

Gender Equality in Islamic Marriage Law through the *Maqāṣid al-Sharī'a* Perspective: A Study on Woman-initiated Divorce (*Cerai Gugat*) in Indonesia

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Abstract: The presence of gender equality issues in Islamic family law has already become a new challenge faced by Muslims to manifest and uphold the higher purpose of *sharī'a* (*maqāṣid al-sharī'a*). Thus, *maqāṣid al-sharī'a* as a theoretical framework should be able to accept adjustment depending on the circumstance. This article aims to discuss the notion of gender equality in *maqāṣid al-sharī'ah* perspective, which is focused on two research questions, namely what is the perspective of *maqāṣid al-sharī'a* on gender equality discourse, especially in Islamic marriage law, and how can the reform of Islamic marriage law in the practice of divorce support the realization of a new paradigm of *maqāṣid al-sharī'a* to achieve justice. Using woman-initiated divorce (*cerai gugat*) in recent Indonesia as a case study and incorporating a normative legal approach along with the Islamic feminism theory proposed by Amina Wadud, the article concludes that the *maqāṣid al-sharī'a* applied in the Muslim legal tradition demonstrates the flexibility of Islamic law in adapting to various demands and circumstances. In the context of Islamic family law in Indonesia, it can be proven by the presence of woman-initiated divorce (*cerai gugat*) which has never been done before. It became a manifestation of the ability of *maqāṣid al-sharī'a* to reconcile contemporary issues such as the notion of gender equality.

Keywords: *cerai gugat*; gender equality; Islamic marriage law; *maqāṣid al-sharī'a*

Abstrak: Kehadiran isu kesetaraan gender dalam hukum keluarga Islam telah menjadi tantangan baru yang dihadapi umat Islam untuk mewujudkan dan menjunjung tinggi tujuan syariah (*maqāṣid al-sharī'a*). Dengan demikian, kerangka teoritis *maqāṣid al-sharī'a* harus dapat menerima penyesuaian tergantung pada keadaan. Artikel ini bertujuan untuk membahas pengertian kesetaraan gender dalam perspektif *maqāṣid al-sharī'a*, yang difokuskan pada dua pertanyaan penelitian, yaitu apa perspektif *maqāṣid al-sharī'a* tentang wacana kesetaraan gender, khususnya dalam hukum perkawinan Islam; dan bagaimana reformasi hukum perkawinan Islam dalam praktik perceraian dapat mendukung terwujudnya paradigma baru *maqāṣid al-sharī'a* untuk mencapai keadilan? Dengan menggunakan kasus perceraian yang diinisiasi oleh perempuan (*cerai gugat*) di Indonesia baru-baru ini sebagai studi kasus, dan menggabungkan pendekatan hukum normatif serta teori

feminisme Islam yang diajukan oleh Amina Wadud, artikel ini menyimpulkan bahwa *maqāṣid al-sharī'a* yang diterapkan dalam tradisi hukum Islam menunjukkan fleksibilitas hukum Islam dalam beradaptasi dengan berbagai tuntutan dan keadaan. Dalam konteks hukum keluarga Islam di Indonesia, hal itu dapat dibuktikan dengan adanya perceraian yang diinisiasi oleh perempuan yang belum pernah dilakukan sebelumnya. Ini menjadi manifestasi dari kemampuan *maqāṣid al-sharī'a* untuk mendamaikan isu-isu kontemporer seperti gagasan ke-setaraan gender.

Kata Kunci: cerai gugat; kesetaraan gender; hukum perkawinan Islam; *maqāṣid al-sharī'a*

A. Introduction

Marriage in Islamic marriage law occupies a very important position because of the many legal consequences that can be resulted from the existence of a marriage. Even in the Shāfi'i school, the priority of marriage can precede the *ḥajj* (pilgrim) under certain conditions. For example, when someone faces a situation that can only make him able to choose between marriage and pilgrim and if he does not perform a marriage, he will find a great difficulty.¹ This shows that marriage occupies a very important position. Besides marriage, no less important and common to attract a lot of attention from Muslim scholars is divorce. Like marriage, divorce also has many legal consequences.

