

## Divorce and Its Practices Before A Religious Court; A Perspective Analysis of Islamic Legal



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### Abstract

This research discusses divorce in Islam, known as "talak." Articles 118 to 120 of the Compilation of Islamic Law regulate "talak raj'i" and "talak ba'in." The issue of divorce in religious courts remains a subject of debate, especially regarding the transfer of the right of divorce from the husband to the religious court judge. This research examines this issue from a jurisprudential perspective. The results indicate that in jurisprudence, "talak" means the dissolution and termination of a marriage bond. "Talak" is divided into "talak raj'i" and "talak ba'in," each with different legal implications. In Islam, "talak" can be pronounced in front of the wife or others. However, in the context of the state, compliance with government regulations is considered important as long as it does not violate Islamic law. The government establishes divorce regulations to maintain administrative order.

*Penelitian ini membahas tentang perceraian dalam Islam, yang disebut talak. Pasal 118 s/d 120 Kompilasi Hukum Islam mengatur talak raj'i dan talak ba'in. Permasalahan talak di pengadilan agama masih menjadi perdebatan, terutama terkait pemindahan hak talak dari suami kepada hakim pengadilan agama. Penelitian ini melihat persoalan tersebut dari perspektif fikih. Hasilnya menunjukkan bahwa talak dalam fikih berarti melepaskan dan menghilangkan ikatan pernikahan. Talak terbagi menjadi talak raj'i dan talak ba'in, dengan implikasi hukum yang berbeda. Dalam Islam, talak dapat diucapkan di depan istri atau orang lain. Namun, dalam konteks negara, taat pada peraturan pemerintah dianggap penting, selama tidak melanggar hukum Islam. Pemerintah membentuk peraturan perceraian untuk menjaga ketertiban administrasi.*

## INTRODUCTION

Islam emphasizes the importance of family as the only legitimate and recognized social institution for reproduction, the preservation of morality, and individual well-being. Therefore, divorce is considered a highly serious act and should only occur when necessary.

In Islamic jurisprudence, the divorce between spouses is referred to as "talak." Based on its legal consequences, *talak* is divided into "talak raj'i" and "talak ba'in"<sup>1</sup>

<sup>1</sup> Wizarat Al-Awqaf wa Asy-Syu'un Al-Islamiyah - Al-Kuwait, *Al-Mausu'ah Al-Fiqhiyah*, Cet. II (Kuwait: Wizarat Al-Awqaf wa Asy-Syu'un Al-Islamiyah - Al-Kuwait, 1983), jilid. 29, h. 26.



Regarding *talak raj'i*, Article 118 of the Compilation of Islamic Law states that it refers to the first or second divorce, allowing reconciliation (*rujuk*) during the wife's waiting period ('iddah).<sup>2</sup>

As for *talak ba'in*, both *talak ba'in sughra* and *talak ba'in Kubra* are regulated in the subsequent articles. Article 119 specifies that *talak ba'in sughra* cannot be reconciled but allows a new marriage contract with the former husband during the iddah period. *Talak ba'in sughra* includes divorce before sexual intercourse (*qobla dukhul*), divorce with compensation or *khulu'*, and divorce issued by the Religious Court.<sup>3</sup>

Article 120 explains *talak ba'in Kubra* as the third divorce, which cannot be reconciled or remarried unless the former wife marries someone else and subsequently divorces after consummation and completion of the *iddah* period.<sup>4</sup>

The compilation of Islamic law regarding *talak raj'i* and *talak ba'in*, adopts the Shafi'i school's doctrine, which is followed by Indonesian society. This writing aims to broaden understanding of *talak raj'i* and *talak ba'in* from a purely jurisprudential perspective, without intending to alter existing legal regulations.

Issues surrounding divorce in religious court proceedings remain a subject of debate among intellectuals. Some argue that marriage laws have a flaw in transferring the right to divorce from the husband to the court judge. The authority to pronounce *talak* should rest with the husband, preventing unjust actions toward the wife.

The nuances of *talak raj'i* and *talak ba'in*, as well as divorce in religious court proceedings, will be explored in this article. While a comprehensive discussion is needed, this summary aims to provide valuable insights for future scholarly studies.

## METHODS

The research method employs a descriptive-qualitative literature study. The primary data sources include fiqh books, tafsir (exegesis), relevant legal rules, and other pertinent literature, while secondary data consists of journals in related print and electronic media. The study will elaborate on the definition of *talak*, its types, and legal consequences, followed by court-initiated divorces and the practice of *talak* in religious court hearings. The results of this research are concluded through an analysis using an inductive approach.

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<sup>2</sup> Article 118 of the Compilation of Islamic Law

<sup>3</sup> Article 119 of the Compilation of Islamic Law

<sup>4</sup> Article 119 of the Compilation of Islamic Law

## RESULT AND DISCUSSION

### Definition of Talak and Its Division into Raj'i and Ba'in

*Talak* etymologically means releasing (*al-hillu*) and removing the bond (*raf'ul qaidi*). In terminology, *talak* means removing the marital bond, whether in the present or future, using specific wording or its equivalents.<sup>5</sup> This is explained as follows: (1) "The marital bond" refers to a valid marriage; if the marriage is judged invalid (*fasid*),<sup>6</sup> then *talak* is not valid but considered *mutarokah*<sup>7</sup> or *fasakh*. (2) "The present" refers to *talak ba'in* (3) "The future" refers to *talak raj'i*.<sup>8</sup> (4) "Specific wording" (*lafdzun makhsus*) means clear expressions like the word "*talak*", and indirect expressions like *ba'in* or prohibited or releasing, and the like.<sup>9</sup> (5) "Its equivalent, includes writings or signals that can be understood, as well as statements similar to *talak*, such as *khulu'* and the judge's statement "I divorce (*farraqtu*)" in cases of separation due to the absence or imprisonment of the husband, or other reasons such as the husband's failure to provide sustenance or mistreatment of the wife.<sup>10</sup>

