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## CRIMINAL JUSTICE | RESEARCH ARTICLE

# Gender inequality and judicial discretion in Muslims divorce of Indonesia

Ramadhita Ramadhita<sup>1</sup>, Ali Mahrus<sup>2\*</sup>, and Bachri Syabbul<sup>1</sup>

**Abstract:** Divorce of Muslims should be carried out in court, as opposed to the classical fiqh teachings still adhered to in some countries. In practice, this process is still gender biased and detrimental to women. Therefore, this doctrinal legal research uses historical and conceptual approaches to eliminate gender inequality in Muslim divorce procedures. This is a qualitative research with data collected from secondary sources in the form of laws and articles on the divorce of Muslims in various countries, especially in Indonesia. The findings indicate that there is gender inequality in the divorce procedural law in Indonesia. For instance, a wife loses the rights guaranteed by the law of a joint residence. Additionally, the wife cannot file for divorce at the place of domicile because it is considered disobedient to the husband. In many cases, the wife leaves the husband because of domestic violence. For this reason, judges' discretion is needed as a form of the active role of the state in eliminating gender inequality in the divorce process, thereby protecting women's rights.

**Subjects:** Dispute Resolution; Family, Child & Social Welfare Law; Asian Law; Islamic Law; Regulation

**Keywords:** gender; divorce; court administration

### ABOUT THE AUTHORS

Ramadhita Ramadhita is a faculty member in the Islamic business law department at Universitas Islam Negeri Maulana Malik Ibrahim Indonesia. His research interests include family law, religious court in Indonesia, Islamic philanthropy, child protection, and legal policy. Syabbul Bachri is a faculty member in the Islamic family law department at Universitas Islam Negeri Maulana Malik Ibrahim Indonesia. His research interests include Islamic inheritance and Islamic family law. Mahrus Ali is a faculty member in the criminal law department at Universitas Islam Indonesia. His research interests include Islamic criminal law, environmental crimes, criminal law and human rights, eco-nomic crimes, victim of crime, and penal policy.

### PUBLIC INTEREST STATEMENT

Muslim divorce in Indonesia is carried out based on religious court hearings as a form of legal protection for women based on gender equality. This study focuses on the efforts of religious court judges in Indonesia in eliminating gender inequality through judicial discretion in Muslims divorce procedures. It is argued that judges have a central role in realizing a gender-responsive divorce process. Divorce procedures are carried out fairly by taking the side of the husband and wife. The divorce procedure is carried out fairly by taking sides with the husband and wife. The judge decides based on the evidence presented by the parties and on his conscience to create a law that satisfies a sense of justice and expediency as well as to provide legal certainty for the parties.



## Introduction

In accordance with Islamic doctrine, divorce is a permissible act, irrespective of the fact that it is abhorred by God (Ahmad, 2003; Essof, 2011). It is still a problem in various Muslim countries, and family resilience to conflict causes the divorce rate to increase every year. (Nursyifa, 2020; Yusdani & Arfaizar, 2021) In the United Arab Emirates (UAE), divorce cases have increased for the past few decades. However, it is difficult to obtain valid information regarding divorce statistics. Al Gharaibeh and Bromfield stated that in 2008, the total divorce rate in the UAE, Bahrain, Saudi Arabia and Kuwait was 46%, 47%, 30%, and 29%, respectively (Al Gharaibeh & Bromfield, 2012). Egypt's divorce rate increased by 83% from 1996 to 2017 (Mendoza et al., 2019). In Malaysia, relatively 50,882 and 56,862 divorce cases were recorded in 2018 and 2019, an increase of 12% (Kadir, 2021). The Indonesian Supreme Court stated that the data acquired from 2017 to 2021, exhibited certain irregularities, as shown in the following table:

In Indonesia, Muslim divorce should be carried out in a religious court (Brickell & Platt, 2015; Devy et al., 2021; Nurlaelawati, 2016; van Huis, 2019). This is aimed at protecting women's rights in marriage, and they can also obtain unpaid maintenance rights during the marriage. Moreover, women also have to earn a living even after the entire process (Nurlaelawati, 2018). Divorcing before a court session also aims to equalize the position of men and women in marriage. Women have the right to file for divorce in any court situated in the area where they reside (Nursaidah et al., 2020). However, the protection of this right is only applicable, supposing the woman does not leave the joint residence without the husband's permission (Butt & Lindsey, 2018). There are indications that the protection of women in court proceedings is limited. For example, the protection will be cancelled unless the wife carries out certain obligations and leaves the joint residence without the husband's permission.

