

May 2023

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Adi Nur Rohman Uni

Fakultas Hukum, Universitas Bhayangkara Jakarta Raya, adi.nur@dsn.ubharajaya.ac.id

Sugeng Sugeng

Fakultas Hukum, Universitas Bhayangkara Jakarta Raya, sugeng@dsn.ubharajaya.ac.id

Hesti Widyaningrum

Fakultas Hukum, Universitas Bhayangkara Jakarta Raya, hesti.widyaningrum@dsn.ubharajaya.ac.id

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Recommended Citation

Rohman, Adi Nur Uni; Sugeng, Sugeng; and Widyaningrum, Hesti (2023) "INSTRUMENTATION OF EX-OFFICIO RIGHTS OF RELIGIOUS COURTS JUDGE RELATED TO FULFILLING CHILDREN AND WIFE'S RIGHTS DUE TO DIVORCE," *Jurnal Hukum & Pembangunan*: Vol. 50: No. 2, Article 6.

Available at: <https://scholarhub.ui.ac.id/jhp/vol50/iss2/6>

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INSTRUMENTATION OF EX-OFFICIO RIGHTS OF RELIGIOUS COURTS JUDGE RELATED TO FULFILLING CHILDREN AND WIFE'S RIGHTS DUE TO DIVORCE

Adi Nur Rohman*, Sugeng, Hesti Widyaningrum*****

*, **, *** Dosen Fakultas Hukum, Universitas Bhayangkara Jakarta Raya
Korespondensi: adi.nur@dsn.ubharajaya.ac.id, sugeng@dsn.ubharajaya.ac.id,
hesti.widyaningrum@dsn.ubharajaya.ac.id
Naskah dikirim: 6 April 2020
Naskah diterima untuk diterbitkan: 4 Juli 2020

Abstract

Most of divorce cases in Indonesia have a negative impact on divorced children and wives. This is due to the lack of public legal knowledge especially wives who are entangled in divorce cases so that their rights are often ignored. Judges of the Religious Court, in this regard, have a very important role in the protection of the rights of children and wives through the instrumentation of ex-officio rights which, because of his position, he has special authority in deciding the divorce case. This research is a combination of normative and empirical juridical research by connecting the case approach and the legislative approach. The research was conducted at the Bekasi Religious Court using the interview, observation and literature study methods. This study aims to analyze the conception of the rights of ex-officio judges, the basis for their consideration and the mechanism of their instruments in issuing decisions on divorce cases and their relevance to Islamic law.

Keywords: instrumentation, ex-officio right, divorce

Abstrak

Tidak sedikit kasus perceraian di Indonesia yang memberikan dampak negatif terhadap anak dan istri yang diceraikan. Hal ini disebabkan lantaran minimnya pengetahuan hukum masyarakat khususnya istri yang terjerat kasus perceraian sehingga hak-haknya kerap terabaikan. Hakim Pengadilan Agama, terkait hal ini, memiliki peran yang sangat penting dalam hal perlindungan terhadap hak anak dan istri melalui instrumentasi hak ex-officio yang oleh karena jabatannya ia memiliki kewenangan khusus dalam memutus perkara perceraian tersebut. Penelitian ini merupakan perpaduan antara penelitian yuridis normatif dan empiris dengan menghubungkan antara pendekatan kasus dan pendekatan perundang-undangan. Penelitian dilakukan di Pengadilan Agama Bekasi dengan metode wawancara, observasi dan studi pustaka. Penelitian ini bertujuan untuk menganalisis konsepsi hak ex-officio hakim, dasar pertimbangannya dan mekanisme instrumentasinya dalam menjatuhkan putusan pada perkara perceraian serta relevansinya dengan hukum Islam.

Kata Kunci: instrumentasi, hak ex-officio, perceraian.

I. INTRODUCTION

Marriage is a legal act that does little to end into divorce. Some problems arise as a result of divorce, starting from neglecting the rights of the wife materially and even impacting on the child.¹ The problem grew when the case entered the Religious Court. When the wife is confronted with a husband, the wife often does not know what things must be stated in a lawsuit that causes demands for the fulfillment of his rights as a wife to be ignored.

In principle, marriage is a bond of relationship between man and woman as a husband and wife both physically and spiritually in order to form a happy family forever and ever based on the principle of Godhead.² In another sense, marriage is a bond between the wife's family and the husband's family.³ Both are tied together in the fabric of sacred ties and mutually responsible both in household affairs and family. Considering that marriage is something that is very essential in the perspective of Islamic law and positive law in Indonesia, the State has a role in implementing the spiritual values of marriage in a legal system.⁴ The marriage law states that a husband and wife are required to love one another, respect each other, be faithful and help physically and spiritually in the frame of married life.⁵ The assistance includes assistance in providing education and participating in parenting. However, family life is not always perfect. There are times when disputes and quarrels occur. Some people respond to quarrels as part of the phenomenon of marriage, but more than that, others consider it the end of their love journey so that it leads to divorce.

In the household, divorce can occur because of problems that are difficult to solve in the household, because the dynamics of the human household are impermanent, even though the purpose of marriage is to develop an eternal and happy family. Therefore, *fiqh munakahat* regulates the provisions related to divorce, one of which ex-husband must provide 'iddah to his ex-wife, even ex-husband must pay mut'ah as long as he has the ability.⁶ The husband's legal basis for paying the livelihood of this iddah is explained in Al-Quran surah al-Baqarah (2): 241, *al-Thalaq* (65): 1 and 75 in which there are already some legal rules regarding iddah.

In accordance with article 41 letter (c) of Law Number 1 of 1974 jo. Article 24 paragraph (2) of Government Regulation Number 9 of 1975, judges have ex officio rights, whereby judges can punish their husbands so that they fulfill the rights of their wives, even if they are not contained in the *petitum* of the petition. This is if it is related to article 178 paragraph (3) of the HIR which states that: "Judges cannot render

¹ Suhadi, "Pernikahan Dini, Perceraian, Dan Pernikahan Ulang: Sebuah Telaah Dalam Perspektif Sosiologi," *Jurnal Komunitas* 4, no. 2 (2012): 168–177.

