

Gender Justice in Talak: A Comparative Analysis Between Classical Fiqh and Positive Law in Indonesia

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Abstract

The phenomenon of inequality in marital relations, particularly in divorce practices, remains a significant issue in the study of family law in Indonesia. One crucial point is the concept of divorce, which shapes the distribution of power between husband and wife. This study examines the issue of gender inequality in the concept of divorce in classical Islamic jurisprudence (fiqh) and Indonesian positive law. The aim of the study is to analyze the fundamental differences between the right of divorce in both systems and to assess the resulting level of gender justice. Using a comparative literature study method, this study examines Islamic jurisprudence sources, laws and regulations, and empirical findings related to divorce practices. The results show that classical Islamic jurisprudence places the right of divorce as the husband's prerogative, creating an imbalance in power relations, while positive law provides a more equal space through divorce by divorce and divorce by lawsuit. However, the implementation of positive law still presents obstacles, such as the heavy burden of proof in divorce by lawsuit and weak guarantees of post-divorce support. The novelty of this study lies in the agreement on the reconstruction of the right of divorce, which emphasizes substantive equality between husband and wife. This proposal has the potential to strengthen women's protection and improve justice in the Indonesian family law system.

Keywords: Gender Justice; Divorce; Classical Jurisprudence; Positive Law; Reconstruction

Abstract

Fenomena ketidaksetaraan dalam relasi perkawinan, khususnya dalam praktik perceraian, masih menjadi isu penting dalam kajian hukum keluarga di Indonesia. Salah satu titik krusialnya adalah konsep talak yang membentuk distribusi kekuasaan antara suami dan istri. Penelitian ini membahas persoalan ketidaksetaraan gender dalam konsep talak dalam fikih klasik dan hukum positif Indonesia. Tujuan penelitian adalah menganalisis perbedaan mendasar antara hak talak dalam kedua sistem serta mengevaluasi tingkat keadilan gender yang dihasilkannya. Dengan menggunakan metode studi pustaka komparatif, penelitian ini menelaah sumber-sumber fikih, peraturan perundang-undangan, serta temuan empiris terkait praktik perceraian. Hasil penelitian menunjukkan bahwa fikih klasik menempatkan hak talak sebagai prerogatif suami sehingga menciptakan ketimpangan relasi kuasa, sementara hukum positif memberi ruang yang lebih setara melalui cerai talak dan cerai gugat. Namun implementasi hukum positif masih menyisakan

hambatan, seperti beban pembuktian yang berat dalam cerai gugat dan lemahnya kepatuhan terhadap nafkah pascacerai. Kebaruan penelitian ini terletak pada tawaran rekonstruksi hak talak yang menekankan kesetaraan substantif antara suami dan istri. Usulan ini berpotensi memperkuat perlindungan perempuan dan meningkatkan keadilan dalam sistem hukum keluarga Indonesia.

Kata Kunci: Keadilan Gender; Talak; Fikih Klasik; Hukum Positif; Rekonstruksi

INTRODUCTION

In classical times, divorce was caused by talaq carried out by the husband because in classical times, the right of talaq was absolutely given to the husband, while if the wife wanted to divorce, the wife could use khuluk on the condition of paying compensation, this caused the dominance of the case of the husband who divorced his wife. In contrast to the classical era which still uses classical fiqh law, in positive law the divorce cases that occur are more caused by divorce lawsuits as shown by data from the Central Statistics Agency which is lyricized in 2024 the total number of divorce cases that occurred was 399,921 cases, 308,956 cases of divorce lawsuits and 85,652 cases of divorce (Central Statistics Agency, 2024).

