

**WOMEN BEFORE THE LAW: BETWEEN JUSTICE AND CERTAINTY:  
NOTES ON DIVORCE SETTLEMENT CASE DUE TO DOMESTIC  
VIOLENCE IN METRO RELIGIOUS COURT**

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<b>Received:</b> 19/03/2020	<b>Revised:</b> 29/04/2020	<b>Approved:</b> 17/06/2020
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DOI: <https://doi.org/10.32332/akademika.v25i1.1974>



Women Before The Law: Between Justice And Certainty  
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**Abstract**

*Family case settlement in the religious court often does not run effectively and efficiently due to some judicial constraints in the level of absolute competence, event law, and material law. This paper seeks to describe some notes related to divorce settlement due to the domestic violence in the religious court. The data was collected through the observation of the trial and the reading of the verdicts on several divorce cases of domestic violence in metro religious court in 2016-2018. The findings suggest that justice for women could only be gained at a formal legal level, while the desired substantive justice has not yet been achieved. The constraints occur in such stages as submission, case handling, and the verdict. The gender perspective of justice case handling and the judges' courage of the religious court to deliver ultra petitem verdicts are a legal breakthrough in order to realize substantive justice in resolving family conflicts.*

**Keywords:** *divorce, domestic violence, legal certainty, legal justice, religious court*

## A. Introduction

The number of divorces filed by women (statement divorce) to the religious court in Indonesia is 2-3 times higher when compared to divorce applications filed by men (*talaq* divorce) with high success rates of lawsuits. Data from the National Commission of the Elimination of Violence against Women (*Komnas Perempuan*) in 2018 shows that of the total cases achieved by the religious court, 71% were categorized as statement divorce, 26% were *talaq* divorced, and the rest 3% were other different cases. This phenomenon becomes a trend almost throughout the religious courts in Indonesia and several other Islamic countries.<sup>1</sup> Research conducted by the PEKKA Team (*Perempuan Kepala Keluarga* or Women as the head of the family) in 2010 showed that 9 out of 10 women's statement divorces were granted.<sup>2</sup> The phenomenon of divorce lawsuits is not always understood as a form of fulfilment of a wife's legal rights. As stated by Nurlaelawati and Huis that many Indonesian women do not get post-divorce rights when their divorce lawsuit is granted.<sup>3</sup> The constraints in the embodiment of justice and legal certainty are not only caused by the factor of women as plaintiffs but are also influenced by the judicial institution as a law

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<sup>1</sup> Tim Peneliti, *Akses Terhadap Keadilan: Pemberdayaan Perempuan Kepala Keluarga di Indonesia* (Jakarta: Pekka & AusAID, 2010), 25. Tim Penyusun, "Laporan Tahunan Pengadilan Tinggi Agama Bandar Lampung 2016" (Bandar Lampung: Pengadilan Tinggi Agama Bandar Lampung, 2017). Tim Penulis, "Tergerusnya Ruang Aman Perempuan Dalam Pusaran Politik Populisme: Catatan Kekerasan Terhadap Perempuan Tahun 2017" (Jakarta: Komnas Perempuan, 2018). "(8) (PDF) Buying a Divorce in Zanzibar | Erin Stiles - Academia.edu," diakses 22 Maret 2019, [https://www.academia.edu/912968/Buying\\_a\\_Divorce\\_in\\_Zanzibar](https://www.academia.edu/912968/Buying_a_Divorce_in_Zanzibar). Danaya. C Wright, "Legal Rights and Women's Autonomy: Can Family Law Reform in Muslim countries avoid The Contradictions of Victorian Domesticity?" *Hawwa (Leiden)* 5, no. 1 (2007): 33-54.

<sup>2</sup> Tim Peneliti, *Akses Terhadap Keadilan: Pemberdayaan Perempuan Kepala Keluarga di Indonesia*.

<sup>3</sup> Stijn Cornelis va Huis, "Islamic Courts and Women's Divorce Rights in Indonesia: The Case of Cianjur and Bulukumba" (Universiteit Leiden, 2015). Euis Nurlaelawati, "The Legal Fate of Indonesian Muslim Women in Court: Divorce and Child Custody," dalam *Religoin, Law and Intolerance in Indonesia*, 1st Edition (London: Routledge, 2016), 430.

enforcement structure as well as the third party involved in the legal process.<sup>4</sup>

Studies of women filing for divorce have so far been mapped out in three trends. *First*, is a study that puts forward aspects of the law relating to the guarantee of protection of women's rights post-divorce.<sup>5</sup> *Second*, the trend of women is seen as a phenomenon of increasing legal literacy of women as an indicator of the success of the process of socialization and education in women through empowerment, gender advocacy, or legal socialization.<sup>6</sup> *Third*, studies on divorce lawsuits are in a normative legal perspective that focuses on the judge's consideration of granting a divorce lawsuit.<sup>7</sup>

This paper responds to the shortcomings of the existing studies by showing a number of judicial constraints faced by the religious court in realizing justice and legal certainty for women who are suing for divorce especially in divorce cases due to violence element. This paper specifically analyses these constraints with the subject of religious courts as a structure of law enforcement and family legal certainty. An analysis is conducted based on the stage of (1) the filing of the case, (2) the handling of the case, and (3) the verdict.

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<sup>4</sup> Tim Penulis, "Tergerusnya Ruang Aman Perempuan Dalam Pusaran Politik Populisme: Catatan Kekerasan Terhadap Perempuan Tahun 2017."

<sup>5</sup> Stijn Cornelis van Huis, "Rethinking The Implementation of Child Support decisions Post-Divorce Right and Acces to The Islamic Court in Cianjur, Indonesia," *Law, Social Justice and Global Development Journal* 15 (2010), <http://www2.warwick.ac.uk/fac/soc/law/elj/lgn>. Tim Peneliti, *Akses Terhadap Keadilan: Pemberdayaan Perempuan Kepala Keluarga di Indonesia*.

<sup>6</sup> Euis Nurlaelawati, "Muslim women in Indonesian religious courts: Reform, strategies, and pronouncement of divorce," *Islamic law and society* 20, no. 3 (2013): 242-71, doi:10.1163/15685195-0010A0003. "(8) (PDF) Buying a Divorce in Zanzibar | Erin Stiles - Academia.edu," diakses 22 Maret 2019, [https://www.academia.edu/912968/Buying\\_Divorce\\_in\\_Zanzibar](https://www.academia.edu/912968/Buying_Divorce_in_Zanzibar). Dina Afrianty, "Indonesian Women and Local Politics: Islam, Gender, and Networks in Post-Suharto Indonesia," *South East Asian Studies* 4, no. 3 (Desember 2015): 614-18.

