

Ensuring Children's Rights after Divorce in Indonesia: Religious Court Decisions on *Nafkah Madiyah*

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ABSTRACT

Studies in various Muslim countries show that the fulfillment of child maintenance after divorce by fathers remains an issue. This paper examines the fulfillment of *nafkah madiyah*, or arrear maintenance for children, by the Religious Courts in Indonesia, especially after the issuance of Supreme Court Circular No. 2 of 2019. Relying on the analysis of ten Religious Court Decisions, this study finds that there have been inconsistencies in the Court Decisions in fulfilling the demand for *nafkah madiyah* submitted by mothers. The differences in the outcomes are caused by the different legal bases used by the judges and their consideration of men's ability to fulfill the demands. The main reason for *nafkah madiyah* rejection is the judges' arguments that maintenance costs are for children to take benefits from them (*li al intifa'*) and not for possession (*li al tamlik*). This means that if a father did not provide for his children in the past, his negligence does not become a debt to be paid in the future. Meanwhile, judges grant the request of *nafkah madiyah* because child maintenance is the father's obligation. As in many cases, women are the primary carers of children after a divorce; ultimately, fulfilling *nafkah madiyah* is to protect not only children's rights but also women's rights.

[Kajian terdahulu di beberapa negara Muslim menunjukkan bahwa pemenuhan nafkah anak oleh ayah masih menjadi masalah. Penelitian ini mengkaji pemenuhan nafkah terhutang (*madiyah*) untuk anak, oleh Pengadilan Agama di Indonesia, khususnya setelah lahirnya Surat Edaran Mahkamah Agung No. 2 Tahun 2019. Dengan analisis terhadap sepuluh Putusan Pengadilan Agama, studi ini menemukan bahwa terdapat inkonsistensi Putusan Pengadilan dalam memenuhi tuntutan nafkah *madiyah* yang dituntut oleh ibu. Perbedaan putusan tersebut disebabkan oleh perbedaan dasar hukum yang digunakan oleh para hakim dan pertimbangan mereka terhadap kemampuan laki-laki untuk memenuhi tuntutan tersebut. Alasan utama penolakan nafkah *madiyah* adalah argumen hakim bahwa biaya nafkah adalah untuk diambil manfaatnya oleh anak (*li al intifa'*) dan bukan untuk dimiliki (*li al tamlik*). Artinya, jika seorang ayah tidak menafkahi anaknya di masa lalu, kelalaiannya itu tidak menjadi utang yang harus dibayar di masa depan. Sementara itu, hakim mengabulkan permohonan nafkah *madiyah* karena menganggap nafkah anak adalah kewajiban ayah. Sebagaimana dalam banyak kasus, perempuan adalah pengasuh utama anak setelah perceraian, pada akhirnya, pemenuhan nafkah *madiyah* adalah untuk melindungi tidak hanya hak anak tetapi juga hak-hak perempuan.]

KEYWORDS

Nafkah madiyah, child maintenance, divorce, Religious Court decision

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Introduction

Every right of children is related to one another. The failure to meet one right will likely affect the others. For instance, when parents are unable to provide for the child's welfare, this failure will influence children's rights to a decent life, a healthy upbringing environment, and meaningful participation in real life. In a family where divorce happens, children are vulnerable, as they are likely to be affected by the conflict between their parents.¹ *Nafkah madiyah*, or past arrears maintenance, is the child maintenance cost neglected by the father during the marriage or before the divorce. In Indonesia, since 2019, a mother, as the rightful carer, can sue the father to pay his child's neglected maintenance obligation to the Religious Courts. This is valid after the issuance of Supreme Court Circular No. 2 of 2019 on implementing the Plenary Chamber Formulation Results. However, this study finds that not many petitions for unpaid child maintenance are granted by the Courts.

In the Indonesian legal context, the child maintenance petition is often included in the divorce petition and the post-divorce maintenance for wives. However, the fulfillment of post-divorce maintenance is still an issue,² let alone

¹ Dimitri Mortelmans, "Economic Consequences of Divorce: A Review," *Parental Life Courses after Separation and Divorce in Europe*, 2020, 23-41; Jennifer Parsons et al., "Economic Impacts of Child Marriage: A Review of the Literature," *The Review of Faith & International Affairs* 13, no. 3 (2015): 12-22; Jennifer M. Weaver and Thomas J. Schofield, "Mediation and Moderation of Divorce Effects on Children's Behavior Problems," *Journal of Family Psychology* 29, no. 1 (2015): 39-48, <https://doi.org/10.1037/fam0000043>.

² Najma Moosa, "An Overview of Post-Divorce Support for Muslim Children in the Context of South African Law, Islamic Law and the Proposed 2010 Muslim Marriages Bill," *International Journal of Liability and Scientific Enquiry* 6, no. 1-3 (January 2013): 27-41, <https://doi.org/10.1504/IJLSE.2013.057734>; Abidin Nurdin, *Mut'ah and Iddah: Post-Divorce Payment Practices in Aceh* (Brill, 2018), https://doi.org/10.1163/9789004386297_008; Euis

nafkah madiyah for children. In many cases, few women obtain their rights after divorce, and few judges are sensitive enough to raise the issue in the hearing process.³ In fact, post-divorce maintenance implementation still becomes a serious issue in many Muslim countries.⁴ As a result, the issue has become one of the targets of national legal reform in some countries,⁵ including Indonesia.

