

## **EFFECTIVENESS OF ULTRA PETITUM PARTIUM IN DIVORCE CLAIMS IN RELIGIOUS COURTS**

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### **Abstract**

The ultra petitum partiumis a principle that doesn't allow judge to make verdicts on unrequested or over-demanding cases. In divorcement cases, it has limited the authority of the judge in giving verdicts to grant women's rights. The existence of a Supreme Court Circular Letter (SEMA) on number 3 of 2018 strengthened by PERMA on number 3 of 2017 concerning The Guidelines for Prosecuting Women Facing the Law opens a gap for judges to consider this principle. The type of this research is empirical legal research. The data obtained through field research and qualitative descriptive. The primary data sources in this study were collected through observations, and judges interview in the Metro Religious Courts. The secondary data sources are acquired from library (legislation and certain related books). The data analysis method conducted in 3 stages, 1. Collecting the data, 2. Restating the statement, and 3. Connecting the data with existed theories. The results shows that the Metro Religious Court Judges still override the existence of a Supreme Court Circular (SEMA) number 3 of 2018 because it is only limited to the formulation of rooms that are not binding as legislations. It is may also be applied or ignored.

**Keywords:** Divorce Litigation, Ultra Petitum Partium, Religious Court

### **Abstrak**

Ultra petitum partium adalah prinsip yang tidak memungkinkan hakim untuk membuat putusan pada kasus-kasus yang tidak diminta atau terlalu menuntut. Dalam perkara perceraian, telah membatasi kewenangan hakim dalam memberikan putusan untuk mengabdikan hak-hak perempuan. Adanya Surat Edaran Mahkamah Agung (SEMA) Nomor 3 Tahun 2018 yang diperkuat PERMA pada Nomor 3 Tahun 2017 tentang Pedoman Penuntutan Perempuan Berhadapan Hukum membuka celah bagi hakim untuk mempertimbangkan prinsip ini. Jenis penelitian ini adalah penelitian hukum empiris. Data

diperoleh melalui penelitian lapangan dan deskriptif kualitatif. Sumber data primer dalam penelitian ini dikumpulkan melalui observasi dan wawancara hakim di Pengadilan Agama Metro. Sumber data sekunder diperoleh dari perpustakaan (undang-undang dan buku-buku terkait tertentu). Metode analisis data dilakukan dalam 3 tahap, 1. Mengumpulkan data, 2. Menyatakan kembali pernyataan, dan 3. Menghubungkan data dengan teori yang ada. Hasil penelitian menunjukkan bahwa Hakim Pengadilan Agama Metro masih mengesampingkan keberadaan Surat Edaran Mahkamah Agung (SEMA) Nomor 3 Tahun 2018 karena hanya sebatas perumusan ruangan yang tidak mengikat sebagaimana peraturan perundang-undangan. Hal ini juga dapat diterapkan atau diabaikan.

**Kata Kunci:** Litigasi Perceraian, Ultra Petitum Partium, Pengadilan Agama

## Introduction

Based on the Compilation of Islamic Law (KHI) on 114th article, it states that the end of the marriage bond is caused of divorcement or a legal action in the court. Then it is continued on 115th article which explains that divorce cases must be submitted and decided in the religious courts. After attempting to reconcile the husband and wife, although it doesn't work, the religious court makes a decision of divorcement (Aulia, 2017). Talaq divorce is a way of terminating the relationship after conducting the solemnization of a marriage (ijab qobul) which is justified in Islamic law. On the other hand, divorce litigation is a form of severance of marriage which is caused of the legal action proposed by the wife to her husband. It will be submitted and decided by the religious court. The difference of who files for divorcement will have an impact on women's after it is occurred.

Some examples regarding the case of talaq divorce regulates that the wife can obtain her rights after the divorcement in accordance with the explanation of the article 149 of the KHI. Nevertheless, it will be different when the wife who files a lawsuit in a divorce case. There are inequalities or differences of the women's rights, especially regarding the financial rights they receive after divorcement (Fakhria, 2018). Therefore, in the divorce litigation case, the wife does not get her rights after the divorcement had occurred. The main task of a judge is to receive, examine, adjudicate and decide every case that goes to the court. He has also the obligation to assist justice seekers and always strive to prevent problems in order to realize a simple, fast and low-cost justice. Besides, the judge is obliged to uphold the law and justice when deciding civil law. According to the law, judges have an obligation to adjudicate. It serves as a control tool for judges who have the principle of freedom, consequently judges are not subjective but they have to be objective in deciding a case, even though every decision adjudicated as legal and final by the judge so it must be respected (*res judicata provaritate habitur*) (Sunarto, 2016).

The existence of Article 189 3rd paragraph (3) of RBG (*Rechtreglement voor de Buitengewesten*)/ 178th paragraph (3) of HIR (*Herzien Inlandsch Reglement*), regulates one of the principles of judge's important and considered decision, known as the *ultra petitum partium* principle. implies that a judge has an obligation to adjudicate the entire contents of the claim but he is not allowed to make an unsubmitted decision. He is also not allowed to grant more than what

he claimed. Therefore, the authority of judges as is limited as stated in article 178 paragraph (3) HIR / article 189 RBG. The article does not also allow judge to make decisions on cases that are not submitted and exceed what is demanded by the litigants. The prohibition of the ultra petitem partium principle is intended to respect the rights of the plaintiff against the defendant in protecting the the defendant from the arbitrariness of the judge.

However, in 4th article 41 letter (c) of Law No. 1 of 1974 jo. Article 24 paragraph (2) of Government Regulation Number 9 of 1975, the Court has the right to determine the former husband to continue providing living expenses to the former wife as well as maintain the obligations of the former wife. Thus, in ex officio, the judge with his position can oblige the husband to fulfill the rights of the wife even though it is not stated in the demands of the trial (Fanani & Lailina, 2015). In line with that, the Supreme Court Regulation Number 3 of 2017 concerning guidelines for adjudicating cases of women in conflict with the law provides legal certainty which aims to ensure the elimination of all forms of discrimination against women in conflict with the law. With the presence of PERMA No. 3 of 2017 also applies to cases within the scope of the Religious Courts in which cases of women dealing with the law dominate, especially in divorcement cases. In addition to the PERMA No. 3 of 2017 which was further strengthened by the Circular Letter of the Supreme Court (SEMA) Number 3 of 2018 concerning the Enforcement of the Formulation of the Results of the 2018 Supreme Court Chamber Plenary Meeting as a Guide to the Implementation of Duties for the Court. There are also rules regarding the elimination of actions that have the potential to cause discrimination against women who are in conflict with the law, one of which is clearly stated regarding divorce in SEMA Number 3 of 2018.

