

Between State Law and Islamic Law: The Practice of Divorce Outside the Situbondo Religious Courts, Indonesia

Antara Hukum Negara dan Hukum Islam: Praktik Perceraian di Luar Pengadilan Agama Situbondo, Indonesia

Abd. Karim Faiz*

Institut Agama Islam Negeri Parepare, Indonesia
abdkarimfaiz@iainpare.ac.id

Zulfahmi AR

Al-Azhar University Cairo, Egypt
zulfahmi469@gmail.com

Ahmad Izzuddin

Universitas Islam Negeri Walisongo Semarang, Indonesia
izzuddin@walisongo.ac.id

DOI: 10.24260/jil.v3i2.848

Received: July 6, 2022

Revised: August 22, 2022

Approved: August 23, 2022

** Corresponding Author*

Abstract: The relationship between state law and religion (Islamic law) is still problematic in its implementation. This problem occurs in practising divorce outside the court in Situbondo, Indonesia. Its case is interesting because it is still considered legal by the community and religious leaders according to religious law even though the divorce decision has not been received from the court. This legal phenomenon is contrary to positive law in Indonesia. This article aims to explain the practice of divorce outside the court in Situbondo and the authority problem between state law and Islamic law. After conducting intensive field research for three months with perpetrators of out-of-court divorce, religious leaders, and the Head of the Office of Religious Affairs, the authors found that 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 divorce in Islamic law is legal without having to await a divorce decision from the religious court. The authors stated that the dominance of the authority of Islamic law over state law in the practice of divorce in Muslim societies has negative implications for the rights of children and ex-wives.

Keywords: State Law, Islamic Law, Divorce Validity, Divorce Outside the Court, Situbondo.

Abstrak: Hubungan antara hukum negara dengan agama (hukum Islam) masih menimbulkan problematika pada implementasinya. Hal ini terjadi pada praktik perceraian di luar pengadilan di Situbondo, Indonesia. Praktik ini menarik, karena masyarakat dan tokoh agama masih menganggapnya sah

secara hukum agama walaupun tidak mendapatkan putusan cerai dari Pengadilan, dan fenomena hukum tersebut bertentangan dengan hukum positif di Indonesia. Artikel ini bertujuan untuk menjelaskan praktik perceraian di luar pengadilan di Situbondo dan problematika otoritas antara hukum negara dan hukum Islam. Setelah melakukan penelitian lapangan selama tiga bulan secara intensif dengan para pelaku perceraian di luar pengadilan, tokoh agama dan Kepala Kantor Urusan Agama, para penulis menemukan bahwa maraknya praktik perceraian di luar pengadilan disebabkan oleh pengaruh pemahaman tokoh agama dan pemahaman masyarakat. Pemahaman ini kemudian menjadi doktrin bahwa perceraian dalam hukum Islam sah tanpa harus menunggu putusan cerai dari pengadilan agama. Para penulis berargumentasi bahwa dominasi otoritas hukum Islam atas hukum negara dalam praktik perceraian masyarakat muslim berimplikasi negatif bagi hak-hak anak dan mantan isteri.

Kata Kunci: Hukum Negara, Hukum Islam, Keabsahan Perceraian, Perceraian di luar Pengadilan, Situbondo.

A. Introduction

The State and religion are two inseparable components in the concept of state law. There are three typologies of the relationship between religion and the State. First is the integral relationship between religion and the State. The domain of religion becomes the domain of the State and vice versa. Al-Maududi supported this first typology. Second is the relationship between symbiotic and dynamic-dialectical. Religion and the State are not directly related, and there is still a distance and control between religion and the State. Religion requires legality from the State to demonstrate and represent its norms and rules. The State needs religious values and spirit to realise a godly, fair, and civilised state. This idea was supported by Abdullah Ahmed Na'im, Muhammad Syahrur, Nahir Hamid Abu Zaid Abdurrahman Wahid, and Nur Cholis Madjid. The third is the secularisation relationship. Religion and the State are two domains that must be separated. The latter typology rejects the formalisation of religion in the system and laws of the State.¹

