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Article Title

## **Custody Determination for a Child Born as a Result of Rape: A Maqashid al-Sharia Perspective**

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## ABSTRACT

*This study aimed to examine child rights and the requirements for custody determination for a child born as a result of rape based on the maqashid al-sharia perspective. This research employed a normative legal research method with the statute and comparative approaches. The collected legal materials were analyzed qualitatively to describe the problem and answer the research objectives. The results of this study indicate that maqashid al-sharia emphasizes the importance of guaranteeing hadhanah, or child custody, by considering the caregiver's rights, the child's rights, and the father's or guardian's rights. Furthermore, the Quran provides comprehensive guidance in protecting and fulfilling child rights, while the principles of maqashid al-sharia, such as hifz al-din, hifz al-nafs, hifz al-'aql, hifz al-nasl, and hifz al-mal, serve as the foundation for fulfilling these rights. In cases of children born as a result of rape, maqashid al-sharia emphasizes the necessity of the state's presence to protect the child through the mechanism of child custody determination through the courts, taking into account specific requirements, such as the age, health, and good conduct of the prospective guardian, to ensure proper care and the fulfilment of the child's rights. Therefore, it is recommended that various parties, including the government, judges, and prospective guardians, synergize in protecting and fulfilling the rights of children born as a result of rape by the principles of maqashid al-sharia.*

*Keywords:* Child Custody; Child Protection; Child Rights; Maqashid al-Sharia; Rape Victim.

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## INTRODUCTION

Children are the most beautiful gift and the pillar of hope for the nation's future. They are the nation's buds, potential, and the next generation of noble ideals that will determine the progress and development of the country in the future. Their role is very strategic in guaranteeing the existence of the nation and state, so it is proper that children get the broadest possible opportunity to grow and develop optimally, physically, mentally, and spiritually (Ramadhan & Lubis, 2024). The fulfilment of child rights, protection, and well-being are top priorities that must be realized in every aspect of life (Yuniarlin, 2023).

Unfortunately, the reality on the ground is still far from ideal. Various forms of violence against children, including child sexual abuse, still cast a dark shadow that haunts the future of children (Mustika & Iwan, 2024). Acts of sexual abuse, especially rape against minors, are often carried out using coercion, threats, bribery, deception, or pressure, resulting in profound negative impacts, both physically and psychologically. Rape victims not only experience physical injuries but also severe psychological trauma that can affect their development in the future (Apriyansa, 2019). They often experience fear, anxiety, depression, post-traumatic stress disorder (PTSD), and difficulty in building interpersonal relationships. In fact, it is not uncommon for rape victims to tend to hide themselves and withdraw from the social environment (Heriyanti et al., 2023).

Data from SIMFONI-PPA (2024) indicates that cases of child sexual abuse have reached a very concerning number, namely 5,988 victims. This data confirms

that sexual abuse or rape of children is a severe problem that demands further and comprehensive handling. Efforts to prevent and handle cases of child sexual abuse must be carried out in an integrated manner and involve various parties, starting from families, communities, and educational institutions to law enforcement officials.

