

CHAPTER II

LITERATURE REVIEW

A. General Review on Marriage

1. Definition and Regulation of Marriage

The meaning of Marriage based on Islamic Law can be seen in the Al-Qur'an surah Ar-Ruum verse 21 which stated: And of His signs is that He created for you from yourselves mates that you may find tranquility in them; and He placed between you affection and mercy. Indeed in that are signs for a people who give thought.

The regulation on Marriage is regulated in Law No. 1 of 1974 on Marriage and Government Regulation No. 9 of 1975 on the Implementation of Law No. 1 of 1974 on Marriage.

Based on Article 1 of Law No. 1 of 1974 marriage is a union between a man and a woman as a husband and a wife with the intention to build a family (household) which is happy and everlasting based on God.

The elucidation of Law No. 1 of 1974 stated that Indonesia is a country based on Pancasila, which the first principle is belief in the one and only God, then marriage and religion have a very close relationship, because marriage is involving not only physical elements but also has a spiritual elements which hold an important role. Therefore if we see Paragraph (1) of

Article 2 of Law No. 1 of 1974: The marriage is valid, if it is held according to the law of each religion and belief.

Based on Civil Code, marriage is the union of a man with a woman to live together legally. Living together is intended to last and forever.¹ Civil Code look a marriage only in civil relation. Marriage is only seen from civil aspects and ignores the religious aspect. This contradicts with the first principle of Pancasila, which stated "belief in the one and only God".

So, marriage is an agreement held by two persons, an agreement between a man and a woman with the material purposes, that is to build a family (household) which are happy and everlasting and must be based on God Almighty as the first principle of Pancasila.²

2. The Purpose of Marriage

The purpose of marriage based on Law No. 1 of 1974 is to build a family or household which are happy and everlasting. The purpose of marriage in Islam is to meet a demand of nature of humanity, a relationship between men and women in order to create a family with a basis of love and compassion, to obtain a legitimate descent in society by following the provisions regulated by the syari'ah.³

¹ Ali Afandi, 2004, *Hukum Keluarga, Menurut Kitab Undang-undang Hukum Perdata*, Jakarta, Bina Aksara, page 95.

² K. Wantjik Saleh, 1982, *Hukum Perkawinan Indonesia*, Jakarta, Ghalia Indonesia, page 18.

³ Soemiyati, 1986, *Hukum Perkawinan Islam Dan Undang-Undang Perkawinan*, Yogyakarta, Liberti Yogyakarta, page 8.

The purpose of marriage is not only seen from the physical aspect, but also the spiritual bonds between a husband and wife with the intention to manage a family or household which are happy and everlasting for both of them and in accordance with the will of the God Almighty. The meaning of family is a unity that consists of father, mother and child which is the basic principle of Indonesian society arrangement. Building a happy family is closely related with the descent, so the forming a descent is the purpose of marriage. Descent is an important issue in the marriage. Besides of that, the marriage must last forever. This means that once held a marriage must be continuously in the lifetime.

3. The Principles of Marriage

The principles about marriage are regulated on general elucidation of Law No. 1 of 1974, which consists of:

- a. The purpose of marriage is to build a family or household which are happy and everlasting, because of that husband and wife have to help and complete each other, so that they can develop their personality to help and reach spiritual and material welfare.

- b. Law No. 1 of 1974 stated that marriage is valid, if it is done according to the law of each religion and belief, every marriage shall be recorded in accordance with the legislation in force.

c. Law No. 1 of 1974 contains monogamy principle. Monogamy principle is the principle where a man in the same time only be permitted to have one woman as his wife and a women only be permitted to have one man as her husband. This matter is regulated in Article 3 Paragraph (1) Law No. 1 of 1974.

However, the principle of monogamy is not absolute, it still can remain unfulfilled, so that a man can have wife more than one if it is allowed by law and religion of the question, as well as it met certain requirements and decided by the Court.

Based on Article 4 Paragraph (2) Law No. 1 of 1974 the reasons that may be filed by a husband who will perform polygamy is:

- a. The wife cannot perform the responsibility as a wife;
- b. The wife got a disability or illness that cannot be cured;
- c. The wife cannot give birth to a descent.

