

# **Court decisions on post-divorce children's livelihood: Islamic law analysis on their practices in Indonesia and Malaysia**

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A divorce is indeed never expected to happen in a marriage. But once it happen as, its consequence should be considered, including the children's livelihood. This study tries to probe into how Malaysia and Indonesia whose populations are Muslims majority adopting the Fiqh concept in terms of post-divorce children's livelihood in their regulations. Since there always be difference between theory and practice, the real implementation of the decisions will also be examined on the basis of legal norms. This study directly explores the laws and court decisions for further assessment based on several indicators. It is found that the legislation and the court decisions of the two countries had adopted the concept of Fiqh yet with a couple of particular notes. It is also found that there is a chance of providing livelihood for illegitimate children in the law and practice of both countries.

Perceraian memang tidak pernah diharapkan dalam suatu pernikahan. Bagaimanapun juga, ketika perceraian tersebut terjadi ada hal penting yang harus diperhitungkan yaitu konsekuensi dari perceraian tersebut. Nafkah anak adalah salah satunya. Penelitian ini mencoba menggali ke dalam terkait bagaimana Malaysia dan Indonesia sebagai negara yang mayoritas penduduknya Muslim mengadopsi hukum Fikih terkait nafkah anak pasca perceraian ke dalam hukum mereka. Dikarenakan selalu terdapat perbedaan antara teori dan praktek, implementasi putusan pengadilan

juga akan ditelaah berdasarkan aspek legal. Penelitian ini secara langsung menelaah regulasi dan putusan pengadilan untuk penilaian lebih lanjut yang didasarkan beberapa indikator. Penelitian ini mendapati bahwa regulasi pengadilan pada kedua negara tersebut telah mengadopsi fikih dengan beberapa catatan penting. Ditemukan juga bahwa secara hukum ada kemungkinan memberikan nafkah kepada anak tidak sah baik dalam regulasi maupun prakteknya pada kedua negara ini.

**Keywords:** *divorce; childrens livelihood; fiqh; law; Indonesia; Malaysia.*

## **Introduction**

Children are the mandate from Allah SWT having been bestowed upon a married couple. Thus, it becomes an obligation for a husband and wife to educate and care for their children as long as their children have not managed to be independent (Hasan, 2004: 387). The Muslim scholars have agreed that a man is obliged to guarantee the livelihood of his children because those children are his own flesh and naturally a part of their parents.

However, there are circumstances that lead into divorce which eventually leaves the children in different situation (Supeno, 2008: 13). When parents get a divorce, it will be difficult to achieve the ideal standards of children's growth due to uncertainty in their life maintenance (Mufidah, 2008: 340-341). Thus, the wedding rope has indeed been broken, but not for the rights of children's livelihood. The obligation to finance children does not only apply when the parents are bounded in a marriage but it also continues after a divorce happens (Setiawan, 2007: 328). Otherwise, it is indicated as a big sin (as-Subki, 2010: 283).

The guarantee of children's livelihood is something that cannot be left behind in household matters. Muslim scholars have already discussed the issues pertinent to the guarantee of children's livelihood in very detailed manner to include possibilities that might arise from it.

Indonesia and Malaysia are the examples of two countries whose most of the population is Muslim. Malaysia makes Islam as the official state religion, while Indonesia does not make Islam as the official religion of the state. Indonesia only makes Islamic law one of the legal sources in the legislation. This difference will certainly lead the two countries to have diverse ways of implementing a law. On that same basis, the regulation on children's livelihood and the implementation of the law will also be different (see further: Jauhari, 2013: 641).

The law made in a country could have been very concerned about the issue pertaining to children's rights but unfortunately the judges or law enforcement do not necessarily care about the rights of children. In the other hand, it could also be that the judges or law enforcement put big concern on children's rights yet the law constituted in that country seem not to be concerned about children's rights. This statement can be proofed from the phenomena in which many violations of children's rights occur such as neglection of children and unfulfilled rights of children's livelihood.

From the aforementioned facts, a big question definitely emerges as to whether the matters on children's livelihood have been properly addressed by the two countries. By using the data of judges' decisions from 2015-2018 obtained from Indonesia and Malaysia through content analysis, a deeper study will be conducted. One of the purposes is to see whether the judges' decisions on children's livelihood along with its implementation have met the provisions of Islamic Fiqh. The function of triangulation is also used to verify the results amid literature studies, field data and interviews with experts.

### **Literature review**

The topic addressing children's livelihood is actually quite extensive because it encompasses several aspects. For instance, one of its aspect is an about determining the levels of *kifāyah* and *ma'ruf* which are explicitly mentioned in the Qur'an when discussing. Ahmad et al. (2014) scrutinized this in the ruling of Malaysian Sharia Court. In this study, it was concluded that because there was a difference in the period and the needs related to the period, the Fiqh rule saying "the change of law may not be denied due to the period change that prevails" could be exerted as a principle in assessing the components of *kifāyah* and *ma'ruf*. Other than being related to the definition of *kifāyah*, the discussion of children's livelihood also extends to the realm of legal certainty and its legal philosophy. This has been discussed by Azizi (2016) who eventually found out that the juridical rules with respect to children's livelihood in the context of Islamic family law in Indonesia contained several useful aspects to the social welfare of the community.

