

Istifadhah Witness (Testimonium De Auditu) for Marriage Authentication (Analysis of Kuala Simpang Religious Court Rulling Number: 10/Pdt.P/2021/MS.Ksg)

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Abstract

This article discusses about istbat nikah (marriage authentication) where the witnesses who gave their testimonies were istifadhah witnesses (Testimonium De Auditu) based on a case which registered in Mahkamah Syar'iyah (Religious Court) in Kuala Simpang, Aceh, as a case number 10/Pdt.P/2021/MS.Ksg. However, based on this witness' testimonies, the judges authorized istifadhah witnesses to give their testimonies to be heard in front of the Court. It has challenged us to know and dig more about the judge's reasoning on why he consider the authorization of istifadhah witnesses testimonies in istbat nikah on the mentioned case. It is also interesting to analyze on how Islamic law view about istifadhah witnesses' testimonies in an istbat nikah case. The combination between field study and library study with juridical normative approach is used as the method in this research. The result shows that istifadhah witnesses's testimonies can be heard in the court as long as the testimonies given cannot be proved, otherwise then the testimonies are true. Similarly, Islamic law views this matter can only be applied in some cases, i.e. In istbat nikah case.

Keywords: Judges' Judgement, Istifadhah, Witness and Itsbat Nikah, Mahkamah Syar'iyah,

Abstrak

Artikel ini membahas tentang istbat nikah dimana saksi yang memberikan keterangannya adalah saksi istifadhah (Testimonium De Auditu) berdasarkan perkara yang terdaftar di Mahkamah Syar'iyah di Kuala Simpang, Aceh, dengan nomor perkara. 10/Pdt.P/2021/MS.Ksg. Namun berdasarkan keterangan saksi tersebut, hakim memberikan kewenangan kepada saksi istifadhah untuk memberikan keterangannya untuk didengarkan di depan Pengadilan. Hal ini menantang kita untuk mengetahui dan menggali lebih jauh alasan hakim mempertimbangkan diperbolehkannya keterangan saksi istifadhah dalam istbat nikah pada kasus tersebut. Menarik juga untuk mengkaji bagaimana pandangan hukum Islam terhadap keterangan saksi istifadhah dalam perkara istbat nikah. Perpaduan



antara studi lapangan dan studi kepustakaan dengan pendekatan yuridis normatif digunakan sebagai metode dalam penelitian ini. Hasil penelitian menunjukkan bahwa keterangan saksi istifadhah dapat didengar di pengadilan sepanjang keterangan yang diberikan tidak dapat dibuktikan, jika tidak maka keterangan tersebut benar. Demikian pula hukum Islam memandang hal ini hanya dapat diterapkan pada kasus-kasus tertentu, yaitu dalam kasus istbat nikah.

Kata kunci: putusan hakim, istifadhah, saksi istbat nikah, mahkamah syar'iyah

INTRODUCTION

In a legal case, a witness is a person who gives information before a trial by fulfilling certain conditions regarding an event or condition that he has seen, heard, and experienced himself as evidence of the occurrence of the event or condition (Amri & Arin, 2018: 156). In marriage case, witnesses are the pillars of the implementation of the marriage contract, therefore every marriage must be witnessed and presented by two witnesses. If the appointed witness is not present at the marriage contract that is being held, then the marriage is invalid. This is as confirmed in the Marriage Law in Article 26 paragraph (1) which states that “a marriage which is held in the presence of an unauthorized marriage registrar, an invalid marriage guardian, or which is held without the presence of 2 (two) persons witnesses, can be asked for cancellation by the families in the straight line up from the husband or wife”. In the law, it is very clear that witnesses in the marriage contract are the pillars of marriage that must be fulfilled in Islam.

Witness, apart from being a pillar of marriage, is intended to anticipate the possibilities that will occur in the future, if a husband or wife wishes to apply for a marriage authentication (*itsbat nikah*), then those witnesses who witnessed the marriage contract can be asked for information in connection with the examination of the case. So in its implementation, in addition to the witness must present and witness the marriage contract directly, the witness is also asked to sign the Marriage Certificate at the time and place where the marriage contract takes place. Therefore, name, age, religion, occupation and place of residence are included in the marriage certificate (Rofiq, 2015: 73).

