

THE LEGALITY OF DIVORCE IN THE PERSPECTIVE OF *HADITH*

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Abstract

Cerai talak (formula for divorce) and *Cerai gugat* (sue for divorce) are two terms of termination of marriage bond in Indonesia. The formula of divorce is a term that coincides with a divorce coming from the will of a husband and sue for divorce is the desire of a wife to separate from her husband. Islamic Law legalizes the right of wives in cases of divorce redeem (*khulu'*) and *fasakh* because of *syiqaq*. On the other side, there are signs setting the rights up, so that the given reasons to use the rights must be legal in *syar'i*. The reasons for the legality of divorce is a common-cause factor, so that the banning with threatening hadiths as well as those of the hadiths that say wives must obey their husbands, the wives should not hurt their husband and the wives are prisoners of husbands are all categorized into general. At another angle, there also the hadiths concerning with the status a couple husband and wife is heaven and hell for them in a household. Contextualization of hadiths that ban a wife asking for divorce without any legal cause from *Syar'i*, and also those of the hadiths legalize *khulu'* are the realization of the conjugal lives with regards to the mandate of Allah and religious values. The facts of a wife sue for divorce to her husband are the conditions related to a confusion occurred in a household which are influenced by a variety of factors, i.g. economy, adultery, polygamy, social strata and others. A sue for divorce which is *Syar'i* based condition is a disagreement prolonged strife after peace held between the two sides and act endangers a wife.

Keywords: *Divorced, Hadith and Sue*

Abstrak

Cerai talak dan *cerai gugat* merupakan term pemutusan ikatan pernikahan di Indonesia. *Cerai talak* yaitu perceraian yang datang dari kehendak suami, dan *cerai gugat* bersumber dari keinginan istri untuk berpisah dari suaminya. Hak istri dalam *cerai gugat* ini dilegalkan syariat Islam dengan kasus *talak tebus* (*khulu'*) dan *fasakh* sebab *syiqaq*. Sisi lain terdapat rambu-rambu yang mengaturnya, sehingga alasan yang digunakan harus legal secara *syar'i*. Legalitas alasan itu dalam faktor sebab *cerai* bersifat umum sehingga hadis larangan dengan ancaman dan hadis-hadis istri harus taat suami, istri tidak boleh menyakiti suami dan istri merupakan tawanan suami. Dari sudut pandang lain berkaitan dengan kedudukan suami-istri adalah surga dan neraka bagi mereka dalam bahtera rumah tangga. Kontekstualisasi hadis larangan istri minta *cerai* tanpa sebab legal *Syar'i*, juga hadis tentang bolehnya *khulu'* dan realisasi kehidupan suami-istri berkaitan dengan amanah Allah dan nilai-nilai ibadah. Fakta *cerai gugat* berkaitan dengan kekisruhan yang terjadi dalam rumah tangga

sehingga istri menggugat cerai suaminya dengan berbagai faktor mulai dari masalah ekonomi, perselingkuhan, poligami, strata sosial, percekocokan yang berkepanjangan dan lainnya. Cerai gugat dengan alasan yang syar'i berlandaskan pada perselisihan dengan percekocokan yang berkepanjangan, setelah diadakan perdamaian antara dua belah pihak dan perbuatan membahayakan istri.

Kata kunci: Cerai, Hadis, dan Gugat

Introduction

The prescribed wedding in Islam aims at Forming a *sakinah, mawaddah* and *rahmah* household outlined by the mercy of God¹ Which is actualized in the ceremony of a mix gender between two servants of God with the background in the bonds of lawful marriage law.

The marriage bond is a mean to meet the demands of a very basic human instincts, and the means for establishing an Islamic family. Islam awards marriage bond immensely to the extent that it is set in proportion to a half part of religion.

عن أنس بن مالك قال: قال رسول الله صلى الله عليه و سلم: إذا تزوج العبد فقد كمل نصف الدين فليتق الله في النصف الباقي²

Narrated by Anas ibn Malik, Rasulullah PBUH said: "If a servant of God married, then a half of religion has perfectly done, and fear to Allah in a half of the rest."

عن أنس بن مالك أن رسول الله قال: من رزقه الله امرأةً صالحةً فقد أعانه الله على شطر دينه فليتق الله في الشطر الثاني³

Narrated by Anas ibn Malik, Rasulullah PBUH said: "He who was given by God an obedient wife, then indeed Allah had helped him in a half of his religion. So, fear Allah in the second half."

The journey of two people bound in marriage with the purpose of worship to God cannot be separated from *muamalah* of living together, happy or sad, healthy or ill conditions. It is one entity in which a family has rules, both detailed and global that regulates the relationship of individuals. This is a hallmark of an Islamic household. The household association is submissive to the rules of Allah. They get along and work together to strengthen each other for the purpose of worshipping to Him.

The integration of two people in bond of a marriage life is formulated at the advantages and disadvantages of each pair which is chime in with another. Excess belongs to a husband covers the shortfall of a wife and wife's excess covers the shortage of a husband, they blend in harmony. In the course of the household, there would be confronted with conflict accompanied by emotional states, either the husband or the wife, even a problem like this is tangible to breaking up their partnership in the form of divorce.

Divorce in Islam is legally permissible and a husband is in control when dropping divorce, a husband has the right and authority to divorce which can be used regardless of time and place. And whatever reason of the husband to divorce his wife depending on the assessment of the subjectivity of the husband, because there is no official board that serves to assess a husband's objectivity because the husband has been able to perceive of survival together, and has been given the burden of paying dowry and bear the lives of his wife and children.

On the other hand, a wife is given the right

¹See al-Rum, verse 21.

² Sunan Iman al-Baihaqi, *Hadith* No. 5486, Volume 4, 382.

³Al-Tabrani, *Al-Mu'jam al-Awsath*, Hadith No. 972, Volume 1 (Cairo: Dar al-Harmain, 1415), 294.

asking for divorce either in the form of *khulu'* or bring the issue to the *Qadi* in the form of sue for divorce⁴ after the wife love interaction to her husband is missing. The position of a husband over his wife and a wife on the husband being debated related to gender issues, exactly when the issues is incorrectly applied. Gender differences in the construction of the Islamic teachings have their own roles, functions, responsibilities, needs and social status between men and women. When this difference is based on the cultural construction of the society or in the understanding of Western culture, there will be conflict.

