

DIVORCE OF PREGNANT WOMEN: A COMPARATIVE STUDY ANALYSIS OF THE THOUGHTS OF THE SYĀFI'Ī MAẒHAB AND THE MĀLIKI MAẒHAB

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ABSTRACT

This article is a comparative study of the thoughts of the Maẓhab Syāfi'ī and the Maẓhab Māliki on the divorce of pregnant women. Maẓhab Syāfi'ī allows divorces to take place during pregnancy. However, some adherents of maẓhab Māliki prohibit divorce from being pregnant. This writing aims to find out the legal *istinbat* methods used by both. This type of research includes library research with normative approaches and fiqh that is descriptive-analytic to describe the problem of divorce of pregnant women. The results of this study are that the legal *istinbat* method used by maẓhab Syāfi'ī is the Qur'an, and the Hadith is based on surah Aṭ-Ṭalāq verse 1 and Hadith from Ibn Umar RA. Otherwise, maẓhab Māliki (Al-Qodhi Abu Hasan) uses "*qiyas*" as the method of *istinbat* his law. Abu Hasan killed a pregnant woman with a man who had menstruated until it was illegal to divorce.

Keywords: Divorce, Pregnant, Mazhab Maliki, Mazhab Syafi'i

ABSTRAK

Artikel ini merupakan kajian komparatif pemikiran Maẓhab Māliki dan Maẓhab Syāfi'ī terkait perceraian wanita hamil. Maẓhab Syāfi'ī membolehkan perceraian yang dilakukan saat hamil, begitupun juga Maẓhab Māliki. Namun, terdapat sebagian ulama' maẓhab Māliki mengharamkan perceraian waktu hamil. Tujuan penulisan ini adalah untuk mengetahui metode *istinbat* hukum yang digunakan keduanya. Jenis penelitian ini termasuk penelitian kepustakaan (library research) yang bersifat deskriptif-analitik dengan pendekatan normatif dan fiqh untuk mendeskripsikan masalah yang terkait dengan perceraian wanita hamil. Hasil penelitian ini menunjukkan bahwa maẓhab Syāfi'ī dan maẓhab Māliki menggunakan metode *istinbat* hukum berupa Al-Qur'an dan hadis berdasarkan pada surah Aṭ-Ṭalāq ayat 1 dan hadis dari Ibnu Umar RA. Sedangkan, sebagian ulama' maẓhab Māliki, yakni Al-Qodhi Abu Hasan menggunakan *qiyas* sebagai metode *istinbat* hukumnya. Abu Hasan menqiyaskan wanita hamil dengan orang yang haid sehingga haram untuk di cerai.

Kata Kunci: Perceraian, Wanita Hamil, Mazhab Maliki, Mazhab Syafi'i.

INTRODUCTION

A marriage can be terminated for various reasons, because of a divorce granted to the wife by the husband, because of a divorce between the two, or other reasons. The result of a marriage is the introduction of family law, which in Islamic law is to comfort and reassure the soul. This can help us understand that a family's existence can calm the mind and refresh the heart. However, if the family's existence is based on compulsion and unwillingness, then the purpose of the family cannot be achieved properly; in other words, a divorce will occur (As-Subki, 2012). At the time of divorce, there is usually a negotiation process between husband and wife which results in the couple no longer being able to reach an agreement that can satisfy both parties and seems unable to continue their household relationship. They see divorce as the best way out (Fahrul, 2011).

Three things can break the marriage of husband and wife, namely due to death, divorce, and the last is based on a court decision (Departemen RI, 2012). In this case, the husband can divorce and leave his wife. Because divorce breaks the marriage bond, divorce will occur without a clear and valid marriage contract. Abu Yala and Al-Hakim narrated about the Hadith of the Prophet Jabir. It is said that (Majah, t.t., p. 225):

لا طلاق إلا بعد نكاح ولا عتق إلا بعد ذلك

Regarding the right to divorce in the hands of the husband, the wife does not need to worry about her husband's arbitrariness because Sharia law provides

an opportunity for the wife to file for divorce from the husband by returning the dowry or part of the property as compensation for the husband to marry another woman. Therefore the husband drops the divorce, called the term *Khulū'* (Rahman Ghozali, 2003, pp. 201–207).

On this issue, Imam Shafi'i and Imam Māliki have different opinions on the term divorce. According to Imam Shafi'i, divorce breaks the marriage contract by pronouncing the word *talaq* or its equivalent. However, according to Imam Māliki, divorce is a legal characteristic that destroys the legitimacy of marriage. This difference of opinion leads to differences in legal consequences. The Mālikis believe that if the action is initiated with intention, it constitutes *ruju'*. However, the Shāfi'i scholars believe that it is forbidden for a husband to have intercourse with his wife while in *iddah*, and this behavior does not constitute *ruju'*. This is because *ruju'* must be done with the husband's clear words, not through actions.

There are several reasons why husbands leave their wives when they are pregnant, including: 1) When he finds out that the child in her womb has a physical defect such as blindness or deafness, syndromes, and the like. 2) When the wife is pregnant, there are many cracks and disharmony in the household. 3) The husband converts to a religion other than Islam, causing disharmony in the family. 4) The husband dies while the wife is pregnant. 5) The wife miscarries during pregnancy (Al-Khatib, 2016, pp. 48–51).

When a child is still in the mother's womb, the parents divorce and the child born is still the child of the divorced parents. This is because the Population and

Civil Registry Office consider the birth of the child to be within a marriage or outside of marriage, and there is confirmation from the biological father that the child born is flesh and blood of his mother and was raised by his mother as long as there has been no divorce. A court order or a DNA test can be requested if the father's acknowledgment is still insufficient. (Kusnadi & Iskandar, 2020).

