

## Juridical Analysis of Judges' Considerations in Cancellation of Marriage Because Husband Likes the Same Sex (Study of Decision Number 176/Pdt.G/2019/PA.YK)

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### Abstract

*The ideal marriage is a marriage between a man and a woman who by nature have an attraction to the opposite sex. In the life of the community there are some men who have sexual orientation with fellow men, not to women as the opposite sex. The purpose of this study is to determine the judge's legal basis in annulling a marriage with a husband who is a same-sex lover (homosexual) in decision number 176/Pdt.G/2019/PA.YK. The type of research used is normative legal research, with research data in the form of secondary data consisting of primary and secondary legal materials. In addition, interviews were also conducted with judges who decided this case at the Yogyakarta Religious Court to complement secondary data. Based on the results of the analysis, it is concluded that the legal basis for the judge's consideration in annulling the marriage between a woman and her same-sex lover husband in case number: 176/Pdt.G/2019/PA.Yk, is the provisions of Article 72 paragraph (2) KHI along with the explanation of Article 72 paragraph (2) KHI concerning fraud as a reason for annulling marriage. The sexual disorder in the form of homosexuality submitted by the applicant as a reason for annulment can be accepted as fraud committed by the husband to the wife, because the husband deliberately concealed his sexual disorder.*

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### Abstrak

Perkawinan yang ideal adalah perkawinan antara pria dan wanita yang notabene secara fitrahnya memiliki ketertarikan kepada lawan jenisnya. Dalam kehidupan masyarakat ada sebagian pria yang mempunyai orientasi seksual dengan sesama pria, bukan kepada wanita sebagai lawan jenisnya. Tujuan penelitian ini untuk mengetahui dasar hukum hakim dalam membatalkan perkawinan yang dilakukan dengan suami seorang penyuka sesama jenis (homoseksual) dalam putusan nomor 176/Pdt.G/2019/PA.YK. Jenis penelitian yang digunakan adalah penelitian hukum normatif, dengan data penelitian berupa data sekunder yang terdiri dari bahan hukum primer dan sekunder. Selain itu juga dilakukan wawancara dengan hakim yang memutus perkara ini di Pengadilan Agama Yogyakarta guna melengkapi data sekunder. Berdasarkan hasil analisis disimpulkan bahwa dasar hukum pertimbangan hakim dalam membatalkan perkawinan antara wanita dengan suaminya penyuka sesama jenis dalam perkara nomor: 176/Pdt.G/2019/PA.Yk, adalah ketentuan Pasal 72 ayat (2) KHI beserta penjelasan Pasal 72 ayat (2) KHI tentang penipuan sebagai alasan pembatalan perkawinan. Kelainan seksual berupa homoseksual yang diajukan pemohon sebagai alasan pembatalan dapat diterima sebagai penipuan yang dilakukan suami kepada istri, dikarenakan suami dengan sengaja menutupi kelainan seksual yang dialaminya.

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## 1. INTRODUCTION

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Humans are individual creatures who have their own lives, but humans cannot live alone because they have to be social, so the instinct arises to live together and interact with each other. Marriage occurs because there is a desire within every human being to have a life partner to live with the opposite sex. It is natural for people of different genders to have an attraction to live together.

Marriage according to Article 1 of Law Number 1 of 1974 concerning Marriage is a spiritual and physical bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the belief in the Almighty God. As a birth bond, marriage is a legal relationship between a man and a woman to live together as husband and wife. This birth bond is a formal relationship that is real, both for those who bind themselves and for other people or society. Normal marriage, which is often found in Indonesian society, is a marriage between a man and a woman who in fact are naturally attracted to the opposite sex or can be said to have a sexual orientation towards the opposite sex.

In fact, since time immemorial, quite a few individuals have liked people of the same sex, for example men and men or women and women. This deviation is known as homosexuality. In its development, the term homosexual is often used to refer to sexual deviations between men, while sexual deviations between women are known as lesbians.

