



## Hybrid Legalities in Muslim Minority Societies: Examining Fapale in West Papua through *Maqāṣid al-Sharīa*

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**Abstract:** This study examines the Fapale tradition in Gamta Village, West Papua, through the lenses of *uṣūl al-fiqh* and *maqāṣid al-sharīa*, with particular attention to its implications for child care, lineage, and property relations. Drawing on qualitative data from six months of participant observation, interviews, and the analysis of customary practices alongside classical legal texts—particularly al-Juwaynī’s *al-Burhān* and al-Āmidī’s *al-Iḥkām*—this study finds that Fapale largely aligns with *maqāṣid* principles in the domain of child protection (*ḥifẓ al-nafs*) and lineage preservation (*ḥifẓ al-nasl*) at the level of identity and care. However, the findings also reveal a normative tension in the sphere of property distribution, where inter vivos gifts (*hibah*) from surrogate parents function socially as substitutes for inheritance, thereby creating potential conflicts with Islamic inheritance law (*farāʿid*) and the *maqṣad* of *ḥifẓ al-nasl* in its material dimension. This ambivalence situates Fapale within a hybrid legal space in which Islamic norms, customary authority, and lived social practices intersect and occasionally conflict. Rather than affirming full normative conformity, this study argues that Fapale requires corrective legal mechanisms—such as regulated *hibah* or *waṣiyyah*—to ensure coherence with Islamic law, Indonesian positive law, and contemporary child protection standards. Conceptually, the study contributes to Islamic family law discourse by proposing *al-Manzūma al-Thulāthiyya* as an analytical framework for understanding negotiated legality in Muslim minority contexts.

**Keywords:** customary adoption; fapale tradition; lineage; *maqāṣid al-sharīa*.

**Abstrak:** Penelitian ini mengkaji tradisi Fapale di Desa Gamta, Papua Barat, melalui perspektif *uṣūl al-fiqh* dan *maqāṣid al-syarīʿah* dengan fokus pada

implikasinya terhadap pengasuhan anak, pelestarian nasab, dan relasi harta. Berdasarkan data kualitatif yang diperoleh melalui observasi partisipatif selama enam bulan, wawancara, serta analisis praktik adat dan teks-teks klasik—khususnya *al-Burhān* karya al-Juwaynī dan *al-Ihkām* karya al-Āmidī—penelitian ini menunjukkan bahwa Fapale relatif selaras dengan prinsip maqāṣid pada ranah perlindungan anak (*hifz al-nafs*) dan pemeliharaan nasab (*hifz al-nasl*) dalam dimensi identitas dan pengasuhan. Namun demikian, penelitian ini juga mengungkap adanya ketegangan normatif pada aspek distribusi harta, ketika praktik hibah dari orang tua pengasuh berfungsi secara sosial sebagai pengganti waris, sehingga berpotensi bertentangan dengan hukum waris Islam (*farā'id*) dan *maqṣad hifz al-nasl* dalam dimensi kepemilikan harta. Ambiguitas ini memosisikan Fapale sebagai ruang hukum hibrida, tempat norma Islam, otoritas adat, dan praktik sosial berinteraksi sekaligus bernegosiasi. Alih-alih menegaskan kesesuaian normatif secara mutlak, penelitian ini menegaskan perlunya koreksi hukum melalui pengaturan hibah atau *waṣiyyah* agar praktik Fapale tetap sejalan dengan hukum Islam, hukum nasional, dan standar perlindungan anak kontemporer. Secara konseptual, penelitian ini berkontribusi pada kajian hukum keluarga Islam melalui pengajuan kerangka *al-Manzūma al-Thulāthiyya* untuk membaca legalitas yang dinegosiasikan dalam konteks masyarakat Muslim minoritas.

**Kata Kunci:** adopsi adat; tradisi fapale; silsilah; maqāṣid al-syarī'ah.



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## Introduction

The people of Gamta Village, located in the remote interior of Papua, preserve an indigenous child-care system known as Fapale, a customary practice designed to protect abandoned,<sup>1</sup> orphaned,<sup>2</sup> and economically vulnerable

<sup>1</sup> Jasser Auda, “Maqasid for Re-Envisioning Islamic Higher Education for Sustainability and Socio-Economic Development,” in *Islamic Finance and Sustainable Development* (Routledge, 2025), 8–27; Muhammad Umer Chapra, *Morality and Justice in Islamic Economics and Finance* (Cheltenham, UK: Edward Elgar Publishing, 2014), <https://doi.org/10.4337/9781783475728>; Mohammad Hashim Kamali, “Have We Neglected The Shariah-Law Doctrine of Maslahah?,” *Islamic Studies* 27, no. 4 (September 1988): 287–303.

<sup>2</sup> John Y-Luluaki, “Child Welfare and Protection Law Reform in Papua New Guinea: A Critique,” *Int'l Surv. Fam. L.*, 2018, 399; Gary Robinson, Simon Moss, and Yomei Jones, “Parenting for Child Development: The Development and Preliminary Pilot of a Parenting Intervention to Reduce Violence against Children in Papua New Guinea,” *International Social Work* 66, no. 4 (May 2021): 1277–92, <https://doi.org/10.1177/00208728211008965>; Amri Amri and Fifin Iba, “Kedudukan Kompilasi Hukum Islam Dalam Memutus Perkara Perdata Islam Di Pengadilan Agama Jayapura – Papua: The Position of the Compilation of Islamic Law in Deciding Islamic Civil Cases in the Jayapura – Papua Religious Court,” *OBHE: Jurnal Pascasarjana IAIN Papua* 1, no. 01 SE- (May 2024): 54–71, <https://doi.org/10.53491/obhe.v1i01.995>.

children through extended kinship responsibility. Unlike institutionalized childcare models, Fapale embeds children within family networks, ensuring emotional security, moral upbringing, and collective accountability grounded in local wisdom. However, a structural legal problem arises when the Indonesian state, through the Child Protection Law and the Compilation of Islamic Law, fails to recognize this living practice formally.<sup>3</sup> As a consequence, children raised under Fapale frequently experience legal marginalization, including the loss of inheritance rights, civil documentation, and juridical recognition, despite demonstrably enjoying greater social stability and affective care than those placed in formal orphanages.<sup>4</sup>

This tension between state law and customary systems is not unique to Papua. Still, it reflects a broader global debate within Muslim societies concerning the distinction between *tabannī* (adoption that alters lineage) and *kafālah* (non-lineage foster care). Studies from North Africa, the Middle East, and Muslim minority contexts such as the Philippines consistently demonstrate that Islamic law rejects *tabannī* while endorsing *kafālah* as a *maqāṣid*-oriented mechanism for child protection without compromising *nasab* (lineage).<sup>5</sup> Within this global discourse, Fapale occupies a distinctive position. While it does not sever biological lineage as in Western-style adoption,<sup>6</sup> it also extends beyond formal *kafālah* models by integrating

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<sup>3</sup> Freerk Ch. Kamma, *The Myth of Manarmakeri BT - Koreri Messianic Movements in the Biak-Numfor Culture Area: Koninklijk Instituut voor Taal-, Land-, en Volkenkunde Translation Series 15*, ed. Freerk Ch. Kamma (Dordrecht: Springer Netherlands, 1972), 17–36, [https://doi.org/10.1007/978-94-015-0742-4\\_3](https://doi.org/10.1007/978-94-015-0742-4_3); Joaquín Bahamondes et al., “Numbing the Perception of Stigma: System Justification Decreases Psychological Distress by Reducing Perceived Stigma among Gay Men and Lesbians (Adormeciendo La Percepción Del Estigma: La Justificación Del Sistema Disminuye El Malestar Psicológico Mediant),” *International Journal of Social Psychology* 35, no. 2 (May 2020): 282–309, <https://doi.org/10.1080/02134748.2020.1721052>.

<sup>4</sup> Abdur Rohman Wahid, “Distribution of Inheritance Among Different Religions: A Perspective from Islamic Sociology of Law Atho’ Mudzhar,” *Al-Syakhsiyyah: Journal of Law and Family Studies* 7, no. 1 (June 2025): 103–26, <https://doi.org/10.21154/syakhsiyyah.v7i1.11383>.

<sup>5</sup> Ulfa Pirmani, Edi Kurniawan, and Najmi, “From the Debate on the Legality of Waqf Al-Ahli to Its Implementation in Southeast Asia: Indonesia, Malaysia, and Singapore,” *International Journal of Law and Society (IJLS)* 3, no. 2 SE-Article (August 2024): 59–76, <https://doi.org/10.59683/ijls.v3i2.81>; Mohammad Fadel, “DNA Evidence and the Islamic Law of Paternity in Light of Maqāṣid al-Sharī’a,” *The Muslim World* 112, no. 3 (July 2022): 311–23, <https://doi.org/10.1111/muwo.12441>; Eka Mahargiani, Itsna Ummahatul Izza, and Eko Sariyeki, “Adopted Children with the Legal Status of Biological Children: Implications for Inheritance Rights,” *Jurnal Syariah, Hukum, dan Ekonomi Islam* 3, no. 1 (2025): 249–60.

