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## **Legal Controversy Over Divorce Filed by Wives in Religious Courts in Indonesia**

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**Abstract:** Divorce initiated by a wife is often a source of controversy within religious courts. In line with that, three questions are answered in this paper. First, what is the form of the "controversy" in the normative and juridical legal considerations of *cerai gugat* or divorce initiated by a wife; (b) what is the form of the legal impact in the judge's decision on the "controversy" of a contested divorce; (c) what is the form of the "controversy" in community life on the response to a contested divorce. This study is a sociological study of law using a case study approach in religious courts. Data were collected by analyzing court decisions, journal articles, and books, then analyzed using Islamic legal theory. The results of this study indicate that there are three levels of controversy surrounding divorce initiated by wives. First, the differences that occur in normative and juridical law regarding the incompatibility between Islamic law and positive law governing divorce lawsuits by wives cause controversy in the law of divorce at the request of wives in religious courts. Second, differences in judges' decisions in the law of divorce initiated by a wife. It causes controversy and resulting in legal impacts from various aspects. Third, the controversy over the response of community leaders. Some religious and community leaders see it as a threat to the stability of the family and the long-established social order. In contrast, others see it as a form of women's freedom to determine the direction of their own lives. In the context of Islamic law, the decision of a religious court is binding and enriches the development of sociological studies of law, especially divorce initiated by the wife, and influences social and legal change in Indonesia.

**Keywords:** Legal controversy, divorce at the wife's request, religious courts, Islamic sociological law

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**Abstrak:** *Perceraian yang diajukan oleh seorang istri seringkali menjadi sumber kontroversi di pengadilan agama. Sejalan dengan hal tersebut, ada tiga pertanyaan yang ingin dijawab dalam tulisan ini. Pertama, bagaimana bentuk “kontroversi” dalam pertimbangan hukum normatif dan yuridis cerai gugat atau perceraian yang diajukan oleh istri; (b) bagaimana bentuk dampak hukum dalam putusan hakim atas “kontroversi” cerai gugat; (c) bagaimana bentuk “kontroversi” dalam kehidupan bermasyarakat terhadap respon cerai gugat. Kajian merupakan studi sosiologi hukum dengan pendekatan studi kasus pada pengadilan agama. Data dikumpulkan dengan mengalisis putusan pengadilan, artikel jurnal, buku dan kemudian dianalisis dengan teori hukum Islam. Hasil penelitian ini menunjukkan bahwa terdapat tiga tingkatan kontroversi seputar perceraian yang diinisiasi oleh istri. Pertama, perbedaan yang terjadi dalam hukum normatif dan yuridis mengenai ketidaksesuaian antara hukum Islam dan hukum positif yang mengatur tentang gugat cerai oleh istri menimbulkan kontroversi dalam hukum perceraian atas permintaan istri di pengadilan agama. Kedua, perbedaan putusan hakim dalam hukum perceraian yang diajukan oleh istri. Hal ini menimbulkan kontroversi dan menimbulkan dampak hukum dari berbagai aspek. Ketiga, kontroversi mengenai tanggapan tokoh masyarakat. Sebagian tokoh agama dan masyarakat melihatnya sebagai ancaman bagi stabilitas keluarga dan tatanan sosial yang telah lama terbentuk. Sebaliknya, sebagian yang lain melihatnya sebagai bentuk kebebasan perempuan untuk menentukan arah kehidupannya sendiri. Dalam konteks hukum Islam putusan pengadilan agama merupakan suatu hal yang mengikat di samping memperkaya perkembangan kajian sosiologi hukum khususnya perceraian yang diinisiasi oleh istri dan berpengaruh terhadap perubahan sosial dan hukum di Indonesia.*

**Kata Kunci:** *Kontroversi hukum, perceraian atas permintaan istri, pengadilan agama, sosiologi hukum Islam*

## Introduction

A divorce initiated by a wife often sparks legal controversy within the religious courts. These cases are often seen as a form of resistance to the patriarchal norms that have taken root in Indonesian society. Although Islamic law provides space for women to file for divorce, practice shows that there are many obstacles, both legal and social, that make the process far from easy.<sup>1</sup> The controversy surrounding divorces filed by wives has sparked heated debates in legal, religious, and societal circles, especially in contexts where religious law plays a central role in family matters. Data on the number of contested divorces or divorces filed by wives shows that in 2023, there were 352,403 cases of

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<sup>1</sup> Atun Wardatun and Bianca J. Smith, “Woman-Initiated Divorce and Feminist Fiqh in Indonesia: Narrating Male Acts of Nushūz in Marriage,” *Ulumuna: Journal of Islamic Studies* 24, No. 2 (2020). Ghina Reftantia, et. al., " Analisis Nilai Patriarki dalam Putusan Sidang Cerai Gugat di Pengadilan Agama Sawahlunto," *IAPA Proceedings Conference*, (2024), p. 11-30.

contested divorces. This number dominates the total divorce cases with a percentage reaching 76% of the total national divorce cases.<sup>2</sup> From these cases, it was found that there were still many fulfillments of women's rights after divorce that were not fulfilled due to low legal awareness. This disparity reflects the legal uncertainty faced by women when filing for divorce.<sup>3</sup>

Research on the issue of divorce in Islam has been conducted with various approaches. At least three studies on the issue of divorce can be mapped. First, analyzing the nature of divorce from the perspective of Islamic law as a way for divorce laws to be applied at all levels of society.<sup>4</sup> This is because some communities still adhere to traditions that require family problems not to be decided in front of a religious court. Second, domestic conflict, economic factors, and social change are among the main factors that contribute to the divorce rate in Indonesia<sup>5</sup>. The impact of divorce includes psychological problems for individuals, changes in family dynamics, and increased economic pressure. Third, the increasing number of divorce cases from year to year, especially *cerai gugat* or divorce initiated by a wife, both at the national and local levels, is a serious problem if it is related to the purpose of marriage<sup>6</sup>. From these three studies, it can be seen that studies exploring the legal controversy of *cerai gugat* in religious courts are still very limited and require further attention for future research.