² Abdullah Gofar, "Mengkaji Ulang Hukum Acara Perceraian Di Pengadilan Agama," *Jurnal Amanagappa* (2012): 105–124.

³ Siti Ummu Adillah, "Implikasi Hukum Dari Perkawinan Siri Terhadap Perempuan Dan Anak," *Palastren* 7, no. 1 (2014): 193–222.

⁴ Neng Djubaedah, "Child Marriage and Zina in Indonesian Legislation in Islamic Law," *Jurnal Hukum & Pembangunan* 49, no. 1 (2019): 210.

⁵ Sakirman, "Urgensi Reaktualisasi Undang-Undang Perkawinan Di Indonesia," *Justicia Islamica*, 2016.

⁶ Hilman Hadikusuma, *Hukum Perkawinan Di Indonesia* (Bandung: Mandar Maju, 2007).

decisions on cases that have not been sued or provide than other than what was sued" would appear to be very contrary to article 178 paragraph (3) HIR.

The ownership of ex-officio judge's rights is actually an effort to protect the community and provide as much justice as possible, especially to women in divorce cases related to iddah and mut'ah livelihoods.⁷ Until now, many people do not understand the rights they have especially a wife if they are to be divorced by her husband, so the judge must use his ex officio rights to fulfill these rights to those who will divorce, especially in divorce cases (*talak*). This is done as a form of legal protection for wives who want to divorce their husbands so as not to be left in an economically unfavorable condition.

The divorce rate in Bekasi is one of the highest in Indonesia. As reported on the page metro.sindonews.com, in 2017 there were at least 2867 divorce cases in Bekasi City and 2392 in Bekasi Regency.⁸ Further stated on the page, that the cause of divorce is generally triggered by economic factors besides there are other factors such as third people and the influence of social media. This is certainly ironic considering that sometimes the rights of wives and children after divorce are often ignored. The principle of legal protection should really be realized by coupled with the form of clear instruments in the judicial process, especially in religious courts.

Based on the background description above, the researcher sees that the resolution of divorce cases is very important to study given that children and women will be severely affected by divorce. This research will focus on the conception and basis for the consideration of the instrumentation of the ex-officio rights of the Bekasi Religious Court judges in order to realize a fair decision, especially in divorce cases for all parties without ignoring the rights that should be obtained. Furthermore, this research will elaborate the instrumentation mechanism of ex-officio judges' rights of the Bekasi Religious Court as a form of protection for divorced wives and children so that the welfare of children and wife after divorce can be guaranteed and find its relevance to the principles of Islamic law.

II. FORMULATION OF THE PROBLEM

Based on the above background, several issues that need to be examined are how is the conception of the rights of ex-officio judges and the basis for consideration of the instrumentation in guaranteeing the rights of his wife and children due to divorce in the Religious Courts? What is the mechanism of ex-officio judge's instrumentation rights in guaranteeing the rights of his wife and children due to divorce in the Bekasi Religious Court? And how relevant is the instrumentation of ex-officio judge rights to the principles of Islamic law?

III. RESEARCH METHODS

⁷ Syaiful Annas, "Masa Pembayaran Beban Nafkah Iddah Dan Mut'ah Dalam Perkara Cerai Talak (Sebuah Implementasi Hukum Acara Di Pengadilan Agama)," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 10, no. 1 (2017): 1.

⁸ <https://metro.sindonews.com/read/1306769/170/trend-di-bekasi-istri-ramai-ramai-gugat-cerai-suami-1526569890>, accessed on 5 Mei 2019.

This research is a combination of normative and empirical juridical research using a comparative approach that links the case approach and the legislative approach with the Bekasi Religious Court as the object of the research. Collecting data and legal materials obtained by interview and observation methods as primary data obtained directly through field research. While secondary data is generated from library research consisting of primary legal materials, secondary legal materials, and tertiary legal materials obtained by studying the laws and regulations, the results of previous research, legal theories, legal doctrines and all forms of writing that can be used as a source of related studies. Primary data and secondary data consisting of primary, secondary, and tertiary legal materials that have been obtained are then analyzed in analytical comparative descriptive.

IV. RESULT AND DISCUSSION

4.1. The Divorce in The Indonesian Marriage Law

Divorce is a form of separation and dissolution of a marriage bond when there are several parties who are still alive for reasons that can be justified.⁹ A divorce will be declared valid since it has been decided by a judge and registered in the civil registry. Law Number 1 of 1974 concerning Marriage states that in the course of a marriage, marriage may end if caused by death, divorce or a court decision.¹⁰ Thus, it can be understood that basically marriage regulations in Indonesia are in line with religious teachings which make it difficult to break a marriage bond (divorced life). This is because divorce indicates the failure of the goal of a marriage to form an eternally happy family forever. In contrast to the breakup of a marriage due to death, remembering that death is God's destiny that is inevitable.

As is known that divorce is understood as the termination of a marriage. Related to this, the experts put forward some of their opinions as follows: (a) According to Subekti as follows: "Divorce is the abolition of marriage by the judge's decision, or the demands of one of the parties in the marriage".¹¹ (b) According to P.N.H. Simanjuntak as follows: "Divorce is the termination of a marriage for some reason by the judge's decision on the demands of one party or both parties in the marriage".¹²

In line with national marriage law, matters related to marriage and divorce in customary law are influenced by the religion of the indigenous peoples concerned.¹³ From all of the religions, only Islam has a lot to regulate about divorce or what is commonly known as "talak" which means to break the ties which in principle Islamic divorce law is makruh (reprehensible).¹⁴ So, it can be understood that two people with different traits and personalities put together in a marriage bond does not mean that

⁹ Hadikusuma, *Op. Cit.*, p. 3.