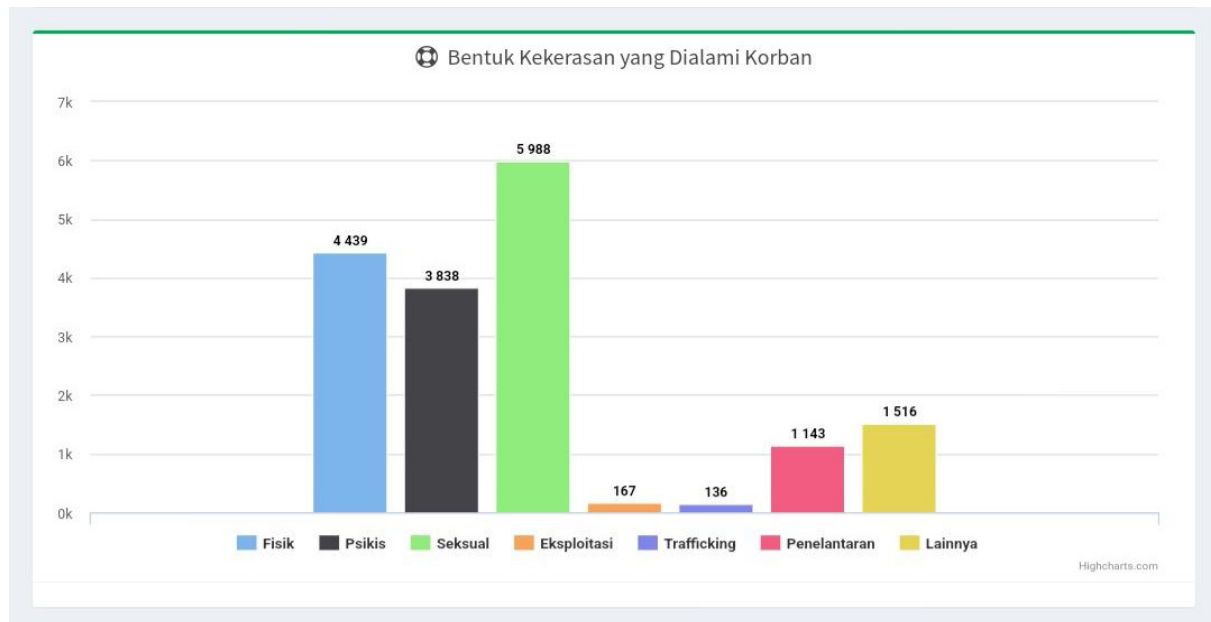


Figure 1. Forms of Violence Experienced by Victims (SIMFONI-PPA, 2024)

One example of a rape case that occurred at the end of 2023 in Medan City indicates how vulnerable minors are to sexual abuse crimes. A minor became a rape victim by an unknown man, resulting in pregnancy and childbirth. After giving birth, the victim was treated in a mental hospital because she experienced a mental disorder. Unfortunately, neither the victim's family nor the perpetrator nor his family could be located, leaving the child and the victim in precarious circumstances and need of protection. This case indicates that rape of minors is not only a severe violation of [Law Number 23 of 2002](#)<sup>1</sup> but also raises crucial questions regarding the fate of children born as a result of this tragic event.

In Islam, there is the perspective of *maqashid al-sharia*, which emphasizes the protection of five primary goals in human life, namely *hifz al-din* (protecting religion), *hifz al-nafs* (protecting life), *hifz al-'aql* (protecting the mind), *hifz al-nasl* (protecting lineage), and *hifz al-mal* (protecting property) (Hefni, 2017). The concept of *maqashid al-sharia* is the philosophical foundation of Islamic law, which aims to realize the benefit of humanity (Tohari & Fawwaz, 2022). Protection of lineage or offspring is one of the main focuses in *maqashid al-sharia*, which requires that the lives of children born to be treated fairly and with dignity, regardless of how the child was born. This principle emphasizes that every child has the right to recognition of

<sup>1</sup>Law Number 23 of 2002 on Child Protection has been amended twice: by Law Number 35 of 2014 and Law Number 17 of 2016 (enacting Government Regulation in Lieu of Law Number 1 of 2016).

lineage, maintenance, education, and proper protection without any discrimination. In the context of children born as a result of rape, *maqashid al-sharia* guides child custody determination that focuses on the best interests of the child.

Several previous studies have discussed *maqashid al-sharia* in the context of child protection, but none have focused explicitly on custody determination for a child born as a result of rape. Muzaiyanah (2022) revealed that the principles of *maqashid al-sharia* have been implemented in East Java Provincial Regulation Number 16 of 2012 to protect women and children victims of violence. However, the focus of this study is the evaluation of local policies in the context of protecting victims of violence in general and not specifically on child custody for a child born as a result of rape.

Furthermore, Haiba and Nugraheni (2024) highlight child custody after divorce based on Indonesian Positive Law by emphasizing the importance of the principle of the best interests of the child. This research also did not specifically examine the position of child custody for a child born as a result of rape based on the *maqashid al-sharia* perspective. Similarly, Ulya (2021) discussed legal protection for child victims of sexual abuse with a state and *maqashid al-sharia* approach. This study focuses more on the judge's considerations in determining child custody concerning the principles of *maqashid al-sharia* as a form of protection for a child born as a result of rape.

Based on the description above, this study is presented to fill the void of previous studies that have not deeply touched on custody determination for a child born as a result of rape based on the *maqashid al-sharia* perspective. Thus, this study aims to examine child rights and the requirements for custody determination for a child born as a result of rape based on the *maqashid al-sharia* perspective. The results of this study are expected to provide intellectual contributions and recommendations for the development of law in Indonesia, especially in giving protection and realizing the best interests of children born as a result of rape.

## METHOD

This study uses a normative legal research method with statute and comparative approaches (Qamar & Rezah, 2020). The legal materials used in this study include legislation, court decisions, legal books, scholarly articles, and online materials that discuss custody determination for a child born as a result of rape. The collection of these legal materials is done through a literature study technique. The collected legal material is then qualitatively analyzed to describe the problem and answer the study objectives (Sampara & Husen, 2016).

## RESULTS AND DISCUSSION

*Maqashid al-sharia*, meaning “the goals of Islamic law,” is a crucial concept in Islamic jurisprudence that aims to achieve benefit and prevent harm to humanity. This concept emphasizes that all laws and policies should be directed towards attaining good purposes and avoiding adverse impacts. *Maqashid al-sharia* comprises five fundamental principles: *hifz al-din* (protecting religion), *hifz al-nafs* (protecting life), *hifz al-‘aql* (protecting the mind), *hifz al-nasl* (protecting lineage), and *hifz al-mal* (protecting property). These five principles are interconnected and form a unified whole in realizing benefits for individuals and society.