<sup>7</sup> Asasniwarni, "Studi Tentang Putusan-Putusan Pengadilan Agama Sebagai Produk Pemikiran Hukum Islam: Kasus Wilayah Pengadilan Tinggi Agama Padang 1989-1997" (Universitas Islam Negeri Sunan Kalijaga, 2016). Amir Mu'alim, "Yurisprudensi Peradilan Agama: Studi Pemikiran Hukum Islam di Lingkungan Pengadilan Agama Se-Jawa Tengah dan Pengadilan Tinggi Agama Semarang. 1991 - 1997" (Institut Agama Islam Negeri Sunan Kalijaga, 2003).

## B. Literature Review

### Divorce and Woman's Position in the Religious Court

Divorce in Islam is an emergency exit and the final option for families who no longer find the benefit and goodness in their marriage life. Divorce is the most hated thing before Allah. Nevertheless, divorce became the case that dominated the courtroom of the religious court in Indonesia.<sup>8</sup> Statement divorce (*cerai gugat*) is a type of divorce filed by women with a ratio of 3 to 1.<sup>9</sup> In some divorce cases, it is generally filed with the court because the family's condition is already very acute, and no longer irreconcilable.<sup>10</sup> This assumption is reinforced by the findings of research in Aceh, Metro, West Sumatra, and Sulawesi in that the divorce cases follow two patterns. First, a new divorce was filed and is acknowledged that the divorce has not yet occurred. Second, a divorce which is recognized to have occurred by fulfilling the Islamic jurisprudence or *fiqh* (read: religion) provisions, and submitting to the court (religious court) simply to legalize it by obtaining a divorce certificate.<sup>11</sup>

Nevertheless, studies of divorce cases show that women are in a legally weak position. There is a tendency for women to experience injustice in family relationships in that they have to file for divorce.<sup>12</sup>

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<sup>8</sup> Tim Penulis, "Tergerusnya Ruang Aman Perempuan Dalam Pusaran Politik Populisme: Catatan Kekerasan Terhadap Perempuan Tahun 2017." Tim Pokja Laporan Tahunan MA RI, "Laporan Tahunan Mahkamah Agung RI 2016" (Jakarta, 2017).

<sup>9</sup> Nurlaelawati, "Muslim women in Indonesian religious courts: Reform, strategies, and pronouncement of divorce," 251. Cate Sumner dan Tim Lindsey, "Courting Reform: Indonesia's Islamic Courts and Justice For The Poor," *International Journal For Court Administration*, Desember 2011.

<sup>10</sup> A. Jamil, "Peran Mediator Dalam Mendamaikan Perkara Perceraian Pada Pengadilan Agama Metro" (Thesis, IAIN Raden Intan, 2010).

<sup>11</sup> Arskal Salim, *Demi Keadilan: Dokumentasi Program Sensitivitas Jender Hakim Agama di Indonesia* (Jakarta: PuskumHAM UIN Jakarta & Asia Foundation, 2009). Huis, "Islamic Courts and Women's Divorce Rights in Indonesia: The Case of Cianjur and Bulukumba." Nurlaelawati, "Muslim women in Indonesian religious courts: Reform, strategies, and pronouncement of divorce." Erin E Stiles, "When is A Divorce A Divorce? Determining Intention In Zanzibar's Islamic Court," *Ethnology* 42, no. 4 (Autumn 2003). Nora Abdul Hak dkk., "Right of women to obtain divorce under Shari'ah and Islamic family law of Malaysia: With special reference to ta'liq and khulu'," *Australian Journal of Basic and Applied Sciences* 6, no. 11 (2012): 286-93,

<sup>12</sup> Siti Aisyah dan Lyn Parker, "Problematic Conjugations: Women's Agency, Marriage and Domestic Violence in Indonesia," *Asian Studies Review* 38, no. 2 (3 April 2014): 205-23, doi:10.1080/10357823.2014.899312. Mohamad Abdun Nasir,

While in the legal process, women also experience objectification that further weakens it both legally, socially and economically.<sup>13</sup> In this legal process, women face typical social experiences in the form of subordination and stigmatization. They become subordinate because they have no choice but to sue.<sup>14</sup> At the same time, stigmatization is attached to women because they have sued and is considered persons who fail to become good wives. This view is further strengthened when the women who sue are often stigmatised as disobedient wives (*nusyuz*) that must relinquish their divorce rights.<sup>15</sup>

### **Domestic Violence as a Reason for the Divorce**

The term violence is commonly used to describe a behavior, both open and closed, offensive and defensive that is accompanied by the use of force on others.<sup>16</sup> This understanding is in line with the notion of violence stated in the Indonesian Dictionary that highlights only to the order of physical violence involving force, and the presence of an element of unwillingness or the absence of consent of the other party who is harmed.

"...concerning the nature, the violent nature, the actions of a person causing injury or death of another person or causing bodily harm or other person's goods, or any coercion"

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"Islamic law and paradox of domination and resistance: Women's judicial divorce in Lombok, Indonesia," *Asian journal of social science* 44, no. 1-2 (2016): 78-103, doi:10.1163/15685314-04401006.

<sup>13</sup> Mufliha Wijayati, "Punishing Women: Diskriminasi terhadap Perempuan yang Mengajukan Cerai di Pengadilan Agama Indonesia," dalam *Islam Indonesia: Dialektika Agama, Budaya, dan Gender* (Yogyakarta, Indonesia: LKiS, 2020). Nurlaelawati, "The Legal Fate of Indonesian Muslim Women in Court: Divorce and Child Custody." van Huis, "Rethinking The Implementation of Child Support decisions Post-Divorce Right and Acces to The Islamic Court in Cianjur, Indonesia."

<sup>14</sup> Nurlaelawati, "Muslim women in Indonesian religious courts: Reform, strategies, and pronouncement of divorce."

<sup>15</sup> Abdul Ghofur Anshori dan Yulkarnain Harahab, "Interpretasi Konsep Nusyuz Dalam Perkawinan Pada Pengadilan Agama di Daerah Istimewa Yogyakarta," *Mimbar Hukum*, t.t., 74-86, <https://repository.ugm.ac.id/id/eprint/19763>. Lyn Parker, "The Theory and Context of the Stigmatisation of Widows and Divorcees (*Janda*) in Indonesia," *Indonesia and the Malay World* 44, no. 128 (2 Januari 2016): 7-26, doi:10.1080/13639811.2015.1100863.

<sup>16</sup> Febi Rizki Ramadhan, "'KEKERASAN BISA DIMAKNAI BERBEDA-BEDA': RAGAM PEMAKNAAN ATAS KEKERASAN TERHADAP PEREMPUAN DALAM PRAKTIK GERAKAN SOSIAL ALIANSI LAKI-LAKI BARU," *Paradigma, Jurnal Kajian Budaya* 7, no. 2 (24 Januari 2018): 103, doi:10.17510/paradigma.v7i2.169.

