

# Testimonium De Auditu Witness: Comparison of Maslahah in the Settlement of Syiqaq in the Religious Court of the Border Regions

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## Testimonium De Auditu Witness: Comparison of *Maslahah* in the Settlement of *Syiqaq* in the Religious Court of the Border Regions

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**Abstract:** *Witness examination is one of the trial procedures required to resolve cases before the Religious Courts. According to the regulations, witnesses must provide information directly related to their testimony that they actually have seen, heard, or experienced the case. The issue is that some of the witnesses introduced were unaware of the testimony they provided and only learned about it from the litigants. How can the Religious Courts in the border area, which is the Minang region, resolve the syiqaq case from a maslahah perspective, and what are the solutions that can be implemented to bring about a positive outcome in the syiqaq case when the witness's closest family does not have knowledge about the case in person? Comparing these two court products in terms of maslahah is an intriguing analysis. Using a comparative approach to the two cases, this study conducted a fundamental analysis of the literature. The results demonstrated that distinct assemblies evaluated the presence of these witnesses in relation to the issued decisions. Some of the panels regarded the testimony in this case as insufficient evidence, so they denied the requested divorce despite the family's ongoing disputes (syiqaq). In petition cases with the same witness issue, however, the tribunal deemed the evidence to be sufficient to grant the requests.*

**Keywords:** Witness, *Testimonium de Auditu*, *Maslahah*, *Syiqaq*, Religious Court

**Abstrak:** Pemeriksaan saksi dalam perkara syiqaq merupakan salah satu proses persidangan yang harus ditempuh dalam rangka penyelesaian perkara di Pengadilan Agama. Menurut aturannya, saksi harus memberikan keterangan tentang sesuatu yang dilihat, didengar atau dialami langsung tentang kesaksian yang diberikannya. Namun di Pengadilan Agama daerah perbatasan ada saksi yang dihadirkan oleh para pihak tidak mengetahui secara langsung tentang kesaksian yang disampaikan, tetapi mereka hanya mengetahui berdasarkan informasi atau cerita dari para pihak berperkara yang dikenal dengan saksi testimonium de auditu. Bagaimana Pengadilan Agama di daerah perbatasan yang merupakan daerah rantau Minang menyelesaikan perkara perceraian karena syiqaq tersebut dilihat dari perspektif *maslahah*, dan solusi yang dapat ditempuh untuk mewujudkan kemaslahatan dalam perkara syiqaq padahal keluarga terdekat yang menjadi saksi tidak mengetahuinya langsung. Dua produk Pengadilan ini menarik untuk dianalisis dengan memperbandingkan keduanya dari sisi *maslahah*. Penelitian ini menggunakan pisau analisis *maslahah* dengan kategori kepustakaan melalui pendekatan perbandingan terhadap 2 (dua) perkara tersebut. Hasil penelitian menunjukkan, majelis berbeda dalam menilai kehadiran saksi tersebut ketika dikaitkan dengan putusan yang telah dikeluarkan. Sebagian majelis memandang kesaksian seperti ini tidak sempurna sebagai alat bukti sehingga mereka menolak gugatan cerai yang diajukan meskipun dalam keluarga tersebut terjadi pertengkaran terus menerus, sebaliknya dalam perkara permohonan cerai thalak dengan masalah saksi yang sama, majelis menilai sebagai alat bukti yang sempurna sehingga endingnya mengabulkan permohonan cerai thalak itu.

**Kata Kunci:** Saksi, *Testimonium de Auditu*, *Maslahah*, *Syiqaq*, Pengadilan Agama

## Introduction

Examination of witnesses in divorce cases at the Lubuk Sikaping Religious Court and the Talu Religious Court, which are located in the border regions of West Sumatra and North Sumatra, both contested divorce and sued divorce, is a process that must be passed with several rules, including rules regarding the obligations of a witness, the examination procedures, and conditions required to be eligible as the witness. A witness is required to see, hear, or know what he/she witnessed for himself/herself (*'ain al-yaqin*), not based on word-of-mouth or hearings of others; this includes drawing his/her own conclusions and rendering his/her own judgment. The witness must explain as is, based on reality and clarify how he/she discovers and observes the events, such as a witness knowing that the plaintiff and defendant are married because he himself was present during the marriage ceremony.

The Latin term for word-of-mouth or hearing-to-hearing testimony is *testimonium de auditu*, while the Arabic term is *mu'anaan*.<sup>1</sup> The *testimonium de auditu/mu'an'an* is not deemed evidence because he did not explain how he discovered the information. However, the *testimonium de auditu/mu'an'an* cannot be avoided altogether in the settlement of divorce cases before the Lubuk Sikaping Religious Court and the Talu Religious Court in spite of the relatively small number of divorce cases. Although these two courts are located in the Minang area (not *luhak nan tigo* as the area of origin of the Minangkabau), which is multi-ethnic regions, the responsibilities of the extended family of tribes and people towards children and nephews are nearly identical to those in the *luhak nan tigo* area.

The issue of witnesses in divorce cases involving on-going or persistent quarrels (in *fiqh*, it is known as *syiqaq*), has been well explained, and there have been rules in place to prevent it from causing new problems, particularly among indigenous peoples. However, in reality there were two interesting cases filed by the parties by presenting family witnesses who did not know about or directly hear the family disputes involving the child/nephew, and both were judged differently by the panel of judges. In general, the authors have uncovered a number of prior studies on witnesses in divorce cases. First, research conducted by Fauzan Nento at the Gorontalo Religious Court regarding the judge's perspective

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<sup>1</sup>Roihan A. Rasyid, *Hukum Acara Peradilan Agama* (Jakarta: PT RajaGrafindo Persada, 2005), 168.

in *syiqaq* case resolution<sup>2</sup>, reveals dissenting views between Islamic law, the Marriage Law, and the Supreme Court. Second, Arne Huzaimah discusses the incorporation of mediation with judges in resolving *syiqaq* cases in the Religious Courts, with a particular emphasis on the appointment of judges.<sup>3</sup> Ramdani conducted research at the Karawang Religious Court regarding the strength of *de auditu* *testimonium* evidence in divorce cases in relation to the decision of the High Religious Court.<sup>4</sup> Ihdi Karim studied *testimonium de auditu* witnesses in divorce cases according to Islamic law by linking it to lineage, death, marriage, endowment, and ownership of an item<sup>5</sup>.

