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## THE DEVELOPMENT OF CIVIL LAW PROCEDURES IN THE RESOLUTION OF DIVORCE DISPUTES IN THE RELIGIOUS COURT

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### Abstract

Relations which appear from legal actions do not always end well. It is not seldom that it may end with conflicts or disputes which end in court. To demand for the rights which appear from those legal relations, there needs to be some procedures and regulations so that the demand of rights may be carried out according to the law. The law which regulates those things are usually called the civil law procedures.

The resolution of civil disputes in court (litigation) and the resolution of civil disputes through a non-court manner (non-litigation) in the context of the divorce dispute resolution in the Religious Court, is a combination between the litigation and the non-litigation methods. This is rather interesting to be studied. The interesting part is its effectivity as a preventive or a repressive effort in handling the divorce cases in the Religious Court.

**Keywords:** litigation, non-litigation, e-court, civil law

### INTRODUCTION

In daily life, humans, as social beings usually undergo legal activities with other people, such as transactions, loans, trade, etc. Relations which appear from legal actions do not always end well. It is not seldom that they end with conflicts or disputes which end in court. To demand for the rights which come from those legal actions, there needs to be procedures and regulations so that those demand of rights may be carried out according to the law. The law which regulate those things are usually called the civil law.<sup>1</sup>

With the starting point of the theoretical and the practical aspects of court, it is stated that principally, the civil law procedure is a legal regulation which regulates the process of how someone tries to solve civil disputes in court trials, and the process of how the judge (the court) accepts, examines, judges, and decides upon a case, and the

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<sup>1</sup>Asikin, Zainal. 2015. *Hukum Acara Perdata Di Indonesia*. Jakarta: Prenadamedia Group. hlm.1.

process of how the implementation of the verdict is to maintain the existence of the material civil law.<sup>2</sup>

The issuing of the Constitution No. 7 of 1989 based on Article 54 legal procedures which apply in the environment of the public court also applies in the Religious Court. The mentioned laws are the HIR and RBg in addition to the provisions of the law procedures as regulated in the Governmental Decree No. 9 of 1975 and which is specially regulated in the Constitution No. 7 of 1989. The said constitution is a regulation of special law procedures regarding *cerai talak* (divorce which happens when the man initiated it) and *cerai gugat* (divorce which happens when the woman initiated it) as an exception and the opposite of the “*actor sequitas foeum rei*” principle, which says that the demand for divorce is carried out to the Court near to where the defendant lives. This also applies to the regulations of the other special law procedures such as *syiqaq*, *Lian*, *Chulu*, etc.<sup>3</sup>

The Republic of Indonesia’s Constitution No. 7 of 1989 Article 54 states that “The law procedures which apply in Court and in the Religious Court Environment are the Civil Law Procedures which apply in Court in the environment of Public Justice, except those which are specially regulated in this Constitution.”

The resolution of civil cases in court (litigation) and the resolution of civil disputes through the non-court procedures (non-litigation) in the context of divorce dispute resolution in the Religious Court, is a combination between the litigation and the non-litigation methods, which becomes interesting to observe, regarding its effectivity in becoming a preventive and a repressive effort in handling divorce cases in the Religious Court.

The quick development of the times and the development of technology in the digital era may be used to develop the civil law procedures. This development may also be done by cutting complex bureaucracy procedures in the context of the civil law procedure administrative processes, especially those related to the religious court in the resolution of the divorce dispute in the religious court.

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<sup>2</sup> Mohammad Saleh, Lilik Mulyadi, *Op. Cit.*, h. 3.

<sup>3</sup>*Ibid.*, hlm. 13.

Based on the background of the problem which the writer has described above, thus the research problem of this study is. "The Development of the Civil Law Procedures in the Resolution of the Divorce Disputes in the Religious Court."