Islamic law strictly opposes and prohibits gay sex. This prohibition is based on Islamic rules whose sources are the Al-Qur'an and the hadith of the Prophet. There are various verses in the Qur'an, for example in Surah Al-A'raf (7) verses 80-81 regarding the story of the Prophet Lut's people, Allah SWT says:

وَلَوْطًا إِذْ قَالَ لِقَوْمِهِ أَتَأْتُونَ الْفَاحِشَةَ مَا سَبَّ قَوْمٌ بِهَا مِنْ أَحَدٍ مِنَ الْعَالَمِينَ

It means:

“And (We too had sent) Lut, when he said to his people, why are you committing abominable deeds, which no one has ever done before you (in this world)”.

God willing, God willing, God willing, God willing God willing

It means:

“Indeed, you have vented your lust on men, not women. You are truly a people who go beyond the limits.”

Al-Qur'an strictly prohibits sexual relations other than sexual relations within the framework of a legal marriage. Likewise, it prohibits sexual relations between a man and a man. Most homosexuals claim that they had no choice and it was fate. This is still debatable in the medical world. Even if this claim is true, the Qur'an firmly refuses to use this argument/claim as justification/legitimization for same-sex lovers.

Article 6 Paragraph (1) of Law 1/1974 confirms that "Marriage is based on the consent of the prospective bride and groom". This means that the marriage that is to take place must have the consent of both parties without any pressure or coercion from other parties. This is because husband and wife can build an eternal and happy family home in the sacred bond of marriage.

The Marriage Law has determined that in order to carry out a marriage, material and formal requirements must be met. In Article 22 of Law 1/1974 it is stated that a marriage that has been solemnized can be annulled and the marriage becomes void if the parties do not fulfill the requirements that have been determined for the marriage to take place. Marriages that were legally solemnized can still be annulled. If a marriage is annulled, the consequence is that the marriage is deemed to have never occurred so that the husband and wife whose marriage is annulled and deemed to have never had a marriage so that the two

of them are no longer husband and wife and it becomes haram for both of them to have husband and wife relations.

CaseMarriage annulment can be found at the Yogyakarta City Religious Court as stated in Decision Number 176/Pdt.G/2019/PA.YK. The applicant for marriage annulment is a wife. Since the beginning of the marriage until the application for annulment of the marriage was submitted, they had never had a relationship like husband and wife. This was because the respondent (husband) felt tired after carrying out the wedding procession, and was embarrassed to carry out his obligations as a husband and asked the applicant for time until the respondent felt ready and confident in carrying it out. The applicant, using various efforts, tried to lure the respondent in the hope that the respondent would want to have husband and wife relations, but the respondent rudely refused. Finally, the respondent admitted that he was a homosexual who sexually liked people of the same sex (men) and that this sexual deviation had been going on for a long time, and had been in a relationship with a man.

Based on the matters described previously, the formulation of the problem is what is the judge's legal basis for canceling a marriage between a wife and a husband who is a same-sex lover?

## 2. RESEARCH METHOD

This research uses a type of normative legal research (normative juridical). Normative legal research is a type of legal research that places law as a building norm. The norm system in question includes principles, norms, rules from statutory regulations and court decisions. Meanwhile, according to Muhaimin, normative juridical research is legal research that focuses on analyzing library data (materials) or other materials of a secondary nature, for example statutory regulations, legal theories, court decisions, and so on. Therefore, normative juridical research is also known as the term library research or dogmatic legal research.

In order to obtain research materials, this research was carried out using library research, which was carried out by studying documents that examine legal materials. Legal materials consist of primary legal materials and secondary legal materials with the following description:

### a. Primary Legal Materials

- 1) Law Number 1 of 1974 concerning Marriage;
- 2) RI Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law (KHI);
- 3) Yogyakarta Religious Court Decision Number 176/Pdt.G/2019/PA.YK.

### b. Secondary Legal Materials

- 1) Books related to family law, marriage law.
- 2) Results of previous research related to research material.
- 3) Journal articles related to research material.

