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The Confiscation of Husbands' Wealth as A Collateral for Post-Divorce Child Support: Perspective of *Maqāṣid Al-Sharī'ah*

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Abstract: A husband is obliged to take care of his family, including his wife and children. when they divorce, he doesn't have to support his wife anymore, but he still has to support their children. With the compilation of Islamic Law, statute no 1 of 1974 and circular letter of Supreme Court, Courts decide how much the father needs to pay for child support after a divorce through judge's consideration. But sometime, fathers don't follow this decision. In Indonesia, a 2021 circular letter from the Supreme Court allows the court to take the husband's property to ensure the children get the support they need after the divorce. This research aims to determine the concept of confiscation of husband's property as a guarantee for child support after divorce from a *maqāṣid al-sharī'ah* perspective. The method used in this research is a normative juridical method which is descriptive. Data was collected through in-depth interviews and religious court studies. The research results show that the concept of including the ex-husband's assets as collateral for post-divorce child support is included in the execution submitted to the Religious Court for the father's husband's negligence in implementing the provisions regarding child consent in the divorce decision. This process can be submitted by the ex-wife or child's mother or child's guardian to the Religious Court. The concept of confiscating the husband's property as a guarantee for children's support after divorce can provide benefits for children in the form of *hifdz nafs* (protecting themselves) and *hifdz aql* (protecting reason), as well as benefits for fathers in the form of *hifdz nafs* (protecting offspring) and *hifdz maal* (protecting assets).

Keywords: Child support, divorce, collateral confiscation, *maqāṣid al-sharī'ah*

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Abstrak: Seorang suami wajib mengurus keluarganya, termasuk istri dan anak-anaknya. ketika mereka bercerai, dia tidak perlu lagi menghidupi istrinya, tetapi dia tetap harus menghidupi anak-anaknya. Dengan kompilasi Hukum Islam, Undang-undang Nomor 1 Tahun 1974 dan Surat Edaran Mahkamah Agung, Pengadilan memutuskan berapa besarnya tunjangan yang harus dikeluarkan ayah setelah perceraian melalui pertimbangan hakim. Namun terkadang, para ayah tidak mengikuti keputusan ini. Di Indonesia, surat edaran Mahkamah Agung pada tahun 2021 mengizinkan pengadilan untuk mengambil harta milik suami untuk memastikan anak-anak mendapatkan tunjangan yang mereka butuhkan setelah perceraian. Penelitian ini bertujuan untuk mengetahui konsep sita harta milik suami sebagai jaminan nafkah anak pasca perceraian dengan tinjauan perspektif *maqāṣid al-sharī'ah*. Metode yang digunakan dalam penelitian ini metode yuridis normatif yang bersifat deskriptif. Data dikumpulkan dengan cara wawancara mendalam dan studi putusan pengadilan agama. Hasil penelitian bahwa konsep penyitaan harta benda mantan suami sebagai jaminan tunjangan anak pasca perceraian merupakan penyitaan eksekusi yang diajukan ke Pengadilan Agama atas kelalaian suami pihak ayah dalam menerapkan ketentuan tunjangan anak dalam putusan perceraian. Proses tersebut dapat diajukan oleh mantan istri atau ibu anak atau wali anak ke Pengadilan Agama. Konsep sita harta milik suami sebagai jaminan nafkah anak pasca perceraian dapat memberikan kemaslahatan bagi anak berupa *hifdz nafs* (melindungi diri) dan *hifdz aql* (melindungi akal), serta kemaslahatan bagi ayah berupa *hifdz nasl* (melindungi keturunan) dan *hifdz maal* (melindungi harta).

Kata Kunci: Nafkah anak, perceraian, sita jaminan, *maqāṣid al-sharī'ah*

Introduction

Referring to the General Explanation of the Republic of Indonesia's Law on Marriage Article 1, marriage aims to create a happy and everlasting family. Because of this aim, the law makes divorce difficult to happen. Islam does not forbid divorce. It is permissible, yet Allah SWT hates it. Because of that, divorce is only allowed if maintaining the marriage brings more harm than good. Every action leads to consequences, including divorce. Divorce brings consequences to wealth, child support (*hadhanah*), and marital status. Consequences of the breakage of marriage are regulated in Article 41 of Law No. 1 of 1974 on Marriage.¹

¹ Khoiruddin Nasution and Syamruddin Nasution, "Implementation of Indonesian Islamic Family Law to Guarantee Children's Rights," *al-Jamiah: Journal of Islamic Studies* 59, No. 2 (2021). Meli Dwi Yuniar and Waluyo Sudarmaji, "The Realization of the Fulfilment of the Children's Sustainance Post-Divorce in Purworejo Religious Court in 2020-2021," *El-Usrah: Jurnal Hukum Keluarga* 6, No. 1 (2023). Undang-Undang No 1 Tahun 1974 tentang Perkawinan.

The broken relationship between a husband and a wife through a divorce does not change the legal status of legitimate children or biological children obtained from that marriage, as divorce does not change parents' obligation to care for the children. Soemiyati describes that in a case of divorce where from that marriage a legitimate descendent was produced, the mother has the right to take care of the child, or the grandmother, and so on from the line of the mother.² But the payment for that child, including the education fees, is the obligation of the father.³ Articles 105, 149 (d) and 156 (d) of the compilation Islamic law (*Kompilasi Hukum Islam/KHI*) regulates that parent must support sons until they are of a mature age according to Islam (*baligh*),⁴ This provision is following the Shafi'i thoughts.⁵ Meanwhile, in Hanafi school daughters must be supported until they get married.⁶

The rights or duties of this *hadhanah* against married couples with child must also be assessed by the judge in making a divorce decision, as is expressly stated in the Islamic Law Compilation. As a result of the divorce, this is the case as stated in Article 156 of the Islamic Law Compilation. Even though Article 105 in the Constitution gives parents equal rights to take care their children, the parent with whom the child spends the most time has the greater say in the child's upbringing, per Law No. 23 of 2002 on the Protection of Children (a) According to the Islamic Law Compilation, a mother has the legal obligation to provide for and care for her child until they reach the age of puberty (*mumayyiz*). However, a mother may be denied this obligation if she engages in risky behaviors such as gambling, violence, excessive alcohol consumption, or neglecting her children. A mother may fail miserably as a teacher of her children and may even resort to physical punishment.⁷

Even though various regulations have stipulated post-divorce child support, in reality, the fulfillment of this obligation usually stops at the regulation level, as its practice of execution is not maximally applied. Apart from the

² Soemiyati Soemiyati, *Hukum Perkawinan Islam Dan Undang-Undang Perkawinan* (Yogyakarta: Liberty, 2004).

