



**THE CONSTRUCTION OF FAMILY LAW IN THE  
COMPILATION OF ISLAMIC LAW IN INDONESIA:  
A Review of John Rawls's Concept of Justice and Jasser  
Auda's *Maqashid al-Shari'a***

**Nur Solikin<sup>1</sup>, Moh. Wasik<sup>2</sup>**

<sup>1</sup>Universitas Islam Negeri KH. Ahmad Sidiq Jember;

<sup>2</sup>Postgraduate Program Universitas Islam Negeri KH. Ahmad  
Sidiq Jember

E-mail : <sup>1</sup>[nursolikin.fs@uinkhas.ac.id](mailto:nursolikin.fs@uinkhas.ac.id); <sup>2</sup>[alfikrwasik@gmail.com](mailto:alfikrwasik@gmail.com)

**Abstract:** Justice has long been studied by philosophers, religious figures, and politicians. It is nearly impossible to speak about the law without talking about justice since justice is the goal of the law. Rawls's concept of justice has an orientation towards social welfare (*li al-maslahat al-umma*). This conception has relevance to the principles of *maqasid al-shari'a*, which also emphasizes justice. This paper will explore Rawls's concept of justice and Auda's notion of *maqasid al-shari'a* and apply them as an analytical device to examine the construction of family formulated in the Compilation of Islamic Law. Family constitutes the most basic unit in society, and any legal stipulation related to the family must be critically re-examined. This study argues that constructing a just family based on *maqasid al-sharia* will form a family that benefits the family members and society. The dimension of justice fosters and provides space for equality in the domestic household. In contrast, the *maqasid al-sharia* dimension serves as an external dimension within the scope of the family. This dimension forms a family construction that safeguards and protects religion, the soul, the Intellect, offspring, and property.

**Keywords:** Construction, John Rawls Justice, Maqashid Al-Syari'ah Jasser Auda, family law

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## Introduction

TALKING ABOUT THE LAW is talking about relationships between people. Talking about human relations is undoubtedly talking about justice. Thus, any discussion of law, transparent and vague,

is always a talk of justice as well.<sup>1</sup> The law regulates the balance between human rights and obligations as social beings and realizing justice in living together. All those who have the will to create a just society rule so that justice becomes the focus of the objective of forming laws which must be under the principles of justice for one party with another.

Aristotle said that man could not be separated from the law only because with and in that law, man can reach the peak of the highest development of his humanity. Still, if the man is isolated from law and justice, he will collapse from everything.<sup>2</sup> In essence, the law's main objective is to create an orderly social order, order, and balance. Every public relationship must not conflict with the provisions in the existing legal regulations and apply in society. Kansil said that one of the main elements of the law relates to humans.<sup>3</sup>

In the discourse of legal philosophy, the essence of law is to become a means for creating a just society. Talking about justice from a humanitarian perspective, it cannot be separated from the law's direction and purpose, namely the realization of a peaceful life in a society. Long before that, the discourse of justice has been the subject of serious discussion since the beginning of the emergence of Greek philosophy. The discussion of justice has a broad scope, ranging from ethical, philosophical, and legal to social justice. Plato said that justice is the primary virtue. In the XXI century, the idea of justice received serious attention from John Rawls, who emphasized social justice. Rawls sees that the central importance of justice is the guarantee of the stability of human life and the balance between personal life and community life.<sup>4</sup>

Rawls's concept of justice has an interesting distinction and novelty to study because Rawls's justice that he proclaimed places the right to justice. He mentions that the default position leads to a

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<sup>1</sup> Satjipto Rahardjo, *Law Science* (Bandung: Citra Aditya Bakti, 2014), 169

<sup>2</sup> Aristotle, *The Politics* (New York: Oxford University Press, 1995), 12

<sup>3</sup> Kansil, *Introduction to Indonesian Law and Legal Administration* (Jakarta: Balai Pustaka, 1997), 481

<sup>4</sup> Umar Sholehudin, *Law & Justice Society Perspective of Legal Sociology* (Malang: Setara Press, 2011), 41

uniform manner while still paying attention to each person's personality. Rawls believes that the structure of a just ideal society is the basic structure of an original society in which fundamental rights, freedom, power, authority, opportunity, income, and welfare are fulfilled.

Manifesting and maintaining the benefit of humanity is one of the fundamental concepts that are the subject of discussion in the philosophy of Islamic law, namely the concept of *maqashid al-Sharia*. Scholars, and therefore have recognized this concept, and legal experts formulate a quite tolerant rule: "Where there is *maslahat*, there is the law of Allah." *Maslahat* theory, according to Masdar F. Mas'udi, is the same as the social justice theory in legal philosophy.<sup>5</sup> One of the principles of *maqashid al-Syariah* is justice; this is like the reformulation of contemporary as *maqashid al-Syariah* developed from the perspective of Jasser Auda.<sup>6</sup>

Justice certainly has to be the spirit of the law, including, in this case, family law which is an essential component in human life. Because humans cannot be separated from their relationship with small institutions in the state, namely the family, every day humans must face their families and all their problems, both as *sumi*, wife, children, and all their rights and obligations. The issue of family law has been regulated in such a way in laws such as Law No. 1 of 1974 and the Compilation of Islamic Law. In this regulation, the rights and obligations of husband and wife are already written in the articles, but it is necessary to build the meaning of these articles, which are relevant and contain the values of justice.

