

DETERMINATION OF IDDAH SUPPORT THROUGH EX OFFICIO JUDGES' EX OFFICIO RIGHTS IN VERSTEK TALAK DIVORCE CASES

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Abstract: This study aims to answer the problem of determining iddah maintenance through the ex officio rights of judges in verstek divorce cases. Divorce cases involving verstek talak mean that the wife has never been present at the divorce hearing and has not filed a claim for her right to support her iddah after the divorce. Even though Article 41 of the Marriage Law and Article 149 of the KHI regulate the husband's obligation to provide iddah maintenance to his divorced wife. The form of research used in this study is normative juridical research (library research) with a statutory approach. This normative legal research is based on secondary legal material obtained through data collection techniques of library studies and the data obtained is then analyzed using descriptive-qualitative methods. This study found that although Article 178 HIR paragraph 3 and Article 189 RBg Paragraph 3 state that judges are prohibited from passing decisions on cases that are not prosecuted or granted more than what is demanded, there are specificities in the procedural law of the Religious Courts as stipulated in Article 54 Law Number 3 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts. The basis for implementing the ex officio right to determining iddah maintenance in cases of verstek divorce is Article 41 letter c of Law Number 1 of 1974 which reads "The court may oblige the ex-husband to provide subsistence expenses and or determine an obligation for the ex-husband".

Keyword: Verstek Talak Divorce, Iddah Income, Judge Ex Officio Rights

I. INTRODUCTION

The purpose of marriage, according to Article 1 of Law No. 1 of 1974, is to form a happy and eternal family (household). However, along the way, not a few households experienced problems that ended in divorce. Divorce is the termination of a marriage for any reason by a judge's decision on the demands of one of the parties or both parties in the marriage.¹ Article 38 of Law Number 1 of 1974 concerning Marriage and Article 113 of the Compilation of Islamic Law state that marriages break up because of death, divorce, and court decisions. Dissolution of marriage due to divorce can occur due to divorce or based on a divorce lawsuit. A divorce suit is a lawsuit filed by the wife with the court to divorce her husband. Meanwhile, a talak divorce is an application submitted by a husband to the court so that he is given permission to impose divorce on his wife. In this condition, there are differences in the method and law between contested divorce (a divorce lawsuit) and talak divorce.

The Marriage Law states that divorce is only valid if it is done before the Court. Especially for Muslims who are going to divorce, they must file a lawsuit (divorce) or application (divorce divorce) to the Religious Court. Article 149 KHI states that there is an obligation for a man who is going to divorce his wife to provide his wife's rights in the form of mut'ah, iddah maintenance (including maskan and kiswah), dowry owed, and haanah (maintenance) costs for children who are not of age twenty-one years.

Government Regulation Number 9 of 1975 concerning Explanation of Law Number 1 of 1974 concerning Marriage Article 24 number (2) letter (a) states "during the course of a divorce lawsuit, at the request of the Plaintiff or Defendant, the Court may determine the maintenance to be borne by the husband". In line with Law Number 1 of 1974 concerning Marriage, Government Regulation Number 9 of 1975 also contains Articles in general; even in this Article, the wife can be sued, both as Plaintiff and Defendant. Thus, the contents of this Article are more specifically determined regarding the permissibility of a woman claiming her rights post-divorce, even though the divorce is at the will of the wife (divorce is contested).

The law expressly states that there must be a request from either the Plaintiff or the Defendant. However, it is different if there is no request from the Plaintiff or Defendant, even if the respondent or defendant does not attend the hearing (*verstek*). In terms of judge authority, Article 178 paragraph (3) HIR *jo.* and Article 189 paragraph (3) Rbg state that the judge is prohibited from or may not decide more than what is required, and the judge only considers the things that are submitted. This authority mentions the passivity of judges in examining cases. The passivity of judges is explained by L.J. van Apeldoorn as follows:

1. The initiative to file a civil case is always carried out by interested parties and never done by a judge; this is a rational thing because civil procedural law regulates how to defend private interests, and only the parties know whether they want their special interests to be maintained or not.
2. Before the judge gives a decision, either because of an agreement to take the path of peace (Article 130 HIR) or other reasons for withdrawing a lawsuit (Article 227 R.v.), the parties have the power to stop the program they have started;
3. The extent of the dispute submitted to the judge depends on the parties. In other words, the judge is obliged to determine whether the things proposed and proven by the parties are relevant to their claim.

