

LEGAL EFFECT OF DIVORCE ON THE POSITION AND RIGHTS OF THE CHILD IN INDONESIA

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ABSTRACT

Divorce is a legal event with the result prescribed by law or a legal events with legal effect. Divorce is a legal consequence of marriage breakdown. The legal consequence of divorce on the status and protection of children's rights is that both father and mother still have the obligation to care and educate their children, solely based on the interests of the child. When there is a dispute over control of a child, the court rendered its decision. The legal consequence of divorce on a child is only applicable to the husband and wife who have a child in their marriage, but it does not apply to the husband and wife who do not have a child in their marriage. The position of the child specified in Law No. 1 of 1974 on Marriage position only regulates legitimate and illegitimate children and does not regulate the other child position so that a legal vacuum is present.

Keywords: Divorce, Status, Rights of the Child.

A. Introduction

Divorce is a legal event with the its legal effect prescribed by law or a legal event with legal effect. Divorce is a legal consequence of marriage breakdown. In addition, there are some further legal consequences of divorce involving children's rights as stipulated in Article 41 of Law 1 of 1974, as follows:

- a. Either father or mother is still obliged to care and educate their children, solely based on the interests of the child. Whenever there is a dispute over the control of the child, the Court gives the decision.
- b. The father is. responsible for all costs needed for the care and education of the child. When the father in fact is not able to provide the obligation, the Court may determine that the mother come to bear such costs.

Considering the substance of Article 41 of Law No. 1 of 1974, it can be confirmed that divorce is a legal effect on children. Due to the essence of the legal effect of divorce governed by Law No. 1 of 1974, it recognizes and protects children's rights as human rights.

Article 1 (1) of Law No. 39 of 1999 proposes that human rights are a "set of rights attached to the nature and existence of human as a creature of God Almighty and it is His grace that must be respected, upheld and protected by the state, law, government and anyone for the honor and protection of human dignity ". In terms of human rights, according to Article 1 (1) of Law No. 39 of 1999, a conclusion can clearly be drawn that Indonesia recognizes the rights possessed by humans, and they are the inherent and existing rights due to the existence of humanity (*he or she is human being*).

The definition and protection of human rights can be explained by the theory of formal legal state according to Stahl which is characterized by the presence of four main elements, as follows:

- a. Recognizing and protecting human rights.
- b. To protect the rights, the state administration should be based on the theory of *trias politica*.
- c. In performing its duties, the government is based on the rule of law (*wetmatigbestuur*).
- d. If, in carrying out its duties under the laws, the government still violates human rights (government interference in the one's private life), the administrative courts will resolve it.¹

In Indonesia the principle of *rechtsstaat* or state of law that enforces the *rule of law* and leads to a *welfare state*, is received with certain adjustments in which the rule of law as a night watchman or *nachtwakerstaat* can not be accepted by Indonesian. "Pancasila State of Law" essentially has the elements contained in concept of *rechtsstaat* and the rule of law. The principle difference lies in the foundation of the state philosophy that Pancasila state of law is based on the philosophy of Pancasila, not liberal philosophy. Pancasila as the national ideology provides the basic provision as the foundation of Indonesia's legal system, including the foundation of state of law.²

According to Hadjon, the critical elements of Indonesian state of law based on Pancasila is the harmonious relationship between the government and citizens based on harmony, proportional functional relationship in the powers of the state, the

¹ Muhammad Tahir Azhary, *Indonesia Legal State (juridical analysis of its constituent elements)*, Jakarta: UI-Press, 1995, p. 46.

² Mohammad Noor Syam, *Translation of Philosophy in the Philosophy of Law Pancasila as the National Legal System Development Platform*, Malang: The Malang Teachers' Training Laboratory Pancasila, 1998, p. 120.

principle of consensual dispute resolution, judiciary as the last effort when consensus fails, and balance between rights and obligations.³

Furthermore, Hadjon explained that, based on the elements of Indonesian state of law based on Pancasila, the efforts of legal protection for the public should be aimed at:

- a. The efforts to prevent disputes or to reduce the occurrence of dispute so that preventive legal protection needs to be prioritized over repressive legal protection
- b. The efforts to resolve disputes between the government and the people in a deliberation and full of family, and
- c. Dispute resolution through the courts is a last effort and confrontation forum, so judiciary reflects peaceful and serene atmosphere through its procedural law.⁴

The principles of the recognition and protection of human rights in the concept of Pancasila state of law are appropriately reflected in the Law No. 1 of 1974, particularly the provisions governing the legal effects of divorce on the status and rights of children.

