

LEGAL EDUCATION ABOUT THE MARRIAGE OF WOMEN WITHOUT DIVORCE CERTIFICATE AND PREVIOUSLY UNREGISTERED MARRIAGES

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ABSTRACT

Marriage is a contract that justifies a man and a woman, with a marriage contract to build a happy and prosperous family. The marriage process has been regulated in Law Number 1 of 1974 that every marriage must be carried out according to religious provisions and must be recorded. The purpose of this study is to find out how the marriage process for women who were previously married without being recorded and divorced outside the Religious Court so that they do not have a divorce certificate. This study uses a normative juridical method. The results showed that for women whose marriages were not recorded and divorced outside the Religious Courts so that they did not have a divorce certificate, to enter into a new marriage the woman had to file a marriage isbath for divorce.

A. INTRODUCTION

Marriage or marriage is a contract that justifies association and limits the rights and obligations between a man and a woman who is not a *mahram*¹. A marriage which is carried out on the basis of mental, physical and spiritual readiness is used as a barometer of the perfection of an ideal between the two brides in building their household mahligai. The marriage law includes a voluntary principle. Law Number 1 of 1974 concerning marriage, for example, states: "*marriage must be based on the approval of the two prospective brides*²." Therefore, marriage has the intention that a husband and wife can form an eternal and happy family, and obtain approval from both prospective husband and wife, without any coercion from any party.³

Nikah comes from Arabic, namely *Nikaahan* which is *masdar* from the verb *Nakaha*. The similarity is *Tazawwaja* which is translated into Indonesian as marriage⁴. According to the general Indonesian dictionary,

1 Dr Hj. Iffah Muzammil, Fiqh Munakahat (Hukum Pernikahan Dalam Islam), *Journal of Chemical Information and Modeling*, Vol. 53, No. 9, 2019;

2 Indonesia, *Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan*, Indonesia, 1974, https://bhpjakarta.kemendikham.go.id/attachments/unduh/Undang-Undang_Nomor_1_Tahun_1974_Tentang_Perkawinan.Pdf.

3 Asman Asman, Marilang Marilang, and Kurniati Kurniati., Existence of Marriage Agreements in Islam Development Studies in the Community of Malay Border Indonesia-Malaysia, *Jurnal Ilmiah Al-Syir'ah*, Vol. 19, No. 1, 2021

4 Atabik Ali, *Kamus Al-Ashry: Kamus Kontemporer Arab Indonesia*, Karya Grafika, Yogyakarta, 2003;

marriage is an agreement between a man and a woman to be legally married.⁵

Meanwhile, according to the scholars, each has its own meaning of marriage. According to *Hanafi* scholars, "Marriage is a contract that has a meaning for something pleasant which is done intentionally"⁶. According to Maliki scholars define marriage as follows, "Nikah is a contract that contains legal provisions solely to allow *watha*, have fun and enjoy what is in a woman he marries"⁷. According to Sayyid Sabiq: "Marriage is a method chosen by Allah as a way for humans to have children, reproduce and survive, after each partner is ready to play a positive role in realizing the purpose of marriage".⁸

According to the Marriage Law Number 1 of 1974 in Article 1 "marriage is an inner and an outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on the One Godhead"⁹. In the Compilation of Islamic Law (Inpres Number 1 of 1991) Article 2 explains that "marriage according to Islam is a marriage, namely a very strong contract or *mitsaqan ghalidzan* to obey Allah's commands and carry it out as worship"¹⁰. So based on some of the above inductions, marriage is a bond or contract that justifies or allows intercourse between men and women.¹¹

To form a prosperous family, marriage is needed. Without a legal marriage in accordance with religious norms and applicable regulations. The strength of the marriage that is enforced and fostered by the husband and wife is very dependent on the will and intentions of the husband and wife who carry out the marriage. Therefore, in a marriage, it is necessary to have inner and outer love between the husband and wife¹². Marriages that are built with false love (not born and inner), then such marriages usually do not last long and end in a divorce. If a marriage that has ended in a divorce, the one who bears the consequences is the whole family, which is usually very concerned.¹³

In principle, no one wants their marriage to end in divorce. No member of society expects his family to end in divorce, Islamic law teaches that divorce is a lawful act but is very hated by Allah. One of the principles in the marriage law is to make it difficult for divorce to occur.¹⁴

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- 5 Ananda Santoso, Kamus Lengka Bahasa Indonesia, *Kamus Lengka Bahasa Indonesia*, 2000;
 - 6 Abdurrahman Al-Jaziri, *Fiqh Empat Madzab, Al-Fiqh' Alal Madzah Ibil Arba'ah*, 1994;
 - 7 Muhammad Jawad Mughniyah, Fiqih Lima Mazhab, Terj, *Masykur AB, Afif Muhammad, Dan Idrus Al-Kaf. Jakarta: PT. Lentera Basritama*, 2000.
 - 8 Sayyid Sabiq, *Fiqh Sunnah Jilid 2*, in *Cet. Ke-3*, 2011.
 - 9 Indonesia, *Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan*
 - 10 Indonesia, *Kompilasi Hukum Islam*, Nuansa Aulia, Bandung, 2017
 - 11 Elizabeth A. Foyster, *Manhood in Early Modern England: Honour, Sex and Marriage, Manhood in Early Modern England: Honour, Sex and Marriage*, 2014
 - 12 A. Plaut, Reflections on Not Being Able to Imagine, *Analytical Psychology: A Modern Science*, 2018
 - 13 H Abdul Manan and S SH, *Aneka Masalah Hukum Perdata Islam Di Indonesia*, Prenada Media, 2017
 - 14 Indonesia, *Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan*.

