

# INTERPRETATION OF *SYIQAQ* AND ITS PROCEDURAL LAW AT RELIGIOUS COURT IN YOGYAKARTA

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## **Abstract**

*The objective of this research is to identify the interpretation of syiqaq as a legal reason in divorce lawsuit and its procedural law implemented by the Religious Courts in Yogyakarta. This is an empirical normative research, using the literature research method and field research through Focus Group Discussion (FGD). This research found that syiqaq is interpreted as a specific form of an endless quarrelling which caused danger for either husband or wife. In practice, judges combine procedural law in divorce lawsuit based on syiqaq into the procedural law in other legal reason.*

**Keywords:** *syiqaq, hakim, religious court.*

## **Intisari**

Penelitian ini bertujuan untuk mengetahui interpretasi *syiqaq* sebagai alasan gugatan cerai oleh hakim dan praktek hukum acara penyelesaian perkara perceraian dengan alasan *syiqaq* yang diterapkan pada Pengadilan Agama di Daerah Istimewa Yogyakarta. Penelitian ini merupakan penelitian hukum normatif empiris, menggunakan metode penelitian kepustakaan dan penelitian lapangan melalui kegiatan *Focus Group Discussion* (FGD). Hasil penelitian menunjukkan bahwa *syiqaq* diinterpretasikan sebagai perselisihan dan percekocokan antara suami istri yang telah menimbulkan bahaya mengancam baik pada para pihak. Dalam prakteknya, hakim menggabungkan proses acara penyelesaian perkara perceraian dengan menggunakan alasan *syiqaq* ke dalam proses beracara untuk perkara yang menggunakan alasan perselisihan terus menerus.

**Kata Kunci:** *syiqaq, hakim, peradilan agama.*

## **Plokok Muatan**

A. Introduction.....	149
B. Research Methods.....	149
C. Result and Analysis.....	151
1. The Interpretation of <i>Syiqaq</i> as A Legal Reason on Divorce Lawsuit by The Judges of Religious Court Special Region of Yogyakarta.....	151
2. The Trial Procedure of Divorce Lawsuit based on <i>Syiqaq</i> in Religious Court of Special Region of Yogyakarta.....	153
3. Implementation of <i>Hakam</i> after The Implementation of Mandatory Mediation through Regulation Supreme Court No. 1 of 2008 concerning Procedural Court-Annex Mediation.....	156
C. Conclusion.....	156

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## A. Background

Religious courts is one specific institution of special courts in Indonesian civil court's system. One of its specification is a procedural law provisions implemented in its trial which some of them different from the provisions of civil law in general. In a divorce dispute filed and examined in the Religious Court, the specification shows in its are different forms of efforts of reconciliation with the other court, which known as specific efforts of reconciliation in divorce disputes. Divorce cases filed in the Religious Courts are divided into different legal reasons. Important things about those reasons is the difference procedural in a trial if a divorce lawsuit filed by the reason of *syiqaq* compared to other reasons. *syiqaq* which is also known as the endless quarrelling gives an additional consequences in the trial process, namely *hakam*.<sup>1</sup> *Hakam* is an additional procedure that can be applied by the court in this kind of case.<sup>2</sup>

Provisions concerning *syiqaq* can be found in Law No. 7 of 1989 concerning Religious Courts. This law define *syiqaq* as an endless quarrelling and continuously between husband and wife.<sup>3</sup> In the same provision, also regulate the procedural provision in its trial through the appointment of *hakam*.<sup>4</sup> But, in many other laws and regulations relating to the provision of divorce in the Religious Court, there are no any specific definitions about *syiqaq* itself. It's important to explore how judges in religious court define and interprets the *syiqaq* in their case. Related to the interpretation, it also important to explore is the procedure of the examination and settlement of divorce lawsuit filed only the *syiqaq* as its legal reason.

*Hakam* is a form of efforts of reconciliations that included representatives of families from both the husband and wife, to help them find their for solving problems. Others also defined *hakam* as *tahkim* which is both has the same meaning<sup>5</sup> *hakam* was appointed by the judge of the case after consultation and hearing to both parties.<sup>6</sup> Through *hakam*, it is expected that peace can be achieved and divorce can be avoided wherever possible. As the development of regulations and procedures of the trials, the provisions of *hakam* as the peacemaker is questioned with other dispute resolution procedure, a mediation. Originally, mediation is one of many alternative dispute resolutions held outside of court. But based on the Supreme Court Rule No. 1 of 2008 on Procedures of Court Annexed Mediation, this procedure become expanded. By this rule, any efforts of reconciliations should use the third parties, an official mediator.

