

The Concept Of Fasakh Nikah In Fiqh Shafi'iyah And Its Application Bireun Shar'iyah Court

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Abstract

Marriage is oriented towards happiness with the concepts of sakinah, mawaddah and mercy, but in fact there is a lot of disharmony that ends in divorce and fasakh. As happened in Aceh, especially in Bireun, in 2022 cases of fasakh marriage by wives reached 419 cases. This study is focused on answering how the concept of fasakh marriage according to the perspective of Syafi'iyah fiqh and how it is applied at the Syar'iyah Court of Bireuen. This research is a field research. This research is a qualitative research that is descriptive-analytical with a regulatory approach. The data sources are divided into primary sources, namely all references that are directly related to the problem, and secondary sources, namely all references that are not directly related to the problem but support the perfection of this research. The results of the study concluded that the concept of fasakh nikah according to the perspective of Syafi'iyah fiqh is (1) fasakh due to disability, can be used to perform marriages such as (crazy, leprosy, supak, impotent, genital mutilation, al-qarn, al-ritq), (2) reasons of subsistence, can be submitted for fasakh marriage because it can cause dharar for the wife, (3) fasakh because the husband is unseen, cannot be used as an excuse to perform a marriage and the wife is required to wait for her husband to hear about the husband died, (4) fasakh because the husband is apostate, the act of apostasy in marriage can cancel the contract. As for the fasakh nikah fiqh decisions at the Syar'iyah Court of Bireuen, some are relevant to the concept of fasakh according to Syafi'iyah and some are different from the concept of syafi'iyah.

Keywords: Fasakh Marriage, Fiqh Syafi'iyah, Syar'iyah Court

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INTRODUCTION

Divorce in fasakh for the wife can be done if the husband does not carry out his obligations which can result in the wife's rights not being fulfilled or the husband's actions which can cause harm to the wife. Therefore, if the wife wants to escape from the actions of her husband that she does not like, then the wife can apply for fasakh to court. A wife have the right to file for divorce by way of fasakh which literally means "revoke" or "remove", the meaning is: divorce caused by the emergence of things that are considered heavy by the husband or wife or both so that they are unable to carry out the life of husband and wife in achieving their goals (Muctar, 1993: 212).

According to Imam Syafi'i fasakh, the marriage relationship is broken (at the request of one of the parties) by a religious judge because one party encounters reproach on the other party or feels cheated on matters that were not known before the marriage took place (Thalib, 1986: 74). According to the Syafi'i School, fasakh is all termination of the husband and wife's bond that is not accompanied by divorce, either one, two and three divorces (Syafii, 2007: 563). In explaining the difference between divorce and divorce, Imam Syafii explained that, if the pronouncement does not come from the husband, even the husband maintains the marriage but is divorced by a third party (judge), divorce due to the wife's initiative, this is categorized as fasakh. Madzhab Syafi'i argues that each party from husband and wife have right khiyar with because disabled Which Possible happened to both, namely madness, hair loss, and leprosy (Syalthut & As-Sayis, 2016: 197).

In positive law in Indonesia there are sources that can be used as guidelines by judges when resolving divorce issues (fasakh), including Article 116 letter f explaining that between husband and wife there are constant disputes and quarrels and there is no hope of living in harmony again in the household (Aulia, 2008: 36). When there is a dispute between husband and wife, either caused by the husband or by the wife, and the dispute cannot be repaired, then both or one of them can file for divorce in court. Based on this article, the wife can file a fasakh lawsuit with the Religious Court (Syar'iyah Court) against her husband. Fasakh is a way to end a marriage that is carried out by a court decision.

The phenomenon of divorce that has occurred in society so far is very concerning, this is because the number of divorces is increasing, especially as a result of divorce lawsuits (fasakh) filed by wives. Meanwhile, in Bireun Regency, based on the author's observations at the Bireun Sharia Court, it was found that there were several cases of divorce sued (fasakh nikah) whose cases had been decided by judges, including the case of husband's apostasy, the defendant did



not provide adequate mandatory maintenance to the plaintiff and her child, there were continuous disputes that were impossible to reconcile, the defendant used illegal drugs/methamphetamine and ended up going to jail, the defendant often said rude words and committed violence against the plaintiff.

