

CONSIDERATIONS OF JUDGES OF THE BINJAI RELIGIOUS COURT IN DETERMINING THE STATUS OF THE MISSING DEFENDANT IN DIVORCE CASES IN THE PERSPECTIVE OF PROGRESSIVE LEGAL THEORY

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Abstract: This study examines the considerations of religious court judges in determining the time limit for assessing the status of the occult defendant in a divorce case. The research problem lies in the differences between the decisions of the judges and the Compilation of Islamic Law and the opinions of the fiqh scholars. This study analyzes the judge's findings and considerations in the divorce case, contesting Decision Number 331/Pdt.G/2022/PA Bji and Decision Number 346/Pdt.G/2022/PA. Bji and a progressive legal review of the judge's considerations. This type of research is qualitative with a normative approach. The results of the study found that the judge's decision in determining the status of the defendant unseen in the divorce case sued Decision Number 331/Pdt.G/2022/PA Bji was with a span of 10 (ten) months, and 5 (five) years in Decision Number 346/Pdt. G/2022/PA. Bji. These two decisions are based on the consideration of a statement from the village head that the whereabouts of the defendant are unknown (unseen). The judge's review in determining the defendant's status unseen in the divorce case is based on civil law in general. If the defendant has been summoned repeatedly but does not comply with the summons, the judge can decide with a *verstek* decision. This judge's consideration is a progressive legal finding because the judge finds aspects of the benefit of women in particular and the family (household) in general..

Keywords: *Judge's consideration; time limit; missing defendant; Progressive law*

Abstrak: penelitian ini mengkaji pertimbangan hakim pengadilan agama dalam menetapkan batasan rentang waktu pada penetapan status tergugat ghaib dalam perkara cerai gugat. Permasalahan penelitian terletak pada perbedaan yang terjadi antara keputusan para hakim dengan Kompilasi Hukum Islam dan pendapat para ulama fikih. Penelitian ini menganalisis putusan dan pertimbangan hakim pada perkara cerai gugat Putusan Nomor 331/Pdt.G/2022/PA Bji dan Putusan Nomor 346/Pdt.G/2022/PA.Bji, serta tinjauan hukum progresif terhadap pertimbangan hakim tersebut. Jenis penelitian adalah kualitatif dengan pendekatan normatif. Hasil peneliltian menemukan bahwa Putusan hakim dalam menetapkan status tergugat ghaib pada perkara cerai gugat Putusan Nomor 331/Pdt.G/2022/PA Bji adalah dengan rentang waktu 10 (sepuluh) bulan, dan 5 (lima) tahun dalam Putusan Nomor 346/Pdt.G/2022/PA.Bji. Kedua putusan ini, berdasarkan pertimbangan surat keterangan dari lurah, bahwa tergugat tidak diketahui keberadaannya (gaib)..Pertimbangan hakim dalam menetapkan status tergugat ghaib pada perkara cerai gugat tersebut adalah berdasarkan hukum keperdataan secara umum. Bahwa apabila tergugat sudah dipanggil berulang kali, namun tidak memenuhi panggilan tersebut, maka hakim dapat memutus dengan putusan *verstek*. Pertimbangan hakim ini dapat dikatakan sebagai temuan hukum progresif, sebab hakim mempertimbangkan aspek kemaslahatan terhadap perempuan secara khusus, dan keluarga (rumah tangga) secara umum

Kata Kunci: Pertimbangan Hakim, batasan waktu, tergugat ghaib. Hukum progresif

Introduction

In contested divorce cases, one of the parties often does not attend court. In this contested divorce case, the reasons for the defendant's absence are often unknown. The lack of one of the parties causes a decision issued by the judge to be called a *verstek* decision.¹

The absence of a husband in a contested divorce case is usually a supernatural divorce suit. *Ghoib* divorce lawsuit or *Ghaib* divorce is a lawsuit filed with the Religious Courts by a plaintiff/applicant to claim divorce from the Defendant/Respondent, where up to the lawsuit filing, the address or whereabouts of the Defendant/Respondent is unclear or unknown.²

