

ICH 2019**International Conference on Humanities****RESOLVING ARREARS MAINTAINANCE FOR CHILDREN:
PENANG CASE STUDY YEAR 2018**

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Abstract

In Islam, it is an obligation of a father to pay maintenance to his children during marriage and after divorce, even though the custody of his kids was given to ex-wife. Therefore, if a father fails to perform his duty, the arrears maintenance will be considered as a debt. This opinion was based on allegation that a default to pay maintenance will lead children and ex-wives facing financial difficulties in their current and future life. They need support for foods, clothes, shelter, education as well as medical treatment. Therefore, the compulsory payment that was ratified by the shariah court must be counted as an outstanding sum. In this case, various steps have been taken by the Shariah law in order to ensure financial support is constantly paid to the children. Therefore, the purpose of this study is to investigate the strategy taken by the shariah court in responding towards arrear maintenance of a father. The findings will portray statistic of cases, as well as the cost of arrear maintenance that involved. It was found that in Penang, the establishment of the Department of Family Support under the shariah court was greatly helps mothers in obtaining this deferred maintenance. Through enforcement of the judgemental debt summon or judgment notice by the shariah court, most of the default father paid the total amount that they have owed towards their children.

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1. Introduction

Maintenance (*nafkah*) is a living expense that includes foods, clothes, shelter, medical treatment, schooling and other necessities. In Islam the duty has been assigned to male guardian especially father. If there was no father, a grandfather is responsible towards his grandson should the former predeceased him (Abu Hassan, 2016). If there was no grandfather, a gentleman from parental heirs will take the reins. Therefore, in marital matters, a husband is responsible for the maintenance of his wife, and so much more, a father is responsible towards wellbeing of his children.

The burden to take care of the household maintenance is crucial to ensure the welfare of every dependents are very well preserved. As a priority matters in a family, *nafkah* is considered fundamental necessities (*daruriyyat*) which will guarantee the lives of children in good order and smooth. Failure to guarantee these living needs can result a mistreatment and abuse on children and wives. Causing harm to children is worse than wives, because the former are young, fragile and unable to survive on their own. Therefore, the scope in this study is focusing on arrears of children maintenance (Mohd Zin, 2007).

2. Problem Statement

Without a problem, a study cannot be gone aboard as a research is working on explaining and resolving it (Pelto, 2017). Therefore, the study found some issues identified in this matter pertaining to child maintenance, that are, delay in ruling the amount of child maintenance, many arrears payment of child maintenance as well as an evasion of father to pay his duty towards child *nafkah*:

2.1. Delay in ruling the amount of child maintenance

A trial in the shariah court carried amount of time, depending on cases and parties involve. A bigger case with higher number of parties involved will lead to some time to resolve. For derivative claims, it must be made after the primary claim has been resolved. For instance, a claim on child maintenance must come after trial on divorce (Nasohah, 2018). Thus, for child maintenance claim, children have to wait a while until the verdict of divorce was decided. If the trial takes up to months, then the decision on child maintenance have been made into delay for a longer period (Berita Harian, 2018).

Claim of child maintenance in the Shariah court must be made in accordance with certain procedures. There are several forms that need to be filled in for proofing the case and to prove that breach has occurred. During a trial, delays also can sometimes took place such as of health problems, change of judges or lawyers, or of sudden event. All these rules and procedures will influence in delaying the trial (Mohd Zin, 2007) and at a meantime, has denied welfare towards children. Hence, in some cases the trial was done through *ex-parte* or in the absence of defendant (Jamaludin & Buang, 2017).

2.2. Many arrears issues in payment of child maintenance

The arrears of child maintenance will occur if a father does not pay his monthly commitment. This would have affected the child's expenditure during the month. If the default continues from month to month, it will force current guardian such as mother or grandfather to find additional sources of income. While the

father is still healthy, strong and has a steady income. This problem will bring difficulties in childcare because the mother must find a nanny while she is working.

According to statistics, arrears of child maintenance involve millions of Ringgits that are still not settled. Even though there is an order that was issued by the Shariah court, the order was disregarded by some father, as it is only effective in certain states. This is because Islam is under state jurisdiction and it differs from one state to another (News Straits Times, 2018).

2.3. Evasion of a father to pay his duty

Obviously, a claim of child maintenance should be done after the divorce has been verified or in the event of a father's failure towards his responsibility. Not all fathers have the same kind of empathy and consideration. So, do in financial ability, background of a father as well as his education will reflect his economic capability. Not to mention if a father has problems at work and is not disciplined in his lifestyle. Those reasons will influence father to be insensitive with the needs of his children, thus, become irresponsible (Ibrahim & Mohd, 2013). As a result, the attitude will lead to mistreat their own children (News Straits Times, 2018).