³ Heppy Hyma Puspytasari and Firman Firman, "Perlindungan Hukum Dalam Pembayaran Nafkah Anak Sebagai Akibat Perceraian," *Jurnal Pendidikan Tambusai* 5, no. 2 (2021), p. 3606–3613.

⁴ Mahkamah Agung Republik Indonesia, *Himpunan Peraturan Perundang-Undangan Yang Berkaitan Dengan Kompilasi Hukum Islam Dengan Pengertian Dalam Pembahasannya* (Jakarta: Mahkamah Agung Republik Indonesia, 2011).

⁵ Muhammad Ibn Idris Al-Syafi'i, *Al-Umm, Juz 6* (Beirut: Jami' Khuquq Al-Tabi', 2001). p. 381

⁶ Muhammad ibn Abdurrahman Al-Hatab, *Mawahib Al-Jalil Fi Syarh Al-Mukhtasor Al-Jalil*, Juz 4 (Beirut: Dar al fikr, 1992), p. 211

⁷ Arif Sugitanata, "Product Renewal in the Field of Family Law in Indonesia," *Law and Justice* 6, no. 1 (2021), p. 62–79.

Decision of the Religious Court that is limited to moral sanctions as opposed to criminal ones, fathers or ex-husbands have low awareness of carrying out their duties. Thus, there needs to be further regulation to guarantee the execution of post-divorce child support.⁸

In December 2021, the Republic of Indonesia's Supreme Court issued Circular Letter No. 5 of 2021 on the Application of the Formulation of the Room Plenary Meeting Results of the Supreme Court of 2021 as Guidelines for Task Execution for Courts. This Circular Letter produced several formulations, one of which was the Plenary Formulation of the Room of Religion, on the Determination of the Confiscation of Husbands' Property as a Guarantee for Post-Divorce Child Support. This regulation was an effort to guarantee the execution of post-divorce child support.⁹ A law or a regulation is determined when there is a goal that needs to be reached. People in Indonesia believe that a prophecy is the highest gift for humans from God. A prophecy serves as proof of the spiritual realm's dominance over humanity, indicating that a prophet is akin to a divine emissary in the earthly realm, endowed with intellect surpassing all other beings.¹⁰

In Islamic law, the aim for determining the law is known as the *maqāshid al-sharī'ah*. The point of *maqāshid al-sharī'ah* is to bring benefit and to avoid harm (*madharat*). In short, the aim of *maqāshid al-sharī'ah* is *maslahat* (benefit), as in Islam, the main consideration in determining law is the *maslahat*.¹¹ In *maqāshid al-sharī'ah*, *maslahat* is known as *dharuriyat*. *Dharuriyat* has five branches, namely maintaining religion, protecting lives, protecting descendants, protecting wealth, and protecting the mind.¹² Thus, in this paper, the writers analyze the content of Circular Letter No. 5 of 2021 on the Application of the Formulation of the Room Plenary Meeting, i.e., the Determination of Confiscation of Husbands' Property as a Guarantee for Post-Divorce Child Support from the *maqāshid al-sharī'ah* perspective. It also includes an analysis of which *dharuriyat* this law encompasses. In other words, it aims to analyze the achievement of which *maslahat* is the goal of "the Determination of Confiscation of Husbands' Property as a Guarantee for Post-Divorce Child Support" from the *maqāshid al-sharī'ah* perspective.

⁸ Istiqomah Sinaga, "Pemenuhan Hak Nafkah Anak Pasca Perceraian Di Indonesia, Malaysia Dan Australia, 2020.

⁹ Mahkamah Agung Republik Indonesia, Surat Edaran Mahkamah Agung, Nomor 5 Tahun 2021.

¹⁰ Khudzafah Dimiyati et al., "Indonesia as a Legal Welfare State: A Prophetic-Transcendental Basis," *Heliyon* 7, no. 8 (2021).

¹¹ Ghofar Shidiq, "Teori Maqashid Al-Syari'ah Dalam Hukum Islam," *Majalah Ilmiah Sultan Agung* 44, no. 118 (2009), p. 117–130.

¹² Ahmad Sarwat, *Maqashid Syariah* (Jakarta: Rumah Fiqih Publishing, 2019). Arbanur Rasyid, et.al., "Dynamics of Childless Marriage Through the Lens of Maqasid Al-Shari'a," *Jurnal Ilmiah Peuradeun* 12, No. 2 (2024).

This research uses a mixed juridical method analyzed with the theory of *maqāṣid al-sharī'ah*.¹³ It employed the mixed method with a juridical normative or the doctrinal method which is connected with the sociological-juridical method (non-doctrinal method).¹⁴ Then, concerning the approach used, this research did not only employ methods with doctrinal characteristics, but it also employed the sociological approach to obtain or gain information to seek answers to the problems¹⁵ studied in this research.¹⁶

This was literary study research, where writers used theories relevant to the analyzed issue by collecting literary materials from various sources, including sociological data.¹⁷ The author also uses the results of interviews with several named jurors who handled *hadhanah* cases. These interview results were used as supporting materials. According to Khudzaifah, materials that were directly obtained can be used in normative research as primary legal materials.¹⁸ This research used sociological data as secondary data, encompassing primary legal materials and secondary legal materials such as Statute No 1 of 1974, The compilation of Islamic law, Supreme Court Circular No 5 of 2021 and the verdict of religious court.

