



Al-Ihkam: Jurnal Hukum dan Pranata Sosial, 20 (2), 2025: 531-558
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: <https://doi.org/10.19105/al-ihkam.v20i2.15927>

Best Interest of the Child (*Hifz al-Awlād*) Principle in Adjudicating Marriage Dispensation for Under-Age Couples

Moch. Nurcholis

Institut Agama Islam Bani Fattah, Jombang, Indonesia
email: moch.nurcholis@iaibafa.ac.id

Iffatin Nur

Universitas Islam Negeri Sayyid Ali Rahmatullah, Tulungagung, Indonesia
email: iffaeltinury@gmail.com

Abd. Holik

Institut Agama Islam (IAI) Bani Fattah, Jombang, Indonesia
email: abd.holik@iaibafa.ac.id

Ahmad Muhtadi Anshor

Universitas Islam Negeri Sayyid Ali Rahmatullah, Tulungagung, Indonesia
email: muhtadianshor@gmail.com

Article history: Received: November 17, 2024, Accepted: December 20, 2025,
Published: December 31, 2025

Abstract:

Since the enactment of Law Number 16 of 2019, which amended Law Number 1 of 1974 on Marriage, the Religious Court of Malang Regency has experienced a significant surge in marriage dispensation applications compared to the period when the previous Marriage Law was still in effect. This research aims to construct the concept of *maqāṣid asy-syārī'ah* *fi hifz al-awlād* by analyzing judicial reasoning of judges in determining marriage dispensations at Malang Regency Religious Court. It specifically explores how judges' interpretations of the best interests of the child can be formulated into a new derivative of *maqāṣid* theory. This research is a normative-empirical juridical research with a case approach. The data were collected through interviews with

Author correspondence email: moch.nurcholis@iaibafa.ac.id
Available online at: <http://ejurnal.iainmadura.ac.id/index.php/alihkam/>
Copyright (c) 2025 by Al-Ihkam: Jurnal Hukum dan Pranata Sosial



three male judges and two female judges from the Religious Court of Malang Regency. Informants were selected using purposive sampling, targeting judges with the most extensive experience in handling marriage dispensation cases. As data saturation had been reached, the number of informants was deemed qualitatively representative. Data were also obtained from official documentation of legally binding marriage dispensation rulings (*inkracht van gewijsde*). All data were analyzed using a descriptive-analytical approach, and conclusions were drawn through the application of an interactive cyclical method. The principle of the best interests of the child in determining marriage dispensations aims at providing protection for the child, both physically and psychologically. It includes the age of the prospective bride and groom, economic adequacy, reliable guidance and assistance from the family, and adequate religious safety and protection of children in the womb.

Keywords:

Marriage dispensation; Best interests of the child;

Maqāṣid asy-Syari'ah fi Ḥifẓ al-Awlād

Introduction

The marriage dispensation regulated in the Indonesian Marriage Law is considered to be the legality of the practice of child marriage.¹ This legality provided by the state is intertwined with the legitimacy of Sharia law, which has been used by judges in adjudicating requests for marriage dispensation.² Baugh noted that the legitimacy of sharia law is rooted in consensus (*ijmā'*) among early Muslim scholars who positioned child marriage as a practice justified by Islamic

¹ Lilik Andar Yuni, "Analysis of the Emergency Reasons in the Application of Marriage Dispensation at the Tenggarong Religious Court," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 5, no. 2 (2021): 976-1002, <https://doi.org/10.22373/sjhk.v5i2.9135>.

² Hoko Horii, "Legal Reasoning for Legitimation of Child Marriage in West Java: Accommodation of Local Norms at Islamic Courts and the Paradox of Child Protection," *Journal of Human Rights Practice* 12, no. 3 (2020): 501-23, <https://doi.org/10.1093/jhuman/huaa041>.

teachings.³ As a result, Indonesia ranks as the country with the highest number of child marriages in Southeast Asia and 4th globally.⁴

Application for marriage dispensation rates in Indonesia after the enactment of Law No. 16 of 2019 experienced a significant increase. In 2018 (when UUP No. 1 of 1974 was still in effect), the number of applications for marriage dispensation on a national scale was 13,880 cases. Meanwhile, in 2019 (UUP No. 16/2019 came into force), applications for marriage dispensation amounted to 24,864 cases. In 2020, there were 64,196 cases, 62,913 cases in 2021, 52,094 cases in 2022, 42,779 cases in 2023, and 32,529 cases in 2024. This data indicates that the implementation of Law No. 16 of 2019 has, in empirical terms, triggered a significant surge in marriage dispensation applications, particularly during the first two years following its enactment. Although the trend has since declined, the number of marriage dispensation cases in the post-Law No. 16/2019 period remains substantially higher compared to the period prior to the amendment. This suggests that, both structurally and culturally, child marriage continues to be a persistent practice that cannot be effectively eliminated through changes in positive law alone.

The increase in the number of applications for marriage dispensation also occurred at the Malang Regency Religious Court. In 2018, when UUP No.1/1974 was still in effect, requests for marriage dispensation in this Court amounted to 398 cases. Meanwhile, when UUP No.16/2019 was implemented, the increase began to appear significant. In 2019, There were 917 cases (a rise of around 130%), 1,783 cases in 2020 (an increase of 348% relative to 2018), 1,762 cases in 2021, 1,433 cases in 2022, 1,009 cases in 2023, and 847 in 2024. This notable rise resulted from the alteration of the minimum marriage age for women from 16 to 19 years. Consequently, an increasing number of couples fail to satisfy the minimum age criterion and seek dispensations from the court. Although the trend experienced a reduction from 2022 to 2024, the number of applications remained markedly elevated compared to the period preceding the law's amendment. The persistently elevated volume of marriage dispensation applications

³ Carolyn G. Baugh, *Minor Marriage in Early Islamic Law* (Boston: Brill, 2017), <https://doi.org/10.1163/9789004344860>.

⁴ Jan Priebe and Sudarno Sumarto, "Reducing Child Marriages through CCTs: Evidence from a Large-Scale Policy Intervention in Indonesia," *Journal of Public Economics* 242, no. 1 (2025): 105306, <https://doi.org/10.1016/j.jpubeco.2025.105306>.

indicates a disparity between the state's objective to safeguard children's rights by prohibiting early marriage and the ongoing occurrence of child marriage, which is unintentionally legitimised by the state through the issuance of marriage dispensations.

Apart from the high number of marriage dispensations, there are other facts about Malang Regency making it worth to study. Having a large area⁵ with various typologies (urban, peri-urban, and rural),⁶ its large population dominated by devout Muslims⁷ and high demographic bonus⁸ offers a unique context for marriage dispensation research. Relatively low levels of education⁹ and economic conditions dominated by agriculture¹⁰ potentially trigger a spike in marriage dispensation applications. The combination of these factors makes Malang Regency a relevant research locus for understanding the dynamics of marriage dispensation comprehensively. Moreover, it is known that the Malang Regency Religious Court is a religious justice

⁵ Badan Pusat Statistik Provinsi Jawa Timur, "Luas Daerah dan Jumlah Pulau Menurut Kabupaten/Kota di Provinsi Jawa Timur, 2024," *Jatim BPS*, February 23, 2025, <https://jatim.bps.go.id/id/statistics-table/3/VUZwV01tSlpPVIpsWIRKbmMxcFhhSGhEVjFoUFFUMDkjMw==/luas-daerah-dan-jumlah-pulau-menurut-kabupaten-kota-di-provinsi-jawa-timur--2024.html>.

⁶ Zulfikar Mohamad Yamin Latuconsina, "Analisis Faktor-Faktor Yang Mempengaruhi Indeks Pembangunan Manusia Kabupaten Malang Berbasis Pendekatan Perwilayah dan Regresi Panel," *Journal of Regional and Rural Development Planning* 1, no. 2 (2017): 202, <https://doi.org/10.29244/jp2wd.2017.1.2.202-216>.