The most straightforward issue in legal construction in Indonesia is that there is no unification of family law in Indonesia; what has happened is the simplification of marriage law arrangements within each religion which dimensions dwarf the pluralistic concept of Indonesian society; in some cases, it is stated

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<sup>5</sup> Masdar F. Mas'udi, "Retaining *Maslahat* as a Sharia Reference," *Journal of Science and Culture Ulumul Qur'an*, No.3, Vol.VI (1995), 97

<sup>6</sup> The concept of the contemporary *maqashid al-Sharia* in this paper will use the *maqashid al-Syariah* Jasser Audah. The meaning of Audah in *maqashid al-Syariah*, especially on the five principles in *maqashid al-Syariah*, finds a meeting point with Rawls's five principles of justice.

by several research results, for example, there are difficulties in interfaith marriages, and in one case the unions had to be carried out abroad due to the lack and absence of regulations that allow it.<sup>7</sup> Attempts should be made to this dimension of vacancy immediately in creating a conceptual construction in the measurement of family law in Indonesia; this is still just one case; many other cases are also the reasons for studying the structure of family law in Indonesia, a new conceptual arrangement must be made. For example, related to the study of children outside of marriage. What started with the Constitutional Court's decision is that internally the religious courts and the KUA still need to comply with these rules comprehensively because there are still many overlapping rules.

This paper tries to trace the construction of family law in the Compilation of Islamic Law in Indonesia. It examines the concept of justice by John Rawls and *maqashid al-Syariah* Jasser Auda. The two perspectives of these figures have the same conceptual basis, namely justice for human benefit, from which various basic ideas and thoughts can be drawn to be developed so that a more relevant and applicable meaning of justice can be found for family law in Indonesia. This paper aims to determine the concept of justice by John Rawls and the idea of *Maqashid Al-Syari'ah* by Jasser Auda and to find out the construction of family law in the Compilation of Islamic Law in Indonesia by examining the concept of justice by John Rawls and the idea of *maqashid al-shari'a* Jasser Auda.

To identify these problems, this paper uses a normative legal research type with a conceptual approach. The primary data include *A Theory of Justice* and *Maqasid Al-Shariah as Philosophy Of Islamic Law: A System Approach*, and *al-Maqasid for Beginners*. The secondary data include any relevant books or articles that discuss *maqashid al-shari'ah* by Jasser Auda and the theory of justice by

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<sup>7</sup> Sri Wahyuni, *Nikah Beda Agama: Kenapa ke Luar Negeri?* (Pustaka Alvabet, 2017); Herman M. Karim, "Keabsahan Perkawinan Beda Agama Di Indonesia Dalam Prespektif Cita Hukum Pancasila," *ADIL: Jurnal Hukum* 8, no. 2 (2017): halaman 185–209; Roni Efendi, "Perkawinan Beda Agama dalam Paradigma Sosiological Jurisprudence," *Al Hurriyah: Jurnal Hukum Islam* 5, no. 1 (2020): halaman 49–56.

John Rawls. To identify these problems, this paper uses a type of normative legal research with a conceptual approach.

There some previous studies about Auda and Rawls, such as Umar,<sup>8</sup> Vivin Nurviana,<sup>9</sup> and Toha.<sup>10</sup> From the three studies above, indeed, the study of the construction of family law in the style of justice by John Rawls and based on Maqasid al-shariah in the style of Jaseer Auda is a new conceptual, the research that has taken place is more on a casuistic atomistic study and this confirms that the paper we have written is building family law construction in the justice dimension of John Rawls and Jaseer Auda's maqasid sharia is relevant study in the dimension of conceptual renewal of family law construction in Indonesia.

This paper uses two views from the study of justice in the style of John Rawl, which represents the way of looking at general law and the study of progressive Islamic law; in this case, it is called Maqasid al-syariah. So the process of John Rawls's perspective on justice in the construction of Islamic family law in Indonesia, and on the other hand, the conceptual lens is also taken from progressive Islamic law in the style of Jassser Auda with the theory of maqasid al-shariah, at first glance the author seems to be making a comparison even though not all of them are like that, on the one hand, it offers John Rawl's way of looking at justice as a theoretical basis, and on the other hand, the author also offers Jaseer Auda's maqasid al-sharia concept with system theory in building family law construction in Indonesia.

### The Concept of Justice

Justice comes from the verb 'adala, which means; First, straighten, or sit straight. The second meaning is to flee, departing or evading from one path (wrong) to another right path. Third,

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<sup>8</sup> Mas Umar, "'Iddah of Death Divorce for Career Woman in Perspective Jasser Auda's Maqasid Sharia," *Al-Hakam: The Indonesian Journal of Islamic Family Law and Gender Issues* 3, no. 1 (2023): halaman 1–19.

<sup>9</sup> Vivin Nurviana, "Poligami dalam Hukum Positif di Indonesia Perspektif Maqasid al-Syariah Jasser Auda" (*PhD Thesis*, IAIN Kediri, 2022).

<sup>10</sup> Ma'arif Toha, "Kedudukan Anak di Luar Nikah dalam Perspektif Hukum Islam Progresif Yang Relevansinya dengan Pembaruan Hukum Keluarga di Indonesia" (*PhD Thesis*, UIN Raden Intan Lampung, 2023).

equal or equivalent or equal. Fourth, balancing or offsetting, proportionate, or being in a state of balance.<sup>11</sup>In English, the term justice is referred to in various terms, such as justice (justice, fairness, appropriateness, and justice), fairness (justice, fairness, fairness), equity (justice, fairness, and rights according to justice), and impartiality (justice, impartiality, honesty, honesty, and neutrality). The formulator of social fiqh, Sahal Mahfudh, concludes that justice means truth, honesty, and compassion. And the benefit of the people depends on ash-said, al-adult, and ar-Rahman.<sup>12</sup>

Aristotle divides the form of justice according to its function into two forms, namely distributive justice and corrective justice. First, distributive justice is justice determined by lawmakers, whose distribution includes services, rights, and benefits for community members according to the principle of proportional equality. In this case, justice must have clear standards and standards and be enforced transparently. Second, correlative justice is justice that is principally regulated by a judge who guarantees, supervises, and maintains this distribution from illegal attacks. This corrective function of justice also stabilizes the status quo by returning the property of the victim concerned or compensating the owner for lost rights.<sup>13</sup>

