

## THEORETICAL AND PRACTICAL IMPLICATIONS OF EVIDENCE IN RELIGION COURT

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### **Abstract**

In the civil procedural law, the certainty of the truth of the events proposed at the trial depends very much on the evidence carried out by the parties concerned. As a consequence, the truth is said to exist or be reached if there is a match between the judge's conclusion (the result of the process) and the events that have taken place. Whereas if the opposite happens, it means that the truth is not reached. Research conducted by the author is research based on document research (Library Research), meaning that the data that are used as a reference in this study are facts in the field that have been documented in the Court's decision. The results of this study indicate that the contribution of evidence in court is very necessary, because one of the duties of the judge is to investigate whether there is a legal relationship on which the lawsuit really exists or not. The existence of this legal relationship must be proven by the parties in court.

**Keywords:** evidence, Religion Court, Court's decision

### **A. INTRODUCTION**

Even though in the theoretical juridical context (Coleman, 1999; Walker, 2003), the verification process is carried out in court at the proof stage, in fact the verification process itself has begun at the investigation stage. At this stage, the investigator processes whether the event that occurred is a criminal event or just an ordinary event. The investigator also searches for and collects and analyzes the evidence he finds (*Hukum Acara Pidana: Surat-Surat Resmi Di Pengadilan Oleh Advocat*, 2005 : 3-4).

Every proof, even with complete evidence, can be paralyzed by the opponent's evidence. Proof of opponents is any proof that aims to deny the legal consequences desired by the opposing party or to prove the truth of the events submitted by the opposing party (McDowell, 2017). Opposing evidence is not possible against decisive or deciding evidence. This decisive evidence is complete or perfect evidence which does not allow the existence of opposing evidence (Mertokusumo, 1995 : 113).

Proof in the sense of juridical is not intended to seek the absolute truth (Ho, 2008), and according to Mertokusumo, proof in the legal sense is to provide sufficient grounds to the judge. This is because the evidence, whether in the form of confessions, testimonies, or letters, submitted by the parties to the dispute may be untrue, false or falsified. Even though the judge in examining every case submitted to him must provide a decision that can be accepted by both parties (Mertokusumo, 1995).

In the civil procedural law, the certainty of the truth of the events proposed at the trial depends very much on the evidence carried out by the parties concerned (McIntyre, 2019). As a consequence, that the truth is only said to exist or be reached if there is a match between the conclusions of the

judge (the results of the process) with the events that have occurred. Whereas if the opposite happens, it means that the truth is not reached (Goldman, 2008).

This burden of proof is regarded as a legal or juridical matter, which can be fought to the extent possible before the Cassation Court, the Supreme Court (Castillo de la Torre & Gippini Fournier, 2017). Distributing an unfair burden of proof is considered to be a violation of the law or the Law which is the reason for the Supreme Court to overturn the decision of the judge or court under it concerned (Brimer & Smith-Porter, 2004).

After seeing the explanation of the evidence, then what needs to be considered in the application of evidence today is whether the judges who have handled a civil problem have applied proof according to Islamic law? (Rasyid & Dulkihah, 2020) Because they see the current phenomenon that develops in the community many cases are handled by judges who have problems with proof, so sometimes the litigation community feels cheated by the judge after the case has been decided, even though the litigants consider that the proof is the correct but the false proof wins in the court process. Cases like this that need to be straightened out by the judges in taking evidence especially in the Religious Courts in all courts that will examine a case (Sage et al., 2002).

## **B. METHOD**

The research method is qualitative research based (Burton, 2013; Hess, 2014) on document research (Library Research) (Curtis, 2005), meaning that the data used as a reference in this study are facts in the field that have been documented (Dobinson & Johns, 2007, 2017) in the court's decision. The approach in this research is Normative-Juridical (Bowen, 2009). The aim is to apply the law as Norms, Rules, Principles or Dogmas based on the classic fiqh Book, Marriage Law Law No. 1 of 1974, Compilation of Islamic Law, Law no. 7 of 1989 and PP No. 9 of 1975. Normative-Juridical Approach was made.

