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IMPLEMENTATION OF ARTICLE 45 OF LAW NO. 16/2019 ON CHILD CUSTODY BY DIVORCED PARENTS IN SINGARAJA DISTRICT COURT

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Abstract

Divorce causes various legal consequences, including for children, joint property, and others. Currently, divorce often occurs which results in problems in determining child custody. There are 2 (two) objectives for conducting this research, the first objective is to find out the implementation of Article 4 of the Marriage Law Number 16 of 2019. Meanwhile, the second objective is to find out what the role of the Singaraja District Court is if there is a violation of child custody rights. The type of research used in this research is descriptive empirical legal research. The research sample determination technique used was the Non Probability Sampling Technique in the form of Purposive Sampling. The data obtained was then analyzed descriptively qualitatively, that is, it clearly describes the research problem. The results of the research obtained are that: (1) Article 45 of Law Number 16 of 2019 concerning Marriage at the Singaraja District Court for divorced parents is implemented because the role of parents to educate and look after their children even though they are divorced is their obligation and in determining custody rights, the panel of judges still pay attention to the role of existing law, facts in the environment and also the child's comfort or child's choice. (2) The legal consequences of violations of child custody rights that have been incarcerated will be dealt with such as revocation of child custody rights, and if there is a dispute over custody rights, neglect and even violence then a criminal offense will be imposed.

Introduction

Families have a very important role in the mental and personality development of children. Parents have a role in building and educating their children. The role of these parents is very influential on the lives of their children in the future. While the eternal family is an intact family and ideally the integrity of this family is maintained until death picks up the couple (Rachman, 2020: 13).

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The responsibilities and obligations borne by parents towards their children are to nurture, maintain and educate, which are inherent until their children mature or are able to stand on their own, but a family that lives life does not always go well and as expected, but there are other things that intentionally or unintentionally become obstacles and eventually become a problem in the midst of the harmony and peace of the family.

Small problems that accumulate in the absence of good resolution can eventually become big problems and obstacles. To realize the integrity and harmony, it depends on each person in the household, especially the quality of behavior and self-control of each person in the household (Abror, 2017: 2). If all roads and efforts have been taken to get rid of obstacles and solve all these problems but apparently not successful, then the best way to go is divorce.

Divorce is considered a shortcut to solve all obstacles and problems that occur in the household, divorce is no longer considered a taboo to undergo. Divorce is commonplace and ordinary and socialized. Couples sometimes do not even think about and take into account all the consequences that occur when they decide to divorce. Divorce will not only harm several parties but divorce within the family environment is also clearly prohibited by religion, but in reality divorce among the community continues to occur.

The term divorce is contained in Article 38 of Law Number 16 of 2019 concerning Marriage which contains a facultative provision that "Marriage can be broken up due to death, divorce, and by decision of the Court". So, the term divorce juridically means the breakup of marriage, which results in the termination of the relationship as husband and wife or ceases to be husband and wife. The dissolution of marriage with a court decision that has permanent legal force has legal consequences. One of them concerns the right to care for children born outside of marriage. Rights and obligations arise from the bond between parents and minors. Parents are obliged to care for their children, in the following conditions related to economic problems, education and all aspects of basic needs (Acoagus, 2018: 62).

The term divorce according to the Marriage Law as a positive legal regulation on divorce indicates the existence of :

- a. Legal actions that can be taken by a husband or wife to terminate a marriage. marital relationship between them;

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- b. The legal event that dissolves the relationship between husband and wife is the death of the husband or wife concerned, which is a definite and direct provision made by God Almighty;
- c. A legal verdict declared by the court that has the legal effect of dissolving the marital relationship between husband and wife.

According to the provisions of Article 39 of Law Number 16 of 2019 amending Law Number 1 of 1974 concerning Marriage, it is emphasized that divorce can only be carried out in front of a Court Session after the Court concerned has tried and failed to reconcile the two parties. Marriage is a legal action that will be experienced by most individuals in society, therefore, a regulation is needed to guide the implementation of marriage in general. (Widiantika, *et., al.* 2023: 159) Law Number 1 of 1974 concerning Marriage is a regulation that regulates various aspects related to marriage, including the basics, requirements, prevention, annulment, agreements, rights and obligations of spouses, property in marriage, divorce, its consequences, child status, parent and child relationships, representation, and other provisions. (Adnyani, 2019: 123) Then as stated by Wirjono Prodjodikoro (1990: 23), that in deciding whether to grant a divorce or not, the Court will collect as much evidence as possible so that the decision taken is truly the best.

In general, at the beginning of the examination at the Court, the Panel of Judges will first try to reconcile the husband and wife who are going to divorce. This means that the Panel of Judges tries to apply the principle of making divorce difficult, including giving advice, mediation, and other efforts aimed at thwarting divorce. If there is peace, the divorce petition is considered canceled and the husband and wife remain a legal husband and wife (Rodliyah, 2015: 2). As a result of the divorce, child custody is not obtained by both parents, but only one. However, educating children, caring for children can be done together for the growth and development of the child. Many things must be considered by husband and wife when deciding to divorce. In addition to property, another crucial thing to think about is the division of child custody in divorce. Divorce pursued by both parents should not harm the fulfillment of children's rights. Every occurrence of parental divorce certainly has a negative impact on the process of education and mental development of children, because elementary school-age children generally still need the love and full attention of both parents. This will be proven later in the following discussion, matters relating to the impact felt by children due to the divorce of their parents.

