

Jasser Auda's Review of Maqashid Syari'ah on PP No. 45 of 1990 Concerning Amendments To PP No. 10 Of 1983 Concerning Marriage And Divorce Permits For Civil Servants

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ABSTRACT

Civil Servants (PNS) play an essential role in the administration of government and public services. Their performance is influenced not only by work professionalism but also by family life conditions. To maintain the stability and integrity of civil servant families, the government has issued regulations governing marriage and divorce, one of which is Article 5 Paragraph (2) of Government Regulation No. 45 of 1990. This regulation grants superiors the authority to provide consideration regarding a civil servant's request for divorce. However, this provision differs from Islamic law, which views divorce as a private matter between husband and wife, without external intervention. This study aims to examine the provisions of Article 5 Paragraph (2) of Government Regulation No. 45 of 1990 from the perspective of maqashid shari'ah as proposed by Jasser Auda. The research uses a library research method with a normative descriptive and descriptive-analytical approach. The findings show that the regulation aligns with contemporary maqashid shari'ah, particularly in terms of *hifz an-nasl* (protection of the family) and *hifz al-'ird* (preservation of dignity and human rights), as interpreted by Jasser Auda. The superior's authority in granting divorce permission is considered a form of institutional protection for the stability of civil servant families, as well as an effort to resolve conflicts peacefully and with dignity.

Keywords: Civil Servants, Divorce, Maqashid Shari'ah, Jasser Auda, Government Regulation No. 45 of 1990.

ABSTRAK

Pegawai Negeri Sipil (PNS) memegang peranan penting dalam penyelenggaraan pemerintahan dan pelayanan publik. Kinerja PNS tidak hanya dipengaruhi oleh profesionalisme kerja, tetapi juga oleh kondisi kehidupan keluarga. Dalam rangka menjaga stabilitas dan integritas keluarga PNS, pemerintah mengeluarkan

regulasi yang mengatur perkawinan dan perceraian, salah satunya melalui Pasal 5 Ayat (2) Peraturan Pemerintah No. 45 Tahun 1990. Peraturan ini memberikan kewenangan kepada atasan untuk memberikan pertimbangan atas permohonan perceraian PNS. Namun, ketentuan ini memiliki perbedaan dengan hukum Islam, yang memandang perceraian sebagai urusan pribadi antara suami dan istri tanpa campur tangan pihak luar. Penelitian ini bertujuan untuk mengkaji ketentuan dalam Pasal 5 Ayat (2) PP No. 45 Tahun 1990 menggunakan perspektif maqashid syari'ah menurut Jasser Auda. Penelitian ini menggunakan metode penelitian kepustakaan dengan pendekatan deskriptif normatif dan deskriptif analisis. Hasil penelitian menunjukkan bahwa ketentuan tersebut selaras dengan maqashid syari'ah kontemporer, khususnya pada aspek *hifz an-nasl* (perlindungan terhadap keluarga) dan *hifz al-'ird* (penjagaan martabat dan hak asasi manusia), sebagaimana dimaknai oleh Jasser Auda. Kewenangan atasan dalam proses perizinan perceraian dianggap sebagai bentuk perlindungan institusional terhadap kestabilan keluarga PNS, serta sebagai upaya penyelesaian konflik secara damai dan bermartabat.

Kata Kunci: PNS, Perceraian, Maqashid Syari'ah, Jasser Auda, PP No. 45 Tahun 1990.

A. INTRODUCTION

Civil servants (PNS) play a crucial role in government as state apparatus tasked with designing, implementing, and overseeing the implementation of government duties and national development. They also play a crucial role in serving the public to realize the nation's ideals as stated in the preamble to the 1945 Constitution. This includes efforts to protect citizens, improve public welfare, educate the nation, and contribute to creating a peaceful and socially just world order. To realize these national goals, effective national development is necessary, which includes strengthening civil servant discipline in various aspects of life, including marriage and divorce. Family is a crucial aspect that influences civil servant performance in carrying out their duties. Therefore, the government pays special attention to the family life of civil servants through regulations governing marriage and divorce for each civil servant (Topan et al., 2022).

In an effort to improve civil servant discipline in administering marriage and divorce, the government issued Government Regulation (PP) No. 45 of 1990 concerning Amendments to PP No. 10 of 1983 concerning Marriage and Divorce Permits for Civil Servants. Based on these regulations, every process of forming a civil servant family must be carried

out with the knowledge of the state so that attention, protection, and supervision of civil servant families can be carried out optimally. One of the provisions in these regulations is Article 5 paragraph (2) of PP No. 45 of 1990, which states that every superior who receives a request for permission from civil servants in his environment to divorce or have more than one wife, is obliged to provide consideration and forward it to officials through hierarchical channels within a maximum of three months from the time the request is submitted. This provision gives authority to superiors in regulating marriage and divorce permits for civil servants (Taufik, 2023).