Distributive justice and corrective justice form the basis of all theoretical discussions. Distributive justice refers to the distribution of goods and services to everyone according to their position in society and equal treatment of equality before the law (equality before the law).<sup>14</sup>In this case, Aristotle argues that justice will be carried out when the same things are treated equally and things that are not the same (justice is done when equals are treated equally). This distributive justice is incompatible with the arguments for Rawls's principles of justice, as written by Will

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<sup>11</sup> Majid Khaddury, *Islamic Perspective Justice Theology* (Surabaya: Risalah Gusti, 1999), 8

<sup>12</sup> Sahal Mahfudh, *Nuansa of Social Fiqh* (Yogyakarta: Lkis, 2003), 237

<sup>13</sup> Muhammad Muslehuddin, *Philosophy of Islamic Law and Orientalist Thought*, trans. Yudian Wahyudi Asmin (Yogyakarta: Tiara Wacana, 1991), 36

<sup>14</sup> E. Sumaryono, *Ethics, and Law: The Relevance of Thomas Aquinas' Natural Law Theory* (Yogyakarta: Kanisius, 2002), 7

Kymlicka that Rawls has two ideas for his principles of justice. The first argument contrasts his theory with what he considers the current ideology of distributive justice - namely, the ideal of equality of opportunity. He argues that his theory is more compatible with the conclusions of institutions about eternity and that it provides a better explanation for definite ideals of fairness.<sup>15</sup>

### **The Concept of *Maqashid al-Sharia***

Maqashid is a form of Jama 'from the Arabic grammatical' maid, 'which refers to the goal, objective, interest, or end goal. This term can be likened to 'ends' in English, 'telos' in Greek, 'finalize' in French, or 'week' in German. As for the science of verse, maqashid can show several meanings, such as *al-Hadaf* (goal), *al-grad* (target), *al-Matlub* (thing of interest), or *al-Gayah* (the final goal) of Islamic law.<sup>16</sup>

Sharia etymologically means the path to the spring; the road to the spring can also be said to be the way to the main source of life. In terms of terminology, Shari'ah is al-nushush al-madrasah (holy texts) from the Koran and al-Sunnah, which are not worries that human thought has not interfered with. Shari'ah content in this sense includes aqidah, amaliyah and khuluqiyah.<sup>17</sup> In terms of terminology, maqashid al-shari'ah can be interpreted as the value and meaning that the maker of sharia wants to realize the maker of sharia behind the making of sharia law, which mujtahid scholars research from shari'ah texts.

The study of Maqashid al-Shari'ah theory in Islamic law is significant.<sup>18</sup> The urgency is based on considerations; First, Islamic

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<sup>15</sup> Will Kymlicka, *Introduction to Contemporary Political Philosophy of Special Studies on theories of justice*, trans. Agus Wahyudi (Yogyakarta: Student Library, 2004), 73

<sup>16</sup> Jasser Auda, *Maqasid al-Syariah a Philosophy of Law System: A System Approach* (London: The International Institute of Islamic Thought, 2007), 2 see also Jasser Auda, *Grounding Islamic Law through Maqashid al-Shari'ah: Systems Approach*, trans. Rosidin and Ali Abd el Mon'im (Bandung: Mizan, 2015), 33

<sup>17</sup> Asafri Jaya Bakri, *Concept of Maqasid al-Syari'ah According to al-Shatibi* (Jakarta: Raja Grafindo Persada, 1996), 61.

<sup>18</sup> Even in recent studies, maqashid al-sharia is often the analytical tool to understand and evaluate practices regarding Islamic law in a broader range, from ritual to medical. See for example, Salman Abdul Muthalib, Tarmizi M. Jakfar,

law is a law that originates from God's revelation and is intended for mankind. Therefore, it will always be faced with social change. Second, seen from the historical aspect, actually the Prophet's attention to this theory has been done by the Prophet Muhammad, his companions, and the generation of Mujtahids afterward. Third, knowledge of maqashid al-Sharia is the key to the success of the mujtahid in their ijtihad because it is based on legal objectives that any problems in mating human beings can be returned.<sup>19</sup>

In this paper, using the maqashid al-Syariah Jasser Auda, the conception of maqashid al-Syariah finds a point of relevance with John Rawls's concept of justice. Auda critically noted the maqashid theory developed in the classical century. According to him, the classical maqashid has four weaknesses, namely. First, the classical maqashid theory does not specify its scope in special chapters, so it cannot answer questions in detail about certain issues. Second, the classical maqashid theory focuses more on the benefit of the individual, the protection of the individual Intellect, the protection of individual property, and so on. Third, the classical maqashid classification does not cover broader main principles, for example, justice, freedom of expression, and others.<sup>20</sup>

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Muhammad Maula and Lukman Hakim, "Changes in Congregational Prayer Practices during the Covid-19 Pandemic in Aceh from Maqashid al-Sharia Perspective", *al-Ihkam Jurnal Hukum dan Pranata Sosial* vol. 16, no. 2 (2021): 421-429 <https://doi.org/10.19105/al-Ihkam.v16i2.5250>, Dri Santoso, Yusefri, Laras Shesa, Musda Asmara, Sheikh Adnan Ahmed Usmani and Ahmad Syarifudin, "The Understanding of the Jamaah Tabligh on Wife Gender Justice: A Maqashid Sharia Review", *Juris Jurnal Ilmu Syariah* vol. 21, no. 2 (2022): 183-194 <http://dx.doi.org/10.31958/juris.v21i2.6935> and Siti Nur Mahmudah, Muhammad Lathoif Ghozali, and Iskandar Ritonga, "Implementation of Sharia Maqashid on Sukuk Based on Fatwa DSN-MUI/IX/2020" *Jurnal Ilmiah Islam Futura* vol. 22, no. 2 (2022): 139-149 <http://dx.doi.org/10.22373/jiif.v22i2.12296> and Kamarusdiana and Naili Farohah, "Reform on the Marriage Age Limit by Jakarta Women's Health Organizations in Maqashid al-Sharia Perspective", *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* vol. 6, no. 1 (2022): 198-223 <http://dx.doi.org/10.22373/sjhk.v6i1.12892>

