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**The Role of Witness as Evidence in Divorce Cases
at the Banda Aceh Syar'iyah Court**

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Abstract: This study examines the role of witnesses as evidence in a divorce case at the Banda Aceh Syari'iyah Court. This study aims to determine the legal basis of witnesses as evidence, the background of the witnesses who were submitted due to disputes or *syiqaq*, and the position of female witnesses in divorce cases. This study uses empirical legal research or sociological law, which is a study whose object is legal phenomena using sociological theories. The legal phenomenon in question is the application of the law at the Banda Aceh Syar'iyah Court, particularly regarding witness evidence in divorce cases. Data collection techniques were carried out by means of in-depth interviews with judges and literature studies related to the existence of witnesses and judges' decisions as primary data related to witnesses as evidence. This study concludes that witnesses as evidence are based on the Qur'an and *hadith* and the applicable laws and regulations. Witnesses have existence as evidence used by judges as a consideration in deciding cases. In the case of a divorce caused by a dispute, the witness evidence comes from the close family background of the husband or wife. Close family who really know, see, and hear the events that occur in their household. In civil procedural law for divorce cases at the Syar'iyah Court, women have the same and equal position as men in giving testimony. The testimony of close families and the sociological equality of women and men is a legal fact that must be appreciated to achieve justice for all parties.

Keywords: *Roles of Witness, Evidence, Proof, Divorces, Syar'iyah Court*

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Abstrak: Penelitian ini mengkaji eksistensi saksi sebagai alat bukti dalam perkara perceraian pada Mahkamah Syar'iyah Banda Aceh. Studi ini bertujuan untuk mengetahui landasan hukum saksi sebagai alat bukti, latar belakang saksi yang diajukan yang disebabkan oleh perselisihan atau *syiqaq* dan kedudukan saksi perempuan dalam perkara perceraian. Kajian tersebut menggunakan penelitian hukum empiris atau hukum sosiologis yaitu suatu kajian yang obyeknya adalah fenomena hukum menggunakan teori-teori sosiologi. Fenomena hukum yang dimaksud adalah penerapan hukum pada Mahkamah Syar'iyah Banda Aceh, khususnya mengenai alat bukti saksi dalam perkara perceraian. Teknik pengumpulan data dilakukan dengan cara wawancara mendalam dengan hakim dan kajian literatur baik yang berhubungan dengan eksistensi saksi maupun putusan hakim sebagai data primer yang terkait dengan saksi sebagai alat bukti. Penelitian ini menyimpulkan bahwa saksi sebagai alat bukti didasarkan pada al-Qur'an dan hadis dan aturan perundang-undangan yang berlaku. Saksi memiliki eksistensi sebagai alat bukti yang digunakan oleh hakim sebagai pertimbangan dalam memutuskan perkara. Kemudian dalam hal perceraian yang diakibatkan oleh perselisihan maka alat bukti saksi berasal dari latar belakang keluarga dekat dari suami atau istri. Keluarga dekat yang betul-betul mengetahui, melihat dan mendengar peristiwa yang terjadi dalam rumah tangga mereka. Sedangkan dalam hukum acara perdata untuk kasus perceraian di Mahkamah Syar'iyah perempuan mempunyai kedudukan yang sama dan setara dengan laki-laki dalam memberikan kesaksian. Kesaksian keluarga dekat dan kesetaraan perempuan dan laki-laki secara sosiologis merupakan fakta hukum yang harus diapresiasi untuk mewujudkan keadilan pada semua pihak.

Kata Kunci: Eksistensi Saksi, Alat Bukti, Kesaksian, Perceraian, Mahkamah Syar'iyah

Introduction

Witnesses are evidence in legal cases in all types of courts, for example, general, state administration, military, constitution as well as religious courts. The information given by the witness is significant in solving cases in courts. The Religious Courts in Indonesia, which are under the auspices of the Supreme Court, have generally accepted rules regarding the role of witnesses as evidence. Therefore, the role of witnesses as evidence is found in almost all religious courts in Indonesia. For example, at the Religious Courts of Madiun, Central Java, there was a study on the strength of the evidence for the witness *testimonium de auditu*. A judge in a trial has the authority to examine witnesses *de auditu* and hear statements from them. However, the witness is not the only evidence, and the testimony can be used as a source of suspicion.¹

¹Rif'ah Roihanah dan Irfina Cornelia, Analisis Yuridis Kekuatan Alat Bukti Saksi

Accordingly, at the Takalar Religious Court, South Sulawesi, the factors that influence witnesses in giving testimony are explored. A testimony must be about events that were seen with their own eyes or experienced by a witness. It is unacceptable as the evidence if the witnesses hear about the events from other people rather than experience them. The factors that influence the witness in giving testimony are motivation, personality, and acquaintance with the perpetrator and the situation and context.²

Meanwhile, the practices of justice in Syar'iyah Court in Aceh are similar to those in Madiun, Central Java where there was also *testimonium de auditu* which was later rejected.³ In fact, witnesses play an important role in every case decided by the panel of judges. A judge in deciding a divorce case must listen to witness statements from the family or people closest to the husband and the wife. In so doing, the case can be measured the extent to which the household has broken up between the plaintiff and the defendant.⁴

