

Protection of Wife Rights in Divorce in Religious Court (In the Region of Religious High Court of Makassar)

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Abstract: *The purpose of this research is the existence of regulation of Law of Procedure and Material of Religious Court about resolution of divorce case and its execution in the framework of legal protection for justice seeker, because the absence of criminal sanction for husband who neglect responsibility in the household then by the decision can be recommendation of human rights violation. This research was conducted by using combination of normative law research type or doctrinal legal research and type of empirical law research or non-doctrinal legal research (socio-legal research). The result of the research is an responsibility for the husband so it must be implemented and if not implemented will be the debt, Implementation of wife rights protection in divorce in the Religious Court so far has been impressed merely the husband's willingness to fulfill his responsibility but not because the responsibility has the effect or legal sanction so the protection of wife rights is not maximally protected in divorce. Factors affecting the protection of the rights of wife in divorce in the Religious Courts are the legal substance, law enforcer factors and cultural-legal factors of society.*

Keyword: wife rights protection, divorce, religious high court

1. Introduction

The husband's responsibility to his wife can be divided into two parts, namely the material responsibility called nafaqah and the responsibility that is not material, and on the contrary, the wife has responsibility to her husband that is the husband's right from his wife that is not in the form of material or non material because of the material responsibility or nafaqah only in husbands.

Article 34 of Law No. 1 1974 about marriage, a husband is obliged to protect his wife, the word obliged means the husband has a responsibility to protect his wife and the wife gives the right to be protected. In Law No. 1 1974, it is clear that the role of each others, the husband is the head of the family and the wife is a housewife.

The responsibility of a husband can not be separated from the responsibility to his children. In Article 34 point (1) of Law No. 1 1974 about marriage, the responsibility of a husband according to his ability, by flexibility of the section does not mean that if the husband is not able then his responsibility falls.

From the several decisions of the Religious Courts especially in the area of the Makassar Religious High Court, the decision is not carried out properly, although this may be requested for execution and this execution does not necessarily solve the problem but the problem increases because of the incompetence of the wife or ex-wife with the execution fee.

The complexity of formal procedures for the execution request of the society, especially the poor, the cost of execution compared with the amount of living value determined by the Panel of Judges is not balanced. Therefore, it is very common to find, decisions of Religious Court are not enforced and implemented because of the

space, namely the imposition of the applicant (male) in the decision does not prevent the implementation of the pledge.

The function of the court is not only to enforce law and justice but the authority by law is to seek and apply the values of law live in the society moreover the values are according to appropriateness and humanity, in order to be able to realize the resolution of conflicts that knowledgeable and nuanced morality and not just by law (legal justice).

2. Basic Theory

2.1 Theory of The State of Law

Plato stated that the government that is able to prevent a decline in one's power is government by law, this idea developed by his disciple Socrates and continued by Aristoteles. Originator of the concept of rechtsstaat, Immanuel Kant, a French thinker between 1742-1804, regarded the state of law as an instrument of protection of the rights of citizens from the actions of the ruler [Azhary, 1992]

The Stated philosophy of society is laid in its constitution, because each nation of nations in the world has a relatively different view of life, namely the most sharp concept of the state is liberalist and communal, religious and the philosophy reflected as their fundamentals are listed in their constitution, so the concept of state is also relatively unequal, including the concept of the state of law [Muin Fahmal, 2013]

According to Hadjon [Philipus, 1987] the important elements of the state of law, Indonesia based on Pancasila are the suitability of the relationship between the government and the people based on harmony, the proportional functional relationship between the state powers, the principle of conflict resolution by discussion and the judiciary is the last way if the discussion fails, as well as a balance between rights and responsibilities.

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2.2 Theory of The Right and Responsibility

Right is the power to accept or do acceptable something or done by certain party, and can not be precluded by any other party and principally can be forcibly prosecuted by it, whereas the responsibility is actually a burden given by law to a law subject

The 1945 Constitution guarantees the right and responsibility of every Indonesian citizen as noted in article 27 to article 34 of the 1945 Constitution.

2.3 Theory of Conflict Resolution

Resolution is the process, deed, way of completion. Resolution is defined as finishing, making ends, clearing or deciding, organizing, reconciling (conflicts or disputes), or organizing things to be good [Departemen Pendidikan dan Kebudayaan].

Richard L. Abel understands conflicts from aspects of incompatibility or unsuitability of party about valuable something. Valuable something means as something that has a price or money [Salim & Erlies, 2013].

