

# REDEFINING LEGAL FRAMEWORKS: PROGRESSIVE METHODS IN ASCERTAINING CHILDREN'S LINEAGE FROM FASID MARRIAGES IN RELIGIOUS COURT

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**Abstrak:** Penelitian ini bertujuan untuk mengungkap dan menganalisis pertimbangan majelis hakim dalam perkara penetapan asal usul anak akibat perkawinan fasid di seluruh Pengadilan Agama di Kalimantan Selatan, serta menawarkan konstruksi hukum yang ideal dalam penetapan asal usul anak dalam rangka perlindungan hukum bagi anak berdasarkan pendekatan hukum progresif. Penelitian ini merupakan penelitian hukum normatif yang menggunakan pendekatan kasus (case approach) dan pendekatan perundang-undangan (statute approach). Analisis data menggunakan teknik analisis isi kualitatif, yaitu menginterpretasikan pertimbangan hukum hakim dalam Penetapan Pengadilan Agama. Hasil penelitian ini menetapkan asal usul anak dari perkawinan fasid di Pengadilan Agama di Kalimantan Selatan dari tahun 2020 sampai dengan tahun 2022 terdiri dari 13 yang menolak permohonan dan 15 yang mengabulkan permohonan. Mereka yang mengabulkan mempertimbangkan pentingnya perlindungan anak berdasarkan UU Perlindungan Anak dan pendapat ulama kontemporer. Di sisi lain, mereka yang menolak berlandaskan pada UU Perkawinan dan KHI bahwa perkawinan fasid tidak sah secara materiil dan formil sehingga anak yang dilahirkan menjadi tidak sah. Perlindungan terhadap anak merupakan hak asasi yang harus digali oleh hakim dengan pendekatan hukum progresif, bahwa anak dari perkawinan fasid tidak boleh menanggung beban atas kesalahan dan kelalaian kedua orang tuanya terhadap peraturan hukum yang berlaku. Pendekatan hukum progresif ini harus diimplementasikan dalam bentuk aturan yang pasti untuk melindungi hak-hak anak dari perkawinan fasid di Indonesia.  
**Kata Kunci:** Perkawinan Fasid, Hukum Progresif, Pertimbangan Hakim, Perlindungan Anak.

**Abstract:** This study aims to reveal and analyze the considerations of the panel of judges in cases of determining the origin of children due to *fasid* marriages in all Religious Courts in South Kalimantan, and to offer an ideal legal construction in determining the origin of children in the context of legal protection for children based on a progressive legal approach. This research is a normative legal research that used a case approach and a statutory approach. Data analysis used qualitative content analysis techniques, namely interpreting the judge's legal considerations in the Religious Court Determination. The results of this study determine the origin of children from *fasid* marriages in the Religious Courts in South Kalimantan from 2020 to 2022 consisting of 13 that rejected the application and 15 that granted the application. Those who granted considered the importance of child protection based on the Child Protection Law and the opinions of contemporary scholars. On the other hand, those who rejected based on the Marriage Law and the KHI that *fasid* marriages were invalid materially and formally so that their children became illegitimate. Protection for children is a fundamental right that must be explored by judges with a progressive legal approach, that children from *fasid* marriages should not bear the burden of the mistakes and negligence of both parents regarding applicable legal regulations. This progressive legal approach should be implemented in the form of definite rules to protect the rights of children from *fasid* marriages in Indonesia.

**Keywords:** Fasid Marriage, Progressive Law, Judge's Considerations, Child Protection.



## INTRODUCTION

The status of marriage validity determines the legal protection for both spouses and their offspring. Law No.1/1974 on Marriage (hereinafter referred to as Law No.1/1974), as amended by Law No.16/2019 on the Amendment of Law No.1/1974 (hereinafter referred to as Law 16/2019), stipulates that a marriage will be considered valid if it is carried out in accordance with the religious beliefs of the couple concerned (substantive requirements) and administered (formal requirements) in accordance with applicable regulations (Article 2 paragraphs (1) and (2)). (2) juncto Article 8 letter f). Marriage registration is conducted at the Religious Affairs Office (KUA) for Muslims and at the Civil Registration Office (DUKCAPIL) for Muslims. 2 non-Muslims. This is done to provide legal certainty and legal protection, because the main purpose of this law is to create order and balance in the order of society in order to realize order in accordance with the applicable laws.<sup>1</sup>

The Religious Court has the authority to determine the validity of marriage through the *itsbat nikah* procedure due to *nikah sirri*.<sup>2</sup> However, the request for *itsbat nikah* is not always accepted by the Religious Court because it is considered that it does not fulfill the conditions of marriage or there is a violation of the principles of marriage that results in the cancellation of the marriage (*nikah fasid*). This impacts on the validity of the marriage substantively and formally, and which in turn affects the status of the children from the marriage.<sup>3</sup> Children born into a registered marriage will be recognized as legally legitimate. Meanwhile, children born from unregistered marriages, whether substantively valid (in accordance with religious principles) or formally or administratively invalid, are both considered legally illegitimate. For illegitimate children, legal remedies can be made through the process of *itsbat nikah* and child validation through filing a lawsuit or application for the origin of the child with the Religious Court.<sup>4</sup>

In the context of Islamic law, *fiqh* scholars have differing opinions on the definition and criteria of a void marriage (*fasid*). According to the Hambali scholars, a *fasid* marriage is one that does not fulfill its conditions, while if there are defects in certain elements, then the marriage can be considered void. For example, according to Hambali, the presence of

<sup>1</sup> Sudikno Mertokusumo, *Knowing Law: An Introduction* (Yogyakarta: Cahaya Atma Pustaka, 2010), 99.

<sup>2</sup> Unrecorded marriages are known by several terms, such as *kawin sirri*, *kawin di bawah tangan*, *kawin syar'i*, *kawin modin*, and often also called *kawin kiyai*. What is meant by *sirri* marriage in the context of marriage law is marriage in general in Islam, where there are several conditions and pillars that must be fulfilled such as the existence of a prospective bride, guardian, 2 witnesses, *aqad* and *masawin*. In Indonesian Marriage Law, *nikah sirri* is a marriage practice, either monogamous or polygamous, that is not registered at the local Religious Affairs Office. The *sirri* marriage has been studied by many researchers including: Anwar Hafidzi et al., "Sirri Marriage Celebration and Its Impact on Social Change in Banjarese Community, South Kalimantan," *Al-Ahkam* 32, no. 2 (October 30, 2022): 153-68, <https://doi.org/10.21580/ahkam.2022.32.2.12789>; Rahmiyati Rahmiyati, Diana Rahmi, and Nadiyah Nadiyah, "Siri Marriage Practices In Makmur Village Community, In Gambut, Banjar District," *Syariah: Journal of Law and Thought* 20, no. 1 (July 1, 2020): 27-40, <https://doi.org/10.18592/sjhp.v20i1.3738>; Khairani Amalia Tambunan, Sriono Sriono, and Risdalina Siregar, "Legal Respect for Children from Sirri's Marriage in the Perspective of Islamic Marriage Law and Regulations Indonesian Law in the District Labuhanbatu," *Budapest International Research and Critics Institute (BIRCI-Journal): Humanities* 4, no. 2 (2021): 2043-52; Idris Idris, Raya Lestari, and Zetria Erma, "The Problems of Siri Marriage for Couples Who Have Not Married According to the Law in Marriage Legal Perspective," *Legal Brief* 11, no. 6 (2023): 3520-29.

<sup>3</sup> Tambunan, Sriono, and Siregar, "Legal Respect for Children from Sirri's Marriage in the Perspective of Islamic Marriage Law and Regulations Indonesian Law in the District Labuhanbatu"; Nurhadi Nurhadi, "The Dualism of the Supreme Court's Decisions on the Position of Non-Marital Child," *Journal of Law and Justice* 8, no. 2 (2019): 228-54.

