



**Judges' Perspectives on the Determination of the Amount of Mut'ah,
Childbirth Costs, and Child Sustenance in Divorce Cases
(The study on the Court's Decision Number 808/Pdt.G/2021/Pa. Kab. Kdr)**

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Abstrak

The case 808/Pdt.G/2021/PA.Kab.Kdr is a petition for divorce. The judge will order the Petitioner to pay *mut'ah*, maternity costs, and child support once the divorce has been finalized. The issue that will be addressed in this study is the absence of a specific regulation governing the calculation of *mut'ah*, maternity costs, and child support in this instance. In determining the amount of *mut'ah*, maternity expenditures, and child support, the Panel of Judges therefore applies *ijtihad* based on its opinion. The purpose of this study is to determine how the judge perceives the amount of *mut'ah*, maternity costs, and child support in this specific case. This is a qualitative research and socio-legal study. The quantity of *mut'ah* is determined by the length of the marriage and the husband's abilities, or by mutual agreement between the parties. In addition, the Panel of Judges will examine the issue of childbirth expenses so long as the prosecution can provide proof in the form of receipts or witnesses, as childbirth expenses are an obligation of the husband. Regarding child maintenance, the quantity of support that must be provided is adjusted based on the child's needs and the husband's suitability to meet them, or the parties can reach an agreement.

Keywords: *Mut'ah*, Maternity Costs, Child Care Subsistence, 'Urf

Abstrak

Kasus dengan nomor perkara 808/Pdt.G/2021/PA.Kab.Kdr ini merupakan permohonan cerai talak. Hakim akan menghukum Pemohon untuk membayar mut'ah, nafkah iddah, dan nafkah anak setelah perceraian diputuskan. Permasalahan yang akan dibahas dalam penelitian ini adalah belum adanya peraturan khusus yang mengatur tentang perhitungan mut'ah, nafkah iddah, dan nafkah anak dalam perkara ini. Oleh karena itu, dalam menentukan besaran mut'ah, nafkah iddah, dan nafkah anak, Majelis Hakim melakukan ijtihad berdasarkan pendapatnya. Tujuan dari penelitian ini adalah untuk mengetahui bagaimana pandangan hakim dalam menentukan besaran mut'ah, nafkah iddah, dan nafkah anak dalam kasus ini. Penelitian ini merupakan penelitian kualitatif

dan studi sosio-legal. Besaran mut'ah ditentukan oleh lamanya perkawinan dan kemampuan suami, atau atas kesepakatan bersama antara kedua belah pihak. Selain itu, Majelis Hakim akan memeriksa masalah biaya persalinan selama penuntut dapat memberikan bukti berupa kuitansi atau saksi, karena biaya persalinan merupakan kewajiban suami. Mengenai nafkah anak, jumlah nafkah yang harus diberikan disesuaikan dengan kebutuhan anak dan kemampuan suami dalam memenuhinya, atau para pihak dapat mencapai kesepakatan.

Katakunci: Mut'ah, Biaya Persalinan, Nafkah Pengasuhan Anak, 'Urf

Introduction

Conflicts between spouses is inevitable. The factors for familial issues and conflicts may vary from one family to the other. Some families are fortunate enough to solve their problems; while others end up with divorce. Family breakdown can come in many forms. First, *Talaq*, divorce lawsuit (*Khulu'*), and *Fasakh*, which is a type of divorce lawsuit in which the judge has the authority to decide whether the marriage relationship persists or not, can lead to the dissolution of a marriage.¹

Religious Courts have the authority to decide Islamic civil cases for Muslims in Indonesia, and they preside over the middle of the divorce process in Indonesia in terms of authority and duty. When a divorce is conducted outside of the court, such as when a marriage is not registered, the divorce is deemed invalid or without legal standing. The urgency of completing a divorce in court is intended to secure and guarantee the rights of the husband and the wife in an equitable and mutually beneficial manner, as well as to create benefits for both parties.²

In the case of divorce, the ex-husband must bear the consequences of the Panel of Judges' granting of the petition for divorce and granting of permission to pronounce the divorce vow. Article 41 letter (c) of the Marriage Law explains that the ex-husband is required to pay for the ex-wife's living expenses and determine her obligations.³ In addition, according to Article 149 of the KHI, if a marriage is dissolved due to divorce, the ex-husband is required to grant his ex-wife a proper *mut'ah*. Offering assistance during the *Iddah* period. Pay the dowry and provide for their children's *hadhanah* expenses until they reach the age of 21.⁴

The ex-husband is obliged to pay *mut'ah* support, *iddah* support, *madhiyah* support, and child care support (*hadhanah*) to the estranged wife and children, if the marriage produced offspring. This is governed by the Marriage Law Article 41 letter c and the Islamic Law Compilation Article 149.

In addition, the judge ordered the appellant to pay *mut'ah* in the amount of

¹ Khoirul Abror, *Hukum Perkawinan dan Perceraian* (Yogyakarta: Ladang Kata, 2020), 162-192.

² M. Anshary, *Hukum Perkawinan di Indonesia Masalah-Masalah Krusial* (Yogyakarta : Pustaka Pelajar, 2010),79-81.

³ Republik Indonesia, "Undang-Undang R.I. Nomor 1 Tahun 1974 tentang Perkawinan" dalam Lembaran Negara Nomor 3019, Pasal 41 huruf c.

⁴ Kementerian Agama RI, *Kompilasi Hukum Islam di Indonesia* (2018), 100.

