


## RETHINKING THE THEORY OF LEGAL FLEXIBILITY (THREE DIVORCE LAW OUTSIDE RELIGIOUS COURTS)

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ARTICLE INFO	ABSTRACT
<p><b>Article History</b></p> <p>Published : 9 June 2024</p> <hr/> <p><b>Keywords</b></p> <p>Legal Flexibility, Society, Religious Court</p> <p> Copyright © 2025 Author(s)</p> <p>This work is licensed under a <a href="https://creativecommons.org/licenses/by/4.0/">Creative Commons Attribution 4.0 International License</a></p>	<p><i>This study aims to review the concept of legal flexibility in the context of the practice of triple divorce carried out outside the Religious Court in Indonesia. The main focus of this study is to present another side of the theory of legal flexibility in the issue of triple divorce law outside the religious court which until now has only been punished as one divorce. This study is library research. The results of the study indicate that the application of the results of collective ijihad in a regulation that binds the Indonesian people, in the form of a rare opinion, has created legal turmoil in society. Judges who do not consider the occurrence of a divorce pronounced by a husband outside the court on the grounds that using the principle of divorce is complicated, are challenged by the social community who choose to follow the opinion of the majority of scholars. The application of the articles in the UUP and KHI must be reconsidered by judges by looking at the social conditions of the community where the parties to the case live. Judges have the right to decide with <i>contra legem</i>, so that legal justice and legal certainty are achieved in society.</i></p>

## INTRODUCTION

Differences of opinion in responding to a legal problem are an inevitability that cannot be avoided, especially in the realm of Islamic law which is rich in perspectives and methods for exploring law from its sources. This dynamic is part of the rich treasures of Islamic thought which continue to develop following the context of the times and the needs of the people. In the Indonesian context, with

the diversity of schools of thought and backgrounds of the Muslim community, the need for adaptive and contextual law becomes very important. This is where relevance emerges theory of legal flexibility, namely an approach that allows changes or adjustments to the law by taking into account social, and cultural conditions and the needs of local communities, without ignoring the basic principles of sharia.

One legal product that represents the application of this theory is the Compilation of Islamic Law (KHI) a codification of fiqh designed specifically for Indonesian society. Even though the majority of Indonesian people are affiliated with the Syafi'i school of thought, KHI does not exclusively refer to one school of thought but is a pluralistic school of thought. Several articles in the KHI even adopt considered opinions of thank you (weak or unpopular in classical schools of thought), giving rise to debate and turmoil among lower society and Islamic law academics.

One of the crucial issues that reflects the tension between classical texts and the flexibility of contemporary law is the subject matter of triple divorce spoken simultaneously outside the religious court. In practice, divorce like this often occurs in society. However, in positive law in Indonesia, based on KHI and Supreme Court jurisprudence, talak is considered as just one divorce, not three, and has no legal force until it is decided by the court. This decision sparked a polemic, because according to classical jurisprudence, especially in the view of the majority of scholars of the Shafi'i school, triple talaq which is pronounced at once is considered valid as three divorces, which causes final divorce.

In this article, the author wants to present the other side of the theory of legal flexibility in the legal issue of triple talaq outside the religious courts, which until now has only been punished by the first talaq.

## **RESEARCH METHODS**

This research is library research (library research). As the types of data used in this research are primary and secondary data obtained from various sources, such as Primary sources, namely classical fiqh texts from various schools of thought (especially the Shafi'i, Hanafi, Maliki, and Hanbali schools), Compilation texts of Islamic Law, Laws on Marriage, as well as decisions of the Supreme Court or religious courts relating to triple talaq. Secondary sources, namely scientific books, journal articles, theses or theses, and the results of previous research discussing the theory of legal flexibility and divorce in Islam. The data analysis technique was carried out descriptively-analytically, namely by describing, classifying, and analyzing various ulama opinions and positive legal provisions, to then be compared critically. Next, the author will reflect on the application of legal flexibility theory in the context of triple talaq law outside religious courts.