RESEARCH METHODS

This study uses a qualitative research method, which is a method that intends to understand the phenomenon of what is experienced by research subjects that starts from facts and data and in their reasoning does not use numbers or statistical formulas (Arikunto, 2002: 11). On the other hand, this research is included in literature research. Meanwhile, the approach will use a regulatory approach, which is an approach that is very important in conducting legal research that refers to statutory regulations (Kurnia, 2009: 162-163).

The choice of this approach is because the object of this research is directly related to legal provisions. It is hoped that an ideal discussion will emerge because basically this regulatory approach is a research approach aimed at examining in depth the legal system. The nature of this research is analytical descriptive, namely research to provide data that is as precise as possible about humans, conditions or hypotheses so that it can assist in strengthening old theories or in the preparation of new theories (Soekanto, 1986: 2).

In line with the methods and types of research used in this study, the sources of data in this study were library data and field data in the form of documents and interviews and observations. The authenticity of the data depends on the data collection method used. Likewise in this study, the data collected will provide appropriate results for the research problem. To find the concept of fasakh and the shift or development of the meaning of fasakh, the researcher obtained data using documentation review techniques, namely studying fiqh books/books as well as laws and regulations and court decisions. To find answers to judges' considerations in resolving fasakh disputes, the author examines the documents of judges' decisions at the Syar'iyah Court in Aceh.

Data that has been collected through documentation review will be classified and analyzed using descriptive qualitative analysis techniques. Furthermore, because this research is descriptive analysis using qualitative methods, data analysis to produce a conclusion tends to use a deductive logic approach, where syllogisms are built based on general matters or field data which lead to specific conclusions (Bungin, 2007: 143) .



RESEARCH RESULTS AND DISCUSSION

1. The Concept of Fasakh Marriage According to Fiqh Syafi'iyah

According to Imam Syafi'i, *fasakh* is all termination of the husband and wife's bond that is not accompanied by divorce, either first or after divorce, (two and three) (Syafi'i, 2007: 563). *Fasakh* is also the breaking of a marriage relationship (at the request of one of the parties) by a religious judge because one party encounters reproach on the other party or feels cheated on matters that were not known before the marriage took place (Thalib, 1986: 74). Damaged or invalid marriage because it does not fulfill one of the conditions or pillars or for reasons that are forbidden by religion. If there are the words *fasakh bai'*, it means the sale and purchase contract is canceled because there is a reason. Whereas *fasakh* marriage is breaking or canceling the bond between husband and wife (Tihami, & Sahrani, 2010: 196).

Imam Syafi'i also believes that termination of marriage relations (*fasakh*) is all termination of the marital bond that is not accompanied by divorce, either one or two divorces. According to Az-Zuhaili in the book of Islamic fiqh, it states that an annulled marriage is a marriage that is not perfectly harmonious, while a *fasid* (broken) marriage is a marriage that has imperfect conditions and has defects after it is carried out. In general, the Syafi'i Madhhab scholars consider the two laws to be the same which can result in the non-implementation of the consequences of a valid marriage (Az-Zuhaili, 2007: 114).

Imam asy-Shafi'i's opinion regarding *fasakh* was stated clearly and in detail by Wahbah Zuhaili, in the discussion it was explained that the choice to annul the marriage arose as a result of disgrace, the fact that conditions were not fulfilled, or allegations that conditions were not fulfilled (Az-Zuhaili, 2008: 31). In Islamic marriages there is the term *khiyar* which according to language is choice or choice, while according to the term is a condition that causes the *aqid* to have the right to decide on his *aqad*. In the case of marriage, the husband and wife have the right to choose between preserving their marriage or ending it with several factors. For example, a husband has a disability or illness in his wife, or vice versa, the wife discovers a defect or disease in her husband, which they did not know about when the marriage contract was made. If they know this when the marriage *aqad*. If this happens, then each has the right to choose between keeping the marriage or canceling it.

According to the Syafi'i school of thought, there are several reasons why a husband and wife can propose to enter into a marriage because there is something that causes harm to one



of the parties and causes the goal of the marriage to not be achieved. As for the implementation of fasakh, it is invalid if it is not based on a judge's decision. Even though the husband and wife are willing to enter into a fasakh marriage without going through a judge (court), it is still invalid. According to al-Nawawi, the fasakh due to defects as mentioned above is carried out after reporting the lawsuit through the judge and the judge determines the fasakh of marriage in front of him (Mas'ud et al., 2022: 43).

