

Child Custody Due to Divorce in Indonesia Post the Constitutional Court Decision Number 140/PUU-XXI/2023 from a Human Rights Perspective

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Abstract

Article 1 of Marriage Law Number 16 of 2019 amending the Marriage Law 1 of 1974, states that marriage is a marriage is a physical and mental bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on God Almighty, a marriage that is built based on physical and mental bonds, with the aim of being eternal, and getting offspring that can continue generations. However, not all existing marriages run smoothly as expected, the many obstacles and trials in every household sometimes trigger a divorce, which consequently has an impact on one of the children born. As a result, many divorced couples feel entitled to child custody. This paper takes the formulation of the problem of how child custody due to divorce, after the decision of the Constitutional Court Number 140/PUU-XXI/2023 from the perspective of Human Rights. This paper uses a normative juridical writing method with a statutory approach.

Keywords: *Marriage Law, Divorce, Child Custody.*



A. INTRODUCTION

Article 1 of the Marriage Law Number 16 of 2019 amending the Marriage Law 1 of 1974 concerning Marriage provides a definition of marriage, namely “Marriage is a physical and mental bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on God Almighty” this definition is formed by the Law, so that the public will understand what the core meaning of a marriage is. The union of a man and a woman in a marriage bond, results in the acquisition of a special legal position, the man will become a husband, and the woman will become a wife. And the legal position of the husband and wife, on the shoulders of each of them is a noble obligation so that the household that is built remains eternally happy.

Special legal position as husband and wife, with the aim of giving birth to offspring and successors to their generation. Generation after generation is formed, getting healthy offspring who will become successors is the ideal of every family. Article 30 of the Marriage Law states that husband and wife have a noble obligation to uphold the household which is the basic structure of society (Rika & Yanti, 2023). The purpose of marriage is to form a happy and eternal family, a noble goal that has always been the dream of every couple who forms a family. However, not all marriages that are built are able to run harmoniously, as desired and expected, there

is incompatibility, disharmony which ultimately leads to separation and divorce. Finally, every separation of parents will have a direct impact on children. Especially minors, who still need the love of both parents. Divorce that cannot be avoided, has an impact and even creates new problems, namely each of them feels they have custody of the child.

The marriage law stipulates that custody of children resulting from divorce is given to the father and mother. However, if there is a dispute over the control of children whose parents are divorced, the court can give a decision regarding who the control of the children belongs to. Not a few problems arise as a result of child custody being terminated by the court, and given to one of the parties (one of the parents) however, due to the dissatisfaction of the other party, so that there are those who forcibly take the child under the care of their former spouse.

B. METHODS

This research is normative legal research which is understood as legal research that examines a norm or provision that applies, it can also be said to be research conducted by examining library materials or secondary data (Irwansyah, 2020). By using the Legislation approach, this approach is based on examining all regulations related to legal issues, besides that this research also uses a case approach. The cases examined are cases that have received permanent legal force court decisions, as well as using the law approach (statue approach). The analysis of this research is organized according to the legal criteria of the research, especially after the decision of the Constitutional Court Number 140/PUU-XXI/2023.

C. RESULTS AND DISCUSSION

1. Child Custody After Divorce

The institution of marriage is a sacred institution, with the fact that any religion always teaches how a marriage is held, and how husband and wife are obliged to fill the household ark that they built by carrying out various obligations that must be fulfilled (Isnaeni, 2016). Every household has ideal conditions that produce harmony (Siregar et al., 2023). Marriage according to Islamic Law as a strong agreement or *misaqon ghaliza*, which is confirmed in Article 2 of Presidential Instruction Number 1, 1991 concerning the Compilation of Islamic Law in Indonesia (hereinafter referred to as the Compilation of Islamic Law), states that marriage according to Islamic Law is marriage, which is a very strong contract, or *misaqon ghaliza* to obey the commands of ALLAH SWT and carrying it out is an act of worship "then continued with Article 3 of the Compilation of Islamic law "marriage aims to create a *sakinah, mawaddah, and warahmah* household life".

The definition of marriage is also known in customary law. Marriage according to customary law not only binds a man as a husband and a woman as a wife, but marriage is a customary bond, namely a kinship bond, as Ter Haar stated that marriage is a kinship affair, family affairs, community affairs, dignity affairs, and personal affairs". The ideal goal of marriage, both according to National Law, Islamic

Law, and Customary Law, is a strong bond between a man and a woman based on God Almighty, becoming husband and wife, and involving family, kinship, but in reality, this goal is difficult to realize (Syaifuddin et al., 2014).