This matter is not merely related to financial rights but also social and gender justice. In many divorce cases, mothers become custodial parents.⁶ With the residency separation, fathers most often neglect their child care and support obligations.⁷ In this case, the custodial mothers are unprotected financially.⁸ In Indonesia, the primary custody of children is given to mothers as the Compilation of Islamic Law, Article 105 grants children under 12 years old to be under their mothers' care, unless in extraordinary cases. However, there is no established mechanism to ensure that the fathers are involved in the livelihood of the children. In many Muslim societies, not only in Indonesia, but the close family system has also caused men to ignore their responsibilities after divorce. With mothers as the primary carers of children, the obligation to fulfill their daily needs often relies on

Nurlaelawati, "Women's Financial Rights After Divorce in Indonesia," in *Women and Property Rights in Indonesian Islamic Legal Contexts* (Brill, 2018), 89–106.

- ³ Stijn Cornelis van Huis, "Rethinking the Implementation of Child Support Decisions Post-Divorce Rights and Access to the Islamic Court in Cianjur, Indonesia," *Law, Social Justice & Global Development*, no. 1 (2010): 1–22; Euis Nurialawati, "Sharia-Based Laws: The Legal Position of Women and Children in Banten and West Java," in *Islam, Politics and Change: The Indonesian Experience after the Fall of Suharto*, ed. Kees van Dijk and Nico J. G. Kaptein (Leiden: Leiden University Press, 2016); Nurlaelawati, "Women's Financial Rights After Divorce in Indonesia"; Ayesha Shahid, "Post-Divorce Maintenance for Muslim Women in Pakistan and Bangladesh: A Comparative Perspective," *International Journal of Law, Policy and the Family* 27, no. 2 (August 1, 2013): 197–215, <https://doi.org/10.1093/lawfam/ebt004>.
- ⁴ Muslihah Binti Hasbullah Abdullah, Najibah Binti Mohd Zin, and Saodah Binti Wok, "Knowledge and Accessibility of Muslim Women to the Law on Post-Divorce Financial Support," *IJUM Law Journal* 18, no. 1 (2010); Huis, "Rethinking the Implementation of Child Support Decisions Post-Divorce Rights and Access to the Islamic Court in Cianjur, Indonesia"; Moosa, "An Overview of Post-Divorce Support for Muslim Children in the Context of South African Law, Islamic Law and the Proposed 2010 Muslim Marriages Bill"; Euis Nurlaelawati, "Muslim Women in Indonesian Religious Courts: Reform, Strategies, and Pronouncement of Divorce," *Islamic Law & Society* 20, no. 3 (July 2013): 242–71, <https://doi.org/10.1163/15685195-0010A0003>; Nurlaelawati, "Women's Financial Rights After Divorce in Indonesia"; Md Sadekur Rahman and Hossain Mohammad Younus Sirazi, "Post-Divorce Maintenance (MAA'TA) For Muslim Women in Bangladesh, Pakistan and India," *IOSR Journal Of Humanities And Social Science* 23, no. 2 (February 2018).
- ⁵ Moosa, "An Overview of Post-Divorce Support for Muslim Children in the Context of South African Law, Islamic Law and the Proposed 2010 Muslim Marriages Bill"; Shahid, "Post-Divorce Maintenance for Muslim Women in Pakistan and Bangladesh."
- ⁶ Mortelmans, "Economic Consequences of Divorce."
- ⁷ Stijn Cornelis van Huis, *Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba* (Van Vollenhoven Institute, Faculty of Law, Leiden University, 2015).
- ⁸ Frances Raday, *Gender Equality and Women's Rights in the Context of Child Custody and Child Maintenance: An International and Comparative Analysis* (UN Women, 2019), <https://www.unwomen.org/en/digital-library/publications/2019/07/discussion-paper-gender-equality-womens-rights-in-context-of-child-custody-and-maintenance>.

the mothers and their families. Normatively, fathers still have obligations to provide for children until they reach adulthood. In Indonesian law, such obligation prevails until the children reach 21 years old.

Another issue in post-divorce rights is its execution. Even though, in some cases, the courts have ordered husbands to pay a certain amount for *iddah* (maintenance cost for wives during the waiting period after divorce before they are allowed to marry other men) and *mut'ah* (gifts from an ex-husband after divorce pronouncement), not many men obey.⁹ Moreover, not many women have the will to sue for such a violation. This is caused by several factors, such as limited knowledge of the legal procedures, limited resources, and the avoidance of meeting with their ex-husbands.¹⁰ In response to the situation in 2019, the Supreme Court discussed this issue in the plenary meeting of the Religious Court Chamber. This meeting resulted in a formulation that judges are allowed to order men to pay the post-divorce rights during the divorce pronouncement in the courtroom before the issuance of a divorce certificate.

