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Ithbāt Ṭalāq: An Offer of Legal Solutions to Illegal Divorce in Indonesia

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Abstract

The dispute between Islamic law and positive law is continuously ongoing regarding the practice of illegal divorce. This practice is valid in Islamic law as long as the conditions and pillars are fulfilled. However, in Islamic law, it is considered a violation of marriage norms. The urgency of this study lies in the discourse of *ithbāt ṭalāq* to bridge the rise of illegal divorce in society. Through a literature review with a juridical approach to finding a legal basis for a case in concreto, this article shows that *ithbāt ṭalāq* functions as an instrument that can solve disputes between Islamic law and positive law. Through this instrument, husbands who force divorce out of court can be considered criminal actors who must be given sanctions in the form of *ta'zīr* (fine).

Keywords: illegal divorce; *ithbāt ṭalāq*; *ta'zīr*

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Kontradiksi antara hukum Islam dengan hukum positif tentang perceraian di bawah tangan terus berlangsung. Dalam konsep hukum Islam, praktik tersebut dianggap sah selama syarat dan rukunnya terpenuhi. Namun, dalam hukum positif, hal itu dianggap melanggar norma perkawinan. Urgensi penelitian ini terletak pada wacana *ithbāt ṭalāq* untuk menjembatani maraknya perceraian di masyarakat. Melalui kajian kepustakaan dengan pendekatan yuridis untuk menemukan landasan hukum suatu perkara in concreto, artikel ini menunjukkan bahwa *ithbāt ṭalāq* berfungsi sebagai instrumen yang dapat menjadi solusi perselisihan antara hukum Islam dan hukum positif. Melalui instrumen ini, suami yang memaksakan talak di luar pengadilan, dapat dianggap sebagai pelaku pidana yang harus diberikan sanksi berupa *ta'zīr* (denda).

Kata Kunci: talak liar; *ithbāt* talak; *ta'zīr*

Introduction

Ratno Lukito describes the disputes that occur in the legal system in Indonesia.[1] Early history records the existence of customary, Islamic, and civil law, which constantly interact in Indonesia. Customary law is a *cathonic* law.[2] that was born and originated from cultural formations deeply rooted in Indonesian society. It is abstract, recognized, and a habit taken from the indigenous population's activities. Even though it is abstract and unwritten, this custom is considered a living law.[3]

In a different context, Islamic and civil law came later and tried to exert their influence in Indonesia.[4] Talking about these two legal systems seems to bring together two other poles; on the one hand, Islamic law appears as a sacred law that is metaphysical, originating from God's revelation, which is autonomous and free from the intervention of human thought. While on the other hand, civil law is a secular law that seeks to impose its existence on the archipelago and is substantially the result of the accumulation of thoughts and doctrines of Dutch legal scholars who expanded the territory of Indonesia.[5]

The presence of these three legal systems characterizes the dynamics of Indonesian law, which gradually becomes a pluralism that complements each

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[1] Ratno Lukito, *Hukum Sakral dan Hukum Sekuler (Studi tentang Konflik dan Resolusi dalam Sistem Hukum Indonesia)*, ed. Muhammad Syukri and Inyiak Ridwan Muzir (Jakarta: Pustaka Alvabet, 2008).

[2] The term chthonic refers to the etymology of the word derived from the Greek *khthon* or *khthononos*, meaning earth: therefore, living the native way means living close to the planet. The term *khthon* or *khthononos* means the original or earliest known land inhabitants: aboriginal people—chthonian or chthonic means dwelling in the earth. The concept of Indonesian chthonic law represents the normative system of indigenous peoples. It is only applied based on their membership in these community groups in Indonesia, apart from other groups not from Indonesia, such as Europeans, Arabs, Chinese, and Indians. C. T. Onions, *The Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 1964), vol. I.3; 334.

[3] Sardjana Orba Manullang, 'Understanding the Sociology of Customary Law in the Reformation Era: Complexity and Diversity of Society in Indonesia', *Linguistics and Culture Review* 5, no. S3 (2021): 16–26, https://doi.org/10.21744/lingcure.v5ns3.1352.

[4] Imam Mawardi, 'Islamic Law and Imperialism: Tracing on the Development of Islamic Law In Indonesia and Malaysia', *Al-Ihkam: Jurnal Hukum & Pranata Sosial* 13, no. 1 (2018): 24, https://doi.org/10.19105/al-ihkam.v13i1.1583.

[5] Kasman Bakry and Edi Gunawan, 'The Implementation of Islamic Law at the Early Spread of Islam in Indonesian Archipelago', *Jurnal Ilmiah Al-Syir'ah* 16, no. 2 (2018): 113–25, https://doi.org/10.30984/jis.v16i2.685.

other but sometimes creates legal conflicts between its adherents.[6] Civil law has received the most support from the government of the three legal systems. At the beginning of independence, the founding fathers needed to focus more on fixing the legal system. Their energy is only spent in the political field to proclaim the freedom of this country, so for them, the existing civil law system is considered capable of accommodating all the legal needs of the Indonesian population.[7] As a result of this omission, some and even ninety percent of the national legal system adopts the applicable civil law system,[8] such as the application of criminal law and commercial law.