Regarding the unknown whereabouts of the defendant, the Compilation of Islamic Law explains if a summons has been made. The defendant is declared unseen, and then the divorce suit filed by the wife is accepted without the defendant present. As long as it complies with the provisions and is proven, a judge can decide in a *verstek* manner.³

In the perspective of Islamic law (*fiqh*), the unseen husband is called *al-mafqūd*. *mafqūd* or neglected husband referred to here is a husband who is far away and has no news, so his place is not known, and it is not known whether he is still alive or has died.⁴

Regarding the status of *mafqūd* and

marital relations, Imam Abu Hanifah and Imam Syafi'i said that the wife of a man who has no news about it is not lawful to remarry until she has passed the time when her husband is usually declared impossible to be alive. Imam Abu Hanifah said the time limit was 120 years, and Syafi'i and Ahmad gave a limit of 90 years.⁵

The Hanafiyah also believe that a wife her husband has abandoned for a long time should be patient and not sue for divorce. They argued that the marriage between the two was ongoing until there was clear information that her husband had died or had divorced her.⁶

Meanwhile, Imam Malik and Imam Ahmad think that a wife whose husband has left without her whereabouts being known, then she waits four years (the maximum time limit for pregnancy) and four months and ten days (as with *iddah* death). After that, he was lawful to remarry with another man.⁷

Whereas in the Compilation of Islamic Law, as an explanation of the reasons for divorce, Article 116 letter b KHI states that "divorce can occur for the reason that one party leaves the other party for 2 (two) consecutive years without the permission of the other party and legal reasons or for other reasons beyond his control. This is different from the opinion of the scholars, as has been explained.⁸

¹ Maswandi SH., MH, 'Putusan Verstek Dalam Hukum Acara Perdata', *JURNAL MERCATORIA*, 10.2 (2017)

<<https://doi.org/10.31289/mercatoria.v10i2.1153>>.

² Faisal Yahya and Maulidya Annisa, 'Putusan Verstek Dalam Cerai Gugat Analisis Putusan Mahkamah Syar'iyah Banda Aceh', *El-USRAH: Jurnal Hukum Keluarga*, 3.1 (2020) <<https://doi.org/10.22373/ujhk.v3i1.7706>>.

³ Bustanul Arifien Rusydi, 'PROBLEM KEHADIRAN DAN UPAYA HUKUM TERGUGAT DALAM PUTUSAN VERSTEK PERKARA PERCERAIAN PADA PENGADILAN AGAMA BANDUNG', *Muslim Heritage*, 5.2 (2020) <<https://doi.org/10.21154/muslimheritage.v5i2.2362>>.

⁴ Sofia Hardani, Asmiwati Asmiwati, and Dewi Nofrita, 'PERKARA MAFQUD DI PENGADILAN AGAMA DI PROVINSI RIAU DALAM PERSPEKTIF KEADILAN GENDER', *Marwah: Jurnal Perempuan*,

Agama Dan Jender, 17.2 (2019) <<https://doi.org/10.24014/marwah.v17i2.4810>>.

⁵ N Damayanti, S Irwansyah, and ..., 'Analisis Fikih Munakahat Terhadap Putusan Nomor: 7580/Pdt. G/2018/PA. Cmi Tentang Perceraian Suami Mafqud', ... *Hukum Keluarga Islam*, 2019.

⁶ Choirul Anam, 'STATUS HUKUM PERKAWINAN WANITA DARI SUAMI MAFQUD DAN ANAK DALAM PERSPEKTIF HUKUM ISLAM DAN HUKUM POSITIF', *Twinning Program*, 2006.

⁷ A Khomsatun, 'Hukum Pernikahan Istri Yang Disebabkan Suami Mafqud Menurut Perspektif Hukum Islam', *Jurnal Al-Wasith: Jurnal Studi Hukum Islam*, 2021.

⁸ Novita Dwi Lestari, 'KOMPILASI HUKUM ISLAM (KHI) DAN PENDAPAT MADZHAB SYAFI'I TENTANG BATASAN MASA TUNGGU SUAMI/ISTERI MAFQUD', *JURNAL ISLAM NUSANTARA*, 2.1 (2018) <<https://doi.org/10.33852/jurnal.in.v2i1.76>>.

