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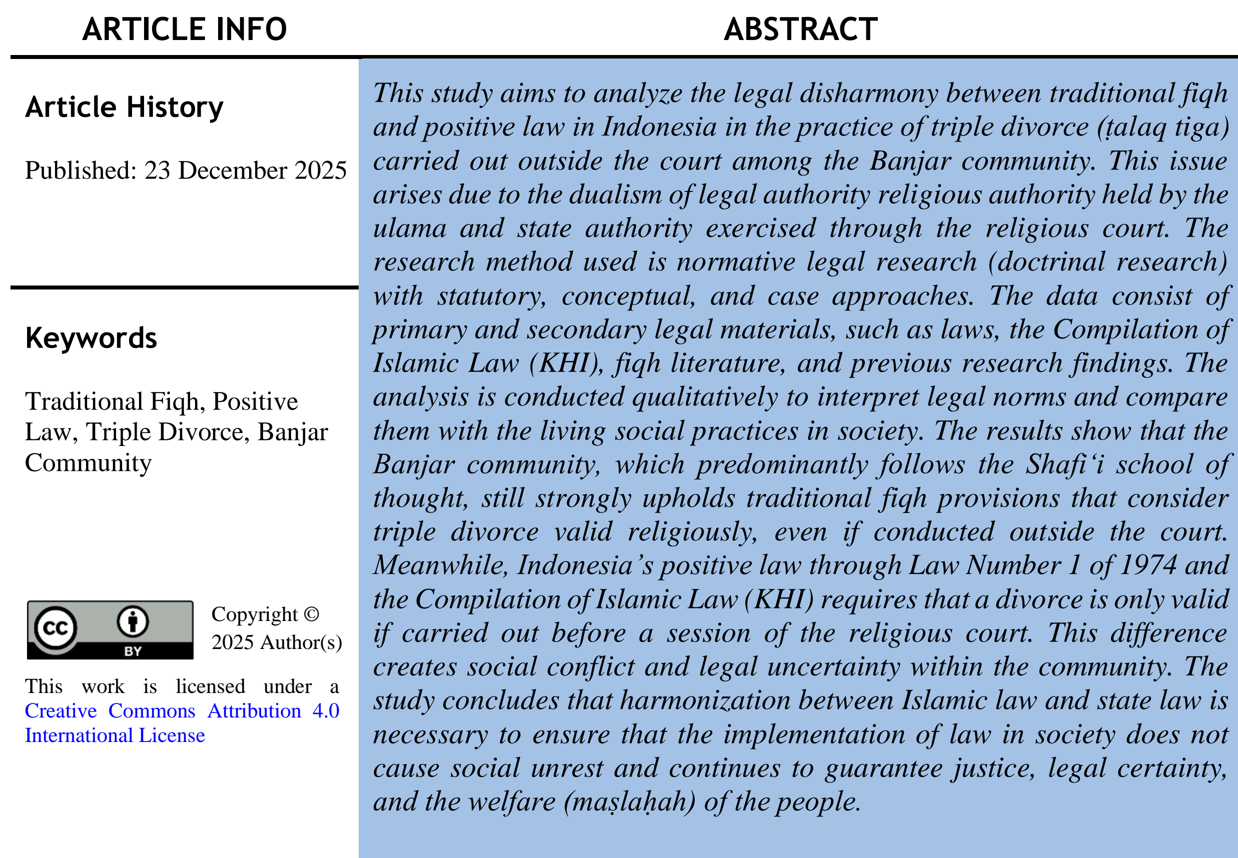
LEGAL DISHARMONY BETWEEN TRADITIONAL FIQH AND POSITIVE LAW IN THE CASE OF TRIPLE DIVORCE OUTSIDE THE COURT AMONG THE BANJAR COMMUNITY

M. Anshari[1], Muhammad Nafi[2]

[1]STAI Al-Falah Banjarbaru
[2]Pengadilan Agama Marabahan

manshari438@gmail.com[1], nawafi82@gmail.com[2]