In classical jurisprudence, the majority of scholars affirm that talaq is the prerogative of the husband. Figures such as Wahbah az-Zuhaili, Sayyid Sabiq, al-Jaziry, Ibn Qudamah, and Imam Nawawi stated that talaq is in the hands of the husband because he is considered a qawwam or head of the household, a breadwinner, a dowry-giver, and a party who bears the material burden in marriage. Therefore, husbands are considered more capable and stable in considering divorce decisions than wives. Classical jurisprudence also explains that the wife does not have the right of direct talaq and can only end the marriage through the mechanism of khulu' or fasakh, so that the decision remains in the husband's control. Classical scholars argue that giving equal talaq rights to wives can disrupt the stability of the household because it opens up easier chances for divorce from both parties (Az-Zuhaili, 1989; Sabiq, 1990; al-Jaziri, 2003).

Abdullah Saeed, as well as Musdah Mulia criticized that the placement of the right of talaq is exclusive. On the contrary, modern thinkers such as Fazlur Rahman, Aminah Wadud, Fatima Mernissi, on husbands create gender inequality that is not in accordance with the modern social context. They consider that the construction of classical fiqh is greatly influenced by patriarchal culture at the time of its drafting, so that unilateral talaq rights are more of a cultural product than a final normative provision. Contemporary thinkers encourage a reinterpretation of the verse and concept of qawwamah to be more egalitarian, and affirm that husbands and wives should have an equal position in determining the continuation of marriage. Institutions such as Komnas Perempuan also highlight the negative impact of unilateral talaq on women, such as economic vulnerability and the burden of childcare, so that the reform of the concept of talaq is considered important to realize justice in the family (Rahman, 2001; Komnas Perempuan, 2023).

This research differs from previous research because it does not only discuss the concept of talaq in classical jurisprudence or in positive law separately, but examines the reconstruction of talaq rights through a gender justice approach by comparing the historical roots of classical jurisprudence and the implementation of positive law in Indonesia. Many previous studies have been limited to normative descriptions of talaq, for example, discussing the differences in talaq in fiqh and positive law, the right of divorce between husband and wife, or divorce procedures in court, but have not profoundly criticized the gender inequality inherent in the concept of classical

talaq and how positive law has not been fully able to address these inequalities in practice. This study looks at it from another perspective by showing that the reconstruction of the concept of talaq is not only needed at the normative legal level, but also at the practical level to answer the problem of injustice that women still experience in the modern divorce system.

The purpose of this study is to analyze in depth the concept of talaq rights in classical jurisprudence which places talaq as the husband's prerogative. This research also aims to describe and evaluate the concept of talaq in Indonesian positive law, including the mechanism of talaq divorce and divorce, along with its effectiveness in providing legal protection to both parties. In addition, this research is directed to formulate a more equitable reconstruction of talaq rights by considering the principle of gender equality, so that it can produce a model of understanding and application of talaq that is more relevant to the modern social context.

RESEARCH METHODS

This research is a literature study, which is carried out by collecting data sourced from relevant literature, then analyzed qualitatively descriptively by explaining the concept of talaq in classical jurisprudence and positive law and comparative analysis, namely comparing the concept of talaq in classical jurisprudence and positive law with the library research method and conceptual approach to assess the concept of talaq through perspective to answer the problem raised, namely gender justice in talaq between classical fiqh and positive law in Indonesia. This research is written descriptively and must provide a statement regarding the research methodology. This method is as much as possible to give an idea to the reader through the method used.

RESULTS AND DISCUSSION

The concept of talaq in classical jurisprudence and positive law the concept of classical jurisprudence

In Fiqh, Munakahat Talak is a right that is completely in the hands of the husband after the marriage takes place. A man has the right of triple talaq against his wife. In its application, talaq is considered valid if it is imposed in a state of consciousness, sound mind and puberty. By saying the talak (like Tallaqtuki), the marriage bond is immediately broken by the fall of one talaq between the husband and the wife. The right to impose talaq is inherent in the person who marries her. If the right to marry a woman is to be used as a wife, then the one who has the right to impose talaq is the man who marries her (F Rozi, 2014), but the wife also has the right to terminate the marriage relationship accompanied by the payment of 'iwadh, in the form of money or goods to the husband from the wife's side in return, (Suhendra, 2016). And applying for fasakh or annulment of marriage to the judge (Firdaferi, 2009).