Studies in legal aspects have been much more extensively conducted by other researchers. For example, Rasharendi et al., (2013) had conducted a more detailed study into the aspect

of legal certainty on father's responsibility in the Compilation of Islamic Law (CIL). Unfortunately, this study only ended up with the law interpretation in terms of its technical implementation in the field. Similarly, another study undertaken by Suhendrick et al., (2013) also revealed the same thing about the protection of children after a parental divorce through providing livelihood by parents to their children resting upon the established law. Both of researches talk extensively on the law aspect.

Another research that is still not indifferent from the aforementioned two studies was also conducted by Sipahutar et al., (2016) who also still interpreted and re-described the regulations which had been set in CIL. However, the elaborations delivered were only developed by exploring the related Qur'an verses as the bases of the arguments. In addition, if Suhendrick et al., (2013) only mentioned one deviation factor, Sipahutar et al. (2016) provided several hypothetical factors. Among them were the low level of economy, the indications of parents who got married again, the psychological impacts, and a mother's ability to provide the costs of living for children.

The studies which are only anchored in the legal certainty definitely need to further scrutinize about the implementation and comparison. Unfortunately, the studies as such have only been conducted by few scholars. One of them is Duriyati (2009) who tried to find out more about the application of law in the Semarang Religious Court. Even though this study more or less still mostly addressed the legal norms, at least it had researched specifically in the Semarang Court. A variety of other studies which explicitly stated that they addressed the implementation of children's livelihood decision were also not much different from the study conducted by Duriyati (2009). The focus of those studies was oriented towards discussing the legal norms by adding to the factors hampering the implementation of the decision (see for example Raudhatunnur (2017); Sutanto (2010); and Al-Anam (2018)). So far, the comparative study and implementation analysis that can be found by the author is the research by Nugraheni et al (2013). This study compares the decisions of the District Court and Religious Courts with specific study areas in Surakarta. Meanwhile, the rest are the studies mentioned above.

Based on the literatures presented above, it can be concluded that the study addressing the implementation of judges' decisions in the Religious Court pertinent to children's livelihood rarely gains attention. Majority of the studies only focus on the legal norms

and the compatibility between Islamic law and legislation. Hence, the present study makes an effort to fill the gap in the literature concerning on the implementation of the court decisions. More than that, a comparison will be made between the decisions of the Indonesian Religious Court and those of the Malaysian Sharia Court pertaining to post-divorce children's livelihood which is scrutinized from Islamic law perspective.

## **Method**

This study applied qualitative method in the form of comparative law of a country with another country or the law prevailing at a certain time to the law prevailing at the other time. In addition, this study also compared between the decisions of one court and those of the other court in respect of the same matter. This method is useful for exploring the background of the establishment of particular legal provisions for the same matter resting upon two countries or more (Marzuki 2008: 132-133).

In this study, there were three ways of comparison. *First*, it is a horizontal comparison which compared the law which is prevailing in Indonesia and Malaysia. *Second*, it is a vertical comparison that compares the laws of Indonesia and Malaysia with the Islamic law. *Third*, it is a diagonal comparison which compared between the decisions in the Central Jakarta Religious Court and the decisions in Federal Territory Sharia Court Kuala Lumpur along with the respective degree of differences.

Inasmuch as this was a study in the field of law, it is necessary to determine the referred legal sources. First, the primary legal resource; it consisted of legislation, official records or treatises in the making of legislation, and judges' decisions (Marzuki, 2008: 141). In this study, the primary legal resources used are as follows:

1. The decisions of the Central Jakarta Religious Court on the children's livelihood of in 2012-2015.
2. The decisions of Federal Territory Sharia Subordinate Court Kuala Lumpur on the children's livelihood in 2012-2015.
3. Compilation of Islamic Law.
4. Islamic Family Law (Federal Territory) Act and Labuan 1984.
5. Other related regulations.

Besides using the primary legal sources, secondary legal sources which consist of publications on the field of law such as textbooks, legal dictionaries, legal journals, and comments on court decisions were also utilized. Non-legal resources were also used to enrich and widen the insights related to this study. Non-legal resources in this study included social, philosophical, and cultural books or non-legal studies which are relevant to this topic.

The data collection of this study was carried out through documentation technique. The data source of Malaysia was obtained directly from Kuala Lumpur Sharia Court while the data source of Indonesia were obtained from Religious Court official website. In addition, interviews were conducted with judges, academicians, and professional institutions that had a connection with the topic being addressed.

