



## The Legality of Divorce in Aceh: A Study of Divorce Practices Out of Religious Courts

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**Abstract:** Divorce for the people of Aceh is inseparable from Islamic law, the power of Islamic law dominates in every legal decision related to religion. Islamic law for the people of Aceh is understood as *fiqh* produced by the *ulama* (Muslim scholars). Likewise with divorce, when there are legal differences, Islamic law becomes the main priority in resolving these differences. This study aims to analyze the legality of divorce for the people of Aceh between Islamic law and state law. In addition, this paper will also analyze the legal trends used by the Acehnese people in divorce cases. This paper is empirical legal research with a statute approach and the sociology of law, the primary data source interviews, this research also examines essential writings related to divorce. The results show that the legality of divorce for the majority of the people of Aceh is what is specified in the *Syafi'i* school of jurisprudence, state law will be used if needed for administrative needs, for people who are aware of the legality of state law, will use the judiciary in divorce cases to guarantee post-divorce rights.

**Keywords:** Divorce, Legality, *Fiqh*, Religious Courts, State

**Abstrak:** Perceraian bagi masyarakat Aceh tidak terlepas dari hukum Islam, kekuatan hukum Islam lebih mendominasi dalam setiap keputusan hukum yang berkaitan dengan agama, hukum Islam bagi masyarakat Aceh dipahami sebagai *fikih* yang dihasilkan oleh para *ulama*. Begitu juga dengan perceraian, ketika terjadinya perbedaan hukum maka hukum Islam menjadi prioritas utama dalam menyelesaikan perbedaan tersebut. Tujuan penelitian ini yaitu untuk menganalisis legalitas perceraian bagi masyarakat Aceh antara hukum Islam dan hukum negara. Selain itu, artikel ini juga akan menganalisis kecenderungan hukum yang digunakan oleh masyarakat Aceh dalam perkara perceraian. Artikel ini merupakan penelitian yuridis empiris dengan pendekatan perundang-undangan dan sosiologi hukum, sumber data primer berupa wawancara, dan hasil penelitian terdahulu berkaitan dengan perceraian. Hasil penelitian menunjukkan bahwa legalitas perceraian bagi mayoritas masyarakat Aceh yaitu apa yang ditentukan dalam *fikih mazhab Syafi'i*, hukum negara akan digunakan jika diperlukan untuk kebutuhan administrasi, namun bagi masyarakat yang menyadari legalitas hukum perceraian akan menggunakan peradilan dalam kasus perceraian guna untuk menjamin hak-hak pasca perceraian.

**Kata Kunci:** Perceraian, Legalitas, *Fikih*, Pengadilan Agama, Negara

## Introduction

Divorce in Indonesia has been regulated in the marriage law so that there is legal certainty of marital status. Divorce in Indonesia is only recognized when it occurs before the court, this provision is still reaping the pros and cons, especially for the people of Aceh. For the majority of Acehnese people understand that divorce is a legal provision in fiqh literature, because divorce is related to Islamic law, so every legal aspect related to divorce must refer to the fiqh book of *munakahat*, especially with the presence of the Aceh MPU (Aceh Ulema Consultative Assembly) *Fatwa* (a religious and legal decree issued by a council or religious leaders) which increasingly legitimizes the law divorce in fiqh.<sup>1</sup> Fiqh *munakahat* does not imply court elements in divorce cases, indirectly the concepts in fiqh are different from what is regulated in the marriage law. Divorce debates are still ongoing in Aceh, although they are aware of the negative impacts of the divorce. The strength of the fiqh tradition in Aceh also influences the Acehnese Muslim community to continue to follow the laws contained in fiqh books, so that sometimes divorce regulations tend to be ignored.

Research on divorce that is in direct contact between Islam and the State has been carried out by researchers, such as Muhazir's research<sup>2</sup> which is doctrinal in nature which tends to discuss the contestation between *fatwas* and marriage law in Aceh, the results of his research explain that juridically there is legal contestation which results in dualism of divorce law, although Juridically, the *fatwa* is not binding, but its presence sociologically influences the practice of divorce in Aceh. Furthermore, the research of Muhammad Salamuddin, Hamid Sarong and Muzakkir Abubakar explained that the impact of the MPU's *fatwa* on divorce without a court process has a negative impact on husbands, especially for wives.<sup>3</sup>

Jamaluddin's research on justice for women against unregistered divorces provides an explanation that unregistered divorces (out of court) will cause difficulties for the parties, especially women. It is almost certain that every divorce carried out by a husband against his wife is carried out outside the court, so husbands often do not fulfill their rights and obligations after the divorce.<sup>4</sup> Euis Nurlaelawati's research<sup>5</sup> on Muslim women and religious courts explains that in 2009 divorce in courts tended to increase and the dominance of divorce was carried out by women, from this research it can be understood that judicial institutions are the first way for women to legally separate themselves from their husbands.

Mark Cammack's research<sup>6</sup> conducted in West Java and East Java shows that the power base of fiqh is still the main basis in legalizing divorce so that the rule of law has no effect on divorce

<sup>1</sup> 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/sjkh.v1i1.1570>.

<sup>2</sup> Muhazir Muhazir, "Dualisme Peraturan Perceraian Di Aceh: Kontestasi Fatwa dan Hukum Negara," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 13, no. 2 (2020): 198–208, <https://doi.org/10.14421/ahwal.2020.13208>.

<sup>3</sup> Muhammad Salamuddin, A Hamid Sarong, and Muzakkir Abubakar, "The Impacts of a Fatwa (Edict) From Aceh Ulema Council (Mpu) Number 2 of 2015 Concerning Talak (Divorce) Without Court Proceedings," *IOSR Journal Of Humanities And Social Science* 25, no. 2 (2015):25–32.

<sup>4</sup> Jamaluddin Abdullah, Nanda Amalia, and Laila M. Rasyid, "Women And Divorce: Legal Justice Study Of Societal And Judicial Perspective Toward Unrecorded Divorce In Aceh, Indonesia," *US China Law Review* 12, no. 8 (2015), <http://www.davidpublisher.org>.

