




## The Icrar of Talak as A Result of Mut'ah Imposition Perspective of Mashlahah Mursalah

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**Abstract.** The Marriage Law in Indonesia stipulates that divorce can only be done before a court hearing, therefore the validity of divorce outside the court is not recognized. To the husband who submits a divorce application, besides allowing the husband to declare divorce in front of the court, the panel of judges can also burden the husband with paying a number of obligations including in the form of mut'ah. In common practice, mut'ah is usually paid after the trial of the divorce pledge is completed, but since the issuance of SEMA Number 1 of 2017 which stipulates that judges can include in a decision that the obligation of mut'ah must be paid before the pledge of divorce, many judges then carry out mandate of SEMA Number 1 of 2017 on the grounds of providing legal certainty for women's rights. However, this actually becomes an obstacle for the husband to carry out the divorce vow if the husband is unable to make payments. However, the results of the study found that the non-implementation of the divorce pledge was due to the inability of the husband to pay the mut'ah burden that was required to be paid before the divorce pledge, so if viewed from the perspective of mashlahah mursalah it does not actually make this judge's decision unfair, as well as an order to pay mut'ah before the pledge of divorce being pronounced also does not make the decision unfair. In this case the judge has considered many things, not only consideration of the husband's rights but consideration of the welfare of the wife as well.

Keywords: Divorce Pledge, Mut'ah, Mashlahah Mursalah

### Introduction

Marriage is a sacred contract that is carried out with the aim of forming a happy and eternal family based on the provisions of Allah SWT.<sup>1</sup> However, even though every human being wants his marriage to last forever, in fact not all marriages can end happily, well and smoothly as the purpose of the marriage itself. There are many problems that can arise in married life. If this problem is not resolved properly, it can eventually threaten the integrity of the household which can result in the end of a marriage.

The various problems that often trigger the breakdown of a marriage include the absence of alimony from the husband, lack of mutual attention, constant fights, infidelity, domestic violence, or other reasons. Related to this problem, divorce is the final way that must be taken in resolving household disputes and crises, resolving household rifts that are no longer possible to restore, even if allowed to drag on it is feared it will cause family disintegration on both sides.<sup>2</sup>

In Islam, divorce is better known as talak. Actually in Islam divorce is something that is not desirable, in accordance with the hadith of the Prophet which means *lawful acts but*

<sup>1</sup> Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan, (Jakarta: Menteri Sekretaris Negara Republik Indonesia, 1974), hlm. 1.

<sup>2</sup> Soemiati, *Hukum Perkawinan Islam dan Undang Undang Perkawinan* (Yogyakarta: Liberty, 1986), hlm. 104.

*hated by Allah SWT is talaq<sup>3</sup>*, Therefore, in Indonesia, which is one of the Muslim countries with the largest Muslim population in the world, it regulates things in such a way as to make it difficult for divorce or talak itself to occur.

In addition, according to Article 39 paragraph (1) of Law Number 1 of 1974 Concerning Marriage, it stipulates that divorce can only be carried out before a court hearing after the court concerned has tried to reconcile the two parties but to no avail. Moreover, in paragraph (2) it is explained that in order to carry out a divorce, there must be sufficient reasons whereby the husband and wife will not be able to live in harmony as husband and wife. This shows that the state has taken an important role in managing household life.

The rules regarding the validity of divorce before this court session have various benefits in it, one of which is that the court is expected to be able to guarantee the rights of each party as a result of divorce (talak), such as guaranteed compensation in divorce or *mut'ah*.<sup>4</sup> As for the right of *mut'ah* for the wife, this is regulated in Article 149 letter a KHI which states that if the marriage is broken up due to divorce, the ex-husband is obliged to give a proper *mut'ah* to his ex-wife, either in the form of money or objects, except for the ex-wife. *qabla dukhul*.

On this basis, if a divorce occurs due to divorce, meaning that the husband who submits a divorce application to the Religious Court, the wife who is divorced has the right to get *mut'ah* whose level is determined by the policy of the panel of judges by taking into account various things such as the ability of the husband, the length of the marriage period and the conditions wife.

