

# POSITION OF DIGITAL EVIDENCE TOWARDS JUDGES' DETERMINATION IN DIVORCE CASES AT THE RELIGIOUS COURT OF SAMARINDA

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## Abstract

*The legal force of digital evidence submitted by litigants in divorce hearings in religious courts is the background for this research. This study used normative legal research with a normative analytical juridical approach to judges' determinations in divorce cases as the research object. Researchers can answer problems by conducting literature research from relevant legal sources. The judge's considerations in deciding the case are in the law related to Marriage, the trial procedure stages, the legal basis of the case, the legal basis for evidence, the legal basis for the reason or cause of divorce, and the legal basis for the authority of the judge. Meanwhile, the position of digital evidence is the evidence of confessions stamped and used by the judge as the main case for the cause of divorce. The judges did not use the Law No. 11 of 2008 on electronic information on digital evidence but focused on Jurisprudence which produces rules on the examination of divorce on the grounds of Article 19 letter (f) of Government Regulation No. 9 of 1975 jo Article 116 of the Compilation of Islamic Law, where the doctrine that must be applied in divorce cases is not "Matri Monial Guilt" but "Broken Marriage" or precisely the outbreak of the household "Az-Zawwaj Al-Maksuroh" so that the court does not focus on whose faults are the triggers for the dispute, but emphasizes the condition of the household itself.*

**Keywords:** Divorce, evidence, Islamic Law

## INTRODUCTION

From 2017 to 2020, the Supreme Court of the Republic of Indonesia recorded 2,664,296 divorce cases. Based on several determinations, not a few use social media screenshots such as Whatsapp and Facebook as media evidence of the trial when filing a divorce suit.

"One of five divorces in the United States is caused by the social network, Facebook." It is revealed from a survey conducted by the American Academy of Matrimonial Lawyers where The Frisky

revealed that 80% of lawyers handling divorce cases revealed a spike in the number of divorce cases that used digital evidence from social media as evidence of infidelity in their spouse's behavior (Ulfa, 2019).

On the other hand, social media has slipped into all walks of life, so digital evidence becomes a challenge to study. The research question is how the judge's consideration in the case decision number 17xx/Pdt.G/2017/PA.Smd. and the position of digital evidence in the divorce case decision number 17xx/Pdt.G/2017/PA.Smd.

This electronic/digital evidence is very interesting to discuss to find out the extent of the role of digital evidence in consideration of divorce case determinations, so researchers need to research related to "Analysis of Judges' Determinations in Divorce Cases with Digital Evidence at the Samarinda Religious Court".

## Literature Review

Literature Review in previous research has been carried out by researchers on research that discusses the approach of using digital or electronic evidence and suspected infidelity through social media as a cause of divorce. However, the differences are in the substance of the researcher's analysis.

Such studies are: Research conducted by Siti Hajar in 2019, "Divorce Lawsuits due to Infidelity on Social Media According to Islamic Law (study verdict number 1979/Pdt.G/2017/PA. Mdn)". It focused on the act of infidelity carried out by one of the parties so that it became the cause of the divorce and its impact on the analysis of the judge's determinations and child custody. This research has similarities in the research object, analyzing court determinations and infidelity that uses Social Media as a reason for divorce but has differences in places and lawsuit letters. Siti focused on actions and their impact on child custody, while the author focuses on the legal strength of evidence (Hajar, 2018).

Research conducted by Mardhiyyah Ulfa in 2019, "Islamic Law Analysis of the Use of Social Media as a Cause of Divorce" (case study in the Sungguminasa Religious Court Class 1B 2016-2018). This study analyzed the view of Islamic sharia law on the use of social media as a reason for the cause of divorce and how judges consider it in resolving cases. Although both discuss the use of social media as a cause for divorce, the author focuses on digital evidence in judicial proceedings in religious courts. The procedural religious courts revolve around the combination of Islamic law and Indonesian civil procedural law, so the author discusses it more thoroughly than previous research that only focused on Islamic law (Saifudin, 2019).

The last research was a study by Zulfi Rifqi Izza in 2021, "The Impact of Social Media on Marital Life (case study in

Ponorogo Court)". This research also provided a theory on the impact of social media, but in contrast to this study, researchers try to analyze the impact of the position of electronic evidence or digital evidence in divorce case determinations (Izza & Huda, 2022).

Some of the above studies explain the relationship between social media and divorce cases that are relevant to this research.

## Conceptual Framework

This research focuses on the judge's determinations in divorce cases on the grounds of infidelity, as evidenced by social media. The author describes the relevant theories to analyze the judge's consideration in the judgment of case number 17xx/Rev.G/2017/PA. Smd and the position of digital evidence in the judge's determinations on the case. Law number 7 of 1989, Article 54 states that the civil procedural law is applicable in the jurisdiction of the religious court that applies or is listed in the legal area of the general court, except for matters that have been specifically regulated.