<sup>5</sup> Euis Nurlaelawati, "Muslim Women in Indonesian Religious Courts," *Islamic Law and Society* 20, no. 3 (2013): 242–271, <https://doi.org/10.1163/15685195-0010A0003>.

<sup>6</sup> Mark Cammack, Lawrence A. Young, and Tim B. Heaton, "An Empirical Assessment of Divorce Law in Indonesia," *Studia Islamika* 4, no. 4 (1997): 94, <https://doi.org/10.15408/sdi.v4i4.766>.

decisions, as well as Mufliha Wijayati's research<sup>7</sup> which emphasizes that women are subordinates in the judicial process due to limited access to courts and subordinate stigma against women. In the form of a book, Euis Nurlaelawati has also written describing that people in Cianjur consider divorce in court to be a burden for them, because they have to travel a very long distance to get to court, this is one of the triggers for divorce to occur outside the court,<sup>8</sup> Stijn Cornelis van Huis in his research conducted in the Cianjur area also explained that one of the reasons for the large number of divorce cases outside the Court is because most marriages are not registered so that divorce is not required in the Court.<sup>9</sup>

Some of these studies explain the causes of divorce and the majority of divorce cases tend to harm women, both divorces that occur in court and out of court, while in this paper the focus of the study is on the legality of divorce outside the court for the people of Aceh both juridically and sociologically. Why is this important to be reviewed in Aceh? It is based on fiqh and the Marriage Law; in 2015 the Aceh MPU *fatwa* appeared which strengthened the legal position of divorce in fiqh, ultimately causing ambiguity for the people of Aceh. There is a tendency to view that divorce as regulated in the Marriage Law and KHI (Islamic law compilation) is only for administrative purposes. Moreover, divorce for traditionalist societies is closely related to religion and belief, so it is necessary to comply with the law with the Qur'an, hadith and fiqh books produced by the Muslim scholars. On the other hand, those who are critical tend to give an understanding that Islamic texts are often interpreted in a way that suppresses social equality and social status of men and women.<sup>10</sup>

### Fiqh and the State: Formulation of Divorce Law in Indonesia

Divorce is the termination of the marriage bond between husband and wife due to several reasons. Juridically, divorce in Indonesia is regulated in the Marriage Law and the Compilation of Islamic Law (KHI), the government realizes that it is necessary to regulate the mechanism of marriage and divorce in order to regulate the administrative system and legal protection for husbands, wives and children. Divorce in the marriage law is in principle complicated, meaning that there are efforts made by the court to reconcile so that divorce does not occur, as the concept of marriage in Law Number 1 of 1974 Article 1 which states that marriage is an inner and outer bond between men and a woman with the ultimate goal of forming a happy and eternal family. At least it can be understood that in the article there are three important messages, namely; First, the legality of the relationship between men and women in a household; Second, form a happy family; Third, the eternal family.<sup>11</sup>

A happy and eternal family is the main goal in the household, meaning that there should be no violence, discrimination by both husbands and wives and vice versa.<sup>12</sup> Therefore, to safeguard

<sup>7</sup> Mufliha Wijayati et al., "Justice Brokers: Women's Experiences with Injustice and Dependence in the Divorce Process," ed. Kevin Cheng, *Cogent Social Sciences* 7, no. 1 (2021): 1-15, <https://doi.org/10.1080/23311886.2021.1966208>.

<sup>8</sup> Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, ICAS Publications Series Monographs 4 (Amsterdam: Amsterdam Univ. Press, 2010). 186

<sup>9</sup> Stijn Cornelis van Huis, "Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba" (Belanda, Leiden University, 2015). 152

<sup>10</sup> Rachel Rinaldo, "Muslim Women, Middle Class Habitus, And Modernity In Indonesia," *Contemporary Islam* 2, no. 1 (2008): 26, <https://doi.org/10.1007/s11562-007-0035-6>.

<sup>11</sup> Moh Faizur Rohman, "Implikasi Putusan Mahkamah Konstitusi Nomor 69/PUU/XIII/2015 Tentang Perjanjian Perkawinan Terhadap Tujuan Perkawinan," *Al-Daulah: Jurnal Hukum Dan Perundangan Islam* 7, no. 1 (2017): 6, <https://doi.org/10.15642/ad.2017.7.1.1-27>.

<sup>12</sup> Ayu Setyaningrum and Ridwan Arifin, "Analisis Upaya Perlindungan dan Pemulihan Terhadap Korban Kekerasan dalam

and protect against acts of violence, the government issued Law Number 3 of 2004 concerning the Elimination of Domestic Violence. This shows that the government is serious about protecting the integrity of the household from violence which in the end is fatal to the integrity of the household, but the presence of the law of PKDRT (Elimination of Domestic Violence Law) is not sufficient to protect households from acts of violence.<sup>13</sup>

Even though the government has issued a Marriage Law and KHI, there are still differences in public understanding of divorce law in Aceh. Fundamentalist Muslims think that divorce must refer to the book of fiqh *munakahat*, but for modernist Muslim society they understand that divorce refers to legal rules issued by the State. This condition certainly has implications for the practice of divorce in Indonesia. In fiqh divorce has some very strict provisions; there are several classifications in divorce which are certainly different from the marriage law and KHI.<sup>14</sup>

Divorce in the KHI and Law Number 1 of 1974 concerning Marriage do not contain the specific meaning of divorce, only in the explanation that the termination of marriage is due to death, divorce and court decisions. This provision only explains the reason for the dissolution of the marriage and does not explicitly state the meaning of divorce. Subekti provides a more specific definition of divorce with a legal perspective so that the definition given tends to be more normative.<sup>15</sup> This definition focuses more on the judge's decision so that a marriage only ends if it is decided by the judge.

