

Reconstruction of courts authority in children foster rights dispute due to the differences based on the value of Islamic law justice

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Abstract

This study aims to examine and analyze the jurisdiction of courts in child-Fostering Rights cases due to divorce based on Islamic value of Justice. This research uses the nature or form of descriptive analytical and prescriptive research. With an analytical descriptive study, it is intended to illustrate and criticize the legal values and norms and their applications relating to the jurisdiction of courts in child-Fostering Rights Dispute cases as a result of divorce. It is necessary to reconstruct the jurisdiction of the court in the case of child-fostering rights due to divorce based on Islamic justice value in order to make Lawsuit about child fostering rights and the obligation to provide the children filed together with divorce lawsuit, while the wife's livelihood, and also in case of joint property of husband and wife can be submitted together Divorce lawsuits or after the divorce verdict got a permanent legal force.

Keywords: divorce, legal effects of divorce on children, reconstruction of court authority

Introduction

One signs of Divine Power and Divinity is that He (Allah SWT) has created man in pairs ^[1]. So it has become sunnatullâh (a non-obligation order from Allah) that between two people of different kind, a man and a woman, there is encouragement of mutual interest to each other and the desire to live together, which then form the will to live together that form a relationship tied with A bond of legal relationship known as 'Copulate' or 'marriage'. 'Marriage' is very important for human life, because by way of marriage - legitimate - the association of men with women occurs respectably according to the position and dignity of the human being as a noble creature of God ^[2].

In Islamic Law, Marriage has become one of the most important thing to be done (*disyari'atkan*) ^[3], it is recommended because as it is not only obliged by the prophet as dictated by the gods but also to avoid unnecessary suspicion of adultery ^[4]; Pergaulan hidup berumah tangga dikonsepsikan dalam suatu hubungan suami isteri dengan suasana tenteram, dipenuhi cinta dan kasih sayang (*sakînah, mawaddah, dan rahmah*);

What should be (*das sollen*), is marriage with the aim of forming a happy family lasts for the life of the couple, but in reality (*das sein*) sometimes the happiness of the household can not be maintained so that the marriage bond breaks up and ends in divorce. For certain reasons, when the life of the household is split then the purpose of marriage that is to form

a happy and eternal family or household based on the Supreme God decree ie the family of *sakînah, mawaddah, and warrahmah* is no longer realized, and between husband and wife can not be reconciled To live in harmony again in the household, so divorce becomes the only chosen path. But it must be admitted that whatever the reason, if the marriage has been blessed with a child, then the divorce will always cause adverse effects on the children. "when Parents are divorced, the children are the victims," says the person who is often addressed to families who have broken.

If divorce occurs, an imbalance relationship exists between parent and child. Psychologically, a bad relationship between a child and a parent can have a negative effect on the child's psyche, such as loss of security and happiness. Divorce causes personal, domestic and social disintegration, and in most cases, makes a greater impact on women than men. Studying the historical trends of divorce phenomena, among them contemporary society, reveals that whatever we change from feudal systems to liberal and industrial societies, still allows an increased amount divorce ^[5].

The issue of child care or custody is not a simple matter. As Mukhtar Zamzami pointed out, "child custody is actually not as simple as it seems when associated with divorce cases, because it concerns the safety, development and health of children safety and psychologically, physically and spiritually" ^[6]. Zamzami added that psychologically separating minors from their mothers tends to make children experience maternal deprivation, and psychic inanity (psychic emptiness). As a result, the child will experience retardation (slowness) development of all the physical functions. In turn,

¹ Al-Qur'ân Surat *Ar-Rûm* ayat 21 (Terjemahan ayat tersebut sebagaimana dalam: Departemen Agama RI, *Mushaf Al-Qur'an Dan Terjemahnya*, Jakarta: CV Pustaka Al-Kutsar, 2011, hlm. 406).

² Hamudah Abd Al'ati, *The Family Structure In Islam*, Washington Street: American Trust Publications, 1977, hlm. 50.

³ Wahbah Az-Zuhaili, *Fiqh Islam Wa Adillatuhu*, Jilid 9, Penerjemah: Abdul Hayyie al-Kattani, dkk., Depok: Gema Insani, 2011, hlm. 40.

