

## **Measuring Ex Officio Judge Rights and Application of the Ultra Petitem Partium Principle in Deciding Cases in Religious Courts**

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### **Abstract**

The judge carries out the authority to try based on independent judicial power. Judges in examining cases are guided by, among other things, two things: making decisions based on applicable laws and regulations and being obliged to explore the values that live in society. The procedural law of the religious courts also originates from the civil procedural law, which applies to general courts. One of the distinctive characteristics of civil cases is the judge's restriction not to grant the petitem of a lawsuit that was not requested by the plaintiff (ultra petitem partium). The threat to the ban on the use of the ultra petitem partium principle is that the decision is declared null and void. On the other hand, in practice, judges at religious courts often use ex officio rights to decide something that was not requested by the plaintiff, not even limited to that; instead, the judge adds a ruling that benefits the

defendant. This often occurs in examinations of cases of marital dissolution filed by the husband (*cerai talak*) or by the wife (*cerai gugat*), and in some cases, it also occurs in claims for the division of joint assets in a marriage. The judge's consideration of using ex officio rights and going beyond ultra petitem partium is to provide balance in court decisions. In addition, it is also based on the concepts of justice and benefit. The application of ex officio rights by judges needs to be explained in laws and regulations. This is to guarantee legal certainty and the understanding of judges and justice seekers so that limiting the use of rights officio, does not conflict with the principle of ultra petitem partium.

### Keywords

*ex officio; ultra petitem partium; religious courts*

### Introduction

Religious Courts are organizers of power lower judiciary environment Supreme Court. Religious justice is enforced with legitimacy Invite Number 7 of 1989 as has changed the first two times with Invite Number 3 of 2006 and amendments second with Invite Number 50 of 2009. Religious Courts have the authority to judge cases between people who are Muslim, including in-field marriage, inheritance, wills, zakat, wakaf, infaq, shodaqah, and Sharia economics.

In the field of marriage ranges, among other questions, he decided on marriage. Something marriage stated separated Because of three matters namely; death, divorce, and because decision court. Special in the problem he decided on marriage because of divorce two things are distinguished i.e., he decided on marriage proposed by the husband (*cerai talak*) and its dissolution marriage proposed by the party's wife (*cerai gugat*). In submission, he decided marriage the tangent direct with the problem right foster child (*hadhanah*), division treasure *gono gini*, demands living, mut'ah, living iddah and so on which are part of law civil material well sourced from living law nor law positive Islam.<sup>1</sup>

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<sup>1</sup> Agus Salim, "Formulasi Hukum Keluarga Sebagai Positifisasi Hukum Islam di Indonesia." *Syariat: Jurnal Studi Al-Qur'an dan Hukum* 8, no. 2 (2022): 231-242.

The applicable law in the Religious Court Procedure Law is civil procedural law that applies to the environmental Justice general, except where specified in invite religious justice. One consideration he ignored civil procedural law Justice general as one source environmental law religious justice is that law civil material that applies to religious courts, including in grove law civil in matter this law family.

Civil law (material) nuances the private is very strong so civil procedural law frequently called law civil formal works as instrument implementation or enforced law civil material. Aspect private that comes to the fore related with characteristic connection law between subject personal law with other personal. This thing is tightly connected with the principle that the judge is in a judge case civil nature passive. Passive nature interpreted including from initiative litigious originate from party interested parties direct with the matter. Judges are limited only receiving and checking throughout the matters submitted plaintiff and defendant.<sup>2</sup> Apart from that characteristic Passivity is also indicated by the inner judge's limitations judge case civil often called *ultra petita*,<sup>3</sup> or as it is also called *ultra petitum partium*, where the judge only considers demands based on law to him and matters submitted by the parties. Beyond what the parties demand, judges are limited by regulations and legislation.

Legal basis principle *ultra petita* this there is in provision Article 178 paragraph (3) HIR junto Article 189 paragraph (3) RBG. Principle this prohibited the judge from granting demands that are not requested by the parties or in other words the judge did not decide more than requested by the plaintiff in *petitum*.<sup>4</sup> This principle is very important

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<sup>2</sup> Junaidi Junaidi, and M. Martindo Merta. "Asas Hakim Pasif dalam Reglement Op de Rechtsvordering (RV) dan Prinsip Hakim Aktif dalam Herziene Indonesisch Reglement (HIR) dalam Penyelesaian Perkara Perdata di Pengadilan." *Qistie* 13, no. 1 (2020): 60-77.

<sup>3</sup> Heru Sugiyono, Heru Suyanto, and Suherman Suherman. "The Implementation of Ultra Petita Decisionsin Civil Dispute." *International Journal of Multicultural and Multireligious Understanding* 7, no. 3 (2020): 132-142.

<sup>4</sup> Rohman Uni, Adi Nur, Sugeng Sugeng, and Hesti Widyaningrum. "Instrumentation of Ex-Officio Rights of Religious Courts Judge Related to Fulfilling Children and Wife's Rights Due to Divorce." *Jurnal Hukum & Pembangunan* 50, no. 2 (2020): 361-378.

because when the judge decides the case exceeds *ultra petita*,<sup>5</sup> the decision concerned is null and void, even if the judge decides the case the width-based intention is good or by interest general. As a result, it violates the principle of *ultra petita* the same as violating the principal rule of law.<sup>6</sup>

Because civil procedural law in religious courts is based on civil procedural law in the judiciary general, the *ultra petita* principle in case Justice Civil law also applies to the environment of religious justice.<sup>7</sup> However, in several cases, the judge was given the right *ex officio*, which means rights conferred because of his position.<sup>8</sup> Subekti says right *ex officio* is acquired and inherent rights. Because of position, not because of letter determination or appointment or because of application.<sup>9</sup> *Ex officio* rights of religious court judges generally around the fulfillment right of the wife who was divorced by her husband appeared because there exists an application for divorce (divorce) and also fulfillment right proposed wife in a lawsuit divorce by wife (divorce). Rights the covers rights of a woman after divorce,<sup>10</sup> like a description of living *mut'ah*, *maskan*, *kiswah*, and cost maintenance child or *hadhanah*. However, in practice often happen disagreement and uncertainty arise Because of inequality perception when the judge uses the right *ex officio* in the verdict.

