

Reconstruction of The Implementation of Children's Rights Protection Regulations After Divorce in Law Enforcement Practices in Religious Courts

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Abstract. *This research is motivated by the implementation of post-divorce child protection regulations in law enforcement practices in Religious Courts which have not been effective. This can be seen in a number of divorce case decisions in Religious Courts, especially those decided without the presence of the parties (verstek or in absentia), have not guaranteed the fulfillment of children's rights compared to granting the main case of the divorce suit itself. While child protection is part of the implementation of Human Rights and is a mandate of the 1945 Constitution of the Republic of Indonesia Article 27 paragraph (1) and Article 28B paragraph (2), in the implementation of post-divorce child protection regulations until now there are still various problems that arise both in terms of Human Resources, legal umbrella, facilities and infrastructure and the active role of society and government. In terms of Human Resources related to the activeness of judges in making decisions related to children's rights, in terms of the legal umbrella, existing child protection regulations also still need to be revised because there are still things that need to be regulated, in terms of facilities and infrastructure, it is also necessary to improve the database and compatible IT-based applications, and in terms of socio-cultural, the role of society and government in implementing post-divorce child rights protection is still weak. This research is qualitative, using descriptive methods and supported by a juridical-normative and juridical-sociological approach. Data collection sources and techniques are obtained from primary and secondary data sources related to the research object. Data analysis techniques use a deductive approach until research conclusions are formulated. The results of this study indicate that the implementation of regulations on the protection of children's rights after divorce in law enforcement practices in Religious Courts has not been fully implemented even though there are various positive laws that regulate it, there are various obstacles and require concrete solutions to problems that hinder the implementation of these children's rights. The main obstacle to the implementation of regulations on the protection of children's rights in Religious Courts is the lack of breakthroughs by judges in making new legal discoveries and also harmonization of protection regulations related to the protection of children's rights. While the solution is to harmonize the regulations that serve as the legal umbrella for the protection of*

children's rights after divorce and change the judge's paradigm regarding the provision of decisions that favor children's rights after divorce to enforce the implementation of children's rights after divorce in Religious Courts, reconstruction is needed. carried out by way of legal reform through three ways, namely: constitutional approach; structural approach; and cultural approach. In addition, government and non-government institutions also play an active role in providing protection for children's rights in Indonesia.

Keywords: *Protection of Children's Rights; Post-Divorce; Religious Courts.*

1. Introduction

This research is motivated by the phenomenon in recent years related to the implementation of child protection regulations after divorce in law enforcement practices in Religious Courts.¹ The implementation of child protection should actually receive great attention from all relevant stakeholders, especially in judicial institutions, but the facts show that there is still a lot of neglect and the rights of children have not been guaranteed and fulfilled.² This can be found in a number of divorce case decisions both in Religious Courts and in District Courts, especially those decided without the presence of the parties (*verstek* or *in absentia*), where the portion of fulfilling children's rights has not received a more adequate portion in the judge's decision compared to granting the main case of the divorce suit.³

Protection of children's rights covers 2 (two) large areas, namely the fulfillment of children's rights and special protection of children implemented by the state, central government, regional government, other state institutions, society, families, and parents or guardians as well as the business world. It is recorded Several children's rights that have not been optimally fulfilled are children's rights to grow and develop, children's rights to receive protection from violence and discrimination, children's rights to education, rights for children with disabilities, and the rights of children with disabilities to obtain legal aid.⁴

Moreover, in terms of fulfilling children's rights after divorce, it has become a highlight for many parties from the perspective of marriage law, where children are often the subjects who are most often positioned as victims of divorce. Although there are already regulations governing divorce in the Marriage Law in Indonesia, the protection of children's rights after

¹ Murniasih, 2022, "Protection of the Rights of Women and Children After Divorce According to Statutory Regulations", in <https://www.pa-sanggau.go.id/wp-content/uploads/2022/06/Article-1.pdf> accessed 4 May 2024.

² Muliawan, "New Paradigm of Child Protection Law Post Amendment to Child Protection Law", see <https://pn-palopo.go.id/index.php/publikasi/artikel/164-paradigma-baru-hukum-perlindungan-anak-pasca-perubahan-undang-undang-perlindungan-anak> accessed May 4, 2024.

³ Aziz Sholeh, Dian Rachmat and Aah Tsamarotul Fuadah, 2019, "Assistance for Women's and Children's Rights After Divorce", *Jurnal CIC*, Vol. 1, No. 2, Depok.

⁴ DPR RI Public Study Team, "Study and Evaluation of Monitoring the Implementation of the Child Protection Law", in <https://berkas.dpr.go.id/puspanlakuu/kajian/kajian-public-141.pdf> accessed 4 May 2024.

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divorce is still a very complex legal problem.⁵ For example, several cases that occur cause children to become victims of divorce because parents experience continuous disputes, because of domestic violence, and because of other factors.⁶

The implementation of the protection of children's rights after divorce is in fact part of the implementation of human rights and the mandate of the 1945 Constitution, Article 27 paragraph (1) and Article 28B paragraph (2), guaranteeing the fulfillment of children's rights is part of the implementation of the principle of equality and non-discrimination, the principle of equality before the law.

The Indonesian government is one of the countries that has ratified the 1988 UN Convention on the Rights of the Child, which was ratified by Presidential Decree Number 36 of 1990, but in reality the mainstream policy and child protection laws still do not fully support the need for child protection as an integral part of human rights (HAM). In the Indonesian legal system, the protection of children's rights is regulated in Law Number 35 of 2014 concerning amendments to Law 23 of 2002 concerning Child Protection, but in practice it seems that it has not been fully able to guarantee the protection of children's rights, especially after divorce.

