

## **JUDGES PERSPECTIVE ON THE THIRD TALAK IMPOSED OUTSIDE OF COURT SESSION**

<sup>1\*</sup>Nur Rofiq, <sup>2</sup>Ro'fah Setyowati, <sup>1</sup>Meydora Cahya Nugraheni, <sup>1</sup>Wahyu Prabowo,  
<sup>3</sup>Ahmad Asroni, <sup>4</sup>Halisma Amili, <sup>5</sup>Taufik Setyudin, <sup>6</sup>Musthafa

<sup>1</sup> Faculty of Social and Political Sciences, Universitas Tidar, Magelang, Indonesia

<sup>2</sup> Faculty of Law, Universitas Diponegoro, Semarang, Indonesia

<sup>3</sup> Faculty of Business and Economics, Universitas Islam Indonesia, Yogyakarta, Indonesia

<sup>4</sup> Faculty of Law, Universitas Puhuwato, Gorontalo, Indonesia

<sup>5</sup> Sekolah Tinggi Agama Islam Al-Hikmah 2, Brebes, Indonesia

<sup>6</sup> Department of Fiqh and Usul, Academy of Islamic Studies, University of Malaya, Kuala Lumpur, Malaysia  
nurrofiq@untidar.ac.id

### *Abstract*

*The research aims to analyze the views of the Panel of Judges, Mediator Judges, Positive Law in Indonesia and Islamic Law regarding triple talak outside the Religious Court hearings. The research method uses the research Normative Law-Empirical and the nature of this research is descriptive-analytic. The results of this research, namely the views of the Panel of Judges, Mediator Judges and Positive Law in Indonesia state that triple talak handed down outside the courtroom is invalid according to Law No. 7 of 1989 concerning Religious Courts and Compilation of Islamic Law Article 117. Meanwhile, according to Law Islam, there are four opinions, namely; First, the one that punishes three divorces imposed at once is three divorces. Second, the opinion condemns that three divorces at the same time only fall one. Third, a detailed opinion, that is a wife who has not had intercourse and has had intercourse with her husband. Three divorces are pronounced simultaneously against a wife who has not had intercourse, then it is divorced one, while divorces against a wife who has been consummated, then it is divorced three. The fourth opinion condemning three divorces at once is not divorced.*

**Keywords:** Judge; Law; Divorce Outside Court

### **1. Introduction**

Marriage is part of Islamic teachings.<sup>1</sup> Marriage is a sacred bond in our religion because with this marriage, one's desires will be channeled within the framework of worship.<sup>2</sup> Islam views marriage as something sacred and noble, meaning the value of worship for Allah, following the sunnah of the Messenger and carried out based on responsibility, sincerity and following legal provisions that apply<sup>3</sup> to a sakinah, mawaddah and rahmah family.<sup>4</sup> Marriage is intended for life

<sup>1</sup> Henderi Kusmidi, "Konsep Sakinah, Mawaddah Dan Rahmah Dalam Pernikahan," *El-Afkar: Jurnal Pemikiran Keislaman dan Tafsir Hadis* 7, no. 2 (2018): 63–78, <https://ejournal.iainbengkulu.ac.id/index.php/elafkar/article/view/1601>.

<sup>2</sup> Rusli Halil Nasution, "Talak Menurut Hukum Islam," *Jurnal Ilmiah Al-Hadi* 3, no. 2 (2018): 707–716, <https://jurnal.pancabudi.ac.id/index.php/alhadi/article/view/357>.

<sup>3</sup> Wahyu Wibisana, "Pernikahan Dalam Islam," *Ta'lim: Jurnal Pendidikan Agama Islam* 14, no. 2 (2016): 185–193.

<sup>4</sup> Ahmad Sainul, "Konsep Keluarga Harmonis Dalam Islam," *Jurnal Al-Maqasid: Jurnal Ilmu Kesyarifan dan Keperdataan* 4, no. 1 (2018): 86–98, <http://jurnal.iain-padangsidiimpunan.ac.id/index.php/almaqasid/article/view/1421>.

and happiness for the married couple concerned. Domestic violence results in any action against a person in the household which results in physical, sexual, or psychological misery or suffering and or neglect of the household, including threats to commit acts, coercion, or deprivation of liberty unlawfully within the household.<sup>5</sup> So that the marriage could not be maintained and ended in divorce.<sup>6</sup>

However, it is still found that there are Muslims who experience failure in fostering the household, dropping divorce outside the courtroom<sup>7</sup>, although ideally divorce must be carried out according to Islamic law and applicable laws in Indonesia, in reality many husbands recklessly decide to divorce their wives at home during the dispute between them without registering their lawsuits to the court.<sup>8</sup> Although normatively Islamic law allows divorce in order to avoid a greater mafsadah for married couples who experience deadlock in maintaining the marriage bond<sup>9</sup> but basically, divorce is something that God hates.<sup>10</sup> If divorce outside the court is allowed, the impact outside the court will have implications for the parties deciding. The implication is related to his marital status and custody of children in particular<sup>11</sup> and several rights and obligations that must be fulfilled by both ex-husband and ex-wife, namely *mutah* or divorce compensation, living during *iddah*, and *hadlanah* or childcare.<sup>12</sup>

This five-year decade, previous research discussing this focus has been the study of previous researchers, including; *First*, an article from Ilham Hidayat, Yaswirman and Mardenis, with the

---

<sup>5</sup> Dedi Sumanto, Titin Samsudin, and Fikri Hi. Asnawi Amirudin, "The Existence of the Religious Court in Handling Divorce Cases on the Reason of Domestic Violence," *Jambura Law Review* 3, no. 2 (2021): 214–230, <https://ejournal.ung.ac.id/index.php/jalrev/article/view/11651>.

