

**THE UNDERHAND DIVORCE AND ITS IMPACTS ON CHILD CUSTODY
ACCORDING TO ISLAMIC LAW AND POSITIVE LAW
(A Study in Seginim Subdistrict, South Bengkulu Regency)**

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ABSTRACT

This research examines a. How does the underhand divorce and its impact on child custody in Seginim Subdistrict, South Bengkulu Regency? b. What are the factors leading to underhand divorces and its impact on child custody in Seginim Subdistrict, South Bengkulu Regency? c. How do underhand divorces and its impact on child custody in Seginim Subdistrict, South Bengkulu Regency, align with Islamic Law and Positive Law in Indonesia? This study employs an empirical legal research method. It uses a qualitative approach by determining the research location and informants through in-depth interviews, followed by analysis using a juridical-qualitative method. The research findings are: 1. The underhand divorce is driven by economic reasons and the complexity of legal processes considered burdensome and expensive. This includes cases where the husband leaves the household or infidelity occurs, forcing couples to choose underhand means to end the marriage. The impact of such divorces in Seginim includes injustices related to iddah as waiting period and *hadanah* support for ex-wives and children. Many do not fully receive these rights post-divorce, worsening their financial and social conditions. 2. Factors leading to underhand divorces in Seginim Subdistrict, South Bengkulu Regency, and its impact on child custody, as follows: Traditional Practices: Underhand divorces have been a long-standing custom in Seginim society. Although Islamic law considers such divorces valid, the state does not recognize them. Lack of Legal Awareness: The people of Seginim often do not understand or do not care about national legal regulations regarding divorce. Personal Issues and Economic Constraints: Divorce is often viewed as a stigma, leading to it being carried out quietly. Impact on Child Custody: The unofficial divorce process can negatively affect child custody arrangements. 3. Underhand divorce affects not only the legal status of the spouses but also significantly impacts child custody. Under both Islamic law and Indonesian positive law, divorces that do not go through the court can result in legal uncertainty that negatively affects children's rights, such as financial support and custody rights. Therefore, it is crucial for divorcing couples to undergo the divorce process through the court to ensure legal certainty and protection of children's rights.

Keywords: Divorce, Underhand, Child

Introduction

Background Research

Marriage is a human destiny. Since humans cannot live alone but are interdependent and need each other, men and women form relationships through the marriage institution with the aim of creating a happy and prosperous family according to Islamic teachings. Marriage is a significant event in human life. Through marriage, families can be supported and encouraged by religious norms and social customs. According to Islamic law, marriage is one of the most fundamental principles of life in a perfect society.¹

A valid marriage, according to Sirman Dahwal in the book *Comparative Marriage Law*, is one that complies with the provisions of the laws in force in Indonesia. Similarly, a valid divorce, in accordance with legal provisions, must be conducted through the Religious Court.²

In Law No. 1 of 1974 on Marriage, the purpose of marriage

is to form a lasting family based on the belief in the One and Only God. In Presidential Instruction No. 1 of 1991 on the Compilation of Islamic Law, the purpose of marriage is to create a family that is harmonious, loving, and compassionate. In reality, many marriages fail to achieve these objectives; conflicts often arise within families, and if these disputes cannot be resolved between the parties, they may lead to divorce. The dissolution of marriage is regulated in Article 38 of Law No. 1 of 1974 on Marriage, specifically in Chapter VIII on the Dissolution of Marriage and Its Consequences, which includes:

1. Death,
2. Divorce, and
3. Court decision.

According to Abdul Djamali, divorce is the termination of marriage between husband and wife within the family relationship. From the definition provided above, it can be concluded that talaq refers to the severance of the marital bond between husband and wife using a specific term, namely talaq or similar terms, so that the wife is no longer lawful for him after the divorce. It can also be understood that talaq is interpreted as a living divorce, which means the dissolution of the marriage relationship between husband and wife, or the termination of the marital bond. This termination

¹ Huzaemah T. Yanggo, "Hukum Keluarga Dalam Islam" (Jakarta: YAMIBA, 2013) p. 137

