

Legal Certainty of the Rights of Wives and Children After Divorce

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Abstract

The position of suspicious children in the perspective of Islamic law is a topic of significant interest and importance within legal and ethical discourse. In Islamic jurisprudence, the treatment and rights afforded to children, particularly those born under suspicious circumstances, hold profound implications for both societal norms and legal frameworks. Understanding the nuanced stance of Islamic law towards suspicious children necessitates a comprehensive exploration of religious texts, legal principles, and contemporary interpretations. This research aims to see what the rights of women and children are after divorce, what is the legal certainty in fulfilling the rights of women and children after divorce in the Religious Courts, and what are the obstacles to fulfilling the rights of women and children after divorce in the Religious Courts. This research method uses a qualitative method with content analysis approach. From the research that has been carried out, it was found that legal certainty in fulfilling the rights of women and children in the religious court environment is still not effective. The issue of the rights and obligations of husband and wife in the event of divorce is closely related to the legal awareness of both parties. So there is a need for good legal awareness among the public regarding the rights and obligations of marriage. Good legal awareness has a causal relationship with the effectiveness of legal certainty of the rights of children and wives after divorce.

INTRODUCTION

Divorce is an aspect of family law that requires inclusive arrangements for both men and women (Huntington, 2015; Huntington, 2015). The way society manages marriage and divorce has a big influence on everyone's life (Bradbury et al., 2016; Kiecolt-Glaser, 2018; Ruparelia, 2018). Therefore, there must be a system that allows married couples to divorce without leaving conflict, unnecessary financial loss, psychological trauma, and negative impacts on children. Divorce in Indonesia is relatively high. Every year there are approximately 350,000 divorce cases in Indonesia, with an estimated 60-70% of them filed by women. This shows that women are one of the parties most vulnerable to feeling the impact of an unharmonious marriage (Target et al., 2017).

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National legal instruments and international law classify women in vulnerable groups along with other vulnerable groups such as children (Heacock et al., 2016). Women are classified as a vulnerable group due to various social, cultural, and economic conditions, or are physically at risk of experiencing violence or rights violations by other groups (Gostin et al., 2020; Thomas et al., 2019). Women's rights in various texts and contexts are often discriminated against, and marginalized, both in terms of interpretation of verses, customs that develop in society, and regulations made by the government (Williams et al., 2016).

In the Compilation of Islamic Law Article 149, it is stated that divorce has its legal consequences if it occurs, including (a) giving appropriate mut'ah to his ex-wife, either in the form of money or objects, except for the ex-wife. *qobla al-dukhûl*; (b) provide maintenance, maskan, and kiswah to the ex-wife during the iddah, unless the ex-wife has been divorced ba'in or nushuz and is not pregnant; (c) repay the dowry that is still owed in full, and a half when *qobla al-dukhûl*; and (d) provide costs gift for children who have not reached the age of 21 years.

When the verdict has been finalized and divorce has been imposed, the husband is obliged to fulfill these rights. The rights of a divorced wife are regulated in Law No. 1 of 1974 concerning Marriage and the Compilation of Islamic Law, as well as the rights of children as victims of divorce (Djawas et al., 2022; Nasution & Nasution, 2021). In many divorce cases that occur in society, husbands often neglect fulfilling the rights of their wives and children after the divorce (Michelson, 2019; Sumanto et al., 2021). Ironically, the ex-wife does not know that she still has rights that must be fought for, so the wife becomes vulnerable to experiencing losses related to her rights, especially in divorce cases (Goltz, 2015). Women's low understanding of the law regarding their rights after divorce has resulted in minimal lawsuits regarding this matter being filed in court (Barkah et al., 2022). Based on the results of AIPJ2 (Australia Indonesia Partnership for Justice) research regarding the analysis of divorce case decisions in Religious Courts, of around 447,417 divorce cases decided by Religious Courts in 2018, only around 1% contained claims for child support, 1% contained child support claims. wife and less than 1% contain demands for the division of joint assets (Akram et al., 2023; Kholiq & Halimatusa'diyah, 2023).

Religious courts have a significant role in realizing access and control over material and non-material rights that are gender equitable, especially in divorce cases relating to women and children (Samsul & Husen, 2020; Sarkar & Sarkar, 2016). This is reflected in the direct authority of religious courts in handling family cases, such as divorce, maintenance, child custody, and others that impact the rights of women and children. The efforts of religious courts to accommodate this are reflected in policies and decisions of judges, such as the Guidelines for Adjudicating Women's Cases in Conflict with the Law and SEMA Number 3 of 2018 which stipulates the rights of mut'ah and alimony for wives in contested divorces. However, the implementation of this policy still raises questions regarding its effectiveness in fulfilling the rights of women and children, especially regarding the low level of execution of court decisions which can result in legal uncertainty and injustice for ex-wives and children.