Meanwhile, regarding the imposition of the status of an unseen husband in the divorce case decision, the authors found that there were 2 (two) decisions, namely at the Binjai Religious Court: Decision Number 331/Pdt.G/2022/PA Bji and Decision Number 346/Pdt.G/2022/PA. Bji—in addition to other decisions, because these 2 (two) decisions are the focus of the author's study.

Based on the author's initial study, the 2 (two) decisions are different in setting the time limit for determining the status of the occult defendant. First, Decision Number 331/Pdt.G/2022/PA Bji, the time limit is 1 (one) year, namely September 2021 to June 06 2022. Second, Decision Number 346/Pdt.G/2022/PA. Bji, in this decision, the time limit is 5 (five) years, namely from 2017 to May 27, 2022.

To confirm the difference in determining the occult time, the author then conducts initial interviews with the Judge who examines and tries the 2 (two) cases. Fatma Khalida explained that in civil procedural law, the RBG/HIR of occult divorce is not regulated for how long. So, for the determination based on the Judge's *ijtihad*. Then, Muhammad Taufik also explained that "basically in *fiqh* law a person is occult/*dimafqūd* if his whereabouts are not known for two years, but in the case of an unseen/*mafqūd* divorce it can be concluded that 6 (six) months more is unknown. Because the civil procedural law stipulates that issues can be decided in a *verstek* manner, where the husband is invisible, it is enough with a statement that the whereabouts of someone from the *lurah* or village head is unknown.⁹

After the writer describes the problems above, the writer then examines this case with the title, "Considerations of Judges of

the Binjai Religious Court in Determining the Status of the Unseen Defendant in Divorce Cases Claiming the Perspective of Progressive Legal Theory (Study of Decision Number 331/Pdt.G/2022/PA Bji and Decision Number 346/Pdt.G/2022/PA.Bji").

Literature Review

Progressive Law Theory

Progressive is a word that comes from a foreign language (English) whose origin is progress which means progress. Progressive is an adjective, so something that is advanced. Progressive law means advanced law. By basing it on progressive law, its application in the judge's decision at the Religious Courts can be described as follows.¹⁰

1. Assumptions of Progressive Law

First, the law is assumed to be for humans, not vice versa. When the law is considered for humans, not humans for law, the presence of law is not for himself. That is why if there is a problem in the law, it is the law that must be reviewed and corrected.¹¹

2. Components of Progressive Law Rules and Behavior

Whereas progressive law departs from two components of the legal basis, namely rules and behaviour. The law cannot escape from its normative characteristics as rules, but the law is also behaviour. Regulations will build a favourable legal system, while behaviour or people will drive the practices or systems built.¹²

3. Purpose of Progressive Law for Human Happiness

When a law has a progressive character, it always proceeds towards change and rejects the status quo when it creates decadence. Of course, this shift in principle is of the nature of progressive law to provide

⁹ Muhammad Taufik, Hakim PA Binjai, Wawancara Pribadi, Binjai 12 Juni 2023

¹⁰ Satria Sukananda, 'Pendekatan Teori Hukum Progresif Dalam Menjawab Permasalahan Kesenjangan Hukum (Legal Gaps) Di Indonesia', *JURNAL HUKUM EKONOMI SYARIAH*, 1.2 (2018) <<https://doi.org/10.30595/jhes.v1i2.3924>>.

¹¹ Fauzan Fauzan, 'PROGRESSIVE LAW PARADIGM IN ISLAMIC FAMILY LAW RENEWAL

IN INDONESIA', *JURNAL ILMIAH MIZANI: Wacana Hukum, Ekonomi, Dan Keagamaan*, 7.2 (2020), 187–202 <<https://doi.org/10.29300/MZN.V7I2.3617>>.

