

Progressive Legal Perspective on the Fulfilment of Women's and Children's Rights Post-Divorce in Divorce Cases Suitable in Religious Courts

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Abstract

A divorce filed by a wife is known as a divorce suit, is filed based on reasons permitted by Islamic law and is processed in the Religious Court according to the wife's place of residence. In divorce suit cases, women become active parties in the legal proceedings. Law Number 1 of 1974 and the Compilation of Islamic Law regulate the rights of women and children after divorce, including child support, spousal support, and mut'ah (a form of compensation for the wife). However, these regulations primarily focus on cases of divorce initiated by the husband. This research uses a qualitative method with a normative legal approach and descriptive techniques to synchronize legal regulations. The findings indicate that divorce must go through a court process to be legally valid. If mediation fails to preserve the family, the court is considered the final solution. Husbands filing for divorce are obligated to provide maintenance according to Islamic law. In cases of divorce suit, the husband cannot reconcile with the wife except through a new marriage contract. However, the implementation of women's and children's rights in divorce suit cases remains limited, influenced by the lack of claims from the plaintiff, weak implementation of Supreme Court Circular Letters, and insufficiently strong regulations. These rights are outlined in Circular Letters but have weak binding power because they are not part of formal legislation.

Keyword: *Progressive Law, Divorce Lawsuit, Court, Women's Rights, Children's Rights.*

A. INTRODUCTION

A contested divorce is a divorce filed by and on the initiative of the wife to divorce her husband for reasons permitted by the Sharia'.¹ The Compilation of Islamic Law states in Article 132 paragraph (1) that a contested divorce is a divorce filed by the wife or her proxy at the Religious Court at the place of residence unless the wife leaves the husband or the place of residence

¹Sylvia Vatak, "Divorce at the Wife's Initiative in Muslim Personal Law: What are the Options and What are their Implications for Women's Welfare," In *Redefining Family Law in India*, pp. 200-235. Routledge India, 2020.

together without permission from the husband.² In contested divorce cases, women are the ones who actively deal with the law, namely as parties who file cases. As Article 1 of Supreme Court Regulation Number 3 of 2017 states that women in conflict with the law are women who have conflict with the law, both as victims and as witnesses who are female.³ Divorce not only affects the individuals involved but also has implications for the extended family and the social community, especially in societies where religious and cultural norms are still strongly upheld. Divorce, especially initiated by women, often places a heavy emotional burden not only on the wife but also on the children involved. The economic impact of divorce, particularly for women, can be significant, especially if the wife lacks economic independence.

The provisions that include the rights of women and children, the first of which is contained in Article 41 of Law Number 1 of 1974 concerning Marriage which regulates that the consequences of dissolution of a marriage due to divorce are as follows: First, the father and mother are still obliged to care for and educate their children, solely based on the interests of the child, if there is a dispute regarding control of the child, the court makes a decision. Second, the father is responsible for all the child's maintenance and education costs that the child needs, if in reality the father is unable to provide this obligation then the court can determine that the mother also bears these costs. Third, the court can require the ex-husband to provide living expenses and/or determine obligations for the ex-wife.⁴

Apart from being contained in the Marriage Law, the rights of women and children are also contained in Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law as stated in Article 149 which regulates that the consequences of divorce are due to divorce or divorce proposed by the husband. The ex-husband is obliged to provide appropriate mut'ah to his ex-wife in the form of objects or money (except if the ex-wife was not married to him during his marriage), iddah living (waiting income), maskan (residence), and kiswa (clothing).⁵ Based on Article 149 of the Compilation of Islamic Law above, the punishment for living iddah, maskan, kiswa and mut'ah only occurs when a divorce is filed in a Religious Court by a husband, while divorce cases are filed in a Religious Court by a wife or are usually called contested divorce.

²Will Smiley, "The Other Muslim Bans: State Legislation against "Islamic Law"," J. Islamic L. 1 (2020): 5.

³Yofi Tirosh, "Diminishing constitutional law: The first thirty decades of women's exclusion adjudication in Israel," International Journal of Constitutional Law 18, no. 3 (2020): 823.

⁴Hasdiana Juwita Bintang, "A Legal Protection of Children to Adults as Victims of Parental Divorce According to The Marriage Law Number 16 Of 2019 Concerning Marriage," INFOKUM 10, no. 5 (2022): 511.

⁵Muhammad Fitri, Adi, "Hadhonah Rights of Children (Not Mumayyis) Based on Compilation of Islamic Law and Child Protection Act," NUSANTARA: Journal of Law Studies 2, no. 1 (2023): 11.

Regarding child support provisions, it is still guided by Article 156 letter (d) of the Compilation of Islamic Law and Circular Letter of the Supreme Court of the Republic of Indonesia Number 6 of 2016, which in essence states that the costs of maintaining a child are the responsibility of the father if the child is actually under the care of the mother.⁶ Child support referred to in this research is income for children's living expenses, for health and for education. The rule of law must exist in every place and community, the existence of a society automatically creates a law, society changes then the law changes or vice versa, the law is created and changes first and then society follows these changes. There are 2 (two) forms of changing a law, namely society changes first and then the law comes to validate the change or in another form, namely law that changes society for the better.

