Access to Justice for Women and Children in Divorce Cases in the Indonesian Religious Courts

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Abstrak: Penelitian ini bertujuan untuk mengetahui akses keadilan bagi anak dan perempuan dalam Putusan Pengadilan Agama pasca terbitnya Keputusan Mahkamah Agung Nomor 4 Tahun 2016 Poin 5 tentang Kamar Beragama. Dalam poin khusus ini disebutkan bahwa Pengadilan Agama dapat meminta seorang ayah untuk mengasuh anak jika anak tersebut berada di bawah asuhan ibunya. Penelitian ini bersifat normatif, dengan data diperoleh dari wawancara dan 150 putusan Pengadilan Agama. Putusan-putusan tersebut dikeluarkan oleh Pengadilan Agama Jakarta Timur dan Jakarta Pusat dari tahun 2015-2017. Berdasarkan pemeriksaan terhadap Putusan tersebut, sebagian besar Putusan perceraian tidak menyebutkan ketentuan tentang pengasuhan anak. Artinya, Surat Edaran Mahkamah Agung Nomor 4 Tahun 2016 belum mampu melindungi hak anak dan hal perempuan dalam kasus perceraian. Data pengadilan yang digunakan dalam penelitian ini, menyebutkan hanya 14% yang mewajibkan ayah untuk mengasuh anak setelah perceraian. Persentase ini hampir sama dengan keputusan yang dikeluarkan sebelum keluarnya keputusan tersebut, yaitu hanya 12% pada 2016, dan 14% pada 2017.

Kata kunci: Pengasuhan Anak; Akses terhadap Keadilan; Perwalian Anak; Perceraian; Pengadilan Agama

Abstract: This research aims to investigate access to justice for children and women in the Religious Court Decisions after the issuance of Circular Letter of Supreme Court No. 4 of 2016, Point 5 on Religious Chamber. This particular point states that the Religious Court can require a father to provide child maintenance if the child is under the custody of the mother. This is a normative study, with the data obtained from interviews and 150 Religious court decisions. These decisions are issued by the Religious Courts of East Jakarta and Central Jakarta from 2015-2017. The examination of those Decisions reveals that most of the decisions on divorce do not mention any stipulation about child maintenance. This means that the Supreme Court Circular No. 4 of 2016 has not been able to protect children rights in the case of divorce, as well as women's rights. From the court used in this study, only 14% that require the fathers to provide child maintenance after divorce. This percentage is almost similar to the decisions issued before the issuance of the Circular, which only 12% in 2016, and 14% in 2017.

Keywords: Child Maintenance; Access to Justice; Child Guardianship; Divorce; Religious Court

Introduction

Divorce is the most resolved cases by the Religious Courts of Indonesia. In 2018, the Religious Courts decided 419,268 divorce cases, with 307,778 cases on divorce by the request from wives, and 111,490 cases on divorce by repudiation that submitted in 2017. In 2017, the Religious Courts only decided 380,723 cases, consisting of 276,718 cases of divorce requested by wives (*cerai gugat*) and 104, 005 cases of divorce by repudiation (*cerai talak*) (https://badilag.mahkamahagung.go.id).

One of the impact of the divorce is the residential separation between a child and the parents. In most of the cases in Indonesia, a child with divorced parents is likely to live with the mothers. As long as the child maintenance is fulfilled, there will be no problem with the choice of living with the mother or father. The problem arises when the child maintenance is not fulfilled by the father while the child is living with the mother. This, in fact, violates the rights of the child and, at the same time, against the law.

In 2016, the Supreme Court of Indonesia issued Circular No. 4 of 2016, dated 19 December 2016. This Circular is an important legal product that is expected to provide a better access to justice and legal certainty, especially for divorced women (mothers) with child(ren) and for the children themselves. Point 5 of the Circular No. 4 of 2016 on the Religious Court Chamber states that the Religious Court judges can determine that the father should provide for child maintenance allowance if the child is with the mother. It can be seen that this stipulation is against the principle of "*Ultra Petitum Partium*" as is mentioned in Article 178 (3) of HIR/ and Article 189 (3) of RBg.

Moreover, the Supreme Court Circular No. 4 of 2016 is in contrary with the Supreme Court Circular No. 3 of 2015 stating that "the guardianship rights cannot be determined by judges, in ex-officio, if the matter is not requested by the plaintiffs in their court document. This implies that the judges should not violate the principle of "*Ultra Petitum Partium*" (Choiri, 2015)

At the same time, neglecting child maintenance is regarded as domestic violence. Indonesian law orders the Courts to provide protection for the victims of domestic violence by a fair decision"

(Choiri, 2015). Therefore, the implementation of the Supreme Court Circular No. 4 of 2016 becomes crucial to deal with child guardianship and child maintenance cases.

Child Maintenance in the Court Decisions

The following is court Decisions issued by the Religious Court of Central Jakarta and East Jakarta from 2015-2017.

No	Year	Decision mentioned the existing child(ren)			*Posita*		*Petitum*		Decision		*Verstek*
		Anak	< 12	> 12	HA	HN	HA	HN	HA	HN	
1	2	3	4	5	6	7	8	9	10	11	12
1	2015	100%	74%	26%	10%	16%	10%	14%	10%	12%	82%
2	2016	100%	86%	14%	8%	4%	14%	6%	16%	14%	72%
3	2017	100%	82%	18%	20%	6%	20%	12%	16%	14%	62%

The table shows that from the sample of 50 decisions on divorce issued in 2015, all mentioned the fact that the spouses have child(ren) resulted from their marriage. 37 decisions (74%) mentioned that the children were under 12 years of age. Only 13 s (26%) mentioned that the children were older than 12 years old and unmarried. In 5 (10%) s, the litigants requested child guardianship, and in 6 (12%) decisions, the litigants requested child maintenance. Meanwhile, there were 5 (10%) decisions with the request of child guardianship, and 7 (14%) of decisions with the request of child maintenance mentioned in the *petitum* (the request of the plaintiff).