[Az-Zuhaili \(2011b\)](#) explains that there are levels of importance to consider in understanding and applying *maqashid al-sharia*. These levels include *dharuriyyat* (primary level), *hajiyyat* (secondary level), and *tahsiniyyat* (complementary level). These three levels form a hierarchy of human needs that complement each other in realizing the well-being of life in this world and the hereafter.

Firstly, *dharuriyyat* represents the most fundamental level, encompassing essential needs for human life, both religious and worldly. If the needs at this level are not met, human life will experience deficiencies, loss of enjoyment, and punishment in the hereafter. *Dharuriyyat* is the foundation for realising the five main principles of *maqashid al-sharia*. For instance, fulfilling basic needs such as food, clothing, and shelter is part of *dharuriyyat* within *hifz al-nafs*.

Secondly, *hajiyyat* aims to eliminate difficulty and provide ease in human life. The absence of *hajiyyat* does not cause deficiencies in life but leads to problems and constraints. Although without *hajiyyat*, the five main principles of *maqashid al-sharia* can still be realized, it will be accompanied by various difficulties. For example, *taqsith*, as a rule for buying and selling houses where payments can be deferred, is part of *hajiyyat* within *hifz al-mal* because it allows people to own a dwelling without waiting for cash.

Thirdly, *tahsiniyyat* is a complementary and perfecting level. Its purpose is to achieve perfection and beauty in life, both in worship and *muamalah* (social relations). *Tahsiniyyat* can be likened to a fence that protects and strengthens the realization of the five main principles of *maqashid al-sharia*. For instance, using technology to study the Quran and seek knowledge is part of *tahsiniyyat* within *hifz al-din* and *hifz al-‘aql*. *Tahsiniyyat* also encompasses permissible things in religion to achieve enjoyment and beauty in life, as long as they do not contradict the principles of Sharia.

In the context of child protection, *maqashid al-sharia* emphasizes the importance of guaranteeing *hadhanah*, or child custody ([Syafiuddin et al., 2021a](#)). *Hadhanah* is the child’s right to be cared for and protected by those who are entitled and capable

of fulfilling their physical, mental, and spiritual needs, especially for children who are not yet *mumayyiz* or unable to distinguish between good and evil independently. *Mumayyiz* is defined as a child who has reached the age of 12 and can differentiate between right and wrong (Idris et al., 2024).

The obligation of *hadhanah* is based on the principle of *hifz al-nafs* within *maqashid al-sharia*. Children who do not receive proper care will have their safety and well-being threatened, both physically and psychologically. Therefore, *hadhanah* is obligatory, as is providing maintenance for the child. Both are forms of responsibility for parents and families in fulfilling the child's fundamental rights.

Scholars, as stated by Az-Zuhaili (2011a), explain that *hadhanah* relates to three rights that must be considered simultaneously: the rights of the caregiver (usually the mother), the rights of the child being cared for (right to protection), and the rights of the father or child's guardian (custody). Ideally, these three rights can be fulfilled harmoniously. However, if a conflict of interest occurs, the rights of the child being cared for should be prioritized. This principle demonstrates that *maqashid al-sharia* places the child's best interests as the primary consideration in determining child custody.

#### **A. Child Rights within the *Maqashid al-Sharia* Framework**

Child protection is the foundation for realizing a future generation of high quality. Every child has the right to comprehensive and optimal protection to grow and develop by their human dignity (Nurheliza & Iwan, 2024). Protection, as regulated in Law Number 23 of 2002, encompasses all efforts to guarantee, protect, and fulfill all child rights, as well as to protect them from violence, discrimination, and exploitation in any form. The responsibility for realizing child protection rests not only on the shoulders of parents but is also a shared obligation between families, communities, and the state (Lira, 2023). Parents, as children's first and foremost environment, have a central role in providing care, education, and guidance by religious, moral, and ethical values. The community plays a role in creating a safe and supportive environment for child development. Meanwhile, the state is responsible for formulating and implementing policies and providing facilities and infrastructure that support the fulfillment of child rights.

The case of the rape victim in Medan City at the end of 2023, where the victim who became pregnant and gave birth experienced a mental disorder and had to be treated in a mental hospital, demonstrates the urgency of special protection for children born from such situations. Children born as a result of rape have higher vulnerability compared to children in general. They are at risk of experiencing stigma, discrimination, neglect, and even violence. Therefore, special

protection must guarantee security and support their optimal development. This special protection covers various aspects, from fulfilling fundamental rights and psychological assistance to accessing education and health services. In formulating and implementing special protection for children born as a result of rape, the principles of *maqashid al-sharia* can serve as a strong foundation.

