

THE ANALYSIS OF JUDGE'S DECISION ON MAFQUD'S HUSBAND IN CASE OF CLAIM FOR DIVORCE IN PONOROGO RELIGION COURT AND THE LAW IMPACT OF THE MAFQUD HUSBAND (Analysis of Decision Number. 959/Pdt. G/2018/PA. PO)

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Abstract

This research is a study on divorce claims in the Ponorogo Religious Court with case number 959 / Pdt. G / 2018 / PA. PO that involves one of the parties that is not known to involve him (Husband / Defendant Ghoib). On the verdict, the Judge granted the Plaintiff's claim and dropped the Defendant's ba'in shugra to the plaintiff (wife) and the defendant (husband) has not lived together for 7 years, because the husband disappeared and was not recognized as completing it. This study elaborates the discussion of the Panel of Judges of the Religious Courts regarding the divorce case Number 959 / Pdt. G / 2018 / PA. PO about mafqud husband (ghoib) in a divorce case, then think about how it happened to the Plaintiff (wife) due to mafqud's husband. From the results of this study, it is known that the decision of the Judges of the Ponorogo Religious Court in the case of divorce Number 959 / Pdt. G / 2018 / PA. The PO that was canceled by divorce one ba'in shugra through verstek, for reasons of more than 7 years added was also not approved until now, and this became the wife's reason to not be able to maintain his marriage. Subsequently, the finding out some analysis obtained from the case number 959 / Pdt. G / 2018 / PA. PO. So that the judge can determine the reason for the divorce stated in Article 19 letter "b" Government Regulation Number 9 of 1975. Article 116 letter "b" Compilation

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of Islamic Law as “one of the parties” leaves the other party for 2 (two) years together without permission from the other party and without a valid reason or other matters beyond its ability. Decision issued then it does not occur in the future if there is a party that is harmed and appealed for the decision.

Keywords: Verdict, Divorce, Mafqud (Ghoib)

Abstrak

Penelitian ini merupakan suatu studi tentang gugatan cerai di Pengadilan Agama Ponorogo dengan nomor perkara 959/Pdt. G/2018/PA. PO yang melibatkan salah satu dari pihak ada yang tidak diketahui keberadaannya (Suami/Tergugat Ghoib). Pada amar putusannya, Majelis Hakim mengabulkan gugatan penggugat dan menjatuhkan talak ba'in shugra. Tergugat terhadap penggugat dengan alasan yang diambil Majelis Hakim antara penggugat (istri) dan pergugat (suami) telah lama tidak tinggal bersama selama 7 tahun, karena suami menghilang dan tidak diketahui keberadaannya. Penelitian ini bertujuan untuk mengetahui analisa keputusan Majelis Hakim Pengadilan Agama Ponorogo mengenai perkara cerai gugat Nomor 959/Pdt. G/2018/PA. PO mengenai suami mafqud (ghoib) dalam perkara cerai gugat, kemudian mengetahui dampak yang terjadi terhadap penggugat (istri) akibat suami mafqud. Dari hasil penelitian ini diketahui bahwa putusan Majelis Hakim Pengadilan Agama Ponorogo dalam kasus perceraian Nomor 959 / Pdt. G / 2018 / PA. PO yang menjatuhkan talak satu ba'in shugra melalui verstek, dengan alasan kehilangan seorang suami selama lebih dari 7 tahun serta keberadaannya tidak diketahui sampai sekarang. Kemudian mencari tahu beberapa analisa yang diperoleh dari kasus perkara nomor 959 / Pdt. G / 2018 / PA. PO. Serta mengetahui dampak yang terjadi pada istri dari hukum suami Mafqud (ghoib). Sehingga hakim dapat menentukan alasan perceraian yang tertera dalam Pasal 19 huruf “b” Peraturan Pemerintah Nomor 9 Tahun 1975. Pasal 116 huruf “b” “Kompilasi Hukum Islam yaitu” salah satu pihak meninggalkan pihak lain selama 2 (dua) tahun berturut-

turut tanpa izin dari pihak lain dan tanpa alasan yang sah atau hal-hal lain di luar kemampuannya “. Sehingga keputusan yang dikeluarkan nanti tidak terjadi di masa depan jika ada pihak yang merasa dirugikan dan mengajukan banding atas keputusan tersebut.