Based on the legal consequences that arise thereafter and the possibility of reconciliation for the husband and wife, *talak* is divided into two types: *talak raj'i* and *talak ba'in*.<sup>11</sup> *Talak raj'i* is a divorce in which, if initiated by the husband, he is still allowed to reconcile with his wife during the *iddah* period without needing a new marriage contract, even if the wife is unwilling. This occurs after the pronouncement of the first and second *talak raj'i*, and reconciliation can occur before the end of the *iddah* period. However, if the *iddah* period has elapsed, *talak raj'i* becomes legally similar to *talak ba'in*, and the husband no longer has the right to reconcile with his divorced wife except through a new marriage contract.<sup>12</sup>

<sup>5</sup> Wizarat Al-Awqaf wa Asy-Syu'un Al-Islamiyah - Al-Kuwait, *Al-Mausu'ah Al-Fiqhiyah*, jilid. 29, h. 5.

<sup>6</sup> A *fasid* marriage is a marriage that does not fulfill one of the conditions of marriage (deficient), while a *batal* marriage is one in which one of its pillars is not fulfilled. The legal status of both *batal* and *fasid* marriages is the same, namely, they are not valid, refer to Feity Meiryana, "Tinjauan Hukum Islam Terhadap Nikah Fasid Dan Dampaknya (Studi Terhadap Putusan Hakim di Pengadilan Agama Bengkulu)," *Qiyas: Jurnal Hukum Islam dan Peradilan* 3, no. 1 (1 April 2018): 43, <https://doi.org/10.29300/qys.v3i1.963>.

<sup>7</sup> *Mutarokah* in the Abu Hanifah school means the husband leaving his wife. In the Hanafi school, the termination of a deficient marriage is done through two methods: first, by a judge's decision, and second, by *mutarokah*. There is no *talak* in a deficient marriage, but *mutarokah* is performed when the husband expresses this to his wife (after they have engaged in marital relations) using phrases such as "*I have left you (Taaraktuka)*," or "*I have abandoned her (taaraktuha)*," or "*I have let you go (khollaitu sabilaka)*," and so on.

<sup>8</sup> *Talak ba'in* is declared with the narrative in the present (*fil hal*) because the termination of the marriage occurs at the time the *talak* is pronounced. On the other hand, *talak raj'i* is declared with a future timeframe (*fil ma'aal*) because the actual termination of the marital bond occurs only after the completion of the *'iddah* period. Refer to Wahbah Az-Zuhayli, *Mausu'at Al-Fiqh Al-Islami wa Al-Qadhaya Al-Mu'ashirah*, Cet. III (Damaskus: Dar al-Fikr, 2013), jilid. 8, h. 344.

<sup>9</sup> Wahbah Az-Zuhayli, jilid. 8, h. 344.

<sup>10</sup> Wahbah Az-Zuhayli, jilid. 8, h. 344.

<sup>11</sup> Wahbah Az-Zuhayli, jilid. 8, h. 407. Lihat juga Wizarat Al-Awqaf wa Asy-Syu'un Al-Islamiyah - Al-Kuwait, *Al-Mausu'ah Al-Fiqhiyah*, jilid. 29, h. 26.

<sup>12</sup> Wahbah Az-Zuhayli, *Mausu'at Al-Fiqh Al-Islami wa Al-Qadhaya Al-Mu'ashirah*, jilid. 8, h. 413.

On the other hand, *talak ba'in* is a divorce that immediately severs the marital bond. *Talak ba'in* is further divided into two: *talak ba'in sughra* and *talak ba'in Kubra*. *Talak ba'in sughra* applies to a single *ba'in* divorce, as well as two consecutive *ba'in* divorces or two simultaneous *ba'in* divorces (*thalqatain ba'inatain*). However, if the third divorce is pronounced, it is considered an absolute *talak ba'in*, whether it is preceded by *talak raj'i* or *talak ba'in*<sup>13</sup>

When a husband issues one or two *ba'in* divorces, he is allowed to reconcile with his wife during or after the *iddah* period, but not through reconciliation; instead, a new marriage contract is required.<sup>14</sup>

Examples of *talak ba'in* include: (1) divorce before consummation (*qobla dukhul*), (2) divorce with financial compensation (*iwadh*), (3) divorce through implied expressions (*kinayah*) according to the Hanafi jurists, and (4) divorce pronounced by a judge, but not due to the husband's failure to provide maintenance and not due to *ilaa*<sup>15, 16</sup>. *Talak ba'in Kubra* is a divorce that prevents the husband (after pronouncing the divorce) from reconciling with the divorced wife unless the former wife marries another man in a valid marital relationship. The new husband must consummate the marriage genuinely (*dukhulan haqiqiyah*).<sup>17</sup> Subsequently, if the second husband divorces or dies, and the *iddah* period of the former wife from her second husband has ended, only then is she allowed to reconcile with the first husband.<sup>18</sup> This provision is written in Surah Al-Baqarah, verse 230: "So if he divorces her (for the third time), she will not be lawful to him afterward until [after] she marries a husband other than him. And if the latter husband divorces her, there is no blame upon them if they return to each other if they think that they can keep within the limits of Allah. These are the limits of Allah, which He makes clear to people who know."

<sup>13</sup> Wizarat Al-Awqaf wa Asy-Syu'un Al-Islamiyah - Al-Kuwait, *Al-Mausu'ah Al-Fiqhiyah*, jilid. 29, h. 29.

<sup>14</sup> Wizarat Al-Awqaf wa Asy-Syu'un Al-Islamiyah - Al-Kuwait, jilid. 29, h. 29.