For example, in the divorce case at the Palu Religious Court, Central Sulawesi Province, Indonesia, where the wife filed for a relative competence exception, which was rejected by the panel of judges, because based on the decision of the Palu Religious Court Number: 616/Pdt.G/2016/PA.PAL, the wife had left the joint residence without the husband's permission. A similar case was also filed in the Religious Court, located at Malang Regency, Indonesia. In accordance with Decision Number 3956/Pdt/G/2018/PA.Kab.Mlg, the relative competency exception that was filed for, was also not granted by the panel of judges for the same reason.

Several preliminary studies on procedural law have been carried out in Indonesia, but none of them focused on efforts to eliminate gender inequality in divorce processes filed in religious courts. Van Huis stated that women initiated many divorces issues because of disharmony in the family. In the Indonesian religious court, divorce does not require the payment of compensation to the husband, therefore it is cheaper and easier (Huis & van, 2019). The society usually stigmatizes women who file for divorce in religious courts. It is even a shame to disclose marital problems, such as domestic violence (Sarawati, 2020). The increase in cases of divorce initiated by women is not a successful manifestation of gender equality in marriage. Divorce initiated by women is a form of legal protection from husbands who are negligent of their marital obligations (Wardatun & Smith, 2020). The protection of the wife and children's rights after divorce is yet to receive the attention of the judge examining the case (Nasution & Muchtar, 2020).

Turatmiyah et al. stated that most of the religious courts' decisions failed to mention fulfilling the post-divorce wife's maintenance. This is because the wife does not file a lawsuit against the husband, hence the judge focuses on what was requested (*ultra petitum partium*). Other related cases include the wife's absence at the trial, failure to answer the main request, does not carry out their marital obligations (*nusyuz*), or the husband being economically incapacitated (Turatmiyah et al., 2019). Meanwhile, Lilik Andar Yuni stated that *ex officio* judges can order these husbands to pay for maintenance. This does not violate the *ultra petitum partium* principle, and payment of maintenance is made either before the divorce pledge is pronounced or when the involved parties take the divorce certificate to realize justice, benefits, and legal certainty, especially for women

(Yuni, 2021). Kholiq and Halimatusa'diyah stated that the judges' understanding of the gender concept tends to affect the equality of men and women in the divorce process. (Kholiq & Halimatusa'diyah, 2022)

This research aims to complement the shortcomings of the previous ones by offering a concrete solution to adjudicate divorce cases where the wife leaves the joint residence without the husband's permission. The authors argue that judges can play an important role in applying divorce laws flexibly amid rigid rules. Judges have the authority to act on their own initiative based on their discretion to achieve gender equality. Our argument is presented in six distinct sections. The first section provides an introduction, and the next section presents the methodology that guided the research and data sources. The third part is the conceptual basis of Muslim divorce procedures from the classical to modern era. It was argued that the emergence of the modern state provided guarantees for divorce rights that were more gender responsive. The fourth section examines the procedures for Muslim divorce in Indonesian religious courts. Muslim divorce procedures have been regulated since the time of the Islamic sultanates until the emergence of the Indonesian State. Divorce procedures are aimed at protecting the rights of husband/wife equally. The fifth section discusses the efforts of judges to eliminate discrimination against women in Muslim divorce proceedings in Indonesia. The last section analyzes proposed solutions to protect men/women in the Muslim divorce process in Indonesia.

**Research method**

This research represents a qualitative study by combining doctrinal and empirical legal research. This study's focus emphasizes judges' role in eliminating gender inequality in divorce cases in Indonesia through discretion. The research data uses primary and secondary data. Primary data comes from interviews with 5 religious court judges in Indonesia. The selection of these judges was based on their tenure of more than 3 years and having decided on divorce cases in more than 200 cases per year representing male and female judges. Among the judges there were 4 men and 1 woman. Secondary data is in the form of 16 divorce case decisions starting from 2010–2021 which explains the exception of the relative competence of the Religious Courts in handling these cases. The secondary data was taken from the Supreme Court decision directory site (<https://putusan3.mahkamahagung.go.id/>). Relative competence is defined as the authority of the institution in deciding certain cases based on jurisdiction. The jurisdiction of the Religious Courts is one district or city (Zuhriah, 2014).