Along the way, divorce often causes problems, one of which is caused by the legal postulate on the subordination of women from men (*qiwāma*).² Historical experiences that place women in second place in social class have greatly affected their position and rights, including in marriage. Women are often unable to make their own choices because all control in the marriage relationship is held by the man who is the husband.³ When a marital relationship is deemed unsustainable from the side of the woman as a wife, she cannot file for divorce if the husband does not want it. This will certainly give suffering to the wife. The fundamental values of Islam always prioritize three

¹ Oliver Leaman, *Routledge Handbook of Islamic Ritual and Practice* (London: Routledge, 2022), 138, <https://doi.org/10.4324/9781003044659>.

² Ziba Mir-Hosseini et al., eds., *Gender and Equality in Muslim Family Law, Justice, and Ethics in the Islamic Legal Tradition* (New York: I. B. Tauris Publishers, 2013), 9.

³ Royan Utsany, Afrizal Tw, and Khamim Khamim, 'Women's Rights and Gender Equality: An Analysis of Jasser Auda's Thoughts and His Contribution to Renewal of Islamic Family Law in Indonesia', *JIL: Journal of Islamic Law* 3, no. 1 (2022): 54–73, <https://doi.org/10.24260/jil.v3i1.530>.

things, beauty, goodness, and justice. These values are universal and are the main foundation in all aspects of Islam.⁴ There is no way these values can be achieved in a marriage where there is no justice in it.

Although then there is *khulu'* (divorce with compensation from the wife) which is considered as divorce on the initiative of the wife that compensates for the dominance of divorce by men, the acceptance of *khulu'* is enough to cause a lot of debate. The difference of opinion relates to the need for consent from the side of the husband and the authority of the judge in deciding the marriage relationship if a husband refuses his wife's *khulu'* request. Some argue that *khulu'* should only be done based on the agreement of both parties.⁵ Consequently, the wife will still accept injustice when she wants a divorce because she does not find the fundamental Islamic values mentioned above. The reason is, without her husband's consent, her *khulu'* is unacceptable.

Seeing such conditions, of course, another review of the provisions that have been carried out as a tradition uses appropriate approaches which in this case is the approach of *maqāṣid al-sharī'a*. Especially considering that the purpose of marriage in nurturing lineage and property occupies the position of necessity (*darūriyyāt*) which is one of the highest levels in *maqāṣid al-sharī'a*.⁶ One might think that the existing law is sufficient to answer all problems and view Islamic law as a single truth.⁷ But this will cause problems because Islamic law will not be able to adapt to the demands of new period and circumstances that have never existed in the classical Islamic legal tradition. In addition, the view of Islamic law as a single truth is an evasion from reality that shows the diversity and pluralism of Islamic law. Whereas diversity and pluralism have a positive value that enables Islam to survive in a variety of cultures and societies while preserving its universalist message.⁸

⁴ Yusdani Yusdani, 'Islamic Law and Contemporary Challenges from Fresh Ijtihad Point of View', *Jurnal Hukum Islam* 20, no. 1 (2022): 102, <https://doi.org/10.28918/jhi.v20i1.5991>.

⁵ Leaman, *Routledge Handbook of Islamic Ritual and Practice*, 305.

⁶ Jasser Auda, 'A Maqāṣidī Approach to Contemporary Application of the Sharī'ah', *Intellectual Discourse* 19, no. 2 (2011): 196, <https://journals.iium.edu.my/intdiscourse/index.php/id/article/view/231>.

⁷ Yusdani, 'Islamic Law and Contemporary Challenges from Fresh Ijtihad Point of View', 104.

⁸ Patrick Sookhdeo, 'Issues of Interpreting the Koran and Hadith', *Connections: The Quarterly Journal* 05, no. 3 (2006): 76, <https://doi.org/10.11610/Connections.05.3.06>.

Another thing that needs to be re-examined in the application of Islamic law is related to the existing context. Interpretations of Islamic legal sources that ignore contexts such as historical, social, economic, and so on give rise to partial understandings and potentially deviate from the fundamental values of Islam.⁹ Contemporary social conditions such as the discourse on equal rights between man and woman have received special attention from contemporary Muslim scholars. In the case of Islamic marriage law, many reforms have been carried out, one of which is about the practice of divorce.

