

A Review of the Maqashid Al-Shariah Regarding the Inheritance Rights of Children Born Out of an Unregistered Interfaith Marriage (An Analysis of Constitutional Court Decision No. 46/Puu-Viii/2010)

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Keywords:	Abstract
maqashid al-sharia; inheritance rights; interfaith marriage not recorded; mandatory will; Constitutional Court decision no. 46/puu- viii/2010.	This study examines the inheritance rights of children born from unregistered interfaith marriages from the perspective of Maqashid al-Shariah, with particular reference to Constitutional Court Decision No. 46/PUU-VIII/2010. The study employed normative legal research using statutory and conceptual approaches. The findings reveal three main points. First, from a legal perspective, children born from unregistered interfaith marriages face multiple obstacles, including the absence of their parents' marriage certificate and religious differences, which constitute barriers to inheritance under the Compilation of Islamic Law. However, the jurisprudence of the Supreme Court, from Decision No. 368 K/AG/1995 to Decision No. 331 K/AG/2018, has consistently developed the concept of a mandatory bequest (wasiat wajibah) of up to one-third of the estate as a compromise mechanism. Second, an analysis based on Maqashid al-Shariah indicates that the absolute denial of children's civil rights may conflict with the five essential objectives categorized as daruriyyat. In this context, wasiat wajibah may serve as a middle-ground solution consistent with the objectives of Islamic law because it can be understood as an extension of the biological father's maintenance obligations rather than as the granting of inheritance rights contrary to the faraid system. Third, there remains an uneven institutional response among branches of state power. The executive has responded through the Statement of Absolute Responsibility instrument since 2016, and the judiciary has responded through Supreme Court Circular Letter No. 3 of 2023. By contrast, the legislature has not substantively followed up on Constitutional Court Decision No. 46/PUU-VIII/2010, as reflected in the absence of an amendment to Article 43 paragraph (1) of Law No. 16 of 2019.

INTRODUCTION

From the perspective of Islamic law, marriage is not merely a sociological phenomenon but a solemn and sacred covenant (mitsaqan ghalizhan), as stated in Surah An-Nisa verse 21 of the Qur'an. Accordingly, the validity of a marriage is based on the fulfillment of the pillars and requirements prescribed by sharia (Al-Zuhaili, 2011). In the context of Indonesian positive law, this religious dimension is integrated with an administrative obligation to register marriages, as stipulated in Article 2 paragraph (2) of Law No. 1 of 1974 concerning Marriage. Philosophically, marriage registration is intended to establish legal order and legal certainty for all parties, particularly children born from the marriage (Republic of Indonesia, Law No. 1/1974). From the perspective of legal sociology, this registration requirement may be understood through Roscoe Pound's theory of law as a tool of social engineering, which views law not merely as a reflection of society but also as an instrument for directing society toward a more orderly condition (Pound, 1922).

Interfaith marriages in Indonesia frequently encounter administrative obstacles. Article 2 paragraph (1) of Law No. 1 of 1974 stipulates that a marriage is valid when it is conducted according to the laws of the respective religions and beliefs of the parties. A restrictive interpretation of this provision by the Office of Religious Affairs (Kantor Urusan Agama/KUA) and the Civil Registry Office (Dinas Kependudukan dan Pencatatan Sipil/Disdukcapil) may result in interfaith couples being unable to register their marriages, leading some couples to enter into unregistered marriages, commonly referred to as *nikah siri*. One of the most significant consequences concerns the civil status and rights of children born from such marriages. These children may be treated as children born outside a legally registered marriage, thereby creating difficulties regarding recognition of the biological father, maintenance rights, and inheritance rights.

This issue becomes more complex when examined from the perspective of Islamic inheritance law. The Compilation of Islamic Law (Kompilasi Hukum Islam/KHI), enacted through Presidential Instruction No. 1 of 1991, provides in Article 171 letter c juncto Article 172 that an inheritance relationship requires, among other things, the absence of legal impediments to inheritance, including differences in religion (Republic of Indonesia, Presidential Instruction No. 1/1991). This principle is derived from the *sahih* hadith narrated by Usamah bin Zaid stating that “a Muslim does not inherit from a non-Muslim, nor does a non-Muslim inherit from a Muslim” (*muttafaq ‘alaih*, HR. Bukhari and Muslim). This hadith has traditionally served as a basis for the classical juristic consensus (*ijma’*) that religious difference constitutes an impediment to inheritance (*mawani’ al-irth*) (Al-Bukhari; Muslim bin al-Hajjaj).

