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When Justice Overrides Procedure: Unpacking the Reluctance to Apply SEMA No. 3 of 2023 in *Verstek* Divorce Cases

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Abstract:

This study investigates the non-application of Supreme Court Circular (SEMA) No. 3 of 2023 in *verstek* (default) divorce decisions at the Jember Religious Court, highlighting the underlying judicial reasoning and its implications for legal uniformity. While SEMA No. 3 of 2023 was introduced to guide judicial practice—particularly in ensuring procedural fairness in divorce cases—this research reveals that it is not consistently used as a reference in *verstek* rulings. Through qualitative analysis, including interviews with judges and examination of court decisions, the study finds that the judges prioritize the specific circumstances of each case, often relying more heavily on the legal facts revealed during the trial and on considerations of *maṣlaḥah* (public interest or welfare). Judges argue that rigid adherence to procedural guidelines may, in certain contexts, lead to greater injustice, particularly when it delays the legal resolution for aggrieved parties. The study further identifies a pattern of legal disparity resulting from differing interpretations and applications of SEMA provisions. This inconsistency not only contributes to uncertainty in legal outcomes but also poses a risk to public trust in the judiciary. The paper argues that to enhance legal certainty and consistency, the principles embedded in SEMA No. 3 of 2023 should be codified into binding legislation. Moreover, it recommends a re-evaluation of the normative and authoritative status of Supreme Court Circulars within Indonesia's judicial framework. This research contributes to the broader discourse on judicial discretion, procedural justice, and the balance between legal formalism and substantive fairness in Islamic family law adjudication.

Keywords: Divorce; Supreme Court Circular; *verstek*.

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Introduction

The Religious Court is a special judicial institution recognized by Indonesian law to handle claims related to Islam. Its authority includes receiving, examining, adjudicating, deciding, and resolving cases involving individuals of the Islamic faith. The aim of this authority is to uphold law and justice in accordance with the principles of Islamic teachings.[1]

The duties and authority of the Religious Court are regulated under Article 49 of Law Number 7 of 1989 concerning the Religious Judiciary, which was later amended by Law Number 3 of 2006 and Law Number 50 of 2009. According to these provisions, the Religious Court holds the authority to adjudicate cases at the first level involving individuals of the Islamic faith. This authority covers several areas, including marriage, inheritance, grants, endowments (waqf), almsgiving (zakat), charitable donations (*infaq* and charity), as well as sharia-based economic matters.[2]

As part of the religious judiciary in Indonesia, the Jember Religious Court carries out its duties and authority in accordance with the aforementioned laws. One of the main types of cases handled by the Religious Court is divorce between Muslim married couples. In every divorce case, the court is required to first attempt mediation between the parties, with the aim of resolving the dispute amicably. However, in practice, it is often the case that only one party appears in court, resulting in several cases ending in *verstek* judgments.[3]

In civil procedural law, there are two types of rulings that may be issued in relation to the absence of one of the parties: a dismissal ruling and a *verstek* judgment. A dismissal ruling is issued when the plaintiff fails to appear in court despite having been duly summoned, while a *verstek* judgment applies when the defendant does not attend the hearing even though they have also been properly summoned. In the context of divorce cases, a *verstek* judgment is often used, particularly when the defendant fails to appear without a valid reason.[4]

The high number of *verstek* judgments in divorce cases at the Jember Religious Court has drawn attention. In Indonesia, *verstek* judgments in divorce proceedings have become common and culturally embedded among the public. According to 2023 data, the Jember Religious Court recorded a high number of *verstek* rulings, with 4,993 divorce cases decided by default out of a total of 5,864 filed cases. In 2024, the court issued 5,384 *verstek* judgments out of 5,613 divorce cases.[5] This high number of default rulings raises concerns about potential issues in the divorce case resolution process that require further

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[1] Misbahul Amin and Binty, "The Authority and Power of the Religious Judiciary," *Jas Merah*, no. 2 (2024): 86. https://ejournal.staidapondokkrempyang.ac.id/index.php/jmjh/article/view/557

[2] M. Koirur Rofiq, *Hukum Acara Peradilan Agama*, (Semarang: CV. Rafi sarana Perkasa, 2022), 20.

[3] Endang Conik Pebruani, "Analisis Terhadap Tingginya Angka Putusan Verstek Dalam Perkara Perceraian Pada Tahun 2017 (Studi Pengadilan Agama Pekanbaru Kelas 1 A)," *JHL*, no. 1 (2021):3 https://ejournal.anotero.org/index.php/hupo

[4] Sarwono, *Hukum Acara Perdata Teori dan Praktik*, (Jakarta: Sinar Grafika, 2011), 220.

[5] Direktori Putusan Mahkamah Agung Republik Indonesia, diakses pada tanggal 2 November 2024.

analysis, particularly regarding the lack of implementation of Supreme Court Circular (SEMA) No. 3 of 2023 in the religious court's decisions.

A judge's decision to grant a *verstek* ruling must be based on Article 125 of the HIR (Herziene Inlandsch Reglement). This article stipulates that if the defendant fails to appear in court and does not authorize legal counsel to represent them, despite having been properly summoned, the court may proceed with a default judgment.[6] In practice, the summons process for the defendant or respondent is carried out two to three times. If the defendant or respondent still does not appear, the proceedings will continue to the next stage. In this situation, the applicable procedural law is *verstek* proceedings, as regulated by the RBg (Reglement op de Burgerlijke Rechtsvordering) and the HIR (Herziene Inlandsch Reglement).[7] This principle aligns with what is stated in Kitab Al-Anwar, Volume II, page 55, which explains that if the respondent refuses to appear, hides, or their whereabouts are unknown, then the case may be decided based on the evidence presented.

