

## Sociological Analysis of the Concept of Divorce In Marriage Law in Indonesia

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**Abstract:** Divorce is the last resort to take when polemics within the family have entered an emergency situation; after various attempts have been made but have failed to maintain the integrity of the household. Divorce is a private matter, but considering the current social conditions, it requires the government to intervene to see the legal impact it causes. This study aims to find out how society responds to divorce rules in marriage law in Indonesia. This research is descriptive qualitative research with literature journals, books, and research results used as data sources, and then analyzed using content analysis techniques to find comprehensive answers. The results of the study found that there was legal dualism in society between fiqh and laws and regulations, leaving conflict between the two. In fiqh, it is stated that divorce may be carried out anywhere without being limited by space and time, however, in Indonesian marriage law it is stipulated that divorce must be carried out before a court hearing. The difficulty for the community to accept the rule of law is due to differences in social habits and values that develop in society.

**Keywords:** Divorce, Marriage Law, Sociological Analysis

**Abstrak:** Perceraian merupakan jalan terakhir yang ditempuh ketika polemik dalam keluarga sudah memasuki kondisi darurat, setelah berbagai upaya telah dilakukan tapi tidak berhasil mempertahankan keutuhan rumah tangga. Perceraian merupakan urusan pribadi namun melihat kondisi sosial sekarang ini mengharuskan pemerintah untuk turut campur melihat dampak hukum yang ditimbulkannya. Penelitian ini bertujuan untuk mengetahui bagaimana masyarakat menyikapi terhadap aturan perceraian dalam hukum perkawinan di Indonesia. Penelitian ini merupakan riset kualitatif bersifat deskriptif dengan literatur jurnal, buku dan hasil penelitian dijadikan sebagai sumber data, dan kemudian dianalisis menggunakan teknik analisis content untuk menemukan jawaban yang komprehensif. Hasil penelitian didapatkan bahwa terjadinya dualisme hukum di masyarakat antara fiqh dan peraturan perundang-undangan sehingga menyisakan pertentangan diantara keduanya. Dalam fiqh disebutkan bahwa perceraian boleh dilakukan dimana saja tanpa dibatasi oleh ruang dan waktu, akan tetapi dalam hukum perkawinan di Indonesia ditetapkan bahwa perceraian harus dilakukan di depan sidang pengadilan. Sulitnya masyarakat menerima aturan hukum tersebut disebabkan perbedaan dengan kebiasaan dan nilai-nilai sosial yang berkembang di masyarakat.

**Kata Kunci :** Perceraian, Hukum Perkawinan, Analisis Sosiologis

### Introduction

The marriage contract in Islamic law is not a civil matter per se, but a holy ikatan (*Mitsaqan ghalidza*) which is related to belief and faith in Allah swt. Thus there is a dimension of worship in a marriage. (Musthofa & Subiono, 2020) For this reason, marriage must be maintained properly so that it can be eternal and what is the purpose of marriage in Islam, namely the realization of a prosperous family (*mawaddah wa rahmah*) can be realized (Amrar Mahfuzh Faza, Dedisyah Putra, 2021; Hamid et al., 2022). If the bond between husband and wife is so strong, then it is not appropriate to be damaged and taken for granted. Any act that takes marital

relationships lightly and ignores them is hated by Islam, because it can eliminate the neglect and benefit of husband and wife. (Azhari, 2004)

Marriage is one of the favors of Allah Swt, while a divorce is part of the denial of his favors. Therefore, basically, divorce is legally not allowed, except in emergency conditions. However, if there is no justified reason for Shari'a, then divorce is a form of denial of the favors of Allah Swt, and a form of evil against the wife. Thus, this kind of divorce is an act that Allah Swt hates and is forbidden in sharia. (Daud et al., 2020)

In principle, the marriage is carried out for a time forever until the death of one of the husbands or wives. This is exactly what is desired in the teachings of Islam. But often what is the purpose of marriage runs aground on the way. The marriage had to break up halfway. Actually, the breakup of marriage is a natural thing, because the basic meaning of a marriage contract is a bond or it can also be said that marriage is basically a contract. Consequently it can escape which can then be called talak. The basic meaning of the talak is to untie or give up the covenant. (Asrul Hamid, 2020)