Data collection from informants was taken using interview techniques to explore how judges eliminate gender inequality in Muslim divorce procedures in Indonesia. Interviews were conducted by asking informants regarding the basis for determining the relative competence of the Religious Courts in examining divorce cases, the exception procedure for the relative competency of the Religious Courts in examining divorce cases, and the efforts of judges in realizing gender equality in muslim divorce proceedings in Indonesia. The summary of the interview is described in more detail in the following table:

Judges' Initial Name and Gender	List of Questions	Summary
SYZ (Male)	What is the basis for determining the relative competence of the Religious Courts in examining divorce cases?	Based on the address on the ID Card or domicile certificate from the local government
	What is the procedure for the exception of the relative competence of the religious courts in examining divorce cases?	Submitted by a husband/wife supported by proof of a local government certificate or witness
	What are the efforts of judges in realizing gender equality in the Muslim divorce process in Indonesia?	Based on benefits and justice for the parties

(Continued)

<b>(Continued)</b>		
HZF (Male)	What is the basis for determining the relative competence of the Religious Courts in examining divorce cases?	Based on the address on the ID Card, domicile certificate from the local government or parental domicile.
	What is the procedure for the exception of the relative competence of the religious courts in examining divorce cases?	Submitted by a husband/wife supported by proof of a local government certificate or witness
	What is the procedure for the exception of the relative competence of the religious courts in examining divorce cases?	Providing legal assistance to parties, especially women who generally receive unfair treatment
EVI (Female)	What is the basis for determining the relative competence of the Religious Courts in examining divorce cases?	Based on the address on the ID Card
	What is the procedure for the exception of the relative competence of the religious courts in examining divorce cases?	Submitted by a husband/wife supported by proof of a local government certificate or witness
	What is the procedure for the exception of the relative competence of the religious courts in examining divorce cases?	Based on justice without any partiality to one partner
MAF (Male)	What is the basis for determining the relative competence of the Religious Courts in examining divorce cases?	Based on the address on the ID Card or domicile certificate from the local government
	What is the procedure for the exception of the relative competence of the religious courts in examining divorce cases?	Submitted by a husband/wife supported by proof of a local government certificate or witness
	What is the procedure for the exception of the relative competence of the religious courts in examining divorce cases?	By providing exceptions based on the evidence submitted
NTR (Male)	What is the basis for determining the relative competence of the Religious Courts in examining divorce cases?	Based on the address on the ID Card or domicile certificate from the local government
	What is the procedure for the exception of the relative competence of the religious courts in examining divorce cases?	Submitted by a husband/wife supported by proof of a local government certificate or witness
	What is the procedure for the exception of the relative competence of the religious courts in examining divorce cases?	Determination of decisions according to the context of the case is based on the mandate of Law No. 48 of 2009 concerning Judicial powers

The collected data were summarized, restated, and then thematically categorized in accordance with the goals of this article. Using description, it was possible to spot patterns and trends in the data that had been gathered, which were then interpreted in the settings of the individual informants and the larger social environment. In order to comprehend the linguistic and symbolic meaning of the information gathered from informants and pertinent legal texts, interpretation was also utilized.

### Muslim divorce from classical to modern views

Divorce is one way to end the marriage bond (Amri, 2019). Divorce often occurs due to weak family resilience in the face of conflict, dissatisfaction with partners, disharmony, economic problems, nudity, and domestic violence (Abubakar, 2020; Djawas et al., 2021; F. K. Daud, 2021; Rahmawati, 2016; Rais, 2021; Wardatun & Smith, 2020). In several Muslim countries, divorce is also caused by family intervention and extramarital affairs (HI Rehim et al., 2020).

In classical Islamic literature, there are several divorce models, namely *talaq*, *khulu*” (F. K. Daud, 2021), and *fasakh*. (Peletz, 2018) Islam Uddin stated that *talaq* and *khulu*” are two popular ways to end a marital relationship. The major difference between these two is that in the case of *talaq*, the husband must ensure the full payment of the dowry. This is presumed to be more financially profitable for women. Meanwhile, in the case of *khulu*’, the wife asks for a divorce and may be asked to return the dowry to the husband (Uddin, 2018). In this modern era, there are two models of divorce, namely *talaq* and the sued type. *Talaq* is a divorce application initiated by the husband (Devy & Firdaus, 2019). Meanwhile, sued divorce is an application requested by the wife (Iskandar & Agustina, 2019).

Divorce occurs due to weak family resilience in dealing with conflict (Rahmawati, 2016), dissatisfaction with a partner, disharmony, economic problems, bareness, and domestic violence (Djawas et al., 2021; M. K. Daud et al., 2020; Novitasari et al., 2019; Wardatun & Smith, 2020). In some Muslim-populated countries, divorce is also caused by family intervention and infidelity (HI Rehim et al., 2020). There are several reasons for divorce, however in Indonesia, Morocco, Malaysia, Maldives, Qatar, Sudan, and Bahrain, it is caused by domestic violence (Djawas et al., 2021; Nisa, 2021; Trigiyatno & Sutrisno, 2022; Wardatun & Smith, 2020). Divorce is regarded as a solution to the socioeconomic problems of Muslims in India (Dutta, 2021), including those in the United Kingdom and Wales (Uddin, 2018), German (Jaraba, 2019), Denmark (Liversage, 2021), and Holland (Eijk, 2019). Some research stated that higher education and economic independence are the driving factors for divorce initiated by the wife (Maimun et al., 2019; Parker et al., 2022).

