

## **WHEN RELIGIOUS JUDGES PROTECT CHILDREN'S RIGHTS**

### **Case of Divorce in Padangsidempuan Religious Court**

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#### **Abstract**

In a marriage, a parent is the primary party that fulfills children's rights, but in reality, not all marriages end in ideal conditions. In many divorces, children's rights are jeopardized. This paper aims to study how children's rights are fulfilled at the hands of the Padangsidempuan Religious Courts. Data for this study were collected through in-depth interviews, while secondary data was obtained from the case register files at the

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Padangsidempuan Religious Court. After conducting research, it was found that the majority of wives who filed for divorce at the Padangsidempuan Religious Court mostly did not include the rights of the children in their petition. In deciding this case, the judge at the Padangsidempuan Religious Court followed existing regulations. The verdict always refers to the *posita*. However, apart from that, many judges also advise the litigants to include children's rights in the *posita* lawsuit therefore their rights can be protected by a judge's decision.

[Dalam sebuah perkawinan, orang tua seharusnya menjadi pihak utama yang memenuhi hak-hak anak, tetapi ternyata tidak semua pernikahan baik-baik saja. Banyak terjadi perceraian yang mengancam hak anak. Tulisan ini bertujuan untuk mengkaji bagaimana terpenuhinya hak-hak anak di Pengadilan Agama. Data dalam penelitian ini dikumpulkan dengan cara melakukan wawancara mendalam, sedangkan data sekunder diperoleh dari berkas-berkas register perkara di Pengadilan Agama Padangsidempuan. Setelah melakukan penelitian didapatkan fakta bahwa mayoritas istri yang mengajukan gugatan cerai di Pengadilan Agama Padangsidempuan hanya mengajukan gugat cerai belaka tanpa turut menyertakan hak anak yang di bawah pengasuhannya. Hakim Pengadilan Agama Padangsidempuan dalam memutuskan hal tersebut konsisten dengan regulasi yang ada. Putusan selalu merujuk *posita*. Namun ternyata selain itu, banyak juga hakim yang menyarankan kepada pihak yang berperkara untuk memasukkan hak-hak anak dalam *posita* gugatan agar dapat dilindungi haknya oleh putusan hakim.]

### Keywords

Children's rights, divorce, Padangsidempuan Religious Court

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## Introduction

Marriage is a legal and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on belief in God.<sup>1</sup> Even though basically a marriage is intended to last forever, sometimes there are certain reasons that result in a marriage not being able to continue so it must be halted midway through a divorce. The initial causes of divorce can vary from one individual to another ranging from economic problems, fights, and physical or psychological abuse, and others that lead to the termination of the marriage itself.<sup>2</sup> Islam and the law that applies in Indonesia both justify the dissolution of marriage as the final step of the marriage of its society through the formation of legal instruments as a juridical basis for the state in realizing its role in providing protection and welfare for its people in various aspects, including in divorce cases. Islam, without a doubt, as part of the law in Indonesia in its dogma has from the beginning provided full support with its principles and material in that regard.

According to the provisions of the law, divorce can only be done before a trial court after the trial in question has been tried and has not been successful in reconciling both parties. In the Religious Courts, there are two types of divorce cases, namely *gugat cerai* (divorce filed by wife) and *talak* (divorce filed by husband). A divorce lawsuit is a divorce case filed by the wife against her husband. Meanwhile, *talak* divorce is a divorce case filed by the husband to the wife. There are several rights of women and children that can be sued in the event of a divorce, both in *gugat cerai* and *talak* cases.<sup>3</sup> The rights that can be obtained are *iddah* (waiting time), *mut'ah* (a proper living allowance), *maskan* (proper place to live), and *kiswah* (clothing), payable dowry, and child maintenance.<sup>4</sup> Women who file for divorce can obtain these rights by including claims for women's and children's rights post-

<sup>1</sup> Mohamad Athar, "Konsep Pernikahan Dalam Al-Quran," *AL-ADILLAH: Journal of Islamic Law* 2, no. 1 (2022): 44–54.