A wife who has fulfilled one of the alternative reasons above, can be used as the reason by the husband to do polygamy. Beside of alternative reasons, there are also the cumulative reasons as regulated in Article 5 (1) Law No. 1 of 1974, namely:

- a. The presence of agreement from wife or wives;

- b. The presence of certainty that the husband is able to guarantee the necessities of life of wives and their children;
- c. The presence of guarantee that the husband would be fair to wives and their children.

Thus many and stringent requirements of doing polygamy can be seen in Islamic Law and in the Marriage Law itself. However, most of the people take Islamic Law in terms of taking a second wife too lightly, which means that marriage is so easily done as long as they have dowry and witnesses. It was enough for them without looking at the legal consequences, as well as the requirements for it, especially rights of inheritance and other legal consequences.⁴

- d. This law contains the principle that the candidate of husband and wife must have been ready physically and mentally in order to be able to reach the goal of marriage without ending in divorce and to get a good and healthy descents.
- e. This law complicates a divorce. To held a divorce, there must be specific reasons and must be done in the court trial.
- f. The right and the position of wife is equal with the right and the position of husband both in the household as well as in the society. Thus everything in the family can be negotiated and decided together by husband and wife.

4. The Requirements of Marriage

⁴ Soimin Soedharyo, 2002, *Hukum Orang dan Keluarga*, Jakarta, Sinar Grafika, page 11.

To held a marriage based on Law No. 1 of 1974, certain requirements shall be fulfilled. The requirements that must be fulfilled are:

- a. Approval by both brides and the groom.

Article 6 Paragraph (1) Law No. 1 of 1974 stated “marriage must be based on approval by both bride and groom.” This marriage requirement is to prevent a forced marriage in the society. So, the marriage should give more opportunity for each bride and groom to determine their own choice of who will be the companion of his/her life in marriage.

- b. Permission of parents for the bride who is not 21 years old yet.

The provisions require the permission of parents / guardians to hold a marriage for those who are not reach 21 year old yet. This is indeed appropriate to the manners of our society. Our society has a strong sense of kinship, especially the relationship between a child and both parents so the marriage is also a family affair. Therefore, before holding a marriage, it both parents/guardians should give permission.

- c. The age of a man is 19 years old and a woman is 16 years old.

This provision is to prevent a marriage of children that are still under age. The provisions of the bride age restriction is intended to ensure that those who get married is matured mentally and physically, so husband and wife can manage a family as well as possible without ending up with a divorce and got a good and healthy descent. Deviation of this provision is only possible by asking for a dispensation to the Court.

d. A man and a woman who have blood relation/family are not allowed to marry.

Blood relation/family are not allowed to marry based on Article 8 Law No. 1 of 1974 are:

- 1) Blood relation in a straight line downwards and upwards;
- 2) Blood relation in line sideways namely between brothers, between a brother parents and between a brother of her grandmother;
- 3) Blood relation by marriage, namely parent-in-law, stepson, step daughter and stepfather;
- 4) In connection of the suckle, parents suckler, child suckler, brother suckler and aunt/uncle suckler;
- 5) Blood relation with the wife or an aunt of the wife, in the case of a husband who has more than one wives;
- 6) Blood relation by religion or regulations, it is also forbidden to marry.

e. Not within the marriage bond with others.

Article 9 Law No. 1 of 1974 states that a person who is still bonded with marriage with the other person cannot marry again, except in the case mentioned in Article 3 and Article 4. This law contains the principle of monogamy, only if the law and religion permits it for a man to marry more than one wife. Although it is desired by the person concerned, marriage can only be done if certain requirements are fulfilled and are decided by the Court.

- f. Not divorced for the second time with husband / wife that will be married.

Therefore, marriage has the intention that the husband and wife can manage an everlasting relationship. Then, an action that results in the termination of marriage should really be considered and thought out. This provision is intended to prevent divorce repeatedly, so that the husband and wife will really respect each other.

In Islam, the husband and wife who have been divorced twice, is still allowed to marry for third time, but when they divorced for the third time, they should not be married again. Unless the ex-wife who has been divorced three times is married to another man and then divorced, then, she may be remarried with ex-husband who had divorced three times.

- g. Not within the waiting time (*'iddah*) for a widow.

