



## RESEARCH ARTICLE

# The Nature Of The Fulfilment Of The Rights Of Women And Children After Divorce In The Jurisdiction Of The High Religious Court Of Makassar

Muhammad Fajar Arief<sup>1\*</sup>, Sufirman Rahman<sup>2</sup>, Ma'ruf Hafidz<sup>3</sup>, Ilham Abbas<sup>4</sup>

<sup>1</sup>Student Doctoral of Law, Universitas Muslim Indonesia

<sup>2,3,4</sup> Lecturer, Universitas Muslim Indonesia

ARTICLE INFO	ABSTRACT
<p>Received: Nov 12, 2024</p> <p>Accepted: Jan 24, 2025</p> <p><b>Keywords</b></p> <p>Women's Rights, Children's Rights, Divorce, Religious High Court</p> <p><b>*Corresponding Author:</b></p> <p>muhammadfajararief.pasca@gmail.com</p>	<p>This research aims to know, explain, analyse, and find the nature of the fulfilment of women's rights after divorce, the fulfilment of children's rights after divorce, and the factors that influence the fulfilment of these rights in the jurisdiction of the Makassar Religious High Court. This research uses a sociological empirical legal approach with a qualitative method, focusing on the legal reality in society and the gap between expectations (das sollen) and reality (das sein) in the implementation of the law. The nature of the fulfilment of women's rights after divorce is regulated in Law Number 1 of 1974 concerning Marriage and Compilation of Islamic Law which includes nafkah mut'ah, nafkah iddah, maskan, kiswah, dowry owed, and joint property. The effectiveness of the fulfilment of children's rights after divorce has not been optimal. Factors that influence the fulfilment of women's and children's rights include legal substance, legal culture, legal knowledge, and public legal awareness. This research recommends the Religious High Court to increase socialisation and legal education related to the rights of women and children after divorce through seminars, workshops, and legal counselling programs. This effort aims to increase public understanding of the rights of women and children, including maintenance, custody, and rights to joint property, so as to achieve the philosophical values of legal expediency, certainty, and justice.</p>

## 1. INTRODUCTION

Normatively, Law No. 16/2019, which is an amendment to Law No. 1/1974 on Marriage, as well as Islamic law applied in the Religious Courts, has provided clear guidelines on the post-divorce rights of women and children, including maintenance, child custody, and division of joint property. However, there is a gap between regulation and implementation in the field, where the rights of women and children are often not fulfilled due to the former husband's non-compliance with court decisions. The increase in divorce rates in the jurisdiction of the Makassar High Court of Religious Affairs exacerbates this situation. Difficulties in implementing decisions related to maintenance and child custody are often caused by the financial incapacity of the ex-husband, weak enforcement mechanisms, and a lack of legal awareness.

In addition, women often lose their main source of income after divorce, leading to a decline in their standard of living and that of their children. The dominance of a strong patriarchal culture also results in women's rights often being ignored, exacerbating the inequality in the fulfilment of post-divorce rights. The High Religious Court of Makassar itself faces various obstacles in the enforcement of judgements, such as non-compliance by losing parties and a lack of effective execution mechanisms. Law enforcement reform, training of officials, and stronger advocacy are needed to ensure the rights

of women and children after divorce. Article 41 letter (c) of the Marriage Law and Chapter XVII of the Compilation of Islamic Law (KHI) have regulated the husband's obligation to ensure the living needs of his ex-wife and children, but concrete steps in the implementation of this regulation are crucial to ensure justice for women and children after divorce.<sup>1</sup>

Article 144 (KHI) states that divorce can occur due to a divorce from the husband or a divorce suit filed by the wife, the divorce can only be carried out on the basis of a judge's decision in a Religious Court session. The court can oblige the former husband to provide livelihood costs and or determine an obligation to his former wife. Obligations of the former husband in the form of mut'ah, iddah maintenance and maintenance for children. In this case, even in the absence of a claim from the wife, the judge may order the former husband to pay the former wife mut'ah maintenance, iddah maintenance and child maintenance.<sup>2</sup>

