al-Ahkam, Vol 33 No 1 (2023): 45-62
DOI: http://doi.org/10.21580/ahkam.2023.33.1.14566

al-ahkam
Jurnal Pemikiran Hukum Islam

Post-Divorce Child's *Nafaqah Māḍiyah*: An Analysis of the Shifting from Fulfilment to the Assertion of Ownership Rights

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Abstract

The claim for child's *nafaqah māḍiyah* (past income) is often overlooked in the rulings of the Religious Court. This research aims to propose a shifting from the concept of *li al-intifā'* (benefit) to *li al-tamlīk* (ownership) regarding child's living costs claims in the Religious Court, employing the *istihsān* (juristic preference) approach. The objective is to ensure a more equitable judgment for the child. This study was conducted as a literature review using a normative juridical approach. The research findings reveal that the legal standpoint, which rejects any claim for child's *nafaqah māḍiyah* in the Religious Court based on the argument that child's living costs is categorized as *li al-intifā',* contradicts Islamic legal principles regarding child's living costs and fails to fulfill the principles of justice, as well as being incongruent with several other legislative provisions related to child protection. Therefore, this article proposes a shifting from the concept of *li al-intifā'* to *li al-tamlīk* in determining child's *nafaqah māḍiyah* in the Religious Court.

Keywords: *nafaqah māḍiyah* for children; *li al-intifā'*; *li al-tamlīk*; *istiḥsān*; Religious Court

Tuntutan *nafaqah māḍiyah* (nafkah di masa lampau) untuk anak seringkali diabaikan dalam putusan Pengadilan Agama. Penelitian ini bertujuan untuk menawarkan peralihan konsep *li al-intifā'* (pemanfaatan) kepada *li al-tamlīk* (kepemilikan) pada nafkah anak dalam tuntutan di Pengadilan Agama dengan pendekatan *istiḥsān*. Hal ini bertujuan agar putusan lebih berkeadilan bagi anak. Penelitian ini merupakan studi kepustakaan (*library research*) dengan pendekatan yuridis normatif. Hasil penelitian menemukan bahwa sikap hukum menolak setiap gugatan *nafaqah māḍiyah* anak yang ada di Pengadilan Agama dengan alasan nafkah anak sifatnya *li al-intifā'* bertentangan dengan aturan hukum Islam mengenai nafkah anak dan tidak memenuhi rasa keadilan serta tidak relevan dengan beberapa peraturan perundang-undangan lainnya yang mengatur mengenai perlindungan bagi seorang anak. Oleh karenanya artikel ini menawarkan peralihan konsep dari *li al-intifā'* kepada *li al-tamlīk* dalam penentuan *nafaqah māḍiyah* anak di Pengadilan Agama.

Kata Kunci: *nafaqah māḍiyah* anak; *li al-intifā'*; *li al-tamlīk*; *istiḥsān*; Pengadilan Agama

p-ISSN: 0854-4603; e-ISSN: 2502-3209
Submitted 20 Jan 2023; Received in Revised Form 23 Feb 2023; Accepted 20 Apr 2023

Introduction

In the regulation, the *nafaqah māḍiyah* (past income) for children can be sued in a divorce process in court. It is in the provisions contained in the Supreme Court Circular (called SEMA in Indonesian abbreviation) No. 2 of 2019 concerning the Enforcement of the Formulation of the Results of the 2019 Supreme Court Chamber Plenary Meeting as a guideline for the implementation of tasks for the court, letter (c) Formulation of the Law of the Chamber of Religion No. 1 (one) letter (a) which explains that *nafaqah māḍiyah* for children whom the father neglects can be filed by the mother or the person who takes care of the child.[1]

Unfortunately, in its practice in the religious courts, the judges generally reject claims on a child's *nafaqah māḍiyah* since the judges only give thought to the legal considerations contained in the decision of the Supreme Court of the Republic of Indonesia No. 608 K/AG/2003, in such a way that there are still many judges in the religious courts generalize such lawsuits and decide to reject them based on legal considerations for "the obligation of a father to provide for his child is *li al-intifā'*, not *li al-tamlīk*. Therefore, the negligence of a father who had not provided a living for his child in the past (*nafaqah māḍiyah* for children) cannot be sued".[2]

Research on post-divorce child support has been conducted by many previous researchers, which can be divided into three categories. First, research that compares the laws in force in Indonesia and Malaysia regarding child support which includes child support after divorce and *nafaqah māḍiyah*, for instance, research conducted by Kamuruddin and Ahmad,[3] Ismail and Sulong,[4] and Mat Saleh et al.[5] The second is research related to the husband's

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[1] Mahkamah Agung Republik Indonesia, "Surat Edaran Mahkamah Agung (SEMA) No. 2 Tahun 2019-Rumusan Kamar Agama-C.1.A," Jakarta, 2019.