⁷ Badan Pusat Statistik Kabupaten Malang, "Penduduk Menurut Agama dan Kecamatan, 2018-2020," *BPS Kabupaten Malang*, July 30, 2021, <https://malangkab.bps.go.id/statictable/2019/08/27/751/penduduk-menurut-agama-dan-kecamatan-2018-2020.html>.

⁸ Badan Pusat Statistik Kabupaten Malang, "Jumlah Penduduk Menurut Kelompok Umur dan Jenis Kelamin di Kabupaten Malang, 2024," *BPS Kabupaten Malang*, February 11, 2025.

⁹ Badan Pusat Statistik Kabupaten Malang, "Rata-Rata Lama Sekolah (Tahun), 2019-2021," *BPS Kabupaten Malang*, December 2, 2024, <https://malangkab.bps.go.id/indicator/26/44/1/rata-rata-lama-sekolah.html>.

¹⁰ Badan Pusat Statistik Kabupaten Malang, "Rata-Rata Pengeluaran Perkapita Sebulan Menurut Jenis Pengeluaran Makanan dan Non Makanan (Rupiah), 2023," *BPS Kabupaten Malang*, November 10, 2025, <https://malangkab.bps.go.id/id/statistics-table/2/MTY0IzI=/rata-rata-pengeluaran-perkapita-sebulan-menurut-jenis-pengeluaran-makanan-dan-non-makanan.html>.

institution that is the largest contributor to the number of marriage dispensations in East Java.¹¹

This research aims to construct the concept of *maqāṣid asy-syari'ah fi hifz al-awlād* by analyzing judicial reasoning of judges in determining marriage dispensations at the Malang Regency Religious Court. It specifically explores how judges' interpretations of the best interests of the child can be formulated into a new derivative of *maqāṣid* theory. Although the issue of marriage dispensation is commonly discussed, no existing research has employed judicial practice as a basis for constructing a derivative theory of *maqāṣid asy-syari'ah*.

Numerous studies have been conducted on the issue of marriage dispensation. Among them are those focusing on changes to the legal minimum age of marriage and the implications of marriage dispensation policies,¹² urgent reasons for requesting a marriage dispensation,¹³ pregnancy as a factor in marriage dispensation applications,¹⁴ the culture of judges in handling marriage dispensation applications,¹⁵ the judge's argument in granting a marriage dispensation request,¹⁶ the judge's argument in rejecting the marriage dispensation application,¹⁷ the impact of marriage through marriage

¹¹ Pengadilan Tinggi Agama Surabaya, "Statistik Perkara," PTA Surabaya (Surabaya, December 2021), https://pta-surabaya.go.id/main/pages/statistik_perkara.

¹² Salmah Mursyid and Nasruddin Yusuf, "Changes in Marriage Age Limits and Marriage Dispensations: A Study of Causes and Impacts on the Religious Courts in North Sulawesi," *Samarah* 6, no. 2 (2022): 975-96, <https://doi.org/10.22373/sjhk.v6i2.12439>.

¹³ Muhamad Beni Kurniawan and Dinora Refiasari, "Interpretation of the Meaning of 'Imperative Reason' In Marriage Dispensation Denial," *Jurnal Yudisial* 15, no. 1 (2022): 84, <https://doi.org/10.29123/jy.v15i1.508>.

¹⁴ Isnawati Rais, "Marriage Dispensation Due to Extramarital Pregnancy: The Study on the Decision by the Religious Court of South Jakarta (2010-2011)," *Ahkam: Jurnal Ilmu Syariah* 18, no. 1 (2018): 155-76, <https://doi.org/10.15408/ajis.v18i1.7490>.

¹⁵ Supriyadi and Siti Suriyati, "Judges' Legal Culture in Dealing with High Number of Applications for Child Marriage Dispensation during Covid-19 Pandemic at the Kudus Religious Court," *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* 17, no. 1 (2022): 136-61, <https://doi.org/10.19105/AL-LHKAM.V17I1.6060>.

¹⁶ Yuni, "Analysis of the Emergency Reasons in the Application of Marriage Dispensation at the Tenggarong Religious Court."

¹⁷ M Anwar Nawawi et al., "Harmonization of Islam and Human Rights: Judges' Legal Arguments in Rejecting Child Marriage Dispensation in Sukadana, Indonesia," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 22, no. 1 (2022): 117-34, <https://doi.org/10.18326/ijtihad.v22i1.117-134>.

dispensation.¹⁸ Based on the review of existing studies, there has been no research to date that specifically examines the application of *maqāṣid asy-syārī’ah*, particularly the principle of *hifz al-awlād* (protection of children), within the context of *marriage dispensation* rulings issued by the Religious Courts.

This study advances the practical application of *maqāṣid asy-syārī’ah* theory in judicial contexts, particularly in relation to marriage and child protection. It continues the classical debate over whether *hifz an-nash* (preservation of lineage) or *hifz an-nasl* (protection of progeny) constitutes one of the five essential objectives (*ad-darūriyyāt al-khams*) of Islamic law. While jurists such as al-Qarāfī, al-Baydāwī, al-Tūfī, *Şadd asy-syārī’ah al-Mahbūbī*, and Tāj al-Dīn al-Subkī emphasized *hifz an-nash*, others including al-Ghazālī, al-Āmidī, Ibn al-Hājib, and al-Shāṭibī highlighted *hifz an-nasl* as a core element of *ad-darūriyyāt al-khams*.¹⁹

Within contemporary *maqāṣid asy-syārī’ah* discourse, this study reinterprets *al-nasl*—traditionally viewed as the main objective of marriage by Ibn ‘Āshūr and Jamāluddīn ‘Aṭīyyah—by framing it around the child as a rights-bearing individual. While classical thought emphasized lineage preservation (*hifz an-nasl*), this research situates it in the context of child protection. Jāsir ‘Awdah traces the evolution of *hifz an-nasl* from Abū al-Ḥasan al-‘Āmirī’s concept of *hatk al-satr* to al-Juwaynī’s *‘ismat al-furūj*, later systematized by al-Ghazālī and al-Shāṭibī.²⁰ Ibn ‘Āshūr expanded its scope to social and civilizational dimensions, further developed by al-Qaradāwī through *takwīn al-usrah al-maṣlaḥah* (formation of a virtuous family). This evolution, as noted by ‘Awdah, reflects Islamic law’s enduring pursuit of *maṣlaḥah* (human welfare) across contexts.²¹

Building on this topic, the focus of this study is directed toward two main aspects: First, the interpretation and application of the *best interests of the child* principle by judges; and second, the construction of

¹⁸ Darmawan et al., “Marriage Dispensation and Family Resilience: A Case Study of the Bener Meriah Shariah Court, Aceh Province,” *Ahkam: Jurnal Ilmu Syariah* 22, no. 2 (2022): 433–54, <https://doi.org/10.15408/ajis.v22i2.28827>.

¹⁹ Muḥammad Sa’id al- Yūbī, *Maqāṣid Al-Syārī’ah Al-Islāmiyyah* (Saudi Arabia: Dār al-Hijrah li al-Nasyr wa al-Tawzī’, 1998), 246.

²⁰ Jāsir ‘Awdah, *Al-Ijtihād Al-Maqāṣidī: Min al-Taṣawwur al-Uṣūlī Ilā al-Tanzil al-‘Amalī* (Beirut: Al-Syabakah al-‘Arabiyyah li al-Abhāṣ wa al-Nasyr, 2013), 20.

²¹ ‘Awdah, *Al-Ijtihād al-Maqāṣidī: Min al-Taṣawwur al-Uṣūlī Ilā al-Tanzil al-‘Amalī*.

judicial reasoning as a manifestation of *maqāṣid asy-syari'ah* *fi hifz al-awlād* (the objectives of Islamic law in safeguarding children).