A similar theme has been discussed by numerous authors with various focuses and approaches. Atun Wardatun, for example, in her article co-authored with Bianca J. Smith, focused their discussion on the case of women-initiated divorce, emphasizing the husband's *nushūz* (disobedience) as a legitimate reason for filing for divorce.¹⁰ In addition, Dewi Alhaa, etc. have also written an article related to gender equality in the study of Islamic law. Although related, their focus leaned more towards its actualization in the field of education, using Husein Muhammad's thoughts as her theoretical framework.¹¹ In contrast to previous research, this article focuses more on the discourse surrounding the compatibility of Islamic law with gender equality issues. By employing the feminism theory proposed by Amina Wadud, this article offers a new perspective on women-initiated divorce in Indonesia as one of the manifestations of the compatibility between Islamic law and gender equality, which is often considered unaccommodated or even contradictory.

Taking the example of Indonesia as a country with the largest Muslim community, the author argue that Islamic marriage law reform in Indonesia related to divorce is always adjusted to the demands of the situation based on the paradigm of *maqāṣid al-sharī'a*. But in addition, there are questions the author inquire about gender equality and *maqāṣid al-sharī'a* in divorce practice. First, what is the perspective of *maqāṣid al-sharī'a* on gender equality discourse,

⁹ Sookhdeo, 72.

¹⁰ Atun Wardatun and Bianca J. Smith, 'Woman-initiated Divorce and Feminist Fiqh in Indonesia: Narrating Male Acts of Nushūz in Marriage', *Ulumuna* 24, no. 2 (2020): 266–95, <https://doi.org/10.20414/ujis.v24i2.416>.

¹¹ Abdul Wahab Fahrub, Dewi Alhaa, and Muhammad Wasith Achadi, 'Gender Equality in Women's Jurisprudence According to Husein Muhammad and Its Relevance to the Goals of Islamic Religious Education', *al-Wijdān Journal of Islamic Education Studies* 8, no. 1 (2023): 124–49, <https://doi.org/10.58788/alwijdn.v8i1.1604>.

especially in Islamic marriage law? Second, how can the reform of Islamic marriage law in the practice of divorce support the realization of a new paradigm of *maqāṣid al-sharī'a* to achieve justice? The following discussion is aimed to seek the answers to those questions.

B. Method

The ongoing debate on the compatibility of *sharī'a* has been carried out by many scholars using different approaches and methods. This study employs a qualitative approach particularly a normative legal research approach, focusing on the interpretation of Islamic law (*sharī'a*) through the principles of *maqāṣid al-sharī'a*, which emphasizes the higher objectives of Islamic law. Apart from that, the use of the Islamic feminism theory proposed by Amina Wadud¹² in this study provides a framework for understanding Islamic law in a way that seeks to balance traditional religious teachings with modern understandings of gender equality, making the theory relevant to discussions on woman-initiated divorce (*cerai gugat*) in Islamic contexts. An in-depth analysis of narrations from classical Islamic jurisprudence text incorporated with modern interpretation is used with a focus on how the existing Islamic legal interpretation addresses the issue of gender equality in the context of woman-initiated divorce (*cerai gugat*). Furthermore, this study draws on both primary sources such as positive law in Indonesia concerning Islamic marriage law and secondary sources including related articles with the topic discussed which is woman-initiated divorce and the issue of gender equality based on the perspective of *maqāṣid al-sharī'a*. The use of this method will explore an effort of Islamic legal practice in Indonesia to accommodate the issue of gender equality by taking woman-initiated divorce as a case study.

C. Result and Discussion

Gender Equality from Islamic Perspective

In some references, there may be an idea that the concept of gender equality is not new in the Islamic world. This concept is quite like the concept of

¹² Amina Wadud, *Qur'an and Woman: Rereading Be Sacred Text from a Woman's Perspective* (New York: Oxford University Press, 1999), 29–39.

