

## **Judge's Consideration of Post-Divorce Rights ('*Iddah and Mut'ah*) from The Perspective of *Maslahah Mursalah***

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### **Abstract:**

The absence of clear regulations regarding determining the amount of post-divorce rights ('*iddah and mut'ah*) in both positive and Compilation of Islamic law has resulted in the judge's consideration being needed for justice. This study aims to identify the judge's steps in determining the difference in post-divorce rights and examine the judge's steps in determining the difference in post-divorce rights, and analyze the status of determining alimony as a result of divorce according to *maslahah mursalah*. This research uses empirical field research with a qualitative descriptive approach. Methods of data collection through interviews with judges of the Religious Court of Lumajang. The results of this study are that the legal basis for judges determining maintenance due to divorce is due to demands from the parties and is also a provision contained in Article 149 of the Compilation of Islamic Law. As for the judge's steps in determining it, it is by considering the economic facts of the parties and also looking at the goodness of his wife while they were married. The determination to live due to this divorce is a *maslahah* that occupies the *maslahah dharuriyat* level, including daily needs.

**Keywords:** Judge's Consideration; Post-Divorce Rights; *Maslahah Mursalah*.

### **Introduction**

Marriage is an inner and outer bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on Belief in One Almighty God. Marriage is a medium for uniting a man and a woman with various backgrounds to build a household ship and create a *sakinah* family, namely a family that can fulfill their needs and is balanced in an atmosphere of love between family members and their environment. Marriage is the only way of channeling sex that is legalized by religion and is a religious commandment. Therefore, the glory of this marriage should not be damaged by trivial things. The principle of marriage according to Islam needs to be considered so that marriage has meaning in human life as a servant of Allah SWT. The principles of marriage include: a) fulfilling and carrying

out religious orders; b) there is willingness and consent; c) marriage is forever.<sup>1</sup> Allah mentions the covenant bond in the contract as *mitsaqon ghalidhan* which means a firm agreement. If the bond between husband and wife is so strong, then it should not be damaged or underestimated.<sup>2</sup>

In the association between husband and wife, it is not uncommon for constant disputes and quarrels to occur, as well as other causes which sometimes lead to a situation that causes a marriage to no longer be maintained. It is not uncommon for a household to run aground in the middle of the road due to several factors, be it because of quarrels, jealousy between one of the parties, economic problems, and so on.<sup>3</sup> At the same time, the peaceful efforts made by both parties and the family do not bring results—maximum so that the way out must be taken is none other than divorce. Divorce in Islam is not a prohibition but a last resort if there is disharmony.<sup>4</sup> Divorce can occur when a husband says the word "divorce" to his wife. *Talak* means freeing an animal.<sup>5</sup> Meanwhile, according to the *Shari'ah*, the notion of divorce is the disengagement of the marriage bond or the dissolution of marriage by pronouncing *talaq*.<sup>6</sup> In another sense, *talak* means breaking the marriage bond and ending the marital relationship.<sup>7</sup> Letting go of the marriage rope, means ending or dissolving the marriage relationship between husband and wife or it is called divorce.<sup>8</sup> Currently, divorce is considered valid when it has gone through the trial process. After the trial is over, fourteen days later, a divorce certificate can be issued as proof of legality that a woman has changed her status to become a widow.<sup>9</sup>

Article 9, paragraph (1) of the Marriage Law contains provisions that divorce can only be carried out before a court hearing after the Court concerned tries to reconcile the two parties but is unsuccessful. The courts referred to in this case are the Religious Courts for people who are Muslim and the General Courts for people other than Muslims.<sup>10</sup> To grant the request for divorce by the judge, the husband is required to pay *madliyah* maintenance, *iddah* maintenance, and *mut'ah* to the divorced wife. It follows the provisions of Article 34, paragraph (1) of Law Number 1 of 1974, in conjunction with Article 80, paragraph (4), Compilation of Islamic Law. In this case, the wife has the right to receive the maintenance given by her ex-husband because of a valid marriage contract, the wife is bound by all her

<sup>1</sup> Beni Ahmad Saebani, "Perkawinan Dalam Hukum Islam Dan Undang-Undang," in *1/1974 Tentang Poligami Dan Problematikanya* (Bandung: Pustaka Setia, 2008), 32.

<sup>2</sup> Khairun Inayah Aliah, Lomba Sultan, and Fatimah Fatimah, "Implikasi Dalam Pemberian Nafkah Iddah Dan Mut'ah Pada Perkara Cerai Talak Di Pengadilan Agama Makassar Kelas Ia," *Jurnal Al-Qadau: Peradilan Dan Hukum Keluarga Islam*, 2021, <https://doi.org/10.24252/al-qadau.v8i2.22974>.

