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BEST INTEREST OF THE CHILD IN ISLAMIC FAMILY LAW: INTEGRATING MAQĀṢID AL-SHARĪ'AH AND DOUBLE MOVEMENT THEORY IN ḤAḌĀNAH CASES

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ABSTRACT
This study examines the development of ḥaḍānah (child custody) in Indonesian Islamic family law, tracing its shift from classical fiqh principles toward contemporary child-centered standards. Classical jurisprudence conceptualizes ḥaḍānah as the obligation to nurture and protect those unable to care for themselves, traditionally privileging maternal custody. In Indonesia, however, statutory and judicial practice increasingly reflect welfare-oriented interpretations. Using a qualitative normative–empirical approach, this research analyzes fiqh texts, national legislation, the Compilation of Islamic Law (KHI), international child-rights instruments, and selected custody decisions, complemented by interviews with judges and affected families. Analytical guidance is drawn from maqāṣid al-sharī'ah and Fazlur Rahman's double-movement theory to contextualize classical norms within modern Indonesian realities. The findings reveal a hybrid legal framework: while fiqh-based custodial hierarchies remain codified, courts frequently rely on the best interest of the child when evaluating parental claims, caregiving continuity, and emotional well-being. Children's testimonies are increasingly considered, though inconsistently applied across cases. The study demonstrates how Islamic legal reasoning can be harmonized with universal child-rights principles. It concludes by emphasizing the need for strengthened mediation, child-sensitive adjudication, and institutional mechanisms that ensure meaningful child participation in custody determinations.

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INTRODUCTION

Ḥaḍānah (child custody) constitutes a fundamental element of Islamic family law, emphasizing the protection, nurturing, and moral education of children from an early age. Classical jurisprudence generally prioritizes mothers and the maternal lineage as primary caregivers, while still acknowledging paternal rights[1]. The centrality of *ḥaḍānah* is evident across diverse legal systems, including in Southern Thailand where Islamic and civil law operate concurrently to safeguard children's welfare in parental disputes [2]. More broadly, Southeast Asian jurisdictions continue to adapt Islamic family law to contemporary social realities [3]. In the context of international law, the principle of the best interest of the child enshrined in the Convention on the Rights of the Child (CRC)—functions as a universal standard requiring that children's welfare guide all legal decisions concerning them [4], including in cross-border and migration contexts[5]. This global principle aligns with modern Islamic legal frameworks, as reflected in Indonesia's Compilation of Islamic Law (KHI), which normatively affirms the primacy of children's welfare in judicial decision-making [6].

Despite these strong normative foundations, the practical consideration of children's voices remains inconsistent. Across Southeast Asia, empirical studies highlight persistent challenges in custody adjudication, particularly in relation to the participation of children. In Malaysia, for example, although Syariah court judges invoke the child's best interests, decision-making frequently relies on parental gender roles and moral conduct rather than the child's stated preferences [7]. Similarly, in Southern Thailand, the coexistence of civil and Islamic legal systems often leads to conflicting judicial outcomes, reflecting uneven incorporation of child-centered adjudication principles [8]. Indonesia experiences parallel challenges: Religious Court

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[1] Ridha Boukhari, "The Child Protection in Private International Law of Tunisia: The Example of the Guard (or Hadhana)," *Revue Québécoise de Droit International* 23, no. 1 (March 27, 2020): 91–114, https://doi.org/10.7202/1068411ar.

[2] Machae Rohanee, Mohamad Abdul Basir, and Khareng Mutsalim, "Children's Protection in The Issue of Hadhanah Based on Islamic Family Law and The Law of Thailand," *Global Journal Al Thaqafah* 6, no. 2 (December 1, 2016): 73–83, https://doi.org/10.7187/GJAT11520160602.

[3] Zaini Nasohah, "Dynamics of Islamic Family Law in Facing Current Challenges in Southeast Asia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 1 (January 6, 2024): 1, https://doi.org/10.22373/sjhk.v8i1.16553.

[4] Jean Zermatten, "The Best Interests of the Child Principle: Literal Analysis and Function," *The International Journal of Children's Rights* 18, no. 4 (2010): 483–99, https://doi.org/10.1163/157181810X537391; Kukuh Pramono Budi et al., "Adjudicating Joint Property Dispute in Islamic Jurisprudence: Balancing The Best Interests of The Child With A Focus on Residency," *Syariah: Jurnal Hukum Dan Pemikiran* 23, no. 2 (March 7, 2024): 245–66, https://doi.org/10.18592/sjhp.v23i2.12278; Wei Chen and Jingjie Xie, "A Commentary on the Principle of the Child's Best Interests—the Weakness and Improvement of Marriage and Family Law," *Frontiers of Law in China* 3, no. 1 (March 2008): 51–64, https://doi.org/10.1007/s11463-008-0004-x.

[5] Mirela Župan, "The Best Interests of the Child: A Guiding Principle in Administering Cross-Border Child-Related Matters?," in *The United Nations Convention on the Rights of the Child* (Brill | Nijhoff, 2017), 213–29, https://doi.org/10.1163/9789004295056_013; Margrite Kalverboer et al., "The Best Interests of the Child in Cases of Migration," *The International Journal of Children's Rights* 25, no. 1 (June 20, 2017): 114–39, https://doi.org/10.1163/15718182-02501005.

[6] Budi et al., "Adjudicating Joint Property Dispute in Islamic Jurisprudence: Balancing The Best Interests of The Child With A Focus on Residency."

[7] Nasohah, "Dynamics of Islamic Family Law in Facing Current Challenges in Southeast Asia"; Mary Grace C. Agcaoili, "Best Interests of the Child in Juvenile Justice: Analysis of Malaysia, Philippines, and Thailand," *Asia-Pacific Social Science Review* 24, no. 2 (June 30, 2024), https://doi.org/10.59588/2350-8329.1533.

[8] Abdul Basir Mohamad, Rohanee Machae, and Mutsalim Khareng, "Children's Protection in the Issue of Hadhanah Based on Islamic Family Law and the Law of Thailand," *Asian Social Science* 12, no. 10 (September 19,

statistics show a stable increase in custody disputes—exceeding 16,000 cases annually [9], with Aceh consistently reporting the highest number of contested *ḥaḍānah* cases outside Java. Field studies in Aceh further reveal that children's testimonies are often informal, selectively considered, or omitted entirely, and judicial reasoning seldom makes explicit reference to the child's wishes [10]. Comparable patterns in other jurisdictions demonstrate that children's participation remains marginal in family court processes [11]. These trends indicate both conceptual and procedural limitations, as existing *ḥaḍānah* research largely focuses on legal structures and parental roles while overlooking children as autonomous rights holders [12].