The state's desire to create a national legal system has also been rejected by some people who firmly defend their respective beliefs.[9] In this context, for example, the state succeeded in creating a law on marriage that accommodates the wishes of Muslims to include the provisions of family law (*al-aḥwāl al-shakhṣiyyah*) in each article. However, the state does not just want to follow this desire; it must also carry the principles of gender equality, justice, and legal philosophy into consideration. The state does not necessarily claim that Islamic law represents state law but tries to make how the national law can be applied by all levels of Indonesian society regardless of ethnicity, race, religion, and class.[10]

The dispute between the national legal system and other legal entities (Islamic law) in the context of pluralism has just found common ground. On the one hand, the state tries to substantially bridge the desire of Muslims to apply Islamic law with an acculturation approach. However, the Muslim population

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[6] Tyesta Addy Listya Wardhani, Muhammad Dzikirullah H Noho, and Aga Natalis, 'The Adoption of Various Legal Systems in Indonesia: An Effort to Initiate the Prismatic Mixed Legal Systems', *Cogent Social Sciences* 8, no. 1 (2022), https://doi.org/10.1080/23311886.2022.2104710.

[7] Rudy, 'The Pathway of Civil Law Development in Indonesia: Laws on Land', in *Civil Law Reforms in Post-Colonial Asia*, ed. Yuka Kaneko (Kobe: Spinger, 2019), 71–82, https://doi.org/10.1007/978-981-13-6203-3_4.

[8] Christoph Antons and Daniel S. Lev, 'Colonial Law and the Genesis of the Indonesian State', in *Law and Society in East Asia* (Routledge, 2018), 3–20, https://doi.org/10.4324/9781315091976-1.

[9] Faisal Ismail, 'Religion, State, and Ideology in Indonesia: A Historical Account of the Acceptance of Pancasila as the Basis of Indonesian State', *Indonesian Journal of Interdisciplinary Islamic Studies (IJIIS)* 1, no. 2 (2018): 19–58, https://doi.org/10.20885/ijiis.vol1.iss2.art2.

[10] Mohamad Abdun Nasir, 'Negotiating Muslim Interfaith Marriage in Indonesia: Integration and Conflict in Islamic Law', *Mazahib Jurnal Pemikiran Hukum Islam* 21, no. 2 (2022), https://doi.org/10.21093/mj.v21i2.5436.

still uses normative and fundamental rules. It is seen in imposing divorce, which husbands often pronounce outside of court (illegal divorce).[11]

Divorce outside the court, known as illegal divorce in the community, is difficult to record because it is not registered. According to research conducted by Zainuddin et al.,[12] usually wild divorce couples also carry out subsequent marriages illegally. Some of these illegal divorces can only be known when the former team is about to remarry because they were asked whether their status was single/virgin or widower/widow. In addition, illegal divorce can also be known when applying for *ithbāt* (certificate) marriage to the Religious Court. The judge will find out about the unlawful divorce in the trial process. In a circuit court, the court usually lists the spouses who will apply for a marriage certificate before the trial. However, several of these illegal divorce pairs were recorded, while the others could not be registered for several reasons. First, registering illicit marriages or illegal divorces is not the duty and function of the the Office of Religious Affairs (KUA). Secondly, no one wants to report it because divorce is considered a disgrace.

The phenomenon of illegal divorce is undoubtedly a formidable challenge to the concept of the rule of law. Article 65 of Law Number 7 of 1989, which has been changed to Law Number 3 of 2006, confirms that "Divorce can only be carried out before a court hearing after the court concerned has tried and failed to reconcile the two parties."[13] This provision is also strengthened by article 115 KHI with the same sound content and substance. In its application (in concreto), this article has the consequence that divorce is only recognized and valid if it is carried out before a court.[14]

The in concreto application of the above provisions is within the framework of *maṣlaḥah* (benefit) to protect the rights of women/wives whose

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[11] Mohamad Abdun Nasir, 'Islamic Law and Paradox of Domination and Resistance: Women's Judicial Divorce in Lombok, Indonesia', *Asian Journal of Social Science* 44, no. 1/2 (2016): 78–103, https://www.jstor.org/stable/43953983.

[12] Zainuddin Zainuddin, Khairina Khairina, and Sulastri Caniago, 'Itsbat Talak dalam Perspektif Hukum Perkawinan di Indonesia', *Al-Ahwal: Jurnal Hukum Keluarga Islam* 12, no. 1 (2019): 29–45, https://doi.org/10.14421/ahwal.2019.12103.

[13] Mahkamah Agung Republik Indonesia, *Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama* (Jakarta: Direktorat Jenderal Badan Peradilan Agama, 2013), 146.

[14] 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 (2017): 52–71, https://doi.org/10.22373/sjhk.v1i1.1570.

husbands divorce them and provide legal certainty after the divorce. If divorce is allowed to roam outside the official state institutions (courts), many husbands divorce their wives according to their wishes and without procedures. The existence of this instrument is to eliminate the arbitrariness of the husband in imposing divorce so that it will provide space for law and order in society. However, from the perspective of Islamic law, even though divorce is done illegally (underhand), it fulfills the conditions and pillars and is still declared valid. It means that if the two of them continue to have a relationship like a husband and a wife, they are punished with adultery (illegitimate), and the child born from this relationship is called an adulteress child or an illegitimate child. Thus, the validity of divorce, according to Islamic law, lies in fulfilling conditions and pillars, not in the formal conditions contained in the law. So that when the divorce is considered valid according to Islamic law, then the marriage is also legal according to Islamic law.[15]

Unlike some of the writings above, this article focuses on the dispute between Islamic law and positive law regarding the phenomenon of divorce in society. This paper also provides a legal construction for *ithbāt ṭalāq* (legal recognition of divorce) as an instrument that bridges the two rules. This paper also offers *ta'zīr* (punishment) for perpetrators of illegal divorces.