<sup>3</sup> Khairuddin Khairuddin, Badri Badri, and Nurul Auliyana, "Pertimbangan Hakim Terhadap Putusan Nafkah Pasca Perceraian (Analisis Putusan Mahkamah Syar'iyah Aceh Nomor 01/Pdt.G/2019/MS.Aceh)," *El-USRAH: Jurnal Hukum Keluarga*, 2020, <https://doi.org/10.22373/ujhk.v3i2.7700>.

<sup>4</sup> Riyan Ramdani and Firda Nisa Syafitri, "PENENTUAN BESARAN NAFKAH MADHIYAH, NAFKAH IDDAH DAN MUT'AH DALAM PERKARA PERCERAIAN DI PENGADILAN AGAMA," *ADLIYA: Jurnal Hukum Dan Kemanusiaan*, 2021, <https://doi.org/10.15575/adliya.v15i1.11874>.

<sup>5</sup> Abdur Rahman, *Perkawinan Dalam Syariat Islam* (Jakarta: Rineka Cipta, 1992), 76.

<sup>6</sup> Wahbah Zuhayli, *Fiqh Islam Jilid 9* (Jakarta: Gema Insani, 2011), 318.

<sup>7</sup> Abdul Rahman Ghazali, *Fiqh Munakahat* (Jakarta: Kecana, 2003), 192.

<sup>8</sup> Muhammad Bagir, *Fiqh Praktis II: Menurut Al-Quran Dan As-Sunnah, Dan Pendapat Para Ulama* (Bandung: Mizan Publika, 2016), 181.

<sup>9</sup> Nur Tasdiq, "IMPLEMENTASI NAFKAH IDDAH PADA PENGADILAN AGAMA WATAMPONE," *AL-SYAKSHIYYAH Jurnal Hukum Keluarga Islam Dan Kemanusiaan*, 2020, <https://doi.org/10.35673/as-hki.v2i1.814>.

<sup>10</sup> Heniyatun Heniyatun, Puji Sulistyaningsih, and Siti Anisah, "PEMBERIAN MUT'AH DAN NAFKAH IDDAH DALAM PERKARA CERAI GUGAT," *Profetika: Jurnal Studi Islam*, 2020, <https://doi.org/10.23917/profetika.v21i1.11647>.

rights, and it is forbidden to marry someone else. This bond causes the wife to be unable to earn a living for herself.

For the amount, there is no clear and detailed regulation regarding the level of living that can be provided by ex-husbands. There needs to be a basic law that is used by judges in determining a decision that forms the basis for consideration by the panel of judges. Discussion regarding obligations of ex-husband after the fall of divorce discussed in full in the study of jurisprudence family law in Islamic jurisprudence books.<sup>11</sup>

Some previous studies that become supporting literature and at the same time intersect directly with this research include research written by Mochamad Balya Sibromullisi, with the research title “Kebijakan Hakim Pengadilan Agama Probolinggo Dalam Menetapkan Pembayaran Nafkah ‘Iddah dan Mut’ah Terhadap Istri Sebelum Ikrar Talak”.<sup>12</sup> This research uses an empirical research type with the research object at the Religious Court of Probolinggo. From the results of this study, it was found that the judge in determining payment of iddah and mut’ah maintenance to the wife before the pledge of divorce was motivated by three factors. First, the philosophical factor promotes justice, welfare, and benefit. The second is the juridical factor, by not violating laws and regulations. The third is the sociological factor. Another study was written by Isrofatu Laila, with the title “Pandangan Hakim Tentang Biaya Nafkah Iddah, Madliyah, dan Nafkah Mut’ah Akibat Cerai Talak Perspektif *Maqashid Syari’ah* (Studi di Pengadilan Agama Kabupaten Kediri)”.<sup>13</sup> From the results of this study it was found that the judge gives related husbands the number of maintenance costs due to divorce is included in the *maqashid syariah* on the level of hajiyyat. Another study was written by Khoiril Ummah, with the research title “Pertimbangan Hakim Ketika Menentukan Besaran Nafkah ‘Iddah Dalam Perspektif *Maqashid Syariah* (Studi Putusan Cerai Talak Tahun 2017-2019 di Pengadilan Agama Kudus)”.<sup>14</sup> From the result of this study when viewed from the perspective of *maqāsid syarīah*, a former wife during the *'iddah* period must be provided with alimony except for the *nusyūz* wife, if the husband does not provide alimony, the wife will be in a dangerous condition due to the absence of alimony. Associated with five basic *maṣlaḥah*, *maṣlaḥah* in the protection of the ex-wife is care for the soul. The soul is one of the five basic *maṣlaḥah* which must be guarded. The obligation to care for the soul has been started in the womb by parents until their children are adults or have married. For a woman, after marriage, management shifts to her husband, and after a divorce, the husband should not be free from responsibility until the end of the *'iddah* period.