(Kebudayaan, 1996: 425)

The word violence is one of the words commonly used to describe some issues related to treatment or actions seen as unpleasant, inhuman, challenged with certain norms/values or laws, or something that goes against our will.<sup>17</sup> The word is then used in other words to describe issues of treatment or action in certain contexts, such as political violence, economic violence, cultural violence, structural violence, state violence, domestic violence, violence against women, child abuse, and so on. In each of these new terminologies, then constructed theories, concepts, laws or even doctrines of what is meant by violence.

Domestic violence (*KDRT Kekerasan Dalam Rumah Tangga*) is 'any act against a person that may result in and cause misery or suffering either physically, sexually, psychologically, or any form of domestic abuse including threats to commit acts of coercion or unlawful deprivation of liberty within the domestic sphere'.<sup>18</sup> Violence is not only the form of real physical violence, but also psychic violence due to verbal violence in various forms, sexual violence, and other violence in the form of domestic abuse, including restrictions on any access. Similarly, acts of coercion, or deprivation of liberty/rights in the sphere of domestic life.<sup>19</sup>

In its review of article 16 and article 5, CEDAW, the UN Committee explained that domestic violence has long been considered prevalent for people in many countries, with no exception to Indonesia. In kinship at all levels of age, women suffer all sorts of suffering, including beatings, rape, and other forms of sexual and mental assault per perished by traditional attitudes. The responsibility removal or takeover by men can also be referred to as a form of violence and coercion. These forms of violence put

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<sup>17</sup> Lily Zakiyah Munir, "Domestic Violence in Indonesia Special from the Field Issue: Islam and Human Rights Advocacy for Social Change in Local Contexts," - *Muslim World Journal of Human Rights*, t.t., [i].Iwu Dwisetyani Utomo dkk., "Young people's understanding of domestic violence: evidence from a school based survey of Grade 6 and Grade 12 students in Indonesia," *Genus* 70, no. 2-3 (2014): 35-57, doi:10.4402/genus-544. Clare McGlynn, "Rape as 'Torture'? Catharine MacKinnon and Questions of Feminist Strategy," *Feminist Legal Studies* 16, no. 1 (April 2008): 71-85, doi:10.1007/s10691-007-9079-5.

<sup>18</sup> "Undang-Undang Penghapusan Kekerasan Dalam Rumah Tangga," 23 § (2004).

<sup>19</sup> Nur Rofiah, "Kekerasan dalam Rumah Tangga dalam Perspektif Islam," *Wawasan: Jurnal Ilmiah Agama dan Sosial Budaya* 2, no. 1 (Juni 2017): 31-44.

women at risk of health and hinder the opportunity to participate in family life and public life on the basis of common ground.<sup>20</sup>

Divorce is considered valid when filed before the court conveying reasons included the Marriage Act and the Compilation of Islamic Law. In its explanation, the Marriage Act mentions 6 reasons that can be taken as reasons namely adultery, drunks, drug users, gamblers; leave for 2 consecutive years; sentenced to a minimum of 5 years in prison; commit cruelty or severe mistreatment; disabilities or diseases resulting in being unable to carry out the husband/wife; and constant quarrels.<sup>21</sup> The compilation of Islamic Law specifically adds 2 things to these 6 reasons; transgressing the divorce and apostasy.<sup>22</sup> Limiting the reasons for divorce in the Marriage and Compilation Act of Islamic law is an administrative regulation to limit the practice of unilateral and in-place divorce. Estuary of this limitation is a form of protection for each party, especially women and children.

The term of domestic violence literally comes to the fore after the Marriage Act and the Compilation of Islamic Law. Physical violence, psychic violence, abuse and sexual violence are the 4 types of violence mentioned in the elimination of domestic violence law (*PKDRT Penghapusan Kekerasan dalam Rumah Tangga*).<sup>23</sup> These four types of domestic violence are not rigidly defined by law. The explanation of the elimination of domestic violence law focuses more on the impact of violent behaviour that can be very personal, so it becomes a space of interpretation and makes it away with certainty. If it is linked to the reason for divorce, then literally acts of cruelty or severe persecution are parts of this type of physical violence. As for other types of interpretation, they become areas to be categorized on the type of psychic violence. The common reason divorce is expressed in divorce lawsuits is an economic issue. However, not a single reason, the economy and constant bickering are the main reasons most filed in the lawsuit.<sup>24</sup>

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<sup>20</sup> Rita Serena Kalibonso, *Opsional Protokol terhadap Konvensi Penghapusan Segala Bentuk Diskriminasi terhadap Perempuan* (Jakarta: Mitra Wacana, t.t.). 14

<sup>21</sup> Pasal 39 ayat (2) "Undang-Undang Republik Indonesia Tentang Perkawinan," 1 § (1974). Lili Rasjidi, *Alasan Perceraian Menurut UU No. 1 tahun 1974 tentang Perkawinan* (Bandung: Penerbit Alumnus, 1983).

<sup>22</sup> "Kompilasi Hukum Islam," 1 Instruksi Presiden § (1991).

<sup>23</sup> Undang-Undang Penghapusan Kekerasan Dalam Rumah Tangga.

<sup>24</sup> Abe Sohpiyan Abdul Rahman, Zuliza Mohammad Kusrin, dan Anwar Fakhri Omar, "Faktor Perceraian di Mahkamah Syariah Bahagian Mukah, Sarawak dari Tahun 2000-2010," *Islamiyyat* 36, no. 1 (2014): 5-20. Nurlaelawati, "Muslim women in Indonesian religious courts: Reform, strategies, and pronouncement of

### Justice and Legal Certainty in Divorce

Justice and legal certainty are the pillars of law enforcement objectives that are most talked about by legal theorists in addition to realization of benefit or social welfare.<sup>25</sup> Law is an institution that delivers people to a just, prosperous, and happy life. As an institution, law is not as absolute, final, and plenary, but is understood as a process of being (law as a process, law in the making).<sup>26</sup> This understanding inspires progressive legal theorist. Thus all three should be treated flexibly, compromise, and harmony. Soekanto mentioned at least 5 law enforcement factors to be aware of, namely the legal factors, their enforcement, their facilities and facilities, the community, and also the culture.<sup>27</sup>

Access to justice is defined as an opportunity or right to justice. Its existence can be obtained in the form of protection, service, law enforcement, as well as court rulings. Law-based justice by Almubarak is described as equality in accessing welfare in the social institution ensonced in the legislation.<sup>28</sup> The law fairness in the divorce case is derived from equal access to the initiation of the divorce, equal treatment in the litigation process and after the divorce related to its rights and obligations. While in the perspective of equality, Rofiah explains that justice is essentially justice that promotes equal rights and obligations taking into account women's typical experiences and women's social experiences of violence, marginalization, subordination, stigmatization and double burden.<sup>29</sup> Fakhri calls it a form of discrimination against women.<sup>30</sup>

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divorce." Nasir, "Islamic law and paradox of domination and resistance: Women's judicial divorce in Lombok, Indonesia." Liana C. Sayer dan Suzanne M. Bianchi, "Women's Economic Independence and the Probability of Divorce: A Review and Reexamination," *Journal of Family Issues* 21, no. 7 (Oktober 2000): 906-43, doi:10.1177/019251300021007005.

