

Procedural Justice and the Burden of Marital Dissolution in Contested Divorce Cases: Insights from Islamic Legal Philosophy

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Abstract

This research seeks to find a legal breakthrough in providing ease for ex-wives to obtain their rights due to divorce initiated by the husband in cases where the wife is the initiator. Understanding normatively the provisions that regulate the imposition of rights due to divorce on the ex-husband always poses difficulties for the ex-wife, not to say it is an impossible endeavor. However, from the perspective of Islamic legal philosophy, these regulations can lead to legal breakthroughs that provide ease for the ex-wife to obtain her rights. This research aims to explore legal breakthroughs that can be applied in judicial decisions to facilitate the former wife's access to her rights. With a normative and philosophical analysis approach, this research successfully discovered a legal breakthrough in the form of procedural justice that can be applied by judges in their rulings. The breakthrough consists of an addition to the dictum of the verdict that explicitly grants legitimacy to the authorized official who issues the divorce certificate, in this case, the court clerk, to withhold the ex-husband's divorce certificate until the ex-husband, who has been sentenced to fulfill the rights resulting from the divorce for the ex-wife, has actually fulfilled his obligations.

Keywords: Procedural Justice, Consequences of *Talāq*, Divorce Lawsuit.

Introduction

Islamic legal rules aim to cultivate individuals with noble character, uphold justice within society, and safeguard the essential welfare of life (A. Basyir, 1984). These objectives must be reflected in every norm governing Muslim families in Indonesia. Islamic law should ensure justice in fulfilling the rights and obligations arising from a marriage contract, both during the marriage and after divorce, including maintenance during the iddah period, mut'ah, unpaid dowry, and other rights prescribed by Sharia.

A series of legislative regulations in Indonesia govern the rights of former wives following divorce, including Law No. 1 of 1974 on Marriage and the Compilation of Islamic Law (Kompilasi Hukum Islam, KHI). However, these legal instruments do not always guarantee the straightforward fulfillment of post-divorce rights. One reason is the prevailing paradigm among society and even judges, which often limits understanding of these rights to matters concerning talaq (unilateral divorce by the

husband). Consequently, fulfilling the rights of a former wife in talaq cases is comparatively easier.

In contrast, for judicial divorce initiated by the wife (cerai gugat), explicit provisions allowing wives to claim post-divorce rights were only introduced in 2018. These provisions emerged from the Plenary Session of the Chamber of the Supreme Court, communicated through a circular letter. While this regulation provides some guidance, it has yet to fully address the expectations of former wives in easily obtaining their rights after divorce.

In 2019, the Supreme Court held another plenary session, resulting in more comprehensive technical provisions for fulfilling post-divorce rights in judicial divorce cases. These provisions allow judges to allocate the post-divorce rights to be paid before the respondent obtains the divorce certificate.

Normatively, these provisions remain insufficient in practice. A court ruling granting post-divorce rights prior to the former husband obtaining the divorce certificate does not automatically ensure that a former wife will receive her rights if the former husband is unwilling to comply voluntarily. Thus, a deep, critical, and reflective approach is necessary to interpret these norms and achieve procedural justice for former wives.

Few previous studies have focused on the fulfillment of women's rights after divorce from the perspective of Islamic legal philosophy, and none specifically examine divorce initiated by the wife. Nevertheless, several related studies are relevant: 1) *Perspektif Filsafat Hukum Islam Atas Hak Dan Kewajiban Suami Istri Dalam Perkawinan* by M. Syukri Albani Nst (2015), which discusses general rights and obligations of spouses during and after marriage; 2) *Pengabaian Hak Terhadap Mantan Istri Dan Anak Pasca Perceraian Di Kota Makassar: Kajian Filsafat Hukum Islam* by Achmad Musyahid Idrus et al., (2023) which examines the implementation of post-divorce rights in Makassar but is not specific to wife-initiated divorce; 3) *Tinjauan Kritis Terhadap Hak-Hak Perempuan Dalam UU No. 1 Tahun 1974 Tentang Perkawinan: Upaya Menegakkan Keadilan Dan Perlindungan HAM Perspektif Filsafat Hukum Islam* by Habib Shulton A., (2016) which generally discusses the fulfillment of former wives' rights under the Marriage Law; 4) *Standar Pemberian Nafkah Kepada Istri Perspektif Filsafat Hukum Islam* by Fathul Mu'in et al., (2020) focusing on normative standards for wife's maintenance; and 5) *Aspek Filosofis Nafkah Suami Terhadap Istri Perspektif Ulama Tafsir* by Mahdum Kholid Al-Asror (2023), analyzing the obligation of the husband to provide maintenance from a philosophical perspective.

