



LEGAL ANALYSIS OF THE IMPLEMENTATION OF PHYSICAL INCAPACITY AND HEALTH CRITERIA AS THE BASIS FOR DIVORCE IN RELIGIOUS COURTS

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Abstract

This research aims to uncover the basis of judges' considerations in deciding divorce cases due to physical disability or illness in one of the married couples and to understand the classification of physical disability or illness according to Law No. 1 of 1974 and Islamic law. The research method used is juridical-normative. The research findings indicate that in deciding divorce cases related to physical disability or illness, specifically in cases numbered 115/PDT.G/2005/PA.SMN and 209/PDT.G/2005/PA.SMN, the panel of judges at the Religious Court of Sumenep has followed the procedures stipulated in Articles 65 to 91 of Law No. 7 of 1989 and considered the provisions of Marriage Law and applicable regulations in Indonesia. The decisions are also supported by evidence presented by the litigants, in accordance with both Positive Law and Islamic Law. Moreover, the emphasis on applying Article 19 letter (e) of Government Regulation No. 9 of 1975 and Islamic Law is not solely on the criteria of physical disability or illness but is more focused on the inability to fulfill the obligations as a husband or wife. Therefore, divorce decisions must be supported by facts demonstrating the spouse's actual incapacity to fulfill their marital obligations. This is crucial to prevent the Judiciary from granting divorce too easily, in accordance with the principle stated in Article 39 of Law No. 1 of 1974, which aims to make divorce more challenging to obtain. Additionally, the saying of the Prophet Muhammad is mentioned, emphasizing that although divorce is permissible, it is highly disliked by Allah SWT.

Keywords: *Implementation, Physical Disability and Illness Criteria, Divorce.*

ANALISIS HUKUM TERHADAP IMPLEMENTASI KRITERIA KETIDAKMAMPUAN FISIK DAN KESEHATAN SEBAGAI DASAR PERCERAIAN DI PENGADILAN AGAMA

Abstrak

Penelitian ini bertujuan untuk mengungkap dasar pertimbangan hakim dalam memutuskan perceraian akibat adanya cacat badan atau penyakit pada salah satu pasangan suami-istri, serta untuk memahami klasifikasi cacat badan atau penyakit menurut Undang-undang No. 1 Tahun 1974 dan Hukum Islam. Metode penelitian yang digunakan adalah yuridis-normatif. Hasil penelitian menunjukkan bahwa dalam

memutuskan perkara perceraian akibat cacat badan atau penyakit, khususnya dalam kasus Nomor: 115/PDT.G/2005/PA.SMN dan Nomor: 209/PDT.G/2005/PA.SMN, majelis hakim di Pengadilan Agama Sumenep telah mengikuti prosedur yang diatur dalam Pasal 65 hingga 91 Undang-undang No. 7 Tahun 1989, dan mempertimbangkan ketentuan Hukum Perkawinan dan Peraturan Perundang-undangan yang berlaku di Indonesia. Keputusan tersebut juga didukung oleh bukti-bukti yang diajukan oleh pihak-pihak yang berperkara, sesuai dengan Hukum Positif maupun Hukum Islam. Penekanan pada penerapan Pasal 19 huruf (e) Peraturan Pemerintah No. 9 Tahun 1975 dan Hukum Islam tidak hanya terfokus pada kriteria cacat dan penyakit semata, melainkan lebih pada ketidakmampuan untuk menjalankan kewajiban sebagai suami atau istri. Untuk itu, keputusan perceraian harus didukung oleh fakta-fakta yang menunjukkan bahwa suami atau istri memang tidak mampu memenuhi kewajibannya. Hal ini penting untuk mencegah Majelis Hakim memberikan putusan perceraian dengan mudah, sesuai dengan prinsip dalam Pasal 39 Undang-undang No. 1 Tahun 1974 yang bertujuan untuk mempersulit terjadinya perceraian. Selain itu, disebutkan juga sabda Nabi SAW yang menyatakan bahwa meskipun perceraian adalah halal, namun Allah SWT sangat membenci tindakan tersebut.

Kata kunci: Implementasi, Syarat Cacat Badan dan Sakit, Perceraian.

A. Introduction

Every human being who lives in this world generally always wants a happy life and tries to keep that happiness his. However, achieving this happiness is not easy without understanding and following the rules set by religion. One of the things that is of concern to religion is how individuals in society must properly fulfill their rights and obligations according to the provisions of religion and the state.

Marriage is one way to achieve that happiness. Marriage is considered as a contract or agreement that justifies association and limits rights and obligations, and provides mutual assistance between a man and a woman, as well as the fulfillment of obligations for each party (Zahra, 1957). Through marriage, a household is formed. When the household is doing well, society as a whole will also be good, because the household is the smallest community. Therefore, it is important for husbands and wives to mutually fulfill their rights and obligations in the household (Fidaweri, 1989).

The definition of marriage is regulated in Law no. 1 of 1974 concerning marriage, which states that marriage is an inner and outer bond between a man and a woman as husband and wife, with the aim of forming a happy and eternal family (household) based on Belief in One Almighty God. Apart from that, Article 26 of the Civil Code also states that marriage is a legal relationship between a man and a

woman for a long time, meaning that a valid marriage must meet the requirements set out in the Civil Code.

The legal basis for marriage in Indonesia is contained in Law no. 1 of 1974 and its Implementing Regulations, namely Government Regulation No. 9 of 1975. This law is the implementation of the Pancasila philosophy and the ideals of fostering National Law, as well as providing a legal basis for marriage that applies to various groups in society.