## **C. RESULT AND DISCUSSION**

### **1. Theoretical and Practical Implications About Proof in Religious Courts**

The role of judges as judicial authorities after Law Number 7 of 1989 concerning Religious Courts, in principle, is nothing other than carrying out the function of justice in accordance with applicable regulations. In carrying out this judicial function, the judges of the Religious Courts must be fully aware that the main task of the judge is to uphold the law and justice.

In connection with this, in every decision to be handed down by the judge in ending and completing a case, it is necessary to pay attention to three very essential things, namely justice (*gerechtigheit*), expediency (*zwachmatigheit*), and certainty (*rechtsecherheit*). These three things need to get professionally balanced attention, even though in practice it is very difficult to make it happen. Judges must make every effort so that each decision they impose contains the above mentioned principle. There must not be a judge's ruling that actually causes unrest and chaos in people's lives, especially for the search for justice (A. Manan, 2005).

When a judge has examined a matter that has been extended to him, he must properly and properly make the decision. The verdict must be pronounced in public, in order to end the dispute under investigation. The judge's decision is set when the investigation is completed and the parties concerned no longer present the matter to the judge who is examining the matter. A verdict is the result or conclusion of a matter that has been taken into consideration in a form of verbal or verbal

decision. In other literature it is stated that the verdict was a statement by a judge as a state official authorized to do so and was spoken at a public hearing aimed at resolving a matter or dispute between the parties (Mertokusumo, 1995 : 167-168).

Every decision of a religious court must be made by a judge in written form and signed by the presiding judge and the judges of the members who participated in the examination in accordance with the decision of the panel of judges made by the head of the religious court, and signed by a substitute court clerk who participates in accordance with the clerk's appointment (article 23 paragraph (2) RI Law Number 14 of 1970). What is said by a judge in a hearing must be exactly the same as what is written, and what is written must be exactly the same as what is said in a court hearing.

In a civil suit, Article 178 paragraph (2) H.I.R and Article 189 paragraph (2) R.B. Judges shall not be allowed to render a verdict on an unconscionable matter as provided in article 178 paragraph (3) H.I.R and article 189 paragraph (3) R.Bg. except where those claims are not mentioned in the applicable law (Article 41c of Law No. 1 of 1974 jo. Article 24 paragraph (2) of government regulation No. 9 of 1975 and Article 149 of Compilation of Islamic Law).

Mukti Arto proposes "The Law of Religious Court Events is the rule of law governing how to enforce a civil law by a judge or how to act before a Religious Court and how a judge can act to make it work properly"(Arto, 2017 : 7). From the description above, the religious court procedural law is a set of regulations that guarantee how material civil law continues to run. A set of legal regulations governing material civil law is formal civil law. So that judges are required to master formal and material civil law before establishing a case to get a fair decision.

In applying procedural law, it is not only necessary to have mastery regarding formal and material civil law, but must understand the principles of the Religious Courts Procedural Law, namely "Religious Courts are State Courts (Article 3 Paragraph (1) of Law Number 14 of 1970 concerning Provisions - Principal Provisions for Judicial Power, Article 2 of Law Number 7 of 1989 concerning Religious Courts), Religious Courts are courts for people who are Muslim (Article 1 Paragraph (1) of Law Number 7 of 1989 concerning Religious Courts), and Human Principle, the examination is carried out humanely.