Proof with witness evidence in a divorce case at the Jantho Syar'iyah Court, Aceh Besar has become an important method of proof. However, not all reasons for divorce must be proven by witness evidence, it can rather be proven by other evidence, except for divorce on the grounds of *shiqaq* or continuous disputes. In making the witness as the legal basis of proof in divorce cases, judges refer to the Qur'an, hadith, opinions of scholars, statutory rules and jurisprudence.⁵

In most Religious Court, women as witness have gained equal position to the men as witness, especially in the divorce cases. This takes place in the Jambi Religious Court. Women are witnesses who are presented in the evidentiary trial process. This shows that there are no discrimination and gender differences in the religious judicial process in Jambi.⁶

²Tertimonium de Auditum dalam Sidang Perceraian di Pengadilan Agama Kabupaten Madiun, *al-Syakhsiyah: Journal of law and Family Studies* 1, No. 1 (2019), p. 2.

³Nur Ikawahyuli Basri dan Hasnawi Haris, Peran Saksi dalam Perkara Perceraian di Pengadilan Agama Takalar, *Jurnal Tomalebbi* II, No. 2 (2015). P. 41.

⁴Ihdi Karim Makinara, Jamhir dan Sarah Fadhilah, Saksi *Testimoni De Auditum* dalam Perkara Perceraian Menurut Hukum Islam, *el-USrah: Jurnal Hukum Keluarga* 3, No. 2 (2020), p. 227.

⁵Amiruddin, Eksistensi Alat Bukti Saksi dalam Perkara Perceraian di Mahkamah Syar'iyah, *Jurnal Syarah* 8, No. 1 (2019), p. 19.

⁶Amiruddin, A. Hamid Sarong dan Syarifuddin Hasyim, Keberadaan Alat Bukti Saksi dalam Perkara Perceraian (Studi Penelitian Pada Mahkamah Syar'iyah Jantho), *Jurnal Ilmu Hukum Pasca Sarjana Unsyiah* 2, No. 2 (2014), p. 1.

⁷Jantan Saparuddin dan Maryani, Saksi Wanita dalam Putusan Perceraian di Pengadilan Agama Kelas IA Kota Jambi, *Jurnal Innovatio* XVI, No. 1 (2016), p. 19.

Divorce cases have two categories, namely *talak* divorce (husbands divorce wives) and sued divorce (wives divorce husbands).⁷ The *talak* divorce is an application for divorce filed by the husband to divorce his wife, while the sued divorce is a lawsuit filed by the wife to end the relationship with the husband. The husband in a *talak* divorce case is called the Petitioner, the wife is called the Respondent, while in the case of sued divorce, the wife is called the Plaintiff, and the husband is called the Defendant. Divorce is carried out in court, and the Petitioner/Plaintiff must prove their arguments or reasons for the petition/claim in accordance with the proof provided. The purpose of the proof is to obtain certainty that an event or fact that is proposed actually and truly happened so that the judge's decision is correct and fair.⁸ The judge cannot make a decision before it is clear to him that the event or fact that is being proposed actually happened, that is, it is proven true so that the legal relationship between the parties can be correctly decided. The purpose of proof in Islamic law is no different from the purpose of the proof in a general sense, which is to obtain clarity and certainty of an event in any court, including Islamic courts.⁹

In general, in civil cases, the proof is only needed when the arguments of the Petitioner's/Plaintiff's claim are denied by the opposing party. The Petitioner/Plaintiff is obliged to prove the arguments or reasons that are denied, while in the case where the arguments or reasons are acknowledged, the Petitioner/Plaintiff is not obliged to provide any proofs. Likewise, in cases where the opposing party (Respondent/Plaintiff) has never been present at the trial (*verstek*), the Petitioner/Plaintiff is not obliged to submit evidence because the Respondent/Defendant in his absence before the court is considered to have acknowledged all the arguments or reasons put forward by the Petitioner/Plaintiff. In contrast to divorce cases in the Religious Courts (Syar'iyah Court), which do not fully place confessions and written evidence (letters) as evidence and does not contain perfect and binding values, and even though the legal relationship and or facts of events are not denied by the opposing party, the Petitioner/Plaintiff is still charged with proving the claim. The Petitioner/Plaintiff is charged with proving by means of witness evidence who knows about the arguments or reasons in the Petitioner's/Plaintiff's petition/claim.

⁷Departemen Agama RI, *Tanya Jawab Kompilasi Hukum Islam*, Departemen Agama RI, Jakarta, 1998, p. 65-68.

⁸Mukti Arto, *Praktek-Praktek Perdata pada Pengadilan Agama*, Yogyakarta: Pustaka Pelajar, 2003, p. 140.

⁹Asadulloh Al-Faruq, *Hukum Acara Peradilan Islam*, Yogyakarta: Pustaka Yustisia, 2009, p. 33.