This research is normative-qualitative with a conceptual approach that seeks to build a whole argument about a legal principle in a concrete case. As for the analysis, the author uses the method of substantive analysis by explaining and analyzing all sources of law and then finding the legal framework and construction of *ithbāt ṭalāq* and *ta'zīr* as instruments to provide legal certainty and protect the rights of women and children.

Legal Dualism: Between Social Reality and State Law

The practice of imposing divorce outside the court is still rife among the people of Indonesia. Based on the data that the author has collected from various divorce cases in the Religious Courts, on average, the husband first

[15] Ramadhan Syahmedi Siregar, 'Dampak Perceraian yang tidak Sesuai dengan Prosedur Perundang-Undangan', *Fitrah: Jurnal Kajian Ilmu-Ilmu Keislaman* 1, no. 1 (2015): 54, https://doi.org/10.24952/fitrah.v1i1.333; Maimun, 'The Women's Rights in Divorce and Discourse of Gender Equality in the Dynamics of Divorce in Madura', *Samarah Jurnal Hukum Keluarga dan Hukum Islam* 6, no. 1 (2022): 468–92, https://doi.org/10.22373/sjhk.v6i1.12804.

handed down the divorce to his wife before the two decided to separate.[16] This practice has become a habit and has been recognized in the community.

The existence of divorce outside the court has become a tradition, and its nature is considered sacred. Therefore, divorce is declared to have occurred when the husband has read the divorce to his wife, even outside the court. As a result, they are no longer husband and wife. This assumption is deeply rooted in the community because the typology of people's thinking is still based on *fiqh*.[17] The law of *fiqh* is still valid and applied in society, even though the Marriage Law and KHI have very firmly regulated it.

The controversy between fiqh and positive law in Indonesia regarding divorce outside the court is still a polemic to this day.[18] Islamic jurists (*fuqahā'*) determined that divorce was valid. Meanwhile, the judges ruled it illegal. Even though many studies have found various negative consequences of divorce out of court, Islamic jurists still view it as a legal act. The Islamic jurists consist of personal and institutional members, such as the Central Indonesian Ulema Council, Aceh Province Ulema Council, North Sumatra Indonesian Ulema Council, and Jam'iyatul Washliyah Fatwa Council. Even the Ijtima' Ulama Forum of the Indonesian Ulema Council in 2012 reaffirmed this issue.

Zainuddin et al. stated that judges at the Yogyakarta Religious Court, Judges at the Pasuruan Religious Court, Judges at the Tigaraksa Religious Court, Judges at the Payakumbuh Religious Court, and Judges at the Bukittinggi Religious Court considered it illegal. The main reason is that there is no legality. However, in 2015, judges at the Serang Religious Court granted five cases of consanguineous marriages from couples who had previously divorced out of court. The decision to grant the *ithbāt* of marriage shows that the marriage is

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[16] Based on data from the Directorate General of Population and Civil Registration (Dukcapil) of the Ministry of Home Affairs (Kemendagri), there will be 3.97 million people married and divorced by the end of June 2021. This number is equivalent to 1.46% of Indonesia's 272.29 million population. Viva Budy Kusnandar, 'Inilah 10 Provinsi dengan Penduduk Berstatus Cerai Hidup Terbanyak', Databoks, 7 September 2021, https://databoks.katadata.co.id/datapublish/2021/09/07/inilah-10-provinsi-dengan-penduduk-berstatus-cerai-hidup-terbanyak.

[17] Ilham Hidayat, Mardenis, and Yaswirman, 'Problems Arising from Talak Divorce Outside the Court', *International Journal of Multicultural and Multireligious Understanding* 6, no. 4 (2019), https://doi.org/10.18415/ijmmu.v6i10.919.

[18] Fikri Fikri et al., 'Contextualization of Divorce through Fiqh and National Law in Indonesia', *Al-Ulum* 19, no. 1 (2019): 151–70, https://doi.org/10.30603/au.v19i1.643.

valid and divorces made outside the court are also reasonable. If, according to the judge, the divorce is illegal because it was done outside the court, then the marriage vows cannot be granted. It's just that the judge did not determine the divorce decision first before deciding on the marriage vows.[19]

In a discussion held by the Pelaihari Religious Court on March 6, 2014, with the topic "Plaintiff argues that three divorces have occurred outside the court, what is the judge's attitude?" there are pros and cons in the challenging debate about divorce outside the court. Apart from being consistent with Article 39 of Law Number 1 of 1974, that divorce must be before the court, several other participants (judges) argued that judges must accommodate laws that live in society. In this case, the public believes divorce outside the court is legal, according to *fiqh*. An interesting response was conveyed by Amir Husin, Head of the Pelaihari Religious Court, that there are two kinds of divorce, namely, divorce according to the judiciary and divorce according to the views of the people based on *fiqh* as a firm grip for Indonesian society. Furthermore, he said that divorce out of court, although legal, has no legal force. If it is said to be illegal, it will offend people's feelings.[20]

The dilemma of the dualism of divorce law makes people confused and unsure of which direction to take, whether to prioritize formal law with the consequences of adultery (*ḥarām*) their relationship. Or do you prioritize Islamic law, but the child born does not get legality according to positive law? The two legal systems in Indonesia are equally justified because the law in Indonesia adheres to the doctrine of customary law or local customs, including the Islamic community, in terms of legalizing existing laws, both for inheritance law and marriage law.[21]

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[19] Muhamad Ridho, 'Itsbat Nikah terhadap Pelaku Perceraian di Luar Pengadilan dan Implikasi Hukumnya', *Bil Dalil (Jurnal Hukum Keluarga Islam)* 1, no. 02 (2016): 81–98, https://doi.org/10.32678/bildalil.v1i02.124.

