



THE PROTECTION OF THE RIGHTS OF CHILDREN BORN OUT OF WEDLOCK FROM THE PERSPECTIVE OF JASSER AUDA'S MAQĀSID AL SHARĪ'AH: AN INTEGRATIVE ANALYSIS OF LINEAGE, MAINTENANCE, INHERITANCE, AND CHILD PROTECTION POLICIES

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Abstract

This study examines the protection of the rights of children born out of wedlock from the perspective of Jasser Auda's contemporary maqāsid al-sharī'ah, supported by recent scholarly literature. The legal status of children born out of wedlock has long been dominated by classical Islamic jurisprudence, which tends to adopt a textual approach and may consequently give rise to social *stigma*, legal discrimination, and limited fulfillment of children's rights. This study employs a library research method with a qualitative-philosophical approach to analyze legal reconstruction through the systems approach developed by Jasser Auda. The findings demonstrate that the contemporary maqāsid paradigm shifts the orientation of *ḥifẓ al-nasl* from merely preserving the legitimacy of lineage (*nasab*) toward ensuring comprehensive protection of children's rights and human dignity. This reconstruction underscores the importance of recognizing biological parentage, fulfilling children's maintenance (*nafaqah*) rights, and safeguarding their economic welfare through legal instruments such as the obligatory bequest (*waṣīyyah wājibah*) and inter vivos gifts (*hibah*). Furthermore, the Constitutional Court Decision No. 46/PUU-VIII/2010 and the Child Protection Law demonstrate a convergence with the systems-based maqāsid paradigm by prioritizing the best interests of the child. Therefore, the protection of the rights of children born out of wedlock should be implemented in a manner that is just, humane, and free from all forms of discrimination.

Keywords: Children Born Out of Wedlock, Jasser Auda, Maqāsid al-Sharī'ah



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INTRODUCTION

Islam places the achievement of human welfare (*maṣlahah*) as the primary objective of all divine laws revealed on earth. Islamic law is essentially flexible, dynamic, and responsive to the transformations of time and society. However, in contemporary sociological realities, the implementation of Islamic family law is often confined within rigid and reductionist interpretations of formal religious texts. This situation has caused Islamic law to lose its ethical and humanitarian essence, particularly when addressing vulnerable legal subjects, such as children born outside a valid marriage.

The issue of children born out of wedlock represents a complex humanitarian, social, and juridical problem in many parts of the Muslim world, including Indonesia. Empirical data indicate that the number of children born outside legal marriage continues to increase, driven by the complexity of modern lifestyles, unregistered siri marriages, as well as moral offenses such as adultery and rape. Within the dominant structure of conventional Islamic jurisprudence (*fiqh*) embraced by many communities, these children bear significant civil legal consequences. Legally, they are considered completely disconnected from their biological father's lineage, which directly results in the loss of rights to paternal maintenance (*nafaqah*), marital guardianship (*walī*) for female children, and inheritance rights from their biological father.

The impact of such legal dogmatism extends beyond the realm of civil matters and profoundly affects the socio-psychological sphere. Children born out of wedlock are often subjected to negative labeling (*stigma*), social exclusion, and structural marginalization that limits their access to proper education and welfare. A moral paradox emerges in this context: children are born in a state of innocence without any theological wrongdoing, yet they are compelled to bear social and legal consequences for unlawful acts committed by their parents. Such discriminatory conditions clearly contradict the universal principles of human justice upheld by the Qur'an.

In addressing this fundamental problem, contemporary legal *ijtihād* is urgently required to reconstruct the framework of Islamic family law. One of the most relevant modern Islamic legal methodologies that offers significant methodological transformation is Jasser Auda's theory of *Maqāṣid al-Sharī'ah*. Through the systems approach, Auda deconstructs the partial and atomistic perspectives of textualist approaches and proposes a holistic, open, multidimensional, and purpose-oriented understanding of Islamic law that prioritizes substantive welfare (*maṣlahah*) and human rights.

