

Ratio Legis of Not Regulated the *Madliyah* Livelihood Execution for Wife in the Law of the Indonesian Religion Justice

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Abstract

The Arrangements dealing with the execution of a *madliyah* livelihood in the case of divorce is philosophically very important to do, namely marriage is a very determining family problem in a society. Juridical considerations can become legal certainty guarantee in the implementation of the rights and obligations of husband and wife. Some law ratios or intent and the sociological objectives of lawmakers only include provisions for the execution of a divorce case without including provisions for the execution of the *madliyah* livelihood in these provisions, including: First, at the time of promulgation of the provisions required by society at that time were provisions concerning the divorce process, This provision is intended to put into order the divorce proceedings occurred at that time which tended to be carried out underhand. Second, the provisions of Article 70 of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009 are one of the articles intended to minimize the negative impact of an underhand divorce. Third, the provisions of Article 70 of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009 are also as one of the articles intended as divorce procedural law and complementing the provisions for divorce as in law of marriage.

Keywords: Ratio legis, execution norms, *madliyah* livelihood, religion court.

Introduction

The provision of a livelihood is one of the manifestations of the human tendency to protect and maintain arises from the instinct or tendency to preserve species. The appearance of these instincts includes compassion, love and concern for the husband for his wife and mother for the child, grandfather for grandchildren and so on. The phenomenon of this instinct to preserve this type gives birth to a motherly spirit, a spirit of fatherhood, love and affection.¹ Livelihood is one of the most strategic forms of maintenance and protection that is born from the instinct to preserve species. Thus, livelihood is a consequence of God's law (*Syariah*) and the natural law of a human

¹ Hafidz Abdurrahman, *Islam Politic and Spiritual*, (Jakarta: Al-Azhar Press), p. 53.

relationship, because of marriage, kinship and social responsibility.

There are at least two types of livelihood that can be born by the husband after the divorce, namely:

"In the Islamic Law Compilation, it is determined that" the livelihood of *iddah* (waiting period) is "the livelihood provided by the husband who is divorced during the *iddah*(waiting period) in the form of *nafkah* (livelihood), *kiswah* (clothing) and *maskan* (place to live)".²

Whereas in the Indonesian Arabic dictionary, the meaning of *nafkahmadhiyah* consists of two words, namely *nafkah* and *madhiyah*. *Nafkah* means livelihood and *madhiyah* comes from the word *isimmadhi* in Arabic which has a past or previous meaning. So the *nafkahMadhiyah* is a livelihood that has not been fulfilled.³

If a husband is negligent in his obligation to meet the livelihood to his wife, then if the husband wants to divorce his wife by applying for divorce, then the wife is allowed to submit an answer accompanied by a counterclaim or reconciliation in the form of *madliyah* livelihood, as stipulated in Article 66 paragraph (5) of the Law on Religion Courts which is stipulated as follows: "Applications for child control, child livelihood, wife livelihood (*nafkahmadliyah*, *iddahand mut'ah*), and joint assets can be filed together with a divorce application for divorce or after a divorce is pronounced".⁴ Provisions regarding the execution of the divorce pledge have been regulated as in Article 70 of the Law on Religion Courts as follows:

1. After the Court finds that it is impossible for the two parties to be reconciled and there is sufficient reason for divorce, the Court determines that the petition is granted.
2. With regard to the determination as meant in paragraph (1), the wife can file an appeal.
3. After the determination has permanent legal force, the Court determines the day of the trial for witnessing the pledge of divorce, by summoning the husband and wife or their representatives to attend the trial.
4. In that session the husband or his representative who is given special authority in an authentic deed to pronounce the divorce vow, pronounces the divorce vow which is attended by his wife or proxy.
5. If the wife has received a legitimate or proper summons, but does not come to face herself or does not send a representative, then the husband or his representative can make a pledge of divorce without the presence of his wife or representative.
6. If the husband, within a period of 6 (six) months from the date of the trial for witnessing the divorce pledge, does not come to face himself or does not send his representative even though he has received a valid or proper summons, the power of the determination will be annulled, and divorce cannot be filed again

² See the provisions of Article 149 letter (b) Compilation of Islamic Law. As well as the Word of Allah in *Surah al-Thalaq* verse 6 which means: "Place them (wives) where you live according to your ability and do not trouble them, and if they (wives) who have been bullied are pregnant, then give them-their livelihood-to support them until they give birth."

³ Rusyadi and Hafifi, *Indonesian Arabic Dictionary*, (Jakarta: RinekaCipta, 1995), p. 472.

