

# GENDER MAINSTREAMING THROUGH GUARANTEES OF LEGAL PROTECTION AND ACCESS TO JUSTICE FOR WOMEN AND CHILDREN IN RELIGIOUS COURT

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## Abstract

Barriers to realizing accessibility for women and children in religious courts are still quite significant. Even after five years have passed since Supreme Court Regulation Number 3 of 2017 on Guidelines for Trying Women's Cases in Conflict with the Law was published. The initial suspicion is that this is still an unresolved problem because law enforcement's sensitivity to the needs of women and children has yet to be developed. Gender mainstreaming is then encouraged to overcome this. The problem that is the focus of discussion in this research is how to increase the accessibility of justice for women and children in religious courts. The aim is to elaborate and analyze the problem of how to increase the accessibility of justice for women and children in religious courts. The research method used is normative juridical, the research specification is descriptive analysis, and the data collection technique is library research. The research results show that most of the existing obstacles in access to justice and law for women and children after divorce still exist and still need to be resolved. The Supreme Court, as the supervisor of religious courts, has issued several regulations to overcome this problem. In fact, after several of these

regulations were issued, difficulties with access to justice continued to occur, primarily related to the implementation of decisions/executions. Gender mainstreaming by judges and religious court officials is needed to narrow the gap in access to justice and law for women and children after divorce. The urgency is because women and children are vulnerable parties, have limitations, and have extensive obstacles in accessing justice in court. Hence, they require support for convenience, priority access, simplification of business processes, and additional authority for judges in their positions (e.g., *officio*) when handling cases of women and children.

**Keywords:** Ease of Access, Gender Equality, Religious Courts

## Introduction

Access to justice is the right guaranteed to each citizen by the Constitution, as referred to in Article 28D of the 1945 Constitution. Access to justice can be interpreted as an opportunity to obtain justice that applies to all groups or is often referred to as justice for all. The interpretation of mandate of Article 28D of the 1945 Constitution must be interpreted by all levels of society and all genders. The regulation of access to justice is further regulated in Article 17 of Law Number 39 of 1999 on Human Rights, which states that the right to obtain justice is a human right to ensure respect, protection and fulfillment of the rights of every person before the same law, equal and dignified.<sup>1</sup> The right to obtain justice by every citizen, both men and women, includes several procedural and substantial rights, namely a free and impartial judicial process (fair trial) that upholds the principle of due process of law and the right to get good and correct legal decisions.

The condition of accessibility to justice by women and children then becomes a strategic issue of concern to the leadership of the Supreme Court, as the highest judicial authority that monitors the judicial realms in Indonesia. Primarily this is shown in the AIPJ (Australia Indonesia Partnership for Justice) Research Report

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<sup>1</sup> Komnas Ham Republik Indonesia, Draf 02 Standar Norma dan Pengaturan Tentang Hak Memperoleh Keadilan  
<https://www.komnasham.go.id/files/1635147719draf-02-snp-hak-memperoleh-keadilan-§EDS.pdf>

conducted in collaboration with the Religious Courts, showing that there has been little progress over the last five years, where only 1-2% of divorce cases include the provision of financial support for women and post-divorce children.<sup>2</sup> Efforts have been conducted since 2017 by issuing Regulation of the Supreme Court of the Republic of Indonesia Number 3 of 2017 on Guidelines for Trying Women's Cases in Conflict with the Law. It is hoped that the existence of this regulation will have an impact on increasing access to justice in the Judicial Institution at the Supreme Court. After almost five years, it turns out that changes regarding women's and children's access to the court have not yet achieved the expected results. The existence of this regulation also provides changes that lead to increasing access to the courts for women and children.

In judicial practice, the lack of gender knowledge or sensitivity of judges to the obstacles faced by vulnerable groups (women), children, and the elderly causes services to be carried out in a standard and normative manner. It will make it difficult for vulnerable people to understand, follow, and even resolve their matters (cases) in court. It is essential because courts and judges are supposed to try as hard as possible to remove obstacles to accessing justice. The critical things to do are mainstream gender awareness and provide easy access for vulnerable people.

Then, the knowledge of judges and judicial officers who prioritize services for women and children helps improve the contents of lawsuits, which, in fact, are not accompanied by demands regarding their rights; in fact, the judge is obliged to oversee them until the decision is reached and can be implemented. This knowledge is shown, such as:

1. Some judges understand the power relations factor in the cases of sexual violence or the psychological impact on victims of sexual violence;
2. It was found that judges take the initiative not to examine victims in the same room as the perpetrator or examine children and women before the law in another room that is not a courtroom; the judge even takes the initiative to remove

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<sup>2</sup> <https://aipj.or.id/pages/publication/facilitating-access-to-justice-for-women-children-people-with-disabilities-sharing-between-fcfoa-and-religious-courts-in-malang-and-surabaya>

the judge's gown so that the women facing the law felt calmer or comfortable in providing information;<sup>3</sup>

3. Efforts have been made ex-officially, prioritizing impartiality to the ex-wife and children in the trial stage by prioritizing fulfilling the ex-wife's obligations to the husband shortly before handing over the divorce certificate. The divorce certificate is an engineered husband's compliance to fulfill the rights of his ex-wife and/or children in family law disputes.

It is hoped that the knowledge of judges and judicial officials who are sensitive and aware of gender will prioritize services for women and children, assisting to improve the contents of lawsuits that are not accompanied by demands regarding their rights, and even judges are obliged to oversee them until the decision is reached and can be implemented. Manifestations of access to justice in the judge's perspective on gender are that the judge is not rigid in not allowing women who bring children under five to attend the hearing, they are not provided with lactation rooms, the judge's sentiment views are misogynistic, the tendency for women to be weak from a social perspective and limited in economic and financial matters, especially those divorced, he will be reluctant to take care of the case and just let it go, not to mention the psychosocial obstacles such as having to leave the house to go to the courthouse, the hassle of taking care of the case while carrying a toddler, and the opposing views of people around seeing that women who fight for their rights are considered less than grateful.