The procedural law of the Religious Courts is the law that regulates material civil law with the intermediary of judges or the law that regulates how to act before a religious court and how to become the basis for judges to act in upholding justice. The Procedural Law of the Religious Courts is a source of material law for the religious court environment (A T Fuadah, 2019). Its sources are *Het Herziene Inlandsch Reglement* (HIR), *Reglement Buitengewesten, Staatsblad* (RBg) 1927 number 227, *Reglement op de Burgerlijke Rechtsvordering* (Rv), *Burgerlijke wetboek* (BW), *Wetboek van Koophandel* (Wvk), and some other related rules (Manan, 2013).

## Proof

Proof means to provide a solid foundation or basis in the eyes of the case examiner judge to obtain legal certainty, where proof is the main task of the judge in overseeing the case (Mertokusumo, 2013).

Two theories in evidence and the strength of evidence are the theory of the freedom of judges in evaluating evidence which can also be called *vrijbewijs* and the

theory of judges' attachment to evidence or *verplichtbewijs* (Rubini & Ali, 1974).

The legal basis for this proof is "Whoever says he has rights or mentions an action to strengthen his rights or to dispute the rights of others, then that person must prove the existence of that right or the existence of an incident", stated in Article 283 *Rechtregement voor de Buitengewesten* /RBg or Article 163 *Herzien Inlandsch Reglement* /HIR.(Fauzan & SH, 2016)

### Determination

Article 60 of Law Number 50 of 2009 explains that the determination is a product of the judge in divorce cases (A Tsamrotul Fuadah, 2019).

Determination in Arabic is called *Al-Isbat* and in Dutch it is called *Beschiking* as *Jurisdictio Voluntaria*, a product of the Religious Courts, the ruling on the determination is the determination or proper explanation of the *Declaratoir*, who has no executive power (Sudirman, 2021).

The content and form of the determination are not much different from the decision. The identity of the parties contained in the application and the determination will be written (Rasyid, 2015).

### Divorce Concept

Article 114, chapter XVI in the compilation of Islamic law concerning the termination of a marriage due to divorce can occur due to *talak* or a divorce suit.

In the *Shari'a*, divorce is often referred to as *talak*, which means letting go. *Thuliqat an-naqah* means the camel is released wherever he wants. Meanwhile, according to the term, *talak* means breaking the ties of marriage either in whole or in part (Al-Khauili, 2016).

The legal basis for divorce or *talak* is discussed in the Q.S. Al-Baqarah (Musthafa Dib Al-Bugha, 2018):

الطَّلَاقُ مَرَّتَانٍ فَإِمْسَاكٌ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ  
بِإِحْسَانٍ ۚ وَلَا يَجِلُّ لَكُمْ أَنْ تَأْخُذُوا بِمَا آتَيْتُمُوهُنَّ شَيْئًا  
إِلَّا أَنْ يَخَافَا أَلَّا يُقِيمَا حُدُودَ اللَّهِ ۚ فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا  
حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ ۚ تِلْكَ حُدُودُ  
اللَّهِ فَلَا تَعْتَدُوهَا ۚ وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَأُولَٰئِكَ هُمُ  
الْإِلْمُونَ

Translation:

"*Talak (which can be mentioned) is twice. After that, you can reconcile again or divorce in a good way. It is not lawful for you to take back something from what you have given them, unless they are afraid that they will not be able to keep God's laws, then there is no sin on them about the payment given by the wife to redeem herself. These are the laws of Allah, so do not break them. Whoever violates the laws of Allah, they are the wrongdoers.*" Qs. Al-Baqarah (2:229) (Syaiikh, 2008).

In the positive law, "Divorce can only be carried out before the trial of the Religious Court after the Religious Court tried and failed to reconcile the two parties", stated in the Law on Religious Courts no. 3 of 2006, Article 39 paragraph (1), and Article 115 KHI. Marriages can be terminated by death, divorce, and a court determination (Undang-Undang Perkawinan, 1974).

Several types of divorce include divorce with *talak*, such as *raj'i*, the husband has the right to refer back to his wife, and *talak ba'in*, the ex-husband has the right to refer his ex-wife with a new and complete marriage contract with the pillars and conditions (Ghazaly, 2019).

*Sunni divorce* or *sunnah* divorce is a divorce that is carried out when the wife is in a holy state that has not had intercourse and is then left until she has completed her *iddah*. Meanwhile, *bid'i* divorce is divorced from a wife who is menstruating or in a state of purity, but has intercourse (Ayyub, 2006).

