

## A STUDY OF *FASAKH* AND *KHULU* IN THE COMPILATION OF ISLAMIC LAW (KHI): COMPARISON, CAUSES, AND IMPLICATIONS

**Deris Arista Saputra**

Universiti Sultan Azlan Shah (USAS), Malaysia

\*e-mail: derisaristasaputra@gmail.com

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*Fasakh; Khulu; Compilation of Islamic Law (KHI)*

### ABSTRACT

The Compilation of Islamic Law (KHI), as a legal guideline for Muslims in Indonesia, regulates in detail the *Fasakh* and *Khulu* mechanisms in resolving domestic conflicts. This study aims to provide a comprehensive analysis of these divorce mechanisms, focusing not only on their legal aspects but also on their social and psychological implications for individuals and families within the Indonesian Muslim community. The study used a juridical-normative approach that focused on legal analysis contained in the KHI. First, secondary data consisted of books, journals, and articles that discussed this topic from both the perspective of Islamic law and positive law in Indonesia. Then, case studies were conducted by identifying several divorce cases in religious courts. The findings reveal several key points related to the divorce mechanisms in the broader framework of KHI, including a lack of public understanding, social stigma, and limited resources in religious court. Finally, the study provides strategic recommendations for improving their implementation. These findings can inform policymakers, legal practitioners, and community leaders about the importance of these mechanisms in supporting the rights and welfare of individuals within the community.

### INTRODUCTION

Marriage in Islam aims to create a harmonious and loving relationship, but not all marriages can achieve this goal. The obligation of each husband and wife to maintain a good relationship between the two. In addition to fulfilling each other's obligations on the basis of loving, loving, helping, and opening their hearts sincerely. Thus they can enjoy the happiness of married life as they desire. They must forgive each other for the other's mistakes. Both must be tenacious in upholding their households so as not to waver (Natsir, 2016). Challenges such as disharmony, inability to meet obligations, or prolonged conflict often drive couples to end their marriage (Atho'Mudzhar et al., 2024; Jamo, 2019; Nelli et al., 2023). Divorce occurs when both parties, both husband and wife, have both felt incompatibility in running a household (Sumanto, 2018). In Islamic law, mechanisms such as *Fasakh* and *Khulu* provide a legal avenue for dissolving marriages.

*Fasakh* and *Khulu* are two Islamic legal instruments that provide solutions in resolving household problems, especially related to divorce. These two concepts not only have a legal dimension, but also have a social and psychological impact for the parties involved. *Fasakh*, which means annulment of marriage, is done on the basis of a defect or certain reason that makes the marriage considered invalid or cannot be continued. In contrast, *Khulu* is a form of divorce filed by

a wife by offering certain compensation to the husband, which reflects women's rights and autonomy in Islamic law.

The Compilation of Islamic Law (KHI), as a legal guideline for Muslims in Indonesia, regulates in detail the *Fasakh* and *Khulu* mechanisms in resolving domestic conflicts. The presence of KHI aims to accommodate the needs of the Indonesian Muslim community who live within the framework of a modern legal state while maintaining sharia values. However, in practice, *Fasakh* and *Khulu* often cause various problems, both at the level of legal interpretation and in their implementation in religious courts. The compilation of Islamic Law should be an initiation in the context of harmonizing a law under the auspices of the government in responding to the problems of Muslims in Indonesia, so that the spirit of unification of Islamic Fiqh Law carried out by lawmakers is inseparable from the state visions and missions, namely based on Pancasila (Rofii, 2023).

Compilation of Islamic Law (KHI) means a collection activity or something that is collected, KHI in Indonesia is the first step for the codification of Islamic law in the field of *Muamalah* which applies in the jurisprudence of the Religious Court for Indonesian citizens who are Muslims. The KHI is valid and used as a guideline for all Religious Courts in Indonesia based on Presidential Instruction No. 1 of 1991 dated June 10, 1991, and Decree of the Minister of Religion No. 154 of 1991 dated July 22, 1991.

In the social context, *Fasakh* and *Khulu* also reflect the dynamics of gender relations and the role of the family in Muslim society. The decision to apply for *Fasakh* or *Khulu* is often influenced by factors such as culture, economics, and legal awareness. For example, women who file for a marriage often face social stigma that complicates the divorce process. On the other hand, *Fasakh* involving annulment of a marriage on the grounds of defect or violation of legal conditions often requires complex proof in court. However, public understanding of this mechanism is still limited, so many couples are unaware of their rights and responsibilities in marriage.