<sup>25</sup> Abe Sohpihan Abdul Rahman, Zuliza Mohammad Kusrin, dan Anwar Fakhri Omar, "Faktor Perceraian di Mahkamah Syariah Bahagian Mukah, Sarawak dari Tahun 2000-2010," *Islamiyyat* 36, no. 1 (2014): 5-20.

<sup>26</sup> Awaludin Marwan, *Satjipto Rahardjo: Sebuah Biografi Intelektual dan Pertarungan Tafsir Terhadap Filsafat Hukum Progresif* (Yogyakarta: Thafa Media, 2013), 401.

<sup>27</sup> Soerjono Soekanto, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum* (Jakarta: Rajawali Press, 2016), 11-67.

<sup>28</sup> Fauzi Almubarak, "Keadilan dalam Perspektif Islam," *Istighna* 1, no. 2 (Juli 2018): 138.

<sup>29</sup> Nur Rofiah, "Islam dan Keadilan Hakiki bagi Perempuan," t.t., [https://mubaadalahnews.com/rujukan/detail\\_metodologi/2017-08-11/60](https://mubaadalahnews.com/rujukan/detail_metodologi/2017-08-11/60).



Legal certainty is a form of protection from arbitrary actions that prevent a person from obtaining what is his right under certain circumstances.<sup>31</sup> Legal certainty can also be understood as the purpose of delivering justice. Without legal certainty, people find it difficult to know what to get and do. Even too rigid in realizing legal certainty, it is shackled and too procedural.<sup>32</sup> Legal certainty in divorce cases is based on the legality of the marriage breakup made before the court.<sup>33</sup> In addition to the breakup of the marriage, legal certainty in the case of divorce also ensures the guarantee of legal rights incurred as a result of divorce, both related to childcare and its costs, as well as other rights of things such as *mut'ah*, living *iddah*, and divorce payout. In the court's verdict, the value of certainty is strongly emphasized to be clear, complete, and does not contain multi-interpreted terms.<sup>34</sup>

### C. Method

This paper is the result of a research conducted at Metro religious court in 2017-2019 based on the fact that divorce rates increased over a period of 3 years. One of the most important issues in the increase of the divorce rate is the high number of divorces containing elements of domestic violence. Divorce cases due to violence are important to be reviewed, considering that in the case of statement divorce almost certainly contains elements of domestic violence. Significantly in the jurisdiction of the Metro religious court the statement divorce case becomes the highest intensity case. The research was focused on the legal constraints faced by the religious court in enforcing substantive justice for women as plaintiffs.

Participants involved in this research are focused on three main actors. First, women who have been or are filing for divorce. Second, lawyers who directly act as escorts and consultants of legal aid office (*also known as POSBAKUM or Pos Bantuan Hukum*). Third, judicial institutions who are represented by judges and clerks as sources of information directly involved with the judicial process. In this case, the obstruction of law

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<sup>30</sup> Mansour Fakhri, *Analisis Gender & Transformasi Sosial* (Yogyakarta: INSISTPress, 2012).

<sup>31</sup> Sudikno Mertokusumo, *Bab-Bab Tentang Penemuan Hukum* (Bandung: Pt. Citra Aditya Bakti, 1993), 2-3.

<sup>32</sup> Sudikno Mertokusumo, *Mengenal Hukum: Sebuah Pengantar* (Yogyakarta: Cahaya Atma, 2010).

<sup>33</sup> Pasal 39 "Undang-Undang Republik Indonesia Tentang Perkawinan," 1 § (1974). Pasal 115 dan 123 Kompilasi Hukum Islam.

<sup>34</sup> A. Mukti Arto, *Pembaharuan Hukum Islam Melalui Putusan Pengadilan Hakim* (Yogyakarta: Pustaka Pelajar, 2014), 3-10.

enforcement and justice in divorce cases is identified in religious courts as the essence of the judiciary.

This paper is based on three data collection techniques, namely observation of trials, interviews with participants, and documents mapping. The observation of the trial was made by attending several divorce proceedings in 2017 and 2019. Interviews were also used to three groups of participants, especially court participants and lawyers, as parties who interacted directly in the trial. Documents mapping was done by tracking court ruling documents in divorce cases in Metro religious court in 2016-2018. In addition, legal documents related to divorce and civil event law were used as the entrance to the normative discussion of the handling of divorce and domestic violence in Indonesia.

The data analysis was conducted by summarizing and restating the data collected to be grouped thematically according to the purpose of writing. The description process was carried out to build patterns and tendencies from good data derived from interviews, document studies and observations. The data was then interpreted by returning the data in the context of the divorce juridical. In addition, interpretation was also made by looking at the meaning of language and symbolic meaning of data derived from informants and their relevance to the laws and regulations related to divorce proposed by women.

#### D. Result and Discussion

That a divorce lawsuit because the domestic violence filed by women in the religious court does not necessarily mean the success and achievement of justice.<sup>35</sup> There are several juridical obstacles encountered in divorce proceedings ranging from the filing phase of the case, the trial,

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<sup>35</sup> In Black's Law Dictionary 7th Edition keadilan dimaknai dengan *Justice Fairly Administered According to Rules of Substantive Law, Regardless of Any Procedural Errors Not Affecting the Litigant's substantive Rights*. Pengertian tersebut di atas memberikan penekanan pada keadilan substantif yang tidak memandang perbuatan semata-mata secara formal-prosedural, namun lebih pada terpenuhinya hak-hak substantif seseorang. Dalam mengimplementasikan paradigma ini tuntutan keadilan dapat saja berjalan lebih cepat dibandingkan dengan bunyi undang-undang. Selama bunyi undang-undang memberi rasa keadilan, maka Undang-Undang dijadikan sebagai dasar dalam pengambilan putusan; namun sebaliknya jika penerapan bunyi undang-undang tidak dapat memberi keadilan, maka dapat saja diabaikan untuk kemudian dibuat putusan yang berkeadilan. Karena hukum sesungguhnya bukan merupakan suatu institusi yang absolut dan final, melainkan berada dalam proses untuk terus menjadi (*law as a proces, law in the making*). Lihat Tim, *Black's Law Dictionary, 7th Edition*, h. 869.

and the verdict. The juridical constraints include obstacles, barriers that limit or prevent religious judiciary in order to enforce and service the law as well as justice based on Islamic *sharia* for the justice seekers. These juridical constraints can be formal law, material law, as well as the law of the state system governing the position, institutional, and competence of the religious judiciary.<sup>36</sup>

### 1. Constraints on the Filing Phase of the Divorce Case

Litigation is the gateway to the continuation of the handling of divorce lawsuits. In this phase, women who are exposed to domestic violence, register the case by including a lawsuit letter, litigation fees, and other administrative fittings. The correct and proper entrance becomes a precondition of handling and making decisions. The formulation and material of the lawsuit become the central points of the examination of the case and the judge's consideration in making the decision. All events or facts checking are oriented towards sitting the case described in the lawsuit.<sup>37</sup> The letter of lawsuit containing only the material of the divorce lawsuit, then in the examination and verdict of the panel of judges will be decided according to what is requested.

