

Women and Children's Rights Claims in A Disclaimer Case at Religious Courts

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Abstract:

This study aims to determine the causes of the low fulfillment of wife and children's income after divorce and the efforts that can be made to optimize the fulfillment of wife and children's income, especially in divorce cases. The research method used is normative with a case approach (statute approach) and a conceptual approach. The results of the study show that the percentage of women's and children's rights in religious courts has a very low percentage, so it is necessary for judges to use their ex officio rights massively for the optimal fulfillment of women's and children's rights. In addition, the position of the Sema which is considered to be a guideline or policy and does not have strong binding power, it is necessary to have rules recognized by the national legislation formation system, preferably in the form of a Supreme Court Regulation or Government Regulation. The results of the study show that the percentage of women's and children's rights in religious courts has a very low percentage, so it is necessary for judges to use their ex officio rights massively for the optimal fulfillment of women's and children's rights. In addition, the position of the Sema which is considered to be a guideline or policy and does not have strong binding power, it is necessary to have rules recognized by the national legislation formation system, preferably in the form of a Supreme Court Regulation or Government Regulation. The results of the study show that the percentage of women's and children's rights in religious courts has a very low percentage, so it is necessary for judges to use their ex officio rights massively for the optimal fulfillment of women's and children's rights. In addition, the position of the Sema which is considered to be a guideline or policy and does not have strong binding power, it is necessary to have rules recognized by the national legislation formation system, preferably in the form of a Supreme Court Regulation or Government Regulation.

Keywords: The Rights; Women; Children; Divorce.

How to cite (Chicago Manual Style):

Sunyoto, S. 2021. "Women and Children's Rights Claims in A Disclaimer Case at Religious Courts". *Damhil Law Journal* 1 (2): 101-115



Introduction

Marriage is a strong contract or agreement (*mitsaaqan ghlidzon*) to obey Allah's commands and carry it out is considered worship. Even though marriage is considered a strong agreement, it can be broken if one or both of them are unable to continue their marital relationship. The dissolution of marriage as stated in Article 38 of Law no. 1 of 1974 concerning Marriage with Article 113 of Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law is divided into 3 (three) namely because of death, divorce, and on-court decisions. In this paper, we will only discuss the dissolution of marriage due to divorce.

A divorce is a legal event that forbids something that was previously lawful, the biological relationship of husband and wife which was previously lawful then with the divorce both of them are forbidden to have a biological relationship. This is one of the legal consequences of a divorce. In addition, both husband, wife, and children have their respective legal consequences and consequences, one of which is regarding the rights of the (former) wife and children, as stated in Article 149 of the Compilation of Islamic Law and regarding children, as stated in Article 149 of the Compilation of Islamic Law. in Article 41 letters (a) and (b) and 45 paragraph (2) of the Marriage Law in conjunction with Article 156 of the Compilation of Islamic Law.

The right of the wife in question is regarding the right to *mut'ah*, *iddah*, *kiswah*, *maskan*, and *madhiyah* (if any), while the child's rights are the right to be



cared for and financed for all their needs, both maintenance costs and education and health costs. (Fikri 2019).

The Religious Courts are the actors of judicial power appointed by the Law as stipulated in Article 24 of the 1945 Constitution of the Republic of Indonesia. Religious Courts are institutions that are specifically authorized to adjudicate and resolve certain cases, namely for people who are Muslim. The authority of Religious Courts is stated in Article 49 of Law Number 3 of 2006 concerning the Religious Courts, namely the authority to adjudicate certain cases, one of which is divorce cases, namely for people whose marriages are carried out based on Islam.

Religious Courts have material legal references, one of which is the Compilation of Islamic Law which is Presidential Instruction Number 1 of 1991, which regulates marriage, divorce and its legal consequences, and so on. The Compilation of Islamic Law only provides the burden of iddah, maskan, kiswah, and mut'ah living expenses only when a divorce in the Religious Court is filed by a husband or as a result of divorce.

In addition to the Compilation of Islamic Law, the Religious Courts also use jurisprudence as a benchmark or guide in deciding a similar case. The existence of Jurisprudence No. 137 K/AG/2007 and No. 276 K/AG/2010 has shifted the paradigm that is different from the previous one, in the Compilation of Islamic Law the burden of living on husbands for wives is only in cases of divorce, but in jurisprudence, iddah and mut'ah can be given in divorce cases, as long as the wife does not prove to be a nusyuz woman. Furthermore, in the Regulation of the Supreme Court of the Republic of Indonesia Number 3 of 2017, judges are instructed that in examining cases dealing



with women, they should consider gender equality and gender stereotypes, both contained in written and unwritten regulations.

