

APPLICATION OF CONTRA LEGEM IN JUDGE DECISIONS (Critical Study of Iddah Alimony Rights in Divorce Cases)

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ABSTRACT

The subject of this study is based on article 149 letters (b) Compilation of Islamic law which reads: ex-husband must provide maintenance, *maskan*, and *kiswah* to ex-wife during the *iddah*, unless the ex-wife has been granted *talaq bain* or *nusyuz* and is not pregnant. There are two barriers for an ex-wife to earn a living during the period of *iddah*, namely because the wife is divorced *ba'in* and or because the ex-wife is *nusyuz*. In general, the wife filed for divorce in court because she could no longer stand her husband's treatment of her. As a result of the law, if the wife who filed for divorce sues the Court, then the panel of judges will issue a divorce. Unless the husband violates the *talaq*. In the context of the wife falling into the act of *nusyuz*, generally as a result of the treatment and conduct of the husband towards the wife. If this is returned to the sound of the law then it will be very felt the injustice received by the wife (ex-wife). This study seeks to find the answer from the formulation of the problem "Why is contra *legem* important for the judge in deciding the case (inconcritoplaintiff) divorce with the decision of *talaq ba'in* and or proven in court *nusyuz* wife's arbitrary because of the husband treatment of his wife? Materials and data are obtained by methods library research, the nature of the research is normative research. The goal to be achieved is to provide an alternative solution in providing justice and legal protection to women (ex-wives) who do not get *iddah* alimony because of filing a lawsuit or *nusyuz* with a theory approach contra *legem*. Positive law in practice is not sufficiently able to accommodate the legal facts revealed in the Court, in another narrative it can be said that positive law always lags behind social reality. So in the legal system in Indonesia, the judge's *ijtihad* to deviate and or find the law is accommodated by the principle of Contra *legemin* order to provide justice and benefits to the community seeking justice, the judge needs to do contra *legem*.

Keywords: *Contra Legem; Iddah Livelihood; Divorce Lawsuit; Judge's Decision*

A. INTRODUCTION

The Problem Civil law is a rule that regulates and protects the rights of individuals (private) so that civil law can be defined as rules or norms that provide restrictions on legal acts

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by a person in order to provide protection for the interests of individuals. Fairness between the interests of one person and another in a group of people (Vollmar, 1989).

Civil Law in principle aims to: 1). Regulate legal relations between individuals, between legal entities in public relations; 2). Protect the rights and interests of individuals or individuals; 3). Civil law is the whole basic law; 4). Civil law is fundamentally different from public law which essentially protects the public interest.

The systematics of civil law, in general, can be grouped into two major groups, namely systematics according to science and systematics according to the Book of Civil Law (KUHPerd). Based on the KUHPerd systematics, the Civil Law consists of four books, namely: The First Book on People (*Van Personen*); Second Book on Materials (*Van Zaken*); Third Book on Engagement (*Van Verbintennissen*); and Fourth Book on Expiration Proof (*Van Bewijs en Verjaring*) (Setiawan, 2011).

The civil law in the view of science can include four domains, namely:

1. The Individual Law (*Personenrecht*), which is a rule that governs human beings as a subject of law, the ability to act law and matters that affect competence, or individual law is a law that contains authority law and authority to act;
2. The Family Law (*Familierecht*), which is a rule of law that governs the legal relationship that exists within the family. For example, marriage, the relationship of husband and wife, the relationship of parents with their children (*Onderlijkemach*), guardianship (*Voodgdij*) and forgiveness (*Kuratele*);
3. The Wealth Law (*Vermogenrecht*), which is a set of legal regulations that can be valued in money. These laws include: law of absolute wealth, which is the right that gives direct power over an object and can be maintained by anyone as well; The law of relative wealth, that is, the law that contains individual rights, that is, rights that arise from an alliance and can only be defended against certain people.
4. Law of (*Inheritance Erfrecht*), which is the law that governs the affairs of a person's property if he dies, or the law that governs the transfer of property left by a person who has died to his heirs (Muhammad, 2014; Setiawan, 2011).

In Islamic law, the things that underlie a divorce are very diverse. This study focuses on divorce caused by the death of the husband leaving his wife, children, and other relatives as well as the civilian consequences of the death of the deceased husband, which are broadly divided into four discussions, as follows: *'iddah*, *Ihdad*, *Hadanah* and Division of inheritance.

In the first part, will be discussed *'iddah*. The of *'iddah* that the terminology is as follows:

العِدَّةُ هِيَ تَرْئُصُ مُدَّةٌ مَعْلُومَةٌ تُلْزِمُ الْمَرْأَةَ بَعْدَ زَوَالِ النِّكَاحِ سَوَاءً كَانَ النِّكَاحُ صَحِيحاً أَوْ بِشُبُهَةٍ إِذَا تَأَكَّدَ بِالذُّخُولِ أَوْ الْمَوْتِ.

