



## **Normative Harmonization: The Eclecticism of Talak Law as a Compromise between Islamic Legal Principles and Indonesian Legislation**

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### **Abstract**

This article discusses the validity and legal consequences of divorce in Islamic law and positive law in Indonesia. This research uses a qualitative approach with deductive analysis method and literature study with Normative-Juridical approach. The results show that divorce is considered valid in Islamic law if it fulfills the predetermined conditions. On the other hand, in Indonesian positive law, divorce is recognized as valid if it is carried out through a court hearing process in accordance with Law No. 1 of 1974 concerning Marriage. In terms of post-divorce legal consequences, both Islamic law and Indonesian positive law regulate the rights, positions and obligations of former husbands and wives. Indonesian positive law, particularly in relation to divorce, has undergone legal eclecticism, incorporating the principles of legality, justice and humanity. Meanwhile, in the context of Islamic law, these principles are manifested in the concept of *mashlahat*, which covers five aspects, namely the maintenance of religion, soul, mind, offspring, and property.

**Keywords:** Eclecticism, Talak, Islamic Law, Positive Law, Harmonization.

### **Introduction**

One of the important points of building a household in Islam is to make a serious effort not to divorce. Therefore, every effort must be made so that the partnership can continue, because this is what the *shar'i* wants as *mitsaqon*

*ghalidzan*. However, if all hope and affection has been destroyed and the marriage has become harmful, then separation between them is permissible.<sup>1</sup> Had Islam not provided a way of divorce for husbands and wives and not allowed them to divorce at such a critical time, it would have been harmful to the couple, which would have had disastrous consequences and would have made their lives more difficult.<sup>2</sup>

Islam leaves the right of divorce entirely to the husband.<sup>3</sup> However, a glance at the fiqh rules regarding divorce seems to give men enormous power. It is as if divorce is the *prerogative of* men, so it seems to provide an opportunity for a husband to act authoritarian, with the possibility of imposing divorce unilaterally.<sup>4</sup>

In Islamic legal discourse, divorce is not required to go through the court. The provision of divorce through court proceedings is not regulated in any of the fiqh madhabs. In the view of fiqh, divorce, like marriage, is a private matter and therefore does not need to be regulated by public provisions.<sup>5</sup> Such a view is still believed by some Indonesian Muslim communities, they still consider that classical fiqh rules are pure Islamic law and difficult to replace. This is because most Islamic communities in Indonesia are polarized with the understanding of the law adopted from the views of the madzhab imams in fiqh,<sup>6</sup> and they consider that these opinions are final, including in the rule of law regarding the pledge of divorce. In practice, there are still some Muslims who assume that when divorce is not done in the Religious Court, it is considered valid and the marriage is broken.<sup>7</sup>

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<sup>1</sup> Rahmat Hakim, *Hukum Perkawinan Islam*, (Bandung: Pustaka Setia, 2000), pp. 145

<sup>2</sup> Syaikh Hasan Ayyub, *Fikih Keluarga*, terj. M. Abdul Ghaffar EM, (Jakarta: Pustaka Al-Kautsar, 2006), pp. 205-206

<sup>3</sup> Rahmat Hakim, *Hukum Perkawinan Islam*, pp. 115

<sup>4</sup> Amiur Nuruddin dan Azhari Kamal Tarigan, *Hukum Perdata Islam di Indonesia Studi Kritis Perkembangan Hukum Islam dari Fikih UU No. 1 tahun 1974 Sampai KHI*, (Jakarta: Kencana, 2004), pp. 214. 214

<sup>5</sup> Amir Syarifuddin, *Islamic Marriage Law in Indonesia Between Fiqh Munakahat and Marriage Law*, (Jakarta: Kencana, 2006), pp. 227-228

<sup>6</sup> Saifudin Zuhri, Menempatkan Nilai-Nilai Fikih Islam dalam Proses Modernisasi dan Perubahan Sosial, Studi tentang Teori al Tufi Mazhab Hanbali, *Al-Ijtihad: Jurnal Wacana Hukum dan Kemanusiaan*, Vol. 14, No. 2, 2014, pp. 167-187.