[20] Muh. Irfan Husaeni, 'Pemohon Mendalilkan Telah Talak Tiga di Luar Pengadilan, Bagaimana Sikap Hakim?', Direktorat Jenderal Badan Peradilan Agama, 5 March 2014, https://badilag.mahkamahagung.go.id/artikel/20147-pemohon-mendalilkan-telah-talak-tiga-di-luar-pengadilan-bagaimana-sikap-hakim-oleh-muh-irfan-husaeni-sag-msi.html.

[21] Nurhadi Nurhadi, 'Perceraian di Bawah Tangan Perspektif Hukum Islam dan Hukum Indonesia', *Al-Mawarid: Jurnal Syari'ah & Hukum* 1, no. 2 (2019): 159, https://doi.org/10.20885/mawarid.vol1.iss2.art5.

As a concrete example, a husband and wife married in 2002 and then had a domestic crisis until the husband divorced in 2008. Since 2008, the husband has left his wife for five years. In 2013, the wife filed for divorce from her husband in court. Because the wife's surrender began in 2013, the court's decision has been effective since 2013. It means that divorce has been calculated since 2013. So many wives' rights are lost and violated by husbands, such as the rights of *'iddah*, *mut'ah*, and income owed.

There are at least five impacts of imposing divorce out of court: lack of legal certainty, husband's arbitrariness, harm to children, unclear joint property, and unclear inheritance status. These impacts are concluded as unfavorable because they can harm the various parties mentioned. With this view, many people criticize divorce outside the court.

Apart from having social and economic impacts, out-of-court divorce also has legal implications for spouses and their children. Among the legal implications is that a divorced husband and wife cannot carry out their subsequent marriage officially (registered) because they do not have a divorce certificate. Usually, the person who divorces outside the court performs the subsequent marriage in an unregistered manner, known as *sirri* marriage. After the *sirri* marriage, new legal problems arose when they already had children who needed legal status and residence documents.

The management of these documents requires a marriage certificate from the parents. So, in this case, the parents will apply to *ithbāt* marriage to the court. Meanwhile, the court cannot conclude a marriage because the previous divorce was not legal according to the law. For men, this is not a problem because polygamy is allowed. It's just a matter of getting married with a polygamy permit.[22] However, when a woman marries another man while,

[22]Supreme Court Circular Letter (SEMA) No. 7 of 2012 states that "If there is a cumulating of marriage certificates for a second marriage with divorce, while the second Marriage does not get the consent of the first wife, the Marriage cannot be confirmed unless there is permission for polygamy from the Religious Court. "This decision was reinforced by SEMA No. 2 of 2019, which stated that "Marriage with second, third and fourth wives carried out without court permission and not in good faith, does not cause legal consequences for material rights between husband and wife in the form of *zawjiyah* maintenance, assets together, and inherit." Direktori Putusan Mahkamah Agung Republik Indonesia, 'Rumusan Kamar', Direktori Putusan Mahkamah Agung Republik Indonesia, 2019, https://putusan3.mahkamahagung.go.id/rumusan_kamar/.

according to the court, her status is someone's wife, polyandry occurs, which is legally prohibited according to the consensus of the scholars.

The application of Article 65 of the Marriage Law and Article 115 of the KHI is proper to protect the husband's arbitrariness. Still, sometimes the application of this article also harms the wife in terms of legal certainty, where the wife who should have been divorced several years ago, her rights have depended on the passage of time. In those few years, the wife should have obtained legal certainty in status, whether she is still bound to her husband. Not to mention the absence of the husband's responsibility for the livelihood that occurs as a result of the husband dropping the divorce, whether it is *'iddah* income, owed income (*māḍiyah*), or *mut'ah*. If the provisions of the law above are faced with existing *fiqh* provisions, a dilemma will arise. On the one hand, divorce outside the court is not recognized by law, but on the other hand, divorce outside the court is legal according to *fiqh* provisions.

The existence of legal recognition and practice still alive in the community makes the state fail to apply the provisions of national law, especially the Marriage Law and the KHI, in the context of imposing divorce before the court session. The gap between the law that lives in society and the direction that the state has legalized should be allowed to continue, and a legal solution must be given. In this context, the existing legislation has not been able to provide legal solutions to people still rife in practicing divorce outside the court.

Within this framework, the judiciary needs a legal breakthrough to reduce and bridge the legal conflicts between the provisions of legislation and the existing social reality. Courts, as the only institution that bridge the gap, must prioritize between social norms and appear as state agents to provide legal certainty to women who are marginalized due to illegal divorce practices that occur in society.