The Circular Letter of the Supreme Court of the Republic of Indonesia Number 3 of 2018 also regulates this matter, which basically accommodates the Regulation of the Supreme Court Number 3 of 2017 and states that the provision of iddah and mut'ah living in divorce cases is allowed as long as the wife is judged by the judge not to be a wife. nusyuz, While the provisions regarding children are contained in the Circular Letter of the Supreme Court Number 4 of 2016 which confirms that the judge has the authority *ex officio* to punish the father to provide a living or the cost of raising a child who actually lives with his mother, in addition to the cost of raising the child also has the right to finance education and health.

Various provisions issued by the Supreme Court in the form of Supreme Court Regulations, Supreme Court Circulars, and Jurisprudence as references in deciding similar cases, have not yet been able to provide optimal fulfillment of the rights of wives and children. This is evidenced by the data obtained by the author from the Religious Courts Agency (Badilag) that there were 384,023 divorce cases in 2020, but only 13,081 contained the imposition of women's and children's rights, or about 2.73% of the total number of lawsuits. The percentage figure is very low while behind it, there are the rights of women and children that must be fulfilled.

The Religious Courts in relation to the fulfillment of the rights of women and children have a very important and strategic role to ensure the fulfillment of these rights. The Religious Courts are the only stakeholders who are authorized to order those who are burdened to give the rights of women and children after divorce, so that the Religious Courts must be able to provide the best for those who are considered



weak, in this case, are women and children. Religious Courts (judges) must also know and consider the conditions that may be experienced by women and children, for example, women during the marriage period do not work because they are preoccupied with caring for household needs and children, women are victims of violence by their husbands, victims of neglect,

Problem Statement

This paper was written to find out the causes of the low fulfillment of the rights of women and children in the Religious Courts and what actions should be pursued so that the rights of women and children can be fulfilled optimally by looking at divorce data, especially divorced divorce which includes the imposition of the rights of women and children. the rights of women and children, as well as the position of the legal substance regulated by the Supreme Court which is directly related to the rights of women and children.

Method

This study uses normative research, namely research which according to Sumitro is research in the form of literature or secondary data. Normative legal research serves to provide legal arguments in the event of a legal vacuum, ambiguity, and conflict of norms.

The approach used is the conceptual approach and the statute approach. The conceptual approach offers a new conception so that the fulfillment of the rights of women and children can be applied optimally, while the statutory approach is to offer



renewal of new rules or legal norms for the realization of the fulfillment of the rights of wives and children.

Discussion

1. Women and Children's Rights in Religious Courts

The Religious Courts are institutions that have the authority to receive, adjudicate, and resolve certain civil cases specifically for Muslims. The authority possessed by the Religious Courts is stated in Article 49 of Law Number 3 of 2006 concerning Religious Courts that the Religious Courts have the authority to settle cases in the field of marriage, inheritance, wills, grants, waqf, zakat, infaq, alms, and sharia economics.

One of the authorities of the Religious Courts is to accept, adjudicate, and resolve cases in the field of marriage, one of which is the issue of divorce. (Zuhriah, Indonesian Religious Courts: History of Thought and Reality 2009) The intended divorce is based on Article 114 of the Compilation of Islamic Law which states that the breakup of a marriage can be caused by 2 (things) namely breaking up due to a divorce suit. Divorce due to divorce is the result of the utterance of the divorce pledge spoken by the husband in front of the court, while litigation is a divorce filed by the wife.

According to data obtained by the author from the statistical section of the Religious Courts Agency (Badilag) that the number of divorces in the Religious Courts in 2020 was 122,698 for divorce cases, and 355,683 for contested divorce cases. The



data shows that there are 3 (three) times more cases of litigation compared to divorce cases.

