

Ijtihad Mubadalah of Judges on Women's Rights after Divorce and its Contribution to Family Law Reform in Indonesia

Sanusi,^{1*} Rifqi Qiwiylul Iman,² Reza Baihaki,³ Ibnu Farhan⁴

¹Pengadilan Agama Tanjungkarang; ²Pengadilan Agama Tais Bengkulu; ³Pengadilan Negeri Bayukumbuh Padang; ⁴Universitas Islam Negeri Syarif Hidayatullah Jakarta

Abstract: Women's rights in divorce cases are not regulated explicitly in the Compilation of Islamic Law. This, however, has an impact on the inequality that is adhered to in the principle of marriage law. The purpose of this article is how the ijtihad of judges regarding women's rights after divorce is contested and their contribution to family law reform in Indonesia. The method of analysis is carried out qualitatively, with a normative approach. Data analysis techniques use the theory of mubilah and mashlahat. The results of the study show that the consideration of the Panel of Judges ex officio punishing husbands for providing iddah and mut'ah maintenance, or other rights, departs from a new interpretation of the nusyuz concept which applies to both parties (men and women). Another consideration is based on Supreme Court Jurisprudence Number 137 K/AG/2007. The Panel of Judges is also based on the Supreme Court Circular Number 3 of 2017. Such a decision is a legal breakthrough. In the reading of mubilah, such a decision is in accordance with the principles of interdependence, especially in the concept of nusyuz. Such a decision is also in accordance with the principle of benefit. In the end, the renewal of Islamic family law in Indonesia is a necessity.

Keyword: Judges' Ijtihad, Mubadalah, Women's Rights, Law Reform

Abstrak: Hak perempuan dalam perkara cerai gugat tidak diatur secara *explicit* dalam Kompilasi Hukum Islam. Hal ini menimbulkan dampak ketidaksetaraan yang dianut dalam asas hukum perkawinan. Tujuan artikel ini adalah bagaimanakah ijtihad hakim tentang hak perempuan pasca cerai gugat dan kontribusinya terhadap pembaharuan hukum keluarga di Indonesia. Metode analisis dilakukan secara kualitatif, dengan pendekatan normatif. Teknik analisa data menggunakan teori mubadalah dan mashlahat. Hasil penelitian menunjukkan bahwa pertimbangan Majelis Hakim yang secara ex officio menghukum suami untuk memberikan nafkah iddah dan mut'ah, atau hak-hak lainnya berangkat dari tafsiran baru konsep nusyuz yang berlaku bagi kedua belah pihak (laki-laki dan perempuan). Pertimbangan lain adalah dengan mendasarkan pada Yurisprudensi Mahkamah Agung Nomor 137 K/AG/2007. Majelis Hakim juga berdasar kepada Surat Edaran Mahkamah Agung Nomor 3 Tahun 2017. Putusan demikian merupakan sebuah terobosan hukum. Dalam pembacaan mubadalah, putusan yang demikian itu telah sesuai dengan prinsip-prinsip ketersalingan khususnya dalam konsep nusyuz. Putusan demikian juga berkesesuaian dengan prinsip maslahat. Pada akhirnya pembaruan hukum keluarga Islam di Indonesia merupakan sebuah keniscayaan.

Kata Kunci: Ijtihad Hakim, Mubadalah, Hak Perempuan, Reformasi Hukum

Corresponding author: Sanusi (sanusiinlampung@gmail.com)

Article History: Received: March 15, 2023; Revised: June 01, 2023; Accepted: June 29, 2023

DOI: <https://doi.org/10.24042/smart.v3i1.16981>

Copyright © The Author(s). 2023 Open Access This is an open access article under the (CC BY-SA 4.0) license (<https://creativecommons.org/licenses/by-sa/4.0/>).

A. Introduction

Normatively, the rights of women after divorce (divorce) are determined in the Compilation of Islamic Law, precisely through Article 149 which states that if the marriage is broken up due to divorce, the former husband is obliged to provide decent mut'ah to the former wife, as well as provide maintenance, maskan and kiswah during the iddah (Undang-Undang, 1991) However, this provision is not found when the right to divorce is filed by the wife, in this case a complaint divorce (Rais, 2014).

The rights of maintenance (*iddah and muth'ah*) for women after divorce filed in a contested divorce are not explicitly regulated in the Compilation of Islamic Law. Based on the provisions of Article 156 of the Compilation of Islamic Law, the various consequences of divorce from a contested divorce only mention the custody of children (*hadhonah*). Meanwhile, various legal consequences related to the guarantee of rights for women are not regulated as the legislators determine the rights of women as a result of divorce. Furthermore, these provisions reflect the differentiation of rights for women after divorce, considering that the normative provisions only mention that nafkah (iddah and muta'ah) can be given to women who are divorced through their husbands (divorce), while in a divorce, the plaintiff (ex-wife) is not mutatis mutandis accompanied by a guarantee of nafkah rights as is the case in divorce.

Based on this, the concept of nafkah as a guarantee of rights for women should not be differentiated through the classification of divorce conceptualized through divorce and contested divorce, because if viewed from the aspect of the reasons for filing for divorce, both submitted from the husband and wife, they are relatively similar as outlined in the Explanation of Article 39 paragraph (2) of Law Number 1 Year 1974 concerning Marriage and the Compilation of Islamic Law. Thus, the provision of maintenance as a guarantee of rights for women who file for divorce should not be differentiated from that which occurs in divorce from the husband's initiative (*talak*).

