

## **Opportunities and Challenges of Isbat Talak in Divorce in Indonesia and Abroad**

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### **Abstract**

*This article presents a discussion of the legal construction of the isbat divorce in religious courts, because the norm regarding the isbat divorce has not yet existed, but there have been many conditions that demand it and many people have suggested it, including the Indonesian Ulema Council through the fatwa commission. There are two main points to be discussed in this article. First, the construction model of isbat talak in religious courts in Indonesia. Second, the opportunities and challenges of implementing this model for couples who are divorced abroad. This study uses a qualitative approach with data collection techniques in documentation. Sources of data were obtained from documents in the form of the Marriage Law and its derivative rules, the Compilation of Islamic Law in Indonesia, and the results of the 'ijtima' of the MUI Fatwa Commission throughout Indonesia in 2012. This study shows that the isbat talak is possible to be constructed in the religious justice system as recommended by the MUI in the fatwa. This construction is also possible to apply to couples who divorce abroad by paying attention to other relevant regulations.*

**Keywords:** Legal Construction; Isbat divorce; Isbat Marriage; MUI fatwa.

### **Abstrak**

*Artikel ini menyajikan pembahasan tentang konstruksi hukum isbat talak di pengadilan agama, karena norma tentang isbat talak itu hingga saat ini belum ada, tetapi sudah banyak kondisi yang menuntut ke sana dan sudah banyak kalangan yang menyarankan, termasuk Majelis Ulama Indonesia melalui komisi fatwa. Ada dua hal pokok yang hendak dibahas dalam artikel ini. Pertama, model konstruksi isbat talak di pengadilan agama di Indonesia. Kedua, peluang dan tantangan penerapan model ini bagi pasangan yang bercerai di luar negeri. Studi ini menggunakan pendekatan kualitatif dengan teknik pengumpulan data secara dokumentasi. Sumber data diperoleh dari dokumen berupa Undang-Undang Perkawinan dan aturan turunannya, Kompilasi Hukum Islam di Indonesia, dan hasil 'ijtima' Komisi Fatwa MUI se-Indonesia tahun 2012. Penelitian ini menunjukkan bahwa isbat talak memungkinkan dikonstruksi dalam sistem peradilan agama sebagaimana direkomendasikan oleh MUI dalam fatwanya. Konstruksi ini juga memungkinkan diterapkan bagi pasangan yang melakukan perceraian di luar negeri dengan memperhatikan aturan-aturan terkait lainnya.*

**Kata Kunci:** Konstruksi Hukum; Isbat Talak; Isbat Nikah; Fatwa MUI.



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## Introduction

If marriage outside the court can be granted by the court, why can't divorce outside the court also be granted? This question is often the subject of discussion and even serious study among legal reviewers, legal practitioners, and the general public. Law Number 1 of 1974 concerning Marriage mandates that every marriage must be registered (article 2). The Compilation of Islamic Law (KHI) added that the recording was carried out by the Marriage Registrar (article 5). However, for marriages that are not carried out in front of a marriage registrar, the parties can apply for a marriage certificate to the religious court (KHI article 7). In the case of divorce, the Marriage Law states that it must be done before a court hearing (article 39). The difference is, for divorce that has been handed down by the husband out of court,

It is recognized that the majority of Indonesian people's understanding of fiqh is still not in sync with the Marriage Law, Religious Court Law, and KHI. The opinion of *jumhur* (majority) of scholars in fiqh books states that divorce does not have to be carried out in court. This opinion is practiced by some Indonesian people. Meanwhile, Article 39 paragraph (1) of Law Number 1 of 1974 concerning Marriage jo. Article 65 of Law Number 7 of 1989 concerning Religious Courts jo. Article 115 of Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law states that divorce can only occur in a court session. Likewise, the public understands that marriages do not have to be registered or performed in front of a marriage registrar, while Article 2 of the Marriage Law jo.

