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Article Title

## **The Challenge of a Ghoib Divorce Lawsuit: An Analysis of a Court Decision and Legal Implications in Indonesia**

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## **ABSTRACT**

*This research aimed to analyze the legal basis and considerations of judges in deciding ghoib divorce cases and their legal consequences for the parties involved. This study combines normative and empirical research methods. Subsequently, the collected data were analyzed qualitatively to describe the problem and address the research purposes. The results showed that in deciding ghoib divorce cases, the Panel of Judges considered various aspects balanced, including the reasons for divorce given by the plaintiff and witness testimony. The judge made the appropriate decision by *verstek*, granting the ghoib divorce lawsuit and imposing *talaq one ba'in sughra*. The legal consequences of ghoib divorce refer to Article 119 of the Compilation of Islamic Law, which regulates *talaq ba'in sughra*, while Law Number 1 of 1974 and the Civil Code only regulate the legal consequences of divorce in general. Therefore, it is recommended that judges consistently adhere to the principles of justice and caution when handling ghoib divorce cases. Married couples must realize that disappearing without a trace is not a wise solution and will only complicate problem-solving. Divorce should be pursued as a last resort after all efforts to maintain the household have failed. Furthermore, the government needs to create more transparent and comprehensive rules and guidelines regarding the ghoib divorce trial process in Religious Courts to avoid legal uncertainty and ensure the protection of all parties' rights.*

*Keywords: Ba'in Sughra; Divorce Lawsuit; Ghoib; Marriage Law; Talaq.*

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## **INTRODUCTION**

Marriage, as a sacred union between a man and a woman, is ideally based on a commitment to building a harmonious, prosperous, and lasting household (Mangarengi & Hamzah, 2021). Law Number 1 of 1974 mandates that marriage aims to establish a happy and eternal family based on belief in the One and Only God. In this context, marriage is not only viewed as a social event but also has profound legal and spiritual dimensions (Nst & Lubis, 2024). Marriage creates a bond that binds both parties in a relationship expected to be full of love, trust, and shared responsibility (Gadjong, 2023).

Marriage will undoubtedly give rise to rights and obligations between husband and wife, such as the husband's obligation to provide for his wife physically and emotionally, while the wife has the right to receive such support (Ali et al., 2022). Physical support includes clothing, food, and shelter, while emotional support includes affection, attention, and protection. The wife also must manage the household, such as cooking, cleaning the house, and caring for children, while the husband is obliged to assist his wife in this regard, primarily if the wife also works (Anggaunitakiranantika, 2021). However, reality shows that not all marriages can achieve this goal. Disputes and difficulties in the household often lead to divorce (Lira, 2023).

Divorce is one way to break the bonds of marriage that have been built (Atmadianti & Rizal, 2024). Although seen as a last resort, divorce is permitted by law with certain conditions and procedures. Divorce is regulated in Articles 39 to 41 of Law Number 1 of 1974 and Articles 14 to 36 of Government Regulation Number

9 of 1975. Divorce can be filed in two ways: divorce lawsuit (filed by the wife) and divorce by *talaq* (filed by the husband) (Darmawan et al., 2023). These two types of divorce have different processes and legal implications. There is a lawsuit among the various reasons for or problems with divorce because the husband's whereabouts are unknown, commonly referred to as a ghoib divorce (Ahkam et al., 2023). Ghoib divorce can be qualified as a ground for divorce as stated in Article 19 point b of Government Regulation Number 9 of 1975 junto Article 116 point b of the Compilation of Islamic Law which stipulates that divorce can occur because one party leaves the other party for 2 (two) consecutive years without the other party's permission and a valid reason or because of other matters beyond their ability.

Ghoib divorce poses challenges in the religious court process. One of the main challenges is ensuring the fulfilment of the defendant's rights, whose whereabouts are unknown (Hasibuan et al., 2022). It raises various questions and controversies, for example, how to ensure that the defendant is genuinely unknown, how to carry out a legally valid summons, and how to protect their rights in the trial process. In addition, ghoib divorce also raises other issues, such as legal certainty for both parties, especially regarding marital status, division of joint property, child custody, and maintenance.