² Dahwal Sirman, *Perbandingan Hukum Perkawinan*, Cv Mandar Maju, Bandung 2017, p.7

must be expressed using the term *talaq* or similar expressions. Therefore, it can be concluded that divorce or *talaq* is a legal provision concerning the dissolution of the marital bond between husband and wife using specific expressions.³

The differences in the implementation of divorce between Islamic Law and State Law result in a choice of legal systems that society may use for divorce. The low level of awareness and legal compliance among the community with respect to State Law is a cause of the occurrence of underhand divorces. However, underhand divorce is an act against State Law. As a result, according to State Law, the marital bond remains legally intact because the husband and wife are still officially registered as married. This creates difficulties when attempting to remarry according to the applicable legal provisions, and most importantly, it results in the failure to fulfill the rights of children affected by underhand divorces.⁴

³ Abdul Djamali, *Hukum Islam* (Bandung: Mandar Maju, 2007), p. 95

⁴ Latifah Ratnawaty, *Perceraian dibawah Tangan dalam Perspektif Hukum Islam dan Hukum Positif*, (YUSTISI Vol. 4 No. 1 Maret 2017), 112, p. 112

The issue of divorces conducted outside of court proceedings, which are then referred to as underhand divorces or divorces conducted outside the court, remains prevalent. In many cases, numerous community members handle their divorces simply through an official who usually manages divorces for the community, or through a religious leader or figure, sometimes even just with verbal agreements from both the husband and wife. Despite the prevalence of underhand divorces across various communities, which have their own distinct characteristics, this practice is still common and is acknowledged by the local Head of the Office of Religious Affairs.⁵

In practice, many people carry out divorces without going through the court, allowing them to unilaterally pronounce *talaq* on their wives. For instance, there are communities where divorces are conducted underhand, not through the court, with the justification that the marriage was conducted underhandedly according to local scholars, rather than by a Marriage

⁵ *Ibid*

Registrar. Conversely, those who marry through a Marriage Registrar will have their divorces processed by the court. The question now is: what is the actual view of underhand divorce according to Islamic law and positive law in Indonesia? Based on the qualitative method used, the researcher aims to explain the answer to this question.⁶

Public awareness of divorces through the court is still lacking, especially in the Seginim District of South Bengkulu Regency. This is due to a lack of understanding, which results in insufficient awareness in the implementation as expected by legal regulations. However, there are extraordinary consequences of marriages and divorces that are not officially recorded, affecting both the couple and the children born from the marriage.

Based on the issues mentioned above, the author is interested in addressing this topic in a thesis titled, "**The Underhand Divorce and Its Impacts on Child Custody According to Islamic Law and Positive Law (A Study**

in Seginim District, South Bengkulu Regency)."

Problem Identification

- a. There is a practice of underhand divorce that does not comply with positive legal regulations in Indonesia in the Seginim District of South Bengkulu Regency.
- b. There are impacts on child custody which are uncertain in determining child custody rights following the underhand divorce in the Seginim District of South Bengkulu Regency.
- c. There are potential conflicts between both parties regarding child custody responsibilities.

Research Methodology

This study uses a juridical-empirical method or field research, which involves direct investigation in the field, where the researcher visits the research subjects.⁷ This study is a field research, so the researcher has chosen Seginim District, South Bengkulu Regency as the location.

The type of research used is empirical legal research. Empirical legal research, also known as

⁶ H.S.A. Al-Hamdani, *Risalah Nikah* (Jakarta: Pustaka Amani, 2012), p. 202; 1.

⁷ Sugiyono, *Metode Penelitian Kuantitatif, Kualitatif Dan R&D*, Bandung :Alfabeta. 2013, p. 16

sociological legal research, is a type of legal research that examines law as it is manifested in actual behavior, as a social phenomenon that is unwritten and experienced by individuals in their interactions within society.⁸ Thus, this empirical legal research refers to the study of legal effectiveness, which aims to examine regulations. By using this type of research, it is possible to understand the model of underhand divorce and its impact on child custody according to Islamic Law and Positive Law in the Seginim District, South Bengkulu Regency.

