

Law Enforcement on the Protection of the Rights of Children and Women after Divorce

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Abstract: Children and Women in Indonesia post-divorce are vulnerable to injustice with regard to the rights to be received. These rights include the breadwinner of children, the livelihood of wives and the sharing of marital property. At the time of divorce, many who do not understand the law or the rules that apply. Law enforcement factors such as judges and lawyers should help women seek justice still oriented to commercial interests, less conscientious, and not in favor of the interests of children and women. Besides, the legal culture of the community, both internal and external, is still not in favor of children and women. Therefore, cooperation from all components is required so that law enforcement is implemented properly. One alternative to answering law enforcement on the rights of children and women after divorce is through the progresif law used to achieve happiness and justice in society

Keywords: law enforcement, divorce, children's and women's rights.

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I. INTRODUCTION

Divorce always brings harmful and painful effects not only to the parties but also to children and their families. One of the most pronounced impacts is on rights that must be accepted by either party, especially women. In the case of divorce in Indonesia many decisions that turned out to be very unfair to women. The high divorce rate in some areas, for example in Indramayu District, occupied the highest divorce rate in Indonesia, Indramayu District was ranked first with 9,444 cases, Malang Regency 8,497 cases, Surabaya 8,262 cases of divorce. Although divorce cases continue to increase, not all rights that must be in post-divorce are guaranteed as well. These rights include the right to livelihood of children, the rights of the wife, the marital property (Muhammad Syaifuddin, 2012: 354).

Article 41 of Law Number 1 Year 1974 concerning marital letters (a) explains, the father of the mother or father remains obliged to maintain and educate their children after the divorce; (b) the father is responsible for the maintenance and education costs that are needed for the child, if the father does not have the ability, the court can determine the mother to share the cost. The Child Protection Act becomes the obligation of both parents, especially the obligation to meet the needs of the child's life in his father. Article 1 point 11 of Law Number 23 Year 2002 on Child Protection explains that in the intention of the power of care is the power of parents to nurture, educate, nurture, nurture, protect, and nurture children according to the religion and their abilities, talents, and interests. But the reality, post-divorce, almost most children who follow his mother, the father as if free of responsibility from the obligation to live the life of his biological child. The main problem is the right of hadhonah or custody of a child who falls to the mother, but the obligation to cost the child's life until the child is still a mother's obligation to finance it (Hilman Hadikusuma, 2007: 176). Whereas some of the decisions about divorce under investigation impose the custody of the child remains the primary responsibility of his father. But the reality is that father has never carried out his duty to the child after he divorced his wife. Some run their duties but not routinely every month, some even run for only a few months, then completely discard the responsibility of providing for their children. The main weakness is that the Marriage Law has no strict sanctions for a father who abandoned his duty to take full responsibility for the needs of his biological children, especially after the divorce. And the judges who decide the case also do not dare to add sanctions for a father who does not want to account for the cost of living his biological child, because there are no clear legal rules, and not requested in the lawsuit made by the women.

Due to marital problems for divorced women is the wife's living after divorce and sharing of marital property. The wife of a post-divorce wife, in reality, is often the wife does not fight even though the ex-husband does not give his duty even though the judge's decision after the divorce obliges to provide for the ex-wife's wife after the divorce. The next right is the marital property is the property acquired during the marriage bond (M. Anshary, 2016:29). In Indramayu district is the highest divorce rate in West Java, Cilacap regency is the highest divorce rate in Central Java while East Java, Malang Regency occupies the highest divorce rate. Although the divorce rate of each Regency is high in every year, the filing of marital property in every year is very little, on average under 10 cases each year. The average solving of conflicts of marital property is settled out of court. In reality, out-of-court settlements are largely resolved by way of both parties' peace and often women are victimized by being under pressure. Therefore, it is necessary to have a neutral mediator who can assist both sides.

From the above background shows that family law in Indonesia has not been able to provide a sense of justice for children and women and has not been able to provide legal protection against their rights after they divorced from their husbands. Therefore, this article will explore about what factors lead to weak law enforcement on the protection of the rights of children and women after the divorce, how law enforcement efforts in providing a sense of justice and legal protection of the rights for children and women after the divorce.