## DISCUSSION

### **The Development of the Civil Law Procedures in the Resolution of the Divorce Disputes in the Religious Court**

Since 1882, the Dutch East Indies Colonial Government has acknowledged the existence of the Religious Court in the Indonesian Muslim society to fulfill the need for Islamic law in Indonesia.<sup>4</sup> Even though in the Constitution No. 14 of 1970 *jo* the Constitution No. 35 of 1999 the position of the Religious Court is equal with the three other courts, the reality shows that it is not equal. This is because the history of its establishment was under the influence of the Dutch colonial law political power years ago.

Even with the Constitution No. 1 of 1974 regarding Marriage, the position of the court becomes strong. Yet, its condition is still weak as it does not have its own complete written law procedures. It does not have a confiscator which has the power to execute its own verdict. It does not have written material law which is written in a book systematically, which may become the guide for all parties which are involved with the Religious Court.

The Muslim society in Indonesia was relieved when the Draft of the Constitution on the Religious Court was issued to become the Constitution No. 7 of 1989 on December 24<sup>th</sup>, 1989. This is because the provisions of Articles 10 and 12 of the Constitution No. 14 of 1970 *jo* the Constitution No. 35 of 1999 regarding the Main Provisions of the Juridical Power states that the judges' power is carried out by the Public Court, Religious Court, Military Court, and the State Governance Court.<sup>5</sup>

With the issuing of that Constitution on the Religious Court, there ends the various court structure, power and law procedures in the environment of the Religious Court. The effort to achieve the realization of the Constitution on the Religious Court was not an easy one. It must go through a long, steep, and winding road.

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<sup>4</sup>Suyuthi Mustofa, Wildan. 2002. *Pemecahan Permasalahan Acara Perdata Peradilan Agama*. Jakarta: PT. Tatanusa. Hlm. 7.

<sup>5</sup>*Ibid.*,h. 6.

After the birth of the Constitution No. 7 of 1989 based on Article 54 of the law procedures which apply in the Public Court environment, there also apply the HIR and RBg plus the provisions of the law procedures in the Religious Court. The law procedures are regulated in the Constitution No. 7 of 1989 as a special law procedure regarding *cerai talak* and *cerai gugat* as an exception and an opposite of the “*actor sequitas foeum rei*” principle which states that the demand for divorce is proposed to the Court near to where the Defendant lives. This also applies to the other special law procedures such as *syiqaq*, *Lian*, *hulu*, etc.<sup>6</sup>

The Republic of Indonesia’s Constitution No. 7 of 1989 Article 54 states that “The law procedures which apply in Court and in the Religious Court Environment are the Civil Law Procedures which apply in Court in the environment of Public Justice, except those which are specially regulated in this Constitution.”

The Republic of Indonesia’s Constitution No. 14 of 1970 *jo*. The Constitution No. 35 of 1999 regarding the Main Provisions of the Judicial Power states also some provisions regarding the Civil Law Procedures.

- 1) The Republic of Indonesia’s Constitution No. 7 of 1989 regarding the Religious Court (Chapter IV Articles 54-91) are the fixed and renewed versions of the Law Procedures which regulate the divorce process regulated in Chapter V of the Governmental Decree No. 9 of 1975.

To determine the relative competence of each Religious Court, its legal basis is the guide from the Civil Law Procedure Constitution regulations. In Article 54 of the Constitution No. 7 of 1989 it is stated that the law procedures which apply in the Religious Court are the Civil Law Procedures which apply in the Public Court. Because of that, the basis to determine the relative power of the Religious Court is referenced from provisions of HIR Article 118 or R.Bg article 142 *jo*. The Constitution No. 7 of 1989 Article 73.<sup>7</sup> Yet, there are some exceptions, which are stated in Article 118 paragraph (2), paragraph (3), and paragraph (4), which are:

- a) If there are more than one defendant, thus the lawsuits are proposed to the court in which its legal area includes the home of one of the defendants;

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<sup>6</sup>*Ibid.*, h. 13.

<sup>7</sup>M. Fauzan. 2007. *Pokok-pokok Hukum Acara Perdata Peradilan Agama dan Mahkamah Syar’iyah di Indonesia*. Jakarta: Kencana. hlm. 33.

