JUDGE LEGAL DISCOVERY OF *NAFKAH 'IDDAH* IN PETITION DIVORCE
(Case Study of Supreme Court Decision Number: 137/K/AG/2007)

Thesis

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STATEMENT OF THE AUNTENTICITY

In the name of Allah (SWT)

With Consciousness and responsibility towards the devolopment of science, the author declares that the thesis entitled:

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IN PETITION DIVORCE
(Case Study of Supreme Court Decision Number: 137/K/AG/2007)

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APPROVAL SHEET

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Author,

M. Refi Malikul Adil

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TRANSLITERATION GUIDANCE

A. Consonant

Arab	Latin	Arab	Latin
ا	A	ط	Th
ب	B	ظ	Zh
ت	T	ع	‘
ث	Ts	غ	Gh
ج	J	ف	F
ح	H	ق	Q
خ	Kh	ك	K
د	D	ل	L
ذ	Dz	م	M
ر	R	ن	N
ز	Z	و	W
س	S	ه	H
ش	Sy	ء	‘
ص	Sh	ي	Y
ض	Dl		

B. Vocal, long –pronounce and dipthong

Vocal f*athal* = A

Vocal *kasrah* = I

Vocal *Dhomah* = U

Long –Vocal (a)=	Â	e.g.	قال	become	Qâla
Long-vocal (i) =	Î	e.g.	قيل	become	Qîla
Long-vocal (u)=	Û	e.g.	دون	become	Dûna

Diphthong (aw) =	و	e.g.	قول	become	Qawlun
Diphthong (ay) =	ي	e.g.	خير	Become	Khayrun

C. Ta' marbûthah (**ة**)

Ta' marbûthah transliterated as "*t*" in the middle of word, but if *Ta' marbûthah* in the end of word, it transliterated as "h" e.g. الرسالةللمدرسة become *al-risalat li al-mudarrisah*, or in the standing among two word that in the form of *mudlaf* and *mudlaf ilayh*, it transliterated as *t* and connected to the next word, e.g. فىرحمةالله become *fi rahmatillâh*

D. Auxiliary Verb dan Lafdh al-Jalâlah

Auxiliary verb "al" (ال) written with lowercase form, except if it located it the first position, and "al" in lafadh jalâlah which located in the middle of two word or being or become *idhafah*, it remove from writing.

a. Al-Imâm al-Bukhâriy said …

b. Al-Bukhâriy in muqaddimah of his book said …

c. *Masyâ' Allâh kâna wa mâ lam yasya' lam yakun*.

TABLE OF CONTENT

M. Refi Malikul Adil. 13210189. *Penemuan Hukum Hakim Mengenai Nafkah 'iddah Dalam Cerai Gugat*. (Studi Kasus Putusan Kasasi Mahkamah Agung No. 137/K/AG/2007). Skripsi. Jurusan Al-Ahwal Al-Syakhsiyyah, Fakultas Syariah, Universitas Islam Negeri Maulana Malik Ibrahim Malang. Pembingmbing : Erik Sabti Rahmawati, M.A.

Kata kunci : Penemuan Hukum, *Nafkah ''iddah*, Hakim

Hakim dalam menerima, memeriksa dan memutus suatu perkara hakim menggunakan hukum tertulis sebagai basis dalam mengadili. Namun, tidak semua permasalahan dapat terakomodir dalam Undang-undang. Kadang kala permasalahan di masyarakat lebih cepat berkembang dibandingkan pembentukan perundang-undangan. Untuk mengantisipasi hal tersebut, maka hakim memiliki hak untuk melakukan penemuan hukum. Seperti dalam putusan kasasi Mahkamah Agung nomor: 137/K/AG/2007 yang memberikan hak *nafkah 'iddah*bagi istri yang mengajukan cerai gugat. Adanya hak untuk melakukan penemuan hukum merupakan upaya hakim dalam memenuhi rasa keadilan sebagai bagian dari tujuan hukum. Berdasarkan hal ini peneliti tertarik untuk melakukan penelitian dengan mengkaji dua persoalan, yaitu pertama mengenai tahapan pertimbangan hakim dalam melakukan penemuan hukum. kedua, metode penemuan hukum yang digunakan hakim dalam putusan kasasi nomor: 137/K/AG/2007.

Penelitian ini merupakan penelitian normatif dengan menjadikan putusan nomor: 137/K/AG/2007 sebagai objek kajian. Metode pengumpulan data dalam penelitian ini menggunakan metode kualitatif. Data yang digunakan ialah data sekunder yang terdiri dari tiga bahan hukum, yaitu bahan hukum primer, sekunder dan tersier.

Hasil dari penelitian ini ialah pertimbangan hakim dalam putusan nomor: 137/K/AG/2007 dilakukan dengan tiga tahapan, yaitu tahapan mengkonstatir, mengkualifikasi dan mengkonstituir. Pada tahapan konstatir, ditemukan bahwa Hakim Agung menetapkan peristiwa konkret berdasarkan hasil pemeriksaan peradilan dibawahnya. Pada tahapan kualifikasi, hakim melakukan penemuan hukum dengan memberikan hak *nafkah ''iddah*kepada istri. Dari segi hukum islam, pemberian *nafkah ''iddah*sejalan dengan pendapat imam Abu Hanifah. Pada tahapan konstituir, hakim memberikan jawaban hukum terhadap masalah yang diajukan kepadanya yaitu dengan mengabulkan dan memberikan *nafkah 'iddah*sebagaimana terdapat dalam amar putusan nomor: 137/K/AG/2007. Sedangkan metode penemuan hukum yang digunakan oleh hakim ialah metode argumentasi yang terdiri dari metode analogi dan penyempitan makna (*Rechtsvervijning*). Metode penyempitan makna digunakan oleh hakim dalam memaknai kata "perceraian" dalam pasal 41 huruf C undang-undang nomor 1 tahun 1974 tentang Perkawinan. Sedangkan metode analogi digunakan hakim dalam menganalogikan antara cerai talaq dengan cerai gugat dikarenakan diantara keduanya memeliki unsur yang sama.

ABSTRAC

M. Refi Malikul Adil. 13210189. *Judge Legal Discovery of Nafkah 'iddah in Petition Divorce* (Case study of Supreme Court Decision Number: 137/K/AG/2007). Thesis. Department of Al-Ahwal Al-Syakhsiyyah, Sharia Faculty, of State Islamic University, Maulana Malik Ibrahim Malang.. Supervisor : Erik Sabti Rahmawati, M.A.

Kay word : Legal Discovery, *Nafkah 'iddah*, judge

Judge, when they receiving, examining and deciding a case the judge uses the written law as a basis in the judgment. However, not all problems can be accommodated in the Act. Sometimes problems in society more rapidly than the formation of legislation. To anticipate this, the judge has the right to conduct legal discovery. As the Supreme Court ruling number: 137 / K / AG / 2007 which gives the right to a living waiting period for the wife who filed for divorce is final. Their right to conduct legal discovery is an effort to satisfy the justice of judges as part of a legal purpose. Based on this, researchers interested in conducting research to examine the two issues, the first of the stages of the consideration of judges in performing legal discovery. second, the method used legal discovery judge in cassation decision number: 137 / K / AG / 2007.

This research is a normative reseach that examines decision of judge number: 137 / K / AG / 2007, as an object of study. Methods of data collection in this study using qualitative methods. The data used is secondary data consisting of three legal materials, namely primary legal materials, secondary and tertiary. A Theory of legal discovery becomes a major theory in this study and used as analysis data to answer the formulation of problem.

The results of this study is that a consideration of the judge in making the decision number: 137 / K / AG / 2007, carried out in three stages, namely the stages konstatir, qualify and konstituir. In konstatir stage, it was found that the Justice establishes concrete events based on the results of judicial underneath. In the qualification stage, judges perform legal discovery by providing the right of nafkah iddah to his wife. In terms of Islamic law, the provision of nafkah iddah in line with the opinions imam of Abu Hanifah. In konstituir stage, judges provide legal answer to the problems proposed to him by granting and providing nafkah iddah as printed in the ruling number: 137 / K / AG / 2007. While the legal discovery methods used by the judges is a argumentation method that contains analogy method and narrowing of meaning (Rechtsvervijning). Meaning constriction method used by the judges in deriving the meaning of the word "divorce" in article 41 letter C Law No. 1 of 1974 on Marriage. While the analogy method used to make an analogy between talaq divorce and petition divorce because both have the same element.

ملخص البحث

محمد ريفى مالك العادل. 13210189. *اكتشاف الحكم القاضي عن نفقة العدة في طلاق المتنازع عليها.* (دراسة في قرار النقض للمحكمة العظيمة النمرة 2007/AG/K/137). بحث الجامعي، قسم الأحوال الشخصية، كلية الشريعة ، جامعة مولانا مالك إبراهيم الإسلامية الحكومية مالانج. المشرفة: أيرك سبتي رحم واتي الماجستير.

كلمة الرئيسية: اكتشاف الحكم، نفقة العدة، القاضي.

القاضي هو المرتجى الآخر لطالب العدل. قد استخدم القاضي حكما مكتوبا كالأساس في التحكيم عند قبول دعوى قضائية وتفتيشها وتقريرها. ولكن، ليس كل المسألة استيعابا في القانون. ومسألات المجتمع أسرع من استنباط القانون أحيانا. فللقاضي حق لاستنباط الأحكام في توقيعها. كمثل قرار النقض للمحكمة العظيمة النمرة 2007/AG/K/137 الذي فيه يعطى القاضي حق نفقة العدة للزوجة التى تستقدم الطالاق علي زوجها. فإنما هذا الاكتشاف لتطبيق مقاصد الشريعة.

وهدف هذا البحث لتعريف خطوات الاعتبار للقاضي في استنباط الأحكام. وتعلم هذه الخطوات بتحليل اعتبار القاضي في قرار النقض النمرة 2007/AG/K/137 إجمالا. وهكذا لتعريف المناهج التى يستخدمها القاضي في استنباط الأحكام.

هذا البحث هو بحث معياري الذي يجعل قرارا النمرة 2007/AG/K/137 كموضع الإطار. وتقنية استخراج البيانات في هذا البحث هي التقنية النوعية. وتنقسم البيانات في هذا البحث على ثلاثة أقسام فهي البيانات الأساسي والبيانات الفرعي والبيانات الزوائد. أما البيانات الأساسي فتتكون على القرار النمرة 2007/AG/K/137 والقانون المتعلق بالبحث. وأما البيانات الفرعي فتتكون على مادات الأحكام التي تبين البيانات الأساسي كالكتاب تحت الموضوع "Penemuan Hukum" للأستاذ الدكتور سودكنوا مرتوكسوموا.

ونتيجة هذا البحث هي أن اكتشاف القاضي في القرار نمرة 2007/AG/K/137 من خلال ثلاثة خطوات وهي التأكيد والتصفيات والتركيب. ومنهج اكتشاف الحكم الذي يستخدمه القاضي هو منهج الحجة التي تتكون على منهج القياس وتضيق المعانى.

CHAPTER I
INTRODUCTION

A. Background

'iddah is the phase of waiting obliged for woman after divorce with husband, if she wants to get married again. Globally, *''iddah* phase is a phase of waiting determined by *syariah* which should be passed by woman after divorce or the broken marriage in which during the *'iddah* phase a woman is not allowed to have another marriage.[1]

Besides causing the obligation of doing *'iddah* for a wife, a broken marriage due to a divorce can also cause the obligation of ex-husband to provide sustenance to the former wife when ex-wife is carrying out the *'iddah* period. Provision of livelihood by ex-husband to ex-wive who carries out the *'iddah* period then better known as a *nafkah 'iddah*.[2]

[1] Dahlan Idhamy, *Azas-azas Fiqih Munakahat Hukum Keluarga Islam*, (Surabaya: Al-iklas, 2002), 73.
[2] Sayyid Sabiq, *Fiqhus Sunnah*, terj. Asep Sobari, dkk, (Jakarta: Al-I'tishom, 2008), 513.

If it is viewed more deeply, giving *nafkah 'iddah* by ex-husband is needed by the former wife than before they are divorced. This is because there is a right of holding back for women that has been divorced according to syara'. In other words, an obligation to do *'iddah* for the wife, results a prohibition for her not to marry another man and is not allowed to do something like husband and wife with her ex-husband. Based on this, a livelihood is more needed for a woman who is undergoing *'iddah* period.[3]

However, not all ex-wives get a right of *nafkah 'iddah* after divorced. The fuqoha (the expert of fiqh) agree that a divorced woman by *talaq raj'i* entitled to make sustenance on *'iddah* period. Whereas for women who get talaq ba'in, it is still blurred because the scholars have different perception on it.

In Indonesia, the provision of *nafkah 'iddah* determined by the decision of a judge. In deciding a case, the judge used civil material law of Islam as the main basis to examine the case. Islamic civil material law contains rules that govern the private interest of a Muslim, mainly related to the Muslim family law.

Then, in the Act No. 48 of the year 2009 article 5 (1), it is also explained that the judges in performing their duties are required to discover, follow and understand the values of law in society. In accordance with the act, there are three aspects that must be done by the judge based upon his position, they are discovering, following and

[3] Andriana Maulananingrum, *Analisis Mazhab Hanafi Tentang Hak Nafkah Istri Dalam Iddah Talak Ba'in*, Skripsi. UIN Walisongo, 51

understanding the values of law existed in community. The word "discovering" in the article indicates that the obscure law still exist, so the judge needs to discovering the law, based on the values of society, which is then known as the law invention.

Law invention is a process of law-making by the subject of law invention in attempt to implement the common rule of law towards concrete circumstances.[4] In this process, the judge use the methods that are justified in jurisprudence. There are several law invention methods generally used by the judge, such as interpretation, argumentation and legal construction.

Law invention by the judge can be demonstrated in the decisions of cassation by the Supreme Court No. 137 / Ag / K / 2007. In this decision, the judge gives the husband an obligation to provide maintenance to his wife during the *'iddah* phase, in spite of the fact that the divorce is made by the wife's request through the petition of divorce.

Giving a living on the *'iddah* phase as the decision is such a law penetration that could be considered as a law invention. This is because, the provision of *nafkah 'iddah* giving in the positive law is only for a *talaq* divorced wife. Even if it is seen from the view of *fiqh*, the provision of *nafkah ''iddah* giving toward the divorced wife of *talaq ba'in* is still in controversy.