It used the qualitative data analysis method that described the collected data and linked them to one another to obtain an explanation of the truth.¹⁹ Starting with collecting legal materials then carrying out analysis, explanation and elaboration of the legal materials used, then strengthening them with supporting data including interviews with religious court judges, then the researcher analyzed the discussion from a *maqāṣid al-sharī'ah* perspective. This research uses *maqāṣid al-sharī'ah* as a theory, which aims to protect five (5) things, namely religion, soul, reason, heredity and property, so that according to researchers this theory is relevant to reveal the benefits contained in the confiscation of the father's property as a guarantee for the child's livelihood.

¹³ Anton F Susanto, *Penelitian Hukum Transformatif-Partisipatoris: Fundasi Penelitian Kolaboratif Dan Aplikasi Campuran (Mix Method) Dalam Penelitian Hukum* (Malang: Setara Press, 2015).

¹⁴ Mukti Fajar and Ahmad Yulianto, *Dualisme Penelitian Hukum: Normatif & Empiris* (Yogyakarta: Pustaka Pelajar, 2015).

¹⁵ Martyn Denscombe, "Communities of Practice: A Research Paradigm for the Mixed Methods Approach," *Journal of Mixed Methods Research* 2, no. 3 (2008), p. 270–283.

¹⁶ Kornelius Benuf and Muhamad Azhar, "Metodologi Penelitian Hukum Sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer," *Gema Keadilan* 7, no. 1 (2020), p. 20–33.

¹⁷ Jennifer C. Greene, "Is Mixed Methods Social Inquiry a Distinctive Methodology?," *Journal of Mixed Methods Research* 2, no. 1 (2008), p. 7–22.

¹⁸ Khudzaifah Dimiyati and Kelik Wardiono, *Metode Penelitian Hukum*, Surakarta: Fakultas Hukum Universitas Muhammadiyah Surakarta, 2004.

¹⁹ Ishaq Ishaq, *Metode Penelitian Hukum Dan Penulisan Skripsi, Tesis, Serta Disertasi* Bandung: Alfabeta, 2017.

Concept of the Confiscation of Husbands' Property as Guarantee for Post-Divorce Child Support

Child support is an obligation of parents to their children. This obligation does not recede even though the relationship between the father and mother ended in a divorce. In Islamic teachings, child support is the obligation of the father. But in cases where fathers cannot provide, for instance, due to certain conditions that make it impossible for them to do so, mothers can help. Then, the Indonesian positive law contains stipulations that fathers have the obligation to support their children. This obligation still applies even if the father has been divorced from the mother as stipulated in Article 41 of Law No. 1 of 1974 on Marriage.²⁰

Divorce changes the relationship between a husband and a wife, making them an ex-husband and an ex-wife. But divorce does not change the relationship between the father and the child or that between the mother and the child. The parent's obligation to their children continues even though they are divorced. This includes the obligation for child support that must still be fulfilled until that child is independent or mature (around > 21 years of age) or has married, as stipulated in Article 45 of Law No.1 of 1974 on Marriage.

The amount of post-divorce child support is usually determined by the judge of the Religious Court that is stipulated in the Decision on a Divorce. Child custody does not influence the obligation of the father or the ex-husband to provide child support. Thus, even though child custody rights fall to the hands of the ex-wife, the ex-husband must still provide child support.²¹

In general, child support is the obligation of the father that applies until the child is mature or has become an adult. The father's obligation for child support does not disappear due to the divorce. This obligation is according to the Islamic law and the Indonesian positive law, as stipulated in Article 149 of the Compilation of Islamic Laws as well as Article 41 letter b of Law No.1 of 1974 on Marriage.²² Factors causing the lack of fulfillment of the child support include the lack of the father's good faith to voluntarily fulfill his obligations, the lack of collateral or forced money, and the lack of stipulations that regulate officials or related parties that can force its application or that have the authority to oversee it.²³

²⁰ Undang-Undang No 1 Tahun 1974 tentang Perkawinan.

²¹ Tarmizi M. Jakfar and Nur Azizah Fayyadhah Binti Baharuddin, "Peran Majelis Sulh Dalam Penyelesaian Hak Hadhanah Pasca Perceraian (Studi Kasus Di Mahkamah Syariah Kabupaten Tawau, Provinsi Sabah, Negara Malaysia)," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 2, no. 1 (2018), p. 197.

²² Instruksi Presiden RI Nomor 1 Tahun 1991 Tentang Kompilasi Hukum Islam.

²³ Oxys Mardi and Fatmariza Fatmariza, "Faktor-Faktor Penyebab Keterabaian Hak-Hak Anak Pascaperceraian," *Jurnal Ius Constituendum* 6, no. 1 (2021), p. 182.

In a divorce decision on child support, if the decision is not carried out by the father, the Religious Court does not have the authority to undergo any actions. This is according to the principle that judges are passive. It means that judges can only give justice under applications or lawsuits.²⁴ Thus, a divorce decision only obliges the ex-husband to pay *madhiyah* (support for the past), *iddah* (support given to a wife during a waiting period before an official divorce or before coming back as a married couple), and *mut'ah* (support given to a divorced wife) to the mother as well as *hadhanah* (child support) to the children.²⁵

In previous research regarding post-divorce child support guarantees in the form of the father's assets, several judges at the Marabahan Religious Court stated that collateral in the form of the father's assets could put pressure on the ex-husband. It is a strategy to make sure that child support is properly paid.²⁶ This wealth collateral can be imposed by the Religious Court under several conditions. First, it is demanded by the parties, as the judge assembly strongly holds the legal procedure principle, "*ultra petita partium*", meaning that the judge cannot grant more than what is demanded. Second, the wealth that serves as collateral must be safe and clear. It must not be in a dispute and it must be executable. Third, if since the start of the divorce, the mother does not demand child support during the examination of divorce disputes, then it was found that the ex-husband or the child's father did not give child support, the mother can file a lawsuit to the Court on the father demanding child support. Fourth, the father or the ex-husband has the good faith to implement that decision. Fifth, this demand for execution can only be carried out if the father has wealth that can be executed or used as collateral.²⁷

The confiscation of a husband's property is an effort that can be taken if the father or the ex-husband neglected his obligation to provide for his child after a divorce.²⁸ Divorce decisions generally contain stipulations on child support after the parents are divorced. In both cases where the husband filed for a divorce (*cerai talak*) and where the wife filed for a divorce (*cerai gugat*), after the divorce, the

²⁴ M Masrukhin and Meliana Damayanti, "Hukum Progresif Penanganan Hak Nafkah Anak Dalam Kasus Perceraian Di Pengadilan Agama (Studi Di Pengadilan Agama Karesidenan Surakarta)," *Al-Ahkam: Jurnal Ilmu Syari'ah Dan Hukum* 5, no. 1 (2020), p. 25–36.