This paper aims to complement the shortcomings of previous studies that have not examined the various dimensions of the issues related to the law of divorce initiated by a wife. In particular, this paper shows that the "controversy" over the law of divorce initiated by a wife is a difference in perspective exhibited by various groups in society. In line with that, three questions are answered in this paper. First, what is the form of the "controversy" in the normative and juridical legal considerations of *cerai gugat* or divorce initiated by a wife; (b) what is the form of the legal impact in the judge's decision on the "controversy" of a contested divorce; (c) what is the form of the "controversy" in community life on the response to a contested divorce. The answers to these three questions will enable

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<sup>2</sup> Mursyid Djawas, et.al., "Creating Family Resilience in Indonesia: A Study of "Marriage Guidance" Program in Aceh and South Sumatera," *al-Ihkam: Jurnal Hukum dan Pranta Sosial* 17, No. 2 (2022). Icen Ectefania Mufrida, "Disputes and Quarrels are the Main Factors of Divorce in Indonesia," *GoodStaats*, 2024.

<sup>3</sup> Hotnidah Nasution and Ahmad Rifqi Muchtar, "Access to Justice for Women and Children in Divorce Cases in the Indonesian Religious Courts," *AHKAM: Jurnal Ilmu Syariah* 20, no. 2 (2020).

<sup>4</sup> Firdaus Firdaus, et.al., "Post-Divorce Child's Nafaqah Mādiyah: An Analysis of the Shifting from Fulfilment to the Assertion of Ownership Rights," *Ahkam* 33, No. 1 (2023).

<sup>5</sup> Abdul Rozak, et.al., "Pengaruh Pandemi Covid 19 terhadap Perceraian Masyarakat Rembang Berdasarkan Aspek Sosial dan Angka di Pengadilan," *Al-Ahkam Jurnal Ilmu Syari'ah dan Hukum* 6, No. 2 (2021), p. 161-181.

<sup>6</sup> Rais Isnawati, "The High Rate of Plaintive Divorce (Khulu') in Indonesia; A Critical Analysis of the Causes and Alternative Solutions to Overcome It," *Al-Adalah*, 2014.

us to understand the rationale used as the basis for the acceptance and rejection of the law of divorce initiated by a wife.

The paper on the "controversy" in the interpretation of the law of divorce is based on the argument that each group has different ideological and practical foundations in viewing the law of divorce initiated by a wife. In Islamic law, wives can only sue for divorce if there are valid reasons, such as the husband's inability to fulfill his obligations. Unlike the case with Indonesian positive law, as stated in Law No. 1 of 1974 concerning Marriage, wives are given a more egalitarian right to file for divorce without having to fulfill certain conditions. This is the cause of the controversy that arises from the incompatibility between the norms of Islamic law and the provisions of positive law. It also causes legal uncertainty in the practice of religious courts.

Legal controversy is the defense of worker protection in the effectiveness of social rights in agreements and judicial humanization, with the ideals of harmony and empowerment of the parties in conflict resolution as normative support.<sup>7</sup> A legal controversy is also defined as a claim - an action brought by or on behalf of someone against someone else claiming that something is right or wrong.<sup>8</sup> It encompasses two opposing interests that are, in their own way, protected by legal treaties and constitutional provisions: the right to self-determination and the obligation to maintain and preserve the common good.<sup>9</sup> This potentially reduces the ethical possibility of controversy to defending arguments in claiming the truth.<sup>10</sup> Thus, legal controversy is the true claim of one person against another.

Legal controversies in divorce consider the religious and civil aspects of marriage and divorce in law-making and decision-making<sup>11</sup>. In the religious aspect, the civil registration of Islamic marriages (*nikah*) and the role of Sharia councils in issuing religious (rather than civil) divorces have always been subject to controversy in law enforcement.<sup>12</sup> The effect of divorce law reform on divorce

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<sup>7</sup> Marciele A. de Vasconcellos and Cinara L. Rosenfield, "The Legal Controversies And Disputes Over The Meaning Of Justice In Conciliatory Policy In The Labor Court," *Caderno CRH*, 2022

<sup>8</sup> Paola Frati et al., "Preimplantation and Prenatal Diagnosis, Wrongful Birth and Wrongful Life: A Global View of Bioethical and Legal Controversies," *Human Reproduction Update* 23, no. 3 (2017), p. 338–57.

<sup>9</sup> Filippo Gibelli et al., "COVID-19 Compulsory Vaccination: Legal and Bioethical Controversies," *Frontiers in Medicine*, (2022).

<sup>10</sup> Vlad Krotov, et.al., "Legality and Ethics of Web Scraping," *Communications of the Association for Information Systems* 47 (2020).

<sup>11</sup> Joel Nichols, "Marriage: Civil, Religious, Contractual, And More\*," *Family Court Review* 50, no. 2 (2012), p. 222–27.

<sup>12</sup> Ralph Grillo, "Comment on the Report of the Siddiqui Review Panel, 2018," *Journal of Muslims in Europe*, 2018.

rates elsewhere has generated controversy in the legal and economic literature<sup>13</sup>. The same thing can be said for the legal basis for the court's authority to order coordinated intervention as well as legal remedies to determine the scope of authority in individual cases<sup>14</sup>. The civil aspect explains that "each case depends on its facts", and one of these facts is the philosophical approach of certain judges to marriage, divorce and continued spousal support after judicial termination of marriage.<sup>15</sup>

Divorce initiated by a wife is a problem when the husband cannot treat his spouse well. It is necessary (for him) to initiate a divorce, and the wife can reciprocally divorce, so she can initially ask justice to the court<sup>16</sup>. In addition, divorce initiated by a wife represents the desire of the wife to separate due to conflict with the husband or the absence of compatibility to continue the household.<sup>17</sup> Women are also eligible to petition for the execution of a divorce at the Religious Court.<sup>18</sup> Wives can sue for divorce in the following circumstances: poverty of her husband, unfulfillment of the wife's rights, husband's ill-treatment, and husband's effort to socially isolate her<sup>19</sup>. In the concept of procedural law in Indonesia, when the verdict has been rendered and the divorce has been granted, the husband is obliged to fulfill his former wife's right to maintenance, but in reality, a problem arises, namely the assumption that after the divorce occurs, the husband does not fulfill his rights. Thus, a divorce initiated by a wife is the right at the request of the wife to sue in the marriage relationship.

