyah. These rights are for both parties. See Amir Syarifuddin, *Islamic Marriage Law in Indonesia*, First Ed., (Jakarta: Prenada Media Group, 2006), pp. 164-165 and p. 181.
However, researchers only used nine verdicts as research objects ranging from 2015-2019 as considered the most up-to-date and contained this rule.3

This research uses a qualitative library research method focusing on content analysis using divorce case decisions that contain the legal rule of No-Fault Divorce as one of the judges' considerations and comparative descriptive. This method is used to find data from several pieces of literature to obtain more relevant data for research needs.

**No-Fault Divorce Implementation in Court**

One of the impacts of applying the rule of No-Fault Divorce in the judge's consideration was the non-achievement of justice for both litigants and the absence of legal certainty. It was due to the limited source of rules for Divorce filing caused by 'constant disputes and quarrels' in General and Religious Courts. It leads to a legal loophole for the litigants as a clear definition of 'dispute' and 'quarrel' does not exist, nor what parameters are used to measure 'persistent'. Thus, the legal loophole will facilitate the divorce process and not support the expected justice that wants to be enforced.

Moreover, the negative impact of the No-Fault Divorce rule of law is that measures used to consider the meaning of 'disputes,' 'quarrels,' and 'continuously' are left to the subjectivity of the judge's single consideration without any norms of rules implied as a guideline. By explaining the content of this rule of law, the judge does not need to explore the causes of the constant disputes and quarrels. Yet, the additional law rules will significantly help the judge if his decision is challenged or appealed. The content of the no-fault divorce legal rule is contrary to the Marriage Law in Indonesia, namely "the principle to complicate or make divorce difficult."4 It aims to confirm the purpose of marriage: creating a happy and eternal family, as stated in the general explanation of the Marriage Law.

To see the application of judges' considerations that use No-Fault Divorce, the following table presents the data on Divorce Decisions using No-Fault Divorce in the Scope of Regencies / Cities of Religious Court Areas in several jurisdictions in Indonesia.

<table>
<thead>
<tr>
<th>No</th>
<th>Regency/ City Region</th>
<th>Reasons for divorce application/ lawsuit</th>
<th>Case Number</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Krui, Lampung</td>
<td>The divorce lawsuit is due to a financial matter in which the husband was irresponsible for the family economy, had a high temper, and left the plaintiff for two years.</td>
<td>Verdict Number 0049/Pdt.G/2016/PA.Kr.</td>
<td>2019</td>
</tr>
<tr>
<td>2</td>
<td>Krui, Lampung</td>
<td>The Respondent was not harmonious due to frequent disputes and quarrels caused by a strong intention to own a private residence while the household's economic condition was unstable.</td>
<td>Verdict Number 0008/Pdt.G/2016/PA.Kr.</td>
<td>2016</td>
</tr>
<tr>
<td>3</td>
<td>Kayu Agung, Sumatera Selatan</td>
<td>The Divorce lawsuit comes from the plaintiff because the defendant would not listen to the plaintiff's words, which led to feeling lacking. In this case, the plaintiff has tried to be patient. The defendant was often angry with the plaintiff. Still, the</td>
<td>Verdict Number 767/Pdt.G/2016/PA.KAG.</td>
<td>2016</td>
</tr>
</tbody>
</table>