This difference actually creates inequality (justice) which is precisely embraced in the legal principle of marriage as stated in Chapter 31. The article reflectively implies that from the beginning the legislator wanted marriage to be defined as a contract between one individual and another, namely men and women with equal positions. Thus, women can demand and obtain their rights as well as those desired by men in accordance with the principle of equality.

The provisions regarding iddah and mut'ah maintenance in a divorce filed by the wife (*cerai gugat*) can be assumed to be provisions that disturb women's sense of justice, especially from a gender perspective. This is because it creates differences in rights (for women). Thus, the parties, both the plaintiff and the defendant, have equal positions that face each other in defending their rights, so that in terms of civil procedural law, in divorce cases, they have fulfilled the requirements that allow the imposition of decisions containing condemnatory rulings (Yahya Harahap, 2001). Thus, various judges' decisions regarding divorce are usually ex officio also include various women's rights such as *iddah* rights and mut'ah rights, as is the case in divorce.

Related to this, several previous studies have been conducted that are considered relevant, including research by Yayuk Alfiyanah which reveals descriptively the

disparity in judges' decisions in determining women's rights after a divorce is caused by differences in understanding of the ex officio rights of judges and the position of several Supreme Court regulations that increasingly support women's rights, in this case the rights of women after a divorce is contested (Afiyanah, 2021) Another study by Abdurrahman Rahim concluded several things including the considerations underlying the judge's decision in dealing with the issue of the rights of women and children after divorce including juridical, philosophical, psychological and benefit considerations in order to protect the rights of women and children. (Rahim, 2021) Heri Irawan in his thesis in 2021 also examines the considerations and arguments of judges regarding the provision of maintenance in a case of contested divorce in one of the decisions in the South Jakarta Religious Court (Irawan Heri, 2021) Furthermore, research by (Putri & Izzuddin, 2022) argued that the judges of the Singaraja Religious Court in terms of determining maintenance can be through the request of the plaintiff and with the ex officio rights of the judge.

In addition, Hanik Harianti, Mansari and Rizkal in the Journal of Mediasas in 2021, judges at the Syar'iyah Court have tried to have a value of sensitivity to the protection of women after divorce, besides that the judge did not determine maintenance in the decision because he still used the basis of the Compilation of Islamic Law, and the wife did not know her rights and only asked for a divorce certificate (Harianti et al., 2021).

The research gap of this article lies in the *ijtihad* of judges through the *mubadalah* approach in fulfilling the rights of wives after a contested divorce and its contribution to family law reform in Indonesia. So that the novelty of this article is the *ijtihad mubadalah* of judges and legal reform in Indonesia. the focus of this article is what form of *ijtihad mubadalah* of judges in deciding a case of contested divorce that includes demands regarding iddah and mut'ah maintenance? How urgent and urgent is the need for more specific legal provisions governing women's rights in the case of contested divorce in legislation, especially in family law? What is the relevance of this research to family law reform in Indonesia?.

B. Research Methods

This article uses a qualitative method, which aims to reveal the *ijtihad* efforts of judges in fulfilling the rights of wives after divorce, this article also reveals its contribution to the reform of Islamic family law in Indonesia. article analysis uses a normative approach, namely analyzing the results of the decision of the Majelis Hakim related to the case. The primary data source in this article is the judge's decision, which is analyzed with the theory of *mubadalah* and *mashlahat*. This article seeks to find new theories or concepts as prescriptions in solving legal problems (research) in the case of women's rights after a divorce.

C. Discussion

Construction of Women's Rights in Divorce Cases

In contrast, in a complaint divorce, which is filed by a woman when applying for divorce in the Religious Court, the provisions on iddah maintenance and mut'ah are not formally contained in the articles. Neither the law nor the Compilation of Islamic Law regulates the existence of iddah or mut'ah maintenance, as well as other maintenance, such as maintenance in the past (*madhiyah*) and *maskan*. This is

despite the fact that the rules applied regarding the requirements for filing a lawsuit and the grounds for divorce for men and women are applied equally. Many decisions refused to grant the demand for *iddah* and *mut'ah* maintenance and other maintenance if it was the woman who filed for divorce, thus not fulfilling the sense of justice. Therefore, the Supreme Court issued Circular Letter No. 3/2018, which gives equal treatment between divorce and contested divorce in determining *iddah* and *mut'ah* maintenance. However, the circular letter was not immediately implemented as a reference for judges in determining *iddah* and *mut'ah* maintenance until now.

In an interview with a Supreme Court Judge Candidate (CHA) held by the Judicial Commission, he stated that he has never ruled on the provision of *iddah* and *mut'ah* alimony in a case of contested divorce because there is no statutory provision that determines the provision of *iddah* and *mut'ah* alimony (S. Yetti, personal communication, June 23, 2016).

Another reason is the prevalence in society of the tradition that if a woman files for divorce, it is still considered *nusyuz* (disobedience of a wife to her husband). The connotation of *nusyuz* as stipulated in the law only applies to women. Article 84 of the Compilation of Islamic Law states as follows: (1) The wife can be considered *nusyuz* if she does not want to carry out the obligations referred to in Article 83 paragraph 1 except with valid reasons; (2) As long as the wife is in *nusyuz*, the husband's obligations towards his wife as referred to in Article 80 paragraph 4 letters a and b do not apply except for matters in the interests of his children; (3) The husband's obligations referred to in paragraph 2 above apply again after the wife is not *nusyuz*; (4) Provisions regarding the presence or absence of *nusyuz* from the wife must be based on valid evidence.