<sup>2</sup> Amal Yousef Omar Alqawasmi, "Marriage and Divorce Practices in Islamic Centers in Italy," *Oñati Socio-Legal Series* 11, no. 4 (2021): 959–89, <https://doi.org/10.35295/osls.iisl/0000-0000-0000-1198>.

<sup>3</sup> Ondra Aiko, "HAK ANAK PASCA PERCERAIAN (Studi Kasus DiNagari Pakan Rabaa Timur Kec. Koto Parik Gadang Diateh Kabupaten Solok Selatan)," *Jurnal AL-AHKAM* 12, no. 1 (2021): 53–70, <https://doi.org/10.15548/alahkam.v12i1.2915>.

<sup>4</sup> Fadhilah Nisa, Adri Adri, and Yansalzisatry Yansalzisatry, "Implementasi Hak-Hak Anak Dalam Putusan Hakim Pengadilan Agama Yang Berkaitan Dengan Perceraian Orang Tua Di Pengadilan Agama" (Universitas Bung Hatta, 2021).

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divorce in the lawsuit and submitting proof of their husband's employment and income during the trial. Whereas for women who are filed for divorce by their husbands in divorce cases, they can obtain these rights by filing demands both during the answer agenda in court.<sup>5</sup>

If the wife's demands are granted by the Panel of Judges, but the ex-husband does not carry out the court's decision, then the ex-wife can make several efforts, such as submitting an application for execution to the Religious Court, visiting the ex-husband's place of work and bringing the court's decision and then consulting the ex-husband's leaders so that the decision can be carried out, as well as reporting to the police on the grounds that the ex-husband neglected the obligations set by the court. The state's support for women and children is so strong that this is regulated in material and formal laws. At the level of material law, children's rights have been clearly stated in the text and the official state laws and regulations, but the formal legal level has not explicitly regulated this issue which in turn affects the fulfillment of the children's rights, mostly due to unawareness of the society on the subject.<sup>6</sup>

Failing to include children's rights can have serious implications for the future of the children concerned.<sup>7</sup> In civil cases, the scope or extent of the subject matter being submitted to the judge for examination is basically determined by the litigants and not by the judge. Judges only help justice seekers and try to overcome all obstacles and challenges to achieve justice at the end of the process. The judge is obliged to judge all lawsuits and is prohibited from passing decisions on cases that are not prosecuted or granted more than what was demanded.<sup>8</sup>

In Padangsidempuan Religious Court, however, many of the couples demanding divorce were so clueless about the children's rights that the judge had to personally provide

<sup>5</sup> Ilham Hidayat, Yaswirman Yaswirman, and Mardenis Mardenis, "Problems Arising from Talak Divorce Outside the Court," *International Journal of Multicultural and Multireligious Understanding* 6, no. 10 (2019): 138–48, <https://doi.org/10.18415/ijmmu.v6i10.919>.

<sup>6</sup> Zendy Wulan Ayu Widhi Prameswari and Erni Agustin, "Indonesian Marriage Law Reform: The Way to Strengthen the Protection of Children's Rights against Child Marriage," *JSEHR* 2, no. 1 (2018): 286, <https://doi.org/10.19184/jseahr.v2i1.5353>.

<sup>7</sup> M Masrukhin and Meliana Damayanti, "Hukum Progresif Penanganan Hak Nafkah Anak Dalam Kasus Perceraian Di Pengadilan Agama (Studi Di Pengadilan Agama Karesidenan Surakarta)," *Al-Ahkam Jurnal Ilmu Syari'ah Dan Hukum* 5, no. 1 (2020): 25–36, <https://doi.org/10.22515/alahkam.v5i1.1794>.