At the same time, *hakam* still exist because its provisions in the Law No. 7 of 1989 has not been cancelled yet. Related to the essence of *hakam* and mediation, its clearly showed that the obligation of mediation for all civil cases (with certain exceptions) may give effects to *hakam*. *Hakam* itself may be abandoned or merged into this court-annexed mediation.<sup>7</sup> It is still been debated since hierarchy, the *hakam* is regulated through a law which while in the court annexed mediation only regulated at the level of the Supreme Court Rules. Based on those conditions, this research has analysed some main problems which are the interpretation if *syiqaq* as a legal reason in divorce lawsuit by judges in the Religious Court, the procedure of the examination and settlement of divorce lawsuit filed only the

<sup>1</sup> M. Yahya Harahap, 2007, *Kedudukan Kewenangan dan Acara Peradilan Agama (Undang-Undang Nomor 7 Tahun 1989)*, Pustaka Karini, Jakarta, p. 248.

<sup>2</sup> Mahkamah Agung, 2010, *Buku II Pedoman Teknis Administrasi dan Teknis Peradilan Agama*, Mahkamah Agung, Jakarta, Ketentuan Hukum Keluarga No. 12 huruf (c), Mahkamah Konstitusi, Jakarta. Also see Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution (State Gazette of the Republic of Indonesia of 1999 Number 138).

<sup>3</sup> Also defined by Ahmad Azhar Basyir, 2000, *Hukum Perkawinan Islam*, UII Press, Yogyakarta, p. 88. Also see Article 19 point (f) Government Regulation Number 9 of 1975 on Implementation of Law Number 1 of 1974 on Marriage.

<sup>4</sup> Article 76 paragraph (2) the Law Number 7 of 1989 on Religion Court (State Gazette of the Republic of Indonesia of 1989 Number 49, Supplement State Gazette of the Republic of Indonesia of Number 3400).

<sup>5</sup> Ramdani Wahyu, "Pelaksanaan Hakam dan Mediasi di Pengadilan Agama", <http://www.fshuinsgd.ac.id/2012/04/pelaksanaan-hakam-dan-mediasi-di-pengadilan-agama/>, accessed on 1 October 2012.

<sup>6</sup> Article 76 paragraph (2) the Law Number 7 of 1989 on Religion Court (State Gazette of the Republic of Indonesia of 1989 Number 49, Supplement State Gazette of the Republic of Indonesia of Number 3400).

<sup>7</sup> Article 2 paragraph (2) the Supreme Court Rule Number 1 of 2008 on Procedures of Court Annexed Mediation.

*syiqaq* as its legal reason on Religious Courts in D.I. Yogyakarta, and last is the implementation of *hakam* after the obligation of court annexed mediation, especially after the Supreme Court Rules No. 1 of 2008 concerning Procedure of Court-Annexed Mediation.

## B. Research Method

This research combine both of normative legal research and empirical legal research. Under these conditions, this research examine the development of some of the regulations of Islamic marriage law in the Indonesian legal system and its practices and implementations of the religious courts.

### 1. Literature Research

Literature research conducted in two (2) phases, before and after the field research. Literature research conducted prior to field research aims to provide the basic concepts and guides for researcher to carry out the next stage of research. Literature research conducted after the field research aims to analyse the results from the respondents and interviewees in accordance with the principles of Islamic inheritance law. In more detail, the literature research that has been done is as follows: (a) Research tools. This literature research uses general secondary data include official documents, the results of previous research, and other library materials; (b) Research material. Literature research consists of 3 (three) materials, which are the primary legal materials, secondary legal materials and tertiary legal materials, with systematics; primary legal materials are any regulations closely related to the study, include, laws and regulations: (1) Law No. 1 of 1974 concerning Marriage; (2) Law No. 7 of 1989 concerning Religious Courts as last amended by Law No. 50 of 2009 concerning the Third Amendment of Law No. 7 of 1989 concerning Religious Courts; (3) Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law.