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3 https://putusan3.mahkamahagung.go.id/
4 The principle of complicating divorce is a legal principle in the general explanation of Law Number 1 of 1974 about Marriage, Number 4 Letter e. It states that the act adheres to the principle of making a difficult process for divorce and only allows divorce to occur if the lawsuit is carried out before the court process and based on certain reasons.
<table>
<thead>
<tr>
<th>No.</th>
<th>Location</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.</td>
<td>Kayu Agung, Sumatera Selatan</td>
<td>Plaintiff applied for divorce as having insufficient resources for domestic needs, being too lazy to work, and the defendant wanted to remarry another woman. These reasons caused the plaintiff and defendant's household to be inharmonious; there were often constant disputes and quarrels between the plaintiff and defendant, making it difficult to reconcile and re-unite. Verdict Number 0073/Pdt.G/2017/PA.KAG 2017</td>
</tr>
<tr>
<td>5.</td>
<td>Kota Banjar, West Java</td>
<td>Plaintiff filed for divorce due to constant disputes and quarrels with the defendant as Plaintiff felt lacking in economic and family matters. Also, having a tense argument related to the residence where Plaintiff did not want to live in the home of Defendant's parents and vice versa. In the reconvening, Defendant rejected Plaintiff's argument and stated that there was only one dispute, i.e., when the defendant was in a reasonable post-miscarriage condition requiring attention from Plaintiff. Verdict Number 774/Pdt.G/2019/PA.Bjr 2019</td>
</tr>
<tr>
<td>6.</td>
<td>Krui, Lampung</td>
<td>The plaintiff's divorce application occurred due to an inharmonious situation resulting from frequent disputes and quarrels caused by a regular stay at the defendant parents' homes for no apparent reason and did not want to return unless the Plaintiff had to pick them up. It caused a separated living since June of 2019; the relationship can never be re-united during that time. Verdict Number 0274/Pdt.G/2018/PA.Kr. 2018</td>
</tr>
<tr>
<td>7.</td>
<td>Krui, Lampung</td>
<td>Plaintiff applied for divorce as the marriage was not harmonious because of frequent disputes and quarrels. The defendant was not responsible for the economic costs, left without notice, and remarried another woman. As of now, it has been running for four years. Since then, the plaintiff and defendant never have re-united. Verdict Number 0348/Pdt.G/2018/PA.Kr. 2018</td>
</tr>
<tr>
<td>8.</td>
<td>Krui, Lampung</td>
<td>Plaintiff applied for divorce due to an inharmonious relationship caused by frequent disputes and quarrels related to domestic economic problems. Defendant did not want to work. Since last year, they have never been united again. Verdict Number 0366/Pdt.G/2018/PA.Kr. 2018</td>
</tr>
</tbody>
</table>
Based on the examples of divorce judgments above, it is clear that the judges apply the legal rule of No-Fault Divorce in making a decision. The consideration includes whether or not the defendant is present in the proceedings and whether the case is conventional. The evidence proves that there is a need for other reinforcements as consideration for the judge in deciding the divorce case, although the plaintiff’s reasons are quite clear, accompanied by the witness's testimony. It is due to the different indicators used as a basis for divorce, which heavily relies on the *I’tikad* (intention) of the plaintiff and defendant in defending their marriage. If both are passive, the marriage has broken so that the reason or argument for divorce is only a condition for fulfilling all applicable laws or regulations.

Admittedly, deciding a case based on only one party’s evidence shows the weak value of justice. Nevertheless, the judge in the above case used the effect as an indicator, not the cause. From the previous example, the consequences indicator shows separation between them for months and even years following the absence of communication and mutual care for each other. This result can reinforce the reasons for the divorce of the couples. If the judge used the cause indicator in the previous case, the justice's expected value is not achieved. Therefore, applying a legal rule of No-Fault Divorce in the previously mentioned cases is considered most aligned with the values of justice.

*Fiqh review of the application of No-Fault Divorce*

Among the pillars of *talaq*, one occurs due to the husband’s will (*al-qasd*) without being coerced by anyone. There is no explanation included talking about the husband's underlying intentions to do *talaq* for his wife, only insignificant differences in *lafaz*, whether accompanied by intention or not. From this perspective, it appears that there is no extensive discussion in the *fiqh* regarding the reason or cause of the husband imposing his *talaq*, as its part of the prerogative right of the husband granted by Islam.

The hadith narrated by Aisyah (May Allah please with her) tells the story of the Messenger of Allah and eleven women in the *jahiliyyah* period. These eleven women deliberately sat together to discuss their respective husbands’ character. The *wajh al-dilālah* hadith concerning the discussion of one woman named Ummu Zar’în. Aisyah said:5

“My husband, Abu Zar’în. Who is Abu Zar’în? He equipped both my ears with jewelry, 6 He filled my arms (along with my whole body) with fat, glorified me so that I felt so noble, and found me living with my family (who was faikir), having only a few goats that we shepherded on the edge of the mountain. Then (after marrying me), he made me live in the luxury of owning horses and camels, lading paddy fields, and others. By his side, I spoke without ever being vilified and disputable. I drank until I was satisfied. I slept in the morning with no one to wake up (because the helpers had handled all the work).

