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Muslim Women and Post-Divorce Rights in Indonesia: Husbands' Perception and Courts Judges' Discretion on Alimonies

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Introduction

Women have for long time become a central issue within the Islamic legal discourse in the Muslim world, including Indonesia (Esposito, 2001; Husseini, 2006; Tucker, 2008; Cammack, 1999). Classical Islamic legal doctrines have been deemed by a number of Muslim scholars as one of the barriers for Muslim women to receive equal and just position. In line with the reform trend and modern demand of life, Muslim countries made legal changes which have led to the empowerment of legal status of women (Hirsch, 1998; Cammack, 1999; Tucker, 2008), including Indonesia (Nasution, 2009). The rule of divorce, for an example, has received modification allowing women as men to have access to seek for divorce (Bowen, 2003; Cammack, 2007) and to arrange divorce more easily (Sumner and Lindsey, 2012). The rule of the rights that emerge after divorce has to some extent also received modification, although in general it maintained what has been regulated in classical legal doctrines.

Nonetheless, such legal reforms have not fully and instantly led Indonesian Muslim women to a better justice in case of post-divorce rights in particular. It must be noted that under Indonesian Islamic legal rule women have several rights after divorce. They include right to custody, iddah maintenance, financial support for children, and gift of consolation (*mut'ah*). Except the right to custody, all these right are awarded if divorce petition is filed by men. If it is filed by women under *khuluk* way, women receive less right, as rights to spousal alimony and gift of consolation are excluded.

In regard with the procedure of divorce, the *Kompilasi* makes quite a good reform in term of divorce under wife's petition, which is in Indonesian knows as *gugat cerai*, and its implementation, introducing two ways of divorce proceedings (Bowen, 2003). It is article 148 that clearly regulates these two ways. The article states that in case that

woman wishes to proceed divorce by *khuluk*, the judges of religious court give an explanation on the effects of *khuluk*. After both parties, wife and husband agree the amount of money compensation (*iwadl*), religious court issue a decision on the permission for husband to pronounce divorce formula and appeal is not accepted on this decision (4). However, when agreement of the amount of money compensation is not achieved, religious court judges hear and treat the case as 'common case' (6),¹ which, therefore, means that divorce is not to be proceeded under *khuluk* way. From this article, I understand that not all 'gugat cerai' can be treated as *khuluk*. The *kompilasi* has therefore gone beyond *fiqh* doctrines and introduced important reform, giving wife right to petition divorce without always having to pay money compensation. Wife has therefore also right to spousal alimony when she is divorced from her petition deploying non-*khuluk* proceeding. As will be elaborated below, this is unfortunately not the case in practice.

This paper shall discuss the implementation of post-divorce rights of women in Indonesia which concern with property. It discusses how the rules of these rights to property, i.e., iddah maintenance and financial support for children alimonies, are implemented by judges and how husbands see these kinds of rights. It argues that women are mostly aggrieved about these rights. This paper is based on data gathered from two methods of research, bibliographical and empirical investigations, through interviews, observations on hearings, and analysis on decisions. Conducted in two courts, empirical investigations were completed by interviewing 23 female litigants and 10 judges and by attending 28 hearings on cases of divorce most of which include the decree on spousal and children alimonies. The discussion will be therefore based on the general data that I gathered from a number of documents and on specific data that I obtained from my fieldwork in three religious courts of Tangerang, Serang and Cianjur.

Women, post-divorce rights, and property

Women's property rights and men's financial responsibility

The regulation of the awarding of post-divorce property rights to women stems from the Islamic ruling of husbands' obligation to pay their wives when they enter into marital contract. Wives have right to

¹ Article 148 of the *Kompilasi*.

property in form of financial support from their husbands during their marital relationship. In general when women start to enter into marriage and end it, they have also fixed rights to property from their husbands. Beside their allocated share of inheritance upon the death of their husbands, women have at least three rights; to the dowry at the time of the marriage performance; to the maintenance throughout the course of the marriage, and, to the gift of consolation after the occurrence of the irrevocable divorce (Ridha, 1947).

When Muslim couple separate, the majority of Islamic family codes regulate that women are not entitled to any post-divorce financial support and property settlement under the pretext that these women have already exhausted their shares by being sheltered, clothed, and fed by their husbands during the period of their marital life. However, they administer that divorced women are only entitled to three months of spousal support during their religiously prescribed waiting period, known as *'iddah* maintenance (Tucker, 2008). Therefore the rights of women to property after divorce include *iddah* maintenance, gift of consolation, and allocated share of inheritance from their husbands' wealth. One more right to property is due to women when they are awarded right to custody over their children, namely financial support for their children.