[2] Mahkamah Agung Republik Indonesia, "Putusan Mahkamah Agung R.I No. 608 K/AG/2003," Jakarta, 2003.

[3] Abang Kamurudin, "Nafkah Anak Pasca Penceraian Studi Perbandingan di Lembaga Peradilan Indonesia dan Malaysia," *Sakina: Journal of Family Studies* 3, no. 4 (2019).

[4] Mohd Hazwan Ismail and Jasni Sulong, "Saman Penghutang Penghakiman: Keperluan Perintah Nafkah atau Perintah Tunggakan Nafkah," *Journal of Contemporary Islamic Law* 6, no. 1 (2021): 29–38.

responsibilities and legal protection regarding the living of ex-wives and children after divorce, such as research by Jati et al.,[6] Suharto,[7] and Mansari and Moriyanti.[8] The third category is research that specifically describes the condition of the impartiality of the religious court in providing post-divorce children's *nafaqah māḍiyah*, as written by Salma et al.,[9] Fitriana,[10] and Mustofa.[11]

Based on the three categories of research above, research on children's post-divorce *nafaqah māḍiyah* seen from the perspective of *istiḥsān* has not received the attention of researchers. If studied further, the *istiḥsān* approach can provide an opportunity to produce benefits in the form of past *nafaqah*, which children have rarely obtained after their parents' divorce.

This research is library research with a normative juridical approach, which combines aspects of literature and normative juridical approaches in preparing a study. A normative juridical approach is an approach that focuses on analyzing applicable laws and regulations, legal principles, and legal doctrines.[12] In this research, researchers will study relevant literature, such as

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[5] Hasiah Mat Salleh, Mohd. Norhusairi Mat Hussin, and Raihanah Hj Abdullah, "Perlindungan Hak Warga Emas dalam Perundangan di Malaysia," *Kanun Jurnal Undang-Undang Malaysia* 34, no. 1 (2022): 1–22, https://doi.org/10.37052/kanun.34(1)no1.

[6] Cahya Samekta Jati, Muhyidin Muhyidin, and Suparno Suparno, "Pelaksanaan Tuntutan Nafkah Terhutang Suami pada Perkara Perceraian sebagai Pemenuhan Hak Istri (Studi di Pengadilan Agama Banyumas)," *Diponegoro Law Journal* 10, no. 3 (2021): 596–608, https://doi.org/10.14710/dlj.2021.27122.

[7] Mukhamad Suharto, "Perspektif Hukum Islam-Sosial terhadap Kontekstualisasi Nafkah Cerai Gugat," *Khuluqiyya Jurnal Kajian Hukum dan Studi Islam* 2, no. 1 (2020): 45–67.

[8] Mansari and Moriyanti, "Sensitivitas Hakim terhadap Perlindungan Nafkah Isteri Pasca Perceraian," *Gender Equality: International Journal of Child and Gender Studies* 5, no. 1 (2019): 43–58.

[9] Salma, Elfia, and Afifah Djalal, "Perlindungan Hukum bagi Perempuan dan Anak (Analisis Putusan Hakim tentang Nafkah Madhiyah pada Pengadilan Agama di Sumatera Barat)," *Istinbáth Jurnal of Islamic Law* 16, no. 1 (2017): 168–208, http://ejurnal.iainmataram.ac.id/index.php/istinbath%0Aperlindungan.

[10] Fitriana Isnataini Nur, "Upaya Istri dalam Memperoleh Nafkah Iddah dan Nafkah Madhiyah dalam Perceraian (Studi Kasus Putusan Banding No. 125/Pdt.G/PTA Smg)," [Undergraduate Thesis] (IAIN Salatiga, 2019).

[11] Ahmad Alif Mustofa, "Nafkah Madliyah Anak dalam Perspektif Hukum Positif: Studi atas Putusan Mahkamah Agung RI Nomor 608/K/AG/2003," [Undergraduate Thesis] (Universitas Islam Negeri Maulana Malik Ibrahim, Malang, 2020).

[12] Enik Isnaini, "Tinjauan Yuridis Normatif Perjudian Online Menurut Hukum Positif di Indonesia," *Jurnal Independent* 5, no. 1 (2017): 23–32, https://doi.org/10.30736/ji.v5i1.61.

books, journals, laws and regulations, court decisions, and other legal documents. The researcher will then analyze and compile legal arguments based on the literature that has been reviewed. The method used in this research is document analysis, where researchers will collect data by reading, identifying, and evaluating relevant literature. The data obtained will be analyzed qualitatively using a normative juridical approach.

This study aims at criticizing the regulations of the Supreme Court of the Republic of Indonesia because the result of the decision allegedly squanders the rights that children should receive after the divorce. Therefore, the research questions were formulated: are such legal products, views, and attitudes equitable regarding a father's obligations and fulfilling children's post-divorce rights? And what is the relevance between the legal decision of the Supreme Court of the Republic of Indonesia and the concept of Istihsān in Islamic law? These two questions will lead the author to discuss this theme.