<sup>4</sup> Muhammad Fauzudin Faiz, Zezen Zainul Ali, dan Muhammad Taufiq, "Underage Widows and Widowers before the Law: Problem, Contestation and Legal Certainty in Marriage Dispensation," *JURIS (Jurnal Ilmiah Syariah)* 22, no. 2 (15 Desember 2023): 223, doi:10.31958/juris.v22i2.9097.

a guardian is not a valid condition of marriage, whereas according to Shafi'i, the permission of the guardian is one of the valid conditions of marriage for a woman, whether she is a girl or a widow.<sup>5</sup>

Substantive provisions related to marriage can be found in Law No. 1/1974 and the Compilation of Islamic Law (KHI), which is the result of the agreement of most scholars with a background in the Syafi'i school of thought. Law No. 1/1974 and KHI regulate the prohibition of marriage and the annulment of marriage. Marriage prohibitions can include technical aspects (Article 7 of Law No. 1/1974) and permanent or temporary prohibitions (Article 8 to Article 12 of Law No. 1/1974 and Article 40 to Article 44 of KHI). Regarding marriage annulment, this procedure is regulated in Article 28, Articles 39 to 44 of Law No. 1/1974, and Articles 70 to 76 of KHI. However, these regulations do not explicitly regulate void marriages (*nikah fasid*).<sup>6</sup>

The problem of clarifying the status of children born from a failed marriage can indeed be submitted to the Religious Court, but not all applications for the origin of children submitted are accepted by the judge. For example, several religious courts in South Kalimantan rejected applications for the origin of children for various reasons. Among them are because the woman is still bound by her first husband's marriage (polyandry) (Case No. 38/Pdt.P/2017/PA. Bjb.); the woman is in the waiting period (iddah); or the marriage guardian is not the nasab guardian in accordance with the provisions of Islamic law (Article 1 letter b KHI), but the wali muhakkam appointed by the village head as the marriage guardian (Case No. 581/Pdt.P/2020/PA Bjm).<sup>7</sup> Another reason, in Case 38/Pdt.P/2017/PA. Bjb, was that one of the applicants was still bound by a previous marriage because it had not been divorced through the Religious Court. The applicants entered into an *unlawful* marriage and gave birth to a child. After the birth of the child, the two entered into a legal marriage. In this case, the Panel of Judges rejected the application on the basis that the status of Applicant II, who was still bound to her previous husband, was something that Applicant I and Applicant II were aware of, so it could not be considered a void marriage (*nikah fasid*). As a result, the children of the applicants could not be recognized as descendants of their father.<sup>8</sup>

A child can be said to have a legitimate nasab relationship with his father if he is born from a legal marriage, both materially and formally. Conversely, a child born outside a legal marriage cannot be called a legitimate child and is usually called an adulterous child or a child outside a legal marriage and he only has a nasab relationship with his mother. According to Rofik, talking about the origin of children is actually talking about legitimate

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<sup>5</sup> Wahbah Zuhaily, *Al-Fiqhul Islamy Wa 'Adillatuhub*, Volume 7 (Beirut: Dar al-Fikr, 1985), 686-87; Some studies that mention marriage guardians include: Agustin Hanapi and Edy Yuhermansyah, "Urgency of Marriage Registration for Women and Child Protection in Gayo Lues District," *Samarab: Journal of Family Law and Islamic Law* 4, no. 2 (December 28, 2020): 528-44, <https://doi.org/10.22373/sjkh.v4i2.7942>; Fatum Abubakar, "Islamic Family Law Reform: Early Marriage and Criminalization (A Comparative Study of Legal Law in Indonesia and Pakistan)," *Al-Ahkam Journal of Shari'ah and Legal* 4, no. 2 (2019), <https://oldjournal.iainsurakarta.ac.id/index.php/al-ahkam/article/view/1667>; Nabilah Luthfiah Chusnida and Teddy Prima Anggriawan, "Dispensation of Marriage in the Perspective of Children's Rights: Best Interest of the Children," *De Jure Journal of Legal Research* 22, no. 3 (2022): 295-310; Nur Alam Nur Alam, Rusdaya Basri, and Fikri Fikri, "Dynamics of Judges' Considerations in the Determination of Marriage Dispensation at the Enrekang Religios Court," *Al-Iftah: Journal of Islamic Studies and Society* 1, no. 2 (2020): 1-12; Ahmad Ropei et al., "Managing 'Baligh' in Four Muslim Countries: Egypt, Tunisia, Pakistan, and Indonesia on the Minimum Age for Marriage," *Al-Ahwal: Journal of Islamic Family Law* 16, no. 1 (June 30, 2023): 112-40, <https://doi.org/10.14421/ahwal.2023.16106>.

<sup>6</sup> Muna Madrah dkk., "The Policy Integration Concept of The Mahram Relationship on Nurseling Study on Nurseling Practices in Semarang, Central Java-Indonesia," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 17, no. 2 (31 Desember 2022): 356, doi:10.19105/al-lhkam.v17i2.6316.

<sup>7</sup> "Directory of Decisions," accessed June 15, 2023, <https://putusan3.mahkamahagung.go.id/>.

<sup>8</sup> Compilation Team of Banjarbaru Religious Court, *Compilation Team of Banjarbaru Religious Court, Contextualization of Islamic Civil Law: Text-Context Synergy* (Yogyakarta: Phoenix Publisher, 2018), 173.

children.<sup>9</sup> In some cases about the determination of the origin of children in the Religious Court, there are some differences between one case and another because of differences in understanding and beliefs of the Religious Court judges about the status of the child, whether the legitimate child of the father and mother, the biological child of the father of the mother, the child of the mother who has a biological and civil relationship with the father, or the child recognized as the child of the father of the mother who does not clearly mention whether the child is legitimate or not. Of course, with the difference in determination, there are different legal consequences for the child.<sup>10</sup>

The origin of the child is the basis for showing the existence of a relationship of *kemahraman* (*nasab*) with his father. This is what is believed in Sunni Jurisprudence. The scholars agree that adulterated children, or *li'an* children only have a *nasab* relationship with their mother and mother's siblings. Determining a child's *nasab* is one of the most important rights of a child and is something that has a lot of impact on the child's personality and future. A child must know about his descendants, because the origin of which concerns the offspring and is very important to take life in society.<sup>11</sup>

Based on the above background, this research aims to reveal and critically analyze the considerations of Religious Court judges in South Kalimantan in determining the origin and status of children from facade marriages and construct an ideal law for determining the origin of children based on a progressive legal perspective. There are several relevant previous studies on facade marriages and child protection in facade marriages. Among them is Rofahiyah's research<sup>12</sup>, which examines normatively the concept of protection of children outside of marriage; Fathoni and Auliya<sup>13</sup>, who examine the status of children in invalid marriages; Oktaviana and others, who examine the decisions of the Religious Court and the Sharia Court regarding the *nasab* of children.<sup>14</sup> However, all of them have not comprehensively studied and have not mapped the differences in determining the origin of children in the religious courts, especially since this research intends to offer a solutive legal

<sup>9</sup> Ahmad Rofiq, *Islamic Law in Indonesia* (Jakarta: PT. RajaGrafindo Persada, 1995), 220.

<sup>10</sup> Fika Aufani Kumala, "Sewa Rahim Antara Pro dan Kontra," *El-Maslahah* 10, no. 2 (30 Desember 2020): 26, doi:10.23971/maslahah.v10i2.1938.

<sup>11</sup> Andi Sumsul Alam and Muhammad Fauzan, *The Law of Child Adoption from an Islamic Perspective* (Jakarta: Pena Media, 2008), 175.

<sup>12</sup> Gina Rofahiyah, "The Concept of Legal Protection of Unmarried Children in Indonesia and Malaysia from the Perspective of Ibn Qayyim Al-Jauziyyah in *Tuḥfatu Al Maudūd Bi Ahkāmī Al Maulūd*" (Master Thesis, Faculty of Sharia and Law, UIN Syarif Hidayatullah Jakarta, 2022), <https://repository.uinjkt.ac.id/dspace/handle/123456789/65617>.