The place for collecting primary and secondary legal materials in this research was carried out at:

- 1) Yogyakarta Religious Court;
- 2) Yogyakarta Muhammadiyah University Library;
- 3) Internet media and print media.

Data obtained from library research is arranged systematically, so that a comprehensive picture of the principles and legal provisions relating to the problem under study is obtained. Next, it will be analyzed using a descriptive method with a qualitative approach so that it can explain clearly and in depth in answering the problems raised.

### 3. RESEARCH RESULTS AND DISCUSSION (12 Pt)

#### 3.1 Cancellation of marriage on the grounds that the husband is a homosexual at the Yogyakarta Religious Court.

Marriage is a legal act that has serious legal consequences for both husband and wife. For this reason, the Marriage Law determines the marriage conditions that must be fulfilled by the prospective bride and groom who want to get married. The material conditions of marriage are regulated in Articles 6 to Article 11 of Law Number 1 of 1974. The material conditions of marriage are:

- a. There is agreement between the bride and groom.
- b. There is permission from both parents/guardians for prospective brides and grooms who are not yet 21 years old.
- c. The age of the prospective groom and bride has reached 19 years.
- d. The prospective groom and the prospective bride are not related by blood/family and cannot marry.
- e. Not in a marital relationship with another party.
- f. Not divorcing a second time with the same husband/wife you are going to marry.
- g. There is no waiting time for prospective brides who are widows.

Candidate of the bride and groom must fulfill these requirements to be able to get married. Marriages that do not meet the requirements for marriage can be annulled. Article 25 of the Marriage Law stipulates that a request for annulment of a marriage must be submitted to the Court in the jurisdiction where the marriage for which the annulment is requested took place or where the husband and wife, husband or wife live.

Based on research conducted at the Yogyakarta Religious Court, there was a case regarding a marriage annulment lawsuit caused by one of the partners being a homosexual, namely in Decision Number 176/Pdt.G/2019/PA.YK with the main case as follows: The applicant is a wife, has filed a request for annulment of marriage. Since the beginning of the marriage until the application for annulment of the marriage was submitted, they had never had a relationship like husband and wife (*qobla dukhul*). After marriage, the applicant and respondent (husband) chose to live in the respondent's parents' house. The applicant was suspicious of the respondent's activities, and the applicant felt something strange about the respondent. This strangeness occurred when the applicant asked the respondent why they were not having husband-wife relations as husband-wife couples generally do. The Respondent answered with reasons; still tired after carrying out the wedding procession, the respondent still felt taboo, embarrassed to carry out his obligations as a husband and asked the applicant for time until the respondent felt ready and confident in carrying it out. Apart from these oddities, the applicant also found oddities about the respondent. Some of these irregularities include; a) The applicant has tried with various efforts to lure the respondent in the hope that the respondent will want to have husband and wife relations, but the respondent has instead rudely refused; b) The respondent does not want to sleep in the same bed as the respondent as husband and wife should, in fact the respondent sleeps downstairs near the bed; c) The respondent always changes clothes in the bathroom, d) In the respondent's cell phone, the applicant surprisingly and unusually found a portrait of a man and a man's boarding room; e) The applicant found the door key and padlock in the respondent's trouser pocket, even though the room key and padlock were not the house key and lock belonging to the respondent's parents. Based on these irregularities, the applicant began to have suspicions about the respondent. Finally, the respondent admitted that he was a homosexual, where the respondent sexually liked people of the same sex (men) and this sexual deviation had

occurred for a long time, and had been in a relationship with a man. The applicant feels cheated by the respondent.

Based on the reasons mentioned above, the applicant finally submitted a request for annulment of the marriage that had been entered into with the respondent. The judge then conducted an examination of the case after failing to advise the applicant. Finally, the Panel of Judges at the Yogyakarta Religious Court decided: 1) Declared null and void the marriage performed by the applicant and the respondent before the Marriage Registrar of the Religious Affairs Office (KUA) District xxx, as recorded in the Marriage Certificate Excerpt Number xxx; 2) Declare that the Excerpt from Marriage Certificate number xxx issued by the Religious Affairs Office (KUA) of xxx District has no legal force.