Based on these three typologies, Indonesia is included in the second typology. Historically, Muslim societies have established Islamic law as the sole authority in marriage law before colonisation. During the colonial period, the Dutch East Indies Government abolished religious (Islamic) provisions in the marriage and divorce

¹ M Din Syamsuddin, "Usaha Pencarian Konsep Negara dalam Sejarah Pemikiran Politik Islam," *Jurnal Ulumul Qur'an* 4, no. 2 (1993).

laws. Post-independence, regardless of the dynamics and legal politics, the State accommodated religious (Islamic) rules in Indonesia's positivization of family law.² It is evidenced by the enactment of Marriage Law No. 1/1974 (Marriage Law). In divorce, Article 39, paragraph 1 of the Marriage Law stipulates that divorce can only be carried out before a Religious Court session. Unfortunately, some Muslim communities in Mangaran District, Situbondo Regency, East Java, Indonesia, do not apply this rule. This practice is affirmed and legitimised by a local religious figure, KH. Ahmad Djazuli³ that when a husband pronounces divorce to his wife, it is legal for the wife to be divorced.

One factor for the practice of divorce outside the religious court is the local community's religious understanding which is still traditional and has become a habit in the community. This religious understanding is reinforced by the understanding of religious leaders that divorce is valid when it is pronounced *ṣāriḥ* or figuratively, even though it is done outside the religious court. It was confirmed by the Head of the Office of Religious Affairs (KUA) of Mangaran District, Abdul Mukti. Besides the public understanding factor, the divorce process outside the religious courts is because of the lack of legal awareness of the community, personal problems that must be covered, economic factors, and time problems.⁴

Scholars have widely studied the study of out-of-court divorce. Some of these previous studies focused on the juridical analysis of divorce,⁵ normative and against the practice of divorce outside the court.⁶ Some of these scholars have also examined the reasons for the perpetrators of out-of-court divorce⁷ and perceptions from

² Rusdi Malik, "Kembalinya Unsur Agama ke dalam Hukum Perka Winan di Indonesia," *Jurnal Hukum & Pembangunan* 31, no. 1 (2017): 6–22. It also happened in Malaysia. See: Siti Aminah and Arif Sugitanata, "Genealogy and Reform of Islamic Family Law: Study of Islamic Marriage Law Products in Malaysia," *Journal of Islamic Law (JIL)* 3, no. 1 (February 27, 2022): 94–110.

³ KH. Ahmad Djazuli is one of the elders and community leaders in Situbondo Regency. He has a considerable influence on society in the fields of religion, politics and education.

⁴ Vivi Hayati, "Dampak Yuridis Perceraian di Luar Pengadilan," *Jurnal Hukum Samudra Keadilan* 10, no. 2 (2015): 215–27.

⁵ Muhamad Fajri and Muhammad Silahuddin, "Tinjauan Undang-Undang dalam Perceraian di Luar Pengadilan Agama: Studi Kasus di Desa Rancagong Kecamatan Legok," *An Nawawi* 2, no. 1 (April 1, 2022): 1–12

⁶ M. Muhsin and Soleh Hasan Wahid, "Talak di Luar Pengadilan Perspektif Fikih dan Hukum Positif," *Al-Syakhsyiyah: Journal of Law & Family Studies* 3, no. 1 (July 26, 2021): 67–84.

⁷ Khairuddin, "Alasan Perceraian Luar Pengadilan dan Akibatnya bagi Masyarakat Desa Sanggaberu Kecamatan Gunung Meriah Aceh Singkil," *Tahkim (Jurnal Peradaban dan Hukum Islam)* 5, no. 1 (March 31, 2022): 43–58.

judges' views⁸ and fatwas on the practice.⁹ In addition, other scholars also examine the legal consequences of the practice of divorce outside the court¹⁰ and legal sanctions for the perpetrators.¹¹ A few focus on the negative impact of divorce practices on children's rights¹² and ex-wives.¹³ In contrast to some of these studies, besides examining the practice of divorce outside the courts, the authors also focused on the contestation of legal authority between the State and Islamic law. The authors argue that the problem of the duality of legal authority harms the rights of children and ex-wives after divorce.

