

Divorce Lawsuit against Unrecorded Marriages Post Sema Number 3 Year 2018

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Abstract

Issuance of Supreme Court Circular Letter (SEMA) No. 3 of 2018 which states that "divorce where the marriage is not registered in the civil registry against a divorce lawsuit filed in court, can be accepted and granted, as long as the marriage was solemnized according to religion/custom before the enactment of Law Number 1 of 1974, has made the marriage registration at the Civil Registry office is a condition for the validity of the marriage and/or a condition for filing for divorce in accordance with statutory provisions. The problem raised in this research is whether the Supreme Court Circular (SEMA) No. 3 of 2018 can be used as a basis for deciding divorce lawsuits that are not registered in the civil registry against divorce lawsuits filed in court, as long as the marriage was solemnized according to religion/custom before the enactment of Law Number 1 of 1974 in conjunction with Government Regulation No. 9 of 1975?. The research method used in this research is the normative juridical legal research method. The approaches used in this research are the statutory approach and the conceptual approach. The legal data used in this research are primary legal materials and secondary legal materials.

Keywords

Divorce; marriage; not registered; civil registry



I. Introduction

The definition of marriage according to the Big Indonesian Dictionary (KBBI), is: the term marriage comes from the word "marriage". Marriage is interpreted in several meanings, namely: (1) forming a family with the opposite sex; married or married; Marry; (2) having sexual relations; androgynous (for animals); (3) sexual intercourse and (4) marriage (KBBI, 2002). Meanwhile, according to the United Nations, marriage is an act, ceremony or process of forming a legal relationship between husband and wife. The legality of the husband and wife union is legalized, both based on civil, religious and other registration as regulated by law in each country (Usman, 2019). According to Subekti "Marriage is a legal relationship between a man and a woman for a long time" (Bazhir, 1996). Dr. Anwar Haryono SH, in his book Islamic Law also says: "marriage is a sacred agreement between a man and a woman to form a happy family" (Syahrani, 2006).

The definition of marriage according to Law Number 1 of 1974 concerning Marriage can be seen in Article 2 paragraph (1) which reads: "a marriage is valid if it is carried out based on the law originating from each respective religion and belief".

Article 2 paragraph (2) of Law Number 1 of 1974 concerning Marriage reads: "Every marriage is recorded according to the applicable Legislation".

Before the Marriage Law (UUP) Number 1 of 1974 became effective as a national law, marriage in Indonesia was regulated in various legal regulations that applied to various groups of citizens and various regions.

II. Review of Literature

2.1 Customary Marriage Law

Marriage according to customary law is an act that is not only worldly in nature, but also spiritual and religious in nature.(Soepomo, 1989). The purpose of marriage according to customary law in general is to maintain and continue the survival and livelihood of the traditional community. Each custom's kinship or kinship system is different, so the purpose of each marriage will be adjusted according to each custom's system, for example, in marriages in patrilineal societies that use the father's lineage, such as the Batak tribe. On the other hand, matrilineal marriages use the mother's lineage, such as the Minang tribe.

2.2 Islamic Law

It is a marriage law that applies to native Indonesian people who are Muslim and functions as a muamalah law, because it regulates legal relationships between human beings. Marriage law in Islamic literature is called fiqh munakahat, namely the provisions of fiqh law that regulate marriage, divorce, reconciliation and other family life issues. The purpose of marriage itself according to Islamic law is to fulfill the instinctive demands of human life for relations between men and women in order to realize family happiness according to the teachings of Allah and His Messenger. This goal is deduced from the Qur'an(Azhar, 1980).

2.3 Civil Code (Burgerlijk Wetboek)

This is a marriage law that applies to European, Chinese and Foreign Eastern groups or to those who are subject to BW regulations. BW itself is a copy of BW from the Netherlands because it colonized Indonesia for a long time.

2.4 Indonesian Christian Marriage Ordinance (Ordonnantie ChristenIndonesiaers or HOCI)

This is a marriage law that applies to native Indonesians (Javanese, Minahasa and Ambonese) who are Christians (Catholic or Protestant). Marriage according to HOCI is only seen in terms of civil relations. A man can only marry one woman and a woman can only marry one man (monogamy system)(Syahuri, 2013).

The term divorce according to Law Number 1 of 1974 concerning Marriage as a positive legal rule regarding divorce indicates the existence of:

- a) Legal action that can be taken by a husband or wife to end the marital relationship between them.
- b) The legal event that terminates the relationship between husband and wife, namely the death of the husband or wife concerned, which is a definite and direct provision determined by God Almighty.
- c) A legal decision declared by a court which has the legal effect of breaking up the marital relationship between husband and wife(Syafuddin, 2014).

