

Strengthening Women's Rights In Law Through Supreme Court Number 3 Year 2017 Regulation In Divorce Cases In The Religious Court

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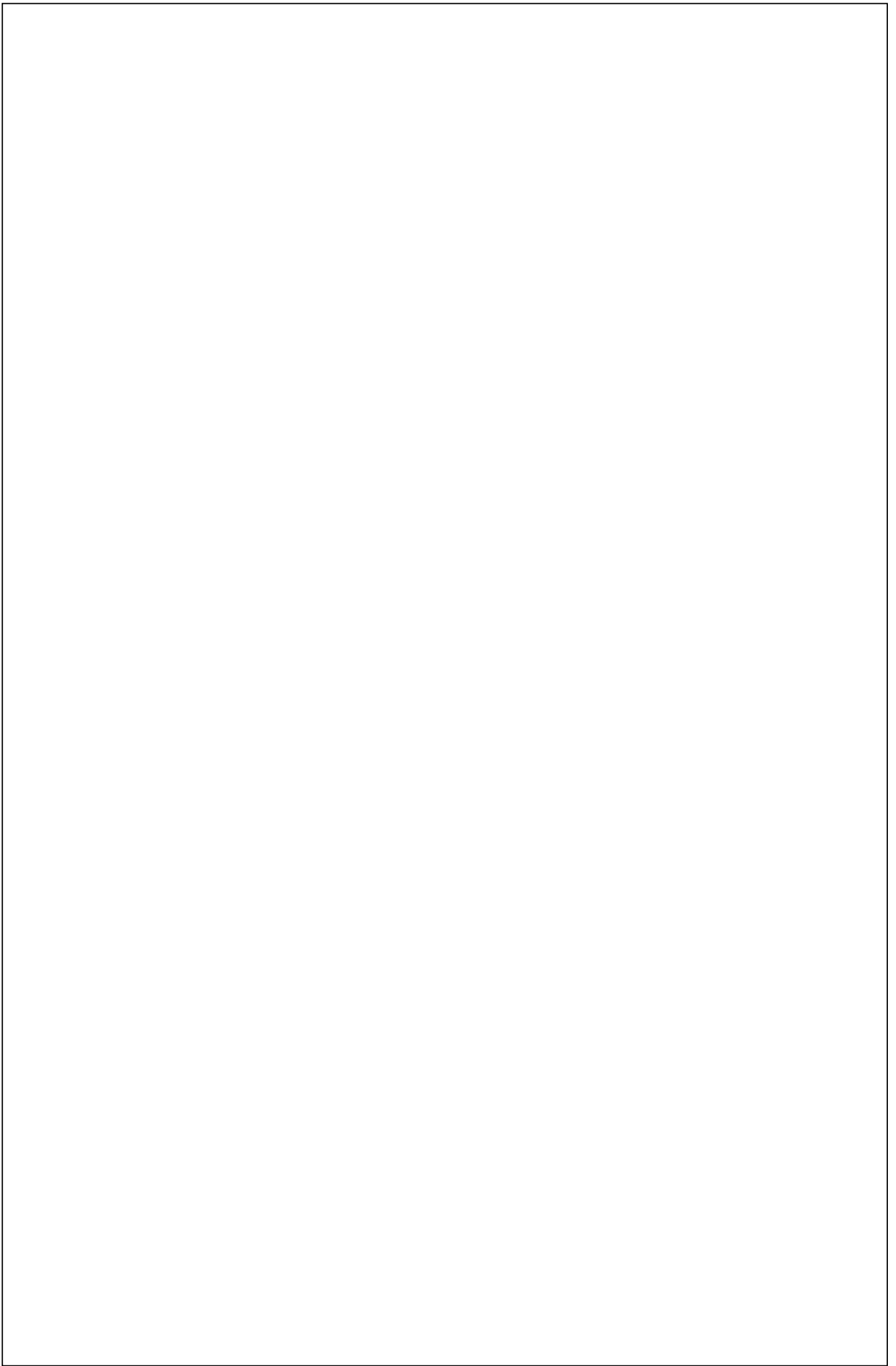
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Strengthening Women's Rights In Law Through Supreme Court Number 3 Year 2017 Regulation In Divorce Cases In The Religious Court