From the explanation of the context above, it can be formulated several problems to be solved in this research, namely: 1) what are the judge’s legal bases in determining post-divorce rights?; 2) how the judge steps in considering the difference in post-divorce rights?; 3) what is the status of post-divorce rights from the *maslahah mursalah* perspective? Based on the explanation of the problem formulation above, it can be concluded that the objective of this research are: identify the judge’s legal bases in determining post-divorce rights, examine

<sup>11</sup> Nandang Ihwanudin, “PEMENUHAN KEWAJIBAN PASCA PERCERAIAN DI PENGADILAN AGAMA,” *ADLIYA: Jurnal Hukum Dan Kemanusiaan*, 2019, <https://doi.org/10.15575/adliya.v10i1.5146>.

<sup>12</sup> Mochamad Balya Sibromulissi, “Kebijakan Hakim Pengadilan Agama Probolinggo Dalam Menetapkan Pembayaran Nafkah Iddah Dan Mut’ah Terhadap Istri Sebelum Ikrar Talak” (Universitas Islam Negeri Maulana Malik Ibrahim Malang, 2013), <http://etheses.uin-malang.ac.id/7166/1/08210037.pdf>.

<sup>13</sup> Isrofatu Laila, “Pandangan Hakim Tentang Biaya Nafkah Iddah, Madliyah, Dan Nafkah Mut’ah Akibat Cerai Talak Perspektif *Maqashid Syari’ah* (Studi Di Pengadilan Agama Kabupaten Kediri)” (Universitas Islam Negeri Mauana Malik Ibrahim Malang, 2021).

<sup>14</sup> Khoiril Ummah, “Pertimbangan Hakim Ketika Menentukan Besaran Nafkah ‘Iddah Dalam Perspektif *Maqashid Syariah* (Studi Putusan Cerai Talak Tahun 2017-2019 Di Pengadilan Agama Kudus)” (IAIN Kudus, 2020), <http://repository.iainkudus.ac.id/4327/>.

the judge's steps in considering the difference in post-divorce rights, and analyze the status of post-divorce rights from the *maslahah mursalah*'s perspective.

### Methods

The type of research is to use empirical legal research. Empirical legal research is legal research that examines the application of a legal application in reality to a group or individual by emphasizing the behavior of the group or individual.<sup>15</sup> Alternatively, empirical legal research is to examine the operation of law in society. The research approach that the researcher will use is a qualitative descriptive approach. Descriptive research produces descriptive data from people or observed behavior in written or spoken words.<sup>16</sup> Primary and secondary data sources supported this research. Primary data sources are obtained from sources and informants who have the authority to explain the research.<sup>17</sup> Secondary data is obtained from the second source of some of the data needed.<sup>18</sup> Primary data is obtained from interviews with the judges in the Religious Court of Lumajang. Secondary data is obtained from books or scientific literature related to the research. The location of this research is the Religious Court of Lumajang. The jurisdiction area covers all areas of Lumajang Regency, which consists of 21 Districts and 198 Villages. Because of this, the area was chosen. The procedure in managing data is taken by going through several processes, namely editing, classification, data examination, and data analysis. Finally, this study has conclusions from the results of the research process carried out.

### The Legal Bases of Religious Court of Lumajang Judges in Determining Post-Divorce Rights ('*Iddah and Mut'ah*)

Every marriage in Indonesia can be considered dissolved if the judge has rendered his decision in the Court. In this case, the dissolution of marriage proposed by the husband is called talaq divorce. In the cases of talaq divorce, the husband is charged with paying an amount of maintenance to his wife under the rules that apply to the law. Regarding the amount, no provision explains it. It is the discretion of the judge to determine as will be discussed below.

Providing a living is one of the definite obligations under Islamic law, this is as stated in Surah Al-Baqarah: 233 which states that "The duty of the father (husband) is to provide food and clothing to the mother (wife) in a good or good way and proper". A person (husband) is not burdened except according to the level of his ability. Another legal basis regarding maintenance is also listed in surah ath-Thalaq verse 7 "Let someone who is able to provide a living according to his ability. And the person whose sustenance is limited should provide a living from the wealth that Allah has given him". Allah does not burden a person except (only) what Allah gives him. God later will give spaciousness after narrowness". In positive law, of course, it is regulated in various laws and regulations, including in the provisions of Article 41 letter c in Law no. 1 of 1974 which states that: "(c) The court may oblige the ex-husband to provide living expenses and/or determine an obligation for the ex-wife."