Nafaqah Māḍiyah for Children in Compilation of Islamic Law and Jurisprudence

The Compilation of Islamic Law (called *Kompilasi Hukum Islam* or KHI in Indonesian abbreviation) does not stipulate provisions regarding a child's *nafaqah māḍiyah*. The case of child support in KHI is explained in Article 105 KHI and Article 156 KHI letters d to f. Article 105 KHI explains that when a divorce occurs, the care of a child who is not yet *mumayyiz* or not yet 12 years old is the mother's right; if the child is *mumayyiz*, he is given the right to choose to follow his mother or father, and whatever related to the *nafaqah* cost is the father's obligation. Based on this provision, the issue of providing for a child's living, KHI regulates that a father must fulfill it even though there has been a divorce. However, KHI does not provide clear legal provisions regarding *nafaqah* matters that the father neglected in the past.

In article 156 KHI, which is regulated in letters (d) to (f), it is explained that; the child's *nafaqah* (cost) is the father's obligation until the child is 21 years old or an adult; disputes regarding *ḥaḍānah* and child support are solved through the religious courts; and the court can determine the amount of cost for the living and education of children according to the capability of the father. If it is related to the issue of providing for a child's *nafaqah māḍiyah*, which the father neglected in the past, KHI does not regulate it. The rules regarding a child's *nafaqah māḍiyah* that can be prosecuted in the religious courts are regulated in

the Results of the Formulation of the Religious Chamber of SEMA N0. 2 of 2019, which states that a child's *nafaqah māḍiyah* is one of the matters that can be sued.[13] Based on SEMA No. 2 of 2019, this is the mother or guardian who takes care of a child can sue it.

However, in practice, judges in the religious courts generally take a legal stance that rejects any claim on a child's *nafaqah māḍiyah*.[14] Because the judges of the Religious Courts generally adhere to the provisions of the decision of the Supreme Court of the Republic of Indonesia No. 608 K/AG/2003 dated March 23, 2005, and several other similar decisions, by assuming that the child's *nafaqah* that a father did not give in the past becomes aborted because its nature is *li al-intifā'*, not *li al-tamlīk*.[15]

Those are some regulations regarding the *nafaqah* of a child's *nafaqah māḍiyah* that the basis for prosecution is based on the Formulation Results of the Religious Chamber of SEMA No. 2 of 2019, which states that a child's *nafaqah māḍiyah* can be sued either by the mother or a guardian who takes care of a child. Meanwhile, the provisions that judges often use in deciding such claims are the Decision of the Supreme Court of the Republic of Indonesia No. 608 K/AG/2003, dated March 23, 2005, and several other similar decisions considered to have become jurisprudence.

Istiḥsān as the Evidence of Islamic Law

Istiḥsān is a term in *uṣūl al-fiqh*, which is quite well-known. The concept of *istiḥsān* as a legal proposition belongs to most schools of *uṣūl al-fiqh*, but according to Hafid, the one who is more popular as the initiator of *istiḥsān* is Abū Ḥanifah. When he first conveyed his idea of *istiḥsān* in a *ḥalaqah* (teaching assembly), Abū Ḥanīfah and his followers were criticized by many groups.[16]

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[13] Mahkamah Mahkamah Agung Republik Indonesia, "Surat Edaran Mahkamah Agung (SEMA) No. 2 Tahun 2019-Rumusan Kamar Agama-C.1.A," Jakarta, 2019.

[14] Salma, Elfia, and Djalal, "Perlindungan Hukum bagi Perempuan dan Anak (Analisis Putusan Hakim tentang Nafkah Madhiyah pada Pengadilan Agama di Sumatera Barat)."

[15] Aria Gandi, "Tinjauan Hukum Islam tentang Penolakan terhadap Gugatan Nafkah Lampau Anak (Studi Putusan Hakim Nomor: 0207/Pdt.G/2018/PA.Bn)" (Institut Agama Islam Negeri Bengkulu, 2019).

[16] M Hafid, "The Concept of Istihsan Abu Hanifah in Indonesian Islamic Family Law (Review of Marriage Registration as an Accumulative Condition)," *Legal Brief* 11, no. 2 (2022): 583–95, https://legal.isha.or.id/index.php/legal/article/view/163.