The effective implementation of post-divorce rights does not only rely on formal legal norms but also informal ones, such as customs.¹¹ One example in Indonesia is the case of the Minangkabau society, a tribe in West Sumatra. Minangkabau people adhere to the matrilineal paternity and extended family system. In terms of post-divorce rights, the system makes women ignore the possibility of fighting for their rights after divorce, as they feel that their extended family will help them with the burdens. With the changes in the family system to a nuclear family orientation, there is a need for the Religious Court judges to be more sensitive to the cultural changes in order to ensure the survival of women and children.¹²

However, in the case of Indonesia, in general, the demand for past unpaid maintenance is not always as expected. This paper argues that several factors are causing it. First, formally, the legal basis for adjudicating past unpaid maintenance is relatively new, as it was issued in 2019 through the Supreme Court Circular. Second, there have been differences in legal reasoning when dealing with the arrear past maintenance lawsuit. Third, judges' sensitivity towards gender and child rights issues determines the outcomes of the lawsuit. Moreover, judges mainly consider the fathers' capacity heavily, not the mothers.¹³ This means there

⁹ Idrus Abdullah, "Legal Protection Setting of Post-Divorce Women's Rights: Case Study of Siri Marriage in Lombok," *Mediterranean Journal of Social Sciences* 8, no. 3 (2017): 297.

¹⁰ Huis, "Rethinking the Implementation of Child Support Decisions Post-Divorce Rights and Access to the Islamic Court in Cianjur, Indonesia."

¹¹ Shahid, "Post-Divorce Maintenance for Muslim Women in Pakistan and Bangladesh."

¹² Muhammad Fauzan and Euis Nurlaelawati, "Nafkah Pasca Perceraian Pada Masyarakat Minangkabau: Perubahan Sistem Kekerabatan Dan Praktek Rekonstruksi Hukum Demi Keadilan Perempuan," in *Nilai-Nilai Budaya Dan Keadilan Bagi Perempuan Di Pengadilan Agama Indonesia: Praktik Terbaik*, ed. Livia Holden and Euis Nurlaelawati (HAL, 2019).

¹³ Nurdin, *Mut'ah and Iddah*.

has been an absence of a support system and enforcement to ensure the fulfilment of children's rights, contributing to gender-based economic gaps or poverty.¹⁴

De Vaus et al. argue that gender-based inquiry is crucial in looking at the economic effect of divorce. This is because, in many cases, mothers hold custodial rights for their children. Moreover, it is proven that divorce results in different economic consequences for men and women. Compared to men, women mainly experienced adverse economic outcomes due to divorce.¹⁵ A family with the traditional division of labor, with the husband as the primary breadwinner, tends to put the wife in a more vulnerable economic situation after divorce. This is because women are likely to have less human capital than men.¹⁶

This paper examines the legal reasoning and outcomes in the arrear past maintenance lawsuits. The research draws data from ten Religious Court decisions, consisting of the decisions rejecting and granting the demand for unpaid child maintenance lawsuits from several Religious Courts in Indonesia from 2020-2021. This study finds that the outcome differences are caused by the different legal bases used and the judges' consideration of men's ability to fulfill the demands. The main reason for the rejection of the *nafkah madiyah* petition is the consideration that the maintenance costs are for children to take benefits from them and not for possession. This means that if a father did not provide for his children in the past, his negligence does not become a debt to be paid in the future. Meanwhile, judges grant the request of *nafkah madiyah* because child maintenance is the obligation of both a father and a mother. This is not only to protect children's rights but also women's rights.

Arrears Child Support (*Nafkah Madiyah*) in the Indonesian Legal System

Child support is a part of child rights protected by laws. Among them are Article 28b, Paragraph 2 of the 1945 Constitution. Article I Paragraph 12 of Law No. 23 of 2003, amended by Law No. 35 of 2014 on Child Protection, mentions that child protection should be guaranteed, protected, and fulfilled by parents, family, society, central government and local government. Furthermore, Articles 4 to 14 of Law 35 of 2014 discuss child support. Other laws supporting the fulfillment of children's rights are Law No. 4 of 1979 on Child Welfare and Law No. 39 of 1999 on Human Rights, especially Articles 52 to 64.

Indonesian law determines that the primary provider of child support is the father. Article 41 Section B of Law No. 1 of 1974 regulates the obligation to fulfill child support. This law mentions that the "father is responsible for all maintenance and education costs needed by a child. If, in reality, the father cannot fulfill such an obligation, the court can decide that the mother participates in fulfilling the rights.

¹⁴ Raday, *Gender Equality and Women's Rights in the Context of Child Custody and Child Maintenance*.

¹⁵ David de Vaus et al., "The Economic Consequences of Divorce in Six OECD Countries," *Australian Journal of Social Issues* 52, no. 2 (2017): 180-99, <https://doi.org/10.1002/ajs4.13>.

¹⁶ Mortelmans, "Economic Consequences of Divorce."

Fathers' obligation related to child support is also mentioned in the Compilation of Islamic Law Article 80, Paragraphs B and C; Article 81; Article 105, Paragraph C; Article 149 and Article 156, Paragraph D. The responsibility of the fathers is still valid even if a divorce occurs (Article 149 of the Compilation of Islamic Law). Moreover, the Compilation of Islamic Law Article 156 (d) determines that all child maintenance costs become the father's obligation according to his ability until the child reaches adulthood and is independent (21 years old).