Methods

This research is a normative-empirical juridical one with a case approach.²² The research data were obtained through interviews with three male judges and two female judges from the Religious Court of Malang Regency. Informants were selected using purposive sampling, targeting judges with the most extensive experience in handling marriage dispensation cases and for whom data saturation had been reached, thereby ensuring the qualitative representativeness of the sample. In addition, gender is also a consideration in determining informants so that the information obtained is truly objective and free from gender bias. Data were also obtained from official documentation of legally binding marriage dispensation rulings (*inkracht van gewijsde*), as well as from the prevailing legal and regulatory frameworks governing *marriage dispensation* in Indonesia.

Table 1. Research Samples of Marriage Dispensation Decisions in the Malang Regency Religious Court

| Case | Number Decision | Age of the Groom | Job and Monthly Income | Age of the Bride | Reasons for Application | Decision |
|------|--------------------------------|--------------------|---------------------------------------|---------------------|-------------------------|----------|
| I | 1042/Pdt .P/2018/ PA.Kab. Mlg. | 31 years old | Construction workers/ Rp. 1,500,000,- | 14 years, 2 months | Engaged for 2 months | Rejected |
| II | 1819/Pdt .P/2022/ PA.Kab. Mlg. | 21 years, 8 months | Construction workers/ Rp. 1,500,000,- | 17 years, 0 months | Engaged for 2 years | Rejected |
| III | 1838/Pdt .P/2020/ PA.Kab. Mlg. | 17 years | Trader/Rp. 3,000,000,- | 20 years | Engaged for 12 months | Granted |
| IV | 2023/Pdt .P/2020/ PA.Kab. Mlg. | 24 years, 2 months | Farmer/ Rp. 2,000,000,- | 17 years, 11 months | Engaged for 36 months | Granted |

²² Peter Mahmud Marzuki, *Penelitian Hukum*, 1st ed., vol. 6 (Surabaya: Kencana Prenada Media Group, 2020), 94.

| Case | Number Decision | Age of the Groom | Job and Monthly Income | Age of the Bride | Reasons for Application | Decision |
|------|--------------------------------|--------------------|-----------------------------------|---------------------|-------------------------|----------|
| V | 2024/Pdt .P/2020/ PA.Kab. Mlg. | 17 years, 6 months | Factory employee/ Rp. 3,000,000,- | 23 years | Engaged for 8 months | Granted |
| VI | 2034/Pdt .P/2020/ PA.Kab. Mlg. | 20 years | Private Worker/ Rp. 2,100,000,- | 17 years, 14 months | Engaged for 12 months | Granted |
| VII | 2036/Pdt .P/2020/ PA.Kab. Mlg. | 17 years | Private worker/ Rp. 3,000,000,- | 18 years | 8 months pregnant | Granted |
| VIII | 2040/Pdt .P/2020/ PA.Kab. Mlg. | 21 years | Driver/ Rp. 3,000,000,- | 17 years, 18 months | Engaged for 6 months | Granted |
| IX | 2041/Pdt .P/2020/ PA.Kab. Mlg. | 20 years | Private workers/ Rp. 1,500,000,- | 15 years, 5 months | Engaged for 10 months | Granted |
| X | 2044/Pdt .P/2020/ PA.Kab. Mlg. | 19 years old | Farmer/ Rp. 1,900,000,- | 17 years, 9 months | Engaged for 12 months | Granted |
| XI | 2085/Pdt .P/2020/ PA.Kab. Mlg. | 30 years | Trader/ Rp. 4,000,000,- | 15 years, 2 months | Engaged for 12 months | Granted |

To ensure the validity of the data, we employed source triangulation through the five judge informants. In addition, time triangulation was conducted over a period from February to May 2023, along with methodological triangulation using two data collection techniques: interviews and document analysis. All data were analyzed using a descriptive-analytical approach. In making conclusions, we utilized the interactive cycle conclusion drawing technique developed by Miles, Huberman, and Saldana.²³

²³ Matthew B. Miles, A. Michael Huberman, and Johnny Saldana, *Qualitative Data Analysis: A Methods Sourcebook*, ed. Helen Salmon, 3rd ed. (London: Sage Publication, 1994), 32, 33.

Result and Discussion

Judges' Interpretation of the Best Interests of the Child Principle in Marriage Dispensation Cases

The principle of the best interests of the child is a fundamental consideration that must guide judges in deciding whether to grant or reject marriage dispensation petitions as mandated by Supreme Court Regulation (PERMA) No. 5 of 2019. In evaluating marriage dispensation petitions, judges assess the child's consent, age readiness, safety, welfare, and social vulnerability—using these factors to determine which option better serves the child's long-term interests.²⁴ In this context, a judge A from the Malang Regency Religious Court remarked:

"We always ask the child directly whether they agree to the marriage. If the child appears hesitant or pressured, we usually explore the matter further with psychological support."²⁵

Apart from the things mentioned, judges in handling marriage dispensations also consider aspects of vulnerability to violence that may be experienced by children after marriage, aspects of child development, and also health and education needs. All of the aspects become a reference for the judge in either rejecting or granting the request for marriage dispensation. In relation to the principle of the best interests of the child in adjudicating marriage dispensation cases, another judge B from the Religious Court of Malang Regency, stated:

"Child protection must be a priority. If the child is not of sufficient age, it constitutes both psychological and physical suffering. Therefore, the judge views that if someone is not yet fit to become a husband or wife or lacks the necessary capacity, such a situation amounts to a form

²⁴ Mahkamah Agung Republik Indonesia, *Buku Saku Pedoman Mengadili Permohonan Dispensasi Kawin* (Jakarta: Mahkamah Agung Republik Indonesia, 2020), 37.

²⁵ Enik Faridaturrohmah, A Judge of the Religious Court of Malang Regency, *Interview*, February, 2023.

of suffering for the child. Hence, psychological and physical readiness are essential.”²⁶

The judges share a common view with the law on child protection – this includes the protection of the prospective groom, the prospective bride, and the child to be born, both physically and psychologically.²⁷ In this regard, a judge C stated:

“Those who come to the Religious Court to request a marriage dispensation are, in fact, law-abiding individuals. Therefore, they deserve protection. The dispensation must be able to provide protection to both prospective spouses. Especially in cases where the bride is already pregnant, the dispensation must serve to protect all parties involved. We have studied the Child Protection Law. Even if the child is still in the womb, they must be protected, so that when the child is born, they will have legal parents – a mother and a father.”²⁸

Efforts to provide protection are not limited only to the time of granting or rejecting dispensation. It extends beyond that, especially when the two partners live their lives together in marriage. Judges are required to carry out *ijtihād* with nuanced projections of the future (*ijtihād iftirādī*) to find these best interests. Steps and efforts that can be taken are to consider the facts of the trial, then carry out an impact analysis and find predictive legal conclusions based on the existing facts. This stage, as long as it is carried out through the logic of drawing correct and objective conclusions, will definitely produce conclusions that are valid or at least close to valid.²⁹ This stage can be said to be a necessity for the judge to avoid being perceived as a party participating in legalizing child marriage. One of the judges B stated:

²⁶ Abd. Rauf, A Judge of the Religious Court of Malang Regency, *Interview*, March, 2023.

²⁷ Rauf.

²⁸ Sutaji, A Judge of the Religious Court of Malang Regency, *Interview*, March, 2023.

²⁹ Yuni, “Analysis of the Emergency Reasons in the Application of Marriage Dispensation at the Tenggarong Religious Court.”

