



## The Fulfillment of Women's and Children's Rights Post-Divorce in Judicial Decisions of the Unaaha Religious Court

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### ABSTRACT

This study aims to describe and analyze the decisions of the Unaaha Religious Court in ensuring the rights of children and women after divorce, as well as to examine the constraints faced by judges in this process. This normative-empirical research employs document studies and interviews for data collection. Data analysis involves identifying legal facts, examining legal norms related to these facts, and applying the norms accordingly. Findings indicate that between July 2021 and June 2022, the Unaaha Religious Court decided 493 divorce cases, with only 22 cases addressing the fulfillment of rights for wives or children. The reasons for fulfilling these rights fall into four typologies: 1) requested in the convention (12 cases), 2) agreement in mediation (8 cases), 3) posita of the application (1 case), and 4) posita lawsuit (1 case). This suggests judges have not exercised their ex-officio rights to ensure women's and children's rights are upheld, nor fully implemented the Director General of Badilag's directive. The constraints judges face include: 1) the financial capacity of the husband or father, 2) the parties' abilities in the evidentiary process, 3) the presence of parties during the trial, and 4) lack of coordination between Religious Courts and related agencies for parties who are civil servants.

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## 1. INTRODUCTION

Divorce is the end of a marriage caused by the non-fulfillment of family roles, as decided by the court, specifically by judges with various considerations. There are several reasons for divorce, including family economic problems, infidelity, misunderstandings, and others (Hifni, 2016). Divorce is regulated in Article 38 of Law No. 1 of 1974 concerning marriage, where juridically, the definition of divorce is the dissolution of marriage, which results in the termination of the relationship as husband and wife (Hammad, 2014). Divorce is a term that signifies the breaking of a marital bond between husband and wife for certain legal reasons, processes, and legal consequences. A marriage can be said to be divorced if a divorce application or lawsuit has been filed in court, either as a divorce petition or a contested divorce, and has been decided and granted by the court (Kurniawan et al., 2022).

Divorce cases received and decided by Religious Courts throughout Indonesia number more than 400,000 cases. According to data available at Badilag, in 2020, the number of divorce and contested divorce cases decided was 444,055, with 113,231 divorce cases and 330,824 contested divorce cases. The main causes of divorce are continuous disputes and quarrels based on several factors such as economics, irresponsibility, infidelity, and domestic violence. Women and children suffer the most from the consequences of divorce because they are vulnerable groups that require special protection by law. When there is a divorce due to talaq, a husband is obliged to provide certain expenses to the wife and children left behind (Kurniati, 2018). These include mut'ah fees, the obligation to pay off the dowry if it has not been paid, child maintenance fees (*badhanah*), and waiting period fees (*iddah*). The obligation to provide these fees is formulated in the Marriage Law and the Compilation of Islamic Law (Sholeh et al., 2019).

Research by the Australia Indonesia Partnership For Justice 2 (AIPJ2) shows that more than one million Indonesian children are affected by divorce every year, especially in relation to the fulfillment of their long-term social and developmental needs (Hamzah et al., 2022). Of the many cases filed with the Religious Courts, child maintenance applications are found in only 1% of divorce cases, and only 2% of divorce cases mention child custody applications (Badilag MA, 2021).

The lawsuit and petition forms currently provided by the religious courts, both manual forms and those provided in the self-suit application, do not yet summarize the consequences of divorce as an additional option for women who will file for divorce (Yani et al., 2021). Additionally, in handling divorce cases, judges have not fully implemented Supreme Court Regulation No. 3/2017 on Handling Cases of Women Against the Law. In fact, the presence of this Perma is intended to open *ijtihad* space for judges to identify important legal issues for the protection of women and children, including in handling divorce cases.

Another problem found by the DG Badilag Team is the determination of the value of maintenance for wives and children as a result of divorce, which still varies. In general, there is no standardized guideline that can be followed by Judges to determine the value of maintenance for wives and children as a result of divorce that reflects propriety and justice (Yani et al., 2021).

Based on research conducted by the Directorate General of Badilag team on Religious Court Leaders, Judges, Registrars, PTSP Officers, Litigants, and external stakeholders who carry out advocacy activities for women and children in seven provinces (DKI Jakarta, West Java, Central

Java, Yogyakarta, East Java, Aceh, and South Kalimantan), factual data were obtained. The causes of divorce decisions not containing the consequences of divorce (women's and children's rights) include: (1) the lawsuit filed does not contain a petitum on the consequences of divorce; (2) the lack of application of Article 41 letter c of Law Number 1 of 1974 concerning Marriage, which has been amended by Law Number 16 of 2019; (3) most cases are decided by *verstek*, which results in a lack of examination related to the consequences of divorce (Saputra et al., 2021); (4) the variation in the determination of the consequences of divorce due to the fact that the socialization of the standard of such determination has not been optimal, while the decisions of the Supreme Court have established norms that can be guided by judges (Miftah, 2023); (5) in the case of divorce suits (divorce filed by the wife), judges still differ in opinion regarding the rights of wives who are divorced with divorce *ba'in*; (6) the relatively large number of divorce cases is not matched by an adequate composition of judges examining the cases.