Family is a very important and influential part of every individual, including civil servants. The atmosphere and conditions of family life significantly influence the performance of civil servants in carrying out their official duties. Therefore, the government provides attention and protection to civil servants to build a family atmosphere of peace, tranquility, and prosperity that can positively energize the performance of each civil servant.

Islam defines marriage as a contract established by sharia to legitimate the relationship between a man and a woman in order to build a harmonious, prosperous, and loving household. The purposes of marriage in Islam include worship of Allah, preserving offspring, and creating a family life of peace, love, and mercy. However, not all marriages can work out as hoped, so in certain circumstances, divorce is a last resort (Fauzi Salim, 2022).

Divorce is the act of severing the marital bond by a husband and wife after maximum efforts to reconcile. In Islamic jurisprudence, divorce is called *talaq*, which means to break, to sever, or to sever a bond. Terminologically, *talaq* means to sever the marital bond or to terminate the marital relationship between husband and wife. Divorce in Islam is regulated by certain conditions without involving external parties such as superiors or officials. Islam requires that divorce can only be carried out by a husband who is mature, of sound mind, and of his own free will. This indicates a conceptual difference in terms of the conditions that must be met before divorce between Government Regulation No. 45 of 1990 and Islamic law. The Government Regulation requires the role and authority of a superior in terms of divorce permission, which must be obtained by civil servants before divorcing. Whereas in Islam, divorce is more private between husband and wife, without involving external parties, such as colleagues, superiors, or officials (Fauzi Salim, 2022).

Seeing this difference, the author feels it is important to examine the provisions in Article 5 Paragraph (2) of Government Regulation No. 45 of 1990 using the maqashid sharia according to Jasser Auda. Jasser Auda is a contemporary Islamic thinker who developed a systems approach to understanding maqashid sharia. His approach emphasizes the extent to which a law or regulation can resolve problems, provide benefits, and be effective in achieving the desired goals in Islam. Therefore, this study focuses on examining the role and authority of superiors regarding divorce permits for civil servants as regulated in Article 5 paragraph (2) of PP No. 45 of 1990 by using Jasser Auda's maqashid sharia as an analytical tool in this study. The author is interested in discussing this problem further in the form of a thesis with the title "Review of Jasser Auda's Maqashid Sharia on Article 5 Paragraph (2) of PP No. 45 of 1990 concerning Amendments to PP No. 10 of 1983 concerning Marriage and Divorce Permits for Civil Servants".

B. RESULT AND DISCUSSION

1. Article 5 Paragraph (2) PP No. 45 of 1990

Government Regulation No. 45 of 1990 concerning amendments to Government Regulation No. 10 of 1983 concerning Marriage and Divorce Permits for Civil Servants. This regulation outlines marriage and divorce procedures for civil servants. Civil servants wishing to divorce must undergo a procedural process in accordance with statutory provisions and first obtain permission from an authorized official (Andiko & Fauzan, 2019).

Government Regulation No. 45 of 1990 concerning Amendments to Government Regulation No. 10 of 1983 concerning Marriage and Divorce Permits for Civil Servants. In Article 1 point 3 (three), the provisions of paragraph (2) of Article 5 are amended to read as follows:

"(2) Every superior who receives a request for permission from a Civil Servant within his/her environment, either to carry out a divorce and/or to have more than one wife, is obliged to provide consideration and forward it to the official through hierarchical channels within a period of no later than three months from the date he/she receives the request for permission in question."

Explanation of Article 5 Paragraph (2) as stated:

“Every superior who receives a request for permission to divorce or to have more than one wife is required to provide written considerations to the Official. These considerations must include matters that the Official can use in making a decision as to whether the request for permission has a strong basis. As material for making such considerations, the superior concerned may request information from the spouse or other party deemed capable of providing convincing information.”

Civil servants (PNS), both male and female, who wish to file a divorce petition as a plaintiff are required to obtain written permission from the authorized official. Meanwhile, civil servants who are defendants in a divorce case must submit written notification of the lawsuit received from their spouse. This notification is submitted through the hierarchy to the relevant official in order to obtain a certificate, within a maximum of six working days after receiving the divorce suit (Ari Wijaya & Shihab, 2022).

The divorce permit process for Civil Servants (PNS) requires a written application to be submitted to the authorized official, stating clear legal grounds for the divorce. The request is issued through the hierarchy of positions or following the internal procedures applicable within the relevant agency or institution, while still taking into account the existing job structure within the organization (Wijayanto & Kasuwi Saiban, 2023).