Civil Procedure Law generally prioritizes written evidence (letters) rather than witness evidence, and it does not distinguish between general or ordinary cases and divorce cases. Witness evidence applies to all cases, does not apply specifically, and does not distinguish one case from another. While the Religious Courts Procedural Law in the settlement of divorce cases on the basis of *syiqaq* reasons, judges can submit evidence of witnesses from the family or people close to the litigants to be witnesses, judges or arbitrators (peacemakers). In the divorce cases based on *syiqaq* reasons,¹⁰ the Plaintiff/Applicant is charged with witness evidence from the family of a person close to the parties to be heard at trial.

Divorce cases at the Banda Aceh Syar'iyah Court are cases of divorce for various reasons. All of these cases are charged with proving through witness evidence, one of which is a family witness or a person close to the parties as evidence, not limited to *syiqaq* reasons, but on all reasons for divorce, both those denied by the respondent/defendant and those recognized, both those denied, and both were present at the trial and only the plaintiff/applicant was present. Witness family and close people are witnesses whose position is the same as witnesses in other civil cases, so the examination is carried out at the evidentiary stage, therefore they are placed formally and must be sworn in and the information they provide meets material requirements, namely the information they give based on own eyesight or experience, which then the information they provide is in agreement with witnesses or other evidence and what they provide is valid and valuable as evidence and has the power of proof.

This study uses empirical legal research or sociological law, which is a study whose object is legal phenomena using sociological theories. The legal object in question is the application of law to the Religious Courts or the Syar'iyah Court, particularly regarding witness evidence in divorce cases.¹¹ Data collection techniques were carried out by means of in-depth interviews with judges and literature reviews both related to the role of witnesses and analyzing several judges' decisions as primary material related to witnesses as evidence.¹²

¹⁰*Syiqaq* adalah perkecokan yang terjadi secara terus menerus antara suami isteri yang tidak harmonis sehingga dapat menjadi faktor terjadi perceraian. Amiur Nuruddin dan Azhari Akmal Tarigan, *Hukum Perdata Islam di Indonesia: Studi Kritis Perkembangan Hukum Islam dan Fikih, UU No. 1/1974 sampai KHI*, Jakarta: Kencana, 2006, p. 212.

¹¹ Achmad Ali dan Wiwie Heryani, *Menjelajah Kajian Empiris terhadap Hukum*, Jakarta: Kencana, 2012, p. 7. Alvin S. Johnson, *Sosiologi Hukum*, diterjemahkan Rinaldi Simamora, Jakarta: Rineka Cipta, 2004. Munir Fuady, *Teori-Teori Besar dalam Hukum*, Jakarta: Kencana, 2013. Munir Fuady, *Teori-Teori dalam Sosiologi Hukum*, Jakarta: Kencana, 2013, p. 189.

¹²Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Kencana, 2009, p. 155.

Roles of Witness in Islamic Court Cases

Etymologically (*lughawi*) witness in Arabic is *al-syahadah* which is a *masdar* (noun) form of the word (*syahdah-yasyhadu*) which means attending, witnessing (with eyes), and knowing. *Shahadah* also means *al-bayinan* (proof), *yamin* (oath), and *iqrar* (confession).¹³ Meanwhile, according to the term (terminology) that testimony means definite news. *Musyahadah* means something real because witnesses are those who see and experience something that other people do not have any knowledge about. Witness also means someone who tells the truth about what he saw and heard.¹⁴ In addition, witnesses can be interpreted as a person or a number of people who present information to establish rights over other people. In court, evidence with witnesses is very important, especially when there is a custom in society that legal acts committed are not recorded.¹⁵

Meanwhile, the legal basis for witnesses is as described in the Islamic law can be referred to in the Qur'an and the traditions of the Prophet. In the Qur'an, surah Al-Baqarah: 282, Allah says: "and testify with two male witnesses, if there are no two men available, then (it is permissible) a man and two women from the witnesses you are pleased with, so that if one of them feel uncertain about what they observe, other two witnesses will remind them. Likewise, the Al-Qur'an, surah Al-Maidah: 8, Allah says: "O you, who believe, be people who always uphold the truth because of Allah, be a just witness, and never does your hatred of a people encourage you to act unjustly. Be fair because fair is closer to piety. Fear Allah verily Allah is Knowing of what you do". While the *hadith* from Ibn Abbas ra. "It has been told to me, Saif bin Sulaiman from Qais bin Sa'ad from Umar bin Dinas from Ibn Abbas that the Messenger of Allah decided based on an oath and one witness (HR. Muslim)."¹⁶

There are five kinds of witness as evidence in court according to the laws and civil procedural law, Civil Religion Article 164 HIR Article 1866 BW and *Juncto* Article 283 R.Bg: written evidence, witness evidence, assumptions,

¹³Ahmad Warson al-Munawwir, *Al-Munawwir: Kamus Arab-Indonesia*, Surabaya: Pustaka Progresif, 2002, p. 746-747.

¹⁴Ihsanuddin, Mohammad Najib dan Sri Hidayanti, *Panduan Pengajaran Fiqh perempuan di Pesantren*, Yogyakarta: YKF dan Ford Foundation, 2002, p. 94. Jantan Saparuddin dan Maryani, *Saksi Wanita dalam Putusan Perceraian...*, p. 22.