## RESULTS AND RESEARCH

### Legal Flexibility Theory

Islamic law is a law that is closely related to this change. Apart from its role in changing society from bad to good, the law is also a product of change, the result of contextual *ijtihād* from legal scholars and practitioners from the time of the apostles to the present.<sup>1</sup> If in religious matters the apostle received revelation, in worldly matters he consulted. In the time of the Companions, the text was a reference, but the policies and decisions resulted from deliberation. Likewise, nowadays, Islamic law has developed far from its initial inspiration which is still preserved in the Koran and Sunnah. Thus, Islamic law is not an instant law given by God according to His wishes, but a law that develops step by step along with the development of Muslim society during its time through *ijtihād*, namely understanding the text, interpreting new cases to existing cases of law, and issuing new laws that are in line with the objectives of sharia.<sup>2</sup>

Thus, Islamic law is a dynamic law created by Muslims based on their understanding of the text. The basis is a hadith from Muadz bin Jabal:

مُعَاذِ بْنِ جَبَلٍ، أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لَمَّا أَرَادَ أَنْ يَبْعَثَ مُعَاذًا إِلَى الْيَمَنِ قَالَ: «كَيْفَ تَقْضِي إِذَا عَرَضَ لَكَ قَضَاءٌ؟»، قَالَ: أَقْضِي بِكِتَابِ اللَّهِ، قَالَ: «فَإِنْ لَمْ تَجِدْ فِي كِتَابِ اللَّهِ؟»، قَالَ: فَبِسُنَّةِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، قَالَ: «فَإِنْ لَمْ تَجِدْ فِي سُنَّةِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، وَلَا فِي كِتَابِ اللَّهِ؟» قَالَ: أَجْتَهُدُ رَأْيِي، وَلَا أَلُو فَضْرَبَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ صَدْرَهُ، وَقَالَ: «الْحَمْدُ لِلَّهِ الَّذِي وَفَّقَ رَسُولَ اللَّهِ لَمَّا يُرْضِي رَسُولَ اللَّهِ»<sup>3</sup>

It means: *While the Messenger of Allah, peace be upon him, sent him (Muadz) to Yemen, he said: How will you decide a legal matter? Muadz replied: I will decide based on the Koran. The Prophet, peace be upon him, said: If you do not find the law in the Qur'an? Muadz replied: (I will look for it and use the principle) Sunnah Rasulallah saw. The Prophet, peace be upon him, said: If you do not find the legal answer in the Sunnah of the Messenger of Allah, peace be upon him, and also in the Qur'an? Muadz replied: I will ijtihad with my thoughts. So the Messenger of God, peace and blessings be upon him, patted Muadz's chest and said: All praise be to Allah*

<sup>1</sup> Muhammad Salim al-Awwa, *al-Fiqh al-Islāmi fi Tharīq al-Tajdīd*, (Beirut: Maktabah al-Islami, 1998), p. 4.

<sup>2</sup> Muhammad Salam Madkur, *al-Ijtihad fi Tasyri al-Islami*, (Mesir: Dar an-Nahdah al-Arabiah, 1983), p. 58-62.

<sup>3</sup> Abu Daud as-Sijistani, *Sunan Abu Daud*, (Beirut: Maktabah al-Ashriah, tth), jilid 3, p. 303.

*who has given taufik to the Messenger of Allah, peace and blessings be upon him, as the Messenger of God, peace and blessings be upon him, has been pleased with. (HR Abu Daud).*

The theories about the relationship between law and social change and the function of law as above can also apply to Islamic law, although not completely. What differentiates Islamic law from secular law is that the main sources of Islamic law are the Koran and the Hadith of the Prophet, both of which are revelations from Allah SWT. However, in both sources of law, there are texts that are partly in nature qath'i (axiomatic) and some others are Dhanni (hypothetical). In the texts that Dhanni This is the intervention of the human mind which makes it possible to carry out interpretations and adjust their meaning to the demands of social change through the activities mentioned ijthihad. Not even just texts Dhanni course, the texts are qath'i even when fragrance the laws can be known and undergo a transformation, so the laws contained in these texts can undergo changes. Herein lies the reciprocal relationship between Islamic law and social change, meaning that Islamic law can influence social change, and vice versa, social change can also influence changes in Islamic law. The relationship between Islamic law and social change has been actualized in the historical reality of the development of Islamic law from its conception to the latest developments in the modern era. In the conception phase at the time of the Prophet Muhammad, changes in the law were known as a copy (abolition of the law with new text with a time lag). For example, in the early days of the emergence of Islam, the Islamic faith of Muslims was not very strong, so the habit of visiting graves was strictly prohibited by Islam to avoid the possibility of shirking towards Allah. However, in subsequent developments, when the Islamic community was considered strong in line with the increasing existence of Islam, the habit of visiting graves was permitted because the possibility of shirk towards Allah no longer existed.

