



Ratio Legis of the Government Regulation No. 10 Of 1983 Towards an Obligation to Distribute Salary from Ex-Husband Who Works as Civil Servant to Ex-Wife after Divorce

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Abstract

Legal consequences of conflict of norm, the norms in Article 8 of the Government Regulation No. 10 of 1983 jo. the Government Regulation No. 45 of 1990 with Islamic Law, cause the different treatment before the law/ discrimination which causes injustice between ex-husband who works as civil servant and those who works not as civil servant. The objective of this study is to examine the ratio legis of the Government Regulation No. 10 of 1983 regarding an obligation to distribute salary from ex-husband who works as a civil servant to ex-wife after divorce. There are 4 (four) types of approaches utilized in this study: philosophical approach, statute approach, historical approach, and case approach. The ratio legis of the Government Regulation No. 10 of 1983 jo. the Government Regulation No. 45 of 1990 concerning the obligation to distribute salary from ex-husband who works as civil servant to ex-wife after divorce is because of the position of civil servants as the elements of the state apparatus, the state servants, and the public servants are required to provide examples to the community in marriage and divorce. However, the regulation of the obligation to distribute salary from ex-husband who works as a civil servant to ex-wife after divorce until the ex-wife is married again does not reflect the principle of justice and balance.

Keywords: Government Regulations; Salary; Divorce

Introduction

Article 1 of Law No. 1 of 1974 concerning marriage states: "Marriage is the bond of body and soul between a man and a woman as husband and wife with the aim of building a happy and eternal family based on the one Supreme God."¹ The Article 2 of Presidential Instruction No. 1 of 1991 On June 10, 1991 concerning the Dissemination of Compilation of Islamic Law points out: "Marriage according to Islamic law is a very sacred *aqad (miitsaqan ghalidzan)* to obey God's commands. Getting married is worship."²

In terms of law, marriage is an agreement. It is confirmed in the Quran surah An-Nisa (verse 21) that marriage is: a very solid agreement called (*miitsaqan ghalidzan*). Furthermore, there are several

¹ Association of Laws and Regulations concerning Religious Court, (Jakarta: Supreme Court of the Republic of Indonesia, Directorate General of Religious Court, 2010), page 392.

² *Ibid*, page 489.

reasons for marriage to be referred to as an agreement: the first one is that marriage has been regulated with a marriage contract and certain conditions, and the second one is that divorce or breaking the marriage ties is also arranged before marriage, namely the procedure of *talak, fasakh, siqaq*, etc.³

According to the number of Islamic scholars (*jumhur ulama*), these are the conditions where the husband must provide for his wife:

- a. The wife is submissive towards her husband even though they had not yet had a conjugal relationship.
- b. The wife is an adult. It means that she is old enough to have the conjugal relations. If the wife is still young and has not been able to have conjugal relations, there is no livelihood for her because the husband has an obligation to provide a livelihood if they have had a conjugal relationship.
- c. Marriage meets the requirements. If the marriage includes a broken marriage (*fasid*), according to the number of scholars the provision of livelihood is not mandatory because the *fasad* marriage must be canceled.
- d. The wife obeys her husband. If the wife is disobedient (a *nusyuz*⁴ wife), then the husband is not obliged to pay her livelihood. If the *nusyuz* is caused by the husband, then the wife has the right to get a livelihood from her husband.⁵

Based on the above provisions, the husband is obliged to protect and provide a livelihood for his wife based on his ability. However, if the marriage has been broken because of the divorce and the divorce is due to the husband's will, the result of the divorce, according to the provisions of Article 41 letter c of Law No. 1 of 1974 concerning Marriage, is: "The court can require ex-husband to provide a livelihood and / or determine obligations for ex-wife."⁶

The legal consequences of the conflict of norm are the norms contained in Article 8 of Government Regulation No. 10 of 1983 jo. Government Regulation No. 45 of 1990 with Islamic Law. It causes different treatment before the law/ discrimination which creates injustice between ex-husbands who work as civil servants and those who are not civil servants.

Based on the background of the afore-mentioned problem, the main problem to be studied and reviewed in this paper is the ratio legis of the Government Regulation No. 10 of 1983 to the obligation to distribute salary from ex-husband who works as civil servant to ex-wife after divorce. The purpose of this study is to examine the ratio legis of the Government Regulation No. 10 of 1983 to the obligation to distribute the salary of the ex-husband who works as Civil Servant to ex-wife after divorce.

Research Method

1. Type of research

This research is a normative research which will examine legislation in a coherent arrangement of law as a positive norm that applies at a time as a product of a certain power.⁷

³ Mohd Idris Ramulyo, *Islamic Marriage Law: An Analysis of Law No. 1 of 1974 and Compilation of Islamic Law*, (Jakarta: PT Bumi Aksara, 2004), page 16.

⁴ *Nusyuz* comes from Arabic "*nasyuza*" which means prominent, insubordinate, opposing, see Ahmad Warsan Munawir, *Al-Munawir Dictionary Arabic-Indonesian*, (Surabaya: Pustaka Progresif, 1997), page 1419.

