

Maqashid Sharia Perspective on Judges' Considerations in Determining the Origin of Children

Rizka 'Afifa Zulkifli^{1*}, Muchlis Bahar², Elfia³, Zulkifli⁴

¹ Universitas Islam Negeri Imam Bonjol Padang

² Universitas Islam Negeri Imam Bonjol Padang

³ Universitas Islam Negeri Imam Bonjol Padang

⁴ Universitas Islam Negeri Mahmud Yunus Batusangkar

*Corresponding Author: 2420040035@uinib.ac.id

Abstract: This study aims to analyze the legal considerations of the Panel of Judges in granting the petition for child origin at the Talu Religious Court in Determination Number 355/Pdt.P/2021/PA.Talu, and how these considerations are viewed from the *maqashid sharia* perspective. The research method used is normative juridical with a qualitative approach, where data is obtained through literature study and analyzed descriptively. The results showed that the Panel of Judges decided to accept/grant the petition after considering the evidence submitted, including testimonies and supporting documents regarding the applicants' *siri* marriage and household conditions. The decision was in accordance with *maqashid sharia*, which emphasizes the importance of preserving offspring (*hifẓ al-nasl*) and eliminating harms, especially in relation to obtaining legal documents to guarantee children's civil rights, such as *nasab* and inheritance rights.

Abstrak: Penelitian ini bertujuan untuk menganalisis pertimbangan hukum Majelis Hakim dalam mengabulkan permohonan asal usul anak di Pengadilan Agama Talu dalam Penetapan Nomor 355/Pdt.P/2021/PA.Talu, serta bagaimana pertimbangan tersebut dipandang dari perspektif *maqashid syariah*. Metode penelitian yang digunakan adalah yuridis normatif dengan pendekatan kualitatif, di mana data diperoleh melalui studi kepustakaan dan dianalisis secara deskriptif. Hasil penelitian menunjukkan bahwa Majelis Hakim memutuskan untuk menerima/mengabulkan permohonan ini setelah mempertimbangkan bukti-bukti yang diajukan, termasuk kesaksian dan dokumen pendukung mengenai pernikahan siri dan kondisi rumah tangga para pemohon. Keputusan tersebut sesuai dengan *maqashid syariah*, yang menekankan pentingnya memelihara keturunan (*hifẓ al-nasl*) dan menghilangkan kemudharatan, terutama kaitannya dengan pengurusan dokumen legal untuk menjamin hak-hak keperdataan anak, seperti nasab dan hak waris.

Keywords: *Maqashid Syariah, Hifẓ al-Nasl, Judge Consideration, Child Origins*

Introduction

Marriage is the starting point for setting up a household which is the smallest unit in social life (Fadhlullah & Andriani, 2018, p. 19). Therefore, marriage always receives attention from various groups, both the attention that comes from individuals and the general attention that comes from the government through various laws and regulations that have been established as rules of life for the people in the country of Indonesia. In its development, the government not only regulates marriage, but the consequences of marriage are also other important things that do not escape the government's attention, this is because new phenomena about marriage are always growing rapidly in society which will certainly always move faster than the formation of law in a country.

It has become common knowledge in the community that, where there is a law that is enforced there is a violation found, for example, when it is mentioned in article 2 paragraphs 1 and 2, namely "Marriage is valid, if it is carried out according to the laws of each religion and belief (1) Every marriage is

recorded according to the applicable laws and regulations (2)". So automatically, the phenomenon of violations in society appears in the form of *siri* marriage. In the general public, *nikah siri* is also known by the phrase "*nikah di bawah tangan*" which generally has the same meaning, namely a marriage that is carried out with the terms and conditions in accordance with marriage in Islamic teachings but is not recorded through the local Religious Affairs Office. Registration is an effort by the government to protect and safeguard the consequences of a marriage (Elimartati, 2013, p. 19).

Another phenomenon that has become a concern in society is the rise of illegal polygamy or polygamy without permission from the Court, this phenomenon in addition to being a violation in the eyes of positive law also gets a negative view in a society that really understands the law and upholds feminism in order to protect the rights of women after marriage. Polygamy without court permission can occur for several reasons, such as the absence of permission from the first wife and public ignorance of the importance of marriage registration through government institutions (Djubaidah, 2012). In such conditions, one of the couples chooses to marry another person, from which a child is born who does not have a clear status from the perspective of the law. Therefore, to provide clarity on the status of the child, the parents come to the Religious Court to apply for the origin of the child.