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<sup>5</sup> Ali Zia Husnu Labib, "Hak Ex Officio Haki Pengadilan Agama Wamena dalam Perkara Nafkah Pasca Perceraian." *Journal de Jure* 9, no. 2 (2017): 106-116.

<sup>6</sup> Dea Mahartika, "Ratio Decidendi Majelis Hakim tentang Hak Ex Officio Hakim dalam Memberikan Hak Asuh dan Nafkah Anak Pada Perkara Cerai Talak." *UNISKA Law Review* 1, no. 2 (2020): 40-60.

<sup>7</sup> Nurhidayati Nurhidayati, et al. "Effectiveness of Ultra Petitem Partium in Divorce Claims in Religious Courts." *ADHKI: Journal of Islamic Family Law* 4, no. 2 (2022): 91-113.

<sup>8</sup> Nasrullah Nasrullah, "Eksistensi Hak Ex Officio Hakim dalam Perkara Cerai Talak". *Thesis* (Banda Aceh: Universitas Islam Negeri Ar-Raniry Banda Aceh, 2017).

<sup>9</sup> Zainal Faizin, and Ahmad Junaidi. "Penerapan Hak Ex Officio Hakim dan Asas Ius Contra Legem dalam Perkara Perceraian dan Pembagian Harta Bersama di Pengadilan Agama Magetan Perspektif Hukum Progresif". *Journal of Economics, Law, and Humanities* 1, no. 1 (2022): 109-124.

<sup>10</sup> Aas Tri Ariska, and Udin Latif. "Analisis Yuridis Penerapan Hak Ex Officio Hakim dalam Melindungi Hak-Hak Perempuan yang Berhadapan dengan Hukum pada Perkara Cerai Talak di Pengadilan Agama Sorong." *Muadalah: Jurnal Hukum* 2, no. 1 (2022): 55-69.

A number of the judge's decision shows inequality in consideration of the law so which gives rise to disparity one each other. There are 2 (two) views of the judges that matter i.e., first: the internal judge the verdict states that right must submitted simultaneously with the principal the thing good divorce or divorce divorced sue nor submitted in form sue the compensation contained therein to petitum requested related right the above. If no request in petitum so considered to violate ultra petita. Whereas view, there is a judge's decision in nature progressive with justification use of right ex officio with grant right based on goals give justice and rights right wife posta happen to divorce.

In some the judge's case is too much active in using the right ex officio in the matter of lawsuit divorce from the wife even in case certain granted or decided in a way verstek without the presence party husband.<sup>11</sup> The decision version that followed fulfillment obligation living to the husband, of course, matters this related tightly with the defense husband will his abilities to fulfill ordered living. There's potential no happen something balanced evidence as the right answer husband on case fulfillment living.<sup>12</sup> Decision verstek principle audi et alteram partem no get sufficient portion whereas principle the is an inevitability for internal judges inspect something the matter.<sup>13</sup> On the one hand, religious court judges are also taking refuge behind demands subsidiary related application decision fair based on ex aequo et bono. The focused study is the difference in the perspective of religious court judges, namely the paradox between application right ex officio judge and application ultra petitum principle partium. So, the title raised in the study is "Measuring the Ex Officio Rights of Judges and the Application of the Principle of Ultra Petit um Partium in Deciding Cases in Religious Courts".

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<sup>11</sup> Zhahwa Nurdhyani, "Disparitas Putusan Cerai Talak Verstek dan Korelasinya Terhadap Hak-Hak Mantan Istri: Studi Analisis Perbandingan Putusan Perkara No. 2694/Pdt. G/2018/PA. Jbg dan Perkara No. 1713/Pdt. G/2020/PA. Jbg." *Thesis* (Malang: Universitas Islam Negeri Maulana Malik Ibrahim, 2021).

<sup>12</sup> Abdul Jamil and Muliadi Nur, "Perlindungan Hukum Dan Keadilan Para Pihak Melalui Ex Officio Hakim dalam Putusan Verstek Perkara Perceraian," *Jurnal Hukum Ius Quia Iustum* 29, no. 2 (2022): 439–460.

<sup>13</sup> Dian Saputra Saputra, Jamaluddin Jamaluddin, and Yulia Yulia. "Perlindungan Hak Perempuan dan Anak Dalam Putusan Verstek di Mahkamah Syariah." *Suloh: Jurnal Fakultas Hukum Universitas Malikussaleh* 9, no. 2 (2021): 1-24.

The type of research is study law (legal research) i.e., research that examines rule normative law. This analysis discovers coherence between regulation with other regulations. The nature of the research is reformed-focused rigorous rule-evaluation research that suggests amending any regulations that are deemed to be insufficient.<sup>14</sup> The approach used is approach concept and approach legislation invitation. Approach legislation invitation realized in form look for coherence between one regulation with other related regulations with the issues discussed including laws invite marriage, invite power judiciary, civil procedural law and compilation Islamic law, meanwhile approach draft related with principle, doctrine as well as draft law among other problems principle ultra petitem partium, right ex officio judge, the judge's principle is passive.