### 3.2 Legal Basis for the Judge to Decide on Cancellation of the Marriage on the Reason that the Husband is a Same-Sex Person (Homosexual).

As explained in Article 1 of Law Number 1 of 1974, marriage is a spiritual and physical bond between a man and a woman as husband and wife whose aim is to form a happy and eternal family based on the belief in the Almighty God. Cancellation comes from the word cancel, which means to consider an event to be invalid, the event never existed. If the word annulment is connected to marriage, it means that the marriage is invalid or never existed. So, marriage annulment is a decision from the court through a trial stating that a marriage is legally defective. A marriage deemed to be legally defective can be proven by not fulfilling the terms and conditions of marriage or the marriage violating provisions that forbid such marriage. One of the reasons why a marriage breaks up is because there are reasons that are violated or conditions that are not fulfilled. In jurisprudence, marriage annulment is also called *fasakh*, which means to destroy or annul. Ibn Mazur defines *fasakh* linguistically, namely cancellation (*naqada*) or dissolution (*faraqa*). From this linguistic understanding, the meaning of *fasakh* is destroying or canceling a marriage, causing the marriage to break up.

Article 22 of Law Number 1 of 1974 states that a marriage can be annulled if the parties do not fulfill the requirements to enter into a marriage. Marriage annulment is divided into 2 types, namely; (1) Marriages that are void by law, (2) Marriages that can be annulled. Regarding a marriage that is void by law, it means that the marriage violates anything that is prohibited by marriage. Meanwhile, a marriage that can be annulled means that one of the parties has had their rights impaired so they can request an annulment of the marriage. Then in Article 27 of Law Number 1 of 1974 which is in accordance with Article 27 of the KHI which explains the rights of a husband or the rights of a wife to apply for an annulment of a marriage where the marriage was held in a situation of being threatened, deceived or misunderstood.

Besides in Law Number 1 of 1974, marriage annulment is also regulated in the Compilation of Islamic Law (KHI). Article 70 KHI determines that a marriage is void if:"

- 1) a husband who has 4 wives even though one of the four wives is in *iddah talak raj'i*;
- 2) someone marries his wife who has been *li'an*;
- 3) a person marries his ex-wife to whom he has been given three divorces, unless the ex-wife was married to another man and then divorced again *ba'da al-dukhul* from that man and her *iddah* period has expired;
- 4) A marriage is entered into by a man and a woman who are related by blood, marriage and consanguinity to a certain degree which prevents marriage according to Article 8 of Law Number 1 of 1974, namely: "
  - a. related by blood in a straight downward or upward lineage;
  - b. related by blood in a deviant lineage, namely between siblings, between a person and their parents' siblings and between a person and their grandmother's siblings;

- c. marital relations, namely parents-in-law, stepson, daughter-in-law and mother or stepfather;
  - d. related to one another, namely parents who are breastfed, children who are breastfed and aunts or uncles who are breastfed.
- 5) wife is a sibling or as an aunt or niece and his wife or wives.”
- Then Article 71 KHI states "the reasons a marriage can be annulled if:
- 1) a husband commits polygamy without permission from the Religious Court;
  - 2) the woman he married was later discovered to still be the wife of another man who was *mafqud*;
  - 3) the woman he marries turns out to be still in *iddah* and has another husband;
  - 4) marriage that violates the age limit for marriage as stipulated in article 7 of Law Number 1 of 1974;
  - 5) the marriage was carried out without a guardian or was carried out by a guardian who had no rights;
  - 6) marriages carried out by force.”

