EFFECTIVENESS OF THE ROLE OF JUDGES OF RELIGIOUS COURT CLASS IA OF BENGKULU THROUGH VERDICT AMARIN PROTECTING THE RIGHTS OF CHILDREN OF DIVORCE VICTIM REVIEWED FROM ISLAMIC JUSTICE THEORY

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Abstract
Divorce is a process that involves many aspects and comes from emotions, economics and social. Divorce in Islamic law is not prohibited but divorce is also a matter of hate. Divorce often makes children a victim, this is because divorce will take away the wholeness of affection that should be given by both parents to the child. The role of the judge is also necessary in deciding the custody of the child who will fall to the mother or father. At the trial of the Court handling the divorce, for a child who is not yet 12 years old (not mumayyiz) usually the judge decides to go with her mother. This is based on the consideration that a child of that age still desperately needs his mother's affection. In analyzing the problems in this research, the researcher used descriptive method of analysis so as to produce the result of research showing that the role of Judges of Religious Court Class IA of Bengkulu City through decision amarin protecting the rights of the child of the divorce victim in terms of Islamic law has been in accordance with the rules and the word of God but the role of the judge in protecting the rights of the child was deemed to have not run maximally due to several factors such as the factor of the absence of sanctions against the father who did not run the verdict and the lack of self-awareness of the parents to protect the rights of their children.

Keywords: Role of Judge, Decision Amar, Right of Child, Divorce, Theory of Justice, Islamic Law
A. INTRODUCTION

1. Background

Divorce is a process that involves many aspects and comes from emotions, economics and social. Divorce in Islamic law is not prohibited but divorce is also a matter of hate. The reasons for the divorce in detail are contained in Article 19 of Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage, namely:

a. One party commits adultery or becomes an intoxicated drunkard, compactor, gambler, etc.

b. One party leaves the other 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 commits atrocities or severe maltreatment that endangers the other;

e. Either party gets a disability or illness with the consequences of being unable to perform his / her duties as a spouse;

f. Between husbands and wives there are continuous disputes and quarrels and there is no hope of living in harmony again in the home.

While in Presidential Instruction Number 1 of 1991 About Compilation of Islamic Law Article 110 divorce reasons consist of:

1. One party commits adultery or becomes a drunkard, compactor, gambler and others that are difficult to cure.

2. One party leaves the other party for 2 consecutive years without the other's permission and for no legitimate reason or for any other matter beyond his or her ability.

3. One party gets prison sentence of 5 (five) years or a heavier penalty after marriage takes place.

4. One party undertakes serious cruelty or maltreatment that endangers the other party.

5. One party gets a disability or illness with the consequences of not being able to perform his duty as husband and wife.

6. Between husband and wife continuous disputes and quarrels and no hope of living in harmony again in the household.

7. Husband broke Ta’lik Talak.

8. Transition Religion or apostasy that causes disharmony in the household.

According to Dodi Ahmad Fauzi there are several factors or reasons for the occurrence of divorce include the following.¹

1. Disharmony in the household;
2. The moral crisis and morals;
3. Adultery;
4. Marriage without love and
5. There are problems in marriage.

¹ Dodi Ahmad Fauzi, Perceraian Siapa Takut, RestuAgung, Anggota IKAPI, Jakarta, 2006, page 4
Divorce often makes children a victim, this is because divorce will take away the wholeness of affection that should be given by both parents to the child. In essence the child cannot protect himself from various actions that cause mental, physical, and social losses in various areas of his life, given the circumstances and conditions. Children need protection to avoid loss, whether mental, physical, or social.\(^2\) The child is also entitled to environmental protection that may endanger or impede growth reasonably.\(^3\) The child is the bud, the potential and the younger generation successor ideals of the nation's struggle. Children also have a strategic role and have characteristics and special nature that ensures the continuity of the existence of the nation and the State in the future.\(^4\) According to Cole there are six main negative impacts felt by children due to divorce, namely:\(^5\) 

\[\begin{align*}
\text{a.} & \quad \text{Denial;} \\
\text{b.} & \quad \text{Shame;} \\
\text{c.} & \quad \text{Guilty feeling;} \\
\text{d.} & \quad \text{Fear;} \\
\text{e.} & \quad \text{Sadness and} \\
\text{f.} & \quad \text{Anger / anger}
\end{align*}\]

The judge’s role is also necessary to protect children’s rights particularly on custody decision given into father or mother. On the trial court of divorce, the children under 12 years old (not yet *mumayyiz*) are usually under the mother custody. This decision was based on the concern of children with such age still need mother’s affection.

### 2. Identification of Problem

The problem in this research is: How effective the Judge’s role of Religious Court Class Ia of Bengkulu in making decision on protecting children’s right in divorce case based on the theory of justice in Islamic Law.

