
**The *Maqāṣid* Analysis on the
Nafkah Iddah of Divorce Lawsuit in
the Compilation of Islamic Law
(KHI) Article 149 (b) and the
Supreme Court Verdict Number
137/K/AG/2007**

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Abstract

This article examines the *nafkah iddah* of divorce lawsuit in the Islamic Law Compilation (KHI) Article 149 (b) and the verdict issued by the Supreme Court Number 137/K/AG/2007. It also analyses their legal basis based on the Jasser Auda's *maqāṣid al-sharī'ah* approach concerning the preservation of life and treasure. The primary objective of this article is to find the main differences between the KHI and the Verdict in determining the *nafkah iddah* of divorce suit. Although some scholars have concerned about the case of *nafkah iddah*, the Jasser Auda's *maqāṣid al-sharī'ah* approach seems to be rare to be dealt with the case. Accordingly, the *maqāṣidi* approach will be mainly utilised in order to consider the effectiveness of both the KHI and the Verdict. This article finds that the KHI states that a wife who applies for a divorce is considered disloyal. As a consequence, she is undeserving of receiving *nafkah iddah*. The additional finding is that the Verdict decides that in the case of the divorce filled by the ex-wife, it brings a responsibility for the former husband to pay the *nafkah iddah*. From the perspective of *maqāṣid al-sharī'ah*, this article argues that the implementation of the Verdict gains better benefit rather than the KHI, because the legal basis evolved for the *nafkah iddah* of divorce suit is in line with the *maqāṣid* principles of the preservation of life and property. In the particular case, the principles tend to protect the ex-wife's safety and welfare after the divorce.

Abstrak

Artikel ini ingin menguji tentang *nafkah iddah* yang disebabkan oleh cerai gugat berdasarkan kepada Kompilasi Hukum Islam (KHI) Pasal 149 (b) dan Keputusan Mahkamah Agung Nomor 137/K/AG/2007. Di samping itu, artikel ini juga menganalisis dasar-dasar hukum yang digunakan kedua peraturan di atas, dengan menggunakan pendekatan *maqāṣid al-sharī'ah* yang menekankan pada pentingnya menjaga jiwa dan harta kekayaan. Tujuan utama artikel ini adalah ingin menemukan perbedaan-perbedaan mengenai kedua peraturan yang ada dalam penyelesaian kasus *nafkah iddah* melalui cerai gugat. Artikel ini menemukan bahwa KHI menyatakan seorang isteri yang mengajukan cerai gugat merupakan isteri yang tidak taat dan setia. Konsekuensinya, ia tidak layak untuk mendapatkan *nafkah iddah*. Sementara itu, temuan berikutnya menyatakan bahwa Keputusan Mahkamah Agung dalam kasus cerai gugat yang diajukan isteri, membawa kepada keputusan bahwa suami tetap harus membayar *nafkah iddah*-nya. Artikel ini mengajukan argumentasi bahwa, penerapan Keputusan Mahkamah Agung dianggap mendapatkan manfaat yang lebih besar ketimbang penggunaan KHI, karena dasar-dasar hukum yang digunakan dalam menetapkan nafkah iddah dianggap selaras dengan prinsip-prinsip *maqāṣid*, terutama menjaga jiwa dan harta. Berkaitan dengan kasus ini, prinsip-prinsip tersebut cenderung memberikan perlindungan pada keamanan dan kesejahteraan bekas isteri setelah perceraian yang terjadi.

Keywords: *Nafkah iddah*; divorce lawsuit; the Compilation of Islamic Law; the Supreme Court Verdict; *maqāṣid al-sharī'ah*; *maqāṣidi* approach.

Introduction

It is considered normal for every household to be filled with conflicts that even lead to divorce.¹ Divorce is the breaking of marriage ties in domestic life because of certain dynamics. The primary factor that often triggers divorce, as will be proved further in this article, is domestic violence, in which, the wives often become victims. In such circumstances, women are given the right to file for divorce. While the right divorce (*ṭalāq al-raj'i*) refers the case of husband filing for divorce, the *ba'in* divorce is when divorce is filed by the wife. Although women have the right to file for divorce, there are a number of debates that are not favourable for women. In addition to the debate about whether the divorce must require the husband's approval or not,² it is more important to note the wife's right of welfare after the divorce, particularly whether the ex-husband is obliged to pay the *nafkah iddah* or not. The judge must consider the considerations on the basis of certain law.

The *nafkah iddah* itself is a living allowance given by a man to his ex-wife based on a court decision that completes their divorce.³ The *nafkah iddah* in the *fiqh* is provided with certain conditions. For example, the absence of *nushuz*⁴ on the wife (and not on the husband), and different Islamic legal schools (*mazhab*) hold conflicting opinions. In Indonesia, the basic law governing the provision of *nafkah iddah* to the former wife is the Islamic Law Compilation (Kompilasi Hukum Islam/HKI) Article 149 (b), which states that "a *nafkah iddah* must be given to the former wife except herself makes a request of *ba'in* divorce or considered *nushuz* or not in a pregnant state." A judge in the West Jakarta Religious Court, for instance, in the case Number 396/Pdt.G/2012/PA.JB rejected the plea for receiving *nafkah iddah* of the woman deals with the *ba'in* divorce, on the grounds of her being perceived as *nushuz*, because she insisted on filing for divorce when her husband wanted to maintain the marriage. While the main reason she filed for divorce is that her former husband often committed domestic violence, as a result of this court judgment, the ex-wife does not get *nafkah iddah*.