Later, al-Shāfi'ī and his followers were among those who criticized the concept of *istiḥsān* because they considered the establishment of that law was based on desires. Therefore, al-Shāfi'ī and his followers thought that a law that was determined based on *istiḥsān* was invalid.[17] Even so, according to Wahbah al-Zuhaily, al-Shāfi'ī rejected the Ḥanafiyah model of *istiḥsān* and accepted the Mālik model of *istiḥsān* because Mālik said that *istiḥsān* was nine-tenths of knowledge.[18]

al-Sarakhsī argues that *istiḥsān* is linguistically defined as something good. *Istiḥsān* can also mean believing something is good; the opposite is *istiqbah* which is believing something is bad.[19] Furthermore, al-Sarakhsi divides *Istiḥsān* into two meanings. First, practice *ijtihād* by considering more opinions as a good thing. Second, *istiḥsān* is a proposition that contradicts clear *qiyās*. After deeper reflection, this contradictory argument appears stronger than *qiyās*. Thus, practicing stronger arguments is mandatory.[20] Ibn Qudāmah argues that what is meant by *istiḥsān* is turning away from the law for the sake of a problem due to a special argument that causes the deviation, both from the Quran and from the Sunnah.[21] Meanwhile, Abū Ḥasan al-Karkhī, as quoted by Rahman, states that *istiḥsān* is the legal determination of a *mujtahid* on a

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[17] Saim Kayadibi, "Formation of the Concept of Istiḥsān in Islamic Law," in *Pool Finance Economic System: Law, Democracy, Alliance of Civilization* (Selangor: International Islamic University of Malaysia, 2011), 152–78; Noorwahidah Noorwahidah, "Istihsan: Dalil Syara` yang Diperselisihkan," *Syariah Jurnal Hukum dan Pemikiran* 16, no. 1 (2017): 13–24, https://doi.org/10.18592/sy.v16i1.1001; Murteza Bedir, "The Power of Interpretation: Is Istiḥsān Qiyās?," *Islamic Studies* 42, no. 1 (2003): 7–20, https://www.jstor.org/stable/20837249.

[18] JM Muslimin and M Abdul Kharis, "Istihsan and Istishab in Islamic Legal Reasoning: Towards the Extension of Legal Finding in the Context of Indonesia," *al-Risalah: Forum Kajian Hukum dan Sosial Kemasyarakatan* 20, no. 2 (2020): 163–79, https://doi.org/10.30631/alrisalah.v20i2.589; Miftahurrohim N. Sarkun, "Athār Ta'Āruḍ Manhaj al-Fikr Bayna Abū Ḥanīfa wa'l-Shāfi'ī 'an al-Istiḥsān Ansha'at al-Ḥadarat al-Islāmiyyah," *al-Jami'ah: Journal of Islamic Studies* 51, no. 1 (2013): 217–46, https://doi.org/10.14421/ajis.2013.511.217-246.

[19] Syawaluddin Hanafi, 'Urgensi Pemikiran Syams al-Aimmah al-Syarakhsi tentang al-Istihsan dalam Menjawab Problematika Hukum dalam Masyarakat', *Tasamuh: Jurnal Studi Islam* 12, no. 2 (2020): 335–54, https://doi.org/10.47945/tasamuh.v12i2.252.

[20] Abū Bakr Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī, *Uṣūl al-Sarakhsī* (Beirut: Dār al-Fikr, 1982); Achamad Lubabul Chadziq, "Istihsan dan Implementasinya dalam Penetapan Hukum Islam," *Miyah: Jurnal Studi Islam* 15, no. 2 (2019): 337–48, https://doi.org/10.33754/miyah.v15i2.192.

[21] 'Abdullāh ibn Aḥmad ibn Muḥammad ibn Qudāmah, *Rawḍah al-Nāẓir wa Jannah al-Manāẓir fī Uṣūl al-Fiqh* (Riyāḍ: Maktabah al-Rushd, 1993); Ahmad Sanusi, "Menggagas Fiqih Moderat (Studi Analisis Kritis atas Metode Ijtihad Fiqih)," *Syaksia: Jurnal Hukum Perdata Islam* 20, no. 2 (2020): 243–78, https://doi.org/10.37035/syakhsia.v20i2.2352.

problem that departs from legal provisions that have been applied to similar issues due to stronger reasons that require this deviation.[22]

Based on this understanding, it can be understood that there is a legal determination from a *mujtahid* for an issue that deviates from the *qiyās* provisions due to a stronger reason that requires the deviation to be carried out.[23] Thus, *istiḥsān*, in this sense, includes definitions that other scholars have put forward because *istiḥsān* is a legal argument that deviates from the usual rule of law. It results from other factors pushing it out of the rule, which is even closer to Sharia objectives than the requirement to implement general rules.[24] Or the transformation made by a mujtahid from *kullī* (general) legal provisions to *juz'ī* (partial) legal provisions because a special argument causes it.[25]

