

Judge's Ijtihad Discourse In Deciding Cases Divorce Suit Of Pregnant Wives In Indonesia

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Abstract. *This research focuses on how judges use ijtihad in deciding divorce cases filed by wives in pregnant conditions. By using normative juridical methods and statutory, concept, and case study approaches, this research examines positive legal provisions, expert views, and related court decisions. The research results show that pregnancy cannot be used as a basis for rejecting a divorce suit. The judges use ijtihad to interpret legal rules, assess aspects of benefit, and provide protection for women in accordance with the principles of maqāṣid al-shari'ah and the provisions in Supreme Court Regulation Number 3 of 2017. From the analysis, two patterns of judge's decisions were found: postponing the divorce until the wife gives birth or immediately granting the divorce if the continuation of the marriage is considered to endanger the wife or fetus. Thus, the judge's ijtihad becomes an important instrument in realizing more substantial justice and ensuring protection for pregnant women in divorce cases.*

Keyword: *Judge's Ijtihad, Divorce Claim, Pregnant Wife.*

INTRODUCTION

Disharmony in marriage is a common occurrence. Various problems are inevitable in every family unit, both on a small and large scale, sooner or later will arise. If these problems are not handled wisely, they can result in separation. The tendency of individuals, both husband and wife, to maintain personal positions (selfishness) often hinders the resolution of family problems. Divorce should be the last option, therefore religion recommends several solutions such as giving advice, light physical reprimands, and appointing representatives from both families. If all of these efforts reach a dead end, only then is the husband allowed to end the marriage.(Al-Faqi, 2011)

Husbands and wives have an obligation to maintain the continuity of their marital relationship. This is because the relationship is a sacred, strong bond, or in other terms known as

mitsaqan ghaleezhan. Because of this sacred bond, Allah SWT. does not like it when the relationship ends or a divorce occurs. Even so, the legal status of divorce is still permitted in religious teachings by paying attention to the provisions in Islamic law. Divorce is recognized in Islam as one solution to overcome household problems that arise as a result of endless disputes.

On In practice, the failure of a relationship or marriage can be seen through various indicators in daily life. For example, constant arguments, peace efforts that have been made but have not been successful, separation for at least three months, or the emergence of third-party interference. If the family's condition is no longer sustainable and the continuation of the marriage potentially endangers the safety of the couple and children, then in such circumstances, the court is authorized to grant the divorce petition filed.(Manan, 2017)

The divorce procedure in the Indonesian legal system is regulated in detail through Law Number 1 of 1974 concerning Marriage, which applies generally to all citizens. For Muslims, there are additional rules in Law Number 9 of 1979 concerning Religious Courts, which specifically regulates religious matters, including divorce cases. Based on Article 39 paragraph (1) of Law Number 16 of 2019 which amends Law Number 1 of 1974, a divorce can only be carried out through a trial process in court, after the institution has first attempted to reconcile the two parties but has not achieved success.(Indonesia, 2019)

The court functions as a final dispute resolution mechanism in marriage relationships. The Panel of Judges has the responsibility to facilitate reconciliation between the two parties, which requires the court to always open opportunities for peace. In Chapter V of the Marriage Law which discusses the Rights and Obligations of Husband and Wife, Article 31 emphasizes that:

1. The wife has a position and rights that are equal to the husband, both in domestic life and in social relations in society;
2. Each party is given the authority to take legal action.

The husband holds the role as head of the household, while the wife acts as the manager of the household. Furthermore, Article 34 paragraph (3) states that: "If the husband or wife neglects their respective responsibilities, the party concerned can file a legal claim to the court".(Indonesia, 1974)

Based on the provisions of Article 34 paragraph (3), if one party in the marriage does not carry out their obligations, then the other party has the right to file a claim to the court. Consequently, if a wife does not carry out her role or no longer meets her husband's expectations, the husband has the option to file a legal claim. This means that the husband can file for divorce

against his wife. The judge has a responsibility to issue a fair verdict for both parties. A judge must conduct a careful examination in resolving, reviewing, and deciding cases that arise in society. A judge can establish norms of law that are considered appropriate even though this has not been stated in the laws and regulations.