*Khulu'* is a farewell requested by the wife as Islam allows the wife to redeem herself through *khuluk* since divorce can be caused by economic factors, domestic violence, and boredom with a third person. Several regulations, which serve as guidelines in the trial regarding the reasons for divorce, are listed in PP No. 9 Article 19 of 1975, government regulations regarding the implementation of Law No. 1 of 1974 concerning marriage and Presidential Instruction No. 1 of 1991 in conjunction with Decree of the Minister of Religion of the Republic of Indonesia No. 154 of 1991 concerning Implementation of Presidential Instruction Number 1 of 1991 dated June 10, 1991, concerning the Compilation of Islamic

Law, hereinafter referred to as the Compilation of Islamic Law, chapter XVI concerning the Dissolution of Marriage, in article 116 the reason for divorce occurs for various reasons. It includes the respondent/applicant committing immorality, the wife or the husband leaving the other party for two consecutive years without permission and valid reasons from another party or for other reasons beyond his ability, and one of the parties serving a prison sentence of five years or more after the marriage.

Other reasons are acting cruelly or persecuting and endangering others, having a disability or illness that results in being unable to carry out his obligations as husband or wife, constant strife and quarrels, and husband violating *Ta'lik Talak*, *Murtad*.

The general reasons for divorce are as follows (Satiadarma, 2001):

a. Psychophysical Reason

The physical aspect that causes the attraction is because someone approaches. The physical aspect can be in appearance or facial beauty, eye gaze, body shape, how to dress, body movements to the tone of one's speech. The reasons for being attracted to one's physical appearance are difficult to define.

b. Psychological Reason

Physical, psychological, or social reasons are based on need, including needing someone to talk to and share. This need arises because of an unpleasant situation or dissatisfaction.

According to Harley & Chalmers, couples often do not dare to express their feelings openly, so the convenience of quality communication obtained from third parties outside of marriage opens up opportunities for infidelity (Satiadarma, 2001).

c. Reasons for Divorce Due to Third Parties

Infidelity, or the reason for divorce due to a third party, is generally the main trigger for divorce. Violation of marital commitments is not an easy matter to forgive (Satiadarma, 2001).

### **Digital Evidence Tool**

Digital evidence in legal language is called electronic evidence, which is regulated in the Law of the Republic of Indonesia Number 11 of 2008 concerning Electronic Information and Transactions (Undang-Undang Republik Indonesia, 2008).

Chapter 1 General Provisions Article 1 states that the Electronic Information in question is one or a collection of electronic data, including written, sound, pictures, maps, designs, or photographs, which are processed and understood by people who have the capacity to understand.

*Budapest Convention* or also known as *The Council of Europe Convention on Cybercrime* says that electronic evidence is evidence that is collected electronically (Grotto, 2010).

Thus, it can be concluded that digital evidence is evidence sourced from digital/electronic devices whose authenticity can be proven.

Social Media is an online media that supports social interaction. Using web-based technology turns communication into interactive dialogue. Michael Haenlein and Andreas Kaplan define social media as “*a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that enables the creation and exchange of user-generated content*” (Haenlein, 2010).

From this explanation, we can conclude that digital evidence has legal force regulated by the state. Screenshots can be electronic or digital evidence. Article 5 of the ITE Law states that electronic information or printouts are legal evidence which is an extension of evidence in procedural law in Indonesia.

The position of electronic evidence in the civil code is as evidence of recognition. Some valid evidence in civil law comes from *Rechtregement voor de Buitengewesten* / RBg 283 or article 163 *Herzien Inlandsch Reglement* / HIR, including written evidence, witnesses, suspicions, confessions, oaths or other evidence, local examinations, or expert statements.

In addition, electronic evidence in divorce dispute cases in Religious Courts can be evidence of expansion after the parties acknowledge the electronic evidence.

ISO/IEC 27073:2012 Information technology — Security techniques Guidelines for identification, collection, acquisition, and preservation of digital evidence (2012) defines the digital evidence types as follows:

- a. Computers, Peripheral Devices, and Digital Storage Media;
- b. Network Devices;
- c. CCTV (Eddy Armi, 2020).

From the explanation above, we can conclude that digital evidence requires expert statements such as smartphone screenshots, video content, photos, textual, voice recordings, and others.

### Digital Forensics

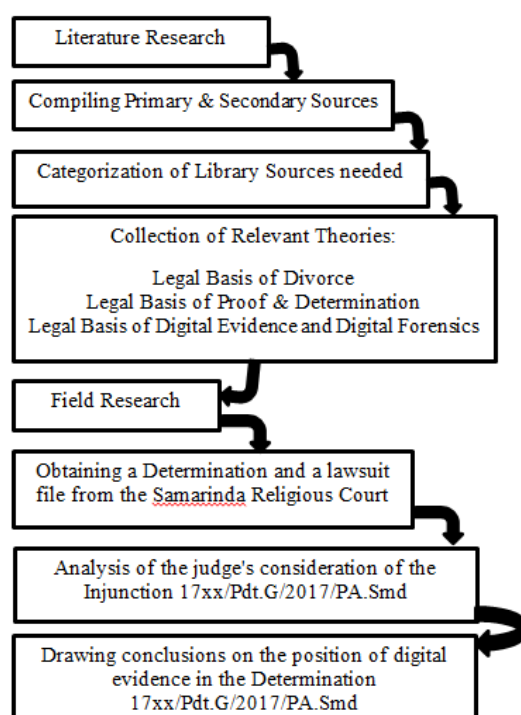
Forensic Science or the application of science in law includes a Scientific Process in the assessment and collection of information that will be used in the judicial process (Cahyadi, 2021).