For this reason, a woman who files for divorce and also demands *iddah* and *mut'ah* maintenance is rarely granted because she is considered *nusyuz*. Similarly, the influence of the Shafi'i madzhab, which is followed by the majority of the Indonesian population, has also been recognized.

There is also the opinion of Imdad (Judge of PA Magelang) that Article 149 specifically regulates the legal consequences of divorce due to divorce. Therefore, the judges' legal considerations that refer to Article 149 of the Compilation of Islamic Law are not appropriate if applied in the case of a contested divorce. This is because the article clearly states "if the marriage breaks up due to divorce, the husband is obliged to" in this case Article 149 of the Compilation of Islamic Law is specifically applied in divorce cases, not in cases of contested divorce (Heniyatun et al., 2020).

A divorce case is different from a divorce in which the verdict states that the husband's obligation to his wife to provide *iddah* and *mut'ah* maintenance and other maintenance can be included in the verdict as required by Supreme Court Regulation Number 1 of 2017. The regulation states that the husband's obligation to pay *iddah* and *mut'ah* maintenance as well as other maintenance is carried out before the pledge of divorce because the pledge of divorce is also the execution of the judge's decision, while in a contested divorce it will be difficult to include the husband's obligation and after the verdict is read out, it no longer affects whether it can be decided or not. When the verdict is read, the husband is obliged to pay his obligations to the wife from then on (Huis, 2015). This is the provision in a *gugat* divorce (divorce filed by a wife who also files a claim for *iddah* and *mut'ah*

maintenance which foramal has no provisions in the legislation or the Compilation of Islamic Law).

Decision on the Award of Iddah and Mut'ah in a Divorce Case

As previously described, iddah alimony and mut'ah are difficult to find in the decision of a contested divorce, even though there is a circular from the Supreme Court Number 3 of 2018, which is a legal umbrella that in a divorce suit still applies ex officio judges can include iddah alimony and mut'ah, but the author tries to try to analyze several decisions in a contested divorce in which the plaintiff (wife) is also granted iddah alimony and mut'ah, as well as other rights which will be discussed and analyzed in the next discussion:

Judgment Number 0076/Pdt.G/2017/PA. Mgl

The case was filed by a wife who sued her husband for divorce due to the existence of reasons as referred to in Article 19 of Government Regulation No. 9 of 1975 jo Article 116 of the Compilation of Islamic Law, therefore requesting that her marriage be divorced. In the process the wife was not found to have acted nusyuz as referred to in Article 84 of the Compilation of Islamic Law. Because the wife (plaintiff) was not proven to be nusyuz, the Court ex officio ordered the husband (defendant) to pay *iddah and mut'ah* maintenance. With the following considerations (IKAHI, 2018)

To determine that the wife (plaintiff) was not nusyuz, the court formulated the definition, purpose and limits of nusyuz, because in the legislation, nusyuz has not been clearly regulated, while Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power determines that the court is prohibited from refusing to examine, hear and decide a case submitted on the pretext that the law does not exist or is unclear, Therefore, the court conducted legal discovery (*rechtsvinding*) using the instrument of legal discovery theory guided by Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power which determines that judges are obliged to explore, follow and understand the legal values and sense of justice that live in society. As a result, the court was of the opinion that what is meant by Nusyuz is the non-compliance of one spouse with what should be obeyed within the framework of the rights and obligations of each spouse arising from the existence of the marriage bond and/or the turning of one spouse towards the other. Or more simply, it is the disobedience of a husband or wife to the rules that have been bound by the covenant that has been established because of the bond of marriage without a reason that is justified by Shara'.

Another consideration is based on the Jurisprudence of the Supreme Court Number 137 K/AG/2007, dated February 6, 2008 which has punished the husband (defendant) to pay iddah and mut'ah maintenance, because it is not proven that the wife (plaintiff) has committed nusyuz (disobedience of the wife to the husband), the decision canceled the Bandung Religious High Court Decision Number 112/Pdt.G/2006/PTA.Bdg dated November 28, 2006 and upheld the Bekasi Religious Court Decision Number 688/Pdt.G/2005/PA. Bks, dated August 25, 2005 by adding legal considerations and rulings that decide that wives who sue for divorce (*cerai gugat*) their husbands are not always punished for nusyuz, even though the divorce suit is filed by the wife but it is not proven that the wife is acting nusyuz, and ex officio the husband (defendant) can be punished to provide iddah

maintenance to his former wife on the grounds that the former wife must undergo an iddah period whose purpose is, among others, for istibra' (goodness) which concerns the interests of the husband. The Cassation Council's consideration is based on Article 41 letter (c) of Law Number 1 Year 1974 Jo. Article 149 (b) of the Compilation of Islamic Law.

Based on the aforementioned considerations, the Court ex officio orders the husband (Defendant) to pay iddah maintenance and mut'ah, the amount of which is adjusted to the ability and value of the husband (Defendant), based on Article 41 letter (c) of Law Number 1 of 1974 Jo. Article 149 letters (a) and (b) of the Compilation of Islamic Law.

