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Comparative Analysis of Civil Procedure Law and Religious Court Procedure Law in Divorce Cases

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ABSTRACT

The handling of divorce cases in Indonesia is normatively regulated through two different judicial channels, namely the District Court for non-Muslims and the Religious Court for Muslims. This research aims to analyze the comparison between civil procedural law and religious court procedural law in divorce cases, as well as to examine the juridical implications when Muslims file cases with the District Court, which is not the forum with absolute authority. The research uses a normative and comparative juridical approach, by examining Law No. 1 of 1974 concerning Marriage, Law No. 7 of 1989 concerning Religious Courts (which has been amended by Law No. 3 of 2006), and HIR/RBg as the basis for procedural law. The results show that there are fundamental differences in formal-procedural aspects, including in the mediation mechanism, evidence, and the type of divorce certificate issued. In addition, the filing of a divorce lawsuit by a Muslim party to the District Court creates a mismatch in absolute competence and has the potential to cause juridically invalid decisions. Therefore, the understanding of the public and law enforcement officials about the limits of judicial competence is very important to ensure legal certainty and protection of the rights of justice seekers in divorce cases.

KEYWORDS

Divorce; Civil Procedure Law; Religious Court; Procedure Law; Absolute Competence



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INTRODUCTION

Divorce is a complex social and legal phenomenon, reflecting the dynamics of relationships between individuals within the institution of marriage.¹ In Indonesia, the dualistic legal system regulates divorce through two different judicial channels: District Courts for non-Muslims and Religious Courts for Muslims. This division is based on the principle of religious personality stipulated in Law No. 1/1974 on Marriage and Law No. 7/1989 on Religious Courts.²

Civil procedural law in the District Court refers to the *Herziene Indonesisch Reglement (HIR)* and *Rechtsreglement voor de Buitengewesten (RBg)*, which are Dutch colonial legacies.³ Meanwhile, procedural law in the Religious Courts, although generally adopting the HIR/RBg, has specificities that are regulated in Law Number 7 of 1989 and its amendments.⁴ These differences include formal-procedural aspects, such as mediation mechanisms, evidence, and the type of divorce certificate issued.⁵

The fundamental difference between the Religious Courts and the District Courts in the settlement of divorce cases is evident at the mediation stage. In the Religious Courts, mediation is a legal obligation affirmed through Supreme Court Regulation (Perma) Number 1 of 2008, which was later updated with Perma Number 1 of 2016 concerning Mediation Procedures in Court. This process is not only an administrative formality, but is also used as a substantial instrument to save households from divorce. In practice, mediation in the Religious Courts emphasizes Islamic principles such as deliberation, justice, and *ishlah* (peace) as reflected in the values of sharia.⁶ This is by the mandate of Article 1, paragraph (3) of the 1945 Constitution, which states that Indonesia is a state of law that upholds the principle of substantive justice.

Conversely, the District Court also adopted the same Perma-based mediation procedure, but its implementation is more technocratic and does not incorporate religiosity in its settlement approach.⁷ Mediator judges in the District Courts generally only perform the function of facilitator without entering into the moral or religious substance of the husband and wife relationship. This model reflects a secular approach to domestic conflict resolution, which may be considered less adaptive to Indonesian society, which still holds religious values in their personal lives.⁸

¹ Sudikno Mertokusumo, *Penemuan Hukum: Suatu Pengantar* (Yogyakarta: Liberty, 2009).

² B Manan, *Pembaruan Hukum Islam di Indonesia* (Bandung: Alumni, 2008).

³ R Sutantio & E Oeripkartawinata, *Hukum Acara Perdata dalam Teori dan Praktik* (Bandung: Mandar Maju, 2005).

⁴ M Lubis, A Zainuddin & Mardani, *Peradilan Agama di Indonesia: Teori dan Praktik* (Jakarta: Kencana, 2006).