Furthermore, a more detailed explanation of child rights within the *maqashid al-sharia* perspective will be provided based on verses from the Quran. This analysis will reveal how the Quran offers comprehensive guidance in protecting and fulfilling child rights and how the principles of *maqashid al-sharia* can be applied to resolve contemporary issues related to child protection, including in cases of children born as a result of rape.

### **1. The Right to Protection and Well-Being**

One of the main principles in *maqashid al-sharia* is *hifz al-nafs*, which encompasses comprehensive protection for children physically, emotionally, and socially (Saputra, 2023). Physical protection aims to safeguard children from violence, neglect, and exploitation that could endanger their safety and health. Emotional and social protection includes efforts to create an environment that supports the healthy psychological and social development of children, free from fear, anxiety, and trauma. Parents and society have a shared responsibility to ensure children's physical and mental well-being. This obligation is realized through fulfilling children's basic needs, such as clothing, food, shelter, education, and healthcare, as well as protection from all forms of violence and exploitation that could harm their development.

In the context of a child born to a mother who has a mental illness as a result of rape and requires treatment in a mental hospital, specialized protection becomes especially crucial. Children in this situation face multiple vulnerabilities: the stigma of being a child born as a result of rape and the mother's condition, which prevents her from providing optimal care. Specialized protection must guarantee the child's fundamental rights, including the right to life, growth and development, proper care, education, healthcare, and protection from discrimination. Additionally, intensive psychological support is necessary to help the child overcome trauma and develop mental resilience. The state, through child protection agencies and social services, plays a vital role in providing the protection and support that this child needs. Furthermore, fulfilling the child's well-being is part of the principle of *hifz al-mal*, as emphasized in Q.S. An-Nisa' verse 10, which states:

إِنَّ الَّذِينَ يَأْكُلُونَ أَمْوَالَ الْيَتَامَىٰ ظُلْمًا إِنَّمَا يَأْكُلُونَ فِي بُطُونِهِمْ نَارًا ۖ وَسَيَصْلَوْنَ سَعِيرًا ۗ



“Indeed, those who devour the property of orphans unjustly are only consuming into their bellies fire. And they will be burned in a Blaze.”

This verse explicitly states that children’s rights, especially property rights, must be protected from unjust acts. Misappropriating the wealth of orphans is likened to consuming hellfire, indicating the gravity of the sin and the threat to those who commit such injustice. This verse reflects the *maqashid al-sharia*, which demands protecting children’s rights and justice in managing their property. In the case of a child born to a mother who has a mental illness as a result of rape, the protection of property becomes even more critical because the child lacks parents capable of managing their assets responsibly. The state is responsible for ensuring that the child’s property is handled correctly and used for the child’s benefit, according to the principles of justice and welfare within the *maqashid al-sharia*.

## 2. The Right to Education and Knowledge

*Maqashid al-sharia*, as the objectives of Islamic law, directs attention to spiritual aspects and the holistic development of human potential, including in the intellectual realm. The principles of *hifz al-din* and *hifz al-aql* within *maqashid al-sharia* aim to realize a knowledgeable and educated society. Within this framework, education is viewed as a fundamental right of every individual, including children. Every child, without exception, has the right to quality education, encompassing religious education, knowledge, and life skills necessary to prepare them for the future (Syafiuddin et al., 2021b). Quality education will equip children with the knowledge, skills, and values that enable them to contribute positively to themselves, their families, society, and religion.

Specifically for children born as a result of rape, the right to education receives further emphasis. These children are vulnerable to experiencing stigma, discrimination, and rejection that can hinder their access to education. Therefore, specialized protection in the form of guaranteed access to equitable and quality education becomes particularly important. The state, through child protection agencies and educational institutions, is responsible for eliminating all forms of barriers that hinder these children from pursuing education. Moreover, psychological and social support is necessary to help them overcome trauma and develop self-confidence in participating in the



learning process. The importance of education is also emphasized in Q.S. Al-Mujadalah verse 11, which states:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا قِيلَ لَكُمْ تَفَسَّحُوا فِي الْمَجَالِسِ فَافْسَحُوا يَفْسَحَ اللَّهُ لَكُمْ وَإِذَا قِيلَ  
انشُرُوا فَانشُرُوا يَرْفَعِ اللَّهُ الَّذِينَ آمَنُوا مِنْكُمْ وَالَّذِينَ أُوتُوا الْعِلْمَ دَرَجَاتٍ وَاللَّهُ بِمَا  
تَعْمَلُونَ خَبِيرٌ ﴿١١﴾

*“O you who have believed, when you are told, “Space yourselves” in assemblies, then make space; Allah will make space for you. And when you are told, “Arise,” then arise; Allah will raise those who have believed among you and those who were given knowledge, by degrees. And Allah is acquainted with what you do.”*

This verse indicates that Allah will elevate the status of believers and those who possess knowledge. It demonstrates that education is not merely a right but also an obligation for every Muslim, and seeking knowledge is a form of worship and a path to draw closer to Allah. This verse aligns with *maqashid al-sharia*, which prioritizes the achievement of goodness and well-being through knowledge. Education is the key to individual and societal progress and thus must be prioritized in development.

