



Legal implications of a divorce filed due to the husband's failure to provide financial support and the request for child custody: An analysis of decision number 5139/PDT.G/2020/PA.TGRS. Indonesia

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Abstract

Post-divorce and after a final ruling on child custody, it is expected that the Panel of Judges will have the courage to make a legal breakthrough in the form of judicial discretion. This step could involve issuing an order to the relevant authority, such as a bailiff, to assist the party awarded custody in taking the child from the custody of the opposing party. This approach is deemed necessary as a child is not an object that can be executed like property, and specific execution concerning children is not yet regulated by existing law. By adopting this measure, it is hoped that legal gaps can be addressed and prolonged conflicts that might negatively affect the child's psychological well-being can be avoided. This also aligns with the principles of a simple, swift, and cost-effective judicial process, which is a manifestation of the principle of legal justice.

Keywords: Implications, divorce, child custody

Introduction

One form of human obedience to Allah SWT is by channelling sexual desires between men and women in accordance with His regulations, which is through the institution of marriage, considered sacred and solemn by Muslims. Marriage is a bond, both physical and spiritual, between a man and a woman as husband and wife, with the aim of building a happy and eternal family (household) based on the belief in the One and Only God, as well as fostering harmony within the family, which is characterised by tranquility (sakinah), love (mawaddah), and mercy (warahmah) — qualities that every couple hopes to achieve. In fact, marriage is referred to in the Qur'an as the most sacred and binding covenant between a husband and wife (miṭāqan ghalīẓan). Furthermore, marriage aims to prevent adultery, continue the lineage (children), and also serves as an act of worship^[1]. Marriage plays a crucial role in the lives of both individuals and society. Through a legitimate marriage, the relationship between a man and a woman is formed with full respect, in accordance with the dignity of humans as honourable beings. Family life is nurtured in an atmosphere of peace, tranquillity, and affection between husband and wife. Children born from a legitimate marriage enrich family life and, at the same time, ensure the continuation of human life in a dignified and honourable manner^[2].

In marital life, conflicts often arise between husband and wife over various issues that can trigger arguments, even leading to divorce. Every argument has a way out, but if it leads to a significant decision such as divorce, the process towards that decision is not an easy or quick one. For instance, a wife who wishes to file for divorce because her husband is believed to have betrayed their marriage. In such a situation, it may be understood that, despite being disliked by Allah SWT, divorce can still be justified. Divorce is a part of marriage, as there can be no divorce without marriage first taking place. Marriage marks the beginning of a shared life between a man and a woman as husband and wife, while divorce signifies the end of that life together.

Everyone hopes that their marriage will remain intact throughout their lifetime. However, many marriages, which are built with great effort, unfortunately end in divorce^[3]. Not all marriages turn out as envisioned, even when great efforts have been made to nurture them in the best way. Ultimately, some couples are forced to part ways and decide to dissolve their marriage. According to A. Fuad Sa'id, divorce is the termination of marriage between husband and wife due to a lack of harmony in the household or other reasons, such as infertility of either the wife or the husband, after efforts for reconciliation have been made involving the families of both parties^[4].

Marriage may be dissolved due to death, divorce, or by a Court decision, as regulated in Article 38 of the Marriage Law. Furthermore, according to the provisions of Article 39, it is emphasized that divorce can only be carried out in front of the Court after the relevant Court has attempted and failed to reconcile both parties. There must be sufficient reasons for a divorce, meaning that the husband and wife cannot live harmoniously as a couple. The explanation provides the following grounds that may serve as a basis for divorce:

- a. One party commits adultery or becomes an alcoholic, drug addict, gambler, or engages in other behaviors that are difficult to cure;
- b. One party leaves the other for 2 (two) consecutive years without the other party's consent and without a valid reason, or for other reasons beyond their control
- c. One party is sentenced to 5 (five) years in prison or a more severe sentence after the marriage takes place;
- d. One party commits cruelty or severe abuse that endangers the other party;
- e. One party suffers a bodily defect or illness that results in their inability to perform their duties as a husband/wife;
- f. Continuous disagreements and arguments between the husband and wife, with no hope of reconciliation in the marriage^[5].

