

JUDGES' CONSIDERATION IN THE DECISION OF FULFILLING THE RIGHTS OF WOMEN AND CHILDREN AFTER DIVORCE IN THE REGION OF THE DKI JAKARTA HIGH RELIGIOUS COURT

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Abstract

The background of this research is related to the most basic issues and has become the discourse among legal practitioners and academics so far, regarding how the rights of women and children that have been imposed by judges through their decisions can be implemented properly by ex-husbands voluntarily. In reality, in practice, many judges' decisions relating to women's rights are not carried out by ex-husbands. In addition, there is no mechanism that is able to ensure the payment of child and / or financial support by the defendant after divorce, ex-husbands are often absent from their obligations to pay for the rights of ex-wives and children after divorce. The results of this study indicate that: The position of guarantee for the rights of women and children after divorce is very weak, therefore the issue of living for wives who have been divorced by husbands and children still does not fully provide legal protection to wives. Judges' considerations in the decision of the Religious Court in the DKI Jakarta High Religious Court area in providing the rights of women and children in their development have attempted to provide protection in the form of charging fees as a result of divorce submitted by husbands to the Religious Court in the form of iddah, mut'ah, and livelihoods. children, common property

Keywords: Religious Court, divorce, iddah, mut'ah, children, property.

A. INTRODUCTION

The main objective of justice is the realization of justice (Praja, 1993 : 112) which is manifested through the judge's decision. The provisions of Article 2 paragraph (4) of Law Number 48 of 2009 concerning Judicial Power state that justice is carried out simply, quickly and at low cost. Justice is given to all parties who seek justice, regardless of gender, position or age. In the process of imposing a judicial decision first through a number of examinations and the applicable procedural law and adhering to the principles of simple, fast and low cost.

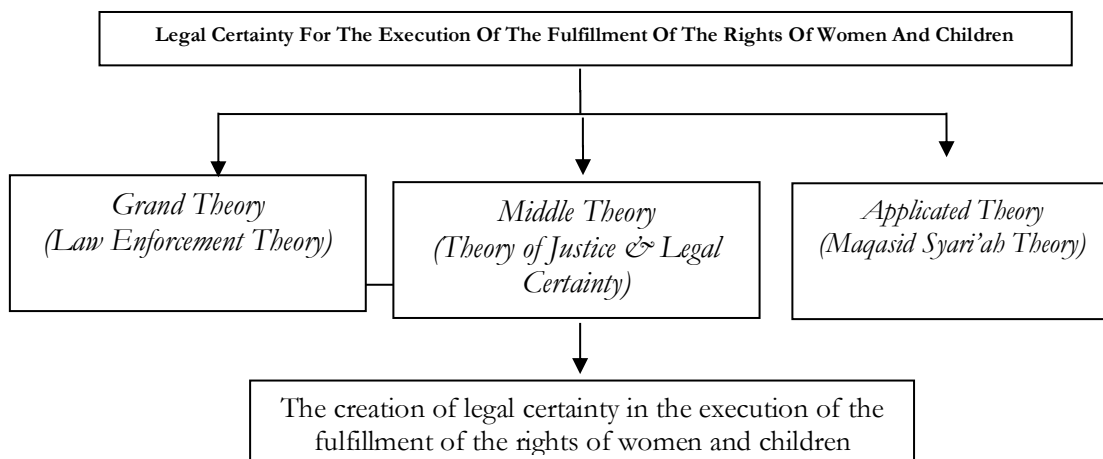
As one of the elements of social institutions in charge of implementing and enforcing justice, the Religious Court is one of the most urgent institutions in the system of community life, especially Muslims. Philosophically, it is formed and developed to meet the demands of upholding the law and justice of Allah in the community. Juridically, it is part of the supra political structure in the life of the nation and state. Historically, it is one of the links in the Islamic justice chain that has developed since the time of Rasulullah SAW. And

sociologically, it was born with the support and efforts of the community which is part of the intensity of Islamic culture in the life of a very diverse Indonesian nation (Syafe'i, 1999 : 29).