¹⁵M. Abdul Mujieb, Mabruhi Tholhah dan Syafi'ah, *Kamus Istilah Fiqih*, Jakarta: Pustaka Firdaus, 1994, p. 306.

¹⁶Imam Muslim, *Shahih Muslim*, Juz II, Beirut: Daar al-Kutub al-Ilmiyah, t.th., p. 60.

confessions and oaths.¹⁷ Evidence by witnesses is required in the event that written evidence is not obtained. The practice of the procedural law of religious courts has many events or incidents that cannot be proven in writing but must be proven by witnesses. For example, related to the issue of divorce between a husband and a wife. Regarding this witness, there are those who coincidentally saw and experienced or heard of events that must be proven before the trial. For example, the witness happens to be in the neighborhood of a house that is currently litigating in court. So, he often hears bickering, quarrels between the husband and the wife.¹⁸

The testimony of a witness presented before the trial is something he has seen, experienced, or heard himself. The evidence can be also shown on the basis of one's expertise. However, it is not the authority of the witnesses to draw conclusions from what is seen, heard, and known, it is rather the judge's authority in assessing the testimony of the witness.¹⁹

Witness testimony can be worth a testimony if:

- a. the statement was spoken before a court hearing;
- b. the statement is made under oath;
- c. at least two witnesses must provide their statements, because one witness cannot be accepted unless accompanied by other evidence, such as an oath;
- d. the statements of each other (between witnesses) are in agreement with each other.²⁰

Meanwhile, the requirements for witnesses as evidence are based on both formal and material the laws. The formal requirements for a witness are being capable of giving witness (usually aged 15 years and over), sound in mind, have no blood or marital relationship from either party even though they are divorced, have no working relationship with either party by receiving a salary, be present at the trial, swearing in accordance with their religion, totaling at least two people to testify to an event and providing information orally.²¹

In addition, the material requirement is to explain what is seen, heard and experienced by oneself, having a well-understanding of the incident, not the opinion or conclusions of the witness himself, are in accordance with each other, is not conflicting with common senses. In addition, witnesses have the

¹⁷Achmad Ali dan Wiwie Heryanti, *Asas-Asas Hukum Pembuktian Perdata*, Jakarta: Kencana, 2012, p. 73. Retnowulan Sutantio dan Iskandar Poeripkartawinata, *Hukum Acara Perdata dalam Teori dan Praktek*, Bandung: Mandar Maju, 2009, p. 63-85.

¹⁸ Taufiq Hamami, *Hukum Acara Perdata Agama: Teori dan Pratiknya dalam Proses Peradilan Agama*, Jakarta: Tatanusa, 2004, p. 224.

¹⁹Taufiq Hamami, *Hukum Acara Perdata Agama...*, p. 225.

²⁰Taufiq Hamami, *Hukum Acara Perdata Agama...*, p. 225.

²¹M. Yahya Harahap, *Hukum Acara Perdata, tentang Gugatan, Persidangan, Penyitaan, Pembuktian dan Putusan Pengadilan*, Jakarta: Sinar Grafika, 2006, p. 633-643.

obligation to swear in accordance with their religion, not people who are prohibited from being heard as witnesses for groups, and who are independent to make decisions, such as to resign as witnesses and to state their willingness to be examined as witnesses.²²

Islamic law and positive law have something in common regarding the criminal cases, in which the evidence is witness testimony, expert testimony, letters, instructions and statements of the defendant. Both laws also see that witness evidence is important as it assists the evidentiary process in criminal trials and help judges to gain confidence in the alleged act.²³

It is then understandable that the existence of witnesses in Islamic courts has an urgent position because they can assist judges in deciding civil cases, especially divorce. Likewise, in criminal cases, the existence of witness statements is also important both in Islamic law and positive law.

The Role of Witnesses as Evidence in the Syar'iyah Court

Divorce is one of the causes of dissolution of marriages other than death and court decisions. What it is meant by divorce in this context is not only defined in a narrow sense, namely *talaq* which in Islamic law becomes the right of the husbands to file the divorce to their wives; divorce in this context means as an act of the severance of marital ties submitted to the Syar'iyah Court to get a fair decision. Both husbands and wives agree to cease their marital status because they see it as impossible to maintain their marriage. Given the importance of the role of evidence with witnesses, almost all case examination processes at trial cannot be separated from the testimony of witnesses. This is even more so in divorce cases with certain reasons that have been outlined in the legislation, namely Article 39 of the 1974 Marriage Law.²⁴

In a divorce case, the petitioner/plaintiff is required to submit 2 pieces of evidence, namely evidence about marriage in the form of a Marriage Certificate which is used to prove that the parties are indeed a legal husband and wife and a witness to confirm the arguments of the petitioner/plaintiff's lawsuit or rebuttal from the respondent/defendant. Even though each husband-and-wife state that they want a divorce, it cannot be accepted by judges if they are unable to submit sufficient reasons for divorce. For that reason, both wives and husbands should present witnesses before a judge to hear their testimony.

²²Abdul Mannan, *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama*, Jakarta: Kencana, 2006, p. 250-251.