¹⁰ Indonesia, Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan, pasal 38.

¹¹ Subekti, *Pokok-Pokok Hukum Perdata* (Jakarta: Intermasa, 2001), p. 25.

¹² P.N.H. Simanjuntak, *Pokok-Pokok Hukum Perdata Indonesia* (Jakarta: Djambatan, 2007), p. 17.

¹³ Hadikusuma, *Hukum Perkawinan Di Indonesia*.

¹⁴ Sulaiman Rasjid, *Fiqh Islam*, (Bandung: Sinar Baru, 1989), p. 127.

they will continue to coexist. Because one day, between husband and wife problems will arise both from the wife and husband.

In regulations regulated in Indonesia, one of the principles of marriage is to make divorce more difficult, because divorce causes bad things for the parties involved. Therefore, as much as possible a divorce must be avoided.¹⁵

Divorce often occurs due to various factors. Starting from economic problems, boredom, misunderstanding, domestic violence to the presence of a third person. Some of the causes of divorce according to Government Regulation Number 19 of 1975 article 19 are as follows:

- 1) Adultery, drunkenness, gambling and or other bad habits that are difficult to cure; this can be proposed because the act of adultery is a betrayal of the sanctity of a marriage bond.
- 2) The husband or wife leaves the other party for 2 years in a row without permission and without the support of a strong and accountable reason or for other reasons beyond their power. Given the income that must be provided, then this reason can be used as a reason in filing a lawsuit to the court.
- 3) Husband or wife is sentenced to 5 (five) years in prison or other more severe penalties after the marriage takes place given that this kind of law will clearly harm either party and household obligations can certainly be ignored.
- 4) Husband or wife is committing severe maltreatment, physical cruelty or actions that endanger other parties;
- 5) Disease or disability which results in not being able to carry out their respective obligations;
- 6) Reprisals and disputes that occur repeatedly.

The breakup of the marriage had a serious impact on both parties. Article 41 of Law No. 1 of 1974 and Article 149 of Compilation of Islamic Law state that there are two kinds of consequences caused after divorce, namely: (1) due to talak and (2) due to divorce. If caused by divorce (talak), the ex-husband must:

- a. Giving mut'ah to his ex-wife properly both money and objects.
- b. Provide a decent living, clothing, and dowry for the ex-wife during the iddah period unless the ex-wife falls divorce ba`in and is not pregnant.
- c. Pay off dowry debt in whole and in part if you have not had sexual relations between husband and wife (qabla al-dukhul)
- d. Provide childcare costs if not yet reached the age of 21 years.

The husband has the right to make a referral to his ex-wife while he is still in his iddah. As for the wife's right during the iddah period of living that comes from her ex-husband, except if the wife is proven nushuz given that nushuz is one of the things that cancels a wife from earning a living. Furthermore, the result of marriage termination due to divorce is also regulated in article 156 Inpres Number 1 of 1991. Some of the

¹⁵ Sudarsono, *Lampiran UUP Dengan Penjelasannya*, (Jakarta: Rineka Cipta, 1991), p. 79.

consequences of divorce are: (1) to their children, (2) to joint property, and (3) to mut'ah.¹⁶

Regulations on divorce in Indonesia are generally found in Marriage Law and Government Regulation No. 9 of 1975 concerning the Implementation of Marriage Law. Article 38 of the Marriage Law states that marriages can be terminated due to death, divorce and court decisions. In addition, Article 39 paragraph (1) of the Marriage Law states that divorce can only be conducted before a court hearing after the court concerned has tried and failed to reconcile.

Divorce or divorce suit known in the Marriage Law and Government Regulation 9/1975 is a lawsuit filed by a husband or wife or proxy in a court where the jurisdiction covers the defendant's residence.¹⁷ In the context of Islamic law, as stated in KHI, there are significant differences in the definition of divorce or divorce. The Marriage Law states that divorce lawsuits can be filed by both husband and wife. While in KHI it is stated that a divorce suit is a lawsuit filed by the wife as contained in Article 132 paragraph (1) KHI which reads:

"The divorce lawsuit was filed by the wife or attorney at the Religious Courts, whose jurisdiction covers the plaintiff's residence unless the wife leaves the residence without the husband's permission."

Whereas divorce (talak) is regulated in Article 114 KHI as follows, "Marriage termination due to divorce can occur due to divorce or based on divorce suit". Furthermore, article 117 KHI states that what is meant by divorce (talak) is a husband's pledge before the Religious Court which is one of the reasons for the breakup of marriage. This is regulated in Article 129 KHI which reads:

"A husband who will drop divorce on his wife submits a request both verbally and in writing to the Religious Court which occupies the wife's residence accompanied by a reason and requests that a hearing be held for that purpose."

4.2. Divorce Case in Bekasi Religious Court

Religious Courts are part of an independent judiciary in order to uphold the foundations of justice in people's lives. Bekasi Religious Court as stated in Article 49 paragraph (1) of Law Number 7 of 1989 concerning Religious Courts confirms that the Religious Courts have the duty and authority to examine, decide upon and settle cases at the first level among people who are Muslim in the fields of: Marriage , Inheritance, Endowments, Grants, Wills, Zakat, Sadaqah and Islamic Economics.¹⁸

In the last 3 years, namely 2016, 2017 and 2018, the Bekasi Religious Court received approximately 11,482 cases entered from all types of cases that entered the Bekasi Religious Court with details of 3625 cases in 2016, 3922 cases in 2017 and

¹⁶ Budhy Prianto, Nawang Warsi Wulandari, and Agustin Rahmawati, "Rendahnya Komitmen Dalam Perkawinan Sebagai Sebab Perceraian," *Jurnal Komunitas* 5, no. 2 (2013): 208–218.

¹⁷ Republik Indonesia, Undang-Undang No. 1 Tahun 1974 tentang Perkawinan Pasal 40 jo. Pasal 20 ayat (1) PP 9/1975.

