

# Children Born out of Wedlock Inherit the Lineage of Their Biological Father: Jasser Auda's *Maqāṣid asy-Syarī'a* Perspective

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**Abstract:** This article discusses the debate of the lineage (*nasab*) of children born out of wedlock according to *maqāṣid asy-syarī'a* framework by Jasser Auda. The data were collected from various literary sources, including primary, secondary, and tertiary materials. By employing the approach and theory of *maqāṣid asy-syarī'a* of Jasser Auda, this article concludes that efforts to create a just and equitable jurisprudence can be undertaken by reconstructing the classical fiqh framework concerning the status and rights of children born out of wedlock. This article also concludes that every child fundamentally possesses the same legal status and civil rights, including the right to lineage with their biological father. This is made possible by establishing the reconstruction of the lineage of children born out of wedlock on a substantive-legal basis, not a formal-legal basis, as in the classical fiqh construction.

**Keywords:** *Child born out of wedlock; nasab; maqāṣid asy-syarī'a.*

**Abstrak:** Artikel ini mendiskusikan perdebatan mengenai nasab anak yang lahir di luar pernikahan menurut kerangka *maqāṣid asy-syarī'a* ala Jasser Auda. Data dikumpulkan dari berbagai sumber pustaka, termasuk bahan primer, sekunder, dan tersier. Dengan menerapkan pendekatan dan teori *maqāṣid asy-syarī'a* Jasser Auda, artikel ini menyimpulkan bahwa upaya untuk menciptakan yurisprudensi yang adil dan merata dapat dilakukan dengan merekonstruksi kerangka fiqh klasik mengenai status dan hak-hak anak yang lahir di luar pernikahan. Artikel ini juga menyimpulkan bahwa setiap anak pada dasarnya memiliki status hukum dan hak-hak sipil yang sama, termasuk hak atas nasab dengan ayah biologis mereka. Hal ini dapat tercapai dengan melakukan rekonstruksi nasab anak yang lahir di luar pernikahan berdasarkan dasar hukum substantif, dan bukan dasar hukum legal-formal seperti dalam konstruksi fiqh klasik.

**Kata Kunci:** *Anak hasil zīna; nasab; maqāṣid asy-syarī'a.*

## Introduction

This article aims to reexamine the status of children born out of wedlock (*zina*) who, according to *fiqh* provisions, have traditionally been considered to have lineage solely through the mother and not the biological father.<sup>1</sup> This certainly has serious implications, as these children are deprived of their rights, particularly inheritance rights,<sup>2</sup> marriage guardian,<sup>3</sup> financial support, and *mahram* (person who is unlawful to marry) relationship— from the biological father<sup>4</sup> whereas children born out of wedlock also possess equal rights, particularly in ensuring their well-being and development until adulthood. On the other hand, every child fundamentally cannot be held accountable for

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<sup>1</sup> The argument that holds significant familiarity among *fiqh* scholars pertains to the concept of *li'an* (an allegation of adultery that cause divorce), wherein, in cases of *li'an*, Prophet Muhammad connected the lineage of a child, refuted through the oath of *li'an*, to the biological mother. This argument has gained widespread recognition and acceptance within the *fiqh* scholarly community due to its historical association with the practice of *li'an*, as exemplified by the actions of Prophet Muhammad. (QS. [24]: 6-10). Abdurrahman al-Jaza'iri, *Al-Fiqh 'ala al-Mazāhib al-Arba'ah* (Beirut: Dar al-Fikr, 1996), V: 116. See too Ibnu Hazm, *Al-Muhalla bi Asar*, (Beirut: Dar al-Kutub al-Ilmiyyah, t.t.), X: 142.

<sup>2</sup> According to the consensus of Islamic law, there are only three categories of individuals who are entitled to inheritance: *dzawī al-furud*, *dzawī al-ashabah*, and *dzawī al-arham*. Consequently, children born out of wedlock are automatically excluded from the possibility of inheriting from their biological fathers. This exclusion is based on the understanding that the legal rights of inheritance are limited to specific groups, and the status of children born from unlawful relationships falls outside the defined parameters of inheritance eligibility within Islamic jurisprudence. See Khalil Ahmad as-Saharnafur, *Baḥḥ al-Majhūd fī Hilli Abi Dawūd* (Beirut: Dar al-Kutub al-Ilmiyyah, t.t.), IV: 356.

<sup>3</sup> In the context of the marriage guardian (*wali nikah*), children born out of wedlock do not have a guardian on the father's side, and only a judge-appointed guardian has the authority to solemnize their marriage. This condition is derived from the interpretation of Islamic law, which recognizes that in cases of children born out of wedlock, the relationship with a guardian on the father's side does not apply. Consequently, a judge-appointed guardian is the sole authority entrusted with the responsibility of overseeing the marriage for such individuals. See Ibnu Al-Qayyim, *I'lām al-Muwaqī'in 'an Rabb al-Alamin* (Ttp: Dar al-Arabī, t.t.), V: 116.

<sup>4</sup> Abdurrahman al-Jaza'iri, *Al-Fiqh 'ala al-Mazāhib al-Arba'ah* (Beirut: Dar al-Fikr, 1996), V: 116; As-Shirānfuri, *Baḥḥ al-Majhūd fī Halli Abi Dawūd* (Beirut: Dar al-Kutub al-Ilmiyyah, t.t.), IV: 356.; Asy-Syafī'i, *Al-Umm* (Beirut: Dar al-Fikr, 1983), II: V.

the actions (sins) of their parents.<sup>5</sup> Thus, severing the lineage between a child and their biological father due to adultery constitutes a form of discrimination and injustice, particularly regarding the protection of the child and the additional burden borne by the mother. It seems to impose a legal burden on the child for the actions committed by both parents.

In 2012, the Indonesian Ulama Council (MUI) issued a fatwa that aimed to serve as a legal breakthrough for children born out of wedlock, particularly regarding their inheritance rights through the mechanism of a compulsory testament (*wasiat wajibah*).<sup>6</sup> However, a compulsory testament is not a full right that can be obtained by a child born out of wedlock, as it only limits their share to one-third of the total inheritance. In Islamic inheritance law, for example, a male child may be entitled to a larger portion than this. Thus, the legal solution provided by the MUI regarding the issue of children born out of wedlock still does not place the child in an egalitarian position in terms of protecting their rights.

