

Judge Authority in Providing Justice to Children and Ex-Wives

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ABSTRACT

This paper aims at studying the implementation of the rights of ex officio judges in Religious Court of Krui in Lampung, for ex-wife and children in their divorce case, especially 'verstek'. It questions about the considerations used by the judge in determining the burden of obligation to the husband with the right of sex officio for ex-wife and children, and about the judge's reasons behind the use of rights of ex officio in deciding divorce verstek. It concludes that it is only judges who think progressively about using the rights of ex officio in divorce verstek decisions. Verdict of divorce verstek, accompanied by the imposition of ex-husband in the Krui Religious Court, in the burden of iddah and mut'ah or child, is still low. Since many judges are bound to formal and material legal aspects, the principles and legal reasons of the ultra petitem aspect, the absence of a wife, and the panel of judges' concern over husbands who are unable to carry out what is charged, so that the verdict becomes useless. The consideration becomes the basis of a judge who gave a burden on the husband, based on the consideration of a sense of justice. As for the reference for the loading is the following: the husband's financial ability and willingness of the husband, the length of marriage, nusyuz or not of wife, and the last is the age and number of children.

Keywords: Rights of ex officio judge, divorce of "talak verstek"

1. INTRODUCTION

Divorce is the end of a marriage that has been fostered by a married couple. The breakup of marriage can be initiated either by the husband or the the wife.[1] Yet, there is a fundamental difference between the two divorces. If the divorce is filed by the wife, then after divorce, no-obligation must be fulfilled by the husband to his ex-wife. But if the divorce is proposed by the husband, he has several obligations that he must fulfill to his son and ex-wife.

Furthermore, the results of observations in Krui religious court (referred to as PA Krui), showing this figure: preliminary data were obtained that throughout 2016-2017 divorce cases received at the PA Krui had received divorce cases totaling 167 divorce cases; out of that number, 131 cases were decided by the judges with *verstek* because of the absence of his wife during the hearing of the case.

This illustrates that the majority of divorce cases in PA Krui were terminated with *verstek* because the wife/respondent had never attended the trial. Of 131 divorce cases that were terminated *verstek* followed by loading using rights ex officio as many as 33 cases while the rest were decided with verstek pure without charging, totaling 98 cases.

Based on the above data, the question arises on how the implementation of the rights of ex officio judges in PA Krui for ex-wife and children in their divorce case,

especially verstek divorce? How consideration of the judge in determining the burden of obligation to her husband with the right *sex officio* for ex-wife and children? And what is the reason for the judge to use rights or not *ex officio* in deciding verstek divorce?

2. RIGHT OF CHILD AND EX-WIFE AFTER DIVORCE

2.1. Right of Child

Husband who divorced his wife is obliged to pay a living expense of their children, including their education and health, until they are of legal age and understanding, and have their own income.

2.2. Right of Ex-Wife

Some obligations to ex-wife that must be fulfilled by a husband are in the form of the following:

- Must provide mut'ah namely providing divorced husband to his wife as compensation can be money or objects, while the amount of the provision of mut'ah is adjusted to the ability of

the husband. Majority of ulama believe that mut'ah is only for divorce whose initiatives originate from husbands such as divorce.[2] In KHI there are 3 (three) chapters that talk about mut'ah, namely in articles 158, 159 and article 160, which states that a husband who wants to divorce his wife is obliged to give mut'ah on condition:

1. Not yet the price is fixed for the wife *qabla dukhul*.
2. Divorce is based on the will of the husband. Giving *mut'ah law* is recommendable (*sunnah*) given by the ex-husband if without these conditions, and the amount of *mut'ah* is also adjusted to the propriety and ability of the husband.[3]

Must provide *iddah*, ex-shelter, and clothing for the ex-wife during the *iddah period*, unless the ex-wife has been given divorce *bain* or *nushuz* and is not pregnant. In Book II of the PA Technical Guidelines, it is determined that if a divorce is filed for reasons of cruelty or violence by the husband, the judge can decide an *ex officio* to determine the *iddah*. [4]

The obligation to pay off the dowry is fully payable if when the dowry marriage contract has not been paid and he has been hanging out with his wife, and if the wife has not been paid, the dowry must be paid in half.