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The legal system in Indonesia is still fixated on the formulation that parenting rights fall to one party, which places the child in the choice of a party that is not necessarily the child's choice. In the provisions of article 45 of law number 16 of 2019 concerning marriage, it is stated that both parents are obliged to maintain and educate their children until the child marries or stands alone, even though the two parents are divorced. The fulfillment of children's rights is also regulated by the state through child custody laws through Law Number 23 of 2002 concerning Child Protection. In the General Provisions of Article 1 point 11, it is explained that the power of custody is the power of parents to care for, educate, maintain, foster, protect, and develop children in accordance with their religion and their abilities, talents, and interests.

The importance of child custody is also reflected in the evolving law, which tends to encourage collaborative settlements between parents involved in divorce or custody-sharing cases. This could be in the form of a joint custody agreement arrangement, where both parents have an important role in the child's life and share responsibilities equally. All of this is aimed at ensuring the well-being and growth of the child in a supportive and loving environment. Child custody is often an issue before or after divorce, and it is not uncommon for ex-husbands and ex-wives to fight each other for custody of their children.

In Indonesia, there are two judicial institutions used to resolve divorce issues, namely the District Court and the Religious Court. (Kesuma, *et. al.*, 2023: 196), such as the example of decision number 26/Pdt.G/2023/PN.Sgr, the two parents divorced but still disputed about child custody. Due to the dispute over child custody, the plaintiff (mother) took legal action by filing this lawsuit with the court. In another decision number 635/Pdt.G/2019/PN.Sgr, the plaintiff is the mother and the defendant here is the father. Has 4 children, the first is a girl aged 16 years, the second is a boy aged 12 years, the third is a girl aged 10 years, and the last is a boy aged 3 years. The dispute between the Plaintiff and the Defendant occurred on an ongoing basis which culminated in the Plaintiff and the Defendant separating. However, based on the facts of the trial, the four children of the Plaintiff and the Defendant are being cared for on a daily basis by the Defendant who is able to care for, educate and provide love to the children.

The Panel of Judges is of the opinion that what is needed by a child is affection, care, attention, education, for the child to grow and develop properly and this is obtained by the child from both

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biological parents, therefore it is appropriate for the Defendant to continue to provide the Plaintiff with the opportunity to meet with the child so that the child does not feel deprived of the affection and attention of his biological parents despite the fact that the child is in the family environment of the Defendant.

In accordance with the mandate of the Child Protection Law and the Marriage Law, if a husband and wife are divorced, their obligations, in other words, are not only the obligations of the husband or wife. The Panel of Judges is free to determine which father or mother has the right to care for the child, depending on who is the most capable or best considering the interests of the children. However, it still often continues to the higher court level because one of the parties is dissatisfied with the decision. Through this statement, one of the parents has the right to care for the child, and the child has the right to be cared for by the other parent. However, if the mother is prevented from seeing the child by the father, the mother can appeal to the court for custody of the child, even though she feels she can maintain the child's growth and development (Budhisulistiyawati, 2021:358).

However, in reality, it is not possible to care for children together in the event that parents no longer live together in the same house. Therefore, the provisions of Article 41 and Article 45 of the Marriage Law cannot be interpreted and/or implemented regarding custody without a court order. The court also has the right to determine the custody of children to be given to the mother or father, especially if there is a dispute in the divorce process. Therefore, the focal point of this research is how the legal consequences arising from divorce discuss child custody with the title "**Implementation of Article 45 of Law Number 16 of 2019 on Child Custody Rights by Divorced Parents in Singaraja District Court**".

Research Methods

This research is an empirical legal research that aims to examine how the implementation of a recorded customary law or written law basically experiences a misalignment or gap between the applicable norm (*das sollen*) and the practice in the field or legal reality (*das sein*). This research includes empirical legal research because it wants to examine the gap between *das sollen* and *das sein* in the Singaraja District Court, where there are already laws governing the Marriage Law. Articles 41 and 45 paragraph 2 of Law Number 16 of 2019 on the amendment of Law Number 16 of 2019 on Marriage.

However, in reality, it is not possible to care for children together in the event that parents no longer live together in the same house. Therefore, the provisions of Article 41 and Article 45 of the Marriage Law cannot be interpreted and/or implemented regarding custody without a court decision. The court also has the right to determine the custody of children to be given to the mother or father, especially if there is a dispute in the divorce process, so it is necessary to conduct research to examine a reality on the object or subject of the research based on the real thing or as it is, namely for the role of the court and in handling child custody in divorce.