The condition of access to justice for women and children in religious courts is realized through adjudicating divorce cases; judges can deviate from the "Ultra Petita" doctrine. The judge can ex officio determine this based on the provisions of Article 41 letter c of the UUP.<sup>4</sup> However, even after the publication of Regulation of the

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<sup>3</sup> Siti Aminah Tardi (et.al) *Laporan Penelitian Kualitatif Tinjauan Penerapan Peraturan Mahkamah Agung Republik Indonesia Nomor 3 Tahun 2017 Tentang Pedoman Mengadili Perkara Perempuan Berhadapan Dengan Hukum Di Lima Mitra Wilayah Sistem Peradilan Pidana Terpadu Penanganan Kasus Kekerasan Terhadap Perempuan (SPPT-PKKT): DKI Jakarta*, (Jakarta: Komnas Perempuan-MaPPI FH UI, 2021), P.47

<sup>4</sup> Siti Musawwamah & Eka Susylawati, *Penerapan Peraturan Mahkamah Agung Tentang Pedoman Mengadili Perkara Perempuan Berhadapan Dengan Hukum Di Peradilan Agama*, (Pamekasan: Duta Media Publishing, 2019), P.18

Supreme Court of the Republic of Indonesia Number 3 of 2017 on Guidelines for Adjudicating Women's Cases in Conflict with the Law, there are still several problems that have not been resolved until now.

The factual problems that occur within the Religious Courts regarding access to justice for women and children are shown by research conducted by Agus Digdo Nugroho in his dissertation; at least the problem of women's and children's access to justice in the Religious Courts still exists and has not been successfully resolved. These problems are:<sup>5</sup>

1. Problematic Execution of the Hadlanah Decision;

Filing a lawsuit for *hadlanah* rights in the Religious Court is the same as filing a lawsuit regarding other civil rights as regulated in articles 142 and 144 RBg. Concerning *hadlanah* lawsuits, if we look at the interests of the plaintiff, there are at least two possible forms of claim; namely, The plaintiff is only interested in establishing, according to the law, that the right to care for the child is under his control. In contrast, the child is already under his care and control. The lawsuit was filed on the grounds that there were strong indications that the Defendant wanted to seize the child while the Defendant was unable to provide guarantees for the child's best development. It is intended to ensure that the Defendant cannot simply take their child to control it. Another possibility is that the plaintiff (in addition to having an interest in legally establishing that his child is in custody and control) is also interested in getting his child back into his care, which, in fact, has been controlled by the Defendant all this time.

It should also be noted that in this *hadlanah* lawsuit, HIR/RBg does not allow confiscation of the object of the case. Thus, in a claim for child care authority (*hadlanah*) there cannot be an application for confiscation. The execution of *hadlanah* decisions is not expressly regulated in the HIR or RBg and other statutory regulations that apply specifically to Religious Courts. The absence of a law that clearly governs the execution of *hadlanah* decisions does not mean that *hadlanah* decisions cannot be implemented but must be implemented based on generally applicable legal rules. Execution of payment of the amount is carried out by selling the debtor's goods at auction or is also

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<sup>5</sup> Agus Digdo Nugroho, *Rekonstruksi Dasar Hukum Kewenangan Eksekusi Isi Putusan Pengadilan Agama Terkait Pemenuhan Hak Mantan Istri Dan Anak*, (Jakarta: Disertasi Universitas Jayabaya, 2023), P.181.

carried out in the division of assets if the parties do not agree upon this division in-kind, or it is not possible to carry out an in-kind division in an inheritance or joint property dispute. In connection with the development of judicial practice needs, the execution of decisions in the Religious Courts is not only limited to the field of object law. In practice, the execution of Religious Court decisions has also extended to the execution of decisions on the right to care or control over children (*badlanah*). The execution of *badlanah* decisions can be classified into the first type of execution (real execution: doing something). However, the execution of *badlanah* decisions often experiences significant obstacles because the object of the case concerns people, so the success rate could be higher compared to executions in the field of property law.

## 2. Postponement of Execution of Case Review Efforts.

The implementation of the decision (execution) by the court of first instance is based on a decision that has permanent legal force (*Inkracht van Gewijsde*), which includes the execution of the decision to carry out an act, delivery of goods, and payment of a sum of money. This decision must contain judgment (*condemnatoir*), not be declaratory and constitutive. Judicial practice does not rule out the possibility of a losing or dissatisfied litigant filing an extraordinary legal action for judicial review (PK) either before the case has been executed or after the case has been executed.<sup>6</sup> With the opportunity to grant this extraordinary legal remedy, it becomes a dilemma for the court of first instance as the executor. On the one hand, what considerations are used as legal reasons to postpone the execution because of the submission of a PK application? On the other hand, if the execution has been carried out, it turns out that the PK's decision cancels the decision, which has permanent legal force; how to restore the object of the dispute which has already been executed to its original state (*restitutie in intergum*).