Besides SEMA Number 3 of 2018, the Supreme Court also issued jurisprudence relating to the ultra petitem partium principle which can be understood as allowing judges to violate this principle, such as the Supreme Court Jurisprudence No.137 K/AG/2007 and the Palembang High Religious Court Decision Number 21/Pdt.G/2018/PTA Plg. The Supreme Court No.137 K/AG/2007 stated in one of its preambles stating "A wife who sues for divorce from her husband is not always punished with nusyuz. Although the divorce litigation is filed by the wife, if it is not proven that the wife has committed nusyuz, then in ex officio the husband can be punished for providing iddah support to the former wife with an excuse that the former wife must undergo a period of iddah which is aimed to istibra which concerns the husband's interests". Meanwhile, in Decision No. 276K/AG/2010, a decision at the appeal level, it is decided that the wife as the plaintiff is reserved the right to receive iddah supports after the divorce decision from the court, which in the trial the wife was not proven to be nusyuz.

Based on the results of the acquisition of case data at the Religious Courts concerning the annual report of the Religious Courts in 2019, there were 418 divorce litigation cases out of 638 cases that were decided up to December 31,

2019 (Metro, 2019). It can be seen from this data that the Metro Religious Courts accept and decide on divorce cases compared to other cases in 2019.

The data found were based on the results of interviews with Kusmayadi as Judge of the Metro Religious Court on Friday, September 23, 2020, explained that the filed lawsuit is usually only about accepting, granting the plaintiff's claim, and setting court costs and charging the plaintiff and without any inclusion to include granting rights to the former wife. In addition, according to him, there has never been a violation of the principle of *ultra petitum partium* at the Metro Religious Court. Therefore, what is demanded will also be examined and decided in the verdict (Kusmayadi, 2020).

Similar research has also been conducted previously. The first study is a thesis submitted by Abdillah Asif (2016), "Penerapan Asas *Ultra petitum pertium* dalam Perkara No.0303/PTD.G/2015/PA.KDS". It tells about talaq divorce in the Kudus Religious Court that the judges had burdened the former husband to give *mut'ah*, *iddah* and children's livelihood for the former wife with the consideration that the judge adheres to the *Ultra Petitum Partium* principle. On the other hand, the judge can also decide cases by deviating from the *Ultra Petitum Partium* principle through *Ex Officio* rights as well as the judge has the authority to explore, follow and understand the values of justice in order to achieve what?(judge made law) (Abdillah, 2016).

In contrast to Abdillah Asif (2016), Sahid Abdullah (2017) in his Thesis "Ultra petitum partium dalam perkara cerai gugat di pengadilan agama Bandung: Analisis putusan nomor 3941/Pdt.G/2014/Pa.Bdg, explains that this thesis results a study of judges' discretion in making a decision on a case when the wife is not strong enough to experience suffering, so the judge imposes *talak bain sugro* instead of *Fasakh*. He reasoned that there are a lot of misunderstandings between the defendant and the plaintiff which in the end made a discrepancy (Abdulloh, 2017).

Furthermore, in an article by Sri Turatmiyah et al (2019), entitled: Does Judge Has *Ex Officio* Rights In Determining *Mut'ah* and *Iddah*?, published in the *Sriwijaya Law Journal*, it is revealed that the application of *ultra petitum partium* in the Palembang Religious Court cannot be applied by judges in divorce as long as the wife as the defendant has never attended the trial, the wife has never provided an answer or response to the arguments of the plaintiff's petition, the wife is not present in the decision (*verstek*), the wife is *nusyuz* (not carrying out her obligations as a wife) the husband is not economically capable, the wife does not want to demand *mut'ah* maintenance and *iddah* maintenance, the judge sees from the causality side (Turatmiyah et al., 2019).

From some of the explanations above, it is clear that there are similarities in the discussion with the author's journal. They both discuss the *Ultra Petitum* principle but they have different focus of study especially in subject, object as well as the cases. Meanwhile, this study focuses more on the choice of law taken as a guide as well as the judge's policy in deciding divorce cases.

Based on the description above, the researcher wants to study further about the views of the judges in the application of the *ultra petitum partium*

principle in the divorce litigation decision. In addition, the researcher has an interest in conducting a study entitled “Application of the Ultra Petitem Partium Principle in Divorce Decisions in the Metro Religious Court”.

### **Research Method**

The type of study used in this thesis is empirical legal research. The empirical data obtained by going into the field or getting from the community (Joko Subagyo, 2006). Field research is a type of research that requires researchers to play an active role in observing and participating and being directly involved in the location or place where the data research is located whether in small-scale or large-scale research (Sugiarti et al., 2020). The purpose of field research is to study more intensively related to current conditions regarding social interaction activities in the surrounding environment, either individually, in groups, social communities or society (Narbuko & Achmadi, 2018).

In this writing, the research steps taken by the author are as follows:

1. Make initial observations at the research location.
2. Identifying the data needed.
3. Collecting data that has been previously identified.
4. Conducting interviews with informants and related sources at the research location.
5. Analysing the initial data and the results of the interviews that have been conducted.
6. Formulating conclusions to explain field conditions based on related legal regulations.