<sup>8</sup> Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia* (Yogyakarta: Liberty, 2009).

input to the plaintiffs to include children's rights in their lawsuit, in their personal capacity. Even with such a length, some claimants still did not include their children's rights in their lawsuits for various reasons such as not wanting to deal with their ex-husband anymore or not wanting to wait for a long legal process. Both indicate that their focus in the legal process was not the kids in the first place. Many of them only wanted to be done with their spouse, unfortunately ignoring the obvious in regard to the children's rights.<sup>9</sup> In general, divorce cases that do specifically mention children's rights in their demand are rare in the context of Padangsidempuan Religious Court.

This study is important because, unlike most studies on the fulfillment of children's rights following their parents' divorce, this study was conducted in a region where legal awareness of children's rights is worryingly low.<sup>10</sup> In addition, this study focuses on examining the issue from the judge's perspective in helping spouses, especially, and society in general in fighting for their children's rights should a divorce happen. This study is qualitative research that emphasizes a descriptive understanding of society's legal awareness of children's rights in the event of their parent's divorce within the juridical-sociological approach. The data was obtained through document studies supported by interviews with judges. 60 divorce case records were reviewed, added with an in-depth interview with the judges in Padangsidempuan Religious Court to gain a deeper understanding of the issue of children's rights in divorce cases. The data was analyzed through data reduction, display, and verification. The study was conducted in Padangsidempuan Religious Court, South Tapanuli Regency, Sipirok.

### **Divorce Decisions containing Children's Rights in Padangsidempuan Religious Court: Cases and Local Custom**

During 2018-2022, of the 60 divorce decisions of couples who have children under 12, it was found that only 25% (a total of 15 cases were filed by husbands, while 45 other cases (75%) were filed by the wife. There is an impression that the number of wives who sued

<sup>9</sup> Heti Kurnaini, "Pemenuhan Hak Nafkah Sebagai Salah Satu Pola Terhadap Perlindungan Anak: Analisis Pemikiran A. Hamid Sarong," *PETITA* 2, no. 1 (2017): 54, <https://doi.org/10.22373/petita.v2i1.61>.

<sup>10</sup> Arief Syahrul Alam, Andy Usmina Wijaya, and Fifin Dwi Purwaningtyas, "Harmonization of Law to the Protection of Children's Right Caused by Divorce in Indonesia," *JL Pol'y & Globalization* 93 (2020): 58, <https://doi.org/10.7176/JLPG/93-05>.

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proves that many husbands neglect to fulfill their obligations in the household, including the rights of children. The level of legal awareness of parents is also seen in 91.7% of cases that are decided by *verstek* (without the presence of one party) creating legal uncertainty over children's rights. What is more concerning is that 83.3% (50 cases) of divorce only demands separation of husband and wife without discussing the rights of children as a result of the divorce. Because of the 60 decisions, there are only 3 cases, namely 5% of the wife making demands for reconvention on the husband's divorce application which demands the fulfillment of children's rights. Then as many as 33.3% revealed data on children in the *posita*, and legal considerations, but did not appear in the dictum of the decision. None of the wives used the services of a lawyer in litigation before this religious court. Comparative data that is also worrying is submitted by the Religious Courts of the Supreme Court of the Republic of Indonesia where out of more than one million children affected by divorce, only 2% are discussing *hadanah* rights and only 1% are demanding child fees.

Legal certainty in children's rights is intended as an effort to ensure conformity between the text and legal norms that exist in the level of practice in Society. In an attempt to achieve this, in the 1980s, Padangsidempuan Religious Court institution determined that one of the conditions for a case to be submitted to the court was first through a customary court or village customary council. If there is a conflict in the household in the South Tapanuli area, the family is the first to take responsibility for the reconciliation of the husband and wife first, before the case is reported to the village elders or the so-called *hatobangon*. *Hatobangon* is a set of people consisting of two elements, namely: the clergy and intellectuals. *Hatobangon* will also try to reconcile or in most cases, settle the demands of each party disputing through customary discussions called *marbobar*. When these measures are completed, the case will be brought up to the court for a hearing.<sup>11</sup>

