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The Acceptability of Active Judge Principle in Divorce *Talak* Cases of Religious Courts at Madura to Assure The Wife's Rights

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Abstract

In divorce *thalāq* (*talak*) trial, a wife as the defendant sometimes stays silent and surrendering probably because not knowing the rights she can struggle to get such as child living allowance, *iddah*, *mut'ah*, and joint property. Consequently, she may lose her rights because the judges cannot decide more than the divorce. The result of this study shows as follow; *first*, the judges in Religious Courts of Madura accept the active judge principle on divorce *thalāq* cases even though in limited use. The acceptability itself is based on a legislation which gives an *ex officio* right. *Second*, the implementation of active judge principle in divorce *thalāq* cases in fulfilling the wife's rights is through some ways. They consist of telling her any rights after divorce she can sue from the husband, asking her to concern on her rights during hearing process, always fulfilling her rights in its verdict (*ex officio*) due to her presence in the hearing and her status out of *nusyūz* condition, and also delaying the divorce pledge session for six months if the husband has not fulfilled the verdict yet.

Keywords:

Principle; Active Judge; Divorce Thalāq

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Abstrak:

Dalam persidangan cerai *thalāq* (*talak*) terkadang istri bersikap diam dan hanya pasrah dan kemungkinan tidak mengetahui tentang hak-hak yang dapat dituntut pada suami misalnya nafkah anak, nafkah *'iddah*, *mut'ah*, ataupun harta bersama sehingga istri dapat kehilangan hak-haknya karena hakim tidak boleh memutus lebih. Hasil penelitian menunjukkan bahwa, *pertama*, hakim di Pengadilan Agama wilayah Madura menerima prinsip hakim aktif dalam perkara cerai *thalāq* walaupun penggunaanya secara terbatas. Dasar akseptibilitas prinsip tersebut didasarkan pada peraturan perundang-undangan yang memberikan hak *ex officio*. Kedua, implementasi prinsip hakim aktif dalam perkara cerai *thalāq* untuk pemenuhan hak-hak istri adalah dengan memberikan penjelasan kepada istri tentang hak-hak istri pasca cerai yang dapat dituntut dari suami, menanyakan ketika istri diam selama persidangan terkenaan dengan hak-haknya, selalu memberikan hak-hak istri dalam putusannya (*ex officio*) selama istri hadir di persidangan dan tidak dalam keadaan *nusyūz*, serta menunda sidang ikrar *thalāq* maksimal enam bulan apabila suami belum memenuhi isi putusan).

Kata Kunci:

Prinsip; Hakim Aktif; Perceraian *Thalāq*

Introduction

Judicial institutions have an important and strategic role in a country and therefore in carrying out its duties and functions, it is bounded by a procedural law. In this context, Indonesian civil procedural law adheres to the passive judge principle¹ which puts the judges in a passive position for carrying out their duties and functions.² Most of jurists consider that they need to maintain this principle during examining and deciding the cases.³

¹ As a comparison, the principle in procedural law of Administrative Courts is an active judge one considering that examined materials are at public law area. See Aju Putrijanti, "Prinsip Hakim Aktif (*Domini Litis Principle*) dalam Peradilan Tata Usaha Negara". *Jurnal Masalah-Masalah Hukum*, Vol. 42, No.3 (July 2013), 320.

² Sunarto, "Prinsip Hakim Aktif dalam Perkara Perdata". *Jurnal Hukum dan Peradilan*, Vol. 5 No. 2 (July 2016), 249.

³ Tata Wijayanta, *et al.*, "Penerapan Prinsip Hakim Pasif dan Aktif serta Relevansinya terhadap Konsep Kebenaran Formal". *Mimbar Hukum*, Vol. 22 No. 3 (October 2010), 14.

However, as the time goes on, the principle of civil procedural law began to head for an active judge principle as regulated in Article 4 Paragraph (2) of Law Number 48 of 2009 concerning Judiciary Power. It states that the main functions of the judges are accepting, adjudicating, and deciding every case submitted. Further, they are also obliged to support any justice seekers and try to help overcoming obstacles and problems in order to achieve a simple, rapid, and low- cost trial.