### **Developments of Principle of Ultra Petitem Partium**

Before discussion related to right ex officio judge and principle ultra petitem partium need to put base beginning related maintenance power justice administered by judges. Judges have independent power to administer justice to uphold law and justice. The things that the judge is guided by operate its function among others are judge something case based on provisions applicable laws and digging mark living value in society. Judges are also bound by the rules generally no one can reject the case filed to her with reason no there is the law that regulates it. In case the judge finds existing law but there is contradiction one each other, not by development public even contradictory with justice, propriety, civility in society, then the judge must bravely use his rights with apply ius contra legem.

Although the judge is granted independence or freedom in deciding cases, judges are also limited by the regulations and nature of legislation forcing (*dwingend recht*). Regulations of a natural force must not be violated, or deviated but must complied with, including therein is rule how the judge acts in handling specified matters is naturally passive, or active. Use the right ex officio judge in handling case civil limited with the use of principle ultra petitem partium which is incarnation from the judge passive. According to several expert laws, the

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<sup>14</sup> Terry Hutchinson, *Researching and Writing in Law*. (New Jersey: Thomas Lawbook Co., 2006).

principle of passive judges means the judge is waiting for initiative cases submitted by the parties.<sup>15</sup> According to another opinion, the judge is passive<sup>16</sup>, because the breadth of the case filed is determined by the litigants, not by the judge.<sup>17</sup> Possibly there is a difference in opinion among judges about the application judge's principle of character passive in case civil, however, according to several literature laws. This is caused by facts that the parties to the case determine how much wide or wide topic dispute is submitted to the judge for check in case that. In other words, the judge can in a way actively involved in the trial process to make things clear.<sup>18</sup> Temporary *ultra petitem partium* is a legal term that consists of two words, namely *ultra* and *petitem partium*. The word *ultra* has the meaning of extraordinary, excessive, and extremely.<sup>19</sup>

Although civil judges' nature is passive, they are required to act actively moment check and disconnect case because the judge is the leader trial and must try to finish the dispute as effectively and fairly as possible as well as overcome all possible obstacles and barriers obstructing a fair judicial process.<sup>20</sup> One example of a judge's behavior active arranged in provision Article 132 RV which states that "although no there is parry or indicating exception that the judge did not authority, then the judge because his position must state his authority."<sup>21</sup> The phrase "*because his position must state himself no authorized*" is

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<sup>15</sup> Junaidi and Merta, "Asas Hakim Pasif dalam Reglement Op De Rechtsvordering (R.V) dan Prinsip Hakim Aktif dalam Herziene Indonesisch Reglement (HIR) Dalam Penyelesaian Perkara Perdata di Pengadilan."

<sup>16</sup> Eka Susylawati, "The Judge Principle is Active in Case of Divorce in Madura District Religious Court." *Al-Ihkam: Jurnal Hukum & Pranata Sosial* 14, no. 2 (2019): 267-282.

<sup>17</sup> Anita Afriana, Ema Rahmawati, and Rai Mantili. "Batasan Asas Hakim Pasif dan Aktif Pada Peradilan Perdata." *Jurnal Bina Mulia Hukum* 7, no. 1 (2022): 142-154.

<sup>18</sup> Nurul Waqiah, "Pelaksanaan Pelayanan Kesehatan Bagi Narapidana dalam Upaya Pemenuhan Hak Atas Kesehatan di Lembaga Pemasarakatan Kelas IA Makassar." *Journal of Lex Theory (JLT)* 2, no. 2 (2021): 236-250.

<sup>19</sup> Muh Zulfikar Rais Barliansyah, "Interpretasi Majelis Hakim Pengadilan Agama Klaten Atas Asas *Ultra Petitem Partium*." *Jurnal Impresi Indonesia* 2, no. 3 (2023): 251-265.

<sup>20</sup> Afriana et al., "Batasan Asas Hakim Pasif dan Aktif Pada Peradilan Perdata."

<sup>21</sup> Republic of Indonesia, "*Reglemen Acara Perdata (Reglement Op de Rechtsvordering) (S. 1847-52 Jo. 1849-63.)*," 2020, 1-166.

considered as reason *ex officio* for the judge to reject inspect case that. The same thing was also mentioned in provision Article 134 HIR

The active nature of religious court judges who are incarnation right *ex officio* in inspect case divorce legitimized in invite Number 7 of 1989 concerning Religious Courts as has changed with invite Number 3 of 2006 and last changed with invite Number 50 of 2009 (next in this article abbreviated as the Religious Justice Law). Article 78 in essence states that at the request of the plaintiff or wife, the court may a. determine necessary costs covered husband; b. determine matter for ensure pet and children's education; and c. ensure maintained treasure with husband and wife, property husband or treasure wife.

If observed provision Article 78 of the Religious Justice Law there are two things important that are necessary reviewed i.e., the phrase "top application plaintiff" and the word "can". The top phrase application plaintiff meaningful that the judge granted demands about livelihood, maintenance, and education of children is based on an application from the plaintiff. This thing uses the principle *ex officio* no applies absolutely Because still hung on something the situation in which the wife is as a plaintiff in a way active initiative apply his rights as decomposed in provision Article 78 above. This thing emphasizes on use phrase 'top application'.

If linked with the words can, then in line with an explanation on giving the room the judge's freedom or freedom for using a known no right *ex officio*. If linked between the phrase on the application of the plaintiff and the word can in the chapter, then no there is a problem with the use of right *ex officio* by judges, even no exceed matter things that are limited by principles *ultra petitem partium*. In different cases, if no there is no phrase on the application plaintiff, then the word 'can' is applied by the judge, then the absolute becomes the judge's authority to apply or no right *ex officio* granted authorized by regulations legislation invitation.