Furthermore, Article 72 of the Compilation of Islamic Law also regulates that "1) a husband or wife can apply for an annulment of the marriage if the marriage was solemnized under threat of breaking the law, 2) A husband or wife can submit a request for an annulment of the marriage if at the time of the marriage there was fraud or wrong thoughts about the husband or wife."

In Indonesia, religious values and the values that exist in society agree that same-sex (homosexual) marriage is an unethical act and violates the provisions regulated by religion and morality. In an era that has developed and there are social changes in society, homosexuals are increasingly developing. Andi Hamzah is of the opinion that etymologically a homosexual is a human being who is attracted to someone of the same gender. Terminologically, homosexuality is the tendency of a human being to channel his desires towards someone who has the same gender as him.

Homosexuality is a sexual disorder where a person is attracted to and has sexual relations with members of the same sex. Men who like men are called gay and women who like women are called lesbians. This action does not only occur today, but has occurred since the time of Prophet Lut. As This is in accordance with the word of Allah in QS. Al-A'raf verses 80 and 81.

Psychologists are of the view that homosexuals have a congenital injury to the center of their brain which causes aspects of their personality to be disrupted as a whole. Homosexual acts in a person are based on self-belief where his thoughts and beliefs provide justification for this so that his will can become a strong incentive to carry out this behavior in order to have same-sex relations.

Ibnul Qayyim quoted a history that the companions of Rasulullah SAW agreed to impose the death penalty for homosexual perpetrators. Rasulullah SAW once said, "Whoever of you finds someone who has committed the actions of the Prophet Lut's people, then kill the perpetrator and the object of that perpetrator." None of them disagreed with the agreement. It's just that they have different opinions about how to carry out the death penalty. Some scholars of the Hambali School have an agreement with their friends that the punishment for homosexuals is death. Same-sex sexual acts become a category of cursed sins, if the homosexual commits same-sex adultery. If this act of adultery is not followed by the desire to be accepted by the law, does not ask for legality religiously and wants to be accepted in the social community then it is not included in the category of LGBT perpetrators and activists but is said to be a homosexual who commits a sin.

Marriage between two people of the same sex (homosexuals) is not recognized and not permitted by law. Article 1 of Law Number 1 of 1974 clearly states that marriage is a marriage bond between a man and a woman. Thus Law Number 1 of 1974 as a positive norm for marriage has tightly closed the potential for homosexual marriage to be recognized or at least Law Number 1 of 1974 has tightly closed the loopholes for same-sex marriage, namely marriage between homosexual men, or marriage between women, can be legally recognized.

In this marriage annulment case, the Petitioner explained that he and the respondent were married, witnessed by a Marriage Registrar at the KUA. The applicant and the respondent are Muslim, so the marriage between the applicant and the respondent was carried out according to the provisions of the Islamic religion, fulfilling the requirements and pillars of marriage, namely the presence of a prospective male and female bride, guardian, witnesses, and consent. The applicant has submitted several written pieces of evidence in the form of letters and several people as witnesses. The documentary evidence presented at the trial was in the form of a photocopy of the Marriage Certificate Excerpt issued by District xxx Number xxx, which was sufficiently stamped and matched the original.

The marriage between the applicant and the respondent is therefore valid if viewed from Article 2 paragraph (1) of Law Number 1 of 1974 which determines "Marriage is valid if it is carried out according to the laws of each respective religion and belief". This has been taken into consideration by the judge in his decision. Based on the applicant's arguments which are supported by the testimony of witnesses, it can be stated that the following facts are proven: 1) During the marriage, the applicant and the respondent have never had relations like husband and wife (*qobla dukhul*), the respondent still feels taboo, embarrassed to carry out his obligations as a husband and ask the applicant for time until the respondent feels ready and confident in carrying it out, 2) The respondent admits that the respondent is a man who likes men (homosexuals) and this deviation has been going on for quite a long time, so far the respondent has been trying to cover it up- meeting with his family, 3) The Respondent had a relationship with a man named xxx since before he married the Petitioner, 4) The Respondent was willing to marry the Petitioner to cover up the identity of the Respondent's sexual disorder from his family so that there would be no suspicion from his family, 5) That the Respondent left home and never returned to his parents' house. After his departure, the Respondent once contacted the Petitioner to apologize and explain to the Petitioner that the Respondent could no longer live with the Petitioner, because that was not his world, the Respondent did not want to have a husband and wife relationship with the Petitioner and preferred a similar partner.

