

The Normative Fragility of Women's Post-Divorce Economic Rights: Hierarchical Inversion between the Compilation of Islamic Law and Supreme Court Circular Letters from the Perspective of Hifz al-Mal

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Abstrak

Hak ekonomi perempuan pasca-perceraian dalam perkara cerai gugat kerap tidak terwujud meskipun Mahkamah Agung telah menyediakan dasar aturannya. Penelitian yuridis normatif ini menggunakan pendekatan perundang-undangan, konseptual, dan kasus, dengan Putusan Pengadilan Agama Probolinggo Nomor 123/Pdt.G/2024/PA.Prob sebagai instansi pengujian, memadukan teori jenjang norma dan maqashid al-syari'ah, serta menganalisis bahan hukum secara kualitatif melalui penafsiran sistematis-teleologis dan analisis isi terhadap pertimbangan hukum putusan. Penelitian ini menemukan empat hal. Pertama, terjadi inversi hierarki. Norma yang meniadakan hak berbentuk pasal Kompilasi Hukum Islam yang bekerja otomatis, sedangkan norma yang memulihkannya berbentuk rumusan kamar agama dalam Surat Edaran Mahkamah Agung yang fakultatif. Kedua, terdapat kontradiksi kelembagaan, karena Mahkamah Agung sendiri menegaskan bahwa peraturan kebijakan tidak dapat diuji hakim, sementara hak substantif perempuan justru diletakkan pada instrumen berjenis peraturan kebijakan. Ketiga, terdapat ketidaksesuaian materi muatan, yakni substansi hukum materiil diangkut oleh wadah yang dirancang untuk hukum formil. Keempat, kerapuhan perlindungan berlapis dua, yaitu pada status norma dan pada pelaksanaannya, sekaligus merupakan manifestasi kelembagaan dari terpinggirkannya hifz al-mal. Implikasinya, perbaikan tidak dapat ditempuh melalui sosialisasi melainkan melalui pemindahan materi rumusan kamar agama menjadi Peraturan Mahkamah Agung, reformulasi Pasal 149 Kompilasi Hukum Islam, dan pengaktifan Pasal 95 ayat (1) sebagai instrumen preventif.

Kata Kunci: hak ekonomi perempuan; hifz al-mal; inversi hierarki; peraturan kebijakan; Surat Edaran Mahkamah Agung.

Abstract

Women's post-divorce economic rights in wife-initiated divorce are frequently unrealized even though the Supreme Court has supplied a basis for granting them. This normative juridical study employs statutory, conceptual, and case approaches, treating Probolinggo Religious Court Decision Number 123/Pdt.G/2024/PA.Prob as an instance for testing, combines the theory of the hierarchy of norms and maqashid al-shari'ah, and analyzes the legal materials qualitatively through systematic-teleological interpretation and content analysis of the court's legal reasoning. Four findings emerge. First, a hierarchical inversion exists: the norms extinguishing these

rights are articles of the Kompilasi Hukum Islam that operate automatically, whereas the norms restoring them are religious chamber formulations in Supreme Court Circular Letters that remain facultative. Second, an institutional contradiction arises, since the Supreme Court itself affirms that policy rules cannot be judicially reviewed, yet women's substantive rights rest on precisely such an instrument. Third, a mismatch of regulatory content occurs, as substantive law is carried by a vessel designed for procedural law. Fourth, this fragility is twofold, upstream in the status of the norm and downstream in its enforcement, and manifests institutionally the marginalization of hifz al-mal. The implication is that reform requires not socialization but elevating the chamber formulations into a Supreme Court Regulation, reformulating Article 149 of the Kompilasi Hukum Islam, and activating Article 95(1) as a preventive instrument.

Keywords: women's economic rights; hifz al-mal; hierarchical inversion; policy rules; Supreme Court Circular Letter.

INTRODUCTION

In Probolinggo Religious Court Decision Number 123/Pdt.G/2024/PA.Prob, a wife petitioned for divorce because her husband had depleted household resources through online gambling and online loans. The court granted the divorce. The plaintiff was released from the marital bond, yet she received no restoration for the economic losses borne during the marriage. The legal mechanism that freed her from the marriage simultaneously operated in a manner that extinguished her economic entitlements. This outcome is not an anomaly; it reflects the structure of Indonesian divorce law.

The legal mechanism can be traced through three interlocking normative steps. First, Article 119(2)(c) of the Compilation of Islamic Law provides that a divorce pronounced by a Religious Court constitutes *ba'in sughra* divorce.¹ Because every wife-initiated divorce ends with a judicial pronouncement, the wife automatically acquires *ba'in* status. Second, Article 149(b), under its conventional reading, excludes *iddah* maintenance for a former wife divorced by *ba'in* who is not pregnant.² Third, Articles 158 and 159 frame *mut'ah* as an obligation of a husband who pronounces divorce. Because the procedural initiative in a wife-initiated divorce comes from the wife, the textual basis for claiming *mut'ah* becomes uncertain.³

These provisions create a structural tension. The more actively a woman seeks to escape a harmful marriage, the weaker her economic position may become after the marriage ends. The incentives generated by the legal structure therefore move in the opposite direction from the protective objective that family law is expected to serve. Post-divorce protection should not end with dissolution of the marriage; it must also address economic rights eroded during the marital relationship.

¹ Pasal 119 ayat (1) dan ayat (2) huruf (c) Kompilasi Hukum Islam sebagaimana disebarluaskan melalui *Instruksi Presiden Nomor 1 Tahun 1991 tentang Penyebarluasan Kompilasi Hukum Islam*. Ayat (2) menyebut tiga kategori talak *ba'in sughra*, yaitu talak *qabla al-dukhul*, talak dengan tebusan atau khuluk, dan talak yang dijatuhkan oleh Pengadilan Agama.

² Pasal 149 huruf (b) Kompilasi Hukum Islam.

³ Pasal 158 dan Pasal 159 Kompilasi Hukum Islam. See also Ahmad Rofiq, *Hukum Perdata Islam di Indonesia*, edisi revisi (Jakarta: Rajawali Pers, 2013), 280–85.

