

## Legal Construction of Kajen Religious Court Judge's Decision Regarding Claims for Sharing of Salaries in Divorce Cases for Civil Servants

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**Abstract.** Article 8 of Government Regulation Number 10 of 1983 which was later updated in Government Regulation Number 45 of 1990 is a disciplinary regulation for Civil Servants which specifically regulates divorce and marriage permits for civil servants. Divorce as part of marriage matters is truly the absolute competence of the Religious Courts, but the details of the existing articles, such as the issue of salary distribution as a result of divorce, whether or not it becomes a legal tool in procedural practice in the Religious Courts or not is still a matter of debate. The author divides three formulations into the discussion, namely: Judge's Authority, Judge's Legal Considerations and Legal Construction of Kajen Religious Court Judges in Deciding Salary Distribution Claims Due to Divorce of Civil Servants. This research is library research. The normative juridical method is used with a statutory approach and a conceptual approach. A normative juridical approach is applied because this research is related to government regulations which discuss the distribution of salaries due to divorce and the binding force of a regulation in the practice of proceedings in the Religious Courts. The sources and types of data used are primary, secondary and tertiary data with collection techniques through interviews and documentation. The problem is analyzed using the theory of legal certainty, the theory of legal discovery and the theory of justice. The Kajen Religious Court judge is of the view that the issue of salary distribution as a result of civil servant divorce is not within the authority (absolute jurisdiction) of the Religious Court, but rather the authority of the State Administrative Court. This is because the person who handles salary issues is the treasurer who is a state administrative official. So that all problems that arise within it fall under the authority of the State Administrative Court. Only in the future, if the same case is encountered, it would be better if it is accompanied by a solution for burdening maintenance due to divorce in the form of iddah

*maintenance and child maintenance in accordance with the provisions of Islamic law, the values of which are embodied in the Marriage Law and the Compilation of Islamic Law. This will provide more legal certainty and also fulfill a sense of justice.*

**Keywords:** *Construction; Decisions; Judge; Servant; Salaries.*

## 1. Introduction

The Qur'an states that living in pairs and soul mates is the instinct of all creatures, including humans, as stated in Q. S Az Zariyat verse 49.

Meaning: We created everything in pairs so that you may remember (the greatness of Allah).<sup>1</sup>

Islamic law is established for the welfare of the people, both individually and in society, both for life in this world and in the afterlife. Community welfare is created from family welfare because the family is the smallest institution in society. Having a good family according to Islam supports prosperity.<sup>2</sup> Everyone wants the marriage they are in to remain intact throughout their lifetime, but rarely do marriages that have been built with great difficulty end in divorce.<sup>3</sup> If divorce is an option, then the application must be truly based on a basis or reason which is indeed the last alternative or it may not be that divorce is the only way that must be taken to realize the common good for each party.

The Compilation of Islamic Law (KHI) which is based on Presidential Instruction Number 1 of 1991 Article 116 states the acceptable reasons for filing for divorce.<sup>4</sup> Meanwhile, Article 39 paragraph (2) of Law Number 1 of 1974 as amended by Law Number 16 of 2019 concerning Marriage states that in order to carry out a divorce there must be sufficient reasons that the husband and wife will not live in harmony as husband and wife. . The reasons referred to are explained in Article 19 of Government Regulation Number 9 of 1975.

The Compilation of Islamic Law (KHI) which is based on Presidential Instruction Number 1 of 1991 is used as a guideline in resolving issues of marriage, inheritance, waqf which is the duty and authority of the Religious Courts to

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<sup>1</sup>Ministry of Religion Qur'an, taken from <https://quran.kemenag.go.id/surah/51/49>

<sup>2</sup>Abd. Rahman Ghazaly, 2006, Fiqh Munkahat, Kencana, Jakarta, p. 13

<sup>3</sup>Radi Yusuf, Division of Joint Assets Due to Divorce Based on Justice Values, Journal of Legal Reform Vol. 1 Number 1 of 2014 h. 74

<sup>4</sup>Zainal Abidin Abubakar, 1993. Collection of Legislation in the Religious Court Environment, Al Hikmah, Jakarta, p. 333-334

resolve all problems and disputes regulated in the Compilation of Islamic Law, through services law and justice in the litigation process.<sup>5</sup>

Divorce, as one of the absolute competencies of the Religious Courts, accounts for the largest number of cases every year of all types of cases submitted to the Religious Courts. At the Kajen Religious Court, from 2011 to 2019 the cases submitted each year tended to increase, in 2020 and 2021 cases tended to decrease which could be the impact of the Covid 19 pandemic where almost the majority of Religious Courts throughout Indonesia have limited the acceptance of case registrations.

