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## Legal Review of Fasakh Divorce Pledge of Divorce Based on Compilation of Islamic Law

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### Abstrak

Perkawinan merupakan ikatan lahir dan batin yang kuat antara suami istri, namun dalam perjalanannya tidak dapat dipungkiri muncul permasalahan rumah tangga yang berujung pada putusnya perkawinan agama (murtad). Tujuan penelitian ini adalah menganalisis menurut perspektif hukum positif Indonesia yang ditetapkan dalam proses perceraian fasakh. Penelitian ini jenis penelitian normatif dengan menggunakan penelitian kepustakaan atau data sekunder. Sumber data primer yang digunakan adalah salinan putusan cerai undang-undang nomor 1 tahun 1974, hukum perdata sedangkan data sekunder yang digunakan adalah buku-buku dan jurnal. Kasus talak oleh Suami non muslim dengan Fasakh (talakbain) putus nikah segera setelah putusan tersebut telah berkekuatan hukum tetap dan suami tidak wajib mengucapkan ikrar talak, namun pada praktik talak fasakh tetap mengajak suami untuk melafalkan ikrar talak. Untuk itu disarankan agar diberikan sosialisasi kepada masyarakat khususnya mengenai perceraian yang disebabkan oleh suami yang murtad atau mualaf mengenai perceraian fasakh

Kata Kunci: *Perceraian, Fasakh, Hukum, Islam*

## Abstract

Marriage is a strong physical and spiritual bond between husband and wife, However, along the way, it cannot be denied that household problems have arisen which have led to broken marriages. one of which can be caused by a husband and wife who move to other religion (apostasy). The purpose of this study is to analyze according to the perspective of Indonesian positive law which is applied in the fasakh divorce process. This research is a type of normative research by using literature research or secondary data. The primary data source used is a copy of the divorce decision, law number 1 of 1974, civil law while the secondary data used are books and journals. Talak divorce cases by non-Muslim husbands with fasakh (talakbain) marriages break up immediately after the decision has permanent legal force and the husband is not required to pronounce a pledge of divorce, However, in practice, fasakh divorce still invites the husband to recite the divorce vow. For this reason, it is recommended that socialization be given to the community, especially regarding divorce caused by husbands who apostate or convert from Islam regarding fasakh divorce.

Keywords : *Divorce, Fasakh, Islamic Law.*

## INTRODUCTION

Marriage is an aqad (consent/qabul) between a man and a woman to fulfill the purpose of married life as a legal husband and wife by fulfilling the conditions and harmony that have been determined by syara' (Samad, 2017). Marriage is recommended not only to meet biological needs alone, but has a purpose beyond that, is to form a happy family. Marriage is prescribed so that husband and wife can jointly create a household as a place of refuge, enjoy the affection and be able to care for their children to live in a safe and peaceful household.

Even though marriage is a strong physical and spiritual bond between husband and wife, however, along the way, it cannot be denied that there have been household problems that have reached a broken marriage, making it difficult to put them back together, even though peace efforts have been made, under these circumstances, husband and wife often take action so that their marriage is terminated through divorce with the intention that both parties are somewhat protected from losses in the household.

Divorce is essentially unwanted in Islam. Marriage is expected to be a strong bond, so that in marriage between husband and wife a happy and eternal family can be realized according to Islamic teachings. But Islam also does not provide a limit to divorce that occurs between husband and wife through divorce. Referring to one principle, namely fiqh rules, avoiding the occurrence of evil must take precedence over attracting good, so that divorce is an emergency exit from the marriage bond, namely the one that reads:

Islam understands and realizes about divorce. A marriage can break up for three reasons according to article 113 of the Compilation of Islamic Law, "because of death, divorce and on the decision of the Court". In article 114 of the Compilation of Islamic Law it is stated that, "the breakup of a marriage caused by divorce can occur due to divorce or based on a divorce lawsuit".