In other case, a judge used the Supreme Court Verdict Number 137/K/AG/2007 as the basic law for deciding divorce cases, and the judgment established advocates that

¹ Fanani and Badria Nur Lailina Ulfa, "Hak *Ex Officio* Hakim: Studi Kasus Perceraian di Pengadilan Agama Sidoarjo, No. 3513 2015," *Jurnal Tsaqafah* 13, no. 2 (2017): 340.

² Mahmoud Jaraba, "The Practice of *Khul'* in Germany: Pragmatism versus Conservatism," *Journal of Islamic Law and Society* 26, Issue 1-2 (2019): 83-110.

³ Depdikbud, *Kamus Besar Bahasa Indonesia* (Jakarta: Balai Pustaka, 1996), 667.

⁴ It means ignoring any responsibility as a wife or husband.

nushuz does not always apply only for the wives filing for divorce which often results in the cancellation of rights for the *nafkah iddah*. A judge at the South Jakarta Religious Court in the case Number 1394/Pdt.G/2012/PA.JS used the Supreme Court Verdict as a legal basis to decide a divorce case. It is clearly stated in the court decision document that the women file for divorce because they quarrel constantly in addition to the man's conviction of adultery. Therefore, justice is restored when the wife is granted the divorce and because the lawsuit is not considered as a form of *nushuz*, judges punish the husband with the obligation to provide a *nafkah iddah*.

Although in general the adoption of the classical *fiqh* studies on *nafkah iddah* (as well as the debate around whether the *nafkah iddah* is entitled to women who are divorced from *ba'in* or not) are considered as instruments that have given more women's justice,⁵ but there is also a critical view that sees the adoption process as being political-exclusive because it only refers to one dominant school,⁶ which allows inadequate adoption of the law as judges fail to achieve justice. Because, despite the written rules, in fact, many women have to 'fight' in court just to get their basic rights.⁷ It is important that there are continuous critical contentions on the results of the adoption. To complement the growing critical dialectics, this study raises two important questions, namely (a) comparing two different legal bases about *iddah* in the religious court environment: the Compilation of Islamic Law and the jurisprudence of the Supreme Court's decree, and (b) analysing them through *maqāṣid al-sharī'ah* approach.⁸ Previous study concerning the granting of *nafkah iddah* rights for ex-wives who files for divorce in the religious court was conducted by Muhammad Qiyamul Wustha, in an article published in the proceedings of the Islamic family law of Unisba.⁹ However, the study only analyses decisions and refers their arguments to the study of the classical Islamic Jurisprudence (*fiqh*). While this article has focused on another significance that is to "correct the paradigm" behind the two legal bases in conflicting

⁵ Stijn Cornelis Van Huis, "Khul' over the Longue Durée: The Decline of Traditional *Fiqh* Based Divorce Mechanisms in Indonesian Legal Practice," *Journal of Islamic Law and Society* 26, Issue 1-2 (2019): 58-82.

⁶ Nuzulia Febri Hidayanti, "Rekonstruksi Hukum *Iddah* dan *Ihdad* dalam Kompilasi Hukum Islam (KHI)," *Jurnal Madzahibuna* 1, no. 1 (2019): 59.

⁷ Euis Nurlaelawati, "Women's Financial Rights after Divorce in Indonesia," *Journal of Leiden Studies in Islam and Society* 8 (2018): 89-106.

⁸ Even though the *maqāṣid al-sharī'ah* is a discourse that is commonly taken into consideration in studies of previous Muslim scholars, in general, it is rarely used in judicial institutions, both in Islamic civil justice (in Indonesia) or Islamic crime (in Malaysia).

⁹ Muhammad Qiyamul Wustha', M. Roji Iskandar and Siska Lis Sulistianti, "Analisis Putusan Pemberian Nafkah *Iddah* pada Cerai Gugat (Studi Putusan Pengadilan Agama Jakarta Selatan no. 1542/Pdt.G/2014/PAJS)," *Prosiding Hukum Keluarga Islam* 5, no. 2 (2017).

religious court environments, it seeks to determine which the legal basis that is more suitable for adjudicating *nafkah iddah* of divorce lawsuits in the future. It is, indeed, the gaps of study that needs to be taken over.

