



Received: 06-02-2025  
Accepted: 16-03-2025

ISSN: 2583-049X

## **Progressive Law Enforcement in the Fulfilment of Alimony Post Divorce**

<sup>1</sup> Zihan Fahira, <sup>2</sup> Iman Jauhari, <sup>3</sup> Muazzin

<sup>1</sup> Student, Faculty of Law, Universitas Syiah Kuala, Indonesia, Banda Aceh, Indonesia

<sup>2,3</sup> Lecturers, Faculty of Law, Universitas Syiah Kuala, Indonesia, Banda Aceh, Indonesia

Corresponding Author: **Zihan Fahira**

### **Abstract**

The implementation of progressive legislation in divorce proceedings, especially with the execution of post-divorce spousal support, necessitates careful consideration. The Banda Aceh Syariah Court employs a progressive legal method to deliver substantive justice to the interested parties. The implementation of progressive law necessitates that judges not only comply with normative regulations but also take into account the social and economic circumstances of the parties concerned. The research methodology employed in the formulation of this study is the Empirical Juridical research method. This research aims

to elucidate the application of progressive law enforcement for spousal maintenance in divorce litigation. The research findings indicate that the implementation of progressive law enforcement for spousal maintenance in divorce proceedings prioritizes substantive justice by taking into account the social and economic circumstances of the parties involved. Judges are not solely focused on formal rules, such as Article 41 letter c of Law Number 1 of 1974, but also consult instruments like SEMA Number 2 of 2019 and Perma Number 3 of 2017 to expand the interpretation of the law.

**Keywords:** Progressive Law, Alimony Fulfilment, Divorce

### **Introduction**

According to John Rawls, the enforcement of formal law must be based on objective and non-discriminatory principles of justice. This means that the law must be applied consistently and fairly to all individuals, without distinguishing their social, economic, or cultural status. Thus, formal law enforcement must ensure that every individual has the same right to legal protection and fair treatment within the legal system. Furthermore, Rawls also emphasizes the importance of transparency and accountability in formal law enforcement. According to him, the legal process must be open to the public and accountable to all parties involved. This aims to prevent the abuse of power and ensure that law enforcement operates by established principles of justice <sup>[1]</sup>.

Progressive law enforcement is an approach that considers the social, economic, cultural, and political context in enforcing the law. This approach emphasizes the importance of understanding the background of a case and its impact on society at large. In progressive law enforcement, law enforcers can use creativity and innovation to find fair and sustainable solutions to complex legal issues <sup>[2]</sup>.

The essence of progressive lawmaking is not merely about creating and implementing legal texts (rulemaking) and then being done with it. In certain circumstances, the method of law enforcement needs to involve rule-breaking (legal breakthroughs). When the legal text is deemed no longer capable of delivering justice to society, law enforcers must dare to make legal breakthroughs beyond the legal text.

Based on the definition of law enforcement above, the husband's obligation to provide maintenance to the wife is due to the existence of the marital bond between husband and wife. If alimony is not provided while still bound by the marriage contract without any legal reason, the wife has the right to reclaim her rights. Meanwhile, a divorce initiated by the husband implies that the husband is obligated to provide maintenance for the wife post-divorce. If the divorce is initiated by the wife, then the ex-husband is not obligated to provide the iddah and mut'ah rights to the wife <sup>[3]</sup>.

Alimony in divorce cases is included in Article 34 paragraph (1) of Marriage Law Number 1 of 1974, which states that "the husband's duty is to protect and provide for the necessities of life according to his ability." Furthermore, it is also

accommodated in Article 41, which regulates the consequences of the dissolution of marriage due to divorce, namely:

1. Both mother and father are still obligated to care for and educate their children, in accordance with the child's best interests.
2. You are responsible for all maintenance and education costs required for the child.
3. The court can require the ex-husband to provide alimony to the ex-wife.

