



Article History	Received: 20-06-2025	Reviewed: 29-06-2025	Accepted: 30-07-2025	Published: 07-08-2025
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ANALYSIS OF THE RELIGIOUS COURT DECISION Number 119/Pdt.G/2020/PA.Plk REGARDING CHILDREN'S MADHIYAH SUPPORT FROM THE PERSPECTIVE OF HIFDZ NAFS AND JUDICIAL ACTIVISM THEORY

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ABSTRACT

In the Palangkaraya Court Decision Number 119/Pdt.G/2020/PA.Plk there is a dynamic where the judge requires the ex-husband to provide child support as much as requested by the applicant without considering the income and financial strength of the ex-husband. So this study was conducted by analyzing the court's decision in the Theory of hifdz nafs in Maqashid Syariah and the theory of Judicial Activism. This study uses a qualitative method with a research location which is a Library study. The results of this study indicate that the Decision made by the judge at the Palangkaraya Religious Court is stated in the purpose of maintaining the soul which is implemented in the provision of food, drink, clothing and also Education. Meanwhile, the Judge's Decision is at the level of hajiyyat (secondary) not dharuriy (primary). Therefore, in the theory of Judicial Activism, judges at the Palangkaraya Religious Court should reinterpret and formulate decisions that accommodate peace between two people who have separated, by applying the Interpretive Fidelity dimension to obtain substantive justice.

Keywords: Livelihood, Hifdz Nafs, Judicial Activism.

ABSTRAK

Pada putusan Pengadilan Palangkaraya Nomor 119/Pdt.G/2020/PA.Plk terdapat dinamika di mana hakim mewajibkan mantan suami memberikan nafkah anaknya sebanyak yang diminta oleh pemohon tanpa memperhatikan penghasilan dan kekuatan finansial mantan suami. Maka dilakukanlah penelitian ini dengan menganalisis putusan pengadilan itu dalam Teori hifdz nafs dalam Maqashid Syariah dan teori Judicial Activism. Penelitian ini menggunakan metode kualitatif dengan tempat penelitian yang merupakan studi Pustaka. Hasil dari penelitian ini menunjukkan bahwa Keputusan yang ditetapkan hakim di pengadilan Agama Palangkaraya tertera dalam tujuan pemeliharaan jiwa yang terimplementasikan dalam pemberian makan, minum, pakaian dan juga Pendidikan. Sementara itu, Putusan Hakim masuk pada taraf *hajiyyat* (sekunder) bukan *dharuriy* (primer). Oleh karena itu, dalam teori Judicial Activism hendaknya para hakim di Pengadilan Agama Palangkaraya melakukan penafsiran kembali serta merumuskan putusan yang mengakomodasi ketentraman antara dua orang yang telah berpisah, dengan menerapkan dimensi *Interpretive Fidelity* untuk mendapatkan keadilan substantive.

INTRODUCTION

Marriage is designed to foster a harmonious bond. The mitsaqan Ghalidzan (the obligation of marriage) stipulated in the Quran carries significant consequences for a successful marriage. It is a responsibility not only required while the husband and wife are still together, but also required even after they separate. The required maintenance is not limited to the husband's support for his wife, but also the former husband's support for their children. This is a strong agreement that cannot be broken even after the couple divorces.¹

Divorce is the legal end of a marriage. In Islam, divorce is not prohibited if the marital situation no longer allows for reunification and could potentially cause significant problems. After a marriage ends, the former spouses retain their respective responsibilities. The former husband is still required to provide maintenance during the former wife's iddah (waiting) period and to support the children until they are adults and independent.

In Indonesia, divorce is divided into two types based on the party who initiates it: a divorce by petition, filed by the wife, and a divorce by talaq, filed by the husband. Divorce regulations are outlined in the law, which distinguishes between divorces based on the wife's will and divorces based on the husband's will. This is due to the differing characteristics of Islamic law, so the divorce process desired by the wife will differ from that desired by the husband.²

First, Divorce and Talak is stated in Article 114 of the KHI which states, "A marriage can end due to divorce that occurs through talak or through filing a divorce suit." Further explanation is contained in Article 129 of the KHI which explains, "A husband who wishes to issue a divorce must submit an application either verbally or in writing to the competent Religious Court in the area where his wife lives, accompanied by reasons and a request to hold a hearing."

