

Divorce outside the Court According to Fiqh

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Abstract

Divorce is the act of the husband with his pledge which aims to eliminate and release the marriage bond by using certain words. The fiqh perspective explains that divorce talak is an utterance with clear words to indicate divorce. However, if you look at the legality of divorce according to positive law, divorce according to the Compilation of Islamic Law in Indonesia which is regulated in chapter XVI regarding the Dissolution of Marriage in Article 117 which reads that divorce is the husband's pledge before a Religious Court session which is one of the reasons for the breakup of a marriage according to the procedure certain way. In practice, in Islamic society in Indonesia, for the sake of valid divorce for a husband who wants to divorce his wife, then a valid divorce can only be carried out by the husband in front of the Religious Court. So when viewed from a legal context, as a result of divorce cases that are not submitted to the Religious Courts for Muslim communities who want to divorce, then it is still considered a husband and wife marriage bond. The status of talaq outside the court is invalid, because the divorce is not carried out before a court session and if it is seen that there are more harms than benefits. Then the legal consequences that arise after the divorce is more clearly regulated, so that the obligations and rights that arise after the divorce are more secure and no one feels intervened between the two parties who want to divorce.

Keywords

divorce; fiqh; religious court



I. Introduction

Islam does allow divorce, but Allah hates divorce. Thus, the Prophet implicitly taught Muslim families as much as possible to avoid divorce. And behind God's hatred lies a warning that divorce is very dangerous and has a negative impact on the family. That means, divorce is the last option for married couples when there is no other way out. As contained in the QS Al Baqarah verse 227 which reads:

ا الطَّلَاقُ اللّٰهُ عَلِيْمٌ ۙ {227}

"And if they resolve to divorce, then indeed Allah is All-Hearing, All-Knowing.

If you look at the legality of divorce according to positive law, divorce according to the Compilation of Islamic Law in Indonesia which is regulated in chapter XVI regarding the Dissolution of Marriage in Article 117 which reads that divorce is the husband's pledge before a Religious Court session which is one of the reasons for the dissolution of a marriage according to the procedure. certain way. Likewise, according to the Law of the Republic of Indonesia Number 1 of 1974 Article 39 paragraph 1 states that divorce can only be carried out in front of a Religious Court session after the judge concerned has tried

and failed to reconcile the two parties. And in Article 40 it is also explained that the divorce suit is submitted to the Religious Court.

However, in practice in the Islamic community in Indonesia for the sake of valid divorce for a husband who wants to divorce his wife, then a valid divorce can only be carried out by the husband before the Religious Court. So when viewed from a legal context, as a result of divorce cases that are not submitted to the Religious Courts for Muslim communities who want to divorce, then it is still considered a husband and wife marriage bond.

In this case, the problem of the position of divorce when viewed from the perspective of Islamic jurisprudence, is that there is no explanation regarding the requirements for divorce that must be carried out before the Court. However, the requirements for the imposition of divorce which must be carried out before the Court are fully included in the legal product which is then formed and formulated. So that the right to divorce can be done anytime and anywhere and must be done with certain limitations in accordance with the terms and conditions. Therefore, a divorce which is rendered outside the court is still considered valid. However, according to the Aceh MPU, it is hoped that the Office of Religious Affairs (KUA) can optimize the provision and strengthening of knowledge for prospective married couples in order to prevent arbitrary divorce.

So in this case, the author is interested in examining the issue of the imposition of divorce which is carried out outside the Court that if it is viewed from a fiqh perspective, the imposition of divorce is valid if it is carried out outside the Court with certain conditions and conditions.

II. Review of Literature

Marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal household based on the One Godhead (Amiur Nuruddin, 2004). But in a marriage, not everything is in forming domestic life, the marriage can form a *sakinah*, *mawaddah*, *warahmah* family, surely in that marriage there will be quarrels between husband and wife. Where in the dispute there is a cause for the breakup of a marriage, namely divorce.

One of the causes of divorce is the act of the husband with his pledge which aims to eliminate and release the marriage bond by using certain words or called *talak* divorce (Nasution, 2018). The fiqh perspective explains that divorce *talak* is an utterance with clear words to indicate divorce. Sayyid Sabiq said that *talak* is an attempt to end the marriage relationship itself (Tihami & Sohari, 2014). *Disyari'atkan* divorce is nothing but for the common good for the wife and husband in household matters and divorce is something that is an emergency to be the last way out of various family problems (Az Zuhaili, 2011).