## 3. Problematic Confiscation in the Execution of Joint Property Decisions.

One of the problems in execution is confiscation. In the confiscation process, many problems were found in the field, including the object of the confiscation being unclear, what happens

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<sup>6</sup> Mas Mushendar, *Efektivitas Eksekusi Menghambat Upaya PK*, Jurnal Varia Peradilan Majalah Hukum Tahun XXIX No 344 Juli 2014, P.2

when the Defendant has transferred the confiscated object before the confiscation is carried out, or what happens when the confiscation has been carried out but is not considered in the decision. Apart from these things, there are many other problems with confiscation, especially regarding the development of confiscated objects, not only in the form of objects but also non-objects, such as shares, property rights, and intellectual property rights. The question is what the regulations and implementation are regarding confiscating shares and other non-objects.

#### 4. Divorce Decision Without *Mutab* and *Iddah*

Inequality may also occur in the hearing process when the judge who decides on divorce cases does not comply with procedural law and does not have gender sensitivity. Judges must have gender sensitivity in applying laws involving women. In examining cases, every judge must adhere to the principle of impartiality, namely, not taking sides. The application of this impartial principle in practice is still limited in providing equal treatment for litigants but has not yet touched on the aspect of gender equality between men and women.<sup>7</sup>

Without realizing it, there is still a cultural bias that makes judges place women as objects in the hearing. As objects, women do not have an equal bargaining position with men and tend not to be respected appropriately.<sup>8</sup> In divorce cases, it is often found that respondents who are not familiar with the law do not demand *mutab*, living, food and *kismah* from the applicant, even though the applicant is quite financially capable. In such cases, there are disparities in the decisions of Religious Court Judges with various kinds of arguments. Some determine it *ex officio*, and some don't. In practice, *ex officio* rights are still rarely used by some Religious Court Judges in determining *mutab* and *idab* as a result of the dissolution of divorce due to *talak*. As a result of *ex officio* rights not being implemented thoughtfully and not carefully considered, the parties' interests are not properly accommodated, especially the wife's. In a *talak* divorce case where the

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<sup>7</sup> Muh. Irfan Husaeni, *Disparitas Putusan Hakim Pengadilan Agama Dalam Menetapkan Mutab dan Iddah*, Varia Peradilan XXIX No. 342 Mei 2014, IKAHI, Jakarta, 2014, P. 94

<sup>8</sup> Muhammad Isna Wahyudi, *Menjadi Hakim Sensitif Gender Varia Peradilan*, *Majalah Hukum*, Tahun XXVII No. 317 Desember 2011, IKAHI, Jakarta, 2012, P.51.

ruling dispositive grants the applicant's request by permitting the applicant to impose one *raj'i talaq* on the respondent before the Religious Court but is not accompanied by a *condemnatoir* ruling that punishes the applicant to pay *mutah* and *idab* to the respondent.<sup>9</sup>

5. Zero capable mechanism of ensuring payment of child support and/or child support for the convicted person's ex-wife;

On a practical level, the convict (ex-husband) sentenced to pay child support and/or ex-wife support per certain period (usually per month) wants to refrain from carrying out his obligations voluntarily. This punishment is difficult to enforce because it depends on the will/good faith of the ex-husband. Moreover, if the respondent hides behind the excuse of unstable income and/or loss of livelihood, then he is unable to pay maintenance. In the Court itself, there is yet to be a mechanism that can ensure that the respondent pays attention to carrying out his obligations to pay child support and/or support for his ex-wife on a regular basis.

6. Zero Procedure binding third parties (institutions or business entities where the convict works) to ensure the execution of maintenance payments.

In research conducted by Alfeus Jebabun et al., in several divorce cases, it was found that the PN and PA had attempted to ensure payment of child support by providing a copy of the divorce decision and a request to the head and/or treasurer of the agency where the ex-husband worked to automatically deduct the ex-husband's salary per month to pay child support. Many courts also advise ex-wives to submit a similar application by attaching a copy of the divorce decision to the agency where their ex-husband works. However, this approach generally cannot ensure that the convict pays child support according to the divorce decision. It is because almost all agencies refused on the grounds that the decision only binds the divorced husband and wife, not the agency, and the agency where the ex-husband worked was not listed as the party sentenced to do something in the decision.<sup>10</sup>

These series of problems show that the Religious Courts still have access problems, and guarantees of legal protection for women

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<sup>9</sup> Muh. Irfan Husaeni, *Op.Cit*, P.95.

<sup>10</sup> Alfeus Jebabun (*et.al*), *Asesmen Awal Permasalahan Eksekusi Putusan Perkara Perdata Di Indonesia*, (Jakarta: LeIP, 2018), P.26.

and children have not been fulfilled. It appears that access to justice for women and children in the Religious Courts must be aimed at facilitating access to the process, legal certainty, guaranteed protection, and judicial matters that provide justice for women and children in the Religious Courts.

In connection with this, it is necessary for policymakers to make a comprehensive and systematic effort, one of which is gender mainstreaming in religious court institutions. The choice of gender mainstreaming diction in the title of this journal manuscript refers to gender mainstreaming, the process of ensuring that women and men have access and control over resources, obtain development benefits, and make appropriate decisions. the same at all stages of the development process and all projects, programs, and government policies.<sup>11</sup>

Previous research conducted by the Indonesia Australia Legal Development Facility (IALDF) found that a primary principle of justice is that justice must be universally accessible. Unfortunately, the poorest sections of Indonesian society face considerable obstacles in bringing their family law cases to court. Nine out of ten female heads of household surveyed cannot access the courts for their divorce cases. For poor people, court costs and transportation to the nearest court are considered significant obstacles to accessing the courts. Information and support for disadvantaged groups through the court process, especially those with low literacy levels, is also essential. Information barriers for disadvantaged groups can be overcome through information desk work and collaboration with NGOs.<sup>12</sup>

Then, research by Kamarusdiana stated the fact that access to justice for island communities in Indonesia is different from access to justice for people living on the mainland. The island communities in the Thousand Islands Regency have their own characteristics because in accessing justice at the Religious Courts, they have to pay more for transportation costs; the Thousand Islands people have to increase