The law accommodates the elements and provisions of religious law and public beliefs, in accordance with the basic philosophy of Pancasila and the 1945 Constitution.(Syahrani, 1987). Article 2 paragraph (1) Law No. 1 of 1974 states that there is no marriage outside the law of each religion and belief in accordance with the 1945 Constitution. Therefore, there is also no divorce outside the law of each religion and belief(Diamil, 1985). This regulation provides freedom for Religious Court Judges to reason and be creative in handling divorce cases by considering various statements from various legal schools.

Islamic law teaches that the marriage bond must be strengthened as much as possible, but if the household has been damaged and endangered, then separation can take place. Islam does not teach that marriage partners cannot be separated again if they have been completely broken and exceeded the provisions of Allah SWT. The door to divorce is opened as a last resort to end a marriage that is no longer possible to maintain. Although Islam seeks to strengthen the marriage bond, it is not as wide as the practice of divorce in some Western countries(Judge, 2000).

There are several reasons that can be the basis for divorce (Article 19 Government Regulation (PP) Number 9 of 1975 concerning Implementation Rules for Law Number 1 of 1974 concerning Marriage (Government, 1975)), one of which is the inability to carry out obligations as a husband or wife due to disability or illness (Harahap, 1993) (Prodjodikoro, 1974). Article 39 paragraph (2) letter (e) of Law no. 1 of 1974 provides for this as a possible reason for filing for divorce. This divorce must go through a process in court with strong reasons and in accordance with the law.

Republic of Indonesia Government Regulation No. 9 of 1975 which regulates the implementation of Law no. 1 of 1974 does not provide more detailed information regarding this article(Khamim, 1996), so that Religious Court Judges have freedom in reasoning and creativity in dealing with divorce cases of this kind. Decisions taken by judges can be based on ideas from various schools of law that are considered relevant.

Cases of dissolution of marriages due to divorce occurred in the Sumenep Religious Court, and several cases have received decisions from the Court. Divorce due to disability can occur due to physical or spiritual disabilities, which results in disruption in social life. In dealing with cases of this kind, judges have the freedom to exercise reasoning and creativity in making decisions that are appropriate to the circumstances of each case, while still referring to the applicable legal basis.

Divorce based on disability or illness is one of the things regulated in Law Number 1 of 1974 concerning Marriage. This is also in accordance with the teachings of Islamic Law. In this context, there are two main issues that need to be answered, namely: the criteria for disability or illness as the basis for divorce according to Law Number 1 of 1974 and Islamic Law, and how to implement the conditions for disability or illness in the Religious Courts.

This study aims to examine and analyze the criteria for disability or illness according to Law No. 1 of 1974 concerning Marriage and Islamic Law. In addition, this study also aims to find out and analyze how the conditions for disability or illness are implemented as the basis for divorce in the Sumenep Religious Court.

In examining the criteria for disability or illness according to Law Number 1 of 1974 and Islamic Law, this research will examine and identify the specific points regulated in the law. Furthermore, researchers will compare the views of Islamic law and positive law in determining the criteria for disability or illness as the basis for divorce. The right scientific approach will be used to develop strong and logical arguments.

The implementation of the conditions for disability or illness as the basis for divorce in the Sumenep Religious Court is also a concern of this research. Researchers will conduct field studies to collect data from decisions that have been taken by the Religious Courts in divorce cases based on disability or illness. The results of this analysis will be used to evaluate the extent to which the implementation of the conditions for disability or illness complies with applicable legal provisions.

This research is expected to provide a more in-depth understanding of the criteria for disability or illness as the basis for divorce according to Law Number 1 of 1974 and Islamic Law, and how these conditions are applied in the Sumenep Religious Court. The results of this research are expected to contribute to the development of law and a wider understanding of marriage and divorce in Indonesia, especially in the context of household welfare and happiness which are the main goals of marriage itself.

B. Method

This research is a juridical-normative research, namely research on legal principles, legal principles and the legal system (Mertokusumo, 2002). The primary legal material in this research is Law no. 1 of 1974 concerning Marriage, Government Regulation no. 9 of 1975 concerning the Implementation of the Marriage Law, Law no. 7 of 1989 concerning Religious Justice, Presidential Instruction No. 1 of 1991 concerning Compilation of Islamic Law, Decision of the Sumenep Religious Court Judge Case Number: 115/pdt.G/2005/PA. Smn regarding divorce due to disability and illness on one of the parties, the decision of the Judge of the Sumenep Religious Court Case Number: 209/pdt.G/2005/PA. SMN regarding contested divorce due to disability and illness on one of the parties, utilizing primary, secondary and tertiary legal materials related to research legal issues.

C. Results and Discussion

The Religious Court is a judicial institution tasked with exercising judicial power in Indonesia in accordance with Article 24 of the 1945 Constitution of the Republic of Indonesia (1945 Constitution of the Republic of Indonesia). The Religious Courts are part of the courts which are under the Supreme Court, and have the authority to implement Islamic law within the limits of their powers. To carry out its duties, the Religious Courts have a Law of Procedure which regulates procedures for receiving, examining and adjudicating cases, as well as functioning as law enforcement and justice.. This is also clearly seen in Article 10 paragraph (2) of Law no. 4 of 2004 concerning Judicial Power which stipulates that the judiciary which is under the Supreme Court includes judiciary bodies within the General Courts, Religious Courts, Military Courts, and State Administrative Courts. A special court, namely the Islamic Court in Indonesia which is authorized by the State to implement Islamic material law within the limits of its power

To carry out its main duties, namely receiving, examining and adjudicating and resolving cases, and its function as law enforcement and justice, the Religious Courts already have concrete procedural law. This started since the enactment of Law no. 7 of 1989 which in Article 54 of the law explains that the procedural law that applies to courts within the religious courts is the civil procedural law that applies in the general court environment, except for what has been specifically regulated in this law. The Sumenep Religious Court in receiving, examining and adjudicating divorce cases due to disabilities or illness, is guided by the provisions of Article 56 paragraph (1) of Law No.