Based on General Explanation number 4 letter b of Law no. 1 of 1974 concerning Real Marriage that:

1. Marriage registration is not a factor that determines the validity of a marriage;
2. Record keeping is an administrative obligation that is required based on statutory regulations.

The factors that determine the validity of a marriage are the conditions determined by the religion of each prospective bride and groom.

However, with the publication of the Supreme Court Circular Letter (SEMA) Number 3 of 2018 which states that "divorce where the marriage is not registered in the civil registry against a divorce lawsuit filed in court, can be accepted and granted, as long as the marriage was solemnized according to religion/custom before the enactment of Law Number 1 of 1974 jo. Government Regulation no. 9 of 1975 has made civil registration a condition for the validity of a marriage and at the same time a condition for divorce.

III. Research Methods

The type of research used is normative research. According to Peter Mahmud Marzuki, legal research is a process of discovering legal rules, legal principles and legal doctrines to answer the legal issues faced (Marzuki, 2010). Normative legal research is also known as dogmatic legal research which studies, maintains and develops positive legal buildings with logical buildings (Wiradipraja, 2015).

The approaches used in this research are the statutory approach and the conceptual approach. The statutory approach is carried out by reviewing all laws and regulations related to the legal issue being handled (Marzuki, 2010). The conceptual approach departs from legislation and doctrines that develop in legal science. By studying views and doctrines in legal science, legal concepts, and legal principles that are relevant to the legal issues faced (Marzuki, 2010).

The legal data used in this research are primary legal materials and secondary legal materials. The primary legal materials used in this research are:

1. 1945 Constitution
2. Marriage Law no. 16 of 2019 concerning Amendments to Law no. 1 of 1974 concerning Marriage
3. Government Regulation Number 9 of 1975 concerning Implementation of Law Number 1 of 1974 concerning Marriage
4. SEMA No. 3 of 2018

Meanwhile, secondary legal materials are in the form of all legal publications which are official documents. Legal publications include text evidence, legal dictionaries, and comments on court decisions (Marzuki, 2011).

IV. Result and Discussion

The legal principles of marriage according to Law no. 1 of 1974 there are 6 (six), namely:

- a. The purpose of marriage is to form a happy and eternal family.
- b. The validity of a marriage really depends on the legal provisions of each religion and belief.
- c. The principle of monogamy.
- d. Prospective husband and wife must be mature in body and soul.
- e. Makes divorce difficult.
- f. The rights and positions of husband and wife are equal.

The validity of a marriage is an important part of a marriage. Does a marriage that is not registered cause the marriage to be invalid so that when a divorce lawsuit is filed it will not be accepted or rejected? Regarding marriage in Indonesia, normatively it is covered by Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974 concerning Marriage. According to the Marriage Law, "the validity of a marriage is carried out according to the laws of each religion and belief" as confirmed in Article 2 paragraph (1) of Law Number 1 of 1974. So it can be concluded that "a marriage is valid, if it is carried out in accordance with religious laws and beliefs adhered to by the person entering into a marriage". Based on the article above, it can be seen that religion and beliefs are one of the bases underlying the validity of a marriage.

Recording important events such as marriages is intended so that people can take legal action and receive legal protection by their country. So that the interested parties have authentic evidence about the incident, and their legal position becomes firm and clear. The function and benefit of marriage registration is as authentic evidence if problems occur in the marriage, for example determining the status of children born in the marriage between the couple and if there is a divorce, the marriage certificate is used as evidence and a tool in resolving it. (Harahap, 1975) However, this does not mean that the validity of a marriage will be assessed from the aspect of civil registration alone, but rather from the aspect of the Marriage Law which states that a marriage is valid according to the religion and beliefs held by the community itself. Marriage is also declared valid because it meets the requirements contained in the Marriage Law.

Marriage is a medium for building family social groups. It is human nature to marry to breed children as heirs to their bloodline. So that through this marriage the continuity of a family's lineage will be maintained from generation to generation (Usman, 2019). Marriage is a legal event which is carried out with a marriage blessing or marriage contract and is followed by registration at the Population and Civil Registration Service, as intended in Article 2 paragraph (2) of Law Number 1 of 1974 concerning Marriage. This is as intended by Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (UUD 1945) which states that: "Indonesia is a country of laws". This article explains the meaning of law as a rule of law in the life of society, nation and state (supremacy of law). (Devi, 2019).

It is hoped that the marriage that has taken place will last happily until the end. However, often in the implementation of life between husband and wife, one or both of them do not carry out their obligations, do not trust each other and so on. At times like these, divorce is a decision that cannot be avoided and is considered to be the solution or best way to resolve problems that occur in a marital relationship.