<sup>15</sup> *Iila'* in Arabic means an oath. The definition of *iila* is the husband's oath not to engage in marital relations with his wife for four months or more, or a similar expression indicating an unspecified period, refer to Ibnu Rusyd Al-Hafid, *Bidayatul Mujthaid wa Nihayatul Muqtaashid* (Kairo: Maktabah Ibn Taimiyah, 1994), vol. III, 187.

<sup>16</sup> Wahbah Az-Zuhayli, *Mausu'at Al-Fiqh Al-Islami wa Al-Qadhaya Al-Mu'ashirah*, vol. VIII, 413.

<sup>17</sup> The meaning is the entry of the male reproductive organ (dzakar) completely into the female reproductive organ (farj). There are two types of marital relations: actual relations (al-dukhul al-haqiqi) and legal relations (al-dukhul al-hukmi). The concept of "dukhul" referred to in the context of divorce is al-dukhul al-haqiqi. Imam Shafi'i stated that marital relations that require the waiting period (iddah) are those that are actual (al-dukhul al-haqiqi). If a husband pronounces talak to his wife after being alone together (al-dukhul al-hukmi), but the male reproductive organ has not entered the female reproductive organ, then the talak is considered *talak qobla al-dukhul*, refer to Fajri Ilhami, "Pemenuhan Hak-Hak Perempuan dan Anak Pasca Perceraian Dalam Putusan Verstek Perkara Permohonan Cerai Talak di Pengadilan Agama Tigaraksa Perspektif Maqbsid al-Syarah Jasser Auda" (Master Thesis, Fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta, 2023), 33, <https://repository.uinjkt.ac.id/dspace/handle/123456789/73532>.

<sup>18</sup> Wahbah Az-Zuhayli, *Mausu'at Al-Fiqh Al-Islami wa Al-Qadhaya Al-Mu'ashirah*, jilid. 8, h. 414.

## Is Every Divorce Pronounced by a Judge Considered Talak Ba'in?

In the literature of Islamic jurisprudence, especially in the chapter on divorce, the term "*At-Tafriq Al-qadha'*" is found. It refers to the action of a judge in adjudicating a divorce. This discourse indicates that the judicial institution has the authority recognized by Sharia to adjudicate marriages that are deemed no longer viable for the parties involved.

"*At-Tafriq Al-qadha'*"<sup>19</sup> is defined as "the dissolution of the marital bond between husband and wife through a judge's decision based on the request of one party due to reasons such as discord (*syiqaq*), harm (*dharar*), lack of financial support, or even without a request from either party but carried out to safeguard Sharia rights, such as when one party leaves the faith (*murtad*)."<sup>20</sup>

Based on that definition, it can be concluded that the court, specifically the judge, has the authority to dissolve the marital bond (*tafriq*) in several circumstances. These include: (1) when the husband fails to provide financial support to the wife (*'adam an-nafaqah*), (2) due to the presence of disgrace or defect (*'aib aw ilal*), (3) due to discord and harm (*as-syiqaq aw ad-dharar*), (4) due to the husband's absence without a valid reason (*ghoibat ar-zauj bila 'udzr*), and (5) because the husband is in detention (*Habs*).<sup>21</sup>

There are other conditions in which the court has the authority to decide on divorce, but these conditions are still a subject of disagreement among some jurists who view them as *talak*. These conditions include: (1) *tafriq* with *khair bulugh*, (2) *tafriq* due to differences in religion, (3) *tafriq* due to *li'an* (accusation of adultery), (4) *tafriq* due to the invalidity of the marriage contract or the loss of desired qualities, (5) *tafriq* due to the prohibition caused by foster relationships (*rodho'ah*) and marital relationships (*mushahaharah*), (6) *tafriq* due to insufficient dowry, and (7) *tafriq* due to the husband's disappearance (*faqd*).<sup>22</sup>

Here are the types of divorce based on conditions where the court has the authority to decide on the marriage or divorce of husband and wife:

### 1. Divorce Due to Apostasy or Conversion to Islam:

If one of the spouses apostatizes from Islam, a divorce occurs between them, not through *talak*, and no decision from a judge is necessary. Their marriage is annulled solely due to apostasy. In the widely accepted opinion in the Maliki school, divorce resulting from one spouse's apostasy is considered *talak*.

<sup>19</sup> A. Zamakhsyari Baharuddin dan Rifqi Qowiyul Iman, "At-Tafriq Al-Qadha'i And The Religious Courts' Authority In Deciding A Divorce," *Syariah: Jurnal Hukum dan Pemikiran* 20, no. 1 (27 Juni 2020): 1–12, <https://doi.org/10.18592/sjhp.v20i1.3493>.

<sup>20</sup> Wizarat Al-Awqaf wa Asy-Syu'un Al-Islamiyah - Al-Kuwait, *Al-Mausu'ah Al-Fiqhiyah*, jilid. 29, h. 6.

<sup>21</sup> Wizarat Al-Awqaf wa Asy-Syu'un Al-Islamiyah - Al-Kuwait, jilid. 29, h. 77.

<sup>22</sup> Wizarat Al-Awqaf wa Asy-Syu'un Al-Islamiyah - Al-Kuwait, jilid. 29, h. 77.