The novelty of this topic from this research from previous research is the object of research that focuses on the legal problems of marriage for women who have previously been married without being recorded and divorced outside the Religious Courts so that they do not have a divorce certificate.

B. RESEARCH METHODS

This normative juridical research examined and discussed legal science doctrines and principles using statutory and conceptual approaches. It was done by identifying the rules regarding the protection of women's rights in the court, namely Law no. 1 of 1974, KHI, as well as journals and articles regarding the protection of women's rights and their fulfillment in the Religious Courts.

The approach used in this study was conceptual and statutory, by examining Al-Quran, Al-Hadits, Law no. 1 of 1974, KHI. The data collection technique was a literature study, by collecting secondary data in the form of primary legal materials, Al-Quran, Al-Hadits, Law no. 1 of 1974, KHI and the decision for the lawsuit and talaq divorce and at Surabaya Religious Court, and secondary journal material related to the themes studied.

The data collected were grouped and analyzed by qualitative descriptive analysis, by describing the data obtained from the literature review, conceptualizing, and concluding.

C. RESULTS AND DISCUSSION

1. Understanding Basic and Law of Divorce

In Arabic, it explains that divorce is from *lafadz* الطلاق meaning divorce, letting go or leaving. Divorce in the Big Indonesian Dictionary, comes from the word divorce, which means separation or the release of marital bonds between husband and wife.¹⁵

The Hanafi and Hanbali madzab have similarities in defining divorce, namely: "divorce is the release of marriage bonds directly or for the future with special pronouncement". According to the Maliki madzab: "Talak is a legal trait that causes the loss of the lawful relationship between husband and wife"¹⁶. Meanwhile, according to the *Syafi'i madzab*: "divorce is the release of the marriage contract with the pronouncement of *talaq*". Sayid Sabiq defines divorce as "an attempt to break the bonds of marriage and end the marital relationship".¹⁷

Whereas in Law number 1 of 1974 Article 28 Paragraph (1) what is meant by divorce is "the cancellation of a marriage, starting after a court decision has permanent legal force and is valid from the time the marriage takes place". In the Compilation of Islamic Law the definition of

15 dkk. Fatya Permata Anbiya, *Kamus Besar Bahasa Indonesia Edisi Kelima*, Badan Pengembangan Dan Pembinaan Bahasa Kementerian Pendidikan Dan Kebudayaan Republik Indonesia, 2014.

16 Zakiyah Hayati, Pengaturan Talak Dan 'Iddah (Studi Komparatif Prespektif Fikih Empat Mazhab Dan Kompilasi Hukum Islam (Khi), *Qiyas: Jurnal Hukum Islam Dan Peradilan*, Vol. 2, No. 1, 2017

17 Sabiq, *Fiqih Sunnah* Jilid 2.

divorce is contained in Article 117 "Talak is a husband's pledge before a Religious Court trial, which is one of the reasons for the breakup of a marriage".¹⁸

Based on some of the definitions above, the writer concludes that divorce is an act which is one of the consequences of breaking the ties of a husband and wife marriage by taking a vow of divorce in front of a court which eliminates the lawfulness of husband and wife relationships.¹⁹

Legal basis in the Qur'an as in the Word of God:

يَا أَيُّهَا النَّبِيُّ إِذَا طَلَقْتُمُ النِّسَاءَ فَطَلِّقُوهُنَّ لِعَدَّتِهِنَّ وَأَحْصُوا الْعِدَّةَ وَاتَّقُوا اللَّهَ رَبَّكُمْ لَا تَخْرِجُوهُنَّ مِنْ بُيُوتِهِنَّ وَلَا يَخْرُجْنَ إِلَّا أَنْ يَأْتِيَنَّ بِفَاحِشَةٍ مُّبِينَةٍ وَبِئْسَ مَا كَانُوا يَفْعَلُونَ
اللَّهُ وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَقَدْ ظَلَمَ نَفْسَهُ لَا تَدْرِي لَعَلَّ اللَّهُ يَحْدِثَ بَعْدَ ذَلِكَ أَمْرًا

"O Prophet, when you divorce your wives then you should divorce them when they can (face) their (reasonable) iddah and calculate the time of the iddah and fear Allah your Lord. Do not take them out of their homes and do not (allowed) them to go out unless they do clear abominations. These are the laws of Allah and whoever violates the laws of Allah, then indeed he has wronged himself. You don't know that maybe Allah will make after that something new." (Surat At-Thalaq: 1)²⁰

