
Legal Protection Efforts for Wives and Children in Divorces Caused by Husband's Nusyuz Case

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ABSTRACT

Divorce is the main cause of the dissolution of a marriage, as stated in Article 38 of UUP No.1 of 1974. Currently, one of the problems in society is the nusyuz case, which is defined as disobedience or non-compliance between husband and wife in prioritizing roles and obligations. contained in a marriage bond. The word nusyuz is found in Qs. An – Nisa verses 34 and 128, nusyuz cases are rife in religious courts. Therefore, the researcher used a normative juridical approach method by referring to Islamic law and positive civil law, statutory regulations and supported by secondary data in the form of interviews from several opinions and considerations of court judges' decisions. Comparisons with previous research can be found in interviews conducted by researchers with one of the chairmen of PA Surakarta, in terms of considering a decision in the form of livelihood, as well as developments in regulations issued by the Supreme Court. Often the children and wife are still the parties who suffer losses after a divorce, the basis for the judge's consideration in granting maintenance rights to the wife and children after the divorce. It is explained in Islamic law using 4 (four) methods: "Al - Qur'an, As - Sunnah, istidlal and ijma". Supported by Perma No. 3 of 2019, Law No. 16 of 2019 in regulating maintenance rights for wives and children. As an effort to protect the law, referring to the Decree of the Director General of the Supreme Court of Republic of Indonesia Religious Courts No. 1951 of 2021 concerning the Implementation of a Policy Brief Guaranteeing the Protection of the Rights of Women and Children Post-Divorce.

Keywords: Divorce, Nusyuz, Living, Wife and Children.

INTRODUCTION

The peak of the distribution of love and affection between humans is found in the sacred bond of marriage. In Law No.16 of 2019 concerning amendments to Law No.1 of 1974 concerning Marriage (hereinafter referred to as UUP) is present as a unification of marriage law. Marriage is defined as a legal act that involves the strength between partners as an inner bond between a man and a woman to become a husband and wife in a happy and eternal household by looking to the Almighty Godhead.¹It was explained that marriage is not only a matter for the prospective bride and groom, but will be bound by the rules of Indonesian marriage law and religious/belief laws which have the aim of achieving a harmonious and happy family life, which is referred to as "sakinah, mawaddah and rahmah" in the Islamic religion.²However, under certain conditions there are several things that make it possible for a marriage bond to be broken or annulled, as in Article 38 of Law No. 1 of 1974 concerning marriage and Chapter divorce, death, and the decision of a court.³

Divorce is the cause of the breakdown of a marriage. Divorce provisions are contained in Article 22 of the UUP, explaining that a marriage can be filed for annulment when the marriage does not meet all the marriage requirements. Violation of the terms of marriage, both formally and materially, which causes the marriage to be null and void by law. One of them is caused by the nusyuz case. Nusyuz which is

¹ Pasal 1 Undang – undang No.1 Tahun 1974 Tentang Perkawinan.

² Bab II Pasal 3 Dasar – Dasar Perkawinan Kompilasi Hukum Islam.

³ Humas Pengadilan Agama. (2022). *Keharusan Perceraian Di Pengadilan Agama*. Dipublikasi pada 08 Juli 2021, <http://pa-pulangpisau.go.id/berita/arsip-berita-pengadilan/149-artikel/1711-keharusan-perceraian-di-pengadilan-agama>, diakses pada 22 September 2022, Pukul 07.40 WIB.

interpreted as disobedience,⁴Tafsir experts define nusyuz as a case of domestic violence whether in words, actions or both as actions carried out by both parties that can threaten the continuity of the marriage. It's like a husband giving nusyuz to his wife, or vice versa.

The legal understanding of nusyuz needs to be studied in more depth, especially in these cases, which often occur in the Religious Courts, there needs to be clarity on the consequences of the husband's nusyuz on the wife, as well as legal protection for ex-wives and children (if the wife files for divorce in court). Regarding the regulation of this matter, it is contained in article 66 paragraph (1) of Law No. 7 of 1989.