Islamic law regulates a woman whose husband defies her, and she may only make a new marriage with another man after his *iddah period* is over. With the occurrence of this new marriage, the ex-husband's relationship with the wife has been completely broken so that by itself, the wife is no longer entitled to receive a living from her ex-husband. Vice versa, the husband, is no longer obliged to provide for his ex-wife.

2.3. Right Ex Officio Judges'

In the Big Indonesian Dictionary, *ex-officio* means because of the position, as in the sentence of holding the position in a position *ex officio*. [5] The definition of right *ex officio* according to several legal experts includes the following. According to Sudarsono, in the legal dictionary, *ex officio* means because of position. [6] According to Yan Pramadya Puspa, *ex officio* means for position, it can be seen from the example: in the case of the exception is justified by the law judge or the court *ex officio* shall declare itself not competent. [7] According to Subekti, the meaning of rights *ex officio* comes from Latin, *ambtshalve* of Dutch, which means that due to position, not based on a letter of appointment or appointment, nor is it based on a request. [8]

From some of the explanations above it can be concluded that the definition of *ex officio* judge's right is the right to the authority possessed by the judge because of his

position, one of which is to decide or give something that is not in the demands, namely giving rights owned by ex-wife and children.

Divorce legal process in PA outlined technically in the Decree of the Chief Justice of the Republic of Indonesia Number: KMA / 032 / SK / IV / 2006 concerning the enactment of Book I Guidelines for Implementation of Duties and Administration (Revised Edition 2020). In item 7 (seven) mentions PA *ex officio* can establish a living obligation *waiting* on the husband for his wife's period as long as she was not proven to do *nusyuz* and establishes the obligation *mut'ah* (Article 149 letters a and b KHI). In Book II of the PA Technical Guidelines, it is determined that if a divorce is filed for reasons of cruelty or violence by the husband, the judge can *ex officio* determine the income *iddah*.

2.4. Statistics Case Received by Islamic Court in Krui

From a brief overview of divorce cases received by the PA Krui, author specializing in acceptance of divorce cases, divorce is the object of the present study. The number of divorce applications since 2016-2017 can be seen in the table below:

Table 1 Type Decision

Type of Case	Received	Case Decided in 2016 -2017		
		Present	<i>Verstek</i>	Others (Unplug, Strike and fall)
Divorce				
2016	81	11	62	8
Year 2017	86	11	69	6
Total	167	22	131	14
Percentage		13.18%	78.44%	8.38% [10]

*Source: Documentation of Case Reports, in PA Krui

The total number of divorce cases received in 2016-2017 amounted to 167 cases, further elaborated by divorce decision criteria, decided upon by the judges in terms of aspects of the application of *ex officio*. The verdict can be seen in the table below:

Table 2 Criteria decision Divorced Divorce Year 2016-2017

Criteria Decision	Number	Percentage
Kabul, No imposition of a judge	8	4.79%
Kabul, there imposition of judges for their rekonvensi (counterclaim)	14	8.38%
<i>Verstek Charges</i> , No from Judges	98	58.69%
<i>Verstek Charges Death Strike</i> , No from Judges using rights, <i>ex officio</i>	33	19.76%
5. Revoke	14	8.38%
Total	167	100%

^bSource: PA Krui Case Report Documentation.

Based on that data, the authors conclude that divorce cases divorce is the object of much more research is completed with decision *verstek* by the judges for the respondent/wife many who did not attend the hearing, which is about 78.45%. The application of rights *ex officio* by the panel of judges in the Krui PA 19.76%.

2.5. Analysis of Expenses and Obligation to Establish Hushband With Ex Officio as a Form of Justie Sensus

Some findings obtained by the author related to the application of the right of *ex officio* judge in PA Krui through the results of interviews, as well as a review of several decisions, as follows:

1. The main thing that must be proven first before imposing a decision on the imposition on the applicant is regarding the work and income. Furthermore, seeing from the will and intention of the applicant itself.
2. Exercise of *ex-officio* judge form a living loading *iddah* or *mut'ah* see from the length of the marriage age, and whether there is *nusyuz* wife.

3. The living of the child must consider that it is essential to prove first on which child is in the care of whom, the number of children cared for by the wife, and finally see the condition of the child.

Regarding the consideration of Judge PA Krui in determining the burden of obligations to the husband with *ex officio* who based his consideration on looking at the economic capacity and the intention of the husband, length of marriage, *nusyuz* whether or not a wife, in addition, it is also based on the child's factor that is seen from the age and number of children taken care of by ex-wife.