And it should also be explained that when based on Article 149 letter (b) of the Compilation of Islamic Law which reads: "If the marriage is broken because of divorce, the former husband is obliged to: b. Provide nafkah, maskan and kiswah to the former wife during iddah, unless the former wife has been sentenced to divorce ba'in or nusyuz and is not pregnant". From the wording of the article, it is clear that the obligation of iddah alimony, maskan and kiswah applies to divorces filed by the husband (divorce talak), and does not apply if the wife is sentenced to divorce ba'in, where a contested divorce is a verdict in the form of divorce ba'in, However, it turns out that the Panel of Judges was not bound by the text of the article above, and attempted to provide a new interpretation of the text, so as to create an understanding that provides a breakthrough and fulfills a sense of justice, if the maintenance of *iddah* and *mut'ah* is imposed on the husband (defendant) who turns out that his wife (plaintiff) is not proven to have committed *nusyuz*.

Judgment Number 1629/Pdt.G/2022/PA.Tnk

This is a case in the Tanjungkarang Religious Court, filed by a wife (plaintiff) demanding that the court grant a divorce against her husband (defendant), because the defendant was considered negligent in providing mandatory family maintenance. The defendant also lacked attention to the plaintiff's and defendant's children, and the defendant's family often interfered in household matters. The plaintiff in her lawsuit did not include a claim for iddah maintenance or child maintenance, but in the process it turned out that the verdict ex officio ordered the husband (defendant) to provide iddah maintenance to the plaintiff and pay maintenance for the plaintiff and defendant's children. Whereas in terms of the divorce, it is a case of gugat divorce, namely a divorce filed by the wife (Plaintiff), and the divorce that was decided was divorce ba'in. If based on Article 149 letter (b) of the Compilation of Islamic Law, then the wife (Plaintiff) cannot obtain her rights to receive iddah maintenance, mut'ah or other maintenance.

With regard to the above description, the author presents the considerations of the Panel of Judges as follows:

"Considering that the case a quo is a case of a divorce suit filed by the Plaintiff (wife), which in essence if understood from the provisions of Article 149 of the Compilation of Islamic Law that only applies to divorce due to divorce (divorce filed by the husband), then the Panel can determine the rights of the wife that must be fulfilled or given by the husband who divorced his wife, as well as Article 178 paragraph (3) R.Bg Judges are prohibited from issuing decisions on something that is not requested;

Considering that looking at Article 10 paragraph (1) of Law Number 48 of 2009, concerning Judicial power that the Court is prohibited from refusing to examine, hear and decide a case submitted on the pretext that the law does not or does not regulate but is obliged to examine and hear it and in addition that the value of a Compiled Islamic Law decision is justice and expediency, therefore Judges are obliged to explore, follow and understand the values of law and justice that live in society (rechvinding)."(Putusan Nomor: 1629/Pdt.G, 2022)

From the considerations of the Tribunal mentioned above, it appears that indeed the rules of law do not clearly regulate the rights of women when filing for divorce (divorce gugat), but the Tribunal remains focused on efforts to fulfill the rights of wives in divorce by looking for the basics that are not contrary to the law and the laws prevailing in society, and the efforts made are by interpreting the provisions of Article 149 letter (b) with the provisions that apply to divorce talak (divorce filed by the husband).

In addition to the above considerations, the panel of judges also based on Supreme Court Circular Letter No. 3 of 2017, concerning Guidelines for Adjudicating Cases of Women Against the Law, ponit 3 of Supreme Court Circular Letter No. 3 of 2018 concerning the Results of the Plenary of the Religious Chamber, the wife is entitled to nafkah *madliaya*, nafkah *iddah*, *mut'ah*, and nafkah anak as long as there is no evidence of *nusyuz*. Thus, it is fairer if the defendant as a husband is more responsible for his wife and children.

Although the Supreme Court Circular Letter No. 3 of 2018 mentioned above, does not include the obligation of judges to follow it (because it is not part of the law), but the sound of the circular letter does not contradict the values that live in society, on the contrary, it provides an umbrella so that the circular letter can be a reference for judges in applying laws that have not been explicitly stipulated, and are discretionary (policy).

Judgment Number 688/Pdt.G/2005/PA.Bks

A similar decision to the previous one was the decision of the Bekasi Religious Court, which ordered the husband (defendant) to pay *iddah* maintenance and *mut'ah* to the wife (plaintiff). Although in her lawsuit the wife (plaintiff) did not demand *iddah* maintenance and *mut'ah* to the husband (defendant), when it reached the Appeal level at the Bandung Religious Court, the Bekasi Religious Court Decision was overturned regarding *iddah* maintenance to the wife (plaintiff). The consideration of the Appeal Level Panel was that if the wife filed a lawsuit, then she could not receive her rights to receive *iddah* maintenance, because the wife (plaintiff) was considered *nusyuz*. However, at the Cassation level, the decision of the Bandung Religious High Court was overturned, with Decision Number 137 K/AG/2007 on February 6, 2008. The cassation decision even added legal considerations and rulings that decided that wives who sued their husbands for divorce (*cerai gugat*) were not always punished as *nusyuz*.

Thus, the understanding of *nusyuz* itself is still multi-interpretation so that it needs to be explained in the legislation in this case the Compilation of Islamic Law. The Compilation of Islamic Law has so far given the provisions of *nusyuz* only to women, so that there are gaps or differences when women sue for divorce, in the event that it is actually the husband who is wrong and even neglects his wife.