Prior to the issuance of the MUI fatwa, Article 43 paragraph 1 of the Indonesian Marriage Law and Article 100 of the Compilation of Islamic Law (KHI) had already established that children born out of wedlock only have civil ties with their mother and her family. This indicates a strong influence of the Indonesian Marriage Law and KHI on classical Islamic law. Such a situation can be understood within a democratic system, where the government's structure and various decisions are always influenced by the majority's voice.

This research aims to reconstruct the lineage (*nasab*) of children born out of wedlock by employing the approach and theory of *maqāṣid asy-syarī'a* proposed by Auda, with the goal of achieving justice and protecting the rights of children born out of wedlock. The fundamental question addressed in this article is: what is the new construction of lineage for children born out of wedlock? This question is based on the understanding that the difference in lineage between children born out of wedlock and those born within marriage, and the resulting implications for their rights, do not reflect the universal principles of

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<sup>5</sup> Ahmad Asy-Syarbasi, *Yas'alunaka Fi Ad-Din Wa Al-Hayah*, V (Beirut: Dar al-Jayl, 1977), p. 18.

<sup>6</sup> Fatwa Indonesian Ulama Council No 11 Tahun 2012. concerning Children Produced of Adultery and Treatment of Them

the Qur'an regarding justice, equality, and the equal status of all human beings. Children born out of wedlock should have the same rights as children born within marriage.

Several researchers have conducted studies on the rights of children born out of wedlock. For example, Samad, in one of his writings, states that children born out of wedlock have the same rights as any other children. However, he does not explicitly state that children born out of wedlock have *nasab* ties with their biological father. According to him, children born out of wedlock should not be treated unilaterally, where their existence in society is deemed unimportant and carries a low social value.<sup>7</sup> Syamut<sup>8</sup> and Yassin<sup>9</sup> also share the view that children born out of wedlock should have the same legal and social status as any other children. According to them, Muslim-populated countries should reconstruct Islamic law to encompass and protect the rights of all individuals, including the rights of children born out of wedlock.

Several of these scholarly studies indeed demonstrate a clear effort to reexamine the concept of *nasab* for children born out of wedlock. Their studies go beyond mere understanding and also aim to establish a clear legal status that affirms that these children not only possess the same civil rights as any other children but also specifically have a lineage relationship with their biological father. Therefore, this research aims to complement previous studies on the civil rights of children born out of wedlock.

### ***Maqāṣid asy-Syarī'a* as an Approach and Methodology for the Deduction of Islamic Legal Rules**

There are two fundamental factors that underpin Auda's efforts to develop *maqāṣid asy-syarī'a*, namely the increasing humanitarian crisis and the inadequacy of Islamic legal methodologies in addressing various contemporary issues. In this regard, Auda refers to data

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<sup>7</sup> Muneer Ali Abdou Samad, 'Nasab Walad Al-Zina: Dirasah Al-Fiqhiyyah Fi Dawi Maqsad Hifz Al-Nasl', *Majallah Al-Ulum Al-Islamiyyah Al-Dauliyyah*, 1.2 (2017), p. 107–139.

<sup>8</sup> Hasan Taisir Abd al-Rahim Syamut, 'Al-Ahkam Al-Fiqhiyyah Al-Khasah Bi Al-Qada' Al-Syar'i Wa Al-Ahwal Al-Syakhsiyyah Li Al-Hadis Wahtajibi Minhu Ya Saudah', *Majallah Al-Jami'ah: Journal of Shariah*, 26.2 (2018), p. 36–57.

<sup>9</sup> Mohammed Naeem Yassin, 'Daur Al-Ihktibar Al-Jini Fi Hifzu Al-Ansab', *Journal of Tabayyun*, 7.27 (2019), p. 107–136.

released in 2006 by the Human Development Index (HDI). The data indicate that Muslim-populated countries rank lowest in various aspects, such as poverty rates, education, security, economy, women's empowerment, human rights, and corruption. Based on these findings, he aims to restore the image of Islamic law, which encompasses justice, compassion, love, progress, and the promotion of goodness among humanity.<sup>10</sup> It inspires Auda to develop the concept of *maqashid asy-shari'a*, as he observes that the existing studies tend to merely reiterate what has been formulated by previous scholars such as al-Juwayni,<sup>11</sup> al-Ghazali,<sup>12</sup> al-Syatibi.<sup>13</sup> The existing studies on *maqasid asy-shari'a* appear rigid, narrow, and less compatible in addressing various contemporary issues and crucial concerns, such as human development and economic

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<sup>10</sup> Jasser Auda, *Maqasid al-Shari'ah as Philosophy of Islamic Law: A Systems Approach* (London: The International Institute of Islamic Thought, 2008), p. xxii; Jasser Auda, *Maqashid Al-Syari'ah Dalil li Al-Mubtadiin*, I (Beirut: Maktab al-Tauzi' fi al-Alam al-Arabi, 2011).

<sup>11</sup> Al-Juwayni (w. 478 H/1085 M) introduced and at the same time classified the Maqashid into three levels of necessity, yaitu *dharuriyyat*, *hajiyyat* and *tahsiniiyat*. According to Auda, the main targets of *maqashid Juwayni* were *hifz al-din*, *hifz al-nafs*, *hifz al-mal*, *hifz al-'aql* and *hifz al-nasl*. Jasser Auda, *Maqasid al-Shari'ah as Philosophy of Islamic Law: A Systems Approach* (London: The International Institute of Islamic Thought, 2008), p. 17.

<sup>12</sup> Al-Ghazali (d. 505 H/1111 AD), in his book *Al-Mustasfa*, developed the ideas of his teacher, Al-Juwayni, by introducing the concept of *hifz al-ird* (preservation of honor) in addition to the five necessities proposed by his teacher. He further categorized the benefits into three parts: First, *maslahat* that is *mu'tabarrah* (accepted); second, the *mulgab* benefit; Third, *maslahat* that is *mursalah* (neutral). Jasser Auda, *Maqasid al-Shari'ah as Philosophy of Islamic Law: A Systems Approach* (London: The International Institute of Islamic Thought, 2008), p. 18. See too; Syamsul Anwar, "Epistimologi Hukum Islam: Dalam Al-Mustasfa Min 'Ilm Al-Usul Karya Al-Ghazzali", *Disertasi Doktor*, UIN Sunan Kalijaga, 2000), p. 385-386.; Muhyar Fanani, *Metode Studi Islam: Aplikasi Sosiologi Pengetahuan Sebagai Cara Pandang* (Yogyakarta: Pustaka Pelajar, 2010), p. 173.