In this frame of reference, evidence-based studies regarding the interpretation of the law by judges in divorce cases on lawsuits from pregnant wives are still very limited. Several previous studies have examined judges' decisions, but these studies are partial and do not present a comprehensive map of the interpretation methods used. For example, Muthmainnah Samsir Salam, Kiljamilawati, and Roswati Nurdin conducted a case study on the decision of the Religious Court (Number 0210/Pdt.G/2019/PA.PKJ). They found that judges have two types of considerations in deciding divorce suits when the wife is pregnant: some panels of judges decided to postpone the decision until the wife gives birth, while other panels of judges immediately granted the lawsuit on the grounds of common good and prevention of losses in the household. (Muthmainnah et al, 2023)

In addition, M. Malik Abdul Aziz and Muhammad Habibur Rochman conducted a study on the aspects considered by judges in making divorce decisions against pregnant wives (Decision Number 541/Pdt.G/2016/PA.Bkl). In an article entitled "Analysis of Judges' Considerations Regarding Divorce Decisions for a Wife in a Pregnant State", their research results show that judges consider factors such as fundamental disputes, potential negative impacts, and evaluation of the marriage condition before finally issuing a divorce decision. (Aziz and Rochman 2023)

However, the studies that have been carried out have limited scope at the local level and are based on analysis of a single decision or only limited to one judicial forum. Until now, there has been no comprehensive research on the pattern of judges' *ijtihad* nationally in divorce cases where the wife is pregnant. This research gap indicates an urgency for further research that not only aims to describe, but also to analyze the tendency of judges' *ijtihad*, the consistency of the legal basis used, and the impact of the decision on protecting the rights of the wife and the fetus she is carrying. Therefore, this research has significance in making academic and practical contributions to the advancement of Islamic family law in Indonesia.

METHOD

This research adheres to the normative legal research method using a statutory approach, a conceptual approach, and a case approach (Marzuki, 2017). The statutory approach is used to analyze positive legal provisions governing divorce, such as Law No. 1 of 1974, PP No. 9 of 1975,

KHI, and PERMA No. 3 of 2017. The conceptual approach is used to explain the concept of judge's *ijtihad*, protection of women, and *maqāṣid al-syarī'ah* in dispute resolution. Meanwhile, the case approach is carried out through a review of the Religious Court decisions, which are relevant involving divorce suits by wives in a pregnant state.

The research data consists of primary legal materials, in the form of laws and regulations and court decisions; secondary legal materials, in the form of books, journals and previous research results; and tertiary legal materials, such as legal dictionaries and encyclopedias. The data collection technique was carried out through literature study and documentation. All data was analyzed using the method qualitative analysis, namely processing and interpreting legal materials systematically to find patterns of judges' *ijtihad* and legal arguments used in deciding pregnant wives' divorce suit cases.

FINDINGS AND DISCUSSION

Definition of Divorce

Islam basically does not prohibit divorce, but Allah SWT does not like it. Therefore, Islamic teachings encourage husbands and wives to first seek other solutions before choosing to separate. Divorce is seen as the last step when efforts to resolve problems no longer produce results. In Surah Al-Baqarah verse 227 it is stated: "If they really intend to divorce, then indeed Allah is All-Hearing, All-Knowing." The provisions regarding divorce continue in verses 228 to 232 of the surah same. Apart from that, Islam also provides guidance regarding household life and divorce through Surah Ath-Thalaq verses 1 to 7.(Shihab, 2002)

Divorce is not a right that is only owned by a husband to pronounce divorce against his wife, but it is also the right of a wife to sue her husband. In the event that the wife can sue her husband, it must be accompanied by clear reasons.