Use right *ex officio* is also regulated in Constitution Number 1 of 1974 concerning Marriage (UUP). Article 41 states that if the marriage separated because of divorce, letter (b) the father is responsible answer on all costs of maintenance and education child, except if the father cannot pay it, and letter (c) The court can oblige the ex-husband to provide living expenses and/or determine certain obligations for the ex-wife. In Article 41 letter (c), the word "can" can be interpreted *ex officio*,



which gives the judge room to determine obligations. to use a wife from living mut'ah and living during the iddah period.<sup>22</sup> Provision letter b Article This if linked with provision Article 78 of the Religious Courts Law above is very relevant ie that cost maintenance for children, the living wife is charged to the husband. The difference between both of them is that Article 78 of the Religious Courts Law has nuances loading obligation to the husband based on the application wife as a defendant, meanwhile, in UUP Article 41 letter b specifically to child oblige to father for bear cost livelihood child and if father no capable, then Mother gave burden next. Temporary in Article 41 letter c rights ex officio judge appears every with the word can is placed in front of the word obligation loading to the husband.

Different from the provision above, the Compilation of Islamic Law (KHI) determines the obligation of the husband to wife on right post-divorce. Chapter 149 KHI emphasizes that if a marriage breaks up due to divorce, the ex-husband is obliged to letter (a) give appropriate mut'ah to his ex-wife in the form of money or objects unless his ex-wife is *qabla dukhul*. Letter (b) provides maintenance, food, and kiswah to the wife during the iddah, unless the ex-wife falls into divorce or *nusyuz*. Letter (c) pays off the dowry owed in full and half if *qabla dukhul*. Letter (d) provides *hadhanah* fees for children who are not yet 21 years old. Other obligations that must be borne by the husband also exist in provision Article 80 KHI number 4 letters b and c where costs of house stairs, cost maintenance, and costs treatment, and costs of education for the child are required of the husband. Obligation is still attached although both parents are already separate or divorced.

Article 149 KHI provides a burden obligation to the husband through divorce. Provision of this considered gives rise to discrimination to women's rights. Children and women will be severely affected by divorce.<sup>23</sup> Compared to provision Article 41 UUP provisions loading obligation to the husband given to all types of lawsuits because the state in a way general if a marriage is separated or happens Because of divorce, no looking initiative he decides whether marriage originates

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<sup>22</sup> Ibrahim and Nasrullah, "Eksistensi Hak Ex Officio Hakim dalam Perkara Cerai Talak."

<sup>23</sup> Uni, Sugeng, and Widyaningrum, "Instrumentation of Ex-Officio Rights of Religious Courts Judge Related To Fulfilling Children and Wife's Rights Due to Divorce."

from husband or wife. UUP is unification in law marriage, applies in a way general because no know difference submission he decided marriage because of divorce (by the husband) or divorced sue (by wife). Discrimination Article 149 KHI Because obligation giving living only given the opportunity through divorce, isn't it? on divorced sue. Different case if he decided on marriage for groups other than people who are Muslim are became competence absolute district court does not know variety, he decided to divorce because of divorce or because of divorce sue. Characteristics inspection case he decided marriage in religious courts is very different from the decided marriage in court general.

Article 149 KHI as mentioned above, sets how divorce because of divorce. In this case, this is basic *ultra petitem partium* no again applies because the norming obligation husband to right wife stated clearly in the norms of the relevant article. Temporary special for a request for mut'ah money as arranged in Article 158 KHI which states that mut'ah must be given by the former husband with the condition first; Not yet set dowry for wife *ba'da dukhul* and second; divorce that on will husband (divorce). The judge's actions in giving rights to ex-wife with the use of right *ex officio* are valid or not violate the law.<sup>24</sup> However needs to be noticed is problem request for divorce by the husband if granted by the judge still hanged or required for implementation reading vow of divorce by the husband. If the husband feels too heavy in fulfilling the obligation stipulated income in the judge's decision will influence the decision of the husband if the vow of divorce is not spoken within 6 months after the decision stated powerful law fixed, then a divorce request by the husband stated fall. The fall such a request for divorce potentially results in the decision handed down becoming drained (*illusoir*) because although right *ex officio* used by internal judges grants obligation supported by the husband, however, if the husband does not once say the pledge of divorce to the wife in grace specified time that, then the judge's decision no can implement (non-executable). If the husband has no read pledge of deep divorce specified time (6 six months), then the husband's divorce request is stated to fall. Therefore, stated fall, then consequence law to the legal status of his

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<sup>24</sup> Ibrahim and Nasrullah, "Eksistensi Hak Ex Officio Hakim dalam Perkara Cerai Talak."

marriage still there is. In other words, the legal status of his marriage is considered like circumstances beginning before happen verdict. If the husband submits a divorce petition again, the divorce petition cannot use the same reason as the divorce petition first.

Apart from that big obligations imposed on husband to wife though born from the decision on the case she filed for divorce wife nor lawsuit recompense from the wife to petition for husband's divorce, will impact on probability exists effort law on the matter concerned so that the thing will drag on until level cassation because type such a lawsuit follow and become one unity with principal the matter. The breakup of marriage as a problem mainly becomes follows appeal or cassation so that impact on more it drags on right received rights wife, temporary need life must quick He accept. Excluded if the judge decides possible decision executed moreover first (*uit voerbaar bijvooraad*) though there is effort appellate law, Cassation or even Judicial Review. However, judge practice does not always grant UBV's decision although submitted by the plaintiff in petitum the lawsuit.