In applying the *verstek* (default) procedure, the judge must ensure the truth of the claims presented in the lawsuit in order to gain sufficient conviction. Therefore, the judge is required to hear witness testimonies and examine other relevant evidence. Throughout the case examination, the judge also assesses whether the lawsuit or petition submitted contradicts applicable laws, and whether the claims made in the suit have a strong and legitimate legal basis.[8]

In 2024, there were several divorce rulings. *First,* case number 7/Pdt.G/2024/PA.Jr., a *verstek* decision in a cerai talak case, where the divorce occurred due to repeated quarrels and disputes, infidelity, and a two-month separation.[9] *Second*, case number 1301/Pdt.G/2024/PA.Jr., a *verstek* decision in a cerai talak case, with the cause of divorce being continuous quarrels and disputes, infidelity, and a four-month separation.[10] Third, case number 1553/Pdt.G/2024/PA.Jr., a *verstek* decision in a cerai gugat case, in which the causes of divorce included quarrels, disputes, infidelity, and a three-month separation.[11] *Fourth,* case number 1167/Pdt.G/2024/PA.Jr., a *verstek* decision in a cerai gugat case, where the reasons for divorce were quarrels and disputes, embezzlement of the plaintiff's parents' money, and a one-month separation.[12]

Verstek rulings in these divorce cases are not only related to the absence of one party but also to the non-implementation of Supreme Court Circular (SEMA) Number 3 of 2023 in religious court decisions. According to SEMA Number 3 of 2023, divorce can only be granted after the husband and wife have been living separately for at least six

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[6] Pasal 125 Herzen Inlandsch Reglement (H.I.R).

[7] Nurul Azizah Rosyada, "Analisis Hukum Putusan Verstek Dalam Perkara Perceraian (Studi Kasus di Pengadilan Agama Semarang)" (Undergraduate Skripsi, Universitas Islam Sultan Agung Semarang, 2022) http://repository.unissula.ac.id/25789/1/30301800001_fullpdf.pdf

[8] M. Yahya Harahap, *Hukum Acara Perdata Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, Dan Putusan Pengadilan*, (Jakarta: Sinar Grafika, 2016), 398.

[9] Direktori Putusan Mahkamah Agung Republik Indonesia nomor 7/Pdt.G/2024/PA.Jr.

[10] Direktori Putusan Mahkamah Agung Republik Indonesia nomor 1301/Pdt.G/2024/PA.Jr.

[11] Direktori Putusan Mahkamah Agung Republik Indonesia nomor 1553/Pdt.G/2024/PA.jr.

[12] Direktori Putusan Mahkamah Agung Republik Indonesia nomor 1167/Pdt.G/2024/PA.Jr.

months, except in cases where domestic violence (KDRT) is proven.[13] However, in practice, several *verstek* rulings at the Jember Religious Court show that divorces were still granted even though the period of separation was less than six months, which clearly contradicts the provisions of the SEMA.

The non-implementation of Supreme Court Circular (SEMA) Number 3 of 2023 in religious court rulings has drawn attention for further study. This is because decisions that do not adhere to established guidelines can lead to injustice, both for the attending party and the absent party. Consistent application of legal guidelines is crucial to maintain uniformity and fairness in court rulings.[14]

Several previous studies, such as the one conducted by Fatimah Zahra (2024), examined the application of the separate-residence principle as stipulated in SEMA Number 1 of 2022 through the lens of John Rawls' theory of justice. She concluded that the justice principles in the legal basis of SEMA Number 1 of 2022 meet Rawls' criteria of justice, whereby judges, in granting divorce petitions, must consider the well-being of both parties and ensure equal opportunities in the trial.[15] Meanwhile, research by Muhamad Sarman (2025) criticized the application of SEMA Number 3 of 2023 in divorce cases, particularly in terms of the rejection of cerai gugat (wife-initiated divorce) petitions. Sarman argued that the judge's reasoning for rejecting divorce petitions based on this provision is unjust, as it fails to consider the principle of substantive justice.[16]

This study will focus on analyzing *verstek* rulings in divorce cases at the Jember Religious Court, particularly those related to the non-implementation of SEMA Number 3 of 2023 in religious court decisions. It is expected that this research will provide insight into the factors influencing judicial decisions and the implications of rulings that deviate from SEMA Number 3 of 2023, thereby supporting the development of decisions that are more just and legally sound.

Method

This study uses an empirical juridical research type with a case approach to analyze how normative legal provisions are applied to specific legal events that occur in society.[17] This research aims to analyze how the law is applied and functions in the field, focusing on the implementation of the Supreme Court Circular Letter in the context of

[13] Surat Edaran Mahkamah Agung Republik Indonesia Huruf C angka (1) No. 3 Tahun 2023.

[14] Ramadani, Syahrul Affan, "Analisis Yuridis SEMA No. 3 Tahun 2023 Terhadap Kasus Perceraiandi Pengadilan Agama Stabat", *Jornal Smart Law*, no. 1 (2024): 46 https://jurnal.perima.or.id/index.php/JSL/article/view/711

[16] Fatimah Zahra, "Waktu Pisah Tempat Tinggal Dalam SEMA NO 1 Tahun 2022 Sebagai Dasar Perceraian Ditinjau Dari Teori Keadilan John Rawls (Studi Putusan Nomor 1610/Pdt.G/2023/PA. Mr)"(Undergarduateskripsi, Universitas Islam Negeri Maulana Malik Ibrahim Malang, 2024), http://etheses.uin-malang.ac.id/62397/1/200201110187.pdf

[16] Muhammad Sarman, " Pertimbangan Hakim Dalam Penolakan Cerai Gugat Berdasarkan SEMA No. 3 Tahun 2023 (Analisis Putusan Nomor 1119/Pdt.G/2024/PA. Srg)" (undergraduate skripsi, Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2025. https://repository.uinjkt.ac.id/dspace/bitstream/123456789/83289/1/SKRIPSI_SARMAN55555.pdf

[17] Abdul Kadir Muhammad, *Hukum Dan Penelitian Hukum*, (Bandung: Citra Aditya Bakti, 2004), 134.