Based on the explanation above, the author is interested in examining the determination of the application for child origin at the Talu Religious Court. So, it can be known what is the basis for the consideration of the Panel of Judges in granting the application for the origin of this child in Determination Number 355/Pdt.P/2021/PA.Talu, and how the maqashid sharia perspective on the Judge's consideration in these cases. The aim of this article is to critically analyze the judges' legal reasoning in determining the origin of a child born from an unregistered (*siri*) marriage at the Talu Religious Court, and to assess whether this reasoning aligns with the principles of *maqashid sharia*, especially the objective of preserving lineage (*hifz al-nasl*).

Method

This study uses a normative juridical research method, which is a legal research approach based on secondary data obtained through literature studies. This method emphasizes the interpretation of legal norms found in legislation, jurisprudence, legal theory and doctrines of Islamic law (*fiqh*) as well as the decisions of judges. The research adopts a qualitative approach, aiming to provide an in-depth and contextual understanding of the judges' reasoning in granting the determination of a child's origin. Data sources include a copy of the Talu Religious Court's decision Number 355/Pdt.P/2021/PA.Talu, relevant statutory regulations such as Law No. 1 of 1974 (as amended by Law No. 16 of 2019), Compilation of Islamic Law (KHI), and classical and contemporary Islamic legal texts concerning *nasab* and *maqashid sharia*. The data analysis technique used is descriptive-analytical, which involves describing the factual and legal aspects of the case, interpreting legal arguments used by the panel of judges, and then correlating them with the theory of *maqashid sharia*, particularly the principle of *hifz al-nasl*. This analytical framework helps to examine whether the judges' decisions fulfill both formal legal justice and the substantive objectives of Islamic law.

Results and Discussion

Sitting of Case Number 355/Pdt.P/2021/PA.Talu

That Applicant I and Applicant II based on their petition dated November 24, 2021 which has been registered at the Registrar of the Talu Religious Court under register number 355/Pdt.P/2021/PA.Talu, dated November 25, 2021 have submitted their petition with the following postulates after the amendment:

1. That Applicant I and Applicant II are a married couple who have entered into a marriage according to Islam on Wednesday, April 24, 2013, at the home of Applicant II's parents at Batang Umpai, Jorong Batang Umpai, Nagari Aia Gadang, Pasaman District, West Pasaman Regency, West Sumatra Province, who is the guardian of marriage is the biological father of Applicant II named Kadir and witnessed by Witness I Tumbok and Witness II Monday with a dowry of Rp. 6.00 (Six Rupiah) paid in cash;

2. That at the time of marriage Applicant I was a living divorcee as evidenced by a Deed of Divorce Number: 0412/AC/2020/PA.TALU dated November 04, 2020 issued by the Talu Religious Court and Applicant II was also a living divorcee as evidenced by a Deed of Divorce Number: 0332/AC/2014/PA.TALU dated December 08, 2014 issued by the Talu Religious Court;
3. That after the marriage, Applicant I and Applicant II lived together building a household at the home of Applicant II's parents located at Batang Umpai, Jorong Batang Umpai, Nagari Aia Gadang, Pasaman District, West Pasaman Regency, West Sumatra Province, and were blessed with 1 (one) child named Afita Safitri, born on June 19, 2015 in Batang Umpai;
4. That then Applicant I and Applicant II remarried on Tuesday, July 27, 2021 M/ 17 Zulhijjah 1442 H, in the presence of a Marriage Registration Officer, in accordance with Marriage Certificate Excerpt Number: 0341/052/VII/2021, dated July 27, 2021, issued by the Religious Affairs Office of Pasaman District, West Pasaman Regency, West Sumatra Province;
5. That when Applicant I and Applicant II applied for a Child Birth Certificate, they encountered difficulties because the Civil Registry requested a letter explaining that the child was the biological child of Applicant I and Applicant II, therefore Applicant I and Applicant II requested a Determination on the origin of the child which could be used as a legal basis and have legal certainty.

Table 1
Timeline of Events

No	Time	Activities
1	April 24, 2013	Applicant I and Applicant II entered into marriage (<i>nikah siri</i>)
2	December 08, 2014	Applicant II was widowed by divorce
	November 04, 2020	Applicant I was a widower by divorce.
3	June 19, 2015	From the marriage the two applicants were blessed with 1 (one) child
4	July 27, 2021	Applicant I and Applicant II were legally remarried in the presence of a Marriage Registrar.
When Applicant I and Applicant II applied for the child's birth certificate, they encountered difficulties because the Civil Registry requested a letter stating that the child was their biological child (because the child was born from an unregistered marriage).		
5	November 24, 2021	Applicant I and Applicant II filed an application for determination of the origin of the child with register number 355/Pdt.P/2021/PA.Talu.