B. Discussion

1. Position and Rights of the Child in Marriage

Legally, the position of the child in marriage is regulated in Article 42 of Law No. 1 of 1974 containing definitive provisions that legitimate child is a child born in or as a result of a legal marriage. Then, according to the limitative provisions in Article 43 paragraph (1) of Law No. 1 of 1974, illegitimate children only have civil relationship with their mothers and mothers' family. It means that Law No. 1 of 1974 does not justify the recognition of illegitimate children.

The position of the child specified in Law No. 1 of 1974 is only the positions of legitimate and illegitimate children and does not regulate the other position of children as the fact in the life of family/ household in the community, for example, concerning stepchildren, adopted children, foster children, children recognition, and so on, that has to do with parenthood and marriage prevailing in indigenous communities.⁵ Thus, there is a legal vacuum in the Law No. 1 of 1974 because it does not regulate the positions of stepchildren, adopted children, and recognized children which factually occur in domestic life.

Article 45 paragraph (1) and (2) of Law No. 1 of 1974 contains an imperative provision that both parents are obliged to care and educate their children very well. The obligation applies until the child is married or can be independent. The obligation continues to be applicable even though the marriage between the parents break up. Thus, the obligation of parents to care and educate their children is until they are married and can be independent. It means that even though the child is married but in reality he/ she can not be independent, it remains the obligation of parents to raise their children and grandchildren, despite the marriage of the parents breaks up due to divorce.

Children who have not aged 18 (eighteen) years old or have never been married, according to Article 47 paragraph (1) of Law No. 1 of 1974, are under the authority of their parents as long as their powers (the parents) are not removed. Then, according to paragraph (2) of Article 47 of Law No. 1 of 1974, parents represent the child regarding all legal actions in and out of court. The legal ratio of paragraph (2) of Article 47 of Law No. 1 of 1974 is that immature children are not legally competent in the field of civil law so that the child's legal act is represented by his/ her parents, in the sense that their parents are the ones who take legal actions for and on behalf of their children in and out of court.⁶

Parents are prohibited by Article 48 of Law No. 1 of 1974 to alienate or mortgage "fixed assets" possessed by their child aged under 18 (eighteen) years old or unmarried, unless the interest of the child requires to do so. As the example of the "fixed assets" owned by a child which must not be transferred or mortgaged by parents is land. On the contrary, Article 48 of Law No. 1 of 1974 does not contain the legal norms that prohibit parents to alienate or mortgage "non-fixed assets" owned by a child under 18 (eighteen) years old or unmarried, such as laptops, cell phones, and others.

Then, based on Article 49 of Law No. 1 of 1974, one of the parents or both parents may be deprived of his power against a child or more for specific period of time at the request of another parent, the child's family in a straight line up and adult siblings or the authority, by decision of the Court, in case he/ she neglects his or her duty or he/ she has a very bad behavior.

³ Philip M. Hadjon, *legal protection for Indonesian People: A Study on Its principles, Handling by the Court of General Jurisdiction and Formation Environment Judicial Administration*, Surabaya: Development Studies, 1987, p. 90.

⁴ Ibid.

⁵ Hilman Hadikusuma, *Indonesia Marriage Law According to Laws, Customary Law, Law of Religion*, Bandung: Mandar Maju, 2007, p. 125.

⁶ Muhammad Syaifuddin, *Divorce Law*, Jakarta: Sinar Grafika, 2014, p. 360.

According to the explanation of Article 49 of Law No. 1 of 1974, "power" referred to in this chapter does not include the power as the proxy of marriage. Furthermore, the term "proxy" in Law No. 1 of 1974 indicates a difference between "male proxy" under Article 26 and "proxy" under Article 50 through Article 54. The proxy of marriage is entitled to marry a female child with her future husband, while the child's proxy is the proxy of the child who has not been aged 18 (eighteen) years old or unmarried and not under the authority of his/ her parents.

Customary law society is different from the modern one in which the family/ household of a marriage bond does not only have biological children, but it also includes stepchildren, adopted children, foster children, children's recognition, and so on.⁷ All of the children have nothing to do with the rights and obligations of parents who care or maintain them, and vice versa. The position of the children has the regulation with the backgrounds on the structure of indigenous peoples concerned and the form of parents' marriage which applies. It is not an issue on the legitimacy of the child, which is influenced by the religious law adhered by the people, but it is also important to deal with descent and inheritance.⁸

2. Legal Effect of Divorce on the Position and Rights of the Child

The legal effect of divorce on the status and protection of the rights of the child under Article 41 point a of Law No. 1 of 1974 is that the father and mother still have the obligation to care and educate their children, solely based on the interests of the child. When there is a dispute over the control of the child, the court provides its decision. The legal effect of divorce on the child only applies to husbands and wives who have children in their marriage, but it does not apply to husbands and wives who do not have children in their marriage.