Generally, it divides *istiḥsān* into two forms: *istiḥsān bi al-qiyās*, which is about two characteristics of a problem that require different *qiyās*, and *istiḥsān* that the driving factor of it is not '*illat khafī* (hidden) but *qiyās* conflicts with other arguments such as *al-Sunnah, al-ijmā', al-ḍarūrāt, al-'urf,* and *al-maṣlaḥah*, and these arguments have a stronger influence in realizing benefit (in this case what is meant by *qiyās* are standard general provisions). According to the Ḥanafiyah group, *istiḥsān* can be used as a Sharia proposition. *Istiḥsān* can stipulate laws different from laws stipulated by *qiyās* or common *naṣṣ* (texts). In conclusion, according to the scholars of the Ḥanafiyah group, *istiḥsān* can be used as an argument *(ḥujjah)*,[26] states that *istiḥsān* is one of the arguments agreed upon by the scholars because *istiḥsān* is based on texts, *ḍarūrat*, *ijmā',* or *qiyās khafī*.[27]

When discussing the sources of fiqh law, it has been revealed that the arguments agreed upon by the majority of ulama as sources of Islamic law consist of four major sources: the *Quran, Sunnah, ijmā', and qiyās*. Meanwhile,

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[22] Holilur Rohman, *Maqashid al-Syariah* (Malang: Setara Press, 2019).

[23] Abd Wahid, "Penggunaan Metode Istishlahi/Maqoshid dalam Istinbath Hukum Fiqh," *Mukammil Jurnal Kajian Keislaman* 3, no. 1 (2020): 21–34.

[24] Busyro, *Maqashid al-Syari'ah* (Ponorogo: Wadegrup, 2017), 166.

[25] Darliana Darliana et al., "Pembaharuan Hukum Islam di Indonesia (Pendekatan Metode Istihsan)," *Jurnal al-Ahkam: Jurnal Hukum Pidana Islam* 4, no. 1 (2022): 1–14, https://doi.org/10.47435/al-ahkam.v4i1.851.

[26] Ḥusain Ḥāmid Ḥassan, *Naẓariyāt al-Maṣlaḥah fī al-Fiqh al-Islāmī* (Riyāḍ: Dār al-Nahḍah al-'Arabiyyah, n.d.), 594.

[27] al-Taftazānī, *Syarh al-Talwīh 'ala al-Tawḍīh 2* (Beirut: Dār al-Kutub al-'Ilmiyah, n.d.), 82.

the rest of them belong to disputed arguments, including *istiḥsān*. It means the scholars are supposed only to agree to use some of them. Meanwhile, several scholars use *istiḥsān*, and some reject it. The scholars, such as those from the al-Shāfi'iyah, Ẓāhiriyah, and Mu'tazilah groups, generally do not accept *istiḥsān* as one of the arguments for establishing Sharia law. In its development, according to Nabilah et al., al-Shāfi'ī, in principle, accepted the substance of *istiḥsān* because, in some of his *ijtihād,* he allegedly used the *istiḥsān* method. However, it was the use of *the īstiḥsān* term that he rejected.[28]

Regarding the relevance of using *istiḥsān* in the present and the future, human life's problems will certainly become more complex and developing. Muslims must face these various problems. However, if they only rely on approaches using old/conventional methods, then it is likely that they will not be able to solve problems properly/accurately. Therefore, a *mujtahid* must be able to find alternative approaches and arguments out of the approaches that have been used and defended thus far. Therefore, the tendency to apply *istiḥsān* will be stronger due to the encouragement and challenges of legal issues that develop in human life, which are increasingly developing and complex.[29]

Nafaqah māḍiyah for Children in the Perspective of *Istihsān*: From *li al-Intifā'* to *li al-Tamlīk*

Istiḥsān is one of the propositions in Islamic law used to determine the law on a case. Ibn Qudāmah explains that what is meant by *istiḥsān* is the law principle shift done by a mujtahid in solving a matter due to a specific argument that causes the deviation, both from the Quran and Sunnah.[30] Abū Ḥasan al-Karkhī states that *istiḥsān* is a legal determination of a *mujtahid* on a problem that deviates from legal provisions that have been applied to similar issues due to stronger reasons that lead to the deviation. Based on some of the

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[28] Wardatun Nabilah, Arifki Budia Warman, and Nurul Aini Octavia, "Istihsan dalam Literatur Syafi'iyah (Telaah Istihsan dalam Kitab al-Mustaṣfa al-Ghazali)," *Juris (Jurnal Ilmiah Syariah)* 20, no. 1 (2021): 77–89, https://doi.org/10.31958/juris.v20i1.3323; Asep Saepudin Jahar, "al-Bid'ah versus al-Mashlahah al-Mursalah and al-Istihsân: al-Syâthibî's Legal Framework," *Ahkam: Jurnal Ilmu Syariah* 12, no. 1 (2012): 1–14, https://doi.org/10.15408/ajis.v12i1.975.

[29] Amir Syarifuddin, *Ushul Fiqh* (Jakarta: Kencana Prenada Media Group, 2008).

