

LAWSUITS RELATED TO DIVORCE DUE TO APOSTASY IN BITUNG RELIGIOUS COURT

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Abstract: This study aims to analyze the considerations of judges in deciding two divorce cases due to apostasy claims including Case Number 14/Pdt.G/2019/PA.Bitg and 17/Pdt.G/2019/PA.Bitg at the Bitung Religious Court, Bitung City, North Sulawesi, Indonesia. It was conducted qualitatively through a descriptive-comparative approach with primary data obtained from informants including four judges using observation, in-depth interviews, and documentation techniques, subsequently analyzed using an inductive analysis model. Meanwhile, secondary data were retrieved from decision documents. The results showed that the judge decided Case Number 14/Pdt.G/2019/PA.Bitg in *fâsakh* and Case Number 17/Pdt.G/2019/PA.Bitg in *malâq ba'in sughra* through the consideration of the subsidiary petitum. These decisions were observed to have legal consequences on *hadhânah* and the right of mutual inheritance between children and parents.

Abstrak: Penelitian ini bertujuan untuk menganalisis pertimbangan hakim dalam memutuskan dua perkara perceraian dengan gugatan murtad, yakni Perkara No. 14/Pdt.G/2019/PA.Bitg dan 17/Pdt.G/2019/PA.Bitg di Pengadilan Agama Bitung, Kota Bitung, Sulawesi Utara, Indonesia. Penelitian dilakukan secara kualitatif melalui pendekatan deskriptif-komparatif dengan data primer diperoleh dari informan meliputi empat orang hakim dengan menggunakan teknik observasi, wawancara mendalam, dan dokumentasi, selanjutnya dianalisis menggunakan model analisis induktif. Sedangkan data sekunder diperoleh dari dokumen keputusan. Hasil penelitian menunjukkan bahwa hakim dalam memutuskan dua perkara perceraian dengan gugatan murtad berdasarkan pada alat bukti dimana Perkara No. 14/Pdt.G/2019/PA.Bitg diputuskan secara *fâsakh* dan Perkara No. 17/Pdt.G/2019/PA.Bitg diputuskan secara *malâq ba'in sughra* dengan menggunakan pertimbangan petitum subsider. Kedua putusan tersebut berakibat hukum pada *hadhânah* dan hak saling waris antara anak dan orang tua.

Keywords: judge's consideration, divorce, apostasy, marriage *fasâkh*, *malâq ba'in sughra*

Introduction

Divorce cases in Indonesia are increasing every year¹ with the data from the Central Statistics Agency (BPS) showing an increase from 344,237 cases recorded in 2014 to 347,256 in 2015.² It was also discovered by the National Population and Family Planning Agency (BKKBN) data that the divorce rate increased from 392,610 in 2018 to 392,610 cases in 2019.³ This indicates divorce is becoming an issue of concern in Indonesia.

The legal basis normally used to process divorce in Indonesia is Law Number 1/1974 on Marriage and Government Regulation Number 9/1975 concerning the Implementation of Law Number 1/1974. These laws effectively regulate the issue of marriage registration, procedures to conduct the marriage, filing for divorce, the grace period for separated women, marriage annulment, provisions in the case of a husband with more than one wife, and several others.⁴

Law Number 1/1974 and PP Number 9/1975 allow one of the parties either husband or wife to file a divorce suit but certain differences are observed between Muslims and non-Muslims.⁵ This is indicated by the divorce process for a Muslim married couple requires the husband to apply for *talâq* or a wife registered with the religious court to seek a divorce suit. Meanwhile, non-Muslim couples including both husband and wife can divorce simply by filing a divorce suit through the district court. This indicates the process of divorce which includes examining, deciding, and adjudicating the case is based on the authority of the religious court, especially for Muslims.

The religious courts are Islamic courts in Indonesia, because of the types of cases they may try, all of them are types of cases according to Islam. The combination of the words "Islamic courts" with the phrase "in Indonesia" is because the types of cases that he is allowed to try do not cover all kinds of cases according to the Islamic courts universally.

¹ Lucy Pujasari Supratman, "A Qualitative Study of Teenagers Viewpoint in Dealing with Parents' Divorce in Indonesia," *Journal of Divorce & Remarriage* 61, no. 4 (May 18, 2020): 287–99, <https://doi.org/10.1080/10502556.2019.1699374>; Riatu Qibthiyah and Ariane J. Utomo, "Family Matters: Demographic Change and Social Spending in Indonesia," *Bulletin of Indonesian Economic Studies* 52, no. 2 (May 3, 2016): 133–59, <https://doi.org/10.1080/00074918.2016.1211077>.

² Badan Pusat Statistik (BPS), "Nikah, Talak dan Cerai, serta Rujuk, 2007–2016," accessed January 13, 2022, <https://www.bps.go.id/dynamic/table/2015/09/10/893/nikah-talak-dan-cerai-serta-rujuk-2012-2015.html>.