According to Hilman Hadikusuma, the purpose of marriage according to the Marriage Law is for the happiness of husband and wife to get offspring, uphold religion, in a family unit that is parental (*keorangtuaan*). So, it is narrower than the purpose of marriage according to customary law, whose people adhere to a patrilineal (fatherly) kinship system and a matrilineal (maternal) kinship system (Syaifuddin et al., 2014). Forming a family through marriage with the purest purpose is to get offspring, which can later continue the family clan. Getting healthy offspring, raising and providing affection, and providing proper education. It is possible that the marriage will be stronger with the presence of children.

The definition of a child is regulated in Article 42 of the Marriage Law, which states that a legitimate child is a child born in or as a result of a legal marriage. Which means that the position as a legitimate child is determined by the position of the validity of the parents' marriage. A marriage that is conducted legally also has an impact on the child who is born, namely the result is that the child is a legitimate child. As for children born outside a legal marriage, they can be recognized (child recognition) by their father/mother (explanation of Article 49 paragraph (1) of Law No. 23 of 2006 concerning Population Administration, or legitimized (child legitimation) through the marriage of their parents (explanation of Article 50 paragraph (1) of Law No. 23 of 2006 concerning Population Administration. If the parties, namely the parents, go to a Notary to make a deed of statement of heirs for the heirs (Adjie, 2021).

However, in reality, marital relations do not always go according to the will of the law, namely eternal life based on the Almighty God. Bad marital conditions, resulting in any aspect, the marital relationship is better terminated than continued (Syaifuddin et al., 2014). Marriage breakup is the result of a marriage that does not always run smoothly, couples who do not perform their household duties properly will not achieve their goals as a couple. In principle, the breakup of marriage, due to disharmony between husband and wife, which gives rise to the will to break the marriage relationship by way of divorce, including the relationship between husband and wife who do not respect each other, do not keep each other's secrets, household conditions that are not safe and peaceful, and there are cross disputes, or very principled disagreements (Syaifuddin et al., 2014).

The dissolution of marriage due to the will of the husband and wife or the will of both parties, due to the absence of harmony is called the term divorce, which stems from the non-performance of the obligations of husband and wife according to the applicable marriage law. Divorce law in Indonesia is a set of laws or rules contained in a record that has been legalized by the state. Divorce law is part of the law that regulates the divorce procession of a family, which becomes a fair and orderly legal framework for couples who want to end their relationship. Indonesian divorce law

also aims to protect the interests and welfare of all parties involved. Whether it is the husband, wife, and children, the divorce law will regulate everything to be fair.

One of the principles of marriage is that divorce is made difficult, protecting the rights and obligations of the wife and children, realizing the main purpose of marriage, namely a happy and lasting family, preventing divorce that is done carelessly. The principle of complicating the legal process of divorce due to attention to the very essential purpose of marriage, because the occurrence of divorce results in the failure of efforts as an endeavor to form a happy and eternal family (household) due to the breakup of marriage and even its impact can be broad, not only resulting in the husband and wife who divorce, In addition, with divorce other consequences arise, the emergence of conflicts between ex-husbands and ex-wives stemming from the struggle for property and control of children who have been born in their marriage.

Divorce can only be carried out in front of a court session, there must be sufficient reason that the husband and wife will not be able to live together Before applying for divorce, the court will try to reconcile the two parties The divorce process must go through alternative solutions, such as mediation. The emphasis on the principle of making divorce difficult in the Religious Courts is an approach taken to suppress the practice of divorce that is frivolous and does not consider the profound consequences. It aims to encourage a more thoughtful divorce process, taking into account mutual interests, and ensuring that any decisions taken are in accordance with legal norms. Thus, the implementation of the principle of making divorce difficult in the Court can be considered as an effort to create a better understanding of Islamic law and sharia, as well as having a positive impact on the community that follows the divorce procedures that are clearly regulated by the *nash* and Islamic sharia for a contested divorce, clear reasons are needed (Hermansyah, 2024).

This is as stipulated in the provisions of Article 39 paragraph (2) of the Marriage Law. Article 38 of Law No. 1/1974 explains that "Marriage can end due to death, divorce, and a court decision." In a legal context, divorce reflects the end of the marriage bond, resulting in the termination of the husband, and wife relationship. The article states that in order to divorce there must be sufficient reason that the husband and wife will not be able to get along as husband and wife. In this regard, the Marriage Law and KHI regulate a number of reasons that can be used as a basis for divorce.