⁴ Sayyid Sabiq, *Fiqh Sunnah*, Jilid 2, Penerjemah: Nor Hasanuddin, dkk., Jakarta: Pena Pundi Aksara, 2006, hlm. 481.

⁵ Seyed Mohammad Reza Ghaem Mohammadi Dr. Fariba Chavoshzadeh Tafti, *The Main Causes of Divorce in Islamic Republic of Iran*

(*Yazd*), International Journal of Humanities and Social Science, 2014, hlm. 1.

⁶ Mukhtar Zamzami, "Hak Asuh Anak, Antara Agama dan Kemanusiaan", *Varia Peradilan*, Majalah Hukum Tahun XXX, Nomor 348 November 2014, hlm. 19-20.

in adolescence and adulthood psychopathologic births resulting from childhood bad experiences such as historia, phobias, obsessions, depression, possibly even alcoholism ^[7]. They are also more prone to experience mood depression and eventually acute depression ^[8].

In many cases occurred within the community, a household conflicts that lead to divorce often pose serious problems especially in regard to parenting. In the context of legal studies related to child care due to divorce is very interesting to be studied. The legal issues that arise, among other things: how the divorce result on the rights of the child, how the legal protection for the child, and the extent to which the role of the state in providing protection to the child of the divorce victim - whether the state (court, according to its authority) can interfere in Or is it passive (waiting) up to the will and will of the parents? What kind of legal justice will the child of the divorce victim obtain ?. Based on the decision of the Constitutional Court Number 46 / PUU-VIII / 2010 and also Revision Pasan 43 verse 1 of Law No.1 / 974, Article 283 Civil Code and Article 26, paragraph 2 of Law No.35 / 2014. Other structural aspects such as the expansion of jurisdiction in determining the civil rights of adulterous children and cultural aspects are also part of this analysis ^[9].

In practice of law enforcement through the courts in Indonesia now in particularly related to the jurisdiction of the court in adjudicating childcare cases due to divorce - given the position of the child as an object in the case of child-fostering rights - encountered various issues that are vulnerable to child protection. If a marriage bond breaks out because of a divorce then a dispute arises over the child's foster ing rights, then a typical and crucial issue arises. Based on the description of the problem that needs to be reviewed is about the reconstruction of the court's authority in the case of child care due to divorce based on the value of Islamic legal justice.

Method of Research

Thus, the approach method used in this study is socio-legal. In connection with the formulation of the problem and its purpose, this research uses the method of descriptive analytical research ^[10] and prescriptive ^[11]. With an analytical descriptive study, ^[12] intended to illustrate and criticize the legal values and norms and their applications relating to the jurisdiction of courts in child-rearing cases of divorce. As with the research that is perscriptive intended to get advice on what should be done to overcome the problems formulated in the regulation in need to be reconstructed, or should not formulated in the regulation. While the form of analysis leads to what should be so that the reconstruction of judicial

authority in the case of child care due to divorce based on the value of Islamic justice can be formulated.

The main Source ^[13] of this research consists of :

Primary Data

Primary Data, ^[14] Ie data obtained from legal practice / empirical law conducted by interviewing:

- Some judges in the High Court of Religion;
- Several Judges and / or Chairmen of the Religious Courts;
- Some people of Registrar or confiscator in Religious Courts.
- Officials at the Directorate General of Religious Courts at the Supreme Court of the Republic of Indonesia;
- Officials to the Supreme Court Supervisory Board of the Republic of Indonesia.

Secondary Data

Secondary Data, ^[15] Ie data obtained from library studies and documentary studies to obtain primary legal materials, secondary legal materials, and tertiary legal materials.

To obtain and collect primary data in this study, the authors conducted a direct and in-depth interviews to some of the respondents who have been selected before. The data obtained are then collected and organized for further analysis. While to obtain and collect secondary data, conducted by way of literature study and document studies. In this study used several techniques of checking the validity of data adjusted to the criteria, that is:

- a. Triangulation
- b. Peer examination through discussion
- c. Negative case analysis

Research results and discussion

Literary Research of Divorce

Divorce law in fact a part of marriage law. Since marriage law is essentially a part of civil law, then in a broader sense the law of divorce is in the field of civil law ^[16] Found in the formulation of legislation, among others mentioned in Article 38 of Law Number 1 Year 1974, that "marriage may be terminated because of: death, divorce, and the judgment of the court." ^[17]. Thus, the divorce of juridical is one of the reasons for the breaking of marriage bonds.