3,000,000; (three million rupiah) to his wife as consolation for a wife whose husband has divorced her; this is the responsibility of a husband who dislikes his wife. In addition, the judge panel ordered the Reconventional Defendant or Convention Petitioner to pay a delivery fee of Rp. 5,000,000; (five million rupiah) and a child's maintenance of Rp. 300,000; (three hundred thousand rupiah) per month until the child reaches adulthood, excluding expenditures for education and health care.

The issue being discussed in this study is regarding the amount of *mut'ah*, childbirth costs, and child maintenance (*hadhanah*) that ex-husbands must pay, are not explicitly regulated in the Indonesian positive law or Islamic law. In KHI Article 160, it is stated only that the amount of *mut'ah* that must be paid by the ex-husband is adjusted according to the ex-husband's decorum and ability. In addition, SEMA Number 3 of 2018 specifies that when determining *madliyah* income, *iddah* income, and *mut'ah*, one must consider a sense of justice and compliance by examining the husband's economic capacity and the wife's and children's needs. In addition, the provision of maintenance is solely for the purpose of protecting divorced spouses' rights.

On the basis of the preceding context, the author is interested in learning more about the determination of the amount of *mut'ah*, childbirth costs, and maintenance of children that a divorced spouse must provide. In the State Law and in the Islamic Law, the amount of *mut'ah*, the costs of labor, and the maintenance of children are not regulated in detail. In this instance, the Panel of Judges authorized to exercise *ijtihad* in determining the amount of *mut'ah*, delivery costs, and child support. This must be investigated, and the author wishes to know what the basis or opinion of the Panel of the Judges is for determining the amount of *mut'ah*, delivery costs, and maintenance of children resulting from a divorce from their fathers. In order to do so, the author intends to conduct a study.

The Nature of the Sued Divorce

a. Definition of the Sued Divorce

From the perspective of Islamic law, sued divorce is referred to as *talaq*. *Talaq* is the severing of ties and the annulment of agreements, whereas *furqah* is divorce, the antithesis of gathering. *Talaq* and *furqah* have both broad and narrow connotations. In general, it refers to various forms of divorce imposed by the spouse and sanctioned by the court. Specifically, it refers to a divorce imposed on the wife by the spouse. According to Islamic law, therefore, divorce is defined by the terms *talaq* and *furqah*, which have both general and specific meanings.

From a legal standpoint, divorce is the termination of a marital relationship by a magistrate. Therefore, the legal definition of divorce is the dissolution of the relationship between a husband and wife as a result of a judge's decision based on the demands of one of the parties, both husband and wife, for reasons specified by statute.⁵

⁵ Khumedi Ja'far, *Hukum Perdata Islam di Indonesia : Aspek Hukum Keluarga dan Bisnis* (Surabaya, Gemilang, 2019), 39.

b. The legal Foundation for Divorce

The legal basis for divorce has been stated in the Islamic Holy Scripture, and thus is in accordance with what Allah SWT says in Surah At-Talaq, verse 1 of the Qur'an.

يَا أَيُّهَا النَّبِيُّ إِذَا طَلَّقْتُمُ النِّسَاءَ فَطَلِّقُوهُنَّ مِنْ لَدُنَّهِنَّ وَأَخْصُوا الْعِدَّةَ وَاتَّقُوا اللَّهَ رَبَّكُمْ لَا تَخْرُجُوهُنَّ مِنْ
بُيُوتِهِنَّ وَلَا يُخْرَجْنَ إِلَّا أَنْ يَأْتِيَنَّ بِفَحِشَةٍ مُبَيِّنَةٍ ۚ وَتِلْكَ حُدُودُ اللَّهِ ۚ وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَقَدْ ظَلَمَ نَفْسَهُ
لَا تَدْرِي لَعَلَّ اللَّهَ يُحْدِثُ بَعْدَ ذَلِكَ أَمْرًا

Meaning: "O Prophet! When you divorce your spouses, you must do so at a time when they can (face) their (reasonable) idah, calculate the duration of that idah, and fear Allah, your Lord. Do not remove them from their residences and do not permit them to leave unless they have clearly committed an abomination. Those are Allah's laws, and whoever violates Allah's laws, then indeed, he has done injustice to himself. Who knows, perhaps Allah made a new provision after that

c. Different Types of Talaq

1. Viewed from the standpoint of the level of the *talaq* seen from the the angle of possibility to ruju':
 - a) *Raj'i* divorce, which is a divorce in which the husband can return to his wife on the condition that she is still in the *iddah* period without having to apply for a new marriage. In this case, a wife can refuse to reconcile with her husband on the condition that she has had sexual relations with him.
 - b) *Talak Ba'in*, a divorce in which the husband cannot reconcile with his wife without a new marriage. This *Ba'in* divorce prevents both parties from inheriting, even though the wife is in the *iddah* period. This type of divorce is divided into two:
 - 1). *Talak Ba'in Sughra* (small), which is a type of one or two divorce where the *talak* is accompanied by *iwadh* (replacement money) from the wife, usually called *khulu'*. It is also a divorce that is imposed on a wife who has never been engaged in sexual intercourse, including the divorce decided by judges due to the assertion of 'ila, which is a vow administered by the husband not to engage in sexual intercourse with the wives where marriage has passed the four-month length of the marriage
 - 2). *Talak Ba'in Kubra* (big), which is a type of triple divorce. The intended triple *talaq* can be dropped all at once or one at a time. If a husband has imposed triple *talaq* on his wife, he is not permitted to return to his ex-wife, unless his ex-wife has remarried a new man with whom she had sexual relations during their marriage, then divorced, and