<sup>6</sup> George C. Nche and Benson Ogar Michael, “It Is Taboo to Clear Those Forests or Cut Trees from Them’: How Sacred Forest Preservation in Abanyom, Cross River State, Nigeria Promotes

customary inheritance ethics, communal guardianship, and spiritual belonging rooted in Papuan socio-religious cosmology. Unlike adoption practices in Java, which are increasingly formalized and state-regulated,<sup>7</sup> or Middle Eastern *kafālah*, which operates within codified Islamic legal systems,<sup>8</sup> Fapale represents a form of living Islamic law that evolves organically in a remote Muslim community. This case, therefore, contributes not merely as a local anomaly but as a critical empirical lens for rethinking Islamic family law, *uṣūl al-fiqh*, and *maqāṣid al-sharīa* in peripheral contexts where law, custom, and survival intersect.

The resolution process initiated by the state, which includes the socialization of laws and training for village officials,<sup>9</sup> neglects the dimension of *‘urf ṣāliḥ*. This dimension is fundamentally in line with the principles of *maṣlahah* and *istiṣlāḥ* in *uṣūl al-fiqh*, leading to a dissonance between positive law and the moral realities of society. Ironically, the imposition of an individualistic Western legal framework by the state threatens the existing child protection ecosystem, which aligns with the values of *ta’awun*, *takāful*,

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Environmental Sustainability,” *Worldviews: Global Religions, Culture, and Ecology* (Leiden, The Netherlands) 28, no. 3 (2024): 268–94, <https://doi.org/10.1163/15685357-02803005>; Muhamad Riandi and Rusdiyah Rusdiyah, “The Interaction between Islam and Local Wisdom in Indonesia: A Normative-Philosophical Study,” *ASEAN Journal of Islamic Studies and Civilization (AJISC)* 2, no. 1 SE-Articles (June 2025): 93–115, <https://doi.org/10.62976/ajisc.v2i1.1370>.

<sup>7</sup> Ervan Nurtawab, “Indonesia’s Pesantren Law of 2019: New Developments in the Bureaucratisation of Islamic Education,” *Religion, State and Society* 53, no. 3 (May 2025): 236–52, <https://doi.org/10.1080/09637494.2025.2563958>; Banu Senay et al., “Islamic Bureaucracies in Indonesia and Turkey: The Challenge of Comparison,” *Religion, State and Society* 53, no. 3 (May 2025): 165–87, <https://doi.org/10.1080/09637494.2025.2561361>; Waheeda Waheeda et al., “The Dynamic Interplay: A Normative-Philosophical Study of Islam and Local Wisdom in Indonesia,” *ASEAN Journal of Islamic Studies and Civilization (AJISC)* 2, no. 1 SE-Articles (June 2025): 61–91, <https://doi.org/10.62976/ajisc.v2i1.1369>.

<sup>8</sup> Khusnul Amalia, “Child Adoption in Modern Islamic Family Law: A Comparative Study of Child Adoption in Turkey, Morocco, and Indonesia,” *Al-Mazaahib: Jurnal Perbandingan Hukum* 13, no. 1 (2025): 53–77; Jamiu Muhammad Busari, Saheed Afolabi Ashafa, and Saheed Abdullahi Busari, “challenges of al-farā’id application in a multi-religious society: the case of yoruba muslims of lagos and oyo states, southwestern nigeria,” *Jurnal Syariah* 32, no. 1 SE-Articles (April 2024): 158–99, <https://doi.org/10.22452/syariah.vol32no1.6>.

<sup>9</sup> Evi Mufrihah Zain et al., “The Implementation of Special Autonomy in Southwest Papua,” *Sospol* 9, no. 2 SE-Articles (December 2023): 235–46, <https://doi.org/10.22219/jurnalsospol.v9i2.29611>; Miranda Forsyth, “Policing in a Relational State: The Case of Sorcery Accusation-Related Violence in Papua New Guinea,” *Policing and Society* 32, no. 5 (May 2022): 611–28, <https://doi.org/10.1080/10439463.2021.1953026>.

and *rahmah*,<sup>10</sup> central to *fiqh al-mu'āmalāt* as emphasized by *sharīa*.<sup>11</sup> From the *maqāṣid al-sharīa* perspective,<sup>12</sup> the activities of *ḥifẓ al-nasl* (protection of lineage) and *ḥifẓ al-nafs* (protection of life) are better protected within the Fapale system than under a bureaucratic adoption process that is overly administrative.

This research seeks to reposition the Fapale tradition not merely as a validation of conformity with Islamic law, but as an anthropological inquiry into how legal meanings are constructed and negotiated within local Muslim societies. By addressing the epistemological clash between the dominant state's legal framework and the morally and theologically rich indigenous legal systems, this study aims to propose a reconstructive approach (*al-muqārabah al-iṣlāḥiyyah*) based on *qawā'id fiqhīyyah* and *istishāb al-ḥāl*. This approach is necessary to restore the normative legitimacy (*al-shar'iyyah al-mi'yāriyyah*) of local practices. It underscores the need for indigenous legal frameworks that better reflect the community's values and lived experiences.

This study employs a qualitative research design with an ethnographic jurisprudence approach, without incorporating quantitative or mixed-method components.<sup>13</sup> The choice of this approach is grounded in the objective of

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<sup>10</sup> Abdoljabar Zargooshnasab and Ali Hosinifar, "Analyzing the Concept of the Negation of 'Junah' in the Qur'an and Hadith," *Quranic Knowledge Research* (Associate Professor, Faculty of Theology and Islamic Studies, Ilam University, Ilam, Iran) 14, no. 54 (2023): 245–72, <https://doi.org/10.22054/rjqk.2023.74441.2833>; Amalia, "Child Adoption in Modern Islamic Family Law: A Comparative Study of Child Adoption in Turkey, Morocco, and Indonesia"; Andrea Buchler and Eveline Schneider Kayasseh, "Fostering and Adoption in Islamic Law—Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates," *Elec. J. Islamic & Middle EL* 6 (2018): 31.

<sup>11</sup> Abdul Rahman, Zainal Amin Ayub, and Ratnawati Ratnawati, "Legal Framework for Protecting Children from Commercial Sexual Exploitation," *Volkgeist: Jurnal Ilmu Hukum Dan Konstitusi* 8, no. 1 SE-Articles (April 2025): 87–110, <https://doi.org/10.24090/volkgeist.v8i1.13156>; Anthony C. Diala, "Neoliberal Influences on Legal Pluralist Marriage Reforms in Africa," *J. Int'l & Comp. L.* 9 (2022): 81; Mohamed Mitiche, "A Decolonial Critique of the Maqasid-Based Approach to Shari'a: The Call for a Moratorium on the Hudud," *J. Islamic L.* 6 (2025): 233.

<sup>12</sup> Tasnim Rahman Fitra, Noratinah Binti Yusof, and Anwar M. Radiamoda, "Sanctions and Legal Compliance in Marriage Registration: A Comparative Implementation of Islamic Family Law in Indonesia and Malaysia," *Islamic Law and Social Issues in Society* 1, no. 1 SE-Articles (May 2025): 47–61.

<sup>13</sup> James P. Spradley, *The Ethnographic Interview* (Waveland Press, 2016); John W. Creswell and Cheryl N. Poth, *Qualitative Inquiry and Research Design: Choosing among Five Approaches* (Sage publications, 2016); Johnny Saldaña, "A Workshop in Styles of Qualitative Writing and Reporting," *International Review of Qualitative Research* 17, no. 3 (2024): 441–62; Matthew B. Miles and A. Michael Huberman, "Drawing Valid Meaning from Qualitative Data: Toward a Shared Craft," *Educational Researcher* 13, no. 5 (1984): 20–30; Edi Kurniawan, "Early Marriage, Human Rights, and the Living Fiqh: A Maqasid Al-Shari'a Review," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 20, no. 1 (2020): 8.

understanding Fapale as a lived legal and socio-religious practice rather than as a measurable demographic phenomenon. Data collection was conducted through six months of field immersion in Gamta Village, during which the researcher resided within the community, participated in customary activities, and observed everyday practices related to child care, kinship, and inheritance. Primary empirical data were collected through participant observation and in-depth interviews with five purposively selected key informants, including customary elders, adoptive parents, children involved in Fapale arrangements, and local religious figures. This immersive strategy enabled the researcher to capture both explicit norms and implicit legal reasoning embedded in communal life.

The analytical process integrated ethnographic findings with normative Islamic legal analysis to assess Fapale's legal position within the framework of Islamic law. Textual analysis focused on classical sources of *uṣūl al-fiqh*, particularly the concept of *maqāṣid al-sharīa* as articulated by al-Juwaynī and the principle of *istishāb* as developed by al-Āmidī, alongside relevant *qawā'id fihiyyah* concerning lineage, guardianship, and inheritance. Data analysis proceeded through three interrelated stages: first, identifying the objectives of *Sharī'ah* reflected in Fapale practices; second, examining the continuity of social responsibility and lineage preservation through the lens of *istishāb*; and third, evaluating the implications of customary child care for inheritance rights under Islamic legal maxims. This qualitative-ethnographic methodology allows the study to critically position Fapale as a form of living Islamic law, offering normative insights for the recognition of customary practices within formal Islamic family law discourse.