Recent studies in Islamic legal scholarship over the past three years have increasingly examined the civil rights and protection of children born out of wedlock through a welfare-oriented and victim-centered approach (Asman, 2024). Progressive Islamic legal thought emphasizes the importance of reforming social and legal constructions so that children do not bear the burden of discrimination resulting from their parents' actions (Syafri, 2025). This research seeks to address this academic gap by conducting an integrative analysis of the civil rights of children born out of wedlock. By employing Jasser Auda's thought as an analytical framework, this article examines four fundamental pillars of child protection: lineage (*nasab*), maintenance (*nafaqah*), inheritance (*waṣīyyah wājibah*), and the extent to which positive legal policies in Indonesia, particularly following the Constitutional Court Decision No. 46/PUU-VIII/2010, respond to demands for substantive justice. It is expected that this theoretical reconstruction will contribute to the development of a more inclusive, responsive, and accountable legal framework aimed at protecting the dignity and fundamental rights of every child.

RESEARCH METHOD

Research Design

This study employs a library research method with a qualitative-philosophical approach oriented toward normative and conceptual analysis. The research design was selected to examine in depth the reconstruction of the protection of the rights of children born out of wedlock through the perspective of Jasser Auda's contemporary *maqāṣid al-sharī'ah*. The primary approach employed is normative legal research (doctrinal legal research) to analyze Islamic legal norms and positive legal provisions governing the status and protection of the rights of children born out of wedlock. In addition, this study applies a conceptual approach (conceptual approach) and a philosophical approach (philosophical approach) to explore Jasser Auda's systems approach as a new paradigm for reconstructing Islamic family law that is more oriented toward justice, *maṣlahah* (public welfare), and the protection of children's human rights.

Research Target/Subject

The research materials consist of various relevant literature documents related to the focus of the study. The primary data sources include the major works of Jasser Auda, particularly *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* and *Maqasid al-Shariah: A Beginner's Guide*, which serve as the theoretical foundation of this research. The secondary data sources comprise classical Islamic jurisprudential works from the four major schools of law (Hanafi, Maliki, Shafi'i, and Hanbali), the Qur'an, Hadith, Law No. 1 of 1974 concerning Marriage and its amendments, the Compilation of Islamic Law (Kompilasi Hukum Islam), Law No. 35 of 2014 concerning Child Protection, Constitutional Court Decision No. 46/PUU-VIII/2010, as well as reputable national and international scholarly articles published within the last three years to strengthen the contemporaneity and relevance of the analysis.

Research Procedure

The research was conducted through several stages. The first stage involved the identification and exploration of literature related to the protection of the rights of children born out of wedlock, *maqāṣid al-sharī'ah*, and Jasser Auda's legal thought. The second stage consisted of selecting and classifying sources based on their relevance, credibility, and publication recency. The third stage involved critical reading and interpretation of various sources to identify conceptual constructions related to lineage rights (*nasab*), maintenance rights (*nafaqah*), inheritance rights, and legal protection of children. The final stage was a conceptual synthesis through the integration of contemporary *maqāṣid al-sharī'ah* principles with Islamic legal norms and Indonesian positive law, resulting in a legal reconstruction framework that is more responsive to the protection of children's rights.

Instruments, and Data Collection Techniques

The primary research instrument is the researcher as a human instrument, who plays a role in identifying, evaluating, interpreting, and synthesizing various literature sources. Data collection was conducted through thematic documentation by tracing, collecting, recording, classifying, and organizing various documents according to the focus of the study. The data were categorized into several main themes, namely lineage status (*nasab*), maintenance rights (*nafaqah*), inheritance rights, legal protection of children, *maqāṣid al-sharī'ah*, and national legal policies. Subsequently, a process of data reduction and verification was carried out for each source to ensure validity, consistency, and relevance to the objectives of the research.

Data Analysis Technique

Data analysis was conducted using a qualitative content analysis model combined with a descriptive-analytical method. The stages of analysis included data reduction, categorization, interpretation, and deductive conclusion drawing. All data were analyzed using Jasser Auda's systems approach framework, which emphasizes six main characteristics: cognitive nature, wholeness, openness, interrelated hierarchy, multidimensionality, and purposefulness. Through this framework, the study reconstructs the concept of *ḥifẓ al-naṣl* from a legal-formal paradigm toward a more comprehensive paradigm of child rights protection. The results of the analysis were subsequently compared with Indonesian positive legal provisions to identify the convergence between contemporary *maqāṣid al-sharī'ah* and the national legal system in realizing social justice, legal certainty, and the protection of children's rights without discrimination.