In the context of divorce, legal controversies have always been about women's rights. Ferdousi says that divorced women, in the majority, face many social justice challenges and are not protected in the current legal system<sup>20</sup>. In the year 2000, the Egyptian state introduced a new law giving women the right to file for divorce unilaterally, a move that generated great controversy at home and

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<sup>13</sup> Clarisse Coelho and Nuno Garoupa, "Do Divorce Law Reforms Matter for Divorce Rates? Evidence from Portugal," *Journal of Empirical Legal Studies*, 2006.

<sup>14</sup> Milfred D. Dale, et.al., "Parenting Coordination Law in the U.S. and Canada: A Review of the Sources and Scope of the PC's Authority," *Family Court Review* 58, no. 3 (2020), p. 673–709.

<sup>15</sup> Julien D. Payne, "A Practitioner's Guide to Spousal Support in Divorce Proceedings," *Revue Générale de Droit* 19, no. 4 (2019), p. 701–34,

<sup>16</sup> Mohammad Abedi and Azam Amini, "The Right to Divorce for Women: Religious Ordinance, a Human Rights Need," *Human Rights*, 2021,

<sup>17</sup> Muchamad Coirun Nizar and Ghofar Shidiq, "Divorce And Dini Marriage In Semarang District," *ADHKI: Journal of Islamic Family Law* 1, no. 2 (2020), p. 125–36.

<sup>18</sup> Sugih Ayu Pratitis, "Legal Effects of Divorce on Marital Property," *Doktrina: Journal Of Law*, (2019).

<sup>19</sup> Azmi Abubakar, "The Reason for Poverty as a Cause of Divorce in Pidie Society," *Posita: Journal of Islamic Family Law* 1, no. 1 (2023), p. 32–38.

<sup>20</sup> Nahid Ferdousi, "Protection of Wife's Right To Maintenance In Bangladesh: An Overview," *Malaysian Journal of Syariah and Law*, (2021).

abroad<sup>21</sup>. In Saudi Arabia, similar developments took place before the Egyptian reforms but without state intervention. Instead of applying written state law, Saudi Arabia's family courts draw their decisions from Islamic jurisprudence (*fiqh*).<sup>22</sup> Muslim, Jewish and Christian litigants alike struggle to reconcile their religious beliefs about marriage and divorce with the expectations (and requirements) of the state regarding family law.<sup>23</sup>

"Controversy" in interpreting the law of contested divorce was chosen as the subject of this paper for three reasons. First, the issue of "controversy" is a central topic that has not received much attention in previous studies. Secondly, "controversy" explains the existence of a causal relationship that requires a careful understanding. "Controversy" arises for reasons that need to be revealed. Third, the existence of "controversy" is the basis for a series of consequences that occur. These consequences require mapping to enable action to be formulated. The three reasons for choosing the issue of "controversy" as the subject of the paper are expected to provide a comprehensive understanding for problem-solving.

This research is a sociological study of law uses case study approach of religious court decisions in Indonesia. Data were collected by referring to religious court decisions, journal articles, and books, which were then analyzed using Islamic law sociology theory.<sup>24</sup> With a socio-legal approach, researchers can understand how legal norms are not only seen from the formal text but also from how the law is applied and accepted in society. This method involves data collection through text reading, online document analysis, and data from journal articles relevant to the research topic to explore people's perceptions, values, and practices related to the law. By understanding these dynamics, this research aims to provide a more holistic picture of the effects of law in everyday life as well as how social factors such as culture, economics, and politics contribute to the development and application of law so that the results are more relevant and applicable.<sup>25</sup>

This research uses two types of data, namely primary data and secondary data. Primary data is obtained from the judge's decision on the divorce case at the request of the wife, and text data is sourced from the Holy Book (Al-Quran). Data sourced from legislation (juridical law) regarding the law of divorce initiated by a wife, the text of the Holy Book (Al-Quran) and the text of the hadith (normative

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<sup>21</sup> Dominik Krell, "Die Reform Der Loskaufscheidung (Ul): Lehren Aus Saudi-Arabien," *Welt Des Islams*, (2020).

<sup>22</sup> Dominik Krell, "Die Reform Der Loskaufscheidung."

<sup>23</sup> Nichols, "Marriage: Civil, Religious, Contractual, And More."

<sup>24</sup> Achmad Ali and Wiwie Heryani, *Sosiologi Hukum: Kajian Empiris terhadap Pengadilan*, Jakarta: Kencana, 2014. Faisar Ananda Arfa and Watni Marpaung, *Metodologi Penelitian Hukum Islam*, Jakarta: Kencana, 2018. Victor Imanuel W. Nalle, "The Relevance of Socio-Legal Studies In Legal Science," *Mimbar Hukum* 27, no. 1 (2015), p. 179.

