

Divorce Outside the Court from the Perspective of Islamic Legal Philosophy Regarding Legal Certainty and Protection of Women's and Children's Rights

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ABSTRACT

This study examines out-of-court divorce from the perspective of Islamic legal philosophy, focusing on legal certainty and the protection of women's and children's rights. Out-of-court divorce remains common in Indonesian society and is often conducted solely through the husband's declaration without a judicial process in the Religious Court. This practice creates legal problems concerning the status and rights of women and children after divorce. This research aims to analyze divorce in Islamic family law and Indonesian positive law and to examine the impact of out-of-court divorce on justice and legal protection. The study uses a qualitative method with a library research approach. Data were collected from the Qur'an, Hadith, laws and regulations, the Compilation of Islamic Law, books, journals, and related literature. Data analysis employed a qualitative descriptive method using the perspective of Islamic legal philosophy. The findings reveal that Islamic family law permits divorce only as a last resort and requires responsibility toward women's and children's rights. Indonesian positive law also stipulates that divorce is legally valid only through court proceedings to ensure legal certainty and legal protection. Out-of-court divorce often results in the loss of legal certainty, neglect of maintenance rights, uncertainty in child custody, and social and psychological impacts on women and children. From the perspective of Islamic legal philosophy, court-based divorce procedures support justice, legal certainty, and public benefit.

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1. INTRODUCTION

Divorce is a family law issue with far-reaching social, psychological, and legal implications for society. Under Islamic law, divorce is permitted as a last resort when a marriage is no longer sustainable. However, the practice of divorce concerns not only the relationship between husband and wife but also

the protection of women's and children's rights following a divorce. In Indonesia, the issue of divorce has become increasingly complex due to the widespread practice of divorce outside religious courts based solely on the husband's word, without following a legal process (Karmin, 2025). This phenomenon demonstrates a gap between state legal norms and prevailing legal practices.

Normatively, the Indonesian legal system stipulates that divorce can only be obtained in court. This provision is stipulated in Law Number 1 of 1974 concerning Marriage and reaffirmed in the Compilation of Islamic Law, which states that divorce must be obtained through a religious court after the judge has attempted to reconcile the parties (Indoensia, 1974). These regulations demonstrate that the state views divorce not merely as a private matter, but as a legal event that must be supervised to ensure legal certainty and protect the rights of the parties. Through the court process, the judge can examine the grounds for divorce, ensure the fulfillment of maintenance rights, determine child custody, and provide legal certainty regarding the parties' marital status (Junaidi, 2021).

However, social reality shows that the practice of divorce outside the courts is still common. Some people believe that a divorce is religiously valid when a husband pronounces it to his wife without requiring a court process. This understanding is influenced by classical Islamic jurisprudence (fiqh), which places the husband's pronouncement of divorce as the primary element of a valid divorce. As a result, many women are socially considered divorced, but legally, the state still considers them legal wives because they lack a court order. This situation gives rise to various legal issues, such as difficulty obtaining maintenance rights, unclear child custody rights, obstacles in the division of joint property, and uncertainty regarding the legal status of remarriage. In many cases, women and children are the most vulnerable parties to the loss due to the lack of formal legality of divorce.

From the perspective of a modern state governed by the rule of law, the practice of divorce outside the courts contradicts the principles of legal certainty and legal protection. The law serves not only as a set of normative rules but also as an instrument for realizing social justice, order, and the benefit of society. Therefore, formal legality of divorce through the courts plays a crucial role in ensuring that every divorce process is conducted fairly and without prejudice to either party. A legal philosophy approach is relevant for analyzing this issue because legal philosophy views law not only from a textual perspective but also from the perspective of the law's purpose, namely to achieve justice, certainty, and benefit. In the theory of legal certainty, a legal action must be carried out according to established procedures to have valid legal force and protect citizens' rights.

Previous research on out-of-court divorce has generally focused more on the normative aspects of Islamic jurisprudence (fiqh), the legality of divorce under positive law, or the social impact of divorce on the family (Karmin, 2025). However, studies specifically integrating the perspective of Islamic legal philosophy with the issue of protecting women's and children's rights within the context of legal certainty are still relatively limited (Kusuma & Erlina, 2021). Some previous research tends to view divorce solely as a matter of the validity of religious law, without deeply linking it to the goals of modern law and the protection of the human rights of vulnerable parties (Faradilla Asyatama & Ridwan, 2021). In addition, there is still little research that examines how the formal legality of divorce through the courts can be understood as a form of implementation of *maqashid al-syari'ah* and the objectives of law in a modern state based on law.

