

Socio-Legal Updates of Children's Rights on the Protection and Shared Assets in Divorce Cases in Indonesian Family Law

Muhyidin

Lecturer at Diponegoro University, Semarang, Indonesia

Abstract

The focus of this research study is the law on the distribution of joint assets and child custody as a result of divorce against husbands and wives who work based on justice value. Article 97 Compilation of Islamic Law which determines that widows of divorced widows get a half share of the joint property. This is inseparable from the provisions of Article 31 and Article 34 of Law Number 1 of 1974 concerning Marriage. This study uses normative juridical method, sociological juridical method, and comparative juridical research method; and using decision data and interviews with judges of the religious courts, using critical paradigms and using inductive qualitative analysis. The results of the study were that the judge had begun to make legal discoveries. Factors that influence the ruling of the religious courts that do not bring about justice are substantial, structural, and cultural factors. The current division of shared assets and the rights of child ownership as a result of divorce is not yet fair, meaning that the construction of the distribution of shared assets and child rights as a result of divorce is currently granted by The reconstruction of the legal value of the distribution of shared assets due to divorce is carried out casually based on its contribution by taking into account the benefit and well-being of the company.

Keywords: *Child rights, custody, child care, marital assets, family law.*

Introduction

Marriage law is part of the teachings of Islam that must be obeyed and implemented according to the religious provisions. With the enactment of Law Number 1 of 1974 concerning Marriage, the reception theory by Snouck Hurgronje as taught in the Dutch East Indies era was erased formally¹. The reception theory is a theory which states that Islamic law only applies in Indonesia to adherents of Islam, if something Islamic law has clearly been permeated by and in customary law². By looking at certain articles in this Marriage Law there is no doubt to accept the argument that Islamic law

has become a direct source of law without the need for assistance/intermediaries for customary law³. Marriage law that applies to all Indonesian people, namely Law Number 1 of 1974 concerning Marriage, was ratified and signed by the President Soeharto in Jakarta on January 2, 1974, and that day was also promulgated and signed by the Minister/Secretary of the Republic of Indonesia Maj. Gen. Sudarmono, as well as being included in the 1974 State Gazette no. 1 and the explanation contained in the additional sheet of the Republic of Indonesia No. 3019. This law contains 14 chapters and 67 articles. In it regulates the basis of marriage, conditions for marriage, marriage prevention, marriage cancellation, marriage agreements, rights and obligations of husband and wife, property in marriage, marriage termination and its consequences, child status, rights and obligations between parents and children, guardianship and other provisions^{4,5,6}.

For the smooth implementation of Law Number 1 of 1974 the government issued Government Regulation Number 9 of 1975 concerning Implementation of Law Number 1 of 1974. Government Regulation Number

Corresponding Author:

Muhyidin

Lecturer at Faculty of Law, Diponegoro University, Jl. Prof. Soedarto, Tembalang, Semarang, Central Java 50275, Indonesia
e-mail: muhyidin.fhundip@gmail.com

9 of 1975 is contained in State Gazette No. 12 and its explanation in the Supplement to the State Gazette No. 3050. Government Regulation Number 9 of 1975 contains 10 Chapters and 47 articles. The study aims to examine further the case of the distribution of shared assets and the right of child care due to divorce of husband and wife. Different from the perspective offered in previous studies, this paper also aims to examine the right for child custody after divorce^{7,8,9}. This is based on the assumption that there is an absence regarding clear arrangements regarding the distribution of shared assets, as well as child custody due to divorce in Islamic Marriage Law.

Marriage in Religious and Legal Perspectives:

Marriage is very important in the lives of people, individuals and groups. By way of a legal marriage, the association of men and women takes place in an honorable manner according to the position of humans as respectable beings. Relationships of married life are fostered in an atmosphere of peace, tranquility, and affection between husband and wife. The offspring of the result of a legal marriage adorns family life and at the same time is a continuation of human life in a clean and respectful manner. Human relations between men and women are determined to be based on a sense of devotion to God and devotion to humanity in order to carry on the life of its kind. Marriage is carried out on the basis of the willingness of the parties concerned, which is reflected in the provisions of the marriage before marriage and consent granted in the marriage ceremony which is also witnessed before the public in an event. The rights and obligations of a husband and wife are regulated very neatly and in an orderly manner, as well as the rights and obligations between parents and children. If there is a dispute between husband and wife, it is also arranged how to deal with it. It also guided the customs of social courtesy in the family as well as possible so that harmony of life remains maintained and guaranteed.

From the foregoing, it can be seen that marriage has a very important position in Islamic law because the marriage law regulates family life procedures which are the core of people's lives in line with the position of humans as respectable beings over other creatures¹⁰. Opinion which states that the reception theory both as a theory and as a provision in article 134 paragraph 2 Indische Staatsregeling has been erased by the enactment of the 1945 Constitution. This can be seen in the 1945 Constitution article 29 paragraph (2), which contains

provisions: The state guarantees the independence of each population to embrace their respective religions and to worship according to their religion and beliefs. From the provisions of article 29 paragraph (2), the government has the right to regulate certain issues based on Islamic law, to what extent these regulations are intended for citizens who are Muslim¹¹.