Based on this consideration, the Fatwa Commission of the Indonesian Ulema Council (MUI) made this issue one of the topics discussed in the Ijtima' Ulama on July 1, 2012 in Tasikmalaya. In the ijtima', the MUI stated that divorce outside the court was legal as long as it complied with the provisions of the Shari'a and could be proven in court. In fact, the wife's iddah count has already begun when the divorce is handed down. However, for benefit considerations, the divorce that has been handed down must be reported to the religious courts in their respective jurisdictions. This MUI recommendation uses the reasoning of legal recognition or in KHI it is termed "itsbat" which among other things is used in matters of marriage which are held not in front of the Marriage Registrar or commonly known as siri marriage.

The issue of divorce outside the court and its isbat has been discussed quite a lot. Arrum Aisyah Abdulloh's research in Pasuruan revealed that the Pasuruan Religious Court judges viewed the isbat talaq as unnecessary, because apart from being stipulated by the Marriage Law and the KHI that divorce must

be carried out before a court session, divorce outside the court is also vulnerable to arbitrary behavior of man (husband). With the consideration of *mashlahah*, the divorce procedure must be considered better before the court than opening the opportunity for *isbat* divorce (Abdulloh, 2019). This consideration is in line with one brought by the Marriage Law and the KHI from the beginning, namely trying to maintain marriage and making it difficult for divorce to occur.

Abdurahman's study reveals that divorce outside the court does not have legal certainty. In practice, divorce outside the court often ignores the principles, rules, certainty, and purpose of the law, to the detriment of one party, especially women. As a norm, the Marriage Law clearly states that divorce must be done before a religious court session. To provide legal certainty and guarantee the rights of wives, children, and other related parties, the court through judges or mediators seeks to reconcile the parties first (Abdurrahman, 2019).

Zainuddin et al. argues, there are at least five problems that arise when divorce is handed down out of court, namely the difficulty of proving its validity, the possibility of the divorce occurring more than once, the absence of legal protection for the parties, obstacles to carrying out the next marriage, and the difficulty of fulfilling the rights of the parties. However, Zainuddin continue, *isbat talak* can still be carried out by judges in religious courts by taking into account the provisions of *fiqh*, even though its function is very important in providing legal protection, especially for women and children. Both procedurally and considerations of benefit, the *isbat* divorce can be analogous to the *isbat* of marriage (Zainuddin et al., 2020).

However, the study of Zainuddin et al. concluded that the judge of the religious court may perform the *isbat* divorce on the grounds that in Law Number 1 of 1974 concerning Marriage there is not a single verse that states that divorce outside the court is invalid. This argument contains an understanding bias, because in the Marriage Law and the Religious Courts Law it is clearly stated that divorce can only occur before a court session. Therefore, by using the method a *contrario argumentum* (Widiyasari, 2010), then the argument "there is not a single verse stating that divorce outside the court is invalid" put forward by Zainuddin is not correct.

Departing from this, to realize the understanding of the majority of *fiqh* scholars that divorce does not have to be before the court, the steps that must be taken are legal construction, not just interpreting articles which basically already have clear clauses. The decision of *Ijtima' Ulama* of the MUI Fatwa Commission in Indonesia IV in 2012 regarding divorce outside the court can be used as an initial reference, with the consideration that the fatwa is one of the products of Islamic law (Hallaq, 1997; Muzhar, 2012), while Islamic law is one of the sources for the formation of national law (Maksum, 2016). For this reason, this article intends to examine the MUI fatwa in order to build the legal construction of the *isbat* divorce in religious courts. There are two things to look at. First, the

reasoning of the MUI Fatwa on divorce outside the court. Second, the derivative form of the MUI fatwa as a legal construction of divorce outside the court.

### **Method**

This study uses qualitative data obtained from documents in the form of Law Number 1 of 1974 concerning Marriage, Law Number 7 of 1989 concerning the Religious Courts which has been amended by Law Number 3 of 2006, then amended again by Law Number 50 of 2009, the Ijtima' Ulama's Decision of the MUI Fatwa Commission in Indonesia IV in 2012 regarding divorce outside the court, fiqh literature on *munakahat* (marriage) and justice (*qadha'*), and other related documents.

