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"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



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THE RECONSTRUCTION OF MADLIYAH AND IDDAH MAINTENANCE AND MUT'AH IN DIVORCE CASE FOR JUSTICE AND WELFARE

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A. Background of The Study.

In 2015, divorce cases reached 457.493 (85,65%) out of 534.164 cases throughout Indonesia, 321.487(60,18%) cases were dominated by contested divorce cases.¹ The most dominant factor of divorce in contested divorce cases is no liability (negligence) of husbands to wives, with the implication that wives' rights during marriage and after divorce are abandoned such as madliyah and iddah maintenance and mut'ah which are husbands' duty. Wives that sued husbands are categorized as nusyuz therefore the reception of madliyah and iddah maintenance is deprived, on the other hand, the reasons of divorce are dominated by the abandonment of wives, thus the definition of nusyuz needs to be re-examined, such as the abandonment of wives by husbands (unjust) is categorized as nusyuz or not.

Texts or legal norms in the Compilation of Islamic Law only regulates wives' rights of post-divorce (iddah maintenance and mut'ah) if the divorce are at husbands' will or talaq divorce by judges' ex officio (Article 41 letter c of Law No. 1 of 1974), or by counterclaim from wives for madliyah and iddah maintenance and mut'ah on a condition that wives are not nusyuz. The texts or legal norms in KHI for wives who filed for contested divorce are considered nushuz, therefore they are deprived of their rights on, the latter is caused by no texts in the Compilation of Islamic Law that regulate it so that the contestants either through law power (advocates) as well as personal did not demand for madliyah and iddah maintenance in their posita or their petition.

B. Research Problems.

Based the explanation above, the research problems of the study are listed below:

¹www.badilag.net. Downloaded on 15 November 2016 at 03.00pm

1. how are the implementations of madliyah and iddah maintenance and mut'ah in current divorce cases?
2. how are the weaknesses of the implementation of madliyah and iddah maintenance and mut'ah in current divorce cases?
3. how is the reconstruction of madliyah and iddah maintenance and mut'ah in divorce cases based on justice value?

C. Analysis

1. The Implementation of Madliyah and Iddah Maintenance and Mut'ah in Religious Court/Syariah Court.

In **talaq divorce** cases, madliyah maintenance is regulated in Article 34 paragraph (1) of Law No. 1 of 1974 in conjunction with Article 66 paragraph (5) and Article 86 paragraph (1) of Law No. 7 of 1989 in conjunction with Article 80 paragraph (2) and (4) a and b Law Compilation Islam, while iddah maintenance is regulated in Article 149 letter b and Article 152 Compilation of Islamic Law and Judges' Ex Officio in accordance with Article 41 c of Law Number 1 of 1974 and Mut'ah is regulated in Article 1 point (j), Article 149 (a), Article 158 and Article 160 Compilation of Islamic Law, and Ex Officio Justice as regulated in Article 41 letter c of Law No. 1 of 1974.

Incontested divorce, madliyah maintenance can be sued with a condition that it is listed in the petition vide Article 86 paragraph (1) of Law No. 7 of 1989, sued from the beginning as long as wives are not nusyuz, the problem is that judges still consider wives contesting husbands are nusyuz based on Subulus Salam holy book:

“A wife who filed for divorce to sue categorized acted nusyuz”

On the other hand **iddah maintenance and mut'ah** can be sued in contested divorce or through judges' ex officio institute based on Article 41 letter c of Law No. 1 of 1974, whether it is still following Subulus Salam holy book as above or it depends on the definition of nusyuz whether husbands are categorized as abandoning wives or wives are categorized as nusyuz, they depends on judges' decision.

2. The Weaknesses of Madliyah and Iddah Maintenance and Mut'ah Implementation.

The weaknesses of madliyah and iddah maintenance and mut'ah implementation can be divided to two categories such as law construction (texts) in Law or Compilation of Islamic Law and religious court decision influence, the detailed explanation as below:

2.1 The Weakness in Law Construction.

Madliyah maintenance, legal texts regulation of madliyah maintenance are regulated in Article 34 paragraph (1) of Law No. 1 of 1974 in conjunction with Article 78 (a) of Law No. 7 of 1989 in conjunction with Article 80 paragraph (2) and paragraph (4) (a) and (b), the weakness is that there is no regulation of the process of “how to sue madliyah maintenance only without counterclaim in talaq divorce” and “it is not regulated in contested divorce.”

