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## Reformulating Progressive Fiqh of *Talak* (Divorce): A Contemporary Study of the Principle of Making Divorce More Difficult in SEMA No. 1 of 2022 for Women's Protection

**Abstract:** This study aims to analyze the reformulation of progressive fiqh of *Talak* (divorce), with a focus on SEMA No. 1 of 2022, which emphasizes the principle of making divorce more difficult in the interest of protecting women. In the context of Islamic law, divorce has often been considered a unilateral right controlled by the husband, potentially neglecting the rights of women. SEMA No. 1 of 2022 was introduced as a response to this issue, offering a fairer and more just approach for all parties involved. This research employs a library research method, reviewing legal literature, official documents, as well as the views of legal scholars and practitioners regarding the implementation of this policy. The analysis results show that the reformulation of the fiqh of divorce in SEMA No. 1 of 2022 provides a better platform for protecting women's rights in divorce proceedings, including encouragement for mediation and peaceful dispute resolution. Furthermore, this study identifies challenges in the application of this principle on the ground, including cultural and social resistance. This research is expected to contribute to the development of family law in Indonesia that is more responsive to the needs of women, as well as to raise awareness of the importance of justice for all parties in the context of divorce. This study serves as an important reference for further research on fiqh of divorce and women's protection policies within the framework of contemporary Islamic law.

**Keywords:** Divorce, *Khulu'*, Progressive, SEMA, Women Protection.

### INTRODUCTION

The main focus of this study is the validity and implementation of the Supreme Court Circular Letter

(SEMA) No. 1 of 2022 within the context of Islamic law and positive law. This research aims to explore whether the Circular aligns with existing *fiqh* principles and how it is integrated into the broader legal system in Indonesia. The principle of making divorce more difficult, as proposed in the SEMA, serves as a critical point of this study. With the goal of protecting women's rights, this principle requires a thorough analysis of whether the mechanisms outlined in the SEMA are truly effective in preventing arbitrary divorces.

The principle of making divorce more difficult, as proposed in SEMA, becomes a critical point in this study. Aimed at protecting women's rights, this principle demands a thorough analysis of whether the mechanisms outlined in the SEMA are truly effective in preventing arbitrary divorces. This research also examines women's rights within the context of the reformulation of *fiqh* on divorce (*talaq*). There is an argument that SEMA No. 1 of 2022 could provide better protection for women; however, a critical evaluation is needed to determine whether its implementation actually delivers justice. This includes assessing women's access to justice and how the law can protect them from harmful divorce practices.

Criticism of traditional *fiqh* interpretations is an essential part of this analysis. The question arises whether traditional views on *talaq* remain relevant in the context of a rapidly evolving modern society. A progressive reformulation of *fiqh* on divorce could provide a solution to address contemporary challenges, but it must also take into account the values upheld within society. The social and cultural impacts of applying such a reformulation are also a central focus of this study. This research seeks to understand how society accepts and responds to the changes proposed by SEMA. Is there resistance to the principle of making divorce more difficult, and how does this affect women in their social context? This will offer a broader perspective on the acceptance and implementation of the law in everyday life.

A comparison of the principles outlined in SEMA with those in other legal systems that adopt different approaches to divorce and women's protection is essential. By examining this comparison, the study aims to identify more comprehensive and effective solutions for safeguarding women's rights. The overall analysis seeks to provide a deeper

understanding of how the reformulation of *fiqh* on divorce can contribute to protecting women in the context of divorce, as well as the challenges that may arise during its implementation.

In Indonesia, to support the effective functioning of the judicial system within the scope of religious courts, several factors serve as references in the legal process. These include substantive legal sources such as the Qur'an, Hadith, the Marriage Law, the Compilation of Islamic Law, and other relevant materials specifically related to religious court matters. In terms of procedural law, the procedure followed in religious courts is generally based on the civil procedural law applicable in the General Courts, except for aspects that are specifically regulated (Article 54 of Law No. 7 of 1989). The details are as follows:<sup>1</sup>

Table 1. Legal Regulations Concerning Marriage Law in Indonesia

No	Name of Regulation
1	HIR/RBg (Civil procedure law applicable to the Courts)
2	Law No. 14 of 1970, which was replaced by Law No. 4 of 2004
3	Law No. 1 of 1974
4	Law No. 14 of 1985, amended by Law No. 5 of 2004
5	Law No. 7 of 1989, amended by Law No. 3 of 2006
6	Law No. 20 of 1947
7	Government Regulation No. 9 of 1975
8	Presidential Instruction No. 1 of 1991 on the Compilation of Islamic Law (KHI)
9	Supreme Court Circular Letter

Source: author's interpretation

The regulations issued by the Supreme Court cannot be equated with those established by the legislative body. The Supreme Court can only issue regulations when a law is unclear or does not provide sufficient guidance. However, this is not mandatory for the Supreme Court to implement. The Supreme Court Circular Letter (SEMA) is a policy

<sup>1</sup> Aris Bintania, *Hukum Acara Peradilan Agama Dalam Kerangka Fiqh Al-Qadha*, Ed. 1 (Jakarta: RajaGrafindo Persada, 2012), p.5.

regulation for several reasons. First, in terms of its form, the Supreme Court Circular Letter does not have the formal structure typically associated with statutory regulations.<sup>2</sup> The Supreme Court Circular Letter is specifically directed to judges, court chairpersons, clerks, and other officials within the judicial system, which reflects its nature as a policy regulation intended for internal governance.

In 2022, the Supreme Court issued Circular Letter No. 1 of 2022. This Circular implements the resolutions from the plenary meeting of the Supreme Court in 2022 as a guideline for the execution of judicial duties. One of the sections discussed is the religious court chamber's resolutions. The first part of this section addresses marriage law, specifically focusing on efforts to preserve marriage and uphold the principle of making divorce more difficult. It states that divorce cases based on the failure of either spouse to fulfill their obligations of financial support (*nafkah*) or emotional support (*batin*) can only be granted if it is proven that the spouse has failed to fulfill their obligations for at least 12 (twelve) months. Similarly, divorce cases based on ongoing disputes and continuous quarrels may be granted if it is proven that the spouses have been in constant conflict or have lived separately for at least 6 (six) months.<sup>3</sup>

Before discussing the relationship between the aforementioned SEMA and divorce law, it is necessary to first examine the regulations on divorce within the framework of marriage law. Marriage law is a legal product of the state that substantively incorporates Islamic law. Although this legislation is intended to regulate the welfare of the public in matters of marriage, it is essentially influenced by Islamic marriage laws. This can be understood given that the majority of the population is Muslim, making such positive law an interesting phenomenon that reflects the integration of religious law and state law.

The most characteristic case in religious courts related to marriage is divorce. Divorce is divided into two types: *cerai gugat* (wife-initiated divorce) and *cerai talak* (husband-

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<sup>2</sup> Irwan Adi Cahyadi, "Kedudukan Surat Edaran Mahkamah Agung (Sema) dalam Hukum Positif di Indonesia," *Jurnal Mahasiswa Fakultas Hukum Universitas Brawijaya* (Journal:eArticle, Brawijaya University, 2014), p.5., <https://www.neliti.com/publications/35079/>.