Talak or divorce in Arabic is called "thalaq", which is from the words *إغلاق - طلاق - غلاق*, which means to divorce a woman from her husband. So, the word thalaq here means the same as divorce. In Indonesian, the word talak is also used which means divorce between husband and wife, the release of the marriage bond. The definition of talaq / divorce is divided into two parts, namely the meaning in terms of language and terms. Linguistically, thalaq comes from the word "itlaq" which means to let go or leave. Meanwhile, according to Zainuddin in the book "Fathul Mu'in", talaq in language means to release the bond. According to the term, Sayyid Sabiq defines talaq by releasing the bonds of marriage and ending the relationship between husband and wife. While in "Fathul

Mu“in” talaq means to release the marriage bond with the words that will be mentioned later. Al-Jaziri in his book "al-Fiqh al-Madzhab al-Arba“ah" gives the following definition of talaq: "Talak is the elimination of the marriage bond or reducing the release of the bond by using certain words" Muhammad Al-Jaziri further explained that what is meant by eliminating the marriage bond is to lift the marriage bond or contract so that after that it is no longer a halal wife for her husband, in this case if there is triple talaq. Then the purpose of reducing the release of the marriage bond is to reduce the right of talaq for the husband, in the event of talaq raj'i. If the husband mentally breaks his wife with one talaq, then there are still two more talaqs, if there are two, then there is one more, if there is three talaqs, then the talaq rights will be exhausted (Sabiq, 2010).

Based on this description, the author understands that the concept of talaq in classical fiqh is built on the assumption of leadership and economic responsibility of the husband in the household. However, the placement of the right of talaq that is completely in the hands of the husband shows that there is an unequal power relationship between husband and wife. Although classical jurisprudence provides khulu' and fasakh mechanisms for wives, these mechanisms remain limited and often burden women, both economically and psychologically. Therefore, the concept of talaq in classical jurisprudence tends to reflect more of the patriarchal social context of its time than the universal principle of gender justice.

Positive legal reconstructions

In resolving the case of talaq divorce in Indonesia, you must follow legal procedures as regulated by law, In positive law in Indonesia, talaq divorce is the husband's right to break the marital relationship, but in positive law, the wife is also given the right to break the marital bond, namely the right to sue. For a husband who has said that his wife's mentality with talaq three must still take the legal route and the talaq is only considered valid if the talaq is pronounced in front of the court at the Sharia Court, as mentioned in Article 39 paragraph (1) of Law Number 1 of 1974 the pronunciation of talaq must be done in front of the court, otherwise the divorce is not recognized by the law of the State, for the following reasons:

1. In order to avoid the scarcity of
2. To protect women's rights so that women are not abandoned because the law only applies unilaterally

1 To follow the laws listed in the compilation of Islamic law because the compilation of Islamic law is a legal guideline for Indonesian citizens ((Safrizal & Karimuddin, 2020).

In contrast to the Marriage Law which does not recognize the term talaq, the Compilation of Islamic Law referred to by talaq is a husband's pledge in front of the Religious Court which is one of the causes of the breakdown of marriage. In the KHI, it is required that the husband's vow to divorce (talaq) must be submitted before the Religious Court hearing.

The regulation of talaq in Indonesia's positive law is an effort by the state to control the practice of divorce so that it is not carried out arbitrarily. The obligation to divorce in front of the court shows that there is legal protection, especially for women. However, although positive law has given the right of divorce to wives through the mechanism of divorce, women's position in practice is still not fully equal to that of husbands. This can be seen from the difference in procedures and burden of proof between talaq divorce and suude divorce, which has the potential to put women in a more difficult legal position.

Aspects of gender justice in classical fiqh and positive law Aspects of gender justice in classical fiqh

The scholars agree that talaq is the prerogative of the husband. Wahbah Zuhaili mentioned the reason why the right to mentally act is only in the hands of the husband, not in the hands of the wife, among others, because the husband gives dowry to the wife and the husband who provides for the wife and the husband who provides a place to live for the wife. Even Sayyid Sabiq added another reason, namely, because the husband has a mind and a character that is patient with his wife's temperament so that when something happens with his wife, he is not in a hurry to divorce her (Harmanto, 2021).