Based on this, it can be understood that if the husband submits a divorce application to the Religious Court, then after the judge gives permission to pronounce the divorce vow in front of the court, then after the hearing for the pronouncement of the divorce vow, then the husband and wife have legally separated with the husband's consequences after the pledge Divorce must pay various obligations born after divorce, one of which is *mut'ah*. As for the problem lately, based on the Formulation of the Results of the Plenary Meeting of the Religious Chamber from 2012 to 2019, SEMA Number 1 of 2017, in divorce cases the panel of judges can include in the decision to oblige the husband to pay his obligations first, before making a vow divorce is done.

Based on the Formulation of the Results of the Plenary Meeting of the Religious Chamber from 2012 to 2019, SEMA Number 1 of 2017, the husband must pay his obligations first, in this case including the new *mut'ah* the husband can declare his divorce before the court. The problem is, there are quite a number of cases where the husband, when the divorce ceremony is being held, states that he is unable to pay the *mut'ah* that has been determined, as a result, the divorce ceremony has to be postponed for a maximum of 6 months as stipulated in Article 131 paragraph (4) The KHI stipulates that if the husband does not make a divorce vow within 6 months, then the husband's right to declare a divorce is null and void and the marriage bond remains valid as before. But what happened, even though he was given 6 months, the husband still could not pay his *mut'ah* obligation, so that in the end the husband's right to declare divorce was nullified.

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<sup>3</sup> *ibid*

<sup>4</sup> A1-Tah

ir al-Haaddäd, *Wanita dalam Syari'at dan Masyarakat*, terjemahan M. Adib Bisri (Jakarta: Pustaka Firdaus, 1993), 99-101;

The same thing also happened between the Petitioner (husband) and the Respondent (wife) in the case that occurred at the Lima Puluh Kota Religious Court with Case Number: 643/Pdt.G/2020/PA.LK where in this case the Panel of Judges finally granted the Petitioner to impose one divorce on his wife in front of the trial court by compulsorily obliging mut'ah to be paid to the wife as stated in the decision that must be paid before the trial of the divorce pledge. This is what, in turn, caused the Petitioner to lose the right to declare divorce, as a result of not being able to pay the mut'ah charge before the divorce ceremony was held.

This of course will bring harm to the lives of both parties, both husband and wife where their household life can no longer be saved, but divorce vows cannot be carried out. Apart from that, the wife will certainly be burdened where she is forced to live in a messy household, mutah cannot be obtained, and divorce cannot be carried out. On this basis, the question arises for the author what is the background to this regulation? then can the consideration of mashlahat for the wife's side eliminate the husband's right to declare divorce? Then what is the consideration of mashlahah on this issue.

## Discussion

### The Definition of Divorce and Mutah in Islam

Before entering into a discussion of the matter under study, it is necessary to understand in advance the understanding and concept of divorce and mut'ah in Islam, so that later you can get a complete picture of what is discussed and analyzed in this research. The main concept that needs to be understood in this research is related to divorce and mut'ah in Islam.

Divorce in Arabic is known as talak. Divorce, etymologically means letting go of the rope. The word divorce is taken from the word *ithlaq* which means to let go or *irsal* which means to decide or *tarkun* which means to leave, *faraakun* means separation. Divorce in religious terminology is an activity of releasing marital relations or dissolving a marriage. Meanwhile, in the Compilation of Islamic Law, talak is interpreted as a husband's pledge before a religious court hearing for a certain reason.<sup>5</sup>

Divorce or talak according to Sayyid Sabiq is releasing the bonds or dissolving the marital relationship.<sup>6</sup> Meanwhile, Abdurahman al-Jaziri defines divorce as the release of marital status.<sup>7</sup> Divorce in this sense is the loss of ties or limiting its movement with special words, while the meaning of divorce is the loss of marital ties so that it is no longer lawful for husband and wife to mix. Meanwhile, according to al-Hamdani, divorce is the release of ties and the end of marital relations.<sup>8</sup>

Based on some of the meanings above, it can be understood that divorce is the breaking of the marriage bond between husband and wife in order to build a household that is intact, eternal and eternal, so that between the two of them it is no longer lawful to associate as husband and wife do. Thus, talaq is eliminating the marriage bond so that after the loss of the marriage bond the wife is no longer lawful for her husband.