Results and Discussion

Implementation of Article 45 of Law No. 16/2019 on Child Custody as a Result of Divorce in Singaraja District Court

Divorce is the last alternative that can be chosen to resolve disputes in marriage (Atmadjaja, 2016: 19). Divorce is the abolition of marriage by a judge's decision or the demands of one of the parties to the marriage (Subekti, 2017: 42). With the divorce of husband and wife, legal consequences will arise. One of the legal consequences is related to the issue of determining custody of children born from marriage, including the issue of the obligation to provide for children after divorce. Each parent has the same opportunity for child custody in divorce.

As for who gets custody of the child, joint custody will only be granted if the parents fight or dispute about it. Thus, the court will decide to whom the custody will be given. However, the decision made by the District Court is done with the best interests of the child in mind. *The Legal Information Institute* explains that according to the law the judge must award custody according to the best interests of the child. The court also cannot automatically award custody to the mother or father, regardless of the age or gender of the child. The provisions regarding divorce and child custody are listed in Law No. 16 of 2019 (Marriage Law) Article 41, Article 45, Article 47 and Article 48, as follows:

a. Article 41 of Law Number 16 of 2019

As a result of the dissolution of a marriage by divorce, then:

- a) Both mother and father remain obliged to care for and educate their children based solely on the interests of the child. If there is a dispute about who will be primarily responsible for the child, the court will decide.

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- b) The father is responsible for the maintenance and upbringing of the children, and if he is unable to fulfill this obligation, the court may determine that he should bear the costs.
- c) The court may require the former husband to provide maintenance and/or determine other responsibilities in favor of the former wife.
- b. Article 45 of Law Number 16 of 2019
 - 1) Both parents are obliged to maintain and educate their children as well as possible.
 - 2) The parental obligation referred to in paragraph (1) of this article shall apply until the child is married or able to stand on his own feet and such obligation shall remain in force even if the marriage between the parents is dissolved.
- c. Article 47 of Law Number 16 of 2019
 - 1) Children who have not reached the age of 18 (eighteen) years or have never entered into marriage are under the authority of their parents as long as they are not deprived of their authority.
 - 2) Parents represent the child regarding all legal actions inside and outside the Court.
- d. Article 48 of Law Number 16 of 2019

Parents are not allowed to transfer rights or duplicate fixed assets owned by their children who are not yet 18 (eighteen) years old or have never been married, unless it is for the benefit of the child.

Referring to Article 45 paragraph (2) of Law Number 16 of 2019 concerning Marriage above indicates that parental affection for children should not be cut off or hindered. The existence of formal control of the child by one of the parties is essentially to end the dispute over the child. If the dispute is not resolved in court, it will become protracted so that the impact is that the child becomes a victim, although it must also be recognized that there are many who do not question child custody after the divorce process because both agree to care for and educate the child together.

In addition to Law Number 16 of 2019 concerning Marriage, regarding custody rights is also found in Article 246 of the Civil Code (KUHPer) which states that, "*Upon divorce of the parents, each of the minor children shall be determined by the District Court as to which of the parents shall maintain the child, unless there is a termination of parental authority.*"

From the description above, it can be concluded that the Civil Code and the Marriage Law completely leave the determination of child custody to the Judge to determine who is entitled between the mother

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or father to get custody of their children. Furthermore, in addition to referring to the provisions of the Civil Code and the Marriage Law, the determination of child custody also refers to the provisions of the Child Protection Law where the determination is based on considerations that refer to the best interests of the child, this is explicitly contained in Article 14 paragraph (1) of the Child Protection Law which states that:

"Every child has the right to be cared for by his/her own parents, unless there are valid reasons and/or legal rules showing that the separation is in the best interest of the child and is the last consideration."

In addition to referring to the Legislation, another source of law that can be referred to is the Supreme Court Jurisprudence related to the determination of child custody, which in several related Jurisprudence, stipulates that child custody should fall to the mother as long as the judge considers that there is no reason that can result in the right to maintain the child being in the control of the father. This is in accordance with several Supreme Court Jurisprudence, namely:

- a. Supreme Court Decision No. 102 K/SIP/1973 dated April 24, 1975 which basically states: "Based on jurisprudence regarding guardianship of children, the benchmark is that the biological mother is prioritized, especially for young children, because the interests of the child are the criterion, unless it is proven that the mother is not reasonable to maintain it".
- b. Supreme Court Decision No. 423 K/SIP/1980 dated September 23, 1980 which basically states: "In the event of divorce, minor children are under the guardianship of their birth mother".
- c. Supreme Court Decision No. 239 K/SIP/1990 which basically states: "In the event of divorce of children who are still young and need the love and care of their mother, guardianship should be given to their mother".

Referring to the Decision of the Supreme Court of the Republic of Indonesia No. 102 K/Sip/1973 dated April 24, 1975 states, "Based on jurisprudence regarding guardianship of children, the benchmark is that the biological mother takes precedence, especially for young children, because the interests of the child are the criterion, unless it is proven that the mother is unfit to care for her child.