According to Rais, the increasing culture of divorce in the Religious Courts is first, women are increasingly aware of their rights so that women do not accept the treatment of husbands whose behavior ignores the rights of their wives. Second, the factor of women's economic independence, meaning that women or career wives are able to support themselves and their children so that they can carry on their lives even without the help of their husbands. Third, there is the husband's authority to pronounce divorce in front of his wife, so that the wife feels she is not allowed to live with her husband anymore, so many women file for divorce. Fourth, is the education factor, women who have a high level of education do not want to depend on their lives with their husbands. (Rais 2014)

The legal consequences of divorce are one of them regarding the husband's obligation to provide mut'ah, iddah, maskan, and kiswah to his ex-wife, but only specifically in cases of divorce (divorce proposed by the husband). As explained in Article 149 of the Compilation of Islamic Law. In contrast to litigation, in divorce cases filed by the wife or commonly called litigation, the Compilation of Islamic Law does not regulate it. The basis or basis for the right to provide iddah and mut'ah in divorce cases is contained in Jurisprudence No. 137 K/AG/2007 and No. 276 K/AG/2010 and Circular Letter of the Supreme Court Number 3 of 2018 concerning Plenary Meetings. The jurisprudence in its consideration provides iddah and mut'ah to the ex-wife which requires that the ex-wife is not a nusyuz wife. The same thing is also regulated in the Circular Letter of the Supreme Court Number 3 of 2018



concerning the Plenary Meeting that judges can provide iddah and mut'ah living provided that the wife is judged by the judge not to be a nusyuz wife.

In addition to having an impact on women or ex-wives, divorce also has a tremendous impact on children. The Compilation of Islamic Law and the Circular Letter of the Supreme Court in this regard have the same perception that when a divorce occurs, the father is still responsible for providing child care costs, as well as health and education costs for children, the same thing is also regulated in the Marriage Law.

Women or wives have the right to receive affection and love from a husband which is constructed in a marriage that is valid and strong and sacred, so that if it is interpreted philosophically, then the husband should treat his wife as a partner and not discriminate against her, let alone consider her a servant and make her a second class.

Children's needs are also regulated in the provisions of Article 105 of the Compilation of Islamic Law, among others, if they are not yet 12 years old, custody is with the mother, if over 12 years old, the child has the right to choose between the father or the mother, and the child's maintenance costs are the responsibility of the father. The same thing is also regulated in Article 26 of Law Number 23 of 2002 concerning Child Protection which stipulates that children have the right to be cared for, nurtured, educated, and protected.

The existence of women's and children's rights really need to be protected by anyone, including the Religious Courts. The number of court decisions within the Religious Courts which contains the burden of living both to the wife and to children



in divorce cases in 2020 is 13,081 of the total divorce cases in 2020 which amounted to 384,023. This means that only 2.73% of divorce decisions in which there is an imposition of the rights of women and children. This percentage is considered very small compared to the number of divorce cases and the rights of women and children that should be given by ex-husbands. The wife during the marriage has sacrificed time, energy, and others in order to prepare and take care of all matters relating to the condition of the house and children.

Fulfillment of the rights of women and children in the Religious Courts in divorce cases needs to be improved, whether requested in the petitum or not. In the petitum, the judge can exercise ex officio rights provided that the results of the trial prove that the wife is not a nusyuz wife, as stated in the Circular Letter of the Supreme Court Number 3 of 2018. The authority due to position or ex officio owned by the judge is the ultimate weapon that functions to solve problems without leaving problems, let alone adding new problems. Ex officio judges can be interpreted as real actions of judges to find the law for the realization of justice,

The ex officio rights of judges should be carried out massively by all judges within the Religious Courts in order to optimize the fulfillment of the rights of wives and children in the Religious Courts considering that women and children are a weak group who need protection to ensure the fulfillment of their rights. Women and children often become victims of neglect, violence, infidelity, and so on, so it is very necessary for judges to pay attention and consider the condition of women and children to make decisions in their decision to punish their husbands to provide iddah and mut'ah and madhiyah (if any), besides that It also punishes the father to provide



the cost of raising the child and is responsible for all the needs that the child needs, including the cost of education and health.

2. Women's and Children's Rights in Positive Law

The legal consequences of divorce are one of them regarding the husband's obligation to provide mut'ah, iddah, maskan, and kiswah to his ex-wife but only specifically in cases of divorce (divorce proposed by the husband). As explained in Article 149 of the Compilation of Islamic Law. In contrast to litigation, in divorce cases filed by the wife or commonly called litigation, the Compilation of Islamic Law does not regulate it. The basis or basis for the provision of iddah and mut'ah subsistence rights in divorce cases is contained in Jurisprudence No. 137 K/AG/2007 and No. 276 K/AG/2010 and Circular Letter of the Supreme Court Number 3 of 2018 concerning Plenary Meetings.

The Supreme Court Circular Number 3 of 2018 was issued by the Supreme Court to accommodate Supreme Court Regulation Number 3 of 2017 concerning Guidelines for Adjudicating Women in Conflict with the Law which states that in divorce cases the wife can be given mut'ah and iddah expenses as long as the wife is not included in the law. nusyuz wife. This second analysis does not discuss the legal substance in the circular letter but will discuss and analyze the position of the Supreme Court Circular in the national legal system (positive law).