#### **a. Legal Resources for Religious Court Procedures**

The basis of the judge in deciding cases is sourced from formal law and material law. Formal legal sources are legal sources that have been determined by the state(Domiri, 2016 : 334). According to Bagir Manan "the source of material law is the source of law that determines the contents of a rule or rule of law that binds everyone"(B. Manan, 2007 : 61). According to Mukti Arto, the source of the legal procedure for religious justice is(Arto, 2017 : 12): (1) HIR / RBg; (2) Law Number 7 of 1989 concerning Religious Courts; (3) Law Number 14 of 1970 concerning Basic Provisions for Judicial Power; (4) Law Number 14 of 1985 concerning the Supreme Court; (5) Law Number 1 of 1974 concerning Marriage jo. Government Regulation Number 9 of 1975 concerning Implementation of Law Number 1 of 1974 concerning Marriage; (6) Law Number 20 of 1947 concerning the Trial Court; (7) Compilation of Islamic Law (*Kompilasi Hukum Islam [KHI]*); (8) Regulations of the Supreme Court of the Republic of Indonesia; (9) Circular of the Supreme Court of the Republic of Indonesia; (10) Minister of Religion Regulation; (11) Decree of the Minister of

Religion; (12) Islamic Fiqh Books and Other Unwritten Legal Sources; and (13) Supreme Court Jurisprudence.

Based on the provisions of Article 27 of Law Number 14 of 1970 concerning the Basic Provisions of Judicial Power "judges as law enforcement and justice are obliged to explore, follow and understand the legal values that live in society". Another case for judges in the Religious Court, in filling the legal vacuum the decision must continue to come from Islamic law. The goal is that the resulting decision is close to justice and truth that is desirable and desired by the parties (Arto, 2017 : 13).

#### **b. Procedure for Checking Divorce Matters**

In the language of divorce is breaking the bonds, while in terms of divorce means breaking the marriage rope (Muhamamd, 2014 : 454). According to Dr. Hammudah Abd. al-Ati divorce is interpreted as a kind of simple divorce that can be referred back to, because basically the divorce sentence is only used as a statement of displeasure or resentment of a husband towards his wife (Harahap, 2001 : 215).

Since the enactment of Law Number 1 of 1974 concerning Marriage jo. PP Number 9 of 1975, divorce filed by husband (divorce divorce) must be done in the Religious Court (Harahap, 2001 : 215). It can be concluded that divorce is not only the husband's personal affairs, but has become the authority of the Religious Court. The Religious Court has the right to refuse or accept divorce divorce claims filed by the husband based on evidence and beliefs of the judge. The divorce divorce application formulation is as follows (Harahap, 2001 : 2017): (1) The identity of the applicant (husband) and the respondent (wife) in the form of name, age and place of residence; and (2) Posita, which is the reason for the filing of divorce divorce application as contained in Article 19 PP No. 9 of 1975 jo. Elucidation of Article 39 of Law Number 1 of 1974 concerning Marriage: (a) One party commits adultery or becomes a drunkard, gambler and others who are difficult to cure; (b) One party leaves the other for 2 consecutive years without permission and valid reasons; (c) One of the parties received a prison sentence of at least 5 years during the marriage; (d) One party is carrying out persecution that could endanger the other party; (e) One of the parties has a bodily disability which causes him unable to carry out his obligations as a husband or wife; and (f) Between husband and wife disputes continue; (3) Petitum, who called for the marriage to be decided and gave her husband permission to make a solemn confession in the face of the trial; and (4) Procedure for Examining Divorce Lawsuit

Article 73 Paragraph (1) has stipulated that in a divorce case the act of the plaintiff is the wife and husband placed as the defendant (Harahap, 2001 : 234). It can be concluded, that each party has its own channel if they want to file for divorce. The husband through divorce divorce efforts, and the wife through divorce efforts.

In the case of a divorce suit formulation, the entire contents are almost the same as divorce divorce formulation. It's just that there are privileges that allow the wife's lawsuit to accumulate the lawsuit according to what is stated in Article 86 1 which states: permanent law. " This article allows a wife to file a divorce suit as well as a child, wife's livelihood and joint property suit to the Religious Court (cumulative suit).

When filing for divorce, the thing that needs to be considered is the completeness of the lawsuit so as to reduce the occurrence of libel obscur defects. To avoid obscur libel defects, the formulation of

a lawsuit must be arranged systematically by placing divorce lawsuits as the main subject and the other lawsuits as assessors who are attached to the principal claim. Regarding the formulation of the petition, the contents must be sequential and in accordance with the systematic formulation of the lawsuit. If the petition is irregular and turns upside down in its formulation, the lawsuit is deemed incompatible and in line with the position of the suit (Harahap, 2001 : 235).