However, the Shafi'i and Hanbali scholars argue that the annulment due to one party's apostasy depends on the completion of the iddah period. If the apostate party returns to Islam before the end of the iddah, they remain bound by the marriage. If, however, they do not return to Islam by the end of the iddah, the partners are considered separated since they follow different religions. The Ja'fari Shia school holds that the apostasy of one spouse before consummation leads to an immediate annulment (*fasakh*), but if apostasy occurs after consummation, the annulment waits until the end of the iddah.<sup>23</sup>

## 2. Divorce Due to Husband's Failure to Provide Maintenance:

Suppose a judge grants a divorce to a couple because the husband fails to fulfill his obligation to provide maintenance to his wife. In this case, according to the Maliki school, the talak pronounced by the judge is considered *talak raj'i*. The husband retains the right to reconcile with his wife during her iddah period if he becomes financially stable and is prepared to support her. This divorce arises from the husband's failure to meet his obligation to provide maintenance. Similar to the divorce between a husband who issues an *ilaa'* and his wife, it is regarded as a divorce if the husband refuses to redeem or pronounce talak.

The Shafi'i and Hanbali schools state that divorce due to the absence of maintenance cannot be carried out except through a judge's decision.<sup>24</sup> This is because such divorce is a contested annulment, and a judge's decision is required, similar to annulment due to impotence. In this case, divorce by a judge should only be granted upon the wife's request because this divorce results from her rights being unfulfilled, and it cannot be initiated without her request, as in the case of annulment due to impotence. If the wife requests it, and the judge grants the divorce, it is an annulment that the husband cannot contest.<sup>25</sup>

## 3. Divorce Due to Defects or Disgrace (*Tlal*):

The Hanafi and Maliki schools argue that this type of divorce is *talak ba'in*, reducing the number of *talak*. This is because the judge's action in divorcing is based on the husband, making it appear as if the husband himself divorced his wife. Since this is a divorce that occurs after a valid marriage, divorce by a judge in such a case (according to the Maliki school) is *talak* and not *fasakh*. This type of divorce is judged as *talak ba'in* to eliminate harm to the wife. If the husband were allowed to reconcile with his wife before the end of the *iddah*, there is a fear that the harm would recur.

<sup>23</sup> Wahbah Az-Zuhayli, *Mausu'at Al-Fiqh Al-Islami wa Al-Qadhaya Al-Mu'ashirah*, jilid. 8, h. 587-588.

<sup>24</sup> A. Zamakhsyari Baharuddin dan Rifqi Qowiyul Iman, "Kompetensi Peradilan Agama Menangani Perkara Cerai Gugat Dalam Tinjauan Fikih Islam," *Al-Mizan (e-Journal)* 16, no. 2 (31 Desember 2020): 217, <https://doi.org/10.30603/am.v16i2.1875>.

<sup>25</sup> Wahbah Az-Zuhayli, *Mausu'at Al-Fiqh Al-Islami wa Al-Qadhaya Al-Mu'ashirah*, vol. VIII, 490.



On the other hand, scholars from the Shafi'i and Hanbali schools argue that divorce by a judge due to defects is *fasakh*, not *talak*. Therefore, it does not reduce the number of *talak*. According to this perspective, the husband retains the right to reconcile with his wife through a new marriage ceremony, which must be attended by a guardian, two just witnesses, and a dowry. This process is considered a separation initiated by the wife, either through her request for separation or due to her defects.<sup>26</sup>

4. Divorce Due to Dispute or Harm (*Syiqaq* or *Dharar*):

*Talak* issued by a judge due to disputes between spouses (*syiqaq*) is considered *talak ba'in* because the harm that arises cannot be eliminated except through *talak ba'in*. If *talak raj'i* were applied, the husband might have the possibility of reconciling with his wife during the *iddah*, allowing the harm to recur.<sup>27</sup>

5. Divorce Due to Husband's Absence (*Ghoibat Az-Zauj*):

According to the predominant opinion of the Maliki school, a divorce issued by a judge in this case is considered *talak ba'in* because every divorce pronounced by a judge is classified as *talak ba'in*, except for divorces caused by *iilaa'* and lack of care.

According to the Hanbali school, this type of divorce is called *fasakh*. *Fasakh* is different from *talak*, and it does not decrease the number of *talak*. This is because the wife initiates the divorce. In the Hanbali perspective, a divorce initiated by the wife is considered *fasakh*. This type of divorce can only occur with a judge's decision. A judge should not pronounce divorce unless the wife requests it because this divorce results from her right as a wife being unfulfilled, and it cannot be done without her request, similar to annulment due to the husband's impotence.<sup>28</sup>

6. Divorce Due to Husband's Detainment (*Habs*):

The majority of jurists do not permit divorce due to the husband's detention (*Habs*), captivity (*asr*), or arrest (*i'tiqal*) because there is no clear Sharia evidence regarding this. Additionally, according to the Hanbali school, the departure of someone in prison is considered a departure with an excuse (*'udzr*).

However, the Maliki school allows the wife to seek divorce from a judge if her husband has been absent for more than one year, regardless of whether it is due to a legitimate excuse or not. If the period of absence exceeds one year, the wife

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<sup>26</sup> Wahbah Az-Zuhayli, vol. VIII, 499.; M. Zein Satria Effendi, *Problematika Hukum Keluarga Islam Kontemporer, Analisis Yurisprudensi Dengan Pendekatan Ushuliyah* (Jakarta: Kencana, 2004), 132.

<sup>27</sup> Wahbah Az-Zuhayli, *Mausu'at Al-Fiqh Al-Islami Wa Al-Qadhaya Al-Mu'ashirah*, vol. 8, h. 504.; Wizarat Al-Awqaf wa Asy-Syu'un Al-Islamiyah - Al-Kuwait, *Al-Mausu'ah Al-Fiqhiyah*, vol. 29, 56.