### **Result and Discussion**

#### **Metro Religious Court Profile**

The Metro Religion Court 1A Class is a Religious Court at the first level within the jurisdiction of the Bandar Lampung High Religious Court. The Metro Religious Court 1A Class is domiciled in Metro City, which is located on highway of 24B Stadium, Tejo Agung Urban Village, East Metro Sub-District. The jurisdictional area of the Metro Religious Court includes 5 districts and 22 urban villages (Metro, 2021). The Metro Religious Court IA Class has a 446 M2 wide building covered a 1620 M2 area which get an expansion of 291 M2. The building is still used as a place to hold court, secretarial and clerkship activities. In 2008, the Metro IA Class Religious Court Office building has been built with a wide of 518 M2 on a 3695 M2 land area with two floors (Metro, 2021). The Metro Religion Court is one of the spearheads of the Indonesian Supreme Court to receive, examine, hear and resolve cases submitted by the justice seekers. It also positioned itself as an extension of the “blue print” compiled by the Indonesian Supreme Court for renewing judicial program and reforming bureaucratic as an effort to prevent deviations that may arise (Metro, 2020)

In line with technological developments, the Metro Religious Courts begin to implement 9 Religious Court Service Innovation applications in 2019. In

accordance with the letter of the Directorate General of the Religious Courts Agency number 3396/DjA/OT.02.1/VII/2019 on July 15, 2019. The letter contains 9 IT-based innovations developed by the Directorate General of the Religious Courts Agency (Badilag) which contain: Case Notification Applications, Court Product Information Applications, Court Queue Applications, Poverty Integrated Database Application, Command Center, PNPB Application, e-Examination Application, e-Register Application, and e-Financial Application (Report on the Implementation of 2020 Metro Religious Court Class IA). The organizational structure of the Metro Religion Court IA Class consists of: the Chairperson, 5 Judges, Registrar, Secretary, Junior Registrar of Laws, Young Clerk of Lawsuits, Young Registrar of Applications, Head of Subdivision of Personnel (Kasubbag) and Ortala, Head of Subdivision of Planning, IT and Reporting, General Head of Subsection and Head of Subsection of Finance, 6 Substitute Registrars, 3 Bailiffs, 4 Substitute Bailiffs, Personnel Analyst and Judicial Case Analyst (Metro, 2021)

Regarding the Vision and Mission of the Metro Religious Courts, the vision statement of the Metro Religious Courts is formulated in accordance with the vision directions of the Indonesian judiciary as formulated in the Blueprint for Indonesian Judicial Reform 2010-2035 by the Supreme Court of the Republic of Indonesia and various stakeholders as described above. The vision of the Indonesian judiciary as formulated by the Supreme Court, reads: "The Realization of the Great Metro Religious Court". In line with this vision, the Directorate General of the Religious Courts Agency (Badilag) within the scope of the religious courts formulates a vision which reads: "To create the Great Religious Courts Agency". Along with the formulation of the vision that has been formulated by the Supreme Court (Badilag) regarding the aspired judicial agency, the Metro Religious Court formulates its vision as follows: "The Realization of the Great Metro Religious Court".

According to the Big Indonesian Dictionary (KBBI) the word "great (agung)" has the meanings of "sublime", "noble" and "big". From the vision statement, it is known that the Metro Religious Court wants the realization of the nobility, glory, and greatness of the judiciary as the executor of judicial power so that it will be respected, appreciated, trusted, loved and become the pride of the judicial apparatus itself, justice seekers, the community and stakeholders in general. Furthermore, to realize the greatness of the Indonesian judiciary, the Metro Religious Court has formulated the following missions:

1. Realizing a simple, fast, low cost and transparent judiciary.
2. Improving the quality of Judicial Apparatus Resources in order to improve public services.
3. Implementing an effective and efficient supervision and guidance.
4. Executing an effective and efficient judicial administration and management.
5. Ensuring the availability of judicial facilities and infrastructure in accordance with applicable regulations

**Application of the Ultra Petitum Partium Principle in Divorce Litigation Jurisdictions at the Metro Religious Court in relation to PERMA Number 3 of**

**2017 concerning the Guidelines for Prosecuting Women in Facing the Law and SEMA Number 3 of 2018 concerning Enforcement of the Formulation of Results of the 2018 Supreme Court Plenary Meeting as a Guide to Implementing Duties for Court**

The data on cases at the Metro Religious Courts that have been obtained and decided by the Religious Courts based on the Religious Court Implementation Reports in 2019. The data obtained are as follow:

**Table 1 Number of cases received and decided at the Metro Religious Courts in 2019**

No	Types of Cases Filed by the Community	Number of Case Submissions	Percentage
1	Polygamy Permit	-	-
2	Marriage Cancellation	1	0,2%
3	Talaq Divorce	130	20%
4	Divorce Litigation	442	69%
5	Childcare/Parenting	4	0,6%
6	Child Adoption	1	0,2%
7	The origin of the child	7	1%
8	Guardianship	1	0,2%
9	Change of identity on marriage book	12	1,9%
10	Marriage Dispensation	13	2%
11	Isbath of Marriage	27	4%
12	Miscellaneous things	-	-
<b>Total</b>		<b>638</b>	<b>100%</b>

Source: Report on Implementation of Metro Religious Court Activities in 2019.

The next is the case data at the Metro Religious Courts that have been decided until December 30, 2020 based on the Religious Court Activity Implementation Report on 2020. The data obtained are as follow:

**Table 2. Number of cases received and decided at the Metro Religious Courts in 2020**

No	Types of Cases Filed by the Community	Number of Case Submissions	Percentage
1.	Polygamy Permit	1	0,1 %
2.	Marriage Cancellation	-	-

3.	Talaq Divorce	172	16,8 %
4.	Divorce Litigation	649	63,5 %
5.	Childcare/Parenting	3	0,3 %
6.	Child Adoption	-	-
7.	The origin of the child	6	0,6 %
8.	Shared Property	4	0,4 %
9.	Inheritance	2	0,2 %
10.	Guardianship	6	0,6 %
11.	Marriage Permission	1	0,1 %
12.	Wali Adlal	1	0,1 %
13.	Change of identity on marriage book	24	2,3 %
14.	Marriage Dispensation	29	2,8 %
15.	Isbath of Marriage	98	9,5 %
16.	Determination of Heirs	23	2,2 %
17.	Sharia Economics	1	0,1 %
18.	Miscellaneous things	1	0,1 %
<b>Total</b>		<b>1.021</b>	<b>100%</b>

Source: Report on the Implementation of Metro Religious Court Activities in 2020

From the table above, it can be seen that 89% of the cases decided by the Metro Religious Courts in 2019 were divorcement cases. Furthermore, in 2020, it is known that 80.3% are also divorcement cases. Therefore, divorcement still dominates the cases that are put on trial and decided at the Metro Religious Court. Divorcement cases particularly occupy the highest percentage of cases. The practice that occurs at the Metro Religious Courts, in the contents of the lawsuit, the plaintiff generally only asks to accept and grant the plaintiff's claim, and charges the court fees based on the applicable laws and regulations without any participation for contains the granting of rights to the former wife.