²³Syahrul Azwar, Eksistensi Alat Bukti dalam Pengadilan (Suatu Komparatif Menurut Hukum Islam dan Hukum Positif di Indonesia, *Jurnal Qiyas* 3, No. 2(2018), p. 219.

²⁴The Constitution No 1, 1974 on Marriage-that to file a divorce spouses should provide evidence that they are not able to maintain their marriage any longer.

Testimony is the certainty given to the judge at trial regarding an event or incident in dispute by way of verbal and direct notification by people who are not parties to a case. With the evidence of the witnesses of the parties litigating in the Syar'iyah Court, they try to convince the panel of judges of the truth of the events that are put forward as arguments or reasons in the trial.

Evidence by witness testimony at the Syar'iyah Court is also called witness evidence or witness testimony evidence, which means people who see, experience and hear for themselves the events or incidents that are being disputed. Evidence by witness testimony is permitted in all cases and is not excluded by law. Evidence by means of witness testimony is required if there is no written evidence or is incomplete evidence to support or corroborate the truth of the arguments for the petition or lawsuit. In a certain event or legal issue, the documentary evidence is only qualified as the initial proof, the witness as evidence can be a form of additional proof.

Witness as evidence is the most important means of proof in cases that are being examined in court. A testimony must be about events that were seen with their own eyes or experienced by the witness; the claim based of hearing cannot be accepted as the legal proof. The testimony of the witness must not be the conclusions he draws from the events he has seen or experienced, because it is the judge who has the right to draw those conclusions. Testimony, however, is not a perfect means of proof and binds the judge. The judge is free to believe or not to believe the testimony of a witness.

Witness from the Family for the Syiqaq divorce Case

Based on Law Number 7 of 1989 concerning Religious Courts, the syiqah case should be submitted to the religious court. It is originally the *syiqaq* case from the beginning; it is not a general case and then later on made it as the *syiqaq* case.²⁵

The *syiqaq* case requires a special form of law enforcement; it can in fact deviates from the general principles of civil procedural law. Therefore, a divorce due to *shiqaq* is a divorce because of the harm that befell the wife or husband and the breakup of the marriage ties, the judge is obliged to confirm (assess) whether or not the events proposed by the litigants are true. Then qualify the *shiqaq* event, and finally give punishment (constitution) to the event proposed by the parties.²⁶

Divorce cases on the grounds of *shiqaq* or continuous disputes, family of the plaintiff and defendant originally cannot be invited as witness in exempted

²⁵Abdul Mannan, *Penerapan Hukum Acara...*, p. 387. A. Basiq Djalil, *Peradilan Agama di Indonesia*, Jakarta: Kencana, 2010, p. 92.

²⁶Abdul Mannan, *Penerapan Hukum Acara...*, p. 388.

by the law 1986.²⁷ The judge must first listen to witnesses who come from family or people who are close to the husband and wife in dispute before making a decision. Negligence or failure to examine witnesses, families or people close to a husband and a wife, the case cannot be easily solved. Therefore, the judge must ask the parties who are the closest relatives to the husband and wife. If it turns out that the close family does not exist or is far away or the close family is difficult to present in court, the judge can ask people who are close to the husband and wife.

The fact that close family witnesses is explained in Law no. 7, 1989 Article 76 paragraph (1) states that “if the divorce lawsuit is based on *shiqaq* reasons, to get a divorce decision, witnesses must be heard from the family or people who are close to the husband and wife. In addition, in Article 22 paragraph (2) Government Regulation no. 9 of 1975 stated: “the lawsuit in paragraph (1) can be accepted if it is clear enough for the court regarding the causes of the dispute and quarrel and after hearing the family and people close to the husband and wife”.²⁸

The judge may order the Substitute bailiff to summon the witnesses, if the witnesses are unable to fulfill the summons they can be presented by force. Therefore, when considered in Law no. 7 of 1989 in Article 76 paragraph (1) concerning the examination of witnesses of families or people close to husband and wife is imperative, that is, it is a must or something that must and must be examined. Because the position of the family or close people in the *syiqaq* case is a witness, not as a person who merely provides information or as a person requested by the judge in the context of efforts to reconcile the litigants in ordinary divorce cases. Because of the position of the family or people close to the husband and the wife as witnesses, the judge must seat them formally and personally. So before they testify before the trial, they must take an oath first. Some families as witnesses only apply in divorce cases based on reasons of continuous disputes and quarrels and there is an element of *dharar* and the breakup of marital ties (*syiqaq*).

Divorce cases due to *syiqaq* are relatively high in Aceh. For example, in the decision of the Banda Aceh Syar'iyah Court Number 233/Pdt.G/2020/MS.Bna, a husband (33 years old) filed for divorce (*talak* divorce) his wife (29 years old) who were married in 2015. In the application form, the husband stated that since 2018 the household of the petitioner and the respondent had a dispute for 1 month and had been fighting for 2 years because the respondent was disobedient. In fact, she prefers obeying her mother instead

²⁷Undang-Undang Nomor 7 Tahun 1989 tentang Peradilan Agama.