This article applies the *maqāṣid al-sharī'ah* analysis especially the concept offered by Jasser Auda. The *maqāṣid al-sharī'ah* analysis is important for at least two reasons. First, the *maqāṣid al-sharī'ah* is well considered to pay high attention to the care of the soul (*hifẓ al-nafs*) and the maintenance of property (*hifẓ al-mal*),¹⁰ which are closely related and guarantee the fulfillment of justice and goodness in the affairs of *mu'āmalāt*,¹¹ in this case also includes the *nafkah iddah*. Second, *maqāṣid* is oriented not to the text but to the intentions and objectives behind the law, namely benefits.¹² Only by analysing the *maqāṣid*, the cases of *nafkah iddah* for divorce lawsuit could be assessed more clearly that the ex-wife, as vulnerable people who often suffer from gender inequality in marital affairs, can secure her welfare particularly during and after *iddah* period by obtaining the right to get allowance.¹³ The strength of *maqāṣid* approach, especially that put forward by Jasser Auda, is the nature of *ijtihād* which does not leave the text but still accommodates rational arguments and is open to contemporary discourses,¹⁴ including in this case the discourse of gender equality.

This article argues that through the *maqāṣid* approach, the Compilation of Islamic Law (KHI) Article 149 (b) cannot be completely used as the basis in determining the case of *nafkah iddah* of women who file divorce for domestic violence, because such legal basis does not legitimately reflect justice and unable to fulfil the rights of former wife after suffering through prolonged domestic conflict. It also proves that the Supreme Court Verdict Number 137/K/AG/2007 is more suitable as a legal basis for the case, because it reflects justice more and fulfils the rights of the wife after divorce. In terms of the article structure, it would present the argument starting from the explanation of *nafkah iddah* for divorce lawsuit in the KHI Article 149 (b) and the Supreme Court Verdict Number 137/K/AG/2007. Furthermore, both of the legal bases are analysed

¹⁰ Adi Setia, "Freeing *Maqasid* and *Maslaha* from Surreptitious Utilitarianism," *Journal of Islamic Science* 14, no. 2 (2016): 127-156.

¹¹ Mohd Shahid Bin Mohd Noh and Mohammad Taqiuddin Bin Mohamad, "The Justification of *Maqasid Al-Shari'ah* through the Doctrines of *Usul Al-Fiqh* and *Qawa'id Al-Fiqhiyyah*: A Study on Securitization Process," *Journal Of Islamic, Social, Economics And Development* 3, issue 12 (2018): 11.

¹² Arif Rahman, "*Al-Dharuriyat Al-Khams* dalam Masyarakat Plural (Analisis Perbandingan Ulama tentang Makna Maslahat)," *Jurnal Madzahibuna* 1, no. 1 (2019): 25-41.

¹³ Muhammad Fauzan, "Maqashid *Nafkah Iddah* dan Perlindungan Perempuan," *Jurnal Hukum Islam* 16, no. 1 (2016): 80.

¹⁴ M. Amin Abdullah, "Bangunan Baru Epistemologi Keilmuan Studi Hukum Islam dalam Merespon Globalisasi," *Asy-Syir'ah* 46, no. 2 (2012): 328.

in the *maqāṣid* through the Jasser Auda's conception, in particular, by using two main instruments in *kulliyah al-khamsah*, namely preserving life and property.

The comparison of two legal bases for *nafkah iddah* of divorce lawsuit

The KHI is constructed based on the needs of the judiciary, namely the book of Islamic legal material used in the Religious Courts in Indonesia.¹⁵ The Religious Courts are very old, but the judges do not have a reference in making decisions. As a result, judges use traditional Jurisprudence without any standardisation, so that different judgements can be made in the same case. The codification of the KHI is carried out by a government team and a number of Islamic scholars, which is later endorsed by the Presidential Decree Number 1 of 1991.¹⁶

However, such standardisation is susceptible to making contextual legal thought which does not accommodate certain sensitivity to current problems. Formalising one opinion will therefore ignore another opinion in a case. In fact, the law of *nafkah iddah* for divorce suit under the KHI Article 149 (b) does not reflect all opinions within Islam regarding related matters. The debate in the case of *ba'in* divorce is actually very diverse. The KHI generally shares the opinions of the Muslim legal scholars of Hanabilah, Shafi'iyah and Malikiyyah. The Hanabilah scholars argue that the wife does not have the right to earn living expenses and *maskan* (accommodation). This opinion refers to the hadith from Fatimah bint Qays when she received a triple divorce from her husband. Then Rasul said to her (Fatimah): "Your expenses are not an obligation on him."¹⁷ Likewise, Shafi'iyah and Malikiyyah scholars who say that wives are only allowed to obtain housing rights, while for the right to living expenses, they must first look at whether the wife is pregnant or not, because only pregnancy makes a former wife get a living.¹⁸ If the ex-wife is not pregnant, the right to *nafkah iddah* cannot be obtained because there is indeed nothing that needs to be funded. Hanafiyah scholars generally view the right to living expenses and accommodation for the wives who are divorced in *ba'in* similar to those of women who are divorced *raj'i*. Even in this case, they only cite the basis on the fact that when women are not given their rights to living expenses and *maskan* then women have to spend time waiting in her ex-husband's house, but the spirit which is notable is the sense of justice in the opinion among the Hanafiyah scholars. They believe that the ex-husband owes a debt to his former wife for divorcing her thus he needs to provide the living expenses and

¹⁵ Nuruddin and Azhari Akmal Tarigan, *Hukum Perdata Islam di Indonesia* (Jakarta: Kencana, 2004), 29.

¹⁶ Abdurrahman, *Kompilasi Hukum Islam di Indonesia* (Jakarta: Akademika Pressindo, 2015), 21.