One of the common reasons that arises in society today, in relation to the provisions of letter (f), is the continuous disputes and quarrels between husband and wife, which leads to the loss of hope for a harmonious life in the household. These disputes are generally caused by the inability of either the husband or the wife to fulfil their responsibilities, such as the husband failing to provide financial support to the wife or the wife not obeying the husband's commands. However, one of the main issues in a marital relationship is the imbalance in financial matters, which is often seen as a significant problem. The husband's inability to provide financial support to the wife is often one of the contributing factors to divorce, particularly in cases of divorce initiated by the wife.

Maintenance is the husband's obligation to provide something for his wife, relatives, and his household as basic necessities for them. The law of maintenance is mandatory, being the wife's right over the husband as a result of a valid marriage contract. If the husband neglects the issue of maintenance within the family, it will lead to unresolved problems that will affect the harmony of the household, potentially even resulting in divorce. In the case of divorce, the main issue considered by the husband and wife is whether they have children as the fruit of their love. For some, children might be seen as a burden, but in reality, it is proven that many divorced couples are eager to gain custody of their children ^[6].

Child custody is a right that arises as a result of a divorce petition between husband and wife based on a court ruling. This right to custody can occur if the divorcing couple has children, whether biological or adopted within the marriage. Child custody can be exercised if the child is still in need of care (not yet of mumayyiz) or is still underage. In practice at the Religious Court, judges typically refer to the regulations in the Compilation of Islamic Law (KHI). Child custody in the KHI concept is known as "hak hadhonah" (childcare). Hak hadhonah refers to the right to care for, raise, and educate a child until they reach adulthood, get married, or become independent. This right is regulated in Article 105 of the Compilation of Islamic Law, which grants the mother the right to care for a child who is not yet mumayyiz (able to distinguish right from wrong) or under the age of 12. The KHI introduces the concept that the right to childcare is primarily focused on the psychological needs of the child, particularly those who are not yet mumayyiz or under the age of 12, who naturally still require the affection of a mother. In the practice of the Religious Court, judges usually refer to the rules in the Compilation of Islamic Law (KHI). Child custody in the context of the KHI is known as hak hadhonah (child custody). Hak hadhonah refers to the right to care for, maintain, and educate a child until adulthood, marriage, or the ability to stand on their own. This right is regulated in Article 105 of the Compilation of Islamic Law, which grants the mother the right to custody of a child who is not yet mumayyiz (able to differentiate right from wrong) or is under 12 years of age. The KHI establishes the concept that the primary emphasis of hak hadhonah is on the psychological well-being of the child.

In a lawsuit, it should be noted that a request for custody of children can be submitted simultaneously with a divorce petition or lawsuit to the Religious Court (consolidated lawsuit). Therefore, in a divorce lawsuit, in addition to requesting the dissolution of the marriage due to divorce, one party can also request the custody of the children (who

are still underage) born from the marriage to be granted simultaneously in the same lawsuit. Sure, here is the translation into British English: Based on the judge's consideration in delivering the verdict in case number 5139/Pdt.G/2020/PA.Tgrs as well as the execution of the verdict in case number 5139/Pdt.G/2020/PA.Tgrs. Indonesia.

Research Method

The research method used is normative-empirical law research (which includes doctrinal legal research and practical legal research), an approach that examines document studies by using secondary data such as regulations, legal theories, as well as expert opinions, and also involves research based on data obtained from the research location (such as the Religious Court and the Plaintiff). Normative legal research fundamentally analyses law as a norm or rule that is applied in society, serving as a guide for individual behaviour. In this study, the researcher employs a descriptive-analytical method to describe and analyse divorce and child custody cases based on the principle of justice. The choice of this analytical method aims to address or resolve the issues faced in the current social context.