⁵ Mardani, *Hukum Perkawinan Islam di Indonesia* (Jakarta: Sinar Grafika, 2009).

⁶ Musthofa, *Kepaniteraan Pengadilan Agama* (Jakarta: Kencana, 2005).

⁷ Sri Sukmana Damayanti & Siti Marwiyah, "Mediation in Pancasila Philosophy: A Value Analysis of the Fourth Precept of Consultative Consensus" (2025) 1:1 *Iuris Philos J* 81–90, online: <<https://jurnal.jurisprudenceinsights.com/index.php/Iurisphilosophiajournal/article/view/10>>.

⁸ T Yuliasari, H Santoso & I Maulida, "Problematika Yurisdiksi Absolut dalam Gugatan Perceraian Umat Islam" (2024) 10:1 *J Huk dan Keadilan Islam* 33–48.



The evidentiary system in divorce procedural law in the two judicial domains is formally similar. Both the District Court and the Religious Court recognize the five means of evidence according to the HIR/RBg and other procedural laws, namely witnesses, letters, confessions, oaths, and testimony. However, in terms of praxis, the Religious Courts have a distinctive interpretative approach in assessing the probative value of each piece of evidence, particularly when it relates to violations of moral and religious obligations within the household. For example, in the case of *nusyuz* (a wife's defiance of her husband), the testimony of a local religious figure or a *ta'lim* assembly can be used as additional evidence to support the plaintiff's argument.⁹

This shows that religious courts are not only oriented towards legalistic aspects, but also consider the integrity of the spiritual values of the people. In contrast, the District Court has no room for religious values in its legal considerations. Divorce cases in the District Court emphasize more on formal legal principles, such as proof of continuous disputes, domestic violence, or household disharmony, without taking into account the value of religious violations in marital ties.¹⁰ This becomes important in the context of plural Indonesia, where law cannot be separated from the sociocultural dimensions of society.

Another substantial difference is in the end product of the divorce process, namely, the type of divorce document issued by each court. In the Religious Courts, a divorce certificate is an authentic document issued after the divorce verdict is legally binding. This certificate serves as an important administrative requirement in the population administration process, including in the renewal of status on the Family Card and KTP, and also as a basis for the implementation of Islamic law related to the *iddah* period and child custody (*hadhanah*).¹¹ In the context of Muslim societies, divorce certificates from the Religious Courts also have a spiritual legitimacy recognized by their religious communities.

Meanwhile, the District Court only issues a divorce verdict in the form of a verdict certificate, which cannot necessarily be used as a basis for issuing a divorce certificate in the civil registration system for Muslim citizens. This creates problems when Muslims divorce through the District Court: not only will they face administrative obstacles, but they will also potentially experience social and religious rejection of the validity of their divorce. Therefore, the Indonesian legal system requires an absolute separation in the jurisdiction of divorce between Muslims and non-Muslims, by the principle of absolute competence of the judiciary.¹²

From a juridical point of view, when a Muslim files a divorce case with the District Court, he indirectly violates the principle of absolute competence as stipulated in Article 63 of Law No. 7 of 1989 jo. Law No. 3 of 2006. Filing a case in an unauthorized forum not only causes procedural legal defects but can also have an impact on the invalidity of the decision. Decisions issued by courts that do not have

⁹ H Rasyid, *Hukum Islam dan Implementasinya di Indonesia* (Jakarta: Gema Insani, 1991).

¹⁰ A Ghofur, *Hukum Perkawinan Islam di Indonesia* (Malang: Setara Press, 2013).

¹¹ E Mujahidin, *Hukum Acara Peradilan Agama* (Bandung: Refika Aditama, 2012).