[4] Bambang Sutiyoso, *Metode Penemuan Hukum*, (Yogyakarta : UII Press, 2006). 50.

The provision of the husband's obligation to provide *nafkah 'iddah,* rendered by the judge, is based on the fact that the petition of divorce filed by the wife is not always seen as a *nusyuz*. Therefore, the judges make such a legal penetration by providing *nafkah 'iddah* in the case of that petition of divorce.

Regulation in Indonesia, *nafkah ''iddah* is explicitly granted to the *talaq* divorced, in the case that the wife does not do any *nusyuz*. But what if it does in the reverse, in which the wife is filing the petition of divorce and causes the husband's *nusyuz*. Whether the wife still has right to get the *nafkah 'iddah*.

The decision of cassation No. 137 / K / AG / 2007 brings a new color in the development of law in Indonesia, especially the Islamic law. Then, the next year after the decision issued, the decision was stipulated by the Supreme Court as *Jurisprudence*. It is fascinating that by the enactment of the verdict as Jurisprudence is indirectly making the decision as a law resource for judges in deciding a case, particularly in the case of divorce. It is proven that after the enactment of the decision to be jurisprudence, it then becomes reference for the lower courts in deciding *nafkah ''iddah*of the divorce by petition, as stated in the decision of South Jakarta Court No. 1445 / Pdt. G / 2010 / PA. JS and Religious Court of Pati No. 1925 / Pdt. G / 2010 / PA. Pt.

It then becomes interesting study to be investigated, especially in the aspect of law invention methods. Therefore, it is necessary to study in

advance about the methods of law invention made by the judge in the decision No. 137 / AG / K / 2007.

B. Statement of Problems

1. How did judges conduct the steps of consideration of deciding cassation verdict number: 137/K/AG/2007?
2. How was the method applied in discovering a law conducted by Supreme Court Judges in cassation verdict number: 137/K/AG/2007?

C. Objective of Research

From the formulation of the problem used above, this research aims:

1. To describe the steps of consideration used by a judge in deciding cassation verdict number: 137/K/AG/2007.
2. To know the method applied in discovering a law conducted by Supreme Court in cassation verdict number: 137/K/AG/2007.

D. Significance of Research

This study is beneficial to conduct in both practical and theoretical. As for the benefits that can be drawn is:

1. The Theoretical Benefit

The theoretic, this study is highly beneficial to contribute on finding the method of discovering a law which is conducted by a judge as an answer for fulfilling justice toward social problem that tends to be dynamic especially in petition divorce cases.

2. The Practical Benefit

Practically, this study is expectedly enlarging the view of Islamic law knowledge and perspectives for especially, the law academicians and large society related to a legal discovery which is conducted by judges. Furthermore, this study is a hope for law enforcer to be wise law enforcers and more responsible to spread justice for all societies.

E. Operational Definition

These are the definition of keyword of the study:

1. Legal Discovery

   Legal discovery is a process of forming a law conducted by judges or another law enforces that is given a duty to apply the law toward any cases concretely.[5]

2. *Nafkah 'Iddah*

   Nafkah 'iddah is the basic necessary of life given by husband for the wife after divorce during *'iddah* phase .[6]

F. Research Method

This research is an attempt to seek knowledge that is conducted systematically, methodologically, and consistently. Through those series of process, the collected data will be processed and analysed. It is needed a research method to do that thing each is compatible with the discipline of knowledge. It is because each discipline of knowledge has its own research method.

[5] Sudikno Mortokusumo, *Penemuan Hukum*, (Yogyakarta : Liberty, 1998), 37.
[6] Sayyid Sabiq, *Fiqhus Sunnah*, terj. Asep Sobari, dkk, (Jakarta: Al-I'tishom, 2008), 526

Realizing how significant a research method is, so that this research will elaborate the method which is going to be used in order to gain maximum result. These are the methods used in this research:

1. Type of Research

   This research is categorized as a qualitative research which concerns on normative juridical research. What is meant by normative juridical research is a research that refers to a legal norm which is stated in law and court decision and norms that are used in the society.[7] Meanwhile, what is meant by qualitative research is the required data in this research do not need sample and population.

   The usage of normative method in this research because the object of the research is the cassation verdict of Supreme Court Judge number 137/K/AG/2007 about legal discovery. Therefore, this research does not need field collecting as the main data of the research.

2. Research Approach

   Research approach is a method or way to conduct the research.[8] This research uses three approaches; they are case approach, statute approach, and conceptual approach.

   The case will become the decision of the court which has the power of legal. The case approach is applying *ratio decidendi* and

[7] Zainudin Ali, *Metode Penelitian Hukum,* (Jakarta : Sinar Grafika, 2011), 105.
[8] Amirudin dan Zainal Asikin, *Pengantar Metode Penelitian Hukum*, (jakarta : Pt. Rajagrafindo Persada, 2006). 133

reasoning to observe the problem. *Ratio decidendi* is the consideration of the court in deciding the problem.[9]

Statute approach is also required in analysing the verdict as a central theme in this study. By understanding the ratio "legis" and ontological of the birth of these laws can assist researchers in seeing the interpretations of the judges in the verdict.[10]

The latter approach is a conceptual approach. The conceptual approach is an approach which is based on the views and doctrines that developed in the jurisprudence. By using this approach will give birth to the concept of law relevant to the issues faced.[11] In using a conceptual approach, this study will refer to the legal principles that can be found in the view of legal scholars.[12]

3. The source and type of data

Normative legal research is also called as the doctrinal legal research. In this kind of research, the law is often conceived as something that is only written in the law.[13] Because of that, the data sources used only secondary data that consists of primary, secondary and tertiary legal materials.

Primary legal materials are materials legally binding. In other words, the primary legal materials have an authoritative position. The

[9] Petter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta : kencana, 2010), 94.
[10] Petter Mahmud Mazuki, *Penelitian Hukum*,.. 94.
[11] Petter Mahmud Marzuki, *Penelitian Hukum*,.95.
[12] Ayah Octorina Susanti dan A'an Efendi, *Penelitian Hukum (Legal Research),* (Jakarta : Sinar Grafika, 2014), 115.
[13] Amirudin dan zainal asikin, *Pengantar Metode Penelitian Hukum*. 118.

materials of primary law consist of legislation, official records or proceeding in the legislation and the judge's decisions.[14] In this study, the primary legal material is the cassation verdict of the Supreme Court No. 137 / K / AG / 2007.

While the source of the secondary law in this study, is using books relating to sub discussion that describes the primary legal materials.[15] These are the secondary law materials used in this study:

1. Penemuan Hukum by Prof. Dr. Sudikno Mertokusumo, SH.
2. Penemuan hukum oleh hakim dalam prespektif hukum progresif by Ahmad Rifai, S.H. MH
3. Aspek-aspek pengubah hukum by Dr.H. Abdul Manan, S.H., S. IP, M. Hum
4. Metode-metode penemuan hukum by Bambang

The source of tertiary law in this study will be used when the primary and secondary legal materials are requiring additional information, such as a translation of dictionary of law.

4. Methods of data collection

In general, data collection in this research conducted by documentation. Documentation is a method of data collection and recording of files or documents that are related to the material being discussed.[16] Method of documentation is needed in this study

[14] Petter Mahmud Marzuki, *Penelitian Hukum*, 181.
[15] Zainudin Ali, *Metode Penelitian Hukum*, 54.
[16] Soerjono Soekanto, *Pengantar Penelitin Hukum*, (jakarta : Ui Pres, 1986), 66

considering this type of research is normative that is using secondary data only.

Documentation plays an important role in the collection of primary legal materials, such as legislation relating to this study. Besides, books, journals, magazines and so on which is relevance to the discussion will also be taken as the data by using a documentation tool.

Data collection of primary legal is done by copying Supreme Court's decision No. 137 / K / AG / 2007 as the object of study. In addition, laws and regulations relating to the research will be copied as well.

While collecting data of secondary law derived from books, journals and scientific papers discussing the method of the making of law by judges in answering the existing problems

G. Previous Studies

In doing research, previous study is an important element to avoid a duplication of research. In addition, it proof that the present study is different from the related previous study. The following are the related previous study:

First, a related study was conducted by Muhammad Fuad Hasan, who was a student of Syariah Faculty of State Islamic University of Maulana Malik Ibrahim Malang in 2012. The study is entitled "Penerapan Metode Penemuan Hukum Rechtsvinding Oleh Hakim Pengadilan Agama

Blitar Dalam Perkara Dispensasi Nikah". The issue brought up by the researcher is the procedure in making law and the methodological basis of making law done by judge Religious Court of Blitar. Besides, the focus of the study is marriage dispensation. The result of the study conducted by Muhammad Hasan is that the judge of religious court of Blitar follows three stages in making the law to decide marriage dispensation. Those stages are Constatir, Qualify, and constituir. In the other side, judge used the method of interpretation, law construction and Istislah in making law.

Based on the explanation above, it is found similarity and distinction between the present study and research conducted by Fuad Hasan. Both studies investigate the method of finding proper law done by judge. However, both have different focus, in which Fuad Hasan focused on marriage study, while the present study focuses on *nafkah 'iddah* in petition divorce.[17]

Second research has been done in 2013 by Faris Ahmad Jundi, who is a student of STAIN of Salatiga, entitled *Nafkah ''iddah Pada Cerai Gugat (Studi Putusan Pengadilan Agama Pati No. 1925/Pdt. G/ 2010/ PA. Pt)*. The research done by Faris Ahmad Jundi aimed to investigate about right of wife related to *nafkah ''iddah* which gotten by wife after filing divorce toward the husband based on *fiqih*, constitution and judge judgment regarding the decision. The result of the study is about the compliance of *Nafkah ''iddah* in No. 1925/Pdt. G/2010/PA. Pt decision,

[17] Fuad hasan, *"Penerapan Metode Penemuan Hukum Rechtsvinding Oleh Hakim Pengadilan Agama Blitar Dalam Perkara Dispensasi Nikah"*. Skripsi UIN Maulana Malik Ibrahim Malang Tahun 2012.

based on Imam Hanafi point of view, Cassation Decision No. 137/K/AG/2007 and five basis of judge judgment, which are justice, legal order, uphold the value of woman properly, existence of husband obligation to give *Nafkah 'iddah*, and the right of wife to get *Nafkah 'iddah*.[18]

Similarity and distinction are found in the present research and the study done by Faris Ahmad Jundi. The similarity is pointed on the discussion, in which both research discuss about *nafkah ''iddah* inside petition divorce. The distinction point is on the focus of the study, the research of Faris Ahmad only focus on fundamental law applied by Judge of Religious Court of Pati, while the present study focus on method of making law used by Chief Justice which explained inside the decision of No. 137/K/AG/2007.

Third research done by M. Ulil Azmi in 2015, who was student of Syarif Hidayatullah State Islamic University, entitled "Pemberian *Nafkah ''iddah* Dalam Cerai Gugat (Analisis Putusan Perkara No. 1445/ Pdt. G/ 2010/ PA. JS)". The research done by M. Ulil Azmi aimed to investigate the Islamic law point of view and positive law regarding the issue of *Nafkah 'iddah* in petition divorce based on South Jakarta Religious Court decision number 1445/Pdt. G/ 2010/PA. Js. M. Ulil Azmi found that issue of *nafkah 'iddah*, according to Islamic law is based on Ulama Hanafiah point of view. In addition, according to positive law, issue of *Nafkah*

[18] Faris Ahmad Jhundi, *"Pemberian Nafkah 'iddah Pada Cerai Gugat*. Skripsi STAIN Salatiga tahun 2013

'iddah in petition divorce is based on cassation decision of Supreme Court Number 137/AG/2007.[19]

By seeing it thoroughly, it seemed similar with the research done by Ahmad Jundi. the similarity is pointed in the focus of the study, in which both investigate about *Nafkah 'iddah* in petition divorce. in other hand, the different is on the subject of study, which M.Ulil Azmi examined about Islamic law basis and positive law regarding *nafkah 'iddah* in petition divorce which explain in the decision of South Jakarta Religious Court No. 1445/ Pdt. G/ 2010/ PA. JS, while this study focus on the method of making law used by the chief justice related to issue of *nafkah 'iddah* on petition divorce case through his decision No. 137/K/AG/2007, recently become jurisdiction.

no	RESEARCH TITTLE	WRITER	SIMILARITY POINT	DISTINCTION POINT
1	Penerapan Metode Penemuan Hukum Rechtsvinding Oleh Hakim Pengadilan Agama Blitar Dalam Perkara Dispensasi Nikah.	Muhammad Fuad Hasan	Similar in discussing the method of making law used by judge of religious court	The distinction point is on the objective of study, in which the research done by Fuad Hasan focus on the law making done by the judge related to marriage dispensation, while the present study focus on the cassation decision regarding the issue of *nafkah ''iddah*in

[19] M. Ulil Azmi, *"Pemberian Nafkah 'iddah Dalam Cerai Gugat*. Skripsi UIN Sarif Hidahyatullah Jakarta Tahun 2015

				petition divorce.
2	Pemberian *Nafkah 'iddah* Pada Cerai Gugat (Studi Putusan Pengadilan Agama Pati No. 1925/Pdt. G/ 2010/ PA. Pt)	Faris Ahmad Jundi	Both discuss about *nafkah 'iddah* in petition divorce case.	The distinction point is on the subject of study. The study, which conducted by Faris Ahmad discussed the issue of *nafkah 'iddah* in case of No. 1925/Pdt. G/2010/PA.Pt Religious Court of Pati, while this research discussed about the method of law making applied by the judge Cassation of Chief Justice No. 137/ K/AG/2007 case.
3	Pemberian *Nafkah 'iddah* Dalam Cerai Gugat (Analisis Putusan Perkara No. 1445/ Pdt. G/ 2010/ PA. JS)	M.Ulil Azmi	The similarity point of the present study compared to research conducted by M. Ulil Azmi is the discussion of *nafkah 'iddah* in petition divorce case.	The distinction point is on the discussion. Fundamentally, M. Ulil Azmi discuses about the issue of *nafkah 'iddah* in petition divorce case. In the other side, the present study investigates about the law making as the basis of judge in making decision regarding obligation of husband to compliance *nafkah ''iddah* to wife in petition case which explain on cassation decision No. 137/K/AG/2007.