### **Fapale Tradition, Social Responsibilities, and Islamic Legal Frameworks through *Maqāṣid al-Sharīa* in Papuan Muslim**

Based on field observations and interviews conducted in Gamta Village, Fapale refers to a customary childcare arrangement in which a child is transferred from the biological family to a surrogate family within the same indigenous community. Unlike formal adoption under state law,<sup>14</sup> Fapale does not involve

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<sup>14</sup> Joaquín Bahamondes, Chris G Sibley, and Danny Osborne, "System Justification or Social Dominance? A Multilevel Test of the Ideological Motivators of Perceived Discrimination," *Personality and Social Psychology Bulletin* 48, no. 7 (August 2021): 1134–48,

written legal documentation or judicial authorization. Instead, it operates through communal recognition and customary legitimacy.<sup>15</sup> The child continues to be identified by their biological lineage while simultaneously being integrated into the daily life, economic support system, and social identity of the surrogate family. This arrangement can only be understood within the plural social composition of Gamta Village, where ethnic affiliation, kinship networks, and indigenous status collectively shape customary authority and determine who is entitled to assume childcare responsibilities under Fapale. Therefore, the practice of Fapale is inseparable from the village’s demographic structure, which influences both the legitimacy of surrogate families and the community’s acceptance of responsibility transfer.

**Table 1.** Ethnic Groups Inhabiting Gamta Village, Age Groups, and Population by Gender

No	Ethnic Group	Number of Ethnic Groups	Age Group	Total by Ages	Gender	Total by Gender
1	Java	3	0-5 years	22	Male	68
2	Bugis	15	6-15 years	37	Female	55
3	Wihel (Mat Bat / Tuan Tanah)	38	16-25 years	18		
4	Wailegi	7	26-35 years	21		
5	Al-Qadri	8	36-45 years	13		
6	Soltief	6	46-55 years	8		
7	Loji	7	>56 years	4		

<https://doi.org/10.1177/01461672211036020>; Hjh Norhartijah binti Haji Puteh and Cecep Soleh Kurniawan, “Reforming Islamic Family Law in Southeast Asia: A Comparative Study of Indonesia, Malaysia, and Brunei Darussalam,” *ASEAN Journal of Islamic Studies and Civilization (AJISC)* 2, no. 1 SE-Articles (June 2025): 1-25, <https://doi.org/10.62976/ajisc.v2i1.1367>.

<sup>15</sup> Mohammad Hashim Kamali, “Shari’ah And Civil Law: Towards A Methodology Of Harmonization,” *Islamic Law and Society* (Leiden, The Netherlands) 14, no. 3 (2007): 391-420, <https://doi.org/10.1163/156851907782792508>; Jasser Auda, “Realizing Maqāṣid in the Shari’ah,” *The Objectives of Islamic Law the Promises and Challenges of the Maqāṣid Al-Shari’a*, 2018, 35-56; J. Van Baal, “The Cult of The Bull-Roarer in Australia and Southern New Guinea,” *Bijdragen Tot de Taal-, Land- En Volkenkunde* 119, no. 2 (September 1963): 201-14.

8	Wainsaf	7		
9	Limalol	6		
10	Banlol	8		
11	Djabumir	7		
12	Rumakat	4		
13	Others	8		
<b>To</b>		<b>123</b>	<b>123</b>	<b>123</b>
<b>tal</b>				

Source: Gamta Village Monograph Data, 2018.

Table 1 illustrates the ethnic diversity, age distribution, and gender composition of Gamta Village, which are central to understanding the operation of Fapale as a customary institution. The dominance of indigenous clans such as *Wihel* (recognized as *tuan tanah*) establishes a hierarchy of customary authority, where decision-making legitimacy in Fapale deliberations is primarily vested in senior members of these groups. The age structure shown in the table indicates that elders within the productive and senior age groups play a decisive role in customary consultations. At the same time, younger members and children are positioned as subjects of protection rather than decision-makers. This demographic configuration explains why Fapale decisions are collective rather than parental, and why the transfer of childcare responsibility is socially binding. From a *maqāsid al-sharīa* perspective, the interaction between ethnic authority and age hierarchy provides the social mechanism through which *ḥifẓ al-nasl* and *ḥifẓ al-nafs* are operationalized at the community level, even before any explicit legal or theological articulation.

Fapale implementation typically occurs when a family faces economic hardship, the death of a parent, or limited caregiving capacity. Decisions are not made unilaterally by parents but through customary deliberations involving elders, religious figures, and kinship representatives.<sup>16</sup> The involvement of elders and religious figures reflects the integration of social authority and moral legitimacy, ensuring that the decision is recognized not merely as a private family arrangement but as a communal obligation. One

<sup>16</sup> Abū al-Ma‘ālī al-Juwaynī, *Al-Burhān Fī Uṣūl al-Fiqh*, 3rd ed., v, ed. ‘Abd al-‘Azīm al-Dīb (Cairo: Dār al-Wafā’, n.d.).

symbolic ritual involves tying a rooster beneath a mangrove tree,<sup>17</sup> which community members interpret as both a declaration of intent and a request for divine guidance. This ritual marks the social recognition of responsibility transfer rather than the severance of biological ties.<sup>18</sup> Thus, the ritual process functions as a socio-legal confirmation that reinforces accountability for the child's welfare within the broader community structure.

From a social perspective, the child gains daily care, access to communal land use, and protection under the surrogate family's authority. This access to resources is closely linked to the communal land system, in which land-use rights are embedded in social relations rather than formal ownership, enabling children under Fapale to sustain their livelihoods. However, this arrangement produces legal ambiguity, particularly regarding inheritance. While children under Fapale may access land and livelihood resources, their status in formal Islamic inheritance (*farā'id*) and state law remains unclear. This ambiguity creates a normative tension between customary welfare-based arrangements and doctrinal requirements of Islamic inheritance law, particularly in defining entitlement and legal continuity. For the biological family, Fapale alleviates immediate caregiving burdens but does not fully relinquish moral responsibility. At the communal level, Fapale reinforces collective accountability for child welfare but simultaneously challenges formal legal classifications of guardianship (*kafālah*) and adoption.<sup>19</sup>

### **Figure 1.** Landscape of Gamta Village

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<sup>17</sup> al-Juwaynī; Martin Ramstedt, "Towards an Epistemological Decolonization of Legal Pluralism: The Case of Indonesia," *Oñati Socio-Legal Series* 15, no. 5 (October 2025): 1717–48, España, Internacional, <https://doi.org/10.35295/osls.iisl.2157>.

<sup>18</sup> Lily Bauw, "The Special Status of Papua in the New Format of Special Autonomy and the Concept of Regional Autonomy in the Perspective of Islamic Law," *Al-Istinbath: Jurnal Hukum Islam* 10, no. 1 (2025): 429–42, <https://doi.org/10.29240/jhi.v10i1.12409>.

<sup>19</sup> Wilnan Fatahillah and Teguh Luhuringbudi, "Comparative Study of Islamic Family Law in Indonesia and Saudi Arabia: Maqāṣid Al-Sharī'ah Perspective," *Tatho: International Journal of Islamic Thought and Sciences* 2, no. 2 SE-Articles (April 2025): 127–40, <https://doi.org/10.70512/tatho.v2i2.87>; Bahamondes, Sibley, and Osborne, "System Justification or Social Dominance? A Multilevel Test of the Ideological Motivators of Perceived Discrimination," August 2021; Ugwu Ndidiamaka V. and Okoye Kanayochukwu M., "We Do Not Father Another Man's Child': Child Adoption among Christians in Enugu-Ezike Community," *HTS: Theological Studies* 81, no. 1 (January 2026): 10820, <https://doi.org/10.4102/hts.v81i1.10820>.

1. A motorboat owned by a resident is moored beside a resident's house



2. The houses of the residents of Gamta Village on the coast still use shingle roofs made from sago leaves



3. The houses of Gamta Village residents on the mainland already use zinc roofs and other materials



Source: Observation, 2018

Figure 1 presents an overview of the socioeconomic conditions of Gamta Village, highlighting disparities in housing materials, mobility assets, and settlement patterns between coastal and mainland residents. These conditions illustrate varying levels of economic vulnerability that directly influence the emergence of Fapale as a mechanism of social support. In contexts where formal welfare systems are absent, Fapale serves as an adaptive response to ensure *ḥifẓ al-nafs* by securing daily subsistence and protecting children from economically constrained households. At the same time, integrating children into surrogate families through shared residence and livelihood practices contributes to *ḥifẓ al-nasl* by maintaining continuity of care, lineage recognition, and social belonging within the community.

Only after examining these practices can Fapale be analytically situated within *Maqāṣid al-Sharīa*. Empirically, the tradition appears to prioritize *ḥifẓ al-nafs* through sustained caregiving, *ḥifẓ al-nasl* by maintaining biological lineage,<sup>20</sup> and *ḥifẓ al-‘ird* by preserving the child’s social dignity.<sup>21</sup> These

<sup>20</sup> al-Juwaynī, *Al-Burhān Fī Uṣūl al-Fiqh*.

