

Integration of Maqāṣid al-Syarī'ah and Social Justice: Reconfiguring the Legal Status of Children Born Out of Wedlock in Islamic Law and the Indonesian Legal System

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Abstract

This article explores the redefinition of the status of children born out of wedlock by integrating maqasid al-syariah and social justice. This study departs from the dominant classical Islamic legal construct, which severs the relationship between a child and his biological father. This restrictive approach, although intended to prevent adultery (sadd al-dhari'ah), actually causes injustice by neglecting the protection of innocent children. The research uses a normative-theological and sociological approach to analyze the dialectic between classical Islamic law and Indonesian positive law. Supreme Court Decision No. 46/PUU-VII/2010 is an important milestone that recognizes the relationship between children and their biological fathers based

on scientific evidence. The ethical justification lies in the framework of *maqāṣid al-sharī'ah*, particularly the protection of life (*ḥifẓ al-naḥs*), honor (*ḥifẓ al-'ird*), and lineage (*ḥifẓ al-nasl*) in a more substantive manner. Criticism and deconstruction from the perspective of justice and *maqāṣid* offer a new legal-ethical framework centered on the interests of the child. *Ḥifẓ al-nasl* is not only about preserving lineage, but also guaranteeing the basic rights of children. Meanwhile, *ḥifẓ al-'ird* becomes a synthesis to protect the honor of children from discrimination. The integration of *maqasid al-syariah* and social justice paves the way for a more inclusive, humanistic, and relevant study of Indonesian Islamic family law in the face of contemporary challenges.

Keywords: *Maqāṣid al-Syarī'ah*, Social Justice, Children Born Out

Abstrak

Artikel ini mengeksplorasi pendefinisian ulang status anak luar nikah dengan mengintegrasikan *maqasid al-syariah* dan keadilan sosial. Kajian ini berangkat dari konstruksi hukum Islam klasik yang dominan, yang memutuskan hubungan anak dengan ayah biologisnya. Pendekatan restriktif ini, meski bertujuan mencegah zina (*sadd al-dhari'ah*), justru menimbulkan ketidakadilan dengan mengabaikan perlindungan anak-anak yang tidak bersalah. Penelitian menggunakan pendekatan normatif-teologis dan sosiologis untuk menganalisis dialektika hukum Islam klasik dengan hukum positif Indonesia. Putusan Mahkamah Agung No. 46/PUU-VII/2010 menjadi tonggak penting yang mengakui hubungan anak dengan ayah biologis berdasarkan bukti ilmiah. Pembenaran etisnya terletak dalam kerangka *maqāṣid al-syarī'ah*, khususnya perlindungan kehidupan (*ḥifẓ al-naḥs*), kehormatan (*ḥifẓ al-'ird*), dan keturunan (*ḥifẓ al-nasl*) secara lebih substantif. Kritik dan dekonstruksi dari perspektif keadilan dan *maqāṣid* menawarkan kerangka hukum-etika baru yang berpusat pada kepentingan anak. *Ḥifẓ al-nasl* tidak hanya tentang menjaga garis keturunan, tetapi juga menjamin hak-hak dasar anak. Sementara *ḥifẓ al-'ird* menjadi sintesis untuk melindungi kehormatan anak dari diskriminasi. Integrasi *maqasid al-syariah* dan keadilan sosial ini membuka jalan bagi studi hukum keluarga Islam Indonesia yang lebih inklusif, humanis, dan relevan menghadapi tantangan zaman.

Kata Kunci: *Maqāṣid al-Syarī'ah*, Keadilan Sosial, Anak-anak yang Lahir di Luar Nikah

Introduction

Marriage is a social and religious institution that has a fundamental position in human life.¹ It not only serves as a means of fulfilling biological needs, but also as a means of forming a legitimate and harmonious family within the framework of divine values. Islam places marriage as a sacred way to continue the lineage, maintain honor, and uphold a moral social structure.² The purpose of marriage as implied in the Qur'an is to realize a life of *sakinah*, *mawaddah*, and *rahmah*. Within this framework, offspring born from a legal marriage are considered part of a protected legal and social order. However, the phenomenon of children

¹ Johari dan Muhammad Hafis, *Hukum Keluarga Islam: Dalam Kajian Fiqih Mu'asyarah Zaujiyah* (Yogyakarta: PT Penamuda Media, 2024), 37.