In the provisions of the Southern Tapanuli custom, if a family experiences shock and even reaches the stage of divorce, the wife during the process and even in the post-divorce condition must still be in the husband's family. Wives are not allowed to complain let alone go home to their families. This is intended to facilitate the fulfillment of the rights of their

<sup>11</sup> Sulistyowati Irianto, "Competition and Interaction between State Law and Customary Law in the Court Room: A Study of Inheritance Cases in Indonesia," *The Journal of Legal Pluralism and Unofficial Law* 36, no. 49 (2004): 91–112, <https://doi.org/10.1080/07329113.2004.10756574>.

ex-wife and children by the husband's family. If the wife ignores this customary rule, the consequence is the loss of the rights of her and her children. However, fewer and fewer people nowadays were bothered to take these customary processes, and, oftentimes, that leads to a bigger gap in the fulfillment of children's rights in the legal process due to the lack of discussions before the legal steps. The mediation of the custom trial or village custom deliberations is still widely practiced, although, of the 60 decisions sampled above, only 10% have passed the new custom trial to the Padangsidempuan Religious Court. Some of the customary law is still believed by the local community to be good law, following their legal needs. In the process of *bobar* (the customary-arranged Tapanuli discussion) custom, the wife can convey the demands of her rights and that of her child to the family of the man who represents her husband who is responsible for it.

The level of awareness of customary law of parents unconsciously forms a society that is ignorant of the rule of law. Ignoring customary law can disrupt social balance and harmony. If a husband understands and obeys customary law, it is very possible for the wife to follow the husband's steps and customary law will be socialized and internalized in the family as the smallest part of the legal community. The family acts as the first learner in inculcating and internalizing legal values. In addition to understanding customary law, people who submit their cases to court institutions are required to know the material and formal law. There are rules of the game and standard procedures that must be followed by the parties, which include requirements and procedures that serve as guidelines in maintaining material law.<sup>12</sup>

In principle, the cost of children is a shared responsibility of a husband and wife. If the cost of the child has been met by the wife, then the husband is free from his obligations. In line with that, if the ex-wife does not file a claim for child support, it means that the wife is considered capable of providing for the children, and the husband is free from his obligations. Academically, however, this understanding refers to the contract. Marriage and agreement are both contracts. In the context of an agreement or contract, whoever is harmed is the one who has the right to claim his rights. If the wife does not apply for the *hadanah* fee, then the person concerned is considered to have been able and

<sup>12</sup> Zendy Wulan Ayu WP and Haidar Adam, "Putusan Ultra Petita Mahkamah Konstitusi Dalam Perkara Pengujian Konstitusionalitas Undang-Undang," *Yuridika* 29, no. 2 (2014): 168–90, <https://doi.org/10.20473/ydk.v29i2.365>.

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volunteered to fulfill it. For parents, this understanding may not cause problems, but for children, this means that their rights to their fathers have been neglected. This is per the policy brief to guarantee the protection of the rights of women and children after divorce. The Religious Courts Agency showed that out of 256,003 divorce cases in 7 provinces, only 3.10% listed the consequences of divorce in the form of requests for the fulfillment of the rights of children and wives, and 0.26% filed for execution.

In Supreme Court Jurisprudence Number 608/K/AG/2003 it is stipulated that children are grouped into *lil-intifaq*, not *littamlík*.<sup>13</sup> On the one hand, the consequence is the release of the father from the responsibility of providing for the children in the past. This step seems to give rise to court decisions that are not in favor of children's rights, a decision policy that needs to be studied from various aspects. The Padang High Court of Religion tries to address this understanding and establishes the rights of the child as *littamlík* where the father's obligations will not disappear before the fulfillment of these rights. This institution sees the *littamlík* concept as relatively more just, and humanist, and brings substantive benefits. The *ex officio* rights of judges have not yet entered this area. Padangsidempuan Religious Court continues to charge husbands based on an agreement on the cost of *hadanah* in fulfilling children's rights. This aspect is taken from the benefits of the law. The obligation to provide for children cannot be transferred or delegated to other people, considering the provisions of the verse which designate explicitly and explicitly the father as the person in charge.