Research Method

This study aims to comprehensively explore the norms in Indonesian legislation regarding the fulfillment of wives' post-divorce rights in cases initiated by the wife. Furthermore, it seeks to interpret these norms through the lens of Islamic legal philosophy, aiming to formulate provisions that ensure procedural justice and

facilitate the realization of former wives' rights. Practically, these formulations can guide judges in guaranteeing the fulfillment of post-divorce rights effectively.

Using a normative-legal analysis combined with a philosophical approach, this study focuses on statutory provisions governing the fulfillment of former wives' rights, including laws, government regulations, presidential instructions, Supreme Court regulations, and circulars. These legal instruments serve as primary sources, while books and journal articles discussing women's rights serve as secondary sources.

Results and Discussion

The Concept of Divorce (*Talaq*) in Islamic Family Law in Indonesia

Linguistically, *talaq* means "to release a bond." The term originates from the Arabic word *al-talaq*, which signifies releasing or letting go (Shan'ani, n.d.). In religious terminology, *talaq* refers to the dissolution of the marital bond. The Hanafi and Hanbali schools of thought deem *talaq* "prohibited" except for valid reasons, whereas Imam Shafi'i does not consider it haram. Nevertheless, Ibn Sina in *Kitab Asy-Syifa'* stated that the option for divorce should be available and not entirely blocked, as restricting divorce could result in harm and social disruption.

From the perspective of conformity with the Sunnah, *talaq* is divided into *sunni* (permissible) and *bid'ah* (prohibited innovations). In terms of revocability, it is categorized as either *raji'* (revocable) or *ba'in* (irrevocable) (Sabiq, 2017).

The Indonesian Marriage Law uses the term "termination of marriage" to describe divorce or the end of a marital relationship between a husband and wife. Divorce is one cause of marriage termination, alongside death and court rulings. Article 38 of the Marriage Law states that marriage may be terminated due to (a) death, (b) divorce, or (c) by court decision. It is clear that divorce under letter (b) is distinguished from termination by court decision under letter (c). The provisions regarding termination due to death are self-explanatory (Sastroatmojo & Aulawi, 1975).

Article 39 stipulates that divorce can only occur before a court session, which explicitly regulates *talaq* in accordance with Islamic law and aligns with the principle in the Marriage Law's General Explanation: "As the purpose of marriage is to form a happy, eternal, and prosperous family, this law adopts the principle of making divorce difficult to achieve."

In Islamic jurisprudence, aside from *talaq*, several other forms of divorce exist, including *khulu'*, *fasakh*, *zihhar*, *ila'*, and *li'an*. *Khulu'* refers to a woman's release from marriage, often involving compensation to the husband. *Fasakh* is judicial annulment based on valid reasons such as violations of marriage law. *Zihhar* is the pre-Islamic custom of equating one's wife with an unlawful relative. *Ila'* refers to a husband's oath not to cohabit with his wife. *Li'an* involves a husband accusing his wife of adultery without sufficient witnesses (Az-Zuhaili, n.d; Rahman, 1992).

In contrast, Indonesian marriage law recognizes only two types of divorce: *cerai talak* (husband-initiated divorce) and *cerai gugat* (wife-initiated divorce). These terminologies were first introduced in Law No. 7 of 1989 on Religious Courts, later amended by Law No. 3 of 2006 and Law No. 50 of 2009.

Cerai talak is a permissible form of divorce under Islamic law, where the husband acts as the petitioner. While the husband has the right to pronounce *talaq*, its validity and execution are subject to court review after considering the wife's objections. *Cerai gugat*, in contrast, is filed by the wife, requesting the Religious Court/Mahkamah Syar'iyah to dissolve the marriage. Indonesian law does not explicitly differentiate *cerai gugat* from *khulu'*, whereas in Islamic jurisprudence, *khulu'* is the recognized procedure for women seeking divorce (Syarifuddin, 2006).