Rethinking the Discourse on *Ithbāt Ṭalāq* Using an Analogy Approach

Every citizen has the right to legal protection by the mandate of the 1945 Constitution. As citizens, couples divorced outside the court are entitled to protection and legal remedies. On the one hand, this couple has violated the laws and regulations. Still, on the other hand, as citizens, even though they are

guilty, they should be allowed to improve themselves and take legal action, either on their initiative or awareness or because of pressure or specific conditions. Moreover, doing a divorce outside the court is legally categorized as a violation, not a crime (criminal). The convicts still have legal rights as citizens. One of the ways to get legal treatment for divorced couples outside the court is to file for *ithbāt ṭalāq*.

The law also mandates that the state must protect all its citizens from various things detrimental to statutory regulations. Even people who have been found guilty must be protected and must not be treated arbitrarily by violating their rights. As a state institution played its instrument, the court represents the state in providing legal rights to the community. When a divorce case outside the court is processed through *ithbāt ṭalāq* so that the divorce is legally recognized, it is the presence of the state in protecting its citizens. Couples whose divorce has been confirmed can carry out further legal actions without other obstacles, such as remarriage, *ithbāt* marriage, etc.

In real terms, Indonesian Marriage Law adheres to the concept of divorce being carried out before the court. While in Islamic Law, divorce is valid when it meets the conditions and pillars. According to Islamic law (Islamic jurisprudence), the position of divorce or divorce under the hand is correct, and its existence is recognized so that it has legal consequences in the form of breaking up marital relations and other legal matters. Meanwhile, according to formal law in Indonesia, illegal divorce or divorce does not receive recognition and protection by law and its implications. It is considered that the marriage has not been broken up because it was not according to the applicable legal regulations. It would be better if the divorce or divorce that has been carried out should be registered in court (*ithbāt ṭalāq*) so that it can be registered by the state as a divorce event to obtain evidence of a divorce certificate and can guarantee legal certainty.[23]

The dualism of divorce law in society cannot be denied. This condition is a reality and is still being carried out openly and even getting a place. They believe that divorce, according to classical *fiqh*, still exists and remains a legal

[23] Novia Sari et al., 'Opportunities and Challenges of Isbat Talak in Divorce in Indonesia and Abroad', *Al-Qisthu: Jurnal Kajian Ilmu-Ilmu Hukum* 19, no. 2 (2021): 106–20, https://doi.org/10.32694/qst.v19i2.1084.

choice in divorce.[24] In response to this phenomenon, two opinions developed. Firstly, the divorce pronounced by the husband is considered invalid because the pronunciation is wild and not before the court. This opinion rests on Article 36 of the Marriage Law and Article 115 of the KHI. At the same time, the second opinion states that the divorce is still valid but has no legal force. This opinion seeks to bridge the normative provisions in *fiqh* and make positive law a tool of social control. On the one hand, this last opinion still recognizes the husband's authority in imposing divorce. Still, on the other hand, the divorce handed down needs to have legal certainty and recognition from the state, so the rights that the wife should obtain will disappear or be considered nonexistent.

In this framework, it is necessary to make an analogy with the provisions of *ithbāt nikāḥ* for married couples who marry illegally (underhand).[25] This provision illustrates that to provide legal certainty for husbands and wives who are married in an unregistered manner; the law makes *ithbāt* marriage an instrument to obtain the legality (legitimacy) of an unregistered marriage that has been carried out. With the court's determination of the marriage *ithbā*t, the husband and wife can take care of their marriage registration to the KUA office.

The analogy between marriage *ithbāt* and divorce *ithbāt* are two legal instruments that can be initiated to provide an element of certainty and legal protection to the wife. Why can the court determine an unregistered marriage carried out several years ago (*ithbāt*) while the divorce handed down cannot be determined (*ithbāt*)? If these two legal instruments are studied using the analogy method (*qiyās*), they both have the same elements and variables, namely the existence of *aṣl*, *furū'*, *'illah*, and *ḥukm al-'aṣl*. [26]

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[24] Sulistyowati Irianto, *Perempuan di Antara Berbagai Pilihan Hukum (Studi Mengenai Strategi Perempuan Batak untuk Mendapatkan Akses kepada Harta Waris Melalui Proses Peyelesaian Sengketa)* (Jakarta: Yayasan Obor Indonesia, 2012), 56–67.

[25] The provisions of the articles of law that become the juridical basis for the Religious Courts to carry out marriage isbat are the explanations of Article 49 Paragraph (2) number 22 of Law Number 7 of 1989 concerning the Religious Courts and Article 7 Paragraph (2) and section (3) letter d Islamic Law Compilation.

[26] M. Atho Mudzhar, 'The Legal Reasoning and Socio-Legal Impact of the Fatwās of the Council of Indonesian Ulama on Economic Issues', *Ahkam: Jurnal Ilmu Syariah* 13, no. 1 (2013): 14, https://doi.org/10.15408/ajis.v13i1.946; Majdah Zawawi, 'Legal Analogy in Islamic Law and Common Law: Masālik Al-'Illah, Obiter Dicta and Distinguishing Compared', *IIUM Law Journal* 10, no. 1 (2002): 41–46, http://irep.iium.edu.my/17144/.