¹² Sayuti Sayuti, 'Arah Kebijakan Pembentukan Hukum Kedepan (Pendekatan Teori Hukum Pembangunan, Teori Hukum Progresif, Dan Teori Hukum Integratif)', *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan*, 13.02 (2018) <<https://doi.org/10.30631/alrisalah.v13i02.407>>.

justice for the disputing parties.¹³

Perkawinan *Mafqūd* dalam Perspektif Ulama Mazhab

According to Wahbah al-Zuhayli, the terminology of *mafqūd* is an unseen person who has no news about him; it is not known whether he lived or died. In this case, the place of residence is known or unknown, but the life or death is not known, then it is also said to be a *mafqūd* person..¹⁴

Abū Ḥanīfah ra. said in the *mafqūd* case, a woman could not marry. However, in cases where a missing husband (*mafqūd*) results in the neglect of the wife's rights, Imam Abū Ḥanīfah provides a solution to waiting for four years. After four years, the wife may remarry. If a husband sentenced to death earlier is still alive and returns to his wife, he is still her husband and the dowry is given by the husband who has just been returned.

According to Imam Malik in his work *al-Muwatṭa*, a wife who has been abandoned by her husband (*mafqūd*) and is cut off from information, a wife has the right to report her case to a *qāḍi* or Judge. Then she orders a wife to undergo a waiting period of four years.

If the husband who was sentenced to death earlier is still alive and comes back to his wife, regarding this matter, Imam Malik has the opinion that the husband who was *mafqud* earlier no longer has *khiyar* (the right to vote) for the wife who is left behind. Whether the wife has been raped by her second husband or not.

According to Imam Malik, the Judge is allowed to give a verdict for the death of the *mafqūd* man within four years. So when the four-year waiting period is over, the woman enters the *iddah* period for four months and

ten days; only then can she remarry.

Imam Mawardi from Ulama Syafi'iyah said that there are two conditions when a husband leaves the house. The first is if the husband leaves the house, but the news is still received, and his life is still known. In this case, the wife is not allowed to remarry even though the husband has been away for a long time and even though the husband has left wealth for the wife to fulfil her needs or not.¹⁵

The second situation is the husband's departure, whose news cannot be known again and his life and death. However, the circumstances of his departure are different, whether he still lives in the same country or has left his country via land or sea travel. Whether the vehicle was destroyed or lost during the war, this situation is called *mafqūd*. In a state of *mafqūd*, the husband's property that is *mafqūd* may not be used or inherited. If the husband is gone for a long time, it is unknown that there are differences of opinion about the wife's fate.¹⁶

Differences in the circumstances of leaving the husband from home are also mentioned in the book *Al-Mausu'ah Al-Fiqhiyyah Al-Kuwaitiyyah*. In the book, it is explained regarding the three occasions of the departure of the husband from home:¹⁷

1. Unseen, meaning a husband who leaves his house and does not return, but his life and death are still known.
2. *Mafqud* is a husband who leaves home and is not known about his life and death.
3. *Mahbus*, which means a husband who is proven guilty and sentenced to several years in prison.

The difference in circumstances when the husband leaves the house causes differences in the steps that the wife can take. For a wife whose husband is unseen, Syafi'iyah scholars

¹³ Adi Nur Rohman, 'Hukum Islam Dan Perubahan Sosial: Dinamisasi Perkembangan Metode Ijtihad Muhammadiyah', *Jurnal Hukum Perdata Islam*, 22.1 (2021).

¹⁴ M. Burhanuddin Ubaidillah, 'Yurisdiksi Ijtihad Umar Bin Khattab Dalam Kasus Anggapan Kematian Suami Mafqud', *Uratuna: Jurnal Hukum Keluarga Islam*, 2.2 (2019).

¹⁵ Hatice Kübra Kahya, 'In Search of a Remedy in Another Madhab: Marriage of an Absent

Husband in Ottoman Family Law', *Islam Tetkikleri Dergisi*, 12.2 (2022) <<https://doi.org/10.26650/iuitd.2022.1123353>>.

¹⁶ Hardani, Asmiwati, and Nofrita.

¹⁷ Mek Wok Mahmud and Siti Zulaikha Binti Mokhtar, 'Mafqūd and Fasakh in the Writings of Muslim Jurists and Provisions of Malaysian Federal Territory Islamic Family Law: The Case of MH 370 Missing Plane', *Intellectual Discourse*, 25 (2017).

think that the wife does not have the right to file for divorce because her husband is unseen. This opinion is based on the right of continued sexual relations between husband and wife to be the husband's right. So if a husband has had intercourse with his wife once, the husband is not guilty before the Judge. The wife's right to have sex must only be fulfilled once.