Data analysis is carried out through qualitative approach. The first step is to process the legal resources in order to be concise and systematic. It is classified and grouped based upon their types afterward (Muhadjir, 1996: 29). The next step is to analyze the legal resources by applying a comparative approach through examining the decisions of both courts in association with children's livelihood after a parental divorce. Furthermore, the comparison between the statutory provisions in Indonesia and those of Malaysia pertaining to children's rights was also executed (Marzuki, 2008: 195). The next step was to look for the relationships between the variables that became the objects of the study (Narbuko and Ahmadi, 2004: 131). Then, the conclusion was drawn in the form of arguments that will answer the problems being studied. The last stage provides a perspective on what should be done on the basis of the arguments that had been constructed in the conclusion. This is to ensure the fulfillment of sense of justice and benefit of the law.

## **Results and discussion**

According to the Islamic law, providing livelihood to children is obliged depending upon four conditions. In this regard, two conditions have been agreed by the Muslim scholars, and the rest two conditions are still debated. The two agreed conditions are as follow:

1. Children those needs are supported must be indigent and unable to take care of themselves (Ad-Dasuki, n.d.; Ash-Shirazi, 1955; Quddamah, 1968; Yunus, 1968).

2. There is an excess part of the livelihood which is used to support the need of the father. (Al-Ghanimi, n.d.; Illish, 1989; Ar-Ramli, 1984; Quddamah, 1986, Zein & Aripin, 2004).

The two conditions which are still debated are as follows:

1. There is religious similarity between the person who supports and those that are supported (Quddamah, 1968; Mardawi, 2010).
2. The livelihood is given to children who have inheritance rights (Mardawi, 2010).

As for the amount that must be given as a living, the scholars agree that the amount is based on what is appropriate and reasonable. In determining the degree of children's livelihood, Maliki mazhab states that the amount of livelihood provided must be viewed from the condition of the recipient. Both Hanafi and Shafi'i mazhab in the other hand argue that the amount of livelihood must be considered based on the condition of the person who provides the livelihood. Furthermore, the Hanbali Mazhab elucidates that the amount of livelihood is determined in accordance with the conditions of both provider and receivers.

In the following discussion, the 4 criteria mentioned above along with the livelihood amount will be used as a tool to measure the compliance of court decision towards Islamic standard. This will help to create a clear cut on whether the implementation of court decision need to be improved or have been well established.

### **Analysis of Indonesia court decision**

A decision can be said to have conformed to the fiqh provisions if the decision has addressed all the conditions determined by Muslim scholars mentioned above. Apart from it, the amount of livelihood must be at an appropriate and reasonable level. Thus, the discussion below will scrutinize all the conditions one after another.

First condition: the child must be indigent and does not have their own income. In the legislation of Indonesia, it is not clearly stated about the mandatory conditions required for child support. However, in Article 156 (d) of Compilation of Islamic Law (CIL) and Law No. 1/1974 on Marriage makes the ability of the children to be self-reliance as indicated by the age of 21 years old along with the condition of both father and son become parameter in looking after the child (Budiyanto, 2014).

The judges at Indonesia Religious Court takes into account the age of the child in considering whether a child is still entitled to gain livelihood or not. If the child is 16 years old for a woman and 19 years old for a man, it will then be seen whether the child is still studying at school or has got married. If the child has got married, he or she is no longer entitled to get child's livelihood. In the other condition, if a child is found to have been over 21 years old, but he/she makes request to the court to be given parental livelihood, the judges will view the child's condition in prior whether he/she still deserves livelihood or not. This is based on the interview with Munadi, the judge of Central Jakarta Religious court

The aforementioned provisions are depicted in the decision number 0303/Pdt.G / 2015/PAJP. In this case, the children number one, two, and three of the plaintiff had been over 12 years old, and they could determine their own custody. The three children chose to be cared for by their father. In the meantime, the fourth child was still less than 12 years old, and under the custody of his mother. Hence, the mother only claimed for the fourth child's livelihood. The court granted the request because the fourth child was considered as still need livelihood, while the livelihood of the children number one, two, and three would automatically be guaranteed by their father.

Second condition: the obligation to guarantee children's livelihood applies to the father if there is an excess part of the need to support himself. Basically, the one who is obliged to guarantee the children's livelihood is their father. Based on Article 41 1/1974, if the father is incapable of giving children's livelihood due to financial constraint and other sort of physical and phsycological inability, the court can further stipulate that the mother can be obliged to support children's livelihood. If according to the judge's viewpoint that both the mother and father are considered incapable, the court can further appoint a guardian (Sudarsono, 1994: 191).

The provision as such is reflected in the decision no. 0194/Pdt.G/2013/PAJP and 222/Pdt.G/2012/PAJP. In the first case, the father was jobless during the trial. The judge ruled that father's obligation to provide the livelihood commenced after he got a job. In the second case, the father confessed that he was only able to fulfill some of the demanded livelihood. The judge decided that the father should pay based on his capability.