<sup>3</sup> "JDIH Mahkamah Agung," accessed April 5, 2023, <https://jdih.mahkamahagung.go.id/index.php/legal-product/sema-nomor-1-tahun-2022/detail>. Circular Letter No. 1 of 2022 on the Implementation of the Formulation of the 2022 Plenary Meeting Results of the Supreme Court Chamber as a Guideline for the Implementation of Court Duties

initiated divorce). *Cerai talak* refers to a divorce petition filed by a husband against his wife in the religious court, based on Article 117 of the Compilation of Islamic Law (KHI).<sup>4</sup> If reconciliation efforts fail and the Religious Court finds sufficient grounds to pronounce *talak*, the next hearing will proceed to witness and record the *talak* declaration. After the *talak* is declared, in the presence of the wife or her representative, the husband will sign the *talak* declaration form that has been prepared.<sup>5</sup> *Cerai gugat* is the opposite of *cerai talak*; it refers to a divorce petition filed by a wife against her husband in the religious court. In this study, the primary focus of the research is on *cerai gugat* as the central issue in marriage cases.

In Islam, *cerai gugat* is referred to as *khulu'*. *Khulu'* linguistically means to remove or release, similar to taking off clothing (*khala'ats tsaub*).<sup>6</sup> This type of divorce is carried out through *khulu'*, which means the wife requests a divorce (or *talak*) from her husband by offering him a sum of money or property that she had previously received as her dowry (*mahr*).<sup>7</sup> The possibility of divorce through *khulu'* exists to balance the husband's right to *talak*. Thus, *khulu'* is a divorce that occurs at the wife's request, in which she must redeem herself from her husband by returning the dowry or any property she had received from him.

Returning to the discussion of Supreme Court Circular Letter No. 1 of 2022, specifically regarding the marriage chamber's focus on efforts to preserve marriage and uphold the principle of making divorce more difficult, the Circular states that divorce cases based on the failure of either spouse to fulfill their obligations of financial and/or emotional support can only be granted if it is proven that the husband or wife has failed to

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<sup>4</sup> Ibrahim AR Ibrahim Ar and Nasrullah Nasrullah, "Eksistensi Hak Ex Officio Hakim dalam Perkara Cerai Talak," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 1, no. 2 (December 30, 2017): p. 3., <https://doi.org/10.22373/sjkh.v1i2.2378>.

<sup>5</sup> Mohammad Barmawi, "Ikrar Talak Pengadilan Agama (Sebuah Tinjauan Atas Istibat Hukum Pengadilan Agama Tentang Sahnya Perceraian)," *Qolamuna : Jurnal Studi Islam* 1, no. 2 (October 5, 2016): p.6.

<sup>6</sup> Isnawati Rais, "Tingginya Angka Cerai Gugat (Khulu') di Indonesia: Analisis Kritis terhadap Penyebab dan Alternatif Solusi Mengatasinya," *Al'Adalah* 12, no. 1 (2014): p.3., <https://doi.org/10.24042/adalah.v12i1.183>.

<sup>7</sup> Ahmad Azhar Basyir, *Hukum Perkawinan Islam* (Yogyakarta: UII Press, 2004), p.81.

fulfill their obligations for at least 12 (twelve) months.<sup>8</sup> Alternatively, divorce cases based on continuous disputes and quarrels may be granted if it is proven that the husband and wife have been in constant conflict or have been living separately for at least 6 (six) months. If all of these conditions are applied as policy in *cerai gugat* cases, they contradict the provisions for divorce through *khulu'* for women. From the perspective of *cerai gugat* rules alone, it becomes increasingly burdensome for women. In fact, *khulu'* provides a way out for women who are in a situation where it would be detrimental to maintain the marriage. This raises the question: must women suffer for an extended period before they are allowed to request a divorce?

The legal framework in this context is also quite interesting to discuss. The provisions in the Compilation of Islamic Law (KHI) and SEMA appear to lack continuity with the principles found in *fiqh munakahat* (Islamic family law). The relationship between Islamic law, particularly the regulations on *khulu'*, and the Compilation of Islamic Law, along with SEMA, which is a policy from the Supreme Court, seems to be at odds with the interests of women. Therefore, this issue will be examined in more detail in this study. The question arises: is the institutional authority of the religious courts under the Supreme Court's jurisdiction conservative in relation to *khulu'* cases, or is it more progressive?

In this study, the research method used is qualitative, with a legal research approach within the scope of normative analysis. The data is sourced from literature review. It is analyzed using an inductive analysis technique, which moves from specific issues towards general discussions.<sup>9</sup> In this case, the specific issue is Supreme Court Circular Letter No. 1 of 2022 regarding the marriage chamber's focus on making divorce more difficult, while the general discussion relates to *fiqh talaq* concerning *khulu'*.

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<sup>8</sup> Hanafi Ilba and Ibnu Radwan Siddik Turnip, "Masa Enam Bulan Berpisah Tempat Tinggal Sebagai Syarat Formil Pengajuan Perceraian Dengan Alasan Pertengkaran: Studi Putusan Mahkamah Agung No 421 K/Ag/2023," *As-Syar'i: Jurnal Bimbingan & Konseling Keluarga* 6, no. 2 (2024): 1738-54, <https://doi.org/10.47467/as.v6i2.6589>.

<sup>9</sup> Agus Zaenul Fitri and Haryanti, *Metodologi Penelitian Pendidikan :Kuantitatif, Kualitatif, Mixed Method, Dan Research and Development*, vol. 1 (Malang: Madani Media, 2020), p.45., <http://repo.uinsatu.ac.id/23533/>.

In the study titled *The Position of the Supreme Court Circular Letter (SEMA) in Positive Law in Indonesia*, Irwan Adi Cahyadi argues that SEMA, when viewed from the perspective of its users, can be categorized as a policy rule (*beleidsregel*), since it is typically addressed to judges, court clerks, and other officials within the judiciary. However, upon closer examination of its content, not all SEMAs can be classified as policy rules (*beleidsregel*). In fact, out of the 369 Supreme Court Circular Letters that can be inventoried, disregarding the validity of each individual SEMA, Article 79 of Law No. 14 of 1985 grants the Supreme Court the authority to create laws or rule-making power. This authority is provided so that the Supreme Court can address issues that are not specifically regulated in existing legislation.<sup>10</sup>

In the article titled “*Tingginya Angka Cerai Gugat (Khulu’) Di Indonesia; Analisis Kritis Terhadap Penyebab Dan Alternatif Solusi Mengatasinya*,”<sup>11</sup> Isnawati Rais identifies several factors contributing to the high rate of *cerai gugat*, including women's understanding of their rights as wives, increased female education, easier access to information, economic independence, and the growing awareness of various institutions regarding women's issues. The proposed solution to address this is to equip the younger generation, particularly those preparing for marriage, with sufficient knowledge and the cultivation of religious values.

Third, in the article *Peningkatan Angka Perceraian Di Indonesia: Faktor Penyebab Khulu’ dan Akibatnya*, Muhammad Sholeh identifies the factors contributing to *cerai gugat* over a three-year period (2013–2015). These factors include: lack of harmony (5,419 cases or 37.6%), economic issues (3,721 cases or 25.8%), lack of responsibility (3,191 cases or 22.1%), interference from third parties (1,458 cases or 10.1%), abuse (443 cases or 3.0%), unhealthy polygamy (88 cases or 0.6%), and jealousy (36 cases or 0.25%). The most dominant factor leading to *cerai gugat* at the Lubuklinggau Religious Court is the lack of harmony in the household, which ranks the highest among all other contributing factors.<sup>12</sup>

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<sup>10</sup> Cahyadi, “Kedudukan Surat Edaran Mahkamah Agung (Sema) dalam Hukum Positif di Indonesia,” p.16.