Every superior who receives a divorce permit request from a Civil Servant (PNS) is required to consider the request. After obtaining the necessary information and explanations, the superior will require time to evaluate and analyze the appropriate considerations before finally issuing a decision or forwarding the request to the appropriate official. The official must submit a written decision to grant or deny the divorce permit within three months of receiving the request (Yani, 2022).

In accordance with Article 5 Paragraph (2) of Government Regulation No. 45 of 1990, every civil servant seeking a divorce must submit a divorce permit application to the authorized official, providing clear and valid reasons. In this case, superiors have the authority to issue divorce permits for civil servants, including the following (Kurniawan, 2023):

1. Any superior who receives a divorce permit application or notification of a divorce suit is obliged to carry out their duties and authority, namely, to accept the request and then conduct mediation

efforts between the two parties. If necessary, the superior may summon or request information from the relevant parties.

2. If mediation is unsuccessful, the superior is obliged to forward the divorce permit application or notification of the divorce suit to the authorized official.

Technically, any superior who receives a divorce request must submit it to an official within three months through hierarchical channels, calculated from the date the request is received. The official concerned must then make a decision within three months of receiving the request. The superior's consideration of a civil servant's divorce request significantly influences the official's decision regarding the divorce. If mediation efforts with both parties are unsuccessful, the superior will forward the matter to an official, carefully considering several factors, including:

1. Whether or not it conflicts with the teachings/regulations of the religion they adhere to.
2. Whether or not it conflicts with applicable laws and regulations.
3. The reasons stated by the Civil Servant concerned, as stated in the divorce permit request letter, accompanied by strong evidence.
4. Statements from other parties deemed to be knowledgeable about the circumstances of the husband and wife submitting the divorce permit request, if any.

In accordance with Circular Letter Number 48/SE/1990 concerning Guidelines for the Implementation of Government Regulation Number 45 of 1990 concerning Amendments to Government Regulation Number 10 of 1983 concerning Marriage and Divorce Permits for Civil Servants, it is stated that civil servants who wish to divorce must obtain a written permission letter or decree from their superior before proceeding. Obtaining this permission letter from a superior is not easy, as it involves a lengthy procedure and must follow the applicable hierarchical channels. Furthermore, a lengthy mediation process is also part of the procedure, where the superior or head of the relevant agency will summon both parties to mediate (Djanuardi et al., 2020).

During the mediation, the superior will gather information regarding the reasons for the dispute and argument, which must be recorded in writing. If the mediation fails to reach an agreement, the superior will send the results of their deliberations to the authorized official through the appropriate hierarchical channels, a process that certainly takes considerable time (Rizqullah & Fida, 2022).

The laws and regulations governing divorce permits for civil servants are strictly formulated and appear quite difficult to comply with. This provision aims to prevent civil servants from making the decision to divorce lightly, but rather to choose to provide, repair, and rebuild harmony in their households. Furthermore, civil servants are expected to resolve various problems, both within the family and in the workplace, wisely. This regulation also provides space for direct superiors to play a role in reconciling civil servant couples who wish to divorce and helping to restore harmony in their households (Kusmayanti & Ramadhanty, 2021).

While discussing divorce regulations for civil servants, which appear complicated and involve lengthy procedures, this aligns with the principle of complicated divorce as stipulated in the legal principles of marriage in Law No. 1 of 1974 (Dalila et al., 2023). This principle was implemented to make the divorce process less difficult, in accordance with the purpose of marriage, as stipulated in Article 1 of Law No. 1 of 1974 and its explanation, namely to form a happy and eternal family (household) through a physical and spiritual bond between a man and a woman, based on the belief in the One Almighty God (Ari Wijaya & Shihab, 2022).

Considering the essential purpose of marriage as outlined above, Article 39 (1) of Law No. 1 of 1974 stipulates that divorce complicates the process. This principle undermines the efforts to establish a happy and lasting family (household). This severance of the physical and spiritual bond between husband and wife often results in the severance of ties between the former husband and wife. Furthermore, divorce can also lead to conflicts over property and custody of children born during the marriage, which can negatively impact the mental development of their children (Utami & Setyaningsih, 2022).

This principle, which complicates the divorce process, requires the judge to attempt to reconcile the husband and wife in court. This demonstrates that the law considers the marriage to be preferable. This principle also includes a mandatory provision, stating that divorce can only be granted if there are sufficient grounds, proving that the husband and wife can no longer live harmoniously as a couple (Khoirin, 2010).