Judge's Itihad in the Case of Women's Rights after Divorce

The three decisions above, it can be seen that the panel of judges tried to reconstruct the law using a legal analogy approach, although in their considerations they did not explicitly mention the role of analogy, but implicitly, the imposition of iddah maintenance in a contested divorce, which was included by the panel of judges, was indirectly a product of the analogy of the panel of judges who stated that the conditions of divorce that contained iddah maintenance could also be used in a contested divorce case, considering that both divorce and contested divorce have implications for the iddah period of the ex-wife for three times the holy period (Rahardjo, 2012).

Based on this, it can be said that the three decisions above have successfully departed from normative teachings and dared to give decisions that ex officio provide the right to maintenance of iddah and mut'ah in a contested divorce, even though there are no normative provisions governing them (Ali, 1996).

Perspective of Mubadalah Theory

In language, mubadalah comes from Arabic which means exchange, reciprocity, and interchangeability (Asnawi & Ismail, 2020) Terminologically, according to its initiators, mubadalah is an understanding and resistance movement against all forms of tyrannical, hegemonic, discriminatory, and tyrannical values and behaviors as well as a change in norms and perspectives on women's and men's relations that lead to the values of equality, solidarity, cooperation, equality and togetherness for a better, fairer, more peaceful and prosperous life (Siti Khoirotul Ula, 2021).

In the context of the relationship between women and men in the household, mubadalah is an Islamic principle regarding the interplay between men and women in carrying out their gender roles in the domestic and public spheres, based on equality between them, justice and benefit for both so that one does not hegemonize over the other, and or become victims of injustice from the other. Instead, mubadalah is the principle of mutual support, cooperation, and mutual assistance..

In practical terms, qira'ah mubadalah can be explained in the following two illustrative interpretations. First, a text that asks husbands to be kind to their wives can be taken to mean reciprocally, that wives are also asked to be kind to their husbands. Even if it is not mentioned literally in the text. Secondly, a text that asks the wife to thank the husband for the good favor she has received. Similarly, the meaning can be drawn; that the husband is also obliged to thank the wife for all the good favors he receives (Kodir, 2016).

Mubadalah also has the consequence that the condition of nusyuz does not only apply to women, but also to men. Because just like women, a man as a husband has the potential to act unjustly which even results in the collapse of the marriage building between the two. This is as stated in the consideration of the Panel of Judges in Decision Number 0076/Pdt.G/2017/PA. Mgl which provides a new interpretation of nusyuz. It is said that nusyuz is the disobedience of one of the spouses to what should be obeyed within the framework of the rights and obligations of each spouse arising from the existence of the marriage bond and/or the turning of one spouse towards another spouse. Or more simply, it is the disobedience of the husband or wife to the rules that have been bound by the agreement that has been established by the cause of the marriage bond without reasons justified by Shara (IKAHI, 2018).

In the context of the fulfillment of women's rights after divorce, mubadalah is implemented through the elimination of the distinction between divorce and contested divorce regarding the consequences on the rights of women as ex-wives. Thus, women's rights in the form of nafkah iddah, and mut'ah are not canceled solely because the divorce is filed by the woman. The assumption of a woman's nusyuz when she files for a contested divorce is certainly contrary to the concept of interdependence in this mubadalah theory. Men and women are assumed to have the power to file for divorce. The difference is that for the sake of women's legal protection, the divorce can only be decided by a judge. This can be found in the three decisions that the author has previously presented, namely Decision Number 0076/Pdt.G/2017/PA. Mgl, Decision Number 1629/Pdt.G/2022/PA.Tnk, and Decision Number: 688/Pdt.G/2005/PA.Bks. The three decisions tried to eliminate the distinction between divorces filed by women (cerai gugat) and divorces filed by husbands (cerai talak) related to their legal consequences on women's rights. Women who file for divorce are not penalized for nusyuz, because the opposite, namely men who divorce their wives, does not apply the same way.

Perspektif Maslahah

Etymologically, maslahah is the same as benefit, both in terms of memorization and meaning maslahah also means benefit or a job that contains benefits. (Majma' al-Lughah al 'Arabiyah, 1972) If it is said that trade is a benefit and studying is a benefit, then this means that trade and studying are causes of physical and mental benefits (Husain Hamid Hasan, 1971) In terminology, there are several definitions of maslahah put forward by scholars of usul fiqh, but all of these definitions contain the same essence. Imam Al-Ghazali, argued that in principle maslahah is taking benefits and rejecting misfortune in order to maintain the objectives of shara'. Al-Ghazali argued that maslahah is what there is no evidence for it from shara' in the form of a specific nash that invalidates it and no one pays attention to it (Abu Hamid Al-Ghazali, 1983).

For Al-Ghazali, the basic point used in determining a benefit is the will of the shara's purpose, while the purpose of the shara'a contains five principles that must be maintained, namely maintaining religion (*din*), soul (*nafs*), intellect ('*aql*), property (*maal*) and offspring (*nasl*). For someone who does an act of the five elements is called Maslahah. Judging from the importance of the quality of the benefit, the ushul fiqh experts divide it into three parts, namely: (Maymun & Meidina, 2023) Al-Mashlahah Ad-Dharuriyah, benefits related to the basic needs of the people in the world and the hereafter which are divided into five elements mentioned above. Al-Maslahah Al-Hajiyah, a benefit that is needed in perfecting, and Al-Maslahah At-Tahsiniyah maslahah is a complementary form of other benefits.