This study uses a legal construction approach or also termed the method of legal interpretation. This method can be used by judges in filling the void in laws and regulations based on legal principles and principles. This legal construction approach consists of three forms, namely *argumentum per analogiam* (analogy), determination (refining), and *argumentum a contrario* (understanding the opposite). Analogy is a legal equation for a situation whose form has not been explicitly regulated with a condition whose substance is the same and its form has been regulated in legal norms. Determination (*rechtsverfining*)—often also referred to as legal refinement—is the application of the law beyond written provisions in order to promote justice for the parties, because if it is applied according to written norms, it is feared that social injustice will occur. *Argumentum a contrario* is the opposite interpretation or denial of the opposite condition of the norm (Juanda, 2017).

### **Results and Discussion**

#### **MUI Fatwa Framework on Divorce outside the Court**

The MUI Fatwa Commission throughout Indonesia held the fourth *ijtima'* at the Cipasung Islamic Boarding School, Tasikmalaya, West Java, from June 29 to July 2, 2012. In addition to discussing contemporary religious issues, this *ijtima'* is projected to strengthen the position of the Fatwa Commission, both at the central and regional levels, considering that regional fatwa commissions and community organizations are also involved, including Islamic boarding school scholars and academics. The results of this *ijtima'* are divided into three groups. First, on national issues in the form of the principles of governance according to Islam, obedience to the government, the concept of Human Rights (HAM) in the life of the nation, ethics in expressing opinions and freedom of expression, and about the General Election of Regional Heads (*Pilkada*). Second, regarding contemporary fiqh issues in the form of divorce outside the court, confiscation of assets of perpetrators of corruption, criminal acts of money laundering, drug abuse, consumption and production of nicotine for medical purposes, transactions under Islamic law (*muamalah*), hajj bailouts, deposits from the Hajj Organizing Agency (BPIH) and its management in conventional banks, use of

formalin and food preservatives, legal status of mosque land, Friday prayers in buildings, and vasectomy contraception. Third, the formulation of recommendations regarding legislation and vasectomy contraception. Third, the formulation of recommendations regarding legislation and vasectomy contraception. Third, the formulation of recommendations regarding legislation and vasectomy contraception. Third, the formulation of recommendations regarding legislation (Sam & Soleh, 2012).

Regarding the legal decision (*fatwa*) regarding divorce outside the court, the forum's decision based the problem on the incompatibility between the Marriage Law and the understanding of fiqh that lives in society. In the Marriage Law, it is emphasized that divorce must be carried out in front of a court hearing, while in the understanding of community jurisprudence, divorce may be imposed out of court. The understanding of the community is based on the opinion of the majority of fiqh scholars. There is a difference of opinion among scholars on this matter. There are scholars who put forward strict rules by requiring divorce to be in front of the court, there are scholars who relax it by not requiring a court process. However, the most widely developed opinion in the fiqh literature and commonly practiced by the Indonesian people for a long time is the loosening opinion. When the Marriage Law requires that divorce must go through a court hearing, there is a conflict of understanding.

MUI then concludes three points. First, divorce out of court is legal as long as it fulfills the conditions stipulated by the sharia and can be proven in court. Second, the iddah of divorce is counted from the time the divorce is passed or is counted as valid. Third, for the sake of benefit and legal certainty, any divorce handed down outside the court must be reported to the local Religious Court (Sam & Soleh, 2012). On that basis, the MUI recommends two things: (i) that the government and the ulama provide education to the public to strengthen the marriage institution and not easily drop divorce; (ii) even if the divorce ends, the husband must guarantee the rights of his wife and children after the divorce.