According to Soemiyati, in case of divorce with offspring in the marriage, the one who has the right of care to the child born in the marriage is the mother or grandmother and continues to the older ones. However, the financing for the livelihoods of the child including the cost of education is the responsibility of the father. The expiration of care is at the when time the child is able to decide to whom he/ she will live with. When the child chooses his or her mother, the mother will have the rights to raise the child. When the child chooses to live with his or her father, the right to care goes to the father.⁹

The same as the one expressed by Soemiyati, Hilman Hadikusuma argued that the father is the one who responsible for all costs of care and education required by the child after the breakup of marriage by divorce. When the father, in fact, is not capable of carrying out his obligations to finance the care and education of the child, the court may determine that the mother share the responsibility for financing the care and education of child.¹⁰

Wahyu Ernaningsih and Putu Samawati outlined their opinions on the legal consequences of divorce on "child's living" in more detail, as follows:

- a. The liability of "financing" a child is not lost due to the breakup of a marriage as a result of divorce.
- b. The child care cost is borne by the father (until the child is an adult or independent, working/ earning his/ her own living or married). The liability of supporting the child's living remains the responsibility of the father even though the child is under his care. It means that the father remains under an obligation to pay a living for the child although the right to care is in the mother, grandfather, grandmother, aunt, and so forth.
- c. When the father is not able to provide the cost of care (living), the court may determine that the mother mutually bear the child's living costs.
- d. When the father does not implement the court decision to finance the care of the child, the (former) wife can do the petition to the Chairman of the Religious Court or the District Court in which the divorce process is held. Furthermore, the Court will call the (former) husband. When the (former) husband does not meet the summons from the court with no appropriate reason, then Chief of the Court will issue a Letter of Determination that orders the execution to the Registrar or Process Server. However, when the (former) husband comes to the call of the Court, the Chief of the Court will issue a Court Warning addressed to the (former) husband in order to meet his obligations. The length of the warning time should not be longer than 8 days. When the (former) husband does not carry out/ fulfill the court's decision more than eight days, the court issues the Letter of Determination by the Chief of the Court ordering the execution to the Registrar or Process Server.¹¹

⁷ Hilman Hadikusuma, *Indigenous Justice in Indonesia*, Jakarta: PT. Miswar, 1989, p. 139.

⁸ Hilman Hadikusuma, *op.cit.*, 2007, p. 126.

⁹ Soemiyati, *Islamic Marriage Law and the Marriage Act (Act 1 of 1974 on Marriage)*, Yogyakarta: Liberty, 1982, p. 126.

¹⁰ Hilman Hadikusuma, *op.cit.*, 2007, p. 176.

¹¹ Rev. Ernaningsih and Putu Samawati, *Marriage Law Indonesia*, Palembang: PT. Rambang Palembang, 2008, p. 126.

Considering the explanations of some experts in divorce law as described above, it can be understood that Article 41 point a of Law No. 1 of 1974 is a normative form of the state's efforts to protect the rights of the child after the divorce of his/ her parents based on the functions of the state of law that recognize and protect human rights.

According to Article 50 paragraph (1) and (2) of Law No. 1 of 1974, the child who is under 18 (eighteen) years old or unmarried and not under the authority of parents, is under the authority of a trustee. The Trust is concerned about the child's personal and property.

The power of a trustee may be deprived under Article 53 paragraph (1) and (2) of Law No. 1 of 1974 in the matters as mentioned in Article 49 of Law No. 1 of 1974, i.e.: the trustee highly neglects his/ her duty towards his/ her child and misbehaves. In terms of the revocation to the power of a trustee, the court appoints another person as the trustee.

The position of children is very weak when confronted with adults; some of them just surrender and obey. The pressure and indifference of adults can only be accepted with the condition of not being able to do anything. On the basis of the weak position of children, Law No. 1 of 1974 provides the protection to the rights of children with divorced parents. In addition, the efforts of the child/ children with divorced parents who are not responsible or do not comply with the obligations decided by the court related to the issues of the rights of the child are also set forth. The legal efforts to protect children from irresponsible parents are badly needed in this case. It means that the children who suffer as a result of their parents' divorce should not be treated arbitrarily by the non-fulfillment of their rights.

C. Conclusion

1. It is necessary to have the revision to Law No. 1 of 1974 that regulates the positions of the child considering that the positions of the child set forth in the law are only related to the positions of legitimate and illegitimate children, and it does not regulate the positions of the other kinds of children, such as step-children, adopted children, and recognized children which are factual in families. It is important since it is also related to the issues of inheritance and descendant. The revision is aimed at filling the vacuum of law.
2. There should be legal institutions that can protect children from the actions of irresponsible parents not to let the children who have suffered as a result of their parents' divorce to be treated arbitrarily by the non-fulfillment of their rights.

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