Results And Discussion

1. Underhand Divorce and Its Impacts on Child Custody in Seginim District, South Bengkulu Regency

Here are some of the impacts resulting from underhand divorces in Seginim District, South Bengkulu Regency:

a. Administrative Impacts

Divorces conducted underhand are not officially registered with the court, and therefore, do not have legal

validity. This can lead to issues with civil registration and the legality of marital status.

Based on interviews, both YF and Mrs. LW acknowledge that they do not have a divorce certificate because they did not process their divorce through the court. This indicates an administrative gap that can affect various aspects of their lives, particularly regarding the legality of their marital status. Furthermore, as YF expressed, a divorce certificate becomes important if either of them wishes to remarry. Without this certificate, the subsequent marriage process could be hindered because the previous marital status is not officially terminated. Mrs. LW stated that their divorce is not recognized by the state, although it is valid according to their religious beliefs. This highlights that, despite feeling the divorce is valid according to their religious beliefs, the state does not recognize it. This can lead to other legal and administrative issues, such as civil registration and legal rights.

The impact of an underhand divorce is that, without a divorce

⁸ Muhaimin, *Metode Penelitian Hukum*, Mataram University Press, Mataram, 2017, p. 10

certificate, one cannot remarry officially according to the state. Mrs. LW stated that their divorce is not recognized by the state, even though it is valid according to their religious beliefs. This emphasizes that, despite feeling that the divorce is valid according to their religious beliefs, the state does not acknowledge it. This can lead to other legal and administrative issues, such as civil registration and legal rights.

Without a valid divorce certificate, women who have undergone an underhand divorce cannot legally prove their divorced status. This prevents them from legally remarrying in the eyes of the state, as their status in civil records is still considered "married" to their previous spouse. The administrative process for a new marriage requires official documents that show the previous marital status has ended. Without a divorce certificate, women lack the necessary official proof required to process a new marriage at the Marriage Registry Office (henceforth KUA - *Kantor Urusan Agama*) or civil registry.

b. Impact on Rights After Divorce

Divorce is an event that not only affects the relationship between the divorcing partners but also has broad implications for the rights of the individuals involved, both emotionally, socially, and legally. Here are some narratives about the impact on rights following a divorce:

1) Failure to Provide Support During the Iddah Period

Based on an interview with Mrs. LW, she revealed, "Since divorcing my husband, I have never received any support, neither post-divorce support nor support for the children."

According to Mrs. FY, regarding her own rights, typically the support is expected, but there has been no support provided, and even when they were together, the support was rarely given, especially money for groceries. So, in my opinion, even though I am now divorced and do not receive the support, it is not a problem because I am accustomed to managing my own living expenses. Moreover, now that I have one child, it remains my responsibility to

provide food and education for my child. During the divorce, I also never received any money; not only was money not given, but even inquiring about my child's well-being was not done.⁹

Mrs. WI also expressed, "Although my ex-husband and I divorced amicably, our relationship remains full of mutual understanding and respect. However, after the divorce process was completed, I did not receive the iddah support that should have been provided by my ex-husband. The iddah support is my right as an ex-wife to receive financial support during the iddah period, which is a specific period after the divorce as stipulated by religious law. Nevertheless, I continue to try to understand the situation and focus on making an effort to move forward positively after this divorce."¹⁰

Based on the interviews, it is found that

underhand divorces in the Seginim District do not receive any support during the iddah period, even though this is their right according to religious law. Some of them expressed that this is due to the former husbands' habits or ignorance regarding this obligation. There are also those who receive the support only once or not at all, while others do not mind because they are used to being independent. Nevertheless, some people try to understand the situation and maintain a good relationship with their ex-husbands after the divorce.

A divorce conducted outside of court will negatively impact the wife, as it does not produce a divorce certificate with legal authority. As a result, if the widow wishes to remarry, she will face difficulties with the KUA, as any widow intending to remarry must have a divorce certificate from the court. This often drives them to enter a second marriage informally (underhand marriage). Additionally, after an underhand divorce, the wife does not receive her rights such

⁹ An Interview on May 10th, 2024 in Seginim District, South Bengkulu Regency

¹⁰ An interview on May 10th, 2024 in Seginim District, South Bengkulu Regency

as support during the iddah period, housing, clothing, and food.