<sup>7</sup> Ulfatul Khasanah, Pandangan Tokoh Agama Desa Jatiroo Kecamatan Bonang Kabupaten Demak Mengenai Jatuhnya Ikrar Talak Di Luar Sidang Pengadilan Agama, *Skripsi*, Universitas Islam Sultan Agung, 2019. Lihat pula dalam Rizki Dwi Nofayanti, Talak Di Luar

An out-of-court divorce is legal according to religion, but not according to the law. What is meant by dropping a divorce outside the court is a divorce that has fulfilled the terms and conditions of divorce stipulated in Islamic law, but without an official determination at the authorized agency as stipulated in the Law.<sup>8</sup> According to positive law, every divorce must be carried out in court as stipulated in Article 39 paragraph (1) of Law Number 1 of 1974 concerning Marriage that *"Divorce can only be carried out in front of a Court session after the Court concerned has tried and failed to reconcile the two parties"*. This provision is also regulated in Article 65 of Law Number 7 of 1989 concerning Religious Courts which states that *"Divorce can only be carried out in front of a Religious Court session after the Religious Court concerned has tried and failed to reconcile the two parties"*. With regard to this matter, Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law also explains the same thing about the validity of divorce.

Based on this, there are two different things in understanding the law of divorce from two sources of law, namely Islamic law (fiqh) and Indonesian legislation. So that the author is interested in studying and seeing further how to choose by compromising the best (Eclecticism) **divorce** law from two understandings, namely between Islamic law and legislation in Indonesia.

## Methods

This article is part of a research with a type of qualitative research that is a literature study (*Library Research*). The subject of research is legal texts that are more specific to Law No. 1 of 1974 concerning Marriage, Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law. While the object of research is the problem of the validity of divorce. The approach used in writing this article is the Normative-Juridical approach<sup>9</sup>, with research data

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Pengadilan Perspektif Kyai Pondok Pesantren Kabupaten Kediri, *Skripsi*, IAIN Tulungagung, 2021. Lihat juga dalam Amir Syarifuddin, *Meretas Kekuatan Ijtihad: Isu-isu Penting Hukum Islam Kontemporer di Indonesia*, (Jakarta: Ciputat Pree, 2002), pp. 49-51

<sup>8</sup> Djamil Latif, *Aneka Hukum Perceraian di Indonesia*, (Jakarta: Ghalia Indonesia, 1982), pp. 49

<sup>9</sup> Pendekatan Normatif-Yuridis yaitu pendekatan yang meletakkan hukum sebagai sebuah bangunan sistem norma. Sistem norma yang dibangun adalah mengenai asas-asas, norma, kaidah dari peraturan perundang-undangan, putusan pengadilan, perjanjian, serta

sources in the form of legal documents, namely Law No. 1 of 1974 concerning Marriage, Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law as a primary data source, and Islamic Law literature that discusses other divorce as a secondary data source. The data collection technique used is documentation, then all the data obtained is then analyzed and arranged systematically by using the data analysis technique using the deductive method, namely data *reduction*, data *display*, and then data *conclusion*.

### Talak in Islamic Law

Talak is derived from the word إطلاق which means to untie or separate.<sup>10</sup> According to Shara', the definition of divorce is to dissolve the marriage and end the relationship between husband and wife (حل ربطة زواج وانهاء العلاقة الزوجية).<sup>11</sup>

According to the Hanafi and Hambali madhhabs, divorce is the immediate or future dissolution of the marriage bond.<sup>12</sup> The Shafi'i madhhab explains that divorce is the annulment of the marriage contract with the memorization of talak or its equivalent.<sup>13</sup> Meanwhile, according to the Maliki madzhab, divorce is a law that causes the nullification of the relationship between husband and wife.<sup>14</sup> Based on the above definitions, it can be concluded that what is meant by divorce is an act that causes the breakup of marriage and with it the nullity of the relationship between husband and wife.