The following are reasons why a mother's custody of a child may be lost:

- a. Mother has poor behavior

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b. Mom goes to jail

c. The mother cannot guarantee the physical and spiritual safety of her children

The following is the data on the number of divorce cases in Singaraja District Court:

Table 1.1

Data on the number of divorce cases in Singaraja District Court

Year	Remaining Cases of the Previous Year	Number of cases filed for divorce	Number of Divorce Case Decisions	Remaining Cases of the Current Year
2019	103	720	694	129
2020	129	707	736	100
2021	100	637	625	112
2022	112	599	630	81

Source: Singaraja District Court

Based on the data above, it can be concluded that child custody is determined during the divorce verdict. Moreover, the determination of child custody in the Singaraja District Court is certainly different between the father or mother, the panel of judges still determines the best interests of the child so that the child feels comfortable, but the determination of who gets custody of the child does not reduce the role of the parent who does not get custody. Especially the fulfillment of maintenance and attention from between the two parents.

Judges must be able to comparatively analyze in assessing the value of propriety and justice of jurisprudence compared to what is formulated by the relevant law. To be able to conduct a clear and clear comparative analysis, anticipation and insight into professionalism are needed (Ahmad, 2011: 46). Decisions in general terms are statements of Judges, not only those that are pronounced are called decisions, but also statements outlined in the trial (Muljono, 2012: 137).

During the trial, the judge will look at the legal facts that allow who will be given custody, so the conclusion from the question earlier is that custody will be held by the panel based on legal facts

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by considering the feasibility of the parties to carry out parenting, and the feasibility here will be extended if the ability to provide care for the care and living expenses of the child.

Fulfillment of maintenance is the obligation of a father towards his child, be it in the form of food, drink, clothing and shelter and education. Nafkah is the obligation of a father towards his children when the child is not yet an adult and has not been able to finance his life. Maintenance of children who are not yet 12 years old is the right of the mother. However, in determining child custody rights, customary law itself is also considered, where the Balinese customary family system adheres to the Patrilineal kinship system. This system connects the child with the father's relatives based on the uniteral male lineage. In a patrilineal society the descendants of the father are considered to have a higher and more honorable position so that it is also likely that the custody of the child will appear in the father's family so that in addition to national law, customary law is also raised as a consideration for determining custody and does not close. The possibility that custody is sometimes given to the father's family.

Based on this, the father is obliged to provide maintenance to his child every month. Meanwhile, the custody of the child is given to the mother. For the benefit of the child, parents are obliged to provide the best possible care. Among them are the wisdom of raising children by their mothers. First, in the matter of life to the community, the function of women is different from men. Affection for the child and the child's education are primarily left to the mother. The mother's specialty in this regard is especially needed during childhood. Secondly, the mother associates more with the child than the father and is more knowledgeable in matters of clothing, food, drink and health and others.

Raising boys to seven years old and girls to nine years old, because boys at the age of seven can help themselves to start knowing about things, manners or getting along with the environment. As for girls up to nine years because they need a longer time to be able to take care of themselves. In this case the mother understands more about the situation of girls (Yaswirman, 2013: 247).

Determination of child custody can be seen from several factors that are considered by the panel of judges, namely:

- 1) If the child is a minor, the custody of the child will be prioritized to the mother.

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- 2) If during the trial process the child is on the father's side, the custody of the child may fall to the father on the condition that the father must still allow communication between the mother and the child with the agreement of both parties.
- 3) If one of the parties objects to the judge's decision regarding child custody, the party can file an objection during the hearing by providing clear and demonstrable reasons or can be accounted for.
- 4) Regarding the payment of children's living expenses, the panel of judges will look at the economic aspects of both parents, meaning that the panel of judges will decide on the party whose economy is more capable, however, if both parents are economically capable, both parties are entitled to use a mutual agreement.
- 5) According to Balinese customary law, a child born to a man is purusa, which means that he will be responsible for continuing the rights and obligations of his father, both in terms of custom and religion. If seen according to customary law. Custody rights should clearly follow the father, the rights here mean that everything related to the interests of the child and legal status is the father's child because Hindu society, especially in Bali, adheres to the patrilineal system. This means that the child who is born is the father's child who will continue the father so that the inheritance will fall to the foster child only.

As explained in Article 45 of Law Number 16 of 2019 concerning Marriage that (1) Both parents are obliged to maintain and educate their children as well as possible; (2) The obligations of the parents referred to in Paragraph (1) of this article apply until the child is married or can stand on his own, which obligation continues even though the marriage between the two parents is broken, regarding the right to get maintenance and education from both parents. Either the father or mother of the child is obliged to maintain and educate the children they acquired during the marriage. There is no such thing as ex-child or ex-parent. For this reason, divorce occurs, the status of children and parents will not change to maintain and educate their children until the child is married or can stand on their own. This right to be maintained refers to the fulfillment of outward needs, children are entitled to get maintenance of their physical members from both parents. From the above explanation, it can be understood that the rights and obligations between parents and their children are reciprocal, based on principles that are appropriate and justified according to state law, religion and humanity