her iddah has been completed.⁶

2. Viewed from the standpoint of religious principles (*sunnah*):
 - a) The *Sunni* divorce is legally permitted, which is a divorce in accordance with religious guidance, namely a divorce imposed when the wife is in a pristine state and has never been impregnated, with only one divorce at a time.
 - b) The *Bid'i* divorce, which is not in accordance with religious guidance, namely a divorce imposed when the wife is pure and has been engaged in sexual intercourse, or when the wife is in her period; this type of divorce is unlawful but still valid.⁷

d. Legal Consequences of Divorce

1) For wives

In accordance with Article 149 KHI, if a marriage dissolves due to divorce, the ex-husband is required to provide appropriate *mut'ah* to his ex-wife in the form of money or objects, unless the ex-wife has not had sexual relations with the husband. In addition, the ex-husband is required to provide iddah support to his ex-wife as long as she carries out her *iddah* period unless the wife is divorced and not.⁸

2) For Children

Providing support for children is one of the legal ramifications of divorce. Although the marriage has ended, the obligations of husband and wife as father and mother to their children remain.⁹

General Characteristics of *Mut'ah*

a. The nature of *Mut'ah*

- b. The terminology of the *mut'ah* is derived from the word *mata'a*, which means giving, adding, a pleasure, which complements, calms, and pleases. Etymologically, *mut'ah* means benefit or enjoyment, which is a form of completing basic needs or maintaining the fulfillment of these basic needs.¹⁰

Mut'ah maintenance is something that must be given by ex-husbands to ex-wives as consolation for the divorced wife, and the giving can be varied, such as in the form of monetary or daily needs.¹¹

⁶ Iffah Muzammil, *Fiqih Munakahat Hukum Pernikahan dalam Islam* (Tangerang : Tira Smart, 2019), 138-139.

⁷ Ibid, 142-143.

⁸ Jamaludin dan Nada Amalia , *Buku Ajar Hukum Perkawinan* (Lhokseumawe : Unimal Press, 2016), 104-105.

⁹ Rodliyah, "Akibat Hukum Perceraian Berdasarkan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan", *Keadilan Progresif* 5, no. 1 (Maret 2014) : 127.

¹⁰ Nuraisah. "Hak Nafkah, Mut'ah dan Nusyuz Istri (Studi Komparatif Undang-Undang Hukum Keluarga di Berbagai Negara Muslim)", *Al-Ahwal* 4, no. 1, (2011): 82.

¹¹ Khairuddin, Badri, dan Nurul Auliyana. "Pertimbangan Hakim Terhadap Putusan Nafkah Pasaca Perceraian (Analisis Putusan Mahkamah Syar'iyah Aceh Nomor 01/Pdt.G/2019/Ms.Aceh)", *El-Usrah* 2, no. 1, (Januari-Juni 2019): 167.

c. Legal Foundation of *Mut'ah*

The legal basis for *mutah* is in accordance with what Allah SWT states in Al-Baqarah verse 241 of the Qur'an:

وَالْمُطَلَّاتِ مَتْعٌ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ

Meaning: *As a religious obligation, divorced women are required to receive mut'ah from their former spouses.*

d. The Degree of *Mut'ah*

The level of *mut'ah* varies according to the views of various scholars. These differences in views can be regarding the level, type, and ability of each to make a living. The *Maliki* and *Haambali* scholars, and some the *Syafii* scholars agree that the amount of the *mut'ah* should be decided in accordance with the ex-husband's economic capacity; while some *Hanafi* and *Syafii* scholars see it from the standpoint of the ex-wife's economic condition. However, they also agree that the amount of *mut'ah* should be considered based on the condition of both ext husbands and ex-wife.¹²

Regarding the amount of *mut'ah*, the *ulama* have differing opinions. According to the *Hanafi* and *Syafi'i* scholars, the amount of *mut'ah* is determined by the judge who decides the case. This is because the *Shari'a* contains no definite provisions regarding the amount, and because these matters are *ijtihadiah*, the judge is given the authority to decide based on the circumstances.¹³

Some *Hanabilah* scholars believe that the highest amount of *mut'ah* that should be given to the rich is roughly equivalent to the cost of one servant, while the lowest amount of *mut'ah* that must be given to the poor is a piece of clothing. This means that the amount of *mut'ah* that must be paid is not limited to a specific price, but rather serves as an example or reference regarding the amount of *mut'ah* that must be paid.

According to a number of *Hanafiyah* scholars, the amount of *mut'ah* was adjusted to the conditions of the time. There are those who argue that the highest amount of *mut'ah* is limited to half the *mitsil* dowry, while the lowest amount is limited to no less than 5 dirhams because the lowest dowry at the time was 10 dirhams.¹⁴

The Childbirth Cost

The obligation of the spouse to provide for his wife is stated in Allah SWT's words in Surah At-Thalaq, verse 6 of the Qur'an:

¹² Nuraisah. "Hak Nafkah, Mut'ah dan Nusyuz Istri (Studi Komparatif Undang-Undang Hukum Keluarga di Berbagai Negara Muslim)", *Al-Ahwal* 4, no. 1, (2011): 83-84.