[30] Qudāmah, *Rawḍah al-Nāẓir Wa Jannah al-Manāẓir Fī Uṣūl al-Fiqh*.

understandings given by the scholars above, it can be concluded that *istiḥsān* is the departure done by a *mujtahid* from general legal provisions to specific legal provisions due to strong reasons that require the deviance to occur. This concept of *istiḥsān*, when it is related to the case of *nafaqah māḍiyah* for children, can provide a new perspective for the determination of its law because *istiḥsān* is a legal argument that can be used to establish a new law that is more relevant to the considerations of benefit in it.

In the initial chapter, the main reason for judges generally taking a legal position in rejecting any claim on a *nafaqah māḍiyah* for children in the Religious Courts is because they see the obligation of a father in providing *nafaqah* to his child as *li al-intifā'*, not *li al-tamlīk*.[31] In a sense, the obligation to provide living for children is limited to fulfilling their needs, so if these needs have been fulfilled, it is no longer mandatory to provide for children who have been fulfilled in the past. Regarding the child's *nafaqah māḍiyah* as generally accepted and applied by judges in the Religious Courts, it is customary to decide to reject a claim on a child's *nafaqah māḍiyah* because the child's *nafaqah māḍiyah* is *li al-intifā'*, not *li al-tamlīk*. Most judges generally use this reason because they consider that the Supreme Court of the Republic of Indonesia No. 608 K/AG/2003, dated March 23, 2005, and several other similar decisions as jurisprudence must be applied to the same cases.

However, as previously explained, if this jurisprudence is applied equally to all cases of claims on a child's *nafaqah māḍiyah* without considering the related facts surrounding it, it will certainly bring about a sense of injustice for the child. It will even cause much harm. In cases of claims on a child's *nafaqah māḍiyah*, not all fathers who had an obligation to provide for their children in the past proved unable to provide for their children's *nafaqah*. Sometimes a father can financially provide for his child but deliberately neglects this obligation. Thus, in this case, it is not a wise attitude if the judges still base their decision on the existing jurisprudence.

Adhering to the provisions of the Supreme Court decision of the Republic of Indonesia No. 608 K/AG/2003 dated March 23, 2005, and several other similar decisions, by assuming that the *nafaqah* of a child whom a father did

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[31] Mahkamah Mahkamah Agung Republik Indonesia, "Putusan Mahkamah Agung R.I No. 608 K/AG/2003," Jakarta, 2003.

not give in the past is null and void, this is equivalent to deeming all obligations a father for the *nafaqah* of a child he has neglected, even if it is proven that a father is actually capable of providing a living but deliberately does not provide it. Meanwhile, the wife who takes care of the child is sometimes in such difficult circumstances that she may have to go into debt to meet the needs of the child whose father has neglected them.

In settlement of cases in court, the judge does not only function and play a role as the leader of the trial so that the parties concerned follow the course of the trial as they should. But more than that, a judge also plays a role and must seek and find objective or material law that will be applied in deciding a case both parties dispute. The ruling of the Supreme Court of the Republic of Indonesia No.608 K/AG/2003, dated March 23, 2005, and several other similar decisions have been considered as jurisprudence by judges in the Religious Courts; in such a manner, decisions are rarely contrary to this provision, even though each case has different legal facts that should not be ignored just because of this jurisprudence. Yahya Harahap states that there is a *Curia Novit Jus* principle where judges are deemed to know all laws. Therefore, if the judge in providing dispute resolution services does not find a written law that is suitable to be applied to an existing case, then the judge is obliged to explore unwritten law to decide cases based on the law as a wise person and has full responsibility to God Almighty, society, himself, nation and state.[32]

Based on this, a judge has the opportunity to stipulate another law in the suit of a child's *nafaqah māḍiyah* if there are facts found in the trial that support the enactment of a law other than the use of the existing jurisprudence. Suppose a judge considers that granting a claim on a child's *nafaqah māḍiyah* brings more benefits to the child and is not burdensome for the person being charged, namely the father. In that case, the Religious Courts judge must decide to grant the claim on *nafaqah māḍiyah*.

Related to this, the concept of *istiḥsān* is the most suitable concept to be applied in the case of the child's *nafaqah māḍiyah*. If the common law applied to this case is the existing jurisprudence, which considers the obligation of a

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[32] Yahya Harahap, *Hukum Acara Perdata* (Jakarta: Sinar Grafika, 2017); Muhidin Muhidin et al., "Implementation of the Ius Curia Novit Principle in Examining Case at the Constitutional Court of the Republic of Indonesia," *Baltic Journal of Law & Politics* 15, no. 1 (2022): 453–65, https://doi.org/10.2478/bjlp-2022-00030.