³ "Angka Perceraian hingga Stunting Tinggi, BKKBN Buka Konsultasi Gratis," accessed January 13, 2022, <https://www.idntimes.com/news/indonesia/indianamalia/angka-perceraian-hingga-stunting-tinggi-bkkbn-buka-konsultasi-gratis/2>.

⁴ Nurul Ilmi Idrus, "Marriage, Divorce and Reconciliation: State Law, Islam and Local Practice," in *Gender Relations in an Indonesian Society* (BRILL, 2016), 209–60, https://doi.org/10.1163/9789004311947_007.

⁵ Euis Nurlaelawati, "For The Sake of Protecting Religion: Apostasy and Its Judicial Impact on Muslim's Marital Life in Indonesia," *Journal of Indonesian Islam* 10, no. 1 (June 7, 2016): 89–112, <https://doi.org/10.15642/JIIS.2016.10.1.89-12>.

Strictly speaking, the religious courts are limited to Islamic courts, which have been adapted to the conditions in Indonesia. Thus, it can be concluded that the religious court is one of the legitimate Indonesian state courts, namely a special court, which is authorized in several types of Islamic civil cases, for Muslims in Indonesia.

Several studies have associated the increase in divorce cases in religious courts with domestic violence (KDRT),⁶ quarrels, unregistered marriages,⁷ underage marriages,⁸ women with low education⁹ and inability to have children,¹⁰ economy, and even infidelity on social media was observed to have recently become a trigger for divorce.¹¹ Therefore, this present study focuses on divorce due to apostasy lawsuits in religious courts with specific attention placed on the considerations of judges in making decisions. The conversion of religion or apostasy in a marriage carried out by a husband or wife is including a difference of heart and *aqidah* which can affect the steps and goals that have been formed and fostered by both. This is the biggest change in the shock of belief, where in the view of Islam a person who apostates is out of the light of Islam and into the valley of disbelief. Judging from Islamic law, conversion or apostasy can lead to the breaking of the marriage bond by itself, and the obligation to separate from his wife.

Divorce is an important and serious issue that needs attention because the findings from previous studies that divorce has an impact on several things including health¹²

⁶ Hongwei Zhang, "The Influence of the Ongoing COVID-19 Pandemic on Family Violence in China," *Journal of Family Violence* 37, no. 5 (September 4, 2020): 733–43, <https://doi.org/10.1007/S10896-020-00196-8>; Nancy Nason-Clark, "When Terror Strikes at Home: The Interface between Religion and Domestic Violence," *Family Rights and Religion*, September 11, 2020, 245–52, <https://doi.org/10.4324/9781003075127-15>; Mies Grijns and Hoko Horii, "Child Marriage in a Village in West Java (Indonesia): Compromises between Legal Obligations and Religious Concerns," *Asian Journal of Law and Society* 5, no. 2 (November 1, 2018): 453–66, <https://doi.org/10.1017/ALS.2018.9>.

⁷ Masyithah Umar, "Marriage and Divorce: How the Two Manifest within the Banjarise Community in Indonesia," *The Journal of Social Sciences Research*, no. 63 (March 24, 2020): 245–51, <https://doi.org/10.32861/jssr.63.245.251>.

⁸ Muhammad Roy Purwanto et al., "Divorce and Its Effects on The Social and Religious Life in Malang Indonesia," *Talent Development & Excellence* 12, no. 2s (2020): 1987–94.; Umar, "Marriage and Divorce: How the Two Manifest within the Banjarise Community in Indonesia."

⁹ Muh Idris et al., "Peace Resolution in Education and Application on Information and Communication Technology," *Journal of Advanced Science and Technology* 29, no. 6 (2020): 3349–58.

¹⁰ Dyah Anantalia Widyastari et al., "Marital Dissolution in Postmodern Java, Indonesia: Does Early Marriage Increase the Likelihood to Divorce?," *Journal of Divorce & Remarriage* 61, no. 8 (November 16, 2020): 556–73, <https://doi.org/10.1080/10502556.2020.1799308>.

¹¹ M. Saeful Amri, "Mitsaqan Ghalidza di Era Disrupsi (Studi Perceraian Sebab Media Sosial)," *Ulul Albab: Jurnal Studi dan Penelitian Hukum Islam* 3, no. 1 (January 12, 2020): 89–06, <https://doi.org/10.30659/jua.v3i1.7496>.