Whereas based on the facts mentioned above, the Tribunal found facts based on presumptive evidence that the respondent deliberately concealed his identity and if the applicant knew about the respondent's personal condition, the applicant would not want to marry the respondent. Whereas based on these facts, it is evidence that during the marriage, the respondent never told his wife or applicant that the respondent was a same-sex lover. The applicant of course thought that her husband was a normal man, who liked the opposite sex. However, it is known that the respondent does not want to have a relationship like husband and wife with all the efforts that have been made, resulting in misunderstandings against the respondent. This is proven by the absence of sexual relations after marriage between the plaintiff and the defendant (*qobla dukhul*).

Based on the results of interviews with Yogyakarta Religious Court Judges, namely Drs. H. Nurul Huda, SH, MH stated that in this case the husband was not a normal man and married the respondent only for social status so that the respondent's parents would be happy that he had a family, but in reality during the marriage the respondent did not

act as a husband should, due to a disorder within him. Article 6 paragraph 1 of Law Number 1 of 1974 explains that marriage must be based on the consent of the prospective bride and groom, both of whom agree to form a happy and eternal family. However, after finding out the truth, the applicant was shocked because he did not know the respondent's true identity, so fraud occurred because the respondent married the applicant to cover up the respondent's sexual deviation from his family. Based on the facts above, the judge then annulled the marriage, based on article 72 paragraph (2) of the KHI which stipulates that a husband or wife can apply for an annulment of the marriage if during the marriage there is fraud or misunderstanding about the husband or wife. According to the Explanation to Article 72 paragraph (2) of the Compilation of Islamic Law, what is meant by fraud is if the husband claims to be a man at the time of marriage and then it turns out he is already married, resulting in polygamy occurring without court permission, as well as fraud regarding personal identity. The judge also considered that fraud regarding self-identity, which according to Erikson, is an identity that involves the "existence" of the subject, which means that the subject has a unique personal style, therefore self-identity means maintaining one's own style of individuality. The husband's condition as a same-sex lover can be said to be his 'own individuality style'.

The judge in deciding on the annulment of the marriage also based the syar'i argument in the book Sirajul Wahhaj: 382, namely:

God willing

Meaning: Or if the wife finds her husband impotent or crazy, then the woman still has the right to fasakh.

Based on the considerations mentioned above, the petitioner's petition can be granted, therefore the Religious Court judge declared the marriage of the petitioner and the respondent null and void which had been held before the Marriage Registrar of the Religious Affairs Office (KUA) of District xxx, as recorded in the Marriage Certificate Excerpt Number xxx . The main reason for the annulment of this marriage was because the respondent deceived the applicant because the respondent was a sufferer of sexual deviation, so the annulment of this marriage was due to fraud.

#### 4. CONCLUSION

Based on the results of the analysis that has been carried out, it can be concluded that the legal basis for the judge's consideration in canceling a marriage between a husband who is a same-sex lover in case Number: 176/Pdt.G/2019/PA.Yk, is the provisions of Article 72 paragraph (2) KHI along with explanation of Article 72 paragraph (2) KHI regarding fraud as a reason for canceling a marriage. The sexual disorder in the form of homosexuality proposed by the applicant as a reason for annulment can be accepted as fraud committed by the husband against his wife, because the husband deliberately covered up the sexual disorder he experienced. Apart from that, the judge's legal basis for annulling a marriage is based on syar'i arguments in the book Sirajul Wahhaj; 382, namely:

God willing

Meaning: Or if the wife finds her husband impotent or crazy, then the woman still has the right to fasakh

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