Based on these previous studies from which comparison and contrast are drawn, the author will specifically analyze two decisions that both present witnesses who did not hear and did not know directly about the quarrel between husband and wife (child and son-in-law) in the Minang *rantau* area with the following questions: how can the Lubuk Sikaping Religious Court and the Talu Religious Court, both of which are in the Minang *rantau* area, accept the testimony of these witnesses.

To answer these research questions, the author employs a qualitative approach using a *masalah* analysis procedure, which includes the study of Islamic law through an in-depth analysis of literature and a comparative approach to the two cited Religious Court decisions. While the purpose is to discuss the resolution of the *Syiqaq* case directly from the *masalah* perspective, family witnesses and close friends who are unaware of the case. Which of the two decisions is more problematic for the border-dwelling Minang people, also known as the Minang *rantau* region? To complete the research data, *Maslahah* analysis is supplemented by interviews.

## Discussion

### Disagreements or quarrel in the Family

<sup>2</sup>Fauzan Nento dan Titin Samsudin, "Perkara Syiqaq Perspektif Hakim di Pengadilan Agama Gorontalo," *Al-Mizan Jurnal Pemikiran Hukum Islam* 14, no. 2 (2018), p. 220–239.

<sup>3</sup>Arne Huzaimah, "Menelaah Pelaksanaan Pengangkatan Hakim pada Perkara Syiqaq di Pengadilan Agama Indonesia dan Mahkamah Syariah Malaysia," *Nurani* 19, no. 1 (2019), p. 15–25.

<sup>4</sup>Ramdani Wahyu Sururie, "Kekuatan Pembuktian Testimonium de Auditu dalam Perkara Perceraian," *Jurnal Yudisial* 7, no. 2 (2014), p. 137–155.

<sup>5</sup>Ihdi Karim Makinara, Jamhir Jamhir, and Sarah Fadhilah, "Saksi Testimonium de Auditu dalam Sidang Perceraian," *El-Usrah: Jurnal Hukum Keluarga* 3, no. 2 (2020), p. 227–242.

The family life of a husband and wife is not always smooth and safe as expected,<sup>6</sup> in some cases, it is marred by recurring quarrels and disputes that are difficult to restore and resolve on their own.<sup>7</sup> When this situation cannot be resolved and separation signs have begun to emerge, both the husband and the wife have the right to terminate the marriage. According to the provisions, they have the same opportunity to register and proceed with their case before the local Religious Court with a contested divorce or sued divorce.<sup>8</sup>

The emergence of *syiqaq* in a family as a result of the husband or wife's failure to fulfil their responsibilities, thereby causing disputes and divisions that can lead to divorce. Sayyid Sabiq characterizes divorce based on this *syiqaq* as *dharar* (dangerous) divorce. He went on to explain the opinions of Imam Malik bin Anas and Imam Ahmad bin Hanbal, which state that if a wife is mistreated by her husband, she may file the petition for divorce with the Religious Court, based on her relative competence. According to the two scholars of the aforementioned schools, a hazardous condition exists when a husband frequently abuses his wife, beats her, or even orders her to do something forbidden. Al-Syarbaini stated that *syiqaq* is a dispute between husband and wife in which it is anticipated that the marriage will suffer if it continues.<sup>9</sup>

Article 76 of Law Number 7 of 1989 explains the issue of contested divorce and sued divorce for *syiqaq*-related reasons. Article 76, paragraph 1 defines *syiqaq* as "acrimonious and persistent disagreement between a husband and a wife." As explained in Verse 35 of the Surah an-Nisaa', there is a solution that can be pursued before the case reaches the Religious Courts..

<sup>8</sup> If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from her's; if they both wish for peace, Allah will cause their

<sup>6</sup>Linda Rae Bennett, "Early Marriage, Adolescent Motherhood, and Reproductive Rights for Young Sasak Mothers in Lombok," *Wacana, Journal of the Humanities of Indonesia* 15, no. 1 (2014), p. 66–86.

Zulfatun Nimah, "The Violation on Women's Rights in the Unilateral Divorce in Sasak Community From A Feminist Legal Theory," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 13, no. 1 (2018), p. 25-48.

<sup>7</sup>Mhd Rasidin, Natardi, and Doli Witro, "The Impact of Unequal Marriage on Household Harmony (Case Study in Sungai Penuh City, Jambi)," *Samarah* 4, no. 2 (2020), p. 313–336.

Imani-Jaafar Mohammad and Charlie Lehmann, "Women's Rights in Islam Regarding Marriage and Divorce," *Journal of Law and Practice* 4 (2011), p. 1-13.

<sup>8</sup>Choirunnisa Nur Novitasari, Dian Latifiani, and Ridwan Arifin, "Analisis Hukum Islam Terhadap Faktor Putusnya Tali Perkawinan," *Samarah* 3, no. 2 (2019), p. 322–341.

<sup>9</sup>Zaiyad Zubaidi and Miftahul Jannah, "Perceraian karena Syiqaq Akibat Tidak Perawan (Analisis Hukum Islam Terhadap Putusan Mahkamah Syar'iyah Bireuen Nomor 0223/Pdt.g/2015/MS. Bir)," *Samarah* 1, no. 2 (2017), p. 510–527.

reconciliation. Indeed Allah is Ever All-Knower, Well-Acquainted with all things (QS. An-Nisaa' ayat 35).