Breaking up of a marriage bond sometimes occurs when both husbands and wife are alive and are often called 'living divorces'; ^[18]. Abdul Kadir Muhammad calls 'the marriage cut of death' with the title 'dead divorce'; 'The breakup of marriage due to divorce' there are two, namely: "divorce divorce" and "divorce"; While 'the marriage breakup of court decisions' is called the "void divorce" ^[19].

⁷ *Ibid.*, hlm. 28.

⁸ Sung-Youn Chun, Suk-Yong Jang, Jae-Woo Choi, Jaeyong Shin, Eun-Cheol Park, *Long-term effects of parental divorce timing on depression: A population-based longitudinal study*, International Journal of Social Psychiatry, 2016, Vol. 62(7) 645–650, hal.4

⁹ Suryati, (Reconstruction of the legal protection of civil rights for the child of adultery based on vales of justice in Indonesia European Journal of Economics, Law and Social Science IIPCCL Publishing, Graz-Austria) Vol.1 January 2017 hlm.1

¹⁰ Sumadi Suryabrata, *Metodologi Penelitian*, Jakarta: Raja Grafindo Persada, 2010, hlm. 76

¹¹ Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Kencana Prenada Media Group, 2008, hlm. 22 – 24

¹² Bambang Sunggono, *Metodologi Penelitian Hukum*, Jakarta: Raja Grafindo Persada, 2007, hlm. 35.

¹³ Bahder Johan Nasution, *Metode Penelitian Hukum*, Bandung: Mandar Maju, 2008, hlm. 166

¹⁴ Soerjono Soekanto, *Pengantar Penelitian Hukum*. Jakarta: UI Press, 1998, hlm. 12

¹⁵ *Ibid.*

¹⁶ Muhammad Syaifuddin, Sri Turatmiyah, dan Analisa Yahanan, *Hukum Perceraian*, Jakarta: Sinar Grafika, 2013, hlm. 1

¹⁷ Pasal 114 Kompilasi Hukum Islam.

¹⁸ Munir Fuady, *Konsep Hukum Perdata*, Jakarta: PT RajaGrafindo Persada, 2014, hlm. 23.

¹⁹ Abdul Kadir Muhammad, *Hukum Perdata Indonesia*, Bandung: Citra Aditya Bakti, 2000, hlm. 108.

In reference to Islamic law, the term divorce which resulted in the breaking of marriage refers to some term divorce form based on the reasons leading to divorce forms. According to Ahmad Azhar Basyir, based on the provisions of Islamic law, marriage may break because of: death, divorce, fasakh, li'an, nusyuz and syiqaq^[20].

Referring to the Religious Judicature Law - which among other things governs the special procedural law concerning marriage disputes for Muslims, it can be understood that in terms of whoever filed the divorce case differed between the 'divorce lawsuit' and 'divorce'. The term 'divorce lawsuit' - as stipulated in Article 66 - is the petition of a Muslim husband who will divorce his wife, while 'divorce' - as provided for in Article 73 - is a divorce suit filed by the wife^[21].

In the Islamic perspective, even though divorce or 'Talakh' is basically permissible, yet very hated by Allah SWT; As in the Hadith of the Prophet SAW which reads: *اد غضالاً حلالاً الا لهالاً طلاقاً*^[22] which means: "the deeds most hated by God are divorce".

Divorce is only used in emergency situations as a natural way for husbands to correct their mistakes. Divorce sometimes becomes a therapy to restore balance, avoid husband behavior that harms his wife, or otherwise the behavior of a wife that harms her husband. In other words, divorce is a sociological, psychological, and sometimes materialist solution and is therefore governed by law^[23].