<sup>13</sup> Al Fathoni and M. Irsyad Auliya, "Juridical Analysis of the Status of Children After the Cancellation of Marriage Due to Wrongful Guardianship (Study of Decision Number: 0947/Pdt. G/2016/PA. Po at the Ponorogo Religious Court)" (PhD Thesis, IAIN Ponorogo, 2023), <http://etheses.iainponorogo.ac.id/id/eprint/25676>.

<sup>14</sup> Dwi Oktavia, "Protection of Children's *Nasab* Rights Without *Isbat Nikah* (Analysis of the Stipulation of the *Syar'iyah* Court Number 40/Pdt. P/2021/MS. Bna)" (PhD Thesis, UIN Ar-Raniry, 2022), <https://repository.ar-raniry.ac.id/id/eprint/23636/>; Jati Prihantono, "Analysis of the Decision to Validate the Origin of Extra-Marital Children Based on Law Number 1 of 1974 concerning Marriage in the Perspective of *Hifzhu Nasl*" (PhD Thesis, IAIN KUDUS, 2023), <http://repository.iainkudus.ac.id/id/eprint/11266/>; Yosan Yolanda, "Analysis of the Position of Children in the Cancellation of Marriage in Indonesia from the Perspective of Islamic Law" (PhD Thesis, UIN Fatmawati Sukarno Bengkulu, 2023), <http://repository.uinfasbengkulu.ac.id/id/eprint/536/>; Tambunan, Sriono, and Siregar, "Legal Respect for Children from *Sirri's* Marriage in the Perspective of Islamic Marriage Law and Regulations Indonesian Law in the District Labuhanbatu"; Nurhadi, "The Dualism of the Supreme Court's Decisions on the Position of Non-Marital Child"; Haniah Ilhami, Destri Budi Nugraheni, and Tata Wijayanta, "Child Protection Post the New Marriage Law: How the Indonesian Religious Court Interprets the Urgency in Child-Age Marriage," *Journal Ius Kajian Hukum Dan Keadilan* 11, no. 1 (2023): 75-95; Qodariah Barkah et al., "Abandonment of Women's Rights in Child Marriage; An Islamic Law Perspective," *AL-IHKAM: Journal of Law & Social Institutions* 17, no. 2 (2022): 383-411.

construction for the protection of children from fasad marriages, especially in the jurisdiction of religious courts in Indonesia.

## METHOD

This research is a normative legal research that uses a case approach and a statutory approach. The case approach aims to examine the application of legal norms or rules in legal practice contained in Court Decisions/decisions,<sup>15</sup> namely Religious Court Decisions regarding the origin of children from *fasid* marriages in the jurisdiction of the South Kalimantan Religious High Court. The statutory approach aims to explore the inclusiveness or accommodation power of legal norms on the authority of religious court judges, facade marriage, child status, and protection of children's rights.<sup>16</sup>

This research data comes from literature review in the form of secondary data consisting of primary legal materials and secondary legal materials. Primary legal materials consist of Religious Court Decisions in the South Kalimantan region regarding the origin of children from facade marriages in 2020 to 2022. This data is obtained from the directory of Supreme Court decisions<sup>17</sup> and from the documents of the Religious Courts in the South Kalimantan Region, and is complemented by laws and regulations including the 1945 Constitution, Marriage Law, Judicial Power Law, Human Rights Law, Child Protection Law, and the Compilation of Islamic Law. The secondary legal materials of this research are in the form of annual reports of the Religious Courts and Religious High Courts, books, and journal articles relevant to the object of research.

The data analysis process uses technical content analysis<sup>18</sup> which is presented in a descriptive qualitative manner, namely interpreting the legal argumentation of the judge in the Religious Court decision and analyzing it using legislation and legal discovery theory and progressive legal theory.

## RESULTS AND DISCUSSIONS

### **Child Protection in the Legal Consideration of Determining the Origin of Children from Fasid Marriages in the Religious Courts of South Kalimantan Region**

The obligation to determine the origin of children for individuals who adhere to Islam is the duty of the Religious Court based on Law Number 7 of 1989 concerning Religious Courts as amended by Law Number 3 of 2006 and the second revision through Law Number 50 of 2009 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts. Determination of the origin of children for Muslims can be done in 2 (two) ways Law No. 1/1974 Article 55 and KHI Article 103), through: first, official documents such as birth certificates or other legal evidence that can validate the origin of a child; or second, through a Religious Court Determination. In the absence of valid official evidence such as birth certificates or documents mentioned in point (1), the Religious Court is authorized to issue a decision on the origin of the child after conducting a careful investigation with reference to valid evidence. On the basis of the decision issued by the

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<sup>15</sup> Jonaedi Efendi and Johnny Ibrahim, *Legal Research Methods: Normative and Empirical* (Jakarta: Kencana, 2020), 146-47.

<sup>16</sup> Efendi and Ibrahim, 132.

<sup>17</sup> "Directory of Decisions."

<sup>18</sup> "Basic Content Analysis | Robert Philip Weber | Download," August 8, 2022, <https://en.id1lib.org/book/1184154/4d0538>; Jumal Ahmad, "Content Analysis Research Design," *Research Gate* 5, no. 9 (2018): 1-20.

Religious Court as described in point (2), the birth registration agency within the jurisdiction of that Religious Court has the authority to issue a birth certificate for the child concerned.<sup>19</sup>

From 2020 to 2022, Religious Courts in the jurisdiction of the Banjarmasin High Religious Court, South Kalimantan Province, have handled cases of the origin of children from facade marriages. The number of incoming applications and judges' legal considerations can be classified as follows:

*First*, there were 15 cases of Religious Court decisions accepting applications for the origin of children. The details are in table 1.1 below:

**Table 1.1. List of Religious Court Decrees Granting Applications for the Origin of Children**

No.	Year	Religious Court	Religious Court Decree Number	Causes of <i>facade</i> marriage
1.	2020	Religious Court of Barabai	92/Pdt.P/2020/PA.Brb	The wife is still married to another person
2.	2020	Religious Court of Barabai	107/Pdt.P/2020/PA.Brb	The husband is still married to another person
3.	2020	Religious Court of Marabahan	30/Pdt.P/2020/PA.Mrb	each wife and husband are still married to someone else
4.	2021	Religious Court of Batulicin	101/Pdt.P/2021/PA.Blc	The guardian of the marriage was the village headman
5.	2021	Religious Court of Amuntai	104/Pdt.P/2021/PA.Amt	each wife and husband are still married to someone else
6.	2021	Religious Court of Barabai	74/Pdt.P/2021/PA.Brb	The wife is still married to another person
7.	2021	Religious Court of Martapura	361/Pdt.P/2021/PA.Mtp	The guardian of the marriage was the village headman
8.	2021	Religious Court of Tanjung	279/Pdt.P/2021/PA.Tjg	The wife is still in her <i>iddah</i> period

<sup>19</sup> Akhmad Wafi dkk., "Reaktualisasi Persyaratan Perempuan Menjadi Saksi Perkara Perdata Dalam Fikih Klasik Dan Korelasinya Pada Hukum Modern," *JOURNAL OF ISLAMIC AND LAW STUDIES* 7, no. 2 (27 November 2023): 186, doi:10.18592/jils.v7i2.11550.