Kata Kunci: Putusan, Perceraian, Mafqud (Ghoib)

Introduction

According to the language, divorce comes from the word الإرسال which intends to release, leave or renounce marriage.³ In the book *kifayatul akhyar* it is stated that divorce according to language is letting go of bonds.⁴

From the definition above, divorce is the termination of the marriage rope and divorce is a necessity.⁵ And, it is clear that divorce is an institution that is used to release a marriage bond, so the marriage bond can actually be broken and the procedure has been regulated both in *fiqh* and in Law No. 1 of 1974 concerning Marriage and Compilation of Islamic Law (KHI).⁶

In short, divorce can be accepted when done by the expert divorce, namely understanding, *baligh* and self-choice as the *hadits* narrated by Ashhab As-Sunan from Ali RA from the Prophet SAW said:

رُفِعَ الْقَلَمُ عَنْ ثَلَاثَةٍ: عَنِ الْمَجْنُونِ حَتَّى يَفِيْقَ، وَعَنِ النَّائِمِ حَتَّى يَسْتَيْقِظَ، وَعَنِ الصَّبِيِّ حَتَّى يَحْتَلِمَ

“He has been appointed a pen from three groups: from a madman until he realizes, from a person sleeping until he wakes up, and from a small child to his height.”⁷

كُلُّ طَلَاقٍ جَائِزٌ إِلَّا طَلَاقَ الْمَعْتُوهِ الْمَغْلُوبِ عَلَى عَقْلِهِ

³ وهبة الزحيلي، *الفقه الإسلامي وأدلته* (دمشق: دار الفکر، ٥٨٩١) الجز: ٧، ص. ٩٧٥

⁴ تقي الدين، *كفايات الأخير*، (جدة: دار المنهاج للنشر والتوزيع، ٦١٠٢) ص. ٤١٥

⁵ حسن أيوب، *فقه الأسرة المسلمة*، (القاهرة، مصر: دار السلام، ٢٠٠٢) ص. ٧٠٢

⁶ Amieur Nuruddin, dan Azhari Akmal Tarigan, *Hukum Perdata Islam Di Indonesia*, (Jakarta: Kencana 2004) p. 207.

⁷ رواه أحمد وأبو داود والحاكم عن علي وعمر، ورواه أحمد وأبو داود والنسائي وابن ماجه والحاكم عن الجامع الصغير: ٤٢ / ٢ عائشة بلفظ آخر)

“Every divorce is permissible except for the divorce which is done by a person who lacks reason.”⁸

The meaning is closed here, people are forced, the name is given because people who are forced to close all doors cannot come out but must be aware, whereas if the coercion is based on the truth as a condition that the law imposed by the judge is valid because this is justified.

Then the second pillar of divorce is the expression of divorce (*sighat* divorce). This divorce expression is divided into several types including:

- a. *Talaq* expressions with clear language
- b. *Talaq* expression with satire.
- c. *Talaq* with a gesture.
- d. *Talaq* with writing.
- e. It is free and dependent.
- f. *Sighat Talaq* in the future.⁹

The third pillar of divorce is the existence of a wife that is a person who is under the protection of a husband and he is the object of getting divorce.¹⁰

Reasons for Divorce

The breakup of marriage is a marriage bond between a man and a woman who has broken up. Breaking ties could mean that one of the two died, between a man and woman divorced and one of the two went to a place far away and there was no news so the court considered that the person was dead.¹¹ As explained in the Compilation of Islamic Law article 113 and the marriage law article 38, 39, 40, states that marriage can break up because: a). Death, b). Divorce, c). Court Decisions.can trigger the desire to break / break the marriage:

⁸ قال عنه الزيلعي: حديث غريب، وأخرج الترمذي عن أبي هريرة: «كل طلاق جائز إلا طلاق المعتوه المغلوب على عقله) وفيه ضعيف، وروى ابن أبي شيبة عن علي قال: (كل طلاق جائز إلا طلاق المعتوه) ١٢٢ - ٢٢٢: نصب الرأية)

⁹ Abdul Aziz Muhammad Azzamdan Abdul Wahab Sayyed Hawwas Al-Usroti, *Fiqh Munakahat Khitbah, Nikah, dan Talak*, (Jakarta: Amzah, 2009), p. 261

¹⁰ Syaikh Kamil Muhammad Uwaidah *Fiqh Wanita*, (Jakarta: Pustaka Al Kautsar, 1998), p. 437

¹¹ Zainuddin Ali, *Hukum Perdata Islam di Indonesia*, (Jakarta: Sinar Grafika, 2006), p. 73.

Divorced by Wife (*Khulu'*)

Divorce by wife (*Khulu'*) is a divorce lawsuit filed by a wife or proxy to a Religious Court whose jurisdiction is the residence of the plaintiff unless the wife leaves the residence together without her husband's permission. If the wife leaves the residence together without her husband's permission, the lawsuit must be presented to the court of her jurisdiction in the area of her husband's residence.¹² The right to beg to break this marriage bond in Islamic law is called *Khulu'* divorce on the part of the wife, while the husband does not want.