According to Islamic teachings, divorce is recognized on the basis of determination after good consideration, for reasons of an emergency or very urgent nature. Divorce is legally recognized to terminate the marital relationship based on the shari'a instructions. Nevertheless, normatively the Messenger of Allah warned that Allah Swt hated the deed very much even though it was lawful to do. (Wahbah al-Zuhaili, 2011) Thus, the Prophet impliedly taught muslim families to avoid divorce as much as possible. And behind the hatred of Allah Swt there is a warning that divorce is very dangerous and has a negative impact on the family. Nevertheless, under certain conditions the alternative of divorce is forced to function, because only then can a dispute in the household be ended. (Sayyid Sabiq, 1983) Various factors are the cause of divorce, so one of the parties has neglected its obligations, or the occurrence of a dispute that never ends, while each party does not want to relent. In addition, disharmony can also be caused by economic factors. (Ratnawaty, 2017)

The Quran describes several situations in the life of a husband and wife that indicate a rift in the household that can lead to divorce. The rift and turmoil of the household stems from the non-implementation of the rules set by sharia for the life of a husband and wife in the form of rights and obligations that must be fulfilled by both parties. (M. Quraish Shihab, 2007) Islamic Law describes some of the efforts that must be made to deal with the chaos so that divorce does not occur. Thus, Islamic law anticipates the possibility of divorce and places that divorce as the last alternative that is impossible to avoid. (Oktorinda, 2017)

For cases related to divorce, the State has regulated in Law Number 16 of 2019 Amendments to Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law which is a reference in deciding divorce cases. (Nasution, 2019) However, in the reality of life there is a duality of law, namely formal law and non-formal law. Formal law is a regulation that has been established by the State and non-formal law is *fiqh mazhab* which has been a guideline or binding rule in society. (Faridy et al., 2022) If we look again at the fact of saying, that it turns out that in general there has been a rejection of the Marriage Law on the issue of the validity of divorce whose concept is the same as the Compilation of Islamic Law in Article 115 which is "Divorce can only be carried out before a Religious Court after the Religious Court has tried and unsuccessfully reconciled the two parties."

The refusal occurred because in the opinion of the *fiqh madzhab* that divorce proceedings could fall anywhere even if not in a Religious Court hearing. In other words, *talak* can fall anywhere without being limited by time and space. Indirectly, there has been a conflict between the legislation enacted by the State and the opinion of *fiqh madzhab* which becomes law and applies in society. The phenomenon seems to quietly elevate the linkage of the *qanun* dimension with the *fiqh*, and at the same time the law appointed from within the *fiqh* still has sacred value among the people as well as in the sphere of the Religious Court. However, even though it has sacred value, it still leaves opposition on certain issues.

This research is a descriptive qualitative research, which describes matters related to divorce by searching the literature according to the research theme. The data sources used both primary and secondary are journals, books, and research results. The analysis method used is *content analysis*, where the data obtained is systematically deciphered and then analyzed comprehensively to find comprehensive answers.

## **Results of Research and Discussion**

### **Definition and Legal Basis of Divorce**

The notion of divorce is not found in classical *fiqh* literature, but the notion of divorce is referred to in the notion of *talak*. *Talak* according to the language means the release of ties and liberation. Included among the *talak* sentences is the sentence *naaqatun thaaliquun*, meaning it is released without restraint. Also the phrase *asiirun mutthaliqun*, which means to break free from it. However, tradition specializes *talak* with the notion of meaningful bonding for the woman. (Wahbah al-Zuhaili, 2011)

In accordance with the foregoing, divorce is the release of the marriage bond or the release of the marriage with the talak pronouncement and the like, or untie the marriage directly or suspended with a devoted recitation. The release of the marital bond is directly in the form of talak *ba'in*. Deferred means after the completion of the *iddah* period which is in the form of talak *raj'i*. Divorce is also defined by an attempt to untie the marital bond and further end the marriage itself. (Sayyid Sabiq, 1983)

In Islamic teachings, it has been arranged in such a way that the issue of divorce is arranged by deriving the verses of the Koran and the hadith of the Prophet relating to the divorce so that it has its own legal basis and rules, including:

وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ سَرَخُوهُنَّ بِمَعْرُوفٍ

It means: "If you are mentalizing your wives, and then they are nearing the end of their *iddah*, then refer to them in a ma'ruf way, or divorce them in a ma'ruf (also) way." (Q.S Al-Baqarah (2) : 231). (Ministry of Religious Affairs of the Republic of Indonesia, 2010)

وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ إِذَا تَرَاضَوْا بَيْنَهُمْ بِالْمَعْرُوفِ ذَلِكَ يُوعَظُ بِهِ مَنْ كَانَ مِنْكُمْ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَ لَكُمْ أَرْكَى لَكُمْ وَأَطْهَرُ وَاللَّهُ يَعْلَمُ وَأَنْتُمْ لَا تَعْلَمُونَ

It means: "If you have your wives, and then the *iddah* period expires, then do not you (the guardians) prevent them from remarrying their future husbands, when there has been a willingness between them in a ma'ruf way. That is what is exhorted to those who have faith among you to God and the day after. it is better for you and more holy. God knows, while you do not know." (Q.S Al-Baqarah (2) : 232) . (Ministry of Religious Affairs of the Republic of Indonesia, 2010)

And there are many other verses that become legal arguments related to divorce such as Q.S Al-Baqarah (2): 229 – 230, Q.S Ath-Thalaq (65): 1. In addition to these verses there are also hadiths of the Prophet which are understood as the legal basis of divorce, including:

عَنْ عَبْدِ اللَّهِ بْنِ عُمَرَ أَنَّهُ طَلَّقَ امْرَأَتَهُ وَهِيَ حَائِضٌ فِي عَهْدِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَسَأَلَ رَسُولَ اللَّهِ عَلَيْهِ وَسَلَّمَ فَسَأَلَ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَنْ ذَلِكَ فَقَالَ مُرُّهُ فَلْيَرْجِعْهَا ثُمَّ لِيُمْسِكْهَا حَتَّى تَطْهَرَ ثُمَّ تَحِيضُ ثُمَّ تَطْهَرَ, ثُمَّ إِنْ شَاءَ امْسَكَ بَعْدَ وَ إِنْ شَاءَ طَلَّقَ قَبْلَ أَنْ يَمَسَّ فِتْلِكَ الْعِدَّةَ الَّتِي أَمَرَ اللَّهُ أَنْ تُطَلَّقَ لَهَا النِّسَاءُ (رواه البخارى)

It means: "From Abdullah ibn Umar r.a., verily ibn Umar had menthalaq his wife, while his wife was in a state of menstruation at the time of the Messenger of Allah Saw., then Umar Ibn Khatab asked such a thing to the Messenger of Allah Saw, he said: tell him to refer to his wife, then let him hold his wife until it is holy, then menstruation, then holy, then afterwards if he wants he can hold (keep him) his wife afterwards and if he wants he may menthalaqnya. Menthalaq wife to run her 'iddah' period." (H.R Bukhari). (Al-Bukhari, 2002)

عَنْ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُ قَالَ : كَانَ الطَّلَاقُ عَلَى عَهْدِ رَسُولِ اللَّهِ وَ أَبِي بَكْرٍ وَسنتينٍ مِنْ خِلافةِ عُمَرَ طَلَّقُ  
الثَّلَاثِ واحِدَةً فَقَالَ عُمَرُ ابْنُ الحِطَّابِ . إِنَّ النَّاسَ قَدْ اسْتَعْجَلُوا فِي أَمْرِ قَدْ كَانَتْ لَهُمْ فِيهِ آناةٌ فَلَوْ اِمْتَضَيْنَاهُ عَلَيْهِ  
فَأَمْضَاهُ عَلَيْهِمْ (رواه مسلم)

That is to say:"From Ibn Abbas r.a., he said: It was thalaq in the time of the Messenger of Allah Saw., the time of Abu Bakr and the two years of the reign of Umar, thalaq three fell one, then said Umar Ibn Khatab: Verily men are hasty in the business which they may do slowly, and then I do such upon them." (H.R Muslim). (Imam Abi Husen Muslim bin Hajaj, 1992)

Islamic law aims to form a prosperous family unit through marriage. Marriage is a contract that benefits the life of the world and religion, while talak removes benefit, which means making mischief. But if for some reason this goal fails. Islam advocates peace between the two husbands and wives rather than deciding them. But if the good relationship between the husband and wife is impossible to continue, then Islam does not shackle with a sickening chain, resulting in a miserable and painful situation, then divorce is allowed.

