

NORMATIVE CRITICISM OF ARTICLE 115 OF THE KHI ON DIVORCE BEFORE A JUDGE FROM A CLASSICAL FIQH PERSPECTIVE

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Abstract: This study aims to analyze and critique Article 115 of the Compilation of Islamic Law (KHI) concerning divorce before a judge and to examine its compatibility with the principles of classical *fiqh*. This research employs a descriptive qualitative design based on bibliographic and documentary sources, using a normative juridical and comparative approach. The results of the study indicate that classical *fiqh* positions divorce as the absolute authority of the legitimate husband without the need for judicial intervention, while the KHI limits this practice by transforming it into a judicial process for the protection of the wife and legal certainty. As a solution, this study proposes a compromise model. If Article 115 of the Compilation of Islamic Law (KHI) is to be retained, it should be reviewed to ensure its consistency with the principles of classical *fiqh*. Harmonization can be achieved by combining material and formal validity. The pillars and conditions of divorce still refer to the provisions of classical *fiqh*, but in positive law, the vow of divorce must absolutely be pronounced in a court hearing as a formal requirement for it to have binding legal force and consequences. This is crucial to prevent legal dualism and protect the civil rights of the wife after divorce.

Keywords: Compilation of Islamic Law (KHI); classical *fiqh*; divorce; Islamic family law; judicial intervention

Abstrak: Penelitian ini bertujuan untuk menganalisa dan mengkritisi Pasal 115 Kompilasi Hukum Islam (KHI) tentang talak di depan hakim, serta meninjau kesesuaiannya dengan paradigma fikih klasik. Penelitian ini menggunakan desain penelitian kualitatif deskriptif yang didasarkan pada sumber-sumber kepustakaan dan dokumen, dengan menggunakan pendekatan yuridis normatif dan komparatif. Hasil kajian menunjukkan bahwa fikih klasik memposisikan talak sebagai otoritas mutlak suami yang sah tanpa perlu intervensi peradilan, sementara KHI membatasi praktik ini dengan mentransformasikannya ke dalam proses yudisial demi perlindungan istri dan kepastian hukum. Sebagai solusi, penelitian ini menawarkan model kompromi. Apabila Pasal 115 Kompilasi Hukum Islam (KHI) tetap dipertahankan, ketentuan tersebut perlu dikaji ulang agar tidak bertentangan dengan ketentuan fikih klasik. Harmonisasi dapat diwujudkan dengan memadukan keabsahan materiil dan formil. Rukun dan syarat talak tetap merujuk pada ketentuan fikih klasik, namun dalam perspektif hukum positif, ikrar talak wajib diucapkan di hadapan sidang pengadilan sebagai syarat formil agar memiliki kekuatan hukum dan akibat hukum yang mengikat. Ketentuan ini sangat penting untuk mencegah terjadinya dualisme hukum sekaligus memberikan perlindungan terhadap hak-hak keperdataan istri setelah perceraian.

Kata kunci: Kompilasi Hukum Islam (KHI); fikih klasik; talak; hukum keluarga Islam; intervensi peradilan

Introduction

Marriage in Islam is a sacred institution intended to achieve peace, love, and the continuation of family life. However, the dynamics of married life often face challenges that can lead to divorce, a phenomenon recognized and regulated by Islamic law, even though it is fundamentally frowned upon.¹ Divorce, as one of the mechanisms for ending a marriage, has been regulated in detail in the Quran and the *Sunnah* of the Prophet Muhammad PBUH, and has been systematically codified in the literature of classical *fiqh* (the classical tradition of Islamic jurisprudence), which emphasizes that marriage is a sacred contract and an act of worship.² In the Islamic jurisprudence tradition, divorce (*talak*) is understood as the full right of the husband which can be imposed directly as long as it fulfills the pillars and conditions set by the *ulama*, without requiring the intermediary of a judge or judicial institution.³ However, the judicialization of modern Islamic family law has changed this paradigm, where although divorce remains the husband's right, the process of filing for divorce now requires bureaucratic and administrative procedures through religious courts.⁴ Doctrinally, classical *fiqh* holds that a husband has the privilege of terminating a marriage through divorce, even unilaterally, as long as it is pronounced consciously and without coercion. However, it is important to understand that divorce is considered a permissible act that is most hated by Allah among

permissible acts, so divorce should be a last resort after attempts at mediation and reconciliation have failed.⁵ The granting of exclusive divorce rights to the husband in classical *fiqh* is philosophically based on the concept of *qiwamah* (responsibility for household leadership) and the absolute financial burden borne by the husband, such as the obligation to pay dowry, maintenance, and post-divorce *mut'ah* (a type of compensation). This is also intended to prevent the disclosure of marital secrets to the public if the divorce process must go through the courts.