Divorce is a legal act that is the result of the breakdown of a marital legal act. Divorce must be carried out in front of the court in order to provide legal protection to ex-wives and their children and the rights of ex-wives and children can be fulfilled because it has permanent legal force. With the breakup of a marriage based on a court decision that has permanent legal force. Divorce is a lawful act that is hated by Allah SWT, because the negative impact of divorce, one of which is on children resulting from marriage.

Furthermore, when referring to the provisions of Article 105 of the Compilation of Islamic Law, (hereinafter abbreviated as KHI), child custody or maintenance of children who are not yet *mumayyiz* (able to distinguish between good and bad things)

or not yet 12 years old is the right of the mother. Meanwhile, the maintenance of children who have *mumayyiz* is left to the child to choose between the father or mother as the holder of custody or maintenance rights.

In the case if a person is Muslim, then it can refer to the provisions of Article 105 KHI as mentioned above, that the two children are not yet 12 years old and are assumed not to be *mumayyiz*, so that the custody of the child should be with the mother. Meanwhile, according to KHI, all costs of *hadhanah* and child maintenance are the responsibility of the father according to his ability, at least until the child can take care of himself or is 21 years old.

However, KHI also regulates further, that if the holder of *hadhanah* (maintenance or custody rights) turns out to be unable to guarantee the physical and spiritual safety of the child even though the costs of *nafkah* and *hadhanah* have been fulfilled, then at the request of the relatives concerned, the Religious Court can transfer *hadhanah* rights to other relatives who have *hadhanah* rights as well. Furthermore, in relation to the costs of child maintenance, the Marriage Law stipulates that the costs of child maintenance and education are the responsibility of the father. However, if the father in reality cannot fulfill this obligation, the court can determine that the mother shares in these costs.

Thus, in this case, the former husband has the obligation to provide the cost of maintaining the children who are in the care of the mother. In the case of Muslims, it can refer to the provisions of Article 105 KHI as mentioned above, that the two children are not yet 12 years old and are assumed not to be *mumayyiz*, so the custody of the child should be with the mother.

The explanation of child maintenance is clearly contained in Article 41 of the Marriage Law, that upon the dissolution of marriage there are several consequences, namely:

- a. Both mother and father remain obliged to maintain and educate their children, based solely on the interests of the child; if there is a dispute regarding the control of the children, the court gives its decision;
- b. The father is responsible for all the costs of maintenance and education needed by the child; if the father in reality cannot fulfill these obligations, the court can determine that the mother shares in these costs;
- c. The court may require the ex-husband to provide maintenance and/or determine an obligation for the ex-wife.

In accordance with the meaning and formulation of the Law, to determine guardianship rights, child maintenance rights that must be considered is in the legal interest of the child. So, the judge must really pay attention if the child is maintained by his mother or father has a better guarantee of social life and welfare (Khair, 2020).

Although Islamic law opens an emergency door to divorce, divorce must not bring disaster, but divorce must be able to bring peace and benefit to the husband and wife and their children. The benefit in a divorce means that there is no arbitrary divorce carried out by the husband against the wife, there is a guarantee that the rights of the wife and her children will be fulfilled as a result of the divorce. Therefore, to

ensure the realization of the benefit in a divorce, the state authorities who have the authority are obliged to protect the weak party, in this case the wife and her children, by making rules for the process and procedure of divorce (Jamaluddin, 2012).

2. Children's Rights from a Human Rights Perspective

Applicant for judicial review (JR) which gave birth to the Constitutional Court's decision Number 140/PUU-XXI/2023, an application submitted by five women who faced the situation of deprivation of child custody by the ex-husband after divorce. Cases of seizure and deprivation of child custody do not only occur when there is a decision on child custody, but seizure of child custody is also found in cases when the divorce process is still ongoing.

The filing of the judicial review is due to the large number of cases of complaints against deprivation or seizure of child custody, both those that have been decided by the court and those that are still in the process of applying for custody of the child. The police are also reported to often consider cases of child seizure as domestic affairs. As a result, the police tend to be slow in handling cases, some police are hesitant to follow up on reports from women facing deprivation of child custody by ex-husbands on the grounds that the reported perpetrator is the father of the child who was taken away, based on the submission of a judicial review of Article 330 Paragraph (1) of the Criminal Code, that the Police now no longer need to hesitate in immediately processing cases of deprivation of child custody with reference to the Constitutional Court's decision. The Constitutional Court's decision provides clarity on the interpretation of Article 330 Paragraph (1) of the Criminal Code, which places the father or mother who deprives a court-ordered child custody right as an act against the law.