Progressive law departs from two basic assumptions. First, law is for humans, not vice versa.⁷ Starting from this basic assumption, the presence of law is not for itself, but for something broader and greater. That is why when problems occur in the law, it is the law that must be reviewed and corrected, not humans who are forced to be included in the second legal scheme, the law is not an absolute and final institution, because the law is always in the process of continuing to become (law as a process, law in the making)⁸. The presence of progressive law which departs from the basic assumption that law is for humans and is always in the process of becoming, then in providing an explanation of legal phenomena, it will involve other legal theories.⁹ The involvement of other legal theories in progressive law also explains the position of progressive law amidst these other legal theories. In general, the character of progressive law can be identified¹⁰: First, progressive legal studies try to shift the emphasis of legal studies which originally used legal optics to behavior. Second, progressive law consciously places its presence in close relationship with humans and society, Third, progressive law shares ideas with legal realism because law is not viewed from the perspective of the law itself, but is seen and assessed from the social goals to be achieved and the consequences arising from the operation of the law.¹¹ Fourth, progressive law

⁶Syaifuddin, Zuhdi et al., "The Confiscation of Husbands' Wealth as A Collateral for Post-Divorce Child Support: Perspective of Maqāṣid Al-Sharī'ah," *Samarah: Journal of Family Law and Islamic Law* 8, no. 2 (2024): 913.

⁷Muhammad Harun, "Philosophical Study of Hans Kelsen's Thoughts on Law and Satjipto Rahardjo's Ideas on Progressive Law," *Walisongo Law Review (Walrev)* 1, no. 2 (2019): 197.

⁸Henry G., Schermers, and Niels M. Blokker, "International Institutional Law: Unity within Diversity Fourth Edition," In *International Institutional Law*. Brill Nijhoff, 2021.

⁹Orfeas Chasapis Tassinis, "Customary international law: Interpretation from beginning to end," *European Journal of International Law* 31, no. 1 (2020): 236.

¹⁰Clare, Huntington, and Elizabeth S. Scott, "Conceptualizing legal childhood in the twenty-first century," *Michigan Law Review* (2020): 1373.

¹¹Bhupinder S Chimni, "Customary international law: A third world perspective," *American Journal of International Law* 112, no. 1 (2018): 4.

is close to Roscoe Pound's sociological jurisprudence, which examines law not only by studying regulations but goes out and looks at the effects of law and the workings of law.¹² Fifth, progressive law is close to natural law theory, because it is concerned with meta-juridical matters.¹³ Sixth, progressive law is close to critical legal studies but has a broader scope.¹⁴

Progressive law in providing explanations of legal phenomena cannot escape its connection with other legal theories, so legal theories that are related to progressive law are also used as a basis for analysis, namely: First, responsive legal theory (Nonet & Selznick) which requires that Law is always sensitive to the development of society, with its outstanding character, namely offering more than just procedural justice, being justice-oriented, paying attention to the public interest, and more than that prioritizing substantive justice.¹⁵ Second, realist legal theory or legal realism (Oliver Wendell Holmes) is famous for its credo that, The life of the law has not been logic: it has been experience. With the concept that law is no longer limited to logic but experience, law is not seen from the perspective of the law itself, but is seen and assessed from the social goals to be achieved, as well as the consequences that arise from the operation of the law. In legal realism, understanding of law is not only limited to legal texts or documents, but goes beyond these legal texts and documents.¹⁶ Third, sociological jurisprudence (Roscoe Pound) which studies law is not only limited to the study of regulations but also looks at the effects of law and the workings of law (famous for the concept that law is a tool of social engineering). Fourth, natural law or natural law which provides an explanation of meta-juridical matters. Natural law views law as inseparable from transcendental moral values.¹⁷ Fifth, critical legal studies (Roberto M. Unger), which is dissatisfied with modern law which, among other things, is full of procedures.¹⁸

¹²Tamanaha, Brian Z. "Sociological jurisprudence past and present." *Law & Social Inquiry* 45, no. 2 (2020): 493-520.

¹³Syinta Amelia, "Progressive Legal Approach to Modern Community Law Enforcement in Indonesia," *Pancasila and Law Review* 4, no. 1 (2023): 4.

¹⁴Herlambang P Wiratraman, "The challenges of teaching comparative law and socio-legal studies at Indonesia's law schools," *Asian Journal of Comparative Law* 14, no. S1 (2019): S231.

¹⁵Muhammad Jazil Rifqi, "Dynamics of the Development of the Marriage Age Limit in a Progressive Legal Perspective," *Legal Arena* 15, no. 2 (2022): 286.

¹⁶Lynette J., Chua, and David M. Engel, "Legal consciousness reconsidered," *Annual Review of Law and Social Science* 15 (2019): 337.

¹⁷Ahmad, Dakhoir, and Sri Lumatus Sa'adah, "Meta-Juridical Analysis on the Legal Arguments beyond Changes in Indonesia's Marriage Age Rule," *AL-IHKAM: Journal of Law & Social Institutions* 18, no. 1 (2023): 81.

¹⁸Nicholas Mignanelli, "Legal research and its discontents: a bibliographic essay on critical approaches to legal research," *Law Libr. J.* 113 (2021): 101.