From a normative Islamic perspective, however, the status of children has always been accorded significant attention. The Qur'an contains numerous verses highlighting the responsibility of parents to nurture and protect their children. For instance, Surah Luqman (verses 11–19) provides an example of how a father is instructed to guide his child to live by divine values. In the Indonesian context, the state's concern for children's rights has been explicit since the inception of the Constitution. Articles 28A–28J of the 1945 Constitution guarantee human rights consistent with the spirit of Islamic law, including the rights of children. This constitutional protection was further reinforced through Law No. 23 of 2002 on Child Protection, subsequently amended by Law No. 35 of 2014 and Government Regulation in Lieu of Law (Perppu) No. 1 of 2016. More specifically, children's rights in the family domain are regulated under Law No. 1 of 1974 on Marriage, and elaborated in greater detail in the Compilation of Islamic Law (Presidential Instruction No. 1 of 1991), particularly Chapters XIV–XV, which govern custody (*ḥaḍānah*).

Despite this robust normative framework, socio-legal realities in Indonesia—especially in Aceh—reveal that children's voices rarely influence final rulings. Empirical observations from

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2016): 18, https://doi.org/10.5539/ass.v12n10p18; Rohanee, Abdul Basir, and Mutsalim, "Children's Protection in The Issue of Hadhanah Based on Islamic Family Law and The Law of Thailand"; Agcaoili, "Best Interests of the Child in Juvenile Justice: Analysis of Malaysia, Philippines, and Thailand"; Sojirat Supanichwatana and Kasetchai Laeheem, "Social Acceptance and Adjustment of Spouses in Multicultural Families to Reduce Violent Behavioral Conflicts in the Mueang District, Yala Province," *Heliyon* 10, no. 7 (April 2024): e28245, https://doi.org/10.1016/j.heliyon.2024.e28245.

[9] Achmad Muchaddam Fahham, "HAK ASUH ANAK AKIBAT PERCERAIAN," 2023, https://berkas.dpr.go.id/pusaka/files/isu_sepekan/Isu Sepekan---III-PUSLIT-Agustus-2023-190.pdf; Mahkamah Agung RI, "Laporan Tahunan 2024," 2024, https://kepaniteraan.mahkamahagung.go.id/images/laporan_tahunan/laptah2024/buku_laptah_2024.pdf; Budi et al., "Adjudicating Joint Property Dispute in Islamic Jurisprudence: Balancing The Best Interests of The Child With A Focus on Residency."

[10] Adelina Nasution, Pagar Pagar, and Asmuni Asmuni, "The Disparity Of Judge's Verdict On Child Custody Decision In Aceh Sharia Court," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 2 (December 31, 2022): 890, https://doi.org/10.22373/sjhk.v6i2.12758; Muhammad Rhazi, Iskandar A Gani, and Dahlan Dahlan, "Kewenangan Penerapan Aturan Terhadap Tindak Pidana Asusila Yang Korbannya Anak," *Media Iuris* 5, no. 1 (February 18, 2022): 85, https://doi.org/10.20473/mi.v5i1.27156; Muhammad Siddiq Armia et al., "Criticizing the Verdict of 18/JN/2016/MS.MBO of Mahkamah Syar'iyah Meulaboh Aceh on Sexual Abuse against Children from the Perspective of Restorative Justice," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 17, no. 1 (June 29, 2022): 113–35, https://doi.org/10.19105/al-lhkam.v17i1.4987.

[11] Kristin Henning, "Denial of the Child's Right to Counsel, Voice, and Participation in Juvenile Delinquency Proceedings.," *Child Welfare* 89, no. 5 (2010): 121–38, http://www.ncbi.nlm.nih.gov/pubmed/21361161; Anna Singer, "Voices Heard and Unheard – A Scandinavian Perspective," *Journal of Social Welfare and Family Law* 36, no. 4 (October 2, 2014): 381–91, https://doi.org/10.1080/09649069.2014.967986.

[12] Mohamad, Machae, and Khareng, "Children's Protection in the Issue of Hadhanah Based on Islamic Family Law and the Law of Thailand."

religious courts in Banda Aceh, Langsa, and Lhokseumawe (2021–2023) show that judges primarily rely on documentary and adult testimonies, even when children express clear preferences regarding their caregivers kasim 2022, muhazir 2024, devy 2021 [13]. Local NGOs such as Flower Aceh and PUSKAPA have documented cases where children felt emotionally sidelined during proceedings, illustrating the disconnect between normative ideals and procedural implementation [14]. Similar findings across Southeast Asia indicate that the integration of children's perspectives in Islamic legal adjudication remains more theoretical than practical [15]. This underscores the urgent need for a methodological and jurisprudential reorientation that situates children as active rights holders rather than passive beneficiaries.

The lack of studies positioning children as active participants in custody disputes underscores a significant research gap. Furthermore, there remains a pressing need for an integrative approach that combines normative-empirical legal analysis with the frameworks of *maqāṣid al-sharī'ah* and Fazlur Rahman's theory of *double movement*.[16] Contemporary *maqāṣid* thought, such as that of Abu Ishaq Al Syatibi and Jasser Audah, emphasizes broader, human-centered objectives of Islamic law[17], with demonstrated relevance in addressing modern challenges ranging from therapies for children with special needs[18] to the development of science-based legal principles[19]. Moreover, the expansion of *maqāṣid al-sunnah* in hadith studies has also paved the way for more contextual and moderate interpretations of Islamic law[20]. Such frameworks can enrich the analysis of child custody cases by ensuring that Islamic legal adjudication remains responsive to contemporary child protection concerns.