¹³ Nuraisah. "Hak Nafkah, Mut'ah dan Nusyuz Istri (Studi Komparatif Undang-Undang Hukum Keluarga di Berbagai Negara Muslim)", *Al-Ahwal* 4, no. 1, (2011): 84-85.

¹⁴ *Ibid*, 85.

أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ وَلَا تُضَارُوهُنَّ لِتُضَيِّقُوا عَلَيْهِنَّ وَإِنْ كُنَّ أُولِي حَمَلٍ فَأَتِفُوا عَلَيْهِنَّ حَتَّى يَضَعْنَ حَمْلَهُنَّ

Meaning: "Place them (divorced wives) where you live based on your ability, and do not make it difficult for them to close their hearts." If they are expecting, then provide for them until they give birth."

The husband's obligation to provide for his wife in the form of legal apparel and shopping is obligatory; this obligation does not arise from the wife's need for him to take care of the household but rather arises on its own.

Madzhab scholars hold the view that childbirth and medical expenditures are included in the income category. However, for expensive treatments, separation is required or the husband's financial resources can be considered.¹⁵

Childbirth costs are also included in the income category which covers the wife's needs during childbirth, such as financing for the midwife or doctor who helps the wife give birth, medical and hospital costs, and meeting the wife's biological needs. As a result, the husband is obligated to fulfill this, and if the maternity costs have not been met when the husband wants to divorce her, the wife can seek this right from the court.

Childcare Cost

a. Meaning of Childcare

Etymologically, *hadhanah* is derived from the word *hadhana-yahdhunu-hadhnan*, which means to raise and educate children.¹⁶ Terminologically, the term *hadhanah* means caring and nurturing of children (Those who have yet to be *mumayiz*) or those who are insane, since they are not capable to meet their own needs.¹⁷

In *syara'* terms, *hadhanah* refers to the maintenance of children for those who have the right to care for them. It can also be interpreted as caring for or looking after someone who is unable to meet his own needs because he is not *mumayiz*, for example, children, and adults but without sense. Caring means daily needs, such as food, clothes, and accommodation.¹⁸

b. Legal of foundation of the child-care

The scholars agree that the legal standing of *hadhanah* is mandatory. According to Hanafiyah and Malikiyah scholars, the right to *hadhanah* is the right of the mother, so the mother can terminate this right. However, according to a number of scholars, *hadhanah* is a joint right of both parents.

¹⁵ Muhammad Jawal Mughniyah, *al-Fiqh 'ala al-Madzahib al-Khamsah*, Terjemah Masykur A.B, dkk, (Jakarta : PT Lentera Basritma. 1996), Cet. II, 424-425.

¹⁶ Ahmad Muhajir, "Hadhanah dalam Islam (Hak Pengasuhan Anak dalam Sektor Prndidikan Rumah)", *Jurnal SAP* 2, no. 2, (Desember2017): 166.

¹⁷ Mardani, *Hukum Keluarga Islam di Indonesia* (Jakarta : Kencana, 2016), 127.

¹⁸ Elimartati dan Firdaus. "Hak *Hadhanah* dalam Putusan Pengadilan Agama", *Jurnal Ilmiah Syari'ah* 17, no. 2, (Juli-Desember 2018) : 234.

In Wahbah Zuhaili's opinion, the right to *hadhanah* is a joint right between the mother, the father, and the child. If a dispute occurs during the *hadhanah*, it is obligatory to put the interests of the children.¹⁹

c. **Childcare Provision in the Marriage Law and KHI**

Article 45 of the Marriage Law stipulates that parents are obligated to care for and educate their children until they are able to support themselves or marry, and this obligation remains in effect even if the parents' marriage dissolves.²⁰

In addition, in Article 47 of the Marriage Law, it states that a child who has not yet reached the age of 18 or is unmarried remains under the authority of his parents until that authority is removed. Parents are required to represent their children in all legal proceedings, both inside and outside of court.²¹

In addition, KHI Article 105 explains that if the child's parents divorce, the maintenance of a child under the age of 12 (*mumayiz*) becomes the mother's responsibility. When the child reaches the age of *mumayiz*, he or she may choose either the father or the mother as the holder of child maintenance rights (*hadhanah*).²²

The Conception of 'Urf

a. **The Nature of 'Urf**

From the perspective of Ushul Fiqh, '*Urf*' is something that has been known by the community and is a habit among them.²³ In Arabic, '*urf*' has multiple meanings, including something that is liked and regarded as good, the top of something, succession, and recognition. In Islamic law, '*urf*' is something that humans have become accustomed to in their relationships and daily lives.²⁴

As for terminology, the word '*urf*' has the meaning of something that has become a habit for humans, and they follow it in the form of every action that is popular among them, or a word that they are familiar with in a certain sense, not in the sense of etymology, the word is only understood in this specific meaning.²⁵

Some *Ulama* of *ushul fiqh* refers to '*urf*' as *adat* (customs), despite the

¹⁹ Mardani, *Hukum Keluarga Islam di Indonesia* (Jakarta : Kencana, 2016), 128.

²⁰ Republik Indonesia, "Undang-Undang R.I. Nomor 1 Tahun 1974 tentang Perkawinan" dalam Lembaran Negara Nomor 3019, Pasal 45.

²¹ Republik Indonesia, "Undang-Undang R.I. Nomor 1 Tahun 1974 tentang Perkawinan" dalam Lembaran Negara Nomor 3019, Pasal 47.

²² Kementerian Agama RI, *Kompilasi Hukum Islam di Indonesia* (2018), 89-90.