The judges have a central position at the courts. Their main and basic function are as the law and justice enforcers due to their responsibilities to the almighty God.⁴ Therefore, in solving any civil cases, they should know the event in dispute for details through careful examination and verification on both argumentation and evidence presented by involved parties at the hearing season. Their decision, at the end, needs to reflect law enforcement and fairness.

Among others, Religious Court at the first-level has an authority to handle and make decision on divorce cases among Muslims based on the principle of Islamic teaching. The cases can be either divorce initiated by wife (so called *cerai gugat*) or divorce *thalāq* from husband's initiative.⁵ Relating to this, Law Number 1 of 1974 on marriage provides legal protection for a wife (later referred as defendant) due to her common lower position in economic, public access, and others compared to her husband (later referred as plaintiff). It is clear, for instance, from the procedure of divorce *thalāq* case in which the plaintiff has to file the case in the Religious Court at an area where the defendant lives.

According to data presented in Siadpa Religious Court website and its online version, the divorce cases in Religious Courts across Madura have same characteristics. The level of divorce rate significantly increases over the past few years with the largest age group between 21-30 years old. Meanwhile, the divorce couple's

⁴ Hamza Baharuddin, "Fungsi hakim dalam Mendorong Terwujudnya Moral Justice Dalam Perspektif Islam". *Jurnal Masalah Masalah Hukum*, Vol. 43 No. 1 (January 2014), 67.

⁵ M Syaifuddin and Tri Turatmiyah, "Perlindungan Hukum terhadap Perempuan dalam Gugat Cerai (*Khulu'*) di Pengadilan Agama Palembang". *Jurnal dinamika Hukum*, Vol. 12 No. 2 (May 2012), 249.

occupations are farmers and housewives.⁶ Particularly in divorce *thalāq* cases, most of defendants are uneducated housewives.

A preliminary research found many cases where the defendants were helpless in the examination process of divorce *thalāq* at the Religious Court. Some of them attended the hearing process but just kept silent, surrendering, and probably had no idea about their own rights to demand from the plaintiffs such as children living allowance, *`iddah*, *mut'ah*, and joint property. Otherwise, they had information about the rights but decided not to sue them because of their fear of the plaintiffs. Commonly, most of them taking this choice come from rural areas with low education level.⁷ The condition will be typically different when those who understand their rights or are helped by an advocate because their lawsuit of living allowance will be detailed in a large amount.⁸

In examining and making adjudication on any civil case, including the divorce, the judges are prohibited to apply *ultra petitem partium* principle. Article 178 paragraph (3) HIR limits their authority and restricts them to formulate adjudication on any unrequested material or to exceed certain pursuit of related parties. Furthermore, their access is limited by materials presented by the parties or so called *secundum allegata iudicare* principle.⁹

Consequently, if a defendant keeps silent during the hearing process without demanding her right, the judge will not give her the right she deserves in the dictum of adjudication. This situation is certainly disadvantageous for her. In fact, her presence on divorce *thalāq* trial implies an effort to obtain her rights accordance to applicable law instead of solely getting "a divorce certificate". Such situation can actually be prevented if the judges actively give

⁶ The data was based on the recapitulation of the cases, type of the cases, and the occupations in 2015 and 2016. Accessed on September 24, 2017.

⁷ Interview with M. Syafi'i, the judge of Religious Court of Pamekasan, 3rd October 2017. Look Erie Hariyanto, "GERBANG SALAM: Telaah Atas Pelaksanaanya di Kabupaten Pamekasan," KARSAs: Journal of Social and Islamic Culture 15, No. 1 (25 Maret 2012): 73–81.

⁸ Eka Susylawati et.al. "Putusan Nafkah Istri Pasca Cerai Talak di Pengadilan Agama Pamekasan". *Al-Ihkam*, Vol. 8 No.2 (December 2013), 386.

⁹ Elisabeth Nurhaini Butarbutar, "Kebebasan Hakim Perdata dalam Penemuan Hukum dan Antonomi dalam Penerapannya", *Mimbar Hukum*, Vol. 22 No. 1 (February 2011), 74.

information about the right that she deserves for during the trial, particularly at the stage of verification. In addition to provide both information and explanation, judges can also motivate her to demand their rights she deserves for.