¹² Manan, *supra* note 2.



absolute authority can be considered *ultra vires*, i.e., exceeding their authority, which in procedural law can be the basis for cassation or judicial review.¹³

The impact is not limited to the realm of procedural law, but also affects the civil rights of the parties involved. For example, civil status cannot be renewed, child custody becomes unclear, and the risk of re-disputes arises when one of the parties questions the legality of the divorce. In Supreme Court Decision No. 410 K/AG/2018, for example, it is stated that divorces conducted by Muslims in the District Court are considered invalid and have no binding legal force. This shows the urgency of a deep juridical understanding of absolute jurisdiction by both justice seekers and legal practitioners.

This research aims to comparatively analyze civil procedural law and religious court procedural law in divorce lawsuits, as well as examine the juridical implications when Muslim communities file cases in the District Court. A normative and comparative juridical approach is used to examine the applicable laws and regulations, including Law Number 1 of 1974, Law Number 7 of 1989, and HIR/RBg.¹⁴

The problem formulations that will be discussed in this study are as follows:

1. How do the procedures differ between civil procedural law in the District Court and religious judicial procedural law in the Religious Court in handling divorce lawsuits?
2. How is the absolute and procedural authority between the District Court and the Religious Court on the rights of Muslim communities who file divorce lawsuits outside the competence of religious judicial institutions?

METHOD

This research uses the normative legal research method, which is a research approach that focuses on the study of legal documents, including legislation, court decisions, legal doctrine, and relevant legal literature. The purpose of this approach is to analyze applicable legal norms systematically and comprehensively, especially those governing absolute competence in divorce cases in Indonesia. In this context, the research examines the differences between civil procedural law in the District Court and religious procedural law in the Religious Courts, as well as the juridical impact of applying the law that is not by absolute jurisdiction. This approach is appropriate to explore the consistency of the legal system as well as to assess the effectiveness of the rules in practice.¹⁵

RESULT & DISCUSSION

I. Differences in Procedures of Civil Procedure Law in District Courts and Religious Procedure Law in Religious Courts in Handling Divorce Cases

Indonesia has a dual judicial system: District Courts (PN) for general cases (including non-Muslim divorces) and Religious Courts (PA) for cases involving Muslims (including Muslim divorces). Juridically, Law No. 7/1989 on Religious

¹³ Yuliasari, Santoso & Maulida, *supra* note 8.

¹⁴ A Rofiq, *Hukum Islam di Indonesia* (Jakarta: RajaGrafindo Persada, 2019).

¹⁵ S Soekanto & S Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: RajaGrafindo Persada, 2001).



Courts mandates that Muslim divorces be settled in the PA. On the other hand, Law No. 1/1974 on Marriage requires divorces for non-Muslim couples to be filed in the District Court (Article 39) and implemented according to the provisions of Government Regulation No. 9/1975 on the Implementation of the Marriage Law. The paradigm difference between the principle of legal formality and social benefit is reflected in these two procedures. This subchapter comprehensively discusses the philosophical, historical, procedural, technical, and juridical dimensions of the different divorce processes in the District Court and Religious Courts.¹⁶

Philosophically, the positive legal system (HIR/RBg) emphasizes legal certainty and formalistic procedures. Abdullah Gofar (2013) mentions that the measure of truth in procedural law tends to be mechanistic and oriented towards certainty and expediency alone, so that it often “overrides aspects of benefit by the values of Islamic law”. This paradigm is different from Islamic principles that prioritize moral values, family benefits, and substantive justice. The Religious Courts Law (Article 54 of Law No. 7/1989) affirms that Western procedural law may only be applied *mutatis mutandis* in the Religious Courts and may not conflict with Islamic principles. This difference in values is the philosophical basis for the emergence of different approaches in the treatment of divorce cases.¹⁷