Child Rights on Shared Assets as Results of Divorce: Regarding the consequences of divorce against children Law Number 1 of 1974 concerning Marriage under Article 41 determines that the mother or father remains obliged to look after and educate their children, solely based on the interests of the child, if there is a dispute regarding childcare, the court gives its decision. The father is responsible for all the maintenance and education costs required by the child, if in fact the father cannot provide this obligation, the court can determine that the mother will share the costs. Article 149(d) Compilation of Islamic Law, stated that if the marriage is broken because of divorce, then the ex-husband is required to provide child custody fees for his children who have not reached the age of 21 years old^{12,13,14}. According to Law Number 1 of 1974 and the Compilation of Islamic Law, parental divorce does not eliminate the obligation of parents to care for and educate their children. It is the father who is responsible for bearing the costs of maintaining and educating his children with the provisions that if in reality the father cannot fulfill his obligations, then the mother can also be burdened to bear the costs. As a result of divorce against a child is about the issue of parental power, with the divorce resulting in the termination of marriage, the court determined that each of the children who had not grown up who of the parents who do guardianship. Regarding the trusteeship it is up to the judge who determines and who will be appointed guardian only in the appointment must be considered the interests of the child.

Most people, especially parents or husband and wife, do understand and realize that caring for their child is an obligation. However, there are also those who mistakenly carry out child care, so that there are only those who are concerned only with the physical growth of their children and meet the material needs of children excessively, without regard to the child's mental growth and the spiritual needs of children in the form of attention to mental development and giving love affection for him. This mistake may be caused by the lack of understanding of the parents of the meaning and understanding of the child care, as well as the obligations that exist in it.

Child care is an authority to care for and educate people who have not been adults who have not sufficiently acquired their intelligence. The emergence of the child care problem is sometimes caused by divorce or because of death where children are not yet mature and are no longer able to take care of themselves, hence the need for people who are responsible for caring for and educating the child^{15,16,17}. Child care is to equip children materially and spiritually, mentally and physically so that children are able to stand alone in facing life and later life when he is an adult. Child care covers all the needs of the child, physically and spiritually. So including child care is to develop the intellectual soul of children through education.

Islamic jurists agree that the mother is the person most entitled to do child care. However, they differ in matters, especially regarding the length of a mother's upbringing, which is most entitled after the mother and also about the conditions for being a caregiver mother. As long as there is no obstacle to taking care of the children, the mother must perform the child care unless there is an obstacle preventing her from carrying out the child care.

In the condition of the more dominant wife/greater contribution in meeting the needs of the family, the right of the child care due to divorce, the child in the care of the mother. This right will be erased if the mother behaves badly or because of desires the child himself (the child who has been in teenage has the right to choose to get child care from his father or mother, article 156 letter b of the Compilation). Thus, the husband (also applies to the wife) can also ask for custody of the child based on the best interests of the child, by proving the arguments that one of the parties apparently cannot be used as a role model for children. In other words one of the parties cannot carry out a good obligation as a parent to their children, in the same conditions. First, one party commits adultery or becomes a drunkard, compactor, gambler, etc. that is difficult to cure; second, one party has left the other party without the permission of the other party and without a valid reason or because of anything else beyond its ability; third, one party gets a prison sentence; fourth, one party commits atrocities or severe persecution that endangers the other party; fifth, in carrying out the activities of caring for children so far, it turns out that it is no better than the party that submitted it; and/or other reasons¹⁹.

Article 156 of the Compilation point b stated that as a

result of the marriage breaking up due to divorce are that children who are in teen have the right to choose custody of the child from their father or mother. One thing that needs to be warned is that whoever is ultimately chosen to be followed, the success of education in order to become a godly child becomes the joint responsibility of his father and mother. Everything is discussed together, divorce father and mother do not result in the child being a victim. The child should never instill hatred to parents, mothers should not make the father's name in the face of the child, and vice versa. The child who follows the father should not be separated at all from his mother and the child who follows the mother should never be separated from his father's relationship.

Conclusion

The current division of shared assets and the rights of child ownership as a result of divorce is not yet fair, meaning that the construction of the distribution of shared assets and child rights as a result of divorce is currently granted by Marriage Law No. 1 of 1974, Compilation of Islamic Law has not fulfilled a sense of justice. The factors which influence the distribution of shared assets and the rights of the children of a child due to divorce are not based on justice. The reconstruction of the legal value of the distribution of shared assets due to divorce is carried out casually based on its contribution by taking into account the benefit and well-being of the company. The provisions of article 97 the Compilation will not be considered fair and cannot explain or resolve if there is a case of a wife other than as a housewife as well as a household regulator, the wife also contributes to family needs. The judge needs to make a legal discovery. The right to child care often becomes a problem after divorce. This study uses normative juridical method, sociological juridical method, and comparative juridical research method; and using decision data and interviews with judges of the religious courts, using critical paradigms and using inductive qualitative analysis. The results of the study were that the judge had begun to make legal discoveries such as in the decision of the Padang High Religious Court with No. 38/Pdt.G/2013/PTA.Pdg. by adjudicating themselves, namely establishing joint assets of 1/3 part for the plaintiff (husband) and 2/3 part for the defendant (wife) on the basis of consideration in obtaining joint property of the plaintiff and defendant during the marriage, the defendant is more dominant and plays an active role as a civil servant. Factors that influence the ruling of the religious courts that do not bring about justice are substantial, structural, and cultural