Several countries still apply the classical Islamic Law as a source. Although some nations with the most Muslim populations have implemented legal reforms to accommodate women’s rights (Islamy, 2019). One form of reformulation of Islamic law is to reduce male domination in divorce. A husband is no longer able to divorce their wife easily. Any husband intending to divorce the wife must apply to the court (Wardatun & Smith, 2020). In Indonesian marriage law, women have the right to file for divorce. The court can grant a divorce even without permission or compensating the husband (Huis & van, 2019).

The studies on Muslim divorce law in this contemporary era are always associated with the gender equality issue. (Bone, 2020; Dutta, 2021; Kalita, 2020; Khalfaoui, 2020; Liversage, 2021; Qureshi, 2022) Islam seeks to equalize the position of men and women in marriage, irrespective of the fact that both are assigned different roles. Classical *fiqh* categorizes men as leaders and providers of the family. Men’s activities are conceptualized as being in the public domain. Meanwhile, women carry out their activities in private areas, such as giving birth, caring for children, cooking, washing clothes, and doing other household chores. Anisa and Ikawati stated that the equality of men and women in Islamic law is manifested in the rights and obligations of marriage, divorce procedures, joint property, child custody, and restrictions on polygamy. (Anisa & Ikawati, 2021).

Divorce is inseparable from the discussion of husband and wife relations in Islam. A legal marriage results in a reciprocal relationship between both parties in the form of rights and obligations. Bastiar (Bastiar, 2018) and Nurani (Nurani, 2021) stated that husband and wife are equal in marriage. However, their rights and obligations are equally burdened to create an eternal and happy family. Most Islamic jurists believe that the position of men and women is not the same because they play different roles. Law Number 1 of 1974 concerning Marriage and the Compilation

of Islamic Law states that the husband is the head of the household and the wife is the subordinate. This is because the husband plays a key role in the family, such as decision-making and engaging in activities conducted in public spaces. The wife plays a major role in the domestic area and economically depends on the husband. (Hamzani, 2010) According to Zulfa, differences in household positions and roles cause discrimination against women. (Insiyah, 2019)

Article 80 of the Compilation of Islamic Law states that the husband is obliged to guide, protect, and fulfill the needs of the wife and children according to the husband's ability. Article 83 of the Compilation of Islamic Law states that the wife is obliged to take care of and educate the children, including serving the husband. Interestingly, Article 84 of the Compilation of Islamic Law states that a wife is regarded as *nusyuz*, assuming the wife fails to serve the husband unless there is a valid reason. The wife's financial rights are disregarded when they commit *nusyuz*. This disobedience can be in the form of refusing sexual relations, surly, leaving the house without the husband's permission, and other behavioral activities that the husband does not like. The Compilation of Islamic Law does not explain the legal reasons for the wife's disobedience to the husband and the competent authority to prove the occurrence of *nusyuz*. This condition has the potential to lead to subjective and arbitrary judgments in the name of religious teachings. The concept of *nusyuz* that is misunderstood can also lead to domestic violence. (Ayu & Pangestu, 2021; Izzah, 2021).

#### **Divorce procedure law in the Indonesia religious courts**

Divorce for Muslims has always been handled by religious courts since the inception of the Islamic sultanates in the archipelago (Nurlaelawati, 2010; Yakin, 2016). During the period of the Islamic sultanates, the Muslim divorce procedure refers to classical Islamic law (Achmad & Nurcholis, 2016; van Huis, 2019). Husband and wife have the right to file for divorce. Islamic law provides equal space for men and women to defend their rights and obtain justice. For example, although the woman does not have the right to divorce but can apply for *khulu'* at the religious court (Black et al., 2013). The divorce trial process also puts forward the principles of balance and justice. The message of Prophet Muhammad to Ali bin Abi Talib was to listen to both parties' statements and not to be hasty in making a decision (Hamang, 2016). Caliph Umar bin Khattab also advised Abu Musa al Asy'ari to understand the case and equate the statements of both parties before making a decision (Malik, 2021). This trial procedure has always served as a guideline from the time of the Islamic sultanate to the Dutch and Japanese colonial periods.

After Indonesia gained independence, divorce for Muslims was still monitored by the religious court based on Articles I and II of the 1945 Constitution Transitional Rules of Indonesia (Zuhriah, 2014). Therefore, judges still need an official reference regarding procedures for adjudicating divorce cases. They have the freedom to refer to various Islamic classical books. Until 1974, Law Number 1 of 1974 concerning Marriage provided an equal position for both men and women in divorce (Nurlaelawati & Salim, 2017). In 1975, the government issued Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974. Article 20 stipulates that a divorce application shall be submitted to the court where the defendant is domiciled. Assuming the defendant's residence is unknown or the individual stays abroad, the divorce suit is filed at the plaintiff's domicile (Dahwadin et al., 2019). The essence is to protect the defendant's rights because they did not necessarily commit the actions alleged by the plaintiff (Mertokusumo, 2010; Muhammad, 2015).