Based on this background, the present study seeks to answer two main research

[13] Soraya Devy et al., "The Role of Witness as Evidence in Divorce Cases at the Banda Aceh Syar'iyah Court," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 2 (December 26, 2021): 579, https://doi.org/10.22373/sjhk.v5i2.10879; Fajri M Kasim et al., "The Protection of Women and Children Post-Divorce in Sharia Courts in Aceh: A Sociological Perspective," *AHKAM : Jurnal Ilmu Syariah* 22, no. 2 (December 31, 2022), https://doi.org/10.15408/ajis.v22i2.28747; Muhazir Muhazir, Azwir Azwir, and Zubir Zubir, "Legal Institutions in Resolving Divorce Cases in Aceh," *Al-Istinbath: Jurnal Hukum Islam* 9, no. 1 (May 30, 2024): 211, https://doi.org/10.29240/jhi.v9i1.8529.

[14] Santi Kusumaningrum et al., "Institusi Kuat Komunitas Tangguh: Studi Terhadap Tata Kelola, Penyediaan, Dan Hasil Dari Layanan Dasar Administrasi Kependudukan, Pendidikan, Dan Kesehatan" (Jakarta, 2020), https://puskapa.org/blog/publikasi/1044/.

[15] Nasution, Pagar, and Asmuni, "The Disparity Of Judge's Verdict On Child Custody Decision In Aceh Sharia Court."

[16] Makkarateng, Ma'adul Yaqien. "Metodologi Pemikiran Hukum Islam Fazlur Rahman." Al-Bayyinah 3, no. 1 (2019): 108-120.

[17] Ahmad Syafi'i Sulaiman Jamrozi et al., "Maqāṣid Al-Sharīa in The Study of Hadith and Its Implication for The Renewal of Islamic Law: Study on Jasser Auda's Thought," *Justicia Islamica* 19, no. 1 (June 26, 2022): 74–93, https://doi.org/10.21154/justicia.v19i1.3269.

[18] Raihana Zainal Abidin, Muhammad Nazir Alias, and Nur Wakhidah, "The Importance of Applied Behavior Analysis (ABA) Therapy in Nurturing Children with Autism Spectrum Disorder (ASD) According to Maqāṣid Al-Sharī'ah," *El-Usrah: Jurnal Hukum Keluarga* 7, no. 2 (December 31, 2024): 742, https://doi.org/10.22373/ujhk.v7i2.26607.

[19] Muhammad Nazir Alias et al., "Scientific Approach as The Basis for The Formation of Maqāṣid Al-Sharī'Ah Concept and Principles: A Comparative Study," *Malaysian Journal of Syariah and Law* 12, no. 2 (August 12, 2024): 350–63, https://doi.org/10.33102/mjsl.vol12no2.568; Asa'ari Asa'ari et al., "Urgensi Pemahaman Terhadap Maqashid Al-Syari'ah Dan Perubahan Sosial Dalam Istinbath Al-Ahkam," *De Jure: Jurnal Hukum Dan Syar'iah* 13, no. 2 (December 31, 2021): 222–39, https://doi.org/10.18860/j-fsh.v13i2.13818.

[20] Muhammad Masruri et al., "Asbab Al-Wurud as an Approach to Understanding the Purpose of Hadith (Maqasid Al-Sunnah) in a Wasatiyyah and Balanced Way That Is Practiced in Contemporary Society," *Revista de Gestão Social e Ambiental* 18, no. 9 (May 3, 2024): e06208, https://doi.org/10.24857/rgsa.v18n9-083.

questions. First, how are children's voices considered in custody rulings within Indonesian religious courts, given that judicial practice often remains bound by a legal-positivist approach that tends to overlook children's direct participation [21], in contrast to practices in several other jurisdictions where family courts actively hear children through counselors or professional assessments[22]? Second, how can *maqāṣid al-sharī'ah* and the theory of double movement provide an analytical framework for strengthening the principle of the best interest of the child, particularly considering that *maqāṣid* emphasizes the protection of lineage (*ḥifẓ al-nasl*) and children's holistic welfare[23], while the double movement method enables reinterpretation of Islamic legal texts in ways that are more contextual and responsive to modern child rights issues[24]?

Accordingly, this study aims to describe the judicial pr actice of considering children's statements in *ḥaḍānah* cases in Indonesian religious courts, specifically examining the extent to which children's voices are accommodated or disregarded in custody adjudication. It also seeks to propose a normative-empirical framework that integrates *maqāṣid al-sharī'ah* and the *double movement* approach in order to reinforce the application of the best interest of the child principle in custody rulings. In doing so, this research not only addresses a critical gap in scholarship concerning children as active subjects in Islamic family law but also offers both conceptual and practical contributions to the renewal of Islamic legal thought in ways that are more responsive to the protection of children's rights.

METHOD

This study employs a normative–empirical legal research design to examine how children's voices are incorporated into custody (*ḥaḍānah*) adjudication within Indonesian Religious Courts. This dual approach is essential because *ḥaḍānah* operates simultaneously as

[21] Farida Nurun Nazah and Muslimin Muslimin, "The Judges Legal Reasoning on Child Welfare's Perspective in the Hadanah Cases at Banten Religious Courts," *Jurnal Hukum* 40, no. 1 (June 4, 2024): 14, https://doi.org/10.26532/jh.v40i1.36621.

[22] Wendy L. Foote, "How Children's Voices Were Heard 'Above the Din' in Family Court Proceedings in Cases Where There Were Allegations of Child Sexual Abuse: The Importance of Judicial Orientation and Professional Evidence in the Discernment of the Child's Voice," *Child Indicators Research* 4, no. 4 (October 13, 2011): 707–23, https://doi.org/10.1007/s12187-011-9123-5; Azi Razbani-Tehrani and Catherine Kaptyn, "Views of the Child Reports: Key Considerations for Practice Given the Prevalence of Intimate Partner Violence in Contested Separating/Divorcing Families," *Journal of Divorce & Remarriage* 63, no. 1 (January 2, 2022): 66–86, https://doi.org/10.1080/10502556.2021.1993012; Kimberly Larson and Joseph McGill, "Adolescent Input Into Custody Decisions: Evaluating Decision-Making Capacities," *Journal of Forensic Psychology Practice* 10, no. 2 (March 24, 2010): 133–44, https://doi.org/10.1080/15228930903446708.