Second, Divorce by Lawsuit is regulated in Article 132 paragraph 2 which explains, "A divorce application can be submitted by the wife or her representative to the Religious Court whose jurisdiction includes the Plaintiff's residence, unless the wife leaves the house without the husband's permission." The difference in the way of filing between divorce by lawsuit and divorce by

¹ Nuriel Amiriyyah, Nafkah Madhiyah Anak Pasca Perceraian: *Studi Putusan Mahkamah Agung Republik Indonesia Nomor 608/K/AG/2003*. (Jurisdictie: Jurnal Hukum Islam dan Syariah Vol. 6. No. 1 Tahun 2015)

² Sheila Fakhria, *Cerai Gugat dan Implikasinya Terhadap Hak-hak finansial Perempuan*, (Legitima, Jurnal Hukum Keluarga Islam, No. 1, 2019)

talaq in the Religious Court shows that each process has its own consequences. The important thing to understand regarding the consequences of divorce by talaq is contained in Article 41 letter c of Law No. Article 149 of the Compilation of Islamic Law states: "(c) The court may require the ex-husband to provide maintenance and/or determine certain obligations to the ex-wife."

Article 149 of the Compilation of Islamic Law states: "If a marriage ends due to divorce by talaq, the ex-husband is obligated to: a) provide appropriate mut'ah (partial payment) to the ex-wife, either in the form of money or goods, unless the ex-wife has not yet entered into a marital relationship; b) provide maintenance, accommodation, and clothing for the ex-wife during the iddah period, unless the ex-wife has received a ba'in divorce or committed nusyuz (partial payment) and is not pregnant; c) pay all outstanding dowries, and half if they were paid before the marital relationship occurred; d) cover the cost of caring for any children under 21 years of age." Furthermore, in cases of divorce by talaq filed by a husband against his wife, Article 140 of the Compilation of Islamic Law states that the ex-husband must meet household needs such as maintenance, including mut'ah maintenance, madhiyah maintenance, iddah maintenance, and child support.

From the statement above, it can be concluded that a father is obligated to provide for his children by virtue of their birth, and also has a responsibility to support the mother who gave birth, breastfed, and cared for the child. Madliyah child support is an obligation a husband must fulfill to his children, but which he fails to fulfill. Most Islamic legal experts agree that this support becomes a debt when the obligation arises and the husband refuses to fulfill it. Generally, madliyah child support is the husband's responsibility for the neglected child. This support becomes a debt from the moment the obligation arises and the father fails to fulfill it. The debt can be considered a valid debt unless it has been paid and with the wife's consent, in which case the support debt is considered settled.

In a decision issued by the Palangkaraya Religious Court number 119/Pdt.G/2020/PA.Plk, a divorce case occurred in which the couple had four children. In this case, the ex-husband, who earned Rp. 7,500,000 is required to provide maintenance to his four children with a nominal amount of Rp. 4,500,000 excluding education and health costs until the child is an adult. This is a unique decision to be studied to determine the urgency of providing child support and also to find out the reasons and actions of the judge in the perspective of the theory of Judicial Activism. Therefore, this research was written with the title Analysis of the Decision of the Palangkaraya Religious Court number 119 /

RESEARCH METHODS

This paper is a normative empirical study using a qualitative approach. Data collected are based on primary sources drawn from all Religious Court decisions related to child maintenance. Secondary data are drawn from legal journals, scientific journals, Islamic texts, and other supporting documents. Data were collected through document studies in the form of court decisions and a literature review of all secondary sources. Data analysis techniques employed a normative approach to analyze court decisions to assess their alignment with the Maqasid Sharia and Judicial Activism theories.

RESULTS AND DISCUSSION

The Palangkaraya Religious Court's ruling No. 119/Pdt.G/2020/PA.Plk, requiring the ex-husband to spend 4.5 million rupiah on four children, is a ruling that occupies the position of hajiyat (obligatory obligation) within the hifdz nafs (obligatory obligation) theory of the Maqasid Sharia. This ruling disregards the father's obligation to provide for his four children.