'*al-musāwā*' whose term can be found in the main source of Islamic religious teachings, namely the Qur'an. The Qur'an always emphasizes that all humans have the same degree regardless of tribe, nation, and gender. Both man and woman are given the same obligations and responsibilities before the God.¹³ Although it is not new, the impression of gender equality discourse seems to show that this concept has only emerged for less than a century, especially when this concept is described by secular society.¹⁴

In general, secular societies criticize gender equality in Islam which is understood as a form of male superiority to female subordination. In their criticism, they cite many examples of the difference in the amount of inheritance between male and female heirs and the provision of polygamy in marriage law. They considered that if there was equality, male and female heirs should receive an equal share of the inheritance. In addition, polygamy provisions that allow men to marry up to four wives should also apply to wives. Such understandings are erroneous because they ignore the context in which the provision relates. If explored deeply, facts will be found that can disprove these allegations. For example, in the case of polygamy, polygamy itself is not a basic provision because it is a derivative provision derived from monogamy. Mainly, the provision of marriage in Islam is monogamy. But some factors can allow a husband to marry more than one wife under very strict conditions. This is what many secular societies usually ignore.¹⁵

An understanding of the shortcomings of Islamic law in upholding gender equality can also be found in Islamic societies themselves. Haida Moghissi implicitly expresses that *sharī'a* is incompatible with the principles of human equality. For her, there is no single distortion that can reconcile the Qur'anic commands and instructions with the concept of gender equality. In line with Moghissi, Ibn Warrāq as cited by Jasser Auda revealed that Islamic human

¹³ Wan Fariza Alyati and Wan Zakaria, 'Gender Equity and Equality from Islamic Perspective: Malaysian Context', *Kafa'ah: Journal of Gender Studies* 7, no. 2 (2017): 123, <https://doi.org/10.15548/jkv7i2.183>.

¹⁴ Raihanah Abdullah, Asadullah Ali, and iti Aminah Hamid, 'Gender Equality, Islam, and Law', *The Journal of Oriental Studies* 25 (2015): 20, [http://www.iop.or.jp/Documents/1525/Raihanah Abdullah1_%5B001-153%5Djournal25-2.pdf](http://www.iop.or.jp/Documents/1525/Raihanah%20Abdullah1_%5B001-153%5Djournal25-2.pdf).

¹⁵ Abdullah, Ali, and Hamid, 23–36.

rights do not have sufficient support for the principle of freedom. Therefore, Islamic jurisprudence cannot be an ethical vision in the contemporary sense.¹⁶

Various criticisms of Islamic legal provisions, especially related to gender equality, are quite interesting in contemporary Islamic legal discourse. Indeed, it must be understood that the notions that place Islamic law unfriendly to gender equality are heavily influenced by the implementation of Islamic legal traditions in the past period. Although at that time there were parameters of *maqāṣid al-sharī'a* in measuring the interpretation and implementation of the existing laws, the same parameters were considered insufficient to be used in this contemporary era. Traditional *maqāṣid al-sharī'a* pay little attention to issues such as freedom and gender equality.¹⁷ While many paradigms change in society so that it also demands a new paradigm in *maqāṣid al-sharī'a* as a framework of thought and parameters in the interpretation and the implementation of Islamic law. Renewal here does not necessarily mean formulating new answers to answer new problems, but to rediscovering forgotten guidelines from the past.¹⁸

The strongest indicator of the implementation of gender equality according to George Ritser as cited by Maimun is the involvement of men and women actively in the overall social processes including household affairs as a domestic process.¹⁹ Therefore, when a woman is treated as an object in a divorce matter, gender equality cannot be implemented. The absence of unilateral divorce for women in traditional Islamic jurisprudence has made Islamic law deemed as a form of preserving patriarchal tradition. Although there is a *khulu'* mechanism, its conditions are still debatable and a woman who initiated such a mechanism is often seen negatively due to the presumption that she has committed *nushūz* (disobedience). This presumption is also highly

¹⁶ Auda, 'A Maqāṣidī Approach to Contemporary Application of the Sharī'Ah', 204.

¹⁷ Soni Zakaria, 'The Contextualization of the Māqāṣid al-Syarīah Jasser Auda Theory in the Concept And Practice of Islamic Family Law', *al-Adl* 14, no. 2 (31 July 2021): 83, <https://doi.org/10.31332/aladl.v14i2.2396>.

¹⁸ Ihsan Yilmaz, 'Ijtihad and Tajdid by Conduct: The Gülen Movement', in *Turkish Islam and the Secular State: The Gülen Movement*, ed. M. Hakan Yavuz and John L Esposito (New York: Syracuse University Press, 2003), 214.