Hanabilah scholars describe their opinion in two circumstances. First, in the unseen condition of the husband, where there is an allegation that the woman's husband is still alive, this situation is exemplified when, for example, the husband travels for a vacation, works, studies or performs the pilgrimage safely. In such circumstances, the Judge can determine the death status of her husband after there is a substantial allegation that the man has died. In this first condition, Imam Ahmad gave a balance for 90 years.

Second, if the disappearance of the husband is in a situation where there is a life-threatening danger, such as the loss of the husband while on the battlefield or when an enemy attack occurs and then does not return, then the Judge can determine the status of the husband's death after four years from the time the man's disappearance occurred.¹⁸

Methods

Research on "Considerations of Judges at the Binjai Religious Court in Determining the Status of the Unseen Defendant in Divorce Cases Lawsuit Progressive Perspective (Study of Decision Number 331/Pdt.G/2022/PA Bji and Decision Number 346/Pdt.G/2022/PA.Bji)" is an empirical legal research.¹⁹

This research approach uses a legal psychology approach (legal psychology approach). This legal psychology approach is

used to understand the thoughts of judges.²⁰ This is because legal psychology focuses on the human psyche. Psychiatry here includes what the Binjai Religious Court Judge considers in determining the occult defendant's status in the divorce case. This legal psychology approach is also intended to know, connect, examine, and criticize the judge's considerations as a legal decision.

Data analysis begins with examining all data by reading, studying, and analyzing; reduces by abstracting and arranging them in units; categorizes in tabular form; ends by checking the validity of the data before it becomes information. In summary, data analysis in this study is organizing the results of observations, interviews and field notes.²¹

Result and Discussion

Judge's Considerations in Determining the Status of the Unseen Defendant in Divorce Cases

It is known that the category of mafqūd in the decision of Decision Number 331/Pdt.G/2022/PA Bji and Decision Number 346/Pdt.G/2022/PA. Bji is the type of mafqūd in which the husband's departure is safe—not leaving for the area or in a situation that can potentially destroy.

In the case of departure or mafqūd in this safe condition, Hanafiyah scholars provide a standard of 120 years from the age of the husband's birth, the year according to Ḥasan bin Ziyad's opinion. Then, Abi Yūsuf, still a Hanafiyah scholar, set 100 years. According to both of them, the human age of their time did not exist until that long. However, in cases where a missing husband (mafqūd) results in the neglect of the wife's rights, Imam Abū Ḥanīfah provides a solution to waiting for four years. After four years, the wife may remarry.

Interestingly, if a husband sentenced to

¹⁸ 'Sumber Hukum Dalam Menetapkan Status Bagi Mafqud Oleh Hakim Pengadilan Agama', *Syaksia : Jurnal Hukum Perdata Islam*, 20.1 (2020) <<https://doi.org/10.37035/syakhsia.v20i1.1982>>.

¹⁹ Jason M. Chin and Kathryn Zeiler, 'Replicability in Empirical Legal Research', *Annual Review of Law and Social Science*, 2021

<<https://doi.org/10.1146/annurev-lawsocsci-121620-085055>>.

²⁰ V.A. Ilyina and N.A. Ilyina, 'Ontological Approach to Knowledge of the Legal Psychology Value System', *Psychology and Law*, 10.1 (2020) <<https://doi.org/10.17759/psylaw.2020100113>>.

²¹ Wiwin Yuliani, 'Metode Penelitian Deskriptif Kualitatif', *QUANTA*, 2.2 (2018).

death earlier is still alive and returns to his wife, what is his marital status? Imam Abū Ḥanīfah thought he was still her husband, and the newly-born husband gave the dowry.

Whereas in the Malik School, a wife who has been abandoned by her husband (mafquḍ) and is cut off from information, a wife has the right to report her case to a qāḍī or judge, then orders the wife to undergo a waiting period of four years.

In contrast to Abu Hanifah, according to Imam Malik, if the husband who was sentenced to death earlier is still alive and comes back to the wife, regarding this matter, Imam Malik has the opinion that for the husband who was mafquḍ earlier, he no longer has khiyar (the right to vote) over the abandoned wife. Whether the wife has been raped by her second husband or not.