In Islam, divorce is permissible (mubah) if the marital relationship can no longer be maintained. In this case the Prophet said:

أبْغَضَ الْحَلَالِ إِلَى اللَّهِ الطَّلَاقُ

"The most hated lawful act by Allah is divorce". (Narrated by Abu Dawud and Ibn Majah and considered authentic by Imam Al-Hakim)²¹

The legal basis for divorce is also regulated in Law Number 1 of 1974 concerning Marriage which contains the basic substance of divorce law in Indonesia article 38, marriage can be broken because:

- a. Death;
- b. Divorce; and
- c. On the decision of the Court.²²

Based on several legal sources, the divorce law (Talak) is divided into 4 (four), namely:

a. *Wajib*

If there is a dispute between husband and wife and divorce is used as a goal to resolve the conflict between husband and wife if each party sees that divorce is the only way to end the dispute. In

18 Indonesia, *Kompilasi Hukum Islam*.

19 Judith Areen, *Uncovering the Reformation Roots of American Marriage and Divorce Law*, *Yale Journal of Law and Feminism*, Vol. 26, 2014

20 Departemen Agama RI, *Al Quran Dan Terjemahan, Al-Qur'an Terjemahan*, 2020.

21 Isham Musa Hadi, *Bulughul Maram -Terjemah Indonesia* (Amman, n.d.).

22 Indonesia, *Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan*.

addition to the *syiqaq* in the *Ila case* where the husband swears not to interfere with his wife, it can also require divorce.²³

b. Sunnah

Divorce is sunnah if the wife is morally corrupt, commits adultery or violates religious prohibitions or leaves religious obligations, such as leaving prayer, fasting, the wife does not " *iffah* (protect herself, behave dishonorably). This is because such a wife will degrade the dignity of religion, disturb the husband's bed and not guarantee the safety of the child being born.²⁴

c. Haram

Divorce is unlawful if it is not done because of a demand and brings harm to the husband and wife and does not provide good for both of them.²⁵

d. Makruh

Based on the hadith which stipulates that divorce is a lawful way that Allah hates the most, that is, it is hated if there is no justified reason, while the Prophet did not forbid it also because divorce (talak) can eliminate the benefits contained in marriage²⁶. Divorce is the last alternative as an emergency door that can be taken when the ark of domestic life can no longer be maintained in its integrity and continuity. As a last resort, Islam shows that before the divorce, peace efforts are made between the two parties, because the marriage bond is the most sacred and solid bond. Even though Islam justifies divorce, Allah SWT himself hates it. Therefore, divorce is better avoided.

2. Divorce Outside Religious Courts According Fiqh

For Muslims, marriage is not only considered sacred, but also means worship, because family life, in addition to preserving the survival of human children, also ensures social stability and a dignified existence for men and women. Marriage has a noble purpose and noble motive, because marriage is a place of love, affection and intimate reciprocal relationship between husband and wife. According to the Madzhab circles, the most important thing is that the marriage is fulfilled in harmony and the conditions of the marriage are carried out, then the marriage is considered valid.²⁷

There are differences of opinion about the meaning of marriage, but from all the formulations put forward, there is one element which is

23 Elyanur, Analisis Komperatif Pendapat Ibn Hazm Dan Imam Syafi'i Tentang Talaaq Muallaq, *Jurisprudensi: Jurnal Ilmu Syariah, Perundangan-Undangan Dan Ekonomi Islam*, Vol. 9, No. 2, 2017, page. 79–110.

24 Elyanur.

25 Makmun Syari, Reformulasi Hukum Talak Di Luar Pengadilan, *Mazahib*, Vol. 14, No. 1, 2015

26 Ramadhan Syahmedi Siregar, Keabsahan Perceraian Perspektif Fiqh Dan Undang-Undang No. 1 Tahun 1974," *Al-Muqaranah - Jurnal Program Studi Perbandingan Mazhab*, Vol. 5, No. 1, 2017

27 DIAN EKA RAHMAWATI, MUHADJIR DARWIN, And MUNAWAR AHMAD, Power Contestation on Marriage Age Discourse in Dealing with Islamic Value: A Case Study on Nahdlatul Ulama, *Jurnal Studi Pemerintahan*, Vol. 9, No. 1, 2018

the commonest of all opinions, namely that marriage is an engagement agreement between a man and a woman.²⁸

Along with the progress of administration in the field of *muamalah* in Indonesia, the implementation of marriage and divorce registration by the government is very necessary. This is a preventive measure for the parties involved or as a result of the marriage. Regarding marriage or divorce, there must be a recording as authentic evidence so that there is no harm.²⁹

Divorce or the fall of talak in Islamic law when the husband intentionally or not utters words that contain elements of talak, can be declared talak to his wife³⁰. There are still many people who divorce outside the Religious Court Session which are not in accordance with the provisions of the Marriage Law Number 1 of 1974. Thus, the existence of an illegal status indicates that marriages whose divorce process is carried out outside the Religious Courts Session indirectly indicate a prohibition on carrying out divorce proceedings. A new marriage with a different partner. The invalid status of a new marriage after an illegal divorce also applies to the wife who has a new marriage after an illegal divorce.³¹