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ABSTRACT

This study aims to analyze the legal disharmony between traditional fiqh and positive law in Indonesia in the practice of triple divorce (ṭalaq tiga) carried out outside the court among the Banjar community. This issue arises due to the dualism of legal authority religious authority held by the ulama and state authority exercised through the religious court. The research method used is normative legal research (doctrinal research) with statutory, conceptual, and case approaches. The data consist of primary and secondary legal materials, such as laws, the Compilation of Islamic Law (KHI), fiqh literature, and previous research findings. The analysis is conducted qualitatively to interpret legal norms and compare them with the living social practices in society. The results show that the Banjar community, which predominantly follows the Shafi'i school of thought, still strongly upholds traditional fiqh provisions that consider triple divorce valid religiously, even if conducted outside the court. Meanwhile, Indonesia's positive law through Law Number 1 of 1974 and the Compilation of Islamic Law (KHI) requires that a divorce is only valid if carried out before a session of the religious court. This difference creates social conflict and legal uncertainty within the community. The study concludes that harmonization between Islamic law and state law is necessary to ensure that the implementation of law in society does not cause social unrest and continues to guarantee justice, legal certainty, and the welfare (maṣlaḥah) of the people.

INTRODUCTION

Islamic law has existed since the emergence of Islam itself. The presence of Islamic law in various countries is determined by when Islam entered and developed in those countries. Likewise, the development of Islamic law is closely related to the existence of Muslim communities. To this day, Islamic law has spread to almost every country around the world along with the presence of Muslims therein. The same applies to Indonesia Islamic law has grown and developed in line with the arrival and expansion of Islam in the archipelago.[1] The implementation of Islamic law in Indonesia has undergone various phases in accordance with the nation's historical development.

In general, there are three major legal systems that apply in Indonesia: Islamic law, civil (Western) law, and customary (adat) law. At the state level, these three legal systems have collectively shaped and influenced the institutionalization of national law. In this context, a prolonged conflict has occurred, beginning with the arrival of Dutch colonialism in Indonesia and continuing to the present day.

Within the Banjar community, cases of talaq tiga (triple divorce) pronounced outside the religious court are still common, leading to social unrest in the community where such acts occur. The dualism of legal authority political authority represented by the state and religious authority represented by ulama, ustadz, kyai, or tuan guru has resulted in a situation where the law of the state appears to lack dignity and authority. Based on this issue, the author seeks to further examine how the practice of triple divorce outside the court is carried out within the Banjar community.

RESEARCH METHOD

This study is normative legal research (doctrinal research) aimed at analyzing the legal provisions regarding the practice of triple divorce (talaq tiga) conducted outside the court among the Banjar community, based on the perspectives of Islamic law and positive law in Indonesia. The approaches used include the statutory approach, the conceptual approach, and the case approach.

The statutory approach is employed to examine various positive legal provisions related to divorce, such as Law Number 1 of 1974 concerning Marriage, Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law (KHI), as well as other regulations governing ṭalaq. The conceptual approach is used to understand the fundamental concepts of Islamic law concerning divorce, particularly according to the Shafi'i school of thought followed by most members of the Banjar

[1] To obtain a correct understanding of Islamic law according to Daud Ali, in studyingand understanding Islamic law, it means that Islamic law must be studied withinthe basic framework of Islamic teachings, which places Islamic law as onepart of the Islamic religion; it must also be linked to faith (aqidah) andmorality (akhlak), ethics or morals. This is because in the Islamic legal system, faith,law, and morality cannot be separated; likewise, it must belinked to several key terms, including sharia and fiqh, whichcan be distinguished but constitute a whole. See, Mohammad Daud Ali, *Hukum Islam, Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia* (Jakarta: PT. Raja Grapindo Persada, 2000), h. 48.

community, as well as legal theories such as legal pluralism and the concept of living law developed by Eugene Ehrlich. Meanwhile, the case approach is utilized to examine the practice of divorce outside the court as it occurs within the Banjar community and how it is perceived by ulama and religious court institutions.

The type of data used in this research is secondary data, which consists of primary and secondary legal materials. Primary legal materials include statutory regulations and relevant official state documents. Secondary legal materials include literature, books, scholarly articles, and previous research related to Islamic law and marriage law in Indonesia.

All these legal materials are analyzed using qualitative analysis, namely by interpreting existing legal norms and examining the living legal practices within society. This analysis aims to identify the consistencies and discrepancies between Islamic legal norms, positive legal norms, and the social realities that develop within the Banjar community, as well as to propose solutions to address the existing legal disharmony.

