



## THE URGENCY OF RECOGNIZING OUT-OF-COURT DIVORCE IN BANUHAMPU SUB-DISTRICT FROM A MASLAHAH PERSPECTIVE

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### Abstract

Hukum negara mengatur bahwa perceraian hanya sah jika dilakukan melalui Pengadilan Agama. Namun, di Banuhampu, banyak kasus talak di luar pengadilan tetap terjadi. Keyakinan masyarakat yang berbeda, sebagian meyakini talak sah secara agama, sementara lainnya percaya talak hanya sah jika dilakukan melalui pengadilan, menyebabkan kesewenang-wenangan beberapa suami dalam menjatuhkan talak di luar pengadilan. Kedua pandangan ini menciptakan ketidakpastian hukum dan merugikan hak-hak perempuan serta anak. Majelis Ulama Indonesia (MUI) mengeluarkan fatwa yang mengakui sahnya talak di luar pengadilan asalkan dilaporkan ke Pengadilan Agama, menjadi landasan pengakuan talak di luar pengadilan. Penelitian ini mengkaji latar belakang talak di luar pengadilan di Banuhampu dan bagaimana pengakuan terhadap talak di luar pengadilan dapat memberikan kemaslahatan. Menggunakan pendekatan kualitatif, data primer diperoleh melalui wawancara mendalam dengan pihak terkait dan tokoh masyarakat, sementara data sekunder dikumpulkan dari sumber relevan. Analisis data dilakukan dengan pengelompokan, penggabungan, dan penarikan kesimpulan. Hasil penelitian menunjukkan bahwa pengakuan talak di luar pengadilan, melalui pendekatan maslahah mursalah, memenuhi tiga syarat: membawa manfaat rasional, tidak bertentangan dengan syariat, dan melindungi pihak terdampak seperti istri dan anak. Meskipun bukan kebutuhan primer, pengakuan talak termasuk dalam kategori hajiyyat yang penting untuk menyelesaikan masalah perceraian di Banuhampu. Bagi tokoh masyarakat, pengakuan talak melalui pengadilan menyelaraskan hukum agama dengan hukum negara, menciptakan kepastian hukum, melindungi hak perempuan dan anak, serta mencegah konflik di masa depan.

### Abstract

State law stipulates that divorce is only valid if it is done through the Religious Court. However, in Banuhampu, many cases of off court divorce continue to occur. The different beliefs of the community, with some believing that divorce is valid religiously, while others believe that divorce is only valid if done through the courts, has led to the arbitrariness of some husbands in imposing divorce outside the courts. Both views create legal uncertainty and harm the rights of women and children. The Indonesian Ulema Council (MUI) issued a fatwa recognizing the validity of off court divorce as long as it is reported to the Religious Court, providing a foundation for the recognition of out-of-court divorce. This study examines the background of off court talak in Banuhampu and how the recognition of off court talak can provide benefits. Using a qualitative approach, primary data was obtained through in-depth interviews with relevant parties and community leaders, while secondary data was



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collected from relevant sources. Data analysis was conducted by grouping, combining, and drawing conclusions. The results show that off court talak recognition, through the maslahah mursalah approach, fulfills three conditions: bringing rational benefits, not contradicting the Shari'ah, and protecting affected parties such as wives and children. Although it is not a primary need, divorce acknowledgment falls into the category of hajiyat which is important for resolving divorce issues in Banuhampu. For community leaders, divorce recognition through the court harmonizes religious law with state law, creates legal certainty, protects the rights of women and children, and prevents future conflicts.

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## INTRODUCTION

According to Law No. 1 Year 74 Article 39 which is strengthened by *the Compilation of Islamic Law Article 115* states that *divorce can only be carried out before a Religious Court session after the Religious Court has*(*Collection of Legislation Relating to the Compilation of Islamic Law and Definitions in its Discussion 2011, 92*) *tried to reconcile the two parties but was unsuccessful* . In view of this, a divorce that is valid and recognized by the state is one that is pronounced in front of the court. In that sense, no matter how many divorces a husband pronounces outside the court, it does not mean anything. There is a legal dilemma regarding the validity of a divorce pronounced outside of a court proceeding. The marriage law generally does not recognize the validity of divorce pronounced outside the court mechanism. However, in the view of Islamic fiqh, a divorce imposed by a husband even outside the court is valid as long as the pillars and conditions are fulfilled (Zainuddin and Dkk 2019).

However, in Islamic law, divorce is seen as the last solution to resolve disputes between husband and wife in a household that cannot be maintained, especially if continuing it causes harm.(Haris 2013) So to prevent indiscriminate divorce, the state stipulates that this matter must be submitted to the Court. The aim is to protect all rights and obligations arising from the divorce law. (Fahriyanti 2019) Despite the provision that divorce must be done in the Religious Court, the practice of divorce outside the court is still common. As in Banuhampu Subdistrict, there are still many divorce problems outside the court.

Out – of – court divorce in Banuhampu Sub – district is quite common and reflects complex issues between customary traditions, religious beliefs and formal law. One of the most common cases is baganyi, When a problem occurs between a husband and wife, where the husband does not return home to his wife, known as baganyi, the mamak of the husband's tribe and the mamak of the wife's tribe usually meet to find a solution. Traditionally, if the mamak of both parties meet and the baganyi husband's problem is solved, the marriage continues as before because the baganyi husband is picked up by custom.(Nofiardi 2018) However, when in the baganyi problem it is not uncommon for the husband to drop the divorce and lose responsibility for his children and wife. However, when this problem can be resolved by the niniak mamak, then the case is over and not brought again to court (Basa 2024), although basically in this case it has been calculated that he has given one divorce to his wife (Rinaldi 2024). In this sense, the divorce is considered valid in customary and religious terms, but its legal status is unclear because it did not go through the court process.