default divorce rulings in the Religious Court. The data used in this study comes from primary and secondary data. Primary data were obtained from observations or direct interviews with judges of the Jember Religious Court. [18] Secondary data consists of primary, secondary, and tertiary legal materials. Primary legal materials include Articles 124–129 of the Herziene Inlandsch Reglement (HIR) on default, Articles 77–83 of the Reglement op de Burgerlijke Rechtsvordering (B.Rv), Articles 148–153 of the Rechtsreglement voor de Buitengewesten (R.Bg), Law Number 1 of 1974 on Marriage, the Compilation of Islamic Law, and Supreme Court Circular Letter Number 3 of 2023. In addition, Decisions Number 7/Pdt.G/2024/PA.Jr, 1301/Pdt.G/2024/PA.Jr, 1553/Pdt.G/2024/PA.Jr, and 1167/Pdt.G/2024/PA.Jr are used as the main basis in the case analysis. Secondary legal materials consist of books, articles, legal journals, and previous research relevant to support this study. As for tertiary legal materials, such as the KBBI and mass media, they are used to provide additional understanding regarding default decisions in the Religious Court. The data collection technique in this study was carried out directly from data sources at the research location or in the field obtained through interviews with judges of the Jember Religious Court. In addition, data collection techniques also used documentation obtained from photographs related to the research process. The obtained data were then analyzed using data processing methods, namely through the stages of data checking or editing, classification, verification, data analysis, and conclusion.

Factors That Cause Judges at the Jember Religious Court Not to Use the Supreme Court Circular Letter (SEMA) Number 3 of 2023 as a Legal Basis in Deciding *Verstek* Divorce Cases

Based on interviews with Drs. Anwar, S.H., M.H., E.S., and H. Soleh, Lc., M.A., who are judges at the Jember Religious Court, there are several factors that cause judges not to use Supreme Court Circular Letter (SEMA) Number 3 of 2023 in deciding *verstek* divorce cases. *First,* case-specific considerations (casuistry). In civil law, the term casuistry is not explicitly defined in the context of deciding divorce cases. However, Article 39 of Law No. 1 of 1974 stipulates that a divorce may be conducted in court after the husband and wife can no longer be reconciled and there is sufficient reason to believe they can no longer live harmoniously.[19] In this context, case-specific circumstances play a role in judicial decision-making, where each divorce case is assessed based on the specific facts and conditions involved—for example, whether there are sufficient reasons indicating that reconciliation between the spouses is no longer possible. This allows the judge to consider and determine the grounds for divorce as stated in the petition or claim.

According to the Great Dictionary of the Indonesian Language (KBBI), *kasuistik* (casuistry) refers to something related to a particular case or incident.[20] In the Oxford

[18] Zainuddin Ali, Metode Penelitian Hukum, (Jakarta: Sinar Grafika, 2011), 23.
[19] Pasal 39 ayat 1 dan 2 Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan.
[20] Kamus Besar Bahasa Indonesia (KBBI), diakses pada 06 Maret 2025.

Dictionary, the term originates from the Latin word *casus*, meaning "event" or "case." Immanuel Kant argued that casuistry is neither a science nor a part of science, but rather dogmatics. Furthermore, casuistry is not a doctrine on how to discover something, but a practice of seeking the truth.[21]

Teza Salih Mauludin et al., in their research[22], explain that the casuistic approach in law emphasizes case-by-case analysis by considering the unique characteristics of each event in order to achieve substantive justice. This approach allows for flexibility in the application of law, especially when general legal principles need to be adjusted to specific circumstances for example, in the application of restorative justice in criminal cases. One real-life example is the termination of prosecution against a father who stole cooking oil to buy milk for his child. Although legally this act constitutes a criminal offense, the casuistic approach takes into account the offender's socio-economic background, the intent behind the act, and the minimal value of the loss. As a result, the case was resolved through restorative justice. This approach demonstrates that judges and law enforcers can consider special circumstances to ensure a more humane and contextual form of justice.

Based on the researcher's interviews with judges at the Jember Religious Court, in deciding divorce cases, judges often use a casuistic approach, as each case has different characteristics. Therefore, SEMA No. 3 of 2023 is not always used as the primary legal basis. [23] Although SEMA serves as a guideline to standardize judicial practice, normatively, it does not carry binding legal force like statutory regulations. Hence, in practice, judges may rule on cases by considering the specific conditions of each one, even if the decision does not fully follow the provisions of the SEMA. This approach allows for flexibility and adaptability in legal application to achieve substantive justice that aligns with the concrete context of each case.

In her research, Kandy Resty explains that to meet the requirements for divorce based on the separation period as stated in SEMA No. 3 of 2023, the rule can be applied in cases where the grounds for divorce are disputes and quarrels without serious issues in such cases, the claim may be declared inadmissible (Niet Ontvankelijke Verklaard/NO). However, if the divorce is due to ongoing conflict and irreconcilability, or if the case involves serious matters such as economic problems, infidelity, irresponsibility, or online gambling, then the divorce may be granted by the judge. [24]

The panel of judges at the Jember Religious Court, in several divorce rulings, tends not to strictly follow the formal provision in SEMA No. 3 of 2023 that requires a six-month separation period. Instead, they prefer to apply a casuistic approach, taking into

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[21] Rudolf Schussler, "*Kant Casuistry and Casuistical Questions*", *Oxford Academic*, No. 6 (2021): 1005 https://doi.org/10.1111/1467-9752.12612

[22] Teza Salih Mauludin, dkk, "Kriteria/Keadaan Yang Bersifat Kasuistik Dalam Penghentian Penuntutan Berdasarkan Keadilan Restoratif," *Pridensial*, no. 4(2024):75 https://doi.org/10.62383/presidensial.v1i4.196

[23] H. Soleh, Lc. M. A., wawancara (Jember, 11 Februari 2025)

[24] Kandy Resty Audina, "Analisis Ratio Decidendi Hakim Dalam Putusan Perceraian Akibat Pisah Tempat Tinggal Bedasarkan SEMA Nomor 3 Tahun 2023 (Studi Putusan No. 352/Pdt.G.2024.PA.Pwt)", (*Undergraduate* Skripsi, Universitas Islam Negeri Prof. K.H. Saifuddin Zuhri Purwokerto, 2025), http://repository.uinsaizu.ac.id/id/eprint/29024

account the specific facts occurring in the household of the parties involved. This approach has been applied in various cases such as prolonged infidelity, embezzlement of money by a spouse, and a temperamental attitude that has the potential to lead to violence situations that are considered to cause emotional suffering or psychological domestic violence (KDRT psikis).The judges assess that strictly enforcing the separation time requirement may only prolong the suffering of the aggrieved party and does not guarantee any improvement in the marital relationship. Therefore, the casuistic approach is used to achieve substantive justice and promote the best interests (*kemaslahatan*) of the party filing for divorce. In a study conducted by Iffaty and Risma, infidelity is categorized as one of the forms of psychological violence in domestic relationships. This conclusion is based on an analysis of several court decisions, including Decision Number 2192/Pid.Sus/2020/PN Mdn, Decision Number 506/Pid.Sus/2021/PN Mre, and Decision Number 578/Pid.Sus/2021/PN Dps. In these rulings, the panel of judges declared that the defendant was proven to have committed psychological violence against their spouse, as evidenced by the wife's psychological condition, which included severe depression.[25]