A significant development in the protection of children’s civil rights occurred when the Constitutional Court issued Decision No. 46/PUU-VIII/2010 on February 17, 2012. The Court reinterpreted Article 43 paragraph (1) of Law No. 1 of 1974 by recognizing that a child born outside marriage may also have a civil relationship with the biological father, provided that the biological relationship can be established through science and technology and/or other legally valid evidence (Constitutional Court of the Republic of Indonesia, Decision No. 46/PUU-VIII/2010). However, the implementation of this decision in the context of unregistered interfaith marriages creates a legal tension. On the one hand, a child may establish a civil relationship with the biological father; on the other hand, the KHI recognizes religious difference as an impediment to inheritance. This situation may create legal uncertainty (*rechtsonzekerheid*) regarding the scope of the child’s inheritance rights.

To examine this tension, this study applies the concept of *Maqashid al-Shariah* developed by Abu Ishaq al-Shatibi in *Al-Muwafaqat fi Ushul al-Shari’ah*. This framework emphasizes that Islamic law is directed toward the realization of human welfare (*maslahah al-‘ibad*) through the protection of five essential interests (*al-daruriyyat al-khamsah*): religion, life, intellect, lineage, and property (Al-Syathibi, 2006). The two elements most relevant to this study are *hifz al-nasl* (protection of lineage) and *hifz al-mal* (protection of property). One legal instrument that may provide a middle ground is the mandatory bequest (*wasiat wajibah*). Although the KHI expressly regulates *wasiat wajibah* primarily in relation to adopted children and adoptive parents under Article 209, Supreme Court jurisprudence has developed its application as an instrument of substantive justice in certain inheritance disputes involving heirs of different religions.

The urgency of this research is reinforced by the continuing prevalence of unregistered marriages in Indonesia, including applications for *itsbat nikah* submitted to the Religious Courts. This phenomenon demonstrates that the legal consequences of unregistered marriages remain relevant, particularly for children whose civil status and inheritance rights may be affected. Furthermore, the absence of comprehensive legislative harmonization following Constitutional Court Decision No. 46/PUU-VIII/2010 has required courts and administrative

institutions to develop practical responses through jurisprudence and policy. Therefore, a systematic legal analysis integrating constitutional law, Islamic inheritance law, and Maqashid al-Shariah is necessary to formulate more coherent recommendations for legal reform.

Based on this background, this study formulates three research questions: (1) what is the legal position of the inheritance rights of children born from unregistered interfaith marriages under Indonesian positive law following Constitutional Court Decision No. 46/PUU-VIII/2010; (2) how does Maqashid al-Shariah assess the protection of such children's inheritance rights in relation to the realization of *maslahah*; and (3) how can the Marriage Law, the Compilation of Islamic Law, and Constitutional Court Decision No. 46/PUU-VIII/2010 be harmonized to provide legal certainty for children? This study aims to comprehensively analyze these three issues and contribute to the development of Islamic family law in Indonesia, particularly for Religious Court judges, lawmakers, legal practitioners, and communities facing similar legal issues.

The development of modern biotechnology, particularly DNA testing, has significantly strengthened the ability to establish biological relationships with a high degree of accuracy. From the perspective of Islamic law, the use of DNA testing as evidence of *nasab* remains a subject of scholarly debate. Some scholars emphasize the established evidentiary mechanisms for determining lineage, while others regard DNA evidence as a strong form of *qarinah* that may assist in establishing material truth. Constitutional Court Decision No. 46/PUU-VIII/2010 expressly recognizes science and technology, together with other legally admissible evidence, as a basis for establishing a biological relationship. This recognition represents an important development in integrating modern scientific evidence into the legal determination of parentage and provides a significant foundation for further discussion of children's civil and inheritance rights.

The novelty of this research, compared with the three most relevant previous studies—Sulistiani's thesis (2015) on the status of children from interfaith marriages, Yusup's (2014) thesis on Maqashid al-Shariah as a foundation for the development of Islamic family law, and Anshary's (2010) thesis on major issues concerning marriage in Indonesia—lies in three aspects. First, this study focuses on the dual legal barriers of religious difference and the absence of marriage registration in determining children's inheritance rights, which have not been examined in an integrated manner in the previous studies. Second, it operationalizes Maqashid al-Shariah at a specific and case-oriented level rather than merely at a broad methodological level. Third, it examines legal developments following Constitutional Court Decision No. 46/PUU-VIII/2010, including subsequent jurisprudence and administrative policies such as Supreme Court Circular Letter No. 3 of 2023.

METHOD

This study employed normative legal research using statutory and conceptual approaches (Marzuki, 2014; Ibrahim, 2012; Soekanto & Mamudji, 2014). The statutory approach was used to examine relevant laws, regulations, and judicial decisions, while the conceptual approach was applied to analyze legal doctrines and the theory of Maqashid al-Shariah relevant to the inheritance rights of children born from unregistered interfaith marriages.