²⁵ Riyan Ramdani and Firda Nisa Syafitri, "Penentuan Besaran Nafkah Madhiyah, Nafkah Iddah Dan Mut'ah Dalam Perkara Perceraian Di Pengadilan Agama," *Adliya: Jurnal Hukum Dan Kemanusiaan* 15, no. 1 (2021), p. 37–50.

²⁶ Nur Amelia, "Persepsi Hakim Pengadilan Agama Marabahan Tentang Jaminan Harta Ayah Terhadap Nafkah Anak Pasca Perceraian" (Banjarmasin: Universitas Islam Negeri Antasari, 2020).

²⁷ Nur Amelia, "Persepsi Hakim Pengadilan Agama Marabahan Tentang Jaminan Harta Ayah Terhadap Nafkah Anak Pasca Perceraian".

²⁸ Fahmi Tiara, Rahma Andrea, and Zakiah Nurul Awaliyah, "Pemenuhan Hak-Hak Isteri Dan Anak Pasca Perceraian," *MILRev: Metro Islamic Law Review* 1, no. 2 (2022), p. 231–42.

father has the obligation to provide child support (*hadhanah*). But in reality, there are many cases where after a divorce, the father neglected his obligation to give child support following the divorce decision. Some gave less than what was obliged in the decision. Some only gave support in the first few months. Then, others did not give child support at all.

On December 2021, the Supreme Court issued Circular Letter No. 5 of 2021 on the Application of the Formulation of the Room Plenary Meeting Results of the Supreme Court of 2021 as Guidelines for Task Execution for Courts. The Plenary Formulation of the Room of Religion made a decision on the Determination of Confiscation of Husbands' Property as a Guarantee for Post-Divorce Child Support. This regulation described in detail the object that can be used as collateral in the lawsuit *posita* (the subject matter) and *petitum* (conclusion of a lawsuit). This lawsuit can be included as part of the convention, reconvention, or an independent lawsuit can be made. This regulation is an effort to protect the child support rights of children after a divorce.

Some Religious Court Judges seemed to highlight the execution of divorce decisions, especially concerning *hadhanah* for children. One of them was Epri Wahyudi, a judge of Kuala Kapuas Religious Court who gave some ideas on special efforts on child custody. One of his ideas was 'Making a Father's Property a Collateral After a Divorce'. This idea was exposed before the issuing of Circular Letter No. 5 of 2021. Thus, this shows that this issue has caused concerns in society. It is hoped that the issuing of Circular Letter No. 5 of 2021 can become a solution to answer this problem.²⁹

Epri Wahyudi explained that if judges decided a decision stating that the father is obliged to provide *hadhanah* for the child of a certain amount as stated in the decision every month until the child becomes an adult or is 21 years old, then, a legal relationship between a debtor and a creditor applies between the father and the child. It can also be defined as the creation of a relationship between a party with a certain obligation and another party that has the right to receive something. Due to this legal relationship, fathers must carry out their obligations for child support.³⁰

An effort to apply one's obligation and fulfill other people's rights in the creditor-debtor relationship has been regulated in Indonesian civil law as it provides a legal concept of collaterals. Article 1131 of the Civil Code states that "All movable and immovable goods of the debtor, both existing goods and goods

²⁹ Epri Wahyudi, "Sebuah Gagasan dalam Perkara Nafkah Anak dan Pelaksanaan Eksekusinya di Pengadilan Agama," *Artikel Pengadilan Agama Kuala Kapuas*, 2021, p. 1–15.

³⁰ Epri Wahyudi "Sebuah Gagasan dalam Perkara Nafkah Anak dan Pelaksanaan Eksekusinya di Pengadilan Agama,".

that will be obtained in the future, become collateral in the debtor's personal bonds".³¹

The execution of child support is different from civil executions in general, as the former is continuous until the child becomes an adult (21 years old). Thus, to guarantee the continuous provision of child support, there needs to be something that guarantees that the father will provide for his children, either directly or through his ex-wife.³² The collateral given may be in the form of movable or immovable goods. This aims so that if the father or the ex-husband fails to carry out his obligations on child support, the child, represented by his mother or guardian, can sell the father's goods that were used as collateral in exchange for the child support that must be given.

The application for the confiscation of collateral can be demanded individually and separately after a divorce decision. Or, it can be demanded simultaneously with the divorce decision. Thus, the judicial decision that originally only stated: "Punishing the Defendant/Reconviction Defendant (the father) to pay child support to the child named ... of at least... (IDR) each month with an increase of ... % annually until that child is 21 years old or is independent".

This clause must be added with another sentence, making it into: "Punishing the Defendant/Reconviction Defendant (the father) to pay child support to the child named ... of at least... (IDR) each month with an increase of ... % annually until that child is 21 years old or is independent. And determining/stating that all wealth owned and/or that will be owned by the Defendant/Reconviction Defendant will become collateral in case of neglect in paying child support. This is imposed to the Defendant/Reconviction Defendant".

The implementation of the Religious Court's decisions must voluntarily be carried out by the disputing parties. But if the disputing parties or the party that was obliged to carry out its duties objected from voluntarily undergoing its responsibility, the party that was supposed to be the recipient of the rights can file execution efforts by demanding an execution application through the Religious Court that decided upon that case. This applies to cases on child support. If there is an ex-husband that was punished by the Religious Court to pay for child support through his ex-wife every month of a certain amount, but he failed to carry this out voluntarily, the ex-wife can file for an execution application through the Religious Court that decided upon that case.³³

³¹ B I P Tim, *KUHPer (Kitab Undang-Undang Hukum Perdata)* (Bhuana Ilmu Populer, 2017).

