

## Problematics of Child Support after Paternal Death: A Study of Islamic Family Law Reform in Indonesia from the Perspective of Islamic Law

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### Abstract

This study examines child maintenance (*nafkah*) after the father's death within the reform of Islamic family law in Indonesia. The study addresses a research gap in existing scholarship, which predominantly focuses on child maintenance after divorce, religious court decisions, and parental non-compliance, while limited attention has been given to the reconstruction of child maintenance after the father's death, particularly in relation to Article 104 of the Compilation of Islamic Law (KHI) and *maqāṣid al-sharī'ah*. Employing a normative-qualitative approach, the study analyzes classical fiqh, Indonesian family-law regulations, judicial practices, and comparative perspectives from Muslim-majority countries. The findings demonstrate that the principal problem is not the absence of normative responsibility, but an implementation and institutional gap. Article 104 KHI provides a kinship-based framework, yet its effectiveness is constrained by unequal economic capacity among paternal relatives, changing family structures, and the absence of clear enforcement mechanisms. The analysis further finds that responsibility should be assessed not solely through paternal kinship but also through economic capacity, caregiving continuity, guardianship, inheritance resources, and the best interests of the child. Accordingly, the study proposes a shift from a kinship-centred model toward a child-welfare-centred framework, grounded in *ḥifẓ al-nafs*, *ḥifẓ al-nasl*, and *maṣlaḥah*, with proportionate state intervention where family mechanisms are insufficient.

**Keywords:** *Islamic Family Law, Child Support, Legal Reform, Islamic Law.*

### INTRODUCTION

Islamic law in Indonesia developed through a long interaction between Islamic normative teachings, customary law, and state legal authorities. Since the emergence of early Islamic kingdoms such as Samudra Pasai, the Shafi'i school of law has become the dominant reference in regulating Muslim social life and has gradually gained strong

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legitimacy throughout the archipelago.<sup>1</sup> Over time, Islamic law became deeply embedded in social institutions, especially in marriage, inheritance, and family relationships. Among these areas, Islamic family law (*aḥwāl al-shakṣiyyah*) occupies a central position because it is one of the earliest areas in which Islamic legal norms are systematically codified in modern Muslim countries.<sup>2</sup> In Indonesia, this development culminated in the formal integration of Islamic family law into the national legal system through the Marriage Law No. 1 of 1974, the Religious Justice Law No. 7 of 1989, and the Compilation of Islamic Law (KHI) issued through Presidential Instruction No. 1 of 1991.<sup>3</sup>

The integration of Islamic family law into national law is a process of selection, adaptation and contextualisation; it is not a literal application of classical fiqh, but is influenced by *maṣlaḥah*, judicial practice and social dynamics. Amir Syarifuddin explained that the relationship between *fiqh munakahat* and positive law can range from direct adoption to reinterpretation based on public interest.<sup>4</sup> This dynamic is in line with the principle of legal change due to shifts in time, place, and social conditions, as expressed in the maxim of *taghayyur al-aḥkām bi taghayyur al-zamān wa al-makān* and Ibn Qayyim al-Jawziyya's view of the contextual nature of legal decisions.<sup>5</sup>

Within this framework, the KHI is understood not only as a codification of classical fiqh, but also as a legal instrument that responds to the concrete realities of family life in Indonesia. Article 104 of the KHI warrants further examination as it regulates child maintenance following the father's death by placing the responsibility on the father's family or a designated guardian. Although this provision provides a normative framework for protecting the child's welfare, its implementation often diverges from social reality. In practice, the mother or the mother's family often bear the cost of the child's daily needs, particularly when the father's family lacks the ability or willingness to provide support.

This situation highlights a gap between 'law in the books' and 'law in action', as formal responsibilities do not always align with the distribution of financial burdens and caregiving that occurs in practice. Existing research generally still focuses on Islamic family law through codification, fiqh and doctrinal approaches, whilst empirical studies on the application of Article 104 following the father's death remain limited. In particular, there remains a lack of attention to how families negotiate, reinterpret, or even disregard these provisions in situations of poverty, gender-based childcare burdens, and disparities

<sup>1</sup> Saiful Millah and Asep Saepudin Jahar, *Dualism of Islamic Marriage Law in Indonesia: Fiqh and KHI* (Jakarta: Amzah (Bumi Aksara), 2021), 1; Mohammad Daud Ali, *Islamic Law: Introduction to Islamic Law and Jurisprudence in Indonesia*, Ed. 3 (Jakarta: RajaGrafindo Persada, 1993), 210.

<sup>2</sup> Elimartati and Firdaus, *Family Law in the Muslim World* (Sukabumi: Haura Utama Publishers, 2022), 1.

<sup>3</sup> Amior Nuruddin and Azhari Akmal Tarigan, *Islamic Civil Law in Indonesia: A Critical Study of the Development of Islamic Law from Fiqh, Law No. 1/1974, to KHI*, ed. 1 (Rawamangun, Jakarta, Indonesia: Kencana, 2004), 24–25; Abdurrahman, *Compilation of Islamic Law in Indonesia* (Jakarta: Akademika Pressindo, 1992), 16.

<sup>4</sup> Amir Syarifuddin, *Hacking the Ijtihad Ice: Important Issues of Contemporary Islamic Law in Indonesia* (Jakarta: Ciputat Press, 2002), 77–80.

<sup>5</sup> Syamsuddin Abu 'Abdillāh Muḥammad ibn Abi Bakr Ibn Qayyim al-Jauziyyah, *I'lam al-muwaqī'in 'an rabb al-'alamin* (Beirut: Dar al-Jail, 1991), 3.

in capacity between families. Therefore, empirical research is needed to examine how Article 104 operates within the reality of family life and to assess the extent to which these provisions are responsive to children's welfare.

The phenomenon of child custody shows that there is a problem between legal norms and practices. *First*, Safitri and Ahmad examined the responsibility of parents for post-divorce child support by highlighting the gap between positive legal norms and the implementation of court decisions. Fathers' non-compliance remains systemic, while weak sanctions fail to deter violations or ensure children's rights, creating an *enforcement gap* in post-divorce child protection.<sup>6</sup>

*Second*, Muthiah, through a normative-empirical approach and a case study at the Tembilahan Religious Court, revealed that the failure to pay alimony was not only caused by juridical factors, but also by the weak internalization of the moral and social responsibilities of the father after divorce. This research emphasizes that the dimension of religious ethics plays a significant role, but has not been operationally integrated in the mechanism of execution of court decisions.<sup>7</sup>

*Third*, Kurnia, Salsabila, and Murofikoh more specifically studied the maintenance of children under five after divorce and found that this age group is most vulnerable to uncertainty in the fulfillment of alimony due to low obedience on the part of the father, weak execution of decisions, and lack of legal literacy in the community, which cumulatively worsens the welfare condition of early childhood.<sup>8</sup> *Fourth*, Andriyani et al. focused on the practice of deliberate neglect of alimony by fathers after divorce, by highlighting the aspect of *intentional neglect* that has an impact on the emergence of legal consequences, but the implementation of child protection still faces obstacles in the effectiveness of enforcement and the limitations of comprehensive child rights restoration instruments.<sup>9</sup>

The literature mapping indicates that previous studies have primarily focused on post-divorce child support, particularly parental responsibility, payment practices, court decisions, and law enforcement. However, limited attention has been given to the reconstruction of child maintenance after the father's death, especially regarding the implementation of Article 104 KHI, which regulates child maintenance responsibilities in the absence of the father. Moreover, the relationship between this issue and Islamic family law reform based on *maqāṣid al-sharī'ah* remains insufficiently explored.

<sup>6</sup> Dian Ayu Safitri and Muh Jufri Ahmad, "Parental Responsibility For Post-Divorce Child Support," *Court Review: Journal of Legal Research (e-ISSN: 2776-1916)* 4, no. 01 (January 2024): 34–56, Bahasa Indonesia, <https://doi.org/10.69957/cr.v4i06.1610>.