2. Article 5 Paragraph (2) of PP No. 45 of 1990 According to Maqashid Syari'ah Jasser Auda

Jasser Auda is a contemporary Islamic thinker who developed a systematic approach to understanding Islamic law. This approach is based on six key features that serve as analytical tools: the cognitive nature of the Islamic legal system, the holistic nature of the Islamic legal system, the openness of the Islamic legal system, the hierarchical interplay, its multidimensional nature, and the purposefulness of the Islamic legal system (Yuningsih et al., 2023). The explanation of Article 5 Paragraph (2) of Government Regulation No. 45 of 1990 is examined from Jasser Auda's six approaches:

First, the cognitive nature of the system, namely, that exploring Islamic law is inseparable from cognition, or the nature of understanding using the human mind/reason. This research provides an understanding of the meaning approach found between Q.S. An-Nisa' verse 35 and Article 5 Paragraph (2) of Government Regulation No. 45 of 1990. Allah's Word in the Qur'an:

“And if you fear a dispute between them, then send a peacemaker from the man's family and a peacemaker from the woman's family. If they both intend to reconcile, Allah will surely grant them success. Indeed, Allah is Knowing and Acquainted.” (Q.S. An-Nisa' [4]: 35)

Through the verse above, Allah mandates two judges, each from the husband's side and the other from the wife's side, to work towards improving their household. In this context, if we look at the role and authority of a superior regarding the divorce permit for civil servants, the superior acts as a judge (peacemaker) who seeks reconciliation before considering the divorce permit for the civil servant (Utami & Setyaningsih, 2022).

Second, the comprehensiveness of the system, where Islamic law relates to all aspects, both related to the science of ushul fiqh and other sciences. Establishing Islamic law requires a unity between law and morality to create a holistic approach. Through the comprehensive nature of this system, it can be seen that Article 5 Paragraph (2) of Government Regulation No. 45 of 1990 represents the government's effort to provide protection, attention, and supervision for civil servants who wish to

divorce so that they can still obtain a divorce while still adhering to existing values of justice and morality (Hidayat et al., 2023).

Third, the openness of the system. In line with the development of the times and social life in society, Islamic law is deemed necessary to open the door to *ijtihad* in accordance with the demands and needs of the times. Islamic law can be further developed to adapt to existing changes. As long as the development remains based on the main sources of Islamic law, namely the Qur'an and Hadith. The open nature of this system provides an opportunity for the existence of Article 5 Paragraph (2) of Government Regulation No. 45 of 1990, where while in the era of previous scholars there was no requirement to first request permission from superiors for every civil servant wishing to divorce, with the development of the times, this regulation has undergone changes (Permata Puteri & Windarto, 2023).

Fourth, the hierarchy is mutually influential, according to Jasser Auda, the essence of the levels of *maqashid*, namely the needs of *dharuriyyat*, *hajiyat*, and *tahsiniyat*, all three are interrelated. Article 5 Paragraph (2) of Government Regulation No. 45 of 1990, when viewed from the contemporary perspective of the *maqasid* (obligatory needs), falls within the category of *dharuriyat* (necessary needs), namely *hifz an-nasl* (concern and development of the role of institutions towards the family) and *hifz al-'ird* (protection of human rights and human dignity).

Fifth, the multidimensionality of the system. This multidimensionality opens up a new understanding of the world of *mujtahids*, so that in conducting *ijtihad* to determine Islamic law, multidimensional thinking is required. This broadens the perspective on Article 5 Paragraph (2) of Government Regulation No. 45 of 1990.

“Sixth, the purpose of the system. The six aspects described above are interconnected and interact, forming a holistic way of thinking. Among all these features, the *maqasid*, or objectives of Islamic law, serve as the primary benchmark that encompasses all other aspects. The effectiveness of an Islamic legal system is then assessed based on the extent to which it achieves its objectives, particularly in resolving problems, increasing efficiency, and providing greater benefits.”

C. CONCLUSIONS

Article 5 Paragraph (2) of Government Regulation No. 45 of 1990 concerning Amendments to Government Regulation No. 10 of 1983 concerning Marriage and Divorce Permits for Civil Servants explains the rights and authority of a superior in responding to divorce permit requests submitted by Civil Servants. A superior has the authority to accept, provide consideration, and forward the request to officials through hierarchical channels within a maximum period of 3 (three) months from the date of receipt of the request.

According to Jasser Auda, the maqashid sharia is a means to achieve the welfare of individuals and society, including families. Therefore, the existence of regulations requiring superiors to participate in the matter of divorce permits for Civil Servants reflects the state's efforts to maintain family stability, which is part of the welfare. This is in accordance with Jasser Auda's maqashid sharia regarding concern for and development of the role of the family institution (*hifzh an-nasl*). In addition, there is a role for superiors in the implementation of which there are mediation efforts carried out as well as a review of the factors behind the divorce. This is considered to be in accordance with contemporary maqashid in terms of protecting human rights (*hifz al-'Ird*), namely for the benefit of humanity.

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