In the development of Islamic law, the issue of divorce of pregnant women is still a serious topic of discussion among the *maẓhab*, especially the Sunnis. In general, there is a tendency for differences and similarities in opinion between the *maẓhabs* regarding the divorce of pregnant women. In this discussion, the author wants to compare the thoughts of the Shafi'i *Mazhab* and the Māliki *Mazhab*, which are familiar in Indonesia, because of the disagreements between these two *Mazhabs*. According to the Shafi'i *Mazhab*, it is permissible to divorce a pregnant wife for various reasons. On the other hand, according to Maliki *Mazhab*, divorcing a pregnant wife is also permissible, but some other Māliki scholars prohibit it.

Meanwhile, the previous studies mostly raised the case of the marriage of pregnant wives. In contrast, the material on the divorce of pregnant wives was rarely raised, and almost no related articles were found. Moreover, in this research, the author focuses on Islamic law according to the views of the Shafi'i *maẓhab* and the Māliki *maẓhab* so that the law is clear between the two *maẓhab*.

With many household problems in family life in this rapidly developing era, there is often the phenomenon of divorce cases we can find in the community or

electronic media. Moreover, in the past, many cases involved husbands who divorced their wives while pregnant. It is not only the husband who is the cause of the divorce but also the wife who files for divorce even though she is pregnant. (Basyier, 2012).

Some Research related to pregnant women that have been widely researched in both cases and normative perspectives is marriage. As for the opposite, there are still few studies related to the divorce of pregnant women, so research on the divorce of pregnant women is still limited. One of them is a scientific work in the form of a thesis from Farhatul Muwahidah with the title 'The Judge's View of the Wife's Divorce Suit in the State of Pregnancy (Study of Malang Religious Court Case No. 789/Pdt.G/2008/PA.Mlg)'. The results of the research in the form of an explanation related to the views of the Panel of Judges of the Malang Religious Court regarding the case of the wife's divorce during pregnancy, namely related to the opinion of the judge following the opinion of the scholars' who allowed divorce during pregnancy, and also based on the Hadith from the Prophet Muhammad. It is related to *Khulu's* permissibility (Muwahidah, 2010).

Next, there is a scientific work in the form of a thesis also from Zainuddin with the title 'Settlement of Pregnant Wife's Divorce (Analysis of the Decision of the Bogor City Religious Court No. 532/Pdt.G/2008/PA.Bgr)', which explains the procedure for resolving the wife's divorce when she is pregnant, starting from the initial procedure, including filing the litigation process, paying the cost of the

case until a court decision is made, to the judge's consideration of the case by focusing on existing cases. (Zainuddin, 2009).

Apart from the two studies above, the author still has not found research related to the divorce of pregnant women from a normative perspective, especially on the views of the fuqaha'. Seeing the explanation above, the opinion of some scholars of the Maliki mazhab, which is different from the other mazhabs, still needs to be studied more deeply so that there is an understanding of interpretation and can provide the correct explanation to present a comprehensive understanding.

RESEARCH METHODS

This type of research is categorized as descriptive-analytic library research, which describes and explains issues related to divorce for pregnant women, then analyzes them through a classification process according to applicable legal regulations. In this context, it is analyzed from the perspective of the Māliki mazhab and the Shāfi'i mazhab. (Noor, 2012).

Regarding the approach used in this research, the author uses a normative approach and a fiqh approach. This normative approach is based on the provisions of Islamic law taken from the Qur'an and Hadith by collecting verses from the Qur'an and traditions related to divorce. Based on the science of fiqh, the fiqh approach becomes the object of discussion, namely the fiqh of Imam Māliki and Imam Shafi'i. The author will also relate the case of divorce of a pregnant wife by the applicable provisions of Islamic law and the use of the *istinbat* (legal

determination) method by the two mazhab (Dermawan, 2013).

In collecting this data, the author uses library data collection techniques, especially the study of relevant literature on the topic of discussion in the form of Al-Qur'an, Hadith, and laws related to divorce cases of pregnant wives. In addition, the author also collects literature data from books by the Maliki mazhab and the Shafi'i mazhab. Meanwhile, related data analysis in this study will be carried out through content analysis, namely, deepening the study of the content of information written in the media or books. Moreover, to analyze this data, the way of thinking is to use the deductive method, which is a method that must be analyzed by the author based on the views of the Shafi'i and Maliki Mazhabs from general data to conclude, namely the divorce of pregnant women according to the thoughts of the Shafi'i mazhab and the Māliki mazhab. (Hermawan, 2019).

RESULTS AND DISCUSSION

Definition of Divorce

Divorce in Arabic means (الطلاق) *Aṭ-Ṭalāq* means to release or leave a bond like a camel that is untied to graze in the pasture. The word *athlaqtu al-asīr* means to set it free. Ibn Manẓur said that divorce has two meanings: to break the bond of marriage and to free and release (Nur, 1993, p. 45).

Meanwhile, according to Article 38 of Law No.1 of 1974 concerning marriage, divorce is "the breakup of marriage." This means the loss/break of the inner bond between husband and wife, which results in the end of the family bond (relationship)

between the husband and wife. (Syaifuddin, and friends, 2013).

Several scholars of fiqh schools have offered definitions of divorce. For example, Māliki defines it as follows (Syamilah, t.t., p. 14):

صفة حكمية ترفع حلية متعة الزوج بزوجه

Talak has a legal nature that results in the loss of legal relations between husband and wife. Meanwhile, according to Shāfi'i, divorce is (as-Syarbini, 2006, p. 379):

حل عقد النكاح بلفظ الطلاق ونحوه

It renounces the marriage contract using the word *talaq* or its equivalent. This definition clarifies that the ruling of divorce applies immediately, both in *raj'i* and *ba'in* divorce.