<sup>19</sup> Ghofar Shidiq, "The Theory of Maqashid al-Syari'ah in Islamic Law", Sultan Agung Vol. XLIV No. 118 (June-August 2009), 119-120

<sup>20</sup> Muhammad Faisol, "Jasser Auda's System Approach to Islamic Law: Towards Post-Postmodernism Fiqh", *Kalam*, vol. VI, No 1 (June 2012), 51. See further Jaser Auda, *Maqasid al-Syariah a philosophy of system law: A System Approach* (London: The International Institute of Islamic Thought, 2007), 3-4. See



Auda is present in intellectual anxiety related to the powerlessness of Islamic law with the development of the modern world to overcome imbalances in scientific knowledge. According to him, this happened because of the inability of the ulama to produce new legal products, which was caused by methodological inability. After carrying out related research on the maqashid theory throughout the history of Islam after the Prophet Muhammad, he proposed a systems analysis theory and the maqashid al-Syariah theory, which were placed as the philosophy of Islamic law.<sup>21</sup>

According to Jasser Auda, so that Islamic shari'ah can play a positive role in realizing the benefit of humanity and can answer the challenges of the present era, the scope and dimensions of maqashid theory as developed in classical Islamic law must be expanded. What was originally limited to the benefit of the individual dimensions must be expanded to include a more general area, from the individual's territory to the realm of society or humanity at all its levels. From the protection of offspring (*hifz al nasl*) to the protection of the family (*hifz al-usrah*); from the protection of the mind (*hifz al-aql*) to the manifestation of scientific thinking or the embodiment of the spirit of seeking knowledge; from protection of the soul (*hifz al-nafs*) to protection of human honor (*hifz al-karamah al-isnaniyah*) or protection of human rights, (*hifz huquq al-insan*); from religious protection (*hifz al-din*) to protection of freedom of belief (*hurriyah al-i'tiqad*); from protection of wealth (*hifz al-mal*) to a manifestation of social solidarity.<sup>22</sup>

### John Rawls's Life and Work

Understanding the ideas and thoughts of a character is incomplete and will not even be achieved without knowing the figure first closely. Both from family factors, social conditions, and education to relationships. Because, after all, family factors, social

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also Jasser Auda, *Al Maqasid For Beginners*, trans. Ali Abdelmon'im (Yogyakarta: Like Pres UIN Sunan Kalijaga, 2013), 13.

<sup>21</sup> Muhammad Salahuddin, "Towards Humanist-Inclusive Islamic Law: Analysis of Jasser Auda's Thought about Maqashid al-Syari'ah", *Ulumuna*, Vol. 16, Number 1, 2012: 105.

<sup>22</sup> Muhammad Faisol, "Jasser Auda's System Approach to Islamic Law:", 51.

conditions, education, and relationships are essential things to know in the emergence of ideas and thoughts of a character. Because until now, it is still recognized that no product of thought is born from space.

John Bordly Rawls was born on February 21, 1921, in Baltimore, Maryland, United States. Her father is William Lee Rawls, Rawls's father is a tax expert as well as an expert in the field of constitutions, and a mother named Anna Abell Stump, a woman who supports the feminist movement and has also served as president of the League of Women Voters in her area. Rawls, some people close to him called people "blue blood," which gave Rawls a sense of nobility.<sup>23</sup> Rawls' primary education begins at a public school in Baltimore, where he lives. After completing the school, Rawls continued his high school in Kent, a private educational institution in Connecticut.<sup>24</sup> In 1950 after maintaining his dissertation at Princeton University, Rawls received the title Doctor of Philosophy, then trusted to teach at his alma mater until 1952.

Upon returning to the United States, Rawls continued his academic career at Cornell University and was gradually appointed a Professor in 1962. Not long after that, Rawls also had the opportunity to teach and became a Professor at the Massachusetts Institute of Technology (MIT). Two years later, Rawls chose to move to teach fully at Harvard University until his death. Many of the works written by Rawls, such as *Political Liberalism* (1993), *The Law of People* (1999), and *A Theory of Justice*, the works discussed in this paper; Rawls's work was published in 1971, and published in 1991 until now the book is familiarly called " TJ "is translated into 27 world languages including Indonesian.

## **John Rawls's Concept of Justice**

### *The Role of Justice*

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<sup>23</sup> Damanhuri Fatta, "The Theory of Justice According to John Rawls" *Journal of TAPIS* Vol. 9 No.2 (July-December, 2013), 13.

<sup>24</sup> Pan Mohamad Faiz, "Johh Rawls's Theory of Justice", *Journal of the Constitution*, Volume 6, No.1 (April 2009), 135.

Justice is a value of goodness in the basic social structure, including social, political, legal, economic institutions, and so on, as the position of truth in a thought. Because seeing the very urgency of justice, there is no justification for any reason if it is unfair. Rawls describes the value of justice, however graceful and economical, must be rejected or revised if it is not true. Likewise, laws and institutions must be rejected or revised, or abolished if injustice is found in them.<sup>25</sup>

Justice is a basic need that everyone must possess; there is no basis whatsoever that hinders or hinders justice for the existence of human life. Since humans were born on earth, simple language has since brought and protected justice. Whatever hinders injustice must be negated. In principle, it is stated that *fiat justicia ruat coelum* or *fiat justicia pereat mundus* (even if the sky will collapse or the world will be destroyed, justice must be upheld), the same legal principle is *justicia est ius suum* (justice is given to everyone who is entitled to it).<sup>26</sup> This principle of law affirms that justice belongs to every human being, and in any situation and condition, immortality must be upheld.