The importance of executing court decisions in ensuring legal certainty and justice for society is a crucial highlight, as stated by Herri Swantoro (2018). Having legal certainty in fulfilling the rights of women and children after divorce in religious courts is essential to guarantee the actual benefits of the law. However, there are still obstacles in carrying out executions, which can result in a loss of legal certainty and lead to injustice for ex-wives and children. Therefore, it is important to continue to study and identify obstacles and solutions to ensure effective protection for women and children after divorce in the Religious Courts, in line with the principles of justice and legal certainty.

METHODS

This study uses a qualitative method with content analysis approach, all data taken from various sources are derived from classical holy books, books, theories and expert opinion of Islamic education (Azzahra et al., 2021; Islamoğlu et al., 2022; Kasmar et al., 2019; Ramli et al., 2017). According to Fajrussalam, (2020); Mukholik, (2017); Saini, (2022) this research approach design can be done to discuss problems, issues or specific topics derived from the literature collected thoroughly and then take the appropriate themes with the necessary data. Once all the data the authors collected then the next step is to choose the necessary data in accordance with the issues raised in this article. Methods of the research results with these themes are also in accordance with the opinion Hsieh & Shannon, (2005) explains that, discussion of the results by content analysis approach can be done by using a theme or a major review in accordance with the issues and problems are discussed

RESULT AND DISCUSSION

Women's and Children's Rights After Divorce

a. Women's Rights After Divorce

A woman who has been divorced according to religious law still has to pay the iddah period. Viewed from perspective *maqâshid al-Syari'ah* then an ex-wife during the iddah period must be given maintenance because without maintenance the ex-wife will be in a dangerous condition. Related to *dharuriyat al-khamsah* (five basic mashlahah), mashlahah in the protection of the ex-wife is *hifz al-nafs* (keep the soul). The soul is one of the dharuriyat al-Khamsah that must be preserved. The obligation to preserve the soul has started since the womb in the form of preservation of sperm and ovum fertilization even before conception with the shari'a of marriage and the prohibition of adultery.

Protection of women's rights after divorce is regulated by Law No. 1 of 1974 concerning Marriage and the Compilation of Islamic Law.

“that the Court can oblige the ex-husband to provide living expenses and/or determine obligations for the ex-wife. The rights mentioned are still limited to the ex-wife's living costs. The article does not state whether the ex-husband's obligation to the ex-wife is only in cases of divorce or divorce.”

Meanwhile, in the Compilation of Islamic Law article 149, it is stated that if a marriage breaks up due to divorce, or divorce, the ex-husband is obliged to: i) provide mut'ah in the form of money or objects, except for the ex-wife. *qobla dukhul*, ii) provide maintenance, food, and kiswah during the 'iddah period to the ex-wife, unless the ex-wife is in a state where she has been given a talak ba'in or is in a state of nusyūz and is not pregnant. iii) pay off the entire dowry debt and some of the *qobla dukhul*.

In another article, the Compilation of Islamic Law in Article 97, it is mentioned that widows or widowers who are divorced, then each is entitled to half of the joint property unless otherwise specified in the marriage agreement. Thus, a wife after a divorce is also entitled to half of the joint property.

Children's Rights After Divorce

In the explanation of the Big Indonesian Dictionary, children's rights are guarantees that children are entitled to receive regarding protection, love, etc. from family, society, government, and the State. Meanwhile, according to Law no. 23/2002 Jo. UU no. 35/2014 concerning Child Protection, children's rights are human rights that must be guaranteed, protected, and fulfilled by parents, families, communities, government, and the State. (State Secretariat of the Republic of Indonesia. Law Number 35 of 2014 concerning Child Protection, Article 1 Paragraph (12).

Regarding children's rights after divorce, it has been regulated both in the Marriage Law and in the KHI. Article 41 of the Marriage Law states that after

divorce, parents still must care for and educate their children for the sake of the children. Apart from that, the costs of maintaining and educating children are the responsibility of the father. However, if the father cannot fulfill this obligation, the mother also must pay the costs in question.

The same thing is also regulated in Article 149 letter d KHI which states that the ex-husband should provide alimony to his children. The meaning of an alimony gift is the cost of maintaining, nurturing, and educating children until they grow up. Compilation of Islamic Law Article 105 letter c also emphasizes that the responsibility for post-divorce child maintenance costs lies with the father. These obligations that must be fulfilled are rights that children must obtain after divorce. This is as regulated in Article 4 of Law No. 23 of 2002 where children have the right to live, grow, develop, and participate appropriately by human dignity and to receive protection from violence and discrimination. These rights manifest the obligations of both parents as regulated in Article 1 of Law Number 9 of 1979 concerning Child Welfare where efforts for the child's welfare are first and foremost the responsibility of the parents. From these several things, the children's rights which are the obligations of the parents must still be fulfilled regardless of the conditions, whether the parents are still bound by marriage or after divorce. These rights can be fulfilled if the ex-wife files a claim for these rights either in a lawsuit or through reconvention in a divorce case.