These findings are problems that occur in all Religious Courts in Indonesia. This fact prompted the issuance of Director General Badilag's Letter No. 1669/DJA/HK.00/5/2021 on the Guarantee of the Rights of Post-Divorce Women and Children and Director General Badilag's Decree No. 1959/2021 on the Implementation of the Policy Brief on the Guarantee of the Protection of the Rights of Post-Divorce Women and Children. The academic question that arises is the extent to which progress has been made towards the fulfillment of women's and children's rights in Religious Court decisions after more than a year since the letter's issuance.

This research specifically aims to examine the fulfillment of the rights of women and children in decisions at the Unaaha Religious Court, which is one of ten Religious Courts within the jurisdiction of the Kendari Religious High Court in Southeast Sulawesi. The study focuses on understanding how the court addresses the rights of women and children post-divorce and identifies the challenges faced by judges in this context. By analyzing the court's decisions and the implementation of legal norms, the research seeks to highlight the effectiveness of the Unaaha Religious Court in safeguarding these rights and to provide insights into potential areas for improvement. The findings are expected to contribute to a better understanding of the judicial process concerning women's and children's rights in divorce cases, particularly within the Southeast Sulawesi region.

The number of divorces decided in the Religious Courts from July 2021 to June 2022 totaled 493 cases, with details of 85 cases of divorce and 408 cases of contested divorce. This study focuses on cases decided from July 2021, namely after the issuance of Director General of Badilag's Letter Number 1669/DJA/HK.00/5/2021 concerning Guaranteeing the Rights of Women and Children After Divorce signed on 18 June 2021, until June 2022, or within a period of one year (12 months) since the issuance of the circular letter. This is intended to determine the extent to which the fulfillment of the rights of women and children can be implemented and applied in the Unaaha Religious Court. Based on the description above, the author raises the research title: "Fulfillment of the Rights of Women and Children after Divorce in Case Decisions at the Unaaha Religious Court."

## **2. METHODS**

This research adopts a normative-empirical approach, chosen for its dual emphasis on secondary data and primary interviews with judges from the Unaaha Religious Court. The study aims to investigate the obstacles faced by the court in ensuring the rights of women and children in divorce rulings. By combining normative legal analysis with empirical observations, the research seeks to provide a comprehensive understanding of the challenges and legal intricacies involved.

The normative-empirical method involves the collection of both legal materials and empirical data through document studies and interviews. Document studies focus on relevant legal texts, judicial decisions, and regulations, while interviews provide insights directly from the judges who adjudicate these cases. The selection criteria for resources are specifically tailored to cases affecting women and children post-divorce, as suggested by Ben-Horin (2020). This methodological choice ensures that the study is grounded in real-world legal practices and experiences.

Legal research methods traditionally fall into two major categories: normative research, which is concerned with legal norms and principles, and empirical research, which examines how laws function in practice. This study positions itself as a middle ground between these two approaches. As a normative study influenced by sociological jurisprudence, it integrates theoretical legal analysis with practical, observational data, thereby enriching the research with a broader sociological context (Irwansyah, 2020).

The normative aspect of the research involves a detailed examination of the legal frameworks and norms governing the rights of women and children in divorce cases. This includes analyzing statutes, legal precedents, and relevant regulatory guidelines. The empirical component, on the other hand, provides a practical perspective by highlighting the real-life application of these legal norms, identifying gaps between theory and practice, and exploring the judges' experiences and challenges in implementing these laws.

## **3. RESULTS AND DISCUSSION**

### **Fulfillment of the Rights of Women and Children after Divorce in the Unaaha Religious Court Decisions**

The enactment of Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law (Presidential Instruction Number 1 of 1991) provides an opportunity for the cumulation of divorce lawsuits with other lawsuits. Law Number 7 of 1989 concerning Religious Courts also grants judges the authority to determine the consequences of divorce that must be fulfilled by husbands, with or without demands from women, including matters regarding child support (A. Chintya, 2022).

To investigate the fulfillment of the rights of women and children after divorce in the decisions of the Unaaha Religious Court, the author has downloaded case data from July 2021 to June 2022 from the Unaaha Religious Court Case Tracking Information System page. This data contains details of cases that have been decided following the issuance of the Director General of Badilag Letter Number 1669/DJA/HK.00/5/2021 concerning Guaranteeing the Rights of Women and Children After Divorce, signed on 18 June 2021. The study covers a period of one year (12 months) since the issuance of the circular.

In July 2021, 37 cases were decided, comprising 30 contested divorce cases and 7 divorce cases. Of these 37 cases, only 4 included the fulfillment of the rights of women and children after divorce in cases where the opposing party or wife was present. The fulfillment of these rights was based on requests in counterclaims by the opposing party. The other 33 cases did not address the rights of women and children because they were decided in the absence of the opposing party, known as *verstek* decisions, which indirectly disregarded these rights.

In August 2021, the number of cases that were decided was 23 cases with details of 21 *gugat* divorce cases and 2 divorce cases. Of these 23 cases, there were no decisions that mentioned the fulfillment of women's and children's rights in the verdict because the decision was decided without the presence of the opposing party or what is called a *verstek* decision which is indirectly considered to ignore their rights. Then in the case of a contested divorce that was attended by the opposing party, the verdict did not contain the fulfillment of the rights of women and children because the opposing party or husband was not present the person being sued usually does not want a divorce so he or she also does not want to give these rights.