¹⁷ Muwaffiq al-Din ibn Qudamah, *al-Mughni*, Juz 11 (Kuwait: Dar al-'Alim al-Kutub, 1997), 606.

¹⁸ Ahmad ibn Muhammad al-Dardiri, *al-Syarh al-Shaghir*, Juz 2 (n.c: n.p., n.d.), 740.

maskan. The debt will not be considered fully paid unless it has been compensated by the ex-husband or given up by the ex-wife. This opinion is embraced by al-Tsauri, al-Hasan and Ibn Syubrumah.¹⁹

In the context of the KHI, the widely-accepted opinion is the denial of the right to *nafkah iddah* for the former wife due to *nushuz*, and the rejection is validated as a sanction for disobedience. Here is what seems to be an example injustice; in *fiqh* debates about *munakahat*, from the start, women are not given right to have an opinion on the matter. Even in the issue of reconciliation, a number of schools believe that the statement of reconciliation does not require the approval of a former wife.²⁰ It can be said, in general that the study of the rights of ex-wives for *nafkah iddah* due to domestic violence have not been thoroughly accommodated in the KHI. It is mainly due to the standardisation carried out in the legalisation still refers to the opinions of the classical era that are no longer relevant to the present dynamics. The trend of divorce cases in Indonesia reveal the fact that the majority of women have a good reason to file a divorce lawsuit, namely the desire for protection and justice due to the high intensity of women suffering domestic violence and gender inequality.

The following data confirms the divorce trends above: the 2019 annual report of the Indonesian Commission for Women (Komnas Perempuan) reveals a total of 5,114 cases of violence against wives reported in various regions. While the Religious Courts discovers 392,610 divorce cases the cause of which is domestic violence. A year earlier, in 2018, out of 406,178 cases of violence against women reported and handled by Komnas Perempuan, more than half, as many as 392,610 cases, are cases of domestic violence and are also handled by the Religious Courts.²¹ While in 2015, there are 252,587 cases of divorce due to domestic violence with women as victims. Violence occurs because women protest the practice of infidelity and even *sirri*/ secret marriage.²² In 2017, divorce cases handled by the entire Religious High Court whose causes are disputes and domestic violence, totalled 152,575 cases. At the Religious

¹⁹ Abu Bakar ibn Mas'ud al-Kasani, *al-Bada'i' al-Shana'i'*, Juz 4 (Beirut: Dâr al-Kutub al-Ilmiyah, 2010), 16.

²⁰ Fadhilatul Maulida and Busyro, "Nafkah Iddah Akibat Talak *Ba'in* dalam Perspektif Keadilan Gender (Analisis Terhadap Hukum Perkawinan Indonesia)," *Al-Hurriyyah* 3, no. 2 (2018): 116-117.

²¹ Quoted from "The Fact Sheet and Key Points of the 2015 National Commission on Violence Against Women," *The National Commission on Violence Against Women*, accessed February 13, 2019. <https://www.komnasperempuan.go.id/read-news-lembar-fakta-dan-poin-kunci-catat-tahunan-komnas-perempuan-tahun-2019>.

²² Taken from "Perceraian Meningkat," *Harian Nasional*, accessed February 11, 2019. <http://www.harnas.co/2016/04/18/perceraian-meningkat>.

Courts level, the total number of divorce cases due to violence against wives is 245,548 cases.²³

Although the data shows the increasing trend of domestic violence in divorce cases, filing for divorce deemed as a form of protective mechanism remains difficult because there is a public conception in the Religious Courts that divorce must not be immediately facilitated, because divorce is not favoured by God at the same time so that the community does not easily end marriage.²⁴ As a result, women who experience injustice and want to fight for their rights to physical and psychological protection as well as welfare must contemplate thoroughly before filing for divorce. The struggle of divorce is supported by the Marriage Law Article 39 regarding the termination of marriage due to divorce, which states that divorce may be decided after unsuccessful attempts at reconciliation and there are clear reasons that there will be no harmony in the marriage.²⁵

Contrary to the KHI, the Supreme Court determines the case of *nafkah iddah* for divorce lawsuit Supreme Court through contextual way of thought. In decree number 137/ K/ AG/ 2007, the Supreme Court granted the ex-wife's claim to get *nafkah iddah*. Although there has been a basic law governing the right to a *nafkah iddah* for former wife, in this case, the Supreme Court use its legitimacy as a judge to receive, inspect, judge and decide the case, as the mandate of Act No. 14 of 19 70 of Article 2.

“Judicial power” is the main foundation for allowing decisions that are different from the basic legal references that already exist, namely the KHI.²⁶ It is due to the fact that a judge is a party that examines cases thoroughly and faces new situations that may not be accommodated by law, while he must make the fairest decisions.²⁷ In deciding the case, it is his responsibility not only to look at the source of the law, but on the real situations, especially the plaintiff and defendant. In the case of the Supreme Court decisions, the judge who receives the wife's divorce lawsuit when he grants the right to a *nafkah iddah*, he has carefully considered the reasons used by the plaintiff to sue the defendant namely: the intensity of the dispute between couple

²³ Quoted from “Pemicu Utama Cerai secara Nasional Karena KDRT, Bukan WhatsApp,” *Detik News*, accessed on February 13, 2019 <https://news.detik.com/berita/d-3671333/pemicu-utama-cerai-secara-nasional-karena-kdrt-bukan-whatsapp>.