<sup>13</sup> Syatibi (d. 790 H/1388), mapped *maqasid shari'ah* into three aspects: First, the Shari'a which was revealed by God for the betterment of humanity; Second, its understanding should be accessible to the accountable individuals (*mukallaf*); Third, it should be implementable by the morally responsible individuals (*mulatto*); Fourth, in order for human beings to submit to God's law. From this perspective, Syatibi's *Maqasid Shari'ah* can be characterized as inductive (*istigra'*). See Asy-Syatibi, *Al-Muwafaqat fi Usul al-Ahkam*, II (Mesir: Dar al-Fikr) p. 5.; Fanani, p. 173-174; See too Muhammad Khalid Mas'ud, *Islamic Legal Philosophy: A Study of Abū Ishāq Al-Shātibī's Life and Thought* (Delhi: International Islamic Publ, 1989), p. 221.; Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oxford: Oneworld Publ, 2010), p. 132.

development. In this regard, Auda strives to shift the paradigm of the traditional *maqasid*, which initially focused on protection and preservation, towards a new *maqashid* approach that emphasizes development, progress, and the protection of human rights.

Auda seeks to broaden the scope of *maqashid asy-shari'ah* to encompass not only the traditional objectives of Islamic law but also to include the development and advancement of individuals and societies. This paradigm shift involves placing a greater emphasis on the promotion and protection of human rights, aligning with the principles of justice, compassion, and the well-being of humanity. By adopting this approach, Auda aims to provide a more comprehensive and relevant framework that addresses contemporary challenges and fosters human development and economic progress.<sup>14</sup> Auda considers *maqashid asy-shari'a* as the philosophy of Islamic law, particularly emphasizing its role as an independent field of study. The comparison between the old *maqasid* and the new *maqasid* can be observed in table 1 below:

**Table 1:** Old and new paradigm on *maqashid al-shari'ah*

No	Old Maqashid Paradigm	New Maqashid Paradigm
1.	Preserving the religion ( <i>hifẓ ad-din</i> )	Protecting, safeguarding, and respecting the freedom of religion or belief
2.	Preserving lineage ( <i>hifẓ an-nasl</i> )	Protection and enhancement of family quality and potential
3	Preserving reason ( <i>hifẓ al-aql</i> )	Multiplying mindset and scientific research, prioritizing the journey of seeking knowledge, discouraging the mindset that prioritizes criminal activities of mob mentality, and avoiding efforts to undermine intellectual work

<sup>14</sup> Auda categorizes the new *maqasid* into three levels: First, *maqasid al-ammah* (general objectives); Second, *maqasid al-khassah* (specific objectives); Third, *maqasid al-juz'iyyah* (particular objectives). These three new *maqasid* should not contradict one another. For example, the freedom of religion (*maqasid al-juz'iyya*) should not conflict with the objective of not disturbing other religions (*maqasid al-khassah*) and should also align with the objective of religious tolerance (*maqasid al-ammah*). See: Jasser Auda, p. 5-21.

4.	Preserving honor; preserving the soul ( <i>hifz al-irdh</i> )	Preserving and safeguarding human dignity and protecting human rights
5.	Preserving wealth ( <i>hifz al-mal</i> )	Prioritizing social care, paying attention to economic development and growth; promoting human welfare, and eliminating the gap between the rich and the poor.

The previously existed *maqasid asy-shari'a* concept often understood *maslahah* (benefit) as utility. Hence, the slogan emerged: "where there is benefit, there is *maqasid*." This utilitarian perspective in the old *maqasid* implies that the greatest utility becomes the basis for policy-making. However, this utilitarian approach tends to overlook the rights of minority groups that are not covered under the umbrella of the greatest utility. For example, it may justify sacrificing one life to save ten others.

In contrast to the old *maqasid*, the new *maqasid* no longer defines *maslahah* solely in terms of benefit but interprets it as development and the protection of human rights. By adopting this perspective, the new *maqasid* recognizes the importance of protecting and fulfilling the rights of minority groups. This shift ensures that the rights of minorities are safeguarded and fulfilled within the framework of *maqasid asy-shari'a*. Thus, the new *maqasid* provides a more inclusive and human rights-oriented approach that promotes the development and well-being of all individuals, regardless of their minority status.

**The Implementation of *Maqashid asy-Syari'a* regarding the *Nasab* of Children Born out of Wedlock**

There are six operational features of *maqashid asy-syari'a* proposed by Auda. The first feature is cognition, which entails the separation between divine revelation and human cognition. Auda introduces a shift in the prevailing claim that represents divine commands to a dualistic understanding rooted in human cognition.<sup>15</sup>

<sup>15</sup> This concept is not novel within the realm of Islamic studies, as it has been explored by prominent Muslim scholars long before. Thinkers such as Fazlur Rahman, Abdullah Saeed, Nasr Hamid Abu Zaid, and Abdul Karim Soroush have engaged in discussions concerning these distinctions. For instance, the latter scholar has made a clear distinction between religion itself and the interpretation or

The second feature is integrity, which emphasizes the interconnectedness of different components within *maqāshid asy-syari'a*. This feature aims to address the shortcomings of *usul al-fiqh*, which often adopts a reductionist approach and overlooks the importance of integrity. By emphasizing the principle of integrity, the derivation of legal rulings (*istinbath al-hukm*) should not rely solely on one or a few verses but should consider and encompass the entirety of the Quranic verses.