In that context, if a witness does not meet the proper requirements, such as a witness who does not see, hear, know or experience the legal event itself, but he is still called as a person who will testify before a court, then in this case he is called an *istifadhah* witness or *testimonium de auditu* (Makinara, 2020; Rahmah & Bachri, 2022; Agusta & Umara, 2022; Juhaipah, 2016; Anggraini, 2015; Asmuni, 2014). This testimony is of course outside the category of testimony imposed in Article 171 HIR/308 Rbg and Article 1907 of the Civil Code, in this article it states (1) each testimony must contain all causes of knowledge, (2) opinions or suspicions that special events that occur as a result of thought, not counted as witness. The testimony must be accompanied by information about how the witness knew his testimony. So it can be understood that witness statements that can be used as legal evidence as stated in Article 164 HIR and Article 284 R.Bg must be limited to events that have been experienced, seen, and heard by themselves and must also be accompanied by

reasons for knowing the events described by the witness. Based on the description above, the *istifadhah* witness is not in accordance with the provisions of the actual witness, but we find the use of *istifadhah* witness in the determination of the Kuala Simpang Syar'iyah Court, one of which is the determination recorded in the case register of determination Number 10/Pdt.P/ 2021/MS.Ksg.

In the process of examining the cases of Petitioners I and Petitioners II, two witnesses presented testimony that they knew about petitioners' marriage. However, witness I was not present at the wedding of Petitioners I, and Petitioners II because the witness had fled. The relationship between witness I and both Petitioners is his younger brother. Meanwhile the second witness was also not present when both Petitioners were married. Based on the information given by the two witnesses above, the judge considers concluding the testimony of the *istifadhah* witness as a consideration of the judge's evidence in determining the case of *itsbat nikah* (marriage authentication). Therefore, the judge's legal considerations in accepting the testimony of this *istifadhah* witness are interesting to be studied further.

This article is qualitative one by conducting field study and library research as its method through a normative legal approach (Moleong, 1995). This paper examines the considerations of judges who received the testimony of *istifadhah* witnesses in the trial process at the Kuala Simpang Syar'iyah Court, especially in the case of *itsbat nikah* (marriage authentication), while *istifadhah* witnesses did not meet the actual witness criteria. Determination Number 10/Pdt.P/2021/MS.Ksg is the primary data that is reviewed and analyzed with a review of Islamic law perspective. The study of literature is aimed at obtaining concepts regarding the use of *istifadhah* witnesses in the review of Islamic law and also collecting data regarding *istifadhah* witnesses. The literature review was obtained from various books, articles, journals and documents relating to the issue of *istifadhah* witnesses and reviews of Islamic law.

Literature Review

1. Definition and Legal Basis of Witness

The word "witness" in Arabic is called *syahadah* which comes from the word *syahida-yasyhadu-syhadatan*, which means people who see with their own eyes (Yunus, 1989). According to the term, *syahadah* is the notification of an honest person to establish the truth with the word "testimony" in the court of justice, or the actual reporting of someone other than himself with a special word/speech. In the study of *fiqh*, the term testimony is taken from the word *musyahadah*, which means seeing something with your own eyes and being present in it. Al-Jauhari said that *syahadah* means "certain information" (Zuhaili, 2008: 509). The definition of a witness in the legal dictionary is a person who is involved, considered involved, or knows the occurrence of a legal event (Puspa, 2010).