In September 2021, the number of cases that were decided was 49 cases with details of 39 *gugat* divorce cases and 10 divorce cases. Of these 49 cases, only 2 cases were decided with the fulfillment of the rights of women and children after divorce in divorce cases attended by the opposing party or wife. The fulfillment of these rights was based on a request in a counterclaim or what is known as a counterclaim by the opposing party. The other 47 cases decided in the verdict did not contain the fulfillment of the rights of women and children because the decision was decided without the presence of the opposing party or what is called a *verstek* decision which is indirectly considered to ignore their rights.

In October 2021, the number of cases that were decided was 50 cases with details of 42 *gugat* divorce cases and 8 divorce cases. Of these 50 cases, only 2 cases were decided with the fulfillment of the rights of women and children after divorce in divorce cases attended by the opposing party or wife. The fulfillment of these rights was based on a request in a counterclaim or what is known as a counterclaim by the opposing party. As for the other 48 cases that were decided, in the verdict there was no fulfillment of the rights of women and children because the decision was decided without the presence of the opposing party or what is called a *verstek* decision which is indirectly considered to ignore their rights. Then in cases of contested divorce where the opposing party was present, the verdict did not contain the fulfillment of the rights of women and children because the opposing party or husband who was sued usually did not want a divorce so he also did not want to provide these rights.

In November 2021, the number of cases that were decided was 51 cases with details of 44 *gugat* divorce cases and 7 divorce cases. Of these 51 cases, only 1 case was decided with the fulfillment of the rights of women and children after divorce in a divorce case attended by the opposing party or his wife. The fulfillment of these rights was based on a request in a counterclaim or what is known as a counterclaim by the opposing party. As for the other 50 cases that were decided, in the verdict there was no fulfillment of the rights of women and children because the decision was decided without the presence of the opposing party or what is called a *verstek* decision which is indirectly considered to ignore their rights. Then in cases of contested divorce where the opposing party was present, the verdict did not contain the fulfillment of the rights of women and children

because the opposing party or husband who was sued usually did not want a divorce so he also did not want to provide these rights.

In December 2021, the number of cases that were decided was 24 cases with details of 18 gugat divorce cases and 6 divorce cases. Of these 24 cases, there was not a single case in which the verdict contained a provision for the fulfilment of the rights of women and children because most of the cases were *verstek* cases in which the opposing party was never present in the examination of the case so that they were considered neglecting their rights, as well as in cases of gugat divorce where the opposing party or husband was present in the verdict there was no fulfilment of the rights of women and children because the opposing party or husband who was sued usually did not want a divorce so he also did not want to provide these rights.

In January 2022, the number of cases that were decided was 41 cases with 36 cases of gugat divorce and 5 cases of divorce. Of these 41 cases, only 1 case was decided with the fulfilment of the rights of women and children after divorce in a divorce case attended by the opposing party or his wife. The fulfilment of these rights was based on mutual agreement in the mediation process (is a conflict resolution effort involving a neutral third party, who has no decision-making authority to help the disputing parties reach a settlement (solution) that is acceptable to both parties). As for the other 40 cases that were decided, in the verdict there was no fulfilment of the rights of women and children because the decision was decided without the presence of the opposing party or what is called a *verstek* decision which is indirectly considered to ignore their rights.

In February 2022, the number of cases decided was 40 cases with details of 34 cases of gugat divorce and 6 cases of divorce. Of these 40 cases, only 2 cases were decided with the fulfilment of the rights of women and children after divorce in divorce cases attended by the opposing party or wife. The fulfilment of these rights was based on mutual agreement in the mediation process and at the request of the opposing party in a counterclaim or so-called counterclaim. As for the other 38 cases that were decided, in the verdict there was no fulfilment of the rights of women and children because the decision was decided without the presence of the opposing party or what is called a *verstek* decision which is indirectly considered to ignore their rights.

In March 2022, the number of cases decided was 42 cases with details of 35 cases of gugat divorce and 7 cases of divorce. Of these 42 cases, only 2 cases were decided with the fulfilment of the rights of women and children after divorce. In case number 71/Pdt.G/2022/PA.Una, although the type of case was a gugat divorce, there was a fulfilment of the rights of women and children in the verdict because these rights were discussed in a joint agreement during mediation, while in case number 76/Pdt.G/2022/PA.Una, which was a divorce case attended by the opposing party or wife, it was found that the fulfilment of these rights was based on the request of the opposing party in a counterclaim or so-called counterclaim. As for the other 40 cases that were decided, in the verdict there was no fulfilment of the rights of women and children because the decision was decided without the presence of the opposing party or what is called a *verstek* decision which is indirectly considered to ignore their rights.

In April 2022, the Unaaha Religious Court decided a total of 38 cases, comprising 35 gugat (plaintiff-initiated) divorce cases and 3 talak (husband-initiated) divorce cases. None of these 38 cases included rulings on the fulfilment of women's and children's rights. This lack of consideration for such rights can be attributed to the fact that most of these cases were decided by default judgment. In these instances, the opposing party failed to appear during the examination

of the case, leading the court to conclude that they had neglected their rights. Consequently, the absence of one party in these proceedings resulted in the omission of specific rulings to secure the welfare and rights of women and children affected by these divorces.