According to Djaren Siragih, a divorce by Islamic law occurs after the Religious Court has rendered a judgment against both the plaintiff and the defendant. On the other hand, a divorce that is not based on Islamic law (positive law) is when the divorce occurs during the registration of the court decision in the registry office by the Civil Registry Officer. (Siragih, 2011).

The Pillars and Conditions of Divorce

The pillars of divorce/*talaq* mean that important elements must occur in realizing divorce and fulfilling several divorces. The following are the pillars of divorce: *First*, Husband. *Second*, Wife, the validity of the law of *talaq* intended for the wife is as follows: (1) The wife is still under the protection of her husband; (2) According to Islamic law, the wife undergoing the *iddah* period of divorce *raj'i* by her husband is still protected by her husband's power.

Therefore, if the husband is dropped during that period, it can reduce the right of divorce owned by the husband; (3) The position of the divorcing wife must be based on a valid marriage contract (Ghozali, 2012)

Third, *Sighat Talaq* is an utterance issued from the mouth of the husband and shows firmness in divorcing. The husband can pronounce the divorce with a clear (*sharih*) or vague (*kinayah*) *Sighat*. Suppose the husband pronounces the divorce with a *sharih Sighat*. In that case, the divorce will fall even without the intention, unlike the pronunciation of divorce with *kinayah*, which requires an intention to impose divorce. (Ghozali, 2012). *Fourth*, *Qashdu* (intentionality) is that by pronouncing the divorce, the person pronounces it for divorce and not for any other purpose. (Kusuma, 2016).

Legal Basis for Divorce

Regarding the legal basis of divorce, it is permissible but can be detrimental to children, so Islam resolves family disputes. If a dispute arises, Islam advises them to restrain themselves, and if they cannot, then two hakams are sent to the house to give advice. (Azizah, 2012).

There is a difference of opinion among the scholars regarding the divorce ruling. According to Ibn Hammam, corroborated by Ibn Abidin of the Hanafi Mazhab, the original ruling on divorce is haram, except in cases of emergency. According to most scholars, the original divorce law is *ibahah* (must), but more importantly, it is not to do so. This is because divorce can break family ties. Regarding the ruling on divorce under certain conditions, it is divided into four

(Rodliyah, 2014). *First, haram*, if the divorcee is suspected of falling into adultery or cannot remarry another woman after the divorce. *Second, Makruh*, if the husband still wants to continue the marriage with his wife and hopes to have children. It is also makruh if the husband pronounces the divorce without the mentioned reasons. *Third, Obligatory*, if they continue to live together but commit haram acts, the household situation is no longer conducive, and they can no longer fulfill their obligations as a husband/wife. *Fourth, sunnah*, this provision applies to the husband if the wife neglects the rights of Allah that must be carried out. For example, she often neglected prayer and fasting (Asmuni, 2016).

In the Qur'an, many verses discuss divorce. According to fiqh scholars, the verses on divorce are classified as detailed verses in the Qur'an. About pregnant women, the Qur'an also contains verses about divorce when the wife is pregnant, as follows in Surah At-Talāq verse 6 below:

اسْكُنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ وَلَا تُضَارُّوهُنَّ لِتُضَيِّقُوا عَلَيْهِنَّ وَإِنْ كُنَّ أُولِي حَمْلٍ فَأَنْفِقُوا عَلَيْهِنَّ حَتَّى يَضَعْنَ حَمْلَهُنَّ فَإِنْ أَرْضَعْنَ لَكُمْ فَاتُّوهُنَّ أُجُورَهُنَّ وَأُتِمُّوا بَيْنَكُمْ بِمَعْرُوفٍ وَإِنْ تَعَاَسَرْتُمْ فَمَنْزَعُ لَكُمْ آخَرُ

"Place them (divorced wives) where you live according to your ability and do not trouble them to constrict their (hearts). If they (divorced wives) are pregnant, then give them their living until they give birth; then if they breastfeed your (children), then reward them; and negotiate between you (everything) well; and if you both encounter

difficulties (in terms of breastfeeding), then another woman may breastfeed (the child) for her."

The above verse talks about the command for husbands after divorcing their wives where the wife must be placed properly and the prohibition of nursing to constrict her heart. It also talks about the husband's maintenance to his wife after divorce, where if the husband divorces her while she is pregnant, then the husband must provide maintenance until she gives birth. In addition to the above, there is also surah At-Talāq verse 4 regarding the *iddah* of divorce when the wife is pregnant:

وَالَّذِي يَسْنَن مِنَ الْمَحِيضِ مِنْ نِسَائِكُمْ إِنْ ارْتَبْتُمْ فَعِدَّتُهُنَّ ثَلَاثَةُ أَشْهُرٍ وَالَّذِي لَمْ يَحْضَنْ وَأُولَتِ الْأَحْمَالِ أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ وَمَنْ يَتَّقِ اللَّهَ يَجْعَلْ لَهُ مِنْ أَمْرِهِ يُسْرًا

"Women who are not likely to menstruate again (menopause) among your wives, if you are in doubt (about the period of menstruation), then the period is three months. So (also) women who are not menstruating (immature). As for pregnant women, their Idah period is until they give birth to their wombs. Whoever fears Allah, He will make it easy for him in his affairs."

This verse emphasizes that the *iddah* period for pregnant women is until childbirth. If pregnancy is said to be an *iddah* period, it means that there is no doubt that it is permissible to divorce a wife when she is pregnant.