Legal protection of children aims to ensure children's rights, including welfare, education, love, and protection from violence or discrimination. Divorce, which is often triggered by domestic conflict, has a direct impact on children, especially in relation to the fulfilment of custody and love. Children are often the victims of the breakdown of parental relationships, so their rights are not fulfilled, including material and spiritual rights. The state has established various regulations to protect children's rights, such as Article 28B paragraph (2) of the 1945 Constitution, Law No. 35/2014 on Child Protection, and Law No. 39/1999 on Human Rights. These regulations emphasise that every child has the right to protection from the family, community and state, even from the womb. In the case of divorce, the court is authorised to ensure that the reasons for divorce are in accordance with the law and prioritise the best interests of the child. The state also supports child protection through institutions such as the National Commission for Child Protection and social welfare agencies. However, reality shows that there are still parents who fail to fulfil their responsibilities after divorce. Therefore, parents' awareness and commitment to ensure children's rights, both physically and spiritually, is very important. Child protection must involve all elements-family, society, and the state-so that their rights are fulfilled fairly and thoroughly.<sup>3</sup>

## 1. RESEARCH METHODS

Sociological empirical legal research is conducted to examine legal reality in society with a qualitative approach, focusing on the gap between expectations (*das sollen*) and reality (*das sein*). The research was conducted in South Sulawesi, covering five Religious Courts, namely Jeneponto, Pangkajene, Barru, Enrekang and Makassar Religious Courts, involving 50 respondents through purposive sampling technique. Primary data were obtained through interviews and observations, while secondary data were collected from relevant documents and literature. The analysis technique used is deductive qualitative to draw conclusions based on concrete issues, supported by operational definitions that avoid multiple interpretations related to the concepts of law, legal culture, legal awareness, and children's *nafkah madhiyah*.<sup>4</sup>

## 2. The Nature of Fulfilment of Women's Rights after Divorce in the Legal Area of the Makassar Religious High Court

The fulfilment of women's rights after divorce in the jurisdiction of the Makassar High Religious Court essentially aims to ensure justice, welfare and protection for women who experience divorce. Based on interviews with several judges at the Makassar Religious Court, the fulfilment of these rights covers various important aspects, including economic rights, legal protection, children's rights and parenting, and the welfare of women after separation. In terms of economic rights, divorced women are often in a vulnerable position, especially economically. Therefore, the Makassar High Court of

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<sup>1</sup> Rusyda, F., & Syofiarti, S. (2023). Implikasi Pemberlakuan Perubahan Undang-Undang Perkawinan terhadap Permohonan Dispensasi Nikah di Pengadilan Agama Solok. *UNES Law Review*, 6(1), 1469-1478. <https://doi.org/10.31933/unesrev.v6i1.942>

<sup>2</sup> Fatimah, Rabiatal Adawiyah dan M. Rifqi, "Pemenuhan Hak Istri dan Anak Akibat Putusnya Perkawinan Karena Perceraian (Studi Kasus di Pengadilan Agama Banjarmasin)", *Jurnal Pendidikan Kewarganegaraan*, Vol. 4, No. 7, Mei 2014, Banjarmasin: Universitas Lambung Mangkurat, hlm. 559

<sup>3</sup> Syahrudin Nawi, 2013 *Penelitian Hukum Normatif versus Penelitian Hukum Emiris*, UMI Toha

<sup>4</sup> Syahrudin Nawi, 2013 *Penelitian Hukum Normatif versus Penelitian Hukum Emiris*, UMI Toha

Religious Affairs ensures that the fulfilment of women's economic rights, such as iddah maintenance, mut'ah, child maintenance, and a share of joint or shared property, can be met fairly. This step is important to prevent the injustice that women often experience after divorce. In addition, the court also ensures that women's rights in childcare or hadhanah are protected, while still considering the welfare of the child as a top priority. In many cases, hadhanah rights are usually awarded to the mother, especially if the child is young, with adequate legal support to carry out her responsibilities.<sup>5</sup>

Women often face various obstacles in obtaining their rights, such as the refusal of the ex-husband to provide child maintenance or pay off the dowry owed. For this reason, the Makassar High Court of Religious Affairs provides legal protection so that women can legitimately claim their rights, with law enforcement mechanisms that ensure their implementation. This includes the former husband's obligation to provide mut'ah, iddah maintenance and child maintenance as set out in Article 41(c) of the Marriage Law and the Compilation of Islamic Law (KHI). Mut'ah, for example, is a gift from the ex-husband to the ex-wife as a form of honour or compensation after divorce, especially if the divorce was not his will.