RESULTS AND DISCUSSION

The emergence of modern law demands the establishment of formal legal sources or foundations in every country as a reference for resolving arising legal issues. Likewise, Islamic law, which has long existed in the form of shariah and fiqh, is also required to be formulated into a codified legal system or legislation so that it possesses binding legal force over every individual subject to the law.[2,3] Legal positivism teaches that positive law is the law that truly applies, and that positive law consists of judicial norms established by the authority of the state. State law must be obeyed absolutely, which is summarized in the statement gesetz ist gesetz or the law is the law.[4]

Eugen Ehrlich (1862–1922), a legal scholar and sociologist from Austria, argued that contemporary legal issues are no longer merely matters of formal legality or the proper interpretation of

[2] The word sharia and its derivatives are used five times in the Quran, found in: QS. al-Syura, 42:13, al-'Araf, 7: 163, al-Maidah, 5:48, and al-Jasiyah, 45:18. 2 Literally, sharia means the path to a spring, or a place through which a river flows. Its use in the Quran is interpreted as a clear path that leads to victory. See, Muhammad Fuad Abdul Baqi', al-Mu'jam al-Mufahras li Alfaz Al-Qur'an al-Karim (Jakarta: Maktabah Dahlan Indonesia, t.th), h. 480.

[3] Etymologically, fiqh means deep understanding (al-fahmu al- 'amiq). This can be distinguished from the word 'ilm, which means to understand. Knowledge can be obtained through reason or revelation, while fiqh emphasizes reasoning even though its application will later be bound by revelation. In terms of terminology, according to the opinion of fiqh scholars, fiqh is the knowledge of Sharia laws related to human actions that are explored or taken from detailed arguments. The activity of extracting or deriving laws from detailed evidence is the result of intellectual activity. The outcome of human understanding through this intellectual activity will depend greatly on the quality and condition of each individual. See, Al-Imam Abu Zahrah, *Ushl Fiqh* (Beirut: Dar al-Fikr, 1958), h. 6. Lihat juga, Wahbah al-Zuhaily Al-Fiqh al-Islamy wa Adillatuh (Dumasyiq, Dar al-Fikr, 1989), h. 16.

[4] Ade Maman Suherman, *Pengantar Perbandingan Sistem Hukum, Civil Law, Common Law, Hukum Islam*, Cet. 2 (Jakarta: Raja Grafindo Persada, 2006), h.37-38

statutory provisions, but rather concern the use of law as a means to help shape a new social order in accordance with existing conditions. In other words, positive law will only be effective if it embodies or aligns with the living law that exists within society.[5]

Mahmud Syaltut, in his book Al-Islam: ʿAqidah wa Shariʿah, defines shari'ah as the set of laws revealed by Allah to humankind to be used as guidance in their relationship with God, with fellow human beings, with their environment, and with life itself.[6] Therefore, in Islamic countries or countries with a Muslim majority population, various laws have been enacted to regulate legal matters within their respective jurisdictions. The same situation also applies to Indonesia. The legislation of Islamic law in Indonesia represents an effort to make Islamic law part of the state legal system. In other words, Islamic law is adopted and reinforced as state law.

As a state governed by law, Indonesia upholds the principle that law can only be effectively implemented when supported by three essential elements: reliable law enforcement institutions, clear legal regulations, and public legal awareness. This principle, known as the doctrine of national law, also applies to the implementation of Islamic law.[7] The law enforcement institution referred to above is the Religious Court, particularly its judges. Judges of the Religious Court are required to hold a bachelor's degree, either in Islamic law or in general law.

This requirement is intended to ensure that Religious Court judges can carry out their duties properly. However, the existence of clear legal regulations is still not fully guaranteed, as Islamic legal rules (fiqh) remain subject to differences of opinion, making it difficult to achieve the unification of Islamic law. Therefore, the need for a compilation or codification of Islamic law is indeed a very reasonable and necessary measure.

The Compilation of Islamic Law (Kompilasi Hukum Islam or KHI) is essential to make Islamic legal provisions clearer and to minimize differing interpretations, thereby facilitating their implementation by the Religious Courts. On this basis, Indonesian ulama subsequently drafted the Compilation of Islamic Law, which contains three books of law: marriage law, inheritance law, and endowment (waqf) law. This draft was officially enacted through Presidential Instruction Number 1 of 1991, dated June 10, 1991.[8]

The effort to legislate Islamic law within the framework of national law must be supported by three components, each with specific requirements: (1) the structural component, namely the existence of a national lawmaking body; (2) the substantive component, namely the content of Islamic law to be adopted into national law; and (3) the cultural component, namely the awareness and willingness of

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[5] R. Otje Salman, *Beberapa Aspek Sosiologi Hukum*, Cet. 1 (Bandung: Alumni, 1993), h. 34.