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6 It means that Abu Zar’în filled both ears of Umm Zar’în with various types of jewelry, such as gold and pearls.
Abu Zar’in’s mother, who is Abu Zar’in’s mother? The house is spacious, and the furniture and equipment are full and ample. The area lies like a woven mat from the fronds of dates and fills them zirā’ (cubit part) goats (four-month-old females). Abu Zar’in’s daughter,7 Who is Abu Zar’in’s daughter? She was ta’at/devoted to his father and mother, perfected his body (or fat filled), and angered his honey (out of envy at his excess). Abu Zar’in’s female labor who was Abu Zar’in’s female labor? She did not spread our talk, did not betray us in taking care of our food, and did not fill our house with twigs/garbage.8

Ummu Zar’in continued her story, 'one day, Abu Zar’in came out of the house when the milk in pots and vessels was being processed. Then he met a woman with her two boys, like two tigers. The two were engrossed in playing with two pomegranates thrown from under the woman’s waist.9 Abu Zar’in was mentally defiant and married the woman. After divorcing him, I married a man who was good in shape and appearance. He rode a good horse again and walked without getting tired. He wielded a spear from the Land of Khath (for war). He brought me a lot of treasure (camels and other things).10 And he gave me a pair of everyone that passed.11 He said: ‘Have a meal, O, Ummu Zar’in and give the food to your family.’ Ummu Zar’in said, ‘had I gathered all the things he had given me, it would not have reached even the smallest vessel of Abu Zar’in.’12” After Aisyah finished with the story, Rasulullah SAW said, “I am to you like Abu Zar’in to Ummu Zar’in.”13 In history, He added, “Except (I am not the same as him) on Abu Zar’in saying the talaq his wife, and I did not say talaq to you.”

First, this hadith implies that a husband, i.e., Abu Zar’in, can talaq to his wife for no apparent reason. Even though the relationship between the two as husband and wife was good, Ummu Zar’in described how good Abu Zar’in’s morals were to him. Then at the end of the hadith, the Messenger of Allah did not denounce the deeds of Abu Zar’in do talaq to his wife. Even Rasulullah likened himself to Abu Zar’in regarding his treatment of his wife. It shows that Rasulullah consented to Divorce without an apparent reason.

Second, Islam also justifies Divorce as khulu’.13 Based on the opinion of some scholars such as Abu Hanifah, Al-Tsauri, Malik, Al-Auza’i, and Al-Shafi’i, it is permissible for wives to ask for khulu’ even without being based on hatred and fear if they cannot fulfill the rights of Allah. Then jumhur’s opinion about the permissibility of khulu’ without cause is corroborated by Al-Shairazi in al-Muhadzzab that khulu’ is permissible without cause; husbands and wives are both willing to do.14

Third, the general notion of shiqāq gives rise to multiple interpretations. The Shafi’iyyah (the majority belief in Indonesia) defines shiqāq as a constant dispute between husband and wife who is very peaking. There will be mudharat if they continue the marriage. What is meant by ‘disputes and quarrels’ that cause mudhorat (misfortune)? What is the duration of ‘continuous' considered to damage the sakinah (peace) of the two couples? These aspects indirectly support the development of the legal rule of No-Fault Divorce in Civil Law in Indonesia.

7 Meaning not eating or drinking a lot.
8 It means she is a person who likes to clean up and always cleans her master’s house without letting the dirt in it.
9 Some scholars say the meaning of this lafaz is that the woman’s bottoms are big so that when she lies on her back, the body close to her bottom is lifted, not touching the earth so there is a gap that the pomegranate can pass.
10 He went to war and returned home with victory and spoils of war until he could bring in a lot of livestock.
11 In Muslim history, it is stated: “... of everyone who is slaughtered”. Ummu Zar’in was about to describe how much her husband had given her; when giving, he does not give only one.
12 Ummu Zar’in describes her husband’s leadership, courage, virtue, and generosity. However, in Ummu Zar’in’s heart, he is still not comparable to Abu Zar’in. Abu Zar’in was her first husband until her love for Abu Zar’in remained in her heart as it was said: ‘It is not that love, except for the first lover.’
13 Where the wife redeems herself by asking the priest/judge to break the marriage bond with her husband for physical disability reasons, the husband has a bad character, the husband does not exercise his rights as a husband, or the wife is afraid of breaking the law as she cannot obey her husband. See H.S.A. Al-Hamdani, Treatise on Marriage, (Jakarta: Pustaka Amani, 2002), p. 265.
However, if we trace the books of fiqh, we will find the essential point that covers these particular laws. In most cases, scholars have a different opinion on the law of origin of talaq, i.e., ibâhah (allow) or makhzûr (forbidden). Most of them state that talaq is prohibited except when accompanied by a valid reason. In their opinion, the talaq is Kufur (disobedience, destructive, rejecting) against Allah’s favor and Kufur against Allah’s blessing is haram. Therefore, it is not lawful to divorce except for emergency reasons, such as the wife’s older age, doubts about the wife’s improper behavior, a disposition that cannot be united between the couple, the desire to teach the wife a lesson, and the husband cannot fulfill the rights and obligations in marriage.15 Hanafiyah and Hanabilah Scholars put forward this opinion. Two hadiths state that:16