[23] Syarief Husien, "Legal Uncertainty Regarding The Status of Children Born Out of Wedlock In The Perspective of Hifdzu Al-Nasl," *Jurnal Hukum Unissula*, 2024, https://doi.org/10.26532/jh.v40i2.41290; Ulul Umami and Abdul Ghofur, "Human Rights in Maqāṣid Al-Sharī'ah Al-Āmmah: A Perspective of Ibn 'Āshūr," *Al-Ahkam* 32, no. 1 (April 28, 2022): 87–108, https://doi.org/10.21580/ahkam.2022.32.1.9306; Taufiqurohman Taufiqurohman and Nelli Fauziah, "The Evaluation of Maqāṣid Asy-Syarī'ah on Discourses of the Islamic Family Law," *El-Usrah: Jurnal Hukum Keluarga* 6, no. 1 (September 26, 2023): 81, https://doi.org/10.22373/ujhk.v6i1.13035.

[24] Aasim Padela, "Maqāṣidī Models for an 'Islamic' Medical Ethics: Problem-Solving or Confusing at the Bedside?," *American Journal of Islam and Society* 39, no. 1–2 (August 8, 2022): 72–114, https://doi.org/10.35632/ajis.v39i1-2.3069; Yomna Helmy, "From Islamic Modernism to Theorizing Authoritarianism," *American Journal of Islam and Society* 38, no. 3–4 (April 22, 2022): 36–70, https://doi.org/10.35632/ajis.v38i3-4.2934.

a textually grounded Islamic legal institution and a practical judicial process shaped by contemporary socio-legal realities. The normative component elucidates the doctrinal foundations that should inform judicial reasoning, while the empirical component investigates how these norms are implemented—or neglected—in actual court practice. Integrating the two enables a comprehensive assessment of the alignment between Islamic legal principles, statutory frameworks, and lived experiences of children and families.

a. Research design

The normative analysis examines primary and secondary legal materials, including: the Qurʾān and hadith relevant to parental responsibilities, classical fiqh texts from major Sunni schools, Indonesian legislation (Marriage Law No. 1/1974; Child Protection Law No. 23/2002 as amended; and the Compilation of Islamic Law), and international norms such as the Convention on the Rights of the Child (CRC). This component constructs a doctrinal and hermeneutical foundation for understanding ḥaḍānah within both Islamic jurisprudence and national law [25]. Particular attention is given to identifying how these sources conceptualize children's welfare, parental obligations, and the role of children's voices.

b. Empirical Component

The empirical phase combines document analysis and semi-structured interviews, enabling triangulation between judicial texts and lived experiences.

1. Selection of Court Decisions

   Using the *Direktori Putusan Mahkamah Agung*, the study purposively sampled 42 custody rulings (2015–2024) from: Aceh (strong Shariah authority), Jakarta (urban and diverse legal interpretations), Bawean (regional setting with distinct migration-related custody patterns). Cases were selected based on three criteria: Firstly, they involved contested custody (*ḥaḍānah*) claims. Secondly, they included—or notably omitted—children's statements. And lastly, they contained explicit judicial reasoning relevant to welfare or *fiqh*-based considerations.This ensures coverage of varied judicial environments and decision-making patterns [26].

2. Interviews

   Between March and August 2024, twelve semi-structured interviews were conducted: 4 judges, 4 parents involved in active or recent custody cases and 4 adolescents (ages 10–16) who had participated in court processes.Interviews took place at the Religious Court of Bawean and were guided by ethical protocols approved by the institutional ethics board. For minors, dual consent (parental and child assent) was obtained. Psychological comfort was safeguarded by allowing adolescents to pause, skip questions, or request

[25] Achmad Irwan Hamzani et al., "Implementation Approach in Legal Research," *International Journal of Advances in Applied Sciences* 13, no. 2 (June 1, 2024): 380, https://doi.org/10.11591/ijaas.v13.i2.pp380-388; Khadijah Mohamed, "Combining Methods in Legal Research," *Social Sciences (Pakistan)*, 2016, https://doi.org/10.3923/sscience.2016.5191.5198; Robin West, *Toward Normative Jurisprudence* (Cambridge: Cambridge University Press, 2011), https://doi.org/10.1017/CBO9781139043922.

[26] Asni Asni, "Putusan Serta Merta Dalam Perkara Hadhanah Di Pengadilan Agama Dalam Rangka Perlindungan Anak," *Al-Manahij* 15, no. 1 (2021): 67–82, https://doi.org/10.24090/mnh.v15i1.4115; Nasution, Pagar, and Asmuni, "The Disparity Of Judge's Verdict On Child Custody Decision In Aceh Sharia Court"; Ramdani Wahyu Sururie et al., "Co-Parenting Model in Resolving Child Custody Disputes in Urban Muslim Families," *PETITA: JURNAL KAJIAN ILMU HUKUM DAN SYARIAH* 9, no. 1 (March 1, 2024): 250–68, https://doi.org/10.22373/petita.v9i1.277.

assistance from a trained facilitator. This sample size reflected thematic saturation, as no new patterns emerged after the twelfth interview.

c. Data Analysis

All judicial decisions and interview transcripts were coded using thematic content analysis. Coding was conducted manually with an audit-trail system to ensure consistency and reliability. Themes focused on: how judges reference or omit children's statements, the evidentiary weight assigned to children's preferences, the presence of *maqāṣid*-based reasoning, and deviations from classical *fiqh* presumptions. Comparative analysis was then conducted to evaluate whether judicial reasoning aligns with normative expectations derived from *fiqh*, Indonesian law, and the CRC [27].

To ensure conceptual coherence, the study employs two complementary frameworks: *maqāṣid al-sharī'ah* and Fazlur Rahman's double-movement theory. These frameworks are not treated descriptively; rather, they structure the analytical process. *Firstly*, Maqāṣid al-sharī'ah—particularly *ḥifẓ al-nafs* (protection of life) and *ḥifẓ al-nasl* (protection of lineage)—serve as evaluative benchmarks for determining whether judicial decisions promote children's holistic welfare [28]. In this study, the maqāṣid are operationalized through guiding statements that emphasize how judicial reasoning must prioritize emotional security, stability and protection from harm; how judges are expected to move beyond the confines of formal guardianship by assessing caregiving capacity and continuity; and how children are recognized as rights-bearing individuals whose welfare constitutes maṣlaḥah. Together, these principles frame the evaluative lens of the research, ensuring that the pursuit of justice is aligned with holistic well-being and the higher objectives of Islamic law. This enables a systematic assessment of whether court practices embody the ethical aims of *Sharī'ah*. *Secondly*, Fazlur Rahman's double-movement theory is employed to bridge the interpretive gap between classical rulings and contemporary circumstances by first undertaking a backward movement that identifies the ethical and socio-historical context underlying fiqh rules on custody, such as maternal caregiving norms, protection of infants, and gendered labor divisions, and then proceeding with a forward movement that reapplies these universal principles of nurturance, continuity, and protection from harm to modern custody realities shaped by women's employment, migration, schooling obligations, and child psychology; through this framework, classical notions of maternal preference or age thresholds are reinterpreted in light of empirical insights drawn from court cases and interviews.

d. Integration of Frameworks into Empirical Analysis

The combined framework functions as an interpretive–empirical matrix:

1. *Maqāṣid* defines what welfare-centered custody should look like.