Second, the existence of legal facts in court. A *verstek* (default) judgment is rendered when the defendant or respondent fails to appear in court despite having been properly and lawfully summoned, as stipulated in Article 125 of the HIR (Herziene Indonesisch Reglement). However, this article does not explicitly regulate matters of evidence. Nevertheless, in practice, evidence remains a crucial element in *verstek* judgments, as it concerns the validity and fundamental principles of civil cases.[26] According to Yahya Harahap, even when the defendant is absent, the judge must still hear the testimony of the plaintiff's witnesses in order to issue a valid and fair ruling.[27] This view is in line with statements from judges at the Jember Religious Court, who assert that evidence must still be presented in *verstek* cases to uphold the quality of justice. Therefore, even though the judgment is issued in the absence of the defendant, the process of proof and evidence remains a formal requirement that cannot be disregarded.

The judge's consideration during the evidentiary process is crucial, as it is the stage in which the panel of judges assesses the facts that have emerged during the trial. This consideration determines whether a decision reflects justice, legal certainty, and the benefits for the disputing parties. In civil procedural law, judges are required to seek and uncover the material truth based on legally recognized evidence, as stipulated in Article 1866 of the Indonesian Civil Code (KUH Perdata) and Article 164 of the HIR/Article 284 of the RBg, which include written evidence, witness testimony, presumptions, confessions, and oaths. Specifically, Article 1907 of the Civil Code explains that witness statements must consist of personal and oral accounts regarding the disputed event, based

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[25] Iffaty Nasyiah dan Risma Nur Arifah, "Typology Of Psychological Violence In Maqashid Sharia Perspective," *At- Turats* No. 2 (2024): 149 http://repository.uin-malang.ac.id/22211/1/Jurnal%20At%20Turats%20.pdf

[26] Bunga Citra Gothera, "Prosedur Pembuktian Dalam Perkara Perceraian Yang Diputus Verstek (Studi Kasus Pengadilan Agama Brebes)", (*Undergraduate* Skripsi, Universitas Islam Sultan Agung Semarang, 2021), https://repository.unissula.ac.id/24405/1/30301700081_fullpdf.pdf

[27] M. Yahya Harahap, *Hukum Acara Perdata*, 396.

on direct sight, hearing, or experience—not on opinions or assumptions. Thus, evidence in *verstek* (default) cases plays an important role in maintaining the legitimacy and integrity of civil decisions. [28]

According to A. Pitlo, testimony must only contain what the witness has perceived through their senses and what they know personally.[29] According to Sudikno Mertokusumo, testimony is certainty presented to the judge during the trial about a disputed event, delivered orally and personally by someone who is not a party to the case and who is summoned to testify.[30] According to S. M. Amin, testimony is merely a depiction of what has been seen, heard, and experienced—such statements are entirely objective.[31]

In judicial proceedings, there is the term judex facti, which refers to the judge responsible for examining and assessing the facts that emerge in court to determine whether those facts can be proven in a case. The term comes from Latin *judex facti*, meaning "fact-finding judge" and refers to judges at the first-instance court who perform this role.[32] According to Moh. Amir Hamzah, the tasks of a judex facti involve several stages of examination: formulating the facts, seeking causal relationships, and making possible inferences.[33]

Legal facts presented in court are a key reason why judges at the Jember Religious Court do not fully refer to SEMA No. 3 of 2023. This SEMA stipulates that a divorce may be filed if the husband and wife have been living separately for at least six months. However, in certain cases, judges may issue a decision even if the separation period is shorter than six months. Judges will examine the reasons behind the divorce claim if the reasons reflect irreconcilable differences or involve serious matters, the divorce may still be granted. If it is proven in court that reconciliation is no longer possible, the judge can approve the divorce without applying SEMA No. 3 of 2023. In such situations, judges prioritize the substantial facts revealed during the hearing, including failed reconciliation efforts and witness testimonies that confirm the marriage is already in a state of broken marriage. Therefore, judges may disregard the provisions in SEMA if they are deemed irrelevant to the actual conditions in the field. [34]

Bunga Citra, in her research[35], explains that in deciding a *verstek* (default) divorce case, judges still rely on evidence presented during the trial process. The judge renders a decision by examining, evaluating, and ruling on the facts presented by the petitioner or plaintiff, while also verifying the truth of the events or facts stated in the petition or claim.

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[28] Pasal 1907 Kitab Undang-Undang Hukum Perdata *(Bugerlijk Wetboek Voor Indonesie)*
[29] Hari Sasangka, *Hukum Pembuktian dalam Berperkara Perdata*, (Bandung: Mandar Maju, 2005), 60.
[30] Sudikno Mertokususmo, *Hukum Acara Perdata Indonesia*, (Yogyakarta: Liberty, 2006), 166.
[31] Hari Sasangka, *Hukum Pembuktian dalam Berperkara Perdata*, 60.
[32] Nadia Towenty, dkk, "Analisis Putusan Hakim Terhadap Pertimbangan Alat Bukti dalam Perkara Waris (Studi Kasus Putusan Nomor 28/Pdt.G/2022/ PN Wates)" *Jurnal Hukum Desentralisasi*, No. 1 (2025): 249 https://doi.org/10.62383/desentralisasi.v2i1.512
[33] Moh, Amir Hamzah, *Hukum Acara Perdata Peradilan Tinggi Banding*, (Jakarta: Setara Press, 2013), 5.
[34] H. Soleh. Lc. M. A., wawancara, (Jember, 11 Februari 2025)
[35] Bunga Citra Gothera, "Prosedur Pembuktian Dalam Perkara Perceraian Yang Diputus Verstek (Studi Kasus Pengadilan Agama Brebes)", 68.