- b) If the home of the defendant is unknown, thus the lawsuit is proposed to the court where the plaintiff lives;
- c) If the lawsuit regards immobile assets, thus the lawsuit is proposed to the court in the legal area where it is located, and
- d) If there is a residence chosen with a certain agreement, thus that lawsuit may be proposed to the court where the chosen residence is in that agreement.

The relative competence of the *cerai talak* and *cerai gugat* cases may be described as follows: for these two terms, usually in the court it is named as the demand of the *talak* divorce and the *gugat* divorce. For a demand of *talak* is called *talak* divorce, which is demanded by the husband. For *gugat* divorce, it is demanded by the wife.<sup>8</sup>

There are some exceptions in the relative power of the Religious Court, which are as follows:

1) The Demand for *Talak* Divorce

The Religious Court has the power to inspect, judge, and give a verdict on the case of the demand for divorce. *Talak* divorce is regulated in Article 66 paragraph (2) of the Constitution No. 7 of 1989. Its points are as follows:<sup>9</sup>

- a) If the husband or the Plaintiff who demands *talak* divorce, thus the Religious Court in which its legal area includes the wife's or the Defendant's residence has the right to inspect on the case;
- b) The husband or the plaintiff may demand for *talak* divorce to the Religious Court in which its legal power includes the husband's residence as the plaintiff if the wife as the defendant purposefully leaves her residence without the husband's permission;
- c) If the wife or the defendant lives abroad, thus the Religious Court in power is that in which its legal power includes the husband's residence as the plaintiff;
- d) If both of them (the husband and the wife) live abroad, thus the Religious Court in power is that in which its legal power includes the location of marriage or the Central Jakarta Religious Court.

2) The Case of *Gugat* Divorce

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<sup>8</sup>Roihan A. Rasyid. 1992. *Hukum Acara Peradilan Agama*. Jakarta: CV. Rajawali. hlm. 26.

<sup>9</sup>Abdullah Tri Wahyudi. 2004. *Peradilan Agama di Indonesia*. Yogyakarta: Pustaka Pelajar. hlm. 89.

The Religious Court which has the power to inspect, judge, and decide upon the case of *gugat* divorce is regulated in Article 73 of the Constitution No. 7 of 1989 in which its points are as follows:

- a) The Religious Court which has the power to inspect the case of *gugat* divorce is that in which its legal power includes the wife's residence as the plaintiff.
- b) If the wife or the plaintiff purposefully leaves her residence without permission of the husband, thus the case of *gugat* divorce is proposed to the Religious Court in which its legal area includes the husband's residence as the defendant.
- c) If the wife or the plaintiff lives overseas, thus the Religious Court in power is that in which its legal power includes the husband's residence as the defendant.
- d) If both of them (the husband and the wife) live overseas, thus the Religious Court in power is that in which its legal power includes the location of marriage or the Central Jakarta Religious Court.

The Religious Court has the power over marital cases for those who embrace the religion of Islam. Those whose religion is not Islam; it is the power of the Public Court. The Religious Court also has a hierarchy to the Supreme Court so the solving of cases for those who are Muslims must go through the Religious Court first, not the Supreme Court.<sup>10</sup>

### **1. The Urgency of Civil Law Procedure Renewal in Solving Civil Cases**

The urgency of renewing the civil law procedures in the solving of civil cases (litigation) is for instance regarding the proving of civil cases. It can be defined that proving is an effort done by parties involved in cases to strengthen or to prove the propositions proposed to convince the judges who examine the case.<sup>11</sup>

The use of electronic evidences in the law-proving system is based on these principles:<sup>12</sup>

1. The Principle of Law Certainty

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<sup>10</sup>Erfaniah Zuhriah, *Op. Cit.*, h. 132

<sup>11</sup>Abdullah Tri Wahyudi, *Op.Cit.*, h. 157.

<sup>12</sup>Munir Fuady, *Op. Cit.*, h. 169.

2. The Principle of Benefit
3. The Principle of Carefulness
4. The Principle of Good Intention, and
5. The Principle of choosing technology or being technology-neutral.