<sup>7</sup> Aulia Muthiah, "The Implementation Of Alimony Payments For Children After Divorce In The Perspective Of Moral Philosophy," *Wasaka Hukum* 12, no. 2 (August 2024): 1–15, <https://ojs.stihsa-bjm.ac.id/index.php/wasaka/article/view/141>.

<sup>8</sup> Chahya Naila Nisfu Kurnia, Diny Khalisha Salsabila, and Dede Ika Murofikoh, "Legal Analysis of the Obligation to Provide Post-Divorce Maintenance to Children Under Five," *Journal Evidence Of Law* 4, no. 3 (December 2025): 1818–26, <https://doi.org/10.59066/jel.v4i3.1955>.

<sup>9</sup> Andriyani Andriyani, Qodariah Barkah, and Ifrohati Ifrohati, "Intentional Neglect of Child Support by Fathers After Divorce," *Journal of Judicial Review* 27, no. 1 (June 2025): 187–202, <https://doi.org/10.37253/jjr.v27i1.10155>.

This gap demonstrates the need to extend research beyond post-divorce maintenance toward fatherless family situations as a substantively distinct legal condition. Accordingly, this study addresses three questions: (1) how is child maintenance practiced after the father's death in Indonesia; (2) what ideal model can ensure justice, sustainable maintenance, and child welfare; and (3) how can *maqāṣid al-sharī'ah* principles provide a normative basis for reformulating Islamic family law concerning child maintenance after the father's death? The study thus seeks to connect legal norms, social realities, and child-centered Islamic legal reform.

Based on this framework, this study aims to analyse child custody practices following the death of the father, formulate a model of child protection that ensures justice, and propose a framework for the reform of Islamic family law based on *maqāṣid al-sharī'ah*. It is hoped that this study will make a theoretical and practical contribution to the development of family law that is adaptive, humanistic, and oriented towards the best interests of the child.

## METHOD

This research is normative legal research with a qualitative approach that aims to explore, analyze, and reconstruct the norms of child care after the death of the father from the perspective of *maqāṣid al-sharī'ah*.<sup>10</sup> Normative legal research is used to examine law as a norm contained in laws and regulations, doctrines, and fiqh literature, as well as assess its relevance to contemporary legal issues.<sup>11</sup> In this study, attention is directed to the relationship between child custody, guardianship, inheritance, and child protection norms. In particular, the study places the Compilation of Islamic Law (KHI) Article 104 as the main norm that regulates the responsibility for child maintenance and financing, especially in the context of the sustainability of meeting the needs of children after the breakdown of the marriage bond or the death of one of the parties. This analysis of Article 104 is then strengthened by the provisions of Law No. 1 of 1974 concerning Marriage, which affirms the obligation of parents in maintaining and educating children for the best interests of children. In addition, the study also examined Law No. 35 of 2014 concerning Child Protection, which provides guarantees for the protection of children's rights, including the right to upbringing, maintenance, and protection from neglect. The three legal instruments were chosen because they are directly related to the principles of parental responsibility and the protection of the best interests of children in the family law system in Indonesia.

The approaches used include a statutory approach, a conceptual approach, and a comparative approach. The conceptual approach uses the principles of *maqāṣid al-sharī'ah*, specifically *ḥifẓ al-nafs*, *ḥifẓ al-nasl*, and *maṣlaḥah*, as the basis for evaluating

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<sup>10</sup> Morris L. Cohen dan Kent C. Olson, *Legal Research in a String*, edisi ke-6, Seri West Nutshell (St. Paul, Minn: West Pub. Co, 1996), 1.

<sup>11</sup> Soerjono Soekanto, *Introduction to legal research* (Jakarta: University of Indonesia Publisher (UI-Press), 2006), 43.

and reconstructing norms.<sup>12</sup> The main fiqh literature is limited to the Shafi'i madhhab that is relevant to the historical character of Indonesian Islamic law, especially *al-Muhadhdhab*, *I'ānat al-Ṭālibīn*, and *al-Majmū'*, then compared with the fiqh literature of other madhhabs if necessary to strengthen the analysis. The comparative approach compares Indonesia with Malaysia, Egypt, and Morocco because all three have a Muslim family law codification system and family law reform experience that can provide a comparative perspective.

The data source consists of primary and secondary legal materials. The literature was selected based on four criteria: direct relevance to child custody, guardianship, or inheritance; the academic or juridical authority of the source; up-to-date publications, especially the research of the last five years; and contributions to *the perspective of maqāṣid* or family law reform. Data collection was carried out through documentation studies and systematic literature search.<sup>13</sup> The data were analyzed textually, comparatively, and normatively-prescriptively to identify the gap between the prevailing norms and the need for child protection, then formulate a more adaptive, fair, and child-oriented legal reconstruction.<sup>14</sup>

## RESULTS AND DISCUSSION

### Conceptualization of Islamic Family Law

Islamic family law (*al-aḥwāl al-shakhṣiyyah*) is one of the most fundamental areas in the Islamic legal system, as it regulates internal relationships within family institutions, from marriage to inheritance. Terminologically, family law is understood as the whole legal norm that governs legal relationships arising from blood relations and marriage.<sup>15</sup> From an Islamic perspective, this concept has evolved into a set of rules that include *munākahāt* (marriage law), lineage (*nasab*), alimony (*nafaqah*), child custody (*ḥaḍānah*), guardianship (*wilāyah*), and inheritance (*mīrāth*). Tahir Mahmood emphasized that Islamic family law consists of the principles of religion-based law that comprehensively govern domestic relations, including the rights and obligations of family members.<sup>16</sup>

Wahbah az-Zuhaili expands this definition by emphasizing that Islamic family law covers the entire life cycle of the family, from its formation (marriage) to its dissolution (divorce and inheritance).<sup>17</sup> Meanwhile, Mustafa Ahmad al-Zarqa classifies its scope into three main subsystems: marriage, guardianship and will, and inheritance.<sup>18</sup> This approach shows that family law is not just a set of personal norms, but also has a broad social dimension, as it is directly connected to the structure of society.

In the Indonesian context, the *Compilation of Islamic Law (KHI)* adopts a similar

<sup>12</sup> Mahmud Marzuki, *Legal Research: Revised Edition* (Jakarta: Prenada Media, 2017), 133.

<sup>13</sup> Zainuddin Ali, *Legal Research Methods* (Jakarta: Sinar Grafika, 2021), 107.

<sup>14</sup> Cornelis Anthonie van Peursen, *Cultural Strategy* (Yogyakarta: Kanisius Publishing, 1976), 23; Peter R. Senn, *Social Science and Its Methods* (Boston: Holbrook Press, 1971), 5, <http://archive.org/details/socialscienceits0000senn>.

<sup>15</sup> Ali Afandi, *Hukum Waris, Hukum Keluarga, Hukum Pembuktian* (Bina Aksara, 1997), 93.

<sup>16</sup> Tahir Mahmood, *Family Law Reform in the Muslim World* (N. M. Tripathi, 1972), 2.

<sup>17</sup> Wahbah Zuhaili, *Al-Fiqh al-Islami Wa 'Adillatuhu* (Damascus: Dar Al-Fikr, 2008), 12.