Iddah maintenance, law constructions of iddah maintenance are regulated in Article 41 (c) of Act No. 1 of 1974 (ex officio) in conjunction with Article 149 (b) and Article 152 Compilation of Islamic Law, the weakness is that it is only regulated in talaq divorce while in contested divorce is not.

The weakness of **Mut’ah in law construction**, law constructions of mut’ah are regulated in Article 41 (c) of Act No. 1 of 1974 (ex officio) in conjunction with Article 149 (a) of Article 158 (mandatory), Article 159 (sunnah) and Article 160 Compilation of Islamic Law, the weakness is that it is not regulated in contested divorce.

2.2 Religious Court/Syariah Court Decision Influence

Related to **madliyah maintenance**, in talaq divorce it has to be followed by counterclaim, the weakness is that in contested divorce, there are considerations to regard wives that filed contested divorce are categorized as nusyuz by considering them as disobedient or rebel, especially for them that had left their husbands, therefore they did not receive the maintenance.

Related to **iddah maintenance**, in talaq divorce it has to be followed by counterclaim from wives, there are so few of judges that use ex officio because of many factors such as, the residency of wives are unknown (*mafjud*), wives never come to the court even officially have been called twice therefore the cases are decided as *verstek*, in the investigation, wives are considered as nusyuz if they left their husbands even their leaving is caused by husbands' bad treatment, and even if they present in the court they did not sue for maintenance out of their ignorance, or husbands are totally have no ability (poor) and judges rarely use their authority which is granted in Article 41 (c) of Act No. 1 of 1974, the weakness is in contested divorce since it is not regulated in Compilation of Islamic Law, there are so few judges who

use their authority *in ex officio* even there is Article 41 (c) of Act No. 1 of 1974, and the jurisprudence of the Supreme Court of the Republic of Indonesia Number: 137 K / AG / 2007 and No. 276 is now existed.

Related to **Mut'ah**, in talaq divorce it has to be followed by counter claim from wives, the reasons are the same with point 2), in contested divorce, the majority of judges did not use their authority *in ex officio*, the jurisprudence of the Supreme Court of the Republic of Indonesia Number: 137 K / AG / 2007 and No. 276 is now existed.

3. Reconstruction of Madliyah and Iddah Maintenance and Mut'ah

From the explanation above, therefore the construction is to give madliyah and iddah maintenance and mut'ah to protect wives and husbands legally.

The theory that is constructed by the writer is called the Theory of Justice and Welfare. Therefore, the implementation of madliyah and iddah maintenance and mut'ah is a must based on the theory of **justice** and **welfare**, that is to accentuate **proportional** justice and Islamic **perspective justice** and **welfare**. So that, in the divorce case proposed by the husbands or wives, and the wives are not *nusyuz*, and the divorce is granted by the Religious Court, the husbands should be sentenced to pay to the wives in the form of madliyah and iddah maintenance and mut'ah based on the judge's *ex officio*, the counterclaim, or based on the divorce which is accumulated by the claim of madliyah and iddah maintenance and mut'ah.. The articles are reconstructed as mentioned below:

3.1 Reconstruction of Madliyah Maintenance

The text of the law which is reconstructed is legal text that is in the Compilation of Islamic Law, Article 80 paragraph (1), paragraph (2), paragraph (3), paragraph (4) was not be reconstructed but paragraph (5) was reconstructed in the addition of the phrase "**The husband who does not fulfill the requirements as mentioned in paragraph (4), the wife may file a lawsuit against the husband to the Religious Court so that the husband fulfills the requirements as mentioned in paragraph (4)**" paragraph (5) becomes paragraph (6), paragraph (6) becomes paragraph (7), and paragraph (7) becomes paragraph (8);

3.2 Reconstruction Related to Iddah Maintenance

The text of the law which is reconstructed related to the texts that regulate iddah maintenance in the Compilation of Islamic Law Section XVII Part One that the

phrase was converted into *“The Results of Talaq Divorce or Contested Divorce,”* and the phrase of Article 149 is reconstructed into, *“When the marriage broke up because of talaq divorce or contested divorce, the former husband requires,”* then the phrase of Article 149 subparagraph (b) becomes, *“giving maintenance, maskan and kiswah to his former wife during Iddah period either raj’italaqor ba’in talak, unless the former wife isnusyuz, .”* The underlined captions are the insertion of the word while the word in the nonpregnant state is dropped (delete) since contradicture with Article 152.

