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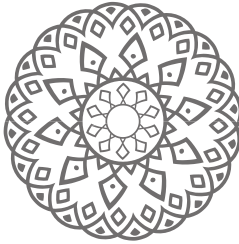
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IMPLEMENTATION OF THE PRINCIPLE OF *ULTRA PETITUM PARTIUM* IN DECIDING CHILDREN LIVELIHOOD IN DIVORCE LAWSUIT IN RELIGIOUS COURTS

Hotnidah Nasution

Abstrak: Penelitian ini menganalisis 64 putusan Peradilan Agama Jakarta Selatan tahun 2011-2013 untuk melihat asas *ultra petitum partium* dalam penyelesaian gugatan nafkah perkara perceraian. Solusi hukum yang diberikan UU untuk hal itu ialah memaksa ayah menjalankan kewajibannya memenuhi nafkah anak. Dalam praktiknya, hal itu dapat dilakukan bersamaan dengan perkara perceraian atau secara terpisah dengan perkara perceraian. Berdasarkan kajian, penulis berpendapat dalam memutuskan gugatan nafkah anak, hakim di Peradilan Agama selain harus sesuai dengan hukum acara yang berlaku yaitu pasal 54 UU No. 7 tahun 1989 yang diamandemen dengan UU No. 3 tahun 2006 dan UU No. 50 Tahun 2009 yang menyatakan bahwa Hukum Acara yang berlaku di Peradilan Agama adalah Hukum Acara yang berlaku di Peradilan Umum kecuali yang diatur secara khusus, juga merujuk pada asas asas yang berlaku di lingkungan peradilan umum yaitu asas *ultra petitum partium* yaitu hakim dilarang menjatuhkan putusan atas perkara yang tidak dituntut atau mengabulkan lebih daripada yang dituntut. Sebanyak 60 dari 64 putusan gugat nafkah dalam penelitian ini menerapkan asas tersebut dan tidak ada satupun yang menghukum ayah untuk membayar nafkah anak sekalipun dalam posita disebutkan perkawinan antara penggugat dan tergugat telah dilahirkan anak yang tinggal bersama penggugat.

Kata kunci: hukum perceraian, hak anak, *ultra petitum partium*, pengadilan agama

Abstract: This study analyzes 64 decisions of the South Jakarta Religious Courts, issued in 2011-2013, to see how *ultra petitem partium* principle is used to settle a child support claim in a divorce case. Child protection lawsuit is a legal solution given by the law to force fathers to carry out their obligations to fulfil their children's livelihood. In the Religious Courts, the case can be done simultaneously with a divorce case or done separately. This paper argues that in deciding children's livelihood claims, judges in the Religious Courts, besides having to comply with the applicable procedural law, should also follow basic principles applied in the General Court. This is based on article 54 of Law No. 7 of 1989. One of the principles is *ultra petitem partium*, in which the judges are prohibited from deciding a matter that is not stated in the lawsuit or decide more than what is demanded. From 64 decisions, 60 of them applied the *ultra petitem partium* principle. In this case, none of them decided to order the fathers to pay for children supports, even though the *posita* mentions that children were born during their marriage, and the children are with the mothers.

Keywords: divorce lawsuit, child lawsuit, *ultra petitem partium*, religious court

ملخص: كانت هذه المقالة نتيجة على التحقيق ٦٤ قراراً من المحكمة جنوب جاكرتا الدينية، الصادرة في ٢٠١١-٢٠١٣، للنظر كيف يتم استخدام مبدأ البتيوم الثنائي الفائق لتسوية دعوى دعم الطفل في قضية الطلاق. الدعوى المتعلقة بحماية الأطفال هي حل قانوني ينص عليه القانون لإجبار الآباء على الوفاء بالتزاماتهم لتحقيق المعيشة أطفالهم. في المحكمة الدينية، يمكن أن تتم القضية في وقت واحد مع قضية طلاق أو منفصل. وفي هذه الدراسة، اري أنه عند الاثبات القرار في دعاوى لتقرير المعيشة الأطفال يجب على الحاكم ان ينظر الي القانون الإجرائي وفقاً على القانون المطبق. وهذا طبقاً للمادة ٤٥ رقم ٧ سنة ١٩٨٩ التي تعدلت بالمادة رقم ٣ لعام ٢٠٠٦ والمادة رقم ٥٠ لعام ٢٠٠٩. أحد المبادئ هو نظام البتيوم الصغير، الذي يحظر فيه على القضاة البت في أمر لا يرد في الدعوى أو يقرر أكثر مما هو المطلوب. ٦٠ من ٦٤ قراراً مستخدماً البتيوم ولكن لا يوجد من القرار بالزام الإباء علي إعطاء المعيشة لأطفالهم منع ان أشار *posita* الي بيان ولادة الأطفال في حياة الزوجية و عاش مع امه

الكلمات المفتاحية: دعوى الطلاق؛ دعوى قضائية، البتيوم، المحكمة الدينية

Introduction

The number of divorce cases in the Religious Courts has increased since 2007. There were 8% divorces in two million marriages. Some people believe that divorce becomes easy after the implementation of One Roof system. Farid Ismail argues that three other factors which make divorce easier are the increasing legal awareness in the society; the availability of Pro-Deo system; and the implementation of circuit courts by the religious courts. (<http://badilag.mahkamahagung.go.id/> accessed on 18 January 2016, 12.00).