Decision of the Administrative Officer, Decree, Circular Letter, and other binding legal materials, include: (a) Regulation of the Supreme Court

No. 1 of 2008 concerning Procedure in Annexed-Court Mediation; (b) Decree of the Chairman of the Supreme Court Number: KMA/032/SK/IV/2006 on 4 April 2006 concerning the Enforcement of Book II Guidelines for Administration of Justice in Court. Religious Courts' Decisions in Special Region of Yogyakarta: (a) Decision No. 528/Pdt.G/2010/PA.Yk; (b) Decision No. 172/Pdt.G/2010/PA.Btl.; (c) Decision No. 341/Pdt.G/2010/PA.Btl; (d) Decision No. 302/Pdt.G/2010/PA.Btl; (e) Decision No. 0357/Pdt.G/2011/PA.Wt.; (f) Decision No..0026/Pdt.G/2011/PA.Wno; (g) Decision No. 1185/Pdt.G/2011/PA.WNO.

Secondary legal materials, all materials that explain the primary legal material, include: (a) the books that discuss Islamic marriage law in general and procedural laws of religion in Indonesia in particular; (b) other results of legal research and opinion of legal experts to discuss related issues; (c) magazines, journals and newspaper articles related to the related problem, both nationally and internationally; (d) the writings contained in the internet sites related to the problem. Tertiary legal materials, any legal materials that give instructions and explanations of the primary and secondary legal materials, which include: (1) legal dictionary; (2) Indonesian dictionary; (3) encyclopaedia.

### 2. Analysis Method

Research done by find, select, analyse, collect, and compare all legal materials related to the research problem, to make the conclusions related to the problem. The research used a qualitative analysis method, which collected all the data, selected, and studied as a whole so that can give a comprehensive description.<sup>8</sup>

### 3. Field Research

Field research conducted through the Focus Group Discussion by inviting religious court judges, 1 (one) Judge from each Religious Courts in Special Region of Yogyakarta, include the Religious Court in Sleman, Religious Court in Bantul, Religious Court in Wonosari, Religious Court in Wates, and the Religious Court of Yogyakarta, and

<sup>8</sup> Matthew B. Miles & A. Michael Huberman, 1992, Analisis Data Kualitatif, Universitas Indonesia Press, Jakarta, pp. 16-19.

1 (one) High Religious Court Judges. In addition, this study will also involve speakers, which is the Islamic law lecturer from the Faculty of Law, University of Gadjah Mada. FGD raised the issue as a topic of discussion, include: (1) How does *syiqaq* interpretation as legal reason in divorce lawsuit by the religious court judge in Special Region of Yogyakarta?; (2) What are the basic considerations and legal arguments against this interpretation?; (3) How the litigants (plaintiff, defendant, and/or legal counsel) in understanding the interpretation? (4) How the application of the provisions of *hakam* into the trial of divorce lawsuit based on *syiqaq* as its reason on Religious Courts in Special Region of Yogyakarta? (5) Where is the position of *hakam* after the enactment of mandatory court-annexed mediation rules by the Supreme Court Rule No. 1 of 2008? From the results of field research, the data analysis is done by processed and analysed directly using the descriptive qualitative method. The process is conducted into a broad description, the it conclude the results comprehensively.

### C. Result and Analysis

#### 1. The Interpretation of *Syiqaq* as A Legal Reason on Divorce Lawsuit by The Judges of Religious Court Special Region of Yogyakarta

##### a. Legal Basis of *Syiqaq* in Islamic Marriage Law and Religion Court Proceedings

Divorce settlement using *syiqaq* as its reason based on both provisions in fiqh Islamic marriage law and national positive law. Those provisions in are: **Firstly**, based on fiqh provisions the Islamic marriage law. Fiqh provisions based on the Qur'an that explicitly defines *syiqaq* and its reconciliation's procedure in An-Nisa verse 35:

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا  
فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ، وَحَكَمًا

مِّنْ أَهْلِهَا إِنْ يُرِيدَ إِصْلَاحًا يُوَفِّقُ اللَّهُ  
بَيْنَهُمَا إِنْ اللَّهُ كَانَ عَلِيمًا خَبِيرًا

“If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, on from his family and the other from hers; if they both wish to peace, Allah will cause their reconciliation. Indeed Allah is Ever All-Knower, Well-Acquainted with all things”.