Witness testimony remains necessary to ensure that the judge's legal considerations are based on solid grounds.

In *verstek* divorce rulings, evidence continues to be a crucial element that judges take into account, as reflected in several decisions of the Jember Religious Court such as case numbers 7/Pdt.G/2024/PA.Jr, 1301/Pdt.G/2024/PA.Jr, 1553/Pdt.G/2024/PA.Jr, and 1167/Pdt.G/2024/PA.Jr—where legal facts were derived from the testimonies of the petitioner's or plaintiff's witnesses, due to the absence of the respondent or defendant at trial. The witnesses' testimonies revealed marital issues such as infidelity, prolonged conflict, and even embezzlement, all of which served as substantive grounds for the judge in issuing the divorce decree. This demonstrates that although SEMA (Supreme Court Circular) No. 3 of 2023 provides formal guidelines, in practice, judges do not fully adhere to it—particularly regarding the requirement of living separately for six months, which does not always reflect the reality of a dysfunctional marriage. Consequently, judges tend to prioritize a case-by-case approach, considering all facts and evidence revealed during the trial in order to ensure a fair and impartial judicial process that upholds the pursuit of truth and substantive justice in each case.

Third, the consideration of maslahah (public interest or welfare). In Arabic, maslahah refers to actions that promote the well-being of humanity. Broadly speaking, it encompasses anything beneficial to humans either by bringing about advantages such as profit or pleasure, or by preventing harm or damage.[36] Etymologically, maslahah means something good, the opposite of harm or corruption. In a broader sense, maslahah includes all that is beneficial to humans, whether in the form of gaining goodness and pleasure or removing hardship and suffering.[37] According to the Indonesian Dictionary (KBBI), the term kemaslahatan (derived from maslahat) means something that brings about goodness, safety, and benefit.[38] Terminologically, Imam al-Ghazali explains that at its core, maslahah is the concept of attaining benefit or avoiding harm. However, he clarifies that this is not merely about pursuing benefit and avoiding harm for their own sake these are the goals of human welfare, but not the essence of maslahah in the legal sense. What is meant by maslahah, according to al-Ghazali, is the preservation of the objectives (mashlahah) of Islamic law (syara).[39]

Imam al-Ghazali further states that while maslahah originally refers to that which brings benefit and avoids harm, its true essence lies in safeguarding the objectives of syara namely, the protection of religion, life, intellect, lineage, and property.[40] The maslahah in question is thus the welfare that aligns with these divine objectives, not one that is merely driven by human desires or whim.[41]

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[36] Amir Syarifuddin, *Ushul Fiqh*, (Jakarta: Kencana, 2008),324.
[37] Romli, *Studi Perbandingan Ushul Fiqh*, (Yogyakarta: Tata Aksara, 2014), 217.
[38] Kamus Besar Bahasa Indonesia (KBBI), diakses pada 06 Maret 2025.
[39] Abu Hamid Muhammad bin Muhammad al-Ghazali, *al-Mustashfa min ilm al-Ushul, Juz 1* (Beirut: Dar al-Kutub al-Ilmiyyah, 1413), 286.
[40] Amir Syarifuddin, *Ushul Fiqh*, 324.
[41] Romli, *Studi Perbandingan Ushul Fiqh*, 219.

Berlian Fajrul, in his research[42], explains that the concept of maṣlaḥah (public interest) according to Imam al-Ghazali, in the context of deciding divorce cases, requires judges to prioritize the public good. Judges must place greater importance on societal benefit over individual interests. In this regard, a judge's decision aims to generate benefit and prevent harm while maintaining the objectives of shara', which include the protection of religion, intellect, lineage, and property. Thus, the concept of maṣlaḥah emphasizes justice not only for individuals but also for the overall welfare of society. In the study conducted by Safinah and Risma[43], the concept of justice is interpreted as the realization of balance and equality between rights and obligations. This interpretation stems from the understanding that a judge holds a significant moral responsibility. If a judge fails to act with integrity, it may lead to injustice for the parties involved in a case. Therefore, every judicial decision must reflect the core values of justice as taught in religious teachings.

The concept of maṣlaḥah is a key consideration in judicial decisions, including in *verstek* (default) divorce rulings at the Jember Religious Court. This is reflected in the statement of Mr. Anwar, a judge at the Jember Religious Court, who stated that the absence of the defendant in court indicates a waiver of their rights and a lack of good faith in maintaining the marriage. Under such conditions, according to the judge, if the court does not issue a ruling promptly, the wife would suffer harm due to the lack of physical and emotional protection from her husband. In this context, the Religious Court applies the principles of simplicity, speed, and low cost as a tangible effort to deliver justice to the public. The implementation of these principles aims to ensure that the presence of law in Indonesia is more strongly felt through the realization of justice, usefulness, and legal certainty.[44] Therefore, to prevent greater psychological and social harm, the judge uses maṣlaḥah as the basis for legal reasoning. In practice, this approach seeks to uphold substantive justice, particularly for vulnerable parties such as women in dysfunctional marriages. Hence, divorce is seen as a better and fairer solution in certain situations, even if not strictly aligned with formal regulations such as those outlined in SEMA No. 3 of 2023, yet still prioritizing protection for those who suffer injustice or harm in marriage.[45]

This perspective aligns with the findings of Muhammad Sarman in his research[46], which states that ongoing conflict and disputes often due to infidelity and other issues

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[42] Berlian Fajrul Falakh, "Kemaslahatan Dalam Putusan Perkara Cerai Gugat (Studi Putusan Nomor 1388/Pdt.G/2019/PA.Kra dan Putusan Nomor 277/Pdt.G/2020/PTA.Smg)", (*Undergraduate* Tesis, Universitas Islam Negeri Sunan Kalijaga Yogyakarta, 2022), https://digilib.uin-suka.ac.id/id/eprint/58523/1/20203012001_BAB-I_IV-atau-V_DAFTAR-PUSTAKA.pdf