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Abstract

PERMA Number 3 of 2017 concerning Guidelines for Judging Women's Cases Against the Law is a form of protection for women against all acts of discrimination and this can enrich the quantity and quality of the judges related to gender equality. This research used the juridical-empirical research method. The results of the study indicate that there is no difference between before the enactment of PERMA Number 3 of 2017 and before in the "Cerai Gugat" case. The judges have not optimally implemented PERMA Number 3 of 2017. There are 3 obstacles involved in implementing PERMA No. 3 of 2017: (1) the Judge's consideration if the wife submits divorce papers to the husband by considering them nusyuz or rebellious in accordance with the rules of fiqh, (2) there is no optimisation of proof and (3) the husband is not present at the hearing processes, so the Judge has difficulty getting holistic information.

Keywords: Divorce, Women, Judge, Court.

Fortalecimiento De Los Derechos De Las Mujeres En La Ley A Través De La Regulación De La Corte Suprema Número 3 Años 2017 En Casos De Divorcio En La Corte Religiosa

PERMA Número 3 de 2017 sobre las Directrices para juzgar los casos de mujeres contra la ley es una forma de protección para las mujeres contra todos los actos de discriminación y esto puede enriquecer la cantidad y calidad de los jueces relacionados con la igualdad de género. Esta investigación utilizó el método de investigación jurídico-empírico. Los resultados del estudio indican que no hay diferencia entre antes de la promulgación de PERMA Número 3 de 2017 y antes en el caso "Cerai Gugat". Los jueces no han implementado PERMA número 3 de 2017 de manera óptima. Existen 3 obstáculos involucrados en la implementación de PERMA No. 3 de 2017: (1) la consideración del juez si la esposa presenta documentos de divorcio al esposo al considexrarlos nusyuz o rebeldes de acuerdo con Según las reglas de fiqh, (2) no hay optimización de la prueba y (3) el esposo no está presente en los procesos de audiencia, por lo que el juez tiene dificultades para obtener información holística.

Palabras clave: Divorcio, Mujeres, Juez, Corte.

1. INTRODUCTION

2.

Religion Judicial Competence is related to accepting, examining, and judging and resolving every Islamic Shari'a case submitted to him, including marriage, inheritance, wills, grants, endowment, zakat, infaq, shadaqah and Sharia economic disputes (HAMAMI, 2003). Divorce cases occupy the highest number compared to other cases, reaching 80% - 95% (SUNARSI, YUHERMAN, & SUMIYATI, 2018). Every year the highest number gets divorced, which means the plaintiff is a wife, because one of the parties left the obligation mainly in the form of irresponsibility (PUSPITA, DHARMA & IDANATI, 2016).

In the practice of divorce cases in the Religious Courts, often the wife does not get rights after a divorce such as Mut'ah and a living Iddah. In the de-

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cisions of the Religious Courts, the case of divorce is contested and the wife as the Plaintiff does not receive the Iddah and Mut'ah income. This is because a woman who divorces her husband is considered to be nusyuz, or defying her husband. This has led to an injustice towards women who are facing the law (ASSHIDDIQIE, 2004).

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To provide protection for women from acts of discrimination, the Supreme Court issued PERMA No. 3 of 2017 concerning Guidelines for Judging Women's Cases Dealing within the Law (hereinafter written PERMA No. 3 of 2017). The protection of citizens from all acts of discrimination is the implementation of their constitutional rights as stated in the Constitution of the Republic of Indonesia 1945. Indonesia has ratified the International Covenant on Civil and Political Rights (ICCPR) with Law Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights. This confirms that all people are equal before the laws and regulations prohibiting discrimination and guaranteeing equal protection for all people including sex.