Based on these reasons/arguments, the Plaintiffs requested that the Talu Religious Court determine that the child was the legitimate child of the Plaintiffs.

In the course of the trial examination, the Plaintiffs asserted that when they were married siri/underhand, the Plaintiffs had been divorced out of court from each of their previous spouses. The underhand divorce occurred because of the Plaintiffs' ignorance of the legal procedures that must be followed if they wanted to divorce.

The Plaintiffs corroborated the arguments of the petition with several pieces of written evidence and two witnesses. The written evidence submitted by the Plaintiffs was in the form of: photocopies of birth certificates on behalf of the Applicants' children, photocopies of divorce certificates on behalf of Applicant II (wife) and her former husband, photocopies of divorce certificates on behalf of Applicant I (husband) and his former wife and photocopies of marriage certificate extracts on behalf of the Applicants.

In addition to this evidence, the Plaintiffs also presented evidence from two witnesses, both of whom were siblings of Applicant II (the wife) and had testified under oath about the Plaintiffs' household conditions. The witnesses testified that they were aware of the Plaintiffs' underhand marriage which was conducted in accordance with Islamic law with the marriage guardian being the biological father of the Plaintiff II (wife), attended by 2 witnesses and there was a dowry of Rp. 6.00 (six rupiah).

The witness also gave some testimony which was basically that the witness knew the status of the Plaintiffs when they got married, namely that the first Plaintiff was a widower who had been divorced, while the second Plaintiff was a widow who had been divorced. The witness clearly knew that before the marriage, the second Plaintiff (wife) had lived alone for 5 years and had never been in contact with her former husband. The witness knew that from the marriage of the Plaintiffs, the two had been blessed with one daughter who was born in 2015 and no one disputed, recognized or challenged the status of the child as the Plaintiffs' child. At the end of their testimony, the two witnesses testified about the Plaintiffs' difficulties in obtaining their child's birth certificate.

Legal Considerations and Judges' Stipulations

After the Plaintiffs had provided sufficient evidence, the Panel of Judges gave the following considerations:

- a. The Panel of Judges considered the aims and objectives of the Plaintiffs and the absolute authority of the Religious Court in adjudicating cases of petitions for the origin of children. Based on Article 49 and its explanation, the Panel of Judges considered that the case could be accepted and decided by the Talu Religious Court.
- b. Further consideration, the Panel of Judges emphasized the Petitioners' ignorance of the applicable divorce law and the subject matter of the Petitioners' petition.
- c. The Panel of Judges also considered the evidence submitted by the Petitioners in the form of consideration of *meterei* in accordance with Law Number 10 of 2020 and consideration of the type of evidence in the form of 3 authentic deeds (photocopy of divorce certificate on behalf of Petitioner II, photocopy of divorce certificate on behalf of Petitioner I and photocopy of marriage certificate on behalf of Petitioner I and Petitioner II) and 1 handwritten deed (birth certificate on behalf of the Petitioners' child).
- d. The Panel of Judges considered that the witnesses had met the formal and material requirements of witnesses in accordance with Articles 171-172 and 308-309 R.Bg.
- e. From the evidence presented by the Plaintiffs, the Panel of Judges drew the following facts:
 1. That on April 24, 2013 the Plaintiffs had entered into marriage with the marriage guardian of the biological father of Applicant II, witnessed by two witnesses and a dowry of Rp. 6.00 (six rupiah).
 2. At the time of marriage Applicant I was an underhand divorcee and Applicant II was an underhand divorcee.
 3. From their marriage, the Plaintiffs have been blessed with one daughter who was born on June 19, 2015.
 4. That Applicant I was officially divorced at the Talu Religious Court on November 04, 2020 while Applicant II was officially divorced from her former husband on December 08, 2014.
 5. That the Plaintiffs have officially remarried on July 27, 2021.
- f. After drawing out the facts, the Panel of Judges gave consideration to these facts.
- g. The Panel of Judges considered the condition of a child who can be considered a legitimate child in accordance with Article 42 of the Marriage Law and Article 99 letters a and b of the KHI, namely, first, children born in or as a result of a legal marriage. Secondly, the child is the result of a legal act of husband and wife outside the womb and is born to the wife.
- h. There was a difference of opinion between the Chairman of the Panel and Member Judge II and Member Judge I in giving consideration to the petition filed by the Plaintiffs.
- i. The President of the Panel and Member Judge II gave the following considerations:
 1. The Chairman of the Panel and Judges II considered the validity of the underhand marriage entered into by the Plaintiffs by citing Article 2 paragraphs 1 and 2 of the Marriage Law which basically explains that a valid marriage is one that is conducted in accordance with the provisions of the religion of the perpetrator and the marriage must be registered in accordance with the laws and regulations.
 2. The Chairman of the Panel and Judge Member II cited articles 14 to 44 of the KHI which explain that the validity of marriage must fulfill the pillars and conditions, namely the existence of a prospective husband, prospective wife, marriage guardian, two witnesses and *Ijab Kabul*, while