Demand for divorce from a wife to her husband is always associated with equal belongings of right and the wife is on an equal footing with her husband. If there is a mismatch between the two, *i.e.* either in communication or interaction, or related to social status or economic problems, so that the cancellation of the marriage settlement is at last path to be taken. Whereas a household with full of problems and contradictions of conflict is said to be colorful wedding.

In reality, the household life cannot be free from problems and conflict that led to the cancellation of marriage contract in which the divorce cases increase from year to year. Office of Pekanbaru Religious Court recorded as many as 1426 cases of divorce in 2013. 410 Husband and wife divorced cases and 1016 wife filed for divorce to sue over husband. It is calculated that there were 70 per cent of contested divorce of wives to husbands than the husbands to wives.⁵ While in 2014 there was an increasing significant percentage up to 200 percent that is 1700 contested divorce cases with almost the same percentage (70%) proposed by women.⁶

⁴Sue for divorce, also called contested divorce is a claim for divorce (whether oral or written) proposed by a wife to be divorced from her husband.

⁵See http://m.riapos.co/42113-berita-1.016-kasus-cerai-istri-gugat-suami-.html#.UvmXeWJ_v7Q

⁶See Republika Online, March 30th, 2015.

When we examine the issues from different aspects, so many causes contributed to the emergence of the divorce cases, whether economic, social, psychological, hedonistic style of life, cultural, and technological. A woman divorcing her husband is Islamically incorrect, unless there is a justifiable reason from *Shari'a* law, essentially, such as a husband committed his wife abusively. Asking for a divorce without any justifiable reason from *Shari'a* means committing a big sin that must be shunned and abandoned by Muslim wives.

عن ثوبان قال قال رسول الله -صلى الله عليه وسلم- «-أيما امرأة سألت زوجها طلاقا في غير ما بأس فحرام عليها رائحة الجن.

Narrated by Tsauban: Rasulullah PBUH said: "Anyone wife requested (demanded) to her husband for divorce without justifiable reason then forbidden smell of heaven on the woman".⁷

The paradigm of the above *Hadith Nabawi* establishes that a wife may not ask for divorce or sues her husband to divorce her or does *khulu'* without any justifiable basis from *Shari'a*. But if there is a basis or causes justified by *Shari'a*, the law is conditional or may be mandatory, optional, performance of which is not sinful or permissible only.

Divorce is lawful but most hated by Allah so that divorce might be a final alternative when needed. Otherwise, keeping the households can bring to greater impact than the divorce itself,⁸ then its implementation is conditional.

The Nature and Shape of Sue for Divorce

1. The Nature of Sue for Divorce

Contested divorce is a term that is based on the will of the wife and the formula for divorce which is based on the will of the husband in

⁷Sunan Abu Daud, *Hadith* No. 2228, Volume. 2, 235, Sunan Ibnu Majah, *Hadith* No.2055, Volume. 1, 662, and *Musnad Ahmad ibn Hanbal*, *Hadith* No. 22433, Volume. 5, 277.

terminating their marriage bond. Compilation of Islamic Jurisprudence, Article No. 114 that the breakdown of marriage may be occurred by Divorce or Lawsuit of Divorce.⁹ According to Act of Religious Court No. 7, 1989 has changed *talak* to a new term. The term used for divorce petition is called “*Formula for Divorce*” and the term formerly used for petition of divorce has been reversed to “*Sue for Divorced*”.¹⁰

The term sue for divorce is composed of two key words, *sue* and *divorce*. Divorced in Arabic is called *talaq*, namely حل القيد والإطلاق (Removing and liberating of bond).¹¹ *Removing* and *liberating* linguistically mean breaking the bond of marriage between husband and wife in which each of them is free from the bond of marriage.

As far its term is concerned, divorce is meant حل قيد النكاح, أو حل عقد النكاح بلفظ الطلاق ونحوه. أو رفع

قيد النكاح في الحال أو المآل بلفظ مخصوص

(*Removing the marriage bond, releasing marriage ceremony by saying talaq and the like, raised the marriage bond with certain condition or desire*).¹²

⁸According to the Compilation of Islamic Jurisprudence, Article No. 116; The basic acceptable reason of sue for divorce at Office of Religious Court are: a) husband has fornicated, drunk, a condenser, a gambler *etc.* which is unescapable; b) husband leaves the wife for 2 (dua) years consecutively without permissible valid reason. It means that the husband leaves the wife intentionally and consciously. c) The husband is in jail for more than five years exactly after the marriage contract; d) The husband treats his wife relentlessly and persecuted the wife unsafe; e) The husband has physically incapable to fulfill his responsibilities; f) There happened consecutively breakdown and confusion with no possibilities of living together safely; g) The husband breaks promises that he has dealt at the beginning of his marriage contract; h) The husband converts to other religious believe that causes inharmonic household.

⁹the Compilation of Islamic Jurisprudence, Article No. 116.

¹⁰ Yahya Harahap, *Kedudukan Kewenangan dan Acara Pengadilan Agama* (Jakarta: Sinar Grafika, 2003), 207.

¹¹Wahbah al-Zuhaili, *al-Fiqh al-Islami wa adillatuhu*, Vol.7 (Bairut: Dar al-Fikri, 1986), 356.

¹²Ibid.

Terminology of divorce includes three natures; 1) *Removing*, means to open up binding ties between husband and wife in the figuratively palace of household. 2) *Opening*, refers to the ceremony of marriage as it has been tied up by guardian by law so that the marital relationship ended. 3) *To appoint*, is the breaking of marriage bond due to several reasons in particular.