This verse is the legal basis of *syiqaq*, especially about the. Here *syiqaq* is generally interpreted as a form of dispute and to solve them must be appointed *hakam* to reconcile them. This verse is also the basis of the consideration of the judges to interpret and implement the provisions of *syiqaq* and *hakam* as part of a divorce lawsuit. **Secondly**, based on the provisions of national positive law. Indonesian positive law, particularly related to the trial in religious court, adopted the provisions *syiqaq* in various provisions. The law defines *syiqaq* as an endless and continuously quarrelling between the husband and wife.<sup>9</sup> Under this provision, it can be concluded that in general, *syiqaq* is a dispute between husband and wife to be reconciled.

##### b. *Syiqaq* Interpretation by Judges in Religious Courts in Special Region of Yogyakarta

The results showed that the judges in Religious Court of Special Region of Yogyakarta interpret *syiqaq* differently. This difference is closely related to other provisions in the law, which is the term named as Continuous Disputes that also as one reason for filing for divorce lawsuit. The existence of those two (2) terms raises some different *syiqaq* interpretation: **Firstly**, *syiqaq* is different from continuous disputes. Opinion stating that *syiqaq* substantively different from the continuous disputes based its argument on the nature of the disputes arising from the two

<sup>9</sup> Article 116 point (f) Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law.

(2) circumstances. *Syiqaq* is a special form of Continuous Disputes. In *syiqaq*, disputes between husband and wife is a sharp disagreement, the dispute which pose a danger and the danger threatens to physically and psychologically against one or even both parties, a husband and wife.<sup>10</sup> This is in contrast to the Continuous Disputes reason. Continuous Disputes interpreted as a form of dispute that does not lead to danger in between the husband and wife.

Differences between *syiqaq* and Continuous Disputes also show on the trial procedure. In the examination of the case based on *syiqaq*, the proceedings must be done by listening to witness testimony from the families and people who have a working relationship with one of the parties. This provision is an exception to the general law of civil procedure that not allow families to witness.

Different provisions apply to the examination of divorce based on Continuous Disputes reason. Examination with using this reason use the general provisions of civil law that not allow the families and people who have a working relationship with one of the parties as a witness. Examination by reason of Continuous Disputes is not the part of specification in Religious Court so that the provisions of the examination of witnesses follows the principle of examination of witnesses in general.

During its development, the current judges are generally no longer distinguish between *syiqaq* and continuous disputes. Based on its meaning, *syiqaq* considered similar to continuous disputes. The implications is to equalize the trial process for both *syiqaq* and Continuous Disputes. Both process are done by appoint and hear testimony from witnesses of families.

**Secondly**, *syiqaq* is similar with continuous disputes. Dissenting opinion also

expressed by some judges. In contrast to previous interpretations, this opinion is interpreted *syiqaq* as the same term with Continuous Disputes. This opinion was developed based on the doctrine that the opinion of a former Chief Justice, M. Yahya Harahap, which expressly states that there is no difference between *syiqaq* and continuous disputes as both are the same thing.

Based on these similarity, the provisions of trial for both reasons should be applied equally. Either case investigation based on *syiqaq* or Continuous Disputes, both has to listen to witness testimony from relatives or people nearby. In addition, the provisions regarding the appointment of *hakam* as a mediator can also be done in the examination of the case that uses both these reasons.

### c. **Determination of *Syiqaq* by Judge in Religious Court of Special Region of Yogyakarta**

Generally, the judges use one (1) common criteria in deciding a case in the category *syiqaq*, which is the danger. The danger can be found through the trial process that there have been revealed any domestic violence between the husband and wife. In particular, the determination of the criteria should be done by exploring the testimony both from the witnesses and family about the shape and nature of the dispute. Judge must first define the form of dispute between husband and wife, does it a dispute or quarrel. Dispute is defined as loss of mutual respect from both husband and wife which is not showed physically, but can only be seen from their daily life. For example, there is no any conversation between them, or never been seen going out together. While the quarrel is defined as a physically dispute, for example a fight or a harsh debate between them. *Syiqaq* itself is a special form of the combination of dispute and quarrel which pose a danger either to

<sup>10</sup> Also defined by Kamal Muchtar, 1974, *Asas-Asas Hukum Islam*, Karya Uni Press, Jakarta, p. 188.

one or both parties. To be able to determine the value of the dangers posed in the dispute between husband and wife, the judge should be able to explore the fact in each case. The law does not set the criteria for determining the danger as has happened *syiqaq*. In practice, the danger is still based on case by case and there is no common perception among judges themselves.