Third condition: it is the similarity of religion between the two objects which are the father and the child. The condition with respect to the similarity of religion is irrelevant as the condition of post-divorce children's livelihood in the Indonesian law. This is because the Religious Court is designed for Muslim only as stated at Article 1, Paragraph 1, Law No. 50 of 2009 jo. Law No. 3 of 2006 jo. Law No. 7 of 1989 pertinent to the Religious Court. Then, it is definite that everyone who makes request for children's livelihood in the Religious Court is a Muslim. Besides, the law also stipulates that when a child is still unable to make his choice, the child's religion follows the religion of his parents as stated at Article 42, Paragraph 2, Law No. 17 of 2016 about Child Protection.

However, when a child is a Muslim and still has the right to gain livelihood while the father has changed his religion, Indonesia law does not prevent the child from earning livelihood from his father. However, the lawsuit cannot be submitted to the Religious Court but instead it must be submitted to the District Court. In other words, there are no laws in Indonesia that state that religious equality is a condition in providing livelihood.

As for this study, the decisions of child livelihoods discussed here are certainly between two parties who are Muslim. This is because all decisions are taken from the Religious Courts so that it definitely fulfills the principle of religious equality.

Fourth condition: the livelihood is given to children who have inheritance rights. The agreed inheriting factors between Muslim scholars are kinship (*qārahah*), marriage, and slavery (Faculty of Sharia Al-Azhar, 2011). Here, child gains inheritance rights from his father on account of kinship. Therefore, a child who is entitled to inheritance is a legitimate child born from a legal marriage because kinship will only be obtained through a legal marriage. This is confirmed in Article 99 paragraph 1 CIL, Article 42 of Law No. 1/1974 on Marriage and also related with article 100 CIL, 186 CIL as well as Article 43 paragraph (1) Law No. 1/1974. Based on aforementioned regulations, those who are obliged to provide livelihood for adultery children and extramarital children are his mother and his mother's family as well.

In Islamic law, a child who is categorized as an illegitimate child has three characteristics: a child of *zina* (adultery relationship), a child of *mula'anah*, and a child indicated as *shubbah* (Yanggo, 2005: 177-178). In Indonesia, the definition of illegitimate child must follow

Criminal Code (Manan, 2006: 81) and Law No. 1/1974 as stipulated at Article 42, Law No. 1 of 1974 regarding Marriage.

On 17<sup>th</sup> of February 2012, the Constitutional Court through decision No. 46/PUU-VIII/2010 decides that the relation between an extramarital child with his/her father is a biological relation confirmed by a legal process. Based on that point, at least there are two ways to be undertaken in order to make an extramarital child have blood and civil relation with his/her biological father. First is through confession from his/her biological father and second is through legalization of an extramarital child from his/her biological father. With the presence of a confession, a civil relation arises between an extramarital child and his/her father. Since both of them are considered as having a civil relation, the extramarital child further deserves livelihood from his/her father.

In the decision No.220/Pdt.G/2012/PAJP and No. 0376/Pdt.G/2012/PAJP it was found that the range between the wedding day and the birth of their first child was less than 6 months. In this regard, it could be ascertained that the child was an extramarital child. In both aforementioned decisions, the father stated his capability of paying livelihood for his child as much as IDR 1,000,000 per month, and the judge granted it. Thus, after the presence of the Constitutional Court decision No. 46/PUU-VIII/2010, the demand for an extramarital child's livelihood is granted by the judge based on it.

Based on the explanation above, it can be concluded that in Indonesia there is no law that explicitly prohibit adultery or extramarital children from gaining livelihood from their genetic fathers. In addition, the judge also still grants the request of the children's livelihood based on the civil relation between the children and their genetic fathers on the basis of the fathers' confession.

Besides the four conditions of children's livelihood above, the judge must also determine the amount of livelihood appropriately. In determining the amount of children's livelihood, the judge refers to the CIL which explains that the Court must take into account father's capability of providing it. However, when there is no agreement between the father and mother, the Court will determine the amount which will be based on the father's capability as stipulated at Article 156, Paragraph (f), Compilation of Islamic Law.

The provision as such is depicted in the decision No. 266/Pdt.G/2012/PAJP and 0450/Pdt.G/2013/PAJP. In both cases the defendant was able to present evidence that stated their inability to fulfill the claim of the obligation of the plaintiff. From the two examples

of the decisions above, it can be seen that in deciding on the demand of child's livelihood, the judge really considers father's capability on providing it

In making a decision, sometimes the judge rejects the lawsuit for various reasons. For example, out of 20 decisions analyzed, there were four decisions that were not granted. Decision 553/Pdt.G/2012/PAJP rejected the lawsuit because there was no dispute over child custody. Decision 0364/Pdt.G/2013/PAJP rejected the claim because there was no evidence that the child needed a living. Decision 1036/Pdt.G/2013/PAJP rejected the claim because the defendant was never present at the court. Decision 218/Pdt.G/2015/PAJP rejects the claim because child custody is in the care of the father.

