

The Role Of Judges In Reducing Divorce Cases In The Religious Court Of Luwuk In The View Of Maqashid Sharia

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ABSTRACT

This thesis deals with the role of judges in reducing divorce cases at Luwuk Religious Court in the view of Maqashid Sharia. The description is based on the problems (1) What is the role of the judge in the divorce cases at Luwuk Religious Court? (2) What is the cause of divorce in Luwuk Religious Court? The study used qualitative methods with data collection techniques using observation, interviews, and documentation. Data analysis techniques were data reduction, data presentation, data verification, and drawing conclusions.

The results showed that: (1) The divorce process at the Luwuk Religious Court consisted of contested and talak. The role of the judge is to make mediation effective by acting as a facilitator in helping to resolve problems or disputes to reach an agreement that benefits the disputing parties so that maximum results are achieved. (2) The causes of divorce at the Luwuk Religious Court seen from the various divorce cases registered at the Luwuk Religious Court can be grouped as follows: first, the factor of adultery by one party, 2 cases; second, alcohol addiction, 12 cases; third, abuse/drugs consumption, 3 cases; fourth, gambling, 5 cases; fifth, leaving the partner alone, 213 cases; sixth, imprisoned, 4 cases; seventh, polygamy, 13 cases; eighth, domestic violence, 71 cases; ninth, physical disability, 1 case; tenth, continuous disputes and quarrels, 297 cases; eleventh, forced marriage, 3 cases; twelfth, apostasy, 7 cases; and thirteenth, economic crisis, as many as 7 cases. Meanwhile, from the aspect of filing for divorce, there are 58 cases of sued divorce and 32 cases of talak divorce.

The implications of this research are: 1) It is hoped that the judges who acts as the mediator judges will further improve their ability and knowledge in trying to resolve divorce cases at the Luwuk Religious Court, so that they no longer face language constraints when communicating with litigants during the trial. 2) Litigants who have problems in the family should not directly file for divorce in the Religious Courts before trying to resolve them, discussing them within the family. If the problems cannot be resolved amicably and they cannot find the best solution, then file a lawsuit in the Religious Court as the last solution.

1. Introduction

Marriage has a significant role in the reality of human life. Through marriage, the household can be upheld and fostered in accordance with religious norms and the order of social life. In a household, a man and woman (husband and wife) gather in

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order to get offspring as lineage successors. The people who are in the household are called "family." (Abdul Manan, 2008) Each marriage is recorded according to applicable regulations. Based on Article 2 of Law Number 1 of 1974, legal marriage is carried out according to the religion and beliefs of the marriage parties. In addition, it must also be recorded based on the applicable laws and regulations. Thus, following the Article mentioned above, marriage implementation according to each religion and belief is an absolute requirement to state whether or not a marriage is valid. With the formulation of Article 2 paragraph (1), there can be no marriage outside the law of religion and belief and it should not contradict or be stipulated otherwise in Law Number 1 of 1974. The provisions of the law and its explanation mean that the rules regarding marriage which have become separate laws in several religions will still exist as long as they are not contradictory with the law. Many reasons make a marriage disharmonious, leading to continuous fights that can no longer be reconciled. Because of the constant bickering and uncomfortable atmosphere, many married couples decide to separate or divorce. Judges, as law enforcers and officials who carry out the duties of judicial power, are given the autonomy of freedom in carrying out judicial functions in Indonesia. It is strictly guaranteed in the constitution, as contained in Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia, that judicial power is an independent power to administer justice in order to uphold law and justice.

The first step the judge takes in hearing every case submitted is to try to reconcile the litigants. The judge's role of reconciling the litigants is more important than the function of deciding on a case. Efforts to reconcile the litigants are a top priority and are seen as the fairest in ending a case because it means no one loses or wins, and the establishment of kinship and harmony remains (Abdul Manan, 2006). It is different if the dispute is resolved through litigation. Even though the judge's decision has been considered in such a good way to provide the fairest possible justice because each party has different interests, the decision still creates dissatisfaction for the losing party. Therefore, resolving disputes in peace will be better because neither party will feel defeated, and more importantly, both can maintain their honor. In connection with the existence of PERMA No. 1 of 2016, mediation is expected to be able to mediate and reconcile the dispute parties so that they can maintain peace in the household. This PERMA places mediation as part of the process of resolving cases submitted by the parties to the court. Judges do not directly resolve cases through the judicial process (litigation). Mediation is an obligation the judges must take before deciding cases in court (Shahrial Abbas, 2009).