Result and Discussion

Explanation of Child Custody and Its Legal Basis

Child custody, often referred to as Hadanah in Arabic, is derived from the word hidan which means "side" or "flank". More accurately, Hadanah refers to the concepts of care and education, and can also be understood as the right to raise a child through guidance and protection. Custody or guardianship is both a right of the child from the parents and an obligation for the parents toward the child. Articles 45, paragraphs (1) and (2) of the Marriage Law state the imperative provision that both parents are obligated to care for and educate their children to the best of their ability ^[7]. Caring for a child also implies the responsibility of parents to supervise, provide appropriate care, and meet the essential needs of the child. Furthermore, the responsibility of upbringing, which involves supervision, care, and providing for the child's livelihood, is continuous until the child reaches the legal age of adulthood, when they are able to stand on their own ^[8]. In more detail, scholars of Islamic jurisprudence define custody as the care of children who are still young, whether male or female, or those who are older but not yet of discerning age, without their command. It involves providing what is beneficial for them, protecting them from harm and damage, nurturing their physical, mental, and intellectual development so that they can eventually stand on their own and later live independently, bearing responsibility for themselves ^[9]. Caring for young children is an obligation, as neglecting them would expose the children to the danger of destruction. Hadanah (custody) is a right for young children because they require supervision, protection, the management of their affairs, and someone to nurture them. In this regard, it is primarily the mother who has the duty to provide hadanah. The Prophet Muhammad (peace be upon him) said: "You (the mother) have the right over your child.

In more detail, Islamic jurists define custody as the responsibility of caring for young children, both male and female, or those who are older but not yet of discerning age (mumayyiz), without any instruction from them. It

involves providing what is beneficial, safeguarding them from harm and destruction, and educating them physically, spiritually, and intellectually so that they are able to stand on their own and later live independently, carrying their own responsibilities^[10].

Child Custody in the Perspective of Islamic Law and Legislation in Indonesia

The scholars have established that child custody is an obligation, just as it is the responsibility of parents to care for children born within the bond of marriage. Child custody is a shared responsibility between the mother and father, as the child requires care, the fulfilment of needs, and supervision throughout the educational process. If a young child is not properly cared for, it can have a negative impact on the child's well-being and development^[11] In practice, custody is an obligation for both parents, just as it is for the child's future. Therefore, parents have a duty to care for their children, as this will impact the child's future. The legal basis for this is found in the words of Allah SWT in Surah At-Tahrim, verse 6.

In this verse of the Quran, the message from Allah SWT is clear: it is an obligation to protect the family, and it is the responsibility to care for the family, including the custody of children. This responsibility ensures that the child's future is safeguarded from things that are prohibited by Allah SWT. Therefore, child custody is an obligation for parents, as outlined in the verse from Surah At-Tahrim, which calls for the protection and care of the family, including the custody of children, by the parents to ensure the child grows up as a devout Muslim, obedient to Allah SWT. This verse instructs all Muslims to make an effort to educate their families. The verse above illustrates that preaching and education must begin at home. Although the verse is directed towards men (fathers) in its wording, this does not mean it is only addressed to them. This command is for both women and men (mothers and fathers), just as similar verses (such as those commanding fasting) apply to both men and women. This means that both parents are responsible for their children and for one another, just as each is accountable for their own actions. The command to the believers is to protect themselves and their households from the torment of hellfire. The way to do this is by avoiding sinful actions, strengthening oneself with faith to resist desires, and always obeying the commands of Allah SWT.

Explanation of The Divorce Lawsuit and its Correlation with Child Custody in the Decision 5139/PDT.G/2020/PA.TGRS Indonesia

The essence of the arguments presented by the Plaintiff in the divorce lawsuit Case No. 5139/Pdt.G/2020/PA.Tgrs is that the Defendant has failed to provide financial support, has often acted abusively and physically assaulted the Plaintiff (domestic violence), and has forbidden or not allowed the Plaintiff to take their child, who has not yet reached the age of discernment, after an argument. Furthermore, the Defendant has obstructed the Plaintiff from meeting their child.