In Islamic law, it has been distinguished between *syahadah* and *bayyinah*. If the witness is equated with the *bayyinah*, then the evidence in the Islamic Court may only be

judged from the evidence of the witness. Etymologically, "al-bayyinah" means information or everything that is used to explain the right (true), while in terminology, *al-bayyinah* means evidence in the court (Alhafidz, 2013: 31). According to Ibn Qayyim Al-Jawziyyah (1292-1350 AC) said that the testimony was only part of the *bayyinah*. He clearly explained that *bayyinah* is everything that can reveal and explain the truth of a disputed matter (Mannan, 2012: 374). Ibn Qayyim's opinion is broadly used by Islamic jurists for the benefit of proceedings in the Islamic Court. Based on the explanation stated above, what is called *bayyinah* is to provide clear information that can convince the judge of a case that has occurred. While what is meant by *belief* is something that exists based on in-depth investigation or search, and something that has been believed will not disappear unless another belief is stronger than the previous belief (Mannan, 2012: 375).

Furthermore, the legal basis for witnesses is contained in Surah Al-Baqarah verse 283:

.... وَلَا تَكْتُمُوا الشَّهَادَةَ وَمَنْ يَكْتُمْهَا فَإِنَّهُ آثِمٌ قَلْبُهُ وَاللَّهُ بِمَا تَعْمَلُونَ عَلِيمٌ ۨ۸۳

"And conceal not the evidence for he, who hides it, surely his heart is sinful. And Allah is All-Knower of what you do". (QS. Al-Baqarah (2): 283).

According to Muhammad Hasbi ash-Shiddieqy in his work of the Al-Qur'anul Majid, the verse means do not be reluctant to testify if you are asked to testify before a judge (court). People who are reluctant to be witnesses, their souls are sinners. Why is the soul burdened with sin? Because the soul can remember everything that has ever happened, the soul is also a tool of taste and reason. Hiding testimony and concealing sin are related to the realm of conscience. Sin is like the work of the limbs and also the work of the heart. This verse shows that humans do not want to do what is *makruf* (good) and prefer evil work. The purpose of writing a letter of agreement and presenting witnesses is to strengthen the trust of the parties (Ash-Shiddieqy, 2000: 505).

Another legal basis for the witness is further found in Surah Al-Isra' verse 36:

وَلَا تَقْفُ مَا لَيْسَ لَكَ بِهِ عِلْمٌ إِنَّ السَّمْعَ وَالْبَصَرَ وَالْفُؤَادَ كُلُّ أُولَٰئِكَ كَانَ عِنْدَهُ مَشْرُوفًا ۚ

۳۶

"And follow not (O man i.e, say not or do not or witness not) that of which you have no knowledge. Verily, the hearing, and the sight, and the heart, of each of those one will be questioned (by Allah)". (QS. Al-Isra'. (17): 36).

According to Tengku Muhammad Hasbi ash-Shiddieqy, it is not to find out what you do not know, either in actions or words. The commentators have several opinions in interpreting the verse above as follows:

- a. Ibn Abbas said, "Do not be witnesses, but what your eyes see, your ears hear and your mind remembers or your mind remembers."
- b. Qatadah said, "Don't say I heard, even though you haven't heard it, don't say I know, even though you don't know what really happened."

- c. There are those who state that it is forbidden to determine something based solely on suspicion or conjecture (Ash-Shiddieqy, 2000: 2324).

2. Witness Requirements

There are two types of witness requirements in Islamic law, namely, general and special witness requirements. General witness requirements covering all forms of testimony, and special witness requirements relating to different forms of testimony. The general requirements for witnesses are Reasonable and *baligh*, Independent, Islam, able to see, able to Speak, Fair, Unsuspected (*at-tuhmah*). Besides that, the requirements for special witnesses relating to certain testimonies are:

- a. Requirements for the amount in testimony to matters that are (usually) known to men.
- b. There is a match between two testimonies if indeed there is more than one testimony.
- c. Witnesses who witnessed firsthand the incident (Zuhaili, 2011: 181).
- d. The requirements for witnesses in marriage are also regulated in the Compilation of Islamic Law (KHI) contained in articles 24, 25, and 26.

As for the provisions of Article 24, witnesses in marriage are the pillars of the implementation of the marriage contract. Every marriage must be witnessed by two witnesses. Furthermore, Article 25 states that those who can be appointed as witnesses in a marriage contract are a Muslim man, fair, of puberty, not impaired by memory, and not deaf. Then, it is explained again in Article 26 which states that witnesses must be present and witness the marriage contract directly and sign the marriage certificate at the time and place of the marriage contract (Mardani, 2016: 46).