[6] Mahmud Syaltut, *Al-Islam, 'Aqidah wa Syari'ah* (Mesir: Dar al Qalam, 1966), h. 12.

[7] Bustanul Arifin, *Pelembagaan Hukum Islam di Indonesia: Akar Sejarah, Hambatan, dan Prospeknya,* (Jakarta: Gema Insani Pres, 1996), h. 56

[8] Abdurrahman, *Kompilasi Hukum Islam di Indonesia* (Jakarta: Akademika Pressindo, 1992), h. 50.

society to accept and implement it. With these three components in place, the focus of the Muslim community in the future should not be limited to the field of private law but should also extend to areas of law concerning the public sector. In this way, Islamic law will attain a stronger bargaining position in the process of transformation and development of national law.[9]

The reasons Islamic law is entitled to a constitutional position in Indonesia are as follows, first; the philosophical reason, Islamic teachings serve as the worldview, moral ideals, and legal ideals of the Muslim majority in Indonesia, and they play a crucial role in shaping the fundamental norms of the Pancasila state. Second; the sociological reason, the historical development of Indonesian Muslim society shows that the legal ideals and legal consciousness based on Islamic teachings have maintained continuous relevance and actuality throughout history. Third; the juridical reason, Articles 24, 25, and 29 of the 1945 Constitution provide a formal legal basis for the implementation of Islamic law in Indonesia.[10]

The three legal systems customary law, Western (colonial) law, and Islamic law form the foundation of Indonesia's legal system.[11] Objectively, Islamic law holds greater potential to contribute to the development of national law.[12] This is not only because the majority of Indonesia's population is Muslim and maintains an emotional connection to Islamic law, but also because the Western or colonial legal system has ceased to develop since Indonesia's independence, while customary law has not shown significant contribution to national legal development. Therefore, the main expectation in the formation of Indonesia's national law lies in the contribution of Islamic law.[13]

According to Mohammad Daud Ali, Islamic law in Indonesia that applies to Muslims can be divided into two categories. First, Islamic law of a normative nature this refers to laws related to aspects of pure worship ('ibadah mahdhah), whose implementation depends entirely on the faith and obedience of Indonesian Muslims to their religion. The Islamic law that applies normatively is that which carries social sanctions, and its enforcement depends on the strength or weakness of the Muslim community's

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[9] Abdul Haris Abbas*, Hukum Islam dalam Hukum Nasional,* Al-Risalah,Volume 13 Nomor 1 Mei 2013, h. 64

[10] Abdul Ghani Abdullah, *Peradilan Agama Pasca UU No.7/1989 dan Perkembangan Studi Hukum Islam di Indonesia*, (Jakarta: Mimbar Hukum al-Hikmah & Ditbinpera Islam Depag RI, 1994) , h. 94, A similar sentiment was also quoted by Amhar Rasyid in "*Politik Hukum dalam Undang-undang No. 7 Tahun 1989*", Media Akademika, Vol. 28, No. 2, April 2013

[11] William R.Roof, "*Customary law, Islamic Law and colonial Authority: Three Contrasting Case Studies and Their aftermath*" Islamic Studies, vol 49 No 4 (Winter : 2010), h. 459.

[12] In practice, Islamic law has existed since the early Islamic kingdoms, and was even officially adopted as state law during the era of the Islamic sultanates in Indonesia. See Ahmad Rafiq, *Hukum Islam di Indonesia*, (Jakarta, PT. Raja Grafindo Persada, 1995), h. 12: Rahmat Djatmika, *Sosialisasi Hukum Islam di Indonesia*, dalam Abdurrahman Wahid, et al, "Kontroversi Pemikiran Islam di Indonesia", (Bandung: Remaja Rosdakarya, 1991), h. 230