Historically, religious courts were only recognized as a subsystem of the Indonesian judiciary after the issuance of Law No. 14/1970 on the Basic Provisions of Judicial Power. Since Law No. 1/1974 on Marriage came into force, divorce has been regulated nationally, but until 1975, religious courts did not have written guidelines, so religious judges resolved cases based on local traditions. After 1989, through Law No. 7/1989 on Religious Courts (and its improvement Law No. 3/2006, jo. 50/2009), PAs were officially authorized to hear Muslim divorces (both *talak* and *gugat*). In the early period of independence, the procedural law for divorce in the Religious Courts was simple and quick, but the application of the HIR *mutatis mutandis* since the era of legal reform has caused the divorce process in the Religious Courts to become more formalistic. As a result, the orientation of divorce proceedings in the two institutions has different historical roots, but currently there is much overlap due to the application of the *Herzien Indonesisch Reglement* in the Religious Courts and the involvement of PP 9/1975 in the District Courts. Jurisdictional Authority separates divorce competence:¹⁸

1. Religious Courts have absolute authority to examine and decide on divorce for Muslim couples (both divorce and contested divorce). Article 49 of Law No. 3/2006 states that “divorce due to divorce” and “divorce lawsuit” are within the jurisdiction of the Religious Courts.
2. District Court: handles divorce cases for non-Muslim or mixed couples, by Marriage Law No.1/1974 jo. PP No.9/1975. Non-Islamic marriages registered at the KUA require divorce at the District Court. In summary, if

¹⁶ H Badriyah, “Kekuatan Hukum Akta Cerai dari Pengadilan Agama” (2018) 16:1 J Huk Islam 87–101.

¹⁷ A Wijaya, “Analisis Perbandingan Hukum Acara Perdata dan Hukum Acara Peradilan Agama dalam Perkara Gugatan Perceraian” (2024) 5:1 Lex J Kaji Huk dan Keadilan 1–25.

¹⁸ Ramsupitri Mohamad & Titin Samsudin, “Peran Dan Tugas Pokok Serta Fungsi Panitera/Panitera Pengganti Pada Pengadilan Agama” (2021) 5:1 J Al-Himayah 32–49.



both parties are Muslim, then the religious court applies, while if one is non-Muslim, then the district court applies.

Differences in terminology reflect this characteristic. Two patterns of divorce are recognized in the Religious Courts: *cerai talak* (husband's divorce petition) and *cerai gugat* (wife's divorce petition). Although *cerai talak* takes the form of a petition, the Supreme Court insists that it be treated as a dispute with a verdict. Meanwhile, in the District Court, divorce is always filed as a "divorce suit" by one of the spouses without distinguishing between *talak* or *gugat*, because *talak* only applies to Muslims. Thus, the formal procedure in the District Court is single (lawsuit), while in the Religious Courts, two procedural paths are distinguished.¹⁹

The process of filing a case also has basic similarities (HIR) but technical differences. In the District Court, a divorce petition is filed in writing to the authorized District Court (i.e., the defendant's domicile). If the plaintiff cannot write, the request can be submitted orally to the President of the Court (Article 120 HIR). Similarly, in the Religious Court, a divorce petition is filed with the Religious Court by the domicile of the defendant; the submission may be in writing or orally (Article 118 HIR jo. Article 73 of Law 7/1989). A lawsuit (or petition) in both institutions must contain the identity of the parties, *posita* (facts of the incident and legal reasons), and *petitum* (demands for divorce and related rights). Therefore, the formal content of a divorce lawsuit is relatively the same, even though the main language uses civil law (HIR).

Case fees are also similar in principle. In both the District Court and Religious Courts, the applicant is required to pay the court fee at first instance. If they cannot afford it, they can apply for *pro bono* litigation with a poor certificate. This statement of indigence is proven by an official certificate (*kelurahan*) so that the lawsuit can be registered without paying the fee. Thus, the fee mechanism in both courts is similar, following the general provisions of the HIR and Perma No.1/2014.

