

Justice, Certainty, and Legal Benefit in the Decision of the Bengkulu Religious High Court on Child Living Expenses after Divorce

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Abstract

Due to parental divorce, children become victims and require the husband as the father to pay for the child's living expenses until they are independent. However, the amount of living expenses is not regulated by law and there are no legal sanctions if the father violates the decision. This often harms the mother and child who have custody. This study aims to analyze: (1) Considerations of the Religious Court in determining the child's living expenses after divorce; (2) Implications of the Religious Court Decision regarding the child's living expenses; (3) Legal efforts of the wife against the ex-husband who does not comply with the decision; (4) Clarity and justice of the law in decisions regarding the child's living expenses. The theories used include the theory of legal benefit from Imam Al-Ghazali and the theory of legal principles from Gustav Radbruch. This study is qualitative with a descriptive analysis method, using data from the contents of the Religious Court decision. Data were obtained through observation, interviews, documentation, and content analysis. The results of the study show: (1) Variation in the amount of the child's living expenses; (2) Many violations of the father's actions in fulfilling the cost obligations; (3) Legal efforts taken by the wife; (4) The decision must regulate more property guarantees to facilitate the implementation of the child's living expenses. Legal development is needed regarding clauses in decisions and statutory regulations.

I. Introduction

For husbands who divorce their wives if they have children who are still minors, they must support their children until they live independently.¹ The care of children victims of divorce, especially children who are still minors, is the protection of the child's civil rights that must be accounted for by both parents.² The protection of children victims of divorce requires a definite, fair, and beneficial law that is consistently enforced by law enforcement officials for the protection of children's rights. If the parent's relationship ends in hostility, the child will experience emotional disturbance and worse long-term settlement ability in the child.³

Based on Article 105 of the Compilation of Islamic Law in the event of divorce are; (1) Maintenance of children who are not yet mumayyiz or not yet 12 years old is the right of the mother; (2) Maintenance of children who have mumayyiz is left to the child to choose between the father or mother as the holder of the right of maintenance; and (3) maintenance costs are borne by the father.⁴ Several Religious Court Decisions in the Bengkulu Religious High Court area, one of the interesting cases contained in Decision Number 16/Pdt. G/2021/PTA. Bn. which states that the Bengkulu Religious Court, which examines, hears and decides civil cases at the first level in a trial of the Panel of Judges, has ruled on the case of child custody to the mother and imposes the costs of nafkah 'iddah, mut'ah, and the costs of maintaining the child until he lives independently to the defendant as the child's biological father and the plaintiff's former husband.

This custody decision is a decision from an appeal made by the plaintiff as stated in the Bengkulu Religious Court Decision Number 315/Pdt.G/2021/PA.Bn, two of his children have reached the age of over 12 years, while the one under the age of 12 years or not yet mumayyiz (9 years old) also has custody rights assigned to his mother. With other normative juridical reasons confirming that post-divorce custody rights are also included in Article 41 letter (a) of Law Number 1 of 1974 which states

¹ Abdul Wahab al-Sayyid al-Hawwas, 2007, *Kunikahi Engkau Secara Islami*, Bandung: Pustaka Setia, p. 34.

² Soetojo Prawirohamidjojo and Marthalena Pohan, 1991, *Hukum Orang dan Keluarga*, Suabaya: Airlangga University Press, p. 44.

³ Muhamad Isna Wahyudi, 2014, *Pembaharuan Hukum Perdata Islam, Pendekatan Dan Penerapan*, Bandung: Mandar Maju, p. 151-152.

⁴ Articles 105 and 156 of the Compilation of Islamic Law.

that as a result of the breakdown of marriage due to divorce, both father and mother are still obliged to maintain and educate their children, based solely on the interests of the child, if there is a dispute regarding the control of the child, the court gives its decision. Thus, referring to Law Number 1 of 1974, if there is a divorce between husband and wife, providing childcare remains the responsibility of both parents.