Basically, the formation of the law aims to bring about the benefit of mankind and to reject misfortune and eliminate difficulties. To rule on something that is not explained by Sharia, it is necessary to consider the benefits and harms. If the harm is greater, then it is prohibited by religion, or vice versa, if the benefits are greater, then that is the law that is interpreted by Sharia.

The rights of maintenance (iddah and muth'ah) for women after divorce, which are filed in a contested divorce, are not explicitly regulated in the Compilation of Islamic Law. Based on the provisions of Article 156 of the Compilation of Islamic

Law, the various divorce consequences of a contested divorce only mention various rights regarding custody of children (*hadhonah*).

The absence of regulation of maintenance rights for wives who file for a contested divorce has implications for the majority of court decisions which are considered not in favor of guaranteeing the rights of wives in contested divorce. This is because some court decisions actually do not include the provision of *ex officio* iddah and *mut'ah* maintenance rights to the defendant (former husband) in the ruling. As a result, to obtain various rights such as iddah maintenance and *mut'ah*, a wife must file a counterclaim to request their rights, however, it is not uncommon for them not to file a counterclaim due to the lack of knowledge of women about the guaranteed rights they must obtain. This, of course, contradicts the principle of benefit, which is one of the objectives of the Shari'ah itself.

In the three decisions mentioned above, *maslahat* (although not explicitly) is one of the aspects considered by the judge. This is because there is a legal loophole in the provision of wife's rights after a divorce. If based on Article 149 letter (b) of the Compilation of Islamic Law, only in divorce due to divorce (divorce filed by the husband) the wife can obtain her rights to receive iddah maintenance, *mut'ah* or other.

Another issue is the *ex officio* punishment of husbands to provide maintenance for their wives in cases of contested divorce. The rules of law do not clearly regulate the rights of women when filing for divorce (*cerai gugat*), but the Tribunal is still concerned with how to fulfill the rights of wives in divorce by looking for the basics that are not contrary to the law and the laws that apply in society, and the efforts made are by interpreting the provisions of Article 149 letter (b) by considering the *maslahat* aspect which indirectly avoids the existing disadvantages.

Relevance to Family Law Reform in Indonesia

An uncontested divorce is considered an act of defiance by the wife to break away from the marriage bond. So that there are some rights that are reduced or not given as their rights when divorced at the will of her husband. Whereas in reality, sometimes the occurrence of a contested divorce is motivated by problems that are not always caused by the wife. As in the case of infidelity from the husband and domestic neglect, or a husband whose whereabouts are unknown after more than 2 years (Fakhria, 2018).

This provision seems to disturb the sense of gender justice addressed to women, especially since Article 119 paragraph 2 KHI explicitly states that every divorce imposed by the Religious Court is a *ba'in* divorce. This is in contrast to the Egyptian and Syrian laws which stipulate that a divorce imposed by the court is a *raj'i* divorce. The existence of this provision on divorce *ba'in* causes many women to be sentenced to divorce *ba'in* and directly implicates the absence of maintenance for women in the iddah period, and this does not seem to provide justice for women (Maulida & Busyro, 2018).

The provisions as above, when viewed from the perspective of gender justice, are certainly unfair or one-sided where iddah maintenance is only given to the former wife if she is divorced *raj'i* in the sense that the husband imposes a divorce on the wife, while in a situation where the wife sues her husband for divorce and is decided by the court with the status of divorce *ba'in*, then the wife is not entitled to iddah support.

In the perspective of gender equality, men and women should be given a balanced and equal status and have the same rights to realize their human rights. Gender equality provides socially balanced/comparable opportunities for both men and women to enjoy their rights as human beings (Herien Puspitawati, 2012) In this case, if it is related to the provisions regarding iddah maintenance for divorced wives *ba`in* as stated in article 149 (b) KHI, it can be seen that there is inequality between men and women where when a woman files for divorce, she loses her right to receive iddah maintenance, even though it is clear that iddah maintenance is a right for women during their iddah period.

When viewed explicitly, there is an impression that KHI sets rules that are one-sided, especially considering that sometimes a woman or wife is a figure who has a double burden (performs a dual role) in the household. A double role is the existence of two or even more workloads that must be carried out by women. Women often have no other choice but to undergo this double role for the sake of their survival (Nur M. Kasim, 2012) So, according to the author, when she is divorced from her husband, and is in the iddah period, she should get maintenance during the iddah period. This is because of the many duties and responsibilities that she has carried out while building a household, and the rights that actually belong to her should be given by her ex-husband.

The problem is the difference in quantity obtained between women who divorce based on their own initiative and divorce based on the will of the husband (divorce *talak*). An uncontested divorce is considered an act of defiance by the wife to break away from the bonds of marriage. So that there are some rights that are reduced or not given as their rights when divorced at the will of their husband. In reality, sometimes the occurrence of a contested divorce is motivated by problems that are not always caused by the wife. As in the case of infidelity from the husband and domestic neglect, or *mafqud*, namely a husband whose whereabouts are unknown after more than 2 years.