⁴ Al-Hikmah Foundation, *Association of Law in the Religion Court Environment*, (Jakarta: Al-Hikmah Foundation, 1993), p. 263.

based on the same reasons.⁵

Research methods

This research uses the normative juridical type or library research, which is a problem approach by examining and reviewing applicable laws and regulations that are competent to be used as a basis for problem solving, so the steps in this study use juridical logic. With a research approach, namely the statute approach, the case approach and the conceptual approach are used to find out the views and developing doctrines. By studying these views and doctrines, researchers will find ideas that give birth to legal notions, legal concepts, and legal principles relevant to the issues discussed. An understanding of these views and doctrines is the basis for researchers in building a legal argumentation in solving the problems discussed.

Results and Discussion

1. Historic Position of Religion Judges

The name, status, position and authority of the Religion Courts have ebbed and flowed, even though the existence of the Religion Courts existed long before the independence of the Republic of Indonesia. G.W.J. Grewer and Faat Bin Shaykh Zainuddin Bin Abdul Aziz al-Malibari stated that "Religion Courts which are known today have existed since *Islam* entered Indonesia. When *Islam* entered Indonesia, the Islamic community had formed its own group which later became the Islamic kingdom and were generally located on the coast of the island of Java."⁶

This ups and downs situation continued until the New Order era, the Religion Courts were still not an independent judiciary, this is because: first, from a judicial technical point of view in certain cases the Religion Courts had not been able to directly decide the case (*incrach*) but had to obtain a decision from the General Court (*executoir for claring*) first, especially regarding matters of property, including the existence of option rights for inheritance issues. Apart from that secondly, in terms of organizational management, finance and human resources, the Religion Courts are still under the shadow of executive power (read: Ministry of Religion).⁷

The starting point for strengthening the position of the Religion Courts occurred since the promulgation of Law Number 14 of 1970 concerning Basic Provisions of Judicial Power, in which the government further emphasizes the position of the Religion Courts as state courts which are parallel to the three courts in Indonesia.

⁵ See the provisions of Article 70 of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009.

⁶ Faat Bin SyaikhZainuddin Bin Abdul Aziz al-Malibari, *Gijdgren to the Tool LederValkenkundeNalibari, Fat bi SyarkhQuratul 'in Report*, al-Ma'arif, Bandung, t.th, p. 117. See also Directorate of Institutional Development of Islamic Religion Courts, Ministry of Religion of the Republic of Indonesia, *Memories of a Century Religion Courts*, Cet. II, Ade Cahaya, Jakarta, 1985, p. 8. See also G.W.J. Grewer, *New Higat on the Coming of Islam to Indonesia*, 1968, p. 124.

⁷ This Law was an amendment to Law Number 19 of 1964 concerning the Principles of Justice, because it was no longer in accordance with the circumstances, then Law Number 14 of 1970 was issued and came into effect on December 17, 1970.

At least in Law Number 14 of 1970 concerning Basic Provisions of Judicial Power, there are two main principles related to strengthening the position of the Religion Courts, namely first, establishing the Religion Courts as one of the state judiciary bodies in addition to three other judicial bodies (General Court, Military Courts and State Administrative Courts).⁸Second, the elimination of the causes of the "inferior" position of the Religion Courts before the General Courts in line with the abolition of the "fiat execution" system by the General Courts of decisions of the Religion Courts.⁹ The birth of various laws and regulations above is a form of real recognition of Islamic law and at the same time the Religion Court as the executor. With de jure and de facto recognition, both from the community and by the state, the Religion Courts can carry out their duties and functions steadily without any influence and attachment to other institutions, so that they become an institution that can create justice in the midst of society.

2. Contents of Law Concerning Religion Jurisdiction

Since the enactment of Law Number 7 of 1989 concerning Religion Courts, the implementation of religion courts is based on the same and uniform regulations. This uniformity is carried out as an effort to apply the concept of archipelago insight in the field of law and as the implementation of national legal politics as mandated by the Outlines of State Policy.

Alaidin Koto said that "uniformity is also carried out to achieve implementation simple, fast and low cost trial, in accordance with the provisions stipulated in the Law on Judicial Power."¹⁰

Protection of women is a concern and is contained in the contents of Law Number 7 of 1989 concerning the Religion Courts. According to the general explanation of this law, it is stated that "to protect the wife, the divorce suit in this law is subject to amendments, not to be submitted to a court whose jurisdiction includes the residence of the Defendant, but to a court whose jurisdiction includes the residence of the Plaintiff."

3. Arrangements For The Execution Of Divorce Cases In Indonesia

In general, the execution process within the Religion Courts refers to the provisions of execution that apply in the General Court, this is confirmed in the provisions of Article 54 of Law Number 7 of 1989 concerning the Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009, which regulates that "the procedural law that applies to Courts within the Religion Courts is the Civil Procedure Law that applies to Courts within the General Court, except as specifically regulated in this Law."