Divorce is the end of the marriage bond through a court decision, either at the request of one of the parties or for certain reasons certainly in that marriage (Subekti, 1985). Divorce can only be carried out through court proceedings after the panel of judges has tried to reconcile the couple but to no avail. Even though in Islamic teachings a divorce pronounced directly by the husband is considered valid according to religion, the divorce process must still be pursued in court. This is intended to guarantee protection of the rights and obligations of each party that arise as a legal consequence of divorce.(Susilo, 2017)

The term divorce is stated in Law Number 1 of 1974 concerning Marriage, especially in Chapter VIII which regulates the termination of marriage and its consequences. Article 38 explains

that a marriage can end because one of the partners dies, a divorce occurs, or through a court order.(Indonesia, 1974)

Furthermore, the Compilation of Islamic Law explains in chapter XVI which discusses the termination of marriage, in article 114 it explains that the termination of marriage caused by divorce can occur due to divorce or based on a divorce suit and on article 115 mentions that Divorce can only be done in front of the court of Religious Affairs after the Court of Religious Affairs has tried and failed to reconcile the two parties.

According to the Marriage Law in Indonesia, there are 2 (two) types of divorce when viewed from the point of view of procedures in the Religious Court namely:

a. Divorce Talaq

Divorce talaq is the termination of a marriage relationship that occurs at the husband's initiative for a specific reason, which is then stated through the lafaz or utterance of talaq. Divorce talaq cases are categorized as applications, where the husband acts as the applicant and the wife as the respondent. A husband who marries according to Islamic law and intends to divorce his wife must submit an application to the Court to be tried, so that the declaration of talaq can be pronounced before the panel of judges.(Syarifuddin 2014)

b. Divorce Sue

Divorce suit is a form of divorce filed by the wife against her husband to the court by including certain reasons, and asking the court to open a trial to examine the case. The termination of marriage through a divorce suit occurs after an official decision from the court. The procedure for filing a divorce suit itself has been regulated in Government Regulation Number 9 of 1975 articles 20 to 36, which is reinforced by the provisions in articles 73 to 83 of Law Number 7 of 1989.(Hidayati, 2022).

Ijtihad Judge Regarding Divorce Sue against Wife in a Pregnant State

A judge does not simply carry out the task of applying written law, but is also required to carry out ijtihad when faced with cases that are not fully answered by existing rules. A judge's ijtihad is a reasoning process to find legal solutions when normative provisions do not provide certainty or complete explanation. In judicial practice in Indonesia, this ijtihad is carried out by considering the principles of justice, expediency and appropriateness. This provision is in line with Article 28 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, which affirms that judges are obliged to “explore, follow and understand the legal values that develop in

society.”(Hidayatullah, 2020)

Thus, when legal rules do not specifically regulate divorce in a state of pregnancy, judges have room to carry out legal discovery through interpretation, consideration of benefits, expert doctrines, and jurisprudence.

The legal basis that is the reference for judges in determining divorce judgments when the wife is pregnant is, among others contained in Law Number 1 of 1974 Article 39. The provision explains that:

- a. Divorce can only be carried out through a trial process in court after the judge has tried to reconcile the couple but failed.
- b. The divorce application must be accompanied by strong reasons that the husband and wife are no longer able to live harmoniously as a couple.
- c. The procedure for implementing divorce in court is further regulated in special laws and regulations governing divorce procedures.(Hidayat, Al-Amruzi, and Sarmadi 2023).

According to the explanation of Article 39 of Law Number 1 of 1974 which is reinforced through Article 19 of Government Regulation Number 9 of 1975, there are a number of reasons that can be used as the basis for filing for divorce, namely:

- a. One of the partners commits adultery or has bad habits such as getting drunk, drug addiction, gambling, and the like, which are difficult to cure (explanation of Article 39 paragraph (2) letter a UU 1/1974 jo. Article 19 letter a PP 9/1975 jo. Article 116 letter a KHI).
- b. One party leaves their partner for two consecutive years without permission, without a valid reason, or due to circumstances beyond their control (explanation of Article 39 paragraph (2) letter b UU 1/1974 jo. Article 19 letter b PP 9/1975 jo. Article 116 letter b KHI).
- c. The husband or wife is sentenced to prison for five years or more after the marriage takes place (explanation of Article 39 paragraph (2) letter c UU 1/1974 jo. Article 19 letter c PP 9/1975 jo. Article 116 letter c KHI).
- d. One of the partners commits violence or serious abuse that endangers the safety of their partner (explanation of Article 39 paragraph (2) letter d UU 1/1974 jo. Article 19 letter d PP 9/1975 jo. Article 116 letter d KHI).
- e. One party experiences a physical defect or suffers from an illness that causes them to be unable to carry out their role as husband or wife (explanation of Article 39 paragraph (2) letter e UU 1/1974 jo. Article 19 letter e PP 9/1975 jo. Article 116 letter e KHI).
- f. There are continuous disputes and arguments between husband and wife so that there is no