For law enforcers, especially judges, a decision must be based on the fulfillment of legal objectives, namely justice, benefit and legal certainty.¹⁹ The objectives of the law will be carried out well if the judge's decision is based on statutory regulations which have strong binding power on the community and law enforcers, especially Religious Court judges.²⁰ Therefore, the Supreme Court established legal regulations to guarantee the protection of the rights of women and children. Provisions that include the rights of women and children are contained in Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law as stated in Article 149 of the Compilation of Islamic Law which states that as a result of divorce which occurs due to talak or divorce proposed by the husband, then ex-husbands are obliged to give appropriate mut'ah to their ex-wives in the form of objects or money, unless during their marriage the ex-wife was not married (qabla dukhul), iddah living (waiting support), maskan (residence), and kiswah (clothing) except if the divorce occurs because of talak ba'in, namely divorce filed by the wife (suitable divorce), divorce because of lian (accusing the wife of adultery and not recognizing her child), dzihar (forbidding the wife to him), and apostasy (leaving Islam).²¹

One consequence of divorce, whether resulting from talak (divorce initiated by the husband) or divorce filed by the husband, is the ex-husband's obligation to provide child maintenance (hadhanah fees) for children who have not yet reached the age of 21.²² Article 156 of the Compilation of Islamic Law explicitly regulates children's rights, stating that all hadhanah and child support costs are the father's responsibility according to his ability, at least until the child reaches adulthood and can take care of themselves, or at least until they turn 21.²³ On the other hand, Article 149 of the Compilation of Islamic Law specifically applies to talak cases, meaning divorces initiated by the husband, and does not apply to divorces filed by the wife. These provisions have been implemented in practice and serve as a primary reference for judges in the Religious Courts.²⁴

¹⁹Dietmar von der Pfordten, "Validity in Positive Law: a mere summary concept," *Legal Validity and Soft Law* (2018): 3.

²⁰Muhamad, Romdoni et al., "A critique and solution of justice, certainty, and usefulness in law enforcement in Indonesia," *Journal of Law Science* 5, no. 4 (2023): 175.

²¹Misnanto Misnanto, "The Problematics of Divorce Before Judges the Perspective of Islamic Law Compilation and Madzhab Syafi'I," *Indonesian Journal of Law and Islamic Law (IJLIL)* 4, no. 1 (2022): 149.

²² Sylvia Vatuk, "Divorce at the Wife's Initiative in Muslim Personal Law: What are the Options and What are their Implications for Women's Welfare," In *Redefining Family Law in India*, pp. 200-235. Routledge India, 2020.

²³ Muhammad Fitri Adi, "Hadhanah Rights of Children (Not Mumayyis) Based on Compilation of Islamic Law and Child Protection Act," *NUSANTARA: Journal of Law Studies* 2, no. 1 (2023): 10.

²⁴ Subroto, Gunarto, and Anis Mashdurohatur, "Legal Reconstruction on Talak Divorce Regulation Based on Justice Value," *Sch Int J Law Crime Justice* 5, no. 10 (2022): 464.

In deciding cases, the Religious Courts also use classical jurisprudence books as material for consideration and reference, which also serve as the main source for the Compilation of Islamic Law. There were 38 books of fiqh that were reviewed and 7 IAINs were assigned to carry out studies on these books.²⁵ These books include: Al Bajuri; Fathul Mu'in; Sharqawi' tools of Tahrir; Mughnil Muhtaj; Nihayah Al Muhtaj; Ash Syarqawi; 'Ianatut Talibin; Tuhfah; Targhibul Musytag; Bulghat Al Salik; Syamsuri Fil Faraidh; Al Mudawanah; Qalyubi/Mahalli; Fathul Wahhab with his Syarah; Bidayatul Mujtahid; Al Uum; Bughyatul Mustarsyidin; Aqidah Wa Al Syariah; Al Muhalla; Al Wajiz; Fathul Qadier; Al Fiqhu Al Madzhabil 'Arba'a; Fiqhus Sunnah; Kasyf Al Qina; Majmu'atu Fatawi Ibn Taimiyah; Qawaninus Syariah lis Sayyid Usman bin Yahya; Al Mughni; Al Hidayah Syarah Bidayah Taimiyah Muhtadi; Qawanin Syar'iyah lis sayyid Sudaqah Dakhlani; Nawab al Jalil; Syarah Ibn Abidin; Al Muwattha'; Hasyiah Syamsuddin Muh Irfat Dasuki; Hurricane al Sinnai; Tabyin al Haqaiq; Al-Fatawi Al Hindiyah; Fathul Qadier; Nihayah.

Judges, using their ex officio authority, must ensure that the judicial process is simple, swift, and cost-effective, providing real legal protection and justice through fair and enforceable decisions. Protecting legal morals is crucial for achieving legal certainty and justice. To advance legal protection for women (wives) and children, it's essential to reconstruct the legal substance, structure, and culture in society.²⁶ Therefore, the aim of this research is to see how the Progressive Legal Perspective is towards fulfilling the Rights of Women and Children Post-Divorce in Divorce Cases in Religious Courts in order to provide legal protection. This applicable if the rights of women and children in divorce cases are regulated in a regulation which is included in the types and hierarchy of statutory regulations as regulated in the provisions of Article 7 of Law 12 of 2011 concerning the Formation of Legislative Regulations, namely in the form of a Presidential Instruction by updating the Compilation of Islamic Law or Government Regulations as stated in Article 8 of the Law, namely in the form of Regulations made by the Supreme Court, namely the Supreme Court Regulations. This research is important because it ensures the protection of the rights of women and children in divorce, as well as the application of gender justice and non-discrimination principles.