The Supreme Court has recognized this problem and responded through religious-chamber formulations.⁴ The religious-chamber formulation circulated through Supreme Court Circular Letter Number 3 of 2018 states that a wife in a wife-initiated divorce may receive mut'ah and iddah maintenance where nusyuz is not established.⁵ Supreme Court Circular Letter Number 4 of 2016 further states that a Religious Court may, ex officio, impose child-maintenance obligations on the father where the child is in the mother's care.⁶

The academic problem lies in the form of the Supreme Court's response. Structurally, the provisions that restrict women's economic rights are articles of the Compilation of Islamic Law, a source routinely used by religious courts for more than three decades and applied without requiring active judicial intervention. By contrast, the provisions restoring those rights are chamber formulations disseminated through circular letters. In administrative-law doctrine, such circulars are commonly treated as internal policy rules rather than instruments within the formal hierarchy of legislation. This article calls the resulting condition a hierarchical inversion: the instrument restricting the right is institutionally more robust than the instrument that restores it.

The second dimension is philosophical. The question is not only how hierarchical inversion operates, but why such a condition persists without consistently being treated as an urgent problem. This inquiry leads to maqashid al-shari'ah, within which hifz al-mal is traditionally placed last among the five al-kulliyat al-khams. That ranking has its own historical logic. Yet when it is carried uncritically into the contemporary context of online gambling and digital lending, where household resources can be destroyed within weeks, a traditional hierarchy of priorities may become a source of institutional neglect.

Addressing both dimensions requires two analytical tools used sequentially. The hierarchy-of-norms framework locates each instrument according to its legal status and binding force; without such a mapping, the difference between an article, a regulation, and a circular letter can be overlooked. Maqashid al-shari'ah complements that structural analysis by explaining why a fragile arrangement may be produced and normalized even when its practical consequences are serious.

Previous scholarship may be grouped into three strands. The first examines judicial ex officio authority in wife-initiated divorce. Heniyatun analyzes decisions awarding mut'ah and iddah maintenance and treats them as judicial-law-finding

⁴ Sejak 2011 Mahkamah Agung menerapkan sistem kamar, yakni pengelompokan hakim agung menurut bidang keahlian ke dalam kamar pidana, perdata, agama, militer, dan tata usaha negara. Setiap tahun masing-masing kamar menyelenggarakan rapat pleno untuk menyepakati sikap hukum atas persoalan yang selama ini diputus berbeda-beda oleh majelis yang berlainan. Hasil kesepakatan itulah yang disebut rumusan kamar, dan penyebarluasannya kepada seluruh pengadilan di bawah Mahkamah Agung dilakukan melalui Surat Edaran Mahkamah Agung. Sistem kamar diterapkan untuk menjaga kesatuan penerapan hukum. Sepanjang satu dasawarsa terakhir Mahkamah Agung telah menerbitkan sejumlah Surat Edaran yang memuat rumusan hasil rapat pleno kamar, di antaranya Surat Edaran Mahkamah Agung Nomor 4 Tahun 2014, Nomor 4 Tahun 2016, Nomor 1 Tahun 2017, Nomor 3 Tahun 2018, dan Nomor 2 Tahun 2019.

⁵ Rumusan Hukum Kamar Agama huruf A angka 3 dalam *Surat Edaran Mahkamah Agung Nomor 3 Tahun 2018*.

⁶ Rumusan Kamar Agama dalam *Surat Edaran Mahkamah Agung Nomor 4 Tahun 2016*, merujuk Pasal 156 huruf (f) Kompilasi Hukum Islam.

departures from Article 149 of the Compilation of Islamic Law.⁷ Cahyani, Widodo, and Musthofa examine ex officio authority under Supreme Court Regulation Number 3 of 2017.⁸ Setiabudi, Budiono, and Widhiyanti assess the issue through the ultra petita principle.⁹ Saputra, Murtadlo, and Haider document practical obstacles to enforcing women's post-divorce rights in the Mataraman region of East Java.¹⁰

The study closest to the present article is Nurlaelawati and Salim's analysis of judicial practice in enforcing post-divorce maintenance, which reads a series of Supreme Court Circular Letters as strengthening the Court's regulatory function in protecting vulnerable parties.¹¹ From a comparative perspective, Jannah and colleagues map post-divorce alimony policy in Indonesia, Malaysia, and Brunei Darussalam through the lens of gender justice.¹² These studies generally take the circular letters as an available legal basis and focus on how judges apply them, rather than on whether their application can itself be demanded as a legal obligation.

The second strand examines the legal status of Supreme Court Circular Letters within the Indonesian legal system. Cahyadi maps their position by reference to Article 8 of Law Number 12 of 2011 and Article 79 of Law Number 14 of 1985.¹³ Fajarwati examines the validity of Supreme Court Circular Letter Number 7 of 2014 from the perspective of the Government Administration Law.¹⁴ Arifin discusses judicial review of policy rules in Indonesia.¹⁵ Santoso, Jaelani, and Rosidin analyze the general legal position and force of Supreme Court Circular Letters.¹⁶ These

⁷ Heniyatun, "Pemberian Mut'ah dan Nafkah Iddah dalam Perkara Cerai Gugat," *Profetika: Jurnal Studi Islam* 21, no. 1 (2020).

⁸ Ayu Cahyani, Muhammad Fajar Sidiq Widodo, dan Mohammad Hendy Musthofa, "Pelaksanaan Hak *Ex Officio* Hakim atas Nafkah Iddah, Mut'ah, Hadlonah dan Madhiyah dalam Perkara Cerai Gugat Ditinjau dari Perma Nomor 3 Tahun 2017," *Mandub: Jurnal Politik, Sosial, Hukum dan Humaniora*, 2024.

⁹ Helpan Setiabudi, Abdul Rachmad Budiono, dan Hanif Nur Widhiyanti, "Ex Officio Judge's Authority Towards Fulfillment of Women's and Children's Rights after Divorce as Reviewed from the Principle of *Ultra Petita*," *International Journal of Educational Review, Law and Social Sciences* 5, no. 5 (2025): 3744–50.