²³ Jaenal Aripin, *Kamus Usul Fiqih dalam Dua Bingkai Ijtihad* (Jakarta: Kencana Prenada Media Group, 2012), 405.

²⁴ Indi Aunillah, *Ensiklopedi Fiqih untuk Remaja Jilid 2* (Yogyakarta: Pustaka Insan Madani, 2008), 281.

²⁵ Abd. Rahman Dahlan, *Ushul Fiqh* (Jakarta: Amzah, 2014), 208.

fact that there is no difference between 'urf and adat (customs) in the sense of the term. Because the customs are well-known to the community, they are also commonly practiced among them, as if it were a written law, and those who violate it are subject to get punishment.²⁶

b. The Legal Foundation of 'Urf

The scholars have agreed that 'urf can be used as proof as long as it does not conflict with *sharia*'. The *Malikiyah Ulama* is famous for its statement that the *Madinan Ulama* can be used as proof. The *Hanafiyah Ulama* states that the opinion of the *Kaffah Ulama* can be used as proof. Imam Syafi'i was known for his *qaul qadim* dan *qaul jadidnya*. When he was in Egypt he judged differently on certain issues (*qaul jadid*). This suggests all the schools of thought refer to 'urf when deciding the legal status of certain issues. However, the 'urf *fasid* was not taken as the legal foundation.²⁷

The scholars have agreed that 'urf can be used as proof as long as it does not conflict with *sharia*'. The *Malikiyah Ulama* is famous for its statement that the *Madinan Ulama* can be used as proof. The *Hanafiyah Ulama* states that the opinion of the *Kaffah Ulama* can be used as proof.²⁸

c. Varieties of 'Urf

In general, ushul fiqh scholars divide 'urf into the following three parts:

1. In a standpoint of the nature of 'urf is divided into two:

a) 'Urf *lafdzi*

'Urf *lafdzi* is the people's tendency to use certain pronunciations and expressions, so that a particular meaning comes to mind even though, according to the rules of the language, a certain expression could have a different meaning.

b) 'Urf *Amali*

'Urf *Amali* is a community habit associated with actions or muamalah, such as buying and selling without consent or qabul, which has become a community habit. Or a guarantee when purchasing something, such as a watch guarantee that it will be good for a certain period of time. Or buying and selling by delivering goods without additional costs.²⁹

2. From the standpoint of scope and application within the communities, 'urf is also divided into 2:

a) The Common 'Urf

There is no clear definition of the boundaries and scope of this general 'urf. Is it only when a habit is implemented among the majority of 'urf people that it can be called common 'urf? Whether

²⁶ Ahmad Sanusi, *Ushul Fiqh* (Jakarta: Rajawali Pers, 2015), 84.

²⁷ Ahmad Sanusi, *Ushul Fiqh* (Jakarta: Rajawali Pers, 2015), 84.

²⁸ Indi Aunullah, *Ensiklopedi Fikih untuk Remaja Jilid 2* (Yogyakarta: Pustaka Insan Madani, 2008), 282.

²⁹ Sucipto, " 'Urf sebagai Metode dan Sumber Penemuan Hukum Islam", *Asas* 7, no. 1, (Januari 2015): 30-31.

'urf is only valid in a certain area, it can be said that 'urf is common or not.

b) The Specific 'Urf

Despite the fact that scholars of ushul fiqh do not require a specific age to classify this particular 'urf, it is clear from a number of frequently cited examples that time also includes conditions that can distinguish whether something belongs to the general or special 'urf.³⁰

3. Viewed from the legal standpoint, 'urf is divided into two as well:

a) 'Urf Shahih

Despite the fact that scholars of *ushul fiqh* do not require a specific age to classify this particular 'urf, it is clear from a number of frequently cited examples that time also includes conditions that can distinguish whether something belongs to the general or special 'urf.

b) 'Urf Fasid

'Urf Fasid is a practice that is contrary to *Sharia's* tenets, such as usury, which was widespread among Arabs before the advent of Islam, or drinking alcohol. After the advent of Islam, the 'urf such as these were challenged and eroded either gradually or explicitly.³¹

d. The Terms for 'Urf

If it meets a certain requirement, 'Urf can be used as a source for the revelation of Islamic law:

1. 'Urf (whether general or specific or in the nature of actions or words) applies generally, meaning that 'urf applies in the majority of cases that occur in the society and is adhered to by the majority of the population.

This means that the 'urf upon which the law will be based existed prior to the case in which the law will be applied

2. 'Urf will be used as the legal standing within the communities, when the cases required for the 'urf emerge. It means that the 'Urf will be referred to as the legal foundation prior to the existence of the cases.
3. 'Urf does not contradict what is clearly expressed in a transaction, which means that if both parties have clearly determined what must be done in a transaction, then the 'urf is no longer legitimate.
4. 'Urf does not conflict with the *qath'i* texts in *syara*, or the Islamic law, so 'urf can be used as a source of legal determination if there is no *qath'i* text that expressly prohibits performing actions that have become socially accepted.³²

³⁰ Sucipto, " 'Urf sebagai Metode dan Sumber Penemuan Hukum Islam", *Asas 7*, no. 1, (Januari 2015): 31.

³¹ Ibid.

³² Sucipto, " 'Urf sebagai Metode dan Sumber Penemuan Hukum Islam", *Asas 7*, no. 1, (Januari 2015): 31.