Khulu' also means that the wife releases the marriage contract by paying compensation in the form of returning the dowry to the husband. The legal basis of *khulu'* is found in Al-Quran Al-Baqarah verse 229, namely:

الطَّلَاقُ مَرَّتَانٍ ۖ فَإِمْسَاكٌ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَانٍ ۗ وَلَا يَجِلُّ لَكُمْ أَنْ تَأْخُذُوا بِمَا آتَيْتُمُوهُنَّ شَيْئًا إِلَّا أَنْ يَخَافَا أَلَّا يُقِيمَا حُدُودَ اللَّهِ ۗ فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ ۗ تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا ۚ وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَأُولَٰئِكَ هُمُ الظَّالِمُونَ

"Divorce (which can be reviewed) twice. After that you can refer again in a way that is forgiving or divorcing in a good way. It is not lawful for you to take back something from what you have given them, unless both are worried that they will not be able to carry out God's laws. If you are worried that both (husband and wife) cannot carry out the laws of God, then there is no sin on both of them being paid by the wife to redeem themselves. Those are God's laws. So do not violate it. Those who violate the laws of their God are the wrongdoers".¹³

Khulu' is only permitted if there is a right reason such as a husband leaving his wife for 2 consecutive years without his wife's permission and legitimate reasons, or her husband apostatizing and not fulfilling obligations to his wife while his wife is worried that he will violate God's law in such conditions. Husband well and he has the right to *khulu'*.¹⁴ And also if the

¹² Bahder Johan Nasution dan Sri Warjianti, *Hukum Perdata Islam*, (Bandung: Mandar Maju, 1997), p. 33.

¹³ Syaamil Al-Qur'an Depag, *Al-Qur'an dan Terjemahnya...*, p.36.

¹⁴ Ainur Nuruddin dan Azhari Akmal Tarigan, *Hukum Perdata Islam di Indonesia*, (Jakarta: Kencana, 2006), p. 233.

wife feels unhappy living together with her husband or it can also happen because the wife hates her husband very much, this situation often happens to people who are still familiar with marriages determined by the parents or determined by other parties who can force one party especially (prospective wife) to marry someone she does not love.¹⁵

Definition of Husband *Ghoib (Mafqud)*

The *ghoib's* husband in the term *fiqh* is also called *Al-Mafqud*. The issue of the husband's inability to know where he went and where he was for a long time would have made it difficult for the life of his wife who was left behind, especially if the husband did not leave something to support his wife and children. In this case there was a difference of opinion among the *Ulama* regarding the ability of the wife to submit a choice to request a marriage certificate.

Wahbah Zuhaili gave an explanation, namely:

المفقود هو الغائب الذي لم يدر أحي هو فيتوقع قدومه أم ميت أودع القبر

"*Mafqud is a missing person who is not known whether he is still alive, that is, he can be expected to be present or dead in the tomb*".¹⁶

From some definitions above, it can be understood that *mafqud* is the loss of someone from a place, unknown news and whereabouts are certain, and it is not known whether he is still alive or has died. Husband who is *mafqud* is a husband who is missing from his family without knowing where he is and when he will return. The husband's departure may be due to intentional motives of escaping due to something, or maybe because he died and was not known, or maybe because of something else.

Analysis of Judges' Decisions on Husband (*Mafqud*) in the Ponorogo Religious Court.

As we known in the statement above, that a judge in hearing and resolving legal matters must not have the basis and consideration, whether the case falls within his authority or not. In the case of divorce, Islam has justified the divorce on the grounds that the *ghoib* husband or in Islam is called *mafqud*.

¹⁵ Sudarsono, *Hukum Perkawinan Nasional*, (Jakarta: Rineka Cipta, 2000), p. 143.

¹⁶ ابن عابدين، حاشية رد المختار، (الرياض: دار عالم الكتب، ٢٠٠٢) الجزء: ٤، ص. ٣٨٤

In the event that a wife submits a divorce claim to the court, it must be supported with strong reasons as the reasons mentioned above include:¹⁷

- a. The husband is crazy.
- b. The husband suffers from an infectious disease that cannot be expected to heal
- c. Husbands are unable or lose the ability to carry out sexual intercourse.
- d. The husband falls poor, so he is unable to provide for his wife.
- e. The wife feels cheated in the husband's wealth, wealth or position
- f. The husband leaves without being known where he lives and without news, so that he is not known to live or die, and the time is long enough

This verse is an appeal to treat and associate wives well by fulfilling their rights as well as their obligations. If the husband has left for so long without any news, his rights and obligations have been cut off so that the wife is allowed to complain to the court.