H. Structure of Discussion

The systematics of discussion contains of five chapters, in which every chapters has its different sub-discussion. The following are the explanation related to sub discussion inside every chapter:

First chapter discusses about the introduction of the research. This chapter discusses about background of study, research problem, objectives of study, significant, definition of key terms, research method, previous studies, and the systematics of discussion.

In a connection, the background of study elaborates the fundamental issues as the basic reason of conducting the present study. Then, those fundamental issues are formulated into research problem as the key point of study, which should be answered. Beside fundamental issues and research problem, significances and objectives of study are explored in this chapter as the form of contribution toward the knowledge development. Furthermore, definition of key terms is the following discussion after the significance and objective of the study. The function of definition of key terms is to avoid any misunderstanding in transforming the elaboration between the intended message of researcher and the reader. In addition, the previous studies are included to avoid plagiarism in conducting research. Besides the explanation about definition of key terms, this chapter contains of research method, which elaborates about how the study conducted including the process of

determining type of data and data collection. The final explanation in this chapter is the systematics of discussion to portray the flow of research.

Chapter II discusses about the Literary Review. In this case, it elaborates about the main theories used as the material explained in detail, like the Theory of Making Law. In addition, literary review is one of important aspect in conducting the research, like the explanation related to *nafkah ''iddah*based on fiqih and constition, and related to the Supreme Court as one of the judiciary institution.

Furthermore, in Chapter II is about the finding and discussion related to Law Making done by judge in cassation case No. 137/ K/ AG/ 2007. This chapter is the main part of the research, since this chapter contains of toward material of law and the previous chapter. The analysis and result of study is elaborated descriptively using word.

Chapter IV is the final chapter in this study which discusses about the conclusion and suggestion. The conclusion is not written as the summary of whole discussion, but as the summary of the answer regarding the research problem.

CHAPTER II

NAFKAH 'IDDAH AND LEGAL DISCOVERY THEORY

A. *Nafkah 'Iddah*

'iddah is the phase of waiting obliged for woman after divorce with husband, if she wants to get married again. Epistemologically, *'iddah* is from the word *al 'Adad* (number) and *al Isha'* (count). *'iddah* is the phase and refusal of woman to get married again due to husband death or divorce.[20] Imam Abu Hanifah defined *'iddah* as a phase which determined by *syariah* with any rest marriage impact. In another word, *'iddah* phase is a phase of waiting which should be passed by woman after divorce or the broken marriage.[21] The broken bound of marriage can be resulted from

[20] Sayyid Sabiq, *Fiqhus Sunnah*, terj. Asep Sobari, dkk, (Jakarta: Al-I'tishom, 2008), 513.
[21] Wahbah Zuhaili, *Fiqih Islam Wa Adillatuhu*, terj. Abdul Hayyie al-Kattani, dkk, (Jakaerta : Gema Insani, 2011), 534

husband death or divorce. Based on the explanation above, it can be conclude that *ulama* defined *'iddah* as the name of waiting phase for woman who left by her husband due to death or divorce, and during the *'iddah* phase a woman is not allowed to have another marriage.

'iddah phase should be passed by every woman who separated with her husband due to divorce, *Khuluk*, *Fasakh* or death. However, if the wife separated with her husband due to either divorce or death, while the never doing intercourse (*Jima*') yet, so the wife is not obliged to pass *'iddah*.[22]

The united opinion of ulama regarding the inexistence of *'iddah* for divorced by her husband before *Dukhul*, is founded on Al Quran Surah *Al Azhab* article 49:

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓاْ إِذَا نَكَحۡتُمُ ٱلۡمُؤۡمِنَٰتِ ثُمَّ طَلَّقۡتُمُوهُنَّ مِن قَبۡلِ أَن تَمَسُّوهُنَّ فَمَا لَكُمۡ عَلَيۡهِنَّ مِنۡ عِدَّةٖ تَعۡتَدُّونَهَاۖ فَمَتِّعُوهُنَّ وَسَرِّحُوهُنَّ سَرَاحٗا جَمِيلٗا ٤٩ [23]

[22] Shalih bin Fauzan bin Abdullah Al fauzan, *Ringkasan Fikih Lengkap*, terj. Asmuni, (Jakarta: Darul Falah, 2005), 926.
[23] Q.s.Al Azhab :49.

The meaning: Oh you believe! When you marry believing woman, but then divorce them before you have touch them, there is no waiting period for you to observe in respect to them, and release them in grateful manner.[24]

Every divorce that occurs between husband and wife, except *talaq* cause of death, *'iddah* phase is exactly the same like *'iddah talaq*. In another word, divorce through *khulu', lian, fasakh* either caused by deformity or relationship bounded because two children suckle on the breast of one mother, so the *'iddah* phase is exactly the same with *'iddah talaq*[25].

The broken bound of marriage due to divorce brings impacts of law, like *nafkah 'iddah*. *Nafkah 'iddah* is the basic necessary of life given by husband for the wife after divorce during *'iddah* phase. The issue of *nafkah 'iddah* can be seen from *fiqih* and constitution point of view, as the following explanation.

1. *Nafkah 'iddah* from *fiqih* point of view

Fuqoha (expertise of *fiqih*) agree that woman who divorced through *talaq raj'i* have right to get basic necessary of life and house or another place to stay. It is because woman who is passing

[24] Departemen Agama RI, *Al Quran Tajwid dan Terjemahnya*, (Bandung : Jabal Raudhotul Jannah), 600.
[25] Muhammad Jawad Mughniyyah, *Al Fiqh 'Ala al Madzahib al-Khamsah*, terj. Masykur A.B, Afif Muhammad dan Iddrus al-Khaff, (Jakarta: PT. Lentera Baristama, 2001), 465.

'iddah phase in *talaq raj'i* is still considered as wife.[26] In other side, *ulama* have different opinion regarding the issue of woman who divorced through *talaq ba'in*.

Abu Hanifah argue that woman who divorced through *talaq ba'in* has right to get the basic necessary of life (*nafkah 'iddah*) and place to stay as well as woman who divorced through *talaq raj'i*. It is because woman who divorce through *talaq ba'in* should pass the '*iddah* phase in the husband house, which means wife still obliged to compliance the right of husband, so the must get the basic necessary of life.[27] The argument of Imam Abu Hanifah is founded by the Al Quran Surah *At Thalaq* article 6:

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنتُم مِّن وُجْدِكُمْ وَلَا تُضَآرُّوهُنَّ لِتُضَيِّقُواْ عَلَيْهِنَّ ۚ وَإِن كُنَّ أُوْلَـٰتِ حَمْلٍ فَأَنفِقُواْ عَلَيْهِنَّ حَتَّىٰ يَضَعْنَ حَمْلَهُنَّ ۚ فَإِنْ أَرْضَعْنَ لَكُمْ فَـَٔاتُوهُنَّ أُجُورَهُنَّ ۖ وَأْتَمِرُواْ بَيْنَكُم بِمَعْرُوفٍ ۖ وَإِن تَعَاسَرْتُمْ فَسَتُرْضِعُ لَهُۥٓ أُخْرَىٰ

[26] Wahbah Zuhaili, *Fiqih Islam Wa Adillatuhu*, terj. Abdul Hayyie al-Kattani, dkk, 562.
[27] Sayyid Sabiq, *Fiqhus Sunnah*, terj. Asep sobari, dkk, . 526

> The meaning: Allow them to reside where you reside, according to your means, and do not harass them in order to make things difficult for them. If they are pregnant spend on them until they give birth. And if they nurse your infant, give them their payment. And conduct your relation in amity. But if you disagree, the let another woman nurse him.[28]

M. Quraish Shihab through his translation of Al Misbah argued that the replacement of the word هُن *hunna/* them (women) in the word أَسۡكِنُوهُن *askinu hunna/* place them, is understood by the majority of ulama/mufti referring to all divorced women, whether they are possible to reunite, pregnant, or even in *ba'in* divorce.[29]

Besides, M. Quraish Shihab explained that there is a rejection of to word *them* in ba'in divorce by imam Ahmad Ibn Hambal, due to the fact that Fatimah Binti Qais is ba'in divorced by his husband. So then, the relatives of her husband banned her to come into the house or even getting expenses/ *nafkah.* Therefore, Fatimah ra came and told the Rasul, Muhammad, about this. Then, Rasul explain her that house and expense/ *nafkah* are only allowed for *thalaq raj'i/raj'i* divorce. However, this statement is then

[28] Departemen Agama RI, *Al Quran Tajwid dan Terjemahnya*, (Bandung : Jabal Raudhotul Jannah), 817

[29] M. Quraish Shihab, *Tafsir Al Mishbah: Pesan, Kesan dan Keserasian Al Quran*, (Jakarta: Lentera, 2002), 301.

rejected by some ulama, even *Sayyidina* Umar rejected it by saying:

> "*We are not leaving kitabullah and sunnah of our prophet to accept the utterance of a woman, that could possibly forget or misunderstood*"[30]

In spite of referring to the generality of surah *At Thalaq* verse 6, Mazhab Hanafi/ Hanafi paradigm also argued that *nafkah* of divorced wife and wife in *''iddah* period is more prioritized rather than before the divorce happen because of the right preventing the divorced women to get *nafkah*/expense due to syara' law. In the other word, the obligation of wife to conduct *'iddah* had prevented her to marry other men or doing sexual activity with her ex-husband, therefore, *nafkah* is more needed by divorce women in *'iddah* period. *Nafkah* that is given to divorce women implicitly indicates that the divorce is not caused by the women, or women's bad behaviour[31]

According to the mazhab/paradigm of Maliki and Syafi'i, ba'in divorced women still have their right to get living house, yet not allowed to get *nafkah* except if she was pregnant. The reason is because Aisyah ra. and Ibnul Musayyib rejected the statement of Fatimah Binti Qais ra. Ibnu Syihab stated that women that are ba'in divorced are not allowed to go out of her house but when the *'iddah*period is over. Besides, she does not have right to get

[30] M. Quraish Shihab, *Tafsir Al Mishbah: Pesan, Kesan dan Keserasian Al Quran*, 301.
[31] Andriana Maulananingrum, *Analisis Mazhab Hanafi Tentang Hak Nafkah Istri Dalam 'iddah Talak Ba'in*, Skripsi. UIN Walisongo, 51-52.

nafkah/ expense except when she is pregnant. However, if the divorced women are pregnant, they still have right to get *nafkah* in form of living house until they give birth.[32]

2. *Nafkah 'iddah* based on Regulation

In Indonesia, the giving of *nafkah 'iddah* after the divorce is regulated in the constitution No. 1 Year 1974 and Compilation of Islamic Law. In the constitution No. 1 Year 1974, the giving of *nafkah* toward wife after the divorce, are arranged in Article 41, Point C stated that some factors that can make a break marriage are; court can make the expense compulsory paid by the ex-husband, and/or giving an obligation for the ex-wife. This article aims to protect the right of divorced women so that they will not be suffering as she was notable to fulfill their need.[33]

The regulation of *nafkah ''iddah* in article 41 of Constitution number 1 year 1974 is related to the previous article, article 11, that gave a waiting time for divorce women. The waiting time is then described in Article 39 of Government Regulation No. 9 Year 1975, contain of imperative provision stating that the waiting time of widow as a result of divorce marriage is three times sterile from due date (*haid*) if they are in menstruation period, or about 90 days in average. Meanwhile, if women are divorced when

[32] Sayyid Sabiq, *Fiqhus Sunnah*, terj. Asep Sobari, dkk, 526
[33] Amiur Nuruddin dan Azhari Akmal Tarigan, *Hukum Perdata Islam di Indonesia Studi Kritis Perkembangan Hukum Islam dari Fikih, uu No. 1/1974 Sampai KHI*, (Jakarta: Kencana, 2015), 255.

she was pregnant, the waiting time for her is by the birth of the baby. Hence, there is no obligation for women if she never done any sexual activity with her ex-husband when she is divorced.[34] In addition, the period of when *'iddah* should start is determined by court decision that has constant power of law.

In spite of the regulation 41 in the constitution No. 1 Year 1974, the obligation of husband to fulfill the need of women is also stated in the Compilation of Islamic Law Article 149 stating that, if the marriage are split because of divorce, so the an ex-husband is obliged to:

a. Giving a worthy *mut'ah* to his ex-wife, either in the form of money or goods, except if the ex-wife is *qobla al dukhul*;
b. .Giving the ex wife *nafkah* along the period of '*'iddah*, except if the ex-wife had got nusyuz and *talaq ba'in* and also impregnant;
c. Paying off the outstanding dowry/mahar, and a half if *qobla al dukhul*;
d. Giving cost of hadhonah for their children under 21 years old.[35]

Besides, in the Compilation of Islamic Law Article 151 are stated that a wife that are doing '*'iddah* period should have kept themselves, not receiving marriage proposal or remarry other people. Therefore, it has been a logical consequence that husband are still obligated to fulfill the ex-wives need as long as her *'iddah* period.

[34] Peraturan Pemerintah No. 9 tahun 1975
[35] Kompilasi Hukum Islam

The obligation of husband to give *nafkah 'iddah* to his ex-wife should be done as long as the ex-wife are not committing *nusyuz*. As it has explained in the verse 152, stating: the ex-wife are obligated to get *nafkah 'iddah* from ex-husband except if she does *nusyuz*.[36]

The regulations about the obligation of husband to his ex-wife are made differently for governmental officer. It is regulated in the Governmental Regulation Number: 10 Year 1983 that has changed into Regulation Number: 45 Year 1990. Mentioned in Article 8:

(1). If the divorce happens because of the eagerness of the governmental officers, so then they are obligated to give half of their wages to ex-wife and their children;
(2). The division of the salary mentioned in point (1) is 1/3 for the Governmental Officers concerned, and 1/3 for their children;
(3). If the divorce couple do not have any children, half of the salary should be given to the ex wives by the Governmental Officers as husbands;
(4). The division of the salary is not given to the ex-wife if the divorce caused by: the wife who are cheating, doing criminal, doing psychological or physical oppression, drunk, gambling, leaving his husband for two years without permission or logical reason.
(5). If the provisions of going on their own will, then he is not entitled to the portion of the earnings of the former spouses;
(6). The regulation in point (5) is not applicable for wife who demand for divorce because of deviation done by her husband, for example, the husband wants to remarry other women, cheating, or doing physical or psychological oppression, drunk, gambling, and leaving his wife for two years without permission or logical reason;

[36] Kompilasi Hukum Islam

(7). If the former wife remarry other men, the ex-wife do not have right to get half of the salary.[37]

Due to the explanation above, it is clear that the Constitution Number. 1 Year 1974 and the Compilation of Islamic Law about marriage explain about *nafkah 'iddah* as the consequence of divorce claimed by husband. Meanwhile, if the divorce is claimed by the wife,, the is no clear regulation on the obligation of husband to give *nafkah* as long as the wife is in *'iddah* period. Besides, the giving of *nafkah 'iddah* is limited by the existence of *nusyuz* done by the wife.