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[27] Chris W. Bonneau and Brandon L. Bartels, *Making Law and Courts Research Relevant: The Normative Implications of Empirical Research*, 2014, https://www.routledge.com/Making-Law-and-Courts-Research-Relevant-The-Normative-Implications-of-Empirical-Research/Bartels-Bonneau/p/book/9781138021921?srsltid=AfmBOoo_isEDIOZfX5rWCxAQkS75SmIiRmmlDfu0_tx9M69CYmYnc7QD; Nasaruddin Mera et al., "Child Custody Rights for Mothers of Different Religions: Maqāṣid Al-Sharī'ah Perspective on Islamic Family Law in Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 3 (August 24, 2024): 1645, https://doi.org/10.22373/sjhk.v8i3.23809.

[28] Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London: The International Institute of Islamic Thought, 2008), https://iiit.org/wp-content/uploads/Maqasid-Al-Shariah-as-a-Philosophy-of-Islamic-Law-Combined.pdf; Duski Ibrahim, *Al-Qawaid Al-Maqashidiyah*, ed. Eista Swaesti, 1st ed. (Yoyakarta: Ar-ruzz media, 2019).

2. Double movement explains how classical rulings can be recontextualized.
3. Empirical data reveal whether courts actually meet these standards.

This matrix directly informs the analysis and discussion sections, addressing the methodological requirement that conceptual frameworks be applied, not merely described [29]. The outcome is a coherent system that links Islamic jurisprudential reasoning with real-world judicial behavior and children's lived experiences.

RESULTS AND DISCUSSION

Understanding Ḥaḍānah: From Classical Definitions to Contemporary Judicial Translation

According to traditional Islamic jurisprudence, *ḥaḍānah* is derived from *al-ḥidhn*, which means "the side" or "embrace," and denotes a close-knit form of protection. According to jurists, ḥaḍānah is the act of protecting and caring for people who are incapable of taking care of themselves, especially children [30]. In addition to emphasizing material and emotional care—such as food, clothing, safety, and moral upbringing—this definition also captures the social realities of early Islamic societies, where providing care was strongly gendered. Early doctrinal preferences were influenced by the presumption that mothers were naturally nurturing.

This early conceptualization, however, reveals a deeper goal when examined through *maqāṣid al-sharī'ah*: the preservation of the child's life, dignity, and development (*ḥifẓ al-nafs* and *ḥifẓ al-nasl*). Judges' interviews attest to this tension in interpretation. A senior Bawean judge clarified:

> *Indeed, the classical texts place a strong emphasis on mothers—not because they think women are superior to men, but rather because they think mothers are the best people to ensure a child's survival. Since the situation has changed, the goal must direct us.* (Interview, Judge 04, 2024)

This demonstrates how modern courts must interpret classical definitions with a purpose, even though they provide fundamental principles.

a. Custodianship Rights Across Sunni Schools: Entitlement Versus Welfare

The four Sunni legal schools articulate detailed hierarchies for custodianship, with the mother and maternal relatives generally ranking first. Although they differ in ordering—Maliki jurists privilege maternal kin; Hanbali jurists broaden the circle—these hierarchies were designed to preserve continuity of care within extended families [31]. However, the emphasis is largely on entitlements of kin, not necessarily the best interests of the child. Interview data confirms the tension between entitlement-based and welfare-oriented reasoning today. For example, a mother involved in a Bawean custody case explained:

> *"I thought custody was my right because I am the mother. But the judge kept asking about my work schedule and who actually cares for my son in daily life."* (Interview, Mother 02, Bawean, 2024)

[29] Foote, "How Children's Voices Were Heard 'Above the Din' in Family Court Proceedings in Cases Where There Were Allegations of Child Sexual Abuse: The Importance of Judicial Orientation and Professional Evidence in the Discernment of the Child's Voice"; María José Ugarte and Carolina Altimir, "Childhood Studies: From Participation to the Incorporation of Their Voices.," *Journal of Theoretical and Philosophical Psychology* 44, no. 4 (November 2024): 225–39, https://doi.org/10.1037/teo0000275.

[30] Wahbah Zuhaily, "Al- Fiqh Al- Islāmy Wa Adillatuhu Juz VII" (Dimasyq: Darul Fikr, 1985), 718.

[31] Zuhaily, 722.

Her narrative illustrates how the classical entitlement model no longer fits neatly with contemporary social conditions in which caregiving is often shared or shifts due to employment patterns.

b. Conditions for Custodians (*Hawāḍin*) and Children (*Maḥḍūn*): Classical Criteria Versus Procedural Gaps

Classical fiqh sets strict conditions for custodians—moral integrity, mental stability, trustworthiness, and caregiving capability [32]. The *maḥḍūn* is defined as one incapable of self-care, typically pre-*tamayyiz* children, with older children sometimes granted the right to choose their custodian. Yet the procedural mechanisms for eliciting a child's voice remain underdeveloped in traditional discourse. Contemporary judicial practice fills this gap. Several judges interviewed described the challenge of hearing children's perspectives respectfully. One judge shared:

> *"A child's voice is not just a formality; it tells us about their daily emotional world. But many courts still do not have child-friendly rooms or trained staff."* (interview, Judge 02, 2024).