²⁸ Abdul Mannan, *Penerapan Hukum Acara...*, p. 389.

of her husband.²⁹

In the divorce case in Banda Aceh, it was found that the disputes and quarrels had been going on for two years, the Banda Aceh Syar'iyah Court asked for witnesses from both parties and all of them were close relatives. The four witnesses are all relatives of both parties, the applicant presented the first witness, the female (29 years old) is the applicant's sister-in-law, the second witness is the applicant's older sister (39 years). Meanwhile, the respondent also has two witnesses; the first witness is the biological mother (57 years) and the respondent's biological brother (48 years).³⁰

The witness as evidence from a close family background can also be seen in the decision of the Banda Aceh Syar'iyah Court Number 187/Pdt.G/2020/MS.Bna concerning the case of a divorce between a wife (43 years) and husband (47 years) who were married in 2000. The divorce was caused by an argument, and both were in 2005. The husband also never had a good reciprocal communication, always had disagreements, and always blamed his wife for no apparent reason. The husband sometimes insults, rebukes and yells to his wife, she is then traumatized. In this case, there were three witnesses who were presented by the wife, the first and second witnesses were the plaintiff's uncle and the third witness, a woman was the plaintiff's younger sister. Meanwhile, the defendant only presented one witness, who was a friend of the defendant.³¹

The rule of law regarding witnesses who come from close family backgrounds can only be applied for the *shiqaq* case. In this last case, it is sufficient for them to just ask for information, as well as peace efforts so that the litigants can get back together again. The ratio of placing family and close people as witnesses in a *shiqaq* case is none other than because this *shiqaq* divorce is very special in nature and thus family involvement is needed to resolve it.³²

The testimony of the witness as evidence in the trial is stated in judge's decision since it becomes the basis for the judge in making his decision on certain cases. The fact that the dispute and quarrel between the the wife and the husband, has made it eligible for the judges to grant the husband's request to divorce his wife.³³

²⁹Mahkamah Syar'iyah Banda Aceh, Putusan Nomor 233/Pdt.G/2020/MS.Bna.

³⁰Mahkamah Syar'iyah Banda Aceh, Putusan Nomor 233/Pdt.G/2020/MS.Bna.

³¹Putusan Mahkamah Syar'iyah Banda Aceh Nomor 187/Pdt.G/2020/MS.Bna.

³² An interview with Surya, a judge in the Syar'iyah Court of Banda Aceh, October 22, 2020.

³³Putusan Mahkamah Syar'iyah Banda Aceh, Nomor 233/Pdt.G/2020/MS.Bna.

In this case, it shows that Syar'iyah Court has carried out procedures in accordance with the rule of law that for divorce cases caused by *Shiqaq*, the witness as evidence must be from the close family. Of the four witnesses presented by each side, all were close relatives. Because divorce cases in Islamic civil law are handled by religious courts, witnesses as evidence must indeed come from close families who saw and heard and knew firsthand the situation of the case.

In general, the family hopes that the marriage can be maintained since it is unlikely that family units plan to end their marriage bond. Based on these views and assumptions, the family is expected to be a valuable witness as evidence that can be accounted for. Only the family and close people can interfere in the affairs of the husband and wife who filed for divorce; therefore, the family can be expected by law to provide clarity on all matters and events that occur in the disputes and quarrels between a husband and a wife who file for divorce. Because family and close people are witnesses, the examination is carried out at the proof stage. The examination of witnesses is more directed to the formal truth of the argument of litigation. If the close relative as witnesses has confirmed that disputes and quarrels are very tense between a husband and a wife, and there has been a breakup of marriage and it is a small possibility the marriage bond can be maintained, the judge will decide and permit the divorce to take place. However, the judge may also postpone the decision in seeking of the best solution for the couple.

Witnesses as evidence are very strong resource for justice because they see, hear and feel what happened (an event), but not all witnesses can be taken for granted without careful selection. It is for this reason that witnesses must meet the requirements as witnesses. In using witnesses before the Syar'iyah Court, it is necessary to distinguish whether the witness is a legal requirement or as a means of proof, since the two function differently. For example, 2 witnesses are a legal requirement for a marriage to be valid, but to prove a marriage does not have to be with 2 witnesses, it can be done in other ways, such as by confessing of both husband and wife with their oath, with a marriage certificate, with a witness plus the oath of one husband and wife.

This discussion allows us to understand that the witness as evidence comes from a close family background for the *syiqaq* divorce case. This is because divorce is different from ordinary civil cases (*lex specialist*), so it requires testimony from close family members who really see, hear and know the dispute between a husband and a wife.