Some scholars are of the view that divorce is prohibited in principle, but in some circumstances they may depart from the prohibition. The majority of scholars are of the view that divorce is basically permissible, but it is better not to do it. Based on this, the fuqoha agree that divorce is subject to five

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doktrin (ajaran). Lihat: Mukti Fajar, *Dualisme Penelitian Hukum Normatif dan Empiris*, cet-IV, (Jogjakarta: Pustaka Pelajar, 2007), pp. 33

<sup>10</sup> Wahbah az-Zuhaili, *Fiqh Imam Syafi'i* Jilid II, Terj. Muhammad Afifi dan Abdul Aziz, (Jakarta: Almahira, 2010), pp. 579

<sup>11</sup> Abdul Rahman Ghazaly, *Fiqh Munakahat*, (Jakarta: Kencana, 2003), pp. 191

<sup>12</sup> Dewan Redaksi Ensiklopedi Islam, *Ensiklopedi Islam* Jilid 5, (Jakarta: Ichtiar Baru Van Hoeve, 2001), pp. 53

<sup>13</sup> Wahbah az-Zuhaili, *al-Fiqh al-Islami wa Adillatuhu Volume 7*, (Jakarta: Gema Insani, 2011), pp. 343. 343

<sup>14</sup> Editorial Board of Islamic Encyclopedias, pp. 53

*taklifi* rulings according to the situation and conditions.<sup>15</sup> Thus the law of divorce is divided into several types, namely; 1) Compulsory divorce which aims to resolve conflicts between husband and wife that cannot be reconciled, 2) Sunnah divorce which is carried out against a wife who has done wrong to the rights of Allah that she must carry out, for example the wife is not obedient to religion and the husband has repeatedly reminded her. Divorce is also recommended when the husband and wife are in a situation where by divorcing one of them will be saved from a threatening danger. 3) A permissible divorce that is done because there is something that requires it, either because of the wife's bad behavior, her socialization, or other bad things. 4) Makruh divorce as the original ruling. 5) Haraam divorce is a divorce that will bring harm to both the husband and the wife, and does not provide good for both.<sup>16</sup>

As for the triggers of divorce, fiqh does not specifically regulate it. However, there are at least three possibilities that can trigger divorce, namely because of *Nusyuz* on the part of the wife<sup>17</sup>, *Nusyuz* on the part of the husband<sup>18</sup>, *Shiqoq*<sup>19</sup>.

### Talak in Indonesian Legislation

Breakup of marriage is a legal term used in the Marriage Law to explain divorce or the end of the marriage relationship between a man and a woman who have lived as husband and wife (including divorce).<sup>20</sup> The term divorce

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<sup>15</sup> Abu Malik Kamal bin As-Sayyid Salim, *Shahih Fiqh Sunnah*, Terj. Kahirul Amru Harahap dan Faisal Saleh, (Jakarta: Pustaka Azzam, 2007), pp. 365.

<sup>16</sup> Syaikh Kamil Muhammad 'Uwaidah, *Fiqh Wanita*, (Jakarta: Pustaka Al-Kautsar, 1998), pp. 428-429

<sup>17</sup> *Nusyuz* wife means that the wife's disobedience to her husband in terms of carrying out what has been obliged to her. See; Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia*, (Jakarta: Kencana, 2009) pp. 190

<sup>18</sup> *Nusyuz of the husband* means that he disobeys Allah by neglecting his obligations towards his wife. The possibility of husband's nusyuz can occur in negligence on the part of the husband to fulfill his obligations to his wife both physical and mental maintenance. The causes of the husband's nusyuz are avoiding the wife, being rude, reducing his maintenance, or various other heavy burdens for the wife. *Ibid.* pp. 191

<sup>19</sup> *Syiqaq* can be defined as a quarrel that occurs between husband and wife that neither of them can resolve on their own. *Syiqaq* usually occurs when one or both spouses do not fulfill the obligations that have been imposed on them. see Abdul Somad, *Hukum Islam: Penormaan Prinsip Syari'ah Dalam Hukum Indonesia*, (Jakarta: Kencana, 2012), pp. 304

<sup>20</sup> Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia*, (Jakarta: Kencana, 2009), pp. 189. 189

juridically means the breakup of a marriage which results in the breakup of the relationship as husband and wife. The term divorce is found in Article 38 of Law No. 1 of 1974 which contains a facultative provision that marriage can be broken up by death, divorce and by court decision.