“We must exercise *ijtihād* and think far ahead. Would rejecting this marriage dispensation lead to greater harm, such as illicit sexual relations (*zinā*)? Or would granting it under strict conditions actually bring benefit (*maṣlahah*) to the child and the unborn baby? This is where our role lies—in finding a progressive legal solution in pursuit of justice.”³⁰

From the perspective of judges at the Religious Court of Malang Regency, the exercise of *ijtihād* is essential in adjudicating *marriage dispensation* cases, even if it involves a *contra legem* approach—setting aside general statutory norms when necessary. One judge B stated:

“A judge may deviate from general legal provisions (*contra legem*), as long as the reasoning behind that decision is genuinely well-founded and accountable. Judges possess the freedom to act in accordance with sound scholarly reasoning.”³¹

According to legal scholars, *contra legem* is a method for achieving progressive legal interpretation—a form of law that places the human being as the ultimate purpose of its application, rather than requiring individuals to submit unconditionally to the interests of the law itself.³² Such a *contra legem* approach is acceptable as long as it is grounded in valid scholarly reasoning and aimed at fulfilling a sense of justice for those seeking legal remedy.³³

The above perspective affirms that legal norms should serve humanity, not the other way around, and that justice must prevail over rigid formalism when the two come into conflict. In the context of child marriage regulations, the rules *on* marriage dispensation exist to ensure the realization of the best interests of the child, not merely to preserve

³⁰ Abd. Rauf, A Judge of the Religious Court of Malang Regency, *Interview*, March, 2023.

³¹ Rauf

³² Satjipto Rahardjo, “Hukum Progresif: Hukum Yang Membebaskan,” *Jurnal Hukum Progresif* 1, no. 1 (2011): 1–24, <https://doi.org/10.14710/hp.1.1.1-24>.

³³ Rian VAn Frits Kapitan and Tontji Christian Rafael, “Penerapan Asas Contra Legem oleh Hakim dalam Perkara Tindak Pidana Korupsi,” *Spektrum Hukum* 17, no. 1 (2020): 2, <https://doi.org/10.35973/sh.v17i1.1336>.

the internal consistency or perceived effectiveness of legal norms. The purpose of the dispensation mechanism, therefore, is not to protect the law for its own sake, but to serve and protect the rights and welfare of the child.

In interpreting the term "*child*" within the phrase "*the best interests of the child*," judges at the Religious Court of Malang Regency do not rely on the definition provided in Article 50(1) of the Marriage Law No. 16 of 2019 (UUP). That provision narrowly defines a "*child*" as one who has already been born and is under 18 years of age and/or has not yet entered into marriage. In other words, under the UUP, the category of "*child*" applies strictly to individuals who are physically born; unborn children (fetuses) are excluded from this legal recognition.

In contrast, the judges refer instead to Article 1(1) of the Republic of Indonesia Law Number 35 of 2014 concerning Child Protection (UUPA), which adopts a broader definition of "*child*" that includes fetuses still in the mother's womb. Accordingly, the term "*child*" in the context of this discussion refers to two distinct entities: (1) the underage prospective bride or groom; and (2) the fetus that already exists in the womb, if any, at the time the dispensation petition is submitted. This expanded understanding aligns with the judges' child-centered approach to legal reasoning and underscores their application of the best interests of the child principle in a comprehensive and inclusive manner. This interpretive stance is reflected in the words of one judge C during an interview:

"Even if the child is still in the womb, they must be protected – so that when the child is born, they will have legal parents (a father and a mother)." ³⁴

In cases of out-of-wedlock pregnancy, judges' A, B, C, interpretation of the term "*child*" – as previously described – becomes especially evident. Nearly all judges approve marriage dispensation petitions when pregnancy is involved, reflecting their broader understanding of "*child*" to include not only the underage individuals seeking to marry, but also the unborn child. This perspective reinforces the judges' commitment to safeguarding all parties involved,

³⁴ Sutaji, A Judge of the Religious Court of Malang Regency, *Interview*.

particularly by ensuring that the unborn child is born into a legally recognized family structure, thereby preventing psychological distress upon birth, in line with their interpretation of the best interests of the child principle.³⁵

Therefore, from the perspective of judges at the Religious Court of Malang Regency, granting a marriage dispensation petition due to pregnancy is seen as an act of safeguarding all parties involved—children who are about to get married and the child still in the womb. Although this study includes only one case (no. VII) involving pregnancy, the issue frequently arises and often becomes a central consideration for judges, as confirmed in the interviews (judge A):

"Most marriage dispensation petitions are filed after the girl is already pregnant. However, this does not mean that pregnancy becomes a legal consideration. We deliberately do not mention pregnancy in the legal reasoning to avoid setting a harmful precedent for the public. Especially to prevent the emergence of a negative perception such as, 'Just get pregnant first, and the dispensation will be granted.'"³⁶

Judges view out-of-wedlock pregnancy as an issue requiring special attention, particularly when it results from rape. Although this study does not specifically address marriage dispensation in cases of sexual assault, judicial perspectives reveal a recommendation to limit dispensations strictly to emergency circumstances—one of which is pregnancy caused by rape. One judge B stated:

"I recommend that marriage dispensation regulations be made strictly limited, both in terms of time and conditions. In terms of time, dispensations should only be allowed for ten years following the enactment of the regulation. In terms of conditions, marriage dispensation should serve as an emergency exit, not something that can

³⁵ Sutaji.

³⁶ Faridaturrohmah, A Judge of the Religious Court of Malang Regency, *Interview*.

be used arbitrarily. It must be extremely restricted—for example, in cases involving victims of rape.”³⁷

Although pregnancy is often a significant factor in the submission of marriage dispensation petitions, it is important to emphasize that judges maintain the view that there is no direct causal link between marriage dispensation and pregnancy. Out-of-wedlock pregnancy is seen as a consequence of broader social and cultural dynamics, particularly those beyond the supervision and control of parents. The notion that marriage dispensation is responsible for the rise in premarital pregnancies is therefore unfounded.³⁸

On the other hand, marriage dispensation serves as a legal remedy provided by the state to address such issues. As such, it may also be regarded as a legal pathway capable of ensuring the best interests of both the children who are about to get married and the child still in the womb.³⁹

The principle of the best interests of the child is applied by judges not only when granting marriage dispensation petitions, but also when rejecting them. One judge D explained:

“The Panel of Judges does not simply approve a marriage dispensation unless there is a genuine legal interest to protect and a clear benefit for the child. We, as judges, do not always grant such petitions. We have rejected them when the situation is not truly urgent. We carry out our duties based on our assigned role, on facts, and on the available evidence.”⁴⁰

This perspective reinforces the understanding that marriage dispensation is not a tool provided by the state to legitimize or perpetuate child marriage. Rather, it is intended to ensure protection and the best possible care for the child. This protection is grounded in

³⁷ Abd. Rauf, A Judge of the Religious Court of Malang Regency, *Interview*, March, 2023.

³⁸ Faridaturrohmah, A Judge of the Religious Court of Malang Regency, *Interview*.

³⁹ Sutaji, A Judge of the Religious Court of Malang Regency, *Interview*.

⁴⁰ Masrifah, A Judge of the Religious Court of Malang Regency, *Interview*, March, 2023.

evidence presented during the trial, especially regarding the child's readiness to enter marital life. Even when petitioners claim that the child is prepared for marriage, if the judge finds such claims to be unsubstantiated, the petition must be rejected. One judge A elaborated:

"Yes, rejecting petitions requires firmness. Many people disagree when we reject them. But we must consider: what kind of family life will result if we approve it? Judges cannot rely on assumptions."⁴¹

This statement emphasizes that a judge's decision must be based on concrete proof of the prospective spouses' readiness—not just physically, but also economically and psychologically. Psychological readiness in particular refers to formal assessments conducted by court-appointed psychologists. The judge's statement above is consistent with a similar view expressed by another judge B, who remarked:

"Therefore, we cannot rely solely on physical readiness. If the psychological assessment shows that the child does not understand household roles or displays poor communication patterns, we reject the petition."⁴²

These judicial remarks regarding both physical and psychological readiness as key considerations in deciding marriage dispensation cases are corroborated by the Court's official rulings. An example of a judge's legal reasoning in rejecting a petition based on psychological evaluation reads:

"Considering the psychological evaluation report of the petitioners' child, which stated that the child is not recommended for marriage—citing significant deficiencies in nearly all areas, including financial management, knowledge of marital roles, awareness of the risks of early marriage, and poor communication skills as evidenced by

⁴¹ Faridaturrohmah, A Judge of the Religious Court of Malang Regency, *Interview*.