The rejection of the lawsuit on the decisions leaves a question. This is because if we look at the provisions of Islamic law and the provisions of laws in Indonesia, the obligation of a father is to provide a living for his child until he/she grows as adult. This is regardless whether the parent is still married or got divorced. The absence of the defendant also did not make the obligation to pay for the child stated in the fiqh and law null or void. Basically it becomes the duty of the judge as the person who is in charge for upholding justice to look for ways for ensuring the right of livelihood of the children as stated by the Law.

**Table 1.**  
**The recapitulation of the decisions accepted and rejected at the central Jakarta religious court in 2012-2015**

<b>YEAR</b>	<b>ACCEPTED</b>	<b>REJECTED</b>
2012	4	1
2013	4	1
2014	3	2
2015	5	0
<b>TOTAL</b>	<b>16</b>	<b>4</b>

*Source: the data processed from the Central Jakarta Religious Court.*

### **Analysis of Malaysia court decision**

The issues with regard to child protection in Malaysia are regulated in Child Act (Act 611)2001. The Act incorporates several laws associated with livelihood, protection and

restoration of children. This act also contains provisions for a variety of cases associated with children such as The combination of several laws, namely the Juvana Court Act of 1947, the Child Protection Act (CPA) of 1991, the Women and Girl Protection Act (WGPA) of 1973, and the Children's Maintenance Center Act (CMCA) of 1984 which has become The Children Act (CA) of 2001. In addition, the Islamic Family Law Act in Malaysia has also made special regulations regarding the protection of children's rights, especially for the protection for the right of children's livelihood. In Malaysian law, it is not clearly stated about the mandatory conditions for gaining children's livelihood. However, some of the conditions have indirectly been implemented in the Malaysia State law.

Now, we start the conditions of providing children livelihood. First condition: the child must be indigent and does not have their own income. Although this condition is not mentioned in the law, Court sets standard to cover this matter in its practice by looking into child's condition as to whether the child really does not have assets, no income, poor, and unable to take care of himself/herself. In this regard, the Court interprets that the people who are considered as incapable includes young children, unmarried children, disabled children and the children who are still studying at schools (Ibrahim and Azizah Mohd, 2013: 259). This also has been mentioned in Islamic Family Law (Federal Territory) Act 1984.

The implementation of this provision can be seen in decision No. 14008-024-0128-2014 and 14100-024-0637-2015. In both two cases there were indeed children over 18 years who were granted by the court to earn livelihood. However, it is not in the contrary to the regulations they set. That is because even though these children are not entitled to earn a living based on their age, they are still entitled to earn a living because they are still studying and do not have their own income.

Second condition, the obligation to guarantee children's livelihood applies to the father if there is an excess part of the need to support himself. In deciding the children's livelihood, the Court will consider father's capability in terms of providing livelihood. When a father is deemed to be unable to provide livelihood because of having no any excess asset to share, or there are other obstacles that make the father unable to complete his obligation, the Court can choose another person to help or replace the father in providing the livelihood. This point fits with the section 72 subsection (2) of the Islamic Family Law (Federal

Territory) Act 1984.

The interesting part is that Court will not just let the father escape from his responsibilities. If the father does not have a job, then the father must try to find a job in order to be able to carry out his obligations. However, when the father has an obstacle that really makes him unable to make a living, the Court may decide that other people help to bear the income of the child.

The provision as such is reflected in the Court decision number 14005-024-0610-2012 and 14200-024-0586-2012. At the first case, the husband did not have a job so he had no income to spend. However, children's livelihood was still obliged upon him because the father was considered as still able to find a job. At the second decision the father only worked as a waiter. Based on the evidence which was presented, the father did not have money as much as requested. Thus, the court granted decision that the father obliged to only provide half of the demanded amount.

Third condition: it is the similarity of religious between the two subjects which are the father and the child. This requirement is actually not clearly stated in Malaysian law. In section 3, subsection 12 of the Malaysian law, it is stated that "the religion of a person whose age is less than eighteen years old must be determined by his mother, father or guardian." Thus, as far as the child is still in between 0-18 years where livelihood obligation applies, child's religion follows his/her parent.

However, if the child is a Muslim and the father has been an apostate (*murtad*) or the father is originally a non-Muslim, Malaysian law does not prohibit the child from gaining livelihood from them. In other words, there is no any point in Malaysian law which states religious similarity as condition for providing children's livelihood. However, when a child and a father of different religion want to bring their livelihood-related case, it cannot be submitted to the Sharia Court but must be submitted to the Civil Court.

Fourth condition: the livelihood is given to children who have inheritance rights. The Islamic Family Law (Federal Territory) Act states that the preservation of illegitimate child becomes the responsibility of his/her mother and the mother's family as stated at Section 85, Islamic Family Law (Federal Territory) Act and Labuan 1984. This provision conforms to the Islamic law which stipulates that an extramarital child only has a *nasab* relation with his/her mother.