Meaning: 'iddah is a certain waiting time for women after the dissolution of marriage, whether it is a legal marriage or suspicion if there has been intercourse or due to the death of her husband (al-Ansari, tt.; al-Jaziri, 2004; Al-Bujairimi, 1981; Sabiq, 2002).

Based on the above explanation, it can be understood that *'iddah* waiting is a period for a woman to confirm the status of marriage memorial or *ataral-nikah* a material, such as ensuring pregnancy or the cleanliness of the uterus and to realize things of moral ethics, such as maintaining the honor of the deceased. Husband or an expression of grief felt by his family and the family of the deceased husband in general as well as the prohibition of sermons and marriage at that time.

Some verses of Al-qur'an indicating *'iddah* for *al-mabtutah* or widowed woman are as follows: QS. Al-Baqarah [2]: 234, which explains the period of *'iddah* for a woman who is left dead by her husband for four months and ten days, QS. Al-Talaq [65]: 4, explains about the time of *'iddah* for women who do not come to the moon again with the time of *'iddah* three *quru'* and for those who are pregnant, then the time of *'iddah* until the birth of her child. QS. Al-Ahzab [33]: 49, explains the absence of the period of *'iddah* for women who have not been intermarried during the period of marriage. *Fuqaha* puts forward some social ethics for women who are undergoing the period of *'iddah*, as follows:

First, it is not permissible to accept proposals from men, either overtly or insinuatingly. However, for women who undergo the *'iddah* of the death of the husband, the proposal can be done but by insinuation. The reason the *fuqaha* establishes this law is QS. Al-Baqarah [2]: 235. Furthermore, a woman who is in *'iddah* should not enter into a marriage contract (marry or be married) absolutely.

Second, women who are undergoing *'iddah* are prohibited from leaving the house. Jumhur *fuqaha* consisting of al-Syafi'i, Malik ibn Anas, Ahmad ibn Hanbal, and al-Lais agreed that women who undergo *'iddah* are prohibited from leaving the house when there is no urgent need, such as to meet the needs of daily life. As for Malik and al-Syafi'i have different opinions, Malik is of the view that the prohibition of leaving the house for *mu'taddah* is absolute without distinguishing between *talak raj'i* and *talak ba'in*. Meanwhile, al-Syafi'i argued that the *mu'taddah* forbidden by the *raj'i* was not allowed to go out of the house, either day or night. Leaving the house during the day is only allowed for women who are forbidden *ba'in* (Al-Qurthubi, 2003).

Third, *mu'taddah* or women who are on *'iddah* are obliged to *ihdad*.

The problem in Syari'ah *'iddah* is that it only applies to women, while men are free from such *tasyri'*, in a feminist perspective it is an act of marginalization and even stereotyping against women. Such regulations, both derived from religious values and local wisdom of a region indicate injustice in the field of law that needs to be re-interpreted so as to give birth to regulations that place both men and women a person equal before the law.

In the second part, we discuss *ihdad*, which by definition is as follows:

الإِحْدَادُ هُوَ تَرْكُ لُبْسِ مَصْبُوغٍ يُقْصَدُ لِرِزْنَةٍ وَتَرْكُ تَحْلِئِ بِحَيْثُ يَتَحَلَّى بِهِ كَلْؤُهُ وَمَصْبُوغٍ نَهَارًا وَتَرْكُ تَطْيِيبِ بَدَنِ وَثَوْبٍ وَطَعَامٍ وَتَرْكُ دُهْنِ شَعْرِ وَاكْتِحَالِ بِكَحْلِ زِينَةٍ إِلَّا لِحَاجَةٍ وَتَرْكُ مَا

يُطْلِي بِهِ الْوَجْهَ وَخِضَابُ مَا ظَهَرَ مِنَ الْبَدَنِ بِنَحْوِ الْحِنَاءِ وَحَلُّ بَحْمِيلِ فِرَاشٍ وَأَثَاثٍ وَحَلُّ
تَنْظِفِ بَعْسَلِ رَأْسٍ وَقَلَمِ ظَفْرِ وَإِزَالَةَ وَسَخٍ وَامْتِشَاطِ وَحَمَامٍ وَاسْتِحْدَادِ.

Meaning: Leaving dyed clothes (colors) to adorn and leaving adorned with pearls and sparkles during the day, leaving body perfume, clothes and food, leaving hair oil, and smearing for beauty except for treatment and leaving face polish, grooming limbs body with contempt (girlfriend), decorate the bed mattress, household utensils, decorate the head with beauty treatments, cut nails, clean the trash, comb her hair, bathroom and cut nails (Jaib, 1998).

The legal basis for *ihdad al-mabtutah* is:

إِنَّ أَسْمَاءَ بِنْتَ عُمَيْسٍ لَمَّا أَتَاهَا نَعَشُ زَوْجِهَا جَعْفَرَ بْنِ أَبِي طَالِبٍ قَالَ لَهَا النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ
وَسَلَّمَ تَسَلِّي ثَلَاثًا.