PERMA No. 3 of 2017 provides a basis for gender equality, including how the Judges should behave and what should not be done in court. PERMA also regulates what matters should be considered by the Judges when examining and adjudicating women's cases against the law, such as the inequality of their social status, physical helplessness, power relations, a history of violence and the psychological impact. This also covers opportunities for women to have a companion in court and it prohibits the Judges from showing an attitude or making gender-biased statements, justifying any discrimination against women. If there is any party who acts or makes a statement that denigrates women, the Judge is expected to be able to reprimand the party. Another thing stipulated in the Regulation is that the Judge should also consider and ask about the loss, the impact of the case and the need for the recovery of the victim.

The enactment of PERMA is an important breakthrough when handling women facing the law. Judges are expected to have a level of gender sensitivity that will assist the judicial process and the birth of progressive decisions. In addition, it is expected that not only will the law be translated, but it can also bring in a sense of justice that exists in the community. The Chairperson of the Indonesian Supreme Court Judicial Chamber, Amran Suadi explained (SUADI, 2018) that this Perma could bring in the winds

of change. "I hope for change. I was inspired by the draft Criminal law, which is how people who do not want to comply with court decisions due to divorce can be sentenced to direct imprisonment. This already applies in Jordan, Australia or Malaysia." Of course, this requires an intervention from the Ministry of Women's Empowerment and other related ministries. The formulation of the problems discussed in this paper are as follows:

- (1) How does the law apply in the decisions of the Religious Court Judges in the case of divorce after the enactment of PERMA No. 3 of 2017?
- (2) What obstacles arise when implementing PERMA No. 3 of 2017 in deciding on divorce cases in the Religious Courts?

2. RESEARCH METHOD

This research is judicial-empirical research method. This research rests on the legal norms and systematics and it is supported by the primary data collected by conducting field research. The primary data was the result of interviews with the respondents in the religious courts and several related advocates. The sampling of 199 people in this study used purposive sampling.

The analysis of the application of the law of PERMA Number 3 of 2017 in the Religious Courts and how the judges interpret the trial process against women who were sampled occurred in the Bogor, Depok, Cibinong, Semarang, Surabaya, and Jakarta Capital City Religious Courts. This was to compare the decisions of the religious courts in divorce cases before and after the enactment of PERMA Number 3 of 2017.

The analysis of the factors that had become obstacles in their application in terms of the three economic, legal and socio-cultural aspects used a qualitative descriptive approach.

3. RESULTS AND DISCUSSIONS

3.1. Application of Law in the Decision on Divorce Cases in Religious Courts After the Entry of PERMA No. 3 of 2017

According to Friedman, the legal system can work well if the three elements are mutually supportive, namely law enforcement, the rule of law and legal culture. Law enforcers can work well if the legal rules are good

and clear and the community obeys the law, even if law enforcement is not effective (FRIEDMAN, 2011).

The authority of the Religious Courts is in direct contact with the interests of women and children, especially in divorce and childcare cases. The Religious Court has the authority to adjudicate disputes in the fields of family law and Sharia economic law. Matters that are included in family law include divorce, livelihood, child custody, child care, and cases that are the result of divorce. Many of these reasons are in contact with the rights of women and children. In law enforcement related to the rights of women and children, the Supreme Court has ratified the Supreme Court Regulation No. 3 of 2017 which emphasises that judicial institutions pay more attention to aspects of protecting the rights of women and children when deciding cases.

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Divorce is the breaking of the inner bond between husband and wife which results in the end of the relationship between the husband and wife. Article 39 of Act No. 1 of 1974 concerning Marriage stipulates that: "to carry out a divorce, there must be enough reasons where the husband and wife cannot live in harmony as husband and wife and where the court has tried and failed to reconcile both parties."

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The number of divorce cases in the Indonesian Religious Courts is increasing. The number of divorces put forward by the applicant's wife is 3 times that of divorce being submitted by the husband (ARIFIN, 2017).

