

# Disparity in the Considerations of Judges in Deciding Divorce Disputes in Religious Courts and District Courts

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**Abstract:** *This paper aimed at exploring judges' disparity in deciding divorce disputes in religious courts and district courts. Disparity is not only the differences in legal subjects that obey the absolute competence of different judicial environment but also the norms that serve as guidelines. This research is empirical juridical research with primary data namely judges' decision and the results of judges' interview. This research found that there were several disparity differences between religious and district judges in deciding divorce disputes. First, the considerations of district court judges were oriented to the aspect of legal certainty over juridical considerations. Second, besides paying attention to legal certainty aspects, the panel of judges at religious courts also considered religious aspects in making decision. Consideration of the rules of Islamic law has a very important role for judges in making decisions.*

**Abstrak:** Artikel ini bertujuan untuk mengeksplorasi disparitas hakim dalam memutus sengketa perceraian di pengadilan agama dan pengadilan negeri. Disparitas tidak hanya perbedaan subyek hukum yang tunduk pada kompetensi absolut dari lingkungan peradilan yang berbeda tetapi juga norma-norma yang menjadi pedoman. Penelitian ini merupakan penelitian yuridis empiris dengan data primer berupa putusan hakim dan hasil wawancara hakim. Studi ini menemukan bahwa terdapat beberapa perbedaan antara hakim agama dan hakim distrik dalam memutus sengketa perceraian. Pertama, pertimbangan hakim pengadilan negeri berorientasi pada aspek kepastian hukum di atas pertimbangan yuridis. Kedua, selain memperhatikan aspek kepastian hukum, majelis hakim pengadilan agama juga mempertimbangkan aspek agama dalam mengambil keputusan. Pertimbangan aturan hukum Islam memiliki peran yang sangat penting bagi hakim dalam mengambil keputusan.

**Keywords:** *Disparity; Judges Consideration; Divorce; Religious Court; District Court.*

## INTRODUCTION

Judicial power under the Supreme Court is carried out and implemented by four judicial circles, namely general courts, religious courts, military courts, and state administrative courts (Law Number 48 of 2009 concerning judicial power, 2009) (Subiyanto, 2016). These four judicial circles under the Supreme Court are the organizers of power in the judicial field. Therefore, they act as constitutional courts to enforce law and justice in their position as state courts (Rahmi, 2018; Harahap, 2007: 180-181).

The authority of each judicial environment includes the general court, as outlined in Article 50 and Article 51 of Law Number 49 of 2009 concerning the second amendment to Law Number 2 of 1986 concerning General Courts (2009a) (General Court Law) only authorized to adjudicate criminal (general and special criminal) and civil (general and special civil) cases, in addition to being authorized in the general civil sector as well (Maksum, 2020). The authority that they have are applied to the people in general. One of the general civil disputes which is under the authority of district court is the dispute of non-Muslims

divorce (Thohari, 2015). While the religious court as one of the special judicial institutions has duties and functions in resolving disputes that arise among Muslims (Aisyah, 2018). In Article 49 of Law Number 50 of 2009 concerning the second amendment to Law Number 7 of 1989 concerning Religious Courts (2009b) (Religious Court Law), it is explained that the Religious Courts have authority over issues/disputes related to marriage, inheritance, endowments, charity, wills, grants, and disputes in the field of sharia economics. District courts and religious courts have the same absolute competence in civil matters such as divorce and others (Rosalinda, 2019). Divorce is part of marriage because there is no divorce without marriage previously. Marriage is the beginning of living together between a man and a woman which is regulated in a country's legislation. Lili Rasjidi states that inner and outer bonds are important in a marriage because it is also perceived as an effort to create a happy life based on God (Farhan et al., 2020). Meanwhile, realizing a happy life is not an easy matter. However, God gives instructions to prevent divorce (Farhan et al., 2020: 246). In civil law, divorce can only occur based on the reasons determined by law. In relation to this, there are two meanings that need to be understood, namely the term of marriage dissolution and the term of divorce. Divorce is one of the reasons for dissolution of a marriage (Manan, 2006: 445).