In the end, there were only 5 (10%) of the decisions where the judges positively responded to the request of child guardianship and 6 (12%) of the decisions where the judges granted the request of child maintenance. These numbers are different from the requests in the *petitum.* From all decisions, 50 (82%) of them is decided in-absentia (*verstek*) due to the absence of the plaintiffs or defendants.

The 50 sample of decisions issued in 2016 show that from 50 decisions on divorce, all of them mentioned the fact that the litigants have child(ren) from their marriage. 43 (86%) mentioned that the children were under 12 years old. Meanwhile, the rest (7

decisions) mentioned that the children were older than 12 years old and unmarried. The request for child guardianship in the *posita* were in 4 (8%) decisions, and the other 2 decisions requested for child maintenance. Furthermore, there were 7 (14%) of the decisions that requested for child guardianship and 3 (6%) of the decisions that requested for child maintenance in the *petitum.* From those decisions, only in 8 (16%) of decisions where the judges grant the request of child guardianship and 7 (14%) decisions where the judges granted the request of child maintenance. Meanwhile, 50 (72%) of the decisions were decided in absentia due to the absence of the plaintiffs or the defendants.

In 2017, from 50 samples of divorce decision, all of them mention the fact of existing children resulted from the marriage. 41 (82%) of the decisions involved children under 12 years old, while 9 (18%) of them involved children older than 12 years old but under 21 years old and unmarried. Among them, only 10 (20%) decisions mentioned child guardianship and 3 (6%) decisions mentioned child maintenance in the *posita*. The litigants requested to become the guardians to their children in 10 (20%) cases, and requested child maintenance in 6 (12%) in the *petitum.* In the decisions, the judges determined child guardianship in 8 (16 cases), child maintenance in 7 (14%) cases, and there were 31 (62%) cases with *verstek* decisions.

The above description reveals that the majority of decisions did not determine child maintenance. From the total of 150 decisions issued by the Religious Courts of Central Jakarta and East Jakarta, there were only 20 decisions (13%) of them that decided child maintenance.

Causes of Low Vonis Defined Child Support

Verstek

This study shows that 108 decisions (70%) of the 150 decisions were in *verstek*. A *verstek* decision is a case in which the examination and settlement were not attended by the defendant or the respondent. Here is the reason why *verstek* ddecision becomes the reason for the absence of child support those decisions:

1. A case that is decided in *verstek* cannot go through a mediation process

The requirement for a mediation process in a lawsuit is when both parties are present. In the mediation case, it is found that the panel of judges determined that the children's livelihood in the decision was based on an agreement made by the parties at the mediation stage eventhough the plaintiff or the respondent was not request a reconciliation in the *posita* or *petitum*. An example is Decision No 0755 / Pdt. G / 2017 / PA.JP.

This Decision was issued on September 18, 2017. This case is a divorce filed by the wife (plaintiff) on the grounds of contention. In the *posita*, the plaintiff stated that from their marriage (plaintiff and defendant), 2 children were born. However, in that *posita,* she did not claim the rights of children support and custody. The Plaintiff also did not ask for custody and livelihood of the children in the petitum, but included a subsidiary: If the Panel of Judges had a different opinion in relation to this case, the plaintiff asked for the fairest decision (*ex aequo et bono*).

At the second session, both parties attended the session. Based on the provisions of the Indonesian procedural law, the session begins with the mediation of the panel of judges and a mediation process by a mediator. At the mediation session a conversation about the children were brought up, beside the discussion about the marriage and the possibility of reconciliation. In case of the mediation regarding the marriage is failed, both parties can still agreed upon their children's livelihood. The children custody was agreed to be in the responsibility of the plaintiff, while the livelihood of the two children will be paid by the defendant at least three million Rupiah per month. This is to be submitted to the plaintiff, excluding the health and education costs of the children until they reach adulthood and are considered to be independent. This case was decided by granting the plaintiff's claim to a divorce from the defendant.

Another decision is Decision No. 0777 / Pdt.G / 2017 / PA.JP. This Decision is a divorce case, in which the request was filed by the husband due to constant fights with the wive. The first trial was attended by the husband (applicant) and wife (respondent) with a mediation agenda. The mediator reported that the mediation failed.

The wife was never present again after mediation. The trial process continued. The judge granted the petitioner to pledge a divorce. In addition to that, the judge also sentenced the petitioner to pay for the children their living by saying "Punishing the Petitioner to give the two children, born from the marriage of the Petitioner and Respondent, for minimum one million Rupiah each month until they reach adulthood and are independent." The panel of judges punished the applicant to pay for child living based on the mediator's report that the applicant is able to provide for two children, who are under the care of the respondent, amounting of one million Rupiah per month. Whereas the respondent never asked for the rights for custody for the two children and did not also require the judge to punish the petitioner to pay for the living of the children, because the respondent was only present at the mediation stage. Meanwhile, the right as a caregiver and request for payment of child support in a divorce can only be submitted on the counterclaim, after mediation was unsuccessful.