[13] In historical developments, when there were attempts to legislate Islamic law, legal experts who were influenced by Dutch ways of thinking would usually oppose Islamic law with Dutch customs and politics, which succeeded in influencing some legal scholars in the post-independence period. See, M.B Hooker, *Adat Law in Indonesia Modern,* The Journal of Asia Studies,Vol 39 No.3, May 1980, h. 674

awareness in adhering to this normative aspect of Islamic law. This type of Islamic law does not require assistance from state authorities for its implementation. Almost all aspects of Islamic law governing the relationship between humans and God, in the sense of pure acts of worship (ʻibadah mahdhah), fall under this category of Islamic law, such as prayer (ṣalah), almsgiving (zakah), fasting (ṣawm), and pilgrimage (ḥajj). The implementation of this normative Islamic law depends on the level of faith (iman), piety (taqwa), and moral integrity (akhlaq) of the Muslim community itself.[14]

Second, Islamic law of a formal juridical nature this refers to laws related to aspects of muʻamalah (particularly in the field of civil law and, to some extent, efforts in the field of criminal law, although the latter remains in the stage of ongoing struggle), which have become part of Indonesia's positive law. This formally juridical Islamic law requires the assistance of state authorities for its full implementation, for example, through the establishment of Religious Courts, which serve as one of the components within the national judicial system.[15]

According to Busthanul Arifin, the prospects of Islamic law in the development of national law are highly positive, as it possesses strong cultural, juridical, and sociological foundations.[16] Islam, being the religion adhered to by the majority of Indonesia's population, has a significant influence on the lifestyle and behavior of the Indonesian people. The conduct of its followers is inseparable from the muʻamalah (civil interactions) contained in the Qur'an and Hadith. The muʻamalah aspects of Islamic law serve as one of the parameters of a person's obedience in practicing their religion. Therefore, it is particularly interesting to understand the historical development of Islamic law within the world's largest Muslim community.

Muhammad Abduh, in line with the aforementioned view, stated that the Qur'an is the original and primary source of Islamic law. However, in order to understand its contents, the use of reason (ʻaql) is essential and even becomes a determining factor. In interpreting the Qur'an, the involvement of human intellect in every aspect of religious teaching is necessary. According to him, to truly comprehend Islam, humans must employ their intellect so as to avoid difficulties and attain benefit. The teachings revealed by Allah Almighty are largely principled and general in nature, and their practical application requires the use of human reason. In this operationalization particularly in the field of muʻamalah the concept of maṣlaḥah (public interest or welfare) becomes crucial.[17]

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[14] Mohammad Daud Ali, *Penerapan Hukum Islam dalam Negara Republik Indonesia*, (Jakarta, Makalah Kuliah Umum Pada Pendidikan Kader Ulama di Jakarta, 1995), h.15

[15] Mohammad Daud Ali, *Penerapan Hukum Islam dalam Negara Republik Indonesia*, (Jakarta, Makalah Kuliah Umum Pada Pendidikan Kader Ulama di Jakarta, 1995), h. 15

[16] Busthanul Arifin, *Transformasi Syariah ke dalam Hukum Nasional Bertenun dengan Benang-benang Kusut*, (Jakarta: Yayasan Al-Hikmah, 1999), h. 5 dan h. 11.

[17] Muhammad Abduh, *Tafsir al Manar, jilid II* (Kairo: Dar al Manar, t.t.), h. 283

Muhammad Syahrur likewise advocated for the renewal of Islam through a contemporary reading that fills the existing gap by means of ijtihadan independent reasoning process carried out in response to human needs and the challenges of the modern era.[18] The traditional view that the gate of ijtihad has been closed is not only challenged but is also regarded as a reflection of intellectual stagnation. It is therefore unsurprising that taqlid (blind adherence to precedent) receives strong criticism from reformist scholars.[19]

Busthanul Arifin's perspective differs from that of Snouck Hurgronje, Schacht, and several Muslim jurists who continue to maintain that Islamic law in its concept, developmental nature, and methodology is an eternal law.[20] This notion was later reinforced by the establishment of the four Sunni schools of thought (madhhabs) in the 9th and 10th centuries, during which shari'ah came to be codified as divine law unchangeable, comprehensive, and considered beyond the need for addition or modification.