Court summonses are similarly regulated, but the Religious Courts add specific procedures. In the District Court, the HIR stipulates that the summons is delivered by the bailiff at least 3 working days in advance, with a copy of the lawsuit to the defendant. If the defendant is not found, the summons can be posted in the office and announced according to the provisions (it is found in Article 133 HIR). In the Religious Courts, the summons process is also through bailiffs at least 3 working days in advance. If the defendant is not found at the address, the summons is submitted to the local village head. Particularly if the defendant is declared *ghaib* (long unknown whereabouts), the Religious Court requires the summons to be announced on the radio twice, with an interval of one and three months before the second hearing. This provision is a technical exception in the Religious Courts (special formulation in SEMA Divorce) that is not found in the District Courts.

Mediation or settlement is pursued in both courts as a pre-trial stage. Both the law and the HIR require peace efforts: The District Court follows Article 130 HIR / Article 154 RBg (attempt to reconcile at every hearing), while in the Religious Courts Law 7/1989 Article 56(2) requires mediation at every divorce hearing. The practice

¹⁹ Abdur Rahman Adi Saputera & Siti Nur Muthiah, "Menyorot Pertimbangan Hakim Pengadilan Agama Gorontalo Dalam Menetapkan Ahli Waris Pada Perkara Sengketa Waris" (2021) 11:1 *Dusturiyah J Huk Islam Perundang-undangan dan Pranata Sos* 28.



is the same: the judge must offer reconciliation at the beginning of the trial. If reconciliation is achieved, in the District Court, a deed of peace is made that is legally binding; in the Religious Court, the parties sign a peace agreement, and the lawsuit is revoked. Conversely, if peace fails, the trial continues until the examination of the case material is completed.

Furthermore, the process of hearing cases in the District Court and Religious Court is quite parallel. After mediation fails, the judge orders the reading of the lawsuit (closed to the public if divorce). At this stage, the plaintiff can change or maintain the contents of the lawsuit (as long as it does not change the *posita/petitum*). Then the defendant submits an answer in writing or orally (Article 158 RBg), containing rebuttals, exceptions (legal objections), and counterclaims, if any. After that, the plaintiff is given the opportunity for a replication, and then the defendant duplicates. These steps in the District Court are listed in Articles 131-138 HIR (read lawsuit, answer, replication, dupli), and in the Religious Court are regulated *mutatis mutandis* by the applicable HIR (see Article 54 of Law 7/1989 and RBg). Thus, the formal trial sequence - reading of the lawsuit, response, replication, duplicates - is almost the same in both cases.

Case proof is also subject to the general HIR rules. Article 54 of Law 7/1989 confirms that the HIR/RBg applies in the Religious Courts, so that valid evidence (letters, witnesses, confessions, oaths, etc.) is the same in both courts. For example, according to Article 1866 of the Civil Code, evidence can be in the form of letters, witness testimony, arguments, confessions, or oaths. Practically speaking, the principle of the burden of proof remains with the applicant (who is suing for divorce). Particularly in the Religious Courts, if the petitioner relies solely on a unilateral confession without witnesses, the judge may impose an obligation to swear (Article 203 HIR); if the petitioner refuses, the divorce petition may be rejected. A similar oath requirement applies in the District Court in HIR (Article 203 HIR/RBg). In essence, the evidentiary requirements are technically the same, but PAs tend to place more emphasis on investigating the motive for divorce according to SEMA MA 1981 (e.g., identifying the guilty party).²⁰

One of the main technical differences is the closed hearing.²¹ The procedural law is generally open, but divorce in both courts is heard behind closed doors. Article 56 of Law 7/1989 does not mention it explicitly, but in the practice of the Religious Courts, divorce hearings are conducted in public. Similarly, in the District Court, the SEMA on divorce requires a closed hearing if mediation fails. This step is taken to maintain the privacy and honor of the family.