The third feature is openness, which entails the willingness of a mujtahid (a qualified jurist) to be receptive to knowledge from various disciplines. This openness allows for a broader perspective and integration of insights from different fields of knowledge into the process of legal reasoning. The fourth feature is an interrelated hierarchy, which highlights the interconnectedness among the various levels of *maqāshid asy-syari'a*, with each level holding equal importance. An example of implementing interrelated hierarchy is the obligation of prayer (*darūriyyat*), the pursuit of knowledge (*hājīyyat*), and recreational activities (*tahsiniyyat*). Although these three levels have different degrees of importance, they are all equally significant and should be fulfilled and practiced. The fifth feature is multidimensionality, emphasizing the need to consider multiple dimensions rather than focusing on a single aspect. This approach recognizes the complexity of human experiences and societal issues, requiring a comprehensive analysis from various perspectives. The sixth feature is purposefulness, which emphasizes the interconnectedness and interdependence among different aspects. The essence of these six features is that the theory of *maqāshid asy-syari'a* serves as a crucial project in the contemporary era for the development

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understanding of religion. See Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (Chicago: Chicago University Press, 1982), p. 5; Abdullah Saeed, *Reading The Qur'an in The Twenty-First Century: A Contextualist Approach* (London: Routledge, 2014), p. 4-5; Abdullah Saeed, *Interpreting Quran: Towards a Contemporary Approach* (London: Routledge, 2006), p. 8.; Abdullah Saeed, *Islamic Thought: An Introduction* (London: Routledge, 2006), p. 15.; Abdullah Saeed, *Introduction to the Qur'an: History, Interpretation and Approaches* (London: Routledge, 2008), p. 21; Nasr Hamid Abu Zaid, *Isykalīyat Al-Qira'at wa Aliyyat at-Ta'wil* (Beirut: al-Markaz ats-Tsaqafi al-Arabi, 1994); Nasr Hamid Abu Zaid, *Maḥmū an-Nas: Dirasah fi 'Ulum Al-Qur'an* (Beirut: al-Markaz ats-Tsaqafi al-Arabi, 1994).; Nasr Hamid Abu Zaid, *An-Nas, as-Sultān, al-Haqiqah* (Beirut: al-Markaz ats-Tsaqafi al-Arabi, 1996).; Nasr Hamid Abu Zaid, *'Dawair al-Khauf: Qira'ah fi Khatib al-Mar'ah'* (Beirut: al-Markaz ats-Tsaqafi al-Arabi, 2004).

and reform of Islamic law. The methodological basis of *maqāshid asy-syari'ah* includes rationality, utility, justice, and morality.

In summary, the six features outlined above demonstrate that the theory of *maqāshid asy-syari'ah* is a significant undertaking in the contemporary context to enhance and reform Islamic law. These features promote an integrated and comprehensive approach that considers the interconnectedness, integrity, openness, interrelated hierarchy, multidimensionality, and purposefulness of *maqāshid asy-syari'ah*. Furthermore, the methodology of *maqāshid asy-syari'ah* is grounded in rationality, utility, justice, and morality.<sup>16</sup>

The combination of the six features above is called a system,<sup>17</sup> which is the basis and guideline for the work of *maqāshid asy-syari'ah* developed by Auda in analyzing various legal problems. The six features are a unified whole, binding, and at the same time functioning to control, direct, criticize, question, improve, control, and animate. The main goal is to deliver its users safely to their destination, without having to cause damage in the middle of the road and injure other road users.<sup>18</sup> The application of Auda's *maqāshid asy-syari'ah*, based on the six aforementioned features, when employed to analyze the issue of children born out of wedlock (*anak zina*), can be explained as follows.

#### a. *Cognition (al-Idrākīyah)*

The current cognitive framework that shapes the understanding of the lineage structure of children born out of wedlock is derived from the consensus among jurists (*ulama*) in Islamic jurisprudence regarding the texts about adultery and its legal consequences. However, it is important to note that cognitive understanding, which represents the jurists' interpretation of these texts, cannot be claimed as an absolute truth that transcends time and space. Legal cognition, which reflects the jurist's logical thinking, tends to be influenced by a bias between *syari'a* as a divine text and *fiqh* as the human understanding of that text, which inherently possesses the potential for both correctness and fallibility.<sup>19</sup> On the other hand, this has resulted in traditional Islamic legal cognition failing to distinguish

<sup>16</sup> Jasser Auda, *Maqasid al-Shari'ah as Philosophy of Islamic Law*, pp. 45-51.

<sup>17</sup> Jasser Auda, pp. 33.

<sup>18</sup> Abdullah, p. 144-145.

<sup>19</sup> Jasser Auda, p. 103.

between *fiqh* (jurisprudence) and *Shariah*. As a consequence, the outcomes of juristic *ijtihad* (legal reasoning) have been regarded as final and unchangeable, including the provisions of *fiqh* regarding the lineage of children born out of wedlock.

The influence of such traditional cognition remains highly significant in the perspectives of Islamic legal scholars in Indonesia today. This can be observed through the fatwas (religious rulings) issued by the MUI, which implicitly reject the decisions of the Constitutional Court (MK) regarding the issue of the lineage of children born out of wedlock.<sup>20</sup> Consequently, the enactment of a new law that accommodates the Constitutional Court's decision has not been realized to date. Moreover, judges in religious courts have opted to interpret the Constitutional Court's decision in a manner that does not contradict the fatwas issued by the MUI. This adjustment in interpreting the Constitutional Court's decision in line with the MUI fatwas is evident in the interpretation that the legal rights of children born out of wedlock or children from zina relationships towards their biological fathers are limited to maintenance rights and compulsory bequests (*wasiyat wajibah*).<sup>21</sup> This aligns precisely with the substance of the MUI fatwa which is built upon the foundation of traditional Islamic legal cognition. In the traditionalist Islamic legal cognition, the construction of lineage for children born out of wedlock is believed to be final and unchangeable. This perspective emphasizes the protection of the rights of children born out of wedlock, similar to the rights of children born within a valid marriage. Consequently, any attempt to reconstruct the lineage of children born out of wedlock is deemed impossible as long as the legal methodology (*istinbat*) remains based on traditional Islamic legal cognition. The realization of reconstructing the lineage of children born out of wedlock can only be achieved by basing it on contemporary Islamic legal cognition.

In this context, it is important to understand that the concept of lineage for children born out of wedlock in the classical *fiqh* construction, which eliminates the legal connection between a child

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<sup>20</sup> See fatwa Majelis Ulama Indonesia, No 11 Tahun 2012.

