

The Status of Children in the Annulment of Mixed Marriages: Living Fiqh Perspectives, Legal Pluralism, and Maqāṣid al-Sharī'ah

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Abstract

The annulment of intermarriage in contemporary Muslim society not only raises cross-border legal issues, but also raises issues regarding the legal status of children. Fiqh's approach that tends to be textual is often not able to provide optimal protection for children's civil rights after the marriage is declared null and void. This study aims to analyze the legal status of children after the annulment of mixed marriage through the paradigm of living fiqh integrated with International Civil Law, national law, and Maqāṣid al-Sharī'ah, especially the principle of *ḥifẓ al-nasl*. The research uses socio-legal methods with legislative, conceptual, and court decision analysis approaches. The results of the study show that the annulment of marriage due to administrative defects and legal smuggling does not remove the civil status of children. The paradigm of living fiqh places the protection of children's nasab, identity, and rights as a form of benefit that must be prioritized through the harmonization of Islamic law, national law, and the principle of child protection. This study concludes that this approach can be a normative and sociological basis in guaranteeing the rights of identity, nasab, citizenship, and legal protection of children in disputes over the annulment of mixed marriages.

Keywords: *living fiqh; annulment of mixed marriage; child status; legal pluralism; maqāṣid al-sharī'ah.*

Introduction

The annulment of mixed marriage is one of the increasingly complex family law issues with the increasing mobility of the population, inter-citizenship marriages, and the development of transnational legal relations. The issue is not only related to the validity of marriage according to state law, but also concerns how Islamic law is understood and applied in determining the legal consequences for children born from the marriage. In practice, differences in views on the annulment of marriage often give rise to uncertainty regarding the civil status of children, especially when there are differences between fiqh norms, positive law, and judicial practice.

In the Islamic legal tradition, the issue of annulment of marriage is often understood through the textual fiqh approach, which is a way of understanding the law that is oriented to the literal meaning of nash and the construction of classical fiqh without considering changes in the social context and the development of the modern legal system. In the context

of marriage annulment, this approach tends to view that if the marriage contract is declared null and void due to the non-fulfillment of certain conditions or principles, then all legal consequences born from the contract, including civil relations, are seen as following the status of the nullity of the contract. Although the jurists have a variety of views on the status of children born from fasid or void marriages, the textual application of fiqh in practice often gives rise to the perception that the annulment of marriage can have an impact on weakening the recognition of children's civil rights. Such a view has the potential to contradict the development of the child protection system in the modern legal state that places children as legal subjects who must be protected from legal consequences caused by the actions of their parents. In contrast to this approach, living fiqh views that Islamic law is a normative system that continues to interact with social reality, community development, and the state legal system. In this perspective, fiqh is not understood as a static collection of norms, but as the result of ijtihad that can continue to develop to realize benefits. Therefore, the resolution of the issue of the status of children due to the annulment of marriage is not enough to rely only on the formal legality of the contract, but must also take into account the purpose of the sharia (Maqāṣid al-Sharī'ah), especially ḥifẓ al-nasl (protection of offspring), as well as the principles of protection of children's rights that have become part of the national legal system and international law.

This paradigm allows for a dialogue between fiqh, human rights, the provisions of Article 28B paragraph (2) of the Constitution of the Republic of Indonesia of 1945, Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019, Law Number 35 of 2014 concerning Child Protection, and various other child protection instruments. Thus, living fiqh does not ignore sharia norms, but places them as a living law (law in action) and is able to provide substantive protection for children's rights in contemporary society. A number of academic studies have discussed various aspects related to mixed marriage, annulment of marriage, and legal protection of children. Research on mixed marriage generally focuses on the issue of legal conflicts and citizenship implications arising from differences in legal systems between countries. On the other hand, studies in the field of family law highlight more on the protection of children's rights in family disputes by emphasizing the principle of the best interests of the child and the principle of non-discrimination. Meanwhile, international civil law studies highlight jurisdictional issues, applicable laws, and the recognition and enforcement of foreign court judgments in cross-border family disputes. However, most of these studies are still sectoral and have not integrated a constitutional law perspective that places the state as the party responsible for ensuring constitutional protection of children's rights.

Although various studies have discussed the annulment of mixed marriages, the legal status of children, and the protection of children's rights from the perspective of family law, international civil law, and constitutional law, most of these studies still place these issues within a normative positive legal framework. Previous studies have generally focused on legal conflicts, the choice of law, the legal consequences of annulment of marriage on children's civil status, or constitutional protection of children's rights. This approach makes an important contribution in explaining the formal legal aspects, but it has not adequately explained how Islamic law develops and is actualized through judicial practice, interaction

with state law, and the social dynamics of Muslim society in resolving the issue of child status due to the annulment of mixed marriages.

Thus, there is still a gap in research on how the concept of living fiqh works in shaping the legal protection of children through the process of judicial *ijtihad*, legal pluralism, and the application of the values of *Maqāṣid al-Sharī'ah*, especially *ḥifẓ al-nasl*. In fact, in Indonesian judicial practice, court decisions not only apply the provisions of laws and regulations, but also show a dialogue between Islamic law, national law, human rights principles, and the social needs of the community. These interactions show that the protection of the status of children is no longer solely based on the formal legality of a marriage, but is directed at realizing substantive benefits through a progressive and responsive interpretation of the law to social change.

Based on these gaps, this study aims to analyze the legal status of children in the annulment of mixed marriages through the perspective of living fiqh by examining the interaction between International Civil Law, constitutional law, legal pluralism, and *Maqāṣid al-Sharī'ah* in Indonesian judicial practice. In contrast to previous research that tends to separate the analysis of Islamic law and state law, this study offers a paradigm reconstruction that places living fiqh as the main analytical framework to explain how sharia values are actualized through the *ijtihad* of judges in providing protection for children's identity, nasab, citizenship, and civil rights. Thus, this research is expected to make a conceptual contribution to the development of contemporary Islamic law studies, especially in understanding the relationship between fiqh, legal pluralism, and the protection of children's rights in modern Muslim society.

Based on this research, this study aims to analyze the legal status of children in the annulment of mixed marriages through the perspective of living fiqh by placing the interaction between Islamic law, International Civil Law, constitutional law, and judicial practice as the main analytical framework. This study seeks to explain how the values of *Maqāṣid al-Sharī'ah*, especially *ḥifẓ al-nasl*, are actualized through the *ijtihad* of judges in providing protection for children's identity, nasab, citizenship, and civil rights. In contrast to previous research that focused more on normative analysis of legal conflicts or constitutional protection separately, this study offers a paradigm reconstruction from textual fiqh to living fiqh as an approach that is able to explain the dynamics of the relationship between Islamic law, state law, and social reality in resolving disputes over the annulment of mixed marriages. Thus, this research is expected to make a theoretical contribution to the development of living fiqh studies and strengthen the model of legal protection of children in Muslim societies characterized by legal pluralism.