Classical *fiqh* stipulates specific conditions for a husband who has the right to issue a divorce namely, he must be of sound mind, mature, and free.⁶ In social practice, the uncontrolled freedom of divorce often places women in an unequal position compared to men. This unilateral right is vulnerable to abuse by husbands as a means to threaten and control their wives. As a result, women who feel threatened may choose to comply with all of their husbands' irrational demands to avoid divorce.⁷ Another negative implication is the imposition of three divorces at once, which the husband then regrets because he cannot take his wife back.⁸

Responding to this sociological reality, the development of Islamic family law in Indonesia demonstrates a significant paradigm shift. The Compilation of KHI, specifically Article 115, stipulates that divorce can only be obtained before a Religious Court after conciliation efforts have been made. This provision substantially limits the traditional practice of divorce as embodied in classical *fiqh*

¹ Nurhayati Ali Hasan, "Efektifitas Izin Atasan Dalam Perceraian Aparatur Sipil Negara Di Wilayah Hukum Pengadilan Agama Limboto," *Jurnal Ilmiah AL-Jauhari: Jurnal Studi Islam Dan Interdisipliner* 3, no. 2 (2019): 70.

² Muhammad Annaufal and Akhmad Husaini, "Nafkah Anak Bagi Pasangan Kawin Siri Menurut Mazhab Syafi'i (Studi Putusan Pengadilan Agama No. 0882/Pdt.G/2020/PA.Mlg Dan No. 289/Pdt.G/2019/PA.Pbm)," *Cendekia: Jurnal Ilmu Pengetahuan* 5, no. 4 (2025).

³ Yulisa Fitri, Jamaluddin, and Faisal, "Analisis Yuridis Perceraian Di Luar Pengadilan Menurut Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Dan Menurut Pendapat Ahli Fikih Islam," *Suloh: Jurnal Fakultas Hukum Universitas Malikussaleh* 7, no. 1 (2019): 29, <https://doi.org/https://doi.org/10.29103/sjp.v7i1.1980>.

⁴ Mohamad Abdun Nasir and Heru Sunardi, "Yudisialisasi Dan Limitasi Hukum Islam: Cerai Talak Di Pengadilan Agama Di Lombok," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 11, no. 2 (2020): 57–58, <https://doi.org/https://doi.org/10.14421/ahwal.2018.11205>.

⁵ Azhar Fikri Izzuddin and Teguh Dwi Cahyadi, "Krisis Pernikahan Di Era Digital: Studi Netnografi Tiktok Tentang Generasi Z Dan Relevansinya Terhadap Hukum Keluarga Islam," *CENDEKIA: Jurnal Ilmu Pengetahuan* 5, no. 3 (2025): 858–68.

⁶ Fitri, Jamaluddin, and Faisal, "Analisis Yuridis Perceraian Di Luar Pengadilan Menurut Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Dan Menurut Pendapat Ahli Fikih Islam."

⁷ Harry Yuniardi, Laras Shesa, and Hamzah Abed Alkarim Hammad, "Criticism of Taklik Talak as an Effort to Protect Women's Rights in Indonesian Marriage Law," *MADANIA: JURNAL KAJIAN KEISLAMAN* 28, no. 2 (2024): 203–14, <https://doi.org/http://dx.doi.org/10.29300/madania.v28i2.5924>.