An example of a ghoib divorce case decided by the Makassar Religious Court in Decision Number 66/Pdt.G/2021/PA.Mks demonstrates the complexity of this issue. In this case, the plaintiff filed for divorce because the defendant had left her, and his whereabouts were unknown. Despite being officially summoned through various media, the defendant never appeared in court. The court then faced a dilemma in determining the marital status of both parties and ensuring justice for both. Finally, the judge declared the divorce a ghoib divorce by considering various legal and justice aspects.

Based on the description above, this research aims to analyze the legal basis and considerations of judges in deciding ghoib divorce cases and their legal consequences for the parties. This research is expected to contribute to the development of law and the enforcement of justice related to ghoib divorce cases in Indonesia.

## **METHOD**

This study combines normative and empirical research methods. The normative method analyzes legal issues based on legislation and court decisions (Qamar & Rezah, 2020). At the same time, the empirical method focuses on the practice of law regarding reciprocal relationships with social phenomena, encompassing economic, political, psychological, and anthropological aspects (Irwansyah, 2021). The types and data sources used in this study are primary and secondary. Primary data collection was done through direct interviews with informants, while secondary data were obtained

through a literature review of legal materials. Subsequently, the collected data were analyzed qualitatively to describe the problem and address the research purposes (Sampara & Husen, 2016).

## **RESULTS AND DISCUSSION**

### **A. Decision Number 66/Pdt.G/2021/PA.Mks: Legal Basis for the Judge's Considerations in a Ghoib Divorce Lawsuit**

Civil procedural law in Indonesia adheres to the principle of simple, fast, and low-cost trials. However, in divorce cases, especially those involving ghoib divorce, the principle of caution and protection of household integrity takes priority (Farid et al., 2024). It is reflected in [Law Number 1 of 1974](#) and [Government Regulation Number 9 of 1975](#), which regulate special procedures and provisions for settling divorce cases.

One crucial principle emphasized in the legislation is the effort for reconciliation. Article 39 of [Law Number 1 of 1974](#) explicitly states that divorce can only occur before a court session after the court concerned has attempted and failed to reconcile the two parties. This effort for reconciliation manifests the principle of protecting household integrity and preventing unwanted divorce (Muhaimin & Ishaq, 2023). In this context, the judge acts not only as an adjudicator but also as a mediator who actively encourages the parties to find the best solution for their problems (Golovashevych et al., 2024).

The mediation process in divorce cases involves providing advice, guidance, and opportunities for both parties to express their complaints and hopes. The judge acts as a neutral and objective facilitator, helping the parties communicate effectively and find common ground that is acceptable to both. If the reconciliation effort is successful, then the divorce case can be withdrawn, and the household can be saved (Sulaiman, 2021). However, if the reconciliation effort is unsuccessful, the trial process will continue to examine the reasons for the submitted divorce (Ilham, 2020).

However, the mediation process faces challenges in ghoib divorce cases, where the defendant's whereabouts are unknown. In this situation, the judge cannot communicate directly with the defendant to listen to their version of the story and offer reconciliation solutions. Nevertheless, the judge must still strive to mediate by summoning the defendant per the applicable procedural law provisions (Sudirman et al., 2023).

[Decision Number 66/Pdt.G/2021/PA.Mks](#) reveals that the judge of the Makassar Religious Court has attempted to conduct mediation by carrying out

an official and proper summons on January 13, 2021, and February 3, 2021, to the defendant. The summons was by the provisions of Article 27 of [Government Regulation Number 9 of 1975](#), which regulates the procedures for summoning in divorce cases. In this case, the judge ensures that even though the defendant is absent, their rights must still be protected throughout the trial.

A valid summons is a form of respect for the defendant's rights and the principle of due process of law ([Nurfaizah & Sholehudin, 2023](#)). Through a valid summons, the defendant is given the opportunity to learn about the lawsuit filed against them and prepare to defend their rights. If the defendant does not appear even though they have been legally summoned, the judge can continue the examination of the case without their presence, noting that the defendant's rights are still observed and protected throughout the trial process.

In this case, the defendant did not appear or send representation without a valid reason. Thus, the reconciliation process could not be carried out because the defendant never appeared in court. Therefore, according to procedural law provisions, the case examination can be continued with ghoib divorce status. However, Imran provides a nuanced perspective on the discussion of ghoib divorce.<sup>1</sup> His statement reveals an interesting dynamic in the religious court process, namely the possibility of the ghoib being cancelled if the defendant returns before the divorce decree is issued. This shows that ghoib divorce is not a rigid and closed procedure but has the flexibility to adapt to changing facts and circumstances.