Apart from that, in establishing laws for society, Islam always considers their readiness to accept the burden of the law. Therefore, the method taken is to use stages (tadarruj), meaning not simultaneously. For example, determining the prohibition of palm wine (khamr) was carried out in stages, because the Arabs at that time were deemed not ready to accept the provisions of the law considering that the habit of drinking palm wine among them was ingrained and had become a matter of pride for them. At first, Islam only forbade them from getting drunk when going to pray, then in the next stage, the Koranic text explained that in palm wine (as well as gambling) there was a big sin, in addition to its many benefits and the sin was greater than the benefits. Here, the prohibition of palm wine (and gambling) has not been clearly explained. Finally, when the psychological condition of the community was deemed ready to accept the final decision to prohibit palm wine (and gambling), a verse was revealed that stated that palm wine (gambling and other things) was a vile act of Satan that must be avoided.

More than that, basically all the texts of the Koran and Hadith were revealed by Allah to the Prophet in stages as a form of response to every development that occurred in society. In this regard, we know *asbāb-al-nuzūl* (the reasons for the revelation of the verses of the Qur'an) and *asbāb al-wurūd* (reasons for the emergence of Hadith).

After the Prophet died, the revelation and copy doesn't happen anymore. After the Prophet appeared the caliphs who also established laws, in addition to being based on the Qur'an and Hadith, also based on *ijtihād* by paying attention to the social development that occurred in the life of the community. An example is the decision of Caliph Umar ibn Khattab about war booty (booty), especially immovable property. After Umar obtained information about the success of the Islamic army in liberating Sham, Iraq, and the country of Khusru (Persia), he felt the need to make a controversial policy in order to maintain the monetary stability of the country which was experiencing a crisis at the time. With regard to movable property, Umar fully implemented the provisions outlined by the Qur'an Surat Al-Anfāl verse 41 and which was also practiced by the Prophet Muhammad SAW during his lifetime. He took one-fifth of the country and distributed four-fifths to each of the soldiers. But, regarding agricultural land, Umar has a different opinion. According to him, the land should be controlled by the state and not distributed to the soldiers by leaving it in the hands of the original owner but by taxing (*kharāj*). The tax income was then budgeted for the benefit of the people in general, after deductions from the salaries of soldiers serving at defense posts in the liberated countries.<sup>4</sup> Another example, Caliph Umar ibn Khattab did not punish criminal theft committed during the economic crisis.<sup>5</sup> Because according to him, imposing punishment for this criminal act during the economic crisis will not be able to realize the legal objectives to be achieved, considering that the driving factor for theft is stronger in influence than the punishment. Also Umar ibn Khattab made a legal provision that a woman who marries within her term *'iddah* it becomes forever haram for a man who marries her, because according to him, people who rush to something before the time must be punished with a ban. The examples above are a representation of many of Caliph Umar ibn Khattab's rational and seemingly controversial thoughts, because in establishing laws, he paid great attention to the sociological conditions of society, and in his view, laws can change if social conditions change. This characteristic of Umar's thinking was also followed by other friends, for example Abdullah ibn Mas'ud, Zaid ibn Thabit, and others.

Post-friends appear *para or*. At this time two trends in legal thought were different from each other, namely the hadith school and the *madhhab ra'yu* (ratio). The hadith school, as its name suggests, in establishing laws always uses textual sources and rarely uses *ra'yu* except under forced circumstances.

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<sup>4</sup> Nurcholish Madjid, *Islam, Doctrine and Civilization*, (Jakarta: Paramadina Waqf Foundation, 1995), p. 392.

<sup>5</sup> Ruwai'i al-Ruhaili, *The jurisprudence of Umar Ibn al-Khattab*, (Beirut: Dar al-Gharb al-Islami, 1983), p. 290.

This school of thought is based in Medina, which is known as the center of hadith. Meanwhile the sect *ra'yu* often uses ratios in establishing laws. This school of thought holds that Islamic law can be rationalized and contains benefits for humanity. The law is established based on 'frangrances, and therefore, the law can change as it changes 'frangrance. This school of thought is based in Iraq, which is known as the center of Islamic civilization.

In the following period, more personal school figures appeared, among the famous for example the school of Imam Abu Hanifah, the school of Imam Malik, the school of Imam Shafi'I, and the school of Imam Ahamad ibn Hanbal, and others. Each of these madhabs formulates their madhab's thinking framework and methodology. For example, Imam Abu Hanifah is famous for *istihsan*-His name, Imam Malik is famous for *mashlah mursalah*-his, and Imam Shafi'i is famous for *qiyas*-his. All of these methods always take into account the benefit of society, which means that if that benefit changes, the consequence is that the law will also change. Apart from that, Imam Syafi'i is also famous for *qaul qadim* And *qaul jadid*-his, namely the change in his fatwa after migrating from Iraq to Egypt due to the differences in sociological conditions he found in the two countries. After the period of this school of thought passed, scholars emerged who formulated legal theories, for example Ibn al-Qayyim al-Jauziyah, who stated that it could not be denied that legal changes occurred due to changes in place, time, and environment. Apart from that, al-Syatibi, with the concept *maqāshid al-syari'ah*-her, also positions *maslahah* as a goal of the Islamic law that must be a person's focus *mujtahid* in establishing Islamic law. Also Najm al-Din al-Thufi al-Hanbali is famous for the concept *maslahah*-it states that if *maslahah* contradicts the text or *ijma'*, then what must be prioritized is *maslahah* based on *bayan*.