The complexity regarding subsequent maintenance is clearly outlined in Article 149 of the Compilation of Islamic Law, which explains that:<sup>[4]</sup>

1. The husband is obligated to give a reasonable *mut'ah* in the form of money or goods. Except for the ex-wife before consummation.
2. The husband is obligated to provide living expenses, clothing, and a place to live for the ex-wife during the *iddah* period. Except if the wife has been given a *ba'in* divorce or is *nusyuz* and is not pregnant.
3. The husband is obligated to pay the dowry, the *ta'lik talak* agreement, and other agreements made during the marriage. And half is before consummation

Both provisions in Article 41 of the Marriage Law Number 1 of 1974 and Article 149 of the Compilation of Islamic Law explicitly regulate the rights to maintenance for the wife post-divorce, but only in the context of divorce initiated by the husband. However, there are no provisions that specifically regulate the obligation of the ex-husband to provide maintenance to the wife who files for divorce, except in certain circumstances determined by a court ruling. This indicates a legal loophole in the regulations that have not yet fully provided equal protection for women, especially in terms of fulfilling post-divorce alimony rights.

As a result, women who file for divorce tend to be in a more vulnerable position in obtaining alimony rights compared to women who are divorced through *talaq*, because there are no specific regulations that guarantee these rights in the context of a divorce initiated by the wife.

Progressive law demands that regulations respond to inequality, making the accommodation of women's post-divorce maintenance rights important to ensure social justice and their well-being after divorce. Therefore, this highlights the importance of considering the aspect of justice for women in the law. Based on the above description, the purpose of this research is to analyze and explain the implementation of progressive law enforcement regarding Wife Maintenance in Divorce Cases.

### Research Method

The type of legal research used is empirical legal research, which is a legal research approach that combines normative legal analysis with empirical observation. This method aims to understand how law is applied and functions in practice through the collection of empirical data from sources obtained through interviews, observations, or case analysis. This research not only examines existing legal rules but also how these rules are applied in the field and their impact on society<sup>[5]</sup>. The data sources used in this research are primary data and secondary data. Primary data is data obtained directly from the main source through field data collection such as interviews.

### Results and Discussions

In the perspective of progressive law, post-divorce alimony for the wife should be understood as an important element in achieving substantive justice for women. Progressive law focuses on the fair fulfillment of individual rights, with an orientation towards real social conditions, not just on the rigid text of statutory regulations<sup>[6]</sup>.

The fulfillment of a wife's maintenance in a divorce lawsuit must be viewed as a form of protection for the welfare and rights of women that are neglected in the divorce process, taking into account the real social and economic conditions of the wife, who is generally in a weaker position compared to the husband. Therefore, the rights of the wife post-divorce must be fulfilled in a way that balances the existing injustices, so that substantive justice is achieved, not just formal justice<sup>[7]</sup>.

The progressive meaning in this context is that the law must be able to create a balance and substantive justice that goes beyond merely fulfilling formal obligations. The rights of the wife in a divorce lawsuit, such as *iddah* maintenance, *mut'ah*, and child support, should be granted fairly. Judges should not only decide based on rigid legal provisions but also consider the actual conditions of the wife post-divorce, including the social and economic impacts<sup>[8]</sup>.

Progressive law demands the implementation of these rights with a perspective that prioritizes justice, especially in the context of the wife's powerlessness after divorce. Therefore, the progressiveness of the law regarding post-divorce alimony should be viewed from the perspective of fully fulfilling the wife's rights, without being hindered by gender bias or the husband's dominance<sup>[9]</sup>.

However, applying progressive law in divorce cases is often less than optimal. Although SEMA No. 2 of 2019 and Perma No. 3 of 2017 provide guidelines that recognize the wife's right to *iddah* maintenance and other rights, even when the divorce is filed by the wife, in practice, the implementation of these provisions remains weak.

Often, judges are not sensitive to the gender condition of the wife, who is more economically vulnerable after divorce, and pay more attention to the interests of the husband, who is often more dominant in the divorce process. This shows that insensitivity to gender issues remains a significant obstacle to the implementation of progressive law in Indonesia<sup>[10]</sup>.

Progressive law enforcement is often understood as the application of law that not only prioritizes formal justice but also substantive justice that takes into account the social and economic context of the parties involved. In the case of post-divorce alimony, the concept of progressive law requires judges not only to follow written norms but also to accommodate women's rights more sensitively to social and economic inequalities. The concept of gender in this progressive law demands fairer protection for women, who often become the more vulnerable party in divorce, especially in terms of fulfilling *iddah* maintenance<sup>[11]</sup>.

The implementation of this progressive law can be seen in the judge's decision on the divorce case, where the judge not only adheres to existing normative provisions but also considers the social and economic conditions of the parties involved. In Case Number 296/Pdt.G/2024/Ms. Bna handled by the Panel of Judges of the Banda Aceh Sharia Court, the application of progressive law is clearly visible in the fulfillment of the wife's post-divorce maintenance rights.