Based on Article 39 of Government Regulation No. 9 of 1975, the period of waiting time is regulated as follows:

- 1) If the marriage ended because of death, the waiting time is 130 days (one hundred and thirty days);
- 2) If the marriage ended because of divorce, the waiting time for those who are still menstruating is 3 (three) times the period cycle with at least 90 days (ninety days) and those who do not menstruating is 90 days (ninety days);

- 3) If the marriage ended when the widow is pregnant, the waiting time is until she gives birth;
- 4) There is no waiting time for the widow who ended the marriage because of divorce if the widows and her ex-husband has never had sexual intercourse.

The provisions on waiting time which is based on Government Regulation No. 9 of 1975 is basically the same with the provisions of *'iddah* in the Islamic Marriage Law.

According to Ahmad Azhar Basyir⁵ the purposes of waiting time (*'iddah*) are:

- 1) To show how important the issue of marriage because it is a legitimate way to fulfill the instinctive desire so do not easily to be decided, also should be considered carefully when it has to divorce.
- 2) The marriage in human life should be everlasting, so that the existence of waiting time is to provide an opportunity for husband and wife to be back again without a new marriage contract.
- 3) If the marriage ended because of death, the waiting time is held to show a sense of mourning for the death of her husband.
- 4) If the divorce occurs, between husband and wife who has been having sexual intercourse, the waiting time is held to convince the void uterus to keep them from mixing of blood for a child.⁶

5. Validity of Marriage

⁵ Ahmad Azhar Basyir, 1995, *Hukum Perkawinan Islam, Yogyakarta*, Perpustakaan Fakultas Hukum UII, page 86-87.

⁶ *Ibid.*

Regarding the validity of marriage, Law No. 1 of 1974 has been regulated in Article 2 which states:

- 1) The marriage is valid, if it is held based on the law of each religion and belief.
- 2) Every marriage shall be recorded in accordance with the legislation in force.

From Article 2 Paragraph (1) Law No. 1 of 1974, it can be known that the marriage shall be done based on the law of each religion and belief, if it is not, the marriage is invalid. Because of that, based on the provision of Article 2 Paragraph (1), for Muslim people if they will hold a marriage, it must be in accordance with the provision of Islamic marriage law so that the marriage is valid, also for the Christian, Hindu and Buddha.

Article 2 Paragraph (2) Law No. 1 of 1974 determines that every marriage shall be recorded in accordance with the legislation in force. Furthermore, the general elucidation of Law No. 1 of 1974 states that records of every marriage is as important as the recording of important events in the life, such as birth and death, an official deed that is also loaded in the recording list.⁷

According to judicial practice, the legitimacy of a marriage depends on the law of each religion and belief, and registration of marriages is an administrative step that can be seen in the decision of East Jakarta District Court No. 253/11978/G, the divorce case between Ny. Titi Tjahaja

⁷ *Ibid.*

Kumandang and Sujoso Karsono⁸. In the decision, the judge argued that the marriage between the plaintiff and the defendant held in Hong Kong are not recorded, and according to Marriage Law in force in Hong Kong, it is considered invalid, but because the marriage was valid according to Islam Law, the marriage should be declared as a valid marriage.

A marriage is if it is held based on the law of each religion and belief. This regulation can be seen in the decision of Supreme Court No. 2099K/Pid/1990, 24 February 1994, which consider: “Based on the provision of Article 2 Paragraph (2) Law No. 1 of 1974 determines that the marriage held based on the law of each religion, this means that there must be a ceremony of marriage based on religion before it is recorded in Civil Registry Office for non-Muslim and Religious Affairs Office for Muslim.

6. The Rights and Obligations of Husband and Wife

The existence of a valid marriage creates legal consequences for the relationship between husband and wife, the relationship between parents and children and the problem of property.

Based on Article 30 of Law No. 1 of 1974 the husband and wife carried out the obligation to uphold the households, and that becomes the

⁸ Riduan Syahrani, 1992, *Seluk-beluk dan Asas-asas Hukum Perdata*, Bandung, Alumni, page 92.

basic principle of the society. Husband and wife have equal rights and status both in the household and in social life in society.

To manage the household, they must be in love, have mutual respect, are loyal and give help physically and mentally. The husband is obliged to protect his wife and children to provide every necessity of household according to his ability. The wife as a housewife shall regulate the household as well as possible. If the husband or wife neglect the obligation, each can file a lawsuit to the Religious Court for Muslim and District Court for non-Muslim.

