Legal Reformulation of Religious Court Divorce Decisions in Indonesia Due to Religious Conversion (Apostasy) Based on Unification and Principles of Islamic Law Formation

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Abstract

Religious Courts as a manifestation of Islamic justice is reflected in its decisions that make Islamic law (fiqh) as a reference to its legal considerations. The difference in opinion of fiqh scholars regarding the application of divorce mechanisms due to the religious conversion of one of the parties, has implications for the birth of disparities in religious court decisions due to the absence of legal unification so as not to guarantee the realisation of justice, certainty and legal expediency in the decision. This research aims to explore and analyse the disparity in religious court decisions and to reformulate the law that is more appropriate in applying the divorce mechanism due to the religious conversion of one of the parties. This research is normative legal research, which is qualitative and uses a philosophical approach. The importance of legal unification so that there is no disparity in decisions will ensure the realisation of justice, certainty, and expediency, Moreover, religious court decisions as a manifestation of Islamic judicial decisions will become law for the community, therefore, it must also consider the principles in the formation of Islamic law.

1. Introduction

Religious courts are a manifestation of Islamic courts, which means that in applying the law not only based on the provisions of norms in positive law, but also applying the provisions of Islamic law (al-Qur'an, Hadith and opinions of fiqh scholars). The religious court is also a shaper and guardian of Islamic law as well as

integrating Islamic law into the national legal system,[1] so it is very appropriate if the decision becomes the law for the community. However, the reality is that there are many differences regarding the application of law in religious court decisions, not least in divorce cases, which in fact are the dominant cases in religious courts.[2] Such a condition becomes a problem of inconsistency within the religious courts.

The grounds for divorce are regulated limitatively in legislation (Government Regulation Number 9 of 1975).[3] The involvement of Islamic law in national law, the grounds for divorce are also regulated in Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law (KHI) with similar arrangements but there are additions that are not regulated in PP Number 9 of 1975. One of the reasons specified is the conversion of religion.[4] Unfortunately, the issue of the reason is problematic at the level of the application of the divorce mechanism because religious court judges occur disparity in deciding marriage, namely with the mechanism of talaq and the mechanism of fasakh. Whereas the two mechanisms have different legal implications.

The difference in the application of law in the divorce mechanism indicates the absence of legal unification, while religious court decisions are required to realise justice, certainty and legal expediency. The Supreme Court as the highest court that oversees the four courts below it,[5] basically wants the unity of legal application. This is as the birth of SK KMA Number 213 of 2014 Guidelines for the Application of the Chamber System in the Supreme Court of the Republic of Indonesia,[6] one of which

[1] Abu Rokhmad, "Institutions and Contributions to Islamic Law in Indonesia's Legal System," *Walisongo Law Review (Walrev)* 3, no. 1 (June 23, 2021): 21–44, https://doi.org/10.21580/WALREV.2021.3.1.7282.

[2] The meaning of the dominant diction here does not indicate that the specialisation of cases handled by religious courts is divorce. The absolute competence of religious courts is contained in Article 49 of Law Number 3 of 2006 as the first amendment to Law Number 7 of 1989 concerning Religious Courts. The number of divorce cases resolved by religious courts is due to the fact that the majority of Indonesia's population is Muslim, while the authority of religious courts is to hear cases for Muslims or those who subject themselves to Islamic law, which is called the principle of Islamic personality.. C Permata, ZZ Ali - Dialog, and undefined 2022, "Implikasi Asas Personalitas Keislaman Terhadap Penyelesaian Sengketa Antara Muslim Dan Non-Muslim Di Pengadilan Agama," *Jurnaldialog.Kemenag.Go.IdC Permata, ZZ AliDialog, 2022•jurnaldialog.Kemenag.Go.Id* 45, no. 2 (December 29, 2022): 181–94, https://doi.org/10.47655/dialog.v45i2.663.

[3] The grounds for divorce are regulated in article 19 of Government Regulation (PP) Number 9 of 1975 concerning the Implementing Regulations of Law Number 1 of 1974 concerning Marriage.

[4] The reason for religious conversion is one of the reasons other than the violation of taklik talaq regulated in KHI. Religious conversion, particularly from Islam to another religion, is a complex phenomenon that is intertwined with the social, cultural and psychological dynamics of individuals. In the context of Indonesian society, religious change is not simply a change of belief, but also reflects a process of deep identification with self and social environment. Several studies have shown that identity factors play an important role in religious conversion. It is not uncommon, during adolescence, for individuals to experience an identity crisis, and the decision to convert often occurs in the context of a search for a stronger identity.. Rut Marchel Avellia, Yulius Yusak Ranimpi, and Rama Tulus Pilakoannu, "Identity Crisis and Religious Conversion in the Perspective of Religion Psychology: A Case Study of Married By Accident (MBA)," *INSAN Jurnal Psikologi Dan Kesehatan Mental* 8, no. 1 (June 28, 2023): 42–63, https://doi.org/10.20473/JPKM.V8I12023.42-63.

[5] See in article 24 paragraph (2) Constitution of the Republic of Indonesia 1945. The courts under the Supreme Court are the general courts, religious courts, state administrative courts and military courts.

[6] One of the purposes is to maintain the unity of the application of law and the consistency of Supreme Court decisions. Therefore, religious courts are under the guidance of religious chambers led by the Chief Justice of Religion. From this provision, legal formulations were born as a result of chamber discussions on the existence of a legal vacuum that was normalised in the form of the Supreme Court Circular Letter (SEMA).

aims to maintain the unity of the application of law and the consistency of Supreme Court decisions. This is because differences in the application of law are also a problem for the existence and dignity of religious courts. Especially in terms of the quality and capability of the judicial apparatus (judges).