² Muhammad Hafis dan Jumni Nelli, *Hukum Keluarga Islam Indonesia: Konsep Masalah Terhadap Perkembangan Hukum Keluarga Islam Di Indonesia* (Yogyakarta: Deepublish, 2023), 27.

born outside of legal marriage poses a serious challenge both legally and socially, as it raises complex issues regarding lineage, civil rights, and the social status of these children.³

The urgency of discussing the status of children born out of wedlock has become increasingly significant in the context of modern societies undergoing changes in values and social structures. Globalization, urbanization, and advances in information technology have given rise to new lifestyles that in some ways stray from moral and religious values. As a result, the phenomenon of extramarital relationships has increased and has broad legal implications, including in the context of Islamic law. According to the fuqaha, adultery is an absolutely forbidden act and is considered a major sin. The Qur'an explicitly prohibits this act in the words of Allah, "And do not approach adultery; indeed, it is an abomination and an evil way" (QS. Al-Isra [17]: 32). However, social reality shows that violations of this norm continue to occur, giving rise to new issues that must be addressed legally, namely the status of children born as a result of adultery.⁴

The study of the status of children born out of wedlock in Islamic law is important because it relates not only to moral aspects, but also to basic human rights. In Islamic law, this issue is linked to the concept of nasab, which has implications for inheritance rights, guardianship, and social identity. The majority of scholars, including those from the Shafi'i, Maliki, and Hanbali schools of thought, argue that children born out of wedlock only have a nasab relationship with their mother. This opinion is based on a hadith of the Prophet Muhammad SAW narrated by Amr bin Syu'aib, "Whoever commits adultery with a woman, then the child is the product of adultery, does not inherit and is not inherited" (HR. Al-Tirmidzi). This opinion shows that the nasab relationship between the child and his biological father is severed due to the absence of a valid marriage bond. However, in the context of positive law in Indonesia, this view has been reinterpreted through Constitutional Court Decision Number 46/PUU-VIII/2010, which states that children born out of wedlock have a civil relationship with their biological father based on scientific evidence such as DNA tests. This development shows an effort to balance social justice values with religious moral principles.⁵

The main issue to be examined in this context is how Islamic law views the status of children born out of wedlock and what the consequences are for civil rights such as lineage, inheritance, and guardianship. This question forms the basis for formulating a comprehensive solution-oriented approach between Islamic normative texts and contemporary social realities. Methodologically, the approach used is normative-empirical, analyzing sources of Islamic law such as the Qur'an, hadith, ijma, and qiyas, and relating them to legal practice in Indonesia. This approach aims to reaffirm the relevance of Islamic law in responding to evolving humanitarian problems without neglecting the principles of universal justice that form the basis of sharia.

A solution-oriented approach to understanding the status of children born out of wedlock must be based on the principles of maqāṣid al-shar'ah, particularly in the aspects of

³ Deni Purnama and Dhiauddin Tanjung, "ISLAM DAN PERLINDUNGAN HAK ANAK: TINJAUAN FIKIH TERHADAP NASAB ANAK DI LUAR NIKAH," *Al-Mashlahah Jurnal Hukum Islam Dan Pranata Sosial* 12, no. 01 (June 26, 2024), <https://doi.org/10.30868/am.v12i01.6085>.

⁴ Abdul Manan, *Aneka Masalah Hukum Perdata Islam Di Indonesia* (Jakarta: Kencana, 2008), 46.

⁵ Azni Azni et al., "Pseudo-Maṣlaḥah and Epistemological Failure in Marriage Dispensation at Indonesian Religious Courts," *Jurnal Ilmiah Peuradeun* 13, no. 2 (May 30, 2025): 1399–1420, <https://doi.org/10.26811/peuradeun.v13i2.2047>.

hifz al-nasl (preserving lineage) and hifz al-'ird (preserving honor). This principle emphasizes that the main objective of Islamic law is not only to punish offenders, but also to protect innocent parties.⁶ Illegitimate children cannot be held responsible for the sins of their parents, as stated in the Qur'an, "And no bearer of burdens will bear the burden of another" (QS. Al-An'am [6]: 164). Therefore, substantive justice demands that illegitimate children continue to receive adequate legal and social protection. In this context, Islamic law needs to be interpreted with a rahmatan lil 'alamin approach, that is, as a legal system that brings compassion and benefit to all of humanity.

Several previous scientific attempts have sought to unravel this issue. Muhammad Jawad Mughniyah in *Fiqh five Mazhab* (2001) emphasizes the differences in views among the madhhabs regarding the status of children born out of wedlock, particularly with regard to lineage and inheritance rights. Ibn Qudamah in *Al-Mughni* states that children born out of wedlock have no legal relationship with their biological father even if he acknowledges them, because such a relationship is only valid through marriage. Abdul Manan (2006) in his study of Islamic civil law in Indonesia as quoted by Muhammad Hafis⁷ highlights the need for harmonization between fiqh norms and national law to ensure justice for children born out of wedlock. Meanwhile, contemporary studies such as those conducted by Yusuf al-Qaradawi and Jasser Auda emphasize the importance of new *ijtihad* in interpreting Islamic law in accordance with the demands of the times, without neglecting the core values of sharia.⁸

The specific solutions offered within this framework include reinterpreting the concepts of lineage and children's rights through the *maqāṣid al-syarī'ah* approach. This means that the validity of civil relations between children and their biological fathers can be recognized not to legitimize adultery, but to ensure the welfare of children. In the Indonesian context, this approach can be realized through the strengthening of regulations that favor the best interests of the child as mandated in the Convention on the Rights of the Child, which was ratified through Presidential Decree No. 36 of 1990. This effort does not conflict with the principles of Sharia as long as it does not ignore the basic provision that Sharia lineage is only recognized through a valid marriage. Thus, Islamic law can serve as a fair and solution-oriented system in dealing with modern social problems.⁹