Digital forensics is the eighth field in the *Netherlands Register Gerechtelijk Deskundigen/The Netherlands Register of Court Experts* or NGRD.

Forensic digital experts will assess whether there is noise, speckles, blocking JPEG compressed images, authentic or not, the type of camera used, whether there is engineering or not in the image of digital evidence (Cahyadi, 2021).

## RESEARCH METHODS

The normative legal research method examines Decision Number 17 xx /Pdt.G/2017/PA.Smd Regarding Divorce Cases with Digital Evidence at the Samarinda Religious Court, which has digital evidence material. For this reason, researchers take an inventory, study, and try to find the truth of the assumptions of how judges decide cases involving digital evidence and how the



position of the evidence is then linked to one of the results of divorce case determinations in the Religious Courts and analyzed based on positive law (Muhammad, 2004).

The object of the study is how the judge considers making an injunction or judgment involving digital evidence in a divorce case with the subject of research on the judge's legal product in determination number 17xx/Rev.G/2017/PA. Smd is then analyzed with a research knife, relevant theories such as the legal basis and reasons for divorce that apply in religious courts, both compilations of Islamic law and religious court proceedings.

The theories are also related to the legal basis of proof and determination. The ITE Law deals with digital evidence and the history of digital forensic development to ensure the position of evidence in the determination of the case.

## Research Material

In this study, researchers used several legal materials as data sources and research objects to be studied, including:

1. Primary Legal Materials are legal materials that are binding and authoritative in nature related to research material and consist of:
  - a. The basic norm or rule is the 1945 Constitution of the Republic of Indonesia.
  - b. Legislation; or equivalent Laws and Regulations.
  - c. Government Regulations (PP), Presidential Regulations (*Perpres*), Ministerial Decrees (*Kepmen*), and Regional Regulations Decisions of the Constitutional Court.
2. Secondary Legal Materials provide explanations related to primary legal materials, such as draft laws, research results and scientific works from related legal circles.

Non-legal materials include interviews with litigants and judges serving in religious courts (Anas, 2002).

Furthermore, as a raw material in completing this research, field research is also important to carry out to support the library data. Researchers also look for data about variables in the notes, transcripts, books, and so on (Emzir & Pd, 2012).

## Data Collection Techniques

Collecting data requires precise techniques. In this study, the researcher tries to balance library research and field research which are complementary, functional, and mutually supportive.

The research was divided into two stages, library research and field research. Field research is carried out after the library research has been completed. But of course, not constantly but alternately and complementary according to the needs in the field and research needs (Sidharta, 2007).

In collecting data sources on the research object, the author is based on the hierarchy of legislation, ensuring the existence of rules, historical approaches related to the ratification of rules (Pasek, 2016).

Analysis, legal data information is analyzed qualitatively-juridically, and conclusions are drawn using deductive and inductive methods, and then the research results are presented in analytical descriptive.

Qualitative descriptive by presenting the data and information, the researcher then analyzes by concluding a finding from the research results (lexi j moleong, 2007).

The in-depth study of data obtained in the field and from existing legal materials is then combined with problems and the legal experts' views related to the research problem, and then conclusions can be drawn.

The study process taken on legal materials is the learning and identification of legal norms formulated in the laws and regulations to be adjusted to legal theories, principles, and legal concepts in the focus of this research. It is continued with the process of reviewing secondary legal materials by observing quotations containing opinions or theories from experts in accordance with the topic of this study. The next is to find the relationship between one legal material and another, primary and secondary legal material, by conducting deductive and inductive reasoning so that propositions can be produced, new concepts, in definitions, descriptions, and classification as a result of research.

The data obtained is then processed by analytical descriptive so that it can be described systematically, factually, and accurately to the object of research related to certain properties, characteristics, or factors.

The legal data information collected from the results of library and field research is then analyzed by using qualitative normative analysis methods (Sumardjono, 2005).

Then conclusions are drawn using deductive and inductive methods because this research is based on existing regulations as positive law (normative). Qualitative is used because the data analysis comes from information on the results of determinations and interviews described by sources and respondents, which are presented descriptively. Therefore, it analyzes the data without using formulas and numbers.

