



# Optimizing Legal Protection for Divorce Outside of Court: Study of the Need for Divorce *Isbat* in the Indonesian Legal System

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## Abstract

This research examines the dualism of religious law and national law in the context of divorce in Indonesia, which raises significant legal and social dilemmas and challenges. This study uses a descriptive-analytic qualitative method with a normative juridical approach to analyze differences in divorce recognition under religious law and national law, as well as its impact on access to justice and legal protection, especially for women. This research identifies that discrepancies in divorce recognition cause various legal and social obstacles, such as difficulties in obtaining maintenance, division of assets, and child custody. As a solution, this study proposes the application of the concept of "divorce *isbat*" as a mechanism that allows official recognition of divorces carried out outside formal courts, offering higher legal certainty and more effective protection. This research highlights the importance of engaging cross-sectoral stakeholders,



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including religious leaders, legal practitioners, and civil society organizations, in supporting inclusive and effective legal reform. The implication of these findings is the need for legal reform that harmonizes religious law with national law to strengthen the integrity of the justice system and improve social justice.

### **Keywords**

Divorce *Isbat*; Legal Reform, Legal Protection

### **Kata Kunci**

Penelitian ini mengkaji dualisme hukum agama dan hukum nasional dalam konteks perceraian di Indonesia yang menimbulkan dilema dan tantangan hukum dan sosial yang cukup signifikan. Penelitian ini menggunakan metode kualitatif deskriptif-analitik dengan pendekatan yuridis normatif untuk menganalisis perbedaan pengakuan perceraian dalam hukum agama dan hukum nasional, serta dampaknya terhadap akses keadilan dan perlindungan hukum, khususnya bagi perempuan. Penelitian ini mengidentifikasi bahwa perbedaan pengakuan perceraian menyebabkan berbagai hambatan hukum dan sosial, seperti kesulitan dalam memperoleh nafkah, pembagian harta gono-gini, dan hak asuh anak. Sebagai solusinya, penelitian ini mengusulkan penerapan konsep “isbat cerai” sebagai mekanisme yang memungkinkan pengakuan resmi atas perceraian yang dilakukan di luar pengadilan formal, yang menawarkan kepastian hukum yang lebih tinggi dan perlindungan yang lebih efektif. Penelitian ini menyoroti pentingnya melibatkan pemangku kepentingan lintas sektoral, termasuk pemuka agama, praktisi hukum, dan organisasi masyarakat sipil, dalam mendukung reformasi hukum yang inklusif dan efektif. Implikasi dari temuan-temuan ini adalah perlunya reformasi hukum yang menyelaraskan hukum agama dengan hukum nasional untuk memperkuat integritas sistem peradilan dan meningkatkan keadilan sosial.

### **Kata Kunci**

Isbat Perceraian; Reformasi Hukum, Perlindungan Hukum

## **Introduction**

In the Indonesian legal context, the dualism between religious law and national law regarding divorce creates various legal dilemmas and significant social challenges. Divorce carried out in accordance with Islamic law, which requires the presence of two witnesses and the fulfilment of certain procedures, is recognized as valid according to religious law. However, without official registration in court, the legal status of the divorce is not recognized by the state. This often results in long-lasting legal consequences, affecting the legitimacy of legal actions related to divorce, such as the division of marital property, determining child custody, and maintenance obligations. These gaps create ample room for legal uncertainty, complicating the situation for separated individuals, especially for women, who, in many cases, find themselves without sufficient legal support to claim their rights.

At the implementation level, the differences between the provisions of religious law and national law not only cause confusion but also often give rise to injustice. Women, as parties who are traditionally more vulnerable in divorce matters, tend to experience greater difficulties in obtaining their legal rights after divorce. This includes the right to receive maintenance, division of joint property, and in many cases, custody of their children. In many cases, they also have to face the social stigma attached to divorce and the additional difficulty of navigating the bureaucratic legal process to obtain adequate recognition and protection for their divorce.