This article is a qualitative study¹⁴ with a case study approach conducted over three months, from July to September 2021. The authors focused on the divorce practices of the community in Situbondo Regency, East Java Province, Indonesia. The authors used data collection techniques as interviews with three divorce cases outside the religious court because the wife was not collecting her husband. In addition to the divorcing couples, the authors interviewed the KUA of Mangaran Sub-district and KH. Ahmad Djazuli, a religious figure in Mangaran Sub-district and also serves as Muntsyar of the Situbondo Nahdlatul Ulama Branch Management (PCNU). The authors selected these three cases based on the areas that are the most villages that follow Djazuli's recitation, Tanjung Glugur and Mangaran villages. Besides interviews, the authors used observation and documentation as fund collection techniques. The data collected is then analysed descriptively analytically, namely describing divorce cases based on data from informants and literature and

⁸ Muhammad Jufri and A. Muhyiddin Khotib, "Tinjauan Hukum Islam dan Hukum Positif Terhadap Status Cerai Talak di Luar Pengadilan Agama (Pandangan Ketua Pengadilan Agama Bondowoso)," *Al-Hukmi: Jurnal Hukum Ekonomi Syariah dan Keluarga Islam* 1, no. 2 (2020): 189–97.

⁹ Nurdin Bakri Nurdin Bakri and Antoni Antoni, "Talak di Luar Pengadilan Menurut Fatwa MPU Aceh No 2 Tahun 2015 tentang Talak," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 1, no. 1 (July 17, 2017): 52–71.

¹⁰ Maryati Maryati, "Akibat Hukum terhadap Perceraian yang Dilakukan di Luar Pengadilan Agama Merlung Kabupaten Tanjung Jabung Barat," *Jurnal Ilmiah Universitas Batanghari Jambi* 22, no. 1 (2022): 500–503.

¹¹ Muhammad Yalis Shokhib, "Sanksi Hukum terhadap Pelaku Talak di Luar Pengadilan Agama," *Al-Adalah: Jurnal Syariah dan Hukum Islam* 3, no. 1 (March 5, 2018): 58–88.

¹² Amelin Heranti Amelin Heranti, "Dampak Perceraian di Luar Pengadilan terhadap Hak Nafkah Anak (Studi Kasus di Desa Mendala Kecamatan Sirampog)," *Khuluqiyya: Jurnal Kajian Hukum dan Studi Islam* 4, no. 1 (2022): 18–49.

¹³ Muhammad Nur, Imam Jauhari, and Azhari Yahya, "Perlindungan Hukum terhadap Korban Perceraian di Luar Pengadilan (Suatu Penelitian di Kota Langsa Provinsi Aceh)," *Jurnal Penelitian Hukum De Jure* 19, no. 4 (2019): 563–72.

¹⁴ Imam Gunawan, "Metode Penelitian Kualitatif," (Jakarta: Bumi Aksara, 2013): 32–49.

analysing them based on *fiqh* (Islamic jurisprudence) and positive law.

B. Talak Perspective of *Fiqh* and Positive Law in Indonesia

Etymologically, divorce (*ṭalāq*) comes from the Arabic *ṭa-la-qa*.¹⁵ The word “*ṭalāq*” is a corruption of *ṭa-la-qa* which becomes *maṣḍar* with the meaning or intention of *ithlāk*, which means letting go or leaving.¹⁶ In terminology, using certain words, the word “*ṭalāq*” is interpreted as removing the marriage bond or reducing its bondage. The Shafi’iyah *Madhhab* defines the word “*ṭalāq*” as unbinding and releasing.¹⁷ The Shafi’iyah *Madzhab* provides conditions and pillars that must be fulfilled in determining whether the divorce is valid.¹⁸ The conditions and pillars of divorce according to the Shafi’iyah *Madzhab* are five: *muṭliq* (husband), *ṣighat* (the words of divorce, either explicit or implicit), *maḥāl* (wife who is in a legal marriage), *wilāyah* (ownership, i.e. the woman whose words of divorce are uttered is his wife), and *qoṣḍun* (intent and purpose in this case for *shighat* uttered with implicit words). Meanwhile, the conditions of divorce according to the Shafi’iyah *Madzhab* are three: the marriage contract, baligh and rationale.¹⁹ Abdul Karim Zaidan argued that the validity of the actions of *mukallaf* in the perspective of Islamic law is seen from the manifestation of the elements (pillars) and conditions of deeds. If the pillars and conditions are fulfilled, then the divorce is in sharia.²⁰