Meaning: Indeed, Asma' binti Umais when the coffin of her husband Ja'far ibn Abi Talib came, the Messenger of Allah said to her: Entertain yourself with me for three days (Al-Mawardi, 2009).

لَا يَحِلُّ لِامْرَأَةٍ تُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ أَنْ تُحِدَّ فَوْقَ ثَلَاثٍ إِلَّا عَلَى زَوْجٍ أَرْبَعَةَ أَشْهُرٍ وَعَشْرًا.
(رواه البخاري)

Meaning: It is not permissible for a woman who believes in Allah and the Last Day to mourn for more than three days except for the death of her husband for four months and ten days (Al-Bukhari, 2003).

As for *al-mabtutah ihdad* required to do by avoiding the following: a). Wearing gold or silver or silk ring jewelry even if it is black; b). Wearing body perfume instead of clothes and combing perfumed hair; c). Wearing hair oil whether it contains perfume or not; d). Wearing eyeliner, *jumhur fuqaha'* also allows its use in emergency conditions such as treatment and others such as; e). Wearing henna and painting nails; f). Wearing clothes dyed with bright colors, such as red or yellow.

The issue of shari'ah *ihdad* that has been carried out so far, requires women to avoid social interaction and avoid activities that can attract attention men, such as make-up, adornment, etc. because it is considered can mediate the emergence of marriage in the period of *ihdad* which is illegal. This is faced with the demands of the reality of career women who have to work in the public sector to meet the basic needs of her life and that of her orphans by always dressing and looking attractive as well as building interaction with anyone, including the opposite sex. These two different realities, between the concept of Islamic *Shari'ah* about *ihdad* and the demands of career women's performance, become interesting problems and the object

of this research study that needs to find the root of the problem with the approach *usuliyah* to find a solution.

In the third part: *hadanah*, which by definition is as follows:

الْحَضَانَةُ هِيَ تَرْبِيَةٌ وَحِفْظٌ مَنْ لَا يَسْتَقِيلُ بِأُمُورِ نَفْسِهِ عَمَّا يُؤْذِيهِ لِعَدَمِ تَمْيِيزِهِ كَطِفْلٍ وَكَبِيرٍ
مَجْنُونٍ، وَكَذَلِكَ بِرِعَايَةِ شُرُونِهِ وَبِتَدْيِيرِ طَعَامِهِ وَمَلْبَسِهِ وَتَوَمِّمِهِ وَتَنْظِيفِهِ وَعَسْنَلِهِ وَعَسْنَلِ ثِيَابِهِ فِي
سِنِّ مُعَيَّنَةٍ وَنَحْوِهَا. وَالْحَضَانَةُ نَوْعٌ وَلَايَةٌ وَسُلْطَةٌ، لَكِنَّ الْإِنَاثُ أَلْيَقُ بِهَا لِأَنَّهِنَّ أَشْفَقُ وَأَهْدَى
إِلَى التَّرْبِيَةِ وَأَبْصَرُ إِلَى الْقِيَامِ بِهَا وَأَشَدُّ مُلَازِمَةً لِلْأَطْفَالِ. فَإِذَا بَلَغَ الطِّفْلُ سِنًّا مُعَيَّنًا كَانَ الْحَقُّ
فِي التَّرْبِيَةِ لِلرَّجُلِ لِأَنَّهُ أَقْدَرُ عَلَى حِمَايَتِهِ وَصِيَانَتِهِ وَتَرْبِيَتِهِ مِنَ النِّسَاءِ.

Meaning: Hadanah is educating and nurturing a person who is unable to be independent of everything that hurts him due to his ignorance such as children or insane people (adults), as well as maintaining his condition and providing for his food, clothing, bedding, and hygiene and bathing and washing his clothes at a certain age and the like. Hadanah is a form of authority and authority that is prioritized for women because of some of its more gentle, loving, and patient characters in educating. When the child has reached a certain age (mumayyiz), then the right of child custody is handed over to men, because they are more capable in caring for and educating children than women. (Al-Kassani, 2006; Al-Zuhaili, 2007; Qadamah, 2002).

The meaning of scope of *hadanah* is as follows: Parenting; Education; Fulfillment of basic needs; In the age before *mumayyiz* women are preferred and after that men are preferred. The legal basis is QS. al-Baqarah [2]: 233:

...وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ لَا تَكْلَفُ نَفْسٌ إِلَّا وُسْعَهَا لَا تُضَارُّ وَالِدَةٌ
بِوَلَدِهَا وَلَا مَوْلُودٌ لَهُ بِوَلَدِهِ وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ ... ﴿٢٣٣﴾

Meaning: ... And the duty of the father to feed and clothe them in a ma'ruf way. A person is not burdened except according to his level of ability. Let not a mother suffer for her child and a father for his child, and the heirs also are obliged to do so

In the sentence "ذَلِكَ مِثْلُ الْوَارِثِ وَعَلَى" al-Qurtubi quotes the opinion of Qatadah and other companions who argue that the obligation of child support is also imposed on the heirs of both men and women (Al-Qurthubi, 2003).