[43] Safinatun Najah dan Risma Nur Arifah, " Analisis Putusan Cerai Gugat Dalam Perspektif Keadilan Hukum Aristoteles (Studi Putusan 1361/Pdt.G/2023/PA.MLG)," *Al-Fattah* No. 1 (2022):20 https://journal.stai-almujtama.ac.id/index.php/al-fattah/article/view/110/81

[44] Rizki Laili Fadlilah dan Risma Nur Arifah, "Implementation Of One Day Minutation And One Day Publish In Terms Of Simple, Fast, And Low Cost Principles," *Talrev* No. 1 (2024):316 http://repository.uin-malang.ac.id/20555/2/20555.pdf

[45]Drs. Anwar. S. H., M. H., E. S., wawancara, (Jember, 13 Februari 2025)

[46] Muhammad Sarman, " Pertimbangan Hakim Dalam Penolakan Cerai Gugat Berdasarkan SEMA No. 3 Tahun 2023 (Analisis Putusan Nomor 1119/Pdt.G/2024/PA. Srg)" (undergraduate skripsi, Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2025. https://repository.uinjkt.ac.id/dspace/bitstream/123456789/83289/1/SKRIPSI_SARMAN55555.pdf

without resolution are the main reasons for granting divorce petitions. Even though the period of separation has not reached six months as stipulated in Article 39 paragraph (2) of Law No. 1 of 1974, judges may determine that the breakdown of marital harmony and the impossibility of reconciliation are sufficient legal grounds for divorce. This emphasis on the essence of the conflict reflects flexibility in legal application to safeguard justice and public interest for both parties.

The alignment with the maṣlaḥah concept, as previously described, is evident in decision number 7/Pdt.G/2024/PA.Jr, where the judge granted the petition despite the couple not being separated for six months. This was considered appropriate due to the respondent's infidelity since 2015 and defiance toward the petitioner, making the marriage unsustainable. A similar rationale appears in decision number 1301/Pdt.G/2024/PA.Jr, where, although not fully in line with SEMA No. 3 of 2023, the judge considered the petitioner's welfare, who suffered severe emotional and physical distress due to the infidelity that completely fractured the marriage. Likewise, in decision number 1553/Pdt.G/2024/PA.Jr, even though the couple had only been separated for three months, the judge approved the divorce due to the greater potential harm to the plaintiff from the defendant's temperamental behavior, which posed a risk of domestic violence. In decision number 1167/Pdt.G/2024/PA.Jr, the judge's decision was also deemed appropriate even though the separation had lasted only one month, as it took into account the petitioner's substantial financial loss caused by the respondent's embezzlement over two years, amounting to one billion Rupiah. In all four rulings, the panel of judges emphasized the principle of maṣlaḥah, assessing that maintaining a disharmonious marriage would only increase suffering without any assurance of behavioral change from the respondent or defendant. Therefore, divorce was deemed a fairer and more appropriate solution to prevent greater harm.

Implications of the Non-Application of SEMA Number 3 of 2023 on *Verstek* Decisions in Divorce Cases at the Jember Religious Court

A Circular Letter of the Supreme Court (SEMA) is a regulation issued by the Supreme Court of the Republic of Indonesia to provide guidance and direction to judges and courts in carrying out judicial duties.[47] The purpose of SEMA is to ensure uniformity and consistency in judicial decisions across Indonesia.[48] In the hierarchy of legislation, SEMA ranks below statutory laws and does not have an equal or superior status to them. SEMA only holds binding authority within the judicial environment. If a SEMA contradicts laws or the Constitution, it may be considered invalid. A SEMA serves merely as an instruction,

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[47]Maulana Rihdo Al Fasil, Ishaq Maulana Sudur dkk, "Kedudukan Surat Edaran Mahkamah Agung (SEMA) dalam Perspektif Akademisi: Kekuatan Hukum, Ketetapan dan Konsistensi, Pengaruh Terhadap Putusan Hukum," *USRAH*, No. 2, 2023:231 https://jurnal.staim-probolinggo.ac.id/USRAH/article/view/791

[48] M. Afif Gusti Fatah, "Kedudukan SEMA Sebagai Dasar Pertimbangan Hukum Hakim", *Jurnal Transparasi Hukum*, no. 1 (2024):134 https://ojs.unik-kediri.ac.id/index.php/transparansihukum/article/view/5462

not as a mandatory regulation that must be obeyed by judicial panels, and there are no legal consequences for non-compliance. [49]

Afif Gusti explains in his research[50], that although SEMA is recognized in Indonesia's legal system, it cannot automatically be used as a basis or reference by a judge when making legal considerations in a case being examined and adjudicated. The legitimate legal basis is legislation that is officially recognized and has binding legal force; thus, if such a law is violated, there will be sanctions. If a judge sets aside a SEMA in their legal reasoning, no direct sanctions are applied, because the position of the panel of judges is considered higher and more authoritative over a case than the policy-maker issuing the SEMA. SEMA merely functions as an institutional oversight tool by the Supreme Court and does not automatically bind judges. Only binding legislation can intervene in a judge's decision, not internal institutional policies such as a SEMA..

The Supreme Court, based on its authority as stated in Article 79 of Law Number 3 of 2009 (Second Amendment to Law Number 14 of 1985 on the Supreme Court), which reads: "The Supreme Court may further regulate matters necessary for the smooth administration of justice if such matters are not adequately regulated in this Law," uses this provision as the legal basis for issuing policy rules to make divorce procedures more structured by adding requirements to the filing of lawsuits.

The Supreme Court issued a policy rule as a guideline for Religious Courts through SEMA No. 3 of 2023. In the legal formulation of the Religious Chamber, item 1 states that: "Marriage Law refines the legal formulation of the Religious Chamber, item 1 letter b point 2 in SEMA Number 1 of 2022, namely: 'Divorce cases based on continuous dispute and quarrel can be granted if it is proven that the husband and wife have been constantly arguing or have lived separately for at least six (6) months'," so that it now reads: "Divorce cases based on continuous dispute and quarrel can be granted if it is proven that the husband and wife are in continuous conflict with no hope of reconciliation, accompanied by a minimum of six (6) months of separate living, unless legal facts are found that the defendant/plaintiff has committed domestic violence."