However, divorce case for the civil servants OR Apparatus State Civil regulated differently in Governmental Regulation (PP) No. 45 of 1990 replacing PP No. 10 of 1983. In the PP, it can be concluded that the wife is entitled to get cost living from her ex-husband, whether it is the husband or the wife who claim the divorce. However, their right for Wife to get *nafkah* from the former husband is required that divorce is not because the deviation of wives, like drunk, cheating, gambler And Leaves husband for two year Without permission from husband and without logical reason. Then, *nafkah* should be given continuously until the Wife remarries other men.

B. Legal Discovery Theory

[37] Peraturan Pemerintah Nomor: 45 Tahun 1990 perubahan atas Peraturan Pemerintah Nomor: 10 Tahun 1983.

The discovery of the law has long been known in the field of law and has been practiced by the judges for a long time. The discovery of the law comes from the Dutch language that is *rechtsvinding*. Definition of legal discovery among law experts is different. Literally, it doesn't have an agreed definition but has approximately the same intention.

Sudikno Martokusumo provides a definition of legal discovery as a set of law-making process by the judge, or other law enforcement officer assigned to the application of common law on legal concrete events.[38]Based on this understanding, the legal discovery process is making concrete a general rule of law with a concrete event.

N N. E algra and Van Duyvendjk interpreted legal discovery as finding the law to a concrete incident, by a judges or lawyers that are given jurisdictional authority. Furthermore, it also stated that the discovery of the law as the judge's activities using a wide variety of interpretation techniques and how to decipher using a variety of reasons that are not contained in the rules of law regarding the matter submitted to them.[39]

Discovery of the law is not only defined as a process making concrete to an event that does not have a clear legal regulation or complete, but also on the application of the law to a concrete event which has a clear legal rules. According to Muhammad Busro

[38] Sudikno Martokusumo, *Penemuan Hukum*, (Yogyakarta: liberty, 2007), 37.
[39] N.E Elgra dan Van Duyvendijk, *Mula Hukum*,tej. Simorangkir, (Bandung : Bina cipta, 1983), 359.

Muqoddas who said that the discovery of the law made by the judge are of The discovery of the law is not only defined as a process of making concrete to an event that does not have a clear or complete legal regulation, but also on the application of the law to a concrete event which has a clear legal rules. According to Muhammad Busro Muqoddas there are two kinds of discovery of the law made by the judge; First, discovery of the law in terms of the application of a concrete event, for an event that has a clear rule. Second, legal discovery in the sense of the legal establishment, which for a concrete event does not provide a clear or complete rule to be applied.[40]

Based on the above explanation, it can be deduced that the discovery of the law is a law-making process by the subject or perpetrator discovery of the law in order to implement the general rule of law to concrete events. Then, Setiyoso Bambang added that the effort should be using methods that are justified in law/legal studies[41]

The methods of the invention of the law, which is already known to be divided into three kinds, namely the method of interpretation (interpretation), arguments (reasoning) and construction (construction law). As for the explanation as follows:

1. Interpretation Method

   Interpretation method is a method to interpret text of the unclear legislation, in order that legislation can be applied in

[40] Bambang sutiyoso, *Metode Penemuan Hukum*, (Yogyakarta : UII Press, 2006), 50.
[41] Bambang sutiyoso, *Metode Penemuan Hukum*, 50.

certain concrete events. The application of this method is then narrowed down into:

a. S*ubsumptif* Interpretation

Subsumptive method is the application of a text of legislation to the case of In Concreto with not entering the stage of more complicated use of reasoning and interpretation. Yet, it merely applies the syllogism. Syllogism is a form of logical thinking to draw conclusions from things that are general (major premise) and the things that are specific (minor premise or the event).[42]

b. Gramatikal Interpretation

Grammatical interpretation is to interpret the words of the legislation according to the rules of language and grammar rules of law. This grammatical interpretation is appropriate efforts to understand a text of legal.[43] Plato argued that the method of grammatical interpretation is an attempt to capture the meaning of a text / regulation based on the sounds of the words in legislation..[44]

To know the meaning of the provisions of law, the provisions of these laws are interpreted or explained by

[42] Bambang Sutiyoso, *Metode Penemuan Hukum Upaya Mewujudkan Hukum Yang Pasti dan Berkeadilan*, 109.
[43] Ahmad Rifai, *Penemuan Hukum Oleh Hakim Dalam Prespektif Hukum Positif*, h. 62.
[44] Bambang Sutiyoso, *Metode Penemuan Hukum Upaya Mewujudkan Hukum Yang Pasti dan Berkeadilan*, 109.

describing in common everyday language. In this case, the meaning of the provisions of law is interpreted by the use of everyday language .[45]

c. Systematic Interpretation (logical)

Systematic Interpretation is method to interpret the legislation by linking to legal regulations or with the entire justice system.[46] Each legislation is a reference to other regulatory legislation. By using this method, legal discovery is done by connecting the legislation with other legislation.

d. Historical Interpretation

Historical interpretation is to interpret the meaning of the law, according to the occurrence by studying the history, either the history of its law or the history of the legislation.[47]

e. Theological Interpretation / sociological

The interpretation made by the judge by look at the purpose of the legislators, so the goal was more concerned than the sound of his words.[48]

2. Argumentation Method

[45] Sudikno Martokusumo, *Penemuan Hukum*, 57.
[46] Bambang Sutiyoso, *Metode Penemuan Hukum*..,111.
[47] Bambang Sutiyoso, *Metode Penemuan Hukum*..,112.
[48] Bambang Sutiyoso, *Metode Penemuan Hukum*,111-117.

Arguments method is also called as a method of legal reasoning or *redenering*. Argumentation method is a method of legal discovery. In term of the rules, it exists but unclear to be applied in the event.[49] In addition, this method is used when there is an incomplete law, then the argumentation method is used to complete it.[50] There are several methods used in the method of argumentation, including:

a. Method of analogy (*Argumentum Per Analogiam*)

Method of Analogy is a method that expands the rule of legislation which scope is too narrow, so then it is applied the similar events/incidents to which regulated in the legislation.[51] Therefore, the judge is trying to find more general essence of incidents or law act, whether it has been regulated in the legislation or not .[52]

b. A *Contrario* Method

A contrario Method is a way to explain the meaning of legislation based on the reverse meaning of concrete events/incidents that is faced with the incidents regulated in legislation..[53]

c. *Rechtsvervijining* Method(Law Stricture)

[49] Sudikno Mertokusumo dan A. Pitlo, *Bab-bab Tentang Penemuan Hukum*,(Bandung: Pt. Citra Aditya Bakti,2013), 21.
[50] Bambang Sutiyoso, *Metode Penemuan Hukum*, 132.
[51] Bambang Sutiyoso, *Metode Penemuan Hukum*, 133.
[52] Ahmad Rifai, *Penemuan Hukum Oleh Hakim Dalam Prespektif Hukum Progresif*, 75.
[53] Bambang Sutiyoso, *Metode Penemuan Hukum*..,137.

Law Stricture Method is a translation of Dutch language *Rechtsvervijining*. *Fijn* means smooth, so than it mean the smoothing of law.[54] Sometimes, the scope of rules of legislation too wide, therefore, the meaning needs to be narrowed in order to be applicable in particular events/incidents.[55]

3. Exposition Method

Exposition Method is a way to explain words or derived meaning (law), it is not a way to explain goods. In the other word, it is a law construction as a tool to arrange law material systematically in a good language and terminology.[56] [35] Exposition method or law construction will be used by judges when they are facing vacuum of law because the judges cannot refuse a lawsuit by making an excuse that there is no clear law or regulation Because, in principle the judge may not refuse a case on the pretext of law does not exist or there is no governing law. Therefore, it is really needed a law construction.

C. Supreme Court as Power of Justice Executor

One feature of democratic country is the existence of independent power of justice in its country. The understanding of free judicature of them is always tied to the theory of Lock and Montesquieu, saying the

[54] Sudikno Mertokusumo, *Penemuan Hukum*, 71.
[55] Bambang Sutiyoso, *Metode Penemuan Hukum*, 132-139.
[56] Sudikno Martokusumo, *Penemuan Hukum Sebagai Pengantar*,(Yogyakarta: Liberty, 1996), 69.

need of separation of power into three parts; the comprehension of independence is not far from the theory of John Lock and Montesquieu which stated that the it needs three powers in the government, they are legislative, executive, and judicative power. Montesquieu added that the existence of independent judicature power will guarantee the work of human's right in the society.

Independent power is one of the demands to be democratic country, as expressed in the Decision of MPR RI Number X/MPR/1998 about the principals of infrastructure reformation as Indonesia had passed a long history of juridical power before. It started from the involvement of executive until the independency is formed like today.[57]

executive interference in the Implementation of the judicial authorities to encourage the Assembly to urgently formulate the basics of independent judicial power to enforce justice. It is to uphold the law and justice for the implementation of state laws dignified.[58]

The establishment of the third amendment of Constitution 1945 is the beginning of the establishment of independent juridical power. Juridical power was firstly arrange in two articles and reformed into five articles.[59] One of those articles is arranging after the third amendment Constitution 1945, formulating that juridical power should be independent and there is no any involvement from the government. It is also stated in

[57] Muhammad Asrun, *Krisis Peradilan Mahkamah Agung di Bawah Soeharto*, (Jakarta : ELSM, 2004), 3.
[58] Rimdan, *Kekuasaan Kehakiman Pasca-Amandement Konstitusi*, (Jakarta : Kencana, 2013), 4.
[59] Anwar, *Teori dan Hukum Konstitusi*, (Malang : Setara Press, 2015), 252.

article 24 A verses 1 that juridical power is an independent power in conducting a justice as the implementation of law and justice establishment.[60]

After the third amendment Constitution 1945, juridical power in Indonesia is performed by Constitutional Court. This rule is arranged in Article 24 Verse (2) of UUD 1945 stating that juridical power is performed by a Constitutional Court and other judicature institution under their management in the scope of public, religious, military, clerical work's judicature by Constitutional Court.[61]

Referring to the duty and function of Constitutional Court based on UUD 1945 and UU No. 5 Year 2004 as the amendment of UU No. 14 Year 1985 about Supreme Court and another regulation, Supreme Courts have same duty. As for it duties is to justify and examine the rule under Constitution and toward Constitution, Administrative and admonitory function, and law consideration.

Supreme Court has an authority to justify a lawsuit of cassation request, reconsideration, and dispute of foreign ship expropriation. Those authority refer to UU No. 14 Year 1985 stating that Supreme Court have an authority to justify a lawsuit of cassation request and reconsideration, to justify all area of court and justice and also to justify the dispute of foreign ship expropriation.[62]

[60] Pasal 24 A ayat 1 Undang-undang Dasar 1945.
[61] Undang-undang Dasar 1945.
[62] UU No. 14 Tahun 1985, Pasal 33 ayat (2)

The authority of the Supreme Court in adjudicating a case in cassation level, despite it is based on article 24 A paragraphs 1 of the Constitution 1945, it is also based on Law Number 48 amendments to the Law No. 4 Year 2004 on Judicial Power. In addition, Article 11 paragraph (2) a mentioned that the Supreme Court in the position and capacity as the country's highest court can adjudicate on appeal that the verdict given by the court on the last level in all courts below the Supreme Court.[63] Based on the article, it can be concluded that the cases can be proposed to the Supreme Court in the cassation level is a case originated or derived from all courts under the Supreme Court.[64]

The authority of the Supreme Court as the court of cassation has several functions, including:

1. Correcting errors of subordinate judiciary

   The Supreme Court as the court of cassation is responsible for repairing and straightening any errors on the subordinate verdicts. In other words, the Supreme Court as the last and highest instance courts can correct and fix mistakes and errors contained in the decision of the subordinate courts.[65] Errors that occur generally associated with: errors with the process, mistakes concerning the facts and mistakes regarding the application of the law.

2. The Function is to avoid arbitrariness

[63] Undang-undang Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman.
[64] M. Yahya Harahap, *Kekuasaan Mahkamah Agung dan Peninjauan Kembali Perkara Perdata*, (Jakarta : Sinar Grafika, 2008), 230.
[65] M. Yahya Harahap, *Kekuasaan Mahkamah Agung dan Peninjauan Kembali Perkara Perdata*, 237.

In spite of having the function of correcting, the Supreme Court as a judicial appeal has a function for the prevention of such abuse to the community through a verdict that is stated by the judicial under the the Supreme Court.[66] Therefore, the Supreme Court can annul decisions that are stated by the court under the Supreme Court, if there is an element of arbitrariness that led it harmful to the society.

3. Resolving the controversy to eared standard principles of justice which is common, objective and uniform

   A court's decision is not only purely impartiality free from defects sided, but also must be free from controversy's defects ranging from aspects of partiality. So the decision that has been stated objectively becomes impartial and uniformity throughout Indonesia.[67]

4. Assist the availability of sources of law that has the case's law

   One of the functions of the judicial appeal is to provide the availability of sources of law that has and in the form of cases law. This is because the codification of the law is not always available or the available pattern requires interpretation. With such circumstances, the Supreme Court as the judicial in the level of cassation act as a provider of the decisions that have the quality of

[66] M. Yahya Harahap, *Kekuasaan Mahkamah Agung* .., 238
[67] M. Yahya Harahap, *Kekuasaan Mahkamah Agung* .., 238

Stare Decisis that can be used as the basis for settling disputes for the judiciary underneath.[68]

In conducting a correction against the decision issued by the court which he level is under the Supreme Court, the Supreme Court at first, do a cancellation (*neiteg*) of the decision given. Then after cancellation, then the Supreme Court as a judicial in the level of cassation corrected things in accordance with the legal values that contain the nature of justice in terms of law and morale.

