

## Legal Reconstruction on Talak Divorce Regulation Based on Justice Value

Gunarto<sup>1\*</sup>, Subroto<sup>2</sup>, Anis Mashdurohatun<sup>1</sup><sup>1</sup>Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia<sup>2</sup>Doctorate Student of Faculty of Law, Sultan Agung Islamic University, Semarang, IndonesiaDOI: [10.36348/sijlcrj.2022.v05i10.009](https://doi.org/10.36348/sijlcrj.2022.v05i10.009)

| Received: 04.09.2022 | Accepted: 10.10.2022 | Published: 14.10.2022

\*Corresponding author: Gunarto

Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia

### Abstract

The aims of this study are to analyze and find weaknesses in the regulation of legal protection for wives who have been *talak* divorced by their husbands due to their husband's mistakes and to find a reconstruction of legal protection regulations for wives who are *talak* divorced by their husbands due to the husband's mistakes based on the value of justice in a research that uses constructivism paradigm. The approach method used is empirical juridical, namely the application of normative legal provisions in action on divorce legal events, especially divorce divorces. The data used are primary data, secondary data, and tertiary data which were analyzed descriptively. The legal theory used is the theory of Islamic justice, the theory of the legal system and the theory of legal protection. The results of the study show that the weakness of the regulation of legal protection for wives who got *talak* divorced by their husbands due to the husband's fault lies in the unclear article on the type of reason for the divorce and its consequences, especially when the husband who handed down the divorce was the perpetrator of the affair, and the wife as the victim did not receive compensation. therefore, the legal reconstruction can be done by adding new norms to Article 41 of Law no. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage, and also Article 149 of the Presidential Instruction (INPRES) No. 1 of 1991 concerning the KHI, namely: "The ex-husband is obliged to provide compensation in the form of a year's income to the ex-wife if the divorce is due to the husband's fault, but if the husband is unable to fulfill it then he must make a statement of incapacity and apologize to the wife for not being able to do so able to pay for it."

**Keywords:** Legal Reconstruction, Talak Divorce, Justice Value.

**Copyright © 2022 The Author(s):** This is an open-access article distributed under the terms of the Creative Commons Attribution **4.0 International License (CC BY-NC 4.0)** which permits unrestricted use, distribution, and reproduction in any medium for non-commercial use provided the original author and source are credited.

### INTRODUCTION

On a global scale, it is stated that divorce is caused by unstable financial conditions, physical conditions and emotional conditions. On a smaller scale, in several regions in Indonesia, divorce data which continues to increase in number also shows that divorce is the result of financial insecurity, physical limitations and emotional instability of the spouse. There are 6 (six) things that can be used as legal reasons for divorce. First, one of the parties commits adultery. Second, one of the parties leaves the spouse for two consecutive years. Third, one of the parties gets a sentence of 5 years in prison or heavier. Fourth, one party commits atrocities or mistreatment that endangers the other party. Fifth, one of the parties has a disease so that they cannot carry out their duties as husband or wife. Sixth, there are continuous disputes or quarrels (Hasa, 2022).

The more diverse models of infidelity and the lack of public education in dealing with conflicts in the household make the divorce phenomenon difficult to stem. Divorce, which was initially considered a solution to domestic conflicts, is, in fact raises new problems. Some of the divorce cases that were filed by husbands commonly known as Talak who had an affair, who deliberately filed for divorce to break their relationship with their legal wives, were also granted by the judge because usually judges in the Religious Courts did not consider ethical factors in deciding cases for example, there are 4 cases of divorce cases on the basis of infidelity. The data are respectively the decisions of the Serui Religious Court of Papua Province number 11/Pdt.G/2001/PA. Sri, the decision of the Kajen Religious Court number 121/Pdt.G/2014/PA. Kjn., Batang Religious Court decision number 1163/2017/PA. Btg., and the decision of the Purwodadi Religious Court number 869/Pdt.G/2020/PA. Pwd. When dealing with divorce cases, judges only see how severe the rift in the household is without investigating

the case to find out who is wrong and who is right (Mudhiyah, 2014). in order to achieve true justice. The researcher also found in interviews with several judges that judges always refer to Jurisprudence Number 534 K/Pdt/1996: *"In the case of divorce, it is not necessary to look at who is the cause of the dispute or because one party has left the other party, but what needs to be seen is the marriage itself, whether the marriage can still be maintained or not, because if the hearts of both parties have been broken then the marriage itself has been broken then it is impossible to be reunited, even though one of the parties wants the marriage to remain intact, if the marriage is maintained then the party who wants the marriage broken will continue to do bad things so that the marriage will remain broken."*

The regulations governing marriage still seem biased and in favor of the patriarchal culture, which has an impact on the ease with which the divorce decision is granted, even though the trigger for the breakdown of the household is the husband, with no compensation or compensation to the wife. In contrast to the countries of Malaysia, Yemen and Jordan which have made strict legal rules in terms of protecting the wife, where she gets her rights if her husband *talak* divorced her without a reason justified by law (Hammad, 2014).