As for mut'ah, in language *mut'ah* comes from the word *mata'a* which means giving, adding, a pleasure, which complements, calms, and pleases. Etymologically, the word

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<sup>5</sup>Rusdaya Basri, *Fikih Munakahat II*, (Parepare: IAIN Parepare Nusantara Press, 2020), hal. 1

<sup>6</sup>Sayyid Sabiq, *Fiqh Sunnah*, (Mesir: Dar al-Fikr, 1983), hal. 2006

<sup>7</sup>Abdurrahman Al-Jaziri, *al-Fiqh ala Madzahibil Arba'ah*, (Mesir: Dar al-Fikr, 1989), hal. 278

<sup>8</sup>Al-Hamdani, *Risalah Nikah*, (Jakarta: Pustaka Amani, 1998), hal. 1

*mut'ah* has the meaning of benefit or enjoyment which is a form of completing basic needs or maintaining the fulfillment of these basic needs. *Mutah* in divorce is defined as a gift from a husband to a wife who has divorced after the divorce is pronounced.<sup>9</sup>

As also explained in the Encyclopedia of Islam that *mut'ah* literally means a few things or things that are pleasant. The word *mut'ah* is often used to refer to an item or money given by a husband to his wife which is divorced before being mixed in advance according to the husband's ability and sincerity.<sup>10</sup>

*Mut'ah* is the gift of a husband to his divorced wife as compensation.<sup>11</sup> This is in accordance with the explanation contained in the Compilation of Islamic Law (KHI) that "mut'ah is the gift of an ex-husband to a wife who has been divorced in the form of objects or money and others".

*Mut'ah* is a gift given by a husband to a wife who has been divorced, this gift can be in the form of money, objects or any provision as a tribute and assistance to an ex-husband to his ex-wife, as well as this gift as consolation for the wife who has been divorced.<sup>12</sup> So, *mut'ah* is something that must be given by ex-husbands to ex-wives as a form of consolation for the wife who has been divorced.

Fiqh scholars define *mut'ah* as "property left by a husband to his wife due to divorce". The word *mut'ah* is often used to refer to goods or money that a husband gives to his wife who is divorced before being mixed in advance according to his ability and sincerity.<sup>13</sup> In terms of the Syafi'i Madzhab, *mut'ah* is defined as an asset that must be given by a husband to his wife whom he has divorced and what has the same meaning under certain conditions. Meanwhile, the Maliki school of thought defines *mut'ah* as goodness for a divorced wife according to the level of the husband's ability.<sup>14</sup> In the book *Islamic Fiqh* by Wahbah az-Zuhaili it is stated that "mut'ah is clothing or property given by a husband to his divorced wife that exceeds the dowry or in exchange for dowry as in the condition of a mufawwidhah woman to comfort the woman's heart. And to lessen the pain of parting."<sup>15</sup>

From the above understanding it can be concluded that *mut'ah* is the gift of a husband to a divorced wife in the form of material according to the ability of the husband which aims to comfort and reduce the pain caused by separation.

### **The Pledge of Divorce Due to the Imposition of Mut'ah Perspective of Masalah Mursalah**

In Islamic law, the right to impose divorce is only given to husbands on the basis that in general husbands prioritize thinking and logic in considering an issue. In contrast to the wife who will put forward emotions and feelings in considering something. Based on this it is intended to minimize the occurrence of divorce if the right to divorce is given to the

<sup>9</sup>Nuraisah, "Hak Nafkah, Mut'ah dan Nusyuz Isteri (Studi Komparatif Undang-undang Hukum Keluarga di Berbagai Negara Muslim)", *Al-Ahwal*, Vol. 4 No. 1 (2011), hal. 82

<sup>10</sup>Dewan Redaksi Ensiklopedia Islam, *Ensiklopedia Islam*. Cet. 9. (Jakarta: Ihtiar Baru Van Hoeve, 2001), hal. 311

<sup>11</sup> Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia*, (Jakarta: Kencana, 2009), hal. 302.