<sup>21</sup> Jauharatul Maknunia, Sutrisno Sutrisno, and Teguh Arafah Julianto, “Peacebuilding and Humanitarian Crises: The Role of Islamic Humanitarianism in Indonesia’s Conflict Resolution and Disaster Response,” *ASEAN Journal of Islamic Studies and Civilization (AJISC)* 2, no. 1 SE-Articles (June 2025): 117–33, <https://doi.org/10.62976/ajisc.v2i1.1371>; Siti Muniroh and Khoiruddin Nasution, “The Adoption of Found Child According to Islamic Law and Law No. 3 of 2006 on Religious Courts in the Perspective of Maqasid Al-Shari’ah,” *Millah: Journal of Religious Studies* 21, no. 1 SE-Articles (December 2021): 89–112, <https://doi.org/10.20885/millah.vol21.iss1.art4>.

maqāṣidic dimensions are not inferred abstractly but emerge from observable caregiving practices, resource-sharing mechanisms, and communal responsibility structures documented in the field. However, tensions emerge when customary land grants intersect with Islamic inheritance norms and the principle of *istishāb*. These findings suggest that Fapale does not fully conform to classical legal doctrines but rather operates as a negotiated ethical practice that responds to lived realities.

Rather than asserting immediate conformity with *Maqāṣid al-Sharīa*, this study demonstrates that Fapale represents a site of legal and moral negotiation. Its alignment with *maqāṣid* principles is contingent, partial, and context-dependent, highlighting the need to read Islamic law as a living framework rather than a rigid normative code.<sup>22</sup> By grounding *maqāṣid* analysis in empirical socio-economic and demographic data, this study avoids normative overgeneralization and situates Fapale within the lived legal realities of Papuan Muslim communities.

### **Customary Adoption and Islamic Legal Frameworks through *Istishāb***

An analysis of the Fapale practice in Gamta Village through the principle of *istishāb*, as proposed by al-Āmidī in *al-Iḥkām fī Uṣūl al-Aḥkām*, indicates that the local community normatively preserves a child's biological lineage while transferring the responsibilities for care and social protection. Empirically, this analysis proceeds by mapping observable field data—such as the retention of biological surnames, ritual naming practices, and inheritance references—onto specific formulations of *istishāb*, before deriving their respective legal implications. This aligns with the principle of *al-aṣl baqā'mā kāna 'alā mā kāna* (what is originally fixed remains in its state), ensuring that, in the absence of explicit evidence that alters lineage, the child's genealogical status remains linked to their biological parents.<sup>23</sup> The pattern in which Fapale children retain their original surnames and participate in religious rituals such as *Aqiqah* and *Tahlilan* demonstrates the community's adherence to the logic of *al-istiṣhāb*,

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<sup>22</sup> Ayodele Oloko et al., “The Multi-Dimensional Perspectives of Taboos on Gender Roles of Fisherfolk in the Global South,” *Maritime Studies* 23, no. 1 (2023): 1, <https://doi.org/10.1007/s40152-023-00340-2>; Firdaus Firdaus et al., “The Indo-Pacific Child Trafficking Dynamics: Islamic and Cultural Viewpoints,” *KARSA Journal of Social and Islamic Culture* 31, no. 2 SE-Articles (December 2023): 202–45, <https://doi.org/10.19105/karsa.v31i2.12391>.

<sup>23</sup> Alī ibn Muḥammad Al-Āmidī, *Al-Iḥkām Fī Uṣūl al-Aḥkām* (Riyad: Dār as-Sāmi'i, 2003), 127.

emphasizing that no new legal status is created that contradicts *sharīa*.<sup>24</sup> Furthermore, the customary leadership structure in Gamta, exemplified by Jojau, reinforces an ecosystem where decisions concerning Fapale are taken prudently, thereby upholding the principle that certainty should not be undermined by doubt. The absence of any claim of “adoption” as equivalent to “one’s own child” within genealogical contexts reinforces that Fapale operates under *kafāla*, not *tabannī*, thus aligning with the Islamic prohibition against false lineage.

The presentation of field data reveals a systematic pattern where each instance of Fapale results in the child's identity (name, surname, and rights to customary land) remaining associated with their biological family. Meanwhile, the rights to care, education, and social welfare are transferred to the recipient family, illustrating the application of the principle of *istishāb al-ḥāl al-sābiq* (maintenance of the previous state). These field data are derived from direct observations of naming practices in *aqiqah* and *tahlilan* rituals, records of customary land access, and interviews with biological parents, foster families, and customary leaders in Gamta Village. Al-Āmidī emphasizes that *al-istishāb* applies in both negation and establishment,<sup>25</sup> asserting that changes are valid only when supported by definitive evidence. Trends indicate that, in cases of inheritance disputes, the Gamta community consistently refers to biological lineage rather than the Fapale relationship, demonstrating that lineage remains the legally recognized basis. This practice, supported by the fact that Fapale children are identified by their original names in religious rituals, affirms that their spiritual and religious identities are tied to their biological lineage. Such evidence not only depicts the Fapale practice but also unveils an underlying normative system that is both theologically Islamic and sociologically transformative, effectively applying *qawā'id uṣūliyyah* without overtly referencing them.

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<sup>24</sup> Al-Āmidī, 128; Sufi Maulana Gajah, Irwan, and Dahruji, “Bridging Tradition and Islamic Law: The Evolution of Pakpak Customary Inheritance Practices in the Muslim Community of Dairi,” *DIKTUM: Jurnal Syariah Dan Hukum* 23, no. 2 (March 2025): 165–79, <https://doi.org/10.35905/diktum.v23i2.13000>.

<sup>25</sup> ‘Alī ibn Aḥmad Ibn Ḥazm, *al-Iḥkām fī uṣūl al-aḥkām* (Maktabat al-Khānjī, 1926); Muammer İskenderoğlu, “Ash‘arism Encounters Avicennism: Sayf al-Dīn al-Āmidī on Creation: By Laura Hassan, Piscataway, NJ, Gorgias Press, 2020, 329 Pp., \$114.95 (Hardback), ISBN 978-1463207199,” *Islam and Christian-Muslim Relations* 33, no. 2 (April 2022): 191–93, <https://doi.org/10.1080/09596410.2022.2046958>.

The construction of meaning from the field data and classical texts illustrates that Fapale functions as a form of *ijtihād ‘amali* (concrete-practical *ijtihād*), utilizing the principle of *istishāb* to foster social stability and legal certainty. This indicates that the Gamta community, despite lacking formal fiqh education, has developed a customary legal system that aligns with *uṣūl al-fiqh*, challenging the notion that Islamic law is confined to formal institutions. The correlation between kinship structure and the principle of *Istishāb* underscores the community's intuitive understanding that *istishāb* applies when no prohibition exists to customary care, thereby maintaining lineage as the legally recognized foundation.<sup>26</sup> Moreover, the coexistence of spiritual and customary authority under Jojau reflects an integrated legal ecosystem in which Fapale decisions are bound by sharia considerations, making *istishāb* more than a theoretical concept—it becomes a lived practice. Additionally, Fapale serves as a model of *kafāla ‘urfīyya* (customary care) that effectively protects children's rights without compromising the principle of *ḥifẓ al-nasl*. However, when assessed against formal Islamic law and positive law, this form of *kafāla* may create legal ambiguity, particularly in cases of formal inheritance claims or state-recognized guardianship, suggesting that Fapale simultaneously fills a legal vacuum while remaining vulnerable to future normative conflict. This innovative framework offers a fresh perspective on the relationship between custom and Islamic law, presenting a model of family law grounded in local justice rather than centralized authority. This intellectual contribution enriches the discussion of *uṣūl al-fiqh* and promotes a decolonization of Islamic law in peripheral regions.

The following table systematically demonstrates the analytical trajectory of this study by linking specific field data from Gamta Village to the corresponding principles of *istishāb* and their concrete legal implications in Islamic law.

**Table 2.** Corelating Fapale Customary Practice with al-Amidi *Istishāb* Doctrine

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<sup>26</sup> Al-Āmidī, *Al-Iḥkām Fi Uṣūl al-Aḥkām*, 128–29.