The requirements for witnesses in civil procedural law are divided into two, namely formal requirements and material requirements. The two conditions are cumulative, if one of the requirements for a formal and material witness contains a defect, then the evidence for the witness is invalid. The formal requirements for witnesses are as follows:

- a. A capable person is a witness.
- b. The statement is presented at the Court hearing.
- c. Affirmation resigns as a witness, and states willingness to be examined as a witness.
- d. Witnesses were examined one by one
- e. Take an oath or promise before giving testimony.

The material requirements of witnesses in civil procedural law are as follows:

- a. The testimony of a witness used as evidence is invalid, because the witnesses who can be used as valid evidence are two witnesses.

- b. The information given by the witness must be based on the source of knowledge that he has experienced, heard, seen for himself, this is based on Article 171 paragraph (1) HIR and Article 1905 paragraph (1) of the Civil Code.
- c. The testimony of witnesses given must be in accordance with one another. This is regulated in Article 170 HIR and Article 1908 of the Civil Code (Harahap, 2009: 633).

3. *Istifadah* Witness in Civil Procedure Law

Istifadah witnesses in civil procedural law are called *testimonials de auditu*. In the legal dictionary, *testimony* means witness (Puspa, 2010, 820). Meanwhile, *de auditu* means the testimony of a witness in which the information or statements presented are based solely on what has been heard from the other party (Sudarsono, 2005: 90). The meaning of testimony in the Civil Procedure Code is the certainty given to judges at trial regarding events that are known by way of verbal and personal notification by people who are not one of the parties to the case summoned at trial (Adlhiyati, 2018: 132).

In the practice of civil procedural law, generally there are three types of witnesses, namely:

- a. The witnesses who were presented regarding their existence were very necessary because they had witnessed an event in a legal act committed by the parties who needed it (found in Article 1902 BW).
- b. Witness who happens to be at the time of the occurrence of a legal event. This witness saw, heard and experienced witnessing firsthand, not hearing from other people's stories.
- c. Testimony from hearing or testimony *de auditu*, testimony that generally does not see, hear, and experience directly the occurrence of legal events. However, this witness in giving testimony only heard stories from other people (Sarwono, 2014: 256).

Regarding witnesses, there are several things related to witnesses, namely:

- a. Evidence with one witness, without other evidence is unacceptable (*unus testis nulus testis*) contained in Article 1905 BW.
- b. Each witness must explain the reasons for what he himself knows or the information presented must be experienced by himself.
- c. Witnesses are not allowed to explain the opinions, conclusions, or allegations of witnesses.

Meanwhile, in examining *istifadhah* witnesses at the trial, it is the same as in examining witnesses in general, namely:

- a. Witnesses are called into the courtroom one by one and the trial is declared open to the public, except in special cases, such as divorce matters.

- b. The panel of judges asks the witness about his/her identity which includes name, date of birth, age, religion, education, occupation, place of residence, and the witness' relationship with the parties.
- c. The judge ordered the witness to stand up to take the oath according to their respective religions.
- d. Upon the judge's question, the witness gives his statement according to what he has seen, heard and experienced for himself the occurrence of a legal event. Meanwhile, the *istifadhah de auditu* witness gave information that he had not seen, heard and experienced himself, but rather came from other people. Witness families, workers/employees and housemaids of the parties can be heard, seen as witnesses under special oaths/pledges in the case of marriage authentication (*itsbat nikah*).
- e. Witnesses who have been examined are welcome to leave first and take turns with the other witness so as not to contact each other while the witness examination process is in progress (Salwa, 2019: 27).