Masrinedi, a judge from Painan Religious Court states the same (pa.painan.go.id/ accessed January 2016 January 20 at 10.00). According to Masrinedi, there are three aspects that influence the increase of divorce rate: 1) the rise in people legal awareness, including the awareness to the legalisation of a marriage status; 2) service improvisation by the Religious Courts through the Pro-Deo system, circuit courts, and legal aid posts (POSBAKUM); and 3) the fragility of Indonesian people morality that leads to their inability to maintain their marriage.

The high rate of divorce can also be seen in South Jakarta Religious Court. In 2012, there were 3757 divorce cases, with 2681 divorces initiated by women (*cerai gugat*) and 1076 divorces initiated by men (*cerai talak*). Likewise in 2013, a divorce cases number were higher than in other cases. In 2017, divorce cases amounted to 3879 cases, with 2712 divorces initiated by women and 1167 divorces initiated by men (<http://infoperkara.badilag.net/> accessed January 12, 2017, at 13:35).

As a consequence, divorce will have an impact on children. One of the effects is that the children will have to live with only a single parent, and not both father and mother. A child who lives with a father may not have a problem with his livelihood, because the father is legally responsible for fulfilling his child's livelihood. It may be problematic when the child lives with the mother, in the case that the father neglects the livelihood of the child. Based on the Quran (al-Baqarah [2]: 233), a hadith and Complications of Islamic Law (KHI) article 41 and article 45 of Law No. 1 of 1974 jo article 80, 81, 105, 149 and 156, the law should provide a solution. This can be obtained by filing a child livelihood or child support claim to the Religious Courts.

***Ultra Petitem Partium* Principle**

In making a decision, a judge should follow a principle known as *ultra petitem partium*. Article 178 paragraph (3) HIR / Article 189 paragraph (3) RBG and Article 50 RV assert that judges are prohibited from imposing decisions on unsolicited matters or granting more than what is requested. This means that the authority of a panel of judges in deciding a civil case, according to this principle, is limited only to the matters petitioned by the parties (*ultra petita non-cognoscitur*). The judges cannot decide a case beyond what is requested. Judges who grant more than what is stated in the *posita* (the case) or *petitum* (the claim) is considered to have exceeded the authority limit or the *ultra vires*. In other words, they act beyond their authority. If the decision contains *ultra petitem partium*, the decision is invalid even if it is done by the judges in good faith or according to the public interest. This is considered illegal (illegal) (Harahap, 2007: 801).

This legal principle aims to protect the interests and rights of each; guarantee the fulfilment of rights; and prevent any harms. The principle of *ultra petitem partium* is intended to protect the involving parties from the arbitrariness of judges in deciding something exceeding the claims. Furthermore, it gives a mandate for judges to be prudent in making a decision. (Asnawi, <http://pa-banjarbaru.pta-Banjarmasin.go.id/> accessed January 2016).

Mertokusumo (2006: 188) argues that in applying the Article 178 Paragraph (3) of the HIR, the Supreme Court initially believed that making decisions exceeding the claims and deciding only half of the total claims are conflicting the Article 178 (3) of HIR. However, the Supreme Court then argues that the courts are allowed to proceed the exceeding claims, in the case that the claims are related to each other. Furthermore, Mertokusumo argues that based on the Supreme Court Decision on February 4th, 1970, the General Courts could decide the exceeding claims without considering the connectivity of one claim to the other. In this case, Article 178 (3) HIR was not applied in an absolute manner, because the judges actively engage in providing decisions to solve the cases. The Supreme Court Decision on January 8th, 1972, also allowed the exceeding claims as long as the claim was relevant to the case.

Judges who violate the *ultra petitem partium* principle, according to Yahya (2007: 802), are regarded as breaking the rule of law. This is

because, according to that principle, all judges' actions should follow the law. Granting more than what is claimed breaches the authority limit given by Article 178 (3) HIR. Furthermore, Yahya argues that if *ultra petitem* is carried out by a judge based on good intentions, it remains inexcusable or illegal considering that it violates the rule of law. This is confirmed by the Supreme Court Decision No. 1001 K / Sip / 1972 which prohibits judges from granting matters that are not requested or exceeding what is asked for. Based on the Supreme Court Decision No. 140 K / Sip / 1971, this cannot be done unless the matters are still within the framework that is in accordance with the core of the lawsuit.