No.	Year	Religious Court	Religious Court Decree Number	Causes of <i>facade</i> marriage
9.	2022	Religious Court of Barabai	128/Pdt.P/2022/PA.Brb	The husband is still married to another person and The wife is still in her <i>iddah</i> period
10.	2022	Religious Court of Kandangan	232/Pdt.P/2022/PA.Kdg	The wife is still married to another person
11.	2022	Religious Court of Negara	95/Pdt.P/2022/PA.Negr	The wife is still married to another person
12.	2022	Religious Court of Batulicin	4/Pdt.P/2022/PA.Blcn	The wife is still married to another person
13.	2022	Religious Court of Rantau	207/Pdt.P/2022/PA.Rtu	each wife and husband are still married to someone else
14.	2022	Religious Court of Kotabaru	9/Pdt.P/2022/PA.Ktb	The wife is still married to another person
15.	2022	Religious Court of Pelaihari	502/Pdt.P/2022/PA.Plh	The husband is still married to another person

In the above cases it can be seen that there was a material defect in the marital status of the applicant or applicants, namely that the wife/husband or both were still married to another; the marriage guardian was not the nasab guardian, but a *mubakkam* guardian appointed by the village head as the marriage guardian; and the marriage was during the *iddah* period. In this case, the judge first checks the marital status of the child's parents by ascertaining in evidence whether the child is the result of adultery or not (in accordance with Article 44 of Law No. 1/1974). Apart from adultery, the judge also considered the status of the child as a result of the marriage of the applicants, without questioning the material or formal defects of the marriage (including *fasid* marriages).<sup>20</sup> Given that there was no violation of Article 44 of Law No. 1/1974, the judge also examined in depth and comprehensively before determining the status and validity of the child. The judges' legal considerations in the 15 (fifteen) decisions above generally used the legal basis with an intensity that can be classified as in the following table:

**Table 1.3. Legal Basis for Judges Granting Petitions Origin of Children**

<sup>20</sup> Adinda Dewi Mutiara Sari dan Seno Aris Sasmito, "Penetapan Wali Hakim Dalam Perkawinan Di Kantor Urusan Agama Kecamatan Karanganyar Kabupaten Karanganyar Tahun 2020," *EL-Ushab: Jurnal Hukum Keluarga* 5, no. 2 (31 Desember 2022): 340, doi:10.22373/ujhk.v5i2.15201.

No.	Legal Basis for Granting the Application	Number of Referrals	Intensity
1	Constitution of the Republic of Indonesia Amendment II Article 28B Paragraph (2)	3	20,00%
2	Constitution of the Republic of Indonesia Amendment II Article 28I Paragraph (1)	1	6,67%
3	Constitution of the Republic of Indonesia Amendment II Article 28I Paragraph (4)	1	6,67%
4	Law Number 1 of 1974 which has been amended by Law Number 16 of 2019 concerning Marriage, Article 44 paragraph (1)	1	6,67%
5	Law Number 39 Year 1999 on Human Rights, Article 52 Paragraph (2)	5	33,33%
6	Law Number 39 Year 1999 on Human Rights, Article 53 Paragraph (2)	4	26,67%
7	Law No. 23/2002 on Child Protection, concordance.	4	26,67%
8	Child Protection Law Number 23 of 2002 concerning Child Protection, Article 5	1	6,67%
9	Child Protection Law Number 23 of 2002 concerning Child Protection, Article 7	5	33,33%
10	Child Protection Law Number 23 of 2002 concerning Child Protection, Article 27	1	6,67%
11	Law Number 4 Year 2004 on Judicial Power Article 25 Paragraph (1)	1	6,67%
12	Law Number 35 of 2014 amending Law Number 23 of 2002 concerning Child Protection, Article 7 Paragraph (2)	4	26,67%
13	Constitutional Court Decision Number 46/PUUVIII/2010	3	20,00%
14	Compilation of Islamic Law, Article 99	3	20,00%
15	QS. Al-An'am: 164	1	6,67%



No.	Legal Basis for Granting the Application	Number of Referrals	Intensity
16	The Hadith of the Prophet SAW which reads: " <i>That the child is born in a state of fitrah.</i> "	1	1,59%
17	The Hadith of the Prophet (SAW) which reads: " <i>The children of a woman belong to the man who is her husband.</i> "	1	1,59%
18	Kitab al-Fiqh al-Islamu wa-Adillatuhu, Volume V, page 690.	14	93,33%
19	Kitab al-Fiqh al-Islamu wa-Adillatuhu, Volume VII, pages 675-676.	1	6,67%
20	kitab al-wajiz fi fiqh madzhab al-imam al-shafi'i pages 286-289	1	6,67%
21	Qawa'id al-Fiqh, p. 534	1	6,67%
22	Al Majmu' book page 360	1	6,67%
23	Kitab Al-Mughni volume VIII page 96	1	6,67%
24	Al-Maqashid ash-Shari'iyah	3	20,00%
25	Child Interests	1	1,59%

Based on the data above, there are various legal bases and references that were used as legal references by the panel of judges. The reference most often used by judges is the opinion of Wahbah Az-Zuhaily in Kitab *Al-Fiqh Al-Islamu wa-Adillatuhu*, Volume V, page 690.<sup>21</sup> According to Wahbah Az-Zuhaily, if a marriage has actually taken place, even if it is a *fasid* (defective) marriage or a marriage that is carried out in a customary or traditional way, even if it is not registered in an official marriage certificate, then the nasab of the child born to the woman is the child of the husband and wife (concerned).<sup>22</sup> This is a matter of justice for the child. The concept of justice that is attributed to divine teachings can be understood as an effort to maintain the obligation for the existence of children, because Allah SWT's justice is basically his mercy and kindness.<sup>23</sup> Children born to sinful parents should not bear the sins of their parents, because children are born in a state of purity or *fitrah*. The sanctity of this child is a right that must be understood by everyone, especially by Religious Judges.<sup>24</sup> In line with that, judges also refer to the 1945 Constitution, including Article 28B paragraph (2) and Article 28I paragraphs (1) and (4), Law Number 39 of 1999

<sup>21</sup> Wahbah Zuhaily, *Al-Fiqhul Islamy wa 'Adillatuhu*, vol. 7, II (Cairo: Darul Fikri, 1985), p. 690.

<sup>22</sup> Wahbah Zuhaily, *Al-Tafsir al-Munir*, vol. IX (Beirut: Dar al-Fikr, 1991), p. 41.

<sup>23</sup> Zulkifli Zulkifli, "Demands for Justice in the Perspective of Islamic Law," *JURIS (Sharia Scientific Journal)* 17, no. 1 (June 30, 2018): 140–42, <https://doi.org/10.31958/juris.v17i1.1005>.

<sup>24</sup> Mutiara Fahmi dan Fitiya Fahmi, "Penetapan Nasab Anak Mulā'anah Melalui Tes DNA (Studi Atas Metode Istinbāṭ Yūsuf al-Qaradāwī)," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 3, no. 1 (9 Agustus 2019): 133, doi:10.22373/sjhk.v3i1.5024.

concerning Human Rights in Article 52 paragraph (2) and Article 53 paragraphs (1) and (2). All of these articles emphasize that every child has the right to survival, growth and development and the right to protection from violence and discrimination. For this reason, children have the right to life, not to be tortured, freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on the basis of retroactive laws. For its sake, the rights of the child are recognized and protected by law even from the womb. Judges are part of the judiciary, which is a representation of the Indonesian State, and are obliged to apply the Constitution in each of their decisions, without denying the judges' independence.<sup>25</sup>

Another reference for the judges was Law No. 23/2002 on Child Protection (Law No. 23/2002). Article 5 stipulates that every child has the right to a name as an identity and citizenship status, and Article 7 Paragraph (1) that every child has the right to know his or her parents, to be raised, and to be cared for by his or her own parents. In this case the judge seemed to consider the psychological aspects of the child who would be disturbed because they did not know who their parents were if they held the status of illegitimate children. The judge considered that the sins of the parents should not be a burden for the child, especially since the sins were committed due to ignorance and not intentionally by the applicants when they got married. This is in line with the Qur'an Surah Al-An'am Verse 164. To ensure the protection of children's rights and welfare, the status and identity of children must be legalized as stipulated in the Child Protection Law, namely in Article 27 Paragraph (1) and Paragraph (2).<sup>26</sup>