The issue of the application of the mechanism between divorce and fasakh because of the religious conversion of one of the parties (husband or wife), among the fiqh scholars themselves there are also differences. The majority (Hanafi, Shafi'i and Hanbali) are of the opinion that the condition of religious conversion of one of the parties (husband or wife) must be divorced through the mechanism of fasakh (annulment).[7] On the other hand, KHI also does not provide explicit instructions on the use of divorce mechanisms regarding this matter. Instead, the guidance is contained in the Technical Guidelines for the Religious Courts Apparatus (Book II) revised edition of 2013 which substantially states that for uniformity, the divorce case filed by a husband who is *riddah* (apostate), the ruling is to terminate the marriage.[8] As a precedent for decisions in divorce cases due to the religious conversion of one of the parties, the Supreme Court (MA) at the cassation level with decision number 322 K/Ag/2014, argues that in the issue of legal application of the religious conversion of one of the parties (husband or wife) can apply either by the mechanism of talaq or fasakh, but because the petition of the applicant requests divorce through the mechanism of talaq, it is more appropriate to grant according to the petition.

Despite the Book II guidelines and the cassation decision, the fact is that there are still many religious court decisions (first and appellate levels) that remain different from applying the fasakh mechanism. This can be seen in several decisions, including at the first level in the decision of the Simpang Tiga Redelong Sharia Court number 339/Pdt.G/2021/MS.Str., the decision of the Pangkalan Kerinci Religious Court (PA) 76/Pdt.G/2024/PA.Pkc., then at the appeal level in the decision of the Surabaya High Court of Religion (PTA) number 0249/Pdt.G/2015/PTA.Sby. This is certainly a legal anomaly within the religious courts.

Such conditions will certainly continue if there is no permanent and precise guidance as a unification of legal application. Based on data from the Directorate of Religious Courts in 2023, there were 1,415 cases with reasons for religious conversion. In 2024, there were 1,000 cases with reasons for religious conversion in the types of cases of divorce and divorce. With so many divorce cases with reasons or caused by religious conversion, there will certainly continue to be disparities in the application of the law in religious court decisions..

Research related to religious court divorce decisions due to religious conversion (apostasy) of one of the parties and the application of fasakh has actually been carried out by several previous researchers. Among them is research conducted by Siska Octaviani, examining the decision on marriage fasakh due to apostasy in the Semarang Religious Court, Semarang Religious High Court and the Supreme Court

[7] Wahbah az-Zuhaili, *Al-Fiqh al-Islâmi wa Adillatuhu*, Juz VII (Dar al Fikr, 1989), hal. 349-353.

[8] In the 2010 edition of Book II, the mechanism of divorce bain shughra was determined, but in the 2013 revised edition, it was changed and determined to use the fasakh mechanism. However, this is only mentioned in the subchapter on divorce, while in the subchapter on contested divorce it is not mentioned at all.

of the Republic of Indonesia.[9] Another study was also conducted by Syafa'at regarding the Kendal Religious Court Decision number 772/Pdt.G/2006/PA.Kdl, concerning a divorce petition that ended in fasakh nikah due to apostasy.[10] Furthermore, there is also research also conducted by Muhammad Idris Nasution which examines the disparity of decisions due to religious conversion.[11] However, none of these studies or other studies found by the author have conducted comprehensive research so as to give birth to an offer of precise and concrete legal reformulation based on legal unification and the principles of Islamic law formation in religious court decisions. Therefore, this is an interesting issue to be explored and analysed in depth in this research, so as to obtain the right legal reformulation of the differences in formulations that actually exist that are applied differently in religious court divorce decisions in Indonesia due to the religious conversion of one of the parties, so that there is legal unification for the disparity in the application of the divorce mechanism.

2. Research Method

This research uses a normative legal approach to analyse the norms and principles of Islamic law, along with relevant and developing doctrines related to the theme of this research, namely legal reformulation for disparity of decisions in the application of divorce mechanisms based on unification and the principles of Islamic law formation. The philosophical approach is used to analyse and seek answers to the causes of disparity in accordance with positive law and Islamic law as a source of knowledge and truth,[12] thus giving birth to legal reformulation in the application of the divorce mechanism due to the religious conversion of one of the parties in accordance with aspects of justice, certainty and legal expediency.

This research uses a literature review methodology, by collecting data from secondary sources such as documented policies, books, academic journals, and texts related to Islamic marriage law. These sources were selected based on their relevance, credibility, and contribution to legal reformulation for religious court divorce verdict disputes.[13] This research did not involve field data collection.[14] The researcher chose this approach because of its theoretical nature and its aim to gain a deeper understanding of the principles of legal formation in religious court decisions in the

[9] Octaviani Siska, "Analisis Putusan Tentang Fasakh Nikah Karena Alasan Murtad Di Pengadilan Agama Semarang, Pengadilan Tinggi Agama Semarang, Dan Mahkamah Agung RI" (IAIN Purwokerto, 2020) <http://repository.uinsaizu.ac.id/id/eprint/8733>

[10] Syafaat, "Studi Analisis Putusan Pengadilan Agama Kendal No. 772/Pdt.G/2006/PA.Kdl, Tentang Permohonan Cerai Talaq Yang Berakhir Dengan Fasakh Nikah Karena Murtad" (IAIN Wali Songo Semarang, 2007).

[11] Muhammad Idris Nasution, "Disparitas Putusan Mahkamah Agung Dan Pengadilan Agama Dalam Penerapan Fasakh Terhadap Perceraian Atas Dasar Murtad," *El-Usrah: Jurnal Hukum Keluarga* Vol. 4, no. No. 1 Juli-Desember (2021), https://doi.org/http://dx.doi.org/10.22373/ujhk.v4i2.10015.