Post-Divorce Child Support/ Livelihood

Law No. 1 of 1974 and Law No. 7 of 1989 (amended by Law No. 3 of 2006 and Law No. 50 of 2009) states that divorce can only be done before a court; and after the court failed to reconcile the two parties. Chapter IV paragraph 2 and paragraph 3 of Law No. 7 of 1989 states that there are two types of divorce conducted in the Religious Courts, namely: divorce initiated by women (*cerai gugat*) and divorce initiated by men (*cerai talak*). The Compilation of Islamic Law (KHI) article 114 also mentions that “the breakup of a marriage caused by divorce can occur due to divorce repudiation/*talak* (by a husband) or based on a divorce lawsuit (by a wife)”.

Manaf maintains that divorce by repudiation is a divorce where the initiator is the husband. In this case, the husband is the petitioner, and the wife is the defendant (2008: 440). In *cerai gugat*, the one who acts as the initiator or petitioner is the wife, while the husband becomes the defendant. One of the consequences in a divorce is the residency separation of the husband and the wife. This is because their legalized relationship, which allows them to live in one house, has broken. The house separation, in turn, affects their children. Problems arise after that are: who will the children live with after the divorce; and who will maintain and take care of their needs and livelihood.

Both father and mother in a marriage have a joint obligation to maintain children resulted from the marriage. If a divorce occurs, the wife has the most rights to take care of the children until they reach adulthood (Ayub, 1999: 391). Two conditions, namely determine

the eminence of the mother's rights: she has not remarried, and she is eligible to carry out the duty of child custody (*hadana*). If one of these conditions is missing, then the mother is not more important than the father. Consequently, the parenting right is given to the closest order in the family, which is the father (Syarifudin, 2006: 330).

Law No. 1/1974 Article 41 states that if a marriage breaks due to a divorce, then the consequences are: first, both father and mother are obliged to maintain and educate their children, based on the children's interest. If disputes related to children maintenance occur, the court will decide. Furthermore, with the different sentence but the same meaning, the obligation of children maintenance is also mentioned in Article 45 (1), "Both parents are obliged to maintain and educate their children properly. Article 45 (2) mentions that "the parent obligation as intended by subsection (1) of this article applies until the children getting married or being independent. The parents' obligation remains applicable even though the marriage bond between them has been broken. This is in contrast with the KHI that assertively determines that in the case of divorce, the maintenance of children before *mumayyiz* (age of discretion) or before 12 of age is in the rights of their mother. Meanwhile, for the children who already reach 12 of age are given a right to choose whether to be with the mother or the father.

Article 80 of the KHI mentions "(1) a husband is a guide for his wife and household, but all essential household affairs are to be decided by both husband and wife; (2) A husband is obliged to protect his wife and fulfil all household needs according to his capability; (3) A husband is required to provide religious education for his wife and give her opportunities to learn knowledge that is beneficial to the religion and the nation; (4) Depending on his earnings, a husband bears: a) livelihood, *kiswa* (clothes) and residence for his wife; b) household expenses, maintenance costs, and medical expenses for his wife and children; c) educational costs for children; (5) The obligation of a husband to his wife as mentioned in Article (4) a, b, and c shall take effect after a perfect *tamkin* from their wife; (6) A wife can discharge her husband from his obligation mentioned in the Article (4) a and b; (7) The husband's obligation as specified in Article (5) terminates if the wife commits *nusyuz* (ill-conduct).

Article 81 of the Compilation of Islamic Law stipulates (1) a husband is obliged to provide a place of residence for his wife and

children or ex-wife who is still in *iddah* period; (2) The residence is a proper place of residency for the wife during the marriage, or during *iddah* caused by divorce or *iddah* caused by death; (3) The residence is provided to protect the wife and children from the interference of other parties, so they feel safe and secure. The residence also serves as a place to store wealth, to organize and manage household appliances. (4) A husband is obliged to equip the residence according to his ability and to adjust it with the environmental conditions in which they live, in the form of household equipment and other supporting facilities.

Meanwhile, the Article 105 of Compilation of Islamic Law states that, “In the event of a divorce: a) the maintenance of a child who has not reached *mumayyiz* or 12 years old is in the right of the mother; b) the maintenance of a child who is *mumayyiz* is left to him/her to choose between the father or mother as a holder of the maintenance right; c) the father endures the maintenance costs.

Article 149 of the Compilation of Islamic Law explains “when a marriage breaks due to a divorce initiated by the husband, then the ex-husband must: a) give a decent *mut'a* to his ex-wife, either in the form of money or goods, except *qabla dukhul* (no intercourse) with the ex-wife; b) give a living costs, food, and *kiswa* (clothes) to the ex-wife during *idda* period, except if the wife has been divorced with *talak bai'n* or commit *nushuz* (ill-conduct), and is not pregnant; c) pay the all indebted *mahr* or half in the case of *qabla dukhul*; and d) give *hadana* (maintenance) costs for the children who have not reached 21 years of age.