To produce this decision, the MUI Fatwa Commission based its opinion on three verses of the Koran, two Hadiths of the Prophet, and five principles of fiqh. The verses referred to are Surah al-Thalaq verses 1 and 2, and Surah al-Baqarah verse 236, which are as follows:

يَا أَيُّهَا النَّبِيُّ إِذَا طَلَّقْتُمُ النِّسَاءَ فَطَلِّقُوهُنَّ لِحَدَّتِهِنَّ وَأَحْصُوا الْعِدَّةَ وَاتَّقُوا اللَّهَ رَبَّكُمْ لَا تُخْرِجُوهُنَّ مِنْ بُيُوتِهِنَّ وَلَا يَخْرُجْنَ إِلَّا أَنْ يَأْتِيَنَّ بِفَاحِشَةٍ مُّبِينَةٍ وَتِلْكَ حُدُودُ اللَّهِ وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَقَدْ ظَلَمَ نَفْسَهُ لَا تَدْرِي لَعَلَّ اللَّهَ يُحْدِثُ بَعْدَ ذَلِكَ أَمْرًا

"O Prophet, if you divorce your wives, let it be done when they are (facing) iddah, and estimate the time of iddah and fear Allah, your Lord. Do not throw them out of their homes and do not allow them to go out except when they are doing an obvious heinous act. Those are God's laws. Whoever violates the laws of Allah, then indeed he has wronged himself. You do not know that after that Allah will make a new provision."

فَإِذَا بَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ وَأَشْهِدُوا ذَوَيْ عَدْلٍ مِّنكُمْ وَأَقِيمُوا  
الشَّهَادَةَ لِلَّهِ إِنَّكُم مِّنْ يَوْمِنِ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ۗ وَمَنْ يَتَّقِ اللَّهَ يَجْعَلْ لَهُ مَخْرَجًا ۗ

"When they are nearing the end of their iddah, refer to them in a good way or release them in a good way, then testify through two fair witnesses. Establish that testimony for the sake of Allah. Thus this teaching is given to those who believe in Allah and the Last Day. Whoever fears Allah, Allah will open a way out for him later."

لَا جُنَاحَ عَلَيْكُمْ إِن طَلَقْتُمُ النِّسَاءَ مَا لَمْ تَمْسُوهُنَّ أَوْ تَفْرِضُوا لَهُنَّ فَرِيضَةً ۖ وَمَعُوهُنَّ عَلَى  
الْمُوسِعِ قَدْرُهُ ۚ وَعَلَى الْمُقْتِرِ قَدْرُهُ ۚ مَتَاعًا بِالْمَعْرُوفِ حَقًّا عَلَى الْمُحْسِنِينَ

"There is no sin for you if you divorce your wives who you have not had intercourse with or you have not determined the dowry. Give *mut'ah* to them for those who can afford it, while for those who can't, it should be adjusted according to their abilities properly. Thus it is an obligation for those who do good."

The first verse contains provisions regarding the law of divorce and iddah (waiting period for a divorced wife). This verse uses the editorial "*idza*" (if) which means that divorce is not an act that is in line with the meaning and purpose of marriage, but only as a possible solution to unresolved household problems. Even if you have to drop the divorce, this verse emphasizes that the divorce should be handed down when the "*wife is facing the iddah*". The meaning of this phrase is when the wife is in a holy condition (not menstruating) and has not had intercourse during the holy period. This provision is so as not to burden women by waiting too long when they go through their iddah period (Shihab, 2017b).

Meanwhile, the second verse contains provisions for reconciliation during the iddah period or still deciding to divorce. Referring in a good way means that it is based on considerations of benefit or love, not because of the intent to harm (Ashqar, 2013). This verse also contains provisions regarding witnesses for referring persons. The social context of this verse when it was revealed relates to the child of Auf bin Malik who was taken prisoner by the enemy, then Auf bin Malik reproduced the recitation of *hauqalah*, until then his son was released by the enemy (Zuhaily, 2003). The sentence "*fa-amsiku hunna*" (refer/keep them) indicates that the husband has the right to determine the continuity of his marriage by referring to the wife who has passed the divorce. This provision also means that women whose status is in the waiting period (iddah) are still considered as wives who must be supported by their husbands. It's just, he can't be mixed during that time (Shihab, 2017b).