Divorce Case Data from 2017 to 2021<sup>6</sup>

Case	Year					
	Types of Divorce	2017	2018	2019	2020	2021
Divorce Divorce		411	466	430	389	393
Divorce		1364	1390	1856	1632	1532
Amount		1775	1856	2110	2021	1925

The interesting thing about the divorce statistics at the Kajen Religious Court is that the divorce rate for Civil Servants (PNS) in the last 5 years is quite small. This can be seen in the following table:

Civil Servant Divorce Data for 2017 to 2021

Year	Types of Divorce		Amount
	Divorce	Divorce	

<sup>5</sup>Mukti Arto, 2007, Practice of Civil Cases in Religious Courts, Student Library, Yogyakarta, p. 2

<sup>6</sup>Interview with Junior Legal Registrar of the Kajen Religious Court, 4 July 2022.

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<b>2017</b>	16	41	57
<b>2018</b>	32	38	70
<b>2019</b>	14	28	42
<b>2020</b>	16	31	47
<b>2021</b>	7	35	42

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It is interesting here, of course, if you look at the amount of salary or allowances received by civil servants, if other members of the public file for divorce because of disputes and quarrels due to economic factors, this should not apply to these "state servants" even though it is not the full measure because after all Civil servants as ordinary humans certainly have the same psychological and biological instincts as other humans, only their status differentiates them from other citizens. Therefore, it is very humane for civil servants to marry or divorce.<sup>7</sup>

The ambiguity of the meaning of a statutory regulation provides opportunities for the creation of legal interpretations which also have an impact on the resulting decisions. Legal interpretation (interpretation) is a method of legal discovery that provides explanations of unclear legal texts so that the scope of the rules can be applied to certain events or cases.<sup>8</sup>

Based on the background explanation above, the author formulates the problem as follows:

1. What are the legal considerations of Religious Court judges in deciding salary distribution claims for civil servant divorce cases?
2. What is the legal construction of Religious Court judges in deciding salary distribution claims for civil servant divorce cases?

## **2. Research Methods**

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<sup>7</sup>Akrimni Nur Zakiyah, Legal Review of Divorce Conditions and Legal Consequences of Divorce Decisions for Civil Servants. Sultan Agung Islamic University Semarang Law Journal Vol 38 No. August 2, 2021, 3

<sup>8</sup>Mukti Arto, 2001, Seeking Justice: Criticism and Solutions to Civil Justice Practices in Indonesia, Student Library, Yogyakarta. p.34

This research is normative juridical research with a statutory and conceptual approach. A normative juridical approach is applied because this research is related to government regulations which discuss the distribution of salaries due to divorce and the binding force of a regulation in the practice of proceedings in the Religious Courts. The specifications of this research are descriptive analysis and the data sources the author uses come from primary data and secondary data.<sup>9</sup>This writing uses an analytical knife based on the theory of legal certainty and the theory of legal discovery.

### **3. Result and Discussion**

#### **3.1. Consideration Judge's Law in Deciding Salary Distribution Claims for Divorce of Civil Servants**

This research examines demands for salary distribution for former wives of Civil Servants due to divorce. Juridically, the distribution of salaries for former civil servant wives is regulated in Article 8 of Government Regulation Number 8 of 1983 which was later updated in Government Regulation Number 45 of 1990 concerning marriage permits and divorce for Civil Servants.

It is an interesting thing to study when there is a case that already has statutory provisions but is decided differently by the judge handling the case. To be precise, at the Kajen Religious Court, in a case registered at the Registrar's Office of the Religious Court on May 19 2011 with case number 0565/Pdt.G/2011/PA.Kjn.