the conditions for the validity of marriage are that the prospective bride and groom are not prevented from marrying, the marriage guardian and witnesses are authorized persons and the conditions for Ijab Kabul are fulfilled.

3. The Chairperson of the Panel and Judge Member II also included the opinion of the shafiyyah in the book *al-fiqh ala madzahib al-arba'ah* by Abdurrahman Al-Jaziry which explained that according to the shafi'ie madzhab, there are five pillars of marriage, namely, the prospective husband, prospective wife, marriage guardian, two witnesses and ijab qabul.
4. In further consideration, the Chairman of the Panel and Judge Member II explained that all the pillars had been fulfilled in the Plaintiffs' underhand marriage but there was a condition that was violated, namely that the Plaintiffs were legally bound to their former spouse because they had not been officially divorced by the Religious Court.
5. The Chairman of the Panel and Judge Member II considered the values that live in the community, such as underhand divorce due to the community's ignorance of the applicable law and the community's assumption that divorce can be considered valid as long as it follows religious procedures.
6. Thereafter, the Chairman of the Panel and Judge Member II considered that the occurrence of divorce between the Plaintiffs and each of their previous spouses was negligence due to ignorance of the law, not defiance of the applicable law.
7. The current life of the Plaintiffs, who had been living together for a long time and there were no protests from the community, also corroborated the allegations of the Chairman of the Panel and Judge Member II about the ignorance of the Plaintiffs, who considered that they were bound by a valid marriage in the eyes of the law.
8. The Chairman of the Panel and Judge Member II emphasized that they did not contradict positive law and *fiqh* because the formation of positive law was also in order to maintain the public welfare and was a public need in accordance with the *fiqh* rule "public needs occupy the position of emergency".
9. The Chairman of the Panel and Judge Member II stated that although the marriage of the Plaintiffs which was conducted under the hand could not be legally legalized, in terms of the status of the child, the Chairman of the Panel and Judge Member II gave further consideration.
10. With the non-fulfillment of the conditions in the marriage of the Plaintiffs, the Chairman of the Panel and Judge Member II stated that the marriage of the Plaintiffs was a *fasid* marriage in accordance with the opinion of Muhammad Amim in the book of *Qawaid a-Fiqh* page 534 which explains that a *fasid* marriage is a marriage that lacks one of the conditions of the marriage contract.
11. The President of the Tribunal and Judge Member II cited the opinion of Imam Nawawi in *al-Majmu'* page 360 on the status of children from a *fasid* marriage which basically explains that sexual intercourse in a *fasid* marriage results in the same legal provisions as a valid marriage and the legal consequences of a *fasid* contract are the same as the legal consequences of a valid contract.
12. The President of the Panel and Judge Member II also quoted Wahbah Al-Zuhaili's opinion in *al-fiqh al-islam wa adillatuhi* volume IV page 690 which explains that "Marriage, whether valid or invalid is a cause for establishing nasab in a case. Therefore, if a marriage has actually taken place, even if it is a marriage that is invalid or a marriage that is done by custom, which takes place by means of a certain contract (traditional) without being registered in an official marriage certificate, it can be established that the nasab of the child born to the woman is the child of the husband and wife concerned".
13. In further reasoning, the Chairperson of the Panel and Member Judge II explained about the provision of shubhat children, which has the definition of children born from shubhat marriages, which can be interpreted as biological relations between a man and a woman outside of a marriage contract, whether the marriage is valid or invalid, but cannot be referred to as adultery and the law is unclear.
14. The President of the Tribunal and Judge Member II explained that the relationship between the husband and wife of the Plaintiffs was a subhat relationship because the Plaintiffs considered their marriage to be a valid marriage in the eyes of the law, so the child born from that relationship

should be considered a shubhat child with the same legal consequences as a legitimate child. As the fiqh rule states, "in fact, sexual intercourse in a subhatic manner raises the had and connects (nasab) of the child".