The obligations that must be fulfilled by the husband that must be fulfilled towards the ex-wife are as follows: '*iddah* maintenance as the rationale that in divorce cases being contested is the fact that after the verdict, the ex-wife underwent an '*iddah* mass. So that the concept of '*iddah* maintenance as explained in the Qur'an is used as the same reason for divorce cases. The '*iddah* income itself is the husband's income which must be given to the wife to meet

<sup>15</sup> Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020). 83.

<sup>16</sup> Kasiram, *Metodologi Penelitian Kuantitatif-Kualitatif* (Malang: UIN Malang Press, 2008). 151.

<sup>17</sup> Muhaimin, *Metode Penelitian Hukum*. 83.

<sup>18</sup> Bungin Burhan, "Metodologi Penelitian Kuantitatif: Komunikatif, Ekonomi, Kebijakan Publik Dan Ilmu Sosial Lainnya," *Penelitian Kualitatif*, 2006. 122.

basic needs during the waiting period until the end of the *'iddah* period. The living expenses can be in the form of living expenses or a place to live, but generally what is determined by the judge in the Religious Courts is only living expenses during the *'iddah* period, for the place of residence, the judge rarely decides to give a place to live for the wife during her *'iddah* period other than because the costs are not small if she has to provide different residence, also the judge is of the view that if the husband and wife are still in the same place stay, then it is considered that the marriage is still in good condition and does not deserve to be divorced.

Then *mut'ah*, is a form of clothing or property by the husband given to the wife he divorced to comfort the wife's heart and to relieve the wife's suffering due to separation. *Mut'ah* wages are given to minimize the feelings of sadness and/or suffering experienced by a wife who has been divorced by her ex-husband. So ex-husbands must provide *mut'ah* maintenance as a relief for grief. However, some opinions state that if the filing is the wife, namely in a divorce case, then *mut'ah* maintenance is considered non-existent. By seeing the absence of suffering experienced by the wife. The judge is of the view that *mut'ah* is given based on the wealth or assets owned by the husband, not based on his income. Any reasons put forward by the husband for filing for divorce at the Religious Court, even though the wife is in the *nusyuz* category, does not rule out the possibility of *mut'ah* will still be given to the wife who wants to be divorced. Likewise, if the wife asks for something but the husband does not have anything that should be given, then *mut'ah* cannot be given to the wife.

To find out the legal basis for judges determining *'iddah* and *mut'ah* living as a result of divorce, researchers have conducted interviews with judges at the Lumajang Religious Court. According to MHB, the legal basis for the judge's considering post-divorce rights, in this case, is as follows: "If we use the Islamic Law Compilation as the legal basis, there is Book II of the 1974 Law and Government Regulation Number 9 of 1975. It is written and implied there that if there is a divorce for the maintenance of *'iddah* and *mut'ah*, it is a gift from husband to wife as we usually know in a divorce filed by the husband".<sup>19</sup> According to him, the legal basis for determining maintenance as a result of divorce is contained in the Compilation of Islamic Law, more precisely in article 149 KHI which explains that if a marriage is broken up due to divorce, the ex-husband is obliged to: (a) give proper *mut'ah* to his ex-wife in the form of money or objects, except for the ex-wife before *dukhul*; (b) provide maintenance, *maskan*, and *kiswah* to the ex-wife during the *'iddah* period, unless the ex-wife has been divorced *ba'in* or *nusyuz* and is not pregnant.

MHB added: "There are two things that can have legal consequences for the provision of living *'iddah* and *mut'ah*. The first is a claim from the party. If the wife files for divorce, the wife has the right to demand *'iddah* and *mut'ah* maintenance. Then the second ex-officio. Even though a wife does not sue, if the judge judges it out of compassion and humanity, the ex-officio Judge can punish the husband for giving *'iddah* or *mut'ah* alms". Determination of living due to divorce, according to MHB, also based on the wife's demands in filing for divorce and also through ex-officio judges.

ASH also said almost the same thing: "When the party sues, the husband will automatically receive a claim that must be paid when the wife files a lawsuit, that is the first. Secondly, there is the term *'iddah*, *mut'ah* maintenance which is based on Article 149 KHI."<sup>20</sup> From the two judges above, it can be concluded that the legal basis for determining maintenance due to

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<sup>19</sup> Interview, MHB, (Religious Court's Judge of Lumajang), 15 November 2022.

<sup>20</sup> Interview, ASH, (Religious Court's Judge of Lumajang), 15 November 2022.

divorce is the demands of the plaintiff and several articles in the Compilation of Islamic Law and Law Number 1 of 1974.