In fiqh literature, the terms used for divorce are *thalaq* (repudiation), *farqu* and *Fasach*. In the Qur'an itself there are also verses that use the word *thalaq* as described in the QS. Ath-Thalaq. 65: (1) and the word *farqu* is found in QS an-Nisā '4: (130). Etymologically, *thalaq* has the meaning of breaking the bond, *thalaq* is a form of the word *fi'il mādhī* which means "a woman who has been divorced by her husband".<sup>16</sup> While the terminology meaning is releasing the marital bond or breaking the relationship between husband and wife due to the utterance of divorce, the utterance of divorce in fiqh can only be done by the husband either with clear words or with satire.<sup>17</sup>

Divorce through the *talaq* (repudiation/wives ask husbands to end the marriage) process carried out by a husband to his wife has a legal aspect; it is not automatically accepted and cannot be reconciled. In Islam, *talaq* is classified into several aspects; First. In terms of the time of its pronouncement, Islamic law does not absolutely prohibit husbands from divorcing their wives, but there are legal provisions on when it is permissible to divorce a wife and when it is forbidden. In this case, *talaq* is divided into two, namely *talaq Sunni* and *talaq bid'i*. *Talaq Sunni*, namely divorce that is handed down by the husband to the wife in accordance with the provisions of the Shari'a, in the sense that it is not contradictory or prohibited by Allah and the Sunnah of the Prophet. The scholars agree that the divorce handed down by the husband when the wife is in a state of purity from menstruation, and not having intercourse (*jima'*) with her husband is included in the *talaq Sunni*,<sup>18</sup> the legal basis used is the QS. Ath-Thalāq 65: (1).

Rumah Tangga (KDRT) Khususnya Anak-Anak dan Perempuan," *Jurnal Ilmiah Muqoddimah: Jurnal Ilmu Sosial, Politik dan Humanioramania* 3, no. 1 (2019): 10, <https://doi.org/10.31604/jim.v3i1.2019.9-19>.

<sup>13</sup> Alfitri Alfitri, "Protecting Women from Domestic Violence: Islam, Family Law, and the State in Indonesia," *Studia Islamika* 27, no. 2 (2020): 274, <https://doi.org/10.36712/sdi.v27i2.9408>.

<sup>14</sup> Muhazir, "Dualisme Peraturan Perceraian di Aceh." 199

<sup>15</sup> R Subekti, *Pokok-Pokok Hukum Perdata* (Jakarta: Intermasa, 2010).43

<sup>16</sup> Wahbah Zuhaili, *Al-Fiqh al-Islami Wa Adillatuhu*, VII (Damaskus: Dār al-Fikr al-Mu'āshir, 2008).343

<sup>17</sup> Zuhaili.343

<sup>18</sup> Ibnu Rusdi, *Bidayatul Mujtahid Wa Nihayatul Muqtashid*, trans. Al-Mas'udah, vol. 2 (Jakarta: Pustaka Al-Kautsar, 2016).116

Quoting the opinion of Ibnu Taimiyyah in the book of *fiqh sunnah lin nisa'* that the criteria for *talaq sunni* are divided into five, including:<sup>19</sup> (1) A husband divorces his wife with first declaration of *talaq* (divorce/repudiation); (2) After menstruation; (3) After bathing from menstruation; (4) Before having intercourse; (5) Not followed by another *talaq*

In Article 121 of the KHI, it is also explained that *talaq sunni* is a divorce that is permissible, namely divorce that is imposed on a wife who is not in a menstruation period and not having intercourse during that period. When you see what is wrong with *talaq sunni* and why should this type of divorce be regulated. Therefore, the important point that will be obtained is that the purpose of this provision is to protect the rights of women, so that husbands do not easily divorce their wives regardless of legal provisions and wife's rights. In addition, the law of divorce is a solution when there is an unavoidable commotion in the household, so that unwanted things do not happen, it is permissible to divorce according to the provisions stipulated in Islam.<sup>20</sup> Meanwhile, *talaq bid'i* is a type of divorce that is contrary to Islamic law, such as divorce when the wife is menstruating, pregnant or there are also those who argue that a third declaration of *talaq* which is uttered at once are considered *talaq bid'i*. *Ijma' ulama* (Muslim scholars' statements) states that *talaq bid'i* is *haram* (forbidden).<sup>21</sup>

Second, *talaq* in terms of clarity of pronunciation; in the pronunciation of *talaq* is related to the clarity of its pronunciation. So, this type of divorce is divided into two types, namely *talaq sharīh* and *talaq kināyah*; *talaq sharīh* are divorces uttered by the husband to his wife with words that directly indicate the meaning of divorce<sup>22</sup> such as "I divorce you with a first declaration" or "I divorce you". Meanwhile, *talaq kināyah* is a divorce that is uttered indirectly or through satire so that it is necessary to clarify the meaning of his words, such as the words "go back to your parents' house". *Talaq* can be pronounced directly in the form of *sharīh* and *kināyah*, but for the dumb it can be done through a sign; majority of Muslim scholars allow it through writing on condition that it is accompanied by the intention or have an intention to divorce.<sup>23</sup>

Third, divorce in terms of the husband's ability to reconcile, in this case it is divided into two, namely *talaq raj'i* and *talaq ba'in*. *Talaq raj'i* is a divorce handed down by a husband to his wife who has been married and, in this condition, the husband can refer back<sup>24</sup> to his wife without making a new contract and dowry (*tajdid an-nikāh*), the legal basis used in *talaq raj'i* is QS. Al-Baqarah. 2: (229).

"*Talaq* which is declared twice can be referred back. After that it is permissible to reconcile again in a *maruf* way or divorce in a good way. It is not lawful for you to take back something from what you have given them, unless both are worried that they will not get it. Keep Allah's laws. If you are worried that both (husband and wife) cannot keep Allah's laws, then there is no sin on either of them regarding the payment given by the wife to redeem herself. These are Allah's laws, then do not violate them. Whoever violates the laws of Allah, they are the wrongdoers."

<sup>19</sup> Malik Kamal Bin Al-Sayyid Salim, *Fiqh Sunnah Linnisa* (Arab Saudi: Maktabah Dār al-Bayan al-Hadistah, 1422).551

<sup>20</sup> Dahlan Tamrin, *Filsafat Hukum Islam* (Malang: UIN PRESS, 2007).169

<sup>21</sup> Zakiyah Hayati, "Pengaturan Talak Dan 'Iddah (Studi Komparatif Prespektif Fiqh Empat Mazhab Dan Kompilasi Hukum Islam (KHI))," *Qiyas : Jurnal Hukum Islam Dan Peradilan* 2, no. 1 (2017), <https://doi.org/10.29300/qys.v2i1.463>.