This study aims to provide a comprehensive analysis of *Fasakh* and *Khulu*, exploring their causes and implications for families and communities. With a deeper understanding, it is hoped that this mechanism can be an effective and fair solution for the Indonesian Muslim community in resolving domestic conflicts. The research contributes to the field of family law by offering a comprehensive analysis of *Fasakh* and *Khulu*, two forms of divorce in Islamic jurisprudence, specifically within the context of the Indonesian Muslim community. By exploring the causes and implications of these divorce mechanisms, the study aims to enhance understanding of their roles in resolving domestic conflicts. This insight is intended to promote fair and effective solutions for families and communities facing such issues, thereby contributing to the broader discourse on conflict resolution and family dynamics in Islamic contexts. Ultimately, the findings can inform policymakers, legal practitioners, and community leaders about the importance of these mechanisms in supporting the rights and welfare of individuals within the community.

The research by Saputra (2024) focuses on the consequences of *Talaq*, *Khulu*, and marriage *Fasakh*, examining the legal implications of these divorce mechanisms and emphasizing the outcomes on individuals post-divorce. Meanwhile, Zahir (2021) conducts a comparative analysis of *Talaq* that occurs outside the courts, investigating the legal frameworks and implications of informal divorce practices, and highlighting differences between traditional practices and formal legal mechanisms.

The research gap identified is that while both studies touch upon the implications of divorce mechanisms, they do not provide an in-depth examination of the interplay between *Fasakh* and *Khulu* specifically within the broader framework of the Compilation of Islamic Law (KHI). The existing literature lacks a comprehensive analysis of how these mechanisms function in practice and their

socio-legal impacts on families and communities, particularly in the context of public understanding and stigma.

The novelty of the study lies in its comprehensive approach to analyzing *Fasakh* and *Khulu*, focusing not only on their legal aspects but also on their social and psychological implications for individuals and families within the Indonesian Muslim community. By addressing the challenges of public understanding and the social stigma associated with these divorce mechanisms, the study aims to provide strategic recommendations for improving their implementation. This multifaceted analysis contributes to a more holistic understanding of how these legal mechanisms can effectively resolve domestic conflicts while upholding justice and individual rights in a contemporary context.

## **METHODS**

This study used a juridical-normative approach that focused on legal analysis contained in the Compilation of Islamic Law (KHI). This method was chosen to examine legal rules related to *Fasakh* and *Khulu* in the context of Islamic legislation in Indonesia. The data used in this study was divided into two main categories. First, primary data, which included a compilation of Islamic law and religious court decisions related to *Fasakh* and *Khulu*. Second, secondary data consisted of books, journals, and articles that discussed this topic from both the perspective of Islamic law and positive law in Indonesia.

The data collection process was carried out through several main techniques. Document study involved analyzing the articles in the KHI and other relevant legal documents. In addition, case studies were conducted by identifying several divorce cases in religious courts to provide a practical picture of the application of *Fasakh* and *Khulu*. The collected data was analyzed using descriptive-analytical methods.

## **RESULTS**

Marriage is a combination of two different characters, where each party seeks to know and understand what their strengths and weaknesses are. But it is undeniable, no matter how ideal the married couple is, there must be a problem where they are required to be able to make a decision that in the end does not have an impact on a condition that hurts both. If there is a dispute that cannot act wisely, then the husband and wife are allowed to find an intermediary to resolve it. However, if the judge is unable to resolve it, then in the end he will go to the gate of divorce. The settlement (divorce wish), both the wife and the husband must go through the local Religious Court through several processes.

Islam gives the right of *Talaq* to the husband to divorce a wife, the right of *Khulu'* to the wife to divorce a husband, and the right of *Fasakh* for both husband and wife (Rofiq et al., 2023). Thus, what decides the marriage and the cause of divorce between husband and wife is *Talaq*, *Khulu'*, *Fasakh*. Article 113 of the Compilation of Islamic Law states that a valid marriage can be dissolved due to death, divorce and court decision (Mahkamah Agung RI, 2005). In another article, it is also stated, article 115 of the Compilation of Islamic Law (KHI), that divorce can only be done in front of a religious court session after the relevant court has made mediation efforts, but has not succeeded in reconciling and preventing both parties from divorcing.