In relation to the *ultra petium partium* principle, the judge is not allowed to give a decision that is not demanded or exceeds what is demanded as described in article 189 (3) Rbg / 178 (3) HIR. It becomes a principle that is highly upheld by judges. In the trial at the Religious Courts, such as in the case of talak divorce, the judge can give a decision that is not required by using his *ex officio* right to oblige the husband to provide *iddah*, *mut'ah*, *madhiyah*, or child support even though the claim is not requested as long as the wife is not proven to have committed *nusyuz* as stated in Article 149 of the Compilation of Islamic Law (KHI). In the other hand, in the case of litigation, there is no statutory regulation that regulates the granting of the rights of the wife (Rehman, 2007)

According to the Judge of the Metro Religious Court, Amin M., concerning the application of the *ultra petitem partium* principle in the divorcement jurisdiction at the Metro Religious Court, he stated that if there is a subsidiary lawsuit in the accusation "if the Panel of Judges is of the opinion, please make a fair decision" (*ex aequo et bono*). This means that with this



sentence the judge can determine beyond what was requested by the plaintiff. For example in child custody (hadhonah). Because it is related to children, it must be clearly stated about the future of the child. He also stated that it can be granted as long as it is requested or contained in a subsidiary lawsuit by submitting to the judge as long as it is still related to the subject matter (Amin, 2021)

Furthermore, in the divorcement litigation case, ultra petitum partium may be applied as long as it is still closely related to the case itself, such as the case of a wife who has been left by her husband for months or even years without being given a living. The case may be considered to determine rights to be granted provided that in a subsidiary accusation (*ex aequo et bono*). Thus, if it is contained in a subsidiary lawsuit, it is still possible to grant the accusation because the decision must be fair, benefit and have a legal certainty (Amin, 2021)

Then Al Hasna said that the concept of the ultra petitum partium principle at the application level was in accordance with what was requested and appropriated with the sound on paragraph 3 of article 178 HIR/189 RBG. In principle, the judge at the Metro Religious Court did not grant anything beyond what was requested. In the case of divorce litigation for certain conditions, the judge has the authority to add to the verdict related to iddah, child living, mut'ah and mahdiyah. The authority is with the judge by exercising his *ex officio* rights. Then, if the plaintiff asks for his rights, the judge must be observant to assess how important the accusation is to be granted (Al-Hasna, 2021)

In principle, divorce filed by women or divorce litigation does not ask for iddah, mut'ah and other expenses that are common. However, the judge has the greatest authority to grant an accusation as long as it has a clear basis. For example, a wife who has been abandoned by her husband for many years while having a child and her husband does not leave anything that can be used as a living. Therefore, a judge who has sense of foresight has known when a woman files for divorce with the condition left by her husband. Judges may grant what is not requested by returning to the empathy possessed by a judge by taking the policy and substance of PERMA Number 7 of 2017 concerning Guidelines for Prosecuting Women in Facing the Law.

Basically, it goes back to how much empathy the judge has to grant the wife's rights and how much the husband's ability can carry out the contents of the decision. As a result, in granting the wife's right, between *ex officio* rights and empathy of the judge to consider all the factors contained in the trial, the judge was very careful about the ultra petitum partium principle (Al-Hasna, 2021)

Moreover, Aminuddin said that in the case of divorce litigation, no authority was determined as in the case of talaq divorce. In the case of talaq divorce, the judge, in *ex officio*, can oblige a husband to provide iddah, mut'ah and mahdiyah if he gives talaq divorce to his wife. However, it is possible to be granted more than what is requested in relation to child support or child custody. This is because there is an obligation of a father to provide a living for the child which in due course of the decision, the custody and care of the child will be in the care of the biological mother (Aminudin, 2021)

Regarding the basic reasons, the Judge at the Metro Religious Court remained firm in applying the *ultra petitum partium* principle, especially in the case of divorce litigation. Amin M., said that there had not been violation of this principle at the Metro Religious Court so far. This is because the accusation of divorce litigation is not included or is not requested. In a divorce litigation case where the divorce accusation is filed by the wife, it is very important to assess whether the wife has been proven to have committed *nusyuz* or not. A wife who is proven to have committed *nusyuz* then her rights as a wife such as *iddah* living and *mut'ah* cannot be given. Unlike the case with a wife who is not proven to have committed *nusyuz*, and she is in an accusation contains a request to get a decision that is as fair as possible (*aquo*), the judge can consider it and possibly give it (her rights). The issue of the wife asking for or not asking for her rights becomes the right of the wife as the plaintiff. If the accusation contains her request, the judge will continue to see and assess how appropriate it is to be granted, because the decision must be just and fair. The accusation containing a subsidiary claim or an application for a fair decision based on the judge may grant other than what is requested with a note that this has something to do with the subject matter of the case (Amin, 2021)

According to Al Hasna, the Judge only grants what is requested and appropriated with article 189 (3) Rbg / 178 (3) HIR. She adds that what is not requested will not be granted by the Judge. For example, the wife asks to be divorced without any other requests, then the decision is only limited to granting the request for *talaq* divorce *ba'in sughro*. Regarding the wife's rights that are not asked for, such as *iddah* and *mut'ah*, they are not granted. The elements lie in the function and urgency to be granted. Then it can be assessed how critical the marriage is and how likely the decision can be executed (Al-Hasna, 2021)

Aminuddin also stated that the Metro Religious Court is still applying the *ultra petitum partium* principle. However, looking at the facts in the trial, it is possible to grant the child's right to support at least in the dialogue and in the accusation with a note that the parents (Father and Mother) have had children during marriage. With this way, the future of the child is depicted and this becomes a serious issue that can be noticed and considered in the trial dialogue and in mediation (Aminudin, 2021). Furthermore, regarding special rights for wives such as *iddah* living and *mut'ah*, there are still many differences of opinion among judges in the Religious Courts. To grant or not is the authority of each judge in understanding the meaning of the protection of women and children. In relation to granting the wife's rights, a dialogue is needed between the parties, both husband and wife. It needed to reveal the facts of the trial which are a consideration of how urgent it is to be granted, but also to reveal the extent of the husband's ability. Although the judge hopes that something can be implemented, if the concerned person is unable to carry out the contents of the decision, it will become something non-executable (the decision cannot be implemented) (Aminudin, 2021).