⁸ Syaiful Annas, "Rekontekstualisasi Penjatuan Talak Tiga Dalam Bingkai Negara Indonesia," *Al-Ushroh: Jurnal Hukum Keluarga Islam*, no. 1 (2023): 13.

and shifts some of the authority to issue divorce from the husband's private sphere to the public sphere through judicial mechanisms.⁹

This judicialization of the KHI aligns with the spirit of Islamic legal reform. As emphasized in the study by Yuniardi et al. (2024), the reform of Islamic family law essentially serves as an effort to unify marriage regulations, improve women's status in domestic relationships, and respond to the excesses of social change resulting from modern developments. Improving women's status in this context is inseparable from efforts to guarantee their rights and provide protection from abuse by their husbands.¹⁰ Therefore, state intervention through the KHI is present to ensure legal certainty and take over the protection function to break the chain of inequality in patriarchal power relations.¹¹

The fundamental difference between the concept of divorce in classical Islamic jurisprudence and the provisions of the KHI is the core of this study. Classical *fiqh* asserts that divorce is valid only upon the husband's pronouncement, even if not witnessed by a judge.¹² While the KHI stipulates that the judicial process is the only legal means of divorce under state law, this raises questions about the compatibility of Article 115 of the KHI with the normative framework of classical *fiqh*, and how the gap between sharia authority and state legal provisions can be bridged.¹³

Method

This research is a normative legal study (*library research*) developed within a qualitative framework. The approaches employed are juridical-normative

and comparative. The juridical-normative approach focuses on examining the legal construction of divorce in classical *fiqh* and the provisions of Article 115 of the KHI. Meanwhile, the comparative approach is used to analyze points of intersection and differences between the two legal systems, particularly regarding the authority to issue divorce and the role of judges.

The legal materials in this research were obtained through literature studies classified into three categories, namely: [1] Primary Legal Materials: Includes authoritative sources of Islamic law and positive law, namely the Quran, the Prophet's hadith, the official text of the KHI, and classical *fiqh* books. [2] Secondary Legal Materials: Consisting of supporting literature in the form of Islamic family law books, national and international scientific journal articles, academic works, and previous research relevant to the issue of divorce and the authority of judges. [3] Tertiary Legal Materials: Includes explanatory reference materials such as encyclopedias, legal terminology dictionaries, and other supporting scientific publications that outline key research concepts.

The legal material collection technique was conducted through literature searches and document studies. All legal materials were systematically sorted and recorded, both from classical *fiqh* arguments and positive legal regulations. Subsequently, analysis was conducted using qualitative-descriptive methods and content analysis. This analysis process included evaluating the substance of the text, interpreting the legal meaning, and comparing the views between classical *fiqh* and the provisions of Article 115 of the KHI. Through this normative-comparative analysis, this research was oriented towards assessing fundamental differences and identifying potential gaps for harmonization between the two legal constructs.

Result and Discussions

Understanding the differences between classical *fiqh* and the KHI is key to analyzing them. Both are distinct legal systems, both in terms of their sources, nature, and objectives.

⁹ Amiur Nuruddin and Azhari Akmal Tarigan, *Hukum Perdata Islam Di Indonesia: Studi Kritis Perkembangan Hukum Islam Dari Fikih, UU No 1/1974 Sampai KHI*. (Jakarta: Kencana, 2004).

¹⁰ Yuniardi, Shesa, and Hammad, "Criticism of Taklik Talak as an Effort to Protect Women's Rights in Indonesian Marriage Law."

¹¹ Abdul Manan, *Aneka Masalah Hukum Perdata Islam Di Indonesia* (Jakarta: Kencana, 2006).

¹² Wahbah Az-Zuhaili, "Fiqh Islam Wa Adillatuhu, Terj," Abdul Hayyie Al-Kattani, Dkk, Jakarta: Gema Insani, 2011.

¹³ Muhammad Daud Ali, *Hukum Islam Dan Peradilan Agama (Kumpulan Tulisan)* (Jakarta: RajaGrafindo Persada, 1997).

Classical *fiqh* (Islamic Jurisprudence)

Classical *fiqh* is the science of Islamic sharia laws extracted from primary sources, such as the Quran, *Sunnah*, *Ijmak*, and *qiyas* through the process of *ijtihad* (reasoning) by *ulama*.¹⁴ *Fiqh* is not a law created by the state, but rather the result of human understanding of God's revelation. Therefore, *fiqh* is subjective, dynamic, and not legally binding on the state.