15. The President of the Tribunal and Judge Member II explained that in order for a fasid or shubhat marriage to be equated with a valid marriage, three conditions must be met. Firstly, the husband has the ability to make his wife pregnant, is baligh and murahiq. Secondly, the relationship was actually carried out by the couple concerned and thirdly, the child was born within six months or more of the fasid marriage contract. This opinion is mentioned by Wahbah Al-Zuhaili in *L-Fiqh Al-Islam wa adillatuhu* juz 7 pages 686-688.
 16. The Chairman of the Panel and Judge Member II considered the condition of the child of the Plaintiffs, who was recognized as the child of the Plaintiffs, had never been disputed and was born after 2 years of the Plaintiffs' underhand marriage, thus the Chairman of the Panel and Judge Member II considered that the child was a shubhat child from the relationship of the Plaintiffs.
 17. The Chairman of the Panel and Judge Member II then considered the concept of children in the legislation, namely legal children and unmarried children. Legal children and extra-marital children are considered by the Chairman of the Panel and Judge Member II as contradictory words because they have two opposite legal consequences, where extra-marital children only have a civil relationship or nasab in fiqh terminology with their mother and their mother's family while it is understood in mukhalafah that legal children have the meaning of children who have a civil relationship / nasab with their mother's father.
 18. The Chairman of the Panel and Judge Member II considered that the syubha child of the Plaintiffs could have the same legal consequences as a legitimate child in the legislation, so the Chairman of the Panel and Judge Member II stated that the child was the legitimate child of the Plaintiffs by granting the Plaintiffs' petition.
- j. The decision also found a dissenting opinion in the deliberation process of the Panel of Judges, where Member Judge I gave the following opinion:
1. Judge Member I considered the aims and objectives of the Plaintiffs.
 2. Member Judge I considered the condition of the status of the Plaintiffs when they were married which was still bound to their previous spouse and only officially divorced when the Plaintiffs had entered into a siri marriage.
 3. Judge Member I also considered the change in the Plaintiffs' claim regarding the status of a single girl to a widower of an underhand divorce, the change was not allowed because Judge Member I considered it a form of concealment of facts, so that the Plaintiffs' request should not be accepted.
 4. Judge Member I emphasized that at the time of marriage the Plaintiffs were still legally bound by their previous marriages to their respective spouses.
 5. Judge Member I also considered the invalidity of divorce outside the Court, as it was not accommodated by the applicable laws in Indonesia.
 6. Judge Member I considered that the Plaintiffs' under-armed marriage was not a valid marriage, but was an invalid marriage.
 7. Member Judge I considered that the lineage of the Plaintiffs' children could have been attributed to the Plaintiffs as long as it was proven in the process of proof, but because this case contained a dispute which had to place the old husband of Applicant II as a party.
 8. Based on these considerations, Member Judge I considered that the Plaintiffs' petition contained ambiguity and should be declared inadmissible (*Niet Ontvankelijke Verklaard*).

After explaining its reasoning, the Panel of Judges determined and gave a decision which reads:

Determine,

1. To grant the petition of Applicant I and Applicant II;
2. Determine that the child named Afita Safitri, born on June 19, 2015 in Batang Umpai is the legitimate child of Applicant I and Applicant II;
3. Charged the Plaintiffs to pay court costs in the amount of Rp120,000.00 (one hundred and twenty thousand rupiah);

Origin of Children in the Religious Courts

Nasab is something that cannot be underestimated in Islam. Abdul Manan (Manan, 2012, p. 9) explained that the *nasab* of a child in Islamic Law can be known from one of three ways, namely; first, by means of *al-firasy* (legal marriage). Second, by way of pledge or recognition. Third, by means of *bayyinah* or proof. In positive law, it is stated that the position of children is regulated in articles 42-44 of Law NO.1 of 1974 concerning Marriage which was amended into Law NO. 16 of 2019 which states in one of the articles. 16 of 2019 which states in one of its articles that a legitimate child is a child born in or as a result of a legal marriage. Then it is reinforced in articles 99-100 KHI.