Unlike the Syafi’iyah *Madzhab*, which is held by most Muslim communities in Indonesia, the rules of marriage are regulated in the Marriage Law and the Compilation of Islamic Law (KHI). Article 38 of the Marriage Law categorises breaking marital ties in three circumstances: death, divorce and court decisions.²¹ Regarding the breaking up of a marriage because of a court decision, Article 39 explains that couples who wish to apply for divorce must fulfil one of the reasons for

¹⁵ Atabik Ali, “Kamus Kontemporer Arab-Indonesia (Yogyakarta: Multi Karya Grafika Pondok Pesantren Krapyak, t.t.): 1140.

¹⁶ Luis Ma’luf, *Kamus Al-Munjid*, (Beirut: Al-Maktabah Al-Katuliqiyah, 1986): 406.

¹⁷ Abu Ishaq, *Al-Muhadzab fi Fiqh al-Imām al-Syāfi’i*, Jilid I, (Beirut: Darul Fikr, 2016): 380.

¹⁸ Abu Ishaq, 45.

¹⁹ Al-Syafi’i, *Al-Umm*, 47.

²⁰ Abdul Karim Zaidan, *Al-Wājiz fi Uṣūl al-Fiqh*,” *Cet. VII*, (Beirut: Muassasah Qurtubah, 1994): 55.

²¹ 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).

divorce and must first follow the reconciliation of the two parties. If the reconciliation is unsuccessful, then the application or lawsuit can be continued, and the process or procedure for divorce is regulated in other laws and regulations.²²

Article 114 of KHI explains that the breakdown of marriage due to divorce can be occurred due to talak or based on a divorce lawsuit. Article 117 of KHI explains that the definition of talak is *“The husband’s pledge before a Religious Court session which is one of the reasons for the breaking up of marriage in the manner referred to in Articles 129, 130 and 131”*. The authority to decide on divorce is regulated in Article 115: *“Divorce can only be carried out before a session of the Religious Court after the Religious Court has tried and failed to reconcile the two parties.”* This provision is reinforced in Article 123 of KHI that the divorce occurs at the time the divorce is declared in front of the Religious Court.²³

Based on the explanation above, it can be concluded that there are differences in the validity of divorce between Islamic law and state law. In Islamic law, divorce is legal when the conditions and pillars are fulfilled. Meanwhile, in state law, a legal divorce is a divorce that can only be carried out in front of a court session. Second, the legality of divorce in Islamic law does not require witnesses. In contrast, state law considers that divorce can only be carried out in the Religious Court after the Religious Court has tried and failed to reconcile the couple (wife and husband) (Article 115 of KHI). The State, through religious court judges, requires the pledge of divorce to be witnessed by a religious court judge. Third, in Islamic law, divorce is valid when the husband utters the *ṣighat ṭalāq*, either in *ṣāriḥ* or innuendo, intending to divorce. Whereas in state law, divorce occurs when the divorce is declared in front of a court session (Article 123 of KHI).

Although it is regulated in state law that divorce is legal after the pledge of divorce in court, the fact is that in society, there are still numerous divorces that occur outside the court. Juridically, this practice harms the rights of both parties (husband and wife) and children. First, divorce is illegal and has no legal binding

²² Fajri and Silahuddin, “Tinjauan Undang-Undang dalam Perceraian di Luar Pengadilan Agama.”