The legal consequence is not only about the *nasab* relation and the child custody, but also the support of child's livelihood which all of it is given to the mother and the mother's family as it is mentioned at Islamic Family Law (Federal Territory) Act 1984.

The aforementioned law explains that even if the mother is indifferent and reluctant to provide livelihood to an illegitimate child, the Court may give an order to the mother in order to provide livelihood on the basis of an appropriate and reasonable consideration taken by the Court. Based on that law, it is clear that the one who is obliged to provide livelihood for an illegitimate child is the mother.

If an illegitimate child claims for livelihood from his genetic father, there is no any other regulation that enables an illegitimate child to do it except the implicit understanding of The Islamic Family Law (Federal Territory) 1984 as stated at Section 78, Islamic Family Law (Federal Territory) Act and Labuan 1984. An illegitimate child can claim for livelihood when his genetic father confirms this child as his flesh. It is Based on this confession then the duty to provide livelihood for this illegitimate child comes under his responsibility.

Apart from the mandatory conditions children's livelihood, the amount of the livelihood is not clearly determined by the Law as well. However, the Islamic Family Law (Federal Territory) Act 1984 states that a father provides a livelihood for his children according to his capability as stated at Section 71, Islamic Family Law (Federal Territory) Act and Labuan 1984. In determining the amount of livelihood to be paid, Court determines it based on father's capability and children's needs while the amount of livelihood is measured based on the father's income as stated at Section 61, Islamic Family Law (Federal Territory) Act and Labuan 1984.

The above provision is reflected in the Court decision on the application number 14600-024-0357-2012. The Defendant can prove in the Court that he has a backbone pain that requires medical treatment and causes him to retire from his career from the army in 2016. The Court then grants the petition of the applicant but with a quite big reduced nominal.

## **Comparison between Indonesia and Malaysia**

### **1. Horizontal comparison**

Regarding the regulations of children's livelihood Indonesia and Malaysia legislation does not directly mention about the mandatory conditions for providing livelihood. However,

those conditions are still reflected in number of laws and regulations. The conditions of providing livelihood in Islamic law are adopted by Indonesia and Malaysia indirectly and also implemented by the judges in deciding the cases. Therefore, it can be concluded that Indonesia and Malaysia have ideally regulated all provisions regarding the post-divorce children's livelihood.

## **2. Vertical comparison**

First condition: the child must be indigent and does not have their own income. In implementing this condition, Indonesia and Malaysia determine the age limit of the child who deserves livelihood. This age limit is similar to the limit when a child is considered as an adult and capable of taking care of himself/herself.

The practice above fits the opinion of Muslim scholars which states that children who are entitled to gain livelihood are those who do not have any asset to support themselves while being unable to find their own income. Hence, either man or woman absolutely has the right to gain livelihood as long as they do not have any asset (al-Zayla'i, 2000: 325).

Although the law does not clearly state this condition, in practice the judge considers a person is categorized as someone as having the right to gain livelihood under certain standards. The standards are the children do not have any asset, unable to make an effort to earn income, poor, and unable to take care of himself. The judge considers that an incapable individual like the standard above refers to a young child or an under-age child, unmarried daughter, child who is sick, disabled child, child suffering from mental retardation and child who is still studying.

The second condition is that a father has an excess part of the assets or income he uses to support himself. This condition is in line with the opinion of the majority of Muslim scholars, namely Maliki, Shafi'i, and Hanbali who argue that a father is only responsible for providing livelihood for his children only if he is capable. According to the majority of Muslim scholars, father capability here means that he has excess assets or more income after he has supported himself and his wife. If he does not have such capability, he will not be given an obligation to provide livelihood for his children since the obligation depends upon his capability. However, Shafi'i and Hanbali agree with Hanafi's opinion that a father may be forced to work if he is able to work. This is for the sake of maintaining children's

lives and save them from begging people in the streets. Shafi'i scholars accentuate that if there is no other way while the father has assets of both movable and immovable, the assets must further be sold for the sake of his children's livelihood. This point applies because the father is deemed to be capable and have excess assets.

For the sake of deciding on a livelihood request, the judges in Indonesia and Malaysia see whether the father has more assets to spend on his children. In Indonesian law, when a father is unable to provide livelihood due to the reasons justified by law, the law instructs the judges to determine that the mother helps support children's livelihood. In the meantime, in Malaysian law, if a father is unable to provide livelihood due to the reasons justified by law, the obligation must be handled by the person who has been determined in *shara'*.

Apart from the written law, the practice in both Indonesia and Malaysia shows that when a father declares his inability to provide livelihood due to joblessness, the judge still decides on the case and tells him to look for a job in order to carry out his responsibility in providing livelihood. The legal provision in Indonesia and Malaysia regarding the conditions of providing livelihood has conformed to the Fiqh provision where the decision on supporting children's livelihood takes into account the condition of the father.