¹ Akmaluddin Syahputra, *Indonesian Civil Law, Volume 1*, Citapustaka Media Perintis, Bandung, 2011, P. 59.

4. If the parties agree on certain matters with one party admitting the truth of the things proposed by the other party, the judge does not need to investigate further to determine whether the things put forward are really true; the judge must accept what is said, determined by the parties;
5. The judge may not examine the truth of the decider's oath (an oath that decides and determines) that has been made by one of the parties with the intention of hanging a decision on that oath.

In the Supreme Court Jurisprudence as stated in the MARI Decision No. 233 PK/Pdt/1991 dated June 20, 1997 stated that: "that in a divorce decision, where a judge may not decide anything that does not become the petitem of the divorce suit is not subject to a counterclaim for reconvention", so that the judge who grants exceeds the posita or petitem lawsuit is considered to have exceeded the limits of authority or ultra vires, namely acting beyond the powers of his authority, so that decisions containing ultra petitem must be declared flawed even though this was done by the judge in good faith or in accordance with the public interest, because the judge violated the ultra petitem partium principle is tantamount to violating the rule of law principles.²

The passivity of judges in examining civil cases certainly has an impact on eliminating the rights of divorced wives in vertex divorce cases. In situations like this, judges have ex officio rights when deciding a case. Ex officio rights are rights given to judges, namely that with this right, a judge can get out of standard rules and make his own rules as long as there are logical arguments and they are in accordance with applicable laws and regulations. So in this case, giving full authority to judges in deciding cases is necessary so that the values of legal certainty, legal justice, and legal benefits are realized for all people who seek justice.³

II. RESEARCH METHODS

The form of research used in this study is normative juridical research (library research) with a statutory approach. This type of normative juridical research is legal research that is conceptualized as what is written in laws and regulations (law in books) or as rules or norms, which are standards for human behavior that are considered appropriate. The statutory approach is applied through a review of statutory regulations relating to the ex officio rights of judges. This normative legal research is based on secondary legal material obtained through data collection techniques in library research, and the data obtained is then analyzed using descriptive-qualitative methods.

III. RESULT AND DISCUSSION

The Obligation of Providing Iddah Support According to Positive Law in Indonesia

The legal consequence of divorce on the position, rights, and obligations of the ex-husband or ex-wife, according to Article 41, letter c, of Law Number 1 of 1974, is that the Court requires the ex-husband to provide living expenses and/or determine an obligation for the ex-wife. The normative provisions in Article 41 letter c of Law Number 1 of 1974 are related to Article 11 of Law Number 1 of 1974, which contains normative provisions that a woman who has broken up with her marriage is subject to a waiting period, which later this

² M. Yahya Harahap, *Civil Procedure Law*, Sinar Grafika, Jakarta, 2012, P. 801.

³ Ibrahim AR. and Nasrullah, *The Existence of Judges' Ex officio Rights in Divorce Cases*, Samarah: Journal of Family Law and Islamic Law, Vol. 1 No. 2, UIN Ar-Raniry Banda Aceh, 2017, P. 46.

article has explained in Article 39 Government Regulation No. 9 of 1975, which contains an imperative provision that for a widow whose marriage has broken up due to divorce, the waiting time for the widow who is still menstruating is set at 3 (three) sacred times with at least 90 (ninety) days and for those who are not menstruating is set at 90 (ninety) days.

