

DIVORCE DUE TO APOSTASY (Study of Differing Decisions in Religious Courts)

Dzurrotul Muniroh Ahdaniah¹, Sri Lumatus Sa'adah², Muhammad Faisol³

^{1,2,3} Universitas Islam Negeri Kiai Haji Achmad Siddiq Jember, Indonesia

Email: Dzurrotulmuniroha00@gmail.com, srilumatus.iainjember@gmail.com, mfaisol18@gmail.com

ABSTRACT

The case of divorce due to apostasy is a civil case that is not directly regulated in Indonesian legislation. Therefore, there are differing decisions in cases of divorce due to apostasy. In the divorce case No. 0333/pdt.G/2013/PA.Bdw, with the reason of the husband's apostasy, the court issued a decision of talak bain sughra, while in the divorce case No. 3/pdt.G/2019/PA.Bky, with the same reason, the court issued a decision of fasakh. The research method used is a normative method with a statutory approach. The researcher employs descriptive analysis in discussing relevant theoretical studies related to divorce due to apostasy. The findings of this research are: 1) the legal considerations of the judges in the cases No. 0333/pdt.G/2013/PA.Bdw and No. 3/pdt.G/2019/PA.Bky were not appropriate and should have referred to KHI article 116 letter k. 2) the judges' decisions in the cases No. 0333/pdt.G/2013/PA.Bdw and No. 3/pdt.G/2019/PA.Bky were in accordance with the maqasid shariah in terms of preserving religion because both decisions terminated the marriage bond, either through talak bain sughra or through fasakh.

KEYWORDS Divorce, apostasy, different verdicts



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INTRODUCTION

Allah created humans in pairs, unlike other creatures. Humans do not have the freedom to channel their nature indiscriminately. According to Adliyah Ali and Asep Daudi, humans have a paired character, and paired relationships need to be planned and in accordance with applicable legal regulations (Ali, 2001).

The purpose of marriage in the Compilation of Islamic Law (KHI) is mentioned that marriage aims to form a household or family that is sakinah, mawaddah,

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and warahmah (Sirajuddin & Zubaedi, 2008). This is in accordance with the verse of Allah SWT in Surah Ar-Rum, verse 21 which states;

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ
يَقُومُ يَتَفَكَّرُونَ 21

The meaning: "And among His signs is that He created for you mates from among yourselves, that you may find tranquility in them, and He placed between you affection and mercy. Indeed, in that are signs for a people who give thought." (Q.S. Surah Ar-Rum, verse 21).

In Article 1 of Law Number 1 of 1974, it is stated that the purpose of marriage as husband and wife is to establish a happy and everlasting family (household) based on the belief in the Almighty God. Thus, marriage not only has physical or worldly elements that only have short-term impacts but also has more substantial and long-term elements, namely, containing spiritual or inner elements.

According to the Central Statistics Agency (BPS) in 2022, the divorce rate in Indonesia reached 516,334 cases, and those are only specific divorces in Religious Courts. The main causes are disputes and conflicts, with underlying reasons such as economic issues, domestic violence, and one of them is disputes and conflicts caused by one of the spouses apostatizing, leading to divorce.

Article 116 of the Compilation of Islamic Law (KHI) mentions eight reasons for divorce, namely:

1. One of the parties commits adultery or engages in immoral activities that are difficult to cure.
2. One of the parties abandons the other party for 2 consecutive years without the other party's permission and without valid reasons or due to other reasons beyond their capacity.
3. One of the parties receives a 5-year prison sentence or a heavier punishment after the marriage.
4. One of the parties commits severe cruelty or abuse that endangers the other party.
5. One of the parties suffers from severe disability or illness that prevents them from fulfilling their duties as a husband or wife.
6. Continuous disputes and conflicts occur between the husband and wife, and there is no hope of living peacefully in the household.
7. The husband violates the talak pledge.
8. Conversion of religion or apostasy resulting in discord in the household.

The eighth point in the KHI regarding the reasons for divorce states that the conversion of religion or apostasy can be a cause of divorce. This is evident in the divorce cases filed with the Bondowos Religious Court under case number 0333/pdt.G/2013/PA.Bdw and the divorce cases filed with the Bengkayang Religious Court under case number 3/pdt.G/2019/PA.Bky. Both cases involve divorce petitions filed by a husband who has apostatized, but their rulings differ. In case no. 0333/pdt.G/2013/PA.Bdw, the court issued a talak ba'in sughra verdict, while in case no. 3/pdt.G/2019/PA.Bky, the court issued a fasakh verdict.

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From the above explanation, it can be seen that there are divorces filed with the Religious Courts due to one of the spouses apostatizing. Rulings no. 3/pdt.G/2019/PA.Bky and no. 0333/pdt.G/2013/PA.Bdw indicate that cases with the same reason, namely divorce filed because one of the spouses apostatized, result in different verdicts. This is an interesting subject for further study, hence the title of this research is "DIVORCE DUE TO APOSTASY (A STUDY OF DIFFERENT VERDICTS IN RELIGIOUS COURTS)".