In addition to *baganyi* cases, there are also many out-of-court divorce cases where husbands leave their wives without a formal legal process. For example, there was a woman with the initials LD who was divorced by her husband unofficially. Four years later, LD wanted to remarry but did not have a divorce certificate. The KUA refused to officially marry her because there was no legal document. The solution given by the ulama she asked was to marry siri with the condition that she could not get pregnant until the official divorce certificate was issued. (Hendrawati 2024)

The Indonesian Ulema Council (MUI) has responded to the issue of out-of-court divorce by issuing a fatwa on July 1, 2012 in Tasikmalaya. The fatwa states that divorce outside the Religious Court can be recognized as valid as long as it is based on shar'i reasons that can be proven in the Religious Court. The 'iddah (waiting period) is calculated from the time the divorce is pronounced, and the divorce must be reported (ikhbar) to the Religious Court to maintain legal certainty and family interests. Thus, MUI recognizes the validity of an out-of-court divorce as long as the reason for its imposition is in accordance with applicable regulations, and the 'iddah is calculated from the time the divorce is pronounced. However, reporting to the Religious Court is still required as a basis for recognizing the divorce. (*Decision of the Ijtima Ulama of the All-Indonesia Fatwa Commission IV on Contemporary Jurisprudence Issues (Masail Fiqhiyyah Mu'ashirah) [(I) Out-of-Court Divorce; (II) Confiscation of Assets of Corruption Criminals; (III) Money Laundering Crimes; (IV) Punishment B* 2012])

Recognition of out-of-court divorce is a legal process that offers a solution for valuing divorces conducted outside of court. Although Indonesian positive law requires divorce through the courts, the concept of isbat nikah (recognition of marriage through the courts) can be the basis for developing a legal mechanism that recognizes and gives legal effect to out-of-court divorce. This allows for official recognition of a divorce that has been pronounced informally, provided that the conditions are met. (Wahyudi 2022) To formalize a divorce, one must go through a trial, and in this case, the woman divorced by her husband had to report the divorce by filing a complaint for divorce. This creates difficulties for the woman, especially as she has to wait for the 'iddah period (waiting period) which is calculated from the time the Religious Court decision has permanent legal force, in accordance with KHI Article 153. This condition encourages some women in Banuhampu to marry siri during the court-ordered 'iddah period. The question is, can the recognition of out-of-court divorce provide a solution and benefit for cases of out-of-court divorce in Banuhampu Sub-district?

This research discusses the benefits of out-of-court divorce recognition for the settlement of divorce cases in Banuhampu Subdistrict. This acknowledgment of divorce is in line with the MUI fatwa which states that it is valid as long as it is reported to the court, so that the court can recognize the divorce and calculate the iddah period since the divorce was imposed. This study examines the factors behind out-of-court divorce in Banuhampu, including the impact and response of *niniak mamak, bundo kanduang, ulama, KUA Banuhampu, and the nagari government* to these out-of-court divorce cases. In addition, this research analyzes the importance of out-of-court divorce recognition for the KUA, the government, and the Banuhampu community. The author plans to compile these findings in a thesis entitled "*The Urgency of Recognition of Out-of-Court Divorce in Banuhampu Subdistrict in the Perspective of Maslahah.*"

The approach used in this research is a qualitative approach, where the results of the research are in the form of descriptions that reveal a deep understanding of the things studied, not numbers or statistics. This research is field research (Raco, n.d., 9). Primary

sources are people at the research site who are believed to know the most about the data under study. (Nofiardi and Dkk 2023, 40) Namely interviews with parties involved in out-of-court divorce cases. In addition, researchers also utilize secondary data, supported by data from other people or other relevant documents related to recognition of divorce (Abdussamad 2021, 143).

The data obtained will be collected through two methods, namely interviews and documentation. Interviews are used to extract information directly from participants, while documentation is used to complement data obtained from interviews and observations, which are sourced from documents, recordings, photographs. The data analysis technique used in this research is qualitative analysis. Qualitative analysis in descriptive form. In addition, data analysis also uses inductive and comparative methods (Nofiardi and Dkk 2023, 45).

### **Out-of-Court Divorce in Banuhampu Subdistrict**

Out-of-court divorce refers to divorce that has fulfilled all the conditions and pillars of divorce according to Islamic law, but not through official authorization from an authorized institution in accordance with the provisions of laws and regulations. (*Decision of the Ijtima Ulama of the All-Indonesia Fatwa Commission IV on Contemporary Jurisprudence Issues (Masail Fiqhiyyah Mu'ashirah) [I] Out-of-Court Divorce; (II) Confiscation of Assets of Corruption Criminals; (III) Money Laundering Crimes; (IV) Punishment B 2012*). From the data obtained, several cases of out-of-court divorce were found in Banuhampu Subdistrict, including:

#### **1. Nagari Pakan Sinayan**

Based on information from the local government, there are 5 cases from Jorong Kalampayan, where there have been siri marriages caused by the absence of the wife's divorce certificate, two of which with the initials Y and S became sources in this research. Then, interviews were conducted with related parties on N in Jorong Surau Baru and LD in Jorong Ladang. LD testified that she was forced to marry siri until the expiration of the iddah period determined by the court, so that she could get legally married to her current husband.

#### **2. Nagari Padang Luar**

There was one case in Nagari Padang Luar where R divorced his wife at home and asked her to go to court if she wanted a divorce certificate. In addition, there was one case of a couple who asked the Banuhampu KUA for a solution because the husband had divorced his wife three times and one case was found from the Head of the Banuhampu KUA, where the husband and wife consulted the Banuhampu KUA after the husband divorced his wife at home, but was successfully reconciled by the Banuhampu KUA, so the divorce case did not go to court.

#### **3. Nagari Taluak IV Suku**

An interview was conducted with Ms. Y, whose husband did not pursue the case in court because of the burden of alimony and iddah (alimony for the wife) that her husband had to bear when the divorce was decided by the court, so her husband left the processing of the divorce certificate entirely to Ms. Y. Ms. Y was divorced by her husband in the presence of a mediator during the mediation process. However, because he did not want to pay the court costs and the wife's rights, her husband decided not to proceed with the divorce trial and asked Mrs. Y to file a complaint for divorce.

#### **4. Nagari Kubang Putiah**

Based on information from the Head of the Banuhampu KUA, there was one case in Nagari Kubang Putih, where the husband had divorced his wife and wanted to ruju',

but the wife's iddah period had expired, so they were married again by the Banuhampu KUA.