The Supreme Court responded to this by presenting Supreme Court Regulation (Perma) No. 3 of 2017 concerning Guidelines for Trying Women's Cases in Conflict with the Law.⁵Then it was accommodated in Article 41 letter (C), the Marriage Law which provides regulations regarding various kinds of women's rights after a divorce. This article stipulates obligations for ex-husbands to fulfill the living needs of ex-wives.

After a divorce, both parties (husband or wife) are obliged to look after the child until they reach adulthood, such as by ensuring that living expenses and education costs are met. The rights and obligations of both parents are stated in Article 45 of Law No. 1 of 1974. This is the reason for the author to identify and understand the problems that occur in society and to find the gap between *das sollen* and *das sein*.

Find the main elements of factual cases. Looking at the statistical data, the factors that cause divorce can be explained by several basic reasons or things in several Religious Courts which have experienced quite a significant increase, one of which is disputes and quarrels. This, of course, has legal consequences for certain parties, including children and wives. Referring to this problem, the author determines the identification of the problems to be discussed, namely First, what are the legal considerations for Nusyuz divorce cases in considering the rights of children and wives? Second, what is the legal protection for the wife and children in a divorce caused by a nusyuz case committed by the husband? As well as being guided by the concept of Islamic law with positive law (the term Islamic law uses the rules of *al-fiqh al-Islami* or in western literature it is called the Islamic law) assisted by several sources in strengthening the substance of the research, including: jurisprudence and doctrine to resolve the main problem existing in society.

RESEARCH METHODS

The method used in this research is normative juridical which refers to applicable laws and regulations, the data source uses secondary data in the form of judges' opinions and considerations in deciding a case. The problems studied are related to positive law, Islamic law and are connected to data obtained from several informants from law enforcement officials in implementing several regulations issued by the Supreme Court of the Republic of Indonesia. The research uses a qualitative descriptive type which aims to collect data or information to be compiled, explained and analyzed with the aim of solving actual problems in Islamic family law literature, then interpreting and concluding these symptoms according to the context. Providing a systematic description in the form of facts, characteristics, objects and subjects studied appropriately, in drawing conclusions the author uses deductive techniques. In this research the author will describe the legal protection rights for wives and children after Nusyuz divorce.

RESULTS AND DISCUSSION

⁴ Nurzakia. (2022). *Pemahaman Masyarakat terhadap Nusyuz dan Dampaknya terhadap KDRT dalam Rumah Tangga*, Tadabbur : Jurnal Perdaban Islam, volume 2, Nomor 1, hlm.46.

⁵ Peraturan Mahkamah Agung Nomor 3 Tahun 2017 tentang Pedoman Mengadili Perkara Perempuan Berhadapan dengan Hukum.

Legal analysis in considering the rights of children and wives after divorce (regarding nusyuz cases).

Consideration or what is known as *considerans* is the basis for a decision.⁶ Based on the SE issued by the Supreme Court, as material to complete the results of the Religious Chamber Formulation as stated in SE MA No. 04 of 2014 number 4⁷, as emphasized "The judge should consider sufficiently and carefully in adjudicating divorce cases, because divorce will end the sacred institution of marriage, change the legal status from halal to haram, have a broad impact on the structure of society and involve responsibility for the world of the afterlife."⁸ So a divorce can only be granted by a judge when there are indicators that are clearly proven before the court. Then in accommodating the enactment of Perma No. 3 of 2017 concerning Guidelines for Adjudicating Women's Cases in Conflict with the Law⁹ In case of divorce, the wife still gets her rights to *mut'ah* maintenance and *iddah* maintenance as long as the wife is not proven to have committed nusyuz acts.

When deciding a case, a judge has a legal reference which becomes the basis and consideration in deciding the case. Based on applicable law in Indonesia, in divorce cases, the parties must have strong reasons for what they are proposing. Looking at the legal theory, known as *Ratio Decidendi*, written in his book *The Law Making Process*, which is defined as "A proposition of law which decides the case, in the light or in the context of the material facts" that it is a legal proposition that deciding a case from the perspective or context of material facts.¹⁰ This stands as the legal basis for consideration of a decision.