In article 49 of Law Number 7 of 1989 as one of the judicial bodies in Indonesia, the Religious Courts have the duty and authority to receive, examine, try and resolve civil cases of Muslims submitted to them. In carrying out their duties and authorities, the Religious Courts must heed the two rules of law in accordance with their positions as State Courts and Islamic Courts. The two rules of law are state law and Islamic law which have been transformed into a form of written law. This is what underlies the existence of special rules (*lex specialis*) proceeding at the Religious Courts. But in reality, not all procedural rules according to Islamic law (Islamic law) have been transformed into written law, namely in the form of statutory regulations, for example the provisions of the procedural law of the Religious Courts around the execution of decisions. So far, the procedural law regarding the execution of decisions in the Religious Courts has been dominated by HIR. and R.Bg which is a source of Civil Procedure Law in the Court within the General Court. This is given the opportunity by Article 54 of Law Number 7 of 1989, which Article 54 confirms that the Procedural Law that applies to Courts within the Religious Courts is the Procedural Law that applies to Courts within the General Court, except as specifically regulated in Law invite this.

This research is closely related to the theory of law enforcement in which there are law enforcement agencies such as judges, clerks, bailiffs and advocates as parties representing the parties and of course it is closely related to the meaning of law or legal material itself, namely the laws that govern. the mechanism for executing decisions of religious courts related to the rights of women and children after divorce. Related to the above, there are several theories that are used as references in this study.

To answer the research questions in this dissertation, the researcher uses the following theories: First, for the grand theory, law enforcement (Black, 1976) and *mashlahah* theory are used. Second, for the middle theory, the theory of justice and legal certainty is used (Ratnapala, 2009). Third, for applied theory, the *Maqasid Syari'ah* theory is used (Kasdi, 2014).



B. METHOD

The method used in this research is descriptive analytical method with a normative juridical approach. This research is more focused on knowing and analyzing the position of guarantee for the rights of women and children after divorce through the decision of the Religious Court.

C. RESULT AND DISCUSSION

The enforcement of the principle of justice is one of the characteristics of a rule of law. Justice is a basic human right that is in line with the principle of equality before the law. Everyone has the right to receive remedies for the violations of their rights, while the state has an obligation to ensure the fulfillment of these rights. This accumulation and rights affirm that justice has become a human right that must be respected and guaranteed to be fulfilled.

Basically, marriage is carried out for eternity, until the death of one husband and wife. As stated in Law Number 1 of 1974 concerning Marriage, the purpose of marriage is to form a happy and eternal family. This is in accordance with Islamic teachings. Therefore, this law adheres to the principle of making divorce difficult. However, in certain circumstances there are things that require the end of the marriage in the sense that if the marriage continues, then harm will occur. In this case, Islam justifies breaking the marriage as the last step in the effort to continue the household (BIP, 2017).

Termination of a marriage takes several forms depending on who wishes to break up the marriage. In this case, there are four possibilities, namely: First, the dissolution of the marriage by Allah's will through the death of a husband and wife. With that death automatically ends the marital relationship. Second, the marriage was broken by the husband's will for a certain reason and the wish was expressed by a certain statement. Divorce in this form is called *talaq*. Third, the marriage is broken up by the wife's will because the wife sees something that requires the break-up of the marriage, while the husband does not want it. The wife conveyed the wish to break up the marriage in this particular way was accepted by the husband and continued with his statement to terminate the marriage. The termination of a marriage in this way is called *khulu'*, and fourth, the marriage is broken at the will of the judge as a third party after seeing that there is something in the husband and / or wife which indicates that the marital relationship is unable to continue. The breakup of a marriage in this form is called *fasakh*.

