

**LEGAL PENALTY OF DIVORCE OUTSIDE THE RELIGIOUS COURT  
IN INDONESIA, MALAYSIA, AND BRUNEI DARUSSALAM**

**Thesis**

**by:**

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**ISLAMIC FAMILY LAW DEPARTMENT  
SHARIA FACULTY  
MAULANA MALIK IBRAHIM  
STATE ISLAMIC UNIVERSITY MALANG  
2020**

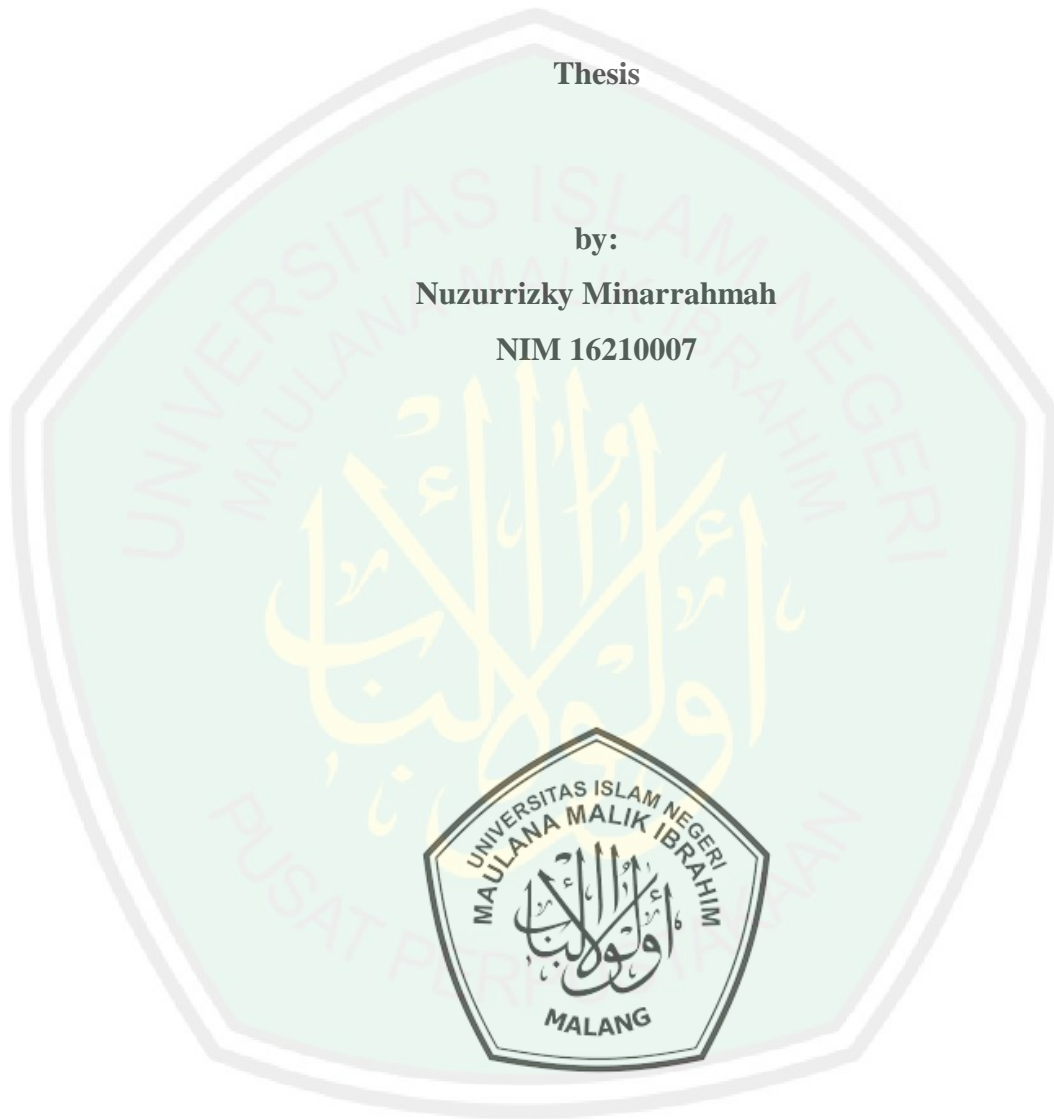
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**2020**

## STATEMENT OF THE AUTHENTICITY

In the name of Allah (swt),

With consciousness and responsibility towards the development of science, the author declares that the thesis entitled;

### LEGAL PENALTY OF DIVORCE OUTSIDE THE RELIGIOUS COURT IN INDONESIA, MALAYSIA, AND BRUNEI DARUSSALAM

Is truly the author's original work. It does not incorporate any material previously written or published by another person. If it is proven to be another person's work, duplication plagiarism, this thesis and my degree as the result of this action will be deemed legally invalid.

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## MOTTO

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولَى الْأَمْرِ مِنْكُمْ فَإِنْ تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا

*“O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result”*

(An-Nisaa: 59)

## ACKNOWLEDGEMENT

All praise due to Allah, the Cherisher and Sustainer of all the worlds. There is neither might nor power but with Allah the Great, the Exalted. With only His Grace and Guidance, this thesis entitled “” could be completed, and also with His benevolence and love, peace and tranquility of the soul. Peace be upon Prophet Muhammad (saw) who had brought us from darkness into the light in this life. May we be together with those who believe and receive intercession from Him in the day of Judgement. Amîn.

With all the support and help, discussions, guidance and directions from all parties involved during the process of completing this thesis, the author wishes to express her utmost gratitude to the following:

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3. Dr. Sudirman, M.A., as the Head of Islamic Family Law (Ahwal Syakhshiyah) Department of the Sharia Faculty, Maulana Malik Ibrahim State Islamic University Malang
4. Dr. H. Isroqunnajah, M. Ag, as my gurdian lecturer during I study at Sharia Faculty of Universitas Islam Negeri Maulana Malik Ibrahim Malang.
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7. Staff of the Sharia Faculty of Maulana Malik Ibrahim State Islamic University Malang. The author express gratitude for all their support and co-operation during the course of completing this thesis.

Hopefully, by imparting what has been learned during the course of study in the Sharia Faculty of Universitas Islam Negeri Maulana Malik Ibrahim Malang, it will benefit all readers and the researcher herself. Realizing the fact that error and weakness is impartial to being human, and that this thesis is still far from perfection, the author appreciates constructive critics and suggestion for the improvement and betterment of this thesis.

Malang, 25<sup>th</sup> of February 2020  
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## TRANSLITERATION GUIDENCE

### A. General

Transliteration is the transfer of Arabic script into Indonesian (Latin) writing, not Arabic translation into Indonesian. Included in this category are Arabic names from Arabs, while Arabic names from nations other than Arabic are written as the spelling of the national language, or as written in the reference book. Writing the title of the book in the footnotes and bibliography, still use the provisions of this transliteration.

### B. Consonant

ا = Not symbolized	ض = dl
ب = b	ط = th
ت = t	ظ = dh
ث = ts	ع = ‘
ج = j	غ = gh
ح = h	ف = f
خ = kh	ق = q
د = d	ك = k
ذ = dz	ل = l
ر = r	م = m
ز = z	ن = n
س = s	ه = h
ش = sy	و = w

ص = sh

ي = y

Hamzah (ء) which is often symbolized by alif, if it is located at the beginning of a word, then in its transliteration follows the vowel, it is not symbolized, but if it is located in the middle or end of a word, it is symbolized by the comma above ('), turning around with a comma (') to substitute for the “ع” symbol.

### C. Vocal, Long-pronounce and Diphthong

Every Arabic writing in the form of Latin fathah vowels is written with “a”, kasrah with “i”, dlommah with “u,” while long readings are each written in the following way;

Vocal (a) long-pronounce = â for example قال becomes qâla

Vocal (i) long-pronounce = î for example قيل becomes qîla

Vocal (u) long-pronounce = û for example دون becomes dûna

Specifically for reading ya’ nisbat, it should not be replaced with “î”, but it should still be written with “iy” in order to describe the ya’ nisbat at the end. Likewise for the diphthong, wawu and ya’ after fathah is written with “aw” and “ay”. Look the following example:

Diphtong (aw) = نو for example قول becomes qawlun

Diphtong (ay) = ني for example خير becomes khayrun

#### D. Ta' marbûthah (ة)

*Ta' marbûthah* is transliterated with “t” if it is in the middle of a sentence, but if *ta' marbûthah* is at the end of a sentence, it is transliterated using “h” for example الرسالة للمدرسة becomes *al-risalat li al-mudarrisah*, or if it is in the middle of a sentence. Sentences consisting of the composition of *mudlaf* dan *mudlaf ilayh*, then transliterated using t which is connected with the next sentence, for example في رحمة الله becomes *fī rahmatillâh*.

#### E. Auxiliary Verb and Lafdh al-Jalâlah

Auxiliary verb “al” (ال) written with lowercase form, except if it located it the first position, and “al” in lafadh jalâlah which located in the middle of two (*idhafah*) it remove from writing. Look the following examples:

1. Al-Imâm al-Bukhâriy said ...
2. Al-Bukhâriy in muqaddimah of his book said ...
3. *Masyâ' Allâh kâna wa mâ lam yasya' lam yakun.*
4. *Billâh 'azza wa jalla.*

#### F. Name and Indonesianized Arabic Word

In principle, every word that comes from Arabic must be written using a transliteration system. If the word is an Indonesian Arabic name or an Indonesianized Arabic language, it does not need to be written using a transliteration system. Consider the following example:

“... Abdurrahman Wahid, the fourth former Indonesian President, and Amin Rais, former Chair of the MPR at the same time, have made an agreement to

eradicate nepotism, collusion and corruption from the face of the Indonesian earth, one way through intensifying prayers in various government offices, but ...”

Look at the writing of the name “Abdurrahman Wahid,” “Amin Rais” and the word “salat” written using Indonesian language procedures that are tailored to the writing of his name. Even if these words come from Arabic, they are Indonesian names and are Indonesianized, therefore they are not written by “Abd al-Rahman Wahid,” “Amîn Raîs,” and not written with “shalât.”

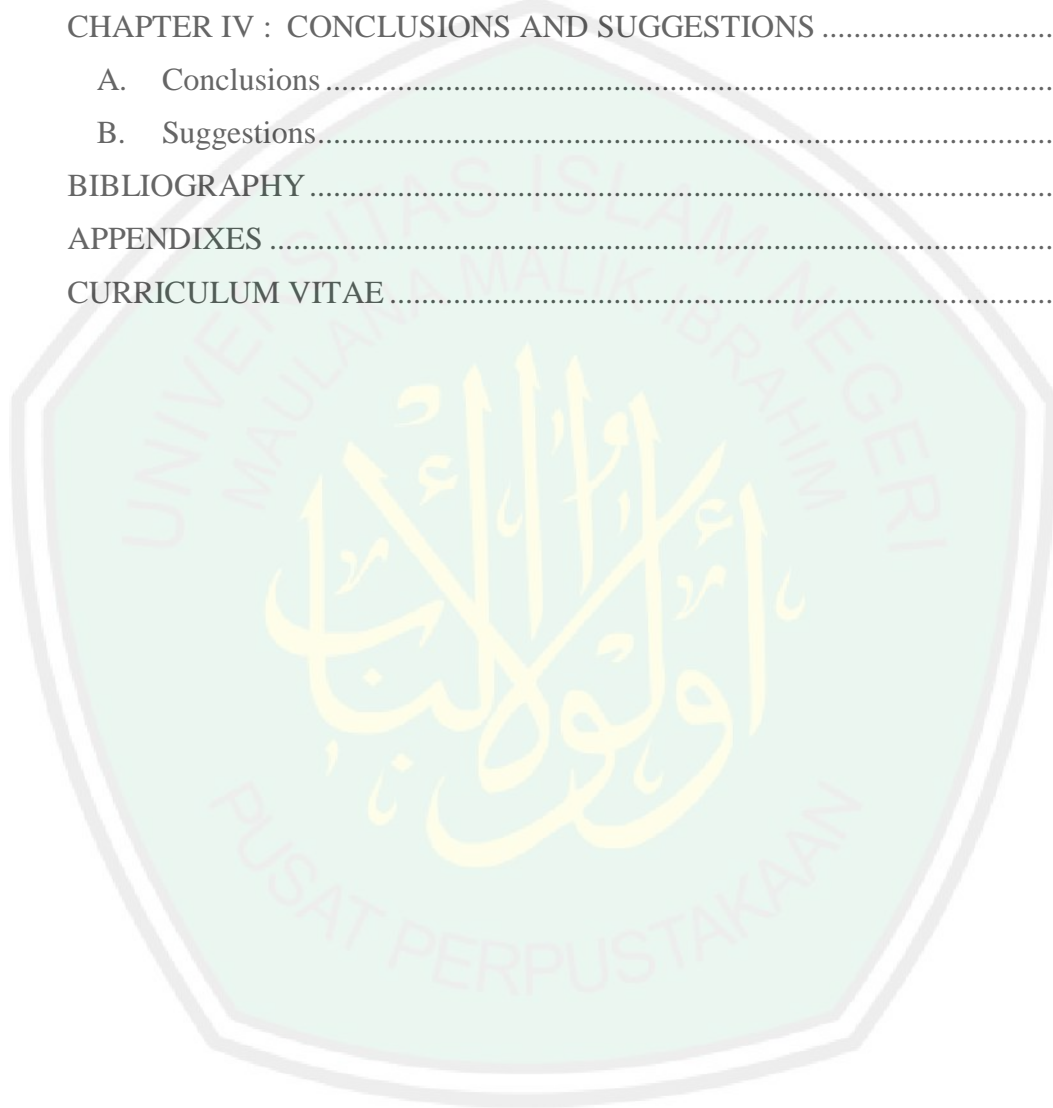


## TABLE OF CONTENT

TITLE SHEET .....	i
STATEMENT OF THE AUTHENTICITY.....	ii
APPROVAL SHEET .....	iii
CONSULTATION PROOF.....	iv
LEGITIMATION SHEET .....	v
MOTTO.....	vi
ACKNOWLEDGEMENT .....	vii
TRANSLITERATION GUIDENCE .....	ix
TABLE OF CONTENT .....	xiii
ABSTRACT.....	xv
CHAPTER I : INTRODUCTION.....	1
A. Background of Research .....	1
B. Statement of Problem.....	5
C. Aims of the Research .....	5
D. Benefits of the Research.....	6
E. Research Method.....	7
F. Previous Research .....	12
G. Discussion Structure.....	17
CHAPTER II : DIVORCE IN INDONESIA, MALAYSIA, BRUNEI DARUSSALAM .....	19
A. Divorce in Indonesian Family Law .....	19
1. Islamic Family Law in Indonesia .....	19
2. Definition and Causes of Divorce .....	20
3. Legal Requirements for Divorce .....	22
B. Divorce in Family Law of Malaysia.....	22
1. Islamic Family Law in Malaysia .....	22
2. The Causes of Divorce in Malay Islamic Family Law .....	23
3. Legal Requirements of Divorce in Malaysia.....	25
C. Divorce in Brunei Darussalam Family Law.....	26