Ali Said, in his address at the Symposium on the Reform of National Civil Law held in Yogyakarta on December 21, 1981, stated that Islamic law consists of two main domains: the domain of 'ibadah and the domain of mu'amalah (civil affairs).[21] The legal regulations related to 'ibadah are detailed and specific, whereas those concerning mu'amalah (civil matters) are not as detailed only the fundamental principles are determined. Islamic civil law constitutes a part of Islamic law that has been formally and juridically applied, becoming part of Indonesia's positive legal system. Its content covers only a portion of the scope of mu'amalah. This segment of Islamic law attains the status of positive law by virtue of, or through designation by, statutory regulations.[22] To ensure that Islamic civil law becomes more prospective in the future codification of national law, the political will of legislators at both the central and regional levels is a primary prerequisite. Court decisions that align with Islamic civil law as practiced within Islamic communities also play an important role. This reflects the ultimate goal of producing constructive legal thought that contributes to the development of Islamic civil law in Indonesia.

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[18] Muhammad Syahrur, *Metodologi Fiqih Islam Kontemporer* terj. Sahiron Syamsuddin dan Burhanudin, (Yogyakarta: elSAQ Press, 2003), h. xiii-xiv

[19] Harun Nasution,*Pembaharuan Dalam Islam Sejarah Pemikiran dan Gerakan*, (Jakarta: Bulan Bintang, 1996), h. 21

[20] J. N. D. Anderson, *IslamicLaw in the Modern World*, (New York: New York University Press, 2011), h. 3

[21] Mohammad Daud Ali, *Hukum Islam Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia* (Jakarta: Rajawali Pers, 1990), h. 230-226.

[22] Muhammad Daud Ali, *Hukum Islam Pengantar Ilmu Hukum*, h. 227

Islamic law is one of the essential aspects of Islamic teachings, holding a central position within the Islamic worldview, as it represents the most concrete manifestation of Islam as a religion. The significance of Islamic law in the doctrinal framework of Islam is so great that an orientalist named Joseph asserted that it is impossible to understand Islam without understanding Islamic law.[23]

The effort to integrate Islamic law into the national legal system has continually faced obstacles.[24] Indonesia, as a nation founded on Pancasila and committed to guaranteeing religious freedom for all its citizens, has not yet fully provided adequate space for the implementation of religious teachings particularly those of Islam, whose followers constitute the majority of the population. The attempt to legislate Islamic law within the national legal framework often encounters opposition from various groups seeking to block or reject it. Numerous reasons are put forward, among them claims that such efforts contradict the spirit of pluralism, aim to turn Indonesia into an Islamic state, or seek to revive the Jakarta Charter.

According to Abdurrahman Wahid, not all Islamic teachings need to be legislated by the state. Many aspects of state law operate purely under moral guidance that is realized through the full awareness of society. The glory of religious law will not diminish when it functions as a system of social ethics. In fact, its vitality becomes more evident because its development can occur even without state support. For this reason, he preferred to regard shari'ah as a moral injunction rather than as a formalistic-legalistic order.[25] Challenges also arise from non-Muslim groups. Legislative products are inherently political in nature; therefore, for efforts to legislate Islamic law to succeed, they must gain majority support within the legislative body. However, political reality shows that Islamic political aspirations do not represent the majority in Indonesia.[26]

On several occasions, the author participated in bahtsul masa'il sessions organized by the Regency MUI (Indonesian Ulema Council) as well as in online fiqh discussion groups, which debated the legal conflict surrounding triple divorce (ṭalaq tiga) conducted outside the court and later brought before the Religious Court. In such cases, judges often issue a ruling recognizing only a single revocable divorce (ṭalaq raj'i).

Muhammad Irfan Husaeni, a judge of the Religious Court, wrote in his article:

"*Not only ordinary people, but even public figures and university students within the Religious Court itself, some of its officials still draw a dichotomy between divorce according to religion and divorce according to state law. Even a Religious Court judge may appear hesitant when a petitioner claims to have already pronounced divorce on his wife. 'Yes, religiously it is valid,*

[23] Yoseph Schachat, *An Introduction to Islamic Law* (London: The Clarendon Press, 1971), h. 1

[24] Warkum Sumitro, *Perkembangan Hukum Islam di Tengah Kehidupan sosial Politik di Indonesia* (Malang: Bayumedia, 2005), h. 214-215

[25] Abdul Haris Abbas, Hukum Islam Dalam Hukum Nasional, *Al-Risalah* | Volume 13 Nomor 1 Mei 2013

[26] Jazuni, *legislasi Hukum Islam di Indonesia* (Bandung: Citra Aditiya Bakti, 2005), h. 489-490.

since Indonesia adheres to the Shafi'i school, but according to state law, it is not yet valid,' the judge replied."