D. Legal Reasoning

Considerans a judge's decision is a form of accountability to the public why the judge was taking a particular decision. "In order that a trial should be fair, if it is necessary, not only correct decision should Be Reached, but Also that it should be seen to be based on reason; and that can only be seen if the judge himself states his reasons ", said Sir Alfred Denning.[69] Articles both of the sources written and unwritten laws must be specified. In the face of a case, the judge considered knows all the law (*ius curia Novit*). So the matter of finding the law is a matter for the judge, and not a party to the litigant parties. Sources to find the law for judges is:[70] law, an unwritten law, the decision of the village, jurisprudence, and science. Legislation is a product of primary law in the legal system of the Civil Law issued by authorities in Indonesia. But it needs to be underlined

[68] M. Yahya Harahap, *Kekuasaan Mahkamah Agung* .., h239
[69]Sudikno Mertokusumo, *Sejarah Peradilan dan Perundang-undangannya sejak 1942*,(Jakarta : PT. Gunung Agung, 1973), 29.
[70] Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, (Yogyakarta: Liberty,1982), 161.

that according to the mandate of Law Number 48 Year 2009 on the judicial power of Article 5 Paragraph (1) "judges and constitutional judges shall explore, and understand the values of law and justice in the society."[71]

As described earlier, that the substantive law that is used in the Religious Court judges are still many who have not been realized in the form of law. Therefore, in terms of deciding cases, judges must always basing on the law applicable in a broad sense, which includes; Act as a positive law, in a manner of living in society, jurisprudence, as well as the opinion of the experts (legal doctrine).

It is intended that the judicial process there is no gap for the judge to reject the case on the grounds there is no law (*ius curia Novit*), meaning that the judge deemed to know the law, so that any problems posed to him, then he is obliged to find the law. He shall explore legal values that live in the community. He serves as a shaper of law and allowed him not only as the mouthpiece of the law (la bouche de la loi),[72] and glued to the positive law. The application of this principle in the court process is very important, because the judge as an organ of the court and the last resort, is considered to know and understand the law, so that, if the judge did not find any written law, he is required diligence and digging law.[73] Given Indonesia is a country of law and the legal system of the Roman (Roman

[71] Duwi Handoko, *Kekuasaan Kehakiman di Indonesia,* (Pekanbaru: Hawa dan Ahwa, 2015),.64.
[72]Taufiq Hamami, *Mengenal Lebih Dekat Kedudukan dan Eksistensi Peradilan Agama dalam Sistem Tata Hukum di Indonesia, (*Bandung: Alumni, 2003), 98.
[73]Mahsun Fuad, *Hukum Islam Indonesia dari Nalar Partisipatori Hingga Emansipatoris*,(Yogyakarta: LkiS, 2005), 257.

Law) as in terms Manan,[74] by following the role model of positivistic paradigm, then use the law as substantive law in deciding cases absolutely necessary. But in fact, to the environment of Religious Courts in Indonesia, many are adopting competency but substantive law in the form of legislation. Therefore, the use of jurisprudence in deciding the case can also be done by the judges.

However, in respect of the laws state Indonesia adopts Continental Europe, the use of this jurisprudence does not recognize the principle of the binding force of precedent, the judge is bound by the case law and must be followed, or the judge's decision before.[75] But the principles of the persuasive force of precedent, the judge may consider the previous judge's rulings in order to be used as guidelines to decide a case. In other words, the use of jurisprudence in proceedings especially to be taken into consideration not an absolute decision.[76] In this regard, according to Gani Abdullah, one strategy is a judge must have and are able to apply methods of legal discovery (*rechtssvinding* law). If there is a case at hand there is no law, he is required to create (*rechtsschepping*) new laws with *ijtihad* and taking legal precedent that live in the community (living law).[77]

Theoretically, the discovery of the law is "how to find the appropriate rules for certain legal event, by way of a systematic

[74]Abdul Manan, *Reformasi Hukum Islam*,(Jakarta: PT. Raja Grafindo Persada, 2006), 296.
[75]Bagir Manan, *Sistem Peradilan Berwibawa, Suatu Pencarian*, (Jakarta: Mahkamah Agung RI, 2004), 12.
[76]Helmy Ziaul Fuad, *Penerapan Putusan Mahkamah Konstitusi No: 46/PUU-VIII/2010 Oleh Hakim Prespektif Penemuan Hukum*. Thesis Pascasarjana Uin Malang Tahun 2016, 43.
[77]Abdul Gani Abdullah, *Penemuan Hukum* (*Rechtsvinding*), 36.

investigation to rule by connecting between one rule with other rules".[78] Therefore, the discovery of the law is actually a law-making process by the judge on the concrete legal events.[79] In view Bambang Sutiyoso legal discovery is a law-making process by the subjects or actors inventor of law in order to implement the common law rule on the incident by the rules or certain methods that can be justified by the science of law such as, interpretation, reasoning, exposition, etc..[80]

In regard judges as the inventor and manufacturer of the law, Bentham argued that "the law maker and law should be able to adopt laws and rulings to reflect justice for all individuals. By adhering to this principle, the resulting law should provide the greatest benefit and happiness for the people ".[81] He also confirmed that; "Legal and moral are two things that can not be separated. The law must be charged should be charged moral and moral law, moral remember it was one of the major joints of human life that is rooted in his will, the law of efficient and effective is that can give happiness as much as possible to the general public".[82]

There are three stages of court action that a judge should do in investigating and adjudicating a case:

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[78]N.E. Algra, dkk., *Kamus Istilah Hukum Fockema Andrea Belanda Indonesia*, diterjemahkan dalam Bahasa Indonesia oleh Saleh Adiwinata, dkk. Dari judul asli Rechtsgeleerd Handwoordenboek, (Bimacipta, Jakarta, 1983), 455.
[79]Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, (Yogyakarta: Liberty, 1998).Hlm.26.
[80]Dr. Bambang Sutiyosos, S.H., M.Hum, *Metode Penemuan Hukum,* cet ke-5 (Yogyakarta: UII Press, 2015).Hlm.50.
[81]Lili Rasjidi dan Ira Thania Rasjidi, *Pengantar Filsafat Hukum*, (Bandung: Mandar Maju, 1988).Hlm.37
[82]Abdul Manan, *Reformasi Hukum Islam.*Hlm.20-21

1. Constatir Stage

   At this stage, the judge tries to justify the existence of a proposed concrete event to him.[83] In this stage, judge doing constatir to justify the existence of an event that is submitted to him. To ensure that the necessary existence of evidence on the basis of evidence that justified by the law.[84]

2. Qualifying Stage

   At this stage, the judges qualify to assess the concrete events that are considered truly happened, including determining the law.[85] In this stage, judge determines the laws of the events that have been proven and are considered true.

   If the event is already proven and has laws that clearly and unequivocally, the application of the law will be easy. However, if the rules of the events that have been proven to have obscurity, or lack of sharpness, then this is the time judges perform legal discovery.[86]

3. Constituir Stage

[83] Fuad hasan, *"Penerapan Metode Penemuan Hukum Rechtsvinding Oleh Hakim Pengadilan Agama Blitar Dalam Perkara Dispensasi Nikah"*. Skripsi UIN Maulana Malik Ibrahim Malang Tahun 2012, 90

[84] Ahmad Rifai, *Penemuan Hukum Oleh Hakim Dalam Prespektif Hukum Progresif,* 55.

[85] Ahmad Rifai, *Penemuan Hukum Oleh Hakim Dalam Prespektif Hukum Progresif,* 55

[86] Fuad hasan, *"Penerapan Metode Penemuan Hukum Rechtsvinding Oleh Hakim Pengadilan Agama Blitar Dalam Perkara Dispensasi Nikah"*, 93.

This stage is the stage where the judge set a legal event that is submitted to him and gives justice to the litigants. In adjudicating a case, the judge must determine the legal in-concreto to a specific event, so that the judge's decision could become law.[87]

[87] Ahmad Rifai, *Penemuan Hukum Oleh Hakim Dalam Prespektif Hukum Positif*, h. 56.

CHAPTER III

JUDGMENT STAGES AND LEGAL METHOD

A. The Stages of Legal Reasoning on Decision Number: 137/K/Ag/2007

Court decision is genuinely judge's thought, since there must be judge's thinking in every decision. Especially in relation with the lawsuit procession brought to him. The reasons and considerations will be the basis for the judges in deciding any lawsuit.

Considering a judge's decision is a form of accountability to the public why the judge was taking a particular decision. "In order that a trial should be fair, if it is n necessary, not only correct decision should Be Reached, but Also that it should be seen to be based on reason; and that can only be seen if the judge himself states his reasons ", said Sir Alfred

Denning.[88] Articles both of the sources written and unwritten laws must be specified. In the face of a case, the judge considered knows all the law (ius curia Novit). So the matter of finding the law is a matter for the judge, and not a party to the litigant parties. Sources to find the law for judges is:[89] law, an unwritten law, the decision of the village, jurisprudence, and science. Legislation is a product of primary law in the legal system of the Civil Law issued by authorities in Indonesia. But it needs to be underlined that according to the mandate of Law Number 48 Year 2009 on the judicial power of Article 5 Paragraph (1) "judges and constitutional judges shall explore, and understand the values of law and justice in the society."[90]

In investigating any cases, a judge is required to establish the facts, qualify the case, and stipulate the decision.[91] Therefore, those three stages can be seen in every decision. The stages of judge's consideration is included in the decision No.137/K/AG/2007:

1. *Constatir*

Constatir is a stage, in which a judge justifies the truth of the cases brought to him. It is confirmed by verifying any evidences in the court session, using the valid evidences according to the law.[92] Those valid

[88]Sudikno Mertokusumo, *Sejarah Peradilan dan Perundang-undangannya sejak 1942*,(Jakarta : PT. Gunung Agung, 1973), 29
[89] Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, (Yogyakarta: Liberty,1982), 161.
[90] Duwi Handoko, *Kekuasaan Kehakiman di Indonesia*, (Pekanbaru: Hawa dan Ahwa, 2015), 64.
[91] Sudikno Martokusumo, *Hukum Acara Perdata Indonesi*, (Yogyakarta : Universitas Atma Jaya, 2014), 181.
[92] Ahmad Rifai, *Penemuan Hukum Oleh Hakim Dalam Prespektif Hukum Progresif*, (Jakarta : Sinar Grafika, 2011), 54-55.

evidences may be in the form of written evidences, witness' testimony, presupposition, admission, oath, local investigation and expert's testimony.[93]

In the decision of appeal no. 137/K/AG/2007, Supreme Court gets into concrete circumstances. Any of them is in the case of the plaintiff (wife) and the defendant(husband) area spouse married on November 20th1984 and registered in the Quotation of Marriage deed No: 324/25/XII/1984 at the local Office of Religious Affairs, South Bekasi sub district. By this marriage, the spouse was gifted three children. They are HH, who was born on November 13th 1986, M. HT, born on April 11th 1989 and HMK, on November 31st1996.

The marriage of the plaintiff (wife) and the defendant (husband), proven by the quotation of marriage deed no. 324/25/XII/1984 at the Office of Religious Affair Bekasi, is included into law fact. This law fact shows that there is relationship between the plaintiff and the defendant. In this case, it seems that the Supreme Judge is establishing the facts, starting from the relationship between the plaintiff and the defendant. It is in line with the opinion of Prof. Subekti, S.H, in his book "Law of civil procedure", saying that the law relationship between the plaintiff (wife) and the defendant (husband) is always able to be read in the initial judgment, considered as the lawsuit position..[94]

[93] Sudikno Martokusumo, *Hukum Acara Perdata*, 205-268.
[94] Subekti, *Hukum Acara Perdata*, 124

In 2001 the relationship between the plaintiff (wife) and the defendant (husband) was going to be inharmonious. The causal factors of disharmonious were:

a. The defendant (husband) and the plaintiff frequently got involved in quarrel and squabble, leading to the threat expressed by the defendant to the plaintiff;
b. The defendant (husband) said bad words in frequent during the quarrel. Moreover, he often threat the plaintiff using cold steel, that can be dangerous for the plaintiff and the children;
c. The defendant (husband) did not fulfill the plaintiff's life (wife) since 2 years before the petition of divorce was brought to the Religious Court, Bekasi.

Based on those facts, the plaintiff (wife) filed a petition to the Religious Court Bekasi, in order that it would be given the first *talak Khul'i* from the defendant to the plaintiff. Then, after passing through the court session in the Religious Court Bekasi, by the decision no. : 688/Pdt.G/2005/PA.Bks the suit brought by the plaintiff was acceded, by the command as the following:

1. Acceding the suit of the plaintiff (wife);
2. Asserting the (first) *talaqbain sughro* of the defendant (JBS) toward the plaintiff (MBHA);

3. Charging the plaintiff (wife) to pay the cost of suit for the amount of Rp172.000,- (one hundred seventy two thousand rupiah);

The acceding of the plaintiff's (wife) suit by the Religious Court Bekasi indirectly stated that the proposition brought by the plaintiff (wife) had been well proven. Sarwono, in his book of Law of Civil Procedure, stated that the acceded suit has passed through the verification process and turned out to be well proven (authentic) of the evidences brought by the plaintiff (wife).[95]

Upon the verdict of the Religious Court Bekasi no. 688/Pdt.G/2005/PA, then the defendant did the legal remedy to appeal. What be intended to be the legal remedy of appeal is the claim brought by one side of the lawsuit, in order that the verdict has been stipulated by the District Religious Court will be re-verified by the High Religious Court in Province level.[96] In this case, the defendant brought the appeal to the High Religious Court Bandung, in order that High Religious Court Bandung will revivify the lawsuit.

The legal basis of appeal is on the Act No. 50 of the year 2009 as the change of the Act No. 7 of the year 1989 about religion court, section 61 stated that for the stipulation and verdict of Religious Court can be appealed by the party in dispute, unless the law stipulates the otherwise.

[95] Sarwono, *Hukum Acara Perdata Teori dan Praktik*, (Jakarta : Sinar Grafika, 2011), 223
[96] Mardani, *Hukum Acara Perdata Peradlan Agama dan Mahakamah Syar'iyah*, (Jakarta : Sinar Grafika, 2009), 129

In the first appeal, the High Religious Court of Bandung, through its verdict no. 112/Pdt.G/2006/PTA.Bdg stipulated decision on November 28th2006, commanding : Stating that the claim of appeal of formal appellants accepted and rescinding the verdict of Religious Court Bekasi No. 688/Pdt.G/2005/PA.Bks by the date of Agustus 25th 2005. Then, by self-adjudicating: Stating that the suit of the plaintiff cannot be accepted/ *niet ontvankelijkverklaard* (NO), charging the plaintiff to pay the cost of suit in the first instance and judging the appellant to pay the cost of suit in the first appeal.