III. Results and Discussion

3.1 Definition of Divorce

In language, divorce can be interpreted to let go or leave. Meanwhile, according to the term divorce is to release the marriage bond and end the marital relationship. Or in religious terms, divorce is the release of marriage bonds, or the breakdown of marital relations. If there is a dispute in a marital relationship, namely between husband and wife, then it would be better to be resolved so that there is no divorce. Because any attempt to trivialize the marital relationship and weaken it is hated by Islam, because it destroys the good and eliminates the benefit between husband and wife.

Islamic law stipulates that the right to divorce belongs to the husband, with the consideration that men in general are naturally better able to think and consider which one is better between separating or surviving as a wife than women. Men are generally more mature in thinking before making decisions than women who usually act on the basis of emotions. Thus, if the right to divorce is given to the husband, it is expected that the occurrence of divorce will be less likely than if the right to divorce is also given to the wife. However, in this case, it does not mean that the wife is not given a way to prioritize separation over her husband, if the situation is very urgent. For example, a wife is abused by her husband, their rights are not considered and so on until they feel they are no longer able to live as a wife.

Divorce outside the Court is a very popular term to refer to the termination of a marriage bond between husband and wife who have not gone through the court process as stipulated in the law. Substantively, talak divorce which is carried out when it has fulfilled the requirements and the pillars is legal according to Islamic law, but does not rule out having to go through a peaceful process, only if the peacemakers appointed from both husband and wife families as mediators fail to reconcile, Islamic law allows the couple to separate.

So in this case the author wants to conclude about divorce outside the court that is a husband's pledge to his wife to break the marriage relationship whose divorce was carried out without going through the court trial process.

3.2 Legal Basis of Divorce talak

a. The Legal Basis of Divorce According to Islamic Law

الطَّلَاقُ مَرَّتَانِ فَإِمْسَاكٌ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَانٍ وَلَا يَحِلُّ لَكُمْ أَنْ تَأْخُذُوا مِمَّا ءَاتَيْتُمُوهُنَّ شَيْئًا إِلَّا أَنْ يَخَافَا أَلَّا يُفِيمَا حُدُودَ اللَّهِ فَإِنْ خِفْتُمْ أَلَّا يُفِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَأُولَئِكَ هُمُ الظَّالِمُونَ {229}

It means: *The divorce (which can be referred) is twice. (After that the husband can) hold well, or let go well. It is not lawful for you to take back what you have given them, unless both (husband and wife) fear that they will not be able to carry out Allah's laws. If you (the guardian) are worried that both of them are not able to carry out the laws of Allah, then both of them are not guilty of the payment (must) be given (by the wife) to redeem themselves. These are the laws of Allah, so do not break them. Whoever violates Allah's laws, they are the wrongdoers. (Surat al-Baqarah: 229)*

This noble verse raises a case that was valid at the beginning of Islam for women, namely that a man has the right to marry his wife, even though he has divorced her a hundred times, as long as it is still in the period of iddah. But when this causes harm to women, then Allah limits raj'i divorce to only three times. He is allowed to refer to his divorced wife in the first and second divorces, but separates them completely in the third divorce.

With this verse, husbands are not allowed to play with the words divorce, either openly or with satire, because both can drop divorce or be considered as the essence of divorce. Thus, Islamic law stipulates divorce as an act that must be avoided from the life of husband and wife.

أَيُّهَا النَّبِيُّ ا تَفْتُمُ النَّسَاءَ لِقُوهُنَّ لِعِدَّتِهِنَّ ا الْعِدَّةُ اتَّقُوا اللَّهَ لِأَتُخْرِجُوهُنَّ بِبُيُوتِهِنَّ لَا يَخْرُجْنَ لِأَاحِشَةً لَكَ اللَّهُ يَتَعَدَّ إِلَّ

Meaning: O Prophet, if you divorce your wives then you should divorce them when they can (face) their (reasonable) iddah and calculate the time of iddah and fear Allah your Lord. Do not take them out of their homes and do not leave them (permitted) unless they are doing an obvious abomination. These are the laws of Allah and whoever violates the laws of Allah, then indeed he has wronged himself. You don't know maybe Allah will do something new after that. (Surat at-Talaq: 1)

In this verse, it is explained that for husbands who divorce their wives during the holy time of intercourse, it is an act that is not commendable because by doing so women will be persecuted, because the period of iddah will be longer. So for husbands who have divorced their wives, they are required to know the period of the beginning of the iddah, as well as the period of its end, because the husband has the right to refer the woman (if the divorce has only been twice), in addition to being obligated to provide a living during the period of iddah.

b. The Legal Basis of Divorce According to Positive Law

Divorce talak is when the husband wants to divorce his wife, the husband must file a lawsuit in court in accordance with the statutory procedures. As for filing a divorce suit to the Court, Government Regulation Number 9 of 1975 Article 14 explains: "A husband who has entered into a marriage according to the Islamic religion, who will divorce his wife, submits a letter to the Court at his place of residence, which contains a notification that he intends to divorced his wife accompanied by reasons and asked the Court to hold a hearing for that purpose.