Overcoming this gap requires an integrated approach and adjustments to national law to better accommodate the principles of religious law that are widely adhered to by Indonesian society. Harmonization efforts between these two legal systems will enable the creation of a more inclusive and fairer legal framework. In this context, the development of legal mechanisms such as '*isbat* divorce' could be a strategic step in facilitating a divorce process that is in accordance with religious law and national law, ensuring that all citizens, regardless of

their religious and social background, have equal access to justice. and legal protection.

The significant inconsistency between religious law and state law regarding the divorce process in Indonesia often causes widespread negative impacts, especially for women. In the context of Islamic law, divorce is considered valid when it is carried out in accordance with religious requirements, even without court approval. However, according to state law, divorce is only considered valid if it is registered and processed through the judicial system.

As a result of this discrepancy, many women who have undergone divorce proceedings according to religious law find that they do not have the legal rights that are usually guaranteed by state law post-divorce. First of all, the lack of legal recognition of their divorce often deprives women of the right to receive maintenance post-divorce. Alimony which is supposed to provide temporary economic support after the end of a marriage, in many cases, cannot be reclaimed due to the absence of valid divorce documents in the eyes of state law. This situation worsens women's already vulnerable economic conditions, leaving them with little or no financial support to start their new lives independently.

Second, the division of joint assets which is usually regulated in a formal divorce process also becomes complicated. Without court approval of the divorce, the process of dividing assets—such as property, savings, and investments acquired during the marriage—can often not be carried out fairly. As a result, many women feel disadvantaged in the distribution of assets, where they may not receive a fair share or match their contributions during the marriage. Third, child custody is also a complex and challenging area. In many cases, without legal recognition of divorce, mothers often have difficulty obtaining legal custody, which results in obstacles in making important decisions regarding children's education and health. The absence

of clear legal documents about their divorce status often creates uncertainty about who has the legal right to make those decisions.

Apart from economic and legal problems, the social stigma attached to divorce also adds to the psychological burden faced by women. In a society that still holds traditional values, divorced women are often faced with prejudice and negative judgments, which can lead to social isolation and a decrease in overall quality of life. This stigma not only affects divorced women, but also impacts children and the wider family, exacerbating an already difficult situation. Taking these challenges into account, it is clear that there is an urgent need for legal reform that can harmonize religious law with state law in matters of divorce. These reforms will not only provide legal certainty, but will also ensure that the rights of individuals, especially women and children, are protected fairly and equally after divorce. Continuity between these two legal systems is important to ensure that all citizens can access adequate legal protection without discrimination or prejudice.

The emergence of the issue of incompatibility between divorce practices in religious law and national law has indicated an urgent need for comprehensive legal reform. This discrepancy results in legal instability and uncertainty for the parties involved, especially in obtaining legal rights post-divorce. In order to address this problem, legal reforms must be designed to align divorce practices with national legal norms, ensuring that every act of divorce receives legitimate legal recognition and validation. One of the proposed solutions to achieve this harmonization is the application of the concept of "divorce *isbat*".

This concept proposes a mechanism that would allow official recognition of divorces that occur outside the formal court framework, similar to the existing "*isbat nikah*" process. *Isbat nikah* has proven effective in recognizing marriages conducted without official registration, providing legal protection to the couple and legitimacy to the descendants of the

marriage. Therefore, adapting a similar framework for divorce may provide a more stable basis for resolving legal issues arising from out-of-court divorce.

The implementation of divorce *isbat* is expected to offer greater legal certainty and adequate protection for all parties involved in a divorce. By formalizing the divorce *isbat* process, a clear and structured procedure will be created that guarantees that all applicable rights and obligations in accordance with religious law and national law can be enforced. This includes settlements regarding the division of assets, post-divorce maintenance, and child custody, all of which must be handled fairly and transparently within a valid legal framework. Steps towards implementing divorce *isbat* require collaboration between legal institutions, religious stakeholders, and the government, to develop policies that not only respect religious beliefs and values, but also meet modern legal standards that apply nationally. Thus, the proposed legal reforms will not only strengthen the justice system and legal integrity, but also improve social justice and legal security for the entire society.