However, in the dictum of the ruling of the Religious Court above there are differences in the diction of children, such as the biological children of the applicants, biological children of the applicants, children of the applicants, biological children of the applicants, or biological children of the applicants. Meanwhile, the term biological child refers to the decision of the Constitutional Court Number 46/PUUVIII/2010, and there is no definite rule in positive law, Islamic law, and fiqhiyah doctrines.<sup>27</sup>

**Secondly**, Religious Court decisions rejecting child origins applications amounted to 13 cases, with the following details:

**Table 1.2. List of Religious Court Decrees Rejecting Child Origin Applications**

No.	Year	Religious Court	Religious Court Decree Number	Causes of <i>facade</i> marriage
1.	2020	Religious Court of Banjarmasin	527/Pdt.P/2020/PA.Bjm	the guardian of the marriage is not a Muslim
2.	2020	Religious Court of Banjarmasin	171/Pdt.P/2020/PA.Bjm	The wife is still married to another person

<sup>25</sup> Abdullah Jarir, Ratno Lukito, dan Moch Nur Ichwan, "Legal Reasoning on Paternity: Discursive Debate on Children Out of Wedlock in Indonesia," *AHKAM: Jurnal Ilmu Syariah* 23, no. 2 (31 Desember 2023), <https://journal.uinjkt.ac.id/index.php/ahkam/article/view/27005>.

<sup>26</sup> Agustin Hanapi, Imanuddin Imanuddin, dan Khairuddin Hasballah, "Kedudukan Metode al-Qāfah Dalam Penetapan Nasab Anak Menurut Ulama Perspektif Maqashid al-Syariah," *De Jure: Jurnal Hukum dan Syariah* 14, no. 1 (29 Juni 2022): 21, doi:10.18860/j-fsh.v14i1.15875.

<sup>27</sup> Fahmi Al Amruzi, "Hak Dan Status Anak Syubhat Dalam Pernikahan," *Syariah: Jurnal Hukum Dan Pemikiran* 17, no. 1 (5 Agustus 2017): 10, doi:10.18592/sy.v17i1.1539.

No.	Year	Religious Court	Religious Court Decree Number	Causes of <i>facade</i> marriage
3.	2020	Religious Court of Banjarmasin	581/Pdt.P/2020/PA Bjm	The guardian of the marriage was the village headman
4.	2020	Religious Court of Banjarbaru	166/Pdt.P/2020/PA.Bjb	The wife is still married to another person
5.	2020	Religious Court of Martapura	290/Pdt.P/2020/PA.Mtp	The wife is still married to another person
6.	2021	Religious Court of Banjarmasin	67/Pdt.P/2021/PA.Bjm	The wife is still married to another person
7.	2021	Religious Court of Banjarmasin	551/Pdt.P/2021/PA Bjm	The wife is still married to another person and The guardian of the marriage was the village headman
8.	2021	Religious Court of Amuntai	348/Pdt.P/2021/PA.Amt	The wife is still married to another person
9.	2021	Religious Court of Banjarbaru	115/Pdt.P/2021/PA.Bjb	each wife and husband are still married to someone else
10.	2021	Religious Court of Banjarbaru	157/Pdt.P/2021/PA.Bjb	The wife is still married to another person
11.	2021	Religious Court of Martapura	169/Pdt.P/2021/PA.Mtp	each wife and husband are still married to someone else
12.	2022	Religious Court of Banjarmasin	234/Pdt.P/2022/PA.Bjm	The guardian of the marriage was the village headman
13.	2022	Religious Court of Banjarmasin	262/Pdt.P/2022/PA.Bjm	The wife is still married to another person

In their legal considerations, the judges of the 13 (thirteen) decisions above used material law references with intensity as shown in the following table:

**Tabel 1.4. Legal Basis for Rejecting an Application**

No.	Legal Basis for Rejecting the Application	Number of Referrals	Intensity
1	Law Number 1 Year 1974 Concerning Marriage Article 2 Paragraph (1)	6	46,15%
2	Law Number 1 Year 1974 Concerning Marriage Article 2 Paragraph (2)	1	7,69%
3	Law Number 1 of 1974 concerning Marriage Article 3	4	30,77%
4	Law Number 1 of 1974 concerning Marriage Article 9	2	15,38%
5	Law Number 1 of 1974 concerning Marriage Article 10	2	15,38%
6	Law Number 1 Year 1974 concerning Marriage Article 42	3	23,08%
7	Compilation of Islamic Law Article 1 letter b	3	23,08%
8	Compilation of Islamic Law Article 4	2	15,38%
9	Compilation of Islamic Law Article 5	1	7,69%
10	Compilation of Islamic Law Article 7 Paragraph (3) letter e	1	7,69%
11	Compilation of Islamic Law Article 14	2	15,38%
12	Compilation of Islamic Law Article 20	1	7,69%
13	Compilation of Islamic Law Article 23	1	7,69%
14	Compilation of Islamic Law Article 40	4	30,77%
15	Compilation of Islamic Law Article 99 letter a	9	69,23%
16	Regulation of the Minister of Religious Affairs of the Republic of Indonesia Number 30 of 2005 concerning Guardian Hakim Article 1 Point 2	1	7,69%
17	Q.S. An-Nisa verse 24	2	15,38%
18	Hadith of the Prophet SAW, which means: The government (judge) becomes the guardian of a person who has no guardian (HR. Ash Shafi'I, Abu Daud and Ibn Hibban).	1	7,69%
19	Kitab Ats-Tsamr Ad-Daani fi Taqriib al-Ma'aani, Syarh Risaalah Ibni Abi Zaid Al-Qoyrowaani, Al-Azhari, p	2	15,38%

No.	Legal Basis for Rejecting the Application	Number of Referrals	Intensity
	451: 'The definition of shubhat marriage is when a person marries an invalid marriage, which is agreed to be invalid, but is not enforced. Such as marrying a woman who is still in 'iddah, or a woman who is his fifth wife, or a woman who is his mahram, if he is unaware of that, and he has had intercourse with her, or he has had intercourse with a woman whom he thought was his wife. So all these women are haraam for the man concerned, including anything other than intercourse.'		
20	Kitab Al Muhazzab Juz II page 320 which means: If the claim (petition) is not proven, then the claim (petition) must be rejected.	1	7,69%
21	Kitab al-Nikah page 11 (opinion of Shaykh Muhammad Arshad al-Banjari): "It is haraam for a man to approach a married woman and a woman in 'iddah if he is aware of that and knows that it is haraam. It is also haraam to go to a woman who is being proposed to by someone else, provided that the proposal is clearly accepted, and he is aware of the circumstances of the proposal and knows that it is haraam."	1	7,69%

Looking at the 13 cases in table 1.4 above, the panel of judges assessed the applicant's marital status as invalid, leading to the rejection of the application for child origins. The panel of judges did not consider the rights of the child, the sense of justice and the benefit of the child. It can be understood that the panel of judges tended to be very textual in understanding and using some of the legal basis above so that they only questioned the disability in the marriage of the parties/applicants. The panel of judges did not pay attention to the *fiqhiyyah* rule, that the law in a region can change along with changes in the times, places, culture, and civilization of the region.<sup>28</sup> If they prioritize textual

