

JURIDICAL REVIEW DUE TO THE BROKEN OF MARRIAGE BECAUSE OF DIVORCE AND ITS LEGAL CONSEQUENCES BY APPLICABLE LAW

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ABSTRACT

The ideal condition of a marriage goal is to form a happy and eternal family based on the omnipotence of the divine. This is certainly not easy to achieve. The journey of a household often encounters obstacles, such as the occurrence of different views and perceptions of the husband and wife that sometimes have an impact on the occurrence of family disagreements and divisions, so that marriage becomes difficult to defend and must be broken by terminated by divorce. The impact is most felt by the consequences of broken marriage because of divorce is the child born, children of the victim of divorce is not infrequently experiencing stress and despair in reaching her dream. In addition, the breakup of marriage due to divorce can also affect the couple's own husband and also to the distribution of property that has been obtained during the marriage. From the background as described above the author is interested in further study related to the above issues by raising the title: "Juridical Review Due To The Broken Marriage Because of Divorce and Its Legal Consequences By Applicable Law". The issues raised in connection with the background of the above problems are: 1) What reasons can cause the marriage breakup because of divorce? , 2) What is the legal effect of the marriage break-up due to divorce under applicable regulations? From the results of the review conducted can be seen that there are several reasons that can be used as basis for divorce as which is determined in the Marriage Act of the Republic of Indonesia Number 1 of 1974 and Government Ruling Number 9 of 1975 and Compilation of Islamic Law. From the results of further research it can be seen that divorce will bring the result on the couple's own husband that is that they no longer live together as husband and wife and property obtained during the marriage must be divided in two while the rights of child care is still in Under age the judge has the right to decide whether the child will be with his mother or with his father.

Keywords: Divorce, Legal Consequence

A. INTRODUCTION

Recently, we often hear and see in various mass media, both newspapers and electronics, the occurrence of divorce cases committed both by the lower classes and in the upper tier society as practiced by Indonesian artists and even scholars such as Ustadz Zaki Mirza and Ustadz Ahmad Alhabsyi which should be a good example in fostering households. The phenomenon of the many cases of divorce that occurred in society of course it is very *memrihantikan*. Considering the Marriage Law mandates that marriage can last forever, it means that until the life of the body is conceived, only death separates.

Law of the Republic of Indonesia Number. 1 of 1974 concerning marriage has defined marriage as a bond of inner birth between a man and a woman as husband and wife with the aim of forming a happy and eternal family or household based on the Almighty God.

Based on the definition of marriage as described above, it gives us an idea that marriage essentially has a very broad and profound meaning as stated by Wibowo Rekso Pradoto that the marriage bond is not only a bond born but also has a strong spiritual bond. Birth bonds are a visible bond, revealing a legal relationship between a man and a woman as husband and wife. This bond is called a formal relationship. Nevertheless the marriage bond is sacred as it is taught by their respective religions.¹

This means that the parties concerned because the marriage is formally a husband and wife both for them in relation to each other and to them in relation to the wider community. The definition of the inner bond in marriage means that in the mind of the husband and wife concerned there is a genuine intention to be together as husband and wife in order to form and foster a happy and eternal family. Clearly, in a marriage there should not be only a bone bond or a bond of mind alone. Both elements are expected to exist in every marriage.²

The purpose of marriage according to the Marriage Law is to form a family or a happy and eternal household based on Belief in the One Almighty God. The formula contains the hope that by marriage will be a happiness both born and inner. The happiness to be achieved is not the temporary happiness but the eternal happiness of the expected marriage is eternal marriage. This eternal marriage here is a lasting marriage and is expected to occur only once in a lifetime.³

But in reality, in marriage is not always an eternally happy life can easily be realized, it is what one person wants marriage only happen once in a lifetime. Many things will happen in marriage, and not all marriages can achieve the desired goals, many marriages are foundered in the middle of the road.

According to Article 38 of the Marriage Law, marriage may be ended because of:

- a. Death
- b. Divorce
- c. Court decision.