Field Data Element (Gamta Village)	Key Quotes from al-Āmidī's Book al-Iḥkām fī Uṣūl al-Aḥkām	Principle of Istishāb	Implications of Islamic Law
<p>Fapale Children still use their original surnames (Wihel, Wailegi, Lewataka); there is no claim of changing lineage in traditional or religious rituals; inheritance rights are limited to access, not full ownership</p>	<p><i>al-istiṣhāb hujja yafza' ilayhi al-mujtahid idhā lam yajid fī al-ḥāditha dalīl khāṣṣ bi al-mas'ala</i> (Juz 4, p. 128)</p> <p>أن الاستصحاب حجة ، يفرع إليها المجتهد إذا لم يجد في الحادثة دليل خاص بالمسألة محل الاجتهاد ، وبه قال الحنابلة والمالكية وأكثر الشافعية والظاهرية سواء كان في النفي بحالتيه، العقلي والشرعي أو الإثبات</p>	<p><i>Al-aṣl baqā' mā kāna 'alā mā kāna</i> (the initial legal status is maintained as long as there is no evidence to change it)</p>	<p>Fapale does not change <i>nasab</i>; it only shifts <i>wilāya</i> and <i>kafāla</i>, which are in line with the prohibition of <i>tabannī</i> and the permissibility of <i>kafāla</i> in Islam.</p>
<p>In inheritance or identity disputes, society always refers to biological <i>nasab</i>. In religious rituals (<i>aqiqah</i>, circumcision, <i>tahlil</i>), the child's original name and surname are still used; there are no customary symbols that indicate "lineage adoption."</p>	<p><i>al-istiṣhāb hujja fī al-nafy wa al-ithbāt, 'aqliyyan wa shar'iyyan</i> (Juz 4, p. 128)</p> <p>كان ذلك الاستصحاب لأمر وجودي أو عدمي أو عقلي أو شرعي</p>	<p><i>Al-yaqīn lā yazūl bi al-shakk</i> (belief in biological lineage is not invalidated by doubt or social change)</p>	<p>Fapale operates within the logic of <i>Fiqh al-Wāqī'</i>, where parenting does not equate with identity ownership (a legitimate form of *<i>kafāla</i> 'urfīyya)</p>
<p>The Jojau Authority Construction integrates custom and religion; Fapale decisions are made in deliberations that consider social and</p>	<p><i>Al-Istiṣhāb Yasta'miluhu al-Mujtahid 'ind 'adam al-Dalīl</i> (Juz 4, p. 128)</p> <p>وإنما قلنا ذلك، لأنه لو لم يكن الراجح هو الاستصحاب، لم يخل. أما ان</p>	<p><i>Istishāb al-Ḥāl al-Sābiq</i> (maintaining the previous legal state as the basis for new decisions)</p>	<p>Fapale* is <i>Ijtihād 'Amalī</i> that protects <i>Ḥifz al-Nasl</i> while fulfilling <i>Ḥifz al-Nafs</i> (a holistic and contextual model of family law)</p>

Field Data Element (Gamta Village)	Key Quotes from al-Āmidī's Book al-Iḥkām fī Uṣūl al-Aḥkām	Principle of Istishāb	Implications of Islamic Law
spiritual sustainability. The child remains morally and ritually bound to the biological family	يكون الراجح عدم الاستصحاب، او ان الاستصحاب وعدمه سيان.		

Source: field and textual data, 2018.

Overall, the table synthesizes how Istishāb operates not as an abstract doctrine but as a practical legal logic embedded in everyday customary practices, reinforcing the argument that Fapale represents an applied form of uṣūlī reasoning grounded in lived experience.

### Customary Adoption and Islamic Legal Frameworks through Istishāb

An analysis of the Fapale practice in Gamta Village, grounded in the principle of Istishāb, must proceed with caution to avoid post hoc justification of custom through selective textual citation. Drawing on al-Āmidī's discussion in *al-Iḥkām fī Uṣūl al-Aḥkām*, *istishāb* is not an automatic validation of existing practices, but a legal presumption that operates only in the absence of decisive evidence (*dalīl khāṣṣ*) to the contrary. Al-Āmidī explicitly states that “*al-istishāb ḥujja yufza' ilayhā al-mujtahid idhā lam yajid fī al-ḥādithah dalīlan khāṣṣan bi al-mas'alah*,” meaning that *istishāb* functions as a provisional legal anchor rather than a substantive proof in itself.<sup>27</sup> Within this framework, field data from Gamta indicate that Fapale does not introduce any explicit legal claim that alters *nasab*: children retain their biological surnames, genealogical references, and ritual identification in religious practices such as *'aqīqah* and *tahlīlan*. From the standpoint of *al-aṣl baqā'mā kāna 'alā mā kāna*, lineage

<sup>27</sup> Al-Āmidī, *Al-Iḥkām Fi Uṣūl al-Aḥkām*; Heru Susanto and Agustina Kumala Dewi, “Abu Al-Ma'ali al-Juwaini's Contribution to Maqashid al-Shari'ah Thought in Kitab al-Burhan Fi Ushul al-Fiqh,” *Bilancia: Jurnal Studi Ilmu Syariah Dan Hukum* 18, no. 2 (December 2024): 173–94, <https://doi.org/10.24239/blc.v18i2.3418>.

remains legally intact so long as no authoritative act or claim establishes otherwise.<sup>28</sup>

However, certain ritual elements within Fapale (such as the symbolic act of “handing over a child through a window” or the ceremonial washing of a child’s head) require critical scrutiny, as they may appear, at a superficial level, to signify a severance of lineage. If interpreted as *ḥaqīqah* (literal legal acts), such symbols would directly contradict the maqṣad of *ḥifẓ al-nasl*. This study argues that these practices cannot be understood as legal acts of lineage transfer, but rather as *majāz ‘urfī*—customary metaphors that signify the transfer of caregiving responsibility (*wilāyat al-ri‘āyah*), not genealogical identity. In *uṣūl al-fiqh*, valid custom (*‘urf ṣaḥīḥ*) may inform the interpretation of social acts so long as it does not negate an established *shar‘ī* ruling. Al-Āmidī’s formulation that *Istishāb* applies “*sawā’an kāna al-istishāb li amrin wujūdiyyin aw ‘adamiyyin aw ‘aqliyyin aw shar‘iyyin*” underscores that the presumption of continuity encompasses social and legal states alike, unless explicitly overturned.<sup>29</sup> In Gamta, no verbal declaration, ritual formula, or juridical consequence accompanies these symbols that would indicate a claim of nasab transformation; hence, the presumption of lineage continuity remains legally operative.

The integration of ethnographic findings with classical legal theory demonstrates that Fapale functions as a bounded form of *ijtihād ‘amalī*, rather than an unregulated customary adoption. In inheritance disputes, communal deliberations under the authority of Jojau consistently revert to biological lineage as the sole basis for entitlement, thereby operationalizing the *uṣūlī* maxim *al-yaqīn lā yazūl bi al-shakk*. This confirms that certainty of nasab is not displaced by social proximity or emotional bonds. In this sense, *Istishāb* is not employed to sanctify Fapale uncritically, but to discipline it within *shar‘ī* limits. Fapale thus emerges as a model of *kafālah ‘urfīyyah* that expands the sphere of care (*ḥifẓ al-nafs*) without collapsing the legal boundary of lineage (*ḥifẓ al-nasl*). This finding challenges the assumption that Islamic law operates only through

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<sup>28</sup> Bernard Weiss, “The Primacy of Revelation in Classical Islamic Legal Theory as Expounded by Sayf Al-Dīn al-Āmidī,” *Studia Islamica*, no. 59 (1984): 79–109, <https://doi.org/10.2307/1595296>.

<sup>29</sup> Norman Calder, “Bernard G. Weiss: The Search for God’s Law: Islamic Jurisprudence in the Writings of Sayf al-Din al-Amidi. xxvi, 745 Pp. Salt Lake City: University of Utah Press, 1992. \$65.,” *Bulletin of SOAS* 59, no. 3 (October 1996): 556–57, <https://doi.org/10.1017/S0041977X0003072X>.

formal institutions while simultaneously rejecting the romanticization of custom by rigorously evaluating it within the framework of *uṣūl al-fiqh*.

**Table 3.** Legal Evaluation of Fapale Tradition based on *Istishāb* and *Urf Sahih*

Field Data (Gamta Village)	Relevant Text from al-Āmidī	Uṣūl al-Fiqh Principle	Critical Legal Evaluation
Children retain biological surnames and ritual identity	<i>al-istishāb ḥujja... idhā lam yajid dalīlan khāṣṣan<sup>1</sup></i>	<i>Al-aṣl baqā' mā kāna 'alā mā kāna</i>	No legal alteration of nasab; caregiving does not create filiation.
Symbolic rituals (handover, washing)	<i>sawā'an kāna al-istishāb li amrin wujūdiyyin aw 'adamiyyin<sup>3</sup></i>	<i>Majāz 'urfī + 'urf ṣaḥīḥ</i>	Symbols signify responsibility, not lineage severance.
Inheritance disputes are resolved by biological lineage. Jojau-led deliberations integrate religion and custom.	Derived application of <i>Istishāb</i>  <i>Istishāb al-ḥāl al-sābiq<sup>2</sup></i>	<i>Al-yaqīn lā yazūl bi al-shakk</i>  <i>Ijtihād 'amālī</i>	Emotional bonds cannot override genealogical certainty. Custom is constrained by Shari'ah, not legitimized unconditionally.

Source: Fieldwork and classical textual analysis.