It is necessary to send a *hakamain* (one from the husband's family and one from the wife's family) to determine the best method to resolve conflicts and disagreements. If for some reasons the assigned *hakamain* cannot perform their duties, it is preferable to dispatch another *hakamain* who is capable of completing the task. Establishment of the Advisory Board for Marriage and Divorce Settlement (BP4), whose duties include acting as a judge to seek improvement for litigating married couples and advising prospective spouses who are about to get married is considered necessary.<sup>10</sup>

Amir Syarifuddin outlined several methods for resolving quarrels and disputes between a husband and a wife: first, analyzing and investigating the underlying causes of the emergence of these quarrels and disputes. When it is determined that the emergence is due to a wife's breaching the marriage principles, three measures are taken to resolve the issue. A spouse must inform his wife that her actions are contrary to religious law and may cause problems within the household. If this method or measure has failed to improve her behavior, the next step is to separate the bedroom.<sup>11</sup> After these two stages, if there are no visible signs of a change in her attitude, it is permissible for the husband to strike the wife that does not cause pain.<sup>12</sup>

When a husband is the cause of quarrels and disputes, a wife can make peaceful efforts by sincerely reducing her rights in the hope that her husband will reconcile,<sup>13</sup> or by choosing a person respected by the husband to provide advice so that he does not harm his wife. If quarrels and disputes arise between the husband and wife because they accuse each other and neither is willing to reconcile, the *hakamain* seeks and chooses an authoritative advisor for the couple.

Second, if this strategy is unsuccessful, the *hakamain* are given the opportunity to resolve the conflict. The two selected judges are tasked with reuniting conflicting spouses and wives and determining the best course of action to avoid divorce. Divorce can be pursued by registering a case with the Religious

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<sup>10</sup>Ahmad Rofiq, *Hukum Islam di Indonesia* (Jakarta: PT RajaGrafindo Persada, 2003), p. 273.

<sup>11</sup>Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia Antara Fiqh Munakahat dan Undang-Undang Perkawinan* (Jakarta: Kencana, 2011), p. 194.

<sup>12</sup>Mohd. Idris Ramulyo, *Hukum Perkawinan Islam Suatu Analisis dari Undang-Undang No. 1 Tahun 1974 dan Kompilasi Hukum Islam* (Jakarta: Bumi Aksara, 1999), p. 99.

<sup>13</sup>Ahmad Rofiq..., p. 271.



Court after multiple unsuccessful attempts to reconcile. However, the family's responsibilities continue, as the Religious Courts will prioritize witnesses from the immediate families of both parties.

Regarding the status of those appointed *hakamain*, whether as representatives of the spouses or as judges, scholarly opinion varies. According to some academics, the position of the two judges represents the husband and the wife. In this position, the *hakamain* are only permitted to reconcile, and are not permitted to divorce without the consent of the couple. The reason for this is that a husband's property becomes his wife's, while a wife's obligations become her husband's. Since both parties are adults, the magistrate or *hakamain* cannot take action against them without their consent.<sup>14</sup>

According to another viewpoint, the *hakamain* serves as an adjudicator. With their position as judges, they are able to do something deemed acceptable without the consent of the husband and the wife,<sup>12</sup> including reconciling the couple, divorcing them for a ransom, or divorcing them without a ransom. Even though the scholars had differing opinions regarding the status of the *hakamain*, they all concurred that the two *hakamain* must be mature, intelligent, male, and just.

### Family Members Testifying in Religious Courts

Article 22 paragraph (2) of the Government Regulation Number 9 of 1975 states, "if the sued divorce filled is based on *syiqaq*, in order to obtain a divorce decision, the statements of witnesses from the husband and the wife's family or close friends must be heard." This article regulates the procedure for adjudicating divorce cases involving ongoing quarrels and disputes. Therefore, the provisions that govern it become one of the methods of adjudication that the panel of justices should employ. If it is implemented negligently, the examinations of cases conducted will not meet the statutory examination requirements. It is considered null and void court decisions resulting from negligence, or conduct additional examinations to complete the examination.<sup>15</sup>

In accordance with the preceding article in terms of procedural law, Law No. 7 of 1989 pertaining to the Religious Courts, article 76 confirms that a judge in a divorce case involving *syiqaq* requests that the plaintiff and the defendant, or the applicant and the respondent, exhibit their close family witnesses.<sup>9</sup>

<sup>14</sup>Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia Antara Fiqh Munakahat dan Undang-Undang Perkawinan...*, p. 196.

<sup>15</sup>M. Yahya Harahap, *Kedudukan Kewenangan dan Acara Peradilan Agama Undang-Undang Nomor 7 Tahun 1989* (Jakarta: Sinar Grafika, 2005), p. 245.

After the tribunal has heard the testimony of witnesses from the immediate family, the court may appoint a member of the immediate family or someone else to serve as a judge who makes every effort to find a solution to the *syiqaq* dispute.<sup>16</sup>

The position of close family witnesses or people close to the husband and wife who are in litigation in the Religious Courts, whether sued divorce or contested divorce due to continuous fights and disputes (*syiqaq*) is not simply providing ordinary information, but the position of the witness is extremely important, as explained in article 76 paragraph (1) above.

It is essential to emphasize that this is not merely a statement, but rather a 'witness' statement. Formally and substantively, they are witnesses who must be sworn in prior to delivering their testimony.<sup>17</sup> If the provided information satisfies the material requirements based on one's own experience, hearing, and sight, and if the testimony is consistent with other witnesses or other evidence, then the testimony is valid and valuable as evidence. The testimony itself has the value of evidence strength. This was emphasized by the Supreme Court in its decision dated December 20, 1979, under the case number 1282 K/Sip/1979, which stated that "in cases of divorce claims based on disputes and quarrels, parents, including maids, are permitted to testify".