### **Divorce Procedure in Marriage Law in Indonesia**

Divorce is an act done by the husband to refuse or stop the continuation of a marriage. Talak is the husband's right of divorce from his wife if he feels that he can no longer maintain his marriage. On the contrary, a divorce suit can be filed by the wife against her husband for the reasons that have been established. (Bastomi & Paramita, 2021) (Bastomi & Paramita, 2021) The issue of divorce is a much-discussed issue long before the existence of the Marriage Law, because the reality is that in today's society many marriages end in a divorce and it seems that this happens easily. Sometimes the divorce occurs without a good reason, this is what led to the birth of Law No. 1 of 1974 concerning Marriage. In addition, it is also to create a happy, eternal and prosperous marriage in accordance with one of the principles in the general explanation of the Marriage Law, which is to make it difficult for divorce to occur. (Khiyaroh, 2020)

the breakup of a marriage by justifiable causes can occur in three circumstances: 1) Death; 2) Divorce and 3) Court Decision. The end of marriage in the state that the husband and wife are still alive (divorce) can occur at the will of the husband, can occur at the will of the wife and occur outside the will of the husband and wife. In the Marriage Act, it is explained that divorce can only be made before a hearing of the Court after the Court concerned has tried and unsuccessfully reconciled the two parties (Article 39 paragraph 1). This is in accordance with the Compilation of Islamic Law Article 115 it is said that divorce can only be carried out before a religious court

after the Religious Court has tried and unsuccessfully reconciled the two parties. (Novitasari et al., 2019)

If you look at the editors above, the so-called divorce is to remove or untie the marriage so that after the loss of the bond, it is no longer lawful for the husband to his wife. But from the above understanding there is a difference that scholars define divorce can be done anytime and anywhere, but this is different if we see in Law No. 1 of 1974 and the Compilation of Islamic Law that divorce can be carried out only in religious courts. So that if there is a Muslim in Indonesia who performs a legal marriage either religiously or statewide and he divorces outside the religious court, then the divorce is invalid for the sake of law or null and void. (Asrul Hamid, 2020)

It is clear that talak is a method used to untie a marital bond, thus the marriage bond can actually be broken and the procedure has been regulated both in jurisprudence and in the Marriage Law and the Compilation of Islamic Law. The existence of a divorce process regulated in statutory provisions is a realization of the marriage principle adopted by the Marriage Law, which is the principle to prevent and complicate divorce. Although this divorce is a personal matter, or a common will, in order to avoid arbitrary actions, especially from the husband to the wife and for the sake of legal certainty, the divorce must be carried out through the channels of the judicial institution.

In the Marriage Law, the consequences of breaking up a marriage due to divorce are only regulated in one article, namely article 41. Divorce has legal consequences or consequences, namely the husband and the wife are legally no longer bound in the marital bond. Children born in their marital bonds experience a psychological impact, as well as on the property acquired during the marriage will be divided in accordance with applicable legal regulations.

### **Divorce In Marriage Law: A Sociological Analysis**

The development of an increasingly advanced world accompanied by the era of globalization and the rapid development of science and technology in several fields of people's lives, such as medical, legal, social and economic has brought great influence, including legal issues. Islamic society as an inseparable part of the world, cannot escape from issues that concern the legal position of an issue. (Hamid & Putra, 2021b)

New issues whose legal status is already clear and unequivocally stated in the Koran and al-Hadith, will not cause pros and cons among Muslims. However, on new issues of unclear legal status in both sources, it requires scholars to provide quick and appropriate solutions and

answers so that Islamic law becomes responsive and dynamic. (Arijulmanan, 2017) Herein lies the strategic position of *ijtihad* as an instrument for conducting "*social engineering*". Islamic law will play a real and functional role if *ijtihad* is placed proportionally in anticipation of social dynamics with the various complexities of the problems it causes. (Hamid & Putra, 2021a)