The Judge's Opinion Regarding the Amount of Mut'ah, Childbirth Costs, and Child Care Support in Decision Number 808/Pdt.G/2021/PA.Kab.Kdr 'Urf

In deciding a case, the judge must have his own views on the subject, which is a form of *ijtihad* or an attempt to find answers to a case filed with the Kediri Regency Religious Court in order to reach a decision that provides justice, benefits, and legal certainty for the parties.

In deciding a case, the judge must have his own views on the subject, which is a form of *ijtihad* or an attempt to find answers to a case filed with the Kediri Regency Religious Court in order to reach a decision that provides justice, benefits, and legal certainty for the parties.³³

Talak divorce is a divorce that is requested by the spouse; if the request is granted, a number of obligations must be met, one of which is the payment of *mut'ah* to the wife. *Mut'ah* is a consolation gift given by a divorced spouse to his ex-wife. *Mut'ah* may take the form of money, commodities, etc. The divorce petition filed by the husband has several legal repercussions, one of which is the obligation to provide maintenance to the wife during her *iddah* period and to pay *mut'ah*. The objective of the litigants in resolving their case in court is to completely resolve their case with a court decision. However, the existence of a court decision does not necessarily result in a complete resolution of the case, but the parties have equally implemented the ruling.³⁴ *Mut'ah* is an obligation that a husband must fulfill when divorcing his wife. *Mut'ah* is a form of comfort for divorced wives.³⁵

Mut'ah, as defined by the terminology of the *Shafi'i* school, is a property that must be fulfilled by a spouse to his divorced wife, and has the same meaning under certain conditions. Therefore, *mut'ah* is a gift from a husband to his ex-wife, in the form of alimony or commodities, as a form of consolation or consolation for his divorce.

Mut'ah is a requirement that a spouse must meet in order to divorce his wife. *Mut'ah* is provided to divorced wives as a form of consolation. When the husband divorced his wife, the wife's right to *mut'ah* became the husband's obligation to satisfy. It is permissible for the wife to request *Mut'ah* because it is her prerogative. If the wife does not request *mut'ah*, it will be determined by the Panel of Judges with ex-officio privileges.

The ex-officio privileges of this judge are derived from his position. This privilege is granted to the ex-officio judge because the judge's role is to render decisions that are fair and beneficial to justice seekers. Through this ex-officio right,

³³ Syaiful Annas, "Masa Pembayaran Beban Nafkah Iddah dan Mut'ah dalam Perkara Ceai Talak (Sebuah Implementasi Hukum Acara di Pengadilan Agama)", *Al-Ahwal* 10, no. 1, (Juni 2017) : 5.

³⁴ Nur Afifa Annisa, "Pandangan Hukum Islam Terhadap Implementasi Pembayaran Nafkah Iddah dan Mut'ah dalam Cerai Talak (Studi Kasus Pengadilan Agama Kelas I A Watampone)", (Skripsi Sarjana, Fakultas Syariah dan Hukum Islam IAIN Bone, 2020), p. 39.

³⁵ Rizki Hidayanto, "Penentuan Jumlah Nafkah Iddah dan Mut'ah Pasca Perceraian (Studi Putusan Pengadilan Agama Purwokerto Nomor 0155/Pdt.G/2019/PA.Pwt.)", (Skripsi Sarjana, Fakultas Syariah IAIN Purwokerto, 2021), p. 32-33.

the judge has the authority to rule on something that is not argued for or requested by the Respondent in a divorce case. The purpose of the judge's ex-officio right is to render a decision that is just and beneficial to those who seek justice.³⁶

This judge's ex-officio rights in divorce cases are limited to *iddah* and *mut'ah* maintenance, which are inherent and absolute rights of the wife in the event of a divorce. To award *iddah* maintenance, the judge must first determine whether or not the divorced wife has committed *nusyuz*. If it can be established that she is *nusyuz*, the wife is not entitled to *iddah* maintenance. However, for this *mut'ah* gift, whether the wife is proven to be *nusyuz* or not, the divorced wife still receives it.

In the divorce case that occurred at the Religious Court of Kediri Regency, case number 808/Pdt.G/2021/PA.Kab.Kdr, the Respondent (wife) did not ask to be given *mut'ah*, but the Judge ex-officio punished the Petitioner (husband) to pay *mut'ah* to the wife in the amount of Rp. 3,000,000; (three million rupiah) because *mut'ah* has become mandatory

In addition, in his legal considerations, the Judge ex-officio determined that the Respondent (wife) did not receive *iddah* rights. This is because, after the marriage, the Petitioner and Respondent separated and never lived together as husband and wife. Therefore, there is no sexual intercourse between the Petitioner and Respondent, and thus the Respondent has no *iddah* rights.

According to the results of the author's interviews with the Panel of Judges who examined and decided on case 808/Pdt.G/2021/PA.Kab.Kdr regarding determining the amount of *mut'ah*, the judge has the authority to determine the amount of *mut'ah* to be paid, taking into account fairness, benefit, and legal certainty obtained by the parties. This is because there is no fixed regulation both in the Islamic law and the Indonesian positive law regarding the exact amount of the *mut'ah*. This drives the panel of judges in the religious court of Kediri to make a consensus on the feasible amount of *mut'ah*.

The judge in determining the amount of this *mut'ah* also takes into account the parties' agreement and the length of the marriage itself. The judges also take the economic capabilities of the husband into account. The amount of the *mut'ah* is counted based on the amount of monthly allowance given to the wife multiplied by the length of marriage between the couple.