The impact of divorce is one of the triggers for the instability of the child's psychological condition. Bumpass and Rindfuss stated that children of divorced parents tend to have educational problems. On the emotional dimension, children who live in a circle of divorce often experience heart problems, feelings of depression, shyness, rebellious spirit and often experience emotional instability. Thus, it can be said that divorce has a negative impact on the psychological development of children. In general, the psychological development of children whose parents are divorced is very disturbed, besides that the negative impact of divorce is the lack of love and attention from both parents for the child. On the other hand, children who are raised in incomplete families have a tendency to experience past trauma, especially when they have witnessed acts of violence experienced by their parents.

The values of legal norms stated in Article 41 of Law Number 1 of 1974 as amended by Law Number 16 of 2019, and Article 149 of the KHI provide protection for wives who are divorced by their husbands, but do not provide protection for wives who are divorced by their husband due to the husband's mistake, so that in that situation the wife is harmed.

Based on this, the author feels this problem needs to be raised in a study titled *"Legal Reconstruction on Talak Divorce Regulation Based on Justice Value"* where the authors raise 2 (two) main issues as follows:

1. What the weaknesses of legal protection regulations are for wife who got *talak* divorced by their husband unjustly?
2. How is the legal reconstruction of legal protection regulation for wife who got *talak* divorced by their husband unjustly based on justice value?

## METHOD OF RESEARCH

This study uses a constructivist legal research paradigm approach. The constructivism paradigm in the social sciences is a critique of the positivist paradigm. According to the constructivist paradigm of social reality that is observed by one person cannot be generalized to everyone, as positivists usually do.

This research uses descriptive-analytical research. Analytical descriptive research is a type of descriptive research that seeks to describe and find answers on a fundamental basis regarding cause and effect by analyzing the factors that cause the occurrence or emergence of a certain phenomenon or event.

The approach method in research uses a method (*socio-legal approach*). The sociological juridical approach (*socio-legal approach*) is intended to study and examine the interrelationships associated in real with other social variables (Toebagus, 2020).

Sources of data used include Primary Data and Secondary Data. Primary data is data obtained from field observations and interviews with informants. While Secondary Data is data consisting of (Faisal, 2010):

1. Primary legal materials are binding legal materials in the form of applicable laws and regulations and have something to do with the issues discussed, among others in the form of Laws and regulations relating to the freedom to express opinions in public.
2. Secondary legal materials are legal materials that explain primary legal materials.
3. Tertiary legal materials are legal materials that provide further information on primary legal materials and secondary legal materials.

Research related to the socio-legal approach, namely research that analyzes problems is carried out by combining legal materials (which are secondary data) with primary data obtained in the field. Supported by secondary legal materials, in the form of writings by experts and legal policies.

## RESEARCH RESULT AND DISCUSSION

### 1. Weaknesses of Legal Protection Regulations for Wife Who Got Talak Divorced by their Husband Unjustly

The condition of the Religious Courts in Indonesia, in principle, does not seem to highlight universal objective values. Good and bad, proper and

inappropriate become substances that are not considered. The role of the judge as an extension of the law becomes somewhat ambiguous when the judge only decides the case without wanting to do study (*ijtihad*) about it first. In the environment of the Religious Courts, a phenomenon like this is actually a big question because prospective judges have been educated about religious insight and a series of laws that can be referred to in deciding a justice (Wahyu, 2018).

The interpretation of various cases is a permitted activity, especially if it is brought within the realm of the Religious Courts. The Religious Courts are oriented to the concept of Islamic law based on the Al-Quran, Hadith, *Ijma'*, *Qiyas*, *Maqashid Syariah*, and *Maslahah Mursalah*. The last four sources of law may be used as a gradual reference if the law of a particular action is not explicitly contained in the main source of law. If a *muamalah* activity has no clear legal basis in the Qur'an, then humans are allowed to refer to the second legal basis, namely *hadith* and so on. This kind of law-making technique should be the basis for judges in deciding divorce cases with various new phenomena as triggers (Fathurrohman, 2020).