The procedure for filing a divorce suit in Government Regulation Number 9 of 1975 is similar to Article 118 paragraph (1) *Herzien Inlandsch Reglemen* (HIR). It contains the *actor sequitur forum rei* principle that the court authorized to handle lawsuits is in charge of the defendant's residence. This aims to prevent the defendant from having difficulties having a fair trial in court. According to Yahya Harahap, it is based on three scopes, namely residence, specific address, and the actual resident. The basis for determining the place of residence is the Identity Card (ID-Card), Family Card (FC), Tax Certificate, or the Articles of the Company Association. Assuming there is a change

of residence after the lawsuit is filed, it will not affect the relative competence of the court for the sake of legal certainty (Harahap, 2017). Based on this provision, a wife who is suing the husband must apply to the religious court where the man resides. This condition impedes access to justice for women. Given that often, the wife is the weak party and the victim.

Furthermore, this divorce procedure was revised by Law Number 7 of 1989 concerning Religious Courts. Lawmakers seek to protect women's rights in divorce. Legislators also tend to create marriage equality between husband and wife, as mandated by Law Number 1 of 1974 concerning marriage (Stiles & Yakin, 2022). Divorce is no longer filed at the defendant's place but at the wife's domicile. The relative competence of the religious courts is viewed from the parties' juridical or factual domicile. An identity card or other equivalent items prove juridical domicile. Meanwhile, factual domicile is depicted by a certificate that states certain reasons, which is often a problem in filing for divorce.

There is gender bias in the formulation of divorce procedural law in religious courts. Articles 66, paragraph (2) and 73 of Law Number 7 of 1989 state that the divorce application is filed at the wife's residence unless the woman leaves the joint residence without the husband's permission. This formulation contains the notion that legal protection for women is contextually applicable. Supposing the wife leaves the joint residence based on the husband's permission, then the woman may file a lawsuit at the wife's residence. Assuming the wife leaves the joint residence without the husband's permission, a divorce suit will be filed in the court where the man resides.

The formulation of the divorce procedural law has not changed even though Law Number 7 of 1989 has been amended twice, through Law Number 3 of 2006 and Number 50 of 2009. The implementation of relative competence in divorce procedural law is closely related to the gender sensitivity of the case-examining judge. In some cases, there are still limitations to justice for women due to domicile issues. For example, the Decision of the Palu Religious Court Number 616/Pdt.G/2016/PA.Pal. A wife filed for a relative competence exception at the Palu Religious Court. However, this exception was rejected because the woman left the joint residence without the husband's permission. Furthermore, this decision was appealed to the Palu Religious High Court with register 0004/Pdt.G/2017/PTA Pal. When the verdict was passed, the judge at the high religious court stated that the Palu Religious Court was not right in giving the demurrer of exception, then re-examined and accepted the Respondent's exception on the grounds of Article 129 of the Islamic Law Compilation. The change of the wife's domicile without the husband's knowledge was caused by domestic violence, which affected the woman's psychological condition. It was also discovered that the husband was the first to leave the joint residence. The wife became stranded without a guarantee of safety and living expenses. The husband was also not informed about where the wife lives, therefore the movement without the applicant's permission is justified. The judge of the Palu Religious Court *ex officio* ruled that the husband was no longer authorized to protect the wife's interests.

### Judge's attitude to eliminating gender inequality in religious court

Based on Tables 1 and 2, the religious court sided with the woman in most of the relative competency exceptions in divorce cases. These courts can also carry out incidental examinations

**Table 1. Number of Muslim divorce decisions in Indonesian religious courts**

No	Year	Divorce Filing	Divorce Decision	Revoked application
1.	2017	485.797	380.723	25.807
2.	2018	516.668	443.645	6.860
3.	2019	546.781	468.276	35.099
4.	2020	508.934	444.055	32.472
5.	2021	517.034	459.630	36.975

Source: Annual Report of the Indonesia Supreme Court in 2017–2021 (Mahkamah Agung, 2018, 2019, 2020, 2021, 2022)



