

**JUDICIAL CONSIDERATIONS IN ADJUDICATING CHILD MAINTENANCE CLAIMS FROM THE PERSPECTIVE OF PROGRESSIVE LEGAL THEORY NAD MAQASHID AL-SYARIAH (A NORMATIVE JURIDICAL STUDY ON DECISION NUMBER 4115/PDT.G/2023/PA.KAB.MLG. AND DECISION NUMBER 229/PDT.G/2021/PA SAK.)**



**Hamzah<sup>1</sup>**

**Universitas Islam Negeri Sumatera Utara, Medan, Indonesia**  
[hamzah068@gmail.com](mailto:hamzah068@gmail.com)

**Dhiauddin Tanjung<sup>2</sup>**

**Universitas Islam Negeri Sumatera Utara, Medan, Indonesia**  
[dhiauddintanjung@uinsu.ac.id](mailto:dhiauddintanjung@uinsu.ac.id)

**Ramadhan Syahmedi Siregar<sup>3</sup>**

**Universitas Islam Negeri Sumatera Utara, Medan, Indonesia**  
[ramadhansyahmedi@uinsu.ac.id](mailto:ramadhansyahmedi@uinsu.ac.id)

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**Abstract**

This research analyzes judges' considerations in adjudicating lawsuits for child *māḍiyah* maintenance from the perspective of progressive legal theory and Maqashid Al-Syariah, with case studies on Decision Number 4115/Pdt.G/2023/PA.Kab.Mlg. and Decision Number 229/Pdt.G/2021/PA Sak. The study results show that judges strive to achieve substantive justice by prioritizing the child's welfare. Progressive legal theory is applied by considering the social context and factual conditions. At the same time, Maqashid Al-Syariah ensures that decisions are aligned with the objectives of sharia, namely the protection of religion, life, intellect, lineage, and property. The combination of these two perspectives allows judges to make formally and substantively just decisions, and provide optimal protection for children's rights. This study highlights the importance of flexibility and adaptation in the application of law to achieve true justice in cases of child *māḍiyah* maintenance.

**Keywords:** *Māḍiyah*, Progressive Legal Theory, Maqashid al-Sharia, Juridication

## INTRODUCTION

An argumentative discourse regarding alimony is always an interesting subject to discuss. The reason is, that alimony is a legal consequence of a marriage bond. As a legal consequence, alimony is situated at a symmetrical point between rights and obligations.

Based on socio-religious and socio-legal perspectives, providing for the family is an obligation of the husband as the head of the household in Q.S. al-Thalaq (65) ayat 7, meaning

لِيُنْفِقْ ذُو سَعَةٍ مِّنْ سَعَتِهِ وَمَنْ قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنْفِقْ مِمَّا آتَاهُ اللَّهُ لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا مَا آتَاهَا سَيَجْعَلُ اللَّهُ بَعْدَ عُسْرٍ يُسْرًا

"Let the person who has ample means spend according to his means, and the person whose provision is restricted should spend from what Allah has given him. Allah does not burden a soul beyond what He has given it. Allah will grant ease after difficulty."

The above verse can be understood as a form of the husband's obligation to provide financial support, according to his capability. In addition to the marital relationship, which results in the husband's obligation to support his wife, financial support is also the responsibility of a father to his child. Wahbah al-Zuhaily explains,

أن على الأب المولود له نفقة أولاده، بسبب الولادة

The reason a father is obliged to provide for his children is due to their birth. In his explanation, Al-Zuhaily cites Q.S. al-Baqarah (2) 233:

وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُبَيِّمَ الرِّضَاعَةَ  
وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا لَا تُضَارَّ  
وَالِدَةٌ ۖ بِوَالِدِهَا وَلَا مَوْلُودٌ لَهُ بِوَالِدِهِ وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ فَإِنْ أَرَادَا فِصَالًا عَنْ  
تَرَاضٍ مِنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا وَإِنْ أَرَدْتُمْ أَنْ تَسْتَرْضِعُوا أَوْلَادَكُمْ فَلَا  
جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا آتَيْتُم بِالْمَعْرُوفِ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ

And mothers shall breastfeed their children for two full years, for those who wish to complete the nursing period. And the father must provide for their sustenance and clothing in a fair manner.

The issue of providing sustenance is not only limited to the existence of a marital relationship. It also has implications in the event of a divorce. This is especially significant when one of the triggers for the divorce is the husband's or father's failure to fulfill his obligation to provide sustenance to his wife and/or children. The consequence of the

husband's failure to fulfill his obligation to provide sustenance can lead to a lawsuit against him as the sustenance provider. This lawsuit aims to ensure that sustenance is provided. Sustenance that was not provided when it was due is referred to as "*nafkah māḍiyah*" (past sustenance).