In terminology of Indonesian language, the word “*gugat*” means Sues said in Indonesian means *defendant* and *report* (case). “*Menggugat*”: can be meant *to impeach*; *to complaint* (case), and *to demand*.¹³ Combination of the two words identically with sue for divorce in which a wife’s willingness in breaking the bond of marriage from her husband. If divorce is generally the separation of a husband and a wife, and the words came from the husband’s willingness to divorce, so, sues for divorce is a severed result of a proposal filed by the wife to untied the marriage bond to the Religious Court, then the respondent (husband) agreed, so that the religious court granted the concerned petition.¹⁴

Contested divorce is a form of divorce with removal of marriage by Judge’s decision, or demands by either party in the marriage bond.¹⁵ The notion of contested divorce is widely a lawsuit proposed by the plaintiff (the wife) to the Religious Court, that a marital relationship with her husband she decided through a decision of the Religious Court, in accordance with applicable laws.¹⁶

The wife has the same rights as the husband in case of sue for divorce if there is sufficient reason for her. For example, husband treats cruelty, the wife can ask for a divorce and not be forced to accept the treatment which is not suitable

¹³Kamus Besar Bahasa Indonesia, <http://www.kamusbesar.com/13302/gugat>.

¹⁴Zainuddin Ali, *Hukum Perdata Islam di Indonesia* (Jakarta: Sinar Grafika, 2009), 81.

¹⁵Subekti, *Pokok-pokok Hukum Perdata*, Cet. XXXI (Jakarta: PT. Intermedia, 2003), 42.

for her. Islamic jurisprudence explains that a wife has the right to ask her husband to decide or to divorce her which called *fasakh* and *khuluk*.

2. Shapes of Sues for Divorced

Talak is an authority granted over a husband to do and to realization of divorce that includes one, two and three. In relation with a wife who no longer wants to continue the marriage bond, which stripped herself from the power of a husband in a household. The decision of a wife to split up from a husband is a human right in which Islam maintains as a form of maintaining the benefit and distanced from *mafsadah* (damage).

Sue for divorce becomes a model of untied marriage bond which confirmed previous marriage contract (*Ijab Qabul*). The model of divorce with a wife sues for divorce on her husband includes two forms:

a. *Fasakh*

Linguistically, *Fasakh* is defined as نقذ للعقد (terminate or cancel the contract). The distinguished term between *fasakh* with *talak* is the release of marriage bond is fundamentally and the husband and the wife cannot be reconciled after the release, while *talak* is possible to be connected again accept if the husband has mentioned *talak three* in releasing the marriage bond.¹⁷

The terminology of *fasakh* means severing ties of marriage contract for obvious and clear reason that hinder the preservation of conjugal relations. In the realization of *fasakh* between husband and wife is second right of both. Grounding lawsuit that allows spouses to agree

with *fasakh* must be based on the essential reasons, so divorce of this kind is a demand to the court and the judges would decide the divorce or not.

The divorce process in the form of *fasakh* is a lawsuit-base-divorce that a plaintiff must have complete evidences. The evidences may lead to the conviction for judges who hear the case.

Although *fasakh* can come from the husband and wife but synonymously files the sue for divorce by his wife without any given compensation to the husband, in a state of emergency such as: husband lapsed or deny Islam, the husband did not leave a living spiritually and left his wife, the husband does not pay or pay off *kufu* 'dowry and marriage not to be given the right *khiyar* (select) continue a marriage or not.¹⁸

The connotation that becomes the background of *Fasakh* when the wife feels aggrieved by her couple, perceiving her rights blocked in accordance with religious teachings. As a result, no longer been able to continue the marriage life because the household harmony would no longer exist and is impossible to reach peace.

b. *Khulu'*

Khulu' comes from the word خلع - يخلع - خلع which means removing, remove, or stripped.¹⁹ *Khulu'* in the Indonesian language is often referred to "*talak tebus*" (redeem of divorce), because the divorce pronounced by a husband providing with payments made by the wife to her husband.²⁰

In view of Hanafiyah followers, *khulu'* is to eliminate ownership of marriage (which is connected to reception from the wife) in terms of using utterances of *khulu'* or the utterances that convey using similarly to *khulu'*. Meanwhile, according to Malikiyah, *khulu'* is a divorce by

¹⁶Ahrum Hoerudin, *Pengadilan Agama (Bahasan Tentang Pengertian, Pengajuan Perkara, dan Kewenangan Pengadilan Agama Setelah Berlakunya Undang-undang Nomor 7 Tahun 1989 Tentang Peradilan Agama)* (Bandung: PT. Aditya Bakti, 1999), 20.

¹⁷Wahbah al-Zuhaili, 348.

¹⁸Tbid.

¹⁹Sunan Ad-Daruquthni, *Hadith* No.3629, Vol. 4, 376.

²⁰Modul Materi Pelatihan Korps Penasehat Perkawinan dan Keluarga Sakinah (Jakarta: Depag, 2004), 150.

redemption, whether it comes from the wife (guardian or representative) or by using utterance of *khulu'*. According Shafi'ites, *khulu'* means *furqah* (separation) occurring between husband and wife by ransom, it may also be using the word *talaq* or direct *khulu'* by pronouncing it. While Hambali contended that *khulu'* is the separation of a husband to his wife with a ransom taken from the wife (or otherwise) with certain utterances.²¹

The terms *khulu'* in some views was connoted the same, because it is the term used to break the bond of marriage by a wife's willingness in order to provide compensation to the husband. Wife's willingness to give paid or objects being held to ransom or replacement of willingness to divorce her husband is the realization of *khulu'*. This divorce statute is called *bain* (no longer refer to it), meaning that the husband has done *khulu'* on his wife, he is not entitled anymore to refer back to his wife even though the wife was willing to accept the ransom which had been paid. If she is willing to accept her ex-husband, the husband should do the marriage contract once again in completing all complementary pillars and conditions.

The law of *khulu'* includes *Mubah* (Neutral), Optional and Forbidden

Firstly, *Mubah*: Wife is allowed to apply *khulu'* when she feels uncomfortable living with her husband, both because of her husband's vices, or feared not to be given her rights or her obedience to her husband does not cause on the standing and subdued conditions of Allah. Under these conditions, *Khulu'* for the wife may be legitimated, as Allah says:

فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا
 أَفْتَدَتْ بِهِ²²

²¹Wahbah al-Zuhaili, 480-481.

²²QS. al-Baqarah: 229.