The third condition refers to religious similarity between livelihood providers and its recipient. Here, we found no provision for religious similarity as a condition in providing livelihood in both Indonesia and Malaysia. The laws of these two countries only stated that the religion of an immature child is to follow his parents' religion. An immature child is still under the father's responsibility. Thus, it is definite that when requesting for a child's livelihood, the child's religion is the same as his father's. However, when the father becomes an apostate, and the child is still a Muslim, the father still has to provide livelihood for his Muslim child. There is no any statutory regulation in Indonesia or Malaysia which explains that when a father and his child have a different religion, the father is no longer entitled to provide for his child. However, the lawsuit of a child's livelihood for the people having different religions must be submitted to the District Court for Indonesia and the Civil Court for Malaysia.

For the fourth condition, the livelihood is given to a child who has the inheritance right. An adultery or illegitimate child has the familial path (*nasab*) to his mother and mother's



family. This applies to livelihood rule where because he does not have a familial path (*nasab*) to his father, the person who is obliged to provide livelihood for him is the mother. The law in Indonesia does not explicitly state that an adultery or illegitimate child is only entitled to gain livelihood from his mother but the law only states that the child has a civil relation with his mother. In the other hand, the law in Malaysia explicitly states that an illegitimate child gains livelihood from his mother. Nonetheless, the practice of both Indonesia and Malaysia recognizes an adultery or illegitimate child to gain livelihood from his genetic father if the father acknowledges that the child is his own flesh.

Next is the amount of livelihood. In this matter, Muslim scholars are divided into three groups. First, Shafi'i and Hanafi mazhab which say that the provision of children's livelihood is measured based on the ability of the person who provides it. Second, Malik mazhab argues that the provision of livelihood is measured based on the needs of the person who deserves it. Third, Hanbali mazhab argues that livelihood is determined based on both, namely the provider's ability and the needs of the person who deserves livelihood.

Indonesia and Malaysia are the two countries which most of its people are the followers of Shafi'i sect. Nevertheless, in determining the provision of children's livelihood amount, the Indonesian Law still adheres to Shafi'i and Hanafi mazhab which stipulate that the children's livelihood is determined based on the father's ability to provide it. In the other hand, Malaysian Law does not follow the opinion of Shafi'i mazhab, but it adheres to the opinion of the Hanbali which states that in determining the amount of children's livelihood, the provider's capability and the needs of the person who deserves livelihood must both be considered.

### **3. Diagonal comparison**

To compare the decisions of the livelihoods of children in Indonesia and Malaysia to see which one is more in compliance with the provisions of fiqh, it is necessary to evaluate the implementations in each decision. Table 2 below summarizes the evaluation for case of Indonesia while table 3 will summarize the case of Malaysia.

**Table 2.**  
**Analysis of indicators of the fiqh compliance in the decisions of post-divorce children's livelihood at the central Jakarta religious court 2012-2015.**

Registered Number of Court Decision	(1)	(2)	(3)	(4)	(5)
266/Pdt.G/2012/PAJP	✓	✓	✓	✓	✓
553/Pdt.G/2012/PAJP	✓	✓	✓	✓	✓
488/Pdt.G/2012/PAJP	-	-	-	-	-
220/Pdt.G/2012/PAJP	✓	✓	✓	-	✓
1009/Pdt.G/2012/PAJP	✓	✓	✓	✓	✓
0194/Pdt.G/2013/PAJP	✓	✓	✓	✓	✓
0450/Pdt.G/2013/PAJP	✓	✓	✓	✓	✓
0364/Pdt.G/2013/PAJP	-	-	-	-	-
182/Pdt.G/2013/PAJP	✓	✓	✓	✓	✓
222Pdt.G/2012/PAJP	✓	✓	✓	✓	✓
1106/Pdt.G/2014/PAJP	✓	✓	✓	✓	✓
1036/Pdt.G/2014/PAJP	-	-	-	-	-
896/Pdt.G/2014/PAJP	✓	✓	✓	✓	✓
0869/Pdt.G/2014/PAJP	✓	✓	✓	✓	✓
218/Pdt.G/2014/PAJP	-	-	-	-	-
0611/Pdt.G/2015/PAJP	✓	✓	✓	✓	✓
0749/Pdt.G/2015/PAJP	✓	✓	✓	✓	✓
0376/Pdt.G/2015/PAJP	✓	✓	✓	-	✓
0303/Pdt.G/2015/PAJP	✓	✓	✓	✓	✓
0522/Pdt.G/2015/PAJP	✓	✓	✓	✓	✓
<b>Total</b>	16	16	16	14	16

*Data source: processed from the decisions of the Central Jakarta Religious Court. Note: Number (1) refers to indigent, (2) refers to availability of excess asset, (3) refers to similarity of religion, (4) right of inheritance, (5) amount of livelihood.*

These 16 decisions have conformed to the conditions we set throughout the discussion of this research. Nonetheless, there are two decisions that do not conform to the conditions which are the decisions on providing livelihood for adulterous children who do not have familial path (*nasab*) to the father, and the presence of inheritance right from their genetic father.