### The Judge's Steps in Considering The Difference in Post-Divorce Rights

Islamic law only recognizes the concept of *ma'ruf* in determining the amount of mut'ah and iddah maintenance to be paid by the husband. To be able to produce a decision regarding the size of mut'ah and iddah maintenance following the concept of *ma'ruf* in Islamic law, it is appropriate for the judges of the Religious Courts to use various considerations.<sup>21</sup> In this study directly with the informants, namely several judges at the Religious Court of Lumajang, conducted interviews regarding the judge's considerations in determining the living expenses due to divorce. Here this study makes six decisions in the case of deciding alimony as a result of divorce, which will be a sample of the judge's considerations as follows:

**Table 1.** Samples of Cases Decision

No	Case Number	Judges by initials	Work Of The Parties	'Iddah	Mut'ah
1.	913/Pdt.G/2022/ PA. Lmj	MHB	xxx	1.500.000	500.000
2.	1406/Pdt.G/2022/ PA. Lmj	ASH	xxx	4.500.000	-
3.	2153/Pdt.G/2022/ PA. Lmj	ASH	xxx	1.000.000	500.000
4.	2492/Pdt.G/2022/ PA. Lmj	J	xxx	600.000	100.000
5.	1250/Pdt.G/2022/ PA. Lmj	J	xxx	9.000.000	10.000.000

**Source:** Data at the Religious Court of Lumajang

To find out the reasons for differences in judges in determining income due to divorce, researchers conducted interviews with judges at the Lumajang Religious Court, J, said that: "In the matter of maintenance, we can see whether it is *nusyuz* or not, unless there is a willingness on the part of the husband to provide *'iddah* maintenance, but mostly where they agree to be mediated so that it is determined in the decision, that's mostly it. Unless they disagree in mediation, the assembly will determine, according to the examination, meaning the husband's ability, the husband's income, then the husband's habit of providing maintenance to the wife while they were still together, then how much is appropriate because someone's income is different. There are differences between the assemblies in determining the living."<sup>22</sup> According to Mr. J, the reason for the difference in judges in determining the living as a result of a divorce is whether or not *nusyuz* is involved, the length of time both parties have lived in the household, as well as the income of the husband who is, in this case, the accused. He also said that in determining the living, it also looks at the habit of how much the husband provides for his wife when they are still together in the household.

<sup>21</sup> Novita Husni, "Upaya Penyelesaian Kewajiban Pembayaran Nafkah Iddah Dan Mut'ah Oleh Suami Kepada Isteri Dalam Perkara Cerai Talak," *JURNAL AZ-ZAWAJIR*, 2019, <https://doi.org/10.57113/jaz.v1i1.11>.

<sup>22</sup> Interview, J (Religious Court's Judge of Lumajang), 15 November 2022.

Drs. Mohammad Hafizh Bula, M.H, also explained the reasons for differences in the determination of post-divorce rights, according to his statement: "The benchmark is from the ability of the husband, his job. If, for example, he has a large salary, we can grant him a large amount. But if the husband's salary is small, for example, the husband doesn't have any salary. Then we use the minimum regional income standard. It's also impossible that he doesn't have a job. It's impossible for him not to be able to eat. It's probably at least 400 thousand per month if it's normal. We use statistics at least for the month."<sup>23</sup> According to MHB, the reason for the difference in judges in determining the living as a result of divorce is the husband's ability, in this case, regarding his work and income. Suppose the husband doesn't have a job and salary at all, then according to MHB, uses minimal statistics for the parties' area.

As for the steps or ways of the judges of the Lumajang Religious Court determining the living as a result of divorce MHB as the Judge, said that: "We will see if he is *nusyuz* or not. If he is *nusyuz*, then we don't give him a living. If he is not *nusyuz*, then we decide we give it. Regarding the amount, it depends on the ability of the husband. Is it appropriate or not? Is it appropriate or not for us to burden husbands who can't afford it, so it's in vain." According to his statement above, the judge's primary step in determining the living as a result of a divorce is seen from the perspective of whether the wife is *nusyuz*. If the wife, during her marriage to the husband who is going to divorce her, is found to have been *nusyuz*, maintenance will not be given. Conversely, if the wife behaves well and is not *nusyuz*, the judge can determine the husband's care for her.