The legal materials consisted of primary, secondary, and tertiary sources. Primary legal materials included the 1945 Constitution of the Republic of Indonesia; Law No. 1 of 1974 concerning Marriage, as amended by Law No. 16 of 2019; Law No. 35 of 2014 concerning Child Protection; Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law; Constitutional Court Decision No. 46/PUU-VIII/2010; the Convention on the Rights of the Child; Indonesian Ulema Council Fatwa No. 11 of 2012; Supreme Court Decision No. 16

K/AG/2010; and the International Covenant on Civil and Political Rights. Secondary legal materials included relevant books, scholarly journals, and previous research, while tertiary legal materials included legal dictionaries and other supporting references.

Legal materials were collected through library research and document analysis. The materials were analyzed qualitatively using deductive legal reasoning by applying Maqashid al-Shariah principles and relevant statutory provisions to the issue of inheritance rights of children born from unregistered interfaith marriages. Inductive reasoning was also used in the analysis of jurisprudence to identify patterns in judicial decisions concerning mandatory bequests (*wasiat wajibah*). Sociological data concerning unregistered marriages and Religious Court cases were used only as contextual supporting information and were not treated as empirically tested research data.

RESULTS AND DISCUSSION

The Position of the Inheritance Rights of Children Resulting from Interfaith Marriages That Are Not Recorded in a Positive Legal Perspective After the Constitutional Court Decision Number 46/PUU-VIII/2010

Prior to the birth of the Constitutional Court Decision No. 46/PUU-VIII/2010, Article 43 Paragraph (1) of Law No. 1 of 1974 concerning Marriage adhered to a rigid principle: children born out of wedlock only have a civil relationship with their mother and their mother's family. This formulation breaks all civil ties between the child and his biological father, so that the child is not recognized as having the right to maintenance, maintenance, guardianship, inheritance, or inheritance rights from his biological father (Mahfud MD, 2009). This construction places the child as a structural victim of the administrative incompleteness of his parents' marriage, a condition that is not at all the result of the child's own actions.

The Constitutional Court Decision Number 46/PUU-VIII/2010 which was decided on February 17, 2012 stated that Article 43 Paragraph (1) is contrary to the 1945 Constitution insofar as it is interpreted as eliminating the civil relationship between a child and his biological father. Through this decision, children born out of wedlock have a civil relationship with their mother and their mother's family, as well as with a man as their father which can be proven based on science and technology and/or other evidence according to the law. This decision is *erga omnes*, binding on all parties, and is based on Article 28B Paragraph (2) of the 1945 Constitution which guarantees the right of every child to survival, growth, and development as well as protection from discrimination.

However, the scope of the decision is more limited than is often assumed. What is resolved is the issue of civil law relations in general; what is not resolved is the issue of legal consequences in the realm of inheritance, because the Constitutional Court did not touch on the Islamic requirements of heirs in the Compilation of Islamic Law. As a result, children resulting from interfaith marriages who are not recorded face multi-layered obstacles: administrative obstacles in the form of the absence of a parental marriage certificate, and substantive obstacles in the form of Article 171 letter c juncto Article 172 of the KHI which makes religious differences an absolute barrier to inheritance.

The hierarchical position of the Compilation of Islamic Law in the Indonesian legal system needs to be examined first before this conflict of norms is resolved. The Compilation of Islamic Law was enacted through Presidential Instruction Number 1 of 1991, a form of law

that does not include the type and hierarchy of laws and regulations as stated in Article 7 of Law Number 12 of 2011 concerning the Establishment of Laws and Regulations. Consequently, the binding power of the Compilation of Islamic Law does not rest on its position in the pyramid of norms, but on institutional acceptance in the religious justice environment which makes it a daily operational reference. On the opposite side, the Constitutional Court Decision which declares a conditional unconstitutional norm has general binding force and applies to all parties. Formally, there is no balance between the two conflicting norms, but in the practice of religious justice, it is the Compilation of Islamic Law that functions as a handbook that judges open when examining inheritance cases, while the Constitutional Court Decision does not provide a formulation of articles that are ready to be applied to inheritance disputes.

The protection of children's rights in this case is also strengthened by international legal instruments. The Convention on the Rights of the Child which has been ratified by Indonesia through Presidential Decree No. 36 of 1990 affirms that every child has the right to birth registration, identity, and protection without discrimination based on birth status. Article 2 Paragraph (2) of the Convention specifically requires the State Party to take all appropriate measures to ensure that the child is protected from any form of discrimination or punishment based on the status, activities, or beliefs of his or her parents, a provision that is directly relevant to the situation of children resulting from interfaith marriages that are not recorded because the child is punished indirectly as a result of the choice or administrative negligence of his or her parents. The International Covenant on Civil and Political Rights, which was ratified through Law No. 12 of 2005, also guarantees the right of children to special protection without discrimination based on origin, so that the denial of a child's inheritance rights solely due to the absence of a parent's marriage record has the potential to be contrary to the universal human rights protection standards that have become part of Indonesian national law.