<sup>6</sup> Muhammad Tri Ramdhani, "Manajemen Pembelajaran Pendidikan Agama Islam Pada Perceraian Orang Tua Terhadap Perilaku Anak Di Desa Tumbang Runen Kecamatan Kamipang Kabupaten Katingan," *Jurnal Hadratul Madaniyah* 4, no. 1 (2017): 40–46, <https://journal.umpr.ac.id/index.php/jhm/article/view/495>.

<sup>7</sup> Hepi Duri Jayanti, "Talak Tiga Di Luar Pengadilan Perspektif Hukum Islam Dan Hukum Positif Bagi Pegawai Negeri Sipil (Studi Analisis Putusan Pengadilan Agama Argamakmur Nomor 0207/Pdt.G/2015/PA.AGM)," *Qiyas: Jurnal Hukum Islam dan Peradilan* 3, no. 1 (2018): 93–105, <https://ejournal.iainbengkulu.ac.id/index.php/QIYAS/article/view/958>.

<sup>8</sup> Merlin Putri and Shafra Shafra, "People's Understanding of the Off-Court Talak (Case Study in Nagari Koto Tuo, IV Nagari District, the Sijunjung Regency)," *Fitrah: Jurnal Kajian Ilmu-ilmu Keislaman* 7, no. 1 (2021): 99–118, <http://jurnal.iain-padangsidempuan.ac.id/index.php/F/article/view/3374>.

<sup>9</sup> Amin Iskandar and Ahmad Zaeni, "Ikrrar Talak Di Pengadilan Perspektif Ma'anil Hadis," *Al-Tadabbur: Jurnal Ilmu Al-Qur'an dan Tafsir* 7, no. 1 (2022), <http://jurnal.staialhidayahbogor.ac.id/index.php/alt/article/view/2495>.

<sup>10</sup> Sadiran Sadiran, "Perceraian Di Wilayah Desa Jenang Kecamatan Majenang Kabupaten Cilacap Tahun 2008," *Jurnal Al-Wasith: Jurnal Studi Hukum Islam* 3, no. 1 (2018): 1–9, <https://jurnal.unugha.ac.id/index.php/wst/article/view/113>.

<sup>11</sup> Euis Nurlaelawati, "For The Sake Of Protecting Religion: Apostasy and Its Judicial Impact on Muslim's Marital Life in Indonesia," *Journal of Indonesian Islam* 10, no. 1 (2016): 89–112, <https://jiis.uinsby.ac.id/index.php/JIIs/article/view/211>.

<sup>12</sup> Iskandar and Zaeni, "Ikrrar Talak Di Pengadilan Perspektif Ma'anil Hadis."

title “Problems Arising from *Talak* Divorce Outside the Court”.<sup>13</sup> *Second*, an article from Abd. Karim Faiz, Zulfahmi and Ahmad Izzuddin, with the title “Between State Law and Islamic Law: The Practice of Divorce Outside the Situbondo Religious Courts, Indonesia”.<sup>14</sup> *Third*, an article by Irham Zahir, entitled “Comparative Analysis of Talaq that Passed Outside the Court in the Perspective of Islamic Law and Compilation of Islamic Law”<sup>15</sup>. *Fourth*, Merlin Putri, Shafra, with the title “People's Understanding of the Off-Court *Talak* (Case Study in Nagari Koto Tuo, IV Nagari District, the Sijunjung Regency)”.<sup>16</sup> *Fifth*, an article by Muhammad Isa, with the title “Divorce Outside the Religious Courts According to the Perspective of Law Number 1 of 1974 and the Compilation of Islamic Law (A Research in the Legal Territory of the Syar'iyah Court of Aceh Besar)”.<sup>17</sup>

In contrast to previous studies, this research focuses on the problem of how the panel of judge's perspectives on the triple divorce law was handed down outside the religious court session. Why is this important? Bearing in mind that information relating to the fall of triple divorce outside the courtroom from the judge's perspective and the law is still minimal information. Based on the background of the problems above, researchers are challenged to conduct more in-depth research with the title "The Perspective of the Panel of Judges on the Law of Triple Divorce Outside the Religious Court Session".

The purpose of this research is as follows: 1) To analyze the views of the Panel of Judges regarding the triple divorce law that has occurred outside the Religious Court session; 2) To analyze the view of the Mediator Judge on the triple divorce law that has occurred outside the Religious Court hearing; 3) To analyze the review of Islamic law relating to the law of triple *talak* which has occurred outside the trial of the Religious Courts; and, 4) To analyze the review of Positive Law in Indonesia on triple *talak* which has occurred outside the Religious Court hearings.

---

<sup>13</sup> Ilham Hidayat, Yaswirman Yaswirman, and Mardenis Mardenis, “Problems Arising from *Talak* Divorce Outside the Court,” *International Journal of Multicultural and Multireligious Understanding* 6, no. Special Edition 4 (2019): 138–148, <https://ijmmu.com/index.php/ijmmu/article/view/919>.

<sup>14</sup> Abd. Karim Faiz, Zulfahmi AR, and Ahmad Izzuddin, “Between State Law and Islamic Law: The Practice of Divorce Outside the Situbondo Religious Courts, Indonesia,” *JIL: Journal of Islamic Law* 3, no. 2 (2022): 176.

<sup>15</sup> Irham Zahir, “Comparative Analysis of Talaq That Passed Outside The Court In The Perspective of Islamic Law and Compilation of Islamic Law,” *Jurnal Al-Dustur* 3, no. 2 (2020).