1. Islamic Family Law in Brunei Darussalam .....	26
2. The Causes of Divorce in Brunei Islamic Family Law .....	29
3. Divorce Requirements in Brunei Islamic Family Law .....	30
D. Divorce outside the Court .....	31
E. Juridical Impact of Divorce outside the Court .....	33
1. The Consequences of Divorce outside the Court to the Divorce Status .....	33
2. The Consequences of Divorce outside the Court to the Wife .....	34
3. The Consequences of Divorce outside the Court to the Husband .....	34
4. The Consequences of Divorce outside the Court to the Child .....	35
F. The Forms of Penalties .....	36
1. Criminal Principal .....	36
a. Death Penalty .....	36
b. Criminal Prison .....	36
c. Confinement .....	37
d. Fines .....	37
e. Criminal Closure (based on Law Number 20 Year 1946 RI News II Number 247) .....	38
2. Additional Crimes .....	38
CHAPTER III : COMPARISON OF PENALTIES OF DIVORCE OUTSIDE THE RELIGIOUS COURT IN INDONESIA, MALAYSIA, AND BRUNEI DARUSSALAM .....	39
A. The Differences of Rules and Penalties in Divorce outside Religious Courts of Indonesia, Malaysia, and Brunei Darussalam .....	39
1. Ruling about Penalties of Divorce outside Religious Court .....	39
a. Indonesia in Law Number 1 Year 1974 .....	39
b. Malaysia in Islamic Family Law (Federal Territories) Act 1984 .....	46
c. Brunei Darussalam in Emergency Order (Islamic Family Law) 1999 .....	49
2. Amount of Penalties .....	53
B. The Similarities of Rules and Penalties in Divorce outside Religious Courts of Indonesia, Malaysia, and Brunei Darussalam .....	55
1. Indonesia .....	55
2. Malaysia .....	57
3. Brunei Darussalam .....	57

C. Implementation of Penalties of Divorce outside the Religious Court in Indonesia, Malaysia, and Brunei Darussalam .....	58
1. Indonesia.....	58
2. Malaysia .....	60
3. Brunei Darussalam .....	62
CHAPTER IV : CONCLUSIONS AND SUGGESTIONS .....	64
A. Conclusions .....	64
B. Suggestions.....	65
BIBLIOGRAPHY .....	67
APPENDIXES .....	
CURRICULUM VITAE .....	



## ABSTRAK

Nuzurrizky Minarrahmah, 16210007. **Sanksi Hukum Perceraian Di Luar Pengadilan Agama Di Indonesia Malaysia Brunei Darussalam**. Skripsi. Jurusan Hukum Keluarga Islam. Fakultas Syariah. Universitas Islam Negeri Maulana Malik Ibrahim Malang. Pembimbing: Raden Cecep Lukman Yasin, M.A., Ph.D

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**Kata Kunci:** Percerian, Perceraian diluar Pengadilan, Sanksi Hukum

Indonesia, Malaysia, dan Brunei Darussalam adalah negara Muslim yang berlokasi di Asia Tenggara yang melakukan usaha pembaharuan pada undang-undang perkawinan. Saat ini, salah satu tren dalam reformasi hukum keluarga di dunia Islam modern adalah pengenaan sanksi hukum. Misalnya, sanksi hukum untuk perceraian di luar pengadilan. Meskipun sanksi hukum untuk perceraian di luar pengadilan belum menjadi potret umum undang-undang atau peraturan di negara-negara Muslim, keberadaannya semakin dipertimbangkan dan tetap menjadi salah satu topik hangat di komunitas Dunia Muslim.

Penelitian ini merupakan penelitian pustaka (library reseach), yaitu penelitian yang dilakukan dengan jalan menelaah bahan-bahan pustaka baik berupa undang-undang, buku, jurnal maupun sumber lainnya. Teknik dalam penelitian ini adalah studi kepustakaan, sedang pengumpulan datanya adalah menggunakan data primer dan sekunder. Pendekatan penelitian digunakan adalah pendekatan komparatif.

Dalam penelitian ini, ada tiga rumusan masalah, antar lain: 1) Apa saja perbedaan pengaturan dan sanksi perceraian diluar pengadilan agama di Indonesia, Malaysia, dan Brunei Darussalam? 2) Apa saja persamaan pengaturan dan sanksi perceraian diluar pengadilan agama di Indonesia, Malaysia, dan Brunei Darussalam? 3) Bagaimana penerapan sanksi perceraian di luar Pengadilan Agama di Indonesia, Malaysia, dan Brunei Darussalam?

Hasil dari penelitian ini adalah; 1) Perbedaan pengaturan sanksi di Indonesia, Malaysia, dan Brunei terletak pada pemberlakuan sanksi, yang mana di Indonesia sanksi perceraian diluar pengadilan belum ada, di Malaysia setiap negeri memiliki aturan yang berbeda terkait dengan besarnya sanksi yang dijatuhkan sebab Malaysia merupakan Negara Federal, sedangkan di Brunei sanksi berlaku secara sama dan menyeluruh di wilayah Brunei. 2) Dalam draft RUU HMPA Indonesia bentuk sanksi perceraian diluar pengadilan agama adalah denda dan kurungan. Malaysia dan Brunai juga memiliki bentuk sanksi yang sama. 3) Di Indonesia sanksi bagi pelaku cerai diluar sidang pengadilan belum diterapkan. Sementara sanksi perceraian diluar pengadilan agama di Malaysia dilakukan setelah perceraian di daftarkan di mahkamah syariah. Di Brunei sanksi perceraian diluar pengadilan agama dijatuhkan apabila perceraian di daftarkan melebihi 7 (tujuh) hari sejak hari pertama talak dijatuhkan.

## ABSTRACT

Nuzurrizky Minarrahmah, 16210007. **Legal Penalty Of Divorce Outside The Religious Court In Indonesia Malaysia Brunei Darussalam.** Thesis. Islamic Family Law Department. Faculty of Shariah. State Islamic University of Maulana Malik Ibrahim Malang. Supervisor: R. Cecep Lukman Yasin, M.A., Ph.D

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### **Keywords: Divorce, Divorce outside the Religious Court, Legal Penalty**

Indonesia, Malaysia, and Brunei Darussalam are Muslim countries located in Southeast Asia that have made reforms in marriage law. One of the trends in family law reform in the modern Islamic world is the imposition of legal penalty. For example, legal penalty for divorce outside the court. Although legal penalty for divorce outside the court has not become a general portrait of the law or regulation in Muslim countries, its existence is increasingly considered and remains one of the hot topics in the community of Muslim World today.

This research is a library research, which is a study done through the study of library materials in the form of laws, books, journals, or other sources. The techniques in this study were library studies, while data collection was using primary and secondary data. The research approach used is the comparative approach.

In this research, there are three formulations of the problem, including: 1) What are the differences of rules and penalties in divorce outside the religious courts of Indonesia, Malaysia, and Brunei Darussalam? 2) What are the similarities of rules and penalties in divorce outside the religious courts of Indonesia, Malaysia and Brunei Darussalam? 3) How is the implementation of penalties of divorce outside the religious court in Indonesia, Malaysia, and Brunei Darussalam?

The results of this research are; 1) The difference in penalty ruling in Indonesia, Malaysia and Brunei lies in the imposition of sanctions, where in Indonesia penalty for divorce outside the court do not yet exist, in Malaysia each country has different rules related to the amount of penalty imposed because Malaysia is a Federal State, whereas in Brunei sanctions apply equally and comprehensively in the Brunei region. 2) In the draft of *Undang-undang Hukum Materiil Pengadilan Agama (HMPA)* in Indonesia form of penalty for divorce outside the religious court is fines and confinement. Malaysia and Brunei also have the same form of penalty. 3) In Indonesia penalty for divorce outside the court hearing have not been applied. While penalty for divorce outside the religious court in Malaysia are carried out after the divorce is registered at the Syariah Court. In Brunei the penalty for divorce outside the religious court is imposed if the divorce is registered for more than 7 (seven) days from the first day of pronouncement of divorce outside the religious court.

### ملخص البحث

نزوارزق من الرحمة، 16210007، العقوبة القانونية على الطلاق خارج المحكمة الدينية في إندونيسيا، ماليزيا، بروناي دار السلام. بحث جامعي، قسم الأحوال الشخصية. كلية الشريعة. جامعة مولانا مالك إبراهيم الإسلامية لحكومية مالانج، المشرف: رادين جيحيف لقمان ياسين الماجستير

**الكلمات الرئيسية:** الطلاق، الطلاق خارج المحكمة، العقوبة القانونية.

إندونيسيا وماليزيا وبروني دار السلام الدولات الإسلامية الموجودة بجنوب شرق آسيا والتي تبذل جهودا لتجديد قانون الزواج. الآن، أحد الأسلوب في تجديد قانون الأسرة في أحوال الإسلام العصري هو يعاقب بالعقوبة القانونية. كمثال العقوبة القانونية على الطلاق خارج المحكمة. و لو العقوبة القانونية للطلاق خارج المحكمة لم تصبح صورة عامة للقوانين أو اللوائح في الدولة الإسلامية، ينظر وجودها و تكون موضوعا في مجتمع المسلم.

هذا البحث بحث الحكم المعياري و يسمى أيضا بالبحث المكتبي، هو البحث بطريق تحليل مواد المكتبة منها القوانين والكتب والمجلات. الأسلوب في هذا البحث هو دراسة مكتبة، أما جمع بيانات البحث البيانات الأولية والثانوية. و يستخدم هذا البحث مقارنة مقارنة.

و تكون في هذا البحث ثلاثة مشاكل: (1) ما فرق عقوبة الزوج الذي يقول الطلاق خارج المحكمة الدينية وفقا لقانون الأسرة في إندونيسيا، ماليزيا وبروني دار السلام ؟ (2) ما مساواة عقوبة الزوج الذي يقول الطلاق خارج المحكمة الدينية وفقا لقانون الأسرة في إندونيسيا، ماليزيا وبروني دار السلام ؟ (3) كيف التطبيق عقوبة الزوج الذي يقول الطلاق خارج المحكمة الدينية وفقا لقانون الأسرة في إندونيسيا، ماليزيا وبروني دار السلام ؟.

نتيجة هذا البحث: (1) فرق عقوبة الزوج الذي يقول الطلاق خارج المحكمة الدينية في إندونيسيا لا توجد العقوبة القانونية، في ماليزيا العقوبة على من يطلق خارج المحكمة تختلف من ولاية إلى أخرى ، لأن ماليزيا دولة اتحادية، و بروناي دار السلام في أمر الطوارئ (قانون الأسرة الإسلامية)، 1999 يطبق العقوبة المالية لا تزيد عن 2000 دولار بروناي (ألفي دولار بروناي) أو الحبس 6 (سنة) أشهر. (2) في مشروع قانون HMPA إندونيسيا ، شكل عقوبات الطلاق خارج المحكمة الدينية هو الغرامات والحبس، ماليزيا وبروناي نفس شكل العقوبات. (3) إندونيسيا، لم يطبق العقوبة، ماليزيا طبقت العقوبة بعد الطلاق مسجل، و بروناي دار السلام طبقت العقوبة عند تسجيل الطلاق يتم إسقاط أكثر من 7 (سبعة) أيام من اليوم الأول للطلاق.



## CHAPTER I

### INTRODUCTION

#### A. Background of Research

Indonesia, Malaysia and Brunei Darussalam are Muslim countries located in Southeast Asia. The three countries are doing the same effort as other Muslim countries in updating marital (family) law. The first law that was born after Indonesian independence was Law No. 22 of 1946. This law expanded the territory to be applied for the whole of Indonesia with Law no. 32 of 1954, the law is about the registration of marriage, divorce and reconciliation (*ruju*'). This law regulates about administrative matters. Whereas material updates were made with the birth of Law No.1 of 1974 concerning in marriage. Then followed by the birth of Government Regulation No. 9 of 1975 concerning the Implementation of Law No.

1 of 1974. Then in 1991, a compilation of Islamic Law in force was valid with Presidential Instruction No. 1 of 1991 on June 10, 1991.

The same effort with Indonesia was also carried out by Malaysia and Brunei Darussalam. It can be mentioned that the renewal of the Malaysian Muslim Family Law began when the country was still invaded by the British. This renewal effort was carried out simultaneously in all Malaysian states in the 1950s. This effort gave birth to the Selangor Islamic Family Law Act 1952, as the first *enakmen*. This effort ended with the birth of the Johor Islamic Religious Law Enactment in 1978.<sup>1</sup> Like Indonesia and Malaysia, Brunei also carried out ongoing family law discussions.

One of the topics in Muslim Family Law which is still widely debated is related to divorce outside the religious court. In Indonesia and Malaysia divorce must take place before a court hearing. While in Brunei divorce may be conducted outside the court and declared legal, in which the husband can divorce his wife with divorce one, two, or three as Islamic law. When the husband says the divorce is then registered, the kadi will issue a divorce certificate to both parties.<sup>2</sup>

We often know when couples dealing with a conflict in the family not all of them are able to resolve it by deliberation. Some couples who have the conflict end their marital relationship by divorce. The Sources of conflict that occur in family are

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<sup>1</sup> Khoiruddin Nasution, *Hukum Perdata (Keluarga) Islam Indonesia dan Perbandingan Hukum Perkawinan Di Dunia Muslim*, (Yogyakarta: Academia, 2009), 4.

<sup>2</sup> M. Atho' Muzdhar dan Khoiruddin Nasution, *Hukum Keluarga di Dunia Islam Modern*, cet.1, (Jakarta: Ciputat Press, 2003), 189.

generally caused by financial problems, social life, relationships with in-laws, and infidelity.<sup>3</sup>

Divorce happen due to the decadence of human morals which no longer pay attention to the value of religious teachings and norms that live in society. For this reason, it is very necessary to understand religious teachings and norms that live in society. So that the ideals of married life can be achieved as well as possible.

In practice, not all divorce is done in the right way. Nowadays, many divorce happens outside the Religious Court as a result of emotional factors that cannot be controlled by the husband. The pronouncement of divorce outside the Religious Court has occurred in the community. Divorce outside the Religious Court causes legal uncertainty for the wife so that the wife has difficulty filing a lawsuit when the wife receives a loss, because her divorce is not recorded in the Religious Court.

Related with the possibility of bad effects received by one side from a husband and wife after divorce outside the Religious Court, the punishment are deemed appropriate to be made and implemented. In general, legal penalty are still in the scope of violations of various issues surrounding family law, including marriage, divorce, *nafaqah* (financial support for wife), women's rights after divorce, and inheritance rights.<sup>4</sup> For this reason, it is necessary to protect women's rights from

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<sup>3</sup> Nurul Atieka, "Mengatasi Konflik Rumah Tangga (Studi BK Keluarga)," *Guidena*, 1 (September, 2011), 45.