In May 2022, the number of cases decided was 30 cases with details of 25 cases of gugat divorce and 5 cases of divorce. Of these 30 cases, only 2 cases were decided with the fulfilment of the rights of women and children after divorce. In case number 193/Pdt.G/2022/PA.Una, although the type of case was a gugat divorce, there was a fulfilment of the rights of women and children in the verdict because these rights were discussed in a joint agreement during mediation, while in case number 154/Pdt.G/2022/PA.Una, which was a divorce case attended by the opposing party or wife, it was found that the fulfilment of these rights was based on the request of the opposing party in a counterclaim or so-called counterclaim. As for the other 28 cases that were decided, in the verdict there was no fulfilment of the rights of women and children because the decision was decided without the presence of the opposing party or what is called a *verstek* decision which is indirectly considered to ignore their rights, as well as in the case of a divorce that was attended by the opposing party or her husband in the decision there was no fulfilment of the rights of women and children because the opposing party or husband who was sued usually did not want a divorce so he also did not want to provide these rights.

In June 2022, the number of cases that were decided was 68 cases with 49 cases of gugat divorce and 19 cases of divorce. Of these 30 cases, only 6 cases were decided with the fulfilment of the rights of women and children after divorce. In case number 187/Pdt.G/2022/PA.Una, although the type of case was a contested divorce, there was a fulfilment of the rights of women and children in the verdict because these rights were discussed in a joint agreement during mediation, and in case number 234/Pdt.G/2022/PA.Una, although the type of case was a contested divorce, there was a fulfilment of children's rights because the Plaintiff included her demands even though the Defendant was not present, in this case the Panel of Judges could use their *ex officio* rights for the best interests of the child. As for the other 4 cases, which were divorce cases in which the opposing party or wife was present, it is known that the fulfilment of these rights was based on the request of the opposing party in a counterclaim or so-called counterclaim, but in case number 207/Pdt.G/2022/PA.Una, it is known that the Plaintiff realised that the fulfilment of children's rights must be fulfilled so that he included his ability to fulfil the children's rights in the petition.

As for the other 62 cases that were decided, in the verdict there was no fulfilment of the rights of women and children because the decision was decided without the presence of the opposing party or what is called a *verstek* decision which is indirectly considered to ignore their rights. From the overall data on cases decided from July 2021 to June 2022, a summary of the fulfillment of the rights of women and children can be found in the table 1.

**Table 1.** Recapitulation of Fulfilment of Women's and Children's Rights

No.	Month	Total Cases Decided	Cases Fulfilled	Reasons for Fulfillment
1.	July	37	4	-
2.	Agust	23	-	Requested in Counterclaim
3.	September	49	2	Requested in Counterclaim
4.	October	50	2	Requested in Counterclaim

5.	November	51	1	-
6.	December	24	-	Settlement in Mediation
7.	January	41	1	Requested in Counterclaim (1) Settlement in Mediation (1)
8.	February	40	2	Requested in Counterclaim (1) Settlement in Mediation (1)
9.	March	42	2	-
10.	April	38	-	Requested in Counterclaim (1) Settlement in Mediation (1) Settlement in Mediation (4)
11.	Mey	30	2	Petition Claim (1) Plaintiff's Claims (1)
12.	June	68	6	Requested in Counterclaim
	Total	493	22	-

Source: Data Summary of cases decided from July 2021 to June 2022 at Unaaha Religious Court.

Case number 76/Pdt.G/2022/PA.Una, a divorce case, fulfilled women's rights consisting of past-due maintenance, iddah maintenance, and mut'ah through a partially successful mediation agreement. This mediation agreement occurred because the opposing party was present, allowing the mediation process to be conducted in accordance with Perma Number 1 of 2016 concerning Mediation. This case is one of twenty-two cases decided by the Unaaha Religious Court that fulfilled women's rights as stipulated in the legislation.

An example of a case whose decision did not guarantee the fulfillment of the rights of women and children is Case Number 89/Pdt.G/2022/PA.Una, a contested divorce case. In this case, the opposing party was not present, so the case was decided by *verstek* (in absentia). The consequence of the case being decided by *verstek* was that mediation efforts were not implemented, and the opposing party did not file a counterclaim, as they were considered to have waived their rights.

From the explanation of the data above, it can be concluded that case decisions at the Unaaha Religious Court have not fully guaranteed the rights of women and children. This is evidenced by the fact that out of 493 cases decided in the period from July 2021 to June 2022, only 22 cases partially or fully fulfilled the rights of women and children.

The findings of this study can be analyzed through various relevant legal theory perspectives. The responsive law theory of Philippe Nonet and Philip Selznick emphasizes that law must be able to respond to social needs and societal aspirations (Nonet et al., 2017; Selznick, 2020). The low rate of fulfillment of women's and children's rights post-divorce in the Unaaha Religious Court indicates that the legal system has not yet fully responded to the needs of these vulnerable groups. Nonet and Selznick argue that responsive law must be able to accommodate social change and protect public interests. In this context, the Religious Court needs to be more proactive in using its authority to protect the rights of women and children, even when these rights are not explicitly demanded.

John Rawls' theory of justice, with its concepts of "justice as fairness" and the "veil of ignorance" principle, can be applied to analyze the phenomenon of *verstek* decisions that dominate these cases (Edor, 2020; Miele, 2017; Rawls, 1958, 1991; Runcheva, 2013). Rawls proposes that decision-makers should imagine themselves in the position of the least advantaged party



(D'agostino, 2004; Rae, 1975). In the context of *verstek* decisions, where one party is absent and their rights are often neglected, the court needs to apply Rawls' principle to ensure that decisions made still protect the interests of the absent party, especially if they are more vulnerable parties such as women and children (Baier, 1987; Okin, 2017). This becomes increasingly important given the high number of *verstek* decisions found in this study.