The legal construction can be seen in Figure 1. From an *aṣl* perspective, there was an unregistered (*sirrī*) marriage a few years ago, then *furū'*, namely a divorce handed down by the husband a few years ago and not carried out before the court. Then, from these two phenomena, the marriage certificate and the divorce decree have the same legal *'illah*, that is, both are not carried out through official procedures by the state, in this case, the KUA, and the Religious Courts. As for the law, *ithbāt* for marriage is an official instrument and is permitted by law, while *ithbāt* for divorce should also have its legal basis, and a case may be submitted to the court.[27]

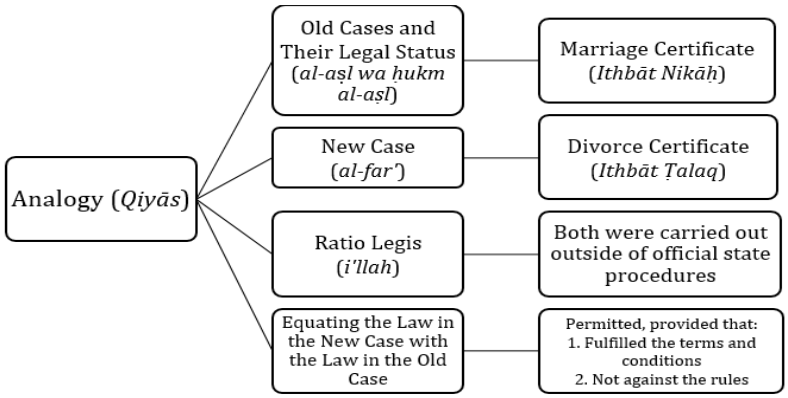

Figure 1
Qiyās reasoning in the ithbāt ṭalāq case

The analogy of the case of *ithbāt ṭalāq* to *ithbāt* of marriage lies in the search for legal legality and legal administration. Marriages that have been registered receive legal legitimacy and are legally registered at the KUA and the Civil Registry Office. Maybe someone sees the analogy of *ithbāt ṭalāq* to *ithbāt* marriage, which cannot be done because of differences. Marriage creates a legal relationship, whereas divorce releases a legal relationship. This difference

[27] Three main requirements in constructing law, (1) cover all areas of positive law concerned, (2) there is no logical conflict in it, (3) contain aesthetic factors. Abdul Manan, 'Penemuan Hukum oleh Hakim dalam Praktek Hukum Acara di Pengadilan Agama', *Jurnal Hukum dan Peradilan* 2, no. 2 (2013): 189–202, https://doi.org/10.25216/jhp.2.2.2013.189-202.

does not preclude analogy because the impact of both laws is related to the following law. Suppose *ithbāt* marriage gives rise to rights and obligations.

In contrast, *ithbāt* divorce provides legal certainty for former husband and wife to be able to remarry and ensure the distribution of joint assets. *Ithbāt* of marriage results in the prohibition of *ḥalāl* (male and female) and recognizes the child's lineage. *Ithbāt* divorce ensures the halalness or validity of a woman's marriage that is divorced outside the court with her new husband. Even though the *ithbāt* of marriage was not originally based on the laws and regulations in force in Indonesia, when it becomes a judge's decision, it becomes a separate legal product.

Initiating the discourse of *ithbāt* divorce with an analogical approach to *ithbāt* marriage is legitimate to provide protection and legal certainty to the wife. What is the condition of the wife whose husband divorced a few years ago, then just submitted her case to court? Of course, she suffered a loss. First, the wife will undergo two' *iddah* periods. When the wife presents her case to court, and it is terminated legally, the wife must return to experience the *'iddah* period for the second time, and of course, this period is an unfair treatment for the wife. Second, the wife will also lose her rights after the husband decides to divorce outside the court. This condition makes the husband arbitrarily use the right of divorce to his wife.

Therefore, it is necessary to make a legal instrument in the form of *ithbāt ṭalāq*. The husband will think again not to arbitrarily drop the divorce to his wife because the divorce handed down is a form of law violation and can be subject to sanctions by the court whenever the wife wants to apply for the *ithbāt ṭalāq* to the court. The judge will examine several related pieces of evidence that the husband's divorce occurred, and the court's decision is retroactive (retroactive). With this retroactive nature, the husband is sentenced to pay all the rights of the wife, be it the rights of *'iddah*, *mut'ah*, *māḍiyah* maintenance, and all husband's obligations due to divorce.

In the framework above, the judge exercises discretion in the form of punishment (*ta'zīr*) to the husband in the form of paying a fine due to the imposition of divorce outside the court, and this is an instrument that can be a means of control in a society that is still rampant in practicing illegal divorce outside the court. *Ta'zīr* that is charged to the husband can be in the form of

payment in the form of *'iddah* or income owed to the wife plus the provision of *mut'ah* as a souvenir.

Ta'zīr Instrument as a Tool of Control and Social Engineering in *Ithbāt Ṭalāq*

It should be noted that Law Number 1 of 1974 concerning Marriage has been in effect since it was promulgated on January 2, 1974. It means that, if counted up to now, Law Number 1 of 1974 has been in force for 42 years. There are still many violations against the material of Law Number 1 of 1974 concerning Marriage. According to Hasan Nur Hakim, the causal factor is not because the public does not know the material from the articles of the law,[28] But because there is no "firmness" in it. In short, there are no articles containing criminal provisions in Law Number 1 of 1974 concerning Marriage. At that time, it may not occur to legislators to include criminal provisions in the law because the substance of the law was full of civil overtones or private law material (*privaatrecht*).[29]

After being in force for 42 years, and there are still many violations of the Marriage Law, we should reconsider the formulation of criminal and criminal articles in the Marriage Law. The next problem is the need to map and "place" the position of the form of violation of the Marriage Law (in this case, divorce out of court), whether it falls into the category of crime (*misdrijven*) or simply with/in the form of violation (*overtredingen*).