Al Ghandur states that many classical fiqh books state that the breakup of a marriage caused by talaq is in the hands of the man (Al-Ghandur, 1967). Logically, it can be understood that the husband has the right and is considered lawful to divorce his wife in their own way, either by sharih (clear), sarcasm, by letter, or by proxy. If the husband has pronounced the word talaq, then the wife with all the consequences must accept all the consequences. In this regard, Islam gives talaq to men because they have the responsibility of being leaders in the household.

As stated in Q.S An-Nisa verse 34 which reads

الرَّجَلُ قَوْمُونَ عَلَى النِّسَاءِ

Man (husband) is the protector of woman (wife)

The word of Allah SWT above has the intention that a man's leadership over women, is not because they are superior, but because men have more obligations and responsibilities in the household than women. Male leadership in the household or family is a responsibility that must be carried out and entrusted to him, not meaning leadership in a dictatorial nature, self-defeating or discrimination that can reduce the values of equality that come down with it. However, the understanding of this verse is often done structurally, without studying it absolutely and deeply. So many men act arbitrarily in terms of talaq towards their wives. Just because of trivial things, some Muslim men act arbitrarily in the mentality of their wives. On the grounds that the right of talaq is completely in their hands and men are the leaders in the household, so that every decision is in the hands of the husband (Nuroniyah, 2019). Although the wife has khulu rights, if the wife wants to use this right, it must be approved by the husband and accompanied by the payment of 'iwadh, in the form of money or goods to the husband as payment (Kusmidi, 2018). This is certainly very contrary to the gender equality that has recently been buzzed. And it will even be in stark contrast to the protection of women. Because this reality will be very detrimental to the woman who has to bear all the consequences of divorce with her husband even though the wife herself ends the marriage.

From the perspective of gender justice, the author understands that the concept of talaq in classical jurisprudence has not fully provided fair protection for women. Interpretations of male leadership in the household are often understood structurally and normatively without considering their impact on women's rights. As a result, the absolute right of talaq in the hands of the husband has the potential to be abused and puts women in a vulnerable position, both economically and socially. This condition shows that gender justice in classical jurisprudence is still formal and has not touched on the aspect of substantive justice.

Aspects of gender justice in positive legal talaq

Breakup of marriage is a legal term used in the Marriage Law to describe divorce or the termination of a marital relationship between a man and a woman who have lived as husband and wife. In Law Number 1 of 1974 concerning marriage, it is explained that divorce can only be carried out in front of the court after the court concerned has tried and failed to reconcile both parties. This is also explained in Marriage Law Number 1 of 1974 Article 39:

1. Divorce can only be done in front of a court hearing after the court in question has tried and failed to reconcile the two parties.
2. To get a divorce, there must be enough reason that the husband and wife will not be able to get along as a
3. Divorce procedures in front of a court session are regulated in the Laws and Regulations (Muhsin & Wahid, 2021).

The rights between husband and wife are protected by law due to divorce/talaq. However, materially, the Court stipulates that the husband must pay iddah maintenance to his divorced ex-wife. Fiqh scholars agree that women who are in iddah talak raj'i are entitled to alimony after iddah talaq, including residence and alimony. The court stipulates materially that the husband must pay iddah maintenance to his divorced ex-wife (Millah & Huda, 2024). Actually, the aspect of gender justice in positive law has been fulfilled by providing the same rights, namely the right of talaq for the husband and the right to sue for the wife, a divorce lawsuit can be used by a wife for various reasons, one of which is if she experiences physical violence committed by the husband so that it is used as a reason for a wife to file for divorce in court, namely the act of beating, slapping, strangling, kicking, and so on which results in pain either in the form of bruises or even severe injuries experienced by the wife (Alwaris et al., 2024).