7. The Termination of Marriage

The cause of termination of marriage is regulated in Article 38 Law No. 1 of 1974 as follows:

a. Death

The termination of marriage because of death is the termination of marriage because of the death of one of the parties (husband or wife). Since one of the parties passed away it causes the termination of marriage. It doesn't happen because of the will of one or both parties but it is the will of God.

b. Divorce

Divorce can only be done in the court trial after the relevant court tried and unsuccessful reconcile the parties. The court competent to examine and decide on divorce for Muslim people is Religious Court while for

other religion except Islam is District Court. To apply a divorce to the court there must be a sufficient reasons in accordance with the reasons specified in Law No. 1 of 1974.

The reasons that can be used as a basis for divorce is mentioned in the elucidation of Article 39 paragraph (2) Law No. 1 of 1974 which is the same content with Article 19 Government Regulation No. 9 of 1975, as follows:

- 1) One of the parties commits adultery or become drunks, compactor, gamblers and other refractory;
- 2) One of the parties leaves the other party for 2 (two) consecutive years without the permission of the other party and without valid reason or because of other things beyond their ability;
- 3) One of the parties is in prison for 5 (five) years or a more severe punishment after the marriage;
- 4) One of the parties commits cruelty or persecution that harm the other party;
- 5) One of the parties gets disability or illness that causes him/her are unable to perform his responsibility as a husband/wife;
- 6) Between husband and wife, there is continuous disputes and quarrels, and there is no hope to live in harmony again in the household.

By looking at the provisions of the reasons for the divorce as mentioned above, in addition to the provision that divorce should be made at the court trial, it can be concluded that in fact although divorce

is not prohibited, we should not file for divorce without good reason. So basically, Law No. 1 of 1974 complicate the divorce. This is in accordance with the purpose of marriage that the marriage is basically last and everlasting.

c. Court Decision

The termination of marriage because of court decision if there is cancellation of marriage because of the marriage does not fulfill the requirements of marriage as regulated in the Law No. 1 of 1974.

B. General Review on Divorce

1. Definition and Regulation on Divorce

Based on Article 38 of Law No. 1 of 1974 divorce is "one of the termination of marriage". As for the meaning of marriage based on Article 1 of Law No. 1 of 1974 is "a union between man and woman as husband and wife with the intention to build a family (household) which are happy and everlasting based on God". Thus, divorce is the termination of a union

between man and woman as husband and wife which resulted in termination of family relations (household) between husband and wife.⁹

Definition of divorce can be explained from several law perspectives as follows:

- a. Divorce under Islamic Law in Article 38 and 39 of Law No. 1 of 1974 that have been outlined in Government Regulation No. 9 of 1975, including among others:
 - 1) Divorce by *talak* is the divorce proposed by the initiative of the husband to the Religious Court, which considered the case happen with all the legal consequences since the divorce was declared in the Religious Court (vide Article 14 to 18 of Government Regulation No. 9 of 1975).
 - 2) Divorce by petition is the divorce proposed by the initiative of the wife to the Religious Court, which is considered to occur with all the legal consequences since the decision of the Religious Court that has a legal power (vide Article 20 to 36 of Government Regulation No. 9 of 1975).
- b. Divorce based on religious law other than Islamic Law in Law No. 1 of 1974 and set out in Government Regulation No. 9 of 1975, is the divorce filed by the initiative of the husband or wife to the District Court, which is considered to occur with all legal consequences from the time it is registered in the list of records by Registrar Employees in the Civil Registry Office (vide Article 20 and Article 34 Paragraph (2) of Government Regulation No. 9 of 1975).

⁹ Muhammad Syaifuddin, Sri Turatmiyah, Annalisa Yahanan, 2003, *Hukum Perceraian*, Jakarta, Sinar Grafika, page 19.