## DISCUSSION

The documentation study results found evidence of an immoral chat between SL (the respondent) with a third person (X), which was attached to the divorce case application and was also included as one of the chronology points of the lawsuit, which reads:

*"That the cause of the dispute and quarrel was due to the fact that the Respondent had a conversation via social media "Whatsapp" with immoral content with another man who was already married. And this has also been done with other men."* (P. Agama, 2017)

Samarinda Religious Court Decision Number 17 xx /Pdt.G/2017/PA.Smd has handed down a decision in the *Talak* Divorce case between DP (initials) as the Petitioner and SL (initials) as the respondent. In the trial session, the respondent was represented by his legal representative with the initials S. By attaching a Special Power of Attorney dated November 28, 2017, this divorce case was submitted to the Samarinda Religious Court in November 2017.

In the petition's arguments submitted by the petitioner, he requested that the Samarinda Religious Court pass a decision to impose one *raj'i* divorce on the respondent. During the trial stage, the respondent, who was represented by his attorney, was not present, and the mediation process also did not have good results.

However, the respondent's response through his lawyer rejects the arguments from the applicant, except for the arguments that are recognized as true by the respondent and says that these arguments are fabricated arguments made by the applicant to be used



as reasons in the divorce application where the respondent states that the applicant does not make sense to believe the conversation in social media using the *Whatsapp application* in the court.

The evidence submitted by the applicant at this trial is digital evidence of a screenshot of the intimate conversation of the respondent, who is suspected of having an affair with her co-worker, let's call her X. In the determination of the case, the judge coded the evidence as P-2 in the photos of conversational communication along with photographs. The respondent is suspected of being with another ideal man by providing stamp duty and adjusting it to the original device.

In consideration, the judge does not necessarily grant the applicant's argument. Although it fulfills the provisions of Article 311 R.Bg, divorce cases are grouped into *personen recht* or individual law, not material law/*z aken recht*. So it is important to hear witnesses from the parties.

Other evidence is witnesses from the respondent and the applicant, who are familiar with the parties. In this determination, the panel of judges granted the petitioner's request and gave permission for the petitioner to give one *raj'i* divorce to the respondent before the Samarinda Religious Court.

Taking into account that there is no harmony in the fostered family. In addition, the legal basis for judges to decide cases is Article 82 of Law Number 7 of 1989, Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2016 dated February 4, 2016, Article 76 paragraph 1 of Law Number 7 of 1989, Government Regulation Number 9 of 1975 in conjunction with Article 307, 308, and 309 Rbg of divorce decree from the letter of the Minister of Environment and Forestry of the Republic of Indonesia, the reasons for divorce are targeted according to the intent of Article 19 letter F of Government Regulation Number 9 of 1975 in conjunction with Article 116 letter f compilation of Islamic law, Jurisprudence of the Supreme Court Number: 38 /K/AG/1990 dated October 5, 1991, Article 33 number 1 and Article 1 Number One of 1974, Article 39 paragraph 2 letter f of Law number 1 of 1974, *al-Muhazzab* Juz II page 176, Book of *Al Iqna'* juz II page 117, Book of *Fathul Wahab*

*Juz II* page 137, Book *Al Fiqhu 'ala Madzahibil juz IV* page 576, Q.S. Al Baqarah verse 229, Al-Qur'an Surah Ar-rum verse 21, the words of the Messenger of Allah in the book *Al Bajuri* Juz 11 page 145 (Concerning Religious Courts, 1989).

Article 311 R.Bg and Jurisprudence of the Supreme Court of the Republic of Indonesia Number: 863 K/Pdt/1990, dated November 28, 1991 Article 208 BW, According to the Panel of Judges, the petition from the applicant has complied with the provisions of Article 311 R.Bg which is the legal basis for the evidence of confession, in Article 174-176 HIR, Article 311-313 R.Bg. and articles 1923-1928 of the Civil Code have stipulated that "confession" is legal evidence according to law. Divorce cases in the individual law group (*personen recht*) are not material law (*zaken recht*), and for legal certainty, the evidence must be supported by witness statements from both parties in accordance with jurisprudence. It is not justified in divorce cases based solely on confession and or agreement because it is feared that a big lie (*de grote langen*) will arise ex Article 208 BW.

Article 285 R. Bg. and Article 2 paragraph (3) of Law Number 13 of 1985 stated that stamp duty is imposed for evidence before the court, and digital evidence and documents in this trial have been stamped so that they are considered to have perfect and binding evidentiary power and can be accepted.