According to Cik Basir, the shift of responsibility from a father to a mother is only possible with a court decision, which in the Indonesian case are the Religious Courts (for Muslims) and General Courts (for non-Muslims). However, this can only happen if the father is proven physically, mentally, or financially incapable of meeting the child's maintenance obligation.¹⁷ In reality, there are cases where fathers fail to maintain their obligations during the marriage or after a divorce. Muhdlor and Asnawi argue that without a court decision, a mother does not bear any obligation to provide for child maintenance as the shift of obligation has not been determined. If the mother has provided for the maintenance, then all costs spent can be considered as the father's debt to the mother.¹⁸ In this case, the father is considered to have failed to meet the obligation.

Child maintenance is one of the post-divorce rights that wives can fight. In reality, however, these rights have often been neglected or unfought. There are several reasons for this. First, few women know how to fight for this right before the courts. In other words, limited knowledge about post-divorce rights is still an issue. Second, some women feel the result may be lower than expected. Even if women know their rights, the thoughts that the process will result in financial and psychological costs become factors that make women avoid dealing with this issue. The last is that some women refuse to meet their ex-husbands before the court after what they had been through until the divorce.¹⁹

The arrear child maintenance is known as *nafkah madiyah* in the Indonesian Islamic judiciary. This term is derived from Arabic as the Indonesian family law for Muslims refers to Islamic family law. The term *nafkah madiyah* emerges due to the father's negligence of the child's maintenance during the marriage or after a divorce. In some cases, as this study finds, some divorce suits have been filed by women consisting of demands for *nafkah madiyah*. The suits are counterclaims or *gugatan rekonvensi*, where one legal claim is combined with another. In this case, a divorce is combined with a child maintenance claim.

¹⁷ Cik Basir, "Menolak Gugatan Nafkah Madhiyah Anak Karena Lil Intifa'," December 19, 2014, <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/menolak-gugatan-nafkah-madhiyah-anak-karena-lil-intifa-oleh-drs-cik-basir-s-h-m-h-i-19-12>.

¹⁸ Ahmad Zuhdi Muhdlor and M. Natsir Asnawi, "Apakah Nafkah Madliyah (Lampau) Anak Yang Tidak Terbayarkan Mutlak Lilintifa?," December 17, 2013, <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/apakah-nafkah-madliyah-lampau-anak-yang-tidak-terbayarkan-mutlak-lilintifa-drs-h-ahmad-zuhdi-muhdlor-sh-m-hum-a-m-natsir-asnawi-shi-1712>.

¹⁹ Huis, *Islamic Courts and Women's Divorce Rights in Indonesia*.

In the procedural law implemented by the Religious Courts, the judges maintain at least three primary legal considerations. First, the Guidelines for the Implementation of Duties and Administration of the Religious Courts of 2013, subsection on child maintenance and livelihood, parts e and f, states: Child maintenance is the father's obligation. If the father cannot meet his duty, the mother should bear this obligation (Article 45 Section A and B of Marriage Law No. 1 of 1974). Section f states that child maintenance is the obligation of the father and mother. The wife cannot sue the past arrear maintenance as the husband's debt.²⁰

Second, the Supreme Court Jurisprudence in Decision No. 608K/AG/2003 dated 23 March 2005 states that "the child maintenance obligation of a father is *li al intifa'* (to be taken its benefit) and not *li al tamlik* (to be owned). This means that the child's maintenance is to be paid on time. Consequently, the father's failure to provide for his child cannot be sued. According to Muhdlor and Asnawi, the principle mentioned in this particular jurisprudence cannot be implemented generally in all cases. The principle is only applicable in certain and exceptional cases. For example, if a father neglects his child's maintenance obligation while he is capable financially and physically, then the mother can sue him for past maintenance fulfilled by the mother.²¹

The notion of *li al intifa'* and *li al tamlik* is debatable. Cik Basir, a Religious Court judge, argues that legal standing that refuses the legal suit to demand unpaid child maintenance on the basis that child maintenance is *li al intifa'* is against the principle of Islamic law and Indonesian Law. This is because, according to Basir, the father has the duty to provide for the children, not the mother. If there are certain situations where the mother takes over this duty, then the father should return or pay what has been spent by the mother.²² This is a legal consequence of the notion that a child's livelihood is the father's obligation.

Furthermore, Indonesian law determines that child maintenance and education are the obligations of both father and mother. However, the child's livelihood is the father's duty. The failure of the father to meet this livelihood can be considered negligence and a violation of the child's rights, which has penal consequences. These include five years imprisonment and a maximum of one hundred million Rupiah fines. Third, the Islamic classical jurisprudence, among the Shafi'i, the school maintains that the unpaid child's livelihood does not become a parent's debt if they cannot provide for them, unless with court (judge) order due to the parents' negligence. According to the Shafi'i scholars, the obligation of the parents comes off if time has passed. The parents should pay no debts. If the needs are fulfilled, it can no longer be sued.

The different legal interpretations regarding arrear child maintenance have led to differences and inconsistencies in decisions issued by the Religious Courts.