Women as Witnesses in Divorce Cases

The Islamic law does not adhere to theories of evidence in general, such as a theory of proof system based on positive laws, based on judges' beliefs only supported by logical reasons, and based on negative laws. This is because for each case the evidence system is different based on the form of the crime. The form of the crime can be divided into three, namely *jarimah hudud*, *jarimah qisas diyat*, and *jarimah ta'zir*, depending on the severity and severity of the sentence imposed. In each of these *jarimah* there are also differences in terms of how to prove it. While the comparison of witnesses for male gender is one man and two women. In general, the practice of law in the religious courts in Indonesia for women's testimonies as evidence for divorce cases has equal position to men.³⁴

The minimum limit for witness evidence in a divorce case is two, both male and female witnesses. According to the results of the research at the Syar'iyah Court of Banda Aceh, the evidence with witness evidence in divorce cases varies slightly in its application. According to the Head of the Banda Aceh Syar'iyah Court as well as the Chair of the Assembly, he emphasized that basically the minimum limit for witness testimony that can be used as evidence in a divorce case is two male witnesses or one male and two female or four female witnesses. However, in the recent times, it has shifted gradually in its meaning, in which there is gender difference any longer. In addition, every witness who testifies at trial is in accordance with what he has seen, heard and experienced, not heard from others.³⁵

According to Yusri, one of the judges at the Syar'iyah Court of Banda Aceh, that the testimony of the witnesses as evidence as many as 2 people, both male and female and not limited to gender, the important thing is the quantity and quality so as to convince the panel of judges which is reflected in the 'unus testis nullus testis' meaning that a witness cannot be accepted as evidence. In this rule, the gender of the witness is not limited. If the witness meets the requirements, the panel of judges can consider it. If only based on the evidence of one witness, the judge cannot decide a case. This is in line with the principle of testimony according to Islamic law that the law of origin for witnesses is two people. So, if there are fewer than two people, other evidence must be added as a substitute.³⁶

³⁴Jantan Saparuddin dan Maryani, *Saksi Wanita dalam Putusan Perceraian...*, p. 28.

³⁵An interview with Jasri, the head of the Syar'iyah Court Banda Aceh, October 22, 2020.

³⁶An interview with Yusri, the judge of the Syar'iyah Court Banda Aceh, October 22, 2020.

In practice within the Banda Aceh Syar'iyah Court, there is no absolute requirement to be accepted as a witness, both regarding gender, nature and ideal numbers. The evaluation on the eligibility of the witness begins with a complete identity check (name, age, religion, education, occupation and address), willingness to be a witness and to take an oath in accordance with the witnesses' religion, as well as questions about the relationship between the witness and the parties having a case in the court. In the period 2010 and 2020, there was no a single witness in the divorce case at the Banda Aceh Syar'iyah Court who was non-Muslim. Religious differences are not an absolute obstacle to being accepted as witnesses, but preferably Muslims, because the main principle in this problem of proof is the disclosure of the truth of an event.

A witness who has a very close family relationship with the litigating party may be rejected by the opposing party, while the witness himself may request to be released from his obligation to testify. Furthermore, the law stipulates that the testimony of one witness is not sufficient. This means that the judge may not base a decision on the victory or loss of a party on the testimony of only one witness. For that reason, the testimony must always be supplemented by another means of proof. Witnesses are very much needed in a dispute to prove the arguments to confirm that the dispute really takes place.

For example, in the case of divorce at the Sya'iyah Court of Banda Aceh in the decision Number 336/pdt.G/2029/MS.Bna between a wife (54 years old) and a husband (63 years old) who was married 1984. In the trial process the plaintiff (the wife) invites all women witnesses: close friends (55 years old) and siblings (58 years old). According to the testimony of the witness, she had seen with her own eyes that the defendant (husband) did not care about his wife when she was sick. The witness also testified that they had been separated and no longer harmonious. These reasons drive the wife to file the sued divorce from her husband.³⁷

This decision is also interesting because only two witnesses were presented, and both were women. The first witness is not a close relative, while the second witness is the applicant's sister. The two witness' statements became the basis for judge's consideration in making a decision for several reasons:³⁸

1. First, the judge considered the first witness' statement that there have been continuous disputes and quarrels in the spouse's households which has lasted for 8 years. This is so because of the defendant's attitude who did not provide sufficient daily needs and the fact that the defendant has been away for sometimes for no real reason. The witness has a firsthand observation on the condition of the spouse.

³⁷The Syar'iyah Court's of Banda Aceh decision Nomor 336/pdt.G/2020/MS.Bna.

³⁸The Syar'iyah Court's of Banda Aceh decision Nomor 336/pdt.G/2029/MS.Bna.

2. Second, the judge considered the second witness' statement that there have been disputes and quarrels for the past five consecutive years. The witness also confirmed that the husband has not so far provided daily needs of the wife. They also do not live together anymore, and it seems impossible to make them unite in the marriage bond anymore. The statements of the first and second witnesses have met the material requirements as stipulated in Article 309 R.Bg so that the testimony of the witnesses has the power of proof and can be accepted as evidence.