<sup>11</sup> Rais, “Tingginya Angka Cerai Gugat (Khulu’) di Indonesia,” h.1.

<sup>12</sup> Muhammad Sholeh, “Peningkatan Angka Perceraian Di Indonesia: Faktor Penyebab Khulu’ Dan Akibatnya,” *Qonuni: Jurnal Hukum Dan Pengkajian Islam* 1, no. 01 (June 21, 2021): p.2.

Based on the previous studies mentioned, this research presents a different approach. The aim of this study is to answer the question: How does progressive *fiqh* of *talak* (Islamic divorce jurisprudence) address the principle of making divorce more difficult as stated in SEMA No. 1 of 2022? This research explores how the concept of progressive *fiqh* of *talak* regarding *khulu'* brings more benefits for women, whereas SEMA's principle of making divorce more difficult could be seen as more harmful to women. In fact, SEMA tends to be conservative in terms of women's welfare. Therefore, this study addresses several crucial legal issues. First, the validity and implementation of SEMA No. 1 of 2022 in the context of both Islamic law and positive law is the primary focus, given the importance of integrating the two. Additionally, this research examines the principle of making divorce more difficult as a mechanism to protect women's rights and evaluates whether this approach is truly effective in practice. The analysis also includes a critique of the traditional interpretation of *fiqh* that may no longer be relevant, as well as the social and cultural impacts of such reforms. Thus, the goal of this study is to provide a deeper understanding of how changes in *fiqh* of *talak* can contribute to the protection of women in the context of divorce.

## **METHOD**

The research method in this study titled *Progressive Reformulation of Fiqh Talaq: A Contemporary Study of the Principle of Making Divorce More Difficult in Supreme Court Circular Letter No. 1 of 2022 for Women's Protection* employs a qualitative approach, aimed at gaining an in-depth understanding of the legal and social phenomena related to *fiqh talaq* and the implementation of SEMA No. 1 of 2022. This study is designed in a descriptive-analytical manner, with a focus on analyzing the implementation of SEMA and its impact on women in the divorce process. The primary data sources for this research include legal documents related to SEMA No. 1 of 2022, fatwas from Islamic scholars, opinions from experts in Islamic family law, and jurisprudence from religious court practitioners. Secondary data is also gathered through literature review, including articles, books, and relevant legal documents. Data analysis is conducted using content analysis techniques and hermeneutic



interpretation to uncover the deeper meaning of existing legal norms.<sup>13</sup> This study is expected to contribute both theoretically and practically to the development of a more just Islamic family law that protects women's rights. With this approach, the research aims to provide valuable insights into the impact of SEMA No. 1 of 2022 in safeguarding women and the challenges in its implementation.

## RESULTS AND DISCUSSION

### The Principle of Making Divorce More Difficult in Supreme Court Circular Letter No. 1 of 2022

Legislative products should have a uniform formal structure to ensure consistency. This approach can help users of the regulations better understand whether a particular rule is classified as legislation, a policy regulation, or an administrative decision (*beschikking*). However, this should not serve as a rigid reference, as in practice, the classification of regulations and policy rules (*beleidsregel*) often appears biased when we only consider their formal structure.<sup>14</sup> Therefore, a substantive approach is a more objective choice in distinguishing whether a legal norm constitutes a regulatory rule or a policy rule.<sup>15</sup>

According to the provisions of Article 8 of Law No. 12 of 2011, although in practice, the content of the Supreme Court Circular Letter (SEMA) largely functions as a policy regulation (*beleidsregel*), it can still be categorized as a legislative regulation with binding legal authority, as it is based on the mandate of Article 79 of the Supreme Court Law.<sup>16</sup> As such, SEMA is considered a form of legislation and holds legal force, as stipulated in Article 8, paragraph 2 of Law No. 12 of 2011. From an authority standpoint, the Supreme Court Circular Letter is issued based on the regulatory powers vested in the

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<sup>13</sup> Laras Shesa, "Keterjaminan Kedudukan Dzau'ul Arham Dalam Kewarisan Islam Melalui Wasiat Wajibah," *Al-Istinbath : Jurnal Hukum Islam* 3, no. 2 (2018): 145, <https://doi.org/10.29240/jhi.v3i2.615>.

<sup>14</sup> Fernando Situmorang, Ramlani Lina, and Sinaulan Mohamad, "Kajian Hukum Tentang Kedudukan SEMA No. 2 Tahun 2022 Atas Undang-Undang Kepailitan Nomor 37 Tahun 2004," *Jurnal Studi Interdisipliner Perspektif* 22, no. 2 (2022): 117-27.

<sup>15</sup> Eric Eric and Wening Anggraita, "Perlindungan Hukum Atas Dikeluarkannya Peraturan Kebijakan (Beleidsregel)," *Jurnal Komunikasi Hukum (JKH)* 7, no. 1 (February 17, 2021): h.3., <https://doi.org/10.23887/jkh.v7i1.31820>.

<sup>16</sup> Arifin Zainal, *Pengantar Ilmu Hukum* (Curup: Lp2 STAIN Curup, 2014), p.78.

Supreme Court,<sup>17</sup> which include administrative functions, advisory roles, supervision, and judicial duties. Another critical aspect is determining the position of the Supreme Court Circular Letter within the hierarchy of legislation in Indonesia. It is theoretically difficult to define the exact place of SEMA in the hierarchy of legal norms, primarily because there is no established standard to refer to.

Before discussing the position of SEMA within the hierarchy of legal regulations, it is important to first understand its role within the structure of the Supreme Court. From both its formal form and content, SEMA is actually positioned below PERMA, as PERMA is created in a more formal and comprehensive manner, serving as a type of regulation.<sup>18</sup> Based on the facts obtained through inventorying the relevant tables, SEMA can be issued based on Supreme Court Regulations, and the presence of a PERMA can revoke a Supreme Court Circular Letter. For example, Supreme Court Circular Letter No. 6 of 1967 was annulled by PERMA No. 1 of 1969. However, Cahyadi, in his article *Kedudukan Surat Edaran Mahkamah Agung (SEMA) dalam Hukum Positif di Indonesia*, argues that determining the position of SEMA within the hierarchy of legislation requires consideration of several specific factors.<sup>19</sup>

First, only those Supreme Court Circular Letters (SEMA) that align with the provisions in Article 79 of the Supreme Court Law can be positioned within the hierarchy of legal regulations. Second, considering the nationwide applicability of Supreme Court Circular Letters across all regions of Indonesia, SEMA is positioned above local regulations (PERDA), as no SEMA is issued to explain or be based on a PERDA. Third, from a content perspective, several SEMAs have been used by the Supreme Court as implementing regulations for laws and decisions made by the Ministry of Law and Human Rights when the Supreme Court operated under a dual-system framework. However, it is also incorrect

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<sup>17</sup> Maulana Rihdo et al., "Kedudukan Surat Edaran Mahkamah Agung (Sema) Dalam Perspektif Akademisi: Kekuatan Hukum, Ketetapan Dan Konsistensi, Pengaruh Terhadap Putusan Hukum," *USRAH: Jurnal Hukum Keluarga Islam* 4, no. 2 (2023): 230-40, <https://doi.org/10.46773/usrah.v4i2.791>.