The formal nature of dispute resolution in the Religious Courts requires defendants to include all claims regarding divorce, including financial rights, in the lawsuit. However, in reality, women are more focused on divorce claims without paying attention to the rights that should be obtained. What is expected is the wisdom of judges as case deciders who have *ex officio* rights to more wisely consider the rights and obligations that should be received by both parties. In addition, the *ijtihad* of judges to decide cases in court based on demands and evidence also determines the fate of women's rights, especially in terms of financial matters that are less considered by the plaintiff. So that judges, who are also one of the milestones of marriage law, should no longer use charismatic and rigid case decisions but rational and in accordance with reality. Post-divorce rights are an effort to empower the dignity of women. The authority to divorce, which was originally only owned by men, has begun to be interpreted as an equal right between husband and wife. Both have the same opportunity to end the marriage. However, post-divorce rights, especially financial rights for women, are still problematic due to the imbalance in the quantity of rights obtained when the wife divorces against her will or the will of her husband.

Islamic Family Law contained in the legislation also seems to need to be updated considering the current times. The provision of the Compilation of Islamic Law in

Article 149 (b) which states that iddah maintenance is given to the ex-wife during the iddah period except for the wife who is divorced ba`in or nusyuz, according to the author explicitly gives the impression that there is injustice or inequality of rights received between men and women, in this case between husband and wife. This rule seems discriminatory.

Islamic family law reform in Indonesia is a necessity. This is due to the demands of changing times, the development of science, the influence of economic globalization, the influence of reform in various fields of law, and also the influence of the renewal of Islamic thought which requires the door of ijthihad to always be open to find new laws on new issues in family law. The purpose of Islamic family law reform practiced in Indonesia is solely in order to welcome the challenges of modernity in the field of family law, because the established conventional understanding of various verses of the Quran, hadith and fiqh books is considered unable to answer the challenges of family law problems that arise in the modern era.

D. Conclusion

Some of the lawsuit divorce decisions, especially those that ex officio punish the husband (Defendant), to provide iddah and mut'ah maintenance, or other rights, are rare decisions and are a breakthrough for the legal vacuum that has been felt by justice seekers, who always feel their rights are neglected. In this case, the Panel of Judges explores, follows and understands the values of law and justice that live in society (rechvinding). The judge's consideration in providing women's rights in a case of divorce is a new interpretation of the concept of nusyuz that applies to both parties (men and women). Ex officio, the husband (Defendant) can be punished to provide iddah maintenance to his former wife on the grounds that the former wife must undergo an iddah period, the purpose of which is, among others, for istibra' (goodness) which concerns the interests of the husband. Legal provisions that more specifically regulate the rights of women in cases of contested divorce in legislation, especially in family law, are considered urgent. In the reading of mubadalah, such a decision is in accordance with the principles of inequality where the concept of nusyuz and its legal consequences apply not only to men but also to women. Thus, there is no longer a distinction between the process of divorce and contested divorce regarding its legal consequences. The verdict that punishes the former husband to provide women's rights after a contested divorce is also in accordance with the principle of maslahat. This is because in fact, whether in the case of a contested divorce or a divorce, a woman will bear the burden of the consequences of divorce. So that by giving her rights, it is the same as avoiding her from harm.

E. References

- Abu Hamid Al-Ghazali. (1983). *Al-Mustasfa fi 'Ilmi Al-Ushul*. Dar Al-Kutub Al-'Ilmiyah.
- Afiyanah, Y. (2021). *Argumen hukum dan aspek normatif dan sosiologis dalam perkara cerai gugat hubungannya dengan hak istri di Pengadilan dalam wilayah Pengadilan Tinggi Agama Banten* [Doctoral, UIN Sunan Gunung Djati Bandung]. <https://etheses.uinsgd.ac.id/48290/>

Putusan Nomor: 1629/Pdt.G, (2022).

Ali, A. (1996). *Menguak Tabir Hukum: (Suatu Kajian Filosofis dan Sosiologis)*. Chandra Pratama. <https://opac.perpusnas.go.id/DetailOpac.aspx?id=287617>

Asnawi, H. S., & Ismail, H. (2020). Discrimination against wife in the perspective of CEDAW and Islam Mubādalah. *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan*, 20(2), Article 2. <https://doi.org/10.18326/ijtihad.v20i2.253-268>

Fakhria, S. (2018). Cerai Gugat Dan Implikasinya Terhadap Hak-Hak Finansial Perempuan. *Legitima: Jurnal Hukum Keluarga Islam*, 1(1), Article 1. <https://doi.org/10.33367/legitima.v1i1.648>

Harianti, H., Mansari, M., & Rizkal, R. (2021). Sensitivitas Hakim Terhadap Perlindungan Hak Isteri Dalam Kasus Cerai Gugat (Analisis Putusan Mahkamah Syar'iyah Banda Aceh Nomor 157/Pdt.G/2020/Ms.Bna). *Jurnal MEDIASAS: Media Ilmu Syari'ah Dan Ahwal Al-Syakhsyiyah*, 4(1), Article 1. <https://doi.org/10.58824/mediasas.v4i1.263>

Heniyatun, H., Sulistyaningsih, P., & Anisah, S. (2020). PEMBERIAN MUT'AH DAN NAFKAH IDDAH DALAM PERKARA CERAI GUGAT. *Profetika: Jurnal Studi Islam*, 21(1), Article 1. <https://doi.org/10.23917/profetika.v21i1.11647>

Herien Puspitawati. (2012). *Konsep, Teori dan Analisis Gender*. IPB Press.