Even though the judge can determine child livelihood based on agreement in the mediation, such decision has been rarely made. Another example shows that even though both parties agreed upon the responsibility of the father regarding the livelihood of the children, such agreement was not in the court decision,This is shown by Decision No. 1466 / Pdt.G / 2016 / PA.JP of 2017. In this case, the plaintiff and defendant have 3 children who were not yet 21 years old and the youngest was 7 years old. At the mediation stage, the plaintiff and defendant agreed that the custody were given to the plaintiff, while the defendant agreed to provide for the children, amounting IDR 6,000.000 per month at the minimum. In legal considerations, the judges did not mention the rights of custody and child support.

The judge's decision that determine the child support based on the mediation report is appropriate because the matters agreed upon at the mediation. Article 1320 of the Indonesian Civil Code mentions that the agreement between the parties can be used as a source of law. In addition, court decisions containing child support determination will guarantee legal certainty for its fulfilmentbecause court decisions have permanent legal (*in kracht van gewijsde*) binding. Thus, the violation of the agreement allows one of the parties to request for execution.

2. Determination of child support that must be paid by the father based on the consent of the husband

Decision No. 0626 / Pdt.G / 2015 / PA.JP is an example of *verstek* decision where child support was not determined, whereas the plaintiff requested the right of custody, with child support subjected to the husband. Decision. The custody was granted by the judge to the plaintiff, but the child support request was not stated in the Decision. It was stated that the child support was denied even though it was demanded at the *posita* and *petitum*. Many of the decisions that were decided in-absentia granted the demands of the custody, as in Decision No. 3077 / Pdt.G / 2017.PAJT. This is in contrast with the child support. None of the in-absentia decisions determine a child support.

The reason for the absence of child support determination in the Decisions is because the panel of judges cannot hear directly the defendants (fathers) ability to pay to the child support. This is because of the defendants' absence in the trials. The hearing becomes crucial as the judges determine the child support based on the financial ability of the fathers. In Decision No. 0042 / Pdt.G / 2015 / PAJP, for example, the plaintiff's petition demanded for three million Rupiah per month for three children support. However, because the defendant stated that he could only pay for one million Rupiah per month, the judge panel punished the husband to pay only one million Rupiah based on his financial ability.

In addition, the Supreme Court Jurisprudence No 608 K / AG / 2003 on March 23, 2003 also outlines that the determination of child support must be based on at least two matters, sucha as the minimum living standard of child needs, fathers' capability, and the propriety and justice.

3. Wives are unable to prove the amount of their husbands' income

In many *verstek* cases, the plaintiff cannot prove defendants' income. This cannot also be confirmed by defendants due to their absence during the trials. If the Plaintiff can prove the husband income, the panel of judges can grant a liability even without the presence of the defendants. This is in line with what was said by one

of the judge at the Central Jakarta Religious Court in an interview. He stated that not all child support requests are granted in *verstek* Decisions. Plantiffs who are able to prove the ability of the defendants to pay for child supports for example are the defendants who are civil servants or public company employees. Their ability can be proven by presenting their official salary statetements. With such statement, the panel of judges can demand the defendants to fulfil child support even without their presence in the trials. The amount of child support determined is 1/3 of the tital salary.

This is also in line with concept of justice in Civil Procedural Law. It is stated that the implementation of the principle of *audi et alteram partem* means the implementation of proporsional justice in the constituent activities, meaning that every body gets their rights. Judges are not required to give equal treatment to both parties in issuing a Decision, but they must produce a just Decision based on the hearing involving both parties during the trial. If a plaintiff can prove his/ her claim, then the claim will be granted. On the otherhand, if the plaintiff cannot prove the claim, or the defendant can prove the rebuttal to such claim, then the claim is rejected. Decision. With the principle of justice, Civil Procedural Law determines that the lawsuit requisting child livelihood can be granted by the panel of judges in *verstek* if wives can prove their ex-husbands' financial ability through the statement of the husbands' income. Decision With the absence of the husbands, they cannot deny the claim of the wives. In other words, the lawsuit regarding child support can be granted because as the Decision does not break the law and is not denied by the husband (father of the child).

The Implementation of the Principle of Passive Judge and Ultra Petita in the Examination of Divorce Cases

In the Religious Courts, the panel of judges is bound by the principle of passive judge and the principle of *ultra petita* in examining cases. The principle of passive judge means that a judge is only allowed to examine and decide cases demanded by the parties and mentioned in their petition. This means that the judge is bound to the matters proposed by the parties (*secundum allegata iudicare*). This principle is contained in Article 178 Paragraph 2 and

3 HIR/189 Paragraph 2 RBG. The principle of *ultra petita* means that a judge is not allowed to examine and decide more than what is demanded.

The implementation of both principles in the examination of divorce cases in the Religious Court by panel of judges results in a decision that is limited to the demands of the parties. If the demand is the termination of the marriage, the panel of judges according to both principles can only grant requests to permit divorce pledges or grant the plaintiff's claim by revoking the divorce petition from the defendant.

Ex-wives considered the Child Support Requests as a Burden for the Ex-husbands

The example is Decision No. 0488 / Pdt.G / 2015 / PA.JP. In this case, the couple have one adopted child. In the lawsuit the defendant, which is the wife, stated that she did not demand monthly support for the child because she did not want to overburden the applicant or the husband. However, the husband in his response stated that he will provide a child support, amounting of of IDR 500,000 every month until the child reach adulthood. In the judge consideration, it is stated that the plaintiff did not demand the child support. Thus, the Decision does not mention the matter.