<sup>16</sup> Putri and Shafra, “People’s Understanding of the Off-Court *Talak* (Case Study in Nagari Koto Tuo, IV Nagari District, the Sijunjung Regency).”

<sup>17</sup> Muhammad Isa, “Perceraian Di Luar Pengadilan Agama Menurut Perspektif Undang-Undang Nomor 1 Tahun 1974 Dan Kompilasi Hukum Islam (Suatu Penelitian Di Wilayah Hukum Mahkamah Syar’iyah Aceh Besar),” *Jurnal Ilmu Hukum* 2, no. 1 (2014): 62–71, <https://jurnal.usk.ac.id/MIH/article/view/4579>.

## **2. Method**

This research uses normative legal research-empirical. The nature of this research is descriptive-analytic. The place of research is in the Office of the Religious Court of Magelang City. To collect research data, researchers used the techniques of interviews and library studies. The technique that the author will use in analyzing the first data is a case study of handling practices and decisions taken by the Panel of Judges and Mediator Judges in cases of triple divorce committed by someone outside the Religious Court of Magelang City, which is part of a qualitative method that wants to explore a particular case in depth by involving the collection of various sources of information. Then after the data is collected, using interview techniques and data presentation, namely presenting the data that has been selected in the form of text as well as the results of documents and archives. And the last is the technique of concluding, namely concluding the research analysis results. To check the validity of the data obtained during the research, the researcher used a triangulation technique, namely a data validity checking technique in the form of collecting data from more than one source, which shows the same information.

## **3. Results and Discussion**

### **3.1. Views of the Panel of Judges in Resolving Divorce Cases Three Times That Happened Outside the Religious Court Sessions**

Disputes are a human phenomenon that is always present in society. In the event of a dispute, there are two mechanisms that can be used to resolve it, namely through court (litigation) and outside court (non-litigation). The litigation paradigm believes the law must be enforced to end the conflict. In addition, a non-litigation paradigm is used, a paradigm that is rooted in consensus, deliberation or peace settlement between the parties. The philosophy of resolution is not to seek absolute victory on the one hand, so there must be another party to lose. This paradigm further encourages the conflict to end by making all parties winners (win-win solution).<sup>18</sup>

Mediation is an order by the panel in the trial as mandated by Perma number No. 1 of 2016 Concerning Mediation Procedures in Court, Article 3 reads: (1) Every Judge, Mediator, Parties, and or legal attorneys are obliged to follow the dispute settlement procedure through Mediation; (2) In considering a decision, the Panel Judges who examine the case have to declare that the dispute has been attempted for reconciliation through Mediation and mention the Mediator's name;

---

<sup>18</sup> Abu Rokhmad, "Paradigma Hukum Islam Dalam Penyelesaian Sengketa," *International Journal Ihya' 'Ulum al-Din* 18, no. 1 (2016): 49–63, <https://journal.walisongo.ac.id/index.php/ihya/article/view/1731>.

(3) The Case Examining Judges who do not order the Parties to take a Mediation process so that the Parties do not Mediate has violated the provisions of laws and regulations governing Mediation in the Court.

In addition, Article 129 of the KHI, it is stated that a husband who is about to impose a divorce on his wife submits a request both verbally and in writing to the Religious Court that administers the wife's residence accompanied by reasons and requests that a hearing be held for this purpose. Article 39 paragraph (1) in conjunction with Article 115 KHI states that: Divorce can only be carried out before a court hearing after the court concerned has tried and failed to reconcile the two parties.

The essence of Article 39 paragraph (1) and Article 115 of the KHI above states that divorce is permitted only if attempts at peace to unite husband and wife have been made but are still unsuccessful. To clarify that the effort has been implemented, it must be done before a court hearing, including assessing the failure of the effort.

According to the Positive Law, a divorce made outside the Court is invalid. Karna refers to the provisions of Article 39 paragraph (1) UUP, that divorce can only be carried out through a trial process in court, in this case for Muslim people in the Religious Courts. Article 39 paragraph (1) of the UUP states: "Divorce can only be carried out before a Court hearing after the Court concerned has tried and failed to reconcile". Paragraph (2): To carry out a divorce, there must be sufficient reasons that the husband and wife will not be able to live in harmony as husband and wife. Based on Article 114 of the Compilation of Islamic Law ("KHI"), the breaking of a marriage bond due to divorce can be caused by a divorce from the husband or a lawsuit from the wife. Article 114 KHI states: "The breakup of a marriage caused by a divorce can occur due to divorce or based on a divorce lawsuit".

Based on the prevailing statutory regulations above, no one of the judges who decided on a triple divorce case outside the trial dared to leave the statutory regulations. If the judge discovers that the husband has pronounced divorce outside the religious court during the trial process, then the panel of judges will not dare to continue the case in the divorce process. So the panel of judges is subject to the prevailing laws and regulations and refers to the provisions of the Compilation of Islamic Law, the Marriage Law, and the Islamic scholars' opinions. They still require a divorce trial in court to legalize the divorce between the husband and his wife.

It means the judge's decision regarding the triple divorce case outside the court still requires it through a Religious Court trial. As long as these parties do not file a divorce petition at the

Religious Court and do not declare divorce in front of the judge, the divorce will still not fall. Even though several opinions in Islamic Law from *jumhur ulama* state that triple divorce handed down by husbands to wives is a divorce without going through a trial process.