²⁴ Interview with Muhammad Hilmy, in the Religious Court Office, Malang, June 5, 2018.

²⁵ Yahya Harahap, *Beberapa Permasalahan Hukum Acara pada Peradilan Agama* (Jakarta: al-Hikmah, 1975), 133.

²⁶ Suhrawardi K. Lubis, *Etika Profesi Hukum* (Jakarta: Sinar Grafika, 1994), 24-25.

²⁷ Zubair Abbasi, “Judicial Ijtihād as a Tool for Legal Reform: Extending Women's Right to Divorce under Islamic Law in Pakistan,” *Journal of Islamic Law and Society* 24, Issue 4 (2017), 405.

accompanied by acts of violence and even threats against the wife with sharp weapons. Granting it done for protecting the women, *ba'in* divorce is decided without a vote to *nushuz*. Consequently, the husband is responsible to provide *nafkah iddah*.

Such decision is strengthened by the provisions in the Qur'an that divorce can be ascertained on the grounds of frequent conflicts that culminate and endanger the safety of life, as has been said;

“And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted [with all things].”²⁸

The substantial meaning behind this verse is that harmony in marital relations should be the key objective of a marriage,²⁹ while the Supreme Court judges face a situation which shows the opposite, namely the absence of harmony. The Supreme Court has based its decision on the context, not on the text of the Islamic Law Compilation Article 149 (b). It can be said that the Supreme Court Verdict Number 137/K/AG/2007 is based on considerations that prioritize aspects of *maqāṣid* or the main purpose of law.³⁰

Analysis on the KHI Article 149 (b)

Nafkah iddah is the right to living expenses for ex-wife given by ex-husband during the *iddah* period (after the divorce).³¹ According to the author, the provisions of *Nafkah iddah* in the KHI Article 149 (b) clearly shows injustice.

The reason is, these provisions do not fulfil the right of the ex-wife to safety and material welfare after divorce. It will be hard for the former wives who do not get a living during the *iddah* to meet their basic rights, both when she lives alone or with their children while she is bound by various provisions in *iddah* until the period expires. The absence of specific law to provide certainty about the context of whether the former wife shall enjoy her right in *iddah* period adds to the injustice of it.

²⁸ QS. Al-Nisa' 4: 35.

²⁹ Lina Kushidayati, “Legal Reasoning Perempuan dalam Perkara Gugat Cerai di Pengadilan Agama Kudus Tahun 2014,” *Yudisia* 6, no. 1 (2015): 143.

³⁰ Jasser Auda, *Maqasid Al-Shari'ah As Philosophy of Islamic Law: A Systems Approach* (London: The International Institute of Islamic Thought, 2007), xxi.

³¹ Wahbah Az-Zuhaili, *al-Fiqh al-Islāmi wa Adillatuhu* (Jakarta: Gema Insani, 2011), 563.

In terms of *maqāṣid*, the guarantee for the right to live of ex-wife (which includes the right to meet basic needs e.g. foods) after divorce is covered in one of the *kulliyah al-khamsah* values, namely *hifz an-nafs* or priorities for the survival of the human soul (life). The human soul in Islamic law is highly treasured, so that its existence must not be neglected and must not be given a path to destruction.³² With no *nafkah iddah* provided, the wife's life is in a dangerous state.

Dangers arise from the condition of the women themselves: for married women, life affairs used to be borne by the husband as a result of marriage. Wage is given to the wife because she has a role that likely prevents her from working, namely pregnancy, childbirth, raising children and taking care of the household. In addition, the wife is also accustomed to being in a state of not being under parental custody after marriage, because custody has been transferred to her husband.³³ Not all women can immediately fulfil their own needs after divorce, especially during the *iddah* period (crucial period after divorce). This is one *maqāṣid* or objective of determining *iddah* period; it serves as a guarantor of women's welfare in her crucial period. After the divorce, the husband is yet to be free from responsibility and must continue to provide a living until the end of the wife's *iddah* period.

By assessing Jasser Auda's ideas about expanding the meaning of *maqāṣid*, the importance of *hifz al-nafs* do not only mean respect for the human soul, but also protection as well as fulfilment of human rights.³⁴ In this case, one of the rights that must be fulfilled for his ex-wife is *nafkah iddah* which enables her to get a decent life after divorce. The *nafkah iddah* does not only guarantee the survival of divorced women, but it also ensures the foundation of her life after the *iddah* period.

The rejection of a *nafkah iddah* for ex-wife filing for divorce can be referred to as an unfair verdict, especially if the legal basis for the decision is the equation of divorce to *nushuz*. The development of divorce cases due to domestic violence and various forms of gender discrimination demands in ways that fully endorses gender discourse. Consequently, divorce lawsuit could be seen as a mechanism selected by women to protect her dignity, and thus not every divorce is equal to *nushuz* and *nafkah iddah* should not be rejected. The reference to the Jasser Auda's *maqāṣid* perspective, *hifz al-māl* which has been interpreted simply as a tribute to human rights on the property is to be in force in case of claiming the right to *nafkah iddah* by the wife submitting a

³² Ahmad Al-Mursi Husain Jauhar, *Maqashid Syariah* (Jakarta: Amzah, 2010), 23.