In recent years, there have been many requests for divorce with various reasons submitted by the people of Sumenep to the Religious Courts. One reason that is frequently asked is the inability of one party to fulfill its obligations as a husband or wife due to a disability or illness. The Sumenep Religious Court has processed and decided several divorce cases for this reason, such as decision Number: 115/pdt.G/2005/PA. Smn and Number: 209/pdt.G/2005/PA.Smn.

In examining and deciding divorce cases due to a disability or illness, the Sumenep Religious Court follows the provisions of Article 56 paragraph (1) of Law No. 7 of 1989 which confirms that the court is obliged to examine and decide on cases submitted, without rejecting them on unclear or unclear legal grounds. This process requires the judge's discretion and accuracy, as well as preambles that support an objective decision. Husaini Idris, a Judge at the Sumenep Religious Court, explained that the Judge's considerations in examining and deciding the case included interpretations of disabilities or illnesses that could affect household harmony,

According to Sudikno Metrokusumo, judges' considerations in civil decisions are divided into two, namely considerations about the case or events and considerations about the law (Mertokusumo, 2002). The decision consideration section contains the judge's reasons as accountability to the community for the decision handed down, so that the judge's decision has objective value. These reasons are in the form of a description of the case or about the incident, starting from the request requested to the description of the results of the examination of the trial.

The basis for the Judge's considerations for examining and deciding on a divorce because one of the parties suffers from a physical disability or illness are: first, the Judge will interpret "ijtihad" in advance regarding physical disability or illness which includes physical and mental illness. According to Husaini Idris, in general the description of physical and spiritual illness is a disease that has implications for affecting household harmony, so that the stability of the husband and wife household is disrupted. Second, the judge will look for the facts, including:

- a) The facts show that the disease suffered by one party is really difficult to cure.
- b) Facts showing that the physical disability or illness has resulted in the parties concerned being unable to carry out their obligations as husband and wife.
- c) The facts show that the husband and wife have no hope of living in harmony anymore as husband and wife for that reason. These facts will be used as the basis for the Panel's consideration in examining and deciding the divorce case.

In carrying out its functions, the Sumenep Religious Court continues to adhere to the principles of justice, legal provisions, and Islamic values to ensure decisions that are in favor of truth and justice in divorce cases. The considerations and legal basis used by the Panel of Judges in deciding the case Number: 115/Pdt G/2005/PA.Smn, include:

1. Article 19 letter (e) Government Regulation No. 9 of 1975 jo. Article 116 letter (e) Compilation of Islamic Law.
2. Article 1 Law no. 1 of 1974 and Article 3 of the Compilation of Islamic Law
3. Article 3 Government Regulation no. 45 of 1990
4. Article 39 paragraph (2) Law No. 1 of 1974
5. Article 89 paragraph (1) Law No. 7 of 1989
6. The evidence of fiqh from the book of Muhadzab II page 82 which explains "The validity of divorce is valid for each husband who has reached puberty according to his own will".

Article 19 letter (e) Government Regulation No. 9 of 1975 jo. Article 116 letter (e) stipulates that divorce can occur if one party suffers from a disability or illness which results in the inability to carry out their obligations as husband or wife. The author is of the opinion that the articles used by the Panel of Judges are very appropriate, because they have regulated valid reasons for divorce, especially in cases where one of the parties suffers from a mental illness which has been proven by the Judge.

Divorce is basically contrary to the purpose of marriage to form a happy, eternal family as well as sakinah, mawaddah and warahmah. Therefore, the use of Article 1 of Law no. 1 of 1974 and Article 3 of the Complications of Islamic Law by the Panel of Judges considered appropriate, because the purpose of the marriage did not materialize in the domestic life of the Petitioner and the Respondent, so that a divorce occurred. In addition, the reasons for divorce have also fulfilled the provisions stipulated in Article 19 letter (e) of Government Regulation No. 9 of 1975 jo. Article 116 letter (e).

Use of Article 3 Government Regulation No. 45 of 1990 by the Panel of Judges considered correct, because the article requires Civil Servants who are going to get a divorce to obtain prior permission from the relevant officials. In this case, the Petitioner as a Civil Servant has received a permit from the Regent of Sumenep dated 18 February 2003.

Article 39 paragraph (2) Law No. 1 of 1974 stipulates that divorce must have sufficient reasons, namely disharmony between husband and wife. Therefore, the

authors are of the opinion that the article used by the Panel of Judges is appropriate, because the Petitioners' petition has been proven and justified, especially because the Respondent suffers from a mental disorder as evidenced by a health certificate from Anwar Sumenep Hospital.

The use of Article 89 paragraph (1) by the Panel of Judges to determine who is responsible for paying court fees is also considered appropriate, because in divorce cases neither party wins or loses, so case costs must be borne by the plaintiff in accordance with Article 89 paragraph (1) of the Law on Religious Courts.