³² Arne Huzaimah, "Reformulasi Hukum Acara Peradilan Agama Dalam Pelaksanaan Eksekusi Putusan "Hadhanah," *Jurnal Nurani* 18, no. 2 (2018), p. 227-244.

³³ Wahyudi, "Sebuah Gagasan Dalam Perkara Nafkah Anak Dan Pelaksanaan Eksekusinya Di Pengadilan Agama."

The execution application may be filed to the Religious Court through the following steps:³⁴

1. The Plaintiff files for an execution application and the mechanism follows the regulations in patterns in the Guiding and Control of Case Administration in the Environment of the Religious Court and related regulations;
2. The Head of the Religious Court issues a determination for *aanmaning* (warning), containing orders to the confiscation official to summon the execution Defendant in the *aanmaning* trial;
3. The confiscation official or his substitute summons the execution Defendant;
4. The Head of the Religious Court carries out the *aanmaning* with an incidental trial participated by the Head, the Registrar, and the execution Defendant. In that *aanmaning* trial, the execution Plaintiff should be summoned. The Head of the Religious Court delivered the warning so that in 8 (eight) days after the warning, the execution Defendant must carry out the contents of the decision. The Registrar makes minutes of the *aanmaning* trial, signed by the Head and the Registrar;
5. If in a period of 8 (eight) days after the warning of the execution, Plaintiff reports that the execution Defendant has not carried out the contents of the decision, the Head of the Religious Court issues the determination for execution orders.

The Head of the Kotamobagu Religious Court, North Sulawesi, Rukijah Madjid, expressed his opinions in a personal interview concerning the collateral confiscation in Circular Letter (SEMA) No. 5 of 2021. In the application for personal property confiscation, he states: "The one who determines the confiscation is the Head of the Assembly. The Head of the Assembly orders the Registrar and the confiscation official to determine a confiscation towards the object that served as collateral to fulfill the children's rights in terms of child support and education if the ex-husband shows signs of bad faith or if he is reluctant to fulfill the rights of the child or the ex-wife."³⁵

A judge of the Religious Court, Muntasir, also gave an explanation of the procedures for applying confiscation of property: "Concerning the procedures for executing the confiscation, there must, first of all, be an application for the confiscation execution. The proposed confiscation application is a confiscation execution on the decision of the Religious Court on child support that is not voluntarily carried out by the husband (the child's father). Because the decision

³⁴ Direktorat Jenderal Badan Peradilan Agama Mahkamah Agung Republik Indonesia, *Buku II Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama* (Jakarta: Mahkamah Agung Republik Indonesia, 2014).

³⁵ Interview with Rukijah Madjid, Religious Court Judge, 2022.

of the Religious Court was not voluntarily carried out by the husband (the child's father), the wife can propose a confiscation execution application towards that Religious Court decision. The executor of the confiscation is a rightful official. In this case, it is the Religious Court Confiscation Official, after the Religious Court sent a warning (*aanmaning*) to the husband (the child's father) to apply the contents of that decision. The difference with other confiscation such as confiscation of collateral is that it is usually proposed simultaneously with the lawsuit in the principal case. In marital confiscation, it is also proposed along with the lawsuit in the principal case. Thus, the confiscation in the Supreme Court Circular Letter No. 5 of 2021 was an execution confiscation, that is proposed for the ex-husband that failed to obey the contents of the Religious Court decision on child support fulfillment. Thus, the ex-wife proposed an application for execution confiscation to the Religious Court, where the confiscation application must list the wealth owned by the husband."³⁶

Thus, based on the explanation and decision above, according to the researchers, the concept of confiscating the ex-husband's property as collateral for child support after a divorce is a confiscation execution filed to the Religious Court for the ex-husband's neglect in carrying out the contents of the divorce decision in terms of providing child support. This can be applied by having the ex-wife or the mother of the child or the child's guardian propose an application to the Religious Court to demand confiscation of the husband's property as collateral on the post-divorce child support. The collateral wealth or object can be sold in exchange for post-divorce child support (*hadhanah*) in cases where the father neglects the obligation to provide it.

The confiscation of the husband's property is carried out under several conditions. *First*, the application on the execution confiscation may be proposed independently after a divorce decision and it can also be applied simultaneously with the divorce decision, with an application procedure that is according to the stipulations of Book II of the Guidelines of the Religious Court's Tasks and Administration issued by the General Directory of the Religious Justice Agency in 2014. *Second*, the collateral wealth or object must be clear and safe and it must be described in detail in the *posita* and *petitum*. *Third*, the ex-husband or the father has wealth that can be used as a collateral object. In this execution collateral, the executor of the confiscation is the confiscation official from the Religious Court under the order of the Head of the Assembly.

³⁶ Interview With Muntasir, Religious Court Judge, 2022.

***Maqāṣid Al-Sharī'ah* Objectives in Confiscating the Ex-Husband's Wealth as a Guarantee of Post-Divorce Child Support**

Islamic law principles, including *maqāṣid al-sharī'ah* principles, are formulated based on Islam's Qur'anic verses and Sunnah. The sharia (Islamic laws) aim to provide ease, benefit (*maslahat*), and safety. God created the Qur'an as a solution for all issues in worldly life.³⁷ In *fiqh* principles, the objectives of the law are known as the *maqashid syariah*. The *maqāṣid al-aharī'ah* has five *dharuriyyat*, namely *hifdz ad-diin* (maintaining religion), *hifdz an-nafs* (protecting the self), *hifdz al-aql* (protecting the mind), *hifdz an-nasl* (protecting descendants), and *hifdz al-maal* (protecting wealth).³⁸ The core of the *Maqāṣid Al-Sharī'ah* is that the aim of law or the aim of law's existence is to create good and prevent harm, or bringing benefit/*maslahah* and preventing *madharat*. Thus, in short, the main point of the *Maqāṣid Al-Sharī'ah* is *maslahah* or benefit. It means that the determination of law must emanate from an issue.³⁹ This is because in essence, there is not a single sharia that is not aimed to achieve mutual benefit (*maslahah*).⁴⁰ The decisions and sharia from Allah as a whole aim to bring benefit to His creations, rather than rendering them difficult, burdening or even making the creatures suffer.⁴¹