What needs to be underlined is that Rawls' conception of social justice is built under his view of an ideal society which he calls a well-ordered society. According to him, a perfect society is governed effectively by a concept of justice that all parties can accept. Namely, a society where (1) everyone accepts and knows that other people adhere to the same principles of justice, and (2) basic social institutions align with these principles.<sup>27</sup> This is in line with the main idea of his theory which is called justice as fairness, namely, the principles of justice result from an agreement from people who are rational, free, and equal in the initial situation of fairness.<sup>28</sup>

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<sup>25</sup> See John Rawls, *Theory of Justice: The Basics of Political Philosophy to Achieve Prosperity in the State*, trans. Uzair Fauzun and Heru Prasetyo (Yogyakarta: Student Library, 2006), 3-4.

<sup>26</sup> See Aprita sari, "Rawls's Theory of Justice and its Relevance in Analyzing Injustice on Ethnic Phenomenon". *Journal of Ethnic and Cultural Studies*, Vol. 7, No. 3.

<sup>27</sup> See Rawls, *Theory of Justice*, 5.

<sup>28</sup> *Ibid.*, 14.

*Two Principles of Justice*

Rawls formulated a special conception of justice into two social justice principles: The first principle, everyone has the same rights to the broadest basic freedom, as wide as the same freedom for all people. Second Principle; social and economic inequalities are organized so that they (a) provide the greatest advantage to the weakest groups and (b) all positions and positions are open to all under conditions of fair equality of opportunity.<sup>29</sup>

First, this first principle of justice is called equality of basic freedoms. In this case, Rawls embraces egalitarianism. This principle deals with the issue of basic freedoms of citizens. This principle with regard to the issue of basic freedoms includes political freedom (the right to choose and be elected to public office) along with freedom of speech and association, freedom of belief, and freedom of thought, the freedom of a person along with the freedom to defend (personal) property rights; and freedom from arbitrary arrest as in the concept of the rule of law. By the first principle, these freedoms are required to be equal because the citizens of a just society have the same basic rights.<sup>30</sup>

Rawls underlines that basic freedoms must be valued as - one unit or as one system<sup>31</sup> that is, the freedom of everyone cannot just be separated from the freedom of the people. And also, a particular form of freedom cannot be lived and exercised in isolation from other forms of space. The value of each of the fundamental freedoms must be understood about them as well as in their dependence on all fundamental freedoms as a system.<sup>32</sup>

Rawls views the priority on the principle of freedom so important that he calls it the principle of great liberty. This is because without giving priority to freedom, social justice will only be a dream that will never come true. The background of this concept is that each person has fundamental beliefs, which are moral, religious, and philosophical, which greatly determine the direction of one's development as a human being. Human growth

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<sup>29</sup> Ibid., 72.

<sup>30</sup> Ibid., 73.

<sup>31</sup> Ibid., 225.

<sup>32</sup> Ibid., 225.

and quality are very dependent on these fundamental beliefs. On that basis, the position of freedom, especially freedom of conscience, is crucial for humans. So important is that those in original positions will choose principles of justice to secure their implementation.<sup>33</sup>

*Second*, this second principle of justice deals with distributing social and economic resources. In this case, Rawls asserts that the distribution in this field may be divided unequally (inequality). This second principle concerns the distribution of income and wealth and with organizations that exercise differences in authority and responsibility or chains of command. While the distribution of wealth and income need not be the same, it must be for the benefit of everyone, and at the same time, positions of authority and parts of command must be accessible to all. A society that applies the second principle by making its positions open to all so that it is subject to this limitation will regulate socio-economic inequality so that everyone benefits.<sup>34</sup>

Thus, this second principle of social justice consists of two principles (1) fair equality of opportunity, (2) the principle of difference or what is commonly known as the difference principle. Both must be seen as one. The difference principle is an essential part of social justice; even the general conception is the application of the difference principle.

Second, the principle of both consists of two parts: the principle of difference (the difference principle) and the principle of fair equality of opportunity. The crux of the first principle is that social and economic differences must be organized to benefit the most disadvantaged. The term socio-economic difference in the direction of difference leads to inequality in one's prospects for gaining the essential elements of welfare, income, and authority. Meanwhile, the most disadvantaged (the least profitable) refers to those with the slightest opportunity to achieve the prospects of welfare, income, and authority.<sup>35</sup>

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<sup>33</sup> Koerniatmanto Soetoprawiro, "Justice as Fairness", *Jurnal Hukum Pro Justitia*, Volume 28 No. 2 (October 2010), 248.

<sup>34</sup> Rawls, *Theory of Justice*, 3-4

<sup>35</sup> Damanhuri Fatta, "John Rawls Theory of Justice", *TAPIS Journal* Vol. 9 No.2 (July-December 2013), 35

To ensure their effectiveness, the two principles must be arranged in serial order, meaning that the first principle must precede the second principle. In other words, the doctrine of the same freedom must be prioritized over the principle of difference. These principles are arranged in an order, with the first principle preceding the second. This sequence implies that the separation from the institutions of equal freedom required by the first principle cannot first be justified by or by greater social and economic benefits. The distribution of wealth and income and the hierarchy of authority must be in line with citizens' freedom and equal opportunity.<sup>36</sup>

Fair equality of opportunity must be prioritized over the difference principle. That is, the principle of fair equality of opportunity must not be sacrificed for the sake of the realization of the difference principle; the doctrine of fair equality of opportunity demands that everyone should have equal access to all positions and, at the same time, prohibits any form of restriction on that access. The closure of access or equal opportunities for those who are less fortunate is something that needs to be fairer.<sup>37</sup>

### Jasser Auda's Life and Work

Jasser Auda is the founder of the Maqashid Research Center and its director, based in London, England. Jasser Audah is the nephew of one of the major figures of the Ikhwan al-Muslimin congregation in the 1960s, namely Abd al-Qadir Audah, a well-known Islamic jurist hanged by Nasser. Jasser is the son of a famous Egyptian artist, Abd al-Gaffar Audah.