³³ Al-Dimasyqi Abi Abdullah Muhammad bin Abdurrahman, *Rahmat al-Ummah fi ikhtilafi al-Aimmah* (Beirut: Dar al-Khatab al-Ilmiyah, 1995), 256.

³⁴ Jasser Auda, *Membumikan Hukum Islam Melalui Maqashid Syariah* (Bandung: PT Mizan Pustaka, 2015), 230.

divorce lawsuit. Therefore, the meaning of *hifz al-māl* extends to the protection and fulfilment of one's rights to material well-being notwithstanding the wife filing for divorce. After a divorce, especially during the *iddah* period, the lack of fulfilling woman's living expenses can cancel the guarantee of women's right to a decent life and that is against the will of Islam.³⁵

Finally, the *maqāsid* analysis from Jasser Auda's perspective shows that the provision of *iddah* in the Kompilasi Hukum Islam or KHI (Islamic Law Compilation) Article 149 (b) is not applicable in the context of contemporary problematic discourse that actually occurs in society, which in this case is gender injustice in domestic relations. Meanwhile, the openness to the development of other discourse which likely supports *ijtihad* is the nature of Islamic law. The provisions of *nafkah iddah* in the KHI Article 149 (b) do not contain the character of Islamic law which should tend towards the greatest benefit to society.³⁶

A consequence that may arise from the cancellation of the KHI Article 149 (b) is the reinterpretation of Law Number 1 of 1974 Section 41 (c) of the ex-wives are entitled to *nafkah iddah* from the ex-husband after divorce or during *iddah*, to cover not only *raj'i* divorce but also *ba'in* divorce.

Analysis on the Supreme Court Verdict

The verdict on case number 137/K/AG/2007, the Supreme Court indirectly assesses that the reason for the former wife to divorce her husband is inevitable. Divorce must be filed because of the husband's irresponsible behaviour. Divorce will provide protection for his wife and the Supreme Court assesses the decision to grant the divorce claim as well as the right to provide *nafkah iddah* will do justice.

Through *maqāsid* approach, the provisions of the Supreme Court to grant a wife's divorce lawsuit without regarding it as *nushuz* accommodate the objectives of Islamic law summarised in *hifz al-nafs* and *hifz al-mal*. As a vulnerable person who has experienced domestic violence, his wife will secure safety and economic welfare after divorce. Thus, the Supreme Court Verdict number 137/K/AG/2007 on *nafkah iddah* is in accordance with the purpose of the Islamic law. The Supreme Court decisions provide a model for a legal basis for the investigation of future cases alike because the decision is contextual and open to the development of discourses and the problems of contemporary society. The Supreme Court's decision can properly and

³⁵ Fauzan, "Maqashid," 78.

³⁶ Jasser, "Maqasid," xxi.

even should be the main reference and basis for legislation in divorce and *nafkah iddah* cases.³⁷

Other *maqāṣid* decisions

The decisions referring to the Supreme Court Verdict Number 137/K/AG/2007 are not many, but they are quite representative. The lack of court decisions that give *nafkah iddah* rights to ex-wives is most likely because the ex-wives did not specifically demand for that, so judges who in civil cases must be passive cannot grant requests that are not petitioned.³⁸ There is indeed a further study on the shift in the passivity of civil judges which allows civil judges to give verdicts beyond *petitum* even though they cannot exceed the *posita* of a lawsuit, as indicated in the Supreme Court Verdict Number 946K/Pdt/1986, but it is not what this study attempts to analyse. That study limitedly shows whether it is valid for a judge to give *nafkah iddah* to the ex-wife in a divorce case even though the ex-wife does not submit it in the *petitum*. Nevertheless, there are sufficient decisions granting *nafkah iddah* for ex-wives.

One of the judges who uses the Supreme Court Verdict Number 137/K/AG/2007 concerning *nafkah iddah* in a divorce lawsuit as a legal basis in deciding another *nafkah iddah* case is a judge at Samarinda Religious Court, in the Decision Number 0856/Pdt.G/2011/PA.Smd. In this case, the wife sues the husband because the husband committed violence and abuse. In addition, it is also known that the husband remarries with other women, even though the wife is very loyal to her husband. The result of the Decision of the Samarinda Religious Court Number 0856/Pdt.G/2011/PA.Smd are as follows:

JUDGMENT

To fully grant the plaintiff's claim;

To pass a *bain sughra* divorce, Defendant against the Plaintiff;

To order the Clerk of Samarinda Religious Court or an official appointed by him to send a permanently legal binding copy of the decision to the Registrar of Marriage whose territory includes the residence of the Plaintiff and Defendant as well as the Registrar of Marriage official where the marriage of the Plaintiff and Defendant is recorded to state that;

³⁷ Sudikno Mertokusumo, *Penemuan Hukum Sebagai Pengantar* (Yogyakarta: Liberty, 1996), 52.