In the case of a divorce, the husband or wife who will file for divorce should pay attention to several things. The law provides restrictions on divorce as stated in Article 39 section (2) of the Marriage Law, namely to divorce must be

¹ Wahyuni, 2008, *Hukum Perkawinan di Indonesia*, Published by: Pustaka Magister, Semarang, p. 5

² Wibowo Reksopradoto, *Hukum Perkawinan Nasional*, Faculty of Law UNDIP Semarang, 1982, p.11

³ Wibowo Rekso Pradoto .*ibid*.

sufficient evidence, the reason that between husband and wife will not be able to live in harmony as husband and wife. In addition, under Article 39 section (1) of the Marriage Law, divorce can only be lawful only when it is conducted before a court of law. And furthermore in the general explanation sub 4e explained that because the purpose of marriage is to build a happy family, eternal and prosperous, then this Law adheres to the principle *mempersulit* the occurrence of divorce. To allow for the occurrence of a divorce there must be certain reasons and should be made before the court. From the above explanation explained that a divorce is only possible in front of the court. Thus the divorce imposed outside the Court of justice is deemed to have not occurred or did not fall on his divorce.

According to Article 14 of Government Regulation No. 9 of 1975 that a husband who has held a marriage according to Islam, who will divorce his wife shall file a petition to the Court of residence containing the notice that he intends to divorce his wife accompanied for reasons of reason and ask the court to hold a hearing for that purpose. From the passage it can be seen that a husband who wants to divorce his wife must apply to the court and the petition must be written. means written here must meet the requirements of a petition or claim. While in general people in Indonesia are blind to the law of law in court so it is considered difficult to make the application letter.⁴ From this explanation the public who will make divorce is not as easy as imagined because the spouse who is going to divorce must meet the requirements and reasons set by the Law. Here it can be concluded that the Law: complicates the divorce, so that the expected marriage is realized and in order not to marry, divorce, marry again and divorce again.

In reality, however, there is much divorce, in this case incompatible with the purpose of marriage as mandated by the Marriage Law which aims to form a happy and eternal household until the end of the body life.

From the above description, the authors are interested to further examine the issue of divorce by raising the title: "Juridical Review Due to The Broken of Marriage Because of Divorce and Its Legal Consequences by Applicable Law".

B. FORMULATION OF THE PROBLEM

Based on the above description, the authors formulate the following issues:

1. What are the reasons for the broken of marriage because of divorce?
2. How are the legal consequences of broken of marriage because of divorce?

C. DISCUSSION

1. Reasons for Divorce

From the results of research conducted through literature studies and interviews with legal practitioners such as the Religious Court of Semarang states that the issue of divorce is a much-discussed issue long before the Marriage Law.

The issue of divorce is a much-discussed issue long before the Marriage Law. Divorce is only possible, if really necessary, meaning that in marriage between husband and wife is no longer able to live in peace and harmony and efforts to reconcile the two have not been successfully done.

To be able to divorce it must have certain reasons or causes in accordance with established by law. The reasons for divorce are limitative, meaning that there is no longer a reason to divorce other than the reasons set forth in the law and should be made before the court.

The reasons for the divorce mentioned in the explanation of Article 39 section (2) of Law Number 1 of 1974, that is:

- a. One party commits adultery, becomes a drunkard, compactor, gambler and so on that is difficult to cure;
- b. One party leaves the other for 2 (two) consecutive years without the permission of the other party and for no legitimate reason or for any other matter beyond his or her ability;
- c. One party is sentenced to 5 (five) years imprisonment or a heavier sentence after marriage takes place;
- d. One party undertakes severe cruelty or maltreatment against the other;
- e. Either party gets a deformed body or illness that can not perform his/her duties as a spouse;
- f. Between husband and wife continuous disputes and quarrels and no hope of living in harmony again in the household.

In Islamic law there is no limitative detail about the reasons for divorce (*thalaq*) except in the case of *ta'lik thalaq* of the husbands fall if the situation pledged in *ta'lik thalaq* occurs, for example:

1. If husband left his wife for 6 (six) months in a row without giving news and money.
2. When the husband hits/hurts the wife beyond the limit and scars.
3. When a husband kicks a wife (an allegory which means the husband does not treat his wife as a wife, but also does not divorce her), and if the wife is not willing for the incident then she comes to the husband or official authorities or to the jOffice of Religious Affairs or mosque officials and pay the *iwald* (replacement) money as determined then the husband's *thalaq* falls.⁵

Divorce as the reasons of adultery is easy to understand, because it violates the obligations of the husband or wife and the purpose of marriage. But the problem of adultery as the reason for divorce has raised the question of *judex factie* in the Netherlands, namely the question of whether an adultery by either party third person, approved or as if presented by another party may be the reason for the other party to sue for divorce on the grounds of adultery.⁶

In Islamic law, the matter of adultery is a curse act, so it is not only used as a reason for divorce, but the adulterer will be punished by stoning to death, if the adulterer is a man already *baliq* (adult), intelligent, independent and married. While adultery committed by a girl and a bachelor, the law is wracked 100 (one hundred) times and exiled out of the region for a year.