factors. The development of the value of the division of shared assets due to divorce is carried out casually based on its contribution by taking into account the benefit and well-being of it. The development of the value of child custody due to divorce is based on orientation in child care is solely for the benefit, benefit and benefit of the child concerned. The theory of case law with justice and prosperity can be used as a contribution in the formation of national law in the field of marriage, especially to re-construct article 37 of Law Number 1 of 1974 and Article 97 of Compilation of Islamic Law.

Ethical Clearance: This research was ethically approved by Faculty of Law, Universitas Diponegoro, Semarang, Indonesia

Funding: This research receives Research Grant Funds at the Faculty of Law of Diponegoro University in the 2020 budget year.

Conflict of Interests: There are no conflict of interests

References

1. Barlinti YS. Harmonization of Islamic Law In National Legal System: A Comparative Study Between Indonesian Law And Malaysian Law. *Indon. L. Rev.* 2011;1:35.
2. Mas'ud M. The application of islamic law at the colonial age and it's implication for the indonesian religious justice system. *Journal of Islamicate Studies.* 2018;1(2)..
3. Lukito R. Islamic Law and Adat Encounter: The Experience of Indonesia. Logos; 2001.
4. Katz JS, Katz RS. The new Indonesian marriage law: a mirror of Indonesia's political, cultural, and legal systems. *Am. J. Comp. L.* 1975;23:653.
5. Suadi A. Peranan Peradilan Agama Dalam Melindungi Hak Perempuan Dan Anak Melalui Putusan Yang Memihak Dan Dapat Dilaksanakan/ The Role of Religious Court In Women And Children Rights Protection Through Partial And Executable Decision. *Jurnal Hukum dan Peradilan.* 2018 Dec 18;7(3):353-74.
6. Nurhadi N. The dualism of the supreme court's decisions on the position of non-marital child. *Jurnal Hukum dan Peradilan.* 2019 Jul 31;8(2):228-54..
7. Waridin W, Dwiyanto BM, Saraswati R, Mafruhah I. Formulation of problem-solving design for indonesian informal sector migrant workers towards post-placement independence: Case study in Malaysia. *Research in World Economy.* 2020;11(1):115-122
8. Utami NS, Prasetyoningsih N, Hidayat A, (...), Saraswati R, Budiono A. Equality of the political rights of people with mental disorders (PWMD) in general elections. *Indian Journal of Forensic Medicine and Toxicology.* 2019;13(4):1571-1575
- 9]Azhar M, Solechan S, Saraswati R, Suharso P, Suhartoyo S, Ispriyarso B. The New Renewable Energy Consumption Policy of Rare Earth Metals to Build Indonesia's National Energy Security. *InE3S Web of Conferences 2018 (Vol. 68, p. 03008).* EDP Sciences.
10. Soemiyati N. Hukum Perkawinan Islam Dan Undang-undang Perkawinan (undang-undang No. 1 Tahun 1974, Tentang Perkawinan). Liberty Yogyakarta; 1986.
11. Hazairin, T. S. T. H. Hazairin, Hukum Kekeluargaan Nasional. Jakarta: Tintamas; 1982.
12. Julia J. The Maqāsid Analysis on the Nafkah Iddah of Divorce Lawsuit in the Compilation of Islamic Law (KHI) Article 149 (b) and the Supreme Court Verdict Number 137/K/AG/2007. *Ulu mudin.* 2020 Jan 31;13(1):23-43.
13. Ristyawati A, Saraswati R. An Effort of Political Party Simplification for the Effective Government Realization. *IOP Conference Series: Earth and Environmental Science* 2018;175(1),012170
14. Tyesta LA, Saraswati R, Faisal A. Implications of Legal Positivism of the Promotion of Children's Rights on National Law. *Journal of Advanced Research in Law and Economics.* 2020 Mar 31;11(2):661-6.
15. Alam S, Fauzan M. Hukum Pengangkatan Anak Perspektif Islam. Kencana Prenada Media Group; 2008.
16. Saraswati R, Ristyawati A, Basworo RS. Recent developments and changes in the governance of regional legal products in Indonesia: Supervision, evaluation and clarification mechanisms. *International Journal of Innovation, Creativity and Change.* 2020;12(7):1-9
17. Ariyanto A, Saraswati R, Sukirno S. Asymmetric election of protecting the voting of the noken

- system in selecting the regional head in Papua. *Test Engineering and Management*. 2020;83(2):3229-3237
18. Jauhari I. Comparison of Child Protection Law between Indonesia and Malaysia. *Indonesian J. Int'l L.* 2014;12:84.
19. Roisah K, Utama YJ, Saraswati R, Whidari Y. Status and contemporary development of employee inventions ownership in G-20 countries. *European Research Studies Journal*. 2018;21(2):214-224