Based on these conditions, this study presents a novel integrative analysis of Islamic legal philosophy, legal certainty theory, and the protection of women's and children's rights in the practice of divorce outside the courts. This study not only discusses the validity of divorce from a normative perspective but also emphasizes the importance of the formal legality of divorce as an instrument of legal protection and social justice. Therefore, this study is expected to provide a theoretical contribution to the development of Islamic family law studies, particularly in understanding the relevance of divorce procedures through the courts as an effort to achieve justice, legal certainty, and the public good.

2. METHODS

This research uses a qualitative approach with library research. The qualitative approach was chosen because it focuses on an in-depth understanding of the phenomenon of divorce outside the courts from the perspective of Islamic legal philosophy, particularly as it relates to legal certainty and the protection of women's and children's rights (Hardani, 2020). This approach is used to examine various concepts, principles, theories, and legal norms related to the practice of divorce outside the courts within the Islamic legal system and positive law in Indonesia.

This library research method was chosen because the research data sources were obtained from various literature and legal documents relevant to the research focus. This research utilizes legal materials and scientific literature as the primary sources for analyzing the issue of divorce outside the courts from a normative-philosophical perspective. The Islamic legal philosophy approach is used to understand how the legality of formal marriage through the courts can be viewed as an instrument of legal protection and a means of realizing justice, certainty, and the welfare of society (Ali, 2016).

The data sources in this study consist of primary and secondary sources. Primary sources include the Quran, Hadith, Law Number 1 of 1974 concerning Marriage, the Compilation of Islamic Law, and various legal provisions governing divorce in Indonesia. Furthermore, literature discussing the concept of divorce in Islamic law and legal philosophy theory was also used as primary references. Secondary sources were obtained from scientific books, national and international journals, previous research results, e-books, academic articles, and other documents relevant to the themes of legal certainty, protection of women and children, and Islamic family law.

Data collection was conducted through documentation by reviewing, identifying, and examining various literature related to the research object. All data obtained was then classified based on discussion themes, such as the concept of divorce in Islamic law, the legality of divorce in positive law, the theory of legal certainty, and the protection of women's and children's rights after divorce (Muhammad, 2004).

The data analysis technique used qualitative descriptive analysis with an Islamic legal philosophy approach. The analysis was conducted through the stages of data reduction, data presentation, and systematic drawing of conclusions. The collected data was then explained by explaining, interpreting, and connecting various expert views, Islamic legal concepts, and positive legal provisions related to the practice of divorce outside the courts. Through this approach, this study seeks to explain the relevance of the legality of formal divorce through the courts as a form of legal protection in realizing justice, legal certainty, and benefits for women and children.

3. FINDINGS AND DISCUSSION

3.1 The Concept of Divorce in Islamic Family Law and Indonesian Positive Law

a. The Concept of Divorce in Islamic Family Law

In Islamic family law, divorce is a form of termination of marital relations carried out by a husband against his wife according to Islamic law. Etymologically, the word divorce comes from the Arabic word *ṭalāq* (الطلاق), which means to release or free from a bond. Terminologically, divorce is defined as the release of marital ties by a husband from his wife through certain words that indicate the end of the marital relationship. From a fiqh perspective, divorce is indeed the husband's right, but its implementation is still limited by sharia regulations to prevent arbitrary action and harm to women and children (Kusuma & Erlina, 2021).

Islam views marriage as a sacred bond (mitsaqan ghalizha) aimed at creating a harmonious, loving, and mutually protective family. Therefore, divorce is not recommended but rather a last resort when marital life is no longer sustainable. This principle demonstrates that Islamic law prioritizes family peace and integrity as long as it is possible to maintain it (Wahyuni, Amaliyah, Septiani, & Cipta, 2021).

The legal basis for talak in Islam is found in the Al-Qur'an and the hadith of the Prophet Muhammad. One of the verses that is the main basis regarding divorce is QS. Al-Baqarah verse 229 as follows:

الطَّلَاقُ مَرَّتَيْنِ فَإِمْسَاكَ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَانٍ ۗ وَلَا يَحِلُّ لَكُمْ أَنْ تَأْخُذُوا مِمَّا آتَيْتُمُوهُنَّ شَيْئًا إِلَّا أَنْ يَخَافَا أَلَّا يُعْطِيَا حُدُودَ اللَّهِ فَإِنْ خِفْتُمْ أَلَّا يُعْطِيَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ ۗ تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَأُولَٰئِكَ هُمُ الظَّالِمُونَ ٢٢٩

Meaning: "Divorce (which can be referred) is two times. (After that the husband can) withhold (reconcile) in a proper manner or release (divorce) amicably. It is not lawful for you to take back anything (dowry) that you have given them, unless both (husband and wife) fear that they will not be able to carry out the limits of Allah's (determination). If you (guardians) fear that they will not be able to carry out the limits (determination) of Allah, then there is no sin on either of them for the payment (must) be given (by the wife) to redeem herself. These are the limits (determination) of Allah, do not transgress them. Whoever transgresses the limits (determination) of Allah, they are the wrongdoers." (QS. Al-Baqarah ayat 229)

This verse emphasizes that divorce must be conducted in a good manner and not harm the woman. This verse demonstrates that Islam provides clear rules regarding divorce to uphold the values of justice and protect women's rights.