During the interview, a judge mentioned that in some cases, wives do not demand child support because they have supported their child(ren) independently. This happens as many of divorce cases caused by economic problems where the husbands are unable to financialy supports the family, including to meet the needs of their wives and children.

The Implementation of the Supreme Court Circular (SEMA) in the Religious Court Decisions

SEMA is a form of regulation issued by the Supreme Court. Since 1951, the Supreme Court has issued numbers of SEMA, as a part of the regulatory function of the Supreme Court (*regelende functie*). The Supreme Court of the Republic of Indonesia on 23

until October 25, 2016 held a Chamber Plenary Meeting to discuss various legal issues raised in six chambers of the Supreme Court, consisting of five chambers, such as Criminal Chamber, civil Chamber, Religious Chamber, Military Chamber, State Administrative Chamber, and Secretariat Shamber.

Since 2012, chamber plenary meeting has become one of the instruments to realize the goal in maintaining the unity of the implementation of the law and consistency of decisions. The 2016 plenary chamber meeting results are promulgated in SEMA No. 4 of 2016 about the Formulation of Plenary Meeting Results of the Supreme Court 2016 as a guideline for the implementation of Task for the Courts. This was issued on December 9, 2016. The formulation of the Religious Chamber point 5 states that the Religious Court ex officio can determine the livelihood of a child as the responsibility of the father to this child if she/ he is evidently in the care of the mother. This is also regulated in Article 156 letter (f) of Compilation of Islamic Law.

The question is whether the SEMA falls intoe category of positive law as mentioned in Law No. 12 of 2011 about the Formation of Law and Legislation? Legislation is a written regulation containing binding general legal norm and formulated or established by a state institution or an authorized official through the procedure stated in a statutory regulation.

The hierarchy of the Republic of Indonesia Legislation is as follows: 1) The 1945 Constitution of the Republic of Indonesia; 2) The House of Representative's Decisions; 3) Goverment Act; 4) Government Regulation (PP); 5) Presidential Regulation; 6) Provincial Regulations; 7) Regency/ City Regional Regulations.

From the above hierarchy, there is no explicit mention of the Supreme Court Circular. However, Article 8 (1) of Law No. 12 of 2011 states that the types of legislation other than those listed above include regulations set by the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Financial Audit Board, Judicial Commission, Central Bank of Indonesia, Ministers, agencies, institutions, or government based-commissions, Provincial

Regional Representative Council, Governors, Regency/ City Regional Representative Council, Regents/ Mayors, Village Head or equivalent. Article 8 (2) mentions that Legislation as referred to in paragraph (1) is recognized and has binding legal force as it is ordered by a higher statutory regulation or formed based on the authority.

The phrase 'legal force' in article 8 paragraph 1 of Law No. 12 of 2011 according to Yuliandri (2010) is in accordance with the hierarchy of statutory regulations, namely the intersection of each type of statutory regulation based on the principle that lower statutory regulations should not conflict with higher statutory regulations. Yuliandri believes that other types of regulations (in this context the rules issued by the Supreme Court) should also be subject to the principle of hierarchy. Jimly Asshiddiqie (Asshiddiqie, 2004) categorized the Supreme Court rules as special rules that are subject to the principle of *lex specialis derogat legi generalis*. However, Asshiddiqie criticized the form of circular letters in terms of the regulatory dimension. If the material contains regulations, the form of legal products should be regulations (www.hukumonline.com).

Furthermore, Article 79 of Law No. 3 of 2009 about the Second Amendment to Law No. 14 of 1985 about the Supreme Court states that "the Supreme Court can further regulate matters that are necessary for the running of the judiciary if there are matters that are not regulated in this Law ". Moreover, the Article 79 of Law No 3 of 2009 contintues, the Law gives the Supreme Court the authority to make a law or rule making power. This authority is given so that the Supreme Court can resolve issues that are not regulated in detail in existing legislation. However, not all Supreme Court Circular (SEMA) can be categorized as the result of the Supreme Court's rule making power function. Only SEMA which regulates procedural law and fills legal vacuum can be categorized as the implementation of the Supreme Court's rule making power function. Besides, SEMA is categorized as a policy rule (*bleidsregel*) (www.hukumonline.com).

Thus, it is understood that the Supreme Court legal products in the form of a Circular is based on Article 8 paragraph 1 of Law No. 12 of 2011 and Article 79 of Law No. 3 of 2009 about the Second Amendment to Law No. 14 of 1985 about the Supreme Court.

They mention that the Supreme Court Circulars is legally classified as a regulation and has binding legal force as specified in Article 8 Paragraph 2 of Law No. 12 of 2011. However, not all Supreme Court Circulars are categorized as the rule making power function.

Then, are the Religious Courts subject to legal products issued by the Supreme Court? Article 32 Paragraph (4) of Law No. 3 of 2009 states that the Supreme Court has the authority to give instruction, reprimand, or warning to all courts under its auspices. This provision needs to be linked to the Supreme Court's monitoring function to the General Courts, Religious Courts, State Administrative Courts, and Military Courts. The measure used by the Law is not to let the legal product 'reduce the freedom of judges to examine and decide cases' (www.hukumonline.com).