In connection with this, the author conducted an interview with one of the PAs, by interviewing Mrs. Nur Lailah Ahmad, SH, MH to find out what standards or criteria are used to evaluate or measure something by a judge in making a decision on a nusyuz divorce case, conveyed by Chairman of PA Surakarta class 1A, who was willing to be an informant regarding the research conducted by the author: "One of the things that is contrary to the purpose of marriage is the act of nusyuz, which is contrary to the concept of the purpose of a marriage, where this act can be carried out if the parties are in a bad condition. cannot become a complete husband and wife, and have made efforts through the mediation process, and to avoid greater danger or a disadvantage that will occur in the household, then divorce is permitted, this is in line with the rules of *fiqiyah* which emphasize that when someone is faced with a difficult situation or dilemma, it is permissible to choose the solution that is least detrimental (has the least harm) among several detrimental options (harmful)."

The high number of contested divorces in PA Surakarta Class 1A is caused by 3 (three) factors, namely: Economic Factors, Moral Factors, and Third Person Factors. Of these three things, various efforts and solutions have been made, the PA provides 2 (two) ways, namely, through mediation and legal counseling by providing knowledge and awareness to the public regarding the consequences or consequences of divorce," then the judge can consider it based on the Per-law regulations. Law in decision making by looking at the contents of the Supreme Court Circular No. 03 of 2018 relating to Nusyuz.

The basis for legal consideration by the judge in granting maintenance rights to children and wives after a divorce is to look at various evidence or facts presented before the court, taking into account the capacity and abilities of the husband, daily income based on a photocopy of the salary slip, regardless of her husband committed injustice against his wife. In this case the judge looked at it from the perspective

⁶ Tri Jata Ayu Pramesti, "Arti Menimbang dan Mengingat dalam Peraturan Perundang – Undang" di publikasi pada 19 April 2017, <https://www.hukumonline.com/klinik/a/arti-menimbang-dan-mengingat-dalam-peraturan-perundang-undangan-1t571458c928b51>, di akses pada tanggal 14 Februari 2023, Pukul 11.13 WIB.

⁷ Surat Edaran Mahkamah Agung Nomor 4 Tahun 2014 Tentang Pemberlakuan Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Tahun 2013 sebagai Pedoman Pelaksanaan Tugas Bagi Pengadilan..

⁸ Surat Edaran Mahkamah Agung Nomor 3 Tahun 2014 Tentang Pemberlakuan Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Tahun 2013 sebagai Pedoman Pelaksanaan Tugas Bagi Pengadilan..

⁹ Perma Nomor 3 Tahun 2017 tentang Pedoman Mengadili Perkara Perempuan Berhadapan dengan Hukum.

¹⁰ Shidarta, "*Ratio Decidendi dan Kaidah Yurisprudensi*", Binus University Business Law, di publikasi pada tanggal 04 Maret 2019, <https://business-law.binus.ac.id/2019/03/04/ratio-decidendi-dan-kaidah-yurisprudensi>, di akses pada tanggal 11 Januari 2023, Pukul 11.00 WIB.

of Islamic law and positive law.¹¹

I. Review of Islamic Law based on legal considerations by judges regarding post-divorce maintenance due to nusyuz.

Guided by empathy, the main ones: Al - Qur'an, Sunnah, Ijma and Istidlal. So far, the Religious Courts have played quite an important role in the application of Islamic Law that applies in Indonesia, the reasons for making decisions and the basis for decisions use references to Per-UU or other sources of law (the Requirements for Religious Courts), as instructed by Article 23 paragraph (1) Law No. 14 of 1970, when referring to the postulates of Positive Law in Indonesia.¹²In Islamic law, the benchmark for judges in considering and deciding a case, among others, is a divorce case. Judges are often required to always prioritize justice for all Indonesian people in cases, strive to always provide mutual benefit for both parties,¹³in order to create the best possible decision, without harming either party.