Likewise, the case of divorce due to *syiqaq* in the decision of the Syar'iyah Court Number 203/Pdt.G/2020/MS.Bna between a wife (42 years old) filing for divorce from her husband (53 years old) who were married in 2014. In the decision, it was stated that the reason for the wife to file for divorce was because since 2014 their household had always been in constant disputes and quarrels. Two witnesses were presented to the Syar'iyah Court, first a man (50 years old) who was her husband's biological brother and the second witness a woman (45 years) her husband's older sister.³⁹

Referring to these two decisions of the Syar'iyah Court, it can be understood that the first case of witnesses consisted of two, all women. In the second case, there were also two witnesses, one of whom was a woman. In addition, other evidence such as written evidence, marriage certificates and proof of peace from the gampong (village) party who had tried to reconcile but to no avail. Also the mediation efforts carried out at the Syar'iyah Court are in accordance with Article 154 R.Bg jo. Supreme Court Regulation No. 1 of 2016, the court also tried to reconcile the parties through a mediator judge, but to no avail.⁴⁰

This shows that female witnesses in divorce cases at the Syar'iyah Court have the equal way of testimony. Women who provide the same information as men become evidence that adds to the judge's confidence in deciding divorce cases, both talaq divorce cases and sued divorce cases. Witnesses as evidence in divorce cases are very important because many legal events cannot be recorded or there is no written evidence. So the witness is the only evidence that can be used. As stated by Surya, a Judge of the Banda Aceh Syar'iyah Court, that a witness is a person who must provide information before a court, by fulfilling certain conditions, about an event or situation that he has seen, heard and experienced himself. As evidence of the occurrence of the event or condition, where the person knew and saw the incident with his own eyes, at the time the

³⁹The Syar'iyah Court's of Banda Aceh decision Nomor 203/Pdt.G/2020/MS.Bna

⁴⁰The Syar'iyah Court's of Banda Aceh decision Nomor 336/pdt.G/2020/MS.Bna.

incident took place.⁴¹

People who testify before the trial must meet certain conditions. The certain conditions referred to are those that must be fulfilled, namely the formal requirements and material requirements of witnesses as described previously. Without the fulfillment of these conditions, of course, a person cannot be a witness in a case before the trial. Evidence by witnesses is allowed in all cases, unless the law provides otherwise. Proof with new witnesses is needed if there is no written or written evidence or is incomplete to support and strengthen the arguments on which the parties are based. Witness testimony was given in the trial to convince the Panel of Judges that the event or dispute that occurred between the parties occurred

Witness testimony can convince the judge only if he gets it from seeing, experiencing, or hearing the incident himself, as according to the rules of *ushul fiqh* which is called confidently: meaning: 'Something that is permanent, by sight or by evidence (proof)'.⁴² This suggests that the witness heard and participated in an event, so that he could convince the judge. That way a belief can be raised when the witness says that the information he gave was because he experienced, heard and saw it himself. The testimony given by the witness can only be considered as evidence and can be used as consideration by the judge if the witness gives his testimony before a court session and is under oath. The dominant evidence used in divorce are written evidence and witness evidence, although in this case there is a Defendant's confession, confessional evidence is rarely used or often neglected.⁴³

Based on this study, the legal basis for imposing evidence with witness evidence in the divorce case at the Banda Aceh Syar'iyah Court is based on the Qur'an, hadith and legal rules that apply to religious courts in Indonesia. As for divorce cases caused by prolonged disputes or *syiqaq*, the witness as evidence comes from a close family background. For the issue of disputes, it is very likely that the family and close relatives are the ones who know better. This consideration can be accepted in the context of the sociology of law, to enable legal facts revealed clearly which allows judges decide cases fairly. Meanwhile, the position of women as witnesses in divorce cases has the same position as men in sociological studies, which is an additional proof, especially since this is a religious civil case, which is different from the psychologically severe

⁴¹An interview with Surya, the judge of the Syar'iyah Court Banda Aceh, Tanggal 22 Oktober 2020.

⁴²Abdul Mudjid, *Al-Qawaid Fiqhiyah (Kaidah-Kaidah Ilmu Fikih)*, Yogyakarta: Nur Cahaya, 1984, p. 25.

⁴³An interview with Juwaini, the judge at Syar'iyah Banda Aceh, dated 1 August 2020.

punishment for women. So equality between men and women in witnessing is something that must be appreciated in the legal field in Indonesia.

Conclusion

The legal basis that imposes evidence with witness evidence in the divorce case at the Syar'iyah Court of Banda Aceh can be accepted. According to civil procedural law, witnesses are one of the types of evidence, other than written evidence, allegations, confessions and oaths. The panel of judges made the legal basis for proof with witness evidence in divorce cases only in general terms from the opinions of the scholars extracted from the Qur'an and hadith as well as the laws and regulations that apply in the Religious Courts under the auspices of the Supreme Court. Witnesses play a significant role in judges' considerations in deciding divorce cases. In addition, in the case of a divorce caused by a dispute or *syiqaq*, the witness evidence comes from family background or people who are close to the husband or wife should be invited. This is because divorce is different from ordinary civil cases (*lex specialist*), so it requires testimony from a close family. Sociologically, it is the immediate family who really knows, sees, and hears the events that occur in their household. The two decisions were analyzed to prove that the role of the immediate family in giving testimony before the court becomes the judge's consideration in deciding the law. In civil procedural law for divorce cases at the Syar'iyah Court, women have the same and equal position as men in giving testimony. The two decisions used as the object of the study show that women are given the same role as men. Sociologically, women are seen as equal and show that there is no discrimination between men and women in terms of giving testimony so that justice can be realized for all parties in the Syar'iyah Court.

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