RESULTS AND DISCUSSION

Theoretical Foundation: Jasser Auda's Maqāṣid al-Sharī'ah

Jasser Auda argues that the methodological crisis in modern Islamic jurisprudence is caused by the entrapment of jurists (*fuqahā'*) in fragmented textual interpretations. As a solution, he proposes a philosophical reconstruction of Islamic law based on systems theory. The systems approach views Islamic law not as a collection of isolated commands and prohibitions, but rather as a living organism that is open, dynamic, and functionally interconnected with the broader ecosystem of universal human values.

There are six main features of Jasser Auda's systems approach that distinguish it from conventional *fiqh* approaches. First, Cognitive Nature, which emphasizes that Islamic law is influenced by the perceptions, levels of knowledge, and cultural backgrounds of interpreters; therefore, it should not be positioned as something sacred and immutable. Second, Openness, which requires Islamic law to continuously engage in interdisciplinary dialogue with social realities, scientific developments, and modern human rights values. Third, Wholeness, which views all textual evidences of the *Sharī'ah* as an integrated vision rather than isolated arguments that contradict one another. Fourth, Interrelated Hierarchy, which connects practical legal rulings at the micro level (*juz'īyyāt*) with universal value-based principles (*kullīyyāt*). Fifth, Multidimensionality, which creates space for *ijtihād* from multiple perspectives in order to avoid the monopolization of a single claim of truth. Sixth, Purposefulness, which establishes that every legal ruling must have an ultimate objective, namely the realization of substantive *maṣlaḥah* (welfare).

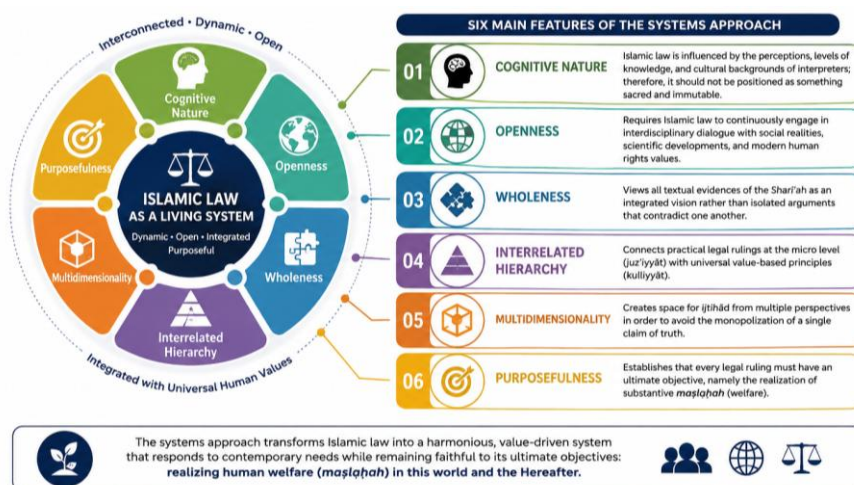


Figure 1. Jasser Auda's Systems Approach to Islamic Law

In relation to children's rights, Auda provides a fundamental redefinition of the structure of *al-darūriyyāt al-khams* (the five essential necessities). He transforms the concept of *hifẓ al-nasl* (preservation of lineage), which in classical *fiqh* is often reduced to the legality of marriage contracts and the formal prevention of adultery, into a broader concept of comprehensive protection of human existence, identity rights, human dignity, and guarantees of child care within a just family social system. Therefore, a child's birth status should not negate his or her intrinsic human rights as a being honored by God.