Mulyadi and Lilik, in their research[51], explain that SEMA No. 3 of 2023 has two interpretations. The first interpretation states that a divorce may be granted if it is proven that disputes and quarrels have occurred for six months, or if it is proven that the couple has lived separately for six months. Therefore, even if they have only been separated for 1–2 months, as long as it is proven that disputes and quarrels have occurred for six months, the divorce petition may be granted. The second interpretation states that a divorce petition can only be granted if it is proven that disputes and quarrels have led to separate living for at least six months. Thus, even if it is proven that disputes and quarrels have occurred for more than six months, if the couple has not lived separately or has been separated for less than six months, the divorce petition cannot be granted. The application of this SEMA in Religious Courts has, in fact, led to differences in interpretation among judges. This has resulted in legal uncertainty in the application of SEMA No. 3 of 2023 in deciding divorce cases.

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[49] Mulana Ridho dkk, "Kedudukan Surat Edaran Mahkmah Agung (SEMA) Dalam Perspektif Akademis: Kekuatan Hukum, Ketetapan Dan Konsistensi, Pengaruh Terhadap Putusan Hakim", 234.

[50] M. Afif Gusti Fatah, "Kedudukan SEMA Sebagai Dasar Pertimbangan Hukum Hakim", 135.

[51] Mulyadi dan Lilik Andaryuni, "Implementasi SEMA No. 3 Tahun 2023 Di Pengadilan Agama Samarinda (Studi Terhadap Persepsi para pihak)", *Attractive Journal*: No. 3 (2024), 273 https://doi.org/10.51278/bce.v4i3.1501

Danix Ramadhani, in his research[52], explains that SEMA No. 3 of 2023 in divorce cases has not yet been effectively implemented in Religious Courts. This is analyzed using Lawrence M. Friedman's theory of legal effectiveness, which is examined through the lens of legal structure, substance, and legal culture. These aspects reveal the gaps that cause the ineffectiveness of this regulation in the Religious Courts.

Differences in rulings that do not align with SEMA No. 3 of 2023 regarding divorce can lead to the emergence of legal disparity. According to the Kamus Besar Bahasa Indonesia (Great Dictionary of the Indonesian Language), "disparity" means difference.[53] In a legal context, disparity in judgments is typically associated with criminal cases, but it is also possible in civil cases.[54] Disparity refers to the application of different legal norms in resolving similar cases. These similar cases may include both criminal and civil matters.[55]

The cause of judgment disparities in court often stems from differences in judges' legal interpretations when deciding a case. Since judges hold a critical role in the legal system, they carry out a function that essentially supplements written law through legal discovery, which can lead to the creation of new law. The purpose of legal discovery is to fill legal gaps and to prevent a case from being left unaddressed due to unclear or non-existent legal grounds.[56]

here are many factors that contribute to the emergence of judgment disparity. In Indonesia, judgment disparity is often linked to the independence of judges. In rendering decisions, judges must not be influenced by any party.[57] This is in accordance with Article 5 paragraph (1) of Law No. 48 of 2009 on Judicial Power, which states that judges must explore, follow, and understand the values of law and justice that live within society.[58]

According to Sudirman Marzuki, the analysis of judgment disparity can be conducted from two perspectives: the philosophical aspect and the juridical aspect.[59] In this context, the decisions of the Jember Religious Court, when analyzed philosophically, reflect the application of two important legal principles: the principle of justice and the principle of utility. The principle of justice is realized by considering the specific circumstances faced by both parties and providing a more appropriate and beneficial

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[52] Denix Ramadhani, "Implementasi Surat Edaran Mahkamah Agung Nomor 3 Tahun 2023 Tenag Pedoman Pelaksnaan Tugas Bagi Pengadilan Dalam Putusan Perceraian Di Pengadilan Agama Kajen.", Undergraduate Skripsi, Universitas Islam Negeri K. H. Abdurrahman Wahid Pekalongan (2024). http://etheses.uingusdur.ac.id/11275/

[53] Kamus Besar Bahasa Indonesia (KBBI), diakses pada 06 Maret 2025.

[54] Muhammad Farhan dan Siti, "Disparitas Putusan Permohonan Pailit Dengan Dasar Cessie atas Sebagian Jumlah Piutang," *Lex Renaissance* no. 1(2023): 152 https://journal.uii.ac.id/Lex-Renaissance/article/download/28036/16034/103903

[55] Mohammad Kamil Ardianyah, "Pembaruan Hukum Oleh Mahkamah Agung Dalam Mengisi Kekosongan Hukum Acara Perdata Di Indonesia", *Jurnal Ilmiah Kebijakan Hukum*, No. 2, (2020): 367. http://dx.doi.org/10.30641/kebijakan.2020.V14.361-384

[56] Mochtar Kusumaatmaja, *Konsep-Konsep Hukum Sarana Pembangunan Masyarakat*. (Bandung: Alumni, 2006), 99.

[57] Ni'am Abdalla Naufal, "Disparitas Putusan Hakim Dalam Perkara Perceraian Akibat Murtad Di Pengadilan Agama (Analisis Putusan Nomor 0249/Pdt.G/2016/PA.Pal dan Putusan Nomor 57/Pdt.G/2017/PA-Jpr)", (*Undergraduate* skripsi, Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2020)
https://repository.uinjkt.ac.id/dspace/bitstream/123456789/56037/1/NIAM%20ABDALLA%20NAOFAL%20-%20FSH.pdf

[58] Pasal 5 ayat (1) Undang-Undang No 48 tahun 2009 tentang Kekuasaan Kehakiman.

[59] Suparman Marzuki, *Disparitas Putusan Hakim Identifikasi dan Implikasi* (Jakarta: Komisi Yudisial, 2014), 508.

solution, even if it does not fully comply with established provisions, such as those in SEMA No. 3 of 2023.