<sup>25</sup> Muhammad Helmy Hakim, "Pergeseran Orientasi Penelitian Hukum: Dari Doktrinal Ke Socio-Legal," *Syariah: Jurnal Hukum dan Pemikiran* 16, no. 2 (2017), p. 10.

law) regarding divorce initiated by a wife, the case number of the judge's decision regarding the case of contested divorce in the religious court. Meanwhile, secondary data is supporting data such as internet data and reputable research articles. This type of data comes from internet sources, including news websites, YouTube, and previous research journals that are relevant to the topic of this research. The data is formulated and classified into three forms of controversy. First, data regarding the controversy over divorce demanded by the wife at the level of normative and juridical legal considerations. Second, controversy at the level of the judge's decision regarding divorce initiated by a wife. Third, the response of community leaders who helped trigger the controversy. These three levels explain the various dimensions of controversy that occur regarding the phenomenon of divorce initiated by a wife.

This research process began with determining a relevant topic, namely the legal controversy over divorce initiated by a wife in religious courts. The researcher collected data through several stages. In the first outcome, data was drawn from the Qur'an, Hadith, and the opinions of scholars, as well as legislation that provides a legal framework and moral guidance in the context of divorce law at the request of the wife. For the second result, data collection was carried out by analyzing case decision documents, which enabled researchers to understand the application of the law in practice and the decisions taken in cases of divorce suit. As for the third outcome, data was obtained from internet sources, including articles, YouTube, and other internet websites, which enriched the perspective with the latest information and community views on the issue of divorce at the wife's request. With this approach, researchers try to get a comprehensive understanding through analyzing various relevant sources. The results of this analysis are then presented in a discussion, in which the researcher outlines the relevance and impact of the findings on the research questions, then ends with a conclusion that summarizes the contribution of this research to the understanding of divorce issues in the context of religious justice law or Islamic law.

### **Normative and Juridical Legal Conclusions Towards Controversy**

Divorce initiated by a wife in Indonesia consists of *talik talak* (divorce initiated by the husband), *khulu'* (divorce initiated by the wife), and *contested divorce* (judicial divorce). In normative and juridical law, there is controversy over the three types of divorce. Normative law only regulates divorce in the form of *talik talak* and *khulu'*, while juridical law regulates divorce in the form of *cerai gugat*. The following is the concept of divorce initiated by a wife based on normative law:

**Table 1: Consequences of Divorce Initiated by a Wife-Based on Normative Law**

No	Source	The Concept of Divorce Initiated by a Wife	Description
1	The Quran	<p>Surat al-Baqarah verse 229:  <i>"If you fear that the husband and wife will not observe the laws of Allah, then there is no sin on either of them in the payment that the wife makes to redeem herself".</i></p> <p>Q.S An-Nisa verse 128;  <i>"And if a woman fears nusyuz or indifference from her husband, then there is nothing wrong with them making a true peace, and peace is better for them, though man is by nature miserly. And if you get along with your wives well and keep yourselves (from nusyuz and indifference), then surely Allah is All-knowing of what you do."</i></p>	<p>Legal basis of <i>khuluk</i></p> <p>Legal basis for divorce initiated by a wife on the grounds of violation of <i>taklik talak</i> (marriage agreement)</p>
2	Hadith	<p><i>"The wife of Tsabit bin Qais came to the Prophet S.A.W, and said: O Allah's apostle Tsabit bin Qais is neither lacking in behavior nor in religion. Only I am not happy that there will be kufr in Islam. The Prophet of Allah (SAW) said "Will you return the garden"? The wife replied "Yes I will" The Prophet said to Tsabit, "Accept the garden and divorce her once divorced". (From Anas bin Malik, narrated by al-Bukhari).</i></p>	<p>Ibn Hajar al-Asqalani, <i>Fath al-Bahri bi Syarh Shahih al-Bukhari</i>, Juz 15 (Cairo: Dar al-Diyan li al-Turats, 1986), 103.</p>
3	Ibn Hajar al-Asqalani	<p>In his book, <i>Fathul Bari</i> defines <i>khuluk</i> as the redemption of the wife to be free from the husband by giving the property that the husband previously gave to the wife.</p>	<p>Ibn Hajar Al-Asqalani, "Fathul Bari," Riyadh: Maktaba Al-Salfiyah, 2008, p. 89.</p>

4	Ibn Rushd	In the book <i>Bidayatul Mujtahid, iwadl khuluk</i> is defined as compensation for the wife to get a divorce from her husband. Forms of divorce such as <i>khuluk</i> , <i>shulh</i> , and <i>mubarra'ah</i> actually return to one meaning, namely the wife making up or paying compensation for her divorce. <i>Khuluk</i> has its own specificity, namely with all the husband's property given to the wife at the time of the marriage, as well as the wife in making <i>iwadl khuluk</i> . At the same time, <i>shulh</i> is providing only part of the property. There is also <i>fidyah</i> , namely the provision of compensation made by the wife only partially, and <i>mubarra'ah</i> , namely, the wife has the right, but the wife waives it against her husband.	Rusyd, <i>Bidayatul Mujtahid wa Nihayah al-Muqtashid</i> , p. 133
5	Ibrahim Al-Syirazi	The book <i>al-Muhadzab</i> states that <i>khuluk</i> is absolutely permissible, even if there is no reason at all as long as both husband and wife are willing or accept each other. Moreover, the <i>khuluk</i> is accompanied by a reason, either a human reason, such as the wife no longer loves her husband, or a shar'i reason, such as the husband stops providing maintenance or does not want to be told to pray.	Ibrahim Al-Syirazi, "Al-Muhadzab," Cairo: Al-Babi Al-Halabi, 1976, p.76.