The Article 156 of the Compilation of Islamic Law mentions: “The consequences of a marriage breakup due to divorce initiated by wife are: a) children who have not reached *mumayyiz* have a right over their mother’s custody (*hadana*), unless she passed away, her role is replaced by 1) women from the upper-line of the mother; 2) the father; 3) women from the upper-line of the father; 4) the children’s sisters; or 5) women from the father’s side-line blood relatives. b) Children who have reached *mumayyiz* are entitled to choose custody from their father or mother. C) Shall the guardian be unable to guarantee the children’s physical and spiritual safety, even though the maintenance cost and the custody are sufficient, with the request of their other relatives, the Religious Court can transfer the custody rights to other relatives who have rights of custody over the children. d) All custody and

maintenance costs become the responsibility of the father depending on his capability, at least until the children become adults and be able to take care of themselves (21 years old). e) If disputes occur on the matters of custody (*hadana*) and children maintenance, the Religious Courts make a decision based on the letter (a), (b), and (d). f) The court, by considering the father's capability, can decide the costs of maintenance and education for the children who are not with him. Children maintenance becomes the obligation of their father and becomes the rights of the children based on the Qur'an, *al Baqara* verse 233: "...and it is incumbent upon him who has begotten the child to provide in a fair manner for their sustenance and clothing..." and the Prophet sayings to Hindun "Take from your husband's belongings in a good manner to suffice you and your children (Az-Zuhaili, 1997: 136).

The book of An Nafaqat, al-Kashaf (1945: 16-17) states that a father is obliged to provide a living for his children in an absolute manner. Furthermore, it is noted that the support for children becomes the sole burden of the father, not others. This is because a child is only tied to his/her father. Az-Zuhaili (1997:138), on the other hand, argued that children who should obtain their father's support are those who have not reach *baligh* (adult) age or productive age; or those who have reached *baligh* age but are weak, unable to work because of mentally-retarded or being disable, paralyzed, no hands or legs, or during education period (diligently and vigorously); or because of a sickness that avoid them to work.

Ulama are in disagreement on the obligation of a father to provide a living for children who are *baligh* and able to do some works but poor. *Jumbur* (the majority of scholars) argue that, in such case, it is not the obligation of the father to provide for the children's living. In contrast, *Ulama* from Hanafiya explained that the father must provide for his children's living, in the case that the children are adult and healthy, but poor. This is different in the case of daughters, in which the father should provide for their living until they got married (Az-Zuhaili, 1997: 138). If the daughters are married, the obligation is entitled to their husbands. Shall a divorce happen; the father regains his duty to provide for his daughters' living. The father has no rights to force his daughter to work. If the daughters want to work, it should be a work that is safe from *fitna* such as sewing, and care-related works. In this

case, the father's obligation is null, unless the daughters' income is not sufficient to meet their needs, then the father helps them.

Child Livelihood/ Support Claim

Abovementioned, both Islamic law and Indonesian law insist that a father should provide for his children until they reached their *baligh* age or 21-year-old, according to KHI; or until they get married or are capable of being independent, according to the Act No. 1/1974.

In the case that the father neglects his obligation, the state can give rights to the neglected parties or their representatives to file a claim to the Religious Courts if they are Muslims. This is mentioned in the explanation of article 49 letter a, No. 7 Act No. 7/1989 amended by Law No. 3/ 2006 and Law No. 50/2009.

Claims of child livelihood or child support is a civil lawsuit or *contentiosa* lawsuit. This is because the problems brought before the courts, in this case, consist of disputes. One party acts as a plaintiff, and the other is a defendant. (Artho, <http://badilag.net/> accessed January 2016).

In the civil law procedure, a person who has a right to file a civil lawsuit is those who are capable of acting legally and have a legal interest. In the case of child support claim, those who have legal interests are the child or parent as the representatives. Therefore, those who can file child support claim are: (1) the biological mother who gave birth the child, based on the provisions of Article 47 paragraph; (2) the guardian, if the child is not in the custody of the mother; (3) The child, even if he/she has not reached an adult, if no one can represent him/her before the courts. This claim of an immature child should be accepted by the court, based on the principle of human rights protection.

The child support claims and other claims can be submitted in written or orally. If it is presented in writing, the claim is submitted in the form of a lawsuit and signed by the plaintiff or his/her representative, which in this case may be his/her biological mother or guardian. The letter is addressed to the Head of the Religious Court based on their relative authority (Article 118 paragraph (1) HIR / Article 142 paragraph (1) RBg) based on their relative authority.