On the one hand, the testimony of the closest relatives or friends appears inconsistent with articles 145 and 146 of the HIR and article 172 of the RBg. This is not a concern, as what is described in paragraph (1) of article 76 is the law's intention. Therefore, Article 76 paragraph (1) of Law No. 7 of 1989 Concerning Religious Courts is an exception to the intent of Articles 145 and 146 of the HIR and Articles 172 and 174 of the RBg. Article 76, paragraph 1 is a special provision for divorce cases, including contested divorce and sued divorce based on incessant quarrelling and disputes. Article 76, paragraph 1 specifies, in both the HIR and the R. Bg, general rules founded on the principle *lex specialis derogat lex generalis*. However, the determination of close relatives or friends as witnesses pertains only to divorce cases based on constant bickering and disputes or *syiqaq*, and cannot be applied to other cases.

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<sup>16</sup>Ali Ibrohim, "Analisis Hukum Islam Terhadap Pembatalan Putusan PA Bangkalan Oleh Putusan PTA Surabaya tentang Perselisihan dan Pertengkaran Terus Menerus sebagai Alasan Perceraian," *Al-Hukama'* 7, no. 1 (2017), p. 122–145.

<sup>17</sup>Chatib Rasyid dan Syaifuddin, *Hukum Acara Perdata dalam Teori dan Praktek pada Peradilan Agama* (Yogyakarta: UII Press, 2009), p. 112.



This special treatment is accorded to the *syiqaq* case because it requires the participation of close relatives or loved ones for resolution. The close family desires to restore and reinforce the deteriorating marriage connections. It is extremely rare for a close family to wish to separate the household of their offspring or their immediate family, unless circumstances make it impossible for the family to remain together. On the basis of these assumptions, denying their presence as highly valuable witnesses and evidence is unnecessary. Very rarely are parents unaware of the living conditions of their offspring, and only close relatives can resolve all domestic issues. The primary source that the law expects to provide an explanation for quarrels and disputes is therefore an examination of the close family or close acquaintances. Evidently, their presence is indispensable to the ongoing investigation of the case. In order to avoid negligence in conducting an examination, one must adhere to the procedures and rules outlined by the law when interrogating witnesses, whether they are close relatives or acquaintances.

## <sup>2</sup> The Role of Witness in the Divorce Cases

The plaintiff or applicant must be accompanied by initial evidence, such as a marriage record or a copy of it, when filing a case with the Religious Court.<sup>18</sup> The marriage certificate implies that they are registering for divorce or submitting their divorce application to the correct parties, namely their respective spouses. In addition to the marriage record and a number of other requirements, it is crucial that the parties present evidence of family or close friends as witnesses when their case reaches the stage of proof.<sup>19</sup>

Numerous verses and *hadiths*, such as verse 282 QS Al-Baqarah, describes the significance of witness testimony as a reference for resolving disputes and conflicts. In addition, sura an-Nisaa', verses 6 and 135; sura al-Thalak, verse 106; sura al-Maidah, verses 4 and 6; sura Ali Imran, verse 81; and sura Yusuf, verse 26. One of the verses <sup>3</sup>states:

O you who have believed, be persistently standing firm in justice, witnesses for Allāh, even if it be against yourselves or parents and relatives. Whether one is rich or poor, Allāh is more worthy of both. So follow not [personal] inclination, lest you not be just. And if you distort [your

<sup>18</sup>Agustin Hanapi and Edi Yuhermansyah, "Urgency of Marriage Registration for Women and Child Protection in Gayo Lues District," *Samarah* 4, no. 2 (2020), p. 528–544.

<sup>19</sup>Amiruddin, A. Hamid Sarong and Syarifuddin Hasyim, "Keberadaan Alat Bukti Saksi dalam Perkara Perceraian (Studi Penelitian pada Mahkamah Syar'iyah Jantho)," *Jurnal Ilmu Hukum* 2, no. 2 (2014), p. 1–7.

testimony] or refuse [to give it], then indeed Allāh is ever, of what you do, Aware. (QS. An-Nisaa' ayat 135).

Rasulullah SAW bersabda:

عَنْ ابْنِ عَبَّاسٍ، أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: الْبَيْتَةُ عَلَى الْمُدَّعِي، وَالْيَمِينُ عَلَى الْمُدَّعَى عَلَيْهِ

Ibn Abbas quotes the Prophet SAW as saying, "Proof for those who demand it, and oaths for those who deny it."<sup>20</sup>

Al-Suddi clarified that this verse was revealed to the Prophet Muhammad SAW during an argument between wealthy and impoverished individuals, about which they complained to the Prophet. The prophet took the side of the poor because he believed it was impossible for the poor to wrong the wealthy, whereas Allah desired to be fair to both parties.<sup>21</sup>

As translated above, the word *syahadah* in verse 135 of surah an-Nisa' means witnessing, attending, and knowing.<sup>22</sup> According to *syara'*, information provided by trustworthy individuals to establish an event in court, particularly in Religious Courts. In contrast, *shahadah* refers to evidence that can be used as a guide for judges to disclose justice based on the testimony's evidence.<sup>23</sup>

Additionally, HIR articles 169 to 172 and RBg articles 306 to 308 govern witness testimony. This witness' testimony is generally admissible in all circumstances, unless the law specifies otherwise, as in the case of the merger of assets upon marriage.<sup>24</sup>

According to Article 164 HIR and Article 284 R.Bg, in order for a witness' statement to be admissible as legal evidence, the witness must have seen, heard, or directly experienced what they claim to have witnessed, and must provide an explanation for how they knew about the incident. In accordance

<sup>20</sup>Ibn Ashim al-Nama' Al-Qurthubi, *Al-Tamhid Lima Fi Al-Muwatha' Min Al-Ma'ani Wa Al-Asanid* (t.t: Muassasah al-Qurthubiyah, t.h.), Juz XXIII, Hadis ke-21, p. 206.