### **Children's Rights in Application for Divorce: *Posita* and *Petitum***

A request for divorce is an expression of a husband as outlined in a letter of application to divorce his wife. This application is addressed to the Religious Courts for Muslims. If the husband does not include the claim for the rights of his child, then the wife must be proactive in filing a counterclaim which was submitted when giving the initial answer to the husband's request. In the 60 sample decisions, 5 cases used this route to defend their rights

<sup>13</sup> Nuriel Amiriyyah, "Nafkah Madhiyah Anak Pasca Perceraian: Studi Putusan Mahkamah Agung Republik Indonesia Nomor 608/K/AG/2003," *Jurisdictie: Jurnal Hukum Dan Syariah* 6, no. 1 (2015): 1–15, <https://doi.org/10.18860/j.v6i1.4085>; Moh Agung Laksono Kholid, Muhammad Zaki, and Iskandar Syukur, "Analisis Tujuan Hukum Terhadap Putusan Mahkamah Agung Tentang Penolakan Nafkah Madhiyah Anak (Studi Putusan Mahkamah Agung No. 608/K/Ag/2003)," *Al Maqashidi: Jurnal Hukum Islam Nusantara* 5, no. 2 (2022): 81–96, <https://doi.org/10.32665/almaqashidi.v5i2.1324>.



and their children. This step is important considering that children do not understand their rights and the procedures for obtaining them, especially since the procedural law has not discussed the procedures and requirements that children must go through to get their rights. From this aspect, the child never appears as the plaintiff.

A wife who intends to file for divorce to a court institution often combines it with claims for her rights as well as the rights and costs of having children in the event of a divorce. The combination of these demands is known as the cumulative term. The definition of cumulation can simply be stated as the step of merging two or more claims in one lawsuit. The formulation and content must still pay attention to close connectivity, the owner of the object of the dispute is the same person, there is a legal relationship, and there is compatibility between the *posita* and the *petitum*. In addition, the absolute and relative competence of the examining body should not be skipped. Due to differences in the examination of the divorce process and the distribution of assets, different procedural laws result in a lengthy process. In principle, the concept of cumulation is intended as an effort to cut the length of time to facilitate the parties in the litigation process in court. This concept may be different when applied in litigation in court because of many factors that influence it. So, the cumulative lawsuit strategy is optional and independent. In the decision of the sample above, 8 cases, or 13.3% of children's rights were accumulated.

The process of examining the case before the court session will be stated in the official report. Eight cases included child data in the *posita* which were then followed up in the judge's consideration. Unfortunately, the data and decisions related to this child did not appear in the court's decision. When children's data are included in the case, it means that the discussion about children having legal standing and their rights needs to be resolved. However, in this study, no children's rights were found in the *petitum* or the judge's decision. This is not explicitly demanded in the *posita*.

Wives who filed for divorce reached 66.7% or as many as 40 cases and only demanded a divorce without any claims regarding their rights or the rights of their children. Marriages that include husband, wife, and children seem to be divided by the one-sided interests of parents. They often do not include the discussion of children's rights when they are about to separate so the institution of marriage seems to have lost its sacred aspect. Marriage is meant to be limited to fulfilling natural needs, so many irresponsible husbands

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are found in the family, as well as wives who only care about their divorce rights but deliberately leave the management of the fulfillment of their children's rights.

In such cases, the judge's *ex officio* rights can be exercised in discussing, discussing, and determining the rights of children after their parents' divorce. So far, the *ex officio* rights of judges are closer to discussing the rights of the wife after divorce than discussing the rights of children in the same case. This requires the expansion of the *ex officio* rights of judges to achieve the fulfillment of children's rights, of course with the support of scientists. Padangsidempuan Religious Court judges have started using *ultra petita* in the context of achieving substantive justice.