⁵ Abdul Aziz Dahlan, *Encyclopedia of Islamic Law*, (Jakarta, PT Ihtiar Baru van Hoeve, 2001), page 1282.

⁶ *Ibid*, page 403.

⁷ Soetandyao Wignyo Subroto, *An Introduction to the Discussion on the Development of Legal Research in Long-Term Development Phase II*, (Jakarta: National Law Development Agency of the Department of Justice), page 5.

Normative legal research is a type of research that is commonly carried out in the development of legal science which in the western world is commonly referred to as Legal Doctrine (Rechtsdogmatiek). Mochtar Kusumaatmaja and Koesno called it Positive Law, Philipus Hadjon called it Dogmatic Law, while H. Ph. Visser't Hooft called it the Practical Law.⁸

2. Research Approach

There are 4 (four) kinds of approaches used in this study: philosophical approach, statute approach, historical approach and case approach. The use of these four approaches is to complement one approach with another approach and enrich the analysis of legal cases faced. According to Enid Campbell, the use of one approach is not sufficient to analyze many cases.⁹

The approaches used in this study will be explained as follows:

3. Philosophical Approach

The philosophical approach is used to analyze legal issues in this study radically and deeply. According to Poedjawijatna, philosophy is a type of knowledge that seeks to find the deepest cause for everything based on mind.¹⁰

The philosophical approach will be used to examine radically and deeply the nature of justice in an obligation to distribute salary from ex-husband who works as a civil servant to ex-wife after divorce. The philosophical approach is also used to reconstruct the regulation obligation to distribute salary from ex-husband who works as a civil servant to the ex-wife after divorce as stipulated in Article 8 of the Government Regulation No. 10 of 1983 jo. the Government Regulation No. 45 of 1990.

4. Statute Approach

The statute approach is used to find out hierarchies, principles and normative meanings contained in legislation.¹¹ Article 1 point 2 of Law No.12 of 2011 concerning the establishment of legislation,¹² determines: "The legislations are written rules which contains legal norms that are generally binding and established by state institutions or authorized officials through the procedures stipulated in the legislation."

The use of this method is based on the reason that legal research is a process of finding legal rules, legal principles, and legal doctrine to answer legal issues faced.¹³ The normative juridical approach is an approach using legislation, which is done by examining library materials or secondary material.¹⁴ This approach is used since the problems studied are about legislation. The normative legal research is

⁸ Bernard Arief Sidarta, *Normative Legal Research: Philosophical and Documentary Research Analysis, in Legal Research Book: Constellation and Reflection*, (Jakarta, Yayasan Obor Indonesia, 2009), page 142.

⁹ Enid Campbell, et al, *Legal Research*, (Sydney: The Law Book Company Ltd., 1996), page 274.

¹⁰ Poedjawijatna, *Guide to the World of Philosophy*, (Jakarta: PT Pembangunan, 1974), page 11.

¹¹ Johnny Ibrahim, *Theory & Methodology in Normative Legal Research*, (Surabaya: Bayumedia, 2006), page 306. See also Bambang Sunggono, *Legal Research Methodology*, (Jakarta: Raja Grafindo Persada, 2006), page 71-72 and 201.

¹² State Gazette of the Republic of Indonesia in 2011 No. 82, Addition to the State Gazette of the Republic of Indonesia No. 5234.

¹³ Peter Mahmud Marzuki, *Legal Research*, (Jakarta: Prenada Media, 2005), page 35.

¹⁴ Soerjono Soekanto and Sri Mamudji, *Normative Legal Research: A Brief Review*, (Jakarta: Rajawali Press, 1986), page 69.

also referred to a research on the rule of law itself (legislation, jurisprudence, customary law or other written law and legal principles).¹⁵

There are two types of statute approach: legal formation method and legal interpretation method. The legal formation method is related to the technique of legislation, while the legal interpretation method relates to the interpretation of the Law. The use of the legislation approach is a *conditio sine quanon* for normative legal research. The benefit of using this approach is to look for ratio legis and the ontological basis for the formation of legislation.

5. *Historical Approach behind the promulgation of the Government Regulation No. 10 of 1983*

Historical approach is used to trace the history of the formation of the Government Regulation No. 10 of 1983 jo Government Regulation No. 45 of 1990, in which there are legal provisions that regulate the obligation to distribute salaries from ex-husbands who work as civil servants. According to Bagir Manan, research on written principles and rules that have ever been applied can be done with historical research on legislation (wethistorie, legislative history). It is not legal history research (rechthistorie, legal history) which is a historical study of a legal institution.¹⁶

Through the historical approach, historical tracking will be carried out based on the consideration of the formulation of the Government Regulation No. 10 of 1983 jo Government Regulation No. 45 of 1990.

6. *Case Approach*

The case approach will be used to analyze several decisions or jurisprudence regarding court decisions related to ex-husbands who work as civil servants who divorce.

a. *Legal Material*

The source of legal material in this study consists of primary, secondary and tertiary legal materials.

b. *Legal Material Data Collection Technique*

Legal material data collection was carried out by conducting library research which includes: inventory of legislation related to the problem under study, research on doctrine (opinions of legal experts), concepts, legal principles related to this research. The legal materials were obtained from literature books, judge decisions and legal material searches through the internet network or web sites and various seminars.

c. *Techniques for Analysis and Interpretation of Legal Materials*

The analysis used in this study will provide prescriptions¹⁷ about the justification of legal construction qualifications and obligation to distribute salary from ex-husband who works as a civil servant to ex-wife after divorce which currently exist and the regulation reconstruction of the obligation to distribute salary from ex-husband who works as civil servant to ex-wife after divorce based on justice.