⁴² Rauf, A Judge of the Religious Court of Malang Regency, *Interview*.

responses during the evaluation—the Court finds that the petition should be denied.”

The explanations provided by judges at the Religious Court of Malang Regency clearly show that the principle of the best interests of the child is applied both in approving and rejecting marriage dispensation application. In interpreting this principle, judges go beyond physical aspects and give serious weight to psychological and social maturity. In their view, psychological and sociological readiness are inherent prerequisites in determining whether a decision truly aligns with the best interests of the child.

In short words, judges at the Religious Court of Malang Regency interpret the best interests of the child not only through formal legal requirements but also through multidimensional assessments of psychological, economic, and social readiness. They employ a child-centered approach—grounded in *ijtihād*, empathy, and ethical foresight—that balances statutory norms with lived realities. Whether granting or rejecting petitions, the consistent aim is to uphold the child’s dignity, safety, and long-term welfare, including that of unborn children.

Aspects of *Maqāṣid asy-Syārī’ah fī Ḥifz al-Awlād* in Adjudicating Marriage Dispensations

It can be concluded that judges at the Religious Court of Malang Regency, in deciding whether to grant or reject marriage dispensation petitions, apply the principles of *maqāṣid asy-syārī’ah*. Although the rulings do not explicitly cite *maqāṣid asy-syārī’ah* as the legal basis for their decisions, it is evident that each marriage dispensation decision reflects legal maxims (*qawā’id fiqhīyyah*) that embody the essence of *maqāṣid asy-syārī’ah*. One such maxim frequently observed is “*dar’ al-mafāṣid muqaddam ‘alā jalb al-maṣālih*” (preventing harm takes precedence over attaining benefits). There are two aspects in this rule, namely *dar’ al-mafāṣid* and “*jalb al-maṣālih*” in the view of ‘Izzuddin Ibn ‘Abdissalām as the essence of *maqāṣid asy-syārī’ah*.⁴³ One of the judges B offered a constructed interpretation of the legal maxim “*aar’ al-mafāṣid*

⁴³ Abū Muḥammad ‘Izzuddin Ibn ‘Abdissalām, *Qawā’id al-Aḥkām fī Maṣālih al-Anām* (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1999), 11.

muqaddamun 'alā jālb al-maṣālih" in the context of marriage dispensation cases as follows:

"Preventing harm—namely, sacrificing the best interests of the child—takes precedence over potential benefit, such as complying with the wishes of the parents or adhering to the minimum age requirement for marriage."⁴⁴

This interpretation underscores the judge's commitment to prioritizing child protection over formal or societal pressures. It reflects a *maqāṣid*-oriented legal reasoning, where the welfare and rights of the child override both procedural conformity and parental intent when they are in conflict. Legal reasoning based on *maqāṣid asy-syārī'ah*—the higher objectives of Islamic law—was first articulated by al-Tirmidhī⁴⁵ and later developed by scholars such as al-Juwainī, al-Ghazālī, and al-Shāṭibī.⁴⁶ At its core, *maqāṣid asy-syārī'ah* aims to achieve human welfare (*maṣlaḥah*)⁴⁷ by ensuring the protection of five essential values:⁴⁸ religion (*hifz ad-dīn*), life (*hifz an-nafs*), intellect (*hifz al-'aql*), lineage (*hifz an-nasl*)⁴⁹, and property (*hifz al-māl*).⁵⁰

Among the domains in which these overarching objectives manifest most clearly is family law, particularly in the institution of marriage, which carries its own set of defined goals within the *maqāṣid* framework. Marriage, as a legal institution, holds specific objectives (*maqāṣid an-nikāh*),⁵¹ which include procreation, emotional stability,

⁴⁴ Rauf, A Judge of the Religious Court of Malang Regency, *Interview*.

⁴⁵ Ahmad al-Raysūnī, *Nazariyyat al-Maqāṣid 'ind al-Imām al-Syātibī* (Herndon: The International Institute of Islamic Thought (IIIT), 1992), 26.

⁴⁶ Yūbī, *Maqāṣid Al-Syārī'ah Al-Islāmiyyah*.

⁴⁷ Hammādī al-'Ubaydī, *asy-Syātibī wa Maqāṣid asy-Syārī'ah* (Beirut: Dār al-Qutaybah, 1992), 119; Iffatin Nur, Ali Abdul Wakhid, and Lestari Handayani, "A Genealogical Analysis on the Concept and Development of *Maqāṣid Shari'ah*," *Al-'Adalah* 17, no. 1 (2020): 9, <https://doi.org/https://doi.org/10.24042/adalah.v17i1.6211>.

⁴⁸ 'Ubaydī, *Al-Syātibī Wa Maqāṣid Al-Syārī'ah*.

⁴⁹ Muḥammad Tāhir Ibn 'Āṣyūr, *Maqāṣid Al-Syārī'ah Al-Islāmiyyah* (Urdun: Dār al-Nafā'is, 2001), 441; Yūbī, *Maqāṣid Al-Syārī'ah Al-Islāmiyyah*.

⁵⁰ 'Ubaydī, *Al-Syātibī Wa Maqāṣid Al-Syārī'ah*.

⁵¹ Ḥasan al-Sayyid Ḥāmid Khiṭāb, *Maqāṣid an-Nikāh wa Āṣāruhā* (Madinah: Jāmi'ah Ṭayyibah, 2009), 9.

mutual support, and the ethical regulation of family relationships.⁵² These objectives were detailed by al-Ghazālī,⁵³ and al-Shāṭibī.⁵⁴ Ibn ‘Āshūr expanded this discussion by linking marriage to the broader purpose of building the family institution.⁵⁵ As noted by Felicitas Opwis, Ibn ‘Āshūr’s contributions included themes like equality (*musāwāh*), freedom (*hurriyyah*), and universal order (*nizām al-ummah*), thus embedding *maqāṣid* discourse in global and societal dimensions.⁵⁶ He argued that the goals of family law include upholding marital ties, blood relations, and the ethical means of separation.⁵⁷

Contemporary scholars like Jamāluddīn ‘Aṭiyyah and Zaynab al-‘Alwānī emphasized child welfare (*maṣāliḥ al-awlād*) as a core legal purpose of family law, advocating a more inclusive understanding of *hifz al-nasl*.⁵⁸ Jāsir ‘Awdah later proposed a tripartite typology of *maqāṣid*: general (*‘āmmah*), specific (*khāṣṣah*), and particular (*juz’iyyah*), allowing for the integration of classical values with modern principles such as freedom (*hurriyyah*), universality (*‘ālamiyah*), and compassion (*samāḥah*). Within this framework, child welfare (*maṣāliḥ al-awlād*) stands as a critical objective in contemporary Islamic legal thought.⁵⁹

Building on this conceptual framework, we seek to explore how these modern *maqāṣid*—particularly those related to child welfare—are operationalized in contemporary legal practice. We made an effort to construct *maqāṣid asy-syari’ah fi hifz al-awlād* inductively by looking at

⁵² Khiṭāb, *Maqāṣid an-Nikāh wa Āsāruhā*.

⁵³ Abū Ḥāmid al- Ghazālī, *Iḥyā’ ‘Ulūmīddīn* (Lebanon: Dār Ibn Ḥazm, 2014), 35.

⁵⁴ Abū Iṣhāq al- Syāṭibī, *Al-Muwāfaqāt* (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2003), 396.

⁵⁵ Muḥammad Ṭāhir Ibn ‘Āsyūr, *Uṣūl an-Niẓām al-Ijtīmā’ī fi al-Islām* (Kairo: Dār al-Salām, 2005), 98.

⁵⁶ Felicitas Opwis, “Ibn ‘Āshūr’s Interpretation of the Purposes of the Law (*Maqāṣid Al-Shari’ah*): An Islamic Modernist Approach to Legal Change,” in *The Objectives of Islamic Law: The Promises and Challenges of the Maqāṣid Al-Shari’ah*, ed. Idris Nassery, Rumee Ahmed, and Muna Tatari (Pennsylvania: Lexington Books, 2018), 117.