The principle of *ultra petitum partium* is related to PERMA Number 3 of 2017 concerning Guidelines for Prosecuting the cases of Women Facing the Law.

Referring to article 41 letter (c) of Law Number 1 of 1974 concerning Marriage which emphasizes that: The court may oblige the former husband to provide living expenses and determine an obligation for the former wife. In the opinion of Dra. Alia Al Hasna, the judges can make judgments on decisions, especially in cases involving women. In this case, the substance of PERMA Number 7 of 2017 concerning Guidelines for Prosecuting Women Facing the Law can be applied. With the principle of ultra petitem partium associated with this PERMA, the judge will assess how urgently it can be helped and granted when there is neglect of his wife and child. The granting of the wife's unsolicited rights from the case of a husband abandoning his wife and children without leaving anything that can be used as a living, can help his wife and even will have a deterrent effect on the husband. The intension of this is the husband will not repeat his actions with other wives in the future. It is important to note that the judge also cannot be arbitrary in granting something depends on the conditions and terms and appropriate considerations (Al-Hasna, 2021).

In addition, Amin M., said that women who are in conflict with the law are often excluded and coupled with the ultra petitem partium principle. The existence of PERMA Number 3 of 2017 is an effort to raise the dignity of women. Law is dynamic, adapting and improving the conditions that need to be addressed. The Metro Religious Court is trying to implement it as best as possible. Regarding education, there is a POSBAKUM (Legal Aid Post) that will help at the Metro Religious Court. Meanwhile, the judge can only weigh and ask whether there will be changes or not in his lawsuit (Amin, 2021)

Regarding PERMA No. 3 of 2017, Aminuddin said that women get something that is their right and must be accepted in every case in the court. He explains that the PERMA can accommodate the protection of women in conflict with the law. Generally, the consideration of the decision of a judge will look at from three sides, those are the juridical, sociological and philosophical side. From a juridical point of view, the judge considers everything legally. Then, from a sociological point of view, the judge sees the impacts of the decision. Afterward, he will philosophically hopes that the decision can be implemented fairly and each party accepts each decision handed down well. This PERMA is a guide and guide for judges to try women who are in conflict with the law (Aminudin, 2021).

The next is related to the ultra petitem partium principle which is also connected to SEMA number 3 of 2018 concerning the implementation of the formulation as resulted in the Supreme Court Chamber Plenary Meeting as a Guide to the Implementation of Duties for the Court in 2018. According to Aminuddin (2021), related to the Ultra petitem partium principle and SEMA number 3 of 2018, currently legal protection is comprehensive and fair. The existence of the Supreme Court Circular is also a guide for judges to apply women's rights, especially in divorce litigation cases. Even though he hopes that the rights of the wife will be given corresponded with the SEMA, the judge still looks at the facts of the trial by looking at the husband's ability regardless of the wife who is not proven to have committed nusyuz. The application of the results of the formulation of the room regarding the SEMA provision of mut'ah and

iddah living has currently been implemented. In addition, dialogue is conveyed to the parties who are burdened with obligations. However, the Circular Letter of the Supreme Court (SEMA) is not yet complete and clear, so it still requires the rules contained in the legislation (Aminudin, 2021).

Al Hasna asserts that SEMA number 3 of 2018 Concerning the Implementation of the Formulation of the Results of the 2018 Supreme Court Plenary Meeting as a Guide to the Implementation of Duties for the Court is the result of the formulation of the room. Yet, the results of the room are not included in the hierarchy of laws and regulations that can be applied in the judge. In the case of divorce litigation, the judge assesses whether the points in SEMA were applied or not. This is because the Circular Letter of the Supreme Court (SEMA) is not binding. In contrast, the articles in the law is binding. In cases of urgency that require the granting of women's rights beyond those requested, it will be judged whether the husband can decide the verdict or not. This is important to note because the judge should not grant something which cannot be executed. Moreover, the accuracy of the judge who already has sufficient experience will be able to see and appraises whether it can be granted or not. Empathy of the judge must synergize with the ability to see the facts in court. A judge cannot imagine being able to grant it without the husband's ability to conduct the contents of the verdict (Al-Hasna, 2021).

Furthermore, Amin M., said that in the accusation of law, whether asking or not is the right of the plaintiff. The Judge's issue is related to the *ultra petitem partium* principle, when it is requested it still can be seen and assessed whether it is appropriate to be granted or not. If the condition is assessed and considered, the wife needs and is entitled to her rights, then she can use the provisions in the SEMA. The decision must be just and fair as long as it is stated in the subsidiary lawsuit. Because with the existence of a subsidiary lawsuit, the judge can grant anything other than what is requested, provided that it has something to do with the subject matter of the case (Amin, 2021).

### **Analysis of Judges' Reasons regarding the Application of the *Ultra Petitem Partium* Principle in Divorce Decisions at the Metro Religious Court in relation to PERMA Number 3 of 2017 and SEMA number 3 of 2018**

After conducting research at the Metro Religious Court through interviews, observation and documentation, the data is found as previously described by the researchers. Based on interviews with judges at the Metro Religious Courts, related to the divorce case and the decisions that have been issued, it is known that the Metro Religious Courts are still applying the *ultra petitem partium* principle. There has not been violation of this principle so far because the accusation is not contained or requested. Therefore, the judge only grants what is requested and appropriated with article 189 (3) Rbg / 178 (3) HIR. What he? does not ask for will not be granted by the judge. However, it is possible to be granted more than what is asked for in relation to child living (*hadhonah*). According to Imam Shafi'i, the limit for *tamyiz* is 7 or 8 years for both boys and girls. Meanwhile, Imam Malik is of the opinion that the limit of

mumayiz. Different between boys and girls, boys are at the limit of itsghar or the time the milk teeth have run out and permanent teeth have grown (between 6 to 14 years). For girls are at the limit of being married and mixed with her husband. It is different with Abu Hanifah that the limit for girls are puberty, and for boys are until *istighna'* where children are able to be independent from their mother's care (Aljan, 2017).