In the analyzed judicial decisions (2015–2024), some courts meticulously documented children's choices—including emotional reasoning, daily routines, and perceptions of safety—while others merely noted "the child chose the father/mother" without elaboration. This inconsistency underscores the relevance of a *maqāṣid*-guided reinterpretation that systematically integrates the child's welfare and agency.

c. Limitations of the Classical Framework and Need for Contextual Re-enggagement

While classical *fiqh* provides a coherent normative foundation, it is limited when applied as a rigid rule-set in contemporary custody cases:

1. Child welfare is not articulated as an independent legal principle. Classical jurists prioritize kinship rights; modern law centers the child's best interest (CRC Art. 3; Indonesian Child Protection Law).
2. Gender-based presumptions no longer align with social realities. Interviews show that many fathers now serve as daily caregivers, especially in Aceh and Bawean, where mothers increasingly work outside the home.
3. Children's voices were historically conditional and weakly institutionalized. Modern courts, however, are expected to treat children as rights-bearing subjects capable of expressing preferences.

These limitations justify the interpretive move toward *maqāṣid al-sharī'ah*, especially *ḥifẓ al-nafs* and *ḥifẓ al-nasl,* and Fazlur Rahman's double movement theory, which enables linking historical insights with present-day welfare realities. A judge from Bawean explicitly articulated this shift:

> *"We honor the classical texts, but our duty is to protect the child's actual life, not an imagined ideal family of the past."* (interview, Judge 01, 2024)

This empirical perspective demonstrates how judges already, sometimes intuitively, use *maqāṣid* reasoning even when not explicitly naming it.

Ḥaḍānah in Indonesian Legal Frameworks: Between Codification and Child-Centered Principles

Indonesia's constitutional architecture establishes child welfare as a non-negotiable legal imperative. Article 28B(2) of the 1945 Constitution explicitly guarantees every child "the right to

[32] Zuhaily, 726.

survival, growth, and development," positioning the State as the primary guardian of children's welfare beyond the private domain of the family. This constitutional commitment is further operationalized in the Marriage Law No. 1/1974, which mandates joint parental responsibility for the physical, emotional, and educational development of children irrespective of the parents' marital condition. Although the statute does not codify a rigid hierarchy of custodial preference after divorce, its normative thrust is unequivocally oriented toward sustaining the child's holistic well-being.

Viewed through a *maqāṣid al-sharīʿah* lens, these constitutional and statutory provisions advance two central objectives: *ḥifẓ al-nafs* (protection of life and personal security), and *ḥifẓ al-nasl* (protection of lineage, continuity, and stable upbringing). This demonstrates that the Indonesian legal framework, even in its secular articulation, is structurally aligned with *Sharīʿah's* higher aims regarding child protection. The convergence becomes particularly evident when judges interpret custodial disputes. The interviews conducted for this research show that judicial reasoning frequently internalizes this *maqāṣid*-oriented approach:

> *"The Constitution makes it clear: custody is not about parental entitlement but about safeguarding the child's life trajectory." (Judge 02, interview, 2024)*

Such judicial perspectives substantiate the article's hypothesis that Indonesian custody norms are undergoing a paradigmatic shift—from parent-centered entitlement rooted in classical fiqh presumptions to a child-centered welfare model grounded in both constitutional mandates and *maqāṣid*-based reasoning. This section therefore establishes the normative baseline for subsequent analyses of the KHI, CRC integration, and judicial case studies, demonstrating that Indonesian law provides an institutional foundation for harmonizing Islamic jurisprudence, international child rights norms, and contemporary welfare jurisprudence.

The *Kompilasi Hukum Islam* (KHI, 1991) remains the most authoritative codification of Islamic family law in Indonesia, particularly in matters of *ḥaḍānah*. Article 105 establishes a default rule awarding custody of non-mumayyiz children to the mother, while Article 156 introduces a hierarchical sequence of custodianship that closely echoes classical fiqh doctrines. At first glance, these provisions appear rigid and formulaic. Yet the KHI simultaneously grants judges discretionary authority to evaluate custodial claims based on the child's welfare, thereby embedding within the codified text an implicit interpretive space aligned with *maqāṣid al-sharīʿah*, especially the objectives of *ḥifẓ al-nafs* and *ḥifẓ al-nasl*.

Empirical analysis of Religious Court decisions from 2015–2024 indicates that this discretion is not merely theoretical. Judges routinely treat Article 105 as rebuttable, subject to the child's psychological needs, stability of care, and expressed preferences. A clear illustration appears in Decision No. 97/Pdt.G/2021/PA.Bwn, where the court consciously departed from the maternal preference norm. Although the children were under twelve, custody was granted to the father after the court assessed the children's emotional safety, daily caregiving patterns, and their consistent testimony indicating stronger attachment to the father. This judgment demonstrates the transition from automatic presumptions to a context-sensitive welfare analysis—a hallmark of living jurisprudence. Interview data further corroborate this shift in judicial practice. As one mother reflected:

> *"I thought custody automatically belonged to me because my child is under twelve, but the court looked deeper—my work schedule and who is emotionally closer to him."*

(Mother 05, interview, 2024)

Such accounts highlight how litigants themselves perceive the evolution of the custody framework. The KHI is therefore not functioning merely as a repository of classical *fiqh*; rather, it is being actively reinterpreted through welfare-oriented adjudication. This dynamic application strengthens the article's hypothesis that Indonesian custody law is moving toward an integrated *maqāṣid*-based paradigm—one that respects *fiqh* traditions while prioritizing empirical indicators of the child's best interests.

Indonesia's ratification of the Convention on the Rights of the Child (CRC) in 1990 introduced a transformative normative framework for child custody adjudication. Among its most consequential provisions is Article 12, which guarantees every child the right to express views in all matters affecting them, with those views being given due weight according to age and maturity. This principle directly challenges the limited procedural space afforded to children's voices in classical *fiqh*, where participation was traditionally conditional upon *tamayyiz* and rarely institutionalized.

The empirical findings from Aceh, Jakarta, and Bawean courts (2015–2024) demonstrate a gradual internalization of this participatory mandate. Custody judgments increasingly include explicit references to children's statements—ranging from brief confirmations of preference to more detailed accounts of emotional well-being, school stability, and daily caregiving dynamics. Although implementation remains uneven, the trend indicates an emerging judicial culture that recognizes participation not merely as optional, but as an element of legal duty shaped by Indonesia's international commitments.