Underhand divorce or divorce outside the Court Session is a phenomenon in society as a result of the implementation of divorce law of the community that is not in accordance with the provisions of Positive Law. In Islamic law, divorce is regulated by the Qur'an and Hadith, so as long as the divorce meets the Shari'a and the pillars that have been set, the divorce is considered valid.³²

This kind of divorce is still legal in Fiqh but does not provide legal certainty, because there is no authentic evidence issued by the competent authority so that it causes a lot of harm. This cannot be denied and is a reality in people's lives that this condition is still widely implemented and is still accepted by the community that divorce under Islamic Law (Fiqh) is an alternative choice of law in divorce.³³

Some Fiqh experts have different opinions about divorce, according to Fiqh scholars divorce does not have to be done in front of a court session. This fact is still happening in society. As a result, the wife is often harmed. Then this seems to be a justification because there is an assumption that the opinion of Fiqh experts is an opinion that is in

28 David C Reardon, The Abortion and Mental Health Controversy: A Comprehensive Literature Review of Common Ground Agreements, Disagreements, Actionable Recommendations, and Research Opportunities, *SAGE Open Medicine*, Vol. 6, 2018,

29 Agustin Hanapi and Edi Yuhermansyah, Urgency of Marriage Registration for Women and Child Protection in Gayo Lues District, *Samarah*, 2020

30 Jeffrey A. Redding, A Secular Failure: Sectarianism and Communalism in Shayara Bano v. Union of India, *Asian Journal of Law and Society*, Vol. 8, No. 1, 2021

31 Misran and Muza Agustina, Faktor-Faktor Terjadinya Poliandri Di Masyarakat (Studi Kasus Di Kabupaten Pidie Jaya), *Samarah*, Vol. 1, No. 1, 2017

32 Latifah Ratnawaty, Perceraian Di Bawah Tangan Dalam Perspektif Islam Dan Hukum Positif, *Yustisi*, Vol. 4, No. 1, 2017

33 Nurhasan Nurhasan and Fitri Yani, Akibat Hukum Perkawinan Di Bawah Tangan Terhadap Istri, Anak, Dan Harta Kekayaan Dalam Perspektif Hukum Islam Dan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan, *Wajah Hukum*, Vol. 3, No. 2, 2019

accordance with Islamic teachings, so there is nothing wrong with this action³⁴. If the husband has pronounced divorce to his wife, then the divorce falls and the divorce is considered religiously valid, so that the divorce does not have to be carried out in front of the Religious Court. Whether it is valid or not is if the pillars and conditions of divorce are fulfilled.³⁵

However, according to the Shia Imamiyyah Itsna'Asyariah and Ismailiyyah madzab say that divorce is not considered a fall if it is not accompanied by two just male witnesses,³⁶ which is based on the Word of God:

فَإِذَا بَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارُقُوهُنَّ بِمَعْرُوفٍ وَأَشْهِدُوا ذَوَيْ عَدْلٍ مِّنكُمْ وَأَقِيمُوا الشَّهَادَةَ لِلَّهِ ذَلِكُمْ يُوعِظُ بِهِ مَن كَانَ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ۗ وَمَن يَتَّقِ اللَّهَ يَجْعَلْ لَهُ مَخْرَجًا

"When they are nearing the end of their iddah, either refer to them well or release them properly and testify with two just witnesses between you and establish your testimony for the sake of Allah. Thus is taught with it those who believe in Allah and the hereafter. Whoever fears Allah, He will provide for him a way out" (Surah At-Thalaq: 2)³⁷

According to the Shi'a madhab, the existence of two fair witnesses in the divorce is very important. And the opinion of the Shi'a madhab is very relevant to the laws in force in Indonesia. Even the presence of witnesses makes it beneficial for the parties concerned. In order to avoid the actions of the husband arbitrarily to the wife.³⁸

Meanwhile, according to some understandings of the Indonesian people, divorce, according to Islamic law is something that can be done. They believe that a husband and wife who are separated by religious law are legal. This reason is a strong consideration so that it is used as a guide for some people who divorce outside the court.³⁹

In the context of divorce, Imam Madhab does not state that the validity of a divorce must be in front of a Court Session or before a Judge, but only with Shigat talak and witnesses. It is different in Law

34 Burcu Kalpaklıoğlu, Guiding the Female Body through the Alo Fetva Hotline: The Female Preachers' Fatwas on Religious Marriage, Religious Divorce and Sexual Life, *The Politics of the Female Body in Contemporary Turkey*, 2021.

35 Yulisa Fitri, Jamaluddin Jamaluddin, and Faisal Faisal, Analisis Yuridis Perceraian Di Luar Pengadilan Menurut Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Dan Menurut Pendapat Ahli Fiqih Islam, *Suloh: Jurnal Fakultas Hukum Universitas Malikussaleh*, Vol. 7, No. 1, 2019

36 Mughniyah, *Fiqh Lima Mazhab*, Terj.

37 Departemen Agama RI, *Al Quran Dan Terjemahan*.

38 Leny Maria Ulfa, Analisis Masalah Terhadap Pendapat Madzhab Syiah Imamiyah Mengenai Kedudukan Saksi Dalam Ikrar Talak, UIN Sunan Ampel, Surabaya, 2018.