II. Research Methods

Research Approach

The approach in this study uses sociological juridical (empirical juridical), the approach that sees the law as a phenomenon which in interaction cannot be separated from non-legal factors (Ronny Hanitijo Soemitro, 1992: 11)

Data Collection Techniques

Data collection techniques used primary data and secondary data. Primary data obtained through observation (observation) and interviews or interviews. Interview techniques are conducted freely using in-depth interviews. Key instruments in this study are the researchers themselves, interview guides and recorders or recorders. Informants who are the sources of information are split husbands or wives, modin /lebe, community leaders, heads of religious courts, judges of religious courts. Secondary data uses the study of legal literature, journals, articles, legal dictionaries and documentary studies of important documents researched and tracked the relevant regulations.

Data Analysis Technique

Data analysis for primary data used qualitative descriptive normative analysis, whereas secondary data in the form of legal law materials collected used content analysis. The steps of data analysis using step interactive model (Miles, Mathew B and A. Michael Hubberman, 1992: 15-20), which consists of components namely: data collection (data collection), data reduction (data reduction), data presentation (data display), conclusion and verification of data (conclusion drawing and verifying).

III. DISCUSSION

Weak Law Enforcement For the Protection of the Rights of Children and Women After Divorce

Law enforcement is a process of realizing the wishes of the law into reality. The legal desires referred to here are the thoughts of the legislatures formulated in the laws (Satjipto Rahardjo 1983: 23-24). The formulation of the minds of the lawmakers set forth in the rule of law, also determines how law enforcement is carried out. Thus, in turn, the law enforcement process culminates in its implementation by law enforcement officials themselves. From this situation, with extreme tone can be said that the success or failure of law enforcers in carrying out their duties actually started since the legal regulations to be executed was made

Satjipto Rahardjo (1983: 23-24) distinguishes various influential elements in the law enforcement process based on the degree of proximity to the process, which is somewhat distant and somewhat close. Based on the criteria of closeness, Satjipto Rahardjo distinguishes the three main elements involved in law enforcement process. First, the elements of legislation cq. legislative body. Second, law enforcement element cq. police, prosecutors, and judges. And thirdly, the elements of the environment include private citizens and social.

Lawrence M. Friedman saw that the success of law enforcement always requires the functioning of all components of the legal system. The legal system theory proposed by Lawrence M Friedman is that every legal system always contains three elements: the legal structure (legal structure), legal substance (a legal substance) and legal culture (legal culture). Friedman sees that the success of law enforcement always requires the functioning of all components of the legal system. The legal structure (legal structure) is the torso, skeleton, eternal form of a system. The legal substance of the actual rules and norms used by the institutions, the reality,

the behavioral form of the principals observed in the system. The culture or legal culture (legal culture) is the ideas, attitudes, beliefs, expectations, and opinions about the law (Lawrence M. Friedmann, 1984: 5-7)

In the life of society, the existence of a written rule that the law is mostly obeyed and there are laws that are not obeyed. The result is that the legal system will suffer destruction if everyone does not comply with the law, so eventually, the law will lose its meaning. The ineffectiveness of legislation tends to affect the timing of attitudes and quantity of non-compliance and has a marked effect on legal behavior, including the behavior of offenders. This condition will affect law enforcement that ensures certainty and justice in the community.

The legal structure in dealing with post-divorce law problems is judges and lawyers. Firstly, the Judge has the primary duty of accepting, examining and adjudicating and resolving all matters raised to him. In dealing with civil matters, the judge should assist the justice seeker and try to overcome obstacles and barriers to create a simple, quick and costly trial. The judge in handling the case of divorce is related to marital property, the judge must be careful and can help separate the marital property, the possessions and the acquisition property. The judge should also consider the pattern of marital relations in non-gender-biased households. So also in handling the problem of wife and children's rights, the principle of justice for wife and child should be put forward. Secondly, the lawyer, in performing his duties is not solely aimed at obtaining material rewards but rather prioritizing the establishment of law, truth, and justice (Article 3 Sub-Article b Code of Advocate Ethics). From these provisions indicate that in representing his client as a divorce attorney for divorce and due to divorce, a lawyer providing legal services should prioritize and enlighten his client about the consequences of divorce and the duty it has to fulfill. In fact, lawyers often add to the situation that heats up after the divorce becomes hotter. Lawyers are not consultants, but lawyers should help solve conflicts well.