B. RESEARCH METHODS

This research is qualitative research with a normative legal approach. The qualitative research approach with normative legal contributes

²⁵Andi Sri Rezky Wulandari, "Comparative Study of the Distribution of Inheritance Assets to Adopted Children According to a Compilation of Islamic Law and Civil Law," *Jurnal Cahaya Perempuan* 5, no. 2 (2018): 2.

²⁶ A. Mukti Ali, *Discovery of Islamic Law to Achieve Justice*, Student Library, 2018.

significantly to uncovering contemporary legal issues in an in-depth and structured way. By inventorying and analyzing the substance of the law and its philosophical basis, this approach allows to understand the basic principles underlying legal regulations and how they are applied in the current context. This helps to identify gaps or inconsistencies in the law that may not be in line with the needs of modern society. In addition, by evaluating the application of the law and synchronizing the applicable regulations, this approach can reveal how the law affects individual rights in practice, such as the protection of women's and children's rights in divorce cases.²⁷

Techniques and methods commonly used in legal research are describing and synchronizing applicable laws and regulations. With secondary data sources consisting of primary legal materials and secondary legal materials. Which is then analyzed qualitatively to reveal the phenomenon of women's and children's rights after divorce in contested divorce cases in religious courts. Primary legal materials are in the form of legislation, official records or minutes in making legislation and judges' decisions. Sources used in the analysis of this research include Law Number 1 of 1974 concerning Marriage, Law Number 12 of 2011 concerning the Establishment, Supreme Court Regulation Number 3 of 2017 concerning the Compilation of Islamic Law, Legal Regulations on the Compilation of Islamic Law or Government Regulation, Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law, Circular of the Supreme Court of the Republic of Indonesia Number 6 of 2016. Secondary legal materials come from data obtained from books, research results, journals related to the rights of women and children after divorce in divorce cases filed in religious courts.

C. RESEARCH RESULT AND DISCUSSION

1. Fulfilling the Rights of Women and Children After Divorce in Contested Divorce Cases

Islam prescribes divorce but that does not mean that Islam favors divorce from a marriage. Divorce cannot be carried out at any time desired even though it is permitted. Islam still views that although divorce is permissible, it is something that is hated by Allah SWT. It is stated in the Compilation of Islamic Law that Article 113 and Article 39 of Law Number 1 of 1974 concerning Marriage regulates the dissolution of marriage which states that a marriage can be dissolved due to: Death; Divorce; and based on the Court's decision. Islamic law basically gives absolute broad powers that it is the husband who declares divorce, but Islamic law also accommodates that

²⁷Bahder Johan Nasution, "Legal Research Methods, Bandung: CV," Mandar Maju (2008).

the wife is also given the right to declare to end her household. In the Islamic legal system in Indonesia, if the husband submits a divorce to the court, it is known as a petition for talak divorce, but if it is submitted by the wife, it is known as a contested divorce.²⁸ A contested divorce is a divorce filed by and on the initiative of the wife to divorce her husband for reasons permitted by the Sharia'. The Compilation of Islamic Law states in Article 132 paragraph (1) that contested divorce is a divorce filed by the wife or her proxy at the Religious Court where she lives unless the wife leaves her husband or the place where they live together without permission from the husband. The case of contested divorce is closely related to women. In contested divorce cases, women are the ones who actively deal with the law, namely as parties who file cases. As Article 1 of Supreme Court Regulation Number 3 of 2017 states that women in conflict with the law are women who have conflict with the law, both as victims and as witnesses who are female.

The Supreme Court Regulation instructs judges to implement basic principles in adjudicating women's cases in conflict with the law, including: The principle of respect for human dignity; Non-discrimination; Gender equality; Equality before the law; Justice; Expediency; Legal certainty. The provisions that include the rights of women and children, the first of which is contained in Article 41 of Law Number 1 of 1974 concerning Marriage which regulates that the consequences of dissolution of a marriage due to divorce are as follows: First, the father and mother are still obliged to care for and educate their children, solely based on the interests of the child, if there is a dispute regarding control of the child, the court makes a decision. Second, the father is responsible for all the child's maintenance and education costs that the child needs, if in reality the father is unable to provide this obligation then the court can determine that the mother also bears these costs. Third, the court can require the ex-husband to provide living expenses and/or determine obligations for the ex-wife.

Apart from being contained in the Marriage Law, the rights of women and children are also contained in Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law as stated in Article 149 which regulates that the consequences of divorce are due to divorce or divorce proposed by the husband. The Birth of Jurisprudence No. 137 K/AG/2007 and No. 276 K/AG/2010, a paradigm shift occurred which formed a new rule that was different from the previous one, namely: The burden of maintenance on the husband for the wife is not only permitted in talak divorce cases, but also in contested divorce cases and the burden can be given provided that the wife

²⁸Aulia Muthiah, *Islamic Law: dynamics surrounding family law*, Pustaka Baru Press, 2017.

is declared the judge did not include nusyuz wives (wives who are disobedient and disobedient to their husbands).