The laws and regulations in Indonesia mentioned in the Compilation of Islamic Law (KHI) article 116 (h) that the decision of the *Fasakh* must be registered with the Religious Court and valid after receiving a decision from the judge. It is also mentioned in Marriage Law Number 1 of 1974 regarding the decision of the case and its consequences in conjunction with Article in Government Regulation Number 9 of 1975. Article 39 paragraph (2) of Law Number 1 of 1974 states that in order

to carry out a divorce, there must be sufficient reasons, that between husband and wife they will not live in harmony as husband and wife. Explanation of Article 39 paragraph (2) of Law Number 1 of 1974 jo Article 19 Letter (f) of Government Regulation Number 9 of 1975 as one of the reasons for divorce, namely between husband and wife there are continuous disputes and quarrels and there is no hope of living in harmony in the household anymore.

With national legal regulations, the government is responsible for providing effective regulations in legally resolving the causes of high divorce (Nafisah et al., 2024). This study reveals several key points related to *Fasakh* and *Khulu* in the Compilation of Islamic Law (KHI).

### Comparison of *Fasakh* and *Khulu*

*Fasakh* and *Khulu* have fundamental differences in procedures and concepts. *Fasakh* focuses on the annulment of marriage due to defects or violations of the legal conditions of marriage. The *Fasakh* process is more complex because it requires strong evidence in a religious court, including testimony and supporting documents. Annulment of marriage is a court action in the form of a decision that states that the marriage carried out is declared invalid and something that is declared invalid is considered to have never existed. Therefore, the man and the woman whose marriage is annulled are considered never married. Thus they have never had the status of husband and wife (Arofik, 2022).

Meanwhile, *Khulu*' in the rules applied to the Compilation of Islamic Law (KHI) is divorce which is seen as *Talaq. Khulu*" which occurs due to the husband's violation of *Taklik Talaq* that has been pledged after the marriage contract (Yuliatin, 2018). On the other hand, a *Khulu* is a divorce filed by a wife with compensation to the husband, usually in the form of a dowry return. *Khulu* is more flexible in implementation, because it focuses more on agreements between the two parties without a heavy evidentiary process. KHI's view of *Khulu* as the cause of the breakup of marriage underscores the need for legitimate reasons and procedures that must be followed correctly. "*Khulu*" is considered a woman's right to divorce her husband if the continuation of a viable marriage is not possible (Nisa & Masrokhin, 2023).

### Main Causes of *Fasakh* and *Khulu*

Factors that cause *Fasakh* include domestic violence, financial incapacity of one of the parties, fraud related to marital status, or violation of the legal conditions of marriage. In Chapter XI article 70 of the KHI concerning the Annulment of Marriage, it is stated that the marriage is null and void if

- a. "The husband is married, while he is not entitled to perform aqad nikah because he already has 4 (four) wives even if one of his four wives is in the *Iddah Talaq Raj'i*
- b. A man marries his ex-wife who has been in *Li'an*.
- c. A person marries his ex-wife who has been sentenced to *Talaq* three times by him, unless his ex-wife has remarried to another man and then divorced again from the man and has expired his *Iddah* period.
- d. Marriage is carried out between two people who have a blood relationship: a child and a relative to a certain degree that prevents marriage according to article 8 of Law No. 1 of 1974, namely
  - 1) Blood is related in a straight lineage down or up.
  - 2) Blood relations in the deviant bloodline are between siblings, between a person and a parent's brother and between a person and a grandmother's brother.
  - 3) Having sex with *semenda*, namely in-laws, stepchildren, daughters-in-law and stepmother

4) Related, namely parents, children, siblings and aunts or uncles.

e. The wife is a sibling or as an aunt or nephew of the wife or wives".

In addition, the Compilation of Islamic Law does not clearly regulate the phase of marriage due to apostasy proportionally. The marriage was broken up due to divorce due to the absence of domestic harmony and not due to apostasy committed by one of the parties (husband/wife). So that if one of the couples does not mind if the partner apostatizes, then the marriage can continue (Afianto, 2013).

This is shown from Article 70 of the Compilation of Islamic Law does not mention the treatment of denial as the cause of annulment of marriage. But article 75 implicitly states that this is the reason for apostasy. Meanwhile, article 116 does not mention apostasy as a reason for divorce, if there is disharmony in the household. The legal decision is very ambiguous.

Article 71 of the Compilation of Islamic Law emphasized that marriage can be annulled if:

- a. A husband commits polygamy without the permission of the Religious Court
- b. The woman who was married turned out to be still the wife of another man who was *mafqud* (missing is not known)
- c. The woman who was married turned out to be still in *Iddah* from another husband
- d. Marriage that violates the age limit of marriage as stipulated in article 7 of law number 1 of 1974
- e. The marriage is carried out without a guardian or is performed by an unqualified guardian
- f. Marriages that are carried out by force.