In the fourth amendment to the 1945 Constitution of the Republic of Indonesia, Article 28 I paragraph (2) regulates human rights. The addition of the formulation of human rights and the guarantee of respect, protection, implementation and promotion of human rights in the 1945 Constitution is not only due to the desire to follow the development of perspectives on human rights which are increasingly considered important globally, but also because it is one of the requirements for a state of law. The formulation of human rights in Article 28 I paragraph (2) of the 1945 Constitution constitutionally guarantees the human rights of every citizen and resident of Indonesia. In that context, Indonesians believe that human rights need to take into account the characteristics of Indonesia and every human right must be accompanied by an obligation in order to create mutual respect and respect for human rights among all parties.

The Indonesian Constitution, the 1945 Constitution as the highest legal norm has affirmed that "every child has the right to survival, growth and development and the right to protection from violence and discrimination" (Article 28B Paragraph (2) of the 1945 Constitution). The inclusion of children's rights in the constitutional text means that the position and protection of children's rights is a crucial aspect to be explained in more detail and applied in everyday life. In Law No. 39/1999 on Human

Rights, there are 15 articles 52-56 that specifically detail the rights of children, as the lawmakers realized that children are a vulnerable group to human rights violations. (Al Faruq, 2022). The importance of the position of children for this nation means that we must be responsive and progressive in organizing the applicable laws and regulations.

The submission of the material Test against the Criminal Code (KUHP) was submitted by five women, namely Aelyn Halim, Shelvia, Nur, Angelia Susanto, and Roshan Kaish Sadarangani. The five petitioners are the women who are fighting for custody of the child. The applicants tested the phrase "whosoever" in Article 330 paragraph (1) of the Criminal Code. All five applicants are a divorced mother and have custody of the child in accordance with the court decision. However, it is a pity that they can no longer meet with their beloved child because the ex-husband allegedly kidnapped the child. The petitioners also revealed that they had reported the treatment of the ex-husband to the police with reference to Article 330 paragraph (1) of the criminal code, but in fact the report was not accepted or did not develop on the grounds that the person who kidnapped the child was his own biological father.

"Amar verdict, reject all the petitions of the petitioners", said Chief Justice Suhartoy while reading *amar* verdict accompanied by eight constitutional judges. In the *amar* reading of Decision number 140/PUU-XXI / 2023, the Constitutional Court's decision states that the phrase "whoever" in Article 330 Paragraph (1) of the Criminal Code also includes fathers and mothers who carry children so that it conflicts with court decisions related to child custody authority. This decision provides legal certainty by closing the multi-interpretation gap in that article. The main purpose of this Constitutional Court decision is the creation of legal certainty. Previously, as submitted by the applicant, a number of police officers showed hesitation in following up on reports from women who experienced deprivation of child custody by ex-husbands on the grounds that the reported perpetrator was the father of the Taken Away child. Disputes regarding child custody not only arise after the divorce process is completed, but can also occur while the divorce process is still ongoing. A group of husbands deliberately hides or disconnects the child from the mother.

This action is done to hold the wife hostage so as not to sue for divorce, or intended to cause prolonged suffering to the wife. In the 2019-2023 period, Komnas Perempuan recorded 222 cases of violence against wives (KTI) which were also related to the seizure of children from 3079 total KTI cases (Yentriyani et al., 2024)

Komnas Perempuan noted that the experience of the judicial review (JR) applicants, namely five women who faced a situation of deprivation of child custody by their ex-husbands after their divorce, was a situation that many women also experienced. Based on data reporting directly to Komnas Perempuan in the range of 2019 to 2023, as many as one third or 93 out of a total of 309 cases of violence committed by ex-husbands are related to child care. Recorded from 93 cases that occurred 364 acts of violence committed by ex-husbands; a third or 126 acts of violence are directly related to the struggle for childcare (Yentriyani et al., 2024). There are also

those who are 'rushed' and hidden until their whereabouts are not traced, even for years.

Komnas Perempuan recognizes that the right to legal protection at the conclusion of marriage is an integral part of the right to gender equality for women in the context of marriage. This can be found in Article 16 of the Convention on the elimination of all forms of discrimination against women (CEDAW) which has been ratified through law no. 7 of 1984. confirmed. CEDAW has three main principles, namely equality, non-discrimination, and the obligation of the state to ensure the realization of equal rights of men and women (Niswah, 2012). Meanwhile, the right to legal protection and the right to be free from discrimination are rights protected in the Indonesian constitution. Thus, this decision of the Constitutional Court also contributes to ensuring the implementation of the country's constitutional responsibility for human rights.