¹² Motti Haimi and Aaron Lerner, "The Impact of Parental Separation and Divorce on the Health Status of Children, and the Ways to Improve It," *Journal of Clinical & Medical Genomics* 4, no. 1 (2016): 1–7, <https://doi.org/10.4172/2472-128X.1000137>.

and children's mental,¹³ psychological relationship between child and parent,¹⁴ social support and level of self-confidence of children and parents,¹⁵ and women's income.¹⁶

The review of several recent pieces of literature showed that studies related to court decisions on divorce due to apostasy is lacking with the most of these studies observed to have focused more on the importance of mediation in divorce (Beddu's research,¹⁷ Salman,¹⁸ Pranawati,¹⁹ Hanifah,²⁰ Alkaff, Ritonga, and Miftah²¹), and divorce from the *maqâshid sharī'ah* perspective (Nizar,²² Munir,²³ and Fathurrohmah²⁴). Court decisions on divorce

¹³ Sarah Tebeka et al., "Parental Divorce or Death During Childhood and Adolescence and Its Association With Mental Health," *Journal of Nervous & Mental Disease* 204, no. 9 (September 2016): 678–85, <https://doi.org/10.1097/NMD.0000000000000549>.

¹⁴ Matthijs Kalmijn, "How Childhood Circumstances Moderate the Long-Term Impact of Divorce on Father-Child Relationships," *Journal of Marriage and Family* 77, no. 4 (August 2015): 921–38, <https://doi.org/10.1111/jomf.12202>; Anda Maria Jurma, "Impact of Divorce and Mother's Psychological Well-Being on Children's Emotional, Behavioral, and Social Competences," *Revista de Cercetare și Intervenție Socială*, no. 48 (2015): 69–82.

¹⁵ Lawrence J. Jackson and Stephen T. Fife, "The Impact of Parental Divorce: The Relationship Between Social Support and Confidence Levels in Young Adults," *Journal of Divorce & Remarriage* 59, no. 2 (February 17, 2018): 123–40, <https://doi.org/10.1080/10502556.2017.1402652>.

¹⁶ Christopher R. Tamborini, Kenneth A. Couch, and Gayle L. Reznik, "Long-Term Impact of Divorce on Women's Earnings across Multiple Divorce Windows: A Life Course Perspective," *Advances in Life Course Research* 26 (December 2015): 44–59, <https://doi.org/10.1016/j.alcr.2015.06.001>; Evra Willya, Ahmad B. Bintang Maronrong, and Sabil Mokodenseho, "The Enforcement of MUI Fatwa Number 1 of 2003 Concerning Copyright for Merchants Selling Pirated VCD and DVD in Manado City," *Al-Ahkam* 31, no. 2 (October 31, 2021): 183–02, <https://doi.org/10.21580/ahkam.2021.31.2.8638>.

¹⁷ Muhammad Juni Beddu et al., "Urgency of Mediator (Mediation) in Resolving Divorce Cases in Religious Courts," *Turkish Journal of Computer and Mathematics Education* 12, no. 4 (2021): 1455–60.

¹⁸ Salman Salman, "Implementation of Mediation and Hakam in Divorce Case in Religious Court," *International Journal of Nusantara Islam* 8, no. 2 (December 15, 2020): 274–81, <https://doi.org/10.15575/ijni.v8i2.12407>.

¹⁹ Rita Pranawati, "Changes in Muslim Divorce Mediation in Indonesia: A Case Study of the Yogyakarta Religious Court," *International Journal of Indonesian Studies* 1, no. 4 (2017): 31–52.

²⁰ Mardalena Hanifah, "Mediation Implementation in the Settlement of Divorce Cases in the Religious Courts," in *Proceedings of the Riau Annual Meeting on Law and Social Sciences (RAMLAS 2019)* (Paris, France: Atlantis Press, 2020), 81–83, <https://doi.org/10.2991/assehr.k.200529.273>.

²¹ Fitriyah Alkaff, A. Husein Ritonga, and A. A. Miftah Miftah, "The Effectiveness of Mediation in Completing Divorce Cases in Jambi Provincial Religious Court," *International Journal of Southeast Asia* 2, no. 1 (March 9, 2021): 11–19, <https://doi.org/10.47783/journiisa.v2i1.196>.

²² Muchamad Coirun Nizar, "The Religious Court's Decisions on Divorce: A Maqâcid Sharī'ah Perspective," *Ulumuna* 24, no. 2 (2020): 398–416, <https://doi.org/10.20414/ujis.v24i2.408>.

²³ Abdulloh Munir, "Konsep Perceraian Di Depan Sidang Pengadilan Perspektif Maqâcid Al-Sharī'ah Ibnu Asyur," *Journal of Islamic Family Law* 3, no. 2 (2019): 87–10.

²⁴ Fathurrohmah Fathurrohmah, "The Judge's Ex Officio Rights on the Case of Talak Divorce; Maqâcid Sharī'ah Perspective," *SHAKHSIYAH BURHANIYAH: Jurnal Penelitian Hukum Islam* 5, no. 1 (January 6, 2020): 1–28, <https://doi.org/10.33752/sbjphi.v5i1.1622>.

cases cannot be separated from the considerations of the judge as the authority holder in deciding the case. However, the judge in deciding a case must consider the juridical, philosophical and sociological truth. Juridical truth means that the legal basis used has fulfilled the applicable legal provisions.