Problem Formulation in this are What are the legal considerations of the judges in apostasy divorce cases in rulings No. 0333/pdt.G/2013/PA.Bdw and No. 3/pdt.G/2019/PA. Bky? And How is the analysis of maqasid al-shariah on the rulings of apostasy divorce cases No. 0333/pdt.G/2013/PA.Bdw and No. 3/pdt.G/2019/PA. Bky?

RESEARCH METHOD

The method used in this study is a normative method with a statutory approach (*ststute approach*). Researchers use descriptive analysis in discussing relevant theoretical studies related to divorce due to apostasy.

RESULT AND DISCUSSION

Divorce for apostasy

In Islamic law, divorce is referred to as "talak." When investigating cases of apostasy that occur within marriage, talak discussions are not found, but they are found in the chapter of "fasakh."

"Fasakh" linguistically means to break or terminate. Technically, fasakh is the termination of the marriage between husband and wife because the conditions stipulated either during or after the marriage contract are not fulfilled. According to Imam Muhammad Abu Zahroh, fasakh occurs when something happens that prevents the continuation of the marriage or is a consequence of something that renders the marriage contract invalid (Zahrah, 1957).

Fasakh can occur due to matters related to the marriage contract or those that arise after the contract. One instance of fasakh occurring after the contract is the apostasy of one of the spouses.

The separation of spouses due to fasakh results in the immediate termination of the marriage relationship. Additionally, fasakh also means there is no possibility of reconciliation during the wife's waiting period (*iddah*), meaning that if the husband or wife wants to reconcile their marriage, they must enter into a new marriage contract. Another consequence of fasakh divorce is that it does not reduce the number of talaks. This means that the husband's right to divorce his wife up to three times is not diminished by the occurrence of fasakh (Tihami & Sahrani, 2013).

Delving deeper into the term "murtad" (apostasy) in marriage laws and government regulations, it is apparent that the term "murtad" is not explicitly mentioned. However, in the Compilation of Islamic Law, the term "murtad" is mentioned in two articles: first, Article 75 letter a states that the decision to annul a

marriage does not retroactively apply to marriages annulled because one spouse apostatized. Second, Article 116 letter k states that conversion of religion or apostasy resulting in discord in the household.

From Article 116 letter k, it can be understood that divorce due to apostasy cannot occur unless there is discord in the household. Therefore, "discord in the household" becomes a condition for divorce due to apostasy. If one of the spouses converts to another religion but the household situation is peaceful, divorce due to apostasy cannot occur.

In court proceedings, judges must clearly understand the facts that caused the discord in the marriage. If the discord is a consequence of a previous event, such as one spouse apostatizing, then this issue can be resolved through divorce. However, if the apostasy of one spouse does not affect the marital harmony, then the issue cannot be resolved through divorce.

The legal consequence of divorcing one of the spouses due to apostasy, especially in cases where the wife files for divorce against a husband who has apostatized, is "talak bain sughra." The consequence of talak bain sughra is that it eliminates the husband's right to reconcile (ruju') but still allows for a new marriage. Additionally, it reduces the right to talak; if the husband divorces once, he still has two more talaks after reconciliation, and if he divorces twice, he forfeits the right to divorce again after reconciliation.

Judges' rulings No. 0333/pdt.G/2013/PA.Bdw and No. 3/pdt.G/2019/PA. Bky

Case No. 0333/pdt.G/2013/PA.Bdw is a divorce case filed in the religious court with the grounds of frequent disputes and continuous arguments because the defendant has left Islam and reverted to their original religion, Christianity.

The petitum in this case is, firstly, to grant the plaintiff's claim. Secondly, to declare the marriage between the plaintiff and the defendant null and void due to divorce. The legal considerations stated by the judge regarding this issue are based on Article 19 letter f of Government Regulation No. 9 of 1975 in conjunction with Article 116 letter f of the Compilation of Islamic Law.

Case No. 3/pdt.G/2019/PA. Bky is also a divorce case. The plaintiff filed for divorce from her husband citing continuous disputes and arguments caused by the defendant's reversion to their original religion, Catholicism.

The petitum in this case is, firstly, to grant the plaintiff's claim. Secondly, to dissolve the marriage between the plaintiff and the defendant. The legal considerations stated by the judge regarding this issue are based on Article 2 paragraph 1 of Law No. 1 of 1974, which states that the defendant's departure from Islam causes the marriage between the plaintiff and the defendant to be dissolved. It is also based on the opinion of Sayyid Sabiq, in the book "Fiqh Sunnah" volume 3, page 70.