2.4 Theory of Law Protection

According to Ridwan HR as quoted by Ahmad Fadil [Salim & Erlies, 2014] that the legal subject as the bearer of rights and responsibilities (*de dragger wan de rechten en plichten*), well it is human (*naturelijke person*), legal institution (*recht person*), or position (*ambt*), can conduct legal actions based on the ability (*beekwaam*) or authority (*bevoegdheid*) it has.

According to Thomas Aquinas [Marwan Mas, 2004] says that natural law is a reflection of the eternal Laws (*lex naturalis*). Long before the birth of the historical ideology of law, in fact, natural law ideology is not only presented as a science, but also accepted as the basic principles of legislation.

2.5 The Right And Responsibility In Marriage

Marriage is a social institution that produces legal consequences. As an implementation for the principle of balance and, equality of various parties that conduct the contract/agreement. Related to the rights and responsibilities of husband and wife, Nawawi in his book *Uqud al-Lujjain*, that the responsibility of husband to wife is fair, giving living, and gently in talking to his wife, and giving love [Ahmad Tholabi, 2013].

2.6 Authority of Religious Jurisdiction

The Religious Court have the authority to examine, judge, and decide marital conflicts among Moslems, consisting of "cerai talak" (article 66 to 72), "cerai gugat" (article 73 to 86) and "cerai dengan alasan zina" as regulated in Law No. 7 1989 jo. Law No. 3 2006 jo. Law No. 50 2009 about Religious Court, so the Religious Courts conduct the Religious Jurisdiction, namely the jurisdiction for the people who are Moslems.

3. Methodology

3.1 Research Location

This research was conducted at the Pinrang, Pare-Pare, Makassar, Bulukumba, and Bone Religious Court, against "cerai talak", namely a lawsuit filed by a man (husband) against a woman (wife). This type of divorce case is most to be filed by the husband and not a few decisions of the Religious Court do not side with women, as well as "cerai gugat" case is a lawsuit filed by a woman, in this case the wife against a man, in this case intended the husband.

3.2 Type of Research

The type of research used is normative juridical. This research is supported and supplemented by juridical-empirical, historical and juridical comparative. The type of normative juridical research is conducted by reviewing a law and regulation concerned to the issue being handled.

3.3 Data Analysis

The analysis can be formulated as a systematic and consistent collection process for certain phenomena. A normative juridical analysis, essentially emphasizes the use of deductive methods as the main method and inductive methods as supporting procedures. The normative juridical analysis primarily uses references as a source of data.

4. Result and Discussion

4.1 The Essence of Legal Protection of Wife Rights in Divorce

Divorce in the marriage law is the broken of marriage bond, juridically is a legal event bringing the legal consequences, both family law and material law.

Amir Syarifuddin [2001], states that if a marriage bond breaks up, then there is a law that applies thereafter:

- a. The relationship between the two applies as between two strangers.
- b. There is a must for the husband to give "mut'ah" to his divorced wife as a compensation
- c. Pay off the debts he has to pay and have not paid while in a marriage bond in the form of dowry or "nafakah".
- d. The existence of *iddah* that apply to the wife who underwent it is a woman who divorced from her husband, both living divorce or divorce due to death by her husband, while pregnant (pregnant) not obliged to undergo the "iddah"
- e. The existence of legal consequences for children care.

For women who broke up their marriages due to divorce there was no waiting time, as in article 39 of Government Regulation No. 9 1975, was between the widow with her former husband who has not happened sex. For marriages that break up due to a divorce, the waiting time is calculated since the decision of a court having a permanent legal force.

In Article 41 of Law No. 1 1974 also contains that in the "iddah" time, a former wife borne by her ex-husband in the form of living livelihood, clothing and residence. "Iddah" is the Arabic word meaning etymology means counting or counts, this word is used for "iddah" because in that time the woman who is in "iddah" awaits the passing of time [Amir Syarifuddin, 2004]

Wife divorced with her husband with "cerai talak", "iddah" periods is as follows:

- a. The wife who is divorced in pregnancy time then "iddah" is until give birth to her fetus.
- b. Wife who is still experiencing menstruation, "iddah" is three times monthlies.
- c. Wife who has never or can not longer experience menstruation "iddah" is three months.
- d. Wife who never has sex and then divorced (cerai talak), then the wife does not need to experience "iddah" period.
- e. Divorce by "fasakh" also applies the rule of "iddah" because of divorce (cerai talak).

Women who have been devorced (cerai talak) either in the "iddah" period or "iddah" has passed even though there is a difference of divorce but still the period of "iddah" as an unfinished divorce while divorce (cerai talak) that has expired of "iddah" periods is a finished divorce.

4.2 Implementation of the Protection of Wife Rights in Divorce in Religious Court

In Section III of Article 49 to Article 53 of Law No. 7 1989 which has been amended by Law No. 3 2006 and the second amendment of Law No. 50 2009 about Religious Court, it is explained about the authority and the power to judge become the burden of duty of Religious Courts.