<sup>21</sup> Marilang, 'Legal Relationship Between Illegitimate Children And Their Biological Father: The Analysis of Constitutional Court Decree No. 46/PUU-VII/2010 in The Perspective of Civil And Islamic Law', *JOURNAL OF INDONESIA ISLAM*, 10.46 (2016), pp. 335–354.

and their biological father, is a legal construct that may be valid only in its historical context. This is because the concept of lineage for children born out of wedlock is formed by interpreting textual evidence from the perspective of mujtahids (jurists) who are inevitably influenced by the societal and contextual circumstances surrounding them.

b. *Wholeness (al-Kulliyah)*

In classical fiqh, children born out of wedlock are not recognized as having a legal lineage connection with their biological fathers. This is due to the legal methodology (*istinbat*) still being based on a partialism paradigm. In this partialism paradigm, the legal derivation is limited to partial evidence. For instance, in cases of lineage for children born out of wedlock, the commonly cited evidence is the hadith of the Prophet which states: "The child born out of wedlock belongs to the mother's family, whether the child is a free woman or a slave."<sup>22</sup> Furthermore, there is also a hadith of the Prophet which states that any man who commits adultery with a free woman or a slave woman, their child is considered to be a child of adultery (*anak zina*) who is not attributed to their biological father and is not entitled to inheritance rights.<sup>23</sup> In classical fiqh, these partialistic evidences are often positioned as stronger than general evidences. Meanwhile, other general evidences, such as Quranic verses about the creation of humankind or verses stating that each person is accountable for their own sins, are scarcely regarded as primary sources for constructing the lineage of children born out of wedlock. Therefore, in order to rectify the construction of lineage for children born out of wedlock, a reexamination and harmonization of both specific (partial) and general (holistic) evidences are necessary. By doing so, a more just framework for determining the lineage of children born out of wedlock can be established.

c. *Openness (al-Infitahiyah)*

Reinterpreting the verses of the Quran alone will not give rise to a new lineage construction for children born out of wedlock if one remains confined to the interpretations of classical fiqh. Therefore, an

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<sup>22</sup> Abu Dawud Sulaiman, *Sunan Abu Dawud* (Beirut: al-Maktabah al-Asriyah, tt), II: 283, Hadith no-2274.

<sup>23</sup> Muhammad bin Isa at-Tirmidzi, *Sunan at-Tirmidzi* (Beirut: Dar al-Gharb al-Islam, 1998), III: 499.

attitude of "openness" is needed to adopt the advancements of modern knowledge as a new perspective in establishing Islamic law. Openness is one of the features of a system that can overcome the stagnation of legal thinking in Islam. This feature requires Islamic legal evidence, both from the Quran and hadith, to be interpreted contextually while also integrating them with the developments of modern knowledge. This approach will result in a flexible interpretation of Islamic law that is in line with the conditions of the modern era.

The discussion of lineage in the Quran is described using the terms *nasab* (lineage) and *nasl* (offspring). Both terms are closely related to the discourse on the mechanism of human creation. This is evidenced by the use of the word *nasab* in the Quran, which is mentioned in conjunction with the word *mā'* (water) or the word *nasl*, which is also mentioned in conjunction with the words *mā'* and *tin* (clay) (Surah and verse references needed). On the other hand, the words *mā'* and *tin* in other verses (Surah and verse references needed) that do not mention the words *nasab* or *nasl* are always closely related to the process of human creation. Additionally, there are two verses (Surah and verse references needed) that mention the words *mā'* and *tin* preceded by the word *sulālah*, indicating the biological substance of the process of human creation.

The term *nasab* is mentioned three times in the Quran, with two instances in singular form (QS. al-Furqan [25]: 54 and QS. as-Saffat [37]: 158) and one instance in plural form (QS. al-Mu'minun [23]: 101). Specifically, verse 54 of QS. al-Furqan describes that Allah created human beings from water (*al-mā'*) and established the relationships of lineage (*nasaban*) and marriage (*sibra*). On the other hand, in QS. al-Qiyamah [75]: 37-39, it is explained that the mentioned water (*al-mā'*) refers to the male semen that fertilizes the female ovum inside the woman's womb. Thus, the occurrence of fertilization within the female's womb and the formation of a fetus are not restricted by specific formal legal conditions, such as marriage.

Next, the word *nasaban* in QS. al-Furqan [25]: 54 becomes important to discuss. This is because the term *nasaban* is mentioned after the word *al-mā'*, indicating a strong correlation between lineage (*nasab*) and the origin of human creation. The term *nasaban* describes that lineage is not established through formal legal mechanisms, such as marriage, but is based on biological relationships through the

compatibility of genetic codes originating from individuals engaged in sexual intercourse. This conclusion can be supported by two aspects: First, the word *nasaban* in Surah al-Furqan [25]: 54 is mentioned after the phrase *kbalaqa min al-ma' basharan*, indicating a close connection between lineage and the process of human creation through the genetic codes present in the spermatozoa and ovum during fertilization. Second, the essence of lineage (*nasab*) in the Quran, which uses the word *nasl*, leads to the conclusion that lineage is a blood relationship established through the compatibility of genetic codes between the child and both parents as a result of the inheritance of genetic traits from the spermatozoa and ovum during the process of fertilization.

d. *Interrelated-hierarchy (al-Harakiriyah al-Mu'tamadah Tabaduliyah)*

The issue of lineage and descent is considered fundamental (*daruri*). In *maqāsid asy-syari'a*, it becomes an important aspect that needs to be protected (*hifẓ an-nasl*). The concept of protecting lineage (*hifẓ an-nasl*) in *maqāsid asy-syari'a* aims to preserve the clarity of a child's lineage to their father. Therefore, the act of adultery is prohibited because it undermines the clarity of lineage. The concept of protecting lineage, in the author's view, is not intended to eliminate the lineage of a child born out of wedlock from their biological father but rather aims to safeguard someone's lineage from the ambiguity caused by the act of adultery. The elimination of the lineage of a child born out of wedlock does not naturally arise from the concept of protecting lineage (*hifẓ an-nasl*). Its emergence is the result of the interpretations and *ijtihad* of scholars that tend to be literalistic and adopt a partialistic approach.