¹⁰ Wahyu Saputra, Muhammad Ali Murtadlo, dan Aftab Haider, "Challenges in Upholding Women's Post-Divorce Rights: Experiences from Legal Practitioners in the Mataraman Region, East Java," *Al-Hukama': The Indonesian Journal of Islamic Family Law* 14, no. 1 (2024): 46–73.

¹¹ Euis Nurlaelawati dan Arskal Salim, "Judicial Practices in Enforcing Post-Divorce Maintenance Rights for Women and Children in Indonesia," *Indonesia Private Law Review* 6, no. 2 (2025): 103–16.

¹² Shofiatul Jannah dkk., "Implementation of Post-Divorce Alimony Policies from a Gender Justice Perspective: A Comparative Legal Study of Indonesia, Malaysia, and Brunei Darussalam," *Ulumuna* 29, no. 2 (2025): 959–89.

¹³ Irwan A. Cahyadi, "Kedudukan Surat Edaran Mahkamah Agung (SEMA) dalam Hukum Positif di Indonesia," *Jurnal Mahasiswa Fakultas Hukum Universitas Brawijaya*, 2014.

¹⁴ Meirina Fajarwati, "Validitas Surat Edaran Mahkamah Agung (SEMA) Nomor 7 Tahun 2014 tentang Pengajuan Peninjauan Kembali dalam Perkara Pidana Ditinjau dari Perspektif Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan," *Jurnal Legislasi Indonesia* 14, no. 2 (2017).

¹⁵ Firdaus Arifin, "Pengujian Peraturan Kebijakan dalam Sistem Peradilan di Indonesia," *Jurnal Litigasi* 22, no. 1 (2021).

¹⁶ R. Andhika Santoso, Elan Jaelani, dan Utang Rosidin, "Kedudukan dan Kekuatan Hukum Surat Edaran Mahkamah Agung (SEMA) dalam Hukum Positif Indonesia," *Deposisi: Jurnal Publikasi Ilmu Hukum* 1, no. 4 (2023): 7–15.

studies operate primarily at the level of administrative law and generally do not connect their conclusions to a particular field of substantive private law.

The third strand is socio-legal scholarship on religious-court practice and women's rights. Nurlaelawati shows that judges do not apply the Compilation of Islamic Law mechanically but through varied legal identities and traditions.¹⁷ Her more focused work also maps women's financial rights after divorce.¹⁸ Van Huis, drawing on fieldwork in Cianjur and Bulukumba, shows that the greatest difficulty often lies in enforcement rather than formal recognition.¹⁹ This literature is empirically strong, but it generally treats weak protection as an implementation or legal-culture problem rather than as a problem of normative location.

A gap therefore remains. Existing scholarship has not sufficiently treated the hierarchical fragility of Supreme Court Circular Letters as an explanation for weak protection of women's post-divorce economic rights while simultaneously reading that fragility as an institutional manifestation of the marginalization of *hifz al-mal*. The gap is twofold: one line of scholarship assumes the instrument's validity and studies implementation, while another studies the instrument's legal status without tracing its implications for substantive family rights. This article connects the two: hierarchy analysis explains the mechanism of neglect, while *maqashid* analysis explains why that mechanism may not be perceived as requiring urgent reform.

The article offers three contributions. Methodologically, it repositions the role of a judicial decision. Rather than treating the decision as the ultimate object of explanation, the decision is used as a test instance for a normative proposition: a tool for examining the structure rather than the endpoint of the inquiry.

Theoretically, the article brings together two traditions that are usually discussed separately in Indonesian Islamic family-law scholarship: hierarchy-of-norms analysis rooted in constitutional and administrative law, and *maqashid* analysis rooted in *usul al-fiqh*. Their combination makes it possible to identify propositions that neither framework can reach on its own.

Substantively, the article identifies three under-theorized features: hierarchical inversion in the protection of women's economic rights; an institutional contradiction in placing substantive rights in an instrument the Supreme Court itself treats as not subject to ordinary judicial review; and a mismatch of regulatory content, because substantive private-law consequences are carried by an instrument designed principally for internal judicial guidance.

The central argument is that weak protection of women's post-divorce economic rights is not merely a problem of judicial implementation but also a problem of where the norm is located. As long as the guarantee is articulated mainly through circular guidance while the restriction appears in article-form rules routinely applied by the courts, the effectiveness of protection will continue to depend heavily on individual judicial initiative.

¹⁷ Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam: Amsterdam University Press, 2010).

¹⁸ Euis Nurlaelawati, "Women's Financial Rights after Divorce in Indonesia" (Leiden: Brill, 2018), 89–106.

¹⁹ Stijn Cornelis van Huis, *Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba* (Leiden: Van Vollenhoven Institute, Leiden University, 2015); see also Stijn Cornelis van Huis, "Rethinking the Implementation of Child Support Decisions: Post-Divorce Rights and Access to the Islamic Court in Cianjur, Indonesia," *Law, Social Justice & Global Development*.

Against this background, the article traces how Articles 119, 149, 158, and 159 of the Compilation of Islamic Law operate to restrict women's economic rights, how religious-chamber formulations seek to reopen those rights, how the two sets of norms differ in legal status, and how that difference relates to the marginalization of *hifz al-mal*. The analysis is then tested against Decision Number 123/Pdt.G/2024/PA.Prob before a normative reconstruction is proposed.

RESEARCH METHOD

This study is normative legal research that treats norms and judicial decisions as objects of legal analysis.²⁰ It is descriptive-analytical and prescriptive: it maps the existing normative arrangement and formulates the reconstruction that should follow. Three approaches are used in sequence. The statutory approach maps relations among legal norms; the conceptual approach constructs the analytical framework; and the case approach tests that framework against Probolinggo Religious Court Decision Number 123/Pdt.G/2024/PA.Prob. Primary materials include Law Number 1 of 1974, the Compilation of Islamic Law, Law Number 12 of 2011 and its amendments, Law Number 14 of 1985 and its amendments, Supreme Court Regulations Numbers 1 of 2011 and 3 of 2017, and Supreme Court Circular Letters Numbers 4 of 2014, 4 of 2016, 1 of 2017, 3 of 2018, and 2 of 2019. Secondary materials include works on *usul al-fiqh* and *maqashid*, administrative law, Islamic family law, and peer-reviewed scholarship. The materials are analyzed qualitatively through systematic and teleological interpretation and content analysis of the court's legal reasoning.