However, the use of fiqh argument from the book *Muhadzab juz II* page 82 which reads "Divorce is valid for each husband who has reached puberty according to his own will" according to the author is not quite right. The article seems to facilitate divorce, even though in the view of Islam, divorce is an act that is hated by Allah SWT. As a religion, Islam has regulated the limitations that must be met in order to carry out a divorce, so that the use of this argument can conflict with Islamic law and the laws in force in Indonesia which emphasize the difficulty of divorce.

In case Number: 209/Pdt.G/2005/PA.Smn relating to the petition for contested divorce, the Panel of Judges used the following considerations and legal basis:

1. Article 26 paragraph (1) Government Regulation No. 9 of 1975.
2. Article 19 letter (e) Government Regulation No. 9 of 1975 jo. Article 116 letter (e) Complications of Islamic Law.
3. Article 1 jo. 39 Law no. 1 of 1974.
4. Article 39 paragraph (2) of Law no. 1 of 1974.
5. Article 125 paragraph (1) HIR.
6. Article 89 paragraph (1) Government Regulation No. 9 of 1975.

The basis for the Panel's legal considerations in deciding on a divorce because one of the parties suffers from a disability or illness refers to Article 26 paragraph (1) of Government Regulation No. 9 of 1975. The article states that every trial court examining a divorce suit, both the Plaintiff and the Defendant or their proxies must be summoned to attend the hearing. The Panel is of the opinion that the use of this Article is appropriate, because the Court has made an official and proper summons against the Defendant. Even though the Defendant was not present at the trial, this divorce suit can be accepted because it has fulfilled the requirements of the *verstek* decision.

Furthermore, the use of Article 19 letter (e) of Government Regulation No. 9 of 1975 jo. Article 116 letter (e) The Assembly considers the Complications of Islamic Law to be true. These articles set out justifiable reasons for filing for divorce, one of

which is if one of the parties suffers from a physical disability or illness which results in the inability to carry out their obligations as husband or wife. The Panel has proven that there is disharmony in the Plaintiff's household caused by the Defendant suffering from an incurable disease, so he cannot carry out his obligations as husband and head of the household.

Use of Article 1 jo. Article 39 Law no. 1 of 1974 by the Assembly is considered appropriate, because the purpose of marriage is to form a happy and eternal family, unless there are justifiable reasons for filing for divorce in accordance with the applicable law. In this case, the Plaintiff's divorce suit was based on the argument that the Defendant suffered from diabetes and stroke which resulted in paralysis, so that his household was no longer harmonious. The Panel is of the opinion that this reason has been proven and justified, especially with the testimony of witnesses stating that the Plaintiff has never received physical and spiritual support from the Defendant for the past five years.

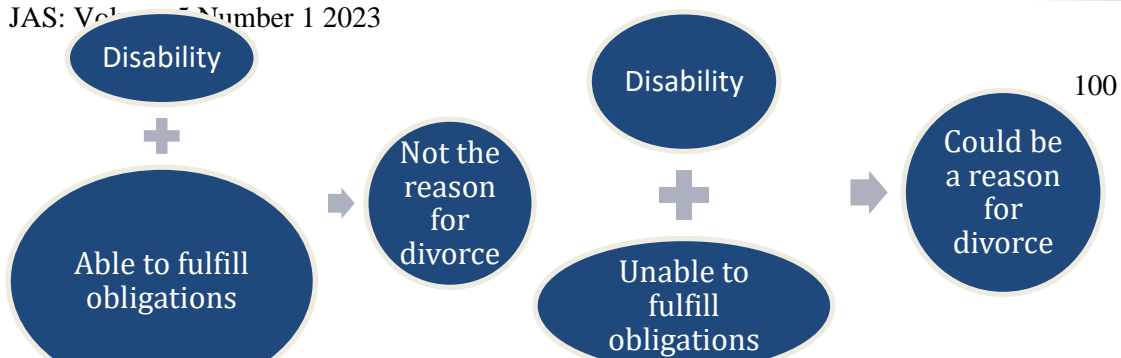
The Assembly also used Article 39 paragraph (2) of Law no. 1 of 1974 which states that in order to carry out a divorce there must be sufficient reasons, namely that between husband and wife will not be able to live in harmony. The use of this article is also considered appropriate because the reasons for the Plaintiff's divorce have been proven and reasoned.

Furthermore, the use of Article 125 paragraph (1) HIR by the Assembly is considered in accordance with applicable law. This article states that the Defendant must be present at the hearing. The Panel also considered it appropriate to use Article 89 paragraph (1) to determine that case costs should be borne by the Plaintiff, bearing in mind that in a divorce case neither party wins or loses.

However, at the end of the article, the author criticizes that the Panel of Judges only considers Legislation without referring to the Qur'an, Hadith, or the opinions of Fiqh experts in deciding cases. For example, in cases of divorce due to disability or illness, the Panel of Judges should refer to the relevant verses of the Koran or Hadith governing divorce issues, so that the decision taken is in accordance with Islamic law and also the laws in force in Indonesia. Thus, the decision will be more dignified and in accordance with the values of Islamic justice.

Chart of Criteria for Physical and Health Disability as the Basis for Divorce in the Religious Courts

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Article 39 paragraph (2) Law Number 1 of 1974 concerning Marriage, Article 116
Compilation of Islamic Law, and Article 19 PP Number 9 of 1975 concerning
Implementation of the Marriage Law

The above chart is described in two sub-chapters as follows.