3. Research Questions

Some of the research questions to answer the issues that have been discussed above are as follows:

- 3.1. What is the position of child maintenance in the Islamic law?
- 3.2. What cause claims of child maintenance to be deferred?
- 3.3. How mandatory child maintenance resolve the current problem?

4. Purpose of the Study

The purpose of this study is to answer the above research questions, that is:

- 4.1. To investigate the position of child maintenance in the Islamic law.
- 4.2. To scrutinize causes of child maintenance to be deferred.

To examine function of mandatory child maintenance in securing the welfare of children.

5. Research Methods

This study is a qualitative research method. The approach was opted on the basis that qualitative research was conducted on observation as well as conception of certain occurrence and submission. Qualitative research methods are engaged by focusing mainly on the social elements of the community conducts (Howell, 2013). In this mode of observation, the research was done through interpretative and explanatory data. According to Willis (2007), that facts and evidences were derived mainly from secondary sources, which are qualitative in nature and are governed by a variety of factors which are non-tangible and difficult to measure. In this study, two methods are employed in doing research, that are, data compilation and data analysis.

5.1. Data Compilation

The study applied two methods of data compilation techniques, that are, 'library research' and 'field research.' The methods were done in order to collect sufficient and appropriate data to tackle the research objectives of this study.

The secondary data which involved various printed materials and documents were gathered through library research. Secondary data means the data is readily available and some of it were findings from previous studies. The data which indicate to the research theme or topic will be screening and scanning for the purpose of answering research objectives. This means that secondary data is not originally collected but rather obtained from published or unpublished sources. In this study, library materials include data gathered from textbooks, published PhD dissertation, published Master's thesis, published academic papers, the Quran, the sunnah, newspaper articles, journals, social media communication (Walliman, 2011).

Meanwhile for field research, the data were collected through observation and interview with expert as well as whom directly involve with the study. The method of observation was done directly as one of researcher is a staff in the shariah court. Meanwhile, interview method was also used as it was complementary research method in the social sciences, because they give the opportunity for a more in-depth, open discussion, and more informal, free interaction between the interviewer and the interviewee. In sum, both methods are essential to obtain primary data. Primary data is a main data that identified as information which were collected during the conduction of a research. In applying interviews, two methods also were applied, that are, face-to-face interview as well as phone conversation. Beforehand, written question has been prepared in the form of open-ended query. In this context, structured interview protocols were applied to ensure the development of questions were well structured, planned and organized (Pelto, 2017).

5.2. Data Analysis

All data will be analysed manually through content analysis. The method was applied by analysing data based on themes, meanings, factors and concepts that are interspersed with the research questions and objectives. Then, the collected qualitative evidences were rearranged into specific groups of theme or elements to reflect on the study objectives. Then it is refined or generalized based on comprehension of the text. In this case, researcher aimed to detect common words and phrases, as well as by categorizing respondents together, in order to be able to determine trends and tendencies in the answers of the respondents (Pelto, 2017; Walliman, 2011).

Generally, analysis on qualitative data involve deductive and inductive method. Deductive method is making an evaluation on group of data to reach a logical true conclusion. Meanwhile, inductive is making extensive generalizations from observations (Pelto, 2017). From that, resolution can be made according to the majority indicators of these data. It is either to agree with the hypothesis or to disagree, supporting from every information that was gathered.

6. Findings

Child maintenance is compulsory to a father. The privilege of child maintenance can be claimed only after the shariah court has issued an order, after a divorce or a father neglect the duty. It is because the

rate of child maintenance is differing from one family to another, depending upon the ability of father. Therefore, the shariah court have to decide on the exact amount of child maintenance before the enforcement and claim can be made. If the amount of claim was made based on mutual written agreement, the court will not entertain as it does not carry a weight as the court order. In case a father fails to abide the order, the default sum became a father's debt and must be pay in full. According to Al-Shirbini (2001), pending child maintenance will be considered as liability when there was a legal ruling to execute the obligation. This responsibility is compulsory and if there was arrears, the default father have to pay the amount outstanding as soon as possible so that the needs of the child at that time can be satisfied, which maybe a child or his guardian has borrowed someone to meet the wants (Nasohah, 2018).