A child support lawsuit can be submitted together/ cumulatively with a divorce initiated by the husband (*talak*) or the divorce initiated

by the wife. In this case, that the applicant is able to combine the divorce claim with child custody, child supports, ex-wife supports, and mutual property sharing. The formulation of the lawsuit can be systematically started with the reason of divorce, and then followed by the claim and reason for joint property sharing. Essentially, *posita* of divorce lawsuit becomes the main claim, while the others are part of assessor claim. Lawsuit of child custody, child support and joint property sharing are only available with a divorce lawsuit. Therefore, to avoid them from becoming “*obscure libel*”, which lead to the unacceptability of those claims. The lawsuits should be systematically and orderly formulated, stated with a divorce claim and then followed by others. These other claims should not come first, because they are the assessor claims to the divorce lawsuit. If the claim is not orderly submitted, it violates the legal procedures, and therefore become “*obscur libel*” and is unacceptable. In the case that a judge finds such lawsuits, he/she can advise for the petitioner to revise the sequence of the lawsuit. This also applies to the formulation of *petitum* (claim), in which it has to be started with divorce *petitum* to break a marriage, and the court allows the husband (the petitioner) to pledge a divorce before the court. After that, the case is continued with child custody, child support and joint property sharing. (Harahap, 1997: 234).

A child support lawsuit can be submitted by concerned parties such as the wife. This is conducted by initiating a counterclaim (*rekonvensi*) of the divorce lawsuit proposed by the husband. This is based on the definition of counterclaim stated in article 132 a paragraph (1) of HIR, indicating that a counterclaim is a claim proposed by the defendant as a counter to the lawsuit against him/her. This kind of lawsuit can be submitted to the court during the examination process of the previous lawsuit filed by the plaintiff. An almost similar definition is available in Article 244 B.Rv, stating that a counterclaim is a counter lawsuit filed by the defendant against the plaintiff in an ongoing legal process. This is also regulated in Article 132 a and n of HIR and inserted in the HIR with Stb. 1927-300, took over by Article 244-246 B.Ry. Meanwhile, in R.Bg, a counterclaim is regulated by Article 157 and 158.

The form of counterclaim in child support lawsuit can be done verbally or in writing. Some conditions in submitting the counterclaim are: *first*, the subject of counterclaim is stated clearly, which in this case is

the husband; *second*, the *posita* (case) or counterclaim proposition should be clearly formulated, by the affirmation of legal basis (*rechtsgrond*) and fact basis (*fijtelijkegrond*) underlying the claim for child support; *third*, the *petitum* of counterclaim is explained in detail, which in this case is related to child support, and ask the court to penalize the husband by paying the cost for child support.

A child support lawsuit can also be initiated after the divorce, or without a divorce, in case the father neglects his duty to provide for the children. The child support claim is a civil lawsuit or *contentiosa* lawsuit. Legal matters brought before the court consist of disputes, in which one party acts as the plaintiff, and the other as the defendant. This is because the product of the legal process is a court decision.

The Principle of *Ultra Petitem Partium* on Child Support Lawsuits

In general, child support claims in South Jakarta Religious Courts is the combination of the divorce petition, child custody, and child support. Therefore, the child support lawsuits are submitted as an assessor to the main case, which is the divorce. There are also claims of child custody cumulated with child support. In this type of cases, the father and mother have had a divorce. After that, one of the parties, which in this case the ex-wife, wished to obtain child custody rights legally.

Furthermore, the ex-wife demanded that the husband pays for the child support, which is paid to the ex-wife as the holder of child custody rights. Apart from that, there are also cases where the child support lawsuits are counterclaims to divorce petitioned by a husband. In this case, the wife as the defendant. After that, she responded to her husband's petition by a counterclaim to obtain the child custody right and to demand the court to penalize the ex-husband for paying for the child support.

In resolving child livelihood/support lawsuit in the Religious Courts, the panel of judges is guided by material and procedural law. Article 54 of Law No. 7/1989 amended by Law No. 3/2006 and Law No. 50/2009 states that the procedural law applied in the Religious Courts is a civil procedural law applied to General Courts, except that are regulated by this law. Therefore, the procedural law applied in the Religious Courts are HIR, RBg; Law No. 1/1974 on Marriage; Law

No. 7/1989 on Religious Courts, which has been amended by Act No. 3/2006 and amended by Law No. 50/2009; Law Number 30/1999 on Arbitration and Alternative Dispute Settlement; Law Number 23/2002 on Children Protection amended by Law No. 35/2014; Law Number 23/ 2004 on the Elimination of Domestic Violence, Government Regulation Number 9/1975 on the Implementation of Law Number 1/1974, Jurisprudence, Supreme Court Regulation (PERMA) and Supreme Court Circular (SEMA) and legislation on Religious Courts.