An important component of *hadanah* is the cost or *mu'nah*, so that among the Sunni school his opinion supports the spirit of the responsibility of the heirs to the *mu'nah hadanah* of the orphan with a variety of portions of responsibility according to the size of their respective inheritance (al-Sairazi, tt.; Al-Dardir, 2004; Al-Juza, 1999; Hammam, 2003; Hasfaki, 1998; Qadamah, 2002).

The regulation of Indonesian family law legislation has also accommodated the spirit of the views of the Sunni sects in its articles as a representation of the legal soul of the Muslims of the homeland. This can be seen in UUP No. 1 yr. 1974 relating to the obligations to children contained in article 45, namely: Both parents are obliged to take care of their children as best as possible (Z. Ali, 2009); The parental obligations referred to in article (1) apply until the child marries or is able to stand on his or her own, an obligation which applies even if the marriage of both parents has been dissolved (UU No. 1 Tahun 1974 Tentang Perkawinan, n.d.).

The Compilation of Islamic Law, hereinafter referred to as KHI, has accommodated the issue of *hadanah* in article 156, as follows: The consequences of divorce due to divorce are:

- a) Children who are not *mumayyiz* are entitled to *hadanah* from their mother, unless their mother has died, then their position is replaced by: Women in a straight line upwards from the mother; Father; The women are in a straight line up from the father; The sister of the child in question; Women are blood relatives according to the side line of the father.
- b) A child who is already has the *mumayyiz* right to choose to obtain *hadanah* from his father or mother;
- c) If the holder of *hadanah* is unable to guarantee the physical and spiritual safety of the child, even though the cost and *hadanah* sufficient have been, then at the request of the relative concerned, the Religious Court may transfer the right of *hadanah* to another relative who has the right of *hadanah* as well ;
- d) All costs of *hadanah* and child support shall be the responsibility of the father according to his ability, at least until the child is able to take care of himself (21 years).
- e) In the event of a dispute regarding *hadanah* and child support, the Religious Court shall decide based on letters (a), (b) , and (d);
- f) The court may also, given the ability of the father to set the amount of costs for the maintenance and education of children who do not follow him (KHI, 2012).

Problems that arise in UUP No. 1 of 1974 and KHI related to *hadanah* articles only limit the responsibility for its implementation only, while the source of implementation *hadanah*, which is the source of funding after the death of the late father of the orphans who should be replaced by his heirs as mandated QS. al-Baqarah [2]: 233, has not been accommodated in the clause of the articles on the two positive laws, namely UUP No. 1 yr. 1974 and KHI, even though the process of implementing *hadanah* takes a long and long time, that is, until the child is 18 years old for women and 21 years old for men and or married before that age. While the treasures of jurisprudence have recommended such an obligation. The next reality is the default of the heirs to the contribution *mu'nah hadanah* of the orphans of *al-mabtutah* who have no criminal or criminal offense. The issue of positive legal emptiness is interesting to study further in this study, in order to know the spirit, the problem is explained and the formulation of regulations is realized in order to realize substantive justice and give color to the reform of family law in Indonesia. Similarly, the negligence and default of the heirs towards the obligation of contribution *mu'nah hadanah* of the orphans of *al-mabtutah*, attracts

a study with the *usuliyah* approach and other relevant legal approaches in order to uphold *masalih al-'ibad* as the main mission of Syari'ah Islam.

In the fourth part, Inheritance, which in terminology are the people who are entitled to receive an inheritance from the property left by the deceased due to kinship or the like (KHI, 2012). As for the arguments of Inheritance *al-mabtutah* in or air are: QS.Al-Nisa' [4]: 12:

وَلَكُمْ نِصْفُ مَا تَرَكَ أَزْوَاجُكُمْ إِنْ لَمْ يَكُنْ لَهُنَّ وَلَدٌ فَإِنْ كَانَ لَهُنَّ بَنُونَ فَلَكُمْ
الرُّبْعُ مِمَّا تَرَكَنَّ مِنْ بَعْدِ وَصِيَّةٍ يُوَصِّينَ بِهَا أَوْ دَيْنٍ وَلَهُنَّ الرُّبْعُ مِمَّا تَرَكَتُمْ إِنْ
لَمْ يَكُنْ لَكُمْ وَلَدٌ فَإِنْ كَانَ لَكُمْ وَلَدٌ فَلَهُنَّ الثُّمُنُ مِمَّا تَرَكَتُمْ مِنْ بَعْدِ وَصِيَّةٍ
تُوصُونَ بِهَا أَوْ دَيْنٍ وَإِنْ كَانَ رَجُلٌ يُورَثُ كَلَالَةً أَوْ امْرَأَةٌ وَلَهُ أَخٌ أَوْ أُخْتُ فَلِكُلِّ
وَاحِدٍ مَنَّهُمَا السُّدُسُ فَإِنْ كَانُوا أَكْثَرَ مِنْ ذَلِكَ فَهُمْ شُرَكَاءُ فِي الثُّلُثِ مِنْ بَعْدِ
وَصِيَّةٍ يُوصَى بِهَا أَوْ دَيْنٍ غَيْرِ مُضَارٍّ وَصِيَّةٍ مِنَ اللَّهِ وَاللَّهُ عَلِيمٌ حَلِيمٌ ﴿١٢﴾