³⁸ Lilik Mulyadi, *Hukum Acara Perdata Menurut Teori dan Praktek Peradilan Indonesia* (Jakarta: Jembatan, 1999), 18.

Children mentioned below:

- a. The first child of the Plaintiff and Defendant, male, born on August 23, 2001;
- b. The first child of the Plaintiff and Defendant, female, born March 11, 2005;
- c. The first child of the Plaintiff and Defendant, male born 29 April 2011;

Are under the full custody (*haqanah*) of the Plaintiff;

- d. To punish the Defendant to provide living and educational expenses for their three children at least Rp 9,000,000 (nine million Rupiah) each month until the three children turn into adults which are independently paid through the Plaintiff;
- e. To punish the Defendant to pay for *nafkah iddah* to the Plaintiff in the amount of Rp. 30,000,000 (thirty million Rupiah);
- f. To sentence the Defendant to pay mut'ah to the Plaintiff in the amount of Rp. 50,000,000 (fifty million Rupiah);
- g. To charge the entire cost of this case to the Plaintiff in the amount of Rp. 501,000 (five hundred thousand Rupiah);

The Samarinda Religious Court's Decision is also strengthened by the Samarinda High Religious Court Decision Number 12/Pdt.G/2012/PTA.Smd. This is due to the husband's appeal to the Samarinda High Religious Court. However, the Religious High Court decided to support the decision of the Samarinda Religious Court. The verdict of the Samarinda High Religious Court is as follows:

JUDGMENT

Stating that the appeal submitted by the Defendant/Appellant is acceptable;

Strengthening the Decision of Samarinda Religious Court Number 0856/Pdt.G/2011/PA.Smd. Dated November 21, 2011 coincides with the 25th Dzulhijjah 1432 Hijriyah;

Imposing the Defendant/ Comparator to pay the court appeal fee at Rp 150,000 (one hundred and fifty thousand Rupiah);

Another court that is recorded concerning *nafkah iddah* on divorce lawsuit case as is decreed by the Supreme Court Verdict is the Decision of the Semarang High Court in case Number 98/Pdt.G/2016/PTA.Smg. In his consideration, the judge firstly examined the possibility of nushuz for ex-wife and finally explains his belief in the evidence presented indicating the absence of nushuz, so the judge does not hesitate to sentence the defendant to pay a *nafkah iddah* in the principal decision reads as follows:

JUDGMENT

Granting a part of the Plaintiff's claim;

Determining children custody of the Plaintiff and the Defendant named CHILDREN P AND T to the Plaintiff;

Punishing the Defendant to pay the living expenses of the child as stated in dictum number 2 to the Plaintiff every month in the amount of Rp 1,500,000.00 (one million five hundred thousand Rupiah) with an annual addition of 10% until the child is adult or able to stand independently;

Punishing the Defendant to pay the Plaintiff in the amount of Rp 2,700,000.00 (two million seven hundred thousand Rupiah) and *mut'ah* in the amount of Rp 30,000,000.00 (thirty million Rupiah);

Refusing the appeal of the Plaintiff.

Another court that is recorded as deciding on a *nafkah iddah* divorce case as outlined by the Supreme Court Verdict is the decision of the Surabaya High Court in case Number 160/Pdt .G/2009/PTA.Sby. In the case investigation, the appellant (ex-wife) is known to have an affair and therefore concluded as *nushuz*, but the judge paid close attention to the strong commitment of the appellant to change and realise her mistakes, which is indicated by a number of behaviours, which unfortunately ignored by the comparison (ex-husband). So in this case, the judge decides not to consider the appellant to be *nushuz* and to punish the defendant for paying *nafkah iddah* in the decision which reads as follows:

JUDGMENT

Granting the appeal of the appellant;

Giving permission for the defendant (ORIGINAL PLAINTIFF) to state divorce against the appellant (ORIGINAL DEFENDANT) before the Kediri Religious Court;

Punishing the defendant to pay to the appellant:

1. Mut'ah of Rp. 2,700,000.00 (two million seven hundred thousand Rupiah);
2. *Nafkah iddah* of Rp. 1,350,000.00 (one million three hundred and fifty thousand Rupiah);
3. Compelling the appellant to pay the court fee for the first instance of Rp. 341,000.00 (three hundred and forty one thousand Rupiah);
4. Imposing the appellant to pay appeal court for Rp. 61,000.00 (sixty one thousand Rupiah).

Another court that is recorded on a divorce *nafkah iddah* case as outlined by the Supreme Court Verdict is the Decision of Wonosari Religious High Court in case Number 0089/Pdt.G/2008/PA.Wno. This case is considered unique because the plaintiff (ex-wife) filed for divorce because of disputes that culminated as the defendant is not willing to go abroad for the sake of earning a living as well as he does not want to leave his parents. The ex-wife has gone away for four months so that the dispute becomes increasingly irreconcilable. The judge sees the persistence of his ex-wife in her good faith to support the household and take responsibility for the child, so that he would not punish the ex-wife for *nushuz*. The judge gives *nafkah iddah* rights to the ex-wife in the decision which reads as follows:

JUDGMENT

To grant the plaintiff's claim for a partial compensation;

To sentence the defendant to provide for past 2 years' compensation amounting to Rp 700,000,00 (seven hundred thousand Rupiah) and living expenses during *iddah* amounting to 300,000,00 (three hundred thousand Rupiah) to the Plaintiff;

To punish the defendant to provide for the living cost of the child under the care of the Plaintiff for Rp. 150,000,00 (one hundred and fifty thousand Rupiah) per month until he turns adult;

To refuse the rest of reconciliation claim.