Analysis of Judges' Decisions about the Divorce (*Khulu'*) that were submitted by the wife

Deciding divorce or dropping divorce is the husband's right. The wife cannot divorce her husband. However, the wife demands the divorce. There came a harsh threat from *Shari'a* settlers to the wife who asked *Khulu* for her husband. The Prophet *sallallaahu 'alaihiwasallam* said from the hadith:

الْمُخْتَلِعَاتُ هُنَّ الْمُنَافِقَاتُ

"*Al-Mukhtali'at is a hypocrite*".¹⁸

What is meant by *al-mukhtali'at* is the wife who asks for *khulu* 'and asks for a divorce from the husband for no permissible reason. They are said to be hypocritical, namely, to act intellectually and show obedience in *zahir*

¹⁷ Soemiyati, *Hukum Perkawinan Islam dan Undang- Undang Perkawinan*, ... p. 114

¹⁸ نور الدين ملا علي بن سلطان محمد الهروي القاري (علي القاري) - محمد الخطيب التبريزي، مرقاة

المفاتيح شرح مشكاة المصابيح، ويلييه: الإكمال في أسماء الرجال (بيروت: دارالكتب العلمية : ٨٠٠٢) ،

ج. ٦، ص. ٧٩٣

Considering, that the Defendant has been summoned legally and that the defendant must have never come before the court and also sent another person as a legitimate representative / proxy and it turned out that the absence was caused by a legitimate obstacle, the Defendant must be declared absent and the plaintiff's claim must be granted with *verstek* because it has fulfilled the provisions of article 125 paragraph 1 HIR, this is also in accordance with the rules in the Book Anwar Juz II page 149 which read as follows:

Meaning: *If (Defendant) is unable to attend due to hiding or reluctance, then the Judge may listen to the lawsuit and examine the evidence and the claim.*

So according to the author, the consideration and decision given by the court judge is very appropriate, because it remembers that *mafqud's* husband has left his wife for more than 7 years, so that the husband has also violated *taklik talak* which other people do not provide for 3 months

1. Analysis of Judge's Judgments about (Iwadh) in case number 959 / Pdt.G / 2018 / PA.Po

The scholars have mentioned that it is permissible for a woman who asks for a divorce because she cannot achieve happiness because the husband is ugly. The idea of this is the story of the wife of the friend of Thabit bin Qois who asked for divorce from him. Ibn Abbas narrated:

أَنَّ امْرَأَةَ ثَابِتِ بْنِ قَيْسٍ أَتَتْ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَقَالَتْ: يَا رَسُولَ اللَّهِ ثَابِتُ بْنُ قَيْسٍ مَا أَعْتَبَ عَلَيْهِ فِي حُلُقٍ وَلَا دِينٍ، وَلَكِنِّي أَكْرَهُ الْكُفْرَ فِي الْإِسْلَامِ. فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: (أَتُرَدِّينَ عَلَيْهِ حَدِيثَهُ؟) قَالَتْ: نَعَمْ. قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: اقْبِلِ الْحَدِيثَةَ وَطَلِّقْهَا تَطْلِيقَةً

"That the wife of Tsaabit bin Qois came to the Prophet sallallaahu aih alaihi wa sallam and said," O Messenger of Allah, my husband Tsaabit bin Qois is not I denounce morality and not religion, but I am afraid to do kufr in Islam ". Then the Prophet sallallaahu 'alaihi wa sallam said," Are you (willing) to return his garden (which he gave as your maharm) ".¹⁹

In this case the judge did not determine the amount of wages to be paid by a wife who filed for divorce (*khulu* ') only to pay a court fee of Rp. 416,000.00

¹⁹ عبد الحق بن عبد الرحمن بن عبد الله الأزدي الأشبيلي أبو محمد ابن الخراط، الأحكام الوسطى من حديث النبي صلى الله عليه وسلم (الرياض: مكتبة الرشد، ٨٠٠٢)، ج. ٣، ص. ٧٩١

Impact of The Law of Divorce *Mafqud's* Husband on Wife

In the *khulu'* case, the couple as long as they are in this world even in the hereafter will not be able to return, forever. Because it's already done. On the contrary, if the case is truly *khulu'in syar'i*, it is not a misnomer, so in this case there are still differences of opinion about the length of the *iddah* period. And also, a material difference of opinion among scholars in the past. In this case there are two different opinion camps, namely between the *jumhur* of the *ulama* (majority) with the opinion of the Al-Hanabilah (the school of Imam Ahmad bin Hanbal).