Article 76 paragraph (1) of Law Number 7 of 1989, Article 22 paragraph (2) of Government Regulation Number 9 of 1975, in conjunction with Articles 307,308 and 309 Rbg Wherein Article 76 paragraph (1) of Law Number 7 of 1989 explains "if the divorce lawsuit based on *Shiqaq*, it is important to listen to the testimony of witnesses from the close family of the husband and wife, so that there is legal certainty in the determination of the case. Based on Article 22 Paragraph (2), the Court can accept the lawsuit regarding the causes or reasons for the dispute and hear witness statements from the family or people who are close and familiar with the litigated couple. The material requirements for

witness evidence are to provide information sourced from the witness's sight and hearing, witness experience, and witness conclusions, as well as testimony from one witness and another in accordance with 170 HIR/309 RBg with a minimum limit of 2 witnesses.

Article 70 of Law Number 7 of 1989 jo and Article 131 paragraph (2) Compilation of Islamic Law are the basis for the Court in drawing conclusions to grant applications related to the two parties that are difficult to reconcile and have sufficient reasons for divorce. The Court has the right to determine the day of the trial for witnessing the divorce pledge by summoning the husband and wife or their representatives to attend the trial.

Article 19 letter (f), Government Regulation Number 9 of 1975 jo and Article 116 letter (f) Compilation of Islamic Law are regarding the reasons for divorce in relation to Article 116 letter (f) of the compilation of Islamic Law. The jurisprudence of the Supreme Court Number: 38/K/AG/1990, dated October 5, 1991, creates a rule regarding divorce proceedings on the grounds of Article 19 letter (f) of Government Regulation Number 9 of 1975 in conjunction with Article 116 of the Compilation of Islamic Law, in which the doctrine that must be applied in the case of divorce, it is not "matrimonial guilt" but "broken marriage" or rather the breakdown of the household "az-zawwaj al-maksuroh" so that the Court does not focus on whose fault is the trigger for the dispute, but emphasizes the condition of the household itself.

Married couples who have litigation are considered unable to realize Article 33 of Law Number 1 of 1974, so it becomes the judge's consideration in deciding the case.

Article 1 of Law Number 1 Year, Article 39 paragraph (2) of Law Number 1 of 1974 jo, Article 19 letter (f) Government Regulation number 9 of 1975 jo, and Article 116 letter (f) Compilation of Islamic Law discuss the dissolution of marriage and its consequences. If husband and wife experience constant disputes and quarrels, there is no hope of living in harmony again in the household. And article 116 letter (f), which has the same sound.

Q.S. Ar-Rum verse (21) and Article 3 Compilation of Islamic Law/KHI in the word of God:

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً  
وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَعْلَمُونَ ٢١

Translation:

"And among His signs (power) is that He created partners for you from your own kind, so that you tend to and feel at ease with him, and He made between you love and affection. Indeed, in that there are indeed signs (of Allah's greatness) for a people who think." Q.S. Ar-Rum (30:21) (Syaiikh, 2008).

Book of *Al Iqna' juz II* page 177:

للمعتدة الرجعية السكنى النفقة

"Must be given to women who experience idah raj'iy, a place to live and earn a living".

Book *Al Bajuri Juz II* page 145, which reads:

اللقى الرجل العدة النساء

"Talak is in the hands of the man (husband) and 'iddah is on the side of the woman".

Book of *al-Muhazzab Juz II* page 176:

اللقى الدخول لقاها السكنى النفقة  
ال

Translation:

"If the husband divorces his wife after dukhul (intercourse) with raj'iy divorce, the wife gets a place to live and provide for the period of Idah". (P. Agama, 2017)

Book of *Al Fiqhu 'ala Madzahibil Arba'ah juz IV* page 576:

النفقة العدة للزوجة المطلقة المراد بالنفقة  
الطعام الكسوة المسكنة

Translation:

"Indeed, the maintenance of the idah is obligatory on a husband for his wife who has been divorced by raj'iy, whether free or slave. What is meant by sustenance is what is related to food, clothing, and shelter.

Article 149 letter (b) Compilation of Islamic Law states that the husband provides



a living, food, and *kiswah* to his ex-wife while in *iddah*, unless the ex-wife has been sentenced to *talak ba'in* or *nusyur* and is not pregnant, as well as Article 89 paragraph (1) of Law Number 7 of 1989, Jo, Article 90 of Law Number 3 of 2006, Article 91 A of Law Number 50 of 2009, and Article 89 of Law Number 7 of 1989 paragraph (1) (Concerning Religious Courts, 1989).

Regarding the explanation of the Judge's legal considerations, we can find answers to the research question: How are the judges' considerations in the determination of case number 17xx/Pdt.G/2017/PA.Smd., in which the Judge considers the legal basis relating to the stages of the religious court procedure, the legal basis for proof, and the legal basis for divorce reasons which emphasizes jurisprudence and produces the rule regarding divorce examination on the grounds of Article 19 letter (f) Government Regulation Number 9 of 1975 in conjunction with Article 116 of the Compilation of Laws Islam, in which the doctrine that must be applied in divorce cases is not "*matri monial guilt*" but "*broken marriage*" or rather the breakup of the household "*az-zawwaj al-maksuroh*" so that the Court does not focus on whose fault is the trigger for the dispute, but emphasizes on the condition of the household itself (P. Agama, 2017).