1. *Criteria for Disability or Illness as the Basis for Divorce according to Law no. 1 of 1974*

The reasons for the divorce in the elucidation and Article 39 paragraph (2) letter (e) of the Marriage Law and Article 19 of the Implementing Regulations aim to protect and protect not all the interests of one of the parties being sacrificed because of causes that befall the other party. The reason for this divorce is very relative in nature, so it will raise many questions (Syahrani, 1987).

For example, what kind of disability and what disease and under what circumstances can it cause the husband and wife to be unable to carry out their obligations? If a wife suffers from cancer so her husband is cut off, can her husband use it as an excuse to divorce? What if a husband has an accident so that his nose is crushed, can his wife use it as an excuse to divorce? Can impotence, madness, or leprosy be used as a reason for divorce? Can one of the parties because of an illness become paralyzed, deaf or blind can be used as a reason for divorce by the other party? Thus it is clear, that it is the Judge who will determine definitively all of these circumstances, whether it can be used as a reason for divorce as referred to in this Marriage Law. To consider all these circumstances, the Judge is required to be very careful. Because the problem may not only have to be seen from one side, but several aspects that are very complex in nature, which include economic, health, psychological, welfare, maintenance and education of children and so on (Ramadhani, 2018).

Article 39 paragraph (2) of Law Number 1 of 1974 stipulates that in order to carry out a divorce there must be sufficient reasons, that the husband and wife

will no longer be able to live in harmony as husband and wife. Then the elucidation of Article 39 paragraph (2) letter (e) stipulates the reasons that can be used as grounds for divorce are that one party has a disability or illness which results in being unable to carry out its obligations as husband/wife (Sa'diah, 2013).

While Government Regulation no. 9 of 1975 which regulates the implementation of Law no. 1 of 1974 states in Article 9 letter (e) which reads that one party has a disability or illness with the result that he cannot carry out his obligations as husband/wife. According to Prawirohamidjojo (Prawirohamidjojo, Soetojo, 1996) that it is not specified in detail what is meant by a bodily defect or disease in the Article above, is appropriate because at any time a new disease may appear which causes the sufferer to be unable to carry out his obligations as husband and wife. This reason does not really need to get an explanation because it is known how far the definition of a disease in the form of a disability can result in a husband or wife not being able to carry out their obligations as husband and wife. For example, memory loss or madness, leprosy, and so on.

Sometimes the disability or illness is hidden by one of the parties so that the other party does not know about it when the marriage takes place. If in this case disability or illness can be used as a reason for demanding divorce? If according to the Judge's opinion the disability or illness causes a person to be unable to carry out his obligations, then this reason can be used to demand a divorce. However, if the disability or illness is known by the other party, by itself it cannot be used as a reason for filing for divorce (Prawirohamidjojo, Soetojo, 1996).

Endang Sumiarni (Sumiarni, 2004) explained that the definition of disability and disease that is mentioned in the Marriage Law is very broad, meaning that it depends on the party providing the understanding, because the Law does not explain the limitations. Sumiarni further explained, the reasons for disability and illness meant by the legislators were solely to protect the suffering party because one of them had a disability and another had a disease, so they could not carry out their obligations as husband and wife. Reasons like this can only be used to file for divorce if one of the aggrieved parties does not want to accept the situation.

Not all illnesses can be used as grounds for divorce, only certain illnesses that cause a person to be unable to carry out their functions and roles as husband or wife can be used as grounds for divorce. The judge must pay attention to the facts about the illness and carry out an in-depth examination and consider the

testimony of expert witnesses, namely doctors, before deciding on a divorce suit. Article 19 letter (e) Government Regulation No. 9 of 1975 provides an opportunity for husband and wife to file for divorce based on a disability or illness in their partner, but this must be examined carefully so that it is not abused.

The existence of a disability or illness is not the only reason that encourages a husband and wife to file for divorce (Yainahu, 2021). The feeling of mutual love, affection and acceptance of each other's shortcomings is an important factor in marriage. Therefore, this article should be deleted or amended so that the provisions of the law regarding divorce are more strictly enforced.

Then, it is necessary to distinguish between the obligation to provide spiritual and physical maintenance in a divorce suit. Article 19 letter (e) Government Regulation No. 9 of 1975 which stated "unable to carry out their obligations" needs to be explained better, because not all obligations must meet the same elements to be used as a reason for divorce. For example, a person who is unable to provide external support but is able to provide spiritual support should not be immediately deemed unable to fulfill his obligations as a husband or wife. That way, decision-making in a divorce suit will be more appropriate and fair.

According to Yahya Harahap (Harahap, 1993) many people are disabled but they are still able to fulfill their obligations, but conversely many people are not disabled but are unable to fulfill their obligations. If this is the case, if the disability or illness suffered by the Defendant does not result in a total paralysis of the ability to carry out the functions as husband and head of the family, then such disability or illness cannot be used as a reason for divorce. From this it is clear that the emphasis on applying the provisions of Article 19 letter (e) of Government Regulation No. 9 of 1975 does not only focus on the criteria for disability and illness, but places more emphasis on the consequences of not being able to carry out their obligations as husband and wife, and this must be proven by the parties to the existence of facts that show the inability of a husband or wife to carry out their obligations. (Arpandi, 2023), physically disabled but between the two there is a high mutual understanding so that the family remains *sakinah* (Nation, 2018), then it is not appropriate to grant the divorce

There is one thing that needs to be considered by the judge in adjudicating and deciding on a lawsuit/application for divorce, namely whether the disability or illness experienced by one of the husband and wife is temporary or is it absolute. According to medical science, every disease has a certain type or stage. There are some diseases that require a fast time in healing. There are medium,

old, and very long. But there are also diseases that cannot be cured. With this knowledge, a judge should not be hasty and rush to make a decision to grant a lawsuit/application for divorce because of a disability or illness.