The legal basis for the execution of the divorce case is to refer to the following

⁸ Article 10 of Law Number 14 Year 1970 concerning Basic Provisions of Judicial Power stipulates that judicial power is exercised in 4 judicial environments, namely: General Courts, Religion Courts, Military Courts and State Administrative Courts.

⁹ JaenalAripin, op. cit., p. 400.

¹⁰ Alaidin Koto, *History of Islamic Justice*, PT RajaGrafindoPersada, Jakarta, 2011, p. 262-263.

provisions: First, the provisions of Article 70 of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009, which stipulate that:

- 1) After the Court finds that it is impossible for the two parties to be reconciled and there is sufficient reason for divorce, the Court determines that the petition is granted.
- 2) With regard to the determination as meant in paragraph (1), the wife can file an appeal.
- 3) After the determination has permanent legal force, the Court determines the day of the trial for witnessing the pledge of divorce, by summoning the husband and wife or their representatives to attend the trial.
- 4) In that session the husband or his representative who is given special authority in an authentic deed to pronounce the divorce vow, pronounces the divorce vow which is attended by his wife or proxy.
- 5) If the wife has received a legitimate or proper summons, but does not come to face herself or does not send a representative, then the husband or his representative can make a pledge of divorce without the presence of his wife or representative.
- 6) If the husband, within a period of 6 (six) months from the date of the trial for witnessing the divorce pledge, does not come to face himself or does not send his representative even though he has received a valid or proper summons, the power of the determination will be annulled, and divorce cannot be filed again based on the same reasons.

Based on these provisions, the execution of the verdict for divorce on divorce is based on the provisions of Article 70 paragraph (3) to paragraph (6), namely if the verdict on the divorce case has permanent legal force, the court will determine the day of trial for witnessing the pledge of divorce, by summoning husband and wife or his representative to attend the trial.

Second, the provisions of Article 131 Compilation of Islamic Law, which stipulates that:

- 1) The religion court concerned studies the petition referred to in article 129 and in no later than thirty days summon the applicant and his wife to ask for an explanation of everything related to the intention of bringing down divorce.
- 2) After the Religion Court failed to convict both parties and it turned out that there is sufficient reason to impose divorce and the person concerned could no longer live in harmony in the household, the Religion Court issued a decision regarding the husband's permission to pledge divorce.
- 3) After the decision is legally binding, the husband still pledges his divorce before the Religion Court trial, attended by his wife or attorney.
- 4) If the husband does not make a pledge for divorce within 6 (six) months as of the decision of the Religion Court regarding the permission of the divorce vows for him has permanent legal force, then the husband's right to pledge divorce is invalidated and the marriage bond remains intact.
- 5) After the trial of witnessing the pledge of divorce, the Religion Court makes a decision regarding the occurrence of quadruplication of divorce which is proof of the divorce of the former husband and wife. The first strand along with the

divorce pledge letter is sent to the marriage registrar who is in charge of the husband's residence for recording, the second and third strands are each given to the husband and wife and the fourth strand is kept by the Religion Court.

Based on these provisions, the execution of divorce decisions as stipulated in the Compilation of Islamic Law is basically the same as the provisions stipulated in Article 70 of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009, that is, if the verdict on the divorce case has permanent legal force, the court will determine the day for the testimony of the divorce pledge, by summoning the husband and wife or their representatives to attend the trial.

It is very important to regulate the execution of a livelihood for *madliyah* in a divorce case with several considerations, including:

First, philosophical considerations. If in a country the issue of marriage is not regulated in the rule of law, it will cause society to be disorganized because family conditions greatly affect the condition of society at large. Marriage is a very important event in a person's life. Because of that Muchsin argues that this marital bond creates legal consequences for husband and wife as well as in the form of a legal relationship in the form of rights and obligations, so that a marriage bond has cultural, social and legal impacts.¹¹

Second, juridical considerations. Arrangements for the execution of a wife's *madliyah* livelihood in a divorce case can guarantee legal certainty for the implementation of the rights and obligations of husband and wife. The implementation of the rights and obligations of husband and wife becomes the basic foundation in building a household which has *Sakinah* (feeling of serenity), *marwaddah* (feeling of love) and *warahmah* (feeling of affection). Therefore, in every matter which is the right of a person in the family sphere must be guaranteed in its fulfillment.