<sup>4</sup> Khoiruddin Nasution, *Hukum Perdata (Keluarga) Islam Indonesia dan Perbandingan Hukum Perkawinan di Dunia Muslim*, 379.

arbitrary acts committed by men. The background of the birth of the marriage law is protecting the rights of women.<sup>5</sup>

There are differences in the application of divorce law outside the court hearing into positive law so that there is a difference legal position about divorce outside the court in Indonesia, Malaysia, and Brunei Darussalam. That in Indonesia and Malaysia divorce outside Religious Court is not legal, but in Brunei Darussalam divorce outside the Religious Court is legal after reporting to the Religious Court.

One of the trends in family law reform in the modern Islamic world is the imposition of legal penalty. For example, legal penalty for underage marriage case in Pakistan, legal penalty on forced marriages case in Iraq, legal penalty for unregistered marriage in Yemen, and also several legal penalty in the realm of Family Law that have been applied by various countries. Although legal penalty for divorce outside the court has not become a general portrait of the law or regulation in Muslim countries, its existence is increasingly considered and remains one of the hot topics in the community of Muslim World today.

Therefore, researcher interested to conduct in-depth research on why Indonesia, Malaysia, and the State of Brunei Darussalam differ in regulating penalty for divorce outside the court, even though these three countries have many similarities, ranging from cultural equality and the same Malay nation located in mainland Southeast Asia. Then compared with each other in the context of conventional Islamic law doctrine, among countries, and its position as one of the images of

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<sup>5</sup> Yayan Sopyan, *Islam Negara Transpormasi Hukum Perkawinan Islam dalam Hukum*, (Jakarta: RMBooks, 2012), 157-158.

dynamism in Islamic law, especially family law in modern Muslim countries.<sup>6</sup> This comparative knowledge of Islamic family law is very important in Indonesia, because we often debate things that other people in other countries have actually solved the problem on decades before.

## **B. Statement of Problem**

1. What are the differences of rules and penalties in divorce outside the religious courts in Indonesia, Malaysia, and Brunei Darussalam?
2. What are the similarities of rules and penalties in divorce outside the religious courts in Indonesia, Malaysia and Brunei Darussalam?
3. How is the implementation of penalties of divorce outside the religious court in Indonesia, Malaysia, and Brunei Darussalam?

## **C. Aims of the Research**

The purpose of this study are;

1. To analyze about the differences of rules and penalties in divorce outside the religious courts in Indonesia, Malaysia, and Brunei Darussalam;
2. To the similarities of rules and penalties in divorce outside the religious courts in Indonesia, Malaysia and Brunei Darussalam;
3. To compare the implementation of penalties of divorce outside the religious court in Indonesia, Malaysia, and Brunei Darussalam.

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<sup>6</sup> Zaki Saleh, "Kriminalisasi Trend Reformasi Hukum Islam". Article accessed on 9 June 2019 from <http://publik-syariah.blogspot.com/2011/04/Kriminalisasi-trend-reformasi.html>.

#### **D. Benefits of the Research**

This research is expected to be useful both theoretically and practically as follows;

##### **1. Theoretical Benefits**

The results of this study are expected to make a scientific contribution to the science of law, especially in the field of Islamic family law and in general in developing Islamic civil law, both material and formal law.

##### **2. Practical Benefits**

This research is expected to add insight and knowledge to;

###### **a. Researcher**

By doing this research, the researcher can find out about divorce arrangements outside the Religious Court in Indonesia, Malaysia, and Brunei Darussalam as well as sanctions imposed in each country.

###### **b. Public**

By reading this research, it is expected that the people will be able to be more careful and be able to apply marriage law as regulated in Islam and positive law.

###### **c. Government**

By this research, it is expected that the government can respond wisely about criminalization of marriage law in Indonesia.

## E. Research Method

Generally methodology is a logical and systematic study of the principles that point to scientific research. The research method is a guide on how the research is arranged systematically, the tools and materials in the research and how the procedure to make the research. Some of the research methods used by the author in making scientific papers are as follows:

1. Type of Research

The writing and discussion of research in this thesis is a type of library research with a qualitative method, which means studying the problem by searching, and examining material in the form of data from the literature relating to the title of the study, both in the form of laws, books, journals, and other sources relevant to the topic being studied<sup>7</sup> related to the discussion of the penalty of divorce outside the court in Southeast Asia Muslim Countries.

2. Research Approach

This research use comparative approach by comparing laws relating to the penalty applied for divorce outside the Religious Court in Indonesia, Malaysia and Brunei Darussalam.

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<sup>7</sup> Lexy J. Moleong, *Metodologi Penelitian Kualitatif*, (Bandung: PT. Remaja Rosda Karya, 2007), 9.

### 3. Data Sources

Data sources in research are subjects where data can be obtained.<sup>8</sup> There are two types of data was used in this research, namely primary data and secondary data.

#### a. Primary data

Primary data is the data obtained from the object directly to be examined. This data sources was obtained from;

- 1) Act Number 1 Year 1974 about Marriage
- 2) Laws of Malaysia Islamic Family Law (Federal Territories) Act 1984
- 3) Laws of Brunei Revised Edition 1984 Chapter 77 Religious Council And Kadis Courts.
- 4) Emergency Orders (Regulation of Islamic Family Law) 1999 Brunei Darussalam.

#### b. Secondary Data

Secondary data is data that is readily available so researchers can simply search and collect it to be used as primary data support.

Secondary data used in this study are the literature included in the secondary source are regulations, and books that discuss the object of study in this study, including;

- 1) Compilation of Islamic Law Year 1991

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<sup>8</sup> Suharsimi Arikunto, *Prosedur Penelitian Suatu Pendekatan Praktek*, (Jakarta: PT. Rineka Cipta, t.th.), 120.

- 2) PP (Government Regulation) No. 9 of 1975 concerning the Implementation of Law No.1 of 1974
- 3) *Perkembangan Peradaban Islam di Kawasan Dunia Islam* written by Thohir ajid
- 4) *Personal Law in Islamic Countries: History, Text, and Comparative Analysis* written by Tahir Mahmoud
- 5) *Family Law Reform in The Muslim World* written by Tahir Mahmoud
- 6) *Hukum Islam di Asia Tenggara* written by Sudirman Tebba
- 7) *Hukum Keluarga di Dunia Islam Modern* written by oleh Mohammad Atho' Mudzhar
- 8) *Hukum Perdata (Keluarga) Islam Indonesia Dan Perbandingan Hukum Indonesia Di Dunia Muslim: Studi Sejarah, Metode Pembaruan, dan Materi & Status Perempuan Dalam Perundang-undangan Perkawinan Muslim* written by Khoiruddin Nasution
- 9) *Hukum Perkawinan di Indonesia Masalah-masalah Krusial* written by Anshary.
- 10) *Hukum Keluarga Islam di Dunia Islam* by Muhammad Amin Suma

as well as other works that are related to the theme that the researcher adopts.

#### 4. Collecting Data Method

The first stage of library research is exploring the books or other written sources that are relevant to the title of the thesis to be followed. Relevant here does not always have the same title as the title of the thesis, but relevant here is that the books contain can support the theories that will be studied.<sup>9</sup>. Thus, the reasearcher in this study who use the type of research data collection methods with literature or manuscript studies will collect written data of any form and from various valid sources that support and in accordance with the research themes discussed in this scientific work by collecting data that discuss about the laws of marriage law in Indonesia, Malaysia and Brunei Darussalam, and penalty for divorce outside the courts in Indonesia, Malaysia and Brunei Darussalam.

#### 5. Processing Data Methods

##### a. Editing

In this step the data is collected and checked again, to determine whether it is in line with the focus of the researcher's discussion. The focus of the researcher is the regulation of divorce outside court trials according to family law in Indonesia, Malaysia, and Brunei Darussalam. And the form of penalties for husband who pronounces divorce outside the court without registering it according to family law in Indonesia, Malaysia and Brunei Darussalam.

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<sup>9</sup> Deni Darmawan, *Metode Penelitian Kualitatif*, (Bandung: Remaja Rosdakarya, 2013), 163.

b. Classifying

After checking the data, then the data is classified based on the research discussion. Laws, books, journals, articles and reference materials in writing this research.

c. Verifying

The data or material is verified by examining who is the author, the year it was written to see its endurance, to conduct research, researchers also need materials that is still valid. So that, researcher prefer to use recent references about divorce outside the Religious Court in Indonesia, Malaysia, and Brunei Darussalam.

d. Analizing

After the data in this study is collected, then researcher will analyse using qualitative descriptive techniques, by describing, explaining and analysing all the problems that exist, and then deductively concluded, by drawing conclusions from general to specific. Thus it is expected to make the understanding of the results of this study easier, and take the data related to the issues examined concretely that will be discussed in this study.

e. Concluding

At this step the researcher concludes the results of the analysis and finds conclusions relating to the differences of rules and penalties in divorce outside the religious courts of Indonesia, Malaysia, and Brunei Darussalam. The similarities of rules and penalties in

divorce outside the religious courts of Indonesia, Malaysia and Brunei Darussalam. The implementation of penalties of divorce outside the religious court in Indonesia, Malaysia, and Brunei Darussalam.

#### **F. Previous Research**

To find out the originality of this study, it is necessary to expose previous studies that have relevance to the theme of this research. Therefore, the researcher will elaborate on some of the previous studies which are considered to have relevance to the theme being studied by the researcher. The following are researchs that has been done;

1. Thesis research conducted by Muhammad Yalis Shokib, student of the Al-Ahwal Al-Syakhsiyyah Master Program at the State Islamic University of Maulana Malik Ibrahim Malang, with the title "Legal Sanctions Against Divorce Outside the Religious Courts (Comparative Study of Positive Legal Academics and Islamic Law Academics in The Malang City)". The focus of this research is on the position of sanctions in the issue of divorce outside the religious court according to Islamic law, and the view of positive legal academics in Malang about divorce sanctions outside the Religious Courts, and the view of Islamic legal academics in Malang about divorce sanctions outside the Religious Courts. In his research findings, Yalis concluded that sanctions in Islamic law are as reinforcers, namely reinforcement of the rules or commands of God, as well as reinforcement of the law stating that divorce must be pronounced in the Religious Court. Based on the statement

of positive legal academics, that the sanction can only be done if there is a report or lawsuit from one of the parties, in this case it is a woman, while the sanction given is administrative sanction in the form of a fine, because this has been regulated by the Government. According to Islamic legal academics, sanctions for divorce offenders outside the Religious Courts are as reinforcing laws and legal norms.<sup>10</sup>

2. Thesis research by Dedi Iskandar, Al-Ahwal Al-Syakhsiyyah Master Program at the State Islamic University of Maulana Malik Ibrahim Malang, with the title "Criminal Sanctions in Family Law (Expert Views of Islamic Law in Banda Aceh City)". The focus of this research is about the views of Islamic legal experts in the city of Banda Aceh regarding criminal sanctions in marital law, and the views of Islamic legal experts in the city of Banda Aceh about criminal sanctions contained in the HMPA Bill (Material Law on Religious Courts). Based on the findings of this study, Dedi concluded that Islamic legal experts in the city of Banda Aceh strongly agreed on the existence of sanctions in the realm of family law because it was in accordance with sharia maqashid. The form of sanctions in the bill covers all things, and there are criminal sanctions so that the legal force is stronger.<sup>11</sup>

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<sup>10</sup> Muhammad Yalis Shokib, *Sanksi Hukum Terhadap Talak Di luar Pengadilan Agama (Studi Perbandingan Pandangan Akademisi Hukum Positif dan Akademisi Hukum Islam di Kota Malang)*, Thesis MA, (Malang: Universitas Islam Negeri Maulana Malik Ibrahim Malang, 2013), 96.

<sup>11</sup> Dedi Iskandar, *Sanksi Pidana Dalam Hukum Keluarga (Pendangan Pakar Hukum Islam di Kota Banda Aceh)*, Thesis MA, (Malang: Universitas Islam Negeri Maulana Malik Ibrahim Malang, 2013), 87.

3. Undergraduate thesis written by Abu Ubaidah bin Fadzli, Al-Ahwal Al-Syakhsiyyah undergraduate student at the State Islamic University of Maulana Malik Ibrahim Malang, with the title "Legal Position and Consequences of Divorce outside the Trial of Sessions in Indonesia and Malaysia (Comparative Study in the City Religious Court Malang and the Kuching Sarawak Syari'ah Court)". The focus of this research relates to the position of divorce outside the court hearing in the Malang City Religious Court and the Sarawak Kuching Syariah Court, then about the legal consequences of divorce outside the hearing at the Malang City Religious Court and the Sarawak Kuching Syariah Court. The findings in this study are that the Malang City Religious Court does not recognize divorce outside the court hearing, while in the Sarawak Syariah Court recognize divorce outside the court hearing. As for the legal consequences in the Malang City Religious Court, divorce must be performed in a court hearing, while in the Sarawak Kuching Syariah Court, all divorce that has been dropped must be administered through the approval of divorce carried out by the husband outside the court hearing.<sup>12</sup>
4. Undergraduate thesis by Luthfah Rohmanah, a graduate student in Family Law at Syarif Hidayatullah State Islamic University Jakarta, with the title "Comparison of Islamic Jurisprudence with Family Law in Indonesia and Brunei Darussalam State about Divorce". The focus of this research is about

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<sup>12</sup> Abu Ubaidah bin Fadzli, *Kedudukan dan Konsekuensi Hukum Talak Luar Sidang Pengadilan Di Indonesia dan Malaysia (Studi Komparatif di Pengadilan Agama Kota Malang dan Mahkamah Syari'ah Kuching Sarawak)*, Skripsi, (Malang: Universitas Islam Negeri Maulana Malik Ibrahim Malang, 2018), 97.

the vertical, horizontal and diagonal comparisons between the Family Law in Indonesia and the State of Brunei Darussalam regarding the legal requirements, the period of *qobla dukhul*, and mediators (*hakam*). In the research findings, Luthfah concluded that in a vertical comparison, the jurisprudence of the *mazhab* did not determine the place where the divorce was pronounced, in Indonesia the divorce was pronounced in the court hearing, Brunei did not specify the place where the talak was pronounced as the school of law. Regarding the rules of the period of *iddah qobla dukhul*, *fiqh mazhab* and Indonesia there is no *iddah*, whereas Brunei there is an *iddah* period, regarding *hakam*, the *fiqh mazhab* appoints a family of the husband or wife as *hakam*, in Indonesia the parties are free to choose a mediator who has a mediator certificate, in Brunei the same as the Syafi'i school which appoints the closest family of the parties.<sup>13</sup>

No	Research Identity	Similarity	Diverification	Result
1	Muhammad Yalis Shokib, <i>Sanksi Hukum Terhadap Talak Di luar Pengadilan Agama (Studi Perbandingan Pandangan Akademisi Hukum Positif dan Akademisi Hukum Islam di</i>	Discussing about the application of divorce sanctions outside the religious court	Field Research. This research is about the opinions of positive law academics and Islamic law academics in Malang related to divorce sanctions outside the court	Sanctions in the view of Islamic legal academics are as reinforcers of God's rules. While positive legal academics say, sanctions can only be carried out if one of the parties reports to Religious Court, in this case is a woman

<sup>13</sup> Luthfah Rohmanah, *Perbandingan Fikih Mazhab dengan Hukum Keluarga Di Indonesia dan Negara Brunei Darussalam Tentang Perceraian*, Skripsi (Jakarta: Universitas Islam Negeri Syarif Hidayatullah, 2019), 83.