DISCUSSION

Analysis of Judge's Consideration of Istifadhah Witness in Determination Number 10/Pdt.P/2021/MS.Ksg

Determination of marriage authentication (*itsbat nikah*) Number 10/Pdt.P/2021/MS.Ksg. put forward two witnesses, namely Kasiman bin Dikromo as the first witness, who has a relationship as the younger brother of Petitioner I and Dani Ikhwal bin Darwin Prayetno as the second witness, who has a relationship with the witness as a neighbor as well as a village official. Based on the statements of the two witnesses above, the panel of judges assessed the information from the testimony of the *istifadhah* witness, so the panel of judges made it one of the considerations for determining the marriage authentication (*itsbat nikah*) case. The judge's consideration in the determination of the marriage *itsbat* case Number 10/Pdt.P/2021/MS.Ksg is as follows:

Considering that the main principle in the law of evidence is that whoever postulates a right or event must prove the incident, which is also regulated in Article 283 RBg. That the burden of proof as referred to above must be determined according to appropriate conditions, namely the relevance of the evidence to the subject matter of the case and whether or not the evidence can be presented by the parties.

Considering the evidence in the form of two witnesses presented by Petitioner I and Petitioner II have explained things which they themselves know under oath and are not hindered from giving testimony as provided for in the law (vide Article 172 paragraph (1) number (4) RBg and Article 175 RBg), therefore the testimonies of the witnesses can be accepted and considered further.

Considering the statements that have been submitted by the witnesses at the trial are in accordance with one another, relevant to the main issues in the petition of

Petitioner I and Petitioner II, therefore, the statements of the witnesses are in accordance with the will of Article 309 RBg.

Considering the statements presented by the two witnesses of Petitioner I and Petitioner II were not based on direct knowledge of the events of the marriage of Petitioner I and Petitioner II, but based on what they had witnessed so far that between Petitioner I and Petitioner II had no blood relationship, by mutual consent, and according to order, so far no one has objected and interfered with the marriage of Petitioner I and Petitioner II, and from that marriage, both of them have been blessed with 6 (six) children, both of whom are still Muslim, and have never been divorced, therefore the Assembly The judge considers it very valuable and has value if the statements of the two witnesses are used as the basis for the Panel of Judges' suspicion that it is reasonable to suspect that Petitioner I and Petitioner II are legal husband and wife and have been blessed with 6 (six) children. Thus the statements of the two witnesses are objective and relevant to the petitions of Petitioner I and Petitioner II and are in line with Article 308 paragraph (1) RBg.

Considering that in addition to the obligation to fulfill the pillars (elements) of marriage, for the validity of a marriage, the conditions of marriage must also be met. The conditions for marriage are the absence of a *mahram* between a prospective husband and a prospective wife, either temporarily or permanently, as stated in Articles 8, 9, and 10 of Law Number 1 of 1974, and Articles 39 to 44 of the Compilation Islamic law.

Based on the judge's consideration of the information given by the witness, it can be one of the judge's considerations in determining this case, the judge has properly considered and paid attention to the witness' testimony in all respects, both in the form of the witness's identity and the life of the witness in order to obtain the correct witness testimony. That the testimony given by the witness has been fulfilled, namely fulfilling the summons, taking the oath, and providing correct information at trial (Sugeng, 2015: 70). Petitioner I and Petitioner II have presented two witnesses at the trial, the two witnesses have explained things that they themselves know under oath based on what they know, but this witness did not see, hear, and experience it directly. The testimony given by the two witnesses is in agreement between the two, therefore, the testimony of a witness like this can be taken into account.

The testimony presented by the two witnesses, the Panel of Judges considered it very valuable and has value if the statements of these two witnesses are used as the basis for the panel of judges' suspicion that it is reasonable to suspect that Petitioner I and Petitioner II are legal husband and wife and have been blessed with 6 (six) children. The judge in assessing the two witnesses did not immediately conclude that the testimony could be judged as a judge's suspicion, but the judge considered the testimony of the *istifadhah* witness which was supported by a legal umbrella, namely SEMA (Supreme Court Circular Letter) Number 10 of 2020 concerning the Enforcement of the Formulation of Meeting Results The Plenary Chamber of the Supreme Court in 2020 as

a Guide to the Implementation of Duties for the Court which is listed in the section on the Legal Formulation of the Chamber of Religion in point 1 of Family Law which states "The *syahadah al-Istifadah* can be justified in cases of *itsbat* marriage and *waqf* (endowment) pledges that have occurred for a long time, both in volunteer cases as well as contentious".