The difference of opinion that occurs among the Imams Mazhab, according to positive law in Indonesia through the Compilation of Islamic Law, is to take the middle way, the limit for child *tamyiz* is up to 12 years. Afterward, if the child has reached the *tamyiz* period, then the settlement of the child custody dispute is by *takhyir*, the child is given the opportunity to choose to join his father or mother (Aljan, 2017). With regard to the maintenance and living of the children which is appropriated with the provisions of Article 156 letter (d) and letter (f) of the Compilation of Islamic Law in Indonesia, the Panel of Judges in *ex officio* based on the principle of appropriateness and decency, the husband may be charged with providing a living for the child for the maintenance and education of children who are not in their care. Apart from verdicts which is related to *hadhonah*, the Metro Religious Court is able to grant the other rights of wife such as *iddah* living, *mut'ah* or *mahdiyah*. Basically, the judge can grant the wife's rights, but he needs careful analysis and consideration both in terms of the urgency to grant the wife's rights and the wife's condition before filing for divorce whether she is proven *nusyuz* or not that depends on how much the husband's ability to conduct the verdict or how much it can be executed (Kamaruddin & Shukor, 2003).

Regarding the above matters, judges actually have the authority with *ex officio* rights they have in the context of legal discovery (Mukti, 2017). Therefore, the judge must take advantage of all the potential that has been given and all the powers inherent in his position to make legal discoveries in order to realize justice in a professional manner. Thus, there is nothing wrong with the judge by considering the sense of justice and the benefit can make a decision to protect the rights of women who are facing the law ((Rohman & Widyaningrum, 2020). Then, the researcher also examines the judge in looking at the case for divorce litigation whether it is appropriate or not for the rights of the wife who filed for divorce litigation to be granted. With *ex officio* rights, the judge may grant the rights of the wife who filed for divorce litigation. First, the judge will ask the whereabouts or where the wife lives, whether she is still in the house with her husband or has left the joint residence. In essence, the wife must go with her husband, where the husband is, that is where the wife is. However, regarding the case of a wife who leaves her husband, the judge will evaluate whether the wife's departure was of her own free will or was expelled by the husband. If domestic violence occurs in the household and for the sake of saving herself, she then leaves the joint residence, of course it is not considered *nusyuz*. According to Islamic law, it is said to be *nusyuz* if the wife leaves her obligations, disobeys her husband (Harahap, 2022).

For judges, the principle of *ultra petitem partium* with *ex officio* rights has a very close relationship in order to realize a fair decision. Therefore it can be selected appropriately and proportionally (Uzelac, 2013). The *ex officio* rights of judges are a concrete step to break through the prohibition of the *ultra petitem partium* principle which becomes a barrier for judges in examining cases to provide justice and legal protection to all litigants in order to realize justice based on the Almighty God (Mukti, 2017).

For the sake of realizing justice and protection for all litigants, especially women in divorce litigation cases, the judge can use the *ex officio* right to give an unsolicited decision related to *iddah* living, *mut'ah* or *mahdiyah*. Likewise, in a judicial system based on legal protection and justice as a constitutional justice system, judges must be active in resolving cases (Amarini & Hidayah, 2019). The active attitude of judges in civil cases is also the authority and responsibility of judges in examining cases. The judge's active attitude to help justice seekers to succeed in obtaining justice, the judge's active attitude to finding the law for the realization of justice based on the YME Godhead, and being active in providing legal guarantees for ease of execution (Mukti, 2017).

Based on the results of the interview with the Judges of the Metro Religious Court, the Judge actually has foresight of feelings when a wife files for divorce litigation whether with the condition of being abandoned by her husband or with the condition being abandoned for years while having a child and the husband leaving nothing that can be used as a living, the Judge may grant what is not requested by returning to the empathy possessed by a Judge by taking a policy. In line with the foresight and empathy of the judges, there is also the consideration of the Panel of Judges in the decision of the Supreme Court of the Republic of Indonesia Number 276 K/AG/2010 that a husband who has a disgraceful attitude, and greatly hurts his wife's heart, the Panel of Judges decides that the wife deserves to be given *mut'ah* which is regulated in article 159 of the Compilation of Islamic Law which reads: *Mut'ah* sunnat is given by the former husband without conditions in article 158. It can be seen that the role of the judge's foresight in making policies and a sense of empathy based on the law play a role in considering his verdict.

The husband's irresponsible attitude during marriage by not providing a living for his wife and children or causing them to be neglected, is one of the causes of many wives suing for divorce from their husbands (Nurlaelawati, 2013). His negligence causes harm to the person who is obliged to provide for him. According to Islamic law, a person is responsible for his actions that cause harm to himself and the property of others (Khan et al., 2022). In the Fiqh Rules it is stated that "the harm must be removed". Among the efforts to anticipate it is to compensate the party who has done harm to the other party who has suffered material loss and the threat of *ta'zir* punishment for making other people suffer physically and mentally. The *ta'zir* are sanctions whose levels and forms are submitted to the judge according to the amount of harm caused by their actions (Effendi & Zein, 2004). In the case of a husband who abandons his wife and child without leaving anything that can be used as a living that cause harm to the child

and wife physically and mentally, the husband deserves to be burdened with compensation for his living and can also be threatened with ta'zir punishment. Allah's Surah Al Baqarah verse 233 follows:

.....وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ

Meaning: "And the obligation of the father to feed and clothe the mothers in a ma'ruf way". (Q.S. Al-Baqarah : 233).

It means that the father of the baby is obliged to provide for the mother who is breastfeeding her baby, also to provide them with clothes in a good way, according to the common customs in the area where he lives (Salim & Said, 1993) The verse therefore provides an explanation that the husband is ordered to provide guarantees for his wife. The wife is a trust from God in the hands of the husband. His obligation is to maintain this trust and provide for her in the form of food and clothing. The judge's consideration in terms of living, whether in the context of a divorce or an accusation for a living in particular, must consider the issue of tamkin or the possibility of a husband and wife relationship and the issue of nusyuz proportionally (Habibi, 2016). As stated in articles 80-84 of the Compilation of Islamic Law (KHI). Nusyuz is defined as the attitude of the wife who does not obey her husband in terms of reasonable orders, to stay in a proper place to live, or leaving the residence without the husband's permission or there is no reason according to syara' (Aljan, 2017). It is the husband's obligation to provide a living for his wife and it is not proven that she is doing nusyuz. The husband's obligation is born not only because the wife needs it, but also because of the marriage bond. Although the wife is already in a state of material abundance, but these obligations continue to be attached and do not abort the husband's obligations (Aljan, 2017).