2. Application of Fasakh Syafi'iyah Fiqh Marriage at the Syar'iyah Court of Bireuen

a. Fasakh Marriage Decision of the Bireuen Syar'iyah Court Number 181/Pdt.G/2018/MS.Bir

The plaintiff, Popi Utari binti Sufi, 23 years old, Islam, high school education, household work, residence in Gampong Keude Matang Glumpang Dua, Peusangan District, Bireuen Regency. Defendant, Roy Marthin P. Dealy bin Adi Daely, 33 years old, Christian, high school education, self-employed, living in Medan City Jalan Palem 9 Perumnas Helvetia, Helvetia Village, Medan Helvetia District.

Observing the decision in this case, the Bireun Syar'iyah Court judge determined the law, namely deciding on a divorce suit by granting the plaintiff's claim, dropping one ba'in shugra of the defendant RM against the plaintiff PU, establishing child custody on the plaintiff, namely PU. In deciding this case, the judges of the Syar'iyah Court of Bireuen took into consideration, namely guided by the provisions of the fulfillment of the provisions of positive law and also the provisions of Islamic law. In this case, the Judge of the Bireuen Syar'iyah Court reviewed legally that in the Plaintiff's lawsuit it had clearly shown a marital dispute and based on evidence P.1 which had fulfilled the formal and material evidence requirements, it was proven that the Plaintiff's domicile was within the jurisdiction of the Bireuen Syar'iyah Court. The judge's consideration refers to the fulfillment of material law, namely related to divorce rules and also the fulfillment of formal law, namely regarding evidence in the Court.

The judge of the Bireun Syar'iyah Court considered that in this case the elements of formal and material law had been properly fulfilled. Because these elements have been fulfilled, the Judge considers it appropriate to accept the plaintiff's claim in full. In this case the law applies that all the reasons contained in the lawsuit and all answers must be in accordance with the facts at trial. Thus this suitability becomes a basis for the judge in deciding the fasakh marriage case.

The judges of the Bireun Syar'iyah Court in deciding the decision case Number



181/Pdt.G/2018/MS.Bir, were also guided by Islamic legal norms, namely fiqh principles which became the argument in making decisions with consideration of the impact of harm and benefits, namely Rejecting harm is more important than attracting (maintaining) benefit) (Al-Zarqā, 1989: 205). This rule becomes the argument for judges in deciding legal cases, namely "rejecting harm" and "taking precedence over achieving benefit". In the case of divorce, the intention is to refuse harm, that is, families experiencing disputes tend to cause harm to the family and this damage will further cause harm when the marriage ties are continued. Because if a household has been destroyed so that the goodness and affection in it have disappeared and the goals of marriage cannot be achieved by the husband and wife, then divorce is the last way out for both of them to be free from uncertainty and the burden of prolonged physical and mental suffering, which if forced to remain together, it is suspected that it will actually cause problems and damage (mafsadah), even though rejecting mafsadah is more important than attracting maslahah, in accordance with the norms of Islamic law.

Judgment of Fasakh Marriage at the Bireun Syar'iyah Court, when it is related to the concept of fasakh nikah according to Syāfi'iyah fiqh, then according to the researcher's opinion that the Decision of the Sya'iyah Bireun Court Number 181/Pdt.G/2018/MS.Bir, which imposed one ba'in shughra divorce against the Defendant is in accordance with the concept of fasakh according to Syāfi'iyah *fiqh*. This is in accordance with the opinion of Imam Syafi'i that "If a man apostates from Islam while he has a wife, or a woman apostates from Islam while she has a husband, then she is arrested, but is not killed, or loses her mind after apostasy, or joins Harbi country, or flees from an Islamic country so that she is not caught, then all conditions are the same between him and his wife, there is no separation until the wife's 'iddah period has passed before she repents and returns to Islam. If his 'iddah ends before he repents, then the status of the wife becomes ba'in from him, and there is no way for him to return to her, and ba'in status from him is the cancellation of the marriage bond without divorce. Likewise the opinion of Imam Syafi'i that "If one of the husbands is an apostate and the husband has never had sexual intercourse with the wife, then the wife will immediately feel good about him. This bain status is the termination of the marriage bond without divorce, because there is no 'iddah on it " (Asy-Syafi'i, 2015: 342-344).

In Islamic law, the principle is that divorce is not easy to do, because there must be certain reasons that really can be the main basis for husband and wife to break up the marriage relationship. Even though in Islam Allah justifies talaq, Allah also does not like and even hates the



act of talaq. In the case of husband apostasy, according to Syafi'iyah scholars, the apostasy of a husband is the cause of fasakh in a marriage, and when a husband apostates, then the fasakh marriage relationship is immediately, without the need for a judge's decision (Natsir, 2016: 286).