The judges' verdict in determining the penalty to the husband to pay some obligations to his former wife is living *iddah*, *mut'ah* and *had* child divorce decision *verstek* by considering some of these things have been very precise, because it is not contrary to the Constitution and the rule of Islamic law, was found the fact that what was done by Judge PA Krui using judgment was not from written law but on conscience and morals. Because there is a law in the search for the consideration of the needs of society with the rules in jurisprudence in addition to the principal legal basis of the Qur'an and hadith such as: *ijma* and *qiyas*, *istihsan* and also *istidlal* that uses proposition as a law such as morality, decency, and customs prevailing in the community.

2.6. Analysis of Judge's Arguments Using Rights Platform Ex Officio in the Case of Verstek Divorce

Judge in PA Krui views on the use of rights *ex officio* in divorce severed with *verstek* divided into two groups:

2.6.1. The group of judges who use ex officio

Consideration that in divorce, there are inherent things that are the responsibility of the husband as well as the rights of the child and wife. Among them, *mut'ah* the waiting, living *madhiyah* and *hadhanah* for children who are minors as stipulated in the Qur'an and legislation.

The judge found out, based on his knowledge, how the laws of the case were brought against him. Study each case seriously, because what is issued by a judge is a law that will be accounted for in this world and the hereafter.

Rights *ex officio* not required to use the judge in each case, for the right *ex officio* is the authority that can be used or not by a judge without being required or requested. And the application depends on the condition of the case, as long as there is a connection with the main lawsuit and does not interfere with the primary lawsuit. Judges who use *ex officio* are not included in the principle of *ultra petitumpartium* because it has been regulated in separate legislation.

Against the judge's ruling that placed obligations to her husband with *ex officio* divorce in particular on divorce, *verstek* is a reflection of the concept of the benefit that can be used to meet the needs of daily life after the divorce.

The rule of law in the ruling provides a description that under certain conditions, a person is required to undergo a legal order if it is related to the interests of other parties, then it is appropriate for him to get what he should have adequately. It can be understood that in specific contexts, judges' decisions that exceed the demands can be justified, especially because the decision will create justice for the parties.

2.6.2 *The group of judges that do not use ex-officio*

Consideration is that if a wife does not attend the trial, although it had been called officially and worth, it is considered to abort their rights and, therefore, inappropriate for granted. Next, to decide a case that is not listed in the petitum, the claim includes the principle of *ultra petitumpartium*, which is prohibited in the examination of the case.

The loading of livelihoods *iddah* and *mut'ah* is a form of *ultrapetitumpartium*. In examining civil cases, the judge is passive in the sense that the scope or extent of the subject matter of the dispute submitted to the judge to be examined is principally determined by the parties who are litigants and not the judge. Judges may not increase or decrease it. They also argued that if they did not come, then their rights would be denied so they would not need to be given.[9]

Judges are obliged to adjudicate all parts of the claim and are prohibited from making decisions on cases that are not prosecuted or grant more than those demanded (article 189 paragraph (2) and (3) RBg). The Supreme Court in its verdict found to grant more than required, deciding a part of all claims filed or decide matters that are not required are contrary to Article 189 Paragraph (3) RBg This prohibition is called the principle of *ultra petitionpartitum*, judges grant beyond petitum lawsuit, is considered to have acted beyond the limits of its authority (*ultra vires*). If the decision contains *ultra petitum*, it must be declared invalid.[10]

The absence of the respondent became the basis for consideration because the respondent had been officially summoned and was appropriate to attend the hearing. The presence of parties in the trial becomes essential because in the trial that every party has the right to defend his rights over other parties so that his absence is deemed to have released/aborted his rights.

The concern is that the husband is unable to pay the burden that has been set so that it will result in no good. If it is charged too much it is feared that the divorce pledge cannot be carried out because the husband cannot fulfill what is charged to him so that their marriage becomes unclear in the end it will even wrong both of them and

when the wife is absent if charged where will be paid, if deposited in a large amount of cash then will be a finding for the agency and also for the leadership.[9]

Based on the data above, there are some different conditions, on the one hand, provide the required beyond the legal defect, on the other hand, the judge is authorized to impose penalties to divorce her husband. Besides, the absence of a party has aborted their rights to another party, while the absence of the party may be due to layman of the law, for fear of the court. Alternatively, because the community's adigium is present or not, the edges obtained are only limited to divorce certificates and because of the contradictions to get a more accurate understanding.