⁴ H.Sarmin Syukur, *Hukum Acara Peradilan Agama Di Indonesia*, Jaudar Press, 2017, p. 141

⁵ Amir Syarifuddin, *Hukum Perkawinan Islam Di Indonesia*, Kencana Prenadamedia Group, Jakarta, 2014, p. 189

⁶ *Ibid.*

In addition to adultery, the drunks, compactors and gamblers are difficult to cure, as well as reasons for divorce. What and how drunkenness, madat and gambling may serve as reasons for divorce not described in the Marriage Law, all of which are left to the judge to interpret it, in this class including the reason that one of the parties leaves the other party for two consecutive years without permission, it can only be granted if the defendant declares or shows an attitude of not wanting to return to the residence (Article 21 section 3 of Government Regulation Number 9 of 1975). The problem that needs to be considered in this reason is the consecutive word. This is important, because if this condition does not exist, then the abandoned party may use this reason arbitrarily, for example if the husband leaves after one year, then returns home and then leaves again for a period of one year from the first departure yet again, this can not be a reason for the wife to divorce from her husband, because of the condition that the leave must be consecutively for two years and the party never returned.)

About the reason of getting a five-year prison sentence or a heavier one, based on the notion that the person concerned can not fulfill his or her obligation as husband and wife. The filing of a divorce suit for this reason according to the author is the easiest way to do, because the party who will ask for divorce is sufficient to show a copy of the court's decision to decide on a case which has a permanent legal force that has tried a convicted person to a court that will adjudicate the divorce (Government Regulation No. 9 of 1975).

Committing a crime or severe maltreatment as a reason for divorce is reasonable, because by committing a crime or torture against another means the love and affection and the nature of help and mutual protection by husband and wife is no longer there. In practice the use of this reason is evidenced by the presence of a doctor's visum, but this doctor's visa does not bind the judge in absolute terms, committing such crime or ill-treatment should be examined or decided as a criminal case before being examined or decided in a divorce case.

Regarding the deformity of the body or illness, the Marriage Law does not explain what the body's defect or illness is and what may be the reason for requesting a divorce, it is only implied that the disability of the body or illness is that the afflicted party can no longer fulfill its obligations as a husband and wife.

According to the writer's opinion, body defects or diseases that can be categorized in this case, such as impotence, crazy, leprosy, diseases paralysis and others that cause the sufferer must be alienated or have to get special treatment in a long time. All of which must be reviewed from various facets. In terms of medical.psikis and so on As for the reasons for continuous disputes and quarrels and no hope for reconciliation is based on the consideration that the purpose of marriage to build a happy, prosperous household will be difficult is achieved, as well as carrying out its obligations properly, as contained in articles 30, 33 and 34 of Law No. 1 of 1974 is difficult to achieve. The reasons for divorce are not known in the Civil Code, but this reason develops in jurisprudence.

The Supreme Court since 1968 which set the reason for on hulbare tweespalt is a continuous bickering that can not be reconciled. Reasons like this is the most widely used for couples who filed for divorce lawsuit.

Thus the Law specifies the reasons for divorce in a limitative manner intended to induce the divorce, which by society is seen as an act contrary to the joints of the social life of society, even in the teachings of Islam is seen as a lawful act that is hated by Allah SWT and His rosary. Despite being hated but allowed many people do divorce without taking into account the consequences.

2. Legal Consequences of The Broken of Marriage Because Of Divorce

Regarding the effect of the marriage breaking law from further research results obtained picture as follows, that in outline. There are three consequences of marriage breakup because of divorce:

1. Effect on husband and wife
2. Effect on the property of marriage
3. Effects on the children

For more details below will be described one by one.