<sup>18</sup> Mohamad Faisal Aulia, "Analisis Perbandingan Penerapan Hukum Keluarga Di Mesir Dan Di Indonesia," *Al-Ahwal Al-Syakhsyiyah: Jurnal Hukum Keluarga Dan Peradilan Islam* 2, no. 2 (2022): 123-32, <https://doi.org/10.15575/as.v2i2.14327>.

<sup>19</sup> Cahyadi, "Kedudukan Surat Edaran Mahkamah Agung (Sema) dalam Hukum Positif di Indonesia," p.6-7.

to conclude that SEMA is subordinate to Ministerial Regulations, as there are SEMAs that serve as implementing regulations for Government Regulations. Therefore, determining the position of SEMA within the hierarchy of legal regulations must be based on the specific content of each individual SEMA.<sup>20</sup>

In this study, the Supreme Court Circular Letter (SEMA) being discussed is SEMA No. 1 of 2022, specifically the section concerning the religious court chamber with the substance of marriage law. The first part of the religious court chamber formulation discusses marriage law. One of the key issues addressed is the effort to preserve a marriage and uphold the principle of making divorce more difficult. Accordingly, divorce cases based on the husband's or wife's failure to fulfill their marital obligations, both material and spiritual, may only be granted if it is proven that one party has failed to meet these obligations for a minimum of 12 (twelve) months. Alternatively, divorce cases based on continuous disputes and quarrels may be granted if it is proven that the husband and wife have been constantly in conflict or have been living apart for at least 6 (six) months.<sup>21</sup>

#### **The Rule of Laws Regarding Divorce Lawsuits in Positive Law in Indonesia**

According to Law No. 1 of 1974, the dissolution of marriage is addressed under three categories in Article 38 of the law: death, divorce, and court rulings.<sup>22</sup> The dissolution of marriage due to the death of one of the parties does not raise any issues, as it is not a result of mutual agreement or the will of either party, but rather a decision of God. In handling divorce cases, the court provides formal legality by issuing an official certificate of divorce upon the husband's request. The divorce certificate is granted based on the reasons stipulated in Article 39, Paragraph 2, where one party is found to have violated their rights and obligations.<sup>23</sup> The dissolution of marriage by court ruling can occur either due to the annulment of a marriage or a divorce.

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<sup>20</sup> Sampara Said, *Pengantar Ilmu Hukum*, Cetakan 1 (Yogyakarta: Total Media, 2009), p.102.

<sup>21</sup> "JDIH Mahkamah Agung." Circular Letter No. 1 of 2022 on the Implementation of the Formulation of the 2022 Supreme Court Plenary Meeting Results as a Guideline for Court Duties

<sup>22</sup> Erfaniah Zuhriah, *Peradilan Agama Indonesia: Sejarah Pemikiran Dan Realita*, Edisi revisi (Malang: UIN-Malang Press, 2009), p.201.

<sup>23</sup> Hj Sulaikin Lubis, Hj Wismar Ain Marzuki, and Gemala Dewi, *Hukum acara perdata peradilan agama di Indonesia*, Edisi 1, Cetakan 1 (Jakarta: Kencana : Fakultas Hukum, Universitas Indonesia, 2005), p.129.

In contrast, the reasons for divorce are explained in Article 19 of Government Regulation No. 9 of 1975 in conjunction with Article 116 of the Compilation of Islamic Law (KHI):<sup>24</sup>

- a. One party commits adultery or becomes an alcoholic, drug addict, gambler, or engages in other similar behaviors, and the condition is difficult to cure.
- b. One party abandons the other for two (2) consecutive years without the other's consent and without a valid reason, or for reasons beyond their control.
- c. One party is sentenced to a prison term of five (5) years or a more severe punishment after the marriage.
- d. One party commits cruelty or severe abuse that endangers the other party.
- e. One party suffers bodily harm or a disease that renders them unable to fulfill their duties as a husband/wife.
- f. Continuous disputes and arguments occur between the husband and wife, with no hope of reconciliation in the household.

In Indonesian marriage legislation, there are two types of divorce procedures. First, *talak* divorce, which is a divorce initiated by the husband. Second, *gugat* divorce, which is a divorce initiated by the wife. The law distinguishes between a divorce initiated by the husband and one initiated by the wife, as Islamic law's characteristics require this distinction. As a result, the divorce process initiated by the husband differs from the process initiated by the wife.<sup>25</sup>

In Law No. 7 of 1989 on Religious Courts, it is stipulated that divorce must be carried out through an institution, namely the Religious Court. The Religious Court is located in the capital of a district or city, and its jurisdiction covers the district area. Article 65 of this regulation states that the divorce procedure can only be conducted in a court session. There are two types of divorce: *talak* divorce and *gugat* divorce. *Talak* divorce occurs when the husband is the one initiating the request, with the husband as the petitioner and the wife as the respondent. On the other hand, *gugat* divorce occurs when the wife is the one filing the divorce petition, either orally or in writing.<sup>26</sup>

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<sup>24</sup> Pustaka Yustisia, *Hukum keluarga: kumpulan perundangan tentang kependudukan, kompilasi hukum Islam, perkawinan, perceraian, KDRT, dan anak*. (Yogyakarta; Jakarta: Pustaka Yustisia ; Distributor tunggal, Buku Seru, 2010).

<sup>25</sup> Zainuddin, Khairina, and Sulastri Caniago, "Itsbat Talak Dalam Perspektif Hukum Perkawinan Di Indonesia," *Al-Ahwal* 12, no. 1 (2019): 29-45, <https://doi.org/10.14421/ahwal.2019.12103>.

<sup>26</sup> Rais, "Tingginya Angka Cerai Gugat (Khulu') di Indonesia," p.5.

*Gugat* divorce is filed by the wife, who petitions the religious court to dissolve the marriage between the petitioner and the respondent. When *gugat* divorce is linked to the procedural rules outlined in divorce litigation, it is purely contentious in nature.<sup>27</sup> There is a dispute, specifically a marital dispute involving divorce proceedings. Both parties stand as civil subjects. Since the lawsuit is contentious, and the parties involved are two subjects facing each other with equal legal standing, the examination process of *gugat* divorce is inherently contradictory (*contradictoir*).<sup>28</sup>

*Gugat* divorce is a type of divorce that occurs after a lawsuit is filed by one of the parties in court, and the divorce is finalized through a court decision.<sup>29</sup> Both Law No. 1 of 1974 and Government Regulation No. 9 of 1975 regarding the process of filing a lawsuit require judicial intervention, in this case, the religious court, for lawsuits filed by a wife married under Islamic law. This is because a Muslim husband does not need to file a lawsuit to divorce his wife, as previously mentioned.<sup>30</sup>

### The Concept of *Khulu'* in Islamic Law

*Khuluk* (*al-khul' u*) etymologically means to remove or eliminate.<sup>31</sup> In terms of terminology, it refers to the dissolution of a marriage through the redemption of *talak* (divorce).<sup>32</sup> The legal basis for *khuluk*, prior to consensus (*ijma*), is found in the Qur'an (2:229), as well as in authentic narrations (*riwayat sahih*) reported by Imam al-Bukhari and Imam al-Nasa'i, concerning the case of Thabit bin Qays and his wife:<sup>33</sup>

<sup>27</sup> A. Zamakhsyari Baharuddin and Rifqi Qowiyul Iman, "Kompetensi Peradilan Agama Menangani Perkara Cerai Gugat Dalam Tinjauan Fikih Islam," *Al-Mizan* 16, no. 2 (2020): 201-24, <https://doi.org/10.30603/am.v16i2.1875>.