The researcher even heard of a case during a technical training session (bimtek), where a judge asked the resource person, "Is a husband's divorce of his wife conducted outside the court valid?" The speaker firmly responded, "If you are still in doubt about that, you had better resign as a judge."[27]

Muhammad Irfan Husaeni's statement indicates that, from the perspective of the Religious Court, the issue in question has been considered resolved; however, this is not the case for the general public. Referring again to Muhammad Irfan Husaeni's statement, based on Article 39 paragraph 1 of the Marriage Law, divorce can only be carried out before a court session after the court has attempted and failed to reconcile both parties. Therefore, a divorce (talak) pronounced outside the court session has no legal force because it does not provide legal protection and justice to the wife.

Meanwhile, based on Article 114 of the Compilation of Islamic Law (KHI), the dissolution of a marriage due to divorce may occur either through a husband's declaration of talak or through a wife's lawsuit. Article 114 of the KHI states: "The dissolution of marriage caused by divorce may occur either through talak or based on a divorce lawsuit."

From this, it is clear that Muslims adhere to the provisions of Islamic law regarding talak (divorce), which are also regulated in the Compilation of Islamic Law (KHI). Then, what is the legal status of Islamic law (KHI) in relation to state law (positive law) concerning talak?

To answer this question, we can understand that the talak regulated in the KHI originates from Islamic law, and the implementation of the KHI itself was affirmed through Presidential Instruction No. 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law ("Inpres 1/1991").

In connection with this, the preamble of Inpres 1/1991 states that Indonesian Islamic scholars (Ulama) in a workshop held in Jakarta from February 2 to 5, 1988, had accepted the three draft books of the Compilation of Islamic Law, namely: Book I on Marriage Law, Book II on Inheritance Law, and Book III on Endowment (Waqf) Law, which then formed the basis for the creation of the Compilation of Islamic Law. Furthermore, the KHI may be used by government institutions and the public as a guideline in resolving matters related to marriage, inheritance, and endowments.

Therefore, in the author's view, the provisions in Islamic law are already in harmony with the provisions of positive law governing talak, as regulated in the KHI. This is because the KHI itself is derived from Islamic law. However, the absence of legal recognition in the form of divorce documentation (due to talak not being pronounced before the court) will indeed affect the legal status of the marriage and may lead to other legal issues. Hence, Muslims must also comply with state law, namely positive law.

[27] Pemohon Mendalilkan Telah Talak Tiga di Luar Pengadilan, Bagaimana Sikap Hakim? Muh. Irfan Husaeni, http://irfanhusaeni.blogspot.co.id, diakses tanggal 2 Mei 2017.

The requirement that talak (divorce) be conducted before the court is not only viewed as a rule of state law but also as part of syar‘ (Islamic law), since both are consistent, mutually supportive, and demonstrate the proper procedure for implementing divorce according to Islamic law.

Pronouncing talak in the presence of a Religious Court hearing is one of the correct ways to practice Islamic law, while also eliminating improper divorce practices that contradict syar‘, such as divorces made through electronic media like SMS (short message service), written notes, or other forms of social media.

Pronouncing talak must be carried out before the session of the Religious Court because the Religious Court serves as a protective authority. The Religious Court can play a role in providing guidance to the parties involved in the case and ensuring the protection of each party's rights resulting from the divorce, such as nafkah iddah (maintenance during the waiting period), mut‘ah (consolatory gift), and child support until adulthood.

From the court's perspective, the guiding principle is based on the Compilation of Islamic Law (KHI) and other formal legal frameworks. Meanwhile, the local community and religious scholars adhere firmly to the traditionalist fiqh concepts in resolving such issues. As a result, differences in views arise between the court and the community regarding the status of the parties involved when they attempt to reconcile. The Religious Court, within its authority, will determine that the case constitutes a ṭalaq rajʿi (revocable divorce), meaning there is still an opportunity for the couple to reconcile during the wife's ʿiddah period. On the other hand, the surrounding community regards it as a ṭalaq thalath (triple divorce), which carries the legal consequence that the couple cannot reconcile. If they wish to remarry, the wife must first marry another man, consummate the marriage as husband and wife, then be divorced, and complete her ʿiddah period. If the couple insists on reconciling (based on the Religious Court's decision), the local community will strongly oppose it possibly resulting in expulsion or other actions that would harm many parties.