For example, in the Shafi'i school of thought, divorce (*talak*) is the husband's absolute right. However, in classical *fiqh*, there is also a mechanism for a wife to sue for divorce (*khuluk*), which has a different procedure and does not always require court intervention. Classical *fiqh* provides various options, but no state institution enforces their implementation.¹⁵ Non-binding: Opinions in *fiqh* are advisory and do not have the power of coercion from the state. The existence of differences of opinion (*khilafiyah*) among the schools of thought (such as Hanafi, Maliki, Shafi'i, and Hanbali) is common and recognized. Focus on the Individual: *Fiqh* focuses more on the personal obligations of a Muslim (*mukallaf*) and his relationship with God, rather than a uniform legal framework for the entire community. Classical *fiqh* views divorce as a personal right of the husband, which can be pronounced at any time and place, provided that the conditions and pillars are met. Its validity is determined by substantive elements, namely the wording of the statement, intention, and legal capacity, without requiring state formalities.

Positive Law

Positive law is a set of legal norms and rules created and enforced by the state or an authorized institution. Unlike classical *fiqh*, positive law has coercive power and is universally binding on all citizens. Its purpose is to create legal certainty, order, and justice in society. It is binding: Positive law is

regulated by statutes, regulations, or government decrees. As explained by M. Daud Ali, positive law is a set of norms and rules created and enforced by the state or an authorized institution. He clearly emphasized the fundamental difference between sharia or *fiqh* and positive law. Unlike *fiqh*, whose obedience is highly dependent on individual faith, positive law has coercive power and is universally binding on all citizens. Therefore, when Islamic law is transformed into positive law as in the KHI it gains state legitimacy. This transformation ultimately aims to create legal certainty, order, and justice in society.¹⁶

Violations of this law will be subject to sanctions. Collective Focus: Positive law aims to regulate social interactions and create a coherent order within a country. The KHI is a clear example of the transformation of *fiqh* into positive law in Indonesia. The KHI adopts *fiqh* principles but refines them and makes them binding.

Aspect	Classical <i>Fiqh</i>	Positive Law
Source of Power	<i>Ijtihad</i> Ulama from the Quran, Hadith, <i>Ijmak</i> , and <i>Qiyas</i>	State (Legislative & Executive)
Characteristics	Non-binding, dynamic, diverse	Binding, uniform, static
Objective	Understand sharia, individual obligations	Creating legal certainty and social order
Product	Various books of the <i>Madhab</i> (<i>khilafiyah</i>)	Laws, Regulations, KHI

The Authority to Issue Divorce and Internal Control Mechanisms in Classical *Fiqh*

Doctrinally, classical *fiqh* literature constructs divorce (*talak*) as the absolute authority and privilege of the husband, which operates fully in the private sphere.¹⁷ Terminologically, classical Islamic jurists

¹⁴ Ali Jum'ah, *Sejarah Ushul Fikih: Histori Ilmu Ushul Fikih Dari Masa Nabi Hingga Sekarang*, ed. Adi Maftuhin (Depok: Keira Publishing, 2017).

¹⁵ Satria Effendi, *Problematika Hukum Keluarga Islam Kontemporer* (Jakarta: Kencana, 2018).

¹⁶ Muhammad Daud Ali, *Hukum Islam: Pengantar Ilmu Hukum Dan Tata Hukum Islam Di Indonesia*. (Jakarta: PT RajaGrafindo Persada, 2004).

¹⁷ Ibn Qudamah Al-Maqdisi, *Al-Mughnī* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1994).

such as Sayyid Sabiq define *talaq* purely as the severance of the marital bond or the dissolution of the marital relationship. Similarly, Abdur Rahman al-Jaziri asserted that the essence of *talak* is the termination of the marital bond through specific language, which automatically renders it unlawful for a husband and wife to mingle.¹⁸

This epistemological construction is based on the paradigm that the husband is the holder of the leadership of the household (*qiwwamah*) and is the entity that bears the absolute financial burden, both before and after divorce (dowry, *iddah* maintenance, and *mut'ah*).¹⁹ Therefore, the validity of divorce in classical *fiqh* is purely determined by the fulfillment of the substantive pillars (husband, wife, wording, and intention) without requiring intervention, presence, or ratification from state judicial institutions.²⁰