Legal certainty in fulfilling the rights of women and children after divorce in the Religious Courts

The rights of women and children after divorce have been regulated in Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019 and have also been regulated in the Compilation of Islamic Law as the legal basis for judges' considerations in examining, adjudicating and decide cases in addition to other provisions in the form of the Quran, Hadith, and opinions of the ulama. However, in society, husbands often ignore these rights after divorce (Bilalu et al., 2022; Zuhdi & Widyawati, 2022). Thus, it can be interpreted that law enforcement regarding this matter has not been effective.

Hans Kelsen expressed the effectiveness of sustainable law with legal validity, meaning that every legal norm is mutually binding in that every human being is obliged to do something according to the norm and is obliged to obey and carry out these norms. The location of effectiveness is when all humans act correctly, obey, and apply these norms. Effective means achieving the goals that have been set. The characteristic of effectiveness is the achievement of a goal that has been made following previous plans (Kizilcec et al., 2017; Nowiński et al., 2019). Law enforcement that is not effective will certainly harm the principle of certainty as well as the benefits of the law itself.

Over the last 5 years since the publication of various legal instruments regarding the fulfillment of the rights of women and children in the Supreme Court, there have been many judge's decisions containing warnings about the fulfillment of the rights of women and children after divorce (Shinkafi et al., 2017). However, its implementation is still very minimal, this can be seen from the lack of parties who propose execution regarding the rights of women and children after divorce. This clearly shows that law enforcement regarding the fulfillment of women's and children's rights after divorce has not been effective.

Law enforcement is essentially an effort to harmonize legal values by reflecting on attitudes and actions in relationships for the sake of realizing justice, legal certainty, and benefits by implementing sanctions for violators. According to Geovani et al., (2021), several factors influence law enforcement, namely: i) The legal factor itself (law); ii) Law enforcement factors, namely the parties who form and implement the law. iii) Facilities or facilities factors that support law enforcement. iv)

Community factors, namely the environment in which the law applies or is applied.
v) Cultural factors, namely as a result of work, creativity, and feelings based on human intention in social life.

The results of the analysis of these 5 elements show that law enforcement regarding the fulfillment of women's and children's rights in religious courts is still very weak and effective. This is not relevant to the concept of legal objectives initiated by Gustav Radbruch who argued that law in its objectives needs to be oriented towards three things, namely legal certainty, justice, and benefit. According to Radbruch, legal certainty is the main guidance for law, namely, that the law be positive, in the sense that it applies with certainty. The law must be obeyed, thus the law is truly positive. This is not relevant to the concept of legal objectives initiated by Gustav Radbruch who argued that law in its objectives needs to be oriented towards three things (Tan, 2021). Thus, the concept of legal certainty in implementing the fulfillment of women's and children's rights after divorce in the religious court environment has not been realized optimally.

Fulfillment of women's and children's rights in Religious Courts faces some obstacles that need to be overcome. One of them is the husband's lack of awareness regarding his obligations after divorce. In talak divorce cases, husbands are often not present when reading the vows in court, causing them to become legally husband and wife again automatically after 6 months (Sitompul et al., 2023; Utami et al., 2023). Likewise, in contested divorce cases, ex-husbands can avoid their responsibilities by not taking the divorce certificate in court, complicating the fulfillment of the rights of the wife and children after the divorce.

Apart from that, the wife's ignorance of her husband's income is also a problem in determining the appropriate amount of maintenance, especially in contested divorce cases which are decided by *Verstek*. It took a lot of work for the judge to consider appropriate maintenance due to the lack of information regarding the husband's income, both from the wife and the witnesses presented. Another obstacle is the husband's lack of assets or income after divorce so the execution of the husband's obligations becomes difficult. Apart from that, the execution process to fulfill the rights of the wife and children is sometimes complicated and expensive, especially if you submit a request for execution to pay a sum of money to the obligated party.

CONCLUSION

Legal certainty in fulfilling the rights of women and children after divorce in the Religious Courts is still not optimal because there are still gaps in the regulations that can be deviated from. Even though there are breakthroughs, such as withholding the divorce certificate before the ex-husband gives up his obligations regarding the rights of his wife and children, it is feared that this could lead to an increase in underhanded marriages. Although the law and legal regulations provide technical assistance, especially in administration, the court can only play that role if the ex-husband does not implement the decision. Wives rarely apply for execution because the procedures are complicated and the costs are high so court decisions ultimately lack legal certainty because they cannot be implemented properly. Therefore, good legal awareness among the community regarding the rights and obligations in marriage is very important, which cannot be separated from the level of education of the community itself.

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