Government Regulation of the Republic of Indonesia Number 9 of 1975 concerning the implementation of Law Number 1 of 1974 concerning marriage (1975), in Article 19 it is stated that the reasons that can be used as divorce reasons are:

1. One of the parties commits adultery or becomes a drunkard, gambler, and so on which is difficult to cure.
2. One of the parties leaves the other party for 2 consecutive years without the permission of the other party and without a valid reason or for other reasons beyond his/her control.
3. One of the parties gets a prison sentence of 5 years or a heavier sentence after the marriage takes place.
4. One of the parties commits violence or torment that endangers the other party.
5. One of the parties gets a disability or illness as a result of not being able to carry out his obligations as husband/wife.
6. There are constant disputes and quarrels between husband and wife and there is no hope of living in harmony again in the household.

The Compilation of Islamic Law also stipulates that what can be the reasons for divorce is due to:

1. One of the parties commits adultery or becomes a drunkard, gambler, and so on which is difficult to cure.
2. One of the parties leaves the other party for 2 consecutive years without the permission of the other party and without a valid reason or for other reasons beyond his/her control.
3. One of the parties gets a prison sentence of 5 years or a heavier sentence after the marriage takes place.
4. One of the parties commits violence or torment that endangers the other party.
5. One of the parties gets a disability or illness as a result of not being able to carry out his obligations as husband/wife.
6. There are constant disputes and quarrels between husband and wife and there is no hope of living in harmony again in the household.
7. A husband breaks taklik talaq (marriage agreement).

8. Conversion of religion that causes disharmony in the household.

Based on the reasons for divorce as mentioned in Government Regulation Number 9 of 1975 and also the Compilation of Islamic Law above, it can be observed that there are differences between the reasons for divorce regulated by Government Regulation Number 9 of 1995 and what is regulated by the Compilation of Islamic Law. The difference is in the form of additional reasons for divorce which are regulated in the Compilation of Islamic Law, so that there is a difference in the number of reasons for divorce between those regulations. Government Regulation Number 9 of 1975 is the juridical basis for district courts in examining and deciding divorce disputes that occur among non-Muslims, while the Compilation of Islamic Law is the juridical basis for the religious courts to examine and decide on divorce disputes that occur among Muslims.

Relating to procedural law, this is a discussion of the processes and stages that must be through and carried out by the judiciary in an effort to realize justice for justice seekers. This is in accordance with the hadith of the Prophet Muhammad PBUH: "Abu Thahir Ahmad bin Amru bin Sarh bin Wahab from Juraih from Ibn Abbas has conveyed to me that the Messenger of Allah, PBUH, said "if someone's claim is granted just like that, surely many people will sue for the blood and property of others, but the oath is obligatory on the defendant" (Muslim, 1993: 120). Based on the hadith, it is obvious that in relation to the court as a forum for realizing justice, the judge at the court has certain efforts and considerations and is based on the formal law that applies in examining and deciding each case.

Concerning the description above, the disparity in the consideration of the panel of judges in deciding disputes is determined

not only by absolute competence but also existing regulations. The next problem is that the religious courts are an extension of Islamic law rules in examining and adjudicating divorce disputes that occur among Muslims, so that the panel of judges at religious court is very concerned about the values and rules/teachings of the Islamic law from each of its lines in adjudicating the divorce dispute. Does the district court, in examining and adjudicating divorce disputes that occur among non-Muslims, pay attention to the religious teachings and rules of each litigating party?

## RESEARCH METHODS

This research is an empirical juridical study with a qualitative approach. The primary data sources were: first, judges and junior clerks of lawsuit at Padang Panjang religious court and judges at Padang district court. Second, cases files at Padang Panjang Religious Court and Padang District Court. The data were obtained by interviewing the primary sources from both types of courts: Padang Panjang Religious Court, Padang District Court, Pariaman District Court, and Sawahlunto Religious Court. In addition to interviews, a documentation study was also conducted. The sources of data were obtained by studying the copied document of the decisions of judges panel who examined and decided on divorce disputes at Padang Panjang Religious Court and Padang District Court.