From the perspective of procedural law theory, the possibility of the defendant's return in a ghoib divorce case can be seen as a form of intervention or joinder (*voeging*). Intervention is a legal event where a person interested in a case asks the judge to be included in the trial process ([Rakhel et al., 2022](#)). In this case, the defendant, whose whereabouts were unknown, can intervene by appearing in court and expressing their desire to participate in the case settlement process.

Furthermore, Kamaruddin provides an interesting perspective on the role of judges in handling divorce cases, especially ghoib divorce. Kamaruddin, with his knowledge and experience in the field of law, emphasizes the importance of achieving a balance between procedural formality and substantive justice.<sup>2</sup> Procedural formalities are essential to ensure legal order and protect the parties' rights. However, they should not override the substance of the case, which concerns the interests and justice of the disputing parties.

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<sup>1</sup>Interview Results with the Court Clerk of the Makassar Religious Court. Dr. H. Imran, S.Ag., S.H., M.H., on January 8, 2024.

<sup>2</sup>Interview Results with the Judge of the Makassar Religious Court. Drs. H. Kamaruddin, S.H., M.H., on January 17, 2024.

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In the context of divorce, procedural formality includes the procedures for filing a lawsuit, summoning the parties, submitting answers, providing evidence, and issuing a decision (Haekal et al., 2020). Meanwhile, the substance of the case concerns the reasons for the divorce and its impact on the parties, especially if there are minor children. Judges must carefully examine both aspects so that the decision rendered is not only procedurally valid but also fair and beneficial to the parties.

Kamaruddin highlights ghoib divorce cases, where the defendant is absent at the trial. He reminds us that judges should not be easily tempted to grant a divorce solely based on the defendant's absence.<sup>3</sup> Moreover, the judge must carefully examine the reasons given by the plaintiff and ensure that the marriage is no longer sustainable. This is important to prevent abuse of the law and protect the rights of the absent defendant.

Kamaruddin's view aligns with the theory of justice put forward by Aristotle (1999), who distinguishes two types of justice: distributive justice and corrective justice. Distributive justice relates to the fair and proportional distribution of rights and obligations among members of society. Meanwhile, corrective justice is restoring justice that has been disrupted due to rights violations or unlawful acts. In the context of divorce, distributive justice requires judges to consider the rights and obligations of each party in a balanced manner, while corrective justice requires judges to restore justice that has been disrupted due to disputes in the household.

Analysis of Decision Number 66/Pdt.G/2021/PA.Mks shows that the judge of the Makassar Religious Court has succeeded in applying these principles of justice in handling ghoib divorce cases. The judge did not only focus on the aspects of procedural formality that allow divorce to be decided without the defendant's presence but also delved into the substance of the household problems underlying the lawsuit. This approach aligns with substantive justice, which emphasizes achieving essential justice, not just procedural justice (Wijayati et al., 2021).

Substantive justice requires judges to not only focus on rigid legal rules but also consider the values of justice, expediency, and legal certainty in rendering decisions. In examining the substance of the case, the judge in Decision Number 66/Pdt.G/2021/PA.Mks was based on Article 19 point b and point f of Government Regulation Number 9 of 1975 junto Article 116 point f of the Compilation of Islamic Law. Article 19 point b of Government Regulation Number 9 of 1975 provides a legal basis for ghoib divorce if one party leaves the other for two consecutive

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<sup>3</sup>Interview Results with the Judge of the Makassar Religious Court. Drs. H. Kamaruddin, S.H., M.H., on January 17, 2024.



years without permission and a valid reason. In this case, the defendant had left the plaintiff for over two years, and their whereabouts were unknown. However, the judge did not merely rely on the fact of the defendant's absence. The judge also examined whether the marriage was no longer sustainable by examining the reasons given by the plaintiff.

Therefore, the judge also relied on Article 19 point f of [Government Regulation Number 9 of 1975](#) junto Article 116 point f of the [Compilation of Islamic Law](#), which regulates divorce due to continuous disputes and quarrels so that there is no hope of living in harmony anymore. To obtain this conviction, the judge carefully examined the witness statements. Article 22 of [Government Regulation Number 9 of 1975](#) regulates the clarity of the causes of disputes and quarrels by hearing the testimony of family members and people close to the husband and wife.