Based on the background above, the main issues of this research are 1) what is the role of judges in reducing divorce cases at the Luwuk Religious Court in the view of Maqasid Sharia? Based on the main issue, the problem boundaries or sub-problem that becomes the focus of this research is the role of judges in divorce cases at the Luwuk religious court. 2) What causes divorce at the Luwuk Religious Court?

2. Literature Review

2.1 Theory and Application of Maqashid Shariah

Muslims believe Islamic law originates from divine law. The source of law in Islam is the Qur'an and the limited *sunnah* of the Prophet, while legal problems continue to increase along with developments in human life. For this reason, efforts to explore and find legal answers (legal *istimbath*) must continue to be carried out by Islamic jurists.

Sociologically it is recognized that society is always changing. Those changes can affect the mindset and values that exist in that society. The more advanced the way of thinking of a society, the more open it will be to accept advances in science and technology. Furthermore, the more advanced science and technology, the more likely legal problems will arise and require answers. The effort to find the answers uses *ijtihad*.

Generally, the law in the Qur'an is divided into matters of *ibadah* (worship) and *muamalah* (social affairs). Worship is *ta'abbudi* in nature, which means humans should not perform *ijtihad* on it. As for *muamalah*, Allah gives the flexibility to interpret his verses broadly as long as they do not violate the principles set by Allah SWT.

This division is intended to emphasize problems that do not accept change and development and those that accept it with various methods of *ijtihad* and considerations applied. From the perspective of Islamic legal thought (*ushul fiqh*), the received *ushul* scholars apply various methods in carrying out legal *ijtihad*. These methods include *qiyas*, *istislah*, *istishab*, dan *'urf* (Abd. Wahab Khallaf, 1972).

The *mujtahid* (people who perform *ijtihad*) must know the purpose of law in order to develop legal thought in Islam in general and answer contemporary legal issues which are not explicitly regulated in the Qur'an and Hadith. Furthermore, the purpose must be known in order to find out whether a case can still be applied based on one legal provision or, due to a change in social structure, the law cannot be applied. Thus, as stated by Satria Effendi, "Knowledge of *Maqashid Sharia* is the key to the success of a *mujtahid* in his *ijtihad* (Satria Effendi, 1996).

2.2 The Role of Judges in Legal Discovery and Law Creation in Resolving Cases in Court

Judicial power with its judges is regulated in chapter IX of the 1945 Constitution, articles 24 and 25. The elucidation of the 1945 Constitution states that the Republic of Indonesia is a state of law, and the consequence is, according to the Constitution, there must be an independent judicial power which means free from government influence. In connection with that, there must be a guarantee in the law regarding the position of judges. The existence of a judicial power (judicial body) which is independent in carrying out its duties indicates that the Republic of Indonesia is a state of law.

Suppose the judge decides a case based on national laws. In that case, he has to apply the contents of the laws without having to explore legal values in society because the national laws are made by lawmakers (DPR and the government) on behalf of the Indonesian people. However, suppose the law is a colonial product or a product of the Old Order era. In that case, the judge can interpret it so that it can be applied following the current situation and conditions. In this case, the judge must explore the legal values that live in society. Likewise, when the law/statute is unclear or has not been regulated, especially in the case of the enactment of customary law or unwritten law, the judge needs to explore legal values in society. The judge must find the law compatible with the needs of the era (Supreme Court RI, 1994). A good decision must be able to fulfil two requirements, theoretical and practical needs. Theoretical needs emphasize legal facts and their considerations, which means the decision must be accountable from the point of view of legal science, not infrequently with decisions that form jurisprudence that can determine new laws (which are sources of law). Practical need is that with the decision, it is hoped that the judge can resolve existing legal issues/disputes and be acceptable to the disputed parties and society in general because it is considered fair, correct and based on law. Because of that, the judge's task becomes more difficult because he will determine the content and face of law and justice in our society. He is a digger of legal values and a sense of justice for society and is expected by society to be the last bastion in enforcing law and justice in the country. In fact, when examining and deciding cases, judges often face a situation where the written law is not always able to solve the problem at hand. In fact, oftentimes, the judge has to find the law himself and/or create it to complement the existing law. In deciding a case, the judge must have his own initiative in finding the law because the judge may accept a case on the grounds that the law does not exist yet, is incomplete, or is still vague and faint.