In Indonesia, several Islamic mass organizations have emerged which often issue legal fatwas to respond to social developments in society, for example, Nahdlatul Ulama (NU), an Islamic mass organization which has the title of being a traditionalist mass organization, has established rules regarding the legal decision making system based on the Decree of the National Conference of Alim Ulama NU in Bandar Lampung in 1992, among which is that legal decision making must use a problem study framework consisting of problem analysis which includes the reasons behind the occurrence of the case from economic, cultural, political and social aspects, as well as reviewing impact analysis. from these aspects. This NU legal decision-making system shows that sociological considerations must be the main basis for making legal decisions within NU, so that the resulting legal fatwa can be accepted by society. Apart from NU, there is Muhammadiyah, an Islamic mass organization that is known as a rationalist-modernist mass organization, and which claims not to be tied to any particular school of thought, in the formulation of its fatwas, of course, it also pays great attention to sociological considerations.

Apart from Islamic organizations, in Indonesia Islamic legal thinkers have also emerged who represent personal thinkers, among whom the famous ones are Hasbi Ash-Shiddiqi with the theme of

Indonesian Fiqh, Hazairin with the National School of Fiqh, Munawir Syadzali with the Reactualization of Islamic Teachings, Abdurrahman Wahid with the Indigenization of Islam, Sahal Mahfudz with Social Fiqh, and Masdar Farid Mas'udi with the Religion of Justice.<sup>6</sup> The local-style fiqh (Islamic law) themes raised by the figures above show that they want to design Islamic law to always be in synergy with the dynamic development of sociological conditions in society so that Islamic law can truly be lived as a valid law. Rahmatan li al-'alamin.

The characteristics of Indonesian jurisprudence are strongly colored by the "Arab personality" (Arab Oriented). It is true that many native jurisprudence scholars wrote various works of jurisprudence, but during that time the Arab personality was very attached.<sup>7</sup> The extent to which Islamic law is adaptable to social change needs to be discussed. In Indonesia there is Muhammadiyah with its Tarjih Council which discusses the problems of the people within the scope of Muhammadiyah, while NU chose the Bahtsul Masail institution to solve contemporary problems, with its own styles and techniques. All are intended to answer legal problems resulting from social changes that occur both on a small and large scale.

Fatwa not only functions as a legal reference for society but also as historical evidence of a social condition in a certain era. Fatwas can change according to social conditions because apart from bridging religious idealism and social realism, fatwas are also a driving force for social change through the authority that the mufti has, both himself and the institution. In Indonesia, the MUI plays an important role in providing legal certainty regarding problems raised by the social conditions of society in Indonesia. This collective ijtihad (jama'i) can change and is open to revision, making it an indication that fatwa (law) can change according to the social conditions of society.

### **Development of Contemporary Affairs**

Several examples of Islamic answers to changes in the social conditions of society mentioned above show that the formulation of Islamic law is needed to answer problems that are always developing, knowledge that is increasingly developing, and technology that is increasingly developing. This is where reformers should no longer be "hostile" but given space to develop their knowledge, but still under social control, so they don't go too far. For example, allowing Friday imams or preachers to be led by women, allowing same-sex marriages, legalizing alcohol, and the like which have a bad effect on social life.

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<sup>6</sup> Yudian W. Asmin, "Reorientation of Indonesian Fiqh", in *Islam: Various Perspectives*, (Yogyakarta: LPMI, 1995), p. 224. See also Mahsun Fuad, *Indonesian Islamic Law*, (Yogyakarta: LKiS, 2005), p. 236-238.

<sup>7</sup> Marzuki Wahid and Rumaidi, *The State School of Fiqh Criticizes the Politics of Islamic Law in Indonesia*, (Yogyakarta: LKiS, 2001), p. 128. See also Hasbi Ash-Shiddiqi, *Islamic Sharia Responds to the Challenges of the Age*, (Jakarta: Bulan Bintang, 1966), p. 41-42.