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<sup>11</sup><https://www.kemenpppa.go.id/index.php/page/view/20#:~:text=Pengarusutamaan%20Gender%20adalah%20proses%20untuk,proyek%2C%20program%20dan%20kebijakan%20pemerintah>

<sup>12</sup> Indonesia Australia Legal Development Facility (IALDF), *Akses terhadap Keadilan: Pemberdayaan Perempuan Kepala Keluarga di Indonesia*, (Jakarta, 2010), P.62.

transportation and lodging costs because of the existence of the Religious Courts in Plumpang, North Jakarta. However, the religious courts have provided equal access to justice in *Sisdukcapil* services so that the Seribu Islands community can have the same access as other communities.<sup>13</sup>

Apart from that, a study on the accessibility of justice for women and children by Syarifuddin explained that women and men are equal before the law. Gender differences are in no way an excuse for discriminatory practices against men or women. The dignity and worth of men and women are the same, so their rights and obligations must be the same. A stereotype arises as a result of biased views towards women's participation in social life. This situation shows that if a country's legal system does not guarantee gender equality, discrimination against women occurs in many sectors, and/or legal protection is lacking, justice for women is still just a dream.<sup>14</sup>

Another study also states that specifically in cases of domestic violence, the main interest to be protected is, of course, the victim. Even though many parties view affairs that occur within a person's household as private, the state does not need to interfere; since 2004, this has no longer been the case with the enactment of Law Number 23 of 2004 on the Elimination of Domestic Violence. The preamble to this law explicitly states that the protection of victims, most of whom are women, is the primary basis for passing this law. Therefore, it is appropriate for law enforcement in cases of domestic violence to be carried out entirely based on the victim's perspective.<sup>15</sup>

Then, in handling criminal cases, it is stated that things that investigating prosecutors should not do when asking for information and/or examining victims, witnesses, female perpetrators, and children are intimidating and justifying mistakes, way of life, and morality, including sexual experiences, which carried out by asking questions

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<sup>13</sup> Kamarusdiana, Akses Keadilan Bagi Masyarakat Kabupaten Kepulauan Seribu, *MIZAN: Journal of Islamic Law*, FAI Universitas Ibn khaldun (UIKA) Bogor. Vol. 3 No. 1 (2019), pp: 1-24. ISSN: 2598-974X, E-ISSN: 2598-6252. DOI: <https://doi.org/10.32507/mizan.v3i1.401> P.1

<sup>14</sup> Syarifuddin, *Aksesibilitas Keadilan Bagi Perempuan Dan Anak*, (Jakarta: Imaji Cipta Karya, 2020),P.184.

<sup>15</sup> Masyarakat Pemantau Peradilan Indonesia Fakultas Hukum Universitas Indonesia, *Berikan Akses Keadilan Terhadap Perempuan Dan Anak Korban KDRT!* (Jakarta, MaPPI FHUI, 2021), P.16.

that are ensnaring in nature or that are not related to a crime as well as asking questions that are sexist in nature and/or give rise to discrimination based on sex or gender which is not relevant to the case.<sup>16</sup>

From several studies, it appears that gender bias is still a vital issue in hindering access to justice for women and children in court. Based on these facts, gender mainstreaming for judges and court officials absolutely must be started and completed to close the gap in poor access to courts in Indonesia. Gender mainstreaming in religious courts is in order to guarantee the fulfillment of the rights of ex-wives and children after divorce. Obstacles that arise in accessing justice to fulfill the rights of ex-wives and children after divorce accumulate at the level of implementation of the contents of the court decision or execution. Execution, namely the contents of decisions related to the rights of ex-wives and children, is the biggest obstacle in religious courts. In fact, it appears that the religious courts are powerless and do not have sufficient instruments to force the condemned person (ex-husband) to carry out his obligations. Justice seekers, especially ex-wives and children, are left to accept this less-than-ideal condition. In the end, only the ex-wife and children received a divorce. Still, their rights and guarantees of continued life have yet to be fulfilled because the implementation of the contents of the decision is still being determined.

Thus, gender mainstreaming in the Religious Courts places greater emphasis on the court's partiality in adjudicating cases involving the rights of ex-wives and children. It is absolutely necessary for judges and all religious court officials to provide legal and judicial services to ex-wives and children on the grounds that women and children are vulnerable, have limitations, and have extensive obstacles in accessing justice in court, so it is necessary to support for convenience, priority access, simplification of business processes, and additional authority for judges in their inherent positions (*ex officio*) when handling women's and children's cases so that gender

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<sup>16</sup> Kelompok Kerja (Pokja) Akses Keadilan Kejaksaan RI & Indonesia Judicial Research Society (IJRS), *Pedoman Akses Keadilan Bagi Perempuan Dan Anak Dalam Penanganan Perkara Pidana*. (Jakarta: AIPJ2, 2021), P.18.

mainstreaming insights can be realized and narrow the gap in access to justice.

Gender mainstreaming in Religious Court Institutions can be a solution to judicial problems in Religious Courts, especially those involving ease of service and access by women and children. Ease and guarantee of protection for women and children are realized by changing the orientation and views that place women and children as priority service subjects in the Religious Courts. Thus, the research problems discussed will be examined using normative juridical research methods. The research specification is a descriptive analysis that provides analysis and presentation of researched data regarding access to justice in religious courts related to fulfilling the rights of ex-wives and children after divorce.