Eugen Ehrlich's concept of "living law" is relevant in understanding the gap between written law and practice in the field (Ehrlich & Ziegert, 2017; Nelken, 2008). Ehrlich argues that the law living in society often differs from formal law. In this case, although regulations protecting the rights of women and children post-divorce exist, their implementation is far from ideal. This indicates that the "living law" in religious court practice has not fully adopted the spirit of protection desired by formal regulations. Efforts are needed to bridge this gap, for example through more intensive judicial training and legal socialization to the community. The research findings showing the lack of use of *ex officio* rights by judges strengthen this argument.

Lawrence M. Friedman's legal system theory can be used to analyze the complexity of this problem more comprehensively. Friedman divides the legal system into three components: structure, substance, and legal culture. In the context of this research, although the legal substance (regulations) exists, the structure (judicial institutions) and legal culture (attitudes and behaviors of judges and society) still need improvement. The low use of *ex officio* rights by judges and the lack of participation in the mediation process indicate the need for changes in legal culture. Friedman emphasizes that effective legal change requires simultaneous changes in all three components. Therefore, improvement efforts should not only focus on regulations but also on enhancing the capacity of judicial institutions and changing the mindset of legal actors (Friedman, 1969a, 1969b, 1990, 2002; Friedman & Hayden, 2017).

Finally, Catherine MacKinnon's feminist jurisprudence theory provides an important perspective in understanding this issue from a gender standpoint. MacKinnon argues that the legal system often reflects and reinforces gender inequality. In the context of this research, the low fulfillment of women's and children's rights post-divorce can be seen as a manifestation of gender bias in the judicial system. MacKinnon emphasizes the importance of integrating gender perspectives in legal processes. Therefore, efforts are needed to increase gender sensitivity among judges and other law enforcers, as well as to reform judicial procedures to better accommodate the needs and perspectives of women in divorce cases. The research findings showing that only a few cases fulfill the rights of women and children reinforce the urgency to adopt a more gender-sensitive approach in the religious court system (Jackson, 1992; MacKinnon, 2018).

### **Constraints of the Panel of Judges in Guaranteeing the Rights of Women and Children in Divorce Case Decisions**

The dissolution of marriage between couples results in consequences that must be carried out by the involved parties. The wife is obligated to observe her "iddah" period before marrying another man, maintain and educate children until adulthood if custody is granted to her, take care of herself, and not accept proposals from other men, along with other consequences stipulated in legal provisions (Rahim, 2021). Similarly, the husband is obligated to fulfill various responsibilities, such as providing for children's education expenses and providing "iddah, maskan, kiswa" to his wife (Mansari & Moriyanti, 2019).

The second objective of this research is to analyze the obstacles faced by the judges of the Unaaaha Religious Court in guaranteeing and fulfilling the rights of women and children in divorce case decisions. To this end, the researcher began by attempting to uncover the judges' knowledge of laws and regulations related to the fulfillment of women's and children's rights within the judges' authority in divorce cases.

The researcher then proceeded to ask the judges' opinions regarding their ex-officio rights in divorce cases. Ex-officio rights refer to the judge's authority to decide on matters not explicitly included in the prosecution. The judges' responses to the laws and regulations that form the basis for fulfilling the rights of women and children were also sought. Subsequently, the researcher inquired about the challenges and obstacles faced by the panel of judges in rendering decisions that could guarantee the fulfillment of women's and children's rights in case decisions.

### ***Judges' Understanding of Legislation relating to the Fulfilment of Women's and Children's Rights***

The judges who were the resource persons in the study, namely Mr Ahmad, Mrs Mauliza, and Mrs Dita stated that they know and understand all laws and regulations related to the fulfillment of the rights of women and children in post-divorce. Meanwhile, Mr Sudirman stated that they were aware of most of these laws and regulations.

The relevant laws and regulations are: 1) Letter of the Director General of Badilag Number 1669/DJA/HK.00/5/2021 Regarding the Guarantee of the Rights of Women and Children after Divorce, 2) Decree of the Director General of Badilag Number 1959 of 2021 on the Implementation of Policy Brief on the Guarantee of Protection of the Rights of Women and Children after Divorce, 3) Supreme Court Circular Letter (SEMA) Number 2 of 2019- Formulation of the Religious Chamber-C.1.c on divorce of Civil Servants. .c on divorce of civil servants, 4) Supreme Court Circular Letter (SEMA) Number 1 of 2017- Formulation of Religious Chamber-C.1., 5) Supreme Court Circular Letter (SEMA) Number 3 of 2018- Formulation of Religious Chamber-III.A.2, 6) SEMA Number 7 of 2012 Religious Chamber-16, 7) Supreme Court Circular Letter (SEMA) Number 3 of 2018-Religious Chamber-III.A.2, 8) Supreme Court Circular Letter (SEMA) Number 3 of 2018-Religious Chamber-III.A.3, 9) Supreme Court Circular Letter (SEMA) Number 2 of 2019-Religious Chamber Formulation-C.1.a, 10) Compilation of Islamic Law, 11) Government Regulation Number 9 of 1975 Concerning the Implementation of Law Number 1 of 1974 Concerning Marriage, 12) Law Number 1 of 1974 Concerning Marriage.