The concept of protecting lineage (*hifẓ an-nasl*) that eliminates the lineage of a child born out of wedlock from their biological father indicates the disregard for aspects of justice (QS. an-Nahl [16]: 90) and the protection of human rights (HAM). The absence of HR protection is manifested in the denial of the rights of a child born out of wedlock to have custody, financial support, and inheritance from their biological father. Therefore, a re-*ijtihad* is necessary regarding the construction of lineage for children born out of wedlock through a *maqāsid* approach. Justice and equal rights between children born out of wedlock and other children are common objectives (*maqāsid al-ammah*) of Islamic law. Yusuf al-Qardhawi supports the rights of women and advocates fair treatment towards them as a common *maqāsid* of Islamic law. Similar actions have been taken by al-Ghazali, who considered justice

as the main factor for the past glory of Islamic civilization, while injustice led to the decline of Islam. Thus, justice is a *maqāsid* at the level of *darūriyyat* that must be fulfilled.<sup>24</sup> Therefore, the classical fiqh construction regarding the hadith of *al-walad lil al-firasy*, which eliminates the lineage of a child born out of wedlock from their biological father, contradicts the general *maqāsid* that considers justice as the essence of all Islamic laws.

The dichotomy between the lineage of a child born within a valid marriage and a child born as a result of adultery is a form of injustice. However, both are born in a state of *fitrah* (natural disposition) and are not accountable for the sins of their parents. Numerous verses in the Quran affirm that each individual is only accountable for their own actions, as explained in several verses (QS. an-Nisa [4]: 110; al-An'am [6]: 164; Fatir [35]:18; and an-Najm [53]: 38-41). These verses state that the sin of adultery will be borne by its perpetrator alone. Therefore, a child born as a result of adultery is not associated with the sins of their parents.

In contrast to general objectives (*al-maqāsid al-ammah*), specific objectives (*al-maqāsid al-khassah*) discuss particular aspects of Islamic law. The construction of lineage in classical fiqh that eliminates the relationship between a child born out of wedlock and their biological father has two weaknesses: family development (*bina' al-usrah*) and family protection (*hifz al-usrah*). From the perspective of family development, there are two arguments regarding the weaknesses of the construction of lineage for children born out of wedlock in classical fiqh. First, children born out of wedlock cannot establish a family as easily as children born within the institution of marriage. If a child born out of wedlock happens to be a girl, she does not have a father who can act as her guardian for marriage. Second, the absence of a lineage connection between a child born out of wedlock and their biological father will subject the child to negative stereotypes from their social environment. This will result in the child born out of wedlock being perceived as inferior to other children, particularly in terms of lineage.

From the perspective of family protection (*hifz al-usrah*), there are two arguments regarding the inappropriateness of the construction that eliminates the lineage of a child born out of wedlock from their

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<sup>24</sup> Jamal 'Atiyyah, *Nahwa Taf'il Maqāsid asy-Syari'ah* (Damaskus: Dār al-Fikr, 2003), p. 49.

biological father. Firstly, the loss of lineage connection between a child born out of wedlock and their biological father will lead to the neglect of the child's civil rights, such as the right to financial support and inheritance from the father's side. Secondly, the classical construction regarding the lineage of a child born out of wedlock that eliminates their connection with the biological father can impose financial burdens and psychological disturbances on the child and the mother. The mother of a child born out of wedlock will bear the financial burden of supporting the child's livelihood since the biological father will not play any role as a father.

e. *Multi-Dimensionality (Ta'addud al-Ab'ad)*

One of the hadiths used by Sunni scholars regarding the absence of lineage connection between a child born out of wedlock and their biological father is the narration of a dispute between Abd bin Zam'ah and Sa'ad bin Abi Waqas. This dispute arose due to the testament of Utabah, who was the brother of Sa'ad bin Abi Waqas. Utabah instructed Sa'ad bin Abi Waqas to take custody of Zam'ah's child, as according to Utabah, the child of his slave Zam'ah was his own (Utabah's) child because he had committed adultery with that slave during the era of ignorance (Jahiliyah). Upon the conquest of the city of Mecca, Sa'ad bin Abi Waqas took the child in accordance with his brother's testament, Utabah bin Abi Waqas. However, Abd bin Zam'ah prevented this from happening, leading to a dispute between Sa'ad bin Abi Waqas and Abd bin Zam'ah over lineage. Both of them brought their dispute regarding lineage to the attention of the Prophet. Sa'ad said, "O Prophet, this child is my nephew, Utabah's child, and he instructed me to take care of and protect him." Abd bin Zam'ah said, "He is my brother, born to my mother on my father's bed." Then, the Prophet rendered a legal judgment and said, "He belongs to you, O Abd bin Zam'ah. The child belongs to the owner of the bed, while the adulterer shall only suffer misfortune." The Prophet then commanded, "Saudah bin Zam'ah to observe hijab after noticing the resemblance between the child and Utabah bin Abi Waqas." The child whose lineage was disputed is Abdurrahman.<sup>25</sup> This argument is strengthened by a

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<sup>25</sup> Abdurrahman bin Abu Bakar Jalaluddin as-Suyuti, *at-Tausyib al-Syarhu al-Jami' ash-Sahib* (Riyad: Maktabah al-Rayd, 1998), I: IX, Hadith no. 6749; Abu Zakariya Muhyiddin Yahya bin Syarf an-Nawawi, *Tabzib al-Asma' wa al-Lughat* (Beirut: al-Maktabah al-Asriyah, t.t.), p. 296.

hadith that explicitly states that a child born out of wedlock cannot inherit from their father and only inherits from their mother. The hadith provides textual evidence to support the claim that children of adultery are not entitled to inherit from their biological fathers but are instead linked to their mothers in terms of lineage and inheritance.<sup>26</sup>

When examined from the perspective of Auda's *maqāsid* in this context, the understanding of classical fiqh (Islamic jurisprudence) regarding the absence of lineage connection between a child born out of wedlock and their biological father can be seen as an interpretation influenced by the historical context. Therefore, it was considered valid in the past but may not necessarily be valid in the present, where knowledge has rapidly evolved. The classical fiqh construction regarding the lineage of children born out of wedlock has several weaknesses when viewed from a multidimensional perspective. Hence, the fiqh understanding of this hadith needs to be re-evaluated under the dimensions of space, time, and the current development of knowledge.