### **3. The Right to Health**

Health, both physical and mental, constitutes the foundation for human well-being and represents a core pillar within *maqashid al-sharia*. In the context of child protection, the right to health is crucial. Every child is entitled to access adequate healthcare services, encompassing immunization, routine check-ups, and necessary medical treatment, to maintain their physical and mental health (Haque et al., 2024). Fulfilling children’s right to health represents a valuable investment in their future. With healthy bodies and strong minds, children can develop optimally and reach their full potential.

Children born as a result of rape require special attention regarding their health, both physical and mental. Physically, these children may experience health issues stemming from the mother’s condition during pregnancy or childbirth. Mentally, they are vulnerable to psychological trauma due to social stigma and the mother’s potential inability to provide optimal care. Therefore, specialized protection in the area of health must be afforded to these children. This protection includes comprehensive health examinations from birth, provision of adequate nutrition, complete immunization, and psychological support and treatment to prevent and address mental health issues. The state

bears the responsibility to provide accessible and quality healthcare services for all children, including those born as a result of rape. The importance of completing breastfeeding is also emphasized in Q.S. Al-Baqarah verse 233, which states:

﴿ وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُتِمَّ الرَّضَاعَةَ وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا لَا تُضَارَّ وَالِدَةٌ بِوَلَدِهَا وَلَا مَوْلُودٌ لَهُ بِوَلَدِهِ وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ فَإِنْ أَرَادَا فِصَالًا عَنْ تَرَاضٍ مِنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا وَإِنْ أَرَدْتُمْ أَنْ تَسْرِعُوا بِأَوْلَادِكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا آتَيْتُمْ بِالْمَعْرُوفِ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ ﴾

*“Mothers may breastfeed their children two complete years for whoever wishes to complete the nursing [period]. Upon the father is the mothers’ provision and their clothing according to what is acceptable. No person is charged with more than his capacity. No mother should be harmed through her child, and no father through his child. And upon the [father’s] heir is [a duty] like that [of the father]. And if they both desire weaning through mutual consent from both of them and consultation, there is no blame upon either of them. And if you wish to have your children nursed by a substitute, there is no blame upon you as long as you give payment according to what is acceptable. And fear Allah and know that Allah is seeing of what you do.”*

This verse affirms the mother’s obligation to breastfeed her child for two years, if possible. Breastfeeding is a natural form of healthcare vital for infants, as breast milk contains complete nutrition necessary for their growth and development. However, in cases of mothers with mental illness stemming from rape, fulfilling the right to breastfeeding may be hindered. In such situations, *maqashid al-sharia* emphasizes seeking alternative solutions prioritising the child’s well-being, such as providing formula milk with nutrition close to breast milk or finding a wet nurse. It demonstrates that *maqashid al-sharia* is flexible and adaptive to various conditions and situations as long as it adheres to the principles of *hifz al-nafs* and *hifz al-nasl* to realize benefits for humanity.

#### 4. The Right to Life and Security

*Maqashid al-sharia*, as the philosophical foundation of Islamic law, positions the right to life and security as a fundamental right inherent in every human being. Every individual, including children, has the right to live and thrive in a safe environment, free from various dangers and threats that

could claim their lives or inflict physical and mental harm (Nasrullah, 2023). This protection must be manifested in the form of prevention of all forms of violence, whether domestic violence, exploitation, neglect, or other heinous acts that endanger the safety and well-being of children. The responsibility to guarantee children's right to life and security is a shared obligation borne by parents, families, communities, and the state.

Children born as a result of rape often face more significant threats to their right to life and security. The social stigma attached to their status can trigger various forms of discrimination, rejection, and even violence. In some cases, these children are considered a disgrace or burden, making them vulnerable to neglect, abuse, and even infanticide. Therefore, specialized protection must guarantee their right to life and security. This protection can take the form of support and counselling for mothers with mental illness stemming from rape, enabling them to accept and care for their children; providing safe houses for mothers and children facing threats from family or their surroundings; and firm law enforcement against perpetrators of violence against children. The prohibition against killing children is also emphasized in Q.S. Al-Isra' verse 31, which states:

وَلَا تَقْتُلُوا أَوْلَادَكُمْ خَشْيَةَ إِمْلَاقٍ نَحْنُ نَرْزُقُهُمْ وَإِيَّاكُمْ إِنَّ قَتْلَهُمْ كَانَ خِطْئًا كَبِيرًا ﴿٣١﴾

*"And do not kill your children for fear of poverty. We provide for them and for you. Indeed, their killing is ever a great sin."*

This verse explicitly prohibits the act of killing children out of fear of poverty. It emphasizes that children are a gift and a trust from Allah, not a burden to be eliminated. Parents must nurture and educate their children responsibly, not to end their lives. This prohibition demonstrates that Islam highly upholds the right to life of every individual, including children born from undesirable circumstances. This verse aligns with *maqashid al-sharia*, which prioritizes the principles of *hifz al-nafs* and *hifz al-nasl* to prohibit all actions that endanger children's safety and well-being.