Table 1. Recapitulation of Divorce Cases (CT / CG) in PA 2016 - 2018 Respondents

No	Name	Number of Cases			Number of Divorce Cases		
		2016	2017	2018 (jan-sept)	2016	2017	2018
1.	PA. Depok	3818	4144	2102	CT= 900 CG:2538	CT= 957 CG:2756	CT = 554 CG:1617
2.	PA. Cibinong	5248	678	4189	CT:1229 CG:3054	CT:1209 CG:4019	CT = 796 CG :2637
3.	PA. Bogor	1829	2022	950	CT= 371 CG:1261	CT:3177 CG:1343	CT = 200 CG = 700
4.	PA. Banjarmasin	2260	2332	1341	CT:3718 CG:1326	CT: 369 CG:1275	CT = 208 CG = 743
5.	PA. Surabaya	7803	8094	4783	CT:1860 CG:3761	CT:1772 CG:3784	CT:1092 CG:2379

6.	PA. Purbalingga	2531	2846	2014	CT= 522 CG:1633	CT= 573 CG:1735	CT = 435 CG:1443
7.	PA. Jakarta Timur	4936	5267	4504	CT:1369 CG:3341	CT:1330 CG:3289	CT:1156 CG:2882
8.	PA. Makasar	3169	3024	2218	CT= 603 CG:1800	CT= 628 CG:1729	CT= 486 CG:1306
9	PA. Jakarta Utara	2267	2255	2121	CT= 580 CG:1413		
10	PA Jakarta Selatan	4495	5056	3512	CT:1057 CG:2760	CT:1115 CG:3185	CT: 860 CG: 2469
11	PA Tangerang	2619	2673	2316	CT:669 CG:1838	CT:715 CG:1896	CT:543 CG:1499

Source: Report 2016-2017- LIPA 2018

Reports on the causes of divorce in the religious Court Indonesia are divided into 13 categories: adultery, drunkenness, illicitism, gambling, leaving one party, sentenced to a prison stay, polygamy, domestic violence, disability, disputes and constant fighting, forced marriage, lapsed attention and economics. Of the 13 causes of divorce, the 3 highest factors causing divorce are the economy, where there is no responsibility taken on and where there is no harmony. Another study found that the weak responsibility of a husband towards his wife and children or where husband does not provide for and faces the betrayal of a cheating husband (ESTIN, 2017) or polygamy (MATRAIS, 2008) are the dominant causes of divorce expressed by women. The factors causing divorce cases in the Religious Court are dominated by economic factors. There is also no harmony and there is also a giving up of responsibility.

Table 2. Factors Causing Divorce in 2016 - 2017

No	Name	Economy		There is no responsibility		There is no Harmony	
		2016	2017	2016	2017	2016	2017
1.	PA. Depok	21	24	613	562	1268	1421
2.	Pa. Cibinong	851		850		1053	
6.	PA. Purbalingga	445	414	1106	1084	512	612
7.	PA. Jakarta Timur	1461	1277	70	334	1457	1585
8	PA Jakarta Selatan	619	273	629	631	467	294
9	PA Tangerang	417	431	780	395	847	1413

Source: PA's Annual Report.

The results of the study by KHUMAS, RETNOWATI, & PRAWITASARI (2015) show that the intentions of divorce can be explained by the strong effect of negative relationship features such as domestic violence, infidelity and irresponsibility. It was also found that there were weak barriers to divorce and the post-divorce expectations of a better life with a new partner who could love them more. The indirect factor that contributed to divorce intention was level of education. (KHUMAS, RETNOWATI, & PRAWITASARI, 2015).

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Legal effectiveness talks about the power of legal work in regulating and/or forcing people to obey the law. This means reviewing the rule of law that must meet the requirements, which are valid judicially, sociologically, and philosophically (ALI, 2011). Legal effectiveness can be measured by looking at the extent to which the legal rules are adhered to or not. If most of the people obey a general rule only because of compliance or being afraid of sanctions, then the degree of compliance is very low. The highest obedience is based on interests that are of an internalised nature, meaning that the legal rules are compatible with the intrinsic values that they adhere to (ALI, 2009).

ARTO (2017), in his book titled “The Discovery of Islamic Law for the Realization of Justice”, provides an opinion on the policy of judges when providing legal protection and justice addressed to women in divorce cases that do not apply to “Ultra Petita”, among others:

1. The wife’s rights as a result of divorce, especially in the case of divorce due to the husband’s mistake, means that in order to provide legal protection and justice to the wife even though the wife did not ask for it, the judge can ex-officio determine her rights based on the provisions of article 41 paragraph c Act Number 1 of 1974 concerning Marriage.