In addition, the development of the above data also shows that every year divorce cases decided through the Religious Court will also have an impact on the lack of guarantees for the protection of children's rights. This is certainly a concern, because ideally marriage aims to form a harmonious family and produce good offspring, but it turns out that some end in divorce. According to the researcher, the above conditions, in addition to not being considered in policy, efforts to fulfill the rights and obligations to children in marriage or after divorce have not been implemented properly as they should.⁷

Efforts to protect children's rights in Indonesia seem to have not been implemented optimally by society and the state. Therefore, there needs to be encouragement from various parties to provide awareness to parents regarding the importance of fulfilling children's rights and input to various state institutions to make the protection of children's rights the orientation of policies to be issued. This encouragement could come from religious views regarding the need to fulfill children's rights. post divorce or from amonglaw enforcement officers in court.⁸

According to several previous research results, it was stated that in general there are three main factors or causes of disharmony in the household that result in divorce, namely: first, the failure to fulfill physical and spiritual sustenance. Physical sustenance is the obligation of couples to support each other, for example by contributing to the management of the

⁵ Law Number 1 of 1974 concerning Marriage.

⁶ KPAI Public Relations, 2016, "KPAI Asks Government to Be More Serious in Handling Cases Against Children", see in <http://www.kpai.go.id/berita/kpai-minta-pemerintah-lebih-serius-tangani-kasus-pada-child/>, accessed May 4, 2024.

⁷ F. Agustina, 2023, Fulfilling Children's Rights Through Post-Divorce Relationships: An Investigation from Bima. Al-Ahwal: Jurnal Hukum Keluarga Islam, pp. 158-179.

⁸ Achmad Asfi Burhanudin, Parents' Obligations Regarding Children's Rights After Divorce, in <https://www.academia.edu>, accessed May 4, 2024.

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household economy. Meanwhile, spiritual sustenance is the way a husband and wife treat each other, so that this cause can be used as a reason to end a household; second, getting married at a young age results in a high divorce rate in Indonesia; and third, domestic violence, both physical and psychological violence committed by the husband and wife.⁹

In addition to the three factors mentioned above, there are four other factors that have caused divorce. The loss of feelings of love does not necessarily mean the end of a marriage, including:¹⁰ First, the child factor. The child factor, as revealed in many cases, is indeed the biggest reason for couples to stay together. However, children are always victims of their parents' divorce. Although later a couple who have separated claim that they will continue to give their best attention and affection to their child, because a child's heartache is not something that can be easily erased;

Second, the second reason is because of the image factor. Living in an eastern country full of normative rules is indeed a challenge for the people who live in it. Social sanctions are sometimes more severe than any sanctions so that the perpetrator is helpless. This is also what makes couples think twice about ending their relationship;

Third, Parental factors. Parental factors are still factors that weigh on the heart to break away from a partner. The loss of economic support is also another reason for the survival of a marriage that is clearly no longer sustainable. Although in modern times many women have their own careers, it does not mean that the role of the husband as the backbone of the family is simply lost; and Fourth, economic factors. If a divorce occurs, there will be many expenses that must be borne alone. Because of this factor, the wife is ultimately willing to sacrifice her feelings by remaining in the bonds of marriage.¹¹

Viewed from the perspective of Islamic law, regulating the protection of children's rights due to divorce in Islamic law is the responsibility of both parents. One of the rights of children as a result of the divorce of their parents is child maintenance (hadhanah) and child support. Right children to be looked after in terms of education, health and so on. The concept of child maintenance in Islamic law is known as hadhanah. The term hadhanah means "placing something close to the ribs or on one's lap as if the mother at that time was protecting and nurturing her child, so that the word hadhanah is used as a term which means: "the education and care of the child from birth until he is able to stand up on his own to take care of himself which is carried out by the child's relatives."¹²

The concept of hadhanah is intended to be more synonymous with caring for children who are still not mumayyiz until the child is able to be independent and responsible. Fiqh scholars define: hadhanah, namely taking care of young children who are not yet mumayyiz, providing something that makes them good, protecting them from something that hurts and

⁹ Kustini and Ida Rosidah (Editors), 2016, Jakarta, Center for Research and Development of Religious Life.

¹⁰ Editor, "Background to Divorce", see in http://pa-sukoharjo.go.id/index.php?option=com_content&view=article&id=620:background-of-divorce&catid=38:pa-sukoharjo&Itemid=53 accessed May 4, 2024.

¹¹ A. Rifai, HB Alteng and R. Alauddin, 2022, Implementation of Religious Court Judge's Decisions in Children by Husband Post Divorce. Legal Briefs.

¹² Abdul Rahman, 1992, Marriage in Islamic Law, Jakarta, Rineka Cipta, p.138.