### c. Divorce Examination Principle

Divorce Examination Principle (Harahap, 2001 : 221) as for the principle of divorce examination is as follows: (1) The examination was conducted by the Panel of Judges; article 15 of Law Number 14 of 1970 concerning Religious Courts mandates that an examination of a case be carried out by a Assembly consisting of 3 judges, unless the law stipulates otherwise. One of them acted as the Chairperson of the Assembly and the other one was a judge in the trial; (2) Examination in closed session; This principle is regulated in Article 68 Paragraph (2) and Article 80 Paragraph (2) which reads "if peace is not reached, the divorce suit is conducted in a closed session."

Guided by the explanation of Article 33 PP No. 9 of 1975 that a closed examination in the examination of divorce cases includes all examinations including examination of witnesses: (1) 30 days inspection from the date of registration; (2) This is stipulated in Article 80 Paragraph 1 and Article 141 Paragraph 1 of KHI that limits the examination of cases no later than 30 days. This principle aims to create a simple, quick and low-cost court and the urgency of divorce cases that require immediate resolution; (3) Check in person or power of attorney; in the case review process, it is not absolutely the plaintiff or defendant in person present but can be represented by his attorney. Except in a peace hearing the plaintiff or defendant must be present in person and cannot be represented by a power of attorney; (4) Efforts to reconcile during the examination; article 82 Paragraph 4, and Article 143 of the KHI assign the judge to be diligent in reconciling the parties. Trying to reconcile the parties is a task that the judge must carry out throughout the trial until the verdict is dropped; and (5) Proof; according to Supomo, in Mardani (2010), evidentiary is the evidence presented by the plaintiff so as to strengthen the belief of the judge in the trial and cannot be refuted by the defendant (Mardani, 2010 : 106). Sudikno Mertokusumo in his book Indonesian Civil Procedure Law said that the word proves to contain logical, conventional and juridical meaning. Logically, proving means providing certainty of the results of logic and absolute definitions so that there is no possibility of opposing evidence. Whereas conventionally, it proves to mean providing certainty based on mere feelings and relative or relative reasoning considerations. Proving in a juridical sense is to give sufficient grounds to the judge based on the truth of the event that occurred (Soekromo, 2016 : 126).

This article found that the proof is an attempt by the litigant to strengthen the judge's conviction in front of the trial so that it does not allow evidence from opponents, namely: (1) Proof Value; even though an event that was disputed in court has been proven, the evidence still needs to be assessed. In this case, the judge does not have the freedom to judge the evidence. For authentic deeds, for example, judges are bound in their judgment (Article 165 HIR, 285 RBg, 1870 BW) (Sunge, 2012 : 7). In assessing evidence, a judge can act freely or be bound by the law based on three theories: (a) Theory of Free Proof; This theory does not require the existence of provisions that bind the judge, so that the judge is free to give an assessment of the evidence in the case in court; (b) Theory of Negative Proof; based on this theory there are binding provisions which are negative in nature, namely that this provision requires the prohibition of judges from doing anything and is related to evidence. So according to this theory, judges are prohibited with exceptions

(Article 169 HIR, 306 RBg, 1905 BW); and (c) Positive Proof Theory If the negative proof theory requires a prohibition, it is different from the positive proof theory. This theory requires an order for the judge to do something on condition (Article 165 HIR, 285 RBg, 1870 BW); (2) Burden of Proof; the principle of sharing the burden of proof is contained in article 163 of the HIR which reads: "Anyone who claims to have rights or bases an event to strengthen his rights or deny the rights of others must be able to prove his rights."(Soeikromo, 2016 : 114). The conclusion is that the parties who are required to prove are both the plaintiff and the defendant. The plaintiff must prove the truth of the event he is proposing, while the defendant must prove the truth of the event proposed by the opponent.