Review of the Ḥadīth “Al-Walad lil-Firāsh” and Classical–Contemporary Mazhab of Thought

Conventional *fiqh* discourse, the determination of a child's lineage (*nasab*) is based on a hadith narrated by ‘Ā’ishah (may Allah be pleased with her), in which the Prophet Muhammad (peace be upon him) stated: “Al-walad lil-firāsh wa lil-‘āhir al-ḥajar” (*The child belongs to the marital bed, and the adulterer receives nothing but disappointment/stone*). This hadith has become the primary foundation for classical Muslim jurists in determining the validity of the legal relationship between a child and his or her father.

The Shāfi‘ī and Mālikī schools apply a highly strict textual interpretation of this hadith. According to these two schools, the concept of *firāsh* requires the existence of a legally valid marriage bond according to Islamic law. If a child is born outside marriage, or is born less than the minimum gestational period of six months from the date of the marriage contract, the child is considered to have no legal lineage relationship with the biological man who impregnated the mother. The logical consequence of this severance of lineage is the loss of civil rights: the child is not entitled to paternal maintenance (*nafaqah*), does not inherit from the biological father, and the man cannot act as the marriage guardian (*walī*) for the female child.

On the other hand, the Ḥanafī school demonstrates a slightly different degree of flexibility. Although it maintains the principle of *firāsh*, Abū Ḥanīfah provides room for the recognition of lineage (*iqrār bi al-nasab*). If a man voluntarily claims or acknowledges that the child born is his, and the woman who gave birth is not legally married to another man, such acknowledgment may be accepted in order to preserve the child's social status and dignity. Meanwhile, within the Ḥanbalī school, the progressive views represented by Ibn Taymiyyah and Ibn Qayyim al-Jawziyyah produced a form of *ijtihād* that transcended the dominant views of their era. They argued that if a man commits an illicit relationship with a woman, the woman becomes pregnant, and the man is willing to acknowledge the child as his biological offspring, the child's lineage may be attributed to him, provided that the woman is not married to another man. This *ijtihād* is based on substantive *maṣlaḥah* considerations aimed at providing moral and economic protection for the child.

In the contemporary era, authoritative scholars such as Yūsuf al-Qaraḍāwī, Wahbah al-Zuhaylī, and ‘Alī Jum‘ah have reconceptualized this issue. They clearly distinguish between the theological aspect (the sin of adultery, which is solely borne by the parents) and the human rights and humanitarian aspects concerning the child. Referring to the Qur’anic principle in Surah al-An‘ām (6:164) that no person shall bear the burden of another person's sin, contemporary scholars emphasize that the state has an obligation to formulate legal frameworks and social policies ensuring that children born out of wedlock do not lose their civil rights, including the rights to identity, education, healthcare, and protection from psychological harm caused by social discrimination.

Integrative Analysis: Reconstruction of the Rights of Children Born Out of Wedlock from Jasser Auda's Perspective

By employing Jasser Auda's systems approach as an analytical framework, the interpretation of the status and rights of children born out of wedlock should be shifted from a paradigm of punishment and preventive restriction (*sadd al-dharī‘ah*) toward a paradigm of legal accountability and social justice. The structure of Islamic law must be integrated to

recognize children as independent legal subjects whose fundamental rights must be protected (Umam et al., 2023).

Within the features of openness and cognitive nature of Jasser Auda's legal systems theory, Islamic law must actively interact with developments in science. If, in the classical period, indications of biological relationships were determined only based on assumptions regarding the timing of birth (*firāsh*) or physical indications (*qiyāfah*), the modern era has introduced Deoxyribonucleic Acid (DNA) technology, which has a scientific accuracy rate of up to 99.9%. The existence of DNA testing has transformed the configuration of *'illah* (legal cause) in determining biological relationships. Ignoring valid scientific evidence in order to maintain classical textual interpretations constitutes a form of injustice. Therefore, the civil relationship between a child and his or her biological father must be legally recognized in order to fulfill the child's right to identity and the protection of lineage (*ḥifẓ al-nasl*).

The unilateral imposition of childcare and maintenance costs for children born out of wedlock solely upon the biological mother and her family represents a clear manifestation of social justice inequality. Jasser Auda's systems approach emphasizes that every action carries consequences of responsibility. A biological man involved in the process of creating the child cannot be released from financial responsibility. The law must require the biological father to assume obligations for the child's maintenance, healthcare, and education until the child reaches adulthood and becomes capable of living independently. This economic obligation is binding (*liability*) as a form of legal compensation for the biological act that resulted in the child's birth.