2.3 Overview and Legal Basis for Divorce

Allah created the relationship between men and women through marriage as a guarantee for the preservation of the human population on earth. In simple terms, marriage can be interpreted as a set of rules whose concrete form is the togetherness of men and women under the same roof so that both can meet certain needs, including biological, individual, social, economic, and cultural (Abdul Ghani Abud, 2004). Islam is a religion that is very tolerant in determining problems in marriage. Basically, marriage is meant to be forever until the death of a husband or wife. This is what Islam wants. However, in certain circumstances, there are things that require a marriage to be dissolved, meaning that if the marriage relationship continues, harm will occur. In this case, Islam justifies the dissolution of marriage as the last step in efforts to continue the household. Dissolving the marriage in this way is a good way out.

Divorce is the breaking up of a family because one or both partners decide to leave and stop carrying out their obligations as husband and wife. Divorce does not just happen without going through a series of legal procedures through the judiciary, either through religious courts for Muslims or district courts for non-Muslims. Divorce according to Subekti is the abolition of a marriage status with a judge's decision or the demands of one of the marriage parties. With a divorce, the marriage between husband and wife is null and void. However, Subekti does not state the notion of divorce as an abolition of marriage by death or commonly referred to as divorce by death (Muhammad Syaifudin, 2012).

Running a household is not as easy and simple as everyone wants and hopes. Many small things and trivial problems up to serious matters are considered to be no longer able to be resolved and there is no way out. Divorce is neither a human will nor a way out. No one wants it because marriage is a very sacred thing and takes place once in a human's lifetime to build a peaceful household. If a marriage does not give happiness and peace or even causes problems and is far from God's pleasure, then it is understandable that the marriage must be terminated. However, divorce is not that straightforward because it is not allowed to be done only for slight commotions or minor problems in the marriage. Divorce is only permitted if there are very complex or fundamental household problems (Save M. Dagun, 1990). On the one hand, divorce is actually permissible in

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Islam, but on the other hand, marriage is oriented as a forever and eternal commitment. When there is a dispute between the two parties, Islam does not directly encourage husband and wife to end the marriage, but deliberation should be carried out first. Divorce can only be carried out before a court session after the court concerned has tried and failed to reconcile the two parties. In order to carry out a divorce, there must be sufficient reasons that the husband and wife will not be able to live in harmony as husband and wife. In the case of divorce, mothers experience more concrete difficulties in dealing with children, while fathers experience difficulties at the thinking level, reflecting on how to handle this situation.

When divorce cases occur, it turns out that the father's and mother's parenting are different, for example, in giving attention, friendliness, and freedom to their children. However, this difference is not quaint because mothers and fathers are different even in a complete family. The image that the mother character is closer to her child causes a tendency for mothers to be burdened with caring for children in divorce cases. On the other hand, because the father figure is portrayed as less close to the children, even in divorce cases, fathers rarely take risks. However, when fathers and mothers divorce, there is a tendency for different attitudes among the fathers and mothers.

3. Methodology

3.1 Types of Research

According to Ari, the research method is a general strategy adopted in collecting and analyzing data to solve the problems faced (Donal Ari, 1999). Therefore, discussing a problem, especially in thesis research, refers to the object or target that will be investigated so that there is no confusion in the discussion of the problem. The type of research that the authors used in this study is qualitative research (Imron Arifin, 1996) because the authors were very confident in the validity of the data and research obtained. Based on this description, it can be understood that qualitative research is research that produces data in the form of information from informants through interviews which are corroborated by data describing the results of observations of researchers on the problems studied. This is in line with the characteristics of qualitative research as described by Bogdan and Biklen in Ezmir as follows: (1) Naturalistic, with process; (2) Descriptive Data; (3) Dealing with process; (4) inductive; and (5) Meaning.