39 Ratnawaty, *Perceraian Di Bawah Tangan Dalam Perspektif Islam Dan Hukum Positif*.

Number 1 of 1974 which explains about divorce, which can only be done before a court session.⁴⁰

Fiqh scholars allow divorce on the basis of the initiative of either the husband or the wife unilaterally. Divorce may be carried out without the intervention of the government or the judiciary. The divorce rules stated in the Marriage Act and the rules for their implementation are felt to be different from the Muslim community, causing differences of opinion for some people.⁴¹

Likewise, Islamic scholars do not explain the existence of marriage registration as a pillar and condition for a valid marriage⁴². So that the obligation to register marriage is understood as a new and official form. At the time of the best friends, it was enough for every marriage to cut a goat and beat a tambourine as a sign of a marriage, but in a complex and full of formality like today's society, such a party is not enough, it must be officially documented at the office in charge of taking care of it.⁴³

In Islamic law, the function of registering marriages in civil registration institutions is so that someone has evidence that he has actually married someone else. The Indonesian Muslim community already believes that a marriage that has fulfilled the pillars and conditions, then the marriage is said to be valid according to Islamic law.⁴⁴

This underhand marriage has attracted the attention of many people, so the law has been published in several Fatwas. In 2008, the Indonesian Ulama Council (MUI) issued Fatwa Number 10 of 2008 concerning Underhand Marriage, the fatwa states that marriage under the law is legal as long as the pillars and conditions of marriage are fulfilled. However, the marriage is forbidden if there are mudharats in it, such as harming the wife and children.⁴⁵

The issue of underhand marriage that must be chosen is an action to avoid or not to do it if in the future it brings harm to other people (children and wife), so avoiding it is a choice that must be taken. The

40 Hayati, Pengaturan Talak Dan `Iddah (Studi Komparatif Prespektif Fikih Empat Mazhab Dan Kompilasi Hukum Islam (Khi).

41 Mark Cammack, Lawrence A. Young, and Tim Heaton, Legislating Social Change in an Islamic Society - Indonesia's Marriage Law, *American Journal of Comparative Law*, Vol. 44, No. 1, 1996

42 Teuku Islahuddin, Dhiauddin Tanjung, and Ramadhan Syahmedi Siregar, Implementation of Marriage Registration in Aceh Qanun Number 6 of 2008 Concerning Administrative Registration (Analysis of Illegal Marriage Practices in Lhoksukon District, North Aceh Regency), *Britain International of Humanities and Social Sciences (BIOHS) Journal*, Vol. 4, No. 1, 2022, page. 70–80.

43 Eka Widiasmara, Kedudukan Perkawinan Dan Perceraian Di Bawah Tangan Ditinjau Dari Hukum Islam Dan Peraturan Perundang-Undangan Yang Berlaku Di Indonesia, *Program Studi Magister Kenotariatan Program Pascasarjana Universitas Diponegoro, Semarang*, 2010.

44 Mimin Mintarsih and Lukman Mahdami, The Legal Status of Mut'ah Marriage in Indonesia, *Jurnal Penelitian Hukum De Jure*, Vol. 21, No. 3, 2021,

45 Soraya Devy and Ayu Maulina Rizqi, Perceraian Nikah Di Bawah Tangan Dan Pengaruhnya Terhadap Pengasuhan Anak (Studi Kasus Di Kecamatan Peusangan Kabupaten Bireun), *Samarah*, Vol. 2, No. 2, 2018

existence of a record is beneficial for the parties, because it is an official document from the State that can be used as evidence in the event of a dispute related to marriage or a dispute due to marriage, for example inheritance, child custody, maintenance and others.⁴⁶

Regarding marriage under the hand in terms of Islamic law. The validity of a marriage does not depend on whether it is registered or not in a recording institution, but what makes a marriage valid or not lies in the terms and pillars of the marriage.⁴⁷

In Islamic law, marriage is valid if the pillars and conditions are fulfilled. To be known to the public, marriages that are carried out should be announced to a wide audience, in this case the Messenger of Allah said:

عَنْ أَنَسِ بْنِ مَالِكٍ أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ رَأَى عَلِيَّ بْنَ أَبِي رَافِعٍ يَتَزَوَّجُ امْرَأَةً عَلَى وَزْنِ نَوَاقِثِ دَهَبٍ. قَالَ: مَا هَذَا؟ قَالَ: يَا رَسُولَ اللَّهِ إِنِّي تَزَوَّجْتُ امْرَأَةً عَلَى وَزْنِ نَوَاقِثِ دَهَبٍ. قَالَ: فَبَارَكَ اللَّهُ لَكَ. أَوْلِمَ وَ لَوْ بِشَاةٍ مُسَلِمَةٍ.