In the Indonesian legal system, the presence of electronic data, including emails, have not been accepted as evidences in the court if there is a dispute. In the Indonesian positive law, the use of electronic data is not as strict as in other countries. Yet, what was agreed upon virtually was substantively according to the law provisions which apply. Thus, how will it be if there is a transaction online. Can that article ignore the agreement between parties.

Those electronic evidences, if printed, have the same value as the other evidences (which are regulated in the constitution). The print out results of an electronic document resulted from information exchange should have the same values as other written evidences. The electronic documents are part of writings produced electronically. Indonesia has the Main Archive Constitution No. 71 of 1971. The presence of such electronic documents has been known since thirty years ago. Then, the Presidential Decree No. 8 of 1997 regarding Company Documents, strictly acknowledges the presence of other media apart from paper such as CD ROM and microfilms.

In reference to the special policies made by the US Government, printed electronic documents which are saved in computers or other similar equipments and all printed results or mechanical results of that computer system is regarded as having represented the data accurately, which means that they are original or authentic.

The problem of authentication is a different case from the acknowledgement of electronic data. If the mentioned electronic data or document are accepted and acknowledged legally, the authentication process of the data will automatically follow it. The problem is that, we are too early in talking about the validity of the electronic documents, while we are talking about the authentication method. The Authentificatin process is the case of technology, meanwhile the acknowledgement of electronic data regards formal acknowledgement formally in the constitutional regulations.

The Constitution No. 11 of 2008 regarding Electronic Information and Transaction (UU ITE) gives the legal basis regarding the legal power of electronic evidences and the material and the formal requirements so that the electronic evidences may be accepted in court.<sup>13</sup>

The digital evidences/the general electronic equipments, such as email, faximile letters, electronic signature, etc. Article 5 paragraphs (1) and (2) of the Electronic Information and Transaction Constitution only states that the electronic documents and/or their printed versions are valid legal evidences and are part of the extended valid evidences according to the Law Procedures which apply in Indonesia.

The main provision so that electronic documents may be regarded as valid evidences is the use of the electronic system which has obtained an electronic certification from the government (Articles 13-16 of the Electronic Information and Transaction Constitution). Another requirement states that there must be an electronic signature, and writes it in a formal electronic contract, etc. With this, the status of electronic documents are actually a *\_\_perluasan* of written evidences as mentioned in Article 1866 BW.

In the context of the civil law dispute resolution through the non-litigation method, with the background of the Indonesian society who likes to emphasize the aspect of deliberation, a method which may be used to resolve disputes without going through the trial process in court, one of them is through mediation. This is parallel with the law procedure provisions in the Indonesian justice, where the dispute resolution through a peaceful effort or which is usually known as *dading* is regulated in Article 130 HIR/Article 154 R.Bg.

The concept of dispute resolution through mediation uses the principle of win-win solution, where both parties win. This is already known since ages ago among the customary law society in Indonesia. The process of dispute resolution through deliberation between the two parties are already known in Indonesia way before the litigation system introduced by the Dutch colonial government.

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<sup>13</sup>Hukumonline.com.,[www.hukumonline.com](http://www.hukumonline.com)., Syarat dan Kekuatan Hukum Alat Bukti Elektronik, diakses tanggal 22 Pebruari 2016.



The special constitutional regulation which regulates arbitrage and APS which have been known since 1999 is the Republic of Indonesia's Constitution No. 30 of 1999 which is contained in the Republic of Indonesia's Fascicle of 1999 No. 139 and the Republic of Indonesia's Additional Fascicle No. 3872 (hereinafter called the Constitution No. 30 of 1999). Meanwhile, the domestic conflict or dispute is resolved through the Body of Marital Advice, Guidance, and Preservation or which may be called BP4. This is a body formed by the Republic of Indonesia's Department of Religion of those who embrace Islam based on the Ministry of Religion's Decree No. 3 of 1975 Article 28 paragraph (3), which states that:

“The Religious Court, after having received an explanation regarding the intention of that divorce, asks for the assistance of the Body of Marital Advice, Guidance, and Preservation (BP4), so that that body may advice the husband and the wife to live their domestic lives in prosperity.”