<sup>18</sup> Mustafa Ahmad Az-Zarqa, *Madkhal al-Fiqh al-'Am* (Damaskus: Dar al-Qalam, 2012), 9.

structure by dividing Islamic family law into three main books: marriage, inheritance, and waqf. This reflects a codification process that aims to create legal unification and legal certainty. Abdurrahman explained that KHI is a synthesis of various schools of law (*madhhab*) and a response to the social needs of the Indonesian people.<sup>19</sup>

From the perspective of *maqāṣid al-sharī'ah*, Islamic family law not only aims to regulate formal relationships between family members, but also ensures the realization of benefits, justice, and protection for vulnerable parties, especially children. Auda places *maqāṣid* as the main orientation of Islamic law that allows norms to be studied holistically, openly, and in response to social changes.<sup>20</sup> In the context of family law, the principles of *ḥifẓ al-nafs*, *ḥifẓ al-nasl*, and *ḥifẓ al-māl* provide the basis for ensuring the sustainability of life, the protection of offspring, and the fulfillment of the material needs of children. Studies in classical literature such as al-Ghazālī in *al-Mustashfā* and al-Shāṭibī in *al-Muwāfaqāt* affirm that all the provisions of the Shari'ah are oriented towards the realization of benefits and the prevention of mafsadat, including in the institution of the family.<sup>21</sup>

Meanwhile, Ibn 'Ashūr in *Maqāṣid al-sharī'ah al-Islāmiyyah* emphasized that the protection of the family and offspring is a fundamental goal that must be realized through regulations that guarantee the welfare of children in real terms.<sup>22</sup> In contemporary discourse, Yūsuf al-Qaradāwī also emphasized that the application of family law must be oriented towards *maṣlaḥah mu'tabarāh*, so that the provisions on *nafaqah*, *ḥaḍānah*, and *wilāyah* do not stop at the legal-formal aspects, but must guarantee the protection and welfare of the child substantively.<sup>23</sup> Thus, the conceptualization of Islamic family law needs to place *maqāṣid* as an evaluative framework to assess whether the norms regarding *nafaqah*, *ḥaḍānah*, *wilāyah*, and *mīrāth* are truly able to guarantee the best interests and welfare of children in the context of changes in the family structure.

## **Normative and Comparative Foundations of Child Maintenance in Islamic and National Family Law**

### **1. Child Maintenance in Islamic and Indonesian Family Law**

*Nafaqah* is one of the central elements in Islamic family law, representing not only an economic obligation but also an ethical and spiritual responsibility within family relations. Conceptually, *nafaqah* in Islamic jurisprudence cannot be separated from the principle of *qiwāmah*, which positions the father as the primary responsible party for the welfare of the family. However, this principle is contextual in nature, as it is closely tied to economic capacity and social conditions. Wahbah az-Zuhaili emphasizes that the obligation of *nafaqah* must consider the standard of sufficiency

<sup>19</sup> Abdurrahman, *Compilation of Islamic law in Indonesia*, 16.

<sup>20</sup> Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* (International Institute of Islamic Thought, 2008), 1–9.

<sup>21</sup> Imam Al-Ghazali, *Al-Mustashfa*, Volume 1 (Cairo: Dar Al-Kutub al-Islamiyah, 1993), 95; Imam al-Syathibi, *Al-Muwāfaqāt fī Ushul as-Syariah* (Cairo: Dar al-Hadits, 2005), 1:22–25.

<sup>22</sup> M. al-Ṭāhir Ibn 'Ashur, *Maqāṣid al-sharī'ah al-Islāmiyyah* (Amman: Dar al-Nafā'is, 2006), 75–79.

<sup>23</sup> Yusuf Al-Qaradāwī, *Fiqh Al-Usrah Wa-Qadāyā al-Mar'ah* (Turkey: Al-Dar Al-Shāmiyah, 2017), 620.

(*kifāyah*) and prevailing social customs (*ʿurf*), making it inherently flexible.<sup>24</sup> The legal maxim “*al-maʿrūf ʿurfān ka al-mashrūʿ shartan*” (what is customarily recognized is treated as if it were stipulated as a condition) reinforces the idea that the standard of *nafaqah* can be adjusted in accordance with living social practices within society.

In Indonesia’s positive legal system, the concept of *nafaqah* has been institutionalized through Law No. 1 of 1974 on Marriage and the Compilation of Islamic Law (*Kompilasi Hukum Islam/KHI*), particularly Article 80 and Article 104. These regulations affirm that the obligation of financial support is a legal consequence of family relations. However, in practice, these provisions have not been fully effective, especially in cases involving the death of the father. The norm that transfers responsibility to the paternal family often lacks sufficient coercive force, creating a gap between legal norms and their implementation.<sup>25</sup>

Recent research shows that the dynamics of child support cannot be separated from changes in social structures and the transformation of roles within contemporary Muslim families. A study by Ubaidilah and Husna emphasizes that child maintenance regulations in Islamic family law function not merely as an individual obligation, but also as an instrument of social welfare closely linked to public policy and the protection of vulnerable groups, particularly women and children.<sup>26</sup> This indicates that the concept of child maintenance has expanded in meaning from merely a private obligation to becoming part of a broader social protection system.

Furthermore, a study by Aziz et al. reveals that in the practice of religious courts, the determination of child maintenance after divorce or in non-intact family conditions demonstrates increasingly contextual judicial considerations, particularly by taking into account the economic conditions of the parties and the social implications for the child.<sup>27</sup> These findings indicate a shift from a purely normative approach toward one that is more responsive to social realities, although it has not yet been fully standardized within the legal system.

Furthermore, a study by Fadhilah and Alamsyah highlights significant changes in child maintenance practices in modern society, where women’s economic contributions have increasingly grown and, in some cases, have even become the primary source of family support.<sup>28</sup> This phenomenon indicates a redefinition of

<sup>24</sup> Zuhaili, *Al-Fiqhu al-Islami Wa ʿAdillatuhu*, 765.

<sup>25</sup> Abdurrahman, *Kompilasi hukum Islam di Indonesia*, 16.

<sup>26</sup> Nizam Ubaidilah and Asmaul Husna, “Regulation of Maintenance in Islamic Family Law: Implications for Family Welfare,” *International Journal of Health, Economics, and Social Sciences (IJHESS)* 5, no. 4 (2023): 601–612–601–612, <https://doi.org/10.56338/ijhess.v5i4.6639>.

<sup>27</sup> Abdul Aziz et al., “Post-Divorce Maintenance in Contemporary Islamic Family Law: An Empirical Study of Judges’ Considerations at the East Jakarta Religious Court,” *Legitima : Jurnal Hukum Keluarga Islam* 7, no. 1 (2024): 1–17, <https://doi.org/10.33367/legitima.v7i1.6429>; Achmad Sulton, “Comparative Study of Reconciliation after Divorce According to the Hanafi Opinion and the Hambali Opinion,” *Al-Jadwa: Jurnal Studi Islam* 2, no. 2 (2023): 186–94, <https://doi.org/10.38073/aljadwa.v2i2.1026>.

<sup>28</sup> Nur Fadhilah and Muhammad Nurravi Alamsyah, “Reinterpreting Financial Responsibilities in Islamic Marriage: A Maqasid al-Usrah Perspective,” *Al-Syakhsiyyah: Journal of Law and Family Studies* 7, no. 1 (2025): 1–26, <https://doi.org/10.21154/syakhsiyyah.v7i1.10449>.

gender roles within Islamic family law, which in turn calls for a conceptual reconstruction of maintenance obligations to better align with contemporary social dynamics.

From a theoretical perspective, this condition reflects a gap between *law in books* and *law in action*. Lawrence M. Friedman explains that the effectiveness of law is determined by the interaction between legal structure, legal substance, and legal culture.<sup>29</sup> In the context of child maintenance, the imbalance among these three aspects causes the law to function less effectively. Therefore, a reconstruction of the concept of maintenance is needed—one that is not solely based on biological relationships, but also grounded in principles of social justice. The legal maxim that harm must be eliminated provides normative legitimacy for state intervention to ensure the fulfillment of child maintenance, so that the law does not remain at a merely normative level, but instead functions as an effective instrument of protection in modern society.