Another court recorded using the Supreme Court Verdict Number 137/K/AG/2007, is the Decision of South Jakarta Religious Court in the case Number 1445/Pdt.G/2010/PA.JS. It is also strengthened by Article 41 (c) of Law Number 1 of 1974 (which states that the court can oblige ex-husband to provide living expenses and/ or determine an obligation for ex-wife), the Religious Court judge decides to grant the request of the plaintiff (ex-wife) not only for *nafkah iddah*, but also for children's education costs and family living expenses during the court process until the court's ruling is *inkrah* or having legal value. Even though, the ex-wife is the plaintiff/ claimant for divorce, because the judge sees evidence that strongly shows prolonged abuse on the ex-wife during their marriage.

The examples above show that the KHI as a textual reference does not always require immediate application without considering the real context. In addition, judges can also actively participate in keeping considerations originating from new discourse on justice. Of course, the examples above also show us that many judges have the awareness of contextual *ijtihad* for the sake of obtaining justice without doubt. Even so, the fundamental and formal basis for contextual *ijtihad* must be established in

order to avoid criticism as well as to produce just decisions in the future. In this case, the Supreme Court Verdict Number 137/K/AG/2007 can answer the need for such fundamental and formal basis. With its decision, the Supreme Court does not only enforce Article 5 Paragraph 1 of the Undang-Undang Dasar Negara Republik Indonesia (UUD) of 1945 (the Indonesian Constitution) on the duty of judges to try cases by upholding justice, but also gives way to judges to ensure the rights of ex-wife as vulnerable people by contextually assessing cases and intentions (for example, intending to fulfil the rights of ex-wife related to the protection of her soul and property).

Conclusion

The results of analysing two sources of law applicable in the Religious Courts environment, namely the KHI Article 149 (b) and the Supreme Court Verdict Number 137/K/AG/2007 lead the article to the conclusion that the KHI in general can no longer always be used as a reference to solve gendered domestic problems, particularly in the case of *nafkah iddah* right for former wife, because the article contains a normative presumption today which cannot be applied immediately without several considerations. In particular, aligning divorce to *nushuz* which makes ex-wife looks disloyal for filing for divorce and makes her undeserving of *nafkah iddah* as a sanction of iniquity. Furthermore, the Article 149 (b) does not fulfil the requirements of divorce and *nafkah iddah* through *maqāṣid* perspective, namely ensuring the safety of life and material welfare of the ex-wife. There is also a quality that is absent from the article, namely the openness of Islamic law to contemporary gender-sensitive discourse. If it continues to be used as a legal basis, it is feared that the article will only produce unjust decisions.

The Supreme Court Verdict Number 137/K/AG/2007 (which grants divorce lawsuits as well as punishes ex-husband to provide *nafkah iddah* for ex-wife) is a judgement that is more suitable as a legal basis in handling divorce cases. Essentially, equating filing divorce with *nushuz* is a rash action, given the many cases of divorce are set in domestic violence and other gender inequalities that threaten the lives and well-being of women. In addition, the Supreme Court Verdict Number 137/K/AG/2007 can be recognised as a legal basis for the case of divorce lawsuit later, the decision is the one which most qualifies to deliver justice according to *maqasidi* because it views the context, especially the decision to accommodate gender inequality discourse. The result is a greater benefit for women. The decision of the Supreme Court further guarantees the fulfilment of *hifz al-nafs* and *hifz al-māl*.

It is therefore without doubt that based on the two conclusions above, this article argues that the KHI Article 149 (b) must be considered to be revised, so that, it is more

in line with the *maqāṣid al-sharī'ah* as shown by the Supreme Court Verdict Number 137/K/AG/2007. The legal hermeneutics of Law Number 1 of 1974 Section 41 (c) of the ex-wives should be broadened not only to require the ex-husband to provide *nafkah iddah* after divorce or during a period of *iddah* but also to include all types of divorces, such as *raj'i* divorce and *ba'in* divorce.

This article can at least be one of the admonitions that convinces us that textual-normative *ijtihād* which is not always able to provide legal justice, in fact, is still often used in court. Also, it gives us the view that the textual-normative paradigm is still inherent in legal instruments used in religious courts as legal references. *Maqāṣid* perspective is needed not only for parties deciding the case, but also for good faith that KHI needs to enhance and accommodate *maqāṣid* justice in new and wider sense. Also, it is important for the public to be clearer and fairer in seeing the issue of divorce, because the clarity and justice offered by the *maqāṣid al-sharī'ah* guarantees the possibility of greater fulfilment of rights.[]

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