The difference between fasakh marriage due to apostasy according to fiqh and according to marriage law in Indonesia is that in fiqh, fasakh marriage due to apostasy does not need a judge's decision, whereas according to the marriage law all forms of divorce must go through a court process and divorce is valid after a court decision. As is the view of Syafi'iyah scholars that the apostasy of a husband is the cause of fasakh in a marriage, and when a husband apostates, then the fasakh marriage relationship occurs at the same time and does not see whether the cause of apostasy of one of the spouses can cause disputes in the household or not. Whereas in the Compilation of Islamic Law (KHI) in article 116 (h) it is stated that the breakup of a marriage can occur due to "religious conversion or apostasy which causes disharmony in the household" (Natsir, 2016: 287).

b. Fasakh Marriage Decision of the Bireuen Syar'iyah Court Number 530/Pdt.G/2021/MS.Bir

Plaintiff, Nurmaulida Binti M Dahlan, place/date of birth, Darussalam, November 7, 1993, Religion Islam, High School Education, Housekeeping, Address Darul Aman Hamlet, Darussalam Village, Samalanga District, Bireuen Regency. Defendant, Darwis Bin Ibrahim, place/date of birth Samalanga, 15 February 1982, Religion Islam, Elementary school education, Entrepreneur , Address formerly Darul Aman Hamlet, Darussalam Village, Samalanga District, Bireuen District, now at Lambaro Penitentiary, Room Number 28, Lambaro Village, Darul Imarah District, Aceh Besar District.

In deciding this fasakh nikah case, the Judge of the Sya'riyah Bireun Court made this decision after seeing various considerations based on the testimony of the witness and also the evidence presented at the trial. Based on the lawsuit filed by the plaintiff to strengthen the reasons for his lawsuit, the plaintiff provided and submitted documentary evidence (exhibit P.3) in the form of a photocopy of the Sigli District Court Decision Number 292/Pid.Sus/2019/PNSgi, dated January 15, 2020 , which has permanent legal force. The evidence is an authentic deed which explains that the Defendant has been proven legally and convincingly guilty of committing a crime and was sentenced to 11 (eleven) years in prison. The Panel of Judges is of the opinion that evidence P.3 has fulfilled the formal and material requirements of documentary evidence.



On this basis, the panel of judges is of the opinion that the provisions stipulated in Article 19 letter (c) of Government Regulation Number 9 of 1975 in conjunction with the provisions of Article 116 letter (c) of the Compilation of Islamic Law are considered to have been fulfilled.

The Bireun Syar'iyah Court judge explained that in the case of fasakh marriage by Sitri to a husband who was sentenced to 11 years in prison above, there was no need for witnesses anymore, because the panel of judges decided the case based on a copy of the decision of the Sigli District Court which already has permanent legal force and this is in accordance with the provisions of the law regulated in Article 19 letter (c) Government Regulation Number 9 of 1975 in conjunction with the provisions of Article 116 letter (c) Compilation of Islamic Law .

The verdict on the fasakh marriage case because the husband was imprisoned as explained above, when analyzed with the opinion of the Imam of the Mazhab, there is a difference between them, that is, some allow it and some prohibit it. The scholars who forbid fasakh marriage because the husband is imprisoned are from the Hanafi and Syafi'i schools of thought, where according to the view of both that even if the husband has been in prison for a long time, there is no loophole for the wife to sue for fasakh nikah, regardless of whether the wife knows where the husband is imprisoned or not. Because if the husband is sentenced to prison, it is considered temporary supernatural and of course there is clarity about the final limit, then it is not good if the wife responds to this temporary absence by asking fasakh. In this case, according to Imam Syafi'i, the marriage of a husband who is held captive, there may not be a fasakh marriage even though there is news that the husband has broken up. Likewise, according to Abu Hanifah and Syafi'i, a wife may not ask the judge for fasakh for her husband's bad treatment, because the husband's bad treatment can still be eliminated by giving punishment to the husband who commits bad behavior and giving the wife freedom so that she is not forced to obey her husband (Sabiq, 1977: 18) .