**Table 2. Data on divorce decisions in religious courts with relative competency exceptions**

No.	Court	Decision Number	Case	Decision	Legal Reasoning
1	Lumajang Religious Court	2211/Pdt.G/2010/PA.Lmj	Talaq	Granted the Respondent's Exception	The wife is in the territory of another religious court <i>de facto</i> and <i>de jure</i>
2	Salatiga Religious Court	0377/Pdt.G/2011/PA. Sal	Talaq	Granted the Respondent's Exception	The wife's domicile is in Magelang Regency, outside Salatiga
3	Jambi Religious Court	835/Pdt.G/2011/PA.Jb	Sue for Divorce	Rejecting Defendant's Exception	Inconsistency of facts with legal basis
4	Karanganyar Religious Court	1274/Pdt.G/2012/PA.Kra	Talaq	Granted the Respondent's Exception	The wife leaves the joint residence with the husband's permission, as evidenced by the testimony of the witnesses
5	Bukittinggi Religious Court	226/Pdt.G/2013/PA.Bkt	Talaq	Granted the Respondent's Exception	The wife is in the territory of another religious court <i>de facto</i> and <i>de jure</i>
6	Sangeti Religious Court	264/Pdt.G/2014/PA. Sgt	Sue for Divorce	Rejecting Defendant's Exception	Husband did not provide evidence
7	Salatiga Religious Court	1029/Pdt.G/2014/PA.Sal	Talaq	Accepting the Respondent's Exception	The wife is in the territory of another religious court <i>de facto</i> and <i>de jure</i>
8	Manado Religious Court	193/Pdt.G/2015/PA.Mdo	Talaq	Granted the Respondent's Exception	The wife is in the territory of another religious court <i>de facto</i> and <i>de jure</i>
9	Palu Religious Court	616/Pdt.G/2016/PA.Pal	Talaq	Rejecting Defendant's Exception	The wife leaves the joint residence without the husband's permission
10	Malang Regency Religious Court	3956/Pdt.G/2018/PA.Kab. Mlg	Talaq	Granted the Respondent's Exception	The wife leaves the joint residence without the husband's permission

(Continued)

No.	Court	Decision Number	Case	Decision	Legal Reasoning
11	Sibolga Religious Court	38/Pdt.G/2018/PA. Sbga	Sue for Divorce	Rejecting Defendant's Exception	The filing of a lawsuit is in accordance with the domicile of the plaintiff
12	Surabaya Religious Court	4128/Pdt.G/2019/PA.Sby	Talaq	Accepting the Respondent's Exception	The wife is in the territory of another religious court <i>de facto</i> and <i>de jure</i>
13	Surabaya Religious Court	1356/Pdt.G/2021/PA. Sby	Talaq	Granted the Respondent's Exception	The wife is in the territory of another religious court <i>de facto</i> and <i>de jure</i>
14	Cilacap Religious Court	1184/Pdt.G/2021/PA.Clp	Talaq	Granted the Respondent's Exception	The wife is not domiciled factually in the jurisdiction of the Cilacap court
15	Blitar Religious Court	2963/Pdt.G/2021/PA.Bl	Sue for Divorce	Granted the Respondent's Exception	The Plaintiff is abroad and the Defendant is in the Madiun Regency area
16	Majalengka Religious Court	3505/Pdt.G/2021/PA.Mjl	Sue for Divorce	Granted the Respondent's Exception	Plaintiff, based on ID card and Family Certificate, is addressed in the City of Tangerang

of relative competence even though it was not requested by the wife. The essence was to provide convenience and legal protection for women. This was confirmed by SYZ, a judge at the Madiun City religious court. The judge once granted the exception of a wife who left the joint residence without the husband's permission. The reason was that the husband had abandoned the wife financially. The wife had to attend a trial at the religious court where the husband lived with their toddler. This is perceived as not reflecting justice for women. Giving equal rights to men and women in court is an effort to overcome gender inequality in divorce cases. Furthermore, SYZ conveyed:

Divorce is filed in a religious court whose jurisdiction covers the wife's residence, according to an identity card or domicile certificate from the government. This submission may be dismissed by the husband/wife with strong evidence. In making decisions regarding exceptions, judges consider the principles of benefits and gender equity. For example, a divorce case was filed at the religious court of the husband's area on the grounds that the wife left the joint residence without the husband's permission, and then the wife made an exception. The judge granted this exception with the consideration that the wife left the joint residence because she no longer received the husband's affection, and the wife had to bring the child to the trial. In fact, the wife's domicile is in another area. (SYZ, personal communication, October 10, 2021)

According to HZF, a judge at the Natuna religious court, filing for divorce follows the addresses of the parties' identity cards. However, these requirements can be replaced with a domicile certificate from the local government with some reason.