Based on the testimony of the *istifadhah* witness which is supported by the legal umbrella of SEMA Number 10 of 2020, the testimony can be wrapped with "Judge's Suspicion", so the evidence that has been regulated in the Civil Code Article 1866 which states "witness evidence includes written evidence, witness evidence, confession, oath, and suspicion, these five pieces of evidence complement each other in the determination of *itsbat* marriage. Unless there is no witness, then it is not accepted and cannot be judged by the judge's suspicion, because there is an *istifadhah* witness and is supported by SEMA, the judge concludes with his suspicion that it is true that the marriage proposed by Petitioner I and Petitioner II, and the marriage has fulfilled the pillars and the conditions in marriage, as the pillars of marriage have been regulated in Article 14 of the KHI which consists of a prospective husband, prospective wife, marriage guardian, two witnesses, consent and *qabul*." Meanwhile, this marriage has also fulfilled the marriage requirements as stated in Articles 8, 9, and 10 of Law Number 1 of 1974, and Articles 39 to 44 of the Compilation of Islamic Law.

It should be underlined that the *istifadhah* witness can be justified for *itsbat* marriage for a marriage that has been going on for a long time. As for the new marriage, the *istifadhah* witness cannot be justified in the case of *itsbat* marriage. If the *istifadhah* witness is used in another case, it cannot be judged as a judge's suspicion, but it has been proven by the defendant's plaintiff and proven by the witness who saw the legal event firsthand. The *istifadhah* witness is also inseparable from the basic concept of a witness, namely as long as the witness cannot be refuted with other evidence, then that is the truth. Petitioners I and II have presented two witnesses in which from the statements of the two witnesses, there is no objection from any party and the applicants have met at least two pieces of evidence, namely letter evidence and witness evidence. Both of these evidences have been fulfilled, then the testimony of the *istifadhah* witness can be determined as the judge's suspicion.

Considering the Court seems necessary to cite the opinion of fiqh experts in the book *I'anatut Thalibin*, Juz IV, page 290, and take it over as the opinion of the Court, as follows:

وَفِي الدَّعْوَى بِنِكَاحٍ عَلَى امْرَأَةٍ ذَكَرُ صِحَّتِهِ وَشُرُوطِهِ مِنْ نَحْوِ وَلِيٍّ وَشَا هِدْيِي عَدْلٍ

"And in the acknowledgment of marriage to a woman, it must be able to mention the validity of the previous marriage and its conditions, such as a guardian and two fair witnesses" (Ad-Dimyati, 2005: 290).

The reason why the Judge quoted the opinion of this book is that, in a person's confession stating about his marriage, he must be able to describe or explain his marriage to a woman, must mention who the guardians and witnesses at that person's marriage are, in this case the confession of the husband and wife is able to describes their marriage, that they married at the house of Petitioner II's parents, that they have no *mahram* relationship, nothing prevents their marriage, also mentions guardians and witnesses at the marriage, therefore, the above argument is a complement to the basis of the argument *posita* or subject of application (Interview). In terms of a person's confession about marriage, the person concerned must be honest, trustworthy and there are no accusations of any kind about that person's confession, then this is sufficient as a guide that can state that the marriage of Petitioner I and Petitioner II is truly legal according to religion.

The Court also views and adopts the rules of *ushul fiqh* which are used as the opinion of the Panel of Judges, as follows:

الأصل بقاء ما كان على ما كان

“The original remains as it was.” (Khallaf, 1994: 129)

The explanation of the *istishab* rule itself as a proposition for the law is a *majazi* (metaphorical) determination. Because in fact the argument is essentially a proposition that became a previous legal provision, *istishab* is nothing but assigning the meaning of the argument to its law. Hanafi scholars stipulate that *istishab* is evidence to defend, not to prove. The meaning of this statement is that *istishab* is a proof of the persistence of something in its original state, and rejects something that opposes it. It is not a proof to establish something that is not fixed, it is explained by something they have established. One of them relates to a marriage (Khallaf, 1994: 130).