¹⁹ Maimun Maimun, 'The Women's Rights in Divorce and Gender Equality Discourse in the Dynamics of Divorce in Madura', *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 6, no. 1 (2022): 483, <https://doi.org/10.22373/sjhk.v6i1.12804>.

influenced by the reading of scriptural texts which commonly positions women as men's subordination.²⁰ Because of that, Kodir as cited by Wardatun and Smith proposed the scriptural reading method called *qirā'a mubādala* (*cooperation reading*) which positions man and woman or in this sense husband and wife equally by upholding the principle of egalitarianism.²¹

It is essential to highlight that what made traditional Islamic law, especially in marriage and divorce matters seem to not uphold the notion of gender equality is the interpretations of previous scholars. The dynamic of gender equality issues in the historical collection of Islamic marriage law which is seemingly dominated by the man is not necessarily what is meant by the qur'anic verse. The previous interpretations and exegesis presumably is only human approximation or what al-Juwaynī called *ghalabat al-ẓann* (preponderance of the evidence).²² Qur'ān as the primary Islamic law source which is divine scripture is mostly dependent on the interpretation.²³ Therefore, it is still possible to read the qur'anic verses using another point of view that can lead to the implementation of principles of gender equality especially in the case of marriage and divorce.²⁴

Islamic Family Law in Classical and Contemporary Era

The presence of Islamic family law interpreted by Muslim scholars has always had the main objective of protecting basic human rights, namely property, life, and obtaining lineage/self-respect.²⁵ Nurturing lineage is one of the main purposes of the enactment of Islamic law or commonly called *maqāṣid al-sharī'a* which can be achieved by the application of Islamic marriage law

²⁰ Wardatun and Smith, 'Woman-Initiated Divorce and Feminist Fiqh in Indonesia: Narrating Male Acts of Nushūz in Marriage', 276.

²¹ Wardatun and Smith, 277.

²² Abu al-Ma'ali al-Juwayni, *al-Burhān fī Uṣūl al-Fiqh* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1997), 10.

²³ Marie O'Reilly, 'The Future of Women's Rights in Islam: Towards a More Harmonistic Interpretation of Sharia Law', *Trinity Women Review* 4, no. 1 (2020): 98, <https://ojs.tchpc.tcd.ie/index.php/TrinityWomensReview/article/view/2074>.

²⁴ Anver M. Emon, 'The Paradox of Equality and the Politics of Difference: Gender Equality, Islamic Law, and the Modern Muslim State', *SSRN Electronic Journal*, 2011, 14, <https://doi.org/10.2139/ssrn.1758966>.

²⁵ Mir-Hosseini et al, *Gender and Equality in Muslim Family Law, Justice, and Ethics in the Islamic Legal Tradition*, 143.

which is part of Islamic family law. As the most widely implemented law in life according to the tracing of Islamic history, Islamic family law has the highest potential among other Islamic laws in realizing *maqāṣid al-sharī'a* comprehensively. However, in its implementation, it cannot be separated from the challenges and demands arising from the existing conditions.²⁶

Family law occupies a very important position in family life. Without a good family order, the family will be easily divided and far from harmonious. In principle, building a family is not much different from building a country that requires a leadership figure in it. The question of the leader of the family in Islamic family law has been widely discussed by Muslim scholars since the classical period. The majority determined that the seat of leadership in the family is the responsibility of the husband as the head of the family. However, it does not mean that the husband has the right to do anything because there are rights of other family members that must be respected including the wife.²⁷

In classical times, the placement of women as subordination in the family began with a mistake starting from defining the concept of marriage. Generally, in the classical tradition, marriage is defined as a contract that implicates the man's ownership of the woman's genitals. This definition has implications for marriage which is understood as mere pleasure by channelling bodily pleasure. Truthfully, there is an ethical obligation which is the greatest demand between married husbands and wives.²⁸ As a result of this understanding, the Muslim family law tradition has become thick with patriarchal character.

Islamic family law that regulates family relationships such as marriage, divorce, guardianship, and so on was originally seen as a personal matter so it is often called personal status law.²⁹ There was no unification in matters of family law in premodern times due to the centrifugal nature of Islamic law.³⁰ To be

²⁶ Nurrohman Syarif, 'The Discourse and Practice of Islamic Family Law in Indonesia', *Psychology and Education Journal* 58, no. 1 (2021): 5201, <https://doi.org/10.17762/pae.v58i1.1774>.