<sup>22</sup> Rusdi, *Bidayatul Mujtahid Wa Nihayatul Muqtashid*.116

<sup>23</sup> Abi Abdillah Muhammad bin Idris al-Syafi'i, *Al-Umm*, 8th ed. (Beirut: Dār Al-Kutub Al-'Ilmiyah, 2009). 206-207

<sup>24</sup> Al-Khatib Asy-Syarbaini, *Mugni Muhtāj*, 4th ed. (Beirut: Dārul Kutub Al-'Ilmiyah, 1991).496

This verse is the legal basis that allows the husband to refer to his wife if there has been divorced twice by the husband against his wife.<sup>25</sup> Meanwhile, *talaq ba'in* is divided into two namely *ba'in sughra* and *ba'in kubra*. *Talaq Ba'in sughra* is a divorce that should not be referred to like a *talaq raj'i*, but the husband may reconcile if by carrying out a new marriage contract and dowry<sup>26</sup> even though it is during the *iddah* (a period of waiting for a woman not to carry out a marriage after the death or divorce of her husband until the time limit determined by Islamic law) period as described in Article 119 of the KHI which reads:

Paragraph (1). *Talaq Ba'in Sughra* is a divorce that cannot be referred back but a new marriage contract with her ex-husband is allowed even though it is in the *iddah* period.

Paragraph (2). *Talaq Ba'in Sughra* as referred to in paragraph (1) is (a) the divorce that occurred *qabla al-dukhul*; (b) divorce with ransom or *khuluk*; (c) divorce decreed by the Religious Courts.

Thus, in the case of *talaq ba'in sughra* it does not apply like *talaq raj'i*, meaning that if the husband has mentally divorced his wife and does not perform reconciliation until the end of his *iddah* period, then if the husband changes his mind to return to his wife, it is obligatory for the husband to enter into a contract and new dowry (*tajdid an-nikāh*).<sup>27</sup> Unlike the *ba'in kubra* which is the divorce of the husband to his wife with third declaration at once whether it is uttered or not, the legal impact of the *talaq ba'in kubra* is that it cannot be referred back by her ex-husband unless the ex-wife remarries to another man and divorced after the occurrence of intercourse (*muhallil*),<sup>28</sup> the legal basis used in *talaq ba'in kubra* is QS. Al-Baqarah. 2: (230), this is also the same as KHI Article 120 which states that “*Talaq ba'in kubra* is a divorce that occurs for the third time. This type of divorce cannot be referred back and cannot be remarried unless the marriage is carried out after the ex-wife marry someone else and then divorce *ba'da al dukhul* and the *iddah* period ends.”

Fourth, *Talaq* in terms of the number of pronunciations. In the Religious Courts practice, even though the husband pronounces third declaration divorce, it is still decided to *talaq ba'in shugra*. The concept applied by the Syar'iyah Court is based on the principle of “complicated” divorce.<sup>29</sup> In other words, it is called “complicated” because in the state process divorce, the State seeks mediation so that divorce does not occur, even though the divorce has been decided, it is declared *talak ba'in shugra* (even though third declaration divorce has occurred outside the trial) which allows the husband to reconcile. In contrast to the Muslim scholars of the *Shafi'i mazhab* which states that when a husband declared third divorce at once on his wife, then *talaq ba'in kubra* apply, such a form of divorce is permissible, this opinion is the same as Imam Malik and Abu Hanifah who argue that third declaration divorce is agreed as a third declaration divorce, but it is *haram* (forbidden) as has been stipulated in Islamic law.<sup>30</sup> The opinion of the *Imam Mazhab* is different from that of Ibnu Taimiyah, who argues that third declaration divorce which are pronounced at the same time is considered one declaration

<sup>25</sup> Hemnel Fitriawati and Zainuddin Zainuddin, “Talak Dalam Perspektif Fiqh, Gender, Dan Perlindungan Perempuan,” *Yinyang: Jurnal Studi Islam Gender Dan Anak* 15, no. 1 (2020): 59–74, <https://doi.org/10.24090/yinyang.v15i1.3584>.

<sup>26</sup> Ibnu Qadamah, *Al-Mughni*, IV (Beirut: Dār al-Fikr, 1994).293

<sup>27</sup> Fadhilatul Maulida and Busyro Busyro, “Nafkah Iddah Akibat Talak Ba`In Dalam Perspektif Keadilan Gender (Analisis Terhadap Hukum Perkawinan Indonesia),” *Al-Hurriyah : Jurnal Hukum Islam* 3, no. 2 (2018): 113–30, <https://doi.org/10.30983/alhurriyah.v3i2.720>.

<sup>28</sup> Malik Kamal Bin Al-Sayyid Salim, *Fiqh Sunnah Linnisa* (Arab Saudi: Maktabah Dār al-Bayān al-Hadīstah, 1422).557

<sup>29</sup> Zainuddin Ali, ed., *Hukum perdata Islam di Indonesia* (Jakarta: Sinar Grafika, 2012).8

<sup>30</sup> Zuhaili, *Al-Fiqh al-Islami Wa Adillatuhu*.410

divorce and this type of divorce is considered *haram* (forbidden), the reason used by Ibnu Taimiyah is because there is no clear argument about the position of third declaration divorce being pronounced at once,<sup>31</sup> while Ibnu Hazm argues that third declaration divorce is agreed as declared three times if the husband intends.

What provisions in fiqh have undergone legal modernization as outlined in the Marriage Law and KHI, meaning that these regulations are representative of *munakahat fiqh* even though they have undergone many changes and differences with *munakahat fiqh*. The significant difference lies in the divorce process and the pronouncement of *talaq*. In the divorce legal system in Indonesia, it requires court elements in every legal divorce and divorce process, namely when spoken in front of the court, of course, these differences are still reaping debate which results in the neglect of divorce law in Indonesia.