The marriage between Petitioner I and Petitioner II had complete requirements and pillars, and there was also no doubt about their marriage from the start, so the original law was that the marriage was legal, so whatever now there are accusations, polemics, and so on, then the existence of marriage it remains valid, no change at all. So, this rule strengthens the postulate of the petition.

Apart from the explanation of the judges' considerations above, there are interview data obtained from several judges who handled the case to strengthen the author's data, while the judges interviewed were as follows:

1. Muhammad Lukman Hakim, S.Ag

Lukman Hakim as chairman of the panel of judges in the case of *itsbat nikah* whose proof was using *istifadhah* witnesses, the following is his explanation: "The witness actually has to see, a witness when giving testimony at trial the witness must see, hear, know, and experience firsthand the occurrence of the act law, so not based on stories from people. If the witness does not see the legal action directly, then the witness does not meet the criteria for a real witness or the witness does not meet the

material requirements of a witness. Although this *istifadhah* witness does not see and hear directly, but the *istifadhah* witness can be justified in cases of *itsbat* (marriage authentication) and *waqf* (endowment) pledges, as has been regulated in SEMA Number 10 of 2020 Formulation of the Law of the Chamber of Religion in point a which reads “*Syahadah al-istifadhah* can be justified to the events of *itsbat* marriage or *waqf* pledges that have occurred for a long time, both in voluntary and contentious cases”

2. Mamfaluthy, S.H.I

Mamfaluthy is a member of the judge who handles the marriage legality case, which is proven using *istifadhah* witnesses, following his explanation: “This decision has presented two witnesses in court. If this witness sees and hears only one person, then his testimony cannot be used. If there are two witnesses, then the witness's testimony is only preliminary evidence. As for the basic concept of a witness as long as it cannot be proven otherwise, then this is the right one! Because the strength of the evidence stands alone, which clearly speaks of the strength of the proof of the *istifadhah* witness as long as he cannot be refuted by other evidence, it is sufficient to meet at least two pieces of evidence, namely letter evidence and witnesses. If the two pieces of evidence are met, then his testimony can be accepted as a judge's suspicion. Here the judge also saw that the statements of the first witness and the second witness were in accordance with Article 1907, 1908 of the Civil Code, that the two witnesses were in agreement and had conveyed what the witness himself knew.”

Based on the arguments above, Petitioner I and Petitioner II appeal to the Chair of the Kuala Simpang Syar'iyah Court c.q. The Panel of Judges examined and tried this case, then handed down a ruling which read as follows:

1. Granted the petition of Petitioner I and Petitioner II.
2. Declare that the marriage between Siren bin Kasin Dikromo and Supiah bint Rakidi was legal which was held on March 8, 1971 in Sido Mulio Village, North Labuhanbatu Regency.
3. Ordered Petitioner I and Petitioner II to register their marriage with the Marriage Registrar at the Office of Religious Affairs, Karang Baru District, Aceh Tamiang Regency.
4. Charge of this case in accordance with the applicable laws and regulations.

The ruling on the above determination was issued by the panel of judges after going through very deep considerations as described above, so that the testimony of *istifadhah* witnesses can be accepted before the trial, and declares that the marriage of Petitioner I and Petitioner II is legal.

Review of Islamic Law on Acceptance of *Istifadhah* Witnesses in the *Itsbat* Marriage Case Number 10/Pdt.P/2021/MS.Ksg

The scholars differed regarding the *istifadhah* witnesses who were used as evidence in the trial. According to the Maliki school of thought, that testimony by hearing is only allowed in ten cases, namely: marriage, removal of a judge or guardian, *kufur*, one's validity (one's stupidity), lineage, breastfeeding, buying and selling, grants and wills. Testimony is based on hearing and seeing if the information conveyed is not limited to certain people, for example the lineage of someone who has spread in the midst of society, both among fair people and others. In this case, the witnesses were signaled to say, "we heard," or "we are still hearing information that is spreading in the community, both among fair people and not, that so and so is the son of so and so (Zuhaili, 2011: 179)."