Usually, the party who demands divorce to the Religious Court would first of all come to this BP4. Yet, even though the parties have not visited nor went through the BP4 process, and they directly come to the Religious Court to file a divorce, the Religious Court will still accept that case. The cases filed to the Religious Court, whether they went through the BP4 process or not, will still be processed by the judge. There will be an effort to bring peace to that case. The judge will still examine and judge that case.

In the cases in the marital field, there is a special law procedure. Meanwhile, the general law procedures will apply to the rest. The special law procedures include the regulation, the relative power of the Religious Court, the summoning of the parties, the examination, the proving and the effort for peace, the judge's verdict, and the legal effort, also the issuing of the divorce letter.

In the process of dispute case examination in general, and especially in the divorce cases, there applies the special law procedures which are regulated in:

- a) The Constitution No. 7 of 1989 Regarding the Religious Court as what has been changed to the Constitution No. 3 of 2006 and the Constitution No. 50 of 2009;
- b) The Constitution No. 1 of 1974 Regarding Marriage (The Constitution No. 1 of 1974);

- c) The Government's Decree No. 9 of 1975 regarding the Implication of the Constitution No. 1 of 1974 regarding Marriage (the Government's Decree No. 9 of 1975);
- d) The President's Instruction No. 1 of 1991 regarding the Islamic Law Compilation (*Kompilasi Hukum Islam/KHI*).

The mediation institution which at this time apply in court has been known in the civil law procedures made in the Dutch colonial era, which is the Article 130 HIR/154 R.Bg.

The integration of the mediation in the procedural process in court is hoped to become one of the effective instruments in resolving the problem of the mounting case files in Court. It is also to strengthen and to maximize the functions of the justice institutions in dispute resolution. Apart from that, the adjudicative court process is also an access for justice to the justice-seeking society, especially in the civil disputes.

Mediations are informal. This procedure is different from the trial process in court, as the trials are bound by the formal law procedures and that there may be the evidencing process. Meanwhile, in mediation, the parties may ignore the evidences and the process may be done according to the parties' wishes.

The mediation in court is constructed by the Article HIR/154 R.Bg which states that:

"If, in the determined day, the two parties come, thus the state court with the mediation leader will try to bring peace to them. This article is applied so as to give space to the parties to find their own peace. Meanwhile, the judge undergoing the trial will not come too far in the problems of the parties, as they have ethic code regulations and the law procedures. Thus, the parties must be active in finding that peace."

The dispute resolution through mediation may be chosen as one of the methods of case resolution outside of court. Apart from the resolution process through mediation, the parties may also resolve conflicts through negotiation, conciliation, and arbitration. Mediation is one of the alternative dispute resolution processes outside of court by using the service of a mediator, just like conciliation.

Mediation in divorce disputes has its own nobility, without decreasing the meaning of the mediation's nobility in other civil disputes. With the achievement of peace between the husband and the wife in the divorce dispute, it is not only the marriage which is saved. Yet, it also saves the sustainability in taking care and guiding children normally. The peace between the families of the two parties will be continued.

## CLOSING

### Conclusion

Based on the discussion above, it can be concluded that:

Indonesia does not have its own civil law procedures which apply nationally. Yet, the regulations on civil law procedure still use the HIR (*Het Herziene Indonesiech Reglement*) and RBg (*Rechts Reglement Buitengewesten*) in which both are products of the Dutch East Indies government. This is based on Article II of the 1945 Constitution's Transitional Regulations after its fourth amendment, which states that, "All Statelike bodies and the regulations which exist directly applies, as there have not been any new regulations in this Constitution."

The civil law procedures keep on developing. With the acknowledgement of electronic evidences in the civil cases, it is parallel with the law procedure regulations in Indonesian justice. The resolution of disputes through peaceful efforts, or *dading* is regulated in Article 130 HIR/Article 154 R.Bg. Not all cases of disputes can be resolved merely through the litigation method, as it is not the only method of resolving conflicts. Another method is mediation.

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