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damages them, educating them physically, spiritually and intellectually, so that they are able to stand up to face life and bear responsibility. The issue of caring for children is not only the obligation of every parent, but also includes the care carried out by parents with all their potential. Every child will feel comfortable if they are always under the care of their parents with lots of love and all the parents' potential is given fully for the child's future.¹³

In the context of Islamic law, it has been explained that the best education for a child is if he is under the care of his two parents: his father and mother who raise him with love and affection and give him a good education, so that the child grows fertile and physically healthy, as well as his intelligence, nobility of morals and refinement of his feelings. However, when the parents divorce, the care of children who are not mumayyiz (under 12 years) becomes the mother's right. If the child is considered mumayyiz, he is allowed to choose between going with his mother or father. Or if the judge has a different opinion then the right to hadhanah is left entirely to the court's decision while still considering the principle of the best interests of the child.¹⁴

Then, seen from the perspective of positive law applicable in Indonesia, there are a number of material legal provisions relating to the protection of children's rights after divorce in the Religious Court. For example, relating to the position of children as human beings, the fulfillment of their welfare and legal protection of their rights against children who are victims of their parents' divorce. Some of the regulations in question include: First, Law Number 1 of 1974 in conjunction with Law Number 16 of 2019 concerning Marriage. This regulation has regulated the rights and obligations of parents towards children during marriage, as can be read in the provisions of Article 34 paragraph (1), Article 45 paragraphs (1) and (2); and the rights and obligations of parents towards children after a divorce as stipulated in Article 41 letters (a), (b) and (c).¹⁵

Second, Law Number 23 of 2002 in conjunction with Law Number 35 of 2014, in conjunction with Law Number 17 of 2016 concerning Child Protection. Explanation of the provisions of Article 2 of this Law states that, "what is meant by the best interests of the child is that in all actions concerning children carried out by the government, society, legislative bodies, judicial bodies, the best interests of the child must be the primary consideration". Therefore, the judiciary (court institution) is required to play an active role in realizing the protection of children's rights, especially for children who will become victims of divorce. To improve the fulfillment of children's rights, the law was revised twice with Law Number 35 of 2014 and Law Number 17 of 2016 concerning Amendments to Law Number 23 of 2002 concerning Child Protection. The provisions of Article 23 paragraph (1) and (2) state: The State, Government and Regional Government guarantee the protection, care and welfare of children by taking into account the rights and obligations of parents, guardians or other

¹³ Hilman Hadikusuma, 2003, Indonesian Marriage Law (According to: Islamic Law and Customary Law Legislation), Bandung, Mandar Maju, p. 144.

¹⁴ Meilisa et al., 2008, Analysis of the Concept of Child Protection and its Implementation in Indonesia, Initial Study, Jakarta, LPPM Unika Atma Jaya, p.42.

¹⁵ Law Number 1 of 1974 concerning Marriage.

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persons who are legally responsible. responsible for children. The State, Government and Regional Government supervise child protection.¹⁶

Based on the provisions of the article above, every judge who handles a divorce case and in the examination of the case there are children who are reasonably expected to be victims of the divorce, the judge must be proactive and responsive in providing legal protection to the child, so that there are no attempts to neglect the child's rights due to the unfulfilled needs of his life, then the judge is obliged to provide legal certainty about who is responsible for his needs of life.

In addition, there are also a number of formal legal provisions relating to the regulation of the protection of children's rights after divorce in the Religious Court, especially those regulating the obligations of both parents to fulfill children's rights after divorce, including:¹⁷

Second, Supreme Court Jurisprudence Number: 556 K/Sip/1971 dated January 8, 1972; jurisprudence Number: 1245 K/Sip/1974 dated November 9, 1976; and jurisprudence Number: 425 K/Sip/1975 dated July 15, 1975 which contains the legal principle that: *Judex factie* is justified in giving a decision exceeding the plaintiff's *petitum*, on condition that it is still in accordance with the arguments/posita/material events presented by the plaintiff in his lawsuit, namely there is no objection from *judex factie* in its decision to grant more than the *petitum* demanded by the plaintiff, as long as it is still in accordance with the material events presented by the plaintiff in his lawsuit."

Third, Circular of the Supreme Court on Protection of Children Due to Divorce. The Supreme Court as an institution that fosters and supervises internally the 4 (four) judicial environments under it has issued Circular of the Supreme Court Number 7 of 2012, dated September 12, 2012 on the Results of the Formulation of the Supreme Court Chamber of the Republic of Indonesia to Become a Guideline for the Implementation of Duties in the Court, which has summarized the Results of the Formulation of the Civil Chamber and other chambers carried out on March 14-16, 2011, in point XII it is stated: As a result of divorce does not create new guardianship of the children born (Article 50 of Law Number 1 of 1974), the judge must appoint one of the two parents to act as guardian for the children.¹⁸

Fifth, Presidential Instruction Number 1 of 1991 concerning Orders for the Dissemination of the Compilation of Islamic Law. Several articles in the Compilation of Islamic Law provide provisions regarding the right to care for children (*hadhanah*) by their parents and regarding the person responsible for their child's support in the event of a divorce between the parents. The provisions of Article 105 state: "In the event of a divorce: (a) The maintenance of a child who is not *mumayyiz* or not yet 12 years old, is the right of the mother; (b) The maintenance of a child who is *mumayyiz* is handed over to the child to choose between his father or mother as the holder of the right to maintain him; (c) the maintenance costs are borne by the father." Then the provisions of Article 149 letter (d) Compilation of Islamic Law states: "As a result of the dissolution of the marriage due to divorce, the ex-husband is

¹⁶ Law Number 17 of 2016 concerning Child Protection

¹⁷ Ahmad Choiri, 2015, "Legal protection for children who are victims of divorce who are neglected by religious court judges", in www.badilag.net, accessed on May 4, 2024.

¹⁸ Law Number 1 of 1974 concerning Marriage.