2. To realise justice if the husband’s right to divorce is given, the wife’s right due to divorce must also be given by the judge at the same time as pronouncing the divorce pledge. This is because the pledge of divorce, Mut’ah and the livelihood of Iddah is a package of justice.

The judge as law enforcement must uphold the values of justice in the implementation of legal certainty. PERMA Number 3 of 2017 becomes the basis for emphasising the right of ex-officio judges granted when implementing article 41 paragraph c of the Marriage Law, even though the paradigm of the judicial civil procedural law is passive. This means that in divorce cases, there are circumstances that position the judges to be active in the fight for women’s rights due to divorce (CHOIRI, 2009).

Before PERMA No.3 of 2017, there was no order for the Petitioners to carry out the verdict which was to pay the burden before the divorce pledge was pronounced. The applicant may recite talak before paying for his wife’s rights. If he cannot pay, then the Judges has been given relief to postpone the recitation of the divorce until the specified time of 6 months. If it has been 6 months and the Applicant cannot pay, then the power of the decree is dropped and the divorce is cancelled. It cannot be submitted again for the same reason. This was explained in Law No.7 of 1989 concerning Religious Courts Article 70 point (6):

If the husband is within a period of 6 months from the stipulation of the witness testimony day, if they do not come or he does not send his representative even though he received a call, then it is valid that the decree is terminated and the divorce cannot be submitted again for the same reason. "Unless the wife gives up the husband does not pay, then on the basis of the wife's willingness, the assembly may allow the husband to drop his divorce

In the plenary formulation contained in SEMA No. 1 2017, ¹ in the context of implementing PERMA No.3 of 2017 to provide legal protection for the women's rights after divorce, the payment of obligations due to divorce, especially Iddah, Mut'ah, and madliyah, can be included in the decision with the sentence paid before the pronouncement of the divorce. The divorce can be implemented if the wife does not object to the husband not paying the obligation at that time. This provision changes the letter c number 12, SEMA No.3 Year 2015, the livelihood of Iddah, Mut'ah and the livelihood of madliyah. Based on the interview that the author had with Mr. Farid Ismail as the South Jakarta Religious Court Judge, he explained that prior to PERMA No. 3 of 2017, when deciding on divorce cases, there was no provision to include the amar and or add the order for the applicant to pay a living and Mut'ah to his wife before reciting the divorce pledge as a part of his verdict. This in accordance with SEMA No. 1 of 2017. Based on the experience of one of the respondents' cases in this study conducted in the East Jakarta Religious Court named Ida Number 3962 / Pdt.G / 2018 / PAJT in 12 sessions, the judge's decision is there is no right to take care of Mut'ah.

Table 3: Differences before and after PERMA No.3 / 2017

No	Before PERMA No. 3 / 2017	After PERMA No. 3 / 2017
1	There are no rules that instruct the Applicant to carry out the verdict, and so they need to pay the burden before the divorce is pronounced. In legal considerations and amends, there are orders to pay for the <i>Iddah</i> and <i>Mut'ah</i> before the pronouncement of the divorce but not maximally.	In legal considerations and amends, there are orders to pay for the <i>Iddah</i> and <i>Mut'ah</i> before the pronouncement of the divorce but not maximally.
2	The former husband may pay <i>Iddah</i> and <i>Mut'ah</i> before or after the recitation of the divorce.	The former husband is ordered to pay <i>Iddah</i> and <i>Mut'ah</i> before the recitation of the divorce.
3	The former wife does not get <i>Mut'ah</i> , <i>Iddah</i> and <i>madliyah</i> .	The former wife does not get <i>Mut'ah</i> , <i>Iddah</i> and <i>madliyah</i> .

Source: Data processed

3.2. Constraints Faced in Practice

Although the principle of equality is widely recognised in the 1945 Constitution of Indonesia and the law, there are many examples of interpretations of equality being challenged as they do not produce substantive equality in Indonesia, namely: a. formal equality and b. a protectionist approach. The gender differences that occur in Indonesia can sometimes lead to an injustice against men and especially women (CHIONGSON, 2010).