Third, psychological considerations. The wife's livelihood does not only mean the material giving of a husband to his wife, but there is immaterial value contained in the provision of this livelihood, namely as a form of the husband's responsibility to his wife who has sincerely carried out his obligations in accompanying him.

Fourth, sociological considerations. The position of the livelihood in the household is the basic foundation in realizing the benefit of the family. The fulfillment of a livelihood is also a manifestation of the husband's piety for his responsibility towards his wife. Therefore, with the arrangement for the execution of the wife's *madliyah* livelihood will bring great benefits in making the joints of household life materialized.

4. Ratio Legis Absence of Norms for Execution of a Wife's Madliyah Livelihood in Article 70 of Law Number 7 of 1989

Philosophically, the law ratio or the basis for the formation of law is a consideration or reason that illustrates that the regulations that are formed take into account the view of life, awareness and ideals of the law which includes the mystical atmosphere and the philosophy of the Indonesian nation which originates from *Pancasila* (five principles) and the Preamble to the Constitution of the Republic of Indonesia of 1945.

¹¹ Muchsin, *Islamic Law in Perspective and Prospective*, Al-Ikhlâs, Surabaya, 2003, p. 52.

The law ratio for the formation of Law Number 7 of 1989 concerning the Religion Courts is also based on the aspirations of the Indonesian nation to realize a prosperous, safe, serene and orderly Indonesian life order. To realize these ideals, Law Number 7 of 1989 was formed as one of the tools in realizing this life order and to guarantee the equal position of citizens in law to uphold justice, truth, order and legal certainty capable of providing protection to the community.¹²

The provisions of Article 70 of Law Number 7 of 1989 concerning the Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009 only regulate the implementation of the execution of the divorce case which is manifested in the form of a trial for witnessing the pledge of divorce. This article specifically regulates the procedural law relating to the execution of a verdict in a divorce case without any other case following it. Philosophically, this provision is originally intended to legalize the provisions of Islamic law into Indonesian laws and regulations in order to realize justice, order and legal certainty in the process of pronouncing the divorce vow that is dropped by a husband on his wife as stipulated in the al-Qur'an and Hadith. The aims and objectives or the ratio of law is philosophically normalizing as the norm text of the article includes:

First, philosophically the lawmakers want a peaceful settlement of cases so that the provisions of the article purely regulate the implementation of the divorce pledge trial as part of the execution of the divorce decision.

Second, the perception of the people at that time that they preferred to settle cases related to rights and obligations in the household through kinship was considered by lawmakers to be more able to realize the value of social justice. The value of social justice is one of the philosophical foundations for the purpose of forming the Indonesian state as stated in the preamble to the 1945 Constitution of the Republic of Indonesia, which is to protect the entire nation and all the blood of Indonesia, promote public welfare, educate the nation's life and participate in implementing world order based on freedom, lasting peace and social justice.

Third, philosophically the intention of the lawmaker which only regulates the execution of cases of divorce for divorce in the provisions of the article is that cases involving the rights and obligations of husband and wife can still be resolved fairly by the husband and wife's family, while cases of the validity of the status of the husband and wife relationship become the realm. Judge to judge it, in the sense of ensuring orderliness in building a household as the basic foundation of the order of state life, divorce must be carried out in front of a court, while cases involving the rights of husband and wife can still be resolved through kinship.

The philosophiclawratio of lawmakers normalize Article 70 of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009. Based on the contents of the law, the authors are of the opinion that norms of Article 70 of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009, in philosophy have not been able to guarantee the realization of the objectives of its formation, namely to create order and justice for litigants.

¹² See the preamble to the considerations or main ideas of Law Number 7 of 1989 concerning the Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009.

Therefore, this norm must be reformulated by adjusting to the dynamics of the development of the divorce case that is currently happening in the Religion Courts. At least there are some law ratios or the sociological aims and objectives of lawmakers that only include provisions for the execution of a divorce case without including provisions for the execution of a *Madliyah* livelihood in these provisions, including: *First*, at the time of the initial promulgation of the provisions needed by the community at that time were provisions concerning the divorce process, these provisions were intended to curb the divorce process that occurred at that time which tended to be carried out underhand. Therefore, in this context, in the current social development of the Islamic ummah, it is not taboo if the provisions of Article 70 of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009 needs to be reformulated to suit the needs of the Muslim community regarding the execution of cases accompanying the divorce case - including the execution of the case of wives' *madliyah* livelihoods.

Second, the provisions of Article 70 of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009 are one of the articles intended to minimize the negative impact of an underhand divorce. Since before the promulgation of Law Number 1 of 1974 concerning Marriage and Law Number 7 of 1989 concerning the Religion Courts, even now, underhand divorce (read: divorce that is carried out outside of court proceedings) is still common.