The Supreme Court of the Republic of Indonesia has also issued regulations several times to regulate this matter. The presence of the Circular Letter of the Supreme Court of the Republic of Indonesia Number 3 of 2018 concerning the Implementation of the Formulation of the Results of the 2018 Supreme Court Chamber Plenary Meeting as Guidelines for Carrying Out Duties for Courts which have accommodated the Regulation of the Supreme Court of the Republic of Indonesia Number 3 of 2017 concerning Guidelines for Trying Women's Cases in Conflict with the Law states that the wife in cases of contested divorce can be given mut'ah, and Iddah maintenance as long as it is not proven nusyuz, while the provisions governing the guidelines for providing support to children are contained in the Circular Letter of the Supreme Court of the Republic of Indonesia Number 4 of 2016 concerning Plenary Meetings which states that Judges within the Religious Courts must The ex officio right can determine the child's maintenance allowance to the father if the child is actually in the care of the mother.

There is Supreme Court Jurisprudence Number 137 K/AG/2007 dated February 6 2008 and Supreme Court Jurisprudence Number No. 276 K/AG/2010 dated 30 July 2010, strengthened again by the provisions of Supreme Court Circular Letter Number 3 of 2018 which provides a shift from patriarchal culture towards gender equality which appears to have not been fully followed by religious court judges. This is proven based on data where the national percentage shows 2.73% of the fulfillment of women's and children's rights in contested divorce cases in 2020, meaning that neither the Supreme Court Circular Letter has sufficiently changed the paradigm of Religious Court judges to optimally give decisions that punish former husband to provide women and children with post-divorce rights in contested divorce cases.

Prior to the Supreme Court Circular Letter Number 3 of 2018, there were also provisions in the Republic of Indonesia Supreme Court Regulation Number 3 of 2017 concerning Guidelines for Trying Women's Cases in Conflict with the Law. Republic of Indonesia Supreme Court Regulation Number 3 of 2017 concerning Guidelines for Trying Women's Cases in Conflict with the Law regulates the guidelines that judges should follow in adjudicating women's cases in conflict with the law, namely considering gender equality and gender stereotypes in statutory regulations and unwritten laws as stated in Article 6 of the Supreme Court Regulations. The Directorate General of Religious Courts (Badilag) is also trying to pay special attention to guaranteeing the fulfillment of the rights of women and children after divorce, with the issuance of Circular Letter of the Director General of Religious Courts (Dirjen Badilag)

number 1669/DJA/HK.00/5/2021 dated May 24 2021 which ordered all Religious Courts throughout Indonesia to take action to ensure the fulfillment of the rights of women and children.

2. Progressive Legal Perspective on the Fulfillment of Women's and Children's Rights After Divorce in Contested Divorce Cases in Religious Courts

The determination of the rights of women (wives) and children rests with the woman herself and rests with the judge's decision *ex officio* (the judge's right because of his position). Women have their own role, namely by including demands for women's and children's rights in their lawsuit letter, whereas if they are not included in the lawsuit letter, the judge's role through his *ex officio* authority is to be able to grant women and children's rights even if they are not asked.²⁹ Regarding the wife's livelihood in Indonesian legislation: First, Law Number 1 of 1974 concerning Marriage: Article 34 paragraph (1): the husband is obliged to protect his wife and provide all the necessities of household life according to his abilities.³⁰ Second, Compilation of Islamic Law Article 80 paragraph (4): According to his income, the husband bears: 1) Support, *kiswah* and residence for the wife, household costs, care costs and medical costs for the wife and children. 2) Education costs for children.³¹

Article 81 paragraph (1): The husband is obliged to provide a residence for his wife and children or ex-wives who are still in the *iddah* period. Paragraph (2): A residence is a suitable place for a wife during marriage or during the *iddah* of divorce or *iddah* of death. Paragraph (3): For polygamous husbands: husbands who have more than one wife are obliged to provide housing and living expenses to each wife equally according to the size of the family supported by each wife, unless there is a marriage agreement. The child protection law explains the rights of children that must be fulfilled by their parents. Children's rights according to Law no. 23 of 2002 concerning Child Protection in Chapter I General Provisions, article 1 explains that a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb. So, what differentiates between children and adults is age.³² Apart from that, Law no. 23 of 2002 regulates children's rights. Children's

²⁹Lilik Andar, Yuni, "The use of *ex officio* to fulfill women's post-divorce rights at the Samarinda Religious Court," *Ijtihad: Journal of Islamic Law and Humanitarian Discourse* 21, no. 2 (2021): 136.

³⁰Muhammad, Andri, HR Mahmutarom, and Ahmad Khisni, "The Ideal Age of Marriage as an Effort to Establish an Ideal Family," *UNIFICATION: Journal of Legal Studies* 7, no. 1 (2020): 71.

³¹Haerunnisa, Yunus et al., "The concept of a marriage agreement in the compilation of Islamic law," *International Journal of Contemporary Islamic Law and Society* 2, no. 2 (2020): 34.

³²Adawiyah, Nasution, "Legal Consequences of Adoption According to Law Number 23 of 2002 concerning Child Protection," *Law Enforcement Scientific Journal* 6, no. 1 (2019): 16.

rights are part of human rights that must be guaranteed, protected and fulfilled by parents, families, society, government and the State.³³ Children's rights are stated in Law no. 23 of 2002 among them are.