According to the view of Islamic law, if in a marriage one of the parties of the husband or wife changes religion (apostasy), i.e., leaves Islam to a religion other than Islam, then the marriage is void and the two must be separated immediately. Therefore, this study aims to analyze the considerations of judges in deciding a divorce suit due to apostasy as in Case Number 14/Pdt.G/2019/PA.Bitg and 17/Pdt.G/2019/PA.Bitg in the Bitung Religious Court with the focus on the implications and legal consequences. This is necessary because Article 2 of Law Number 1/1974 concerning Marriage states that marriage is legal when conducted according to religious laws and beliefs²⁵ and also has several legal consequences.²⁶ It is also considered important to fill the gaps observed in different previous studies which focus on other causes of divorce apostasy and to contribute to the discovery of the basis for judges' considerations regarding divorce due to apostasy claims.

Methodology

This study was conducted qualitatively at the Bitung Religious Court from February to May 2020 through a field study that used a descriptive-comparative approach to analyze data. The descriptive aspect aims to make a systematic, factual, and accurate description of the facts, properties, and phenomena relationships between the variables studied²⁷ while the comparative aspect compares two variables.²⁸ Moreover, this combined approach was used to compare²⁹ judges' considerations in deciding two cases of apostasy divorce in the selected court.

²⁵ Azyumardi Azra, "The Indonesian Marriage Law of 1974: An Institutionalization of the Shari'a for Social Changes," in *Shari'a and Politics in Modern Indonesia* (ISEAS Publishing, 2003), 76–95.

²⁶ Katharine B Silbaugh, "The Practice of Marriage," *Wisconsin Women's Law Journal* 20 (2005): 189.; Megan Arthur et al., "Child Marriage Laws around the World: Minimum Marriage Age, Legal Exceptions, and Gender Disparities," *Journal of Women, Politics & Policy* 39, no. 1 (January 2, 2018): 51–74, <https://doi.org/10.1080/1554477X.2017.1375786>.; Maggie Gallagher, "What Is Marriage For-the Public Purposes of Marriage Law," *La. L. Rev.* 62 (2001): 773.

²⁷ Sandra L. Siedlecki, "Understanding Descriptive Research Designs and Methods," *Clinical Nurse Specialist* 34, no. 1 (January 2020): 8–12, <https://doi.org/10.1097/NUR.0000000000000493>.

²⁸ Frank Esser and Rens Vliegthart, "Comparative Research Methods," in *The International Encyclopedia of Communication Research Methods* (Wiley, 2017), 1–22, <https://doi.org/10.1002/9781118901731.iecrm0035>.

²⁹ Reza Azarian, "Potentials and Limitations of Comparative Method in Social Science," *International Journal of Humanities and Social Science* 1, no. 4 (2011): 113–25.; C. Pickvance, "The Four Varieties of Comparative Analysis: The Case of Environmental Regulation," *Journal of Housing and the Built Environment* 16 (2005): 7–28.

The primary data used were obtained from four judges at the Bitung Religious Court which are Amran Abbas (Chairman), Masita Olli (Vice-Chair), Asmawati Sarib, and Hizbuddin Maddatuang served as informants while the secondary data were retrieved from documents of the court. Data were collected through observation³⁰ in the court and in-depth interviews³¹ of the informants in relation to Cases Number 14/Pdt.G/2019/PA.Bitg and 17/Pdt.G/2019/PA.Bitg. The documents were used to determine the perspective of the subjects through the written media and other documents directly provided by them³² and the data retrieved were later analyzed using an inductive analysis model. Inductive data analysis is a data analysis whose process goes from facts to theory. The purpose of using this inductive analysis is to avoid manipulation of research data, so that it begins with new data adapted to theory.³³

Results and Discussion

Description of the Divorce Case for Apostasy at the Bitung Religious Court

This study focuses on two cases of divorce due to apostasy in the Bitung Religious Court which is described for the purpose of identification, interest analysis, and comparisons. It is important to reiterate that the described process is mainly to understand the background of the problem as submitted by the plaintiff.

1. Case Number 14/Pdt.G/2019/PA.Bitg: The husband of the wife suing for divorce is a new convert to Islam (muallaf) which is a condition required to engage in a marriage contract with a Muslim woman. The marriage was held on June 29, 1996, at KUA Bitung Tengah, Bitung City as indicated in the Marriage Certificate Quotation Book. The couple has been blessed with three children. The marriage was harmonious up to December 2017 when disputes and quarrels started because the husband reverts to his original religion as a Protestant Christian. This caused the family life that has been nurtured for more than 20 years to become fractured to the extent that the husband left the wife and children for another residence in May 2018. This led the wife to file for divorce at the Bitung Religious Court with Case Number 14/Pdt.G/2019/PA.Bitg.
2. Case Number 17/Pdt.G/2019/PA.Bitg: The husband of the wife suing for divorce is also a new convert to Islam (*muallaf*) as required in any marriage contract with a Muslim

³⁰ Malgorzata Ciesielska, Katarzyna W. Boström, and Magnus Öhlander, "Observation Methods," in *Qualitative Methodologies in Organization Studies* (Cham: Springer International Publishing, 2018), 33–52, https://doi.org/10.1007/978-3-319-65442-3_2.