Although the law allows divorce as a sociological and psychological solution, but it is conditional and exceptional, in the sense of divorce there must be enough reason that between husband and wife will not be able to live harmoniously as a husband and wife. The reasons for divorce are limitatively mentioned in the Elucidation of Article 39 Paragraph (2) of Law Number 1 Year 1974 juncto Article 19 of Government Regulation Number 9 Year 1975 and in Article 116 of Compilation of Islamic Law, the reasons are added, namely:

- a. The husband violates the taklik talakh;
- b. The change of religion which resulted in disharmonization in marriage.

In the Draft Law on Applied Religious Law on Marriage Field (hereinafter written as HTPA Bill), there are divorce reasons similar to divorce reasons in mentioned in Islamic law compilation book (KHI). But the conversion of religion or apostasy as a reason for divorce has changed. In KHI, apostasy is used as a reason for divorce by condition, ie apostasy that causes non-reconciliation in the household, whereas in the HTPA Bill is defined as the absolute reason for divorce (Article 108 letter h)^[24].

The Concept of Child fostering right Law Due to Divorce

The term child fostering right or child care or hadhānah can be interpreted as an act of nurturing, tend and caring, guarding and avoiding harmful things, to a child who has not yet having

a perfect knowledge and can not live independently, by fulfilling the necessities of his life, guarding it from things Endangering, developing his or her physical, psychological, and intellectual abilities, giving him or her education in time to be able to assume the responsibility of his life. Thus in the sense of hadhānah this does not include the problem of living and living expenses of children. The arrangement of 'childcare' in positive law is governed in the Marriage Law of Chapter X on Rights and Obligations Between Parents and Children, in particular in Article 45.

Based on the construction of the article of law, the matter of 'child care' is conceived as an obligation for the parents, in other words, the maintenance of the child is the right for the child that must be fulfilled by both parents. Thus, in terms of interests of the child's parents, then the child's maintenance is conceived as the right of the father or mother of the child. Therefore, as a result of a divorce if there is a dispute concerning the fostering right of the child, the interested party may file a claim on his / her right and on such claim the court will give his or her decision on who is entitled to the child's care.

The obligation of parents to care for their children is based on the announcement of the Word of Allāh SWT in QS al-Baqarah (2): 233, which means:

"Mothers should take their children for two full years, that is for those who want to perfect breastfeeding. And the duty of the father to feed and dress to the mothers by ma'ruf. Someone not burdened but according to ability levels. Let not a mother suffer misery because of her child and a father because of her child, and the inheritance is thus obliged. If both want to wean with both their willingness and deliberation, then there is no sin on either. And if you want your son to be nagged by someone else, then there is no sin for you if you make payment accordingly. Serve you to Allah and know that Allah is Seer of what you do "^[25].

According to KHI, the maintenance of children who have not mumayyiz or not yet 12 years old is the right of his mother.²⁶ Furthermore, if her mother has died, her position is sequentially replaced by women in a straight line upwards from mothers, fathers, women in a straight line upwards from fathers, sisters of the child, ladies of blood relatives by line Side of the father^[27].

In the development of judicial law and practice in Indonesia as in the jurisprudence of the Supreme Court of the Republic of Indonesia^[28], the transfer of the right of hadhānah should not be transferred to the mother of the mother and so on as contained in the study of jurisprudence or as prescribed in Article 156 letter a KHI, but may turn to the father, or People who are close and familiar with the child. The principle is to pay attention to the interests of the child (best interests of the child). Thus the maintenance of the child should be left to a close and intimate person with the child. Preferably are relatives who are more concerned about the child's future in normal size.

The concept of child-care law as a result of divorce is essentially put forward in the following summary:

²⁰ Ahmad Azhar Basyir, *Hukum Perkawinan Islam*, Yogyakarta: UII Press, 2014, hlm. 69.

²¹ Lebih tegas Pasal 114 KHI menyebutkan bahwa 'putusnya perkawinan yang disebabkan karena perceraian' dapat terjadi karena 'talakh' atau 'berdasarkan gugatan perceraian'.