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obliged to: provide support for his children until the child is 21 years old or independent", and Article 156 letter (d) states: The consequence of the dissolution of the marriage due to divorce is that all the costs of the child's hadhanah and child support are borne by the father according to his ability at least until the child is an adult and can take care of himself (age 21 years)".¹⁹

2. Research Methods

Research methods are basically a scientific way to obtain valid data with the aim of being found, proven and developed as a source of knowledge so that in turn it can be used to understand, solve and anticipate problems.⁴⁰ In addition, research methods are also scientific activities that are based on analysis and construction that are carried out systematically, methodologically and consistently and aim to reveal the truth as one manifestation of human desire to know what they are facing.²⁰

3. Results and Discussion

3.1. Implementation of Regulations on Protection of Children's Rights After Divorce in Law Enforcement Practices in Religious Courts

In the Indonesian legal system, there are a number of laws and regulations that are closely related to the protection of children's rights after divorce. Among others:

The 1945 Constitution of the Republic of Indonesia;

Law Number 1 of 1974 concerning Marriage in conjunction with Law Number 16 of 2019 concerning Marriage;

Law Number 23 of 2002 in conjunction with Law Number 35 of 2014 in conjunction with Government Regulation in Lieu of Law (PERPPU) Number 1 of 2016 concerning Child Protection.

According to researchers, the legal provisions in the legislation are closely related to the protection of children's rights after divorce in the Religious Court which is part of the parents' responsibility towards their children, both the obligations of the ex-husband and the obligations of the ex-wife, both of whom certainly have responsibility for fulfilling children's rights after divorce. This refers to the word of Allah SWT in QS An-Nisa verse 9 which substantially confirms that children are a mandate and a gift from Allah SWT. In fact, children are considered the most valuable wealth compared to other wealth. Children must always be guarded and protected, both in terms of dignity and his dignity as a human being. Allah SWT has also given a warning to humans not to leave children in a state of physical and mental weakness, and therefore every child's welfare must be guaranteed.

In order to guarantee the fulfillment of human rights, the child's recognition as mentioned by his/her parents in the position of the divorce petition or divorce suit, must receive a response from the judge regarding his/her existence and fair legal protection, as well as receiving a guarantee of legal certainty regarding which of the two parents should...care for

¹⁹ Article 149 letter (d) and Article 156 letter (d) of the Compilation of Islamic Law.

²⁰ Yusuf Muri, 2007, Research Methodology, Padang, Padang State University Press, p.18.

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him, and also provide legal certainty regarding the person responsible for fulfilling the child's right to support, in order to guarantee his basic rights as a human being who must receive legal protection from the court that has tried his parents' divorce.²¹

Based on the results of research at the Semarang Religious Court, Banyumas Religious Court and Cilacap Religious Court, the implementation of protection and enforcement of children's rights after divorce is still based on Law Number 1 of 1974 concerning Marriage in conjunction with Law Number 16 of 2019. In addition to the above Law, the implementing regulations used to support the fulfillment of children's rights after divorce are regulated in Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law (KHI), in addition to filling the legal gap that has not been regulated in the above legislation and providing guidance and uniformity of thought patterns to judges regarding the same case, the Supreme Court completes it by issuing a Supreme Court Circular (SEMA), SEMA itself is a formulation of the results of a plenary chamber meeting, the plenary chamber meeting aims to realize legal unity and consistency of decisions. The results of the plenary chamber meeting are used as guidelines for judicial bodies under the Supreme Court in carrying out their duties and judicial function.

In addition, there are also a number of jurisprudence related to the regulation of child rights protection after divorce in Religious Courts, including:

The jurisprudence of the Supreme Court of the Republic of Indonesia on Procedural Law, namely the decision of the Supreme Court of the Republic of Indonesia Number: 140K/Sip/1971 which contains the legal principle: The claims in the plaintiff's lawsuit consist of primary and subsidiary (ex aequo et bono), if the *judex facti* will provide a decision on the subsidiary *petitum*, namely the lawsuit is tried according to the discretion of the court judge, then the judge's decision must be related or still related to the framework of the primary claim (*petitum*).

Supreme Court Jurisprudence Number: 556 K/Sip/1971 dated January 8, 1972; jurisprudence Number: 1245 K/Sip/1974

November 9, 1976; and jurisprudence Number: 425 K/Sip/1975 dated July 15, 1975 which contains the legal principle that: *Yudex factie* is justified in issuing a decision exceeding the plaintiff's claim *petitum*, on condition that this is still in accordance with the arguments/posita/material events presented by the plaintiff in his/her claim letter, namely that there is no objection from the *judex factie* in its decision to grant more than the claim *petitum* demanded by the plaintiff, as long as this is still in accordance with the material events presented by the plaintiff in his/her claim letter."

Supreme Court Jurisprudence on *Madhiyah* Child Support. Supreme Court Decision Number: 608 K/AG/2003 dated March 23, 2005, which among other things contains the legal principle that the father's obligation to provide support to the child is *lil intifa'* not *lil tamlik*, so the negligence of the father who did not provide support to his child (in the past) can no longer be sued in the Religious Court.

Protection of children's rights after divorce relates to the right to their survival and relates to the right to *hadhanah* and the right to a living or living expenses, the right to receive

²¹ Ahmad Choiri, "Legal Protection for Children Victims of Divorce Neglected by Religious Court Judges", in www.badilag.net, accessed on May 24, 2024.