The breakup of marriage due to death is commonly referred to as divorce. Then the breakdown of marriage due to divorce there are two, namely divorce (talak)<sup>21</sup> and divorce (*khuluk*)<sup>22</sup>. Meanwhile, the breakup of marriage due to a court decision is called divorce void (*fasakh*)<sup>23</sup>.<sup>24</sup> The mention of the terms divorce and divorce void does not show the impression that there is no dispute between husband and wife. Whereas the mention of divorce gugat and divorce talak shows the impression of a dispute between husband and wife. The dissolution of marriage, whether by court decision or by divorce, must be based on a court decree.<sup>25</sup>

Article 117 of the Compilation of Islamic Law which states that divorce is a husband's pledge before a Religious Court session which is one of the causes of marriage breakdown. Meanwhile, in Indonesian legislation regarding divorce, it is regulated in the following regulations:

- a. Law No. 1 of 1974 concerning Marriage which is listed in articles 38-41 of Chapter VIII concerning the Breakup of Marriage and its Consequences.
- b. Law No. 50 of 2009 concerning the Second Amendment to Law No. 7 of 1989 concerning Religious Courts
- c. Government Regulation No. 9 of 1975 concerning the Implementation of Law No. 1 of 1974 concerning Marriage.

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<sup>21</sup> The dissolution of marriage at the will of the husband for a specific reason and the will is expressed in a specific utterance.

<sup>22</sup> Dissolution of marriage at the will of the wife because the wife sees something that requires the dissolution of the marriage, while the husband does not wish to do so. The wife's will to dissolve the marriage relationship

<sup>23</sup> Dissolution of marriage at the will of the judge as a third party after seeing something in the husband and/or wife that indicates that the marital relationship cannot be continued.

<sup>24</sup> Abdul Kadir Muhammad, *Hukum Perdata Indonesia*, (Bandung: Citra Aditya Bakti, 2000), pp. 108

<sup>25</sup> Muhammad Syarifuddin dkk, *Hukum Perceraian*, (Jakarta: Sinar Grafika, 2014), pp. 20

- d. Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law which is contained in Articles 113-148 Chapter XVI concerning the Termination of Marriage and Articles 149-162 Chapter XVII concerning the Consequences of Termination of Marriage.

The legal basis mentioned above is the formal and material legal basis for the implementation of divorce in Indonesia. In Article 116 of the Compilation of Islamic Law, it is stated that the things that cause divorce are as follows (Divorce can occur for reasons):

- a. One of the parties commits adultery or becomes a drunkard, addict, gambler and so on that is difficult to cure.
- b. One party leaves the other party for 2 (two) consecutive years without the other party's permission and without valid reasons or for other reasons beyond his/her control.
- c. One of the parties receives a prison sentence of five years or a heavier sentence after the marriage has taken place.
- d. One of the parties becomes physically disabled or sick with the result that they cannot fulfill their duties as husband and wife.
- e. One party commits cruelty or serious abuse that endangers the other party.
- f. Between husband and wife there are continuous disputes and quarrels and there is no hope of living together again in the household.
- g. The husband violated the taklik talak.
- h. Change of religion or apostasy that causes domestic disharmony.

### **Legal Eclecticism on the Validity of Talak**

According to Islamic law, the validity of divorce is only viewed partially by only looking at the terms and conditions and the reasons for choosing the path of divorce. In other words, divorce is said to be valid if a husband has pronounced a divorce to his wife either seriously or not seriously.