One of the legal foundations in Islam is to prioritize goodness over harm. *Maslahah mursalah* can be used as a method of *ijtihad* for scholars in implementing *maqashid al-syariah* as an effort to get out of the deadlock of a problem that comes later, but in the *qath'iy* (Guidance) there are no clear directions in the Qur'an and *hadith*. If it is correlated with the model and dynamics of Islamic divorce law in Indonesia, the legal substance in the article on the termination of marriage and its consequences should undergo development and review.

In Article 116 letter (a) the Compilation of Islamic Law (KHI) it is stated that divorce can occur due to the reason that one party commits adultery or becomes a drunkard, compactor, gambler and so on which is difficult to cure. Letter b states that one party leaves the other party for 2 consecutive years without the permission of the other party and without a valid reason or for other reasons beyond his control. Letter c one of the parties gets a prison sentence of 5 years or a heavier sentence after the marriage takes place. Letter d one of the parties commits cruelty or serious mistreatment that endangers the other party. Letter e one of the parties gets a disability or disease with the result that they are unable to carry out their obligations as husband or wife. Letter f explains that husband and wife continue to have disputes and quarrels and there is no hope of living in harmony again in the household. The letter g states that the husband violates *taklik talak*. And the letter h contains the change of religion or apostasy which causes disharmony in the household.

The study of the substance of the law is directly related to the purpose of making a law. The purpose of law as explained by Dirjosisworo (1999) is related to the values of freedom and order, personal interests and interpersonal interests, legal comparability and legal certainty, material and morals, sustainability and novelty. Among the values expressed, the values most related to divorce law are material-morality, and sustainability-newness. The increasingly diverse backgrounds of divorce require judges to work hard to be smart in making new breakthroughs in decisions. The main article on divorce is *talak* divorce and its various consequences also need to be updated in its interpretation so that Islamic law can appear in a fresher and more flexible face.

The discussion of Article 116 above when viewed based on Rawls's theory of justice in Widodo (2019) has hinted at equality. This means that justice and responsibility are given to each perpetrator, both the applicant and the respondent. Ideally the law leads to the goal of justice and the creation of a harmonious life among human beings. To be able to realize this equality, it is necessary to combine the statements of the applicant and the respondent at the trial in the *jinawab* response stage, then evidence is needed in the context of finding legal facts. This is in accordance with the applicable procedural law. However, the *jinawab* response stage is often not carried out by the judge because the respondent does not exercise his right to be present at the trial so that the case is decided without the presence of the respondent (*verstek*). Based on the data above, it is known that as a whole there are several facts that are missing when a decision is decided as a *verstek*. This condition is evidenced by the existence of rebuttals or discrepancies between the applicant's reasons and the answers submitted by the respondent in the event that the divorce case is decided contradictory.

Then, in the legal structure, the authority of law enforcement agencies is guaranteed in the 1945 Constitution Article 24 paragraph (2) of the third amendment which states that judicial power is exercised by the Supreme Court and the Judiciary Body which are under it the General Court, the Religious Courts, the Military Courts, and the State Administrative Courts. In this context, what are included in the legal structure is law enforcement agencies that embrace Islam, namely the Religious Courts. Based on observations, it was found that the weakness of the Religious Courts in the legal structure is that the apparatus under the auspices of the Religious Courts are passive. The judges and their staff are only fixated on the legal text editorially. They very rarely reinterpret the language of the articles. The articles in the law seem to be something that has been frozen and cannot be interpreted.

Judges as living law require special skills in the context of sharpness of mind. In Islam, sharpness of thinking is also applied to *mujtahids* who are carrying

out legal reforms in certain issues. Sharpness of thought is not an inherent ability of humans but something that can be cultivated through habituation. In this context, judges should be given skills and habituation to understand issues from various perspectives, not just a legal basis. The structure, namely the entire existing legal institutions and their apparatus, includes, among others: the Police with their Police, the Prosecutor's Office with its Prosecutors, the Court with its Judges. This condition is also exacerbated because in the context of legal culture, there is no law that can legally accommodate women's interests in getting justice in a balanced way with men, especially when she is a victim of unfair treatment by her husband.