Divorce cases can be filed at the religious court where the wife is domiciled. It doesn't have to be in accordance with the resident's identity for certain reasons, such as a security disturbance, a threat to life, or continuous domestic violence. The judge has the authority to interpret procedural law in certain circumstances. The wife's residence can also be interpreted as the residence of the woman's parents. The husband is still given the right to file an exception at the place of filing for this divorce and must include evidence. If the wife leaves the joint residence due to neglect of her obligations or infidelity, the judge will grant the husband's exception. Determining the relative competence of the religious courts in divorce cases boils down to helping women, given that they are usually at a disadvantage. (HZF 2021)

Related to leaving the joint residence without the husband's permission, the wife's complaint will not be argued in the lawsuit. Assuming there is an exception from the husband's side, then the man is bound to know about the complaint, as conveyed by EVI, a judge at the Malang religious court. However, supposing the wife leaves the joint residence without the husband's permission, an exception of relative competence may be made. The relative authority of the religious courts to adjudicate divorce cases is based on the addresses of the parties in the identity cards. Otherwise, you can refer to the domicile certificate. If there is an exception of relative competence, the judge makes a decision based on evidence. In the event that the wife leaves the house together for a valid reason, then the husband's exception is rejected. Husband and wife have the same position in the law of divorce proceedings. Justice means not taking sides with one party, or defending one party excessively. (EVI, personal communication, October 10, (2021))

According to MAF, a judge at the religious court in Malang City, supposing it is not granted by the judge, then the parties' exceptions depend on the evidence presented.

"The application for divorce to the religious court is based on the address on the ID Card or a domicile certificate from the local government. Husband/wife have the same right to file an exception to the authority of the religious court to hear divorce cases. The judge decides whether the wife leaves the cohabitation for valid reasons. Every evidence submitted by the parties is considered. Based on this evidence, the judge makes a decision to accept or reject the exception in accordance with the principle of justice". (MAF, 2021)

Similarly, NTR, a judge at the Tarakan religious court, stated that the divorce procedural law for Muslims refers to the wife's domicile.

An identity card or domicile certificate from the local government is the main reference in choosing a place to file a divorce case at the religious court. However, the husband/wife is given the right to file an exception based on evidence. In certain cases, where the wife is subjected to violent treatment, is left without financial security, or is psychologically distressed, the wife's exception may be granted. However, in other cases, the husband's exception can also be granted because the wife is deemed to have neglected her obligations. The judge's decision may not be impartial by giving equal positions to men and women in court. (NTR, 2021)

### **Judge's discretion to eliminating gender inequality in religious court**

The judge's discretion can resolve the juridical constraints in the relative competence of the religious courts earlier mentioned. Generally, Thomas J. Aaron stated that discretion is the authority given by law to act based on consideration or conscience and uses more moral ideas than law. Although there is an element of subjective consideration from the judge, and Slamet Prajudi Atmosudirdjo, stated that the action must not violate the applicable law. (Ramadhita, 2014) Discretion is one of the tools to bridge the inconsistency between Law Number 7 of 1989

concerning the Religious Courts and Law Number 1 of 1974 concerning marriage which requires the protection of women's rights at the time of divorce.

The judge's discretion in determining relative competence is based on three factors: First, the judge's freedom to perform *Ijtihad* because it had been allowed since the time of the Prophet Muhammad. Arkoun stated that *Ijtihad* is an intellectual effort to interpret confusing matters for the progress of Muslims. (Taufiq et al., 2021) *Ijtihad* is a tool used to develop Islamic law to ensure it is in harmony with the dynamics of society. Meanwhile, judges can resolve various societal problems due to social changes and technological developments through *Ijtihad* while still referring to the basics of Islamic law. (Rohman, 2021; Sodiqin, 2021) The judge's discretion in determining relative competence in examining divorce cases is part of the *Ijtihad*. Courts whose legal jurisdiction is in the area where the wife lives have the authority to adjudicate divorce cases irrespective of the woman leaving the joint residence without the husband's permission. The goal is to realize rapid, simple, and low-cost justice. As mandated by Law Number 48 of 2009 concerning Judicial Power and Law Number 7 of 1989 concerning Religious Courts, which has been revised by Law Number 50 of 2009.

Second, in divorce procedural law, the clause leaving the joint residence without the husband's permission must be read from a gender equality perspective. Divorce procedural law is one of the important issues in discussing the Draft Law on Religious Courts. Munawir Sadzali, the Minister of Religion of the Republic of Indonesia, said that the divorce procedural law contained in the Draft Law on Religious Courts seeks to provide equal opportunities to the wife to defend the woman's rights through the trial process. The relative authority of the religious court in divorce cases must reflect the protection of the wife as the weaker person. (Sjadzali, 1989, pp. 12–13)