longer any hope of living in harmony as a family (explanation of Article 39 paragraph (2) letter f UU 1/1974 jo. Article 19 letter f PP 9/1975 jo. Article 116 letter f KHI).(Fitri 2022)

The reasons above are still added 2 more as stated in the article 116 compilation of Islamic law namely:

- a. Husband violates taklik talak (article 116 letter (g) Compilation of law islam)
- b. Religious conversion or apostasy which causes disputes and arguments and there is no hope will live in harmony in marriage again (explanation of article 39 paragraph (2) letter f No. 1/1974 jo. Article 19 letter (f) PP.No.9/1975 jo. Article 116 letter (f) Compilation of law Islam).

In divorce cases including when the lawsuit is filed by a pregnant wife the process of proving it plays a very decisive role. This is because the reasons for divorce contained in Article 39 of the Marriage Law, Article 19 of PP Number 9 of 1975, and Article 116 of the KHI must be clearly proven. Based on the provisions of the HIR, RBg, and judicial practice formed through the jurisprudence of the Supreme Court, each party who submits an argument is obliged to present evidence to support it. The judge then made an *ijtihad* in assessing the relationship of the evidence to the case, the eligibility of its acceptance, and the strength of the evidence to determine whether the grounds for divorce were proven. In fact, the Supreme Court through its jurisprudence confirms that hearsay evidence cannot be used as evidence, so the judge must carefully assess whether the witness's testimony is in line with the facts of the trial.(Sururie, 2014)

After the evidentiary stage is complete, the mediation process must be taken as regulated in PERMA No. 1 of 2016. In cases involving pregnant wives, judges often use their discretion to assess whether mediation is still appropriate, given the physical and psychological condition of pregnant women. In certain circumstances, judges may conclude that reconciliation efforts could potentially cause further harm, and therefore divorce is considered a more beneficial option for all parties.(Ribi, 2025)

In the context of Islamic law, divorce from a pregnant wife is basically permissible and does not constitute *talak bid'i*. The determination of the *iddah* period for pregnant women until they give birth shows that the Sharia provides protection for the clarity of lineage and the safety of the mother, which is part of *maqāsid al-syarī'ah* (*hifz al-nasl* and *hifz al-nafs*). Consideration of these *maqasid* is often part of the judge's *ijtihad* when deciding on the divorce of a pregnant wife. The judge assesses whether maintaining the household will actually cause physical, psychological, or economic harm to the woman and the child she is carrying (Hidayah, Hamzah, dan Basri 2024).

With the enactment of PERMA No. 3 of 2017 concerning Guidelines for Adjudicating

Cases of Women Facing the Law, the authority and scope of the judge's *ijtihad* has become clearer and stronger. This PERMA instructs judges to pay attention to the vulnerability of women, including when they are pregnant, and to prevent the recurrence of violence that can occur if the divorce is delayed without a valid reason. Judges must ensure that divorce decisions not only comply with positive law, but also fulfill the principle of protection for women based on the principle of substantive justice.