According to the author, who works in the Religious Court, such cases frequently occur, and most of these petitions are merely shortcuts to avoid the traditional fiqh requirement that the wife must remarry another man before reuniting with her first husband. This situation has led to a decline in public trust toward the court in divorce matters, as it is perceived to contradict the provisions of the recognized madhhab fiqh, which for generations has been regarded as the binding law in religious practice within the community.

In this regard, the author holds a different opinion from Muhammad Irfan Husaeni. The author believes that the "triple divorce" (ṭalaq thalath) referred to in this discussion does not mean a triple pronouncement made simultaneously in one sitting, but rather a series of separate divorces occurring naturally over time. For example, a husband divorces his wife, then reconciles; after some time, he divorces her again and later reconciles once more; after several months, he divorces her for the third

time and wishes to reconcile yet again. Such a situation becomes known to religious scholars, community leaders, and other members of society. Naturally, they would not dare to allow the couple to reconcile, fearing they would be complicit in enabling adultery. Within the community's belief system, allowing such reconciliation would be tantamount to permitting zina (fornication), which is traditionally considered to bring misfortune and calamity (bala) upon the entire village.

As is commonly understood, the Banjar community (in South Kalimantan) predominantly adheres to the Shafi'i school of thought. Therefore, it can be said that they find it very difficult to accept the provisions contained in Article 39 of the Marriage Law, the Compilation of Islamic Law (KHI), and other similar legal regulations.

In the laws governing marriage in Indonesia, there is no provision or recognition of the concept of an unofficial divorce. According to Article 117 of the Compilation of Islamic Law (KHI), divorce (talak) is the husband's declaration before a session of the Religious Court, which serves as one of the causes for the dissolution of marriage. Article 117 of the KHI states: "Talak is the husband's declaration before a session of the Religious Court, which constitutes one of the causes for the dissolution of marriage, in the manner referred to in Articles 129, 130, and 131."

Strong legal pluralism refers to the reality of the coexistence of multiple legal systems within all social groups, each considered to have equal standing, such that there is no hierarchy implying that one legal system is more dominant than another. In this context, Eugene Ehrlich's Living Law theory states that within every society, there exist living legal norms (living law) that operate as normative orders. These are often contrasted with, or even opposed to, the formal legal system of the state thus placing them within the category of strong legal pluralism.[28] As the legal scholar Eugen Ehrlich stated, positive law will only be effective if its content aligns with the law that lives within society. In this case, there has not yet been a meeting point between the community and the judicial or legislative authorities.

CONCLUSION

In the establishment of law, differences of opinion between the majority and the minority may occur; however, the implementation of law within society carries different consequences. Social unrest within communities that adhere to religious authority often causes individuals to be judged by society when they follow the authority of the state. In the Banjar community, which predominantly adheres to the Shafi'i school of thought, there exists a clear difference between the laws upheld by religious authority and those regulated by the state through Law Number 1 of 1974 on Marriage as well as the Compilation of Islamic Law (KHI).

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[28] Hooker, M. B., *Legal Pluralism: Introduction to Colonial and Neo-Colonial Law*, (London: Oxford University Press, 1975), h. 3. See Rasyid Rizani, *Sosiologi Hukum Dalam Pandangan Eugen Ehrlich*, http://www.pa-banjarmasin.go.id, diakses tanggal 12 September 2017.

Ideally, the law should serve as a tool of social engineering or social control within society. However, in the case of the Banjar community, this is not the reality religious authority is given more prominence than state authority. As a result, the reasons presented for divorce often miss their intended purpose. How can the claim that a triple divorce (talak tiga) occurred outside the court be used as a husband's reason to file for divorce in the Religious Court, or as a wife's reason to sue her husband? The court is an institution established by the state and is obligated to obey state authority, including all regulations related to marriage and divorce in any jurisdiction. There should be a harmonization of laws between political authority and religious authority so that social conflicts regarding talak tiga outside the court can be properly resolved.

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