*Meaning: From Anas, son of Malik Ra, That the Messenger of Allah saw yellow marks on Abdullrahman son of Auf, then he asked: What is this? "He replied, Yes, Messenger of Allah, indeed I have married a woman with a dowry of some gold the size of a date seed." He said: May Allah bless you, even if you have a goat. (Hadith agreed by Imam Bukhari and Imam Muslim).*⁴⁸

In contrast to the rules stated in the Marriage Law, Fiqh experts have different opinions that divorce is legally even though it is done out of court. Madzhab scholars are of the opinion that divorce does not have to be carried out in front of the Religious Courts.⁴⁹

If the husband has pronounced divorce to his wife, then the divorce falls and the divorce is considered religiously valid, so that the divorce does not have to be carried out in front of the Religious Court. Whether it is valid or not is if the pillars and conditions of divorce are fulfilled.⁵⁰

Women who are divorced outside the religious court, according to Islamic Fiqh have the right to be married by someone else, because the previous divorce was considered valid and had fulfilled the pillars and conditions. According to some Muslims, marriage is valid if it is carried

46 Iskhaq Iskhaq, Status Of The Child As A Result Marriage Under The Hands Post A Marriage Is Registered Without Marriage Isbat, *Jurnal Hukum Khaira Ummah*, Vol. 16, No. 4, 2022.

47 Andi Iismiatiy, M. Thahir Maloko, and Nur Taufiq Sanusi, Status Hukum Pernikahan Sirri Dalam Hukum Islam, *Alauddin Law Development Journal*, Vol. 2, No. 2, 2020

48 Khairul Anhar, Rahimah Rahimah, and M. Husnan Lubis, Analisis Kesalahan Terjemahan Hadis-Hadis Kitab Al-Jami' Di Dalam Bulughul Maram Karya Moh. Machfuddin Aladip, *Arabiyatuna : Jurnal Bahasa Arab*, Vo.l 4, No. 2, 2020.

49 Rinalti Rinalti, Syahabuddin Syahabuddin, and Ermawati Ermawati, Analysis of the Case of Divorce and Its Settlement in the Religious Court of Palu City, *International Journal Of Contemporary Islamic Law And Society*, Vol. 2, No. 1, 2020

50 Nehaluddin Ahmad, A Critical Appraisal of 'triple Divorce' in Islamic Law, *International Journal of Law, Policy and the Family*, Vol. 23, No. 1, 2008.

out according to Islamic law, while marriage registration is only an administrative obligation.⁵¹

Thus, according to Islamic Fiqh, the law of marriage for women who are divorced outside the Religious Courts is legal. In the pillars and conditions of marriage, Islamic scholars do not explain the existence of marriage registration as a condition for a valid marriage, as long as the pillars and conditions of marriage are fulfilled, the marriage is considered valid.⁵²

3. Divorce Outside Religious Courts According Positive Law

Marriage is a sacred bond that is closely related to religious teachings, therefore every religion always connects marriage rules with religious principles. In the event of a marriage, legal norms and regulations are needed to regulate it. One of the first steps to getting legal guarantees in a marriage is to register it with the competent authority.⁵³

According to the Marriage Law Number 1 of 1974, what is meant by marriage are:

Article 1:

"Marriage is an inner and an outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on the One Godhead".⁵⁴

In the Compilation of Islamic Law, what is meant by marriage are:
Section 2:

"Marriage according to Islamic law is a marriage, which is a very strong contract or mitsaqan *ghalidzan* to obey Allah's commands and carry it out as worship".⁵⁵

A marriage will be considered valid if it is carried out and recorded by the Marriage Registrar. This is as explained in Law Number 1 of 1974 concerning Marriage called marriage registration with various procedures, namely:

Article 2 Paragraph:

- a. Marriage is legal if it is carried out according to the laws of each religion and belief.⁵⁶
- b. Each marriage is recorded according to the applicable laws and regulations.⁵⁷

From the provisions of Article 2 paragraph (1) of Law Number 1 of 1974 concerning Marriage mentioned above, it is clear that the marriage

51 Lauryan Orin, Pencatatan Perkawinan Di Indonesia, *Jurnal Hukum*, Vol. 1, No. 2, 2020

52 Hazar Kusmayanti and Nindya Tien Ramadhanty, Legitimacy Of A Sirri Marriages (Second And So On) By The Pair Of Civil Servants, *DiH: Jurnal Ilmu Hukum*, Vol. 17, No. 1, 2021.

53 Muhammad Ngizzul Muttaqin, Unregistered Marriage Between Indonesian Citizens And Foreign Citizens With The Legal Perspective Of Marriage In Indonesia, *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi Dan Keagamaan*, Vol. 7, No. 2, 2020.

54 Indonesia, *Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan*.

55 Indonesia.

56 Indonesia.

57 Indonesia.

law determines the validity of a marriage based on the religious legal rules and beliefs of each adherent.

This is clarified in the KHI (Compilation of Islamic Law):⁵⁸

Article 5 Paragraph:

- a. "In order to ensure the orderliness of marriage for the Islamic community, every marriage must be recorded."
- b. "The registration of the marriage as stated in paragraph (1) is carried out by the Marriage Registrar (PPN) as regulated in Law Number 22 of 1946 in conjunction with Law Number 32 of 1945.