“If you fear that both husband and wife cannot execute the laws of Allah, there is no sin on either of them on a payment given by a wife who redeems herself”.

A *hadith* reinforced the above Qur'anic verse on similar case at the time of the Prophet Muhammad:

عن عكرمة عن ابن عباس أنه قال جاءت امرأة ثابت بن قيس إلى رسول الله صلى الله عليه وسلم فقالت يا رسول الله إني لا أعتب على ثابت في دين ولا خلق ولكني لا أطيقه فقال رسول الله صلى الله عليه وسلم (فترددين عليه حديثه) قالت نعم²³

Narrated by Ikrimah from Ibn Abbas said: There came a wife of Thabit ibn Qays to see the Prophet and said: “O Messenger of Allah, I do not reproach Thabit in any matters of religion and morals, but I cannot live with him. “So the Prophet SAW said: “Do you endure to restore his garden? Said wife of Thabit: Yes.

Secondly, *Optional*: According Hanabilah, *Khulu'* can also be meant legally *sunnat* when, the husband does not carry out the rights of God, for example, the husband had not been carrying out the five obligatory prayers, fasting in the month of Ramadan *etc.*, or if the husband committed a great sin, such as committing adultery and drug addicts. Most other scholars considered that for these conditions, *Khulu'* is no longer the *Sunnat*, but obligatory by Islamic law.

Thirdly, *Forbidden*: *Khulu'* could be unlawful if it is done in the following two conditions: 1) If the wife asks *Khulu'* to her husband without any cause and clear reason, whereas her household affair is fine, so that there is no reason to be used the basis for a wife to submit *Khulu'*. 2) When the husband intentionally hurt and did not give the rights of his wife with

²³Shaheh al-Bukhari, *Hadith* no. 4972, Vol. 5, 2022.

the intention that the wife will submit *Khulu'*, it is also unlawful. If *Khulu'* is happening, the husband does not deserve to take ransom due to the intention alone is wrong and sinful.

The Paradigm of Hadith in Sues for Divorce

1. Realization of Sues for Divorce

عن عكرمة عن ابن عباس أنه قال جاءت امرأة ثابت بن قيس إلى رسول الله صلى الله عليه وسلم فقالت يا رسول الله إني لا أعتب على ثابت في دين ولا خلق ولكني لا أطيقه فقال رسول الله صلى الله عليه وسلم (فتردين عليه حديثه) قالت نعم

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The above *Hadith* describes about allowable of a wife seeks for divorce from her husband if there are lawful things to request. This kind of divorce is called *khulu'* or a redeem *talaq* that explains how wife of Thabit ibn Qays came to the Prophet Muhammad explaining her desire to divorce from her husband due to her feelings of fear on her husband's unstable condition in the truth.

Any kind of divorce which is in a condition to give ransom or *iwadh* can be done at any time either the woman is in sacred or menstrual period, because the sue for divorce is accountable to happen by the will of wife. The realization of a wife's willingness like this, suggests that she is willing and proposes a lawsuit to the husbands because she cannot maintain her household anymore.

In a narration by ad-Daruquthni which explained how the wife of Thabit ibn Qays processed in front of Prophet Muhammad:

عن ابن جريج أخبرني أبو الزبير أن ثابت بن قيس بن شماس كانت عنده زينب بنت عبد الله بن أبي بن سلول وكان أصدقها حديقة فكرهته فقال النبي صلى الله عليه وسلم أتردين عليه حديثه التي أعطاك قالت نعم وزيادة فقال النبي صلى الله عليه وسلم أما الزيادة, فلا ولكن حديثه قالت نعم فأخذها له وخلي سبيلها فلما بلغ ذلك ثابت بن قيس قال قد قبلت قضاء رسول الله صلى الله عليه وسلم²⁵

Ibn Juraih has told Abu al-Zubayr that Thabit ibn Qays ibn Syammas has a wife named Zainab binti Abdullah ibn Abu Salul, for her was given a plot of garden as dowry. But he hates her husband, then the Prophet SAW said: "Do you want to restore the garden to him he had provided to you." So she replied: "Yes and an extra". Rasulullah SAW said: "No need extra, just his garden". She said: "Yes", Rasulullah SAW symbolically took back the garden and released her on her way. After the decision came to Thabit ibn Qays, he said: "I accept the verdict of the Prophet Muhammad".

The statute for which a wife may sue her husband for divorce or releasing the bonds of marriage on the ground which is permissible by *Shari'a*, but if a husband does anything that could endanger the wife then, the wife deserves to sue for divorce, then it makes the husband got the curse of God, as narrated in the following *hadith*:

عن أبي هريرة وابن عباس قالوا: خطبنا رسول الله صلى الله عليه وسلم خطبة قبل وفاته وهي آخر خطبة خطبها في المدينة..... وأما امرأة اختلعت من زوجها لم تنزل في لعنة الله وملائكته ورسوله والناس أجمعين فإذا نزل بها ملك الموت قال لها أبشري بالنار فإذا كان يوم القيامة قيل لها ادخلي النار

²⁴Shaheh al-Bukhari, *Hadith* no. 4972, Vol. 5, 2022.

²⁵Sunan ad-Daruquthni, *Hadith* No.3629, Vol. 4, 376.

مع الداخلين الا وان الله ورسوله بريتان من المختلعات بغير حق الا وان الله ورسوله بريتان ممن اضر بامرأة حتى تختلع منه²⁶

From Abu Hurairah and Ibn 'Abbas said: The Prophet was preaching at us before death and at the end of his sermon in Madinah "and any wife who khulu` from her husband will always be in the curse of Allah, Angels, His Messenger, and people as a whole, then if the Angel of death down on him/her, he said: Inform where the Hell is and in the hereafter he/she will be said, "Go into the hell along with other occupants. It must be known that Allah and His Messenger curse the wives who committed khulu` for no good reason as well as Allah and His Messenger curse a husband threatening his wife until he asks for khulu` ... "

The *hadith* explains two things related to redeeming divorce; *First*, the wife asks for a divorce with *khulu`* but no right forces her to do so by law المختلعات بغير حق (any wives who committed *khulu`* for no good reason) will get condemnation of God, Angels and His Messenger as to be anathema. Secondly, a wife sues her husband for divorces which is based on action that give harm or suppression over the wife so that possibly harm her. The curse of Allah and His Messenger is reversed to the husband as mention in a tradition اضر بامرأة حتى تختلع منه (husband threatening his wife until he asked *khulu`*). The harmful condition of a wife in general meaning includes irresponsible for the livelihood physically and mentally therein, for example, a husband likes to slap his wife (playing the hand) as well as others.