However, to date, there still found a debate on whether the judges can do that considering common cases where the judges try hard to provide the defendant maximum protection yet the adjudication is canceled by the Court of Appeals or Supreme Court. These different interpretation and acceptance on the active judge principle as well as the lack of explanation on the concrete action under the category of judges' active attitude lead to distinction of verdict at such above mentioned situation. Thus, not all adjudication of divorce *thalāq* gives existential protection for the defendants' right.

Based on it, this study aims to describe and analyze the acceptability of the judges' active principle at Religious Courts of Madura in divorce *thalāq* cases. Additionally, it also examines the implementation of the principle on divorce *thalāq* cases for fulfillment the wives' rights in the Religious Courts of Madura.

Some previous studies with similar topics have already existed. *First* is a book entitled *Peranan Prinsip Hakim Pasif dan Aktif serta Relevansinya terhadap Konsep Kebenaran Formal* written by Tata Wijayanta, et al (the research of Faculty of Law of Gadjah Mada University 2009). *Second* is a dissertation of Faculty of Law of Airlangga University last 2012 under the title *Prinsip Hakim Aktif dalam Perkara Perdata* by Sunarto. They are similar in discussing the active judges principle in divorce cases. Nevertheless, this study focuses on implementation of the principle in the same case but for the sake of protecting the wives's right.

Furthermore, this study has its significant as it serves to evaluate the civil procedural law, especially the regulation of passive law. It is urgent for the law formulator, therefore, to reconsider the validity of passive judge principle in divorce *thalāq* cases. Likewise, the judges' role of Religious Court should be *conditio sine qua non* in providing legal protection of the wives' rights.

Research Method

Using a qualitative-descriptive-analysis approach, this study tries hard to reveal the original phenomenon through describing acceptability of the active judges principle as well as its implementation in divorce *thalāq* cases among Religious Courts at Madura. The approach was then integrated to sociological law studies in order to describe and empirically evaluate the process of law in the society.

This study takes place at Religious Courts of Madura from four districts, namely Bangkalan, Sampang, Pamekasan, and Sumenep. The primary data was from an interview with the judges, advocates, and citizens who get involved in in divorce *thalāq* cases. Meanwhile, the secondary was from the legislation related to the topic of this study.

Meanwhile, the research data was compiled using the interactive and non-interactive methods. The former was through depth interview and observation, meanwhile the later was through analysis on judges' adjudication. Data analysis, on the other hand, referring to a process of tracking information and systematic arrangement of field notes, was through organizing data during and after data collection.

Additionally, this research uses credibility test through several techniques, namely depth observation, triangulation of source and method, checking member, peer checking, and tracking the suitability of the result.

Research Finding and Discussion

As a country of law, Indonesia puts the law as the main basic for the whole governmental matter as well as at the highest position.¹⁰ As a consequence, any state institution must do the same in taking every action to support so called law supremacy. Both spirit and practice of law supremacy, however, should not ignore three ideas of law namely certainty, justice, and expediency.

¹⁰ Jaenal Aripin, *Peradilan Agama dalam Bingkai Informasi Hukum di Indonesia* (Jakarta: Prenada Media Group, 2008), 1.

Religious Court is an institution under the management of the Supreme Court as juridically regulated by the Law number 7 of 1989 on Religious Court. It gives the Religious Court authority in accepting, examining, and making adjudication on cases among Moslem. Its most prominent and popular is handling marriage cases, especially for divorce cases that some people identify it as the divorce court.

Divorce is a part of marriage because there will be no divorce without any marriage. Marriage, on the other hand, refers to a shared life between a man and a woman as a spouse and divorce becomes the last part of marriage life which takes the spouse apart each others. Relating to this, article 115 of Islamic Law Compilation mentions that divorce can be legally performed only before the Religious Court after its failure to reconcile both parties. However, this article has not been fully valid yet because in *fiqh* regulation as a main reference for the most of Indonesian Moslem, there found no same regulation. Furthermore, any divorce satire can be probably counted as a divorce contract according to *fiqh* perspective. On the other hand, Law Number 1 of 1974 jo. Government Regulation number 9 of 1975 on Marriage, Law number 7 of 1989 on Religious Court, and Presidential Instruction Number 1 of 1991 on Islamic Law Compilation are those which regulate the procedures of divorce.