The two theoretical frameworks are operationalized through different indicators. Kelsen and Nawiasky's hierarchy-of-norms theory²¹, as reflected in Articles 7 and 8 of Law Number 12 of 2011, is applied through four indicators: the external form of the instrument; the legal basis for the authority to issue it; its addressees and scope of binding force, including whether it operates externally or mainly within the judicial organization as a policy rule;²² and whether it is amenable to judicial review. These indicators are used to position the Compilation of Islamic Law, Supreme Court Regulations, and Supreme Court Circular Letters. *Maqashid al-shari'ah* is operationalized through a comparative indicator: whether the traditional rank of a *maqashid* corresponds to the institutional weight of the legal instrument protecting it. The two frameworks are then used sequentially throughout the discussion.

The judicial decision is not treated as a phenomenon from which statistical generalizations are drawn, but as a device for testing the consistency of a normative structure. Because the inquiry concerns structural coherence rather than frequency, reliance on a single decision does not invalidate the doctrinal proposition, although

²⁰ Peter Mahmud Marzuki, *Penelitian Hukum*, edisi revisi (Jakarta: Kencana, 2016), 133–37.

²¹ Hans Kelsen, *Teori Umum tentang Hukum dan Negara*, terj. Raisul Muttaqien (Bandung: Nusamedia dan Nuansa, 2006), 179–83. Teori Nawiasky dikenal sebagai *die Stufenordnung der Rechtsnormen*, yang mengelompokkan norma ke dalam *Staatsfundamentalnorm*, *Staatsgrundgesetz*, *formell Gesetz*, serta *Verordnung* dan *autonome Satzung*.

²² Hotman P. Sibuea, *Asas Negara Hukum, Peraturan Kebijakan, dan Asas-Asas Umum Pemerintahan yang Baik* (Jakarta: Erlangga, 2010), 96–102; S.F. Marbun, *Hukum Administrasi Negara I*, cet. 2 revisi (Yogyakarta: FH UII Press, 2018), 213–19; Philipus M. Hadjon dkk., *Pengantar Hukum Administrasi Indonesia* (Yogyakarta: Gadjah Mada University Press, 2002), 152–56.

it necessarily precludes statistical generalization. The identities of the parties, witnesses, and child are anonymized in accordance with the best interests of the child and data-protection principles.

The term hierarchical inversion is used here as an analytical category, not as a claim that a Supreme Court Circular Letter formally ranks above the Compilation of Islamic Law. The analysis distinguishes three instruments: the Compilation of Islamic Law as a substantive-family-law reference disseminated through a Presidential Instruction; Supreme Court Regulations as formal rules issued by the Supreme Court within its competence, especially on judicial procedure and administration; and Supreme Court Circular Letters as internal judicial policy and guidance. The research question concerns the practical consequences of a situation in which protection of women's economic rights is more operationally explicit in judicial guidance than in the Compilation itself.

Probolinggo Religious Court Decision Number 123/Pdt.G/2024/PA.Prob is used as a critical case to test consistency between norms and legal reasoning, not as evidence of a national pattern. The study makes no claim about nationwide compliance based on a single decision. Secondary sources are selected for their relevance to wife-initiated divorce, post-divorce maintenance, ex officio authority, Supreme Court Regulation Number 3 of 2017, religious-chamber formulations, and *hifz al-mal*; the limitations of that corpus define the limits of generalization.

RESULTS AND DISCUSSION

Two Sets of Norms in Tension

Women's economic rights in wife-initiated divorce are governed by two sets of norms operating in opposite directions. The first restricts those rights through provisions of the Compilation of Islamic Law, while the second seeks to reopen them through Supreme Court procedural instruments and religious-chamber formulations. This section identifies the characteristics of each set as the foundation for the hierarchical diagnosis that follows.

The first characteristic is automatic operation. Article 119(2)(c) of the Compilation of Islamic Law attaches *ba'in* status because the divorce is pronounced by the court. Article 149(b) then links the exclusion of *iddah* maintenance to that status under the conventional reading. Neither step necessarily requires a separate judicial inquiry into why the marriage ended; the restrictive consequence follows from the legal classification itself.

The second characteristic is indifference to the cause of divorce. A woman who petitions because her husband has devastated the household economy may face the same formal consequence as a woman who petitions for entirely different reasons. Fault, vulnerability, and the distribution of economic loss do not directly alter the operation of the rule. This is a consequence of structuring the legal effect around the form of divorce rather than the cause that produced it.

The third characteristic is asymmetry in argumentative burden. Because the restrictive provisions operate through established legal classifications, the party benefiting from them need not always invoke them expressly. The woman whose rights are restricted, by contrast, must persuade the court to depart from the conventional operation of those provisions. The two parties therefore do not enter the argument on equal terms.

It should be emphasized that the conventional reading of Article 149(b) is not the only legally plausible interpretation. Supreme Court jurisprudence had already indicated that economic consequences of divorce do not necessarily disappear merely because the wife initiated the proceedings.²³ Indonesian precedent, however, is not formally binding in the same manner as legislation, so its corrective force depends on judicial willingness to adopt it. That dependence recurs throughout the analysis.

The second set operates at two different levels. At the higher level is Supreme Court Regulation Number 3 of 2017 on Guidelines for Adjudicating Cases Involving Women. Article 4 requires judges to consider inequality in social status and legal protection, physical and mental vulnerability, power relations, histories of violence, and the psychological effects experienced by victims.²⁴ Yet the regulation is primarily procedural. It directs how judges should examine and reason about a case, but does not by itself formulate every substantive economic right that must be awarded in a wife-initiated divorce.