¹⁸ Adi Nur Rohman and Sugeng, "Probabilitas Mekanisme Small Claim Court Dalam Penyelesaian Sengketa Waris Di Pengadilan Agama," *Jurnal Hukum dan Pembangunan* 7, no. 3 (2018): 1–18.

3935 cases in 2018. This certainly shows that the level of trust of the Bekasi people in the Bekasi Religious Court was very high, although on the other hand it became an irony considering that the case presented was a result of a dispute in the community which was ultimately expected to be resolved in the courtroom.

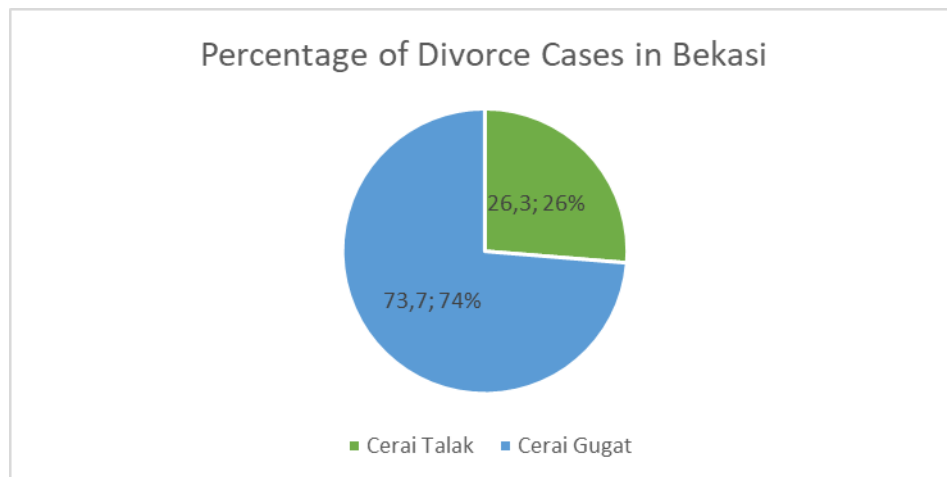
Table 1. Cases that Enter the Bekasi Religious Court

YEAR	TYPES OF PRIVATE				
	Marriage	Inheritance	Wills, Grants, Waqf	Islamic Economics	Others
2016	3508	91	0	0	26
2017	3747	7	0	1	167
2018	3779	5	2	0	149

Source: Report of the Bekasi Religious Court

Marriage matters, especially divorce, still dominate cases that enter the Bekasi Religious Court. From the data collected by researchers, it can be seen that the number of divorce cases that have been terminated (both divorce and talak) from 2016 to 2018 reached 8,399 cases with details of 2,209 divorce (talak) and 6,190 divorce (gugat).

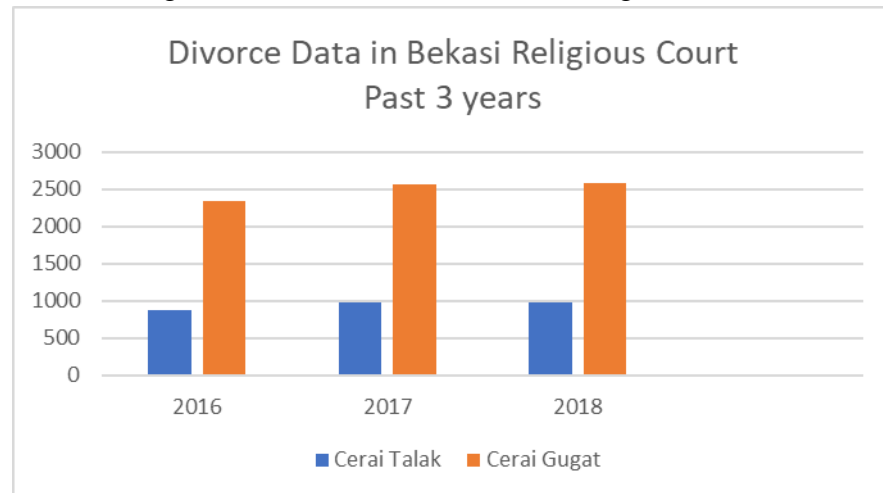
Figure 1. Percentage of Divorce Cases in Bekasi



Source: Report of the Bekasi Religious Court

Divorce cases in Bekasi are among the highest in Indonesia. This was motivated by various factors that caused it to be brought before a religious court. From all data collected in 3 years; 2016, 2017 and 2018, show that the number of divorcees (gugat) in Bekasi is higher than divorce (talak).

Figure 2. Divorce Data at Bekasi Religious Court



Source: Report of the Bekasi Religious Court

4.3. Ex-Officio's Existence Rights in Religious Court Procedures

In a state of law (rechstaat), the power of the judiciary is the body that determines the content and strength of positive legal rules. Judicial power is manifested in examining, evaluating and determining the value of certain human behavior and determining the value of concrete situations and resolving problems or disputes. According to Roscoe Pound, there are some steps that are normally taken by a judge when trying a case in court, namely, finding the law, interpreting the law, and applying the law.¹⁹

As the spearhead of the judiciary and the main executor of judicial authority, the judge is tasked with accepting, examining, adjudicating a case and ultimately making a decision, so that the judge is obliged to find law in a case, even though the legal provisions have not been clearly stated.²⁰ The judicial discovery of the law is based on a deep philosophical foundation, which considers all aspects related to the subject matter of the dispute, and seeks relevant legislation as a legal basis.

Basically, the judge's job is to give decisions in every case that is presented to him, determine things such as legal relations, the legal value of the behavior and legal position of the parties involved in a case, so as to resolve disputes or conflicts impartially based on the law applies, the judge must always be independent and free from the influence of any party, especially in making a decision.²¹

In reality, lawmakers only set general rules and the consideration is left to the judge. As the holder of control and legal determinants at the trial, the judge can give a humanitarian touch to the laws and regulations so that they will continue to be used within the framework of law enforcement, which is more just in the case of protection of women.