## **2. The Legal Reconstruction of Legal Protection Regulation for Wive Who Got Talak Divorced by their Husband Unjustly Based on Justice Value**

As the author has explained before, regarding this problem then regulations should be enforced, including regulations regarding divorce cases against wives which are carried out by husbands because the husband makes mistakes that are contrary to the value of justice. Regulations on legal protection of women's rights must be considered. In addition to being considered unbalanced, the regulations discussed in this study implies a bias, namely the regulation of the husband's rights is regulated in detail in the marriage law and the Compilation of Islamic Law, while there is no regulation that regulates sanctions or compensation imposed on the husband, if the husband imposes his wife's divorce (Talak Divorce) as the result of the husband's fault. In this case, legal protection for women or wives can be in the form of repressive protection, meaning that the legal protection that is given because the husband commits a violation or mistake, with the form of protection in the form of fines or compensation, as seen in the regulations that have been implemented in the State of Yemen, Jordan, and also the State of Selangor, Malaysia (Abdullah, 2022).

For the sake of realizing justice, judges including judges of the Religious Courts in examining and deciding cases are required to explore and understand the legal values that live in society (living law) and are also given the authority to interpret the rule of law in an *argumentus a contrario*, but the results of the study found, and this finding is a weakness of the legal structure and also a weakness of the legal culture for the legal structure, namely that judges are reluctant or at least not to maximize their role in these two powers. And the judges in deciding cases are only based on the sound of the text of the rule of law.

According to Muladi, law enforcement is implementing the rule of law and the legal values contained in the rule of law. In this case, the sound of the text of the rule of law remains the basis for legal interpretation to realize justice; it does not mean that the rule of law only functions as a mere legal certainty.

Even according to Van Apeldoorn legal certainty also means legal protection; in this case the party who disputes can avoid arbitrary judgments. Thus, the reconstruction of regulations remains urgency to realize justice that is in line with the development of the times, civilization and also legal cases that come later (Toebagus, 2022).

Reconstruction of regulations is needed because regulation can function as a tool to protect individual rights. Regulation can also function as a determinant of a person's behavior limits so as not to take other people's property rights. Thus, regulation can also be understood as a guarantee of justice. The existence of regulation can make an individual control his emotions and actions so as not to interfere with the freedom of others. Moreover, the legal culture of the community that rules or regulations must be obeyed because it is included in the category of legal rules to be used as a reference in making court decisions and the basis for filing legal applications.

Reconstruction of legal protection regulations for wives who are divorced by their husbands due to the husband's unjust mistakes need to be carried out on the basis of several things. First, when there is a regulatory text related to the existence of compensation or compensation that must be paid by a husband who abuses his wife, it can minimize the husband's bad behavior towards his wife. Second, the regulation on the existence of sanctions for husbands who act abusively can have a deterrent effect for the person concerned. Third, the regulation of wives who receive unfavorable treatment by their husbands must be able to protect many wives from the practice of domestic violence.

Therefore, legal norms need to be reconstructed. Where the reconstruction proposed by the author is in Article 41 of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, by adding new clause "d": the ex-husband is obliged to provide compensation in the form of a year's income to the ex-wife if the divorce is carried out. imposed due to the husband's mistake, but if the husband is unable to fulfill it then he must make a statement of incapacity and apologize to the wife for not being able to pay it, and also Article 149 of Presidential Instruction (INPRES) Number 1 of 1991 concerning the Compilation of Islamic Law, by adding new clause "e": the ex-husband is obliged to provide compensation in the form of a year's allowance to the ex-wife if the divorce is due to the husband's fault, but if the husband is unable to fulfill it then he must make a statement of incapacity and apologize to the wife for not being able to pay it.

The Legal reconstruction proposed by the author above is necessary because of the development of society, especially when a law has been promulgated for a long time. A dynamic culture indirectly conveys

an implicit message about the need for legal flexibility. Laws can be made in accordance with the conditions of society that are experiencing continuous development. Positive law, especially laws and regulations that are often used as the basis for religious court judges to make decisions, are also open to revision in line with developments or community conditions. Especially with regard to positive law originating from Islamic law, so that the presence of new mujtahids is open.

The basis of *ijtihad* is clearly illustrated in the Qur'an, including Surah An-Nisa verse 105. The verse states that the Qur'an is a guide for humans and Allah's prohibition against humans from becoming servants who oppose the truth of Allah's law by becoming humans who defend group's traitor. The traitor referred to in the verse is someone who likes to lie and convey something that is not true (hypocrite). Based on the *asbabun nuzul* verse, the context of traitor is actually labeled to a man named Thu'mah who pretends to be a devout Muslim even though he is a thief who has committed many thefts, including war clothes. In this incident, the Prophet Muhammad SAW, whose position is the judge, investigated the case carefully and found that Thu'mah was the defendant of the case. In fact, Thu'mah is a good person in the eyes of his neighbors and he is a Muslim. The investigation carried out by the Prophet to produce a decision on Thu'mah is not a light activity that can be carried out in a fast time and requires sharpness of analysis and sensitivity of thinking.