### Fapale Tradition, Utilitarian Society, and Islamic Legal Frameworks through *Qawā'id Fiqhiyyah*

An analysis of the Fapale procession in Gamta Village, particularly the practice of handing over a child through a window and washing the head as a symbol of the severance of rights and obligations from the family of origin, demonstrates that the community is symbolically committed to implementing *inqiṭā' 'urfī* (customary severance), which resembles the concept of *inqiṭā' ḥukmī* in Islamic law. In social reality, emotional ties and clan identity are maintained, resulting in a tension between symbol and substance that can be analyzed through the principle of *al-'ādah Muḥakkamah* (custom can be a source of law), provided it does not conflict with the *nash qath'ī*. The tradition of transferring the child's surname to the recipient family, although traditionally considered as a "replacement of lineage", in the perspective of *qawā'id fiqhiyyah*, does not eliminate the principle of *al-aṣl fī al-mawāriṭh al-tabī'iyya* (originally inheritance is biologically hereditary) because in practice, girls still need a guardian from their biological father when they marry, which confirms that biological lineage is still recognized as the primary legal basis. Furthermore, the fact that the Fapale contract is often carried out while the child is still in

the womb (to prevent a strong emotional bond from forming) has outlined the community's efforts to minimize inner and social conflicts, in line with the principle of *al-mashaqqatu tajlibu al-taysir* (difficulty leads to ease), which supports procedural adjustments to prevent psychological and social *mafsada*. However, although traditionally children are considered “equal to biological children”, in the domain of customary land inheritance and religious rituals, the community still refers to biological lineage, which has shown that Fapale operates in the logic of *kafāla*, not *tabannī*, so that it is in line with the principle of *al-yaqīn lā yazūl bi al-shakk*, which has been obtained as a belief in lineage that does not lapse due to changes in social status. This data presentation has explained that the Gamta community intuitively applies a normative hierarchy: customary symbols may change, but the principles of sharia (especially lineage and inheritance) are maintained as *al-aṣl al-muḥkam*. This is evidence that Fapale is not a violation of Islamic law, but rather a form of *fiqh al-tawāzu'* (balanced jurisprudence) between social needs and theological principles that are rarely found in contemporary family law references.<sup>30</sup>

The presentation of data on the customary inheritance system in Gamta (where only men inherit land and islands, while women only receive usage rights as long as they are not married) shows the implementation of the principle of *al-aṣl fī al-mawāriṭh al-tabi'iyya* in a very strict form, because inheritance rights are only given to male biological descendants, in accordance with patrilineal logic, which is in line with the principle of *al-walad li al-firāsh* (legitimate children belong to the owner of the bed) which is the basis for determining lineage in Islam. However, when there is no man, women are treated as *dhakar muḍāf* (fictitious men) who are given the right to manage the land, but are not allowed to inherit it for their descendants, in accordance with the principle of *al-ḍarūrāt tubīḥ al-maḥzūrāt* (in an emergency, what is prohibited is permissible) because the continuity of ownership of customary land is considered a *maṣlaḥa ḍarūriyya* that must be maintained. Moreover, the fact that the distribution of inheritance takes place during the life of the testator (not after death) has reflected the application of the principle of *al-*

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<sup>30</sup> Idris Nassery, Rume Ahmed, and Muna Tatari, *The Objectives of Islamic Law: The Promises and Challenges of the Maqasid al-Sharia* (Lexington Books, 2020), <https://doi.org/10.5771/9781498549943>.

*taṣarruf bi al-milk jā'iz* (the owner has the right to manage his property) which allows the testator to give a gift or will to anyone, including the child of Fapale, as long as it does not violate the rights of obligatory inheritance (*farā'id*), so that this practice is substantively in line with the principles of *fiqh al-mu'āmalāt*. However, when the Fapale child is given all the property (including customary land) without considering other biological heirs, there is a potential violation of the principle of *lā ḍarar wa lā ḍirār* (there should be no harm or disadvantage to other parties) because it has the potential to trigger social conflict and harm the rights of legitimate heirs. This is an original contribution that demonstrates that customary tradition, when analyzed through the lens of *qawā'id fihiyyah*, has become a normative laboratory for Islamic legal reform in minority areas.

The construction of meaning from the different views of community leaders (between those who prohibit giving inheritance to Fapale children, such as Nuh Wihel, and those who allow it, such as Abdul Sani Wihel) has represented the existence of a normative dialectic between the textualist and contextualist approaches in understanding *qawā'id fihiyyah*, where the former adheres to the principle of *al-aṣl fī al-mawāriṭh al-tabi'iyya* rigidly. At the same time, the second has applied the principle of *al-maṣlaḥa muqaddama 'alā al-mafsidah* (benefit is prioritized over harm) by considering the social and moral responsibilities of Fapale children in caring for their adoptive parents in old age. The fact that inheritance is given during life (not after death) has explained that the Gamta community intelligently utilizes the *hibah* and *'atīyya* instruments (gifts during life) as a moderate solution to meet the needs of Fapale children without violating the principles of Islamic inheritance, which is in line with the principle of *al-kharāj bi al-ḍamān* (right to proceeds commensurate with responsibility) because Fapale children who care for adoptive parents are entitled to material and spiritual rewards. Moreover, the provision of inheritance in the form of islands and customary objects (not movable property) has emphasized that the community distinguishes between *milk al-'ayn* (physical ownership) and *milk al-manfa'ah* (usage rights) so that Fapale children are given management rights, not absolute ownership, which is in line with the principle of *al-'ādah muḥakkamah fī taqyīd al-mutlaq* (custom regulates the absolute) in the context of the use of communal resources. The

hidden meaning of this practice is that Fapale is a form of *fiqh al-takāful* (solidarity jurisprudence) that places social responsibility above legal formalities, so that the Fapale child is given rights because he fulfills the function of *kafāla*, not because of his Lineage status. This is an intellectual contribution that not only improves the quality of *qawā'id fiqhiyyah* studies but also offers solutions to the decolonization of Islamic law in the periphery, an urgent agenda that has not been widely explored in global academic literature.

**Table 4.** Analysis of Fapale Traditions in the Context of Inheritance and Parenting

Field Element (Village)	Data (Gamta)	Relevant Principles	Fiqh	Application of Principles in the Fapale Context	Implications for Islamic Law
Child through a window & head washing; surname transfer; female guardian remains biological father	handover through a window & head washing; surname transfer; female guardian remains biological father	Al-‘Ādah Muḥakkamah; Aṣl fī al-Mawārith al-Tabi‘iyya; al-Mashaqqatu Tajlibu al-Taysīr	العادة محكمة؛ الأصل في الموارث الطبيعية؛ المشقة تجلب التيسير	Customary symbols do not invalidate biological lineage; procedures are simplified to avoid emotional conflict	Fapale is Kafāla, not Tabannī; lineage remains intact
Land inheritance is for men only; women serve as Dhakar Mudāf if there are no men; distribution during life	Land inheritance is for men only; women serve as Dhakar Mudāf if there are no men; distribution during life	Al-walad li al-Firāsh; al-Darūrāt Tubiḥ al-Maḥzūrāt; al-Taṣarruf bi al-Milk Jā‘iz	الولد للفرش؛ الضرورة تبيح المحظورات؛ التصرف بملك الجائر	Biological lineage is the basis of inheritance; exceptions are given for the sake of the continuity of ulayat; grants are used to avoid conflict	Customary inheritance is in line with Fiqh al-Mu‘āmalāt if it does not violate Farā‘id
Differences in the views of figures: prohibit vs. allow inheritance for adopted children; giving property during life; inheritance in the form of an island	Differences in the views of figures: prohibit vs. allow inheritance for adopted children; giving property during life; inheritance in the form of an island	Al-maṣlaḥa Muqaddama ‘alā al-Mafsidah; al-Kharāj bi al-Ḍamān; al-‘Ādah Muḥakkamah fī Taqyīd al-Mutlaq	المصلحة مقدم على المفسدة؛ الخراج بالضمان؛ العادة محكمة في تقييد المطلق	Fapale children are given rights because of responsibility, not lineage; Hibah instruments are used; right of use, not absolute ownership	Inheritance model based on social responsibility, not lineage formality (in line with the spirit of Sharī‘ah)

Source: Field and textual data, 2018.