This study also utilizes a qualitative juridical analysis method,¹⁸ so it will analyze prescriptively and constructively the primary, secondary and tertiary legal materials as a whole, deeply and thoroughly.

¹⁵ Bagir Manan, *Research in Law*, (Bandung: Puslitbangkum Universitas Padjajaran, 1999), page 78.

¹⁶ Bagir Manan, *Op.Cit.*, page 6

¹⁷ Peter Mahmud Marzuki, *Legal Research*, (Jakarta: Prenada Media, 2008), page 206, who stated that "legal research provides prescriptions about what should be essential from legal research since for this reason the research is carried out; for the purposes of legal practice as well as for academic writing, the prescription given determines the value of the research".

¹⁸ Maria SW. Sumardjono, *Guidelines for Making Research Proposals: A Basic Guide*, (Jakarta: Gramedia Pustaka Utama, 2001), page 10, who mentioned that "normative legal research that uses secondary data, the research is generally descriptive or descriptive-explorative, and the analysis is

The analysis can provide a significant meaning to the analysis of legal material that can explain the pattern of description and look for the relationship between dimensions.¹⁹ To find out the prescriptions about justice qualifications, the construction and reconstruction of the obligation to distribute salary from ex-husband ex-wife after divorce, the researcher analyzes the legal material with teleological interpretations.

Results and Discussion

1. Philosophical Arguments

To find out the ratio legis from the regulation of obligation to distribute salary from ex-husband who works as a civil servant to ex-wife after divorce, the researcher needs to examine the foundation of ontological formation of the Government Regulation No.10 of 1983 concerning marriage permits and divorce for civil servants (henceforth – the Government Regulation for marriage and divorce permits for civil servants). It is because in the Government Regulation, the permission of marriage and divorce for civil servants is a norm of obligation to distribute salary from ex-husband who works as a civil servant to ex-wife after divorce.

The Government Regulation for marriage and divorce permits for civil servants enacted on April 21, 1983 includes 23 articles. The article related to this discussion is contained in Article 8, which states:

- (1) “If the divorce occurs at the behest of a male civil servant, he is obliged to distribute a portion of his salary for the livelihood of his ex-wife and children.
- (2) The distribution of salaries as referred to in paragraph (1) is one-third for the male civil servant, one-third for his ex-wife and one-third for his child or children.
- (3) If there is no child from the marriage then the portion of the salary that the male civil servant must distribute to his ex-wife is half of his salary.
- (4) If the divorce occurs at the behest of the wife, then she has no right for the salary from her ex-husband
- (5) The provisions in paragraph (4) cannot be applied if the wife requests a divorce because she is cheated on.
- (6) If the ex-wife of the civil servant is remarried, then she does not have the right to receive the salary of her ex-husband as soon as she remarries”.²⁰

Based on the results of ontological research or the philosophical foundation of the Government Regulation for marriage and divorce permits for civil servants, the regulation of the obligation to distribute salary from ex-husband to ex-wife after divorce until ex-wives remarries, as stated in Article 8 of the Government Regulation for marriage and the permits for civil servant divorce, is very unfair. The reason is that basically the purpose of the law is to uphold justice in all aspects of life, so that order and peace can be realized in people's lives. The justice must be felt by the ex-husband and ex-wife, so that there is a balance rather than partial justice. However, in fact, the regulation only provides a protection for ex-wives while ex-husbands do not get any attention. Therefore, in terms of the philosophy of regulation, the obligation to distribute salary from ex-husband who works as a civil servant to ex-wife after divorce in the Government Regulation for marriage and divorce permits for civil servants is not appropriate since it is related to the discipline of the civil servants.

qualitative; i.e. a method of descriptive data analysis that refers to a particular problem and is associated with the opinions of legal experts and based on applicable laws and regulations”.

¹⁹ Moleong J. Lexy, *Qualitative Research Methods*, (Bandung: PT. Risda Karya, 2001), page 105, who said that “as normative science, legal science has a unique way of working ‘sui generis’ (legal science is a science that has its own character) in helping solve legal problems experienced by society”.

²⁰ Association of Laws and Regulations concerning Religious Court, *Op.Cit.*, page 458.