### B. RESEARCH METHODOLOGY

The method used in this research was qualitative research with empirical law approach. Qualitative research is a research that uses holistic approach requiring some information to analyze in
order to understand certain aspects of human behavior.\(^6\)

C. RESULT AND DISCUSSION

Effectiveness of Judge’s Role of Religious Court Class Ia of Bengkulu in making decision on protecting children’s right in divorce case based on the theory of justice of Islamic Law

Judge has an important role in court trial for his role in making decision. The judge’s role to ensure the justice is very needed as every decision shall contain the principle of one supreme god and justice for whole people. To reflect the justice in divorce case is so difficult since in this case one party must feel injustice. According to Syamsudin, the Judge’s Role of Religious Court Class Ia of Bengkulu in making decision on protecting children’s rights is through considering the following aspects:\(^7\):

1. Always pay attention on children’s rights in making decision since the nature of children as god’s gift who need care and affection;
2. Always give more concern on decision related to financial support for children of divorce case to ensure the proper life;
3. Give decision and ensure the father to fulfill his duty related to children’s rights even after the divorce.

Besides the roles above, according to Johan Arifin, the Head of Religious Court Class Ia of Bengkulu, Judge’s role in divorce case is to ensure the law certainty to children and their rights according to the Law No. 1 of 1974 concerning on Marriage, and article 105 and 106 of the compilation of Islamic Law concerning on children custody.\(^8\)

The implementation in Judge’s role can be seen in making the decision on both in lawsuit divorce and talak divorce related particularly on custody and obligatory support. One of judge’s decisions concerning of the regulation of parents’ obligation on children’s rights is stated in Verdict No. 0303/Pdt.G/2016/PA.Bn. The verdict belongs to Religious Court Class IA.

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\(^7\) Interview with Syamsudin, the Head of Religious Court Class Ia of Bengkulu on April 20, 2017.

\(^8\) Interview with Johan Arifin, the Head of Religious Court Class Ia of Bengkulu on April 20, 2017.
of Bengkulu concerning on lawsuit divorce where the role of judge regarding to children’s rights and protection to children of divorce can be seen as follow:

1. Considering, on reconvention lawsuit regarding to children custody (hadhanah) of MRS bin NS, age 8 years 7 months, between the plaintiff and defendant there is not agreement that the custody held by the plaintiff, then the court gives the partial considerations as follow:

   Considering the evidences and 2 witnesses from plaintiff in the trial, it is proven that the children is still 8 years old and is under the custody of the plaintiff. Along the custody the children get well cared without any hints of indecent character and obstacles to take care of children, and then the court decides the custody goes to the plaintiff. Thus the lawsuit from plaintiff on children custody is approved.

   According to writer’ analysis which is based on judge’s consideration and Islamic Law, the court decision is a reflection of judge’s role to form the goal of Islamic Law to give the benefit and blessing to the whole element of society as it is stated in some verses in Al-Quran such as in surah Al-Anbiya’: 107 concerning on the reason of sending Prophet Muhammad:

   “We have sent you as a benevolence to the creatures of the world (QS. Al-Anbiya’: 107).”

   The judge as representative of god’s will in making decision regarding to children custody has run his role to create the conducive condition where the under aged children will be more happy to live with their mother based on the consideration and principle of Islamic Law. Based on the tale of Abdullah bin Amr of a woman that asked prophet Muhammad, “Prophet Muhammad, my belly has been the womb for my child, my room has been the shelter and my milk has been the drink, then now his father wants to take the child from me.” Then Prophet Muhammad answered, “You are more entitled to the child as long as do not remarry.” (HR Ahmad, Abu Dawud, Baihagqi and Hakim. This Haditz is true according to Hakim)

   Considering, the lawsuit regarding to obligatory support of 1 child from plaintiff to the defendant based on article 105 point c of the Compilation
of Islamic Law in Indonesia in which the divorce occurs the obligatory support for children custody goes to the father. It is stated on Article 149 point (d) of the Compilation of Islamic Law that in case of divorce the ex husband is obligated to provide hadlanah (obligatory support) for his children until they reach age of 21. Thus, it really makes sense to the defendant to provide the obligatory support to 1 child who is under the care of the plaintiff.

Based on the writer analysis, the judge’s decision is one of judge’s role to protect the right. The decision is also in line with the principle of justice where it should be obtained through correction and improvement on the unbalance condition as literal justice is fairness.9

The judge’s decision could give warranty to the children’s life to have education, living, and health protection supporting by obligatory support from the father that has been arranged and law binding.