When viewed from the perspective of multi-dimensionality, the legal decision made by the Prophet as a judge in the dispute between Sa'ad bin Abi Waqas and Abd bin Zam'ah appears to provide justice and avoid discrimination against the child born out of wedlock. This is because all the rights of Abdurrahman have been fulfilled through his affiliation with Zam'ah. By affiliating Abdurrahman with Zam'ah, the Prophet prevented him from being stigmatized as a child born out of wedlock with negative stereotypes in society. If the Prophet had decided that Abdurrahman was affiliated with Utbah, he would have been viewed by society as a child born out of prostitution. By affiliating him with Zam'ah, according to the perspective of classical fiqh, he does not have the status of a child born out of wedlock. Therefore, the legal decision made by the Prophet in the dispute between Sa'ad bin Abi Waqas and Abd bin Zam'ah can be considered a decision that fulfills all the objectives (*maqāsid*) of Islamic law.

The discussion shows that if the classical fiqh interpretation of *al-waladu lil firasyy wa lil 'ahir al-hijr*. If the interpretation that a child born out of wedlock cannot be affiliated with their biological father is considered accurate and valid, it still cannot be universally applied to

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<sup>26</sup> Isa, hadith no. 2113.

all issues related to children of adultery. This is because the hadith represents a specific legal decision made in response to a dispute over lineage and can only be applied to cases involving disputes over lineage, such as the dispute between Sa'ad bin Abi Waqas and Abd bin Zam'ah. Even if it were to be applied to children of adultery in general, it is necessary to re-interpret the meaning of the text by incorporating it with more general verses that promote justice and equal rights for all individuals, without referring to disputes over lineage as the historical background of the hadith.

The wording of the hadith *al-waladu lil firasyy wa lil 'ābir al-hajr* has been used by jurists as the primary evidence to argue for the absence of lineage connection between a child born out of wedlock and their biological father. This is because, within the wording of the hadith, a man claimed to the Prophet that a certain individual was his child as he had engaged in adultery with the child's mother during the era of ignorance (Jahiliyah). However, the Prophet rejected this claim and stated that matters of the era of ignorance no longer hold validity and that children belong to the owner of the marital bed, while the adulterer will face misfortune. Consequently, classical fiqh deduced that the biological father cannot establish a lineage connection with a child born out of wedlock, based on the Prophet's ruling regarding that man's claim. This conclusion reached by the scholars represents a textual understanding that neglects the considerations of the objectives (*maqāsid*) of Islamic law. Such an understanding contradicts the universal *maqāsid* values and even contradicts other hadiths that state that children born out of wedlock during the era of ignorance maintain lineage ties with their biological fathers.<sup>27</sup>

The hadith describes that adultery that took place during the Jahiliyah was prohibited in Islam. However, children born as a result of adultery that occurred during that period still maintain lineage ties with their biological fathers. The act of adultery that occurred before the advent of Islam cannot be subjected to the punishment of adultery after the arrival of Islam. The consequences of adultery that took place during the era of ignorance do not negate the lineage of a child. However, this hadith also does not restrict the lineage connection of a child born out of wedlock solely to instances where adultery occurred

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<sup>27</sup> Hasan bin Ahmad, *Fath al-Ghaffar al-Jāmi' li al-Ahkām Sunnati Nabīyyina al-Mukhtar*, (Beirut: Dar Alam al-Fawa'id, 2005), I: III, hadith no. 4124.

during the era of ignorance. Essentially, there is no explicit prohibition from the Prophet stating that children born out of wedlock are forbidden from having a lineage connection with their biological fathers. In the concluding part of the hadith, it is mentioned that a person claiming lineage without a valid proof (*rusydah*) cannot inherit or be inherited by the child. This indicates that the person cannot inherit from or be inherited by the child without providing valid evidence. Through the concept of *mafhum mukhālafah* (the reverse inference), a person can inherit the child they claim lineage to if they can prove the existence of the lineage connection between them and the child.

The understanding between the hadith narrated by Amr bin Syuaib and Ibn Abbas suggests that the intent of the hadith narrated by Amr bin Syuaib does not indicate a prohibition on the lineage affiliation of a child born out of wedlock with their biological father or the mutual inheritance between them, as long as their relationship can be scientifically proven. The absence of a prohibition on mutual inheritance between them can be demonstrated in the wording of Ibn Abbas, which states, *wa man ad'ā waladan min ghairi rusydahu walā yarisu walā yūrasu*. This limitation specified by Ibn Abbas's wording refines the general statement made by Amr bin Syuaib *Ayyumā rajulin āhara bi hurratin aw amatin fal waladu waladu zina lā yarisu wa lā yūrasu*. The interpretation of these two hadiths provides an understanding that a child born out of wedlock can still have the right to inherit from their biological father as long as the blood relationship between them can be scientifically proven.

Furthermore, the absence of a prohibition on the lineage affiliation of a child born out of wedlock with their biological father can also be supported through the use of the wording *al-waladu lil firāsy wa lil 'āhir al-hajr*, preceded by the phrase *lā da'wata fī al-Islāmi zahaba amrun al-jāhiliyyah*. The first wording does not indicate any prohibition on lineage affiliation, as there is no linguistic evidence of negation (*nahī*) indicating a prohibition. The term *al-firāsy* in the expression *al-waladu lil firāsy* is a figurative word that carries connotative meaning, similar to the term *al-hajr* in the expression *wa lil 'āhiri al-hajr*, which is also figurative and connotative. Thus, *al-firāsy* is a multi-interpretable word in accordance with the cognitive understanding of jurists in every era and period.

The classical jurists interpreted the meaning of *al-firāsy* to imply that a child can only be affiliated with their father if they are born out of a valid marriage. However, this interpretation may not be entirely accurate when considering the historical context of the hadith. The hadith emerged in response to a dispute over the lineage of a slave woman belonging to Zam'ah, involving Utbah bin Abi Waqash as the alleged adulterer and Zam'ah as the owner of the slave woman. In light of the historical background of the hadith, the appropriate meaning of *al-firāsy* would be "ownership" rather than "marital bed" *al-firāsy az-ẓaujīyyah*. This interpretation would lead to the conclusion that a child can have lineage affiliation with their father if they are born within a legitimate ownership relationship, such as in the case of slavery where the father is the owner. However, this literalistic-historical interpretation still has its weaknesses. Firstly, it confines the applicability of the hadith as a legal argument solely to disputes between adulterers and slave owners regarding the lineage of slave women. This limitation is a consequence of a literalistic-historical interpretation that heavily relies on the historical background as the primary basis. Secondly, slavery has been abolished and prohibited by international standards, rendering this interpretation essentially inapplicable in contemporary societal contexts.