<sup>28</sup> Wahbah Az-Zuhayli, *Mausu'at Al-Fiqh Al-Islami wa Al-Qadhaya Al-Mu'ashirah*, vol. 8, 509.

can demand a divorce, and the judge can separate them without writing a letter to the husband or warning him. In such cases, divorce is considered *talak ba'in*.<sup>29</sup>

### The Law of *Talak Raj'i* and *Talak Ba'in*

*Talak raj'i* and *talak ba'in* have similarities in several legal consequences, including:<sup>30</sup>

1. The obligation to provide financial support for the wife who has been divorced during the waiting period (*iddah*).

2. Determination of lineage for the child born to the divorced wife is attributed to the husband who issued the divorce.

3. The marriage of the divorced wife to another husband will nullify the number of divorces between her and the first husband, according to the views of the Hanafi school and Abu Yusuf, whether the divorces are three or any other number.

On the other hand, other Islamic jurists argue that this marriage only nullifies the count of divorces (*'adad ath-talak*) if it occurs in the case of three divorces. In this case, the wife returns to the first husband with a new marital relationship, and the husband retains the right to issue three divorces.

On the one hand, *talak raj'i* has its own distinct laws that differ from the laws of *talak ba'in*, as discussed below.

#### 1. Law of *Talak Raj'i*

Islamic jurists agree that *talak raj'i* has several consequences, namely:<sup>31</sup>

a. Reducing the number of divorces.

*Talak* has the consequence of reducing the number of divorces held by the husband. If a husband divorces his wife with *talak raj'i*, it means he still has two remaining divorces. If he issues another divorce, it means he still has one divorce left, and so on.

b. Termination of the marital bond occurs at the end of the waiting period (*iddah*).

This consequence occurs when a husband divorces his wife with *talakraj'i*, and her waiting period ends without him reconciling with her, then she becomes forbidden (*haram*) to him after the end of the waiting period. The delayed dowry (*mahar*) can be paid in such a situation.

c. Possibility of reconciliation during the waiting period.

<sup>29</sup> Wahbah Az-Zuhayli, vol. 8, 511.

<sup>30</sup> Wahbah Az-Zuhayli, vol. 8, 419.

<sup>31</sup> Wahbah Az-Zuhayli, jilid. 8, h. 419.



A husband who issues *talak raj'i* has the right to reconcile with his wife, either verbally, according to the consensus of jurists, or through actions, according to the Hanafi, Hanbali, and Maliki schools, as long as it is within the waiting period.<sup>32</sup> However, if the waiting period has ended, his wife becomes forbidden to him, and he does not have the right to reconcile with her unless she agrees (meaning reconciliation is conducted through a new marriage contract).

- d. During the waiting period, a wife divorced with *talak raj'i* can be given another divorce, or *zihar*, or *ilaa'*, or *li'an* by the husband, and each of them inherits from the other, according to the consensus of jurists. If the husband performs *khulu'* (mutual release), it is considered valid according to the Hanbali and Hanafi schools because she is a legitimate wife to be divorced and is, therefore, eligible for *khulu'*. *Khulu'* here does not mean prohibition but instead stopping the husband's wrongdoing and their marriage, which is the cause of the harm. In this case, the marriage still exists and does not eliminate the husband's right to reconcile. According to the clearer opinion (*qaul adzhar*) of Ash-Shafi'i,<sup>33</sup> it is valid to perform *khulu'* on a woman divorced with *talak raj'i* during the waiting period because she is still considered a wife in many issues.

- e. Prohibition of sexual relations.

The Shafi'i and Maliki schools, in their predominant opinion, state that engaging in sexual relations with a wife divorced with *talak raj'i* is forbidden, whether through sexual intercourse or other means. Looking at her is forbidden, even without desire, because *talak raj'i* signifies separation, similar to *talak ba'in*.

The reason is that marriage allows the relationship between husband and wife, so *talak* prohibits this as a form of separation. Imam Malik stated that a husband who divorces his wife with *talak raj'i* is not allowed to see her hair or enter her room without her permission.<sup>34</sup>

The Hanafi and Hanbali schools believe that *talak raj'i* does not prohibit sexual relations between divorced couples. However, being alone together is considered *makruh tanzih* (disliked).

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<sup>32</sup> Reconciliation (*rujuk*) can be done in two ways, namely through words and actions. Reconciliation through words means the husband expresses reconciliation to his divorced wife, for example, by saying, "I am reconciling with you" or "I am taking you back under my care," or other similar statements. As for reconciliation through actions, it is done through sexual intercourse (*jimak*) and actions performed before sexual intercourse. Refer to Wizarat Al-Awqaf wa Asy-Syu'un Al-Islamiyah - Al-Kuwait, *Al-Mausu'ah Al-Fiqhiyah*, jilid. 22, h. 109-110.

<sup>33</sup> "Adzhar" is a term used to denote the preferred opinion among several opinions of Imam As-Syafi'i on a particular issue.

<sup>34</sup> As-Sayyid Sabiq, *Fiqh As-Sunnah*, Cet. I (Kairo: Dar Al-Hadits, 2004), h. 646.

According to Abu Hanifah, a wife divorced with *talak raj'i* by her husband is allowed to beautify herself, wear perfume, dress nicely, wear jewelry, color her nails (with henna), and wear kohl in front of her husband who divorced her with *talak raj'i*. But the husband is not allowed to enter the room of his wife who has been divorced with *talak raj'i* without notifying her first through words, gestures, clearing the throat, or making the sound of his sandal.<sup>35</sup> The Hanafi view on this matter is: "*talak raj'i does not eliminate ownership (al-milk) and the legality (al-hill) of the husband over his wife as long as it is within the waiting period. Ownership (al-milk) refers to the legality of the marital relationship (sexual intercourse) and all marital rights. Legality (al-hill) means that the wife divorced with talak raj'i remains halal for the husband who divorced her. The wife is not made haram to her husband for any of the reasons that would make her haram.*"<sup>36</sup>

## 2. Law of *Talak Ba'in*

### a. *Talak Ba'in* Sughra:

*Talak ba'in* sughra has legal consequences in the following aspects, according to the consensus of Islamic jurists:<sup>37</sup>

#### 1) Loss of ownership but not the loss of legality.

It is forbidden to engage in sexual relations absolutely and to be alone together after *talak ba'in* sughra. Reconciliation with the wife is only possible through a new marriage contract. However, the legality remains, both during the waiting period and after the waiting period with a new contract.