Although divorce is a private matter for a troubled husband and wife, it cannot be separated from state affairs. Because as a result of the divorce that occurs, there are rights and obligations of each party to be fulfilled. Indonesia



as a nation state, makes positive law the applicable law in Indonesia. It is only natural that as a good citizen, in addition to obeying religion, he *is* also required to comply with applicable laws and regulations, including in the case of divorce, which *is* considered the domain of religion. The need for the state as an arbiter in the institution of marriage is none other than to ensure the orderliness of marriage itself and the benefit of every citizen. The state's involvement in this case is through the policy of legislation, so that with this policy everything that happens in divorce becomes clear.

The clarity can be found in every process carried out in the Court. that every husband who wants to divorce his wife must submit a request to the court either orally or in writing and accompanied by the reasons behind it. This administrative matter is then followed up with the summoning of the parties.

Based on the theory of *masalah mursalah*, divorce conducted in court is a state policy that can achieve benefits and reject *madharat*. As can be explained as follows:

- a. Even though divorce is an act that Allah hates and its existence is only the last solution for marriages that cannot achieve the purpose of marriage, the process of divorce must be in accordance with the order that has been regulated by Islam so that the divorce is valid and does not harm the husband, wife and children.
- b. In the government system, the administrative aspect of population registration absolutely must be done. Because if it is not done, it will cause disorganization and disorder in people's lives which will ultimately lead to legal smuggling. This is the reason for the modern world demanding administrative order including birth, marriage, divorce, death and so on,.
- c. By conducting the divorce process in court, the protection of the rights of family members of husbands, wives, and children in the form of property rights, the right to maintenance, and the right to hadhanah can be resolved properly and correctly.
- d. With the existence of orderly administration, if at any time there is a denial of the obligations that have been imposed on each party, then



each party has the right to complain and process to claim their rights or demand that the other party carry out their obligations.

The law of divorce before the Court contains the value of legal certainty. This can be found in one of the principles of marriage in Law No. 1 of 1974 concerning marriage, namely the principle of legality. Apart from functioning as administrative order and legal protection for each party to the dispute, the principle of legality in marriage also makes it easier for the parties to control the implementation of the law (maintaining normative legal values).

Although in Islam the proof of the fall of divorce is not proven by the certificate of the pledge of divorce, there is a process and witnesses that must be present for a husband and wife who want to divorce. So the existence of *hakam* (judge) in the process before the divorce is determined is done to avoid the hoax and playfulness in doing divorce. Thus, it is clear that the divorce that must be done in front of the court is an elaboration of fiqh that regulates material laws and is combined with positive law that regulates administrative matters without eliminating the material nature contained in Islamic law itself.

### **Legal Eclecticism Analysis of the Legal Consequences of Divorce**

In the perspective of Islamic law and positive law in Indonesia, divorce has legal consequences that bind both husband and wife. The consequences that arise as a result of divorce are the prohibition of halal when the two are still husband and wife, *Mut'ah* for the wife, the husband is obliged to pay debts to the wife either in the form of *mahr* or *nafaqah*, the wife's obligation to carry out *iddah*, and *hadhanah*. All of these are rights and obligations that must be fulfilled by the former husband and wife after the divorce.<sup>26</sup>

From that it appears that although in the end divorce is the chosen way to end problems in the household, both Islamic law and positive law applicable in Indonesia still pay attention to the rights and obligations that must be fulfilled by the former husband and wife after the fall of divorce. Such rights and obligations in Islamic law are a manifestation of the purpose of Islamic law itself that Islamic law is built for human interests and universal humanitarian

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<sup>26</sup> Amir Syarifudin, *Hukum Perkawinan Islam di Indonesia*, pp. 301-303

goals, namely justice, mercy, benefit, and wisdom. Although redacted differently, the regulation of rights and obligations that must be fulfilled by ex-husbands and ex-wives after the fall of divorce in positive law is in the context of realizing justice and humanizing humans supported by legal regulations and legalization that provide certainty of settlement for every problem that occurs in society.