**Table 3.**  
**Analysis of indicators of the fiqh compliance in the decisions of post-divorce children's livelihood at federal territory Kuala Lumpur sharia court 2012-2015.**

Registered Number of Court Decision	(1)	(2)	(3)	(4)	(5)
14005-024-0610-2012	✓	✓	✓	✓	✓
14200-024-0586-2012	✓	✓	✓	✓	✓
14700-024-0181-2012	✓	✓	✓	✓	✓
14600-024-0357-2012	✓	✓	✓	✓	✓
14600-024-0109-2012	-	-	-	-	-
14700-024-0433-2013	✓	✓	✓	✓	✓
14003-024-0111-2013	-	-	-	-	-
14005-024-0815-2013	✓	✓	✓	✓	✓
14008-024-0578-2013	✓	✓	✓	✓	✓
14600-024-0631-2013	-	-	-	-	-
14600-024-0447-2014	✓	✓	✓	✓	✓
14003-024-0414-2014	✓	✓	✓	✓	✓
14600-024-0354-2014	✓	✓	✓	✓	✓
14007-024-0182-2014	✓	✓	✓	✓	✓
14008-024-0128-2014	✓	✓	✓	✓	✓
14008-024-0122-2015	✓	✓	✓	✓	✓
14011-024-0098-2015	✓	✓	✓	✓	✓
14600-024-0623-2015	✓	✓	✓	✓	✓

<b>Registered Number of Court Decision</b>	<b>(1)</b>	<b>(2)</b>	<b>(3)</b>	<b>(4)</b>	<b>(5)</b>
14008-024-0214-2015	✓	✓	✓	✓	✓
14100-024-0637-2015	✓	✓	✓	✓	✓
<b>Total</b>	<b>17</b>	<b>17</b>	<b>17</b>	<b>17</b>	<b>17</b>

*Data source: processed from the decisions of Federal Territory Kuala Lumpur Sharia Court 2012-2015. Note: Number (1) refers to indigent, (2) refers to availability of excess asset, (3) refers to similarity of religion, (4) right of inheritance, (5) amount of livelihood.*

Table 3 above shows that all of the 17 decisions granted by the Court have been compliance to the fiqh conditions. Based on table 3 above, it can be concluded that the decisions of Federal Territory Sharia Kuala Lumpur Sharia Court are more compliance to the provisions stipulated in Fiqh compared to the decisions of Central Jakarta Religious Court.

### **Conclusions and recommendations**

When the number of divorces in a country is high, the consequences of divorces need to be studied, and the issue in connection with post-divorce children's livelihood is one of the aforementioned consequences. In Indonesia and Malaysia, there are many neglected homeless children where a parental divorce is one of the causes. In addition, the major population of the two countries is Muslims so that the legislation governing the case regarding children's livelihood should also have an Islamic nuance. However, it is of course possible that at some point there is incompatibility between Fiqh concept, prevailed regulations and the implementation of the law.

This study uses five Fiqh indicators referring to the mandatory conditions which entitle a child gain livelihood. The indicators are the child must be indigent, child's father must have excess assets, similarity of religion between livelihood provider and receiver, the child has the inheritance right and amount of livelihood must conform to the existing local wisdom.

For the decisions of the Religious Court in Indonesia, this study reveals that all of the above-mentioned indicators have been indirectly mentioned in the law. However, we found

that there still exists a chance for adultery children to gain livelihood from their genetic fathers in the law. In addition we also found that in the practice the judges still grant the request of children's livelihood from the fathers who do not inherit each other because the child is a child of adultery. It is also important to be underlined that in determining the amount of children's livelihood, the law and practice of Indonesia judges follow Hanafi and Shafi'i mazhab.

In Malaysia, this country has stipulated Fiqh provisions related to children's livelihood indirectly into its regulations. For the indicator of being indigent, the Malaysian law sets an age limit of 18 years old for a son while the limit for a daughter is the marriage day along with other provisions. For the indicator of excess assets, the Court even allows other people to help the father to provide children's livelihood. Besides, from the cases that are studied, we found all the plaintiff and defendant are Muslim. As for the inheritance path provisions, it is clearly seen that adultery child is under the responsibility of his mother as stipulated in the law. In the aspect of the livelihood amount, Malaysia law follows the Hanbali mazhab.

This study also compares between the decisions of the Indonesian Religious Court and those of the Malaysian Sharia Court. This study found that the laws in two countries have conformed to the rules of Fiqh with an important note to be noticed that the two laws still open a chance for illegitimate children to gain livelihood from their biological father.

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