Discussing the basis for consideration, the judge looked at it from the KHI perspective which is the guideline in regulating cases that fall within the scope of justice, one of which is divorce cases, as one of the sources of problems in the scope of religious courts. Looking at the joint considerations of the Decree of the Chief Justice of the Supreme Court and the Minister of Religion dated 21 March 1985 No. 07/KMA/1985 and No.25 of 1985 relating to the Appointment of the Implementation of Islamic Law Development Projects using the basis of jurisprudence¹⁴or what is more familiar in the scope of religious justice, namely the Compilation of Islamic Law. In legal considerations regarding Nusyuz divorce support, the main basis is in determining the law of the Qur'an and Al-Hadith, as a reference for Religious Court judges in giving considerations to a decision. In the Al-Qur'an, the context of nusyuz is explained in Qs An-Nisa verse 4 and verse 128. In providing for children, it is the husband's responsibility, as is the legal basis contained in Surah Al-Talaq verse 6, which reads: "Then if they breastfeed your (children) for you, then give them their wages."¹⁵Surah Al – Talaq verse 6, can be a reference for judges in giving considerations to a decision.

II. Positive Civil Law Review Based on Legal Considerations by Judges Regarding Post-Divorce Income Due to Nusyuz

Law No. 48 of 2009 concerning Judicial Power, Article 14 paragraph (2), states: "In a deliberative session, every judge is obliged to convey written considerations or opinions regarding the case being examined and is an inseparable part of a decision."¹⁶In essence, the judge's considerations determine a decision. Without comprehensive consideration, the court process can derail into bad things, complete consideration will provide an objective decision and conversely incomplete consideration can lead to the cassation stage at the Supreme Court level.¹⁷ Basic considerations for positive law Article 84 paragraph (1) KHI¹⁸, in the context of a wife's nusyuz, the husband's obligation to support post-divorce is terminated, except for the hadhanah income which is intended for the needs of his children.

a) In connection with the judge's argument in determining the child's right to support, it is contained

¹¹ Khairuddin, Badri, Nurul Auliyana. (2019). "Pertimbangan Hakim terhadap Putusan Nafkah Pasca Perceraian (Analisis Putusan Mahkamah Syar'iyah Aceh Nomor 01/Pdt.G/2019/Ms.Aceh)", El – Usrah : Jurnal Hukum Keluarga, Vol.2, No. 1, Januari – Juni, hlm 164.

¹² Pasal 23 ayat (1) Undang – Undang No.14 Tahun 1970 Tentang Ketentuan – Ketentuan Pokok Kekuasaan Kehakiman.

¹³ *Ibid*, p. 186.

¹⁴ E-Book. *Himpunan Peraturan Perundang – Undangan yang berkaitan dengan Kompilasi Hukum Islam Pengertian dalam Pembahasannya*, E – Book Perpustakaan dan Layanan Informasi Biro Hukum dan Humas Badan Urusan Adminstrasi Mahkamah Agung Republik Indonesia.

¹⁵ Qs. Al – Talaq : 6/65

¹⁶ Undang – Undang No.48 Tahun 2009 Pasal 14 ayat 2 Tentang Kekuasaan Kehakiman.

¹⁷ Rosmawati. (2018). "Analisis Terhadap Pertimbangan Hakim dalam Memutuskan Perkara Perceraian Karena Nusyuz Isteri", Jurnal : IAIN Bengkulu, hlm.03.

¹⁸ Pasal 84 ayat 1 Kompilasi Hukum Islam.

in the legal provisions in Article 41 of Law No. 1 of 1974 concerning Marriage in conjunction with Article 80 paragraph 4 letters b, c, and Article 81 of the KHI which basically means that the defendant and plaintiff are proven to be parents. Children as a result of a legal marriage, Article 42 (KHI), are still obliged to provide support for children by considering the income or financial conditions of the parties.