Article 75 Government Regulation No. 9 of 1975 has regulated the procedures for examining cases in dealing with divorce cases due to a disability or illness on one of the parties. The article explains: "The judge may order the Defendant to see a doctor". This examination aims to give the judge a clear picture of the facts about the disability or illness suffered by the Defendant. From the facts of the information given by the doctor, the judge can judge whether the disability or illness suffered by the Defendant is permanent or temporary. Therein lies the purpose of the Defendant's examination of the doctor. So that the Judge can assess and conclude the permanent or temporary disability or illness (Harahap, 1993).

If indeed, according to the doctor's statement, the nature of the disability or permanent illness is sufficient reason for the Judge to grant the lawsuit. If the disability or illness is temporary and the temporary nature is only for a short period of time it is not appropriate, the Judge grants the lawsuit. Because what is desired Article 19 letter (e) Government Regulation No. 9 of 1975 is not a temporary state of impossibility. The impossibility of carrying out the obligations required by this article is the basis for divorce, disability or illness, which makes the husband "forever" unable to carry out his obligations. Such a way of application can be said to contain educational and preventive values in people's lives. By way of implementation that is not easy to grant a claim on the grounds of disability or illness, members of society are educated and discouraged from rushing for a divorce. Even though the possibility of a disability or disease is only "temporary" or "temporary". Furthermore, so that what is desired in Article 75 really meets the target, in the event that the Judge is still unsure or the results of examining a doctor, the Judge can order a re-examination of another doctor who is more skilled with the two examination results. The Judge already has comparative material in making a decision (Harahap, 1993). Then when further reviewed the meaning contained in Article 19 letter (e) Government Regulation No. 9 of 1975 it can be seen that the provisions of the article are one of the conditions for the permissibility of filing a lawsuit/application for divorce. So, if one partner wants to end the marriage, they can file a lawsuit/application for divorce with the condition that one of the partners is found to have a disability or illness. The solution provided by the provisions of Article 19 is divorce, of course

by filing a lawsuit/application for divorce. In the view of the authors, the solutions provided for in this article are not solutive, because the solutions provided by the provisions of this article actually cause problems because they will create new problems that are more risky and chronic. Is it true that the desire to end a marriage because of a disability or illness in one of the partners will actually end all existing household problems. Isn't it if the lawsuit/application for divorce is granted by the judge, then what about the problem with the Defendant/Respondent, won't he actually sink further into a very heavy mental pressure because of a divorce caused by an illness which he himself doesn't want. The divorce decision handed down by the Judge will certainly add to the suffering of the Defendant/Respondent pair. no, he will instead sink even more into a very heavy mental pressure because of the divorce caused by an illness that he himself does not want. The divorce decision handed down by the Judge will certainly add to the suffering of the Defendant/Respondent pair. no, he will instead sink even more into a very heavy mental pressure because of the divorce caused by an illness that he himself does not want. The divorce decision handed down by the Judge will certainly add to the suffering of the Defendant/Respondent pair.

Based on the description above, the Panel of Judges in handling divorce cases caused by a disability or illness in one of the husband and wife must really put a juridical or humane consideration, meaning that it does not only look at cases like this only from a legal perspective, but also must be linked to human values in general (Nur'aini, EH, & Febrian, 2022).

2. Criteria for Disability or Illness as the Basis for Divorce according to Islamic Law

If one of the husband and wife finds a disability or illness in their partner, then he has the right to file for divorce (Fauzi, 2023). Among the schools of fiqh there are details and the number of defects or diseases that cause divorce and its laws. Below is a classification and explanation of the above problems (Al-Mugniyah, Muhammad, 2000):

a) Impotence (Yunianti, 2018)

Impotence is a disease that makes a man unable to carry out his sexual duties. According to Islamic jurists, when a husband experiences impotence, the wife has the right to terminate the marriage. However, there are differences of opinion regarding whether a wife can terminate the marriage if the husband is impotent towards his wife but is able to have sexual relations with other women.

The opinion of the Imamiyah school states that the wife can only terminate the marriage if the husband is impotent towards all women. If the husband is only

impotent towards his wife but is able to have sexual relations with other women, then the wife cannot ask for a divorce. According to them, impotence only applies if the husband is unable to have sexual relations with all women.

The opinion of the Asy-Shafi'i, Hambali, and Hanafi schools is different from that of the Imami schools. According to them, if the husband is unable to perform his sexual duties, the wife has the right to terminate the marriage, even though the husband is still able to do so with another woman. They stated that the husband's inability to have sexual relations with his wife was attributed to the wife herself, so it was called impotence.

If a wife accuses her husband of being impotent, but the husband denies the accusation, then the wife must provide evidence that her husband is truly impotent. If there is insufficient evidence, and the wife is still a virgin, then the case will be left to experienced women to make a decision. However, if the wife is a widow, then the husband is asked to swear an oath because he is the one who denies the accusation. If the husband swears, the wife is also asked to swear an oath, and the case is postponed for one year. After one year has passed, the Judge will offer the wife the choice to terminate the marriage or continue with it. If the wife chooses to continue the marriage, then the marriage remains valid, but if she chooses to divorce, then she decides or asks the Judge to divorce her.