<sup>21</sup>Deni Kamaludin Yusup, "Norma-Norma Hukum Hak Asasi Manusia dalam al-Quran: Studi Kritis atas Tafsir al-Quran Surat al-Nisâ' Ayat 135," *Asy-Syari'Ah* 17, no. 1 (2015), p. 55–68.

<sup>22</sup>Sayyid Sabiq, *Fikih Sunnah* (Bandung: PT al-Ma'arif, 1994), p. 55.

<sup>23</sup>Abdul Syukur and Abu Bakar, "Relasi Gender Terhadap Persaksian Perempuan dalam Perspektif Islam," *An Nisa'* 12, no. 2 (2019), p. 703–709.

<sup>24</sup>Abdul Manan, *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama* (Jakarta: Kencana, 2008), p. 248.

with article 171 HIR and article 308 RBG, conclusions or opinions based on thought do not constitute testimony.<sup>25</sup>

HIR also emphasizes, among other things, the obligation of witnesses who have been lawfully and officially summoned to testify at the Religious Court hearings: their first obligation is to appear before the Religious Court proceedings based on articles 139 to 141 HIR.<sup>26</sup> The following obligation is to take an oath based on one's religion and beliefs and to provide truthful testimony. Articles 148 HIR and 176 R. Bg permits his detention until he expresses his willingness to testify if he is unwilling. When a witness who has been sworn in gives fraudulent testimony, he can be prosecuted for giving false testimony.

Article 1905 of the Civil Code, 306 RBg, and article 169 of the HIR emphasize that the testimony of a single witness in the absence of additional evidence is insufficient.<sup>27</sup> *Unus testis nulus testis*, which translates to "a witness is not a witness". The unaccompanied testimony of a single witness does not satisfy the evidentiary requirements, because the testimony of a single witness is insufficient for deciding a case. In this regard, the judge may administer an oath to the parties in the case if he presents only one witness and no other evidence.

Particularly, based on Article 76 of Law No. 7 of 1989 concerning the Religious Courts, it is permissible to present family witnesses or close relatives in divorce cases involving persistent quarrels (*syiqaq*).<sup>28</sup> Despite the fact that this provision is a *lex specialist* of the preceding general rules, witnesses from the family or close acquaintances are still required to take an oath before testifying, almost identical to taking an oath in other cases in the Religious Courts in accordance with their absolute competence.

### **Maslahah in Legal Determination**

<sup>25</sup>Rohmat Arif, Fathurrahman Alfa, and Syamsu Madyan, "Analisis Kekuatan Alat Bukti Saksi Testimonium De Auditu dalam Perkara Perceraian di Pengadilan Agama Kota Malang," *Jurnal Ilmiah Ahwal Syakhshiyah (JAS)* 2, no. 2 (2020), p. 22-28.

<sup>26</sup>M. Fauzan, *Pokok-Pokok Hukum Acara Perdata Peradilan Agama dan Mahkamah Syar'iyah di Indonesia* (Jakarta: Kencana, 2007), p. 44.

<sup>27</sup>Miswardi, *Hukum Acara Perdata* (Bukittinggi: STAINPress, 2006), p. 44.

<sup>28</sup>*Amandemen Undang-Undang Peradilan Agama (Undang-Undang RI Nomor 3 Tahun 2006)* (Jakarta: Sinar Grafika, 2009), p. 60.

In terms *maslahah* refers to something that is beneficial<sup>29</sup> and is designed to prevent harm,<sup>30</sup> and preserve *Shari'a*.<sup>31</sup> In the meantime, according to the terms, it is an action that brings benefits and rejects harm,<sup>32</sup> regardless of whether it is perceived by the general public or only a small number of individuals. In accordance with this, Imam al-Ghazali stated that *maslahah* is taking advantage and rejecting what is harmful in order to uphold the objectives of the *Shari'a*.<sup>33</sup> Al-Buti associates it with benefits that can provide instant gratification.<sup>34</sup>

On the basis of this definition, *maslahah* can be divided by two. First, the public benefit, which is associated with common interests, such as the protection of the public interest from a variety of damages. Second, special benefit (some people) and its benefits are only felt by specific individuals, such as maintaining the property of a person who has lost his mind, whether the property will be returned when he regains consciousness or given to his descendants if his consciousness cannot return to normal.

The scholars divided the *maslahah* based on its legal standing in establishing *dharuriyyat*, *hajiyyat*, and *tahsiniyyat* laws.<sup>35</sup> *Dharuriyyat* is a required benefit because it does not give any negative impacts, similar to *al-kulliyat al-khams*. In contrast to the sphere of *mu'amalah*, *hajiyyat* is a requirement that must be met in order to obtain a benefit, and its non-compliance does not result in any harm. Ultimately, *tahsiniyyat* is a supplement to achieving life's security and tranquillity.

If there are multiple conflicting benefits or *maslahah*, this can be resolved in two ways: first, if the benefits are of different levels, then *dharuriyyat* takes precedence over *hajiyyat* and *hajiyyat* takes precedence over *tahsiniyyat*; and second, if the benefits are of the same level, then the most powerful benefit can be selected.

<sup>29</sup>Muksana Pasaribu, "Maslahat dan Perkembangannya Sebagai Dasar Penetapan Hukum Islam," *Jurnal Justitia* 1, no. 4 (2014), p. 350–360.

<sup>30</sup>Zulham Wahyudani, "Keabsahan Nikah Siri dalam Perspektif Maslahah," *Jurisprudensi: Jurnal Ilmu Syariah, Perundang-Undangan, dan Ekonomi Islam* 12, no. 1 (2020), p. 44–63.

<sup>31</sup>Amin Farih, "Reinterpretasi Maṣlaḥah Sebagai Metode Istiḥṣān Hukum Islam: Studi Pemikiran Hukum Islam Abū Ishāq Ibrāhīm Al-Shāṭibī," *Al-Ahkam* 1, no. 25 (2015), p. 43–66.