## RESULTS AND DISCUSSION

### Reasons for Divorce Documented in Religious Court

In the context of the task of judges in the Indonesian legal system, decisions are a form of judge's thinking that does not just

appear in the judicial process but is carried out through logical and complicated reasoning, excavation and legal discovery, to later become a source of law or what is called jurisprudence (Aisyah, 2018; Undang-Undang Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman, 2009; Visegrady, 2015). The construction of the judge's decision consists of three main parts, namely the head of the decision, legal considerations and the decision. The urgency of having a decision head that reads "*Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa*" is a manifestation of the judge's efforts to achieve justice based on religious norms and values. So, every decision must be accountable and the responsibility lies in legal considerations. So, legal considerations are important things that must be compiled using the right reasoning from a judge. (Yunanto, 2019: 197)

Referring to Article 19 of the Government Regulation of the Republic of Indonesia Number 9 of 1975 concerning the implementation of the marriage law and Article 116 of the Compilation of Islamic Law, it is explained the reasons that can cause divorce to be carried out in religious courts and district courts. Based on these provisions, the following matters can be observed:

#### 1. Reasons for divorce documented in Padang Panjang Religious Court

Based on the data obtained from the book of lawsuit registration at Padang Panjang Religious Court, it was recorded that there were 204 divorce cases in 2010 consisting of talaq divorce and judicial divorce. The reasons for the submitted divorces can be qualified into 2 types (Yosmedi, 2011):

- a. There are constant disputes and quarrels between husband and wife and there is no hope of living in harmony in the household.

- b. A husband breaks taklik talaq (marriage agreement).

It was further explained that among the 204 cases, 2/3 of them were due to constant disputes and quarrels and there was no hope in living in harmony in the household, and the other 1/3 cases were because of breaking *taklik talaq*. This is also seen in the decision of the judges panel on these cases (Yosmedi, 2011).

#### 2. Reasons for divorce documented in Sawahlunto Religious Court

Rosmaleni, a judge at Sawahlunto Religious Court stated that the judge's consideration in deciding a divorce dispute was based on the extent to which the submitted lawsuit was proven or not proven. Besides that, it also looks at the extent to which the regulations governing divorce, namely the Quran and Sunnah, as well as the rules of Fiqhiyyah, Law Number 16 of 2019 concerning amendments to law Number 1 of 1974 concerning marriage, government regulation Number 9 of 1975 concerning implementing regulations for marriage law (Rosmaleni, interview, April 5<sup>th</sup> 2022).

#### Reasons for Divorce Documented in District Court

##### 1. Reasons for divorce documented in Padang District Court

Based on the data obtained from the book of civil case registration at Padang, in 2010, there were 17 cases of divorce lawsuits recorded by the civil registration unit of Padang District Court (civil clerk of Padang District Court). Among the 17 divorce cases, there were 13 cases that have been decided and the files have been stored to the archives section of the law clerkship unit of Padang District Court (Law clerk of Padang District Court). Based on the results of the research, it can be observed that the reasons for divorce of those 13 cases are as follows:

- a. There were 9 cases due to constant disputes and quarrels between husband and wife and there was no hope of living in harmony in the household.
- b. There was 1 case because the husband was a drunkard and bossy.
- c. There were 2 cases due to violence against the wives and having affair with other women.
- d. There was 1 case because the husband was a gambler and not responsible for providing a living.

Based on the reasons described above, it can be observed that generally there are 4 types of reasons for divorce lawsuits submitted to Padang District Court in 2010. However, after observing and analyzing the decision of the judges panel on these cases, the reasons for divorces in points b, c, and d above were proven, the panel of judges in the evidentiary process stated in their consideration that there had been a dispute and quarrel between the husband and wife, and there was no hope of living in harmony in the household (Law clerk of Padang District Court).

## 2. Reasons for divorce documented in Batusangkar District Court

Furthermore, the disparity of court decisions can be analyzed from the decision of Batusangkar District Court Number 2/Pdt.G/2021/PN.Bsk in the case of divorce of non-Muslim couples and the panel of judges granted the lawsuit because the defendant had been legally and properly summoned but still did not attend without a valid reason or sent someone to represent him at the trial so that the panel of judges continued the examination of the case and continued by carrying out *verstek* (trial in absentia/absence) (Erwin Radon Ardiyanto, interview, May 5<sup>th</sup> 2022).

Regarding the description above, it can be observed that the occurrence of divorce

between husband and wife which was examined and decided at Padang District Court (2010) and Batusangkar District Court (2021) as a whole was due to constant disputes and quarrels between husband and wife and there was no hope of living in harmony again in the household.