This tension cannot be resolved only by the principle of *lex superior derogat legi inferiori*, because the Compilation of Islamic Law enacted through Presidential Instruction No. 1 of 1991 does not include the hierarchy of formal laws and regulations, but remains a daily operational reference for religious court judges, while the formally binding Constitutional Court Decision does not provide a formulation of articles that are ready to be applied to the distribution of inheritance. This issue is operational, not just hierarchical, so the Supreme Court chose to open a complementary channel through a mandatory will without having to declare one norm overrides another.

A search of jurisprudence shows a consistent pattern of evolution for more than twenty years, from Decision No. 368 K/AG/1995 which for the first time confirmed a mandatory will for non-Muslim heirs, followed by Decision No. 51 K/AG/1999, Decision No. 16 K/AG/2010 which explicitly referred to Yusuf al-Qaradawi's view that the prohibition of inheritance is a spirit of help-help and not just religious differences (Al-Qaradawi, 1996), to Decision No. 331 K/AG/2018 which was stipulated as an elected decision of the Supreme Court. The only decision whose subject is really related to children from unrecorded marriage is the Decision of the Denpasar Religious Court No. 363/Pdt.G/2020/PA. The DPS, which gave a mandatory will to Sirri's wife and three children based on the authority of legal discovery (*rechtsvinding*) in accordance with Article 5 Paragraph (1) of Law Number 48 of 2009 in conjunction with Article 229 of the KHI, although only at the first court level so that it has not yet been

established as a broadly binding jurisprudence. A comparison of the six decisions that have been analyzed can be seen in Table 1.

Table 1. Comparison of Jurisprudence of Obligatory Wills and Their Implications for Children

No.	Verdict	Covered Subjects	Instruments and Implications for Children
1	Supreme Court Decision No. 368 K/AG/1995	Non-Muslim heirs	Mandatory will; become a reference jurisprudence for subsequent decisions, not yet touching the position of the child.
2	Supreme Court Decision No. 51 K/AG/1999	Non-Muslim heirs	Mandatory will; strengthening pattern consistency, has not touched the position of the child.
3	Supreme Court Decision No. 16 K/AG/2010	Non-Muslim wives	Obligatory will; opens the reasoning of maqashidi (illat inheritance is read as the spirit of help), the subject is an adult who chooses his own beliefs.
4	Supreme Court Decision No. 331 K/AG/2018	Non-Muslim husband	Mandatory will; determined as an elected decision, the amount is arranged to be in line with the limit of one-third of the inheritance.
5	Denpasar PA Decision No. 363/Pdt.G/2020/PA. Dps	Sirri's wife and three children	A mandatory will does not exceed one-third of the inheritance; the only judgment that directly affects the child of the marriage is not recorded, but only at the first level.
6	Supreme Court Decision No. 1055 K/Pdt/2023	Children born out of wedlock	Determination of biological child status through a shift in the burden of proof when DNA testing cannot be carried out; confirming that alternative proof pathways can be operationalized.

The issue of proving a biological relationship in practice faces serious obstacles when the alleged father refuses to undergo a DNA test, as reflected in Supreme Court Decision Number 1055 K/Pdt/2023. In this case, the plaintiff's request for the defendant to undergo a DNA test could not be fulfilled, so scientific proof as referred to in the Constitutional Court Decision was never carried out. The Banten High Court, which was upheld by the Supreme Court at the cassation level, still determined the child as the biological child of the defendant by relying on conventional evidence in the form of facts of living in the same household and citations of birth certificates, as well as applying the shifting burden of proof mechanism: because both parties are not bound by a valid marriage, the child is considered the biological child of the defendant as long as the defendant cannot prove otherwise. This decision emphasizes that the phrase "and/or other evidence according to the law" in the Constitutional Court's Decision is not just a complementary, but an alternative evidentiary path that can really be operated when scientific evidence is obstructed, while at the same time leaving the issue of legal certainty because the assessment of the adequacy of conventional evidence is entirely dependent on the conviction of the judge examining the case.