³¹ Carolyn Boyce and Palena Neale, *Conducting In-Depth Interviews: A Guide for Designing and Conducting in-Depth Interviews for Evaluation Input* (Pathfinder International, 2006).

³² Glenn A. Bowen, "Document Analysis as a Qualitative Research Method," *Qualitative Research Journal* 9, no. 2 (August 3, 2009): 27–40, <https://doi.org/10.3316/QRJ0902027>.

³³ David R. Thomas, "A General Inductive Approach for Analyzing Qualitative Evaluation Data," *American Journal of Evaluation* 27, no. 2 (June 30, 2006): 237–46, <https://doi.org/10.1177/1098214005283748>.

woman. The marriage was held on July 21, 2008, at KUA Bitung Timur, Bitung City as indicated in the Marriage Certificate Quotation Book. The couple has been blessed with 1 child, and the marriage was harmonious up to April 2015 when continuous disputes and quarrels started because the defendant started a relationship with another woman, returned to Protestant Christianity, and refused to provide physical and spiritual support to the family since 2016. This disrupted the happiness enjoyed in the family for approximately 7 years and led to a separation of residence since early 2015 when the husband left the wife and child. This led the wife to file for divorce at the Bitung Religious Court with Case Number 17/Pdt.G/2019/PA.Bitg.

Judge's Consideration on Case Number 14/Pdt.G/2019/PA.Bitg

The panel of judges decided Case Number 14/Pdt.G/2019/PA.Bitg based on the following legal considerations:³⁴

- a. The provisions of Article 73 Paragraph 1 of Law Number 7/1989 as amended by Law Number 50/2009, the plaintiff is an interested party in this case (*persona standi in judicio*) and this means she has the right to sue.
- b. Article 40 and Article 63 Paragraph 1 (a) of Law Number 1/1974 on Marriage in conjunction with Article 14 and Article 1 (b) of PP Number 9/1975 on the Implementation of Law Number 1/1974 on Marriage in conjunction with Article 49 (a) of Law Number 7/1989 on the Religious Courts which has been amended by Law Number 3/2006 on Amendments to Law Number 7/1989 on the Religious Courts and Law Number 50/2009 on the Second Amendment to Law Number 7/1989 on the Religious Courts stated that the Religious Courts have the authority to examine, hear, and decide a quo case.
- c. Provisions of Article 285 R.Bg. jo Article 2 Paragraph 1 of Law Number 13/1985 on Stamp Duty in conjunction with Article 2 Paragraph 1 PP Number 24/2000 on Changes in Stamp Duty Tariffs which prove that the plaintiff and the defendant were legally husband and wife in this case.
- d. Provisions of Article 146 R.Bg. jo Article 26 PP Number 9/1975 concerning the Implementation of Law Number 1/1974 which shows that the summons was served officially and properly.
- e. The provisions of Article 7 Paragraph 1 PERMA Number 1/2016 concerning Mediation Procedures which state that mediation cannot be conducted because Defendant was not present at the trial.
- f. Article 308 R.Bg jo in conjunction with Article 76 of Law Number 7/1989 concerning the Religious Courts which certifies that the statements of the Plaintiff's witnesses have met the formal and material requirements of testimony and have evidentiary value.

³⁴ Summary of Case Number 14/Pdt.G/2019/PA.Bitg

- g. The testimonies of the two witnesses at the trial strengthen the arguments for the lawsuit.
- h. The fact of the trial that the defendant renounced Islamic religion was verified.
- i. Article 34 Paragraph 3 and Article 39 Paragraph 2 of Law Number 1/1974 concerning Marriage which states that a divorce lawsuit can be filed in a religious court when one of the husband and wife neglects its obligations but there is a need for sufficient reasons for divorce.
- j. The provisions of Article 19 PP Number 9/1975 in conjunction with Article 116 KHI among which there are letters (f) and (h).
- k. The view of the panel of judges is that the household of the plaintiff and the defendant is no longer in line because the defendant has changed beliefs.
- l. The Qur'an Surah al-Baqarah/2: 221 shows that Islam does not condone interfaith marriages because religion is the most important or absolute condition in marriage.
- m. Article 44 KHI states that "a Muslim woman is prohibited from marrying a man who is not Muslim".
- n. Sayyid Sabiq's opinion in the Book of *Fiqh Sunnah* shows that a marriage will be damaged (*fâsakh*) due to apostasy when one of the husband-and-wife leaves Islam.
- o. Article 2 Paragraph 1 of Law Number 1/1974 which states that marriages can only be conducted according to their respective religions.
- p. The provisions of Article 19 PP Number 9/1975 in conjunction with Article 116 (h) KHI.