For more details on how Islamic law and positive law realize the objectives that the author has described above, the author will detail the rights and obligations that must be fulfilled by the former husband and wife after the fall of divorce, among others;

1. Legal consequences of divorce of former husband / wife against children

One of the obligations of a husband who has divorced his wife is to pay maintenance for his children. In the sense that a husband who divorces his wife is obliged to pay maintenance for his children. The obligation to provide for the children must continue until the child reaches puberty.<sup>27</sup>

In the study of Islamic law, this is intended for *Hifz al-Nasl*, this author is based on the definition of *hadhanah* delivered by fiqh scholars, that *hadhanah* is taking care of children who cannot distinguish between good and bad and are not yet independent, providing something that is good for them, guarding against something that hurts and damages them, educating their physical, spiritual and intellectual, so that they are able to stand alone to face life and assume responsibility.<sup>28</sup> Regarding *hadhanah* as explained in article 41 of Law No. 1 of 1974 concerning marriage is as follows:

- a. Whether the mother or father remains obliged to maintain and educate their children, based solely on the interests of the child, if there is a dispute over the control of the child, the Court gives the decision.

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<sup>27</sup> *Ibid*, pp. 303

<sup>28</sup> Syaikh Shalih bin Abdul Aziz Alu Asy-Syaikh, *Al-Fiqh al Muyassar*, Terj. Izzudin Karim, *Fiqh Muyassar*, (Jakarta: Darul Haq), pp. 534-535

- b. The father is responsible for all costs of maintenance and education necessary for the child, if the father in reality does not fulfill this obligation, the court may determine that the mother shares in these costs.
- c. The court may require the ex-husband to provide maintenance and/or determine the obligations for the ex-wife.

## 2. Legal Consequences After Divorce for Former Husband and Wife

After the fall of divorce brings several consequences that must be borne by the former husband and wife. Based on the provisions of Article 11 of Law No. 1 of 1974 contains the following provisions:

- (1) A woman whose marriage is terminated is subject to a waiting period.
- (2) The waiting period mentioned in paragraph (1) shall be regulated in a further Government Regulation.

Then this article has been elaborated in article 39 of PP No. 9 of 1975 which contains provisions that for a widow whose marriage is broken up due to divorce, the waiting time for a widow who is still menstruating is determined by 3 (three) holy times with at least the cost of livelihood.

Furthermore, the same provision stipulates that there is no waiting period for widows whose marriages are broken up because of divorce, while there has been no sexual intercourse between the widow and her former husband. For marriages that break up due to divorce, the waiting period is calculated from the date of the Court decision that has permanent legal force.

In Islamic law regarding the iddah period due to divorce, there are several types:

- a. If a woman is divorced while pregnant, her 'iddah is until she gives birth.
- b. If a woman is divorced by her husband because she is still menstruating, then her 'iddah is three periods of purity.
- c. If a woman who has been divorced by her husband is not pregnant and does not menstruate, whether she is still a child or has gone

through menopause due to old age or other reasons that make it impossible for her to menstruate, then her 'iddah is three months.

- d. If a woman is divorced before having intercourse, there is no 'iddah for her.

Then women who are in iddah have rights and obligations that must be carried out according to Islamic law. The rights of women in the iddah period are:

- a. Wives in waiting for divorce raj'i

For wives who are divorced raj'i are entitled to:<sup>29</sup>

- 1) Place of residence
- 2) Clothing and sustenance for the necessities of life
- 3) Legacy

Housing, clothing, and sustenance for the necessities of life are only given to obedient wives. While the disobedient wife does not get anything. With regard to inheritance is still owned by the wife who is divorced raj'i, because basically the marriage with her husband is still intact while iddah is still running.<sup>30</sup>

- b. Wives who are in a state of divorce ba'in

A wife in iddah ba'in or a divorce that does not allow her to return to her former husband before she marries another man is entitled to this:

- 1) Pregnant wives are entitled to housing, maintenance and clothing.
- 2) For wives who are not pregnant, they only get housing.