From the articles in both the Law and the Compilation of Islamic Law above, divorce can only occur before a Religious Court hearing. It also must be done after the Religious Court has tried to reconcile the parties and fail. The divorce occurs as of the time the divorce is declared in front of the Religious Court hearing. A compilation of Islamic Law was made by Islamic scholars and compiled based on the results of their *ijtihad*. This compilation is a particularly binding Indonesian *fiqh*. So Indonesian Muslim citizens who intend to divorce must proceed in the Religious Court. Why is that so? It is because there is an opinion that says divorce outside the Religious Court hearing does not fall, so the judges base their rules on *Fiqh* rules which read:

**حكم الحاكم إلزام يرفع الخلاف**

“*hukmul hakim ilzmun wa yarfa'ul khilaf* (Judge's decision is binding and ends cross disputes), meaning that the regulations made in our country are binding and eliminate differences of opinion.”

### **3.2. Views of Mediators in Resolving Triple Divorce Cases that Have Occurred Outside the Religious Court Session**

Settlement of divorce cases through mediation in the religious court by the judge as the mediator who reconciles the two parties in the *sulh* dispute which is a dispute resolution process in which the parties agree to end their case peacefully. In this case, the judge must always strive for the parties to the dispute to take the path of peace (*ishlah*) because the path of peace will accelerate the settlement of the case and end it through the willingness of both parties to be carried out voluntarily there is no coercion and the judge only facilitates the parties so that they reach an agreement in order to bring peace. With peace, the parties can try a mutually beneficial resolution to each other (win-win solution); this is because in peace, what is emphasized is not only the legal aspect but how both parties can still benefit.<sup>19</sup>

Mediators in resolving divorce cases at the Magelang City Religious Court against triple divorce that have occurred outside the trial and those that are not triple divorce always refer to Law No.7 of 1989 concerning Religious Courts and Compilation of Islamic Law. The regulation

---

<sup>19</sup> Haeratun Haeratun, Adi Sulistiyono, and Isharyanto Isharyanto, “Mediation as an Alternative Institution of Disclaimer in Religion Court in Indonesia According to Justice Perspective,” in *Proceedings of the 3rd International Conference on Globalization of Law and Local Wisdom (ICGLOW 2019)* (Atlantis Press, 2019), <https://www.atlantis-press.com/proceedings/icglow-19/125920777>.

states that there are two types of divorce: *talak* and claim for divorce. *Talak* divorce is a divorce imposed by the husband against his wife, through a husband who is going to divorce his wife must first apply for divorce to the Religious Court, which ends with the breaking of their marriage ties. Meanwhile, what is meant by a claim for divorce is a divorce based on a lawsuit filed by a wife against her husband at the Religious Court so that the marriage with her husband is broken.

In practice, agreements resulting from mediation will be ratified by a mediator and have similar legal consequences as the judge's decisions. This helps the court reduce the number of cases brought before the court. This study argues that the success of mediation relies on mediators' professionalism and legal culture in society. The success is also shown by the number of agreements issued as a result of mediation.<sup>20</sup>

The mediator always maintains that divorce is the abolition of the marriage bond between husband and wife by a judge's decision on the demands of one of the parties in the marriage. In this case, the Mediator Judge always adheres to the Law that does not allow divorce between husband and wife through consensus.

A claim for divorce refers to a civil case lawsuit against the judge regularly. This lawsuit was preceded by requesting permission from the chairman of the Religious Court (Dewan Syari'ah). Before the plaintiff gets permission, the judge must try to reconcile the two parties. The Panel of Judges allows both parties to have the pre-mediation stage before a court hearing of the divorce process. The pre-mediation is the stage where both parties receive an offer from the judge to use the mediation and appoint a mediator who acts as a facilitator, a third party who will help resolve the dispute.

Mediation efforts are well known in terms of peace in Article 130 HIR. The same provision is found in article 154 RBg. Article 130 HIR emphasizes that if on the appointed day, both parties appear, the district court, through the intermediary of the chairman, will try to reconcile them. Article 154 RBg confirms that if the parties appear before them on the appointed day, the district court, through the intermediary of the chairman, will try to reconcile them.

The judge is guided by the provisions of Article 130 HIR/Article 154 RBg; namely the judge is obliged to reconcile the two parties. Efforts to reconcile the two parties in a dispute are not limited to the first trial day but can be carried out at the subsequent trial even though the level of examination is further. So, the first step the Panel of Judges took was to suggest both parties choose

---

<sup>20</sup> Karmawan Karmawan, "Mediation in the Religious Courts of Indonesia," *Ahkam: Jurnal Hukum Islam* 20, no. 1 (2020): 79–96, <https://journal.uinjkt.ac.id/index.php/ahkam/article/view/13249>.

a mediator to assist them in the mediation process. The Chairman of the Court provides a list containing at least five names of mediators who have experience in solving a case and educational background of mediation. The mediator list will make the parties get easier in choosing a mediator.

With this mediation, both parties can reach a common ground for solving problems that will be stated in a collective agreement. The decision-making in this mediation process is not in the hands of the mediator but belongs to both parties to the dispute. The mediator will only help both parties understand the problem in their dispute and objectively assess the situation and condition of their problems.

The mediator must remain neutral during the negotiation process. He always maintains good relations between the two parties, is impartial, minimizes differences and emphasizes existing similarities, communicates with both parties in good language, and listens to their complaints. All of this was done to help both parties negotiate to resolve their problems and disputes. So, in its task of solving the divorce case, the mediating judge is still reconciling the two parties. However, if the person concerned wants peace, the divorce case is annulled and finished.

Not all cases submitted to the Religious Courts go through a mediation process. Mediation is applied to cases where things must be mediated, such as in a lawsuit case. In a lawsuit case, the party has an opponent called a contingent lawsuit. A contingent lawsuit case is a case that contains a dispute between two or more parties and constitutes a claim for rights and has a legal interest in it. In this case, the divorce case is not a voluntary lawsuit. Volunteer cases are ordinary petition cases where there is no opposing side. A voluntary lawsuit is a lawsuit filed based on an application to a state court or it can be said as a "petition".