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(Nuzul, 2019: 61). The assumption is that with the fulfillment of children's physical needs, the problem of child protection is over. But it is not that simple, because in reality even though there has been a decision that obliges the father to pay for the maintenance of his child, in the future the father no longer cares about his obligations. Therefore, it is necessary to think about how to optimize child protection after parental divorce, especially by conducting a review of the concept of sole parental authority, as well as emphasizing sanctions for fathers who neglect the obligation to pay for the maintenance of their children. If the mother who has been entrusted with the right to maintain the child turns out to be neglecting her obligations, the punishment for her is to revoke the right to maintain the child or the right of guardianship through a request from the party who objected to the mother's actions to the District Court. In accordance with the meaning and formulation of the Act, that to determine the right of guardianship, child maintenance rights that must be considered is in the legal interest of the child. So the judge must really pay attention if the child is maintained by his mother or father has a better guarantee of social life and welfare. The most important thing is the ability of parents to care for and maintain children (Khair, 2020: 298).

The role of both parents in taking care of their children can be in the form of fulfilling the needs of clothing, food and shelter which are primary needs to the fulfillment of tertiary needs if possible. While the right to education refers to the psychological or spiritual development of the child, the fulfillment of this need provides education or teaching of science contained in the school level, religious education, personality education and various other education related to the development of the child's psyche. Both maintenance and education, both must get serious attention by both parents of the child, even though when the divorce verdict is read by the judge in front of the court session, it gives custody to one of the parties, it does not mean that the party who is not given custody can escape the burden of responsibility. Both parties remain responsible for the care and education of their children (Manoppo, 2018:161). In Indonesia, custody of children by the mother usually applies until the child reaches 18 years of age, in line with Law No. 35/2014 on Child Protection. However, in certain cases, for example if the child has special needs or there is a special agreement between the parents, custody can be extended or rearranged after the child turns 18. Once the child reaches the age of majority, which is 18 years old in Indonesia, formal custody usually no longer applies. However, the relationship between parents and children continues in the form of family and affection.

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Nonetheless, the adult child has full autonomy to make decisions about his or her personal life, including education, employment and residence. Parents may give advice or opinions, but the final decision rests with the child.

In a patriarchal system, traditionally child custody tends to give primacy to the male or father figure in the family. In many cultures that adhere to a patriarchal system, the father is considered the head of the family and has greater authority in making decisions regarding children. However, it is important to note that in the context of current Indonesian laws and regulations, child custody is not based on a patriarchal system. Indonesia's Child Protection Law seeks to guarantee children's rights by considering the welfare and best interests of the child regardless of gender.

The overriding principle is the interest and welfare of the child, not the patriarchal or gender system. Although there is no legal provision that specifically determines the age at which a child should remain close to his or her mother, the presence of the mother as an important figure in the child's life usually lasts throughout the child's growth and development. In many cases, the relationship between mother and child remains close and important throughout the child's life. In the context of child development, a healthy and supportive relationship with the mother or other parent is considered important until the child's adulthood. However, along with the process of independence and growth, the child may begin to establish broader relationships with their environment, including peers, other families, and society in general.

Legal Consequences of Violation of Child Custody Rights on Incracht Court Decisions

Law is dynamic, in the sense that a rule of law will always adjust to the times and/or changes that occur in society. This concept also seems to affect the development of marriage law in Indonesia, where marital affairs were initially regulated in Law Number 1 of 1974 which was subsequently amended to Law Number 16 of 2019 (hereinafter abbreviated as Law No. 16 of 2019) (Ardhya, 2021: 300). The occurrence of violations of child custody will certainly have legal consequences.

Divorce has various legal consequences including children, joint property, and others. Currently, divorce often occurs which results in problems in determining child custody. This happened to a former husband and wife, whose ex-wife filed a child custody lawsuit at the Singaraja District Court with Case Number 26/Pdt.G/2023/PN Sgr, which in the case explained that the plaintiff (ex-wife)

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and the defendant (ex-husband) disputed the custody of the child who had been *incracht*. The plaintiff felt that he wanted to be close to the child, but there was a misunderstanding with the defendant, because at the time of the divorce decision the custody was in the hands of the defendant. On the pretext of wanting to be with the child, the plaintiff took the child away from the defendant for approximately 8 months. Therefore, this claim was rejected by the judge because the plaintiff took custody that should have gone to the defendant.

Disputes against children

The phenomenon of children being fought over between ex-husbands and ex-wives often occurs in society. Children are regarded as objects and assets, so that their "ownership" must be contested. More ironically, after the child custody case has been *inkracht* (legally binding), the execution process is very difficult to carry out. As a result, children continue to oscillate in the struggle between their parents, becoming one of the causes of violence against children, including cases of kidnapping, confinement and child abuse committed by their own biological parents. The Supreme Court has yet to establish a policy and legal certainty regarding the status of children of divorced couples and has yet to determine which institution is mandated to "execute" court decisions. Children born from marriage continue to be legal children as stipulated in Law Number 16 of 2019 on the amendment of Law Number 1 of 1974 concerning Marriage (Zulfah, 2020). The party who gets the biggest loss from the divorce carried out by the parents is the child. The child will lose the affection that is needed as a whole from the parents not one of them, there is no child who wants to get affection from the father or mother alone, besides that, maintenance and education will be disrupted (M Agus, 2018). Childcare itself, which is an act that must be carried out by both parents considering that without childcare which can result in children will be neglected and waste their lives. If young children do not get good care and education, it will have a bad impact in the future and can even make their existence threatened. In reality, many parties cannot adjust, have arbitrary behavior without regard for the development of their children and have an indifferent attitude and even potentially abandon their own children. Therefore, the closest community has the right to protect children who are treated unfairly by their parents. Law No. 39/1999 on human rights has outlined children's rights, obligations and responsibilities of parents, families, communities, governments and the state to protect children. However, there is still a need for legislation that specifically contains rules relating to child protection