Based on Article 117 of the Compilation of Islamic Law regarding the fall of divorce, it explains that divorce is the husband's pledge before a Religious Court session which is one of the reasons for the dissolution of marriage in the manner referred to in Articles 129, 130, and 131. Then in the Law of the Republic of Indonesia Number 1 of 1974 Article 39 also emphasized that divorce can only be carried out in front of a court session after the court concerned has tried and failed to reconcile the two parties.

From some of the descriptions above regarding the legality of divorce based on several statutory regulations, that when a husband and wife want to divorce, it must be submitted to the Court because it is considered valid according to law. In this case, both the husband who wants to file for divorce and the wife who files for divorce, for the sake of its validity, it must be submitted to the court. As long as there is no filing of a lawsuit to the court, the husband and wife who want to divorce are still considered to be in a marriage bond.

3.3 The Laws of Divorce

Judging from the side of the benefit and harm, then there are several laws of divorce, namely:

a. Required

If there is a dispute between husband and wife then there is no way that can be taken except by bringing in two judges who take care of both cases. If the judge considers that divorce is more for them, then that's when divorce becomes obligatory. So, if a household does not bring anything but evil, disputes, quarrels and even plunges both of them into disobedience, then divorce is obligatory for him at that time.

b. Makruh

Divorce is legally makruh if there are no demands and needs. There are some scholars who say about this makruh divorce, there are two opinions:

1. That the divorce is forbidden, because it can cause harm to himself and his wife, and does not bring any benefit. Divorce is haram, just like the act of destroying or wasting wealth for nothing.
2. That divorce is permissible, even though divorce is hated because it is done without any demands and reasons that allow it. And because such divorce can annul a marriage that results in goodness which is sunnah, so that divorce becomes makruh law.

c. Mbah

The divorce is permissible if there is an intention/need. Good because of the bad temper of the wife and her association, and because the wife is harmed without achieving the goal. For example, because of the bad morals of the wife and the lack of good relationships which only bring harm and keep them away from the purpose of marriage.

d. Sunnah

Divorce is a sunnah if at the time the wife ignores the rights of Allah SWT that has been required of her, for example praying, fasting and other obligations, while the husband is also no longer able to force it. Or his wife no longer maintains her honor and chastity. This might happen, because the woman has a lack of religion, so it is possible that she cheated on her and gave birth to a child as a result of an affair with another man. In such conditions it is permissible for her husband to narrow his space and movement.

e. Mahzhur (Forbidden)

The divorce done by Mahdzhur is the divorce that is done when the wife is menstruating. The Egyptian scholars have agreed to forbid it. This divorce is also known as bid'ah divorce. It is called bid'ah because the husband who divorces violates the Sunnah of the Prophet and ignores Allah's commands.

3.4 Pillars and Terms of Divorce

Wahbah Az Zuhaili explained that the scholars differed in determining the pillars of divorce. According to Hanafiyyah, there is only one pillar, namely lafadz which shows the meaning of divorce itself, both linguistically and in Syara'. However, according to Malikiyah, there are four pillars: the first who has the authority to impose divorce, namely the husband or his representative, the guardian of a small child. Second, Al Qasdu (intention or will) carries out divorce, either openly (sarih) or kinayah (satire). If a husband calls his wife tahirah, but it is said taliqah then in this case it is not considered as divorce,

because he does not have the desire/will to do it. Third, there is a woman who has been divorced, that is, it must be her own wife, not another woman. the divorce is not considered to have fallen. Fourth, there are lafadz talak both in sarih and kinayah. In the view of Syafi'iyah and Hanabillah the pillars are divided into five, namely husband, wife, sighat, al region (power/authority), and Al Qasdu.

For a divorce to be valid, the husband who renders the divorce is required to be reasonable, mature, and of his own free will. This means that there is a will in the husband to drop the divorce and it is imposed on his own choice, not forced by others. Then for the divorced wife, it is required that the wife is still under the protection of her husband's power, the position of the divorced wife must be based on a valid marriage contract.