	<i>Kota Malang</i> ), 2013.			
2	Dedi Iskandar, <i>Sanksi Pidana Dalam Hukum Keluarga (Pandangan Pakar Hukum Islam di Kota Banda Aceh)</i> , 2013.	Discussing criminal sanctions in Islamic marriage law	This research is a field research about the views of Islamic legal experts in the city of Banda Aceh regarding criminal sanctions in marriage law	Islamic law experts in the city of Banda Aceh strongly agree on sanctions in family law because it is in accordance with <i>maqashid syariah</i> .
3	Abu Ubaidah bin Fadzli, <i>Kedudukan dan Konsekuensi Hukum Talak Luar Sidang Pengadilan Di Indonesia dan Malaysia (Studi Komparatif di Pengadilan Agama Kota Malang dan Mahkamah Syari'ah Kuching Sarawak)</i> , 2018.	Discussing the status and legal consequences of divorce outside the court hearing in the Malang City Religious Court and the Sarawak Kuching Syariah Court	This research is a field research conducted in Malang City Religious Court and Kuching Sarawak Syariah Court	The Kuching Syariah Court recognized divorce outside the court, whereas the Malang City Court did not. The legal consequence in the Malang City Religious Court is that divorce must be pronounce in a court hearing, while at the Sarawak Kuching Syariah Court, all divorce that is dropped outside the court must be administered through the legalization of divorce in Syariah Court.
4	Luthfah Rohmanah, <i>Perbandingan Fikih Mazhab dengan Hukum Keluarga Di Indonesia dan Negara Brunei</i>	Discuss about divorce	Family Law in Indonesia and the State of Brunei Darussalam regarding legal requirements, the period of	In Indonesia divorce is pronounced in court hearings, brunei does not specify the place of divorce as <i>fiqh mahzab</i> . The

	<i>Darussalam Tentang Perceraian, 2019.</i>		<i>iddah qobla dukhul, and mediators (hakam) in divorce</i>	period of <i>iddah qobla dukhul</i> in Indonesia there is no iddah, whereas Brunei there is an iddah period. In Indonesia the parties are free to choose a mediator who already has a mediator certificate, in Brunei the same as the Shafi'i school which appoints the closest relative family of the parties
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## G. Discussion Structure

In order to make the discussion more focused and obtain a representation of the research, the writer will present the systematic writing of this thesis globally and accordance the thesis writing guidelines of the Faculty of Sharia and Law of UIN Maulan Malik Ibrahim Malang. The systematic writing of this thesis consists of four chapters, each chapter consists of several sub-chapters, as follows:<sup>14</sup>

*The first chapter* is an introduction that covers the main aspects of research, namely: the background of the problem, the formulation of the problem, the purpose of the research and the benefits of the study, the research methods, previous

<sup>14</sup> Roibin, dkk, *Pedoman Penulisan Karya Ilmiah Fakultas Syariah UIN Maulana Malik Ibrahim Malang*, (Malang: UIN Press, 2015)

research and systematic discussion. This chapter is important because it is a gateway to understanding the following chapters.

*The second chapter* contains a literature review which will provide an overview and general description of divorce outside the Religious Court in Indonesia, Malaysia, and Brunei Darussalam, juridical impact of divorce outside the Religious Court, and the forms of penalties.

*The third chapter*, is the answer to the formulation of the problem that is at the core of the problem being discussed by the researcher, which contains an explanation about the differences of rules and penalties in divorce outside the religious courts of Indonesia, Malaysia, and Brunei Darussalam. The similarities of rules and penalties in divorce outside the religious courts of Indonesia, Malaysia and Brunei Darussalam. The implementation of penalties of divorce outside the religious court in Indonesia, Malaysia, and Brunei Darussalam.

*The fourth chapter* is the closing, which contains the conclusions of the suggestions of the author. All answers in the study will be summarized and concluded in conclusions. As for the suggestions containing the proposed authors or suggestions for the parties concerned as a source of improvement.



## **CHAPTER II**

### **DIVORCE IN INDONESIA, MALAYSIA, BRUNEI DARUSSALAM**

#### **A. Divorce in Indonesian Family Law**

##### **1. Islamic Family Law in Indonesia**

The State of Indonesia is a unitary state in the form of a Republic with sovereignty in the hands of the people and implemented according to the Constitution. The ideal basis of the state is Pancasila, while the 1945 Constitution is the structural foundation of the country which illustrates that Indonesia is a country that respects religious life.

The majority of Indonesia's population is Muslim. The position of Islamic law is above all the norms that live around society for Muslim in Indonesia. This special position of Islamic law lasted for quite a long time

since the kingdom, the Dutch colonialism, and finally in the independence era, until the birth of Law No. 1 of 1974 that concerning in Marriage.<sup>15</sup>

On June 10, 1991 Islamic Law Compilation was made which was issued in the form of Presidential Instruction No. 1 year 1991. The compilation of Islamic Law was made with the aim of unifying Islamic Law scattered in various classical fiqh books, as well as special regulations that explain in detail about marriage, endowments and heritage in Indonesia.<sup>16</sup>

## 2. Definition and Causes of Divorce

Break up of marriage termination is a legal term used in the marriage law to describe "divorce" or the end of a marriage relationship between a man and woman who have been living as husband and wife.<sup>17</sup> In Section 38 of Law No. 1 of 1974 concerning marriage and Section 113 through 128, the Compilation of Islamic Law states that the termination of marriage can be caused by death, divorce, and the decision of the Religious court. So divorce is a break between the marriage ties between husband and wife based on the provisions of the Religious Court, because the husband and wife cannot live in harmony again and maintain their household life.

<sup>15</sup> Yayan Sopyan, *Islam Negara Transpormasi Hukum Perkawinan Islam dalam Hukum*, (Jakarta: RMBooks, 2012), 77.

<sup>16</sup> Soedjati Zarkowi, *Sejarah Penyusunan Kompilasi Hukum Islam di Indonesia*, (Surabaya: Arkola, 1997), 16-17.

<sup>17</sup> Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia*, (Jakarta: KENCANA, 2006), 189.

The causes of divorce both *talaq* divorce and *gugat* divorce are contained in Section 19 of Government Regulation No. 9 of 1975 and Section 116 of the Compilation of Islamic Law, as follows;<sup>18</sup>

- a. One party commits *zinah* or becomes a drunkard, compactor, gambler, etc. that is difficult to cure;
- b. One party leaves the other party for 2 (two) consecutive years without the permission of the other party and without valid reasons or for other reasons beyond its ability;
- c. One of the parties received a sentence of 5 (five) years in prison or a more severe sentence after the marriage took place;
- d. One party commits brutality or severe persecution that endangers the other party;
- e. One of the parties has a disability or illness with the result of not being able to carry out his obligations as a husband or wife;
- f. Between husband and wife there are continual disputes and quarrels and there is no hope of living in harmony again in the household;
- g. Husband breaks taklik-talak;
- h. Transition of religion or *murtad* that causes disharmony in the household.

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<sup>18</sup> Islamic Law Compilation 1991

### 3. Legal Requirements for Divorce

Requirements for divorce in Indonesia are by conducting divorce in front of the Religious Court hearing. This is in accordance with Section 39 subsection (1) of Law No. 1 of 1974 and article 115 of the Compilation of Islamic Law.

#### B. Divorce in Family Law of Malaysia

##### 1. Islamic Family Law in Malaysia

Malaysia is a Federal State that consists of several states, including; Johor, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Perak, Perlis, Sabah, Sarawak, Selangor and Trengganu.<sup>19</sup> The majority of Malaysia's population is Muslim, which is why Islamic law becomes a significant source of law in Malaysia National Law, especially in the field of Family Law.

Based on the codifications that have been made, the implementation of Islamic Law in Malaysia is divided into 3 (three) phases, including; before British colonization (Malay period), British colonial phase, and independence phase. The first legal codification is written in the Trengganu inscription which contains 10 (ten) rules and penalties for those who break

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<sup>19</sup> Khoiruddin Nasution, *Hukum Perdata (Keluarga) Islam Indonesia dan Perbandingan Hukum Perkawinan Di Dunia Muslim*, 97.

the rules. In addition, there is also a brief legal rule books, one of them is the *Risalah of Kanun Law* which contains civil law and criminal law.<sup>20</sup>

Second codification of the law occurred during the British occupation, at this time the position of Islamic law as the basis of the state changed. At this time Islamic law is limited to family law and the problem of religious violations. Furthermore, in the independence phase the influence of British legal experts is still very strong, but in several federal states laws have been applied in the administration of Islamic law. This is done with the aim of providing a constitutional basis and authority to the Islamic Religious Assembly, the Department of Religion, and the Sharia Court. In the 1980s until the 1990s there was a renewal of Islamic law in various states. Therefore a National conference was held in Kedah to discuss Islamic law, specifically relating to criminal law issues.<sup>21</sup>

## 2. The Causes of Divorce in Malay Islamic Family Law

The causes of order for dissolution of marriage Based on Laws of Malaysia Islamic Family Law (Federal Territories) Act 1984 section 52 are;<sup>22</sup>

<sup>20</sup> Khoiruddin Nasution, *Hukum Perdata (Keluarga) Islam Indonesia dan Perbandingan Hukum Perkawinan Di Dunia Muslim*, 98.

<sup>21</sup> Khoiruddin Nasution, *Hukum Perdata (Keluarga) Islam Indonesia dan Perbandingan Hukum Perkawinan Di Dunia Muslim*, 140.

<sup>22</sup> Islamic Family Law (Federal Territories) Act 1984, [http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng\\_act\\_lib.nsf/858a0729306dc24748257651000e16c5/1d314361e2750042482569810025f0fc?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_act_lib.nsf/858a0729306dc24748257651000e16c5/1d314361e2750042482569810025f0fc?OpenDocument), accessed on 19 January 2020

- a. That the whereabouts of the husband have not been known for a period of more than one year;
- b. That the husband has neglected or failed to provide for her maintenance for a period of three months;
- c. That the husband has been sentenced to imprisonment for a period of three years or more;
- d. That the husband has failed to perform, without reasonable cause, his marital obligations (nafkah batin) for a period of one year;
- e. That the husband was impotent at the time of marriage and remains so and she was not aware at the time of the marriage that he was impotent;
- f. That the husband has been insane for a period of two years or is suffering from leprosy or vitilago or is suffering from a venereal disease in a communicable form;
- g. That she, having been given in marriage by her *wali Mujbir* before she attained the age of baligh, repudiated the marriage before attaining the age of eighteen years, the marriage not having been consummated;
- h. That the husband treats her with cruelty, including;
  - 1) habitually assaults her or makes her life miserable by cruelty of conduct; or
  - 2) associates with women of evil repute or leads what, according to Hukum Syarak, is an infamous life; or

- 3) attempts to force her to lead an immoral life; or
- 4) disposes of her property or prevents her from exercising her legal rights over it; or
- 5) obstruct her in the observance of her religious obligations or practice; or
- 6) if he has more wives than one, does not treat her equitably in accordance with the requirements of Hukum Syarak;
  - i. That even after the lapse of four months the marriage has still not been consummated owing to the wilful refusal of the husband to consummate it;
  - j. That she did not consent to the marriage or her consent was not valid, whether in consequence of duress, mistake, unsoundness of mind, or any other circumstance recognized by Hukum Syarak;
  - k. That at the time of the marriage she, though capable of giving a valid consent, whether continuously or intermittently, a mentally disordered person within the meaning of the Mental Disorders Ordinance 1952 [Ord. 31 of 1952] and her mental disorder was of such a kind or to such extent as to render her unfit for marriage;
  - l. Any other ground that is recognized as valid for dissolution of marriages or *fasakh* under Hukum Syarak.

### 3. Legal Requirements of Divorce in Malaysia

In Malaysia, divorce outside the court is considered invalid, because within 7 (seven) days after the divorce is dropped, the husband must report

it to the Shariah Court. This is in accordance with Laws of Malaysia Islamic Family Law (Federal Territories) Act 1984 section 55A, which reads as follows:<sup>23</sup>

“a man who has divorced his wife by the pronouncement of talaq outside the Court and without permission of the Court, shall within seven days of the pronouncement of the talaq report to the Court.”

### **C. Divorce in Brunei Darussalam Family Law**

#### **1. Islamic Family Law in Brunei Darussalam**

The state of Brunei is in the form of a monarchy with a traditional political system feudalistic where the royal family as the leader of the kingdom. The Head of State is called the Sultan by the official nickname of “Ke Bawah Duli Yang Maha Mulia Paduka Seri Baginda Yang Dipertuan Negara”. The head of government is the Prime Minister.<sup>24</sup>

Before the arrival of British occupation, the Act which was implemented in Brunei Darussalam was an Islamic Law that had been code with the Brunei qanun law. The Brunei Qanun Law was written during the reign of Sultan Hassan (1605M-1619M) which was perfected by Jalilul Jabbar (1619-1652M).<sup>25</sup>

<sup>23</sup> Islamic Family Law (Federal Territories) Act 1984, [http://www2.esyariah.gov.my/esyariah/mal/portallv1/enakmen2011/Eng\\_act\\_lib.nsf/858a0729306dc24748257651000e16c5/1d314361e2750042482569810025f0fc?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portallv1/enakmen2011/Eng_act_lib.nsf/858a0729306dc24748257651000e16c5/1d314361e2750042482569810025f0fc?OpenDocument), accessed on 19 January 2020

<sup>24</sup> Kafrawi Ridwan, et.al., *Ensiklopedi Islam*, (Jakarta: Ikhtiar Baru Van Hoeve, 1994), 257.

<sup>25</sup> Khoiruddin Nasution, *Hukum Perdata (Keluarga) Islam Indonesia dan Perbandingan Hukum Perkawinan Di Dunia Muslim*, 156.

Regulations and legislation in Brunei were continuously changed, as in 1912 the Majlis Mesyuarat Negeri had enacted the Islamic Religious Law known as the “Muhammadans Law Enactment” which was perfected in 1913 with a rule known as “Muhammadan’s Marriages and Divorce Enactment”. Until the last, it namely the promulgation of the Majlis Religion, State Customary Law and the Kadi Court in 1955, which apply on January 1, 1956. After that year, the laws continually amendments, starting from 1957, 1960, 1961 and 1967<sup>26</sup>

In 1984, there was a revision of the law of Brunei. In Brunei Law 1984 Chapter 77 concerning Religious Council and Kadis Courts, consisting of,<sup>27</sup>

- a. Preliminary (Part I section 1-4)
- b. Majlis (Part II section 5-44)
- c. Religious Courts (Part III section 45-96)
- d. Financial (Part IV section 134-122)
- e. Mosques (Part V section 123-133)
- f. Marriage and Divorce (Part VI section 134-156)
- g. Maintenance of Dependants (Part VII section 157-163)
- h. Converts (Part VIII Section 164-168)
- i. Renunciation of Islamic Religion (Part IX section 169)
- j. Offences (Part X section 170-196)

<sup>26</sup> Tahir Mahmud, *Personal Law in Islamic Countries: History, Text, and Comparative Analysis*, (New Delhi: Academy of Law and Religion, 1978), 198-199.