Article 152 in the Compilation of Islamic Law is reconstructed into 2 (two) paragraphs :

- (1) *The former wife receives maintenance from the former husband, unless she is nusyuz;*
- (2) *If the husband does wrong to his wife, the wife still earns Iddah maintenance.*

3.3 Reconstruction Related to Mut’ah

The Article which is reconstructed in the Compilation of Islamic Law related to mut’ah is Section XVII Part One similar to Reconstruction of Iddah Maintenance, as well as the phrase of Article 149 is similar with Reconstruction of Iddah Maintenance where the subparagraph (a) that becomes a part of Article 149 is not be reconstructed, while a particular article which is reconstructed is Article 158 that says, "Mut'ah must be given by the former husband with the terms :

- a. The dowry for his wife has not been set after consummation of marriage (ba’dadukhul);
- b. The divorce based on the husband’s will;

Article 158 subparagraph (b) is reconstructed into, *“the divorce is based on the husband’s will (talaq divorce) or based on the wife’s will (contested divorce).”*

D. Conclusion

For the law enforcers mainly the Judges of Islamic Court toward talaq divorce cases, the wife (defendant) who does not propose counterclaim, needs to be considered a **nusyuz redefinition**, mutaakhirin ulama such as Dr. Wahbah al-Zuhaily (al-Fiqh al Islamy waadillatuhu) said Nusyuz may happen by the act of the husband (the husband is nusyuz), also the writing by Ali Masykuri Haidar, "Al Naafidzah", Majmuuatu al Hujjah Al

Syar'iyah, the High Judge of High Religious Court Pontianak, based on the interpretation of AthTabariJuz 5, page 45²:

"The criteria for the wife's nusyuz is when she left the obligations set forth by Allah SWT to obey her husband. While the limitation of husband's nusyuz is when there is his attitude which is irresponsible and is not ma'ruf in dealing with the wife".

Please use *ex officio* properly which is provided by the legislation according to the conscience, the wife deserves to get their rights after divorce based on the facts in the court, there already exists jurisprudence that can be used as a legal basis to provide the rights of the Defendant (wife) after the divorce, because there has been a legal basis by jurisprudence (Jurisprudence No.: 137 K / AG / 2007 and No.: 276 K / AG / 2010). Towards **the contested divorce** case, the Plaintiff who does not make demands of the maintenance, needs to be considered as well of **ba'in and nusyuz talaq redefinition**, they can also use their authority to use **ex officio** in contested divorce cases to give the rights of the Plaintiff (the wife) after the divorce, there has been a basis of the law by jurisprudence (Jurisprudence No.: 276 K / AG / 2010). The **responsive and progressive** judges will make legislative texts as study materials to create the realization of justice and welfare for those who are seeking for justice and the achievement of the objectives of the law (*maqoshid al-syari'ah*).

For the justice seekers either by the attorney or principal, in **talaq divorce** cases, need to be used the right soft counter claim related to their rights either madliyah and iddah maintenance and mut'ah as well as others such as Assets or child custody, with a special condition that madliyah and iddah maintenance are not in a state of **nusyuz** category. In a contested divorce case, the justice seekers even though there is no legal texts in the Compilation of Islamic Law, to guarantee their rights it can be proposed a claim of madliyah and iddah maintenance and mut'ah in the contested petition, because there has been its jurisprudence.

Either for Legislative or Executive, it requires changes in Article 80, Article 149, Article 152, Article 158, Article 159 and Article 160 in the Compilation of Islamic Law by the Government, as well as to be included in the Marriage Bill made by Executive and Legislative.

²M. Toyeb, S.Ag, MH, the interview result with the Judge of Religious Court Sanggau

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