¹⁹ Roscoe Pound, *An Introduction to The Philosophy of Law*, translated by Koh. Radjati, *Suatu Pengantar ke Filsafat Hukum*, (Jakarta: Bhratara, 1963), p. 67.

²⁰ Ahmaf Rifai, *Penemuan Hukum oleh Hakim dalam Perspektif Hukum dan Progresif*, (Jakarta: Sinar Grafika, 2010). p. 6-8.

²¹ Lili Rasjidi dan Ira Thania Rasjidi, *Dasar-Dasar Filsafat dan Teori Hukum*, (Bandung: Citra Aditya Bhakti, 2004), p. 93.

Religious justice in Indonesia has actually paid more attention to the protection of women and children. Normatively, Amran Suadi in his research mentioned that the norm was about how to file for divorce, both by women and men. Provisions on how to file for divorce in the Religious Courts indicate gender responsiveness.²²

Judges as judge made law and as the embodiment of the law, must uphold the values of justice that live in the midst of social change. Therefore, judges are authorized to *contra legem*²³ if the provisions of an article of the law are contrary to propriety and are not in accordance with the reality of the dynamics of conditions and conditions that develop in the soul, feelings and awareness of the community.²⁴

Judges as the main organ in a court and as the exercise of judicial power to receive, examine, try, a case and subsequently impose a decision, so it is obligatory for the judge to find the law in a case even though the legal provisions are unclear or unclear.²⁵

In the procedural law in the Religious Court, justice can be realized by having a judicial position as a functional position, because the judge has a special right in resolving divorce (*talak*) cases in the Religious Court, namely *ex-officio* rights, meaning rights due to office.²⁶ Judges because of their position or *ex-officio* can decide a case more than what is demanded, even though this matter is not demanded by the parties to the litigation.

In language, the term *ex-officio* is Latin *ambtshalve* (Dutch) which means because of position.²⁷ Subekti in the Legal Dictionary defines *ex-officio* rights as rights because of their position, not based on a letter of appointment or appointment, nor is it based on an application.²⁸

In the Big Indonesian Dictionary (KBBI) it is stated that *ex officio* means because of position, as in the phrase "taking office *ex-officio*".²⁹ Thus, basically the term *ex-officio* right is not only inherent in the judge, but also exists in every person who carries a position. *Ex-officio* rights are the judge's authority in deciding cases to realize legal objectives, namely, legal certainty, justice and expediency. Specifically, for judges, *ex-officio* rights are defined as rights or authorities held by judges because of their position, and one of them is to decide or give something that is not in the suit. In divorce cases, the judge can decide more than requested because of his position,³⁰

²² Amran Suadi, "Peranan Peradilan Agama Dalam Melindungi Hak Perempuan Dan Anak Melalui Putusan Yang Memihak Dan Dapat Dilaksanakan / the Role of Religious Court in Women and Children Rights Protection Through Partial and Executable Decision," *Jurnal Hukum dan Peradilan* 7, no. 3 (2018): 353.

²³ The principle of *Ius Contra legem* is defined as a mechanism that allows judges to deviate from a provision that is clearly contrary to the sense of justice of the community. See Fence M. Wantu, "Kendala Hakim Dalam Menciptakan Kepastian Hukum, Keadilan, Dan Kemanfaatan Di Peradilan Perdata", dalam *Jurnal Mimbar Hukum* 25, no. 2 (2013): 2015-218.

²⁴ Wildan Suyuti, *Sekitar Acara dan Hukum Perdata Agama, Dilengkapi dengan Permasalahan dan Pemecahan*, Edisi revisi, (Jakarta: Pusdiklat Mahkamah Agung RI, 2005). p. 387.

²⁵ Ahmaf Rifai, *Penemuan Hukum oleh Hakim dalam Perspektif Hukum dan Progresif*, (Jakarta: Sinar Grafika, 2010). p. 6-8.

²⁶ J.C.T. Simorangkir, *Kamus Hukum*, (Jakarta: Sinar Grafika, 2007), p. 46.

²⁷ Marjanne Termorshuizen, *Kamus Hukum Belanda*, (Jakarta: Djambatan, 1992), p. 22.

²⁸ Subekti dan R. Tjitrosoedibio, *Kamus Hukum*, (Jakarta: Pradnya Paramita, 1979), p. 43.

²⁹ Tim Penyusun Pusat Pembinaan dan Pengembangan Bahasa, *Op. Cit.*, p. 357.

³⁰ Mukti Arto, *Praktek Perkara Perdata pada Pengadilan Agama*, (Yogyakarta: Pustaka Pelajar, 2005), p. 11.

as well as in divorce (talak) decisions, rights that should be obtained by the wife (the respondent) are not obtained, because they are in a weak position so that the judge can use the authority.

Article 178 HIR paragraph 3 article 189 RBg paragraph (3) states that judges are prohibited from giving verdicts on cases that are not prosecuted or grant more than those demanded. This prohibition is called *ultra petitem partium*. The Supreme Court in several of its decisions stated that granting more than what was demanded, deciding a portion of all claims submitted, or deciding matters not claimed were contrary to article 178 of the HIR above. But on the contrary, in its decision dated May 23, 1970, the Supreme Court stated another opinion that if the claim for compensation was deemed inappropriate while the plaintiff demanded that amount, then the judge was authorized to determine the appropriate amount to be paid. Likewise, in the January 8, 1972 decision, the Supreme Court was of the opinion that granting more than those sued but which was still consistent with material events was permitted.³¹ Thus, in certain circumstances in divorce cases, judges are allowed to require something to ex-wife or ex-husband, the right is intended to achieve *mashalahat* and uphold justice, especially for both parties who litigate. This right belongs to the judge because his position is called *ex-officio* right.