- b) The judge considered the mut'ah living in accordance with the provisions of Article 158 letter (b) KHI and in accordance with the Republic of Indonesia Supreme Court Jurisprudence No. 184K/Ag/1995 dated 30 September 1996, with the substance related to mut'ah living that must be given by the ex-husband to the ex-wife with The terms of the divorce are at the husband's will.¹⁹ Except if the ex-wife is qabla al dukhul in accordance with the contents of Article 41 letter (c) of Law No. 1 of 1974 concerning Marriage.

In this case, the researcher outlines several Positive Civil Law regulations which form the legal basis for providing mut'ah, iddah, and previous maintenance for divorced wives, as well as hadhanah maintenance for children. Judges are required to be more progressive in responding to various legal issues, especially in the field of divorce caused by nusyuz factors, burdens on husbands who have committed nusyuz acts, judges still require husbands to fulfill their maintenance obligations in accordance with the legal basis and legal considerations established delivered by the judge before the divorce vow is pronounced in front of the court session.²⁰

Analysis of legal protection in fulfilling the rights of children and wives after divorce (regarding nusyuz cases)

Every year, approximately 850,000 children in Indonesia feel the impact of divorce cases filed with the Religious Courts or District Courts.²¹ This condition occurs due to the ineffective implementation of the judge's order to ensure sustainable support for the wife and children after the divorce. In the International Dialogue carried out by the Religious Courts Agency in collaboration with the Australian and Malaysian Governments, it was stated that in divorce cases in 2018 the results of research from AIPJ2 (Australia International Partnership for Justice 2 and several other research institutions and universities) were outlined regarding 508,276 religious court decisions. and it is proven that in these divorce cases there were 447,417 divorce cases reported to the religious courts and 70% were filed by the wives as divorce cases, the remaining divorce cases were filed by the husbands.

Children and wives are included in a vulnerable group that requires special protection from law enforcers, especially in post-divorce rights, many wives and children are less protected so collaboration and communication from various parties is needed, so that in an effort to fulfill women's rights and children after divorce, the Director General of the Religious Justice Agency of the Supreme Court of the Republic of Indonesia issued decision Number 1959 of 2021 concerning the Implementation of a Policy Brief on Guarantees for the Protection of the Rights of Women and Children Post-Divorce with the following decision:

- a) With this decision, the Policy Brief for Guaranteeing the Protection of the Rights of Women and Children After Divorce came into effect.
- b) In the decision, it is stated that the Policy Brief for Guaranteeing the Protection of the Rights of Women and Children After Divorce has been regulated in an attachment and is an inseparable part of the decision.

¹⁹ Fitriyani. (2022). *"Pertimbangan Hakim dalam Putusan Perkara Nusyuz Prespektif Keadilan Gender (Putusan Pengadilan Tinggi Agama Tahun 2011 – 2019)"*, Disertasi, Universitas Islam Negeri (UIN) Syarif Hidayatullah Jakarta, hlm.239, diunduh 10 Februari 2023..

²⁰ Ibid, hal.248.

²¹ Tim Media PA Soreang, *"Dialog Internasional : Hak – Hak Perempuan dan Anak Pasca Perceraian di Tiga Negara"*, Mahkamah Agung Republik Indonesia Pengadilan Agama Soreang Kelas 1B, dipublikasi 10 November 2022, <https://pa-soreang.go.id/berita/berita-terkini/dialog-internasional-hak-hak-perempuan-dan-anak-pasca-perceraian-di-tiga-negara-02-10-20.html> diakses 11 Februari 2023, Pukul 19.07 WIB

- c) With the enactment of this decision, an order was issued to all judicial officers within the Religious Courts to be responsible for implementing the policies stated in the Policy Brief for Guaranteeing the Protection of the Rights of Women and Children Post-Divorce.²²