### **Juridical Efforts by the Supreme Court to Realize Ease of Access and Protection of Women and Children in Religious Courts.**

The latest report, as contained in the 2022 Activity Implementation Report of the Directorate General of Religious Courts, states that in 2023, the caseload of the First Instance Court will be 675,158 cases. This figure is dominated by divorce cases involving women and children as parties. There were 389,421 divorce cases and 122,449 divorce cases. Interesting information is that, out of a total of 511,870 divorce cases, there were only 30 cases regarding the rights of ex-wives/obligations of ex-husbands and 12 child support cases by mothers because fathers were unable. Only 42 cases out of 511,870 divorce cases ask for the rights of ex-wives and children after divorce. Of course, that is just the case, and we are not discussing the execution of the court decision. It then drives the need for gender mainstreaming of women and children in the courts. The following are the measures taken by the Supreme Court:

1. Issuance of Supreme Court Circular Letter Number 1 of 2017;

This Circular explains that payment of obligations resulting from divorce, particularly *iddah*, *mut'ah*, and *madhiyah* maintenance, can be included in the decision with the sentence that it is paid before the pronouncement of the divorce vow. Based on this provision, the husband cannot pronounce divorce (vow of divorce) to his wife before the husband fulfills the obligation to fulfill women's rights after divorce as determined by the Panel of Judges.

The presence of Supreme Court Circular Letter Number 1 of 2017 is intended to provide greater certainty regarding fulfilling the rights of ex-wives and children after divorce. It is demonstrated by previous practice that ensuring that the rights of ex-wives and children after divorce are fulfilled is still a big obstacle. It is because the ex-husband is reluctant to fulfill the rights granted to his ex-wife and children. What is worse is that the religious court does not yet have sufficient instruments capable of forcing the condemned person (ex-husband) to carry out the contents of the religious court's decision. It certainly shows that there is no guarantee of legal certainty and access to justice for women and children after divorce. The rights of ex-wives and children are often neglected by the court's powerlessness in forcing the convict (ex-husband), and ex-husbands can also ignore the decisions of religious courts, which clearly in their decisions have punished the convict (ex-husband). Of course, this reality is harrowing, and the Religious Court as an institution administering justice is helpless when faced with unfair practices carried out by ex-husbands. Furthermore, the powerlessness of religious courts creates conditions of injustice for ex-wives and children who do not receive rights that guarantee their survival after divorce. By having constructed norms that regulate that husbands cannot pronounce divorce (vow of divorce) to their wives before the husband fulfills the obligation to fulfill women's rights after divorce, which the Panel of Judges has determined, this will provide guarantees for the ex-wife's rights being implemented by the condemned person (ex-husband).

Of course, this effort shows indications that access to justice for women and children has begun to be strengthened by the Religious Courts. Sociological facts in court are that husbands often focus only on completing the divorce process and hope to get a divorce certificate without fulfilling their obligations towards their ex-wife and children. It is unlikely to happen because the judge requires the convict (ex-husband) to pay or carry out all his obligations as stated in the content of the decision immediately before the divorce vow is carried out as a condition for obtaining a divorce certificate.

## 2. Issuance of Supreme Court Circular Letter Number 3 of 2018

This Circular regulates that a wife can be given rights due to divorce in the form of *mut'ah*, *iddah* living, or *madhyah* living in cases of contested divorce as long as the wife is not proven *musyuz*.

The Supreme Court Circular Letter Number 3 of 2018 also intends to guarantee the rights of ex-wives by ex-husbands. The formulation of norms contained in Supreme Court Circular Letter Number 3 of 2018 verbatim reads: Refining the formulation of the Religious Chamber in Supreme Court Circular Letter Number 07 of 2021 number 16 so that it reads: “Judges in determining *madhiyah* support, *iddah* support, *mut’ah*, and child support must take into account the sense of justice and decency by exploring the facts of the husband’s economic capacity and the facts of the basic living needs of the wife and/or children. This formulation is expected to guide judges in deciding and calculating the burden that will be the right of the wife and/or children borne by the former husband. The burdens that will the ex-husband will bear must consider the appropriateness and rightness of the amount of money given by the ex-husband to the wife and/or children. On the other hand, the judge should also consider the burden that the ex-husband can bear based on the income earned by the ex-husband. The judge must be really observant in seeing the amount that must be charged to the ex-husband; it often happens that the content of the decision that punishes the husband for paying his wife and/or children more than he can afford becomes a decision that will be wholly unenforceable (non-executable) so that the feasibility ratio and it is natural that the burden borne by the husband will also be a determining factor in the implementation of the contents of the decision to fulfill the rights of the wife and/or children after divorce.

### 3. Issuance of Supreme Court Circular Letter Number 2 of 2019

The rules in this Circular explain the order for payment of a husband’s obligations to his wife after divorce in a lawsuit divorce case. You can add the following sentence: “...which is paid before the Defendant takes the divorce certificate”, provided the order is narrated in the *posita* and *petitum* of the lawsuit. Based on these provisions, to ensure that the ex-husband can fulfill his obligation to pay the consequences of the divorce as stipulated in the decision, the husband is only entitled to obtain a divorce certificate after he has paid all his obligations to his ex-wife. Apart from that, this Circular also regulates that a lawsuit can be filed regarding past support (*nafkah madliyah*) for a child whose father is neglected by the mother or the person who is actually caring for the child. The provisions contained in Supreme Court Circular Letter Number 2 of 2019 confirm that the

Supreme Court, in its policies, has paid great attention to fulfilling the rights of women and children, which are often ignored.

In line with what is intended by Supreme Court Circular Letter Number 1 of 2017, Supreme Court Circular Letter Number 2 of 2019 focuses more on engineering legal compliance by designing the granting of ex-husband's rights in the form of a divorce deed shortly after the convict (ex-husband) carries out the decree religious court decision more on children's rights. When the trial process until the decision is decided, there are clearly things that have been missed because they were not submitted by the ex-wife or child's guardian for the child's interests, a lawsuit can be filed again to obtain the child's rights.