The second phrase, *lā da'wata fī al-Islāmi ẓahaba amrun al-jāhiliyyah* (There is no attribution in Islam; the practices of the pre-Islamic era have ceased), which precedes the phrase *al-waladu lil firāsy wa lil 'ābir al-bajr* (The child belongs to the bed, and the adulterer receives no inheritance), has a close relationship and simultaneously strengthens the conclusion that the hadith narrated by Amr bin Syuaib does not aim to prohibit lineage affiliation between a child born out of wedlock and their biological father. This is because the phrase *lā da'wata fī al-Islām* (There is no attribution in Islam) indicates that what is prohibited in the hadith of Amr bin Syuaib is the unilateral claim made by the man in the hadith, which cannot be concretely proven. Thus, the narration of Amr bin Syuaib demonstrates that the prohibition in the hadith pertains to the methodology of attributing paternity based on pre-Islamic marriages. This is further supported by the phrase *ẓahaba amrun al-jāhiliyyah* (The practices of the pre-Islamic era have ceased), which indicates that pre-Islamic marriages and their methods of establishing lineage affiliation are no longer sanctioned in Islam.

f. *Purposefulness (al-Maqāsidīyah)*

This feature serves to validate the outcomes of *ijtihad*, where all *ijtihad* results must not be "contradictory" to the universal values of *maqāsid asy-syarīah*, such as advocating justice and equality. Thus, the six features that have been discussed yield an update in the understanding of Islamic lineage that encompasses six aspects. Firstly, an update in the induction of evidence regarding Islamic lineage, wherein the evidence used by classical *fiqh* to establish lineage is particularistic in nature. This is because they solely rely on the wording of the *hadith al-waladu lil firāsy* to form the concept of lineage without considering more general evidence, particularly evidence that addresses justice, the importance of clarity in lineage, and the creation of human beings.

Secondly, there is a redefinition of lineage, which is significant because, in the framework of classical *fiqh*, lineage can only be established through legal-formal means (marriage). However, there is no verse in which marriage becomes the determining factor for the formation of lineage in a fetus (*nasab*). Numerous verses discuss that a fetus is formed through the fertilization of the male sperm with the female egg in the womb, and this potentiality leads to the birth of a complete baby (QS.: 25:54, 21:30, 24:45, 77:20-22, 36:77, 54:45-46). Thirdly, there is a renewal of the sources of lineage. This improvement occurs by unifying the sources of lineage from both the father and the mother without differentiating between them, as found in the consensus of classical *fiqh*. The *fiqh* construction that states a child of adultery only has lineage with the mother and can establish lineage with the biological father through valid marriage, and sexual relations based on doubtful circumstances (*wati bi syubhat*).

Fourthly, the reconstruction of lineage through the redefinition of lineage will result in a change in the characteristics of lineage in Islamic law, where the characteristics in classical *fiqh* emphasize the legal-formal aspect. On the other hand, the new definition of lineage, through the features of Auda's *maqasid* system, has characteristics that emphasize the legal-substantive aspect. Fifthly, there is a change in the construction of lineage for children born out of wedlock, which will lead to a shift in the characteristics of lineage from being primarily legal-formal to legal-substantive. This shift automatically alters the rights that

children born out of wedlock are entitled to, as they have lineage with their biological fathers.

Lastly, there is a renewal in the methodology of proving lineage. This is important because in classical fiqh, marriage is the primary means of proving the existence of lineage. However, in the *maqāsid asy-shari'a* approach, through the six features mentioned, DNA testing becomes the primary method of establishing lineage, as it is considered valid and conclusive proof that eliminates the reliance on marriage as evidence of lineage. Fiqh gives precedence to marriage as the primary evidence of lineage, as it follows the characteristics of legal-formal aspects of the law. On the other hand, the *maqāsid asy-syari'ah* approach prioritizes DNA testing as the main evidence of lineage, as it aligns with the characteristics of legal-substantive aspects of the law.

The use of DNA as a means of proving lineage in cases of disputed lineage or ambiguity of lineage is a representation of the *maqāsid asy-syari'a* principle of facilitating ease (*taisir*). If the Prophet were given a choice between two methods of proof, he would choose the one that is easier. The methodology of proving lineage through DNA testing in cases of disputed lineage or cases that lead to ambiguity of lineage is considered legally permissible from the perspective of *maqāsid asy-syari'a*. This is because there are hadiths that indicate the permissibility of proving lineage through DNA testing, often falling under the category of discussions on false accusations of adultery (*qadhf*).<sup>28</sup>

The mentioned hadith describes a case of *qadhf*, in which Hilal bin Umayyah accused his wife of committing adultery with Sharik bin Sahma'. The Prophet said, "If Hilal's wife gives birth to a child with curly hair, black skin, and thin calves, then the child belongs to Sharik bin Sahma'. But if she gives birth to a child with fair skin, straight hair, and red eyes, then the child belongs to Hilal." When Hilal's wife gave birth, the child had curly hair, black skin, and thin calves. From this, it can be understood that the child belonged to Sharik bin Sahma', who had committed adultery with Hilal's wife. This hadith indicates that even before the discovery of genetics, the Prophet, through his

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<sup>28</sup> Ahmad bin Muhammad bin Hanbal, *Musnad Al-Imam Ahmad Bin Hanbal*, (Beirut: Mu'asasah al-Risalah, 2001), I: XIV, hadith no-12450.

miraculous knowledge, understood the mechanism of inheriting traits through the genetic codes passed down from parents to their children.

## Conclusions

Based on the research findings highlighted above, it is safe to say that the application of *maqāsid asy-syari'a* as an Islamic legal methodology has shifted the understanding of *nasab*. In classical fiqh, marriage was considered the primary evidence of *nasab*, following the legal-formal characteristics of law. However, the use of DNA testing has now become the primary evidence of *nasab*, aligning with the legal-substantial characteristics of law. This shift in perspective implies that children born out of wedlock can establish lineage with their biological fathers, granting them rights to inheritance, financial support, guardianship, and establishing the *mabram* relationship with their biological fathers.

## Conflicts of Interest

The authors have no conflict of interest with any party in writing this article.

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