<sup>32</sup>Musda Asmara and Reti Andira, "Urgensi Talak di Depan Sidang Pengadilan Perspektif Maslahah Mursalah," *Al-Istinbath: Jurnal Hukum Islam* 3, no. 2 (2018), p. 207–226.

<sup>33</sup>Muhammad Yusuf, "Pendekatan al-Maṣlaḥah al-Mursalah dalam Fatwa MUI Tentang Pernikahan Beda Agama," *AHKAM: Jurnal Ilmu Syariah* 13, no. 1 (2013), p. 99–108.

<sup>34</sup>Imron Rosyadi, "Pemikiran Asy-Syātibī tentang Maslahah Mursalah," *Profetika* 14, no. 1 (2013), p. 79–89.

<sup>35</sup>Mursyid Djawas and Amrullah, "Fasakh Nikah dalam Teori Maṣlaḥah Imām al-Ghazālī," *El-Usrah: Jurnal Hukum Keluarga* 2, no. 1 (2019), p. 97–122.

### ***Testimonium de Auditu/Mu'an'an in Divorce Cases***

In the absence of one litigant, there appears to be a trend for a husband and a wife to submit their divorce case to the Lubuk Sikaping Religious Court and the Talu Religious Court as the border areas of West Sumatra and North Sumatra. When a wife files for a divorce, the majority of husbands are absent from court for various reasons and considerations, despite being formally and duly summoned. It is decided by *verstek* when one of the spouses is absent despite having been summoned in accordance with the law.

Plaintiffs and defendants who were present at the first trial cannot be terminated by *verstek*, even if one of them is not present for the next phase of the trial, especially against the parties who were present during the trial stages. The parties who attend the trial according to a predetermined schedule will proceed through the trial stages in accordance with the stipulated procedural rules, including the mandatory mediation stages.

When the mediation process fails, the trial advances to the next phase until each party presents witness testimony. The majority of required witnesses are family members or close friends who are familiar with the state of the household. The plaintiff's or respondent's family typically accompanies them from the beginning of the trial to the end, with some being represented by their attorneys. Therefore, there are few divorce cases that originated from quarrels and disputes that were unknown, unseen, or unheard of by both parties' families. Due to the small sample size, the authors selected two cases from two distinct Religious Courts, both of which were located in the border region, namely the Lubuk Sikaping, Pasaman Religious Court and the Talu Pasaman Barat Religious Court, whose people were multiethnic and adhered to diverse customs.

This paper focuses on the Lubuk Sikaping Religious Court's examination, trial, and ruling in Divorce Case Number 223/Pdt.G/2019/PA.Lbs, which is the subject of examination, trial, and verdict. The case was filed by the plaintiff and the defendant spouse. The fact that the plaintiffs' marriage was registered by the Marriage Registrar at the Office of Religious Affairs is among the reason and legal events cited in their lawsuit. These legal reasons and events are the primary requirements for filing a divorce case. The narrative continues with a description of the couple's post-marriage residence, the condition of their household, and the number of children they have. Again, these are all legal

circumstances that are nearly identical in all divorce cases submitted to the Religious Courts, as a result of the rules governing the filing of contested divorce and sued divorce applications.

Having described circumstances of their household, starting with the discussion regarding the time they start their marriage, the place they live after marriage, and the number children they have, the plaintiff then describes the facts or circumstances of their household in his litigation. In this case, the plaintiff stated that they actually enjoy harmonious and tranquil lives, and the problem arises due to the fact that the defendant is considered to be unwilling to work to support his family. All of this culminated in the plaintiff leaving the residence he shared with the defendant, which has now become a legal event. The causes of disputes and fights are nearly identical to those of cases brought before religious courts. This is so since it is impossible for one file for a divorce unless one gets unfair treatments from his/her spouse.

This litigation was attended by the plaintiff (wife) and the defendant (husband). At the first trial, the panel of justices unsuccessfully attempted to reconcile the parties. The panel of judges gave the plaintiff and the defendant the opportunity to engage in a mediation process because the trial's efforts to resolve the conflict peacefully were ineffective, and the mediation effort also failed. Due to the failure of mediation, the trial proceeded to the next phase.<sup>36</sup>

If efforts at peace and mediation are unsuccessful, the next trial will proceed to the case examination phase with the plaintiff's lawsuit being read aloud and defended. The defendant responded to the plaintiff's lawsuit by acknowledging some claims and rejecting others. Since the year specified in the lawsuit, the defendant's domestic situation has not been harmonious, according to their responses, but the defendant denied the cause. He stated that he had attempted to earn a living through selling and other money-generating endeavors. In addition to disputes over financial issues, this family has apparently also separated from their home.

In addition to addressing the allegations contained in the plaintiff's lawsuit, the defendant stated in his response that he had witnessed the plaintiff with another man. Even though the defendant feels less tolerant of the plaintiff's behavior, he still wants to continue living with the plaintiff on the condition that

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<sup>36</sup>Takdir Rahmadi, *Mediasi Penyelesaian Sengketa Melalui Pendekatan Mufakat* (Jakarta: PT RajaGrafindo Persada, 2010), p. 154.



they are both willing to change. Uniqueness is intended because there are numerous divorce cases in which the defendant claims that the continuation of their household is dependent on the plaintiff.

Responses from the plaintiff, in response to the defendant's attitude that he continues to maintain his litigation as stated in the lawsuit. To strengthen the evidence, the plaintiff submitted photocopies of identification cards and marriage certificates that were stamped and sealed, as well as witness testimony. While the defendant in his duplicate, which was communicated verbally, essentially remained with the original response and did not wish to divorce the plaintiff.