That the peak of the dispute and quarrel between the Petitioner/Reclaimant Defendant left the Respondent/Reclaimant Plaintiff and up to that time the Counterclaimant Petitioner/Defendant and the Counterclaimant Respondent/Plaintiff had been separated for one year and during that time the two of them had no contact or communication with each other. So, because of this, the Petitioner/Defendant in reconstitution asked the panel of judges to terminate their marriage due to divorce.

Regarding the divorce proposed by the Petitioner, the panel of judges considered that based on Article 39 paragraph (1) and paragraph (2) of Law Number 1 of 1974 concerning Marriage, divorce can only be carried out in front of a court hearing, after the court concerned has tried and failed to reconcile the two parties and to carry out a divorce there must be sufficient reasons that the husband and wife will not be able to live in harmony as husband and wife.

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<sup>9</sup>Amiruddin, 2006, *Legal Research Methods*, PT. Raja Grafindo Persada, Jakarta, p. 30

Another consideration is that what can be used as a basis or reason for filing for divorce is regulated in Article 19 of Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage and Article 116 of the Compilation of Islamic Law. From the provisions of the laws and regulations above, there are several elements that must be fulfilled for a divorce to occur, namely:

- The courts have tried to reconcile husband and wife and have been unsuccessful;
- There is a reason that husband and wife will not be able to live in harmony as husband and wife;
- Husband and wife have separated residences and/or separated beds, each of whom has neglected their obligations as husband and wife;

Regarding these elements, the panel of judges considered them one by one, taking into account the legal facts that occurred in the household of the Plaintiff and Defendant, to reach a conclusion as to whether the household conditions of the Plaintiff and Defendant met the elements of a divorce;

In the case of elements the Court has tried to reconcile husband and wife and was unsuccessful. During the trial, the Panel of Judges tried to advise the Petitioner to reconcile with the Respondent, but the efforts made by the Panel of Judges were unsuccessful. Thus the first element has been fulfilled.

In the marriage of the Petitioner and Respondent there is no hope of living in harmony anymore, so the purpose of marriage as intended in Article 1 of Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019 in conjunction with Article 3 of the Compilation of Islamic Law is to create a home with happy, *sakinah mawaddah warahmah* will not be achieved. Thus the second element has been fulfilled.

The third is the element between husband and wife who have separated residences and/or separated beds, each of whom has neglected their obligations as husband and wife. The Plaintiff and Defendant had separated residences where the Respondent had left their shared residence and during that period of time they never returned, never got along again. Thus, the Court considers that the third element has been fulfilled;

The Supreme Court's decision stated that regarding the distribution of salaries as stated in Article 8 paragraph 4 of Government Regulation Number 10 of 1983 and Government Regulation Number 45 of 1990 are Civil Servant Disciplinary

Regulations and not applied law in the Religious Court Procedure Law. And the termination of giving half of the defendant's salary to the plaintiff is the decision of the State Administrative Official so that the claim for salary distribution should be submitted to the State Administrative Court (PTUN).<sup>10</sup>

In the case of divorce cases where the parties are Muslim, it is the authority of the Religious Court, namely in accordance with Article 49 of Law Number 3 of 2006 that the Religious Court has the duty and authority to examine, decide and settle cases at the first level between people who are Muslim in the fields of: marriage, inheritance, wills, grants, endowments, zakat, infaq, sadaqah and sharia economics.

However, in the case of distributing civil servant salaries, the authorized party in this case is the treasurer of the respective work unit, where the official is a state administrative official, so that when there is a dispute related to salary distribution, it becomes the authority or competence of the State Administrative Court (PTUN).

Nursidik said that the decision of the panel of judges to reject the plaintiff's claim for reconstitution was correct, because Government Regulation Number 10 of 1983 and Government Regulation Number 45 of 1990 concerning marriage and divorce permits for civil servants are not applied law in religious court procedural law, so what is stated in These regulations are not binding on the judge's decisions or decisions.<sup>11</sup>

Meanwhile, according to Awwaliatun Nikmah, counterclaims are regulated in Article 132a paragraph 1 (HIR), which is defined as a counterclaim filed by the defendant/respondent against the plaintiff/applicant in an ongoing case process.<sup>12</sup>With the legal consideration that the distribution of salaries due to divorce is not the authority (absolute jurisdiction) of the Religious Court but rather the authority of the State Administrative Court because those who handle salary matters are state administrative officials, so that disputes arising therein fall under the authority of that court.