### Divorce without Court: The Phenomenon of Divorce Practices in Aceh

Aceh has specificity in the application of Islamic law; this was achieved based on the agreement between the Indonesian government and GAM (Free Aceh Movement).<sup>32</sup> As a result of the agreement, many regulations and government agencies changed and established new offices such as, DSI (Islamic Law Service), WH (Sharia Police), MPU (Ulema Consultative Assembly), the Syar'iyah Court<sup>33</sup> with the aim of supporting the enforcement of Islamic law, as well as the Religious Courts which had changed to the Syar'iyah Courts. Despite the change in name and absolute authority, the divorce regulations still follow national regulations, namely the marriage law and KHI. In the case of divorce, the state and the Muslim community in Aceh have their own mechanism, for those who follow state law the mechanism refers to following the rules of Law Number 1 of 1974. On the other hand, for the Muslim community who follows the provisions of fiqh, it refers to the provisions of the divorce law in fiqh.

The divorce procedure carried out by the aceh community outside the court through several stages which are almost the same as those carried out in religious courts, the stages in question are; First, the registration stage, at this stage the party making the divorce reports of the occurrence of a divorce between husband and wife to the *Imam Gampong* (village religious leader) along with other village officials, by telling about the problems they did and *Imam Gampong* will receive the verbal report.

Second, the next stage is mediation, at this stage *Imam Gampong* mediates by summoning the following litigants if there are witnesses. The *Imam Gampong* will sometimes confirm the information provided by the husband and wife, including the method by which he declared the divorce, complete with the wording of the divorce and the number of divorces have been declared, usually this process will result in a decision by analyzing it using the fiqh book, if the couple have not declared the divorce yet, then a peaceful effort will be taken, but if the divorce has been carried out, *Imam Gampong* will provide a recommendation that the divorce has occurred.

<sup>31</sup> Ibnu Taimiyah, *Majmu'ah al-Fatawa*, XXXIII (Kairo: Dar Al-hadist, 2006).7

<sup>32</sup> Arskal Salim, *Challenging The Secular State: The Islamization Of Law In Modern Indonesia* (Honolulu: University of Hawaii Press, 2008). 150-152

<sup>33</sup> Arskal Salim, "Dynamic Legal Pluralism in Indonesia: Contested Legal Orders in Contemporary Aceh," *The Journal of Legal Pluralism and Unofficial Law* 42, no. 61 (2010): 8-9, <https://doi.org/10.1080/07329113.2010.10756640>.

The third is the stage of giving the divorce decision made by the Imam Gampong and other religious leaders, in accordance with the information that has been collected, the Imam will conclude and declare that the divorce has fallen in accordance with religious provisions and will be given a firm statement that the couple should not stay together, however, even without a written stipulation as in the court's decision, the community has understood and complied with what has become the custom and the divorced couple will also voluntarily implement it.<sup>34</sup> This is obviously different from what is regulated in marriage law in Indonesia.<sup>35</sup>

Divorce out of the court is still carried out by the Acehnese people in general, they still strongly believe that this divorce case is a very sacred matter and cannot be used as a trivial act, consciously or not, if the word of divorce has been pronounced then the divorce is religiously valid. As has been explained in the fiqh books that have been passed down from generation to generation, it is believed and guided by the Acehnese people. Obedience to religious rules for the people of Aceh is very strong and this is the basis for behavioral guidelines in everyday life, as well as in the case of divorce, the community still strongly adheres to the rules of fiqh not to the marriage law. The results of interviews with judges at the Syar'iyah Court obtained information that on average divorce cases processed in court were cases that had been carried out *talaq* in the village (outside court)<sup>36</sup> and in examining these divorce cases, the judges had to interpret the law differently from what should happen.

The judges of the Syar'iyah Court do not have the option of rejecting the lawsuit/application for divorce that occurs outside the court, because for the people of Aceh in general they understand that the court's decision is only an administrative requirement, and those who judge the validity or invalidity of the divorce are religious figures. In these cases, the judges will conduct legal *ijtihad* in accordance with the procedural law applicable to the Syar'iyah Court; the judges must also accommodate the existing problems in order to provide a sense of justice for the community, in accordance with the functions of the Court as regulated in the applicable legislation.

The majority of divorce cases carried out in court are civil servants who are bound by government regulations. The people of Aceh are still dominant in doing divorce in accordance with a tradition that has been believed for a long time, it can be observed that the living tradition in society is a religious tradition by setting aside the Marriage Law and KHI, most people in resolving divorces are enough just to get the recognition of religious leaders, so the divorce rate what actually happens in society will be far from what was recorded and decided by the Syar'iyah Court, the researchers obtained the information from several KUA (Religious Affairs Office) stated that in a year they only get 2 to 3 divorce decisions sent by the Syar'iyah Court,<sup>37</sup> whereas in general we know that in society there are many divorces that do not get the legality of state law, here is also information that the average decision sent by the Syar'iyah Court to the KUA is divorce with civil servant status, the rest is for people who do not need a court decision. Therefore, they do not report it to the court.<sup>38</sup>

Divorce that occurs in Acehnese society certainly has its own arguments, in addition to the reasons for the complexity of divorce matters in court; the role of religious leaders in society is very

<sup>34</sup> Imam Gampong Dalam Wilayah Kec. Madat Kab. Aceh Timur, July 25, 2020

<sup>35</sup> Khaidri, KUA Kec. Madat, July 23, 2020.

<sup>36</sup> Riki Dermawan, Hakim Mahkamah Syar'iyah Lhoksukon, July 23, 2020.

<sup>37</sup> Mahdi, KUA Meurah Mulia Kab. Aceh Utara, July 24, 2020.