Based on several Internal regulations in the Supreme Court include Circular Letters or SEMA, including SEMA Number 3 of 2018 Letter A number 2 states: "Judges in set living madhiyah, iddah living, mut'ah, and living child must consider the sense of justice and propriety with dig fact related ability economy husband and facts need base life wife ". SEMA becomes important because the meaning is a deep-dropping obligation to the husband to the right wife that the judge should consider various aspects including the ability husband. This thing becomes a guideline, especially for judges so no as well as immediately in drop decision *verstek* where decision dropped without presence husband.<sup>25</sup> This thing related tightly to the use principle *audi et alteram partem* i.e., the judge gives burden-balanced evidence with her second split party. In context fulfillment maintenance by the judge's husband at least at least must be careful heart in drop no decision attended by the party husband (*verstek*) who agreed demands fulfillment living although requested in petitum lawsuit. This thing of course

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<sup>25</sup> Ahmad Izzuddin, Ahmad Rofiq, and Abu Hapsin. "Revitalizing Divorce Ethical Values in *Verstek* Decisions in Religious Courts/Revitalisasi Nilai Etika Perceraian dalam Putusan *Verstek* di Pengadilan Agama." *De Jure: Jurnal Hukum dan Syari'ah* 13, no. 1 (2021): 80-96.

related to the excavation fact the judge related the ability husband to fulfil obligation fulfillment living No obtained in a way accurate and also certain will have an impact on a wrongful decision vain (*illusoir*) and happened problem in the execution later.

Furthermore, SEMA provisions Number 3 of 2018 in Letter A number 3 states " Obligations husband consequence divorce to a wife who doesn't nusyuz, then wife in case divorced sue can give mut'ah, and living 'iddah throughout No proven *nusyuz*.<sup>26</sup> SEMA this considered contradictory with provision Article 149 KHI which is only possible because the provision of mut'ah money is based on divorce by the husband not divorce sued by the wife. The word ' can ' here is an opener gap for judges to use right ex officio for giving mut'ah money through a lawsuit submitted by the wife No just eye in divorce. The implication of this SEMA is existing potency triggers non-uniformity of religious court judges in deciding on the same thing. Of course, the word 'can ' will be interpreted differently by the judge and potentially give rise to disparity in decision. There is no request for mut'ah money depending on the circumstances nusyuz or no whereas special to the wife did it nusyuz to the husband no get living during the iddah period. This thing in line with provision Article 152 KHI which states that the used wife is entitled to get iddah livelihood from used her husband, except wife in circumstances *nusyuz*.

Furthermore, there is a Circular Letter Supreme Court Number 2 of 2019 which protects the rights of women post-divorce. In the case of a divorced sue, a judge in drop amar decision form obligation payment husband to wife post-divorce can add the sentence "*paid before Defendant takes deed divorce*", with the provision that amar the narrated in petitum lawsuit.<sup>27</sup> If observed more in SEMA provisions arrange 3

<sup>26</sup> Republic of Indonesia. *Surat Edaran Mahkamah Agung (SEMA) No. 3 Tahun 2018 tentang Pemberlakuan Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Tahun 2018 Sebagai Pedoman Pelaksanaan Tugas Bagi Pengadilan*. Available online at <https://jdih.mahkamahagung.go.id/legal-product/sema-nomor-3-tahun-2018/detail>

<sup>27</sup> Republic of Indonesia. *Surat Edaran Mahkamah Agung (SEMA) Nomor 2 Tahun 2019 tentang Pemberlakuan Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Tahun 2019 Sebagai Pedoman Pelaksanaan Tugas Bagi Pengadilan*. Available online at <https://jdih.mahkamahagung.go.id/index.php/legal-product/sema-nomor-2-tahun-2019/detail>

(three) things principal is first, the need to give protection law for right woman post-decision divorce.<sup>28</sup> Second, the judge can add an ordered obligation to the ex-wife accompanied by the sentence “ paid before defendant take deed divorce ” and third amar decision by the wife or plaintiff be included in petitum the lawsuit. If linked with right ex officio judge, SEMA provisions Number 2 of 2019 which provides requirements for application living to wife to be included in petitum lawsuit, then in matter This right ex officio judge not used in a way full because of course matter the requested by the plaintiff. The problem is if the application living the no be included in the petitum lawsuit, whether the judge still grant the petitum filed by the plaintiff?

Apart from that related amar a decision that requires it to be narrated in petitum lawsuit in practice gives rise to the problem, because often and mostly the practice that occurs in religious courts is that preparation of lawsuit or divorce petition is not done in a way independently by the parties submitting the application good by the husband through divorce or divorce wife through divorced sue. In practice religious courts use standard reception applications for divorce or lawsuits made by officers especially at the counter, even in Lots case religious courts use system applications like SIADPA where there is a form and a list of entries already determined by the system, except for lawsuit filed by attorney law or advocate. Often husband or wife is not accompanied by power law so no one knows his rights. In this condition thereby role active judge becomes important so the right proper wife obtained the consequence he decided marriage can be realized in the judge's decision. Thus, the judge actively provides suggestions and advice to the wife on the rights requested by the judge considered as repair in the lawsuit. The role of the judge impacted positively so the judge didn't consider going beyond basic limits *ultra petitum partium*.