Criminal acts in the violation category are "*wetsdeliktern*," namely actions that are "against the law," which can only be perceived as against the law if the wet (rules) determine that the act is an act against the law.[30] In essence, the distinction between criminal acts in the form of crimes and violations in this

[28] In law, the term legal fiction is known, where after statutory regulations comply with the principle of publicity (in this case, announced in State Gazette/Supplement to State Gazette, State Gazette, and so on), then everyone is considered to know about the "contents" of statutory regulations. There is no reason for someone who violates to say, "I don't know the law".

[29] Hasan Nur Hakim, 'Penindakan terhadap Pelaku Penjatuhan Talak di Luar Pengadilan melalui Sarana/Pendekatan Pidana (Penal Approachment)', *Al-Fikra: Jurnal Ilmiah Keislaman* 15, no. 2 (2016): 326–40, https://doi.org/10.24014/af.v15i2.4020.

[30] Nuzurrizky Minarrahmah, 'Legal Penalty of Divorce Outside the Religious Court in Indonesia, Malaysia, and Brunei Darussalam' (Maulana Malik Ibrahim State Islamic University Malang, 2020), 54, http://etheses.uin-malang.ac.id/17455/6/16210007.pdf.

qualitative point of view emphasizes the unlawful nature of an act. For criminal acts in the crime category, the spirit is indeed evil, even though it is not listed in a confident wet. At the same time, violation, in essence, is not an evil act (in terms of its nature) but because the wet stipulates the act as an unlawful act (*onrecht*). Then, the act becomes a "criminal" (in the sense of violation).

However, because Indonesia adheres to a codification system like the Netherlands, all criminal acts, whether crimes or violations, must be included in statutory regulations. It aims to prevent the arbitrariness of the authorities from "criminalizing" society. It follows the principle of *nullum crimen (delictum) nulla poena sine praevia lege poenali*, as referred to in Article 1 Paragraph (1) of the Criminal Code.

There are two points of view to distinguish between crimes and violations,[31] namely from a qualitative point of view and from a quantitative point of view. From a qualitative point of view, crimes are "*rechtsdeliten*," namely acts which, although not specified in the laws and regulations as criminal acts, are felt as acts that are *onrecht* or contrary to the legal system. For example, stealing, although it does not need to be stipulated in the legislation as a criminal act, people already feel that theft is an act that is contrary to the legal system (*onrecht*).

From a quantitative point of view, the distinction between criminal acts in the category of crime and violations is only related to the severity of the sanctions for the criminal acts committed. It means that for criminal acts in the crime category, the threat of punishment is almost undoubtedly severe. Meanwhile, for criminal acts in the violation category, the threat of punishment is almost certainly light. It also gave birth to the concept that for criminal acts of infringement, probationary offenses (*poging*) do not apply, imprisonment (only confinement, not imprisonment), and so on, because the threat of sanctions for violations is indeed light.

Judging from the explanation above, the model for punishing the perpetrators of imposing divorce outside the court is that the violation provisions, not crimes, apply in nature (qualitative) and the severity of the sanctions (quantitative). The author prefers to do the act - the imposition of

[31] Moeljatno, *Asas-Asas Hukum Pidana* (Yogyakarta: Rineka Cipta, 2002), 72.

divorce outside the court - a "type" of a criminal act in the category of offense (*overtredingen*), not crime (*misdrijven*) because this is in line with the spirit built in Government Regulation No. 9 of 1975, Article 45 Paragraph (2) concerning the Implementation of Marriage Law which states that the criminal act referred to in Paragraph (1) is a violation.

In the study of Islamic law, the punishment imposed by the ruler for someone who has committed an offense is known as *ta'zīr*. It is different from *ḥudūd* and *qiṣāṣ* which focus more on criminals due to crimes (*jarīmah*) they have committed. The difference between the two can be seen from several aspects, namely, first, *ḥudūd* and *qiṣāṣ* are forms of direct punishment that Allah has determined for his people due to the finger he has done. At the same time, *ta'zīr* is a punishment imposed by the ruler and is ijtihadiyah, depending on the severity and severity of the error committed. Second, *ḥudūd* and *qiṣāṣ* are in the realm of a criminal whose nature of punishment is in the form of punishment or even death or cutting of limbs, while *ta'zīr* is in the domain of civil, which is in the form of compensation or payment of a sum of money. Third, *ḥudūd* and *qiṣāṣ* are punishments given for committing a crime, while *ta'zīr* is given due to a criminal offense.