For the sake of a quick divorce settlement, material lawsuits are often made very minimalist just for the divorce sake. The option to sue for divorce is identified solely for three things namely, limited knowledge, efforts to simplify cases, and options for quick, light and low-cost cases.<sup>38</sup> First, the limited knowledge of legal divorce procedures presents as the reality that divorce is a bad taboo and is not necessary or urgent to know and learn. In situations where women's knowledge as a litigant is still very low, while paralegals or legal counsel are not functioning to the maximum,<sup>39</sup> women who experience domestic conflict rely on religious and community leaders who are trusted to help solve family problems both in a

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<sup>36</sup> Arto, *Pembaharuan Hukum Islam Melalui Putusan Pengadilan Hakim*, 87.

<sup>37</sup> Seorang hakim menjelaskan, meski tidak dikenal istilah bersepakat untuk bercerai, namun realitas ini banyak terjadi. Majelis hakim tetap harus memeriksa perkara sesuai tahapan-tahapanpersidangan. ND, Wawancara dengan Hakim Pengadilan Agama Metro, Februari 2019.

<sup>38</sup> DAW, Wawancara dengan Petugas Posbakum, Juni 2018.

<sup>39</sup> Tidak berfungsinya penasehat hukum secara maksimal bisa disebabkan kondisi wilayah hukum yang tidak memiliki banyak advokat atau barangkali akses masyarakat yang terbatas terhadap advokat baik karena terbatasnya informasi ataupun tidak adanya biaya.

regular and legal way.<sup>40</sup> So in their divorce, women tend to involve third parties who help them with administrative affairs in court.

Second, a divorce lawsuit to a religious court is considered a sole process of legalization of divorce. In cases that become the focus of this study, it is obvious that long-standing family conflict, and factually have occurred in the period of 3 months - 9 years.<sup>41</sup> Litigation to the court is solely aimed to obtain state recognition that a divorce has occurred. Some cases show each side has agreed to divorce, and to the court just to legalize it.<sup>42</sup> Thus, the complexity of the family conflict is no longer a proven focus at trial, but more on the choice of how the divorce certificate can be obtained as an authentic deed of marriage breakup. Thus, the lawsuit is only about divorce without combining with other claims concerning the matter; *mut'ah* (compensation), *iddah*, divorce payout, and childcare status (*hadhanah*).

Third, the option of simplification of the case also takes into account the economic aspects of filing a case. With simple lawsuit material limited to divorce, the proceedings do not take a long time so that the processing cost becomes lighter. This economic aspect is also the consideration of the parties to design cases filed by wives only (statement divorce), and in certain cases, husbands as defendants are not present in the trial. In the design of the case without the defendant's presence, the trial is only conducted two or three times until the declaration of the verdict through the *verstek's* verdict. Thus the cost of litigation can be pressed to be lighter. Table 1. presents the difference in cost in accordance with the type of litigation in Metro religious court in 2016.

Table 1. Cost in Accordance with the Type of Litigation

Zone	Distance (km)	Statement Divorce (Divorce proposed by wife)	Talaq Divorce (Divorce proposed by husband)
Radius 1	01 - 20	491.000	651.000
Radius 2	21 - 40	591.000	791.000
Radius 3	41 - 60	716.000	966.000
Hard Radius 1	61 - 80	966.000	1.316.000
Hard Radius 2	81 - etc.	1.091.000	1.491.000
Hard Radius 3	81 - etc.	1.341.000	1.841.000

<sup>40</sup> DAW, Wawancara dengan Petugas Posbakum.

<sup>41</sup> Putusan No. 1645/Pdt.G/2016/PA.Mt. (9 tahun), Putusan No.0050/Pdt.G/2016/PA. Mt. (4 tahun), 1795/Pdt.G/2017/PA.Mt. (6 tahun)

<sup>42</sup> ND, Wawancara dengan Hakim Pengadilan Agama Metro.

The limitations of knowledge, simplification of divorce issues, and the cost savings of divorce become the precondition of simple filing of litigation which at a later stage impacts on the scheme of case-handling and the decision-making of the law. Divorce lawsuits filed by wives, in the absence of defendants (husbands) with divorce lawsuit materials alone become a model of divorce settlement chosen by the public to make the process faster and the cost lighter. In fact, this process leaves the issue related to childcare rights and material rights attached in the verdict.

## 2. Constraints on the Case Handling Phase

The stage of handling the case is the advanced stage of the case registration and the submission of a letter of a lawsuit. This paper finds three problems related to the case handling phase namely the continued impact of simplification of the matter on the filing process, the potential for the negative stigma attached to the plaintiff, and the insensitive attitudes raised in the trial.

As explained in the choice of simplification of legal divorce reasons, the dimensions of domestic violence in divorce lawsuit cases often go unnoticed by judges. Domestic violence is not the focus of handling three things. First, DOMESTIC VIOLENCE substantively becomes the jurisdiction of the general court, so that the authority of the religious court to the extent of making it as proof of the condition of a broken marriage that can no longer be put together to manifest the purpose of marriage.<sup>43</sup> Second, the dimensions of domestic violence make the proof more complicated than continuous quarrel (*syiqaq*). Third, the proof of the absence of domestic violence element as the reason for divorce does not have much legal impact other than to strengthen the divorce lawsuit.<sup>44</sup> So in the material of the lawsuit, the occurring violence is wrapped up in the legal reasons of divorce because of the ongoing quarrel. This is in line with Sulistyowati's findings in her research at the Jakarta court.<sup>45</sup>

Of the many divorce cases in the religious court, some of them include economic problems, infidelity, domestic violence, and polygamy. The causes are usually not a single cause in nature. Domestic violence, for example, is the accumulation and effect of endless feuds (*syiqaq*) with

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<sup>43</sup> "Surat Edaran Mahkamah Agung," No. 4 Tahun 2014 § (t.t.). SEMA ini dikuatkan kembali pada melalui SEMA No. 3 tahun 2018 tentang kriteria broken marriage.

<sup>44</sup> AM, Wawancara dengan Hakim Pengadilan Agama Metro, Februari 2019. ND, Wawancara dengan Hakim Pengadilan Agama Metro.