2. Historical Arguments

The Government Regulations for marriage and divorce permits for civil servants were promulgated on 21 April 1983 or during the New Order regime. Consequently, the government in the regime could influence the laws that would be applied including the Government Regulation for marriage and divorce permits for civil servants. Therefore, this research also aims to discover whether the New Order government is included to a democratic political configuration or an authoritarian political configuration. To find out this concern, Moh. Mahfud MD affirms indicators of the role of political parties and representative bodies, press freedom, and the role of the government (executive). If the political parties and people's representative institutions play an active role in determining state law, the life of the press is relatively free, the role of executive institutions is not dominant and obey to people's wishes expressed through the willingness of people's representative institutions, so they can qualify as democratic political configurations. On the other hand, if the state plays a very active or dominating role in the making of state policy, the life of the press is limited, and political parties and people's representative institutions are less active in determining state law, so they can be qualified as an authoritarian political configuration. Therefore, the three indicators will be examined in depth to obtain an accountable conclusion.

a. The Role of Political Parties and the House of Representatives

The background of the birth of the New Order began with the movement of 30 September 1965 (G 30S / PKI in 1965). It was a failed coup which caused Sukarno's power and the democracy he led to decline sharply. There was a competition between Soekarno, the Indonesian Communist Party and the Army which was cut off and ended with the appearance of the Army as the winner. The destruction of the Indonesian Communist Party and the collapse of the Soekarno regime were the result of the roles played by both of them in the era of guided democracy.²¹ Furthermore, on September 30, 1965, several TNI (Indonesian National Army) Generals were kidnapped, tortured and killed by rebels who had caused the chaos.

The murder of the Generals of TNI resulted in the emergence of great hatred towards the Indonesian Communist Party. The Indonesian society and TNI then carried out arrests and massacres of members of the Indonesian Communist Party in various parts of Indonesia. At that time, riots occurred in various locations so that state security was very vulnerable. It made President Soekarno's influence and power weakened and he lost the trust of some of his people.

After the 1965 G30S / PKI events, Indonesia's political situation became chaotic. The Indonesian people had protested the actions of the Indonesian Communist Party which resulted in massive demonstrations by groups of students. On January 10, 1966, a demonstration led by KAMI (the Indonesian Student Action Unit) at the University of Indonesia delivered the Three Demands of the People (*Tritura*), including: disbanding the Indonesian Communist Party and its organizations, revamping the Dwikora cabinet and lowering prices (economic improvement).²²

In response to the people's demands, President Soekarno reshuffled the Dwikora cabinet. Unfortunately, this kind of effort was considered disappointing because there were still communist elements in the new cabinet. At this crucial time, President Soekarno finally decided to resign as a president. On March 11, 1966 Soekarno signed a *supersemar*, which mentions that Soekarno gave up his mandate to Suharto as president of the Republic of Indonesia. On February 22, 1967 Suharto was officially appointed as the 2nd president of the Republic of Indonesia through the decree of MPRS (the Provisional People's Consultative Assembly) No. XV/MPRS/1966 and a special MPRS session on March 7-12, 1967.²³

²¹ Ismail Sunny, *Shift in Executive Power*, (Jakarta: Aksara Baru, 1983), page 218.

²² New Order Period, <https://www.maxmanroe.com/vid/umum/pengertian-orde-baru.html>, accessed on March 1, 2019, at 10:45 a.m. West Indonesia Time.

²³ *Ibid*, page 4

After the Indonesian Communist Party was dissolved on March 12, 1966, the New Order began to make efforts to guide political parties. On February 20, 1968 there were steps to merge existing Islamic organizations but their aspirations were not yet shared with the establishment of Parmusi (the Indonesian Muslim Party). The New Order's move to classify political parties was continued on March 9, 1970 with the formation of the Development Democracy Group which was a combination of PNI (Indonesian National Party), the Catholic Party, Parkindo (Indonesian Christian Party), IPKI (Supporting Association of Indonesian Independence Party) and Murba (Many People's Consultations). Next, on March 13, 1970 a United Development Group was formed consisting of NU (*Nahdlatul Ulama*-an Indonesia Islamic movement), PARMUSI, PSII (Indonesian Islamic Party) and Perti (*Tarbiyah Islamiyah* Association). The last one was that there was a functional group called the *Golongan Karya* Party (Golkar).²⁴

The 1971 election was the initial priority of the New Order government to create an initiative carried out based on Law No.15 of 1969 concerning general elections. In an attempt to create national stability, *Golkar's* power that controls the majority of votes in the House of Representatives / People's Consultative Assembly proposes simplifying political parties. Although at first it caused pros and cons, in 1973 the proposed simplification of political parties could be accepted by existing parties.

The concept of simplifying political parties is known as the concept of fusion of simplifying 10 political parties into two political parties and one *Golongan Karya* which was later confirmed in Law No. 3 of 1975 concerning Political Parties and *Golongan Karya*. The political parties resulting from the fusion were PPP (the United Development Party), Golkar (*Golongan Karya*) and PDI (the Indonesian Democratic Party).²⁵

Golkar's victory in the election in the New Order was caused by several reasons. The first one was the support of a broad network of government bureaucracies from the national to the village level. The second one was the military support that was carried out through the implementation of TNI's territorial functions.

From the composition of the House of Representatives members, the role of the government and *Golkar* had a very dominant portion in all the spectrum of the political process and made the New Order a strong country. Existing parties other than *Golkar* were weak because every alternative proposed by political parties that were not approved by the government usually will not be approved by *Golkar* who had an absolute majority.