The judge has the authority to find the law required to explore and understand the legal values and sense of justice in society. (Article 5 Paragraph (1) of Law Number 48 Year 2009 concerning Judicial Power). The judge has the authority to deviate the written legal provisions that already exist [9] but has been obsolete since outmoded, thus no longer able to meet the demands for social justice.

According to M Yahya Harahap, in practice, environmental proceedings PA, on case-specific case, the judge for the right position(*exofficio*) can make a decision beyond what is required, although this cannot be applied in all cases that enter in PA.[11] Yahya, in this case, also argued that the judge's decision that exceeds the demands can still be justified along such decision is consistent or have significant relevance to the plaintiff. In such a case, the judge's decision can still be justified.

As for other considerations, the Supreme Court of the Republic of Indonesia in several times decided cases containing *ultra petita using* the reasons as below:

1. There is a close relationship with each other.
2. In carrying out their duties, judges need to be active and try to give decisions that resolve cases.
3. Justified beyond the decision as long as it is still in accordance with the material event according to the *posita*, as contained in the decision of the Supreme Court of the Republic of Indonesia Number: 556 K / Sip / 1971 and the decision of the Supreme Court of the Republic of Indonesia Number: 425 K / Sip / 1975
4. Decision based on *petitumsubsider*, which asks for justice and is not bound by *petitumprimair*, justified if a decision that is closer to a sense of justice is obtained, and in harmony with the core of the primitive *petitum*, as contained in the decision of the Supreme Court of the Republic of Indonesia Number: 140 K / Sip / 1971.

Thus, consideration does not provide liability to the husband for a divorced wife due to problems *ultra petitum*, cannot be used as a basis because the position of a judge is

higher than the applicable law. However, judges must not violate or break the provisions of the law. If the law regulates fairly and feels fair, the judge still needs to stick to the law.

The reason or consideration of the absence of the wife (the respondent) in the trial, which was interpreted by the panel of judges that she had disqualified her rights before the law, could not be considered fully that they waived their rights, because many were found in the field when the wife was called to appear before the court. Rural people in West Lampung and Pesisir Barat districts that belong to the PA Krui jurisdiction have low levels of education and the layman of the law does not understand their rights, or their absence due to fear of judgment and trial institutions, or even the absence caused by the community having an understanding that the court is a formalistic institution of divorce so that it does not know that his absence can be interpreted as disqualifying his rights.

The subsequent analysis is carried out on the reason the judge did not give a burden to a wife because of fears the husband could not afford to pay the set costs so that the consequences are not good for both parties. The duties of a husband and wife of the former in the form of a living *mut'ah* and *the waiting* has been very clearly set and defined in the Qur'an and the legislation in force in Indonesia. Basic necessity of giving *mut'ah* is the word of God in the letter al-Baqarah (2) paragraph 241:

"To the women who divorced (let given by her husband) mut'ah according ma'ruf, as an obligation for the righteous."

Islam also regulates the necessity of a husband who wants to divorce his wife is an obligation to provide a living *iddah*, shelter, and clothing to his ex-wife during the period, *prescribed* unless the ex-wife has been sentenced to divorce *bain* or *nusyuz* and in the non-pregnant state. This is regulated in the letter at-Talaq (65) paragraph 6. This is agreed by KHI 153 paragraph (1) and Government Regulation Number 9 of 1975 concerning Implementation of Law Number 1 of 1974 concerning Marriage Article 24 Paragraph (2) letters a, b, and c.

3. CONCLUSION

Based on the analysis described above, the authors draw the following conclusions. First, the decision of divorce *verstek* accompanied by the imposition of ex-husband in the Krui Religious Court in the Krui PA in the burden of *iddah* and *mut'ah* or child, is still low. Second, the considerations on which the judge is based impose on husbands based on consideration of a sense of justice. As for the reference for the loading is a factor in the husband's financial ability and willingness of the husband, the length of marriage, *nusyuz* or not a wife, and the last is the age and number of children. Third, the lack of application of the right *ex officio* judge of the Religious Court judges Krui, caused much tied to the formal and material legal aspects, principles and legal reasons aspects of *ultra petitum*, his wife's absence, and fears the judges of the

husband who is not able to carry out what is charged, so the verdict is in vain.

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