2. The Effects of Divorce

The effects associated with divorce affects the couple's children in both the short and the long term. After divorce the couple often experience effects including, decreased levels of happiness,¹⁰ change in economic status, and emotional problems. The effects on children include academic, behavioral, and psychological problems. Studies suggest that children from divorced families are more likely to exhibit such behavioral issues than those from non-divorced families.¹¹

In a study of the effect of relocation after a divorce, researchers found that parents relocating away from each other (with either both or moving or one moving) has a long term effect on children.¹² Researchers found major differences in divorced families in which one parent moved away from the child; the children (as college students) received less financial support from their parents compared with divorced families in which neither parent moved. The children also felt more distress related to the divorce and did not feel a sense of an emotional support from their parents. Relocating is defined as when a parent moves more than an hour away from their children. Children of divorces where both parents stayed close together did not have these negative effects.¹³

¹⁰ Lucas, R, "Adaptation and the set-point model of subjective well-being: Does happiness change after major life events?", *Current Directions in Psychological Science*, 16, 75-79, 2007.

¹¹ Miller, "School of Family", *Consumer and Nutrition Sciences*, 2003.

¹² Braver, S. L., Ellman, I. M. & Fabricius, W. V, "Relocation of children after divorce and children's best interest: New evidence and legal considerations", *Journal of Family Psychology*, 17, 206-219, 2003.

¹³ *Ibid.*

Linda Waite analyzed the relation between marriage, divorce and happiness using the National Survey of Family and Households and found that unhappily married families who had divorced were no happier than those who had stayed together.¹⁴ One broad-based study also shows that people have an easier time recovering after the death of a parent as opposed to a divorce. This study reported that children who lose a parent are usually able to attain the same level of happiness that they had before the death, whereas children of divorced parents often are not able to attain the same level of happiness that they had before the divorce.¹⁵

A child affected by divorce at an early age will show effects later in life. They may make premature transitions to adulthood such as leave home or parent their own child early.¹⁶ Recent authors have argued that a major cost to children comes long after: when they attempt to form stable marriages themselves. Parental divorce leads a child to have lower trust in future relationships.¹⁷ Compared with children of always married parents, children of

¹⁴ Waite, L. J., Browning, D., Doherty, W. J., Gallagher, M., Luo, Y. & Stanley, S. M, "Does Divorce Make People Happy Findings from a Study of Unhappy Marriages", *Institute of American Values*, 2003.

¹⁵ Tebeka, S., Hoertel, N., Dubertret, C. & Le Strat, Y, "Parental divorce of death during childhood and adolescence and its association with mental health", *The Journal of Nervous and Mental Disease*, 204, 678-685, 2016.

¹⁶ Shanahan, M. J, "Pathway to Adulthood in Changing Societies: Variability and Mechanism in Life Course Perspective", *Annual Review of Sociology*, 26, 679, 2000.

¹⁷ Jacquet, S. E. & Surra, C. A, "Parental divorce and premarital couples: Commitment and other relationship characteristics", *Journal of Marriage and Family*, 63, 627-638, 2001.

divorced parents have more positive attitudes towards divorce¹⁸ and less favorable attitudes towards marriage.¹⁹

The children of divorced parents have also been reported more likely to have behavioral problems than children of married parents and are more likely to suffer abuse than children in intact families.²⁰

In contrast to the usual negative views on marriage by children affected by it, Constance Ahrons, in *We're Still Family: What Grown Children Have to Say About Their Parents' Divorce*,²¹ interviewed 98 divorced families' children for numerous subjects found a few of the children saying, "I saw some of the things my parents did and know not to do that in my marriage and see the way they treated each other and know not to do that to my spouse and my children. I know [the divorce] has made me more committed to my husband and my children."²² In the book *For Better or For Worse: Divorce Reconsidered*, Mavis Hetherington²³ reports that not all kids fare so badly, and that divorce can actually help children living in high-conflict homes such as those with domestic violence. A peaceful divorce has less of an impact on children than a contested divorce.²⁴

¹⁸ Amato, P. R. & Booth, A, "The consequences of divorce for attitudes toward divorce and gender roles", *Journal of Family Issues*, 12, 306-322, 1999.

¹⁹ Jennings, A. M., Salts, C. J. & Smith, T. A, Jr, "Attitudes toward marriage: Effects of parental conflict, family structure, and gender", *Journal of Divorce and Remarriage*, 17, 67-68, 1992.

²⁰ Fagan, P. F. & Rector, R. E, "The effects of Divorce in America", *The Heritage Foundation*, 2000.