Besides, if the judge’s decision is analyzed based on Islamic Law, it has been in line to the God’s Words: “When you judge among the people do so equitably.” (QS 4:58).

According to Nusri Batubara as the judge in that case, one of considerations of judge’s decision is God’s Words where children are the gift from Allah SWT to their mother and father who need care and affection. It is the parents’ obligation to raise the children to be good persons and not to take the wrong path in their life. Thus, parents’ obligation is not only to provide the obligatory support of money and clothes or any enjoyment in life but also the guidance to direct children to understand about the right things, build decent personality, and good model. In Al-Quran this law can be found in surah At-Tahrîm: 6 as it is mentioned as follow:10

Oh you who believe, save yourselves and your family from the fire whose fuel is men and rocks, over which are appointed angels stern and severe as wardens who

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9 Candra Irawan, Metode Dasar-Dasar Pemikiran Hukum Ekonomi Indonesia, Mandar Maju, Bandung, 2013, p. 14

10 Interview result with Nusri Batubara as the judge in Pengadilan Agama Kelas I A Kota Bengkulu on 20th April 2017.
never disobey what God commands them, and do what they are commanded.

And the words of Rasulullah Saw in Bukhari juz 1, p. 215 which states that:

You all are the leader and you will be asked about your leadership. Imam is the leader and will be asked about his leadership. A man (husband) is a leader in the family and will be questioned about his leadership. A wife is a leader in her husband’s household and will be asked about her leadership. The waiter is a leader in keeping the treasure of his master and will be asked about his leadership. And each one of you all are leaders shall be asked about your leadership.

According to Nusri Batubara, the decisions taken in the imposition of an obligation to provide for a living of child is based on the verses and the hadiths above, in which a father is responsible to provide a living for children and family, while the mother is responsible for caring for children and the household as a representative of her husband. About the size of a living for children and their families Islam does not determine the amount specifically, it is up to the capabilities of each. Word of Allah, [QS. An-Nisaa’: 34] (more or less):

"The men are in charge of women, because Allah has preferred some of them (men) on another (female), and because men spend out of their property .......

According to the writer analysis, the judge's decision is in accordance with the theory of justice in Islamic law, where justice is obtained and searched the word according to the Word of God (more or less):

"And if you say, let you be fair, if word against your relatives." (Qs6: 152)

Justice according to Allah's words according to the writer analysis is the magnitude of the cost of children’s living who are required by judge not only looked at aspects of total liabilities which are all to be responsible by father as the head of the household, but the cost is based on the capability and reliability of a father to support and provide cost life to their children and it is in accordance with the word of god, where about the magnitude of living for children and their families, Islam does not determine the amount specifically, it is up to the capabilities of each. Word of Allah, QS. An-Nisaa ': 34 (more or less):

"The men are in charge of women, because Allah has preferred some of them (men) on another (female), and because men spend out of their property .......

According to the author analysis, if it is evaluated from the legal
protection of children, the judge has made efforts legal protection of the freedoms and rights of children (fundamental rights and freedoms of children) as well as the various interests related to the welfare of children. The judge roles of Religion Court Class IA Bengkulu City through the judicial verdict in protecting the rights of children is a form of the role of judges that serves function in the government structure and judicial institutions which function to ensure awake and fulfillment of any rights of citizens in a decent life in this case the rights of children in getting a decent life, education and health even though his parents divorced.

Against the judge's decision, every people who have the obligation must fulfill its obligations as has been decided by the judges. According Sukardi, as Clerk of Religious Court Class IA of Bengkulu that the husband charged to either the right of the wife or children's rights, must be met in accordance with what is decided by the judges in its decision. When husbands eventually make a deviation, nor shirking its obligation to fulfill maintenance costs (hadhanah) then do the efforts of law or a request for the execution of the decision.\[11\] A wife can also file an ordinary prior to the divorce by the husband pledge as above described that after the judicial verdict was read by Judge granted a grace period of 14 days to take legal actions for parties who feel aggrieved over the decision. But if it turns out after a while became known father undertakes no obligation as decided by the judges, the mother or the child concerned may apply for the execution of a living child to the Religious Court.\[12\]

As for The Operational Standard in implementing the execution of the Religious Court of Bengkulu City Class 1 are:\[13\]

1. Chairman of PA (Religious Court) / Registrar receives a written request confiscation execution from the Applicant and provide disposition to the young registrar to examine and count the bias;

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\[11\] The result of research interviews with Sukardi, SH as Clerk of Class IA Religious Court of Bengkulu p on April 21 2017.
\[12\] Ibid.
\[13\] Ibid.
2. The young registrar's lawsuit checks the completeness file and count down-payment (SKUM) after receiving the disposition from KPA / Registrar;

3. Registrar / Deputy Registrar on that day prepares for the determination of seizure execution of KPA no later than 2 days after the execution of confiscation applicant to pay SKUM;

4. Registrar / Deputy Registrar appoints the bailiff to carry out the confiscation of execution on the same day after the applicant paying SKUM;

5. The young registrar's lawsuit notes into bailiff execution register book to carry out the process of execution of confiscation later than 3 days after receiving the file from the Registrar / Deputy Registrar;

6. Bailiff handed over the dossier to the Registrar / Deputy Registrar not later than one day after the execution of confiscation.