لأن النصوص محدودة ولكن الحوادث والنوازل غير محدودة أو لأن النصوص تنتهى ولكن الحوادث والنوازل لا تنتهى.<sup>8</sup>

It means: "*In fact, the text is limited, while the problems that arise are not limited. Or because the text has actually stopped while problems will always arise and never stop*".

There is an opinion that Islamic law is perfect with the codification of fiqh laws, fatwas and the legal views of judges. This causes the desire to explore Islamic law to stagnate. Until now, this adage still applies in society, especially among traditionalist groups. They think and maintain their opinion that there is no need to mess with existing Islamic law, because they think that the requirements for mujtahid cannot be controlled by them, and the answers to the problems currently being raised are already in the fiqh books written by previous scholars.

This opinion is not entirely correct, because in accordance with the theory of ushul fiqh, ijtiḥād can only be carried out in certain areas, namely: 1) arguments that are qathī al-wurūd but zhanni al-wurūd but qathī are in them, 3) postulates that are zhanni al-wurūd and dalalah, 4) for cases where there is no legal argument.<sup>9</sup>

However, there are scholars who are of the opinion that the door to ijtiḥād should not be closed, because it was opened by the Messenger of Allah, so no one but him has the right to close it. It was these Khalaf scholars who tried to "dismantle" the building of Islamic law which was considered perfect and permanent. Opening the door to ijtiḥād is a continuation of the purification phase because reformists believe that "closing the door to ijtiḥād" is a factor causing the stagnation of Islamic legal thought in the world.

Since the 4th century AH, the Islamic ummah believed that the door to Ijtiḥād had been closed, this fact persisted for quite a long time, until the time of Muhammad Abduh. He realizes that society from time to time will always develop in the world with the times, of course he does not accept that the door to ijtiḥād is closed. Abduh said the door to ijtiḥād must always be open.<sup>10</sup> Furthermore, according to 'Abduh, for people who have met the requirements ijtiḥād in the field Muāmalah and social laws can be based directly on the Koran and hadith and adapted to the times. Meanwhile, worship does not require changes according to the times.

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<sup>8</sup> Abd al-Wahhab al-Khalāf, *Mashādir al-Tasyrī' al-Islāmi fīmā lā Nasha fīhi*, (Kuwait: Dār al-Qalam, 1993), h. 35.

<sup>9</sup> Djazuli, *Fiqh Science, Exploration, Development and Application of Islamic Law*, (Jakarta: Kencana Prenada Media Group, 2005), p. 72.

<sup>10</sup> Harun Nasution, *Rational Islam*, (Bandung: PT Mizan, 1995), h. 198.

The blind faith of previous ulama does not need to be maintained, Abduh even fought against it. Because of taqlid in the field Muamalah stops thoughts and minds from rusting. Taklid hinders the development of the Arabic language, the development of the structure of Islamic society, the Islamic education system, and so on. His opinion about the opening of the door of ijtiḥad is not only on the heart but on the mind. The Qur'an gives a high position to reason. Islam, according to him is a rational religion.

Not being confined to classical jurisprudence books, and not rejecting new legal ijtiḥad in adapting to social change is a type of this modernist view. This is based on a rule from what Umar bin Khaththab said when he visited the governor Muawiyah bin Abi Sofyan. He is different from the appearance of previous judges and governors. He looked luxurious, so Umar questioned this, Muawiyah answered: I'm in a territory that needs this kind of look. So Umar replied: I do not encourage you to do so nor forbid you.<sup>11</sup>

The adoption of Islamic law into state law due to adapting to social changes is often carried out by Islamic countries. For example, mandatory wills are stated in law, but Egyptian legislation is different from Tunisian legislation. Mandatory will only apply to grandchildren (second-degree descendants) and do not apply to lower degrees (levels).<sup>12</sup> Yusuf al-Qardhawi considers that the will of al-Wajibah in Egyptian law is based on a combination of selective ijtiḥad and creative ijtiḥad. In terms of names and links to the opinions of early scholars, it is selective. Meanwhile, in terms of content, it is creative ijtiḥad with arguments *maslahah mursalah*.<sup>13</sup>

The study of the relationship between law and social change includes two dimensions, namely the dimension of the influence of social change on law and the dimension of the influence (change) of law on social change. Social changes clearly influence and bring changes to the law, because if social changes occur, then society's needs will also change both qualitatively and quantitatively, including legal needs will also change, both in positive legal rules and legal institutions. However, the process of adapting the law to social change is usually slow. Often the law has to wait for the process of social change to reach a certain stage of crystallization and stability before it can give rise to new legal rules, institutions and institutions. This fact gives rise to the expression "the law staggers along with events"

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<sup>11</sup> Abd al-Aziz Muhammad Azam, *Qawaid al-Fiqih al-Islami*, (Egypt: ar-Risalah ad-Dauliyah, 1999), p. 295. See Shihab ad-Diin Abu Abbas Ahmad bin Idris al-Qarafi, *al-Ihkam fi Tamyiz al-Fatawa 'an al-Ahkam wa Tashrifat al-Qadhi wa al-Imam*, (Mesir: Maktabah al-Mathnu'ah al-Islamiyah, tth), Jilid 4, h. 103.