The judges' responses indicate that they are familiar with and understand all laws and regulations concerning the fulfillment of the rights of women and children after divorce, even if they do not know the exact wording by heart, as mentioned by Mr. Sudirman. This suggests that the judges are well-versed in the legal frameworks and principles governing these rights, ensuring they can apply the law effectively in their decisions. Their awareness and comprehension of these regulations are crucial for ensuring that the rights of women and children are upheld in divorce cases, reflecting a commitment to justice and the proper implementation of legal standards.

### ***Judges' Opinions on Legislation relating to the Fulfilment of Women's and Children's Rights***

The various laws and regulations that have been stated in the previous discussion, are they sufficient and fulfilling to be the basis for fulfilling the rights of women and children after divorce?

Mrs. Dita stated that all existing laws and regulations are sufficient: "Enough." A similar opinion was expressed by Mr. Sudirman: "Enough." The same thing was conveyed by Mrs. Mauliza: "Already, even the regulation has accommodated the implementation of the payment of maintenance claims before the pronouncement of the vow of divorce." A different opinion was expressed by Mr Ahmad: "There is still a lack of criminal rules if neglected by the Defendant/male".

From the above it can be concluded that in general the judges of the Unaaha Religious Court already consider that the current legislation is sufficient as a basis for fulfilling the rights of women and children after divorce. However, the absence of criminal sanctions for husbands or fathers who neglect or refuse to implement the decision of the Religious Court is considered a weakness in the execution of the decision.

### ***Judges' Opinions on the Use of Ex-Officio Judges' Rights in Fulfilling the Rights of Women and Children in Divorce Cases***

The Ex Officio rights of judges are regulated in 41 letter c of Law Number 1 of 1974 concerning Marriage, Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number KMA/032/SK/IV/2006 concerning the Application of Book II Guidelines for the Implementation of Court Duties and Administration, and SEMA Number 4 of 2016 Formulation of the Religious Chamber-C.5.

The judges of the Unaaha Religious Court are similar in seeing the urgency of this ex officio right in order to fulfil the rights of women and children in divorce cases. This is as stated by Mrs Mauliza: "It is very important because in divorce cases, it is the wife who is generally more disadvantaged, so there needs to be guarantees related to the judge's decision on the rights of the wife after divorce".

The same thing was also conveyed by Mrs Dita: "I agree because it is proposed that the impact of divorce on children and women can be minimised as much as possible. A similar answer was also conveyed by Mr Ahmad: "I think it is a positive thing as a way out for the rights of women and children if they are not prosecuted by the person concerned.

The use of this ex officio right, by the judges of the Unaaha Religious Court is considered as: 1) a medium to guarantee the rights of women who are considered more disadvantaged in divorce cases, 2) an effort to minimise the impact that will arise from divorce for women and children, 3) a way out to fulfil the rights of women and children after divorce that are not demanded by the parties, in this case women and children.

However, after understanding the importance of the use of the judge's ex officio right in this divorce case, do the judges of the Unaaha Religious Court really use the ex officio right in guaranteeing the rights of women and children? It turns out that what is idealised and what is implemented is not always in sync. This can be inferred from the judges' answers regarding the use of the ex officio right. Mr Sudirman answered: "not all". Mrs Mauliza replied: "It is uncertain, depending on the evidence.

Both Mr Sudirman and Mrs Liza's answers illustrate that not all divorce cases can be granted the rights of women and children, but it depends on the evidentiary process in the divorce trial. In

fact, Mrs Dita stated that she had not used this ex officio right at all. Mr Ahmad also stated that he rarely used the ex officio right for the following reasons: "we rarely use it, because the women themselves that we find are more inclined to want to be free from the bonds of marriage rather than demanding their rights after divorce".

The judges' answer is certainly an anomaly from their previous answers regarding how ideally the ex officio rights of judges in order to guarantee the rights of women and children in divorce case decisions.

### ***Fulfilment of Women's and Children's Rights in Divorce Decisions***

Consistent with the previous answer that the ex officio rights of judges are not always used in order to guarantee the rights of women and children, the rights of women and children as stipulated in various laws and regulations are not always fulfilled. As stated by the judges of the Unaaha Religious Court when asked about whether in the decisions that you decide, all the rights of women and children are fulfilled?

Mr Sudirman replied: "No". Similar answer was also given by Mrs Dita: "Not all". So did Mrs Mauliza with her reasons: "Not always, depending on the presence, ability of the opponent (husband) and the demands of the wife.

Mr Ahmad also confirmed the same thing: "Not all of them are fulfilled, because in some cases the plaintiff/women prefer to give up their rights not to be sued. From the various answers above, it can be concluded that the fulfilment of the rights of women and children is based on three things, namely: 1) the presence of the parties, 2) the husband's ability, 3) the wife's demands.

The basis of the wife's demand, which is one of the considerations in fulfilling the rights of women and children, was also reaffirmed by three judges when asked about whether the fulfilment of the rights of women and children in case decisions is based on the wife's request? Mr Sudirman replied: "Yes, based on the request". The same answer was given by Mrs Dita: "Yes.". Similarly, Mr Ahmad confirmed: "Yes, especially when in mediation it is agreed by both parties and the mediator really tries to reach an agreement that prioritises the rights of women and children.

A slightly different answer was given by Mrs Mauliza who included the ex officio rights of judges as one of the factors in the fulfilment of women's and children's rights in case decisions: "Not necessarily, the judge based on his authority can determine the wife's maintenance as a divorced party. So, the emphasis on the fulfilment of the rights of women and children in case decisions is the claim of the wife, then in some cases the judge uses his ex officio rights.