[12] Nurul Ainiy, "PENDEKATAN FILSAFAT DALAM KAJIAN ISLAM: TEORI DAN PRAKTIK," *An-Natiq Jurnal Kajian Islam Interdisipliner* 2, no. 1 (March 7, 2022): 71–83, https://doi.org/10.33474/AN-NATIQ.V2I1.15503.

[13] John W. Creswell et al., "Qualitative Research Designs: Selection and Implementation," *The Counseling Psychologist* 35, no. 2 (2007): 236–64, https://doi.org/10.1177/0011000006287390.

[14] Carol Collier Kuhlthau, Teaching the Library Research Process (Scarecrow Press, 1994).

context of divorce due to one party's religious conversion. Regarding data analysis, this research relies on in-depth qualitative analysis of existing literature, mapping the relationship between concepts and comparing various relevant opinions to draw conclusions on the proper application of divorce mechanisms due to one party's religious conversion.

3. Results and Discussion

a. The Issue of Disparity in Religious Court Divorce Decisions Due to Religious Conversion

Decisions are the crown of judges born from the judicial process and reflect the balance between justice and legal certainty through mature legal reasoning or also known as legal reasoning.[15] The existence of differences in the legal reasoning of judges in divorce case decisions due to the conversion of one party's religion makes differences in the application of the law (divorce mechanism).

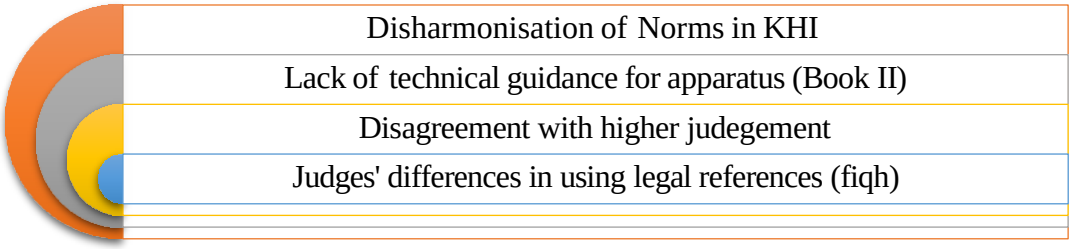
Based on decision data taken from the search results on the official website of the Supreme Court's decision directory,[16] there are several decisions on both types of divorce cases and contested divorce cases both at the first level and the appellate level that are different in applying the divorce mechanism. These differences can be seen from the petitum of the lawsuit or petition and the formulation of the law in the verdict.

Consideration of the decisions of the religious courts, both at the first level and the appellate level, found 4 (four) issues as the cause of the disparity in applying the mechanism of divorce due to religious conversion of one of the parties. *First*, the dissonance of norms in KHI, *second*, the lack of information in the technical guidelines for court officials (book II), *third*, disagreement with higher decisions, and *fourth*, differences in judges' use of legal references (fiqh). Furthermore, it can be described in the following table:

Tabel 1. Issue of Disparity in Religious Court Decisions
Cause of Religious Conversion of One Party

[15] The phrase 'legal reasoning' is used in both a broad and narrow sense. In the broad sense, it refers to the psychological processes that judges go through in making decisions in the cases they face. This process consists of ideas, beliefs, conjectures, hunches, feelings and emotions. Generally speaking, a judge's reasoning is what goes through his mind in the decision-making process, although in reality he may be barely aware, or even not aware at all, of many components of the process. In a broad sense, the emergence of legal reasoning is associated with the biography of a particular judge. Martin P. Golding, *Legal Reasoning* (Canada: Broadview Press, 1930), 1.

[16] https://putusan3.mahkamahagung.go.id/, To view some of the decisions, please use the keywords fasakh or murtad.



Source: Author's Creation

Disharmonisation of Norms in KHI

KHI was formed in order to provide legal unity in applying Islamic law in Indonesia. Presidential Instruction Number 1 of 1991 which became the legal umbrella for the birth of KHI is not part of the stratification of legislation in Indonesia as stipulated in Law Number 11 of 2012 concerning the Formation of Legislation, but KHI remains an applied law that is guided and becomes a reference for religious court judges. With the majority of the Muslim population in Indonesia and the number of legal *ikhtilaf* in Islamic fiqh law, the existence of KHI becomes urgent, because its formation is intended to be a source of applied law as well as guidance so that there is unity in the application of law for the implementation of legal issues in the lives of Muslim communities in Indonesia, especially for religious courts in resolving cases of Muslim communities.

In practice, KHI not only functions as a juridical guideline, but also reflects the social values that develop in society.[17] The existence of KHI as applied law for religious court judges presents its own complexities, with challenges and opportunities to be faced. Fair and authoritative law enforcement in the context of KHI will depend heavily on the readiness of judges to adapt to social change and the needs of society, while adhering to the fundamental principles of Islamic law.[18]

Religious courts in Indonesia as one of the implementers of judicial power that has the authority to accept, examine, hear and resolve certain issues or disputes for the Islamic community or people who subject themselves to Islamic law, as well as a manifestation of Islamic justice.[19] Therefore, in the frame of the rule of law, the legal exploration carried out by judges in their decisions must apply legal provisions based on the legislation in force in Indonesia and fill in and apply the rules of Islamic law both in the Qur'an and Hadith as well as the legal rules codified in the books of fiqh

[17] Ayu Atika Dewi, "Peradilan Agama Dalam Lintasan Sejarah Kajian Pengaruh Teori Pemberlakuan Hukum Islam Terhadap Peradilan Islam Indonesia," *Jurnal Surya Kencana Satu : Dinamika Masalah Hukum Dan Keadilan* 12, no. 1 (April 7, 2021): 12–30, https://doi.org/10.32493/JDMHKDMHK.V12I1.10204.