A review of the literature shows that there are still gaps in research on the integration of Islamic law and positive law regarding the protection of children born out of wedlock. Most previous studies have been normative and textual in nature, without an in-depth examination of the psychological and social aspects faced by children born out of wedlock in society. On the other hand, positive law research often ignores the theological dimension that forms the moral foundation for the application of Islamic law. This gap opens up space for the development of

⁶ Muhammad Hafis and Johari Johari, "Maqasid Al-Syariah Sebagai Problem Solver Terhadap Penetapan Hak Asuh Anak Pasca Perceraian," *Jurnal Ilmiah Universitas Batanghari Jambi* 22, no. 3 (October 31, 2022): 1522, <https://doi.org/10.33087/jiubj.v22i3.2420>.

⁷ Muhammad Hafis, *KONKRITISASI ATURAN MUNAKAHAT DI INDONESIA (Keselarasan Antara "Hukum Islam" Dan "Hukum Nasional")* (Yogyakarta: PT Penamuda Media, 2024).

⁸ Yusuf Qardhawi, *Norma Dan Etika Ekonomi Islam* (Jakarta: Gema Insani, 1997); M Noor Harisudin and Muhammad Choriri, "On The Legal Sanction Against Marriage Registration Violation in Southeast Asia Countries: A Jasser Auda's Maqasid Al-Shariah Perspective," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 1 (June 30, 2021): 471, <https://doi.org/10.22373/sjhhk.v5i1.9159>.

⁹ Anwar Hafidzi, Nadiyah Khalid, and Rina Septiani, "THE BIOLOGICAL FATHERS HAVE CIVIL RIGHTS WITH EVIDENCE AND CONVICTION OF THEIR CHILDREN," *Jurnal Ilmiah Al-Syir'ah* 18, no. 2 (December 27, 2020): 127, <https://doi.org/10.30984/jis.v18i2.1127>.

an interdisciplinary approach that combines fiqh analysis, legal sociology, and Islamic legal anthropology. The research by Euis Nurlaelawati and Van Huis, for example, emphasizes that Islamic law cannot be separated from the socio-cultural context of the society in which it is applied. This anthropological approach is important for understanding how religious norms are internalized in social and local legal practices, including in terms of acceptance of children born out of wedlock.¹⁰

The main objective of this study is to provide a comprehensive understanding of the position of children born out of wedlock in Islamic law and its relevance to the Indonesian national legal system. The novelty of this study lies in its attempt to combine a normative-fiqh approach with a socio-legal approach in a conceptual framework based on *maqāṣid al-syarī'ah*. The justification for the proposed hypothesis is that Islamic law has the flexibility (elasticity) that allows for reinterpretation of contemporary issues, including the status of children born out of wedlock, without neglecting its basic principles. Thus, this study not only enriches the academic discourse on Islamic family law but also contributes practically to the formation of more humane and inclusive legal policies. The scope of the research includes an analysis of primary legal sources (the Qur'an, hadith, and madhhab views), Indonesian positive law, and religious social practices in society, to formulate a balanced synthesis between divine norms and modern humanitarian demands.

Method

This study uses an interdisciplinary qualitative-descriptive approach by combining two analyses, namely normative-theological and sociological. The normative-theological approach is used to examine the principles of Islamic law governing the status of children born out of wedlock, referring to authoritative sources such as the Qur'an, Hadith, and the views of classical and contemporary scholars. Meanwhile, the sociological approach is used to analyze how these norms are practiced in society and contextualized with the positive legal system in Indonesia. The type of research applied is library research, which not only relies on textual studies but is also enriched by an examination of regulations and court decisions, such as Constitutional Court Decision Number 46/PUU-VIII/2010. Through this method, the research attempts to bridge the discourse of Islamic law with current realities and the *maqāṣid al-syarī'ah* approach.

The research data sources include primary and secondary data. Primary data includes Islamic legal sources (the Qur'an, Hadith, and classical and contemporary fiqh works), the Compilation of Islamic Law, and Law No. 1 of 1974 concerning Marriage. Secondary data was obtained from various supporting literature, such as books, journals, and related academic works. Data collection techniques were carried out through document studies and literature analysis, reinforced by comparative methods to compare the views of various fiqh schools of thought. This comparative analysis aims to identify the basic principles of Islamic law and assess the extent to which these principles can be adapted to address contemporary issues in Indonesia, particularly those related to the status and rights of children born out of wedlock.

¹⁰ Euis Nurlaelawati and Stijn Cornelis van Huis, "THE STATUS OF CHILDREN BORN OUT OF WEDLOCK AND ADOPTED CHILDREN IN INDONESIA: INTERACTIONS BETWEEN ISLAMIC, ADAT, AND HUMAN RIGHTS NORMS," *Journal of Law and Religion* 34, no. 3 (December 24, 2019): 356–82, <https://doi.org/10.1017/jlr.2019.41>.