The ability to file a lawsuit for child support that has been missed or was neglected to be filed when filing a divorce lawsuit is not considered to violate the principle of *nebis in idem* justice. It is simply intended to ensure the fulfillment of children's rights and the survival of children in the future until the child is an adult and able to live his or her own life.

#### 4. Supreme Court Circular Letter Number 5 of 2021

The provisions in this Circular explain that in order to fulfill the best interests of the child (the best interest of the child) and the implementation of Perma Number 3 of 2017 on the burden of child support, a wife can apply for a confiscation order on her husband's property as a guarantee of fulfilling child support in the future coming. The mechanism for this determination must be based on the wife's request, which is described in detail in the *posita* and *petitum* of the lawsuit, whether in a convention, reconvention, or separate lawsuit. In addition to the presence of various regulations that serve as guidelines for judges in deciding cases related to the interests of women and children, the Religious Courts Agency, together with the Chair of the Chamber and the Supreme Court Judge, always holds coordination meetings that discuss judicial technicalities regarding problems faced by the courts, including matters that related to the fulfillment of the rights of women and children. Another effort is the Religious Courts Agency (Badan Peradilan Agama), which also regularly holds judicial technical guidance and legal discussions for judges throughout Indonesia regarding the legal protection of the rights of women and children.

Suppose you understand Supreme Court Circular Letter Number 5 of 2021. In that case, its contents show more effort to strengthen the previous Supreme Court Circular Letters, namely Supreme Court Circular Letter Number 1 of 2017 and Supreme Court Circular Letter Number 2 of 2019. The last Circular letter only explained the authority for certainty to get the rights of ex-wife and children after divorce. Technical details regarding how to implement it, the contents of the decision, and what instruments are used to make it happen have not been regulated. In Supreme Court Circular Letter Number 5 of 2021, more technical matters are regulated regarding how the rights of ex-wives and children will be obtained from ex-husbands. In order to ensure the implementation of the contents of religious court decisions regarding the rights of ex-wives and children, things must also be considered that will affect the fulfillment of the rights of ex-wives and children in real terms, not just in the decisions. Responding to this, the leadership of the Supreme Court issued Supreme Court Circular Letter Number 5 of 2021 as a guide and reference in carrying out trials involving women and children. Arrangements are then made for the plaintiff or defendant, whose party is a woman (wife), to be able to apply for collateral confiscation and a decree of confiscation of the husband's property as a guarantee to fulfill the child's support in the future. It is to anticipate so that it doesn't come to the end of the trial when the lawsuit has been granted and the decision has been issued, but in reality, the implementation is hampered by the fact that the ex-husband has transferred his property so that the decision cannot be implemented (non-executable) and efforts to seek justice by the woman and/or child becomes useless (*illusoir*)

5. Circular Letter of the Director General of the Religious Courts Number 1960/DJA/HK.00/6/2021 of 18 June 2021 on "Guarantees to Fulfill the Rights of Women and Children After Divorce"

The Religious Courts Agency has made genuine efforts to support women and children by making various improvements in the administration of justice to support efforts to reform the judiciary based on the principles of transparency and accessibility for all levels of society seeking justice (the justice seekers), especially for vulnerable groups such as women and children. Various policies have been issued

to provide guarantees of legal protection for women and children within the scope of religious justice, including the issuance of a Circular Letter from the Director General of the Religious Courts Number 1960/DJA/HK.00/6/2021 of 18 June 2021 on “Guarantees Fulfillment of the Rights of Women and Children after Divorce” and Decree of the Director General of the Religious Courts Agency Number 1959 of 25 June 2021 on the Implementation of a Policy Brief Guarantee for the Protection of the Rights of Women and Children after Divorce. Policy Brief Guarantee Protection of the Rights of Women and Children after Divorce is a comprehensive text that reveals factual data, problems, and policy recommendations that can be implemented by the Directorate General of Religious Courts, Supreme Court, and stakeholders related to protecting the rights of women and children after divorce. This policy was created to complete, clarify, and detail the protection of women’s and children’s rights after divorce. This policy summary is a reference that all religious court work units will later implement to ensure that women and children have their legal rights maximally protected.

Apart from issuing Circulars and Decisions from the Director General, the Director General of Religious Courts Agency has collaborated with cross-institutions by signing Memorandums of Understanding such as the Memorandum of Understanding with the Family Court of Australia together with the Australia Indonesia Partnership for Justice (AIPJ). A Memorandum of Understanding regarding reform of the judiciary is increasing access to justice, especially for women and children, in terms of services and court decisions in cases relating to women and children. Apart from that, in providing guarantees for the fulfillment of the children’s best interests, Religious Courts Agency has also synergized with the Ministry of Health in a cooperation agreement whose implementation is the Chair of the Religious Court/Shari’yyah Court with the local Health Service. This cooperation agreement is made in a memorandum of understanding regarding health education services (parents and children) and health examinations of litigants’ children in cases of requests for marriage dispensation.

The policies implemented by the Supreme Court and the Directorate General of Religious Courts Agency represent equal access to justice and legal guarantees from the state for the interests of

women and children. The protection and guarantee can be realized by implementing regulations from upstream to downstream and cross-institutional cooperation as stakeholders. It does not stop here; the Supreme Court, in this case, through the plenary meeting of the Chamber, which is held every year and subsequently enforced through the Supreme Court Circular Letter on the Implementation of the Results of the Plenary Meeting of the Supreme Court Chamber as Guidelines for the Implementation of Duties for Judges, continues to formulate policies that accommodate the interests of women and children. In improving the quality of services, the Directorate General of Religious Courts Agency continues to strive to increase access to justice, especially for women and children, in order to ensure the fulfillment of women's and children's rights in the Religious Courts.