⁵⁷ Mohammad Fauzan Ni’ami and Bustamin Bustamin, “*Maqāṣid al-Syari’ah* dalam Tinjauan Pemikiran Ibnu ‘Āsyūr dan Jasser Auda,” *Juris: Jurnal Ilmiah Syariah* 20, no. 1 (2021): 91–102, <https://doi.org/10.31958/juris.v20i1.3257>.

⁵⁸ Jamāluddīn ‘Aṭiyyah, *Nahw Ta’fīl Maqāṣid asy-Syari’ah* (Damaskus: Dār al-Fikr, 2003), 149; Zaynab Ṭāhā al- ‘Alwānī, *Al-Usrah fi Maqāṣid asy-Syari’ah* (Herndon: The International Institute of Islamic Thought (IIIT), 2012), 121.

⁵⁹ Jāsir ‘Awdah, *Membumikan Hukum Islam Melalui Maqashid Al-Syariah, Terj. Osidin dan Ali Abd. El-Mun’im* (Bandung: Mizan, 2015), 36.

how Malang Regency Religious Court Judges determine requests for marriage dispensation.

The following are the aspects of *maqāṣid asy-syarī'ah fī hifz al-awlād* in determining marriage dispensations by Malang Regency Religious Court Judges;

First, the age of the prospective bride and groom. The determination of the age requirement of 19 (nineteen) years in the judge's "E" view is based on the need for a person's physical and mental readiness in carrying out married life.⁶⁰ Furthermore, the judge is of the view that determining the age of 19 (nineteen) years is essentially an indicator of maturity that applies nationally, which is necessary to guarantee legal certainty. This means that a person who has not yet reached the age of 19 (nine) years cannot necessarily be considered immature to take legal action (including marriage).⁶¹ In such cases, a casuistic examination of a person is needed in accordance with existing indicators. This philosophical thinking is used by the judges in interpreting maturity in cases I to XI.⁶² A judge Cstated:

"We do refer to the legal age of 19 as mandated by law, but we also assess the child's mental and biological readiness. If the child has reached puberty (*bāligh*) and demonstrates sufficient preparedness, we may consider approving the petition."⁶³

By using an approach to Islamic legal norms regarding *mukallaf*, the judges concluded that the prospective bride and groom, even though they had not yet reached the minimum age of marriage, were considered adults. So it is also considered that they are ready to get married.⁶⁴ This readiness then became the basis for the judge in granting the request for dispensation in cases III to XI, which were submitted based on urgent reasons. This basis was also used by the

⁶⁰ Suaidi Mashfuh, A Judge of the Religious Court of Malang Regency, *Interview*, February 2023.

⁶¹ Rauf, A Judge of the Religious Court of Malang Regency, *Interview*.

⁶² Faridaturrohmah, A Judge of the Religious Court of Malang Regency, *Interview*.

⁶³ Sutaji, A Judge of the Religious Court of Malang Regency, *Interview*.

⁶⁴ Sutaji.

judge in rejecting the request for marriage dispensation in case I. A judge A said,

“The reason for the rejection is that the bride and groom are still very young, still underage. The child was only 14 years old at the time, hadn't started working yet, and didn't seem mentally ready either—they were still very childish. When asked in court, it was the mother who answered more, while her own child seemed not to understand the essence and responsibilities of marriage. In this condition, I cannot grant it. This hasn't yet reached the category of being accountable according to both religious and social considerations.”⁶⁵

Consideration of the aspect of age readiness, apart from being related to biological sufficiency to ensure the achievement of the *maqāṣid* of preserving offspring, is also closely related to other *maqāṣid* in the form of regulating the relationship between two types of humans, the realization of a *sakīnah* family, *mawaddah wa rāhmah*, and the regularity of the basic aspects of family. Age readiness, according to Hakim, also includes sociological, psychological, and intellectual readiness.⁶⁶ This is also what the judge considered when denying the marriage dispensation application in case II, even though the applicant was over 15 (fifteen) years old.

Second, economic sufficiency. Readiness in the economic aspect is needed in realizing *maqāṣid* in the regularity of fulfilling family economy basic needs and also the preservation of offspring. In the Islamic view, protecting children is a mandate imposed on parents. In this regard, judge always digs up information regarding the jobs and income of the prospective bride and groom, especially the one who will act as head of the family. If a lack of readiness is found in fulfilling economic aspects, the judge will not hesitate to reject the request for marriage dispensation. In the judge's view, an examination of the economic aspects of the parties involved is absolutely necessary. Apart from being concerned with the continuity of the marital relationship

⁶⁵ Faridaturrohmah, A Judge of the Religious Court of Malang Regency, *Interview*.

⁶⁶ Mashfuh, A Judge of the Religious Court of Malang Regency, *Interview*.

that will be fostered by the bride and groom, this aspect is also closely related to the welfare of the children who will be born to the two.⁶⁷ In this regard, one judge A stated:

"We ask directly about their employment and income. If they don't have stable earnings, we consider them unfit to marry, as it could negatively impact the child. The same applies in reverse."⁶⁸

In the granted marriage dispensation decisions, it was found that 9 prospective grooms already had jobs and income. Economic readiness is a key consideration in judicial decisions on marriage dispensation petitions, as it directly affects both the couple and their future children. The lowest income earned by the prospective groom is IDR. 1,500,000 and the highest is IDR. 4,000,000,-. Associated with the monthly income per capita in the district of Malang, which states that the minimum poverty line for a person is IDR. 338,126,⁶⁹ and the average monthly expenditure is IDR. 957,860,⁷⁰ it can be stated that the prospective bride and groom whose request for dispensation is granted has moved beyond the threshold of poverty. This means that in this economic aspect, all applications are considered to be sufficiently prepared.

Third, adequate guidance and assistance from the family. This aspect is needed in realizing *maqāṣid asy-syari'ah* in the form of order in the basic aspects of the family and the realization of a sense of *sakīnah, mawaddah wa rahmah*. Judge, in examining marriage dispensation applications, also checks the parents of each prospective bride and groom. One of the judges A explained:

"We do not assess only the readiness of the child to marry, but also the extent to which the parents are capable of providing support. If the parents are mentally, socially

⁶⁷ Faridaturrohmah, A Judge of the Religious Court of Malang Regency, *Interview*.

⁶⁸ Faridaturrohmah.

⁶⁹ Badan Pusat Statistik Kabupaten Malang, "Garis Kemiskinan (Rp/Kapita/Bulan), 2019-2021," *BPS Kabupaten Malang*, August 5, 2024, <https://malangkab.bps.go.id/indicator/23/83/1/garis-kemiskinan.html>.

⁷⁰ Badan Pusat Statistik Kabupaten Malang.

unprepared or even coercive, that becomes a serious concern. Marriage is not just about two young individuals—it is about building a household supported by the family."⁷¹

In all examples of decisions studied (especially decisions case III to case XI), the judge made the legal fact in the form of the family's ability to participate in building their child's household as material for legal consideration in granting the dispensation. The participation of people referred to here is as far as health, social, and economic concerns are concerned.

Fourth, adequacy of preservation of religion (*hifz ad-dīn*) and protection of children in the womb. There is one rule of jurisprudence (*legal maxim*) that is almost always cited by judges. This is also stated in the marriage dispensation decisions examined in this research (cases I to XI). This rule reads "*dar' al-mafāsid muqaddam 'alā jalb al-maṣālih*" (rejecting damage should be prioritized over bringing goodness).⁷²

From the judges' perspective, applying this rule involves weighing two competing interests. The 'goodness' (*maṣlahah*) that is often set aside is the fulfillment of the formal marriage age of 19, which ideally guarantees educational completion and maturity.⁷³ One judge B stated:

"Preventing harm to the best interests of the child must take precedence over the perceived benefit of complying with the parents' wishes or adhering strictly to the minimum legal age of marriage."⁷⁴

Meanwhile, the aspect of *mafsadah* (damage) which must be more important is to be avoided as stated in the *fiqh* rules above, according to Judge's view, revolves around the following issues: Protecting children from committing adultery, avoiding potential greater harm to the child (violation of religious norms), and

⁷¹ Faridaturrohmah, A Judge of the Religious Court of Malang Regency, *Interview*.