In addition to the obligation to pay *mut'ah* because of the legal consequences of the divorce, there is the issue of childbirth costs. In the divorce case contained in case number 808/Pdt.G/2021 PA.Kab.Kdr, the Respondent demanded the delivery costs in the amount of IDR. 8.000.000; (Eight million rupiah), while the judge obliged the husband to pay only in the amount of IDR. 5.000.000; (Five million rupiah), because the judges decide the case based on their own judgment.

Madzhab scholars hold the view that childbirth and medical expenditures are included in the income category. However, for expensive treatments, separation is

³⁶ Mansari, "Penetapan Nafkah 'Iddah Melalui Hak *Ex Officio* Bagi Istri Nusyuz", *Yudisial* 14, no. 2, (Agustus 2021),p. 273.

required or the husband's financial resources can be considered.³⁷

Childbirth costs are also included in the category of income that covers the wife's requirements during childbirth, such as financing for the midwife or doctor who assists the wife during childbirth, medical and hospital costs, and meeting the wife's biological needs.³⁸ Therefore, the husband is obligated to fulfill this obligation, and if the maternity costs have not been covered when the husband seeks a divorce, the wife can request this privilege from the court.

The interviews with the judge reveal that the case involved childbirth costs, namely that childbirth costs are transitory and therefore the husband's responsibility to pay for them. The wife cannot promptly request these maternity costs, but the defendants can be sued if the prosecution can demonstrate unpaid maternity costs. This evidence utilizes witnesses. The judge's ex-officio rights do not extend to maternity expenses, so the request for maternity costs cannot be granted.

The judge then determines the amount of maternity expenses by examining the receipt or note that details the amount of maternity expenses incurred at that time. In this instance, however, the receipt or memo detailing the delivery costs was lost. To demonstrate this, the Respondent (wife) introduced witnesses. Then, according to the witness's statement, the Respondent (wife) was responsible for all birth costs and the Petitioner (husband) did not contribute to the birth expenses. In addition, information was obtained from witnesses that the Petitioner (husband) was employed, so the Judge classified the Petitioner (husband) as a person with an income and deemed it appropriate for him to pay for the birth expenses.

The Judge used the testimony of the witness as a basis for determining the amount of maternity costs that the Petitioner (husband) was required to pay. In addition, based on the Judge's legal considerations, the Petitioner (spouse) was ordered to pay maternity costs of Rp 5,000,000; (five million rupiahs).

Child rearing, or *hadhanah* in Arabic, is the obligation to care for and educate a child as best as possible by his parents.³⁹ This child care includes education and all basic needs of the child. age of 12 (mumayiz) becomes the mother's responsibility. When the child reaches the age of mumayiz, he or she may choose either the father or the mother as the holder of child maintenance rights. Article 105 of the KHI explains that if the child's parents divorce, the maintenance of a child is under the (*hadhanah*).⁴⁰

The *hadhanah* rights are not directly imposed on the mother when the child is not yet mumayiz, but the judge will consider that the child is guaranteed education, development and that all of his needs are met when he goes with his mother or father. This issue is the main concern of the judge to determine who are entitled to hold the

³⁷ Muhammad Jawal Mughniyah, *al-Fiqh 'ala al-Madzahib al-Khamsah*, Terjemah Masykur A.B, dkk, (Jakarta : PT Lentera Basritma. 1996), Cet. II, p. 424-425.

³⁸ Ibnu Rozali, "Konsep Memberi Nafkah bagi Keluarga dalam Islam", *Intelektualita* 06, no. 02 (2017), p. 189.

³⁹ Amiur Nuruddin dan Azhari Akmal Tarian, *Hukum Perdata Islam di Indonesia* (Jakarta : Kencana, 2006), 293.

⁴⁰ Kementerian Agama RI, *Kompilasi Hukum Islam di Indonesia* (2018), p. 89-90.

rights of *hadanah* (rights for child rearing) to guarantee the protection of the children

In case number 808/Pdt.G/2021/PA.Kab.Kdr, the custody of the child has been awarded to the mother due to the fact that the child has been in the care and care of his mother since birth and the child is still 2.5 years old, at which age the child is declared not yet *mumayiz*. In addition, the Respondent (wife) demanded a child's maintenance of IDR. 70,000 x 30 x 30 = IDR 63.000.000. However, the petitioner (husband) in the amount of IDR. 300.000 (three hundred thousand) until they reach adulthood and then this amount is agreed upon by both parties.

Based on the results of the author's interview with the judge in case number 808/Pdt.G/2021/PA.Kab.Kdr regarding determining the amount of child maintenance income, it is determined based on the child's requirements and the father's ability. The judge of the Kediri Regency Religious Court determines that the range for the amount of income a child can earn is at least one-third of the father's income unless both parties agree otherwise. So, the magistrate determined the amount of maintenance for the child at Rp. 300,000; (three hundred thousand rupiah) every month until the child is an adult. This occurred because both parties reached an agreement.

In resolving a case through a court process, a judge not only functions and plays a role in directing the proceedings, but the judge is also responsible for acting and determining the objective or material law that will be applied in deciding the case. In addition to being able to act fairly, judges must also be able to interpret statutory regulations or carry out legal interpretations by issuing actual court decisions that are tailored to the requirements and developments of the community seeking justice. This must also take into account aspects of justice, legal certainty, and value.⁴¹

When making a decision, judges always consider aspects of justice, legal certainty, and the value of benefits. In case number 808/Pdt.G/2021/PA.Kab.Kdr, the appellant, the husband, was sentenced to pay *mut'ah*, maternity costs, and child support. Because the amount of *mut'ah*, maternity costs, and child support is not explicitly outlined in a regulation or rule, it is determined by the judge in each case.