The use of the judge's ex officio rights is actually key in fulfilling the rights of women and children, so that even though the parties are not present or the wife does not demand these rights, the Religious Court judges can use their authority to fulfil the rights of women and children, as regulated in Article 41 letter c of the Marriage Law which states: "The consequences of the dissolution of marriage by divorce are: (c) The court may oblige the former husband to provide maintenance and/or determine an obligation for the former wife.

More specifically, the rights that can be determined by the Panel of judges are as stipulated in the Compilation of Islamic Law (KHI) article 149 letter (b) which states: "If the marriage is dissolved due to divorce, the former husband is obliged to: (b) provide the former wife with nafaq, maskan and kiswah during the iddah (waiting period), unless the former wife has been sentenced

to divorce ba'in or nusyuz and is not pregnant. These obligations of the husband towards the former wife, although not requested by the wife, should be determined by the panel of judges.

### ***Judges' Obstacles in Fulfilling the Rights of Women and Children in Divorce Cases***

If there are no problems related to legislation related to the fulfilment of the rights of women and children after divorce, then what are the obstacles of the judges or panel of judges of the Unaaha Religious Court in fulfilling the rights of women and children after divorce as regulated in the legislation? Mr Sudirman, stated that the obstacles faced by the panel of judges are: "The financial capability of the husband or father". Meanwhile, Mrs Mauliza stated: "On the evidentiary agenda, sometimes the wife cannot prove her claim or vice versa the husband cannot prove his inability to pay the claim".

Mr Ahmad raised another obstacle, namely,

*"The obstacle is the refusal of the woman herself and the male party who does not want to attend the trial."*

Another obstacle faced by the panel of judges as stated by Mrs Dita, especially in relation to parties who work as State Civil Apparatus (ASN) / Civil Servants (PNS) is:

*"There is no cooperation or a system that will automatically deduct the salary/income of an ASN if they are burdened with child support."*

From the explanation above, the author identifies four main obstacles faced by judges of the Unaaha Religious Court in fulfilling the rights of women and children in divorce case decisions: (1) the limited financial capacity of the husband or father, which is often an obstacle in determining adequate maintenance; (2) the limited ability of the parties in the evidentiary process, which can influence the judge's decision, especially in complex cases; (3) the absence of the parties (wife or husband) in court, which hinders the mediation process and the collection of comprehensive information; and (4) the lack of coordination and cooperation between the Religious Court and relevant agencies in the case of parties who work as State Civil Apparatus (ASN) or Civil Servants (PNS), which complicates the implementation of decisions related to salary distribution. These constraints reflect broader challenges in Indonesia's religious justice system, where Islamic legal principles on the protection of women's and children's rights must be implemented in a modern socio-economic and bureaucratic context (Fadhilah et al., 2023).

In dealing with the above obstacles, the judges of the Unaaha Religious Court have a variety of perspectives. Mr Sudirman stated: "By finding facts in court". While Mrs Mauliza stated: "We must be observant and careful in assessing evidence". A different opinion was expressed by Mrs Dita: "By always paying attention to all applicable laws and regulations and not getting out of religious norms and sharia and not closing ourselves off from legal reforms.

Another opinion was expressed by Mr Ahmad who emphasised the mediation process: "Make mediation and peace efforts in every trial. From the explanation above, it can be concluded that in an effort to face and resolve the various obstacles faced, judges have various ways and methods, namely: 1) being careful and cautious in the process of proof and trial, 2) being guided by the applicable laws and regulations, religious norms and sharia, by not closing themselves off from legal developments, and 3) conducting mediation and peace at each trial. Of the four obstacles

described by the judge of the Unaaha Religious Court above, it can be seen from the point of view of the following legislation:

The judge's consideration that the non-fulfilment of women's and children's rights is caused by the husband's ability, has actually been regulated in Supreme Court Circular Letter (SEMA) Number 3/2018-Religious Chamber-III.A.2 which states: "Improving the formulation of the Religious Chamber in Supreme Court Circular Letter Number 07 of 2012 number 16 so that it reads: "Judges in determining naskah madhiyah, naskah iddah, mut'ah, and child maintenance, must consider a sense of justice and propriety by exploring the facts of the husband's economic capacity and the facts of the needs of the wife and/or childre.

The provisions in Supreme Court Circular Letter (SEMA) No. 3/2018-Religious Courts-III.A.2 explicitly require the panel of judges to carefully consider the economic situation of the husband in addition to the fundamental living needs of the wife and/or children when making decisions in divorce cases. This mandate emphasizes the importance of ensuring that the financial circumstances of both parties are taken into account to provide a fair and just outcome. It is crucial to recognize that, regardless of the husband's financial limitations, the rights of the wife and children should still be upheld. The legislation is clear in stating that these rights must be honored, and judges are instructed not to absolve the husband of his obligations as stipulated by law. The intent behind this provision is to maintain a balance between the economic realities of the husband and the essential needs of the wife and children, ensuring that the latter's rights are protected and that they receive adequate support.