The unacceptable suit/ NO given by the High Religious Court of Bandung, indicates that the suit ground by the plaintiff or appellee had such a formal defect. M. Yahya Harahap, in his book Law of civil procedure, stated that there are several kinds of formal defects that may be found in any suit, they are:

a. The suit signed in the power of attorney does not fulfill the qualification as what has been stated in section 123 article (1) HIR;
b. The suit does not have any legal basis;
c. The suit is *error in persona* in the form of disqualification or *plurium litis consortium*;
d. The suit has defect, such as *obscur libel*, *ne bis in idem*or breaks the absolut or relative competences.[97]

[97] Yahya Harahap, *Hukum Acara Perdata*, (Jakarta :Sinar Grafika, 2013), 811.

Looking to the memory of cassation attached in the claim of appeal, it seems that the suit rejection/ NO by the High Religious Court of Bandung was caused by the *obscur libel* found in the suit. *Obscur libel* in the suit found through the difference of age of the plaintiff, denoted in the quotation of marriage deed and the resident identity card of the plaintiff. In addition, in the suit proposition of the plaintiff (wife), it is stated that the in harmonism in the marriage of the plaintiff (wife) and the defendant (husband) had been started in 2001, indicated by the un-fulfillment of life necessity by the defendant to the plaintiff as long two years until the suit was submitted. If it did, the suit should have been submitted in 2003, while in fact the suit is just filed in 2005 at the Religious Court Bekasi.

By the appeal decision of the High Religious Court of Bandung no. 112/Pdt.G/2006/PTA.Bdg, the plaintiff (wife) then did such a legal remedy by claiming the cassation to the Supreme Court. Upon the claiming, then the Supreme Court did the *constatir* toward the circumstances brought to them based on the verification done by the lower court. As for the concrete circumstances based on the lower court:

1. The plaitiff (wife)and the defendant (husband) are spouse;
2. The household relation between the plaintiff and the defendant cannot be maintained since the quarrel and dispute frequently occured, leading to the threat shown by the defendant (husband) toward the plaintiff (wife) using the cold steel,

saying the bad words in quarrel and the unfulfillment of life necessity to the wife along two years until the suit submitted.

Based on the above explanation, it is found that the *constatir* stage done by the Supreme Court in the decision of 137/K/AG/2007 did not pass the evidentiary phase, but was only leaned to the result of evidentiary process in the first instance and first appeal. In other word, the evidentiary process was not done in cassation level. The absence of evidentiary process in the Supreme Court is in line with Prof. R. Soebakti, stating that the stage of evidentiary is only conducted in the first and appeal level. Whereas, at the court of cassation, the object of the study is only in the application of law.[98] To sum up, it is concluded that in the decision of cassation no. 137/K/AG/2007, the stage of *constatir*is done by doing *nisbat* in the court of first and appeal level.

2. Qualifying

Qualifying is a stage after doing the *constatir*, in which the judge is qualifying the case on side red to be true, by using the law classification provided. At this stage, the judges qualify the events rated / think it has occurred to the classification of the existing law. In other word, in this stage, the judge is grouping and categorizing the concrete case due to the law classification.[99]

In the stage of qualification, it would be easy for the judges to apply the law if the concrete cases are clear and firm. If there is no clear

[98]R. Soebakti, *Hukum Acara Perdata*, 124.
[99]Fuad hasan, *Penerapan Metode Penemuan Hukum Rechtsvinding* .., 93.

and firm law related to the case, the judge is required to establish the law. However, in the level of court of cassation, it only has the duty to test (examine) the decision rendered by the lower court if it is appropriate to apply the law, based on the position of the lawsuit stipulated by the first and second level of court.[100]

Looking at the cassation verdict no.: 137/K/AG/2007, the supreme judge noticed that the reasons denoted in cassation memory as the rebuttal of the plaintiff/ petitioner on appeal to the verdict of the High Religious Court Bandung can be accepted. Due to that decision, the Supreme Court consider that High Religious Court Bandung has been wrong in applying the law.In this case, *judex facti*of High Religious Court Bandung has been mistaken in interpreting the age distinction of the petitioner on appeal and the year vagueness related to the respondent on appeal that did not fulfill the life necessity. Due to the facts, then the High Religious Court of Bandung considered this as the *obscur libel*. Whereas, in the process of evidentiery, there is no refuting on the marriage between the plaintiff and the defendant. Therefore, the marriage between them was considered to be valid occurrence and concluded to be concrete circumstance. Due to this consideration, the Supreme Court had a notion that the High Religious Court of Bandung had been wrong in applying the law. Therefore it must be cancelled by defending the verdict rendered by Religious Court Bekasi,

[100] R. Subekti, *Hukum Acara Perdata*, 160

considered to be right and appropriate decision. Therefore, this concrete circumstance can be qualified as the divorce petition.

The Supreme Court annulment toward the decision rendered by the High Religious Court Bandung is such a function of court of cassation as the corrector of the lower courts. In this case, the Supreme Court as the court of cassation has a responsible to correct and straight ten law opinion applied by the lower courts if there are mistakes. The mistakes usually corrected by Supreme Court are the mistakes in terms of process, the law facts, and the application.[101] In case of consideration to the decision of cassation no. 137/K/AG/2007, the Supreme Court has corrected the verdict rendered by the High Religious Court Bekasi in term of law application.

Beside nullifying the decision of High Religious Court Bandungby defending the decision of Religious Court Bekasi, that is considered to be right decision, in its consideration the Supreme Court also had a notion that the command of *judex facti*in the first instance was not complete. It is on the score of the concrete circumstance that has no law yet.

Looking at the first stage, the *konstatir* of *yudex facti*by Religious Court Bekasi, there was also other concrete cases. First, the judge considered that the divorce is not caused by the *nusyuz* of the plaintiff, who was the defendant's wife. Moreover, it was implicitly said that the causal factor of the divorce is the *nusyuz*of the defendant, who was the plaintiff's husband. The husband's *nusyuz* was seen from the unfulfillment

[101] M. Yahya Harahap, *Kekuasaan Mahkamah Agung Pemeriksaan...,*. 237

of life necessity to his wife. Then, for the next consideration, the judge considered that the result of the divorce, the plaintiff was required to do *'iddah*, that is aimed to *istabro'*. This *Istabro'* is in respect of the husband's importance. Looking at this fact, then the judge qualified the concrete case to the "*nafkah 'iddah*".

Nafkah ''iddah, that is qualified to the above concrete case, is based on the stipulation section 41 (c) Act No. 1 of the year 1974 and the section 149 (b) Compilation of Islamic Law. In the section 41 word (c), there is stated that the broken marriage caused by the court divorce may require the ex-husband to give the living cost and/ or determines the duty for the ex-wife.[102] Based on this stipulation, the judge may require the husband to fulfill the wife's life necessity after the divorce, whether it is denoted in the plea for damages of suit or may not be in the form of *ex-officio* right of a judge. However, if we try to deep analyse, the section does not clearly mention the classification of the broken marriage caused by divorce as the causal factor of the judge to require the husband to give the *nafkah 'iddah*. Whereas, in the Compilation of Islamic Law section 114, it is known that the broken marriage caused by the divorce may occure because of *talaq* or based on the divorce petition. In other word, the giving of *Nafkah 'iddah* based on the section 41 c of the Act no. 1 of the year 1974 is the judge's *ijtihad* in interpreting that section.

[102] Undang-undang Nomor 1 Tahun 1974 Tentang Perkawinan.

Beside the section 41 c of the Act No. 1 of the year 1974, in stipulating the *nafkah ''iddah*, the Supreme Court is also based on the section 149 of KHI (Compilation of Islamic Law). In this section, it is mentioned that the consequence of the broken marriage caused by the divorce, so the ex-husband is required to give , *mut'ah* to the wife, whether it is in the form of money or other needs. It is the exception if the ex-wife has not have any sexual intercourse yet, giving the *nafkah*, *maskan and kiswah* to the wife during the *''iddah* phase, paying the bride price in debt, and giving the *hadhonah* cost for the children who have not in the age of 21 years old yet.[103] Based on that section of 149 KHI, it is clearly stated that the requirement of giving *nafkah* to the wife during the *'iddah* phase is only classified to the *talaq* divorce. Therefore, the giving of *nafkah 'iddah* based on the section 149 KHI is a kind of *ijtihad* done by the judge in interpreting the section.

Taking a look from the fiqh view, the judge's *ijtihad* in considering the *nafkah ''iddah* giving in the stage of qualification, it tends to be included in *mazhab* Abu Hanifah. Imam Abu Hanifah noticed that the divorced wife, whether it is *raj'i* or *ba'in*, she has a right to get the *nafkah ''iddah*. This Abu Hanifah's notion is based on the generality of the verse 6 of *Ath- Thalaq*, said that:

[103] Kompilasi Hukum Islam.

أَسۡكِنُوهُنَّ مِنۡ حَيۡثُ سَكَنتُم مِّن وُجۡدِكُمۡ وَلَا تُضَآرُّوهُنَّ لِتُضَيِّقُواْ عَلَيۡهِنَّۚ وَإِن كُنَّ أُوْلَٰتِ حَمۡلٖ فَأَنفِقُواْ عَلَيۡهِنَّ حَتَّىٰ يَضَعۡنَ حَمۡلَهُنَّۚ فَإِنۡ أَرۡضَعۡنَ لَكُمۡ فَـَٔاتُوهُنَّ أُجُورَهُنَّۖ وَأۡتَمِرُواْ بَيۡنَكُم بِمَعۡرُوفٖۖ وَإِن تَعَاسَرۡتُمۡ فَسَتُرۡضِعُ لَهُۥٓ أُخۡرَىٰ ٦

The meaning: Allow them to reside where you reside, according to your means, and do not harass them in order to make things difficult for them. If they are pregnant spend on them until they give birth. And if they nurse your infant, give them their payment. And conduct your relation in amity. But if you disagree, the let another woman nurse him.[104]

Besides, M. Quraish Shihab explained that there is a rejection of to word *them* in ba'in divorce by imam Ahmad Ibn Hambal, due to the fact that Fatimah Binti Qais is ba'in divorced by his husband. So then, the relatives of her husband banned her to come into the house or even getting expenses/ *nafkah*. Therefore, Fatimah ra came and told the Rasul, Muhammad, about this. Then, Rasul explain her that house and expense/ *nafkah* are only allowed for *thalaq raj'i/raj'i* divorce. However, this

[104] Departemen Agama RI, *Al Quran Tajwid dan Terjemahnya*, 817

statement is then rejected by some ulama, even *Sayyidina* Umar rejected it by saying:

> "*We are not leaving kitabullah and sunnah of our prophet to accept the utterance of a woman, that could possibly forget or misunderstood*"[105]

In addition to relying on the generality of that verse, Hanafi's school opines that *nafkah* to a divorced wife or of experiencing *'iddah*period transcends prior to a divorce. This is because there is a right to resist against a divorced wife according to *syara'*. In other words, there is obligation for a wife to undertake *'iddah*cause her not to allow to marry another man and to have a sexual intercourse with her ex-husband. Thus, *nafkah* is more needed by a woman undertaking the *'iddah*period. This given *nafkah 'iddah*is required that the cause of a divorce does not come from the wife. It means that a divorce does not happen due to the wife's bad be heavier[106]

Based on the above explanations, it is found that a given *nafkah 'iddah*to one of the concrete incidents above which is based upon article 41 letters C, Act number 1 year 1974 on marriage number 149 of Islamic Laws Compilation is a developing law which is undertaken by the judge as a law invention. Moreover, it can be seen through *fiqh* points of view that there is consideration from the judge on a given *nafkah 'iddah* which is more tendentious to Syeikh Abu Hanifah's school.

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[105] M. Quraish Shihab, *Tafsir Al Mishbah: Pesan, Kesan dan Keserasian Al Quran*, 301.
[106] Andriana Maulananingrum, *Analisis Mazhab Hanafi Tentang Hak Nafkah Istri Dalam 'iddah Talak Ba'in*, 51-52.

3. *Constituir*

On this stage, the judge provides concrete clarified incidents with laws and involved parties with justice. The justice given by the judge through his considerations is the judge's persistence in completing the lawsuit. It is in the same manner as delivered by Sir Alferd Denning, a renowned English judge.[107]

The provision of law on this stage is carried out after going through the stage which is then qualified based on the prevailing law. On this stage the judge gives his legal answer to problems proposed to him. In a decision number 137/K/AG/2007 the panel judges hear the appeal of the applicant along with granting the appeal of the applicant and cancel the decision of the High Court of Religion Bandung number: 112/Pdt.G/2006/PTA.Bdg. The cancellation of the appeal number 112/Pdt.G/2006/PTA.Bdg by the Supreme Court is the result of the assessment saying that the High Court of Religion Bandung has misapplied the law. Therefore, the cancellation is taken over the appeal as a legal answer.

Furthermore, by hearing himself the Supreme Court grants the plaintiff's petition by dropping *talaq* 1 (one) *ba'in sughra*, the defendant (Jaharuddin bin H. Sapi'i) against the plaintiff (Muswanih binti H. Asmawi). The grant of the plaintiff's petition is a legal answer from the Supreme Court after asssessing that the Court of Religion Bekasi has

[107] Ahmad Rifai, *Penemuan Hukum Oleh Hakim Dalam Prespektif Hukum Progresif*, 56

rightly applied the law. In this case, the Supreme Court positions itself as a support for the decision of the Court of Religion Bekasi.

Then, on the consideration of the Supreme Court which assesses *amar judex facti* of the incomplete data of the Court of Religion Bekasi, then the Supreme Court judges the plaintiff by asking them to pay *nafkah 'iddah* to the defendant in the amount of 1,000,000.00. Besides, the plaintiff must provide living costs for their three children with a minimal amount of 500,000.00 per month, up to they are 21 years old.