Source: Data processed by the author, 2024

**Table 2. The Consequences of Divorce Initiated by a Wife based on the Juridical Law of Religious Courts**

No	Juridical of Religious Courts	Consequences of Divorce Initiated by a Wife	Description
1	Law No. 1 Year 1974 on Marriage	Article 40; A divorce petition is filed with the Court.	Article 40 contains the preamble to the term divorce lawsuit in the

			courts (this law does not distinguish between divorce at the request of the husband and filing by the wife; the term used in the preamble is the same).
2	Government Regulation No.9 of 1975 concerning the Implementation of Law No. 1 of 1974 concerning Marriage	Article 20 (1) A lawsuit for divorce shall be filed by the husband or wife or their proxies. to the Court whose jurisdiction includes the place of residence defendant.	Article 20 contains an explanation of article 40 of Law No.1 of 1974 concerning marriage
3	Law No. 7 of 1989 on Religious Courts	Article 73: (1) A complaint for divorce shall be filed by the wife or her proxy with the Court whose jurisdiction covers the place of residence of the plaintiff, except where the plaintiff intentionally left the common residence without the respondent's permission	Article 73 contains a consideration of the term divorce lawsuit requested by the wife as Contested divorce (this law distinguishes the terms used for divorce by the husband ( <i>cerai talak</i> ) and divorce by the wife ( <i>contested divorce</i> )).
4	Compilation of Islamic Law (KHI)	<ul style="list-style-type: none"> <li>● Found in Article 132, paragraph 1 and paragraph 2</li> <li>● Article 1 (i) Khuluk is a divorce that occurs at the request of the wife by give a</li> </ul>	<p>Article 132 contains an explanation of the divorce lawsuit requested by the wife with terms and conditions if the respondent does not return to the joint residence.</p> <p>Article 1 contains an explanation of divorce</p>

		<p>dowry or iwadl to and with the consent of her husband;</p> <ul style="list-style-type: none"> <li>● Article 45</li> <li>● Article 46</li> <li>● Article 116 (g)</li> </ul> <p>The husband violated the talik talak;</p> <ul style="list-style-type: none"> <li>● Article 148</li> <li>● Article 124; "<i>khuluk must be based on the grounds for divorce as stipulated in Article 116</i>".</li> </ul>	<p>initiated by a wife with the term <i>khuluk</i>.</p> <p>Article 45 contains an explanation of Talik talak (Marriage Agreement) which can be used by the wife to file for divorce.</p> <p>Article 46 contains an explanation of the content of taklik talak, which must not be contrary to Islamic law; once taklik talak has been promised, it cannot be revoked.</p> <p>Article 116; (g) contains an explanation of the consideration of a request for divorce by the wife on the grounds of violation of <i>talik talak</i></p> <p>Article 148 contains an explanation of the reasons for the wife's request for divorce on the grounds of <i>khuluk</i> and also explains how to proceed with the provisions of <i>Khuluk</i>.</p> <p>Article 124 contains the consideration that the submission of <i>khuluk</i> must be based on the grounds for</p>
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			divorce Article 19 PP No. 9/1975, Article 116 KHI
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Source: Data processed by the author, 2024

Tables 1 and 2 above show that the controversy regarding normative and juridical legal considerations in divorce initiated by a wife is regulated in detail in Islamic legal sources such as the Al-Quran and Hadith and in Indonesian legislation such as the Marriage Law and the Compilation of Islamic Law. The differences in terminology and procedures regulated in these various sources reflect the complexity of divorce law in the normative and juridical context.

The table contains three important points regarding divorce at the wife's request. First, the normative basis shows that this kind of divorce, especially through khuluk and talik talak, has a strong legal basis in Islamic teachings, including in the Quran and Hadith. However, the term "*gugat cerai*" (divorced initiated by a wife) is not found in Islamic law. Secondly, juridically, religious courts use several terms such as *cerai gugat*, *talik talak*, and *khuluk*, which have different procedures, requirements, and legal implications, and misapplication can affect the judge's decision. Thirdly, this table also provides detailed guidance on the procedure for divorce initiated by a wife in religious courts, including residence requirements, valid reasons, and the steps to be followed by the wife in court.

### Controversy over Judge's Decision on Divorce Initiated by the Wife

In Islamic law, the decision to divorce remains with the husband even if the wife asks for it. However, in contested divorce in Indonesia, the decision to divorce is made by the judge, not by the husband. Each judge's decision will be different and have different legal effects. This difference raises several controversies, which can be seen in Table 3 below:

**Table 3: Controversy Over Judge's Decision on Divorce At The Wife's Request**

Aspects	Controversy	Legal Impact	Case Study
Gender Equality	The issue of whether judges' decisions benefit gender equality or worsen it.	Potential gender injustice in decisions.	A divorce case at the Sumenep Religious Court, East Java: Requests for divorce by wives are considered

Aspects	Controversy	Legal Impact	Case Study
			more favorable to the female gender. <sup>26</sup>
Child Custody Rights	How divorce verdicts affect child custody and division of responsibilities.	The judge's decision can influence the determination of child custody.	A divorce case at the Bogor Religious Court, 2017: Child custody was decided to go to the mother, but there was dissatisfaction from the father <sup>27</sup>
Maintenance Obligation	Disputes over maintenance obligations after divorce and the division of property.	Maintenance obligations and the division of property that may be unjust.	Case in Tembilahan Religious Court, 2020: Post-divorce maintenance requests cause disputes between ex-husbands and wives. Even husbands are reluctant to provide post-divorce maintenance <sup>28</sup>
Social Justice	Whether the judge's decision reflects social and economic justice for the parties involved.	Social justice in judicial decisions.	A case at the Wonogiri Religious Court, Central Java, 2014: Judges' decisions in cases of contested divorce are considered to reflect social justice for the parties involved.

<sup>26</sup>Sofia Mubarakah Sa'bana and Rusdiana Navlia. "Tingginya Angka Cerai Gugat di Kabupaten Sumenep and Dampaknya bagi Anak," *Al-Manhaj: Journal of Indonesian Islamic Family Law* 5, No. 2 (2023), p. 202-223.

<sup>27</sup> Directory of Decisions of the Supreme Court of the Republic of Indonesia, "PA BOGOR Decision 915/Pdt.G/2017/PA.Bgr" (2018).