The essence of endangering a wife is related to the facts of many cases or can also be the facts cited in the trial court. Nevertheless, it always be returned by reference to the guidance of the Prophet Muhammad through the context "*must*

²⁶Musnad al-Harits, *Hadith* No. 205, Vol. 1 (Madinah: Markaz al-Sunnah, 1992), 309.

not endanger each other" either endangers themselves or fellow human beings in forming a harmonious life.

عن عكرمة عن ابن عباس قال قال رسول الله صلى الله عليه وسلم لا ضرر ولا ضرار²⁷

Narrated by 'Ikrimah from Ibn Abbas said: Rasulullah SAW said: "Do not harm and do not reply harm".

لا ضرر (do not harm) means one of Moslems should not inflict danger (harm) on others without any clear reason and without any previous criminal acts. While *لا ضرار* (Do not reply to harm) is a prohibition of returning inflict of danger to those who inflict danger to you. In other words, if there is someone who objurgated you, then do not reply to scream at him, and if there are people who beat you then do not reply to hit him. However, demand your right on him before the judge without the need to berate each other.²⁸

Context of contested divorce or *talaq* is a divorce at once that seated charges before the court to get justice, so there is a reciprocal reply, namely doing dangerous thing to one another between spouses who have disagreed, and whose vows are still bound in the marriage bond.

2. Legality of Sue for Divorced

عن ثوبان قال قال رسول الله -صلى الله عليه وسلم- «-أيما امرأة سألت زوجها طلاقا في غير ما بأس فحرام عليها رائحة الجنة²⁹

Narrated by Tsauban: Rasulullah SAW said: "Those any wives requested (demanded) her husband for divorce without justifiable reason then the women are forbidden to smell of heaven".

²⁷Musnad Imam Ahmad Ibn Hanbal, *Hadith* No. 2867, Vol. 1, 313.

²⁸Yahya ibn Syarafuddin an-Nawawi, *Syarh Hadis Arbain* (Solo: al-Qowan, 2001), 215-216.

²⁹Sunan Abu Daud, *Hadith* No. 2228, Vol. 2, 235, Sunan Ibnu Majah, *Hadith* No.2055, Vol. 1, 662, and Musnad Ahmad ibn Hanbal, *Hadith* No. 22433, Vol. 5, 277.

This *Hadith* is an unequivocal expression of the Prophet about wives who asked for separation of their bond of marriage, but no cause was right and not in accordance with the rules permissible by *Syar' i*. The very scary threat that cannot feel the delicious smell of paradise, in which every believer aspires to enter in and enjoys the promise of God.

إن قال رسول الله صلى الله عليه وسلم: قال, عن الحسن المختلعات المنتزعات هن المنافقات³⁰

Narrated by al-Hasan: Rasulullah SAW said: "Surely women who conduct khulu' without any causes is the group of hypocrites".

This hadith reveals that wives who ask for being *khulu'* by their husbands without relying on acceptable reasons by law are categorized into the group of hypocrites. Status of this *Hadith* is the reinforcement of the previous *Hadith* on no basis from *Syar' i*. The phrase *منتزعات* is a woman who divorces herself with her wealth of her husband's arms without his willingness.

أيما امرأة سألت: عن أبي قلابة قال رسول الله صلى الله عليه وسلم زوجها الطلاق من غير ما بأس لم ترح رائحة الجنة³¹

Narrated by Abu Qilabah, Prophet SAW said: "Those any wives requested (demanded) her husband for divorce without justifiable reason then the women are forbidden to smell of heaven".

This hadith intentionally sets the similarity with previous one, although the phrase "no good reason" and *من غير ما بأس* are different. By the same goal and interpretation, it is permanently legal ban on divorce without foundation allowed by *Shari'a*.

³⁰Mushannif Ibnu Abi Syaibah, *Hadith* No. 19602, Vol. 5, 271 and Musnad Imam Ahmad ibn Hanbal, *Hadith* No. 9347.

³¹Ibid., *Hadith* No. 19603.

Based on the above mentioned *hadiths*, divorce which is done by a wife on her husband should have let her backed up with lawful reason. If there is no foundation of justification for divorce, the law essentially is forbidden, unless there is a justifiable reason from *Shari'a*.

The expression of the Prophet Muhammad on sue for divorce is address to *khulu'* law and must be based on reasons permissible by *Syar' i*. Here is the meaning of *غير ما بأس* (*without any justifiable reason*) becomes vital in determining the angle of view about anything that becomes a major cause of divorce. Whether such an abusive husband applies suppression towards his wife *etc*. Asking for divorce without any justifiable reason by *Shari'a* including a big sin that must be shunned and those who do this will come into the category of hypocrites.

Abdul Muhsin al-'Ibad explained that the meaning "no justifiable reason" includes some essential elements:³²

لا يجوز للمرأة أن تسأل الطلاق إلا لأمر يقتضيه ويحتاج إليه

(It is impermissible by a wife asking for a divorce unless there is a case that already set and needed of her).

أن المرأة إذا سألت الطلاق من غير الحاجة فهي متوعدة بهذا الوعيد الشديد

(Indeed, a wife who asks for divorce without any necessity, then she will get an appointment with threat of harsh).

لا يجوز للمرأة أن تطلب الطلاق من زوجها إلا إذا كان لسبب من الأسباب المعترية, ككونها تبغضه أو أنه يعاملها معاملة سيئة *(not permissible for a wife seeking for divorce from her husband unless there is a cause that is recognized, such as the husband hates her attitude or there happens a bad association between both).*

³²Abdul Muhsin al-'Ibad, *Syarh Sunan Abu Daud*, Vol.12 (Beirut: Dar al-Fikri, t.th), 299.