Meanwhile, according to the Hadith, related to divorce during pregnancy, there is a tradition of Ibn Umar narrated by Muslim, Ibn Majah, and Abu Dawud (as-Sajastany, t.t., p. 92):

عن ابن عمر رضي الله عنه أنه طلق إمرأته وهي
حائض فذكر ذلك عمر للنبي صلى الله عليه
وسلم فقال رسول الله عليه وسلم: مره
فليراجعها ثم ليطلقها إذا طاهرا أو حاملا

In the Hadith, it is explained that Ibn Umar divorced and divorced his wife during menstruation, then appealed to the Prophet SAW. Then he said, "Tell him to refer to her; if she is pure or pregnant, you can divorce her."

Divorce-Pregnant Women in Islam

Before further explaining the divorce of pregnant women from a normative perspective, it would be nice to discuss a little about *'iddah* because our discussion is also about the *'iddah* of a pregnant woman after being divorced by her husband. According to the language, *'iddah* comes from the word *'adda-ya'uddu*, which means to count. The meaning is the period of counting/waiting for a woman after being divorced for a certain period. In terminology, *'iddah* is a certain period that a woman must count since she separated (divorced) from her husband, whether the separation was due to divorce or the death of her husband (Muhammad Sayyid Sabiq, 2013). So, *Iddah* is an obligation every woman must carry out after divorce from her husband or for women whose husbands die. (Kurniawati, 2019).

In the book *Fathul Qarib*, chapter at-*Talāq*, it is explained that divorcing a pregnant wife is considered divorce *lā sunni wa lā bid'ī*, as follows (al-Ghazali, 1343, p. 76):

وضرب ليس في طلاقهن سنة ولا بدعة وهن أربع:
الصغيرة, والأيسة وهي التي انقطع حيضها,
والحامل, والمختلعة التي لم يدخل بها الزوج

As explained above, there are four types of women who are divorced by *lā Sunni wa lā bid'ī*: 1) A young woman/wife, 2) Women who have stopped menstruating (menopause), 3) A woman who is pregnant, 4) A woman who is *Khulu'* and has never been married to her husband.

The above divorce is neither a Sunni nor a *bid'ī* divorce because there is no lengthening of the *iddah*. Regarding the ruling on divorcing a pregnant wife, there is not much difference between the scholars divorcing a pregnant wife. In general, the differences are divided into three: 1) The first opinion is that it is haram to divorce a pregnant woman if she has menstruation during her pregnancy. This opinion is shared by some Mālikīyah scholars such as Al-Qadhi Abu Hasan; 2) The second opinion states that it is makruh to divorce a pregnant woman. This is one of Hasan al-Bashri's narrations, as Ibn Mundzir mentioned; 3) The third view is that it is permissible to divorce a wife when pregnant. Most scholars agree with this view, including the four Imams of the Mazhab (Shāfi'i, Mālikī, Hanafī, and Hambali) (S. al-Baji, t.t., p. 96).

By the ruling on divorcing a pregnant wife, as explained above, most scholars, including the four schools of thought (Hanafī, Hambali, Mālikī, and Shāfi'i), agree that divorcing a pregnant wife is permissible. However, some scholars of the Mālikī mazhab argue that divorcing a

pregnant wife is haram if the wife experiences menstruation during her pregnancy.

Effects of divorce on children born (in the case of divorce of a pregnant woman)

If the wife and husband during the marriage have two children, one of whom is still minor. The child will legally follow the mother if the other is still unborn, based on KHI Article 105 paragraph (1). Law Number 1 of 1974 Article 41, as amended by Law Number 16 of 2019 concerning marriage, also regulates the consequences of the breakdown of marriage due to divorce for children: 1. Either the mother or the father remains obliged to maintain and educate their children, based solely on the interests of the child; if there is a dispute over the control of the children, the Court gives its decision; 2. The father shall be responsible for all costs of maintenance and education the child requires; if the father cannot fulfill such obligations, the Court may determine that the mother shall share in such costs. (Kusnadi & Iskandar, 2020).

Scholars' Opinions on Divorce during Pregnancy

The first opinion is the one that thinks that pregnant women can experience menstruation. They then make an analogy to the law prohibiting pregnant women from getting divorced during their menstrual period. Just as it is forbidden to divorce a menstruating woman even if she is not pregnant, this has been agreed upon by all scholars based on the words of the Prophet Muhammad SAW. in the Hadith of Ibn Umar when he divorced his wife during menstruation (Baqi, t.t., p. 813):

مره فليراجعها ثم ليتركها حتى تطهر ثم تحيض
ثم تطهر ثم شاء أمسك بعد وإنشاء طلق قبل أن
يمس فتلك العدة التي أمر الله عز وجل أن طلق
لها النساء

The second opinion is Hasan al-Bashri's view that it is makruh to divorce a pregnant woman if the report from him is correct. It may be applicable in cases where the husband wants to start a family or have children, and the presence of a wife does not prevent him from performing the obligatory acts of worship. Alternatively, it may be makruh if there is no need for divorce, according to the Hadith of Ibn 'Umar. (As-Sajustany, t.t., p. 87):

عن ابن عمر عن النبي صلى الله عليه وسلم قال
أبغض الحلال إلى الله الطلاق

While the third opinion uses the argument: 1) Hadith of Ibn 'Umar when he divorced his wife while she was menstruating. He reported the matter to the Messenger of Allah (peace and blessings be upon him), who said (as-Sajustany, t.t., p. 92):

مره فليراجعها ثم ليطلقها طاهرا أو حاملا

2) Imam Ahmad said, in interpreting Salim's Hadith from his father, which reads, "Then divorce her when she is pure or pregnant." The command is to divorce her when she is pure or pregnant. Al-Khuttabi adds that the Hadith implies that

divorcing during pregnancy is a Sunnah divorce, and divorcing itself can be done at any time when pregnant. In this Hadith, a pregnant wife is compared to a chaste woman. Therefore, it is permissible to divorce a pregnant wife as if she were chaste. This is the view of the majority of scholars; 3) If the divorce is done when the pregnancy has been established, then it is certain that the woman has had sexual intercourse with her husband before the divorce. The divorce itself would have been well thought out, and there would be no foreseeable regret later. Thus, the meaning of doubt in verse is pregnancy, not other doubts, because there is no doubt about the *'iddah* period for her. However, he divorced her when the pregnancy was not yet established, and he had not thought about it, which could lead to problems later on. (al-Humam, 1977, p. 478).