<sup>28</sup> Directory of Decisions et al., "Decision of PA TEMBILAHAN 0314/Pdt.G/2020/PA.Tbh" (2020).

Aspects	Controversy	Legal Impact	Case Study
			293031
Application of Sharia Law	The debate on the application of the principles of sharia in divorce cases.	Consistency in the application of sharia law in decisions.	A divorce case from the Sleman Religious Court, Yogyakarta, 2011: The judge applied sharia principles in the decision of the divorce case <sup>32</sup>

Source: Data Processed by the Author, 2024

Table 3 above shows that judges face complex challenges in divorce cases, ranging from applying the principle of gender equality, determining child custody, and post-divorce maintenance obligations that often arise due to decisions that are considered disproportionate, and judges must ensure that their decisions reflect social and economic justice for the parties involved<sup>33</sup>. In addition, judges must also be consistent in using sharia law in their decisions. As for case studies on aspects of gender equality, judges are more favorable to the female gender in their decisions, as in the divorce case of the Sumenap religious court, East Java<sup>34</sup>. In the aspect of child custody, the judge, in his decision, gave custody of the child to the mother as in the case of a request for post-divorce maintenance in the religious court of Tembilahan in 2020<sup>35</sup>. In the aspect of maintenance obligations, the judge, in his decision, gave the obligation of maintenance to the father every month to the child.

<sup>29</sup> Directory of Decisions of the Supreme Court of the Republic of Indonesia, "PA WONOGIRI Decision 1054/Pdt.G/2014/PA.Wng." (2015).

<sup>30</sup> Directory of Decisions of the Supreme Court of the Republic of Indonesia, "PA WONOGIRI Decision 1439/Pdt.G/2014/PA.Wng." (2015).

<sup>31</sup> Directory of Decisions of the Supreme Court of the Republic of Indonesia, "PA WONOGIRI Decision 652/Pdt.G/2014/PA.Wng" (2014).

<sup>32</sup> Directory of Decisions of the Supreme Court of the Republic of Indonesia, "Decision of PA SLEMAN 134/Pdt.G/2011/PA.Smn" (2011).

<sup>33</sup> Azhari Akmal Tarigan, et al., "Ensuring Equity in Post-Divorce Economic Rights: A Critical Analysis of Judicial Sensitivity in the Religious Court of Padang Sidempuan, Indonesia," *AL-HUKAMA: The Indonesian Journal of Islamic Family Law* 13, no. 2 (2023), p. 180-201.

<sup>34</sup> Reftantia et al., "Analysis of Patriarchal Values in Plaintiff's Divorce Court Decisions at the Sawahlunto Religious Court."

<sup>35</sup> Firdaus Firdaus, et.al., "Post-Divorce Child's Nafaqah Māḍiyah."

### Controversial Responses from Community Leaders

The law controversy over a divorce initiated by a wife occurs not only in the legal impact of the judge's decision but also in the response of community leaders. The diverse and different or even contradictory responses of several community leaders reflect the complexity of this issue and the diverse perspectives that exist in society. An in-depth analysis of the statements and actions of these public figures will provide a clearer picture of the dynamics of public opinion and its implications for policies towards women who demand divorce.

**Table 4. Controversy of Community Leaders who Gave Their Views on Divorce Initiated by a Wife**

Community Leaders	Outlook/ Response	Reason
Conservative scholars (Madhhab Al-Arba'ah)	Generally Reject	According to the popular <i>madzhab al-arba'ah</i> , the opinion is that it is permissible, but in certain conditions, it can be <i>makruh</i> or <i>haram</i> , depending on the conditions that accompany the events that occur. As for the law of divorce due to economic factors, according to the scholars of the madhhab, the law is <i>permissible</i> if what is not fulfilled are the needs that are <i>dharuriyat</i> and <i>hajat</i> . However, if the husband cannot fulfill is the <i>tahsiniyat</i> needs, then the divorce is <i>makruh</i> or <i>haram</i> . <sup>36</sup>
Moderate Ulama (Ustadz Adi Hidayat)	Conditional	Supporting divorce at the wife's request if there are valid reasons such as domestic violence, injustice, or the husband's inability to fulfill his obligations, and strongly rejecting it if the wife asks for divorce without shar'i reasons. <sup>37</sup>

<sup>36</sup>Muhammad Sarbini, et.al., "Hukum Cerai Gugat disebabkan Kesulitan Ekonomi," *Al-Mashlahah: Jurnal Hukum Islam dan Pranata Sosial Islam* 21, No. 1 (2021).

<sup>37</sup> Ustadz Adi Hidayat, "When Wife Asked for Divorce Without Shar'i Reason - Ustadz Adi Hidayat Lc MA," *Dakwah Hikmah*, 2018.

Community Leaders	Outlook/Response	Reason
<p>Traditional Society (DM informant who was married and abandoned by her husband without a divorce in court).</p>	<p>Tend to resist</p>	<p>Divorce is often seen as a disgrace to be avoided. Divorce initiated by a wife is considered to damage the family's honor and social status in society. As in the interview, informant DM married in 2010 had one son and there was an affair committed by her husband, not only that, her husband also left Islam in 2018: "My husband left me without a divorce decree, then my husband remarried and converted to Christianity following his new wife" <sup>38</sup></p>
<p>Modern Society (Informant RL who sued her husband at the Tondano Religious Court in 2008)</p>	<p>More accepting</p>	<p>View divorce as an individual right, including a wife's right to ask for a divorce if she feels unhappy or unfairly treated in the marriage. As described by informant RL who is 28 years old. Informant RL is a housewife who is now still studying at one of the universities in North Sulawesi, Informant RL has no children and was married in 2001 and then sued her husband at the Tondano Religious Court in 2008. In the interview she said:</p> <p>"It is true that I sued my husband because he was abusive/high-tempered and even hit me, leaving bruises on my body, so I couldn't stand it anymore and I divorced my husband." <sup>39</sup></p>

Source: Data Processed by the Author, 2024

<sup>38</sup> Agi Suryana, et.al., "Stigma Masyarakat Terhadap Perempuan Berstatus Cerai Hidup di Kota Tanjungpinang," *JISHUM: Jurnal Ilmu Sosial dan Humaniora* 1, no. 3 (2023), p. 601–18.