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protection (protection rights) from parents, society and the state; the right to live, maintain life and improve the standard of living (the rights of life); the right to know being raised and cared for (development rights) by their own parents; the right to receive legal protection from all physical or mental violence, neglect, sexual treatment and harassment during guardianship, or any other party responsible for the care of the child. These rights are inherent even though the child's parents have divorced in the Religious Court. The discussion on child protection efforts in the Religious Court does not only discuss the implementation of norms from regulations used to make decisions that bring justice, benefits, and provide legal certainty, especially for the interests of children, but also how to make parties comply with implementing the decision. For parties who do not comply, an execution request can be requested in the Court, but this certainly requires costs, time, energy and thought from the party requesting the execution, therefore in terms of implementing regulations on the protection of children's rights after divorce, it is necessary to revise or add articles on criminal effects or logical consequences in terms of population administration if the burdened party does not exercise his rights, adding strict rules on the provision of joint property for children, judges are given the authority to directly provide one third of the joint property of both parents for children from marriage even though it is not in the lawsuit and the judge's decision should be given to a special institution formed by the government to handle children's rights after divorce.

Law Number 23 of 2002, in conjunction with Law Number 35 of 2014, in conjunction with Law Number 17 of 2016 concerning Child Protection

Law Number 23 of 2002, in conjunction with Law Number 35 of 2014, in conjunction with Law Number 17 of 2016 concerning Child Protection, mandates all parties to consider the best interests of the child as the primary consideration, as described in the Explanation of the provisions of Article 2 of the Law, which states that, "what is meant by the best interests of the child is that in all actions concerning children carried out by the government, society, legislative bodies, and judicial bodies, the best interests of the child must be the primary consideration". Thus, the judiciary (court institution) is required to play an active role in realizing the protection of children's rights, especially for children who will become victims of divorce.

This is in order to protect the rights of children and provide legal certainty regarding who is responsible for the child if the child's parents are divorced, or the parents are absent or their whereabouts are unknown, or for other reasons so that the child's parents are unable to fulfill their obligations or are unable to fulfill their responsibilities, then this law has provided legal certainty that the obligations and responsibilities of the child's parents are legally transferred to the child's family.

Then the provisions of Article 149 letter (d) of the Compilation of Islamic Law state: "As a result of the dissolution of a marriage due to divorce, the ex-husband is obliged to: provide maintenance to his children until the child is 21 years old or independent", and Article 156 letter (d) states: The consequences of the dissolution of a marriage due to divorce are that all costs The child's gifts and maintenance are the responsibility of the father according to his ability, at least until the child is an adult and can take care of himself (age 21 years).)".

And regarding the rights of children to obtain ownership of property from their parents, this is emphasized in Article 106 paragraph (1) Parents are obliged to care for and develop the

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property of their children who are not yet adults or under guardianship, and are not permitted to transfer or control it except for urgent needs if the interests and welfare of the child require or are a reality that cannot be avoided. It is emphasized in paragraph (2) which states: Parents are responsible for losses caused by mistakes and negligence. In paragraph (2) it is emphasized that if there is a loss of the child's property caused by negligence and mistakes, then everything becomes the responsibility of the parents, either the father or the mother.²²

3.2. Obstacles and Solutions to the Implementation of Regulations on the Protection of Children's Rights after Divorce in Law Enforcement Practices in Religious Courts

In the implementation of regulations on the protection of children's rights after divorce in the Religious Court, of course, it cannot be separated from various obstacles. This was revealed based on the results of interviews between researchers and informants. There were three informants in this study, namely:

M Toyeb, S. Ag. MH Deputy Chairman of the Semarang Religious Court, interview conducted in November 2024. The results of the interview are as follows

The current regulations governing the protection of children's rights are not sufficient to accommodate the protection of children's rights after divorce. Special regulations or laws are needed to guarantee the implementation of every judge's decision relating to child maintenance, child support, education and child health insurance.

It is necessary to establish a special institution or commission formed by the state to implement the fulfillment of children's rights, which indicates that the state is truly present as a guarantor of the rights of its citizens, including children.

The important point of the law enforcement efforts to protect children's rights is for the government to immediately revise the Child Protection Law which can be a legal umbrella for the formation of an Institution/commission that specifically handles it. The legality of this commission is guaranteed by the law.

Muhamad Isna Wahyudi, SHI, MSI Head of the Banyumas Religious Court. The interview was conducted in November 2024. The results of the interview are as follows:

There is reluctance from the Plaintiff to ask for children's rights because most divorces are caused by economic factors, where before separating, the husband or father rarely provided maintenance or the maintenance provided was insufficient.

Ignorance of the parties regarding the obligations of husband and wife after divorce towards children resulting from their marriage.

A sense of apathy from the parties and confusion from the parties if the party who is burdened with providing child support does not implement the contents of the decision where should they complain?

²² Achmad Asfi Burhanudin, Parents' Obligations Regarding Children's Rights After Divorce, in <https://www.academia.edu>, accessed May 24, 2024.

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Based on the results of these observations, there are several obstacles in implementing the protection of children's rights due to divorce.

in its implementation. The obstacles that parents often encounter are due to economic limitations. However, not only because of economic limitations but also because of parental negligence, low education, and low parental morals.

Meanwhile, from the literature that the researcher took, there are a number of challenges faced regarding the implementation of regulations on the protection of children's rights in law enforcement practices in Religious Courts, including:²³

Challenges of law enforcement. Judges as law enforcement officers must always be progressive towards protecting children's rights due to divorce. Judges must dare to decide in accordance with the objectives of the law, namely justice, certainty, and legal benefits. not only referring to legal certainty. if there is a conflict between legal certainty and justice, then the judge must prioritize justice.

Regulatory weaknesses include: There is no harmonization between the International Convention and positive Indonesian law and between various positive Indonesian laws that regulate the same legal subjects; The absence of various important articles needed to protect children; The absence of an integrated system that binds the parties and provides clarity regarding administration and funding regulated by law to handle children's problems holistically, integrated, and comprehensively, efficiently and effectively; Many articles are too loose or easily interpreted incorrectly and harm children.