This case reflects the progressive steps taken by the judge in responding to the legal ambiguities regarding spousal support in divorce, especially after the issuance of Supreme Court Circular Letter (SEMA) Number 2 of 2019 and Supreme Court Regulation (Perma) Number 3 of 2017. This shows that the judge applies legal principles that not only rely on written norms but also prioritize substantive justice in accordance with the evolving needs of society.

In the case, the panel of judges referred to Article 41 letter c of Law Number 1 of 1974 concerning Marriage, which stipulates, "The court may require the former husband to provide living expenses and/or impose certain obligations on the former wife." Although it does not explicitly mention divorce, this article is still used by the judge to decide on the obligation of alimony based on the applicable legal provisions. This shows the judge's courage in using broader norms to adapt to the existing social and economic realities.

Mrs. Fauziati, as the Deputy Chairperson of the Banda Aceh Sharia Court, in her ruling emphasized, "In considering the application of Article 41 letter c, we refer to SEMA Number 2 of 2019, which provides clearer legal strength, especially regarding the wife's maintenance post-divorce." The existence of this SEMA provides us with a basis to decide the husband's obligations towards the wife even in contested divorce cases."<sup>[12]</sup> This opinion reflects the application of progressive legal instruments, where judges are not only fixated on the formal provisions in the Law or the Compilation of Islamic Law (KHI), but also open up space for more flexible legal applications, accommodating social changes, and providing greater protection for women's rights in divorce.

Additionally, in providing maintenance, Judge Yusri added, "There is no reason for the judge to reject the wife's claim unless it is proven that the wife is nusyuz." Therefore, as long as there is no proven nusyuz, the wife's right to iddah maintenance must still be fulfilled."<sup>[13]</sup> This shows the application of the principle of substantive justice, where the wife's right to iddah maintenance is fulfilled even in divorce cases initiated by the wife, as long as there is no evidence that the wife is nusyuz. Thus, the judge progressively adopts the view that the law does not merely function as a rigid instrument, but must be sensitive to the social conditions and real needs of the parties involved.

The existence of SEMA Number 2 of 2019 and Perma Number 3 of 2017 strongly supports the application of progressive law in this case. Previously, legal provisions were often hindered by a conservative interpretation of Islamic law, which considered iddah maintenance only applicable in divorce by talak. However, with the existence of SEMA, judges are given the space to expand their understanding of the law and provide iddah maintenance in divorce cases, as long as the wife is not proven to be nusyuz. Judge Fauziati stated, "We feel more empowered with the existence of SEMA Number 2 of 2019." This makes it easier for us to ensure the rights of wives in divorce cases, including the obligation of iddah maintenance that must be fulfilled by the ex-husband."<sup>[14]</sup>

The application of progressive law in this case is not only reflected in the use of SEMA and PERMA but also in the way the judge analyzes the social and economic conditions of both parties. The judge does not only rely on the applicable legal provisions but also considers concrete circumstances, such as the financial capability of the defendant. For example, even though the defendant's income

is limited, the judge still granted an iddah allowance of Rp1,000,000.00, considering that the decision should not overly burden the defendant. As explained by Judge Juwaini, "We do not only consider the normative legal aspects, but we also have to pay attention to the balance between the wife's right to receive iddah maintenance and the defendant's economic capability." We made this decision so that no party is disadvantaged socially and economically."<sup>[15]</sup> This decision reflects the application of progressive law that prioritizes substantive justice, where the decision taken is based on real conditions and does not solely focus on rigid legal provisions. The judge applies the principle of *judex facti*, where the decision is based on concrete trial facts, as well as the theory of *rechtsvinding*, where the judge acts as a law finder who is adaptive to social developments.

Progressive law is also in line with the theory of substantive justice, which desires that the law can touch the realities of people's lives. In this case, the judge does not merely apply the prevailing legal norms but also considers their impact on social justice. The determination of iddah maintenance that is proportional to the economic capacity of the defendant shows that the judge's decision reflects a deeper sense of justice, providing space for the more vulnerable party, in this case, the wife, to obtain her rights. Thus, the application of progressive law in this divorce case demonstrates that the law is not merely a rigid set of rules, but must also be responsive to social, economic, and cultural changes. Through the use of SEMA Number 2 of 2019 and PERMA Number 3 of 2017, the judges successfully provided a fair solution by ensuring women's rights, especially in the case of iddah maintenance, remain guaranteed even in the context of a divorce lawsuit.