<sup>27</sup> Laws Of Brunei Revised Edition 1984 Chapter 77 About Religious Council And Kadis Courts

k. General (Part XI section 197-205)

In 1999 another law was made, the 1999 Emergency Order (Islamic Family Law), which became a reference to matters relating to family institutions such as marriage and divorce. This order is also recognized as “An order to set certain designations concerning the Islamic Family Law relating to marriage, divorce, *nafaqah*, maintenance and other matters relating to family life”. Emergency Order (Islamic Family Law), 1999 is a Family Law which has a more intensive and comprehensive design. This order does not invalidate the provisions in the Chapter 77 about Religious Councils and the Kadis Court in total, only part VI (marriage and divorce) and Part VII (the maintenance of the dependents) have abolished. Similarly, sections 175, 176, 178 (1), 178 (2), 179 and 180 have abolished. The order also makes amends in subsection (1), by including “except from a marriage in which both parties adopted the religion of Islam,” as soon as “the State of Brunei Darussalam” in the second line.<sup>28</sup>

Emergency Order (Islamic Family Law), 1999 contains ten parts, which are as follows;<sup>29</sup>

- a. Preliminary (section 1–7)
- b. Marriage (section 8–23)

<sup>28</sup> Saaidah binti Derma Wijaya Haji Tamit, *Institusi Keluarga dan Undang-Undang*, (Bandar Seri Begawan: Pusat Da’wah Islamiah, 2012), 4.

<sup>29</sup> Emergency Order (Islamic Family Law), 1999, [http://www.agc.gov.bn/AGC%20Images/LOB/Order%20PDF%20\(BM\)/Perintah%20Darurat%20\(Undang-Undang%20Keluarga%20Islam\),%201999%20\(S%2057\).pdf](http://www.agc.gov.bn/AGC%20Images/LOB/Order%20PDF%20(BM)/Perintah%20Darurat%20(Undang-Undang%20Keluarga%20Islam),%201999%20(S%2057).pdf), accessed on 19 January 2020

- c. Marriage Registration (section 24–32)
- d. Penalties and Provisions Relating to Marriage and Marriage registration (section 33–bab 39)
- e. Dissolution of Marriage (section 40–60)
- f. Wife's living, Children, and others (section 61–87)
- g. Maintenance (hadhanah) (section 88–94)
- h. The order of Children's legitimacy (section 113–122)
- i. Penalties (section 123–139)
- j. General (section 140–147)

## 2. The Causes of Divorce in Brunei Islamic Family Law

In the Emergency Orders (Islamic Family Law), 1999 Section 43, 44, and 45 state that there are several reasons for break the marriage, including,<sup>30</sup>

- a. Shiaq is a husband who has abused his wife or harmed or done any harm to his wife's body or honor or property whether by word or deed and the wife is not able to live together and maintain a husband's relationship.
- b. Dharar Shar'i for the following reasons;
  - 1) Usually hurts or causes the wife's life suffer due to mistreatment;

<sup>30</sup> Emergency Order (Islamic Family Law), 1999, [http://www.agc.gov.bn/AGC%20Images/LOB/Order%20PDF%20\(BM\)/Perintah%20Darurat%20\(Undang-Undang%20Keluarga%20Islam\),%201999%20\(S%2057\).pdf](http://www.agc.gov.bn/AGC%20Images/LOB/Order%20PDF%20(BM)/Perintah%20Darurat%20(Undang-Undang%20Keluarga%20Islam),%201999%20(S%2057).pdf), accessed on 19 January 2020

- 2) Making friends and associating with bad women or living viciously following the view of Sharia Law;
- 3) Forfeiting a wife's property or forbidding a wife from exercising her rights on the side of the Law against that property;
- 4) Prevent the wife from fulfilling or performing her religious duties or practices;
- 5) If he has more than one wife, he does not fair in caring the wife according to the requirements of the Law.

c. Divorce under ta'liq talaq

Brunei Law states that if a husband or wife harms his or her spouse, they will be fined. The fine was not specified, it could only be a maximum of two thousand dollars or a maximum of six months in prison. This is stated in the Emergency (Islamic Family Law) Order, 1999 Section 127 which reads:

“A husband or wife after being ordered by the Court to live together with his wife or husband intentionally disobeying that order by doing a mistake and if it is wronged, you should be punished with a fine not exceeding two thousand ringgit or imprisonment not exceeding six months or both.”

### 3. Divorce Requirements in Brunei Islamic Family Law

The Emergency Order (Islamic Family Law) 1999 of Section 55 is as follows:

“A man who divorces his wife by pronouncing talaq in any form outside the Court and without the permission of the Court shall, within seven days since talaq pronouciation, report the statement of talaq to the Court”.

#### D. Divorce outside the Court

Terminology of divorce outside the court is a popular term that refer to the breakup of a marriage bond between a husband and wife who do not go through the trial process as regulated in the regulation.<sup>31</sup>

Substantively, *talaq* (divorce), when it has fulfilled the requirements and the pillars of Islam are legal according to Islamic law, but the husband and the wife must join reconciliation, only if the conciliators appointed from both husband and wife families as mediators fail to reconcile the spouse, Islamic law allow the spouse to separate, as the word of Allah;

وَأِنْ يَتَفَرَّقَا يُغْنِ اللَّهُ كُلًّا مِنْ سَعَتِهِ وَكَانَ اللَّهُ وَاسِعًا حَكِيمًا<sup>32</sup>

Translation:

*But if they separate [by divorce], Allah will enrich each [of them] from His abundance. And ever is Allah Encompassing and Wise.*

The verse instructs husbands not to use their power arbitrarily and leave their wives hanging, but rather emphasizes to solve the problem in a better manner, the purpose of the marriage decision must meet the requirements and each aims to avoid

<sup>31</sup> Makmun Syar'i, "Reformulasi Hukum Talak Di Luar Pengadilan," *MAZAHIB*, 1 (Juni, 2015), 72.

<sup>32</sup> QS. An-Nisaa (4): 130.

permanent divorce. The breaking up of the marriage relationship according to Islamic law can only happen after fulfilling the requirements, namely the existence of *nushuz* and *syiqaq*, even though the husband must say divorce one in the first opportunity. The purpose of this restriction is for a possibility of reconciliation in the future, because he pronounces the divorce in jokes or a serious moment so that he can reconcile after the *iddah* of his wife, which began after the divorce was pronounced.

To anticipate that the husband does not arbitrarily drop divorce on his wife and to get legal protection and legal certainty, divorce can only be conducted in front of the Religious Court hearing after the court tries and fails to reconcile the two parties. To get protection and legal certainty must obey and obey the laws and regulations set by the Government. Government is *ulil amri* which must be followed, based on the word of Allah;

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولَى الْأَمْرِ مِنْكُمْ فَإِنْ تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى

اللَّهِ وَالرَّسُولِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا<sup>33</sup>

Translation:

*O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result.*

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<sup>33</sup> QS. An-Nisaa (4); 59.

## **E. Juridical Impact of Divorce outside the Court**

### **1. The Consequences of Divorce outside the Court to the Divorce Status**

Accordance to the Marriage Law, divorce can only be conducted in court hearing, after the court has tried and failed to reconcile the two parties. Based on these regulation, since the the Marriage Law was enacted effectively on 1<sup>st</sup> October 1975, divorce outside the court procedures is not possible.

The status of the divorce outside the court does not have the effect or legal strength, because the decision on divorce was not made before a court hearing. Whereas a divorce which was not pronounced in a court have a very clear legal status, that the divorce was invalid, based on Article 115 of the Compilation of Islamic Law.<sup>34</sup>

Basically, Islam allowing a husband who will divorce her wife is only sufficiently pronounced in front of his wife or someone else, then talaq falls, but we live in a country and must obey the government regulations, as long as they do not conflict with Islamic law itself, because obeying the government, is part of the obligation as Muslims. The government made a divorce regulation to keepi it organized as well as the problems of registering marriages, and child births. This is basically accordance to the principles of Islamic law regarding divorce that is to make a divorce difficult.

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<sup>34</sup> Islamic Law Compilation Article 115

## 2. The Consequences of Divorce outside the Court to the Wife

Divorce that happen outside the court will have an effect and have a negative impact on the wife, because divorce outside the court does not have legal strength, so the widow who wants to remarry will have difficulties in the Office of Religious Affairs. Because every widow who wants to remarry must have a divorce certificate from the Court, so she takes the path of marriage a second time through marriage under the hand. Furthermore, after the divorce (divorce outside the court), the wife does not get her rights after the divorce, such as *nafaqoh* during the period of *iddah*, clothing, and food.<sup>35</sup>

## 3. The Consequences of Divorce outside the Court to the Husband

As a result of divorce outside the court not only affects the wife but also affects the husband. Same as the wife, husband who divorce outside the court will experience difficulties when they want to remarry with other women. Divorce which is done outside the court will not have a divorce certificate and permanent legal strength, so if you want to remarry, you will eventually take the path of marriage under hand (unregistered married).<sup>36</sup>

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<sup>35</sup> Vivi Hayati, "Dampak Yuridis Perceraian Di Luar Pengadilan", *Jurnal Hukum Samudera Keadilan*, 2 (Juli-Desember, 2015), 225.

<sup>36</sup> Makmun Syar'i, "Reformulasi Hukum Talak Di Luar Pengadilan", 74.

#### 4. The Consequences of Divorce outside the Court to the Child

Surely, divorce will bring negative effect for everyone associated with that, both from the wife, husband, and for the families of both parties. Moreover, the divorce will affect the child, whether the divorce is conducted outside Court or in court hearing.

For the child, a separation (divorce) between their parents is something that can damage their mental condition. Before the divorce happen, the child live in a harmonious family environment, full of love from his parents, living together by having the figure of a father, with the figure of a mother, but after divorce, the child suddenly in a troubled family environment which make them to stay only with one figure, mother or father.

Divorce conducted outside the court will affect the child's psychological condition, because the father often does not provide regular income and a fixed the amount. Divorce conducted outside the court does not have legal strength, so it cannot force the father or mother to provide their income regularly.<sup>37</sup>

The status of divorce outside the court does not have legal strength because it was not decided in a court hearing, which caused them not to be able to remarry in the Office of Religious Affairs because they did not have a divorce certificate from Religious Court. The negative impact of divorce

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<sup>37</sup> Vivi Hayati, "Dampak Yuridis Perceraian Di Luar Pengadilan", 226.

outside the court does not only have an impact on husband and wife but also on children.

## **F. The Forms of Penalties**

Types of penalties in Article 10 of the Criminal Code are:

### **1. Criminal Principal**

#### **a. Death Penalty**

This criminal is the heaviest criminal according to our positive law. For most countries, the problem of capital punishment only has meaning from the point of historical culture. It is said so because, most countries no longer include the death penalty in the Law. Even so, this is still a problem in the field of criminal law, because there are screams in the midst of the community to ask for the re-establishment of such crimes, and urged to be included again in the Law. But in general, people are cons to the existence of capital punishment than the pros. Among the objections to the death penalty is that this crime cannot be withdrawn, if there is then a mistake. But capital punishment is still a provision.<sup>38</sup>

#### **b. Criminal Prison**

One type of criminal that is in the criminal law system in Indonesia as stated in Article 10 of the Criminal Code is

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<sup>38</sup> J.E. Sahetappy, *Pidana Mati Dalam Negara Pancasila*, (Bandung: Citra Aditya Bakti, 2007), 10.

imprisonment, which based on Article 12 paragraph (1) consists of life imprisonment and criminal for a certain time.<sup>39</sup>

Criminal imprisonment is a crime of revocation of independence. Prison punishment is carried out by closing the convict in a prison, by requiring that person to obey all the rules and regulations that apply in prison.

#### **c. Confinement**

Confinement are forms of the punishment of deprivation of liberty for the convicted person, that is, the separation of the condemned from the social intercourse of a crowded community in a certain time where it is the same as a prison sentence, which is a deprivation of liberty of a person.

Criminal confinement is lighter than imprisonment. Lighter, among others, in terms of carrying out the required work and the ability to carry the equipment needed by the convicted daily, for example: beds, blankets, and others.<sup>40</sup>

#### **d. Fines**

Fines are threatened or dropped for minor delinquency, in the event of a violation or misdemeanor. Therefore, fines are the only penalties that can be obtained by anyone other than convicted.

Although fines may be imposed on private criminals, there is no

<sup>39</sup> Tongat, *Pidana Seumur Hidup Dalam Sistem Hukum Pidana Indonesia*, (Malang: UMM Press, 2004), 35.

<sup>40</sup> Tongat, *Pidana Seumur Hidup Dalam Sistem Hukum Pidana Indonesia*, 35.

prohibition if the fine is voluntarily paid by the person on behalf of the criminal.<sup>41</sup>

**e. Criminal Closure (based on Law Number 20 Year 1946 RI News II Number 247)**

Criminal closure was actually intended by the legislators to replace the imprisonment that could actually be imposed by the judge for the perpetrators of a crime, on the basis that the crime was committed by the perpetrators because it was motivated by intentions that deserve respect.<sup>42</sup>

**2. Additional Crimes**

Additional criminal penalties are available in Article 10 paragraph (6) including: revocation of certain rights, confiscation of certain goods, announcement of judge decisions.

<sup>41</sup> J.E. Sahetappy, *Pidana Mati Dalam Negara Pancasila*, 11.

<sup>42</sup> P.A.F. Lamintang, *Hukum Penitensier di Indonesia*, (Bandung: Armico, 1984), 147.

### CHAPTER III

## COMPARISON OF PENALTIES OF DIVORCE OUTSIDE THE RELIGIOUS COURT IN INDONESIA, MALAYSIA, AND BRUNEI DARUSSALAM

### A. The Differences of Rules and Penalties in Divorce outside Religious Courts of Indonesia, Malaysia, and Brunei Darussalam

#### 1. Ruling about Penalties of Divorce outside Religious Court

##### a. Indonesia in Law Number 1 Year 1974

All ruling about Marital Law in Indonesia are regulated in Law No. 1 year 1974. One of the material contained in Law No.1 / 1974 is about divorce. In Section 39 subsection (1) of Law No. 1/1974 states that, *"Divorce can only be carried out in front of the Trial Court after the court concerned has tried and failed to reconcile the two parties"*.<sup>43</sup> So in Indonesia, a person is declared

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<sup>43</sup> Act No 1 Year 1974 About Marriage

divorced when the divorce is committed in court. Meanwhile, a person who has divorced outside the court is considered to still be a husband and wife under State Law. This was later reaffirmed in article 115 of the Compilation of Islamic Law.