1. Article 8 Every child has the right to receive health services and social security in accordance with their physical, mental, spiritual and social needs.³⁴
2. Article 9 (1) Every child has the right to receive education and teaching in order to develop his personality and level of intelligence in accordance with his interests and talents. (2) In addition to children's rights as intended in paragraph (1), children with disabilities also have the right to receive special education, while children who have special advantages also have the right to receive special education.³⁵
3. Article 13 a. Discrimination against children which results in children experiencing losses, both material and moral, thereby hampering their social functioning or b. Neglect of children that results in children experiencing pain or suffering, whether physical, mental or social. c. Sentenced to a maximum imprisonment of 5 (five) years or a maximum fine of Rp. 100,000,000.00 (One Hundred Million Rupiah).

The laws and regulations in Indonesia that regulate children are explained in article 2 of Law number 4 of 1979 concerning child welfare, namely:³⁶

1. Children have the right to welfare, nurturing care and guidance based on love both within the family and in special care to grow and develop naturally.
2. Children have the right to services to develop their abilities and social life, in accordance with the nation's culture and personality, to become good and useful citizens.

³³Twoeng, Geovani et al., "Juridical Analysis of Victims of The Economic Exploitation of Children Under the Age to Realize Legal Protection from Human Rights Aspects: Research Study at The Office of Social and Community Empowerment In Batam City," *International Journal of Educational Review , Law and Social Sciences (IJERLAS)* 1, no. 1 (2021): 46.

³⁴Adem, Arkadas-Thibert, and Gerison Lansdown, "Article 27: The Right to a Standard of Living Adequate for Physical, Mental, Spiritual, Moral, and Social Development," In *Monitoring State Compliance with the UN Convention on the Rights of the Child* , p. 227. 2022.

³⁵Yahya Ahmad, Zein et al., "The Local Government Policy in Border Area on the Education Rights Fulfillment for Persons with Disabilities in North Kalimantan Province." *Journal of Legal Reform: Cogito Ergo Sum* 1, no. 2 (2018): 60.

³⁶Tri, Sulistiyono et al., "Legal Protection to Child Labor: The Effectiveness of National Criminal Law and International Law Instrument (A Case Study of Indonesia and China)," *International Journal of Business, Economics and Law* 18, no. 4 (2019): 47.

3. Children have the right to care and protection, both while in the womb and after birth
4. Children have the right to protection from the environment which can harm or hinder their normal growth and development.

For this reason, it is necessary to make protective efforts to realize the welfare of children by providing guarantees for their rights without any discrimination.³⁷ The Birth of Jurisprudence No. 137 K/AG/2007 and No. 276 K/AG/2010, a paradigm shift occurred which formed a new rule that was different from the previous one, namely that the burden of maintenance on the husband for the wife was not only permitted in talak divorce cases, but also in contested divorce cases, provided that the wife was declared by the judge not to be included a nusyuz wife (a wife who is disobedient and disobedient to her husband).³⁸ The existence of this jurisprudence has not been widely followed by judges in the Religious Courts environment, this is proven based on data where the percentage shows a figure of 2.73% of the fulfillment of women's and children's rights, meaning that jurisprudence has not changed the paradigm enough for Religious Court judges to optimally provide decisions that are instructive.

The presence of the Circular Letter of the Supreme Court of the Republic of Indonesia Number 3 of 2018 concerning the Implementation of the Formulation of the Results of the 2018 Supreme Court Chamber Plenary Meeting as Guidelines for Carrying Out Duties for Courts which have accommodated the Regulation of the Supreme Court of the Republic of Indonesia Number 3 of 2017 concerning Guidelines for Trying Women's Cases in Conflict with the Law states that the wife in in cases of contested divorce, mut'ah can be granted, and Iddah maintenance as long as it is not proven nusyuz, while the provisions governing the guidelines for providing support to children are contained in the Circular Letter of the Supreme Court of the Republic of Indonesia Number 4 of 2016 concerning Plenary Meetings which states that Judges within the Religious Courts must The ex officio right can determine the child's maintenance allowance to the father if the child is actually in the care of the mother.³⁹

³⁷Ni Ketut Suriati, "Protection of Children's Rights in The Aspect of International Law," *Ganesha Law Review* 5, no. 2 (2023): 23.

³⁸Maimun Maimun, "The Women's Rights in Divorce and Gender Equality Discourse in The Dynamics of Divorce in Madura," *Samarah: Journal of Family Law and Islamic Law* 6, no. 1 (2022): 469.

³⁹Suparto, Suparto, and Zulkifli Zulkifli, "Position of Circular Letter of the Supreme Court as a Follow up from the Decision of the Constitutional Court Number 37/PUU-IX/2011," *Awang Long Law Review Journal* 5, no. 1 (2022): 227.