The composition of the power of the People's Consultative Assembly also experienced the same thing. The government faction remained dominant because all members of the House of Representatives were members of the People's Consultative Assembly. In addition, there are two other things that strengthen the dominance of the government faction. Firstly, for the membership of the People's Consultative Assembly, the president appointed the members based on the balance of membership in the House of Representatives apart from the House of Representatives, so the People's Consultative Assembly was increasingly unbalanced. Secondly, group envoys after the balance has been determined by the president. Consequently, in such composition, there was an incompatibility between the composition of People's Consultative Assembly membership and the structure of society.

As a result of the weakness of these representative institutions, almost all legislative products that were ratified came from government proposals. The representative institutions only had a stake in making non-principle improvements to the designs submitted by the government.

Therefore, the role of the House of Representatives in the New Order era, which was only the legitimacy of the government (executive), was more prominent than its role as a channel for the aspirations of community members.

²⁴ <https://serbukindonesia.org/pub/partai-politik-di-masa-orde-baru/> accessed on 28 February 2019 at 7.43 a.m. West Indonesia Time.

²⁵ *Ibid.*

b. Press Freedom

The press is a medium of communication between democratic development actors and a means of delivering information from the government to the public and from the public to the government. This communication is expected to provide understanding, knowledge, equality of perception and participation of the community so that democracy can be carried out. Among the tasks of the press, one of its obligations is to form common interests between the community and the state where the press functions as a means of connecting the interests of the government and society. Therefore, the press needs freedom in submitting suggestions or criticism to any party. There are many roles that the press does in a country and in realizing democracy. However, there is a need for freedom of the press in carrying out its duties and functions professionally to make sure that the press can carry out its role to support democratization.

In the early days of the New Order government, the press got good news. There was a hope for the press freedom to be able to develop as desired by the press. The New Order government initially tolerated the scathing criticisms that often appeared in the press at that time, so the student press achieved its success and, along with the general press, it enjoyed the freedom to express its role.²⁶ However, restraints on the press appeared after the government formed a new political format.

From the standpoint of legislation, it is always necessary to have a SIT (Permit Issuance) which by Law No. 11 of 1966 was only tolerated temporarily, apparently even though the Law was amended or renewed by Law No. 4 of 1967, the problem was not mentioned. The law was subsequently renewed with Law No. 21 of 1982. The Institute for the entry into force of SIT was revoked, but this new law contained the SIUPP (Press Issuance Business License) institution. Although the SIUPP is intended for its publishing business, it could directly result in the cessation of the publication of the press. The halt of the publication of Sinar Harapan, Monitor, Tempo, Editor and Detik, was because the SIUPP was revoked.

At this point, the press saw that the leadership model used by the New Order government curbed freedom of the press even though the press freedom was one of the characteristics of democracy. Therefore, during the New Order period, the main function of the press as a distributor of information had suffered a setback.

c. The role of the Government is dominant

The role of the Government in the New Order was very dominant. It can be seen from the logic of economic development which should be supported by national stability that gave a way for the government to make the New Order period a strong country. The decision taken led to the institutionalization of politics that was designed seriously to sustain economic development. It is intended to create a political mechanism that enables economic growth and minimizes political conflict. That kind of design had underpinned the process of creating bureaucracy as the main role, while other political parties and government institutions were only spectators.²⁷ Thus, the logic of economic development made the role of the state dominant.

In the process of legislative decision-making, the government domination is evident in terms of executive management and in legislative activities. Almost all the products of the People's Consultative Assembly come from government contributions, including the outlines of the country's most important policies.

Since the election of the House of Representatives members from the 1971 election results, all legal products in the form of laws have come from designs proposed by the government, especially the Government Regulation for marriage and divorce permits for civil servants promulgated on April 21, 1983.

²⁶ Amir Effensi Siregar, *Indonesian Student Press: One Falls and a Thousand Spring Up*, (Jakarta: PT Karya Unipress, 1983), page 46-47.

²⁷ Mohtar Mas'ood, Social, Economic and Political Changes During the New Order, in Ahmad Zaini Abar (ed), *Some Aspects of New Order Development, Essays from the Faculty of Social and Political Sciences - Bulaksumur*, Ramadhan, Solo, 1990, page 159.

After the author conducted research in the New Order government, based on the three indicators of the democracy pillars (the role of political parties and representative bodies, press freedom, and the role of government / executive), the results were as follows: The first one is that the role of political parties and representative bodies in the New Order government is very weak. It is because political parties have been designed in such a way that *Golongan Karya* party as a supporter of the government in the New Order period greatly dominated the seats acquisition in the House of Representatives. It made the House of Representatives become 'unhealthy' because its members were dominated by *Golongan Karya*. Moreover, during the New Order, all products of the invitation were the government initiatives in which the House of Representatives only made corrections that were not too crucial. The second one is that the life of the press during the New Order was very confined or not free. It is experienced by both general press and student press. Each press that informed the news that was related to the New Order government policy was finally banned which made the main function of the press as a democratic control unable to be carried out. Furthermore, the press was 'castrated' with several regulations, so the press cannot speak freely. The third one is that the role of executives in the New Order era was very dominant. Almost all the products of the People's Consultative Assembly such as the broad outlines of the country's direction are on the government's proposal. In other words, the government was very free to determine the line of state policy because all representative bodies have been controlled by the government or the executive.