Meaning: And for you (husbands) are left half of the property left by your wives. If your wives have children, then you get a fourth of what they leave after the bequest they have made and or after the debt is paid. The wives get a quarter of the property you leave if you have no children. If you have children, then the wives get one-eighth of the property you leave after the fulfillment of the will you made and or after the payment of your debts. If a person dies, either a man or a woman who does not leave a father and does not leave a child, but has a brother (mother only) or a sister (mother only), then for each of the two types of brothers is one-sixth the property. But if the siblings are more than one, then they are allies in the third, after fulfilling the will made by him or after paying the debt without harming (the heirs). (Allah has ordained it as) a law ofi'at which is truly from Allah, and Allah is All-Knowing, All-Forbearing.

On QS. Al-Nisā [4]: 12, also still explains about *ashab al-furud*, including the husband's part of *tirkah* if there are no children and if there are children, and the wife's part $\frac{1}{4}$ of *tirkah* if there are no children and $\frac{1}{8}$ when there are children. As for a person who is in the position of *kalalah* while he has no descendants and ancestors or children and or father, but is surrounded by heirs from the next line of lineage or siblings either siblings, father or mother, then his life partner gets share $\frac{1}{6}$.

In general, in the law of inheritance, the placement of a person as an heir is based on the existence of marriage, blood relations and or freeing slaves, at this time the issue of slaves is not much discussed anymore except in classical jurisprudence. The existence of a marriage bond will give rise to the right to inherit each other between husband and wife, while blood relations will give rise to the right to inherit for both parents and children. If there are heirs in this family, then the heirs are the husband or wife, children, mother and father (al-Jandi, 2000; Pane et al., 2021; Wasil, 1999; Zahrah, 2001). The most prominent characteristic of Islamic inheritance law and distinguishing it from other inheritance law systems is that the daughter's

share gets half of the son's share, as in *al-mabtutah* or a divorced woman dies whose share is half from the husband when the same legal event happened.

The problem that arises in *al-mabtutah* is the ambiguous behavior in initiating the division of heirs when her husband dies. On the part of *usul*, it is assumed that the implementation of inheritance distribution in the middle of the death of the late husband will weaken the economic position of the family in raising and educating orphans who lose their livelihood, while the implementation of inheritance distribution until the mother dies, it has emerged due to the new law before the first law. (death of late husband) settled. On the other hand, Feminists also highlight the heir part of *al-mabtutah* $\frac{1}{4}$ and or $\frac{1}{8}$, while the husband as a widower gets the and or $\frac{1}{4}$ of *share tirkah*, which is considered a marginalization of *al-mabtutah* and far from the spirit of a *quality before the Law*.

These are some of the issues of civil rights of divorced women or *al-mabtutah* in this study that are interesting to study in-depth and integrated with several regulations and legislation related, both *al-Ahwal al-Syakhsiyah*, UUP No. 1 of 1974, KHI and KUHPer with the approach *usuliyah* to find academic and regulative solutions as a guide for Muslims in living the destiny of Allah SWT., as *al-mabtutah* and as a reference study in Islamic law.

B. METHOD

This paper includes the type of normative law research, secondary data from this paper that is the Compilation of Islamic Law article 149 letter (b), and legislation related to divorce cases. Therefore, this study focuses more on sources of information derived from legislation and other regulations that fall into the category of legal sources, judge's decisions, law books, journals, papers, newspapers, and relevant and relevant literature. With the object of study.

C. DISCUSSION

I. Purpose of Law Enforcement

Sudikno Martokusumo quotes Gustav Radbruch's opinion that everything that is created must have an idea and purpose. The main objectives of the law are three, namely: Justice, Legal Certainty, and Utility (Hakim, 2017; Julyano & Sulistyawan, 2019; Mertokusumo, 1993). In the practice of the Court, the three purposes of law above, not all can be accommodated in one decision, does not mean that no decision can accommodate all three, there are, but not many, from here will be born the concept of the antinomy of legal purpose. In the view of jurists, the three objectives of the rule of law, each have their advantages, there are lawyers who say that certainty takes precedence over justice and or vice versa.