There are several theories about the burden of proof that can be used as guidelines for judges, including (Soeikromo, 2016 : 145): (1) Theory of Evidence that Is Strengthening Sheer (blot affirmative); the legal basis of this theory is that negative things cannot be proven. Even though the evidence may be that it is not important and is not imposed on anyone because negative events do not form the basis of a right. This affirmative blot theory has now been abandoned; (2) Subjective Legal Theory; the legal basis in this theory is Article 1865 BW, which explains that whoever has the right or affirms his rights or denies the rights of others then he is obliged to prove the existence of the right or event. However, in practice, this theory has not yet achieved justice due to the judges' leeway in the verification process; (3) Objective Legal Theory; according to this theory whoever claims rights or submits rights to the judge, the judge will indirectly apply the objective legal provisions of the event he is proposing. This article concludes, in this theory the plaintiff must prove the event submitted to the judge but must find the basis of the evidence from the law in accordance with Article 1320 BW (related to the legal terms of the agreement). This theory is formalistic because it cannot answer actual problems not explained in the law; (4) Public Law Theory; according to this theory searching for the truth of an event in justice is in the public interest. So that the judge has greater authority to seek the truth. This theory usually applies in criminal law; and (5) Theory of Procedure Law; that applies the principle of *audi et alteram partem*, a principle that requires judges to share the burden of proof on the parties based on their similarity. Therefore, the judge must share the burden of proof fairly and equally.

#### **d. Kind of Evidence**

According to HIR, the judge in making a decision is bound to the evidence that has been determined by law alone. Evidence in civil proceedings is as follows (Soeikromo, 2016 : 151): (1) Written Evidence; it is anything that contains a reading sign to pour out one's heart or thoughts and can be used as proof. It is divided into two, namely a letter which is a deed and a letter that is not a deed. The letter which is a deed is further divided into two namely authentic deed and underhanded deed. Authentic deeds are evidences in the form of letters, signed, including events that are the basis of rights or commitments and are deliberately made as proof. It must not only be made by or in the presence of an official, but also must be made in accordance with the law. Authentic deed is perfect proof for both parties, heirs and anyone who gets the right. It evidences has the power of free proof, the proof of which is left to the judge's judgment. Another case with a deed under the hand, this deed is a deed intentionally made as proof from the parties but without the help of an authorized official; (2) Verification with the Witness; according to Sudikno Mertokusumo in his book Indonesian Civil Procedure Law, testimony is the certainty given by a judge at a hearing about an event that is disputed by means of verbal and personal notification by a person who is not one of the parties in the case. The information given by the witness must be from what he heard and witnessed himself not the assumptions or opinions obtained from the

results of thinking. There is a group of people who are considered unable to act as witnesses. In this case, it can be distinguished between those who are deemed to be absolutely incapable and who are incapable to be witnesses, namely: (a) those who are not able to be absolutely are those who are not allowed to hear their testimony and are prohibited from becoming witnesses, among others: (i) blood relatives and related families according to descendants born from one party (Article 145 Paragraph 1, Sub 1 HIR, 172 Paragraph 1, RBg, 1910 Paragraph 1 BW). The reason the law restricts it is because they are generally not objective if they hear their testimony, to maintain good relations between families and prevent the emergence of mental stress after being a witness; and (ii) husband or wife of one party, even though they are divorced; (b) Those who are not able to be relative are those who can be heard testimony but cannot be used as witnesses, including: (i) children under 15 (Article 145 Paragraph 1, Sub 3 jo. Paragraph (4) HIR, 1972 Paragraph 1, Sub 4 jo. 173 RBg, 1912 BW); and (ii) Crazy people, though sometimes of bright or healthy memory and people under the influence (Article 145 Paragraph 1, Sub 4 HIR, 172 Paragraph 1, Sub RBg, 1912 BW).

A witness who has been called to the court must swear by his religion in accordance with Article 147 HIR, 175 RBg, 1911 BW jo. Article 4 S. 1920 No. 69. To a Muslim witness, the oath of office reads as follows: "By Allah, I swear that I will tell the truth and nothing else." For a Christian witness to be sworn to stand with his hand up to the ear and extend his index finger and middle finger, recite the following oath: "I swear that I will tell you the truth and nothing else. May God help me."