In Article 49 determined that the Religious Court have the duty and authority to examine, decide, and solve cases at the first level between moslem in the field of marriage, inheritance, wills, and grants conducted under Islamic law and wakaf and shadaqah and in Law No. 3 2006 is the first amendment of Law No. 7 1989 about Religious Courts, increasing authority of Religious Court.

While the Religious High Court is authorized and have duty to judge cases that are the authority and duties of the Religious Court at the appellate level, it also completes the jurisdiction between the Religious Courts.

The authority and power of Religious Court elaborated and detailed in Article 49 of Law No. 7 1989 and its amendments about the Religious Court is one of them in the field of marriage which is intended in the discussion is the occurrence of marital conflicts.

Divorce is not a new problem, divorce cases continue to increase along with the time change and the occurrence of changes in social values. Even due to the increasing economic ability among the women, also contributed to the high divorce lawsuit filed by wife against husband [Evi, 2011]

Divorce done or desired by the wife (gugat cerai) with all the consequences that the rights released in order to get out of the pain that has been experienced, not only physical violence but non-physical violence is done by the husband.

4.3 The Factors Affecting the Implementation of the Protection of Wife Rights in Religious Court

There are 3 factors that affect the implementation of protection of wife rights in divorce. In this research focus on the case or divorce (cerai talak), as follows:

a. Factor of Law Substance

According to Friedman, the substance is composed of substantive rules and rules about how the institutions should be have. So what is meant by substance according to Friedman is the rules, norms and patterns of real human behavior in the system. Substance also means the products produced by those who are within the legal system, including the decisions they make, the new rules they make.

The substance of law in a legal system which become basic and conditions of legitimacy for the implementation of legal legality, Fuller's theory is then famous for the principles of legality theory.

According to Fuller, it is said that to know the law as a system, it must be observed whether it has fulfilled the 8 principles or principles of legality:

- The legal system should contain rules:
- The rules that have been made shall be announced
- Regulations may not apply retroactively.
- The rules are structured in understandable formulas.
- A system should not contain rules that contradict one another.
- The rules should not contain demands over than what can be done.
- Rules should not be changed frequently.
- There should be a match between the rules enacted and the daily implementation.

b. Factor of Law Enforcer

What the judge decided in his decision will be the law for decided case and may also be law for others if the judges rely on the previous decision. Judge as one of the implementers of duties and authority of the judiciary in Indonesia in this case especially the Religious Court.

Achmad Ali in his book entitled "Menguak Tabir Hukum", that in defining the law cannot be one answer [Achmad Ali, 1996] because people's perception of the law varies depending on the angle where they look at it.

Bagir Manan [2009] stated that there are several benchmarks as the meaning of judging according to law, among others:

- Judging according to the law is one of the principles of realizing the state based on the law.

- The law in judging according to the law must be broadly defined beyond the meaning of a written and unwritten law.
- The law that lives in society is the law considered in the judge's decision, but not necessarily followed,
- In accordance with the legal tradition applies, the judge must prioritize the application of written law, unless it will cause injustice

What the judge decided in his decision will be the law for decided case and may also be law for others if the judge rely on the previous decision. That is the law for a judge.

Law enforcer factors are very influential on the protection of the wife rights in divorce in this "cerai talak" in the Religious Court in the area of the Religious High Court of Makassar.

c. Factor of Legal Culture of Society

The legal culture as one of the instruments has an effect on the protection of the rights of the wife in divorce, since the existence of the legal culture instrument is always understood as an element of social attitudes and values which is the choice of law, in the form of demand and requisite of the society (seeker of justice).

Factor of legal culture in relation to the protection of wife rights in divorce, especially in South Sulawesi as research area, the people of South Sulawesi tendency of role and men power are dominant.

Factors of legal culture is very influential on the protection of the rights of the wife in divorce in this "cerai talak" in the Religious Court in the area of the Religious High Court of Makassar

5. Conclusions

- a. Protection of wife rights in divorce is the fulfillment of the rights of the wife who neglected in marriage, the negligence of a husband does not support his wife during the marriage is a debt and must be paid so that in the process of divorce must be paid the responsibility before the husband divorce (cerai talak) his wife.
- b. Implementation of the protection of wife rights in divorce at Religious Court in Region of Religious High Court of Makassar has not been realized or its implementation not yet maximal to protect wife rights in divorce.
- c. Factors affecting the implementation of the protection of the wife rights in divorce are the factors of legal substance, law enforcer factors and public legal awareness factors.

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