The facts show that divorce, especially sue divorce, is not easy to do with the achievement of justice for women. Many decisions have granted claims, while the justice that women want through the process of divorce is often lost and even turns into disastrous when they have to lose their right to support, are separated from children because of guardianship rights and the negative stigma in society because of the title of widow they carry. This condition often occurs because the decision to divorce in a divorce case is not with the initiator but is under the consideration of the judge. The judge's authority is very decisive. Divorce and its consequences are decided based on the review and consideration of the judge on the case through stages in the trial (Sholeh et al., 2019 : 97).

When a divorce occurs and the iddah period is over, the woman who used to be a wife now changes status to an ex-wife. The marriage rope has broken, no longer husband and wife. So that she is not obliged to be supported by her ex-husband. However, the right to support the child will not be broken so that the father is obliged to bear all the needs of the child, even if the child lives with the ex-wife.

A former husband has an obligation to provide for the child according to his ability at least until the child is an adult and can take care of himself (21 years old). This is confirmed in the Compilation of Islamic Law (KHI) according to Article 149 letter d jo Article 156 letter d KHI based on Presidential Instruction No.1 of 1991 which states that:

"All hadhanah costs and child support are the responsibility of the father according to his ability, at least until the child is an adult and can take care of himself (21) years" (Kompilasi hukum Islam, 2004).

The breaking of the marriage bond does not necessarily mean the husband's obligation to continue to support his former wife and children to a certain extent. In the rules and provisions of Islamic law also regulate the issue of living due to divorce. In this regard, the Panel of Judges has a very important role in deciding divorce issues, this is in accordance with Article 39 paragraph 1 of Law No.1 of 1974 concerning marriage, namely divorce can only be carried out in front of a court session after the court is concerned and fails to reconcile the two party.

A household that is experiencing divorce is certain to have several consequences that are detrimental to all parties without exception. In this case, of course, it will have legal consequences for the child. The birth of a child as a legal event that occurs because of a legal relationship will bring legal consequences, in the form of reciprocal rights and obligations between parents and children. This means that children have certain rights that must be fulfilled by their parents as their obligations and vice versa parents also have rights that must be fulfilled by their children as their obligations.

In addition, the ex-wife can apply for an execution confiscation. The court of appeal is not allowed to carry out the execution. Before carrying out the execution, the Head of the Religious Court first issues an order addressed to the clerk or bailiff to carry out the execution and carry out the execution under the Religious Court. This is regulated in Article 196 HIR regarding execution to sentence one of the parties to pay a sum of money.

According to the author, theoretically the execution or implementation of the decision looks very simple and easy to carry out, but in practice the operational costs are high and sometimes greater than the ruling regarding livelihoods so that it becomes an obstacle for the Respondent (ex-wife) to file for execution. The operational costs for the execution of child support at the Jakarta Religious Court have been determined according to regulations.

It is important to provide knowledge to the wives that the absence of the husband in the divorce pledge trial by law and KHI results in the loss of the power to determine the divorce pledge permit, so that the stipulation does not have binding power anymore to the husband

and wife, thus legally the status of the applicant (husband) and the respondent (wife) returns as husband and wife. This is clearly very detrimental to the interests of the temohon (wife), moreover the respondent in the divorce cannot force the applicant to carry out the divorce pledge.

The absence of the petitioner in the execution of the divorce pledge, it is absolutely necessary to carry out or not carry out the pledge in the hands of the petitioner (husband), where the respondent is only positioned as an object, meaning that he cannot force the applicant to carry out a divorce pledge hearing. Back to the applicant's intention, if it is in good faith, whatever the risk, the applicant should carry it out, because the applicant himself filed for the divorce. With the applicant's *itikad* filing for divorce, it can be interpreted that his heart has declared his wife (the respondent) divorced, thus during the divorce process between the two parties there is no longer a harmonious relationship, but if the applicant (husband) has a bad faith. as in the case described above, in the end the petitioner was not willing to carry out the divorce pledge hearing and resulted in the loss of the power of determination.