²³ Bing Waluyo, “Sahnya Perkawinan Menurut Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan,” *Jurnal Media Komunikasi Pendidikan Pancasila dan Kewarganegaraan* 2, no. 1 (2020): 193–99.

force. Second, the practice harms the divorced wife. A wife who is divorced outside the religious court when she wants to remarry with her new husband will have her marriage rejected by the Office of Religious Affairs as there is no valid divorce certificate from the religious court. Third, the negative impact on husbands who want to remarry a new wife because of the absence of a divorce certificate, this desire will be administratively stipulated to polygamy and administratively must get a marriage permit at the religious court. Fourth, the obligation to provide a livelihood to children whose parents divorce outside the religious court cannot be prosecuted legally in the court.²⁴

C. Description of Three Out-of-Court Divorce Cases

After conducting observations and interviews with religious leaders and three cases of married couples who divorced outside the religious court, the authors found similarities between the three cases in Situbondo Regency. The similarity is that the divorce occurred because the ex-wife did not collect her husband, and the ex-wife did not have good faith with her husband for a week. The attitude and expression of the husband before leaving the house given by his parents-in-law and returning the wife to her parents-in-law's house, the husbands in these three cases assumed that the divorce had occurred, even though there had not been a decision from the religious court. For more details, the authors describe the three divorce cases as follows.

The first divorce case was between Abdul Aziz bin Maskut and his wife, Sumyati binti Sumyati.²⁵ Both of them are residents of Tanjung Glugur Village, Mangaran District, Situbondo Regency, East Java. The couple has been married since 1994, as evidenced by Marriage Certificate No. 291/03/XI/1994 on 05 November 1994. Abdul Aziz bin Maskut lived in a house prepared by his wife in a tradition in Situbondo. The tradition obliges the wife's parents to prepare a house for their daughter- and son-in-law.

After 15 years of marriage, the relationship between Aziz and Sumyati

²⁴ Hayati, "Dampak Yuridis Perceraian di Luar Pengadilan."

²⁵ Abdul Aziz, Interviews with Divorce Actors Outside the Religious Court, September 19, 2021.

deteriorated, and there were frequent bickering and scuffles. Aziz was not only in conflict with Sumiyati but also with his parents-in-law, who were inclined to defend their daughter. On 06 July 2009, Aziz left the house he had been living in with his wife and parents-in-law. Aziz returned to live at home with his parents. After a week of leaving the house, Sumiyati and her parents-in-law did not come to Aziz's house to mediate or find the best solution to their marriage. After waiting and no one came to his house, Aziz decided to divorce his wife on 13 July 2009. At the end of September 2009, Aziz filed a divorce petition with the Situbondo Religious Court, citing continuous quarrels and a lack of love between them. Finally, Aziz was legally divorced from his wife on 22 March 2010. It was evidenced by a Certificate of Divorce No. 0375/AC/2010/PA.Sit.

The second divorce case was between Ali Zubairi and Lilik Mardiyani. Both husband and wife are addressed at RT. 08, RT 03, Mangaran Village, Mangaran Sub district, Situbondo Regency.²⁶ They have been legally married since 2001, as evidenced by Marriage Certificate No. 09/09/1/2001. Since the marriage, Zubairi has lived with his wife in a house provided by his wife's parents (in-laws). They have a son named Ahmad Taufiq, seven years old.

After being married for nine years, their household was cracked. His wife often borrowed millions of rupiah without Ali Zubairi's knowledge in 2009. Mardiyani did this three times and was warned by Zubairi. Because his wife's attitude did not change, Zubairi finally left their house, which was lived in on 20 January 2010, and returned to his parent's house. A week after he left, Mardiyani and her parents-in-law did not come to his house. Finally, on 30 January 2010, Zubairi divorced his wife because his wife was not considered to have good faith in their household. Zubairi proved this by the absence of Mardiyani's visits to his home after he left. In February 2010, Zubairi filed for divorce with the Situbondo Religious Court because of disputes and quarrels that could not be expected to reconcile. In June 2010, the divorce between Zubairi and Mardiyani was completed. It is evidenced by a Certificate of Divorce No. 613/Pdt.G/2010/PA.Sit.