In al-Mausu'ah al-Fiqhiyyah al-Kuwaitiyah, one of the most comprehensive fiqh encyclopedias to the author's knowledge, concludes in the discussion of contested divorce because husbands of the unseen, mafqud, and mahbus (imprisoned) are always of the Hanafi and Syafi'i schools of thought not justifying wives asking for divorce for these three reasons (Wuzarah, 1404: 66-67) . It was quoted from the opinion of Imam Ash-Syafi'i, the founder of the Shafi'i school, that the marriage of a husband who is captive cannot be divorced even though the news has broken up. This can be understood, if the husband is captured by the enemy and the news from him has broken up, the wife cannot be disobeyed by the judge, let alone just being



imprisoned where the place is known and the news has not been broken.

The views of the Maliki and Hambali schools above are of course different from the Shafi'i and Hanafi schools. Where in the view of the Maliki and Hambali schools of thought that if a wife may ask for a divorce from a husband who does not want to repent and leave bad deeds such as leaving drugs and often carrying out violent behavior at home. Because this can cause harm to the household. Moreover, a husband who is addicted to taking drugs causes him to be unable to think clearly, his attitude and behavior cannot be controlled. This certainly cannot threaten his religion, soul and children and wife.

According to the researcher's opinion, the judge's consideration in the divorce case was contested in decision number 530/Pdt.G/2021/MS.Bir, it seems clear that the judge's decision on faskh marriage has been proven to fulfill the provisions of the reasons for faskh marriage proposed by the wife, namely because the husband is selfish and cannot be advised and uses drugs which causes him to be imprisoned. The effects of drug use eliminate common sense which can harm children and wives. If it is reviewed in the study of fiqh, the judge's consideration in accepting the wife's lawsuit to carry out a divorce is in accordance with its function as a qadhi's task. Even the judge's consideration for judging that there is a greater benefit when accepting a wife's lawsuit is also in accordance with the rules of fiqh, namely: "The policy of the imam (government) towards his people is based on benefit (al-Suyūṭī, 1997: 202)

In a broader context, the term "al-imam" is not only for those holding power, but can be interpreted as the parties who decide a case which in this case are called judges. Therefore, the judge's decision in deciding the divorce case to sue in decision number 530/Pdt.G/2021/MS.Bir above is a part of an effort to achieve a benefit for a wife.

CLOSING

The concept of fasakh marriage according to the perspective of Syafi'iyah fiqh is (1) fasakh because of disability, can be used to perform marriages such as (crazy, leprosy, supak, impotent, genital mutilation, al-qarn, al-ritq). If one of the spouses is insane, the spouse has the right to apply for fasakh, if both are insane the rights are handed over to the guardian. Regarding leprosy and supak, there is no khiyar if it has not been proven that they have actually contracted the disease. (2) Reasons for subsistence, can be submitted to enter into marriage because it can cause dharar for the wife. Regarding the time, the Syafi'ai school of thought gives a grace period of only 3 days. (3) fasakh because the husband is unseen, cannot be used as an excuse for



entering into marriage and the wife is required to wait for her husband to hear the news of his husband's death. (4) fasakh because the husband is apostate, the act of apostasy in marriage can cancel the contract. While the separation according to Imam Syafi'i there are two differences, if the apostasy before dhukul then the marriage is broken immediately, if after dhukul then the separation is given time until the iddah period runs out.

There are decisions of fasakh nikah fiqh at the Syar'iyah Court of Bireuen that are in accordance with the concept of fasakh according to Syafi'iyah and some are different from the concept of Syafi'iyah. As for what is relevant to the Syafi'iyah fiqh, namely the decision of the Sya'iyah Bireun Court number 181/Pdt.G/2018/MS.Bir, which handed down one ba'in shughra divorce against the Defendant for apostasy. As is the view of Syafi'iyah scholars that the apostasy of a husband is the cause of fasakh in a marriage, and when a husband apostates, then the fasakh marriage relationship occurs at the same time and does not see whether the cause of apostasy of one of the spouses can cause disputes in the household or not. As for those that are less relevant to the concept of fasakh fiqh syafi'iyah, namely the divorce case decision to be sued by number 530/Pdt.G/2021/MS.Bir, where the plaintiff and the defendant often bicker because the defendant uses illegal drugs/methamphetamine and causes the defendant to go to prison. This is different from the opinion of Syafi'iyah fiqh that even though the husband has been in jail for a long time, there is no loophole for the wife to sue for fasakh of marriage, regardless of whether the wife knows where her husband is imprisoned or not.

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