The fulfillment of children's rights will encounter obstacles if the formal law is not made with firm and explicit language and expressions. Material law has been accommodated in positive laws and regulations such as Law Number 1 of 1974 concerning Marriage, Government Regulation Number 5 of 1975 concerning further rules for the Marriage Law, Law Number 7 of 1989 concerning Religious Courts, Compilation of Islamic Law, and Law Number 20 of 2003 concerning Child Protection. Unfortunately, the formal law that leads to the achievement of these rights is not yet clear. The scope of material law and formal law is unified.

For example, a judge explains that if the wife brings a certificate from the village head regarding her husband's income to determine the cost of the *badanah*, then the letter has limitations because it cannot be confirmed by the husband. The letter is still preliminary evidence, not included in the category of an authentic deed, from a minimum of two pieces of evidence. Whoever sues of course he is required to prove. The perfect proof is an authentic deed. The right child support is by the husband's proposal. The formal law that is close to this is Supreme Court Regulation No. 3 of 2017. This regulation stated that "... the wife and children can earn...". The word "can" in the phrase is interpreted as optional, and not mandatory. The wife's rights may be ignored because the wife can act for the fulfillment of her rights. However, the rights of a child should not be equated with a wife. Children have not been able to fulfill their interests because their nature and character are also different, where:

First, children's rights are natural since they are in their mother's wombs. This right is vertical and permanent and will not be reduced due to the divorce of his parents. The wife's rights are legal rights that are determined by the law and arise after a legal

engagement between them. If their legal connection is broken, their rights will also be broken. This legal right can be withdrawn and transferred through the provisions of the lawmakers. While natural rights are inherent and eternal rights with their owners, they cannot be released (inalienable rights) even by the state. Legal rights are an advanced position under the law of society. The right is to have a favorable position under the law of society, in contrast to the most fundamental natural rights, the most fundamental rights.

The thought of natural rights can also be connected with the understanding of the Al-Baqarah verse 233, that the first birth is the husband into his wife's womb. The obligation embeds with the one who gave birth first, namely the husband. Since the child is born through a shared process, then the legal status is natural for both parents. The difference between these two rights has legal consequences and requires judges to be observant and clear in the use of their *ex officio* rights. When the *hadanah* fee is not included in the husband's application for divorce, the wife is expected to be able to "defend" her child's rights through reconciliation. If the wife does not make this effort, then another alternative is the exercise of the judge's *ex officio* right to this natural right. If legal rights and natural rights are equated, then difficulties in finding the legal substance of fulfilling children's rights will occur because of the position of vertical natural rights of children originating from both parents.

The second argument is to use the formal logic of contradictory laws. This rule makes a clear distinction between the positive and the negative. If the wife's rights are included in the category of legal rights that are only related when there is a marriage relationship, then her rights cannot be equated with children's rights as natural rights. Legal rights can be terminated by the demands of one of the parties to the state judiciary, while the natural rights of children cannot be terminated by the state judiciary. With this, it can be said that natural rights are the dominating rights, while legal rights are more of a subordinate position. The domination right has more priority than the subordinate one.

The third reason relates to the accumulation of children's rights in the divorce process. The majority of cases of suing wives only file for divorce without considering and including the clarity of their children's rights. When the wife has the initiative to fight for the rights of her child through a cumulative lawsuit, the judge should give high appreciation and give a positive response to this step. Fourth, in the concept of progressive law, it is stated that the law is a facilitator to fulfill and achieve human welfare. Part of the welfare of

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children can be interpreted as the fulfillment of their rights when faced with the divorce of their parents. So the ideal law is for humans, not just for the law. Fifth, it is important to separate the process of fulfilling the rights of the wife and the rights of the children.