²⁰ *Pedoman Pelaksanaan Tugas Dan Administrasi Peradilan Agama, Buku II* (Mahkamah Agung RI, Direktorat Jenderal Peradilan Agama, 2013).

²¹ Muhdlor and Asnawi, "Apakah Nafkah Madliyah (Lampau) Anak Yang Tidak Terbayarkan Mutlak Lilintifa?"

²² Basir, "Menolak Gugatan Nafkah Madhiyah Anak Karena Lil Intifa'."

There are some cases where the judges grant the unpaid child maintenance claim, but the courts reject most cases. Salma et al. research in a Religious Court in West Sumatera. For example, most of the court decisions refer to the above-mentioned jurisprudence. Consequently, none of the court decisions grant unpaid child maintenance.²³ Basir argues that judges generalize the unpaid past child maintenance lawsuits. This is because they fear deviating from Supreme Court Jurisprudence No. 608K/AG/2003. Only one decision was granted in such a lawsuit: Decision No. 41/Pdt.G/2014/PA Tkl.²⁴

In response to the problem, the Supreme Court of the Republic of Indonesia issued the Supreme Court Circular No. 2 of 2019 on implementing the Plenary Chamber Formulation Results. The formulation of the Religious Courts, letter (a) states: "Arrears Maintenance neglected by the father can be sued by the mother or person involved in the child's upbringing." This implies that the mother can bring the legal suit to the Religious Courts. Therefore, the judges can sentence the father to pay for the neglected livelihood. Ideally, the payment should be made before the husband declares divorce before the judges if the lawsuit is combined with a divorce lawsuit. This is similar to the payment to the divorced wife of *iddah* and *mut'ah*, as regulated by Supreme Court Regulation No. 3 of 2017.

Nafkah Madiyah after the Issuance of Supreme Court Circular No. 2 of 2019

Since the issuance of Supreme Court Circular No. 2 of 2019, there have been inconsistencies in deciding unpaid child maintenance. Some decisions granted the *nafkah madiyah* claims, while others rejected them. This study finds that the different legal grounds and reasoning lead to different decision outcomes. The following are examples of the court decisions used in this study.

Table 1. Samples of Religious Courts decisions on *nafkah madiyah*

No.	Decision ID	Code	Register Date	Issuance	Past Maintenance Claim
1	Decision No. 1120/Pdt.G/2020/PA.Bwi	Decision 1120	17 February 2020	1 September 2020	Rejected
2	Decision No. 235/Pdt.G/2020/PA.Lbs	Decision 235	26 August 2020	23 September 2020	Rejected
3	Decision No. 3094/Pdt.G/2020/PA.Sda	Decision 3094	1 September 2020	24 November 2020	Granted
4	Decision No. 309/Pdt.G/2020/PA.KBr	Decision 309	21 July 2020	31 August 2020	Granted
5	Decision No. No.304/Pdt.G/2020/PA.KBr	Decision 304	16 July 2020	18 August 2020	Granted
6	Decision No.	Decision 557	27 May 2021	8 July 2021	Granted

²³ A. Salma, A. Elfia, and Afifah Djalal, "Perlindungan Hukum Bagi Perempuan Dan Anak (Analisis Putusan Hakim Tentang Nafkah Madiyah Pada Pengadilan Agama Di Sumatera Barat)," *Istinbath* 16, no. 1 (2017): 106–208.

²⁴ Basir, "Menolak Gugatan Nafkah Madiyah Anak Karena Lil Intifa'."

	557/Pdt.G/2021/PA.Mg				
7	Decision No. 217/Pdt.G/2021/PA Sak	Decision 217	16 April 2021	9 May 2021	Granted
8	Decision No. 766/Pdt.G/2021/PA.Bjn	Decision 776	29 March 2021	12 July 2021	Rejected
9	Decision No. 542/Pdt.G/2021/PA.Pdg	Decision 542	26 March 2021	12 July 2021	Rejected
10	Decision No. 241/Pdt.G/2021/PA.Tgt	Decision 241	26 March 2021	30 July 2021	Unaccepted

Out of ten decisions, nine of them are divorce lawsuits. One of them is a joint property claim. In general, those lawsuits can be classified into two types: 1) counterclaim of divorce lawsuits filed by the husband and 2) cumulation lawsuits with divorce filed by a wife. In the first type of case, the divorce was initiated by husbands. Responding to this lawsuit, the wives filed a counterclaim, demanding alimony, including the past child maintenance. The wife, who was initially a defendant, became a plaintiff. In the second type of case, the wives initiated the divorce. This divorce claim directly includes the unpaid past child maintenance claim.

The decisions consisting of counterclaims filed by the wives are Decision 1120, Decision 766, Decision 542, Decision 217, Decision 3094, Decision 309, and Decision 557. In these cases, the claim of unpaid past child maintenance is mentioned in the first submitted counterclaim. In Decision 304, the claim of unpaid child maintenance is included in the final counterclaim or the conclusion. This is because the wife did not want a divorce. With the husband's coercion of divorce, the wife finally should accept the decision. In order to fight for her and her child's rights, she sued the husband to pay the arrear child maintenance and consider it his debt.