Indonesia's positive law has normatively accommodated the principle of gender justice by giving divorce rights to both parties. However, this justice has not been fully realized in practice. The process of divorce is longer and more complex than talaq divorce shows that women still face structural barriers in accessing justice. In addition, the weak enforcement of post-divorce maintenance obligations shows that legal protection for post-divorce women still needs to be strengthened so that it does not stop at the normative level.

Reconstruction of the Right of Talak on the Concept of the Right of Talak in Classical Fiqh and Positive Law of the Reconstruction of Classical Fiqh Talak

In the perspective of classical fiqh, talaq is the right of the husband who is given full control because he is considered capable of managing the continuity of the household, while the wife is not given the right to impose talaq directly. However, the wife can ask for talaq by returning the dowry or giving ransom, known as talaq khulu. In the perspective of classical fiqh, talaq is the right of the husband who is given full control because he is considered capable of managing the continuity of the household, while the wife is not given the right to impose talaq directly. However, the wife can ask for talaq by returning the dowry or giving ransom, known as talaq khulu, Hanafiyah scholars define, that khulu' is the release of the marriage bond that depends on the wife's acceptance by using the word khulu' or its equivalent, which results in the enactment of compensation for the husband. Malikiyah scholars stated that khulu' is talaq with compensation, both from the wife and from the guardian and other people. Then the Shafiiyah scholars defined khulu' as divorce between husband and wife with compensation, both with the recitation of talaq and the recitation of khulu.

Meanwhile, Hanbaliyah scholars define it by the act of a husband divorcing his wife with compensation taken from the wife or another person by using a special word.

The reconstruction of talaq rights in classical fiqh refers to an effort to renew or reinterpret the concept of talaq rights that has been more mastered by husbands in classical Islamic law. In classical fiqh, the right to impose talaq is absolute in the hands of the husband, where the husband has the prerogative to divorce his wife, while the wife can only ask for talaq (khulu') under certain conditions. To achieve gender justice, it is necessary to evaluate the concept of talaq in classical fiqh by giving the same rights to wives to be able to break the marriage bond without any compensation or khuluk costs. With equal rights between husband and wife in breaking the marriage bond, the wife can feel calmer if there is a conflict in the household that cannot be repaired, the wife can reject her husband without fear of being charged compensation. With the equality of talaq rights between wife and husband, the husband will not be able to do arbitrary things to the wife because the wife can refuse it at any time and the husband will not get anything or compensation costs, this can minimize the inequality of rights between husband and wife in the household.

The author understands that the reconstruction of talaq rights in classical jurisprudence is an urgent need to answer the challenge of gender justice in the context of modern society. The reinterpretation of the concept of talaq is not intended to negate the teachings of Islam, but rather to adapt it to the principles of justice and equality which are the main goals of the Shari'a. By providing equal space for wives to end the marriage without the burden of compensation, the husband-wife relationship can be placed in a more balanced and humane position.

Positive legal reconstructions

Positive law is a legal system that applies and is recognized by the state, which is binding and official. In the context of talaq in Indonesia, positive law stipulates that divorce must be carried out through a process in court in order to be declared legal by state law. Based on the Indonesian Marriage Law and the Compilation of Islamic Law (KHI), talaq is only valid if it is pronounced by the husband in a religious court session after mediation efforts have failed. In contrast to the view of classical fiqh or purely Islamic law which considers talaq valid when pronounced by the husband anytime and anywhere, positive law demands the legality of divorce through the courts in order to produce evidence that is recognized by state law. Talak pronounced outside the court is considered religiously valid but not legally valid by state law so the marriage has not been formally dissolved. This can prevent divorce because in many cases the husband can pronounce the word talaq on the basis of momentary emotions. The concept of divorce in positive law has actually fulfilled the aspect of gender justice where the right to break the marriage bond is given to both, namely the husband and wife, in contrast to the concept of talaq in classical jurisprudence where the right of talaq is absolute to the husband. Although in positive law, the aspect of gender justice has been fulfilled by providing equal talaq rights for husbands and wives, there are still many things that need to be evaluated.