However, methodologically, classical *fiqh* does not allow the right of divorce to operate excessively without control. There are very strict internal restrictions (material requirements), requiring the husband to have the capacity to act (*mukallaf*), that is, to be of sound mind, mature, and act of his own free will without coercion.²¹ Actually, the Quran also explicitly commands the presence of fair witnesses when the divorce or reconciliation process is carried out (QS *At-Thalâq* [65]: 2).²² However, in the interpretation of classical *fiqh*, this command to testify is often reduced to a mere moral recommendation (*sunnah*), not an absolute requirement for validity. Meanwhile, the supremacy of the judge (*qadi*) or state intervention is only strictly recognized as legitimate in the realm of forced separation (*fasakh* or *tafriq*), namely when an emergency situation threatens the safety and essential rights of the wife, such as the inability to

provide for her family, physical violence (*dharar*), or the disappearance of her husband.²³

Epistemological Reconstruction: Judicialization of Divorce as a Manifestation of *Siyasah Syar'iyah* and *Sadd al-Dzari'ah*

In contrast to the procedural flexibility of classical *fiqh*, Indonesian positive law through Article 115 of the KHI takes a radical judicialization step: "Divorce can only be carried out before a Religious Court hearing."²⁴ This paradigm shift from the private to the public sphere should not be read simplistically as the state's defiance of the text of sharia, but rather as a form of maturity of institutional *ijtihad* (*siyasah syar'iyah*) in the modern era.²⁵ This step is a reconstruction of legal epistemology that shifts from deductive-textual reasoning to teleological reasoning that is based on the principle: "*Tasharruf al-imam 'ala al-ra'iyah manuthun bi al-maslahah*" (Government policy towards its people must be controlled by the public interest).²⁶ This judicialization step is actually a manifestation of what Maimun (2013) calls "ijtihad in the form of modern legislation." The implementation of *ijtihad* in the contemporary era is no longer sufficient to rely solely on the fatwas of individual *ulama*, but rather requires the involvement of the authorities (government) so that legal thinking can be implemented with certainty.²⁷

This construction aligns closely with Najmuddin al-Thufi's theory of the supremacy of public interest, which asserts that when there is a conflict between the literal implementation of a text and the public interest, maintaining the public interest must be

¹⁸ Linda Azizah, "Analisis Perceraian Dalam Kompilasi Hukum Islam," *Al-Adalah* 10, no. 4 (2012): 417.

¹⁹ Wahbah Az-Zuhaili, *Al-Fiqh Al-Islâmî Wa Adillatuh* (Damaskus: Dar Al-Fikr, 1989).

²⁰ Ali, *Hukum Islam Dan Peradilan Agama (Kumpulan Tulisan)*.

²¹ Effendi, *Problematika Hukum Keluarga Islam Kontemporer*.

²² Fitri, Jamaluddin, and Faisal, "Analisis Yuridis Perceraian Di Luar Pengadilan Menurut Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Dan Menurut Pendapat Ahli Fikih Islam."

²³ An-Nawawî and Yahyâ bin Syaraf., *Minhâj Al-Thâlibîn Wa 'Umdat Al-Muftîn* (Beirut: Dâr al-Fikr, 2005), 214; Az-Zuhaili, *Al-Fiqh Al-Islâmî Wa Adillatuh*; Al-Maqdisi, *Al-Mughnî*.

²⁴ Muhammad Jalaluddin, Ahmad Jalaluddin, and Abdullah Affif, "Implementasi Pasal 115 Kompilasi Hukum Islam Perceraian Hanya Dapat Dilakukan Di Depan Sidang Pengadilan Agama," *Millatuna: Jurnal Studi Islam* 13 (2019), <https://doi.org/10.33752/mjsi.v1i03.6485>.

²⁵ Nasir and Sunardi, "Yudisialisasi Dan Limitasi Hukum Islam: Cerai Talak Di Pengadilan Agama Di Lombok."

²⁶ Izzudidin bin 'Abdussalam, *Qawa'id Al-Ahkam Fi Mashalih Al-Anam* (Beirut: Dar al-kutub al-ilmiyyah, 1999).