The position of the Indonesian Ulema Council also strengthens the direction of this argument. The Fatwa of the Indonesian Ulema Council Number 11 of 2012 concerning the Status of Children Resulting from Adultery and Treatment of Them, which was issued as an official clarification of the Constitutional Court Decision Number 46/PUU-VIII/2010, emphasizes that children born out of wedlock still do not have a nasab, guardian, or heir

relationship with their biological father according to Islamic inheritance law. However, the MUI recommends that men who are biologically proven to be fathers are subject to ta'zir sanctions and are obliged to give property to the child through the mechanism of a mandatory will, as a form of moral responsibility without changing the status of his nasab in fiqh. This fatwa shows that Indonesia's religious authoritative institutions themselves have led to a solution that is in line with the arguments of this research: maintaining the sanctity of the classical inheritance legal text while providing substantive economic protection for children.

A brief comparison with Malaysia as a cognate country that also applies the dualism of the family law system reinforces these findings. For non-Muslims in Malaysia, recognition of the child's relationship with the biological father is possible through a registration mechanism under Act 299 concerning the Registration of Births and Deaths of 1957, while for Muslims, children out of wedlock cannot inherit the property of their biological father unless legally recognized, a position that is substantially more restrictive than the mandatory will approach that has developed in the jurisprudence of the Indonesian Supreme Court. Jurisprudential tendencies in both countries are equally moving towards the expansion of economic protection for children out of wedlock through non-faraid instruments, without changing the basic structure of Islamic inheritance law itself.

A comparison of the six rulings yielded three analytical findings. First, there is consistency of the instruments: although protected subjects change from non-Muslim relatives to children of sirri marriages, the instrument used by judges has never changed, namely compulsory wills, without ever placing the parties as heirs in the faraid system. Second, there has been a fundamental shift in considerations from propriety and humanity to more mature methodological reasoning in the form of legal search. Third, and most decisively, children from unrecorded marriages are the subjects who are the last to receive attention and are only protected at the lowest level of justice, while non-Muslim adult groups have been confirmed to the level of cassation. This inequality explains why the position of children's inheritance rights in Indonesian positive law after the Constitutional Court Decision Number 46/PUU-VIII/2010 is not the position of heirs, but the position as a recipient of economic protection through instruments outside faraid whose existence is consistently recognized in judicial practice but has not obtained a written normative basis that is binding on the public.

Maqashid al-Syariah Review of the Protection of Children's Inheritance Rights to Realize the Benefits

The reasoning of Islamic law in dissecting children's civil rights should not only be fixed on a rigid bayani (textualist) approach, but must be approached with a dynamic and contextual istishlahi (benefit) approach (Al-Qaradawi, 2001). Al-Syathibi divides benefits into three levels based on their urgency, namely al-daruriyyat (primary needs), al-hajiyyat (secondary needs), and al-tahsiniyyat (tertiary needs), with al-daruriyyat having the highest priority because it concerns the basic existence of human beings (Bakri, 1996). The issue of inheritance rights of children of different religions that are not recorded directly touches the level of daruriyat, not just hajiyyat or tahsiniyat, because it concerns a real threat to the survival, education, and human dignity of children, so that methodologically it can override the consideration of administrative formalities that are only at the level of hajiyyat.

The analysis of the fulfillment of the five elements of daruriyyat shows the following results. First, hifdzud din (safeguarding religion): the denial of children's civil rights has the

potential to cause psychological trauma that distances children from religious values, contrary to the rule of *la taziru waziratun wizra ukhra* (QS. Al-An'am [6]: 164) that no one should be burdened with consequences for actions that are not his own (Ministry of Religion of the Republic of Indonesia). Second, *hifdzun nafs* (safeguarding the soul): the neglect of children's civil rights leads to social stigmatization that threatens the human dignity of children, while the Qur'an Surah Al-Isra verse 70 affirms the universal glory of human beings without any administrative conditions (Shihab, 2002). Third, *hifdzul 'aql* (safeguarding reason): the loss of economic support from the biological father threatens the child's access to education, as affirmed by the virtue of knowledge in QS. Az-Zumar [39]: 9. Fourth, *hifdzun nasl* (safeguarding offspring): the recognition of biological relationships through scientific evidence actually strengthens the dignity of heredity and genealogical order, in line with the principle of justice of punishment in QS. Al-Ahzab [33]: 5 and the principle of piety based on glory in QS. Al-Hujurat [49]: 13. Fifth, *hifdzul maal* (safeguarding property): the absolute denial of children's property has the potential to financially impoverish children, in line with the threat to those who eat orphans' property unjustly in QS. An-Nisa [4]: 10 (Al-Qaradawi, 1996).