In the divorce process, women are often faced with dilemmas. On the one hand, they want to get out of a domestic relationship full of violence, injustice, or unhappiness. But on the other hand, they are also burdened with concerns about the views of the public who consider divorce as a woman who fails to maintain her household, actually the concept of divorce can be a weapon to fight the husband so that he does not act arbitrarily, but the process of divorce is different from

divorce which has so many conditions compared to divorce of talaq. In a divorce lawsuit, the plaintiff must include strong and legal reasons and evidence, such as domestic violence (KDRT), infidelity, neglect, or other reasons that cause incompatibility in the household. This causes the length of the divorce lawsuit, when compared to divorce which only requires a pledge that is said in front of the court as a condition for the validity of talaq according to the law. Although in positive law the right to terminate marriage is given to both, it is necessary to evaluate its implementation, for example such as tightening the conditions for divorce talaq so that it is not easily misused by the husband and also making rules that bind the husband to provide iddah maintenance or alimony to his children after the divorce is completed, because there are many cases where even though the court has decided that the ex-husband is obliged to provide iddah maintenance to the former wives or alimony to their children, there are still many ex-husbands who still ignore these obligations due to the lack of strict rules and supervision from the court.

Positive legal reconstruction related to talaq needs to be focused on the implementation aspect, not only on normative arrangements. Although positive law has been more progressive than classical jurisprudence, inequality still occurs due to weak supervision and enforcement of court decisions. Therefore, strengthening the post-divorce maintenance execution mechanism and simplifying the divorce process is an important step so that the principle of gender justice can truly be felt by women in family law practice in Indonesia.

CONCLUSION

The concept of talaq in classical jurisprudence places the right of divorce entirely in the hands of the husband as a form of household leadership responsibility, while the wife can only end the marriage through a limited mechanism such as khulu' or fasakh. In contrast, Indonesia's positive law regulates talaq more strictly and legalistically, where divorce is only valid if it is carried out in front of the court and gives equal rights to husband and wife through the mechanism of divorce talaq and divorce. This arrangement aims to prevent arbitrary talaq, protect the rights of the wife, and create balance in the divorce process.

The aspects of gender justice in classical jurisprudence and positive law show very significant differences. In classical fiqh, the right of talaq is completely in the hands of the husband on the grounds of the responsibility of maintenance and the leadership of the household, so that the wife is in a weaker position because she can only end the marriage through khulu' with ransom or fasakh which depends on the husband's approval or the judge's decision. This condition creates gender inequality and has the potential to open up space for arbitrary actions against women. On the contrary, Indonesia's positive law seeks to bring gender justice by providing equal rights in the form of talaq for husbands and wives, and requires divorce proceedings to be carried out through courts to protect women from unilateral talaq. However, the implementation of positive law still faces challenges, such as the divorce process which is heavier than talaq divorce and there are still many ex-husbands who do not carry out post-divorce maintenance obligations, so that the normatively regulated principle of gender justice has not been fully realized practically.

The reconstruction of talaq rights in classical jurisprudence and positive law shows the need to update the concept of talaq to be more just and equal for both parties. In classical fiqh, talaq is entirely in the hands of the husband, while the wife can only request a divorce through khulu' or fasakh which requires a ransom or the intervention of a judge, thus causing gender inequality. Therefore, reconstruction is needed by giving equal talaq rights to the wife without the burden of

compensation, so that the wife has the same protection and freedom in ending the marriage. Meanwhile, Indonesia's positive law is more advanced because it requires talaq to be carried out in court and provides the right to divorce for both husband and wife. However, the implementation is still not perfect because the divorce process is heavier than talaq divorce and many ex-husbands ignore post-divorce maintenance obligations. Thus, positive legal reconstruction needs to tighten control over talaq divorce, strengthen rules related to post-divorce alimony, and simplify the divorce process to truly reflect the principles of gender justice.

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