The plaintiff's first witness testified under oath that, so far, the plaintiff's household with the defendant was doing well, and that he had never witnessed or heard of disputes and conflicts between the plaintiff and the defendant, but had only heard about them from the plaintiff. According to the plaintiff's account, the witness stated that the domestic dispute began when the defendant was unreliable to the plaintiff, while the defendant claimed that the plaintiff was romantically involved with another man.

Additionally, the second witness stated that the plaintiff's household with the defendant had been harmonious throughout this period, and that he had never heard of any fights or disputes outside of the plaintiff's account. The plaintiff and the defendant had moved into separate residences, as the plaintiff had left the residence with the defendant. At this point, the defendant is still unwilling to divorce the plaintiff and desires to maintain their household.

<sup>7</sup> In their deliberations, the panel of judges noted that the plaintiff and the defendant had been duly and officially summoned to the trial, and that they were present. Thus, the intent of article 26 of PP No. 9 of 1975 has been realized. As required by Articles 65 and 82 paragraphs (1) and (4) of Law No. 7 of 1989, as amended by Law No. 3 of 2006, and again by Law No. 50 of 2009, the Assembly has also attempted to reconcile the parties, but without success.

In accordance with *Perma* No. 1 of 2016 and its regulations, the panel of judges has also taken into account the fact that the plaintiff and the defendant have engaged in mediation, but without success. In addition, the plaintiff and defendant exchanged responses regarding their domestic issues. In addition to responses, replica and rejoinder were also submitted.

In addition to providing the answers, both the plaintiff and the defendant have presented evidence, including photocopies of the marriage certificate and witness statements. It is interesting to note

that the witnesses <sup>9</sup> did not know about the split in the plaintiff's and defendant's household when they made their statements. The only way the witness learned about the plaintiff's residence with the defendant was through the plaintiff's account upon his return home. Due to a lack of knowledge regarding the plaintiff's and defendant's living conditions, the judge ruled that the plaintiff was unable to bolster his case, and the lawsuit was dismissed.

Next, in general, a case that was examined at the Talu Pasaman Barat Religious Court in the form of a divorce application for sued divorce No. 464/Pdt.G/2019 PA. Talu with the consideration that there have been ongoing quarrels, disputes, and conflicts and both use the fiqhiyah method in deciding and resolving the case for divorce. The divorce petition was lodged under the premise that the applicant and respondent had been registered as a valid marriage.

In his petition, the petitioner stated that initially their household ran smoothly, but that recently there have been disputes and conflicts over subsistence issues, frequent jealousy, and foul language. This is the standard reason given when one of the parties submits a case to the Religious Court, as this is the procedure for filing a case.

The Petitioner and Respondent have also engaged in mediation with a mediator judge who is not the primary examiner of the case, but this has also failed. Responding to the petition of the petitioner, the respondent stated that it was true that there were constant quarrels, but that the alleged cause was false, and that he objected if the applicant divorced him.

After the completion of the phases of responses, replicating, and rejoinder, the next phase of the trial is witness statements (examination of evidence).<sup>37</sup> In his testimony, the witness stated that initially the applicant's and the respondent's households ran smoothly, but that disputes and quarrels arose frequently. However, the witness never <sup>10</sup> directly witnessed the altercation between the applicant and the respondent, but only heard about it from the applicant. The testimony of the second witness for the applicant was nearly identical to that of the first witness, in that the witness was aware of the dispute between the applicant and the respondent based on the applicant's account.

Additionally, the Respondent presented a witness who stated that he had never witnessed an argument between the Respondent and the Petitioner. The only source of information for the witness

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<sup>37</sup>Ahmad Misbahul Zaman, "Analisis Istihsan atas Pertimbangan Hakim Terhadap Saksi Non Muslim pada Perkara Perceraian," *Al-Hukama'* 8, no. 2 (2018), p. 507–531.

regarding the dispute and argument was the respondent's account. According to the testimony of the second witness for the respondent, he never witnessed any disputes or conflicts between the respondent and the applicant, but he knew about them from the respondent's account.

In their deliberations, the panel of judges stated that both the applicant and the respondent were present at the trial on the day and date that had been determined, and that the panel had attempted to reconcile the parties without success. They have also participated in a Perma-based mediation procedure, which has also been unsuccessful.

The respondent's oral response at trial acknowledged and justified the dispute and argument, but he denied that it was caused by the defendant's actions. This is essentially the same as the standard response, as he could either dispute it or confess to the fight but dispute the cause.

According to the panel of judges, the two witnesses of the applicant and the two witnesses of the respondent complied with the directives of Article 22 paragraph (2) of Government Regulation Number 9 of 1975, i.e., the witnesses were close relatives of the applicant and the respondent. The statements of the applicant's witnesses are identical, despite the fact that their statements are not based on sight and/or hearing; however, they witnessed the separation of the applicant and the respondent's homes as a result of quarrels and domestic disputes between the applicant and the respondent.

The other considerations of the panel of judges are consistent with Supreme Court Jurisprudence No. 299 K/AG/2003 dated June 8, 2005, which states that the testimony of two witnesses in a matter explaining legal consequences has legal weight as an argument and justifications for such evidence to be carefully considered. In addition to the fact that the witness has testified and that his testimony is consistent with that of other witnesses, and according to the panel of judges, the witnesses have met the material requirements for witnesses as outlined in Articles 308-309 R.Bg.

According to article 19 letter (f) jo. Article 22 subsection (2) of the Government Regulation No. 9 of 1975 jo. Article 116 letter (f) of the 1991<sup>38</sup> Compilation of Islamic Law in Indonesia states that a divorce may be granted if there are constant disputes and quarrels between the husband and wife and there is no hope of living in harmony in the household, as reported by family members and close friends.

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<sup>38</sup>Kompilasi Hukum Islam (Bandung: Fokus Media, 2005), 268.