3.5 Kinds of Divorce

a. Divorce that Falls Directly and does not Fall Directly

Divorce that is handed down directly is when it is pronounced it is not hung or associated with certain conditions and is not postponed until a future time. However, the husband who drops the divorce intends to drop the divorce when he pronounces the word divorce. For example, the words of a husband to his wife, "*I divorce you*". The law of divorce like this is legal if the husband has fulfilled the requirements to be allowed to divorce the wife who is allowed to divorce.

Divorce which does not fall directly means that which is hung with certain conditions is the divorce which is imposed by the husband under certain conditions. For example the words of a husband to his wife, "If you go to that place, I divorce you." This kind of divorce is legal if it has fulfilled several conditions. First, the case doesn't exist yet, but it might happen at a later date. Second, when the divorce is imposed, the woman who is divorced is a woman who is legal to divorce, that is, when she is under the responsibility of her husband. And third, divorced women are legal to be divorced when they meet the requirements.

b. Divorce in accordance with the Sunnah and Bid'ah

The divorce according to the Sunnah is the divorce that is imposed according to what is ordered by religion. For example, the divorce that is handed down by a husband to his wife who has had intercourse with one divorce and when the wife is clean from menstruation, but has not been interfered with. This is in accordance with the words of Allah SWT:

الطَّلَاقُ انْ كُتِبَ عَلَيْكَ انْ تُطَلِّقَ امْرَاَتَكَ فَطَلِّقْهَا طَلِّقًا مَّعْرُوفًا {229}

Meaning: The divorce (which can be referred) is twice. (After that the husband can) hold well, or let go well (Surat al-Baqarah: 229)

The meaning of this verse is that the divorce that is prescribed by religion is the divorce that is imposed first, then reconciled, then followed by the second divorce, and then referred again. Then, the husband who gave the divorce has a choice between referring her back properly or divorcing her in a good way.

Bid'ah divorce is divorce that occurs in conditions that are forbidden. For example, a husband who drops talak or divorces for the first time with three words of divorce or divorces his wife who is menstruating or postpartum or divorces his wife in a holy condition and has intercourse with him while the condition of the woman is not clear whether she's pregnant or not.

c. Divorce Raj'i and Divorce Ba'in

Divorce can be divided into 2 types, namely: *first* Raj'i divorce is a divorce that still allows the husband to refer to his ex-wife without a new marriage contract. The first and second divorces handed down by the husband against his wife who had been interfered with and not at the request of the wife accompanied by ransom (iwad) while still in the iddah period. Then the second, namely talak ba'in is a divorce that does not allow the husband to reconcile with his ex-wife, except by entering into a new marriage contract. There are 2 kinds of talak ba'in, namely ba'in sughra and ba'in kubra. Ba'in sughra is divorce one or two that is handed down to a wife who has never been collected, divorce one or two that is imposed at the request of the wife with a ransom payment (iwad) or divorce one or two that is dropped on a wife who has never been collected, not at her request and without payment of iwad after the iddah period has expired. Then ba'in kubra is the divorce that has been dropped in the amount of three. A husband who has divorced three times may not refer to his ex-wife, except after the ex-wife has married a man and has had sexual relations with her new husband.

3.6 The Legal Consequences of Divorce Done Outside the Court

a. Consequences of Divorce Out of Court on Divorce Status

Basically in Islam justifies a husband who will divorce his wife, her husband is only enough to say in front of his wife or someone else then talaq falls, but in life as a state you must obey government regulations, as long as it does not conflict with Islamic law itself, because it is obedient to the government. , is part of the obligations as Muslims. The family is a basic family unit consisting of a husband, wife and children (Batubara, 2019). The government forms a regulation on divorce with the aim of maintaining order in the administration, such as the problem of registering marriages, the birth of children and making it difficult for divorce. This is basically in accordance with the principles of Islamic law regarding divorce, namely making it difficult for divorce to occur.

b. Consequences of Divorce Out of Court for Wives

Divorce carried out outside the court session will have a negative impact on the wife, because divorces carried out outside the court trial do not have a divorce certificate that has legal force, so the widow remarries will get difficulties with the Office of Religious Affairs. Because every widow who wants to remarry must have a divorce certificate from the Court, so she takes the route of marrying a second time through underhand marriage. Furthermore, after the divorce (divorce out of court), the wife does not get her rights after the divorce, such as a living during the iddah period, a place to live, clothing, food.

c. Consequences of Divorce Out of Court for Husband

The consequences of divorce outside the court not only affect the wife but also affect the husband. Similar to the wife, the husband who divorces outside the court will have difficulty when he wants to remarry another woman. Divorce carried out outside the Court will not have a valid divorce certificate and have permanent legal force, so if you want to remarry through the Office of Religious Affairs it will not allow it until there is a valid letter from the Court, eventually taking the path of underhand marriage.

d. Consequences of Divorce Out of Court for Children

For a child, a separation (divorce) of both parents is something that can interfere with the mental condition, which was the child was in a harmonious and loving family environment from both parents, suddenly in a family full of problems which later eventually have to live with one of the figures either father or mother.