The divorce lawsuit is considered a contingent lawsuit case. In this case, there are plaintiffs and defendants, meaning that there are opponents in this lawsuit. So that in the first and second hearings, when the two plaintiffs and defendants were present, they were obliged to go through a mediation process. If one of the parties is not present, it is not obligatory to go through mediation. One of the parties who presented to the hearing only went through the usual peace process and received advice from the panel judges who examined the lawsuit.

Meanwhile, cases not obliged to go through mediation are related to legality. For example, a marriage cancellation lawsuit is related to the marriage legality. In such cases, mediating or, for example, cases based on apostasy is not obligatory. It is because they can be contradictory. For example, a marriage cancellation case because the marriage does not meet the requirements. If the panel judges succeed in proving that the marriage is invalid, the marriage must be revoked. So



there are matters excluded in the Supreme Court, such as cases of marriage annulment that are not obliged to go through a mediation process.

### **3.3. Positive Legal Review of the Triple Divorce Settlement Process that Has Occurred Outside the Religious Court Session**

Article 2 paragraph (1) of Law 1/1974 explains that marriage is valid if it is carried out according to the laws of each religion and belief. Referring to this regulation divorce is also carried out according to Islamic law, which is regulated in the Compilation of Islamic Law (KHI). In Article 129 KHI, it is explained that a husband who imposes a divorce on his wife submits a request both verbally and in writing to the Religious Court in which the wife lives, accompanied by reasons and requests that a hearing be held for this purpose. Based on this article, it can be said that the husband must carry out the condition for the fall of divorce and will be legally recognized by state law when it is carried out or pronounced by the husband in the Religious Courts.

According to Law Number 7 of 1989 as amended by Law Number 3 of 2006 and the second amendment by Law Number 50 of 2009 concerning the Religious Courts, *talak* divorce is one of the ways to pursue a divorce in addition to a contested divorce. *Talak* divorce is regulated by Article 66 of Law Number 7 of 1989 while the divorce is sued regulated by Article 83UU Number 7 of 1989. The difference between the two lies in who acts as the initiator of the case.

In a *talak* divorce, the husband is filing, while in a civil divorce, the wife is filing. The validity of the divorce ruling on a *talak* divorce is from the time the husband makes a divorce in front of the Religious Court session. After the husband declares divorce in front of the court, the husband and wife are officially divorced or have the status of widowers and widows. The trial forum itself was deliberately opened by the Panel of Judges again after the decision on the divorce application filed by the husband and granted, has permanent legal force. In a contested divorce, the divorce decision takes effect after the decision has permanent legal force (*inkracht van gewijsde*).

Article 66 paragraph (1) of Law 7/1989 states, "A husband who is a Muslim who is about to divorce his wife applies to the Court to hold a hearing to witness the divorce pledge". The wife who wants to divorce can file a divorce suit. Article 73 paragraph (1) of Law 7/1989 states, "The wife or her attorney files a divorce lawsuit to the court whose jurisdiction covers the plaintiff's residence unless the plaintiff intentionally leaves the joint residence without the defendant's permission."

Since we live in Indonesia using the Compilation of Islamic Law and Marriage Law, the judge's decision follows a mitigating opinion (*takhfif*). As has been implemented in Syria and Egypt, laws stipulating three divorces pronounced once is one divorce so that it can be a more robust law (*al-hukm al-aqwa*) to apply. Choosing a mitigating opinion (*takhfif*) does not mean against the decision of Umar bin Khathab r.a. which has also been established by the four priests of the schools. It is because the issue of legal norms is returned to considering aspects of legal changes and the causes of changes in *'urf*/customs and human conditions.

In Indonesia, the Marriage Law and the Compilation of Islamic Law state that in the case of triple divorce imposed by a husband outside a court session, it does not fall into a divorce. A divorce falls through the divorce process at the Religious Court. It is the product of the *ijtihad* of Indonesian Islamic scholars and part of Indonesian *fiqh*.

The unrecognized divorce legality outside the court causes legal chaos due to uncertain laws for the Islamic ummah, namely in terms of when the fall of divorce and the end of the *iddah* period, concerning triple divorce, concerning the validity of the status of children born after the fall divorce and concerning the validity of the second marriage and the status of the child that was born which could damage the religion and descent of the Islamic ummah in Indonesia. If marriage is legal according to the religion, then divorce should also be valid if carried out according to the religious law.<sup>21</sup>

#### **3.4. Review of Islamic Law on the Process of Completion of Triple Divorce that Has Occurred Outside the Religious Court Session**

The institutionalization of Islamic law into the national legal system is carried out procedurally, democratically and by the community's needs. This institutionalization is a further process and recognition of the position of Islamic law, not only as a raw material for the making of national laws but also as a source of law (legal sources) and even a source of values (values sources) for the development of national law. The contribution of Islamic law to the development of the national legal system can be seen in the law on marriage, *zakat*, *waqf*, *hajj*, guarantees of halal products and others which substantively do not contradict Islamic law.<sup>22</sup>

The widespread practice of divorce outside the court was caused by the influence of religious leaders' understanding and public understanding. This understanding becomes the doctrine that

---

<sup>21</sup> Hidayat, Yaswirman, and Mardenis, "Problems Arising from Talak Divorce Outside the Court."