Meanwhile, the provisions of Articles 105 and 156 of the Compilation of Islamic Law, which determine that a person is given custody of a child based on gender, are not based on aspects of morality, health and the ability to educate and maintain children, the end of which is the realization of the best interests of the child. In fact, the position as a child custody holder should be a position that has important responsibilities and wars for the future of the child. Child custody holders are obliged to care for, maintain and educate children both related to education, religion, health, morality and child integrity. This is also the case with Religious Court Decision Number 1039/Pdt.G/2022/PA.Bn. The Defendant is obliged to bear the costs of maintaining (hadhanah) his children.⁵

Paying attention to the consideration of the Decisions of the Bengkulu Religious Court regarding divorce decisions, either by divorce or a contested divorce in which both parties, husband and wife, have offspring or children, there are dynamics in the consideration of the panel of judges in deciding the costs for the future interests of their children. These dynamics include decisions that determine the holder of child custody to the mother even though the child is over 12 years old or has mumayyiz. There are also decisions that assign custody to the mother without determining the costs of the children's future interests until they are independent. And decisions that do not determine child custody holders as well as costs for children even though their children are still minors, and others show a variety of considerations that are based on the principles of certainty, justice, and legal benefits with the amount of costs determined quite diverse.

However, Religious Court decisions that have permanent legal force regarding the burden of children's costs on their biological fathers are often violated so that mothers and children become victims and their civil rights are not protected by the law and even the decision seems to be a futile decision. With the background of the problem, four problems can be questioned, namely: (1) What are the dynamics of the

⁵ Decision of the Bengkulu Religious Court Number 1039/Pdt.G/2022/PA.Bn.

consideration of the Religious Courts in the Bengkulu High Court area in deciding and determining the cost of living for children until they are independent which is imposed on the husband as their biological father after divorce; (2) How is the practice of providing the cost of living for children by the husband as their biological father after divorce in the PTA Bengkulu area; (3) What legal remedies can be taken by the wife to her ex-husband who does not implement the decision of the Religious Court in the PTA Bengkulu area regarding the cost of living for children; and (4) How is the implementation of legal certainty and justice of the Religious Court Decision in the PTA Bengkulu area regarding the cost of living for children and its development to the national legal system?. The purpose of this research is to analyze all the answers to these questions.

2. Research Method

This research is a type of qualitative research that does not use statistical approaches and questionnaires, but rather narrative data from primary, secondary, and tertiary legal materials. The research method used is descriptive analysis, which analyzes legal norms and their implementation. This research combines an empirical juridical approach with normative legal research. The data required includes documents of Religious Court Decisions in Bengkulu as well as relevant laws and regulations. Data collection techniques include observation, interview, and documentation. The data collected will be analyzed using the content analysis method with an empirical juridical approach.

3. Results and Discussion

Relationship between the Decision on Children's Living Expenses and the Protection of Children's Civil Rights at the Bengkulu Religious High Court

Several decisions of religious courts within the Bengkulu Religious High Court regarding the determination of living expenses for children from their fathers from the age of not yet mumayyiz to independent living are very diverse, it shows the dynamics of the consideration of the panel of judges or religious courts in the trial process until the decision and determination. This dynamic is reflected in various considerations, namely: (1) consideration of children who are still minors; (2) consideration of the livelihood of the child's biological father; (3) consideration of

the child's biological father's income; (4) consideration of the child's biological father's ability; (5) consideration of guidance from the wife as a plaintiff; and (6) other considerations that can emphasize the protection of children's rights.

The decision of the religious court at the Bengkulu Religious High Court regarding the child's living expenses from his father shows the dynamics of the panel of judges' considerations. These considerations include:

1. The age of the child is a minor;
2. The father's livelihood;
3. The father's income;
4. The father's ability;
5. The guidance of the wife; and
6. Other considerations that support the protection of children's rights.

The dynamics of the consideration of Religious Court decisions related to children's living expenses after parental divorce reflect the role of the Religious Court in accordance with Law Number 50 of 2009. The Religious Courts function as actors of judicial power for the Muslim community in certain cases, regulating the structure, powers, procedural law, position of judges, and administration. Judicial power in the Religious Courts is exercised by the Religious Courts and Religious High Courts, which have authority over their decisions and decrees, including those related to children's living expenses. The dynamics of Religious Court decisions in PTA Bengkulu illustrate decisions regarding child maintenance that are determined for the husband as the biological father after divorce.

Some of the key points of the decision are:

1. Cancellation of the petition for a contested divorce because the two parties reconciled;
2. The granting of the lawsuit that obliges the husband to pay the child's living expenses;
3. An order for the husband to pay court costs and maintenance until the child is independent;
4. Withholding of divorce certificate until husband pays child support for three months;
5. Determination of the amount of maintenance as agreed by the court; and

6. There is no stipulation on the monthly amount of maintenance. The analysis of Islamic law explains that maintenance covers the costs of housing, care, clothing, food, health, education, and unexpected costs.