The rule that is the basis for determining the origin of this child is Article 55 of Law NO. 1 Year 1974 concerning Marriage as amended by Law NI. 16 of 2019 junto article 103 KHI. Point (1) of each article stipulates that the origin of the child can be proven by an authentic birth certificate. If there is none, then Point (2) stipulates that the Court can issue a stipulation on the origin of the child after an examination. The stipulation then becomes the basis for the Population and Civil Registry Office to issue a birth certificate for the child whose origin is requested.

Overview of Maqashid Sharia

Definition of Maqashid Sharia

Maqashid Al-Syariah is composed of two main words, namely, *Maqashid* which is a *jama'* word from the word *maqshad* which can be interpreted with many meanings including purpose, towards a direction, intention, straight path and lack. While in terms, the *Ushuliyyin* experts interpret *maqshud* with something that is intended behind the action (Sabil, 2018, p. 32). The definition of *maqashid* and *Al-Syariah* in language directs the scholars to provide a definition of *maqashid shariah* in terms, such as Wahbah Zuhaili provides a definition of *maqashid sharia* which is the values and objectives of *shara'* which are implied in all or most of its laws, besides that *Ushul Fiqh Ulama* define *maqashid shari'ah* with the meaning and purpose intended by *shara'* in shari'ating a law for the benefit of mankind.

Maqashid al-syari'ah among scholars of *ushul fiqh* is called by a similar word, namely *asrar al-syari'ah*, which means the secrets that lie behind the laws stipulated by *shara'*, which contain benefits for humans, both in this world and in the hereafter. For example, *shara'* obliges various kinds of worship with the aim of upholding the religion of Allah SWT (Dahlan, 1996, p. 110).

The discussion of *maqashid sharia* certainly cannot be separated from a figure named Abu Isaac Ibrahim bin Musa bin Muhammad Allakhami Al-Gharnathi or better known as Imam As-Syathibi, because he is the one who is considered the father of *maqashid sharia* by refining and collecting parts of the discussion of *maqashid* from previous scholars and even writing a separate discussion of *maqashid* in his book *Al-Muwafaqat*. In addition, there are also scholars such as Ibn Ashur who promote *maqashid sharia* as a separate discipline or as an indicator of solving contemporary problems such as social, political and economic (Febriadi, 2017, p. 235).

Division of Maqashid Sharia

Imam As-Syatibi explained that:

تكليف الشريعة ترجع الى حفظ مقاصدها في الخلق، وهذه المقاصد تعدو الى ثلاثة أقسام : أن تكون ضرورية. والثاني: أن تكون حاجية. والثالث: أن تكون تحسينية.

"Imposition in a law is a means to maintain the intent and purpose of the law in the creature, the purpose of this law can be divided into three namely, *dharuriyyah*, *hajiyyah* and *tahsiniyyah*."

Dharuriyyah must exist to maintain the welfare of the world and the hereafter, *maqashid al-dharuriyyah* can be divided into five parts, namely, protecting religion, protecting the soul, protecting offspring, protecting property and protecting the mind. Furthermore, *maqashid al-hajiyyah* aims to eliminate distress from the lives of *mukallaf*. While *maqashid al-tahsiniyyah* exists to perfect the two previous *maqashid*, which includes the perfection of customs and noble morals (Al-Raisuni, 1992, p. 117).

Maqashid Shari'ah Perspective on Judges' Considerations in Granting Child Origins Petitions

Based on the theory of procedural law, Judges are required to go through three stages in resolving cases, namely constatarizing, qualifying and constituting. In the author's opinion, these three stages have been passed by the Panel of Judges in the case of the application for the origin of the child that the author has described in the previous discussion. The constatar stage in these decisions was passed when the Panel of Judges determined the facts of the evidentiary process by considering the formal and material evidence of the Petitioners, while the qualifying stage was carried out by the Panel of Judges when linking the facts with the applicable law, both the law contained in legislation and jurisprudence as well as *fiqh* doctrines which are also one of the sources in determining the law. Furthermore, the constituent stage is carried out by the Panel of Judges when determining the law on the petition of the Petitioners which is formulated in the ruling.

The Judge's consideration in a decision must be objective, because it will reflect the responsibility of a Judge to seek justice. As Ahmad Rifa'i explained that in his consideration a Judge must consider all aspects such as juridical, philosophical and sociological aspects as determined by the Supreme Court. This consideration aims to make the Judge's decision truly have an orientation of legal justice, moral justice and community justice (Rifai, 2014, p. 126).