Based on the research result, effort execution by wife or child to the implementation of the obligations of a husband or father to provide maintenance of livings to a child is never done and filed by the wife and children in Religious Court Class IA of Bengkulu. According Sukardi, SH as Registrar of Religious Court Class IA of Bengkulu, the absence of the submission of executions carried out by wife to the implementation of the obligation of the husband in giving living for child is motivated by several factors:\footnote{14 Ibid.}

1. The wife has had a new life with a new partner that did not want to make any matters the living for children who are not satisfied by the husband;

2. Ex-husband who has gone away and could not be reached;

3. The existence of the pain of a wife and does not want to establish relationships with the ex-husband, including the demands of children's rights;

4. Established life owned by ex-wife after the divorce and had been considered sufficient to provide for their own children;

5. The assumption that the execution process is a difficult process, take a long time and considerable expense.
The judge in his decision does not consider the presence or absence of lack of good faith from his father, or adequacy of the number of those living in the child's life needs to be appropriate. This is because, the measure used in determining the amount of nominal income children and socio-economic conditions of father, do not have clear standards and are not defined in the legislation clearly and definitely, so if there is a less goodwill from father then the fulfillment of child rights will be minimal or even ignored. Most of the divorce decision on the number of nominal income (maintenance costs) actually do not meet the needs of children and the feasibility of a child's livelihood.

The judges’ decision does not meet an essential of decision theory itself, where a decision maker should make future predictions, choose one among two or more options or make estimates of the frequency of events on the basis of clear evidence. This is not reflected in some divorce decisions either divorce or talak related to the protection of children's rights.

The judge's decision indicates that the decision theory has not been properly implemented in the judge's decision regarding the rights of the child of the divorcée who in the judge's decision does not consider in detail the details of the living expenses that must be incurred from time to time and the increased cost of living to be paid after the divorce Parents make decisions on the child's livelihood does not yet reflect the clear and real protection of children's rights for both their present and future lives. In its judgment according to the author's analysis, the judge does not consider some of the possibilities that will occur, including:

1. Likelihood, a father is not fulfilling his duty on the child's livelihood;
2. Likelihood, a father is fulfilling his or her obligations to the payment of the child's ⅓ or ⅛ that should be provided;
3. Increased cost of the child's life, both the cost of meals, the health and education of the child.

According to the author's analysis, the unfulfilled aspects of decision making make the role of judge in protecting the child of the divorcee victim to be less effective, where the child of the divorcee victim is still not guaranteed the feasibility of his life either the cost of his food, health and education besides based on the
writer's research result, some judgment decisions does not require parents to continue to devote their attention and affection to the child so that both parents become disregard aspects of affection and more concerned with the cost aspects of life. This can adversely affect the development of the child's psychological victim of divorce.

Based on the research results in the field, the role of the judges of the Religious Courts of Class IA Bengkulu through the decisions in protecting the rights of child victims of divorce when it is reviewed according to Islamic Law that has reflected a legal purpose and has reflected a justice based on Al-Qur'an command, where a child must be protected by every person in the fulfillment of his rights and every parent has an obligation in the care and care of his son. However, the role of judges in protecting the rights of children is felt to have not run maximally caused by several things including:

1. The absence of strict action against the father or husband who does not carry out the judge's decision on the obligation of the child's livelihood;

2. The lack of awareness in the parents to keep the rights of the child;

D. CLOSING

1. Conclusion

Based on the results of research and the descriptions that have been the authors pointed out earlier, it can be deduced that the role of judges Religious Courts Class IA of Bengkulu City through amar decision in protecting the rights of children victims of divorce in terms of Islamic law has been in accordance with the rules and the word of God but the role of judges in protecting the rights of the children are considered not to run maximally due to several factors including:

1) The absence of strict action against the father or husband who does not carry out the judge's decision on the obligation of the child's livelihood;

2) The lack of awareness on the parents to keep the rights of the child;

2. Suggestions

1) The government should better protect the rights of children of divorce victims firmly and thoroughly in the relevant
regulations and other new regulations.

2) The judge should decide the cost of the child to consider the future costs so that the rights of the child and the life of the child are more secure.

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