3.2 Data, Data Sources, and Data Collection Techniques

Data is essential for completeness in compiling a thesis because research data is the primary source of obtaining an overview of the problems studied. Research data can be divided into primary and secondary data (Winarno Surakhmad, 2000). The use of appropriate methods in a study is necessary for determining accurate and relevant data collection techniques and tools. Moleong stated the use of relevant data collection techniques and tools enables objective data to be obtained (Lexy J. Moleong, 2002). Furthermore, to obtain objective data, this study used the following data collection techniques: Observation, Interview, and Documentation (Irawan Suhartono, 2002).

4. Research Results

4.1 Profile of the Luwuk Religious Court

The Luwuk Religious Court was formed based on the Decree of the Minister of Religious Affairs of the Republic of Indonesia No. 87 of 1966, dated December 3, 1966, and the Letter of the Head of the Makassar Religious Courts Office No. Ac/2/168, dated May 18, 1968. With the change in local government status, in which the Banggai Swapraja Region became a Banggai level II area with the Decree of the Minister of Religious Affairs of the Republic of Indonesia No. 87 of 1966 dated December 3, 1966, and the Letter of the Head of the Makassar Religious Courts Office No. Ac/2/168, dated May 18, 1968, the Luwuk Religious Court was opened and established starting on June 17, 1968. The birth of the Luwuk Religious Court in Banggai district added to the development of the history of justice in this Republic. Hence, its journey always goes hand in hand from time to time following developments era. In the course of the history of Islam in Banggai Regency before and until the colonial era, called the Banggai Kingdom, the Tahkim institution was in effect from the early days of Islam entering the Banggai Kingdom, even though Islamic society had not yet been officially formed. At that time, when a dispute occurred between the Muslims, upon mutual agreement, the Religious Leaders or the District Imam were asked for their services to resolve the dispute. The development of Islam in the Banggai Kingdom was marked by the emergence of Islamic communities. Among the religious leaders, some appeared as holders of authority and power spiritually and politically, even in a very simple sense, but had the authority to adjudicate. This elite group has the authority to appoint certain figures to run affairs. When the Islamic kingdoms were established in the archipelago with the existence of a structure that took care of the Muslims' religious interests, the *tauliyah* of the Imam began to be applied. With its enactment, administratively, it will make the existence of the Religious Courts and their legal products more abstract and stronger. At the same time, the willingness

and submission of the Islamic community to Islamic law, especially in the field of Islamic criminal law and Islamic social norms, is also getting stronger, including the Islamic community in the kingdom/district of Banggai.

Initially, the area that is now known as Kabupaten Banggai stood for several kingdoms, one of which was the Kingdom of Banggai. The development of the Kingdom, which was centred on the Banggai Islands, became the most prominent of several existing kingdoms. Around the 13th century, during the golden age of the Singosari Kingdom centred on Java, especially when the Singosari Kingdom was under the reign of King Kartanegara in 1288-1298, the Banggai Kingdom has been known in Indonesian history as part of the Singosari Kingdom. Likewise, during the Majapahit Kingdom led by Hayam Wuruk (1351-1389), the Banggai Kingdom was known as Benggawi, and became part of the Majapahit Kingdom. Strong evidence that the Kingdom of Banggai has been famous since the Mojopahit era with the name Benggawi can be seen from what was written by a Mojopahit poet named Mpu Prapanca in his book "Negara Kartanegara". Around the 1580s, the Banggai Kingdom began to expand its territory to the land of Banggai, which was ruled by a Warlord named Sultan Babullah from the Kingdom of Ternate. For a long time in the Kingdom of Banggai, there has been a known Democratic Government structure. The top leader is a king. In carrying out his government, the king is assisted by executive staff or council of ministers known as Commission four.