1. Effect on husband and wife

The result of divorce against husband and wife is marriage between husband and wife to be broken (dissolved), so also delete the obligation to live together between the two, except when there is demand for subsistence allowance (alimention). With the breakup of marriage, the former wife and former husband, both are free to determine his attitude in doing legal deeds. In addition, for married couples whose marriage has been broken/disbanded, so especially for ex-wife apply the provision of *iddah* (waiting time), The period of *iddah* for ex-wife according to Article 39 of Government Regulation Number 9 of 1975 is as follows:

- a. When the marriage is terminated due to death, the waiting time is set one hundred and thirty days.
- b. If the marriage is terminated by divorce, the waiting time for which is still in the moon shall be 3 (three) times sacred with at least 90 (ninety) days and the unfilled month shall be 90 (ninety) days.
- c. If the marriage is broken while the widow is in a state of pregnancy, the waiting time is set until delivery.
- d. There is no waiting time for the widow who broke up her marriage due to a divorce, while the widow and her former husband had never had sex.
- e. The grace period in divorce is counted since the fall of a court decision having a permanent legal power.⁷

For the wife who runs the period of yahah thalaq according to Islamic law is to have certain rights and obligations that are as follows:

- a. The wife who is in the *iddah* period, must stay in the house that has been determined by the husband (occupied until the *iddah* period runs out). During the period of *iddah* wife should not be expelled out of the house.
- b. The wife is entitled to maintenance for the waiting period before a divorce well as a living fulfillment of food and clothing.

⁷ Ahmad Rofiq, *Hukum Islam di Indonesia*, PT. Raja Grafindo, Jakarta, 1998

As a result of the prescribed period is that the widow is forbidden to marry another man until the iddahnya completed, otherwise the former husband to reconcile with his wife.

In conjunction with the problem refer to this, it needs to be said here the provisions contained in Article 10 of Law No. 1 of 1974, which stipulates that: "If a husband and wife who had divorced remarried or with others and divorced again for a second time, then among them shall not be married anymore, as long as the law of each religion and beliefs of the relevant does not specify another".

From the above provisions can the authors conclude that between the same husband and wife only two times can make a divorce. In other words between two equal persons only twice can marry each other, except the law of each religion and his belief is different.

3. Effect On The Property Of Marriage

If we consider the provisions of Law Number 1 of 1974, then the matter of marriage property is only stipulated in 3 (three) articles only, starting from Article 35 to Article 37, which is complete as follows:

Article 35

- (1) The property acquired during marriage becomes a common property.
- (2) The property of each husband and wife and property acquired respectively as a gift or inheritance, is under his control as long as the parties do not specify otherwise.

Article 36

- (1) Regarding joint property, the husband or wife may act upon the agreement of both parties.
- (2) Regarding their respective property, husbands and wives have the full right to engage in legal acts concerning their possessions.

Article 37

When marriage breaks up due to a divorce, property is arranged according to the law of each.

In the explanation of article 37 it states that what is meant by "law of each" is religious law, customary law and other laws.

When we consider the content of the provisions of the articles mentioned above, it appears that the provisions of Law Number 1 Year 1974 has confirmed that the property that is whispered during the marriage into a common property. However, according to their respective laws, namely religious law, customary law and other laws, similarly to those who are subject to customary law, their common property is governed by customary (local) law. Meanwhile, for those who are subject to Western Civil law, it will be governed according to the Civil Code. It can be concluded that although the Law No. 1 of 1974 which applies nationally has regulated the property of marriage, especially the joint property of husband and wife, but the provisions of Law No. 1 of 1974 does not eliminate the existence of legal dualism in the community about property along with it. Because in the end if divorce occurs then the joint property is rearranged according to their respective laws, namely religious law, customary law and other laws.

The above proves that this Marriage Law is incomplete as disclosed in Article 66 of Law Number 1 of 1974, namely "... to the extent provided for in this Law, shall be declared null and void". Therefore we still need to keep (to learn) the provisions of religious law, customary law and other laws concerning marital matters, especially regarding marriage property.

4. Effects on the Children

The obligation of parents to maintain and educate their children after the divorce in Law Number 1 of 1974 is regulated in Article 41 point 1 and b, namely:

Due to the breakup of marriage because of divorce is:

- a. Whether the mother or father remains obliged to nurture and educate her children, solely on the basis of the child's interest, when there is a dispute over the child's tenure, the Court makes a decision.
- b. The father who is responsible for all the maintenance and education costs that the child needs, when the father in reality can not give the obligation the Court can determine that the mother took part to bear the cost.