This Constitutional Court decision also has a contribution to the fulfillment of children's rights to growth and development, as guaranteed in the 1945 Constitution of the Republic of Indonesia. This right is also contained in Law No. 23 of 2002 on Child Protection which mandates that the best interests of children are an important consideration in matters of parenting. The deprivation of parental rights followed by the severance of all communication links between mother and child causes the child to be unable to access equal care after divorce, which is feared to have a long-term impact on her growth. This Constitutional Court decision can be in line with the rights of the child mandated by several positive laws that protect the rights to the growth and development of children. The Indonesian government has recognized the importance of protecting children and has enacted laws to protect their rights and well-being. Law No. 4 of 1979 on child welfare is the legal basis for child protection in Indonesia.

a. Law No. 39 of 1999 on human rights

According to law No. 39 of 1999 on Human Rights, every child is entitled to protection from parents, family, society, and the state. The rights of the child are human rights and are recognized and protected by law. Forms of legal protection according to Law No. 39 of 1999 contained in: Article 52 (1) that every child is obliged to get protection from parents, society and the state. Article 58 (1) that every child must obtain legal protection from various forms of violence, sexual abuse, and unpleasant acts. Article 64 that every child is obliged to obtain protection from work that endangers him, which can interfere with physical health, morale, and social life. Article 65 that every child has the right to obtain protection from sexual abuse, kidnapping, child trafficking, exploitation activities and various forms of abuse of narcotics, psychotropic substances, and other addictive substances. Article 66 states that every child has the right to freedom and humane treatment, the right to effective legal assistance, when dealing with the law, the right to special treatment, if tripped criminal and entitled to obtain justice in juvenile court.

- b. Law No. 23 of 2004 on the elimination of domestic violence
Article 5 of this law contains the Prohibition of domestic violence, both physical and psychological violence and neglect in the household. Forms of protection against children are:
- 1). Forms of legal protection against physical child abuse, is torture, abuse and beating of children, with or without the use of certain objects, resulting in physical injury or death of children.
 - 2). Forms of legal protection against psychological child abuse, such as rewards, showing pornographic images.
 - 3). The form of legal protection against child sexual abuse is violence in the form of treatment of sexual contact either directly or indirectly.
 - 4). Forms of legal protection against child violence socially include child neglect and Child Exploitation.
- c. Law No. 35 of 2014 on Child Protection. Form of child protection under the Child Protection Act written in:
- 1). Article 13 paragraph 1, that as long as the child is in the care of a parent, guardian, or any other party responsible for the care, is entitled to protection from the treatment of violence, persecution, neglect and discrimination and injustice.
 - 2). Article 15, that every child has the right to protection from abuse in political activities, involvement containing elements of violence and involved in war.
 - 3). Article 16 paragraph: (1) that the child shall receive protection from torture, abuse and inhumane sentencing, (2) the child is also obliged to obtain freedom, and (3) about the arrest and detention of children can be done as long as it must be appropriate by law.
- From this law, it is obtained that the child is a God's deposit that must be maintained because in him inherent dignity, dignity as a human being that must be upheld. With the consideration that children are the hope of the nation that determines the future of the country. Child protection efforts are very important and begin while still a fetus until the age of 18 years.
- d. Preventive Legal Protection
Preventive legal protection is carried out by the government to protect its citizens. The public is given the freedom to express their opinions so as to prevent legal problems from arising. In the context of legal protection of children, the focus is prevention before legal problems occur. Many cases make children victims of violence in the family environment because of their weak social and legal position. Children are often the target of emotional abuse by parents. Preventive legal protection aims to prevent violence against children within the family sphere (Siswanto & Purwaningsih, 2017).

e. Repressive Legal Protection

Preventive legal protection is carried out by law to its citizens. The law described above is an example of repressive legal protection (Siswanto & Purwaningsih, 2017).

Protection for children can be interpreted as all activities to ensure and protect children and their rights in order to live, grow, develop, and participate, optimally in accordance with human dignity and dignity, and obtain protection from violence and discrimination. This raises the question of whether the existing human rights legal instruments have not worked well or are there problems beyond the substance of the law itself in providing protection and enforcement of human rights for children. (Nazmi & Syofyan, 2023.)

D. CONCLUSIONS

Komnas Perempuan noted that the experience of the judicial review (JR) applicants, namely five women who faced a situation of deprivation of child custody by their ex-husbands after their divorce, was a situation that many women also experienced. Reporting a partner who forcibly takes a child, who is under the custody of the other partner, is a violation of the provisions of children's human rights, therefore law enforcement must respond quickly if this happens, in accordance with the Constitutional Court Decision.

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