According to the Hanbali school of thought, the testimony of *istifadhah* witnesses can be accepted in cases of lineage, birth of children, marriage, death, ownership, endowments, guardianship, and removal of status as guardian. Scholars of the Shafi'i and Hanbali schools set the conditions for acceptance as witnesses who heard or saw, namely: the hearing of the incident by a number of people who could not agree to lie, where with the information of these people, a strong level of belief or level of suspicion would be obtained strong. When testifying, a witness must also say, "I testify" (Zuhaili, 2011, 180). According to the scholars of the Shafi'i school, the testimony of *istifadhah* witnesses is only allowed in cases of kinship, birth, death, independence, dismissal, marriage and matters related to it, the determination of justice and defects of narrators (narrators), wills, balighan, ignorance, and ownership (Sabiq, 2013: 360).

According to Imam Abu Hanifah, it is permissible to testify by hearing if the incident has spread among the people. The incident was spread thoroughly and clearly, so that it can be believed that the event occurred (Zuhaili, 2011, 179). Imam Abu Hanifah argued that testimony based on *istifadhah* witnesses is only allowed in five cases, namely: marriage, mixing of husband and wife, lineage, death, and guardianship of the judge. Hanafi scholars also provide three conditions that must be met by a person when witnessing a case so that his testimony can be accepted, namely: the witness is a reasonable person, in witnessing a case he must be in a state of seeing, and finally the witness saw the incident himself, not given information by others.

The basic law is that witnesses who do not see, hear, experience directly the occurrence of legal events cannot be used as legal evidence in court. Because a witness like this does not meet the requirements of a real witness. However, a direct witness who knows that the incident is no longer present or has died, then the witness can receive his testimony at trial, provided that the source of the witness' knowledge of the incident must be clear.

As for the review of Islamic law on the use of *istifadhah* witnesses in court, their testimony can be accepted based on the opinion of the Imams of the Madzhab, namely:

on the condition that the incident is spread thoroughly and clearly so that it can be believed that the incident occurred and the fame and fame in the community. However, the use of *istifadhah* witnesses can be accepted in certain cases, one of which is in marriage cases, namely the determination of *itsbat* marriage, as in the case that the author wrote, the judge can accept the testimony of *istifadhah* witnesses as evidence at trial. The testimony of *istifadhah* witnesses can be used as evidence by judges in determining or deciding cases.

CONCLUSION

There are at least two important conclusions that can be drawn from this paper. Firstly, the judge's consideration in accepting *istifadhah* witnesses, namely that the witnesses presented by the Petitioner have explained things that he himself knows under his oath and are not hindered from giving his testimony. The testimony of this witness is in accordance with Article 308 and Article 309 Rbg, namely the testimony given by the witness is based on what is known directly by the witness, not a thought from the witnesses which is then put forward in the trial, in addition to the statements given by the two witnesses are also interrelated. The judge considered that the statements of the two witnesses could be accepted as the judge's suspicions, and to strengthen the basis of the *posita* argument or the main point of the petition, the judge quoted the opinions of *fiqh* experts in the book *I'anaatut Thalibin* and the Rules of *Ushul fiqh*, in the form of *istishab*. So, it could be concluded here that *istifadhah* witnesses's testimonies can be heard in the court as long as the testimonies given cannot be proved, otherwise then the testimonies are true.

Secondly, in terms of Islamic law, the testimony of *istifadhah* witnesses is only allowed in a few cases, namely cases of lineage, death, endowment, marriage and ownership of an item. Because the *istifadhah* witness does not meet the requirements of the actual witness, but the direct witness who knows the incident is no longer there or has died, the witness can be accepted for his testimony at trial, provided that the source of the witness' knowledge of the incident must be clear about its origins. So in the case of *itsbat* nikah (marriage authentication), it can be justified that the *istifadhah* witness is based on the incident that has spread thoroughly and clearly, so that it can be believed that the incident occurred and his fame in the community.

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