Article 6 Paragraph:

- a. "To fulfill the provisions in Article 5, every marriage must be held before and under the supervision of a Marriage Registrar.
- b. "Marriages that are carried out outside the supervision of the marriage registrar have no legal force."

Article 7 Paragraph:

- a. "Marriage can only be proven by a Marriage Certificate made by a Marriage Registrar"

In Government Regulation Number 9 of 1975 concerning the implementation of the marriage law, it is determined:⁵⁹

Article 3:

- a. Every person who will enter into a marriage shall notify the Registrar of his wishes to the Registrar at the place where the marriage will take place.
- b. The notification referred to in paragraph (1) is carried out at least 10 working days before the marriage takes place.
- c. The exception, of the time period referred to in paragraph 2 is due to an important reason, given by the Camat (on behalf of) the Regent of the Regional Head.

In Indonesia there are 2 agencies that are tasked with registering marriages and divorces (and reconciliation). The institutions or institutions in question are:

- a. District Office of Religious Affairs for Marriage, Divorce, and Rujuk for people of various Moslems.
- b. Civil Registry Office for Marriage for non- Muslims.⁶⁰

Thus, even though the registration of marriages in Law Number 1 of 1974 concerning Marriage is only regulated by one paragraph, in fact the problem of recording is very dominant, this will clearly appear regarding the marriage procedure itself which relates to recording. It is no exaggeration if there are legal experts who place it as an administrative requirement that also determines whether a marriage is legal according to positive law.⁶¹

58 Indonesia, *Kompilasi Hukum Islam*.

59 Republik Indonesia, *Peraturan Pemerintah Nomor 9 Tahun 1975*.

60 Harpani Matnuh, Perkawinan Dibawah Tangan Dan Akibat Hukumnya Menurut Hukum Perkawinan Nasional, *Jurnal Pendidikan Kewarganegaraan*, Vol. 6, No. 11, 2016.

61 Neng Jubaidah, Pencatatan Perkawinan Dan Perkawinan Tidak Dicatat, *Menurut Hukum Tertulis Di Indonesia Dan Hukum Islam*, 2003.

Marriages conducted outside the legal provisions will not receive the recognition and are not protected by law. The act of not registering a marriage, even though the marriage has been carried out in accordance with Islamic teachings, is considered to have committed legal smuggling, or disobeyed the law, so there is no opportunity to file a lawsuit legally. The issue of marriage with women who are divorced outside the Religious Courts gives an understanding that divorce has occurred outside the Religious Courts⁶². Because some people think the status of the woman is still someone's wife. Divorce occurs a lot in society because people consider the pronouncement of *talaq* spoken by the husband to his wife is sufficient to meet the requirements for divorce.⁶³

Marriage law in Indonesia does not recognize divorces carried out out of court, this aims to protect women and the wife in particular. In the perspective of Law Number 1 of 1974, divorce is carried out by husband and wife because of something that is justified by the court through the trial.⁶⁴

According to the law, divorce outside the trial of the Religious Court is a violation of the law, because from a positive legal perspective, divorce must be carried out in front of a court session. Juridically, it can be said that divorce outside the court is invalid and must be canceled and the wife is still legally bound to her old husband.⁶⁵

According to Law Number 1 of 1974

Article 39 Paragraph:

- a. "Divorce can only be carried out before a court session after the court concerned has tried and failed to reconcile the two parties".⁶⁶

Later in the Compilation of Islamic Law

Article 113

Marriages can break up because:

- a. Death;
- b. Divorce; and
- c. Court ruling.⁶⁷

Even though there are provisions regarding divorce, there are deviations made by people who divorce, while those that cause divorce outside the Court are:

- a. It has become a habit.
- b. Lack of legal awareness.
- c. Personal matters to be covered.
- d. Economic factors.⁶⁸

62 Mies Grijns and Hoko Horii, Child Marriage in a Village in West Java (Indonesia): Compromises between Legal Obligations and Religious Concerns, *Asian Journal of Law and Society*, Vol. 5, No. 2, 2018.

63 Jubaidah, Pencatatan Perkawinan Dan Perkawinan Tidak Dicatat.

64 Fitri, Jamaluddin, and Faisal, Analisis Yuridis Perceraian Di Luar Pengadilan Menurut Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Dan Menurut Pendapat Ahli Fikih Islam.