The obligation of child maintenance in Islamic law has a strong normative foundation, both in textual sources (the Qur'an and Hadith) and in the construction of classical jurisprudence. Scholars from various legal schools agree that the father is the primary party responsible for child maintenance based on lineage and guardianship. This principle is affirmed in Q.S. al-Baqarah (2):233:

وَالْوَلَدُ يُرْضَعُ أَوْلَاهُ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُتِمَّ الرَّضَاعَةَ وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا لَا تُضَارُّ وَلاَ وَلَدُهَا وَلَا مَوْلُودٌ لَهُ بِوَلَدِهِ وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ فَإِنْ أَرَادَا فِصَالًا عَنْ تَرَاضٍ مِنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا وَإِنْ أَرَدْتُمْ أَنْ تَسْتَرْضِعُوا أَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا آتَيْتُم بِالْمَعْرُوفِ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ ﴿٢٣٣﴾

“‘Divorced’ mothers will breastfeed their offspring for two whole years, for those who wish to complete the nursing ‘of their child’. The child’s father will provide reasonable maintenance and clothing for the mother ‘during that period’. No one will be charged with more than they can bear. No mother or father should be made to suffer for their child. The ‘father’s’ heirs are under the same obligation. But if both sides decide—after mutual consultation and consent—to wean a child, then there is no blame on them. If you decide to have your children nursed by a wet-nurse, it is permissible as long as you pay fairly. Be mindful of Allah, and know that Allah is All-Seeing of what you do.”

This is further reinforced in Q.S. At-Talaq (65):7

لِيُنْفِقَ ذُو سَعَةٍ مِّن سَعَتِهِ وَمَنْ قُدِرَ عَلَيْهِ رِزْقُهُ فَلْيُنْفِقْ مِمَّا آتَاهُ اللَّهُ لَا يَكْلِفُ اللَّهُ نَفْسًا إِلَّا مَا آتَاهَا سَيَجْعَلُ اللَّهُ بَعْدَ عُسْرٍ يُسْرًا

<sup>29</sup> Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, 1975), 15.

*“Let the man of wealth provide according to his means. As for the one with limited resources, let him provide according to whatever Allah has given him. Allah does not require of any soul beyond what He has given it. After hardship, Allah will bring about ease.”*

In Islamic legal literature, child maintenance is understood not only as a moral obligation, but also as a legally binding right of the child.<sup>30</sup> Conceptually, this obligation is rooted in legal maxims such as the principle that responsibility is proportional to benefit, and the principle that affirms the legal relationship between father and child as the basis for reciprocal rights and obligations. In addition, the maxim stating that whatever is necessary to fulfill a primary obligation becomes obligatory itself reinforces that all means required to ensure a child’s survival must also be fulfilled. Thus, child maintenance is not merely an additional duty, but an integral part of the protection of life and lineage within the framework of *maqasid al-sharia*. A. Djazuli emphasizes that these legal maxims function as universal principles that connect normative teachings with the practical realities of society.<sup>31</sup>

In the Indonesian context, these principles have been adopted in various regulations, particularly Law No. 1 of 1974 and the Compilation of Islamic Law (KHI). However, this process of codification reflects a transformation from doctrinal jurisprudence into positive law that is administrative and institutional in nature. Atho Mudzhar explains that Islamic family law in Indonesia is the result of an interaction between classical texts, social context, and state policy, producing a hybrid form of law.<sup>32</sup> This transformation also indicates that Islamic law no longer stands as a single authority based solely on scholars, but has become part of the national legal system that demands certainty, unification, and effective implementation.

However, this is where both epistemological and practical problems emerge. When jurisprudential norms rooted in traditional social structures are incorporated into a modern state system, tensions often arise between normative ideals and empirical realities. Article 104 of the Compilation of Islamic Law (KHI) specifically stipulates that in the event of the father’s death, the obligation of child maintenance is transferred to the father’s family or guardian. This provision reflects the classical concept of responsibility within the paternal lineage. However, as criticized by Satria Effendi, modern family structures no longer consistently support such a system of collective responsibility, causing this norm to often lose its operational effectiveness in practice.<sup>33</sup>

Furthermore, Amir Syarifuddin emphasizes that Islamic family law in Indonesia cannot be understood as a literal reproduction of classical jurisprudence,

<sup>30</sup> Amiur Nuruddin, *Hukum perdata Islam di Indonesia: studi kritis perkembangan hukum Islam dari fikih, UU no. 1/1974, sampai KHI* (Kencana, 2004), 23.

<sup>31</sup> Prof H. A. Djazuli, *Kaidah-Kaidah Fikih* (Prenada Media, 2019), 2–3.

<sup>32</sup> Mohamad Atho Mudzhar, *Islam and Islamic Law in Indonesia a Socio-Historical Approach* (Religious Research and Development and Training Ministry of Religious Affairs Republic of Indonesia, 2003), 94.

<sup>33</sup> Firdaus Al-Muqaddas, *Pemikiran Satria Effendi M. Zein Dalam Pembaruan Hukum Perdata Islam Di Indonesia* (Landasan Ilmu, 2017), 6.

but rather as the result of selection, adaptation, and even reinterpretation based on considerations of public welfare.<sup>34</sup> In this context, Article 104 of the Compilation of Islamic Law (KHI) can be seen as a partial adoption of classical jurisprudence that has not been fully contextualized. As a result, the provision tends to remain normatively ideal, yet weak in its practical implementation.

Empirical studies also show a significant gap between *law in books* and *law in action*. Soerjono Soekanto states that the effectiveness of law is strongly influenced by five main factors: legal substance, law enforcement officers, facilities and infrastructure, society, and legal culture.<sup>35</sup> In cases of child maintenance after the father's death, these five factors often do not function optimally. The legal substance has not fully accommodated the complexity of social realities, law enforcement institutions face limitations in addressing non-litigation cases, and the legal culture of society still relies on informal mechanisms that do not always guarantee justice for the child.

On the other hand, the thought of Indonesian scholars such as Hasbi ash-Shiddieqy regarding the importance of "Indonesian Fiqh" becomes highly relevant in this context. Hasbi emphasizes that Islamic law should be developed in accordance with the social and cultural characteristics of Indonesian society, rather than merely adopting jurisprudential products from the Middle East.<sup>36</sup> This idea implies that the reconstruction of child maintenance law needs to be carried out by taking into account Indonesia's social realities, including changes in family structures, economic conditions, and social protection systems.

Thus, the main problem in the normative foundation of child maintenance does not lie in the absence of legal norms, but in the mismatch between existing norms and the social realities they are meant to address. The legal maxim that legal rulings may change according to changes in time and place becomes highly relevant in affirming that shifts in social context require renewal in legal formulation.<sup>37</sup> Therefore, an approach is needed that is not only normative, but also contextual and based on *maqasid al-sharia*, so that child maintenance law can truly function as an instrument of protection and justice for children in modern society.

## **2. Comparative Perspectives on Child Maintenance in Muslim-Majority Countries**

A comparison of child custody laws in Muslim countries shows that the obligation of *nafaqah* is not uniform. Classical jurisprudence places the father as the main person in charge, but the positivization of Islamic law results in different configurations according to the legal system and policies of each country. Dupret et al. emphasized that positivization changes the translation of *fiqh* norms into state law, making the *fiqh*-legislation-judicial relationship an important arena in the formation

<sup>34</sup> Syarifuddin, *Meretas Kebekuan Ijtihad*, 77.

<sup>35</sup> Soekanto, *Pengantar penelitian hukum*, 43.

<sup>36</sup> Ali, *Hukum Islam*, 210.

<sup>37</sup> Djazuli, *Kaidah-Kaidah Fikih*, 14.

of contemporary family law.<sup>38</sup> This perspective is important for Indonesia because the issue of Article 104 of the KHI cannot be separated from the broader question of how the duty of child care is transformed when the father dies, and the structure of family responsibilities changes.