Related with Number 2 of 2019 legal problems are no entered application right the in petitum sue divorced nor sue recompense to application for divorce. In practice, narrative petitum requested precisely born from the judge's attitude is active in asking the right defendant post-decision divorce. During the trial, the judge asked: if the

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<sup>28</sup> Ahmad Yani, and Edi Mulyadi. "Perlindungan Hukum Terhadap Hak-Hak Perempuan Dan Anak Pasca Perceraian Menurut Peraturan Perundang-Undangan Yang Berlaku." *Jurnal Pemandhu* 2, no. 3 (2021): 299-313.

wife or respondent knew that he owned rights that must be fulfilled by her husband when he divorced. If the wife does not know, the judge must actively explain the rights the wife will divorce. After the wife knew that he owned rights, the judge asked if rights the will requested or not.<sup>29</sup> If a right the requested, then with itself right the considered for granted by the judge so the right ex officio judge is used in a way proportionality and limitations careful the judge's mind does not exceed principle *ultra petitem partium*<sup>30</sup>

The problem with a divorced sue is that the judge is standing no can use right ex officio because the wife requested court divorce himself, so wife No can request livelihood of iddah and mut'ah from her husband. In the case of divorced sue, almost no once there are judges who use it ex officio rights. This thing caused by facts that neither the Marriage Law, PP 9 of 1975, nor the KHI give enough space for the use of ex officio rights of judges in case divorced sue.<sup>31</sup> However, in the case divorced because of divorce, the majority judge's opinion is that fulfillment of mut'ah and iddah maintenance by the husband is a mandatory obligation fulfilled the moment the divorce vow was carried out.<sup>32</sup> Therefore, that is, the fulfillment of mut'ah and iddah livelihood are conditions for implementation whether the divorce vow is halal or not contradictory with a sense of justice, certainty, and expediency law.

According to Article 149 KHI, if the marriage is separated because of a divorce filed by the husband, then the divorced wife is entitled to livelihood, maskan, and kiswah to her husband. On the other hand, if a marriage is separated because of a divorce lawsuit filed by the wife, then the husband does not need to pay livelihood, maskan, and kiswah. Chapter this shows that there is injustice or inequality in received rights between broken marriages because of divorce lawsuits and broken marriages because of divorce. As a result, the wife will not accept living

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<sup>29</sup> Ibrahim and Nasrullah, "Eksistensi Hak Ex Officio Hakim dalam Perkara Cerai Talak."

<sup>30</sup> Hotnidah Nasution, "Implementation of the Principle of Ultra Petitem Partium in Deciding Children Livelihood in Divorce Lawsuit in Religious Courts." *AHKAM: Jurnal Ilmu Syariah* 18, no. 1 (2018): 23-42.

<sup>31</sup> Mahartika, "Ratio Decidendi Majelis Hakim Tentang Hak Ex Officio Hakim Dalam Memberikan Hak Asuh dan Nafkah Anak Pada Perkara Cerai Talak."

<sup>32</sup> Sri Turatmiyah, et al. "Does Judge Has Ex Officio Rights In determining Mut'ah and Iddah?." *Sriwijaya Law Review* 3, no. 2 (2019): 187-198.

from her husband. Chapter this is considered to oppose the rights proper wife protected.<sup>33</sup> Basically, in certain situations and conditions, ex officio rights can be used, unless the wife agrees not to be granted these rights, the wife is in a state of *qabla dukhul*, the wife is declared *nusyuz* by a judge, or the husband does not have the financial resources to fulfill his obligations. the. Therefore, extracting facts is very important for judges.

Special to right maintenance frequent children called *hadhanah*, term this not mentioned in a way clear good in KHI and UUP. However, there is an explanation in a way general about parental rights and obligations to a child if happen divorce.<sup>34</sup> Meanwhile, in chapter XVII part three KHI Article 156 explains about consequences of divorce.<sup>35</sup> However, often right maintenance child is always linked with the right foster or right guardianship of the child post-divorce.<sup>36</sup>

"*Al- hadhan*", which means hug or hugging, is the origin of the word *hadhanah*. However, *hadhanah* in a way term means entitled child to parent.<sup>37</sup> Holder right *hadhanah* obliged for fulfill all need child man or women who haven't *mumayyiz* or child who has adults who don't can fulfill his needs or guard himself against danger.<sup>38</sup> According to expert Fiqh, *hadhanah* means guarding a child against danger, guarding their health physically and spiritually, taking care of his food and courage, and trying to educate him so that he can live in a way

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<sup>33</sup> Uswatun Hasanah, "Nilai Keadilan Hukum dalam KHI dan SEMA No. 2 Tahun 2019 Terkait dengan Nafkah Suami Kepada Istri dalam Perkara Cerai Gugat." *AHKAMUL USRAH: Jurnal S2 Hukum Keluarga dan Peradilan Islam* 1, no. 1 (2021): 65-83.

<sup>34</sup> Prayudi Rahmatullah, Faradiba Suryaningrum, and Endang Sulastri. "Children's Protection in The Issue of Hadhanah Based on Islamic Law Perspective." *Alfuad: Jurnal Sosial Keagamaan* 6, no. 2 (2022): 55-62.

<sup>35</sup> Muhammad Hidayat, Tri Leli Rahmawati, and Isyaq Maulidan. "Hukum Hadhanah Anak Akibat Perceraian." *Ma'mal: Jurnal Laboratorium Syariah dan Hukum* 2, no. 5 (2021): 540-552.

<sup>36</sup> Ari Mardiantari, and Ita Dwilestari. "Children's right to get exclusive breastfeeding in the Islamic law perspective." *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 21, no. 2 (2021): 231-246.

<sup>37</sup> Salsabila Firdausia, "Hadhanah in The Concept of Compilation of Islamic Law and Law." *Nurani: Jurnal Kajian Syari'ah dan Masyarakat* 20, no. 2 (2020): 317-322.

<sup>38</sup> Hidayat and Maulidan Isyaq, "Hukum Hadhanah Anak Akibat Perceraian."

independently.<sup>39</sup> Meanwhile Article 45 of UUP states: obligation maintenance child as such has displayed the on i.e. parental obligations and not stopped until age adult. After divorce, the obligation of a father to fulfill living for his son is simply done to fulfil the rights child to order them can undergo a good and thriving life.<sup>40</sup> This thing by mandate Article 3 of Law Number 23 of 2002 concerning child Protection, as amended by Law Number 5 of 2014 and Law Number 17 of 2016.