While the obligations for women who are in iddah are:

- 1) It is not permissible to accept another person's proposal, either overtly or insinuatingly.
- 2) It is not permissible to marry or be married.
- 3) She is forbidden to leave the house until her 'iddah has ended.

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<sup>29</sup> Kamal Muchtar, *Asas-asas Hukum Islam Tentang Perkawinan*, (Jakarta: Bulan Bintang, 1993), pp. 235

<sup>30</sup> Moh. Riva'i, dkk, *Kifayatul Akhyar (Terjemahan Khulasah)*, (Semarang: Toha Putra, 1983), pp. 337.

- 4) It is obligatory to observe ihdad, or abstain from the symbols of adornment and beauty, and to refrain from using cosmetics to beautify oneself.

Then the obligations of the former husband and wife are regulated in Article 41 letter c of Law No. 1 of 1974 also regulates the obligations of the former husband and wife that "The court may require the former husband to provide livelihood and/or determine the obligations for the former wife". Regarding this provision, Article 149 of the Compilation of Islamic Law regulates the same thing with more specific provisions regarding the nafkah that the former husband must provide to his former wife. If the marriage is broken due to divorce, the former husband is obliged:

- a. to give his ex-wife a decent mut'ah, either in the form of money or objects, unless the ex-wife is qobla al dukhul;
- b. provide alimony, maintenance and kishwah to the former wife during the iddah, unless the former wife has been divorced ba'in or nuzyuz and is not pregnant;
- c. pay off the mahr that is still owed in full, and half if *qobla al dukhul*;
- d. provide hadhanah expenses for their children who have not reached the age of 21 years.

In Islamic law, the obligations of a husband who has divorced his wife are as follows:<sup>31</sup>

- a. Providing mut'ah to the former wife. The husband who divorces his wife should give mut'ah to his former wife. Mut'ah can be in the form of clothes, goods or money according to the circumstances and position of the husband.
- b. Providing maintenance, clothing and housing for the divorced wife while the former wife is still in a state of iddah. When the iddah period ends, the obligation to provide maintenance, clothing and housing ends.

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<sup>31</sup> Amir Syarifuddin, *Hukum Perceraian Islam.*, pp. 303

- c. Paying or paying off the dowry to the wife whom he has divorced.
- d. Paying maintenance for his children, a husband who divorces his wife is obliged to pay maintenance for his children, namely money for the maintenance and education of the children, just what is appropriate according to the husband's ability. The obligation to provide for the children must continue until the child reaches puberty.

The legal consequences of divorce on the position, rights and obligations of former husbands and former wives according to positive law in Indonesia are in line with Islamic law. According to Mhmud Yusuf's explanation, if there is a divorce between husband and wife according to Islamic law, then the legal effect is the obligation of the former husband against his former wife to give mut'ah which is appropriate in the form of money or goods and provide living expenses, clothing, and shelter for the former wife during the iddah period, as well as paying off the dowry and other agreements.<sup>32</sup>

The regulation of legal consequences for ex-husbands and ex-wives after divorce in Islamic law is in order to prevent injustice, prevent injustice, prevent persecution, and reject other mafsadat arising from divorce. The application of Iddah for wives is an Islamic effort to protect honor and keep *sperm* from mixing between the former husband and the new prospective husband, which in the study of *maqashid syar'iyah* this is included in the aspect of preserving the soul and offspring which includes the needs of *dharuriyah* needs or primary needs for humans. Meanwhile, in positive law, this is intended to realize justice, which in Aristotle's view is *Iustitia Protectiva*. Where *Iustitia Protectiva* is justice that provides protection to humans in their relationships in society.

Then regarding the obligation to provide maintenance to the former wife and children in the study of Islamic law is intended to preserve the soul for the wife and children. Do not let after the divorce is imposed, the life of the wife during the iddah period and the life of the child while still in the hadhanah period is threatened and in danger.