The principle of utility also becomes an important consideration in this decision. The ruling is considered to provide greater benefit to the parties involved, such as preventing further harm to those in need of immediate justice in this case, concerning a household that is no longer harmonious. The judge prioritizes benefit for the aggrieved party, even though this goes beyond the time requirement for separation stipulated in the SEMA.

However, from the perspective of legal certainty, the decision of the Jember Religious Court does not fully comply with SEMA No. 3 of 2023. That circular clearly stipulates that, in order to file for divorce, one of the requirements is that the petitioner must have been living separately for six months. Therefore, if a decision does not follow that provision, it can be seen as inconsistent with the principle of legal certainty, which requires the application of clear and consistent rules.

Thus, although the requirements in SEMA No. 3 of 2023 are not fulfilled, the judge in the case relies on the principle of substantive justice, which prioritizes outcomes that bring greater benefit and prevent further harm to the party in need of an immediate decision. This shows that in judicial practice, judges sometimes must make decisions based on broader principles of justice and utility, even if they must deviate from existing formal regulations. However, in judicial practice, disparities in judicial decisions often occur in the juridical aspect, which can result in inconsistencies between rulings by different judges, even in similar cases. This disparity can occur between one Religious Court and another and is referred to as horizontal disparity. Horizontal disparity occurs when courts of equal rank such as Religious Courts in different regions issue different decisions for similar cases.

For example, at the Jember Religious Court, as previously explained, there have been several divorce cases in which judges granted divorce on the grounds of ongoing conflict and infidelity. In those cases, even though the period of separation had not reached six months, as required by SEMA No. 3 of 2023, the panel of judges still granted the divorce petition. This shows that the judges considered greater maṣlaḥah, even if it contradicted the applicable provisions in the SEMA.

Meanwhile, in decision number 1486/Pdt.G/2024/PA.Mlg, a cerai talak petition based on ongoing conflict and the respondent's infidelity was not accepted by the panel of judges. This was due to the material requirement set by SEMA No. 3 of 2023 not being met specifically, the required six-month separation period. This decision demonstrates a stricter application of the SEMA provisions, aiming to provide legal certainty and avoid hasty judgments.

This difference in rulings illustrates the presence of horizontal disparity in the application of law, where similar cases may result in different decisions depending on each judge's juridical approach and interpretation of applicable law. In an interview with Mr. Soleh, a judge at the Jember Religious Court, he explained that disparities in rulings can occur because each judge has subjective legal considerations.[60] Meanwhile, according to Mr. Anwar, also a judge at the Jember Religious Court, disparity can only be termed legal disparity if there is a clear difference in the verdict itself, not merely in the judge's considerations.[61]

[60] H. Soleh Lc. M. A., wawancara (Jember,11 Februari 2025)
[61] Drs. Anwar, S.H, M. H, E. S, wawancara (Jember, 13 Februari 2025)

Inconsistencies in the application of legal foundations, such as SEMA No. 3 of 2023, in *verstek* rulings can lead to future legal uncertainty. If more judges disregard established provisions in the SEMA, confusion in legal application will likely increase. This could add to legal uncertainty, especially for the public, who expect clear and consistent guidance in divorce rulings. Legal consistency is vital so that the public knows what to expect from the justice system in similar cases. A similar issue of legal inconsistency can be observed in decisions relating to intellectual property, particularly trademark cancellations. For instance, although the legal considerations in the relevant court decision were aligned with Law Number 20 of 2016 concerning Trademarks and Geographical Indications, the implementation of that decision specifically the cancellation of the Diposin trademark did not follow the procedure stipulated in Article 92 of the same law.[62]

On the other hand, if a decision that does not fully comply with SEMA provisions can be justified with sound legal reasoning and based on greater maṣlaḥah for the aggrieved party, then such a decision may be accepted within a more specific context for instance, in a divorce case where maintaining the marriage would only increase harm or suffering for one party. However, to avoid further legal uncertainty and disparity, it is important to harmonize the application of legal guidelines. This will ensure that decisions are more broadly accountable and clearly understood by the public.

Overall, the inconsistency in applying the legal foundation of SEMA No. 3 of 2023 in *verstek* divorce decisions at the Jember Religious Court has the potential to cause disparity, although it does not always result in differences in the final rulings. Such inconsistencies more often occur at the level of subjective legal reasoning by each judge and only lead to disparity if the difference affects the final verdict. Therefore, even though there is room for judicial ijtihad, it is important to ensure consistency in legal application to create equitable justice for all parties involved. This will help establish a more accountable and trustworthy judicial system.

Conclusion

Based on the analysis of verstek (default) divorce decisions at the Jember Religious Court that did not apply the provisions of Supreme Court Circular (SEMA) Number 3 of 2023, several underlying factors were identified. Interviews with judges revealed that SEMA is not consistently used as the primary reference due to the unique and specific circumstances inherent in each case. Judges tend to adopt a contextual approach, prioritizing the legal facts presented during the proceedings and emphasizing the principle of *maṣlaḥah* (public interest) to prevent further harm to the aggrieved party. This reflects a judicial preference for substantive justice over rigid procedural compliance.

In the broader context of legal disparity, the inconsistent application of SEMA No. 3 of 2023 in similar cases within the same jurisdiction indicates a potential lack of uniformity in judicial practice. This disparity arises from differing legal interpretations, variations in factual circumstances, and the inherently subjective nature of judicial

[62] Risma Nur Arifah, Azlin Alisa Ahmad, dan Silvana Oktavia Rochmawati., "Trademark Cancellation Of The Pt. Diposin In The Principle Of Legal Certainty By Sudikno Mertokusumo," *El-Mashlahah*, No.1 (2023): 27 http://repository.uin-malang.ac.id/15188/1/15188.pdf

discretion. While some judges argue that legal disparity only occurs when divergent legal reasoning leads to different verdicts, inconsistent use of non-binding guidelines such as SEMA may contribute to legal uncertainty and diminish public trust in the judiciary. Therefore, this study recommends that the essential substance of SEMA No. 3 of 2023 be codified into more binding and enforceable legislation. Furthermore, a comprehensive re-evaluation of the role and effectiveness of Supreme Court Circulars as legal instruments in judicial practice is necessary to ensure consistency, legal certainty, and public confidence in the judicial system.

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