## **5. The Right to Justice and Equality**

Justice is a highly upheld principle within *maqashid al-sharia*. Every individual, without exception, has the right to fair and equal treatment in all aspects of life (Raghavan & Alexandrova, 2015). There should be no discrimination based on gender, race, religion, social status, or any other background. This principle of justice must also be applied to children. They are entitled to equal opportunities to grow and develop, have equitable access to

education and healthcare, and be protected from discrimination and violence. Realizing justice for children is a shared responsibility that must be borne by parents, families, communities, and the state.

Children born as a result of rape are vulnerable to injustice and discrimination. The social stigma attached to their status can lead to them being treated differently, ostracized, and even denied their rights. Therefore, specialized protection is needed to ensure they receive justice and equality as other children. This protection can manifest in guaranteeing the child's legal and citizenship rights, the right to a good name and a clear identity, and the right to live and thrive in a supportive environment free from discrimination. The state plays a crucial role in formulating and implementing policies that guarantee justice and equality for all children, including those born as a result of rape. The importance of understanding divine justice is also emphasized in Q.S. An-Nisa' verse 32, which states:

وَلَا تَتَمَنَّوْا مَا فَضَّلَ اللَّهُ بِهِ بَعْضَكُمْ عَلَى بَعْضٍ لِّلرِّجَالِ نَصِيبٌ مِّمَّا كَتَبُوا وَلِلنِّسَاءِ  
نَصِيبٌ مِّمَّا كَتَبْنَ وَسَأَلُوا اللَّهَ مِنْ فَضْلِهِ إِنَّ اللَّهَ كَانَ بِكُلِّ شَيْءٍ عَلِيمًا ﴿٣٢﴾

*“And do not wish for that by which Allah has made some of you exceed others. For men is a share of what they have earned, and for women is a share of what they have earned. And ask Allah of his bounty. Indeed Allah is ever, of all things, knowing.”*

This verse teaches the importance of acting justly in treating fellow human beings, including in treating children. It emphasizes that we should not envy the blessings Allah has bestowed upon others, including the blessing of children. Every child is a unique individual with their potential and needs. Therefore, we must treat them fairly and wisely, providing equal opportunities to develop their potential and achieve their aspirations. This verse reflects the principles of *hifz al-nafs*, *hifz al-‘aql*, and *hifz al-nasl*, which prioritize justice and equality in granting rights to all individuals, including children, without exception.

## 6. Property Rights

*Maqashid al-sharia*, as an ethical system within Islamic law, emphasizes the importance of respecting and protecting individual rights, including property rights. Every individual, including children, has the right to own and manage property acquired through lawful means. Children's property rights are not solely derived from parental provision but can also originate from inheritance, gifts, or their endeavours. In this context, parents are responsible

for managing their children's property prudence, prioritizing the children's interests and well-being, and ensuring that the property is utilized to support their growth, development, and future (Fathurrahman & Firmansyah, 2024). Responsible management of children's property constitutes a form of protection of their rights and represents a long-term investment in a better future.

Children born as a result of rape possess the same right to property as other children. However, the specific circumstances experienced by their mothers can create unique vulnerabilities related to the principle of *hifz al-mal*. Mothers of rape victims may experience profound psychological trauma, rendering them incapable of effectively managing their children's assets. Furthermore, the social stigma attached to the child's status can trigger discrimination and exploitation by irresponsible parties. Therefore, specialized protection is necessary to fulfil the child's property rights. This protection can be provided through the appointment of a trustworthy guardian to manage the child's property, support and empowerment for mothers with mental illness stemming from rape to enable them to protect their children's rights, and firm law enforcement against all forms of misuse and misappropriation of children's assets. The obligation to protect children's property is also emphasized in Q.S. Al-Baqarah verse 180, which states:

كُتِبَ عَلَيْكُمْ إِذَا حَضَرَ أَحَدَكُمُ الْمَوْتُ إِن تَرَكَ خَيْرًا الْوَصِيَّةَ لِلْوَالِدَيْنِ وَالْأَقْرَبِينَ  
بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ

*"Prescribed for you when death approaches [any] one of you if he leaves wealth [is that he should make] a bequest for the parents and near relatives according to what is acceptable - a duty upon the righteous."*

This verse addresses inheritance rights and underscores the importance of justice in distributing inherited wealth. It obligates individuals to make a fair will for their parents and close relatives by Allah's decree. It demonstrates that Islam places significant emphasis on protecting children's inheritance rights. In cases of children born as a result of rape, where the status of the child's biological father is unclear, the application of Islamic inheritance law can become complex. However, *maqashid al-sharia* emphasizes the need to seek solutions that prioritize the child's best interests, such as establishing the child's right to their mother's property or finding a responsible guardian to manage their assets.