J also provided information about the judge's steps in determining the nafaqat here, namely: "Even though, for example, a living is not asked for, but for the benefit here, the judge has the ex-officio right to determine all the post-divorce living expenses, including the children's living expenses. It can also be seen that her husband has the ability, but he is reluctant. Yes, the assembly here should protect women's and children's rights. Mainly to see the knowledge of the husband."<sup>24</sup> According to her statement, the judge's decision will decide whether the husband wants to provide alimony. In this case, the guidelines for judges in exercising ex-officio rights are contained in the conclusion of the Chief Justice of the Supreme Court of the Republic of Indonesia Number: KMA/032/SK/IV/2006 concerning the application of Book II Guidelines for the Implementation of Duties and Administration of the Religious Courts, determined as follows: "Religious Court can ex officio determine the obligation to support the husband's *iddah* for his wife, as long as the wife is not proven to have committed *nusyuz* and determines the responsibility of *mut'ah*. This decision of the Supreme Court is an administrative decision that is individual and concrete, in contrast to general and abstract regulations (applicability is addressed to anyone known for the formulation of general rules)."<sup>25</sup> In this issue regarding the ex officio right that a judge has in determining the husband's obligations to his wife in divorce cases, in which a husband can still have obligations towards his wife (support), the scale of this obligation for the husband is decided and considered by the judge based on his conscience and see the facts that occurred in a case.

Furthermore, to determine the living due to divorce, the judge also sees the husband's ability in terms of economics. The husband is able or not giving it to the wife. Although the ex-wife did not file a conflict of *'iddah*, the judge still had the right to determine and decide to give it because it was feared that if the living were not given, it would bring a description for

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<sup>23</sup> Interview, MHB

<sup>24</sup> Interview, J.

<sup>25</sup> Bambang Sutiyoso, *Upaya Mewujudkan Hukum Yang Pasti Da Berkeadilan* (Yogyakarta: UII Press, 2012). 6.

the ex-wife when a divorce occurred. Although Article 189 paragraph (3) of the RBG explained, "Judges are required to try all lawsuits and prohibited from imposing decisions on cases that are not demanded or grant more than those sued." Because of the privileges the judge possesses because of his position, the considerations initially limited by the applicable judge rules are permitted because of the ex-office rights owned by the judge.

As for ASH provides information about the steps of the judge in determining post-divorce rights as follows: "See his abilities, also prosecuted or not because everyone's character is different. The effectiveness of the decision must be implemented. The verdict is ineffective if it is charged, but the husband does not want to give it meaningfully. Suppose it is helpful for everything in determining this living. Especially seeing the ship, whether his wife needs it or not."<sup>26</sup> According to his statement, the most crucial thing in the judge's step here is to see the husband's ability. The judge has to look at both parties' conditions because everyone's character is different. He said that if it was not considered carefully, it was feared that there was fraud or exaggerated so that it would harm each other. He also sees the husband's ability to provide a living here as the effectiveness of implementing the decision. If the wife demands more, but the husband cannot provide a living, this is considered ineffective. According to him, determining this living is also helpful for all parties. Furthermore, the consideration is the goodness of his wife. If, as long as they are married, the wife is good and obedient to her husband, then due to the divorce, the husband has the right to provide a living even when they are still married. It is a form of respect for women.

In the decision 1406/Pdt.G/2022/PA. Lmj, who became one of the samples above, ASH, one of the judges, decided that there was no *mut'ah* maintenance in it. In this case, he provides information: "Because she didn't ask, because she wasn't asked, her husband didn't want to give it. Suppose you don't want to give it, fine. The judge must determine if the wife asks but the husband does not want to give. Because of that Consideration, you have to use a job." According to his narrative, if the wife does not ask for *mut'ah* maintenance in a case like that in the sample, the husband may not give it because both are willing. If the wife asks for the care, but the husband doesn't want to give it, the judge will determine it here. The judge must adequately consider the condition of the husband. Considering it, the main thing is the husband's job because it is from this husband's work that one can see his ability to provide for his ex-wife economically. It must be considered carefully and correctly to achieve the common good.

In considering the determination of income, the panel of judges was based on two things first when the wife was not included in the *nusyuz* category and secondly based on the husband's income (economic factor). These two categories are taken into consideration when there is no agreement between the two parties, either based on the wishes of the wife or the husband who does not want to comply with the wife's request.<sup>27</sup> Further consideration by the judge after knowing the husband's income, the judge will consider in terms of the needs of each party. This need is a reasonable need for daily living expenses in the form of food, other living expenses for a certain period, and/or a place to live for the ex-wife during her iddah period.

An ex-husband is obliged to provide maintenance, however. This obligation is carried out if it is proven that the husband did not properly fulfill the maintenance while still in the marriage bond, while the condition of the husband knows very well that fulfilling maintenance is one of the obligations in marriage. In addition, if the husband knows that the judge has determined the amount of maintenance that must be paid, but the husband still

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<sup>26</sup> Interview, ASH.