In the Bill challenging the Religious Courts, husbands and wives who seek divorce, file for a complaint at the court whose jurisdiction is in the woman's domicile. However, the reverse is the case when the wife leaves the joint residence without the husband's permission. Unfortunately, Munawir Sjadzali did not explain further about the wife leaving the joint residence without the husband's permission. This formulation seems to follow the provisions of Article 188 HIR and 142 Rbg. This is because the defendant cannot be forced to make sacrifices for the benefit of the plaintiff, whose conviction has not been proven. (Mertokusumo, 2002, p. 81)

Jayadi stated that religious teachings had manifested into the legal awareness of the community. These serve as a basis for motivation, a source of inspiration, and a means of evaluating the formation of law. (Jayadi, 2017) The phrase "leaving the joint residence without the husband's permission" in divorce procedural law is similar to the concept of *nusyuz*, which is regulated in classical *fiqh*. *Nusyuz* in the *fiqh* treasures is defined as the reluctance of a husband or wife to carry out their marital obligations in the household. (Izzah, 2021; Izzuddin, 2015) The wife is obliged to obey the husband as long as the woman is not ordered to do evil deeds. The wife may only leave the house with the husband's permission. This prohibition protects women's honour and ensures they are protected outside their homes. A wife divorced because of *nusyuz* loses the rights guaranteed by Islamic law. In its development, the concept of *nusyuz* in classical *fiqh* received criticism. According to Khoirotn Nisa et al., *nusyuz* should be understood as disobedience to household commitments and applies to both parties. (Nisa' et al., 2020) Muhammad Syahrûr and Musdah Mulia, as quoted by Alamsyah, define *nusyuz* as an act of going against God's commands. A husband or wife who hurts their partner through words or actions is subject to the concept of *nusyuz*. (Alamsyah, 2018) Nor Salam stated that a wife is considered *nusyuz* when the woman is negligent in worshipping God Almighty and does not maintain their honour. Meanwhile, a husband is considered *nusyuz*, assuming the man cannot direct the wife to maintain worship and honour activities. (Salam, 2015)

The Compilation of Islamic Law only applies the concept of *nusyuz* to women, not men. (Putra & Sumbulah, 2020) The diverse understanding of *nusyuz* also has implications due to inconsistent court decisions in divorce cases. This is due to the different interpretations of the judge regarding the wife's behavior towards her husband. (Chintya, 2018) Assuming the judge's interpretation is not gender-

responsive, it is feared to discriminate against the wife because of the woman's inability to provide evidence that the husband has given the wife permission to leave the house. (Abdullah et al., 2015) The roles of both men and women in marriages have changed. Many couples agree to share roles in the household, (Putri & Lestari, 2016) women no longer act as housewives but also help to meet the family's financial needs. Equal access to education requires women to implement their knowledge in the public sphere. (Prastiwi & Rahmadanik, 2020) In some cases, they are the breadwinners of the family, while some men engage in domestic chores, such as cooking or taking care of the children. (Santoso, 2020; Zuhriyah et al., 2020)

Third, the state must provide guarantees for the fulfilment of fair and free access to the justice system. Laws must regulate the fulfilment of access to justice in the judiciary. Justice is one of the fundamental values in law. Judges are not "mouthpieces" of the law, they explore the values of justice that exist in society based on their conscience. (Nuryanto, 2018) Article 27, paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that every citizen is equal before the law. Law Number 48 of 2009 concerning Judicial Power states that courts may not reject cases submitted because there are no rules or they are unclear. This is in accordance with the regulation of the Supreme Court of the Republic of Indonesia (PERMA) Number 3 of 2017 concerning Guidelines for Prosecuting Women Against the Law. Judges are required to identify the unequal treatment that gives rise to discrimination. In examining cases, they should consider gender equality by considering inequalities in legal protection that impact access to the justice system. Judges may not justify discrimination based on culture, customs, and gender-biased interpretations. Legal values are usually interpreted and explored to create gender-responsive protection.

## Conclusion

Judges have an important role in eliminating inequalities in Muslim divorce proceedings in Indonesia. The judge is the representative of the state in guaranteeing equal rights for men and women in the divorce process. Judges have the freedom to act flexibly amidst rigid divorce procedures. The flexibility of judges in deciding cases shows that judges are not just implementing laws. Judges can form new laws by taking into account gender equality according to the cases they face. Nevertheless, the flexibility of judges in giving decisions still refers to regulations regarding judicial power, various regulations of the Supreme Court of the Republic of Indonesia, and the code of ethics of judges so that they do not cause abuse of power. This study has several limitations. Not many judges were interviewed, and, in terms of location, this research was also conducted in a few religious courts. This study also has not explored the experiences of the parties who filed for divorce and were constrained administratively due to the wrong determination of the religious court. Therefore, this article recommends conducting more in-depth research by involving more judges and the parties filing for divorce.

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