In accordance with the provisions of the Legislation stated, "Religious Court is one of the perpetrators of judicial power for justice-seeking people who are Muslim regarding certain cases as referred to in this Law" (Law No. 3 of 2006). Law Number 50 of 2009 paragraphs 1 – 6 explains that the verdict in divorce only stipulates giving the applicant permission to pronounce divorce against the respondent, the imposition of this divorce resulted in the dissolution of the marriage which was counted from the pronouncement of the divorce pledge, whether or not the respondent attended it.

Petitioners who have left the Islamic religion (riddah) no longer have the right to pronounce a divorce pledge. The termination of the marriage between the husband and wife was based on the decision of the panel of judges which stated that the terms of the marriage had been broken, so that without a divorce pledge, the legal marriage has ended as a result of the religious transition. In the results of RAKERNAS (the national working meeting) of the MARI (Supreme Court of the Republic of Indonesia) in 2005 part c of Uldilag Field (Religious Court environmental affairs) number 3 letter (a) which stated that, the Religious Courts have the authority to try someone (party) who is an apostate, because what determines whether or not the Religious Courts are authorized is the law in force at the time the marriage takes place, and not based on the religion adhered to at the time the dispute occurred.

In general, the concept of division of divorce caused by fasakh is grouped into two groups, the first group is direct divorce, where this divorce is not intervened by a judge, then the second group is divorce due to fasakh with the decision of an authorized court judge (Ibrahim, 2017).

An interesting study in the case under study is that the husband as the applicant for divorce is in a state of riddah (leaving Islam) where at the beginning of the marriage he was a mu'allaf but when the marriage took place, the husband returned to his original religion, namely Christianity. Reviewing from Islamic law it is clear that the marriage law becomes fasakh. Fasakh means canceling or destroying the marriage relationship that has taken place due to things that cancel the marriage contract because of something that is experienced after the marriage contract and marriage takes place (Brata, 2019)

Fasakh caused by new things experienced after the marriage contract and marriage took

place, one of them is a husband and wife who are Muslim then the husband changes religion (apostate). If efforts have been made to return to Islam, but the husband still insists on leaving Islam, marital relations were terminated because there was a barrier to marriage, namely the prohibition of marriage between Muslim women and non-Muslim men (Hermanto, 2022).

## RESEARCH METHOD

The type of research in this paper is normative with a statutory and conceptual approach. While the specification of the research is analytical descriptive, namely explaining the problem according to the research title. The data used is secondary which consists of premier legal materials in the form of the Compilation of Islamic Law (KHI) and Law Number 1 of 1974 Concerning Marriage. And secondary legal materials in the form of books, journals and writings related to the research title. The method of data analysis is done qualitatively. The data that has been collected is selected, arranged in a systematic manner so that conclusions can be drawn from a thorough problem.

## RESULTS AND DISCUSSION

### 1. Fasakh Marriage According to Fiqh and Positive Law

Fasakh comes from Arabic from the root word fa-sa-kha which etymologically means to cancel (Rif'an, 2020). or also fasakh means to revoke or abolish (Ramadhani, 2021) or cancel the marriage contract and release the relationship that exists between husband and wife. Meanwhile, according to the large Indonesian dictionary, fasakh is the right to annul the marriage bond by a religious court based on a wife's or husband's indictment (demand) which can be justified by a religious court, or because a marriage has already violated the marriage law (Atinor, 2018).

Termination of marriage relations in the concept of fiqh consists of two types, separation in the form of talak and separation in the form of fasakh. fasakh based on the willingness of husband and wife called khuluk or based on a court decision (Akbar, 2012). Talak and fasakh can be distinguished by looking at three aspects: First, the nature of the two is different. Divorce ends the marriage contract and the halal status between husband and wife, but it does not really disappear unless divorce is done. Fasakh cancels the marriage contract from its origin and eliminates the halal relationship between the two (Janah, 2021). This fasakh etymologically means naqdh or cancellation. Al-Qarafi defines it by:

رتفاع حكم العقد من الأصل كأن لم يكن

"Revoke the contract law from its origin as if it had never happened." Basically it is generally accepted for all types of contract cancellation, but it is attached to the cancellation of

marriage contracts (Wahid, 2019).Sabiq defines it as an annulment and release of the bonds that bind the husband and wife (naqdhuwa hall ar-rabithahallatiterbuthbainaz-zawjain) (Al-Fathlill'Iam Al Arabi, 1945).Law Number 1 of 1974 contains arrangements for annulment of marriages, but does not specify the intent of the annulment.By looking at the regulations, this Law differentiates between marriage prevention and annulment.In Article 13 it is stated that marriage can be prevented if there is a person who does not meet the requirements to enter into a marriage.