#### 2) Reduction in the number of divorces held by the husband, similar to *talak raj'i*.

#### 3) Legality of the delayed dowry until one of the two events occurs, either death or divorce, with just the occurrence of *talak*. In other words, if *talak ba'in* occurs, the divorced wife is entitled to receive the remaining payment of the deferred dowry that she has not yet received.<sup>38</sup>

#### 4) Prevention of the right to inherit between husband and wife.

If one of the spouses dies during the waiting period, the other does not inherit because *talak ba'in* terminates the marital bond with just the

<sup>35</sup> As-Sayyid Sabiq, h. 646.

<sup>36</sup> It means that the husband is still allowed to reconcile (during the waiting period) or remarry (once the waiting period has ended) with his wife. This is different from the triple divorce, which nullifies ownership and legality for the husband.

<sup>37</sup> Wahbah Az-Zuhayli, *Mausu'at Al-Fiqh Al-Islami wa Al-Qadhaya Al-Mu'ashirah*, jilid. 8, h. 420-421.

<sup>38</sup> As-Sayyid Sabiq, *Fiqh As-Sunnah*, h. 647.

pronouncement of *talak*. Unless the divorce occurs during a severe illness and there is an indication that the husband intends to deprive his wife of her inheritance. According to the majority of Islamic scholars, except for the Shafi'i school, the wife inherits if the husband dies during the waiting period. Similarly, according to the Maliki school, after the waiting period, an action to thwart the husband's intention known as *talak firar*.<sup>39</sup>

b. *Talak Ba'in Kubra*:

This type of divorce leads to the complete loss of ownership (*at-tamlik*) and legality (*al-hill*) of the husband over his wife. There are no legal consequences for the marital relationship of *talak ba'in Kubra* except for the waiting period and other related matters. With *talak ba'in*, the husband pays the deferred dowry (*as-shadaq al-mu'ajjal*) until one of the two events occurs, either divorce or death. Then, between the husband and wife, the right to inherit is blocked, unless the *talak* comes into the category of *talak firar* according to schools other than the Shafi'i school, as in the case of *talak ba'in sughra*, the husband's intention (who issues *talak firar*) is annulled. With *talak ba'in Kubra*, a wife is prohibited from her husband with a temporary prohibition (*tahrim mu'qqat*).<sup>40</sup> The wife is not permissible for her husband until she remarries another husband, and the new husband engages in real sexual intercourse (*dukhul haqiqi*) with her. Then, the wife is divorced by the second husband, or the second husband dies, and the waiting period for the wife from her second husband is completed.<sup>41</sup>

*Talak ba'in Kubra* is similar to *talak ba'in sughra*, except for the following two issues:<sup>42</sup>

- 1) *Talak ba'in Kubra* does not have an opportunity to issue another divorce afterwards, according to the consensus of scholars.

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<sup>39</sup> "Talak firar" or "thalaq al-maridh maradhul maut" refers to a divorce (talak bain) carried out by a husband who is terminally ill or on the verge of death, with the intention of preventing his wife from inheriting from him, refer to Ali Kadarisman, "Kekerasan Dalam Rumah Tangga dan Sanksinya dalam Hukum Islam," *De Jure: Jurnal Hukum dan Syariah* 9, no. 2 (30 Desember 2017): 99, <https://doi.org/10.18860/j-fsh.v9i2.6905>.

<sup>40</sup> "Tahrim mu'qqat" or temporary prohibition refers to the temporary prohibition of marrying a woman during certain circumstances. If the circumstances change, this prohibition is lifted, and the marriage becomes permissible. The women who are temporarily prohibited from marriage until a specific time include: a sister-in-law, an aunt from both paternal and maternal lines, another man's wife, a woman in her waiting period (iddah), a woman who has been divorced three times, and a woman who has committed adultery until she repents. On the other hand, "tahrim mu'abbad" or permanent prohibition has both agreed-upon and disputed aspects. The agreed-upon prohibitions include lineage or nasab relationships, familial relationships due to marriage ties or in-laws, and nursing relationships. The disputed prohibitions include adultery (zina) and li'an (accusation of adultery). Imam Shafi'i and Imam Malik are of the opinion that committing adultery with a woman does not make it impermissible to marry her mother or daughter. However, according to Abu Hanifah, Thawri, and Awza'i, adultery does lead to prohibition.

<sup>41</sup> Wahbah Az-Zuhayli, *Mausu'at Al-Fiqh Al-Islami wa Al-Qadhaya Al-Mu'ashirah*, jilid. 8, h. 442.

<sup>42</sup> Wahbah Az-Zuhayli, jilid. 8, h. 442.

- 2) In the case of *talak ba'in Kubra*, the wife cannot return to her first husband until she remarries another husband.