Based on the three indicators mentioned above, the configuration of the government during the New Order qualifies as an authoritarian political configuration. It makes the legal products produced are not responsive which means that the law produced is not aspirational; it does not contain material in general in accordance with the aspirations of the community. Therefore, the legal product is not seen as a crystallization and will of the people.

3. Sociological Arguments

The social reason for applying the Government Regulation No.10 of 1983 concerning marriage permits and divorce for civil servants which has been amended by the Government Regulation No.45 of 1990 relates to the position of civil servants who are obliged to give a good example for their subordinates and society, including in organizing family life.

The position and role of civil servants, according to Sudibyo Triatmojo, is very important and decisive, because civil servants are one of the implementations of government to carry out government duties and launch development tasks in order to achieve national goals.²⁸

Civil servants have a very important role because they are the elements of the state apparatus to organize government and development in order to achieve the goals of the country. The implementation of government and national development depends on the perfection of the state apparatus. In addition, civil servants are in charge of assisting the president as the head of the government in administering government and carry out legislation which means they need to ensure that the community obeys every regulation. As the civil servants, they have to be loyal and obedient to the *Pancasila* (the five basic principles of the Republic of Indonesia) and the 1945 Constitution of the Republic of Indonesia, the state and the government. Therefore, they can give their attention, mind as well as all their power, effort and energy to carry out the tasks of government and development in an efficient and effective manner.

Considering the substantial role and position of the civil servants mentioned above, they are elements of the state apparatus, state servants and public servants who must be the good examples for the community in terms of their behavior, actions, and adherence to the applicable legislation. To be able to do this, their life should be supported by harmonious family life, so there will be no disturbance such family problems in carrying out their duties.

The civil servants should realize a harmonious family life in order to support the implementation of institutional duties. Good family life reflects the attitudes, behavior, and actions of civil servants in

²⁸ Sudibyo Triatmojo, *Civil Service Law concerning Position, Rights and Obligations of Civil Servants*, (Jakarta: Ghalia Indonesia, 1983), page 106.

carrying out their duties and social life. Accordingly, there is a Code of Ethics for civil servants regulated in the Government Regulation No. 42 of 2004 concerning the Development of the corps' soul and the Civil Code Code of Ethics (henceforth – the Government Regulation No. 42 of 2004).

In general, a code of ethics means a set of norms, principles, and values that become guidelines for members of certain professional groups in behaving and carrying out activities as members of the professional group. In professional life, a code of ethics determines the dignity and honor of the members.²⁹

The provisions regarding the obligation to comply with the Code of Ethics for civil servants are regulated in Article 7 Government Regulation No. 42 of 2004, which states:

“In carrying out official duties and daily life, every civil servant must behave and obey the ethics in the state, in the administration of the government, in organization, as well as for themselves and fellow civil servants as regulated in this Government Regulation.”

The life of civil servants has been regulated in a number of legislations, so that their daily lives cannot be separated from the norms of civil service law. Moreover, the enactment of Government Regulation No. 10 of 1983 jo. Government Regulation No. 45 of 1990 shows that the employment law does not only apply when a civil servant is in the office, but also outside the office. This means that the attitude and behavior of a twenty-four-hour civil servant must be a role model for the environment.

4. *Juridical Argument*

Special legal arrangements (*lex specialis*) for divorce for civil servants are contained in the Government Regulation for marriage and divorce permits for civil servants. The legal reason for enacting the Government Regulation for marriage and divorce permits for civil servants is the legal translation of Law No. 1 of 1974 concerning marriage and its implementing regulations contained in the Government Regulation No. 9 of 1975, which is based on the principles of divorce law. They are stated as follows:

a. *The Principle of Complicating Divorce*

This principle arises in connection with the purpose of marriage contained in the provisions of Article 1 of Act No. 1 of 1974 concerning Marriage and its explanation. It is stated that the marriage is to form a happy and eternal family through the bonding of body and soul between a man and a woman based on the one Supreme God. To realize the purpose of marriage, husband and wife should help each other and complement each other's weaknesses and strengths in order to achieve spiritual and material welfare. A happy and everlasting family or household that will be realized through marriage is based on the one Supreme God, meaning based on the religious teachings adopted by the Indonesian people, including: islam, christianity, catholicism, hinduism and buddhism.

According to the philosopher, Imam Alghazali, the purpose and benefits of marriage are:

- 1) obtaining legitimate children, who will carry out offspring and develop human tribes.
- 2) meeting the instinctive demands of humanity's life.
- 3) preventing humans from crime and damage.
- 4) forming and managing households which become the first base of a large community on the basis of love and affection.
- 5) growing sincerity trying to find halal livelihoods and increasing sense of responsibility.³⁰

²⁹ Sri Hartini, Setiajeng Kadarsih dan Tedi Sudrajat, *Op.Cit.*, page 48.

³⁰ Nadimah Tanjung, *Islam and Marriage*, (Jakarta: Bulan Bintang), page 30-31.