<sup>27</sup> Ahmad Azhar Basyir, *Hukum Perkawinan Islam* (Yogyakarta: UII Press, 2007). 88.



deliberately does not pay the maintenance, the judge has the right to sell the assets owned by the husband by force and then pay the proceeds from the sale of these assets to be paid to his wife as a living. owed according to the needs of his wife. However, if it turns out that the husband does not have any assets so he is unable to pay for maintenance, then he cannot be forced by the judge to pay maintenance, the wife must wait until her husband is in abundance.

The need for a husband in determining the amount of maintenance for his ex-wife is one of the considerations because it is feared that if a judge's decision has been determined by a large number of judges, and it turns out that the ex-husband for his own needs cannot be fulfilled, then the judge's decision will be unfair to ex-husband's side. In this case, the judge must also be able to determine the amount of maintenance which is determined based on the income of the ex-husband minus the needs of each party, besides that it is also hoped that the stipulation of the decision can be carried out without harming both parties. Andi Syamsu Alam, one of the Supreme Court judges, explained that even though it is permitted by law, claims for a living are still not popular or known by the public. There are still many who do not know that a claim for a living can be filed, even if the child needs school fees but the father who can afford it turns out not to provide costs to their children, then this matter can be sued.

Several factors are taken into consideration by the panel of judges in determining the amount of living that must be provided by the ex-husband after the divorce to his wife and children: a) based on the propriety and ability of the husband as measured by looking at the husband's monthly income; b) looking at the age of marriage has been carried out; c) seeing whether his wife is *nusyuz* or not; d) adjusting the husband's needs and abilities according to the conditions of a region; e) seeing whether a husband commits tyranny against his wife, such as domestic violence. These factors form the basis for the panel of judges' considerations in deciding on determining the amount of maintenance and post-divorce that an ex-husband must give to his wife and children.

#### **The Status of Post-Divorce Rights in The Perspective of *Maslahah Mursalah***

*Maslahah Mursalah* comes from two words, namely *Maslahah* and *Mursalah*. *Maslahah* comes from the Arabic word: benefit, benefit, good, good, goodness, use, or usefulness. The word *maslahah* is often contrasted with the word *al-mafsadah* which means damage. *Maslahah* is intended as a way that produces excellence. Al-Khawarizmi defines *maslahah* as "maintaining the objectives of Islamic law by rejecting truth/corruption/things that are detrimental to creatures (humans)."<sup>28</sup> Furthermore, the word *mursalah* means *mutlaqah*, which means detached or free. If the phrase *maslahah* and *mursalah* are juxtaposed as *mausuf* traits, then what is intended is, regardless of whether or not it is permissible to do so, *maslahah mursalah* can be interpreted as something that aims to do well even though there is no information indicating permissibility or prohibition to do so.

In the determination of Islamic law, *maslahah mursalah* can be understood as a legal method based on the benefit which does not receive particular legality from texts regarding its validity, or there is no argument that expressly and clearly states its invalidity. The birth of the law is always expected to benefit the people and prevent the emergence of evil. For this reason, the *maslahah mursalah* method is needed to respond to new things whose provisions are not found in the texts or did not occur when the Prophet lived because of significant changes in time. So as not to create a legal vacuum, damage, and even difficulties for mankind.<sup>29</sup>

<sup>28</sup> Abu Yazid Adnan Quthny, "Implementasi *Maslahah Mursalah* Sebagai Alternatif Hukum Islam Dan Solusi Problematika Umat," *Asy-Syari'ah : Jurnal Hukum Islam*, 2019, <https://doi.org/10.36835/assyah.v5i1.110>.

<sup>29</sup> Ahmad Sanusi dan Sohari, *Ushul Fiqh* (Jakarta: Grafindo Persada, 2017). 248.

Humans have their views about what is considered good or beneficial for them. So *maslahah* is relative. The values of benefits and efforts to stay away from harm in it are considered to be a strong basis as evidence in establishing law.<sup>30</sup> The conditions put forward by Imam Syatibi are: a) the benefit used as the basis for the *maslahah mursalah* proposition is *maslahah* not mentioned by *syara*. Still, no argument justifies or rejects it and aligns with what the *syara'* wants to achieve; b) *maslahah* used as a consideration for determining the law, is considered logical; c) the *maslahah's* taken into consideration in determining the law is the *dharuriyah* and *hajiyyah maslahah's*; d) *maslahah* can perfect life and eliminate the difficulties or pettiness of life that *syara'* really doesn't want.

Article 41 letter c of Law Number 1 of 1974 states that a judge can oblige or charge a former husband to provide maintenance expenses or determine an obligation for his divorced wife. And they are also considering that the judge has ex-officio rights regarding whether living should be given or not. It is a form of respecting and protecting women's rights after divorce. These rules provide benefits for one party and both so they can carry out their rights and obligations properly. It also aligns with the regulations from the Quran texts regarding providing post-divorce support to ex-wives, namely *'iddah* and *mut'ah* maintenance contained in Surah Al-Baqarah verse 241.