Those state laws mention that a husband who wants to divorce his wife should file a petition to the Religious Court in his residence. The petition contains the notice of his intention along with related reason as well as a request for the Court to hold a hearing process. The court council will then examine the petition and invite the spouse to come not more than thirty days after the submission for a legal examination as necessary.

If the divorce finally happens, it does not automatically remove the obligation of the plaintiff toward the children and the defendant, particularly for the living allowance. However, the fact shows that the matter of living allowance becomes the most common problem to happen, including in *`iddah* (post-divorce) period. Any divorce before the judge requires the plaintiff to give living allowance due to his capability.

Generally, the civil procedural law is absolute and therefore requires full obedience from judges, related parties, and everyone

with concern to a case in the hearing. The same goes on for the explained principles, especially for the judges who will adjudicate the case. One of the classic principles in civil procedural law is the passive judge.

This principle puts the judges at a passive position not only in waiting any submission or not determining the scope of case, but also in leading the hearing process. This is based on an assumption that any dispute comes from the willingness of related parties (to submit it to the Court) and therefore the judges should not interfere in litigation process. The series of hearing process, submission of evidence and others are handled by the related parties so that the judges only serve to control the process and make sure that the regulation of procedural law are well applied.

According to Sudikno Mertokusumo, the passive judges principle limits their authority to make adjudication on a specific case as submitted. Instead of the judges, it is the related parties who need to provide any proff (*verhandlungs-maxim*).¹¹ Several reasons to support the passive judges principle according to Abdul Mannan, are: Because RV decides that all examination steps must be in written version and Because in the process of hearing, related parties are required for a legal counsel accompaniment (*procedure stelling*).¹²

Furthermore, Abdul Mannan said that the judges serve to lead the hearing through regulating, directing, and making the verdict. They have an active role to lead the process from the start until the end as well as to direct litigants to make the case clear. This clarity will enable them to examine, adjudicate and resolve the cases more easily.¹³

However, he also stressed that advice and explanation from the judges do not mean that they contravene the principle because the scope of dispute has been determined. In fact, they do that in order to make sure that the whole parties apply stipulated regulation well and

¹¹ Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia* (Yogyakarta: Liberty, 1994), 12.

¹² Abdul Mannan, *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama* (Jakarta: Kencana Prenada Media Grup, 2006), 202-204.

¹³ *Ibid.*

to achieve the principle of justice, legal certainty, and expediency.¹⁴ However, the shifting principle from passive to active is inevitable. Among others, it is clear from some jurisprudential materials¹⁵ including article 5 paragraph (1) of Law number 48 of 2009 concerning the judiciary power. It mentions that the judges are obliged to explore, follow, and understand the law values and justice virtue alive in the society. This no longer puts the passive principle as the only one reference for judges in formulating a fair verdict in adjudicating any case. The active judge principle has its main significance in enabling the judges as the chief of hearing in resolving the disputes effectively and fairly. Furthermore, it will make them easier to overcome any obstacles for justice seekers in carrying out a fair judiciary process.

Either normatively or empirically, those two principles need to be applied altogether in resolving civil cases at the courts. Nevertheless, it does not mean that both have interchangeably relation as they are equally fundamental due to their each own functions. The different function between both exists because as a private law, the civil law regulating individuals' interest has its limitation.

It makes very much sense on whether a judge uses either active or passive principle in the hearing process still becomes a dispute. Certainly, this refers to each judge's opinion and consideration and is very much influenced by any literature they read and academic association they affiliate to.

Normatively, there found no legislation ranging from Law number 48 on Judiciary power, H.I.R., R.Bg., to R.v. which explicitly explain the terms of both active and passive judge principle. Therefore, it is necessary to create the following related limitations;

¹⁴ Ahmad Ghufan; Supraptiningsih, Umi;Ferdiant et al., "Empowering Pamekasan to Become a Child-Friendly Regency through Interpersonal Communication" (Atlantis Press, 2018), <https://doi.org/10.2991/iccsr-18.2018.36>.