The third divorce case was between Yoto bin Yoto and Saniya binti Sunasi.

²⁶ Ali Zubairi, Interviews with Divorce Actors Outside the Religious Court, September 14, 2021.

Their marriage occurred in April 2003, as evidenced by Marriage Certificate No. 67/03/IV/2003.²⁷ Unlike the two previous cases where both lived in a house provided by the wife's parents, this couple lived in Yoto's house at RT. 03, RW 05, Semiring Village, Mangaran Sub-district, Situbondo District.

In 2008, their household was cracked because of Saniya's affair with another man. In 2009, Yoto saw Saniya walking with another man who was not her family. After being caught in an affair by her husband, Saniya finally confessed that she had been having an affair since 2008. Based on this confession, Yoto returned his wife to her parents-in-law's house on 10 October 2009. The aim was for Saniya to self-evaluate her mistake. After eight days of Saniya never returning to Yoto's house to apologise and reconcile with him, Yoto finally divorced his wife because of the infidelity and lack of good faith to continue the marriage on 18 October 2009. At the end of February 2010, Yoto filed for divorce at the Situbondo Religious Court because of his wife's infidelity. On 10 May 2010, Yoto's divorce from Saniya became legal based on Certificate of Divorce No. 354/Pdt.G/2010/PA.Sit.

D. Divorce Outside the Religious Courts: Between State Legal Authority and Islamic Law

State law has regulated that divorce is legal after the pledge of divorce in court. In fact, the State's legal authority is still ignored by the Situbondo Muslim community, who still believe that divorce occurs based on the *fiqh*. The community's religious understanding has been practised continuously by some of the Situbondo Muslim community and has become a tradition. This factor is one of the reasons for the practice of divorce outside the religious court. In addition, lack of legal awareness, personal problems that must be concealed, economic factors, and problems of time are the other four factors.²⁸

Regarding the first factor, the tradition of divorce outside religious courts is reasonable. The main reason is the duality of legal authority understood by the community. In addition to the authority of state law, the community is also the authority of Islamic law. In the *fiqh*, a *ṣāriḥ* divorce uttered by the husband can be

²⁷ Yoto, Interviews with Divorce Actors Outside the Religious Court, September 14, 2021.

²⁸ Hayati, "Dampak Yuridis Perceraian di Luar Pengadilan."

considered a legal divorce, even though it is uttered outside the religious court (state authority). This legal duality was affirmed by Abdul Mukti, KUA of Mangaran sub-district, Situbondo district.²⁹ Mukti explained that various couples in Situbondo are divorced and separated before obtaining a divorce certificate from the religious court. It impacts the practice of *sirri* marriages (unregistered marriage) by assuming that the husband is already a widower, even though he has not received a divorce certificate from the religious court.

The religious understanding of the Situbondo Muslim community is reinforced by one of the local religious leaders who have influenced numerous pilgrims, KH Ahmad Djazuli.³⁰ As the holder of authority (being an authority),³¹ Djazuli argued that a legal divorce in Islamic law could occur when a husband explicitly or implicitly utters a divorce to his wife, even though the divorce is not uttered in a religious court. The Situbondo Muslim community then implements these fatwas and the doctrines as in the three cases above. The problem of the dualism of authority in divorce in the Situbondo Muslim community causes couples who are already not living together to assume that they have divorced, even though the religious court has not decided on them.

Divorce outside the religious court occurs in some Situbondo Muslim communities with negative juridical implications. First, the divorce is not legal and has no binding legal effect due to divorce outside the court. It is according to Article 115 of the Compilation of Islamic Law. Second is the negative impact on divorced wives outside the religious court. The reason is that when a wife who is divorced outside the religious court gets married again to her new husband, this will be rejected at the Office of Religious Affairs because there is no legal divorce certificate from the religious court. Third, due to the absence of a divorce certificate, the negative impact on husbands who will marry a future wife will administratively be stipulated to polygamy and must make a marriage permit at the religious court. Fourth, the obligation to provide a livelihood to children whose parents divorce

²⁹ Abdul Mukti, Interview with Kepala KUA Kecamatan Mangaran.