CONCLUSION AND SUGGESTION

CONCLUSION

Nusyuz can be interpreted as disobedience or disobedience between husband and wife in carrying out their roles and responsibilities in a marriage bond. Islamic law, which is based on the word of Allah SWT, mentions the word nusyuz in the QS. An – Nisa verse 34 and QS. An - Nisa verse 128 states that various types of nusyuz are divided into 2 (two), namely the husband's nusyuz acts towards the wife and the wife's nusyuz acts towards the husband. What is the limitation of the author's discussion is the husband's nusyuz towards his wife. By analyzing the legal basis for the judge's considerations in granting maintenance rights to wives and children after divorce. It is explained in Islamic law using 4 methods, namely based on the Al-Qur'an, As-Sunnah, Ijma and Istidlal.

Then, in legal considerations regarding nusyuz divorce cases, when considering the rights of children and wives, you can be guided by Islamic law and positive civil law, with the legal basis used being Perma No.3 of 2017, Law No.16 of 2019, in regulating maintenance rights. to wives and children, judges can use the KHI (Article 84 paragraph 1 and Article 42) as a reference for considering their decisions. In Islamic law terms judges can consider the right to support using the al-maslahah al-murlah system, one of the basic legal considerations in seeking rights. – Living and child rights are fulfilled fairly. In the Al-Qur'an and Al-Hadith, it is the basis of reference for considering legal decisions by judges Qs. Al - Talaq verse 6 and to ensure that children's rights are fulfilled are contained in Qs. Al – Baqarah paragraph 233, as well as positive legal considerations found in the jurisprudence of the Supreme Court of the Republic of Indonesia No.184K/Ag/1995 and Article 41 of Law No.1 of 1974 concerning Marriage. As a form of legal protection, the Director General of the Religious Courts of the Supreme Court of the Republic of Indonesia No. 1959 of 2021 concerning the Implementation of a Policy Brief Guaranteeing the Protection of the Rights of Women and Children Post-Divorce. In the decision of Director General Badilag, various regulations were initiated for the policies of the Religious Courts Agency in Indonesia. As well as making efforts to carry out synergy and collaboration with the Supreme Court and all religious courts and related institutions, to prioritize the principles of justice by referring to Article 2 of Perma No.3 of 2017.

SUGGESTION

Carrying out wider outreach to the community collectively, in order to achieve the objectives of article 28 B paragraph 2 of the 1945 Constitution. The Indonesian government can learn from the policies of the Government of Malaysia, Australia or other neighboring countries, when a decision on livelihood has been determined, the decision will be followed up by the relevant institution. has the authority to regulate the maintenance rights of wives and children after divorce. According to the author, this can be used as a new innovation, so that in the future the protection of livelihoods for children and wives is guaranteed, where the government needs to form an institution that focuses on dealing with family support problems, an institution that is more proactive and effective in dealing with cases of individuals who do not comply with court orders. The institution is responsible for carrying out maintenance payment orders issued by the court, and can deal with types of actions such as confiscation, debt transfer and coercion. Good cooperation and mutual integrity are needed to fulfill this, one of which is working together with the taxation department to use as a reference how much the husband's income is as one

²² Kepaniteraan Pengadilan Agama Kota Kajen, dipublikasi pada 18 Juni 2021, “Keputusan Direktur Jenderal Badan Peradilan Agama Mahkamah Agung Republik Indonesia Nomor 1959 Tahun 2021 tentang Pemberlakuan Ringkasan Kebijakan (Policy Brief) Jaminan Perlindungan Hak – Hak Perempuan dan Anak Pasca Perceraian”, https://pa-kajen.go.id/v3/images/New_Web/3.Kepaniteraan/1.SK_Dirjen_Badilag_Policy_Brief.pdf, diakses pada 10 Februari 2023.

of the data in determining the amount of child support. And it is very necessary to coordinate with the company or place where the husband works, which will not burden the husband (and can be in accordance with his nature in providing maintenance rights after divorce), the government regulates and manages salary deductions in a systematic manner, in order to ensure the maintenance rights of the wife and child is fulfilled.

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