Mut'ah can be in the form of money or other objects aimed at helping ex-wives overcome temporary financial difficulties due to divorce, in accordance with the principles of justice in Islamic law. The iddah maintenance is the obligation of the former husband to fulfil the basic needs of the former wife during the iddah period, including housing, food, clothing, and other daily needs. This iddah period usually lasts for three menstrual periods for wives who menstruate, or until childbirth if the ex-wife is pregnant. However, if the divorce occurs due to nusyuz (defiance) on the part of the wife, such as disobeying the husband without a valid reason, then the former husband is not obliged to provide iddah maintenance. In addition, hadhanah maintenance is also an obligation of the former husband, which is the maintenance given to the child until the child is an adult and can take care of himself. Nafkah hadhanah covers basic needs such as food, clothing, education, and child health.<sup>6</sup> Although custody of the child is usually given to the mother, financial responsibility for the child remains with the father. Other women's rights stipulated in the KHI include the right to dowry payable as well as the right to joint or gono-gini property. In the event of divorce, women are entitled to a portion of the joint property, which aims to ensure that women do not suffer economic loss after separation. These rights are regulated in detail in Articles 96 and 97 of the KHI, which state that women are entitled to half of the joint property in the event of a death divorce, as well as the right to joint property in a divorce.

Based on interviews with judges at the Makassar High Court of Religious Affairs, the fulfilment of these rights reflects the court's legal responsibility to protect women from social and economic vulnerability. The court also plays a role in providing a more stable basis for women to start a new life after divorce, both in economic, social and emotional terms. The fulfilment of these rights is based on the principles of justice rooted in Islamic law and national legislation, thereby creating a more just and prosperous society, especially for women who experience divorce.

### **3. The Effectiveness of Fulfilling Children's Rights After Divorce in the Legal Area of the Makassar High Court of Religion**

Based on the results of the author's interview with the main informant Judge (FD) at the Jeneponto religious court, stated that:

'The effectiveness of the fulfilment of children's rights after divorce in the jurisdiction of the High Religious Court of Makassar is an important topic that reflects how the implementation of court decisions regarding children's rights can work in practice. The level of effectiveness is influenced by various legal, social, cultural and economic factors'.

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<sup>5</sup> Syahan Nur Muhammad Haiba, & Anjar Sri Ciptorukmi Nugraheni. (2024). Penetapan Hak Asuh Anak Pasca Perceraian Berdasarkan Asas Kepentingan Terbaik Anak. *Aliansi: Jurnal Hukum, Pendidikan Dan Sosial Humaniora*, 1(2), 151–161. <https://doi.org/10.62383/aliansi.v1i2.84>

<sup>6</sup> Ahyaril Nurin Gausia, & Fathur Rochim. (2023). Implementasi Kebijakan Direktorat Jenderal Badan Peradilan Agama Mahkamah Agung RI Tentang Pemenuhan Hak Anak Dan Perempuan Pasca Perceraian Di Pengadilan Agama. *Jurnal Hukum Dan Peradilan*, 1(23), 1–3. <https://www.mendeley.com/catalogue/eb0abcdb-3dee-3708-9ba9-85b199261e78/>

Here's an in-depth look at this:

### 1. Legal Basis for Fulfilling Children's Rights

The Makassar High Court of Religious Affairs is tasked with enforcing the rules of Islamic law governing the rights of children after divorce, including:

- a. Article 41 of Marriage Law No. 1 of 1974, which states the obligation of parents to maintain and educate children even after divorce.
- b. The Compilation of Islamic Law (KHI), which stipulates that the responsibility for child maintenance rests with the father until the child reaches adulthood, although custody of the child rests with the mother.
- c. Child Protection Law No. 35 of 2014, which guarantees the protection of children's rights to care, education and other basic needs. Namun, meskipun dasar hukumnya kuat, efektivitas implementasinya sering kali menjadi persoalan.

### 2. Indicators of the Effectiveness of Fulfilling Children's Rights

The effectiveness of fulfilling children's rights after divorce is measured through several aspects:

- a. Compliance of the former husband in fulfilling child maintenance in accordance with the court decision.
- b. Physical, educational, and psychological well-being of children after divorce.
- c. Supervision and law enforcement by the court against parties who violate the decision.
- d. Participation of the mother as the child's carer in supporting the child's development.

### 3. Constraints to the Fulfilment of Children's Rights

Despite clear legal regulations, the following obstacles often reduce the effectiveness of the implementation of children's rights:

- a. Non-compliance by the ex-husband: There are many cases where the ex-husband does not provide child maintenance as stipulated in the court decision, either due to economic reasons, negligence, or deliberate avoidance of responsibility, and this non-compliance often does not receive sufficiently strict follow-up, so that the child's rights are neglected.
- b. Lack of Oversight of the Implementation of Judgments i.e. Religious courts do not have an effective system to ensure that ex-husbands comply with child maintenance judgements, often relying on complaints from ex-wives.
- c. Economic Factors i.e. If the ex-husband has economic limitations, the fulfilment of children's rights becomes difficult to realise, even though a verdict has been issued.
- d. Patriarchal Culture i.e. in some areas, patriarchal culture still influences people's views, where women or mothers are considered to be fully responsible for children without a sufficient role from fathers.