In Decision 1120, apart from *nafkah madiyah*, the wife demanded several other expenses. These include her living costs for 15 months (IDR22,500,000); maternity costs (IDR878,800); child living costs for ten months (IDR9000,000); mut'a (IDR10,000,000); and iddah (IDR5,000,000). The total amount requested is IDR55,378,800. In the decisions, the judges rejected the demand for child past maintenance for the whole (10 months) as the judges argued that the *nafkah madiyah* could not be sued, arguing that the child maintenance cost is to be taken when needed. This means that the past maintenance should not be paid in the future. Another finding is that, apart from the arrear child maintenance, a wife can also claim for future child maintenance and the unpaid livelihood for the wife during their marriage. Examples are in Decision 235 and Decision 241. The cumulation of divorce claims with post-divorce financial rights is only possible in Religious Courts. This is not possible in the General Courts (*Pengadilan Umum*).

Legal Reasonings in *Nafkah Madiyah* Claim Approval and Rejection

The Supreme Court Circular No. 2 of 2019 on the Application of the 2019 Supreme Court's Plenary Meeting as A Guideline for Duties Implementation of the Courts

allows women to petition past unpaid child maintenance. One formulation in the Religious Court Chamber mentions that past child maintenance (*nafkah madiyah*) neglected by a father can be filed for a lawsuit by the mother or a person taking care of the child.” With this, many women filed child past maintenance lawsuits, sometimes divorce lawsuits. However, there are still differences in the legal decisions concerning the *nafkah madiyah*. In this case, different legal reasonings resulted in different outcomes. Apart from Supreme Court Circular No. 2 of 2019, several other legal bases used in the reasonings include the Indonesian Marriage Law No. 1 of 1974; the Compilation of Islamic Law; the Supreme Court Jurisprudence No. 608 K/AG/2003 dated 23 March 2005; the Supreme Court Circular No. 02 of 2019; and classical *fiqh* (Islamic Jurisprudence).

As mentioned, in granting *nafkah madiyah* demands, the judges use several legal bases. These include Article 41 (b) Law No. 1 of 1974 on Marriage in conjunction with Article 149 (d) in conjunction with Article 105 (c), in conjunction with Article 156 (d) of the Compilation of Islamic Law. Article 41 (b) states that the father is obliged to be responsible for all child maintenance and education costs; if the father cannot fulfil the obligation, the court can stipulate that the mother share the burden. Moreover, the judges argued that child maintenance is the obligation of the father and the mother. This means that child maintenance is a shared obligation between a father and mother.

Moreover, Article 149 (d) of the Compilation of Islamic Law states that a father must pay his children’s *hadanah* (maintenance) costs until they reach 21 years old. Meanwhile, Article 105 (c) of the Compilation of Islamic Law states that “the father bears the child maintenance cost”. The last is Article 156 of the Compilation of Islamic Law, which maintains that “a child who has not reached *mumayyiz* (adulthood), that is, under 12 years of age, has the right to be under the mother’s care.” Those Laws assert that child maintenance is the obligation of fathers. Even if mothers share the responsibility, it is only in exceptional circumstances when fathers are unable to meet their duty. All Articles in the Compilation of Islamic Law stress the fathers’ responsibility.

On the other hand, the court decisions rejecting the demand for *nafkah madiyah* mostly used the Supreme Court Jurisprudence No. 608 K/AG/2003, dated March 2005. This jurisprudence emphasizes Islamic legal reasoning, particularly in interpreting *nafkah* or maintenance for children. This interpretation leads to legal consequences, such as whether the father’s negligence in fulfilling the child’s needs in the past can be considered unpaid debt. The judges argued, as also discussed above, that *nafkah* is intended for *intifa’* (benefits), not *tamlík* (possession). This means that children benefit from the father’s money for their upbringing and maintenance at a particular time. After time passes, the past unpaid maintenance does not become the father’s debt. The judges argued that this aligns with the legal opinion of Zuhaily in his work *Al Fiqh al Islami Wa Adillatuhu*, Chapter V, page 829 (Decision 235). This is because the obligation for maintenance is as long as the children live.

Lastly, almost all decisions consider fathers’ financial capacity and capability, while none consider the mothers’ financial capability and employment status. This is common in court decisions involving maintenance obligation distribution

between divorced men and women. Even if, in many cases, the women have disadvantaged economic situations, the judges keep emphasizing the men's capacity.

Types and Calculations of Child Maintenance

The examination of several court decisions shows that several matters are included as the child needs in *nafkah madiyah* claims. These are food, clothing, health care, and transportation needs. Some petitions detailed these as child needs, while others did not. In some cases, *nafkah madiyah* is calculated based on undetailed monthly spending. It seems that it is easier for judges to consider *nafkah madiyah* with more detailed requests, even though, in most cases, judges rarely grant the whole, as requested. For example, in Decision 241, the judges rejected the *nafkah madiyah* claim because the plaintiff did not detail the request and declared the claim obscure libel or unclear, which is legally defective. An example where the lawsuit provided a detailed calculation of child maintenance cost is in Decision 235. The plaintiff divided the maintenance costs into food, clothes, daily and school needs, and school transportation, with the following details.