Result and Discussion

Genealogy and Legal Consequences: The Construction of the Status of Children Born Out of Wedlock in Classical and Modern Fiqh

The legal construction of the status of children born out of wedlock in classical Islamic jurisprudence is dominated by a strict paradigm, which was formed by the Shafi'i, Maliki, and Hanbali schools of thought. This paradigm centers on the principle of *sadd al-dhari'ah* (closing the path to harm) and is built on two main arguments.¹¹ The first foundation is the hadith *al-waladu lil firāsy wa lil 'āhir al-hajar* (the child belongs to the owner of the bed (husband), and the adulterer gets nothing). The second foundation is the hadith which states that children born out of adultery do not inherit and are not inherited. Through a literal and restrictive interpretation of these texts, the majority of schools of thought have formed a uniform legal consensus, namely: complete severance of lineage from the biological father, no obligation to provide financial support, and severance of mutual inheritance rights.¹²

This majority view, although seemingly solid in textual terms, has been criticized from the perspectives of *maqāṣid* and contextualization. The determination of lineage solely to the owner of the *firāsy* (legal husband) has the noble aim of maintaining clarity of descent *ḥifẓ al-nasl* and preventing mixing of lineages.¹³ However, in practice, this interpretation often ignores the more primary *maqāṣid daruriyyah*, namely the protection of the life and dignity of the child *ḥifẓ al-nafs* and *ḥifẓ al-'ird* that already exist.¹⁴ The law focuses almost exclusively on deterring adulterers, while children, who are the most vulnerable and innocent parties, bear the heaviest legal consequences.¹⁵

A critical analysis of the implementation of the hadith “no inheritance” also shows the potential for a reduction in meaning. The termination of inheritance rights, which is a specific consequence of kinship status, is implicitly extended to sever all legal and financial relationships, including maintenance obligations. However, philosophically speaking, maintenance is a basic right of children, *ḥifẓ al-nafs*, which is more urgent and independent than inheritance rights, the fulfillment of which can be sought through other mechanisms such as mandatory wills. This neglect of maintenance creates real injustice for children.¹⁶

The flexibility of the Hanafi school of thought is clear evidence of the epistemological diversity within the Islamic legal tradition itself. Their approach shows that the texts of the hadith *al-firāsy* and “does not inherit” do not have to be interpreted rigidly and deny all rights to children. The principle of *istihsan* allows one to move from literal legal conclusions to

¹¹ Mohammad Fadel, ““ <sc>DNA</Sc> Evidence and the Islamic Law of Paternity in Light of *Maqāṣid al-Sharī'a*,”” *The Muslim World* 112, no. 3 (July 2022): 311–23, <https://doi.org/10.1111/muwo.12441>.

¹² Bukhari Ali, Nur Wulandari, and Nahara Erianti, “Status of Children Born Out of Wedlock: A Study of Constitutional Court Decision and Its Relevance to the View of Ibnu Taimiyah,” *El-Usrah: Jurnal Hukum Keluarga* 7, no. 1 (June 30, 2024): 406, <https://doi.org/10.22373/ujhk.v7i1.24200>.

¹³ Hafis and Johari, “Maqasid Al-Syariah Sebagai Problem Solver Terhadap Penetapan Hak Asuh Anak Pasca Perceraian.”

¹⁴ Muchamad Coirun Nizar, “The Religious Court’s Decisions on Divorce: A *Maqāṣid Sharī'a* Perspective,” *Ulumuna* 24, no. 2 (January 2021): 398–416, <https://doi.org/10.20414/ujis.v24i2.408>.

¹⁵ Nqobizwe Mvelo Ngema and Desan Iyer, “Extra-Marital Child (Walad Al Zina) and His Right to Maintenance (Nafaqah): A Comparason of Islamic Law and South African Common Law,” *Academic Journal of Interdisciplinary Studies* 12, no. 2 (March 2023): 253, <https://doi.org/10.36941/ajis-2023-0046>.

¹⁶ Theresa M. Pelfrey, “A Survey: Children’s Rights Post Termination of Parental Rights and Pre-Adoption,” *Juvenile and Family Court Journal* 71, no. 1 (March 2020): 45–61, <https://doi.org/10.1111/jfcj.12160>.

conclusions that are more just and minimize adverse effects, especially on innocent parties. In this context, *istihsan* serves as an instrument for realizing the spirit of justice that is at the core of *sharia*.

Contemporary debates also highlight the gap between classical *fiqh* and human rights principles, particularly the Convention on the Rights of the Child, which has been ratified by many Muslim countries.¹⁷ The stigma and systematic deprivation of rights against children born out of wedlock are considered by many activists and academics to be a form of structural discrimination that contradicts the principles of non-discrimination and the best interests of the child. This has sparked demands for a more inclusive reconstruction of family law.