All of these costs must be borne by the ex-husband every month until the child lives independently. Some decisions were agreed upon by the ex-husband and implemented, but some were not agreed upon. In addition, there are those who agree but only carry out a few months, and there are even those who do not implement the decision regarding the child's living expenses, meaning that they do not run as they should until the child is independent.⁶ The ex-wife tried to collect her ex-husband's obligations but always failed to get the expected results, so she had to work alone to provide for herself and her child. The ex-husband's obligation to provide for his child was met with the address given by his ex-husband. However, it did not produce the expected results.⁷

The same applies to other informants as found in the decision of the Bengkulu Class I A Religious Court. In this decision, the panel of judges determined that the custody of the children remained with the Plaintiff (the mother) and determined the obligation of the defendant as a parent to provide for the children until they became adults and could stand on their own. In the decision it was stated that because the living expenses of the two children must be borne by the father for the children, but the ex-husband for three years had paid the expenses for the two children but not as much as had been determined by the Religious Court. The biological father had no news of his whereabouts, making it difficult for his ex-wife to contact him.

The other respondents experienced this after the Bengkulu Religious Court examined and tried a divorce case in a panel of judges and handed down a decision in a case of contested divorce between the plaintiff and the respondent. With this decision, the plaintiff was entitled to the care of her two minor children. Meanwhile, her ex-husband must provide for the needs of his children in the amount of at least Rp. 2,000,000,- (two million rupiah) for each child every month. This is solely for the benefit of her children's future. However, her ex-husband gave money to her children irregularly in both amount and time.⁸

⁶ Interview with Plaintiff's Attorney (AM), December 18, 2023

⁷ Interview with Plaintiff's Attorney (AM), December 20, 2023.

⁸ Interview with Plaintiff's Attorney (AM), December 20, 2023.

The diversity of the provision of children's living expenses by the former husband or biological father of the child based on the decision of the Bengkulu Religious Court, namely:⁹

1. The biological father does not provide for his children at all;
2. The biological father's confession gave one million rupiah every month, while the biological mother's confession only gave money for a few months, about 6 months);
3. The biological father paid one million five hundred thousand rupiahs per month, whereas the religious court decision stipulated three million rupiahs per month;
4. The biological father paid the child two million rupiah per month, while the ex-wife's confession was only one million rupiah, and the two million was only paid twice;
5. The biological father pays the child as stipulated in the decision of the Bengkulu Religious Court every month until the child lives independently;
6. The fees provided by her ex-husband were irregular;
7. The biological father paid one million rupiah every month, but the amount was not in accordance with the Religious Court Decision; and
8. The biological father changed the amount of costs at will.

Violations of the Bengkulu Religious Court Decision are sociologically likened to value-free law, in that the law accepts violations. As in the legal theory of orthodox jurisprudence, the law is a value-free rule. Law is seen as something given, free from elements such as politics, culture, and economics. Law is seen as limited to logical and systematic laws and regulations.¹⁰ Of course, this attitude of legal pragmatism will cause misery for humans, such as mothers and their children who have to bear the burden of costs with their own efforts while the ex-husband as the biological father of their children is free from legal claims.¹¹

This understanding follows the value-free legal pragmatism that is criticized by the Sociological Jurisprudence theory of the post-positivism school. Law is seen as not only written legal regulations in legislation, but also includes unwritten laws that

⁹ Interview with Plaintiff's Attorney (AM), December 20, 2023.

¹⁰ Sulistyowati Irianto and Sidharta (ed.), 2011, *Metode Penelitian Hukum Konstelasi dan Refleksi*, Jakarta: Yayasan Obor Indonesia, p. 6.

¹¹ Satjipto Rahardjo, 2014, *Ilmu Hukum*, Bandung: Citra Aditya Bakti, p. 8.

live in society (the living law). This school gave birth to the school of legal realism with a famous credo: "the law isn't logic, but experience." With this sociological view of law, every religious court decision concerning the fate and rights of humans, both the civil rights of the ex-wife and her children as well as her ex-husband must be protected by law, so the law does not take sides except for certainty, justice, and the benefits of its own law.¹²

This understanding also establishes that law is the norm and reality of normative societal behavior. Thus, law must be understood as a system of rules with two legal concepts, namely primary rules consisting of standards for behavior that impose various obligations. Primary rules determine the actions of legal subjects, by stating what must be done and what is prohibited. These rules arise as a result of the needs of society. The binding force of this type of rule is based on majority acceptance. Secondary rules provide the power to regulate the application of legal rules that belong to primary rules, for example regarding procedures for the adoption and application of primary laws. Contains ensuring the conditions for the perpetrators of the primary rules that reveal the juridical nature of the legal rules concerned. Thus the law as a regulation raises sanctions if the law is violated, the sanctions are binding on human behavior that violates it, whoever and wherever the rule of law is violated, the sanctions will be accepted by the perpetrator of the violation of the rule of law.¹³