Then in Article 22 it is stated that a marriage can be annulled if the parties do not meet the requirements to enter into a marriage.The sound of these two articles is almost the same, what distinguishes it is that prevention is carried out before marriage takes place, while cancellation is carried out for marriages that have already taken place.

Similar to the fasakh concept, article 28 paragraph (1) of the Marriage Law confirms that the annulment of a marriage takes effect from the time the marriage takes place.The second aspect, which distinguishes divorce from fasakh is the causes. Divorce can only occur on a valid marriage contract (Nurhayati, 2011).Whereas fasakh can be caused by defects that occur in the contract or certain conditions that arise later which prevent its continuity.Defects that occur in the contract if after the contract takes place, it is known that the woman being married is a sister who is breastfed, then the marriage is could be fasakh.Then an example of certain conditions is if one of the husband and wife leaves the Islamic religion (apostates) from Islam, then the marriage can be divorced.

The Compilation of Islamic Law distinguishes between two types of reasons for annulment of marriage. The first type of cause that makes a marriage null and void, such as a marriage conducted between two people who are related by blood, is a relationship and incest to a certain degree which hinders marriage.Meanwhile, the second type is a cause that can cancel a marriage, such as a husband who practices polygamy without the permission of the Religious Court or a marriage that takes place without a guardian or is carried out by an unauthorized guardian (Nurhayati, 2011).

## 2. Pronunciation of Divorce Pledge

In the divorce case of a Muslim husband, after the decision has permanent legal force (in kracht van gewijsde), does not mean that the marriage between the husband and wife has legally ended.In the courts in Indonesia, a husband who files for divorce still has to take one action in court, namely the reading of the divorce pledge. Even though the husband has not made a request to pronounce a divorce vow against his wife, when the divorce decision has permanent legal force, the ex officio religious court must immediately make a determination regarding the day and date of the trial for witnessing the divorce pledge from the husband as the applicant to

his wife as the respondent. , accompanied by an order to the bailiff to summon both parties or their representatives to attend the trial and also ordered to the bailiff so that the wife is notified that if the wife has received a valid and proper summons, but is not present at the trial or sends her representative, then the husband or his representative can pronounce a divorce vow without the wife or representative present (Article 70 paragraph (5) of Law Number 7 of 1989).

Likewise, husbands are notified that if the husband, within 6 (six) months after the day of the trial for witnessing the divorce pledge, does not appear in person or does not send a representative, even though he has received a valid and proper summons, then the power of the decision is nullified and divorce cannot be concluded. filed again based on the same reasons (Article 70 paragraph (6) of Law Number 7 of 1989). The pronouncement of the divorce vow can be made by the husband or his representative who is given special power in an authentic deed, in the presence of the wife or her attorney (Article 70 paragraph (4)).The Registrar records all matters that occurred during the divorce ceremony (Article 71 paragraph (1)).Then the judge makes a stipulation, the contents of which state that the marriage between the husband as the applicant and his wife as the respondent has been dissolved since the divorce pledge is pronounced and this stipulation cannot be appealed or cassated (Article 71 paragraph (2)).The Panel of Judges of the Religious Courts ex officio only has the authority to summon the applicant and the respondent once in pronouncing a divorce vow each.

That is, if after the first summons, which was legally and properly made, the applicant does not appear before the Tribunal to pronounce the divorce vow on the respondent, then there is no further obligation for the assembly concerned to summon the applicant a second time to pronounce the divorce vow. If the applicant is not present on the day of the divorce pledge witnessing session and does not send his representative, but after the expiration of that time intends to pronounce the divorce pledge, then legally this opportunity still exists on condition that it is still within the grace period of 6 (six) months from the day and date of the witness hearing divorce vow.In this case the applicant concerned must go through a certain procedure, namely submitting a written application to the Head of the Religious Court who originally summoned him, which stated that he would pronounce a divorce vow, and the applicant is obliged to pay the court summons costs for both the applicant and the respondent for the trial activities for pronouncing the divorce vow.