Divorce carried out outside the court session will affect the mental condition of the child, because it often happens that the father does not provide a regular and fixed amount of income. Divorce that is carried out outside the Court has no legal force, so it cannot force the father or mother to provide a regular basis either from the time to provide a living or from the amount of material or maintenance provided. If the divorce is carried out in the Religious Courts it will be determined by the Court, in accordance with Article 156 point f of the Compilation of Islamic Law.

The consequences of divorce that must be carried out by the husband when the divorce has fallen are as regulated in Article 149 of the Compilation of Islamic Law which states that *first*, the husband is obliged to give a proper mut'ah to his ex-wife, either in the form of money or goods, unless the ex-wife is qobla al dukhul. Second, providing a living, food and kiswah to the ex-wife during the iddah. unless the ex-wife has been sentenced to divorce ba'in or nusyuz and is not pregnant. And thirdly, paying hadhanah for their children who have not yet reached the age of 21 years.

Then Articles 150, 151, and 152 state that ex-husbands have the right to refer to their ex-wife who is still in the iddah period. During the iddah period, the ex-wife is obliged to take care of herself, not to accept a proposal and not to marry another man. And the ex-wife has the right to receive iddah from her ex-husband, unless she is nusyuz.

3.7 The Status of Divorce Done Outside the Court

In essence, divorce is pronounced by a husband to his wife in Islamic law whenever and wherever a husband makes a vow of divorce, at that time a divorce occurs and is considered valid. This is different from the prevailing laws and regulations in Indonesia, where a divorce is considered valid if it is submitted before a court hearing. Divorce that is handed down or pronounced through a decision or in a court hearing is intended to defend the rights and obligations of husband and wife legally, as well as provide legal education so that divorce is not arbitrarily carried out without any process and evidence.

Divorce outside the Court is indeed not in accordance with the provisions of the legislation, namely divorce is legal if it is carried out before a court session. Thus, the practice of divorce by people outside the Religious Courts can be declared invalid according to the legislation in force in Indonesia because it is unfounded and not in accordance with the provisions stipulated in the Marriage Law and the Compilation of Islamic Law. Therefore, as a good citizen, you should obey the applicable government regulations as long as they do not conflict with Islamic law. Even though divorce outside the court is not illegal, if you look at the impacts, divorce outside the court that occurs in the community will be legally makruh because it causes a lot of harm.

The positive law that applies in Indonesia is used as a guideline for breaking up marriages, because the legal consequences that arise after the divorce are more clearly regulated, so that the obligations and rights that arise after the divorce are more guaranteed. Divorce or divorce carried out in court is not a mandatory requirement for divorce, but it becomes mandatory because it is feared that there will be parties who are wronged. Meanwhile, the law of oppressing other people is not allowed.

Divorce in the Court also pays attention to the rights and obligations of husband and wife to carry out the legal consequences they get after divorce. Because a good separation is when you have understood the iddah, mut'ah, madiyah, and children. Meanwhile, if the divorce is done at home or wherever the divorce is done outside the court, then no one can guarantee and know the issue of mut'ah, madiyah and so on.

Therefore, it can be understood that the legal status of the divorce done outside the Court is invalid, because the divorce which was carried out was not before a court session and if it is seen that there are more harms than benefits. Then the legal consequences that arise after the divorce is more clearly regulated, so that the obligations and rights that arise after the divorce are more secure and no one feels intervened between the two parties who want to divorce.

IV. Conclusion

1. Divorce outside the Court is a husband's pledge to his wife to break the marriage relationship whose divorce was carried out without going through the court trial process as regulated in the legislation.
2. The status of talaq outside the court is invalid, because the divorce is not carried out before a court session and if it is seen that there are more harms than benefits. Then the legal consequences that arise after the divorce is more clearly regulated, so that the obligations and rights that arise after the divorce are more secure and no one feels intervened between the two parties who want to divorce.

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