### **3.2. Construction Judge's Law in Deciding Salary Distribution Claims for Divorce of Civil Servants**

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<sup>10</sup>Interview with Drs. Nursidik, SH, MH, judge of the Slawi Religious Court via telephone on July 22 2022.

<sup>11</sup>Author's interview with Drs. Nursidik, MH chairman of the panel for case number 565/Pdt.G/2011/PA.Kjn on June 24 2022.

<sup>12</sup>Author Interview with Hj. Awwaliatun Nikmah, S.Ag, MH in the judge's room at the Kajen Religious Court. The resource person took references from Karaya's book, M. Yahya Harahap. Resistance against Grosse deeds as well as court and arbitration decisions and Execution Law (Bandung: Citra Adhi Karya Bakti), 1993. p. 198

In carrying out their duties, judges have a dual function, namely on the one hand the function of applying the law, on the other hand the function of creating and/or discovering the law to then be applied in the cases they handle.<sup>13</sup>This can mean that when a judge faces a legal case, he can decide based on existing laws and regulations. However, when he does not find any legislation related to the legal case he is facing and/or the legislation is not in accordance with the legal values that live and develop in society, then he functions to create and/or discover laws and then use them to resolve ongoing legal cases.<sup>14</sup>

According to Mukhtar Zamzami, judges are not just mouthpieces for the law (*bouche de la loi*). Judges implement the law when the law is in harmony with justice, but when there are points in the law that if implemented would create injustice, then the judge must find a new law.<sup>15</sup>

Article 16 paragraph 1 of Law Number 4 of 2004 concerning PowerJusticerequires judges to examine and make decisions on cases submitted to them and is not allowed to refuse on the grounds that the arrangements are incomplete or unclear. In the same law, Article 28 also states that judges as enforcers of law and justice are obliged to explore, follow and understand the legal values that exist in society.

The steps taken in Legal Construction include:

- 1) The judge reviews the material system underlying the legal institution he is dealing with as the subject of the case;
- 2) Based on this system, the judge then tries to form a new legal understanding (*rechtsbegrip*) by comparing several provisions in the relevant legal institution, which are considered to have certain similarities;
- 3) After the legal understanding is formed, the legal understanding is used as a basis for constructing a conclusion in resolving the case.<sup>16</sup>

In addition to the steps above, in an effort to construct legal discoveries and solutions, judges mustknowthree main conditions, namely:

- 1) Construction must cover all relevant areas of positive law.

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<sup>13</sup>Achmad Fauzan, 2005, Complete legislation on General Courts, Special Courts and Constitutional Courts, Prenada Media, Jakarta, p. 11

<sup>14</sup>Mochtar Kusumaatmadja, 2000, Introduction to Legal Studies, Alumni, Bandung

<sup>15</sup>Hadi Daeng Mapuna, 2012, Profiles and Thoughts of Religious Justice Figures in Indonesia, Director General of Badilag MARI, Jakarta, p. 56

<sup>16</sup>Herman, Interpretation and construction of Law. *ibid*



2) In making construction there should be no logical contradictions.

3) Construction must be able to provide a clear picture of something, because the purpose of construction is so that the judge's decision can fulfill the demands of justice and be useful for justice seekers.<sup>17</sup>

A statutory regulation that is prepared is basically general in nature, it regulates actions aimed at society in general. This happens because it is impossible for the law to regulate all the activities of citizens' lives as a whole clearly and completely. On the other hand, there are many kinds of community interests and they are always changing and developing according to the development of society. Meanwhile, law is static and does not develop, in fact it is often said that law often lags behind events (*het recht hinkt achter de faitan aan*).<sup>18</sup>

In the case that the author studied, the primary claim of the Kompensation Petitioner (Rekompensation Defendant) was a request to impose divorce on the respondent (Rekompensation Plaintiff) on the grounds of continuous quarrels and disputes because the Respondent did not like the Petitioner's inherited child from a previous marriage. From the results of the trial facts, it was proven that there were frequent quarrels and disputes between the Petitioner and the panel of judges handling the case granted the Petitioner's request and decided to give the Petitioner permission to give divorce to the Respondent. Juridically, this is in accordance with Article 19 letter (f) Government Regulation Number 9 of 1975 jo. Article 116 letter (f) Compilation of Islamic Law.