father to provide *nafaqah* for children as basically *li al-intifā'*, so that they cannot be reimbursed if the income has been fulfilled either by using the assets of the mother, other relatives or debt, then with the concept of *Istiḥsān*, *li al-intifā'* concept can be switched to the concept of *li al-tamlīk* because there is the benefit of the child that requires it. Certainly, the ability of the father to provide a living is considered. In the concept of *istiḥsān*, sometimes there is a clash between general legal provisions and *maṣlaḥah*. Thus, if this clash occurs, a mujtahid can stipulate a law different from the general provisions that already exist based on the consideration that there is maślaḥah. In the distribution of *Istiḥsān*, this kind of *istiḥsān* is called *istiḥsān bi al-maṣlaḥah*.[33]

In the cases of lawsuits for a child's *nafaqah māḍiyah*, *istiḥsān bi al-maṣlaḥah* is the right concept to determine a legal decision that is more equitable and considers the *maṣlaḥah*. Based on this concept, if a father is proven to have the ability to provide a living for his child but deliberately neglects this obligation, then based on the concept of *istiḥsān bi al-maṣlaḥah*, it must be decided that the claim on a child's *nafaqah māḍiyah* is granted. It is for the sake of maintaining the welfare of the child. Moreover, it is also beneficial to avoid the stigma that is likely to emerge, that basically, a child's *nafaqah* may be considered trivial because it cannot be prosecuted even though it has been sued in court. Meanwhile, suppose it is proven that a father does not have the ability to provide for his child, either because of a poor economic condition or other conditions that meet the requirements. In that case, it can be decided as the common decision applied in the same case.

In essence, by using this concept of *istiḥsān*, it is expected that a judge will no longer be solely fixated on the decision of the Supreme Court of the Republic of Indonesia No. 608 K/AG/2003, dated March 23, 2005, which has so far been regarded as jurisprudence in adjudicating a case for a child's *nafaqah māḍiyah*, yet can be more objective in considering each existing matter. Because not all cases related to claims on a child's *nafaqah māḍiyah* present the same facts, by using the concept of *istiḥsān bi al- maṣlaḥah*, a judge

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[33] Fenny Bintarawati and Maskur Rosyid, "Mengurai Istiḥsān sebagai Sumber Hukum Islam," *Mumtaz: Jurnal Studi al-Quran dan Keislaman* 4, no. 2 (2020): 211–32, https://doi.org/10.36671/mumtaz.v4i02.137; Ya'qūb ibn 'Abd al-Wahhāb al-Bāḥusayn, *al-Istiḥsān Ḥaqīqatuh Anwā'uh Ḥujjiyyatuh Taṭbīqatuh al-Mu'āṣirah* (Riyāḍ: Maktabah al-Rushd, 2007).

can make more equitable decisions and be in line with *maqāṣid al-sharī'ah* (the objectives of Islamic law).[34]

Regarding the use of the *istiḥsān* concept in deciding a claim on a child's *nafaqah māḍiyah*, this is in line with what is explained by Yahya Harahap. He states that in dealing with a case, sometimes judges will find several possibilities related to juridical constraints and discovery of law to achieve justice based on the belief in the One and Only God. Mukti Arto explained that laws or existing regulations that are irrelevant for implementation, in this case, related to jurisprudence, are permissible to be bound and follow previous decisions.[35] However, assessing and analyzing the decision realistically and rationally by the facts must be previously conducted.

Ahmad Zuhdi Muhdlor and M. Natsir state that the legal principles extracted from the Supreme Court Decision Number 608K/AG/2003 cannot be applied completely *(*not completely *li al-intifā')*. Regarding the absolute essence of *li al-intifā'*, M. Natsir Asnawi explains that his argument is in line with the opinion of the Shāfi'iyah, who provide exceptions to the nature of *li al-intifā'* in a child's *nafaqah māḍiyah*. The essence of *li al-intifā'* can be excluded if the facts show that a father deliberately neglects his child's obligation to provide a living. At the same time, he can do it or has excess assets to fulfill the obligation to provide *nafaqah*.[36] Therefore, he believes certain casuistic situations can be used as exceptions in applying existing jurisprudential principles. In this case, the sensitivity of a judge's conscience is needed in applying this rule because this is very closely related to the welfare of a child.

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[34] Mohammad Hashim Kamali, "'Maqāṣid al-Sharī'ah': The Objectives of Islamic Law," *Islamic Studies* 38, no. 2 (1999): 193–208, https://www.jstor.org/stable/20837037; Mohammad Hashim Kamali, "Definition and Meaning of Maqāṣid," in *Actualization (Taf'īl) of the Higher Purposes (Maqāṣid) of Shariah* (Kuala Lumpur: International Institute of Islamic Thought (IIIT), 2020), 5–6; Husamuddin MZ and Harwis Alimuddin, "The Urgency of Maqāṣid al-Sharīa in Strengthening Religious Moderation in Aceh," *al-Risalah Jurnal Ilmu Syariah dan Hukum* 22, no. 2 (2022): 105–20, https://doi.org/10.24252/al-risalah.vi.29781; Asni Asni et al., "The Urgency of Transdisciplinary Approaches in Contemporary Islamic Law Studies," *KnE Social Sciences* 2022 (2022): 615–22, https://doi.org/10.18502/kss.v7i8.10779; Alimuddin Alimuddin, "The Urgency of the Maqāṣid al-Syarī'ah in Reasoning Islamic Law," *Britain International of Humanities and Social Sciences (BIoHS) Journal* 1, no. 2 (2019): 117–23, https://doi.org/10.33258/biohs.v1i2.42.