²² Al-Hafiz ibn Hajjar al-'Asqalāni, *Bulugh al-Marām*, Beirut: Dār al-Kutub al-Ijtima'iyah, t.th, hlm. 223. Selanjutnya lihat: Sayuti Thalib, *Hukum Kekeluargaan Indonesia*, Jakarta: UI Press, 1986, hlm. 99.

²³ QS *An-Nisā'* (4):130.

²⁴ *Ibid.*, hlm. 59)

²⁵ Yayasan Penyelenggara Penterjemah/Pentafsir al-Qur'an, *Al-Qur'an dan Terjemahnya*: Departemen Agama 1996, hlm. 57.

²⁶ Lihat: Pasal 105 huruf a KHI.

²⁷ Lihat: Pasal 156 huruf a KHI.

²⁸ Lihat: Putusan Mahkamah Agung RI Nomor 126K/Pdt/2001.

- a. Child care is an act in order to provide protection to the child;
- b. Child care must be fulfilled by both parents;
- c. Parent's obligation to keep a child in effect until the child is mature or able to stand alone;
- d. Judging from the interests of the child and the interests of both parents, the most powerful clerical opinion is that childcare is a common right between mother, child, and father; While if their interests contradict each other, then the interests of the child first;
- e. The main principle in determining child-care rights is the best interests of the child;
- f. Child maintenance law aims to bring social prosperity and eliminating wrongdoing.

Analysis of Concept of Child care Due to Just Divorce

Based on the above explanation, it can be concluded that the concept of child care that is fair in the perspective of Islamic teachings, must at least contains three principles, namely:

- a) The principle of maintaining trust;
- b) Principles of implementation and enforcement in a (Good) makruf manner;
- c) Principles of state or ruler interference in the matter of childcare;

These principles contain the values of justice derived from the Qur'an, as-Sunnah, and Ijtihad. That is what Majid Khadduri calls 'divine justice' or 'revelational justice' (based on revelation). The category of justice derived from the Divine source will form the justice of the category 'positive justice' which is a product of interaction between existing expectations and conditions and built through a process of sustainable social change^[29].

Implementation of Islamic law justice value related to child care law due to divorce, is giving to children what is their right. That is the meaning of justice as stated by Ali bin Abi Talib that justice is putting things in place. Putting something in its place can be interpreted as the translation of deliver and fulfill the mandate to the right to receive it.

Justice must be realized by giving children what they are entitled to. As a less fortunate party considering its position in the judicial process as a disputed object between two interests - the plaintiff and the defendant. Rawls argues that "justice as fairness" means that no one is allowed to dominate choice or take advantage of unjust opportunities as an advantage of natural endowment or social position. Therefore the child must get legal protection with the given certainty of maintenance. In other words, justice includes both procedurally fair, and according to the results is equally meaningful. Justice is a value that embodies a balance between the parts in unity, between personal goals and common goals. This is what John Rawls calls a honesty (fairness)^[30].

The Problems of the Authority of the Court in Judging the Case of Child Maintenance Due to Divorce

²⁹ Majid Khadduri, 1990. *Teologi Keadilan, Perspektif Islam*, Judul asli: *The Islamic of Justice*, Diterjemahkan oleh: H. Mochtar Zoerni dan Joko S. Kahhar, Surabaya: Risalah Gusti, 1990, hlm. 1-5.

³⁰ Lihat: John Rawls, *A Theory Of Justice*, Penerjemah: Uzair Fauzan, dan Heru Prasetyo, "Teori Keadilan: Dasar-dasar Filsafat Politik Untuk Mewujudkan Kesejahteraan Sosial Dalam Negara", Yogyakarta: Pustaka Pelajar, 2011, hlm. 3-7.

The complex of children's problems intersects with the structures and systems that evolve, runs and is applied in institutions, governments, and even countries. This also appears to be the issue of juridical authority in child-rearing cases due to divorce in theory and practice in Indonesia. The implementation of jurisdiction in the case of childcare due to divorce in Indonesia currently implicates the practical theoretical and problematic problems as will be presented in the following discussion.

Theoretical Problem

'Rights of the child' is a part of human rights which must be guaranteed, protected and fulfilled by parents, family, community, government and State. Children are the trust and grace of Almighty God who has the Grace and dignity of all person. Therefore the state has a strategic role to guarantee the right of every child to survival, growth and development, and for the protection of children from violence and discrimination.