Sociologically, law is a reflection of the value system that is believed by society as an institution in the life of society, nation and state. (Siregar & Aini, 2022) This means that the content of the law should be able to capture the aspirations of a society that grows and develops, not only contemporary, but also becomes a reference in anticipating social, economic and political developments in the future. (Soerjono Soekanto, 2013) Thus, the law is not only a static norm that only prioritizes certainty and order, but also has the ability to dynamize thinking and engineer people's behavior in achieving ideals. (Sztompka, 2017) In an Islamic perspective, law will always have the ability to underlie and direct various social changes in society. This is given that Islamic law contains two dimensions: 1) Islamic law in relation to *shari'a* rooted in *nash qath'i* is universal and becomes a unifying principle and patterning the mainstream of the activities of Muslims worldwide. 2) Islamic law rooted in *nash zhanni* which is the territory of *ijtihad* whose products are then called *fiqh*. (Barkah, 2018)

It is in this second sense, which then gives the epistemological possibility of law, that each area inhabited by Muslims can apply Islamic *hukum* differently, according to the context of the problem at hand. In the discourse about divorce according to the laws in Indonesia, it actually still raises big questions. This is due to the large role that the judiciary has to determine the decision of a marriage in accordance with the Marriage Law and the Compilation of Islamic Law which states that, "Divorce can only be carried out before a court hearing after the court in question has tried and unsuccessfully reconciled the two parties."

For Muslims, this rule regarding divorce is a relatively large problem or at least still an unanswered question mark, because it is felt that it is not in line with the legal awareness that has been developing, namely the *fiqh* rule. The *fiqh* rule permits divorce on the basis of the willingness of both parties, or on the initiative of the husband or also the initiative of the wife unilaterally, even divorce may be carried out without the hands of the judiciary. The divorce rules contained in the Marriage Act and *Hukum Islam* are felt to be too much different from the legal awareness that exists in the muslim community, causing difficulties on the ground.

The divorce rules contained in Indonesian legislation still contain some fundamental problems, although in the explanation of the articles there is a "quite clear" statement. From sociological studies, it can be concluded that basically some people do not understand about

divorce according to the compilation of Islamic Law, because there is still a strong religious understanding that sacred fiqh in society, so that an attitude of not accepting other different opinions arises.

Since the law is a reflection of its society, it is not easy to force the people to punish in a way that is not rooted in the values and customs of that society. There is always a tug-of-war between the law that applies and is enforced and the society. Law is not a sterile institution and a finished scheme. Law does not exist in the abstract world, but rather exists in reality in society. (Prasetya et al., 2021)

The reason for this is because it cannot distinguish clearly between the terms sharia, fiqh and Islamic Law, ironically often fiqh is considered a dead price, even as a religion (*al-din*) that should not be changed. (Mu et al., 2022) Therefore, people basically prefer the rule of fiqh madzhab to solve a problem, (Fadhilah Syam, 2021) Because the public feels that what has been established in the fiqh is already a rule of law that must be obeyed. Therefore, society needs formal legality towards the enactment (effective) enactment of the law. Therefore, the institution of and supervision is a necessity so that the purpose of the law to obtain legal certainty can be realized.

## **Conclusion**

Marriage is a strong bond (*midzqaqa ghalidza*) aimed at forming a family of *sakinah, mawaddah* and *rahmah*, and carrying it out is a form of obedience to Allah Swt. Marriage should not be viewed as absolutely undecidable but should not be played with for reasons prescribed by Shari'a and in case of emergency after various attempts have been made but to no avail. Although divorce is a private matter, in the Marriage Law and the Compilation of Islamic Law there is government interference in regulating the issue of divorce so that it is not carried out arbitrarily. In the rules contained in the Marriage Law and the Compilation of Islamic Law it is stated the divorce is only considered legal when it is carried out before a court hearing, by therefore divorces carried out outside the court are considered null and void. While some people consider that divorce is because it is a personal matter and in accordance with the understanding in the fiqh of the school that allows divorce to be carried out anywhere without limited by time and space, the rules set by the government seem unacceptable to the public. Sociologically, society will find it difficult to accept the rule of law that is different from the habits understood, making it difficult to force society to punish with the rule. On the contrary, society wants that the law is a reflection of the values and customs of society so that there is no legal dualism and further



socialization is carried out. That the rules set by the government are rules that accommodate the values of benefit for all levels of society.

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