## **The Discourse of the Fapale Tradition of Papuan Muslims in Indonesian Law, Islamic Legal Frameworks, and International Perspectives**

### **1. Reassessing *Istishāb*, *Nasab*, and Empirical Inheritance Practices in Fapale**

From the perspective of *Istishāb*, the claim that Fapale preserves biological lineage (*ḥifz al-nasl*) cannot be sustained normatively unless it is empirically verified in inheritance practices (*al-mawārith*).<sup>31</sup> Empirical data from Gamta Village demonstrate a concrete normative conflict between the principle of lineage preservation and material practices that functionally resemble inheritance. On the one hand, most Fapale children eventually come to know their biological parents, either through kinship networks or communal narratives, confirming that genealogical knowledge is not entirely erased. This supports the application of *Istishāb al-Hāl*, as articulated by al-Āmidī, that an established legal state remains valid “*mā lam yajid al-mujtahid dalīlan khāṣṣan yunāqīḍuhu*,” meaning that continuity prevails unless a definitive counter-evidence exists.<sup>32</sup>

On the other hand, empirical findings demonstrate that in many cases adoptive parents transfer substantial assets, including customary land and islands,<sup>33</sup> to Fapale children during their lifetime (*hibah fī ḥayāt al-wāhib*),

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<sup>31</sup> Imran Ajjaz, “The Unreality of Traditional Islamic Theism’s Views on Belief, Providence, and Eschatology: A Rejoinder to Tabur,” *Religious Studies*, 2024, 1–21, <https://doi.org/DOI:%252010.1017/S0034412524000180>; Giorgia Baldi, *On Plurality and Singularity: Law, Power and the Muslim Female Dressed Body BT - Un-Veiling Dichotomies: European Secularism and Women’s Veiling*, ed. Giorgia Baldi (Cham: Springer International Publishing, 2021), 17–58, [https://doi.org/10.1007/978-3-030-79297-8\\_2](https://doi.org/10.1007/978-3-030-79297-8_2); Hong Handing, “The Sinicization of Hermeneutics: A Universal Conception of Classical Hermeneutics,” *Social Sciences in China* 42, no. 3 (July 2021): 24–42, <https://doi.org/10.1080/02529203.2021.1971396>; Teguh Luhuringbudi et al., “The Impact of the US-China Trade War on the Application of Islamic Law in Indonesia,” *Islamic Law and Social Issues in Society* 1, no. 1 SE-Articles (May 2025): 1–23; Fakhri Afif, M. Rodinal Khair Khasri, and M. Ilham Ulul Azmi Khasri, “Post-Truth And Qur’an: Hacking The Truth Decay Through The Qur’anic Epistemological-Ethical Vision ,” *Religia* 27, no. 2 SE-Articles (October 2024): 162–95, <https://doi.org/10.28918/religia.v27i2.8562>; Fatahillah and Luhuringbudi, “Comparative Study of Islamic Family Law in Indonesia and Saudi Arabia: Maqāṣid Al-Sharīah Perspective.”

<sup>32</sup> İskenderoğlu, “Ash’arism Encounters Avicennism.”

<sup>33</sup> Muhammad Yusuf and Ismail Suardi Wekke, “Inheritance and Gender Equality,” *Justicia Islamica* 15, no. 1 (2018): 1–12; Muhammad Fauzudin Faiz et al., “Gendered Epistemology and the Question of Legal Authority: Aisha’s Critique of the Companions,” *Justicia Islamica* 23, no. 1 (2026): 1–28; Imron Rosyadi et al., “Gaps and Challenges in Child Marriage Regulation: An Indonesian and Australian Legal Perspective,” *Justicia Islamica* 22, no. 2 (2025): 381–410.

effectively bypassing Islamic inheritance rules. Although formally framed as *hibah fī ḥayāt al-wāhib*, these transfers operate substantively as inheritance, thereby triggering the principle that legal assessment prioritizes substance over form (*al-‘ibrah bi al-ma‘ānī lā bi al-alfāz*).<sup>34</sup> From the perspective of *Fiqh al-Mawārith*, this practice creates a normative tension: if a Fapale child receives property equivalent to inheritance from adoptive parents while remaining excluded from biological inheritance, then *Istishāb al-Nasab* becomes legally fragile. This condition risks transforming *kafālah ‘urfiyyah*<sup>35</sup> into de facto *tabannī māli* (economic adoption), which contradicts the maqṣad of *ḥifẓ al-nasl*. From the perspective of *Sadd al-Dharā’i‘*, such practices open a legal pathway toward the circumvention of Islamic inheritance rules and may constitute a form of prohibited *ḥilāh shar‘iyyah*.

Therefore, this study adopts an academically honest position: Fapale is not uniformly compliant with Islamic inheritance law. Rather, it represents a hybrid legal space where *istishāb* operates at the level of identity and rural.<sup>36</sup>

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<sup>34</sup> Kamma, *The Myth of Manarmakeri BT - Koreri Messianic Movements in the Biak-Numfor Culture Area: Koninklijk Instituut Voor Taal-, Land-, En Volkenkunde Translation Series 15*; Joaquín Bahamondes, Chris G Sibley, and Danny Osborne, “System Justification or Social Dominance? A Multilevel Test of the Ideological Motivators of Perceived Discrimination,” *Personality and Social Psychology Bulletin* 48, no. 7 (August 2021): 1134–48, <https://doi.org/10.1177/01461672211036020>; Joaquín Bahamondes et al., “The Negative Effects of Internalized Homonegativity on Sexual Satisfaction: Dyadic Effects and Gender-Based Differences in Chile,” *Journal of Lesbian Studies* 27, no. 1 (January 2023): 22–40, <https://doi.org/10.1080/10894160.2022.2122197>.

<sup>35</sup> Aishath Khaleela Abdul Sattar and Frakhanda Yousaf, “Negotiating Authority: Ulama and Family Law Reforms in Pakistan,” *Ittesaal – Journal of Connecting Discourses* 2, no. 2 SE-Articles (n.d.): 67–83, <https://doi.org/10.64984/ijcd.2.2.2025.06>; Chafika Saadi, “A Path from Inner Transformation to Civilizational Rebirth: An Integrated Vision of Revival in the Thought of Muhammad Iqbal and Malek Bennabi,” *Ittesaal – Journal of Connecting Discourses* 2, no. 2 SE-Articles (n.d.): 42–52, <https://doi.org/10.64984/ijcd.2.2.2025.04>; Amalia, “Child Adoption in Modern Islamic Family Law: A Comparative Study of Child Adoption in Turkey, Morocco, and Indonesia”; Muhammad Wahdini et al., “Harmonization of Customary Law, Green Constitution and Green Fatwa: Case Forest Burning and Land for Agriculture in Central Kalimantan,” *Mazahibuna: Jurnal Perbandingan Mazhab*, no. SE-Articles (August 2025): 138–56, <https://doi.org/10.24252/mazahibuna.vi.55190>; Yusuf Sani Abubakar, Rajali Haji Aji, and Mpawenimana Abdallah Saidi, “The Principles of Natural Justice: A Comparative Analysis between Secular and Islamic Law in Administrative Decision-Making,” *Mazahibuna: Jurnal Perbandingan Mazhab*, no. SE-Articles (September 2025): 176–92, <https://doi.org/10.24252/mazahibuna.vi.56855>.

<sup>36</sup> Muniroh and Nasution, “The Adoption of Found Child According to Islamic Law and Law No. 3 of 2006 on Religious Courts in the Perspective of Maqasid Al-Shari’ah”; Andrea Büchler, “Islamic Family Law in Europe? From Dichotomies to Discourse – or: Beyond Cultural and Religious Identity in Family Law,” *International Journal of Law in Context* 8, no. 2 (2012): 196–210, <https://doi.org/DOI:%252010.1017/S1744552312000043>; Buchler and Kayasseh, “Fostering and Adoption in Islamic Law—Under Consideration of the Laws of Morocco, Egypt, and the United Arab

But it is partially suspended in the distribution of materials.<sup>37</sup> This finding aligns with al-Āmidī’s caution that *Istishāb* is a probabilistic (*ẓanni*) legal method, not a guarantee, as he notes that its authority rests on dominant presumption (*ghalabat al-ẓann*), not certainty.<sup>38</sup> Consequently, Fapale must be normatively corrected through *waṣiyyah wājibah* or regulated *hibah*, if it is to remain within Sharī‘ah boundaries.

## 2. The Manẓūma al-Thulāthiyya: An Operational Framework

This study defines Manẓūma al-Thulāthiyya as an integrated operational system rather than a metaphorical construct. It consists of three interdependent legal-ethical subsystems that govern Fapale practice:

**Table 5.** Manẓūma al-Thulāthiyya of the Fapale Tradition

System	Core Principle	Classical Reference	Function in Fapale
Maqāṣid al-Sharī‘ah	Ḥifẓ al-Nasl & Ḥifẓ al-Nafs	al-Juwaynī, <i>al-Burhān</i> , vol. 2, p. 542	Protects child survival, dignity, and lineage
Istishāb	Al-aṣl baqā’ mā kāna ‘alā mā kāna	al-Āmidī, <i>al-Iḥkām</i> , vol. 4, pp. 127–128	Maintains biological identity unless proven otherwise
Qawā‘id Fiqhiyyah	Al-‘ādah muḥakkamah	Ibn Juzayy, <i>al-Qawā‘id al-Fiqhiyyah</i>	Regulates customs within Sharī‘ah limits

Emirates”; Andrea Buchler and Eveline Schneider Kayasseh, “Medically Assisted Reproduction in Egypt, Iran, Saudi Arabia and the United Arab Emirates: Sunni and Shia Legal Debates,” *Eur. JL Reform* 16 (2014): 430.