<sup>39</sup> Rahmat Fadillah and Syahrui Syahrui, "Hak Cerai Bagi Perempuan Dan Faktor Penyebabnya" *Mitsaqan Ghalizan* 3, no. 1 (2023), p. 1–15.

Table 3 shows that responses to divorce at the wife's request show significant differences in views between conservative, moderate and various community groups. Conservative clerics generally reject divorce at the wife's request, viewing it as a step that should be avoided and only used as a last resort to maintain family stability and honor<sup>40</sup>. In contrast, moderate clerics tend to be more flexible, supporting divorce under certain conditions such as violence or injustice. Among the public, the traditional tend to reject divorce at the wife's request, considering it damaging to family honor and social status. Meanwhile, modern societies are more accepting of individual rights, including the wife's right to request a divorce if she feels unhappy in the marriage.<sup>41</sup> Views on divorce are often influenced by factors of tradition and modernity. In the traditional context, divorce is considered to be avoided to maintain family honor. In contrast, in the modern context, individual rights and freedom as a woman who chooses to divorce are prioritized.

### **Legal Controversy over Divorce Proceedings Filed by Wives in Religious Courts: A Sociological Perspective of Law**

This research aims to explain "the legal controversy of divorce initiated by a wife in the Religious Courts" and presents three important findings. First is the controversy between normative law and juridical law. The controversy that occurs, in this case, lies in the difference in terminology and procedures for a contested divorce between normative law and juridical law. In normative law, the term contested divorce is not regulated in Islam and divorce initiated by a wife is still based on the authorization of the husband. However, in juridical law, the term contested divorce is regulated in the religious court law and divorce initiated by a wife is based on the power of the judge in the religious court. Second, there is controversy over the judge's decision on divorce at the wife's request. This controversy lies in the differences in the judge's decision and the resulting impact. Judges face complex challenges in divorce cases, ranging from applying the principle of gender equality in determining child custody and post-divorce maintenance obligations that often arise due to decisions that are considered disproportionate. Third, there is controversy about community leaders' responses. This controversy can be seen in the different responses from conservative scholars, moderate scholars, traditional society, and modern society. In responding to divorce at the wife's request, conservative scholars and traditional communities tend to reject it, but moderate scholars and modern communities

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<sup>40</sup> Muhammad Amin Rais, et.al., "Upaya Tokoh Agama Terhadap Perceraian di Kota Balikpapan (Studi Kasus pada Perceraian di Pengadilan Agama Balikpapan)," *Mitsaq: Islamic Family Law Journal* 1, no. 1 (2023), p. 14-40.

<sup>41</sup>Barmawi Arief, "Respon Masyarakat Terhadap Hukum Keluarga Islam," *Hukumah: Jurnal Hukum Islam* 1, No. 1 (2017).

tend to accept it. This difference is also influenced by the factors of tradition and modernity.

This article examines the different views on the application of the law regarding divorce initiated by a wife in religious courts, especially in relation to the differences between Islamic law and positive law in Indonesia. In Islamic law, the husband has a more dominant role in divorce, although the wife is allowed to file for divorce with valid reasons, such as the husband's inability to provide maintenance.<sup>42</sup> Meanwhile, positive law provides more space for wives to file for divorce.<sup>43</sup> Religious courts face a dilemma in interpreting these legal regulations, where differences in interpretation among judges can result in inconsistent decisions, whether based on conservative principles of Islamic law or the more progressive positive law.<sup>44</sup> This condition creates uncertainty and may affect the fair legal treatment of women.

This controversy arises because of the difference between Islamic legal norms and positive legal provisions, resulting in uncertainty in practice in religious courts. Such uncertainty triggers variations in legal interpretation by judges,<sup>45</sup> resulting in diverse decisions that affect important aspects such as gender equality, child custody, maintenance obligations, social justice, and the application of Islamic Law. This often leads to injustice, especially for wives who are suing for divorce, for example, on child maintenance after divorce, which leads to injustice.<sup>46</sup> If the judge does not assess the contribution of child maintenance equally, one party may feel aggrieved.<sup>47</sup> In addition, Islamic legal norms that tend to be conservative sometimes do not consider gender equality and family emotional well-being as a whole, in contrast to positive law, which focuses more on gender equality and family well-being as a whole, which then creates legal uncertainty in divorce cases.

Divorce initiated by a wife often carries a significant social stigma, especially in the context of traditional societies. This stigma can negatively affect the social reputation as well as the emotional state of the individuals involved,

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<sup>42</sup>Rebecca Barlow and Shahram Akbarzadeh, "Women's Rights in the Muslim World: Reform or Reconstruction?" *International Law and Islamic Law* (Routledge, 2017), p. 411-24.

<sup>43</sup>Abidin Nurdin, "Mut'ah and Iddah: Post-divorce Payment Practices in Aceh," in John R. Bowen and Arskal Salim, *Women and Property Rights in Indonesian Islamic Legal Contexts*, (2018).

<sup>44</sup>Maya Sari Budi Santoso, "The Psychological Impact of Divorce on Children and Parental Obligations in Islamic Family Law," *Indonesian Journal of Islamic Law* 4, no. 2 (2021).

<sup>45</sup>Ryan Bubb and Giuseppe Dari-Mattiacci, "Differentiation Through Legal Uncertainty," *SSRN Electronic Journal*, (2024).

<sup>46</sup>Dwi Margi Rahayu and Septi Indrawati, "Legal Effects of Divorce on Child Custody Protection (Study of Case Decision Number 264/Pdt.G/2020/PA.Pwr)," *Examination: Journal of Law* 3, no. 2 (2024), p. 97-104.