Having explained the various scholarly opinions surrounding the above issue, the opinion of the jurists in the third group is the most widely agreed upon opinion. The reason for this is that the *Ṣaḥih* hadith of Imam Muslim fully support their opinion. There is an argument that reads "...then divorce her when she is pure or pregnant ..." that is already reinforcing evidence. This opinion deserves to be accepted because of the weakness of the previous opinion, which does not allow a man to divorce his wife when she is pregnant. (Al-Khatib, 2016, p. 160).

Analysis of Mazhab Māliki's Views and Legal *Istinbat* Method on Divorce of Pregnant Women

The Māliki Mazhab's legal *istinbat* methods are the Qur'an, Hadith, *qiyas*, and

Maslahah mursalah. Mazhab Māliki uses the Qur'an as its legal *istinbat* method, as stated by Allah Swt. in surah At-Ṭalāq verse 1, which reads:

يَا أَيُّهَا النَّبِيُّ إِذَا طَلَقْتُمُ النِّسَاءَ فَطَلِّقُوهُنَّ لِعَدَّتِهِنَّ
وَاحْصُوا الْعِدَّةَ وَاتَّقُوا اللَّهَ رَبَّكُمْ لَا تُخْرِجُوهُنَّ مِنْ
بُيُوتِهِنَّ وَلَا يَخْرُجْنَ إِلَّا أَنْ يَأْتِيَنَّ بِفَاحِشَةٍ مُبَيِّنَةٍ
وَتِلْكَ حُدُودُ اللَّهِ وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَقَدْ ظَلَمَ
نَفْسَهُ لَا تَدْرِي لَعَلَّ اللَّهَ يُحْدِثُ بَعْدَ ذَلِكَ أَمْرًا

"O Prophet, when you divorce your wives, you should divorce them when they can (face) their (reasonable) Iddah, and calculate the time of that iddah, and fear Allah your Lord. Please do not take them out of their homes and do not (allow) them to go out unless they have committed a clear abomination. Those are God's laws. Whoever violates the laws of Allah, then indeed, he has done injustice to himself. You do not know; maybe after that, Allah made a new provision."

As for the hadith as a method of legal interpretation, the majority of Maliki scholars agree that divorce is permissible during pregnancy, according to the following hadith (as-Sajustany, t.t., p. 92):

عن ابن عمر أنه طلق امرأته وهي حائض فذكر
ذلك عمر للنبي صلى الله عليه وسلم فقال مره
فليراجعها ثم ليطلقها طاهرا أو حاملا

According to most scholars, including the four Imams, the above Hadith explains that divorcing a woman while pregnant is permissible. The above Hadith was also narrated by several Imams, including Imam Muslim, Imam Ibn Majah, Imam An-Nasa'i, and Imam Abu Daud. Regarding

the verse of the Qur'an and the Hadith above, there is the phrase "فَطْلَقُوهُنَّ لِعَدَّتِهِنَّ" (then you should divorce her at the time of her 'iddah) and also the phrase "ثُمَّ لِيُطْلَقَهَا".

Thus, it is clear from the above Qur'anic verse and Hadith that a man who divorces his wife when she is pregnant is already in the category of "approaching her natural *iddah*" because it is well known that the *iddah* of a pregnant woman is until she gives birth.

Meanwhile, in the method of legal *istinbat* in the form of *qiyas*, the scholars of the Māliki mazhab likened the words *تَطَهَّرَ* which means "holy" with *حَامِلًا* which means "pregnant" is the same, because when a woman is pregnant, she cannot produce menstrual blood, because when she is pregnant, the ovum (egg) has been fertilized by sperm. When the ovum is not fertilized by the last sperm cell, it produces menstrual blood. Therefore, it is rare for pregnant women to experience menstruation. If there is blood during pregnancy, it is certainly the blood of the disease, and the evidence they use is not based on a definite ruling. If that is the case, it cannot be used as a basis for shar'i rulings because Sharia rulings cannot be based on presumptions and predictions.

Another method of determining the law in the form of *qiyas* is also used by adherents of the Māliki mazhab, namely some Maliki scholars believe that divorcing a wife. At the same time, pregnancy is prohibited/forbidden, as stated by Ibn Al-Mundzir. (An-Nawawi, t.t., p. 325):

قال بن المنذر وبه أقول وبه قال بعض المالكية وقال بعضهم هو حرام وحكى بن المنذر رواية أخرى عن الحسن أنه قال طلاق الحامل مكروه

Not only does Ibn Al-Mundzir state that divorcing a pregnant woman is forbidden, but he also states that it is *Makruh* to divorce a pregnant woman, which is the opinion of Al-Hasan. The view that divorcing a pregnant woman is haram is that of Al-Qaḍi Abu Hasan. This opinion considers that menstruation can occur during pregnancy. They make an analogy between this divorce and divorce during menstruation, even if she is not pregnant, which is agreed upon by all scholars based on the Prophet's statement in the following Hadith of Ibn 'Umar (Baqi, t.t., p. 813):

مره فليراجعها، ثم ليتركها حتى تطهر، ثم تحيض ثم تطهر، ثم إن شاء أمسك بعد، وإن شاء طلق قبل أن يمس، فتلك العدة التي أمر الله عز وجل أن يطلق لها النساء