If the household conditions of the respondent and the applicant can no longer be saved by peace efforts, they do not achieve the goal of marriage as stated in Q.S. Ar-Rum verse 21 that the purpose of marriage is to achieve a *sakinah, mawaddah, warohmah* family. In addition, the evidence attached is in accordance with the provisions of the existing article on the validity of the evidence. The evidence includes:

- a. Photocopy of Marriage Certificate Excerpt from Marriage Certificate Number xxxx/40/XI/2004, sufficiently stamped and has been matched with the original marked P-1,
- b. Photocopy of Conversational Communication on Whatsapp media, History searching Google and photos, sufficiently stamped and has been matched according to the original marked P-2,
- c. Photocopy of BP4 Recommendation of East Kalimantan Province, with sufficient

stamp duty and has been matched with the original marked P-3

- d. Evidence of two persons of action that meet the requirements of the existing rules.

This evidence is considered sufficient for the judge and is in accordance with the applicable laws and regulations so that the divorce application is granted, the imposition of one *raj'i* divorce on the respondent, and after the *talak* pledge is made, the applicant pays *iddah* for three months at a monthly rate of Rp. 7,500,000 and charge the applicant a case fee of Rp. 411,000. Judges make determinations after considering the legal basis of the law, related regulations, and compilations of Islamic law to the Qur'an and hadith.

#### **Position of Digital Evidence in the Judge's Determinations on Case Number 17xx/Pdt.G/2017/PA.Smd**

In Judge's Determination Number 17xx/Pdt.G/2017/PA.Smd, which is the subject of the case and written in the determination, are as follows:

- a. Are the Petitioner and the Respondent legally husband and wife?
- b. Is it true that the Petitioner and the Respondent often disagree and fight because the respondent has a conversation through the social media "*Whatsapp*" which contains immoral content with another man who is married so that the household of the applicant and the respondent is not harmonious which causes the applicant's suspicion to arise, and the respondent often does not give permission to the applicant? if on duty outside the area, causing the applicant to leave the respondent so that there has been a separation of residence?

The main point of the first case is to validate the legal standing of the divorce trial that it is true that the respondent and the applicant are married and recognized by the State in the marriage certificate number xxxx/40/XI/2004. The second point of the case is a confirmation of the reasons for the divorce that the applicant submitted before the court.

The Panel of Judges questioned the Petitioner and the Respondent that the reason for this divorce was that the respondent and

the applicant often quarreled because the respondent had a conversation through the social media "Whatsapp" which had immoral content with another man who was married, so that the household of the applicant and the respondent was not harmonious which led to the emergence of applicant's suspicion.

At the trial, the respondent through his lawyer rejected the arguments from the petitioner, except for the arguments which were acknowledged to be true by the respondent and said that these arguments were fabricated arguments made by the petitioners to be used as reasons for the divorce petition where the respondent stated that the petitioner did not make sense to believe the conversation in the court. social media using the *Whatsapp application*. (P. Agama, 2017)

In this case, the respondent only rejected the alleged allegations and did not attach an expert witness. Concerning the respondent's answer, the applicant submits a written replica to defend the petition's arguments. Against the respondent's reply, the respondent does not submit a duplicate but only states that it remains on the arguments of the previous answer.

Furthermore, to answer the question: How is the position of digital evidence in the judge's determination regarding case number 17xx/Pdt.G/2017/PA.Smd? the Panel of Judges placed digital evidence as one of the evidence marked P-2, which contains a photocopy of Conversational Communication on *Whatsapp* media,

History searching *Google*, and photographs, with sufficient stamp duty and has been matched according to the original. It is based on Article 285 R Bg and Article 2 paragraph (3) of Law Number 13 of 1985 that the evidence before the court and digital evidence and documents in this trial have been stamped, so they are considered perfect evidentiary power. Binding and acceptable in the article states: "*that a stamp duty fee is imposed on documents that will be used as evidence, including household documents and letters that were not previously recognized by Stamp Duty based on their purpose*". The evidence submitted to the trial is considered valid and has value and becomes evidence that has legal force value in proof, and in this case, digital evidence becomes evidence of confession (Harahap, 2009).

Two theories in evidence and the strength of evidence are the theory of the freedom of judges in evaluating evidence or can also be called *vrijbewijs* and the theory of judges' attachment to evidence or *verplichtbewijs* (Rubini & Ali, 1974).