²⁷ Alyati and Zakaria, 'Gender Equity and Equality from Islamic Perspective: Malaysian Context', 125.

²⁸ Qāsim Amīn, *Tahrīr al-Mar'a Wa a-l-Mar'a al-Jadīda* (Cairo: al-Markaz al-'Arabi li-l-Baḥṡ wa-l-Nashr, 1984), 73.

²⁹ Abdullahi Ahmed An-Na'im, 'Sharī'a and Islamic Family Law: Transition and Transformation: Women and Change', *The Ahfad Journal* 23, no. 2 (2006): 2.

³⁰ Wael B. Hallaq, *Sharī'a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 362, <https://doi.org/10.1017/CB09780511815300>.

precise, no provision binds all Muslims to submit to one school of law in Islam. The talk of unification of family law came along with the spread of colonialism in Muslim countries that tried to implement one-stop legal systems under government control. Even the classification of Islamic law into private and public law was also brought by Western countries through colonialism.³¹

Indeed, when viewed from a contemporary perspective, some Islamic family law traditions in the past seem to perpetuate patriarchal culture. In the case of divorce, it looks as if only the husband has the right and authority to file for divorce through *talāq*. As for women, although they also have the option of applying for *khulu'*, some scholars argue that *khulu'* can only be accepted by the agreement of the husband and wife. The frequency of divorce that tends to favour the husband is not because it is legitimized by the Qur'an but is based on an understanding of the social context of the past. In those days, women had almost no rights in either family life or society.³² With a very strong patriarchal tradition, Islamic law was implemented gradually. In addition, the discourse on freedom, gender equality, and so on has not been the focus of attention because it considered other urgencies.

The social system which prioritized male authority and woman as subordinate has highly influenced the condition of family structure in the classical period. Male guardianship (*wilāya*) concept and male superiority in decision-making due to the status of leader (*imām*) within a family supported by a patriarchal social system have made such conditions seemingly adopted by various Islamic legal schools. Not only in terms of interpretation of Islamic law itself but also in terms of the application making it difficult for women to seek legal recourse or dissolve a marriage without the consent of their husband. Indeed, the mechanism of *khulu'* presumably could be one of the alternative solutions. However, unlike unilateral divorce initiated which belongs to the husband without the need for another decision, *khulu'* still needs to the court

³¹ Ebrahim Moosa, 'Colonialism and Islamic Law', in *Islam and Modernity: Key Issues and Debates*, ed. Muhammad Khalid Masud, Armando Salvatore, and Martin van Bruinessen (Edinburgh University Press, 2009), 158–81.

³² Asma Barlas, 'Believing Women', in *Islam: Unreading Patriarchal Interpretations of the Qur'an* (Austin: University of Texas Press, 2002), 211–15.

judgment or even according to some opinions still needs the husband's approval.³³

Differently, in recent times, Islamic family law particularly in the context of divorce has seemingly accommodated the issue of gender equality. This shift has largely been influenced by the global human rights discourse, feminist movements within Muslim society and the reinterpretation of the existing classical Islamic jurisprudence (*fiqh*) using a modern perspective. Many countries especially Muslim-majority countries have given an opportunity for women to initiate divorce which is easier to ensure equitable distribution of property and maintenance rights. These reforms reflect a growing recognition of the need to align Islamic law with contemporary standards of gender equality, while still maintaining fidelity to Islamic principles.³⁴

Reflecting to what currently is on-going, the renewal of Islamic family law to develop what has existed in the past has gained its own urgency. Discourses such as gender equality have now received special attention in Islamic family law. In addition, Islamic family law issues that were originally handled by local religious authorities, have now become issues handled by the state. The accommodation of the issue of gender equality which contributes towards preserving women's rights within the family has received more attention than before. Many Muslim countries have implemented provisions that make Islamic family law a nationally administered affair by the state.³⁵ One of them is Indonesia which is the largest Muslim country in the world today.

Woman-initiated Divorce (*Cerai Gugat*) in Indonesia

Colonial history had coloured the journey of the Indonesian nation before becoming a sovereign state. Previously, Indonesia was a separate region in which stood many Islamic kingdoms. Islamic laws were implemented with adjustments to various local contexts. Legal issues that could not be resolved independently could be submitted to the *qāḍī* (official judge appointed by

³³ 'Abd Allāh Aḥmad al-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002), 23–25.