Methodology

This research uses the socio-legal research method, which is an approach that integrates normative analysis of the law with the study of how legal norms are understood, interpreted, and applied in judicial practice and community life. In contrast to normative legal research which is oriented towards the study of laws and regulations alone, socio-legal research views law as a social institution whose enactment is formed through the interaction between legal norms, court decisions, religious values, and social practices. This approach was chosen

because the issue of the legal status of children due to the annulment of mixed marriage cannot be understood only through a normative approach to positive legal provisions, but must also be analyzed through the interaction between Islamic law, state law, judicial practice, and community dynamics as a form of living fiqh. In this study, living fiqh is understood as a dynamic process of forming and applying Islamic law through ijtihad that continues to evolve in response to social changes, without overriding the main purpose of sharia (Maqāṣid al-Sharī'ah), especially the protection of posterity (ḥifẓ al-nasl).

This study uses three complementary approaches, namely the statute approach, the conceptual approach, and the case approach. The legislative approach is used to examine various regulations that regulate mixed marriage, annulment of marriage, citizenship, and protection of children's rights, including the Constitution of the Republic of Indonesia of 1945, Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019, Law Number 12 of 2006 concerning Citizenship of the Republic of Indonesia, and Law Number 35 of 2014 concerning Child Protection. A conceptual approach is used to examine concepts related to living fiqh, legal pluralism, Maqāṣid al-Sharī'ah, International Civil Law, constitutional protection of the rights of the child, and the principle of the best interests of the child. Meanwhile, the case approach is carried out through an analysis of relevant court decisions, namely the Constitutional Court Decision Number 46/PUU-VIII/2010, the Purworejo District Court Decision Number 88/Pdt.P/2023/PN.Pwr, and the Karawang Religious Court Decision Number 3465/Pdt.G/2024/PA.Krw. The three decisions were chosen because they represent the development of judicial practice in providing protection for the legal status of children while showing how legal values Islam is actualized through the interpretation of judges in the national legal system.

The data sources in this study consist of primary legal materials and secondary legal materials. Primary legal materials include laws and regulations, court decisions, and international legal instruments related to the protection of children's rights and mixed marriage. The secondary legal materials were obtained from scientific books, articles from accredited national journals (SINTA), articles from reputable international journals indexed by Scopus, research results, and other scientific works that discuss Islamic family law, living fiqh, legal pluralism, International Civil Law, constitutional law, and the protection of children's rights. Data collection is carried out through library research by identifying, inventorying, classifying, and critically examining various legal sources and literature relevant to the research focus.

Data analysis was carried out qualitatively using a socio-legal analysis framework. The first stage is carried out by identifying the legal norms that govern the legal consequences of annulment of mixed marriage on the status of children. The next stage analyzes the judge's legal considerations (ratio decidendi) in court decisions to see how judges harmonize positive legal provisions, constitutional principles, and Islamic legal values in providing protection for children's rights. Furthermore, the results of the analysis are interpreted using the perspective of legal pluralism and Maqāṣid al-Sharī'ah, especially the principle of ḥifẓ al-nasl, to assess the extent to which judicial practice in Indonesia reflects the transformation from textual fiqh to living fiqh. Through this analytical framework, this study seeks to show that the protection of the legal status of children in the annulment of mixed marriage is not solely the

result of the application of positive legal norms, but also the result of a dynamic interaction between Islamic law, state law, human rights principles, and judicial practices in Indonesian society.

Living Fiqh and Maqāṣid al-Sharī'ah as a Framework for the Protection of the Status of Children in the Annulment of Mixed Marriages

The annulment of marriage in the treasures of classical Islamic law is basically understood through a fiqh approach oriented towards the formal validity of the contract. The approach, which is often referred to as textual fiqh, places the fulfillment of the harmony and conditions of marriage as the main basis in determining the legal consequences of a marriage. In practice, an overly literal understanding of fiqh norms has the potential to give birth to the consequence that the nullity of the marriage contract is followed by the nullity of various legal consequences born from the marriage. Although the views of the jurists regarding the status of children born from fasid or null marriages are not singular, approaches that are only oriented towards the formal validity of the contract often ignore the purpose of protecting children as legal subjects who do not have responsibility for legal defects committed by their parents. Therefore, the textual fiqh approach requires reinterpretation in order to be able to answer the dynamics of family relations in contemporary Muslim society.¹ In contrast to this paradigm, living fiqh views that fiqh is the result of ijtihad that continues to develop in accordance with social changes, scientific developments, and the needs of society. Fiqh is not understood as a final legal product, but as an interpretation process that continues in order to realize benefits. In this perspective, Islamic law interacts with state law, judicial practices, customs, and human rights principles so as to give birth to forms of legal solutions that are more responsive to contemporary problems. Thus, the settlement of the case of annulment of mixed marriage is not enough to be based on the formal legality of a contract, but must also consider the social impact and protection of children's rights as part of the purpose of sharia.²

The philosophical foundation of the *living fiqh* paradigm is reflected in the theory of *Maqāṣid al-Sharī'ah*, especially the principle of *ḥifẓ al-nasl* (protection of offspring). In the perspective of maqāṣid, Islamic law not only aims to maintain the validity of the marital relationship, but also ensures the preservation of the continuity of offspring, family honor, the legal identity of children, and the rights inherent in each individual. Therefore, the annulment of marriage due to administrative defects, legal smuggling, and procedural violations should not eliminate the civil rights of children, since the protection of offspring is one of the fundamental objectives of sharia. The maqāṣid approach shifts the legal orientation from mere obedience to formal forms to the protection of substantive *justice*.³ This principle has a meeting point with the concept of *maṣlaḥah*, which is an effort to realize benefits and prevent harm in every application of Islamic law. In the context of the

¹ Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oxford: Oneworld Publications, 2008), 14–32; Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press, 2009), 33–58.

² Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, 2006), 83–108; John Griffiths, "What Is Legal Pluralism?," *Journal of Legal Pluralism* 24, no. 1 (1986): 1–55.

³ Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London: International Institute of Islamic Thought, 2008), 1–25;

annulment of mixed marriage, *maṣlaḥah* demands that the dispute resolution be not only oriented towards formal legal certainty, but also take into account the best interests of the child. This orientation is in line with the development of Indonesian national law that guarantees children's rights through Article 28B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, Law Number 35 of 2014 concerning Child Protection, as well as the principles adopted in the Convention on the Rights of the Child. Thus, there is a harmonization of values between *Maqāṣid al-Sharī'ah* and the modern child protection system that both place the interests of the child as the main consideration in every legal policy.⁴

The study of Islamic family law in Indonesia has so far been dominated by a normative-doctrinal approach oriented towards the interpretation of the Qur'an, Sunnah, classical fiqh books, laws and regulations, and court decisions⁵. Such approaches make an important contribution to explaining the normative validity of a rule of law, but are often less able to explain how the law actually works in people's lives. In the context of the annulment of mixed marriages, for example, most research stops at the analysis of the validity of marriage according to Law No. 1 of 1974 concerning Marriage, the Compilation of Islamic Law, or the Constitutional Court ruling, without examining how Muslim society interprets the status of children after the marriage is annulled.⁶ In fact, social reality shows that legal relationships in the family are not entirely determined by the text of the law, but also by social practices, religious authorities, and cultural values that live in society.⁷

This perspective gives birth to the need to shift the orientation of research from the *law in books* approach to *law in action*. In the socio-legal paradigm, law is understood not just as a set of norms produced by the state, but as a social institution that acquires meaning through community practices. The enactment of a norm is not only determined by formal binding power, but also by society's acceptance, interpretation, and internalization of the norm.⁸ Therefore, legal research is not enough to only answer the question of what the content of legal norms is, but also to explain how these norms are carried out, negotiated, and even modified in the practice of daily life. This paradigm shift allows Islamic family law to be understood as a social phenomenon that continues to evolve following changes in Indonesian Muslim society.⁹

The concept of *living law* introduced by Eugen Ehrlich provides the theoretical foundation for this approach. Ehrlich argues that the center of legal development is not in the legislative institution or court decisions, but in the social life of the community. The law that really governs human behavior is the *living law*, which is a norm that gains legitimacy because it is practiced and accepted by society.¹⁰ This idea then developed widely in socio-legal studies and became the basis for research on legal pluralism in various countries,

⁴ Jasser Auda, *Maqasid al-Shariah: A Beginner's Guide* (London: International Institute of Islamic Thought, 2008), 17–41; ; Mohammad Hashim Kamali, *The Objectives of Islamic Law* (Kuala Lumpur: Islamic Book Trust, 1999).

⁵ Fundamental Principles of the Sociology of Law (Cambridge: Harvard University Press, 1936), hlm. 489–506.

⁶ A General Jurisprudence of Law and Society (Oxford: Oxford University Press, 2001), hlm. 128–141.

⁷ Legal Pluralism in Indonesia (London: Routledge, 2013), hlm. 44–62.

⁸ Law in Modern Society (New York: Free Press, 1976), hlm. 1–24.

⁹ Comparative Law in a Global Context, 2nd ed. (Cambridge: Cambridge University Press, 2006), hlm. 35–59.

¹⁰ Ehrlich, *Fundamental Principles of the Sociology of Law*, hlm. 493–506

including Indonesia.¹¹ In the context of Muslim society, the concept of *living law* opens up space to understand that fiqh is not only present as a normative doctrine, but also as a social practice that continues to adapt to the dynamics of people's lives.¹²

This development then gave birth to the concept of *living fiqh*. In contrast to fiqh in the classical sense which emphasizes the results of ijtihad of the fuqaha, *living fiqh* views fiqh as a social practice formed through the interaction between religious texts, scholarly authorities, state institutions, and local culture. Thus, fiqh is no longer understood as a static legal system, but as a value system that is constantly reproduced through the life experience of the Muslim community.¹³ This approach shows that the implementation of Islamic law never takes place alone, but is influenced by social, political, economic, and even institutional developments of the state.¹⁴ In the context of Indonesia, which has the character of a pluralistic society, *living fiqh* is a relevant approach to explain how Islamic legal norms coexist with state law and customary law.¹⁵

The relevance of the *living fiqh approach* is increasingly evident in the case of annulment of mixed marriages. Normatively, the annulment of marriage is understood as a legal consequence of the non-fulfillment of the legal conditions of marriage according to state law and Islamic law. But in practice, the cancellation does not automatically erase the social relationship that has been formed between husband, wife, and children.¹⁶ People often still recognize the family relationship, nasab, and moral obligations of parents to their children even though the marital status has been annulled by the court. This fact shows that social norms often work in tandem with state norms in determining the applicability of family law. Therefore, it is not enough to analyze the status of children only using a normative approach, but must understand how the Muslim community constructs the meaning of legitimacy, family responsibility, and child protection in daily life.¹⁷

Through this perspective, *living fiqh* offers a more comprehensive analytical framework than a purely positive legal approach. This approach allows the research not only to explain the content of norms regarding the annulment of mixed marriages, but also to uncover the negotiation process between state law, religious fatwas, judicial practices, and social values in determining the status of children. Thus, the protection of children is understood not only as an administrative consequence of the validity or annulment of marriage, but as the result of the interaction between sharia goals, institutional practices, and public legal awareness. This perspective is the conceptual basis for this study to reconstruct the status of children in the case of annulment of mixed marriages through the *living fiqh approach*, before being further analyzed in the framework of legal pluralism and maqāṣid al-shari'ah.

Departing from this description, living fiqh is not intended to replace classical fiqh or to override positive law, but rather to be a paradigm that bridges the two through a

¹¹ Journal of Legal Pluralism, "What is Legal Pluralism?," Vol. 24 (1986): 1–55.

¹² Tamanaha, *A General Jurisprudence of Law and Society*, hlm. 170–188.

¹³ Shari'a: Theory, Practice, Transformations (Cambridge: Cambridge University Press, 2009), hlm. 523–548.

¹⁴ Maqasid Al-Shariah as Philosophy of Islamic Law (London: International Institute of Islamic Thought, 2008), hlm. 45–67.

¹⁵ Menski, *Comparative Law in a Global Context*, hlm. 147–172.

¹⁶ Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019.

¹⁷ Compilation of Islamic Law, especially provisions regarding the legal consequences of marriage annulment.

contextual ijtihad process. In the case of annulment of mixed marriage, this paradigm allows for harmonization between International Civil Law, constitutional law, human rights law, and sharia values in providing protection for the legal status of children. Therefore, the discussion of International Civil Law, constitutional protection, and Indonesian judicial practice in the next section is positioned as a concrete manifestation of living fiqh in grounding the values of Maqāṣid al-Sharī'ah in the midst of contemporary Muslim society.