The institutionalization of *cerai gugat* in Indonesia is derived from the concept of *at-tafriq al-qadha'i*, which allows a judge to dissolve a marriage at the request of one party for reasons such as discord (*shiqaq*), harm (*dharar*), non-provision of maintenance, or to uphold Sharia rights, such as when a spouse leaves Islam (*murtad*). This judicial authority empowers the court to grant a wife-initiated divorce, although traditionally the right to divorce (*talaq*) is held by the husband (Khambali, 2017).

Technically, wife-initiated divorce is regulated under Article 73(1) of Law No. 7 of 1989, which states that "A divorce petition may be filed by the wife or her legal representative in the court with jurisdiction over her place of residence, except if the petitioner has deliberately abandoned the marital residence without the husband's consent."

Forms of Obligations Following Divorce in Indonesia

Post-divorce, the Qur'an (Surah Ath-Thalaq: 6) implies the husband's obligation to provide maintenance to the former wife during her *iddah*. Concerning *mut'ah*, Qur'an (Surah Al-Baqarah: 241; Al-Ahzab: 49) obligates the husband to compensate.

According to fiqh scholars, maintenance (*nafaqah*) is the husband's financial responsibility to cover his divorced wife's essential needs, including food, shelter, and clothing. The type of *nafaqah iddah* depends on the form of divorce (*talaq raji'* or *talaq ba'in*). Regarding *talaq ba'in*, juristic opinions vary: Imam Abu Hanifah allows full maintenance during *iddah*, Imam Shafi'i and Imam Malik limit full maintenance to cases of pregnancy, and Imam Ahmad bin Hanbal does not recognize any maintenance.

Mut'ah represents the husband's provision of wealth or clothing to comfort the wife after divorce, distinct from unpaid dowry compensation. In addition, unpaid dowry remains a husband's obligation post-divorce, as it constitutes an inalienable right of the wife.

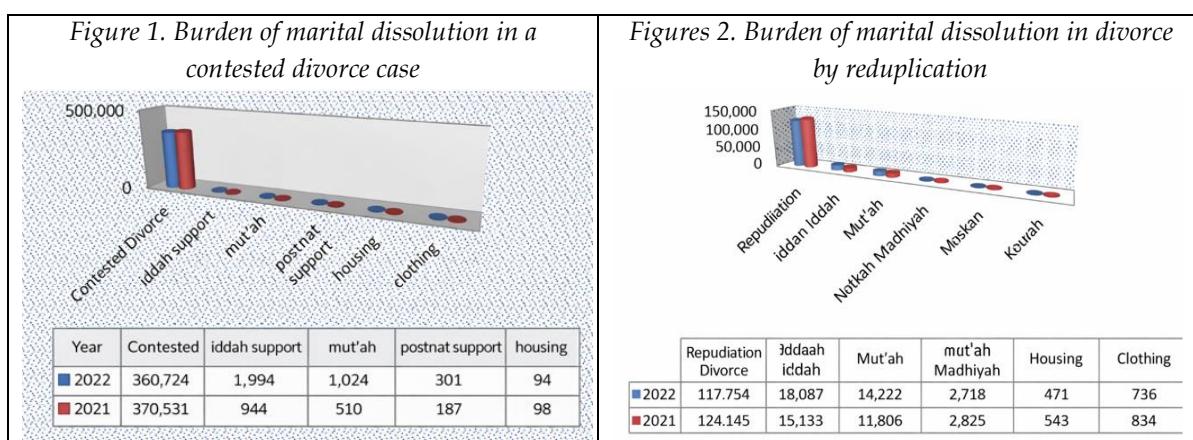
In Indonesia, state protection of women post-divorce is formalized in Law No. 1 of 1974, Article 41(c), which mandates the court to obligate the former husband to provide living expenses and other responsibilities for the former wife. The

Compilation of Islamic Law (KHI), particularly Article 149, further specifies maintenance, *mut'ah*, dowry, and child support obligations.

Supreme Court plenary sessions and circulars reinforce the husband's responsibility to pay overdue maintenance, including *nafaqah iddah*, *mut'ah*, and child support (*nafaqah madliyah*), requiring courts to consider economic capacity and fairness. Notably, Circular No. 2 of 2019 confirms that arrears in child support may be claimed by the mother or caregiver (Khambali, 2017).