<sup>28</sup> Roihan A. Rasyid, *Hukum acara peradilan agama*, 2. ed., 4. cet (Jakarta: Raja Grafindo Persada, 1995), p.143.

<sup>29</sup> Fahmi Tiara Rahma Andrea and Zakiah Nurul Awaliyah, "Fulfillment of The Rights of Wife and Children Post Divorce," *MILRev : Metro Islamic Law Review* 1, no. 2 (2022): 231, <https://doi.org/10.32332/milrev.v1i2.6211>.

<sup>30</sup> Rusjdi Ali Muhammad and Yulmina Yulmina, "Multi Alasan Cerai Gugat: Tinjauan Fikih terhadap Cerai Gugat Perkara Nomor:0138/Pdt.G/2015/MS.Bna pada Mahkamah Syar'iyah Banda Aceh," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 3, no. 1 (August 9, 2019): 33-52, <https://doi.org/10.22373/sjhc.v3i1.4399>.

<sup>31</sup> Wahbah bin Musthafa Al-Zuhayliy, *Al-Fiqh Al-Islamiy Wa Adillatuh* (Damaskus: Dâr al-Fikr, 1433), j. 9, p. 7007.

<sup>32</sup> Al-Zuhayliy, j. 9, p. 7008.

<sup>33</sup> Abû `Abdullâh Muhammad bin Ismâ`il Al-Bukhâriy, *Shahih Al-Bukhâriy* (Mesir: Al-Suthaniyah, 1311), j.7, h. 46; Abu `Abdurrahmân Ahmad bin Syu`ayb Al-Nasâ'iy, *Sunan Al-Nasâ'iy*, 1st ed. (Kairo: Al-Maktabah al-Tijariyah al-Kubra, 1930), j. 6, p. 320.

عَنْ ابْنِ عَبَّاسٍ أَنَّ امْرَأَةَ ثَابِتِ بْنِ قَيْسٍ أَنْتِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَقَالَتْ: يَا رَسُولَ اللَّهِ، ثَابِتُ بْنُ قَيْسٍ مَا أَعْتَبُ عَلَيْهِ فِي خُلُقٍ وَلَا دِينٍ وَلَا كُنْفَةٍ فِي الْإِسْلَامِ، فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: أَتُرِيدِينَ عَلَيْهِ حَدِيثَهُ؟ قَالَتْ: نَعَمْ، قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: اقْبَلِ الْحَدِيثَ وَطَلِّقِيهَا تَطْلِيقًا.

Meaning: From Ibn Abbas, it is narrated that the wife of Thabit bin Qays (Habibah/Jamilah bint Sahal) came to the Prophet (PBUH) and said, "O Messenger of Allah, I do not see any fault in his character or religion, but I do not want to commit disbelief (disobey my husband) in Islam." The Prophet (PBUH) replied, "Are you willing to return his garden?" She said, "Yes." The Prophet then said, "O Thabit, accept the garden and divorce her once."

The case of Thabit bin Qays and his wife marks the beginning of *khuluk* in Islam, where the original ruling was *makruh* (discouraged), although it could later change to *sunnah* (recommended), *wajib* (obligatory), or even *haram* (forbidden), which would invalidate the *khuluk*.<sup>34</sup> In fact, *khuluk* existed even before the advent of Islam, as seen in the family of Amir bin al-Zharib, who married his daughter to his nephew, Amir bin al-Harith bin al-Zharib. At that time, he sought a divorce for his daughter from Amir bin al-Harith by returning the dowry (*mahr*) that had been given in the previous marriage.<sup>35</sup>

The authentic hadith above explains that when Habibah bint Sahal sought a divorce from her husband, the Prophet (SAW), after confirming Habibah's willingness to return the dowry in the form of a garden, called her husband, Thabit bin Qays. He instructed him to accept the return of the dowry and then divorce his wife with one pronouncement of *talaq*. This instruction to divorce was considered an obligatory command, although a small minority interpret it merely as a recommendation.<sup>36</sup>

If a wife sees something in her husband that prevents her from continuing the marriage in a way that pleases Allah, while the husband does not feel the need to divorce

<sup>34</sup> Ahmad bin Muhammad bin `Aliy Ibn Hajar al-Haytamiy, *Tuhfah Al-Muhtaj Fiy Syarh Al-Minhaj* (Mesir: Al-Maktabah al-Tijariyah al-Kubra, 1983), j. 7, p. 457-458.

<sup>35</sup> Taqiyuddin Al-Hilaliy, *Ahkam Al-Khul`iy Fiy Al-Islam*, 2nd ed. (Beirut: Al-Maktabah al-Islamiy, 1395), p. 45-46.

<sup>36</sup> Al-Hilaliy, h. 47.

her, the wife may request a divorce from her husband in exchange for compensation, such as giving him a financial settlement.<sup>37</sup> If the husband accepts and divorces her based on this compensation, the marriage between them is terminated. According to the majority of scholars, the practice of *khul'* is permissible (*mubah*). The basis for its permissibility is found in the Qur'an as well as in the hadith of the Prophet, and it has been practiced generally both before and after the time of the Prophet.<sup>38</sup> The Qur'anic basis for *khul'* is found in the verse of Surah Al-Baqarah, verse 229:

الطَّلَاقُ مَرَّتَانٍ ۖ فَإِمْسَاكَ بِمَعْرُوفٍ أَوْ تَسْرِيحٍ بِإِحْسَانٍ ۗ وَلَا يَجِلُّ لَكُمْ أَنْ تَأْخُذُوا بِمَا آتَيْتُمُوهُنَّ شَيْئًا  
إِلَّا أَنْ يَخَافَا أَلَّا يُقِيمَا حُدُودَ اللَّهِ ۗ فَإِنْ حِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ  
بِهِ ۗ تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا ۚ وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَأُولَٰئِكَ هُمُ الظَّالِمُونَ

Divorce (which can be reconciled) may occur twice. After that, the couple may either reconcile in a known manner or divorce in a good manner. It is not lawful for you to take back anything from what you have given to them, unless both fear they will not be able to uphold the laws of Allah. If you fear that both (husband and wife) will not be able to uphold the laws of Allah, then there is no sin upon them regarding the compensation paid by the wife to redeem herself. These are the laws of Allah, so do not violate them. Whoever violates the laws of Allah, they are the wrongdoers.

The basis for its permissibility in the Prophet's hadith is narrated from Anas bin Malik, as reported by al-Bukhari and recorded in *Musnad Ahmad* (15513). Ahmad ibn Hanbal said: "Abdul Qudus ibn Bakr ibn Khunais narrated to us, saying: 'Hajjaj informed us from Amr ibn Shu'aib, from his father, from Abdullah ibn Amr, and from Al-Hajjaj, from Muhammad ibn Sulaiman ibn Abu Khathma, from his uncle Sahal ibn Abu Khathma, who said: "Habibah, the daughter of Sahal, was married to Thabit ibn Qais ibn Shammash Al-Ansari. He was a man with an unpleasant appearance, and she disliked him. She then approached the Prophet (peace and blessings be upon him) and said: 'O

<sup>37</sup> Ahmidi, "Cerai Gugat Verstek Di Pengadilan Agama Surabaya Perspektif Mashlahah Daruriyah," *Berasan: Journal of Islamic Civil Law* 3, no. 1 (2024): 77-93, <http://202.162.210.182/index.php/berasan/article/view/9723/pdf>.