The fulfillment of the wife's rights depends on the trial process until it reaches a decision that has permanent legal force—*inkracht*. The fulfillment of children's rights, however, does not depend on the *inkracht* decision process, appeal, cassation, or judicial review because the status of these rights is different and the interests are also different. Equating the process in the fulfillment of rights with different statuses will make the law not achieve its substance. Children's rights are an example of this legal issue. Compared to commercial courts where the law of appeal cannot be implemented, there is an opportunity for cassation and review by the Supreme Court based on Article 11 paragraph (1), Article 14, Article; 295 paragraph (1) of Law Number 37 of 2004. Decisions in the form of stipulations also cannot be made through appeals, only cassation based on 43 paragraphs of Law Number 14 of 1985 concerning the Supreme Court.

Sixth, ideally, the execution of children's rights should not be constrained by the objection process of the party submitting further legal remedies, whether it is an appeal, cassation, or review. Additional demands *ex aequo ex bono* include a decision that can be implemented first even though the decision is still in the process of being appealed. Judges have the right to interpret the law. Legal interpretation includes understanding and applying examination and deciding a case based on *petitum ex aequo et bono* or *petitum* subsidiary requesting a decision based on justice and propriety. Divorce is often accompanied by demands for child support.<sup>14</sup>

Seventh, naturally, the child is part of the father. The existence of the father is identical to the child. So the obligation to provide for the child must be directly from the father. The burden of child maintenance on the father is based on economic needs and permanent causes of birth. Under certain conditions, the determination of the debt for the father for the maintenance of his child by the court institution needs to be carried out to ensure the rights of the child properly. The determination of the panel of judges on the child's livelihood as outlined in the verdict because of the request of the parties or because

<sup>14</sup> Bambang Sugeng Ariadi Subagyono, Johan Wahyudi, and Razky Akbar, "Kajian Penerapan Asas Ultra Petita Pada Petitum Ex Aequo Et Bono," *Yuridika* 29, no. 1 (2014): 100–112, <https://doi.org/10.20473/ydk.v29i1.360>.

the judge uses his *ex officio* rights can be used as debt for the father. This step will be more binding for the father to fulfill the obligation to fulfill the child's rights than not being included in the dictum of the decision.

Eighth, *ultra petita* principle is applied. Each of these demands must be written clearly and unequivocally. Then there is a substitute claim (*petitum* subsidiary) which reads "*ex aequo et bono*" which demands a decision based on justice and propriety. The opportunity for judges to exercise their *ex officio* rights slightly crosses the positive line to fill the *petitum* in terms of child rights. This step may theoretically have entered the *ultra petita* area, but the *ultra petita* is in the search for substantive justice does not need to be exaggerated. *Ultra petita* is to fulfill children's rights that are not listed in the primary demands are still within the scope of the *ex aequo et bono* focus. The step of including the child's rights in the *petitum* is part of the settlement of the negligence of the child's maintenance after the divorce of his parents. The redaction can be in the form of punishing the defendant for "providing the cost of living for a child named .... bin .... in the amount of ... ". If there is negligence, then the plaintiff is required to pay forced money (*dwangsom*) per day from the delay since the decision has permanent legal force.

The fulfillment of children's rights directs them to become decent and dignified human beings. In the language of *maqasid al-syariah*, it is understood that *hifz al-din* (preserving religion) also includes the maintenance of *aqidah* (theism), character building that will be felt horizontally by those around him, and fostering worship that will strengthen him as a good creature vertically. Likewise, the development of *muamalah* related to humans and other creatures as a *zoon politicon*. In relation to *hifz al-nafs* for the fulfillment of physical-spiritual needs in a balanced way, the role of judges as representatives of the government who is wise to consider the socioeconomic conditions of the husband, wife's needs, and also children will be discussed with the regulatory text. Reformist reinterpretation of the meaning of *hifz al-nasl* (guaranteeing descent and honor) is not limited to just one aspect. The understanding that the implementation of obligations by parents to children is at the same time the fulfillment of children's rights is part of the meaning of justice which is expressed in the general theme of the Qur'an. The reading of the Qur'an in its entirety on the rights of children needs to be done carefully. *hifz al-nasl* is part of legal justice.