³⁰ Ahmad Djazuli, Interview with Religious Leaders, September 10, 2021.

³¹ Muhammad Lutfi Hakim, "Hermeneutik-Negosiasi dalam Studi Fatwa-Fatwa Keagamaan: Analisis Kritik terhadap Pemikiran Khaled M. Abou El Fadl," *Istinbath* 19, no. 1 (July 16, 2020): 34.

outside the religious court cannot be legally prosecuted in court. It is under Article 156-point f of the KHI.³²

E. The Legality of Out-of-Court Divorce from a *Maṣlaḥah* Perspective

The determination of the legality of divorce in Islamic law is considered from the fulfilment of the conditions and pillars of divorce. If the conditions and pillars are fulfilled, then the divorce between the husband and wife is valid. On the other hand, if the divorce does not fulfil the conditions and pillars, then the divorce is illegal.³³ Concerning the three cases in this study, all of them fulfilled the conditions and pillars of divorce. In the first and second pillars (*muṭliq* and *maḥāl*), the husband and wife in all three cases were healthy, *baligh* and with good mental health. In all three cases, the husband uttered the divorce directly to his wife by an implicit statement. After uttering the divorce (*talak*), the husband left the house given to him by his parents-in-law and sent the wife back to her parents-in-law's house. After waiting a week, the wife did not have any good intentions by not picking up her husband or returning to him. This act of not picking up her husband means divorce. Thus, the five pillars and conditions of divorce have been fulfilled, and the divorce is legal in *fiqh* based on the Shafi'iyah *Madhhab*.³⁴

In contrast to the perspective of state law, divorce can only occur if it is uttered clearly and explicitly in a religious court. In addition, the reason for divorce is a determining factor in whether the divorce that the husband stipulates is acceptable or not.³⁵ In positive law, Article 39, Paragraph 1 of the Marriage Law requires the religious court to attempt to mediate between the two spouses before obtaining a divorce. If mediation is unsuccessful, then the religious court can decide on divorce based on the reasons filed by one of the husband and wife (Article 39 of the Marriage Law and Article 116 of KHI), namely adultery, drunkenness, gambling and other despicable acts that are difficult to be cured; being left for two years without permission; being convicted of five years in prison or more, committing

³² Hayati, "Dampak Yuridis Perceraian di Luar Pengadilan."

³³ Wahbah Zuhaili, *Fiqhul Islam wa Adillatuhu* (Depok: Gema Insani, 2010): 562.

³⁴ Al-Syafi'i, *Al-Umm*, 563.

³⁵ Mohammad Barmawi, "Ikhar Talak Pengadilan Agama (Sebuah Tinjauan atas Istinbat Hukum Pengadilan Agama tentang Sahnya Perceraian)," *Qolamuna: Jurnal Studi Islam* 1, no. 2 (2016): 191-212.

serious persecution; physical disability or illness that can prevent husband and wife from fulfilling their obligations; continuous disputes and quarrels; violating the marriage agreement; and conversing religion (apostasy).³⁶

Based on the three divorce cases above, the authors argue that the three divorces ignore the concept of *maṣlaḥah*,³⁷ especially the rights of children and ex-wives after the divorce. The Islamic Sharia is nothing more than preserving human rights, whether based on text or using the method of *istinbāt al-ḥukm*. The direction of the benefit of Islamic law is for the benefit of humans. The determinations of Islamic law must be based on what is explicit and implicit in it, which contains values of benefit and justice.³⁸ Sheikh Abdul Karim Zaidan in *Al-Wājiz fī Uṣūl al-Fiqh* defines *maṣlaḥah* as taking good and refusing the negative. This definition has two positive dimensions, namely efforts to bring goodness with the aim of *maṣlaḥah* and efforts to avoid harm for *maṣlaḥah* either individually or in the general scope.³⁹