In line with this, according to the author, in granting the application for the origin of the child, the Panel of Judges is required to be careful and observant, because what is decided by the Panel of Judges will have legal consequences for the child, both in terms of *nasab* and other civil rights. In their deliberations, the Panel of Judges must first look at the formality of the petition before deciding to consider the petition materially. The formality of the petition relates to the identity of the parties, the absolute and relative competence of the Religious Court receiving the case and the legal standing of the Petitioners, while in terms of the material the Panel of Judges will consider the status of the child by assessing whether or not the marriage is valid or fulfills the religious provisions of the Petitioners. This is closely related to the status of legitimate children in the law which is defined as children born of or as a result of a legal marriage. In addition, if the marriage of the Plaintiffs, which occurred under the hand, cannot be legalized due to certain obstacles, such as indications of polygamy under the hand, *fasid* or *bathil*, then the Panel of Judges must consider comprehensively the status of the marriage of the Plaintiffs by exploring the legal values that live in the community (living law), and then make *ijtihad* and determine the legal consequences of the marriage of the Plaintiffs on the status of the child whose legalization is sought.

After describing the comprehensiveness of the consideration of the Panel of Judges in determining the origin of the child above, the author will analyze the consideration of the Panel of Judges in granting the application for the origin of the child at the Talu Religious Court using the *maqashid sharia* perspective, so that it is found from the results of the analysis whether the consideration of the Panel of Judges in the case is in accordance with the intent and purpose of the sharia or vice versa. Because in an ideal level, the judge as "God's representative" in the world, must be able to formulate laws that fulfill the purpose of *shari'a* and the intention of *mukallaf* as summarized by the scholars in the *maqashid sharia* theory.

Islam pays great attention to exclusion and the determination of lineage, from which will be the foundation of creed and *sharia*. Based on the agreement of the scholars, Islamic law aims to realize *kemaslahatan* for mankind, both *kemaslahatan* relating to individuals or social *kemashlah* that is collective. In its division, *mashlahat* is divided into three parts, namely *mashlahat mu'tabarah*, *mashlahat mursalah* and *mashlahat mulghat*. *Mashlahat mu'tabarah* occupies the highest position and includes the maintenance of religion, soul, mind, property and offspring (Khakim & Ardiyanto, 2019, p. 38).

Maqashid sharia places *hifdz al-nasl* (preserving offspring) as a form of basic human needs that are included by scholars into *maqashid al-dharuriyyah*. And if developed, the preservation of offspring can contain various provisions, namely the maintenance of the family system, prevention of adultery and determination of *nasab*, so in the author's opinion, the application for the origin of children with the aim of explaining the position of a child which will determine the status, *nasab* and rights of the child, is also an important matter (*dharurah*) that must be resolved.

In his position, the author views that a judge is considered a mujtahid who must be able to resolve the issues submitted to him as in the *fiqh* rules stated "*hukm al-hakim ilzamun wa yarfa'u al-khilaf*" meaning

that the law determined by the judge is permanent and resolves disputes, including disputes about the origin of children in this writing. In line with that, al-Syathibi in an article written by Nashrullah and friends, places the *mujtahid* as a person who has the obligation to provide law by exploring from the Qur'an and Sunnah by paying attention to the situation and conditions surrounding the object of the law, so that the resulting law is truly in accordance with *maqashid sharia* in the sense that it contains the value of *mashlahat* and negates the harm (Nasrullah Kartika MR & Noor, 2014, p. 53).

In the decision of the Talu Religious Court on the application for the origin of the child containing the granting of the application, it can be understood that the Panel of Judges based the granting on consideration of 6 things, namely, the formality of the application, the validity of the marriage and the status of the child of the Petitioners. Consideration of the validity of the marriage is the consideration that most often appears in the determination of the origin of the child, because the status of a legitimate child in the legislation is based on the existence and absence of a legal marriage between the two parents of the child.

The Panel of Judges' consideration of the validity of the marriage of the Plaintiffs as a determinant of a child's status is in line with Islamic provisions. Islam prescribes marriage with the aim of protecting, preserving and determining lineage. The determination of *nasab* through the validity of this marriage is quite popular in the fiqh literature, in the well-known opinion of Imam Malik and Imam Shafi'i determining the *nasab* of a child if he is born after 6 months of marriage between his parents, if less than that then the child is *nasabkan* to his mother. This opinion is based on the Qur'anic text in Surah Luqman verse 14 and in Surah al-Ahqaf verse 15 (Sabil, 2018, p. 88).