<sup>38</sup> Muhammad Nawawi, Hakim Mahkamah Syar'iyah Bireuen, July 26, 2020.



influential on the occurrence of divorce outside the court. In the matter of religion, the Acehnese are very dependent on religious leaders, one very real example in social life is every moment related to divorce, the community will ask for the opinion of *Imam Gampong*, this aims to give a decision on the status of divorce.<sup>39</sup> Therefore, the public's obedience to what is said by religious leaders is very strong and this has an effect in carrying out family law.<sup>40</sup>

The results of this study indicate that the phenomenon of divorce outside the court is still a dilemma for the community and the government. On the one hand, the divorce is religiously legal but does not have state legality; on the other hand, there is no legal protection for the wife and husband as a result of the divorce. When it is understood again that divorces carried out before the court have the aim of creating justice, benefit, administrative order, legal protection and peace for the community.<sup>41</sup>

### Legality of Divorce Out of Court in Aceh

The religious courts in Aceh have undergone a transformation into the Syar'iyah Court; the transformation is certainly not just a mere name change, but also an increase in absolute authority. This follows the status of Aceh which applies Islamic law and *Qanun Jinayat* (Regional Islamic Law), so that the authority of the Syar'iyah Court includes handling Islamic criminal cases which have been regulated in Qanun Number 6 of 2014 concerning *Jinayat*. Nowadays, the divorce at the Syar'iyah Court in Aceh continues to increase with several factors both related to the economy, domestic violence and infidelity.

**Table 1. Number of Divorce Cases at the Aceh Sharia Court**

| Year | REPORT ACCEPTED |                  | REPORT REJECTED |                  |
|------|-----------------|------------------|-----------------|------------------|
|      | Talaq Divorce   | Judicial Divorce | Talaq Divorce   | Judicial Divorce |
| 2020 | 1.694           | 5.003            | 1.558           | 4.532            |
| 2019 | 1.724           | 4.976            | 1.555           | 4.493            |
| 2018 | 1.532           | 4.000            | 1.427           | 3.752            |

Source. Aceh Sharia Court Documents

Based on Table 1, it can be observed that divorce cases are increasing every year. Basically, divorces carried out in court are dominated by government employees, because they are bound by the divorce rules of Government Regulations No. 45 of 1990 concerning Marriage and Divorce for Civil Servants. Based on this regulation, it further clarifies the mechanism for divorce and marriage that must be carried out by civil servants. For those who are not bound by the government, they do not have strict supervision in the divorce process, so they can divorce as they please. For those who have legal awareness and understanding of the law, they will choose the court as an institution that has legality in deciding divorce.

<sup>39</sup> Salahuddin, Ketua MPU Kota Langsa, July 15, 2020.

<sup>40</sup> Muhsin, KUA Simpang Jernih Aeh Timur, July 24, 2020.

<sup>41</sup> Dahwadin Dahwadin et al., "Hakikat Perceraian Berdasarkan Ketentuan Hukum Islam Di Indonesia," *YUDISIA : Jurnal Pemikiran Hukum dan Hukum Islam* 11, no. 1 (2020): 87, <https://doi.org/10.21043/yudisia.v11i1.3622>.

In general, the provision of divorce outside the court is not legally recognized by the State, this provision has been regulated in the Marriage Law Number 1 of 1974, this provision is enforced with the aim of protecting the rights of women in general and of wives in particular in the system. With this provision, of course, every married couple who wants to divorce must go through a judicial process.

Through the judiciary, it will be seen the role of the State in regulating and creating good public relations between human beings, with the presence of the court it will provide a legal certainty for the husband and wife relationship in divorce. In the concept of divorce law in Indonesia, the one who has the right to give legality to divorce status is the Syar'iyah Court, not a religious figure,<sup>42</sup> so that divorces carried out outside the court are considered to have never happened and do not break the marriage bond. However, in practice the force of law that has long been practiced by the Acehnese Muslim community cannot be avoided. Fiqh and customary law are legal references for the people of Aceh in deciding divorce cases. The difference in point of view has resulted in differences in the settlement of divorce cases in Aceh. At least the people of Aceh in this case are divided into three classifications;

First; traditionalist Muslim communities who tend to use fiqh books as the teachings of *ahlussunnah wal jamā'ah*,<sup>43</sup> they understand that laws related to religion must refer to fiqh studies, fiqh books with the *Mazhab Syafi'i* are the main reference for the majority of Acehnese people.<sup>44</sup> This has also been stated by Snouck Hurgronje that the Acehnese are followers of *taqlid* to Syafi'i fiqh.<sup>45</sup> The *Mazhab Syafi'i* is believed by the people of Aceh to be Muslim scholars who have prudence in understanding Islamic law.<sup>46</sup>

The role of the Muslim scholars in providing Islamic legal doctrine has also strengthened the development of the law to become the main reference for the Acehnese Muslim community.<sup>47</sup> This is only natural, because before Indonesia's independence, Aceh had first implemented state law with fiqh nuances, coupled with the *Qanun* Number 8 of 2014 and the *fatwa* of the Aceh MPU Number 2 of 2015 concerning *Talaq*, further strengthening the religious identity in Aceh with the thought *mazhab Syafi'i*.<sup>48</sup> The doctrine of fiqh taught to the people of Aceh is inherent in every religious activity such as in matters of *zakat*, marriage, marriage guardians and others. Likewise in the case of divorce, the tendency to use fiqh law is more understood as a sacred law that must be obeyed. In this case, fiqh law is stronger than state law. So, divorce out of court is not a taboo.

<sup>42</sup> Latifah Ratnawaty, "Perceraian Di Bawah Tangan Dalam Perspektif Hukum Islam Dan Hukum Positif," *YUSTISI* 4, no. 1 (2017): 115, <https://doi.org/10.32832/yustisi.v4i1.1126>.

<sup>43</sup> Ismail Yahya, "Kebangkitan Muslim Tradisional Di Surakarta," *IBDA` : Jurnal Kajian Islam dan Budaya* 14, no. 1 (2016): 50-64, <https://doi.org/10.24090/ibda.v14i1.624>.

<sup>44</sup> David Kloos, *Becoming Better Muslims: Religious Authority And Ethical Improvement In Aceh, Indonesia*, (Princeton: Princeton University Press, 2018).37

<sup>45</sup> Christian Snouck Hurgronje, *The Acehnese*, vol. 1 (Leyden: LATE E. J. BRILL, 1906). 344-345

<sup>46</sup> Damien Kingsbury, "The Free Aceh Movement: Islam and Democratisation," *Journal of Contemporary Asia* 37, no. 2 (2007): 167, <https://doi.org/10.1080/00472330701253759>.