This situation has been stressed by the shariah law, in Section 77 of the Islamic Family Law Enactment (Pulau Pinang, 2004), where child maintenance can be claim as liability from a father if he fails to pay. In addition, Section 133 of the same legislation has underlined that if there was arrears, then the shariah court may order to levy the sum involved according to the existing law, or to penalize imprisonment for not more than a month on every month he has failed to oblige the duty. Mother of the child have right to file a claim for arrears maintenance through process that are known by judgement debtor summons (*Saman Penghutang Penghakiman*) and judgement notice (*Notis Penghakiman*). In Penang, the jurisdiction to handle the case was under responsible of the Family Support Section, Department of the Shariah Court of Malaysia (Nik Saberi, 2019).

Under Section 176 (Pulau Pinang, 2004), the default father will get summon from the shariah court after failure to pay his child maintenance order. The application was known as judgement debtor summons. The father will present at the court in charge and will be investigated by a judge on reasons of his negligence. The, a ruling will be made and at the same time the father has to fulfil his responsibility on that month. However, if the father continuously disregards the order and a second report has been made, then a judicial notice under Section 179 will be issued (Pulau Pinang, 2004). The father must provide strong reasons on his recurring defaults and pay lump sum of the amount outstanding or otherwise he will be imprisoned. In a case a father missing and unable to turn up before the court in charge, an arrest warrant will be issued to him (Salleh, 2019). As a result, these series of lawsuits on the default of child maintenance will ensure the arrears will be collected back fully.

6.1. The Welfare and Legal Procedures in Claiming of Arrears Child Maintenance

Neglecting children maintenance will cause several harms to the kids, especially in their everyday expenses. Many of these problems associated with the lack of responsibility of former husband/father towards his own children especially in providing care, either emotionally or financially. Children who happened to live in surrounding conflict of divorce-parent, polygamy or problematic father such as drug addict were categorized as vulnerable children who need special protection. Thus, their rights have to be given a high priority and concern from authorities (Makhtar et al., 2017). Delay in safeguarding of their rights will delay the welfare of their lives.

As consequences on debts of child maintenance after the shariah court order, the state law has provided measures to claim the arrears. The claim shall be made through one of the following processes

(Mohd Zin, 2007), that were underlined under the Syariah Court Civil Procedure Enactment (Pulau Pinang, 1999):

- a) Enforcement of judgement, where any judgement that has been ordered by the syariah court shall be enforced based on Section 148, for payment of money. Based on the said provision, a judgement or an order for the disbursement of money, may be enforced by one or more of the following means, such as by order of seizure and sale, or *hiwalah* proceedings, or by order of committal (based on Section 151).
- b) Execute order through seizure and sale under Section 160, where the bailiff shall, unless the property seized be money, proceed to sell the property in accordance with the provisions.
- c) Execute order through seizure and delivery under Section 163. Where execution is ordered by seizure and delivery of a chattel, the bailiff shall seize the chattel and upon payment of all expenses due shall deliver it to the judgement creditor.
- d) Execute an enforcement of judgement for possession of immovable property through Section 149, and
- e) Execution of *hiwalah* through Section 161, where the *muhal 'alaih* may pay to the bailiff the amount claimed or may deliver to him the property attached.

All of these procedures will guarantee arrears of child maintenance will be disburse back to them after selling of such assets.

6.2. Cases of Child Maintenance Claims in Penang Year 2018

In Penang, any claims related to the default of a father towards his child maintenance order by the syariah court, should be made at the Implementation and Enforcement Unit of the Family Support Division, Penang Syariah Judicial Department. In year 2018, there was 43 claims were made about arrears child maintenance as portrayed by below statistic in Table 01:

Table 01. Registration of Child Maintenance Claim Year 2018

Month	Registration	Resolved
January	3	2
February	4	-
March	1	1
April	2	2
May	7	3
June	4	4
July	2	3
August	11	7
September	2	1
October	3	1
November	1	2
December	3	4
Total	43	30

Based on the above Table 01, the total number of cases that were registered in 2018, 30 cases or around 70 percent from the registered cases were successfully resolved. The highest case registered as well as being resolved is in the month of August, which is 11 and 7 cases respectively. The second highest registered was in the month of May by 7 cases and share equally by month of June and December at 4 cases. In average, registration case was 3.5 cases per month while resolving case was 2.5 cases per month. This means that the registration case precedes the resolved case by 1 case. While the remainder of the cases of 2018 will be brought to year 2019 as each case is still pending in court. In overall, the type of cases registered was in the of form judgement debtor summons. And only four cases are registered in the form of judgement notice, that was, one case in April and three cases in May (Nik Saberi, 2019).