Research results are linked to the theory used

1. Theory of the Rule of Law

A state of law is defined as a state that exercises governmental power based on law, where in carrying out all activities, both the government and the institutions within it must be based on law and can be held legally accountable. In order to realize the goal of a state of law, namely to organize legal order, the power must run the government based on the sovereignty of law (supremacy of law).²⁴

According to Aristotle, a State of Law is a state that is above the law in order to fulfill the guarantee of justice for its citizens. Justice is one of the requirements for achieving happiness in the lives of its citizens, and it is necessary to teach a sense of morality to every human being as the basis of this justice so that they can become good citizens. Likewise, legal regulations that in fact, it only exists if the legal regulations reflect justice for social interaction between citizens.²⁵

²³ Mohammad Farid, "Challenges in Enforcing Children's Rights in Indonesia", see <https://seputarfarid.wordpress.com>, accessed May 24, 2024.

²⁴ Rokilah. "Dynamics of the Indonesian Legal State: Between Rechtsstaat and Rule of Law". *Journal of Legal Studies*, 1 (May, 2020).

²⁵ Moh. Kusnardi, Harmaily Ibrahim, *Introduction to Indonesian Constitutional Law*, (Center for Constitutional Law Studies, Faculty of Law, University of Indonesia and Sinar Bakti, 1983), pp. 153- 154.

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A rule of law is a state that is structured on the basis of rules in law, where everything in its government is based on law. does not conflict with anything regarding the law, it cannot be done alone, even by the people. The rule of law is a state that is governed by laws, not by people (state the not governed by men, but by laws). Therefore, in a legal state, people's rights are fully guaranteed by the state. On the other hand, citizens must fulfill their obligations by submitting and obeying all government regulations and state laws.²⁶

The rule of law based on the Quran and Sunnah is categorized as Islamic Nomocracy. Where Nomos is interpreted as norm, while cratos is power. The meaning of the term is that Nomocracy is used as a reference in determining the implementation of power. Therefore, the term Nomocracy is inseparable from the idea of legal sovereignty or the principle of law as the highest power.²⁷ In the context of the Indonesian legal system, the rule of law is interpreted as *rechtsstaat*. The concept of a rule of law in Indonesia is constitutional since the declaration of the 1945 Constitution. It is proven in the Explanation of the 1945 Constitution that the Indonesian State is based on law (*rechtsstaat*) not based on mere power (*machtsstaat*). Although in the original text of the 1945 Constitution the term rule of law is not found, the inclusion of several sentences in the Explanation is an affirmation that Indonesia is a rule of law state.

The concept of a state of law has been mentioned in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which is interpreted as a state of law is the law is the highest supremacy in state life, not politics or economics. A state of law or what is commonly called the rule of law, not of man which is said by the government in essence is law means a system, not just individuals who are regulated by the system scenario that regulates it like "puppets". Thus, efforts to realize a state of law can be realized if the implementation of government runs in accordance with the rules regulated in the 1945 Constitution of the Republic of Indonesia.²⁸

Basically, Indonesia is a country of law where the law is the highest reference in all aspects of life, in order to create a just and secure community life, it is necessary to submit to and obey the laws that have been established. The law is one of the one law that regulates all aspects of life. Of course, in the legislation, it will be specifically discussed regarding the protection of children's rights after marriage. The existence of a state as a state of law is expected to be able to protect the rights of children as citizens who must be protected and make it easier to overcome confusion for the parties concerned.

Based on the theory above, it can be concluded that existing laws must be implemented and are binding on all citizens without exception, the same applies to the implementation of regulations on the protection of children's rights after divorce in the Religious Court, which should refer to all legal provisions in the laws and regulations in force in Indonesia. The

²⁶ Abdul Mukthie Fadjar, *History, Elements and Types of Legal States*, (Malang: Setara Press, 2016), h. 6.

²⁷ Setiawan, DB "The Existence and Implementation of Sharia Regional Regulations as Legislation at the Regional Level". *Soumatara Law Review Journal*, I, (April, 2018).

²⁸ Simamora, J. "Interpretation of the Meaning of the Legal State in the Perspective of the 1994 Constitution of the Republic of Indonesia" *Journal of Legal Dynamics*, I, (September, 2014).

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highest law in our country is the 1945 Constitution of the Republic of Indonesia. In it, the protection of children's rights is regulated in one of its articles, namely Article 28B paragraph (2) "Every child has the right to survive, grow and develop and has the right to protection from violence and discrimination." When a country's constitution has mandated a right and obligation, of course the government and parliament must draft laws and other implementing regulations to guarantee protection and enforcement of the law. The formation of the Marriage Law and the Child Protection Law is certainly a consensus from the struggle of interests In the decision-making process of the government and parliament, Indonesia is also subject to international law.