Abdullah Ibn Ibrahim Al Thariqi explains in his book *Musykilatu Al Syarf*:

أما الإسراف بأكل ما زاد عن الحاجة وشربه فهو داخل في النهي في قوله تعالى: { وَكُلُوا وَاشْرَبُوا وَلَا تُسْرِفُوا } [الأعراف: 31] يقول القرطبي (ت 671 هـ): " قال ابن عباس: أحل الله في هذه الآية الأكل والشرب ما لم يكن سرفاً أو مخيلة. فأما ما تدعو الحاجة إليه وهو ما سد الجوعة، وسكن الظمأ فمندوب إليه عقلاً وشرعاً، لما فيه من حفظ النفس وحراسة الحواس، ولذلك ورد الشرع بالنهي عن الوصال؛ لأنه يضعف الجسد ويميت النفس ويضعف عن العبادة، وذلك يمنع منه الشرع ويدفعه العقل. . . . وقد اختلف في الزائد على قدر الحاجة على قولين: فقيل حرام، وقيل مكروه، قال ابن العربي: وهو الصحيح فإن قدر الشعب يختلف باختلاف البلدان والأزمان والأسنان والطعمان [

Excessive consumption in food and beyond one's needs falls under Allah's prohibition, as stated in Surah Al-A'raf, verse 31. Allah permits food and drink in this verse as long as it does not reach the level of excess or luxury. However, consumption that reaches the level of desire, that is, fulfilling the needs of hunger and quenching thirst, is sunnah according to reason and sharia, because it contains elements of preserving the soul and all other needs. Therefore, sharia prohibits voluntary fasting because it can weaken the body and kill the soul, as well as weaken worship. Therefore, it is prohibited by sharia and rejected by reason. There are differences of opinion regarding the ruling on exceeding needs, based on two opinions. Some say it is haram (forbidden), while others say it is

disliked. This second opinion is the choice of Ibn Arabiy. This is the correct opinion. The measure of satiety varies from country to country, and varies in place, time, age, and food.³

Therefore, in this case, it can be concluded that a father's support for his child is a dharuri (primary) need. However, this changed when his ex-wife granted his demands, which exceeded basic needs. Furthermore, in this case, it was known that the father and his ex-wife both worked and earned income. Therefore, this need was not one that required the father to provide support for his child regardless of the amount requested or demanded by his ex-wife.

From the text above, it can be seen that each person's satisfaction in meeting their needs varies depending on the type of material, time, place, and age. Therefore, it is important to consider the father's income, which differs from that of the middle- to upper-class population. Verse 233 of Surah Al-Baqarah explains:

وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ ۚ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا ۚ لَا تُضَارَّ وُلْدَةٌ بِوُلْدِهَا وَلَا مَوْلُودٌ لَهُ بِوَلَدِهِ ۚ وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ ۚ

And it is the father's obligation to feed and clothe his mothers in a manner that is just and fair. A person is not burdened except according to his ability. A mother should not suffer hardship because of her child, nor a father because of his child, and the heirs are also obligated to do the same.

According to Wahbah Az-Zuhaili's opinion in his writings, there are several conditions that must be met for the obligation to provide for children to be enforced. First, parents must be able to provide for their children or have the ability to work. Second, children must be poor, meaning they have no property or are unable to work. Third, people who are considered weak or unable to work.⁴

The following is an explanation of the requirements for the obligation to provide child support: First, parents must be able to provide support and be able to work. This means parents must be healthy, not sick, and not have any physical limitations that prevent them from providing support. Second, children must be poor, without property, or unable to work. This means that even if the child is an

³ Abdullah Ibn Ibrahim Al Thariqiy, *Musykilatu Al Syaraf Fi Al Mujtama' Al Muslim wa Ilajuha Fi Dhau'i Al Islam*. (Mamlakah Saudiyah, Wizarat Al Syu'un Al Islamiyah wal Awqaf, cet. 1, 1321 H), hlm. 62.