In principle, children are entitled to be cared for by their parents because their parents are most responsible for the growth and development of children. Parents also have a distinctive inner bond and are not replaced by anything and / or by anyone. This unique bond will then greatly affect the growth and development of the child until the child becomes an adult. However, in the case of child-rearing due to divorce, the right of the child to receive care and care from both parents can not be fulfilled optimally, even the child as a victim of the divorce of his parents becomes the object of the dispute over the power of his parents.

Given the limited age and physical maturity of the child, the child is entitled to special protection, from parents, community, and country. Thus in the context of child care cases due to divorce, it is contained in terms of public interest that must be protected by the state.

The solution to the above-mentioned theoretical problem, quoting A. Merkel's statement, that "the judge is the instrument of the institution of the public interest insofar as it concerns its active duty"^[31] the legal protection of the rights of the child can be integrated into the judicial system by providing an active role of the court in providing protection to child. Its implementation in the context of juridical authority in child-care cases due to divorce is possible with an exceptionally ex-officio court authority on the principle of passive judges in civil cases in general.

Practical problem

The issue of legal substance formulated in the positiv norms of Article 39 and Article 41 Sub-paragraph a of the Marriage Law is repressive and contains problems / deficiencies and is vulnerable to child protection, which then raises issues related to the court's authority is passive, formalistic, and rigid.

Article 39 of the Marriage Law provides that "to divorce there shall be sufficient grounds, that the husband and wife shall not be able to live in harmony as husband and wife". The provision contains a balance principle and provides a balanced protection between husband and wife, however such

³¹ L.J. van Apeldoorn, *Inleiding tot de Studie van Het Nederlandse Recht Terjemah M. Oetarid Sadino, Pengantar Ilmu Hukum, Noordhoff-Koff, Jakarta 1958...*, *Op.cit.*, hlm. 173.

provisions have not provided assurance or certainty regarding the fostering of children as a result of the divorce.

In addition, Article 41 Sub-article a of the Marriage Law stipulates that as a result of the marriage break-up due to divorce "either the mother or father remains obliged to maintain and educate her children, solely on the basis of the child's interest; When there is a dispute concerning child control, the court gives its decision".

If observed, the provision is 'repressive', that is not really pay attention to the rights and interests of the child, in this case the state (the court) is only passive (waiting); That is, if the party concerned in a divorce dispute wishes to take his / her child controlling case to court, then the law will be enforced by the court. However, if the disputing party does not file their case to the court, the court can not decide - ex officio - of the child's maintenance, but only a passive, even if in fact with the breaking of the marital ties of both parents, the children born Of the marriage must remain - immediately and can not be delayed - to obtain protection and assurance of its control and maintenance;

The rule, when viewed from the perspective of child protection, clearly contains the problem / deficiency and prone to child protection. The provision can not address the issue of child care due to divorce disputed by both parents, both because the parents are irresponsible - does not fulfill the obligation to maintain and educate their children - or because there is agreement outside the court but does not pay attention to the best interests for child.

The issue of legal substance formulated in the written norm of Article 39 and Article 41 Sub-Article a of the Marriage Law is related to Article 66 Paragraphs (6) and 81 Paragraph (1) of the Constitutional Court Law which are repressive and contain the problem / deficiency and prone to child protection, Issues related to the court's authority are passive, formalistic, and rigid, and the policy-related institutional issues in examining and deciding cases of child-fostering as a result of the divorce mentioned above, plus the issue of community culture dealing with courts tend to be 'lose-win') Is a set of problems found in judicial practice law practice in child-fostering cases of divorce.

Reconstruction of Court Authority in Case of Child Maintenance Due to Divorce Based on Islamic Justice Values

The description of the value of justice based on the Pancasila philosophy (as a local wisdom), and the comparison of laws on childcare in the three foreign countries (as international wisdom), and the urgency of applying the 'ex-officio eksepsional' theory of court authority in child-rearing cases due to divorce, Author to perform reconstruction of Article 39 and Article 41 a Law Number 1 Year 1974 About Marriage as follows:

The need of an addition to the norm of Article 39 of the Marriage Law.