If the marriage breaks up while the widow is pregnant, then the waiting time is fixed until she gives birth. Furthermore, according to Article 39 of Government Regulation No. 9 of 1975, there is no waiting time for a widow who ends her marriage due to divorce if there has not been any sexual relationship between the widow and her ex-husband. For marriages that break up due to divorce, the waiting time is calculated from the time the court decision is rendered, which has permanent legal force. Information about the obligations borne by ex-husbands as a result of the breakup of the marriage is found in Article 149 of the Compilation of Islamic Law, which reads:

“If the marriage is broken up due to divorce, the ex-husband is obliged to:

- a. Giving a proper mut'ah to his ex-wife, either in the form of money or goods, unless the ex-wife is qobla al-dukhl;
- b. Giving maintenance, food, and kiswah to the ex-wife during the 'iddah period, unless the ex-wife has been divorced by ba'in or nusyuz and is not pregnant.

The provisions stated in the legislation regarding the husband's obligations to his ex-husband are in accordance with Islamic law, where the ex-husband's obligations are in the form of providing maintenance for the 'iddah, mutah, and ha'anah of children. It's just that a more detailed description is given by the Compilation of Islamic Law regarding the 'iddah (waiting period) contained in the Compilation of Islamic Law, Article 153, as follows:

1. For a wife whose marriage has broken up, a waiting period, or iddah, applies, except for qobla al-dukhl, and her marriage is broken up not because of her husband's death.
2. The waiting time for a widow is determined as follows:
 - a. If the marriage is broken up due to death, even though it is qabla al-dukhl, the waiting time is set at 130 (one hundred and thirty) days:
 - b. If the marriage is broken up due to divorce, the waiting time for those who are still menstruating is set at 3 (three) sacred times with a minimum of 90 (ninety) days, and for those who are not menstruating, it is set at 90 (ninety) days;
 - c. If the marriage is broken up due to divorce while the widow is pregnant, the waiting time is fixed until she gives birth;
 - d. If the marriage is broken up due to death while the widow is pregnant, the waiting time is fixed until she gives birth.
3. There is no waiting time for those who break up due to divorce (qobla al dukhl).
4. For marriages that break up due to divorce, the waiting period is calculated from the date of its fall; the decision of the Religious Courts has permanent legal force, while for marriages that are broken due to death, the waiting period is calculated from the death of the husband.
5. The waiting time for a wife who has menstruated is during her 'iddah without menstruation because of breastfeeding, then her 'iddah is three times during menstruation.

6. If the condition in paragraph (5) is not due to breastfeeding, then her iddah is for one year, but if within one year she has her menstruation again, then her iddah becomes three times the sacred period.

Regarding mut'ah in the Big Indonesian Dictionary it is stated that the meaning of mut'ah is something (money or goods and so on) that is given by a husband to his divorced wife as a living provision (comforter for the heart) of his ex-wife. The failure to provide maintenance in the Compilation of Islamic Law is only stated because of nusyuz committed by a wife against her husband. In language (etymology) nusyuz is masdar or the infinitive of a word ازوشند - زشنید - زشد which means the land that rises high above. عفترايم ن م ض ر لا ا (who was lifted up from the earth). And if the context is associated with the husband-wife relationship, it is interpreted as the attitude of the wife who is disobedient, opposes and hates her husband.

In granting post-divorce rights, judges can decide based on the Circular Letter of the Supreme Court of the Republic of Indonesia Number 3 of 2018 number 2 which states: Judges in determining maḍiyah maintenance, 'iddah maintenance, mut'ah maintenance, and child maintenance, must consider the sense of justice and propriety by exploring the facts of the husband's economic capacity and the facts of the basic needs of the wife and/or children.

The definition of maiyah maintenance is in the form of a father or husband who neglects his responsibilities, or because of certain circumstances or conditions that have not been able to provide a living, the husband is considered to have owed his wife. This is called "madi" in Arabic, which means past or earlier. Mai (past) subsistence is previous maintenance that was not paid or was not paid by the husband to his wife while still legally married, and because of this, the wife can sue her husband to the Religious Court with a claim for maiyah maintenance or maintenance that has not been paid by the husband.