As a result, the status of the respondent (wife) becomes vacillating in the sense that divorce is not taken care of or paid attention to by the petitioner (husband), this greatly adds to the suffering of the respondent, who should receive legal protection by asking for her unfulfilled rights as a wife, however instead the suffering one gets. With regard to the legal remedy, the wife cannot do anything, according to the statement of the judge at the Religious Court of Depok City, saying that the legal step after the power to determine the divorce vow is that the wife files a lawsuit against her husband. According to a statement by one of the Judges at the Central Jakarta City Religious Court, Amir Syarifuddin, that there was no legal action in the divorce case where her husband was reluctant to carry out his vow because the decision was legally binding. Legal remedies can be made when it has not reached permanent legal force, and must file a new case. Legal remedies can also occur because the parties are not satisfied with the judge's decision, the judge is considered negligent in considering several matters, and there are mistakes that violate the law. "

In this case the verdict is legally binding and is then annulled due to the result of the husband not having pledged his divorce, resulting in no legal remedy for the wife, then the legal step for the wife is to file a lawsuit against the husband, in accordance with Article 73 paragraph (1) of Law Number 7 Year 1989 concerning Religious Courts which reads:
"Claims for divorce by his wife or attorney to the Court whose jurisdiction includes the residence of the enforcer, unless the plaintiff deliberately leaves the joint residence without the consent of the defendant".

By filing the lawsuit, the Law only provides legal protection for the respondent (wife) and the consequences of divorce as stipulated in Article 78 of Law Number 7 of 1989 concerning Religious Courts which reads:

"During the divorce, at the request of the plaintiff the judiciary can: 1) Determine the livelihood borne by the husband; 2) Determine the things that are necessary to ensure the care and education of children; 3) Determine the things that are necessary to ensure the maintenance

of goods which are joint rights of husband and wife or items which are the right of the husband or items which are the right of the wife ”.

From the data that the authors obtained in the field, the authors conclude that in the absence of strict sanctions and rules against the absence of the petitioner (husband) in the implementation of the divorce pledge trial, the respondent (wife) is severely disadvantaged and there is legal discrimination between the applicant and the respondent.

When viewed from the theory of legal awareness, when in understanding and implementing the decision of the applicant it can be said that the applicant is not aware of the law, even though in the trial process the judge has tried to give the fairest decision by considering the legal facts that have occurred, namely by ordering / punishing the applicant to pay the respondent is in the form of iddah, mut'ah and madiyah livelihoods. Meanwhile, the efforts of women in defending their rights can also be said to be unaware of the law, because after the verdict is canceled, women only wait for the husband to pay for the livelihoods, even though when the verdict is over, the rights of the wife are lost. In this case, when it is true that the wife and children are neglected by the husband, the wife can take legal steps to the criminal route, with an offense on domestic violence complaints so that when the wives and children are not fulfilled, the husband can be imprisoned.

So there are two routes for a wife to get her rights, namely through the civil route and the criminal route. This civil route is carried out so that the status of the wife becomes clear, then the wife must file a new lawsuit and at the same time in the lawsuit state her rights to be sued and granted by the panel of judges. Meanwhile, problems of neglect of wives and children can be filed criminally for violating the provisions of the Domestic Violence (KDRT) Law and Child Protection.

The end of the trial process is the birth of a decision or decision by the Panel of Judges. A judge's decision can be implemented by a party who has litigated either voluntarily, or by force using state instruments, if the convicted party does not want to carry it out voluntarily.

During conducting the research, the researcher found that the Judges at the Jakarta Religious Court in the PTA Jakarta area had the same perception or opinion regarding the efforts of the Jakarta Religious Court to guarantee the implementation of decisions to provide protection to children due to divorce.