<sup>12</sup> Noel J. Coulson, *Succession in the Muslim Family*, (New York: Cabridge University Press, 1971), h. 139.

<sup>13</sup> Yusuf Al-Qardawi, *Ijtiḥad in Islamic Sharia*, translated by Ahmad Syatahri, (Jakarta: Bulan Bintang, 1987), p. 174.

(the law lags behind the facts). But if social change occurs quickly and causes social upheaval, it is the law that will be directly shaken.<sup>14</sup>

In modern times, Islam is truly under very severe tests, especially epistemological tests. The science of ushul fiqh, which should be able to act as a standard methodology for all Islamic intellectual thought, played a key role in building Indonesian civilization in the 20th century. This role has experienced a decline in the course of its development, and even ushul fiqh has tended to be narrowed down to its scope of work only limited to Islamic law. Therefore, it is natural that a stigma appears that the decline of Islamic fiqh is due to (although it still needs proof) the lack of relevance of the theoretical tools of ushul fiqh science for solving contemporary problems. If we agree with this then it is actually a big job for Islamic thinkers to formulate and provide intellectual solutions to these problems so that the stigma does not become a reality. The way to do this is by re-reading classical texts and then reflecting on current conditions by paying attention to the substance of the meaning contained in the text and looking at the context of the text itself with the social reality that surrounds it.

On several occasions, the author took part in bahtsul masail held by the MUI Barito Kuala Regency, South Kalimantan, bahtsul masail held by fiqh study groups on social media, regarding the legal conflict of triple talaq outside the court, which was then submitted to the religious court, while the judge only imposed one raj'i talaq on the case.

Muhammad Irfan Husaeni, a Religious Court judge in his article wrote: Never mind ordinary people, artists and students. In the religious judiciary, there are still some dichotomizing apparatuses religious divorce and divorce is according to state law, even a religious court judge seemed doubtful when the applicant argued that his wife had mentally divorced him. "Yeah, right religiously "It is indeed legal because Indonesia adheres to the Syafii Madzhab, but according to the law it is not yet legal," the judge answered. The speaker even heard news that in a technical guidance session there was a judge who asked the resource person, "Is it legal for a husband to divorce his wife from outside the court?" asked the participant. The source answered, "If you are still in doubt, just step down as a judge," answered the source loudly.<sup>15</sup>

Muhammad Irfan Husnaeni's statement shows that on the part of the Religious Court, the issue as discussed has been considered resolved, but for the general public this is not the case. Still discussing Muhammad Irfan Husaeni's statement, that based on Article 39 paragraph (1) of the Marriage Law, divorce can only be carried out in front of a Court Session after the court concerned has tried and failed

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<sup>14</sup> Bernard Arief Sidharta, *Reflections on the Structure of Legal Science*, (Bandung: CV. Mandar Maju, 2000), p. 25-26.

<sup>15</sup> The Petitioner Argues That He Had Triple Talaq Outside Court, What is the Judge's Attitude? Muh. Irfan Husaeni, <http://irfanhusaeni.blogspot.co.id>, accessed 2 May 2017.

to reconcile the two parties. So divorce carried out outside of court has no legal force because it does not provide legal protection and justice to the wife.

Meanwhile, based on Article 114 of the Compilation of Islamic Law (KHI), the breakdown of marital ties due to divorce can be caused by a divorce from the husband or a lawsuit from the wife. Article 114 KHI states: "The dissolution of a marriage caused by divorce can occur due to divorce or based on a divorce lawsuit."

From this, it is clear that Muslims are subject to the regulations in Islamic law regarding divorce, which law is also regulated in the KHI. So, what is the position of Islamic law (KHI) relative to state law (positive law) in terms of divorce? Answering your question, from here we can see that the talak regulated in KHI originates from Islamic law and the implementation of KHI itself is confirmed based on Presidential Instruction Number 1 of 1991 concerning the Dissemination of KHI ("Inpres 1/1991").