In some Islamic countries, *ta'zīr* is a punishment given to perpetrators of violations of the provisions set by the government, including in the realm of family law. In the realm of family law, government provisions and regulations apply to protect the rights of women/wives due to divorce. Some countries that have criminalized husbands' arbitrary divorce are Iran, Malaysia, Egypt, Pakistan, Jordan, and Sri Lanka.[32] Malaysian Family Law, as in the 2nd Enactment of 2003, the Enactment of the Islamic Family Law (Negeri Selangor) stipulates a fine for perpetrators of divorce out of court, a maximum of one thousand Malaysian ringgit or imprisonment for six months.[33]

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[32] Maskur Rosyid, 'Kriminalisasi terhadap Hukum Keluarga di Dunia Muslim', *Al Amin: Jurnal Kajian Ilmu dan Budaya Islam* 3, no. 1 (2020): 182, https://doi.org/10.36670/alamin. v3i1.48.

[33] Enactment 2 of 2003 Islamic Family Law (State of Selangor) 2003 Part V/Dissolution of Marriage Section 57 Registration of Divorce Outside the Court: (1) Notwithstanding section 55, a person who has divorced his wife by pronouncing talaq outside the court and without the permission of the court shall within seven days of the divorce report to the court. (2) The court must investigate whether the divorce is valid according to Shariah law. (3) If the court is satisfied that the pronounced divorce is valid, then the court (at the same time) declares that the perpetrator has committed an

Concerning the practice above, in 2003, Indonesia also proposed a KHI Counter Legal Draft (CLD) submitted by the Gender Mainstreaming Group of the Ministry of Religion of the Republic of Indonesia. One of the articles, namely Article 144, states that "*Any person who divorces his wife is not in front of a court hearing shall be punished with a maximum fine of Rp. 6,000,000.- (six million rupiahs) or imprisonment for a maximum of 6 (six) months*". However, in 2008 all of these CLD drafts were withdrawn by the government.

The formulation of Article 144 of the HTPA Bill above lays down two types of punishment, but they are alternatives. The two types of "principal punishment" may only choose one of the two, namely a fine only or imprisonment (containment, not imprisonment) for a maximum of 6 (six) months. In this sense, the punishment for the perpetrators of divorce outside the court only applies alternative penalties, namely fines (only), a maximum of Rp. 6. 000. 000 (six million Rupiah), or imprisonment (only) for a maximum of 6 (six) months. The alternative "punishment" above is more appropriate to apply because the Violation for the perpetrator of the imposition of divorce outside the court is not severe. It has two deterrence, personal/special deterrence (deterrent effect for the perpetrator) and general deterrence (impact on the perpetrator) in the community. In this case, the punishment aims to prevent the community from doing the same thing, namely imposing divorce outside the court).

The existence of criminal provisions in the laws and regulations in the marriage field will positively impact the implementation of marriage rules. It will further protect women's rights,[34] especially in unregistered marriages, illegal polygamy, *mut'ah* marriage, and divorce outside of court hearings, which have been common in society so far. One of the weaknesses of Marriage Law in Indonesia is that it does not accommodate criminal sanctions for perpetrators of crimes, so often unscrupulous husbands take refuge behind the sacredness of marriage itself.

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offense and must be fined not more than one thousand ringgit or imprisoned for six months or both and the prison.

[34] Elizabeth D Katz, 'Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws', *The University of Chicago Law Review* 86, no. 5 (2019): 1241–1309, http://perma.cc/34A6-M2AC; Fatum Abubakar, 'Islamic Family Law Reform: Early Marriage and Criminalization (A Comparative Study of Legal Law in Indonesia and Pakistan)', *Al-Ahkam Jurnal Ilmu Syari'ah dan Hukum* 4, no. 2 (2019): 106, https://doi.org/10.22515/alahkam.v4i2.1667.

In this context, the government appears as a state tool to regulate and maintain public order through several regulations, including punishment for husbands whose cognitive behavior is outside official state institutions (courts). A husband who takes his wife out of court is considered to have committed a criminal offense, and the wife can prosecute this in court. The judge can impose a *ta'zīr* sentence as a sanction on the payment of money charged to the husband. Sanctions for this amount of money can be in the form of *'iddah* money, outstanding living (*māḍiyah*), *mut'ah*, and child care costs.

The primary purpose of marriage is to worship Allah SWT. Still, this meaning not only limits but also creates rights, obligations, and legal responsibilities for both parties. The right of divorce is the husband's prerogative right over his wife, but with this right, the husband cannot treat his wife arbitrarily. There are official procedures that must be followed to defend the rights and interests of the wife. The wife can sue for Violation of this official procedure court and be subject to criminal sanctions in the form of *ta'zīr*, namely paying an acceptable/amount of money determined by the judge. By building a legal structure through the *ithbāt ṭalāq* instrument, the practice of illegal divorce in society can be suppressed as much as possible for the perpetrators and society in general.

Conclusion

Discourse on the legitimacy of divorce outside the courtroom is part of legal pluralism in Indonesia. Even though the community considers this practice sacred, it has a solid potential to annul the rights of wives and children. Legal instruments, in this case, are needed to accommodate the two phenomena above to produce mutually dialectical norms. *Ithbāt ṭalāq* is an instrument to provide legal protection and justice for victims of divorce practices outside of court. This retroactive instrument provides legality to divorces that husbands have previously imposed. Granting this legality must be accompanied by a *ta'zīr* punishment by fulfilling the rights of his ex-wife and children, whom he had neglected since the divorce. With it, divorce out of court is considered a violation that must be subject to sanctions. Apart from being a means of control and social engineering, this instrument offers a solution to synergize the norms of Islamic law with positive law regarding the existence and position of divorce outside the court.[a]

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