According to Mochammad Dja'is, execution means that the defeated party does not want to obey the decision voluntarily so that the decision must be forced on him with the help of legal force. So, execution is a coercive action by the court against the losing party and does not want to carry out the decision voluntarily. execution is the implementation of a decision that is irreversible, and must be obeyed voluntarily by the disputing party. Thus, the meaning of the word execution implies that the losing party inevitably has to obey the verdict voluntarily, so that the verdict must be imposed on him with the help of public force.¹⁴

¹² Irianto and Sidharta, *Op. Cit.*, p. 8.

¹³ Rahardjo, *Op. Cit.*, p. 6.

¹⁴ R. Subekti, 1977, *Hukum Acara Perdata*, Jakarta: Badan Pembinaan Hukum Nasional, p. 130.

Analysis of the Principles of Justice , Certainty and Legal Benefit in Determining the Cost of Living for Children after Divorce

This idea emphasizes the importance of legal certainty, justice, and legal benefits for parties to disputes in court. All parties who comply with legal decisions have the same position. Religious Court decisions have executorial power, so they are binding and force the convicted party to carry out the decision. In the perspective of maqasid sharia, the religious court's decision regarding the living expenses of children borne by the father is an effort to protect religion, because it involves the Islamic command to support children. This also protects the child's soul by fulfilling his physical and psychological needs, as well as protecting offspring as a mandate from Allah swt. which must be fostered so that they are able to live independently.

All of this is aimed at achieving benefit, namely attracting benefits and avoiding damage. Violation of the Religious Court Decision regarding the father of a divorced child can be done in four ways:

1. Complain the violation to the police if there are allegations of child abuse or neglect;
2. Completing the judgment with a written agreement so that it can be executed in the event of default; and
3. The Religious Court may add an order to other parties to help enforce the judgment against the biological father.

General force assistance aims to guarantee the implementation of the judge's decision in the field and overcome the obstacles of the executed party, because execution is the realization of the party's obligation to fulfill the decision. The reconstruction of execution law not only involves general civil aspects, but also focuses on the survival and rights of children. Execution can be a way to ensure legal certainty and justice in the context of child protection. Therefore, the child's living expenses borne by the father should be supported by a binding agreement, with a guarantee to execute the judgment.¹⁵ Execution will be carried out against the property pledged for the child's living expenses, separate from the divorced couple's

¹⁵ Wael B. Hallaq, 1990, *Logic Formal Arguments and Formalization of Arguments in Suni Jurisprudence Arabica*, Jakarta: Raja Grafindo, p. 286-294.

joint property.

Execution is the implementation of a judge's decision against the losing party, whether it has permanent legal force or not, including in a broad sense as the realization of rights, not just the implementation of court decisions. Every judicial decision that has permanent legal force can be executed. This includes the execution of goods as collateral, both movable and immovable. In addition, the religious court can determine the assets of the biological child in its decision, so that after the decision has permanent legal force, the assets can be handed over to the child without depending on the living expenses of the father, if the value is comparable to the father's financial responsibility.

The judges consider the ability of the biological father for the benefit of the child if there is no property. If the biological father or the convicted husband is reluctant to hand over the collateral in dispute, the head of the court may enforce the decision by force with the assistance of local authorities. In order to provide a decision that creates legal certainty and reflects justice, judges need to understand the problem and the relevant legal regulations, both written and customary law. In accordance with Law No. 4/2004 on Judicial Power, judges must explore and understand the legal values and sense of justice that live in the community (Article 28 paragraph (1)). Therefore, deliberation is the best step for both parties in executing the religious court decision for the sake of the children's future.

Not all court decisions can be executed because not all of them have executorial legal force. Execution can only be carried out against court decisions that have obtained permanent legal force, namely decisions that can no longer be appealed or cassated. Decisions that can be executed are those that have obtained permanent legal force. A verdict with permanent legal force reflects a clear and definite legal relationship between the litigants. Because the legal relationship between the litigants is clear, the convicted party is obliged to comply with and fulfill the provisions. To fulfill the legal relationship in the ruling that has permanent legal force, the defendant party may do so voluntarily. Otherwise, the execution of the judgment must be carried out forcibly with the help of public force. Every court decision, whether civil or criminal, aims to resolve the case.

However, the judgment is meaningless without implementation. Therefore, the verdict must be enforceable, because it is meaningless if it cannot be implemented.