Still related to this, in the preamble to Presidential Instruction 1/1991 it was stated that the Indonesian Ulemas at the Workshop held in Jakarta from 2 to 5 February 1988 had accepted three draft books on the Compilation of Islamic Law, namely Book I on Marriage Law, Book II on Inheritance Law, and Book III on Endowment Law, so that a Compilation of Islamic Law was created. Then, the KHI can be used by government agencies and communities who need it as a guide in resolving problems in the fields of marriage, inheritance and waqf.

Therefore, in the author's opinion, the regulations in Islamic law are in line with the regulations in positive law which regulate divorce, namely the regulations in the KHI. This is because KHI originates from Islamic law. However, the absence of legality in the form of proof of divorce (by not having to pronounce divorce in court) will indeed have an impact on marital status issues and other legal problems that may arise so that Muslims also need to submit to state law, namely positive law.

The role of religious courts in divorce cases is not solely as an administrative court or simply registering the occurrence of a divorce between two people who are married, marked by the issuance of a divorce certificate, but rather to provide justice, legal certainty and benefits to all parties so that they can receive protection through the judicial process in accordance with the provisions of the applicable legislation.

The requirement that divorce be carried out in front of a court is not only seen as a rule of state law, but also the law advice' because they are compatible, support each other and show the correct procedures for carrying out divorce according to Islamic Sharia. Talak which is carried out before a religious court session is an alternative to practicing Islamic Sharia which is correct and at the same time can end divorce habits that are not in accordance with Islamic Sharia such as only via electronic media such as SMS (short message send), writing on a piece of paper or other social media.

Dispensing divorce must be done in front of a religious court because the religious court is a protective power institution. Religious courts can play a role in providing lessons to the parties involved

in a lawsuit and religious courts can play a role in guaranteeing the rights of each party as a result of divorce, such as iddah maintenance, mut'ah, and child support until adulthood.

The court adheres to the principles of the KHI and other formal laws, while the local community and ulama adhere to traditionalist jurisprudence concepts in solving these problems so that there are differences in views of the litigants when they reconcile. The religious court with its authority will determine that the case falls under one raj'i divorce, which means there is still a chance to become husband and wife again during the wife's iddah period. Meanwhile, the people living in the surrounding area of the litigant party will judge that triple talaq has occurred, which has the legal consequence that the litigant party cannot reconcile. If you want to start a household again, the wife must remarry another man and must have been intimated like husband and wife, then divorced and have passed the iddah period. If the disputing parties continue to reconcile (based on the decision of the religious court), then the local community will react strongly, there could be expulsions and other actions that will certainly be detrimental to many parties.

For writers who work in religious courts, this problem occurs a lot, and most of the filing of cases in question is just a shortcut to avoid the traditionalist fiqh process which requires the wife to remarry someone else. This makes the public's trust in the courts regarding divorce issues less than complete, because it is considered to violate the provisions of the mu'tabarah school of jurisprudence which has long been the law in religion in society.

In this case, the author has different thoughts from Muhammad Irfan Husaeni, where the author considers that the triple talaq referred to in this discussion is not triple talaq which is pronounced at once in one place, but rather the normal occurrence of talaq. For example, a husband rejects his wife, then reconciles, after some time, the husband rejects his wife again, then they reconcile, and after a few months, the husband rejects his wife again, and wants to reconcile with his wife. This problem is known by ulama, community leaders and other members of the public. Of course, they don't want to bear the sin of allowing the husband and wife to reconcile even though the husband has already rejected three times. Allowing them to reconcile means they are allowing the couple to commit adultery, and it has become a custom that adultery that occurs in a village is considered to be a source of bad luck and the cause of the downfall of evil in that village.

As is understood, the majority of the Banjar people (South Kalimantan) adhere to the Syafii school of thought, so it can almost be said that it is very difficult to accept the contents of article 39 of the UUP, KHI and similar laws which conflict with the "yellow book" doctrine that they got from the ulama and master teachers whose truth they believe.

In the law in force in Indonesia which regulates marriage, the meaning of talak under the hand is not regulated and there is no recognition. The definition of talak according to Article 117 KHI is the husband's vow before the Religious Court session which is one of the reasons for the dissolution of the

marriage. Article 117 KHI states: "Divorce is the husband's vow before the Religious Court which is one of the reasons for the dissolution of the marriage, in the manner as intended in Articles 129, 130 and 131".