The divorce verdict procedure is slightly different. In the District Court, the judge only makes a divorce verdict (or rejects the lawsuit) in one stage. In the Religious Court, if the lawsuit is granted, then the Religious Court's decision immediately grants the husband a divorce (means of divorce) on behalf of the court. However, if the husband's request for divorce is approved, after the decision granting permission for the pledge of divorce, the judge schedules a hearing for the pronouncement of the pledge of divorce. In this hearing, the husband pronounces the divorce three times in front of the panel of judges, witnessed and recorded as a decision (including pronouncement according to Islamic procedures). If the husband

²⁰ Rofiq, *supra* note 14.

²¹ A Mukti Arto, *Praktek Perkara Perdata pada Peradilan Agama* (Pustaka Pelajar, 2001).



has not pronounced the pledge of divorce within 6 months after the verdict, the divorce case ends without a verdict of divorce (husband and wife are declared to remain husband and wife).²² This stage has no equivalent in the District Court because the concept of the pledge of divorce is religious.

After the court decision (with permanent legal force), the execution of divorce is regulated differently. In the District Court, the execution of divorce (termination of divorce in the civil registry) is carried out through registration at the civil registry office. In the Religious Court, since talaq is a religious verdict, the execution is recorded at the Religious Affairs Office. In addition, issues of joint property and childcare are often handled in an integrated manner: in the Religious Courts, plaintiffs can simultaneously file claims for joint property, child custody, and child maintenance (according to Articles 73 and 74 of the Religious Courts Law). In practice, property disputes in divorce are usually decided together with the divorce in the Religious Court, by Article 50 of Law No. 3/2006 jo. 49/2009 (the Religious Court also examines joint property if the subject is Muslim). In the District Court, the division of joint property and child custody is often handled through separate civil suits. Thus, the Religious Courts tend to resolve divorce and its family consequences as a package, whereas the District Courts tend to separate these claims.

Juridically, the post-verdict legal remedies differ slightly: both can be appealed to the appeal level (High Court/High Religious Court) and cassation to the Supreme Court. However, the term appeal in the District Court and the procedure are slightly different; for example, the High Religious Court is called *Mahkamah Syar'iyah* in Aceh, but structurally similar. Interestingly, a peace decision (peace deed) in the District Court is final and cannot be appealed or cassated. Similarly, if a divorce is annulled due to reconciliation in the Religious Court, there is no legal recourse as the case is withdrawn.

Finally, from a juridical-structural aspect, both procedures are now heavily influenced by recent Supreme Court regulations. For example, Supreme Court Regulation No. 1/2008 requiring mediation at first instance applies to the Religious Courts as well. Supreme Court Circular Letter 2022 (Formulation of the Religious Council) and recent Constitutional Court decisions also regulate some of the details of divorce. However, the general formal framework of both continues to refer to the HIR with religious modifications (e.g., Article 54 of the Religious Courts Law).

In summary, the procedural differences between divorce in the District Court and the Religious Courts lie mainly in authority, terminology, and religious stages. The District Court handles it entirely based on the 1974 Marriage Law/Government Regulation of 1975 (with its standard HIR procedures), while the PA is based on the Religious Courts Law with an emphasis on Islamic values (with HIR procedures as a complement). 1974 1974 Although many of the legal stages are parallel (lawsuit/answer, mediation, proof), philosophical differences (formalism vs. benefit) and sacred elements (such as the pronouncement of divorce) give each process its characteristics. The findings are expected to clarify how divorce procedures are formulated and implemented differently in the two judicial institutions, as well as reveal the implications of the underlying legal values.²³

²² Mahkamah Agung Republik Indonesia, *Putusan No. 410 K/AG/2018 tentang Perceraian di Luar Kompetensi PA* (2018).

²³ Yuliasari, Santoso & Maulida, *supra* note 8.