⁴ Wahbah Al Zuhaili, *Fiqh Al Islam Wa Adillatuhu*, Trans, Abdul Hayyie Al Kattani, Vol. 10, (Jakarta: Gema Insani Press, thn 2011), j. 10, hlm. 137.

adult or married, if they are in a situation of poverty or have poor health, such as illness or physical disability, and are unable to work, then the parents are still obliged to provide for the child.

Third, individuals who are considered weak and unable to work. This means that individuals who are considered weak and unable to function are usually viewed as children or women. They are often considered helpless and incapable, especially when faced with heavy physical work or work that requires a lot of time and energy. Therefore, parents are required to provide financial support to these individuals. Referring to the previous discussion, although the primary purpose of marriage is to create a happy and lasting family, if the marital situation is no longer sustainable, the final step is to choose divorce.

In other cases, needs at the level of Hajiyyah, such as food, are sunnah (religious obligation). How can a command oblige parents to fulfill a need that is sunnah? However, even though this Judge's Decision is a manifestation of the implementation of hifdz nafs (self-control) in matters of meeting the needs of food, drink, and clothing, as explained in the book Maqasid Syariah Al Islamiyah:

[أما من جهة الاستمرار والدوام: فقد شرع عدة وسائل لحفظ النفس. أوجب على الإنسان أن يمد نفسه بوسائل الإبقاء على حياته من تناول للطعام والشراب وتوفير اللباس والسكن، فيحرم على المسلم أن يمتنع عن هذه الضروريات إلى الحد الذي يهدد بقاء حياته. كما اعتبر الحصول على هذه الضروريات هو الحد الأدنى الذي يلزم المجتمع ممثلاً في الدولة بتوفيره للأفراد العاجزين عن توفيره لأنفسهم، بل أوجب على الإنسان - إذا وجد نفسه مهددة - أن يدفع عن نفسه الهلاك بأكل مال غيره بقدر الضرورة.]

As for the sustainability aspect, it is

It is obligatory for humans to provide themselves with all the means to survive, including food and drink, clothing, and shelter. Therefore, it is forbidden for Muslims to deprive themselves of these needs to the point that it threatens their survival. It is equally important to provide for these needs to the minimum. It is also obligatory for those in government to provide for the needs of individuals who are weak and unable to fulfill their basic needs. Sharia even requires everyone (who is threatened with death) to avoid being destroyed by taking what belongs to others, just enough for their needs.⁵

Analysis of Judicial Activism

⁵ Wizaroh Al Awqaf Al Saudiyyah, Maqashid al Syariah Al Islamiyyah. (Saudi, Kitab Al Waraqiy), hlm. 22.

In the context of the judge's decision in the case of child support, judicial activism can be applied in situations aimed at protecting citizens' constitutional rights or upholding substantive justice. Therefore, a welfare-based approach to protecting five basic elements, one of which is preserving life, is essential. The justice that should be implemented in this situation is that the four children receive their right to child support, provided the father can also meet his living needs. In other words, the father's support for his children does not deprive the father of his right to continue living by meeting his personal needs. This is especially true given that the ex-wife, the mother of the four children, also works to support herself.

Thus, this decision should be reinterpreted, taking into account the Interpretive Fidelity dimension, which reassesses the relevance of a decision to the intent of the legislator in the matter. Therefore, the approach taken should be the theory of benefits contained in Maqashid Syariah, by returning the benefit in this case to the necessities of life (*maslahat dharuriyat*) and not the needs of the community (*maslahat hajiyyat*).