The argument of continuity of economic responsibility provides the strongest theoretical justification for compulsory wills: the father's maintenance obligation to the child which is affirmed by QS. Al-Baqarah [2]: 233 should not be immediately interrupted by the death of the heir, so that the compulsory will should be understood as a continuation (continuity) of the maintenance obligation that has been attached during life, not a voluntary giving that is contrary to *faraid*. The fiqh rule of *dar'ul mafasid muqaddamun 'ala jalbil mashalih* (rejecting damage over attracting benefits) supports consistent application: if this rule is used to require marriage registration in order to prevent *mafsadah* for children, then the same logic should be used to prevent *mafsadah* that befalls children when the parents' marriage is factually not recorded (Djazuli, 2006).

There is a serious objection that the protection of children from unregistered marriages can weaken the public's motivation to register their marriages. This objection is answered through the distinction of subjects who are burdened by the law: the obligation of registration is addressed to parents as parties who have the legal capacity to fulfill it, so that imposing the legal consequences on the child is contrary to the rules of *la taziru waziratun wizra ukhra*. In terms of the qualification of *maslahah*, the benefits built by this study are classified as *maslahah mursalah* and not *maslahah mulghah*, because they meet the three prerequisites of *istislah*: real, general, and not contrary to the principles of sharia that *qath'i*, because the limit of one-third of the inheritance is maintained and the position of the heirs in the *faraid* system is not reduced at all. Academic honesty demands the affirmation of the limits of the solutions offered. A mandatory will, no matter how strong the justification of the *maqashid*, is not an instrument capable of restoring all the rights of the child derived from the relationship of the *nasab*. Biological relationships do not automatically give birth to the *nasab shari'i*, although it can give birth to civil relations according to national law, so there are certain rights that doctrinally can only be obtained through the *nasab* relationship, namely the position as a guardian of marriage and the right of inheritance in the *faraid* system. This study therefore does not argue that the Constitutional Court Decision changes the concept of *nasab* in fiqh, or that the will obligates to make the child an heir in the *faraid* sense; what is argued is more limited but more methodologically defensible, namely that in the realm of economic protection, the framework

of Maqashid al-Syariah provides a strong justification for the granting of shares through the instrument of a mandatory will. This affirmation of the limit actually strengthens the research argument, because what is proposed is not a revolution against the faraid system, but the optimization of the instruments that have been available and recognized in the Islamic legal system itself.

Thus, a mandatory will with a maximum limit of one-third of the inheritance is a concrete actualization of Maqashid al-Syariah which maintains the sanctity of the Islamic inheritance law text while fulfilling substantive justice for children, in line with the Decision of the Denpasar Religious Court Number 363/Pdt.G/2020/PA. The DPS has been analyzed in the previous sub-section, although the decision shows that the fulfillment of the five elements of daruriyyat still fully depends on the reasoning of the examining judge, not on the guarantee of written norms.

Legal Harmonization between the Marriage Law, the Compilation of Islamic Law, and the Constitutional Court Decision Number 46/PUU-VIII/2010

The disharmony of norms occurred at three meeting points: the conflict between Article 43 Paragraph (1) of the Marriage Law after the reinterpretation of the Constitutional Court and Articles 40 and 44 of the Constitutional Court which prohibit interfaith marriage; the conflict between the Constitutional Court's Decision which is erga omnes and Article 171 letter c juncto Article 172 of the Constitutional Court which makes religious differences an absolute barrier to inheritance; and the inconsistency between Law Number 35 of 2014 concerning Child Protection which mandates protection without discrimination and Islamic family law norms which still treat religious differences as a factor of disqualification of children's civil rights (Mahfud MD, 2006).

Before the harmonization of formal legislation was realized, the jurisprudence of the Supreme Court had acted as a de facto harmonization mechanism (Arto, 2015). However, the harmonization of jurisprudence alone is not enough to create comprehensive legal certainty. Legislative facts show legislative omission: Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 only amends Article 7 regarding the marriage age limit to follow up on the Constitutional Court Decision Number 22/PUU-XV/2017, while Article 43 Paragraph (1) which has been declared contrary to the 1945 Constitution since 2012 has not been amended at all, so that the official text circulating among the state apparatus at the lower level still contains the old formulation that has been canceled.

At the executive level, the Ministry of Home Affairs has responded through the Regulation of the Minister of Home Affairs Number 9 of 2016 which introduces the instrument of the Statement of Absolute Responsibility (SPTJM), strengthened by Presidential Regulation Number 96 of 2018 and the Regulation of the Minister of Home Affairs Number 108 of 2019 which introduces the status of "marriage has not been recorded" in population documents, allowing the inclusion of the father's name in the birth certificate even though the marriage has not been registered, although this instrument does not legalize marriage and does not automatically give birth to a faraid inheritance relationship. At the judicial level, the Supreme Court issued Circular Letter Number 3 of 2023 which for the first time explicitly mentions biological children from marriages who are not recorded as the category of recipients of a mandatory will, even though judicially-formally SEMA is not a law regulation so its binding force is not equal to the law and can be changed at any time through the internal mechanism of

the Supreme Court. At the legislative level, this normative response vacuum is the fulcrum of the main recommendation of this research.