Sharpness of taste and skill in understanding problems are the main requirements that must be possessed by all legal structures, including judges. This is of course also applied in divorce cases at the Religious Courts, especially for cases based on the value of justice. In addition to decisions that must be made carefully, consideration for defending the marginalized (the wife who is hurt) must take precedence.

## CONCLUSION

Based on the results of the research, the following conclusions can be drawn:

1. The Weaknesses in the regulation of legal protection for wives, who are Talak divorced by their husbands due to the husband's mistakes, can be seen by the fact that there is a difference in treatment in accessing the law. In the context of substance, for example, where there is no legal substance that legally protects the wife's rights after being divorced by her husband due to the husband's unjust mistakes. Then, in the context of the legal structure, it was found that the structure did not play a role in the realization of realizing justice as the purpose of the law. This further worsened by the context of legal culture, where there is no law that can legally accommodate women's

interests in getting justice in a balanced way with men, especially when she is a victim of unfair treatment by her husband.

2. Reconstruction, as proposed by the authors, are in Article 41 of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, by adding an additional article "d" : the ex-husband is obliged to provide compensation in the form of a year's income to the ex-wife if the divorce was imposed due to the husband's fault , but if the husband is unable to fulfill it then he must make a statement of incapacity and apologize to his wife for not being able to pay it, and also Article 149 of Presidential Instruction (INPRES) Number 1 of 1991 concerning the Compilation of Islamic Law, then, in article "e" : The former husband is obliged to provide compensation in the form of a year's living money to his ex-wife if the divorce is due to the husband's fault, but if the husband is unable to fulfill it then he must make a statement of incapacity and apologize to his wife for not being able to pay it.

## REFERENCES

- Abdullah, A., Hijrah, H., & Zarkasih, H. (2022). Criticizing The Muslim Divorce Tradition In Lombok: An Effort To Control The Women's Rights. *Justicia Islamica*, 19, 57-73. 10.21154/Justicia.V19i1.3168.
- Atabik, A., & Mudhiiah, K. (2016). Pernikahan dan Hikmahnya Perspektif Hukum Islam. *YUDISIA: Jurnal Pemikiran Hukum dan Hukum Islam*, 5(2), 287.
- Faisal. (2010). *Menerobos Positivisme Hukum*. Rangkang Education, Yogyakarta, P.56.
- Fathurrohmah, F. (2020). The Judge's Ex Officio Rights on the Case of Talak Divorce; Maqasid Shari'ah Perspective. *Shakhsyah Burhaniyah: Jurnal Penelitian Hukum Islam*, 5, 1-28. 10.33752/Sbjphi.V5i1.1622.
- Hammad, M. (2014). Hak-Hak Perempuan Pasca Perceraian: Nafkah Iddah Talak Dalam Hukum Keluarga Muslim Indonesia, Malaysia, Dan Yordania. *Al-Ahwal*, 7(1), 51-52.
- Hasan, K., Ahmaturrahman, A., & Turatmiyah, S. (2022). Efektivitas Sighat Taklik Talak Dalam Perkawinan Islam Di Indonesia. *Batulis Civil Law Review*, 3, 113. 10.47268/Ballrev.V3i1.1019.
- Soedjono, D. (1999). *Pengantar Ilmu Hukum*, Fifth Ed, P.40.
- Toebagus, G. W. P. (2020). The Urgency for Implementing Crytomnesia on Indonesian Copyright Law. *Saudi Journal of Humanities and Social Sciences*, 5(10), 508-514, Doi:10.36348/Sjhss.2020.V05i10.001
- Toebagus, G. W. P. (2022). Peran Integrasi Teknologi Dalam Sistem Manajemen Peradilan.

*Widya Pranata Hukum: Jurnal Kajian Dan Penelitian Hukum*, 4(1), Doi: <https://doi.org/10.37631/Widyapranata.V4i1.583>

- Wahyu, W., & Toebagus, G. (2019). Poverty, Evictions And Development: Efforts To Build Social Welfare Through The Concept Of Welfare State In Indonesia, *3rd International Conference on*

*Globalization of Law and Local Wisdom (Icglow 2019)*, Dx.Doi.Org/10.2991/Icglow-19.2019.65

- Wahyu, W., Sapto, B., & Toebagus, G. W. P. (2018). The Role of Law Politics on Creating Good Governance and Clean Governance for a Free-Corruption Indonesia in 2030. *The Social Sciences*, 13, 1307-1311.