Mechanisms for Fulfilling Obligations in Wife-Initiated Divorce Cases

Although regulations exist to govern post-divorce rights, compliance by former husbands is not always voluntary, especially in *cerai gugat* cases. Disparities in fulfillment between *cerai gugat* and *cerai talak* are evident in practice, as illustrated in comparative data.



The limited awareness of former husbands to fulfill their ex-wives' post-divorce rights is largely driven by traditional doctrines in classical *fiqh*, which assert that *talaq* (divorce) is the husband's prerogative. Interpretations of Islamic religious norms regarding divorce, as contained in the sacred texts, indicate that the husband holds the absolute right to pronounce *talaq*, since he is entrusted with obligations to provide maintenance (*nafaqah*), dowry (*mahr*), gifts, and living expenses during the waiting period (*iddah*). Husbands are traditionally viewed as possessing greater patience than wives; therefore, even in situations of anger or conflict, they do not immediately divorce. Conversely, women are considered more vulnerable to divorce, often perceived as less rational or less capable of managing emotions. This doctrine effectively positions wives as subordinate to husbands, and a wife-initiated divorce carries the stigma of disobedience, thereby jeopardizing her post-divorce rights.

This doctrine is assumed to be upheld not only by communities influenced by classical *fiqh*, but also by certain judges within the Religious Courts. Some *fuqaha'*, including Umar bin Khattab, Ibn Abbas, Ibn Mas'ud, Imam Shafi'i, and Imam Malik, maintained that a former wife is entitled only to residence and not to living expenses

during her *iddah*. This perspective has been used by some judges as a justification for withholding ex-wives' rights in cases of wife-initiated divorce, compounded by the lack of clear legal instruments empowering the court to enforce these rights.

Ex-wives' rights, as stipulated in Article 41(c) of Law No. 1 of 1974 on Marriage and Article 149 of the Compilation of Islamic Law (KHI), have traditionally been understood within the context of husband-initiated divorce. Consequently, wife-initiated divorce (*cerai gugat*) has often been perceived as outside the scope of these provisions.

The implication of this biased understanding and classical *fiqh* doctrine is that post-divorce rights for women, as intended under Article 41(c) of Law No. 1 of 1974 and Article 149 of the KHI, could only be effectively realized in cases of husband-initiated divorce (*cerai talak*). In such cases, the former husband is obliged to provide gifts to a consummated ex-wife, living expenses, housing, clothing during the waiting period, and to settle any debts owed to her. Yet, no clear procedural limitations exist, leaving room for discretionary interpretation. This understanding constitutes a form of gender discrimination that undermines human rights and underscores the need for state intervention.

In husband-initiated divorce cases, fulfilling ex-wives' rights is relatively more straightforward. The 2017 Plenary Session of the Religious Chamber of the Supreme Court facilitated this by allowing courts to stipulate in the verdict that obligations arising from divorce must be "paid at the time of pronouncing *talaq*," effectively delaying the husband's ability to finalize the divorce until he fulfills his obligations. This procedural provision enables wives to secure their rights without having to initiate costly enforcement actions.

However, this facilitation does not extend proportionally to wife-initiated divorce. Although the Marriage Law and the KHI guarantee post-divorce rights, these provisions have been traditionally interpreted only in the context of husband-initiated divorce, contingent on the husband's willingness, counterclaims, or ex officio judicial intervention.

In 2018, through the Plenary Session of the Religious Chamber, the Supreme Court explicitly allowed judges to grant post-divorce rights in wife-initiated cases, including *mut'ah* and *nafaqah iddah*, provided there is no evidence of *nusyuz* (wife's disobedience). Supreme Court Regulation No. 3 of 2017 emphasized that judges handling cases involving women must uphold principles of human dignity, non-discrimination, gender equality, equality before the law, justice, benefit, and legal certainty. Nevertheless, these rules alone did not guarantee that wives could easily obtain their rights without undergoing lengthy and costly enforcement procedures.

In 2019, the Supreme Court addressed this challenge by introducing instruments that made it easier for ex-wives in wife-initiated divorce cases to access their rights. These instruments allowed courts to include in the verdict that obligations

must be “paid before the respondent obtains the divorce certificate,” incorporated into the *posita* and *petitum* of the case.