## Divorce in Front of the Religious Court in The Islamic Legal Perspective

In essence, Islam grants the right of divorce (*talak*) exclusively to the husband, as the husband's desire to continue the marital bond, which often involves significant financial sacrifices, is considered stronger. Considering this, and given that husbands are deemed to possess greater patience and reasoning abilities in dealing with unfavorable behaviors or attitudes from their wives, a husband is less likely to hastily decide on divorce due to anger or his wife's unpleasant traits. This situation gained special attention from the government in 1946, leading to the enactment of Law No. 22 of 1946 concerning Marriage Registration.<sup>43</sup>

As mentioned earlier, *talak* can be executed through various means, indicating the termination of the marital bond. This form of *talak* can be executed through spoken words, written messages addressed to the wife, gestures for a non-verbal person, or by sending a representative or guardian. It is important to note that *talak* is still considered valid even if conveyed through a messenger or representative to the wife in a different location. In such cases, the appointed messenger acts as the one initiating the *talak*; thus, it is deemed valid.<sup>44</sup>

Fundamentally, the right to pronounce *talak* lies with the husband. Therefore, a husband should not act arbitrarily towards his wife. Common misconceptions among the public often arise regarding the issue of pronouncing *talak* and its actual occurrence. Islamic jurisprudence (*fiqh*) explains that once a husband has pronounced *talak* to his wife, whether directly (*sharih*), which does not require a specific intention, it is considered effective.<sup>45</sup>

Divorce outside the court system places a burden on the former wife and children, as their rights are not guaranteed, and legal certainty is lacking. Additionally, the former wife faces difficulties in contracting a valid marriage according to prevailing laws. In contrast, divorce through the court system can ensure the rights of the former wife and children. Furthermore, the former wife can remarry legally according to applicable laws.<sup>46</sup>

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<sup>43</sup> Ahmad Rajafi, "Hukum Keluarga Islam di Indonesia: dari Orde Lama hingga Orde Reformasi," *Al-Adalah* 14, no. 2 (2017): h. 311., <https://doi.org/10.24042/adalah.v14i2.2059>.

<sup>44</sup> Hesti Duri Jayanti, "Talak Tiga Di Luar Pengadilan Perspektif Hukum Islam Dan Hukum Positif Bagi Pegawai Negeri Sipil (Studi Analisis Putusan Pengadilan Agama Argamakmur Nomor 0207/Pdt.G/2015/PA.AGM)," *Qiyas: Jurnal Hukum Islam dan Peradilan* 3, no. 1 (1 April 2018): 94, <https://doi.org/10.29300/qys.v3i1.958>.

<sup>45</sup> Sulaiman Rasjid, *Fiqh Islam* (Bandung: Sinar Baru Algesinda, 1994), h. 402.

<sup>46</sup> Muhammad Syaifuddin, Sri Turat miyah, dan Annalisa Yahanan, *Hukum Perceraian* (Jakarta: Sinar Grafika, 2014), h. 2.

However, concerning divorce in court, the Nahdlatul Ulama (NU) presented the following formulation in the Decision of the 28th NU Congress at Al-Munawwir Islamic Boarding School in Krapyak, Yogyakarta, on 26-29 Rabiul Akhir 1410 H / 25-28 November 1989 M:<sup>47</sup>

1. When the husband has not pronounced a divorce (*talak*) outside the Religious Court, the *talak* pronounced before the Religious Judge is considered the first *talak*, and the waiting period (*'iddah*) is calculated from that moment onwards.
2. When the husband has already pronounced a *talak* outside the Religious Court, the *talak* pronounced before the Religious Judge is considered the second *talak* and onwards if still within the waiting period (*'iddah raj'iyah*). The calculation of the *'iddah* starts from the occurrence of the first *talak* and concludes after the end of the last *'iddah*, calculated from the occurrence of the last *talak*.
3. the *talak* pronounced before the Religious Judge is issued after the completion of the waiting period or during the *'iddah bain*, then it is not considered.
4. When the *talak* before the Religious Judge is done under duress (*mukrah*) or merely narrating a previously uttered *talak*, it is not considered.

If we refer to the above opinions, the position of divorce (*talak*), whether it occurs outside or in front of a court hearing, is the same. The legal validity is not different; what distinguishes them is that divorce conducted in front of a court hearing tends to produce more benefits for the wife and children, who often suffer the consequences of divorce. However, divorce in front of a court has legal consequences and rights for both parties guaranteed by the state, as it is carried out through an authorized institution.

In this context, the pronouncement of divorce in front of the court aims to achieve benefits such as protecting the family institution and ensuring legal certainty, where marriage is not easily terminated. The termination must be based on a thorough examination of whether the reasons are fulfilled. Therefore, divorce pronounced in front of the court means that the reasons for divorce have been under scrutiny, which is examined through the legal process. Divorce conducted in court ensures compliance with Islamic guidelines regarding divorce, as before any decision, an investigation is conducted to determine whether there are strong enough reasons for divorce between husband and wife.<sup>48</sup>

So, how does Islam view divorce in front of the religious court? First, it is essential to understand that there is no need to pit classical jurisprudence (*fiqh*) against existing legal regulations in examining this matter. Classical *fiqh* and

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<sup>47</sup> Yayasan DIA, "Kedudukan Thalaq Di Pengadilan Agama," <http://purl.org/dc/dcmitype/Text>, Kedudukan Thalaq di Pengadilan Agama (laduniid, 12 Oktober 2017), <https://www.laduni.id/post/read/30395/kedudukan-thalaq-di-pengadilan-agama.html>.

<sup>48</sup> Sudarsono, *Pokok-Pokok Hukum Islam* (Jakarta: PT Raneka Cipta, 1992), h. 83-84.

existing laws do not necessarily conflict with or negate each other, such as declaring that divorce outside the court is invalid or concluding that current divorce laws conflict with fiqh. Both can coexist, as the issue does not necessitate such a binary opposition.

Second, the mechanism of divorce in the Religious Court is classified into *talak* divorce and contested divorce. In short, *talak* divorce is a request for permission to divorce submitted by the husband. In contrast, a contested divorce is a divorce lawsuit filed by the wife to have the judge decide on the dissolution of the marriage by pronouncing *talak*. For the second classification, contested divorce, there seems to be no problem. As previously explained, if certain conditions are met, the wife can ask the judge to divorce her from her husband since the wife cannot divorce herself. The focus of many is on *talak* divorce, where the husband who wants to divorce his wife must do it in front of the Religious court.