³⁴ Mir-Hosseini et al., *Gender and Equality in Muslim Family Law, Justice, and Ethics in the Islamic Legal Tradition*, 89–92.

³⁵ An-Na'im, 'Shari'a and Islamic Family Law: Transition and Transformation: Women and Change', 5–6.

governing ruler) which later became the forerunner of the establishment of religious courts as they are today.³⁶ With the presence of the colonial authorities who set policies on the enactment of various laws adopted from the European legal system required local religious authorities to make adjustments, especially in procedural law and public law.³⁷ Nevertheless, Islamic law has never lost its influence to this day in Indonesia.

Family law is a law that can always be applied almost entirely not only in Indonesia but in many Muslim countries. Even in colonial times, Islamic family law was traditionally applicable. Entering the era of independence, the idea of unification of Islamic family law in Indonesia emerged as an answer to the challenges of modernization. The codification of Islamic family law was marked by the promulgation of the Compilation of Islamic Law (*Kompilasi Hukum Islam*) based on the Indonesia Presidential Instruction No. 1 of 1991. The presence of the Compilation of Islamic Law has changed the direction of the Islamic legal system in Indonesia. Before the promulgation of the compilation of Islamic law, most legal schools used in Indonesia were Shāfi'ī schools. But then with the presence of the Compilation of Islamic Law, an expansion was made concerning to five schools namely Ḥanafī, Mālikī, Shāfi'ī, Ḥanābila, and Zāhirī. The compilation of Islamic law summarizes various thoughts on Islamic family law from the five schools.³⁸

With the presence of the Compilation of Islamic Law, it has become evidence of the reform of Islamic family law in Indonesia. The implementation of family law is no longer dominated by the Shāfi'ī school, and all recognized schools of jurisprudence are treated equally. All reliable opinions can be taken to realize the *maqāṣid al-sharī'a* in family law.³⁹ Not only in the treatment of schools, Islamic family law reform in Indonesia has also been able to reconcile the discourse of gender equality through various regulations oriented towards the protection and empowerment of women that are not carried out in the

³⁶ Afridawati Afridawati, 'History, Typology, and Implementation of Islamic Law in Indonesia: Combination of Sharia and Fiqh or the Result of Historical Evolution?', *al-Risalah: Forum Kajian Hukum dan Sosial Kemasyarakatan* 21, no. 1 (2021): 35–38, <https://doi.org/10.30631/al-risalah.v21i1.676>.

³⁷ Ebrahim Moosa, 'Languages of Change in Islamic Law: Redefining Death in Modernity', *Islamic Studies* 38, no. 3 (1999): 309.

³⁸ Syarif, 'The Discourse and Practice of Islamic Family Law in Indonesia', 5208–5209.

³⁹ Syarif, 5210.

classical Islamic legal tradition.⁴⁰ For example, in the issue of divorce which was previously interpreted solely as the right of the husband, now in Indonesia both husband and wife each have the same right to file for divorce through religious courts.⁴¹

Some regulations on Muslim divorce procedures in Indonesia can be seen including Article 73 of Law Number 7 of 1989 concerning Religious Courts and Article 132 of the Compilation of Islamic Law. The articles stipulate that the wife can file for divorce with a religious court whose jurisdiction includes the wife's residence. The provisions of this article replace the original provisions mentioned in Article 20 of Government Regulation Number 9 of 1975. In the article, it is stated that when the wife wants to file for divorce, the lawsuit is filed with the court whose jurisdiction includes the husband's residence. Looking at the general explanation and explanation of the Articles of Law number 7 of 1989, it can be found the reason for replacing this provision. The reason is to protect the wife who is usually the aggrieved party due to divorce. This proves that marriage law in Indonesia has realized legal reforms that can reconcile the discourse of gender equality in family law. The aim is none other than to realize *maqāṣid al-sharī'a* amid the demands of modernity and changing conditions.⁴²

Thus, it can be said that Indonesia has a good example that shows good reform in the case of divorce. Both husband and wife have equal rights to propose their intention to divorce through the religious court. Besides that, this makes the practice of divorce limited and unilateral. It means that the divorce is only recognized nationally if has been legitimized by the court.⁴³ The goal is that every divorce can be proven and has legal force based on positive law. As a result, both the husband and wife have the same right to propose divorce to their partner even though there will be different ways and terms. Nevertheless, the presence of woman-initiated divorce with the term '*cerai gugat*' in Indonesia does not neglect divorce by *khulu'* mechanism which is a divorce

⁴⁰ Mark Cammack, 'Islamic Law in Indonesia's New Order', *International and Comparative Law Quarterly* 38, no. 1 (1989): 68, <https://doi.org/10.1093/iclqaj/38.1.53>.