<sup>22</sup> Abu Rokhmad, "Institutions and Contributions to Islamic Law in Indonesia's Legal System," *Walisongo Law Review (Walrev)* 3, no. 1 (2021): 21–44, <https://journal.walisongo.ac.id/index.php/walrev/article/view/7282>.

divorce in Islamic law is legal without having to await a divorce decision from the religious court.<sup>23</sup> There are two substantial schools of thought in Islamic law regarding the triple divorce settlement process that has occurred outside the Religious Courts trial. Some claim that divorce has fallen, and some have stated that they have not. These opinions are as follows: *First*, the opinion that punishes triple divorce dropped at once is triple divorce. It refers to the view of four Imams of the Schools (Shafi'i, Hanafi, Hanbali, Maliki), Ibn Hazm Az-Zhahiri, Shia Zaidiyyah, and Shia Imamiyah. This opinion was taken (*manqul*) from the opinion of many friends, including Khulafâ'ur Rasyidun (except Abu Bakr), Ibn 'Umar, Ibn' Abbas, Ibn 'Amar, Abû Hurairah, Ibn Mas'ud, and the *tabi'in*.

*Second*, the opinion that punishes three divorces simultaneously falls for one divorce. It refers to the opinion of Ibn Ishaq, Ibn Qayyim Al-Jauziyyah, Dawud Az-Zhahiri (Zhahiriyyah school other than Ibn Hazm), At-Thusi, Ibn Taimiyyah, most of the Shi'a Imamiyah and in one Shia Zaidiyyah narrative. This opinion is taken (*manqul*) from the opinion of Abu Bakr RA.

*Third*, a detailed opinion (interpreting) separates wives who have not been sexual intercourse with husbands and wives who have been sexual intercourse with husbands. The triple divorce is pronounced simultaneously against a wife who has not been sexual intercourse and then falls one divorce (*talak raj'i*). Meanwhile, divorce for a wife who has been sexual intercourse then falls triples divorce. It refers to the view of Ibn 'Abbas RA's students, namely Sa'id bin Jubair, 'Atha, Abus Sya'tsa, 'Amar bin Dinar, the school of Ishaq bin Rahawiyah. This opinion was taken (*manqul*) HR Abû Dâwud:

“Did you know that if someone says divorce from his wife three times before he has sex with her, they make (punish) it as one divorce?”<sup>24</sup>

*Fourth*, the opinion that punishes the pronouncement of triple divorce simultaneously does not fall into divorce (*laysa bisyai'*). It is a bid'ah that is forbidden (*bid'ah muharramah*), null and void because it contradicts the Al-Qur'an and Hadith regarding divorce. Based on the opinion of Muhammad bin Ishaq, Al-Hajaj bin Arthah, and Shia Imamiyah in the history of being diligent (superior).

It is concluded that the Law of *fiqh* allows *talak* divorce based on the willingness of both parties or on the initiative of the husband/wife unilaterally. In fact, *talak* divorce can be done without interference from the judiciary. Whereas in the rules of the Compilation of Islamic Laws,

---

<sup>23</sup> Faiz, Zulfahmi AR, and Izzuddin, “Between State Law and Islamic Law: The Practice of Divorce Outside the Situbondo Religious Courts, Indonesia.”

<sup>24</sup> An-Nawawi An-Nawawi, *Al Majmu'* (Jeddah: Maktabah Al-Irsad, n.d.).

*talak* outside the Court is not valid according to the perspective of Law No.1 of 1974 on Marriage and the Compilation of Islamic Law (KHI), although fiqh allows *talak* outside the Court, it has no power in positive Law.<sup>25</sup>

### **3.5. Legal Vacuum Relating to Divorce Issues**

This study found that there is still an absence of law related to the problem of divorce in Indonesia at this time. The absence of law is that there is no stipulation of divorce legalization (*isbat talak*) as stipulated in the marriage legalization (*isbat* of marriage). Referring to the explanation of Article 49 Law Number 7 of 1989 concerning Religious Courts which has been amended by Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts and Law Number 50 of 2009 concerning Second Amendment to Law Number 7 of 1989 concerning Religious Courts on the section of marriage, there are 22 items of Religious Court's jurisdiction on marriage. There is no divorce legalization in the absolute jurisdiction of the Religious Courts. There is only marriage legalization in it. It cannot say that the case must be in limitations.

The absolute jurisdiction of the Religious Courts has been stipulated in the Law, so when it is not there, the panel of judges is not entitled to try them even though there is a discourse on why not only marriage legalization is conveyed. So, the solution is that divorce legalization (*isbat talak*) must be ruled regulation in the form of a law.

The government can create lower regulations if forming a law regarding divorce legalization takes less time due to legal politics. For example, the Indonesian Supreme Court issued a Supreme Court Regulation (PERMA) or a Supreme Court Circular (SEMA) regarding the procedure for divorce legalization (*isbat talak*) when a husband has handed down a triple divorce to his wife outside the Religious Court hearing. Thus, Religious Court can provide legality for the legal act of divorce carried out by a Muslim husband under the absolute jurisdiction given by law to the Religious Court. When a husband has passed *talak* on his wife outside the court, he can apply for divorce legalization (*isbat talak*). When he can prove it and submit evidence such as letters and witnesses, the judge only needs to validate the divorce. For example, a divorce was done by a husband two months ago. Then he filed for divorce legalization today. The Religious Court Judge will formally examine the petition and the evidence. If proven, the divorce will be counted as two

---

<sup>25</sup> Zahir, "Comparative Analysis of Talaq That Passed Outside The Court In The Perspective of Islamic Law and Compilation of Islamic Law."

months ago and not today. Thus, the judge is limited to ratifying the legal act of divorce committed by a husband against his wife.