⁷² 'Abdurrahmān Suyūṭī, *Al-Asybāh wa al-Naẓā'ir* (Beirut: Dār al-Kutub al-Ilmiyyah, 1982), Vol. 1, 87.

⁷³ Rauf, A Judge of the Religious Court of Malang Regency, *Interview*.

⁷⁴ Rauf.

maintaining the lineage of the child in the womb (case III).⁷⁵ This judge's view, if applied in the sound of the rules, will form a statement to protect children from (1) adultery, (2) *mafsadah* violations of larger religious norms, and (3) protecting the lineage of children in the womb, which is more prioritized to be realized than goodness in the form of complete education and health maturity. In other words, the aspect of loss in protecting religion (*hifz ad-din*) and lineage (*hifz al-nasl*) takes precedence over the good in *hifz al-'aql* and *hifz al-nafs*. One judge D remarked:

"If the girl is already pregnant and marriage is delayed, it can lead to greater social problems. This is not only a legal issue, but also one of dignity and the child's future."⁷⁶

The analysis of marriage dispensation cases at the Malang Regency Religious Court reveals that judges consistently implement the principles of *maqāṣid asy-syari'ah fī hifz al-awlād*—the protection of children—as a central legal consideration. Through detailed case-by-case assessments involving age maturity, economic capacity, family support, and the prevention of moral harm, judges demonstrate a clear commitment to safeguarding the welfare of children—both those who are about to marry and those still in the womb. This approach not only aligns with the classical objectives of Islamic law but also reflects a dynamic, context-sensitive application of Islamic legal philosophy within Indonesia's contemporary judicial framework.

This empirical trend in judicial reasoning indicates more than pragmatic legal adaptation; it also contributes meaningfully to the evolving discourse of Islamic legal theory. By placing child welfare at the core of legal decision-making, judges have, whether implicitly or explicitly, expanded the classical conception of *hifz al-nasl* (protection of lineage) into a more inclusive framework that considers the full well-being of children (*hifz al-awlād*), not merely as descendants but as legal subjects with independent rights and protections.

From a theoretical standpoint, the judges' consideration of *maqāṣid* in their rulings has significant implications for the development of *hifz an-nasl* as one of the *ad-darūriyyāt al-khams*—the five

⁷⁵ Rauf.

⁷⁶ Masrifah, A Judge of the Religious Court of Malang Regency, *Interview*.

essential values in *maqāṣid asy-syārī'ah* discourse. Traditionally, scholarly discussions around *hifz an-nasl* focused narrowly on biological lineage and the continuation of the human species. However, the practice of Indonesian Religious Court judges reveals a shift toward prioritizing *hifz al-awlād*, which emphasizes the actual protection and welfare of children, including those not yet born.

In this light, *hifz al-awlād* emerges as both a continuation and an expansion of *hifz al-nasl*. The concept has a strong academic foundation, particularly within the framework of *maqāṣid asy-syārī'ah* as articulated by contemporary scholars such as Jāsir 'Awdah. It is grounded in two complementary bases: theoretical and empirical. Theoretically, *hifz al-awlād* represents a modern reinterpretation and extension of classical Islamic legal objectives to fit contemporary realities. Empirically, it arises from patterns of judicial reasoning observed in actual marriage dispensation decisions across Indonesian Religious Courts. These dual foundations allow the author to abstract, articulate, and formalize *hifz al-awlād* as a distinct and contextually relevant concept that has, until now, remained implicit within the legal reasoning of judges in Indonesia.

Conclusion

The protection of children begins from the moment life begins in the womb and continues until they enter into marriage. Based on this principle, judges at the Religious Court of Malang Regency, in granting marriage dispensation petitions, consider several critical factors: the adequacy of the prospective spouses' age, economic readiness, the availability of family guidance and support, the sufficiency of religious protection, and the protection of the unborn child. It can thus be stated that in issuing rulings on marriage dispensation petitions, the judges have fulfilled the aspects of welfare and protection for the child—physically, psychologically, and socially—both in the sense of the underage prospective bride or groom and the unborn child in the womb, rather than in their capacity as a continuation of human lineage (*an-nasl*). This fulfillment of the child's welfare and protection in both meanings is what the author terms as the concept of *maqāṣid asy-syārī'ah fi hifz al-awlād*—the objectives of Islamic law in safeguarding children. This concept serves as a meaningful development of the earlier *maqāṣid asy-syārī'ah fi hifz an-nasl* paradigm formulated by classical and contemporary *maqāṣid* scholars alike. This study is limited in terms of

its research locus and its focus on marriage dispensation cases specifically involving pregnancy due to rape. Therefore, it merits further examination and should be continued through subsequent research.

Acknowledgment

This work is dedicated to the institution where we earned our doctoral degrees, the State Islamic University of Sayyid Ali Rahmatullah of Tulungagung, Indonesia, and the Bani Fattah Islamic Institute of Jombang, Indonesia.

Bibliography

‘Abdissalām, Abū Muhammad ‘Izzuddīn Ibn. *Qawā’id al-Āhkām fī Maṣāliḥ al-Anām*. Beirut: Dār al-Kutub al-‘Ilmiyyah, 1999.

‘Alwānī, Zaynab Ṭāhā al-. *Al-Usrah fī Maqāṣid asy-Syārī’ah*. Herndon: The International Institute of Islamic Thought (IIIT), 2012.

‘Āsyūr, Muḥammad Ṭāhir Ibn. *Maqāṣid asy-Syārī’ah Al-Islāmiyyah*. Urdun: Dār al-Nafā’is, 2001.

—. *Uṣūl al-Niẓām al-Ijtīmā’ī fī al-Islām*. Kairo: Dār al-Salām, 2005.

‘Atīyyah, Jamāluddīn. *Nahw Taf’il Maqāṣid Asy-Syārī’ah*. Damaskus: Dār al-Fikr, 2003.

‘Awdah, Jāsir. *Al-Ijtihād al-Maqāṣidī: Min al-Taṣawwur al-Uṣūlī Ilā al-Tanzīl Al-‘Amalī*. Beirut: Al-Syabakah al-‘Arabiyyah li al-Abhāṣ wa al-Nasyr, 2013.

—. *Membumikan Hukum Islam Melalui Maqashid Al-Syariah*, Terj. Osidin dan Ali Abd. *El-Mun’im*. Bandung: Mizan, 2015.

‘Ubaydī, Ḥammādī al-. *Al-Syāṭibī wa Maqāṣid Asy-Syārī’ah*. Beirut: Dār al-Qutaybah, 1992.

Badan Pusat Statistik Kabupaten Malang. “Garis Kemiskinan (Rp/Kapita/Bulan), 2019-2021.” *BPS Kabupaten Malang*. August 5, 2024. <https://malangkab.bps.go.id/indicator/23/83/1/garis-kemiskinan.html>.

—. “Jumlah Penduduk Menurut Kelompok Umur dan Jenis Kelamin di Kabupaten Malang, 2024.” *BPS Kabupaten Malang*. February 11, 2025.

—. “Rata-Rata Lama Sekolah (Tahun), 2019-2021.” *BPS Kabupaten Malang*. December 2, 2024. <https://malangkab.bps.go.id/indicator/26/44/1/rata-rata-lama-sekolah.html>.

—. “Rata-Rata Pengeluaran Perkapita Sebulan Menurut Jenis Pengeluaran Makanan dan Non Makanan (Rupiah), 2023.” *BPS Kabupaten Malang*. November 10, 2025. <https://malangkab.bps.go.id/id/statistics-table/2/MTY0IzI=/rata-rata-pengeluaran-perkapita-sebulan-menurut-jenis-pengeluaran-makanan-dan-non-makanan.html>.