Legal Pluralism in the Protection of the Status of Children

The protection of the legal status of children in the annulment of mixed marriages cannot be understood through only one legal system, because the issue is at the intersection of Islamic law, state law, international law, and social practices of society. This condition reflects the character of legal pluralism, namely the existence of more than one legal system that lives, interacts, and equally influences the resolution of a legal problem in society. In the Indonesian context, legal pluralism can be seen from the enactment of Islamic law as a source of value for the Muslim community, national law as a positive law that binds all citizens, and various international legal instruments regarding the protection of children's rights that have been adopted into the national legal system. Therefore, the settlement of disputes regarding the status of children due to the annulment of mixed marriage cannot be done through a monistic approach that prioritizes only one legal regime, but must consider the dynamic relationship between these various legal systems so as to be able to produce comprehensive legal protection of children's rights¹⁸

The concept of legal pluralism as put forward by John Griffiths rejects *the view of legal centralism* that places state law as the only legitimate source of law. According to Griffiths, in social reality there are always various norm systems that coexist and actually regulate people's behavior, whether they come from the state, religion, or local customs. This perspective is relevant in the context of the annulment of mixed marriages in Indonesia, as the settlement of cases is not only determined by the provisions of the Marriage Law, but is also influenced by Islamic legal values, religious judicial practices, and the social needs of the Muslim community. Thus, the protection of the status of children is not only a consequence of the application of state law, but also the result of the interaction between religious norms and social practices that develop in society.¹⁹

Franz von Benda-Beckmann asserts that legal pluralism not only indicates the existence of various legal systems, but also describes the process of interaction, negotiation, and adaptation among these systems in the practice of people's lives. This approach explains that law does not work separately between state law and religious law, but rather influences each other in response to social change. In the case of annulment of mixed marriage, this dynamic can be seen when the judge is not only guided by the provisions of laws and regulations, but also considers the values of justice, welfare, and protection of children as part of the purpose of sharia. Thus, court decisions become a space for dialogue between

¹⁸ John Griffiths, "What Is Legal Pluralism?," *Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 1–55.

¹⁹ John Griffiths, "What Is Legal Pluralism?," *Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 3–8.

Islamic law, national law, and community development, resulting in legal protection that is more responsive to the interests of children.²⁰

From the perspective of living fiqh, legal pluralism is not understood as a contradiction between Islamic law and state law, but as an integrative mechanism that allows sharia values to develop through modern legal institutions. The protection of the legal status of children in the annulment of mixed marriages shows that the principles of Islamic law, constitutional law, international civil law, and human rights instruments can be mutually reinforcing in realizing legal certainty as well as substantive justice. Therefore, legal pluralism in Indonesia not only reflects the diversity of legal sources, but also becomes the foundation for the development of living fiqh as a paradigm that places the benefits, protection of offspring (*hifz al-nasl*), and the best interests of children as the main orientation in resolving cross-border family disputes. This paradigm is then reflected in the development of Indonesian judicial practice through various decisions that prioritize the protection of children's rights over the rigid application of formal norms.

The main characteristics of Islamic family law in Indonesia cannot be separated from the reality of legal pluralism that has characterized the national legal system from the colonial period to the contemporary era. In contrast to the monistic legal system, family law in Indonesia develops through the interaction between state law, Islamic law, and customary law which both have legitimacy in people's lives.²¹ As a result, the settlement of family problems, including the annulment of mixed marriages, is never fully determined by a single legal system alone. On the contrary, legal practice shows that there is an ongoing negotiation process between the formal norms of the state and the religious norms and social customs that live in Muslim society.²² This condition shows that the applicability of family law depends not only on the power of state regulation, but also on social acceptance of norms that are considered fair and in accordance with religious values.²³

The concept of *legal pluralism* provides an important analytical framework for understanding the phenomenon. Griffiths explains that legal pluralism is a condition when more than one legal system works simultaneously in the same social space without having to be subject to a single authority. In the Indonesian context, legal pluralism is seen through the existence of state law codified in various laws and regulations, Islamic law that develops through fiqh, fatwa, and religious judicial practices, and customary law that survives in various local communities.²⁴ The three legal systems are not always in a harmonious relationship, but often influence each other and form a pattern of dispute resolution that differs from the normative construction formulated by the state.²⁵

In the case of annulment of mixed marriage, legal pluralism can be seen from the stage of establishing a marital relationship until the emergence of legal consequences after the marriage is declared null and void. Normatively, Law Number 1 of 1974 as amended by

²⁰ Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths, *Power of Law in a Transnational World: Anthropological Enquiries* (New York: Berghahn Books, 2009), 25–44.

²¹ Ratno Lukito, *Legal Pluralism in Indonesia: Bridging the Unbridgeable* (London: Routledge, 2013), 21–47.

²² Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2nd ed. (Cambridge: Cambridge University Press, 2006), 35–67.

²³ Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), 170–188.

²⁴ John Griffiths, "What Is Legal Pluralism?," *Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 1–55.

²⁵ Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988): 869–896.

Law Number 16 of 2019 emphasizes that the validity of marriage depends on the religious law of each party.²⁶ This provision was later strengthened by the Compilation of Islamic Law which expressly prohibits Muslim women from marrying non-Muslim men. On the other hand, the fatwa of the Indonesian Ulema Council also places interfaith marriage as a practice that is contrary to Islamic law.²⁷ Normatively, the construction seems to provide legal certainty. However, in social practice, various couples continue to carry out marriage through various mechanisms that are considered to be able to meet the social and administrative needs of the family.²⁸

This phenomenon shows that society does not always view state law as the only source of legitimacy. Some couples choose to marry abroad, some using a specific religious marriage mechanism, while others practice unregistered marriages (*nikah sir*) in the hope of gaining social recognition from the communities in which they live.²⁹ These choices are not just a form of evasion of state law, but reflect the negotiation process between formal legal norms and the social needs of the community.³⁰ From the perspective of *living law*, such a practice actually shows that law develops through the social experience of society and is not always identical to the normative formulation contained in laws and regulations.

The situation became even more complex when the marriage was later annulled through a court ruling. Juridically, the annulment of marriage ends the legal relationship between husband and wife since the existence of a decree that has permanent legal force, but does not remove all legal consequences that have been born during the marriage.³¹ The Marriage Law and the Compilation of Islamic Law still provide protection for children born before the annulment of marriage. This protection shows that the law of the state itself recognizes a higher interest than just administrative certainty, namely the protection of children's rights and the sustainability of the *nasab*. Thus, the relationship between state law and Islamic law is not always confrontational, but can also be mutually reinforcing in ensuring the best interests of children.³²

The perspective of *living fiqh* sees this condition as showing that *fiqh* does not stop as a textual norm, but continues to undergo actualization through institutional practices and community experiences. Religious court judges, headmen, religious leaders, families, and even the surrounding community become actors who actively shape the legal meaning of the status of children. They not only apply normative provisions mechanically, but also consider social conditions, family benefits, and consequences that may arise if the status of children is treated discriminatorily. Thus, the law enforcement process is actually the result of interaction between various legal actors, each of which carries different values, interests, and authorities.

This condition shows that the annulment of mixed marriage is an arena for negotiation between various legal regimes. The state has an interest in maintaining legal

²⁶ Law Number 1 of 1974 concerning Marriage, as amended by Law Number 16 of 2019.

²⁷ Presidential Instruction No. 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law.

²⁸ Fatwa of the Indonesian Ulema Council Number 4/MUNAS VII/MUI/8/2005 concerning Interfaith Marriage.

²⁹ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. Walter L. Moll (Cambridge, MA: Harvard University Press, 1936), 493–506.

³⁰ Brian Z. Tamanaha, *A General Jurisprudence of Law and Society*, 135–148.

³¹ Law Number 1 of 1974 concerning Marriage, Article 28.