Besides, the Religious Courts can adjudicate Law violations by imposing sanctions on people who divorce outside the Religious Courts. Thus, the Religious Court can complete the divorce legalization (*isbat talak*) request. The Religious Courts have jurisdiction to examine Law violations relating to imposing triple divorce outside the Law. It means those such provisions must be accommodated, including whether the pronouncement of divorce by the husband outside the court contains arbitrary elements or not. Alternatively, are there Law violations in performing divorce outside the court or not. So, in addition to increasing absolute authority regarding the *isbat talak*, legal sanctions are also regulated.

When the provisions for ratification of divorce legalization are adopted in the applicable regulations, for example, in the form of Indonesian Supreme Court Regulations (PERMA) or Indonesian Supreme Court Circular Letters (SEMA), judges and mediators will likely follow these rules. It is because judges are subject to formal law and legality principles. As long as it is not regulated, judges cannot decide a case even though technically they can do so. When marriage legalization (*isbat nikah*) can be done by Religious Court, there will be no reason for divorce validation (*isbat talak*) to be not done. Both of them are recognized by Islamic law.

As an illustration, marriage legalization (*isbat nikah*) was done when, for example, there was a Siri marriage two years ago. A Siri marriage is a marriage that is performed outside the Religious Affairs Office. Then the Siri-married couple submitted marriage legalization to the Religious Court. The judge will examine whether the marriage that was carried out two years ago meets the requirements of marriage or not. It also must be proven by evidence submitted to the judge. If it has met the legal requirements and is proven in court, the judge only needs to validate that the Siri marriage was carried out two years ago. So the judge only determines the legal status or legality principle and ratifies the marriage process two years ago. Thus the judge only performs his administrative duties.

So the legalization of divorce (*isbat talak*) should be validated in the Qiyas method as the legalization of marriage (*isbat nikah*). In the case of divorce legalization, for example, the husband divorced his wife two years ago. Then the husband submitted legalization for divorce at the Religious Court. During the hearing process, there were two witnesses (for example, an Islamic cleric or perhaps a village headman where the husband and wife live) to testify that there was a divorce outside the court done two years ago. In addition to the witness, written evidence is

presented to the court. So when a husband filed for divorce legalization to the Religious Court today, the judge determined that divorce had fallen two years ago after examining those documents and witnesses. So, today's court decision is only giving administrative and legal status.

Divorce legalization should be formally possible. The judges are waiting for the regulation regarding it. Islamic scholars can initiate the discourse to the Indonesian Supreme Court by proposing it through the Head of the Religious Chamber. They can discuss the law on this and how to regulate this. Technically, in the Supreme Court, every proposal relates to formal and substantive law. The discourse was then proposed to the chairman of each chamber. In civil court, the name is Head of the Civil Chamber. In criminal court, the name is the Head of the Criminal Chamber. In a military court, the name is Head of the Military Chamber. Meanwhile, in the religious court, the name is Head of the Religious Chamber. So, the proposal of divorce legalization (*isbat talak*) can be filed through the Religious Chamber to the Head of the Religious Chamber (formerly known as the Head of the Religious Organization/Head of the Religious Civil).

Submitting proposals at the Religious Courts starts from the bottom, including discussions or legal opinions submitted to the religious chamber. After that, the religious affairs chamber formed a working group (Pokja). The discussion will then be final there. Then the proposals were discussed internally by the Indonesian Supreme Court justices for approval. If the proposals are approved, the products issued by the Indonesian Supreme Court can be in the form of Supreme Court regulations (PERMA) or Supreme Court circular letters (SEMA).

Formally, the panel of judges and the mediator in the Religious Court did not dare to directly decide for divorce over triple divorce which the husband handed down outside the court without going through the trial process at the Religious Court. Despite the practice, internal discussions contain different opinions; some state that such triple divorce is falling through a divorce, and some say such cases do not fall into divorce. Judges and mediators always adhere to the Compilation of Islamic Law and Marriage Law, resulting from the *ijtihad* of Indonesian scholars and Indonesian *fiqh*. It can be used because it does not violate *fiqh* in general.

#### **4. Conclusion**

A husband must be careful in speaking, especially concerning divorce, because divorce is an absolute right that belongs to the husband. According to Article 117 KHI, divorce law is invalid according to Article 117 KHI which states: "Divorce is a husband's pledge before a religious court session which is one of the reasons for breaking up a marriage, in the manner referred to in Articles

129, 130 and 131". Likewise, Law no. 7 of 1989 states: "The Religious Courts have the duty and authority to examine, decide and resolve cases at the first level between people who are Muslim in the areas of marriage, inheritance, wills and grants made under Islamic law as well as waqf and almsgiving. Meanwhile, according to Islamic Law, there are four opinions.