Meanwhile, al-Baqarah verse 236 contains divorce from a wife who has not had intercourse. In this condition, there is no obligation for a husband to pay the dowry of the *mitsil* when he divorces the wife he has not had intercourse with, even though the *musamma* dowry has been mentioned previously. The gift that can be done in this context is *mut'ah*, which is a gift or gift to a divorced woman

in the form of clothes or other property that is worthy of a dowry, with a measure according to the husband's financial condition and not contrary to the Shari'a. However, if he has intercourse with her, then it is obligatory to pay the dowry of mitsil or dowry of musamma (Zuhaily, 2003). Dowry in this verse is expressed as an obligation, while mut'ah is a gift as a symbol of wisdom so that both parties do not hold grudges and maintain friendship (Shihab, 2017a).

The three verses referred to in the MUI fatwa are verses about divorce and reconciliation. In this verse, there is no explicit statement that requires divorce to be done before the court. The practice of divorce described in the paragraph is individual and does not involve state institutions. Even if there is a clause about "witnessing with two fair people" in one of the verses above, it is still not included with the existence of a judicial institution. This means that a fair witness does not have to be confirmed in a judicial trial, but is more general in nature. These verses at a glance already give an idea of where the MUI fatwa is headed.

Next, the Hadiths quoted in the fatwa are as follows:

عَنْ أَبِي هُرَيْرَةَ قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ثَلَاثٌ جِدُّهُنَّ جِدٌّ وَهَزْلُهُنَّ جِدُّ النِّكَاحِ وَالطَّلَاقُ وَالرَّجْعَةُ

"From Abu Hurairah, he said: Rasulullah SAW. said: "There are three things which when done seriously, the result is real, and when done jokingly, the result is earnest. The three things are marriage, divorce and reconciliation."

عليكم بالسمع والطاعة، وإن تأمر عليكم عبد حبشي كأن رأسه زبيبة

"We are obliged to listen and obey (to the leader), even though you are led by a Habasyi slave whose head is like a raisin."

The first hadith explains the sacredness of husband's speech which contains marriage, divorce, and reconciliation, so that his joking remarks are considered serious. This hadith is found in many hadith books, including in Sunan al-Tirmidhi the 1104th order (Isa, 1996), Sunan Abi Daud order 1875 (Sijistani, 1952), Sunan Ibn Majah 2029 (Yazid, n.d.), and Sunan Daruquthni ranked 3593, 3595, 3596, and 3895 (Umar, 2001). Based on this hadith, the majority of fiqh scholars are of the opinion that marriage is valid as long as it fulfills the pillars and conditions, even without being witnessed by a marriage registrar. Likewise with divorce, it can occur even without going through a trial in a religious court.

Meanwhile, the second Hadith does not contain provisions regarding marriage, divorce, or reconciliation, but rather about obedience to the leader. This hadith can be found in Sahih Bukhari 7142 (Bukhari, 1973), Sunan Ibn Majah 2860 (Yazid, n.d.), and the Musnad of Imam Ahmad in the 114th order (Hanbal, 1990). Quoting this Hadith in the MUI fatwa provides an understanding that MUI wants to direct Muslims in Indonesia to obey the government. Thus, even if the conclusions of the fatwa produced later are not exactly the same as

the regulations or statutory norms, it is not in the context of opposing the government.

Furthermore, the MUI Fatwa cites five principles of fiqh as follows:

الضرر يزال

"Things that are harmful must be removed"

حكم الحاكم الزام ويرفع الخلاف

"The judge's decision is binding and eliminates differences"

تصرف الإمام على الرعية منوط بالمصلحة

"Leaders' efforts for the people must be benefit-oriented"

الأمر بمقاصدها

"Every action depends on the goal"

مقاصد اللفظ على نية الالفاظ

"The purpose of a word is based on the intention of the person who uttered the word"

The first rule contains the principles of safety and benefit contained in Islamic law for mankind. Based on this rule, Islamic rules aim to keep people away from actions that can hurt themselves and others, or be hurt by others (Washil & Azzam, 2009). Meanwhile, the second and third rules contain the principles of leadership or the relationship between the ruler and his people which is oriented towards benefit. The second rule is more specific in terms of addressing the differences that arise, while the third rule is more specific in terms of developing benefits. The fourth and fifth rules contain the motive for a legal action. The fourth rule is more specific about intentions which determine the substance of an action, while the fifth rule is about intentions that determine the purpose of a person's speech (Habziz, 2019).