²¹ Ahrons, C, "We're Still Family: What Grown Children Have to Say About Their Parents' Divorce", *Harper Collins*, 2004.

²² *Ibid.*

²³ Hetherington, E. M. & Kelly, J, "For Better or For Worse: Divorce Reconsidered", *W. Norton & Company*, 2002.

²⁴ *Loc. Cit.*

Contrary to some of the previous research, those with divorced parents were no more likely than those from intact families to regard divorce positively or to see it as an easy way of solving the problem of a failing marriage. Members of both groups felt that divorce should be avoided, but that it was also a necessary option when a relationship could not be rescued.²⁵

A 2015 article²⁶ updated and confirmed the findings in a 2002 article in *Clinical Child and Family Psychology Review*.²⁷ Both articles discuss a variety of health consequences for children of divorced parents. Studies have claimed that people who have been in divorced families have higher rates of alcoholism and other substance abuse compared to those who have never been divorced. Robert H. Coombs, Professor of Behavioral Sciences at UCLA, reviewed over 130 studies measuring how marital status affects personal well-being.²⁸ Researchers have also shown that children of divorced or separated parents:

- a. Have higher rates of clinical depression – Family disruption and low socioeconomic status in early childhood increase the long-term risk for major depression.
- b. Seek formal psychiatric care at higher rates.

²⁵ Burgoyne, Carole B.; Hames, Rebecca, “Views of Marriage and Divorce”, *Journal of Divorce and Remarriage*, 37, 1-2, 2002.

²⁶ Thuen, F., Breivik, K., Wold, B., & Ulvester, G, “Growing up with one or both parents: The effects on physical health and health-related behavior through adolescence and into early adulthood”, *Journal of Divorce & Remarriage*, 56, 451-474, 2015.

²⁷ Troxel, WM; KA Matthew, “What are the costs of marital conflict and dissolution to children’s physical health?”, *Clinical Child Fam Psychol Rev.* 7 (1), 29-57, 2004.

²⁸ Coombs, Robert H, “Marital Status and Personal Well-Being: A Literature Review”, *Family Relations*, 40 (1), 97-102, 1991.

- c. In the case of men, are more likely to commit suicide and have lower life expectancies.
- d. Acute infectious diseases, digestive illnesses, parasitic diseases, respiratory illnesses, and severe injuries.
- e. Cancer – Married cancer patients are also more likely to recover than divorced ones.
- f. Stroke.
- g. Heart problems.
- h. Rheumatoid arthritis and osteoarthritis.
- i. Increased risk of arthritis for children later in life.

3. Divorce for Civil Servant and the Regulation

Based on Article 1 of Government Regulation No. 45 of 1990 on the Permission of Marriage and Divorce for Civil Servants, the meaning of Civil Servant is "the Civil Servant as stipulated in Law No. 8 of 1974 on the Fundamentals of Civil Service conjunction with Law No. 43 of 1999 on the Amendment of Law No. 8 of 1974 on the Fundamentals of Civil Service. Both of these laws provides the same meaning of the Civil Service, namely: Civil Servants are those who have met the requirements specified in the legislation in force, appointed by the authorized Official and given with tasks in the state position or given with other tasks, determined by the legislation and salary based on legislation in force.

Civil Servants who will do the divorce, in addition to implementing the general provisions as contained in Act No. 1 of 1974 and Government

Regulation No. 9 of 1975, also have to implement specific provisions for the Civil Servant that contained in Government Regulation No. 45 of 1990 on the Permission of Marriage and Divorce for Civil Servant.²⁹

Civil Servants who will get the divorce, shall obtain prior permission from the Official. So, he/she must submit a written request (Article 3), through a hierarchy in the area where he/she works (Article 5 (2)). A letter of permission to divorce should include the full reasons underlying the permission request.³⁰

Valid reasons to divorce for Civil Servants are one or more reasons as stated below:

- a. One of the parties commits adultery, to be proven by (1) Court Decision, (2) A statement of at least two witnesses who see the adultery. The statement letter should be acknowledged witness by an Official as low as sub- district head, or (3) adultery was be acknowledged witness by one of the parties (husband and/or wife). In such cases, the party who knows that adultery should make a report describing that adultery.
- b. One of the parties becomes a drunkard, compactor, or a gambler, proven by (1) A statement of two witnesses who knows the act, which is acknowledged by the Official as low as sub-district head, or (2) A letter from a doctor or the police, explaining that based on the results of the examination, the party has become a drunkard, gambler compactor refractory.