In contrast, *Khulu* is more often filed due to relationship disharmony, emotional inability to continue marriage, or the wife's desire to have freedom. Social factors, such as family pressure, cultural stigma, and public perception of divorce, also influence the decision to apply for *Fasakh* or *Khulu*.

Abror (2019) and Yuliatin (2018) explained the reasons that can be used as the basis for lawsuits in the Religious Court are regulated in Article 148 paragraph (1) of the KHI as explained in Article 116 letters a to h, including:

- a. The husband commits adultery, drunkenness, stuffing, gambler and so on which is difficult to cure;
- b. The husband left the plaintiff for 2 (two) consecutive years without any permission or valid reason. That is, the husband knowingly and deliberately abandons the plaintiff;
- c. The husband is sentenced to imprisonment for 5 years or more after the marriage takes place;
- d. The husband acts cruelly and abusively, so that the safety of the plaintiff is threatened;
- e. The husband is unable to carry out his duties as a husband due to physical disability or illness;
- f. There are constant disputes and quarrels without the possibility of getting along again;
- g. The husband violates the *Talaq* pronounced during *ijab-kabul*;
- h. The husband changes religion or apostases which results in disharmony in the family. To support the divorce lawsuit, letters and witnesses must be prepared that will be used as evidence to strengthen the divorce lawsuit.

### **The Legal and Social Implications**

*Fasakh* and *Khulu* have a significant impact on the parties involved. From a legal point of view, *Fasakh* provides a way out for those who feel disadvantaged in marriage, but the long process is often an obstacle. Meanwhile, *Khulu* allows women to end marriages more quickly, despite often facing challenges in the form of social stigma and resistance from their husbands.

Socially, *Fasakh* and *Khulu* often affect the status of women in society, especially in communities that view divorce as taboo. Abror (2019) explained specifically that the impact of divorce on a husband or wife is on the psychological side. On this side, the consequences of divorce will be able to give birth to several implications:

- a. Loss of security and comfort, anyone who files for divorce will feel a loss of security and comfort when alone or with their partner.
- b. Guilt and great sin for having abandoned his spouse and children.
- c. In a case of divorce due to polygamy or the presence of a third party, it is possible that there will be an absence of pleasure in having sex with a new partner.

Children involved in domestic conflict are also vulnerable in multiple dimensions, including emotional, behavioral and psychological well-being. Children from divorced families tend to experience stress, identity confusion, and difficulties in building healthy social relationships due to parental divorce (Nasution & Fauziah, 2024). Therefore, it is important to increase public understanding of legal rights in marriage and divorce in order to reduce the negative impact caused. The provisions of the KHI that apply in Indonesia are a reference for Islamic marriage and divorce treatment in the country (Nisa & Masrokhin, 2023).

The procedure regulated in the Compilation of Islamic Law regarding a wife who wants to divorce through *Khulu'* is stipulated in Article 148:

- g. "A wife who files a divorce lawsuit by way of *Khulu'*, submits her application to the Religious Court that covers her place of residence along with the reasons or reasons.
- h. The Religious Court shall summon the wife and husband to be heard for their respective statements no later than one month
- i. In the trial, the Religious Court gave an explanation of the consequences of *Khulu'* and gave its advice.
- j. After both parties agree on the amount of *iwadh* or ransom, the Religious Court gives permission for the husband to pledge his *Talaq* in front of the Religious Court session. Against this determination, no appeal and cassation efforts can be made.
- k. The next settlement is taken as stipulated in Article 131 paragraph (5).

In the event that no agreement is reached on the amount of the ransom or *iwadh*, the Religious Court shall examine and decide as a matter of course."

## CONCLUSION

*Fasakh* and *Khulu* are legal mechanisms in the Compilation of Islamic Law (KHI) aimed at resolving domestic conflicts fairly under sharia principles, with *Fasakh* enabling annulment due to defects in marriage and *Khulu* allowing wives to file for divorce with compensation. Despite their important role in protecting individual rights, particularly for women, their implementation in Indonesia faces challenges such as public misunderstanding, social stigma, and limited resources in religious courts. To enhance their effectiveness, strategic measures like legal education, capacity building, and regulatory reform are necessary. Future research should delve into these implementation challenges, community perceptions, and the effectiveness of educational programs, as well as conduct comparative analyses with other Muslim-majority countries to improve the understanding of these mechanisms' impacts on gender equality and human rights, ultimately promoting justice and harmony in Indonesian Muslim society.

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