At the lower level are religious-chamber formulations circulated through Supreme Court Circular Letters, and it is here that the substantive protections are stated most explicitly. Circular Letter Number 4 of 2016 opens an ex officio route for child maintenance.²⁵ Circular Letter Number 1 of 2017 addresses the performance of financial obligations resulting from divorce.²⁶ Circular Letter Number 3 of 2018 recognizes mut'ah and iddah maintenance in wife-initiated divorce where nusyuz is not established.²⁷ Circular Letter Number 2 of 2019 permits payment clauses linked to the issuance of divorce documentation.²⁸ The same policy direction is reinforced by the 2021 decision of the Director General of the Religious Courts.²⁹

Unlike the first set, this second set does not operate automatically. It requires judicial initiative and, in some contexts, an additional evaluation of nusyuz or the parties' circumstances. The underlying protective substance is significant and reflects institutional efforts by the Supreme Court to unify practice. The difficulty identified in this article lies not in the substance of the protection, but in the form of the instrument carrying it.

Once the characteristics of the two sets of norms are mapped, the next step is to identify their legal position. This section applies the four hierarchy-of-norms

²³ Putusan Mahkamah Agung Nomor 137 K/AG/2007 dan Putusan Mahkamah Agung Nomor 02 K/AG/2002.

²⁴ Pasal 4 Peraturan Mahkamah Agung Nomor 3 Tahun 2017 tentang Pedoman Mengadili Perkara Perempuan Berhadapan dengan Hukum. Mengenai perspektif gender dalam sistem peradilan Indonesia secara umum, lihat Rika Saraswati, "Perspektif Gender dalam Sistem Peradilan Indonesia," *Jurnal Legislasi Indonesia* 17, no. 3 (2020); dan Dede Kania dkk., "Gender Equality Implementation in Women's Legal Cases in Religious Courts," *Kosmik Hukum* 25, no. 2 (2025): 205–20.

²⁵ Surat Edaran Mahkamah Agung Nomor 4 Tahun 2016, Rumusan Kamar Agama.

²⁶ Surat Edaran Mahkamah Agung Nomor 1 Tahun 2017, Rumusan Kamar Agama mengenai mut'ah, nafkah iddah, dan nafkah anak.

²⁷ Surat Edaran Mahkamah Agung Nomor 3 Tahun 2018, Rumusan Hukum Kamar Agama huruf A angka 3.

²⁸ Surat Edaran Mahkamah Agung Nomor 2 Tahun 2019, Rumusan Kamar Agama mengenai amar putusan dalam perkara cerai gugat.

²⁹ Keputusan Direktur Jenderal Badan Peradilan Agama Nomor 1959 Tahun 2021 tentang Pemberlakuan Ringkasan Kebijakan Jaminan Perlindungan Hak-Hak Perempuan dan Anak Pasca-Perceraian.

indicators set out in the method, considers the principal objections to the diagnosis, and then compares the two sets as a whole.

The four indicators produce a relatively consistent answer when applied to Supreme Court Regulations. Article 8(1) of Law Number 12 of 2011 recognizes regulations issued by the Supreme Court as forms of legislation outside the hierarchy listed in Article 7(1), while Article 8(2) recognizes their binding force when ordered by higher legislation or issued under lawful authority.³⁰ The authority to issue such regulations derives from Article 79 of Law Number 14 of 1985 on the Supreme Court.³¹ Supreme Court Regulations may also be the object of judicial review under the constitutional and statutory framework governing review of regulations below statutes.³²

An important consequence is often overlooked: an instrument capable of being reviewed is also an instrument whose legal application can be meaningfully demanded. Reviewability and enforceability are not identical concepts, but both reflect the instrument's quality as a norm within the legal order.

The same indicators lead to a different conclusion when applied to Supreme Court Circular Letters. In external form, a circular letter does not follow the ordinary promulgation process used for legislation. In terms of addressees, it principally directs the judicial organization as guidance for subordinate courts rather than the public at large. These characteristics are commonly associated in administrative-law scholarship with internal policy rules, or *beleidsregels*.

The position on reviewability is especially important. A State Administrative Chamber formulation circulated through Supreme Court Circular Letter Number 4 of 2014 stated that judicial review concerns regulations below statutes and that policy rules are not reviewable in the same manner.³³ This distinction is also reflected in judicial practice rejecting certain circular instruments as objects of material review because they do not satisfy the characteristics of legislation.³⁴

This produces the article's first central finding: an institutional contradiction. The Supreme Court places women's substantive economic protection in an instrument that the Court itself does not consistently treat as a reviewable legal norm. The same institution thus advances a substantive entitlement while locating its most operational expression in a form whose normative status remains contested.

³⁰ Pasal 8 ayat (1) dan ayat (2) *Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan* sebagaimana telah beberapa kali diubah, terakhir dengan *Undang-Undang Nomor 13 Tahun 2022*.

³¹ Pasal 79 *Undang-Undang Nomor 14 Tahun 1985 tentang Mahkamah Agung* sebagaimana telah beberapa kali diubah.

³² Pasal 24A ayat (1) *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* juncto Pasal 31 *Undang-Undang Nomor 14 Tahun 1985* juncto Pasal 1 ayat (1) *Peraturan Mahkamah Agung Nomor 1 Tahun 2011 tentang Hak Uji Materiil*.

³³ Rumusan Kamar Tata Usaha Negara mengenai objek pengujian dalam *Surat Edaran Mahkamah Agung Nomor 4 Tahun 2014*, yang memberlakukan rumusan hasil rapat pleno kamar tahun 2013. Rumusan tersebut menegaskan bahwa objek hak uji materiil adalah peraturan perundang-undangan di bawah undang-undang dan bahwa peraturan kebijakan (*beleidsregel*) tidak dapat diuji oleh hakim.

³⁴ Putusan Mahkamah Agung Nomor 48 P/HUM/2016, yang menilai bahwa surat edaran yang menjadi objek permohonan tidak memenuhi kriteria peraturan perundang-undangan berdasarkan bentuk luar (*kenvorm*) sebagaimana dimaksud Pasal 81 *Undang-Undang Nomor 12 Tahun 2011*.