<sup>12</sup>Khairuddin, Badri dan Nurul Auliyana, "Pertimbangan Hakim Terhadap Putusan Nafkah Pasca Perceraian (Analisis Putusan Mahkamah Syar'iyah Aceh Nomor 01/Pdt.G/2019/Ms. Aceh)", *El-Usrah*, Vol. 2 No. 1 (2019), hal. 167

<sup>13</sup>Dewan Redaksi Ensiklopedia Islam, *Ensiklopedia Islam*, (Jakarta: PT. Ihtiar baru van Hoeve), 133

<sup>14</sup> Wahbah Az-Zuhaili, *Fiqh Islam Wa Adillatuhu jilid 9*, Penj. Oleh Abdul Hayyie al-Kattani dkk., (Jakarta: Gema Insani, 2011), hal. 285

<sup>15</sup> *Ibid.*

husband rather than given to the wife.<sup>16</sup> There are several other reasons put forward by Muchtar regarding the granting of divorce rights to husbands, namely that the marriage contract is held by the husband. Husbands who accept consent from the wife when the marriage contract is carried out, the husband is obliged to pay the dowry to the wife at the time of the marriage contract and it is the husband who is advised to pay mutah (voluntary gift from husband to wife) after carrying out divorce from his wife. The next reason is that the husband is obligated to provide maintenance for his wife during his marriage during the iddah period if he is moral, finally, the moral instructions in the Koran and hadith are mostly addressed to husbands.<sup>17</sup>

In the study of the yellow book of fiqh, divorce is the absolute right of the husband. Divorce is considered valid if it is given consciously by a husband who is wise and mature. When divorce has been pronounced by a husband against his wife, then immediately the divorce falls, the husband and wife become divorced. There is no need to deal with court. This yellow book divorce does not require written evidence. Husband and wife can be separated just like that. Therefore, the Shi'a Imamiyah are of the opinion that divorce must be pronounced in front of 2 witnesses. If the divorce is not pronounced in front of 2 witnesses, then the divorce is not valid.

Jumhur Ulama's opinion states different things where this divorce is the husband's right, so whenever divorce is imposed it is legal, whether there are witnesses or no witnesses. Then the court intervened to try him. In fiqh in Indonesia, a husband who is about to divorce his wife must ask permission from the religious court, that he will declare his divorce to his wife. Divorce is not an absolute husband's right, but part of it has been taken by the state, in this case by the religious court. A husband who intends to divorce his wife must submit a divorce application to the religious court along with the reasons why he intends to divorce his wife.

Pledge (sighat) divorce itself is a word or speech uttered by the husband or his representative when he divorces his wife. Some of these sighat divorces were said directly with clear words and some were said with satire (kinayah). Sighat divorce that is direct and clear, for example a husband saying to his wife: "I give you one divorce". By saying this sentence by the husband, one divorce falls on his wife right then and there and it is legal. Meanwhile, sighat talak is said satirically, for example a husband saying to his wife "go back to your parents" or "I have let you go from me". This can be declared valid if the husband's words are accompanied by the intention of divorcing his wife and the husband tells the judge that the intention of his words is to declare divorce to his wife. If his words do not mean to impose divorce on his wife, such divorce is not valid.<sup>18</sup>

Based on this provision, it is clear that in the positive law in force in Indonesia, a divorce handed down by a new husband is considered valid if it is declared in a divorce pledge before the court. That is, the validity of a divorce handed out outside the court is not recognized. However, with the presence of SEMA Number 1 of 2017 where based on this rule the judge is allowed to include in the decision to oblige the husband to pay all post-divorce obligations including mut'ah before the pledge of divorce, there have been many cases where the husband ultimately failed to declare divorce because he did not able to pay

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<sup>16</sup> Kamal Muchtar, *Asas-asas Hukum Islam tentang Perkawinan*, (Jakarta: Bulan Bintang, 1974), hlm. 149.

<sup>17</sup> *ibid*

<sup>18</sup> Muhammad Syaifuddin, Sri Turatmiyah dan Annalisa Yahana, *Hukum Perceraian*. (Jakarta: Sinar Grafika, 2005), hlm. 120.

the specified mut'ah obligations. This is also what happened in the case in Case Number: 643/Pdt.G/2020/PA.LK at the Limapuluh Kota Religious Court.