It can be concluded that there are similarities and differences between the causes or reasons for divorce recorded in the religious courts and the district courts as described above. Generally, the divorce cases that were examined and decided at the religious and district courts were due to constant disputes and quarrels between husband and wife and there was no hope of living in harmony again in the household.

## Judges' Considerations in Deciding Divorce Cases in Religious Courts and District Courts

### 1. Judges' considerations in deciding divorce cases in religious courts

The examination of the dispute or case by the judges ends with a decision or verdict. The judges in their decisions determine the actual legal relationship (which must apply) between the two disputing parties. In determining this, the judges must consider all aspects from various points of view so that a sense of justice can be realized as expected by justice seekers.

Ifdal states that judges at religious courts in deciding divorce cases have very complex considerations, besides considering the juridical aspect, they must also pay attention to the sociological and philosophical aspects which will determine the quality of the judges' decision. For example, in term of juridical considerations, the judges must pay attention to the provisions of the legislation that apply to divorce issues (Marriage Law, Government Regulation Number 9 of 1975 and compilation of Islamic law). Meanwhile, the sociological aspect is like the customs or

customary law of a society regarding divorce. Then, from the philosophical aspect is how judges consider the position of customary law with statutory regulations to realize justice as expected by justice seekers (Ifdal, 2011).

When deciding a case, these three elements theoretically must receive proportional and balanced attention. Although in the practice, it is not always easy to compromise on these elements. The conflict that occurs between judges' decision on a case and what the community wants usually revolves around the extent to which considerations of juridical elements (legal certainty) and philosophical elements (justice) are accommodated in it. Legal certainty must be enforced so that there is no worry. But if the emphasis is too much on legal certainty and too strict in obeying the law, it will result in rigidity and create unfair sense.

Besides, what is no less important is paying attention to the rules of Islamic law in stating a decision. Judges at religious courts are very concerned about the teachings of Islamic law from every point of view. This is because the religious court is a particular court intended for Muslims. So that it can be interpreted that the religious court is an extension of the rules of Islamic law in enforcing the rules of sharia itself (Ifdal, 2011). Then, these considerations will be made by looking at several aspects:

a. Considerations based on juridical aspect (legal certainty)

Based on the provisions, if there is a divorce suit that is submitted to a religious court, the judges may not refuse to examine the incoming case and the case must be examined and the judges are obliged to make a decision in that case. In making decision, the judges must consider what the point of the lawsuit filed by the plaintiff. After that, the judges must strive for peace

between the plaintiff and the defendant. These efforts are carried out earnestly by providing advice and views to the plaintiff and defendants in each trial, even though at the beginning mediation efforts has been carried out, facilitated by the mediator judges. Furthermore, the judges must also consider the legal relationship between the plaintiff and the defendant, and pay attention to the lawsuit based on the juridical aspect, whether it is in accordance with formal requirements and the material of a lawsuit (Ifdal, 2011; Rosmaleni, interview, April 5<sup>th</sup> 2022).

The next decisive consideration is the consideration of evidence and the efforts of evidence that take place during the trial. Judges must consider the relationship between one another. Thus, the judges can find the real facts.

Besides considering the things described above, the next consideration that is mandatory for judges in religious courts is to look at the rules and provisions that have been regulated in sharia rules. Juridically, the provisions regarding Islamic sharia rules, that can be used as guidelines for judges in religious courts in deciding divorce cases for Muslims, have been contained in the Compilation of Islamic Law (Ifdal, 2011; Rosmaleni, interview, April 5<sup>th</sup> 2022).

b. Considerations based on sociological aspect (benefits)

In addition to paying attention to the juridical aspects, judges in religious courts must also pay attention and consider sociological aspects (aspects that are in direct contact with the community). According to Drs. Ifdal SH, sociological considerations of religious court judges can be observed during the examination of the case. Basically, the religious court examines divorce cases of which the marriage of the litigating party has been registered in the office of religious affairs, however, even for those whose

marriages are not registered, the religious courts will keep examining the cases, absolutely by following the mechanism and procedures as well as the provisions that have been regulated by the applicable law dan regulations of marriage laws and the Compilation of Islamic Law.