<sup>45</sup> Sulistiowati Irianto dan Lidwina Inge Nurtjahyo, *Perempuan di Persidangan: Pemantauan Peradilan Berperspektif Perempuan* (Jakarta: Obor, 2006).

diverse causative factors. That is, in one case of divorce, the cause is not singular, but the accumulation of many causes.<sup>46</sup> This simplifying option ultimately resulted in the unfulfilling of the rights of the victim because the case was only seen as a dispute that could no longer be reconciled (*syiqaq*). Although judges have independence in case checks, civil judges are limited by the material of the lawsuit. The simplification of the case, as described in the above findings becomes a turning point in how the judges examine and ultimately decides a case.

In the case of suing for divorce, the consequences for the plaintiff are to pay the costs of the case and the potential loss of *mut'ah*, *iddah* living, and also the rights of the *hadhanah*. This provision is set out in Article 152 of the Islamic Law Compilation. In religious beliefs, divorce is generally seen as an absolute right of the husband. This view leads to the stigma that a wife who files for divorce is considered *nusyuz* which leads to the loss of the right to live *iddah* without taking into account the reason. But not all women who divorce are identical to their wives.<sup>47</sup> At the meantime, the label of *nusyuz* becomes the entrance to the loss of litigation rights in divorce.

Furthermore, less sympathetic and sensitive to the problem of violence experienced by women in the family have been found in the trial process. The formal and tense dialogue process is often a psychological obstacle for plaintiffs as well as witnesses to answer judges' questions. This is the case

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<sup>46</sup> Aisyah dan Parker, "Problematic Conjugations: Women's Agency, Marriage and Domestic Violence in Indonesia." Nasir, "Islamic law and paradox of domination and resistance: Women's judicial divorce in Lombok, Indonesia." Justus M. van der Kroef, "Woman and the Changing Marriage Pattern of Indonesia," *The American Catholic Sociological Review* 18, no. 2 (1957): 113-27, doi:10.2307/3708363. Sayer dan Bianchi, "Women's Economic Independence and the Probability of Divorce."

<sup>47</sup> Dalam banyak kasus, perempuan dituduh *nusyuz* (durhaka pada suami) ketika meninggalkan rumah bersama, padahal itu dilakukan untuk menghindari KDRT yang dilakukan oleh suaminya. Akibatnya, perempuan kehilangan beberapa hak hukumnya tatkala ia "divonis" sebagai pelaku *nusyuz* dalam proses pengadilan. Pendampingan kasus Ria (bukan nama sebenarnya) yang semula berdomisili di Bantul, karena mengalami KDRT dari suami maka ia meninggalkan rumah bersama dan pindah kerja (mutasi) ke Klaten. Pada saat suaminya mengajukan proses cerai, berdasarkan pasal 66 UU pengadilan Agama, PA yang berwenang menangani kasus ini seharusnya adalah PA Klaten. Namun karena istri dianggap *nusyuz* maka keberatannya ditolak majelis Hakim, dan perkara tetap dilanjutkan di PA Bantul. Hingga tulisan ini dibuat Juli 2016 perkara Ria masih dalam tahapan kasasi.

with the affirmative questions of the panel of judges that tend to only be answered with a yes or no option. It is as if it does not give another alternative choice for the involved parties. This model of question-and-answer is recognized by the judge as a strategy so that the evidentiary process in the trial is focused on the evidence submitted by the plaintiff. The question and answer in the trial reflect a formal and procedural legal process, which on the one hand shows the efficiency of the handling of the case, but on the other hand, closes the space to dig into the real facts in the trial. Women's experiences are not exposed to the fullest in the formal proceedings of the trial.

### 3. Constraints Related to the Verdict Phase

At the verdict phase, there are several findings that can be explained related to juridical constraints. *First*, the judges have the right to be passive and are not allowed to decide beyond the material of the lawsuit consequently, the judges will decide according to the defendant.<sup>48</sup> The diction used by the judges is also a preferred representation of the word plaintiffs use in the lawsuit, especially in explaining legal facts. So at this point, the plaintiffs' ability to articulate and explain the experience of violence their experiences serve as an important basis of the panel of judges in making a verdict. The granting of the lawsuit material has not forever fulfilled the sense of justice. When the judges do not have the 'courage' or reluctance to guarantee the rights of unsolicited women, then command (*amar*) of the judges is simply accepting and or rejecting the lawsuit because the judges must not decide the case outside the material of the lawsuit (*ultra petitem*).<sup>49</sup> In fact, with the breakup of the marriage, it does not mean that the family's problems can be resolved, it is possible to create other more difficult problems related to post-divorce rights and obligations.

*Second*, the tendency of judges to use the standard template of the verdict system. This template, on the one hand, provides a good standardization of verdicts, but on the other hand, creates a limited space to explain the complexity of the family conflict. Reading the 39 verdicts of the divorce court due to the fact that the domestic violence element impresses the narrative of family conflict is almost the same, and the final verdict is the same. The reasons for divorce are generally explained in a

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<sup>48</sup> pasal 178 ayat (3) HIR, pasal 189 ayat (3) RBG, dan Putusan MA N0. 1001./K/Sip/1972 yang melarang hakim mengabulkan hal-hal yang tidak diminta.

<sup>49</sup> Yahya Harahap, *Hukum Acara Perdata: Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan* (Jakarta: Sinar Grafika, 2005). 801-803

limited way in terms of persistent neglect and contention, the legal facts may differ, but in the final verdict, it implies granting the lawsuit and charging the plaintiffs' litigation costs.<sup>50</sup>

*Third*, in terms of the used legal arguments, there are two tendencies used by the judge assembly, namely comprehensive and substantive tendencies. The comprehensive argument presents a complete and detailed legal basis ranging from the law concerning both event law and material law, jurisprudence, verse quotes of the Qur'an, *hadith* and equipped with *fiqh* rules and *fuqaha* opinions. This pattern is used with the intent to present a strong and comprehensive legal argument.<sup>51</sup> In addition, quotations against verses, *hadith* and opinions of *fuqaha* become Islamic identities as legal products of the religious court (Islam). This reasoning was also confirmed by Nurlaelawati's findings in Banten and Jakarta religious courts.<sup>52</sup> While on a substantive pattern, legal arguments are narrated according to the primary need for proof of the substance of the lawsuit only.<sup>53</sup> However, substantive or comprehensive patterns are pragmatically not part of the parties' concerns. It is obvious that the parties are actually focused on granting lawsuit material for divorce and obtaining divorce deed.<sup>54</sup>

Based on the above findings, it is obvious that a verdict is an answer to the lawsuit decided by the panel of judges. The panel of judges responds as requested (sued) by the plaintiff. Judges are limited by the principle of being passive on civil cases and on the principle of *ultra petita* of not breaking the case beyond what becomes the material of the parties' lawsuit.