³² Compilation of Islamic Law, provisions on the legal consequences of annulment of marriage and child protection

certainty in the administration of marriage, religious institutions are interested in maintaining the authority of sharia norms, while the community emphasizes more on the sustainability of family relations and the protection of children. These three interests do not always meet at the same point, so various forms of legal adaptation are born that are different in each case. These variations in practice actually show that Islamic family law in Indonesia works through a dynamic mechanism of legal pluralism, not through the dominance of one legal system over another.

Legal pluralism should not be understood as a weakness of the national legal system. On the contrary, pluralism shows the ability of society to develop dispute resolution mechanisms that are more adaptive to social needs. In the context of annulment of mixed marriage, this approach helps explain why protection of the status of children retains legitimacy even when the marital status of the parents is questioned. The law that lives in society ultimately emphasizes the protection of human dignity rather than the formal application of administrative norms. Therefore, *living fiqh* is a relevant framework to explain how Islamic law works as a social practice that is always oriented towards substantive justice.

Through this perspective, it can be understood that legal pluralism is not just the existence of various legal systems in one social space, but the process of continuous interaction between the state, religion, and society in shaping the meaning of law. The annulment of mixed marriage clearly shows that the status of children is born as a result of the negotiation of various norms living at the same time. Thus, this study views that *the living fiqh* approach provides a more comprehensive explanation than the normative legal approach alone because it is able to capture the social dynamics that shape the legal protection of children in Indonesian Muslim society. This approach further becomes a bridge to the analysis of *maqāṣid al-shari'ah*, especially the principle of *ḥifẓ al-nasl*, as a normative and ethical basis in protecting the status of children in cases of annulment of mixed marriages.

Analysis of the Legal Status of Children in the Annulment of Mixed Marriages in the Perspective of International Civil Law

The annulment of mixed marriage poses a complex legal problem in the study of International Civil Law (HPI), especially related to the choice of law and its legal consequences on the status of children. In the framework of HPI, a legal relationship that contains foreign elements requires connecting factors to determine which legal system is authorized to regulate the relationship. In practice, the Indonesian HPI system recognizes several important principles, including *lex loci celebrationis* (the law where the marriage takes place) and the principle of nationality of the parties. These two principles serve as the basis for determining the validity of marriage and its legal consequences on the family relationship born from the marriage.³³

In the context of annulment, it is necessary to distinguish conceptually between annulment and divorce. Divorce ends a valid marriage, while annulment states that the marriage is legally considered to have never existed in the first place (void ab initio).³⁴ The consequence of the doctrine is that the legal consequences of marriage can in principle be

³³ Sudargo Gautama, *Indonesian International Civil Law*, Volume I (Bandung: Alumni, 2007), 45.

³⁴ Subekti, *Principles of Civil Law* (Jakarta: Intermasa, 2005), 39.

considered to have never existed. Nevertheless, Indonesia's positive law provides an important exception regarding the status of children. Article 28 paragraph (2) of Law Number 1 of 1974 concerning Marriage emphasizes that the annulment of marriage does not apply retroactively to children born from the marriage.³⁵ This provision shows that the protection of children is a top priority in resolving legal conflicts due to the annulment of marriage.

In the perspective of modern HPI, this provision is in line with the principle of *favor legitimitatis*, which is a principle that prioritizes the validity of the status of children in every family law conflict. This principle developed as an effort to prevent discrimination against children born from relationships whose legal validity is questionable. Therefore, even if a mixed marriage is annulled under the laws of a particular country, the status of the child should not be harmed by a legal defect in the marital relationship of the parents. This principle is also related to the doctrine of the best interests of the child which has become a universal standard in the protection of children in international law.³⁶

The practical implications of this principle can be seen in the citizenship arrangement of children resulting from mixed marriages in Indonesia. Law Number 12 of 2006 concerning Citizenship of the Republic of Indonesia adopts the principle of *ius sanguinis* as the main basis for determining citizenship. Children born of mixed marriages can have limited dual citizenship until they reach a certain age before making a choice of citizenship.³⁷ In this context, the annulment of a marriage does not automatically remove the citizenship status of the child because the citizenship relationship is based on a blood relationship with the parents, not solely on the formal validity of the marriage.

Thus, in the perspective of HPI, the annulment of mixed marriage does not remove the legal status of the child, both in civil relations and in civic relations. This approach shows that modern law places the interests of the child as the main consideration in resolving family law conflicts involving cross-border elements.

The annulment of mixed marriage cannot be understood in essence only as a juridical mechanism that leads to the termination of the legal relationship between husband and wife. From the perspective of *living fiqh* and *legal pluralism*, the annulment of marriage is actually an arena where various legal systems interact, influence each other, and even compete with each other in determining the meaning of justice for the parties involved.³⁸ Therefore, the annulment of marriage does not stop as a product of a court decision, but becomes a social process involving the state, religious institutions, bureaucratic apparatus, extended families, and the Muslim community where the couple lives.³⁹ The resulting legal decisions are ultimately the result of negotiations between positive legal norms, *fiqh* teachings, ethical considerations, and social realities that develop in society.⁴⁰

³⁵ Indonesia, Law Number 1 of 1974 concerning Marriage, Article 28 paragraph (2).

³⁶ Geraldine Van Bueren, *The International Law on the Rights of the Child* (The Hague: Martinus Nijhoff Publishers, 1998), 35.

³⁷ Indonesia, Law Number 12 of 2006 concerning Citizenship of the Republic of Indonesia.

³⁸ Ratno Lukito, *Legal Pluralism in Indonesia: Bridging the Unbridgeable* (London: Routledge, 2013), 59–82.

³⁹ John Griffiths, "What Is Legal Pluralism?," *Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 1–55.

⁴⁰ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2nd ed. (Cambridge: Cambridge University Press, 2006), 83–115.

Annulment of marriage is positioned as a logical consequence of non-fulfillment of the conditions stipulated by laws and regulations and Islamic law. This perspective considers that after the annulment decision acquires permanent legal force, the legal relationship of the parties has obtained certainty. However, the socio-legal approach shows a different reality. A court decision actually only resolves the formal aspect of a dispute, while the various social consequences that arise after the decision remain in people's lives.⁴¹ The emotional relationship between children and parents, the acceptance of the extended family, the community's recognition of the fate, and the child's access to his civil rights do not necessarily end just because of the decision to annul the marriage. This fact shows that the law works through a much more complex social process than the normative construction contained in court decisions.⁴²

This complexity is even more apparent when the annulment of marriage involves couples from different religious and civic backgrounds. In such a situation, the law of the state must deal with the principles of international civil law, the norms of fiqh regarding interfaith marriage, as well as administrative provisions regarding citizenship and civil registration. Each legal system has a different logic in determining the legal status of the parties. The state emphasizes on the certainty of administration and the protection of the constitutional rights of citizens, while fiqh emphasizes more on the validity of marriage contracts according to sharia. On the other hand, society often places the sustainability of family relationships as a more important consideration than the formal legality of a marriage. These differences in orientation cause the annulment of marriage to become a negotiation space that brings together various legal interests at once.