<sup>28</sup> As quoted by Hidayati and Hidayatullah from Ma'âlim Ushûl al-Fiqh 'Ind Ahl as-Sunnah wa al-Jamâ'ah by Muhammad bin Husain bin Hasan al Jaizânî. Tri Hidayati and Muhammad Syarif Hidayatullah, "The Urgency of the DSN-MUI Fatwa Regarding Sharia-based Financing Risk Management," *Al-Manahij: Journal of Islamic Legal Studies* 15, no. 2 (December 1, 2021): 217, <https://doi.org/10.24090/mnh.v15i2.4641>; See also Tri Hidayati et al., "Digitalization of Islamic Finance: Epistemological Study of the National Sharia Board-

understanding of Islamic law, it shows that Islamic law is rigid and not pro-social justice. This certainly injures the values of divine justice taught in Islam. Relevant to Zuhaily's opinion in Sodikin, that when justice comes from religion, then Islamic Law places God as the source of religion.<sup>29</sup> Likewise, Askari and Mirakor emphasized that justice correlates with the level and extent to which a person obeys God's commands in a society with an overtly religious culture.<sup>30</sup> The concept of justice that is attributed to the divine teachings can be understood as an effort to maintain the obligation for the continuation of existence and the acquisition of grace in all aspects of life, because God's justice is basically His grace and goodness.<sup>31</sup>

So many legal changes have occurred in Islam, especially in marriage law, which in essence is to maintain the religion of Islam itself (*hifz al-din*)<sup>32</sup> and the benefit of the people in order to live life properly according to Islamic law. These legal changes in the context of the judiciary are realized by *rechtsvinding* or legal discovery carried out by judges which ultimately becomes jurisprudence which is included in one of the formal sources of law in the Indonesian legal system.<sup>33</sup> The process of legal discovery through *ijtihad* of Religious Judges, must go side by side with legal progressivity which in substance is responsiveness to social symptoms that occur and often change over time and advance the development of law and national civilization.<sup>34</sup>

### **Ideal Legal Construction in Determining the Origin of Children from Fasid Marriage Progressive Legal Perspective**

The case of a petition for the origin of a child is a case that clearly arises from the marriage of a husband and wife who are only materially valid, therefore they need a religious court determination to fulfill formal legality to obtain a child's birth certificate. Judges are part of the actors of judicial power in Indonesia who must be independent as intended by Law Number 48 of 2009 concerning Judicial Power in Article 5 states that judges must explore, follow and understand the values of law and a sense of justice that lives in society. Judges can use the authority of *Contra Legem*, which can deviate from the provisions of written law if it is contrary to propriety and not in accordance with dynamic social realities, or find laws that do not yet exist or have unclear provisions in order to

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Indonesian Council of Ulama's Fatwa," *Al-Ahkam* 33, no. 2 (October 31, 2023): 259–62, <https://doi.org/10.21580/ahkam.2023.33.2.17324>.

<sup>29</sup> Ali Sodiqin, "Legal, Moral, and Spiritual Dialectics in the Islamic Restorative Justice System," *Ahkam: Journal of Sharia Science* 21, no. 2 (2021), <http://journal.uinjkt.ac.id/index.php/ahkam/article/viewFile/22675/9583>.

<sup>30</sup> Hossein Askari and Abbas Mirakhor, *Conceptions of Justice from Islam to the Present* (Cham: Springer International Publishing, 2020), ix., <https://doi.org/10.1007/978-3-030-16084-5>.

<sup>31</sup> Zulkifli, "Demands for Justice in the Perspective of Islamic Law," 140-42.

<sup>32</sup> The fulfillment of children's rights leads them to become good and dignified human beings. In the language of *maqasid al-syariah*, it can be understood that *hifz al-din* (preserving religion) also includes the maintenance of *aqidah* (theism), character building that will be felt horizontally by those around him, and fostering worship that strengthens him as a good being vertically. Ahmatnijar Ahmatnijar et al., "When Religious Judges Protect Children's Rights: Case of Divorce in Padangsidempuan Religious Court," *Al-Ahwal: Journal of Islamic Family Law* 15, no. 2 (December 30, 2022): 235, <https://doi.org/10.14421/ahwal.2022.15204>.

<sup>33</sup> Kukuh Pramono Budi et al., "Adjudicating Joint Property Dispute in Islamic Jurisprudence: Balancing The Best Interests of The Child With A Focus on Residency," *Syariah: Journal of Law and Thought* 23, no. 2 (2023): 245–66, <https://doi.org/10.18592/sjhp.v23i2.12278>.

<sup>34</sup> Harifin A. Tumpa, "Application of the Concept of *Rechtsvinding* and *Rechtsschepping* by Judges in Deciding a Case," *Hasanuddin Law Review* 1, no. 2 (2015), <https://doi.org/10.20956/halrev.v1n2.90>. Id. 113. See also Muwahid, "Methods of Legal Discovery (*Rechtsvinding*) by Judges in an Effort to Realize Responsive Law," *The Indonesian Journal of Islamic Family Law*, vol. 07, 2017. Page. 247.

realize justice, benefit and legal certainty for people's lives.<sup>35</sup> When judges are likened to legal spokespersons, progressive thinking can be an appropriate effort, because legal texts have weaknesses so it is necessary to understand the meaning behind the text.<sup>36</sup>

The law should continue to develop towards better perfection. This quality towards perfection is what is always sought and pursued by the panel of judges in seeking the truth to provide justice, legal certainty, and the welfare of the justice-seeking community. Justice is the main goal in law enforcement, as a noble aspiration that develops along with the development of society.<sup>37</sup> According to Yahya Harahap, the judge's decision in principle is to resolve case disputes.<sup>38</sup> Through the judge's decision, it is hoped that the problems faced by the applicants and the applicant's children as seekers of justice in the religious court can be resolved. By using *contra legem*, the judge must certainly have clear and sharp legal considerations from various other legal aspects.<sup>39</sup> According to Nasir Asnawi, the function of the Decision is also as a reformer, namely as a reformer in the normative order (legal rules or norms) and a reformer in the practical order (the dynamics of law that occur in society).<sup>40</sup> This thinking led to the birth of progressive law in the Decision or determination of the panel of Judges, because Judges are required to not only consider juridical aspects, but also multidisciplinary aspects such as sociological, philosophical and historical aspects so that legal justice, public justice and moral justice in the decision / determination of the judge can be realized. Even according to Bagir Manan, if the application of the law based on existing laws will cause injustice and harm to the community, then the judge is obliged to side with real justice (*moral justice*) and has the right to override the existing laws or rules of legislation (*legal justice*). A good law is a law that is in accordance with the *living* law in society (*the living law*), which reflects local wisdom or values that exist and apply in a society (*social justice*).<sup>41</sup> Therefore, judges have a very important role in legal policy or politics which always makes the court one of the objects of legal reform.<sup>42</sup>

The judge's decision on the case of the origin of children from a *fasid* marriage becomes a legal product as well as a source of material law (jurisprudence) in Indonesia, so that judges are also law makers. Based on the data of this research, there are three main problems that need to be examined, namely the legal consideration of the marital status of the applicants, the legal consideration of the application for the origin of the child from the *fasid* marriage, and the certainty of the use of child diction in the verdict. In the context of legal protection of children, a progressive approach is needed in using legal arguments

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<sup>35</sup> Adi Nur Rohman, - Sugeng, and Hesti Widyaningrum, "Instrumentation of Ex-Officio Rights of Religious Courts Judge Related to Fulfilling Children and Wife's Rights Due to Divorce," *Journal of Law & Development* 50, no. 2 (September 28, 2020): 369, <https://doi.org/10.21143/jhp.vol50.no2.2581>.

<sup>36</sup> Suci Ramadhan and Jm Muslimin, "Indonesian Religious Court Decisions on Child Custody Cases: Between Positivism and Progressive Legal Thought," *JURIS (Sharia Scientific Journal)* 21, no. 1 (June 10, 2022): 92–93, <https://doi.org/10.31958/juris.v21i1.5723>.

<sup>37</sup> Satjipto Rahardjo, *Progressive Law, A Synthesis of Indonesian Law* (Yogyakarta: Genta Publishing, 2009), 71; Nur Hidayah and Abdul Azis, "Implementation of Progressive Law in Sharia Banking Dispute Settlement: Case Study of Religious Court Decisions in Indonesia," *Ulumuna* 27, no. 1 (June 26, 2023): 227-57, <https://doi.org/10.20414/ujis.v27i1.652>; Muhammad Akbar, "Judges' Freedom to Make Progressive Decisions," *Bilancia*: 17, no. 1 (2023): 155-70.