In Article 65 of Law Number 7 of 1989 which has been amended by Law Number 3 of 2006 Jo Article 39 of Law Number 1 of 1974 confirmed that;

*“Divorce can only be carried out before a court hearing after the court has tried and failed to reconcile the two parties.”*

Furthermore, in number 7 (seven) of the General Explanation of Law Number 7 of 1989 it is stated that;

*“The Marriage Law aims to protect women in general and wives in particular ...”<sup>44</sup>*

Legislations of marriage in Indonesia gives absolute rights to a husband to divorce his wife but with the provisions;<sup>45</sup>

- 1) Divorce must be conducted in a court hearing;
- 2) Divorce must be accordance the reasons as stipulated in the law;
- 3) Following the procedures as regulated in Article 66, and so on.

Law Number 7 of 1989 and other statutory provisions.

<sup>44</sup> Act Number 7 Year 1989 About Religious Court

<sup>45</sup> Anshary, *Hukum Perkawinan di Indonesia Masalah-masalah Krusial*, (Yogyakarta: Pustaka Pelajar, 2010), 78.

Indonesian marriage law stipulates that divorce must take place before a religious court, and divorce conducted outside a religious court is not recognized for the purpose of protecting women, especially wives. This is as contained in the General Explanation of Law Number 7 of 1989 concerning Religious Courts. Besides that, legally the law aims to obtain legal certainty.

A divorce that is carried out outside the court, is the same as a marriage that is done by not recording it. It is not recognized by law, and therefore is not protected by law. Moreover, it is firm again to say that divorce conducted outside the court has no legal force. The law considers divorce outside the court as never existed.

One of the principles of the Marriage Law is to make divorce more difficult.<sup>46</sup> A husband who is given the absolute right to divorce his wife is not arbitrary in exercising his rights. A husband's right to divorce his wife can occur if it is based on the reasons for divorce in article 19 Government Regulation Number 9 of 1975 Concerning in the implementation of Law No. 1 of 1974 in conjunction with Article 116 Compilation of Islamic Law as the researchers have described in the previous chapter.

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<sup>46</sup> Muhammad Amin Suma, *Hukum Keluarga Islam di Dunia Islam*, (Jakarta: PT Raja Grafindo Persada, 2004), 160-161.

In Section 149 of the Compilation of Islamic Law it is stated that, if divorce occurs due to *talak*, then the ex-husband is obliged to give to his ex-wife;<sup>47</sup>

- 1) *Mut'ah* that is worthy in the form of money or goods;
- 2) *Iddah* income which includes;
  - a. Residence;
  - b. Living equipment;
- 3) Paying the dowry that has not been paid in full;
- 4) *Hadhanah* or maintenance costs for children who have not yet reached the age of 21 years.

From the description above it can be seen that the urgency of divorce must be done in religious court hearing is to realize *maslahah* and to guarantee the rights of husband and wife in a fair and mutual, so that no party feels disadvantaged.

Marriage is also a support and foundation for the development of a civilized society. Two important things are needed to support the realization of this goal, including;<sup>48</sup>

- 1) A comprehensive legal framework that is able to serve various aspects of the legal needs covered by cultural patterns;

<sup>47</sup> Islamic Law Compilation 1991

<sup>48</sup> Abul A'la al-Maududi, *Kawin dan Cerai Menurut Islam*, penerjemah Ahmad Rais, (Jakarta: Gema Insani Press, 1995), 7.

- 2) Leadership who is able to apply the legal framework appropriately.

Islam itself is one of the most important pillars that recognized. Thus, divorce must be done in front of a court hearing that is never in the conventional jurisprudence of the Fiqh even in a pile of books based on the words of the Prophet Muhammad. But because of its purpose and urgency for the necessary context, there is nothing wrong if it becomes one basic components of a country's modern marriage community.<sup>49</sup>

Divorce carries legal consequences especially for his wife and children as a weak party if divorce occurs. Therefore, divorce does not may just happen without a clear reason and cause. Even though the Islamic Sharia opens an emergency door to divorce, but divorce must not be disastrous. But divorce must be able to bring calmness and benefit to married couples and his children.

The birth of the Marriage Law, one of which is to form a society in an orderly manner in terms of population administration, especially in the field of marriage. This is very necessary, considering that each marriage gives birth to new rights and obligations. Thus, the Marriage Law can be seen as the government's effort to manipulate social (law is a tool of social

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<sup>49</sup> Ahmad Tholabi Kharlie, *Hukum Keluarga Indonesia*, (Jakarta: Sinar Grafika, 2013), 188.

engineering); “To form” a society that is aware and obedient, and perform an orderly administration in the field of marriage.<sup>50</sup>

Divorce must be done in a court hearing will be one of the efforts to improve the orderliness and pleasure of each individual in conducting legal relations, so that the Islamic purpose of marriage will be realized as well, where Islam first came to lift the level and dignity of women.

Through Law No. 1 of 1974 concerning marriage and compilation of Islamic Law (KHI), the government has set the mechanism and legal requirements for a divorce, that is, a divorce that is occur in court hearing. But in the middle of the community, we can found the practice of divorce that does not follow the rules of the law which is often called as divorce outside the court. Divorce outside the court referred to is divorce that has fulfilled all the requirements and pillars of divorce stipulated in the Islamic Shari’a, but without an official stipulation in the institution, as regulated in acts. This happens because the public knows that the opinion of the majority of scholars in the fiqh literature does not require divorce to be carried out through court proceedings.

Before 1974, the *talaq* divorce proceedings in Indonesia were mostly still guided by the legal provisions taught by classical

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<sup>50</sup> Hasan Nul Hakim, “Penindakan Terhadap Pelaku Penjatuhan Talak Di Luar Pengadilan Melalui Sarana/Pendekatan Pidana (Penal Approachment)”, *Al-Fikra*, 2 (Juli-Desember, 2016), 328.

fiqh books. Divorce is the full right of a husband, and it considered as *voluntary* matter. As a result, there is a discriminatory process. Wives are not given much of the right to defend themselves. The opportunity to speak in front of the trial process is only for the husband. The Religious Court seems to legitimize the husband's arbitrary actions towards the wife. The presence of the marriage law, and the Law on Religious Courts Number 7 of 1989 which was amended to become Law Number 3 of 2006, and the Compilation of Islamic Laws aimed to bring order into practice that was not appropriate as explained above. The case process, which has been considered as *voluntary* matter, has been upgraded to be a *kontentius* case.<sup>51</sup> Husband as a plaintiff and wife as a defendant. Divorce must be based on logical reasons in accordance with the law. Government involvement which has been deemed unnecessary has become absolute for this case.

It must be realized, that the State of Indonesia as a state based on law (*rechstaat*), the law has a status and position that determines the life of the state administration. The logical consequence of this reality is the necessity of an order or legal instrument that is able to regulate the life of society, nation and state nationally.

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<sup>51</sup> Yahya Harahap, *Kedudukan Kewenangan dan Acara Peradilan Agama*, (Jakarta: Sinar Grafika, 2005), 47.

The law has a duty to guarantee legal certainty in society. The law protects and prevents everyone from playing vigilantism. Every dispute must be resolved through a legal process in court based on applicable law. Because every person is bound by law, so their every action must be in accordance with applicable legal regulations.

**b. Malaysia in Islamic Family Law (Federal Territories) Act 1984**

In Malaysian Family Law divorce must be registered in the Syariah Court. This is in accordance with article 55A of the Islamic Family Law (Federal Territories) Act 1984 which states that husbands who divorce their wives outside court proceedings and without permission from the sharia court must report to the sharia court counted for 7 (seven) days from pronouncement divorce. If a person divorces his wife outside the sharia court, he will get sanctions as stated in section 124 of the Islamic Family Law (Federal Territories) Act 1984, as follows;

*“If a man divorces his wife by reciting talaq in any form outside the court and without the court's permission then he is making a mistake and should be fined not exceeding 1000RM (one thousand ringgit) or confinement not exceeding 6 (six) months or both.”<sup>52</sup>*

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<sup>52</sup> Islamic Family Law (Federal Territories) Act 1984, [http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng\\_act\\_lib.nsf/858a0729306dc24748257651000e16c5/1d314361e2750042482569810025f0fc?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_act_lib.nsf/858a0729306dc24748257651000e16c5/1d314361e2750042482569810025f0fc?OpenDocument), accessed on 19 January 2020

The records of Muslim law bring us to various countries in Malaysia. Since 1952 an overhaul has been made following the model of legislation and the first legislation that followed that model was the Enactment of the Ordinance Law for Muslims in Selangor in 1952.<sup>53</sup>

The State of Malaysia consists of several states. Of course, every state has its own laws. So as regarding the ruling about divorce outside the sharia court and its sanctions. The same sanctions are listed in the Malaysian state provisions namely; section 124 Enakmen 7 of 1983 Negeri Sembilan, section 128 Ordinances 43 of 2001 Negeri Serawak, section 125 Enakmen 88 of 2004 Negeri Sabah, section 125 Enakmen 3 of 2005 Pahang, section 125 Enakmen 7 of 2008 Negeri Kedah Darul Aman, section 125 of Enakmen 2 2003 Negeri Selangor, section 125 Enakmen 7 year 2006 Negeri Perlis, section 125 Enakmen 12 in 2002 Malacca State, section 125 Enakmen 6 in 2002 Kelantan, and section 125 Enakmen 17 in 2003 Negeri Johor. All of these laws stipulate penalties for divorce offenders outside the court by paying a fine of one thousand Malaysian ringgit or confinement for six months or even both.

Whereas Article 121 Enakmen 12 of 1985 the State of Trennganu sanctions are lighter, as stated that;

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<sup>53</sup> Hooker, *Undang-undang Islam di Asia Tenggara*, penerjemah Rohani Abdul Rahim, Raja Rohana (Selangor Darul Ehsa: Dewa Bahasa dan Pustaka, 1991), 164.

*“... he is making a mistake and should be fined not exceeding 500RM (five hundred Malaysian ringgit) or confinement not exceeding 3 (three) months or both”<sup>54</sup>*

Furthermore, in section 125 of the Islamic Family Enactment (Perak) 2004 the penalties listed are heavier by fine 3000RM (three thousand ringgit Malaysia) or confinement as long as the tempo does not exceed 2 (two) years in prison.<sup>55</sup>

In Islamic law, even though divorce is lawfully recited outside the court or at home, but to keep the husband from arbitrarily reciting the word divorce as he pleases, in order to complying with all Islamic law, a Muslim is also required to respect the laws and regulations of the country in which he domiciled, then he is obliged to obey the rule and not to violate existing regulations to reach the purpose of the Islamic justice institutions. This is in accordance with the instructions contained in Al-Qur'an An-Nisa verse 59, that a Muslim must obey Allah, Rasul, and *Ulil Amri* (government). The government as *Ulil al-amri* (Ruler in an Islamic country) can make provisions and rules that bind the Muslim community as long as it does not conflict with the intention of decreasing Islamic law

<sup>54</sup> “Negeri Terengganu Enakmen 12 Tahun 1985 Enakmen Undang-Undang Pentadbiran Keluarga Islam”, [http://www2.esyariah.gov.my/esyariah/mal/portaltv1/enakmen/State\\_Enact\\_Ori.nsf/f831ccddd195843f48256fc600141e84/d0d9e48fb98376a4482570de0004851a?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portaltv1/enakmen/State_Enact_Ori.nsf/f831ccddd195843f48256fc600141e84/d0d9e48fb98376a4482570de0004851a?OpenDocument), accessed on 20 February 2020.

<sup>55</sup> “Negeri Perak Enakmen 6 Tahun 2004 Enakmen Keluarga Islam (Perak) 2004”, [http://www2.esyariah.gov.my/esyariah/mal/portaltv1/enakmen/State\\_Enact\\_Ori.nsf/100ae747c72508e748256faa00188094/9e4fd406514c7b284825703f0016ea77?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portaltv1/enakmen/State_Enact_Ori.nsf/100ae747c72508e748256faa00188094/9e4fd406514c7b284825703f0016ea77?OpenDocument), accessed on 20 February 2020

(*Maqashidu al-tasyri'*). The existence of marriage and divorce provisions in legislation (government regulations) does not reduce the provisions and laws that apply in marriage and divorce institutions, inclusive in Islam.

In addition, there is a regulation on divorce outside the sharia court which is formed with the aim that the lives of the wife and children after divorce are not neglected. Because the divorced wife is entitled to earn a living as long as she is still in the *iddah* (waiting period). On the other hand, the child is still entitled to get a living from his father. If divorce occurs outside a court of law, then this will have an adverse effect on the wife and child or even the husband. This is because divorce that occurs without the truth of the sharia court has no legal force so that children and wives cannot get their rights after a divorce occurs. This can certainly be ascertained. Many husbands who no longer want to be responsible to their children and wives after a divorce outside the court.

**c. Brunei Darussalam in Emergency Order (Islamic Family Law) 1999**

The majority of Brunei Darussalam's population is Muslim who adheres to the Shafi'i school of law, with some residents from Buddhism, Christians, and some residents who adhere to a traditional religious system. Brunei's first constitution was ratified on 29 September 1959 and article 3 stipulates that Islam is the

official religion, which follows the Shafi'i school of law. The structure of the Brunei Darussalam government rests on the Constitution, which was written together with three pillars of national philosophy, namely Malay, Islam, and Monarchy. From this, it can be seen that the State of Brunei Darussalam is one of the Islamic kingdom states in the north of Borneo bordering the South China Sea in the north, and Serwak in the west, and east.<sup>56</sup>

Before the arrival of the British colonial in Brunei Darussalam, the law used in the region was Islamic law, which had been passed through the *Brunei Kanun Law* which was written during the reign of Sultan Hasan in the 17th century which was perfected by Sultan Jalilul Jabbar in the next period. In 1847 that the British intervened in judicial affairs in Brunei Darussalam, especially after the 1888 treaty. The next treaty, happened in 1906, British had more authority in statutory regulations, the administration of justice and judicial authority, and matters of the State and government except in cases Islamic litigation. With the unclear Islamic law and custom that existed in the community of the Sultanate of Brunei made a petition called the *British pesuruhjaya* on July 1906, the contents of which included;<sup>57</sup>

<sup>56</sup> Ahmad Tholabi Kharlie dan Asep Syaripuddin Hidayat, *Hukum Keluarga di Dunia Islam Kontenporer*, (Ciputat: lembaga penelitian UIN jakarta, 2011), 225.

<sup>57</sup> Ahmad Tholabi Kharlie dan Asep Syaripuddin Hidayat, *Hukum Keluarga di Dunia Islam Kontenporer*, 227.