Translation: "Allah curses the husband who is a player and likes saying talaq to the wife."17

Among the circumstances, divorce is permissible if a husband doubts the cleanliness of his wife’s behavior or has lost feelings between the two without reason. Thus, the talaq law also differs according to its 'illat' differences.18 If a requirement is met, then talaq refers to sharia, and the doer will not be sinless nor receive a reward. It will sin and get the wrath of Allah if it happens the other way around.19

One account stated that a man divorced his wife as he pleased. Based on this presumption, the woman remained his wife as long as the referendum was made in the iddah period, albeit a hundred times talaq or more. The man said to his wife: "By Allah, I will not excuse you, and you still stand beside me as my wife, and I will not carve you at all." His wife said: "what are you going to do?". Her husband also replied: "I will divorce you. When you run out of your iddah, I will refer back again." Then, the woman met the Messenger of Allah to share her problem. Rasulullah was silent until the descent surah Al-Baqarah: 229 was revealed.20 This story becomes the basis for a common rule in Divorce: that it is not permissible or makruh, where talaq is not aimed to hurt the wife physically and mentally.

As for the case of khal' , according to Imam Ahmad, khal’ is illegitimate to perform.21 The particular law of khal’ based on jumhur’s opinion remains limited in its ability or remains bound by the generality of the concept of khal’ contained in the hadith of the Prophet Muhammad saw. "All women who ask for a divorce from their husbands for no reason, then it is illegitimate for her the scent of heaven."22 It is reinforced by KHI Section 124 states that the wife who wishes to file the khal’ must follow the reasons for divorce mentioned in article 116.

Exposure to these talaq concepts shows how important it is to maintain a marriage and avoid talaq. The laws in the book of fiqh mazhab, which discuss talaq broadly, contain the purpose of emphasizing that: "The halal matter that Allah mostly hates is talaq."

The improper use of the No-Fault Divorce legal rule as a basis will obscure the value of justice in a judgment though the judge is very much bound by the principle of Ex Aequo et Beno (a just verdict).23 The divorce reason used in this law is only a justified excuse: constant disagreement and
quarrels caused by the absence of a match (syiqāq). The reason for this divorce is not to blame either party as it occurs with no longer a sense of sakinah (peace) in their soul, so divorce is a solution for them.  

Nevertheless, in the case of syiqāq, the judge must be careful in examining the facts during the trial, especially in assessing whether the disputes and quarrels are irreconcilable. Judges must be active in reviewing and proving divorce cases as civil cases. Otherwise, it will be straightforward to serve as the basis for divorce.

It can also be seen that the justified reasons in concrete forms can be physically proven. The judge must test the motives of the party pleading for divorce. This is due to strife, and quarrel is not a direct reason for breaking a marriage but merely a qualification of the various forms of circumstances that cause conflict. Therefore, judges must include sufficient and mature considerations in every decision.

Admittedly, using syiqāq as a divorce could have led the judge to conclude that disharmony came from one party's fault. In some cases, syiqāq can be triggered by marital transgressions. The violation of the talaq taklik is a frequent domestic violation, Violating the provisions of laws such as child protection laws, marriage laws, etc.

In the case of syiqāq caused for violating the talaq taklik, according to fiqh studies in Indonesia, it includes divorces with the category talaq ba' in sughrah, even though it heavily relies on the husband’s talaq. It is due to the filing procedure where the wife must file a suit for violation of taklik talaq to the Religious Court and must pay ‘iwadh if her husband violates the taklik talaq. Therefore, the husband’s talaq is highly dependent on the wife’s initiative; the one who imposes the talaq is the Religious Court.