When reviewed in terms of factors of legal substance, Article 37 of Law. Law Number 1 Year 1974 on Marriage, "When a marriage breaks up because of divorce, marital property is regulated according to their respective laws." While the "law of each" in the explanation of this article states, "What is meant by law respectively is law religion, customary law, and other laws."If it refers to the provisions of Article 37 of Law Number 1 Year 1974 and the explanation of the article, as if the sharing of marital property there is no standard reference because the Marriage Law does not regulate it in detail the number of portions in case of divorce between ex-husband and wife. Article 41 Law Number 1 in the Year 1974, explained the legal consequences of divorce. In Article 41 explains the right to fulfill the needs of children and wives, there are no civil or criminal sanctions in case of violation of a court decision.

The legal culture of society also plays an important role in law enforcement, in the case of marital property and the right of life after divorce, why women do not get good justice, it is because: first, because women do not know their rights, there is knowing but silence is important divorced. Second, the culture of our society that considers "taboo" if women fight for their rights let alone brought to justice. Third, the level of education is low, because the educational background affects the mind and attitude of someone. Fourth, patriarchal value built by family and social environment.

Law Enforcement Efforts to Provide Justice and Legal Protection for Women's Rights Post-Divorce

Article 31 of Law Number 1 Year 1974 is part of the chapter that discusses the rights and obligations of husband and wife. There are four important things that indicate equality of men and women in the Marriage Law, namely:

- a. A husband and wife share a duty to uphold the household;
- b. Husband and wife have equal rights and position in household and society
- c. Husbands are equally entitled to perform legal acts
- d. Husbands are equally entitled to bring a lawsuit to the court if one of them neglects the obligation.

From the above provisions indicate a balanced role between men and women in the household. Likewise, in the event of a divorce, if a spouse or husband wishes to divorce, divorce or divorce in court, the right of a spouse to claim his / her rights when harmed by his / her spouse, so that the necessary legal protection of the court is authorized to examine, hear and adjudicate his divorce.

One is the legal compliance with the Marriage Law in Indonesia. An example is the duty of a father to finance the life needs of his biological child after divorce living with his mother. Article 41 of the Marriage Law is explained due to the marriage break-up due to divorce is:

- (1) Whether 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 the control of the children, the Court makes a decision.
- (2) The father responsible for all the maintenance and education costs required by the child, when the father, in fact, can not give the obligation, the court can determine that it should bear the cost.

In some of the decisions investigated by the researcher related to the father's duty in meeting the needs of his biological child's life after the divorce, the decision fell to the father to bear all the obligations. However, in reality, the rights to provide for the ex-wife and many children are not met. This is what causes the mother to take full responsibility for the cost and needs of the child's life.

There are several steps to be taken regarding the sharing of marital property after the divorce, including:

1. The desire to share a marital property

The existence of a "desire" to share marital property is important because many people have no desire to share a marital property. So the "desire" to divide this must be on the ex-husband and wife after the divorce.

2. Plan to share a marital property

The plan in question is the desire to share the marital property by means of litigation or non-litigation, place, time, amount of division between the two parties.

3. Implementation of sharing of marital property

The activity of dividing the marital property into its own part. In Islam, it is asserted that the sharing of the marital property must be fair. Some scholars explain the "fair" in the sharing of mutual wealth between ex-husband and wife based on the contribution of each party during the marriage.

In the case of the distribution of marital property becomes very complicated if one party feels more entitled than the disputed property. The distribution of marital property can be done by way of customary law, Islam, Kompilasi Hukum Islam (KHI), Civil Code. As explained in Article 37 of Law no. Law Number 1 of 1974 on Marriage, "When a marriage breaks up because of divorce, marital property is regulated according to their respective laws." While the "lawya respectively" in the explanation of this article states, "What is meant by law respectively is law religion, customary law, and other laws."

From the above rules explain that the settlement of marital property for husband and wife who divorce can be done with three alternative law, that is aware of the religious law, customs law or other law. For people who are Muslim, the sharing of marital property will be settled under Islamic Law. For indigenous peoples, as long as they are Muslims if there is a dispute over the distribution of marital property is settled under Islamic law. Whereas for non-Muslims are settled under their customary law as long as it is not regulated in their religious teachings.