The contradiction has cascading consequences. If the circular letter is not treated as a mandatory norm, it becomes difficult to argue on appeal that a judge committed an error of law by failing to apply it. Yet if the circular itself is not amenable to material review, there is also no ordinary route to challenge weaknesses in the formulation of the protection. The pathway for correcting the judgment and the pathway for correcting the underlying instrument are therefore both constrained.

Two objections must be addressed so that the argument does not rest on formalism alone. The first is that some scholars treat regulatory Supreme Court Circular Letters as instruments that still derive binding force from Article 8 of Law Number 12 of 2011.³⁵ This article does not seek to resolve that broader controversy. Analytically, the existence of the controversy is itself relevant: where the binding status of an instrument remains disputed in scholarship and practice, its application cannot be demanded with the same certainty as an undisputed norm. A right whose operation depends on the outcome of an unresolved doctrinal debate is institutionally fragile.

The second objection is empirical: courts frequently comply with circular letters and appellate courts may correct judgments that ignore them. Three responses are necessary. First, habitual compliance is not identical to normative binding force. Second, appellate correction presupposes an appeal, and women in vulnerable economic circumstances may lack the resources to pursue one. Third, empirical scholarship does not establish universal compliance. Nurlaelawati and Salim report that only a limited number of divorce judgments expressly award maintenance.³⁶ Van Huis likewise shows that even where an award exists, enforcement may remain weak.³⁷

This deepens the diagnosis. The fragility of women's post-divorce economic protection is two-layered. Upstream, protection is fragile because the binding status and reviewability of the circular-letter framework remain contested. Downstream, protection is fragile because even awards that have been granted may not be effectively enforced. The two layers reinforce each other: a weakly institutionalized norm is difficult to insist upon, while a weakly enforceable award does little to strengthen the norm's practical authority.

A further problem strengthens the diagnosis. Conceptually, a Supreme Court Circular Letter is primarily suited to internal judicial guidance, procedure, and technical administration within the Court's supervisory function. Religious-

³⁵ Pandangan ini dikemukakan antara lain oleh Cahyadi, "Kedudukan Surat Edaran Mahkamah Agung," dan Santoso, Jaelani, dan Rosidin, "Kedudukan dan Kekuatan Hukum Surat Edaran Mahkamah Agung," 10–13.

³⁶ Nurlaelawati dan Salim, "Judicial Practices in Enforcing Post-Divorce Maintenance Rights," 103–16.

³⁷ Van Huis, *Islamic Courts and Women's Divorce Rights in Indonesia*; Saputra, Murtadlo, dan Haider, "Challenges in Upholding Women's Post-Divorce Rights," 46–73, mencatat kesulitan serupa pada konteks Jawa Timur. Persoalan penegakan nafkah anak yang sebanding juga tercatat pada yurisdiksi syariah lain; lihat Nurhidayah Hashim dan Tim Lindsey, "An Analysis of the Judicial Approaches in Assessing Child Maintenance Applications in Shariah Courts," *Journal of Contemporary Islamic Studies* 2, no. 1 (2016): 35–57.

chamber formulations, however, have increasingly carried substantive private-law consequences concerning the rights and obligations of the parties.³⁸

A statement that a wife in a wife-initiated divorce may receive mut'ah and iddah maintenance where nusyuz is not established is not merely a technical instruction on how to examine a case. It is a statement about entitlement and it reopens a private-law right that a conventional reading of Article 149(b) of the Compilation of Islamic Law appears to restrict. The form of the instrument and the weight of the substantive content it carries are therefore misaligned.

This mismatch also helps explain why the issue is easily overlooked. Because the content is progressive and protective, religious-chamber formulations are rightly read as institutional progress. Nurlaelawati and Salim, for example, describe them as strengthening the Supreme Court's regulatory role in protecting vulnerable parties.³⁹ The substantive assessment is persuasive. Yet progressive content can obscure a weakness in legal form. The concern is not that the formulations are too protective, but that valuable substantive protections are placed in an instrument that may be too fragile to sustain them consistently.

The norms restricting the rights appear in article-form provisions of the Compilation of Islamic Law. They operate through established classifications, do not necessarily require additional proof, are indifferent to the cause of divorce, do not require active invocation by the benefiting party, and have functioned as settled references in religious-court practice for decades.

The norms restoring the rights are expressed largely through chamber formulations in circular letters. They depend on active judicial use, may require additional assessment of nusyuz and the parties' circumstances, operate facultatively, have contested binding status, are not ordinarily reviewable as legislation, carry content that may exceed the conventional function of their form, and may not always be effectively enforced.

That comparison constitutes the hierarchical inversion identified in this article. In a coherent system, a norm protecting a vulnerable party should have an institutional position at least as robust as the norm restricting that party's rights. Here, the protective norm is instead located in one of the structurally weaker layers of the available normative framework.

The Marginalization of Hifz al-Mal as a Philosophical Explanation

The hierarchical diagnosis explains how fragility operates, but not why such fragility persists. This section offers a philosophical explanation through the maqashid indicator identified in the method: the relationship between the traditional ranking of a maqashid and the institutional weight of the legal instrument protecting it.

Al-Ghazali formulates five foundational objectives of the Sharia in an order that functions not merely as numbering but as a hierarchy of priority, placing hifz

³⁸ Pergeseran materi muatan Surat Edaran Mahkamah Agung dari hukum formil ke hukum materiil, khususnya dalam rumusan hasil rapat pleno kamar agama, telah menjadi catatan dalam diskusi mengenai sistem kamar Mahkamah Agung. Artikel ini melanjutkan pengamatan tersebut dengan menelusuri konsekuensinya pada satu bidang hukum substantif.

³⁹ Nurlaelawati dan Salim, "Judicial Practices in Enforcing Post-Divorce Maintenance Rights," 103-16.

al-mal last.⁴⁰ Al-Shatibi retains that ordering within a more systematic framework.⁴¹ The internal logic is coherent: property is instrumental to the preservation of life and lineage, so the loss of property is conceptually less final than the loss of life. That logic is understandable in a premodern setting in which economic loss was often limited and potentially recoverable through labor.