Based on the provision of Article 8 of Law No. 12 of 2011 about the Legislation Formulation and Article 79 of Law No. 14 of 1985 about the Supreme Court which was amended by Law No. 3 of 2009 and Article 32 paragraph (4) of Law No. 3 of 2009, The Supreme Court Circular No. 4 of 2016 Point 5 in the Formulation of the Religious Chamber is categorized as implementing the rule making power function. The reason is because the content regulates procedural law to response to the sense of justice of the community where judges are allowed to ignore the doctrine of "*Ultra Petitum Partium*" as referred to in Article 178 Paragraph (3) HIR / Article 189 Paragraph (3) RBg in term of fulfilling the child support rights following a divorce even though the plaintiff or the respondent does not demand the child support either in the *posita* or in the *petitum*. In fact, the Supreme Court Circular No. 4 of 2016 Point 5 of the Religious Chamber Formulation is implemented by the Religious Court judges to create Decisions that protect the living rights of children as divorced victims and give justice to wives. In many divorce cases, most of child custody rights fall into the mothers.

Law enforcement means that the law is implemented, functioned, and operated with certainty. Therefore, law enforcement is a process of law to work and function by the legal enforcers against any violation of the legal norms (*Gunakarya,* 2002:59). Soerjono Soekanto mentions that law enforcement is influenced by several factors as follow: 1) the law; 2) law enforcers; 3) facilities and infrastructures

to support the law enforcement; 4) society; and 5) culture (Soekanto, 1983:5).

In the context of the implementation of the Supreme Court Circular Letter No. 4 of 2016, Point 5, it can be seen from the above examination of divorce case decisions that its implementation is still ineffective, especially in ensuring the fulfilment of women's and children rights. This can be seen in the limited numbers of decisions that mention child maintenance and guardianship as part of the case.

Without judges' willingness to implement of the Supreme Court Circular Letter No. 4 of 2006, it will not be effective. This is because the judges are the one who examine the divorce case files; and during the examination, it is possible that the judges find the fact that the litigants have children during their marriage. However, judges' ignorance about the fact that the couples have children will result in the negligence of the rights of women and children. In *in-concreto* legal finding, judges will need to refer to *in-abstracto* legal norms, which are the existing laws and regulations (www.hukumonline.com).

In the *in-concreto* divorce case decisions, judges should refer to *in-abstracto* legal norms to determine child maintenance. These *in-abstracto* legal norms include Law No. 1 of 1974 Article 41 jo the Compilation of Islamic Law Article 80, 81, 105, 149 and 156; and Law No. 35 of 2014 Article 14 (2). Except, if the litigants make particular agreements, the judges will consider those agreements. This is based on the stipulation in KUHP Article 1320 that the agreement of litigants can be used a legal source.

Apart from referring to the material law, the case examination in the Religious Courts can also refer to the procedural law as is mentioned in Article 54 of the Religious Court Act No. 7 of 1989. In case that what occurs in the Religious Courts is not regulated by that law, then the Religious Courts should refer to the procedural in the General Courts. Another stipulation on the procedure in the Religious Courts the Supreme Court Circular No. 4 of 2016. As is mentioned above that from 50 decisions, there are only 7 decisions that determine child maintenance in the Decision. However, none of them refers to Circular Letter of Supreme Court No. 4 of 2016 Point 5. In fact, the determination

of child maintenance in those decision is not based on the request in *posita* or *petitum*, nor in the *rekonvensi.*

Among those 7 decisions, only one that decisively request for child maintenance, namely Decision No. 3218/Pdt.G/2017.PAJT. Meanwhile, the other six decisions (Decisions No. 2707/Pdt.G/2017. PAJT; Decision No. 0488/Pdt.P/2017/PAJP; Decision No. 0777/ Pdt.G/2017/PA.JP; Decision No. 0755/Pdt.P/2017/PAJP, and Decision No. 1485/Pdt.G/2017/PA.JP) do not clearly request child maintenance neither in the posita, petitum, nor in the reconvention. However, judges determine that the fathers should pay for child maintenance. In this case, the decisions also do not contain any reasons to support their decisions, including Circular Letter of Supreme Court No. 4 of 2016 Point 5 as their references.

The interviews with Religious Court judges from the Religious Court of East Jakarta reveal that in determining child maintenance, the judges should consider whether this matter is requested in subsidiary lawsuit. In this case, the judges can decide, in ex-officio, that the father should provide child maintenance, even if the request is absent in the *posita* or *petitum*. Without mentioning the Circular Letter of Supreme Court No. 4 of 2016 Point 5 as their references as the basis for their Decisions, the judges deviated from the principle of *ultra petitum partium* as is mentioned in that Circular. The following is the description of seven court decisions involving child support determination:

Decision No. 2639/Pdt.G/2017.PAJT

This Decision is on a divorce involving a child resulted for the marriage. The child is under twelve years old and lived with the mother (the defendant). Both the applicant and defendant presented at the hearing. However, the defendant did not file any petition requesting for child maintanence to be the responsibility of the child's father. Nevertheles, the applicant, which in this case is the father, stated that he was to pay for IDR. 1,000,000 per month for child maintenance. In the Decision, the judge consideration only mentions that "*the applicant has stated that he is willing to give the defendant the mut'ah, amounting* IDR. 1,000,000 *and a child support* of IDR. 1,000,000 *every month excluding education and health costs until the child reaches*

adulthood /or be independent." Thereby, the panel of judges punished the petitioner to provide *mut'ah* and the livelihood of the child which will be stated in the Decision.