The existence of jurisprudence in 2008 and 2010 was further strengthened by the provisions of Supreme Court Circular Letter Number 3 of 2018 which provided a shift from patriarchal culture towards gender equality. This means that the woman (wife) in a contested divorce case can also demand or obtain her rights through an ex officio judge, and is not trapped by the provisions of the Compilation of Islamic Law which only give rights to women (wives) if it is caused by divorce due to divorce, but based on data provided The percentage shows a figure of 2.73% of contested divorce decisions which contain rulings regarding the fulfillment of the rights of women and children, meaning that the jurisprudence and Circular Letters of the Supreme Court have not sufficiently changed the paradigm of Religious Court judges to optimally provide decisions that punish ex-husbands for provide the rights of women and children after divorce in contested divorce cases.⁴⁰

Article 8 of Law Number 12 of 2011 concerning the Formation of Legislative Regulations explains that the types of statutory regulations stipulated by the Supreme Court are recognized for their existence and have binding legal force as long as they are ordered by higher statutory regulations or are formed based on authority. The Supreme Court is an institution that has a regulatory function so that it has the authority to issue regulations. The administration of justice is often hampered, so in order to expedite the administration of justice and the difficulty of creating a law, to fill the legal vacuum, the Supreme Court created legal products in the form of Supreme Court Circulars and Regulations Supreme Court.

Based on the data, a very low percentage of contested divorce decisions punishing husbands for giving away women's and children's rights is partly due to the existence of legal regulations whose binding power is not recognized as statutory regulations as stated in Article 8 paragraph (2) of the Law Number 12 of 2011 concerning the Formation of Legislative Regulations.⁴¹ If a norm is desired to become a statutory regulation whose existence is recognized and has binding legal force, it must be in accordance with Article 7 and Article 8 of Law Number 12 of 2011 concerning the Formation of Legislative Regulations, one of which is the stipulated statutory regulations by the Supreme Court. The regulations in question are the Regulations of the Supreme Court of the Republic of Indonesia while the

⁴⁰Mohammad Ali, Hisyam, and Omaima Abou-Bakr, "Application of Ex Officio Rights Based on Gender Justice in Divorce Lawsuit in Surabaya Religious Court, Indonesia," *Journal of the Court: Legal Studies and Islamic Law* 8, no. 2 (2023): 189.

⁴¹Yhannu Setyawan, "Draft of the Job Creation Omnibus Law in the Perspective of Law Number 12 of 2011 concerning the Formation of Legislative Regulations," *Scientific Journal of Law and Justice* 7, no. 1 (2020): 154.

Circular Letters of the Supreme Court of the Republic of Indonesia are not included in the type of statutory regulations referred to in that Article.

In the Decree of the Chairman of the Supreme Court of the Republic of Indonesia No. 271 / KMA / SK / important and urgent. Cholida also stated the same thing, that a Circular Letter is a legal product that is materially binding on the public but is not included in statutory regulations, a circular letter is an internal administrative instrument. This is in line with the opinion of H. Amirudin Hinelu, S.Ag, in an exclusive interview conducted by researchers that according to him the Circular Letter is merely an appeal to equate perceptions that may be distorted with good legal reasoning.

Supreme Court Circular Letter by Jimly Asshidiqie is classified as policy rules or quasi legislation. The Supreme Court Circular Letter is a policy which in terms of its form does not have a formal form similar to statutory regulations in general, namely without any forming parts such as naming, opening, body and closing, so it can be assumed that the Letter the Supreme Court Circular is not a statutory regulation. When seen from the Supreme Court Circular Letter from the legal basis as regulated in Law Number 14 of 1985 concerning the Supreme Court, in this case the Supreme Court is given the authority to act as rule making power. This authority was given so that the Supreme Court could resolve issues that were not regulated by law.

Based on the provisions of this article, it can be concluded that the Supreme Court is given the authority by the Law to issue complementary regulations to fill legal gaps and shortcomings, for example making regulations regarding the resolution of cases that are not regulated in the Law. The narrow space/coverage of circular letters is even emphasized in the Minister of State Apparatus Empowerment and Reform Regulation Number 80 of 2012 concerning Guidelines for Official Documents for Government Agencies, explaining that circular letters are official documents that contain notifications about certain matters that are considered important and urgent. Supreme Court Circular Letter is a policy (bleidsregel), guidance or appeal to fill legal gaps, but Supreme Court Circular Letter does not yet have the ability to bind and be recognized in statutory regulations so it is still facultative in nature so it cannot apply pressure to legal targets. Article 1 paragraph (2) of Law Number 12 of 2011 states that written regulations are those that contain a legal norm that is generally binding and is formed or determined by an authorized institution or official through procedures stipulated in statutory regulations. Article 5 of the Law recognizes principles, including: The principle of forming good laws and regulations; and Principles relating to the content of statutory regulations.⁴²

⁴²Faisal Khofif, "Legal Findings and the Impact of Environmental Judge Decisions," *Journal of Legal Certainty and Justice* 5, no. 2 (2023): 114.

Legal certainty according to Fence as written above is one that has clarity and can be implemented, first, the position of the Court Circular which is a guideline or policy and is not found in the hierarchy of statutory regulations as stated in Article 7 of Law Number 12 of 2011, The Supreme Court Circular Letter is not explained in the hierarchy of the Legislative Regulations so that its binding power is different from a rule which is included in the hierarchical structure as regulated in that provision. Second, it can be implemented if it has strong binding power, Article 8 of the Law on the Formation of Legislative Regulations states clearly that the Supreme Court is given the authority to make regulations and regulations made by the Supreme Court will have binding legal force as long as they are ordered by Legislative Regulations. -Higher invitation or formed based on authority. According to the Researcher's opinion, the Supreme Court in making a regulation is in the form of a Supreme Court Regulation, not in the form of a Supreme Court Circular. The Supreme Court Regulation is formed in formal and perfect form as a form of regulation, whereas in making a Circular the formal and perfect level is not the same as the Supreme Court Regulations.