The court follows the Circular Supreme Court Number 3 of 2015, which forbids decision *ultra petita*, including related ones with determination right *hadhanah* in case of dispute between husband and wife.<sup>41</sup> The judge didn't in a way *ex officio* determine who nannies the child throughout right *hadhanah* no submitted in lawsuit or application.<sup>42</sup> According to SEMA provisions, letter C number 10, if the determination right *hadhanah* was not submitted in the lawsuit or application, the judge could not determine in a way *ex officio* who nannied the child. The decision made by the judge is considered as *ultra petita*.<sup>43</sup> the SEMA was strengthened by SEMA Number 3 of 2018 letter A number 9. If the right *hadhanah* was not submitted in a lawsuit or application, the judge could not determine in a way *ex officio* who nannied the child. Giving *hadhanah* and *dwangsom* is *ultra petita* if not mentioned in the demand's lawsuit.<sup>44</sup> The judge violated it principle

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<sup>39</sup> Husnatul Mahmudah, Juhriati Juhriati, and Zuhrah Zuhrah. "Hadhanah Anak Pasca Putusan Perceraian (Studi Komparatif Hukum Islam dan Hukum Positif Indonesia)." *SANGAJI: Jurnal Pemikiran Syariah dan Hukum* 2, no. 1 (2018): 57-88.

<sup>40</sup> Ahmad Faisal Akbar, "Perlindungan Hukum Terhadap Hak Perempuan dan Anak Pasca Perceraian Perspektif Perma Nomor 3 Tahun 2017 Tentang Pedoman Mengadili Perkara Perempuan Berhadapan dengan Hukum". *Thesis*. (Malang: Universitas Islam Negeri Maulana Malik Ibrahim, 2023).

<sup>41</sup> Asantia Puspita Rohmah, Prahasti Suyaman, and Asti Sri Mulyanti. "Determination of Custody Rights (Hadhanah) for Children Who Are Not Yet Mumayiz to the Father." *Rechtsnormen Journal of Law* 1, no. 2 (2023): 48-57.

<sup>42</sup> Republic of Indonesia. *SEMA Nomor 3 Tahun 2015*.

<sup>43</sup> Republic of Indonesia. *SEMA Nomor 3 Tahun 2015*.

<sup>44</sup> Republic of Indonesia. *Surat Edaran Mahkamah Agung (SEMA) Nomor 3 Tahun 2018 tentang Pemberlakuan Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Tahun 2018 Sebagai Pedoman Pelaksanaan Tugas Bagi Pengadilan*. Available online <https://jdih.mahkamahagung.go.id/legal-product/sema-nomor-3-tahun-2018/detail>



ultra petita the same as violating the principal rule of law.<sup>45</sup> Anybody cannot do actions that exceed the limits of his authority (beyond his authority).<sup>46</sup>

Amran Suadi stated that the constitution arranges protection laws for women and children. Article 27 paragraph 1 of the 1945 Constitution of the Republic of Indonesia stipulates principal equality ahead of law for all citizens, who are aligned with Article 7 Universal Declaration of Human Rights Human. However, based on his observations during more than 36 years as a judge, Amran discovered that men as ex-husbands often ignore the rights of women after divorce. According to Article 16 Perma 3 of 2017, judges must interpret the constitution or law with no written guarantee of gender equality and consider reception conventions and agreements related to gender equality have been ratified moment judge cases the woman opposite with law.

ex officio rights of judges are limited by the Supreme Court so that judges' decisions are consistent and do not differ in the same case. Besides, it is not profitable for your child if the judge is limited in the use of ex officio rights.<sup>47</sup> This position puts the two SEMAs at odds with regulations that are hierarchically above the Constitution.<sup>48</sup> Judges must judge according to the law because it controls the principles of their freedom. Thus, without an obligation to judge according to law, judges can act arbitrarily in handing down decisions, so that every judge's decision must be recognized and respected (*res judicata provaritate habitur*).

The SEMA above clearly provides limitations and at the same time emphasizes the scope of ultra petita in divorce cases related to right foster minor children. SEMA rules are very important for Supreme

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<sup>45</sup> Mahartika, "Ratio Decidendi Majelis Hakim Tentang Hak Ex Officio Hakim dalam Memberikan Hak Asuh dan Nafkah Anak Pada Perkara Cerai Talak."

<sup>46</sup> Sunarto Sunarto. "Prinsip Hakim Aktif dalam Perkara Perdata." *Jurnal Hukum dan Peradilan* 5, no. 2 (2016): 249-276.

<sup>47</sup> Lilik Andar Yuni, "The use of ex officio to fulfill women's post-divorce rights at the Samarinda Religious Court." *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 21, no. 2 (2021): 135-154.

<sup>48</sup> Abdul Edo Munawar, "Pembatasan Hak Ex Officio Hakim Terhadap Hadhanah (Studi SEMA Nomor 3 Tahun 2015 dan SEMA Nomor 3 Tahun 2018)." *Ijtihad* 37, no. 1 (2021).

Court judges to overcome differences in understanding of procedural law which on the one hand "must be applied rigidly" and on the other hand still causes disagreements between judges because it still allows for interpretation (interpretable).<sup>49</sup>

From the above explanation of the application of the principle of *ultra petitem partium* and the use of *ex officio* rights, there is still a disparity between the decisions of religious courts and district courts in terms of examining marriage dissolution. This thing especially related to how to use the judge's *ex officio* rights, especially in district court because the wife's rights or other claims cannot be combined with the main case, namely the divorce lawsuit. So, there are differences in the application of the law, even though citizens' rights are considered equal in the eyes of the law (equality before the law).