[18] Permata, Dialog, and 2022, "Implikasi Asas Personalitas Keislaman Terhadap Penyelesaian Sengketa Antara Muslim Dan Non-Muslim Di Pengadilan Agama."

[19] Religious Courts in Indonesia function as a tangible manifestation of the Islamic legal system that aims to protect and uphold justice among Muslims. Its existence is rooted in the long history of Islamic law and the development of legislation governing civil matters relevant to Muslim communities. Law No. 7 of 1989 and its revision through Law No. 3 of 2006 strengthened the position of the Religious Courts as institutions authorised to handle matters of Islamic law, including marriage, inheritance and waqf, thereby indicating official recognition of the Islamic legal system in Indonesia. Eka Susylawati, "PENERAPAN HUKUM WARIS ISLAM DALAM PERKARA WARIS DI PENGADILAN AGAMA PAMEKASAN," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 9, no. 2 (January 26, 2015): 315–37, https://doi.org/10.19105/AL-LHKAM.V9I2.474.

which are the opinions of Islamic law experts. In relation to this, in the regulatory issues regarding the use of divorce mechanisms with talaq or fasakh due to the conversion of religion (apostasy) of one of these parties also occurs due to vagueness, while vagueness in regulation can cause public dissatisfaction and damage to public confidence in legal institutions.

The specificity of the reason for divorce regarding religious conversion as one of the reasons for divorce which is only regulated in article 116 letter h KHI is a 'differentiation in unification' which is not regulated in the legislation, in this case PP Number 9 of 1975. It's just that in the provisions of article 116 KHI letter h there is a variable that states '...which causes disharmony in the household', thus forming an understanding that even though there is a difference in religious status between husband and wife because one of them converts to Islam, but the couple can still live in harmony, the marriage can still be preserved.

In addition to this, the disharmony of the norms in question also occurs because the regulation regarding the religious conversion of one of the husbands or wives is regulated in the provisions of another article in KHI which does not talk about the reasons for divorce, namely the cancellation of marriage contained in the provisions of article 75, which states that the decision to dissolve the marriage does not apply retroactively to one of the marriages that are invalidated because one of the husbands or wives apostates.

Therefore, the norm setting between Article 116 letter h and Article 75 KHI letter a is ambiguous, because religious conversion is not only used as the basis for divorce, but on the other hand it is actually wanted as a matter of marriage cancellation. Cancellation of marriage itself is a legal step in Islam, understandably called fasakh. In fact, related to the cancellation of marriage, it has been preceded by the provisions of Article 70 and Article 71 KHI which regulates that the cancellation and cancellation of a marriage actually does not contain the criteria for religious conversion as one of the causes. However, in article 75 of the KHI, it appears that the religious conversion of one of the husband and wife is mentioned.

Article 75 KHI explicitly states that even though a marriage is void due to the apostasy of one of the husband or wife the decision does not invalidate the marriage contract, so the marriage is still legally recognised until it is declared void. It is still recognised as a marriage that was initially valid and then had to be terminated. However, the nullification of the marriage must be done through a religious court decision and begins after the religious court decision becomes final. (*in kracht van gewijsde*).[20] As for other than cases of religious conversion, the provisions of Article 74 KHI apply, which states that the cancellation of marriage takes effect from the time of the marriage, but the cancellation of marriage due to cases of religious conversion does not start from the time of the marriage.

From this description, it is very clear that there is a disorientation of the purpose of the birth of KHI which actually wants the unity of legal application in the midst of

[20] Ahda Bina Afianto, "Status Perkawinan Ketika Suami Atau Isteri Murtad Dalam Kompilasi Hukum Islam," *Jurnal Humanity* 9, no. 1 (2013), https://ejournal.umm.ac.id/index.php/humanity/article/view/2510.

legal diversity[21] and becomes applied law for religious court judges as an arrangement that is not accommodated (differentiation in unification) in statutory regulations in both the Marriage Law and PP number 9 of 1975.

b. Lack of Technical Guidance for Apparatus (Book II)

The guidelines referred to are those contained in the Guidelines for the Implementation of Duties and Administration of Religious Courts, which are technical implementation guidelines for the religious court apparatus (Book II). Book II is an instruction for the judicial apparatus so that there is uniformity in applying the technical problems of the judiciary. From this it can be understood the urgency of the unification in question, namely in order to provide a guarantee of legal certainty for the people litigating (*justitiabelen*) in the courts.

Unfortunately, the presentation in Book II is not comprehensive, because its nature is basically not a rule of law because it is in the form of instructions. So that the systematics or format is made like an outline of the rule of law as a brief guide so that the apparatus must follow without seeing and analysing in depth the concept of legal epistemology in it. However, the substance of the functionalisation of Book II basically aims for uniformity in the application of both judicial and non-judicial technicalities. As well as guidance on the application of the fasakh mechanism in divorce cases filed by apostate husbands through the formulation and circulation of the dictum of the decision.

In the 2010 edition of Book II, in the subchapter on divorce, the instructions state that for uniformity in the verdict of divorce filed by apostate husbands, the verdict should be pronounced as talaq one bain *shughrâ*. Redactionally, the instructions provide an explicit understanding that the issue of a husband who has apostatised and then submits a talaq petition to the religious court and it turns out that the petition is granted, the religious court in this case through the panel of judges who try and decide with the mechanism of talaq bain *shughrâ*, so as not to permit the applicant (husband) to pronounce or pledge the husband's talaq to his wife in front of the religious court session as a divorce petition in general.