1. Iddah Period: 1 Time *Haidh*

While the opinion of Al-Hanabilah says that *khulu'* is *talak*. This opinion was also supported earlier by the fatwa of the *Khalifah* Usman bin Affan, Ibn Umar and Ibn Abbas *ridhwanullahi 'alaihi majmai'in*. And her husband's *iddah* is 1 time to get menstruation, not three periods. This is also confirmed in the history of the words of the Prophet Muhammad, among them are the following hadiths:

ابن عباس: أن امرأة ثابت بن قيس اختلعت منه فجعل النبي صلى الله عليه وسلم عدتها حيضة (رواه أبو داود والترمذي)

From Ibnu Abbas, the wife of Thabit ibn Qais was up to her husband, so the Prophet SAW made the period once she got her period. (Abu Daud and Tirimizi, as well as being blessed by Al-Albani)²⁰

2. Childcare (*Hadhahah*)

Hadhânah (childcare) is obligatory, because the child will be destroyed because of being abandoned. Therefore, it is obligatory to guard the child from destruction as required to provide for it and save it from destruction.²¹ Small children who still need this care will get danger if they don't get care and care. In addition, he must also be given a living and be saved from all things that can damage it. Some Jurisprudence explain about the obligation to take care of small children to be able

²⁰ عبد الله بن عدي الجرجاني أبو أحمد، الكامل في ضعفاء الرجال (بيروت: دار الفکر، ١٩٠٢) ج.

٣، ص. ٨٦٢

²¹ وزارة الشؤون الإسلامية والدعوة والإرشاد السعودية، الفقه الميسر في ضوء الكتاب والسنة (البيكان

١٩٠٢، ص. ٤٩١)

to be independent. The law must here mean that is mandatory *kifâyah*. *Hadhânah* is strongly associated with three rights:

- a. The right of a caring woman
- b. The rights of children cared for
- c. The right of the father or the person who occupies his position

But, whereas at the time of the marriage the Plaintiff with the status of a virgin and a Defendant during the marriage the Plaintiff with the Defendant was related as husband and wife (*Ba'da dukhul*) and already had 1 child named: Didit Dian Pratama bin Demong Domian, 24 years old and now in care for the claimant.

So, in the author's opinion stating that the child concerned is not required to be fostered by the plaintiff because of the age of the child who is 24 years old. And, in the terms of parenting *hadhonah* the maximum age in parenting is 21 years old *mumayyiz*.

For a wife who does *khulu*, then she is not entitled to get a living from her husband, except in a state of pregnancy until the birth of her child.

3. Earn A Living (*Nafkah*)

It was explained earlier that a woman is not allowed to ask for divorce or *khulu* 'unless there is *udzur syar'i*.

A woman who is divorced from her husband because of *khulu* and she is pregnant, she has the right to live and live from her husband, so she gives birth.

Conclusion

From the discussion described above, the authors concluded as follows:

1. In the case of No: 0959 / Pdt.G / 2018 / PA.Po. regarding this divorce claim, the panel of judges granted a divorce application submitted by the Plaintiff and the judge gave the reason for the divorce stipulated in Article 19 of Government Regulation No. 9 of 1975 jo Article 116 Compilation of Islamic Law. In addition, there were facts in the trial which proved that the defendant had disappeared from his house for approximately 7 years, so that the panel of judges decided to grant the divorce claim filed by the plaintiff. And in this case, the judge decided on the case with *Talak Ba'in Sughro* by means of *verstek*

2. The analysis of Islamic law from the perspective of Islamic Law on the decision of the judges of the Ponorogo Religious Court No: 0959 / Pdt.G / 2018 / PA.Po. about suing for divorce because of *Mafqud*'s husband.

From this analysis states;

- a. The judge's decision in case number 0959 / Pdt.G / 2018 / PA.Po is in accordance with the laws and regulations which state that the husband has disappeared for 2 years, the wife has the right to divorce.
 - b. In this case, it is stated that the *iwadh* paid by the wife is not stated by the judge, but rather in the form of an implementation fee which must be paid by the wife
3. Impact of case cases number 0959 / Pdt.G / 2018 / PA.Po. is
- a. The *Iddah* Period The wife who filed for divorce is the same as the period of the divorce in ordinary divorce which is during 1 *quru'*
 - b. In the management of *hadhonah* the wife is not pleased to care for her child. Because the child in question is 24 years old.
 - c. Wife do not get a living, because it is explained that a living is not given to the wife who submits *khulu*, unless they are pregnant

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