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as a juridical basis for the implementation of these obligations and responsibilities. Therefore, the establishment of child legislation should be based on the consideration that child protection should be provided in various aspects as a national development activity specifically related to the progress of the nation and state.

The issue of child protection is a complex one that leads to various further problems that cannot always be resolved individually but can be resolved jointly and whose resolution is still a shared responsibility. If there is a dispute as to who the child belongs to, whether the father or the mother, then the court decides to get custody of the children (see Article 41 paragraph (1). The dissolution of marriage can occur for three reasons, namely: 1) due to death; 2) due to divorce; 3) due to a court decision (Simanjuntak, 2015:61).

Child protection has legal consequences that are closely related to written or unwritten law. Based on Law Number 35 of 2014 concerning Child Protection Article 1 paragraph (2). Legal protection can be interpreted as various efforts to fulfill the rights as well as provide assistance and provide a sense of security to witnesses or victims, protect victims legally from crime as part of community protection which is realized with various aspects such as restitution, compensation, medical services and various legal assistance. providing such protection to the community so that they can enjoy all the various rights granted by law or in other words, namely protection, namely several legal efforts that should be given by law enforcement officials in providing a sense of security both in terms of mind or disturbance. Child protection is something that is so needed by neglected children with conditions that are so alarming which can be seen in terms of social welfare. The pattern of life that children have is generally slum and clustered in various poverty and various high places such as under bridges, river banks, garbage disposal sites or even those who sleep in garbage carts together with their children and wives. In this condition, neglected children are not only children who are abandoned after divorce but children who are deliberately abandoned.

Child neglect is the attitude and actions of parents who do not pay attention to the process of growing and developing children where children are isolated, alienated, and do not receive proper education and health. The impact of children becoming victims of neglect such as, disruption of mental health, behavior, physical health, economic and social. In addition, the attitude and health condition of the wife as a mother often affects the attitude and health of her children. As a result,

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children experience physical loss and psychological loss. Physical losses suffered by neglected children are in the form of lack of nutritional intake in children. Furthermore, the psychological losses suffered by children are uncontrolled delinquency and other behavioral disorders.

Legal consequences of child custody violations

The term "child custody" legally refers to the power of a person or institution, based on a court decision or determination, to provide guidance, maintenance, care, education, and health, because the parents or one of the parents is unable to ensure the child's proper growth and development. Meanwhile, the definition of the term "foster care power" is the power of parents to nurture, educate, maintain, foster, protect, and develop children in accordance with their religion and their abilities, talents, and interests. From the definition of the terms above, it seems difficult to understand and distinguish between the two terms, but this needs to be explained because when we talk about child custody. Child neglect is any form of action that does not provide adequate food, clothing, shelter or affection for a child. A child cannot be said to be neglected not only because they have one parent, but biological or adoptive parents who cannot fulfill the rights of the child. Child neglect is a form of violence, rooted in the household of parents who neglect their responsibilities, neglect their duties to provide security for their children in any form and provide protection for their children (Normasari, 2012: 1).

Regarding the criminal act of child neglect, parents play a major role in the act of child neglect. Children's rights include being able to grow and develop properly physically, mentally and socially, so it is necessary to get protection and all efforts to eliminate obstacles that occur.

Judges certainly play a major role in determining custody. For this reason, the interests of children need to be considered and used as a basis for guidance for the responsible party, which primarily lies with their parents. Children in this case must have free opportunities to play and be creative. Which must be directed for the purpose of education or welfare, to include a system of life and livelihood of children in order to ensure growth and development naturally, both spiritually, physically and socially. Regarding the neglect of children as contained in Article 13 paragraph (1) of Law Number 23 of 2002 concerning Child Protection states that: "Neglecting a child is an act or acts of willfully neglecting the obligation to maintain, care for, or take care of a child as it should be".

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Children are the young generation as the future successor of a nation. The strength, prosperity, and welfare of a nation depend on the guidance, guidance, and protection of the rights of the younger generation. (Putri, *et., al.* 2023: 61). Parental responsibility for the welfare of children contains the obligation to maintain and educate children in such a way that children can grow and develop into people who are intelligent, healthy, devoted to parents, of noble character, devoted to God Almighty and have the will and ability to continue the ideals of the nation based on Pancasila. Article 26 of Law No. 23 of 2002 stipulates the obligation of parents to:

1. Nurturing, nurturing, educating and protecting children
2. To develop children in accordance with their abilities, talents, and interests, and to prevent child marriage. In the event that parents are not known to exist, or for some reason cannot carry out their obligations and responsibilities, the obligations and responsibilities referred to may be transferred to the family in accordance with the provisions of the applicable laws and regulations.