Iddah and Children Maintenances

As has been slightly mentioned above, in Indonesia divorce effects are also regulated in the Law of Marriage of 1974. The rights and obligations of spouses after divorce are specified in this law. Besides custody, financial maintenances for divorced wives during *iddah* and for children after divorce are also administered in the *Kompilasi*, a legal reference for Muslim. On the issue of maintenance for children, article 156 (d) rules when marriage dissolves husbands are entitled to provide financial supports for children according to their financial capacity, (and this continues) until children become mature and are able to support themselves or enter into age of 21.² The issue of *iddah* maintenance is regulated in articles 149 and 152. Article 149 regulates that husbands are obliged to award proper *mut'ah* (gift of consolation) to his ex-wife, be in goods or money, if marriage is dissolved by *talak*

² Article 156 (2) of the *Kompilasi*.

(divorce under husband's petition), except if marriage is not consummated. It states that 'if marriage is dissolved by *talak* (divorce under husband's petition), a husband is entitled to: a. award proper *mut'ah* (gift of consolation) to his ex-wife, be in goods or money, except if marriage is not consummated, b. provide financial support during waiting period, dwelling, and clothes, except if the wife is divorced for *bain* (irrevocable divorce), or is considered as disobedient with being not pregnant'.³ It further regulates that husbands are also to provide financial support during waiting period, housing, and clothes, except if the wife is divorced for *bain* (irrevocable divorce), or is considered as disobedient with being not pregnant.

The ruling that wife's disobedience harms her to financial maintenance is stressed in article 152, stating that an ex-wife has right to financial maintenance during waiting period (*iddah*) except if she is disobedient.⁴ It states that, 'bekas isteri berhak mendapatkan nafkah *iddah* dari bekas suaminya kecuali ia nusyuz (an ex-wife has right to financial maintenance during waiting period (*iddah*) except if she is disobedient'.⁵

It seems that post-divorce rights for women have been well administered and the administration has stressed on women's interest and tried to improve their legal status, although the rules in a whole remain to follow the Islamic traditional laws.

Women, post-divorce property rights, and implementation

Now I am moving to the cases of women's post-divorce rights, including *iddah* maintenance and financial support for children in practical level. Above I argue that in the case of divorce women have gained better legal information, could use court more easily, could negotiate judges' decision, and win the case. When women have obtained divorce, a question rises and needs discussion, i.e., do women get their rights after divorce?

As has been mentioned above, women are entitled to some rights after divorce. These include custody over their children, financial

³ Article 149 of the *Kompilasi*.

⁴ Article 52 of the *Kompilasi*.

⁵ Article 52 of the *Kompilasi*.

maintenance during waiting period (*iddah*), and financial support for the children under their custody. The points that I want to observe in order to answer the above question are how these rights are dealt with by judges and realized by husbands and how women and men see these rights. However, I shall only discuss two post-divorce rights that are related to property, namely *iddah* maintenance and financial support for children.

Iddah maintenance: procedural reform vs financial problems

If we look at the decisions on divorce cases petitioned by husbands, we could assume that wives' right to *iddah* maintenance have been awarded. As mentioned above, wives have rights to spousal alimony after divorce initiated by husbands and most of the wives interviewed are aware of this right. In fact, in all eighteen cases heard in courts of Tangerang and Serang where I did research for Islam Research Program, judges required husbands to pay and submit to the clerk the spousal alimony and *mut'ah* (gift of consolation). Even better, judges of this court as those of other courts in Aceh, Padang, and Makassar (Salim, 2009) demanded husbands make the payments before they are permitted to pronounce divorce formula at court.⁶

In this regard, judges, however, are often very realistic and adapt to actual condition of husbands. When they see that husbands have financial problems, judges are usually not very strict and would allow husband to pronounce divorce formula without husbands making payments at court. Judges, however, warn the husbands perform their obligations afterward. In so deciding, judges avoid to leave wives with an unclear legal status. Judges also often adapt to the financial condition of husbands and therefore ignore the amount demanded by wives and decided different amount of money to be paid by husbands.⁷ Therefore, although changes in judges' attitudes have to some extent helped improve justice for women, a number of issues, such as

⁶ Based on notes on hearings held in courts of Serang and Tangerang and interviews with a number of judges, Serang and Tangerang, Spetember, October and November, 2010.