Regarding the criteria of a wife who is proven whether to have committed nusyuz or not, it will then greatly affect her decision. However, if in the trial the wife is not proven to have committed nusyuz as it is explained in the provisions of Article 41 letter (c) of Law Number: 1 of 1974 jo. Article 149 letter (b) Compilation of Islamic Law, the husband can be punished to provide iddah living to the wife, on the grounds that the wife must undergo the iddah period. One of the purpose of the iddah is for istibra. It is emphasized in Article 24 paragraph (2) letter (a) Government Regulation No. 9/1975 which states that "During a divorce litigation on the request of the plaintiff or defendant, the Court may determine the expenses that must be borne by husband". In addition, the provisions of Article 152 of the Compilation of Islamic Law also confirms that "the former wife has the right to receive iddah living from her former husband unless she is nusyuz".

Thus, in the divorcement process, both the talaq divorce and the divorce litigation procedure as long as the wife does not do nusyuz, she still has the right to earn madhiyah living, income, maskan, kiswah during the period of iddah and mut'ah from her former husband (Jauhari, 2023). Determination of the wife's

rights can be done through a divorce litigation, a litigation for reconvention in a divorce application for divorcement. It is determined by the judge *ex-officio*. However, what is important and considered is the husband's ability, based on the provisions of Article 86 paragraph (1) Law Number 7 of 1989 which has been amended by Law Number 3 of 2006 and the Second Amendment to Law Number 50 of 2009, jo. Article 34 paragraph (1) and Article 41 letter (c) of Law Number 1 of 1974 concerning Marriage and the rule of law in the Decision of the Supreme Court of the Republic of Indonesia Number 276 K/AG/2007 and the decision of the Supreme Court of the Republic of Indonesia Number 276 K/AG/2010. The wife then has the right to earn *madhiyah*, *iddah* living and *mut'ah* from her former husband in accordance with her husband's ability and income.

The previous explanations explain that the article 189 (3) Rbg / 178 (3) HIR has limited the authority of Judges and does not allow Judges to make decisions on cases that are not requested or exceed what is demanded by the parties. One of the Supreme Court Jurisprudence relating to the *ultra petitem partium* principle which seems to justify the judge to override this principle is the Legal Rules in the Supreme Court Jurisprudence number 137 K/AG/2007, dated March 17, 2004 which confirms that wife who file for divorce from their husbands is not always punished with *nusyuz*. Despite filing the divorce litigation by the wife who is not proven that the wife has committed *nusyuz*, the husband in *ex officio* can be punished for providing *iddah* living to his former wife, on the grounds that the ex-wife must undergo a period of *iddah*. The purpose *iddah* includes *istibra'* which is also involved the interests of the husband. The next, is the analysis of the opinion of the Metro Religious Court Judge on the application of the *ultra petitem partium* principle which is associated with the Supreme Court Regulation (PERMA) Number 3 of 2017 concerning Guidelines for Adjudicating Women's Cases facing the Law. According to the researcher, the Judge at the Metro Religious Court in the divorce litigation case has been open and always considers the articles contained in PERMA Number 3 of 2017. Although it has not been maximally implemented, the implementation of PERMA Number 3 of 2017 regarding women's rights after divorce litigation process is to grant women's rights related to *hadhonah* while for other women's rights it has not been realized.

Several factors that cause the wife's rights have not been realized in the divorce litigation are in the accusation is unsolicited. In addition, the content of the lawsuit is still dominated by requests for *talak ba'in sughra*, but the judge's consideration is how big the husband's ability is, as the result, the possibility of the decision can be executed. Because there are considerations that judges should not be arbitrary in granting something which often related to special rights for wives such as *iddah* living and *mut'ah*, there are still many differences of opinion among judges in the Religious Courts. Consequently, whether to grant or not is the authority of each judge in understanding the meaning of the protection of women and children (Hajjar, 2004).

Related to the divorce litigation case at the Metro Religious Court, the possibility of granting women's rights such as *iddah* living, *mut'ah* and



mahdiyah is contained in a subsidiary accusation which asks for a fair decision (*ex aequo et bono*) unless they are not in the subject matter. As for the use of the Supreme Court Circular (SEMA) Number 3 of 2018 concerning the Implementation of the Formulation of the Results of the 2018 Supreme Court Plenary Meeting as a Guide to the Implementation of Duties for the Court, the Judge at the Metro Religious Court said that the Supreme Court Circular (SEMA) was the result of the formulation chambers. In addition, chamber results are not included in the hierarchy of laws and regulations that can be applied in court. The rules are not yet complete and clear so they still need the rules contained in the legislation. Therefore, it seems that the source of the procedural law of this religious court is still ignored.

In line with the opinion of Judges in the Religious Courts that related to Circulars and Instructions of the Supreme Court of the Republic of Indonesia, as long as it concerns the Civil Procedure Code and Material Civil Law, it can be used as Procedural Law in judicial practice on a legal issue faced by the Judge. However, the Circular Letter of the Supreme Court is not binding as in the Law (Manan, 2005) As stated by Mertokusumo, the Circular and Instructions of the Supreme Court of the Republic of Indonesia are not law, but are sources of law where it does not mean the law is found but a place where judges can explore the law (Manan Abdul, 2006). Nevertheless, the circular and instructions of the Supreme Court of the Republic of Indonesia (SEMA) are one of the main sources of procedural law for religious courts. With the existence of SEMA, the Supreme Court of the Republic of Indonesia has the right to exercise the highest supervision over the actions of other courts according to the provisions determined by law. Thus, to carry out such supervision and guidance, the Supreme Court of the Republic of Indonesia has the authority to provide instructions if deemed necessary, so that a legal issue does not deviate from the predetermined rules (Aljan, 2017).