²⁷ Maimun, "Reorientasi Ijtihad Kontemporer: Analisis Hukum Islam," *AL-ADALAH* 11, no. 2 (2013): 161.

prioritized. In this context, prioritizing orderly judicial administration to protect women's rights after divorce is the highest form of public interest that must be upheld over maintaining the husband's private freedom, which could potentially lead to injustice.

State intervention is absolutely necessary because the reality of legal sociology proves that the freedom to divorce outside the court (illegal divorce) is prone to triggering structural power relations imbalances.²⁸ This practice is often misused as an instrument of repression to control, suppress, and exploit the weak bargaining position of women.²⁹ As Yuniardi et al. (2024) emphasize, the reform of Islamic family law in Indonesia is essentially a social engineering instrument to respond to the destructive excesses of modern developments and guarantee the protection of women's rights from arbitrary treatment. Therefore, the obligation to appear in a Religious Court serves as a *sadd al-dzari'ah* (blocking the path to destruction); the state institutionalizes a protective function to ensure the realization of justice (*'adalah*) and the fulfillment of the civil rights of wives, which are often alienated in the practice of *talak* (divorce) under the hand.³⁰

Global Contextualization: The Judicialization of Divorce Practices in Contemporary Muslim Countries

When viewed within the context of comparative Islamic family law, the provisions of Article 115 of the KHI are not an anomaly. The judicialization of divorce is a global trend adopted by the majority of contemporary Muslim countries to recontextualize classical *fiqh* within the framework of the modern rule of law.³¹

Countries such as Morocco through *Mudawwanah al-Usrah* (2004), Egypt through the Family Law Act (No. 1 of 2000), to Malaysia through the Islamic Family (Federal Territory) Act 1984, all require that legally valid *talak* in the country must be vowed or at least registered and ratified through the Sharia Court.³² This pattern of legal unification in various Islamic jurisdictions confirms that the administrative order of marriage is no longer merely a private-moral matter, but rather a public policy matter concerning social stability, the protection of women (*hifdz al-nafs* and *hifdz al-'irdh*), and the guarantee of the survival of children (*hifdz al-nasl*).

Critical Review: Unraveling the Tensions of Classical *Fiqh* Texts through the Principles of Change of 'Illat

In providing normative criticism, academic discourse must go beyond superficial conclusions that merely state that the KHI "deviates" from classical texts.³³ The transformation of the divorce procedure from oral-private to judicial determination can be solidly justified through the fundamental legal methodology theory: "*al-hukmu yaduru ma'a 'illatihi wujudan wa 'adaman*" (The law revolves with its cause; its existence depends on the existence of its cause).³⁴ The rationale for issuing divorce privately to the husband is that men are assumed to be more rational and to prevent the disgrace of the household from spreading. However, in empirical reality, this rationality has changed. Husbands often issue divorces arbitrarily in a fit of emotion, which

²⁸ Annas, "Rekontekstualisasi Penjatuan Talak Tiga Dalam Bingkai Negara Indonesia." *Al-Usroh: Jurnal Hukum Keluarga Islam*.

²⁹ Yuniardi, Shesa, and Hammad, "Criticism of Taklik Talak as an Effort to Protect Women's Rights in Indonesian Marriage Law."

³⁰ Nuruddin and Tarigan, *Hukum Perdata Islam Di Indonesia: Studi Kritis Perkembangan Hukum Islam Dari Fikih, UU No 1/1974 Sampai KHI*.

³¹ Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*. (Amsterdam: Amsterdam University Press, 2010).

³² John Hursh, "Advancing Women's Rights Through Islamic Law: The Example of Morocco," *Berkeley Journal of Gender, Law & Justice* 27, no. 2 (2012): 278–80; Lama Abu-odeh, "Modernizing Muslim Family Law: The Case of Egypt Vanderbilt," *Journal of Transnational Law* 37, no. 4 (2004): 1085–90; Tamir Moustafa, "Islamic Law, Women's Rights, and Popular Legal Consciousness in Malaysia," *Law & Social Inquiry* 38, no. 1 (2013): 170–75; Tahir Mahmood, *Personal Law in Islamic Countries: History, Text and Comparative Analysis* (New Delhi: Academy of Law and Religion, 1987).