Jasser Auda was born in Cairo, Egypt. Jaser Auda's education began in Cairo. Jasser is an engineering graduate from Cairo University, Egypt; he also studied classically religious sciences (*'ulum al-dīn*) in the form of memorizing the Qur'an, studying the books of Hadith al-Bukhari and Muslim, fiqh, isnad and takhrij, and *usul fiqh* at the al-Azhar mosque, Cairo. In 2004, he completed his Master of Fiqh from the American Islamic University in Michigan with a focus on Maqasid al-Syari'ah studies, as well as a

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<sup>36</sup> Rawls, *Theory of Justice*, 3-4.

<sup>37</sup> Soetoprawiro, "Justice as Fairness, 246-247.

Ph.D. in Theology and Religious Studies from the University of Wales Lampeter, England, and ended his Masters in Canada with a Ph.D. Systems Analysis from the University of Waterloo, Canada

### **Jasser Auda's Concept of *Maqashid al-Shari'a***

In this paper, In the construction of thought maqashid al-Syariah Jasser Auda, the concept of maqashid al-Syariah finds a point of relevance with the theory of justice concept. Auda critically noted the maqashid theory developed in the classical century. According to him, the classical maqashid has four weaknesses, namely. First, the classical maqashid theory does not specify its scope in special chapters, so it cannot answer detailed questions about specific issues. Second, the classical maqashid approach focuses more on the benefit of the individual, the protection of the individual Intellect, the protection of individual property, and so on. Third, the classical maqashid classification does not cover broader main principles, for example, justice, freedom of expression, and others.<sup>38</sup>

Auda is present in intellectual anxiety related to the powerlessness of Islamic law with the development of the modern world to overcome imbalances in scientific knowledge. According to him, this happened because of the inability of the ulama to produce new legal products, which was caused by methodological inability. After carrying out related research on maqashid theory throughout the history of Islam after the Prophet Muhammad, he proposed a systems analysis theory and maqashid al-Syariah theory, which were placed as the philosophy of Islamic law.<sup>39</sup>

According to Jasser Auda, so that Islamic shari'ah can play a positive role in realizing the benefit of humankind and can answer the challenges of the present era, the scope and dimensions of

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<sup>38</sup> Muhammad Faisol, "Jasser Auda's System Approach to Islamic Law: Towards Post-Postmodernism Fiqh", Kailam, Volume VI, No 1 (June 2012), 51. See further Jaser Auda, *Maqashid al-Syari'ah as Philosophy*, 3-4. See also Jasser Auda, *Al Maqasid For Beginners*, trans. Ali Abdelmon'im (Yogyakarta: Like Pres UIN Sunan Kalijaga, 2013), 13.

<sup>39</sup> Muhammad Salahuddin, Towards Humanist-Inclusive Islamic Law: "Analysis of Jasser Auda's Thought About Maqashid al-Syari'ah", *Ullumuna, Journal of Islamic Studies*, Vol. 16, Number 1 (2012), 105

maqashid theory as developed in classical Islamic law must be expanded. What was originally limited to the benefit of the individual dimensions must be expanded to include a more general area, from the individual's territory to the realm of society or humankind at all its levels. From the protection of offspring (*hifz al nasl*) to the protection of the family (*hifz al-usrah*); from the safety of the mind (*hifz al-aql*) to the manifestation of scientific thinking or the embodiment of the spirit of seeking knowledge; from protection of the soul (*hifz al-nafs*) to guard of human honor (*hifz al-karamah al-isnaniyah*) or protection of human rights, (*hifz huquq al-insan*); from religious protection (*hifz al-din*) to protection of freedom of belief (*hurriyah al-i'tiqad*); from protection of wealth (*hifz al-mal*) to a manifestation of social solidarity.<sup>40</sup>

### **Meeting Point of Justice and *Maqashid al-Shari'a***

As previously discussed, Rawls formulates a unique conception of justice into two social justice principles: the first principle, everyone has the same rights to the broadest fundamental freedoms, as wide as the same freedom for all people. The second principle is that social and economic inequalities are structured in such a way that they (a) provide the most significant advantage to the weakest groups and (b) all positions and positions are open to all under conditions of fair equality of opportunity.

The first principle is the principle of greatest equal liberty. These principles include; freedom to participate in political life (the right to vote, the right to nominate oneself in elections), freedom of speech, freedom of belief (religion), freedom to be oneself and liberty to defend personal property.

This first principle of justice regulates that these fundamental freedoms must be equal because citizens of a just society have the same fundamental rights. These freedoms must be available in a similar manner to all citizens of the community. The organization is not regulated fairly if only one group in the society is allowed,

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<sup>40</sup> Muhammad Faisal, "Jasser Auda's System Approach to Islamic Law: Towards Post-Postmodernism Fiqh", *Kalam*, Volume VI, No 1 (June 2012), 51



for example, to express their opinion, or all members of society are forced to embrace only one particular religion.

Suppose you look at the same freedom as possible with the five principles in it as above. In that case, there are similarities to the five principles contained in *maqashid as-sharia*, namely maintaining religion (*hifz al-din*), guarding the soul (*hifz al-nasl*), supporting reason (*hifz al-'aql*), keeping descendants (*hifz al-nasl*), protecting property (*hifz al-mal*). Jaser Audah made a paradigm shift by reformulating the reinterpretation of the classical *maqashid* theory to maintaining religion (*hifz al-din*), which is reinterpreted by preserving, protecting, and respecting freedom of religion and belief, protecting the soul (*hifz al-nasl*) means protecting the family, maintaining reason (*hifz al-'aql*) implies the development of intellect and mindset.

### **The Construction of Indonesian Family Law from Rawls's Justice and Auda's *Maqhasid al-Sharia***

Family law is a set of rules governing internal legal relations related to kinship matters among family members. In Indonesia, family law, primarily regulating husband-wife relations, both rights and obligations or the position of husband and wife, and juridical-normative assets in the marriage, has been held in positive law such as the Marriage Law No. 1 of 1974, which was amended into Law No. 16 of 2019 and in the Compilation of Islamic Law.