The Decision does not explicitly mention that the panel of judges, in ex-officio, has the right to determine the child support based on the Supreme Court Circular No. 4 of 2016 Point 5 of the Formulation of the Chamber of Religion. This is different with *iddah* and *mut'ah* in which the judges determine and mention them in the Decision even without the request from the wife. Unlike the *iddah* and *mutah* livelihoods of the judges consideration explicitly stated "although the Respondent as the wife does not demand mut'ah and iddah livelihoods from the Petitioner as husband, the Panel of Judges ex officio can charge the Petitioner to pay mut'ah and iddah livelihood to the Respondent ".

Decision No. 2707/Pdt.G/2017.PAJT

This is a Decision on a divorce, involving two children who were under 12 years old. It was stated that the Petitioner (husband) and Respondent (wife) had an agreement on the consequence of the divorce, including: child custody (*hadhanah*) costs in the amount of IDR 1,500,000 every month for two children excluding the education and health costs. Both children were in the care of the Respondent. The agreement was included in the judge considerations. The considerations state:

Furthermore, the panel of judges in their consideration stated that with regard to the agreement, the panel of judges considered that both parties had been bound by the agreement in Article 1338 of the Civil Code stating that all treaties legally apply as a law for those who made them. . Thus, the panel of judges punished both litigants to obey and implement the content of the agreement mentioned, which will be stated in the Decision. The Decision states "Imposing the cost of children maintenance (*hadhanah*) to the Petitioner, with the amount of IDR 1,500,000.00 every month, excluding education and health costs for children." The determination of the cost of the *hadhanah* is, then, based on the agreement of the parties; and not the implementation of the Supreme Court Circular No. 4 of 2016 Point 5 Formulation of the Chamber of Religion.

Decision No. 3218/Pdt.G/2017.PAJT

This Decision is based on a divorce lawsuit filed by the wife (plaintiff). The plaintiff demands the custody and livelihood of children under 12 years of age, both in *posita* and *petitum*. In the trial, the defendant filed a counteclaim to establish the custody of the first child at the Defendant's convention / Plaintiff's counterclaim, but the panel of judges rejected the suit. The judicial consideratio states: 1) based on the provisions of Article 41 letter (b) of Law No. 1 of 1974 Jo. Article 105 letter (c) The Compilation of Islamic Law, the cost of caring for children is be borne by the father .2) Based on the provisions of Article 156 letter "d" of the Compilation of Islamic Law, all costs of *hadhanah* and living for the children are be borne by the father depending on his ability. 3) Considering that the Defendant who worked as an expert staff of the Indonesian House of Representatives and lecturer at a university , his monthly income was IDR. 7,000,000.00 , he cannot afford to pay for the support for the children as demanded by the plaintiff, which is IDR. 6,000,000.00 every month.

In the end, the panel of judges sentenced the defendant to pay IDR 2,500,000 per month for the support of the two children until they reach adulthood. Furthermore, the Decision states that the first child and second child are under the plaintiff's care and custody.

Decision No. 0488/Pdt.P/2017/PAJP

This Decision is regarding a divorce case. The respondent did not include the demand of custody and livelihood of the child. However, there was an agreement that the child custody was in the right of the mother (petitioner), but the obligation of child support was borne by the father (defendant). The panel of judges has considered the agreement by reciting the matters agreed between the two parties in the hearing, Then, the Panel of Judges considers that both parties are bound by the agreement as stipulated in Article 1338 of the Civil Code which stated that all treaties made legally apply as law for those who made it. Thus the Panel of Judges sentenced both parties to obey and carry out the contents of the agreement mentioned above, which will be stated the ruling. Finally, the judges determine that the custody is in the right of the petitioner, while

the defendant is obliged to pay IDR 1,500,000 per month for child maintenance fee.

Decision No. 0777/Pdt.G/2017/PA.JP

This Decision was issued without the presence of the wife during the hearing process. It is also revealed that the mediation between the husband and wife failed. The Decision, after that, granted the the petitioner to pledge the divorce. The judge also sentenced the petitioner to pay for the child support with the amount of IDR 1,000,000 for two children until they become adults.

The judge sentenced the applicant to pay for the child maintenance cost based on the mediator report that the applicant was able to provide for 2 children who were in the care of the defendant, with the minimum amount of IDR 1,000,000, per month. The legal basis for determining the livelihood of children is based on the Civil Code Article 41 Letter (b), 45 Paragraph (1 and 2) of Law No. 1 of 1974, Article 156 Letter (d) Compilation of Islamic Law and the opinion of Ulama in the Book of *al-Umm* page 78. It is, then, stated in the legal consideration "it is required for the father to guarantee the *maṣlahat* (good) of his children both in term of breastfeeding, livelihood, clothing and care.

The defendant never asked for the rights as a caregiver for the two children and did not also demand the judge to punish the petitioner to pay for the living of the children. This is because during the trial, the defendant only presented at the mediation stage. Meanwhile, the right as a caregiver and request for payment of child support in a divorce can only be submitted at during the trial. In the legal consideration, the judge also did not mention that the determination of child maintenance costs was based on the judge ex-officio rights through the Supreme Court Circular No 4 of 2016 Point 5 of the Formulation of the Chamber of Religion or based on subsidiary demands. Based on the author's interview with the a judge of East Jakarta Religious Court, in the determining the child maintenance that is not requested by one of the party, the panel of judges must consider clearly that whether the determination is based on subsidiary demands. so that the panel of judges, in ex-officio, has the right to

determine the child maintenance even without the formal request from one the parties.