The Supreme Court is authorized by law to make a regulation to fill legal gaps or gaps.



The circular letter is materially a binding legal product but is not classified as statutory regulation. Circular is only an administrative instrument that is internal, even by Jimly Asshidiqie classifying Circular as a policy rule or quasi legislation. The Supreme Court Circular is used as a guide, direction, prohibition, or order, it is also used to solve a legal problem which if the law does not regulate a legal event and is considered to have no value of justice, in this case, the Supreme Court Circular is a solution. alternative to solve legal problems. (Asshidiqie 2010)

The circular letter on the one hand can be used as a reference by the judge in making decisions, but if it is not decided based on the circular letter then no consequences will be obtained, but on the one hand, the circular letter is not included in the hierarchy of legislation in Indonesia is regulated in the law. Law Number 12 of 2021 concerning the Establishment of Legislation, if a rule or norm is regulated in the legislation then it is materially recognized and has strong binding power. In theory, it is difficult to determine the position of the Supreme Court Circular in the hierarchy of legislation due to the absence of standard rules that can be used as a reference. (Prasetya 2020)

The legal basis for the existence of the Supreme Court Circular was originally contained in the provisions of Article 12 paragraph 3 of Law number 1 of 1950 concerning the Composition, Powers, and Courts of the Indonesian Supreme Court. Based on these provisions, the Supreme Court is given the authority to supervise the judicial institutions under it, for this reason, the Supreme Court has the right to give warnings, warnings, instructions, directives that are deemed necessary. These provisions are valid until the enactment of Law Number 14 of 1985 concerning the



Supreme Court which is not clearly stated so as to create uncertainty regarding its legal status.

Indonesia is a state of law so written legal norms are important and needed, then the strength of a provision, rule, the policy must also be recognized by laws and regulations. achieve legal certainty. Legal certainty requires that the law function as a rule that must be obeyed. Legal certainty is defined as the clarity of norms to be used as guidelines for the people who are the target of the regulation. According to Fence M. Wantu that certainty means, first, the existence of clarity; second, it does not cause multiple interpretations; third, not contradictory; and fourth, can be implemented. (Fence M. Wantu, 2011;76)According to Sudikno Mertokusumo described by Mario and Aditya in their journal that the principle of legal certainty is a form of protection for justice seekers (justiciable) against arbitrary actions, meaning that someone will get something that is expected under certain circumstances, with legal certainty then the law will not only be based on subjective speculation alone, is gray, and there is no clarity in it. (Julyano and Sulistyawan 2019)

Legal certainty according to Fence as written above is that which has clarity and can be implemented, first, the position of the Circular of the Court which is a guideline or policy and is not contained in the hierarchy of laws and regulations as stated in Article 7 of Law Number 12 of 2011, the Circular Letter of the Supreme Court is not explained in the hierarchy of Legislation so that its binding power is different from a rule that is classified as a hierarchical arrangement as regulated in the provision. Second, it can be implemented if it has strong binding power, Article 8 of the Law concerning the Establishment of Legislation clearly states 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 a higher Legislation or formed based on authority. According to the author'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 same as the Supreme Court Regulations.

It is necessary to optimize the fulfillment of the rights of women and children in divorce cases in the Religious Courts, it must be in the form of rules that have strong binding power and have a high level of obligation in carrying them out, and there are legal consequences if they are not implemented properly. This will be implemented if the rights of women and children in divorce cases are regulated in a rule that is included in the types and hierarchy of laws and regulations as regulated in the provisions of Article 7 of Law 12 of 2011 concerning the Establishment of Legislations namely in the form of a Government Regulation or as Article 8 of the Law, namely in the form of a Regulation made by the Supreme Court, namely the Regulation of the Supreme Court.

Conclusion

Fulfillment of the rights of women and children in the Religious Courts in divorce cases needs to be improved, both those requested in the petitum and those not requested in the petitum. If not requested in the petitum, the judge can exercise ex officio rights provided that the results of the trial prove that the wife is not a nusyuz wife, as in the Supreme Court Circular Number 3 of 2018 which states that ex officio judges can provide iddah and mut'ah livelihoods. in the case of a divorce, on the condition that the wife is not classified as a nusyuz. The authority because of the



position or ex officio owned by the judge is the ultimate weapon that functions to solve problems without leaving problems. let alone add new problems. The ex officio rights of judges should be carried out massively in order to optimize the fulfillment of the rights of wives and children in divorce cases in the Religious Courts.