A law made by the Supreme Court is one of the functions of the Supreme Court to provide available means of sources of law in the form of case law. This is because the codification of the law is not always available or the available research question requires interpretation. With such circumstances, the Supreme Court as the judicial in cassation level acted as a provider of the decisions that have the quality of *Stare Decisis* which can be used as the basis for settling disputes for the underneath judiciary.[108]

Based on the above explanation, it can be concluded that the decision of the Supreme Court on number 137 / K / AG / 2007 do three stages, namely stages *Constatir*, qualify and *Constituir* stages. However, in the stage of *Constatir*, the Supreme Court as a judicial in the cassation while investigating the concrete cases, they do not do the process of authentication. However, they directly take the concrete cases that have

[108] M. Yahya Harahap, *Kekuasaan Mahkamah Agung...*, 239

been considered correct in the first and second level of courts. Due to the second court of Religion court Bandung refuses the legal suit because there is a formal defect which was not on the main substance of the case, then the concrete cases taken in the result of the Religion court of Bekasi as the first courts. Moreover, at this stage of qualify, it can be seen that the Supreme Court committed a legal breakthrough by qualifying *nafkah ''iddah* in one of the concrete cases. And at this stage of Constituir, the judge gives legal answer, which is in order to grant the claim of the plaintiff and annul the decision of the High Court of Religion Bandung, punish the husband to provide a *nafkah 'iddah* for the wives and punish the husbands to provide basic needs of life for their three children until they reach adulthood (21 years old).

B. Method of Legal Discovery by the Supreme Court In Kasai Decision No. 137 / K / AG / 2007

Legal discovery is a series of law-making process undertaken by law subject to apply the general law toward the concrete events. [109] The process of legal making which is made by the subject of law is done by using existed methods in the science of law. In general, in the science of law, there are some legal making methods, including method of interpretation, method of argumentation and exposition methods.

[109] Bambang sutiyoso, *Metode Penemuan Hukum*, 50.

Method of interpretation is a legal making method that provides clear explanations of the law text so that the scope of the kaedah can be set to specific event. Based on this, the method of interpretation is a tool to find out the true meaning of the law.[110] Interpretation method has several methods, including substantive interpretation, grammatical interpretation, systematic interpretation (logic), historical interpretation, comparative interpretation and theological interpretation.

Then, another method is known as method of argumentation that is used as one of methods of legal making. The method of argumentation can be referred to the legal reasoning methods. This method is used if the legislation is not yet completed, so then the method of argumentation is used to complete it.[111] In the argumentation method, there are three methods in it, they are analogy method (*argumentum per analogiam*), A. *Contrario* method (*argumentum a contrario*) and methods of narrowing the law (*Rechtsvervijiningi*).

Subsequent legal making's method is a method of exposition. Exposition method is a method of law construction; it is a method to explain words or definition (law) and not to describe the item.[112] Method of exposition or law construction will be used by the judge at the time he was faced with a situation of legal vacuum or laws void. Based on the principle, the judge may not refuse the case to be resolved under the

[110] Sudikno Mertokusumo dan A. Pitlo, *Bab-bab Tentang Penemuan Hukum*, 13
[111] Bambang Sutiyoso, *Metode Penemuan Hukum* ...,132.
[112] Sudikno Mertokusumo, *Penemuan Hukum*, 73

pretext of law that does not exist or has not been set. Judges must keep digging and discovering the laws live and thrive in the community.[113]

However, those methods of legal making have no regulation that specifies the method of legal making that should be used by judges. In other words, judges are given the freedom to choose and use a variety of methods of legal making as needed.

It is seen within the verdict number: 137/K/AG/2007 that in doing law discovery, judges use the Argumentation method. The use of argumentation method as one of the methods to discover laws is seen during the judge's consideration in the rights of "*nafkah 'iddah*" for wives suiting for divorce in number: 137/K/AG/2007. In using argumentation method, the judges use several methods:

1. *Rechtsvervijning* Method (narrowing the law)

   rechtsvervijning method can be interpreted as a method of narrowing of meaning. Rechtsvervijning method or meaning constriction method is a method that aims to specify/ constrict abstract, passive, and general laws.[114] words, this method narrows down the meaning of abstract constitutions.

   Within the cassation decision number: 137/K/AG/2007 the judge was seen to be using this method in order to understand Article 41 subparagraph (C) of Law No. 1 of 1974 jo. Article 149

[113] Bambang Sutiyoso, *Metode Penemuan Huku. ..*, 143.
[114] Jazim Hamidi, *Hermeneutika Hukum*, 61

Compilation of Islamic Law. It is stated in Article 41 subparagraph (C) of Law No. 1 of 1974 that:

"*The Causes of Marriage's End due to divorce are:*

c. Court is allowed to oblige ex-husband to provide cost of living and/ or decide an obligation for his ex-wife".

The judge views the word "*Divorce*" as a general problem. This is due to the reason that the end of marriages in divorce could be in a form of *talaq* divorce and petition divorce, as explained in article 114 Compilation of Islamic Law that stated that the end of marriage may happen due to *talaq* or based on petition divorce. Therefore when the Supreme Court judge used article 41 subparagraph (C) of Law No. 1 of 1974 in giving obligation to husband to provide cost of living his wife during her '*iddah* time, while the wife is the one filing for divorce, the judge will narrow down the meaning of "*divorce*" within the article into "*petition divorce*".

The meaning constriction of the word "*divorce*" into "*petition divorce*" within the article implicates that the judge owns an authority because of his position in giving obligation to husband to provide his wife's cost of living during her '*iddah* time even though the right was not asked within the petition as the judge's *ex officio* rights. Therefore the husband is required to provide

‘*‘iddah*sustenance for his wife according to the cassation number: 137/K/AG/2007 is not an *ultra petitum*, but *ex officio* rights.

2. Analogy Method

Analogy method is a method in which the judge does a legal discovery in finding a more general essence in a legal event or acts, whether it is regulated by the law or not (there is no regulation related to the matter).[115] In accordance to this, the judge expands the legislations that have a narrow scope, and then it is applied to a similar event, similar to the one set within the regulation.

The Supreme Court judge within his decision number: 137/K/AG/2007, uses analogy method in making a legal breakthrough. It is visible during the judge's use of article149 subparagraph (b) Compilation of Islamic Law in his consideration. Article 149 sub paragraph (b) Compilation of Islamic Law is an article that explains about the consequence of marriage's end due to *talaq* divorce instead of petition divorce. Hence the Supreme Court judge analogizes petition divorce as *talaq* divorce.

Petition and *talaq* divorce are analogized because they share similarities, as the following judge's consideration:

> "*...,thus the Supreme Court believes that the cassation defendant must be punished for providing ‘‘iddahsustenance for cassation applicant, with the reason that the wife must undergo ‘‘iddahand the purpose of*

[115] Ahmad Rifa'i, *Penemuan Hukum Oleh Hakim Dalam Prespektif Hukum Progresif*, 75.

'iddahis for istibra', in which istibra' is related to husband's interest"

According to the judge's decision above, the analogy between *talaq* and petition divorce done by the judge is because they share similarities. Those similarities are *first*, the judge views the end of marriage due to divorce, either it is *talaq* or petition divorce, has the same impact towards wife, in which the wife is required to perform '*'iddah*. The similarities in performing '*'iddah*, whether it is due to *talaq* divorce or petition divorce, is also explained in *Al Fiqh 'Ala al Madzahib al-Khamsah* by Muhammad Jawad Mughniyyah. It is explained within the book that every divorce between husband and wife, except for *talaq* because of the husband's death, the *'iddah*is counted the same as *'iddahtalaq*. In other words, divorces through *khulu', lian, fasakh* either it is due to defect or being breast fed by the same person, the *ddah* will be counted the same as '*'iddahtalaq*.[116]

Second, the purpose of *'iddah*by the wife, whether it is due to *talaq* or petition divorce, is for *istibra'*. *Istibra'* is related to the husband's interest, thus the wife is not allowed to accept other people's proposal and is not allowed to get married before the end of her *'iddah*. Moreover Sayyida Sabiq explained that one of the benefits of *'iddah*is to ensure that the womb is empty in order to

[116] Muhammad Jawad Mughniyyah, *Al Fiqh 'Ala al Madzahib al-Khamsah*, 465.

avoid the mixture in posterity.[117] In conclusion, either it is done because of *talaq* or petition divorce, *'iddah*is done for the husband's importance.

Based on these similarities, the judge concluded to make analogies between the contested divorces with talaq divorce in Article 149 (b), which later became a judge consideration in providing a living *'iddah*to the wife who contested divorce.

Based on the above explanation, it can be concluded that from the three methods of finding the law which are interpretation, argumentation, and exposition method, the judge applies argumentation method. In applying the argumentation method, the judge uses two methods, which are meaning constriction method and analogy method. The use of meaning con

[117] Sayyid Sabiq, *Fiqhus Sunnah*, terj. Asep Sobari, dkk, 514

CHAPTER IV

CLOSING

A. Conclusion

1. The judge's consideration in cassation decision number: 137/K/AG/2007 is done in three steps, which are constatir, qualification, and constituir. The constatir step is where the judge verifies the affair submitted to the judge. The Supreme Court judge in his conclusion of a concrete affair, is only based on the conclusion provided by the Justice beneath him, which in this matter is Religion Court of bekasi and Hight Religion Court of Bandung, thus the Supreme Court acquires concrete affairs which are the relationship between litigant and defendant is husband and wife and it can be verified that their domestic relationship cannot be maintained any longer. The next step is qualifying, in which the judge qualifies a concrete affair with the existed laws. During this step, the Supreme Court judge

believes that High Religion Court of Bandung has applied the wrong amar cement. Therefore the Supreme Court withdraws Hight Religion Court of Bandung decision number: 112/Pdt.G/2006/PTA.Bdg by maintaining Religion Court Bekasi decision number: 688/Pdt.G/2005/PA.Bks. Furthermore, in this step the Supreme Court finds the law by giving the husband an obligation to provide cost of living for his wife during her *'iddah*as a form the judge's of *ex officio*. When viewed from *fikih*, providing cost of living during *'iddah*is more likely to be an idea of Abu Hanifah's *mazhab*. And Constituir stage, the judge provides an answer to the issues filed to him. The law's answer in decision number: 137/K/AG/2007 is granting the litigant's suit and withdrawing the decision of Hight Religion Court of Bandung. Next, providing *'iddah*cost of living for the wife and obliges the defendant to provide cost of living for his three children until they reach the age of 21.

2. Afterward, in finding the right law as mentioned in cassation decision number: 137/K/AG/2007, the Supreme Court judge uses argumentation method. Argumentation method is a reasoning method used by the judge when finding legislations that are not comprehensive enough. In using argumentation method, the Supreme Court judge uses constriction (*Rechtsvervijning*) and analogy method. Constriction method used by the judge in the meaning of the word "divorce" in article 41 letter C Law No. 1 of 1974 concerning marriage as the petition divorce. While the analogy

method used by judges in the analogies between talaq divorce in contested divorce between them due to own the same element.

B. Suggestion

1. To all the judges in court especially in religious court, are expected to perform their duties not only based on the provided laws by the Constitution, but they should also analyze and see the norms and beliefs among the society in order to achieve equality and fairness. This is due to the fact that the values among the society develop faster than the existing regulation.
2. Because of the importance of law finding method for Bachelor of law especially Islamic law, thus the researcher suggests that Syari'ah Faculty of UIN Maulana Malik Ibrahim Malang provides a course on law finding.
3. To those who seek for justice, have belief and faith of the legal processes in all the law enforcers, especially in all the judges. The reason, all enforcers, especially judges, handles every issue submitted to them professionally.

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APPENDIXES

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esis Tite	:LEGAL DISCOVERY OF *NAFKAH 'iddah* IN PETITION DIVORC(Case Study of Supreme Court Decision Number: 137/K/AG/2007)

o	Day/ Date	Subject of Consultation	Signature
	Friday, 18 November 2016	Proposal	
	Monday, 9 January 2017	Chapter I and II	
	Wednesday, 18 January 2017	Review of Chapter I and II	
	Tuesday, 24 January 2017	Chapter III and Chapter IV	
	Friday, 27 January 2017	Review of Chapter III and IV	
	Wednesday, 3 Februari 2017	Review of Chapter III and IV	
	Monday, 13 Februari 2017	Review of all Chapters	

Malang, 17th of Februari 2017
Acknowledge by:
o.b Dean
Head of Al-Ahwal Al-syakhshiyyah
Department

Dr. Sudirman, M.A
NIP 19770822200501 1 003

PUTUSAN

NOMOR: 137 K/AG/2007

BISMILLAHIRRAHMANIRRAHIM

DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA

MAHKAMAH AGUNG

memeriksa perkara perdata agama dalam tingkat kasasi telah memutuskan sebagai berikut dalam perkara:

MASWANIH binti H ASMAWI, bertempat tinggal di Jln. H Anwar Cikunir RT 01/01, Kelurahan Jakamulya, Kecamatan Bekasi Selatan, Kota Bekasi, Pemohon kasasi dahulu Penggugat/Terbanding;

melawan:

JAHRUDIN bin H SAPI'I, bertempat tinggal di Jln. H Anwar Cikunir RT 01/01, Kelurahan Jakamulya, Kecamatan Bekasi Selatan, Kota Bekasi, Termohon kasasi dahulu Tergugat/Pembanding;

Mahkamah Agung tersebut;

Membaca surat-surat yang bersangkutan;

Menimbang, bahwa dari surat-surat tersebut ternyata bahwa Pemohon kasasi dahulu sebagai Penggugat telah mengajukan cerai gugat terhadap Termohon kasasi dahulu sebagai Tergugat di depan persidangan Pengadilan Agama Bekasi pada pokoknya atas dalil-dalil:

Bahwa Penggugat dan Tergugat adalah suami-istri yang menikah pada tanggal 20 November 1984 dan tercatat di Kantor Urusan Agama Kecamatan Bekasi Selatan dengan kutipan Akta Nikah Nomor: 324/25/XII/1984;

Bahwa selama perkawinan telah dikaruniai anak 3 (tiga) orang, yaitu Helmi Nasyuyah, lahir tanggal 13 November 1986, M. Husni Thamrin, lahir tanggal April 1989 dan Handi Muamar Khadafi, lahir tanggal 31 November 1996;

Bahwa sejak tahun 2001 rumah tangga dirasakan adanya ketidakharmonisan, hal itu disebabkan:

Tergugat kurang lebih 2 (dua) tahun sampai gugatan ini diajukan tidak pernah memberikan nafkah kepada Penggugat;

Tergugat dengan Penggugat sering terjadi percekcokan dan pertengkaran yang berakhir dengan ancaman dari Tergugat;

Tergugat sering melontarkan kata-kata kotor dalam setiap pertengkaran, padahal Tergugat seorang guru yang seharusnya memberikan teladan kepada murid dan anak-anaknya;