<sup>38</sup> Yahya Harahap, *Civil Procedure Law* (Jakarta: Sinar Grafika, 2005), 859.

<sup>39</sup> Ali Muhtarom dan Yuli Sutoto Nugroho, "Grants as a Model of Inheritance Prospective Distribution in the Coastal Santri Community," *Al-Ahkam* 32, no. 2 (30 Oktober 2022): 169, doi:10.21580/ahkam.2022.32.2.12557.

<sup>40</sup> M. Nasir Asnawi, *Hermenetics of Judges' Decisions: A Civil* (Yogyakarta: UII press, 2014), 74.

<sup>41</sup> Imam Mustofa, "Dampak Putusan Mahkamah Konstitusi Mengenai Pasal 43 Ayat (1) Undang-Undang Nomor 1 Tahun 1974 Terhadap Hukum Keluarga Di Indonesia," *Al-Manabij: Jurnal Kajian Hukum Islam* 6, no. 2 (2012): 287, doi:10.24090/mnh.v6i2.605.

<sup>42</sup> Bagir Manan in Suad Fikriawan, Syamsul Anwar, and Misnen Ardiansyah, "The Paradigm of Progressive Judge's Decision and Its Contribution to Islamic Legal Reform in Indonesia," *Al-Manabij: Journal of Islamic Legal Studies* 15, no. 2 (2021): 256.

for judges in making a determination of the origin of children from a *failed marriage* in the Religious Court.<sup>43</sup> The legal construction in question does not mean to rule out the existence of laws and regulations that are already in force but rather so that judges can consider juridical aspects, sociological aspects, and philosophical aspects in preparing legal considerations. There are several juridical foundations that must be taken into consideration by the panel of judges in deciding the case of an application for the origin of children in the Religious Court, namely:<sup>44</sup>

**a. The 1945 Constitution of the Republic of Indonesia**

The right of children to live a decent and respectable life is regulated in Article 28B Paragraph (2) and Article 28I Paragraph (1) of the 1945 Constitution. Every child has the right to live and develop optimally, to be protected from violence and discrimination, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on the basis of retroactive laws are human rights that cannot be reduced under any circumstances. All of these rights must be possessed by children, regardless of the quality of the legality of their parents' marriage. The panel of judges should consider children's rights to legal status and equal justice before the law. There are only two legal statuses of children, legitimate children and illegitimate children. This constitutional norm also has the consequence that if the application for the origin of the child is accepted or granted by the panel of judges, then the legal status as a legitimate child must be given to the applicant child, he must be treated equally before the public.<sup>45</sup>

**b. Law Number 1 of 1974 Concerning Marriage**

Marriage issues carried out by Muslims in Indonesia are specifically regulated in the Marriage Law (*lege specialis*), while what is regulated in the Compilation of Islamic Law is an elaboration of the Marriage Law so that if there are still doubts for the panel of judges in understanding the provisions of marriage in the Compilation of Islamic Law, it must be returned to the Marriage Law.

The annulment of marriage or rejection of *Itsbat nikah* by the Panel of judges should not apply retroactively to the existence of their children. In accordance with the provisions of Article 28 of the Marriage Law, the status of the children of the Plaintiffs must be returned to the status of the validity of the marriage believed by the parties involved, because this is a form of legal justice that has been regulated in the Marriage Law. By granting the origin of the child from the *Fasid* marriage, even though the parents' marriage was annulled due to problems, this provides basic protection rights for these children, where children who are born pure and clean do not accept and bear the sins or mistakes of their parents, legal justice is truly realized for the child.

Furthermore, Article 44 Paragraph (1) gives the husband the right to refuse to recognize a child born by his wife, if he can prove that his wife had an affair and the child is the result of the affair. Against this provision, it needs to be understood more broadly, namely that as long as no one denies the legitimacy of the child of the Plaintiffs, then it should be considered as their legitimate child, because if you pay attention to the provisions

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<sup>43</sup> Zainal Azwar dkk., "Child Filiation and Its Implications on Maintenance and Inheritance Rights: A Comparative Study of Regulations and Judicial Practices in Indonesia, Malaysia, and Turkey," *Journal of Islamic Law* 5, no. 1 (29 Februari 2024): 62, doi:10.24260/jil.v5i1.2326.

<sup>44</sup> Ali Imron dkk., "Baby Engagement within the Traditional Ulama of the Madurese Ethnicity: A *Maṣlaḥa* Analysis," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 23, no. 2 (2023): 261, doi:10.18326/ijtihad.v23i2.261-280.

<sup>45</sup> Khaeron Sirin, "Aspek Pemidanaan Dalam Hukum Perkawinan (Analisis Terhadap Perkawinan Yang Tidak Dicatatkan Di Indonesia)," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 12, no. 01 (2012): 10, doi:10.30631/alrisalah.v12i01.432.



of Article 44 Paragraph (2) which means that the Court has the authority to determine whether a child is legitimate or illegitimate at the request of the parents or other interested parties, Therefore, the simple interpretation in relation to Paragraph (1) is that the status of illegitimate children is determined only for children resulting from adultery, not for children resulting from marriages with material, formal or both problems, because the substance of the marriage cannot be aligned with adultery.

The issue of the validity of the marriage of the child's parents is indeed one of the basic considerations in resolving the case of determining the origin of the child in the Religious Court, but it is not the main element in accepting or rejecting the application. The most important thing is the existence of the child with his parents, whether the child is truly recognized by both parents as their biological child, whether this child has been well cared for by the petitioners, and the absence of other parties who object to the status of the child if it is determined to be the legitimate child of the Petitioners. This is justified in accordance with the concept of Islamic law, namely the term child recognition (*termhaq*) and the Civil Code procedure with the term Recognition of children outside marriage.

### **c. Law Number 39 Year 1999 on Human Rights**

Indonesia is a *rechtstaat* or state of law, therefore ratification of the Human Rights Convention is a must in every regulation issued by the State, including the Supreme Court and its jurisprudence. The Human Rights Law is an elaboration of the Human Rights provisions set out in the Indonesian constitution, namely in the 1945 Constitution. The existence of this Law is a clear alignment of the state towards the protection of children's rights, especially as stipulated in Article 52 Paragraph (2), which means that children have rights that are part of human rights, so it is important for the law to recognize and protect children's rights, even from the womb. Article 53 Paragraphs (1) and (2) state that every child has the right to live, maintain their life, and improve their quality of life since they are still in the womb. The state also guarantees a child's right from birth to have a proper name and appropriate citizenship status.

The judges are not only the '*representatives of God*' in the world, but also as a father or a mother who has a child so that sociologically and psychologically they can feel the spiritual atmosphere of the parties who have difficulty obtaining guarantees for the basic rights of their children.

### **d. Law Number 23 Year 2002 on Child Protection**

Indonesia is a state of law, which applies protection to human rights for its citizens, as well as in Islamic law which protects the rights of the people and pays attention to the problems of the people. Therefore, the Child Protection Law must be one of the main juridical bases by the panel of judges in considering accepting the case of determining the origin of children in the Religious Court.

Article 2 of the Child Protection Law is an important norm to note, that judges should consider the best interests of the child, even though the parents' marriage is a problematic marriage. Furthermore, to ensure the implementation of the protection of children's rights and welfare, the status and identity of children must be legalized (in the form of birth certificates) as stipulated in Article 27 Paragraph (1) and Paragraph (2) of the Child Protection Law, and progressive judges' considerations do not look back by reconsidering the issue of the validity of their parents' marriage, but must look forward to the benefits and best interests of children.

### **e. Al-Qur'an Surah Al-An'am Verse 164**

Allah SWT in the Qur'an Surah Al-An'am Verse 164 has emphasized that the actions carried out by a servant the consequences are only accepted or charged to that servant.