In summary, according to Imam Malik, the judge can give a verdict for the death of the mafquḍ man within four years. So when the four-year waiting period is over, the woman enters the iddah period for four months and ten days; only then can she remarry. If it turns out that the husband is still alive, the wife is still the wife of her second husband.

Meanwhile, according to the Syafi'iyah school of thought, the wife is still the legal wife of a mafquḍ husband, bound by marital ties with a mafquḍ husband until the mafquḍ husband arrives. Even though the husband disappeared for a long time, as long as there is no conviction of her husband's death, this is the opinion of Imam Syafi'i in Qoul Jadid.

The opinion of Qaul Jadid explains that for a husband who disappears due to leaving or other reasons, and the news is interrupted, his wife cannot remarry until it is believed or strongly suspected based on the evidence of his death because the original law is that the husband is still alive. The marriage is still valid with certainty, so this cannot be lost except with news that is also certain or equivalent. The strong suspicion that the husband has died is the passing of a

period in which it is known or strongly suspected that the person cannot live beyond that, as with his contemporaries..

However, according to the opinion of qaul qadim Imam Syafi'i explained, the wife is required to wait for four years for a judge's decision, and then the Judge decides the death of the mafquḍ husband related explicitly to the rights of his wife after that, the wife leaves with Idah and dies for four months and ten days. If the iddah period has expired, the wife can remarry.

In this case, the wife's goal is to wait for four years to determine her husband's death; mafquḍ is the time most used to find out the wife's womb is clean from the fetus. For iddah for four months and ten days due to the termination of the marriage between the mafquḍ husband and wife is by the decision of the mafquḍ husband's death, not because of divorce. Four years is the standard because it is the maximum gestational age. At the same time, the calculation starts from the disappearance of the husband's whereabouts or the judge's legal decision for the husband's death.

Whereas the Hambali school of thought elaborated their opinion that in a state of an unseen husband in a safe condition, the Judge can determine the death status of her husband after there is a substantial allegation that the man has died. In this state, Imam Ahmad gave in proportion for 90 years.

Then, still, according to Muhammad Taufik, he continued his statement, "because the civil procedural law stipulates that cases can be decided in a verstek manner, where an unseen husband is sufficient with a statement that the whereabouts of someone from the lurah or village head is not known."²²

Muhammad Taufik's opinion, explained in Article 138 paragraph 3 of the Compilation of Islamic Law, is that every time a Religious Court hearing is held to examine a divorce suit, the Plaintiff and the defendant or their attorneys will be summoned to attend the

²² Muhammad Taufik, Hakim Pengadilan Agama Binjai, Wawancara Pribadi, 12 Juni 2023 di Binjai

hearing. Summons are sent to the person concerned. The summons is conveyed through the lurah or the equivalent if the person in question cannot be found.

Interestingly, in Decision Number 331/Pdt.G/2022/PA Bji regarding the reasons for accepting the Plaintiff's claim, it is explained as follows,

Based on the abovementioned considerations, Plaintiff's claim has fulfilled the reasons based on Article 39 paragraph (2) of Law No. 1 of 1974 jo. Article 19 letter f Government Regulation No. 9 of 1975 jo. Article 116 letter f Compilation of Islamic Law, therefore the Judge thinks that the Plaintiff's lawsuit can be granted by imposing Divorce on the Plaintiff by the Defendant.

Then, in Decision Number 346/Pdt.G/2022/PA.Bji,

Based on the abovementioned considerations, Plaintiff's claim has fulfilled the reasons based on Article 39 paragraph (2) of Law No. 1 of 1974 jo. Article 19 letter f Government Regulation No. 9 of 1975 jo. Article 116 letter f Compilation of Islamic Law, therefore the Panel thinks that the Plaintiff's lawsuit can be granted by imposing Divorce on the Plaintiff by the Defendant.