II. Absolute and Procedural Authority between District Courts and Religious Courts over the Rights of Muslims who File Divorce Suits Outside the Competence of Religious Courts

In the Indonesian judicial system, there is a division of authority between the General Courts and Religious Courts. Religious Courts, as special courts, deal with Islamic civil cases, while District Courts handle general civil cases. However, in practice, some Muslims sometimes file divorce lawsuits in District Courts outside the competence of the Religious Courts. This paper discusses the normative-juridical division of absolute authority and relative (procedural) authority between the District Court and the Religious Court over divorce cases filed by Muslims, as well as the juridical consequences of lawsuits filed outside the authority. This study is based on applicable laws and regulations and legal literature, taking into account the principle of *lex specialis derogat lex generalis*.²⁴

Conceptually, absolute authority relates to the type of case and the type of court authorized to hear it. In other words, absolute authority determines “what court” can hear a dispute based on its material nature. In contrast, relative authority (sometimes called procedural authority) relates to the jurisdictional aspect: the court in which the lawsuit is filed, depending on the domicile of the parties or the location of the object of dispute. For example, HIR Article 118 jo. Rv Article 99 stipulates that a lawsuit is filed with the competent court according to the residence of the defendant. This principle ensures that the judicial process runs efficiently according to the location of the parties or the object of dispute. Thus, before discussing the religious aspects of divorce, it is important to understand that the filing of a lawsuit requires paying attention to two dimensions of authority: absolute (type of case) and relative (location).²⁵

Law No. 7 of 1989 concerning Religious Courts (jo. Law No. 3/2006 and Law No. 50/2009) expressly stipulates that Religious Courts have absolute authority to examine and decide marriage cases for Muslims. Article 49 of the Law states that “Religious Courts have the duty and authority to examine, decide, and settle cases ... between people who are Muslims in the fields of: a. marriage; b. inheritance ...; c. waqf and shadaqah”. Thus, divorce (part of the marriage field) filed by Muslims can normatively only be processed in the Religious Courts. This provision is also supported by the Compilation of Islamic Law (KHI) Article 115 which emphasizes that divorce can only be carried out in front of a Religious Court session after mediation efforts fail. digilib.uinkhas.ac.id. This means that the Indonesian state requires the institution of Religious Courts as the exclusive forum for Muslim divorce to realize the principle of impartiality and intensive examination according to Islamic law.²⁶

In line with the principle of *lex specialis*, the Religious Courts Act is a special rule that overrides the general provisions of the General Courts. The position of the Religious Courts is attributive (stipulated by law) and absolute within the scope of Islam; cases outside of that are considered not to fall within the “absolute

²⁴ Lubis, Zainuddin & Mardani, *supra* note 4.

²⁵ Mardani, *supra* note 5.

²⁶ S Bahri, *Hukum Keluarga Islam di Indonesia* (Jakarta: Kencana Prenada Media Group, 2014).



competence” of the Religious Courts.²⁷ The elucidation of Article 49 of Law 7/1989 confirms that only Muslims are entitled to litigate in the Religious Courts. If one party is not Muslim, the Religious Court is normatively not authorized. Thus, Muslim divorces filed with the District Court are clearly outside the absolute competence of the Religious Courts and contradict the specific provisions above.

By way of comparison, the General Courts Law (Law No. 8/2004 on General Courts and the provisions of the Civil Code) states that District Courts are authorized to resolve civil cases in general (at first instance) regardless of the religion of the parties. However, the specific regulation of Muslim marital affairs (“Muslim marriages”) has been relegated to the realm of the Religious Courts. Thus, divorce for non-Muslim couples remains within the realm of the General Courts (Article 49 of Law no.7/1989 does not apply to them). In practice, if one or both parties are non-Muslim, the divorce aspect is still subject to the general civil procedural law of the District Court. However, it should be noted that Muslims filing for divorce with the District Court from the outset was outside the provisions of the Religious Courts law, creating a conflict of norms.²⁸