Even though the respondent stated in court that he still desired to maintain his household with the applicant, how could this household continue in light of the applicant's true desire to divorce the respondent? In addition to citing surah al-Rum verse 21 of the Qur'an and article 3 of the Compilation of Islamic Law, this case is also outfitted with a *fiqh* rule stating that if two *mafsadat* contradict each other, then the smaller *mafsadat* should be chosen.

### **The analysis of the Testimonium de Auditu/Mu'ana'an in Divorce Cases**

In terms of establishing the case, the *petita*, the *petitum*, the trial procedure, and the issuance of the final decision, the cases described in this article are comparable to those of other divorce cases before Religious Courts. However, the striking differences are also apparent, as testimony is provided by family members and close friends, and the decision and determination of the case are based on information provided by witnesses who have never seen, heard, or directly known the events at issue; this method of determining the case is both unique and intriguing. In this instance, the judge appears to have rendered differing judgments; in the case of the litigation, it was neither granted nor denied, whereas the judge granted the petition.

In a contested divorce case, the spouse as the defendant submits an answer stating that the wife is also to blame for the state of his household, since the husband assumed that he was unfairly accused to be the main actor for the household conflict. Even though they were the plaintiff's next of kin, two of the plaintiff's witnesses testified that they did not know directly about the dispute between the plaintiff and the The panel of judges dismissed this lawsuit because they believed the witness only knew it indirectly, based on the plaintiff's account, whereas the witness was required to know and observe the case directly. The assembly also witnessed quarrels between husband and wife, quarrels in which both the husband as the defendant and the wife as the plaintiff were primarily responsible.

From one perspective, the panel of judges in this case seeks to find out who was at fault, as this case was not solely the husband's fault, but also the wife's as the primary cause, and the two witnesses did not know it directly by seeing or hearing it themselves, as stated by the panel who handle the case during a direct interview with the Religious Court.

According to the Supreme Court's jurisprudence, the case could be resolved by granting the plaintiff's claim. However, the Panel did not observe ongoing quarrels, disputes, and dissents, while the court see who was at fault in the household that caused the quarrel, and the husband, as the defendant in the trial, wanted to preserve his marriage with the plaintiff so long as he could change the cause of the dispute.

Based on the description and analysis in <sup>7</sup> the divorce case that was examined and resolved at the Lubuk Sikaping Religious Court, when the author further asked the question to the panel of judges who heard the case, if the wife or the husband cannot and does not want to reconcile after the plaintiff's claim is rejected, then one of the two may apply for a sued divorce or a new divorce suit for different reasons during the trial of the previously filed lawsuit.

The author agrees with the judge's decision to dismiss this lawsuit with the hope that, as a Minang community in a multi-ethnic border region, even though there have been many changes to the original custom, both in terms of where the matrilineal family resides and the role of the extended family in resolving household problems, they can reconcile to continue their household life and raise children together. Hopefully each of them will recognize their shortcomings and mistakes, and then rectify them. Due to the fact that there are many instances in which the wife is tolerant of her husband's actions, including spouses who have not returned home for years but are not divorced, they live in harmony again in their old age.

In the meantime, the Talu Religious Court rendered a different verdict in a case that was nearly identical to the preceding one, granting the petition. The phases of examination are nearly identical to those of the Lubuk Sikaping Religious Court. At the stage of examining the evidence, both the applicant and the respondent presented two families and close friends as witnesses. When examining the applicant's first witness, the witness stated that he only knew of the quarrels and disputes between the husband and wife through information or accounts provided by the applicant, and not through direct observation. The testimony of the second witness for the applicant was identical to that of the first witness for the applicant and the two witnesses for the respondent.

The panel of justices granted the divorce petition on because the couple had engaged in continual conflicts. It does not matter who started or caused this fight, but the wife, as the respondent, doesn't want to divorce her spouse for the sake of their children, and she wants to remain married to the applicant.

In this decision, which differs slightly from the previous one, the judge heard and accepted the testimony of witnesses who did not see or hear the incident directly, but knew about it from the applicant's account (*testimonium de auditu*). According to the author, it is preferable for the household conditions between the applicant and the respondent to be observed and heard by the witnesses presented to court, but the judge is more likely to see it from the perspective of the quarrel that led to the husband and wife no longer living together, despite the fact that the wife does not want a divorce.

Finally, with regard to the application of the rule of law in the panel of justices' decision. In rejecting cases, the panel of judges did not apply the principle "avoidance of harm takes precedence over exploitation," but they did determine that the witnesses had not complied with the applicable regulations based on the evidence presented.

Unlike the other cases granted by the council of judges, this case was denied. The case analysis concludes with the principle that avoiding damage should take precedence over taking advantage. The author believes that this is not the primary reason why a panel of judges grants a plaintiff's claim or an applicant's request.

### **Closing**

*Testimonium de auditu* witness is assigned by the conflicting parties indicates that the function of matrilineal families in border regions has begun to decline. Despite the fact that matrilineal customs teach the community that family problems are mutual problems that are characterized by the happiness at the time of marriage. When there are conflicts between families, it is preferable for each family to come up with a solution. Re-socializing family mediation is one way to decrease the number of divorce cases, especially those caused by *syiqaq*. Religion teaches how to solve a problem by assigning a judge to the situation. Due to *syiqaq* and the presence of *testimonium de auditu* witnesses, the justices' opinions on how to resolve divorce cases varied. Some of the judges believed that the *syiqaq* case's witness *testimonium de auditu* did not meet the criteria for an ideal witness, so the case was dismissed with the hope that the parties could reconcile; if they were unable to reconcile, they could file a new lawsuit or



request for a different reason. While some other judges considered the consequences the *testimonium de auditu* witness was aware of, such as whether or not the husband and wife were still living together, the *testimonium de auditu* witness's knowledge of household conditions was now a factor in deciding the case. Although the decisions are distinct, they all seek to make the litigants' lives difficult.

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