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<sup>32</sup> Muhammad Yunus, *Perkawinan dalam Islam*, (Jakarta: Pustaka Mahmudiah, 1968), pp. 125

Based on the two reviews above, it can be seen that divorce carried out in front of the Court can protect and maintain religious interests, because without the pledge of divorce, religious teachings can be practiced not in accordance with the prescribed shari'a. Such as divorce can be done in a state of anger, when the wife is menstruating, then they can also reconcile without following the mass iddah rules set out in the Qur'an. Uncontrolled divorce can make the divorce invalid, as a result if the wife wants to remarry her second marriage is not valid because her status is still the wife of the first husband.

Divorce in court can also preserve the soul because the divorce process in court will find out the shar'i reasons why they can be divorced. The divorce process carried out in court can prevent the husband or wife from doing injustice to their spouse, such as hurting their spouse's physical body and soul, which could result in the loss of their spouse's life.

Divorce conducted in front of the Court can protect and maintain the mind. The decision to divorce through a court hearing has gone through a fair process and consideration for the parties, which conditions result in peace of mind and peace of mind for the troubled husband and wife and their children so that both husband and wife and children can continue their lives in peace.

The next maintenance when divorce is carried out in front of the Court is the maintenance of offspring. Divorce according to Islamic law and positive law contains benefits for husband and wife and their children, because of the certainty of status, then Nafkah and hadhanah. Divorce conducted outside the court may not fulfill the terms and conditions of divorce, as a result the divorce is not valid and their relationship remains valid in marriage. Therefore, if the wife remarries someone else while she is still the wife of the first husband, then the status of her second marriage is invalid because a woman cannot have more than one husband at a time. Because the status of the second marriage is invalid, the child born from the marriage is categorized as an adulterous child, where the adulterous child is attributed to the mother so that the child's position is threatened in several ways such as the loss of nasab rights to his father, the right to nafaq and the right to inheritance from his birth father. This condition is certainly contrary to what Islam aspires to, which teaches that



clarity of lineage is very important. Events like this will not occur if the divorce is carried out through the judicial process and determined in court.

The final divorce in court can also preserve property because the legal certainty of divorce can ensure the right to maintenance for the wife during the iddah period or during pregnancy or while breastfeeding her husband's child, and the child's right to maintenance can also be ensured by the father.

Thus, by using an eclectic approach, it can be concluded that actually between the objectives of Islamic law and the objectives of positive law in Indonesia governing divorce do not have significant differences. Both speak and regulate about justice, human benefit. However, what distinguishes the two is that if Islamic law only regulates matters relating to divorce in the form of material law, then the existence of rules governing formal law outside the rules of fiqh is not something that violates fiqh, but will be something that can complement fiqh.

According to the author, it is no longer the time to place Islamic law and positive law in an atmosphere of endless conflict. The two laws actually experience a process of mutual influence that will certainly bring humans to peace, tranquility and lead to a better civilization.

## Conclusion

In essence, in Islamic law, divorce can occur when a husband utters the word divorce to his wife. The word is valid anytime and anywhere as long as it fulfills the pillars and conditions that have been determined according to Islamic law. However, Islam still makes divorce the last resort when the household cannot be saved. This is different from the positive law applicable in Indonesia, because in the positive law applicable in Indonesia divorce is considered valid if it is carried out in front of a court session in accordance with the provisions of article 39 paragraph 1 of Law No. 1 of 1974 concerning Marriage. Regarding the legal consequences after divorce, both Islamic law and positive law applicable in Indonesia both regulate the rights, position, and obligations of the former husband and wife. In essence, these two legal systems provide protection to each party, both husband, wife, and children after the

divorce occurs. The positive law in Indonesia, especially that which regulates divorce and its legal consequences, has experienced legal eclecticism. Where this eclecticism is seen in the combination between fiqh and administration then administration and trial. Where the combination has implications for the preservation of the principles of legality, a sense of justice, and humanity or in the editorial of Islamic law has led to a mashlahat which covers five aspects, namely the maintenance of religion, maintenance of the soul, maintenance of the mind, maintenance of offspring, and maintenance of property.

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