These legal considerations serve as the basis for the panel of judges to grant the plaintiff's claim in a *verstek* manner and imposed the marriage *fâsakh* between the plaintiff and the defendant based on the provisions of Article 19 PP Number 9/1975 in conjunction with Article 116 (h) KHI. The decision was based on the legal fact that the plaintiff was Muslim while the defendant was Christian. The judge in this matter believes that the marriage between the plaintiff and the defendant has really broken up due to continuous bickering and this makes any reconciliatory effort difficult.³⁵ Some legal facts showed that the defendant had apostatized, often spoke harshly, continuous interference of his family in the marriage, and also failed to provide a living for the plaintiff. This means the lawsuit complied with the provisions of Article 19 (f) PP Number 9/1975 and Article 116 (h) KHI. The judge's legal considerations are also in accordance with the Jurisprudence of the Indonesian Supreme Court Number 379 K/AG/1995 which states that a household is already broken up when the husband and wife have a dispute and live apart.³⁶

³⁵ Interview with Masita Oliy (Judge of the Bitung Religious Court), May 04, 2020; Interview with Asmawati Sarib (Judge of the Bitung Religious Court), May 06, 2020.

³⁶ Interview with Asmawati Sarib (Judge of the Bitung Religious Court), May 06, 2020.

Judge's Consideration on Case Number 17/Pdt.G/2019/PA.Bitg

The panel of judges decided Case Number 14/Pdt.G/2019/PA.Bitg based on the following legal considerations:³⁷

- a. The provisions of Article 73 Paragraph 1 of Law Number 7/1989 as amended by Law Number 50/2009, the plaintiff is an interested party in this case (*persona standi in judicio*) and this implies she has the right to sue.
- b. Article 40 and Article 63 Paragraph 1 (a) of Law Number 1/1974 on Marriage in conjunction with Article 14 and Article 1 (b) of PP Number 9/1975 on the Implementation of Law Number 1/1974 on Marriage in conjunction with Article 49 (a) of Law Number 7/1989 on the Religious Courts which has been amended by Law Number 3/2006 on Amendments to Law Number 7/1989 on the Religious Courts and Law Number 50/2009 on the Second Amendment to Law Number 7/1989 on the Religious Courts stated that the Religious Courts have the authority to examine, hear, and decide a *quo case*.
- c. Provisions of Article 285 R.Bg. *jo* Article 2 Paragraph 1 of Law Number 13/1985 on Stamp Duty in conjunction with Article 2 Paragraph 1 PP Number 24/2000 on Changes in Stamp Duty Tariffs which prove that the plaintiff and the defendant were legally husband and wife in this case.
- d. Provisions of Article 146 R.Bg. *jo* Article 26 PP Number 9/1975 concerning the Implementation of Law Number 1/1974 which shows that the summons was served officially and properly.
- e. The provisions of Article 7 Paragraph 1 PERMA Number 1/2016 concerning Mediation Procedures which states that mediation cannot be conducted because Defendant was not present at the trial.
- f. Article 308 R.Bg *jo* in conjunction with Article 76 of Law Number 7/1989 concerning the Religious Courts which certifies that the statements of the Plaintiff's witnesses have met the formal and material requirements of testimony and have evidentiary value.
- g. The facts of the trial showed the plaintiff and the defendant are not getting along and have separated.
- h. Article 34 Paragraph 3 and Article 39 Paragraph 2 of Law Number 1/1974 concerning Marriage which states that a divorce lawsuit can be filed in a religious court when one of the husband and wife neglects its obligations but there is a need for sufficient reasons for divorce.
- i. The provisions of Article 19 PP Number 9/1975 in conjunction with Article 116 KHI including letters (f) and (h).
- j. The panel of judges rejected the plaintiff's claim to impose a marriage *fâsakh* due to a lack of sufficient proof.

³⁷ Summary of Case Number 17/Pdt.G/2019/PA.Bitg

- k. Subsidiary petition.
- l. Provisions of Article 19 PP Number 9/1975 in conjunction with Article 116 KHI.
- m. The opinion of the fiqh ulema Shaykh al-Majdi in the book *Ghâyah al-Marâm*.
- n. Qur'an Surah al-Rûm/30:21.
- o. Article 1 of Law Number 1/1974 as well as Article 3 and Article 77 Paragraphs 1 and 2 KHI.
- p. Provisions of Article 19 (b) PP Number 9/1975 in conjunction with Article 116 (b) KHI.