In case Number 5139/Pdt.G/2020/PA.Tgrs, the mediation conducted by the Panel of Judges was based on the considerations of Article 82 paragraph (1) and (4) of Law Number 7 of 1989, as amended and supplemented by Law Number 3 of 2006, and Law Number 50 of 2009, in

conjunction with Article 31 of Government Regulation Number 9 of 1975, in conjunction with Article 143 of the Compilation of Islamic Law. The Panel of Judges made efforts to reconcile the parties and mediation efforts were undertaken in accordance with the provisions of the Supreme Court Regulation Number 1 of 2016 with the appointed mediator. However, these efforts were unsuccessful, as indicated by the written report from the mediator dated 14 October 2020. During the examination phase of the case, based on the claims of the parties and the testimonies of the Plaintiff's and Defendant's witnesses, it became evident that the parties' statements were consistent and not contradictory, particularly concerning the disputes, arguments, and separation between the Plaintiff and the Defendant. This proves that the marriage between the Plaintiff and the Defendant has experienced ongoing conflicts and disputes, making reconciliation difficult, which is an irrefutable fact.

Based on the information from the plaintiff's claims, the defendant's statements, and the evidence presented in the trial, the panel of judges has found the following facts:

1. The plaintiff and the defendant are a legally married couple, married on 5th March 2018, and have been blessed with a child named Ahmad Akhtar Daneer Holik (a boy) born on 3rd May 2019.
2. Initially, the plaintiff's and defendant's marriage was peaceful and harmonious; however, since March 2020, their relationship has become disharmonious and disordered due to continuous disputes and arguments that have become difficult to reconcile.
3. Among the causes of the disputes and arguments between the plaintiff and the defendant is the issue of family support.
4. There has been domestic violence (KDRT) within the plaintiff's and defendant's marriage.
5. The peak of the disputes and arguments between the plaintiff and the defendant occurred in July 2020, when they separated and have not reconciled since then, no longer caring for each other.
6. Both families have made efforts to reconcile the plaintiff and the defendant, but they were unsuccessful, and they are no longer able to reconcile them
7. The court has attempted reconciliation but also failed.
8. Both the plaintiff and the defendant have insisted on a divorce, with the defendant also desiring the divorce.

Based on the above legal facts, the panel of judges concludes that in accordance with Article 39 of Law No. 1 of 1974, a divorce must be based on sufficient reasons, where the husband and wife can no longer live in harmony as a married couple, and the court has attempted but failed to reconcile both parties. Furthermore, as stipulated in Article 39(2) of Law No. 1 of 1974, in conjunction with Article 19 letter (f) of Government Regulation No. 9 of 1975, and Article 116 letter (f) of the Compilation of Islamic Law, it is affirmed that one of the grounds for divorce is the continuous disputes and arguments between the husband and wife with no hope of reconciliation.

From the above-mentioned provisions, the panel of judges deems that to grant a divorce, in this case, the plaintiff and the defendant must meet several criteria: (1) There have been continuous disputes and arguments; (2) These disputes have caused the husband and wife to no longer have hope of reconciling; (3) The court has made efforts to reconcile the

husband and wife but has failed. Based on these considerations, the plaintiff's claim has been proven and is legally justified in accordance with Article 39(2) of Law No. 1 of 1974, in conjunction with Article 19 letter (f) of Government Regulation No. 9 of 1975, and Article 116 letter (f) of the Compilation of Islamic Law. Therefore, the plaintiff's request for divorce from the defendant should be granted by pronouncing a single revocable divorce (talak satu bain shughra) by the defendant against the plaintiff.

After filing for a divorce, the Plaintiff has also filed for custody of the child, Ahmad Akhtar Daneer Holik (Male), born on May 3, 2019. In accordance with the provisions of Article 86 paragraph (1) of Law No. 7 of 1989, amended by Law No. 3 of 2008 and the second amendment Law No. 50 of 2009 concerning Religious Courts, it is stipulated that divorce cases may be consolidated with their legal consequences. Therefore, the Court considers that the child custody claim filed by the Plaintiff along with the divorce claim may be taken into account. Since the child custody claim is an inseparable part of the divorce case, the evidence presented by both the Plaintiff and the Defendant, which has been considered by the Court in the divorce case, may also be reconsidered in this child custody dispute.