¹⁵ Indonesian Supreme Court's verdict No. 964 K/Pdt/1986 December 1, 1988 in the case between Nazir T Datuk Tambijo and Asni Lawan Nazan alias Barokak Gelar Dt. Naro. The Supreme Court stated that the valid civil procedural law in Indonesia is informal and the validity of article 178 HIR (article 189 RBg) is not absolute. Therefore, in adjudicating civil cases, the judges might provide a verdict more than a lawsuit in the petition as long as it is not more than the posita lawsuit. See Lilik Mulyadi. *Hukum Acara Perdata Menurut Teori dan Praktek Peradilan Indonesia* (Jakarta: Djambatan, ed. 3, 2005), 18-20.

(1) Providing the involved parties equal opportunities to defend and maintain their rights (equal access rule). In other words, the judges adjudicate the case without discriminating people (impartiality) (article 4 paragraph 1 law number 48 of 2009 concerning judiciary power). (2) Helping the involved parties to overcome any obstacles as an effort to achieve a simple, rapid, and low-cost judiciary process (article 4 paragraph 2 law number 48 of 2009 concerning judiciary power).¹⁶

In divorce *thalāq* cases, the defendant deserves for several rights that she might demand them to the plaintiff as regulated in the legislation. The term “might” shows that the pursuit of rights is an alternative and optional. Therefore in this situation, the defendant has a choice to claim those rights or not. The rights she might demand include: Proper *mut'ah* (gift) from the plaintiff either money or properties except when the defendant is still in state of *qabla al dukhul* (having not had sexual interaction yet). Proper living allowance, *maskan* (shelter) and *kiswah* (clothes) during, the 'iddah (post-divorce) period of a defendant, The rest of owed dowry if the defendant is still in state of *qabla al dukhul* and The cost of *hadhanah* (child-rising) to the children under 21 years old.

A defendant can claim these during the process of divorce *thalāq* petition or thereafter at the Religious Courts where the cases examination takes place. Procedurally, she might file a counterclaim to demand the plaintiff fulfilling his obligations while the amount granted by the judges should be based on a fair consideration between both. Other than in divorce *thalāq* cases, a defendant can also pursue them through divorce claim or as determined by the council of judges using their *ex-officio* right based on consideration of justice value.

A husband's obligations to provide living allowance after divorce is clearly mentioned in article 41 of Law number 1 of 1974 concerning marriage. It states that a consequence of the marriage termination because of divorce before the court is the obligation for a husband to give living cost for his ex-wife. Otherwise, the Court can simply determine the number of his obligation to the ex-wife.

¹⁶ M. Yahya Harahap, *Beberapa Permasalahan Peradilan dan Alternatif Penyelesaian Sengketa* (Bandung: Pustaka Rosdakarya, 1997), 67.

If the ex-husband does not fulfill the verdict of Court particularly regarding to his financial obligation, his action is referred as insubordination of the court decision. Article 196 HIR mentions that "if the defeated party is unwilling or negligent to discharge the decision peacefully, the winning party can submit a petition, either verbally or writtenly, to a chief of court so he/she can execute the decision in prescribed time, namely within eight days at maximum. In this case, the ex-wife can submit a petition to the chief of Religious court when coping with the same situation.

Unfortunately, not all of those living allowances can be available for the wives as defendants because most of them do not attend the divorce *thalāq* trial. This situation drives the court to decide the cases by *verstek* referring the absence defendants as those who relinquish their rights.

In fact, there exists general principle at any settlement of the cases in the court as the basic *fundamentum* as well as main guidelines in manifesting the whole soul and spirit of law. The principles of Religious Court are not much different from those in general courts. In applying the duties and functions, the Religious Court should pay attention to the essence of Law number 7 of 1989 jo. Law number 3 of 2006 and Law number 50 of 2009. One of the principles related to this research is the principle of justice seekers-help.