### **a. Factors Behind the Occurrence of Out-of-Court Divorce in Banuhampu Subdistrict**

Based on the above cases, the factors that motivate divorce to occur outside of court in Banuhampu Subdistrict include:

- 1) The cost factor when divorcing in front of the court.
- 2) Then, divorce before the court takes time.
- 3) Furthermore, out-of-court divorces have become a habit for the Banuhampu community, because they rely on local scholars who believe that when a husband pronounces a divorce on his wife, the divorce is final.
- 4) In addition, according to custom, some cases of divorce that have been imposed by the husband have been assisted to reconcile by customary parties, such as niniak mamak and Bundo kanduang, so that they are no longer faced with the process in court.
- 5) This is also due to the community's lack of understanding that divorce must be done in front of the court, not just an administrative fulfillment to remarry.

### **b. The Impact of Out-of-Court Divorce in Banuhampu Sub-District**

There are three cases that have been interviewed directly with the parties involved regarding out-of-court divorce that has an impact on siri marriages. First, LD was divorced by her husband 4 years before she remarried. However, she was prevented from getting legally married because she did not have a divorce certificate. After considering the length of time to remarry, as she had to wait for the iddah period as well, LD and her subsequent husband decided to get married siri. Secondly, the case of Y who had been divorced by her husband 2 years earlier, but because her previous marriage was done siri, but her ex-husband was included in her KK, she had difficulty in applying for her divorce certificate, so in 2020 she and her subsequent husband decided to get married siri. Third, S had a siri marriage with her current husband and gave birth to a daughter from that marriage. Until now, S does not have a divorce certificate from her previous marriage and this has an impact on the status of her child who cannot be attributed to her biological father. This is because, even though S has processed her divorce from her ex-husband, she is still bound by the court's iddah, which means that her child with her current husband was born during the iddah period with her ex-husband, according to state law.

In addition to the impact on nikah siri and the uncertain status of children, out-of-court divorce in Banuhampu Sub-district also has an impact on the difficulty of obtaining related documents. As in the case of N, where her ex-husband had changed his identity in order to remarry legally, because according to her ex-husband, it was N who had to apply for a divorce certificate in court because her ex-husband had divorced N and had confirmed it in a letter he sent to his wife containing his divorce to N. N had tried to apply for her divorce to complete the documents for her passport and her children, but because it took a long time, N did not complete the trial process.

Then, this out-of-court divorce also has an impact on the potential loss of wife's rights and even children's rights. Where Y from Nagari Taluak IV Suku was divorced by her husband in the mediation process at the divorce trial, but during the pronunciation of the pledge of divorce her husband dropped the case because he considered the costs he had to bear after the judge's decision. This also happened to Mr. R who divorced his wife, so that he did not need to attend the process of the contested divorce trial filed by his wife, so that the trial process would run quickly because there was an agreement to

divorce from both of them. However, in some cases of contested divorce with a verdict of *verstek* there are still those that do not contain the rights of the wife, because the judge only decides the case in accordance with the material of the lawsuit. (Ulya and Yenti 2023) So that in these two cases, there is great potential for neglecting the wife's rights and children's rights after divorce.

### **c. Community Leaders' Response to Out-of-Court Divorce in Banuhampu Subdistrict**

According to MUI Banuhampu, Islam states that divorce is valid when it is imposed by a husband to his wife with certain conditions. So, related to divorce, there is a difference between Islamic law and state law. According to state law, a valid marriage is one that is conducted according to each religion and registered in front of a marriage registration officer. Supposedly, if a valid marriage is one that is in accordance with each religion, then a valid divorce must also be recognized based on religion.

Similarly, the niniak mamak and Bundo Kanduang Pakan Sinayan, Banuhampu Subdistrict, stated that customary law, religion and the state in addressing out – of – court divorce should go hand in hand. However, in reality, state law conflicts with customary and religious law. This makes administrative matters complicated. Meanwhile, the niniak mamak and Bundo Kanduang as traditional leaders and relatives who seek mediation between their children can only ensure that marriage and divorce proceed according to sharia and custom. For the legal protection of women and their descendants, it is always recommended that couples who can no longer seek reconciliation take the matter to court and if they wish to consult further on the divorce law, they are asked to consult with the Banuhampu KUA.

The Wali Nagari Pakan Sinayan, who is also the judge of Buek Arek (Pakan Sinayan Customary Court), recognizes that out – of – court divorce is valid according to Islamic law. According to him, a divorce is considered valid as soon as it is pronounced by the husband, as long as it fulfills the requirements of sharia, such as the presence of witnesses and clear intentions. In Buek Arek's perspective, divorce does not need to wait for a court decision to be recognized, because sharia has regulated that divorce falls when it is pronounced by fulfilling the pillars and conditions. However, Wali Nagari also highlighted the limitations and risks that arise from the practice of divorce outside of court, especially for women. Without an official document such as a divorce decree, women's position is weakened, as they have difficulty obtaining their rights, such as maintenance or child custody.

The head of the KUA and the Islamic religious counselor in Banuhampu Subdistrict responded to this out – of – court divorce by stating that there were many out – of – court divorces. The head of the KUA responds to the problem of divorce based on the Shari'ah on issues such as the problem of triple divorce. When the KUA does not answer based on Shari'ah, this is a problem that has a very big impact, because it involves the issue of halal and haram for the couple to be able to return.

According to information from the Head of the Banuhampu KUA, the community will also use this divorce before the court as an alibi that they have not been divorced. Therefore, even though they have divorced their wife three times, when the case is submitted to the court, it is only one divorce. Because the alibi from the community will be the court's decision, this moment is used by the community to find an easy way to divorce. As the head of the KUA and the penghulu, until now what can be done is to inform in the marriage guidance because of the many problems of this divorce in the community, the issue of divorce is now included in the marriage guidance, such as

emphasizing that do not carelessly say the sentence of divorce to the wife even though it is outside the court.(Rinaldi 2024).