Divorce has legal implications. Five things need to be considered because of divorce. First the prohibition of halal relations (relationship as husband and wife). Second, *mut'ah*. The third is paying off a husband's duty to a woman as either dowry or *nafkah* (alimony). Fourth, *'iddah* for women. Fifth is the right to *hadānah*. These are all rights and obligations that the husband and wife must fulfil after getting divorced.⁴⁰ In the three divorce cases above, numerous irregularities are not fulfilled by the divorced husband and wife. In the first and second divorce cases, the husband did not give the wife the right to *mut'ah*, while in the third divorce case, the husband did not give *mut'ah*, and there was no *'iddah* for the wife. In addition, the irregularities committed by the husband in the three divorce cases above against the wife's rights have no legal protection. It can be a disadvantage to one side and a

³⁶ Imam Taqiyuddin Abu Bakar Al-Husaini, *Kifayatul Akhyar*, (Surabaya: Maktabah Al-Hidayah, 1997): 104.

³⁷ Yasin Arief, "Praktik Perceraian di Luar Pengadilan Agama dalam Perspektif Kompilasi Hukum Islam (Studi Kasus Desa Sirahan Kecpraktik Perceraian di Luar Pengadilan Agama dalam Perspektif Kompilasi Hukum Islam," *Prosiding Konstelasi Ilmiah Mahasiswa Unissula (KIMU) Klaster Humanoira*, 2021.

³⁸ Zuhaili, *Uṣūl al-Fiqh al-Islamī*, 38.

³⁹ Zaidan, *Al-Wājiz fī Uṣūl al-Fiqh*, 236.

⁴⁰ Yulisa Fitri, Jamaluddin Jamaluddin, and Faisal Faisal, "Analisis Yuridis Perceraian di Luar Pengadilan Menurut Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan dan Menurut Pendapat Ahli Fikih Islam," *Suloh: Jurnal Fakultas Hukum Universitas Malikussaleh* 7, no. 1 (2019): 29-54.

“favour” to the other⁴¹, resulting in a lack of fairness and loss to the aggrieved person.

The assumption of the legality of divorce in the first, second and third cases carried out before obtaining a decision from the religious court is very contrary to the concept of *maṣlaḥah* in Islamic law, as has been explained by Sheikh Abdul Karim Zaidan. With divorce practices outside the religious court, there are numerous disadvantages for the ex-wives, which takes away the value of *maṣlaḥah* which is the principle and purpose of Islamic law.⁴² In considering the choice between taking benefit and avoiding harm, the ulema of *uṣūl al-fiqh (uṣūliyyūn)* prefer to avoid harm. Therefore, the practice of out-of-court divorce in the Situbondo Muslim community must also focus on the negative impact of this practice and the rights of children and ex-wives post-divorce.

F. Conclusion

State law states that the divorce must be conducted in a religious court. Unfortunately, several Situbondo Muslims conduct divorces outside of court and assume that the divorce is legal by Islamic law. It is under the local custom that after the husband has been out of the house for more than a week and the wife does not come to the husband’s house to mediate and pick up the husband to live together again. The husband considers the wife’s attitude as no intention, and the divorce has automatically fallen to his wife. This practice violated the values of utility in Islamic law. Therefore, the occurrence of divorce because of the absence of the wife from the husband’s house for mediation and picking him up to live together again as a result of divorce is an attitude that is not in line with the guidance of the Qur’an. It harms the rights of children and ex-wives. Thus, the value of the benefit that is the purpose of divorce is being lost. Thus, the practice of out-of-court divorce must also focus on the negative impact of this practice and the rights of children and ex-wives.

⁴¹ Nur, Jauhari, and Yahya, “Perlindungan Hukum terhadap Korban Perceraian di Luar Pengadilan (Suatu Penelitian di Kota Langsa Provinsi Aceh).”

⁴² Zaidan, *Al-Wājiz fī Uṣūl al-Fiqh*, 237.

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