If the divorce decision has permanent legal force, then the court clerk, no later than 7 (seven) days after the decision is notified, must issue a Divorce Certificate as evidence of divorce. In addition, within 30 days at the latest, the clerk or the appointed official is obliged to send a copy of the decision on divorce determination to the Marriage Registration Officer (PPN), or the sub-district KUA where the parties previously married. One or the parties who have status as members of ABRI or PNS will also receive a copy of the divorce decision.

In decisions regarding custody of children and disputes over joint property, the implementation of iddah, mut'ah and child support, real executions are carried out by the parties voluntarily, or by the court through a court bailiff after a request if one of the parties is not willing to carry out the verdict is voluntary. The court will not carry out the execution if

there is no request for execution from the injured party. For this reason, if the request for execution is carried out, the ex-husband will first be given a warning to fulfill his obligations on the court's decision relating to the provision of a living.

If at the time of filing the suit for divorce it is not accompanied by a claim for support, then a new lawsuit must be filed concerning the provision of support for the wife and children. Former husbands who do not carry out the obligation to provide for their children and ex-wives who have been divorced, the religious court has the duty and authority to examine, decide and resolve special civil cases at the first level for people who are Muslim, the implication is that everyone who is Muslim can submit or prosecute all special civil cases to the religious court in accordance with the juridical area and absolute competence. One of the duties and authorities of the Religious Courts is to determine the livelihood for children who are divorced by their husbands, where the case is a series of civil cases resulting from a divorce.

Article 225 (1) HIR states that if a person is sentenced to commit a certain act, and he does not commit that act within the time determined by the judge, then the party who benefits from the decision, can ask the district court through its chairman orally or in writing, so that the interests of if the decision is carried out, it is valued in cash, the amount of money must be clearly explained, if this application is submitted orally, it must be recorded.

A verdict that can be executed is any decision that has obtained permanent legal force and is condemnatory (*condemnatoir*). Regarding the divorce decision, the content of the convention decision regarding the divorce pledge of execution is by opening a trial for witnessing the divorce pledge. Meanwhile, the content of the decision on the execution reconciliation is by way of the execution of the payment of a sum of money as stipulated in articles 197-200 HIR / and Articles 208-218 RBg. Thus, convention decisions and convention decisions can be understood as the content of decisions that each stand independently, if there is no clause that links the two contents of the decision, then both of them remain independent. Hence, the failure to fulfill the contents of the convention decisions cannot hinder the implementation of the contents of the convention decisions.

- a) Regarding the contents of the convention decision regarding the pledge for divorce to carry out the execution of the divorce decision which is granted, it is specific, as follows:
- b) Execution is carried out not through an application process by a party permitted to the Chairman of the Religious Court who decides the case.
- c) Execution is not carried out by the Registrar and Bailiff or Substitute Bailiffs for the Religious Courts.
- d) The execution was not preceded by an act of *anmaning*, but in practice, both parties were present at the hearing just before the husband reads the pledge of divorce, the Panel of Judges tried to reconcile the two parties first.
- e) Execution is carried out after the decision is legally binding with the Stipulation of Session Day for witnessing the pledge of divorce issued by the Panel of Judges.

- f) The execution of the divorce vow shall be carried out at the Religious Court building during the trial of the Panel of Judges who decide the case.
- g) If the husband within 6 months of the stipulation of the Stipulation of Session Day for witnessing the pledge of divorce, does not come or send his representative, then the divorce judgment is annulled and divorce cannot be filed again for the same reasons (Law Number 7 of 1989 concerning Religious Courts).
- h) The execution of the pledge of divorce shall be carried out before the trial of the Panel of Judges of the Religious Court based on Article 122 of the Compilation of Islamic Law.

"Talak bid'i is a forbidden divorce which is dropped when the wife is menstruating or the wife is in a state of holiness but has been interfered with during the holy time."