²⁹ Riduan Syahrani, *Op.Cit.* Page 65.

³⁰ *Ibid.*

- c. One of the parties leaves the other party for two consecutive years without the permission of the other party and without valid reasons, or because of other things beyond his ability, proven by a statement from the sub-district head and approved by the Official.
- d. One of the parties is in prison for five (5) years or a more severe punishment after marriage, proven by the Court Decision which has binding legal force.
- e. One of the parties commits cruelty or persecution that harm to the other party, proven by *visum et repertum* from a doctor.
- f. Between husband and wife there is continuous disputes and quarrels, and there is no hope to live in harmony again in the household, proven by a statement from the sub-district head and approved by the Official.

Based on Article 7 Paragraph (2) Government Regulation No. 45 of 1990, "the wife gets disability or illness causes her unable to perform his responsibility as a wife is not given by Officials". This reason can only be used as an alternative requirement for men Civil Servants to do polygamy.³¹

Any Official who received the permission letter to divorce should try to reconcile the husband and wife. If it is not successful, then it forwards the request to the Official through hierarchy accompanied by a written consideration no later than 3 (three) months after receiving the letter of request. The letter among other considerations stated the objective

³¹ *Ibid* page 67.

circumstances of the husband and wife and also contains suggestions for consideration for the Officials in making decisions.³²

The Official should make a decision no later than 3 (three) months after receiving the letter of request. The permission for divorce is not given by the Official if:

- a. It is contrary with the teaching/religious rules adopted by the relevant Civil Servants;
- b. There is no reasons as mentioned in Paragraph (1);
- c. It is contrary with the legislation in force, and/or
- d. The reason is contrary with the common sense.

Civil Servants who have received permission to divorce from the Officials, if he still wants to divorce, he/she should follow the procedure for divorce as stipulated in Law No. 1 of 1974 and Government Regulation No. 9 of 1975.

C. General Review on Teacher

1. Definition of Teacher

³² *Ibid.*

Teacher is a science or knowledge educator. In Bahasa, teachers are generally referring to a professional educator with a primary task of educating, teaching, guiding, directing, training, assessing and evaluating the student. Teachers are educators in early childhood schools, elementary school, junior high school and senior high school.

2. Permanent Teacher

Permanent teacher is a teacher who has had minimal status of a candidate for Civil Servants, and has been assigned to a particular school as their parent institutions. As teachers in private school, the teachers declared as permanent teacher if he/she already has the special authority to teach at a certain foundation that has been accredited by governmental authorities in Indonesia.

3. Honorary Teacher

Honorary teacher is a teacher who has not minimal status as a candidate for Civil Servants and paid hourly. Often they are paid voluntarily, and even below the minimum salary that has been set officially. Generally, they often seem not much different with permanent teacher, even wearing the uniform of the Civil Servants like a permanent teacher. This is actually violates the rules that has been regulated by the government. In fact, their status are underemployment. They volunteered for the sake of appointed candidate for Civil Servants through the honorary, or as a watchman for opportunities to pass the test of candidate of Civil Servants.

D. General Review on The Procedure of Divorce Through Religious Court

1. Legal Basis

The procedure for divorce through the Religious Court is regulated in Article 65 to 88 of Law No. 50 of 2009 on the Second Amendment of Law No. 7 of 1989 on the Religious Courts. Divorce in Law No. 1 of 1974 is regulated in Chapter VII, Article 38 to 41, as further regulated in Article 14 to 36 Government Regulation No. 9 of 1975 on the Implementation of Law No. 1 of 1974. Special for Civil Servants the procedure for divorce is regulated in Government Regulation No. 45 of 1990 on the Permission of Marriage and Divorce for Civil Servants. From the provisions contained above, it can be concluded that there are two kinds of divorce that is *talak* and petition.

2. Procedure of Divorce for Civil Servant Through Religious Court

a. Procedure of *Talak*

The term of *talak* is explained in the Explanation of Article 14 Government Regulation No. 9 of 1975 as an institution of divorce held based on Islam used by the husband to divorce his wife.