#### 4. Law Breakthrough in Handling the Divorce Cases Due to Domestic Violence in Religious Judiciary

The religious judiciary is one of the judicial executors that handles certain matters such as marriage, wills, heirs, grants, *waqf*, *zakat*, *infak*, *shadaqah*, and *sharia* economy (abbreviated as *Kawawahi wazis eksyar*).<sup>55</sup> It

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<sup>50</sup> Pembacaan terhadap putusan perceraian tahun 2016-2018.

<sup>51</sup> Wawancara dengan NS Hakim Pengadilan Agama, November 2017.

<sup>52</sup> Nurlaelawati, "Muslim women in Indonesian religious courts: Reform, strategies, and pronouncement of divorce," 169-70.

<sup>53</sup> ND, Wawancara dengan Hakim Pengadilan Agama Metro.

<sup>54</sup> KJ, Wawancara dengan Perempuan yang Menggugat Cerai, Maret 2017. Sejalan dengan temuan Euis Nurlaelawati, *Modernization. Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam: Amsterdam University, 2010), 171.

<sup>55</sup> Sengketa Ekonomi Syariah merupakan perluasan kompetensi absolut PA berdasarkan UU No. 3 tahun 2006 di samping kompetensi tambahan lain.



includes the issue of marriage that should be sensitive to the issue of domestic violence. During the reformation period, significant changes concerning the authority of the Religious Judiciary have been made which constitutionally processed through Law No. 3 Year 2006 as an amendment to Law No. 7 Year 1989. This law is an organic law due to law No. 4 Year 2004 on the points of power of the court. Article 2 of Law No. 3 Year 2006 affirms that, "Religious Judiciary is one of the perpetrators of judicial power for the people of justice who are Muslims on certain matters." With the affirmation of authority that eliminates the word 'civil' in the previous law, it is possible for the religious court to resolve matters related to criminal matters.<sup>56</sup> Based on Article 49 letter (i) of Law No. 3 Year 2006, the authority of the religious court is expanded in the realm of *sharia* economic disputes.

The religious court and the district court which have the authority to dismiss marriage/family disputes are considered "family courts" as well as the existence of family courts in some other countries. Wahyu Widiana during her time in the Director General Badilag office stated that it is basically not wrong if people say that the religious court is Indonesia's family court because nearly 97% of cases handled by religious courts are family matters in that divorce becomes the highest-rated case. Overall, the sensitivity that Supreme Court handled, 50% of which is divorce cases followed by criminal cases 33%.<sup>57</sup> This means that the majority of cases handled by religious courts are related to divorce cases, especially divorce cases with<sup>58</sup> varying motives and reasons. However, the religious court does not have the authority to accept, examine, and break up crimes related to family matters such as domestic violence, or fraud and falsification of marriage documents. The religious court only handles civil matters, such as divorce, joint property, child custody, and *sharia* economic disputes.

The separation of the handling of civil and criminal cases in cases related to family relationships such as domestic violence in the Indonesian justice system has a detrimental impact on the victim's women in accessing justice. Data from LBH APIK (LBH stands for Legal Aid Agency) shows that the majority of wives who experience domestic violence prefer to solve

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<sup>56</sup> A. Mukti Arto, *Praktek Perkara Perdata Pada Pengadilan Agama* (Yogyakarta: Pustaka Pelajar, 1996), 2.

<sup>57</sup> Data is derived from [www.badilag.net](http://www.badilag.net) diakses tanggal 15 Maret 2016.

<sup>58</sup> Cerai gugat adalah jenis perkara gugatan yang diajukan oleh pihak istri yang menuntut suami untuk mengikrarkan talak (menceraikannya). Adapun jenis yang kedua adalah cerai talak; permohonan yang diajukan oleh suami pada pengadilan untuk menceraikan istrinya.

the problem by making a divorce rather than criminally litigation their domestic violence case, or even 'enjoying' the violence they experience as 'commonplace'. Some women hoped that their marriage could be saved, so only to report their husbands to the police so that the husbands would be deterred, and not be processed it to court. This is seen from the phenomenon of revocation of domestic violence reports in the police which is often also complained about by the Police. This fact also occurs in some other countries as a normalization of violence that afflicts women.<sup>59</sup>

The data possessed by LBH APIK is confirmed by the national commission of the elimination of violence against women. The confirmed data shows that in general women who experience domestic violence prefer to solve the problem to the path of divorce (for Muslims to the religious court of almost 95%) criminal proceedings to the district court.<sup>60</sup> When a woman wants to divorce and gets justice for the actions of domestic violence, she must go to two trials separately namely to district court for the criminalization she got, and to religious court (Muslim woman) to file for divorce. Going to two different trials is not an easy thing for victims to do. The complexity of a separate and unified justice system in solving marital and family issues would not lead to a simple, fast, and inexpensive judicial principle as mandated by the constitution.

Nevertheless, a religious court within the bounds of its authority can play its part to provide protection and fair enforcement for women who file for divorce. In the case of the handling of domestic violence, the religious court may play a role in the following areas.

1. Preventing the continued criminal acts through the advisory and awareness of the perpetrator in each proceeding, especially in the mediation stage. At the premarital prevention level, this role is played by the Marriage Development and Preservation Advisory Board (known as BP4 or *Badan Penasehat Pembinaan Pelestarian Perkawinan*) and

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<sup>59</sup> Elli N. Hayati dkk., "Behind the silence of harmony: risk factors for physical and sexual violence among women in rural Indonesia," *BMC Women's Health* 11, no. 1 (23 November 2011): 52, doi:10.1186/1472-6874-11-52. Afwah Mumtazah, "Dilema 'Kekerasan' dan 'Ujian' Keimanan (ketika Nyai Pesantren Bicara Soal KDRT)," dalam *Ragam Kajian Kekerasan Dlam rumah Tangga* (Cirebon: Fahmina-Institute dan Institut Studi Islam Fahmina, 2012). H. S. Vu dkk., "Divorce in the context of domestic violence against women in Vietnam," *Culture, Health & Sexuality* 16, no. 6 (2014): 634-47, doi:10.1080/13691058.2014.896948.

<sup>60</sup> Valentina Sagala, "Program Legislasi Nasional Pro Perempuan; Sebuah Harapan ke Depan," *JURNAL PEREMPUAN: Untuk Pencerahan dan Kesetaraan* 49 (2006).

- Office Religious Affairs (known as KUA or *Kantor Urusan Agama*) in the Suscatin program. But the extent to which the program is running effectively needs further study and research.<sup>61</sup>
2. Protecting the victims physically and psychologically by providing a special service room at the time of cases settlement. Such a room is also available at police and public hospitals.
  3. Providing legal protection in the proceedings by giving opportunities to social workers and legal assistance to accompany the proceedings as a mandate of the elimination of domestic violence law Article 10 [d]. Legal protection is also granted through a judge's verdict that gives legal certainty and restores the victim's rights in marriage by punishing the perpetrators to fulfill their duties. At this point, the council of the judges should have gender sensitivity and concern.
  4. Providing the victims with emergency assistance when needed by helping victims get help from hospitals or other health services.