The problem arises when a philosophical ranking is reproduced as an institutional ranking. In Indonesian family law, physical violence, engaging *hifz al-nafs*, is expressly recognized as a ground for divorce and criminalized under the Domestic Violence Law. Parent-child relations, engaging *hifz al-nasl*, are protected through the Marriage Law and Child Protection Law. By contrast, women's post-divorce economic rights, the most direct manifestation of *hifz al-mal* in the marital relationship, are most operationally articulated through circular guidance.

In short, the protection of a woman's physical integrity is located in statutes, while protection of her post-divorce economic interests relies heavily on circular guidance. This produces the proposition that the traditional rank of a *maqashid* tends to be reproduced in the institutional rank of the instrument that protects it. The hierarchical inversion is therefore not merely a technical accident; it may also reflect a philosophical ordering that has become normalized and therefore rarely appears on the reform agenda.

Classical *fiqh* addresses household economic failure through the doctrine of *i'sar*, the husband's inability to provide maintenance. The Maliki and Shafi'i schools permit dissolution in certain circumstances on the basis of *i'sar*, while the Hanafi school traditionally resists that approach on the ground that poverty is not a fault for which the husband should be blamed.⁴²

A categorical difference exists between *i'sar* and the conduct at issue in an online-gambling case. *I'sar* denotes inability: a passive condition that may occur beyond the husband's will. Online gambling may instead constitute active economic destruction, a deliberate diversion of family resources into conduct prohibited by Sharia and associated with serious financial risk. Even the restrictive Hanafi rationale that poverty is not fault does not map neatly onto gambling, because gambling itself is voluntary wrongful conduct.

This comparison reveals a further anomaly. A husband who is genuinely unable to provide maintenance has long received detailed normative attention in *fiqh*. A husband who has the ability to provide but deliberately destroys household resources does not always fit an equally distinct category, leaving the wife to rely on more general grounds for divorce. Conduct that is morally more blameworthy may therefore receive a weaker normative response, another manifestation of the marginalization of *hifz al-mal*.

The proposed re-reading does not elevate *hifz al-mal* above *hifz al-nafs*. Rather, it questions the assumption underlying its conventional placement at the lowest rank: the assumption that property loss is limited and recoverable.

⁴⁰ Abu Hamid al-Ghazali, *al-Mustashfa min 'Ilm al-Ushul* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1993), 174.

⁴¹ Abu Ishaq al-Syatibi, *al-Muwafaqat fi Ushul al-Syari'ah*, juz II (Beirut: Dar al-Ma'rifah, t.t.), 8–12.

⁴² Abu al-Walid Muhammad Ibn Rusyd, *Bidayat al-Mujtahid wa Nihayat al-Muqtashid*, juz II (Beirut: Dar al-Fikr, t.t.), 55–57. Bandingkan Wahbah al-Zuhaili, *al-Fiqh al-Islami wa Adillatuh*, juz VII (Damaskus: Dar al-Fikr, 1985), 800–806.

Online gambling linked to digital lending disrupts that assumption in three respects. First, loss is no longer limited to existing property because digital loans can transform loss into debt exceeding present financial capacity. Second, loss may become difficult to reverse where interest and unlawful lending practices compound the obligation. Third, the harm does not stop at property: depletion of family resources directly affects nutrition, continuity of children's education, and housing stability, thereby reaching interests protected by *hifz al-nafs* and *hifz al-nasl*.

The third point is decisive because it reverses the relationship among *maqashid*. In a digital economic context, *hifz al-mal* is not merely a separate lower-ranking objective; it may operate as a precondition for the practical realization of other objectives. Ibn Ashur emphasizes the interconnected character of *maqashid*.⁴³ Jasser Auda's systems approach likewise rejects an overly rigid reading of *maqashid* as a closed hierarchy.⁴⁴ Neglecting *hifz al-mal* in household relations may therefore undermine the very foundations needed to protect interests conventionally ranked above it.

The normative consequence follows. Women's post-divorce economic protection cannot be treated as merely supplementary and left entirely to discretionary judicial initiative; it requires a sufficiently binding normative foundation. This conclusion provides the substantive justification for the structural reconstruction proposed below.

Testing the Argument against Decision Number 123/Pdt.G/2024/PA.Prob

The propositions developed above are normative and must therefore be tested against a concrete case. Decision Number 123/Pdt.G/2024/PA.Prob is selected because it satisfies the critical-case criteria identified in the method. The analysis examines whether the factual prerequisites for *ex officio* intervention were present, whether the corresponding normative consequences were drawn, and what the outcome meant for the child's rights.

The case satisfies the critical-case criteria because the principal factual conditions for protective *ex officio* reasoning were not merely alleged but formally established in the court's own findings. First, the plaintiff was not found to be *nusyuz*. The court granted the divorce and awarded *hadhanah* to her on the basis that she had cared for the child properly. Nothing in the reasoning declared her *nusyuz*. The condition contemplated in Supreme Court Circular Letter Number 3 of 2018 was therefore present.

Second, the child was in fact in the mother's care. This was not incidental; it formed part of the *ratio decidendi* concerning *hadhanah*. Two witnesses testified under oath that the child developed well and was not neglected while living with the plaintiff. The panel accepted this testimony and used it to reject the defendant's

⁴³ Muhammad al-Thahir Ibn 'Asyur, *Maqashid al-Syari'ah al-Islamiyyah* (Tunis: Dar Sahnun, 2006), 78–83.

⁴⁴ Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London: International Institute of Islamic Thought, 2008), 45–55. Penerapan kerangka Auda pada persoalan hukum keluarga di Asia Tenggara dicontohkan oleh M. N. Harisudin dan M. Choriri, "On the Legal Sanction against Marriage Registration Violation in Southeast Asia Countries: A Jasser Auda's *Maqasid al-Shariah* Perspective," *Samarah* 5, no. 1 (2021): 471–95.

competing claim. The factual basis contemplated by the 2016 chamber formulation was therefore clearly established.