In Indonesia, the tension between classical *fiqh* and the need for social justice is very real. The Compilation of Islamic Law (KHI) basically still adopts the Shafi'i school of thought, in which children only have a blood relationship with their mothers.¹⁸ However, Constitutional Court Decision No. 46/PUU-VIII/2010 was a significant breakthrough that recognized the rights of children born out of wedlock to receive financial support and have a civil relationship with their biological fathers. Although this decision did not address issues of lineage and inheritance, it reflected the spirit of integrating social justice and child protection into the national legal system.

This discussion aims to outline the theoretical basis and relevant literature in understanding the issue of the status of children born out of wedlock from the perspective of Islamic law and its relationship with positive law in Indonesia. This literature review not only discusses the normative views of classical scholars on lineage and the rights of children born out of wedlock, but also relates them to the development of modern law and the *maqāṣid al-syarī'ah* approach, which forms the basis of contemporary Islamic legal reasoning.¹⁹ In addition, this section presents an analysis of previous studies that review the issue of protecting children born out of wedlock in social, moral, and legal contexts, and highlights research gaps that remain to be explored further.

In the context of Indonesian national law, the status of children born out of wedlock has undergone significant developments. Law No. 1 of 1974 on Marriage and the Compilation of Islamic Law (KHI) initially stipulated that children born out of wedlock only had a civil relationship with their mother. However, a paradigm shift in the law emerged after Constitutional Court Decision No. 46/PUU-VIII/2010, which expanded the recognition of civil relations between children born out of wedlock and their biological fathers based on scientific evidence such as DNA testing. This ruling became an important milestone in the enforcement of children's rights and more inclusive legal protection. However, theological debates continue

¹⁷ Muhammad Hafis, Nia Elmiati, and Juliani Syafitri, "Contemporary Issues of Islamic Family Law: The Waithood Phenomenon and the Impact of the Sex Recession in Indonesia in Review of *Sadd Al-Dzari'ah*," *Legitima: Jurnal Hukum Keluarga Islam* 7, no. 1 (December 25, 2024): 18–39, <https://doi.org/10.33367/legitima.v7i1.6178>.

¹⁸ Muhammad Hafis, "PERTIMBANGAN HUKUM HAKIM DALAM PUTUSAN CONTRA LEGEM DI PENGADILAN AGAMA PEKANBARU DALAM PERSPEKTIF MASLAHAH MURSALAH" (Universitas Islam Negeri Sunan Kalijaga Yogyakarta, 2022), https://digilib.uin-suka.ac.id/view/creators/Muhammad_Hafis,_S=2EH=3ANIM=2E=253A_20203012020=3A=3A.html.

¹⁹ Muhammad Hafis and Jumni Nelli, "An Interpretive Review of Interfaith Marriages and Validity in Indonesia Election," *Jurnal Mahkamah: Kajian Ilmu Hukum Dan Hukum Islam* 7, no. 2 (December 31, 2022): 218–31, <https://doi.org/10.25217/jm.v7i2.2707>.

to arise because some scholars consider that this recognition cannot be equated with the determination of lineage according to Islamic law.²⁰

The map of contemporary scholars' thinking, based on my mapping, shows a tendency to distinguish between moral-civil aspects and spiritual-lineage aspects. While lineage relationships in accordance with Islamic law are still only recognized through legal marriage, civil relationships between children and biological fathers are beginning to gain recognition based on the principles of justice and benefit. It is this discourse that, in my analysis, serves as a bridge to the discussion of the *maqāṣid al-sharī'ah* approach, where the concepts of *hifz al-nasl* (preserving lineage) and *hifz al-'ird* (preserving honor) are reinterpreted to protect the rights of children without neglecting the basic principles of sharia.

Based on an in-depth comparative analysis of these various views, I conclude that Islamic law has an adaptive capacity that allows for reinterpretation of contemporary issues without neglecting its basic principles. The construction of the status of children born out of wedlock in *fiqh* is not monolithic, but rather a dynamic dialectic product of sacred texts, social realities, and considerations of public interest that have continued to evolve throughout the history of Islamic thought. This finding paves the way for further discussion on the integration of *maqāṣid al-syarī'ah* in responding to contemporary challenges.

Deconstruction Through Maqāṣid: A New Ethical-Legal Framework for the Rights of Children Born Out of Wedlock

The *maqāṣid al-syarī'ah* approach formulated by Imam al-Syatibi and further developed by Jasser Auda offers a transformative analytical framework for reexamining classical legal constructs regarding children born out of wedlock. According to al-Shatibi, as quoted by Mashduqi, the main objective of Islamic law is to realize universal and fundamental benefits (*al-maṣāliḥ al-darūriyyah*), which include protection of religion, life, reason, lineage, and property. Meanwhile, Auda, through his systemic approach, expands this concept by emphasizing the characteristics of interconnectivity, holism, and objectivity so that Islamic law is more adaptive to social developments.²¹ From the perspective of *maqāṣid*, the assessment of the status of children born out of wedlock should not only focus on the legality of the parents' actions, as is dominant in classical *fiqh*, but must also consider the *maqāṣid* of Islam.