Book II of the revised edition in 2013 actually determines that in the issue of divorce filed by a man / husband who leaves Islam (riddah) and applies for divorce, it must take the form of a lawsuit and the verdict terminates the marriage of the plaintiff and the defendant.[22] However, there is no comprehensive explanation of the purpose of these changes, while the legal implications between the dissolution of marriage by talaq and fasakh are different, because divorcing with talaq bain *shughrâ* even though it has an *'iddah* period, but if it turns out that reconciliation during the wife's *'iddah* period must be with a new marriage contract (*tajdid al-nikah*). In addition, this will reduce the number of talaq, whereas if divorced by the mechanism of fasakh, it turns out that during the wife's *'iddah* period the husband returns to Islam, then the

[21] Thoriq Ulumuddin, M. Habibi, and Riyanton Riyanton, "Kesesuaian Fiqih Talaq Syi'ah Imamiyah Dengan Aturan Perkawinan Di Indonesia," *Asy-Syari'ah* 23, no. 2 (September 2, 2022): 245–60, https://doi.org/10.15575/AS.V23I2.12109.

[22] Mahkamah Agung, *Pedoman Pelaksanaan Tugas Dan Administrasi Peradilan Agama Buku II*, 2013th ed. (Jakarta: Direktorat jenderal Peradilan Agama, 2015), 147–149.

return does not require a new marriage contract and does not reduce the number of talaq.[23]

As mentioned above, the changes in Book II from 2010 to the 2013 revised edition do not contain a clear and comprehensive description of the changes. According to the author, this could be due to the nature of Book II, which is in the form of only basic rules or concise instructions so that it is sufficient to mention the main idea. However, Book II, whose legal protection is the Decree of the Chief Justice of the Supreme Court (SKKMA), is binding for the lower judiciary so that it must be obeyed by the lower judiciary (law in book). Therefore, the provisions in Book II also have legal implications for the community.

A reading of Book II indicates a legal construction that if a wife converts to another religion in a divorce case, and a husband or wife converts to another religion in a divorce case, the marriage will still be decided through the mechanism of divorce. However, this does not appear to be the reality on the practical level (law in action), because religious court judges are not uniform in applying the divorce mechanism in their verdicts and are predominantly of the opinion to decide marriage through the fasakh mechanism.

The importance of the description of the argumentation of the thinking basis for the instructions is something that is important, so that there is no bias in understanding that causes disparity in the opinion of judges which is manifested in disparity in decisions. This should also be an autocriticism for the Supreme Court which should have a programme to socialise the contents of Book II, moreover not all judges have the same understanding or point of view, and have different educational backgrounds, while Book II is also not only the consumption of court officials under the Supreme Court, but also the subject of academic legal research.

Disagreement with Higher Decisions

In the issue of the religious conversion of one of the parties, in 2012 the Supreme Court decided a case at the cassation level with case number 724 K/Ag/2012 which substantially cancelled the decision of the Semarang Religious High Court Number 043/Pdt.G/2012/PTA.Smg. Whereas the decision of the Semarang High Court of Religion cancelled the Semarang Religious Court Decision Number 1449/Pdt.G/2011/PA.Smg.. The Semarang Religious High Court had terminated the marriage between the plaintiff and the defendant because it was proven that the defendant (wife) had converted religions by the defendant's own admission. However, the plaintiff in her petition did not ask the court to annul her marriage with the mother of her children, but asked for permission to impose talaq. The Supreme Court in its decision cancelled the decision of the Semarang Religious High Court and then tried the case itself, which basically gave permission to the plaintiff to impose talaq one *raj'i* against the defendant.

In 2014 the Supreme Court again decided through a cassation decision with number 322 K/Ag/2014 which in the postulation of a divorce suit filed at the

[23] Next see at Wahbah Al-Zuhaili, *Al-Fiqh Al-Islâmi Wa Adillatuhu* (Beirut: Dar al-Fikr, 1989), 327.

Tangerang Religious Court, the plaintiff argued that household harmony with the defendant was far from expected. As time went by, it became even further from expectations, because it turned out that the defendant always refused and became angry when invited by the plaintiff to practice Islamic Shari'a, and furthermore, the defendant had now converted (apostatized) to Protestant Christianity. It was known that almost every week the defendant went to church. The continuous arguments reached their peak in 2010, where since July 1, 2010 the plaintiff and the defendant no longer lived in the same house. In her petition the plaintiff requested permission to make a pledge of talaq against the defendant in front of the Tangerang Religious Court.

Against the lawsuit, the Tangerang Religious Court has given a decision Number 1165/Pdt.G/2012/PA.Tng. dated June 19, 2013 which stated that the plaintiff's marriage with the defendant was broken due to fasakh. On appeal, the decision of the Banten High Court of Religious Affairs Number 62/Pdt.G/2013/PTA.Btn. dated October 24, 2013 was upheld. With the appeal level decision, the defendant (wife) filed a cassation appeal, with the main reason (cassation memory) of ultra petita, because the Tangerang Religious Court and the Banten Religious High Court had decided not in accordance with what was requested in the petitum (ultra petita). This is because the decision was not in accordance with what was requested by the plaintiff because in her petitum she asked for permission to impose talaq one *raj'i*, but instead it was imposed by the Banten Religious High Court with a fasakh mechanism, so that it was considered to have been wrong in the application of the law.