Regarding the rights of child custody and the obligations of parents, as well as other legal matters concerning child welfare, this is governed by Article 41 letter (a) and (b) of Law No. 1 of 1974 on Marriage, which stipulates: "The consequence of the dissolution of a marriage due to divorce is: (a) Both the mother and father remain obligated to care for and educate their children, solely based on the child's best interests. In the event of a dispute regarding child custody, the Court will make a decision; (b) The father is responsible for all costs of care and education required for the child. If the father is unable to fulfill this obligation, the Court may decide that the mother will share in the costs." Furthermore, additional provisions are regulated in Article 105 of the Compilation of Islamic Law in Indonesia, Law No. 1 of 1991, which states: "In the event of divorce: (a) Custody of children who have not yet reached the age of discernment or are under 12 years old is the mother's right; (b) Custody of children who have reached the age of discernment is left to the child to choose between the father and mother as the custodian; (c) The father bears the costs of child maintenance."

In accordance with the above provisions, the mother has a greater opportunity for custody of the child than others. However, this is limited by Article 49 paragraph 1 letter (a) and (b) of Law No. 1 of 1974 on Marriage, in conjunction with Article 156 letters (a) and (c) of the Compilation of Islamic Law. The Court concludes that child custody can only be transferred or revoked from the mother if (1) the mother severely neglects her duties toward the child, (2) she behaves in a highly improper manner, (3) she passes away, or (4) she is unable to ensure the physical and spiritual safety of the child.

Conclusion

In deciding Case Number 5139/Pdt.G/2020/PA.Tgrs., the judge essentially considered the arguments presented by the Plaintiff and the Defendant in a proportional manner. However, the judge tended to adopt a more passive approach, prioritising the principle of procedural fairness based on the prevailing laws and regulations, namely Article 39(2) of Law No. 1 of 1974, in conjunction with Article

19(f) of Government Regulation No. 9 of 1975, as well as Article 116(f) of the Compilation of Islamic Law. These regulations assert that one of the grounds for divorce is a prolonged dispute and conflict between the husband and wife with no expectation of reconciliation. Furthermore, Article 105(a) of the Compilation of Islamic Law stipulates that in the case of a divorce, the custody of a child who is not yet of legal discernment or under the age of 12 belongs to the mother. Regarding the implementation of the decision in this case, once it has become legally binding (final and conclusive), there are no issues concerning the divorce itself, as both parties agreed. However, regarding child custody, the implementation faced obstacles because the child of the Plaintiff and Defendant, Ahmad Akhtar Daneer Holik, born on May 3, 2019, was still in the custody of the Defendant. The Defendant was unwilling to hand over the child to the Plaintiff, the rightful custodian. The child was only handed over to the Plaintiff approximately nine months after the judgment was read. During this period, the Plaintiff felt aggrieved as the Defendant did not comply with the legal ruling.

References

1. Abror K. *Hukum Perkawinan dan Perceraian*. Jakarta: Ladang Kata, 2020.
2. Umar Haris Sanjaya AR. *Hukum Perkawinan Islam di Indonesia*. Yogyakarta.: Gama media, 2017.
3. Bahari A. *Tata Cara Gugatan Cerai Pembagian Harta Gono-Gini dan Hak Asuh Anak*. Yogyakarta: Pustaka Yustisia, 2016.
4. Muhammad Syaifuddin ST. *Hukum Perceraian*. Jakarta: Sinar Grafika, 2001.
5. Sudarsono. *Hukum Perkawinan Nasional*. Jakarta: Rineka Cipta, 2010.
6. Bahari A. *Tata Cara Gugatan Cerai Pembagian Harta Gono-Gini Dan Hak Asuh Anak*. Yogyakarta: Pustaka Yustisia, 2014.
7. Fanani AZ. *Pembaruan Hukum Sengketa Hak Asuh Anak di Indonesia*. Yogyakarta: UII Press, 2015.
8. Sahara II. *Legalitas Penguasaan Hak Asuh Anak Dibawah Umur*. ADIL: Jurnal Hukum, 2019;10(1):150-167. <https://doi.org/10.33476/ajl.v10i1.1070>
9. Ghozali AR. *Fiqh Munnakahat*. Jakarta: Kencana, 2008.
10. Ghozali AR. *Fiqh Munnakahat*. Jakarta: Kencana, 2008.
11. Dahlan AA. *Ensiklopedia Hukum Islam*. Jakarta: Ensiklopedia Hukum Islam, 1997.