Malaysia provides the closest comparison to the problem of this study. Article 73(2) of the Islamic Family Law (Selangor) of 2003 explicitly places the paternal family as the party obliged to provide maintenance if the father dies, goes missing, or is unable to carry out his obligations. Abdul Aziz et al. found that the provision has normatively provided a mechanism for the transfer of responsibility, but its effectiveness is still limited due to the lack of understanding of mothers and children of their rights and the weak application of the provision in practice. The study used doctrinal studies that were reinforced by interviews with judges, sharia lawyers, and academics, thus showing that the existence of norms does not automatically result in effective protection.<sup>39</sup> In fact, Supaat et al.'s research explains that the existing legal framework is still inadequate in resolving child support issues when the father dies or is incapacitated, and recommends legal reform and judicial practices.<sup>40</sup> These findings have immediate relevance for Indonesia: the issue is not only who is normatively responsible, but how those responsibilities can be activated, prosecuted, and guaranteed to be sustained.

Malaysia also shows that the concept of *nafaqah* has expanded according to the needs of modern life. Child maintenance includes food, clothing, shelter, health, education, and other needs relevant to the development of society, so that the measure of maintenance cannot be frozen on basic material needs alone. This perspective reinforces the idea that child welfare should be understood substantively, not just as the fulfillment of biological needs.<sup>41</sup> In the context of this study, such an approach opens up space to reassess whether the construction of responsibility in Article 104 of the KHI is adequate to ensure the sustainability of education, health, housing, and the developmental needs of children after the loss of the father.

Egypt and Morocco show two different models of positivization. In Egypt, the obligation of alimony remained on the father, while *ḥaḍānah* (upbringing) and *wilāyah* (guardianship) were institutionally separated.<sup>42</sup> The latest reforms even

<sup>38</sup> Baudouin Dupret et al., "Paternal Filiation in Muslim-Majority Environments: A Comparative Look at the Interpretive Practice of Positive Islamic Law in Indonesia, Egypt, and Morocco," *Journal of Law, Religion and State* 10, nos. 2–3 (2022): 167–217, <https://doi.org/10.1163/22124810-20230002>.

<sup>39</sup> Norazlina Abdul Aziz et al., "Duty Of Paternal Family Members In The Maintenance Of Children According To Section 73(2) Of Islamic Family Law (Selangor) Enactment 2003," *IJUM Law Journal* 29, no. S1 (2021): 111–34, <https://doi.org/10.31436/ijumlj.v29iS1.638>.

<sup>40</sup> Dina Imam Supaat, Abidah Abdul Ghafar, and Nurfadhilah Che Amani, "Vulnerability and Legal Protection: Exploring Islamic Family Law in Malaysia," *Canon: Journal of Malaysian Law* 36, no. 2 (July 2024): 181–212, [https://doi.org/10.37052/kanun.36\(2\)no2](https://doi.org/10.37052/kanun.36(2)no2).

<sup>41</sup> Endad Musaddad et al., "Guaranteeing the Rights of Children and Women Post-Divorce: A Comparative Study Between Indonesia and Malaysia," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, April 18, 2025, 1–14, <https://doi.org/10.24090/volksgeist.v8i1.12214>.

<sup>42</sup> Passent Moussa, "The Making of Egypt's Personal Status Law: An Opportunity for Meaningful Gender Reform or a Contested Field of Power Struggle?," *Arab Reform Initiative*, October 24, 2024,

changed the order of parenting priorities by placing fathers second only to mothers—a significant change from the old provision that previously placed fathers in sixteenth, with a 15-year parenting age limit and a new mechanism for calculating alimony based on fathers' income data from employers, including the establishment of a family welfare fund to support the financing of personal status cases.<sup>43</sup>

Morocco took a different path of reform through Moudawana. In addition to raising the age of marriage and expanding women's divorce rights, recent reforms make child custody and guardianship the shared responsibility of both fathers and mothers, both during and after marriage, while allowing remarried mothers to retain custody of children.<sup>44</sup> However, activists consider that this reform has not touched the patriarchal roots of the family law system as a whole.<sup>45</sup> These two models make it clear that positivization does not result in a single separation between subsistence, hadanah, and territory, but rather a configuration that is continuously negotiated through the legislative process and socio-political pressure of each country.

A comparison of the four systems shows a pattern: the child is still entitled to maintenance, but the transfer of responsibility when the father is unable to afford it varies. Malaysia regulates the paternal family as a surrogate; Egypt institutionally separates alimony, hadanah, and territory<sup>46</sup>; Morocco shifts towards stronger child protection; Indonesia through Article 104 of the KHI still needs clarity on the continuity of alimony after the death of the father. The reconstruction of Article 104 of the KHI needs to build tiered responsibility, certainty of guardianship, sustainability of financing, and the best interests of the child, in line with *maqāṣid al-sharī'ah*.

#### a. Comparative Analysis and Implications for Article 104 KHI

Comparative law shows that the issue of child custody after the loss of the father's capacity is not solely related to who formally bears the obligation, but also to how the law guarantees the continuity of children's rights when the family structure changes. Azwar et al.'s study of Indonesia, Malaysia, and Turkey shows that the configuration of filiation has a direct effect on maintenance and inheritance rights, while differences in legal systems and school choices result in different levels of child protection. Indonesia and Turkey are considered more

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<https://www.arab-reform.net/publication/the-making-of-egypts-personal-status-law-an-opportunity-for-meaningful-gender-reform-or-a-contested-field-of-power-struggle/>.

<sup>43</sup> Sarah Barakat, *The Cost of Justice: Exploratory Assessment on Women's Access to Justice in Lebanon, Jordan, Egypt and Yemen* (Oxfam, 2018), <https://doi.org/10.21201/2018.2593>; Hesham Maged Abdel Fatah and Gamal Shama, "Egyptian Personal Status Law Is a Crime against Divorce Children," *Journal of Psychiatry and Psychiatric Disorders* 4, no. 4 (2020): 139–43, <https://doi.org/10.26502/jppd.2572-519X0101>.

<sup>44</sup> Selman Zahid Özdemir, "Islamic Family Law in Morocco: Historical Developments and Reforms," *Ilahiyat Studies* 16, no. 1 (2025): 107–22, <https://doi.org/10.12730/is.1585555>.

<sup>45</sup> Carolyn Barnett, "Women's Rights and Misperceived Gender Norms Under Authoritarianism," *Comparative Political Studies* 57, no. 14 (2024): 2281–312, <https://doi.org/10.1177/00104140231193010>.

<sup>46</sup> Anna Lundberg et al., "Vernacularizing the Best Interests of the Child: Comparative Insights From Three Legal Systems," *Jurnal Teori Dan Ulasan Keluarga*, ahead of print, February 18, 2026, <https://doi.org/10.1111/jfr.70043>.

accommodating to children's rights than Malaysia because it opens up space for the recognition of paternal relationships through certain legal mechanisms.<sup>47</sup> These findings are important because they show that the sustainability of child custody cannot be separated from certainty regarding *the fate*, guardianship, and legal relationship between the child and family members that can replace the father's position.

The main weakness does not always lie in the absence of norms, but in the fragmentation of responsibilities. The law can designate certain parties as the breadwinner, but without a mechanism for identifying the responsible party, claim procedures, and financing guarantees, the norm has the potential to become declarative. A study by Nasohah et al., on the protection of child welfare in Islamic family law in Southeast Asia, shows that many legal provisions are still formulated in general, so judges must develop indicators of protection through interpretation and ruling, including taking into account the age of the child, the economic condition of the caregiver, health, residence, education, and the parenting environment.<sup>48</sup> Thus, children's welfare should not be reduced to a matter of financial transfer, but must be understood as the continuation of material needs, education, health, parenting, and child development.