For parties who file for divorce but their marriage is not registered in the office of religious affairs, they can apply for marriage confirmation which is well-known as *Isbat Nikah* to the religious court. To illustrate, marriage confirmation is made due to the consideration for the party whose marriage is unregistered because they undergo *siri* marriage or have other reasons that make the marriage unregistered, while according to the sharia actually the marriage has been deemed valid, but parties wish to terminate the marriage legally in accordance with the provision. If the judge does not consider this while the circumstances of the parties force a divorce, it perhaps will bring harm if the divorce is not granted.

c. Considerations based on philosophical aspect (justice)

Decision making by judges will have legal consequences for litigants. Thus, the decision-making process must reflect law enforcement and justice. In the decision-making process, the judges' wisdom is highly demanded, so that their decision reflects the sense of law and justice for the litigants. Therefore, judges are obliged to understand, explore, and follow the legal values that exist in society (Ifdal, 2011; Rosmaleni, interview, April 5<sup>th</sup> 2022).

Moreover, in the decision-making process judges who consist of 3 persons have the freedom to perform *ijtihad* (independent reasoning) that reflects the sense of law and justice for the litigants.

d. Consideration of Sharia rules aspect

Ifdal says: "Consideration of religious provisions is a mandatory element that

cannot be ignored by judges at religious courts in deciding divorce cases. This means that every decision must be based on considerations regarding the provisions regulated by the rules of Islamic law. Therefore, the judges at religious court will take into account the laws and regulations related to the divorce case itself and all the religious provisions of the case in making decision. So that it will be obvious that the institution or religious judiciary is one of the forums for enforcing the rules of Islamic law.

Furthermore, judges in a religious court in making decision must look at the rules and provisions that have been regulated in sharia rules. They must pay attention to the provisions that have been arranged neatly and carefully by fiqh. Because this is a divorce issue, the judges of the religious court must understand very well the provisions that have been regulated by the fiqh *munakahat* (Ifdal, 2011; Rosmaleni, interview, April 5<sup>th</sup> 2022).

Based on the previous description, it can be concluded that religious court judges consider religious arguments, such as the Quran verses, hadiths, the opinions of fiqh scholars, and fiqh & *ushul* fiqh (the basis of fiqh) provisions.

2. Judge's considerations in deciding divorce cases in district courts

Asmar, a judge at Padang District Court, said that judges had precision and seriously paid attention to juridical aspects in making decision because juridical aspects determined the legality of judges' decisions, so that the decisions were not declined legally. Besides, judges also had to pay attention to sociological and psychological aspects which determined the quality of judges' decisions as expected by justice and justice seekers (Asmar, Erwin Radon Ardiyanto, interview, April 6<sup>th</sup> 2022; Afdil Azizi, interview, May 10<sup>th</sup> 2022).

District court judges observe and consider the following aspects in making decisions:

a. Considerations based on juridical aspect (legal certainty)

District court is a place to file divorce lawsuit for non-Muslims. District court can only check and make a decision for the marriages which are registered in Population and Civil Registry Office. When making a decision, the judges must first consider what the point of the lawsuit really is. After that, the judges must seek peace between the plaintiff and the defendant by means of mediation. Furthermore, the judges must also consider the legal relationship between the plaintiff and the defendant, and pay attention to the juridical aspect of the plaintiff's claim, whether it is in accordance with formal requirements and the material of a lawsuit. The very necessary consideration is the consideration of evidence and the evidentiary efforts that take place during the trial. Judges must consider the relationship between one another. Thus, the judges can find the real facts. Consideration of this evidentiary effort is something very important and most decisive from a juridical point of view because basically in the process of examining divorce cases, it is the evidence that is the most decisive part for legal certainty that will be obtained by the parties (Asmar, 2011; Afdil Azizi, interview, May 10<sup>th</sup> 2022).

b. Considerations based on sociological aspect (benefits)

The judges are responsible for returning the law to the owner of the law that is definitely human being. Many people have a cynical and pessimistic view towards judges, but there are also those who have hope for the judges' decision in a case. There are many problems that trigger public disappointment, one of which is how judges decide cases that can invite pros and cons in

the community. A decision sometimes can kill the community's sense of justice (Asmar, Erwin Radon Ardiyanto, interview, April 6<sup>th</sup> 2022; Afdil Azizi, interview, May 10<sup>th</sup> 2022).