Division of marital property after divorce for ex-Muslim husband and wife, the Government of the Republic of Indonesia provides a legal instrument in the form of Presidential Instruction Number 1 of 1991 on the Kompilasi Hukum Islam (KHI). Article 96 paragraph (1) describes the division of marital property in the case of a death divorce, which reads "If a divorce dies, then half the marital property becomes the right of a couple who live longer.", While the husband and wife divorce live, Article 97 which reads, "The widow or divorced divorce of each life shall be entitled to half of the property as long as not specified otherwise in the marriage agreement."

From the provision of the division of marital property both divorce live and divorce death by Kompilasi Hukum Islam and Article 128 Civil Code, each ex-husband and wife get half of the marital property. Considering the substance of the Articles in the marriage legislation enacted in Indonesia it is clear that on the marital property of each party the husband and wife get half of the division, the rule of law does not see what is the backbone or the main breadwinner whether a husband or wife. According to Azharuddin Latif, marital property in the Marriage Law is the recognition of equal status between husband and wife as this opens the opportunity for women to obtain marital property, because before it is regulated in the laws of women housewives do not get a share of property together in case of divorce only get severance pay or mut'ah course. Isna Wahyudi (2014: 85) adds a husband or wife who gets a half-shared treasure will be fair for couples who both run a role that can maintain the integrity and survival of the family, as a complementary partner.

It is these provisions that make reference to judges to decide disputes over marital property other than the values of justice can be extracted from existing science, customs prevailing in society, and jurisprudence. If the wife becomes the main breadwinner, it is certainly the wife who should get a bigger share in the distribution of marital property. But court decisions tend to decide to get half for both parties. Another case if the husband who became the main breadwinner, sharing of marital property in the same because of the obligation of the husband to earn a living even if the wife does not work, he remains entitled to the marital property. According to Jurisprudence (Decision of the Aceh District Court No. 23/1981 / Pdt dated July 21, 1981), property acquired in marriage even if a wife does not work, but because the wife takes care of the household then the property is a joint treasure (Andy Hartanto, 2017: 133)

If we stand to Satjipto Raharjo's opinion, to achieve the value of justice, that the law for man, not man for the law. " The law is in charge of serving the community, not the other way around. The quality of a law is determined by its ability to serve human well-being. This phrase seems to imply to us to return to the flow of utilitarianism Jeremy Bentham which states that the goal of the law is to achieve "the greatest happiness for the greatest number of people" (Satjipto Rahardjo, 2008: 11-13).

When looking at legislation on family law, in reality, the protection of women's rights has not fully fulfilled the values of justice, there is still a lot of domination of ex-husbands against the marital property so that ex-wife cannot prove it. Therefore, a legal awareness, ethics and moral for judges are needed, especially to dare to exit the existing rules to provide justice for women after the divorce. This is permissible because the judge is

also given the right to make jurisprudence as long as the jurisprudence can provide usefulness for the development of law science, especially in providing justice for women after the divorce in terms of financing the lives of their own children in their care and the rights to obtain sharing of marital property fairly.

Law enforcement is closely related to legal compliance. Due to the existence of legal compliance will be realized law enforcement itself. Therefore, to achieve law enforcement, it is necessary to support the factors that constitute a unified whole to make it happen, namely the substance of the law or the rules, the factors of law enforcers and the legal culture. Factors of legal substance, it is necessary to revise the marriage law more adapted to the development of the times, the articles that can be gender need to be changed with the article that put forward the existence of gender equality, the need for strong legal sanctions for husbands who do not fulfill the obligation in the provision of a child's livelihood, wife and marital property.

Legal structure is a part that must move in a mechanism that must be addressed as well, such as the performance of judges and lawyers as law enforcement officers must be addressed its performance. According to Mukti Arto, (2015: 265) in deciding cases particularly with regard to the right of the child, wife and marital property, first, the judge must be able to force the husband of the defendant and the husband of the defendant to continue giving the right of care to the ex-wife for the best interests of the child, related to a child's livelihood, the judge can force his father to continue to provide for children under 12 even if the wife is married again. Secondly, the judge must place a husband and wife equally and equally contribute to the acquisition of marital property collected throughout the marriage, assuming that the wife's status as a housewife is an equal contribution in the process of creating a marital property of husband and wife. Lawyers as law enforcement officers also fix its performance to better defend the right more oriented to the rule of law in accordance with existing provisions.