This perspective has critical implications for Article 104 of the KHI. Provisions that only designate the father's or guardian's family as the responsible party do not necessarily provide a solution when the paternal family does not have economic ability, its existence is unknown, or it does not carry out its obligations. In fact, the automatic transfer of responsibility to the paternal family can result in *responsibility without enforceability*: there are normative obligations, but there are not sufficient instruments to ensure their implementation.<sup>49</sup> In this context, the concept of responsibility must move from a genealogical model to a child welfare-oriented model. This means that kinship remains the basis for the allocation of responsibility, but the best interests of the child are the main parameter in determining who is factually and economically most capable of ensuring the sustainability of maintenance.<sup>50</sup>

This perspective has critical implications for Article 104 of the KHI. Provisions that only designate the father's or guardian's family as the responsible

<sup>47</sup> Zainal Azwar et al., "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 (2024): 62–85, <https://doi.org/10.24260/jil.v5i1.2326>.

<sup>48</sup> Zaini Nasohah et al., "Elements of Child Welfare Protection in Islamic Family Law in Southeast Asian Countries," *Samarah: Journal of Family Law and Islamic Law* 9, no. 3 (September 2025): 1349–70, <https://doi.org/10.22373/sjhl.v9.i3.26746>.

<sup>49</sup> Alamsyah Alamsyah et al., "Islamic Judicial Activism in Determining Child Maintenance: Ex Officio Authority and Peaceful Settlement in Indonesian Religious Courts," *Al-Istinbath: Jurnal Hukum Islam* 10, no. 2 (2025): 671–99, <https://doi.org/10.29240/jhi.v10i2.12755>.

<sup>50</sup> Achmad Kadarisman et al., "Best Interest Of The Child In Islamic Family Law: Integrating Maqāṣid Al-Sharī'ah And Double Movement Theory In Ḥaḍānah Cases," *Jurnal Al-Dustur* 8, no. 2 (2025): 155–74, <https://doi.org/10.30863/aldustur.v8i2.10459>.

party do not necessarily provide a solution when the paternal family does not have economic ability, its existence is unknown, or it does not carry out its obligations. In fact, the automatic transfer of responsibility to the paternal family can result in *responsibility without enforceability*: there are normative obligations, but there are not sufficient instruments to ensure their implementation.<sup>51</sup> In this context, the concept of responsibility must move from a genealogical model to a child welfare-oriented model. This means that kinship remains the basis for the allocation of responsibility, but the best interests of the child are the main parameter in determining who is factually and economically most capable of ensuring the sustainability of maintenance.<sup>52</sup>

This comparison also shows the importance of the role of the judiciary in filling the normative gap. Research by Arrasyid et al. on Indonesian family law reform through the Supreme Court's Circular Letter shows that reform does not only take place through legislation, but also through legal formulations born from the judicial chamber forum. They found that from 2012–2022 there were 458 new legal formulations through SEMA, with 109 of them related to Islamic civil law; All of these developments show the integration of *the principles of maqāṣid al-sharī'ah*, human rights, equality, justice, and *maṣlaḥah* in the process of legal reform.<sup>53</sup> These findings provide the possibility that the void or ambiguity of Article 104 of the KHI does not necessarily have to wait for legislative changes, but can be developed through a consistent and child protection-oriented judicial interpretation.

However, reform through the judiciary also has limitations. Muchlis et al. show that although the Supreme Court has played a role in family law reform through progressive rulings and the formulation of the Religious Chamber, its implementation still faces variations in the compliance of judges and limited public access to information about the results of the formulation.<sup>54</sup> Therefore, the reconstruction of Article 104 is not enough to produce a new interpretation; it requires an institutional design that allows the rights of the child to be known, claimed, and effectively exercised.

The reconstruction of Article 104 of the KHI needs to lead to tiered and sustainable responsibility. The paternal family is one of the mechanisms, not the only, mechanism after the father's death—considering economic capacity, proximity to parenting, certainty of guardianship, inheritance, and the best interests of the child, along with state intervention if the family is unable to afford

<sup>51</sup> Alamsyah et al., "Islamic Judicial Activism in Determining Child Maintenance."

<sup>52</sup> Kadarisman et al., "Best Interest Of The Child In Islamic Family Law."

<sup>53</sup> Fauzan Arrasyid, Pagar Pagar, and Dhiauddin Tanjung, "Islamic Family Law Reform in Indonesia Through Supreme Court Circulars: A Maqasid Sharia Perspective," *Ulul Albab: Journal of Islamic Law Studies and Research* 6, no. 2 (May 2024): 208–25, <https://doi.org/10.30659/jua.v6i2.29236>.

<sup>54</sup> Muchlis et al., "The Supreme Court and Islamic Family Law Reform: A Review of Policy Direction and Implementation Challenges," *Jurnal Hukum Dan Peradilan* 14, no. 3 (2025): 677–700, <https://doi.org/10.25216/jhp.14.3.2025.677-700>.

it. This reform changed the orientation from “who is obliged to pay” to “how the rights of the child are fulfilled,” in line with *maqāṣid al-sharī‘ah*.

### 3. Reconstruction and Legal Reform in the Perspective of Social Theory and Islamic Law

Legal reconstruction in the context of Islamic family law cannot be understood merely as a technical effort to amend norms, but rather as an epistemological process that connects normative texts, social realities, and the objectives of the law itself. Yusuf al-Qaradawi emphasizes that reconstruction must preserve constant values while also allowing room for change, so that Islamic law remains authentic yet responsive to the dynamics of the time.<sup>55</sup> In this context, the reconstruction of child maintenance after the death of the father is not a deviation from the tradition of Islamic jurisprudence, but rather a continuation of the principle of renewal that revitalizes the spirit of justice within Islamic law.

From the perspective of social theory, the idea of Anthony Giddens on structuration theory provides an important framework for understanding the relationship between legal structures and social practices. Giddens rejects the dichotomy between structure and agency, and argues that law as a structure is only effective when it is internalized and reproduced within social practices.<sup>56</sup> In the context of child maintenance, legal norms that shift responsibility to the father’s extended family do not always function effectively due to the lack of adequate social support structures. This indicates that legal reconstruction must take into account changes in social relations, including the weakening of extended family solidarity and the increasing role of the state in social protection.

Within the framework of Indonesian positive law, this reconstruction has both constitutional and juridical foundations. Law No. 1 of 1974 on Marriage and the Compilation of Islamic Law (KHI) provide a normative basis regarding maintenance obligations, yet they do not explicitly regulate mechanisms for child protection in cases where the father has passed away. In addition, Law No. 35 of 2014 on Child Protection affirms that the state is responsible for ensuring the fulfillment of children’s rights, including the right to survival and well-being. This creates space for the reconstruction of child maintenance law that is not solely based on family relations, but also involves the responsibility of the state as a guardian of public interest.

Recent research reinforces the urgency of this reconstruction. A study by Ningsih et al. shows that family law reforms in Muslim-majority countries tend to move toward strengthening child protection through state intervention and the

<sup>55</sup> Yusuf Al-Qaradawi, *Fiqh Al-Awlawiyyaat Dirasat Jadidat Fi Daw’ Al-Qur’an Wal Sunah* (Risalah Publishers, 2000), 10.

<sup>56</sup> Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (University of California Press, 1986), 25.

reinterpretation of classical norms.<sup>57</sup> Furthermore, a study by Majid emphasizes that the maqasid al-sharia approach is increasingly being used in family law reform to address contemporary issues, including child maintenance and gender justice.<sup>58</sup> In addition, a study by Darna et al. shows that the integration of Islamic law and state social policy has become a major trend in family law reform in Southeast Asia.<sup>59</sup>

Thus, the reconstruction of child maintenance law after the father's death must be understood as an integrative process that combines the principles of Islamic jurisprudence, social theory, and modern legal policy. Legal maxims such as the principle that harm must be eliminated and that the authority of the ruler is contingent upon public welfare provide normative legitimacy for expanding responsibility from the private to the public sphere. Therefore, legal reconstruction is not only aimed at improving norms, but also at ensuring that the law truly functions as an instrument of justice and protection for children in a continuously evolving society.