Based on the above Hadith, it is forbidden to divorce during the period of menstruation or the period of purity when the husband has intercourse because it will cause harm to the wife, namely prolonging her *'iddah* period and the wife who is divorced, menstruation at that time does not count as the *'iddah* of menstruation. Based on the above, it is clear that the divorce is a *bid'i* divorce because it is done

during menstruation. It is also by the Hadith (Baqi, t.t., p. 1418):

من عمل عملا ليس عليه أمرنا فهو ردّ

Divorce during menstruation violates Allah's decree, so this divorce is rejected and has no effect. He (Al-Qaḍi Abu Hasan) thinks that what is denied is the violation of one of the conditions or pillars of its implementation. Whereas the violation is due to the length of the waiting period or the absence of a reason for the divorce, then either of these is not a pillar or condition of the divorce, so it does not have to be rejected and does not cause the divorce not to fall. This divorce, done during menstruation, is not permissible or authorized by the shari'ah. Therefore, it does not belong to the husband, just like a representative in divorce; if he disobeys the order of the person he represents, the divorce does not fall. Something that is forbidden because of its substance, because of its goodness, or because of its nature often causes damage, and the cause of the damage cannot be determined.

The prohibition is due to something outside of what is prohibited and does not indicate that it will cause harm if it happens. For example, a sale is made on the day of Jumu'ah prayer. *Qiyas ma'a al-faariq* (making an analogy with something different) because the deputy is only a messenger and conveys the intentions of the person he represents, so he is only entitled to the matter entrusted to him. Whereas the husband does not declare his divorce on behalf of another person, nor for the sake of Allah SWT, he only declares

his divorce for himself. (Az-Zuhaili, 2007, p. 355–357).

Ibn Qayyim al-Jauziyyah also believes that divorce imposed on a wife when she is menstruating is not by the provisions of Shari'ah. Allah and the Prophet never prescribed divorce when the wife was menstruating. The husband can be considered sinful if such a divorce is done. This is because divorce during the wife's menstruation is not permitted and is forbidden in Islamic law. (Djawas and Friends, 2017).

There is nothing worse than divorce by means forbidden by Allah SWT. One of them is divorce done during menstruation. Most fuqaha' agree that a husband must refer to his wife if she is divorced during menstruation or during the chaste period in which the husband has sex with her.

Thus, that is why Al-Qaḍi Abu Hasan forbade divorce when imposed on a pregnant woman who is menstruating. He compared it to the ruling on divorcing a wife when she is menstruating, even if she is not pregnant. How much harm there is when a husband divorces his wife while she is menstruating.

In the *Maslahah mursalah* method of ruling, the Māliki mazhab emphasizes the wisdom of the prohibition of divorce during menstruation, which is feared to prolong the *iddah* period of the wife, and also the wisdom of the prohibition of divorce during chastity and during chastity, where the wife becomes pregnant, so that both or one of them regrets it. If the pregnancy had been known, the two would have reconciled so that they would have kept the marriage and not wanted to separate. All this is based on the words of

Allah, the Almighty, in Sūrat Aṭ-Ṭalāq verse 1:

إِذَا طَلَقْتُمُ النِّسَاءَ فَطَلِّقُوهُنَّ لِعَدَّتِهِنَّ.....

The relationship between the above verse and the method of determining the law of *Maslahah mursalah* is that the person who divorces his wife during menstruation or divorces during the holy period, and during the holy period, there is intercourse, and it is also unclear whether the wife is pregnant or not. He must wait until his *iddah* is reasonable so that the law is clear (if the wife is menstruating, If the wife is divorced during the period of chastity after intercourse, and it is still unclear whether she is pregnant or not, then she must wait until it is clear that she is pregnant, because if the wife is divorced when she is pregnant, then it is clear that her *iddah* is until she gives birth). So what is meant by waiting here is waiting until the divorce ruling is clear, permissible, and in the public interest, and there is no doubt about it.

An Analysis of the Shāfi'i Mazhab's Views and Legal *Istinbat* Method on Divorce of Pregnant Women

The use of the Shāfi'i's Mazhab *istinbat*/legal determination method here is the Qur'an and Hadith. The Qur'an, as a method of determining the Shāfi'i's Mazhab law, is based on the words of Allah SWT. Surah Aṭ-Ṭalāq verse 1 below:

يَا أَيُّهَا النَّبِيُّ إِذَا طَلَقْتُمُ النِّسَاءَ فَطَلِّقُوهُنَّ لِعَدَّتِهِنَّ

In response to the verse above, Ibn Abbas signaled that the word “*فَطَلِّقُوهُنَّ*”

“*لِعَدَّتِهِنَّ*” (So you should divorce her when her *‘iddah* is due). He said: “He should not divorce her during her menses or during the period of purity in which he had intercourse with her. Rather he should leave her until she has menstruated and become pure, at which time he should divorce her with a single divorce. If she menstruates, then her *‘iddah* is three menstrual cycles. If she does not menstruate, then her *‘iddah* is three months. If she is pregnant, her *iddah* is until she gives birth. (ath-Thabari, 1972, p. 31). The meaning of giving birth here is to have given birth to the entire womb. If the woman gives birth to twins as much as two or three, then the birth of the last child is a sign of the end of the *iddah* period. In the view of Imam Shāfi'i, quoted by Wahbah Zuhaili, if the woman is pregnant while her husband has died before, then her *iddah* (wife) is until childbirth because, for pregnant women who are divorced or abandoned by their husbands, the *iddah* period is the same. (Zuhaili, 2012).

Ibn Sirin said: “The husband divorces her when she is chaste without intercourse, or when she is pregnant, and it is clear that she is pregnant.”