The Supreme Court as the *judex jurist* at the cassation court level stated that in this case the *judex factie* did not err in applying the law, based on the legal facts showing that the household had broken up, peaceful efforts were unsuccessful, had been separated since July 1, 2012 (2 years), the defendant also returned to Protestant Christianity, there was no compatibility in the household, frequent arguments and no hope of getting along again in the household. Apart from the aforementioned considerations, the Supreme Court is of the opinion that the verdict of the *judex facti* (PTA Banten) is corrected insofar as it relates to *ex aequo et bono* (subsidiary petitum) and *mut'ah* fees which contains the main principle "That regarding fasakh, although religiously and procedural law can be applied, namely by granting *ex aequo et bono* demands, but in this case it is more appropriate for the reason in accordance with the article and petitum of the plaintiff's/plaintiff's cassation lawsuit. Because the talaq in this case was at the will of the husband, pursuant to Article 41 letter c of Law Number 1 of 1974 in conjunction with

Article 158 of KHI, the plaintiff is required to pay *mut'ah* to the defendant".

In the context of the two cases presented above, it can be seen how the Supreme Court adjudicated based on the formality aspect, namely adjudicating in accordance with what was requested by the party in the petitum of the lawsuit. However, after the issuance of the Supreme Court's decision as mentioned above, it did not make it a legal rule which was then followed by the lower (religious) courts.

c. Judges' Differences in Using Legal References (Fiqh)

The assessment of whether the decision is good or not is also influenced by the ability or quality and capability of the judge. With differences in quality and capability, the occurrence of legal disparities even in the same legal substance or the same legal issue is a necessity. Various studies note that the legal response to religious conversion in Indonesia is not same and undergoes adaptation depending on the interpretation and views of individual judges and the social context in which they act.[24] In the realm of ijtihad, this is certainly a common thing, but in the context of applying the law, in this case the application of the divorce mechanism becomes an important highlight, what is meant in this study is the difference in legal opinion of scholars who are used as references in the consideration of decisions. From the differences in the use of these references, several book references were found, which for simplicity are presented in the following table:

Tabel 2. Book References in Religious Court Decisions

Mechanism of Marriage Termination (Divorce)		
No.	**Talaq**	**Fasakh**
References		
1.	Book *Al-Fiqhu 'Ala Madzahibil Arba'ah*, Volume IV, page 230, by Abdurrahman Jaziri.	Book *Fiqh al-Sunnah*, Volume II, page 389, by Sayyid Sabiq.
2.	Book *Fatawa Al-Azhar*, Volume 6, page 44.	Book *Qolyubi wa 'Umairah*, Juz III, page 254, by Abi Zakariya Yahya bin Syarafa al Nawawi
3.		Book *al*-Furqah *Baina al-Zaujaini,* page 175, by 'Aly Hasballah.

Resouce: Author's Creation

The majority of judges who are of the opinion to divorce with a fasakh mechanism use legal arguments from the book *Fiqh al-Sunnah*, volume II, page 389, by Sayyid Sabiq. [25] In this opinion, it states that if a husband or wife apostatizes, their marital relationship with each other breaks down, and the breakup of the marital relationship is in the form of fasakh. This opinion is the most widely used in almost every decision that argues with the fasakh mechanism.

In addition, some of the considerations of the decision also cite opinions from the book *Qolyubi wa 'Umairah*, volume III, page 254 which states that divorce in the aforementioned matter (religious conversion) is a fasakh divorce, not a talaq divorce, as well as the book *al-Furqah Baina al-Zaujaini* by 'Aly Hasballah page 175 which means as follows: "If the husband converts to another religion, then the marriage bond between the husband and the wife is broken at that time. Whereas the opinion that

[24] Prihatini Purwaningsih, "Pertimbangan Hakim Dalam Memutus Perkara Perceraian Dengan Alasan Murtad Di Pengadilan Agama Bogor," *YUSTISI* 2, no. 2 (September 1, 2015): 55–55, https://doi.org/10.32832/YUSTISI.V2I2.1099.

[25] The editorial cited as a reference in the consideration of the decision is:

إذا ارتد الزوج أو الزوجة إنقطعت علاقة كل منهما بالأخر لأن ردة أي واحد منهما موجبة للفرقة بينهما وهذه الفرقة تعتبر فسخا

Based on the author's search, it is indeed quoted from the book *Fiqh al-Sunnah* by Sayyid Sabiq, but the legal opinion is not discussed in the divorce chapter, but is contained in the hudud chapter on hudud al-riddah (punishment for apostasy). See at Sayyid Sabiq, *Fiqh As-Sunnah*, Juz II (Kairo: Dar Al-Fath lil I'lam Al Arabi, 1945), 443.

states that it is divorced by divorce in addition to conducting legal reasoning on the provisions of article 119 letter c KHI, also quoted legal opinion from the book *Fatawa al-Azhar*, volume 6, page 44, which states that when it becomes clear that a husband has apostatized from Islam, the wife's marriage is terminated by (the cause of) her husband's apostasy and the divorce (includes) divorce bain and the book *al-Fiqhu ʹala Madzahib al-Arbaʹah*, volume IV, page 230, which states that if the husband apostatizes, then divorce between the husband and his wife.

Regarding the book *al-Fiqhu ʹala Madzahibil Arbaʹah*, volume IV, page 230, with the wording separate, this is understood as divorce. It seems that there is a misperception related to the term divorce because the book uses the editorial "farqu" which means separation, not the word "talaq", so in this case the judge understands separation as a divorce, of course this does not correspond to its meaning, the breakup of marriage (divorce) in Islam and positive law is due to death, talaq and fasakh.

In this case, the author wants to say that the tendency towards a certain opinion will certainly find the legal basis that supports that opinion. Differences of opinion are certainly motivated by different knowledge. Then what about the differences in understanding and even interpretation of judges so as to sacrifice the value of justice, certainty and legal benefits for the community, especially in a country. This is where the importance of the state is present to regulate and provide clear guidelines in the form of legal norms.