According to Hilman Hadikusuma, the purpose of marriage according to Law No. 1 of 1974 concerning marriage is for happiness of a husband and wife, to get offspring and uphold religion in a family unit that is parental. It is narrower than the purpose of marriage according to customary law which the community adheres to a patrilineal (fatherly) kinship system, such as Batak, Lampung, Bali and others, and a matrilineal (motherly) kinship system, such as the Minang tribe, and some other tribes which are still strong in kinship and bilateral neighboring systems (family and father's side) in the regions.³¹

Taking into account the very important purpose of marriage, Law No. 1 of 1974 concerning marriage and its implementation rules make divorce difficult to be done. It is because divorce will result in the failure of creating a happy and eternal family (household). The worse impact that usually occurs in the community is the breaking of the relationship between the ex-husband and ex-wife and their family. In addition, divorce also results in conflicts between ex-husband and ex-wife in terms of the struggle for the property of shared assets and the custody of children who have been born from their marriages which will have an impact on the development of their children.

Abdul Kadir Muhammad points out that Law No. 1 of 1974 concerning marriage basically makes the process of divorce difficult, because:

- a. marriage is a holy and noble goal, while divorce is an act that is hated by God.
- b. to limit the arbitrariness of husbands to wives.
- c. to lift the dignity of the wife so that it is equal to the dignity of the husband.³²

The principle of complicating divorce is contained in Article 39 paragraph (1) of Law No. 1 of 1971 concerning marriage which states: "Divorce can only be carried out before a court hearing after the court concerned has tried and has not succeeded in reconciling the two parties".³³

Based on these provisions, divorce can only be carried out before a court hearing. It means that there are no divorces that occur outside the court. In addition, divorce can occur after the court or judge before the court has tried to reconcile the husband and wife and it was unsuccessful. This indicates that the provision considers that a marriage should be maintained. The legal ratio of this provision is that there have been probably legal reasons for divorce, but with the existence of peace and agreed by the husband and wife, the reason for the divorce cannot be used anymore.

The principle of complicating divorce is also contained in Article 39 paragraph (2) of Law No. 1 of 1971 concerning marriage which determines: "To divorce, there must be enough reason that the husband and wife are no longer able to live in harmony as husband and wife."³⁴

The imperative provisions are explained in Article 19 of Government Regulation No. 9 of 1975 which determines:

"Divorce can occur for a reason or reasons:

- a. One of the parties commits adultery or becomes a drunkard, compactor, gambler, etc. which is difficult to cure;
- b. One party leaves the other party for 2 (two) consecutive years without the permission of the other party and without valid reason or because anything else that is beyond their capacity;
- c. One party receives a sentence of 5 (five) years imprisonment or a more severe sentence after marriage;
- d. One party commits atrocities or severe abuse which endangers the other party;

³¹ Hilman Hadikusuma, *Indonesian Marriage Law according to Laws, Customary Law, and Religious Law*, (Bandung: Mandar Maju, 2007), page 22.

³² Abdul Kadir Muhammad, *Indonesian Civil Law*, (Bandung: Citra Aditya Bakti, 2000), page 109.

³³ Association of Laws and Regulations concerning Religious Court, *Op.Cit.*, page 402.

³⁴ *Ibid*, page 403.

- e. One party has a disability or illness with the result of not being able to carry out its obligations as a husband / wife;
- f. Husbands and wives continuously experience disputes and quarrels and there is no hope of living in harmony again in the household.³⁵

The principle of complicating divorce along with the reasons is also strengthened by the need for judges before the court to verify the reasons for the divorce. It means that it is not only to rely on the mere recognition of the party sued or the one who makes a mistake, but there must be other strong evidence that proves the truth of the reasons for the divorce.

2. *Principle of Certainty of Institution and Institutional Law of Divorce*

The legal principle in Law No. 1 of 1974 concerning marriage places legislation as a legal and court institution as a legal institution involved in the divorce process.

The most essential objective of the existence of the legislation, according to Tinton Slamet Kurnia, is to create legal certainty because the legislation can be read and can be understood in an easier way. This can avoid speculation between legal subjects about what must be done or not done, about what can be done or not to do, and about what constitutes rights and obligations.³⁶

According to Apeldoorn, the concept of legal certainty contains two definitions. The first one is that the legal certainty can be determined by what laws apply to concrete problems. In this case, the litigants are able to know from the beginning what provisions will be used in the dispute. The second one is that the legal certainty contains the meaning of the legal protection, repression of parties that have authority related to one's life, in this case, judges and regulators.³⁷

The legislations which become the form of the principle of legal certainty occupy a very central position in the legal system of all countries, including Indonesia. This rule is reinforced by its existence with the recognition in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states: "The State of Indonesia is a state of law."³⁸

Jimly Asshiddiqie as cited in Ahmad Redi formulated 13 (thirteen) principles of the Indonesian rule of law which are the main pillars that support the establishment of a modern state which can be called a rule of law (the Rule of law or Rechtsstaat) in the true meaning. There are:

- a. Law supremacy.
- b. Equality before the law.
- c. The principle of legality.
- d. The imitation of power.
- e. Mixed organs that are independent.
- f. Free and impartial justice.
- g. State Administrative Court.
- h. Constitutional court.
- i. Protection of human rights.

³⁵ *Ibid*, page 428-429.