In reality, not all domestic lives can end peacefully and last long, there will be disputes and trials that couples must face. Disputes in marriage can arise due to internal factors or external factors that can cause the breakdown of the marital relationship. Article 38 of Law Number 1 of 1974 states: a marriage can be dissolved due to death, divorce or a court decision.

In accordance with Article 19 of Government Regulation no. 9 of 1975 reads:

Divorce can occur for a reason or reasons:

- a. One of the parties commits adultery or becomes a drunkard, addict, 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 a valid reason or for other reasons beyond his or her ability;
- c. One of the parties receives a prison sentence of 5 (five) years or a heavier sentence after the marriage takes place;

- d. One party commits serious cruelty or abuse that endangers the other party;
- e. One of the parties suffers from a physical disability or illness as a result of being unable to carry out their obligations as husband/wife;
- f. Between husband and wife there are constant disputes and quarrels and there is no hope of living in harmony in the household again.

For married couples who no longer get along, if they have fulfilled one of the divorce requirements as regulated in Article 19 of Government Regulation no. 9 of 1975 has the right to file a divorce lawsuit in the District Court.

The term "divorce" according to the Big Indonesian Dictionary is: a verb (separate, breaking off relations as husband and wife, divorce), then a noun (separation, regarding divorce between husband and wife, division. The word "divorce" contains the meaning of the verb (do not mix, do not relate, do not unite and stop marrying and wife(KBBI, 2002) . The term "divorce" legally means the dissolution of a marriage, which results in the severing of the relationship as husband and wife or ceasing to be married.(Syafuddin, 2014).

According to A. Fuad Sa'id, what is meant by divorce is the dissolution of a marriage between husband and wife because there is no harmony in the household or other reasons, such as the infertility of the wife or husband and after efforts have been made for peace involving the families of both parties. According to Abdul Kadir Muhammad, breaking up a marriage is called a term(Muhammad, 2010):

- a). "Divorce is dead and divorce is void" does not show the impression that there is a dispute between husband and wife
- b). "Divorce sue (khulu') and divorce divorce" shows the impression of a dispute between husband and wife;
- c). The dissolution of a marriage is due to a court decision or divorce must be based on a court decision.

Divorce according to religious law other than Islamic law, which has been positive in Law Number 1 of 1974 concerning Marriage and described in Government Regulation Number 9 of 1975 concerning the Implementation of Law No. 1 of 1974 concerning Marriage, namely divorce where a divorce suit is filed by and on the initiative of the husband or wife to the district court, (Articles 20-34 Government Regulation Number 9 of 1975).

Based on the definition above, it can be concluded that divorce, which is the breaking of the spiritual and physical bond between husband and wife and resulting in the birth of a family relationship, can only be carried out before the court after the court has tried to reconcile the two parties concerned. Distribution of divorce applications for Muslims is carried out in the Religious Courts and non-Muslim divorce applications are carried out in the District Court. Divorce that does not go through the courts will be considered an illegal divorce or not recognized by the state and religion. This is because divorce carried out through the judiciary will actually better protect women's legal rights, creating certainty for divorce perpetrators.

After the publication of SEMA Number 3 of 2018 which states that "divorce where the marriage is not registered in the civil registry against a divorce lawsuit filed in court, can be accepted and granted, as long as the marriage was solemnized according to religion/custom before the enactment of Law Number 1 of 1974 in conjunction with . Government Regulation no. 9 of 1975. As a result of the publication of the Sema, there will be married couples who have carried out a marriage in accordance with their religion and beliefs, but in the course of building a household, they experience quarrels and/or incompatibility or have fulfilled the requirements for divorce in accordance with applicable

provisions and cannot divorce. as long as the marriage is not or has not been registered. However, the fact is that there are court decisions that grant divorce from unregistered marriages, such as the Simalungun District Court Decision Number: 62/Pdt.G/2012/PN-SIM which was decided before SEMA No. 3 of 2018 published. With the publication of SEMA No. 3 of 2018 causes the household status of married couples who no longer live in harmony to become unclear.

SEMA No. 3 of 2018 makes marriage registration the basis for granting a divorce lawsuit, as if the registration is part of the validity of the marriage and is a condition for divorce. According to the Constitutional Court in Decision Number 46/PUU-VIII/2010, the purpose of registering marriages can be seen in the General Explanation number 4 letter b of Law 1/1974 concerning the principles or principles of marriage which states, "... that a marriage is valid when carried out according to the laws of each religion and belief; and besides that, every marriage must be recorded according to the applicable laws and regulations. "Recording each marriage is the same as recording important events in a person's life, for example birth and death which are stated in certificates, a deed which is also included in the registration register." Based on the explanation of Law 1/1974 above, it is clear that (i) marriage registration is not a factor that determines the validity of a marriage; and (ii) recording is an administrative obligation required under statutory regulations. The factors that determine the validity of a marriage are the conditions determined by the religion of each prospective bride and groom. The requirement for marriage registration by the state through statutory regulations is an administrative obligation.