Based on that interview, it is understood that if the panel of judges determine the livelihood of children in their Decision even without the request from the plaintiff, in their legal consideration the panel of judges should mention their basis of determination. If it refers to The Supreme Court Circular No. 4 of 2016 Point 5 of the Religious Chamber Formulation, then the Supreme Court Cicular is mentioned in the interim consideration in the Decision No. 0777 / Pdt.G / 2017 / PA.JP. Thus it cannot be concluded that the Decision implements the Circular even though in determining the livelihood of children the judge has deviated the principle of *ultra petitum partium* which is allowed by the Supreme Court based on Supreme Court Circular No. 4 of 2016 Point 5 of the Religious Chamber Formulation.

Decision No. 0755/Pdt.P/2017/PAJP

This is a divorce case of a husband and wife who had been marry for eighteen years and had two children from the marriage. The plaintiff filed for divorce because the defendant had an affair. The mediation report mentioned that even though the reconciliation between two parties was not reached, the right of the children is in the responsibility of both parties. Based on the acknowledgment and agreement between the defendant and the plaintiff before the mediator, the defendant agree to give the right of custody to the plaintiff, while the child support allowance becomes the responsibility of the defendant. The defendant agreed to pay at least IDR 3,000,000per month.

In the legal considerations it is stated that although the mediation did not succeed in reconciling the plaintiff and the defendant as husband and wife, both parties have agreed on the rights of the child or the cost of living for 2 two children. The defendant had agreed to provide living expenses for the two children in front of mediator at least IDR 3,000,000 every month, paid to the plaintiff, excluding the health and education costs of the children until they become adults, This is clearly stated in the Decision.

The panel of judges sentenced the husband to pay for the children

living allowance based on the recognition and willingness of the defendant to pay for it in front of the mediator. This is without the request of the plaintiff. In this particular case, the panel of judges did not consider child custody in the Decision. It is not mentioned in the Decision, Decisionwhether the determination of the child maintenance is based on judge's ex-officio rights based on the petitum subsidiary or the implementation of the Supreme Court Circular No. 4 of 2016 Point 5 of the Formulation of the Chamber of Religion.

Decision No. 1485/Pdt.G/2017/PA.JP

This is a divorce case involving one child who had not reached twelve years old. Based on the pre-trial mediation report, there has been an agreement between the petitioner and defendant that the child will be under the care of the defendant, while the child's living allowance will be the responsibility of the petitioner, which is IDR.750,000 every month.This agreement was subsequently quoted by the Panel of Judges and set as part of the Decision. This is in accordance with the provision of Article 105 letter (a) of the Compilation of Islamic Lawthe principle of et aequo et bono, where the Panel of Judges can grant the petition.

Furthermore, the Decision mentions that the amount of IDR 750,000 does not include the education and health costs, and there is a need to pay for additional of ten percent per year. This Decision punishes the Applicant to pay and give the amount of money as stated in the dictum No. 6 to the defendant. The dictum No. 6 mentions "*until the child is adult or 21 years old*".

Access to Justice for Children and Women

The issuance of Circular of Supreme Court No. 4 of 2016 Point 5 on Religious Chamber is a tangible effort made by the Indonesian judiciary to provide justice for women and children. With the certainty that can be provided by that regulation, women will no longer be burdened to provide for child supports alone after the divorce. Moreover, the children will have sufficient supports not only from their mothers but also their fathers. However, from the decisions issued after Circular of Supreme Court No. 4 of 2016 Point 5 on Religious

Chamber are mostly not different from the previous ones. Without a clear request from the plaintiff, the judges will not consider the matter in their decisions.

Based on Point 5 of the Circular Letter of Supreme Court No. 4 of 2016 on Religious Chamber, the judges, in ex officio can request the fathers to pay for child supports even though the child is with her/his mother. This is also regulated by the Compilation of Islamic Law Article 156 (f). According to this regulation, the judges can determine that the fathers should pay for child supports if they find found that the couple have children from their marriage, and they have not reached adulthood. In this case, the judges are allowed to deviate from the principle of "Ultra Petitum Partium" as is mentioned in Article 178 point (3) HIR/ pasal 189 ayat (3) RBg (Choiri, 2016).

According to Fauzan, a Religious Court judge, the lack implementation of point 5 of the Circular Letter of Supreme Court No. 4 of 2016 on Religious Court Chamber is due to the absence of sufficient information and socialization for the judges. Istianah, for example, maintains that judges should not violate the rules in the procedural law in dealing with legal cases. Deciding matters that are not requested by the plaintiff is against the procedural law. This means that the judges are unprofessional. With this unprofessional behaviour, judges are subject to disciplinary punishment. Another reason behind the difficulty in implementing the Circular of Supreme Court No. 4 of 2016 on Religious Court Chamber is because the legal aid providers (POSBAKUM) do not explain that child maintenance supports can be requested along with divorce cases. Meanwhile, POSBAKUM is the institution that provides legal advice for women dealing with divorce.

Conclusion

The study of Religious Court Decisions from three jurisdictions shows that the implementation Circular of Supreme Court No. 4 of 2016 on Religious Court Chamber has been very limited. Only few of the decisions that determine the obligation of the fathers to pay for child supports after the divorce, which is only 14% of

decisions in 2017. This percentage is almost similar with the one in 2015 (12%) and 2016 (14%). Moreover, these decisions do not include the Circular Letter of Supreme Court No. 4 of 2016 in their consideration. In other word, the Circular Letter has not been used as reference in most of divorce cases. As a consequence, the regulation has not been able to provide better justice for women and children in divorce cases.