It mentions that the court must help the justice seeker by overcoming the obstacles in order to achieve the simple, rapid, and low cost judiciary process. On the basis of it, the judges serve not only to examine and adjudicate the cases, but also objectively give the best solution and assistance to the litigants while upholding the justice values since pre-trial hearing to the trial process.

Included in the principle is the active judges principle in assisting the justice seekers. In the civil procedural law, this principle seems to be contrary to the passive ones at glance. In fact, the basic roles of the judge in the active principle, among others, are directly conducting judicial examination of hearing process and delivering the official report orally.

In Madura, data from the official website district of Religious Court on divorce *thalāq* shows that most of defendants do not attend the hearing session so that the judges adjudicate the cases by *verstek*. Therefore, this research purposely chose a few cases with their

attendance at the hearing process to clearly observe the fulfillment of their rights in relation the implementation of active judges principle for women protection.

Selected sixteen divorce *thalāq* cases which were attended by the defendants show that the judges always provide them the rights either based on their claim or not. The differences exist at the types of rights they demand adjusted to plaintiff's economic capabilities and the state of defendants either they are in *nusyuz* (insubordination) condition or not.

In an interview session, the judges of Religious Courts in Madura stated that judges should be passive because divorce *thalāq* is a civil case. The principle becomes a guideline for the judges in adjudicating and deciding the cases because they are prohibited to determine more than what required in the lawsuit of the petition. However, some recent literature or journal articles of law confirmed that passive judge principle is actually attached to the active ones. The existence of active judge principle itself closely relates to article 4 paragraph (2) Law Number 48 of 2009 regarding Judiciary Power as *legitimatie* from the jurisdiction of the judges' activeness.

Relating to the mandate to provide the best assistance in overcoming obstacles for litigants at Religious Courts as stipulated under Judiciary Power Law, either HIR or Rbg also hints such mandate as regulated in Article 132 HIR/156 RBg. It mentions that if the chief considers it important to make the process run well, the council of judges shall advise both parties at the hearing. The Religious Courts in Madura have applied that mandate in providing services to the society all this time.

Unfortunately, in divorce *thalāq* cases, some defendants choose to keep silent and get looked down at the hearing. In this situation, the judges need to give thorough explanation regarding their rights, especially on living allowance. If they understand, the judges will then ask them regarding amounts and exact form of living allowances they demand. This cannot be categorized as an infraction of principle in civil procedural law because the law empowers the judge to use *ex-officio right* in providing provide the rights of wives, especially for living allowance in divorce *thalāq* case. Moreover, those who got the explanation on their rights will demand the living allowances so that the judges will fulfill it in the divorce verdict.

The silent defendants at the hearing process can be related to education or economic factor as well as the fear of the plaintiff. The dominant factor is education level since low education will drive them to feel afraid of hearing atmosphere or unconfident to speak up in demanding their rights. In this situation, the rigidly applied passive judges principle will potentially lead the defendants not to demand their rights due to their ignorance or willingness. As a consequence, they will not obtain their rights as well as an opportunity to demand them because the chance for claim will be expired after the verification step.

In another case, uneducated defendants often do not demand *mut'ah*, living allowances, *maskan*, and *kiswah* to plaintiffs at the hearing event though the plaintiff can afford them all. In such a case, there are different opinions among the judges of Religious Courts with their own different arguments and the legal basis. Some of them stipulate it using their *ex-officio* rights but the others ignore it. If the judges choose to apply passive judge principle and do not use their *ex officio* rights, the defendants might lose their rights and the verdict will be *dispositive*. It means that the verdict will allow the plaintiff to make first *thalāq raj'i* (divorce with possibility of remarriage) to the defendant before the religious court hearing. However, it does not include the *kondemnatoir* point which obliges the plaintiff to pay the cost of *mut'ah* and *iddah* to the defendant.

Otherwise, if the judges apply active the judge principle, the defendants will obtain their rights in divorce *thalāq* cases although they do not submit any counterclaim regarding *mut'ah* and *'iddah* to the plaintiffs. This because the judges with their *ex officio* right can oblige the plaintiffs to discharge their obligation to the defendants.