In practice, judges never work in a space that is completely free from the influence of social values. Court decisions are indeed based on positive legal provisions, but the *legal reasoning* process often pays attention to aspects of utility, sense of justice, and social impact that may arise from the decision.⁴³ This is especially evident when the judge has to determine the legal consequences for children born from marriages that are later annulled. Even if the marriage is formally declared invalid or annulled, judges generally still try to ensure that the rights of children are not harmed by mistakes made by their parents. Such an approach reflects a shift from a legalistic orientation to a rights protection orientation, so that law is understood as an instrument for realizing substantive justice, not just procedural certainty.⁴⁴

Legal negotiations also took place outside the courtroom. The Office of Religious Affairs, the Population and Civil Registration Office, religious leaders, and extended family often play an equally important role in determining how a person's legal status is understood in everyday life. It is not uncommon for people to still recognize the existence of a family even though the marriage has been annulled by the court. This recognition is reflected in social acceptance of children, recognition of kinship relationships, and the implementation of family rights and obligations that continue to run as they should. Thus, the enactment of the law is not only shaped by court decisions, but also by the social legitimacy that develops

⁴¹ Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), 171–198.

⁴² Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. Walter L. Moll (Cambridge, MA: Harvard University Press, 1936), 493–506.

⁴³ Law Number 48 of 2009 concerning Judicial Power, Article 5 paragraph (1).

⁴⁴ Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019.

in society. This phenomenon is the core of the concept of *living fiqh*, which is fiqh that obtains binding power through social practice, not solely through normative texts.

In the context of the Indonesian Muslim community, the role of scholars and religious institutions cannot be ignored. Fatwas, religious advice, and the practice of resolving disputes based on family deliberations are often the main reference for people before they take cases to court. Even after the court decision was handed down, the social legitimacy of the decision was still heavily influenced by the views of religious leaders.⁴⁵ This condition shows that Islamic legal authorities do not only work through state institutions, but also through socio-religious networks that live in society. Therefore, the analysis of the annulment of mixed marriages must take into account the dynamic relationship between state authorities and religious authorities in shaping the legal compliance of the community.⁴⁶

This phenomenon confirms the view that Islamic family law in Indonesia develops through the mechanism of legal pluralism that is interactive. The state does not completely monopolize the formation of laws, nor does fiqh always be applied independently without taking into account state regulations. On the contrary, the two influence each other in the process of forming legal decisions. On the one hand, state law adopts various principles of Islamic law to gain social legitimacy. On the other hand, contemporary fiqh practices have also undergone adjustments to the development of the national legal system, especially in the aspect of protecting the rights of women and children. These interactions show that legal pluralism is not a form of conflict that must be eliminated, but rather an adaptive mechanism that allows law to remain relevant to societal changes.

So from the perspective of *living fiqh*, the annulment of mixed marriage must ultimately be understood as a process of value negotiation, not merely a negotiation of norms. What is at stake is not only the legal status of marriage, but also the protection of human dignity, the continuity of family relationships, and the future of children born from the marriage. Therefore, the settlement of cases cannot only rely on a legalistic approach oriented to the validity or not of a contract, but must consider the social, ethical, and humanitarian dimensions that accompany every family relationship. This approach also emphasizes that Islamic law that lives in society has an adaptive character and is able to respond to social changes without losing its orientation to the values of justice.

On that basis, this study views that the annulment of mixed marriage is not just a matter of legal validity, but a mirror of how various legal regimes work simultaneously in shaping the protection of children. The negotiation process between state law, fiqh, judicial practice, and social norms shows that the status of children is actually built through mechanisms that are much more complex than normative constructions in laws and regulations. This awareness is the basis for shifting the focus of the discussion from the legality of marriage to the protection of offspring (*hifz al-nasl*) as the main goal of sharia. Thus, the further discussion of maqāṣid al-sharī'ah is no longer positioned as an additional theory, but rather as a normative framework that explains why the protection of children should be the main orientation in any settlement of the annulment of mixed marriages.

⁴⁵ Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law.

⁴⁶ Shari'a: Theory, Practice, Transformations (Cambridge: Cambridge University Press, 2009), 523–548.

Constitutional Protection of the Status of Children in the Perspective of Living Fiqh

From the perspective of Constitutional Law, the issue of the status of children due to the annulment of marriage is not only seen as a family law issue, but also as a constitutional issue related to the protection of human rights. The Indonesian Constitution expressly guarantees the protection of children as part of human rights that must be respected by the state. Article 28B paragraph (2) of the 1945 Constitution of the Republic of Indonesia states that every child has the right to survival, growth and development, and the right to protection from violence and discrimination.⁴⁷ The constitutional provision contains the consequence that the state has an obligation to ensure that children do not become victims of legal uncertainty due to the legal relationship between their parents. The principle of equality before the law, which is the main character of the state of law (*rechtstaat*), requires that every child be treated equally before the law regardless of the marital status of his parents.⁴⁸

This constitutional approach is strengthened by the development of jurisprudence of the Constitutional Court of the Republic of Indonesia. In the Constitutional Court Decision No. 46/PUU-VIII/2010, the Court stated that the restriction of a child's civil relationship only with his mother and his mother's family is contrary to the principle of protection of children's rights if it can be proven that there is a biological relationship with their father.⁴⁹ The ruling marks a paradigm shift from a formalistic approach to a substantive approach in the protection of children's rights. The Constitutional Court Decision Number 46/PUU-VIII/2010 is one of the real examples of the development of *living fiqh* in the Indonesian legal system. Although the Court used constitutional arguments, the substance of the decision was in line with the purpose of the sharia to protect offspring (*hifz al-nasl*) and protect the rights of children from the effects of their parents' actions. In this context, the Court conducts constitutional *ijtihad* by shifting the legal orientation from simply assessing the formal validity of the marital relationship to the protection of the welfare of the child. Such an approach shows that *fiqh* values do not stop at normative texts, but live and develop through judges' interpretations that are responsive to the dynamics of society.

In the perspective of modern constitutionalism, the state not only functions as a shaper of legal norms, but also as a guarantor of the protection of citizens' rights (guarantor of rights). Therefore, the state is obliged to provide legal and population administration mechanisms that are able to ensure the certainty of the status of children, including in situations of annulment of mixed marriages.⁵⁰ These developments show that the protection of the status of children in the Indonesian constitutional system is no longer solely based on a legalistic approach, but also reflects a more contextual transformation of Islamic legal thinking. From the perspective of *living fiqh*, sharia norms are not understood as rules that stop at the formulation of classical *fiqh*, but as values that continue to be actualized through the practice of state administration and judicial institutions. Therefore, the constitutional guarantee of children's rights as stipulated in Article 28B paragraph (2) of the 1945

⁴⁷ Indonesia, Constitution of the Republic of Indonesia of 1945, Article 28B paragraph (2).