<sup>47</sup> Amirul Hadi, *Islam And State In Sumatra: A Study Of Seventeenth-Century Aceh*, vol. 48, *Islamic History and Civilization : Studies and Texts* (Leiden ; Boston: Brill, 2004). 159

<sup>48</sup> Bakri and Antoni, "Talak di Luar Pengadilan Menurut Fatwa Mpu Aceh No 2 Tahun 2015 Tentang Talak."

**Figure 1. Scheme of Traditional Society Divorce Process**

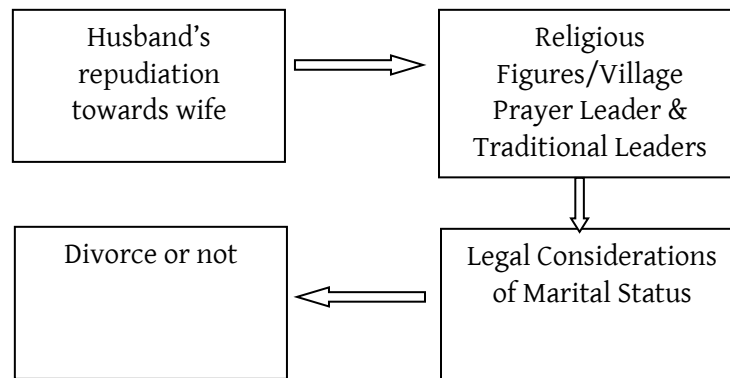


Figure 1. Illustrates that the role of religious leaders and traditional leaders also influences the process of legal interpretation and legitimacy of divorce law.<sup>49</sup> The religious leaders in question are those who have religious abilities, religious leaders who have legitimacy with their knowledge can decide the law whether the divorce that has been carried out is legal or not.<sup>50</sup> Of course, besides being practical and easy, this kind of divorce process does not take much time and does not require a lot of money. This paradigm also encourages the practice of divorce outside the court.

The strong nuances of fiqh in the legal tradition in Aceh have been proven by Bernard Adeney in his writings that in the context of trials in religious courts one cannot ignore fiqh and customary law; it means that there is a need for negotiations with more authoritative laws in society with state law.<sup>51</sup> In this case, Bernard gave an example of the inheritance case which positions men as important heirs in the distribution of inheritance. This does not only apply to inheritance law alone, in terms of divorce the husband has the authoritative right to impose divorce, even the divorce carried out by the wife does not apply, this is the same as the concept of divorce as regulated in the fiqh book,<sup>52</sup> even the husband has the freedom to impose divorce without having to go to court.

Traditionalist societies or can also be referred to as fundamentalist societies with *mazhab* fiqh backgrounds have a major influence on law enforcement, because those who obey Islamic law tend not to follow the rule of law when it is considered contrary to Islamic law. It is as said by Lawrence M. Friedman that social forces are constantly working to destroy the law.<sup>53</sup>

Second, the modernist Muslim community understands the importance of the legality of state law in divorce. Administrative aspects and legal certainty are their concern in every legal process. Modernist Muslims are more open to laws made by the government, modern Muslim communities have legal awareness and cannot be separated from the influence of law, they realize that social life is bound by the rule of law and legal sanctions. Therefore, the law resulting from the court is understood as a strong form of legality.

Modern Muslim society is influenced by educational background and level of understanding of

<sup>49</sup> Andrée Feillard, "Indonesian Traditionalist Islam's Troubled Experience with Democracy (1999-2001)," *Archipel* 64, no. 1 (2002): 117-44, <https://doi.org/10.3406/arch.2002.3728>.

<sup>50</sup> Iva Yulianti Umdatul Izzah, "Perubahan Pola Hubungan Kiai Dan Santri Pada Masyarakat Muslim Tradisional Pedesaan," *The Sociology of Islam* 1, no. 2 (2011): 31-39.

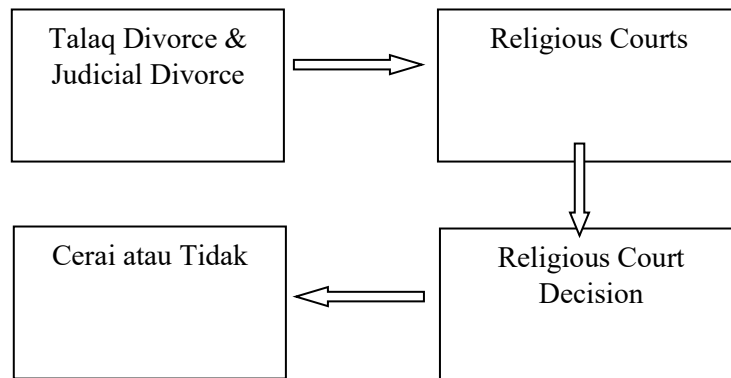
<sup>51</sup> Bernard Adeney-Risakotta, "Traditional, Islamic and National Law in the Experience of Indonesian Muslim Women," *Islam and Christian-Muslim Relations* 27, no. 3 (2016): 303-18, <https://doi.org/10.1080/09596410.2016.1186422>.

<sup>52</sup> Hemnel Fitriawati and Zainuddin Zainuddin, "Talāk Dalam Perspektif Fiqh, Gender, Dan Perlindungan Perempuan," *Yinyang: Jurnal Studi Islam Gender Dan Anak* 15, no. 1 (2020): 60-61, <https://doi.org/10.24090/yinyang.v15i1.3584>.

<sup>53</sup> Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975).15

state law. Courts are used to resolve disputes and legal issues both related to criminal and civil law, as well as in the case of divorce, divorce in court is used by people who understand the law and have legal awareness, so that divorce for them can only be done in court, with the aim of getting legal certainty and legal protection of the rights that must be obtained.

**Figure 1.1 Scheme of the Legality of the Status of Divorce in Modern Society**



Based on Figure 1.1 shows that the court is used not only for formality, but to ensure the clarity of divorce status legally admitted by the state, this is a form of legal legitimacy for divorce status, most of those who use the court are those who are not only aware of the law but those who have ties to the state, such as civil servants, police and armed forces. They are bound by status as state servants, so that when divorce is not carried out in court, it will have an impact on their work.