Bila terjadi perselisihan Tergugat sering mengancam Penggugat dengan senjata tajam yang dapat membahayakan keselamatan Penggugat dan anak-anak Penggugat;

Bahwa Penggugat telah berusaha memperbaiki kondisi ekonomi rumah ngga dengan bekerja untuk membantu tambahan biaya hidup sambil menunggu nya pengertian dan perubahan sikap dari Tergugat, namun Tergugat malahan mburu dan mengancam teman kerja Penggugat;

Bahwa Penggugat telah berusaha memperbaiki keadaan rumah tangga ebut dengan jalan bermusyawarah dengan keluarga Tergugat, tapi tidak tanggapan;

Bahwa dengan kejadian tersebut rumah tangga Penggugat dengan Tergugat ah tidak dapat dibina dengan baik, karenanya sudah tidak dapat rtahankan lagi;

Bahwa berdasarkan hal-hal tersebut di atas, Penggugat mohon kepada gadilan Agama Bekasi agar memutuskan sebagai berikut:

Mengabulkan gugatan Penggugat;

Menyatakan jatuh talak (satu) khul'i dari Tergugat (Jahrudin bin H Sapi'i) terhadap diri Penggugat (Maswanih binti H Asmawi) dengan iwadl Rp10.000,- (sepuluh ribu rupiah);

Menetapkan biaya perkara sesuai dengan ketentuan yang berlaku;

Bilamana Pengadilan Agama Bekasi berpendapat lain mohon putusan g seadil-adilnya;

Bahwa terhadap gugatan tersebut Pengadilan Agama Bekasi telah jatuhkan putusan Nomor: 688/Pdt.G/2005/PA.Bks., tanggal 25 Agustus 2005 ertepatan dengan tanggal 20 Rajab 1426 H yang amarnya sebagai berikut:

Mengabulkan gugatan Penggugat;

2. Menyatakan jatuh talak 1 (satu) *bain sughra* Tergugat (Jahruddin bin H Sapi'i) terhadap Penggugat (Maswanih binti H Asmawi);

3. Membebankan kepada Penggugat unttak membayar biaya perkara ini sebesar Rp172.000,- (seratus tujuh puluh dua ribu rupiah);

Bahwa putusan tersebut dalam tingkat banding atas permohonan Tergugat telah dibatalkan oleh Pengadilan Tinggi Agama Bandung dengan putusannya Nomor: 112/Pdt.G/2006/PTA.Bdg, tanggal 28 November 2006 M bertepatan dengan tanggal 7 Dzulqaidah 1427 H yang amarnya sebagai berikut:

- Menyatakan permohonan banding Pembanding formal dapat diterima;
- Membatalkan putusan Pengadilan Agama Bekasi Nomor: 688/Pdt.G/2005/PA.Bks tanggal 25 Agustus 2005 M bertepatan dengan tanggal 20 Rajab 1426 H;

DAN DENGAN MENGADILI SENDIRI

1. Menyatakan gugatan Penggugat tidak dapat diterima/niet ontvankelijk verklaard (NO);
2. Membebankan kepada Penggugat untuk membayar biaya perkara pada tingkat pertama sebesar Rp172.000,- (seratus tujuh puluh dua ribu rupiah);
- Menghukum Pembanding untuk membayar biaya perkara pada tingkat banding sebesar Rp127.000,- (seratus dua puluh tujuh ribu rupiah);

Bahwa sesudah putusan terakhir ini diberitahukan kepada Penggugat/Terbanding pada tanggal 9 Januari 2007, kemudian terhadapnya oleh Penggugat/Terbanding diajukan permohonan kasasi secara lisan pada tanggal 15 Januari 2007 sebagaimana ternyata dari akta permohonan kasasi Nomor: 688/Pdt.G/2005/PA.Bks yang dibuat oleh Panitera Pengadilan Agama Bekasi, permohonan mana kemudian disusul oleh memori kasasi yang memuat alasan-alasannya yang diterima di Kepaniteraan Pengadilan Agama tersebut pada tanggal 17 Januari 2007;

Bahwa setelah itu kepada Tergugat/Pembanding pada tanggal 26 Januari 2007 telah diberitahukan tentang memori kasasi dari Penggugat/Terbanding, tidak diajukan jawaban;

Menimbang, bahwa permohonan kasasi *a quo* beserta alasan-alasannya yang telah diberitahukan kepada pihak lawan dengan saksama, diajukan dalam tenggang waktu dan dengan cara yang ditentukan undang-undang, maka oleh karena itu permohonan kasasi tersebut formil dapat diterima;

Menimbang, bahwa alasan-alasan yang diajukan oleh Pemohon kasasi/ Penggugat dalam memori kasasinya tersebut pada pokoknya adalah:

1. Bahwa putusan Pengadilan Tinggi Agama Bandung yang telah memberikan putusan NO karena perbedaan umur yang tertera dalam gugatan dengan umur yang ada di akta nikah, sementara pernikahan terjadi tahun 1984, di lain pihak waktu mengajukan perceraian tahun 2005 di dalam KTP umur Pemohon kasasi 34 tahun, jadi ada selisih 7 (tujuh) tahun;
2. Bahwa yang kedua adalah perbedaan penulisan tahun 2001, di mana pada saat Termohon kasasi tidak memberi nafkah kepada Pemohon kasasi kurang dari 2 (dua) tahun, sementara Pemohon kasasi mengajukan ˜gugat cerai tahun 2005, sehingga perlu Pemohon kasasi jelaskan bahwa pada saat pernikahan yang mengurus semuanya adalah Termohon kasasi, pihak keluarga Pemohon kasasi tidak tahu menahu;
3. Bahwa sebenarnya waktu dilakukan pernikahan umur Pemohon kasasi adalah 13 (tiga belas) tahun bukan 20(dua puluh) tahun seperti tertera dalam akta nikah, jadi bila gugatan cerai diajukan tahun 2005, maka yang benar umur Pemohon kasasi adalah 34 (tiga puluh empat) tahun dan itupun sesuai dengan KTP;
4. mengenai perbedaan tahun 2001, padahal seharusnya yang benar sejak tahun 2003 Termohon kasasi tidak memberi nafkah kepada Pemohon kasasi adalah kesalahan pengetikan;

Menimbang, bahwa atas alasan-alasan tersebut Mahkamah Agung berpendapat:

Mengenai alasan-atasan ke-1 sampai dengan ke-4:

Bahwa alasan-alasan tersebut dapat dibenarkan, karena *judex facti* Pengadilan Tinggi Agama Bandung telah salah dalam menerapkan hukum, di mana *judex facti* Pengadilan Tinggi Agama Bandung telah keliru menafsirkan tentang ketidakcocokan umur Pemohon kasasi yang ada dalam buku kutipan akta nikah dan ketidakjelasan tahun sewaktu Termohon kasasi tidak memberi nafkah, digolongkan pada gugatan *obscur libel*, padahal senyatanya benar dan tidak ada yang menyangkal ada perkawinan antara Pemohon kasasi dengan Termohon kasasi, selain itu tidak pula ada kekeliruan tentang orangnya, oleh **sebab itu putusan Pengadilan Tinggi Agama Bandung harus dibatalkan dengan mempertahankan putusan Pengadilan Agama Bekasi yang dianggap sudah tepat dan benar;**

Menimbang, bahwa namun demikian amar putusan *judex facti* tingkat pertama kurang lengkap, karenanya Mahkamah Agung akan menambahkan amarnya dengan pertimbangan sebagai berikut:

- Bahwa sesuai ketentuan Pasal 41 huruf (c) Undang-Undang Nomor: 1 Tahun 1974 jo. Pasal 149 huruf (b) Kompilasi Hukum Islam, meskipun gugatan diajukan oleh istri akan tetapi tidak terbukti istri telah berbuat *nusyuz*, maka Mahkamah Agung berpendapat Termohon kasasi harus dihukum untuk memberikan nafkah *iddah* kepada Pemohon kasasi, dengan alasan istri harus menjalani masa *iddah* dan tujuan dari *iddah* itu antara lain untuk *istibra'*, yang *istibra'* tersebut menyangkut kepentingan suami;
- Bahwa sesuai ketentuan Pasal 41 (b) Undang-Undang Nomor: 1 Tahun 1974 jo. Pasal 105 (c) dan 156 (d) Kompilasi Hukum Islam, maka Termohon kasasi dibebani untuk memberikan nafkah kepada ketiga orang anaknya masing-masing bernama Helmi Helmansyah, lahir tanggal 13 November 1986, M. Husni Thamrin, lahir tanggal 11 April 1989 dan Handi Muamar Khadafi, lahir tanggal 31 November 1996 minimal sebesar sebagaimana dalam amar putusan di bawah ini;
- Bahwa untuk memenuhi ketentuan 84 Undang-Undang Nomor: 7 Tahun 1989 sebagaimana telah diubah dan ditambah dengan Undang-Undang Nomor: 3 Tahun 2006, maka diperintahkan kepada Panitera Pengadilan Agama Bekasi untuk mengirimkan salinan putusan kepada Pegawai Pencatat Nikah sebagaimana dimaksud oleh pasal tersebut;

Menimbang, bahwa berdasarkan pertimbangan-pertimbangan tersebut di atas, maka Mahkamah Agung berpendapat telah terdapat cukup alasan untuk mengabulkan permohonan kasasi yang diajukan Pemohon kasasi, Maswanih binti H Asmawi tersebut, dan membatalkan putusan Pengadilan Tinggi Agama Bandung dan Mahkamah Agung akan mengadili sendiri perkara ini dengan mengambilalih pertimbangan putusan Pengadilan Agama Bekasi yang dianggap sudah tepat dan benar sebagai pertimbangan sendiri yang amarnya sebagaimana akan disebutkan di bawah ini;

Menimbang, bahwa oleh karena perkara ini mengenai sengketa di bidang perkawinan, sesuai dengan Pasal 89 ayat (1) Undang-Undang Nomor: 7 Tahun 1989 sebagaimana telah diubah dan ditambah dengan Undang-Undang Nomor: 3 Tahun 2006, maka biaya perkara dalam tingkat pertama dibebankan kepada Penggugat dan dalam tingkat banding kepada Pembanding serta dalam tingkat kasasi kepada Pemohon kasasi;

Memperhatikan pasal-pasal dari Undang-Undang Nomor: 4 Tahun 2004, Undang-Undang Nomor: 14 Tahun 1985 yang telah diubah dengan Undang-Undang Nomor: 5 Tahun 2004 dan Undang-Undang Nomor: 7 Tahun 1989 yang telah diubah dan ditambah dengan Undang-Undang Nomor: 3 Tahun 2006 serta segala peraturan perundang-undangan yang berlaku dan berkaitan dengan perkara ini;

MENGADILI:

Mengabulkan permohonan kasasi dari Pemohon kasasi, Maswanih binti H Asmawi tersebut;

Membatalkan putusan Pengadilan Tinggi Agama Bandung Nomor: 112/ Pdt.G/2006/PTA.Bdg, tanggal 28 November 2006 M bertepatan dengan tanggal 7 Dzulkaidah 1427 H;

MENGADILI SENDIRI

Mengabulkan gugatan Penggugat;

Menjatuhkan talak 1 (satu) *ba'in sughra* Tergugat (Jahrudin bin H Sapi'i) terhadap Penggugat (Maswanih binti H Asmawi);

Menghukum Tergugat untuk memberikan nafkah *iddah* kepada Penggugat sebesar Rp1.000.000,- (satu juta rupiah);

Menghukum Tergugat untuk memberikan nafkah kepada ketiga orang anaknya yang bernama Helmi Helmansyah, lahir tanggal 13 November 1986, M. Husni Thamrin, lahir tanggal 11 April 1989 dan Handi Muamar Khadafi, lahir tanggal 31 November 1996 minimal sebesar Rp500.000,- (lima ratus ribu rupiah) per bulan sejak putusan ini dijatuhkan sampai dengan ketiga orang anak tersebut dewasa (21 tahun);

Memerintahkan Panitera Pengadilan Agama Bekasi untuk mengirimkan salinan putusan ini kepada Pegawai Pencatat Nikah di wilayah tempat tinggal Penggugat dan Tergugat serta kepada Pegawai Pencatat Nikah di tempat perkawinan Penggugat dan Tergugat dilangsungkan untuk dicatat dalam daftar yang disediakan untuk itu;

Menghukum Penggugat untuk membayar biaya perkara dalam tingkat pertama sebesar Rp172.000,- (seratus tujuh puluh dua ribu rupiah);

Menghukum Pembanding untuk membayar biaya perkara dalam tingkat banding sebesar Rp127.000,- (seratus dua puluh tujuh ribu rupiah);

- Menghukum Pemohon kasasi/Penggugat untuk membayar biaya perkara dalam tingkat kasasi sebesar Rp500.000,- (lima ratus ribu rupiah);

Demikianlah diputuskan dalam rapat Permusyawaratan Mahkamah Agung pada hari Rabu, tanggal 19 September 2007 dengan Drs. H Andi Syamsu Alam, S.H., M.H., Hakim Agung yang ditunjuk oleh Ketua Mahkamah Agung sebagai Ketua Majelis, Drs. H Hamdan, S.H., M.H., dan Dr. Rifyal Ka'bah, M.A., hakim-hakim hgung sebagai Anggota dan diucapkan dalam sidang terbuka untuk umum pada hari Rabu, tanggal 6 Februari 2008 oleh Ketua Majelis dengan dihadiri oleh hakim-hakim hnggota tersebut yang dibantu oleh Drs. H Nurul Huda, S.H., panitera pengganti, dengan tidak dihadiri oleh para pihak.

APPENDIXES

CURICULUM VITAE

Personal Detail:

1. Name: M. Refi Malikul Adil
2. Brith Place : TanjungPinang, 15th of September 1995
3. Religion : Islam
4. Address : Jl. Polosari 1 Blok P1 No. 3 RT/ RW 007/007 Kel. Purwodadi, Kec. Blimbing Kota malang
5. Phone: 083833851323
6. Email : adilrefi@gmail.com

Formal Education

No	Graduate	Year
1.	SD 006 Ranai-Natuna	2001-2007
2	MTs. N 1 Kota Bengkulu	2007-2010
3	MAN 1 Yogyakarta	2010-2013
4	UIN Maulana Malik Ibrahim Malang	2013-2017