Thus, it can be understood that of the three verses of the Qur'an quoted by the MUI fatwa, all of them are about the issue of munakahat. Meanwhile, of the two Hadiths quoted, one of them is about munakahat, the other is about leadership. As for the five fiqh rules, one is about the principle of universal benefit, two are about leadership, and two are about the motive for legal action. If all of them are classified by theme, then there are four categories of themes in these references, namely about the content of munakahat, leadership, universal benefit, and motives for action.

From this, it can also be understood that the fatwa's reasoning is that in addition to conveying content about the fiqh munakahat issue, MUI also wants to convey directions or invitations to the public to obey the government and create the common good. While the fourth theme category implies a message to the



judge who will decide the case regarding munakahat in the Religious Courts that to ensure the purpose of the talaq handed down by the husband is to directly ask the husband who said it, not on the basis of the judge's decision alone which is not necessarily in sync with the intention. husband's words. Therefore, the quotation from the fourth and fifth rules seems to be in sync with the first conclusion in the fatwa that the divorce handed down by the husband at home is valid, because it is the husband who understands what he says best. moreover, this argument is supported by the first three verses of the Qur'an quoted. This means that, although each has its own target focus, the five fiqhiah rules quoted in this article are relevant to the main topic of the fatwa.

### **MUI Fatwa as a Legal Construction of Isbat Divorce**

Considering that the isbat talak is not explicitly regulated in the legal norms of marriage in Indonesia, to follow up on the MUI fatwa, it is necessary to seek legal discovery or legal construction by judges. Construction can be done through three methods, namely analogy, determination, and argumentum a contrario (understanding the opposite). In the issue of isbat talak, the legal construction can use the analogy method, which is to find legal equations for problems that have not been explicitly regulated in the norm with issues that have been explicitly regulated. In this context, the isbat talak is analogous to the marriage isbat which is regulated through Article 7 of the KHI.

KHI is indeed not included in the hierarchy of laws and regulations in Indonesia, because it is established only based on a Presidential Instruction. As stated in Article 7 of Law Number 12 of 2011 concerning the Establishment of Legislations, the hierarchy of laws and regulations in Indonesia consists of: 1) the 1945 Constitution of the Republic of Indonesia; 2) Decree of the People's Consultative Assembly (Tap-MPR); 3) Laws or Government Regulations in Lieu of Laws (PerPPU); 4) Government Regulations; 5) Presidential Regulation; 6) Provincial Regulations; 7) Regency/City Regional Regulations. Of all these types of regulations, presidential instructions are not included.

However, since it was stipulated through Presidential Instruction Number 1 of 1991, KHI has been socialized so that it can be used as a guide for judges in the Religious Courts. In terms of legal authority, the material in KHI is law that lives in society or is termed "the living law", considering that the majority of Indonesian people have made Islamic law the norm and the rules of their daily life long before the state developed legal norms through constitutional mechanisms (Gibb, 1947). The KHI preamble also states that it can be used as a guideline by judges in the religious courts in deciding cases.

Although it is not contained in the Marriage Law and is only found in the KHI, the mechanism for marriage isbat is then regulated through the decision of the Chief Justice of the Supreme Court of the Republic of Indonesia Number KMA/032/SK/2006 concerning Guidelines for the Implementation of Duties and Court Administration. In the KMA it is stated that marriages that have been

carried out according to Islamic religious law, but are not recorded by the marriage registrar or the Office of Religious Affairs (KUA), can then be determined or itsbat. The implementation mechanism is then explained in more detail in the Technical Guidebook for the Administration of Religious Courts (Tim Mahkamah Agung, 2008).

KHI is a step forward for Indonesian Muslims in implementing Islamic law in the civil sector (family law) as well as in the formation of national law. KHI is recognized by national law, and even has the status of national law (Rahman, 2015). In the religious courts in Indonesia, KHI acts as a material law (Rofiq, 2009). However, KHI is still an initial step that is not final and still needs improvement, both formally and materially (Harahap, 2001).