*Mut'ah* itself is a gift from a husband to his divorced wife as compensation.<sup>19</sup> This is in accordance with the explanation contained in the Compilation of Islamic Law (KHI) that "mut'ah is the gift of an ex-husband to a wife who has been divorced in the form of objects or money and others". Fiqh scholars define mut'ah as "property left by a husband to his wife due to divorce". The word mut'ah is often used to refer to goods or money that a husband gives to his wife who is divorced before being mixed in advance according to his ability and sincerity.<sup>20</sup>

In terms of the Syafi'i Madzhab, mut'ah is defined as an asset that must be given by a husband to his wife whom he has divorced and what has the same meaning under certain conditions. Meanwhile, the Maliki school of thought defines mut'ah as goodness for a divorced wife according to the level of the husband's ability.<sup>21</sup> In the book *Islamic Fiqh* by Wahbah az-Zuhaili it is stated that "mut'ah is clothing or property given by a husband to his divorced wife that exceeds the dowry or in exchange for dowry as in the condition of a mufawwidhah woman to comfort the woman's heart. And to lessen the pain of parting."<sup>22</sup> From the understanding of some of these meanings, it can be concluded that mut'ah is the gift of a husband to a divorced wife in the form of material according to the ability of the husband which aims to comfort and reduce the pain caused by separation.

In Indonesia, apart from being regulated in the KHI, the issue of mutah is also regulated in the Decision of the Chief Justice of the Supreme Court of the Republic of Indonesia Number: KMA/032/SK/IV/2006 concerning the Implementation of Book II of the 2013 Revised Edition Guidelines for the Implementation of the Duties and Administration of the Religious Courts which states that in cases divorce The Religious Court/Syar'iyah Court can ex officio stipulate the obligation to provide iddah for the husband for his wife, as long as the wife is not proven to have committed nusyuz, and stipulate the obligation of mut'ah (Article 41 letter (c) of Law No. 1 of 1974 jo. Article 149 KHI letters (a) and (b).

Based on this, it can be understood that if the Religious Courts have determined that there is an obligation for husbands to give mut'ah to ex-wives, this means that the husband is obliged to pay for it. However, in practice, before the release of SEMA Number 1 of 2017, the mut'ah payment was made after the divorce pledge was completed, not before the divorce vow was implemented, which in the end often invalidated the husband's right to declare his divorce as a result of being unable to pay the mut'ah burden before the divorce pledge was implemented. .

In Case Number: 643/Pdt.G/2020/PA.LK at the Lima Puluh Kota Religious Court, the same thing also happened. In court proceedings, there was sufficient evidence that the household between the Petitioner and the Termoho could no longer be maintained, so after trying to reconcile first, the Panel of Judges finally granted the Petitioner's Petition to impose divorce on the Petitioner's wife accompanied by obliging the Petitioner to pay a certain amount of mut'ah to the wife of the Petitioner with the provision that mut'ah is paid before the trial of the divorce pledge is carried out. In fact, when the trial for the divorce

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<sup>19</sup> Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia*, (Jakarta: Kencana, 2009), hal. 302.

<sup>20</sup> Dewan Redaksi Ensiklopedia Islam, *Ensiklopedi Islam*, (Jakarta: PT. Ichtiar baru van Hoeve), 133

<sup>21</sup> Wahbah Az-Zuhaili, *Fiqh Islam Wa Adillatuhu jilid 9*, Penj. Oleh Abdul Hayyie al-Kattani dkk., (Jakarta: Gema Insani, 2011), hal. 285

<sup>22</sup> *Ibid.*

pledge was to be held, the Petitioner stated that he was unable to pay the mut'ah fee that had been determined at that time. On this basis, based on statutory regulations, the divorce pledge hearing is postponed for a maximum of 6 months after the date for the divorce pledge hearing has been determined. However, 6 months later, after the Petitioner was legally and properly summoned based on the provisions to carry out the divorce pledge, it turned out that the husband did not also come to carry out the divorce pledge hearing, so that based on the provisions of the statutory rules the right to declare divorce which previously had legal force remains null and void, and the Petitioner may not submit another Application for the same reasons.

Based on this case, it is clear that the root cause of the problem is the provision on the imposition of mutah which must be paid before the hearing for a divorce pledge and the stipulation regarding the 6-month time limit for a divorce pledge. It was these two things which then led to the implementation of the divorce vow which should have been possible to be carried out to not be carried out. It's just that in this regard, of course, laws and regulations are made with a noble and certain purpose to create legal certainty for the parties.