Third, in the case of divorce filed by the male party (*talak* divorce), the court never positions itself as the one pronouncing the *talak*. *Talak* divorce, which is usually filed by the husband, still considers the husband the sole owner of the *talak* right. However, the law restricts its legal use, so the husband can only divorce his wife in front of the religious court after the court attempts reconciliation and examines the reasons for divorce presented. Such a mechanism is in line with the principle of "taqyid al-mubah" (restriction on permissible matters). The term "taqyid al-mubah" consists of two words: "taqyid," meaning binding or limiting, and "al-mubah," meaning something permissible or allowed.<sup>49</sup> In this case, *talak* falls under the category of mubah (permissible). The hadith states that what is permissible but disliked by Allah is *talak*, where permissible also has the same meaning as allowed, permissible, or lawful (*mubah* or *ja'iz*).<sup>50</sup>

According to *Dar al-Iftaa' al-Misriyyah*, the concept of "the government has the authority to restrict obligatory matters" is not explicitly mentioned in earlier books of fiqh principles. However, this concept is derived from the *istinbat* (deduction) of the concept of *maslahah* itself. In general, this principle implies that the government has the right to set conditions or limitations on matters originally considered obligatory according to Sharia, aiming to realize the general welfare. It is important to note that this concept does not mean legalising what is prohibited or prohibiting what Allah SWT allows. The principles of halal and haram as the absolute rights of Allah SWT are clear and unequivocal in Sharia and cannot be denied by anyone.<sup>51</sup> So, in the case of divorce as well, the state does not absolutely

<sup>49</sup> Abu Hamid Al-Ghazali, *Al-Mustasfa fi 'Ilmi Al-Ushul* (Riyadh: Daar Al-Maiman, t.t.), jilid. 2, h. 127.

<sup>50</sup> Abdul Aziz Dahlan, dkk, *Ensiklopedi hukum Islam* (Jakarta: Ichtiar Baru van Hoeve, 2001), h. 506.

<sup>51</sup> Luqman Tarmizi, "Irsyad Usul Fiqh Siri Ke-50: Hak Pemerintah Untuk Menghadkan Perkara Yang Harus (Taqyid Al-Mubah)," Pejabat Mufti Wilayah Persekutuan, 12 Maret 2020, <https://muftiwp.gov.my/artikel/irsyad-usul-fiqh/4312-irsyad-usul-fiqh-siri-ke-50-hak-pemerintah-untuk-menghadkan-perkara-yang-harus-taqyid-al-mubah>.



prohibit divorce; rather, divorce is limited to certain reasons and carried out through specific mechanisms as regulated in legal statutes, such as being conducted in front of a religious court.

One of the considerations for obligating divorce in court is that divorce will undoubtedly have negative consequences for everyone involved with the divorced couple, whether from the side of the wife, husband, or the families of both parties. Moreover, the divorce will impact the child, especially when the divorce is done either outside the court or within the court. For a child, the separation (divorce) of their parents is something that can disturb their psychological condition. When the child was in a harmonious family environment, filled with love from both parents and living together with both a father and a mother figure, they suddenly found themselves in a family environment full of problems and eventually had to live with only one figure, either the mother or the father.<sup>52</sup>

Divorce conducted outside the court can affect the child's psychological condition, as it often happens that the father does not provide regular and fixed financial support. Divorce conducted outside the court lacks legal force, so it cannot compel the father or mother to provide regular financial support, both in terms of the timing and the amount. If divorce is executed in a religious court, it will be determined by the court in accordance with Article 156 of the Compilation of Islamic Law (KHI).<sup>53</sup>

## CONCLUSION

Several discussion above can draw the following conclusions: Etymologically, "*talak*" means to release (al-hillu) and eliminate the bond (raful qaidi). In terminology, "*talak*" means to dissolve the marital bond, either in the present or the future, using specific utterances or their equivalents. In terms of legal consequences and the possibility of reconciliation for the spouses, "*talak*" is divided into two categories: "*talak raj'i*" and "*talak ba'in*." "*Talak raj'i*" allows the husband to reconcile with his wife during the waiting period (*iddah*) without the need for a new marriage contract, even if the wife is unwilling. "*Talak ba'in*" immediately terminates the marital relationship. "*Talak ba'in*" further divides into "*ba'in sughra*" and "*ba'in kubra*." There are criteria to determine when "*talak*" is considered "*talak raj'i*" and when it is considered "*talak ba'in*." Islamic jurisprudence (fiqh) regulates the authority of judges to separate spouses, depending on the circumstances leading to the separation. Not all divorces issued by a judge are "*talak ba'in*"; it depends on the reasons for the separation between the spouses. Each "*talak raj'i*"

<sup>52</sup> Vivi Hayati, "Dampak Yuridis Perceraian Di Luar Pengadilan (Penelitian Di Kota Langsa)," *Jurnal Hukum Samudra Keadilan* 10, no. 2 (2015): 225.

<sup>53</sup> Wiwi Fauziah dan Muhammad Fathan Ansori, "Keharusan Perceraian di Pengadilan Agama," Pengadilan Agama Pulang Pisau, diakses 2 Agustus 2023, <https://pa-pulangpisau.go.id/berita/arsip-berita-pengadilan/149-artikel/1711-keharusan-perceraian-di-pengadilan-agama>.

and "*talak ba'in*" has legal consequences. In Islam, a husband can divorce his wife simply by expressing it in front of her or someone else. However, in a governed society, one must adhere to government regulations as long as they do not contradict Islamic law. Obeying the government is part of your obligation as a Muslim. The government establishes regulations on divorce to ensure administrative order, such as marriage registration and complicating divorce matters. This regulation establishment aligns with the legal principle in Islam, "*li' imam taqyid al-mubah*" (the ruler has the authority to limit permissible matters).

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