From this it can be seen that article 178 paragraph (3) of the HIR is not applied by the Supreme Court absolutely, because judges in carrying out their duties must act actively and always try to give verdicts that actually resolve cases. Technical obstacles are overcome by the judge's discretion. Because of his position, the judge can decide if there are things that can be used as an exception by the defendant even though there is no exception from the defendant, except in the case of a relative exception outside the divorce case.³²

The legal basis for the application of *ex-officio* rights can also be found in Article 41 letter (c) of Law Number 1 of 1974 concerning Marriage, which states that, "The court may require the ex-husband to provide living expenses and/or determine an obligation for ex-wife ". The word "can" in Article 41 is interpreted as *ex-officio*, which gives the judge room to determine *mut'ah* and livelihood.³³

Article 24 Paragraph (2) Sub-Paragraph a of Government Regulation No. 9/1975 states that during the divorce proceedings at the request of the plaintiff or the defendant, the court can determine the livelihood to be borne by the husband. In addition to being regulated in the Marriage Law, the application of *ex-officio* rights is also regulated in Article 149 of the Compilation of Islamic Law (KHI) which states that:

³¹ Sudikno Mertokusumo, *Op. Cit.*, p. 216.

³² Mukti Arto, *Op. Cit.*, p. 31

³³ *Mut'ah* livelihood is a gift from a former husband to his wife who is given divorce in the form of money or other objects. *Iddah* is a livelihood that must be given to the wife who is barred and this liability lasts for 3-12 months depending on the menstrual condition of the divorced wife. *Mut'ah* and *iddah* livelihoods only apply to cases of divorce petition where husband submits divorce to the wife. Whereas divorce lawsuits filed by wives to husbands, *mut'ah* and *iddah* do not apply. See <https://www.hukumonline.com/berita/baca/lt576bd57329237/belum-diaturnafkahiddahdanmutahdalamcerai-gugat/>.

- a) Giving an appropriate mut'ah to the ex-wife, both in the form of money and objects, while the amount of this mut'ah is adjusted to the appropriateness or feasibility and ability of the ex-husband;
- b) Give iddah, housing and clothing to the ex-wife during the 'iddah period, unless the ex-wife has been subjected to talak ba'in or nushuz and is not pregnant;
- c) Pay off the dowry that is still fully or partially owed if qabla al dhukhul;
- d) Provide maintenance costs for children who have not yet reached the age of 21 years. The cost of maintaining a child remains the husband's obligation even though there has been a divorce with his mother.

In Article 152 KHI also stated that "The ex-wife is entitled to get a living iddah from her ex-husband unless she is nushuz".³⁴ In exercising ex-officio rights, judges are also guided by the Decree of the Supreme Court of the Republic of Indonesia Number: KMA / 032 / SK / IV2006 concerning the Enforcement of Book II Guidelines for the Implementation of Duties and Administration of Religious Courts which states that, "Religious Courts / Sharia Courts ex-officio can set livelihood obligations' iddah on the husband for his wife, as long as his wife is not proven to do nushuz and set mut'ah obligations. The Supreme Court decision is individual and concrete.

4.4. Instrumentation of Ex-Officio Judges of the Bekasi Religious Court

The use of ex-officio rights by Bekasi Religious Court judges follows the procedural law in the Religious Courts in general. As mentioned earlier, that a judge may decide based on his discretion outside of existing regulations. However, the benefit factor also needs to be taken into consideration for the judge in deciding a case that is being handled. Judges must be able to play an active role in deciding cases as best they can without parties being harmed. That is why some articles as in article 41 letter (c) of the Marriage Law states that a judge can require the imposition of a husband who wants to divorce his wife.

However, the use of ex-officio rights by judges is not without conditions. Dr. Umami Azma, SH, M.Hum, judge of the Bekasi Religious Court, said that formally there are some provisions that allow a judge to document the ex-officio right if the application is granted and attended by the respondent and the applicant. The presence of the respondent is needed to ensure that the judge's decision based on the ex-officio right will be effective to be carried out and is not an illusory decision.³⁵

In addition, the ex-officio right used by the judge in examining and deciding divorce (talak) cases is to fulfill a sense of justice for the divorced wife and child. Thus, the needs and survival of his ex-wife and children is more secure, which is a form of legal protection for the interests of mothers and children after divorce.³⁶ These

³⁴ Nusyuz is derived from the word nazyaya-yansyuzunasyazan wa nusyuzan, which means to rise, stand out, be insubordinate, oppose, or act rudely. In use, the meaning of the word annusyuz then develops into al-'ishyaan which means ungodly or disobedient. see Ahmad Warson Munawwir, *Al-Munawwir: Kamus Arab-Indonesia*, (Yogyakarta: Pustaka Progressif, 1997), p. 1418-1419.

³⁵ The results of the interview with Dr. Umami Azma, SH, M.Hum, Judge of the Bekasi City Religious Court, on 13 September 2019.

³⁶ *Ibid.*

objectives are normatively regulated in Article 41 letter (c) of Law No. 1 of 1974 jo. Article 149 letter (a) Compilation of Islamic Law.³⁷ Furthermore, the instrumentation of ex-officio judges' rights especially in divorce cases is accompanied by several considerations before applying this ex-officio right, including:³⁸

1. To give lessons to the husband so as not to easily divorce his wife.
2. To provide guarantee to the wife after the divorce.
3. As the application of the principle of justice for a wife because of divorce (talak).
4. There is a legal obligation for the ex-husband relating to the rights of the ex-wife as divorce (talak).
5. The judge concluded that the husband has the economic ability to be burdened with the obligation to pay mut'ah and livelihood or carry out his obligations to his ex-wife, based on the appropriateness and appropriateness according to the husband's habit of providing daily support to his wife.