Opinions differ from the Maliki sect which states that dissolution of marriage does not require divorce. According to them, women can divorce themselves based on the Judge's order. However, the Hanafi school states that the judge will order the husband to divorce his wife, and if the husband refuses, then the judge will divorce him. Hanafi also stated that the woman was entitled to the entire dowry, while the Imamiyah school stated that women were only entitled to half the dowry. Meanwhile, the Maliki, Ash-Shafi'i, and Hambali schools are of the opinion that women are not entitled to even the slightest dowry.

If impotence occurs after the contract and sexual intercourse, then the wife has the right to terminate the marriage, whereas if it occurs after the contract and before intervening, the wife has the right to decide whether to break up, the same if it occurs before the contract is made.

b) *Al-Jubb* and *Al-Khasha'*

Al-jubb and *al-Khasha'* are two conditions in men which give the wife the right to terminate the marriage according to all schools of thought. *Al-jubb* is the cutting off of the testicles, while *al-Khasha'* is the loss or breaking of the testicles. If this condition existed before sexual intercourse, the wife has no right to

terminate the marriage. According to Hanafi, if the penis can still have an erection even though it doesn't produce sperm, the wife has no right to terminate the marriage. However, other schools of thought argue that as long as they cannot produce sperm, regardless of the condition, the wife has the right to decide. Imam al-Syahid al-Tsani stated that the dry conditions of the testicles still allow for intercourse and give orgasms, but do not release sperm.

Hanafi stated that after the marriage was annulled because of al-jubb and al-Khasha', the former wife was entitled to the entire dowry. However, other schools of thought argue that if a woman chooses to divorce because of al-jubb, she is not entitled to a dowry because there has not been any mixing. However, if the reason is al-Khasha' and there has been a mix-up, she is entitled to the dowry. Hanafi also stated that a man does not have the right to divorce his wife even if she has many defects. However, the wife has the right to terminate the marriage if the husband has all three of the above disabled conditions. Therefore, Hanafi's opinion does not apply to other defects.

c) Crazy

Maliki, ash-Syafi'i and Hambali agree that the husband may break the contract because of his wife's madness, and vice versa. Differences of opinion, contained in the details. Syafi'i and Hambali said that due to madness, marriage termination was determined for both of them, whether the madness occurred before the contract or after, as well as after mixing or not, without having to wait for a time like impotence.

Maliki said that, if madness occurs before the contract, both parties may enter into a divorce on condition that there is a dangerous threat to those who are healthy when associating with the insane. However, if the madness occurs after the contract is made, only the wife is entitled to divorce, after being given a grace period of one year. Because there is a possibility of recovery within this grace period. While the husband is not entitled to divorce, his wife suffers from madness that occurs after the contract.

Imamiyah said that a husband may not end a marriage because his wife is mad after the contract, because there is still a possibility for her to divorce. But a wife may divorce because her husband is crazy, whether it occurs before or after the contract, or after sexual intercourse. Meanwhile, Imamiyah, Hambali, ash-Syafi'i and Maliki agree that the woman is entitled to the full dowry if it has been interfered with, and not entitled if it has not been.

d) Hairpiece and Leprosy

Imamiyah is of the opinion that hair loss and leprosy are two diseases that cause men to have divorce, but not women, with the condition that this occurs before the marriage contract and the man does not know about it. As for the wife, she does not have the right to divorce, if one of these diseases occurs in a man (her husband).

Asy-Syafi'i, Maliki, and Hanafi are of the opinion that these two diseases are defects for both men and women. Both parties may carry out a divorce if they find that the disease is in their partner. People who suffer from this disease, including ash-Shafi'i and Hambali, have the same law as crazy people.

Meanwhile, Maliki said that women may terminate the marriage if the disease is found before and after the contract. Whereas men divorce (divorce) when leprosy from within the woman is found before or during the contract. Meanwhile, hair loss, if found before the contract, then both parties have the right to divorce. But if the hairpiece occurs after the contract, then that right is only for women and not for men. As for hair loss that is mild after the contract is found, it does not affect the continuity of the contract, for people who suffer from hair loss or leprosy, the Judge must give a grace period of one full year if there is any possibility of recovery within this period.

e) Al-Ritq, Al-Qarn, Al-'Afal and Al-Ifdha'

Al-Ritq is the clogging of a woman's vaginal opening, *Al-Qarn* is a lump like a sheep's horn, *Al-'Afal* is meat that secretes fluid, and *Al-Ifdha'* is the union of two sewers. These four defects are often experienced by women. According to Maliki and Hambali, if the husband finds one of the four defects in his wife, he has the right to terminate the marriage. Asy-Syafi'i believes that the cause of divorce is *Al-Ritq* and *Al-Qarn* alone. *Al-Ifdha'* and *Al-'Afal* do not affect the contract. Imamiyah stated that *Al-Qarn*, *Al-Ritq*, and *Al-'Afal* had no impact on the contract at all. If the defect is seen before the contract, the husband can terminate the contract if he wants, but if the defect is in the husband, the wife cannot divorce him. *Al-Mugniyah* states that diseases that can be treated without leaving serious scars will not affect the contract. The madzhab scholars care deeply about these defects because they do not have medical technology like plastic surgery in the past.