With regard to legal breakthroughs, it is empirically understandable when *first*, applied legal norms are deadlocked and unable to realize the purpose of the law; or *second* while the law experiences a gap between existing legal norms incapable of providing legal protection. In Cardozo as quoted Arto M., 2015, the breakthrough is possible when the rule of law is not able to solve the problem then the judge must form a new law. But legal breakthroughs should not be unlawful. In more detail, Mukti Arto states that the legal breakthrough must be made to display the true function of the law, both in the realm of event law and material law.<sup>62</sup> The legal function in question is to provide legal protection, fulfill a sense of justice, fulfill the rights of the victim, prevent sect, and an executable verdict.

At the filing stage, the victim's knowledge limitation on domestic violence becomes a serious obstacle to identifying the violence he experienced. In the process of mentoring domestic violence victims in 2012 it was revealed that the public's knowledge of the new domestic violence in the state of the term, it is not up to the understanding to be able to identify violence as mandated by the Elimination of Domestic Violence Law

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<sup>61</sup> Mufliha Wijayati, *Peran Negara dlam Mewujudkan Keluarga sakinah* (Yogyakarta, t.t.). "Pentingnya Peran Suscatin (kursus Calon Pengantin) Dalam Membendung Laju Perceraian | Na'mah | Yudisia: Jurnal Pemikiran Hukum Dan Hukum Islam," diakses 17 September 2019, <http://journal.stainkudus.ac.id/index.php/Yudisia/article/view/2135>.

<sup>62</sup> A. Mukti Arto, *Penemuan Hukum Islam demi Mewujudkan Keadilan: Membangun Sistem Peradilan Berbasis Perlindungan Hukum dan Keadilan* (Yogyakarta: Pustaka Pelajar, 2017), 115.

(known as PDKRT or *Penghapusan Kekerasan dalam Rumah Tangga*), let alone to the state of efforts to avoid or exit the circle of violence. This problem can be minimized by providing a case acceptance service. The party that must play this role is the officer who receives the filing of the case (Desk 1). It takes a desk 1 officer who has empathy and sensitivity in the face of litigant spilling the issue. To further be accompanied to formulate a letter of lawsuit. Under certain circumstances, the officer receiving the case file tends to direct the litigant to file a principal lawsuit only, taking into consideration that the case is not convoluted, simple, and at a low cost. Whereas in some cases, divorces that are decided without any guarantee of post-divorce rights trigger others, have led to more complicated issues.<sup>63</sup>

Another step that can be taken is by optimizing the role of legal aid office in the religious court by embracing advocates, academics, Consulting and Legal Aid Agencies (known as LKBH or *Lembaga Konsultasi dan Bantuan Hukum*), or Non-Governmental Organizations who are struggling in the realm of legal assistance for vulnerable people. This Legal aid office is a free service for justice seekers to obtain assistance, consultation, and legal assistance. The services that can be accessed from this legal aid office are consulting and letter-making services, so that the economically weak and 'blind' legal community can obtain their rights in advance of the law adequately.

In the realm of ceremony, there is a provision stating that judges must not break more than requested (Article 189 paragraph [1] RBg/Article 178 paragraph [1] HIR. But on the other hand, judges are *ex officio* authorized by the law to decide more cases than requested for the realization of justice and the completion of the cases. Indeed, there is flexibility in this provision (*ultra petitum*) when it is associated with the principle of *ex aequo et bono*, which is usually found in the subsidiary claim 'If the Religious Court holds otherwise, please have this matter decided according to the law fairly'. That is, this principle gives the judges the freedom to dig into the law as widely as possible in order to uphold justice. The judges, however, are not only the mouthpiece of the law, but also as the interpreters and inventors of the law. It is in this context that the ability of judges to trace and uncover legal facts becomes relevant to continue to be excavated and developed in order to empower judges who are sensitive to the noble values of justice.

Although the judges' *ultra petitum* actions violate the principal's rule of law, the Supreme Court's statement asserts that *ultra petitum* can be

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<sup>63</sup> van Huis, "Rethinking The Implementation of Child Support decisions Post-Divorce Right and Acces to The Islamic Court in Cianjur, Indonesia."

justified if it is still within the framework that matches the core of the lawsuit.<sup>64</sup> In this case, the issue of living rights at the time of *iddah*, *mut'ah*, or child custody according to the author is an inherent right of the women after the breakup of marriage that can be broken up at once. Here are some examples of cases:

1. In the case of *talaq* divorce, the judges, by ex officio system, can establish the obligation of the husband to give *iddah* and *mut'ah* for the wife even though there is no *petitum* (request) through reconvention.<sup>65</sup> This condition is not for a wife who are convicted of *nusyuz* or declared for *talaq ba'in*.
2. In the case of statement divorce, the judges on an ex officio can also settle the obligation of *iddah* living with the analogy on divorce proceedings.
3. In the case of statement divorce or *talaq* divorce, if the child joins the mother, then the judges on ex officio can oblige the husband to bear the child's living even if there is no request to do so.<sup>66</sup>

The *iddah* living and *mut'ah*, on the one hand, are a package with balance and justice in the case of *talaq* divorce. So, in order for this obligation to be truly executed, the panel of judges can order for its submission at the time of the divorce pledge and be contained in the the verdict.<sup>67</sup>

### E. Concluding Remarks

The religious court is an institution with a significant role to uphold the values of justice in any civil conflict in the family through litigation. From the legal-formal perspective, some verdicts related to divorce could meet a woman's demands to divorce from her partner. But substantially, there are some post-divorce rights of woman that are often not included in the verdicts. The non-cashing of women's rights after this divorce result in the marginalization of women, both in the economic and social fields. Some new issues arise after the divorce and suffer the women. Women's rights after the divorce are not included in the verdict because there is a rule stating that judges should not sue cases beyond what litigants (ultra

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<sup>64</sup> Harahap, *Hukum Acara Perdata: Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan*, 802.

<sup>65</sup> Lihat pasal 41 UU Perkawinan dan pasal 149 Kompilasi Hukum Islam.

<sup>66</sup> Lihat KHI pasal 156 f.

<sup>67</sup> Arto, *Penemuan Hukum Islam demi Mewujudkan Keadilan: Membangun Sistem Peradilan Berbasis Perlindungan Hukum dan Keadilan*. 206

petitum) claim. Litigants is only demanding to be divorced without any other claims regarding their rights. Therefore, the panel of judges grants what the litigants claim. In fact, there is an opportunity for the judges to guarantee the rights of *mut'ah*, the right to *iddah* living, and *hadanah*, for example, if the judges see any beneficial public interest (*maslaha*) even if it is not demanded by the litigant. As such, not only the verdict will meet the sense of formal legal justice, but it will also lead to a sense of substantive justice[.]

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