Regarding this phenomenon, according to the author, it is necessary to analyze it from the perspective of mashlahahah mursalah, bearing in mind that at first glance this rule seems to cause harm to the husband because it causes the abolition of his divorce rights if he is unable to pay mut'ah, but on the other hand, a rule is certainly impossible. made without any consideration of the benefit in it. Therefore, it is necessary to dig deeper into this matter.

Mashlahahah mursalah itself is mashlahahah in which Shari'a does not require law to create mashlahahah, nor is there any evidence showing its recognition or cancellation. Meanwhile, according to Abu Zahrah, mashlahahah mursalah is all benefits that are in line with the objectives of Shari'a (in making Islamic law) and there is no specific pretext that indicates whether it is acknowledged or not.<sup>23</sup>

If we trace the issuance of SEMA Number 1 of 2017 which became the basis for judges to determine the payment of mutah obligations prior to the pledge of divorce, this regulation was actually issued in order to realize Perma Number 3 of 2017 concerning Guidelines for Trying Cases of Women Confronting the law with the aim of providing protection for women's rights after divorce. As for SEMA Number 1 of 2017 concerning the implementation of the formulation of the results of the 2017 Supreme Court plenary chamber meeting as a guideline for carrying out tasks for the court letter c point 1 it is stated that "In the framework of implementing Perma Number 3 of 2017 concerning Guidelines for Trying Cases of Women Confronting the Law to provide protection law for women's rights after divorce, the payment of obligations due to divorce, especially iddah, mu'ah, and madhiyah maintenance, can be included in the verdict with the sentence paid before pronouncing the divorce pledge. The divorce vow can be implemented if the wife has no objection to the husband not paying the obligation at that time.

Prior to this rule, the implementation of the payment of mut'ah was carried out after the pledge of divorce was carried out, however, in many cases the husband after the pledge of divorce was carried out, did not immediately pay his obligations including mut'ah and tended to neglect payments. Meanwhile, there are no rules that can force the execution of this husband's obligation. This often causes the woman in the end not to get all her rights

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<sup>2323</sup>Muhammad Abu Zahrah, *Ushul al-Fiqh*, (Jakarta: Pustaka Firdaus, 2005), hal. 424

after the divorce. could not be obtained because of negligence on the part of the husband. On this basis, and based on SEMA Number 1 of 2017, at this time the judge can stipulate that the payment of mut'ah is made before the pledge of divorce with the aim of providing legal certainty for the wife in order to obtain her rights.

Based on this, it is clear that prior to the existence of this rule, the implementation of the payment of mut'ah was carried out after the pledge of divorce was carried out, however, in many cases the husband after the pledge of divorce was carried out, did not immediately pay his obligations including mut'ah and tended to neglect payment. Meanwhile, there are no rules that can force the execution of this husband's obligation. This often causes the woman in the end not to get all her rights after the divorce. could not be obtained because of negligence on the part of the husband. On this basis, and based on SEMA Number 1 of 2017, at this time the judge can stipulate that the payment of mutah is made before the pledge of divorce with the aim of providing legal certainty for the wife to obtain her rights.

As for the occurrence of non-implementation of the divorce vow as a result of the sound of a decision requiring the husband to pay the burden of mut'ah first before the divorce pledge, where the husband turns out to be unable to pay the burden of mut'ah before the divorce pledge is carried out, then if analyzed from a positive law point of view, then according to the author, between the pledge of divorce and the burden of paying this mut'ah must be understood as mutually related legal events. The existence of divorce is an absolute condition or condition sine qua non which must exist prior to the existence of mut'ah. A husband must first be declared to have divorced his wife before he is burdened/punished to pay mut'ah. It's just that the execution of mut'ah after the pledge is pronounced in practice is very difficult, where often after pronouncing the vow of divorce the husband does not pay his mut'ah obligation as soon as possible. This is what makes the judge of the Religious Courts stipulate that the payment of mut'ah is made first before the divorce vow is pronounced. The aim, as previously explained, is to provide legal certainty for the wife in order to obtain her rights.