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Taking into account these reasons, one of the efforts to fulfill children's rights after divorce is to use child data in the case as the basis for entering claims for these rights in the subsidiary *posita* as the embodiment of *ex aequo et bono*. In principle, the steps were taken by the Constitutional Court with several decisions that can be categorized as *ultra petita* because they involve normative matters that can be tolerated, while *ultra petita* in the Religious Court are not allowed because they are case-by-case. There is a link between the *ex officio* rights of judges and legal *istinbath* (legal making) which is a step and instrument in legal processes and procedures, a means of controlling *ijtihadiah* (legal finding process), as well as a place of reference for the intricacies of *furu'iyah* (case) problems.

The existence of judges as representatives of the government in resolving cases (*muhakamah*), children's rights, and the law need serious attention considering the needs of children after divorce are in an emergency situation.<sup>15</sup> To provide serious legal protection for children, what has been done in Australia, for example, can be used as a comparison. There the judiciary and the government intervene for the sake of genuine protection for the best interests of children and wives. They form a civil decision execution institution that ensures that every court decision can be implemented by involving various stakeholders to obtain guarantees for the fulfillment of these rights. This is slightly different from Malaysia which has established a family support board with the same task as Australia's version of the same board to ensure the maximum fulfillment of children's rights after divorce. Malaysia has also established a national Mediation Center before cases are brought to court.

Legal issues still often intersect with the principle of certainty. Legal justice often runs less harmoniously. The aspect of legal justice should be a top priority. Even if the principle of legal certainty is different from the principle of expediency, then the principle of expediency should receive serious attention because law or legal decisions are born to bring benefits to legal users.<sup>16</sup> The fulfillment of children's rights in the judiciary can be observed by estimating that the judge's discussion about the fulfillment of children's rights is not included in the hard case category, but is still at the soft case level differences in opinions and opinions of judges are not too dominant and disturbing, let alone supported

<sup>15</sup> Judith S Wallerstein, "Growing up in the Divorced Family," *Clinical Social Work Journal* 33 (2005): 401–18, <https://doi.org/10.1007/s10615-005-7034-y>.

<sup>16</sup> Subagyo, Wahyudi, and Akbar, "Kajian Penerapan Asas Ultra Petita Pada Petikum Ex Aequo Et Bono."

by the interpretation that refers to the principle of progressive law, law for humanity, humanist law. The legal system that is built is not a closed logical system but an open space for various legal approaches and interpretations.<sup>17</sup>

In Indonesia, the politics of marriage law is a will in the context of change for the better. Accommodation to various positive things is reflected in the registration of marriages that adhere to Western principles, the distribution of inheritance based on customary law principles, as well as the legality of a marriage based on Islamic legal principles. The next issue is the cost of *badanah* according to Islamic law. The judge's discretion to guarantee the various rights of children after the divorce of their parents must be done for the sake of justice for the parties concerned.

## Conclusion

The judges will not add to and make decisions related to children's rights because the applicant does not include children's rights in their claim. However, they did help bring awareness to the plaintiffs about their children's rights by providing them with personal advice as well as discussions when it is deemed necessary. In connection with this, Padangsidempuan Religious Court created a means of information, providing input to the parties to assist in the fulfillment of children's rights in divorce cases. Understanding the responsibility holders to fulfill their responsibilities is an effort to humanize human seekers of legal justice through their role as active judges as expected by progressive law in realizing substantive justice, prosperity, and happiness. A complete human being is a responsible human being. Husbands who ignore their responsibilities are included in a split personality, as well as wives who ignore the rights of their children and do not pay attention to the fulfillment of their children's rights when filing for divorce which from the aspect of responsibility can be categorized as mothers who lack responsibility.

<sup>17</sup> Subagyono, Wahyudi, and Akbar.

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