Legal Reformulation of Religious Court Divorce Decisions Due to Religious Conversion

In providing reformulation, of course, it must pay attention to the principles of Islamic law formation, because religious courts as a manifestation of Islamic justice, namely the principles of justice, legal certainty, expediency. *First*, the principle of justice. Justice in Islamic law is not based solely on principles developed by humans. The values of justice originate from very strong and essential principles, namely from Allah SWT. As one of the universal values upheld and emphasized in the Qur'an. This principle places humans in their 'natural' position, both as individuals and as a society. The meaning of natural means that humans and their neighbors are not the central point, but as servants of Allah SWT.

Justice itself according to Majid Khadduri is divided into three, legal justice into procedural justice and substantive justice. Procedural justice is also called formal justice or procedural justice judges must be in a neutral position. Both litigants must be treated equally. Substantive justice is material justice. Substantive justice leads to propriety, and favors the right. The right party will win according to the evidence of the truth.[26] The judge's decision does not have to be in accordance with the petitum of the lawsuit or petition, as long as the petitum is considered not in accordance with the correct legal rules, the judge must consider the substantive aspects in giving a case decision, in accordance with the dynamics of current social life.On the other hand, disparities tend to cause uproar. In the same institution, judges of one religious court

[26] Achmad Irwan Hamzani, *Asas-Asas Hukum Islam Teori Dan Implementasinya Dalam Pengembangan Hukum Indonesia* (Yogyakarta: Penerbit Thafa Media, 2018), 84.

and another religious court in the same region (province) are judging differently, even between judges in the same court when adjudicating cases with the same substance are also judging differently, but differ in the application of the divorce mechanism due to the religious conversion of one of the parties. Such conditions are the victims of the community because court decisions are unable to show the location of justice. In addition, such conditions also create doubts (skepticism) about being able to follow religious court decisions that are desired as guardians of Islamic law. However, justice from the courts requires a multidimensional approach that considers the social context in which the law is applied,[27] So that judges in adjudicating are not based on individual perceptions or even the tastes of the mazhab they adhere to. Therefore, the existence of a clear reformulation is a guideline for religious court judges so that between one court and another, there is legal unification and does not lead to different legal treatment because of the different legal implications between talaq and fasakh.

Second, the principle of legal certainty. The principle of legal certainty in the formation of laws and regulations means that every content material of rules and regulations must be able to realise order in society through guarantees of legal certainty. The principle of legal certainty is very close to the principle of legality. This means that to bring order to something, the rules must be clear and known by the public. If there is a prohibition in the law, then what is prohibited is clear. Likewise, if there is a sanction for the prohibition, it has been expressly stated.[28]

This principle in the norm of legal unification in the application of divorce mechanisms due to religious conversion of one of the parties in religious court decisions must reflect clarity of regulation, so that order is realised in the application of divorce mechanisms due to religious conversion of one of the parties and becomes one of the formation of marriage law in Indonesia. There have been many opinions on this matter. The Supreme Court as the vanguard of the law has issued SEMA Number 2 of 2023, the substance of which is that the validation of marriages of different religions cannot be carried out, as well as the decision of the Constitutional Court rejecting judicial review of marriages of different religions through decision number 24/PUU-XX/2022 dated 31 January 2023. [29]

The Indonesian Ulema Council (MUI) once gave a fatwa prohibiting interfaith marriages as in its 1980 fatwa on mixed marriages.[30] Specifically about interfaith marriage, MUI in 2005 gave fatwa Number 4/MUNAS VII/MUI/8/2005 about Interfaith Marriage. The substance of the MUI fatwa highlighted the rise of interfaith

[27] M. Fadhli et al., "Kasus Baiq Nuril Tinjauan Filsafat Hukum Dalam Pencapaian Keadilan Dan Perlindungan Hak Asasi Manusia," *YUSTISI* 12, no. 1 (February 1, 2025): 405–14, https://doi.org/10.32832/YUSTISI.V12I1.19066.

[28] Achmad Irwan Hamzani, *Asas-Asas Hukum Islam Teori Dan Implementasinya Dalam Pengembangan Hukum Indonesia*.

[29] Utami Argawati, "MK Tolak Permohonan Perkawinan Beda Agama | Mahkamah Konstitusi Republik Indonesia," 2023, https://www.mkri.id/index.php?page=web.Berita&id=18870&menu=2., diakses pada tanggal 23 Maret 2025, pukul 16.02 WIB, The case was filed by E. Ramos Petege, a Catholic who wanted to marry a Muslim woman.

[30] Majelis Ulama Indonesia, *Himpunan Keputusan Dan Fatwa Majelis Ulama Indonesia* (Jakarta: Sekretariat Majlis 'Ulama Indonesia Masjid Istiqlal, 1995), 91.

marriages performed under the pretext of human rights and benefit. Based on several considerations, MUI decided that interfaith marriage is haram and invalid and the marriage of a Muslim man with *ahlu al-kitab*, according to *qaul mu'tamad* is haram and invalid.

Therefore, the prohibition of interfaith marriages from the above norms must also be read and understood as a prohibition on maintaining marriages that are no longer of the same religion. This is important so that there is harmony in the construction of the enactment of rules and laws so that the legal system operates properly and fulfils its purpose. One important aspect of legal harmony is the existence of legal certainty that creates a harmonious relationship between the state and its citizens. Legal certainty is intended so that regulations are easily accessible and understood by the public, which can thus create synergy in the application of the law.