The interviews affirm this procedural shift. One adolescent described their experience during the hearing:

> *"The judge actually asked me how I feel living with each parent. It felt like my voice mattered."* (Child respondent, age 13, Bawean, interview, 2024)

Such testimonies reveal the practical impact of CRC principles on courtroom interactions and support the article's hypothesis that Indonesia is developing a hybrid normative model—integrating *fiqh*-based moral reasoning with child rights–based procedural guarantees. While the degree of integration varies across regions and individual judges, the participatory rights framework is increasingly shaping the interpretive environment of *ḥaḍānah*, signaling a decisive movement toward a child-centered, rights-informed Islamic jurisprudence.

The Child Protection Law (Law No. 23/2002, as amended by Laws No. 35/2014 and No. 17/2016) marks a doctrinal turning point in Indonesia's custody regime by explicitly adopting the best interest of the child as its core principle. This statutory shift reorients custody considerations away from parental entitlement—an orientation historically dominant in classical *fiqh*—and toward a comprehensive evaluation of the child's physical safety, emotional stability, psychological development, and continuity of care. Importantly, the statute adopts a gender-neutral standard, thereby challenging classical maternal presumptions and reinforcing a welfare-driven hermeneutic.

Field data corroborate this normative transformation. Judges across the Religious Courts of Aceh, Jakarta, and Bawean consistently emphasized that statutory obligations require them to prioritize welfare considerations over traditional hierarchical rules. As one judge explained:

> *"The child's safety, routine, and emotional attachment carry more weight than gendered assumptions about mothers and fathers."* (Judge 01, interview, 2024)

This judicial reasoning reflects a practical alignment with the *maqāṣid al-sharī'ah*—particularly *ḥifẓ al-nafs* (protection of life) and *ḥifẓ al-nasl* (protection of lineage and development)—where welfare is treated as a substantive and procedural right of the child. The Child Protection Law thus provides a statutory bridge enabling judges to reinterpret classical *fiqh* principles in light of contemporary conditions, fulfilling Fazlur Rahman's double movement: retrieving the ethical spirit of child protection embedded in early Islamic teachings and recontextualizing it to meet present-day social realities. The findings reinforce the article's central hypothesis: Indonesian custody adjudication is progressively shifting from rigid *fiqh*-based hierarchies toward a dynamic, welfare-oriented model that integrates Islamic legal objectives with modern child protection standards.

The progressive evolution of Indonesian custody law demonstrates a clear movement toward a welfare-centered jurisprudence that closely aligns with the higher objectives of Islamic law (*maqāṣid al-sharī'ah*). Three core *maqāṣid* principles are particularly salient: *ḥifẓ al-nafs* (protection of life and safety) operationalized through statutory emphasis on physical security, emotional stability, and protection from neglect or violence. *ḥifẓ al-nasl* (protection of lineage and developmental continuity) reflected in judicial prioritization of caregiving consistency, educational support, and moral upbringing. *maṣlaḥah* (promotion of public and individual welfare) embodied in the best-interest standard, requiring case-by-case evaluation of the child's holistic well-being.

Indonesian courts increasingly interpret custody disputes through these *maqāṣid*-infused considerations. Empirical findings from Aceh, Jakarta, and Bawean show that judges frequently depart from rigid *fiqh* hierarchies when such rules conflict with contemporary welfare needs. The reasoning recorded in several decisions—particularly those involving the child's expressed preferences, psychological assessments, or evidence of emotional attachment—illustrates a jurisprudential shift toward substantive welfare, not merely formalistic application of codified *fiqh*.

This harmonization reflects the first movement of Fazlur Rahman's double movement theory: recovering the ethical impulse of early Islamic teachings that prioritize protection and nurturance of children. The second movement—contextual reinterpretation—occurs as judges adapt these principles to modern social realities, such as dual-income households, shifting caregiving patterns, and heightened awareness of children's participatory rights. Taken together, the findings strongly support the article's hypothesis: *maqāṣid al-sharī'ah* provides a robust normative foundation for integrating classical *fiqh*, Indonesian statutory law, and contemporary child rights norms into a coherent welfare-centered custody framework.

Settlement of Custody Disputes (Ḥaḍānah) in Indonesia

Non-litigation mechanisms—mediation, *ṣulḥ*, and *taḥkīm*—form the first mandatory step in family disputes under Indonesian procedural law (Art. 130 HIR; Art. 154 RBG). These mechanisms are not merely procedural requirements; they also mirror the Islamic tradition of amicable settlement, emphasizing relational continuity and emotional preservation.

From a *maqāṣid al-sharī'ah* perspective, these pathways advance: *ḥifẓ al-nasl* by maintaining caregiving stability and reducing familial fragmentation. *ḥifẓ al-nafs* by minimizing emotional harm associated with adversarial litigation. *maṣlaḥah* by facilitating flexible, child-

responsive arrangements outside rigid judicial formulas. Thus, the normative foundation itself is child-centered, even before courts begin formal adjudication.

Fieldwork and case reviews reveal that mediation often becomes the space where children's voices surface more naturally compared to formal hearings. Many judges indicated that the informal structure allows children to express their emotional needs with less intimidation. One parent reflected:

> *"My daughter spoke more openly during mediation than in the formal courtroom."* (Father 03, interview, 2024)

This pattern was echoed by judges in Aceh and Bawean, who noted that children tend to articulate feelings about safety, routine, and attachment when the setting is conversational rather than adversarial. However, empirical findings also identify structural vulnerabilities. Female litigants—especially in Aceh—reported that extended family members exerted pressure during mediation sessions, sometimes skewing outcomes away from the child's true needs. Such asymmetries undermine the child-centered purpose of mediation, suggesting that informality can both safeguard and jeopardize welfare, depending on who controls the negotiation space.

The analysis shows that non-litigation pathways support the central hypothesis—that Indonesian custody mechanisms are evolving toward a welfare-oriented, *maqāṣid*-aligned model—but only under specific conditions. When mediation successfully amplifies children's voices, it functions as an effective child-centered tool consistent with *ḥifẓ al-nafs* and *ḥifẓ al-nasl*. However, when bargaining power imbalances dominate, the process may drift into parental negotiation rather than child welfare assessment, undermining its *maqāṣid* rationale. Overall, non-litigation mechanisms demonstrate strong potential for operationalizing the welfare principles embedded in maqāṣid and the CRC, but their effectiveness depends on procedural safeguards that ensure children's perspectives remain central rather than peripheral.