Imam An-Nawawi said: “Divorcing a pregnant woman is not haram. It is neither a Sunnah divorce nor an innovation.” He added: “I understand the words of the Companions in the Shāfi'i mazhab to mean that the pregnant women who are divorced do not have both Sunnah and Bid'ah conditions at the same time, but their divorce is nothing but a Sunnah divorce.

Muṣṭafā Dīb al-Bughā also states in the Shāfi'i book *Mātan at-Taqrīb* that there are two forms of *‘iddah* for a wife whose

husband dies. First, if she is pregnant, the *iddah* period will end until she gives birth. Secondly, if the woman whose husband has died is not pregnant, her *iddah* period is four months and ten days. This provision applies even if the husband dies after having intercourse (where it is feared that pregnancy will occur) (al-Bugha, 2012).

According to Ibn Kathir, the *'iddah* of a pregnant woman ends when the fetus is born. The meaning of fetus consists of a child born and has become human. From this interpretation, it can be understood that the waiting time for a pregnant woman is to wait until she gives birth to a perfect child (Katsir, 2013).

This is based on the interpretation of sunnah as something permissible and bid'ah as something is forbidden. In the above verse, there is both a general and specific meaning. The general meaning includes women whose husbands divorce. The general meaning includes women whose husbands divorce. In contrast, the specific meaning is the mention of divorcing wives at a time when they are approaching their *'iddah* (waiting period) (An-Nawawi, 2007, p. 8).

In addition to relying on the Qur'an surah At-Talāq verse 1, the Shāfi'i madhab's method of *istinbat*/ruling is also in the form of Hadith, which relies on the Hadith of Ibn Umar, which he divorced his wife while she was menstruating. Then Umar told the Prophet about it, so he said (as-Sajustany, t.t., p. 92):

عن ابن عمر رضي الله عنه , أنه طلق امرأته وهي حائض , فذكر ذلك عمر للنبي صلى الله عليه وسلم

فقال: مره فليراجعها ثم ليطلقها طاهرا أو حاملا

The essence of the above Hadith is that the Prophet told Ibn Umar to refer her back, then if he wanted to divorce her, divorce her when she was pure or pregnant. So the Prophet ordered divorce during chastity or pregnancy (Qudamah, 1992, p. 105). Al-Khuttabi adds that the Hadith implies "أو حاملا". In this Hadith, a pregnant woman is compared to a chaste woman, which means that divorcing her when she is pregnant is a Sunnah divorce, and divorcing her can be done at any time when she is pregnant. In this Hadith, a pregnant woman is compared to a chaste woman. Therefore, when a woman is pregnant, it is permissible to divorce her just like when she is chaste. This is the view of the majority of scholars.

As-Shaukani said: Those who say that the divorce of a pregnant woman is a Sunnah divorce rely on the words of the Prophet Muhammad (peace and blessings of Allaah be upon him). "أو حاملا".

Moreover, they are the majority of scholars." About another opinion related to the memorization "أو حاملا", Al-Baji said: The addition of the just man Muhammad ibn Abdur-Rahman, Talhah's slave, is accepted. Moreover, this edition has been corroborated by the group of Salim, Alqamah, and Atha'. They narrated this addition from Ibn 'Umar (A.-W. al-Baji, 1999, p. 98) regarding the above Qur'anic verse and Hadith.

The ruling of each of the two statements in the Qur'an and Hadith is very clear, so combining the two statements and then practicing them is preferable to advancing the ruling of one of them, according to the consensus of the scholars of *ushul*. This is by the *fiqhiyyah* rule (Muhammad, 1424, p. 77):

إعمال الدليلين أولى من إهمال أحدهما ما أمكن

This means it is preferable to unite the two propositions (from the Qur'an and Hadith) and practice them rather than abandoning or choosing one, as long as it is still possible. This means that in terms of both the general and specific meanings of the two verses above, the Qur'anic verse of Sūrat At-Talāq, verse 1, regarding the phrase *فَطْلَقُوهُنَّ لِعَدَّتِهِنَّ* and also the sentence *ثُمَّ لِيَطْلُقْهَا طَاهِرًا أَوْ حَامِلًا*, They can be combined according to the above rules of *fiqh*, and they can be practiced together.

Combining the two propositions above is an order to divorce the wife during the *iddah* period. Then the explanation was given in the Prophet's words in the Hadith of Ibn Umar. If he has not divorced her before he touches her, then this is the period during which Allah, the Almighty, has commanded him to divorce his wife if he wishes. From this, scholars have concluded that divorce is the reason for the length of the *iddah* or the doubt about the *iddah*. (Az-Zuhaili, 2007, p. 362).

The husband of a woman whose pregnancy is obvious should think carefully when divorcing her. Thus, there is no fear

of something that could lead to regret, namely pregnancy. Moreover, the wife is not a woman of doubt because there is no doubt about the form of *'iddah* for her. However, if a husband divorces a pregnant wife who is not yet pregnant, thinking she is not pregnant, and then the pregnancy appears, he may regret it.

The permissibility of divorcing a pregnant woman after intercourse is because the moment of intercourse does not cause confusion in the calculation of *'iddah*, and the wife's *iddah* must end at birth, as Allah SWT says in Surah At-Talāq verse 1 below:

.....وَأُولَاتِ الْأَحْمَالِ أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ

Regarding this, Muhyidin Sharaf An-Nawawi, in his book *Syarh Al-Muslim* explains that the content of the Hadith explains that it is permissible to divorce a pregnant woman whose pregnancy is obvious. Furthermore, according to Ibn Al-Mundzir, the Shafi'i mazhab is the view of most scholars. These include Al-Hasan, Thawus, Abu Ubaid, Malik, Abu Tsaur, Hammad ibn Abi Sulaiman, Ibn Sirin, Rabi'ah, Ahmad, and Ishaq (an-Nawawi, t.t., p. 325).