³³ Marpaung and Adly, "Peran Kompilasi Hukum Islam Sebagai Jembatan Antara Fiqih Klasik Dan Peradilan Modern," *Jurnal Hukum Islam* 15, no. 1 (2022): 88–90.

³⁴ Khoiruddin Nasution, "Status Hukum Talak Di Luar Pengadilan Agama," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 1, no. 1 (2008): 20–25.

causes significant harm to women and children. Because the beneficial benefits of divorce are lost and become harmful, the law must also change. Therefore, the state judicializes divorce (moves divorce to the courts) to restore these benefits.

In the formative era of classical *fiqh*, the ‘*illat*’ (rational reason) why divorce was valid to be pronounced anywhere without state apparatus was because the structure of society at that time was on a homogeneous communitarian scale, based on strong moral-religious sanctions, and did not yet have a massive judicial bureaucratic system.³⁵ However, in the modern era, the massive number of civil disputes and the vulnerability to economic neglect after divorce have fundamentally changed this ‘*illat*’.³⁶ The need for authentic legal proof (*bayyinah*) to prevent systemic injustice (*zulm*) requires the state to formalize the mandate of QS At-Thalâq [65]: 2.³⁷ The Religious Court is here to institutionalize the “fair witness” into state nomenclature, so that divorce can no longer be pronounced in a manipulative and clandestine manner.³⁸

Construction of the Harmonization Model: Separation of Material Validity (*Syar’i*) and Formal Requirements (State Law)

Resolving the normative tension between the doctrine of husband’s authority in *fiqh* and the centralization of state authority in KHI, this formulation offers the construction of a harmonization model built on a clear epistemological separation between sharia validity (material requirements) and administrative legal consequences (formal requirements).³⁹

From the dimension of *fiqh* (material), ontology and the pillars of divorce remain absolutely subject to

the provisions of sharia. The intention, the wording of the divorce, and the husband’s intellectual capacity remain the basic foundations that cannot be intervened, represented, or replaced by the judge.⁴⁰ However, in the architecture of Indonesia’s positive legal system, the declaration of divorce which is made illegally outside the courtroom (out-of-court divorce) is stated to have no administrative legal consequences (null and void in terms of constitutional law).⁴¹ This means that, even though in theological-jurisprudential debates the fallacy of this vow may be debated, the state does not *de jure* recognize the breaking of the marriage bond.⁴² As a legal consequence, the legal status of the husband-wife bond along with all the civil obligations that accompany it (such as inheritance rights and provision of maintenance) remains legally binding and can be enforced by the court.⁴³

Thus, the proposed harmonization is as follows: the pillars and conditions of divorce under classical *fiqh* remain the substantive requirements, whereas the pronouncement of divorce before a court constitutes the sole formal requirement for its legal validity.⁴⁴ This sharp distinction breaks down normative ambiguity, while affirming that the existence of Article 115 of the KHI is not a secular instrument to seize the husband’s right to *qiwamah*, but rather the only authoritative forum capable of transforming the will to divorce into a legal product that has certainty, state legality, and binding power (enforceability) to protect women’s civil rights in the public sphere.⁴⁵

⁴⁰ Al-Maqdisi, *Al-Mughni*.

⁴¹ Tahmid and Fautanu, “Unifikasi Hukum Perkawinan Islam Dalam Sistem Hukum Nasional,” *Jurnal Keluarga Indonesia* 5, no. 1 (2021): 72–75.

⁴² Baehaqi, “Integrasi Hukum Islam Dan Hukum Nasional: Studi Kasus Pembentukan Kompilasi Hukum Islam,” *Jurnal Hukum* 12, no. 3 (2021): 112–15.

⁴³ Sulthon, “Eksistensi Hukum Islam Dalam Sistem Hukum Positif Di Indonesia,” *Jurnal Ilmu Hukum* 14, no. 2 (2020): 55–58.

⁴⁴ Ahmad Rofiq, *Hukum Islam Di Indonesia* (Jakarta: RajaGrafindo Persada, 2015).

⁴⁵ Bustanul Arifin, *Pelembagaan Hukum Islam Di Indonesia: Akar Sejarah, Hambatan, Dan Prospeknya*. (Jakarta: Gema Insani Press, 1996).