Law enforcement is a term that includes several meanings. Law enforcement according to the meaning broadly speaking, it is the process of implementing and applying legal action against violations of the law committed by legal subjects, which can be done through judicial procedures or arbitration procedures and other dispute resolutions (alternative disputes or conflicts resolution).²⁹

Law enforcement in the narrow sense is said to be the implementation of laws and regulations against legal subjects related to violations of a law that can involve the courts and judges' decisions. Jimly Asshiddiqie also argues that law enforcement in the narrow sense is the implementation of laws and regulations for lawbreakers that involve the role of the police, prosecutors, advocates and judicial bodies.¹⁸⁰

The law in Indonesia has been established as written in the legislation, therefore there needs to be law enforcement related to the written regulations that have been made. The law must implemented and applied properly. As is the case quoted by Satjipto Rahadjo in John Kenedi's book who said that the law has no function if it is not enforced for violators. In law enforcement in the field are law enforcement officers.³⁰

Law enforcement is a very popular term that is usually interpreted as applying legal means to enforce sanctions in order to maintain the provisions that have been set. Similarly, as stated by Soedarto, law enforcement is considered as attention to unlawful acts that actually occur (onrecht in actu) or unlawful acts that may occur (onrecht in potentie).³¹

As the law has been enforced, the Religious Court has also enforced and implemented the law as it should be. As the judge has thought about the best decision that does not harm both parties. However, there are still obstacles in the implementation of law enforcement in the Religious Court. Obstacles that arise because there is no criminal effect that is truly binding in the implementation of the Religious Court's decision. the awareness of the burdened party (father) is lacking. The father is considered negligent or less able to provide for his child. There needs to be a guarantee of the implementation of the judge's decision through supervision countries related to this matter. In this case, the role of the state is

²⁹ John Kenedi, Blocking Prostitution: A Juridical-Sociological Study of Regional Regulation Number 24 of 2000 Concerning the Prohibition of Prostitution in Bengkulu Province, (Bengkulu: Vanda Marcom, 2016), p. 218 180
John Kenedi, Blocking Prostitution: A Juridical-Sociological Study of Regional Regulation Number 24 of 2000 Concerning the Prohibition of Prostitution in Bengkulu Province, (Bengkulu: Vanda Marcom, 2016), p. 218

³⁰ John Kenedi, Intercepting Prostitution Study,... p. 218

³¹ John Kenedi, Intercepting Prostitution Study,... p. 219

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needed in maintain and protect children's rights. The state must be present in granting the rights of its citizens. Law enforcement will be weak if not supported by the following:

- a) Clear legal umbrella and not accompanied by strict sanctions. Sanctions are not only in the form of criminal but can be in the form of fines, restrictions on public access in the administrative field depending on the violations committed.
- b) Community compliance in carrying out court decisions also plays an important role in enforcing the law on fulfilling children's rights after divorce.
- c) Lack of public knowledge and awareness regarding children's rights.
- d) Lack of socialization of the law and unsustainable supervision of its implementation.
- e) Synergy between law enforcement officers is also needed in good law enforcement efforts.

In the process of law enforcement in the Religious Court to handle cases related to child protection after divorce, in addition to the related parties being able to obtain legal certainty, it is also hoped that existing obstacles and the discovery of new laws (jurisprudence) can be input for the government to improve the process and regulations related to child protection after divorce.

3. Theory of Development Law

The theory of development law can be interpreted that law is not only a regulator in the life of society, law must also follow the innovation and development of the times. Law also has a role in being a director who follows progress and sees the situation and conditions of current changes.

This development theory is based on two factors. First, society assumes that law has no special role in society. In fact, law is considered an obstacle to people's lives. Furthermore, the second is that people's mindsets are increasingly developing where people prefer to adhere to modern law. In addition, Melaise or the lethargy of the legal function is also one of the factors behind the existence of the development law theory, causing a decrease in public trust in the function of law. Melaise or lethargy is a problem in the local community because of the many cries over questions from the principle of "The rule of law" which is expected to restore justice for the local community.³²

Mochtar Kusumaatmadja developed his thoughts on the theory of development law where law is used to change society in a better direction than before.

But in reality, most people do not trust the law to the authorities or the judicial institution. In this case, it will have an impact on society which is usually called taking the law into one's

³² Otje Salman and Eddy Damian, *Legal Concepts in Development*, (Bandung: Alumni, 2002), 1.

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own hands where people judge the crimes that occur themselves and do not hand them over to the relevant parties.³³

In Indonesian society, the existence of law cannot guarantee certainty and order. Although there are regulations that must be implemented, in reality many people are negligent about this matter. Mochtar Kusumaatmadja argues that the existence of law is enforced with the hope that it can be a "means of social renewal"/"law as a tool of social engineering" or "means of development" based on the basis that law is a "means of social renewal".

Law as a means of renewal also has another meaning, namely that law can have the meaning of a channel towards renewal where law is used as a bridge for community activities towards the direction desired by existing renewal.

Religious Courts as one of the law enforcement institutions use laws as the main basis in the trial process. The marriage laws that are commonly used are still considered relevant to current legal needs. As for the matter the rules and provisions that are still unclear, the judge can refer to in SEMA (Supreme Court Circular) such as in the mediation process used to submit negotiations on children's rights. In the litigation process, there are often new legal breakthroughs that emerge. The discovery of new laws born from the thoughts of progressive judges aimed at the interests of children's rights after divorce gives birth to jurisprudence and brings new ideas in improving regulations on the protection of children's rights after divorce. The application of the law is adjusted to the needs of the community. Progressive law is the application of law based on the circumstances needed and required in society. Progressive law is applied to meet the needs of the community and provide justice that is as fair as possible for the community. The theory of development law in cases of child protection after divorce in the Religious Court is clearly used, to encourage efforts to protect women and children. The Supreme Court is actively holding technical guidance and seminars for all apparatuses under it so that the rights of women and children are well socialized for all court apparatuses and strives to realize the protection of these rights as a form of protection for the vulnerable. Figures who actively voice the rights of the vulnerable groups above include the Chief Justice of the Religious Affairs of the Supreme Court of the Republic of Indonesia, Dr. H. Yasardin, SH, M.Hum and former Chairman Religious Chamber of the Supreme Court of the Republic of Indonesia Prof. Dr. Amran Suadi, SH, M. Hum.