Regarding the past sustenance for a wife, Wahbah al-Zuhaily explains:

، وقال الجمهور إنها تصير ديناً قوياً بمجرد وجوبها وامتناع الزوج عن أدائها إلى الزوجة، فلا يسقط إلا بالأداء أو الإبراء كسائر الديون، ولا يسقط بمضي المدة بدون إنفاق، ولا يسقط المتجمد منها في الماضي بنشوز الزوجة ولا بالطلاق ولا بالموت

In the case of a husband refusing to provide maintenance to his wife, the majority of scholars agree that the maintenance automatically becomes a debt of the husband. This maintenance debt cannot be settled except by payment or by the wife's willingness to forgive it, similar to other types of debt. It does not become nullified with time without repayment; nor does it become nullified if the wife is disobedient (*nusyuz*), through divorce, or by the death of either party.

In this context, there is a difference between a husband's maintenance obligation to his wife and a parent's maintenance obligation to their child. As mentioned by Muḥammad al-Khatib al-Syarbayni, the maintenance of a child does not become a debt of the parents if the time for its payment has passed or if the dependent no longer needs it. However, if the child or an interested party demands past due maintenance for the child (*māḍiyah*) from a judge, then that maintenance becomes obligatory again based on the judge's decision.

وهي الكفاية. وتسقط بفواتها، ولا تصير ديناً عليه إلا بفرض قاض، أو إذنه في اقتراض لغيبة أو منع

The provision for relatives (children) is to cover their needs (*al-kifayah*). These needs will be nullified if the time for their fulfillment has passed and do not become a debt that must be paid later, except by a judge's decision or with the consent of the provider to incur debt. This applies whether the provision is not fulfilled because the provider is absent or because there is an obstacle preventing the fulfillment of the provision. More specifically, according to Imam al-Ramli, it is as follows:

The translation according to Imam al-Ramli is as follows:

وتسقط مؤن القريب التي لم يأذن المنفق لأحد في صرفها عنه لقريبه ( بفواتها ) بمضي الزمن وإن تعدى المنفق بالمنع لأنها وجبت لدفع الحاجة الناجزة مواساة وقد زالت بخلاف نفقة الزوجة

The obligation to provide maintenance for relatives (children) that is not delegated to others for fulfillment is nullified by the passing of the payment period, even if the person intentionally does not fulfill this maintenance. This is because the maintenance for relatives (children) is only to meet their needs, and these needs are met when there is ease from the provider. However, when these needs have passed, the recipient no longer requires them, thus the obligation to fulfill these needs is no longer imposed. This is different from the maintenance of a wife, which must still be fulfilled as it becomes a debt for the husband.

The reason behind the scholars' opinion is that a father provides maintenance to his child (which is the obligation of the provider towards the dependent, where the dependent) can only benefit from the maintenance (*li intifa'*); not own (*li tamlik*) which could be considered the child's full property.

The maintenance of a child does not become the property of the child. Thus, the negligence of a father who does not provide maintenance to his child (*nafqah māḍiyah al-aulād*); similarly, the negligence of a child who does not provide maintenance to his parents (*nafqah māḍiyah al-wālid*) does not become a debt that must be repaid later. However, if this maintenance is brought to court and the judge issues a ruling that orders the responsible party to pay it, then the child's maintenance becomes obligatory to be paid by the parents later and will remain a debt if it is not yet paid.

This past maintenance for the child (*nafkah māḍiyah al-aulād*) is different from the costs of custody and maintenance for the child, which means the costs of custody and maintenance for the child whose custody rights have been assigned to one of the parents or other family members who replace them.

About the above explanation, in the current judicial system, judges have several rights regulated by legislation, one of which is the ex officio right. The ex officio right is a right possessed by a judge due to his position as a judge. With this ex officio right, a judge has the authority to decide a case based on legal considerations and the judge's reasoning (*ijtihad*).

Thus, in deciding a case of child maintenance not provided by the parents when the payment time arrives, the judge with this *ex officio* right can determine that the maintenance becomes a debt of the responsible party that must be paid according to the provisions in the judge's ruling.

Meanwhile, based on the author's research, in Religious Court Decisions, there are two different decisions regarding past child maintenance. In Decision Number 229/Pdt.G/2021/PA Sak., the lawsuit for past child maintenance was rejected by the judge; whereas in Decision Number 4115/Pdt.G/2023/PA.Kab.Mlg., the lawsuit for past child maintenance was granted by the judge. Even though in these two decisions, the material evidence can be proven, the judges differed in their formal considerations.