<sup>38</sup> Kadar M. Yusuf, *Tafsir ayat ahkam: tafsir tematik ayat-ayat hukum* (Jakarta: AMZAH, 2011), p.241.

Messenger of Allah, if not for my fear of Allah, I would have spat in his face.' The Prophet (peace and blessings be upon him) then said: 'Would you be willing to return the garden he gave you?' She replied, 'Yes.' An envoy was then sent to Thabit ibn Qais, and the garden was returned to him, after which the two divorced." Sahal ibn Abu Khathma said: 'This was the first instance of *khulu'* (divorce initiated by the wife) in Islam.<sup>39</sup>

Ibn Sirin and Abi Qalabah stated that *khulu'* (divorce initiated by the wife) is only permissible if it is clear that the wife is carrying a fetus, meaning she has committed a grievous act, as mentioned by Allah in Surah an-Nisa' (4:19).<sup>40</sup> The purpose of allowing *khulu'* is to relieve the wife from the hardship and harm she experiences if the marriage continues, without causing harm to the husband, as he has already received compensation from his wife for her request for divorce.<sup>41</sup> The wisdom behind the law of *khulu'* lies in the justice of Allah in relation to the marital relationship. In *khulu'*, there are several essential elements that constitute its characteristics. The prerequisites for *khulu'* include the husband who divorces his wife with compensation, the wife who requests the divorce from her husband in exchange for financial compensation, and the reasons for the occurrence of *khulu'*:<sup>42</sup> First, the husband: The husband who divorces his wife in the form of *khulu'* must fulfill the same conditions as those required for *talaq* (divorce), namely that he must be of sound mind, mature, and act voluntarily and intentionally. Based on this requirement, if the husband is not of legal age or is mentally incapacitated, then the person who will initiate the divorce in the name of *khulu'* will be his guardian.<sup>43</sup> Similarly, if someone is under guardianship due to ignorance, the guardian will be the one to accept the wife's request for *khulu'*. Second, the wife: The wife who requests *khulu'* from her husband is the one who

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<sup>39</sup> Faza Pauzia Hermawan and Tajul Arifin, "Khulu: Tinjauan Menurut Hadits Bukhori Dan Pasal 148 KHI," *Al Fuadiy: Jurnal Hukum Keluarga Islam* 6, no. 1 (2024): 42-58, <https://doi.org/10.55606/af.v6i1.912>.

<sup>40</sup> Muhammad Ferdian, "Al Quran Surat Al-Baqarah Terjemahan Bahasa Indonesia | Mushaf.Id," accessed June 14, 2022, <https://www.mushaf.id/surat/al-baqarah/>.

<sup>41</sup> Amir Syarifuddin, *Hukum Perkawinan Islam Di Indonesia: Antara Fiqh Munakahat Dan Undang-Undang Perkawinan*, Ed. 1., cet. 1 (Rawamangun, Jakarta: Kencana, 2006), p.197.

<sup>42</sup> Syarifuddin, p.234.

<sup>43</sup> Henderi Kusmidi, "Khulu' (Talak Tebus) Dan Implikasi Hukumnya Dalam Perspektif Hukum Islam," *EL-AFKAR: Jurnal Pemikiran Keislaman Dan Tafsir Hadis* 7, no. 1 (2018): 37, <https://doi.org/10.29300/jpkth.v7i1.1586>.



seeks the divorce. Third, the presence of compensation, or payment, or *iwadh* (recompense): This refers to the financial payment or compensation that the wife gives to her husband in exchange for the divorce.

The issue of *iwadh* (compensation) has been the subject of differing opinions among scholars. The majority of scholars consider *iwadh* to be an essential element of *khulu'* that cannot be omitted. As for the conditions and specific details regarding *iwadh*, these have been widely discussed among the scholars. They are in agreement that *iwadh* must take the form of something of value that can be appraised, as indicated in the Hadith of the wife of Tsabit, as mentioned earlier.<sup>44</sup>

According to the majority of scholars, including Usman, Ibn Umar, Ibn Abbas, Ikrimah, Mujahid, al-Nakha'iy, and as developed in the Hanafi, Maliki, Shafi'i, and Hanbali schools of thought, as well as among the Zahiri scholars, *iwadh* (compensation) does not have a specific limit and may even exceed the amount of *mahr* (dowry) given by the husband at the time of marriage, as long as it is agreed upon by both the husband and wife.<sup>45</sup> The reasoning behind this view is based on the Hadith regarding the wife of Tsabit, mentioned earlier. According to this opinion, if the wife demands more than the agreed amount, the husband is only obligated to accept the equivalent of the *mahr* he originally gave, and any excess must be returned to the wife.<sup>46</sup> Fourth: The *sighah* (formula) or statement of divorce uttered by the husband, in which terms such as "compensation" or "*iwadh*" are clearly stated. Without mentioning the compensation, the divorce would be considered a regular *talaq* (divorce), such as in the phrase "I divorce you with the compensation of a motorcycle."<sup>47</sup>

Fifth, there must be a valid reason for the occurrence of *khulu'*, which is found both in the Qur'anic verses and the Hadith of the Prophet. The reason for *khulu'* is that the wife fears she will be unable to fulfill her duties as a wife, which would prevent her from

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<sup>44</sup> Ali Abubakar and Maulizawati Maulizawati, "Persyaratan Hak 'Iwadh Khulu' (Analisa terhadap Pendapat Mazhab Maliki)," *ElUstah: Jurnal Hukum Keluarga* 1, no. 1 (June 19, 2018): p.4., <https://doi.org/10.22373/ujhk.v1i1.5566>.

<sup>45</sup> Ibnu Qudamah, *Al-Mughniy* (Cairo: Mathba'ah al-Qahirah, 1969), p.325.

<sup>46</sup> Maswiwin Maswiwin, "Analisis Yuridis Pemberian Iwadh Dalam Gugatan Cerai Menurut Hukum Islam (Studi Putusan Mahkamah Agung Republik Indonesia No.248/k/ag/2011)," *Premise Law Journal* 4 (2016): p.10.

<sup>47</sup> Sayyid Sabiq, *Fikih Sunnah*, 8 (Bandung: AL-Maa'rif Bandung, 1980), p.103.

upholding the laws of Allah.<sup>48</sup> In this regard, there are two opinions among the scholars. The first opinion holds that *khulu'* can occur even without the explicit concern about not being able to uphold the laws of Allah, meaning that *khulu'* is valid even in the absence of such a concern. This is the view held by the majority of scholars, though they regard it as *makruh* (disliked), and Imam Ahmad even considered it *haram* (forbidden).