The confiscation of the husband's property as a guarantee of post-divorce child support was determined by the Republic of Indonesia's Supreme Court in Circular Letter No. 5 of 2021. It was an effort to handle the issue of the execution of post-divorce child support by the father. The concept of the confiscation of the husband's property is an execution confiscation applied to the Religious Court for the negligence of the ex-husband or the father in providing child support according to the divorce decision. This confiscation can be applied by the ex-wife or the child's mother or guardian to the Religious Court as a guarantee for post-divorce child support. The collateral wealth or object can then be sold for the

³⁷ Suranto Suranto, et.al., "قاعدة" اقتضاء النهي الفساد و البطلان " عند المذاهب الأربعة " و تطبيقاتها في " المناكحات," *Profetika: Jurnal Studi Islam* 21, no. 1 (July 2020), p. 140–151.

³⁸ Abu Ishaq Ibrahim Ibn Musa Al-Syathibi, *Al-Muwafaqat Fi Ushul Al-Syari'ah* (Beirut: Dar Al-kutub Al-ilmiah, 2004).

³⁹ Chamim Tohari, "Pembaharuan Konsep Maqāṣid Al-Sharī'ah Dalam Pemikiran Muhammad Ṭahir Ibn 'Ashur," *Al-Maslahah Jurnal Ilmu Syariah* 13, no. 1 (2017), p. 1.

⁴⁰ Abdul Basith, "Rekonstruksi Hukum Kewajiban Suami Memberikan Nafkah Iddah Pada Pasal 149 Huruf b Instruksi Presiden Nomor 1 Tahun 1991 Kompilasi Hukum Islam Perspektif Maqashid Al-Syari'ah" Tesis, IAIN Palangka Raya, 2019.

⁴¹ Duski Ibrahim, *Al-Qawa'id Al-Maqashidiyah (Kaidah-Kaidah Maqashid)*, *Ar-Ruzz Media, Jogjakarta* (Jogjakarta: Ar-Ruzz Media, 2019).

needs of the child (*hadhanah*) in exchange for the child support that should be given by the father after a divorce if the father neglects this responsibility.⁴²

There are two parties in this confiscation stipulation, i.e., the plaintiff, consisting of the child or the child's guardian and the defendant, namely the child's father. The benefit that is aimed to be achieved in the *Maqāṣid Al-Sharī'ahis* not only directed to the plaintiff or in this case the child. But it also aims to bring benefit to all related parties, both the plaintiff and the defendant, i.e., for the father and the child. It is not called *maslahah* if it only brings benefit to one party while the opposing party must be burdened by harm.

In several examples of *hadhanah* lawsuit cases that researchers found, namely case decisions Number 2306/Pdt.G/2021/PA.Tbn., Number 2268/Pdt.G/2021/PA.Tbn., Number 3179/Pdt.G/2022/PA.Mr., Number 1400/Pdt.G/2022.PA.Skh, the judge's legal reasoning in making decisions is very influential in realizing problems for both parties, in considering the decision The protection of *maqashidul khamsah (maqashid sharia)* for the father is marked by the judge's considerations based on the father's condition including (1) the father's income, (2) the number of children. (3) Child's age. (4) The right to a decent life and (5) Prices of basic daily necessities per district.⁴³ Or through the principles of Islamic law which are taken into consideration, so that the father does not suffer harm from the decision.⁴⁴

The Islamic legal maxims that are often used in judges' considerations are:⁴⁵

لَا ضَرَرَ وَلَا ضِرَارَ

Meaning: There must be no danger and there must be no harm to others

The reason for the decision of the religious chamber regarding the confiscation of the father's assets as stated in the Supreme Court circular letter (SEMA) no. 5 of 2021, one of which is based on the fact that there is harm to the child because the father is not consistent in providing support, the decision of the

⁴² Yuni Harlina and Siti Asiyah, "Putusan Hakim Pengadilan Agama Pekanbaru Tentang Hadhanah Pasca Perceraian Menurut Perspektif Hukum Islam," *Jurnal An-Nahl* 7, no. 2 (2020), p. 130–144.

⁴³ Putusan Pengadilan Agama Tuban Nomor 2306/Pdt.G/2021/PA.Tbn" (Tuban: Direktori Putusan Mahkamah Agung, 2021). Putusan Pengadilan Agama Tuban Nomor 2268/Pdt.G/2021/PA.Tbn" (Tuban: Direktori Putusan Mahkamah Agung, 2021). Putusan Pengadilan Agama Maros Nomor 3179/Pdt.G/2022/PA.Mrs" (Maros: Direktori Putusan Mahkamah Agung, 2022). Putusan Pengadilan Agama Sukoharjo Nomor 1400/Pdt.G/2022.PA.Skh" (Sukoharjo: Direktori Putusan Mahkamah Agung, 2022).

⁴⁴ Interview with Nanda Trisna Putra, Religious Court Judge, 2023.

⁴⁵ Syaifuddin Zuhdi et al., "Divorce In Kangean Islands: The Study on Judge's Legal Reasoning of Kangean Religious Court, 2020-2022," *Jurnal Jurisprudence* 12, no. 2 (2023), p. 166–187.

supreme court is a form of *sadd dzariah* (preventing harm) and trying to realize the five maqasid of sharia for children and fathers themselves, so that whatever leads to something that must be supported, this is under the Islamic legal maxims

ما لا يتم الواجب الا به فهو واجب

Meaning: Something obligatory cannot be perfect unless it is something, then that something is legally obligatory⁴⁶

This is also supported by Sholihul Huda's opinion "The existence of this circular letter is a form of effort from the Supreme Court to provide certainty regarding children's rights. On the other hand, the father's rights will not be lost even if the assets owned are used as guarantors to provide for the child's needs, because the main consideration in providing support is income. and the abilities of the said father with all the proof thereof. The form of collateral confiscation itself does not mean that the assets are transferred to the winning party, but rather provides a guarantee and certainty that child support will be paid, if within several years it is not paid, the assets can be sold as a replacement for child support that is not/has not been paid".⁴⁷