[(م) يُقَدَّمُ حِفْظُ (النَّفْسِ) عَلَى حِفْظِ النَّسَبِ وَالْعَقْلِ وَالْمَالِ لِتَضَمُّنِهِ الْمَصَالِحَ الدِّينِيَّةَ لِأَنَّهَا إِنَّمَا تَحْصُلُ بِالْعِبَادَاتِ وَحُصُولُهَا مُوقُوفٌ عَلَى بَقَاءِ النَّفْسِ (م) يُقَدَّمُ حِفْظُ (النَّسَبِ) عَلَى الْبَاقِيَيْنِ لِأَنَّهُ لِيَقَاءِ نَفْسِ الْوَلَدِ إِذَا تَحَرَّمَ الزَّانَا لَا يَحْصُلُ اخْتِلَاطُ النَّسَبِ فَيُنْسَبُ إِلَى شَخْصٍ وَاحِدٍ فَيَهْتَمُّ بِرَبِّيَّتِهِ وَحِفْظِ نَفْسِهِ وَإِلَّا أَهْمِلَ فَتَقُوتُ نَفْسُهُ لِعَدَمِ قُدْرَتِهِ عَلَى حِفْظِهَا]

Urgency The preservation of the soul is given priority over the preservation of offspring, the preservation of reason, and wealth, because in the preservation of the soul there is the benefit of Religion. Because the success of a worship depends on the existence of life. Then the preservation of life is given priority over other preservation. To preserve the life of the child. Because with the prohibition of adultery, the mixing of lineages will not be realized. Then his lineage will return to one person who will pay attention to his education and preserve his soul. If this does not exist, then his soul will be wasted and will die due to his inability to preserve it.⁶

The focal point in understanding the text above is that the preservation of life takes precedence over the preservation of property. If we refer back to the decision of the Supreme Court of the Republic of Indonesia number

⁶ Syamsuddin Muhammad Ibnu Amir Hajj, *Al Taqirir Wa al Tahrir ala Tahrir Kamal Ibn Al Humam*, (Dar Al Kutub al Ilmiyah, cet. 2, 1983), j. 2, hlm. 231.

608/K/AG/2003, we will find an understanding that the father's obligation to provide support to his child is *lii intifa*, not *lii tamlik*. This means that the father's obligation to provide support to the child is of a beneficial nature and is for the child to benefit from, not that the support given by the father to the child becomes a right of ownership that fully belongs to the child. The benefits of the support received by the child from the father can be taken advantage of, for example, for schooling or fulfilling the child's other rights.

In this case, the author can conclude that the preservation of assets falls within the realm of *li tamlik* (legal arbitration), as its focus is on assets, not their function. Therefore, it is clear that the preservation of assets is subordinate in its urgency to the preservation of the soul. Therefore, it is not excessive for judges to prioritize the preservation of the soul over the preservation of assets. The ex-husband, the respondent in this case, felt he had not received this, and therefore filed an appeal with the Palangkaraya High Religious Court, with decision number 10/Pdt.G/2020/PTA.Plk.

Although the Supreme Court's decision was used as jurisprudence by subsequent judges in similar cases concerning child support, subsequent judges do not necessarily have to follow this jurisprudence on similar issues, as judges have *ex-officio* rights. *Ex-officio* rights, as defined in the legal dictionary, are due to their position.³¹ Therefore, *ex-officio* rights are the rights of judges due to their position, and judges have the authority to decide a case based on their own considerations and reasoning. This includes cutting off children's *madliyah* support. In fact, this right has been implemented, it just needs a little caution in the provisions to provide balance for both parties.

CONCLUSION

From the explanation above, it can be concluded that the Palangkaraya Religious Court Judge's decision No. 119/Pdt.G/2020/PA.Plk regarding the ex-husband's obligation to fulfill the child's right to maintenance has fulfilled the child's right to food, drink, clothing, shelter, and education costs. This aligns with the objectives of implementing Islamic law, one of which is to preserve the soul. In this decision, the Palangkaraya Religious Court focused its decision on the *hajiyat* (pilgrimage) needs, not the *dharuriyah* (necessary needs).

In its Judicial Activism analysis, the Palangkaraya Religious Court has not applied the Interpretive Fidelity dimension to achieve substantive justice. In this case, the greatest hope in the application of Judicial Activism is the implementation of justice, which is the essence of fulfilling child maintenance. Justice for the father is applied by not burdening him beyond his earning

capacity. Meanwhile, the justice that the mother should receive is assistance from her ex-husband in the form of money to meet her child's needs, and by allowing him to visit and see her biological child.

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