## 2. The Trial Procedure of Divorce Lawsuit based on *Syiqaq* in Religious Court of Special Region of Yogyakarta

### a. Application of *Hakam* in the Trial Process of Divorce Lawsuit based on *Syiqaq*

The application of *hakam* in religious court in the trial should be done by using the trial procedures, include: **Firstly**, when should the *hakam* appointed? The appointment of *hakam* conducted in accordance with Islamic fiqh of marriage law in the Quran Surat An-Nisa verse 35. In this verse, there is one (1) word that became the basis for determining when the appointment of *hakam*, the word “**خِفْتُمْ**” (read: *khiftum*) in Indonesian, the word means have been scared or worried.

Based on the meaning of the word, the appointment of *hakam* can be done in two (2) possible states: (a) *Hakam* will be appointed when there is concern that disputes arising between husband and wife may cause hazards. In general, these provisions provide an opportunity to appoint *hakam* outside the litigation process in the Religious. The emergence of family concerns of both parties to the dispute has to be the basis for the appointment of *hakam* as a mediator between them. *Hakam* appointment does not require approval of a judge because it can be done alone by the family of the husband and wife family. Specifically in religious court proceedings, the appointment of *hakam* can be done by the judge since the judge believe that there

is a danger arising from the dispute between husband and wife. Based on his belief, then *hakam* can be appointed at any stage of the examination in each round of trial at the time when the judges already have beliefs about the danger. (b) *Hakam* will be appointed only when real disputes arising between husband and wife has caused danger. Based on this interpretation, *hakam* may only be appointed if the real danger has been known to occur within marriage. Judge should give more efforts to explore the witnesses to find out the quality of the dispute between husband and wife. When applied in the trial process, the appointment of *hakam* can be done after hearing the testimony of witnesses, particularly witnesses from the family.

**Secondly**, who has an authority to appoint *hakam*? Provisions concerning the authorities can be seen from the 2 (two) regulations, the provisions of Islamic fiqh and the national positive law. Clearly is as follows: (a) Provisions of Islamic Fiqih. In fiqh, there are differences of opinion on the authorities to appoint *hakam* because there are differences of interpretation in interpreting the provisions of the Quran Surat An-Nisa verse 35, that the word “**فَابْعَثُوا**” (read: *fab'atsu*) This word is a command word which means “to appoint” which aimed to appoint *hakam* as a mediator in the case of *syiqaq*. The word raises two (2) different interpretations among the scholars: (1) The word is the command to appoint *hakam* addressed to both families. Implication of this provisions is that only the judge who has an absolute authority to appoint *hakam*; (2) The word is the command to appoint *hakam* addressed to the general public. Legal implications of this interpretation is that the appointment is not an authorized judge *hakam*, but an obligation of families to appoint *hakam* and reconcile both husband and wife. These differences then raised other doctrine of the

scholars of Islamic law which states that there are 2 state on the appointment of *hakam*. In principle, the appointment of *hakam* was a family obligation. So that the family is the preferred party in the appointment of *hakam*. However, in cases where the family is not able to appoint *hakam*, the appointment will be submitted to the court and was appointed directly by the judge. (b) National Positive Law Provisions. In positive law, expressly said that the judge is a person authorized to appoint *hakam*. National positive law does not provide any other authority to appoint *hakam* family.

**Thirdly**, who may be appointed as *hakam*? Provisions about who can be appointed as *hakam* can be seen in terms of Islamic fiqh and positive law, include: (a) Under the provisions of Islamic *fiqh*. From the opinions of scholars and experts of Islamic law, the majority of scholars stated, *hakam* should be appointed from family, both husband and wife's family and the family; (b) Under the provisions of Positive Law. In positive law, *hakam* should not come only from family. Judge as the authorities to appoint *hakam* may appoint another party that will carry out their duties as *hakam*. In the appointment of *hakam* outside the family, the judge should take into consideration that the person does have a purpose and focus to reconcile disputes and trusted by both parties.