Witness testimony plays a crucial role in the evidentiary process in court, especially in ghoib divorce cases where the defendant is absent. In civil procedural law, witness testimony is legitimate evidence to reveal material truth ([Kartiko et al., 2024](#)). This aligns with the theory of fair trial (*rechtmatig proces*), which emphasizes the importance of a fair and transparent examination process to find the truth and achieve justice ([Gestora et al., 2022](#)). In ghoib divorce cases, where the judge cannot examine the defendant directly, witness testimony becomes even more critical because it can provide valuable information and perspectives regarding the condition of the parties' household.

In [Decision Number 66/Pdt.G/2021/PA.Mks](#), the Makassar Religious Court judge, placed witness testimony as one of the main foundations in building their legal conviction. The two witnesses presented by the plaintiff, namely her sibling and brother-in-law, provided detailed and consistent testimony regarding the disharmony of the plaintiff and the defendant's household. They explained that disputes and quarrels had become integral to the plaintiff and defendant's lives since 2002. The defendant's behaviour, such as using harsh words, threatening with sharp objects, and neglecting financial support, was the leading cause of the disharmony.

The conflict culminated in February 2018 when the plaintiff and defendant decided to live separately. Since then, the defendant has left the house, and his whereabouts have become unknown. The plaintiff lived in uncertainty and grief while reconciliation efforts made by family and relatives were unsuccessful. The defendant seemed to have disappeared without a trace, without giving any news or showing any intention of returning. On the other hand, the plaintiff was determined to separate and no longer wanted to maintain a marriage full of wounds.

The testimony of the witnesses provides a complete and convincing picture of the disharmony of the plaintiff and defendant's household. The judge could clearly grasp that their marriage was broken and could no longer be maintained. Continuous disputes and quarrels, exacerbated by the defendant's absence, had eliminated the hope of living in harmony and happiness as husband and wife. Thus, witness testimony became a precious evidence tool for the judge in deciding this ghoib divorce case. In addition, the witness testimony also shows that the plaintiff has fulfilled the principle of "*ius curia novit*", which is the obligation of the parties to disclose facts relevant to the disputed case (Fajriyyah & Alfitri, 2022). In this case, the plaintiff has succeeded in proving the reasons underlying the ghoib divorce lawsuit through the testimony of the witnesses presented. Thus, the judge can render a fair decision based on valid evidence.

In [Decision Number 66/Pdt.G/2021/PA.Mks](#), the Makassar Religious Court judge, demonstrated diligence and wisdom in handling the ghoib divorce case. After thoroughly examining the evidence and witness testimony, the judge was convinced that the marriage of the plaintiff and defendant could no longer be maintained. Continuous disputes and quarrels, exacerbated by the defendant's absence, had eliminated the hope of living in harmony and happiness as husband and wife. Therefore, the judge decided to grant the ghoib divorce lawsuit by *verstek* and impose *talaq one ba'in sughra* from the defendant to the plaintiff.

This decision shows that the judge paid attention to the procedural formality of the ghoib divorce and delved into the substance of the household problems of the plaintiff and defendant. The judge carefully considered all relevant factors and made a decision that was most just and beneficial for both parties. However, the judge still allowed the defendant to reconcile with the plaintiff through a new marriage contract, both during the waiting period (*iddah*) and afterwards. This shows that the judge still adhered to the principle of caution and allowed the married couple to repair their relationship if possible.

[Decision Number 66/Pdt.G/2021/PA.Mks](#) can serve as jurisprudence for other ghoib divorce cases. Judges in other religious courts are expected to emulate the approach taken by the judge in this case, which is paying attention to aspects of procedural formality and examining the substance of the household problems underlying the ghoib divorce lawsuit. Thus, the decision rendered will be more just and fulfil the sense of justice for both parties.

In the context of legal theory, this decision reflects the application of the principle of "*ex aequo et bono*", which is a decision based on justice and goodness (Ahmatnihar et al., 2022). This principle allows judges to render the most just and beneficial decisions for the parties, even though applicable legal rules may not



fully protect them. In ghoib divorce cases, this principle becomes relevant because the judge must consider various complex and dynamic factors, including the plaintiff's psychological condition, the fate of the children, and the possibility of the defendant's return.