After describing the above issues, the author proposes a research plan (thesis proposal) titled, "Judges' Considerations in Adjudicating Lawsuits for Past Child Maintenance from the Perspective of Progressive Legal Theory and *Maqashid al-Syariah* (Normative Juridical Study of Decision Number 4115/Pdt.G/2023/PA.Kab.Mlg. and Decision Number 229/Pdt.G/2021/PA Sak).

## **LITERATURE REVIEW**

### **The Legal Foundation of Alimony in Islamic Law**

Alimony is fundamentally understood as a consequence of the marital bond, which mandates the husband to provide financial support to his wife and children. This obligation is firmly rooted in the Qur'anic injunctions, particularly in Q.S. al-Thalaq (65):7, where Allah commands:

"Let the person who has ample means spend according to his means, and the person whose provision is restricted should spend from what Allah has given him. Allah does not burden a soul beyond what He has given it. Allah will grant ease after difficulty."

This verse emphasizes that a husband's duty to provide sustenance is contingent upon his financial capability, yet it remains a non-negotiable responsibility. This is further reinforced by Wahbah al-Zuhaily's interpretation, which stresses that the obligation of financial support is a direct result of both the marital relationship and the birth of children. He cites Q.S. al-Baqarah (2):233 to highlight the father's duty:

"And mothers shall breastfeed their children for two full years, for those who wish to complete the nursing period. And the father must provide for their sustenance and clothing in a fair manner."

This verse illustrates that the provision of alimony is not only limited to the wife but also extends to the children, establishing a clear framework for financial responsibility within the family unit.

### **Alimony as a Legal and Socio-Religious Obligation**

The obligation to provide alimony does not cease with the dissolution of the marital relationship. In fact, failure to fulfill this duty can lead to significant legal repercussions, particularly in cases where the husband's negligence in providing sustenance is a contributing factor to divorce. In such scenarios, the concept of *nafkah māḍiyah* (past sustenance) becomes pertinent. Wahbah al-Zuhaily elaborates that once the husband fails to provide the necessary sustenance, this obligation automatically transforms into a debt. This debt, like any other, must be settled through payment or forgiven by the wife, and it remains binding regardless of the wife's disobedience, divorce, or even the death of either party.

In contrast, the legal obligation of parents to provide for their children is treated differently. According to Muḥammad al-Khatib al-Syarbayni, a parent's failure to provide sustenance does not inherently create a debt unless a judge intervenes and enforces it. This distinction highlights the nuanced approach Islamic law takes in balancing the responsibilities of a husband and father with the rights of a wife and children.

### **Implications and Consequences**

The legal ramifications of failing to provide alimony underscore the importance of this obligation within Islamic jurisprudence. The transformation of unpaid sustenance into a debt enforceable by law serves as a deterrent against neglect and ensures that the financial rights of wives and children are protected. This legal mechanism aligns with the broader objectives of Islamic law (*maqasid al-shariah*), which seeks to preserve the welfare of the family and society.

In conclusion, the discussion of alimony within Islamic law reveals a complex interplay between socio-religious duties and legal obligations. The Qur'anic foundations, supported by scholarly interpretations, underscore the critical nature of providing financial

support to one's family, both during marriage and after its dissolution. This obligation, while deeply rooted in religious texts, is also reinforced by legal mechanisms designed to ensure compliance and uphold the rights of all parties involved.

## RESEARCH METHOD

Normative legal research, also known as doctrinal, dogmatic, or legislative research, refers to the study that focuses on the analysis of legal documents such as statutes, court decisions, legal theories, and scholarly opinions. The approaches used in this research include the statute approach, which analyzes legal norms as a comprehensive, all-inclusive, and systematic closed system; the case approach, which examines court rulings that have become final and binding related to the issue under discussion; and the comparative approach, which compares legal systems or legislation from one country to another to identify similarities and differences. This type of research, known in Anglo-American literature as legal research, represents an internal study within the field of law.

## RESULTS AND DISCUSSION

### Judicial Considerations in Child Maintenance Lawsuits: Progressive Legal Theory Perspective

When evaluating Decision No. 4115/Pdt.G/2023/PA.Kab.Mlg and Decision No. 229/Pdt.G/2021/PA Sak., it is essential to compare the judges' considerations from the perspective of progressive legal theory. This theory emphasizes the need for rapid changes and breakthroughs in the law to ensure that the law is more responsive to human needs. Decision No. 4115/Pdt.G/2023/PA.Kab.Mlg, which rejected the lawsuit concerning child maintenance because a father's obligation is *lil intifa'* (for benefit) and not *li tamlik* (for ownership), appears not to reflect the principles of progressive law. This decision refers to the Supreme Court Jurisprudence No. 608 K/AG/2003, which is seen as overlooking current social dynamics and justice needs. This assessment neglects the possibility that, under certain conditions, a child's right to maintenance that was previously neglected by the father should be reconsidered to reflect more substantive justice.