The juxtaposition of the four legal pathways available to children, namely *itsbat nikah*, the determination of the origin of children based on the Constitutional Court Decision, the administrative path of SPTJM, and the mandatory will, shows that none of them provide guarantees derived from generally binding written norms: the path that is most complete (*itsbat nikah*) is actually the narrowest, the most accessible path (SPTJM) is the most limited due to the law, while the most relevant path (mandatory will after SEMA Number 3 of 2023) relies on the instrument whose position is the weakest in the hierarchy of laws and regulations. The consistency of the Constitutional Court's stance that repeatedly rejects the test of the validity of interfaith marriage, from Decision Number 68/PUU-XII/2014 to Decision Number 212/PUU-XXIII/2025, confirms that the path of legalization of interfaith marriage is realistically closed, so the recommendations of this study are deliberately directed at strengthening downstream protection for children, not at the legalization of marriage itself.

In addition to the repressive route through a mandatory will, there is also a preventive route in the form of *itsbat nikah* (marriage legalization) in the Religious Court based on Article 7 Paragraph (2) of the Compilation of Islamic Law in conjunction with the Explanation of Article 49 of Law Number 7 of 1989 concerning Religious Courts. The significance of this instrument lies in the retroactive nature of its determination, so that children born within the range of marriage that are then legalized acquire the status of legal children with all inherent civil rights, including inheritance rights in the *faraid* system. Based on data from the Directorate General of the Religious Justice Agency, throughout 2024 there will be more than 51 thousand cases of *itsbat nikah* received by Religious Courts throughout Indonesia, showing that unregistered marriage is a national-scale legal phenomenon. However, this path has structural limitations: *itsbat nikah* can only be applied to marriages that are valid according to Islamic law, while in interfaith marriages the validity of marriage itself is still a matter of debate, so this path is not always open and a mandatory will is still needed as a complementary mechanism that works at the level of legal consequences without having to first resolve the debate about the validity of the marriage of the parents.

There is also a policy paradox that deserves attention: in the same year as the issuance of SEMA Number 3 of 2023 which protects children from unregistered marriages, the Supreme Court also issued Circular Letter Number 2 of 2023 which ordered the court not to grant applications for registration of marriages between people of different religions and beliefs. These two policies should not be read as contradictions, but rather as an affirmation of the principle that the legal consequences of parental choice should not be imposed on children: The Supreme Court is strict with parents in the realm of legality and marriage registration, but remains obliged to protect children born from such marriages. As long as the registration pathway for interfaith marriages remains closed, the need for protection instruments for children born from them becomes even more urgent.

Based on Gustav Radbruch's principle of priority, when the certainty of administrative law clashes with substantive justice for the child, justice must be prioritized, followed by benefits, and finally legal certainty (Rahardjo, 2009). The recommended harmonization model includes three comprehensive steps: the formal revision of Article 43 Paragraph (1) of the Marriage Law to comply with the Constitutional Court's Decision; the codification of the

Compilation of Islamic Law into law accompanied by the addition of explicit mandatory wills for children from unrecorded marriages in Article 209 of the Criminal Code; and the improvement of the Supreme Court Circular Letter Number 3 of 2023 into a Supreme Court Regulation that regulates evidentiary standards, DNA test positions, and parameters for the amount of mandatory wills, which do not exceed one-third of the inheritance, do not exceed the smallest part of the faraid heirs, and are adjusted to the number of children and the level of their needs (Sutiyoso, 2012). A summary of the disharmony of the norms and the recommended harmonization model is presented in Table 2.

Table 2. Summary of Disharmony of Norms and Recommended Legal Harmonization Models

No.	Norm Disharmony Points	Clashing Instruments	Recommended Harmonization Models
1	Recognition of the child's civil relationship with the biological father vs. the prohibition of interfaith marriage	Article 43 Paragraph (1) of the Marriage Law (post-reinterpretation of the Constitutional Court) vs. Articles 40 and 44 of the Criminal Code	Formal revision of Article 43 Paragraph (1) of the Marriage Law to be in accordance with the Constitutional Court Decision No. 46/PUU-VIII/2010.
2	Recognition of child civil relationships vs. inheritance barriers based on religious differences	Constitutional Court Decision No. 46/PUU-VIII/2010 (<i>erga omnes</i>) vs. Article 171 letter c jo. Article 172 KHI	The codification of KHI into law accompanied by the addition of explicit mandatory wills provisions for children from marriages are not recorded in Article 209 of the KHI.
3	Mandate for child protection without discrimination vs. the practice of disqualifying civil rights based on the religion of parents	Law No. 35 of 2014 concerning Child Protection vs. the applicable Islamic family law norms	The improvement of SEMA No. 3 of 2023 to become a Supreme Court Regulation that regulates evidentiary standards, DNA test positions, and parameters for the amount of mandatory wills.
4	Legislative omission after the Constitutional Court's Decision	Law No. 16 of 2019 (only amending Article 7 concerning the age of marriage) vs. Article 43 Paragraph (1) which has not been amended since 2012	Affirmation of the legislative agenda so that the Constitutional Court Decision No. 46/PUU-VIII/2010 is explicitly contained in the next amendment to the Marriage Law.