فيه دلالة لجواز طلاق الحامل التي تبين حملها
وهو مذهب الشافعي قال بن المنذرويه قال أكثر
العلماء منهم طاوس والحسن وابن سيرين وربيعه
وحمام بن أبي سليمان ومالك وأحمد وإسحاق وأبو
ثور وأبو عبيد

In another case of divorce of a pregnant woman, it is explained in the book of Al-Umm (as-Syāfi'i, 1983, p. 462),

قال الشافعي: ولو تزوج رجل امرأة ودخل بها وحملت، فقال لها: أنت طالق، للسنّة أو للبدعة أو بلا سنّة ولا بدعة، كانت مثل المرأة التي لم يدخل بها، لا تختلف هي وهي في شيء مما يقع به الطلاق عليها حين يتكلم به

Imam Shafi said: When a man marries a woman and has intercourse with her and finds out that she is pregnant, he can say to her: "I divorce you," whether the divorce is Sunnah or Bid'ah, or neither Sunnah nor Bid'ah, then the woman is the same as a woman who has not had intercourse, in that the divorce takes effect whenever the husband declares it (Zuhaili, 2008, p. 225).

The evidence supporting Imam Shafi'i's view is the Hadith. At that time, Abu Hurairah disagreed with Ibn Abbas' statement about a wife whose husband died, and the wife was pregnant and gave birth to a child. Abu Hurairah thought a woman could marry because she had given birth. At the same time, Ibn 'Abbas thought that the woman's *iddah* was the longest. So they sent a messenger to Umm Salamah (to inquire about this). The following is the hadith report:

حدّثنا قتيبة بن سعيد حدّثنا عبد العزيز يعني ابن أبي حازم وقال قتيبة أيضا حدّثنا

يعقوب يعني ابن عبد الرّح من القاري كلّهما عن أبي حازم عن أبي سلمة عن فاطمة بنت قيس أنّها طلقاً زوجها في عدّ النبيّ صلى الله عليه وسلم وكان أنفق على نفقة دون فلما رأت ذلك قالت والله لأعلمن رسول الله صلى الله عليه وسلم فإن كان لي نفقة أخذت الذي يصلحني وإن لم تكن لي نفقة لم آخذ من شيء قالت فذكرت ذلك لرسول الله صلى الله عليه وسلم فقال لا نفقة لك ولا سكنى (رواه المسلم)

The above Hadith can be a reference for Imam Shafi'i to determine the legal position on the *iddah* of a pregnant woman whose husband dies until she gives birth. Secondly, if the husband dies and the woman is not pregnant, her *iddah* period is four months and ten days. This applies even if the husband dies after having had intercourse with her (with the fear of pregnancy) (al-Bugha, 2012).

The author concludes this analysis with the opinion of the hadith quoted from the narration of *Jama'ah* except Imam Bukhari, here is (as-Sajustany, t.t., p. 92):

عن ابن عمر رضي الله عنه، أنّه طلق امرأته وهي حائض، فذكر ذلك عمر للنبيّ صلّى الله عليه وسلّم، فقال: مره فليراجعها ثمّ ليطلقها طاهراً أو حاملاً

From the conclusion and understanding of this opinion, the above Hadith is by the narrator of the shiqaq and

is used as a basis by most scholars in ruling on the divorce of pregnant women. Thus, the majority view is that divorcing a pregnant woman is permissible because she is pure and the pregnancy is obvious.

CONCLUSION

By discussing the article, the author can conclude: Regarding the law of divorce for pregnant women, according to the Maliki mazhab, it is valid, based on the Hadith of Abdullah bin Umar, who divorced his wife when she was menstruating. Meanwhile, according to the view of the Shafi'i mazhab, the divorce of a pregnant woman is also valid because it is counted during periods of purity. In this case, the Māliki and Shafi'i schools of thought to base their arguments on the Quranic surah Aṭ-Ṭalāq verse 1 and also the Hadith of 'Abdullāh ibn 'Umar, who divorced his wife during her period.

The use of *istinbat*/determination methods by the Māliki and Shafi'i Mazhabs have similarities and differences. In the same method, the Mazhabs use the Qur'an and As-Sunnah to perfect/resolve the law. As a method of legal *istinbat* in the case of divorcing a pregnant woman, the Maliki and Shafi'i Mazhabs rely on the Qur'an, the first verse of surah Aṭ-Ṭalāq, and also the Hadith of Ibn Umar RA. who divorced his wife during her period. In addition, there is *qiyas* as a difference in the method of determining the law that is not used by the Shāfi'i mazhab but is used by the Māliki mazhab and in the case of divorce of pregnant women, namely when there is a scholar from the Māliki mazhab (Al-Qodhi Abu Hasan) who rules that divorce is forbidden, the reason is that when a pregnant woman can experience

menstruation, then he makes an analogy to the husband who divorces his wife while pregnant in a state of menstruation with the law of the husband who divorces his wife during menstruation even though he is not pregnant.

Suggestions

As a devout Muslim, do not be a person who easily uses emotions anytime, anywhere. Especially in the case of divorce, although it is not prohibited, it should not be used as a game because the marriage contract is sacred and binding. In addition, as an ordinary person, where the Shāfi'i mazhab is the majority of schools of thought in Indonesia, Indonesian Muslims also need to learn about several other schools of thought in other Muslim countries, such as the schools of Māliki, Hanafi, and Hambali which are part of a difference. Hence, tolerance between community/religious organizations is very important, even between religious communities. Therefore, it is not easy to blame their differences as long as they do not cross the boundaries of the regulated shari'a rules and are still by the practice of Pancasila. Related to these differences, people must adapt to their environment and inform each other to maintain the interests and welfare of the people because Islam is a religion that is *Rahmatan lil 'alamin*.

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