Conventional *fiqh* provisions that completely close the door to inheritance rights for children born out of wedlock have the potential to create structural poverty for children after the death of their biological father. To harmonize these provisions with the objectives of economic *maṣlahah*, legal reconstruction can be pursued through two approaches. First, through the establishment of a civil relationship after DNA testing, which opens the possibility of proportional inheritance rights. Second, if inheritance rights remain restricted in order to preserve the social order of *sharī'ah*-based lineage, the instrument of obligatory bequest (*waṣīyyah wājibah*) should be made mandatory by the court. Through judicial authority, the state may determine a portion of the biological father's estate to be granted to the child born out of wedlock, with a maximum amount of one-third (1/3) of the total estate, equivalent to the share of other heirs. This instrument guarantees distributive justice for the child.

The legal landscape in Indonesia has demonstrated progressive developments that are highly consistent with Jasser Auda's contemporary *maqāṣid* vision. Law Number 35 of 2014 concerning Child Protection explicitly stipulates that every child has the right to know his or her parents, to be raised, and to receive care from his or her own parents without discrimination. The culmination of this legal transformation was marked by the issuance of Constitutional Court Decision Number 46/PUU-VIII/2010. This decision, which reformed the provision of Article 43 paragraph (1) of the Marriage Law, states that a child born outside marriage does not only have a civil relationship with the mother but also with the biological father, provided that such relationship can be proven based on scientific and technological evidence (DNA testing). This Constitutional Court decision shifted the orientation of Indonesian family law from merely emphasizing formal marital legality toward the substantive protection of children's human rights (Zaman et al., 2025).

Specific Case Analysis and Resolution through the Principles of Uṣūl al-Fiqh

Children born as a result of sexual violence (rape) require dual protection from legal and social systems. From the perspective of Islamic theology and law, such children are absolutely pure and entirely free from any form of sin or blame. Jasser Auda emphasizes that the primary objectives of the *Sharī'ah* in extreme cases such as this are *ḥifẓ al-naḥs* (protection of life) and *ḥifẓ al-'ird* (protection of human dignity) for both the victim and the child conceived.

If, during the early stages of pregnancy (before the ensoulment of the fetus according to religious perspectives or within medically determined limits), a rape victim experiences severe psychological trauma, acute depression, or potential social rejection that threatens her life and safety, then the principles of *uṣūl al-fiqh* provide a concession (*rukḥṣah*) for medically justified abortion (*abortus provocatus*). The legal basis is founded upon the principle: “*Dar’u al-mafāsīd muqaddam ‘alā jalbi al-maṣāliḥ*” (*Preventing harm takes precedence over attaining benefits*) and the principle: “*Aḍ-ḍararu yuzāl*” (*Harm must be eliminated*). Saving the life of the mother, who is the victim of a crime, is prioritized over preserving a fetus that has not yet attained the status of a living being. However, if the pregnancy has exceeded the medically determined limit or the child has already been born, the state and all social institutions are obligated to provide full protection, guarantee the fulfillment of human rights, and strictly prohibit all forms of bullying and social *stigma*.

In sociological reality, cases are frequently found in which the biological father abandons his responsibility, and subsequently the mother of a child born out of wedlock enters into a lawful marriage with another man (the stepfather). To provide legal certainty and child protection, the stepfather’s name is often included in the Family Card (*Kartu Keluarga/KK*) document. This practice frequently creates legal confusion within society regarding the validity of lineage (*nasab*).

The inclusion of the stepfather’s name in the Family Card document represents an administrative measure and a form of social protection. In the perspective of state law, the stepfather acts as the head of the family, the provider of maintenance, and the socio-economic protector of the child. This administrative action may be regarded as a form of tangible public welfare (*maṣlaḥah mursalah*) aimed at protecting the child’s psychological condition from social ridicule, providing a sense of security, and facilitating access to essential public services, such as school registration, health insurance, and passport issuance. Therefore, such an action is legally permissible and has the value of social responsibility because it does not intend to falsify biological lineage but rather to fulfill the function of family protection.