Some of the factors that occur and cause such neglect include;

- a. Economic reasons of the family Basically, children should be utilized to learn, play, be happy with an atmosphere of peace, fun, and have a good opportunity in terms of facilities to achieve their goals in accordance with their physical, psychological, intellectual, and social development but due to poverty, tradition, changes in production processes, scarcity of inadequate education which increasingly makes neglect of children unavoidable.
- b. Social and cultural environment Children to be able to grow and develop optimally, need personal harmonization from their family. Growing up in a good, loving and understanding environment. A healthy environment can allow children to play a role in creating their own lives.

The family environment is one of the causes of child neglect. The form of child neglect as stated in Article 301 of the Criminal Code (KUHP) states: "Any person who gives or delivers to another person a child who is under his lawful authority and who is less than twelve years of age, knowing that this child will be used for begging or for hazardous work, or which may damage his health, shall be punished by a maximum imprisonment of four years."

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Violence against children in this case means that it can be in the form of an action that can indirectly damage the health, psychology, and everything that the child feels. Article 304 of the Criminal Code states that the form of child neglect is:

"Whoever puts a child under the age of seven years in a place to be picked up by others or, intending to be free from their care, abandons them, shall be punished by a maximum imprisonment of five years and six months."

Some parents after giving birth to their children, they leave the child at the door of the house of the person who is considered capable of caring for it and so on. In addition, such acts of child neglect cannot be justified because the act of neglecting or abandoning children as in Article 308 of the Criminal Code states that:

"If the mother, for fear that others will find out that she has given birth to the child or with the intention of being freed from the care of the child, abandons the child, the maximum sentence mentioned in Article 305 shall be reduced by one half."

Such matters, such as abandoning one's child, which leaves the child unattended, are punishable under Article 304 of the Penal Code.

Child welfare is a natural growth and development which is also the rights of children, in Article 2 through Article 9 of Law Number 4 of 1979 concerning Child Welfare, namely:

- a. Right to care, guidance
- b. Welfare, care and
- c. Right to service
- d. Right to maintenance and protection
- e. Right to environmental protection
- f. Right to first aid
- g. Right to care
- h. Right to assistance
- i. Right to services and care
- j. Right to special services
- k. Right to rocks and services.

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The article is very clear that children have an underlying right in life, namely "The right to welfare, care, upbringing and guidance". It is clear that children are not allowed to be neglected by anyone and can violate Article 2 to Article 9 of the Child Welfare Law. If in a case one of the family relatives is aware of child neglect, it is obligatory to report it. Because basically every thing that violates the rule of law has the right to be reported. Civilly, the judicial process is through the court by way of a report to the police with some evidence that does prove this. So, the investigator has the right to examine the existence of a violation of the law against parents who neglect their children. Judging from several aspects carried out by parents who neglect their children. Is there evidence that fulfills the elements contained in the article of Law Number 23 of 2002 concerning Child Protection. Article 76B states that:

"Everyone is prohibited from placing, allowing, involving, ordering to involve children in situations of mistreatment and neglect." Following the arrest by the Investigator, the next process is witness testimony conducted by the investigator. This is the most involved process because if seen from several aspects that occur. If indeed the witness testimony is not proven and the testimony of the suspect is not proven, the investigator cannot conduct a re-examination because the evidence obtained is lacking. If in the case the evidence is sufficient the witness testimony is sufficient and the victim of this neglect is sufficient then, the BAP from the police has the right to be sent to the District Attorney's Office for further follow-up. In civil cases the judicial process is the same, but there is more paperwork. Because the revocation of parental rights usually occurs in civil law and parents who neglect their children are examples of criminal cases. Therefore, the judicial revocation of child custody is carried out in the same way as the revocation of child custody rights during a divorce.

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Conclusion and recommendations

Based on the research results, it can be concluded that:

1. The implementation of Article 45 of Law No. 16/2019 on the Amendment to Law No. 1/1974 on Marriage against divorced parents regarding the obligation to care for, educate children is best applied in the Singaraja District Court, because the interests of children are paramount, children are entitled to their rights as children, even though the parents are divorced. In determining childcare, the panel of judges considered the applicable legal provisions and the facts in the field with whom the child has the right to live. For minors, they will live with the mother, and if following Balinese customary rules that adhere to the purusa system, especially boys, will live with the father.
2. Violations of custody rights such as child neglect, child abandonment, or disputes over *inchracted* custody rights result in legal consequences such as revocation of custody rights or criminal offenses with penalties such as fines or imprisonment based on applicable laws.