References

Abidin, Zainal. (1999). *Himpunan Peraturan Perundang-Undangan dalam Lingkungan Peradilan Agama*. Jakarta: Yayasan Al-Hikmah.

Asshiddiqie, Jimly. (2004). *Konstitusi dan Konstitusionalisme Indonesia*. Jakarta: Mahkamah Konstitusi RI dan Pusat Studi Hukum Tata Negara FHUI.

Butarbutar, Elisabeth Nurhaini. (2011). "Kebebasan Hakim Perdata dalam Penemuan Hukum dan Antinomi dalam Penerapannya." *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 23, no. 1 61–76. https://doi.org/10.22146/jmh.16196.

_____. (2009). "Konsep Keadilan dalam Sistem Peradilan Perdata." *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 21, No. 2.

Choiri, Ahmad. (2015). "Penjaminan Harta Ayah Terhadap Kelalaian Pembayaran Nafkah Anak Pasca Perceraian (Perlindungan Hukum Terhadap Anak Korban Perceraian Bagian 2)." Direktorat Jenderal Badan Peradilan Agama, https://badilag.mahkamahagung.go.id

_____. "SEMA 4/2016 Hadiah Besar Ketua Kamar Agama Bagi Perlindungan Hukum Terhadap Anak Korban Perceraian di Indonesia, Direktorat Jenderal Badan Peradilan Agama." https://badilag.mahkamahagung.go.id

_____. (2015). "Perlindungan Hukum Terhadap Anak Korban Perceraian Yang Terabaikan Oleh Hakim Pengaadilan Agama." Direktorat Jenderal Badan Peradilan Agama, 10 September. https://badilag.mahkamahagung.go.id

Gunakarya, Widiado. (2002). *Pendekatan Sistem dan Kebijakan Dalam Penegakan Hukum di Indonesia*. Bandung: Wawasan Hukum.

Mahkamah Agung RI. (2007). *Yurisprudensi Mahkamah Agung RI*.

Mahkamah Agung RI. (2013). *Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama, Buku II*.

Mahkamah Agung RI. (2006). *Yurisprudensi Mahkamah Agung RI*.

Kementerian Agama. (1991). *Kompilasi Hukum Islam (KHI)*

Manaf, Abdul. (2008). *Cara Beracara di Lingkungan Peradilan Agama*. Bandung: Mandar Maju.

Mujahidin, Ahmad. (2012). *Pembaharuan Hukum Acara Peradilan Agama*. Jakarta: Ghalia Indonesia.

Praja, Juhaya S. (2005). *Teori-Teori Hukum Suatu Telaah Perbandingan dengan Pendekatan Filsafat*. Bandung..

Asy-Sya'rawi, Syekh Muhammad Mutawalli. *Tafsîr Asy-Sya'rawi*. Kairo: Akhbarul Yaum.

Soekanto, Soerjono. (1983). *Faktor-faktor yang Mempengaruhi Penegakan Hukum*. Jakarta: Rajawali.

Tata, Wijayanta. dkk., (2009). "Penerapan Prinsip Hakim Pasif dan Aktif dalam Hukum Acara Perdata dan Relevansinya terhadap Kebenaran Formil" *Laporan Penelitian Fakultas Hukum Universitas Gadjah Mada, Yogyakarta.*

Wantu, Fence M. (2012). "Mewujudkan Kepastian Hukum, Keadilan dan Kemanfaatan dalam Putusan Hakim di Peradilan Perdata." *Jurnal Dinamika Hukum* 12, no. 3.). https://doi.org/10.20884/1.jdh.2012.12.3.121.

Yanggo, Huzaemah Tahido. (2004). *Fiqh Anak: Metode Islam dalam mengasuh dan mendidik Anak serta Hukum Hukum Yang berkaitan dengan Aktivitas Anak*. Jakarta: Al Mawardi Prima.

Yuliandri. (2010). *Asas-Asas Pembentukan Peraturan Perundang-Undangan yang Baik: Gagasan Pembentukan Undang-Undang Berkelanjutan*. RajaGrafindo Persada.

Al-Zuḥailī, Wahbat. (1997). *al-Fiqh al-Islāmī wa Adillatuh*. Cet. IV. Beirut: Dār al-Fikr.

www.hukumonline.com

Decision No 0755 / Pdt. G / 2017 / PA.JP.

Decision No. 0777 / Pdt.G / 2017 / PA.JP

Decision No. 0626 / Pdt.G / 2015 / PA.JP

Decision No. 3077 / Pdt.G / 2017.PAJT

Decision No. 0042 / Pdt.G / 2015 / PAJP

Decision No. 0488 / Pdt.G / 2015 / PA.JP

Decision No. 3218/Pdt.G/2017.PAJT.

Decisions No. 2707/Pdt.G/2017.PAJT

Decision No. 0488/Pdt.P/2017/PAJP

Decision No. 0777/Pdt.G/2017/PA.JP

Decision No. 0755/Pdt.P/2017/PAJP

Decision No. 1485/Pdt.G/2017/PA.JP

Decision No. 2639/Pdt.G/2017.PAJT

Decision No. 2707/Pdt.G/2017.PAJT
Decision No. 3218/Pdt.G/2017.PAJT
Decision No. 0488/Pdt.P/2017/PAJP
Decision No. 0777/Pdt.G/2017/PA.JP
Decision No. 0755/Pdt.P/2017/PAJP
Decision No. 1485/Pdt.G/2017/PA.JP

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