4.2 The Role of Judges in Divorce Cases at the Luwuk Religious Court

Based on the results of research in the field, it was obtained that, in general, there were two types of divorce cases handled by the Luwuk Religious Court: contested and *talak* divorce. A contested divorce is a divorce filed by the wife against her husband before a religious court based on certain reasons regulated in the law. Meanwhile, a *talak* divorce is a divorce filed by the husband before the court against his wife. The reason for accepting a lawsuit or divorce application is one of the parties (husband/wife) not being able to carry out his duties and obligations properly.

The Luwuk Religious Court also provides legal assistance services for both parties who do not know about the divorce procedure called Posbakum. Posbakum is an institution providing legal services facilitated by the state through the religious courts and is tasked with providing free legal assistance to justice seekers who cannot afford it. The Posbakum officers can be advocates, law graduates and shari'ah scholars who are members of the advocate professional organization or Legal Aid Institute (LBH) of higher education in the jurisdiction of the Luwuk Religious Court. The explanation above is in line with the theory that the researchers use as a reference and an analytical knife of this research that the handling of the divorce process at the Luwuk Religious Court is based on the procedures in the proceedings at the Court, namely having to go through a process, for example, if the plaintiff wants to file a divorce suit at the Luwuk Religious Court then he must file a lawsuit, and if the plaintiff and the defendant need legal assistance, the Luwuk Religious Court provides a Legal Aid Post (POSBAKUM).

Regarding the efforts made by the judge in mediating the parties to the case, especially divorce cases, Mrs. Nurmaidah, as a Judge at the Luwuk Religious Court, said that judges provide advice regarding disputed matters, the objectives and the benefits. Each party is given different advice depending on the problem. Furthermore, we also explain that, in divorce cases, the most difficult thing is the problem of children. The children will be the victim. The problems can be properly discussed until the parties find common ground. However, sometimes the litigants insist that the case should be decided immediately without mediation because, according to them, even mediation will not change the outcome. This situation happens in almost every case that the judges handle. However, they continue to mediate to provide a solution so that each party gets a fair and acceptable decision. The interview above explains that divorce cases are a matter of the egoism of each litigant. The problem of egoism is very individual, so it is very difficult to suppress. In the household of a couple who wants to divorce, the highly complex problem is that of egoism. This was very difficult to reconcile, plus, in mediation, the parties' household problems had reached their peak. Like glass, it has broken. So that the parties, when litigating in the Religious Courts, they already intend to divorce. This kind of thing is such a major reason that mediation fails.

4.3 Causes of Community Divorce in the Luwuk Religious Court

Based on the research results at the Luwuk Religious Court, documentation data was obtained regarding the causes of community divorce throughout 2021. Based on the lawsuit and divorce application letters submitted to the Luwuk Religious Court, the factors that cause people to file lawsuits or divorce applications are very diverse. We have classified it into several

types of lawsuits or requests for divorce, including factors of adultery, drunkenness, madness, gambling, and leaving one of the parties. From this description, it can be understood that the factors causing community divorce, which were submitted to the Luwuk Religious Court, included factors of adultery, drunkenness, madness, gambling and leaving one of the parties.

5. Conclusion

The divorce process handled by the Luwuk Religious Court consists of contested divorces and talak divorces. A contested divorce is a divorce filed by the wife against her husband before the court for reasons that are in accordance with Islamic law and statutory provisions. Meanwhile, talak divorce is a divorce filed by a husband against his wife before the Religious Court. The role played by judges in handling divorce cases at the Luwuk Religious Court is to streamline mediation by acting as a facilitator in helping resolve problems or disputes to reach an agreement that benefits the disputing parties so that satisfactory results are achieved. It is conducted by reading a resume of a case or a letter of complaint to find out the substance of the dispute between the two litigants and gives an understanding to both parties that whatever happens, human relations must be maintained as well as giving advice on the issues of disputed matters, the purpose and the benefits. Besides that, the Luwuk Religious Court has made several efforts. In the mediation process, the mediator judge first explains the purpose of holding mediation to the litigants and provides facilities and means for carrying out mediation.

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