Based on the interviews conducted with the Religious Courts, the Judge stated that: "If the case of the petition filed is by the husband, then the wife has never been present at the hearing while the court has called the wife then they do not get *Iddah* and *Mut'ah*. The wife

is considered nusyuz. The divorce lawsuit is included in Talak Ba'in, meaning that the divorce is dropped by the court and Talak Ba'in cannot be reconciled. If you want to go back, then it must be a new marriage. This is the background of the wife not getting her rights in the form of Iddah. This is because the wife is no longer the responsibility of the husband."

According to PERMA No. 3 of 2017, despite the Verstek's decision, the women's rights must be fulfilled. Before the existence of PERMA, women's rights were not fulfilled so it became unfair for women. The Verstek's decision on a divorce application usually does not get Mut'ah and Iddah because the wife does not come to the Court when properly called for and so her rights fall through. Even though the wife does not come to the trial, the Judge must continue to give the wife rights such as Mut'ah ex-officio in order to create a state of justice on both sides.

For the husbands who are not ready to pay, the applicant is given 6 months. The Judge's view is that within 6 months, it is felt that the applicant was able to continue to provide a living. They are even expected to be able to improve relations between the applicant and the respondent in order to try to get them back together. If at that time the applicant does not pay and they do not come to the Religious Court, then the decision does not have any legal force. However, after SEMA No. 1 2017, it was changed to allow admission so then the applicant pays the burden before or when the applicant pronounces divorce. If the wife is willing to pay the wife's obligations, then the divorce can be carried out. The purpose is to include the ruling within the sentence to ensure that Iddah, Mut'ah and Hadliyah is paid before the pronouncement of the pledge of divorce. This is so then the applicant carries out the order of the panel of judges and so then there is a binding legal force between the applicant and the respondent.

In the event that the applicant does not have the money to pay for his wife's rights, the Judge delays the pronouncement of divorce for

6 months as mentioned in Article 70 point 6 of Law No. 7 of 1989 to protect the rights of the wife. Based on these provisions, there are obstacles in the implementation if the divorce comes from the middle to lower economic families. This is because after being given 6 months, the husband who will pronounce the divorce does not return to the Court on the grounds that he cannot fulfil the payment. In the end, usually the wife is willing to not pay her Iddah or Mut'ah to allow her to divorce her husband.

In divorce cases filed by the wife in the Religious Courts, Judges use fiqh which is used as legislation to decide on the case. During this time, the Judge considers if the wife filing for divorce with her husband is considered to be nusyuz or rebellious, so then the wife does not have rights like Iddah. This was in accordance with the fiqh, which was made into the Law and Compilation of Islamic Law. The applicability of PERMA No. 3 of 2017 shows that it is expected that the Judge can see the reasons for the wife filing the divorce lawsuit. The wife can be considered nusyuz, or not after proof. If the wife is not proven to be nusyuz, then the wife continues to get her rights according to the purpose of Article 2 PERMA No. 3 of 2017. On the contrary, if the wife is proven to be nusyuz, then the wife does not get access to her rights. The paradigm of some of the Judges is that they have assumed that the wife who filed for divorce is nusyuz, which means that they are being deemed to not be nusyuz before there is any evidence for divorce.

4. CONCLUSIONS

In the divorce case, there is no difference before the enactment of PERMA Number 3 of 2017 and after. The Judges have been found to not have optimally implemented PERMA Number 3 in 2017. There are 3 obstacles when implementing PERMA No. 3 of 2017 in the case of divorce, namely: 1) the Judge's consideration if the wife submits a divorce to the husband. This is considered nusyuz or rebellious in accordance with fiqh, without being supported by the optimisation of proof that the wife is divorced. 2) The husband is

not present at the hearing, so the Judge has difficulty getting holistic information and 3) the wife does not dispute the Iddah and Mut'ah, so it is quickly decided for her to be able to divorce her husband.

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