## References

- An-Nawawi, An-Nawawi. *Al Majmu'*. Jeddah: Maktabah Al-Irsad, n.d.
- Faiz, Abd. Karim, Zulfahmi AR, and Ahmad Izzuddin. "Between State Law and Islamic Law: The Practice of Divorce Outside the Situbondo Religious Courts, Indonesia." *JIL: Journal of Islamic Law* 3, no. 2 (2022): 176.
- Haeratun, Haeratun, Adi Sulistiyono, and Isharyanto Isharyanto. "Mediation as an Alternative Institution of Disclaimer in Religion Court in Indonesia According to Justice Perspective." In *Proceedings of the 3rd International Conference on Globalization of Law and Local Wisdom (ICGLOW 2019)*. Atlantis Press, 2019. <https://www.atlantispress.com/proceedings/icglow-19/125920777>.
- Hidayat, Ilham, Yaswirman Yaswirman, and Mardenis Mardenis. "Problems Arising from Talak Divorce Outside the Court." *International Journal of Multicultural and Multireligious Understanding* 6, no. Special Edition 4 (2019): 138–148. <https://ijmmu.com/index.php/ijmmu/article/view/919>.
- Isa, Muhammad. "Perceraian Di Luar Pengadilan Agama Menurut Perspektif Undang-Undang Nomor 1 Tahun 1974 Dan Kompilasi Hukum Islam (Suatu Penelitian Di Wilayah Hukum Mahkamah Syar'iyah Aceh Besar)." *Jurnal Ilmu Hukum* 2, no. 1 (2014): 62–71. <https://jurnal.usk.ac.id/MIH/article/view/4579>.
- Iskandar, Amin, and Ahmad Zaeni. "Ikrar Talak Di Pengadilan Perspektif Ma'anil Hadis." *Al-Tadabbur: Jurnal Ilmu Al-Qur'an dan Tafsir* 7, no. 1 (2022). <http://jurnal.staialhidayahbogor.ac.id/index.php/alt/article/view/2495>.
- Jayanti, Hepi Duri. "Talak Tiga Di Luar Pengadilan Perspektif Hukum Islam Dan Hukum Positif Bagi Pegawai Negeri Sipil (Studi Analisis Putusan Pengadilan Agama Argamakmur Nomor 0207/Pdt.G/2015/PA.AGM)." *Qiyas: Jurnal Hukum Islam dan Peradilan* 3, no. 1 (2018): 93–105. <https://ejournal.iainbengkulu.ac.id/index.php/QIYAS/article/view/958>.
- Karmawan, Karmawan. "Mediation in the Religious Courts of Indonesia." *Ahkam: Jurnal Hukum Islam* 20, no. 1 (2020): 79–96.

- <https://journal.uinjkt.ac.id/index.php/ahkam/article/view/13249>.
- Kusmidi, Henderi. "Konsep Sakinah, Mawaddah Dan Rahmah Dalam Pernikahan." *El-Afkar: Jurnal Pemikiran Keislaman dan Tafsir Hadis* 7, no. 2 (2018): 63–78. <https://ejournal.iainbengkulu.ac.id/index.php/elafkar/article/view/1601>.
- Nasution, Rusli Halil. "Talak Menurut Hukum Islam." *Jurnal Ilmiah Al-Hadi* 3, no. 2 (2018): 707–716. <https://jurnal.pancabudi.ac.id/index.php/alhadi/article/view/357>.
- Nurlaelawati, Euis. "For The Sake Of Protecting Religion: Apostasy and Its Judicial Impact on Muslim's Marital Life in Indonesia." *Journal of Indonesian Islam* 10, no. 1 (2016): 89–112. <https://jiis.uinsby.ac.id/index.php/JIIs/article/view/211>.
- Putri, Merlin, and Shafra Shafra. "People's Understanding of the Off-Court Talak (Case Study in Nagari Koto Tuo, IV Nagari District, the Sijunjung Regency)." *Fitrah: Jurnal Kajian Ilmu-ilmu Keislaman* 7, no. 1 (2021): 99–118. <http://jurnal.iain-padangsidempuan.ac.id/index.php/F/article/view/3374>.
- Ramdhani, Muhammad Tri. "Manajemen Pembelajaran Pendidikan Agama Islam Pada Perceraian Orang Tua Terhadap Perilaku Anak Di Desa Tumbang Runen Kecamatan Kamipang Kabupaten Katingan." *Jurnal Hadratul Madaniyah* 4, no. 1 (2017): 40–46. <https://journal.umpr.ac.id/index.php/jhm/article/view/495>.
- Rokhmad, Abu. "Institutions and Contributions to Islamic Law in Indonesia's Legal System." *Walisongo Law Review (Walrev)* 3, no. 1 (2021): 21–44. <https://journal.walisongo.ac.id/index.php/walrev/article/view/7282>.
- . "Paradigma Hukum Islam Dalam Penyelesaian Sengketa." *International Journal Ihya' Ulum al-Din* 18, no. 1 (2016): 49–63. <https://journal.walisongo.ac.id/index.php/ihya/article/view/1731>.
- Sadiran, Sadiran. "Perceraian Di Wilayah Desa Jenang Kecamatan Majenang Kabupaten Cilacap Tahun 2008." *Jurnal Al-Wasith: Jurnal Studi Hukum Islam* 3, no. 1 (2018): 1–9. <https://jurnal.unugha.ac.id/index.php/wst/article/view/113>.
- Sainul, Ahmad. "Konsep Keluarga Harmonis Dalam Islam." *Jurnal Al-Maqasid: Jurnal Ilmu Kesyariahan dan Keperdataan* 4, no. 1 (2018): 86–98. <http://jurnal.iain-padangsidempuan.ac.id/index.php/almaqasid/article/view/1421>.
- Sumanto, Dedi, Titin Samsudin, and Fikri Hi. Asnawi Amirudin. "The Existence of the Religious Court in Handling Divorce Cases on the Reason of Domestic Violence." *Jambura Law Review* 3, no. 2 (2021): 214–230.



<https://ejournal.ung.ac.id/index.php/jalrev/article/view/11651>.

Wibisana, Wahyu. "Pernikahan Dalam Islam." *Ta'lim: Jurnal Pendidikan Agama Islam* 14, no. 2 (2016): 185–193.

Zahir, Irham. "Comparative Analysis of Talaq That Passed Outside The Court In The Perspective of Islamic Law and Compilation of Islamic Law." *Jurnal Al-Dustur* 3, no. 2 (2020).