In addition to the Quran, the hadith of the Prophet Muhammad (peace be upon him) also explain that divorce is a permissible act that is most hated by Allah SWT.

Meaning: "The halal thing that is most hated by Allah is divorce." (H.R. Abu Dawud).

This hadith provides the understanding that although divorce is permitted, it should not be carried out hastily, emotionally, or without clear reason. Therefore, Islamic law fundamentally requires that divorce be carried out responsibly and consider its impact on all family members.

In Islamic family law, divorce is divided into several types, such as talaq raj'i, talaq ba'in, talaq sunni, and talaq bid'i. This division demonstrates that Islam regulates divorce in detail to maintain order and prevent arbitrary actions within the household. Furthermore, the regulation of divorce in Islam is also closely related to the objectives of sharia (maqāsid al-syarī'ah), particularly in safeguarding offspring (ḥifẓ al-nasl) and safeguarding the soul (ḥifẓ al-nafs). Therefore, after divorce, Islamic law continues to prioritize the rights of women and children, such as the right to maintenance, child custody, and protection of women's dignity (Isnaeni, 2023).

From the perspective of Islamic legal philosophy, talak is not only seen as a formal legal action, but also as an instrument to maintain benefits and avoid harm in family life. Thus, even though Islam provides space for divorce, its implementation must still be oriented towards the values of justice, responsibility and protection for vulnerable parties.

b. Divorce in Indonesian Positive Law

In contrast to some classical Islamic jurisprudence views which consider that divorce is sufficient if it is carried out through the husband's word, Indonesian positive law emphasizes that divorce is only valid if it is carried out in a court of law (Abd. Hannan, 2024). These provisions are stipulated in Law Number 1 of 1974 concerning Marriage and reaffirmed in the Compilation of Islamic Law (KHI). Article 39 of the Marriage Law states that divorce can only be carried out in court after the judge has attempted to reconcile the two parties. A similar provision is also emphasized in Article 115 of the KHI (Konstitusi, 2015).

These regulations demonstrate that the state views divorce not only as a private matter between husband and wife, but also as a legal event with broad social and legal implications. Therefore, the state, through religious courts, plays a role in ensuring that the divorce process is conducted fairly and does not harm either party, particularly women and children, as vulnerable groups (Aziz, 2023).

In Indonesian law, a husband who wishes to pronounce a divorce is required to file a divorce petition with the Religious Court. Once the petition is filed, the court will conduct mediation and examine the grounds for divorce before the husband pronounces the divorce vow in court. This procedure aims to provide an opportunity for reconciliation and ensure the rights and obligations of the parties are fulfilled after the divorce (Solution, 2025).

From a positive legal perspective, divorces performed outside of court are not legally binding. The state still considers a marriage valid as long as there is no court ruling and no declaration of divorce in a Religious Court (Isnaeni, 2023). As a result, women who divorce outside the courts often experience difficulties in obtaining their rights to maintenance, child custody, division of joint assets, and even securing legal status for remarriage.

From a legal philosophy perspective, regulating divorce through the courts reflects the legal objectives of certainty, justice, and expediency. Legal certainty is achieved through formal divorce procedures, justice is achieved through protecting the rights of women and children, and expediency is achieved through creating social order in society. Therefore, the obligation to divorce through the courts is not intended to burden society, but rather serves as a form of legal protection for those vulnerable due to divorce.

3.2. The Impact of Extrajudicial Divorce on Justice for Women and Children

a. Impact on Justice for Women

Extrajudicial divorces create various forms of injustice for women, primarily due to the lack of formal legal basis for legal protection. In practice, women are often in a vulnerable position because the divorce is initiated unilaterally by the husband without going through formal legal mechanisms (Karman, 2020).

One of the main impacts is the loss of legal certainty for women. Women who are divorced outside the courts do not have a divorce certificate as official proof of the dissolution of the marriage (Faradilla Asyatama & Ridwan, 2021). As a result, women experience difficulties in managing civil registration, legally remarrying, and asserting their rights in court. This situation demonstrates a misalignment between the status of divorce according to religious understanding and the legal status of the state.