As one of the material laws that apply to religious courts in Indonesia, KHI in article 7 paragraphs (2) and (3) stipulates that marriages that cannot be proven by a marriage certificate can be filed for isbat at the religious court. The submission of the isbat relates to: (i) the determination of a marriage in the context of resolving a divorce dispute; (ii) loss of marriage certificate or book; (iii) there is doubt about the validity of a marriage; (iv) marriages that took place before Law No. 1/1974 was enacted; (v) marriages that are not accompanied by elements of a marriage barrier according to the Marriage Law. The first four points are special conditions that only provide opportunities for marriage isbat for certain things, while the fifth point opens wider opportunities for marriage isbat. With this fifth point, almost all unregistered marriages can be filed for isbat even though the practice of unregistered marriages was not accompanied by special reasons that are accommodated by the legislation.

However, in the KHI only provisions are stated for isbat for marriages that are not performed in front of the registrar, while for divorces handed down outside the court there is no isbat provision. Both the Marriage Law and the KHI state that divorce can only occur in a religious court trial. Therefore, there seems to be a conflict between fiqh (which develops in society) and the rule of law. Therefore, to mediate this condition, it would not be wrong to approach a legal analogy between marriage and divorce, so that the conclusion arises that the isbat of divorce that has been handed down out of court can of course also be done. However, it is still necessary to think about the consequences that have the potential to bring harm to women and children.

Article 38 of the Marriage Law states that a marriage can be broken due to three things, namely death, divorce, and court decisions. In this article, there is a distinction between divorce and court decisions. Meanwhile, Article 39 states that divorce can only occur before a court hearing. Here, there is an inconsistency of norms in the two articles. If it is true that divorce can only occur before a court session, the points "divorce" and "court decision" contained in article 38 should be combined or combined into one. However, when divorce is declared a separate matter from the court's decision, there is an opportunity to understand that divorce can occur outside the court. On that basis, it would not

be wrong if the religious courts used the isbat divorce mechanism by using a legal analogy approach to marriage ratification.

### **Isbat Talak for Divorced Couples Abroad**

Divorce abroad is possible under several conditions. First, husband and wife marry in Indonesia and then live abroad. Second, marriages between Indonesian citizens but take place abroad. Third, mixed marriages, then the husband or wife follows their partner who lives abroad. For the first condition, in Article 66 of Law Number 7 of 1989 concerning Religious Courts it is stated that every application for divorce must be submitted to the court, while for the respondent who lives abroad, the application is submitted to the court at the residence of the applicant, but if both are abroad, the application for divorce is made at the religious court in the jurisdiction where their marriage took place or to the Central Jakarta Religious Court (Undang-Undang Nomor 7 Tahun 1989 Tentang Peradilan Agama, 1989).

The same provisions apply in a divorce suit. Article 73 states that if the plaintiff resides abroad, the lawsuit is filed with the religious court where the defendant resides. If both are abroad, then file a lawsuit with the religious court at the place where they got married or to the Central Jakarta Religious Court. On the other hand, if the wife files for divorce while the defendant is abroad, then as explained in the Compilation of Islamic Law (KHI), the notification of the divorce suit is submitted by the Head of the Religious Court where the lawsuit was filed to the defendant through the representative of the Republic of Indonesia in the local country (Instruksi Presiden Tentang Kompilasi Hukum Islam, 1991).

At the time of the trial, as explained in article 82, both parties are requested to be present, but for the spouse or one of the parties residing abroad, they can give special power of attorney to the person who can receive the power of attorney. If both are abroad, the plaintiff must come in person at the time of the trial. However, before the trial, as in Article 81, the two parties are reconciled first by the mediator judge. For one party who is abroad, can make a special power of attorney. If both are abroad, then the plaintiff must come directly in the mediation process. If mediation is unsuccessful, the judicial process continues to completion. Court decisions that have permanent legal force, as stipulated in article 84, will be sent by the court clerk to the Marriage Registrar where their marriage is registered (Undang-Undang Nomor 7 Tahun 1989 Tentang Peradilan Agama, 1989).