Provisions on the minimum and maximum charging fees are not regulated in the Marriage Law or KHI. In the case examination, the judge will consider the daily needs of his ex-wife and children and the economic capability of the husband in real life. In divorce cases, the judge will consider the best interests of both children, as the implementation of the principle of best interest of the child.³⁹ Since Indonesia ratified the United Nations Convention on the Rights of the Child, through Presidential Decree Number 36 of 1990, the best interest for children's survival and education has become a major concern in every case that has a direct impact to the interests of children, such as in cases of disputes over child custody, the adoption of adoption of children, and others.

However, ex-officio rights in some conditions cannot be used if there are several things, including:⁴⁰

1. If the wife is in the state of qabla al-dukhul.
2. If the respondent is in a state of divorce, ba'in or nushuz.
3. Because of a statement from the wife (the respondent) who does not want to give the rights they have.
4. Wife who is cheeky just get a living mut'ah.

³⁷ The court may require the ex-husband to provide living expenses and / or determine an obligation for the ex-wife (Article 41 letter (c) of Law No. 1 of 1974. The word "can" be interpreted may be ex-officio, which gives the judge room to determine mut'ah and 'iddah' livelihood.

³⁸ Ahmad Fanani and Badria Nur Lailina Ulfa, "Hak Ex Officio Hakim: Studi Kasus Perceraian Di Pengadilan Agama Sidoarjo No. 3513 Th. 2015," *Tsaqafah: Jurnal Peradaban Islam* 13, no. 2 (2015): 339–352.

³⁹ The principle of best interest of the child is regulated in Article 3 of the UN Convention on the Rights of the Child. The children's rights include: the child's views and aspirations; the identity of the child, including age and gender, personal history and background; the care, protection and safety of the child; and the child's well-being. Indonesia ratified the convention in 1990, through Presidential Decree of the Republic of Indonesia Number 36 of 1990 concerning Ratification of the Convention on the Rights of the Child.

⁴⁰ Fanani and Badria Nur Lailina Ulfa, "Hak Ex Officio Hakim: Studi Kasus Perceraian Di Pengadilan Agama Sidoarjo No. 3513 Th. 2015."

In conducting the examination of cases, especially divorce cases, the Religious Court seeks protection of children and women in divorce cases. This is because children and women generally become the party most affected by the divorce. To that end, Bekasi Religious Court judges, as called Ummi Azma, take various approaches through enlightenment, information, and advice. This is done so that the parties know and realize the consequences of the termination of marriage due to divorce as regulated in Article 41 of the Marriage Law, and Article 149 letter (a) KHI.

From observations and interviews conducted by researchers, it can be concluded that the Bekasi Religious Court judges in determining the livelihood of mut'ah and iddah not demanded by the respondent are divided into 2 (two) mechanisms that are carried out:

1. The judge does not require the applicant to pay mut'ah and iddah to the respondent. This was done on the grounds that there was no counter-claim filed by the respondent.
2. The judge ex-officio requires the applicant to pay mut'ah and 'iddah which are stated in the ruling as a form of punishment to the applicant.

The second form was explained by Ummi Azma, that the ex-officio rights instrumentation was carried out on the main basis of the principles of justice, expediency, and legal certainty. If it does not fulfill that principle, the judge will not use ex-officio rights. He added that the imposition to pay for living to ex-wife and children is intended so that the husband does not act arbitrarily. A wife is married in the best way. Likewise, when a wife is to be divorced, all of her rights must be fulfilled by the husband. To ensure this, the judge can use ex-officio rights. So that it can be understood that the ex-officio rights instrumentation also does not apply arbitrarily but on the basis of fulfilling a sense of justice, usefulness and legal certainty as stated in the guidelines for the administration of religious courts.

Another thing that deserves to be appointed is the payment mechanism by the applicant as a form of imposition for him after being decided by the court. Ummi Azma is of the opinion that the Judge's ruling giving a burden to the husband must be paid before the reading of divorce. After paid, or the promise will be paid at a later date, the husband can read his pledge of divorce. The husband's promise to pay divorce must be with the wife's consent. With regard to judges so that the husband can fulfill his obligations in the form of iddah livelihood, mut'ah voluntarily as follows:⁴¹

1. The judge requests that the husband make payment of his obligations to the wife before the divorce pledge is pronounced by the husband;
2. The judge asks for a commitment by delaying the implementation of the divorce pledge by giving a deadline to the husband until he is able to pay his obligations.

In making decisions and determining the obligation to provide for the ex-wife, the judge will consider the needs of the ex-wife and children fairly, the economic ability of the ex-wife, and the economic ability of the husband. The husband's

⁴¹ Suadi, "Peranan Peradilan Agama Dalam Melindungi Hak Perempuan Dan Anak Melalui Putusan Yang Memihak Dan Dapat Dilaksanakan / the Role of Religious Court in Women and Children Rights Protection Through Partial and Executable Decision."

economic capability must be well considered so that the judge's decision can be implemented. Because if the burden is beyond the ability of the husband, it will be difficult for him to be able to realize the verdict that has been handed down.

Bekasi Religious Court Decision Number 2225 / Pdt.G / 2019 / PA.Bks

One example of the decision of the Bekasi Religious Court which has documented the ex-officio right of judges in its decision is Decision Number 2225 / Pdt.G / 2019 / PA.Bks in the divorce case between Hendy Dewanto bin Sugiarto against Rita Suprihatin binti Soerahmat. The petitioner has submitted an application to the Panel of Judges who in their demand that the Panel of Judges grant the petitioner's request and give permission for the petitioner to drop one king's divorce to the respondent before the Bekasi Religious Court and also charge the court fee to the applicant in accordance with applicable law.

The parties, both the applicant and the respondent acknowledge that their household life is no longer harmonious. Disputes and quarrels between them have filled up their households everyday so that they cannot be expected for the continuity of a harmonious household.