By imposing *talaq one ba'in sughra*, the judge provides a fair decision for the plaintiff, who has long suffered from household disharmony and the defendant's absence. On the other hand, the judge also allows the defendant to reconcile with the plaintiff if possible. This shows that the judge does not close the door to the possibility of reconciliation and restoration of the household relationship.

Overall, [Decision Number 66/Pdt.G/2021/PA.Mks](#) is an example of a good decision in a ghoib divorce case. The judge has succeeded in balancing the aspects of procedural formality and the substance of the case so that the decision rendered is not only procedurally valid but also just and beneficial to the parties. This decision is expected to be a reference for other judges who handle ghoib divorce cases to optimise justice and expediency.

## **B. Legal Consequences of Ghoib Divorce for the Parties Involved**

The [Decision Number 66/Pdt.G/2021/PA.Mks](#) resulted in a series of significant legal rulings, demonstrating a careful process and consideration in resolving the ghoib divorce case. *First*, the judge firmly stated that the defendant did not appear at the trial despite having been officially and summoned adequately through the procedures stipulated in [Government Regulation Number 9 of 1975](#). This absence became the basis for the judge to grant the plaintiff's claim by *verstek*, as regulated in civil procedural law.

*Secondly*, the judge imposed *talaq one ba'in sughra* from the defendant to the plaintiff. This *talaq* has a unique position in Islamic law, where it dissolves the marriage bond but still allows the couple to reconcile with a new marriage contract. The judge's choice to impose *talaq ba'in sughra* demonstrates prudent consideration, providing legal certainty for the plaintiff while opening the possibility of reconciliation if the defendant reappears and both parties wish to reunite.

*Thirdly*, the judge determined that the plaintiff must bear the court costs of IDR 520,000. By procedural law, the losing party is burdened to pay the court costs. Even though the plaintiff has succeeded in obtaining a divorce decree, because she filed the lawsuit, she is responsible for the costs incurred during the trial process.

This ghoib divorce ruling raises various legal consequences that need further analysis. Imran reveals that one of the main challenges in ghoib divorce

is the time required to complete the divorce process.<sup>4</sup> The plaintiff must wait approximately 3-4 months before a ghoib divorce decree can be issued. It is due to the need to ensure that the defendant's whereabouts are genuinely unknown and that maximum efforts have been made to summon them by the principle of due process of law, which guarantees everyone's right to be heard and defend themselves before a legal decision is made (Matvieieva et al., 2022).

This long waiting time can burden the plaintiff, especially if they urgently need to resolve their marital status, such as remarrying. In addition, legal uncertainty during the waiting period can also cause vulnerability for the plaintiff, both psychologically and economically. Therefore, efforts need to accelerate the ghoib divorce process without sacrificing the principles of caution and justice.

On the other hand, ghoib divorce also has specific legal implications according to Islamic law. Article 119 of the [Compilation of Islamic Law](#) stipulates that *talaq ba'in sughra* allows the husband to remarry his ex-wife, even during the waiting period (*iddah*). This provision reflects the flexibility of Islamic law in resolving household problems. Even though *talaq ba'in sughra* dissolves the marriage bond, it still allows the couple to reunite if both parties wish (Hariyadi, 2023). It differs from *talaq ba'in kubra*, which permanently dissolves the marriage bond and does not allow the couple to reconcile except with a new marriage contract after the ex-wife marries another man and divorces (Setiyawan, 2023).

The difference in legal rules between the [Compilation of Islamic Law](#) and [Law Number 1 of 1974](#) and the [Civil Code](#) poses challenges to legal harmonization in Indonesia. [Law Number 1 of 1974](#) and the [Civil Code](#) do not specifically regulate the legal consequences of ghoib divorce, so in practice, judges often refer to the [Compilation of Islamic Law](#). However, using the [Compilation of Islamic Law](#) as a reference also needs to be carried out carefully so as not to conflict with the principles of national law.