The point is that the Panel of Judges prohibits the husband or his attorney from pronouncing the pledge of divorce when the wife is menstruating, or the wife is in a pure state but has been interfered with during the holy time, because talak bid'i is talak which is prohibited by Islamic law. If such a situation occurs, the Panel of Judges will postpone the execution of the pledge of divorce until the wife is in a pure state or is not interfered with by her husband.

Basically, there are two ways to pay for the ex-wife's living in the Religious Courts, namely by voluntary means, where the husband makes payments to the ex-wife without coercion, and the second is by means of coercion, namely by means of execution.

The payment of the ex-wife's living by the Semarang Religious Court to carry out the payment of mut'ah, iddah and madhiyah livelihoods is carried out by means of a persuasive approach according to the agreement of the parties in dispute, so as not to burden one of the parties so that a sense of justice will be created and to guarantee the implementation of fairest judiciary.

The implementation of the provision of mut'ah, iddah livelihoods, and madhiyah livelihoods, namely by means of payment of mut'ah, iddah livelihoods, and madhiyah livelihoods is carried out in front of the court, namely during the husband's divorce pledge session. In practice, judges at the Jakarta Religious Court ordered the applicant to fulfill his obligations before or shortly after the trial for pronouncing the talak vow, this was done to ensure certainty over the rights of the wife who was bullied by the husband. Before a husband makes a pledge of divorce in front of a court hearing, the husband must first fulfill his obligations towards mut'ah, iddah livelihoods, and madhiyah livelihoods for the ex-wife he bullies (Mardani, 2016).

According to the author, the Panel of Judges can postpone the trial of divorce pledge witnessing as long as the policy does not violate existing regulations. The postponement of the trial of the talak pledge conducted by the Semarang Religious Court Judges if the wife objected to being divorced before receiving mut'ah, iddah livelihoods, and madhiyah livelihoods, then this is in accordance with Law no. 7 of 1989. Because the trial for the pledge of divorce as a manifestation of the execution of the pledge of divorce, may be held at any

time as long as not more than six months after the verdict has no permanent legal force. As in Article 70 paragraph (6) Law No.7 Th.1989 which reads:

"If the husband is within a grace period of six months from the date of the trial for witnessing the divorce pledge, does not appear in person or does not send his representative even though he has received a legal and proper summons, then the power of the determination will be annulled, and a divorce cannot be filed again based on the same reasons (Lubis, 2018)."

The party who is aggrieved if the decision of the Religious Court is not implemented in this case is the wife, because mut'ah, iddah livelihoods, and madhiyah livelihoods are not paid by the husband, so that these expenses can be requested for execution, as for the type of execution related to mut'ah payments, iddah livelihoods, and madhiyah is the execution of the payment of an amount of money, the legal basis of which is Articles 197-200 HIR and Articles 208-218 R.Bg. If the verdict contains a penalty of payment of an amount of money, it means that the Reconviction Defendant is forced to pay an amount of money to the Reconviction Plaintiff by selling the Defendant's asset auction.

The execution of mut'ah payments, iddah livelihoods, madhiyah livelihoods at the Religious Courts will go through several stages, namely: Application for execution, paying execution fees, aanmaning (admonition trial), determining execution seizures, determining execution orders, announcing auction, requesting auction, registering auction requests, stipulation of auction day, stipulation of auction conditions and floor price, procedure for bidding, auction buyers and determining the winner, payment of auction prices for confiscated goods from mut'ah execution and iddah income. These procedures are carried out in accordance with existing regulations so as not to violate the law and to make it easier and more able to fulfill the rights of a divorced wife in the form of mut'ah, iddah livelihoods and madhiyah livelihoods (Harahap, 1990).