65 Ratnawaty, *Perceraian Di Bawah Tangan Dalam Perspektif Islam Dan Hukum Positif*.

66 Indonesia, *Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan*.

67 Indonesia, *Kompilasi Hukum Islam*.

Based on the explanations of the positive law that regulates divorce procedures, it is known that the divorce handed down by the husband against the wife can only be carried out in front of a court hearing, if the divorce has fulfilled these provisions, then a divorce is legally recognized by the State.⁶⁹

Since the entry into force of the Marriage Law, it is not possible to divorce outside the Court. To divorce, there must be a sufficient reason that the husband and wife cannot live in harmony again. However, with the enactment of the Marriage Law, it does not have much effect on some people, who are used to divorce outside the court, even though it will have a negative impact. That the divorce status has no legal effect or force, because the divorce decision was not made before a Religious Court trial.⁷⁰

The consequences that arise due to divorce outside the Court are: there is no legal, legality of the divorce, the wife cannot get her rights, and the children are neglected and do not get an inheritance. Thus, it is hoped that the public will be aware of and obey the law by implementing the applicable regulations.⁷¹

From these provisions, it can be seen that a marriage is valid if it is carried out according to each law and belief. This means that if a marriage has fulfilled the requirements and pillars, then the marriage is valid. Not only legal in the eyes of the community, but also legalized by the State. Judging from the applicable law in Indonesia, subsequent marriages carried out by divorced couples outside the Religious Courts are invalid or illegal.⁷²

The illegal status of new marriages conducted after divorce illegally. According to Bagir Manan quoted by Neng Djubaidah in the book Registration of marriages and marriages are not recorded according to written law in Indonesia and Islamic law, a valid marriage is a marriage that meets the provisions of Article 2 paragraph (1) of the Marriage Law Number 1 of 1974, which is legal according to religion, which has legal consequences as well.⁷³

Basically, Islam justifies a husband who is going to divorce his wife, it is only enough to say it in front of his wife or other people, then he still gets divorced, but in the existing regulations, he must obey the rules government, because it is part of the obligation as Muslims. The government establishes a marriage regarding divorce with the aim of

68 V. Hayati, Dampak Yuridis Perceraian Di Luar Pengadilan, *Jurnal Hukum Samudra Keadilan*, Vol. 10, No. 2, 2015

69 Nuzurrizky Minarrahmah, Legal Penalty of Divorce Outside the Religious Court in Indonesia, Malaysia, and Brunei Darussalam, Universitas Islam Negeri Maulana Malik Ibrahim, 2020.

70 Hayati, Dampak Yuridis Perceraian Di Luar Pengadilan.

71 Muhammad Isa, Perceraian Di Luar Pengadilan Agama Menurut Perspektif Undang-Undang Nomor 1 Tahun 1974 Dan Kompilasi Hukum Islam (Suatu Penelitian Di Wilayah Hukum Mahkamah Syar'iyah Aceh Besar)., *Jurnal Ilmu Hukum*, Vol. 2, No. 1, 2014.

72 Grijns and Horii, Child Marriage in a Village in West Java (Indonesia): Compromises between Legal Obligations and Religious Concerns.

73 Jubaidah, Pencatatan Perkawinan Dan Perkawinan Tidak Dicatat.

maintaining order in the administration, such as the problem of registering marriages, the birth of children and making divorce difficult.⁷⁴

Likewise, the opinion of H. Samarul Falah, MH, Judge of the Surabaya Religious Court who said that it is illegal to marry a divorced woman outside the Religious Court because the woman is still someone else's wife. Marriage or divorce must be registered in order to obtain authentic evidence. When one person submits a marriage application for divorce in order to obtain legalization of divorce, which is carried out outside the Religious Court trial to the Religious Court, and the Judge grants the marriage lawsuit for divorce with the judge's consideration and reasons for legal interests.⁷⁵

In the practice of divorce law in the case of women who are divorced outside the Religious Courts to obtain the legality of a new marriage, the effort made is to do isbath Nikah for divorce. The Isbath marriage of divorce is as a marriage ratification when divorce is out of court and wants to do marriage officially according to the rules of law. Isbath marriage, marriage is a legal process that must be taken by married couples in the Religious Courts, so that unregistered marriages are legal according to Islamic law, then the marriage is recorded and valid according to state law.

Although the Isbath of Marriage for divorce is not regulated in the Act, the judge can give a decision even though the legislation does not explain the case or is called Ijtihad Hakim, because only the Judge can decide the Law (Legal Findings).⁷⁶

People who are Muslim are required to be consistent in basic matters such as Marriage and Divorce by following existing regulations, for example: registering marriages and making divorces in front of the Religious Courts. In order not to cause things that are not desirable and do not harm both parties.⁷⁷

D. CONCLUSION

Based on the explanation above, marriage for divorced women outside the religious courts from the perspective of Fiqh and Positive Law can be concluded to be a new fact that exists in society.

Divorce outside the religious court in the Fiqh is considered valid because it is not a pillar and a condition for divorce. Therefore, marrying a divorced woman, both verbally and in writing without going through a court process is declared valid.

The legality of marriage for women who are divorced outside the Religious Courts when they want to remarry, the marriage is considered invalid or illegal according to Law Number 1 of 1974. Because they do not divorce, according to applicable procedures. Therefore, the invalidity of the marital status after an illegal divorce will have an impact on the status of the

74 Hayati, Dampak Yuridis Perceraian Di Luar Pengadilan.

75 MH Samarul Falah, Interview with Judge of Religious Court on Surabaya, 2020.

76 Samarul Falah.

77 Eva F. Nisa, The Bureaucratization Of Muslim Marriage In Indonesia, *Journal of Law and Religion*, Vol. 33, 2018

child resulting from an illegal marriage, which makes the child illegitimate according to the legislation.

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