### **Gender Mainstreaming in Religious Courts in Efforts to Ease Access and Increase Guarantees of Legal Protection for Women and Children.**

Everyone is equal before the law and has the right to equal legal protection without discrimination; this sentence is a fundamental principle in law and human rights. Fair legal protection, certainty, and equal treatment before the law are also some of the things guaranteed in the Constitution of the Republic of Indonesia as regulated in Article 28 letter D paragraph (1). Even though there are legal guarantees that protect women and an emphasis on the state's obligation to ensure that women have access to justice and to guarantee that women are free from discrimination in the justice system, in reality, achieving equality before the law and access to justice for women is not something that easy.

Women often face multiple obstacles in achieving their rights caused by discrimination and negative stereotypical views based on sex and gender. Discriminatory treatment and gender stereotypes against women in the justice system are directly proportional to women's accessibility to justice. The more women experience discrimination and/or negative stereotypes, the more limited women's access to justice will be.

Access to justice is one of the most critical and challenging tasks for the judiciary, especially for vulnerable groups such as children and women. These two groups of users of judicial services

have unique characteristics, so judicial institutions need to ensure that children and women have the right to equality and the right to be free from all forms of discrimination. The social structure of a society that tends to live in unequal social institutions, either inherited through culture or through biased regulations that are not pro-women, has the potential to give rise to multiple biases and obstacles for women in achieving equality caused by discrimination and stereotypical views based on sex and gender.<sup>17</sup> Such conditions are also common in the world of justice, which should prioritize the values of justice and equality.

PERMA Number 3 of 2017 aims to ensure the elimination of all potential discrimination against women in conflict with the law. This PERMA is a step forward for the world of justice in Indonesia and is expected to become a standard for judges and all judicial officials in handling cases involving women, whether as perpetrators, witnesses, and/or victims or parties. This guidebook is a one-way PERMA Number 3 of 2017 that can be internalized and implemented in the field. It is also hoped that this book will be helpful not only for judges and all court staff but also for all law enforcement officers and Indonesian society in general.

He expected a target with the issuance of PERMA No. 3 of 2017 on Guidelines for Adjudicating Women's Cases in Conflict with the Law (PBH), namely the creation of gender mainstreaming of women in the courts. Thus, in connection with this, court administrators, including law enforcers, judicial officers, assistants, and service providers, must utilize these guidelines as much as possible to place women and children in priority services and provide them with better service.

At a theoretical level, gender mainstreaming focuses on discussion on gender. Gender itself is interpreted as a concept that refers to the roles, functions, and responsibilities between women and men which occur as a result of and can change by the social and cultural conditions of society.<sup>18</sup> Gender is a distinction in characteristics, positions, and roles that society attaches to women and

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<sup>17</sup> MaPPI FHUI, *Asesmen Konsistensi Putusan Pengadilan Kasus-Kasus Kekerasan Terhadap Perempuan*, (Depok: BP FH UI, 2016).

<sup>18</sup> Pasal 1 angka (3) PERMA No. 3 Tahun 2017 tentang Pedoman Mengadili Perkara Perempuan Berhadapan Dengan Hukum.

men. This distinction occurs due to social construction that develops and lives in society. The concept of gender is not fixed; it changes and can be transferred and exchanged according to time, place, beliefs, and culture of society, for example: 1) women are considered passive, emotional, and weak; 2) Women are considered incapable of leading; and 3) Women are required to be responsible for taking care of the household and caring for children.

Differences in characteristics, positions, and roles between women and men result in unequal relations between women and men in society. Women are often considered weaker than men, and men are considered to have greater rights to resources than women, for example, in terms of education, employment, and inheritance.<sup>19</sup> In fact, this gender view influences services and practices in the Courts. The view that considers women as deficient creatures then makes it difficult for them (women) even to access justice in judicial institutions. So, the existence of a juridical basis, as described above, is the beginning of an excellent constructive step in building gender equality and eroding gender bias views, which are currently still strong and inherent.

Gender mainstreaming in the courts needs to be promoted more loudly, connecting with previously published juridical principles so that it can bring about change. Mainstreaming gender equality is necessary because, in judicial practice, there are still various gender disparities between women and men, reflected in the low level of women's rights and post-divorce children in Religious Courts. The report from AIPJ2 (Australia Indonesia Partnership For Justice 2) contains the fact that there were 447,417 divorce cases in Religious Courts/Syar'iyah Courts in 2019 and 480,724 divorce cases in 2020. This large number of cases was caused by several factors, including experiencing physical violence at 13%, husbands not supporting their children at 29%, and husbands leaving the house for more than two years without clear reasons at 61%. There are 1% of divorce cases in the Religious Court/Syar'iyah Court which apply for child support, there are 2% of divorce cases in the Religious Court which apply for

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<sup>19</sup> Panduan dan Bunga Rampai: Bahan Pembelajaran PUG", Badan Koordinasi Keluarga Berencana Nasional (BKKBN), Kementerian Negara Pemberdayaan Perempuan RI, dan United Nation Population Fund (UNFPA), P. 92

child custody, and 1% of divorce case decisions in the Religious Court/Syar'iyah Court which there is a request for support for the wife.<sup>20</sup> Less than 1% of divorce cases in the Religious Court/Shar'iyah Court involve requests regarding joint assets and in 9 out of 10 cases the judge grants the claim in his decision.