⁷ Based on notes on hearings held in courts of Serang and Tangerang and analysis on on a number of judgements issued by these two courts.

economic and procedural issues, still mean that many husbands do not fulfil their legal obligations (Nurlaelawati, 2013; van Huis, 2011: 246).

Consider two cases from the religious courts of Tangerang and Serang. Case one is noted from my hearing attendance in Tangerang court. The case involves a husband (S) who wanted to divorce his wife and a wife (RH) and had been heard in two sessions. This third hearing began with the confirmation on a number of agreements made in the previous hearing on the issue of post divorce rights to be fulfilled by husband, as they had agreed to divorce. The agreement goes as follows: spousal alimony is 700.000,- rupiahs per month and to be paid for three months, and equals to 2.100.000,- rupiahs, *mut'ah* (gift of consolation) is 500.000,- rupiahs, and the sum of all the payments became 2. 600.000,- rupiahs. There was no agreement on alimony for children as they had no child. After the wife and husband had agreed the total of the payments, the judges asked the husband if he had prepared the money to which the husband answered in a positive sign. Without being asked, the husband submitted the money to the clerk who directly checked if the amount was right. After he found that it was the right amount he passed the money to the wife. She received the money in a casual fashion and did not do what the chief judge asked to do; to check again the amount of the money. The chief judge therefore permitted the husband to pronounce the divorce formula after he verified that the wife was not in menstruation. The hearing was then closed and litigants shake judges' hands and dismissed.⁸

Two other hearings had been conducted when RH approached the chief judge. She tried to verify the rulings on the alimony and stated that she just realized that the amount was not as she proposed. She mentioned that she proposed more than what she received that day. She further said that she agreed to be divorced if her request was met by her husband. The chief judges responded to it in a relaxed fashion and said that he remembered the amount requested by her, but found that the amount was too much and was not realistic. Considering the amount was not suitable with the financial condition of the husband, the judges decided to change the amount and gave lower amount. To stop her complain, the chief judge said that judges could fulfil either the

⁸ Based on notes on hearing held in court of Tangerang, 5 October 2010.

whole petition or part of it and reminded her of her right to appeal the rulings before the final hearing on the declaration of divorce formula.

Case two involves a wife who was divorced by her husband. She was very aware of her post-divorce rights and demanded that she be paid by her husband. One of her demands was dismissed, as, according to judges, it was an excessive, illogical and unlawful demand, not admitted in law, i.e. *uang sakit hati* (financial compensation for a broken heart). However, the judges met her other demands on spousal alimony and gift of consolation and agreed the amounts to be paid to the wife. The judges asked the husband to make the payments at court and the husband did so.⁹

These two cases basically demonstrate quite good fate of wives in case of alimony after divorce, compared to what women received before this procedural reform. However, what have been achieved was not as what they demanded and expected and was not in full accordance with the ruling.

Some other cases tell us that in this case women remain to have more serious problems. From my interviews with a number of men and judges, I drew conclusion that many men avoid making the payments due to a number of reasons, including economic problems and ignorance. These reasons are strengthened by their view on that obligation. Although husbands are aware that the obligations are mentioned in courts' decisions, they could still avoid the payments, assuming that the payments constitute religious obligations. They are also aware of the punishment, when they fail to make them. Nonetheless, although in many cases the threat of punishment in the hereafter is a much greater motive to comply to laws, in this case their view that the sanction would be religious and would come in hereafter leads them to ignore the payments and excuse themselves as poor people¹⁰ and contributed to the lenient implementation of the rulings by husbands. The absence of any instrument or mechanism to enforce the execution of rulings has encouraged judges' negligence in terms of implementation.

Women can also lose their rights to financial when husbands leave his marital home for years and wives seek for divorce without

⁹ Based on notes on hearing held in Court of Serang, 2010.

¹⁰ Interviews with a number of men and judges from Tangerang and Serang.

their husbands' presence, financial maintenance would certainly not be regulated in decisions. Worse fate greets wives when they are considered to be disobedient, a condition that would not permit wives to receive maintenance. Interesting is that the claim that women are disobedient cannot be always considered fair, as many women are considered disobedient only because they left marital home. Judges often did not attempt to investigate why they left marital home. Instead they maintained that disobedience could be deemed done merely by wives' leaving marital home.¹¹

Financial support for children, religious or legal claim?: lack of mechanism of execution

Alimony for children after divorce is another case where women remain to receive injustice. When women are awarded right to custody, wives are not left alone to bring up the children. As stipulated, ex-husbands or fathers are always entitled to contribute to the upbringing of their children under wives' custody.