In conditions where the marriage is carried out outside Indonesia by fellow Indonesian citizens, then the marriage is considered valid if it meets the provisions applicable in that country without violating the Marriage Law in Indonesia, but they are still required to register their marriage at the Office of Religious Affairs or the marriage registrar where they live. stay. If there is a divorce between them at a later date, then the divorce will follow the normal procedure or as is the case with divorces that occur in Indonesia. The same

provisions apply if the marriage takes place between Indonesian citizens and foreigners abroad, then they return and settle in Indonesia (Peraturan Pemerintah Nomor 9 Tahun 1975 Tentang Pelaksanaan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan, 1975).

In mixed marriages, namely when two people marrying in Indonesia are subject to different laws because one of the parties is not an Indonesian citizen, then both of them must follow the provisions of the laws and regulations in force in Indonesia. Both of them have not been able to get married as long as the conditions stipulated by law have not been fulfilled. The fulfillment of these conditions must also obtain prior information from the marriage registrar. If later there is a divorce between them, the procedure is the same as for the divorce of Indonesian citizens who live in Indonesia (Undang-Undang Nomor 7 Tahun 1989 Tentang Peradilan Agama, 1989).

Every divorce lawsuit must be made in open court. Divorce is calculated from the date of the decision of the judge which has permanent legal force. Administratively, divorce is proven by a decision letter submitted by the clerk of the religious court to each party. For couples who are abroad, a copy is submitted to the Jakarta Marriage Registrar (Undang-Undang Perkawinan, 1974).

Because the Marriage Law in Indonesia adheres to the principle of making it difficult for divorce, every application for divorce must be accompanied by strong reasons that allow a divorce to take place. Each process can only be carried out in front of a court session after attempts at reconciliation or mediation by the court are unsuccessful. For couples or parties who are abroad, they must prepare a number of required documents, namely: a power of attorney made by a law office and legalized by the Indonesian Embassy in the local country; marriage book; Identity Card (KTP); the identity of the defendant; two witnesses; and child birth certificates for couples who already have children (Peraturan Pemerintah Nomor 9 Tahun 1975 Tentang Pelaksanaan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan, 1975).

Based on these provisions, there are no special terms and conditions that distinguish divorces at home and abroad, except for the addition of certain documents or administrative procedures that are conditional in nature. Therefore, the opportunity to apply the isbat talak procedure is still possible for couples who divorce abroad, both marriages between Indonesian citizens and mixed marriages. By analogizing the isbat talak with the isbat marriage, there are no special conditions that can prevent the opportunity to apply isbat talak for couples who are abroad, as long as the substantive matters related to isbat talak can be fulfilled and do not violate the provisions of laws and regulations.

## Conclusion

The fatwa resulting from *ijtima'* IV of the MUI Fatwa Commission throughout Indonesia stated that the divorce that was handed down was not valid before a court session, but it was necessary to prove it in court. However, the MUI recommends that the validity of this divorce be accommodated through a judicial mechanism, so that this fatwa does not create a potential clash between Islamic law and positive law in society. MUI wants to accommodate the *fiqh* prevailing in the community and the laws and regulations, so that by making this recommendation part of the legislation or material law in religious courts, the public no longer needs to clash between *munakahat fiqh* and statutory regulations. Therefore, from various arguments and *fiqh* literature referred to in the fatwa there are arguments about obedience to the leader.

*Isbat talak* is very possible to be carried out by judges of religious courts, especially after taking into account the recommendations of MUI in the *ijtima'* IV of the Fatwa Commission throughout Indonesia in 2012. The approach can use legal construction with an analogy method, namely equating the *isbat talak* (which does not yet have a norm) with the *isbat marriage* which already regulated in article 7 KHI. This analogy can be strengthened by article 38 of the KHI which states that the termination of a marriage can be caused by three things, namely death, divorce, and court decisions. In this article, divorce and court decisions are considered two different things. Thus, divorce is the process of breaking up a marriage outside a court decision. If the *isbat talak* for couples in Indonesia can be carried out, then there is no substantive obstacle if the same procedure is applied to couples who divorce abroad.

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