Table 2. The example of *nafkah madiyah* calculation

No.	Needs	Amount
1	Daily meals IDR10,000 per meal x 2 times/ day x 30 days x 12 months	IDR7,200,000
2	Clothes 2 pieces x IDR150,000	IDR300,000
3	Daily and school needs IDR10,000/ day x 30 days x 12 months	IDR3,600,000
4	School transportation IDR10,000 x 26 days x 12 months	IDR3,120,000
TOTAL		IDR14,220,000

In most cases, the petitions only mentioned a certain amount to be multiplied by the number of months when a father neglects his child's maintenance costs. Unfortunately, the judges rejected the *nafkah madiyah* claim in their decision. The rejection also happened to all detailed *nafkah madiyah* claims examined by this study. It is important to note that the detailing is not why the judges refused to grant the claim. However, the details help judges examine the petition.

Seeing from the studied court decisions, most of them granted the demand for *nafkah madiyah* lower than requested. This is common in post-divorce decisions. Again, the reason is that judges consider ex-husbands' financial capacity and the court decisions' limited enforceability. With this latest reason, the judges appeared to choose between negligence in the decision due to the father's inability to pay or his obedience to the court decisions, as the orders seemed feasible.

Ensuring the Fulfilment of *Nafkah Madiyah* Claim

Various studies show that the problem in post-divorce rights is in its enforcement. Access to the judiciary and court decisions is insufficient to protect spousal and child rights after divorce. With this criticism, van Huis argues that the fulfilment of post-divorce rights is more complex than merely the issue of access to the courts but the failure of the courts to ensure the execution of the court decisions.²⁵ The Religious Court judges are aware of the issue. In response, some take the initiative to make the ex-husbands pay their obligations before the divorce declaration. Similar initiatives can be seen in how judges deal with *nafkah madiyah*. Some judges demand that the husbands pay the determined amount before pronouncing the divorce. Examples of this are Decision 229, Decision 3094, and Decision 309. Some judges in the Religious Courts have maintained this strategy to ensure that husbands pay their obligations to the divorced wives and their children.

One regulation the judges use is the Supreme Court Circular No. 2 of 2019. In the Formulation of the Religious Court Chamber, it is mentioned that considering the implementation of the Supreme Court Regulation No. 3 of 2017 on Adjudicating Cases of Women Facing the Law, judges force the husbands to pay for their ex-wives' post-divorce rights before the divorce pronouncement. This is maintained by adding the statement "... *to be paid before the defendant collects the divorce certificate.*" In its actual implementation, the judges can order husbands to pay the post-divorce rights of their ex-wives during the pronouncement of divorce (*ikrar talak*) or before the court issues the divorce certificate.

Measuring Social Justice of *Nafkah Madiyah* Decisions

The issuance of the Supreme Court Circular No. 2 of 2019 is a critical step in ensuring child rights protection when facing divorce. This reform has influenced the Religious Court judges in adjudicating post-divorce maintenance petitions. The problem shown by this research is that there has been inconsistency in granting arrear child maintenance requests by rightful custodial parties, which mothers mostly hold. This has been due to differences in legal grounds, philosophical grounds, and legal reasonings. Court decisions should reflect legal, social, and moral justice.²⁶ However, these three elements often contradict each other. This is also true for the judicial decisions on arrear child maintenance claims.

Viewing several court decisions used in this study, many rely heavily on the philosophical viewpoint of the concept of *nafkah madiyah*, which is *li al inti'fa'* or *li al tamlik*. This results in different legal consequences. If judges consider that child maintenance is *li al inti'fa'*, it means that the maintenance cost will be taken its benefit during the child-rearing. However, if the judges consider that the child maintenance costs are *li al tamlik*, meaning that the money intended for child

²⁵ Huis, "Rethinking the Implementation of Child Support Decisions Post-Divorce Rights and Access to the Islamic Court in Cianjur, Indonesia."

²⁶ Lilik Mulyadi, *Putusan Hakim Dalam Hukum Acara Perdata Indonesia: Teori, Praktik, Teknik Membuat, Dan Permasalahannya* (Citra Aditya Bakti, 2009).

maintenance costs is for the child to own. In other words, the child is entitled to the ownership of the money.

By considering Islamic legal discourse, Ahmad et al. propose two principles for determining child needs: *kifayah* (needs) and *ma'ruf* (decent).²⁷ These two notions are based on Prophetic traditions recorded in Sahih al Bukhari and Muslim, stating: "Take what is adequate (*yakfiki*) for you and your child in an acceptable way (*bil ma'ruf*)." Furthermore, some judges consider the needs of *daruriyyat* (essential) or *hajiyat* (complementary). This means that the judges should emphasize the sufficiency of children's needs fulfilled by their parents. However, looking at the court decisions used in this study, most consider the fathers' capacity rather than the sufficiency and decency of the child's needs.