2) Failure to Provide Hadanah Needs for the Child

Hadanah refers to the responsibility of parents or guardians to provide care and support that includes the child's physical, emotional, and educational needs. However, in reality, not all children receive these rights fully. The failure to fulfill hadanah support for children can be caused by various factors, including economic inability, lack of awareness of responsibilities, or family issues such as divorce.

Based on interviews, Hadanah is the responsibility of parents or guardians to care for and maintain the child, including physical, emotional, and educational needs. However, many children do not receive these rights fully due to various factors such as economic inability, lack of awareness of responsibilities, or family issues like divorce. Mrs. FY never received support after the divorce, which became a source of conflict. Mr. BU

rarely provided the support after the divorce due to economic limitations. Mrs. AG experienced difficulties because there was no support for six months after separation, and she had to find school expenses on her own with the help of her adult children.

Based on interviews, although there were some differences, the informant LW still receives support from her ex-husband for their children amounting to Rp. 1,000,000, although not every month and only for school expenses. For daily support and other needs, LW covers everything herself. After her husband left, LW's children did not experience significant changes in their social interactions, but financial issues greatly affected them. Mrs. FY added that the impact of the divorce on her child, Satir, might not be apparent until the future. Since birth, her child has never received the support from his father, and Mrs. FY does not question this,

focusing instead on ensuring they are well.¹¹

Every divorce inevitably results in negative impacts for all parties involved, including the wife, husband, and both families. These impacts are particularly significant for the children, regardless of whether the divorce is handled outside or within the court. For a child, the separation of their parents can disrupt their mental well-being. A child who previously lived in a harmonious family environment with the love of both parents suddenly has to face a family situation full of problems. Ultimately, they have to live with only one parent, whether it be the mother or the father, which can disrupt their emotional and psychological stability.

Underhand divorces will affect the child's mental condition, as fathers often do not provide support regularly and in a fixed amount. Underhand divorces lack legal force, so there is no mechanism

to compel the father or mother to provide support regularly, both in terms of time and the amount given. If the divorce is processed through the Religious Court, this will be determined by the court in accordance with Article 156 (f) of the Compilation of Islamic Law.

A. CLOSING

1. Conclusion

Based on the research findings about underhand divorces in the Seginim District, the following conclusions can be drawn:

- a. Underhand divorces occur due to economic reasons and the complexity of legal processes, which are perceived as burdensome and costly. This includes cases where the husband leaves the home or where infidelity occurs, forcing the partners to choose informal means to end the marriage. The impact of such underhand divorces in the Seginim District includes injustices related to iddah support and hadanah for the ex-wife and children. Many of them do not fully receive these rights after the divorce,

¹¹ An interview on May 10th, 2024 in Seginim District, South Bengkulu Regency

exacerbating their financial and social conditions.

- b. There are factors causing underhand divorces in Seginim District, Bengkulu Regency, and their impact on child custody. **Traditional Practices:** Underhand divorces have become a long-standing custom in the Seginim community. Although Islamic law considers such divorces valid, the state does not recognize them. **Lack of Legal Awareness:** The people of Seginim often do not understand or do not care about the state's legal regulations regarding divorce. **Personal Issues and Economic Constraints:** Divorce is often viewed as a stigma, leading to it being handled discreetly. **Impact on Child Custody:** The unofficial divorce process can negatively affect child custody.
- c. Underhand divorces not only affect the legal status of the spouses but also have a significant impact on child custody. In both Islamic law and Indonesian positive law, divorces not processed through the court can lead to legal uncertainties that negatively

impact the rights of the children, such as support and hadanah rights. Therefore, it is important for divorcing couples to undergo the divorce process through the court to ensure legal certainty and protection of the children's rights.

2. Suggestion

- a. The Sub-district Government of Seginim, South Bengkulu Regency needs to continuously conduct socialization and provide understanding regarding divorce through the court.
- b. Those involved in underhand divorces should carry out their divorces through official channels in the future to clarify the status of marriage as well as the support for the wife and children.

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