Badan Pusat Statistik Provinsi Jawa Timur. “Luas Daerah dan Jumlah Pulau Menurut Kabupaten/Kota di Provinsi Jawa Timur, 2024.” *Jatim BPS*. February 23, 2025. <https://jatim.bps.go.id/id/statistics-table/3/VUZwV01tSlpPVlpsWIRKbmMxcFhhSGhEVjFoUFFU MDkjMw==/luas-daerah-dan-jumlah-pulau-menurut-kabupaten-kota-di-provinsi-jawa-timur--2024.html>.

Baugh, Carolyn G. *Minor Marriage in Early Islamic Law*. Boston: Brill, 2017. <https://doi.org/10.1163/9789004344860>.

Darmawan, Asmaul Husna, Mirza Rahmatillah, and Helmi Imran. “Marriage Dispensation and Family Resilience: A Case Study of the Bener Meriah Shariah Court, Aceh Province.” *Ahkam: Jurnal Ilmu Syariah* 22, no. 2 (2022): 433–54. <https://doi.org/10.15408/ajis.v22i2.28827>.

Ghazālī, Abū Ḥāmid al-. *Iḥyā' 'Ulūmīddīn*. Lebanon: Dār Ibn Ḥazm, 2014.

Horii, Hoko. “Legal Reasoning for Legitimation of Child Marriage in West Java: Accommodation of Local Norms at Islamic Courts and the Paradox of Child Protection.” *Journal of Human Rights Practice* 12, no. 3 (2020): 501–23. <https://doi.org/10.1093/jhuman/huaa041>.

Kapitan, Rian VAn Frits, and Tontji Christian Rafael. “Penerapan Asas Contra Legem oleh Hakim dalam Perkara Tindak Pidana Korupsi.” *Spektrum Hukum* 17, no. 1 (2020): 1–17. <https://doi.org/10.35973/sh.v17i1.1336>.

Khiṭāb, Ḥasan al-Sayyid Ḥāmid. *Maqāṣid An-Nikāh wa Āṣāruhā*. Madinah: Jāmi'ah Tayyibah, 2009.

Kurniawan, Muhamad Beni, and Dinora Refiasari. “Interpretation of the Meaning of ‘Imperative Reason’ In Marriage Dispensation Denial.” *Jurnal Yudisial* 15, no. 1 (2022): 83. <https://doi.org/10.29123/jy.v15i1.508>.

Latuconsina, Zulfikar Mohamad Yamin. “Analisis Faktor-Faktor Yang Mempengaruhi Indeks Pembangunan Manusia Kabupaten

Malang Berbasis Pendekatan Perwilayah dan Regresi Panel." *Journal of Regional and Rural Development Planning* 1, no. 2 (2017): 202. <https://doi.org/10.29244/jp2wd.2017.1.2.202-216>.

Mahkamah Agung Republik Indonesia. *Buku Saku Pedoman Mengadili Permohonan Dispensasi Kawin*. Jakarta: Mahkamah Agung Republik Indonesia, 2020.

Malang, Badan Pusat Statistik Kabupaten. "Penduduk Menurut Agama dan Kecamatan, 2018-2020." *BPS Kabupaten Malang*. July 30, 2021. <https://malangkab.bps.go.id/statictable/2019/08/27/751/penduduk-menurut-agama-dan-kecamatan-2018-2020.html>.

Marzuki, Peter Mahmud. *Penelitian Hukum*. 1st ed. Vol. 6. Surabaya: Kencana Prenada Media Group, 2020.

Miles, Matthew B., A. Michael Huberman, and Johnny Saldana. *Qualitative Data Analysis: A Methods Sourcebook*. Edited by Helen Salmon. 3rd ed. London: Sage Publication, 1994.

Mursyid, Salmah, and Nasruddin Yusuf. "Changes in Marriage Age Limits and Marriage Dispensations: A Study of Causes and Impacts on the Religious Courts in North Sulawesi." *Samarah* 6, no. 2 (2022): 975-96. <https://doi.org/10.22373/sjhk.v6i2.12439>.

Nawawi, M Anwar, Sulastri Sulastri, Relit Nur Edi, and Agus Setiawan. "Harmonization of Islam and Human Rights: Judges' Legal Arguments in Rejecting Child Marriage Dispensation in Sukadana, Indonesia." *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 22, no. 1 (2022): 117-34. <https://doi.org/10.18326/ijtihad.v22i1.117-134>.

Ni'ami, Mohammad Fauzan, and Bustamin Bustamin. "Maqāṣid asy-Syārī'ah dalam Tinjauan Pemikiran Ibnu 'Āsyūr dan Jasser Auda." *Juris: Jurnal Ilmiah Syariah* 20, no. 1 (2021): 91-102. <https://doi.org/10.31958/juris.v20i1.3257>.

Nur, Iffatin, Ali Abdul Wakhid, and Lestari Handayani. "A Genealogical Analysis on the Concept and Development of Maqāṣid Shari'ah." *Al-'Adalah* 17, no. 1 (2020). <https://doi.org/https://doi.org/10.24042/adalah.v17i1.6211>.

Opwis, Felicitas. "Ibn 'Āshūr's Interpretation of the Purposes of the Law (Maqāṣid Al-Shari'a): An Islamic Modernist Approach to Legal Change." In *The Objectives of Islamic Law: The Promises and Challenges of the Maqāṣid Al-Shari'a*, edited by Idris Nassery, Rumee Ahmed, and Muna Tatari, 111-30. Pennsylvania:

Lexington Books, 2018.

Pengadilan Tinggi Agama Surabaya. "Statistik Perkara." *PTA Surabaya*. Surabaya, December 2021. https://pta-surabaya.go.id/main/pages/statistik_perkara.

Priebe, Jan, and Sudarno Sumarto. "Reducing Child Marriages through CCTs: Evidence from a Large-Scale Policy Intervention in Indonesia." *Journal of Public Economics* 242, no. 1 (2025): 105306. <https://doi.org/10.1016/j.jpubeco.2025.105306>.

Rahardjo, Satijpto. "Hukum Progresif: Hukum Yang Membebaskan." *Jurnal Hukum Progresif* 1, no. 1 (2011): 1-24. <https://doi.org/10.14710/hp.1.1.1-24>.

Rais, Isnawati. "Marriage Dispensation Due to Extramarital Pregnancy: The Study on the Decision by the Religious Court of South Jakarta (2010-2011)." *Ahkam: Jurnal Ilmu Syariah* 18, no. 1 (2018): 155-76. <https://doi.org/10.15408/ajis.v18i1.7490>.

Raysūnī, Ahmad al-. *Nazariyyat al-Maqāṣid 'ind al-Imām al-Syāṭibī*. Herndon: The International Institute of Islamic Thought (IIIT), 1992.

Supriyadi, and Siti Suriyati. "Judges' Legal Culture in Dealing with High Number of Applications for Child Marriage Dispensation during Covid-19 Pandemic at the Kudus Religious Court." *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* 17, no. 1 (2022): 136-61. <https://doi.org/10.19105/AL-LHKAM.V17I1.6060>.

Suyūtī, 'Abdurrahmān. *Al-Asybāh wa al-Naṣā'ir*. Beirut: Dār al-Kutub al-'Ilmiyyah, 1982.

Syāṭibī, Abū Ishāq al-. *Al-Muwāfaqāt*. Beirut: Dār al-Kutub al-'Ilmiyyah, 2003.

Yūbī, Muhammad Sa'īd al-. *Maqāṣid asy-Syari'ah al-Islāmiyyah*. Saudi Arabia: Dār al-Hijrah li al-Nasyr wa al-Tawzī', 1998.

Yuni, Lilik Andar. "Analysis of the Emergency Reasons in the Application of Marriage Dispensation at the Tenggarong Religious Court." *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 5, no. 2 (2021): 976-1002. <https://doi.org/10.22373/sjhk.v5i2.9135>.