A husband who has held a marriage based on Islam and wants to divorce his wife, submits a lawsuit to the Religious Courts that contains a notice that he intends to divorce his wife, accompanied by the reasons and requests the Religious Court to hold the hearing for divorce.³³

Religious Courts learn the notification letter no later than 30 (thirty) days after receiving the notification letter, calling the husband and

³³ Riduan Syahrani, *Op.Cit.* Page 59.

wife in question to be asked for an explanation about anything related to the divorce.³⁴

After the Religious Court received an explanation from the husband and wife and there is a reason for divorce, and after trying to reconcile the parties, but did not succeed, the Religious Court decided to hold a hearing.³⁵

After the hearing is conducted, the Head of Religious Court makes Certificate about Occurrence Separations in quadruplicate; The first sheet is sent to the Registrar of Marriage Officer; The second and third sheet are given to the husband and wife who have been divorced; and the fourth sheet is kept by the Religious Court.³⁶

b. Procedure of Divorce by Petition

Divorce Petition is a divorce by a court decision due to a lawsuit from one of the parties (husband or wife). The divorce petition may be filed by a wife who is married based on Islam or by a husband or wife who are married based on the religion and beliefs other than Islam.

Procedures for Divorce Petition are regulated in Article 20 to 36 Government Regulation No. 9 of 1975 which can be summarized as follows:

1) Filing the Lawsuit:

Divorce petition filed by the husband or wife or their lawyer to the court where the defendant lived. If the defendant's residence is

³⁴ *Ibid* page 60.

³⁵ *Ibid.*

³⁶ *Ibid.*

unknown or has no fixed residence, the lawsuit filed to the court where the plaintiff lived.

In the case of divorce petition by reason of "one of the parties leaving the other party for 2 (two) consecutive years without the permission of the other party and without valid reason, or because of other things beyond their ability", the lawsuit filed to the court where the plaintiff lived.

2) Calling

Religious Court called to the parties or their lawyer to any trial would be held. Calling is done by the bailiff at the District Court and the clerk appointed by the Religious Court. Callings should be delivered to the individual, otherwise if the parties are not present the call is delivered through the sub-district head.

Callings should be done and delivered appropriate and accepted by the plaintiff or defendant or their lawyer no later than 3 (three) days before the hearing is done. Calling to the defendant shall be accompanied by a copy of the lawsuit.

If the defendant does not have permanent residence, the call is made by placing a lawsuit on the notice board in the Court and announce it through one or several newspapers or other media that are determined by the Court, which are conducted twice at an interval of one month between the announcements of the first and second.

The interval time between a second call with a hearing determined at least 3 (three) months.

3) Hearings

The Judge examines the divorce lawsuit no later than 30 (thirty) days after receiving the divorce lawsuit. Especially for the lawsuit which the defendants are abroad, the hearing is determine at least 6 (six) months from the divorce lawsuit registered in the court clerkships.

The parties may attend alone or accompanied by their lawyer or give to their lawyer by bringing the required document. If the call had been made, but the defendant or the lawyer are not present, the claim would be accepted without the presence of the defendant. The hearing is done in a closed trial.

4) Reconciliation

Before and during the divorce has not been decided, the judge who examined the case should attempt to reconcile the parties. Reconciliation between husband and wife is the main goal to be achieved by the judges.

In reconciling the husband and wife, the Court (judge) can ask for help to other people or other entities if it is necessary. In order to achieve reconciliation, a mediation must be done, which is an attempt to reconcile the husband and wife by a judge as a mediator appointed in the Religious Court. Mediation is done based

on Supreme Court Regulation No. 1 of 2008, within a maximum period of 40 (forty) days and can be extended for 14 (fourteen) days.

5) Decision

Although divorce proceedings are conducted in closed trial, the pronouncement of the decision must be made in open trial. This is in accordance with the principle of justice in Indonesia, where all of the Court's decision is valid and has a legal power when it is spoken in a trial open for public (Article 18 of the Fundamental Law of Judicial Power).

Since the decision of the Religious Court has a legal certainty, divorce was considered as happen with all the legal consequences. The clerk shall provide divorce certificates as a proof of divorce petition to the parties no later than 7 (seven) days after the decision of Religious Court on termination of marriage because of divorce petition delivered to the parties.