A wife's pregnancy when filing for divorce does not prevent judges from examining and deciding the case. Qoidul Khoir, in his research specifically titled "Judges' Views on Divorce Suits Filed by Pregnant Wives," affirms that pregnancy is not a legal reason for judges to reject divorce suits. Qoidul Khoir found two patterns of consideration by judges: (1) judges postpone the divorce until the wife gives birth if there is no harm that threatens the safety of the wife and fetus; and (2) judges grant the petition immediately if the household conditions are considered physically, psychologically, or economically dangerous. This study also shows that judges interpret the provisions of the Marriage Law, Government Regulation No. 9 of 1975, and the KHI through a *maslahah* approach, maintaining the clarity of lineage, and protecting women's rights during the trial process. (Sururie, 2014)

Furthermore, Muthmainnah's research entitled "Judges' Analysis of Divorce Lawsuits Against Pregnant Wives (Case Study of Decision No. 0210/Pdt.G/2019/PA. Pkj)," explains that judges have two different types of considerations when handling divorce cases filed by wives who are pregnant, depending on the situation and the timing of the filing. Although both types of cases result in the divorce petition being granted, some judges choose to postpone the decision, while others grant it immediately in order to consider the welfare and potential harm if the marriage is maintained. However, the final decision still takes into account the position of both parties, both the plaintiff and the defendant. In analyzing divorce case No. 0210/Pdt.G/2019/PA.Pkj, the judge used three approaches, namely a review of the facts that emerged during the trial, conclusions drawn from these facts, and the application of legal rules. Considerations also included the reasons for postponing the divorce until the wife gave birth and the causes of the marital breakdown. When a marriage can no longer achieve the goal of *sakinah* as *mitsaqan ghalidzan* and instead has the potential to cause harm to both parties, the court provides a solution in the form of divorce as a way out of a marital conflict that cannot be reconciled. (Muthmainnah dkk, 2023).

The research by M. Malik Abdul Aziz and M. Habibur Rochman (2020) on Divorce Decisions for Pregnant Wives also reinforces this conclusion. They revealed that divorce suits filed

by pregnant wives are generally based on factors that fulfill the elements of “continuous quarrels” or “lack of financial support,” which are valid reasons according to Article 116 of the KHI. This study confirms that pregnancy does not negate a wife's right to obtain a divorce if the purpose of marriage (*mitsaqan ghalidzan*) can no longer be realized. In fact, some judges have stated that maintaining a marriage that is detrimental to a pregnant wife can threaten her psychological condition and the safety of her pregnancy. (Aziz dan Rochman, 2023)

A similar finding was found in the research by Mustofa, Subekti, and Kurniawati (2021) at the Malang District Religious Court, which analyzed the judges' considerations in divorce cases filed by pregnant wives. This study states that the judges found no basis for prohibition in legislation or *fiqh* to reject these lawsuits. Instead, the judges emphasized the safety of the wife and unborn child and prioritized the protection of women, in accordance with PERMA No. 3 of 2017. The judges in these cases argued that pregnancy is an important factor that must be considered, but it should not be an obstacle for wives to access justice. (Mustofa, Subekti, dan Kurniawan, 2021)

Thus, the judge's *ijtihad* in divorce cases involving pregnant wives is carried out through the interpretation of positive law, consideration of public interest, protection of women, and application of the principles of *maqāṣid al-syarī'ah*. Pregnancy is not an obstacle for a wife to file for divorce, and judges have the authority to assess whether the divorce should be granted immediately or postponed based on safety, justice, and propriety. This approach reflects a combination of positive law, Islamic legal values, and the principle of substantive justice in the Indonesian judicial system.

CONCLUSION

Divorce is the last resort in resolving domestic conflicts when the marriage bond can no longer be maintained. Islam allows divorce under certain conditions, and Indonesian positive law strictly regulates the procedure through the Marriage Law, Government Regulation No. 9 of 1975, the Compilation of Islamic Law (KHI), and related Supreme Court Regulations (PERMA). In cases of divorce filed by a pregnant wife, pregnancy is not an obstacle to filing for divorce or to the granting of the petition. Judges use their *ijtihad* when written rules do not provide specific answers, namely by interpreting legal provisions, considering the public interest, protecting women's rights, and adhering to the principles of *maqāṣid al-syarī'ah*. The verdict may be immediate approval or postponement until delivery, depending on the level of harm and safety of the wife and fetus. Previous studies show that judges tend to prioritize the protection of pregnant women and recognize the wife's right to divorce when the purpose of marriage is no longer fulfilled. Thus,

judicial discretion becomes an important instrument in ensuring fair, proportional, and beneficial verdicts.

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