Regarding the legal consequences of divorce in general, [Law Number 1 of 1974](#) and the [Civil Code](#) contain provisions on the termination of the marital relationship, the division of joint property, and arrangements regarding child custody (Delvira & Firmansyah, 2024). Article 41 of [Law Number 1 of 1974](#) emphasizes that both father and mother still must care for and educate their children after divorce. The court can determine the ex-husband's obligation to provide living expenses and other obligations for the ex-wife, all for the child's benefit. It shows that child protection is a top priority in resolving divorce cases (Amadea et al., 2022).

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<sup>4</sup>Interview Results with the Court Clerk of the Makassar Religious Court. Dr. H. Imran, S.Ag., S.H., M.H., on January 8, 2024.

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The **Civil Code** regulates the legal consequences of divorce on joint property. Article 126 of the **Civil Code** stipulates that marriage ends the union of joint property and that the property must be divided. Article 128 of the **Civil Code** further regulates the procedures for dividing joint property by making an agreement or a court decision. Meanwhile, Article 37 of **Law Number 1 of 1974** allows the parties to choose the legal rules to be used in the division of joint property, whether religious law, customary law, or other laws. This gives the parties the freedom to determine the legal rules that are deemed most appropriate to their needs and interests. However, this flexibility also poses challenges, namely the potential for conflict or legal uncertainty if the parties do not agree or agree on the legal rules to be used.

On the other hand, Kamaruddin provides a valuable perspective on the legal consequences of divorce. He emphasizes that divorce not only dissolves the marital relationship but also has consequences for joint property, which must be divided fairly.<sup>5</sup> The division of joint property often becomes a new source of conflict between ex-husbands and wives, especially if one party feels disadvantaged in the division process (Rimi, 2023). Therefore, Kamaruddin suggests that parties going to divorce should hold deliberations to agree on the division of joint property. If no agreement is reached, the parties can submit a request to the Religious Court to obtain a fair decision.

## CONCLUSIONS AND SUGGESTIONS

Based on the results and discussion, it can be concluded that in deciding the ghoib divorce case, as stated in **Decision Number 66/Pdt.G/2021/PA.Mks**, the Panel of Judges of the Makassar Religious Court, has considered various relevant legal and factual aspects. *Firstly*, the judge ensured the fulfilment of procedural formality by carrying out a valid summons to the defendant by procedural law provisions. *Secondly*, the judge delved into the substance of the case by examining the reasons for divorce submitted by the plaintiff, namely that the defendant had left the plaintiff for more than two years, his whereabouts were unknown, and some continuous disputes and quarrels eliminated the hope of living in harmony again. *Thirdly*, the judge considered the witness testimony presented by the plaintiff, which strengthened the arguments regarding the disharmony of their household. Based on these considerations and **Law Number 1 of 1974**, **Government Regulation Number 9 of 1975**, and the **Compilation of Islamic Law**, the judge made the right decision by granting the ghoib divorce lawsuit by *verstek* and imposing *talaq one ba'in sughra*. The legal consequences of this ghoib divorce decision refer to Article 119 of the **Compilation of Islamic Law**,

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<sup>5</sup>Interview Results with the Judge of the Makassar Religious Court. Drs. H. Kamaruddin, S.H., M.H., on January 18, 2024.

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which regulates *talaq ba'in sughra*, where the ex-husband still has the opportunity to reconcile with his ex-wife through a new marriage contract. Meanwhile, [Law Number 1 of 1974](#) and the [Civil Code](#) only regulate the legal consequences of divorce, including the termination of the marital relationship, the division of joint property, and child custody arrangements.

Based on the above conclusions, it is recommended that judges always adhere to the principles of justice and caution when handling ghoib divorce cases. A balance between procedural formality and the substance of the case needs to be maintained so that the decision rendered is not only legally valid but also just for the parties. Married couples should prioritize open and honest communication and strive to resolve disputes through deliberation, involving a neutral third party if needed. Divorce should be pursued as a last resort after all efforts to maintain the household have failed. Couples must realize that disappearing without a trace is not a wise solution and will complicate the problem-solving process. Good communication, even when separated, will facilitate the search for solutions and prevent legal problems in the future. In addition, witnesses have an essential role in the judicial process by providing honest and objective information, while religious figures are expected to actively provide guidance and counselling to married couples experiencing household problems to prevent divorce. Furthermore, the government needs to create more transparent and comprehensive rules and guidelines regarding the ghoib divorce trial process in Religious Courts to avoid legal uncertainty and protect the parties' rights.

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