This matter came to the attention of the Directorate General of Religious Courts as the Supervisor of Administration and Governance of Religious Courts in 2021 through a Letter from the Director General of Religious Courts Number 772/DjA.3/HK.00/3/2021 of 4 March 2021 on Requests for Data on Decisions Religious Courts Regarding the Fulfillment of the Rights of Wives and Children Post-Divorce, the results of which will be known in 2021. The Religious Courts received and decided on 320,645 Divorce Cases. In contrast, divorce cases included the fulfillment of the rights of wives and children, which include child support, wife support, *mut'ab*, *iddah* support, and *hadhanah* 12,919 cases.<sup>21</sup> Of this number, only 34 cases requested execution from the Religious Court/Syar'iyah Court. This data has yet to be carried out in in-depth profiling; why only 34 cases out of 12,919 cases requested coercive measures through execution by the Religious Court/Syar'iyah Court?

Furthermore, based on case data in 2020, only 3% (three percent) or 13,081 decisions out of 478 381 divorce case decisions contained the rights of ex-wives and children. Then, 0.22% of the total 13,081 decisions containing the rights of wives and children requested execution.<sup>22</sup> The low number of requests for execution means that the husband still needs to implement the decision. The majority of respondents answered that their husbands were still required to implement the contents of the decision. The most common reasons why wives do not apply for execution are due to ignorance, inability to

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<sup>20</sup> AIPJ2, *Analisis Putusan Perkara Perceraian Di Indonesia*, Jakarta, AIPJ2, 2020,P.61

<sup>21</sup> Data Perkara Ditjen Badilag Mahkamah Agung RI yang dihimpun berdasarkan Surat Nomor 772/DjA.3/HK.00/3/2021 tentang Permintaan Data tentang Putusan Pengadilan Agama Terkait Pemenuhan Hak Istri dan Anak Pasca Perceraian.

<sup>22</sup> Aco Nur (Direktur Jenderal Badan Peradilan Agama Mahkamah Agung RI), Kebijakan Ditjen Badilag Dalam Meningkatkan Akses Keadilan Bagi Perempuan Dan Anak 2021, disampaikan dalam Dialog Badilag MA-RI & Family Court of Australia (FCoA), Jakarta, 5 Oktober 2021.

pay, and fear of their husbands. Divorce cases that are decided every year involve children less than 18 years of age, and on average, in Indonesia, every family has two children. It is estimated that in 2020, more than 950 children will be affected by their parent's divorce, and 97% (ninety-seven percent) of this number will not have legal guarantees related to financing their post-divorce survival.<sup>23</sup>

The difficulty and complexity of women in accessing justice in the courts is increasingly crystallized due to gender-biased views. Gaps in access to justice also still need to be combated by creating both material and formal regulations that regulate the role of women in court. The 2016-2019 National Access to Justice Strategy defines access to justice as a matter of protection and equality before the law and broader than that. In the National Strategy for Access to Justice, accessibility of justice for women and children is defined as equal access to basic services and equal access to justice through dispute resolution mechanisms in the courts.

Gender mainstreaming women's and children's access to justice is very relevant because, up to now, women and children still face many obstacles in accessing justice. Studies and reports have revealed the obstacles women face in accessing justice. The first obstacle is the low awareness and understanding of legal rights, where women need legal knowledge about their rights. Second, patriarchal culture still colors most of the process of legislation so that existing laws and regulations still do not touch the interests and rights of women and children. Third, procedural obstacles in law enforcement are crucial. The procedural aspects could be more complex and accommodating, especially to marginalized community groups. Women, as a vulnerable group in society, often have difficulty accessing justice due to procedures that are too complicated. Apart from that, the provision of forms and practical information in court cases responsive to women's and children's interests still needs to be improved. Fourth, women do not receive adequate legal services and assistance when they need it and even still receive discriminatory treatment in the judicial process. If you want to make changes to the

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<sup>23</sup> Aco Nur (Direktur Jenderal Badan Peradilan Agama Mahkamah Agung RI), Kebijakan Ditjen Badilag Dalam Meningkatkan Akses Keadilan Bagi Perempuan Dan Anak 2021, disampaikan dalam Dialog Badilag MA-RI & Family Court of Australia (FCoA), Jakarta, 5 Oktober 2021.

Court, especially in the context of gender mainstreaming, these are the things that must be addressed first.

The explanation of the discussion above shows that access to justice for women and children has not been fully realized; there are still many obstacles to access to justice in religious courts, so the guarantee of the right to justice in law and justice has not been fully realized. Even after various regulations, which include Supreme Court Circular Number 1 of 2017, Supreme Court Circular Number 3 of 2018, Issuance of Supreme Court Circular Number 2 of 2019, Supreme Court Circular Number 5 of 2021, Circular of the Director General of the Judicial Body Religion Number 1960/DJA/HK.00/6/2021 of 18 June 2021, has not yet demonstrated the realization of full access to justice for women and children and can be realized with certainty.

## Conclusion

The Supreme Court, as the supervisor of religious justice, has issued several regulations in order to address access to justice and law for women and children after divorce. However, in fact, several regulations were issued in order to overcome access barriers to justice by women and children. In reality, the obstacles to access to justice are mainly related to the implementation of decisions/executions. Gender mainstreaming by judges and religious court officials is an effort to narrow the gap in access to justice and law by women and children after divorce. It is done so that women and children (as part of vulnerable groups with limitations and obstacles in accessing justice in court) receive support for easy priority access, simplification of business processes, and additional authority for judges in their inherent positions (*ex officio*) when handling cases of women and children so that gender mainstreaming insights can be realized and narrow the gap in access to justice.

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