Based on the provisions in Article 77 paragraph (5) of the Compilation of Islamic Law and Article 34 paragraph (3) of Law Number 1 of 1974 concerning marriage, if a husband is proven to have intentionally neglected his responsibility to provide a living for his wife even though the husband is considered capable of making a living that has not been or has not been paid, the wife has the right to sue her husband to the Religious Court or to the District Court.

In Article 80 paragraph (4) letter (a) of the Compilation of Islamic Law, it states that in accordance with his income, the husband bears maintenance. This article explains that although the husband pays maintenance based on his ability, maintenance is still an obligation for the husband to his wife and children that cannot be neglected. Unless the wife releases her husband from the obligation to provide maintenance, housing, and household expenses as well as care or medical expenses for the wife and children as meant in Article 80 paragraph (6) of the Compilation of Islamic Law, which states that a wife can release her husband from the obligation to provide maintenance, residence, and household expenses as well as care or medical expenses for the wife and children, the husband is free from this maintenance obligation. However, if the wife does not exercise this right, the husband is still obliged to provide for her.

Ex officio Rights of Judges in Deciding Cases at Trial

The definition of ex officio rights in terminology means rights due to position. Ex officio rights come from the Latin *ambeteshalve*, which means because of position, not based on a letter of appointment or appointment, nor based on a request. Qualifying the definition of ex officio rights related to religious courts, it can be explained that ex officio rights are rights owned by a judge because of his position to be able to drop something that is not asked for in a petition or claim to be dropped in a decision, especially in divorce cases. This ex officio right specifically aims to be able to defend the rights of one of the weak parties in the divorce process, which is usually the woman or ex-wife.

Although, in general, ex officio rights are attached to the position of judge because of their authority, in the application of judicial power, of course, there are restrictions and limitations on the use of this power so that there is no excess of power or authority (*excès depouvoir*). Moreover, according to the legal principles that apply in the examination of civil cases that apply in religious courts, judges in trials have at least two (two) characteristics that are put forward, namely:

1. The judge is only waiting (*judex ne procedat ex officio*), that is, the judge is only waiting for a case to be submitted to him because the party filing the claim is the litigant, so the judge may not refuse to examine and adjudicate a case filed on the grounds that the law there is none or it is not clear, but to examine and adjudicate if the law does not exist or is not clear enough, as a law enforcer, the judge is obliged to explore, follow, and understand the legal values that live in society. In the context of civil cases, it is also known the adage "*Nemo judex sine actore*," which means that if there is no case, then the judge does not exist, so that the context for the establishment of a judge's institution in civil cases is confirmed by the existence of a claim for certain rights.
2. The judge in examining civil cases is passive; that is, the judge cannot determine the scope of the dispute in a case; the litigants themselves determine it. Judges are tasked with assisting justice seekers through their legal considerations in resolving disputes fairly and trying to overcome all obstacles to resolving existing problems.

In its implementation, the freedom of judges to exercise ex officio rights certainly has limitations or restrictions; the freedom of judges should not be interpreted as unlimited freedom by highlighting the attitude of arrogance of power; the nature of the freedom of judge power is not absolute; the freedom of judges is limited and relative to several references:

1. Applying laws originating from laws and regulations that are appropriate and correct in resolving cases that are being examined in accordance with the principles and statute law must prevail (statutory provisions must prevail);
2. Interpret the right law through a justified interpretation approach (systematic, sociological, linguistic, analogical, and *contrario* interpretation) or prioritize justice over statutory regulations if the provisions of the Act do not have the potential to protect the public interest. Such application is in accordance with the doctrine that equity must prevail (justice must prevail).

Application of Judges' Ex Officio Rights in Determining Iddah Income in Verstek Divorce Cases

Basically, in making a decision, the judge may not grant more than the demands put forward in the lawsuit (Ultra Petitem Pertium Principle) based on Article 178 paragraph (3) HIR, Article 189 paragraph (3) RBG, and Article 50 Rv. Judges who grant demands exceeding the posita or petitum claim are deemed to have exceeded their authority, or *ultra vires*, namely, acting beyond their authority (beyond the powers of their authority). If the decision contains *ultra petitum*, it must be declared invalid even though this was done by the judge in good faith or in accordance with general provisions (public interest).