- 1) Every case related to Islam is judge by local judges;
- 2) Requesting local customs and laws not to be changed, moved or violated forever

The divorce in Brunei is regulated in the Brunei State Family Law. It mentioned in Section 180 subsection (1) Laws of Brunei revised edition 1984 Chapter 77 about Religious Council and Kadis Courts, said that;

*“Whoever, being under a duty to report to a registrar any marriage or divorce, wilfully neglects or fails to do so shall be guilty of an offence: penalty a fine of \$200.”*

The section above states that anyone who commits *talaq* without registering will be fined as much as B\$200 (two hundred dollars). Whereas in the Emergency Order (Islamic Family Law), 1999 in Article 124 concerning punishment for man who did not report their divorce to the Court, as the follows;

*“A man who divorces his wife by reciting talaq in any form outside the Court without the leave of the Court shall be guilty of an offense and shall be liable to a fine not exceeding two thousand dollars or to confinement not exceeding six months or to both”*

In the regulations of the State of Brunei allow divorce out of court. In the State of Brunei the husband must report the divorce recitation within a period of 7 (seven) days. If within the specified

time period he does not report it, he will get penalty. The penalty is in the form of money which is no more than B\$ 2000 (two thousand Brunei dollars) or confinement of no more than 6 (six) months or both. This is in accordance with the rules of the Emergency Order (Islamic Family Law), 1999 Article 55 paragraph (1) as previously explained.

It can be seen that in the previous regulation namely Article 180 paragraph (1) Laws of Brunei revised edition 1984 Chapter 77 about Religious Council And Kadis Courts it is stated that the sanction for someone who does not register their divorce is a prison sentence or a fine of B\$200 (two hundred Brunei dollars). Then after the Emergency Order (Islamic Family Law), 1999 was published. There was a change in sanctions contained in Article 124, which the sanctions were increased to B\$2000 (two thousand Brunei dollars) or imprisonment for 6 (six) months or both.

Divorce registration in the State of Brunei because the purpose of recording or registration is for the sake of the administration of the country, so that the consequences arising after the divorce such as child custody, livelihood, *iddah*, *mut'ah*, reconciliation and others that require divorce certificates as proof of a marriage can be guaranteed. Divorce needs to be regulated so there is no arbitrariness. Therefore, to avoid such harm, a record for divorce is needed.

## 2. Amount of Penalties

In Malaysia, divorce outside the sharia court is strictly prohibited and sanctions have been imposed. This is stated in the State of Malaysia Section 124 Islamic Family Law (Federal Territories) Act 1984, that a man who divorces his wife outside the court is sentenced to a fine not exceeding 1000RM (Rp. 3,298,000) or imprisonment not exceeding six months or both. Even in the state of Malaysia, namely in the State of Perak the sentence imposed was a fine not exceeding 3000RM (three thousand Malaysian ringgit) or two years in prison or both.

The State of Brunei in practice still allows divorce out of court. However, within seven days of the divorce being handed down the husband is obliged to report and file his divorce in court. When it has been more than seven days then the husband will get sanctions of B\$ 2000 (two thousand Brunei dollars) or imprisonment for 6 (six months) or both.

Countries of Malaysia and Brunei have imposed sanctions on divorce offenders outside the court hearing. Even, the fines imposed by these two countries can be said to be high. If exchanged with the currency in Indonesia, fines imposed in Malaysia are equivalent to Rp. 3,298,000 (three million and two hundred ninety eight thousand rupiah). As in the states of Malaysia, the lowest fine is equivalent to Rp. 1,638,000 (one million and six hundred thirty eight thousand rupiah) and the highest is equivalent to Rp. 9,894,000 (nine million eight hundred ninety four

thousand rupiah). While in Brunei the fines imposed are Rp. 19,752,000 (Nineteen million seven hundred fifty-two thousand rupiah)

**Table I**

**Differences of Rules and Penalties in Divorce outside Religious Courts  
of Indonesia, Malaysia, and Brunei Darussalam**

No	Comparison	Indonesia	Malaysia	Brunei Darusaalam
1	Form of Contries	Republic	Federal Countries	Kingdom
2	Divorce Outside The Court	Not recognized	Banned	Allowed
3	Regulation	Act Number 1 Year 1974	Islamic Family Law (Federal Territories) Act 1984	Emergency Order (Family Law Regulation), 1999
4	Penalty System	Not implemented yet	Every federal countries has it own penalty system	Comprehensive penalty system
5	Amount of Penalty	Not regulated	1000RM or 6 (six) month prisoned. Trengganu; 500RM (five hundred Malaysian ringgit) or confinement for 3 (three months) Perak; 3000RM (three thousand	B\$2000 or 6 (six) month prisoned.

			Malaysian ringgit) or confinement for 2 (two) years in prison	
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## B. The Similarities of Rules and Penalties in Divorce outside Religious Courts of Indonesia, Malaysia, and Brunei Darussalam

### 1. Indonesia

Even though divorce outside the religious court is not justified, Indonesia has not enacted yet to impose sanctions on husbands who drop divorce on their wives outside the court. As for the discourse in imposing sanctions for husbands who perform divorce outside the court hearing are listed in the Draft of *Undang-undang Hukum Materiil Pengadilan Agama (HMPA)*. Although the draft of *HMPA* has long been proposed to the *DPR* (Legislative Assembly), but until now there has been no progress. In the Draft divorce outside the religious court is included in the category of violations that can be sanctioned.

The criminal offenses in the draft *Undang-undang Hukum Materiil Pengadilan Agama* in the field of marriage are regulated in chapter XXI about Criminal Provisions starting from article 143 to article 150. Which consists of; articles of violation (articles 143, 145, 146 and 148), and criminal acts of crime (articles 144, 147, 149, and 150).

Divorce outside the Religious Courts in the plan of *Undang-undang Hukum Materiil Pengadilan Agama* is included in the category of violations, this is contained in article 146 which reads;

*“Every person who divorces his wife is not before a court hearing as in article 110 is liable to a maximum fine of Rp. 6000,000 (six million rupiah) or a maximum sentence of 6 (six) months.”*<sup>58</sup>

Criminal acts in the category of violations are “*wetsdeliktern*”, which means acts that are “against the law” and can only be felt as against the law if *wet* (rules) determine that the act is an unlawful act.<sup>59</sup> That means violations by their very nature is not an evil act (in terms of their character), but because *wet* sets the act as an act against the law (*onrecht*) then the act becomes an act of “criminal” (in the sense of Violation). Criminal acts in the category of violations have less sanctions. That also gave birth to the concept that criminal offenses do not apply to trial offenses (*Poging*), nor does imprisonment apply (only confinement, not prison), and so on, because indeed the threat of sanctions against violations is light.

<sup>58</sup> “Rancangan Undang-Undang Hukum Materiil Peradilan Agama Bidang Perkawinan 2008”, [https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.scribd.com/doc/52178445/Draft-RUU-HMPA-Bid-Perkawinan&ved=2ahUKEwjPlcqegN3nAhVgzTgGHRV5D7sQFjAAegQIBRAB&usg=AOvVaw3o-GdGGhP\\_a96VBRmByBZk](https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.scribd.com/doc/52178445/Draft-RUU-HMPA-Bid-Perkawinan&ved=2ahUKEwjPlcqegN3nAhVgzTgGHRV5D7sQFjAAegQIBRAB&usg=AOvVaw3o-GdGGhP_a96VBRmByBZk), Accessed on 19 Januari 2020

<sup>59</sup> Hasan Nul Hakim, “Penindakan Terhadap Pelaku Penjatuhan Talak Di Luar Pengadilan Melalui Sarana/Pendekatan Pidana (Penal Approachment),” *Al-Fikra: Jurnal Keislaman*, 2 (Juli-Desember, 2015), 327.

## 2. Malaysia

Based on the section 124 of the Islamic Family Law (Federal Territories) Act 1984, as follows;

*“If a man divorces his wife by reciting talaq in any form outside the court and without the court's permission then he is making a mistake and should be fined not exceeding 1000RM (one thousand ringgit) or confinement not exceeding 6 (six) months or both.”<sup>60</sup>*

We can see that the forms of penalties that implemented in Malaysia are fine and confinement.

## 3. Brunei Darussalam

Brunei Darussalam has same forms of penalties with Malaysia, as states in Emergency Order (Islamic Family Law), 1999 Article 124;

*“A man who divorces his wife by reciting talaq in any form outside the Court without the leave of the Court shall be guilty of an offense and shall be liable to a fine not exceeding two thousand dollars or to confinement not exceeding six months or to both”*

From the explanation above, the researcher concludes that Indonesia, Malaysia, and Brunei Darussalam have a same forms of penalties

<sup>60</sup> Islamic Family Law (Federal Territories) Act 1984, [http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng\\_act\\_lib.nsf/858a0729306dc24748257651000e16c5/1d314361e2750042482569810025f0fc?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_act_lib.nsf/858a0729306dc24748257651000e16c5/1d314361e2750042482569810025f0fc?OpenDocument), accessed on 19 January 2020

of divorce outside religious court, but in Indonesia it just states in Draft of *Undang-undang Hukum Materiil Pengadilan Agama (HMPA)*. Although the draft of *HMPA* has long been proposed to the *DPR* (Legislative Assembly), and does not implemented yet.

**Table II**

**Similarities of Rules and Penalties in Divorce outside Religious Courts  
of Indonesia, Malaysia, and Brunei Darussalam**

Similarities	Indonesia	Malaysia	Brunei Darusaalam
Form of Penalties	fine and confinement (Not implemented yet)	fine and confinement	fine and confinement

**C. Implementation of Penalties of Divorce outside the Religious Court in  
Indonesia, Malaysia, and Brunei Darussalam**

**1. Indonesia**

The country of Indonesia, known as the largest Muslim country, in terms of divorce, Indonesia is much tightened with a number of reasons compiled in the Act. Therefore, Law No. 1 of 1974 concerning marriage, adhering to the principles, among others, “divorce is complicated and must be done before a court hearing”.<sup>61</sup> In addition, the court institution does not

<sup>61</sup> Hilman Hadikusuma, *Hukum Perkawinan Indonesia Menurut Perundang-undangan, Hukum Adat, Hukum Agama*, (Bandung: Mandar Maju, 1990), 16.

merely give full authority of the husband but based on permission from the judge (court). It aims to regulate, limit and try to protect and guarantee the rights of women who are often in weaker positions. For example divorce can only be done in front of a religious court and for certain reasons as in Government Regulation No. 9 of 1975 Section 19 and the Compilation of Islamic Law Section 116.

Until now, in terms of sanctions Law Number 1 of 1974 has not yet regulated criminal sanctions for husbands who drop divorce outside the Religious Courts (PA). Provisions on new sanctions will be stipulated in the draft Law on the Material of the Religious Courts in the Field of Marriage which is included in the list of the National Legislation Program (Prolegnas) in 2010. The bill contains criminal provisions (articles 143-153) of criminal penalties ranging from 6 months to 3 years and fines ranging from Rp. 6000.000 million to Rp. 12.000.000 million.<sup>62</sup>

According to Munbazigh the existence of criminal provisions in the laws and regulations in the field of Marriage will have a positive impact on the implementation of marital rules. It would better protect women's rights, especially in the case of divorce outside the court hearing which has still been happening in the community.<sup>63</sup>

Same with Munbazigh above (also in accordance with Article 146 of the Draft of *Undang-undang Hukum Materiil Pengadilan Agama*

<sup>62</sup> Nasional.Kompas, "Program Legislasi Nasional", <http://Nasional.Kompas.Com>, artikel ini accessed on 19 februari 2020

<sup>63</sup> Hasan Nul Hakim, "Penindakan Terhadap Pelaku Penjatuhan Talak Di Luar Pengadilan Melalui Sarana/Pendekatan Pidana (Penal Approachment)", 335.

(*HMPA*)), the author agrees that the type of “punishment” that should be imposed on the perpetrators of divorce outside the court is a maximum fine of Rp. 6,000,000 (six million rupiahs) or confinement for a maximum of 6 (six) months. That is, two types of criminal offenses are chosen, one of which, whether a fine will be imposed, or just confinement, not accumulated by confinement and fines at the same time.

Actually, no one wants that the perpetrators of divorce outside the Court get criminal applied and criminal punishment against him. Considering the Act of the Marriage Law which has been almost  $\frac{1}{2}$  (half) century, but apparently there are still many persons who violate it, so that consider the punishment can be an alternative solution. Because, from the perspective of the effectiveness of regulations, it is clear that the Marriage Law is very ineffective (because there are still many who violate it). Furthermore, the Marriage Law is not successful as a means to “social engineer” which is one of the legal functions as mentioned above.

## **2. Malaysia**

Based on the Malaysian Family Law, in a State of Malaysia Divorce is deemed invalid in the event of a divorce outside the Court, must be repeated in the Court (before the hearing) to recite divorce (qadhi and witnesses admit) and be given a divorce certificate. As for the Procedure for

Settlement of divorce outside the Court according to the Islamic Family Law (Federal Territories) Act 1984 section 55A,<sup>64</sup> are as follows;

- a. Divorce is deemed invalid if a divorce occurs outside the Court, it must be repeated in the Court (in front of the hearing) to recite talak (admitted by Qadhi and witnesses) and be given a divorce certificate.
- b. After the divorce was ratified by the Sharia Court, for husbands who recite divorce outside the Court and without the truth the court (without permission) is fined 1000RM.
- c. If the husband who pronounces divorce is unable to pay a fine of 1000RM, then he must confinement for six months.
- d. In the reality that applies in the hearing on the settlement of divorce cases outside the Court, the Judge can give consideration and relief to the husband who recites divorce outside the Court for acceptable reasons.

According to the Malaysian Family Law section 55A, regarding divorce outside the Court of ratification. It was explained that the Endorsement of the two lafadz; *sharih* (clear) or *kinayah* (satire) if outside the Court it is necessary to judge and ratify by *Hakim Syar'i*. Therefore, rules were made to give the husband time within seven days after reciting divorce and had to report the lafaz to the Shariah Court. The court should

<sup>64</sup> Islamic Family Law (Federal Territories) Act 1984, [http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng\\_act\\_lib.nsf/858a0729306dc24748257651000e16c5/1d314361e2750042482569810025f0fc?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_act_lib.nsf/858a0729306dc24748257651000e16c5/1d314361e2750042482569810025f0fc?OpenDocument), accessed on 19 January 2020

hold a discussion of the report received and *Hakim Syar'i* is obliged to ensure that divorce has been recited legally according to *hukm syara'* (sharia law).

### 3. Brunei Darussalam

The state of Brunei Darussalam still recognizes divorce outside Court.<sup>65</sup> Even though a husband tells about his divorce to the registrant within seven days, a married woman can also file for divorce to the kadi by following Muslim law. If her husband is willing, she should say divorce then be registered and the cadre will issue a divorce certificate to both parties.<sup>66</sup> This is stated in the Emergency Order (Islamic Family Law), 1999 in Article 55.

After considering the various explanations above, the author feels that the violations of marriage law material, especially the perpetrators of divorce outside the court in accordance with the concerns of this research, it is appropriate to adopt a new policy. That policy, is a means of punishment (Penal Policy). Because the penal policy has never been applied to the perpetrators of divorce outside the court in Indonesia.