The purpose of compelling witnesses to swear oaths is to provide truthful evidence and to avoid false witnesses is based on: (1) Perspectives; according to Article 1915 BW, foreclosure is the conclusion of an event that is clear in the event that the law or judge does not make it clear. In the proof, there are two kinds of assumptions, which are law-based and judge-based. Law-based reasoning is an argument based on the specific legal provisions of an event. Whereas a judgment based on a judge is an opinion arising from the events that the judge saw during the trial; (2) Acknowledgment; according to Sudikno Mertokusumo, recognition is information that justifies the right or legal relationship proposed by the opponent. Confession is divided into two, confession before the trial judge and confession outside the court hearing. Acknowledgment in front of the trial judge is a statement that justifies all or part of the opponent's indictment in the face of the trial, whether pronounced alone or through his attorney. Recognition outside the trial is a statement given by one of the parties to justify a civil case outside the trial. The difference between the two is the place where one party states his statement; (3) Asseveration; according to its division oaths are divided into two types, namely the supplementary oath (*supletoir*) and the breaker oath (*desicoir*). *Supletoir* oath is an oath ordered by a judge to one of the parties to complete the evidence in a case dispute. *Desicoir* oath is an oath imposed at the request of one of the parties to his opponent.

Then with the evidence applied in the religious court can have a positive impact on justice seekers, that justice seekers can get a satisfaction in the settlement of the case and with the evidence of the judge can settle the case in this case a valuable divorce case with full legal certainty, usefulness and fairness and also an honest judge decides a case that will produce a good impression and is trusted by the whole community, but if the determination is not honest it will look bad and trust in the court institution is damaged and public confidence is difficult to recover. As stated in QS An-Nisa verse 58 which reads:

*Verily, Allah is telling you to deliver the mandate to those who are entitled to receive it, and (to ask you) when establishing the law among humans with "just". Verily, Allah teaches you the best. Verily, Allah hears again, the All-seeing*

The meaning of "fair" here contains two aspects, the first aspect is aimed at those who are obliged to establish justice, and the second aspect is directed at those who are entitled to justice. Thus, in the word "fair" there are "obligations" and "rights".

According to Rape Rambe and A. Mukti Agafa, in evaluating evidence submitted by litigants in civil procedural law, including religious courts / the Sharia Court, two assessments apply. (A. Rasyid, 2010 : 138-140), namely: (1) Evidence has a binding truth value; evaluation of evidence has a binding truth for the judge as a reference to find material truth based on the evidence submitted by the litigation. It is in the form of an authentic deed, for example, is perfect and binding proof as long as the authentic deed is not proven to be untrue by the party who denied it. Likewise, confession before the court is binding evidence for who did it as explained in Article 174 of the HIR which states that the confession before the judge is sufficient evidence to incriminate the person claiming it, whether spoken alone or with the help of others, special strengthened for that; (2) Evidence that has free value. It is not all of the evidence submitted by the litigants has binding value. From this evidence, it can happen that the judge is not required to regard the evidence as something that is binding on him in finding material truth. From the evidence that does not have binding value, among others, is witness evidence, the information provided by witnesses does not require the judge to take over the testimony as a truth, the judge has the freedom to judge the testimony.

This is a signal given by Article 170 of the HIR which explains that if a foreign and separate testimony from several people, a number of events can strengthen a particular case because the testimony is tangible and related, then it is submitted to the judge to consider appreciate that isolated testimony is so strong, according to circumstances. Likewise, the recognition given outside the hearing is not binding evidence, but only free evidence as required by Article 171 of the HIR which states that it is submitted to the scales from the judge's caution to determine the price of oral confession made outside the law.