This is in line with the opinion of Bagir Manan (former Chief Justice of the Supreme Court, quoted from Neng Djubaidah, who believes that a valid marriage is a marriage that fulfills Article 2 paragraph 1 of the marriage law, that is, it is valid according to one's religion and beliefs. According to Bagir Manan, Article 2 paragraph 2 of the law -The marriage law regarding marriage registration does not indicate equal qualifications which mean the validity of marriage according to religion and marriage registration(Djubaidah, 2012). Based on the general explanation of Law Number 1 of 1974 concerning marriage, birth registration, death registration, marriage registration is also seen as an important event, not a legal event.

In reality, as time goes by, the development of laws as a legal basis seems slow, no longer reflects a sense of justice, is unclear or can give rise to multiple interpretations. When this happens, the Supreme Court as one of the highest judicial institutions in Indonesia must determine its position and provide answers that are in accordance with the community's sense of justice.

However, the regulations established by the Supreme Court cannot be equated with regulations established by the legislative body. Regulations that can be established by the Supreme Court only if the laws and regulations are unclear or do not regulate. The supreme court does not have the authority to cancel articles in the law. For example, the Supreme Court through SEMA Number 3 of 1963 which annulled Article 1328 Burgelijk Wetboek (BW) on the grounds that this article no longer fulfilled the sense of justice of the Indonesian people. This becomes a problem if viewed from the science of legislation.

Hierarchically, SEMA has no position in statutory regulations. The formation of SEMA itself stems from the authority of the Supreme Court (MA) to request information and provide guidance to courts in all subordinate judicial environments. SEMA is a policy to carry out the supervisory function of the Supreme Court by looking at existing developments. SEMA itself is a policy regulation for several reasons such as:

1. Judging from its form, SEMA does not have a formal form that is similar to existing statutory regulations in general. Generally, statutory regulations have forming parts such as naming, opening, body and closing(Farida, 1998). We do not find these parts in full in the Supreme Court Circular, so from a formal perspective we can assume that SEMA is not a Legislative Regulation.
2. Judging from the aspect of naming a "circular letter", Prof. Jimmly Asshidiqie in his book on Circular Laws is classified as policy rules or quasi legislation. Therefore, if we look at it from a naming perspective, ignoring the legal basis for the validity of each circular letter, it can be assumed that the Supreme Court Circular Letter is a policy regulation.(Asshiddiqie, 2010).
3. Judging from the object of norms, the Supreme Court Circular Letter is shown to judges, court heads, clerks, or officials in the judiciary so that it is in accordance with the nature of the internal policy rules. In this case, the objects of the norm are judges, heads of courts, clerks and officials within the judiciary who are defined as administrative bodies or officials. So it can be assumed that the Supreme Court Circular is a policy regulation(Nalle, 2009).

Court decision that cannot accept divorce lawsuits for marriages that do not have a civil registration certificate, after the issuance of SEMA No. 3 of 2018 in practice has ignored religious norms which in the marriage law in Article 2 paragraph 1 which states the conditions for a marriage to be valid if it is carried out based on each religion and belief. The crux of the problem is that the articles in the marriage law are less effective and firm, giving rise to ambiguity as to whether marriage registration has an effect on marriages that have been solemnized according to their respective religions or beliefs or has no effect. Because the existence of religious norms and legal norms in the same legislation has the potential to weaken and conflict with each other. This is seen as potential in Article 2 paragraphs 1 and 2 of the Marriage Law. The Constitutional Court itself in its decision stated that:

1. Marriage registration is not a factor that determines the validity of a marriage
2. Record keeping is an administrative obligation that is required based on statutory regulations. The factors that determine the validity of a marriage are the conditions determined by the religion of each prospective bride and groom.

IV. Conclusion

Based on the substance itself, if SEMA Number. 3 of 2018 used as a guideline for deciding cases in court will result in many marriages that are no longer in accordance with the purpose of marriage and do not receive legal certainty. This happens because divorce lawsuits for marriages that do not have a marriage certificate will not be accepted or niet ontvankelijke verkaar on the grounds that the marriage was carried out after the publication of Marriage Law No. 1 of 1974. This ultimately led to many marriages which could no longer be maintained, but because the marriages were not registered they could not be dissolved by divorce. So the purpose of marriage is as mandated by Article 1 of Law no. 1 of 1974 concerning Marriage cannot be achieved. Because in that household there is no longer any happiness.

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