Along with the problem of divorce in marriage and it that cannot be separated from family life, then to ensure the realization of benefit in a divorce, it is necessary to have a law governing divorce, as a unification of

<sup>65</sup> Moh. Afandi, "Hukum Perceraian di Indonesia: Studi Komparatif antara Fikih Konvensional, UU Kontemporer di Indonesia dan Negara-negara Muslim Perspektif HAM dan CEDAW", *Al-Ahwal*, 2 (2014), 195.

<sup>66</sup> M. Atho' Muzdhar dkk, *Hukum Keluarga di Dunia Islam Modern*, 189.

the law that applies generally to everyone who perform it out so that the rights and obligations between the husband and wife and children can be guaranteed. Likewise, there is no divorce that violates ethical and moral principles, and no arbitrary action towards a partner in life (husband or wife). In these circumstances a legal rule is required which is regulated in a law governing marriages made by state authorities and must be implemented.

From the description above it can be obtained that the steps to impose sanctions against divorce actors outside the court in 3 (three) Muslim countries of Indonesia, Malaysia, and Brunei Darussalam above have shown a continuation of Family Law from the rules of conventional Islamic legal doctrine. The imposition of legal penalty is one of the characteristics in the family law in modern Muslim countries.

One step in reforming Family Law in modern Muslim countries is to review a number of provisions of classical Islamic law that are considered to be irrelevant to social conditions and demands for modern change. Likewise in the case of divorce outside the religious court. Conventional fiqh rules which have been referenced for centuries are now being reviewed and replaced with legislative products that appear to be directed at efforts to raise the status of women and respond to the demands and developments of the times.<sup>67</sup>

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<sup>67</sup> Supriyadi, Dedi dan Mustofa. *Perbandingan Hukum Perkawinan di Dunia Islam* (Bandung: Pustaka Al-Fikriis, 2009), 5.



## CHAPTER IV

### CONCLUSIONS AND SUGGESTIONS

#### A. Conclusions

1. The differences of rules and penalties in divorce outside religious courts of Indonesia, Malaysia, and Brunei Darussalam are; in Indonesia divorce outside the court is not recognized, in Malaysia it is banned, and in Brunei Darussalam it is allowed. Penalty system of divorce outside religious court in Indonesia does not implemenyed yet, in Malaysia every federal contries has it own regulation because Malaysia is federal teritorries, but in Brunei, penalty system of divorce outside the religious court is implemented comprehensively in Brunei's teritorries. The amount of penalties in Malaysia is 1000RM or 6 (six) month prisoned with Trengganu 500RM (five hundred Malaysian ringgit) or confinement for 3 (three months) and Perak 3000RM (three

thousand Malaysian ringgit) or confinement for 2 (two) years in prison.

In Brunei the amount of penalties is B\$2000 or 6 (six) month prisoned.

2. The similarities of rules and penalties in divorce outside religious courts of Indonesia, Malaysia, and Brunei Darussalam is about the forms of penalties in divorce outside the religious court. The forms of penalties are fine and confinement. But in Indonesia this penalties does not implemented yet.
3. Penalty for divorce outside the religious courts in Indonesia have not been applied. Whereas the implementation of penalty for divorce outside the religious court in Malaysia is carried out after the divorce is registered at the Syariah Court. In Brunei penalty for divorce outside the religious court are imposed if the divorce is registered for more than 7 (seven) days from the first day of pronouncement of divorce outside the religious court.

## **B. Suggestions**

### **1. Researcher**

For future researchers, the results of this study can be used as material for comparison and reference for further research.

### **2. Public**

As a good citizen, we must obey the regulation to achieve the goals of the country and bring good for all parties, so that no party is harmed.

### 3. Government

As a government, in setting regulations it must consider matters that bring benefit to the whole community, especially in the case of divorce outside the court.



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# **LAWS OF MALAYSIA**

**REPRINT**

**Act 303**

## **ISLAMIC FAMILY LAW (FEDERAL TERRITORIES) ACT 1984**

*Incorporating all amendments up to 1 January 2006*

PUBLISHED BY  
THE COMMISSIONER OF LAW REVISION, MALAYSIA  
UNDER THE AUTHORITY OF THE REVISION OF LAWS ACT 1968  
IN COLLABORATION WITH  
PERCETAKAN NASIONAL MALAYSIA BHD  
2006

**Registration of divorces**

**55.** No pronouncement of *talaq* or order of divorce or annulment shall be registered unless the Chief Registrar is satisfied that the Court has made a final order relating to it.

**Registration of divorces outside the Court**

**55A.** (1) Notwithstanding section 54, a man who has divorced his wife by the pronouncement of *talaq* outside the Court and without permission of the Court, shall within seven days of the pronouncement of the *talaq* report to the Court.

(2) The Court shall hold an inquiry to ascertain whether the *talaq* that was pronounced is valid according to Hukum Syarak.

(3) If the Court is satisfied that the *talaq* that was pronounced is valid according to Hukum Syarak, the Court shall, subject to section 124—

- (a) make an order approving the divorce by *talaq*;
- (b) record the divorce; and
- (c) send a copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

**Mut'ah or consolatory gift to woman divorced without just cause**

**56.** In addition to her right to apply for maintenance, a woman who has been divorced without just cause by her husband may apply to the Court for *mut'ah* or a consolatory gift, and the Court may, after hearing the parties and upon being satisfied that the woman has been divorced without just cause, order the husband to pay such sum as may be fair and just according to Hukum Syarak.

**Right to *mas kahwin*, etc., not to be affected**

**57.** Nothing contained in this Act shall affect any right that a married woman may have under Hukum Syarak to her *mas kahwin* and *pemberian* or any part thereof on the dissolution of her marriage.

*Order to Resume Cohabitation*

**Application by deserted wife**

**120.** Where a person has ceased to cohabit with his wife in manner required by Hukum Syarak, the wife may apply to the Court for an order that the person resume cohabitation with her.

*Appeals*

**Appeal**

**121.** Any person aggrieved by any decision of any Court, or any Registrar under this Act may appeal to the Syariah Appeal Court.

**122.** *(Deleted by Act A902).*

PART IX

PENALTIES

**Polygamy without Court's permission**

**123.** Any man who, during the subsistence of a marriage, contracts another marriage in any place without the prior permission in writing of the Court commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or both.

**Divorce outside Court and without Court's permission**

**124.** Any man who divorces his wife by the pronouncement of *talaq* in any form outside the Court and without the permission of the Court commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or both.

**Failure to report**

**125.** (1) Whoever, being under a duty to report under this Act, wilfully neglects or fails to do so commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or both.

**LAWS OF BRUNEI**

**CHAPTER 77**  
**RELIGIOUS COUNCIL AND KADIS COURTS**

20 of 1955

21 of 1956

4 of 1957

1 of 1960

12 of 1961

4 of 1967

6 of 1972

S 28/69

22 of 1972

1984 Ed. Cap. 77

Amended by

S 1/88

S 31/90

REVISED EDITION 1984

## LAWS OF BRUNEI

[1984 Ed. p. 66

Religious Council and Kadis Court

CAP. 77]

of the person who solemnised the same to report to the Registrar of the *mukim* in which the marriage was solemnised the fact of such marriage and all necessary particulars concerning the same and to pay the fees specified in the Second Schedule, and the Registrar shall forthwith register such marriage.

(2) It shall be the duty of the Registrar before registering any marriage to make enquiry and to satisfy himself that all requirements of Muslim law and of this Act concerning the same have been satisfied and that the same was valid and registerable.

(3) A Registrar shall have power to administer oaths and affirmations and may examine any person on oath or affirmation concerning any matter submitted to him for registration.

(4) Upon registering any marriage and upon payment to him of the fees specified in the Second Schedule, the Registrar shall issue marriage certificates in the form specified in the Second Schedule to both parties to the marriage.

(5) The Registrar shall also, upon payment of the fees specified in the Third Schedule, prepare a *surat talak* in the form specified in that schedule obtain the signature of the parties thereto, sign the same and deliver one copy to each of the parties to the marriage.

(6) It shall be the duty of the Registrar to report to the Kadi the circumstances of any case in which it may appear to him that any alleged marriage was void, or that any registerable marriage was solemnised in contravention of the provisions of this Act.

**Divorce by *talak*.**

**144.** (1) A husband may divorce his wife in accordance with Muslim law with one, 2 or 3 *talak*.

(2) Within 7 days after any divorce the husband shall report the fact of such divorce and all necessary particulars concerning the same and shall pay the fees specified in the Fourth Schedule to the Registrar of the *mukim* in which the divorce took place, and the Registrar shall forthwith register such divorce.

(3) The provisions of subsections (2), (3) and (4) of section 143 shall, with such modifications as may be necessary, apply to the registration of divorces and the issue of certificates of divorce.

## LAWS OF BRUNEI

[1984 Ed. p. 80 *Religious Council and Kadis Court*

CAP. 77]

**Unlawful solemnisation of marriage.**

179. Whoever solemnises or purports to solemnise in accordance with Muslim law any marriage between persons both professing the Islamic religion in contravention of the provisions of Part VI, or knowingly purports to solemnise any such marriage which is void under the provisions of such Part, shall be guilty of an offence: Penalty, imprisonment for one month or a fine of \$1,000.

**Failure to report.**

180. (1) Whoever, being under a duty to report to a Registrar any marriage or divorce, wilfully neglects or fails to do so shall be guilty of an offence: Penalty, a fine of \$200.

(2) Whoever, being under a duty to report, or having reported, to a Registrar any marriage or divorce, and having been required by such Registrar to furnish any information or to execute or sign any document lawfully necessary for the purpose of effecting registration thereof, wilfully neglects or fails to comply with such requirement shall be guilty of an offence: Penalty, a fine of \$200.

(3) Whoever makes to any Registrar orally or in writing any wilfully false statement or declaration relating to any matter required under the provisions of this Act to be recorded or registered by such Registrar shall be guilty of an offence: Penalty, imprisonment for one month or a fine of \$1,000.

(4) Whoever fails to report his renunciation of the Islamic religion in accordance with the provisions of section 169 shall be guilty of an offence: Penalty, a fine of \$1,000 on conviction by a Magistrate's Court.

**Unlawful conversions.**

181. Whoever in contravention of the provisions of Part VIII, converts or purports to convert to the Islamic religion any person, or, having lawfully converted any person to the Islamic religion, wilfully neglects or fails to report such conversion to the Majlis, shall be guilty of an offence: Penalty, imprisonment for one month or fine of \$1,000.

18hb. NOVEMBER, 1999

**PERLEMBAGAAN NEGARA BRUNEI DARUSSALAM**  
(Perintah di bawah bab 83(3))

**PERINTAH DARURAT (UNDANG-UNDANG KELUARGA ISLAM), 1999**

**SUSUNAN BAB-BAB**

Bab

**BAHAGIAN I**

**PERMULAAN**

1. Gelaran, permulaan kuatkuasa dan gelaran panjang.
2. Tafsiran.
3. Naskhah dalam bahasa Melayu adalah terpakai.
4. Pengecualian hak mutlak.
5. Pengenaan.
6. Kriteria bagi memutuskan sama ada seseorang itu orang Islam.
7. Perkahwinan yang masih berterusan hendaklah disifatkan sebagai didaftarkan di bawah Perintah ini dan boleh dibubarkan hanya di bawah Perintah ini.

**BAHAGIAN II**

**PERKAHWINAN**

8. Orang yang boleh mengakadnikahkan perkahwinan.
9. Pertalian yang melarang perkahwinan.
10. Perkahwinan tidak sah.
11. Perkahwinan yang tidak boleh didaftarkan.
12. Persetujuan dikehendaki.
13. Perkahwinan seseorang perempuan.
14. Pertunangan.

18hb. NOVEMBER, 1999

**Rayuan**

122. Mana-mana orang yang tidak berpuas hati dengan apa-apa keputusan Mahkamah, Hakim Syar'ie atau Pendaftar di bawah Perintah ini boleh merayu mengikut prosedur yang ditetapkan dalam mana-mana undang-undang berkenaan dengan prosedur sivil dan jenayah di Mahkamah Syariah. Rayuan.

**BAHAGIAN IX****HUKUMAN**

123. Seseorang lelaki yang berkahwin lagi di mana-mana jua pun dalam masa perkahwinannya yang sedia ada masih berterusan tanpa mendapat kebenaran secara bertulis terlebih dahulu daripada Hakim Syar'ie adalah melakukan suatu kesalahan dan jika disabitkan kesalahan hendaklah dihukum denda tidak melebihi dua ribu ringgit atau penjara tidak melebihi enam bulan atau kedua-duanya sekali. Poligami tanpa kebenaran Mahkamah.

124. Seseorang lelaki yang menceraikan isterinya dengan melafazkan *talaq* dengan apa-apa bentuk di luar Mahkamah tanpa kebenaran Mahkamah adalah melakukan suatu kesalahan dan jika disabitkan kesalahan hendaklah dihukum denda tidak melebihi dua ribu ringgit atau penjara tidak melebihi enam bulan atau kedua-duanya sekali. Perceraian di luar Mahkamah tanpa kebenaran Mahkamah.

125. (1) Seseorang berkewajipan untuk membuat suatu laporan di bawah Perintah ini dengan sengaja cuai atau tidak berbuat demikian, maka adalah melakukan suatu kesalahan dan jika disabitkan kesalahan hendaklah dihukum denda tidak melebihi dua ribu ringgit atau penjara tidak melebihi enam bulan atau kedua-duanya sekali. Tidak membuat laporan.

(2) Seseorang yang kewajipan untuk membuat sesuatu laporan atau dikehendaki mengemukakan sesuatu permohonan di bawah Perintah ini atau dikehendaki memberi sesuatu maklumat atau menyempurnakan atau menandatangani apa-apa dokumen yang perlu di sisi undang-undang bagi maksud melaksanakan pendaftaran dokumen itu dengan sengaja cuai atau tidak membuat laporan itu atau mematuhi kehendak itu adalah melakukan suatu kesalahan dan jika disabitkan kesalahan hendaklah dihukum denda tidak melebihi dua ribu ringgit atau penjara tidak melebihi enam bulan atau kedua-duanya sekali.

126. Seseorang yang memberi secara lisan atau bertulis kepada Pendaftar pernyataan atau akuan yang salah berkaitan dengan mana-mana perkara yang hendak direkod atau didaftarkan oleh Pendaftar mengikut kehendak peruntukan Perintah ini yang diketahuinya sebagai palsu atau dia mempunyai sebab untuk mempercayainya Laporan palsu.

## CURRICULUM VITAE

### Personal Details

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### Education Background

2005-20011 Islamic State Elementary School Kauman Jombang  
2011-2013 Islamic State Junior High School Tambakberas Jombang  
2013-2016 Islamic State Senior High School Jombang

### Organisational Experience

Member of YOST (Young Sharia Trainer) Maulana Malik Ibrahim State Islamic University Malang