The contemporary *maqāṣid al-syarī'ah* approach provides an opportunity to deconstruct the classical understanding of the objectives of sharia. Al-Syatibi emphasized that *maqāṣid* should not be positioned merely as a supplement in the establishment of law, but must be the main foundation that guides all provisions of sharia. This idea was later developed by Jasser Auda through a more dynamic approach, emphasizing that *maqāṣid* must be responsive to the developments of the times, social changes, and the needs of modern humans.²² In this context, legal assessment of the status of children born out of wedlock must begin with a fundamental question: how can legal provisions provide the greatest benefit to children as the most vulnerable parties who have no involvement in the circumstances

²⁰ Muhammad Hafis, Elmiati, and Syafitri, "Contemporary Issues of Islamic Family Law: The Waithood Phenomenon and the Impact of the Sex Recesson in Indonesia in Review of Sadd Al-Dzari'ah."

²¹ Muhammad Anis Mashduqi, "The Integration-Interconnection Paradigm in Islamic Law: Al-Syatibi's Thought in Al-Muwafaqat," *Al-Mazaahib: Jurnal Perbandingan Hukum* 12, no. 2 (June 30, 2025): 205–21, <https://doi.org/10.14421/al-mazaahib.v12i2.3915>.

²² Mashduqi.

surrounding them? With this orientation, maqāṣid becomes an epistemic framework that guides Islamic law to be more just, humanistic, and adaptive to social realities.

Deconstruction needs to be carried out on two main maqāṣid principles, namely ḥifẓ al-nasl and ḥifẓ al-‘ird. In classical fiqh construction, ḥifẓ al-nasl is often narrowly understood as a preventive measure to avoid mixing lineages through the prohibition of adultery. However, from a more progressive maqāṣid perspective, ḥifẓ al-nasl must be understood substantively as a guarantee of the fulfillment of the basic rights of every child who has been born, regardless of the marital status of their parents.²³ This substantive meaning includes protection of legal identity, the right to financial support, education, affection, and healthy psychosocial growth. Thus, the purpose of protecting offspring is no longer limited to maintaining the purity of lineage, but also ensuring a decent and dignified life for every child as an entity that has a human existence that must be respected.

On the other hand, ḥifẓ al-‘ird needs to undergo a shift in orientation from merely protecting the “honor” of the community through stigmatization, to protecting the dignity of individual children from all forms of discrimination, abuse, and negative labeling. Labeling children born out of wedlock as “illegitimate” actually contradicts the very purpose of ḥifẓ al-‘ird, because this practice degrades the self-esteem and human dignity of children who had absolutely no involvement in their parents' actions. The holistic maqāṣid approach emphasizes that dignity must be protected for every human being without exception, including children born out of wedlock, so that their rights as human beings remain fully guaranteed.²⁴

This paradigm shift will ultimately strengthen the relevance of Islamic law in responding to contemporary challenges, while reflecting Islam's universal message as a blessing for the universe. As emphasized in the reference article, reforming Islamic family law requires not only regulatory improvements but also a transformation in legal reasoning. Deconstruction through maqāṣid is a strategic step towards realizing substantive justice for all children without exception.

In Islamic law, the concept of nasab is the main foundation of the family law system. Nasab not only determines lineage, but is also closely related to civil rights such as inheritance, guardianship, and social honor. According to classical fiqh scholars, the determination of nasab has significant legal consequences because it concerns the legitimacy of blood relations recognized by sharia. Ibn Qudamah in Al-Mughni emphasizes that, “A child born out of adultery has no nasab relationship with the man who committed adultery with his mother even if he acknowledges him,” because the relationship was not born from a valid marriage contract. This opinion is reinforced by the hadith of the Prophet SAW: “Anyone who commits adultery with a woman, whether she is free or a slave, then the child is the product of adultery, does not inherit and is not inherited” (HR. Al-Tirmidhi).

In the modern social context, the issue of lineage is not only a legal matter, but also touches on psychological and humanitarian dimensions.²⁵ Therefore, it is important to

²³ Sukataman et al., “Maqāṣid Al-Sharī‘ah and the Prohibition of Incest in Indonesian Legislation: An Analysis of the Protection of Lineage and Public Morals,” *Al-Manahij: Jurnal Kajian Hukum Islam*, September 18, 2025, 205–26, <https://doi.org/10.24090/mnh.v19i2.14989>.

²⁴ Sukataman et al.

²⁵ Yernati Ulfazah et al., “THE DYNAMICS OF ISLAMIC FAMILY LAW IN THE MODERN ERA: AN ANALYSIS OF TAGHAYYUR AL-FATWĀ AND AL-MUḤĀFAẒAH IN THE CHANGING MARRIAGE AGREEMENT PROVISIONS IN INDONESIA,” *Al-Mawarid Jurnal Syariah Dan Hukum (JSYH)* 7, no. 1 (March 5, 2025): 77–94, <https://doi.org/10.20885/mawarid.vol7.iss1.art5>.

understand that the main purpose of establishing laws in Islam is to maintain benefit (maslahah) and avoid harm (mafsadah), including in the context of protecting children born out of wedlock.