The parent's duties mentioned above continue until the child is married or able to stand alone and this obligation continues despite the authority of the parent is revoked (Article 45 section 2 jo Article 49 section 2 of Law Number 1 of 1974).

Anyone given the right to nurture between the two parents is determined by the agreement of both parents, but if there is a dispute then the court gives a decision.

Generally in practice, children under the age of 12 are under the care of their mothers and for children older than 12 years old are left to the child's own stance, whether or not to participate in the mother or to their father, a child under 2 years of age or still breastfeeding with mother. According to Mr. B. Teer Haar says "sucking children (under 2-3 years) always follow their mother, after which they remain in the proper relatives according to the composition of your child, or if the siblings do not allow such a thing, they gather one of his father's parents whom he submitted for the decision at the time of marriage is declared divorced.

According to the provisions of Article 229 section 1 of the Civil Code that after the divorce declared, after hearing the opinions of the parents of the child and the family that are still in the age, the court decides which of each of the children should be will exercise guardianship over his children, keeping in mind whether the parent in question still has the power of people

If the power of the old man has been released or revoked before the divorce is done, then the parent can not be appointed again be a guardian. Who among the parents appointed to be a guardian is entirely dependent on the judge, only in the case of the appointment of the guardian should pay attention to the child's interests.

So according to the Civil Code, with the occurrence of divorce, the power of parents is removed and replaced with guardianship. As proposed by Marpaung stating that in divorce occurs the status of guardianship on the status of the father and mother's son still take care of his children and in the handling done by one of the parties.

With the disclosure of the consequences of divorce, it can give us the idea that divorce is something to be avoided or if it is possible for married couples only make divorce the last way taken if in marriage to produce children, so as not to happen disastrous or a major problem with the children themselves due to the divorce of their parents.⁸

D. CLOSURE

1. Conclusion

In the previous chapter has been described and discussed several issues related to the marriage breakup due to divorce and its consequences, From the results of research and discussion as described in advance can be drawn a conclusion as follows:

1. As for the reasons to be the basis for the occurrence of divorce is:

- a. One party commits adultery, becomes a drunkard, compactor, gambler, etc. that is difficult to cure
- b. One party leaves the other party for 2 (two) consecutive years without the permission of the other party and without a valid reason or because of anything other than its ability
- c. One party is sentenced to 5 (five) years imprisonment or a heavier sentence after marriage takes place
- d. One party may commit cruelty or maltreatment which may be harmful to another party
- e. One party gets the body's defect or illness that resulted in not being able to fulfill its obligations as husband and wife
- f. Between husband and wife continuous disputes and fighting and there is no hope of living in harmony again in the household.

2. The Cause of Decision of Marriage Due to Divorce

From the results of discussions /analyzes that have been done specifically related to the legal consequences of the marriage breakup due to divorce can be concluded that the decision brought the effect:

- a. Against the breaking of the marriage / marital relationship means husband and wife to be free again as before the marriage bond, which in doing all legal deeds become the responsibility of each period.
- b. Against the breaking of the property of marriage, which in the case of the common property, the property is divided by two each having the right of half of the common property which they obtain during the marriage, while the personal property becomes the private rights of each divorced spouse.
- c. Against the position of child custody of immature children, in essence both parents remain responsible for child custody, except in certain matters such as the situation of inability, the right to assure can be revoked / discharged, but if there is a dispute about who is responsible for the rights foster children, then the court will decide on who is entitled to take care of the child.

Finally, through a brief discussion about the consequences of marriage breakup because of this divorce the public is expected to better understand and realize how important a marriage institution to maintain.

2. Suggestion

Given the importance of the marriage ladaga to be maintained, then based on the results of research and conclusion above there are several suggestions that need to be submitted:

1. For each married couple should always try and cooperate in fostering the household by putting forward the view of life together on the interests of each ego / personal, and to always maintain the integrity of the family in order to achieve the goal of family life as mandated by the Law that is forming Happy and eternal family.
2. To avoid undesirable consequences as a result of the marriage breakup due to divorce, husband and wife should keep in touch so that children who fall victim to the divorce of their parents will be able to keep growing and developing into children useful for themselves, family, society, and his nation.

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⁸ Sajuti Thalib, *Hukum Kekeluargaan Indonesia* , University of Indonesia P[ress Foundation,Jakarta ,2010

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