<sup>47</sup>Mohamed Sulthan Ismiye Begun, et al., "Gender Equity in Muslim Family Law: Modern and Contemporary 'Ulamā' Views," *Ahkam* 34, no. 2 (2024), p. 221-56.

thus worsening their psychological state.<sup>48</sup> On the other hand, in more modern environments, an increased understanding of legal rights and social awareness can contribute to reducing this stigma, encouraging a more open perspective towards divorce.<sup>49</sup> In addition, diverse views among religious leaders also play an important role; some of them adhere to traditional norms that limit a wife's right to file for divorce, while others who are more progressive support legal protection for women in unhealthy relationships.<sup>50</sup>

This research supports a study conducted by Lestari, et.al., which focuses on the factors causing the high rate of contested divorce in Sintang Regency.<sup>51</sup> However, this study has a difference with research in that, the study focuses on analyzing the factors and causes of the high number of contested divorces, while this study emphasizes more on the controversial forms of divorce filed by the wife. In addition, this study also has similarities with the study of Maulawy regarding the consideration of judges in resolving cases of contested divorce due to economic factors in the perspective of Islamic law.<sup>52</sup> Because this study emphasizes more on the legal impact of the judge's decision on contested divorce. Nurjannah emphasized that the high divorce rate is caused by several economic factors, including a lack of responsibility and differing outlooks on life, which can lead to marital crises. As a result, divorced women face a negative stigma in society and feel guilty about the divorce, which can impact their children socially and psychologically.<sup>53</sup>

This study critiques how the current religious court system has not been able to fully balance conservative Islamic legal norms with the need to protect wives' rights in divorce. This critique can encourage reform in a more inclusive and equitable approach to justice, one that takes into account social development and the structure and social realities and the overall well-being of the family. It is hoped that, through this research, a relevant approach or policy that accommodates women's rights after divorce, particularly divorce at the wife's request, will be formulated. Implementing law without social considerations will

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<sup>48</sup> Sarbini and Andi Yusuf, "The Law of Divorce Due to Economic Hardship."

<sup>49</sup> Rahmat Fadillah and Syahrui Syahrui, "Hak Cerai Bagi Perempuan."

<sup>50</sup> Aji Suryana, et.al., "Stigma Masyarakat Terhadap Perempuan." Fajri M Kasim, et.al., "The Protection of Women and Children Post-Divorce in Sharia Courts in Aceh: A Sociological Perspective," *Ahkam: Jurnal Ilmiah Syariah* 22, No. 2 (2022).

<sup>51</sup> Indah Lestari, et.al., "Faktor-Faktor Penyebab Tingginya Cerai Gugat Di Kabupaten Sintang," *Al-Usroh* 3, No. 2 (2023), p. 243-257.

<sup>52</sup> M. Widad Maulawy and Ahmad Ubaidi Hasbillah, "Pertimbangan Hakim Dalam Menyelesaikan Perkara Cerai Gugat Karena Faktor Ekonomi Dalam Perspektif Hukum Islam (Studi Kasus Putusan Nomor 2721/Pdt.g/2023/PA.Jbg)," *Journal Sains Student Research* 2, No. 4 (2024), p. 907-16.

<sup>53</sup> Siti Nurjanah, "Divorce and Its Impact on Custody of Minors Using Islamic Law Perspectives," *Istinbath: Jurnal Hukum Islam* 7, No. 1 (2017).

result in the law losing its meaning and function in society, hence the importance of a sociological approach in law implementation.

A suggestion that can be given to research on the legal controversy of divorce initiated by a wife in religious courts is the need for revision of laws related to contested divorce to be more in line with the principles of Islamic law in handling divorce initiated by a wife. This revision should ensure that the existing procedures and provisions not only protect the rights of women but also respect the rights of husbands in the divorce process. Furthermore, in judicial proceedings, providing an opportunity for the husband to express his opinion or wishes regarding the divorce decision to the wife is very important. In this context, judges should act as facilitators who assist in mediation and annulment of marriages rather than deciding divorce unilaterally. This approach is expected to create a more fair and balanced atmosphere, thereby reducing conflict in divorce proceedings and improving justice for all parties involved.

## **Conclusion**

This study found that the legal controversy surrounding divorce initiated by the wife in religious courts is caused by the existence of misalignment between the norms of Islamic law and positive law governing divorce claims by wives. This misalignment has led to various controversies, especially in relation to the legal interpretations made by judges in religious courts. Differences in the interpretation and application of the law by judges can result in varying decisions, which in turn creates injustice and legal uncertainty, especially for women who file for divorce. This research deepens the understanding of the fundamental differences between Islamic and positive law in the context of divorce, focusing on the authority of the husband in Islamic law and the tendency of positive law to favor the rights of the wife. These normative conflicts often lead to legal uncertainty in religious courts, where different judges' interpretations impact perceived justice, especially for wives suing for divorce. Such uncertainty affects decisions regarding child custody, property division and alimony, which in turn affects post-divorce welfare. This research highlights how the current religious court system fails to fully balance the norms of conservative Islamic law with the need to protect wives' rights in divorce. These critics can advocate for reform with a more inclusive and equitable approach to justice, one that considers social development and the well-being of the family as a whole. In the context of Islamic law, religious court decisions are legally binding, warranting a study of the development of legal sociology, particularly regarding wife-initiated divorce and its impact on social change, social structure and law in Indonesia. This research is limited by limited empirical data and a limited focus on a specific area. This analysis does not allow the results to be used as a reference to explain differences in meaning on a broader scale. This research is largely based on a literature review and analysis of legal documents without extensive empirical data from actual

cases in religious courts. This limits the ability to generalize the research findings and to understand in-depth how judges in religious courts interpret and apply the law in different contexts.

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