Therefore, judges in deciding a case must consider and make a fair and wise decision by considering the legal implications and impacts as well as the benefits that will develop and can be enjoyed by the community. Judges must pay attention to all forms of legal consequences arising from the decision they make. According to government regulation number 9 of 1975 in article 34 point (2), it is explained that "a divorce is considered occurred with all its consequences by the time it is registered and recorded by the clerk, except for those who are Muslims, it starts from the ruling of which it has permanent legal force".

c. Considerations based on philosophical aspect (justice)

Basically, judges' decisions will have a juridical influence on the litigants, then there must be a decision-making process that must reflect law enforcement and justice. In that process, the judges' wisdom is highly demanded. Therefore, judges are obliged to understand, explore, and follow the legal values that exist in society (living law). Judges in deciding a case must consider juridical truth (law) and philosophical truth (justice) (Asmar, 2011; Afdil Azizi, interview, May 10<sup>th</sup> 2022).

Based on the description above, it can be observed that basically judges in deciding divorce cases both in religious courts and district courts have very complex considerations. Besides considering the juridical aspect, judges at religious courts and also district courts must pay attention to sociological and philosophical aspects that will determine the quality of the judges' decision itself. In deciding a case, these three



elements theoretically must receive proportional and balanced attention.

Practically, it can be observed that both religious courts (Padang Panjang and Sawahlunto) and district courts (Padang and Batusangkar) have similarities in considering decisions for divorce cases. Judges in religious courts and district courts do not only give considerations and pay attention to juridical aspects, but also sociological and philosophical aspects on the case they decide. Although in its practice these aspects have been considered, there is a proportional difference between judges in religious courts and district courts in giving these considerations. For example, it can be observed that in the religious courts for parties whose marriages are not registered at the Office of Religious Affairs, but one of the parties files a divorce suit to the court, then the Religious Court keeps examining and adjudicating the divorce suit by following the existing mechanism and provisions which is based on other considerations. The considerations that the author means are sociological and philosophical considerations. On the other hand, divorce suit that can be examined and decided by district courts is the divorce of a registered marriage (registered in Civil Registry Service Office). Thus, the basic difference is that judges in district courts place emphasize more on giving juridical considerations, while judges in religious courts do not only pay attention to juridical matters, but also to social and philosophical aspects. The next difference that can be observed is that judges at religious courts in making decisions are very concerned about religious aspect. In other words, they are very concerned about the rules and provisions of Islamic law in deciding divorce cases. Religious court judges must consider religious arguments, such as the Quran verses, hadiths, the opinions of fiqh scholars, and fiqh & *ushul*

fiqh (the basis of fiqh) provisions in making decision, meanwhile, at Padang District Court, the judges were more based on juridical considerations and did not pay attention to religious teachings and provisions of the litigants.

## CONCLUSION

The case of child custody is quite a dilemma because it involves the life and welfare of the child after the divorce of his parents. Judges are the spearhead in providing justice for children, in this case the role of judges is needed through progressive thinking and reasoning. Progressive legal thinking practiced by judges is not only based on a textual approach. The textual approach will not only injure the value of the benefits that exist within the scope of child custody issues but will also have an impact on the benefit of the child. To provide progressive thinking, legal discovery becomes an important means so that judges' reasoning can run under the direction of progressiveness.

The reasons for divorce which are examined and decided at the religious court and district court are principally similar. Because legally they are both guided by Law Number 1 of 1974 concerning marriage, Government Regulation of the Republic of Indonesia Number 9 of 1975 concerning the implementation of Law Number 1 of 1974. Specifically for religious courts, compilation of Islamic law is added to these provisions. Moreover, there are also differences regarding the reasons for divorce. In religious courts, the reasons for divorce are more varied than the ones recorded in district courts. This is an implication of the implementation of Islamic law compilation in religious courts. Thus, it can be seen that the compilation has a very important role.

Judges' considerations in deciding divorce cases in religious courts and district courts basically have similarities:

1. District courts judges emphasizes more juridical considerations in deciding divorce case than the judges at religious courts do.
2. Judges at religious courts in making decisions are very concerned about religious aspects, considerations from the side of Islamic rules have a very important role for judges in making decisions. Meanwhile, in the district courts, judges tend to not consider and pay attention to religious teachings and provisions of the litigants in making decisions.

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