## B. Requirements for Child Custody Determination in Cases of Rape: A *Maqashid al-Sharia* Perspective

The case of the rape victim in Medan City at the end of 2023, where the victim who became pregnant and gave birth experienced a mental disorder and had to be treated in a mental hospital, raises the question of who has the right to care for the child born from that situation? In principle, parents have inherent custody to nurture, educate, maintain, develop, protect, and cultivate the child according to their religious beliefs and abilities, talents, and interests. However, in circumstances where parents cannot fulfill their roles, as in the case above, this authority can be transferred to a guardian.

Guardians generally come from the child's family, such as grandparents, uncles, aunts, or other relatives. They have the responsibility to provide care and protection to the child, replacing the role of the incapacitated parents. However, in the case of the rape victim in Medan, neither the victim's family nor the perpetrator or his family could be located. This circumstance renders the child born from the incident abandoned (Indriati et al., 2017).

In situations like this, *maqashid al-sharia* emphasizes the necessity of the state's presence to protect abandoned children. The application of the principles of *maqashid al-sharia* for the state, which bears full responsibility for children without custody, encompasses various crucial aspects in the protection and fulfillment of child rights. The principle of *hifz al-din* obligates the state to guarantee the child's right to embrace and practice their faith, provide religious freedom, and protect them from coercion or discrimination based on belief. The principle of *hifz al-nafs* requires the state to prevent all forms of violence against children, including physical, psychological, and sexual violence, and to provide protection and rehabilitation for children born as a result of rape.

Furthermore, the principle of *hifz al-'aql* emphasizes the state's obligation to guarantee access to education for every child, create an inclusive and quality education system, and provide an environment that supports their cognitive development. The principle of *hifz al-nasl* requires the state to protect children from various threats that can disrupt the continuity of generations, such as child marriage, sexual exploitation, child trafficking, and abandonment. Lastly, the principle of *hifz al-mal* obligates the state to guarantee children's inheritance rights and protect them from economic exploitation. The state must ensure that children's assets are appropriately managed and used for the child's benefit, not for the personal gain of parents or other parties.

In the context of children born as a result of rape, *maqashid al-sharia* underscores the importance of protecting and fulfilling their rights, including

the right to be cared for and raised in a safe and conducive environment. Reality demonstrates that children born as a result of rape often face social stigma and vulnerabilities that can hinder their optimal development (Nyirandamutsa et al., 2024). In situations where the child is considered abandoned, either because the biological mother is unable to provide care, the state offers solutions through the mechanism of child custody determination or the appointment of foster parents (Amadea et al., 2022).

Foster parents, who can be married couples or single individuals, provide temporary care for the child. However, if permanent and continuous care is required, adoption becomes an alternative that aligns with the principles of *maqashid al-sharia*. Based on Article 1 point 9 of Law Number 23 of 2002, adoption involves a court decree that transfers custody rights from the biological family or legal guardian to the adoptive parents. In cases of children born as a result of rape, judges have a crucial role in determining child custody, guided by the principles of *maqashid al-sharia*. For others seeking to become adoptive parents or guardians and obtain custody of a child born as a result of rape, judges must strictly examine the fulfillment of requirements based on Article 6 of Government Regulation Number 29 of 2019 to ensure the child's best interests.

*First*, prospective guardians must have reached the age of majority and be at least 30. This age maturity is deemed necessary as it reflects mental and emotional readiness to face the challenges of caring for a child born as a result of rape, who may require specialized attention and care. Thus, this age requirement aligns with *maqashid al-sharia*, particularly in realizing *hifz al-'aql* and *hifz al-nafs* of the child. *Second*, the physical and mental health of the prospective guardian is a crucial requirement. Excellent physical condition enables the prospective guardian to provide optimal care for the child, while good mental health ensures emotional stability and the ability to build a healthy bond with the child. This good physical and mental health embodies the principle of *hifz al-nafs* within *maqashid al-sharia*.

*Third*, good conduct is also an essential requirement for prospective guardians. A life history free from negative behaviour demonstrates moral integrity and the ability to be a good role model for the child. It aligns with the principle of *hifz al-'aql* within *maqashid al-sharia*, emphasising the importance of education and character development for children in a positive environment. *Fourth*, the prospective guardian's economic capacity is also a vital consideration. Financial sufficiency guarantees the fulfillment of the child's basic needs, such as clothing, food, shelter, education, and healthcare. This aspect aligns with the principle of *hifz al-mal* within *maqashid al-sharia*, which emphasizes the importance of preserving and utilizing wealth for the common good, including the child's well-being.