This decision shows that the law must be able to provide substantive justice by considering the concrete conditions and needs of the parties involved, thereby creating more equitable social justice. The application of progressive law in this case paves the way for the protection of women's rights in family law in Indonesia, by providing a more just, inclusive, and responsive law enforcement to social dynamics.

This view aligns with the theory of legal protection proposed by Ronald Dworkin, who emphasizes that law is understood as a tool to achieve substantive justice, not merely an instrument to enforce rules mechanically. Thus, the application of progressive law in this case reflects how the legal system can be used to ensure justice that thrives in society, by principles of justice that are consistent with moral values<sup>[16]</sup>.

## Conclusion

The implementation of progressive law enforcement regarding wife's maintenance in divorce cases emphasizes substantive justice by considering the social and economic context of the parties involved. Judges are not only fixated on formal norms such as Article 41 letter c of Law Number 1 of 1974, but also refer to instruments like SEMA Number 2 of 2019 and Perma Number 3 of 2017 to expand legal interpretation. This approach provides protection for the wife's maintenance rights, including iddah maintenance, even in cases of divorce initiated by the husband, as long as there is no proven nusyuz. Judges in various rulings also consider the economic capacity of the former husband in determining the amount of alimony, so as to achieve a

balance between the wife's rights and the financial condition of the defendant. This approach demonstrates the judges' courage in applying legal principles that are responsive to social and economic dynamics. The implementation of this progressive law reflects that family law in Indonesia is becoming more inclusive, adaptive, and oriented toward broader social justice.

## References

1. John Rawls. *A Theory of Justice*, Terj: Uzair Fauzan dan Heru Prasetyo, Pustaka Pelajar, Yogyakarta, 2006. p76.
2. Gani MI. Konsep Penegakan Hukum Progresif Dalam Mewujudkan Keadilan Sosial, *Jurnal Kriminologi Indonesia*. 2020; 16(2):153-172.
3. Samsul Zakaria. Nafkah and Ketimpangan Gender (Analisis Nafkah Dalam Kompilasi Hukum Islam), *Jurnal Ijtihad*. 2020; 36(2):p63.
4. Anonim. *Kompilasi Hukum Islam*, Citra Umbara, Bandung, 2012, p368.
5. Hamzah. *Metode Penelitian Hukum Sebagai Suatu Pengantar*, Laduny Alfatama, Lampung, Cet. 1, 2019. p7.
6. Heniyatun PS. Pemberian Mut'ah and Nafkah Iddah dalam Perkara Cerai Gugat. *PROFETIKA Jurnal Studi Islam*. 2020; 21(1):39-59.
7. Afifah, Hanani. Tinjauan Hukum Progresif Terhadap SEMA No. 2 Tahun 2019 Tentang Nafkah Dalam Perkara Cerai Gugat". *Jurnal Hukum Islam*. 2020; 5(2):132-150.
8. Riduansyah. *Rechtsvinding Hakim Tingkat Pertama dalam Menentukan Kadar Nafkah Istri Pasca Perceraian*, Thesis, Universitas Islam Negeri Jakarta, 2020.
9. Rahmawati, Fitri. *Perlindungan Hukum Terhadap Istri Pasca Perceraian dalam Perspektif Hukum Progresif*". *Jurnal Hukum dan Pembangunan*. 2019; 8(2):231-245.
10. Kurniawan MI, Hidayati N, Hambatan Pelaksanaan SEMA No. 2 Tahun 2019 terhadap Pemenuhan Hak-hak Perempuan Pasca Cerai Gugat di Pengadilan Agama Kediri. *e-Jurnal Al-Syakhsyiyah Journal of Law and Family Studies*. 2022; 4(1).
11. Asikin Zainal, *Pengantar Ilmu Hukum dan Tata Hukum Di Indonesia*, Rajawali Press, Jakarta, 2018, 78-97.
12. Interview with Fauziati, S.Ag., M.Ag.
13. Interview with Judge Drs. H. Yusri, M.H
14. Interview with Fauziati, S.Ag., M.Ag.
15. Interview with Drs. Juwaini, S.H., M. H.
16. Ronals Dwarkin, *Kerajaan Hukum*, Translated: Muhammad Bukhari, Nusa Media, Bandung, 2009, 154-170.