Optimize the fulfillment of the rights of women and children in divorce cases in the Religious Courts, it must be in the form of rules that have strong binding power and have a high level of obligation in carrying them out and there are legal consequences if they are not implemented properly. the rights of women and children in divorce cases are regulated in the provisions as stipulated in Law 12 of 2011 concerning the Establishment of Legislations, namely in the form of Government Regulations or Supreme Court Regulations.

References

- Arto, Mukti. 2018. *The Discovery of Islamic Law for Realizing Justice*. Yogyakarta: Student Library.
- Asshidique, Jimly. 2010. *Regarding the Law*. Jakarta: Rajawali Press.
- Badilag. 2021. "Sharing Knowledge, Experience, and Praying Yourself, Your Excellency Mukti Arto." Supreme Court of the Republic of Indonesia Directorate General of Religious Courts. October 13th.
<https://badilag.mahkamahagung.go.id/seputar-ditjen-badilag/seputar-ditjenbadilag/berbagi-ilmu-Experience-dan-mohon-diri-yang-mulia-mukti-arto>.
- Cahyadi, Irwan Adi. 2014. "The Position of the Circular Letter of the Supreme Court (SEMA) in Indonesian Positive Law." *Journal of Law* 1-19.
- thought. 2019. "Flexibility of Women's Rights in Divorced Lawsuits at the Parepare Religious Court." *Al-Maiyyah* 12(1):1-16.



- Hanum, Cholida. 2020. "Juridical Analysis of the Position of Circular Letters in the Indonesian Legal System." *Humani (Law and Civil Society)* 10 (2): 138-153.
- Irwansyah. 2020. *Legal Research, Choice of Methods, and Practice of Article Writing*. Yogyakarta: Mirra Buana Media.
- Julyano, Mario, and Aditya Yulia Sulistyawan. 2019. "Understanding the Principle of Legal Certainty through the Construction of Legal Positivism Reasoning." *CREPIDO* 1(1):13-22.
- Mertokusumo, Sudikno. 1988. *Indonesian Civil Procedure Code*. Yogyakarta: Liberty.
- Mulyawan, Service, and Refined. 2007. *Integrative Islamic Education*. Yogyakarta: Student Library.
- Nasution, Bahder Johan. 2008. *Legal Research Methods*. Bandung: Forward Mandar.
- Prasetya, Vestwansan Dipa. 2020. "The Position of the Circular Letter of the Supreme Court Based on Law Number 12 Year 2011 Concerning the Formation of Legislations." *Online Journal of Students of the Faculty of Law, University of Riau* 7 (1): 1-15.
- Prayogo, R. Tony. 2016. "The application of the principle of legal certainty in the Supreme Court Regulation no. 1 of 2011 concerning the Right to Judicial Review and in the Regulation of the Constitutional Court no. 06/PMK/2005 concerning Guidelines for Proceeding in Judicial Examination." *Indonesian Legislation Journal* 13 (2): 191-202.
- Rais, Isnawati. 2014. "High Divorce Rate (Khulu') in Indonesia; Critical Analysis of the Causes and Alternative Solutions to Overcome it." *Al-'Are* 9(1): 191-204.
- Rafiq, Ahmad. 2013. *Islamic Civil Law in Indonesia*. Jakarta: Rajawali Press.
- Sholikin, Nur. 2017. "Observing the Formation of the Regulation of the Supreme Court (PERMA)." *Rechtsvinding* 1-5.



- Soekanto, Soerjono, and Sri Mamudji. 2013. Normative Legal Research. Jakarta: Rajawali Press.
- Suadi, Amran. 2018. "The Role of the Religious Courts in Protecting the Rights of Women and Children Through Judgmental and Implementable Judgments." *Journal of Justice* 7(3): 353-374.
- Wantu, Fence M. 2011. *Idee Des Recht: Legal Certainty, Justice, and Benefits (Implementation in the Civil Court Process)*. Yogyakarta: Student Library.
- Wijayanta, Tata. 2014. "Principles of Legal Certainty, Justice, and Their Benefits in Relation to the Bankruptcy Decision of the Commercial Court." *Journal of Legal Dynamics* 14 (2): 216-226.
- Zuhriah, Erfaniah. 2009. *Indonesian Religious Courts: History of Thought and Reality*. Malang: UIN Malang Press.
- . 2009. *Indonesian Religious Courts: History of Thought and Reality*. Malang: UIN Malang Press.