Apart from that, in dealing with child support claims, the judges are bound by the principles in the procedural law, such as the principle of *ultra petitem partium*, stipulating that judges must not decide more than what is claimed. This principle is stated in Article 178 paragraph (3) HIR / Article 189 paragraph (3) R.Bg [12]. Judges must not decide anything that is not sued by the plaintiff.

In the context of this discussion, that principle is applied by the judges even though before the custody claim or divorce petition submitted, the child is with the mother. However, because the claim of child support is not mentioned in the *posita* and *petitum* by the plaintiff, the judges should not order the father to pay for the child support. In this case, the judges based their decision on the principle of *ultra petitem partium*.

Of the 64 decisions used in this study, 60 decisions implement the *ultra petitem partium* principle, and only four of them deviated this principle. None of those 60 decisions decided to order the fathers to pay for the child supports; even it is mentioned in the *posita* that the children are born from the marriage between the plaintiffs and the defendants, and the children have lived with the plaintiffs. The plaintiffs, after that, requested to hold the custody right. In the decision, the judges grant the requests for custody rights by the wives. However, child livelihood claims are not decided because of the absent of the claim in the *posita* and *petitum*, even though the witnesses told judges that the children are with their mother.

For example, the Decision No. 1197/Pdt.G/2011 is the case of divorce initiated by a husband. In the counterclaim *posita*, the defendant (the plaintiff in the counterclaim) has requested the custody rights over the children. The plaintiff in the counterclaim sought that the defendant in the counterclaim, which in this case the father, to pay for child support costs. However, because the counterclaim *petitum* does not mention

the request, the decision specifies that the claim of the plaintiff in the counterclaim is unacceptable.

The legal considerations are as follows: after a careful review, it can be seen that even the plaintiff (in the counterclaim) submitted a counterclaim pertaining to those matters (custody and child support), it turned out that the claim was not equipped with a proper *petitum*. *Duplik* (a response to a counter plea) from the plaintiff in the counterclaim mentions that she missed to include those claims in the *petitum*. The judges do not violate the procedural law if they grant the claim as indicated in the *posita*. This is because a lawsuit should be composed precisely and accurately. Forget to include a matter in the lawsuit is the unacceptable reason. Moreover, the plaintiff in the counterclaim mentioned that the defendant (in the counterclaim) should pay (*vide petitum* No. 3), without an explanation of what to be paid.

Based on those considerations, the court argues that the counterclaim was formally invalid because a proper *petitum* did not support the *posita*, or there was no detailed request. This resulted in the *obscuur libel*, so the counterclaim was deemed unacceptable (*Niet Onvenkelijk verklaart*). In contrast, the plaintiff of the counterclaim mentioned in the *petitum* that she wished the court to determine the custody rights, child maintenance and education of a child named XXXX. However, because this matter was not mentioned in *posita*, even though it was mentioned in the answer to the primary case, then the request became formally invalid and unacceptable.

The application of the *ultra petittum partium* principle provides legal protection for the children's rights to the livelihood. This is done by the judges' consistency in implementing the principle. The plaintiff's expectation that the father will be responsible for the child support obtains legal certainty. This is in accordance with Islamic law and Indonesian law that child livelihood support is the obligation of the father. This obligation becomes certain by following correct legal procedures. The only hindrance in implementing this principle is in the dissemination of the information about this to the public in submitting a child support lawsuit. The role of POSBAKUM (Legal Aid Post) in every Religious Court becomes significant to provide information and better understanding related to the issue. Manan (2000:20) explains that the *posita* should clearly state the claim for child support; and the

petitum should mention that the defendant is ordered to pay for the child support. The example is as follow:

To grant the Plaintiff's claim entirely;

Stating that a son/daughter named was born on now aged month/year is the defendant's child

(.....);

Punish the defendant (.....) to pay for the child maintenance costs (.....) for months, as much as IDR

Stipulate according to the law; the defendant is obliged to pay for child maintenance costs (.....) every month, as much as IDR
Until the child becomes an adult or be independent.

Punish the defendant (.....) to pay compensation for the late payment on a daily basis, as much as IDR.....;

Punish the defendant to pay the costs incurred due to this case. Declare legitimate and valuable collateral confiscation of property belonging to the defendant petitioned by the plaintiff (Artho, <http://badilag.net/> accessed January 2016).

In deciding the case, apart from paying attention to the principle of *ultra petitum partium*, judges are also bound by the principle of proof (*pembuktian*). For example, the decision No. 300/ Pdt.G/2012/ PA.JS is a divorce lawsuit and judged by *verstek* (default judgment). In this case, the plaintiff did not revoke the child livelihood lawsuit. The plaintiff mentioned in the *posita* that according to the law, the defendant (as the father to his daughter) is responsible for providing for her livelihood, take care of her until she becomes an adult. This is in accordance with Article 41 (a) jo. Article 45 of the Marriage Law No. 1/1974 that requires that the defendant as a father provides for his children until they can be independent”.