³⁶ Tinton Slamet Kurnia, *Introduction to the Indonesian Legal System*, (Bandung: PT Alumni, 2009), page 49.

³⁷ Peter Mahmud Marzuki, Contracting Limits of Freedom, *Yuridika Magazine*, Vol. 18 No. 3 May, 2003 page 50.

³⁸ Association of Laws and Regulations concerning Religious Court, *Op.Cit.*, page 2.

- j. Democratic.
- k. Serves as a means of realizing the goal of the state (*welfare rechtsstaat*).
- l. Transparency and social control.
- m. Godhead.³⁹

The positive legal basis that reflects the legality principle for divorce legal proceedings is Law No. 1 of 1974 concerning marriage which has been described in the Government Regulation No. 9 of 1975 and elaborated again by the Government Regulation No. 10 of 1983 concerning marriage and divorce permits for civil servants who has been amended by the Government Regulation No. 45 of 1990 concerning Amendment to Government Regulation No. 10 of 1983 concerning marriage and divorce permits for civil servants.

Law No. 1 of 1974 concerning marriage was effective from October 1, 1975. Since then, there has only been one national legislation regarding marriage. This is confirmed in Article 66 of Act No. 1 of 1974 concerning marriage. The article contains an implicative provision which means that with the enactment of Law No. 1 of 1974 concerning Marriage, other regulations governing marriage which have been regulated in the law are declared invalid. However, things that have not been regulated in Law No. 1 of 1974 concerning marriage still apply, such as the legal norms that come from religious teachings apply.

The law mentioned above is reinforced by Article 2 paragraph (1) of Law No. 1 of 1974 concerning marriage, which states: "Marriage is legal if it is carried out according to the laws of each religion and its beliefs."⁴⁰ One of the examples is an Indonesian citizen who is Muslim who will get married. In order to make sure that the marriage is legal, it must be carried out according to Islamic legal norms. It can be concluded that Indonesian citizens who are Muslim who will legally divorce must do it based on Islamic legal marriage norms. However, the matters that are not regulated and are not contrary with Law No. 1 of 1974 concerning marriage still apply according to the laws of each religion and belief. Therefore, these provisions can be used as the legal basis for the entry into force of the divorce law according to the religions in Indonesia that are adopted by each husband and wife who wishes to divorce.

The divorce process for muslim husbands and wives is decided before the religious court, while the divorce process for husbands and wives other than Islam is decided before the general court/ district court. It is in accordance with the provisions of Article 63 paragraph (1) of Law No. 1 of 1974 concerning marriage which states: "The meaning of the Court in this Law is: a. Religious Courts for those who are Muslim, b. General Court for others."⁴¹

Based on the above-mentioned provisions, the Religious Courts and District Courts are the authority of the judicial institution authorized by Law No. 1 of 1974 concerning marriage, the Government Regulation No. 9 of 1975 concerning the Implementation of Law No. 1 of 1974, and the Government Regulation No. 10 of 1983 concerning marriage and divorce permits for civil servants to examine, hear and decide on divorce cases. According to Tinton Slamet Kurnia, the authority of the judiciary that relates to its power to decide a case is based on the principle of the independence and impartiality of the judiciary. As a consequence, on the basis of these two principles, court decisions are also authoritative. The principle of independence and the principle of impartiality of the judiciary serve to establish a pattern of certain relations between judicial institutions and other state institutions or between judicial institutions and justice seekers and to implement a measurable framework for judicial institutions in carrying out their functions.⁴²

Independence and impartiality of the Religious Courts and District Courts as the authority of the judiciary that has the authority to examine, adjudicate, and decide divorce cases, directs the legal issue as its demand, equal rights and position of husband and wife as litigants before the law. The consequence of

³⁹ Ahmad Redi, *Law for Establishing Legislation*, (Jakarta: Sinar Grafika, 2018), page 39-40.

⁴⁰ *Ibid*, page 392

⁴¹ *Ibid*, page 409.

⁴² Tinton Slamet Kurnia, *Op.Cit.*, page 77.

the legal principle is that the judges in the Religious Courts and District Courts must listen equally to the husbands and wives as parties in divorce cases (*audi et alteram partem*). The judge must focus on the legal issues from divorce and the settlement of concrete laws by giving prescriptions based on the applicable divorce law.

The explanation of the legal integrity theory developed by Dworkin above shows the enormous responsibility of the judges in the Religious Court and the District Court as the personification of the judiciary that has the authority to examine, hear and decide on divorce cases. Therefore, the judge must be able to provide justice for the husband or wife as a justice seeker in the case of divorce.

Conclusion

The ratio legis of Government Regulation No.10 of 1983 jo. Government Regulation No. 45 of 1990 concerning the obligation to distribute salary from ex-husband who works as a civil servant to ex-wife after divorce is due to the position of civil servants as elements of the state apparatus, state servants, and public servants are required to provide examples and examples to the community in do marriage and divorce. However, the obligation to distribute salary from ex-husband who works as civil servant to ex-wife after divorce until the ex-wife remarries as stated in Article 8 the Government Regulation No. 10 of 1983 jo. the Government Regulation No.45 of 1990 does not reflect the principle of justice and balance.

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