#### **4. Judicial Practice and the Dynamics of Islamic Family Law Reform**

The Religious Courts play a strategic role in implementing Islamic family law in Indonesia, including cases of child maintenance. In recent decades, there has been a paradigm shift in judicial practice from a legalistic-formalistic approach toward a more substantive and contextual one. Judges no longer rely solely on normative texts, but also consider social realities, the economic conditions of the parties, and the best interests of the child. This shift is in line with Satjipto Rahardjo's idea of progressive law, which positions law as a means to achieve substantive justice rather than merely formal certainty.<sup>60</sup> In this context, judges play an active role as functional law-makers, meaning they interpret and even develop the law to respond to the needs of society.

One concrete form of this development is the application of a dynamic approach in determining the amount of child maintenance. Judges have begun to consider variables such as the child's age, educational needs, inflation, and the financial capacity of the obligated party. This approach demonstrates an integration between normative considerations and economic rationality. A recent study by Nasution and Muchtar shows that religious courts in Indonesia have begun adopting a contextual *ijtihad*-based approach in determining maintenance, taking into account principles of distributive justice.<sup>61</sup> This shows that judicial practice is no longer static, but evolves in line with social dynamics.

<sup>57</sup> Ayu Sari Ningsih et al., "Reforming Islamic Family Law: The Relevance of Ibn Qayyim al-Jawziyyah's Concept of Legal Change," *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi Dan Keagamaan* 12, no. 2 (2025): 1, <https://doi.org/10.29300/mzn.v12i1.7087>.

<sup>58</sup> Abdul Majid, "Islamic Legal Reform Based On Maqāṣid Syarī'ah: A Study Of Al-Ghazālī's Thoughts And Its Relevance In The Context Of Indonesian Family Law," *Usrah: Jurnal Hukum Keluarga Islam* 6, no. 4 (2025): 1–11, <https://doi.org/10.46773/usrah.v6i4.2195>.

<sup>59</sup> Andi Darna et al., "Development and Practice of Islamic Law Codification in Southeast Asia," *Legitimasi: Jurnal Hukum Pidana Dan Politik Hukum* 14, no. 1 (2025): 1–19, <https://doi.org/10.22373/legitimasi.v14i1.30008>.

<sup>60</sup> Satjipto Rahardjo, *Ilmu Hukum* (Citra Aditya Bakti, 2014), 45.

<sup>61</sup> Hotnidah Nasution and Ahmad Rifqi Muchtar, "Access to Justice for Women and Children in Divorce Cases in the Indonesian Religious Courts," *AHKAM: Jurnal Ilmu Syariah* 20, no. 2 (2020), <https://doi.org/10.15408/ajis.v20i2.15702>.

However, this development is not yet fully consistent. One of the main issues is the absence of standardized guidelines for determining child maintenance, resulting in disparities in court decisions. From a legal theory perspective, this condition reflects a tension between legal certainty and equity. Lon L. Fuller argues that good law must satisfy principles of consistency and predictability; however, in family law practice, flexibility is often necessary to achieve substantive justice.<sup>62</sup>

Another important constraint is the position of the Compilation of Islamic Law (KHI) as a legal instrument that is not equivalent to statutory law, which limits its binding force. This results in weak normative legitimacy in judicial practice. A study by Abdurrahman shows that the KHI is the result of a compromise between various schools of Islamic jurisprudence and Indonesia's social needs; however, it still requires strengthening in its legislative aspect in order to have stronger enforceability.<sup>63</sup> In practice, judges often have to engage in creative interpretation to fill normative gaps, especially in cases that are not explicitly regulated, such as child maintenance after the father's death.

The absence of specific regulations regarding child maintenance in such situations creates what is known in legal theory as a legal vacuum. In this condition, judges are required to engage in *rechtsvinding* (legal discovery). Sudikno Mertokusumo emphasizes that legal discovery is the process of concretizing general norms into individual cases through legal interpretation and construction.<sup>64</sup> In this context, judges often refer to general principles of Islamic law, such as the principle that harm must be eliminated and the principle that the ruler's policy toward the people must be based on public welfare, as the basis for judicial consideration in their rulings.<sup>65</sup>

In international scholarship, Islamic family law reform shows a similar tendency. Noel J. Coulson argues that family law reforms in the Muslim world are often carried out through the methods of *takhayyur* (selective adoption among legal schools) and reinterpretation in order to adapt to the needs of the time.<sup>66</sup> Lynn Welchman explains that many Muslim-majority countries have developed family law through simultaneous legislative and judicial approaches in order to strengthen the protection of women and children.<sup>67</sup>

In the Indonesian context, a study by Arrasyid et al. shows that religious court judges increasingly use a *maqasid al-sharia* approach in deciding family cases, particularly those involving the interests of children. This approach enables judges to move beyond textual limitations and focus on the objectives of the law, namely public

<sup>62</sup> Lon L. Fuller, *The Morality of Law*, Rev. ed, Storrs Lectures on Jurisprudence 1963 (Yale University Press, 1977), 39.

<sup>63</sup> Abdurrahman, *Kompilasi hukum Islam di Indonesia*.

<sup>64</sup> Sudikno Mertokusumo, *Penemuan Hukum : Sebuah Pengantar* (Liberty, 2009), 16.

<sup>65</sup> Holilur Rohman, "Maqasid Al-Syari'ah Mazhab Syafi'i Dan Urgensinya Dalam Ijtihad Kontemporer," *Jurnal Hukum Islam* 16, no. 2 (2018): 188–204, <https://doi.org/10.28918/jhi.v16i2.1737>.

<sup>66</sup> Noel J. Coulson, *A History of Islamic Law* (Aldine Transaction, 2011), 201.

<sup>67</sup> Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam University Press, 2007), 78.

welfare.<sup>68</sup> This is in line with the legal maxim stating that legal rulings may change in accordance with changes in time and place, which affirms that law can evolve in response to shifting social contexts.

However, various studies also show that family law reform in Indonesia remains partial and not yet systematically integrated. Regulatory fragmentation, limited institutional capacity, and the lack of synergy between state law and social policy are the main obstacles. From the perspective of Lawrence M. Friedman, the effectiveness of law depends on three main elements: structure, substance, and legal culture.<sup>69</sup> These three elements in the Indonesian context still show an imbalance, thereby hindering the optimization of legal protection for children.

Thus, the practice of religious courts in Indonesia demonstrates a fairly progressive dynamic of legal reform, yet it still faces significant structural and normative challenges. Reform of Islamic family law cannot rely solely on judicial interpretation, but requires strengthened regulations, standardization of decisions, and integration with social policy. Without such measures, efforts to protect children's rights in the context of maintenance after the father's death will remain in a state of uncertainty between legal norms and social realities.

### **5. *Maqāṣid al-sharī'ah* as a Framework for the Reform and Reconstruction of Child Maintenance Law**

Maqasid al-sharia is a philosophical approach that positions Islamic law not merely as a set of textual norms, but as a value system oriented toward achieving public welfare and preventing harm. Al-Shatibi emphasizes that all Islamic legal rulings aim to preserve five fundamental aspects: religion, life, intellect, lineage, and property. In the context of child maintenance, the obligation to fulfill a child's needs is directly related to the protection of life and lineage, making it not only an individual duty but also a collective responsibility with a social dimension.<sup>70</sup>

The thought of Ibn Ashur expands the scope of maqasid by distinguishing between general maqasid and specific maqasid. General maqasid relate to universal principles of Sharia such as justice and public welfare, while specific maqasid are connected to the particular objectives of a legal ruling, including the protection of children within family law.<sup>71</sup> This approach provides methodological flexibility in interpreting the law, allowing for the reconstruction of norms in accordance with changing social contexts. Ahmad al-Raysuni emphasizes that maqashid al-shariah should be understood as an ethical framework that directs all Islamic legal products to be oriented towards the comprehensive well-being of humanity.<sup>72</sup>

<sup>68</sup> Fauzan Arrasyid et al., "Islamic Family Law Reform in Indonesia Through Supreme Court Circulars: A Maqasid Sharia Perspective," *Ulul Albab: Jurnal Studi Dan Penelitian Hukum Islam* 6, no. 2 (2024): 208–25, <https://doi.org/10.30659/jua.v6i2.29236>.