Law No. 1 of 1974 and Government Regulation No. 9 of 1975 are legislation. This differs from the position of Compilation of Islamic Law which is a rule under the product. The Compilation of Islamic Law was prepared to complete the marriage law, and efforts were made to place it practically as statutory law, even though its position was not the same as that. The compilation of Islamic law is thus based on the Marriage Law. Its material may not conflict with its position as the practical implementation of the marriage law. Therefore all material on the marriage law was copied into the compilation of Islamic law, although with a slightly different formulation. Besides that, the collection of Islamic law added other material which, in principle, does not conflict with the marriage law. This can be seen from the number

of articles in this. Law No 1 of 1974 has 67 articles, while the compilation of Islamic law has 17 pieces.

Several chapters in the compilation of Islamic law that are not contained in the Marriage Law are on general provisions, proposals, pillars, and conditions of marriage, dowry, pregnancy, marriage, reconciliation, and mourning periods. Article 2 of the compilation of Islamic law emphasizes the philosophical basis of marriage under Islamic teachings without reducing the philosophical basis of marriage based on Pancasila, regulated in Article 1 of Law No. 1 of 1974. As explained in Article 1 of Law No. 1 of 1974, the philosophical basis of national marriage is Pancasila linking marriage based on the first precepts, namely based on belief in the One and Only God. This philosophical foundation is emphasized and expanded in article 2 of a compilation of Islamic law, which contains about; marriage solely obeys Allah's commands, carrying out marriage is worship, and the marriage bond is mistaken Chaldean. This philosophical foundation symbol is deliberately displayed to anticipate opinions and practices that show if the marriage bond is full of rules that are gender biased and unfair, as if the marriage bond in Islam does not have a strong foundation.

Related to this, in the perspective *principle of greatest equal liberty* Rawls. First, freedom of belief or religion is in line with the first principle of the maqhasid to protect religion (*hifz al-din*) to protect and respect religious freedom. There is no compulsion to embrace a particular religion and belief or abandon a faith that one believes in. Islam has responded positively to religious liberty, which is reflected in harmony and tolerance between religious adherents. Of course, this harmony and tolerance are only limited to mammalian or community areas. This freedom is constitutionally protected by the 1945 Constitution article 29 paragraph 2 and also in Law No. 39 of 1999 article 22. This freedom implies that the marriage follows the dictum of each religion and belief.

As stated in the Law on Article 2, paragraph 1, marriage is valid if it is carried out according to the law of each religion and belief. In Compilation of Islamic Law article 40, it is also stated that one of the obstacles to getting married is that one of the candidates

is not Muslim. In the same chapter on the prohibition of marriage, Article 44 stipulates that a Muslim woman is prohibited from marrying a man who does not have a Muslim religion. Article 4 of the compilation of Islamic law implicitly prohibits interfaith marriage. Then a marriage must also be prevented if it is not on par / kufu of religion.<sup>41</sup> Nevertheless, the state must also provide protection or protection for its people who wish to have interfaith marriages because this is also part of the basic freedoms that must be facilitated.

*Second, the principle of greatest equal liberty* is the freedom to participate in political life (the right to vote, the right to run in elections) related to maqashid keeping hifz al-nafs in the meaning that Auda maintains the dignity of humanity and human rights. Human rights are a set of rights inherent in the nature and existence of humans as the Almighty God who must be respected, upheld, and protected by the state, government law, and everyone for the sake of honor and protection of human dignity.<sup>42</sup>

Islam is a teaching that places people in a very high position. Even the Koran (QS: al-Israa': 70) guarantees the right to honor and give priority to humans. Termsuk within the household, the relationship between husband and wife, and freedom to play a role in political life. As in Raws' principle of justice, this relationship is an inevitable part of human rights. Domestic life will reap justice if, in matters of political life, freedom is given to implement human rights. As the head of the family, the husband is not justified if he intervenes too much, especially to deprive his wife of political freedom, and vice versa.

Compilation of Islamic Law article 79 emphasizes that the husband as the head of the family and the wife as the housewife have equal rights and positions. Furthermore, Article 80 states that the husband is obliged to guide. As a consequence, the editorial staff must provide directions, directions and provide views. Husbands cannot be justified, and the relationship between the

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<sup>41</sup> Security can only be used as an excuse to prevent the marriage if it is secure due to religious differences or *ikhtilaafu al dien*. See the Compilation of Islamic Law chapter X article 61

<sup>42</sup> See Law Number 39 Year 1999 concerning Human Rights

two in the household does not contain justice if the husband is too interfering in politics; the wife either determines the choice of a figure or becomes a political candidate. Especially nowadays, women are also active in practical and national politics. This freedom by considering the freedom of others in Rawls's construction of justice as a system of justice by considering the justice of others.

*Principle of greatest equal liberty* Third, the freedom to maintain private property is in line with the principle of protecting property (*hifz al-mal*). In the mulligan of the family, the rights of husbands and wives must be realized to maintain or manage their personal property rights. Maintaining private property in Rawls's principle of justice is the same right and freedom that everyone has. In this case, the husband cannot restrain his wife from managing productively his personal property, and vice versa. Personal property referred to is the inheritance obtained from a gift or inheritance. Regarding the assets, each husband and wife have the full right to carry out legal actions regarding their property.<sup>43</sup> It is clarified in the compilation of Islamic law articles 86 and 87 that the inheritance of each as a gift or estate is under the control of each husband and wife unless there is an agreement or agreement in marriage from the parties of the sumac-wife.

The wife's assets/property still belong to the wife and are fully controlled by the wife. Likewise, the husband's assets are the rights of the husband and are fully controlled by the husband. As mentioned above, assets owned by each husband and wife are a form of safeguarding assets in the meaning of Auda by managing them with a social welfare orientation which includes aspects of health, education, social security, and the field of social work. So that these assets become a field of benefit for the people as a resonance of the vision of Rahmat lil alamin as the essence of Islamic teachings.