[35] A. Mukti Arto, *Praktek Perkara Perdata pada Pengadilan Agama* (Yogyakarta: Pustaka Pelajar, 2011).

[36] M. Natsir Asnawi, *Pembaharuan Hukum Perdata (Pendekatan Tematik)* (Yogyakarta: UII Press, 2019).

It is even explained in the statutory regulations that in certain circumstances, the court may order the mother to provide child *nafaqah* if, according to the court, the father is proven unable to fulfill this obligation. However, what must be emphasized in this case is in what circumstances a father is considered unable to fulfill his obligations to provide for his child as stipulated in Article 41 of Law No. 1 of 1974. The court must immediately declare that a father can only act as obligated to provide for his children with legally justifiable facts. A father must be declared incapable of fulfilling his obligations to provide for his child if it is proven in court that he is physically, mentally, materially, or financially incapable or if another emergency occurs and makes it impossible for him to fulfill the obligation.

The father's inability to provide for his child can be caused by several things: First, due to incapability. In civil law terms, it is called '*on match'*, which means the father concerned is powerless to carry out his obligations due to physical factors such as illness or disability. Second, there is an emergency or in civil law terms; it is called '*over match'*, where the father cannot carry out his obligation to provide for his child because of an emergency such as war, serving a prison sentence, or natural disaster, and other external factors. Considering such situations, a judge can conclude that a father cannot fulfill his obligation to provide *nafaqah*. In other words, he did not deliberately neglect his obligation. In this condition, missed and unpaid *nafaqah* cannot be sued against a father.

Based on this, it can be emphasized that the right concept to be used in Islamic law to present a more equitable decision in the case of a claim on a child's *nafaqah māḍiyah* is the concept of *istiḥsān* if the facts show that a father can provide a living, but deliberately neglected his obligations. In such cases, based on the concept of *istiḥsān*, the general concept of *li al-intifā'* can be excluded so that it can be decided to grant the claim on the child's *nafaqah māḍiyah*. If the judge at the Religious Court then decides to reject the claim on a child's *nafaqah māḍiyah* due to several factors that can be proven as the father's incompetence, then the reason used is logical and fair. Finally, it is not the right legal position to refuse any claim on a child's *nafaqah māḍiyah* due to the only existing jurisprudence or because a child's *nafaqah* is *li al-intifā'*, not *li al-tamlīk* because it is not relevant to the *nafaqah* provisions outlined by Islamic law or positive law.

Drew on this, it can also be emphasized that the use of *the istiḥsān* concept in the case of a child's *nafaqah māḍiyah*, as described above, can present more equitable law, more considerate for the benefit of all parties, both the father and mother/guardian and also the child. It aligns with *maqāṣid al-sharī'ah* regarding *ḥifẓ al-nasl* (preserving the offspring).

Conclusion

Based on the results of the discussion and analysis described in the previous chapter, it can be concluded that the regulations regarding a child's *nafaqah māḍiyah* are not clearly stated in the KHI. In contrast, the basis for prosecution is based on the Results of the Formulation of the Religious Chamber of SEMA No. 2 of 2019, which states that a child's *nafaqah māḍiyah* is a type of *nafaqah* that can be sued either by the child's mother or a guardian who takes care of the child. While the provisions that judges often use in deciding lawsuits for child's *nafaqah māḍiyah* are based on the Ruling of the Supreme Court of the Republic of Indonesia No. 608 K/AG/2003 dated March 23, 2005, and several other similar decisions, which are considered to have become jurisprudence. Viewed from the perspective of *istiḥsān*, the applicable jurisprudence regarding a child's *nafaqah māḍiyah*, which makes the compensation cannot be claimed, can be excluded with consideration of the benefit of the child and considering the facts that a father is proven capable of providing *nafaqah* but deliberately does not provide it. The concept of *istiḥsān bi al-maṣlaḥah* is used in this case so that the decisions given are not generalized but must also prioritize *maṣlaḥah* and pay attention to the facts that appear in court.

The Religious Court decisions that often reject claims for child *nafaqah māḍiyah* based on jurisprudence should be reviewed by the Religious Courts because they do not produce maṣlaḥat and justice for a child, and at the same time, have eliminated the obligation of a father to provide for his child.[a]

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