A talak divorce has occurred since the pledge of divorce was pronounced and followed by a stipulation that the marriage between the applicant and the respondent has been dissolved with all the consequences. If the first decision gives permission for the applicant to pronounce the divorce vow but the applicant does not also pronounce the divorce vow until the specified time, the marriage bond between the applicant and the respondent is legally still intact and has not been broken. This is of course different from the final divorce decision (divorce filed by and

at the initiative of the wife) which is final, meaning that once the decision has permanent legal force (in kracht van gewijsde), then automatically there has been a divorce between the plaintiff and the defendant with all the consequences (Art. 81 paragraph (2) Law Number 7 of 1989).

The question arises, do husbands who are non-Muslims also obligated to pronounce the vow of divorce? The religious court handed down a decision to divorce the marriage between the Petitioner and the Respondent with Talak Bain. Thus, in the event that the Petitioner has been proven not to be a Muslim, the applicant has no right to pronounce a divorce pledge. There is evidence that the applicant has embraced a religion other than Islam is a fact, so the applicant has no right to pronounce a divorce pledge (Hartini, 2009).

### 3. Legal Consequences of Non-Muslim Divorce with Fasakh or Talak Bain

Fasakh is mentioned as a marriage in which there is damage in the marriage and it is permissible to break up or destroy the marriage. In principle, the rights between husband/wife have damage which is known after the process of consent/grant marriage takes place (Awismar, 2022). If fasakh occurs, there are also legal consequences that accompany it. The legal consequence arising from the dissolution of a marriage due to fasakh is that the husband may not reconcile with his ex-wife as long as the wife is undergoing the iddah period. That is why divorce in the form of fasakh has the status of Talak Bain (talakbainsughra) (Hartini, 2009).

Then if the divorce that occurs is caused by fasakh appearing before the occurrence of intercourse between husband and wife, thus the legal consequence is that the wife does not have the right to dowry. Both the fasakh are from the wife's side and from the husband's side. Because if the fasakh comes from the wife's side, the wife's right to dowry is null and void, then if the fasakh comes from the husband's side and because of a defect that the wife hides from her husband, the legal consequence is that the wife is not entitled to get dowry from the husband. However, if the divorce caused by fasakh occurs after the intercourse of the husband and wife then the wife has the right to dowry from her husband (Daud, 2021).

If the ex-husband and wife wish to live again as husband and wife, they must enter into a new marriage contract. the difference is, the marriage contract can be carried out either during the time when the ex-wife is undergoing the iddah period or after the iddah period is over (Daud, 2021). Fasakh comes from Arabic which etymologically means to cancel. If this word is associated with marriage, it means canceling the marriage or destroying the marriage (Rif'an, 2020).

Broadly speaking, in terms of occurrence, fasakh is divided into:

1. Fasakhs who have previously been married, but in the future do not meet the specified requirements such as pillars, conditions or there are obstacles to marriage that do not justify the marriage. This form in the book of fiqh is called fasakh.

2. Fasakh that occurs because the husband or wife has something in themselves that makes it impossible to continue the marriage because if it continues it will cause damage to the husband or wife or both at the same time. Fasakh like this in fiqh is called *khiyarfasakh*.

Fasakh in the first form is not much discussed in fiqh books. The reason is that the marriage clearly does not meet the requirements of marriage or there are obstacles (*mawani*) of marriage. According to the general provisions that have been agreed upon, that a marriage that does not fulfill the pillars and conditions or there are obstacles in it, the marriage is declared null and void. Meanwhile, the fasakh that is widely discussed in almost all fiqh books is the second form of fasakh, namely *khiyarfasakh*.