When the *shighat* of *khulu'* is pronounced by the husband at the wife's request, and the husband has accepted the compensation, the marriage is dissolved in the form of *talaq bain sughra*, meaning that reconciliation is not permitted. However, the couple is allowed to remarry afterwards without the need for a *muhallil* (a third party to marry the wife before she can remarry her first husband).<sup>49</sup> Some scholars, including al-Zuhri and Said bin al-Musayyab, hold the view that the husband has the option to accept or reject the compensation. If the husband accepts the compensation, he loses the right to reconcile with his wife. On the other hand, if he rejects the compensation offered by his wife, he retains the right to reconcile.<sup>50</sup>

*Khuluk* essentially refers to a divorce initiated by the wife who feels uncomfortable with her husband, whether for apparent or hidden reasons.<sup>51</sup> As a legal consequence, the wife must return the *mahr* (dowry) that the husband gave her at the beginning of the marriage. This return becomes the *iwadh* or compensation for the *talaq* (divorce) that the husband will pronounce.<sup>52</sup> Logically, when a wife requests a divorce from her husband, the husband is considered to be at a loss. Therefore, he is entitled to receive the return of the *mahr* he originally provided.

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<sup>48</sup> A. R. Ibrahim and Nasrullah, "Eksistensi Hak Ex Officio Hakim Dalam Perkara Cerai Talak," *Samarah* 1, no. 2 (2017): 459-78, <https://doi.org/10.22373/sjhc.v1i2.2378>.

<sup>49</sup> Qisthy Fajriyanti et al., "Khulu' Sebuah Upaya Memutuskan Ikatan Perkawinan (Studi Kasus Di Pengadilan Agama Garut)," *Al-Adl: Jurnal Hukum* 15, no. 2 (2023): 343, <https://doi.org/10.31602/al-adl.v15i2.9570>.

<sup>50</sup> Qudamah, *Al-Mughniy*, p.331.

<sup>51</sup> Ismail Musa Musthafa ` Abdillah, *Ahkam Al-Khul` i Fiy Al-Syari` ah Al-Islamiyah* (Palestina: Jami` ah al-Najah al-Wathaniyah, 2008), p. 48.

<sup>52</sup> Efrinaldi et al., "Urf Review Of The Practice Of Gold Marriage Mahar In The Community Of Tanjung Senang District Bandar Lampung," *Al-Istinbath: Jurnal Hukum Islam* 7, no. 1 (2022): 287-310, <https://doi.org/10.29240/jhi.v7i1.4085>.

This regulation is limited by the condition that there must be no element of injustice from the husband towards his wife. If such injustice occurs, the *khuluk* becomes legally invalid,<sup>53</sup> and the divorce is reduced to a single *raj'iy talaq* (revocable divorce), with no compensation being applicable. Therefore, the husband is not permitted to take the compensation, and it must be returned to his former wife, who has already been divorced. The prohibition on the husband receiving the compensation is agreed upon by the scholars of all four Sunni schools of thought, without exception.<sup>54</sup> Referring to the rules of *khuluk*, the stipulation of the compensation for the *talaq* found in the *ta'liq talaq* (conditional divorce) in the marriage book, which is often used in divorce petitions in the Religious Courts, is in fact not in accordance with the proper regulations. The payment of compensation becomes invalid and unlawful to accept because it clearly involves an element of injustice by the husband towards his wife. Although *khuluk* as a form of divorce is not regulated under the Marriage Law, the KHI (Compilation of Islamic Law) does address it in two provisions: Article 1, paragraph (1) and Article 124, which states: "Khuluk is a divorce that occurs at the wife's request, with the payment of compensation and/or *iwadh* to the husband, and with the husband's consent. Khuluk must be based on valid reasons for divorce in accordance with the provisions of Article 116."<sup>55</sup>

### **Progressive Fiqh of *Talaq* in Relation to the Principle of Making Divorce More Difficult in SEMA Number 1 of 2022 for the Welfare of Women**

The background of the Supreme Court Circular Letter No. 1 of 2022 (SEMA No. 1/2022) of the Republic of Indonesia is rooted in the urgent need to enhance legal protection for women in the context of divorce.<sup>56</sup> In Indonesia, divorce often becomes a source of complex issues, where women are frequently the most disadvantaged party. The impacts of divorce involve not only emotional aspects but also issues related to child custody, economic injustice, and social stigma, which can place a heavy burden on women.

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<sup>53</sup> Ibn Hajar al-Haytamiy, *Tuhfah Al-Muhtaj Fiy Syarh Al-Minhaj*, j. 7, p. 458.

<sup>54</sup> Al-Zuhayliy, *Al-Fiqh Al-Islamiy Wa Adillatuh*, j. 9, p. 7028.

<sup>55</sup> Syarifuddin, *Hukum Perkawinan Islam Di Indonesia*, p.235.

<sup>56</sup> Daffanza Azriel Rochadi and Sulastri Sulastri, "Pembatalan Perkawinan Yang Perkawinannya Telah Putus Akibat Kematian Dalam Keadaan Poligami Tidak Tercatat," *Al Qalam: Jurnal Ilmiah Keagamaan Dan Kemasyarakatan* 17, no. 6 (2023): 4157, <https://doi.org/10.35931/aq.v17i6.2860>.

In this context, SEMA No. 1 of 2022 is expected to serve as a solution to establish a more equitable legal framework that protects women's rights.

The background of the Supreme Court Circular Letter No. 1 of 2022 (SEMA No. 1/2022) of the Republic of Indonesia is rooted in the urgent need to enhance legal protection for women in the context of divorce. In Indonesia, divorce often becomes a source of complex issues, where women are frequently the most disadvantaged party. The impacts of divorce involve not only emotional aspects but also issues related to child custody, economic injustice, and social stigma, which can place a heavy burden on women. In this context, SEMA No. 1 of 2022 is expected to serve as a solution to establish a more equitable legal framework that protects women's rights.

The primary objective of SEMA No. 1 of 2022 is to protect the welfare of women by providing an opportunity to reassess divorce decisions. By introducing a longer and more complex process, this SEMA aims to ensure that women have time to consider various aspects of life post-divorce, including financial stability and the well-being of their children. This is particularly important, as many women are financially dependent on their spouses and need time to prepare for the significant changes that divorce may bring.

In addition, this SEMA also plays a role in raising public awareness about the impacts of divorce and the importance of maintaining family harmony. By emphasizing the processes of mediation and reconciliation, SEMA No. 1 of 2022 encourages couples to reconsider their decisions and seek alternative solutions before opting for divorce. This approach is expected to reduce the divorce rate and create a more stable environment for children and families. In a broader context, SEMA No. 1 of 2022 reflects a commitment to legal reform for the protection of women. By integrating the principles of *fiqh* with positive legal norms, this SEMA acts as a bridge to create synergy between law and existing social values. Through this effort, it is hoped that women will receive stronger protection when facing the challenges arising from divorce, ensuring that their rights are respected and upheld throughout the legal process.

The principle of making divorce more difficult in *fiqh* of divorce has become an important topic in Islamic legal discussions, particularly in the context of protecting

women's rights.<sup>57</sup> In traditional views, divorce is considered a very serious step and should be avoided except in extreme circumstances. Traditional *fiqh* of divorce emphasizes that divorce not only impacts the couple involved but also affects the family and society as a whole.<sup>58</sup> Therefore, the divorce process is regulated in such a way as to ensure that the decision is made with careful consideration and is not undertaken lightly.