Al-Qur'an which was revealed gradually has its own wisdom in applying the law delivered by the Prophet. The verses delivered in the Qur'an relating to the law are often preceded by the words "Yasalunaka" or "Yastaftunaka" which means they ask you questions. This sentence is right about the target because it is in accordance with the situation and condition of Muslims who at that time were facing problems and immediately got their answers.

In this hadith there is also a great virtue for a fair leader who is righteous and improves the condition of his people, he has a high degree in the afterlife. In a valid Muslim the Prophet said: Meaning: Indeed, those who are just, are on Allah's side on the pulpit from the light. On the right side ar-rahman. Namely those who do justice in their decisions, their families, and whoever they take care of."

It is also mentioned in the hadith that Allah will provide shelter to him on the day of no shade except from the shade of Allah, even he and enter including residents of heaven. This is explained in QS al-Nisa verse 105:



*"Indeed, we have sent down the book to you by bringing the truth so that you judge between humans and what God has revealed to you, and do not be a challenger (innocent people), because of (defending) those who betrayed".*

Al-Bukhari and Muslim narrated the hadith that the Prophet had said to the two men who were in dispute about the inheritance and the evidence that the two men had disappeared. In the presence of the Prophet both parties were free to express their hearts so that each could listen to the conversation of the other party. The evidence used by the Prophet was confession, witnesses, oaths, hunches and draws (Djalil, 2006 : 137).

### 1) **'Illat (Ratio-Legis) of Law.**

Every law, be it procedural law or material law, must have at illat law, *ratio-legis* (Athoillah & Sofyan Al-Hakim, 2013), which is the motive / reason underlying a law. Therefore, each judge in applying the law must examine whether the legal illat of a legal provision and whether the legal illat contained in a concrete event against which the legal provisions will be applied. In this case there is a fiqh rule: "*al-hukmu yaduru ma'a 'illatihi wujud wa 'adaman,*" or the law applies simultaneously with the presence or absence of 'illat law in a concrete event.

Related to the procedural law applicable in the Religious Courts environment, specifically related to divorce cases, there are provisions for procedural law both in Article 22 paragraph 2 PP No. 9 of 1975 and in Article 76 paragraph 1 of Law no. 7 of 1989, which is essentially that in the case of divorce lawsuits based on reasons between husband and wife, there are continual disputes and quarrels and there is no hope of living in harmony again in the household or syiqaq, in deciding the divorce case the witnesses' testimony must be heard come from families or people who are close to husband and wife. From this provision it can be understood explicitly that the evidence in divorce cases for this reason must be with witness evidence.

The problem that often arises in practice is when the Plaintiff / Petitioner is unable to present witnesses to prove disputes and quarrels that occur along with the causes. Is it not possible for other evidence in the case? The answer is faced on:

Related to the above problem, we need to know what the legal provisions of Article 22 paragraph 2 PP No. 9 of 1975 and Article 76 paragraph 1 of Law No. 7 of 1989. Knowledge of this legal knowledge is important so that the judge does not apply a legal provision blindly to the concrete events that he faces. To find out about this law, there is the Supreme Court Jurisprudence of the Republic of Indonesia Number: 863K / Pdt / 1990 dated November 28, 1991 which states that it is not justified in divorce cases based solely on recognition and / or agreement, because there is concern of lying, ex Article 208 BW

Provisions in Article 22 paragraph 2 PP No. 9 of 1975 and Article 76 paragraph 1 of Law No. 7 of 1989 more or less still influenced by the provisions contained in the Civil Code. From the explanation above, it can be seen that 'illat law Article 22 paragraph 2 PP No. 9 of 1975 and Article 76 paragraph 1 of Law No. 7 of 1989 is to prevent lies in divorce based on recognition or agreement. This is in line with the purpose of proof, which is to show the truth of an event.

### 2) **Case in the Field**

To clarify the application of a legal provision by considering the legal status in proving a divorce case, the following case example is presented. The Petitioner argues that the Petitioner and

Respondent's household are not harmonious, often disputes and quarrels occur because the Respondent is jealous of the Petitioner, the Respondent often says harshly to the Petitioner, the Respondent has requested divorce twice, the Respondent often opposes the Petitioner's words, as a result the Petitioner and Respondent have split up bed for one year.