In practice, it is very rare for a wife to carry out an execution because she doesn't want to extend the case in court. The practice of executing mut'ah, nafkah iddah and nafkah madhiyah rarely occurs in court, this is due to the following reasons:

- a) Execution costs borne by the wife according to article 89 paragraph (1) of Law No.7 Th. 1989 explained, that the cost of the case in the field of marriage is borne by the wife. This causes the wife to be reluctant to submit, they prefer to surrender.
- b) The amount of the execution fee is not proportional to the amount of living received by the ex-wife. The cost of execution is not cheap because it involves many parties, so what must be spent varies. Sometimes the executions had to be carried out repeatedly, because of the obstacles that occurred in the field. Like the defendant who did not cooperate, the difficulty in Jakarta was that there were third parties who intervened and so on. The amount of income that is borne by the husband is usually not that large because the parties in the litigation are generally from the middle economic class. If there is a request for execution, the costs that must be incurred are not proportional to the assets to be acquired.

- c) There are no assets that are executed, sometimes the husband's reluctance to pay off his wife's obligation to support the wife is due to the husband's limited economic situation.
- d) There is no provision for *prodeo* in the application for execution, the term *prodeo* is not known so that all costs incurred one hundred percent must be borne by the parties (the applicant), in this case the wife as the respondent.
- e) Basically the court does not interfere in the implementation of the payment of *mut'ah*, *iddah* and *madhiyah* livelihoods, but in order to secure a wife's guarantee for a husband who has bad intentions, a judge at the Semarang Religious Court ordered the husband to pay *mut'ah*, *iddah* livelihood and the living of *madhiyah* before the recitation of the divorce vows. This is done to ensure the certainty of the rights of the ex-wife. The payment of *mut'ah*, *nafkah iddah*, and *madhiyah* is done immediately after the recitation of the *talak* vow .

According to the author's opinion, the income given after the husband reads the divorce vows is less effective, because in practice in society many husbands do not want to pay their obligations. As a result, his ex-wife and children are neglected and his wife has to work hard to support his life and his children.

According to the author, the policy carried out by the Panel of Judges at the Semarang Religious Court has been effective even though juridically, the payment for the ex-wife's living is carried out after the reading of the divorce vow. If the husband denies his obligations, the wife can apply for execution. In practice, it is rare for a wife to apply for execution because the income earned is not comparable to the cost of execution, especially when the wife has to take care of her children. A judge not only looks at the existing laws, but they must see what is happening in society.

By looking at the judges' considerations and decisions will affect the life of the Respondent as the divorced party, the impact of the judge's decision on the divorcee wife, among others:

- (a) The psychological impact, the psychological impact is clearly visible when a woman who has been divorced by her husband. Automatically they will carry the status of being a widow whose majority view of a widow who is divorced by her husband has a negative view.
- (b) The economic impact is that economically women who have been divorced by their husbands still get a living from their husbands, both for *iddah*, *mutah* and *maskan*. However, the provision of *nafakah* is only able to provide for the life of a wife who has been divorced by her husband for several months. For the next life must struggle to bear life and life.

When a court decision decides to impose on one of the parents of the child, this must also be carried out by the parents who are charged from the court in a court decision to provide for the child or the rights that must be obtained by the child.

If the implementation of the religious court decision is not obeyed by the parents, especially the father who is ordered by law to be obliged to pay for children's support, legal steps that can be taken are based on Law Number 7 of 1989 which has been amended to Law Number 50 of 2009 (second amendment) that Article 54 does not regulate legal remedies against

parties who do not implement decisions, so in this case the HIR (Herzien Inlandsch Reglement) applies, which regulates procedural law in civil case proceedings.

D. CONCLUSION

Judges' considerations in the decision of the Religious Court in the DKI Jakarta High Religious Court area in providing the rights of women and children in their development have attempted to provide protection in the form of charging fees as a result of divorce submitted by husbands to the Religious Court in the form of iddah, mut'ah, and livelihoods. children, joint property, and so on by punishing the husband to pay it just before he pronounced the divorce vow in front of the court. Then the consideration of the income and needs of each party, this will later determine the amount of the burden of livelihood for the husband. The determination of the type of income itself is determined based on the consideration of the wife's divorced condition.

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