Huis, S. C. van. (2015). *Islamic courts and women's divorce rights in Indonesia: The cases of Cianjur and Bulukumba*. Van Vollenhoven Institute, Faculty of Law, Leiden University. <https://hdl.handle.net/1887/35081>

Husain Hamid Hasan. (1971). *Nazariyah Al-Maslahah fi Al-Fiqh Al-Islamy*. Dar An-Nahdah Al-Arabiyah.

IKAHI, I. (2018). *VARIA PERADILAN: Majalah Hukum Tahun XXXIII No. 387 Februari 2018* (JAKARTA PUSAT). IKAHI. [//perpustakaan.mahkamahagung.go.id%2Fslims%2Fpa-boyolali%2Findex.php%3Fp%3Dshow_detail%26id%3D1265](http://perpustakaan.mahkamahagung.go.id%2Fslims%2Fpa-boyolali%2Findex.php%3Fp%3Dshow_detail%26id%3D1265)

Undang-undang, 1 § Penyebarluasan Kompilasi Hukum Islam (1991).

Irawan Heri. (2021). *Nafkah Pasca Perceraian Dalam Perkara Cerai Gugat (Studi Kritik Pada Pasal 149 Khi Terhadap Perkara Nomor Xxxx/Pdt.G/2012 P.A Js)* [Masters, UIN Raden Intan Lampung]. <http://repository.radenintan.ac.id/15275/>

Kodir, F. A. (2016). Mafhum Mubadalah: Ikhtiar Memahami Qur'an dan Hadits untuk meneguhkan Keadilan Resiprokal Islam dalam Isu-isu Gender. *Jurnal Islam Indonesia*, 6(02), Article 02. <http://jurnal-islam-indonesia.isif.ac.id/index.php/Jurnal-Islam-Indonesia/article/view/28>

- Majma' al-Lughah al 'Arabiyah,. (1972). *Al-Mu'jam Al-Wasit*. Dar al-Ma'arif.
- Maulida, F., & Busyro, B. (2018). NAFKAH IDDAH AKIBAT TALAK BA'IN DALAM PERSPEKTIF KEADILAN GENDER (Analisis Terhadap Hukum Perkawinan Indonesia). *Al Hurriyah: Jurnal Hukum Islam*, 3(2), Article 2. <https://doi.org/10.30983/alhurriyah.v3i2.720>
- Maymun, M., & Meidina, A. R. (2023). Pemenuhan Hak Istri Sebagai Pencari Nafkah Dalam Keluarga Perspektif Masalah (Studi Kasus Di Desa Pringgondani Kabupaten Jember). *Jurnal Akademika Kajian Ilmu-Ilmu Sosial, Humaniora Dan Agama*, 4(1), 53–74.
- Nur M. Kasim. (2012). Prespektif Islam Tentang Gender. *Jurnal Inovasi*, 9(02), Article 02. <https://ejournal.ung.ac.id/index.php/JIN/article/view/713>
- Putri, D. N. K., & Izzuddin, A. (2022). Pertimbangan Hakim Pengadilan Agama Singaraja Dalam Penetapan Nafkah 'Iddah, Nafkah Mut'ah Dan Eksekusinya Pada Putusan Verstek Cerai Gugat. *Sakina: Journal of Family Studies*, 6(4), Article 4. <https://doi.org/10.18860/jfs.v7i1.2518>
- Rahardjo, S. (2012). *Ilmu Hukum* (Cet. 3). Citra Aditya Bakti. <https://opac.perpusnas.go.id/DetailOpac.aspx?id=481455>
- Rahim, A. (2021). *Kepastian hukum dalam eksekusi pemenuhan hak-hak perempuan dan anak pasca putusan perceraian: Studi di Wilayah Pengadilan Tinggi Agama DKI Jakarta* [Doctoral, UIN Sunan Gunung Djati Bandung]. <http://digilib.uinsgd.ac.id/48281/>
- Rais, I. (2014). Tingginya Angka Cerai Gugat (Khulu') di Indonesia: Analisis Kritis terhadap Penyebab dan Alternatif Solusi Mengatasinya. *Al-'Adalah*, 12(1), Article 1. <https://doi.org/10.24042/adalah.v12i1.183>
- Siti Khoirotul Ula. (2021). Qiwama dalam Rumah Tangga Perspektif Teori Mubadalah dan Relevansinya di Indonesia. *Mahakim: Journal of Islamic Family Law*, 5(2), Article 2. <https://doi.org/10.30762/mahakim.v5i2.138>
- Yahya Harahap, M. (2001). *Kedudukan Kewenangan dan Acara Peradilan Agama: UU No. 7 tahun 1989* (Ed. 2., Cet.1). Sinar Grafika. <https://opac.perpusnas.go.id/DetailOpac.aspx?id=160547>
- Yetti, S. (2016, June 23). *Wawancara Calon Hakim Agung oleh Komisi Yudisial* [Personal communication].

Undang-Undang dan Putusan Pengadilan

Deklarasi Umum Hak Asasi Manusia (DUHAM)

Indonesia Intruksi Pemerintah Nomor 1 Tahun 1991 Tentang Kompilasi Hukum Islam.

Indonesia, Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan sebagaimana telah diubah dengan Undang-Undang Nomor 16 Tahun 2019.

Indonesia, Undang-Undang Nomor 39 Tahun 1999 Tentang Hak Asasi Manusia
Putusan Nomor : 1629/Pdt.G/2022/PA.Tnk