The second reason, namely the ability of the parties to prove their case, is an issue in itself. Because it can be related to *nusyuz*. *Nusyuz* is a factor that cancels the husband's obligation to provide women's rights, for example as stipulated in Supreme Court Circular Letter (SEMA) Number 3 of 2018-Religious Affairs Chamber-III.A.3 stated: "Accommodating PERMA number 3 of 2017 concerning Guidelines for Adjudicating Women's Cases Against the Law, the wife in a case of gugat divorce can be given mut'ah and iddah maintenance as long as there is no evidence of nusyuz."

This evidentiary process is related to the third obstacle, namely the presence of the parties (wife or husband) in the trial. So that the process of proving the wife's nusyuz is no longer relevant because in the trial process there are always parties who are not present which makes it difficult for the panel of judges to decide. The fourth reason related to the obstacles of the panel of judges in fulfilling the rights of women and children is the absence of coordination and cooperation between the Religious Courts and related agencies in the case of parties who work as Civil Apparatus (ASN) or Civil Servants (PNS). This reason is actually less relevant, considering that SEMA actually only mandates to include the division of the salary of the civil servant husband in a declaratory manner in the decision. So the task of the assembly is only in the decision, the task of implementing the distribution is in the respective agencies.

In Supreme Court Circular Letter (SEMA) Number 2 of 2019 - Formulation of the Religious Chamber-C.1.c, it is stated: "In the context of implementing Supreme Court Regulation Number 3 of 2017 concerning Guidelines for Adjudicating Cases of Women Against the Law to provide legal protection for the rights of women after divorce, the implementation of Government Regulation Number 10 of 1983 concerning Marriage and Divorce Permits for Civil Servants jo. Government Regulation Number 45 of 1990 concerning Amendments to Government Regulation

Number 10 of 1983 concerning Marriage and Divorce Permits for Civil Servants, the distribution of salary must be stated in the verdict in a declaratory manner which is implemented through the agency concerned."

This provision of SEMA should emphasise the difference between the duties of judgement and implementation. Judges should strive to fulfil the rights of women and children in their decisions. The issue of implementation is not the authority of the panel of judges. Therefore, there is no need to confuse determination and implementation. Because if it is not determined by the panel of judges in their decision, the aggrieved parties, in this case the ex-wife and children, will not know their rights. Therefore, if the panel of judges determines the salary distribution rights in its decision in a declaratory manner, then either the wife or children can bring the results of the decision to the agency where the former husband works as a civil servant as one of the bases for salary distribution.

### ***Legal Remedies of the Parties to the Decision of the Panel of Judges of the Unaaha Religious Court***

With more case decisions that do not provide and do not fulfil women's rights in case decisions or in cases where the verdict fulfils the rights of women and children, do the parties appeal these decisions? Mr. Sudirman, Mr Ahmad, and Mrs Dita stated that there had been no appeals against decisions related to the fulfilment of women's and children's rights. Meanwhile, Mrs Mauliza stated that there were decisions related to this matter: "Never, in appeals usually the demands are actually enlarged".

Based on the analysis of the four typologies, it can be concluded that judges of the Unaaha Religious Court have not fully exercised their ex-officio rights in ensuring the fulfilment of the rights of women and children after divorce. The ex-officio right, which means the authority of judges to make decisions on their own initiative, is an important instrument in the Indonesian religious justice system to protect vulnerable parties. This finding indicates that the implementation of Director General of Religious Courts (Badilag) Letter No. 1669/DJA/HK.00/5/2021 on Guaranteeing the Rights of Women and Children after Divorce has not been optimal. This raises serious questions about the effectiveness of the policy and the potential gap between written law and practice in the context of protecting the rights of women and children in Islamic family law in Indonesia. Further research is needed to understand the factors that hinder the full implementation of the policy and develop strategies to improve compliance with the principles of protection in Islamic law and national legislation.

## **4. CONCLUSION**

This research aimed to analyze the decisions of the Unaaha Religious Court in guaranteeing the rights of children and women after divorce, as well as examining the obstacles of the Unaaha Religious Court judges in guaranteeing the rights of women and children in case decisions. After conducting a document study by inventorying and analysing court decisions and conducting structured interviews with relevant parties, it can be concluded that from July 2021 to June 2022 the Unaaha Religious Court decided 493 cases of divorce and contested divorce. Of the 493 cases that have been decided, the decision that includes the fulfilment of the rights of the wife or child is only 22 cases. Where the reasons for the fulfilment of these rights can be made into four (4)

typologies. Firstly, because it was requested in the counterclaim in 12 cases. Second, because there was an agreement in mediation in 8 cases. Third, because of the petition post as many as 1 case. Fourth, because of the postulation of the lawsuit as many as 1 case. From these four typologies, it can be concluded that judges have not used their ex officio rights in order to fulfil the rights of women and children. However, it can also be concluded that the judges have not fully implemented the Director General of Badilag's Letter No. 1669/DJA/HK.00/5/2021 on Guaranteeing the Rights of Women and Children after Divorce. The obstacles faced by judges in fulfilling the rights of women and children in case decisions are: (1) the limited financial capacity of the husband or father, which is often an obstacle in determining adequate maintenance; (2) the limited ability of the parties in the evidentiary process, which can influence the judge's decision, especially in complex cases; (3) the absence of the parties (wife or husband) in court, which hinders the mediation process and the collection of comprehensive information; and (4) the lack of coordination and cooperation between the Religious Court and relevant agencies in the case of parties who work as State Civil Apparatus (ASN) or Civil Servants (PNS), which complicates the implementation of decisions related to salary distribution.

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