Article 178 HIR paragraph 3 and Article 189 RBG Paragraph 3 state that judges are prohibited from passing judgments on cases that are not prosecuted or granted more than what is required. This prohibition is called *ultra petitum*. This provision must be applied in the process of examining, adjudicating, and resolving divorce cases because the procedural law that applies to the Religious Courts is the same as the procedural law that applies to the General Courts. It's just that not all the procedural law that applies in the Religious Courts uses the procedural law that applies in the General courts, because specifically there are other provisions that regulate special matters, namely in Article 54 of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning the Religious courts, which emphasizes that "The procedural law that applies to courts within the religious courts is the procedural law that applies to courts within the general courts, except for those specifically regulated in the law".

The special procedural law regulated in the above-mentioned laws and regulations includes arrangements regarding the form of litigation, the relative authority of the Religious Court/Syar'iyah Court, summoning the parties, examining, proving, and charging case fees, as well as implementing the judge's decision. However, this principle, in its journey, has exceptions known as the *ex officio* principle or rights of judges. The basis for exercising *ex officio* rights is Article 41, letter c, of Law Number 1 of 1974, which reads "The court may oblige the ex-husband to provide living expenses or determine an obligation for the ex-husband". This article is the legal basis for a judge because his position can decide more than what is demanded, even if the parties do not demand this.

In its implementation, the freedom of judges to exercise *ex officio* rights certainly has limitations or restrictions; the freedom of judges should not be interpreted as unlimited freedom by highlighting the attitude of arrogance of power; the nature of the freedom of judge power is not absolute; the freedom of judges is limited and relative to several references:

1. Apply laws originating from appropriate and correct laws and regulations in resolving cases under investigation in accordance with the principles and statute law that must prevail (statutory provisions must prevail);
2. Interpret the right law through a justified interpretation approach (systematic, sociological, linguistic, analogical, and *contrario* interpretation) or prioritize justice over statutory regulations if the provisions of the Act do not have the potential to protect the public interest. Such application is in accordance with the doctrine that equity must prevail (justice must prevail).

The ex officio rights of judges are the responsibilities and duties of judges, one of which is to assist justice seekers in obtaining justice. The use of ex officio rights in verstek divorce cases is a judge's attempt to bring justice to the respondent (wife) in terms of living iddah. If the judge does not use ex officio rights in the case decision and is only passive, then the rights of the respondent as stipulated in Islamic fiqh and Indonesian laws and regulations cannot be realized because there is no request from the respondent (wife). The use of ex officio rights in verstek divorce cases is an attempt by judges to apply the law regarding post-divorce wife's rights, both regulated in Islamic jurisprudence and in Article 41 of Law Number 1 of 1974 concerning Marriage and Article 149 of the Compilation of Islamic Law, as well as other regulations relating to the rights of wives or children after divorce.

IV. CONCLUSION

Article 41 of Law Number 1 of 1974 concerning Marriage and Article 149 of the Compilation of Islamic Law oblige the ex-husband to provide subsistence expenses for the ex-wife in the form of iddah, mutah, and child maintenance. In verstek divorce cases, even though the wife has never demanded a living iddah because she never attended a trial, the judge still has to bring about justice in the form of the rights of the wife who was divorced by her husband through the judge's ex officio rights. Although Article 178 HIR paragraph 3 and Article 189 RBg Paragraph 3 state that judges are prohibited from passing decisions on cases that are not prosecuted or granted more than what is demanded, there are specificities in the procedural law of the religious courts as stipulated in Article 54 Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning the religious courts, which confirms that "The procedural law that applies to courts within the religious courts is the procedural law that applies to courts within the general courts, except for those specifically regulated in the law". The basis for exercising ex officio rights is Article 41, Letter C, Law Number 1 of 1974, which reads "The court may oblige the ex-husband to provide living expenses or determine an obligation for the ex-husband".

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