<sup>37</sup> Siti Mu‘awanatul Hasanah et al., “The Integration of Islamic Family Law into Muslim Community Education in Japan: Socio-Cultural Dynamics in a Minority Context,” *Nurani: Jurnal Kajian Syari‘ah Dan Masyarakat* 25, no. 2 (December 2025): 578–98, <https://doi.org/10.19109/nurani.v25i2.31145>; Rosdalina Bukido et al., “The Resilience of Blind Families in Building a Sakinah Family: Adaptive Strategies and the Role of Islamic Values,” *Nurani: Jurnal Kajian Syari‘ah Dan Masyarakat* 25, no. 2 (October 2025): 399–425, <https://doi.org/10.19109/nurani.v25i2.27276>; Nur Fadila Maulana Putri, Mukhammad Nur Hadi, and Ahmad Masum, “Customary Hegemony and Limited Female Agency: The Persistence of the Sangkal Tradition in Madurese Communities,” *Indonesian Journal of Sharia and Socio-Legal Studies* 1, no. 2 SE-Articles (n.d.): 132–51, <https://doi.org/10.24260/ijssls.1.2.120>; Mukarramah Kamaliah and Mhd Yazid, “Legal Consciousness and Living Legal Reasoning: Penghulus and Mediation in Resolving Marital Disputes at the Religious Affairs Office of East Pontianak,” *Indonesian Journal of Sharia and Socio-Legal Studies* 1, no. 2 SE-Articles (n.d.): 152–73, <https://doi.org/10.24260/ijssls.1.2.127>; Opik Rozikin et al., “Contextualizing Maqāṣid Al-Sharī‘ah in Indigenous Legal Practices: A Comparative Study of Family Resilience in Kasepuhan Ciptagelar and Kampung Naga,” *Nurani: Jurnal Kajian Syari‘ah Dan Masyarakat* 25, no. 2 (September 2025): 344–62, <https://doi.org/10.19109/nurani.v25i2.27760>.

<sup>38</sup> Ḥazm, *al-Iḥkām fī uṣūl al-aḥkām*.

This triadic system reflects what al-Juwaynī described as *ta'liq al-aḥkām bi al-maṣāliḥ al-kulliyah*, in which legal rulings are suspended in favor of universal benefits rather than rigid formalism.<sup>39</sup> Unlike Middle Eastern *kafālah* models that rely on state documentation,<sup>40</sup> Fapale operates as *al-fiqh al-murakkab*, combining normative Islam and indigenous governance. Operationally, when conflict arises between child welfare (*ḥifẓ al-nafs*) and inheritance order (*ḥifẓ al-nasl* in property), *manẓūma al-thulāthiyya* requires prioritizing *maqāṣid* through regulated instruments (*waṣiyyah* or conditional *hibah*) rather than unrestricted customary discretion.

### **3. From Legal Critique to Legal Reform: Harmonizing State Law and Fapale**

This study proposes concrete harmonization mechanisms grounded in existing Indonesian legal instruments and Islamic legal doctrine. The Indonesian Child Protection Law (Law No. 35/2014) can be reinterpreted through a *maqāṣidic lens* by recognizing Fapale as a customary *kafālah* regime rather than adoption (*tabannī*). This can be operationalized through three reforms: (1) Administrative recognition of Fapale children as “children under customary care” without altering *nasab* (filiation) in civil registries; (2) Inheritance safeguards, requiring adoptive parents to channel property transfers through *hibah muqayyadah* or *waṣiyyah*, capped at one-third, in line with Islamic inheritance principles; and (3) Judicial guidelines for Religious Courts to treat Fapale disputes under *fiqh al-waqi'*, not formal adoption law. These reforms may be operationalized

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<sup>39</sup> al-Juwaynī, *Al-Burhān Fī Uṣūl al-Fiqh*; Gagah Daruhadi, “reading al-burhān fī uṣūl al-fiqh by al-juwaini: a study of tube baby case resolution,” *International Journal of Social Service and Research* 4, no. 9 (September 2024), <https://doi.org/10.46799/ijssr.v4i9.986>.

<sup>40</sup> Peterson K. Ozili, “Financial Inclusion and Digital Financial Inclusion of Forcibly Displaced Persons: Strategies and Challenges,” *Perspectives on Global Development and Technology* (Leiden, The Netherlands) 24, nos. 3–4 (2025): 628–41, <https://doi.org/10.1163/15691497-12341728>; Luhuringbudi et al., “The Impact of the US-China Trade War on the Application of Islamic Law in Indonesia”; Islamul Haq et al., “Reassessing Maslahah in Islamic Legal Adaptation: An Analysis of MUI South Sulawesi Fatwa No. 003 (2023) in the Context of Minority Muslims in Toraja,” *Parewa Saraq: Journal of Islamic Law and Fatwa Review* 4, no. 2 SE-Articles (September 2025): 56–69, <https://doi.org/10.64016/parewasaraq.v4i2.48>; Harwis Alimuddin, Syaifuddin, and Sucipto, “The Comparison of Marital Property Division Between Indonesia and Malaysia from the Perspective of Fiqh Rules,” *Parewa Saraq: Journal of Islamic Law and Fatwa Review* 4, no. 1 SE-Articles (May 2025): 1–13, <https://doi.org/10.64016/parewasaraq.v4i1.30>; Illy Yanti et al., “Negotiating Sharī'ah and Customary Law: Legal Pluralism in Familial Relationships among the Suku Anak Dalam in Jambi,” *Journal of Islamic Law* 6, no. 2 SE-Articles (June 2025): 177–205, <https://doi.org/10.24260/jil.v6i2.3311>; Fatimah Zuhrah et al., “Tradition Beyond Formal Fiqh: Ethnic Perspectives on Negotiating Kafā'ah in Marriage within the Aceh Singkil Community,” *Journal of Islamic Law* 6, no. 2 SE-Articles (June 2025): 155–76, <https://doi.org/10.24260/jil.v6i2.4187>.

through Supreme Court Circular Letters (SEMA) or Religious Court Guidelines, thereby enhancing their binding force within the Indonesian judicial system.

Such reforms resonate with al-Juwaynī's insistence that legal reasoning must extract meanings and benefits from *sharīa* sources rather than immersing society "*fī ghamarāt al-mutāhāt*" (in legal confusion).<sup>41</sup> At the international level, Fapale can be analytically compared with Muslim minority *kafālah* practices in Southeast Asia and Sub-Saharan Africa, revealing a shared legal challenge: reconciling child welfare with inheritance order under plural legal systems.

### **Conclusion**

The most significant finding of this study is that the Gamta community, lacking formal *fiqh* education and access to classical authoritative texts, has intuitively and systematically embodied the principles of *uṣūl al-fiqh* (specifically *Istishāb*, *qawā'id fiqhiyyah*, and *maqāṣid al-sharīa*) within their Fapale tradition. This customary system not only aligns closely with the spirit of *sharīa* but also surpasses the bureaucratic and legalistic frameworks imposed by state law. The community's commitment to maintaining lineage, practicing *Hibah* for wealth transfer during life, and preserving clan identity demonstrates a robust normative hierarchy: while customary symbols may evolve, foundational principles such as *ḥifẓ al-nasl* and *al-aṣl fī al-mawāriṭh al-tabi'iyya* remain unaltered and valid. This realization challenges the colonial and centric assumptions that posit Islamic law as emanating solely from formal institutions, highlighting instead that *fiqh al-wāqi'* (jurisprudence of reality) flourishes authentically in peripheral contexts. Furthermore, the study reveals a noteworthy integration of customary authority, exemplified by Jojau, and religious authority under figures like Imam Daeng Madi, forming a model of *al-wilāya al-murakkabah* (composite authority) that is both theologically sound and sociologically stable. Rather than representing chaotic syncretism, this composite authority embodies the principle of *al-tawāfuq bayna al-shar'wa al-'urf*, emphasizing the need for academics and religious leaders to adopt a decolonized perspective. Recognizing that legal truths often originate in

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<sup>41</sup> M. Harir Muzakki et al., "Al-Juwaini's Ideas and the Development of Islamic Law: A Shifting Paradigm from the Inadequacy of Qiyas as a Method of Ijtihad to Mashlahah," *Ulumuna* 29, no. 2 (December 2025): 822–50, <https://doi.org/10.20414/ujs.v29i2.1185>.

grassroots movements (rather than in intellectual abstractions), this study calls for greater acknowledgment of local customs and practices in the discourse on religious authority and legal frameworks. In summary, the Fapale tradition offers an innovative framework for understanding Islamic law as a dynamic, living practice that prioritizes social welfare and community needs over rigid formalism. This research contributes significantly to the ongoing discourse on *maqāṣid al-sharīa* and *uṣūl al-fiqh*, promoting a model of family law reform grounded in local justice principles, thereby encouraging further exploration of how indigenous practices can inform contemporary Islamic jurisprudence.

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All authors have made significant contributions to the preparation of this article and have approved the final version for publication. Baitur Rohman was involved in conceptualizing the research, conducting ethnographic fieldwork in Kampung Gamta, and analyzing customary practices within the Fapale tradition. Moh. Wahib was responsible for formulating the Islamic legal framework, including the analysis of Uṣūl al-Fiqh, *istishāb*, *qawā'id fiqhiyyah*, and *maqāṣid al-sharīa*, as well as the integration of classical literature (*al-turāth*). Wike Juniati contributed to socio-legal and policy analysis, particularly in linking findings to child protection laws in Indonesia, legal pluralism, and the

SDGs. Nabilah binti Yusof provided a comparative perspective on *kafāla* and caregiving practices among Muslim minorities, while also conducting a critical review of the manuscript's coherence and international relevance. Naser Ali Abdulghani contributed to refining theoretical arguments, conducting comparative analyses of Islamic family law, and providing editorial oversight to ensure compliance with international publication standards.

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