1. The Child

Maintaining a child's right to support is the main goal in issuing the regulation on the confiscation of an ex-husband's wealth to guarantee post-divorce child support as regulated in Circular Letter No. 5 of 2021. Support of the child is the obligation of both parents, especially the father until that child is independent or he/she has reached adulthood. This obligation does not dissolve even after the parents are divorced. The rights for support include material and non-material support. Material support includes clothes, food, and shelter, meanwhile, non-material support includes affection, protection, and education.⁴⁸

Child support (*hadhanah*) is an obligation of each parent, especially the father as the head of the household. In verse 233 of Chapter Al-Baqarah (The She-Cow) Allah, recommends the mother breastfeed the child that she gave birth to and the father support the two (the wife and the child) in good ways (according to the religious, social, and legal norms).⁴⁹ Different from the relationship between a husband and a wife, the relationship between a child and the parents does not

⁴⁶ H. A Djazuli, *Kaidah-Kaidah Fikih* (Jakarta: Prenada Media, 2019).

⁴⁷ Interview with Ahmad Sholihul Huda Ali Sidratul Muntaha, Religious Court Judge, 2023.

⁴⁸ Zia Thahira and Dwini Handayani, "The Impact of Mother's Gender Preference on Children's Cognitive Ability in Indonesia," *Jurnal Ilmiah Peuradeun* 11, No. 3 (2023).

⁴⁹ Abdul Basir Mohamad, Rohanee Machae, and Mutsalim Khareng, "Children's Protection in the Issue of Hadhanah Based on Islamic Family Law and the Law of Thailand," *Asian Social Science* 12, no. 10 (2016), p. 18.

get severed even though the parents have divorced. Thus, the obligation of the father to support the child continues even after a divorce from his wife until the child is independent, has become an adult, or has married.

The obligation Allah assigned to fathers to provide child support is a way of practicing God's orders to take care of fellow humans' lives. Allah has given a parable in verse 32 of Chapter Al Maidah (The Feast), that a person that takes care of one life is like taking care of the life of all humans. On the contrary, killing or neglecting one life is the same as killing or neglecting all humans. The stipulations on the confiscation of an ex-husband's wealth as a guarantee for post-divorce child support is an effort to maintain a child's rights to support from her father even if the parents have been divorced. This is to maintain the life of the children so that they are not neglected like in cases that often happen in society. Because of that, support is needed by a child to survive, as children cannot fulfill their own needs. Thus, giving or fulfilling child support is a manifestation of maintaining a child's life. Maintaining or taking care of life is a wisdom or objective of the sharia Allah made concerning the fulfillment of child support. In *maqashid syariah*, it is known as the *hifdz nafs* (protecting the self), specifically concerning the life of the child.

The stipulation concerning the confiscation of the ex-husband's wealth as a guarantee for child support has the main goal which is giving *maslahah* to the child. The clause "*To fulfill the principle of the best interest of the child*",⁵⁰ states that the main goal of this stipulation is to protect the child's rights for support. A child is not only a descendant that continues the familial line of the parents. But a child is also the future of the nation and the religion. Allah's orders to maintain and to do good to the descendants or children are not only for the benefit of the children's parents. But it is for the good of all humanity. Allah prohibits us from leaving weak descendants as stated in Chapter An-Nisa (Women), verse 9. Fulfilling and guaranteeing child support gives physical and psychological power to the child. The support given does not only affect the child's soul, but it also affects his mind. Thus, the fulfillment of child support does not only give the wisdom of *hifdz nafs*, but it also provides *hifdz aql* (protection of the mind) for the child. A strong soul and mind will become a great provision for the child to carry out his role well as a servant of God that worships Him.

2. The Father

The father is the second party or the defendant in this stipulation on the confiscation of wealth. In this case, the child's father or the ex-husband is the intended party, who is applying to have his property confiscated as a guarantee

⁵⁰ Mahkamah Agung Republik Indonesia, Surat Edaran Mahkamah Agung Nomor 5 Tahun 2021.

for post-divorce child support. Even though in most cases of divorce, child custody becomes the right of the ex-wife or the child's mother, the father must still fulfill his obligation to provide for the child as stipulated in the divorce decision. The support that must be given is according to the father's capabilities. In Chapter Al Baqarah verse 233, it states that the father must provide reasonable maintenance according to his capabilities. Thus, the amount of child support is relative to the condition of the concerned individual. In the Qur'an, Allah does not state a specific amount of support that must be fulfilled. But Allah orders the support to be given in good ways according to the capabilities of the people as Allah does not burden a soul more than what he can bear.

The confiscation of an ex-husband's property as a guarantee for child support can be demanded in a case where the father neglects fulfilling this duty after divorcing his wife. This is because Allah obliges fathers to main breadwinners for children up to a certain period. This guarantee aims to prevent the father's negligence in fulfilling child support. In case the father is negligent, the collateral can be used to fulfill the child's needs. But a requirement for collateral is that the father must have wealth that can be used as an object of guarantee. The collateral object cannot be an object that the defendant needs to fulfill his primary needs. This is so that the *maslahat* of the party giving the guarantee, i.e., the father, is still maintained. Because *maslahat* is the core of *maqashid syariah*, i.e., taking benefit and preventing harm,⁵¹ the confiscation of a property as a guarantee for support must be carried out by paying attention to the *maslahat* of the two parties.

Requirements are created as a facility to give ease to people in carrying out their roles in life as servants of God. The stipulations on the confiscation of property as a guarantee as stipulated in the Circular Letter No. 5 of 2021 is a facility to ease children in obtaining support after the divorce of their parents. This is to fulfill their needs and to achieve the *hifdz nafs* for the child. But according to the writer, if the application of this confiscation of rights only focuses on the child's *hifdz nafs*, it may bring harm to the father.