The above explanation depicts that *li al intifa'* and *li al tamlik* tend to ignore the empirical consequences of divorce on children. Consequently, "the best interests of children" are at stake. Besides child needs sufficiency and decency, another issue to consider is the unfortunate economic effects of divorce on women, as discussed above. Moreover, divorce negatively affects women more than men.²⁸ However, the court decisions did not consider women's economic status. The common reason is that fulfilling the child's livelihood is the father's obligation, as the laws state. Even if the mothers obtain the custodial rights, which means that the children will be under their care, their financial capacity is often undiscussed. Hashim and Lindsey posit similar criticisms of the heavy emphasis on fathers' capacity to assess child maintenance costs in Malaysia. They argue that the absence of a standardized method in assessing and determining child maintenance application leads to different approaches used by the judges. This, in turn, has caused inconsistency in court decisions concerning child maintenance cases. Consequently, the child's interest may be at stake.²⁹

The ignorance of mothers' capacity is most likely influenced by the socio-cultural situation of Indonesia, with its close kinship. For instance, the *guyub* culture in Java symbolizes family togetherness and close relationships between family members, including extended ones.³⁰ Nurlaelawati notes how bilateral kinship helps women care for their children if the fathers neglect their child support obligation.³¹ Also, Nurlaelawati found that women's confidence in caring

²⁷ B. Ahmad et al., "Pentaksiran Nafkah Anak Berasaskan Kriteria Kifayah Dan Ma'ruf: Kajian Kes Di Malaysia" (The 1st International Conference on Islam and Contemporary Issues in The Muslim World: Challenges and Way Forward, Academy of Islamic Studies, University of Malaya, Kuala Lumpur, 2016), 1–17, <https://eprints.um.edu.my/17773/>.

²⁸ de Vaus et al., "The Economic Consequences of Divorce in Six OECD Countries."

²⁹ Nurhidayah Hashim and Tim Lindsey, "An Analysis of the Judicial Approaches in Assessing Child Maintenance Applications in Shariah Courts / Nurhidayah Hashim and Tim Lindsey," *Journal of Contemporary Islamic Studies* 2, no. 1 (2016): 35–57.

³⁰ Devi Puspitasari, Jatie K. Pudjibudojo, and Hartanti Hartanti, "Decision Making on Divorce for Javanese Women in Indonesia," *International Journal of Environmental, Sustainability, and Social Science* 3, no. 3 (November 30, 2022): 702–12, <https://doi.org/10.38142/ijesss.v3i3.276>.

³¹ Nurlaelawati, "Women's Financial Rights After Divorce in Indonesia."

for their children after divorce is because their families support them.³² With this unmentioned consideration, it seems that the courts take the survival of children with their mothers for granted without even considering their economic readiness.

With the challenging financial situation after divorce, *nafkah madiyah* will likely be a temporary solution for children and their carers during post-divorce adjustment, even if the amount is insufficient. Viewing the court decisions used in this study, most of the amount granted by the judges is relatively inadequate for the child's needs. Even if some petitions provide detailed needs of the children, the detailing does not guarantee that the judges grant the demands. In the case of Malaysia, Ahmad et al. argue that detailed explanations of child needs are crucial to avoid misinterpretation in court decisions. The detailed explanations enable judges to measure the reasonability of the requested amount. However, in some cases, judges' decisions have been affected by the husband's capacity to pay while ignoring the needs of the children.³³ This means that the reasonability of the court order compared to the child's needs has not become the priority.

The amount of *nafkah madiyah*, including future child support, is calculated from the fathers' incomes deducted from their needs and debts. However, this is considered the best solution as the fathers pay the amount. This seems to be a way to avoid the risks of the fathers refusing to pay according to the court's order. In most cases, on the condition that the judges reject the requests for *nafkah madiyah*, they order the fathers to pay for future child support. Another critical aspect of the *nafkah madiyah* petition is the ability of the rightful carers to provide evidence that the fathers neglect their child support obligation. The petitioners must also provide evidence of the fathers' financial capability by showing proof of income. Without concrete evidence, the judges will likely reject the requests. Decision 229 is an example of this.

Conclusion

Nafkah madiyah, or arrear maintenance for children, is among the post-divorce obligations fathers must fulfill. In Indonesia, this is regulated by laws. However, due to fathers' negligence in paying the *nafkah madiyah* for children, in most cases, the Supreme Court of Indonesia issued Circular No. 2 of 2019. The Circular states that a mother can sue the father for neglecting *nafkah madiyah*. This study finds out that, after the issuance of the Circular, there have been inconsistencies in the Religious Court decisions in granting the *nafkah madiyah* petition.

The differences in the outcome of the Religious Court decisions are due to the various legal bases used by the judges. The main reason for the rejection of the *nafkah madiyah* petition is the consideration that the maintenance costs are for children to take benefits (*li al intifa'*) from them and not for possession (*li al tamlik*). This means that if a father did not provide for his children in the past, his negligence does not become a debt to be paid in the future. Another reason for the rejection is the judges' consideration of fathers' capability to pay. Meanwhile,

³² Nurlaelawati, "Muslim Women in Indonesian Religious Courts."

³³ Ahmad et al., "Pentaksiran Nafkah Anak Berasaskan Kriteria Kifayah Dan Ma'ruf."

judges grant the request of *nafkah madiyah* because child maintenance is the obligation of both fathers and mothers. With the mothers as sole carers, in many cases, judges not only intend to protect children's rights by granting *nafkah madiyah*, but also protect women's rights.

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