*Fourth, the principle of greatest equal liberty*, freedom of speech, is in line with the principle of maintaining reason (*hifz al-aql*); Auda interpreted it as multiplying thought patterns and Intellect. Freedom of speech is needed; of course, freedom of opinion with a

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<sup>43</sup> See UUP articles 35-37

rational and argumentative mindset, especially in the sumi-wife relationship. Rawls emphasized that justice will be realized if freedom of opinion is manifested in a wide variety of things and especially in the household. The isolation of freedom of speech and thought can potentially create problems that can break the harmony of the family. It is not uncommon for household breakdowns to occur because husbands and wives do not want to accept one another's opinions.

*Auda interpreted the principle of greatest equal liberty* fifth, freedom to be yourself in the maqasid shariah safeguarding the soul by protecting the family and family institutions. The freedom to be oneself or, in other terms, the freedom to develop oneself has stated in Law No. 39 of 1999 article 38, "Everyone has the right, according to their talents, skills, and abilities, to the right to decent work. Everyone has the right to freely choose the job he likes and is also entitled to conditions of employment. Everyone, whether male or female, who performs the same, comparable, equal, or similar work is entitled to the same wages and terms of the employment agreement. Everyone, whether male or female,

In Compilation of Islamic Law article 79, it is stipulated that the rights and position of the wife are equal to that of the husband in household life and social life together in the community, and each party acts to carry out legal actions. This article emphasizes the balance of the roles of husband and wife in today's empirical reality. The career woman entity in helping the joints of the family economy is a reality that must be accepted. Given the increasing demands of life necessities, relying on the husband's economic resources is insufficient - even - deficient. At the same time, women have job opportunities and opportunities. The role of women is very urgent for a career and helping husbands fulfill the economy and resilience of their families because it cannot be denied that the economy is also one of the factors determining whether a household will last.

Women (wives) can have any occupation if they do not neglect their obligations as wives and housewives. The rights of husband and wife are balanced; they are not in a superior-interior hierarchical position. Islam also does not categorize rigidly and in detail the division of labor in the household. There is no verse that

states that women play an active role in the domestic sphere and men play an active role in the public sphere.

Islam also does not differentiate between men's and women's rights to achieve achievements; it must be adjusted to their intellectual abilities and skills. Because of that, women can become productive human beings who are equal to men. The role of women in the family is an essential task for a woman, although this does not rule out the possibility of her working in society. Career women are certainly not a taboo and debatable issue. Instead, the agency for career women manifests the values of justice, equality, and freedom. Auda mentioned that the principal ideal goals (*maqashid*), such as justice, equality, and freedom, will not change even though the place and time have changed.<sup>44</sup>

The several articles in the Compilation above show a space where John Rawl's style of justice and Jaseer Audah's *Maqasid sharia* space open up opportunities to build new constructions and new understandings related to the study of family law construction in Indonesia (why not only the the Compilation, because the dimensions of the Compilation broaden and narrow as well blocking the way for mixed marriages and interfaith marriages to occur) even though in the construction of family law in Indonesia, with the approach of John Rawls's theory of justice and synergy with the *Maqasid al-shariah* theory a la Jaseer Auda, it opens space for the construction of inclusive family law in Indonesia. And then, with this paper, the author emphasizes that the family law that applies in Indonesia must begin to be reconstructed with the development of the times and science so that it is more inclusive and friendly to freedom of religion, the soul and offspring protection, protecting the mind and other dimensions.

## Conclusion

Justice is the main virtue in social institutions, as security of truth in the system of thought. Rawls's theory of justice regarding the principle of fairness' justice is to respect the basic rights of

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<sup>44</sup> Jasser Auda, *al-Maqasid For Beginners*, Terj. Ali Abdel Mon'im (Yogyakarta: SukaPres UIN Sunan Kalijaga, 2013), 112

individuals in the original position, without discrimination, to achieve social justice through democratic principles or the result of mutual agreement. Rawls formulates a specific conception of justice into two principles of social justice. The first principle is the principle of greatest equal liberty. This principle includes; freedom to participate in political life (the right to vote, the right to nominate oneself in elections), freedom of speech, freedom of belief (religion), freedom to be yourself, and freedom to defend personal property. These five principles of justice are in line with the five principles of *maqasid sharia* as proclaimed by Auda, namely maintaining religion (*hifz al-din*), which is reinterpreted by preserving, protecting and respecting freedom of religion and belief, guarding the soul (*hifz al-nasl*) means protecting the family, protecting Intellect (*hifz al-'aql*) means the development of Intellect and mindset, protecting offspring (*hifz al-nasl*) means maintaining human dignity and human rights and safeguarding property (*hifz al-mal*) means developing and social welfare. Second Principle; social and economic inequalities are organized so that they (a) provide the most significant advantage to the weakest groups and (b) all positions and positions are open to all under conditions of fair equality of opportunity. The two conceptions (Rawls's justice and *maqasid sharia*) have the same conceptual basis, namely carrying justice for the benefit of humans as a manifestation of the aims of the law. As a basis for constructing family law in Indonesia that is more contextual and just.

The third can be seen in the first two important cases related to the freedom to choose partners of different religions, and the second is the dimension of the need to give rights to children outside of marriage to obtain recognition and lineage from their biological father, with these two issues this can be carried out and included in statutory clauses This is only the result of the conceptual construction of family law in Indonesia, where from the start Indonesia has been dominated by a rural society, so the dimension of family law in Indonesia can also accommodate the plurality of the diversity of Indonesian culture, instead of dominating the majority and minorities by regulating their respective religions, this is clear. Far from the primary objective of the theory of justice by John Rawls and *Maqasid Syariah* Jaseer

Auda, which provides space for interfaith marriage as one of Indonesia's constructions of family law.

The next one also provides equal space for women to do and become Careers women have the same distance in the dimensions of rights, obligations, and opportunities. By using justice in the view of John Rawls and Jasser's maqasid sharia, the inequality that has existed in the construction of family law in Indonesia will shift from hegemony to equality and justice.

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