The proposed codification will lose its usefulness if it only emphasizes that children from marriage are not recorded as having the right to receive a mandatory will without setting the parameters of the amount, because the absence of a standard of amount has the potential to move the disparity from the question of "entitled or not" to the question of "how much". Based on the search of jurisprudence, especially Decision Number 368 K/AG/1995 and Decision Number 16 K/AG/2010, this study formulated three operational parameters: first, the maximum limit, i.e. the share of the obligatory will must not exceed one-third of the inheritance's inheritance in line with Article 195 Paragraph (2) and Article 209 Paragraph (2) of the KHI; second, the relative limit, which is that the share does not exceed the smallest share received by the heir in the faraid system; and third, proportionality parameters, namely the amount adjusted to the number of eligible children, the level of children's needs, especially if

they are minors or pursuing education, and the length of the relationship and maintenance responsibilities that have factually been carried out by the heirs during his lifetime.

The implementation of this harmonization model cannot be separated from a number of obstacles that need to be anticipated, namely resistance from religious circles who adhere to the textual interpretation of Islamic inheritance law and view the expansion of compulsory wills as unjustifiable liberalization; limited institutional capacity, both in terms of courts that do not have standard procedures and forensic laboratories for DNA tests that are not evenly distributed throughout Indonesia; and the lack of legal literacy in the community, where many families who face marriage problems are not recorded as not knowing the legal rights that they can fight for through the judiciary. The success of harmonization therefore depends not only on the quality of regulations, but also on the quality of human resources who implement them, so that investment in the capacity development of religious court judges by the Supreme Court and the Ministry of Religion is a fundamental prerequisite for the success of Islamic family law reform in Indonesia.

CONCLUSION

The legal position of the inheritance rights of children born from unregistered interfaith marriages has shifted significantly following Constitutional Court Decision No. 46/PUU-VIII/2010, from the severance of the civil relationship with the biological father to the recognition of a civil relationship that may be established through scientific evidence. However, such inheritance rights remain textually constrained by Article 171 letter c juncto Article 172 of the Compilation of Islamic Law. In response to this limitation, Supreme Court jurisprudence has developed the concept of a mandatory bequest (*wasiat wajibah*) of up to one-third of the estate as a form of economic protection without disregarding the prohibition on inheritance between persons of different religions. From the perspective of Maqashid al-Shariah, the protection of children's property rights constitutes an important aspect of legal and humanitarian justice. An analysis of the five essential elements of *daruriyyat* indicates that the absolute denial of children's civil rights may create harm across multiple dimensions of their lives, while *wasiat wajibah* may be regarded as a form of *maslahah mursalah* that is consistent with the objectives of sharia. This is because it may function as an extension of the obligation to provide maintenance rather than as a departure from the *faraid* system. Legal harmonization among the Marriage Law, the Compilation of Islamic Law, and the Constitutional Court Decision remains incomplete because institutional responses have primarily emerged from the judiciary and executive, while Article 43 paragraph (1) has not been substantively amended through Law No. 16 of 2019.

Therefore, this study recommends three measures for lawmakers, the Supreme Court, and relevant government agencies. First, Article 43 paragraph (1) of the Marriage Law should be revised to reflect Constitutional Court Decision No. 46/PUU-VIII/2010, while the regulation of *wasiat wajibah* for children born from unregistered interfaith marriages should be expressly incorporated into legislation with clear provisions regarding its scope and amount. Second, the substance currently addressed in Supreme Court Circular Letter No. 3 of 2023 should be further strengthened through a more comprehensive Supreme Court regulation governing standards of proof concerning the origin of children and the evidentiary role of DNA testing. Third, public legal education regarding the consequences of unregistered marriages should be strengthened through coordinated efforts by the Ministry of Religious Affairs and the Directorate General of Population and Civil Registration. Future research should examine the procedural aspects of establishing a child's biological origin, particularly the extent of judicial authority to order

DNA testing, and should also conduct socio-legal studies on the implementation and effectiveness of wasiat wajibah across Religious Courts in different regions of Indonesia.

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