Third, the record reflected concrete economic harm. The plaintiff's allegations concerning online gambling and online loans formed part of the factual basis accepted in the proceedings, while the parties had lived separately for approximately four years without meaningful maintenance support. These conditions were not vague assumptions; they were developed through evidence accepted by the panel and recorded in the judicial reasoning. The case therefore offered especially favorable facts for testing the protective framework.

Despite those findings, the operative part of the judgment did not award *mut'ah*, *iddah* maintenance, past maintenance, or child maintenance. The same evidentiary record used for one part of the case was not translated into economic consequences. The relevant question is therefore not simply whether the panel was inattentive, but whether it violated a binding norm. The *ultra petitem partium* principle in Article 178(3) of the *Herzien Inlandsch Reglement* remains part of the procedural framework.⁴⁵ Articles 41(b) and 41(c) of the Marriage Law create room for judicial intervention,⁴⁶ but Article 41 itself uses facultative language. The chamber formulations specifically encouraging protective *ex officio* action are circulated through instruments whose binding status remains contested.

This is where the test reaches its central conclusion. If protection does not necessarily arise even in a case with strongly favorable facts, and the absence of protection cannot clearly be characterized as a violation of a binding norm, then the problem lies not only in the individual case but in the structure of the protection itself. The structure promises a right whose legal enforceability is institutionally incomplete.

The point can be stated more sharply: the problem is not always the violation of a sufficiently robust right, but the absence of a right formulated strongly enough to make non-application clearly unlawful. The distinction matters in practice because violation of a binding right provides a pathway for legal challenge, whereas a fragile entitlement may not.

The consequences extend beyond the plaintiff. The judgment granted the defendant access to meet the child without simultaneously imposing a child-maintenance obligation. Article 41(b) of the Marriage Law, however, places responsibility for the costs of care and education on the father, while Article 45(2) confirms that parental obligations continue despite dissolution of the marriage.⁴⁷

The resulting asymmetry is difficult to justify: the father receives relational access without a corresponding economic obligation; the mother bears day-to-day responsibility without adequate resource support; and the child, who is normatively the holder of the maintenance right, receives no corresponding award. This outcome illustrates the central philosophical proposition of the article: neglect of *hifz al-mal* may spill over into the interests protected by *hifz al-nafs* and *hifz al-nasl*. Neglect at the conventionally lowest level does not remain confined to that level.

⁴⁵ Pasal 178 ayat (3) *Herzien Inlandsch Reglement*. Mengenai ketegangan antara asas ini dan kewenangan *ex officio*, lihat M. Yahya Harahap, *Hukum Acara Perdata: Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan* (Jakarta: Sinar Grafika, 2008), 801–5.

⁴⁶ Pasal 41 huruf (b) dan huruf (c) *Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan*.

⁴⁷ Pasal 45 ayat (2) *Undang-Undang Nomor 1 Tahun 1974*.

The reconstruction must distinguish between protections achievable through judicial interpretation and changes requiring a competent maker of substantive norms. Supreme Court Regulation Number 3 of 2017 strengthens the procedure for adjudicating cases involving women, but it does not by itself create every new substantive economic entitlement. Circular letters and chamber formulations can promote consistency and encourage lawful *ex officio* action within procedural limits, while general restructuring of post-divorce rights and obligations is more appropriately placed in reform of the Compilation of Islamic Law or other authorized legislation.

Hifz al-mal is used here as an interpretive lens for evaluating protection of property and women's economic continuity, not as empirical proof that a particular judicial award automatically produces welfare. It should also be read together with dignity, justice, family responsibility, and the actual economic capacity of the obligated party. The category of *i'sar*, or inability to pay, therefore cannot be assumed without evidence of the relevant financial circumstances.

CONCLUSION

The article reaches four conclusions. First, there is a hierarchical inversion in the regulation of women's post-divorce economic rights. The provisions restricting the rights Article 119(2)(c), Article 149(b), and Articles 158 and 159 of the Compilation of Islamic Law operate through established article-form rules, work largely automatically, are indifferent to the cause of divorce, and do not depend on active judicial initiative. The provisions restoring protection rely substantially on religious-chamber formulations circulated through Supreme Court Circular Letters, require judicial action, remain facultative in important respects, and may require assessment of *nusyuz*.

Second, an institutional contradiction exists. Through the State Administrative Chamber formulation circulated in Supreme Court Circular Letter Number 4 of 2014, the Supreme Court has distinguished policy rules from regulations subject to ordinary material review, while substantive protection of women is simultaneously articulated through that kind of instrument. The result is a constrained pathway both for challenging a judgment that fails to grant the protection and for challenging weaknesses in the protecting instrument itself.

Third, there is a mismatch of regulatory content: substantive private-law consequences are carried by an instrument designed primarily for internal judicial and procedural guidance. The mismatch is easy to overlook precisely because the substantive content is progressive; the strength of the policy objective can obscure the weakness of its legal form.

Fourth, the fragility is two-layered: it exists in the formulation of the norm and in its implementation, and the two layers reinforce each other. This fragility can be understood as an institutional manifestation of the marginalization of *hifz al-mal*. In the context of technology-driven household economic harm, however, *hifz al-mal* may function as a prerequisite for the higher-order *maqashid*, as shown by the way failure to secure maintenance can spill over into the fulfillment of children's rights.

The test against Decision Number 123/Pdt.G/2024/PA.Prob supports those conclusions. The principal factual conditions for *ex officio* protection were established and accepted by the panel for purposes of *hadhanah*, yet corresponding

economic consequences were not included in the operative order, and the omission could not readily be characterized as a clear violation of a binding rule.

This study is limited to normative analysis using a single judgment as a critical test instance. Its findings therefore identify a structural problem rather than the frequency of judicial practice. Future research should measure the use of ex officio authority across a broader corpus of wife-initiated divorce decisions and empirically examine judges' understanding of the legal force of Supreme Court Circular Letters in order to determine how widely the identified fragility affects post-divorce economic protection.

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