Each individual is responsible for his own sinful deeds, and will not be held accountable for others. Therefore, in the context of fasad marriage, the problems of a marriage must be borne by the person concerned (parents), not to be a burden for their children.

**f. Hadith of the Prophet Muhammad narrated by Imam Bukhori (HR. Bukhori. No. 1296)**

كل مولد يولد علي الفطرة<sup>46</sup>

This hadith explains that every child is born in a state of fitrah or purity. The purity of this child is a right that must be understood by everyone, especially by Religious Judges that the child cannot be charged with the fault of his or her parents, even if the parents' marriage is declared rejected or fasid by the Religious Court.

**g. Doctrines of Jurisprudence**

The fiqh doctrines referred to here are Islamic law which in substance states that the child born of the parents, who require recognition of the petitioners' application to the Religious Court is a child who really comes from them (not the child of adultery of the petitioners), regardless of the problematic *ikhtilaf furu'iyah*. Islamic law (fiqh) must be able to adjust and accommodate dynamic changes in society through the process and products of *ijtihad*.<sup>47</sup> In the current context, *ijtihad* can be explained as a progressive effort to update the existing provisions in the Qur'an or Sunnah. This is done so that both can accommodate new situations and conditions, by providing solutions or legal rules that are in accordance with the times.<sup>48</sup> Elasticity of fiqh has actually occurred since long ago, even the differences in the laws formed by the scholars of the madhhab itself are historical evidence that there have been changes in the law among the Imams of the Mazhab.

Based on the data above, it was found that judges who rejected the application for the origin of children from fasid marriages were because the judges were still textual, so that in the arguments of consideration they were still bound by the facts of the marriage of their parents that had occurred in the past which was problematic without paying attention to justice and the problems that the children would face later. Meanwhile, the judge who granted the application for the origin of children from the fasid marriage tried to find the law by taking the basis of his consideration out of the texts of existing laws that were no longer relevant to the fundamental interests of children. The judge's consideration of granting the application for the origin of the child is in line with the concept of progressive law. By granting the origin of children from this fasid marriage, it guarantees justice and benefits for children and the legal norms formed in the stipulation are truly responsive, provide benefits for the parties and society, and reject greater harm, so that the values of justice will truly be realized, not only for the parties, but also for children and society. In principle, the determination of giving birth to progressive law is like Satjipto Rahardjo's thinking that progressive law places the law not as a final scheme, but the law

<sup>46</sup> Imam al- Bukhari, *Shahih al-Bukhâri* (Beirut: Dar Ibn Katsir\_al-Yamâmah, 1987), 456.

<sup>47</sup> Badruddin Badruddin and Aditya Prastian Supriyadi, "The Dynamics of Indonesian Islamic Law : Islamic Norms in Reasoning Positive Law Responding to Contemporary Socio-Cultural Era," *De Jure: Journal of Law and Shar'iah* 14, no. 1 (June 29, 2022): 38–57, <https://doi.org/10.18860/j-fsh.v14i1.15512>.

<sup>48</sup> Hidayah and Azis, "Implementation of Progressive Law in Sharia Banking Dispute Settlement"; Diky Faqih Maulana and Abdul Rozak, "Istihsan as a Finding Method of Progressive Islamic Law in the Industrial Revolution Era 4.0," *El-Mashlahab* 11, no. 2 (December 23, 2021): 127-45, <https://doi.org/10.23971/elma.v11i2.2981>; Imam Asmarudin, "Struggle of Legal Positivism Versus Progressive Thoughts in the Formal Tests of the Job Creation Act (Legal Development through Hermeneutics)," *Journal of* 22, no. 1 (2022): 124-43.

continues to move, change, following the dynamics of human life. Law is not seen as something that lives in a vacuum. Law is born from the provisions that live in society (*ibi societas ibi ius*). On that basis, the law must continue to be dissected and explored through progressive efforts to reach the ultimate truth for the sake of justice.<sup>49</sup> The construction of progressive law in determining the origin of children in this fasid marriage is by making legal norms that are in accordance with the facts of legal development in society, by granting the application for the origin of children in a fasid marriage so that it will become jurisprudence on the basis of considering the future, moral and social interests of children without violating or injuring the provisions of Islamic law that are *qath'i*. By considering the regulations and doctrines of the Islamic law that are already *qath'i*. By considering the regulations and fiqh doctrines as explained above, it is certain that progressive, just and maslahat decisions of the panel of judges will be born in examining, deciding and adjudicating cases of Child Origins in the Religious Courts, especially in the South Kalimantan region.

## CONCLUSION

Based on the results of the above research, it can be concluded that the decision of the Religious Courts in the South Kalimantan region on the application for child origins is divided into two, namely rejection and granting by the judge. The legal considerations of the panel of judges who accept in general are for the benefit of the child's future with the argument of the Child Protection Law, and the opinion of Wahbah az-Zuhaily (contemporary fiqh scholars) that children from fasid marriages are legitimate children of their parents. However, the diction used by the panel towards the status of the child is different, namely child, legitimate child, biological child and biological child. The legal considerations in rejecting the application for the origin of the child generally based their legal basis on Law No. 1/1974 and the Compilation of Islamic Law, which basically states that a legitimate child is born from a legal marriage, at least materially valid, while a fasid marriage is considered an invalid marriage both materially and formally. The ideal legal construction in the decision to determine the origin of the child by the judge of the Religious Court in the jurisdiction of the Banjarmasin High Religious Court from the perspective of progressive law is to postulate a legal basis related to the future interests of the child consisting of the 1945 Constitution Article 28B Paragraph (2) and Article 28I paragraph (1), Marriage Law Article 44 Paragraph (1) and (2), Human Rights Law Articles 52 and 53, Child Protection Law Article 27 Paragraph (1) and (2), Al-Qur'an Surah Al-An'am Paragraph 164, and Hadith of the Prophet SAW (HR. Bukhori. No. 1296) as well as fiqh doctrines that accommodate dynamic changes in society. The fasid marriage is not due to a deliberate act of defying the laws of Allah SWT and the laws of the state, but rather due to the negligence and ignorance of the applicants of the applicable legal rules. The logical consequence of accepting the petition is to determine that the petitioned-for child is the legitimate child of the petitioners.

Based on the above conclusions, the author recommends, namely: *First*, the government should be able to reconstruct marriage law related to the issue of children's rights contained in legislation, so that the Supreme Court has legal reasons to be able to modify the law related to children contained in the Compilation of Islamic Law, or through Supreme Court Regulations, Decrees of the Chief Justice of the Supreme Court or Supreme Court Circular Letters; *second*, Religious Judges should be able to consider aspects of legal justice for children, social aspects in the lives of children, as well as the

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<sup>49</sup> Muh Ridha Hakim, "Implementation of Rechtsvinding Characterized by *Journal of Law and Justice* 5, no. 2 (2016): 229, <https://doi.org/10.25216/jhp.5.2.2016.227-248>.

purpose of establishing a rule of law, in considering the status of children born from a fasid marriage. Thus, legal progressivity in examining, deciding and adjudicating the case *a quo* can be considered to be applied as a paradigm frame regarding the validity of the status of children from fasid marriages; and *third*, further researchers can examine and develop the issue of legal construction of determining the origin of children from other angles and contexts so that science and legal studies related to the origin of children can develop comprehensively which in turn can present legal constructions that are able to represent the values of justice for both the applicants and the applicants' children from all aspects of life. *Third*, this research has not revealed more about the rejection of Religious Court judges on the application for the origin of children who are not from a fasid marriage (materially valid), such as children from polygamous marriages and children of pregnant marriages whose gestational age does not reach 6 months. For this reason, further studies are needed in various perspectives or scientific disciplines comprehensively in order to present progressive legal reforms that carry the values of justice for both the applicants and their children.

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