Third, Neo-modernist Islamic society is a legal society that uses fiqh and state law, for them the law will be used when there is an interest. Likewise in divorce, the court will be used to legalize divorce when needed; this happens a lot among the people of Aceh such as in the case of divorce *isbat*. The importance of divorce *isbat* is carried out to legalize divorce with the aim of being allowed to carry out new marriages. Because when you can't prove the legality of divorce, you can't get a new marriage because it's considered someone's husband. There are several consequences that arise from divorce outside the court, namely, the absence of legal certainty for inheritance assets, *mut'ah* rights, *iddah* expenses, *hadhanah* costs.<sup>54</sup> and not being able to legally marry formally.<sup>55</sup>

As Friedman said, "Social forces are constantly at work on the law-destroying here, renewing there; invigorating here, deadening there; choosing what parts of "law" will operate, which parts will not; what substitutes, detours, and bypasses will spring up; what changes will take place openly or secretly. For want of a better term, we can call some of these forces the legal culture. It is the element of social attitude and value. The phrase "social forces" is itself an abstraction; in any event, such forces do not work directly on the legal system".<sup>56</sup> In this condition, society views the law as the principle of benefit and if it is felt that it does not have a significant impact, then state law will be set aside.

<sup>54</sup> Cut Elidar, Rini Fitriani, and Liza Agnesta Krisna, "Dampak Perceraian Di Luar Mahkamah Syar'iyah Dalam Kehidupan Di Masyarakat Gampong Alue Bu Tuha Kecamatan Peureulak Barat Kabupaten Aceh Timur," *Jurnal Hukum Samudra Keadilan* 12, no. 2 (2017): 207-208.

<sup>55</sup> Ramadhan Syahmedi Siregar, "Dampak Perceraian Yang Tidak Sesuai Dengan Prosedur Perundang-Undangan," *FITRAH: Jurnal Kajian Ilmu-ilmu Keislaman* 1, no. 1 (2015): 171, <https://doi.org/10.24952/fitrah.v1i1.333>.

<sup>56</sup> Friedman, *The Legal System*.<sup>15</sup>

**Figure 1.3 The Legality Scheme of the Divorce Status of Neomodern Society**

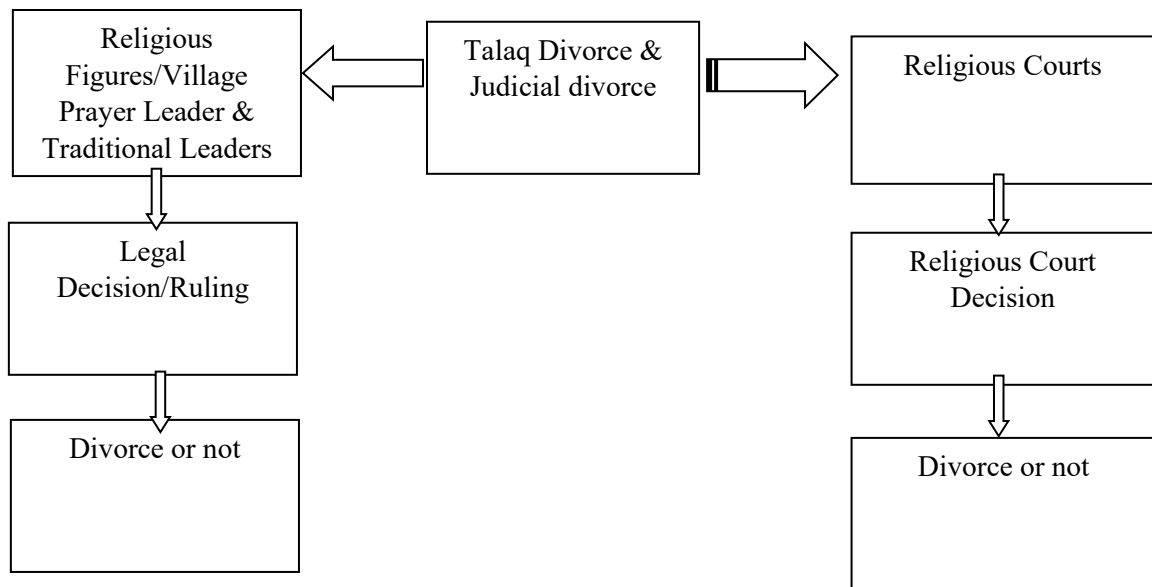


Figure 1.3 illustrates that the main step taken is traditional divorce by involving elements of religious leaders and traditional elements in providing legitimacy to the divorce status. When pressed with conditions where you have to prove divorce status, then the court is the main choice by not ignoring customary law and fiqh. In general, people use the courts as legitimacy for divorces carried out outside the court for administrative needs, such as new marriages that the state wants to recognize, demands for the distribution of joint property and the right to support children. Acehese Muslim women do not really care about the *iddah* living cost because it is related to the self-esteem of women who feel they can meet their own needs without any help from their ex-husbands, sometimes this triggers women's indifference to their divorce status.

The phenomenon of divorce outside the court actually continues to this day, even though there are provisions for divorce and religious courts, sometimes most divorces are carried out by wives who are aware of both religion and state. On the one hand, wives sometimes tend to become victims in every divorce case, because for them the absence of the right to divorce causes them to become subordinates in divorce cases. The only way that can be taken is through the courts. In divorce cases that are carried out out of court, wives who are aware of their rights will seek court proceedings as a form of protection of their rights.

## Conclusion

In fact, divorce harms women a lot, many studies confirm that divorces carried out outside the court and in court do not pay attention to women's interests, and even divorce without a court decision is very detrimental to women. Divorce in Aceh based on the data obtained shows that divorce out of court is the main choice. Divorce without involving the court is in fact still practiced in the divorce process, there are several conditions that support the occurrence of divorce outside the court, among others; because of the power of fiqh in divorce practices that do not involve court elements in the divorce process, the legitimacy of the MPU *fatwa* on the validity of divorce outside the court, the distance from the courts, the tendency for divorce in villages to involve religious leaders in

justifying divorce status. Divorce before the court will be carried out when conditions require clarity of divorce status. This certainly proves that the trend of divorce in Aceh still dominates outside the Religious Courts.

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