4. Conclusion

In addition, there are also a number of jurisprudence related to the regulation of child rights protection after divorce in Religious Courts, including: a. The jurisprudence of the Supreme Court of the Republic of Indonesia on Procedural Law, namely the decision of the Supreme Court of the Republic of Indonesia Number: 140K/Sip/1971 which contains the legal principle: The claims in the plaintiff's lawsuit consist of primary and subsidiary (ex aequo et bono), if the *judex facti* will provide a decision on the subsidiary *petitum*, namely the lawsuit is tried according to the discretion of the court judge, then the judge's decision must be related or still related to the framework of the primary claim (*petitum*). b. Supreme Court

³³ Henny Nuraeny, "Sending Migrant Workers as a Form of Slavery from the Crime of Human Trafficking," *Journal of Law and Justice* 4, no. 3 (November 2015): 501- 518.

Jurisprudence Number: 556 K/Sip/1971 dated January 8, 1972; jurisprudence Number: 1245 K/Sip/1974 dated November 9, 1976; and jurisprudence Number: 425 K/Sip/1975 dated July 15, 1975 which contains the legal principle that: *Judex factie* is justified in giving a decision exceeding the plaintiff's *petitum*, on condition that it is still in accordance with the arguments/*posita*/material events presented by the plaintiff in his lawsuit, namely there is no objection from *judex factie* in its decision to grant more than the *petitum* demanded by the plaintiff, as long as it is still in accordance with the material events presented by the plaintiff in his lawsuit." c. Supreme Court Jurisprudence on *Madhiyah* Child Support. Supreme Court Decision Number: 608 K/AG/2003 dated March 23, 2005, which includes the legal principle that the father's obligation to provide maintenance for his child is *lil intifa'*, not *lil tamlik*, so the negligence of the father in not providing maintenance for his child (in the past) can no longer be sued in the Religious Court. Child protection efforts after divorce in the Religious Court are subject to and based on a number of laws and implementing regulations as mentioned above. Obstacles to the implementation of regulations on the protection of children's rights after divorce in law enforcement practices in Religious Courts Obstacles based on the results of interviews conducted with sources include: a) The current regulations governing the protection of children's rights are not sufficient to accommodate the protection of children's rights after divorce, special regulations or laws are needed to guarantee the implementation of every judge's decision related to child maintenance, child support, education and child health insurance. Fathers who do not carry out court decisions are given criminal penalties or confiscation of the father's assets if the father does not fulfill his obligation to provide child support after the divorce. b) It is necessary to form a special institution or commission formed by the state as the implementer of the fulfillment of children's rights, which indicates that the state is truly present as a guarantor of the rights of its citizens, including children. The body formed is given the authority to conduct asset searches, salary deductions, asset confiscations, auctions and child support payments from the ex-husband's assets. c) The important point of the law enforcement efforts to protect children's rights is for the government to immediately revise the Child Protection Law which can be a legal umbrella for the formation of an Institution/commission that specifically handles it. The legality of this commission is guaranteed by the law. The following are the challenges faced in enforcing the law on the fulfillment of children's rights in Religious Courts based on the literature that researchers have found, namely: a) still weak law enforcement, especially in the implementation of court decisions. b) there is no harmonization between the International Convention and positive law in Indonesia which regulates the protection of children's rights, c) there is still a biased perception about the limitations on children's roles and participation, the development of laws protecting children's rights is not yet optimal and Thus, it can be formulated that the challenges of legal protection for children after divorce are in the law enforcement system which includes: regulatory challenges, law enforcement challenges, and legal culture challenges or public legal awareness. 3. Reconstruction of the implementation of regulations on the protection of children's rights after divorce in law enforcement practices at Religious Courts Things that need to be reconstructed regarding the implementation of children's rights after divorce are: a) There is a common mindset among judges that the decision made is the authority of an independent panel and cannot be influenced, therefore when there is a lawsuit or application being handled, the decision should accommodate and pay attention to the rights

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of the child, in a decision that ex officio punishes the child's father but if it is not stated in the decision it tends to be ignored, especially if the child's father already has a new partner. While the decision from the court is still *declatoire*, where this decision (non-executable) cannot be executed directly, it requires an execution application process to be implemented, the fact is that in today's society there are many obligations to provide support to children that are ignored by their fathers, in terms of support, not to mention in terms of the child's mental safety. b) To make the function of mediation more effective, the mediator judge and independent mediator in the court must have adequate skills. in terms of mediation and guided by the Circular of the Director General of Badilag Number 1960/Dja/HK.00/6/2021 concerning guarantees of fulfillment of the rights of women and children after divorce. c) The Religious Court leadership routinely holds file review and legal discussions in their respective work units. If no resolution or solution is found for problems that may arise in terms of protecting the rights of children and women after divorce, this can be consulted at the appeal level, if no answer is received, guidance can be requested from the Supreme Court. Based on the conclusions above, this research has two implications, namely theoretical and practical implications. 1. The theoretical implication is that a more comprehensive study is still needed, both conceptually and operationally, regarding the reconstruction of the implementation of regulations on the protection of children's rights after divorce in the practice of law enforcement in Religious Courts. This is not only studied from the perspective of Islamic law but also from a multidisciplinary perspective. 2. The practical implication is that relevant stakeholders, especially law enforcement officials such as judges at Religious Courts, should be braver in making breakthroughs and new legal discoveries through court decisions that are more progressive and more child-friendly.

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