The Relationship between the Principles of Uṣūl al-Fiqh and the Principle of Maṣlaḥah

The formulation of the protection of the civil rights of children born out of wedlock in this study is strongly supported by four fundamental principles of *uṣūl al-fiqh* that are based on the principle of *maṣlaḥah*: 1) The Principle of Public Policy Based on *Maṣlaḥah*: “*Taṣarrufu al-imām ‘alā ar-ra’iyyah manūṭun bi al-maṣlaḥah*” (*The actions and policies of a leader or authority toward the people must be based on considerations of public welfare*). The state’s intervention through Constitutional Court Decision No. 46/PUU-VIII/2010 and child protection legislation represents a concrete manifestation of this principle. The state has an obligation to intervene and reform legal provisions when existing regulations are proven to cause hardship and injustice for children. 2) The Principle of Removing Hardship: “*Al-masyaqqah tajlibu al-taysīr*” (*Hardship brings about ease*). The legal obstacles, the absence of identity documents, and the economic discrimination experienced by children born out of wedlock constitute forms of *masyaqqah* (severe hardship). Through the avenue of contemporary *ijtihād*, Islamic law must provide mechanisms of facilitation (*taysīr*) so that the essential rights of children can be fulfilled promptly and justly. 3) The Principle of Legal Flexibility Based on Causation: “*Al-ḥukmu yadūru ma’a al-‘illah wujūdan wa ‘adaman*” (*Legal rulings revolve around their effective cause, whether the cause exists or ceases to exist*). In the past, uncertainty regarding biological relationships became the basis for severing lineage (*nasab*). The emergence of DNA testing technology in the modern era provides a new and highly accurate *‘illah* (legal cause), requiring legal rulings to adapt by establishing civil responsibility between the biological father and the child.

The Principle of No Transferred Sin: This principle is explicitly affirmed in the Qur’anic text of Surah al-An’ām (6:164), which states: “*Wa lā taziru wāziratun wizra ukhrā*” (*And no bearer of burdens shall bear the burden of another*). This verse eliminates the theological

legitimacy of any legal rule or social practice that punishes or marginalizes children because of the unlawful actions committed by their parents.

CONCLUSION

The systems approach to *maqāṣid al-sharīʿah* developed by Jasser Auda successfully provides a humanistic, inclusive, and transformative legal framework for examining the rights of children born outside a legally recognized marriage. Through this integrative analysis, it can be concluded that the protection of children born out of wedlock must be positioned as the fulfillment of fundamental human rights rather than as an instrument of social punishment.

The reconstruction of children's rights, including the establishment of civil lineage based on scientific evidence through DNA testing, the imposition of absolute maintenance obligations upon biological fathers, and the provision of economic access through the instrument of *waṣīyyah wājibah* (obligatory bequest), represents a manifestation of social justice enforcement and the reconstruction of the contemporary concept of *ḥifẓ al-nasl* (protection of lineage). The development of Indonesian positive law through the issuance of Constitutional Court Decision Number 46/PUU-VIII/2010 and child protection regulations reflects a progressive jurisprudential transformation. The law has shifted from a rigid legal-formalistic and textual paradigm toward a substantive and contextual approach oriented toward genuine *maṣlaḥah* (public welfare) and justice for all children.

DECLARATION OF AI AND AI ASSISTED TECHNOLOGIES IN THE WRITING PROCESS

During the preparation of this work, the author used ChatGPT (OpenAI) to assist with grammar refinement, sentence structure improvement, academic writing development, and the organization of the manuscript. After utilizing this service, the author reviewed, verified, and edited the entire manuscript according to the requirements of the study and assumes full responsibility for the accuracy, interpretation, and scholarly content presented in this publication.

AUTHOR CONTRIBUTIONS

Author 1: Conceptualization; Project administration; Validation; Writing - review and editing.

Author 2: Conceptualization; Data curation; In-vestigation.

Author 3: Data curation; Investigation.

DECLARATION OF COMPETING INTEREST

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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