### **Conclusion**

Reason why the judges of the Metro Religious Courts in deciding divorce cases prioritized the *ultra petitem partium* principle more compared to using the Supreme Court Circular (SEMA) Number 3 of 2018 because the *ultra petitem partium* principle became the principle which is still held by the judge because the rules that underlie the principle are clear and binding as written in paragraph (3) article 189 RBG or paragraph (3) article 178 HIR. Meanwhile, the Judges of the Metro Religious Courts still ignore one of the sources of the Procedural Law of the Religious Courts, the Supreme Court Circular (SEMA) Number 3 of 2018 concerning the Enforcement of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber as a Guide to the Implementation of Duties for the Court. This is because the Judge considers that the results of the formulation of the rooms contained in the Circular Letter of the Supreme Court (SEMA) in which the rules therein may be applied or choose to be ignored, because the results of the formulation of the rooms are not included in the hierarchy of laws and regulations, which are not as strong binding as regulations.

In addition, the rules are not yet complete and clear so they still need the rules which is contained in the legislation.

## References

- Abdillah, A. (2016). *Penerapan Asas Ultra Petitum Partium Dalam Perkara No: 0303/PDT. G/2015/PA. KDS. Tentang Cerai Talak Di Pengadilan Agama Kudus*. STAIN Kudus.
- Abdulloh, S. (2017). *Ultra petitum partium dalam perkara cerai gugat di pengadilan agama Bandung: Analisis putusan nomor 3941/Pdt. G/2014/Pa. Bdg*. UIN Sunan Gunung Djati Bandung.
- Al-Hasna, A. (2021). *Wawancara dengan hakim Pengadilan Agama Metro*.
- Aljan, A. E. (2017). *Pembaharuan Hukum Perdata Islam Praktik dan Gagasan*. Yogyakarta. UII Press.
- Amarini, I., & Hidayah, A. N. (2019). Judicial activism resolving administrative disputes in Indonesia. *3rd International Conference on Globalization of Law and Local Wisdom (ICGLOW 2019)*, 322–326.
- Amin, M. (2021). *Wawancara dengan hakim Pengadilan Agama Metro*.
- Aminudin, A. (2021). *Wawancara dengan hakim Pengadilan Agama Metro*.
- Aulia, T. R. N. (2017). *Kompilasi hukum islam (hukum perkawinan, kewarisan dan perwakafan) / penulis*. Nuansa Aulia.
- Effendi, S., & Zein, M. (2004). *Problematika Hukum Keluarga Islam Kontemporer*. Prenada Media.
- Fakhria, S. (2018). Cerai Gugat Dan Implikasinya Terhadap Hak-Hak Finansial Perempuan. *Legitima: Jurnal Hukum Keluarga Islam*, 1(1), 91–119.
- Habibi, A. R. (2016). *Reorientation of rights and duties of husband and wife: Analytical studies of compilation of islamic law on Abdullah Saeed's progressive islamic thought*. Universitas Islam Negeri Maulana Malik Ibrahim.
- Hajjar, L. (2004). Religion, state power, and domestic violence in Muslim societies: A framework for comparative analysis. *Law & Social Inquiry*, 29(1), 1–38.
- Harahap, V. Y. W. (2022). Mu'ah Rights From The Wife That Were Divorced Because Of Nusyuz. *Journal Law Islamic Maqashid Al-Ahkam*, 1(01), 50–63.
- Jauhari, M. A. (2023). Legal Instruments For The Fulfillment Of The Rights Of Women and Children Post-Divorce In The Indonesian Legal System. *Journal of Namibian Studies: History Politics Culture*, 34, 3494–3512.
- Joko Subagyo, P. (2006). *Metode Penelitian Dalam Teori Dan Praktek*. Rineka Cipta. Jakarta.
- Kamaruddin, Z., & Shukor, A. K. A. (2003). A Preliminary Study on the Concept and Application of Ex-Parte in the Malaysian Shari'ah Courts. *IIUMLJ*, 11, 35.
- Khan, A., Javed, K., Khan, A. S., & Rizwi, A. (2022). Aggression and individual criminal responsibility in the perspective of Islamic law. *Competitive Social Science Research Journal*, 3(1), 35–48.
- Kusmayadi, Y. (2020). *Wawancara dengan hakim Pengadilan Agama Metro*.
- Manan, H. A. (2005). *Penerapan hukum acara perdata di lingkungan peradilan agama*.

- Kencana Prenada Media Group.
- Metro, P. A. (2019). *Laporan Pelaksanaan Kegiatan 2019 Pengadilan Agama Metro Kelas IA*.
- Metro, P. A. (2020). *Laporan Pelaksanaan Kegiatan 2020 Pengadilan Agama Metro Kelas IA*.
- Metro, P. A. (2021). *Hasil Observasi di Pengadilan Agama Metro*.
- Mukti, A. (2017). *Penemuan Hukum Islam Demi Mewujudkan Keadilan*. Pustaka Pelajar.
- Narbuko, C., & Achmadi, A. (2018). *Metodologi Penelitian: Jakarta: Bumi Aksara*.
- Rehman, J. (2007). The sharia, Islamic family laws and international human rights law: Examining the theory and practice of polygamy and talaq. *International Journal of Law, Policy and the Family*, 21(1), 108–127.
- Rohman, A. N., & Widyaningrum, H. (2020). Instrumentation Of Ex-Officio Rights Of Religious Courts Judge Related To Fulfilling Children And Wife's Rights Due To Divorce. *Jurnal Hukum & Pembangunan*, 50(2), 361–378.
- Sugiarti, S., Andalas, E. F., & Setiawan, A. (2020). *Desain penelitian kualitatif sastra* (Vol. 1). UMMPress.
- Sunarto, S. (2016). Prinsip Hakim Aktif Dalam Perkara Perdata. *Jurnal Hukum Dan Peradilan*, 5(2), 249–276.
- Turatmiah, S., Syaifuddin, M., Yahanan, A., Febrian, F., & Novera, A. (2019). Does Judge Has Ex Officio Rights In determining Mut'ah and Iddah? *Sriwijaya Law Review*, 3(2), 187–198.
- Uzelac, A. (2013). Croatia: Omnipotent judges as the cause of procedural inefficiency and impotence. In *Civil Litigation in China and Europe: Essays on the Role of the Judge and the Parties* (pp. 197–221). Springer.