Third, the principle of expediency. The principle of expediency is a principle that accompanies the principles of justice and legal certainty. The implementation of the principles of justice and legal certainty should consider the principle of benefit, both for the person concerned himself, as well as the interests of society. The principle of expediency in Islamic law, or *maqashid al-syari'ah*, aims to achieve human happiness both in this world and in the hereafter.[31] In this context, *maqashid al-syari'ah* refers to the values espoused in Islam, particularly those relating to the welfare, protection and benefit of the ummah. Islamic law provides a framework for achieving these goals through various principles that emphasise justice and social benefit.[32] In other words, the purpose of Islamic law is the benefit of human life, both spiritual and individual and social.[33] The principle of expediency is based on legal considerations so that the resulting legal decisions provide benefits to justice seekers and the wider community. Therefore, the principle of expediency in Islamic law is closely related to the ability of law to function in the existing social context. This ensures that the law is not just a formally recognised rule, but also a tool to achieve higher welfare for individuals and society as a whole.

Judges, in making decisions, in addition to considering the principles of justice and legal certainty, must also consider aspects of expediency. This shows that judges have a great responsibility in providing justice not only from a legal perspective but also from a moral and social perspective. The actions of judges to explore the values of justice that live in society are very important to prevent injustice arising from the application of strict laws that are sometimes insensitive to the needs of society.[34]

People who make religious conversions in Islam have severe consequences and

[31] Moh Hatta, "Prospek Pemberlakuan RKUHP Pasca Disahkan Menjadi Undang-Undang Dalam Perspektif Maqasid Syariah," *Al-Qanun: Jurnal Pemikiran Dan Pembaharuan Hukum Islam* 25, no. 2 (December 20, 2022): 248–62, https://doi.org/10.15642/ALQANUN.2022.25.2.248-262.

[32] St. Salehah Madjid, "Prinsip-Prinsip (Asas-Asas) Muamalah," *Jurnal Hukum Ekonomi Syariah* 2, no. 1 (December 16, 2018): 14–28, https://doi.org/10.26618/J-HES.V2I1.1353.

[33] Achmad Irwan Hamzani, *Asas-Asas Hukum Islam Teori Dan Implementasinya Dalam Pengembangan Hukum Indonesia*, 85–86.

[34] Pandu Dewanto, "Rekonstruksi Pertimbangan Hakim Terhadap Putusan Sengketa Perdata Berbasis Nilai Keadilan," *Jurnal Ius Constituendum* 5, no. 2 (October 22, 2020): 303, https://doi.org/10.26623/JIC.V5I2.2307.

are even said to be halal for their blood.[35] However, in its development, Indonesia as a state of law recognizes many religions and not only Islam. Nevertheless, the principle of equality of faith in marriage remains a law that has no bargaining value, because there is no penalty for the party who converts religion, but such a marriage must be terminated, because in the perspective of legal objectives (*maqashid al-syari'ah*), such conditions are not following the principles of protecting religion (*hifz al-din*) and protecting the institution of marriage (family) (*hifz al-usrah*).[36] No religion allows interfaith marriages,[37] in fact, in practice, there is no such thing as an interfaith marriage in Indonesia because one partner will submit to the religion of the other during marriage. It is after the marriage that religious conversion occurs.

Children born from marriages that are not of the same religion make the child have no nasab relationship with the man (husband) who has left Islam, so that if the child is born female then the man cannot be her guardian. In the law of inheritance, the condition of religious differences also cannot inherit each other. As the sahih hadith narrated by Bukhari and Muslim which reads "*la yaritsu al-muslimu al-kafira, wala yaritsu al-kafiru al-muslima*".[38] This is the concept of protecting offspring (*hifz al-nasl*) and maintaining family institutions (*hifz al-usrah*) in Islamic law.

From all considerations of the principles of law formation, the use of the fasakh mechanism in the Indonesian context, according to the author, is more appropriate. In addition to reflecting the values of justice, certainty and expediency, it also reflects the religious value of ubudiyah for obedience to religious law, including the laws of other religions which essentially do not allow interfaith marriages.

4. Conclusion

This research found four issues that caused disparity in religious court decisions due to religious conversion of one of the parties: *first*, disharmonization of norms in KHI, *second*, lack of information from technical guidelines for religious court officials (Book II), *third*, disagreement with the consideration of higher decisions, and *fourth*, differences in judges in using legal references (fiqh).

This research also offers legal reformulation based on unification and legal certainty in order to realize the value of legal objectives, namely providing justice, certainty and legal benefits in religious court decisions in Indonesia, namely the religious conversion of one of the parties requires that the marriage be terminated (divorced) by a religious court with a fasakh mechanism. However, this research is still lacking because there is no field-based empirical data confirming the opinion of religious court judges on the disparity in the application of the divorce mechanism. In conclusion, this research provides a legal reformulation based on legal unification and

[35] Nur Rofikoh, "Kebebasan Beragama Di Indonesia Perspektif Ratio Legis Hukum Riddah," *Al-Jinayah: Jurnal Hukum Pidana Islam* 3, no. 2 (March 22, 2018): 454–84, https://doi.org/10.15642/AJ.2017.3.2.454-484.

[36] *Hifz al-usrah* is the result of the reactualization of *maqashid al-syari'ah* from *hifz al-nasl* carried out by Jasser Auda, which provides protection for the care and development of the role of family institutions.. Jasser Auda, *Al-Maqashid Al-Syariah as Philosophy of Islamic Law: A Systems, The International Institute of Islamic Thought* (London, 2008), 248.

[37] Imron Rosyadi, *Rekonstruksi Epistemologi Hukum Keluarga Islam*, Cet. 2 (Jakarta: Kencana, 2023), 191-210.

[38] M. Basalamah, *Pembagian Waris Menurut Islam* (Jakarta: Gema Insani Press, 2007), 42–43.

the principles of Islamic law formation in realizing religious court decisions that have justice, certainty and legal benefits.

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