If a Muslim continues to file for divorce in the District Court (outside the absolute competence of the Religious Court), there are juridical consequences that must be considered. Article 118 HIR (and its equivalent in RBg/Rv) stipulates that if a lawsuit is filed in a court that is not authorized, the defendant must file an absolute exception. An absolute exception is the defendant's objection that the court has no authority at all (attributive) to hear the case. According to Ali Amran (Supreme Court education staff), this exception asks the court to declare that it has no authority to examine the subject matter of the case. If in a general court, such as the District Court, Muslim divorce cases are still processed without the presence of objections, then the judge has violated the statutory provisions. This is because the procedural law requires the court to examine absolute competence *ex officio* or upon the exception of the parties.²⁹

In jurisprudential practice, if an absolute exception is rejected, the Muslim's claim for divorce must be transferred to the appropriate Religious Court. The District Court is obliged to reject a claim that is clearly outside its competence. As stated in the civil procedure law literature, “if it is not within its absolute competence, the religious court is prohibited from accepting it”. Similarly, the District Court is prohibited from examining cases outside of its authority; if accepted, the defendant can reject the subject matter with an absolute exception. Consequently, any decision by the District Court on a Muslim divorce suit that should have been filed in the Religious Court is juridically flawed.

Normatively, the position of absolute authority is absolute, while relative authority is a complementary order. This means that a case can only be processed if absolute competence is fulfilled, and then it is examined whether it fulfills relative competence. Therefore, the Muslim divorce lawsuit in the District Court violates both absolute competence and relative competence. If it is considered that the Muslim divorce lawsuit goes to a certain District Court (for example, because of the plaintiff's domicile), it is still materially wrong because the absolute authority is not

²⁷ *Ibid.*

²⁸ Manan, *supra* note 2.

²⁹ H A Amrani, *Hukum Acara Perdata Indonesia* (Yogyakarta: Pustaka Pelajar, 2021).



fulfilled. The principle of *lex specialis derogat lex generalis* also supports that the special rule (Religious Courts) overrides the general rule (General Courts) in this case. Thus, Muslim divorces are only validly resolved through PA procedures, and filing in the District Court cannot establish legal certainty. This upholds the principle of certainty and equality before the law for Muslims, because only PAs master the material of Islamic law related to divorce.³⁰

Juridically, the lawsuit for divorce by Muslims in the District Court raises two main possibilities. First, the District Court judge can immediately reject the lawsuit based on the absolute exception filed by the defendant. Second, if the District Court, without exception, accepts the trial, the resulting decision can be challenged in the Supreme Court because it exceeds the absolute competence of the Religious Court. Supreme Court Decision No. 726 K/Sip/1976 once emphasized that the settlement of marital disputes (divorce) is determined based on Islamic civil law relations and must be filed at PAdownload.garuda.kemdikbud.go.id (decision text). Implicitly, all of these decisions emphasize the application of the principle of civic personality (Islamic law is exclusive to Muslims). On the other hand, if the District Court allowed the case to proceed, it would create legal ambiguity because of the dual position: a general judge tried an Islamic divorce without a specific legal basis. Thus, the absolute power norm aims to protect the consistency of religious law and minimize forum shopping for different judicial institutions.

CONCLUSION

A comparison between civil procedural law and religious court procedural law in divorce cases shows fundamental differences in the aspects of authority, procedures, and legal basis used. Civil procedural law refers to the provisions of HIR/RBg and the Civil Code, while religious court procedural law is based on the Compilation of Islamic Law (KHI) and the Religious Courts Law. In religious courts, the divorce lawsuit not only addresses formal aspects but also considers the religious and moral values that bind Muslim married couples.

Although there are differences, both aim to realize justice and provide legal certainty for the parties to the dispute. However, the religious court system tends to be more substantive in examining grounds for divorce, such as *syiqaq*, *nusyuz*, and others, and prioritizes family settlement through mediation. Therefore, understanding the characteristics of each legal system is very important so that justice seekers can determine the right legal path by their beliefs, backgrounds, and legal needs.

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None.

³⁰ Rasyid, *supra* note 9.



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