### 4. Makassar Religious Court's Efforts to Improve Effectiveness

To improve the effectiveness of the fulfilment of children's rights, the Makassar High Court of Religious Affairs has taken the following steps:

- a. Mediation and Conflict Resolution i.e. Religious courts often begin the process with mediation between the former husband and wife to ensure that children's rights are prioritised.
- b. Execution of Court Judgement i.e. If the former husband does not comply with the judgement, the court may take execution steps, such as forced summons or even legal action to ensure the implementation of child maintenance.

- c. Cooperation with Related Agencies i.e. The court cooperates with government agencies such as the Social Service or the Indonesian Child Protection Commission (KPAI) to ensure that children receive adequate protection.
- d. Legal Counseling i.e. Religious courts also conduct socialisation to the community to raise awareness of the importance of fulfilling children's rights after divorce.

## 5. Case Studies and Statistics

Based on some local research in Makassar, the effectiveness of fulfilling children's rights shows mixed results:

- a. The level of child maintenance compliance by ex-husbands is still low, especially in families with a middle to lower economic background.
- b. Child custody rights are often well exercised by the mother, but without adequate support from the father, children's needs are not met optimally.
- c. Legal remedies for the execution of judgements by religious courts tend to be slow due to a lack of resources and an effective supervisory system.

### Recommendations to Improve Effectiveness

To improve the effectiveness of fulfilling children's rights after divorce, the following steps need to be prioritised:

- a. Improve the Supervisory System: Create a digital-based supervisory mechanism to monitor the implementation of child maintenance on a regular basis.
- b. Stricter Legal Action: Apply strict sanctions to parties who do not comply with court decisions, such as asset freezing or detention.
- c. Economic Support Programmes: Integrate social assistance to families in need to ensure that children's welfare is not neglected.
- d. Increased Legal Counselling: Educate the community on the importance of children's rights and parents' legal obligations post-divorce.

Based on the results of the author's interview with the main informant Judge (FD) at the Jeneponto religious court, stated that:

'The effectiveness of the fulfilment of children's rights after divorce in the jurisdiction of the Makassar Religious High Court still faces various challenges, especially in terms of compliance of the former husband and supervision of the implementation of the decision. Even so, the religious courts continue to make efforts through mediation, legal execution, and cross-agency cooperation to ensure that children's rights are maximally fulfilled. Continued efforts, including reform of supervision and enforcement systems, are necessary to achieve better justice for children after divorce'.

Based on the results of the author's interview with the main informant Judge (FD) at the Jeneponto religious court, stated that:

*'The nature of the fulfilment of the rights of post-divorce children in the jurisdiction of the Pangkep Religious Court includes efforts to protect and ensure the welfare of children affected by their parents' divorce'.*

Here are some important aspects of fulfilling children's rights in this context:

### 1. Legal Protection

The Makassar High Court of Religious Affairs plays a role in providing legal protection for children, ensuring that they retain their basic rights after divorce. This includes the right to maintenance, education, health, and emotional care from both parents, even if they do not live together.

### 2. Best Interest of the Child

The principle of the 'best interests of the child' forms the basis of every decision made by the court. This means that decisions regarding custody and maintenance should always consider what is best

for the child's physical, emotional, and social development. These decisions should be made by involving the opinions of the child, in accordance with their age and maturity.

### 3. Maintenance and Parental Responsibility

The court sets out clear maintenance responsibilities for parents, where the father remains obliged to provide maintenance to the child after divorce. This includes the fulfilment of basic needs such as food, clothing, education and health. This is governed by a policy issued by the Directorate General of Religious Courts, which directs that child maintenance be prioritised in divorce proceedings.

### 4. Mediation and Dispute Resolution Process

The Religious Courts also apply a mediation process to resolve disputes that may arise between parents regarding child custody and maintenance. The mediator plays an important role in helping parents reach a mutually beneficial agreement, while focusing on the welfare of the child.

### 5. Institutional and Community Involvement

The involvement of community institutions and non-governmental organisations in supporting the fulfilment of children's rights is also very important. These institutions can provide legal assistance, psychological support, and rehabilitation programmes for children who have been traumatised by parental divorce.