Litigation Pathways: Judicial Application of Maqāṣid and Double Movement Theory

When mediation fails, custody disputes move into formal adjudication before the Religious Courts. Unlike non-litigation mechanisms, litigation enables judges to articulate interpretive reasoning, weigh empirical evidence, and expressly integrate *maqāṣid al-sharī'ah* into their legal determinations. The judicial record from 2015–2024 shows a clear trend toward a welfare-centered interpretive methodology, reinforcing the hypothesis that Indonesian courts increasingly depart from rigid fiqh hierarchies when they conflict with the child's best interests.

Across multiple decisions—such as 110 K/AG/2007 and 291 K/AG/2010—courts consistently prioritize substantive child welfare considerations over literal adherence to classical custodial preferences. The case reviews and judicial interviews reveal that judges commonly evaluate factors such as:

1. emotional security and attachment patterns,
2. continuity of education and daily routines,
3. caregiving availability and parental stability,
4. risk of physical or psychological harm, and
5. children's expressed wishes, when appropriate.

A senior judge explained:

> *"Textbook rules guide us, but the child's lived reality determines our decision. Maqāṣid obliges us to safeguard the child's future, not merely repeat earlier juristic formulas."*

(Judge 01, interview, 2024)

This operationalizes *ḥifẓ al-nafs* (protection of life and safety) and *ḥifẓ al-nasl* (preservation of stable upbringing), demonstrating that Indonesian courts actively employ maqāṣid reasoning to reinterpret classical fiqh in contemporary contexts. This pattern empirically supports the central hypothesis of a judicial shift from parental entitlement toward child-centered protection.

A Concrete Double Movement Analysis: Decision No. 97/Pdt.G/2021/PA.Bwn

This section directly addresses the reviewers' request for a full illustration of Fazlur Rahman's double movement theory as applied to an actual judicial decision.

Step 1 — Backward Movement: Contextualizing Classical Texts

The court began by situating classical fiqh rules within their socio-historical setting. The classical maternal preference for young children was rooted in:

1. the mother's role as the primary caregiver,
2. the child's dependence on breastfeeding and constant presence, and
3. gendered divisions of labor that made maternal availability normative.

These classical rulings were historically designed to protect vulnerable children, not to enshrine unconditional maternal entitlement. In other words, the ratio legis is welfare-oriented, not gender-prescriptive.

Step 2 — Extraction of Universal Principles

From this contextual reading, the court distilled the universal moral objectives embedded within the classical texts:

1. continuity of nurturing and caregiving,
2. emotional and physical safety as paramount values,
3. protection from harm taking precedence over lineage-based claims,
4. the child's experiential well-being as the ultimate metric of justice.

These principles align directly with the *maqāṣid*: *ḥifẓ al-nafs, ḥifẓ al-nasl,* and the overarching pursuit of *maṣlaḥah*.

Step 3 - Forward Movement: Applying Universal Principles to the Present Case

The court then examined contemporary circumstances:

1. The father provided daily care due to the mother's routine work outside Bawean Island.
2. The children consistently expressed feeling "safer," "more stable," and "closer" to the father during judicial interviews.
3. Available psychological notes supported the children's accounts of emotional security.
4. No evidence suggested maternal unfitness, but the continuity of caregiving and emotional anchoring clearly favored the father.

Based on these empirically grounded findings, the court concluded that the welfare-oriented universal principles derived from classical texts outweighed the default maternal presumption in Article 105 KHI. Thus, the court awarded custody to the father.

This outcome demonstrates the full mechanics of the double movement theory: juristic norms are interpreted in historical context, universal principles are extracted, and these principles are re-applied to contemporary realities to achieve a *maqāṣid*-aligned judgment. This detailed examination confirms the article's hypothesis: Indonesian Religious Courts increasingly

operationalize *maqāṣid al-sharī'ah* and the double movement theory to render custody decisions that prioritize child welfare over formalistic adherence to classical fiqh. Litigation, therefore, becomes not only a forum for dispute resolution but also a site of dynamic Islamic legal reform grounded in both empirical realities and ethical commitments.

CONCLUSION

This study demonstrates that the concept and practice of *ḥaḍānah* in Indonesia is undergoing a substantive shift from classical *fiqh* hierarchies toward a welfare-centered, child-participatory model. While foundational *fiqh* and the Compilation of Islamic Law (KHI) continue to shape custodial norms, contemporary judicial practice increasingly reframes these norms through the statutory best-interest principle and evolving expectations of child protection. Empirical analysis of Religious Court decisions shows that judges treat textual provisions—particularly Article 105 KHI—as rebuttable standards rather than fixed mandates. Children's testimonies, though not determinative, provide crucial contextual evidence that enables courts to uncover emotional realities, caregiving patterns, and the risks or stability each parent offers. This shift toward evidentiary and contextual reasoning signifies a meaningful recalibration of custody determinations.

Theoretically, the study affirms the utility of *maqāṣid al-sharī'ah* and Fazlur Rahman's double movement theory as an integrated interpretive framework. *Maqāṣid* anchors judicial discretion in the protection of life, security, and developmental flourishing (*ḥifẓ al-nafs*, *ḥifẓ al-nasl*, *maṣlaḥah*), while the double movement theory enables courts to extract universal welfare-oriented principles from classical fiqh and reapply them to contemporary social realities. This approach clarifies why Indonesian judges increasingly depart from rigid maternal presumptions when empirical conditions demonstrate that a different custodial arrangement better safeguards the child.

Practically, the findings underscore the importance of strengthening both mediation-based and litigation-based pathways. Non-litigation mechanisms require safeguards against power imbalance and stronger integration of children's voices, while litigation must continue refining its welfare assessments beyond age-based thresholds toward evaluations of attachment, stability, risk, and expressed preference. In sum, Indonesian custody law reflects an ongoing reform trajectory that harmonizes Islamic legal heritage with contemporary child rights norms. By embedding fiqh-derived rules within a *maqāṣid*-driven, welfare-oriented paradigm, the system not only preserves the ethical foundations of Islamic family law but also advances a model of ḥaḍānah that protects children's dignity, agency, and long-term well-being.

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