The concept of maqāṣid al-sharī'ah is a fundamental theory in Islamic law which explains that every legal provision has certain moral and social objectives. Al-Syatibi in *Al-Muwafaqat fi Usul al-Syari'ah* states that maqasid aims to protect the five basic principles of human life: religion (hifz al-din), life (hifz al-nafs), intellect (hifz al-'aql), progeny (hifz al-nasl), and property (hifz al-mal). In the context of children born out of wedlock, the two most relevant maqasid are hifz al-nasl (preserving progeny) and hifz al-'ird (preserving honor).

The principle of hifz al-nasl emphasizes that Islam requires human offspring to be born from lawful relationships in order to maintain social order. However, this principle should not be interpreted narrowly in a way that disregards the rights of children born out of wedlock. On the contrary, the maqasid approach requires that Islamic law be applied with consideration for justice and public interest. As stated in QS. Al-An'am [6]: 164, "And no one shall bear the sins of another." This means that children cannot bear the sins of their parents and are still entitled to social protection and dignity as human beings.

In Indonesian positive law, the principle of social justice is embodied in Constitutional Court Decision No. 46/PUU-VIII/2010, which expands the recognition of civil relations between children born out of wedlock and their biological fathers based on scientific evidence. This decision is an important milestone in the national legal system because it affirms that the protection of children is part of the enforcement of substantive justice. From a maqasid perspective, this step can be understood as the implementation of hifz al-nasl and hifz al-'ird, because protecting offspring also means protecting the human dignity of children.

The integration of classical fiqh theory, maqāṣid al-syarī'ah, and modern positive law forms the main basis of this study. All three converge on the principles of justice and the protection of human welfare.²⁶ Islamic law, with its maqasid framework, serves as a source of moral and ethical values; positive law, with its normative system, acts as a formal instrument that embodies these values in public policy.

Through this integration, Islamic law is not only viewed as a set of rules, but as a living value system that is relevant to social reality. The principle of maslahah mursalah can be used as an instrument of ijtihad to establish legal policies oriented towards the public interest, including the protection of children born out of wedlock. This approach allows for the recontextualization of classical legal norms so that they remain in line with universal humanitarian principles.

By integrating these three theories, this study attempts to construct a theoretical synthesis that bridges Islamic law and positive law. This approach is in line with the thinking of Abdullahi An-Na'im (2008), who asserts that the renewal of Islamic law is not a form of deviation from sharia, but rather a way to revive Islamic moral values in the modern social context. Therefore, this study positions Islamic law as a value system that is open to ijtihad and reinterpretation, with the ultimate goal of realizing substantive justice for all parties, including children born out of wedlock.

²⁶ Sukataman et al., "Maqāṣid Al-Sharī'ah and the Prohibition of Incest in Indonesian Legislation: An Analysis of the Protection of Lineage and Public Morals."

Dialectical Construction of Law: Interaction between Islamic Principles and Positive Law in Protecting Children Born Out of Wedlock in Indonesia

Constitutional Court (MK) Decision Number 46/PUU-VIII/2010 is a landmark decision that marks an important dynamic in the dialectic between positive law and Islamic law in Indonesia, particularly regarding the status of children born out of wedlock. Through this decision, the MK stated that the provisions of Article 43 paragraph (1) of the Marriage Law, which limits the civil relationship of children born out of wedlock to only their mother and maternal family, is not entirely in line with the principle of justice. The MK then interpreted that children born out of wedlock also have a civil relationship with their biological father, as long as this can be proven through evidence that is valid according to the provisions of the law.²⁷ The main legal consideration put forward by the Constitutional Court was the fulfillment of children's constitutional rights, particularly those related to protection, recognition of identity, and the best interests of the child, which were deemed more fundamental than the marital status of the parents.

The legal dialectic that occurs is a two-way process that influences each other. On the one hand, the Constitutional Court's decision as a product of positive law “forces” or at least encourages Indonesian fiqh circles to reinterpret *ijtihad* on classical doctrines. Pressure from the constitution and human rights creates a need to find Islamic legal formulations that are more responsive to child protection, without having to sacrifice the principles of sharia. This ruling has become a catalyst for the birth of contextual Indonesian fiqh discourse.

On the other hand, the principle of *maqāṣid al-syari'ah* provides strong ethical and substantial legitimacy for the Constitutional Court's decision from an Islamic perspective. Supporters of this decision argue that the main objective of *maqāṣid sharia* is to protect human welfare, and in this context, protecting the life, dignity, and future of children (*ḥifẓ al-naḥs, ḥifẓ al-'ird, ḥifẓ al-nasl*) is a *daruriyyah* (primary) benefit that must take precedence over simply imposing implicit sanctions on parents. Thus, even though it originates from a different legal system (positive law), the Constitutional Court's decision finds its justification in the broader and more substantive epistemological framework of Islamic law, namely *maqāṣid*.