The Banuhampu Sub-district KUA official also explained why the KUA ensures that the divorce is not only valid in court, because: (Reviko 2024)

*"The fall of divorce in court is not when it is submitted to the court, but when it has been determined by the court, 'iddah arises again from there. So there is a disconnect between classical fiqh and government regulations."*

However, although a divorce pronounced outside of court is valid, the current practice is for the divorce to take place in court, because the benefits of this divorce are greater when it is dealt with in court. So in matters other than triple divorce and ruju', the KUA will still direct them to the court. (Rinaldi 2024)

The importance of the court in this case, as Bundo Zahara, Bundo Kanduang and P3N Pakan Sinayan explained, is that although the divorce imposed by the husband on his wife is valid, there is a rule that the pillars and conditions of divorce must be fulfilled. It is very difficult to declare that an out-of-court divorce is valid, because to see the pillars and conditions of this divorce itself is certainly very difficult for the community to determine. In addition, in some divorce cases in Banuhampu, the community only finalizes the divorce with the husband, making it difficult to prove. However, the divorce imposed by the husband is valid according to fiqh law, but it must be proven that the divorce is valid in court. Thus, there must be synergy between religious law and state law on the issue of out-of-court divorce to bridge the divorce according to Islamic law and the will of state law in this divorce.(Daiman 2024)

### **The Urgency of Recognizing Out-of-Court Divorce in Banuhampu Subdistrict from a *Maslahah* Perspective**

Recognition of divorce by the state, which is done through the religious court as the will of MUI in the ijtimā' above, can be implemented as long as there is adequate proof that the divorce was imposed in accordance with the established conditions, both in Islamic law and positive law. This process is similar to isbat nikah, where the court verifies the validity of an unregistered marriage. To recognize a divorce imposed outside of court, several conditions and processes must be met, such as the presence of witnesses, other evidence (such as a declaration of divorce or a recording), as well as going through a mediation process to ensure that the divorce is a last resort and peace efforts have been made. The court will also ensure that the wife's rights have been met, otherwise this will be included in the acknowledgment of the divorce. If all conditions are met, the court can issue a decree formally recognizing the divorce. Therefore, a divorce pronounced outside of court can also be recognized by the state, provided that it meets the conditions as envisaged by the ijtimā' above, i.e. there are grounds for the divorce and the divorce is reported at the Religious Court.

In cases where the couple has reconciled and not reported the divorce to the court, the recognition of the divorce plays a very important role in providing legal certainty as to the number and status of divorces and reconciliations that occurred during the marriage. In cases where a spouse does not report the divorce to the court but later reconciles, problems can arise when the divorce is pronounced repeatedly until it reaches triple divorce without ever being officially recorded. If the divorce is only reported to the court after the third divorce, the court still decides on divorce one because there is no written evidence or official acknowledgment of the previous divorce.(Yusuf 2024)

With a valid divorce having to be done in front of a court, the limit of divorce set by Allah, which is only up to three times, becomes uncontrollable. This opens up the

possibility for husbands to continue to divorce without any clear consequences, because the court will only count the last divorce as one divorce. This situation is contrary to the provisions of Sharia, where after the third divorce, the husband may not return to his wife except after she has married someone else (muhallil) according to Islamic rules. So with the official recognition of divorce, the number of divorces imposed by the husband can be calculated precisely and in accordance with the provisions of Sharia. This prevents the misuse of the concept of divorce in Islam and keeps divorce from becoming an unrestricted practice in the community. Recognizing divorce also provides legal protection to the wife and ensures that the limits of divorce are enforced in accordance with Allah's intentions in the Shari'ah. (Daiman 2024)

In general, a woman who has been divorced by her husband will file a divorce petition with the religious court when she needs it for administrative purposes. This has caused disputes between the Banuhampu KUA and people who want to remarry but the wife's divorce certificate is not yet available. The head of the Banuhampu KUA explained: (Rinaldi 2024)

*"Most women who have been divorced and come to the KUA to date are indeed women who have stated that they were divorced from their husbands four or five years ago, even though from their explanations their husbands have indeed divorced them Islamically, but for administration, of course they cannot be married at the KUA. This is indeed a problem indeed, some couples who will remarry when they hear that there is 'iddah again in the court after the divorce is determined by the court, yes, they are angry at the KUA and even urge to marry them because the husband certainly thinks that when his future wife is 'iddah again, it means that he took someone else's wife. So what I can say is that this is the current practice, sir, to convince you I will provide recommendations to other KUAs that it is not only like this in Banuhampu, because we are bound by the applicable regulations. "*

Therefore, KUA Banuhampu views MUI's fatwa recommending the recognition of out-of-court divorce as a solution for out-of-court divorce in the community. (Rinaldi 2024)

This recognition of out-of-court divorce should be taken into consideration by the judge in deciding the divorce case. This is because currently, when a divorce is filed, the stage of the divorce hearing is usually preceded by the mediation stage. However, with the recognition of out-of-court divorce, when the judge already knows that she has been divorced, there is no need for mediation, because the divorce has clearly fallen, especially when it is reported after the 'iddah period has expired, so the court only determines the fall of the divorce. There is a concession for the court to determine divorce for a divorce that was pronounced in accordance with sharee'i law. This includes providing relief to the reporting party, because when it is filed according to the ordinary divorce case, there must be longer stages that are passed there, whereas when it is a report or request for recognition of the divorce that has been imposed in accordance with shar'i to the court, the trial is certainly not too long, the stages are more concise. In this case, the recognition of the divorce outside the court is useful to facilitate the processing of the divorce so that it is in line with the religion and the constitution. Recognition of out-of-court divorce is necessary in order to make it easier for the community to explain the status of a woman who has been divorced by her husband and to make it easier for the woman to complete the administration of the divorce imposed by her husband, where the

woman does not have to wait for the expiration of the iddah period after the court decision.(Yusuf 2024)

Wali Nagari Pakan Sinayan provided information regarding the importance of recognition of divorce for the government. In relation to government administration or population documents, it is hoped that recognition can be used as a requirement for population documents. For example, the Nagari can split a person's KK when officially divorced. However, the recognition in state law may need to be ensured as a follow-up to the MUI recommendation, especially for the sake of its administration in the population. For the sake of the community pledging divorce in front of witnesses or admitting that he has divorced the witness, it can happen in his area, this is also for the sake of re-enforcing the strengthening of the function of *niniak mamak*, *Bundo kanduang*, and the family as witnesses and mediators for their children's marriage problems.