Furthermore, in the divorce *petitum*, it is mentioned that the custody rights for the child, named Child I (according to the Birth Certificate No. 143/KONS/0309 dated 30 March 2009 issued by the Embassy of Republic Indonesia for Singapore), is given to the plaintiff. This *petitum* mentions that the defendant is responsible for providing for the child livelihood bring the child up and take care of her. The maintenance cost is given on a monthly basis until the child reaches

adulthood. Meanwhile, the amount depends on the child needs and the ability of the defendant. This decision mentions that the custody and maintenance rights are in the hand of the plaintiff.

Legal considerations for granting the plaintiff the custody rights, and demand the defendant to fulfil child maintenance costs are:

“With the absence of the defendant in the court without a legitimate reason, the court considers that the defendant does not refute or agrees with the claim from the plaintiff entirely. This means that the plaintiff is not obliged to provide evidence (vide article 125 HIR). Because this case is related to a marriage bond that is noble and sacred, the panel of judges still demanded the plaintiff to provide arguments for every claim proposed.

The child of the plaintiff and defendant named XXXX (Evidence p. 2) has been proven his existence and is well cared for by the plaintiff. At the same time, the plaintiff has no legal barriers to be a caretaker and guardian for the child, let alone the child has not yet *mumayyiz*. Based on this reason, the panel of judges decided that the child is in the care and custody of the plaintiff as his mother, without reducing the rights of the defendant (the father) to meet the child’s needs and show his care to the child. Therefore, the plaintiff’s claim regarding the right of child maintenance and custody can be granted.

The cost of child maintenance is mentioned in *petitum* point 4. However, because the plaintiff did not provide any evidence showing the defendant’s financial capability and the costs of child’s needs, the panel of judges found it is difficult to determine and estimate the defendant’s financial ability and the costs child’s needs. In this case, point 4 of the *petitum* became unacceptable.

Furthermore, the decision related to the impact of marriage only states: “stipulates that the child named: child I, female, born on 19 of March 2009 is under the custody and maintenance of the plaintiff. Meanwhile, the maintenance cost is not mentioned in the decision. This means that the claim for child livelihood/support was rejected by the panel of judges, even though the consideration suggests the absence of the defendant in the court without proper reason. In this case, the defendant should be considered agreeing the plaintiff’s proposition entirely. The judge implemented the principle that the plaintiff is not obliged to provide evidence (vide article 125 HIR). However, because

the case is related to the noble and sacred marriage bond, thus, the panel of judges compelled the plaintiff to provide evidence in her lawsuit proposition.

The question with regards to that case is, if the fact shows that the custody right of the child is in the hand of the mother, then isn't it better for the judge to determine the child livelihood cost based on the child's age, in the form of decision that accommodate the legal protection of the child's rights? In a child livelihood lawsuit, it is possible that the decisions are as follow "punish the applicant/ defendant/ defendant in counterclaim to provide for a living for the children (the number of children is stated clearly), which is paid monthly to the plaintiff in a certain amount according to the children's needs, outside the education and health costs. This applies until the children reach adulthood and are independent, or at least 21 years of age.

The author argues that this is more appropriate to be implemented considering a legal principle mentioned in Law 280K/Ag/2004 stating that if a divorce occurs, the impact of the divorce should be determined according to the minimum living cost or based on the appropriateness and justice. Furthermore, for the future of children, the court needs to determine the husband's obligation to pay for his children's living costs (Supreme Court of the Republic of Indonesia, 2006: 210).

The implementation of this proposition can clash with the principle in resolving civil case, which states that one of the judge's duties is to investigate the validity of the legal relationship that becomes the basis of the lawsuit. Therefore, the judges should objectively ascertain the facts through evidence. In turn, the purpose of evidence is to obtain the real fact and to determine the legal relationship between two parties. In the end, the panel of judges is able to decide based on the evidence. Judges in the verification process must share the obligation between two parties in providing the evidence, to assess the acceptability of evidence, and to assess the strength of the evidence. In carrying out their duty, the judges are bound by laws and regulations proposed by the parties in the trial.

Research by Wijaya et al. from the Faculty of Law of Gajah Mada University (2009) maintains that it can be interpreted that the belief of judges is not an essential aspect in determining the truth of facts. In this case, it needs to be returned to the most prioritized aspect, whether the procedural justice or substantial justice. This is because child livelihood

is an essential factor in fulfilling and protecting child rights to grow up and to avoid the negligence of children by letting their mother work harder to meet the needs of the children, including their education.