Achmad Ali argues that the question of the purpose of law can be seen from the perspective of the three purposes of law, each as follows:

- a. From the point of view of positive-normative, or juridical-dogmatic legal science, where the purpose of law is emphasized in terms of legal certainty.

- b. From the point of view of the philosophy of law, where the purpose of law is emphasized in terms of justice.
- c. From the point of view of sociology of law, where the purpose of law is emphasized in terms of its usefulness (A. Ali, 2012; Santoso Az & Yahyanto, 2016).

The three points of view above include a semi-moderate group because each group (point of view) only emphasizes the purpose of law from their respective point of view without denying the purpose of law from another point of view.

It is different if the purpose of the law is viewed from the point of view of conventional legal teachings, namely ethical teachings, utilitarian teachings and Normative-dogmatic teachings. Ethical teachings state that the purpose of law is solely to achieve justice. While the teaching of utilitarianism states that the purpose of law is only to achieve usefulness. And juridical-dogmatic teaching states that the purpose of law is solely for legal certainty.

The following will explain the three purposes of the law.

1) Justice

The word justice comes from *aadilun* which comes from Arabic, in English, it is called *justice* has similarities in various languages have similar meanings with *Justitia* in Latin; *juste* in French; *justo* in Spanish; *gerecht* in German. But if we look at the definition given by the great Indonesian dictionary, justice is equally heavy, not biased, in favor of the right, holding on to the truth, it should be, not arbitrary. There are several expert opinions on justice, among others;

- a) Henry Campbell Black said that justice is a constant and continuous division to distribute the rights of everyone.
- b) Noah Webster said that justice is a general principle of *fairness lawful* and the use of power to defend what is *right, fair* or.
- c) Justice According to the German philosopher Schopenhauer that the most important essence of justice is the principle of *neminem laedere*, which is the principle of avoiding actions that cause suffering, loss, and pain to others.
- d) According to Plato, justice is the highest value of the policy.
- e) According to the jurist HLA Hart said that the welfare of the legal (the most legal of virtues) or to borrow a phrase from Cicero, justice is *habitus animi* an attribute that is private (*personal* attributes).
- f) John Rawls argues that justice is the primary focus of the legal system and that justice cannot be sacrificed because there are two principles, according to him, *first; each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second; social and economic inequalities are to be arranged so they are both a. reasonably expected to be everyone's advantage and, b. attached to positions and offices open to all.*

2) Legal Certainty

Legal certainty is a guarantee that a law must be carried out in the right, good or proper way. Certainty is in essence one of the purposes of the law. Legal certainty

often leads to the flow of positivism because if the law does not have an identity then it is no longer used as a guide or role model for everyone's behavior. But the law is very closely related to the politics of power, so that's where the law is anchored.

According to Sudikno Mertokusumo (Mertokusumo, 1993), legal certainty is a guarantee that the law can be executed properly. Of course legal certainty has become an integral part of this is preferred to written legal norms. Because certainty itself is essentially the main purpose of the law. This legal certainty becomes the order of society is closely related to the certainty itself because the essence of order will cause a person to live with certainty in performing the activities necessary in carrying out the activities of community life.

According to Gustav Radbruch, there are two kinds of notions of legal certainty, namely legal certainty by law and legal certainty in or from the law. Laws that successfully guarantee a lot of legal certainty in society are useful laws. Legal certainty because the law gives another legal task, namely legal justice as well as the law must remain useful. While the legal certainty in the law is achieved if the law is as much as in the law. In the law there are conflicting provisions (laws based on a logical and practical system). Laws are made on the basis of *rechstwekelijkheidtrue* (the state of law) and in those laws there are no terms that can be interpreted differently.

3) Benefit

The benefit is the most important thing in a legal purpose, regarding the discussion of legal purpose first know what is meant by its own purpose and who has a purpose is only human but the law is not the human purpose, the law is only one tool to achieve goals in society and state. The purpose of the law can be seen in its function as a function of protection of human interests, the law has a goal to be achieved.

If we look at the definition of benefit in a large dictionary of Indonesian, benefit in terminology can be defined as use or benefit. Regarding the usefulness of this law according to the utilize theory, want to guarantee the happiness that is impressed for human beings in as much as possible.

In court practice (decision) it turns out that the three objectives of law can not always be together in a decision, sometimes in a case between justice, certainty, and mutual benefit, then the term born *antinomy* of legal purpose was.

According to the Dictionary of Antinomy Law, it is defined as: "a contradiction between two sentences in a law". Zainal Arifin Muchtar quotes Friedmann's opinion as explaining: "The contradictions (*antinomy*) between legal theories or methods of law occur as a natural result of the position of law itself which stands between philosophical reason and the practical needs of political-interests. The intellectual categories of law are constructed from

long and holistic philosophical reasoning, while the ideals of justice in law are constructed through a political mechanism that tends to be transactional”.

While what is meant by antinomy in this paper is the conflict that occurs between the objectives of law (justice, certainty and usefulness) together in one decision.