This research aims to examine the effectiveness of the divorce *isbat* concept in the current Indonesian legal framework and evaluate how the concept can be integrated into the national legal system to provide a fairer and more effective mechanism for recognizing and regulating divorce. By understanding the social, economic, and psychological implications of out-of-court divorce, this research seeks to provide strong recommendations to policymakers for establishing responsive and inclusive legal reform.

This research is expected to have a significant impact in shaping public policy and legal practice in Indonesia. By providing in-depth data and analysis regarding divorce and its implications in legal and social contexts, this research aims to advocate for reforms that will support the principles of justice, ensure the rights of all individuals are protected, and reduce

legal conflicts arising from out-of-court divorce. This will help in creating a more just and harmonious society, where all citizens can gain equal access to justice and legal protection.

## Methods

In this research, the method that will be used is a descriptive-analytical qualitative method, with a normative juridical approach. This approach was chosen because of its ability to analyze and interpret existing legal regulations and practices related to divorce outside of court in the context of national law and religious law in Indonesia. Data will be collected through document studies, which include relevant laws and regulations, court decisions, as well as other academic literature related to divorce and family law. In addition, in-depth interviews will be conducted with several key informants, consisting of legal experts, judges and family law practitioners, to gain further insight into the implementation and impact of the inconsistency between religious law and national law.

Data analysis will focus on the identification and evaluation of policy and practice discrepancies that occur, as well as their impact on the parties involved in an out-of-court divorce. This study will also examine various existing proposals and models for legal reform, including the concept of *isbat* divorce, to assess the effectiveness and feasibility of their implementation in the Indonesian legal system. Through comprehensive analysis, this research aims to produce practical and evidence-based recommendations to assist in the formation of more inclusive and fair policies that accommodate both legal systems, namely religious and national, and overcome current legal gaps.

## Results and Discussion

### *Analysis of the Incompatibility of Religious Law and National Law*

This research identified a significant discrepancy between religious law and national law regarding the recognition and

treatment of divorce in Indonesia. An in-depth study of various divorce cases carried out according to Islamic law but not recognized by the national legal system reveals broad legal and social impacts, especially on parties who do not have access to adequate legal protection post-divorce. The main finding of this analysis shows that many divorces carried out in accordance with Islamic law are not officially recorded in the national justice system.

This is mainly due to the complicated procedures and high costs associated with registering a divorce in court. As a result, many individuals, especially women, face major challenges in claiming rights such as maintenance, division of community property, and child custody. The absence of state-recognized divorce documents makes it difficult for them to prove their legal status, which is often required in various legal transactions and proceedings. The inconsistency between religious law and national law not only creates administrative chaos but also worsens social conditions for those whose divorces are not legally recognized. Women, who are traditionally more vulnerable in divorce cases, often find themselves at a disadvantage, facing social stigma and financial loss.

Children from marriages that end without formal recognition of divorce also experience negative impacts, especially in terms of custody and access to education and health services, which often require clarity about their parents' legal status. Discussions based on these results urge the need for legal reform that allows better integration between religious law and national law. One proposed solution is the development and implementation of divorce *isbat*, which would provide a legal framework to officially recognize divorces conducted outside of court. *Isbat* divorce aims to overcome the problem of reducing the rights of women and children by providing a clear and affordable process for legalizing divorce according to religious law in the national legal system. This will reduce legal

uncertainty and strengthen social and economic rights for all parties involved. The conclusion of this discussion is that this legal gap requires legislative action that will not only simplify procedures and reduce the costs associated with legalizing divorce, but also ensure justice and equality for all citizens, regardless of their religious affiliation or social background.