Threats to the wife who asked for divorce from her husband is in the category of the essence in connection with the smell of paradise. The phrase *فحرام رائحة الجنة* (*then forbidden smell of heaven on the woman*) and also *لم ترح رائحة الجنة*. (*Will not inhale the smell of paradise*) is a very severe threat with logic; If the smell of paradise cannot be reached how about fitting into it.

The paradigm of above *Hadith Nabawi* establishes that a wife should not ask for a divorce or sues the husband for divorce her, or doing *khulu'* without any justifiable basis from *Shari'a*. But if there is the basis or causes that can be justified by *Shari'a*, the law becomes conditional which may be mandatory, optional, the avoidance of which yields merit but the performance of which is not sinful (*makrooh*) or permissible only.

The book entitles *Fayd al-Qadir al-Jami' Syarah al-Shagir* explains the meaning *بأس* (*justified reason*) as:
 في غير حالة شدة تدعوها وتلجئها إلى المفارقة كأن تخاف أن لا تقيم حدود الله فيما يجب عليها من حسن الصحبة وجميل العشرة لكرهاتها له أو بأن يضارها³³

(In a condition where a wife is highly demanding and in need of shelter, like the condition of fear of not carrying out God's laws obligated on her through good and harmony relationships, so the aversion on her husband would harm her).

Another book "*Aun al-Ma'bud*" explained that the purpose of *بأس* or *من غير ما بأس* (*without any justifiable reason*); means there is an urgent cause she asks for divorce, while the word *ما* (*something*) is an additional word as amplifier. The phrase "*forbidden for her to smell heaven*" is a serious threat to a woman who asks for a

divorce from her husband without any lawful reason from *Shari'a*, so the shape of the threat is that the woman does not feel delicious smell of heaven even though she enters into it.³⁴

In addition, *Sharh al-Sunnah* claimed that the wife asked for a divorce redeemed (*Khulu'*) to the husband is permissible as long as it is based on the wife's inability to live with her husband in the right reasons. If the wife is not based on the justified request, then the sentence *في غير ما بأس* shows *Makruh* leaning with the cause of disconnecting marriage bond without urgent cause.³⁵ Unlike al-Zuhaili Wahbah who states that the sue for divorce which is not based on the true reason is unlawful, on the basis of the threat did not get the smell of paradise.³⁶

The context of sue for divorce in the phrase *المحتلعات المنتزعات هن المنافقات (women who commit khulu' and quarrel in their argument are group of hypocrites)* indicates the act is a part of inner immoral acts and physically iniquity.³⁷
 لا تؤذي " :عن النبي صلى الله عليه وسلم قال , عن معاذ بن جبل , لا تؤذيه :امرأة زوجها في الدنيا إلا قالت زوجته من الحور العين وإنما هو عندك دخيل يوشك أن يفارقك إلينا , قاتلك الله³⁸

Narrated by Mu'az ibn Jabal from the Prophet SAW said: "It is not a wife hurt her husband in the world, except that of God demolished you. She is just a weak person who barely leaves (goes to) to us."

This hadith explains that the wife's position in the world is her husband's friend to live a life that must be mutually respected. A tribute of a

³³Zainuddin Muhammad al-Manawi, *Fayid al-Qadir Starh al-Jami' al-Shagir*, Vol 3, (Beirut: Dar al-Kutub al-Ilmiyah, 1994), 178.

³⁴Abu al-Thaib Muhammad al-Azim Abadi, '*Aun al-Ma'bud Syarh Sunan Abu Daud*, jilid 6 (Madinah al-Munawwarah: al-Maktabah al-Salafiah, 1968), 308.

³⁵Al-Husein Ibn Mas'ud al-Baghawy, *Syarh al-Sunnah*, Vol. 8 (Beirut: al-Maktab al-Islamy, 1983), 185.

³⁶Al-Fiqh al-Islamy, 377.

³⁷Muhammad Abdurrahman al-Mubarakfury, *Tuhfah al-Ahwazy Bisyarh Sunan al-Tirmizi*, Vol. 2 (Beirut: Makbah Islamy, t.th), 272.

³⁸Sunan al-Tirmizi, *Hadith* No. 1174, Vol.3, 476.

wife towards a husband by not hurting him. A sue for divorce proposed by a wife using the reason sought out or that of false is one of the acts that hurt her husband.

Dealing with friendship reciprocity in honor between a husband along and his wife who live in love and respect, Rasulullah SAW explained on how morality the husband against his wife should do is a choice;

عن أبي هريرة قال قال رسول الله -صلى الله عليه وسلم- «أكمل المؤمنين إيماناً أحسنهم خلقاً وخياركم خياركم لنسائهم خلقاً»³⁹

Narrated by Abu Hurairah: Rasulullah SAW said: "Men of faith with their perfect believe is the best in ethic and morality. The best guys among you are those who do the best to his wife".

Exploring the Hadith in the Context of Sue for Divorce

God put a power over men (husbands) for committing divorce, that is releasing a bond of marriage, and does not give the right to women to divorce or stripped bonds of marriage so that it is free as a wife which is subject to her husband.

Islam in this case does not put women in weak position and can be enslaved by men. By granting the women with sue for divorce on her husband in the form *khulu'*, *fasakh* or *tafriq* they seem to be put in similar position. The fractures of a marital relationship (*syiqaq*) which finally be brought to the Religious Court in order to seek a solution, to find the solution between peace and divorce.

The termination ties of marriage bond by judge decision at the Religious Court aims at finding the solution after trying to seek for peace (reconciliation) between wives and husbands through their respective delegates. This could be happening if peace is not possibly reached with the cause no longer cracks but has reached the

stage broke. The *Syiqaq* occurs due to these causes: 1) the husband and wife have a hard character (stubborn), so both cannot be assembled, and each maintains an argument and without budge. 2) the husband is an authoritarian, such as the treatment of the husband on his wife with very ill-treatment until the *mahabbah* (love) of the wife is faded and cannot be returned for which she is very hard to be able to survive as a wife.