In the traditional context, the process of divorce (*talak*) involves several stages aimed at encouraging reconciliation. For instance, there is a waiting period (*iddah*) during which the wife cannot remarry after being divorced, providing the husband with an opportunity to reconsider his decision. Additionally, it is expected that mediation efforts by family members or third parties will take place to resolve conflicts before divorce is finalized. This approach is designed to protect women by giving them time to reflect on their situation before making a decision that could have serious consequences.<sup>59</sup>

On the other hand, the progressive view in the *fiqh* of *talak* acknowledges that the situations faced by women are often more complex and varied. Therefore, this approach seeks to introduce additional protective mechanisms, such as more formal mediation processes and assessments of the economic and social conditions of the couple before divorce is permitted. Proponents of the progressive view argue that the principle of making divorce more difficult should remain in place, but with relevant adjustments to ensure that women are not trapped in harmful relationships.

One of the main criticisms of the principle of making divorce more difficult is that, although it is intended to protect women, in practice it can prolong their suffering. In many cases, women trapped in unhealthy or abusive relationships may feel compelled to endure the situation to avoid the uncertainty caused by a complicated divorce process. This indicates that the existing mechanisms are sometimes insufficient to effectively protect

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<sup>57</sup> Rusydi Ali Muhammad Yulmina, "Multi Alasan Cerai Gugat: Tinjauan Fikih Terhadap Cerai Gugat Perkara Nomor:0138/Pdt.G/2015/MS.Bna Pada Mahkamah Syar'iyah Banda Aceh," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 3, no. 1 (2019): 32-51.

<sup>58</sup> Yunus Rkt et al., "Perceraian Di Luar Pengadilan : Menelisik Tanggungjawab Suami Dalam Keluarga" 11, no. 3 (2024): 311-20.

<sup>59</sup> Darmawan Darmawan et al., "Relative Competence of the Sharia Court: Talaq Divorce Lawsuit and Protection of Women's Rights," *Samarah* 7, no. 1 (2023): 84-100, <https://doi.org/10.22373/sjhc.v7i1.16053>.

women's rights and may even exacerbate the burdens they face. The impact of this principle on women's rights is significant. Although the intention is to provide protection, if not balanced with adequate safeguards, women may suffer greater harm. They may lose the opportunity to obtain the justice and protection they are entitled to. In some cases, women might feel forced to remain in unbeneficial relationships to avoid the social stigma or economic consequences of divorce.<sup>60</sup>

Additionally, there are concerns that this principle may overlook women's rights in terms of freedom and independence. In societies where patriarchal norms are still strong, women are often expected to sacrifice for the sake of maintaining family harmony, without regard for their own needs and desires. This highlights that, despite the intention to protect, women's rights are often neglected.

In the legal context, it is crucial to reassess how the principle of making divorce more difficult can be implemented without sacrificing women's rights. Reforms in divorce jurisprudence (*fiqh talaq*) are necessary to ensure that women have fair access to justice and protection. This includes creating space for women to voice their needs and desires within the existing legal processes. One approach that can be taken is to strengthen mediation and consultation mechanisms that actively involve women. By engaging women in the decision-making process, it is hoped that they will feel more empowered and have greater control over their situation. This approach could also help reduce the stigma often attached to women who choose to divorce.

From a social perspective, it is crucial to raise public awareness about the impacts of divorce and the importance of supporting women through the process. Education and awareness campaigns can help change the social stigma that often hinders women from taking steps toward freedom. By providing accurate information, society can better understand that divorce is not always a failure, but sometimes a necessary step toward achieving a better life. Overall, the principle of making divorce more difficult in Islamic divorce jurisprudence (*fiqh talaq*) must continue to be evaluated and adjusted to meet the needs of contemporary society. By integrating progressive views and considering women's

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<sup>60</sup> Amalia Lathifah, "Interpretation of Verses on Women in Politics," *MILRev : Metro Islamic Law Review* 2, no. 1 (2023): 10-26, <https://doi.org/10.32332/milrev.v2i1.6872>.

rights, it is hoped that a legal system can be created that not only protects but also empowers women in facing the challenges they encounter in their lives.<sup>61</sup> This reform is essential to ensure that women's rights are respected and protected in all aspects of applicable law.

From the discussions above, it can be concluded that SEMA No. 1 of 2022 is, in fact, conservative in terms of women's welfare. The text clearly states that the regulation is intended to make divorce more difficult. If this regulation was issued in an effort to reduce the high number of divorce cases in religious courts, particularly those resulting from lawsuits for divorce (*cerai gugat*), then such an approach is entirely unjustifiable. Every marital issue is unique, and thus, the provisions of SEMA cannot be applied universally to all divorce cases, especially not to divorce lawsuits.

In fact, in 2009, the Circular Letter of the Chief Justice No. 17/TUADA/IX/2009 dated September 25, 2009, was issued to encourage parties involved in divorce cases to separate the issues of divorce and shared assets in order to facilitate and expedite the resolution of such cases.<sup>62</sup> This means that even the consolidation of divorce and shared asset cases is no longer permitted, to ensure that the divorce process itself proceeds more quickly. For women, this approach significantly simplifies the process. They are not left in prolonged uncertainty regarding their status. However, if the provisions of SEMA No. 1 of 2022 are followed, requiring a six-month separation before a divorce can proceed, women would have to endure six months of uncertainty in an already difficult marriage. Alternatively, if a twelve-month period of non-support is required before a divorce can be granted, women would first have to struggle alone for twelve months before being granted clarity on their status. This is despite the fact that, according to Islamic regulations, a husband is still responsible for providing financial support to his wife during the waiting period (*iddah*) following a divorce.

In fact, the concept of *khulu'* in Islamic divorce jurisprudence is progressive in terms of advancing women's welfare. The rules are clear: women are allowed to file for

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<sup>61</sup> Muhammad Agus Muljanto Annisaa Shalsabila Miracle, "Efektivitas Kebijakan Program Puspaga Sebagai Unit Semolowaru Kota Surabaya," *Jurnal Sosial Humaniora Sigli (JSH)* 7 (2024).

<sup>62</sup> Mizaj Iskandar and Liza Agustina, "Penerapan Asas Peradilan Sederhana, Cepat dan Biaya Ringan dalam Kumulasi Cerai Gugat dan Harta Bersama di Mahkamah Syar'iyah Banda Aceh," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 3, no. 1 (August 9, 2019): p.11., <https://doi.org/10.22373/sjkh.v3i1.4403>.

divorce with valid reasons. *Khulu'* also provides a waiting period (*iddah*) for women, which is one period of purity or one month. For men, the concept of *iwadh* (compensation) is also applied, balancing the process by ensuring the return of the dowry. Under the *khulu'* system, women who are suffering in an undesirable marriage no longer have to endure prolonged uncertainty about their status. It would be beneficial for SEMA No. 1 of 2022 to be reconsidered. Alternatively, judges could exercise their *ex officio* authority to avoid applying rules that may harm women's welfare.

## CONCLUSION

The conclusion of this study indicates that the principle of making divorce more difficult in SEMA No. 1 of 2022 can be considered conservative, as it tends to cause more harm to women than benefit them. In contrast, the concept of *khulu'* in Islamic divorce jurisprudence is more progressive, offering women greater ease in seeking separation, a shorter *iddah* period, and the obligation for men to provide *iwadh* (compensation). This shows that a conservative perspective does not always prioritize traditional authority, such as that of religious scholars or established Islamic legal institutions, while a progressive approach is not solely about bold or liberal interpretations of Islamic law. In this context, the rules of *khulu'* in the *fiqh of talak* provide positive benefits for women's welfare without disadvantaging men, whereas the principle in SEMA No. 1 of 2022 has a negative impact on women. This underscores the need for policy reform that considers a balance between legal principles.



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