Analysis of the Legal Considerations in Judges' Rulings No. 0333/pdt.G/2013/PA.Bdw and No. 3/pdt.G/2019/PA. Bky

According to Gustav Radbruch, a legal expert and philosopher of law in Germany, to achieve the goals of law, there is a need for a principle of priority among DIVORCE DUE TO APOSTASY
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three fundamental values of legal objectives. These are the principles of legal justice, legal utility, and legal certainty (Erwin & Arpan, 2012).

In rulings No. 0333/pdt.G/2013/PA.Bdw and No. 3/pdt.G/2019/PA. Bky, the grounds for divorce are continuous disputes and arguments caused by the defendant's apostasy (leaving Islam). The first step that must be proven in the trial is the apostasy of the defendant. In the case No. 0333/pdt.G/2013/PA.Bdw, the defendant never appeared in court, so the proof of apostasy was provided by two witnesses who testified that the defendant had converted religions (apostasy). In the case No. 3/pdt.G/2019/PA. Bky, the defendant's apostasy was proven in court by the defendant's confession that he had converted religions, along with the testimony of two witnesses confirming the defendant's apostasy. Therefore, it can be concluded that the defendant in both cases was proven to be apostate.

In Indonesian law, divorce due to apostasy is explained in Article 116 letter k of the Compilation of Islamic Law (KHI), which states that divorce can occur due to a change of religion or apostasy resulting in disharmony in the household. In the case No. 0333/pdt.G/2013/PA.Bdw, the legal considerations of the judge were based on Article 19 letter f of Government Regulation No. 9 of 1975 in conjunction with Article 116 letter f of the Compilation of Islamic Law, which states that continuous disputes and arguments between husband and wife without hope of reconciliation are grounds for divorce. It is evident that the judge focused on the issues of disputes and arguments without considering apostasy as the cause of the dispute.

Meanwhile, in Case No. 3/pdt.G/2019/PA. Bky, the legal considerations of the judge were based on Article 2 paragraph 1 of Law No. 1 of 1974, which states that marriage is valid if conducted according to the laws of each religion and belief. Thus, from this statement, the council of judges concluded that the defendant's apostasy caused the marriage to be dissolved (fasakh). Additionally, based on the opinion of Sayyid Sabiq in the book "Fiqh as-Sunnah" volume 3, page 70, which states that "if one of the spouses leaves Islam (apostatizes) and does not return to Islam, then their marriage is dissolved due to that apostasy."

In terms of positive law, the basis for consideration seems somewhat inappropriate because it refers to articles about the definition of marriage. In terms of Islamic law, the basis for consideration is very appropriate. However, in the application of Islamic law in Indonesia, especially regarding marriage, it is governed by the Compilation of Islamic Law (KHI). The KHI explains that divorce due to apostasy refers to Article 116 letter k.

Analysis of Maqasid al-Shariah Regarding the Rulings of Apostasy Divorce Cases No. 0333/pdt.G/2013/PA.Bdw and No. 3/pdt.G/2019/PA. Bky

As social beings, humans naturally require companionship, not only to fulfill their biological needs but also to maintain the existence of humanity on earth. Within the framework of Maqasid al-Shariah, humans have three levels of welfare that must be preserved: necessities (dhoruri), needs (hajiyat), and refinements

(tahsiniyat). Marriage is a form of preserving the necessity of lineage from the perspective of progeny (Sanusi, 2015).

To achieve welfare in marriage, the marriage must be based on the provisions of Islamic law. Therefore, in the case where one spouse apostatizes, the spouses must be separated in order to protect the religion. Because if the spouses, one of whom has apostatized, remain together, there is a fear that the spouse who follows Islam may be influenced by the apostate spouse. This is highly likely to occur, especially in couples with weak faith.

In Indonesia, divorce cases are civil cases and will not be legally processed unless they are brought to religious courts. In case No. 0333/pdt.G/2013/PA.Bdw, the judge pronounced talak bain sughra, and in No. 3/pdt.G/2019/PA. Bky, the judge pronounced fasakh. In both cases, the judge ruled for the "dissolution" of the marital relationship. This decision is in accordance with the objectives of Shariah in preserving the most important aspect, which is religion.

CONCLUSION

The legal considerations of the judge in case No. 0333/pdt.G/2013/PA.Bdw are based on Article 19 letter f of Government Regulation No. 9 of 1975 in conjunction with Article 116 letter f of the Compilation of Islamic Law (KHI). Meanwhile, in case No. 3/pdt.G/2019/PA. Bky, the legal considerations are based on Article 2 paragraph 1 of Law No. 1 of 1974 and the opinion of Sayyid Sabiq in the book "Fiqh as-Sunnah" volume 3 page 70. However, KHI Article 116 letter k clearly states that divorce can occur due to a change of religion or apostasy causing disharmony in the household. The difference in these considerations results in different rulings. From the perspective of Maqasid al-Shariah, the judge's rulings in both cases fall under the category of safeguarding religion because they have terminated the marital bond, whether through talak ba'in sughra or fasakh..

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