If we observe carefully the position of a wife before the husband is like between paradise and hell, and so does her husband before the wife.

عن أبي هريرة قال قال رسول الله -صلى الله عليه وسلم- «أكمل المؤمنين إيماناً أحسنهم خلقاً وخياركم خياركم لنسائهم خلقاً»⁴⁰

Narrated by Busyair ibn Yasar al-Hushain ibn Mihshan said, her aunt came to see the Prophet Muhammad. So, when she completed her question, the Prophet asked him: "Do you have a husband?" She replied, "Yes, I do." He asked again, "How is your attitude to your husband?" she replied, "I never reduce his rights, except that I could not do it. Then the Prophet said, "Look, your position in his side, indeed, he (your husband) is your heaven and hell".

Paradigm of sue for divorce occurred at Pekanbaru Religious Court through the context of trial processes in divorcing civil law mostly occurred only by reasons specified by law. In this regard there are two senses to understand that the term "dissolution of marriage" and the term "divorce". Divorce is one of the causes of marriage dissolution. The government of Indonesia's Act No. 9 1975 on the implementation of Law No. 1, 1974 about Marriage, as stated in Article 19 says that there are six reasons that can be used as causes of breaking the bond of marriage, namely: 1) Either party commits

³⁹Sunan al-Tirmizi, *Hadith* No. 1195, Vol. 5, 5.

⁴⁰Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia*, 197.

adultery or an alcoholic, junkie, gamblers, etc., which have been hard to cure. 2) One party left the others for two years in a row without permissible reasons from other parties and no legitimate reason out of their personal abilities. 3) One party gets 5-year sentence in prison or a more severe punishment after the marriage took place. 4) One of the parties committed atrocities or severe abuse that endanger others. 5) One party gets disability or disease due to inability to perform the duties as husband or wife. 6) Between husband and wife continuous disputes and quarrels and no hope of living their household in harmony.

In the Islamic Law Compilation, the above six reasons added by two others, contained in Article 116, namely: 1) Husband abuses *ta'lik thalaq* (marriage treaty). 2) Conversion to another religion that causes disharmony in the household.

Eight points of the reason for terminating marriage as stated in Act 1974 and the Islamic Law Compilation is the cause permissible according to the basic principles in case of ending or breaking down a marriage bond. The breakdown in the marriage means ending the marital relationship. The breakdown in the marriage depends in terms of who is willing to break the marriage. The Islamic law underlines four (4) possibilities for the breaking down:⁴¹ 1) The breakdown of marriage is based on the Will of God through death. 2) Loss of marriage on the husband's will called *talak* (divorce). 3) Loss of marriage on the wife's will called *khulu'*. 4) The breakdown in the marriage at the discretion of the judge as a third party called *fasakh*.

The context of sue for divorce is possibly be at level number three and four in which a wife is an instrument in demanding the cancellation of the marriage contract. The wife's demands at the Religious Courts through court trial processes in order a divorce is being dropped by a judge

includes a husband who leaves his wife for two years in a row. The husband does not provide mandatory to the wife for three consecutive months, the husband hurts the wife's body physically, husband lets or does not care about the wife for six consecutive months. The size of these demands are based on the presence of harm and it's a *mafsadah* for the wife as well as directing her into the plunge from Allah (among others, committing philandering) and the wife's position is uncertain and float in vein as wasted by the husband.

Hadith which states that a husband is like paradise and hell for a wife, and vice versa means that a wife is heaven and hell of a husband. The role that should be raised is by framing domestic harmony with wise and intelligent communication. In this regard, Prophet Muhammad gave signs to be very clever to improve women's personality to show the nature of creation:

قال رسول الله صلى الله عليه و : عن أبي هريرة رضي الله عنه قال استوصوا بالنساء فإن المرأة خلقت من ضلع وإن أعوج شيء (سلم في الضلع أعلاه فإن ذهبت تقيمه كسرته وإن تركته لم يزل أعوج فاستوصوا بالنساء⁴²

Narrated by Abu Hurairah RA: Rasulullah SAW said: "Give the right last will against women. Because women are created from a rib and the most crooked rib is at the top. If you (forced to) to straighten it, you will break it. And if you let it (still in a state bent), then it will remain crooked. Therefore, give right last will against women".

In a real contextualization of sue for divorce and rule of law in Indonesia about the case which is now associated with the thriving culture and civilization regarding the accountability of wedlock. Even the trend of life that leads to

⁴¹Ibid.

⁴²Shaheh al-Bukhari, *Hadith* No. 3153, Vol. 3, 1212 and Muslim, *Hadith* No. 3719, Vol. 4, 178.

hedonism otherwise, both wife and husband cannot be blamed 100 percent. Paradigm of *Hadith* in contemporary reality cannot be understood textually, but it should be analyzed on a contextual level, with reference to the traditions of Prophet Muhammad SAW which states that a wife is like a prisoner of her husband: عن سليمان بن عمرو بن الأحوص قال رسول الله صلى الله عليه و سلم قال ألا واستوصوا بالنساء خيرا فإنما هن عوان عندكم ليس تملكون منهن شيئا غير ذلك إلا أن يأتين بفاحشة مبينة فإن فعلن فاهجروهن في المضاجع واضربوهن ضربا غير مبرح⁴³

Narrated by Sulaiman ibn 'Amr ibn al-Ahwash: Rasulullah SAW said: "Give a testament to his wife in a good way, because they were (like) captive on your side. You have no power over them in the slightest besides (wills over goodness), unless they commit heinous act openly. If they do, then leave them on the bed and beat them with a punch that did not hurt".

The phrase من عوان عندكم (*they were prisoners on your side or husband*). It is explained in Tuhfah al-Ahwazy that the phrase شبهن بمن عند الرجال لتحكمهن فيهن (*likened a wife on the husband's side as a captive means to strengthen the power of a husband on his wife*) and كل من ذل واستكان وخضع (*all humility, calmness and wife submission*).⁴⁴

Syarh Riyadushshalihin explained that: شبه رسول الله صلى الله عليه وسلم المرأة في دخولها تحت حكم الزوج بالأسير

*(Prophet has made parable of a wife as a husband's captive in order to put under the authority of the husband).*⁴⁵

Implementation of the phrase "husband

⁴³ Sunan al-Tirmizi, *Hadith* No. 1163, Vol. 3, 467.