### ***The Impact of Out-of-Court Divorce on Women and Children***

The results of this research indicate that divorce outside of court has a significant negative impact on women and children in the context of Indonesian national law. In many cases, the non-recognition of divorce by the formal justice system prevents women from accessing their rights to maintenance, division of assets, and child custody. This lack of recognition creates major obstacles in the process of economic and social recovery for women, who often experience a decline in their economic status and social well-being after divorce.

On a broader level, out-of-court divorce often exacerbates gender inequality. Women, who are already vulnerable in many social and economic aspects, find themselves in an even more disadvantageous position following a legally unrecognized divorce. Without clear legal status, they often face difficulties in fighting for their rights to joint property and maintenance which should provide financial support post-divorce. This situation not only affects women, but also impacts children who depend on their mothers' economic stability and resources.

Further analysis shows that out-of-court divorce increases social and economic vulnerability for women. Without legal legalization, women are often unable to access the social services and supports needed to navigate post-divorce life transitions. This includes access to adequate housing, employment opportunities, and educational services for their children. In many cases, the social stigma associated with divorce makes it difficult for them to get adequate social support. This discussion also identified that the absence of formal recognition of divorce

often makes it difficult for women to obtain custody of their children.

In legal systems that do not recognize divorce, the legal status of mother and child is often unclear, leading to complications in custody arrangements and the right to make important decisions about the child's education and health. This creates significant anxiety and uncertainty for the children involved, affecting their psychological development and emotional stability. Recommendations resulting from this research urge legal reform that strengthens the recognition of divorce outside of court and harmonization between religious law and national law. It is hoped that these reform efforts can address existing legal gaps and ensure that women and children can fully access protected legal rights after divorce, supporting the principles of justice and equality in society.

### ***Evaluation and Effectiveness of the Divorce Isbat Concept***

Evaluation of the concept of 'isbat divorce' in the context of Indonesian law reveals that this approach can provide a more inclusive and effective solution to the problem of divorce carried out outside the court. Based on an in-depth analysis of the implementation of 'isbat nikah', which has proven successful in providing legal certainty for marriages that are not officially registered, a similar concept is expected to overcome the incompatibility between religious law and national law in divorce cases. This approach promises significant benefits, not only in ensuring legal recognition of divorce, but also in ensuring that all parties obtain their rights in accordance with applicable law.

One of the main benefits of implementing divorce *isbat* is increasing legal certainty. In the current system, many divorces carried out in accordance with Islamic law do not receive legal recognition, which makes it difficult for the parties involved to access legal rights such as division of assets, maintenance and

child custody. With the *isbat* divorce mechanism, the divorce will be recorded and officially recognized by the state, enabling the implementation of the law more consistently and fairly. This not only simplifies the divorce process, but also helps in avoiding legal and social conflicts that may arise from ambiguous divorce status.

Adoption of divorce *isbat* can also contribute to reducing legal and social conflicts that often arise post-divorce. By providing a clear and well-defined legal framework, divorcing couples can manage their separation in a more structured and defined way. This will reduce cases where unclear divorce status leads to disputes over child custody or property rights, which often require lengthy and complicated legal interventions. In addition, this legal certainty will help in eliminating the social stigma that is sometimes attached to individuals, especially women, who experience divorce without official recognition. Divorce *isbat* offers the prospect of increased support for women's and children's rights in the context of divorce. As women are often at a disadvantage in cases of divorce that are not officially recognized, this mechanism ensures that they have equal access to justice and legal protection.