The Wali Nagari Pakan Sinayan underlined that if this could be the domain of the PA, the maslahah *would* be very great for those concerned, especially for women, they would get a grip, while for the community there would be no question about the status of a woman who had been left behind by her husband, that she had received recognition from the court for her divorce, in relation only to the government, it was hoped that recognition of the divorce could become a basic document for population administration. For the community, of course, this is a great benefit, because women certainly have a very long time to think about filing a contested divorce. Plus, a contested divorce goes through a fairly long trial.(Kuniang 2024)

The importance of recognizing this divorce is also needed by the *niniak mamak*. KAN Pakan Sinayan as the traditional leader of Banuhampu Subdistrict emphasized that divorce outside the court is valid, with a note that it must be reported to the court in order to get legal protection for the children of the niece who have been divorced by her husband.(Basa 2024)

This is because what often happens is that after divorcing a niece, the husband who comes from outside simply leaves. It is difficult for the nephews to reach him. In the end, it's the daughters who have to go to court themselves. Divorce has occurred with the husband's divorce, but it is difficult for the *niniak mamak* to ask the ex-husband to fulfill the rights of the female nephews after the divorce. This is a problem that is deeply felt by the *niniak mamak*, so that when there is recognition of divorce, it can facilitate the administration of divorce for our female nephews where they have been divorced by their husbands. For the issue of witnesses and mediation can actually be pursued by *niniak mamak*, when problems occur in the middle of the household of their children, *niniak mamak* in Minangkabau does have an important role in solving problems. This is because parents are usually shaken by their children's problems, so *niniak mamak* become a more neutral party. KAN Pakan Sinayan also exemplifies its position in resolving the household matters of its children.(Basa 2024)

In Banuhampu Subdistrict, there were several cases of siri marriages where the wife did not yet have a divorce certificate. The husband's divorce is valid religiously and customarily, but not administratively. This problem becomes difficult if there are children born from a siri marriage, because they cannot be taken care of under state law. So it can be said that for cases like this, it is necessary to have the divorce recognized by the court. This is because if the siri marriage was conducted by a legal guardian, and the husband's divorce was also legal and there were witnesses, then it is religiously valid. The only thing that needs to be done is to report the divorce to the court to obtain a certificate of

acknowledgment. Like a letter for a deceased person, this acknowledgment is important for administration.

Recognition of divorce is important for the *niniak mamak*, *Bundo kanduang*, and extended family to play a role in resolving the household disputes of their children or nephews. This confirms the role of the nuclear and extended family, as well as the elders, as mediators and advisors to resolve marital problems and in accordance with customary values.(Alikhsan and Yenti 2023) Thus, the recognition of divorce not only legally legalizes divorce, but also strengthens the collective responsibility of the family in maintaining harmony and mutual welfare.

This is in line with the Wali Jorong Padang Luar's view that the recognition of divorce outside the court is very important to clarify the status of a woman, whether she has been divorced by her husband or not. Wali Jorong Padang Luar gives an example of the unclear status of a woman who has separated by exemplifying the case of Mrs. D: (Istinanda 2025)

*"Mrs. D has been a long time and leads to the truth of committing sumbang salah, there is a man entering D's house sometimes at dawn and sometimes in the middle of the night. D's status even though she has been separated from her husband for a long time, there is no divorce certificate, so it is not clear whether she was still a wife or what at that time. D argued that the divorce certificate had not been issued by the court. There was a conflict and she was taken to the village hall. At the village hall, the niniak mamakk was called to resolve the problem. D's reason to the nagari when she was in court that night was that she wanted to get married but her divorce papers had not yet been issued. D did not have time to take care of it because there was no money."*

The Wali Jorong mentioned that the first sanction requested by the *niniak mamak* at that time was that Mrs. D should be married off because her condition had a high potential for adultery, but Mrs. D argued that she wanted to get her divorce certificate first. At that time, the *niniak mamak* asked for a siri marriage, but Ms. D refused because she still wanted to wait for her divorce certificate from the court. Meanwhile, the court proceedings did not take long, and Ms. D had been in contact with her new partner for quite some time. Thus, the parties who tried Mrs. D's case felt that the unclear status of Mrs. D was creating problems in the community. Asked to remarry, she could not, asked to take care of the divorce certificate, the reason is that until now the divorce certificate has not been issued.

The problem in this case arose because of the unclear status of a woman. *The niniak mamak* of the village believed that Mrs. D had been divorced in Islam, so they asked Mrs. D to marry siri on the grounds that she was in a condition where they feared adultery if they did not marry immediately. Mrs. D insisted on obtaining a divorce certificate first and refused the siri marriage.(Istinanda 2025) In these circumstances, the recognition of divorce is also very important to harmonize the understanding of divorce in the community and in court. This is because even though the community understands that divorce is a valid divorce according to Islam, their understanding of Islamic divorce itself is difficult to assess the validity of the divorce by the community, as in the case of Mrs. D.

Recognition of divorce plays an important role in providing clarity and certainty for the community regarding divorce, in accordance with Islamic law and in accordance with state law. The official recognition of divorce helps people understand that divorce is only

valid if it is imposed by the husband or through a divorce suit in court. As long as there is no acknowledgment of the divorce, the marriage relationship is still considered established, so the wife remains bound as the wife of her husband.

The document recognizing the divorce provides a legal basis for traditional leaders and the nagari government to assess the marital status of its citizens. The discrepancy between positive and Islamic law regarding divorce often causes confusion and conflict in the community. Therefore, the acknowledgment of divorce not only helps to resolve individual problems such as Mrs. D's, but also contributes to ensuring the community about what constitutes a valid divorce in Islam.

Bundo Zahara, as Bundo Kanduang and P3N Pakan Sinayan in Banuhampu Subdistrict, gave an in-depth view of the MUI fatwa on out-of-court divorce. She explained that according to the fatwa, divorce is still considered shar'i even if it is pronounced outside the court, as long as it fulfills the pillars and conditions of divorce. However, she emphasized the importance of *tabayyun* (further clarification) to ensure its validity. Thus, Bundo Zahara highlighted the obligation to report divorce to the court as an important step to resolve various problems that often arise in society. Some of these problems include husbands who divorce unilaterally, then return to their wives without a new marriage contract, and even have children during the iddah period. This creates uncertainty about the status of the marriage and the fate of the children who are born.