Apart from the abovementioned description, the author also finds irregularities in dealing with child livelihood lawsuit. For example, the counterclaim mentions the request for child livelihood, and the judges state this issue in their consideration. However, in their decision, the issue of child livelihood is missing. There is also the fact that the judges' consideration is not synchronous with the *posita and petitem* of the plaintiff. In other cases, the plaintiff's *posita and petitem* mention the child livelihood claim, but the judges do not mention it in their consideration. In fact, the legal consideration (*rechtsgronden*), theoretically, determines the value of judges' decision. Therefore, their consideration should be addressed carefully, correctly, and thoroughly. Moreover, all parts of the plaintiff's *petitem* should be entirely considered/adjudicated one by one (Mulyadi, 1999: 218-219). There are some child livelihood decisions that do not mention the legal basis of the judges in granting such claim or do not refer to the principle of *racial decidendi* (legal consideration) in every legal decision.

Beside containing reasons and legal basis, a decision should also consist of certain articles from related laws and legislation or other unwritten laws that are used in the trial. Every decision should include legal consideration based on basic assessment (*basic reason*), and a correct and accurate legal basis (Mujahidin, 2012: 40-41).

Furthermore, the fact which draws the author's attention is that most of the cases decided in *verstek* are generally divorce claims cumulated with child custody and child livelihood claims. In those cases, the plaintiffs revoked their child livelihood claim despite the importance of this claim to guarantee the future of children. Moreover, the fulfilment of child livelihood claim can ease the burdens of the mothers in maintaining their children alone. In turn, they can play their role as the guardian to their children better, and the children will have a better life, as is mandated in the Law No. 23/2002.

The question after that is: why is the child livelihood claim revoked in the *verstek*, despite its mentioning in the *posita and petitem*? Based on the author's interview with a judge of the South Jakarta Religious Courts, the author finds out that the examination of child livelihood lawsuits

without the presence of the defendant is difficult. This is because the judges cannot hear from the defendants about their capability in fulfilling their children's needs. At the same time, the plaintiffs cannot provide evidence about the defendants' capability in fulfilling the child support. Apart from that, the accumulation of a divorce case with *hadana* and child livelihood/support is done to give certainty for the plaintiff's legal status in order to remarry with another person. So, the most important thing for the plaintiffs is the certainty of their legal status. (Interview with Judge of South Jakarta Religious Court, December 2014).

Even though the defendant is absent in the examination of child livelihood lawsuit, the defendant has been summoned accordingly. This means that the claim can be granted according to the basic minimum needs of the child, based on appropriateness and justice. The *verstek* principle mentions that the claim can be granted if: a) the defendant is or defendants are not present in first trial day; b) The defendant does not or defendants do not delegate a representative for the trial; c) the defendant has been, or defendants have been summoned accordingly; d) the claims are cogent and have a legal basis. (MA RI: 2013).

Besides, with the decision mentioning the ex-husband's obligation to pay for child livelihood cost, the imposition is normative, persuasive and repressive to make him more responsible. The breakup of a marriage does not abort the responsibility of the ex-husband to fulfil his children's needs, even though the court determines that the custody is in the hand of the mother. This is because, psychologically, child supports given by the father is an instrument to maintain the bond between parents and children. Children who grow up with sufficient attention and affection from parents tend to have optimal growth physically, psychologically, and spiritually. With the livelihood support given by the father, children's socialization process will not be disturbed by the need to fulfil their daily needs and education costs. Therefore, apart from being mature psychologically, the children will also be avoided by having an anti-social personality.

The provision of child livelihood is not only seen as fulfilment of life necessity or mere economic needs (economic fulfilment), but also an effort to obtain a closer emotional relationship between children and parents, especially the father, who has a responsibility to fulfil the needs of his children as stated in the Quran, hadith and Indonesian laws.

Conclusion

60 out of 64 child livelihood lawsuits, which become the object of this research, implement the principle of *ultra petitem partium*, but none of them decided to order the fathers to pay for child livelihood costs. This happens even though the *posita* states clearly that a child was born during the marriage between the plaintiff and the defendant, and the child has lived with the plaintiff. The plaintiffs (mothers) also required to obtain the *hadana* (custody) rights. In the decision, the custody requests are granted, but the child livelihood is not determined. This is because the claim is not available in the *posita* or the *posita* mentions the request for *hadana* and child livelihood claim, but not in the *petitum*.

In the hearing process involving a child livelihood lawsuit, the witnesses and the mother approved that the child is with the mother. However, the judges did not order the father to pay for child livelihood costs because it violates the principle of *ultra petittum partium*. In fact, if the custody is granted to the mother or the fact in court shows that the child is with the mother, child livelihood claim should be granted and order the father to fulfil it. This can be done without the father's presence in the court. This is a normative, persuasive and repressive effort to make the father more responsible. The breakup in marriage does not decline the responsibility of the ex-husband to provide for his children, even though the court decides that the mother has a right over the children custody. With the father's support, a child will grow up well and have an optimal socialization period. In turn, this will avoid the child to have anti-social personality.[]

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