Based on the analysis and thought as mentioned earlier, the authors argue that against Article 39 it is necessary to do reconstruction by adding a new norm which reads: "the decision of divorce while establishing the maintenance of the child". With the addition of such norms it gives the court the authority of ex officio to examine, consider, and decide upon the fostering right of the child's even though the child's care is

not demanded by a divorced husband or wife. Thus children who are victims of their parents' divorce will be protected and immediately assured of their care; Such norms provide more assurance of protection of rights and justice for children.

The authors propose the norm as an additional provision of one verse after the second verse, into paragraph (3); And the original verse (3) becomes paragraph (4); Whereas the sounds of paragraphs (1), (2) and (3) are not previously amended, except the sequence of paragraph (3) to paragraph (4). So the formula after the reconstruction of Article 39 is as follows:

1. A divorce can only be made before a court hearing after the court has tried and failed to reconcile the parties.
2. In order to divorce there should be enough reason that the husband and wife will not be able to live in harmony as husband and wife.
3. Decision of divorce while establishing child care.
4. The divorce proceedings before the court are stipulated in separate laws and regulations.

With the addition of such norms it gives the court the authority of ex officio to examine, consider, and decide upon the mastery of the child's care even though the child's maintenance is not demanded by a divorced husband or wife. Thus children who are victims of divorce will be protected and immediately assured of maintenance; such norms provide more assurance protection of rights and justice for children, social welfare and goodness.

Amendment to Article 41 of the Marriage Law.

Legal practitioners are generally understand the Article 41 a, particularly regarding to the jurisdiction of the court in the case of child domination due to a divorce is to contain the principle of passive judge; That is, if the issue of child care is not prosecuted and not disputed by both parents, then the court is not authorized to decide, even though the real facts show that children who are victims of the divorce still need care.

If observed, these provisions are vulnerable to child protection and child-prone interests. The provision ignores the right of the child to obtain proper care. The provisions does not immediately provide assurance of protection and certainty of child care of the victims of divorce. Therefore it is necessary to do reconstruction, ie by means of addition and refinement in the formula. The enhanced formulation is in line with the conception that the issue of child care is a common right between mother, father and child; If each other contradicts each other than the right of the child takes precedence. The new formula is also in accordance with the principle of best interests for children. The new formulation allows for an active role of judges (as a representation of the state in providing child protection) in examining and deciding cases of child care resulting from divorce.

The authors argue that Article 41 of the Marriage Law requires reconstruction with the amendment and refinement of the phrase "when there is a dispute concerning the acquisition of children, the court of judgment" is amended and refined to "to give protection to the child, the court has the authority to decide on the -child". Thus Article 41 of a Marriage Law after the reconstruction, reads as follows:

"Both mothers and fathers remain obliged to maintain and educate their children solely on the basis of the child's interest; to provide protection to the child, the court is authorized to give a decision on the control of children".

With this enhanced formula in line with the conception that the issue of child care is a common right between mother, father and child; And if each other contradicts each other, the right of the child takes precedence; So that in accordance with the principle of best interests for children. With such formulation, it is possible for the active role of the judge (as a representation of the state's obligation to provide child protection) so that the child of the divorce victim immediately gets the assurance of proper care, gets justice and protection. Husbands and wives who filed for divorce can not simply ignore / ignore their obligations to nurture and educate children as well as possible even if both have divorced.

Amendment to Article 66 Paragraph (5) of the Religious Judicature Law

The positive norms contained in Article 66 Paragraph (5) of the Religious Judicature Law does not provide assertiveness to combine the issue of child care with cases of divorce lawsuit. The text of the article of the Law uses the word 'can'; Thereby combining the issue of child care due to divorce with the divorce lawsuit according to the construction of the provisions of the article is facultative, meaning that it can be accumulated with the principal matter (divorce lawsuit), or it may be filed separately (split) in a separate case after the Divorce lawsuit is spoken. Therefore, to provide more protection to the child of the divorce victim and to guarantee the certainty of the maintenance due to the divorce to whom the child will be given the right to care, the provision needs to be reconstructed. Based on the above analysis the authors propose the reconstruction of Article 66 paragraph (5) of the Religious Judicature Law with the changes and refinement of the phrase: "The plea of child control, the livelihood of the child, May be submitted together with the divorce lawsuit or after the pledge of talak is pronounced ", so that Article 66 paragraph (5) of the Religious Judicature Law after reconstruction reads as follows:

"The plea for child care and the livelihood of the child shall be filed together with the divorce lawsuit, while the wife's livelihood, and the joint property of the husband and wife may be filed together with the divorce of divorce and after the vow of talak is spoken".