The greatest resistance often arises at the cultural-bureaucratic level in the religious court system, where classical fiqh understanding is deeply rooted. Systematic efforts through education and ongoing training of judges are needed to build a holistic understanding of *maqāṣid* and the current social context. Efforts to reform the KHI to bring it into line with the Constitutional Court's ruling and the principles of justice based on *maqāṣid* also still face legal and political challenges from conservative groups.

However, in general, this dialectic has opened up a very productive space for discourse. It has triggered an in-depth evaluation of the ability of Islamic law to respond to contemporary humanitarian problems. Practices that are beginning to develop, albeit slowly, point to a direction of integration: positive law provides a constitutional framework of protection, while *maqāṣid al-syari'ah* provides an ethical and methodological foundation for reinterpreting fiqh in a more equitable manner. This dialectical construction ultimately enriches Indonesia's legal

²⁷ Sukataman et al.

heritage and strengthens its position in protecting every child, without exception, in accordance with the constitutional mandate and the spirit of Islam as rahmatan lil 'alamin.²⁸

This study provides a deeper understanding of the status of children born out of wedlock from the perspective of Islamic law and its relevance to the national legal system in Indonesia. Based on an analysis of primary and secondary legal sources, it can be concluded that there are three main axes that form the conceptual framework for the status of children born out of wedlock, namely (1) classical Islamic law provisions on lineage, inheritance, and guardianship, (2) the development of Indonesian national law following Constitutional Court Decision No. 46/PUU-VIII/2010, and (3) the maqāṣid al-syarī'ah approach as a reinterpretative paradigm that connects the two. These three pillars form the basis for explaining the relationship between Islamic normative texts and the contemporary social and legal context.

The maqāṣid al-syarī'ah approach offers an integrative perspective that balances religious norms and social realities. The principle of hifz al-nasl demands protection of offspring from moral and social destruction, while hifz al-'ird mandates protection of human dignity from humiliation and discrimination. In the context of children born out of wedlock, the application of these two principles affirms that children cannot be blamed for the sins of their parents, as stated in QS. Al-An'am [6]: 164, "And no one shall bear the sins of another."

With the maqasid framework, Islamic law functions not only as a normative system that regulates human behavior, but also as an ethical system that guarantees the public interest (maslahah 'ammah). This view is reinforced by Al-Syatibi in Al-Muwafaqat fi Usul al-Syarī'ah, which states that all of Allah's laws aim to protect the interests of humans in this world and the hereafter.²⁹ In this context, children born out of wedlock are entitled to social and legal protection just like other children, without disregarding the moral principles of Sharia law that reject adultery. Therefore, legal policies that guarantee the rights of children born out of wedlock cannot be considered contrary to Islam, as long as the aim is to maintain public interest and justice.

The results of this study indicate that the relationship between Islamic law and national law is complementary, not contradictory. Both can enrich each other when understood through the maqāṣid al-syarī'ah approach. In classical fiqh, laws are established based on texts and ijma (consensus) of scholars, while in national law, laws are established through rational and empirical mechanisms. Although they have different foundations, both have the same objectives, namely to uphold justice and maintain public interest.

The implications of this study indicate the need for a new paradigm in understanding Islamic law substantively, rather than merely formalistically. Protection of children born out of wedlock must be placed in the context of protecting human dignity and the continuity of descent. With the maqāṣid al-syarī'ah approach, Islamic law can function as an ethical solution that not only upholds norms but also addresses concrete humanitarian issues. In the Indonesian social context, this approach can strengthen the synergy between religious institutions, the government, and society in overcoming the stigma against children born out of wedlock.

²⁸ 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>.

²⁹ Mashduqi, "The Integration-Interconnection Paradigm in Islamic Law: Al-Syatibi's Thought in Al-Muwafaqat."

Conclusion

This study concludes that the issue of the status of children born out of wedlock must be understood through an integrative approach between Islamic law (*maqāṣid al-syarī'ah*) and national law. The framework established by positive law in this case is driven by the Constitutional Court's ruling that the principle of legitimate lineage must be upheld to protect descendants and the social order, while the *maqāṣid al-syarī'ah* approach provides room for reinterpretation of the law so that it remains in line with the principles of justice and benefit. On the other hand, Indonesian national law, through regulatory developments and Constitutional Court Decision Number 46/PUU-VIII/2010, shows progressive efforts to provide legal protection for children born out of wedlock based on the principles of humanity and human rights. The synergy between these two legal systems shows that Islam and positive law have common ground in upholding substantive justice. The main contribution of this study is to construct a conceptual framework that integrates the values of *maqāṣid al-syarī'ah* with the principles of modern social justice, thereby enriching the discourse on Islamic family law in Indonesia. The implications of this study include the need for a more inclusive and humanistic reform of family law, while maintaining the moral principles of sharia. Further research is recommended to examine the social and juridical implementation of this concept in legal practice and public policy.

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