Furthermore, Bundo Zahara underlined that with the recognition of divorce, it emphasizes the need for witnesses and the mediation process in divorce, because currently in the community there are those who only rely on unilateral recognition without strong evidence. For example, a husband disappears for years, then the family concludes that the couple has divorced without any legal certainty. As a result, various problems arise such as siri marriages, children whose status is unclear, and offspring born outside the bonds of legal marriage. This phenomenon, according to him, is the result of the misalignment between Islamic law and state law. Without official recognition through the courts, many divorce cases lead to the practice of adultery without realizing it, because couples think they are still married even though religiously the divorce has fallen. Therefore, Bundo Zahara always directs the community to report to the KUA for proper guidance, as well as encouraging awareness of the importance of legal certainty in divorce to protect the rights of wives and children." (Daiman 2024)

The recognition of divorce is an effort that can be made, how to synergize between religious and customary law with state law. Or what should be the bridge that can be provided by the government and that is really needed by the community. However, there must be a regulation that oversees the implementation of divorce recognition. Then there must be education to the family so that the family really pays attention to the family relations of their descendants, so that the divorce can be proven that he was indeed witnessed and there have been mediation efforts.(Daiman 2024)

*Bundo Zahara* explained that the recognition of out-of-court divorce as desired by MUI in point 3 of the fatwa provides enormous benefits in the midst of divorce problems in the community. Because for people who have divorced outside the court must be able to prove the divorce that has been imposed in front of the religious court, that is what MUI wants with the reporting of this out-of-court divorce. So, divorce that cannot be proven cannot be recognized by the Religious Court. Recognition of divorce will narrow the space for divorce imposed by husbands and husbands are more careful in imposing divorce on their wives, especially considering the sanction of divorce three. This is because what happens today is that husbands easily pronounce divorce and are free to return as they please to the wife they have divorced on the grounds that he has not

divorced his wife in front of the court, so there is no physical evidence that he has divorced his wife. (Daiman 2024)

There must be a regulation of marriage and divorce that is valid according to the state which is also valid according to religious law. MUI's contribution in the form of this fatwa has been well developed with the mechanism of divorce that falls outside the court in the form of witnesses and mediation, so the government should accommodate regulations related to this matter how efficient and effective. So that divorce hearings do not take a long time and eliminate confusion in the community in understanding divorce. The problem will reach the community and the government if there is a regulation regarding the mechanism for recognizing this divorce. (Daiman 2024)

With this recognition, the divorce that has occurred still receives legal protection from the state, so that the wife is not in an unclear legal status. This is in line with the concept of divorce in Islamic fiqh, which regulates that divorce is not carried out arbitrarily, and ensures that the rights of the wife and children are protected. The state, as the ulil amri that must be obeyed as mentioned in QS. An-Nisa verse 59, has the authority to provide legal certainty for every legal action, including in matters of divorce. (Syar'i 2015) Therefore, although religious divorce remains valid, reporting it to the court becomes mandatory so that the divorce can be legally recognized, avoid abuse of the right to divorce, and ensure that the rights of all parties involved are guaranteed.

Several cases of out-of-court divorce in Kecamatan Banuhampu show that women who divorce without going through the court process face various administrative and legal difficulties. Although the divorce is legal according to religion, the absence of a divorce certificate hinders the processing of administrative documents, such as changes in the status of the ex-husband in the Family Card (KK) or the processing of other population documents that require valid proof of divorce. In addition, without an official court record, a wife's post-divorce rights, such as maintenance and 'iddah rights, are often denied. This is further exacerbated if the husband disappears or is irresponsible, so that women's rights that should be protected, such as maintenance for the 'iddah period, become difficult to obtain.

The issue is even more complex for women in siri marriages, because in addition to not having a divorce certificate, they also face greater legal challenges. If the woman has had children during the siri marriage, this further confuses the administration of the children and the recognition of their rights. Without the divorce being legalized by the court, all the rights that the wife and children should have, whether related to legal status, maintenance, or other protections, become very difficult to enforce. Therefore, the importance of recognizing divorce through the courts is very clear, so that women and children can obtain legal certainty and protection of rights in accordance with applicable regulations.

It can be said that the recognition of out-of-court divorce through the courts is important so that the divorce is not only religiously valid, but also recognized by the state, so that the wife still receives legal protection. With official registration, divorced women can access their rights according to regulations, such as alimony 'iddah, mut'ah, and clarity of legal status that prevents negative impacts in the future. In addition, the state as a guarantor of legal certainty can ensure that divorce is not carried out arbitrarily and without responsibility on the part of the husband.

In the history of Islamic law during the time of the Prophet (PBUH), there was no system of formal recognition of divorce through a judicial institution as is applied in the modern legal system. A divorce imposed by a husband was immediately considered valid

without the need for authorization from a particular authority, as long as it met the shar'i requirements. If there was a problem, the case could be brought to the Prophet for a ruling. However, although there was no formal recognition of divorce during the Prophet's time, it does not mean that there was no mechanism for monitoring or resolving disputes related to divorce. In some cases, the Prophet judged the validity of divorce after hearing reports, such as in the case of Ibn Umar.

The current system of recognizing divorce through the religious courts is a development of ijtihad that did not explicitly exist during the Prophet's time, but was implemented for the sake of benefit to prevent abuse of divorce and protect the rights of the parties involved. This rule is closer to the concept of *maslahah mursalah*, because there is no explicit evidence that requires the recognition of divorce through a judicial institution, but its existence is made to maintain justice and legal certainty in society.

The *maslahah* of recognizing divorce outside the court is not explicitly recognized or rejected by a particular proposition, in the sense that it is not explicitly mentioned in the *naṣ*. However, this *maṣlaḥah* is in line with *Shara'* and can be used as a basis in realizing the good that is needed by humans and preventing harm. (Safriadi, 2021, p. 71)

Imam Al-Ghazali explained that *maslahah* is:

أَمَّا الْمَصْلَحَةُ فَهِيَ فِي الْأَصْلِ عِبَادَةٌ عَنْ جَلْبِ مَنْفَعَةٍ أَوْ دَفْعِ مَضَرَّةٍ، وَأَسْنَانِ نَعْيٍ بِذَلِكَ، فَإِنَّ جَلْبَ الْمَنْفَعَةِ وَدَفْعَ الْمَضَرَّةِ مَقَاصِدُ الْخُلُقِ، وَصَلَاحُ الْخُلُقِ يَسْتَحْقُقُ فِي تَحْصِيلِ مَقَاصِدِهِنَّ. لَكِنَّا نَعْنِي بِالْمَصْلَحَةِ الْمُحَافَظَةَ عَلَى مَقْصُودِ الشَّرْعِ. وَمَقْصُودُ الشَّرْعِ مِنَ الْخُلُقِ خَمْسَةُ أُمُورٍ، وَهِيَ أَنْ يُنْهَى عَلَيْهِمْ دِينُهُمْ، وَأَنْفُسُهُمْ، وَعُطُوهُمْ، وَأَنْسَابُهُمْ، وَأَمْوَالُهُمْ. فَكُلُّ مَا يَنْتَصِمُ حِفْظُ هَذِهِ الْأَصُولِ الْخَمْسَةِ فَهُوَ مَصْلَحَةٌ، وَكُلُّ مَا يُؤَدِّي إِلَى فَوَاتِ هَذِهِ الْأَصُولِ فَهُوَ مَفْسَدَةٌ، وَدَفْعُهَا مَصْلَحَةٌ. (Al-Ghazali 1993, 174)