**b. Trial Practice in Divorce Lawsuit by *Syiqaq* as Its Legal Reason on Religious Courts in Special Region of Yogyakarta**

This research found that until now there is no case for divorce lawsuit that from the beginning using the reason *syiqaq* received and resolved by the Religious Courts in D.I. Yogyakarta. This is in contrast with the practice in other religious courts. Particularly in the Religious Courts outside Java, divorced lawsuit that originally filed using

the reason *syiqaq* often found and examined by the judge. The absence of this condition caused by several reason, include: (1) Lack of knowledge about *syiqaq*. The parties, including each attorney does not know much *syiqaq* term, especially it specific procedural law. More popular term is Continuous Disputes. This resulted in every divorce that contains elements of quarrelling, has always aimed to be submitted in the Continuous Disputes reasons, not *syiqaq*. (2) Lack of uniformity of definition and category of *syiqaq*. This situation creates difficulties for judges in determining which procedural law should be used. Judge is authorized to perform interpretation, so it is possible the interpretation disparity among judges themselves. (3) The existence of trial principle which is Quick, Short and Low Cost in the Religious Court.

This principle emphasizes the efficiency of time spent in the examination of a Religious Court cases and costs to be incurred by the judges. Based on this principle, judges are required to promptly resolve cases assigned to him. This is reinforced by the provisions of the Supreme Court that a judge should be able to resolve cases assigned to him within a period of 6 (six) months from the case registered. If along that time the case has not found its conclusion yet, then Chairman of the Council of Judges shall report the delay to the Chairman of the Supreme Court through the Chairman of the Religious Court by stating the reasons. When a case containing a dispute filed with *syiqaq* reason, the legal implications of the event was the appointment of *hakam* will add more time to the trial and at the same time also adds to the costs of the parties.

Practice which is often done by the judges in the religious court is holding the trial of divorced lawsuit that use the Continuous Dispute combined by appointing *hakam*. The judges had originally accepted the case

of divorce lawsuit by using Continuous Dispute's reason. However, after the hearing of witness testimony, the judge took the decision to appoint *hakam*. Under this practice, the judges has added a new procedural law, which is to apply the procedural law of *syiqaq* into divorce proceedings of the Continuous Dispute.

When referring to the procedural law of religious court, this practice is a violation of the provisions of law. The law provides that the appointment of *hakam* only done for the case that used *syiqaq* as its reason from the beginning. Expansion of the provisions related to the liability of judges to reconcile the parties, especially in divorce cases in accordance with the Mandatory Principles of Reconciling in Religious Court. To realize this principle, the appointment of *hakam* for divorce lawsuit that do not use the reason of *syiqaq* might be done.

**c. Religious Court Decision in Special Region of Yogyakarta related Provisions of Trial for the Case Using Syiqaq as its Reason**

Practice law in a trial of case using both *syiqaq* and Continuous Dispute in Religious Courts in Yogyakarta can be seen in several related decisions. generally, based on the decision, there are 3 (three) forms of the practice in the religious court judges in the Special Region of Yogyakarta, include: **Firstly**, *hakam* appointed to cases that do not use *syiqaq* as its reason. This practice can be seen in the Religious Court of Bantul Decision No. 172/Pdt.G/2010/PA.Btl. In the decision, it appears that the case filed by reason of Continuous Dispute. In the trial, the judge heard the testimony of witnesses family, i.e. father and brother of the applicant. During the trial, no testimony of witnesses and other evidence that shows there has been a dispute that contain elements of danger and threat. But in the trial, the Judge issued Injunc-

tions Number. 172/Pdt.G/2010/PA.Btl dated July 21, 2010 which set a court case and appoint *hakam*, the brother of the applicant and Respondent's father. After doing their job, *hakam* reported that the results of peace efforts between the Applicant and the respondent has been difficult to live peacefully and maintain a household. *Hakam* reports later became a judge in a ruling consideration.

**Secondly**, examination of the case by reason of Continuous Disputes that contain elements of danger, but do not use *hakam*. This practice can be seen in some religious court decisions, where a judge has found in the trial that there has been a danger to either party, but the judge did not categorize the case as *syiqaq* and not appoint *hakam*. Forms of dangers that occur include: (a) Acts of physical violence, punching, kicking, choking, slapping, hair pulling, putting out cigarettes, and so forth; (b) Psychological violence, which often drive out of the house and asking to divorce. **Thirdly**, examination of the case on the reason of Continuous Dispute has attempted to appoint *hakam*, but did not succeed. In one of the court's decision, the case filed by the reason of Continuous Dispute and there is no element of danger to physical/mental in between husband and wife. In trial process, the judge has ordered the parties to bring representatives from each family to be appointed as *hakam*. Representative of applicant is always present at the hearing, while the defendant was not able to present theirs.