Please note, Article 39 paragraph (2) of Law No. 1 of 1974 states, "To carry out a divorce there must be sufficient reasons, that the husband and wife will not be able to live in harmony as husband and wife". Then, Article 19 letter f of Government Regulation No. 9 of 1975 contains reasons for Divorce: "There are constant disputes and quarrels between husbands and wives and there is no hope of living in harmony in the household again". The same thing is also contained in Article 116, letter f of the Compilation of Islamic Law, that Divorce can occur because "between husbands and wives there are constant disputes and fights and there is no hope of living in harmony in the household again".

At this point, it can be seen that the Judge's juridical considerations in deciding the Divorce were "because between husband and wife there are constant disputes and fights and there is no hope of living in harmony again in the household". Not because one of the parties has left the other party, as Article 116 letter b KHI states that Divorce can occur because "one party leaves the other party for 2 (two) consecutive years without the permission of the other party and valid reasons or because of anything other than ability". Or article 19 letter b Government Regulation No. 9 of 1975 states, "One party leaves the other party for 2 (two) consecutive years without the other party's permission and without valid reasons or for other reasons beyond his capacity" as a reason for Divorce.

Progressive Legal Theory Perspective on Judge Considerations in Determining the Status of the Unseen Defendant in Divorce Cases

The author has explained on the theoretical basis that progressive law is to change quickly, fundamentally reverse legal theory and practice, and make various breakthroughs. This liberation is based on the principle that law is for humans and not vice versa. That law does not exist for itself but for something broader: human dignity, happiness, welfare and glory.

This understanding means progressive law is a series of radical actions by changing the legal system (including changing legal regulations if necessary) to make the law more valuable, especially in raising self-esteem and guaranteeing human happiness and welfare.

In the writer's favour, the reason for the judge establishing occult status in the Divorce Case Claims Decision Number 331/Pdt.G/2022/PA.Bji with a span of 10 (ten) months, and Decision Number 346/Pdt.G/2022/PA.Bji 5 (five)) year is a progressive legal finding.

Because in the judge's consideration, based on legal facts, Plaintiff has succeeded in proving the central argument of his lawsuit, and it can be concluded that the

household between Plaintiff and Defendant has no hope of being maintained anymore because the families of the Plaintiff and the Defendant have broken up (marriage breakdown). So that the purpose of marriage is to foster a *sakinah*, *mawaddah*, and *warohmah* family as referred to in Article 1 of Law Number 1 of 1974 jo, article 3 of the Compilation of Islamic Law has yet to materialize.

Even so, the judge is also of the view that maintaining such a household will add to the prolonged physical and mental suffering and will bring even more significant harm to the home and their families, even though the Islamic religion teaches that eliminating difficulties/harm takes priority over getting the benefit, this is following the purpose of the *ushul fiqh* proposition which means "Rejecting harm must take precedence over attracting benefit".

The opinion of the *madhhab* scholars who must wait for a substantial allegation that the *mafqud*'s husband has died, based on today's social conditions, the author's opinion is no longer adequate to apply. Because it will cause losses on the part of women, it is said that, again, ignorance of the whereabouts of the husband, in this case, is due to a fight. Or did wander, but then there was no news.

To decide on marital status because husbands are *mafqud* nowadays, of course, it's getting easier. Because, with the sophistication of technology (social media), it becomes more open to knowing the husband's whereabouts. If the husband is still unknown, it should be assumed that the husband does not intend to continue the marriage.

Considering the alleged death of the *mafqud* husband as a reason to decide on marital status, according to the writer's opinion, at this time, is also inappropriate. This is because marriage aims to foster a *sakinah*, *mawaddah*, *warohmah* family as referred to in Article 1 of Law Number 1 of 1974 jo. Article 3 Compilation of Islamic Law. If the husband's whereabouts are unknown. Thus, if the whereabouts of the husband are not known, then the household has lost the

essence and meaning of the purpose of the marriage, where the marriage bond is so fragile there is no sense of *sakinah* (calmness) and *mawaddah* (love) and *rahmah* (affection).