Looking at the description above, there is a difference between Muslim husbands' divorce and non-Muslim husbands' divorce regarding the determination of when a marriage will break up. In divorce cases involving Muslim husbands, even if the decision has permanent legal force, the marriage is not automatically terminated as long as the husband has not made the pledge of divorce before the court. Meanwhile, for cases of divorce by non-Muslim husbands with fasakh (*talakbain*) the marriage is dissolved immediately after the decision has permanent legal force because the husband is not required to pronounce the pledge of divorce by the husband.

The Sect of Hanafi argues that the requirement to do fasakh is fully given to the wife because only in this way can the wife escape from the harm she has received, while the husband can eliminate the harm he has received from his partner through divorce, and the wife does not have the right to divorce, complete divorce. is the right of the husband. Then explained by the Maliki, Hambali, Syafi'i schools the right to carry out fasakh demands is the right of husband and wife because those who receive harm as a result of *uyub* (illness and disability) are both husband and wife.

According to the author, the difference in determining the dissolution of a marriage has further implications in determining the *iddah* period (waiting period) that must be lived by the wife (Hidayat, 2018). That is the waiting period for a woman to marry another man after a divorce from her husband with the aim of knowing the condition of her womb or to think for her husband. The calculation of the *iddah* period for a widow who is divorced by a Muslim husband does not start when the decision has permanent legal force but is counted from the time the husband makes a divorce vow. On the other hand, for widows who are divorced by non-Muslim husbands, the calculation of their *iddah* period is calculated since the decision has permanent legal force.

Article 155 of the Compilation of Islamic Law (KHI) stipulates that the *iddah* period for a widow whose marriage is broken up due to *khuluk*, fasakh and *li'an* is valid for *iddahtalak*. Thus for Muslim and non-Muslim husbands who divorce their wives, the terms of the *iddah* period, such as *iddah* divorce, apply. Regarding the regulation of the *iddah* period for a widow whose

husband divorces her by divorce, it can be seen from the waiting time arrangement in PP No. 9 of 1975 as an implementation of the Marriage Law and the provisions of the iddah period in the Compilation of Islamic Law.

The arrangements in the two regulations are not much different, except that the Compilation of Islamic Law provides more detailed arrangements compared to the Marriage Law. According to PP No. 9 of 1975 and the Compilation of Islamic Law, the waiting time for a widow is as follows:

1. If the marriage is broken up due to divorce, the waiting time for those who are still menstruating is set at 3 (three) sacred times for at least 90 (ninety) days and for those who are not menstruating is set at 90 (ninety) days (PP No. 9 of 1975 Article 39 letter b, KHI Article 153 paragraph (2) letter (b));
2. If the marriage is broken up due to divorce while the widow is pregnant, the waiting time is set until delivery (PP No. 9 of 1975 Article 39 letter c, KHI Article 153 paragraph (2) letter c)
3. There is no waiting time for those who break up due to a moderate divorce between the widow and her ex-husband qobla al dhukul (not yet having marital relations) (PP No. 9 of 1975 Article 39 paragraph (2), KHI Article 153 paragraph (1) );
4. For marriages that break up due to divorce, the waiting period is calculated from the date of the decision of the Religious Court which has permanent legal force (PP No. 9 of 1975 Article 39 paragraph (3), KHI Article 153 paragraph (4).

## CONCLUSION

The difference between divorce divorced by Muslim husbands and divorced divorced non-Muslim husbands is the determination of when a marriage will break up. In cases of divorce divorced by Muslim husbands, even though the decision has permanent legal force, the marriage has not automatically been terminated as long as the husband has not made the pledge of divorce before the court. Meanwhile, for cases of divorce by non-Muslim husbands with fasakh (talakbain) the marriage is dissolved immediately after the decision has permanent legal force because the husband is not required to pronounce a vow of divorce by the husband.

The law arising from the dissolution of a marriage due to fasakh is that the husband may not reconcile with his ex-wife as long as the wife is undergoing the iddah period. That is why this divorce in the form of fasakh has the status of Talak Bain (talakbainsughra). If the ex-husband and wife wish to live again as husband and wife, they must enter into a new marriage contract. the difference is, the marriage contract can be done either during the time when the ex-wife is undergoing the iddah period or after the iddah period is over.

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