This case is therefore very relevant to the case of custody. In regard with the issue of custody, the stat Islamic law of Indonesia regulates that when parent divorce custody over children aged below 12 is awarded to their mothers and those aged above 12 can choose which parent they will leave with. Although the rule is clear, woman can face two issues in custodial cases: first she loses right to become a custodian according to the law (that is, to retain custody of children under the age of 12, while children over 12 can choose which parent they will live with); secondly, she may struggle to have the courts' decision to make her custodian actually implemented. Although many women face problems of the first case, more women are awarded right to custody over their children.

Based on judges' legal policies, husbands are required to make payments of, at least, one first month together with the payment of spousal alimony, when mothers are warded right to custody over their children. However, a number of husbands could not realize it, due to economical issue and lack of procedural mechanism, in particular

¹¹ Based on analysis on decisions issued by three courts of Tangerang, Serang, and Cianjur.

(Nurlaelawati, 2013; van Huis, 2011: 246-247). Generally, judges have attempted well in regard with this right. In fact, all of the 37 collected decisions from courts of Tangerang, Serang and Cianjur, and six hearings on divorce petitioned by husbands at courts of Serang and Tangerang include obligations for the husbands to contribute to the upbringing of children under the mothers' custody. One of the six cases told us that the husband made the payment of alimony for child for the first month before he was permitted to pronounce divorce formula at court, adding to the amount of money to be paid by the husband for spousal alimony.

To comprehend better what is practiced I interviewed 12 male divorcees about this issue and found that, while there might be few husbands who have complied the ruling, none of 12 husbands interviewed for my research were paying alimony according to the ruling. Four of these twelve husbands had paid maintenance only during the first few months and two of remaining eight made regular payments during few years and still pays it until now but irregularly. The other six had not paid maintenance at all. So, irregular or even non-payment of post-divorce alimony for children by ex-husbands constitutes another example of how women have not benefitted so far. Besides economical issue, men's view that the obligation of providing alimony for children, as of paying spousal alimony, constitutes religious has led women to remain grieved in this regard.

One example represents the majority cases of alimony for children. A mother with two children was divorced by her husband and was awarded right to custody over one of their under aged child, 7 years old. In the ruling, she had the right to receive 300 thousand rupiahs every month from her ex-husband. She had been divorced for one year when I interviewed her and when she said that she no longer received regular money and could not expect more than what she received from her ex-husband, i.e., smaller amount received only every school term. She tried to understand the financial condition of her ex-husband who had married again with another woman.¹² Her lenience to her-ex husband's position was also influenced by the fact that one of their child is under husband's custody.

¹² Interview with NV, Tangerang 2012.

Conclusion

To conclude, the discussion on how and why women seek for divorce and on why women use courts more than men do has led us to easily understand why divorce cases petitioned by wives were doubled or even more than doubled than those brought by men. In regard with this, what Nasaruddin has said might be wrong and need to be corrected. Nasaruddin has accused judges of being too 'obral' to decide divorce cases and claim them as having played with divorce cases as to upgrade their career.¹³ In fact, the increase of divorce rate petitioned by women was motivated by their strong intention to divorce and the rise of their legal knowledge. It might be true that divorce proceedings are not easier than before. However, it is not achieved from judges' too loose application of law but due to procedural legal reforms made by the government who was influenced by international aids, both in financial and system issues.

Meanwhile, the discussion on women's post-divorce rights after divorce has demonstrated that it is hard to implement in the coming time what is decided by court. It is the problem of the system of execution that has prevented it implemented well. Indonesia remains to have problem in the issue of system of the implementation of law. The fact that Indonesia has serious problem in economy has contributed to the weak implementation of law and to the grievance of women in the issue of property. Husband' perception of the payment of alimonies as religious obligation has also contributed to the loose implementation of the law. Therefore, although judicial technical reforms have been made by the state as to create better justice for women and that judges have attempted to give better protection, the perception that the payment of alimonies are religious obligation rather than legal claims, has made women remain to be aggrieved

¹³ See 'Wamenag: Perceraian Marak karena Pengadilan Agama di Bawah MA', *Merdeka.Com*, December 19, 2012, accessed on January 26, 2013.

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