⁴⁴ Muhammad Abdurrahman al-Mubarakfury, Vol.7, 411.

⁴⁵ Muhammad al-Shaleh al-'Utsaimin, *Syarh Riyad al-Shalihin* (Saudi: Maktab Salafi, t.th), 325.

"captive" on his wife is not to denigrate women, but to establish and foster families who directed *sakinah* (safe), *mawaddah* (peace) and *Rahmah* (be endowed with).

To understanding words "*demanding a divorce from her husband without the right reasons*" is the wish of Prophet Muhammad in order the new formed households are bond with a valid marriage contract and it can be reached in accordance with the purpose of marriage in Islam. Sue for divorce in the realization of the cause sets legal permissible; it cannot rely upon the plaintiff's (wife) feeling or logic, so that the permissible category can rise to the level of circumcision and compulsory when the divorce becomes urgent. However permissible positions can descend to the level of optional and forbidden when breaking the bond of marriage is based mostly on the despicable things, such as boredom, a third person, the social strata, life style and hedonism.

In the era where culture and civilization have changed, intersect in household's life until divorce could be occurred with diverse reasons. Whether the divorce becomes urgent or not the reference must be directed to law of mandatory, circumcision, optional, forbidden or just reach to the permissible level only. For the analysis of any cases on processing sue for divorce, before giving a decision, it must always be trying to reconcile between the plaintiff and the defendant by appointing two persons to be Judges. This step is in accordance with the instructions of the Qur'an; وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَأَبْعَثُوا حَكَمًا مِّنْ أَهْلِهِمْ وَحَكَمًا

مِّنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا

"And if you worry there will be dispute between the couple, then send an Hakam of husband's relative as well as that of the wife's.

⁴⁶QS. al-Nisa: 35.

If the two Hakam intend to repair the couple case, Allah undoubtedly gives guidance to the husband and wife. Lo! Allah is Knower, Knowing”.

The word *ثقاق* (*dispute*) in the above verse means strife, discord and enmity because the attitude and direction of thinking of both parties cannot be compromised anymore. Squabbles in a household can be called *ثقاق* (*dispute*) if the extent of dispute between husband and wife can no longer be resolved. Thus, at least two criteria of disputes in a household can be termed as a case of *syiqaq*. First, mismatches on both sides with the attitude of each of them no compromise anymore. There happen prolonged bickering that is no longer possible to unite the couple in a peace household. Second, the strife happening between husband and wife is the implementation of a serious brawl, so that each of them took a different direction.⁴⁷

The contextualization *غير ما بأس* (*there is no good reason*) in a disagreement of a wife over her husband on the problem *غير ما بأس* (*dispute*) has given the idea that sue for divorce is reasonable and is acceptable by nature of the hadith. Whatever the reasons conveyed by the plaintiff (the wife) should be based on prolonged disputes in their marriage life and has reached the stage that cannot be compromised.

Reinterpretation of the facts happening today regarding reasons that are legal by *Syar'i* is related with the investigation for proves on the dependent whether or not he has committed infidelity, *Sirri* marriage, lack of attention and other case faced with reconciling between husband and wife who have a basic principle should divorce as last step. To achieve understanding of the meaning of *غير ما بأس* (*no*

reason right) connoted with multiple frames that make every wife wants sue for divorce to think two or three in the paradigm of tradition allowed by *khulu*, *fasakh* and *tafriq qado 'i* as well as on any other position denounce acts that are not relied on grounds of *Syar'i*.

The realization of a good relationship between husband and wife is leant on the point that every servant of God has advantages and disadvantages. Likewise, a husband and wife have different temperament, but not to brawl. Advantages and disadvantages between the spouses serve as a cover; husband's excess covers the shortage of his wife and the excess of a wife is used to cover the shortfall of husband.

عن أبي هريرة قال قال رسول الله -صلى الله عليه وسلم- « لا يفرك مؤمن مؤمنة إن كره منها خلقا رضى منها آخر. »⁴⁸ «أو قال» غيره.

Narrated by Abu Hurairah: Rasulullah SAW said: "Do not be a man of faith hate a believing woman, when she did not like any of her husband's character (temperament), then she likes the others, or otherwise."

This *Hadith* tells us that everyone has different original properties from others and the characteristic is reflected in the attitude and temperament of behavior. In fact, we would get one of someone temperament which may be disliked, on the other hand, it must be realized that the person has another temperament that we like. Such a life may also be the life of a husband and a wife which have faced temperaments that the spouse likes and that of which the spouse hated, but the condition should have been used as a complete mutually complementary.

Conclusion

The reality in connection with the above *Hadith Nabawi* explained that sue for divorce issues between allowing and prohibiting by using

⁴⁷Satria Effendi, *Problematika Hukum Keluarga Islam Kontemporer Analisis Yurisprudensi dengan pendekatan Ushuliyah* (Jakarta: Prenada Media Group, 2004), 115-116.

⁴⁸Shahih Muslim, *Hadith* No. 3721, Vol. 4, 178.

references about law of *khulu'* relied on the provisions of Prophet Muhammad's tradition who opened a permissible door for the wife to divorce redeem a lawsuit over her husband. The other side of the Prophet Muhammad ban for a wife to divorce her husband without cause justified by Religion with the threat of not getting delights to the smell of paradise. Instead the threats of getting curse from Allah directed by the Prophet Muhammad on any husband performs acts that endanger his partner until she asked for a divorce.

The legality of the sue for divorce in the traditions of the Prophet regarding the meaning of contextualization غير ما بأس (*no right reason*) with reference to the *Hadith* on prohibition of committing harmful act because marriage is a worship and trust of Allah and the nature of disputes can tarnish affection. Disputes in a household that fall into the category of "legal reasons" First, mismatches on both sides with respective attitudes that would end with no longer compromise resulting in prolonged bickering that is no longer possible to unite. Second, strife that has occurring between husband and wife is the implementation of a serious brawl, so that each of them need to take different direction.

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