In contrast, Decision No. 229/Pdt.G/2021/PA Sak. can be classified as a progressive ruling because the judge in this case demonstrated a concern for justice and the specific circumstances of the parties involved. The judge was not strictly bound by the existing Supreme Court Jurisprudence but rather considered appropriateness and fairness in the concrete context. This court's decision to grant the child maintenance claim shows a willingness to adapt and respond to social changes and pressing societal needs, in line with the principles of progressive legal theory.

### **Judicial Considerations in Child Maintenance Lawsuits: Maqashid al-Sharia Perspective**

From the perspective of Maqashid Al-Sharia, the assessment of Decision No. 229/Pdt.G/2021/PA Sak. indicates that the decision is more aligned with the objectives of Sharia. Maqashid al-sharia prioritizes family economic regulation and views child maintenance as a primary obligation of the father. In this decision, the judge considered important aspects of Sharia that emphasize justice and responsibility in the context of child care and education. This reflects a better application of Maqashid Al-Sharia principles by ensuring that children's rights are met according to the father's obligations.

Conversely, in Decision No. 4115/Pdt.G/2023/PA.Kab.Mlg, the judge rejected the claim for child maintenance by referring to the principle of *lil intifa'* rather than *littamluk*. This decision tends to ignore Maqashid Al-Sharia aspects that stress the need for family economic regulation and ensuring the father's obligation regarding child maintenance. By rejecting the claim on this basis, these rulings risk neglecting Sharia's goals of maintaining justice and children's welfare, potentially worsening the understanding and enforcement of maintenance obligations in society.

Therefore, this ruling can be seen as a setback in applying the principles of Maqashid Al-Sharia, which expects that every child maintenance claim should be considered with justice and without disregarding the father's responsibilities. The court should consider a broader social and economic context and ensure that legal decisions not only adhere to formal provisions but also fulfill the primary goals of Sharia in protecting children's rights and welfare.

## Discussion

The author argues that the decision by the Director General of Religious Courts (Dirjen Badilag) to instruct religious courts to provide information regarding the rights of women and children post-divorce is a crucial step in safeguarding these rights. However, there are significant issues related to the enforcement of child support obligations by religious court judges. Many judges tend to reject claims for child support that have been neglected by fathers, arguing that such obligations are for the benefit of the child (*lil intifa'*) and not for the child's ownership (*littamlík*). However, according to the results of the Religious Court's Circular Letter No. 2 of 2019, past child support (*nafkah madhiyah*) can still be claimed. This ongoing viewpoint creates potential injustice that could harm children and their mothers.

According to Islamic provisions, the responsibility of providing for a child is primarily the father's, not the mother's. The Qur'an and Hadith emphasize that the obligation to provide for a child remains even after divorce, and a father who neglects this obligation is still required to fulfill it. Rejecting claims for past child support solely because the father's obligation is *lil intifa'* contradicts fundamental Islamic legal principles and risks unjust treatment of both the child and the mother. Moreover, this view does not align with positive law regulations governing child support obligations and child neglect as a form of domestic violence.

In the context of positive law, rejecting claims for past child support without considering the father's ability to meet his obligations is an unrealistic stance and contrary to legislative provisions. The law imposes sanctions on fathers who fail to provide for their children, and the mother has the right to claim support that has been expended. The author argues that the courts should consider specific circumstances and apply a more sensitive approach to justice, rather than strictly adhering to absolute legal principles. This is essential to uphold social justice and humanitarian values in family law enforcement.

## CONCLUSION

The obligation to provide past child support (*māḍiyah*) under Islamic law is not considered a debt if the time for its fulfillment has passed or the child no longer needs it. However, if a claim is made in court, the obligation can be reinstated. According to SEMA

No. 2 of 2019, past child support claims can be filed by the mother or another party who has supported the child during the father's neglect, and such claims become mandatory if the father's neglect is proven.

In Decision No. 4115/Pdt.G/2023/PA.Kab.Mlg, the court rejected a claim for past child support, reasoning that the father's obligation is for benefit (*li intifa'*), not ownership (*li tamlik*), aligning with Supreme Court Jurisprudence No. 608 K/AG/2003. Conversely, in Decision No. 229/Pdt.G/2021/PA Sak, the court granted a past child support claim, citing the father's responsibility under Law No. 1 of 1974 and the Compilation of Islamic Law. The rejection in the first case is criticized as inconsistent with *Maqāṣid Al-Sharī'ah* and non-progressive, potentially wronging the child, while the acceptance in the latter case is viewed as aligning with Islamic legal objectives and promoting justice.

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