In the author's view, the consideration of the Panel of Judges in the above case is also in line with the provisions of *maqashid sharia* which is very much based on *kemashlahatan*, because in the sitting of the case in the application for the origin of the child, it was based on the difficulty of taking care of the birth certificate of the Plaintiffs' child, and by granting this application, the Panel of Judges has raised the difficulties and misfortunes that will arise from these difficulties later. The removal of this harm is one of the principles of *maqashid sharia* which is in line with the fiqh rules of "harm must be eliminated" (الضرر يزال) and (لا ضرر ولا ضرار) "it is not permissible to create harm and cause harm to others". The Plaintiffs' need for the processing of children's civil documents at first glance appears to be a secondary need which, if not fulfilled, will only cause difficulties, not great harm. However, in the author's opinion, at the present time population documents are *dharuri* things that must be owned, this is related to the rights that should be received such as the right to maintenance, inheritance and others, so it is not an exaggeration to say that the Plaintiffs' need for these documents is a public need that occupies an emergency position as the fiqh rule الضرورة منزلة تنزل العامة الحاجة (public needs occupy an emergency position).

Conclusion

Based on the material presented above, it can be concluded that the Panel of Judges accepted the petition after considering the evidence submitted, including testimony about the *siri* marriage and the household condition of the applicants. Although there were differences of opinion among the judges, the final decision recognized the child as a legitimate child based on an integrated analysis of Islamic law, statutory law and social considerations. The decision was grounded in the principle that a child's civil status must be legally affirmed to protect their rights, such as lineage (*nasab*) and inheritance. From the perspective of *maqashid sharia*, the judge's decision aligns with the objective of preserving lineage (*hifz al-nasl*) and minimizing potential harms (*mafsadah*), particularly regarding the issuance of vital civil documents for the child's legal identity and rights.

As a recommendation, the writer suggests that legal reforms should be considered, especially to accommodate the recognition of children born from unregistered marriages, by streamlining procedures in civil registration and ensuring that the principle of child protection remains paramount. In addition, socialization and legal education regarding the consequences of unregistered marriages should be intensified, so that legal certainty and justice can be achieved not only formally but also substantively within society.

References

- Al-Raisuni, A. (1992). *Nadariyat Al-Maqashid Inda Al-Imam Al-Syatibi*. Muassasah al-Jami'ah.
- Dahlan, A. A. (1996). *Ensiklopedia Hukum Islam* (Jil. 6). Ichtiar Baru van Hoeve.
- Djubaidah, N. (2012). *Pencatatan Perkawinan dan Perkawinan Tidak Dicatat : Menurut Hukum Tertulis di Indonesia dan Hukum Islam* (Cet.2). Sinar Grafika.
- Elimartati. (2013). *Bunga Rampai Perkawinan Di Indonesia*. IAIN Batusangkar Press.
- Fadhullah, & Andriani, N. (2018). PERNIKAHAN DI BAWAH UMUR DALAM PERSPEKTIF HUKUM PERKAWINAN. *Jurnal Hukum Dan Keadilan: MEDIASI*, 5(2), 19–38.
- Febriadi, S. R. (2017). Aplikasi Maqashid Syariah Dalam Bidang Perbankan Syariah. *Amwaluna: Jurnal Ekonomi Dan Keuangan Syariah*, 1(2), 231–245. <https://doi.org/10.29313/amwaluna.v1i2.2585>
- Khakim, M., & Ardiyanto, M. (2019). Menjaga Kehormatan Sebagai Perlindungan Nasab Perspektif. *Nizham*, 8, 1–40.
- Manan, A. (2012). *Aneka Masalah Hukum Perdata Islam di Indonesia*. Fajar Interpretama.
- Nasrullah Kartika MR, G., & Noor, H. (2014). Konsep Maqashid al-Syari'ah dalam Menentukan Hukum Islam (Perspektif Al-Syatibi dan Jasser Auda). *Al Iqtishadiyah Jurnal Ekonomi Syariah Dan Hukum Ekonomi Syariah*, 1(1), 50. <https://doi.org/10.31602/iqt.v1i1.136>
- Rifai, A. (2014). *Penemuan Hukum oleh Hakim Dalam Perspektif Hukum Progresif* (Cet. 3). Sinar Grafika.
- Sabil, J. (2018). *Validitas Maqasid Al-Khalq Studi Terhadap Pemikiran al-Ghazzali, al-Syatibi dan Ibn 'Asyur* (Cet. 1). Sahifah.