*Fifth*, the requirement for the prospective guardian to be Muslim is intended to ensure the fulfillment of the child's right to religious education and character formation based on Islamic values. It aligns with the principle of *hifz al-din* within *maqashid al-sharia*, which prioritizes the preservation of religion as the foundation of life. *Sixth*, for married prospective guardians, written consent from their spouse is an absolute requirement. It demonstrates commitment and shared responsibility in caring for and educating the child. This consent also reflects the couple's readiness to accept the child as part of their family. Thus, this requirement aligns with the principle of *hifz al-nasl* within *maqashid al-sharia*, which emphasizes the importance of building a harmonious family and ensuring the continuity of generations.

*Seventh*, prospective guardians are also required to provide a written statement containing a commitment to refrain from violence, exploitation, neglect, and mistreatment of the child, including the use of corporal punishment for any reason. This commitment represents a concrete manifestation of the principle of *hifz al-nafs* within *maqashid al-sharia*, which mandates the protection of the child's physical and mental well-being from all forms of violence and abuse. *Finally*, prospective guardians must obtain written consent from the child's biological parents if they are still alive, their whereabouts are known, and they are legally competent. This requirement demonstrates respect for the rights and responsibilities of biological parents in child-rearing. However, in the context of a child born to a mother who has a mental illness as a result of rape and must be treated in a mental hospital, while neither the victim's family nor the perpetrator or his family could be located, this requirement cannot be fulfilled. In such situations, the judge needs to prioritize the child's best interests. The judge's decision must be based on the principles of *maqashid al-sharia*, especially *hifz al-nasl* and *hifz al-'aql*, by striving to ensure that the child receives proper care and a secure future, even without consent from their biological parents.

By considering all the requirements for child custody determination, as outlined above, the judge effectively emphasizes the importance of *hadhanah*, which is the comprehensive care of the child, physically, mentally, and spiritually. *Hadhanah* is the right of every child, including those born as a result of rape, to be cared for and protected by someone who not only has the legal right but also possesses the capacity and commitment to fulfill the child's needs. Thus, custody determination for a child born as a result of rape must be carried out rigorously and carefully to ensure that the child can grow and develop optimally in a safe, comfortable environment that supports their future.



## CONCLUSIONS AND SUGGESTIONS

Based on the results and discussion, it can be concluded that *maqashid al-sharia* is a critical concept in Islamic law that aims to realize benefits and prevent harm. This concept emphasizes that all rules and policies, including child custody determination, must be directed towards achieving good purposes and avoiding adverse impacts. Moreover, *maqashid al-sharia* underscores the importance of guaranteeing *hadhanah*, or child custody, which encompasses three rights that must be considered: the caregiver's rights, the child's rights, and the father's or guardian's rights. In conflict of interest, the child's rights must be prioritized. Furthermore, the Quran provides comprehensive guidance in protecting and fulfilling child rights, including the right to protection and well-being, the right to education and knowledge, the right to health, the right to life and security, the right to justice and equality, and property rights. The principles of *maqashid al-sharia*, such as *hifz al-din*, *hifz al-nafs*, *hifz al-'aql*, *hifz al-nasl*, and *hifz al-mal*, serve as the foundation for fulfilling child rights. In cases of children born as a result of rape, *maqashid al-sharia* emphasizes the necessity of the state's presence to protect the child. The state provides solutions through the mechanism of child custody determination through the courts. Child custody determination for third parties includes requirements such as reaching the age of majority, physical and mental health, good conduct, economic capacity, being Muslim, spousal consent (if married), and a commitment to refrain from violence against the child. These requirements aim to ensure that children born as a result of rape receive proper care and have their rights fulfilled by the principles of *maqashid al-sharia*.

Based on the above conclusions, it is recommended that the government increase efforts to protect children born as a result of rape by providing healthcare services, legal assistance, and access to appropriate education. Furthermore, the government needs to search for the victim's family and the perpetrator's family to pursue the fulfilment of child custody by applicable legal provisions. Judges should uphold the principles of *maqashid al-sharia* in determining child custody for children born as a result of rape, carefully considering the established requirements and prioritizing the best interests of the child. Prospective guardians must understand and fulfil all stipulated requirements and possess the mental and emotional readiness to care for a child born as a result of rape. Society is expected to play an active role in preventing sexual violence against children and providing social support for children born as a result of rape. Thus, collaborative efforts from various parties to protect and fulfil the rights of children born as a result of rape represent a concrete manifestation of the commitment to safeguarding the future of the nation's next generation.

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