In the example case number 913/Pdt.G/2022/PA.Lmj, the Judge considers determining the living level due to a talaq divorce. In determining the level of these costs, the judge looks at it from the side of both parties. It is hoped that what the judge determines can benefit the parties. This consideration is one of the efforts to achieve benefit and will be more awake in the maintenance of *maqashid sharia*, namely: a) keep religion. In this case, the judge determines that the provision of maintenance to the wife by the husband is in terms of maintaining religion because this is a religious order and is contained in the Qur'an; b) guard the soul. This provision of maintenance is one of the efforts to protect the soul because the judge gives what is the right of the wife to fulfill her life needs after divorcing her husband; c) keep the sense. Therefore, in case number 913/Pdt.G/ 2022/PA.Lmj is included in the level of *dharuriyat*, namely, maintaining the soul. Even if, judging from its nature, it is only temporary. Still, if it is accumulated between *'iddah* and *mut'ah* maintenance, everything can be used for capital efforts to provide for the needs of the ex-wife's life in the future.

When viewed from the terms of *maslahah*, the judge's decision and even the consideration is a benefit that we can follow as a legal basis. We can analyze this against the conditions put forward by Imam Syatibi, which the author will describe in tabular form as follows:

**Table 2.** *Maslahah Mursalah's* Analysis by Imam Syatibi

No	Maslahah Conditions, According To Imam Syatibi's Version	Judge's Consideration On Post-Divorce Rights
1.	In line with what the <i>syara'</i> wants to achieve.	In <i>syara'</i> it is not regulated as to what the judge considers in determining the maintenance of a wife whose husband divorces her, especially regarding the appropriate amount. However, <i>syara'</i> governs

<sup>30</sup> Moh Usman, "Maslahah Mursalah Sebagai Metode Istinbath Hukum Perspektif Al-Thufi Dan Al-Qaradhawi," *Al-Mashlahah: Jurnal Hukum Islam Dan Pranata Sosial Islam*, 2020.

		the obligation of a husband who divorces his wife to provide a living and for entertainment.
2.	Logical	In this case, of course, the judge will give reasonable consideration regarding the decision, which is adjusted to the economic conditions of both parties so that the judge will decide as somewhat as possible and can be accepted by reason and facts.
3.	<i>Dharuriyah and hajiyyah maslahahs</i>	The Judge's Consideration of determining the living as a result of divorce is <i>maslahah dharuriyah</i> because it includes being able to meet daily needs during the 'iddah period.
4.	Can perfect life and eliminate the difficulties	Husband and wife who have a good marriage, then if they are separated, they should be on good terms too. Providing maintenance as a result of divorce by the husband is a form of attitude to maintain good relations with the ex-wife and the family that was cut off. It will give the impression of honor and a sense of responsibility as a husband at the end of their relationship. Of course, this will eliminate difficulties for wives undergoing the 'iddah period, especially if they have children.

Based on the analysis above the Judge's Consideration of the determination of income as a result of divorce is a benefit. This analysis is in line with the judge's assessment which states that all the judge's considerations and decisions prioritize the benefit of both parties. It makes protecting their rights and carrying out obligations more accessible for each other.

### Conclusion

The legal basis of the judge in determining the living as a result of divorce is when there is a claim from the party filing for divorce. If, in this case, the wife demands alimony because of the divorce, the husband must provide it. However, if there is no demand, the judge has the right to determine it because of the ex officio rights owned by looking at the economic facts of each party. Then the basis is contained in Article 149 of the Compilation of Islamic Law.

The difference in judges in determining the living as a result of divorce looks at whether the wife is *nusyuz*, the length of time the two parties have had a husband-and-wife relationship, and the husband's income demanded by his wife. In this case, you can also see the daily habit of earning a living when they were still together. The judge's steps in determining the residency due to divorce are the first to look at the condition of the wife's *nusyuz* or not. Next, look at the husband's income or his economic situation. In this case, the

judge needs to consider both parties' economic facts to implement the decision's effectiveness which will be determined later.

The Judge's Consideration of post-divorce rights (*'iddah and mut'ah*) as a result of divorce is critical to benefit the litigants and prevent harm to each other. Therefore this is included in the masalah *dharuriyah* because it includes being able to meet daily needs during the *'iddah* period. For future researchers, if they want to research with the same theme and discussion, they should look for different informants and perspectives so that they seem newer, more innovative, and more complete.

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#### **Interview**

- Interview, MHB, (Religious Court's Judge of Lumajang), 15 November 2022.
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- Interview, J (Religious Court's Judge of Lumajang), 15 November 2022.