The settlement of arrears child maintenance claim of year 2018 has been resolved through two ways, firstly through discussion of both parties under supervision of the shariah court officer from the Section of family support; and secondly through order of the shariah court. There were two cases where a mother has withdrawn the claim after agreed on mutual arrangement between parties (Nik Saberi, 2019). The amount of settlements or sums that have been collected through the trial was shown in the Table 02 below:

Table 02. Sum Collected of Arrears Child Maintenance Claim 2018

No.	No. of Mal Cases	Date of Order	Amount
1	07003-037-0109-2016	9/24/2018	RM3,490.00
2	07004-037-0290-2017	2/22/2018	withdrew
3	07004-037-0350-2017	8/10/2018	RM2,250.00
4	07400-037-0089-2017	8/10/2018	RM12,300.00
5	07100-037-0298-2017	6/28/2018	RM10,000.00
6	07200-037-0101-2017	1/10/2018	RM253,100.00
7	07002-037-0294-2017	12/4/2018	RM15,050.00
8	07100-037-0197-2017	11/29/2018	RM15,800.00
9	07100-037-0184-2017	7/27/2018	withdrew
10	07001-037-0061-2018	4/12/2018	RM11,700.00
11	07001-037-0250-2018	5/9/2018	RM10,500.00
12	07002-037-0106-2018	6/26/2018	RM18,000.00
13	07002-037-0359-2018	6/27/2018	RM2,660.00
14	07002-037-0547-2018	8/7/2018	RM4,600.00
15	07002-037-0610-2018	8/30/2018	RM5,900.00
16	07004-037-0257-2018	7/4/2018	RM4,900.00
17	07004-037-0264-2018	7/25/2018	RM1,700.00
18	07100-037-0124-2018	6/7/2018	RM7,600.00
19	07100-037-0125-2018	7/10/2018	RM3,550.00
20	07400-037-0084-2018	9/13/2018	RM23,200.00
21	07001-037-0680-2018	12/6/2018	RM25,954.00
22	07002-037-0871-2018	12/4/2018	RM2,400.00
23	07003-037-0167-2018	12/5/2018	RM20,900.00
24	07200-037-0184-2018	11/29/2018	RM15,500.00
25	07200-037-0294-2018	12/6/2018	RM20,000.00
26	07001-037-0061-2018	4/12/2018	RM11,700.00
27	07001-037-0250-2018	5/9/2018	RM10,500.00
28	07001-076-0596-2017	4/12/2018	RM14,730.00
29	07100-076-0044-2018	5/24/2018	RM33,880.00
30	07002-076-0355-2018	5/29/2018	RM11,433.00
TOTAL			RM573,297.00

In year 2018, the shariah court succeeded in collecting RM573,297 of arrears child maintenance claim. The highest collection was RM253,100.00 that was recorded in January from last year case. It was followed by amount RM33,880.00. According to Nik Saberi (2019), most of the cases has been resolved after a father was summoned to be imprisoned if he fails to pay the full cost. Meanwhile the minimum amount of arrears child maintenance case in the Table 02 was RM1,700.00 that was recorded in July. Based on 43 registered cases, only four cases that involved judgement notice which may imprison a father who fail to pay the overdue amount. And the rest was cases under judgement debtor summon.

Based on statistics that were provided by the Penang Family Support Division (Nik Saberi, 2019), it portrays that there were many cases involving arrears of child maintenance. However, the Division has greatly played its roles in assisting mothers to reclaim the money that was well-ordered by the shariah court. The commitment of the shariah court in establishing the Section of Family Support really facilitate the issue of fathers' failure in paying his children maintenance. The arrears were collected in many ways such as by instalment, two or three times of payment and payment in full. In addition, Employees' Provident Fund (EPF) withdrawals are also allowed to be handed over to the mother when the father's retirement money is permitted to be withdrawn. A transfer of property is also allowed when the parties have agreed to swap permanent property such as a house, land or car for the exchange of the amount due. If a father is employed and has an employer, the deduction can also be made through the order of the detention of income. As a result, the child's arrears maintenance will be settled, and the father was able to pay the amount due effectively (Sinar Harian, 2018).

7. Conclusion

Child maintenance is a major responsibility that a father must fulfil. Islam considered it as debts for the default father who maltreat his children. Failure to do so can result in harm to children as it may affect their quality of life, education and medical treatment. Therefore, Penang Syariah courts have taken an essential move to set up a family support division to help certain wife in claiming the right of her children. Through judgement debtor summon and judgement notice, the shariah court can force a possible father to carry out his religious responsibilities in full of consciousness. Through these law enforcements, a father may be imprisoned for a month or several months according to the default months to pay the arrears. Other alternative enforcement such as through seizure and sale of one's father's assets can also overcome these barriers and guarantee the rights of the child to get the arrears through various angles.

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