So, the real main problem is that there are rights for each party that must be fulfilled, on the one hand the husband has the right to pronounce a divorce vow, while on the other hand there are rights of the wife which must be protected to obtain mut'ah. So, regarding this matter, Article 131 paragraph (4) KHI stipulates that if the husband does not make a divorce pledge within 6 months, then the husband's right to declare divorce is null and void and the marriage bond remains valid as before. So, in cases where the husband is unable to pay mut'ah before the trial of the divorce pledge, the panel of judges will usually postpone the trial of the divorce pledge within 6 months. However, if within 6 months the husband is unable to pay his mut'ah fee, then as stipulated in Article 131 paragraph (4) KHI, the husband's right to declare divorce is null and void.

So, in the author's opinion, the non-implementation of the divorce vow due to the husband's inability to pay the mut'ah burden before the divorce pledge actually does not mean that the panel of judges deliberately obstructed the husband's right to declare divorce, but because the statutory provisions stipulate this, where other than the husband who have the right to declare a divorce, on the other hand there are also the rights of the wife that must be protected, which in practice was indeed before the issuance of SEMA Number 1 of 2017 which was often neglected due to the absence of rules regarding the execution of post-divorce husband obligations.

So it can be understood that from the side of mashlahah, the panel of judges when stipulating that the husband is obliged to pay his mut'ah obligation before the trial of the divorce pledge is held is in order to maintain mashlahah from the ex-wife's side, which in practice is often neglected due to negligence on the part of the ex-husband. Therefore, in order to have legal certainty that the wife will get her rights, the panel of judges determines this.

On this basis, in relation to the non-fulfillment of the divorce vow due to the inability of the husband to pay the burden of mutah which is obligatory to be paid before the divorce pledge, if analyzed from the point of view of Islamic law, Islamic law does not find such a rule nor does it find any discussion that leads to it in Islamic law. studies of classical scholars. Usually, mut'ah is indeed paid after the word divorce is spoken from the mouth of the husband, because mut'ah exists because of the divorce itself, not the other way around.

Even the classical scholars did not link the validity of a divorce with trial or testimony. That is, because divorce is the husband's right, legal divorce is carried out without being witnessed and without being carried out before the court. So, of course, the discussion regarding the court's decision to pay mut'ah before the pledge of divorce was also not discussed by the classical scholars.

This is in line with the opinion of Shaykh Shamsuddin Muhammad bin Muhammad al-Khatib as-Syarbini in *al-Iqna' fi al-fazi abi Syuja'*, his discussion of the validity of the divorce pledge is related to whether the word divorce is clear or not, whether it is necessary or not. the need for intention, the fulfillment of the pillars of divorce or not.<sup>24</sup> As for testimony and court intervention, they are not discussed, which means they are considered not to affect whether the divorce pledge is valid or not. Sayyid Sabiq also defines talak as eliminating the marriage bond and ending the relationship between the husband and wife so that with the pronouncement of the pledge of divorce or a statement of divorce from the husband to his wife, it causes the marriage bond with his wife to be broken because of these words. As for Sayyid Sabiq, in this case he did not link the validity of divorce with testimony or the necessity of pronouncing it before the court.

On this basis, it is clear that in fiqh munakahat there is no provision regarding the payment of mut'ah made prior to the pledge of divorce, because what is usually practiced by classical scholars is pronouncing divorce first and then paying all post-divorce obligations including mut'ah. That is, it is not true that the payment of mut'ah causes the husband to delay his right to divorce or even to lose his right to divorce altogether because of his inability to do so, and such a rule has never been found in the discussions of classical scholars.

On this basis, in relation to the non-fulfillment of the divorce vow due to the husband's inability to pay the mut'ah burden that must be paid before the divorce pledge, if analyzed from the point of view of munakahat fiqh, then in munakahat fiqh there is no such rule nor is there any discussion that leads to it in munakahat fiqh. studies of classical scholars. Usually, mut'ah is indeed paid after the word divorce is spoken from the mouth of the husband, because mut'ah exists because of the divorce itself, not the other way around. So, if the imposition of mut'ah is determined before the pledge of divorce, especially to the extent that it hinders the husband's right to divorce or even causes the husband to lose his divorce rights, then this, from the point of view of fiqh munakahat, is certainly not in line

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<sup>24</sup>Syaikh Samsuddin Muhammad bin Muhammad al-Khatib al-Syarbini, *Al-Iqna' fi hal al-Fazi Abi Syuja'*, (Beirut: Dar al-Khottob al-Ilmiyyah, 2006), hal. 355-357

with what has been going on so far. It's just that, of course, when viewed from the perspective of positive law, of course legislators have other considerations in order to bring about benefit.