During the trial process, the compensation respondent filed a claim for compensation which essentially demanded the distribution of half of the compensation applicant's salary in his position as a civil servant. This has also become a concrete event or problem that is known and proven to exist, so the panel of judges needs to determine the law or statute that discusses this claim.

Discussion regarding the distribution of salaries of former civil servant wives as a result of divorce is regulated in Article 8 of Government Regulation Number 10 of 1983 which has been updated to become Government Regulation Number 45 of 1990 concerning Marriage and Divorce Permits for Civil Servants which contains:

1) If a divorce occurs at the will of a male civil servant, he is obliged to hand over part of his salary to support his ex-wife and children.

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<sup>17</sup>Suhadak, Judges' Freedom to Apply Legal Discovery Methods in Deciding Religious Civil Cases. Ibid p.19 Website :[www.mahkamahagung.go.id](http://www.mahkamahagung.go.id)

<sup>18</sup>Suhadak, Judges' Freedom to Apply Legal Discovery Methods in Deciding Religious Civil Cases. Ibid. h. 9

- 2) The salary distribution as intended in paragraph (1) is one third for the male Civil Servant concerned, one third for his ex-wife, and one third for his child or children.
- 3) If there are no children from the marriage, the portion of the salary that a male Civil Servant must hand over to his ex-wife is half of her salary.
- 4) If the divorce occurs according to the wife's wishes, then she is not entitled to a share of her ex-husband's income.
- 5) The provisions as intended in paragraph (4) do not apply if the wife asks for a divorce because she is married.
- 6) If the former wife of the Civil Servant in question remarries, then her right to a portion of her ex-husband's salary will be extinguished from the date of her remarriage.

Normatively, in accordance with the statutory regulations above, the compensation respondent/claimant is entitled to the provisions as stated in number 3, namely that the ex-wife receives half the salary from the male civil servant as her ex-husband due to divorce and there are no children in the marriage. However, the panel of judges at the Kajen Religious Court which handled the case decided differently, namely by rejecting the compensation respondent's claim on the basis that the statutory regulations were disciplinary regulations for civil servants and not procedural law in the Religious Courts. So that the provisions regarding the distribution of salaries fall under the authority of the superior of the compensation defendant/compensation applicant.

Indonesia is a legal country (*rechstaat*) that applies the Roman legal system (Roman Law) or the Continental European System, which is a school that follows or applies a positivistic paradigm. Therefore, the use of the law as material law in deciding cases is absolutely necessary.<sup>19</sup>

However, in the religious justice environment there are many competencies that are carried out, but many material laws (positive law) are not yet available or there are statutory regulations but they are incomplete or unclear. So judges still need to judge by exploring legal values that exist and apply in society by applying methods of legal discovery either by creating (*rechtscepting*) new laws or taking legal precedents that live in society (*living law*), especially with religious judges who serve in religious courts) of course also need to pay attention to Islamic law, including the husband's obligations to his ex-wife who has been divorced.

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<sup>19</sup>Khuzaifah Dimiyati, 2004, *Legal Theorization: Study of Legal Thought in Indonesia*, UMM Press. Surakarta. h. 86

#### 4. Conclusion

Article 8 of Government Regulation Number 10 of 1983 which was later updated in Government Regulation Number 45 of 1990 is a disciplinary regulation for Civil Servants which specifically regulates divorce and marriage permits for civil servants. Divorce as part of marriage matters is truly the absolute competence of the Religious Courts, but the detailed details of the Articles contained in this government regulation, such as the issue of salary distribution that arises as a result of divorce, are not applied law or legal instruments in the practice of proceedings in the Courts. Religion. In deciding cases, judges use two methods of applying the law at once, namely futurist interpretation and also the argumentum a contrario method. The futurist interpretation method was chosen considering that government regulation number 10 of 1983 concerning granting marriage and divorce permits for Civil Servants has the potential to become a statutory regulation that will soon be replaced.

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