**3. Implementation of Hakam after The Implementation of Mandatory Mediation through Regulation Supreme Court No. 1 of 2008 Concerning Procedural Court-Annex Mediation**

*Hakam* as a special form of trial procedure applied in a divorce lawsuit has a similar function to mediation. *Hakam* task in the proceedings



of a divorce case is to reconcile the two parties to the dispute. The same duty is also charged on the mediation and implemented by the mediator. This condition gives impact in the mediation practice in the courts. Judges in the Special Region of Yogyakarta generally have the same opinion, that *hakam* and the mediator has the same functions and duties. Both are equally as the representative of the principal of Obligation to Reconciling, particularly those applied in the examination of divorce lawsuit. The difference between mediation *hakam* and will be seen in the procedural law applicable to both. Under religious law court proceedings, the difference between mediation and *hakam* and divided into 2 (two) categories: (1) Differences in the position of the legal basis. *Hakam* and mediation arranged in two (2) different levels of regulation. *Hakam* set out in the Law, while mediation is set in the Supreme Court Rules. Related to the Indonesian Legislation Hierarchy, the provisions of *hakam* governed by rules higher than mediation. (2) Difference in binding strength. Difference in binding strength between *hakam* and mediation provided in each legal provisions. In provisions of *hakam*,

the nature of *hakam* is only facultative while the mediation is an obligation to be held by all judges.

#### **D. Conclusion**

Based on the research that has been done, it can be concluded that: **Firstly**, *syiqaq* as a reason for divorce lawsuit interpret as continuous dispute and quarrell between husband and wife that contains danger for both. One common danger might be found in the fact of trial that there have been acts of domestic violence between husband and wife is. **Secondly**, the trial procedure of divorce lawsuit using *syiqaq* as its legal reason based on the provisions regulated on the Law No. 7 of 1989 concerning Religious Courtm by appointing lifting *hakam* after hearing witness testimony. However, in practice, the appointment of *hakam* was also carried out on divorce lawsuit using other reason than *syiqaq*. **Thirdly**, after the implementation of the Supreme Court Rules No. 1 of 2008 on Procedures of Court-Annexed Mediation, judges still have their right to appoint *Hakam* after they held the mediation process between both husband and wife.

### **BIBLIOGRAPHY**

#### **A. Books**

- Basyir, Ahmad Azhar, 2000, *Hukum Perkawinan Islam*, UII Press, Yogyakarta.
- Harahap, M. Yahya, 2007, *Kedudukan Kewenangan dan Acara Peradilan Agama (Undang-Undang Nomor 7 Tahun 1989)*, Pustaka Karini, Jakarta.
- Mahkamah Agung, 2010, *Buku II Pedoman Teknis Administrasi dan Teknis Peradilan Agama*, Mahkamah Agung, Jakarta, Ketentuan Hukum Keluarga No. 12 huruf (c), Mahkamah Konstitusi, Jakarta.
- Miles, Matthew B. & A. Michael Huberman, 1992, *Analisis Data Kualitatif*, Universitas Indonesia Press, Jakarta.
- Muchtar, Kamal, 1974, *Asas-Asas Hukum Islam*,

Karya Uni Press, Jakarta.

#### **B. Internet Articles**

- Wahyu, Ramdani, "Pelaksanaan Hakam dan Mediasi di Pengadilan Agama", <http://www.fshuin-sgd.ac.id/2012/04/pelaksanaan-hakam-dan-mediasi-di-pengadilan-agama/>, accessed on 1 October 2012.

#### **C. Act and Regulation**

- Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution (State Gazette of the Republic of Indonesia of 1999 Number 138).
- Government Regulation Number 9 of 1975 on Implementation of Law Number 1 of 1974 on Marriage.

Law Number 7 of 1989 on Religion Court (State Gazette of the Republic of Indonesia of 1989 Number 49, Supplement State Gazette of the Republic of Indonesia of Number 3400). Supreme Court Rule Number 1 of 2008 on Procedures of Court Annexed Mediation. Presidential Instruction Number 1 of 1991 on the Compilation of Islamic Law.