2. Benefit as a Priority

Satjipto Rahardjo said: Law does not exist in oneself and one's own needs, but for human beings, especially human happiness (Mukhidin, 2014; Rahardjo, 2007). Other legal experts are of the same opinion: Law has no purpose in itself. The law is a tool to uphold justice and create social welfare (Faisal et al., 2021; Lathif, 2017).

Indeed, everyone naturally expects benefits in the implementation or enforcement of the law. The law is for human beings, so law enforcement or law enforcement must provide benefits or uses for society. Do not let the fact that the law is implemented or enforced cause unrest in the community.

Ideally, the three ideals of law (legal objectives), namely justice, certainty, and usefulness, must be accommodated in a court decision. But the reality is difficult to realize for various reasons, among them is the rapid change of time so that legislation is always behind the social life of society. What is in the legislation is no longer in line with the changes in society's life and the sense of justice that lived and flourished in the midst of society at that time.

Facing the statement of *antinomy* in the concept of the purpose of the law, it takes the courage of judges as law enforcers in deciding cases. Judges as law enforcement must determine which choice should take precedence over the three objectives of the law over legal certainty, fairness, or usefulness. According to Peter Mahmud Marzuki "There law enforcement must be able to make a choice which must be sacrificed, legal certainty or justice".

Judges have the authority to choose or not to choose from one or two of the three objectives of the law but still must with accountable legal arguments. The existence of antinomy in the purpose of the law (legal ideal) has paved the way for judges to do *contra legem*, judges may ignore the certainty of law (legislation) in order to gain benefits or justice.

In Islamic civil law, especially if we talk about Islamic family law, then it will not be able to escape the concept of *mashlahah* (usefulness). al-Syathibi, a reformer of *ushul fiqh* who lived in the 8th century AH, in his book *Al-Muwafaqat fi Ushul al-Syari'ah*, said that in fact the Shari'ah was established for the benefit of mankind in this world and in the hereafter.

In the context of positive law in Indonesia, accommodating these three legal objectives is certainly something ideal, but in practice, many have found that judges have to choose between certainty, fairness, and usefulness. Included in deciding divorce matters.

3. Urgency of *Contra Legem*

According to Fanani (2014), *Contra legem* is If the legislation is not in accordance with the values of justice and social conditions of society then the judge can set aside the law by doing *contra legem* provided that a rational-legal argument must be made.

Another meaning of *Contra Legem* is to oppose or deviate from the prevailing positive legal rules. *Contra legem is existing* required while the written law no longer reflects the values of truth and justice for the case at hand (*inconcriso*). In order to be able to defend the values of truth and justice, then the judge can do *contra legem* through the right *sex officio* he has. So what is meant by the principle of *ius contra legem* is the authority of a judge to deviate from the provisions of existing written law, which have become obsolete so that it is no longer able to meet the sense of justice of society.

The main job of a judge is to uphold law and justice. Law can come from written or unwritten law. If the written law does not exist or the existing written law no longer reflects the values of justice and usefulness, then the judge must make a legal discovery. The discovery of law can be done by digging into unwritten law or interpreting written law and combining the two. The judge's thoughts *contradictory included* must be clearly in the legal considerations.

Up to this paragraph, it can be understood that *contra legem setting aside* is an attempt made by a judge to find law by the written Law, when the Law is deemed unable to provide a sense of justice to the litigants or the Law is deemed unable to provide fair legal certainty.

The essence of human beings has a tendency and a need for certainty and justice. Because only in certainty and justice is man able to actualize all his human potential in a reasonable, good and maximum manner.

Without legal certainty, people do not know what to do which in the end will cause unrest. But too much emphasis on legal certainty, too strict obedience to the sound of the articles will also result in stiffness, judges only as a funnel of the law and do not close the possibility will be able to cause injustice and useless verdict. Whatever happens, the rules are so and must be obeyed and implemented. And sometimes the Law often feels cruel when strictly enforced (*lex dura sed tamen scripta*).

Empirically, there are two conditions that require a legal breakthrough, namely: first, while the existing norms of applied law (positive law) have experienced "clumsiness" so that it is not able to penetrate the purpose of the law (utility); or second: while the law experiences a gap between the existing legal norms and the expected legal objectives so that the existing legal norms cannot provide legal protection, fulfill the sense of justice, fulfill the rights of victims, prevent injustice. In order to avoid injustice and be able to benefit from a court decision, the instrument of *contra legem* is something very important that can be a way out in deciding the case.

4. Application of *Contra Legem Principles* in Providing Iddah Maintenance to Ex -Wives Who Have Divorced Ba'in and or Nusyus leads to uselessness

One example of injustice that that occurs if the judge remains guided by the sound of the article that is about iddah maintenance regulated in article 149 letter (b) Compilation of Islamic law that reads: *the ex-husband is obliged to give alimony, maskan, and kiswah to the ex-wife during the iddah, unless the ex-wife has been sentenced to talaqbain or nusyuz and is not pregnant.*

In the context of *iddah* living for ex-wives who have been sentenced to *talaq ba'in* and or ex-wives who are *nusyus*, the author chooses to prioritize the purpose of usefulness and justice rather than legal certainty.