When viewed from the factor of legal culture, related to issues of protection of women's rights especially post-divorce, it must be understood that the legal culture formed in Indonesia is the legal culture that is still controlled by patrilineal. The culture of patrilineal law is a legal culture that defends men's rights more than women's rights. Many of the rules of law prevail in Indonesia, especially in family law with much more preference to men. Examples are parenting issues, then marital property issues. This is because there is a mindset that men are superior, more powerful than women, so they are entitled to get because their main task is also to protect women and their families. But in fact, they are not aware that it has hurt and stepped on the rights of women.

Efforts that can be taken to enforce the law of women's rights post-divorce is to apply a law that is prolonged both from the substance of the law, its law enforcement side, the aspect of society and the culture of law that has been described above. This is because the law of progress has a purpose to improve all that, in particular, to achieve happiness and justice in society, must begin with the ethical and moral improvement of the entire legal apparatus (both from lawmakers and law enforcers). Because ethics and morals are the basis for the development of progressive law in the future. The improvement of ethics and morals as the basis for the establishment of progressive law in Indonesia according to Sutjipto Raharjo (2008: 227), has the intention of:

1. Having a great purpose in the form of human welfare and happiness;
2. Contains a very strong humanitarian morality;
3. A progressive law is a law covering a vast dimension that not only moves in but also the theory;
4. Being critical and functional, therefore he is constantly seeing the shortcomings and finding ways to improve them.

A progressive law is a moral institution of humanity, it is clearly an inexorable emphasis. It is very closely related to mental development, good physical development, aimed at the development of human farmers and law enforcers in Indonesia. Since the progressive law is human, human ethics or moral development is necessary if we are to achieve optimal law enforcement in this country. The content and nature of the ethics and morals that form the basis of the creation of progressive laws include:

- a. Renewal, renewal or renewal of human thought;
- b. Improvement, guidance or direction in the workings of human beings; and
- c. Upgrading, establishing or presenting and discovering new initiatives and so on.

A Mukti Arto (2017: 21) to realize justice based on Belief in the Almighty, then in solving civil cases especially regarding the rights of children, wife's living, marital property, it must be noted some indicators as follows:

- a. Those who are entitled to what the justice conscience believes to be their right in the matter, whether or not limit
- b. The duty party has fulfilled what the conscience of justice is obliged, both against the opponent and the other party in the case which is his responsibility
- c. There is a balance between two sides and no discrimination
- d. No party will win unlawfully due to obstacles and obstacles that hit the opponent so as to get justice
- e. There is a guarantee of legal certainty that judicial decisions can be carried out easily, effectively and efficiently.

In addition, to minimize the conflict within the family is required a commitment between husband and wife between them through marriage agreements. Marriage agreements in Indonesian society are still rare but need to be developed so that no mixing of congenital property, marital property, and justice can be realized. The marriage agreement is an agreement between two prospective husbands to regulate the property of each person each made before the marriage and certified by the marriage clerk (Damanhuri, 2012: 7). The marriage agreement is set forth in article 29 of Law Number 1 Year 1974 about Marriage. In paragraph (1) stipulates that at the time or before the marriage takes place, both parties of the joint bag of agreement may file a written agreement authorized by the Registrar.

IV. CONCLUSIONS

Factors in weak law enforcement on the protection of the rights of children and women after the divorce are the legal substance of the Marriage Act Number 1 Year 1974 as the main substance in its application. Besides the law enforcement factor that is the judge who decides the case of the divorce. Judges not only rely on the existing rules, he must explore the norms to provide justice in the decision and its implementation for the protection of the rights of women after the divorce. In addition, the legal culture of the people who laid the law in social reality in society, particularly in relation to the distribution of marital property which in reality still has not brought justice for women to the equitable sharing of marital property with women, placing women as equals / equal partners of the law / partners them to solve the problem of the property together well without any pressure. One alternative solution to enforcing the law on the rights of women after divorce is through government law. This is because progeny law has the goal of improving all that, especially to achieve happiness and justice in society, which creates a balance between two sides and no discrimination.

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