Furthermore, divorces outside the courts also result in the non-fulfillment of women's economic rights. Many women are denied iddah (waiting period), mut'ah (waiting period), or child support after divorce. Because divorce is not conducted through the courts, the state struggles to compel ex-husbands to fulfill their obligations (Santoso, 2016). As a result, women are often left to shoulder the costs of living and childcare alone after divorce.

Another equally significant impact is the psychological and social impact on women. Women who are unilaterally divorced often experience mental stress, anxiety, shame, and even social stigma within their communities. These conditions are exacerbated when women face economic hardship and the responsibility of raising children without the support of their ex-husband (Apriyanti, 2021).

From a legal philosophy perspective, this situation contradicts the principles of justice and protection for vulnerable groups. The law should exist to provide protection and certainty for all members of society, regardless of gender. Therefore, formal legality for divorce through the courts is crucial for the state to fulfill its role in providing legal protection for women.

b. Impact on Justice for Children

Divorces outside the courts also have a significant impact on children's lives. Children are often the most vulnerable to the losses caused by divorces conducted without formal legal process. In many cases, children lose certainty regarding their rights to maintenance, custody, and legal protection after their parents divorce (Herawati, Azzahra, Syafadita, Pinasty, & Arrigo, 2023).

One of the biggest impacts is the failure to fulfill the right to child support. Under both Islamic and Indonesian law, fathers remain obligated to provide child support after a divorce. However, divorces

conducted outside of court often result in this obligation being ignored due to the lack of a legally binding decision (Rahma, 2023).

Furthermore, divorce outside the court also creates uncertainty over child custody rights. Without a court decision, child custody often becomes a source of conflict between parents. This situation can impact a child's psychological development and create instability in their lives after the divorce (Fathullah & Abduh, 2022).

Psychologically, children who experience parental divorce without a proper resolution are also vulnerable to trauma, anxiety, and emotional distress. Children can lose their sense of security within the family and experience disruptions in their social and educational lives. In some cases, children also experience social stigma due to their parents' divorce (Walgito, 2000).

From the perspective of Islamic legal philosophy, child protection is a crucial part of the objectives of sharia (*maqāṣid al-syarī'ah*), particularly in safeguarding offspring and the continuation of human life. Therefore, the formal legality of divorce through the courts is crucial so that the state can ensure that children's rights are fulfilled after a divorce (Andi Risnawaty, 2020).

Based on the analysis, the practice of divorce outside the courts fundamentally contradicts the objectives of both Islamic law and Indonesian positive law, creating legal uncertainty and potentially leading to injustice for women and children. By having a divorce process conducted through the courts, the state can ensure that divorces are conducted responsibly, the rights of women and children are protected, and the legal objectives of justice, certainty, and benefit are optimally realized.

4. CONCLUSION

From the perspective of Islamic family law, divorce outside the courts is essentially permitted as a last resort when a marriage is no longer sustainable. However, its implementation must adhere to the principles of justice, responsibility, and protection of the rights of women and children. In the context of Indonesian positive law, a divorce is only considered valid if it is carried out through a court hearing, as stipulated in the Marriage Law and the Compilation of Islamic Law. This provision demonstrates that formal legalization of divorce through the courts is a crucial instrument for creating legal certainty and protecting vulnerable parties.

Research shows that the practice of divorce outside the courts has various negative impacts, particularly on women and children. Women often experience unclear legal status, difficulty obtaining maintenance rights, child custody rights, and legal protection after divorce. Children also potentially lose their rights to maintenance, parental attention, and legal certainty regarding their upbringing and well-being. Furthermore, this practice has social and psychological impacts that can impact the lives of women and children in the long term. From the perspective of Islamic legal philosophy, the obligation to divorce through the courts aligns with the objectives of law (*maqāṣid al-syarī'ah*) and the theory of legal certainty, namely to achieve justice, benefit, and social order. The courts serve not only as formal institutions that validate divorce but also as a means of legal protection to ensure the fulfillment of women's and children's rights after a divorce occurs. Therefore, the formal legality of divorce through the courts is a relevant form of legal protection in modern society.

This research makes a theoretical contribution to the development of Islamic family law studies through an integrative approach combining Islamic legal philosophy, legal certainty, and the protection of women's and children's rights. This research also confirms that the formal legality of divorce is not merely an administrative procedure but a crucial component of efforts to achieve social justice within the Indonesian family law system.

A limitation of this research lies in the use of a literature review approach that is not supported by empirical data on the practice of divorce outside the courts in society. Therefore, future research is expected to use an empirical or socio-legal approach to analyze the implementation of divorce law and its direct impact on women and children in various regions of Indonesia.

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