⁴⁸ Jimly Asshiddiqie, *Indonesian Constitution and Constitutionalism* (Jakarta: Sinar Grafika, 2010), 115.

⁴⁹ Constitutional Court of the Republic of Indonesia, Decision Number 46/PUU-VIII/2010 concerning the Examination of the Marriage Law against the 1945 Constitution.

⁵⁰ Philipus M. Hadjon, *Legal Protection for the People in Indonesia* (Surabaya: Bina Ilmu, 1987), 25

Constitution of the Republic of Indonesia can be understood as a form of institutionalization of *the values of Maqāṣid al-Shari'ah*, especially *ḥifẓ al-nasl*, into the national legal system. The state not only serves as a law-maker, but also as a space where fiqh values develop dynamically in response to the needs of contemporary Muslim society.

Judicial Ijtihad of Judges as a Manifestation of Living Fiqh

From the perspective of *living fiqh*, court decisions are not only understood as the application of positive legal norms, but also as a form of ijtihad of judges in translating sharia values into concrete case resolution. Judges do not just act as a mouthpiece of the law (*la bouche de la loi*), but carry out progressive interpretations to realize the benefit, justice, and protection of the rights of the parties. Therefore, judicial practice in Indonesia can be seen as an arena where fiqh interacts with state law, community development, and human rights principles so as to give birth to what is called *living fiqh*. Analysis of judicial practice shows that courts in Indonesia tend to prioritize the protection of the status of children in cases related to the validity of marriage. One example can be found in the Purworejo District Court Decision Number 88/Pdt.P/2023/PN.Pwr related to the application for ratification of the status of children in the context of mixed marriage. In the case, the applicants who came from different nationalities submitted an application for the ratification of the child's status so that the child could obtain clear legal legitimacy and his derivative rights, including inheritance rights and legal relationship with both parents.⁵¹ The ruling shows that the court places the best interests of the child as the main parameter in determining the legal status of the child. Despite the question of the formal validity of the parents' marriage, the court still gives ratification of the status of the child to ensure legal certainty. This approach shows that in practice judges not only adhere to the formalities of marriage law, but also consider the substantive principles of protection of children's rights. A similar approach is also seen in the Karawang Religious Court Decision Number 3465/Pdt.G/2024/PA. Krw related to the annulment of marriage due to the falsification of the identity of one of the parties. In the case, the judge stated that the marriage could be annulled due to the element of fraud, but at the same time still considered the implications of the annulment on the rights of the children born from the relationship.⁵²

Likewise, the Purworejo District Court Decision Number 88/Pdt.P/2023/PN.Pwr and the Karawang Religious Court Decision Number 3465/Pdt.G/2024/PA. Krw shows that Indonesian judicial practice increasingly prioritizes substantive protection of children rather than the formal application of norms. The judge did not focus on the legal consequences of annulment of marriage alone, but considered that identity rights, civil relationships, and the future of children must remain guaranteed. This way of ruling is a manifestation of *living fiqh*, which is a judicial ijtihad process that brings together sharia values, positive law, and the social needs of the community. Within this framework, court decisions are not only an instrument of law enforcement, but also a medium for the transformation of

⁵¹ Purworejo District Court, Decision Number 88/Pdt.P/2023/PN.Pwr.

⁵² Karawang Religious Court, Decision Number 3465/Pdt.G/2024/PA.Krw.

fiqh towards legal practice that is oriented towards the benefit, justice, and protection of vulnerable groups.

Judicial practice in Indonesia shows that judges no longer merely act as executors of the law (*la bouche de la loi*), but as perpetrators of judicial *ijtihad* (judicial *ijtihad*) that actualize the values of Islamic law within the framework of the modern legal state. Decisions such as the Constitutional Court Decision No. 46/PUU-VIII/2010 and various court decisions that provide protection for the legal status of children after the annulment of marriage reflect a shift in orientation from a legalistic-formal approach to substantive justice centered on *the best interests of the child*. From the perspective of *living fiqh*, the interpretation of the judge is a form of contemporary *ijtihad* that does not stop at the textual reading of fiqh norms and laws and regulations, but seeks to harmonize the principles of *Maqāṣid al-Shari'ah*, especially *ḥifẓ al-nasl*, with the guarantee of constitutional rights and instruments for the protection of children's rights. Thus, court decisions not only function as an instrument of law enforcement, but also become a space for the actualization of living fiqh, where sharia values develop dynamically through dialogue between Islamic law, state law, and social reality. This approach shows that the protection of the legal status of children no longer depends solely on the formal validity of a marriage, but on a legal commitment to realize the benefits, justice, and legal certainty in a balanced manner, so that fiqh remains relevant as an adaptive legal system in dealing with the complexity of transnational family problems.

The main problem that arises after the annulment of a mixed marriage is not only about the end of the legal relationship between husband and wife, but about how the legal system provides protection for children born from the marriage. In practice, children are parties who have no contribution at all to the violation of marital conditions, but are the most vulnerable parties to legal consequences and social stigma.⁵³ Therefore, if the annulment of marriage is only understood as a mechanism to enforce formal legality, then the law has the potential to ignore a more basic purpose, which is to protect *the best interests of the child*.⁵⁴ The perspective of *living fiqh* offers a different approach by viewing that the protection of children should be placed as the primary orientation in any settlement of family matters, since the existence of law is ultimately aimed at safeguarding human welfare, not simply enforcing normative formalities.⁵⁵

Through the tradition of *maqāṣid al-shari'ah*, the protection of offspring (*ḥifẓ al-nasl*) is one of the main objectives of the sharia which has a position parallel to the protection of religion, soul, intellect, and property. However, the development of modern society shows that the meaning of *ḥifẓ al-nasl* can no longer be understood narrowly as an effort to maintain the purity of the lineage through the arrangement of legal marriage.⁵⁶ Posterity protection must be interpreted more broadly as an effort to ensure legal identity, civil rights, welfare, nurturing, education, and the dignity of children as human beings.⁵⁷ Thus, the main orientation of *maqāṣid* does not stop at the protection of the institution of marriage, but

⁵³ Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London: International Institute of Islamic Thought, 2008), 1–28.

⁵⁴ Wael B. Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 501–548.

⁵⁵ United Nations, Convention on the Rights of the Child, arts. 2–3.

⁵⁶ Abū Ishāq Abu Ishaq al-Shatibi, *Al-Muwafaqat fi Usul al-Shari'ah*, vol. 2 (Beirut: Dar al-Kutub al-'Ilmiyyah), 8–20.