³⁵ Yuniardi, Shesa, and Hammad, “Criticism of Taklik Talak as an Effort to Protect Women’s Rights in Indonesian Marriage Law.”

³⁶ Ali, *Hukum Islam Dan Peradilan Agama (Kumpulan Tulisan)*.

³⁷ Fitri, Jamaluddin, and Faisal, “Analisis Yuridis Perceraian Di Luar Pengadilan Menurut Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Dan Menurut Pendapat Ahli Fikih Islam.”

³⁸ Nasir and Sunardi, “Yudisialisasi Dan Limitasi Hukum Islam: Cerai Talak Di Pengadilan Agama Di Lombok.”

³⁹ Islamy, “Kompilasi Hukum Islam: Analisis Kritis Terhadap Kedudukan Dan Implementasinya Di Peradilan Agama,” *Jurnal Hukum Islam* 10, No. 2 (2019): 45–47. 10, no. 2 (2019): 45–47.

Conclusion

This study concludes that the dichotomy between classical *fiqh* and the provisions of Article 115 of the Compilation of Islamic Law (KHI) is not an absolute contradiction, but rather represents a paradigm shift in legal reasoning from deductive-textual to teleological-contextual. Essentially, Article 115 of the KHI substantially limits the scope for private expression of the husband's right to divorce, which was previously granted near-absolute freedom in classical Islamic jurisprudence. However, this limitation must be understood proportionally as a manifestation of valid constitutional law *ijtihad* (*siyasah syar'iyah*) based on the principle of *maqasid al-syari'ah* (the objectives of *sharia*).

Classical *fiqh* places divorce in the private sphere because it is based on the assumption and '*illat* (logical reason) that communitarian societies in the past were bound by very strong moral-religious sanctions, as well as the guarantee of the husband's rational maturity. In the modern era, sociological reality proves that '*illat* has undergone a fundamental shift. The massive abuse of unilateral divorce in clandestine (outside the court) has actually transformed this permissibility into a source of real harm, especially in the form of neglect of the rights of wives and children. Therefore, the judicialization of divorce through the KHI is an instrument of social engineering and a preventive measure (*sadd al-dzari'ah*) to ensure legal certainty, uphold structural justice, and provide absolute protection for women from exploitative power relations.

As a resolution to the normative tension between the authority of *sharia* and positive law, this study offers a compromise model by formulating a very clear demarcation line between the validity of *sharia* (material requirements) and the legality of state law (formal requirements). Materially, the ontology and pillars of divorce remain absolutely subject to *sharia* provisions. The existence of the word, intention, and capacity to act (*mukallaf*) are entirely the prerogative of the husband, whose essence cannot be created, represented, or taken over by the judge. In this construction, the court does not position itself as the "divorcing party,"

but rather as an authoritative forum to oversee and validate the fulfillment of these pillars.

However, from a formal-administrative perspective, state authorities have absolute authority to limit the scope for the actualization of these rights for the sake of public order. This means that a husband's vow of divorce will only have binding force (*quwwah mulzimah*), legality, and legal consequences if it is practiced exclusively in a courtroom in a transparent manner. With this limitation, a divorce issued illegally outside the courtroom (out-of-court divorce) even though it may be believed to be valid in the eyes of the religion based on theological debate and school of thought is *de jure* declared administratively null and void in the eyes of state law. As long as there is no *inkrach* (permanent) court decision, the marriage bond is considered intact along with all its accompanying civil obligations.

This two-layered, harmonized construction simultaneously maintains the purity of the pillars of Islamic jurisprudence as the theological foundation of marriage, while simultaneously adhering to the orderly procedures of modern legislation. By integrating *sharia* requirements into the judicial system, the state has successfully prevented the legal dualism that has created a gray area for wife abandonment. This state's legal certainty ensures that every divorce proceeding is followed by the enforced fulfillment of civil obligations, such as guaranteeing child custody (*hadhanah*), *iddah* (waiting for period), *mut'ah* (post-divorce financial compensation), and the division of joint assets, thus ensuring that the spirit of Islamic justice is truly embedded in the national legal system.

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