Third, the provisions of Article 70 of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009 are also as one of the articles intended as divorce procedural law and complementing the provisions for divorce as in law of marriage. The procedural law provisions as contained in Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009 at the beginning the lawmakers intended to complete the provisions on divorce procedures which is regulated in Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019, in addition to lawmakers also adjusting to the needs at that time, namely that the majority of people go to court only to take care of the divorce process.

Sociological perspective, the ratio of lawmakers normalizes Article 70 of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009. Sociological perspective according to this law, Islam reflects the norms of the Indonesian nation, which is predominantly Muslim. As Daniel Lev admits, "before the archipelago was united by a Dutch colonial government, Islamic law had previously unified the majority of the Indonesian people. This is a fact that Islamic law has become part of Indonesia's positive law."¹³

The juridical law ratio in the formation of laws is a consideration or reason that illustrates that regulations are formed to overcome legal problems or fill legal gaps by considering existing rules, which will be changed, or which will be repealed to ensure legal certainty and a sense of public justice. . There are two ratios of lawmakers from a juridical perspective related to normalizing the provisions of Article 70 of Law Number 7 of 1989 and Law Number 50 of 2009, which only regulate the execution

¹³ Daniel S. Lev, *Indonesian Law and Politics; Continuity and Change*, trans. Nirwoo and A.E. Priyono, LP3ES, Jakarta, 1990, p. 121.

of divorce cases and do not regulate the execution of cases that accompany them, namely first, to fill in the incomplete procedural law regarding divorce and second, the provisions for the execution of cases other than divorce refer to the provisions of execution that apply in the general court. The law ratios are as follows:

First, filling in the incomplete procedural law regarding divorce. As previously stated, the issuance of Law Number 1 of 1974 concerning Marriage stipulates that divorce must be carried out before a court session. Juridically, the aims and objectives of lawmakers only regulate provisions for the execution of divorce in Article 70 of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009 to fill in the vacancies divorce procedural law.

Second, the provisions for the execution of cases other than divorce refer to the provisions of execution that apply in the general court. This purpose is normalized in the provisions of Article 54 of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009, which regulates "Civil Procedure Law that applies to Courts within the General Court, except those that have been specifically regulated in this Law". The juridical norm of the provisions shows that the execution of cases other than divorce refers to the provisions of the procedural law in force in the general court, this is because the procedural law stated in Law No.7 of 1989 concerning the Religion Courts as amended by Law No. 3 of 2006 and Law Number 50 of 2009 only regulate procedural law regarding the process of examining, trying and settling divorce cases.

The political law ratio in the formation of laws in the norms of Article 70 of Law Number 7 of 1989, is a consideration or reason that illustrates that the regulations formed are the direction of state administrator policies which are fundamental in determining the direction, form and content of the law to be formed.¹⁴ Based on the description of the law ratios, the authors are of the opinion that the provisions of Article 70 jo. Article 54 of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009 requires reformulation to ensure legal certainty in the fulfillment of the rights of wives and children in divorce cases, in the context of this dissertation study, for the execution of the decision for the *madliyah* livelihood of a wife - it is necessary to obtain a separate arrangement in the provisions of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009.

Conclusions

Finally, in the last chapter of our article we try to analyze the law ratio or the sociological intent and objectives of lawmakers only to include the provisions for the

¹⁴ This definition is taken from the definition of legal politics according to PadmoWahjono, namely the policy of state administrators which is fundamental in determining the direction, form and content of the law to be formed and about what will be the criteria for punishing something. See PadmoWahyono, Indonesia is a State based on the Law, Cet. II, Ghalia Indonesia, Jakarta, 1986, p. 160. See also PadmoWahyono, Investigating the Process of Forming Lawlation, in the Justice Forum, Edition No. 29 (April 1991), p. 65. Meanwhile, according to Rahardjo defines legal politics as an activity to choose and the means to be used to achieve certain social and legal goals in society. See SatjiptoRahardjo, Legal Studies, Cet. III, Citra AdityaBakti, Bandung, 1991, p. 352.

execution of divorce cases without including the provisions for the execution of the *madliyah* livelihood in these provisions, including:

1. At the time of the initial promulgation of the provisions needed by the community at that time were provisions regarding the divorce process, these provisions were intended to curb the divorce process that occurred at that time which tended to be carried out underhand.
2. The provisions of Article 70 of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009 are one of the articles intended to minimize the negative impact of an underhand divorce.
3. The provisions of Article 70 of Law Number 7 of 1989 concerning Religion Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009 are also as one of the articles intended as divorce procedural law and complementing the provisions for divorce as in law of marriage.

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