Based on the results of the author's interview with the main informant (BZ) Judge at the Jeneponto religious court, stated that:

“With this comprehensive approach, the Jeneponto Religious Court seeks to create an environment that supports the fulfilment of children's rights, so that they can grow and develop well despite difficult circumstances. This reflects a commitment to safeguarding the integrity and welfare of children as the next generation of the nation”.

Under Indonesian law, children as citizens have rights that must be protected. These rights are regulated in Law No. 23 Year 2022 on Child Protection (Law No. 23 Year 2002). The enactment of Law No. 23/2002 is a consequence of Indonesia being a state of law as well as a consequence of the ratification of the Convention on the Rights of the Child. Law No. 23/2002 regulates several rights of children, namely:

1. The right to life as stipulated in Article 4 of Law No. 23/2002 which guarantees the child's right to life;
2. The right to religion, thought and expression as stipulated in Article 6 of Law No. 23 of 2002. This article provides protection to children to be able to express themselves, freedom to channel their creativity, give children the choice of the religion they embrace and receive protection to worship in accordance with their religion;
3. The right to health and welfare, Law No. 23 of 2002 guarantees children's health for their growth and development and in Article 12 states that children have the right to rehabilitation, social assistance and maintenance;
4. The right to education and teaching, where children have the right to receive teaching to increase their knowledge, channel their abilities and to be morally and socially responsible;
5. The right to protection, where children have the right to be protected from various forms of discrimination, neglect, exploitation, cruelty, violence and other mistreatment;
6. The right to care, children have the right to receive effective care and to be free from pressure or arbitrary treatment under the care of either their parents or other parties;
7. The right to justice, children have the freedom to be treated humanely and get help in order to obtain justice in their lives.

Meanwhile, in order to enforce legal protection of children's rights, especially within the scope of the household, the government has stipulated Law Number 23 of 2004 concerning Prevention of Domestic Violence, including by establishing criminal sanctions for parties who are legally responsible for the rights of children, but do not carry out their obligations so that they can be

categorized as having committed acts of violence against children. So with the increasing demands for protection of children's rights from the state, government, local government and society along with the increasing cases of violence against children, the Legislative body together with the Government has revised and improved the child protection law into Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection.<sup>7</sup>

The rights mentioned above must be fulfilled regardless of the circumstances. Regarding the rights of children 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 have an obligation to maintain and educate their children for the benefit of the child. In addition, the costs of maintaining and educating children are the responsibility of the father. However, if the father is unable to fulfill this obligation, the mother also has an obligation to the costs in question. The same thing is also regulated in Article 149 letter d KHI which states that the former husband has an obligation to provide *nafkah hadhanah* to his children. The purpose of *nafkah hadhanah* is the cost of maintenance, care and education of the child until he grows up. Article 105 letter c of KHI also emphasizes where the responsibility for post-divorce child maintenance costs lies with the father.

Based on the results of the author's interview with the main informant (HS), the Chairman of the Pangkajene Religious Court, stated that:

“The obligations that must be fulfilled are the 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 be able to live, grow, develop and participate reasonably in accordance with the dignity of humanity and receive protection from violence and discrimination “.

These rights are a manifestation of the obligations of both parents as stipulated in Article 1 of Law No. 9 of 1979 concerning Child Welfare where child welfare efforts are first and foremost the responsibility of parents. From these several things, the rights of children who are the obligation of parents must still be fulfilled regardless of their condition, whether the parents are still bound in marriage or after divorce.<sup>8</sup>

#### 4. CONCLUSION

The fulfillment of women's rights after divorce according to laws and regulations, such as Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law, aims to achieve the values of legal expediency, certainty and justice, with arrangements regarding *nafkah mut'ah*, *nafkah iddah*, *maskan* and *kiswah*, dowry owed, and division of joint property determined by the court based on women's requests. Meanwhile, the effectiveness of the fulfillment of children's rights after divorce has not run optimally. Factors that influence the fulfillment of the rights of women and children in the jurisdiction of the Makassar High Court of Religion include legal substance, legal culture, legal knowledge, and legal awareness. Therefore, it is recommended that the Religious High Court increase socialization and legal education on the rights of women and children after divorce, improve the quality of mediators and court staff with more in-depth training on gender issues and children's rights, and strengthen policies and regulations that support the fulfillment of these rights. With the implementation of these suggestions, it is hoped that the fulfillment of the rights of women and children can be better and more just, and support the creation of a more prosperous society and the protection of human rights in Indonesia.

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