⁴¹ Wardatun and Smith, 'Woman-Initiated Divorce and Feminist Fiqh in Indonesia: Narrating Male Acts of Nushūz in Marriage', 270.

⁴² Law of the Republic of Indonesia Number 7 of 1989 Concerning Religious Court" (1989)

⁴³ Abu Rokhmad and Sulistiyono Susilo, 'Conceptualizing Authority of the Legalization of Indonesian Women's Rights in Islamic Family Law', *Journal of Indonesian Islam* 11, no. 2 (2017): 489, <https://doi.org/10.15642/JIIS.2017.11.2.489-508>.

lawsuit with financial compensation. In *khulu'*, the wife must pay back 'iwadl that has been given by her husband previously.⁴⁴ This makes divorce alternatives for the wife more than the husband. If the husband only has a method of divorce through *talāq*, the wife other than has a choice called divorce and *khulu'*.

In addition, when viewed through the lens of *maqāṣid al-sharī'a*, woman-initiated divorce (*cerai gugat*) in Indonesia holds significant relevance. The application of *cerai gugat* in line with the concept of *maqāṣid al-sharī'a* which prioritizes the preservation of key principles such as life, intellect (*'aql*), lineage (*nasab*), wealth (*māl*), and dignity (*'ird/karāma*). Furthermore, the ability of women to initiate divorce aligns with the principle of dignity by upholding the dignity and well-being of women, particularly in situations where marriage remains harmful or unjust. This perspective acknowledges that Islam seeks to protect individuals from harm and ensures justice in all aspects of life, including marital relations. The provision of *cerai gugat* empowers women to exercise their right to seek justice and protection within the context of family. By allowing women to initiate divorce, contemporary Islamic legal practice demonstrates a commitment to gender justice or gender equality, aligning with the broader objectives of Islamic law.

D. Conclusion

The notion of the incompatibility of the *sharī'a* with the principle of human equality should be understood as one based on a lack of understanding of the historical context and social conditions in which the *sharī'a* is applied. Recently, the perspective of *maqāṣid al-sharī'a* on gender equality has evolved, especially in the context of Islamic marriage law, to accommodate contemporary understandings of justice and equality. Historically, interpretations of *sharī'a* might not have emphasized gender equality due to the social and historical contexts of their time. However, *maqāṣid al-sharī'a* provides a framework that is flexible and capable of adaptation, allowing for reforms that meet the current

⁴⁴ Stijn Cornelis van Huis, 'Khul' over the Longue Durée: The Decline of Traditional Fiqh-Based Divorce Mechanisms in Indonesian Legal Practice', *Islamic Law and Society* 26, no. 1-2 (2019): 61, <https://doi.org/10.1163/15685195-00254A05>.

needs and demands, including those for gender justice. Recent developments in Islamic family law in Indonesia exemplify this shift.

The introduction of provisions allowing for woman-initiated divorce (*cerai gugat*) in Indonesia is a relevant example as it marks a significant reform in Islamic marriage law, reflecting a new paradigm within *maqāṣid al-sharī'a* that aligns with modern values of gender equality. This reform not only grants equal rights to both spouses to initiate divorce but also ensures that the process protects the interests of the wife, often seen as the more vulnerable party in divorce cases. By requiring that divorce cases be filed in the court of the wife's residence, the law further supports her rights and well-being. These changes illustrate how *maqāṣid al-sharī'a* can be reconciled with contemporary ethical visions, demonstrating its capacity to support gender equality and challenge outdated perceptions that *sharī'a* is incompatible with modern human rights discourses. This study contributes to the understanding that *maqāṣid al-sharī'a* is not static but is a dynamic legal framework capable of evolving to meet the justice needs of contemporary society.[s]

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