The KHI explains that Article 149 letter (a) states that if a marriage dissolves due to divorce, the former husband is obligated to provide *mut'ah* to his ex-wife in the form of money or objects unless the ex-wife is *qobla* al dukhul. In case number 808/Pdt.G/2021/PA.Kab.Kdr, the judge ordered the spouse to pay *mut'ah* in the amount of three million rupiah. In determining the amount of *mut'ah* in this case, the judge considered the length of a wife's service to her spouse or the duration of the marriage. The judge then considered the husband's capability, in this instance his financial capability. In addition, when determining the quantity of *mut'ah*, the judge takes the parties' agreement into account. The judge determines the amount of the *mut'ah* by multiplying the amount of monthly support by the length of the wife's service to her spouse or the length of the marriage.

⁴¹ Nurbaiti, '*Urf dalam Putusan Pengadilan Agama: Analisis Pertimbangan Hakim dalam Putusan Harta Bersama*' (Tangerang Selatan: Cinta Buku Media, 2017),p. 14-15.

In addition, the judge in case number 808/Pdt.G/2021/PA.Kab.Kdr ordered the Petitioner to pay maternity expenses. Because maternity expenses are temporary, the spouse is responsible for covering them. The wife cannot promptly request these maternity costs, but the defendants can be sued if the prosecution can demonstrate unpaid maternity costs. This evidence utilizes witnesses.

In case 808/Pdt.G/2021/PA.Kab.Kdr, the judge ordered the spouse to pay Rp. 5,000,000 in maternity expenses. The judge determines the amount of maternity expenses based on the evidence presented at trial. In this instance, since the proof of receipt or note was misplaced, the wife presented a witness who detailed the amount of the birth expenses.

In addition, in case number 808/Pdt.G/2021/PA.Kab.Kdr, the judge ordered the Petitioner to pay Rp. 300,000 in child support for each child he fathered until the child reaches adulthood, based on the agreement of both parties. In determining the amount of child support, both the child's requirements and the father's financial situation are considered. The judge of the Kediri Regency Religious Court determines that the range for the amount of income a child can earn is at least one-third of the father's income unless both parties agree otherwise.

If the matter is examined within the realm of *'urf*, which is also the scope of Islamic law, then it can be seen that the definition of *'urf* is something that is a habit of humans, which they follow in the form of every action that is prevalent among them or a common word. They know it in a particular sense, not an etymological sense, and they do not comprehend it in any other sense when they hear it.⁴²

The determination of the amount of *mut'ah*, maternity costs, and child support by the judge of the Religious Court of Kediri Regency falls under a particular type of *'urf*, namely a custom that applies in a particular society, region, or circle. Because the determination of *mut'ah*, maternity costs, and child support as described above only pertains to the jurisdiction of the Religious Court of the Kediri Regency, it falls under the special *'urf* category.

In addition, it falls under the category of *'urf* *shahih*, which refers to a prevalent social custom that does not contradict the Qur'an or the Sunnah of the Prophet, does not negate their benefit, and does not cause them damage. The provisions for bestowing *mut'ah* are regulated in the QS, so the Kediri Regency Religious Court judge's determination of the amount of *mut'ah*, maternity costs, and child support do not conflict with the Qur'an or Sunnah. Verse 241 of Al-Baqarah reads as follows:

وَالْمُطَلَّاتِ مَتْعٌ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ

As a religious obligation, divorced women must receive mut'ah from their ex-husbands in accordance with Jewish law.

In determining the amount of *mut'ah*, maternity expenditures, and child support, the judge of the Religious Court of the Kediri Regency also considers the husband's financial resources. This demonstrates that the judge took into consideration the interests of both parties and did not cause any harm with his

⁴² Abd. Rahman Dahlan, *Ushul Fiqh* (Jakarta: Amzah, 2014), p. 208.

decision.

Consequently, this conforms to the requirements of *'urf*, namely that it applies generally, which implies that *'urf* applies in the midst of society. In this case, the religious court of the Kediri Regency has jurisdiction over the determination of the amount of *mut'ah*, maternity expenses, and child support. Then, this *'urf* does not conflict with *qath'i* texts such as the Qur'an and the *sunnah* of the prophet, because determining the amount of *mut'ah*, childbirth expenses, and child care support prioritizes the parties' interests.

Conclusion

The quantity of *mut'ah* as determined by the judge who reviewed and ruled on case number 808/Pdt.G/2021/PA.Kab.Kdr was determined based on the husband's suitability, namely the material ability and extent of a wife's devotion to her husband, or the duration of the marriage according to the second agreement. The amount of nominal quantity of *mut'ah* that a husband must provide is determined by multiplying the amount of support he provides each month by the duration of the marriage. Additionally, it may be contingent on the assent of both parties.

Labor expenses are not an unreasonable request, and it is the husband's responsibility to cover them. Determining the amount of the delivery fee must be able to establish its existence in advance with evidence in the form of a receipt detailing the amount of the delivery fee; if no such evidence is available, at least a witness can be presented for questioning about the delivery fee.

The amount of child support is determined by weighing the child's requirements against the father's financial capacity. The range of this child's maintenance obligation is one-third of the father's income, or it can be determined by agreement between the parties.

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