The judge's decision has executorial power, which is expressed by the phrase: "For the sake of justice based on God Almighty." Judges' decisions that have permanent legal force must be implemented, so that the case is considered finished after execution. The execution of the verdict is the obligation of the relevant parties to fulfill their obligations. In family law, there are no rules regarding the execution of children's living expenses after divorce. Therefore, additional articles or provisions are needed regarding agreements, property guarantees, and the availability of the defendant to be executed, while the right to request execution remains with the plaintiff. This research found that the decision of the Bengkulu Religious Court has an executorial power, but in the case of children's living expenses imposed on the father after divorce, this power is less effective because the decision does not include sanctions for violators.

As a result, there are frequent violations of the verdict, rendering it meaningless. These findings prompted the idea of clarifying the execution of judgments, whereby the losing party should be compelled to fulfill the judgment with legal recourse stated in writing. Forced execution is supported by a clear legal foundation. The findings of this research corroborate the theory of legal certainty between positive law and Islamic law, which asserts that the law does not exist without *nash*, and the truth of the law depends on legal facts and applicable regulations, including in Islamic law which requires arguments as the basis for human behavior. Judges carry out their duties based on the orders of the Law, where the original law is permissible as long as there is no prohibition. Judges have the authority to perform *ijtihad* in finding the law, especially in the face of *zhanni* arguments.

In deciding cases, judges must consider accurately and understand local wisdom so that the decisions made can provide justice. In addition, laws in Indonesia and Islamic law can change with the times, situations, and prevailing customs. The results of this study confirm the strengthening of *mashlahah* theory, legal principles, and judicial power as the basis for legal development aimed at providing benefits for the community. For the development of national law, it is recommended that religious court decisions include a clause that confirms that execution is the realization of the obligation of the relevant parties to fulfill the achievements in the decision.

Execution should not be limited to general civil matters such as debts and receivables, but should also pay attention to the survival and rights of children.

Therefore, execution can be a legal development to ensure justice. The biological father must complete the child's living expenses agreement accompanied by collateral, so that execution can be carried out on the pledged property, separate from the joint property which is the right of the divorced husband and wife. Execution is the execution of a judge's decision to the losing party who does not want to carry out the contents of the decision voluntarily. In a broad sense, execution is also the realization of rights, both for decisions that have or have not had permanent legal force.

If there is no property, the panel of judges considers the ability of the biological father for the benefit of the child. If the convicted father or husband is unwilling to hand over the collateral, the head of the court may execute the judgment by force with the assistance of local authorities. Judges need to understand the value of the law and the community's sense of justice in order to give a fair and certain verdict. They also provide legal assistance to the plaintiff who has the right to care for the child, so as to facilitate the legal process, especially when the defendant is already burdened with the child's living expenses.

4. Conclusion

The decision of the High Court of Religious Affairs of Bengkulu regarding the child's living expenses that must be complied with by the husband as the father, if ignored, will be useless. In accordance with Article 54 of the Religious Courts Law, the procedural law in Religious Courts follows the Civil Procedure Law, unless otherwise provided. The Religious Courts Law does not regulate legal remedies for parties who do not comply with decisions, so the HIR applies to divorce in the District and Religious Courts. Wives can sue ex-husbands who do not implement PTA Bengkulu's verdict regarding children's living expenses, even though several divorce verdicts state such obligations. The wife seeks to claim her rights after the violation of the religious court decision. In accordance with Article 196 HIR, the winning party may request the chairman of the court to execute the judgment if the losing party does not comply with the judgment. The chairman summons the losing party to comply with the judgment within eight days. If not, the chairman will order the seizure of goods. If the goods are not sufficient, goods equal to the value of the money determined, plus the costs of enforcement, will be seized. Refusal by the ex-husband or provision of child maintenance below the judge's stipulation is considered non-

compliance. Legal remedies in Religious Courts follow the Civil Procedure Law, unless there are special rules. Because the Religious Courts Law does not regulate legal remedies for parties who do not implement the decision, the HIR is applied. Implementation of legal certainty of child living expenses after divorce in PTA Bengkulu can be done by: (1) reporting violations of child abuse to the police; (2) drafting a written agreement regarding child costs that can be executed; and (3) the court orders other parties to assist in the implementation of the decision which is binding and must be respected by all parties. A “geza van gewijsde” judgment has the force of law that modifies civil powers and obligations and legal relationships, binding on the parties, but not third parties. This decision aims to resolve disputes and establish rights related to their realization.

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