This includes access to maintenance rights, division of assets, and other support to which they are legally entitled. Also, by ensuring legal recognition of divorce, child custody can be handled more fairly, ensuring that decisions are made with the child's best interests in mind. Based on the results of this evaluation, it is recommended that the Indonesian government and its legislative institutions consider legal reform to incorporate the concept of divorce *isbat* into the national legal framework. This will require amendments or the introduction of new laws that will regulate the specifics of the procedures and requirements for divorce *isbat*. These steps must be taken taking into account broad consultation with religious communities, academics, legal practitioners and the public

## ***Policy Suggestions for the Integration of Religious and National Law***

The results of this research indicate that the integration of religious law and national law in the context of divorce in Indonesia requires a comprehensive approach involving the development of a legal framework, increasing access to legal services, as well as education and outreach programs. First, improving the legal framework through divorce *isbat* is needed to accommodate divorces that are carried out based on religious law, but are not officially registered in court. Divorce *isbat* will ensure that all divorces receive legal recognition, which allows for the division of assets, determination of child custody and maintenance obligations in accordance with applicable law. Second, increasing access to legal services is critical in ensuring that divorcing individuals, particularly women, receive adequate legal support.

This includes the provision of pro bono or affordable legal assistance by the government or non-profit institutions, training for lawyers and judges regarding the provisions of religious and national law, as well as the establishment of special units in courts that handle divorce cases by respecting the principles of religious law. applies to the applicant. Third, education and outreach programs need to be improved to reduce the social stigma that is often attached to divorced individuals, especially women. This program can take the form of an awareness campaign run by the government together with civil society organizations, which disseminates information about post-divorce legal rights, applicable legal processes, and the importance of social support for divorcees. This campaign must also target changes in people's attitudes that still view divorce negatively, by emphasizing that divorce is every individual's right which is protected by law.

Fourth, this recommendation also emphasizes the need for dialogue and cooperation between religious leaders and policy

makers to ensure that the integration of religious law with national law is carried out in harmony. This includes joint discussions on draft laws that not only meet national legal standards but also respect the principles of religious law held by society. Fifth, there needs to be regular monitoring and evaluation of the implementation of the proposed policies to ensure their effectiveness in practice and make adjustments if necessary. This evaluation must involve all stakeholders, including the legal community, religious institutions, and direct beneficiaries of the policy, to obtain comprehensive feedback and ensure that the process of integrating religious and national law runs effectively and fairly.

### ***Involvement and Role of Various Stakeholders***

The results of this research emphasize the importance of involving various stakeholders in the divorce law reform process in Indonesia. Religious leaders, legal practitioners and civil society organizations play a critical role in mediating between community needs and the existing legal framework. They not only provide valuable insight into current legal practices but also advocate for social needs that are often overlooked in formal legal discussions. Religious leaders, for example, have a deep influence in society whose values are closely related to religious teachings. In the context of divorce law reform, they act as a bridge between the principles of religious law and the demands of national law. Their involvement can help in designing policies that not only meet national legal standards but are also sensitive to the religious values and norms held by society. This is very important to ensure that legal reform is well received by various levels of society and does not cause social conflict.

On the other hand, legal practitioners and judges provide valuable insight into the realities of existing law and the complications that arise in its application. They are at the forefront of dealing with incompatibilities between religious law and national law, especially in divorce cases. With direct

experience in handling divorce cases, they have practical understanding that can be used to formulate more effective and efficient legal solutions. Their involvement in legal reform discussions is essential to ensure that legal changes can be implemented successfully without disrupting the functioning of the judiciary. Civil society organizations also play an important role in pushing for inclusive legal reform.

They often provide a voice for marginalized groups directly affected by deficiencies in the legal system. This organization can help in identifying the needs and obstacles faced by individuals, especially women and children, in the divorce process. By bringing these issues into public discussion and legal debate, civil society organizations encourage policymaking that is more in favor of social justice and equality. This inter-sectoral collaboration between stakeholders is the foundation of an effective and inclusive policy formation process. Through ongoing dialogue and consultation, the resulting solutions will not only be more comprehensive but also more adaptive to social changes and community dynamics. Successful policy implementation in divorce law reform requires wisdom informed by multiple perspectives and expertise, combining practical and theoretical knowledge to achieve optimal outcomes for all parties involved.