<sup>69</sup> Friedman, *The Legal System*, 15.

<sup>70</sup> Ibrahim bin Musa As-Syatibi, *Al-Muwafaqat Fi Usul al-Shari'ah* (Dar Al-Ma'arif, 2003), 8.

<sup>71</sup> Muhammad Al-Tahir Ibn Ashur, *Treatise on Maqasid Al-Shariah* (IIIT, 2006), 251.

<sup>72</sup> Ahmad Al-Raysuni, *Imam Al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law* (International Institute of Islamic Thought (IIIT), 2005), 19.

In a contemporary context, the maqashid approach has undergone significant development through Jasser Auda's thought, which introduces a systems approach to understanding Islamic law. Auda emphasizes that Islamic law should be viewed as an open system capable of adapting to the complexities of modern society, including issues related to child protection.<sup>73</sup> This approach is relevant in the context of child maintenance after the father's death, where classical norms are not always able to address increasingly complex social realities.

In the practice of law in Indonesia, the application of maqashid al-shariah in family matters still faces challenges. Many decisions of the religious courts are still oriented towards a textual approach and have not fully integrated the substantive objectives of the law. Recent research by Spencer and Hueston shows that although judges are beginning to consider aspects of *maslahah* (public interest) in some cases, this approach has not yet become a dominant paradigm in judicial practice.<sup>74</sup> This indicates a gap between maqashid theory and the implementation of law.

In the context of child maintenance, the maqashid approach opens up possibilities for reinterpreting existing norms. For instance, the obligation of maintenance shouldn't be limited to the father's family structure as in the concept of *nafkah qarabah*, but can be expanded through state intervention as a representation of public interest. The fiqh maxim "*tasarruf al-imam 'ala al-ra'iyyah manutun bi al-maslahah*" affirms that state policy should be oriented towards the well-being of the people, thus legitimizing state intervention in ensuring the welfare of orphaned children has a strong normative basis. Additionally, the maxim "*al-darar yuzal*" (harm must be removed) justifies that a child's unmet needs constitute harm that must be addressed through legal mechanisms and social policies. Translation of the original text:

In the context of child maintenance, the maqashid approach opens up space for reinterpretation of existing norms. For example, the obligation of maintenance does not have to be limited to the father's family structure as in the concept of *nafkah qarabah*, but can be expanded through state intervention as a representation of public interest. The fiqh maxim '*tasarruf al-imam 'ala al-ra'iyyah manutun bi al-maslahah*' affirms that state policy must be oriented towards the benefit of the people, so the legitimacy of state intervention in ensuring the welfare of orphaned children has a strong normative basis. In addition, the maxim '*al-darar yuzal*' (harm must be removed) provides justification that the condition of a child whose needs are not met is a form of harm that must be immediately addressed through legal mechanisms and social policies.

International research also shows that the maqasid approach is increasingly used as a framework for family law reform. A study by Mas'ud et al. indicates that

<sup>73</sup> Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law*, 45.

<sup>74</sup> Pauline Spencer and Jamey H. Hueston, "The Power of Compassion: A Judicial Reflection on Wellbeing and the Court," *Psychiatry, Psychology and Law* 31, no. 3 (2024): 320–26, <https://doi.org/10.1080/13218719.2024.2344233>.

Muslim-majority countries have begun integrating maqasid principles into family law legislation in order to enhance the protection of women and child.<sup>75</sup> Meanwhile, a study by Bitoh Purnomo finds that the maqasid approach enables harmonization between Islamic law and international human rights standards, particularly in issues concerning child protection.<sup>76</sup>

In Indonesia, the concept of maqasid has also received attention from Islamic legal scholars. Atho Mudzhar emphasizes that reform of Islamic law must be based on considerations of social welfare, rather than merely reproducing classical norms.<sup>77</sup> This approach is in line with Satjipto Rahardjo's idea of progressive law, which places human beings at the center of law, meaning that law must be capable of responding to the real needs of society.<sup>78</sup>

However, the application of maqasid al-sharia faces methodological challenges. A central criticism concerns the potential subjectivity in determining what constitutes "public interest" (maslahah), since interpreters may project personal or contextual biases onto ostensibly objective sharia objectives. This risk underscores the need for a clear, measurable methodological framework to guide maqasid-based reasoning, preventing it from collapsing into unchecked legal relativism where outcomes vary arbitrarily by interpreter. Consequently, an integrative approach—combining maqasid al-sharia with established legal maxims (qawa'id fihiyyah) and principles drawn from modern legal theory—becomes essential for ensuring methodological rigor, consistency, and legitimacy in contemporary Islamic legal reasoning.

## CONCLUSION

This study concludes that the central problem of child maintenance after the father's death in Indonesia is not the absence of legal norms but the limited capacity of existing norms to translate formal responsibility into sustained protection of children's rights. Article 104 KHI reflects a kinship-based allocation of responsibility, yet its effectiveness becomes problematic when paternal relatives lack economic capacity, family structures change, or no effective mechanism exists to activate and enforce their obligations. Thus, the principal legal problem is an implementation and institutional gap, rather than a purely normative vacuum.

The comparative and normative analysis further indicates that the allocation of responsibility should not be understood solely through biological or paternal kinship. Child maintenance requires a more functional conception of responsibility that considers economic capacity, caregiving continuity, guardianship, inheritance resources, and the best interests of the child. The emerging progressive orientation of religious courts

<sup>75</sup> Muhammad Masud et al., *Islam and Modernity: Key Issues and Debates*, with Martin van Bruinessen et al. (Edinburgh University Press, 2022), 102, <https://doi.org/10.1515/9780748637942>.

<sup>76</sup> Bitoh Purnomo, "Maqâshid Al-Syarî'ah And Human Rights Problems," *Nurani: Jurnal Kajian Syari'ah Dan Masyarakat* 20, no. 1 (2020): 1–12, <https://doi.org/10.19109/nurani.v20i1.5631>.

<sup>77</sup> Al-Raysuni, *Imam Al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law*, 101.

<sup>78</sup> Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge University Press, 2009), 56.

provides an important foundation, but its sporadic character indicates the need for clearer legal standards to prevent unequal protection across cases. Accordingly, reform should move beyond textual reinterpretation toward an integrated framework connecting substantive norms, judicial mechanisms, and social protection.

From a *maqāṣid al-sharī'ah* perspective, *ḥifẓ al-nafs* and *ḥifẓ al-nasl* provide more than abstract justification for child protection; they establish normative criteria for evaluating whether the existing allocation of responsibility actually preserves children's life, lineage, development, and welfare. This perspective also legitimizes proportionate state intervention when family-based mechanisms cannot guarantee minimum protection. The implication is therefore a shift from a kinship-centred model toward a child-welfare-centred model, while retaining family responsibility as the first layer of protection.

The study is limited by its normative and literature-based design and the absence of comprehensive empirical and quantitative data. Future research should therefore test the proposed reconstruction through regional case studies, religious court decisions, and statistical evidence, while examining how Islamic family law can be integrated with social security mechanisms. Such research is essential for developing a sustainable model of child maintenance that is legally certain, socially responsive, and genuinely consistent with the objectives of *maqāṣid al-sharī'ah*.

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