Therefore, the author agrees with the legal considerations of the judge in Decision Number 331/Pdt.G/2022/PA Bji and Decision Number 346/Pdt.G/2022/PA. Bji decided the divorce was "because there are constant disputes and fights between husband and wife, and there is no hope of living in harmony in the household again. Not because one party has left the other party, as Article 116 letter b KHI states that divorce can occur because "one party leaves the other party for 2 (two) consecutive years without the other party's permission and a valid reason or because of anything other than ability". Or Article 19 letter b Government Regulation No. 9 of 1975 makes "One party leaves the other party for 2 (two) consecutive years without the other party's permission and valid reasons or for other reasons beyond his capacity" as a reason for divorce.

Meanwhile, regarding the issues in Decision Number 331/Pdt.G/2022/PA Bji and Decision Number 346/Pdt.G/2022/PA. Bji, viewed from the perspective of *maqāsid al-'usriyah*, the marriage is not again fulfilling the element of achieving *sharia* objectives (*maqāsid al-syarī'ah*).

First, تحقيق السكن والاستقرار الأسري / Making *sakinah* and family stability.

ويتحقق مقصد السكن الذي يؤدي إلى استقرار الأسرة

Realizing the goal of *sakinah* automatically leads to family stability. Therefore, the first thing to consider is developing a *sakinah* family. In this case, ignorance of the husband's whereabouts, even in one of the decisions deliberately leaving the wife, is certainly contrary to this principle.

Second, ضبط العلاقة بين الرجل والمرأة / regulates the relationship between men and women. The arrangement of this relationship is intended so that each man or woman understands the boundaries between their rights and obligations in the family. After the husband leaves the house, or his

whereabouts are no longer known, this second principle is ignored.

Fifth, وحفظ النسل/ Protecting Offspring.

اتفق علماء الشريعة على أنَّ المقصد الأصلي من النكاح هو المحافظة على النسل

Scholars have agreed that one of the purposes of marriage is to preserve offspring. Thus, the husband's unknown condition will make the household crippled; of course, this has implications for the neglect of the *hifz al-nasl* aspect.

It has been previously stated regarding a propositional statement that if all the elements above, the features explained by Jamāluddīn 'Atṭīyah and Zainab Ṭḥāh al-'Alwānī are fulfilled, then family resilience will be achieved; if family resilience is achieved, then the purpose of the marriage law has been fulfilled. Conversely, if the abovementioned things in the family are not fulfilled, then the law provides an alternative, "breaking up marriage".

Then, to obtain legal certainty, the time limit for deciding the husband's occultation is 1 (one) year. This is in line with Sayid Sabiq's explanation, as follows,

١. دفعاً للضرر عن المرأة، فللمرأة أن تطلب التفريق إذا غاب عنها

زوجها ولو كان له مال تنفق منه، بشرط:

٢. أن يكون غياب الزوج عن زوجته لغير عذر مقبول

٣. أن تتضرر بغيابه

٤. أن تكون الغيبة في بلد غير الذي تقيم فيه

٥. أن تمر سنة تتضرر فيها الزوجة

To avoid harm to a wife, she may file for divorce (to the judge) if her husband is unseen, with the following conditions,

1. The husband's supernatural condition is not based on acceptable reasons;
2. His departure caused harm to the wife;
3. The husband's departure is to another area, not to the same area; And
4. The husband's occultation has harmed the wife within one year.

Conclusion

As an effort to simplify providing an understanding of this research, the authors compiled the following research conclusions,

The judge's decision in determining the

status of the occult defendant in the divorce case sued Decision Number 331/Pdt.G/2022/PA Bji is with a span of 10 (ten) months and 5 (five) years in Decision Number 346/Pdt.G/ 2022/PA. Bji. These two decisions are based on the consideration of a statement from the head of the village that the whereabouts of the defendant are unknown (unseen).

The judge's considerations in determining the status of the occult defendant in the divorce case sued Decision Number 331/Pdt.G/2022/PA Bji and Decision Number 346/Pdt.G/2022/PA. Bji is based on civil law in general. If the defendant has been summoned repeatedly but does not comply with the summons, the judge can decide with a *verstek* decision.

Regarding the judge's considerations in determining the status of the occult defendant in the divorce case, the lawsuit against Decision Number 331/Pdt.G/2022/PA Bji and Decision Number 346/Pdt.G/2022/PA. Bji can be said to be progressive legal findings, because the judge considers aspects of the benefit of women in particular, and the family (household) in general

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