In a divorce lawsuit, where the divorce lawsuit is filed by the wife, when the cause of the divorce is due to the actions and treatment of the husband to the wife such as the husband having an affair with another woman or a drunken husband and a gambler, or the husband does not support the wife for a long time then it is not fair if the Plaintiff (wife) does not earn maintenance during the period of *iddah*.

In the case of a plaintiff's divorce case, that is, the wife who filed for divorce in Court, there will be two types of decisions, namely (1). Divorce one *bain sughro*, (2). Divorce one *Khul'i*. In article 149 letter (b) if the *talaq* is pronounced by the judge (the suing wife) in the form of a *talaq* of one *bain sughro* then the ex-wife is not entitled to alimony, *maskan*, and *kiswah* during the period of *iddah*.

The same is the case with the case of divorce (filed by the husband) if it is proven that the wife is *nusyus*, then the wife (ex) is not entitled to *iddah* maintenance. Either in the case of divorce plaintiff or divorce is very unfair if the divorce plaintiff filed by the wife or divorce *talak* but the wife *nusyus*, which *nusyus* is due to the husband's bad deeds, the wife does not get *iddah* maintenance.

One example of a case is the divorce case, number 1537/Pdt.G/2009/PA.Mlg. At the eleventh point in the position submitted by the petitioner to the Religious Court of the City of Malang, the petitioner requested that he not be required to provide *iddah* alimony to his ex-wife as a result of the divorce due to *nusyuz*. This is in accordance with the provisions of article 152, Chapter XVII, Consequences of Divorce, Part one on the Consequences of Divorce, Book I Compilation of Islamic Law which reads: "Ex-wife is entitled to *iddah* maintenance from her ex-husband unless he is *nusyuz*".

In his answer, the petitioner (wife) defended as follows: The petitioner refused to live with her husband because the petitioner felt often hurt physically or mentally by the treatment of the petitioner who never provided maintenance while her child was in the womb, the petitioner also wasted the petitioner so mentally and physically the applicant was tortured for a long time due to the applicant's lack of responsibility towards the applicant and the applicant felt uncomfortable with the treatment of the applicant's family who often said inappropriate things to the applicant and his family.

In its decision, the Council of Judges of the Religious Court of Malang decided that the petitioner as ex-husband must still provide *iddah* alimony to the petitioner as his ex-wife because the petitioner in fact was not proven to have done *nusyuz* to her husband at that time.

If in the study there is something interesting from this consideration, which is to give *iddah* maintenance to the Petitioner (wife) because it is not proven *nusyuz*. Meanwhile, the author argues that what the wife did was an act of *nusyuz* that occurred due to the irresponsible treatment of the Petitioner (husband). But in spite of all that, the judge's decision to grant *iddah* maintenance to the Respondent (ex-wife) has given a sense of justice and benefit to the Respondent even with different considerations.

According to Prof. Bagir Manan, there must be at least one of the four reasons if the Judge will set aside the law, namely considerations for the sake of justice, or considerations of benefits, or considerations of feasibility or propriety, or reasons to maintain balance.

The judge's authority to set aside articles (law) is part of the judge's freedom to decide the case, but it does not mean that the judge can arbitrarily use his authority or abuse his power or be motivated by partiality to one of the parties to the case. The authority of the judge to set aside articles or even decide cases contrary to the will of these articles which in the legal world is known as *Contara Legem*.

A Judge before reaching his decision not to apply or set aside the law, the judge must first devote all his power and effort to re-"read" the articles that will be set aside, including the method of interpretation, analog method (for civil), construction, law, or *method of argumentum a contrario*. So the decision of a judge who decides by not applying the law (article) must also be accompanied in the decision by finding the law because the judge is bound by the 'principle of deciding according to law'.

In the context of article 149 letter (b) Compilation of Islamic law specifically on women who file for divorce and it is decided by *talaq ba'in* that the woman does not get *iddah* maintenance, even though the reason for the divorce plaintiff in fact in court was revealed due to the actions of the husband who cheated with other women, of course, will be in question the location of justice and usefulness in this case.

D. CONCLUSION

Positive Law in practice is not sufficiently able to accommodate the legal facts revealed in the Court, in another narrative it can be said that positive law always lags behind social reality. So in the legal system in Indonesia, the judge's *ijtihad* to deviate and or find the law is accommodated by the principle of *Contra legem* in order to provide justice and benefits to the community seeking justice, the judge needs to do *contra legemin*.

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**Application Of Contra Legem In Judge Decisions
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Endang Ali Maksun, Suharto, Khairuddin, Zuhriani, Is Susanto

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