Imam Ghazali originally interpreted *maslahah* as an attempt to bring benefit or avoid harm, or in short, anything that provides benefit or rejects harm. This simple understanding is what Imam Ghazali initially used. However, because "bringing benefit and avoiding harm" is more a human desire, not the intention of God, while *maslahah* is God's purpose underlying the law, Imam Ghazali reformulated it by stating that *maslahah* is an effort to maintain the objectives of *shara'*. The objectives of *shara'* relating to mankind include five things: protecting religion, soul, mind, offspring, and property, which became known as the five principles. (Ramli 2021, 242-43)

In general, the application of the principles of *jalbul mashalih* (achieving benefit) and *dar'ul mafasid* (preventing damage) in the context of out-of-court divorce recognition and *iddah* calculation shows a balance between Islamic law and positive legal certainty. *Jalbul mashalih* is achieved by recognizing the validity of the divorce by law since it was pronounced, so that the wife does not need to repeat the *iddah* after the court decision. This provides benefits in the form of status certainty, protection of reproductive rights, and efficiency of the legal process. Meanwhile, *dar'ul mafasid* is applied by requiring court authorization to prevent abuse of unilateral divorce, injustice to the wife, and legal disputes in the future. Thus, although the divorce is valid from the moment it is pronounced, formalization through the court is still necessary to ensure justice and order, without ignoring the sharia provisions on *iddah*. This approach reflects a harmonization between the principles of classical fiqh and the demands of modern law, which aims to protect the rights of all parties in a fair and civilized manner.

Meanwhile, the *maslahah* of recognizing divorce when seen as an effort to maintain the objectives of *shara'*, then from a religious perspective (*Hifzh al-Din*), recognition of divorce ensures that the divorce process is carried out in accordance with Islamic law, such as undergoing the *'iddah* period prescribed by Islamic law. This preserves religious

rules and prevents violations of shara' law, such as a wife who marries during the '*iddah* period because it is unclear how to calculate *her 'iddah* after being divorced by her husband.

In terms of nasab (*Hifzh al-Nasab*), the recognition of divorce plays an important role in maintaining the clarity of the status of children born from the marriage. Without a valid acknowledgment of the divorce, the nasab status of the children born from the previous marriage of the mother, who does not have a divorce certificate with her previous husband, can become blurred, which has implications for inheritance rights and other legal issues. Thus, the recognition of divorce can ensure that the nasab of children from subsequent marriages is clearly maintained.

Then, in terms of property (*Hifzh al-Mal*), recognition of divorce provides a guarantee of women's rights, such as maintenance during '*iddah* and the division of joint property, which must be fulfilled by the husband. This is important so that women do not suffer material losses that can affect their welfare after divorce, so that the husband can be held accountable for the word of divorce that he has imposed. One of the reasons why divorce is in the hands of the husband is because after pronouncing the word divorce, the husband is charged with various obligations towards his wife, so he is careful with the word divorce. (Az-Zuhayli, n.d., 6877) Recognition of divorce serves to establish this caution in the husband, so that the husband does not simply disappear after he pronounces divorce.

A benefit that is considered good by the intellect, in line with the Islamic Shari'ah's aim of safeguarding the *kulliyah khamsah*, but is not legitimized by the text, either supporting it or prohibiting the action that is considered *maslahah*. Overall, there are several conditions that must be met when using *maṣlaḥah mursalah* as a method of ruling, namely: It is good for human beings according to common sense, it does not contradict the *text* and is in line with the *maqashid shari'ah*, and the *maslahah* is general. (Safriadi, 2021, pp. 71-72; Umar, 2017, p. 143).

To assess whether the recognition of divorce is in line with the requirements of *maslahah mursalah*, it is necessary to analyze the three conditions that have been mentioned and see how the recognition of divorce meets or does not meet these conditions.

First, *maslahah mursalah* must bring benefits or goodness to human life in a rational manner. Recognition of divorce by the court can be considered *maslahah* because it provides legal certainty for the husband, wife, and children, protects the wife's rights such as nafkah, mut'ah, and child custody, prevents future disputes regarding divorce status, and ensures that the divorce is carried out in accordance with Islamic law and positive law. Thus, the recognition of divorce fulfills the first condition because it brings goodness and convenience in human life.

Secondly, *maslahah mursalah* must not contradict the sharia text and must be in line with *maqashid al-syariah* (the purpose of sharia). Based on the previous explanation, it can be seen that the recognition of divorce has a significant impact on the maintenance of several principles of shara' related to religion, lineage, and property.

Thirdly, *maslahah mursalah* must be general, not just for private interests. Recognition of out-of-court divorce is essential to ensure that the Banuhampu community can implement state regulations related to divorce. With the recognition of divorce, the Banuhampu community can avoid various administrative and social difficulties that may arise, such as uncertainty of marital status, loss of women's and

children's rights, and conflicts in the implementation of state law. Because of the cases that have been studied, such as women who have been divorced by their husbands, couples who have reconciled and not gone through the divorce process in court, and cases of nikah siri that have an impact due to the processing of divorce certificates that are too long a span of time from the previous separation, in general, the recognition of divorce is needed by women who have been divorced by their husbands.

It can be said that for the Banuhampu community, the recognition of talak has a general benefit because it protects the rights of wives and children, who are vulnerable groups in divorce, provides legal certainty for the community so as to reduce the potential for disputes and confusion in the community in understanding this talak, and promotes justice by ensuring that the rights of all parties are fulfilled. Thus, the recognition of divorce fulfills the third condition, because it brings about a general *maslahah*, as a settlement of the out-of-court divorce cases that have occurred in Banuhampu Subdistrict.