This is because the father's negligence in fulfilling the child support may be due to the father's incapability to provide support, rather than his unwillingness to provide support, as a form of purposeful negligence.⁵² In a case where the father is incapable to provide for his child but is still demanded to give his property as collateral for child support, this can hurt the *hifdz nafs* of the father. For instance, after divorcing his wife, the ex-husband or the child's father lost his job or

⁵¹ Abu Ishak Al-Syatibi, *Al-Muwafaqat Fi Ushul Al-Syari'ah* (Mesir: Dar Al-Fikri Al-Arabi, 1958).

⁵² H. Draper, "Paternity Fraud and Compensation for Misattributed Paternity," *Journal of Medical Ethics* 33, no. 8 (2007), p. 475-480

experienced losses in his business. Thus, it is difficult for him to fulfill his own needs and pay child support.

The main basis for the father's obligation for providing support is Allah's orders that are stipulated in the Holy Qur'an. Allah has determined a mother's nature to become pregnant, give birth, and breastfeed the child. Then, it is of the father's nature to provide for his child and his wife. This stipulation was made because Allah has created men (fathers) with higher capabilities to lead the household and provide support for his family members as Allah revealed in Chapter An-Nisa verse 34.⁵³

The concept of confiscating the husband's property as a guarantee for child support provides a facility for fathers to fulfill the obligations Allah has given. The fulfillment of child support is also part of the father's *hifdz nasl* (protecting the descendants). Putting wealth as collateral for child support is a way of protecting human welfare. This is a development of *hifdz maal* (protecting the wealth),⁵⁴ thus, the wealth becomes blessed and beneficial. But Allah's order to provide support in reasonable manners must still be emphasized. One of them is by giving according to the father's capabilities to prevent harming him.

The main concept of *maqāṣid al-sharī'ah* is obtaining benefits and preventing harm. All this emanate to *maslahah*. Benefit must be achieved through a rightful path.⁵⁵ The provision of benefit to a party that harms another must be prevented. In a *fiqh* principle, it is stated that there are *maslahah* (benefit) and *mafsadah* (harm) of the same amount and strength, it is preferable to prevent *mafsadah/mudharat* (harm) rather than to achieve *maslahah*. This is because preventing *mafsadah* or *mudharat* is a form of benefit, as in the *fiqh* principle, "Preventing *mudharat/harm* is more important than achieving *maslahat/benefit*".⁵⁶

The idea of *mashlahah* stands at the forefront as the fundamental objective guiding the entire framework of Islamic legal jurisprudence. Exploration of this principle can be traced through the pages of *Ushul Fiqh* texts spanning from the initial stages of development to the modern era of Islamic legal

⁵³ A. Kumedi Ja'far and Agus Hermanto, "Reinterpretation of the Rights and Duties of Contemporary Husbands and Wives," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 2 (2021), p. 648.

⁵⁴ Jasser Auda, *Membumikan Hukum Islam Melalui Maqasid Syariah* (Bandung: Mizan Pustaka, 2015).

⁵⁵ Mukti Tabrani, "Maqāshid Revitalization in Global Era: Istidlāl Study from Text to Context," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 13, no. 2 (2018), p. 310–333.

⁵⁶ H A Jazuli, *Kaidah-Kaidah Fikih: Kaidah-Kaidah Hukum Islam Dalam Menyelesaikan Masalah Masalah Yang Praktis* (Jakarta: Kencana, 2006).

scholarship. These books, at different levels, discuss *maslahah* as the purpose of the sharia.⁵⁷

Ibnu Majah, Ad-Daruquthni, and also other hadeeth narrators narrated a hadeeth from Ibn Umar which contained the words of Prophet Muhammad PBUH, "There should be neither harming nor reciprocating harm".⁵⁸ Through this hadeeth, Prophet Muhammad PBUH stated that there is no creation of Islamic sharia unless it contains benefit in the world and the Hereafter. The Prophet prohibited us from making things difficult for ourselves and for others. Also, in determining a law or sharia, ease should be given to those who applied it. The Prophet stated in a hadeeth narrated by Al-Imam Al-Bukhari, "Make things easy for the people and do not make things difficult for them and make them calm (with glad tidings) and do not repulse (them)."⁵⁹

Based on the description of the *maqāṣid al-sharī'ah* analysis on the concept of confiscating the ex-husband's wealth as collateral for post-divorce child support, according to the researcher, it can be perceived from the side of the child, where this concept can bring benefit or *maslahah* by maintaining the soul (*hifdz nafs*) and maintaining the mind (*hifdz aql*). Then, from the perspective of the father, this concept can bring benefit to the father by maintaining the descendants (*hifdz nasl*) and maintaining the wealth (*hifdz maal*). But this law may potentially harm a part of maintaining the soul (*hifdz nafs*) of the father.

Conclusion

The concept of confiscating an ex-husband's property as a guarantee for post-divorce child support is an execution confiscation proposed to the Religious Court for the negligence of the husband of the father in applying the child support stipulations in the divorce decision. It can be applied by the ex-wife or the child's mother or the child's guardian to the Religious Court. The collateral wealth or object can then be sold to fulfill the needs for child support (*hadhanah*) if the father neglects his duty to fulfill it. Based on the description of the *Maqāṣid Al-Sharī'ah* analysis on the concept of confiscating the ex-husband's wealth as collateral for post-divorce child support, according to the researcher, it can be perceived from the side of the child, where this concept can bring benefit or *maslahah* by maintaining the soul (*hifdz nafs*) and maintaining the mind (*hifdz aql*). Then, from the side of the father, this concept can bring benefit to the father by maintaining the descendants (*hifdz nasl*) and maintaining the wealth (*hifdz*

⁵⁷ Elviandari Elviandari et al., "The Formulation of Welfare State: The Perspective of Maqāṣid Al-Sharī' Ah," *Indonesian Journal of Islam and Muslim Societies* 8, no. 1 (2018), p. 117.

⁵⁸ Abu Abdullah Muhammad ibn Yazid ibn Abdullah Ibn Majah Al Quzwaini, *Sunan Ibn Majah* (Beirut: Dar Al-Fikr, 2004).

⁵⁹ Ibrahim, *Al-Qawa'id Al-Maqashidiah (Kaidah-Kaidah Maqashid)*.

maal). But this law may potentially harm a part of maintaining the soul (*hifdz nafs*) of the father.

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Interviews

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