It is necessary to optimize the fulfillment of women's and children's rights in contested divorce cases in the Religious Courts, it must take the form of rules that have strong binding power and have a high level of obligation to implement them, and there are legal consequences if they are not implemented properly. This will be applicable if the rights of women and children in divorce cases are regulated in a regulation which is included in the types and hierarchy of statutory regulations as regulated in the provisions of Article 7 of Law 12 of 2011 concerning the Formation of Legislative Regulations, namely in the form of a Presidential Instruction by updating the Compilation of Islamic Law or Government Regulations as stated in Article 8 of the Law, namely in the form of Regulations made by the Supreme Court, namely the Supreme Court Regulations.

Fulfillment of the rights of women and children, if in a form that has binding force, such as a Presidential Instruction, Government Regulations or Supreme Court Regulations, will give rise to legal consequences if it is not implemented so that a regulation will be effective, targets can be achieved, legal objectives can be implemented and targets are achieved in accordance with the substance of the specified regulations. and in the end a policy can be successfully implemented and well followed by the targets of the policy. Apart from that, if a rule has been created and determined and implemented, the next step is to supervise the implementation of the rule. Supervision is an activity that has a very important role in the smooth running of an organization's activities. Supervision can be a controlling function for

management to ensure that the plans they have set can run smoothly and smoothly so that the organization can achieve every target that has been set.

Supervision is basically completely directed at avoiding the possibility of deviation or deviation from the goals to be achieved. Through supervision, it is hoped that it can help implement the policies that have been set to achieve the planned goals effectively and efficiently. In fact, through supervision an activity is created that is closely related to the determination or evaluation of the extent to which leadership policies are implemented and the extent of deviations that occur in the implementation of the work. This concept of supervision actually shows that supervision is part of the management function, where supervision is considered as a form of inspection or control from those above them to those below them. The main goal of supervision is to ensure that what is planned becomes a reality. In order to truly realize this main objective, the first level of supervision aims to ensure that work is carried out in accordance with the instructions that have been issued and to identify the weaknesses and difficulties encountered in implementing the plan based on these findings, so that action can be taken to improve them, either at that time or in future times. With supervision, it is also hoped that the implementation of the plan will utilize all elements of management effectively and efficiently.

D. CONCLUSION

From this research it can be concluded that a divorce that is considered legal is a divorce that is carried out before a court after both parties have tried to find a resolution through deliberation but failed to reach an agreement. In the case of a husband who files for divorce, he is obliged to provide maintenance in accordance with Islamic law and the law, while a contested divorce requires the husband to carry out a remarriage contract if he wants to refer to his wife. Divorce affects custody and maintenance costs for children, who must still receive love and protection from their parents. The low percentage of contested divorce decisions that include the rights of women and children is due to the lack of demands from plaintiffs, the lack of massive implementation of the Circular Letter, and less binding regulations. These rights are regulated in a Circular Letter from the Supreme Court of the Republic of Indonesia, which is administrative in nature and does not have as strong a binding force as statutory regulations.

The implications of this conclusion include the need to raise legal awareness among those involved in divorce regarding their rights. There is a need for regulatory improvements to strengthen the protection of women's and children's rights after divorce, by replacing the administrative Circular

Letter with more binding legislation. Courts must ensure that divorce decisions clearly address maintenance obligations and child custody, with enhanced training for judges and oversight of decision implementation. Legal process reform is also necessary to make it more transparent and fairer, ensuring effective protection of rights for all parties involved.

Suggestion

1. There must be a change in regulations because while the granting of women's rights in divorce cases is regulated in the Compilation of Islamic Law, the granting of women's rights in divorce cases must also be regulated by the same level of regulations. The Compilation of Islamic Law needs to be updated. To optimize the fulfillment of women's and children's rights in divorce cases in the Religious Courts, these regulations must have strong binding power and a high level of obligation in their implementation, as well as legal consequences if they are not implemented properly. This can be achieved by including the rights of women and children in divorce cases into the types and hierarchy of statutory regulations as regulated in Article 7 of Law 12 of 2011 concerning the Formation of Legislative Regulations, for example in the form of a Presidential Instruction by updating Compilation of Islamic Law or Government Regulations, or through regulations made by the Supreme Court, namely Supreme Court Regulations.
2. There needs to be a comprehensive concept that regulates from upstream to downstream regarding the fulfillment of the rights of women and children, starting from regulations that can be binding not only internally on the Supreme Court, but also externally. These rules must cover from the beginning how to make a good lawsuit letter to how to optimize execution after the court decision.
3. There needs to be encouragement for judges to pay more attention to the rights of women and children, not only in talak divorce cases, but also in contested divorces by paying attention to the values of justice, expediency and legal certainty.
4. It is important to supervise, monitor and evaluate the implementation of the rules that have been created and determined for the smooth implementation process. There needs to be warnings, warnings, and even punishments for court leaders or judges who do not or are reluctant to implement the concept of fulfilling the rights of women and children.

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