Based on the analysis above, the recognition of divorce is in line with the requirements of *maslahah mursalah*. Recognition of divorce brings benefits and goodness to human life, does not contradict the nash sharia, and provides general *maslahah*. Thus, the recognition of divorce can be considered as a form of application of *maslahah mursalah*, especially in an effort to protect the rights of all parties, especially the rights of wives and children.

Looking at the above explanation, it can be said that the recognition of out-of-court divorce by the court is important to ensure legal certainty for wives who have been divorced outside the court. In Islamic fiqh, divorce is a religiously valid right of the husband when pronounced, whether in the presence of his wife or not, and this understanding is still adhered to by the majority of Muslim communities in Indonesia. However, in the context of a state of law, it is not enough for the implementation of divorce to fulfill the shar'i aspect, but it must also comply with the formal legal aspect to ensure legal certainty and protect the rights of the wife and children. Article 115 of the Compilation of Islamic Law (KHI) and Article 39 of Law No. 1/1974 explicitly state that divorce can only be conducted through a Religious Court hearing. This regulation aims to prevent injustice against wives and children, as well as maintaining orderly civil registration. Without official registration, wives risk losing their rights to alimony, *mut'ah*, *'iddah*, and clarity of legal status. (Malikah, Septiandani, and Junaidi 2021)

The court aims to provide fair legal certainty and protect individual rights, especially for women who are often the more vulnerable parties in the divorce process. One of them is the effect of marriage dissolution according to Articles 149–152 of the Compilation of Islamic Law (KHI) which regulates the consequences of divorce. So, legal certainty can also be realized with the recognition of divorce issued by the court. This is because, given the custom in Banuhampu, it is the woman who has been divorced who tends to apply for the divorce certificate. When referring to the importance of recognizing out-of-court divorces, it is actually not entirely possible to resolve the issue only through the mechanism of *gugat* divorce as it is currently practiced.

For KUA Banuhampu, *cerai gugat* does provide administrative certainty for women who wish to remarry, as the court decision becomes the basis for recording their marital status. However, *cerai gugat* does not accommodate cases where the husband has pronounced a divorce outside of court but is reluctant to take care of the official divorce process, so the wife still has to file a lawsuit and bear administrative and financial burdens that should not be her responsibility. So the marriage is constrained by the long process

of obtaining a gugat divorce and this is also a problem for some couples who will remarry with the KUA.(Rinaldi 2024)

For the *niniak mamak*, a divorce certificate filed by a female relative does not necessarily guarantee the protection of the rights of the relative after a woman has been divorced, especially if the husband is a distant person who is difficult to reach so that he can avoid his responsibilities.(Basa 2024) In many cases, out – of – court divorce leads to unclear rights for women and children in customary families, so a clearer and more effective mechanism for recognizing divorce is needed.(Daiman 2024)

For the nagari government, an uncontested divorce becomes the basis for civil registration. However, unreported out – of – court divorces cause delays in updating data, so women who have been religiously divorced are still recorded as legal wives. This can lead to legal problems such as inheritance disputes, new marriages that are considered invalid, or misuse of identity by ex – husbands. Socially, women may experience stigma, administrative difficulties, and barriers in obtaining civil registration documents.(Kuniang 2024)

Courts have an important role in providing official recognition of divorces that occur, as this provides a clear legal status for the parties involved. Recognition of the divorce by the court allows the divorce process to be legally recognized under state law, even if the divorce is pronounced outside of court or in the presence of a mediator, provided that the applicable legal procedures and requirements are met. Once the divorce is recognized, the court will issue a divorce certificate that serves as proof of the validity of the divorce under state law.

The legal certainty that results from the recognition of divorce by the court not only provides a clear legal status for both parties, but also protects the rights of the wife and children, and avoids potential losses arising from legal uncertainty. Overall, the recognition of divorce is an important step towards protecting women's rights in the context of siri marriage, as well as ensuring that they do not lose their basic rights after they are divorced.

Socially, recognition of divorce helps to reduce the social stigma against women who seek divorce, allowing them to maintain their dignity in the community. In addition, this recognition increases people's legal awareness of the importance of legal divorce procedures, which can indirectly prevent the practice of unauthorized siri marriages. Legal certainty of divorce from the court is currently very important to guarantee the rights of the parties involved and ensure that the divorce process is carried out in accordance with the applicable provisions. The registration of this acknowledgment provides legal certainty of the status of the marriage and divorce that has occurred with the imposition of divorce by the husband. The court also ensures that the obligations that must be fulfilled by both parties, such as *alimony*, *mut'ah*, and child support, are carried out in accordance with the applicable law.

In addition, the recognition of out – of – court divorce guarantees the rights of the wife and children to be fulfilled by the husband who has divorced his wife through the report of the divorce to the court. The recognition of out – of – court divorce also serves to sanction the husband to be more careful in pronouncing the word divorce.(Iqbal 2024; Daiman 2024)

## CONCLUSION

Out – of – court divorce in Banuhampu Subdistrict occurs due to the cost and time of processing divorce in court, the habit of the community that considers the husband's divorce to be valid according to local scholars, and lack of understanding of the obligation

to divorce through the court. The impacts include siri marriages, unclear child status, difficulty in processing civil registration documents, and loss of legal and financial rights for the wife and children. Community leaders such as MUI, ninik mamak, Bundo Kanduang, Wali Nagari, and KUA acknowledged the validity of out-of-court divorce in terms of shar'i and customary law as long as it fulfilled the pillars of Islam, but stressed the importance of formalization through the courts to protect the rights of women and children and avoid administrative problems. They asked the state to bridge religious and customary values with positive law for the sake of legal certainty and justice.

The recognition of out-of-court divorce in Banuhampu is an attempt to bridge the divorce law, as well as a solution for these cases. Therefore, it is important for various parties. For the KUA, it is necessary for the administration of the remarriage of divorced women. Niniak mamak and Bundo kanduang need it to protect the post-divorce rights of their children, while the government uses it to facilitate the processing of civil registration documents. This recognition provides legal certainty regarding the status of divorce, creates social order, and harmonizes religious understanding with state regulations. In addition to being administrative, recognition also serves as an instrument of supervision over husbands in divorcing and referring wives, while protecting the rights of women and children, including emphasizing the legal consequences for husbands post-divorce.

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