Strong legal pluralism refers to the fact that there is a plurality of legal orders in all groups of society which are considered to be of equal status, so that there is no hierarchy that shows one legal system is more dominant than another legal system. For this, the theory of Living Law from Eugene Ehrlich who stated that in every society there are living legal rules (living law) of the normative order, which is usually contrasted or opposed to the state legal system falls into the category of strong legal pluralism (strong legal pluralism).<sup>16</sup>

Incorporating shadz laws into statutory regulations is something that must be carefully considered because the effect of legal disharmony in society can cause social friction. As the author stated above, the opinion that triple talak imposed outside the religious court is valid and falls under triple talaq according to the version of fiqh that is widely adhered to by Indonesian society, however, by entering a triple talak law outside the religious court that is not recognized as talak, it creates turmoil in lower society - even though they have not yet moved to test the materiality of this article.

For people who already follow the fiqh doctrine which states that talaq is legal even if it is pronounced outside a religious court, this is more fulfilling a sense of justice. Apart from not being in conflict with the majority jurisprudence, it also did not conflict with the law in force at that time. However, another thing happens if the religious court decides that the divorce imposed by the husband outside the religious court session is not recognized as divorce, then this creates legal uncertainty again for the parties involved in the case. Implementing the judge's decision which allows reconciliation during the wife's iddah period is an option, but on the other hand, the law in force in society does not allow the person concerned to carry it out.

Religious court judges should consider the legal conditions in the community itself. When the litigant lives in an environment that adheres to the Syafi'i school of thought, then it is appropriate for his decision to be adjusted to the conditions of jurisprudence in that society. When making decisions, judges have autonomy in every case they handle. As the explanation of article 4 of Law Number 4 of 2004 states:

*Freedom in exercising judicial authority is not absolute because the judge's job is to uphold law and justice based on Pancasila so that his decisions reflect the sense of justice of the Indonesian people.*

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<sup>16</sup> Hooker, M. B., *Legal Pluralism: Introduction to Colonial and Neo-Colonial Law*, (London: Oxford University Press, 1975), p. 3. See Rasyid Rizani, *Sociology of Law in the Views of Eugen Ehrlich*, <http://www.pabanjarmasin.go.id>, accessed 12 September 2017.

How do people feel fair, when their religious interests are not considered in the decision. Although the judge is bound by the provisions of the law, can't the judge do it? against the law namely, if existing legislation is contrary to the public interest, decency, civilization, and humanity, judges are free and authorized to take action against the law namely making a decision that is contrary to the article of the law in question. As an example of the case, the Supreme Court decision Number 275/K/Pid/1983 (15-12-1983) which is based on Article 244 of the Criminal Procedure Code, cannot be appealed against an acquittal decision. However, in reality, the Supreme Court granted the appeal filed by the Public Prosecutor against the District Court's decision.<sup>17</sup>

Likewise, it is more acceptable if the judge carries out *contra legem* in triple talaq cases outside the religious court, apart from being the judge's right, sociological legal considerations and legal certainty can also be achieved simultaneously. The author often takes part in divorce trials, and the panel of judges never asks whether triple talaq has really occurred as he claims in his lawsuit/petition for divorce. Then the decision given by the judge gave rise to new legal problems in society.

It can be said that almost the entire society that makes teachers and scholars role models in various legal matters will reject the sound of the judge's ruling on the issue of not considering divorce pronounced outside the religious court. In fact, according to the author, the interested community should be able to file for a divorce decree on the party who has legally imposed triple talaq according to jurisprudence, but still gathers together and lives together. As can be done by annulment of marriage, or confirmation of marriage, the original is the consideration of the doctrine of jurisprudence.

## CONCLUSION

The theory of legal flexibility in its development cannot be denied by modernists, but is considered a violation of authority by traditionalists. Differences between scholars in accepting differences in *qiraah*, disagreements in determining the hadith used in determining the law, doubts in assessing the authenticity of the hadith, differences of opinion in understanding texts and interpretations, double meanings in pronunciations, contradictions between propositions, and so on. The theory of *ushul fiqh* is being debated, some think that this theory is standard, so they are traditionalists who close the door to *ijtihad*, others say that *ushul fiqh* is still developing, so they are modernists and carry out *ijtihad* in all aspects of law.

The application of the results of collective *ijtihad* in a regulation that binds Indonesian society, in the form of a *syadz* (rare) opinion, creates legal turmoil in society. Judges who do not consider divorce pronounced by a husband outside the court on the grounds that it makes divorce difficult, face challenges from the social community who choose to follow the opinion of the majority of *ulama*. The application

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<sup>17</sup> M. Yahya Harahap, *Civil Procedure Law*, (Jakarta: Sinar Graphics, 2013), 13th cet, p. 58-856.

of the articles in the UUP and KHI must be reconsidered by the judge taking into account the social conditions of the community where the litigant lives. The judge has the right to decide with against the law to achieve legal justice and legal certainty in society.

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