The evidence in question is the letters, witnesses, suspicions, confessions, and oaths. However, some points do not need to be proven, including the allegation admitted by the respondent in the right of reply trial. The respondent's confession or acceptance in the lawsuit filed by the applicant does not need to be further proven because the confession is legal evidence in the eyes of the law. The judge's vision is no longer necessary to prove before the trial because the purpose of the proof is to convince the judge that if the judge is sure of the evidence shown, then there is no need to prove it further. The last is the general facts that have been known (Supramono, 1993).

Because of the position of digital evidence, it is recognized as evidence of recognition. Although, in this case, the respondent rejects the applicant's argument, the judge has his own judgment in making determinations, so Law Number 11 of 2008 concerning Electronic Information and Transactions, which is the legal basis for digital evidence, is not attached as a legal basis for judges' considerations in making determinations. In contrast, the implementation of this law's mandate is important to assess the authentication of evidence so that the role of judges in making determinations is based on authentic and difficult truths.

Nevertheless, this is also due to the judge's consideration of which the Jurisprudence of the Supreme Court Number: 38/K/AG/1990 dated October 5, 1991, which produced the rule regarding divorce examination on the grounds of Article 19 letter (f) Government Regulation Number 9 of 1975 in conjunction with Article 116 Compilation of Islamic Law, that the doctrine that must be applied in divorce cases is not "*matri monial guilt*" but "*broken marriage*" or rather the breakup of the household "*az-zawwaj al-maksuroh*" so that the Court does not focus on whose fault is the trigger for the dispute, but emphasize the condition of the household itself (P. Agama, 2017).

From the above explanation, we can conclude that the Judges' consideration in deciding the case is the inability to achieve a *sakinah, mawaddah, warohmah* family. The Samarinda religious court granted the application for a divorce injunction. In addition, the position of digital evidence in religious courts is not effectively used as the evidentiary basis in the determination does not involve the ITE Law Number 11 of 2008 on the grounds that the doctrine in divorce cases is "broken marriage" not "matrimonial guilt". In fact, the Judge should consider the determinations by enacting the basis of Law Number 11 of 2008, which regulates rules regarding the authenticity of digital evidence and the Law on Information and Electronic Transactions so that the existence and effectiveness of the Law can be seen.

In addition, people's lives have been side by side in the digitalization era, so the judiciary should keep up with the times. The Law that has regulated electronic evidence is certainly a legal answer to the polemics that have occurred in people's lives because the development of Law goes hand in hand with the development of civilization. Therefore, technology in society can be controlled through a law that organizes society in an orderly manner. This research can make a little contribution that can be used as a reference in further research, especially to the use of digital evidence at religious court events.

## CLOSING

Based on the formulation of the research problem, the researcher draws the conclusion that: the legal basis that the judge considers in deciding the case is that there is no harmony in the fostered family. As mandated by law and the Qur'an, achieving *sakinah, mawaddah, warohmah* families is challenging. In positive law, the judge's determination is based on several articles, including Article 82 of Law Number 7 of 1989. The reason for divorce is based on the intent of Article 19 letter F of Government Regulation Number 9 of 1975 in conjunction with Article 116 letter f compilation of Islamic law, Jurisprudence of the Supreme Court Number: 38 /K/AG/1990 dated October 5, 1991, Article 33 number 1, Article 1 Number 1 of 1974, Article 39 paragraph 2

letter f of Law number 1 of 1974, *al-Muhazzab Juz II* page 176, Book of *Al Iqna' juz II* page 117, Book of *Fathul Wahab Juz II* page 137, Book of *Al Fiqhu 'ala Madzahibil juz IV* page 576, Q.S. Al Baqarah verse 229, Q.S. Ar-rum verse 21, and the words of the Messenger of Allah in the Book of *Al Bajuri Juz 11* page 145 (P. Agama, 2017).

In involving digital evidence, the Samarinda Religious Court was not based on Law Number 11 of 2008 on Information and Electronic Transactions. It can be seen that apart from not attaching this law to the determination, the proceedings did not present expert witnesses from digital forensics. The authenticity of digital evidence is not assessed. Still, the position of digital evidence is only based on Article 285 R. Bg. and Article 2 paragraph (3) of Law Number 13 of 1985, that evidence is submitted subject to stamp duty before the Court. Digital evidence and documents in this trial have been stamped so that they are considered to have perfect and binding evidentiary power and can be received. The reason for not involving the ITE Law is the Jurisprudence of the Supreme Court Number: 38/K/AG/1990 dated October 5, 1991, that produced a rule regarding divorce examination on the grounds of Article 19 letter (f) of Government Regulation Number 9 of 1975 in conjunction with Article 116 of the Compilation of Laws Islam, that the doctrine that must be applied in divorce cases is not "matrimonial guilt" but "broken marriage" or rather the breakup of the household "*az-zawwaj al-maksuroh*" so that the Court does not focus on whose fault is the trigger for the dispute, but emphasizes on the condition of the household itself.

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