Although this provision represents a positive step for ex-wives whose rights were previously delayed, it does not fully resolve the problem. The clause “paid before the respondent obtains the divorce certificate” cannot function independently, as difficulties in enforcement may still arise, potentially rendering execution impractical or impossible.

Procedural Justice in the Enforcement of Post-Divorce Obligations: An Islamic Legal Philosophy Perspective

Lucius Calpurnius Piso Caesoninus, commonly known as Piso (100 BCE – 43 CE), once emphatically proclaimed the maxim “*Fiat justitia ruat caelum*,” which has since become a familiar adage among legal practitioners: “Let justice be done, though the heavens fall.” This ancient principle underscores the imperative of upholding justice regardless of potential consequences (Bakir, 2015).

According to Sayyid Qutb, as cited by Abustan, Islamic teachings encompass comprehensive principles governing human relationships—with God, among fellow humans, with the environment, with oneself, between individuals and society, between individuals and the state, and between generations. This integrated vision is conceptualized as Islamic Philosophy (Abustan, 2020). While Christian teachings emphasize love, Islamic thought places justice at the center of all human action. Justice in Islam is understood as giving each entity its rightful place, impartial to kinship or social standing.

The philosophical conception of justice in Islamic thought includes four dimensions: balance, equality, protection of individual rights and granting rightful entitlements, and safeguarding the continuity of existence. As a constitutional state, Indonesia’s legal system bears the obligation to protect women’s rights. Facilitating ex-wives in obtaining post-divorce entitlements represents a form of justice in practice. Despite substantive legal guarantees, obstacles in implementation persist. Procedural mechanisms are critical because procedural justice serves as the gateway to substantive justice. Procedural justice emphasizes transparency, efficiency, and fairness in legal processes, ultimately ensuring substantive justice.

Normative understanding alone is insufficient to guarantee ex-wives’ access to post-divorce rights. Even when laws clearly stipulate entitlements, wife-initiated divorce cases (*cerai gugat*) often face practical difficulties. Rights decreed by the court may remain inaccessible if the ex-husband lacks the willingness to fulfill them voluntarily. Hence, philosophical interpretation of the legal framework is necessary to facilitate actual access to these rights.

To operationalize these rights, the clause “to be paid before the respondent collects the divorce certificate,” as stated in Supreme Court Circular No. 2 of 2019, must be understood philosophically. This procedural orientation seeks to uphold justice by

safeguarding the ex-wife's rights, ensuring she can obtain them without initiating prolonged litigation, as these rights constitute obligations the ex-husband must fulfill regardless of external prompting.

From this philosophical perspective, the clause should empower judges to introduce procedural innovations in verdicts. For example, judges may include a dictum authorizing the competent official to withhold the divorce certificate until the ex-husband has fulfilled all post-divorce obligations. Such measures are not *ultra petita* (beyond the claim) but are necessary for ensuring protection and legal certainty. Mukti Arto emphasizes that when issuing a verdict, courts should consider whether additional directives are needed to secure enforcement, including ex officio measures under Articles 57(3) and 58(2) of the Religious Court Law in conjunction with Articles 2(4) and 4(2) of the Judicial Power Law, to ensure effective and unobstructed execution.

This procedural innovation aligns with principles outlined by the Supreme Court for cases involving women, including respect for human dignity, non-discrimination, gender equality, equality before the law, justice, benefit, and legal certainty. While such mechanisms may not fully guarantee easy access to post-divorce rights, delaying the issuance of the divorce certificate can at least act as leverage to enforce compliance, compelling an unwilling ex-husband to fulfill his obligations.

Conclusion

The state has fundamentally guaranteed post-divorce rights for women, explicitly articulated in multiple legal instruments, including laws, government regulations, presidential instructions, Supreme Court regulations, and circulars. However, these provisions have not fully facilitated the realization of such rights, particularly in wife-initiated divorces. Normative interpretation alone often leaves execution problematic, even when courts have decreed obligations for ex-husbands.

Islamic law consistently upholds justice in its application. A philosophical understanding of post-divorce obligations fosters procedural justice, which in turn enables ex-wives to access substantive justice. Efforts to facilitate practical enforcement of legal provisions reflect the aspirations of Islamic legal philosophy.

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