The legal considerations were used by the panel of judges to grant the plaintiff's claim for *verstek* and rejected the defendant's *talâq ba'in sughra*. Moreover, a subsidiary petition which was based on Article 19 (b) PP Number 9/1975 in conjunction with Article 116 (b) KHI was also applied due to the fact that the divorce was triggered by continuous quarrels (*syiqaq*) rather than apostasy. Meanwhile, the plaintiff clearly presented her case based on the change in the defendant's religion (apostate).³⁸

The panel of judges discovered that the case was not based on apostasy but a constant quarrel and this led to the rejection of *talâq ba'in sughra*. This is in line with the factors listed by Maddatuang to be considered in deciding *talâq ba'in sughra* or *talâq raj'i* which include (1) evidence, (2) reference of the *talâq* to article 116 KHI letter (f) such as the ability of the plaintiff in this case to prove the disputes and quarrels is continuous or only once, (3) when there are continuous disputes and quarrels which led to the separation of their residences and lack of communications, (4) separation of beds and places to eat, (5) reconcilability of the disputes and quarrels, (6) determine the basis for the *Verstek* such as the reason for the absence of the person concerned and failure of the peace process initiated through counsel at each trial.³⁹

The point is that the decision made by the panel of judges is based on the evidence set by law in line with the efforts of the litigating parties to convince the judge of the truth of the events as stated by the disputing parties.

Analysis of Judge's Consideration on Case Number 14/Pdt.G/2019/PA.Bitg and 17/Pdt.G/2019/PA.Bitg

Cases Number 14/Pdt.G/2019/PA.Bitg and 17/Pdt.G/2019/PA.Bitg are divorce cases based on the argument that the husband or defendant has apostatized from Islam. It is important to note that the defendant was absent after being officially and appropriately

³⁸ Summary of Case Number 17/Pdt.G/2019/PA.Bitg

³⁹ Interview with Hizbuddin Maddatuang (Judge of the Bitung Religious Court), May 07, 2020.

summoned in accordance with the provisions of Article 146 R.Bg and this means mediation effort cannot be implemented as stipulated in Article 7 Paragraph 1 PERMA Number 1 of 2016. However, the panel of judges advised the plaintiff to stay in harmony in order to maintain the marriage but the continuous absence of the defendant led the panel of judges to grant the *verstek*.

Some of the legal facts considered by the judges in case Number 14/Pdt.G/2019/PA.Bitg include the submission that the plaintiff and defendant are legally married with three children, the originally harmonious household became disorganized in May 2017 because the defendant apostatized from Islam, and this led to their separation in May 2018. The panel of judges decided that the marriage was damaged and allowed to be terminated (*fâsakh*). This study agrees with this decision in line with the argument in QS al-Baqarah/2:221 where Allah asserts that marrying a polytheist woman is unlawful except for those that are Jews and Christians. Moreover, the Book of *Fikih Sunnah* states that “if one of the husband-and-wife leaves Islam (apostasy) and does not want to return to Islam, then the marriage is damaged (*fâsakh*) due to the apostasy that has occurred.”⁴⁰ The legal considerations normally used by the panel of judges to decide this type of divorce are based on Law Number 1/1974 concerning Marriage and KHI.

It is, however, important to note that the decision in Case Number 17/Pdt.G/2019/PA.Bitg is different from Case Number 14/Pdt.G/2019/PA.Bitg where a subsidiary petition was used as the legal consideration to reject the *talâq ba'in sughra* decision in line with Law Number 1/1974 and KHI because the defendant apostatized from Islam. It was discovered that the witnesses did not know the defendant has renounced Islam until it was stated in the plaintiff's confession. Meanwhile, the plaintiff's confession is more acceptable because she has been living with the defendant since 2008.

The *ijtihad* usually considered by a judge in divorce cases is to examine the broken-down marriage to determine the possibility of its continuance or maintenance. The cases analyzed were observed to have started with disputes due to the religious conversion of the husband which subsequently led to the separation of the couple for several years.

Some of the considerations of the panel of judges in deciding Case Number 14/Pdt.G/2019/PA.Bitg were observed to include (a) the legal fact that the plaintiff is a Muslim while the defendant has returned to his original religion, Protestant Christianity, (b) Legislation Article 34 Paragraph 3 and Article 39 Paragraph 2 of Law Number 1/1974 concerning Marriage which states that any of the couples can apply for divorce in a court when one of them fails to perform the required obligation, there is sufficient reason for divorce, and that they no longer live in harmony as indicated in the provisions of Article 19 PP Number 9/1975 in conjunction with Article 116 of the KHI (h) which focuses on the disharmony in marriage due to conversion of religion or apostasy, (c) Qur'an Surah al-Baqarah/2:221

⁴⁰ Sayyid Sabiq, *Fikih Sunnah* (Jakarta: Cakrawala Publishing, 2009).

which explains the prohibition against marrying polytheist men or women, (d) Sayyid Sabiq's opinion that "if one of the husband and wife leaves Islam (apostasy) and does not want to return to Islam, then the marriage is damaged (*fâsakh*) due to his apostasy". The consideration of the judges that the marriage between the plaintiff and defendant has broken down and is difficult to reconcile due to continuous bickering and the conversion of the husband to his original religion before marriage is in line with the statutory regulations and Islamic family law and this led to the termination of the marriage more appropriately with *fâsakh*.