Several legal bases exist to represent active judge principle and have been used by the judges of Religious Courts in Madura as follow: *First* is the article 41 letter c of law number 1 of 1974 concerning marriage. It mentions that during the hearing process of either divorce or divorce *thalāq* cases, the court might oblige the husbands in order to provide the living cost and/or determine their obligation to the wives. The term "might" means that the judges, as their consideration, may use or not use *ex officio* right to stipulate *mut'ah* and *iddah* in divorce *thalāq* cases.

Second is the article 24 paragraph (2) letter a of Government Regulation number 9 of 1975. It states that during the hearing process, either in divorce or divorce *thalāq* cases, the court might determine living cost of the wife that the husband needs to afford. *Third* is the article 149 letter a and b of Islamic Law Compilation. It regulates consequences of divorce *thalāq* in which the plaintiffs are obliged for obligation for; Providing reasonable *mut'ah* for the former wife either money or properties except if she is in state of *qobla al dukhūl*. Giving living allowance, *maskan*, and *kiswah* for the former wife during *'iddah* period except if divorce is *thalāq bā'in* (divorce with impossibility to remarry), *nusyūz*, or occurring during her pregnancy.

Fourth is equality before the law principle. Based on this, the judge needs to give fair treatment for involved parties before the trial, particularly in formulating the fair adjudication and providing equal rights to file a claim. In several Religious Courts, some plaintiffs make the petition or lawsuit under a professional guide, while defendants formulate their answer or counterclaim by themselves. For the sake of justice, all parties need to obtain equal substantive law (*equal uniformity*) as well as equal protection for their rights according to the provision of substantive law (equal protection of the law).¹⁷

Any divorce *thalāq* decision that only grants the request of the plaintiff without urging them to pay *mut'ah*, living allowance and such can still be justified according to the principle of the passive judge. Nevertheless, on the perspective of justice and expediency principles, it still leaves problems over the rights of the wife. This is particularly because a wife's attendance in the divorce *thalāq* trial implies her wishes that she could obtain her right not only a divorce certificate.

Practically, some ex-wives are still unsure even worried on whether her rights stipulated in dictum of divorce verdict will be well fulfilled by the ex-husband. This unnecessarily occurs because legislation literally urges the ex-husband as plaintiff to discharge his obligations to the defendants' rights after the divorce before stating the divorce *thalāq* pledge. If the plaintiff gets difficulties to do it, the

¹⁷ A. Mukti Arto "Pelayanan Prima Jasa Peradilan Membangun Kepercayaan Publik dan Jati Diri", *Varia Peradilan*, Majalah Hukum, Tahun XXV No. 298, September 2010, Jakarta: IKAHL, 2010, 83.

divorce *thalāq* pledge settlement will be postponed. Later on, he will be given six months period at maximum after the verdict with a legal binding for the pledge of *thalāq* to fulfill the right. If there nothing occurs, the decision of divorce *thalāq* case loses its legal force and consequently, the husband must submit again his divorce *thalāq* case. This shows that the law has provided legal protection for women.

Conclusion

The judges of Religious Courts in Madura generally accept the active judge principle on divorce *thalāq* cases even though in the limited use. It is particularly due to the basic rule in civil procedural law to apply the passive one. The use of an active principle, among others, is clear from the issued verdicts which provide the defendants' rights as long as they are not in a state of *nusyūz*. This is literally based on the spirit to fulfill the wives' rights as stipulated at the law that judges have the *ex officio* right to provide them legal protection.

The implementation of active judge principle in the context of Madura is through some ways, namely explaining the defendants's rights after divorce which they can claim to the plaintiff, asking their wishes relating to their rights or providing what they deserve based on the *ex officio* when they stay silent during the hearing session. Further, the council of the judge can delay the pledge of *thalāq* for six months if the plaintiff can not fulfill the defendants' rights as mentioned at the court adjudication. This delay becomes a forceful instrument to fulfill the defendants' rights. After six months, the divorce *thalāq* verdicts have no legal binding anymore. The most common obstacle for the council of the judge in protecting the wives after divorce is when a case ends with *verstek*. It will automatically lead to unavailability to demand the wives' rights. Furthermore, the *verstek* verdict rarely drives them to make any *verzet* remedy.

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