Regarding this matter, the Panel of Judges had tried to give advice to the petitioners and the respondent so that they could get back together and continue to foster households as before, but to no avail. Likewise, the Mediator, Samsu Hidayat, SH, MH, in his report dated June 18, 2019, had reported to the Panel of Judges that mediation efforts between the Petitioner and Respondent were unsuccessful. In the end, after going through various considerations, the Panel of Judges decided to grant the petition of the petitioner and give permission for the petitioner to drop divorce (talak) from the petitioner in front of the Bekasi Religious Court. In addition, the Panel of Judges sentenced the applicant to provide a living during the period of iddah to the respondent in the amount of Rp. 5,000,000 (five million rupiah) and a mutually Rp. 2,000,000 (two million rupiah).

Related to this, in his consideration, the Panel of Judges stated that the sentence was carried out in order to fulfill a sense of justice for both parties if it were appropriate and fair if the Petitioner as husband who would divorce the Respondent as his wife was sentenced to provide matters as agreed upon together.

Looking at this case, it can be seen that the Panel of Judges in their deliberations clearly stated that the basis for imposing a sentence for a husband to pay the cost of living was to fulfill his sense of justice. Therefore, the Panel of Judges principled to the values of justice and to their rights and authority's ex-officio sentenced the husband to charge the cost of living. This certainly becomes a parameter of the success of the institutions of the Religious Courts institutions in guaranteeing the rights and fulfillment of a sense of justice with the principle of equality before the law.

4.5. The Relevance of Costing for Living with Islamic Law

Islamic law and fiqh are a set of rules of Allah as a product of ijtihad of mujtahids that are dynamic, moving, and able to follow the development of society in every age and place. That is, where the community moves, when and where the

community is located, Islamic law also moves to follow it and be there, setting its rules to be a reference in solving various problems they face.⁴² With this dynamic character, Islamic law is able to respond to various cases in society without being insulated by the conditions of the times and places.

Imposition by a judge to a husband who divorces his wife is a form of judges' *ijtihad* in order to safeguard justice and benefit, especially for women. The concept of benefit which is the core of *maqasid shari'ah* is the best alternative for the development of *ijtihad* methods, where the Qur'an and Sunnah must be understood through *ijtihad* methods by emphasizing the dimension of *maslahah*⁴³ including the application of this *ex-officio* right.

If we look further, the concept of divorce before the Religious Court itself is the actualization of Islamic law in a practical dimension which at the same time invalidates the divorce habits which are not in accordance with the text, namely only thinking about divorce without thinking about its negative impact as a whole.⁴⁴ In fact, divorce cases can have an impact not only on divorced parties (husband and wife), but also on other parties including children.

The application of the *ex-officio* judge's right to sentence her true husband is a form of protection for women and children affected by the divorce. The value of justice, benefit and benefit, which is the core of Islamic sharia, has actually been reflected in the application of *ex-officio* rights where judges impose penalties in the form of the obligation to pay the cost of living as a logical consequence in order to avoid the emergence of lateness resulting from the divorce.

In Islam, the rules regarding livelihood after divorce have been explained in the Qur'an al-Thalaq verse 1:

"O Prophet, if you divorce your wives then you should divorce them when they can (face) their iddah (the natural) and count the iddah time and fear Allah your Lord, do not remove them and do not let them (allowed) out unless they are doing a heinous act of light. These are the laws of Allah, so he has indeed done wrong to himself. You do not know maybe God has done after that something new "

In another verse, Al-Qur'an surah al-Thalaq verse 6 Allah swt explains:

"Place them (wives) where you live according to your abilities and do not trouble them to narrow (their hearts). and if they (the wives who have been barked) are pregnant, then give them their living until they give birth, then if they suckle (your children) for you then give them their reward, and deliberate among you (all things) well; and if you encounter difficulties then another woman may suckle (that child) for her. "

⁴² Dedi Ismatullah, *Sejarah Sosial Hukum Islam*, Bandung: CV. Pustaka Setia, 2011, cet. ke 1, p. 7

⁴³ Asrafi Jaya Bakri, *Konsep Maqashid Syari'ah Menurut Al-Syatibi*, (Jakarta: RajaGrafindo Persada, 1996), p. 168

⁴⁴ Khoiruddin Nasution, *Studi Terhadap Perundang-Undangan Perkawinan Muslim Kontemporer di Indonesia dan Malaysia*, (Jakarta-Leiden: INIS, 2002), p. 257.

The above verse shows the very substantive existence of 'iddah. So that its existence cannot be denied even though its implementation has various models that are used in judicial practices. Although some people consider that the 'iddah livelihood law does not yet reflect the protection of women,⁴⁵ however, the basic principles of enforcing the ex-officio judge's right to sentence the husband to the divorced wife are to be in line with the basic principles of the maqasid shari'ah.

V. CONCLUSIONS

Ex-officio rights are the judge's authority in deciding cases to realize legal objectives, namely legal certainty, justice and expediency. It is defined as the right or authority possessed by a judge because of his position to decide or give something that is not in the suit. The application of ex-officio rights is based on several considerations, such as giving lessons to husbands not to divorce their wives easily, giving guarantees to wives after divorce, as applying the principle of justice for a wife due to divorce (talak), and as a form of legal obligation for ex-husband relating to the rights of the ex-wife after divorce (talak).

In relation to the protection of children and women as a result of divorce, judges in deciding divorce cases, livelihoods, and child custody can exceed the requirements. The judge can sentence the husband who divorced his wife in the form of charging the cost of iddah and mut'ah even though it was not the request of the respondent. The ex officio rights instrumentation must be through a fair and responsible mechanism of deliberation of the Panel of Judges where this mechanism must first meet the elements of formal and material requirements.

The concept of maslahah as a core part of the maqasid sharia is very much felt in the instrumentation of the rights of ex-officio judges in the Religious Courts. Sentencing by the judge to her true husband is a form of protection for women and children affected by divorce in upholding the principles of justice, benefit and benefit which is the core of Islamic sharia.

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⁴⁵ Muhammad Fauzan, "Maqasid Nafkah Iddah Dan Perlindungan Perempuan," *Hukum Islam* XVI, no. 1 (2016): 71–82.

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