Some of the considerations of the judges to reject the plaintiff's prayer to impose *fâsakh* in Case Number 17/Pdt.G/2019/PA.Bitg is due to the inability to prove the truth of the evidence in the trial in relation to the defendant's religious conversion with the plaintiff observed to have made her submission based on "hearing from a story".⁴¹ The judge viewed the evidence as an assumption because the court usually decides based on proven evidence and this led to the rejection of the *talâq* as usual. Therefore, the application for the imposition of *fâsakh* was rejected using a subsidiary petitum while *talâq ba'in suhbra* was granted based on the evidence available.

It is important to note that the judge's consideration in case Number 14/Pdt.G/2019/PA.Bitg is more in line with the law, Islamic Family Law, and socio-cultural conditions in society considering the argument that (a) *Fâsakh* is the breakdown of marital relations caused by certain things such as apostasy, (b) the judge needs to examine the benefits and harms in a case before deciding and the *fâsakh* was granted in this case because the marriage can cause damage and loss if it is allowed to be continued considering the differences in the faith of the couple, (c) there are two types of divorce in the religious courts which are sued and *talâq* with the first usually filed by the wife while the second is by the husband based on the reasons contained in Article 19 PP Number 9/1975 and Article 116 KHI such as apostates which is one of the juridical basis for imposing *fâsakh*, (d) the rules of *fâsakh* in the marriage law are not explicitly regulated but globally regulated in the Guidelines for the Implementation of Duties and Administration of Religious Courts,⁴² and (e) *fâsakh* and *talâq* cannot be equated because they are very different in Islam. *Fâsakh* is not a reason for *talâq* but a separate way of divorce and this is the reason Islam regulates its own chapter on *fâsakh* in marriage. The husband has the right to *talâq* by just divorcing the wife without having to reason with *fâsakh* and this is the reason it is the concept associated with breaking a marriage.

⁴¹ Interview with Amran Abbas (Judge of the Bitung Religious Court), May 09, 2020.

⁴² Mahkamah Agung RI, *Pedoman Pelaksanaan Tugas Dan Administrasi Peradilan Agama (Buku II)* (Jakarta: Direktorat Jenderal Badan Peradilan Agama, 2011).

Implications of Decisions and Legal Consequences

The decisions on Case Number 14/Pdt.G/2019/PA.Bitg and 17/Pdt.G/2019/PA.Bitg have legal consequences and impact on the survival of the plaintiff as well as the children as indicated by at least two factors listed as follows:

1. Child care (*hadhânah*): This is the maintenance of children that cannot stand alone as indicated by the term *ja'alahu fî hadhinihi* which means “making it in the arms”. The maintenance and provision of care for children are one of the duties and obligations of parents. Therefore, the care for the children affected by the divorce caused by one of the parents is regulated in Article 105 of the KHI that the right to raise children that are not *mumayyîz* belongs to the mother. The father in Case Number 14/Pdt.G/2019/PA.Bitg was found to have been apostatized and this placed in the *hadhânah* on the plaintiff while the cost of raising the children is shared.
2. Inheritance: Apostasy usually affects marriage and children’s inheritance rights as indicated in Article 116 (h) of the KHI due to the fact that one of the requirements for inheritance is for both parties to be Muslims. Apostasy is one of the factors preventing people from inheriting from their families based on the hadith of Rasulullah SAW. that “Muslims do not inherit from unbelievers and unbelievers do not inherit from Muslims”. This means the children of a man that apostatized do not have any inheritance relationship due to the differences in their religion. Therefore, judges have a constitutional obligation to make legal discoveries in concrete events, the rules of which are neither clear nor relevant. Article 5 Paragraph 1 of Law Number 48/2009 concerning Judicial Power states that a judge needs to explore, follow, and understand legal values as well as the sense of justice existing in a society. The values need to be understood and followed by judges in order to ensure the law is dynamic, living, and has the ability to respond to the challenges at different times. It is important to note that there are presently no special rules regulating divorce cases associated with *fâsakh* because the existing *fiqh* rules are allowed and are sufficient to be used as a basis and reference for decisions.

Conclusion

This divorce is the breaking up of a marital relationship and is only allowed in Indonesian law to be accomplished before a court accompanied by sufficient evidence and reasons. The adjudication of divorce cases due to apostasy usually requires the judges to use juridical considerations as evidence of the decisions made for each legal event to ensure legal certainty. This research found that the panel of judges granted the plaintiff’s claim for *fâsakh* in a *verstek* manner based on the provisions of Article 19 PP Number 9/1975 and Article 116 (h) KHI. The panel of judges considered that the defendant’s apostasy was clearly known and could be proven in court. Meanwhile, the panel of judges in Case Number 17/Pdt.G/2019/PA.Bitg granted the plaintiff’s claim for *verstek* and imposed the defendant’s *talâq*

ba'in sughra using a subsidiary petitum based on the provisions of Article 19 (b) PP Number 9/1975 and Article 116 (b) KHI due to the absence of substantive evidence that the defendant had converted to another religion (apostatized). Both decisions were observed to have legal consequences on *hadhânah* and the right of mutual inheritance between the children and parents.

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