Based on this, it can be understood that in this case the Panel of Judges of the Fifty Cities Religious Court has basically decided this with legal considerations in such a way, using strong legal arguments and taking into account the human side and justice so that the decision made legally is not positive. contrary to any laws and regulations as well as not contradicting Islamic law which both want to protect human rights including women's rights which are often neglected. As for the non-fulfillment of the divorce vow due to the ex-husband's inability to pay the mut'ah nominal, it basically does not make this decision unfair, similarly an order to pay the mut'ah burden before the divorce vow is pronounced also does not make this decision unfair, even though as a result the rights of the parties the husband's vow to divorce becomes impeded. In this case, according to the author, the judge has considered many things, not only the consideration of the husband's rights but also the consideration of the wife's rights.

It's just that, in the opinion of the author, the non-implementation of the divorce pledge in this case could indeed bring harm to both parties for both the Petitioner (husband) and the Respondent (wife) if no way out is found. This is because on the husband's side, he lost his right to pledge divorce only because he was charged with paying mut'ah before the divorce vow. Even though of course his decision to divorce his wife was based on household life which could no longer be repaired. On the wife's side, of course, there is also a disadvantage, that is, the wife does not get her right in the form of mut'ah plus she does not get divorced, while both of them have completely ruined their household life. This of course will add to the suffering for the wife because she has to live in a messy household status.

Meanwhile, according to the writer's opinion, in cases like this, so that both parties get their rights and separation as a last resort can be taken immediately, the wife can file a lawsuit for divorce at the local Religious Court. As for the right of mut'ah that he should have received, he can also be sued in this lawsuit for divorce. This is based on the latest regulation, namely the Supreme Court Circular (SEMA) Number 2 of 2019 concerning the Enforcement of the Formulation of the Results of the 2019 Supreme Court Chamber Plenary Meeting as a Guideline for the Implementation of Duties for Courts, Religious Courts/Syar'iyah Courts may oblige husbands to provide maintenance to the wife in the divorce case is sued by adding the sentence of the obligation to pay maintenance in the verdict.

The payment will be made by the husband before taking the divorce certificate from the Court, meaning that the Court will postpone the issuance of the divorce certificate to the ex-husband until the ex-husband pays maintenance to his ex-wife. SEMA No. 2 of 2019 concerning the Enforcement of the Formulation of the Results of the 2019 Supreme Court Chamber Plenary Meeting as a Guideline for the Implementation of Tasks for the Court is the latest legal breakthrough made by the Supreme Court in upholding justice.

With this rule, it can be a way for both parties to get their respective rights. On the one hand the divorce can still take place, on the other hand the wife's right to obtain mut'ah can also be obtained.

### **Conclusion**

Based on the discussion that has been carried out and some of the analyzes that have been presented, it can be concluded that the divorce pledge was not implemented due to

the husband's inability to pay the mut'ah burden that was required to be paid before the divorce pledge in Case Number: 643/Pdt.G/2020/PA.LK, then if viewed from the perspective of mashlahah mursalah this does not actually make the judge's decision unfair, likewise the order to pay the burden of mut'ah before the pledge of divorce is pronounced also does not make the decision unfair, even though as a result the husband's right to declare divorce is hindered. In this case, according to the author, the judge has considered many things, not only the consideration of the husband's rights but also the consideration of the welfare of the wife.

Divorce vows are not implemented due to the husband's inability to pay the mut'ah burden that must be paid prior to the divorce pledge in Case Number: 643/Pdt.G/2020/PA.LK, if analyzed from the point of view of Islamic law, Islamic law does not find such a rule. Likewise, there is no discussion that leads to it in the studies of classical scholars. Usually, mut'ah is indeed paid after the word divorce is spoken from the mouth of the husband, because mut'ah exists because of the divorce itself, not the other way around. Thus, if the imposition of mut'ah is determined before the pledge of divorce, especially to the extent that it hinders the husband's right to divorce or even causes the husband to lose his divorce rights, then this, if viewed from the perspective of Islamic law, especially fiqh munakahat, is certainly not in line with what has been in effect so far. It's just that, of course, when viewed from the perspective of positive law, of course legislators have other considerations in order to bring about benefit.

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