Taklik talaq is a tradition that has existed since ancient times to protect wives from arbitrariness. Taklik talaq is not a covenant that must be held in every marriage, but a common practice deliberately preserved as a path of anticipation preventing divorce from quickly occurring. In contrast to the taklik talaq procedure that applies in Indonesia, the fiqh mazhab, or the study of fiqh mazhab, books says that if certain circumstances are required in the talaq taklik occur, then the talaq automatically falls immediately. As mentioned in the Kitab al-Syarqawiy ‘Ala al-Tahir juz 2, page 302:

24 Al-Ghazali explained that in married life, syiqāq could occur due to three factors: a wife nusyudz against her husband, a wife was abused by her husband physically and mentally, and there are complicated problems, so it is difficult to know who is at fault. See Muhammad Al-Ghazali, al-Waṣiṭ fī al-Madżhab, (Cairo: Dār al-Salām, 1997), p. 305-307

25 Al-Ghazali menjelaskan bahwa dalam kehidupan berumah tangga, syiqāq bisa terjadi karena tiga faktor: istri nusyudz terhadap suami, seorang istri mendapat perlakuan sewenang-wenang dari suami baik fisik maupun mental, dan adanya persoalan yang rumit sehingga sulit diketahui siapa yang bersalah dalam persoalannya tersebut. lihat Muhammad Al-Ghazali, al-Waṣiṭ fī al-Madżhab, (Cairo: Dār al-Salām, 1997), hlm. 305-307

26 Sunarto, Peran Aktif Hakim..., pp. 155-168

27 Article 62 of Law Number 7 of 1989 and article 25 paragraph (1) of Law Number 4 of 2004 state that all court decisions need to include the reasons and basis for the decision and must also contain certain articles of the relevant regulations or unwritten sources of law. (Law Number 4 and 5 of 2004 concerning Judicial Power and the Supreme Court, (Bandung: Fokus Media, 2004), p. 10). Based on the two articles, the judge must consider two things in examining and deciding cases, including divorce cases resulting in disputes and quarrels (syiqāq). Reasons and basis must accompany the judgment, it must also contain articles or sources of the unwritten law. See Eka Susyawati, Disputes, and Quarrels as a cause for divorce in Religious Courts, Al-Ikham, Vol. 3 No. 1 June 2008.

28 Talaq Taklik is a husband’s talaq dependent on a certain personality trait; when that particular trait appears, taklik talaq exists. In KHI, article 1 letter (e) provides provisions on taklik talaq, an agreement pronounced by the prospective groom after the marriage, which is included in the marriage certificate in the form of talaq promise based on a certain circumstance that may occur in the future.

29 ‘Iwadh is a ransom which is usually in the form of money that a wife must give to her husband if the wife wants to file a divorce lawsuit against the husband by means of khulu’ or for other reasons, e.g. violated the talaq taklik. See Aris Bintania, Procedural Law of Religious Justice Within the Framework of Fiqh al-Qadha, (Jakarta: PT. Raja Grafindo Persada, 2012), p. 133
"Whoever (husband) hangs the talaq on a trait, then falls his talaq with the realization of that trait, according to his speech."

Therefore, violating the talaq taklik can be one of the causes of Divorce that provides a solution for the judge in determining the guilty party in a divorce case so that the value of justice in a judgment can be achieved.

Furthermore, the reason for syiqāq can also be triggered by violations of the Child Protection Act. In general cases, the explanation of Divorce is caused by constant feuds due to differences of opinion about the child. The judge can trace this as a consideration in deciding who is guilty of disregarding the children's rights. It can also anticipate the child's mental, physical, and social consequences after his parent's Divorce. By explanation, the Child Protection Law states that every child needs to get the broadest possible opportunity to grow and develop optimally, both physically, mentally, and socially. Then the State, Government, Local Government, Community, Family, and Parents are obliged to provide protection and guarantee the fulfillment of children's human rights following their duties and responsibilities.

Meanwhile, there are several rights of children summarized based on the Quran and hadith, including:

1. The right to life and growth (QS. An-Nisa': 29, al-An'am: 151).
2. The right to protection and guard from the torments of hellfire (QS. Al-Tahrim: 6 and the hadith of the Messenger of Allah narrated by Ibn Jarir in Nashih 'Ulwān: "Command your son to work on the commandments (Allah) and stay away from the prohibitions (Allah). So that's how to keep them from the torments of hellfire")
3. The right to receive a living and welfare (QS. Al-Baqarah: 233 and the hadith of the Messenger of Allah narrated by Abu David: "it is enough for a person to sin if he wastes the person under his dependents (his livelihood)").
4. The right to have an education (as the Prophet said, narrated by Ibn Majah: "Raise your children and improve their education").
5. The right to have justice and equality (QS. Al-Hujurat: 13, al-Maidah: 8, and the hadith of the Messenger of Allah narrated by Bukhari and Muslims: "... Fear to your God and do justice among your children... ").
6. The right to love (as the Prophet's hadith narrated by Bukhari and Muslims that the Prophet asked the companions whether they kissed their children? This is a form of parental love for them).
7. The right to play (as the Prophet said: "Whoever goes to the market and buys a toy and brings it home for his children, then what he does is like giving alms to a group of displaced people who need it most. And let it be given first to the daughter and then the male one").

Therefore, if a case of shiqāq caused by constant feuds is challenging to prove, the judge can trace the cause by assessing the one aspect of fulfilling the child's rights in the family. It will also be known to the party who is guilty of not being able to fulfill the child's rights or even having violated the Child Protection Law. Thus, the guilty party must get a sentence and be responsible for the marriage breakup.

Furthermore, suppose the judge uses the legal rule of No-Fault Divorce to decide on this basis and generalizes all divorce cases. In that case, one of the impacts or consequences will be the child's unstable mental state. Then it could have continued to a poor physical condition and social discrimination from the surrounding environment, considering that Divorce is still a taboo in Indonesia. This kind of situation has led to violations of the Child Protection Law.

Moreover, the judge should ideally, in examining the divorce basis of shiqāq, consider whether or not it is necessary to appoint ḥakam. Suppose at the initial examination stage, the judge

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30 Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection.
31 HM. Budiyanto, Children's Rights in an Islamic Perspective, moraref.kemenag.go.id
considers that the husband and wife can still be united due to trivial reasons. In that case, it is very commendable and beneficial if the judge appointed hakam. The judge is also bound by the principle of being obliged to reconcile articles 65 and 82 of Law Number 7 of 1989. The focus of the judge's obligation to reconcile the parties to the dispute can be in the form of advice, advice, or explanation. Therefore, for the reconciliation function to be performed more effectively, the judge must find the factors behind the dispute. Although the existence of hakam in the divorce process will make the procedure longer, the possibility of re-uniting is higher so that the peace process can succeed. This will align with Islamic values that want to be upheld in a marriage.

Therefore, the use of the legal rule of No-Fault Divorce as one of the reinforcements of the judge's consideration can be considered to align with the values contained in the fiqh. However, making it the judge's primary consideration in deciding divorce cases or generalizing each divorce case using this rule of law could contradict the purpose of maqashid (maqashid) of marriage in fiqh.

Conclusion

The legal rule of No-Fault Divorce can indeed be applied in Religious Courts in Indonesia. However, its application cannot be generalized to all divorce cases because it is the cassowary. There is also different legal practice in the West and East, which are highly influenced by respective cultures and background. Indonesia recognizes a variety of grounds for Divorce, and most divorce cases are based on one party's mistakes, so they demand justice in the settlement. For example, the reason for Divorce is due to adultery, being left for two years, domestic violence, and others, which requires the judge to be fair by punishing the wrong party. In contrast, the West makes the reason for divorce singular, irreconcilable differences or irretrievable breakdowns, which translates to continuous disputes and quarrels without hope of re-uniting.

The impacts can be both positive and negative. The positive side is related to strengthening the rule on the syiqaq case, which is difficult to prove. On the other hand, the negative impacts include the non-achievement of justice for both parties to the case and the absence of legal certainty. It occurs due to limited rules and details in filing for divorce based on 'constant disputes and quarrels,' both within the scope of the General Court and the Religious Courts.

The use of the legal rule of No-Fault Divorce as one of the reinforcements of the judge's consideration is considered to align with the values contained in the fiqh. More specifically, at least this rule is appropriate with some regulations in the fiqh, such as:

الحكم يدور مع علّته وجودا و عدما
يختار أهون الشرين

1. درب المفاسد مقدّم على جلب المصالح

However, making it the judge's primary consideration in deciding divorce cases or generalizing any divorce case using this rule of law is inconsistent with the purpose of (maqāṣid) marriage in fiqh.

Judges should use the No-Fault Divorce rule in their consideration only in divorce cases challenging to prove because both parties are passive in giving information and no longer have i’tikaf to live together.

Wallâhu a’lam bi al-ṣawâb.

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