The Petitioner and Respondent have mediated in court but failed. In the hearing the Respondent denied the Petitioners' arguments regarding the reasons for the dispute, but acknowledged that the Petitioner and the Respondent had been separated for one year, and the Respondent objected to divorce from the Petitioner. In the evidentiary stage at the hearing, the Petitioner was unable to present witnesses to prove his arguments.

In the above case, there is a legal fact that the Petitioner and Respondent have been separated for one year based on the Respondent's acknowledgment. However, in that case there was no agreement between the Petitioner and the Respondent to divorce. The question then is whether the provisions of Article 22 paragraph 2 PP No. 9 of 1975 and Article 76 paragraph 1 of Law No. 7 of 1989 can be applied in this case? As we know, that at illat law Article 22 paragraph 2 PP No. 9 of 1975 and Article 76 paragraph 1 of Law No. 7 of 1989 is avoiding lies in divorce based on recognition or agreement. In this case there was no agreement to divorce, because the Respondent objected to divorce from the Petitioner.

Then, related to the element of deception in divorce, it would be illogical, if the Respondent lied about separating the bed for a year, while the Respondent did not want divorce. In this case, the judge can be sure that there were no lies in the Respondent's confession. Thus, the illat lie in divorce based on recognition or agreement was not found in this case. Therefore, the provisions of Article 22 paragraph 2 PP No. 9 of 1975 and Article 76 paragraph 1 of Law No. 7 of 1989 cannot be applied in the case.

In that case, even though the Petitioner was unable to present witnesses, but there was acknowledgment from the Respondent that the Petitioner and the Respondent had been separated for one year. Of course, the bed split was a result of a dispute that occurred between the Petitioner and the Respondent. Because if there is no dispute, it is impossible for the Petitioner to submit divorce application to the court.

In addition, the Petitioner and Respondent have taken mediation in court, and have gone through peace efforts by the Panel of Judges at each stage of the trial, but failed to reach an agreement to get along well. Recognition of the Respondent in the case included a type of pure recognition. Pure recognition has the power of proof that is perfect, binding, and determining or coercive, so it does not require any other evidence. Based on the evidence of recognition, there is sufficient evidence for the judge to grant the Petitioner's petition.

The legal fact that the Petitioner and the Respondent have been separated for a year and has mediated and through a peaceful effort by the panel of judges but failed, shows the condition of households that have broken apart and are difficult to reconcile, as a result of disputes between the Petitioner and the Respondent. Accordingly, the Petitioner's application has fulfilled the provisions of Article 19 letter f PP No. 9 of 1975 jo. Article 116 letter f KHI because it allows broken household conditions that are difficult to reconcile as in the case above will only cause prolonged madharat (psychological pressure) to both parties, and this is contrary to the principles in the fiqh rules of "from" ul mafasid muqaddamun 'ala jalbil mashalih, "that is avoiding mafsadat takes precedence over attracting benefit."

Closing, the application of procedural law provisions by paying attention to the legal status is important for judges so that procedural law does not hamper justice and benefit for litigants. In a divorce case, which is an individual law, it must be avoided that there is an element of deception in divorce. However, it does not mean that the judge then ignores evidence other than witnesses in examining divorce cases on the grounds of Article 19 letter f PP No. 9 of 1975 jo Article 116 letter f KHI, but must be seen on a case by case basis.

#### D. CONCLUSION

The contribution of evidence in court is needed, because one of the judges' duties is to investigate whether there is a legal relationship on which the lawsuit really exists or not. The existence of this legal relationship must be proven by the parties in court. In preparing a lawsuit (specifically *posita*), the plaintiff or the petitioner must pay attention to the chronology of the case incident based on legal facts that have strong evidence. If the plaintiff wants his claim / claim granted then he must be able to prove his *dalal* at the stage of proof at trial. Because, if that cannot be proven the consequences will be rejected or not accepted.

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