## **Conclusion**

This research has revealed significant disparities between religious law and national law in Indonesia, particularly in the context of divorce, which has a particularly negative impact on women and children. It was found that discrepancies in the recognition of divorce according to religious and national laws gave rise to various legal and social obstacles, including difficulties in obtaining maintenance rights, division of assets, and child custody. Initiatives such as the 'isbat divorce' proposed in this research aim to provide harmonious legal solutions,

facilitate a more inclusive recognition of divorce that is in line with religious law and national law, and ensure more effective and fair legal protection for all parties concerned.

The involvement of various stakeholders, including religious leaders, legal practitioners, and civil society organizations, has proven critical in resolving these discrepancies. Such inter-sectoral collaboration is needed not only to advocate for social needs that are often overlooked in legal policy making, but also to ensure that legal reforms can be implemented successfully without disrupting the functioning of the judiciary. It is hoped that the legal reforms proposed in this research will strengthen the justice system and legal integrity, as well as improve social justice and legal security for Indonesian society as a whole.

### **Bibliography**

- Abdullah, R. "Legal Dualism and Disputes in Muslim Marriages in Indonesia." *Journal of Southeast Asian Studies* 35, no. 3 (2004): 425-443. DOI: 10.1017/S0022463404000176.
- Anwar, E. "Islamic Law and the Issue of Gender Equality in Indonesia." *Hawwa* 3, no. 3 (2005): 233-257. DOI: 10.1163/156920805775570834.
- Banda, F. and E. Ssenyonjo. "Women's Rights and Religious Law: Domestic and International Perspectives." Routledge, 2016.
- Bowen, John R. "Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning." Cambridge University Press, 2003.
- Crouch, Melissa A. "Law and Religion in Indonesia: Conflict and the Courts in West Java." Routledge, 2014.
- Feener, R. Michael. "Muslim Legal Thought in Modern Indonesia." Cambridge University Press, 2007. DOI: 10.1017/CBO9780511499274.
- Hooker, MB "Indonesian Sharia: Defining a National School of Islamic Law." ISEAS Publishing, 2008. DOI: 10.1355/9789812308511.

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- Jones, Sydney. "Divorce in Indonesia: The Impact of Legal Disparity." *Asian Journal of Social Science* 40, no. 5 (2012): 568-587. DOI: 10.1163/15685314-12341289.
- Lindsey, Tim. "Islam, Law and the State in Southeast Asia Volume I: Indonesia." IB Tauris, 2012.
- Indonesian Supreme Court. "Annual Report on Divorce and Marriage in Indonesia." 2018.
- Menski, Werner F. "Modern Indian Family Law." Routledge Curzon, 2001.
- Millie, Julian. "The Court of Religion: Sharia and Social Life in Aceh." Cornell University Press, 2019. DOI: 10.7591/9781501734674.
- Nurlaelawati, Euis. "Modernization, Tradition and Identity: The Compilation of Islamic Law and Legal Practice in the Indonesian Religious Courts." Amsterdam University Press, 2010. DOI: 10.5117/9789087280574.
- Otto, Jan Michiel. "Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present." Leiden University Press, 2010.
- Peletz, Michael G. "Islamic Modern: Religious Courts and Cultural Politics in Malaysia." Princeton University Press, 2002.
- Rinaldo, Rachel. "Mobilizing Piety: Islam and Feminism in Indonesia." Oxford University Press, 2013.
- Salim, Arskal. "Challenging the Secular State: The Islamization of Law in Modern Indonesia." University of Hawaii Press, 2008. DOI: 10.21313/hawaii/9780824832377.001.0001.
- Sonneveld, Nadia. "Khitbah and Marriage Law Reform in Contemporary Indonesia." *Islamic Law and Society* 22, no. 1 (2015): 1-30. DOI: 10.1163/15685195-00221P01.
- Turner, Bryan S., and Oscar Salemink, eds. "Routledge Handbook of Religions in Asia." Routledge, 2014.
- Van Huis, Susan. "Islamic Divorce in North America: A Shari'a Path in a Secular Society." Oxford University Press, 2012.