With the amended and refined formulation there is firmness about the cumulation of the question of child domination with the divorce petition for divorce. Thus, in every court decision in the divorce cerebral divorce case, the child's rights are protected and the issue of child care resulting from the divorce immediately be assured of who will be given the right to care.

Amendment to Article 86 paragraph (1) of the Religious Judicature Law

As the norm contained in Article 66 paragraph (5), the positive norms contained in Article 86 paragraph (1) of the Religious Judicature Law also does not provide assertiveness to combine the issue of child care with divorce cases. The text of the chapter uses the word 'can'; Thereby combining the issue of child care resulting from divorce cases according to the construction of the provisions of the article is facultative, meaning that it can be accumulated with the principal matter (divorce lawsuit), or may be filed separately (split) in a separate case after the divorce verdict Fixed law. Therefore, to provide more protection to the child of the divorce victim and to guarantee the certainty of the maintenance due to the

divorce to whom the child will be given the right to care, the provision needs to be reconstructed.

In this case the authors argue that against Article 86 paragraph (1) of the Religious Judicature Law by adjusting to the argumentation as mentioned above with the changes and refinements of the phrase: "The lawsuit of child foster right, the livelihood of the child, May be filed jointly with divorce or after divorce decisions have a permanent legal force", so that Article 86 paragraph (1) of the Religious Judicature Law after reconstruction reads as follows:

"Lawsuits concerning child foster right and child livelihood are filed together with divorce lawsuits, while the wife's livelihood, and joint property of a husband and wife may be filed together with a divorce suit or after the divorce verdict obtains a permanent legal force".

With the amended and refined formulation there is firmness about the cumulation of the issue of child domination with divorce cases. Thus in every decision of the court in divorce cases as well as deciding about parenting, so the rights of children protected and the issue of child care due to divorce immediately get assurance to whom will be given the right to care.

Conclusion

The implementation of jurisdiction in the case of child care due to divorce in the judicial practice in Indonesia as regulated in Article 39 and Article 41 of the Marriage Law is related to Article 66 paragraph (5) and 86 paragraph (1) of the Religious Judicature Law, currently still 'repressive' , Which has not been seriously concerned about the rights and interests of the child, contains problems and is vulnerable to child protection, neglected children's interests, and child care is not immediately certain, and not fully based on Islamic justice value after the research writer can conclude that the lawsuit about child foster right and The livelihood of the child is filed jointly with the divorce lawsuit, while the wife's livelihood, and joint property of the husband and wife may be filed together with the divorce lawsuit or after the divorce verdict obtains a permanent legal force".

The practical problem of the jurisdiction of the court in child-foster right dispute cases of divorce rests on the issue of legal substance and correlates with the institutional problem as mentioned above, plus the problem of justice-seeking justice-oriented culture, therefore the law of jurisdiction in the case of childcare Due to divorce needs to be reconstructed so as to make it possible for the courts to play an active role so that the verdict not only provides justice to the divorced spouses in a balanced way, but equally important to provide justice, generosity, guidance and proper protection to the child of divorce victim by providing certainty care according to the best interests for children.

The reconstruction of juridical authority in child care cases resulting from divorce based on the value of Islamic justice is a necessity; Reconstruction needs to be done so as to enable the jurisdiction of the courts to examine cases of child care due to divorce of judges is active. In this case the authors conclude the need to apply the ex-officio theory of exceptions of court authority - as a new theory of authors' findings in child-foster right dispute cases of divorce. Based on the theory, then the ex officio judge has the authority to decide on the maintenance of children due to divorce at the same time and become *asessor* divorce case.

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