As for the next, based on this research, there are a number of suggestions that can be proposed, namely as follows:

1. Aimed at the community, especially divorced parents, even though there is a divorce in a marital relationship, it is good for a person who has been married and has a child or offspring to remember and care about the rights of the child, both the rights in education, maintenance or the right of affection that parents must give to the child to help the child grow until the child matures or can be independent in order to avoid the occurrence of children as victims of their parents' divorce.
2. To Law Enforcement Officials, especially the Panel of Judges in their role in the creation of ideal justice, they should be more selective and thorough in making / giving decisions related to child custody after divorce considering that the child must be guaranteed his rights both custody and affection rights from both parents so that the child can avoid becoming a victim of his parents' divorce, because it is the child's mentality that must be prioritized so that children grow well without stressful thoughts and depression.
3. To similar researchers

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To similar researchers who conduct research related to child custody of divorced parents to analyze in more depth the legal consequences for parents who violate child custody and also the consequences caused or the impact on children if their parents divorce.

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References

Books

- Nuzul, Andi, 2019. *Indonesian Civil Law, Cet. I*; Yogyakarta: Trussmedia Grafika.
- Putri, Anak Agung Ayu Anandhita Mahendra, Ketut Sudiarmaka, Dewa Bagus Rachman, Anwar, et al. 2020. *Indonesian Marriage Law (In the Perspective of Civil Law, Islamic Law, and Administrative Law)*. Jakarta: Prenadamedia Group,
- Simanjuntak, 2015. *Indonesian Civil Law, Cet. 1*; Jakarta: Kencana.
- Subekti. 2017. *Principles of Civil Law*. Jakarta: Intermasa
- Yaswirman, 2013. *Family Law*. Jakarta: Rajawali Press.

Journals

- Abror, Khoirul. 2020. *Marriage and Divorce Law*. Bantul Yogyakarta: Ladang Kata.
- Adnyani, Ni Ketut Sari. 2019. Legal Effects of Divorce on the Position of Women from The marriage of Asu Pundung. *Kertha Wicaksana*, Volume 13, Number 2, (pp. 121-130).
- Agus, M. (2018). Child Custody Rights Due to Religious Divorce from the Perspective of Islamic Law and Law. *Civil*.
- Ahmad Kamil and Fauzan, 2011, *Rules of Jurisprudence*. Jakarta: Prenada Media Group.
- Ardhya, S. N., & Mertha Sujana, I. P. W. 2021. Juridical Consequences of the Enactment of Agreement Marriage after the Constitutional Court Decision Number 69/PUU-XIII/2015. *Journal of Legal Communication (JKH)*, 7(1), 295- 314.
- Budhisulistiyawati, Ambar. 2021. Legal Basis for Judges' Considerations in Determining Custody Rights Minor Children to Husband as a Result of Divorce. *Journal of Privat Law*, Vol.9 No.2
- Kesuma, I Made Tresna Ambara, Komang Febrinayanti Dantes, Ketut Sudiarmaka. 2023. Implementation of the Principles of Certainty, Benefit and Justice in Divorce Without a Marriage Certificate Based on Law No. 48 of 2009 (Case Study at Singaraja District Court). *Journal of Gender and Human Rights*, Volume 1, Number 2, (pp. 194-202)

INTERNATIONAL JOURNAL OF LAW, TOURSIM, AND CULTURE

Published Law Department, Universitas Pendidikan Ganesha
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- Khair, Umul. 2020. Implementation of Child Custody Rights after Divorce Volume 5, no 2.
- Manoppo, Amanda M. O, 2018. "Dissolution of Marriage and Its Legal Effects on Children According to Marriage Law Number 1 of 1974 concerning Marriage", *Lex Privatum*. Vol. VI, No. 2. Page 161.
- Sanjaya. 2023. Implementation of Law Number 24 of 2013 concerning Administration Population Article 49 in the Making of Birth Certificates for Children Born Outside of Marriage at the Buleleng Regency Disdukcapil Office. *Sui Generis Journal of Legal Science*, Volume 3, Number 2, (pp. 60-71)
- Widiantika, Kadek, Ni Ketut Sari Adnyani, Dewa Bagus Sanjaya. 2023. Juridical Review of Marriage Beda Agama Based on Law Number 16 of 2019 and Balinese Customary Law. *Sui Generis Journal of Legal Science*, Volume 3, Number 3, (pp. 158-168).

Legislation

- Civil Code (KUHPerdata) (*Staatsblad* 1847 Number 23)
- Kitab Undang-Undang Hukum Pidana (KUHP) (State Gazette 2023 Number 1, Tambahan State Gazette Number 6842)
- Law Number 4 of 1979 concerning Child Welfare (State Gazette 1979 Number 32, Supplement to State Gazette Number 3143)
- Law Number 39 of 1999 concerning Human Rights (State Gazette of the Republic of Indonesia) Indonesia Year 1999 Number 165, Supplement to State Gazette Number 3886)
- Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 on Child Protection (State Gazette 2014 Number 297, Supplement to State Gazette Number 5606).
- Law Number 16 of 2019 Concerning the Amendment to Law Number 1 Year 1974 concerning Marriage (State Gazette 1974 Number 1, Supplement to State Gazette Number 3019).