⁵⁷ Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law*, 45–67

moves towards the protection of the human being born of that institution. This understanding is in line with the development of contemporary maqāṣid theory which places human rights, social justice, and the public benefit as integral parts of the goals of sharia.⁵⁸

This approach has important consequences for the way the status of children is viewed in cases of annulment of mixed marriages. So far, the legal debate has been more directed at whether or not parental marriage is legal. In fact, such a focus has the potential to shift attention from the subject that actually needs protection the most, namely children. From the perspective of *living fiqh*, the status of a child should not be completely determined by administrative defects or issues of the validity of the contract made by the parents.⁵⁹ Children are legal subjects who have independent rights that must be protected by the state and society. Therefore, the recognition of identity, the relationship of the family, the right to upbringing, education, and social protection must be maintained even if the marriage of the parents is later annulled by a court decision.⁶⁰

The social reality of the Indonesian Muslim community shows that the protection of children often precedes the resolution of the issue of marriage legality. In many communities, the relationship of the family, the responsibility of alimony, and the recognition of the extended family to the child is maintained despite legal issues regarding the marital status of the parents. This phenomenon shows that society has actually developed a form of *living fiqh* that places the protection of children as the main value in family life.⁶¹ These social norms were born not because they ignored Islamic law, but because society understood that the goals of sharia could not be realized through the sacrifice of the rights of children who are not at fault for the actions of their parents. Thus, the social practice of the community actually shows the actualization of maqāṣid al-sharī'ah in daily life.⁶²

From the perspective of state law, the orientation also gained a strong legitimacy. The Marriage Law, the Compilation of Islamic Law, and various court decisions basically show a tendency to continue to protect the rights of children despite the annulment of marriage. This protection reflects a paradigm shift from a legalistic approach to a *rights-based approach*.⁶³ The state no longer acts solely as a guardian of the orderly administration of marriage, but also as a protector of the constitutional right of every child to obtain identity, upbringing, education, and protection from all forms of discrimination. These developments show that there is a meeting point between the principles of national law and the goals of *maqāṣid al-sharī'ah*, both of which are oriented towards the protection of human dignity.⁶⁴

The interaction between state law and Islamic law shows that the protection of children does not require a dichotomy between positive law and fiqh. On the contrary, the two can be brought together through the maqāṣid approach that makes the benefit the main orientation. In this framework, the annulment of marriage should not be interpreted as a

⁵⁸ Mohammad Hashim Kamali, *Maqasid al-Shariah Made Simple* (Herndon, VA: International Institute of Islamic Thought, 2008), 17–34.

⁵⁹ Law Number 1 of 1974 concerning Marriage, Article 28.

⁶⁰ Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law.

⁶¹ Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), 194–211.

⁶² Ratno Lukito, *Legal Pluralism in Indonesia: Bridging the Unbridgeable* (London: Routledge, 2013), 103–128.

⁶³ Constitution of the Republic of Indonesia of 1945, Article 28B paragraph (2).

⁶⁴ Law Number 35 of 2014.

basis for reducing or eliminating the rights of children. On the contrary, the annulment of marriage must be understood as an instrument of correction to the legal relationship of the parents without sacrificing the best interests of the child. Such an approach also avoids Islamic law from the tendency of formalism that only emphasizes the validity of the contract, but ignores the social impact it has on children's lives.

The *living fiqh approach* then expands the meaning of protection through the recognition of the social practices of the community. Child protection is not only realized through judges' decisions or legal provisions, but also through social acceptance, recognition of extended families, moral responsibility of parents, and community support for children's growth and development. Thus, the law works simultaneously through formal institutions and social institutions. This condition shows that the effectiveness of child protection is actually highly determined by the ability of the state and society to build mutually reinforcing relationships in realizing the goals of sharia.

Based on this description, this study offers a reconstruction of the concept of child status in the case of annulment of mixed marriage. The status of the child is no longer understood as a legal consequence that is completely dependent on the validity or annulment of the marriage, but as a manifestation of the purpose of the sharia to maintain the sustainability of human life. This reconstruction shifts the legal orientation from a formal legality-based approach to a *rights-based approach (maqāṣid)*, where *ḥifẓ al-nasl* is interpreted as the protection of legal identity, dignity, civil rights, welfare, and the future of children. Thus, *living fiqh* not only explains how Islamic law lives in society, but also provides a normative framework that allows Islamic law to continue to evolve adaptively without losing its orientation to the values of justice, welfare, and protection for the most vulnerable groups.

The reconstruction is a conceptual contribution that this article offers. In contrast to previous research that generally focused on the validity of mixed marriages or conflicts between state law and religious law, this study places the status of children as a meeting point between legal pluralism, *living fiqh*, and *maqāṣid al-shari'ah*. With this approach, the protection of children is no longer seen as an additional consequence of the annulment decision, but rather as the main objective that must direct the entire process of legal discovery. Through this framework, the article offers a new perspective that the success of the legal system is not measured by its ability to annul an unqualified marriage, but by its ability to ensure that every child continues to receive recognition, protection, and dignity as a human being, in accordance with the ideals of substantive justice that are at the core of Islamic law.

Harmonization of National Law, International Law, and Living Fiqh

To broaden the perspective of child legal protection, it is important to look at the development of international legal practice. One of the decisions that is often used as a reference is the case of *Marckx v. Belgium* decided by the European Court of Human Rights. In that case, the court ruled that the legal provision that distinguishes between legal children and out-of-wedlock children constitutes a form of discrimination contrary to the European Convention on Human Rights.

The decision affirms that the marital status of parents should not be the basis for discrimination against children in obtaining legal protection, including in family relations and

inheritance rights. This principle is also in line with the development of international law that places the interests of children as the main consideration in resolving family disputes.¹³

Conclusion

The annulment of a mixed marriage does not necessarily remove the legal status or civil rights of the child, even if the marriage is declared null and void due to administrative defects or legal smuggling. The results of the study show that the protection of children must be placed as the main goal of dispute resolution, so that legal interpretation cannot stop at the formal legality of a marriage. Through the living fiqh approach, the principles of Maqāṣid al-Sharī'ah, especially ḥifẓ al-nasl, are contextually actualized to ensure the protection of children's nasab, identity, citizenship, and civil rights without ignoring legal certainty.

This research also shows that the protection of children's legal status is the result of the interaction between Islamic law, international civil law, national law, and judicial practice within the framework of legal pluralism. Court decisions in Indonesia reflect the development of judicial ijtihad as a manifestation of living fiqh, which is a process of legal interpretation that integrates sharia values, constitutional guarantees, and the principle of the best interests of the child to realize substantive justice. Thus, living fiqh not only functions as a normative approach, but also as a paradigm that bridges the relationship between Islamic law and the national legal system in response to transnational family dynamics.

The contribution of this research lies in the reconstruction of the paradigm of protection of children's legal status from a textual-oriented fiqh approach towards a living fiqh that is adaptive to social changes and legal pluralism. This paradigm provides a conceptual basis for the development of judicial policies and practices that are more responsive to the protection of children's rights in cases of annulment of mixed marriages, as well as enriching the development of contemporary Islamic family law studies in Indonesia.

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