D. Conclusion

The decision of the Sumenep Religious Court in a divorce case due to a disability or illness has complied with the procedures regulated in Law no. 7 of 1989 and is based on the provisions of the Marriage Law and the applicable laws and regulations in Indonesia, as well as the evidence submitted by the litigants. Therefore, the decision can be justified and does not conflict with positive law or Islamic law. However, in deciding on a divorce case of this kind, the Panel of Judges should focus more on the consequences of not being able to carry out their obligations as husband and wife, not only on the criteria for disability and illness. This is important to make it more difficult for divorce and to maintain a happy and loving household.

References

- Al-Mugniyah, Muhammad, J. (2000). *Fiqh Lima Madzhab, cet. V, terjemahan Masykur A.B.* Jakarta: Lentera.
- Arpandi, M. R. (2023). *Pendapat Hakim Pengadilan Agama Banjarmasin Mengenai Perceraian Akibat Cacat Badan dan Penyakit.* uin-antasari. <https://idr.uin-antasari.ac.id/22259/>
- Bangsa, B. K. (2018). *Keluarga Sakinah Menurut Pandangan Suami Istri Yang Cacat Fisik (Studi Kasus Di Kabupaten Rejang Lebong Dan Kabupaten Kepahiang) (Doctoral dissertation, IAIN Curup).* IAIN Curup.
- Diamil, L. (1985). *Aneka Hukum Perceraian di Indonesia.* Jakarta: Ghalia Indonesia.
- Dewi Mahmudah, U., Iftitah, A. and Alfaris, M. 2022. Efektivitas Penerapan Pasal 7 Undang-Undang Perkawinan Nomor 16 Tahun 2019 dalam Upaya Meminimalisir Perkawinan Dini. *Jurnal Supremasi.* 12, 1 (Feb. 2022), 44-58. DOI:<https://doi.org/10.35457/supremasi.v12i1.1838>.
- Fauzi, R. N. (2023). *Cacat Badan Istri Sebagai Alasan Cerai Talak di Pengadilan Agama Sleman Perspektif Hukum Islam (Analisis Putusan Nomor 784/Pdt. G/2019/Pa. Smn).* Fakultas Ilmu Agama Islam Universitas Islam Indonesia.
- Fidaweri. (1989). *Hukum Islam tentang Fasakh Perkawinan Karena Ketidakmampuan Suami Menunaikan Kewajibannya.* Jakarta: CV. Pedoman Ilmu Jaya.
- Hakim, R. (2000). *Hukum Perkawinan Islam.* Bandung: CV. Pustaka Setia.
- Harahap, M. Y. (1993). *Kedudukannya Kewenangan dan Acara Peradilan Agama dan Undang-Undang No. 7 Tahun 1989.* Jakarta: Pustaka kartini.
- Khamim. (1996). *Kriteria Cacat Badan atau Sakit sebagai Alasan Perceraian (Studi Menurut Hukum Islam)* (Skripsi). Yogyakarta: Fakultas Syari'ah IAIN Sunan Kalijaga.

- Mertokusumo, R. M. S. (2002). *Hukum Acara Perdata Indonesia*. Yogyakarta: Liberty.
- Nur'aini, E. H., & Febrian, U. P. (2022). Tinjauan Sosiologis Terhadap Pembatalan Perkawinan Disebabkan Cacat Badan Atau Penyakit. *Legitima: Jurnal Hukum Keluarga Islam*, 5(01).
- Pemerintah, P. (1975). *Peraturan Pemerintah (PP) Nomor 9 Tahun 1975 tentang Aturan Pelaksanaan bagi Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan*.
- Prawirohamidjojo, Soetojo, dan M. P. (1996). *Sejarah Perkembangan Hukum Perceraian di Indonesia dan Belanda*. Surabaya: Airlangga University Press.
- Prodjodikoro, W. (1974). *Hukum Perkawinan di Indonesia*. Bandung: Sumur Bandung.
- Ramadhani, F. A. (2018). Analisis Yuridis Terhadap Cacat Badan dan Penyakit Sebagai Alasan Perceraian (Pasal 19 E PP. No. 9 Tahun 1975). *Kumpulan Jurnal Mahasiswa Fakultas Hukum*.
- Sa'diah, I. N. N. (2013). Implementasi Syarat Cacat Badan atau Penyakit Sebagai Dasar Perceraian di Pengadilan Agama Sidoarjo. *Jurnal Hukum Universitas Narotama*, 1.
- Sumiarni, E. (2004). *Problematika Hukum Perceraian Kristen dan Khatolik*. Yogyakarta: Wonderful PublisingCompany.
- Syahrani, R. (1987). *Perkawinan dan perceraian Bagi Pegawai Negeri Sipil*. Jakarta: Media Sarana Press.
- Yainahu, M. (2021). Cacat Badan Sebagai Alasan Perceraian (Undang-undang No. 1 Thn. 1974 tentang Perkawinan dan KHI). *Al-Mizan: Jurnal Kajian Hukum Dan Ekonomi*.
- Yunianti, Y. (2018). Pandangan Syaikh Wahbah Az Zuhaili dalam Kitab Fiqih Al-Islam Wa Adillatuhu tentang Batasan Cacat sebagai Alasan Perceraian. *Syariati : Jurnal Studi Al-Qur'an Dan Hukum*, 3(01).
- Zahra, M. A. (1957). *Al-Ahwal al-Syakhsiyah*. BeyruT: Dar al-Fikr.