The procedural law in district courts in deciding cases does not recognize the accumulation of claims like in religious courts. District court judges are limited to examining only cases of dissolution of marriage so that other claims such as child custody, alimony, and alimony owed are filed after the main case has had binding legal force (*inkracht van gewijsde*). This thing corresponds with Jurisprudence Supreme Court No. 913 K/Sip/1982, dated 21 May 1983, which in essence states that a lawsuit treasured together in the environment Justice general only can done after the marriage is separated because divorce obtains strength law fixed. Because this limitation is in the case of a divorce suit judges in district courts cannot use *ex officio* rights proportionally. In contrast, religious court judges can use *ex officio* rights as explained above, although specifically regarding *hadhanah* they are limited by the provisions of SEMA Number 3 of 2015 and SEMA Number 3 of 2018. i.e., must requested in *posita* and *petitem* lawsuit, odor application or sue recompense so no surpass principle *ultra petita*.<sup>50</sup>

In practice use right *ex officio* as an implementation characteristic the judge's activeness is also reflected from interpretation to demands

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<sup>49</sup> H. Asmu'i Syarkowi, "Sudah Jatuh Tertimpa Tangga (Sekelumit Refleksi Seputar Ultra Petita)", *Online Article*. Retrieved from <https://pa-semarang.go.id/publikasi-pengadilan/arsip-artikel/536-sudah-jatuh-tertimpa-tangga>

<sup>50</sup> Abdul Edo Munawar, "Pembatasan Hak Ex Officio Hakim Terhadap Hadhanah dalam SEMA No 3 Tahun 2015 dan SEMA No 3 Tahun 2018". *Thesis*. (Yogyakarta: UIN Sunan Kalijaga Yogyakarta, 2020).

the subsidiary reads *ex aquo et bono* (please decision fair).<sup>51</sup> According to the Supreme Court decision Number 140 K/Sip/1971, "the petitum in the plaintiff's lawsuit consists of the primary petitum and subsidiary petitum (*ex aequo et bono*). Primary petitum is the petitum principal containing matter the thing requested plaintiff to be granted by the panel of judges, meanwhile, subsidiary petitum is included after the primary petitum, it's just that the subsidiary petitum is not formulated clearly and in detail, only with a single and brief formulation which usually reads, "if the Court has a different opinion, ask for the fairest possible decision (*ex aequo et bono/naar bellijkheid*)."<sup>52</sup>

In cases where *judex factie* gives a decision on a "subsidiary petitum", which means that the lawsuit is decided at the discretion of the trial judge, the judge's decision must be relevant or remain tied to the primary petitum. The subsidiary award must not exceed the plaintiff's demands or exceed the primary demands.<sup>53</sup> The judge considers principal *ex aequo et bono*, so *amar* decision must be clear and detailed considering various elements so the parties can understand it. This thing can be that by the incident material main case it and complement it petitum lawsuit presumed plaintiff no or not enough clear. If interpreted in a way narrow or rigid, the action taken by the judge violates the principle *ultra petitum partium*. However, because it corresponds with *posita* suit and suit with incident or fact, the action can be justified because it aims to give certainty, justice, and expediency law.<sup>54</sup>

## Conclusion

Using the right *ex officio* by the judge does not mean the judge is too active in deviate provision regulation legislation. Judges use right *ex*

<sup>51</sup> Risma Safitri Fadhli, "Putusan Ultra Petitum Partium Perkara Perdata Ditinjau dari Pasal 178 Ayat (3) HIR (Studi Kasus Putusan Nomor 445/Pdt.G/2018/PA. Kab. Mn)." *Jurnal Hukum Magnum Opus* 4, no. 1 (2021): 81-92.

<sup>52</sup> H. A Zahri, "Urgensi dan Aplikasi Petitum Subsidair dalam Perkara Perdata," *Online Article*, 24 February, 2015. Retrieved from <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/urgensi-dan-aplikasi-petitum-subsidair-dalam-perkara-perdata-oleh-h-a-zahri-s-h-mh-i-24-2>

<sup>53</sup> Waqiah, "Pelaksanaan Pelayanan Kesehatan Bagi Narapidana dalam Upaya Penuhan Hak Atas Kesehatan di Lembaga Pemasarakatan Kelas IA Makassar"

<sup>54</sup> Waqiah.

officio based on regulations and legislation invitation as reflected in Article 41 letter (c) Article 78 of the Religious Courts Law, Art 149 KHI and Article 158 KHI. In practice still happen disparity decisions of the judge of the religious court in determining the obligation ex-husband to the ex-wife. The difference in the judge's view caused the word '*can*' to be present in the article norms chapter giving rise to different considerations between one judge with others in the use right ex officio. In certain situations, and conditions, ex officio rights can be used, unless the wife agrees not to be granted these rights, the wife is in a state of *qabla dukhul*, the wife is declared *nusyuz* by a judge, or the husband does not have the financial resources to fulfill these obligations.

Some SEMA delivers restrictions right ex officio where the judge does not in a way as well as immediately grant demands plaintiff except stated firm in petitum the lawsuit. SEMA Number 3 of 2015 which was strengthened with SEMA Number 3 of 2018 provides limitation rights ex officio determination hadhanah child with still requires inclusion in posita lawsuit or application. Inclusion fulfillment right hadhanah in petitum so the judge does not violate principle ultra petitum partium. A similarly related characteristic is the activeness of the judge who took refuge behind the petitum subsidiary entitled ex aequo et bono, in condition certain can justified throughout consideration of the based-on goals to clarify the problem principal in the petitum lawsuit. Important for every religious court judge for more be careful heart in using the right ex officio so no give rise to increasing disparities and widened related decisions One decision will impact on existence of uncertain law, justice, and expediency.

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