



LEGALITY OF HEIR FOR NON-MUSLIM CHILDREN AS A RESULT OF FORNICATION UNDER MAQASHID SHARIA OF JAMALUDIN ATHIYYA

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Abstract

This article discusses a child born due to fornication with a broken lineage of Muslim father whose child is a non-Muslim. This article uses a normative juridical method and qualitative analysis. Moreover the study was carried out on the legality of the status of heirs for non-Muslim children born by a fornication out of wedlock, which is viewed under in the perspective of the law in force in the Indonesia law prepective compared with the Maqasid Syariah *fil-usrah* view of Jamaluddin Athiyya. Regarding the legality of the status of heirs, there are several opinions in the Civil Code providing opportunities for heirs While it is clear in the Islamic law, especially the Islamic law of inheritance (*Fiqh Mawaris*), states that the children born as a result of fornication to be eligible as heirs. The contrast between the two legal systems is fused with the Supreme Court Jurisprudence No. 51.K/AG/1999 and the MUI Fatwa No. 11 of 2012 which states that non-Muslim children as a result of a fornication are not entitled as heirs, but

they are eligible to obtain the inheritance through a mandatory will (*Wasiat Wajibah*). Thus, there are still pros and cons on the legal impact of Jurisprudence and Fatwa which are not fully binding. Moreover, Jamaluddin Athiyyah's view of the Maqasid Syariah in terms of the family issue against the Supreme Court Decision No. 51.K/AG/1999, No. 368 K/AG/1995, the Constitutional Court Decision No. 46/PUU-VIII/2010 and the MUI Fatwa No. 11 of 2012, concludes although the non-Muslim children born as a result of fornication are not eligible as the heirs. However, the providing a mandatory will has considerably benefited the child welfare and the family are considered implementing the Islamic law.

Keywords: Non-Muslim Children, Out of Wedlock, Legality of Inheritance Status, Maqasid Sharia

A. Introduction

As social beings, humans are very dependent on interactions with other individuals. The Interaction is a common thing that occurs between humans both as individuals and as groups. This interaction then has an impact which is never separated from an engagement and a hostility. This is because the human interaction is always based on interests. As a result of interaction, conflicts between religious communities and even between religions are increasingly becoming a vital issue to be discussed. This causes a difficulty in creating a harmonious life between religious communities. However, in addition to the negative impact, the existence of inter-religious conflicts will give birth to stronger social ties with a better understanding of religious patterns.¹

¹ St. Aisyah BM, *Konflik Sosial Antar Umat Beragama*, Jurnal Dakwah Tabligh, Vol.5, No.2, December 2014. 190-191

On the other hand, marriage is an interaction activity between two human beings who have matured and understand to bind desires in a sacred agreement. The true love is not limited to the ethnicity, the skin color, and the regions. Such as Indonesia is known as the most colorful in diversity of cultural, customs that have been ingrained from their ancestors as well as different religions and beliefs.² However, discussion on marriage issues, there are conflicts that will arise from differences in religion and community beliefs. A love have no boundaries, but a sacred bond have conditions.

The Fatwa of Indonesian Ulema Council (MUI) has strictly prohibited an interfaith marriages between Muslims and non-Muslims³. The prohibition of interfaith marriages, especially for Muslims and non-Muslims⁴ is the impact of technological developments that affect communication patterns and facilitates interaction between religious communities. This interaction may then develop into interfaith marriages on the basis of love.

The, general explanation section of Law Number 1 of 1974 number 1 has explained the background of the formation of Law no. 1 of 1974. Namely the impetus for the unification of the law mainly in the family law, especially regarding marriage

²Jane Marlen Maklalew, *Akibat Hukum dari Perkawinan Beda Agama di Indonesia*, Lex Privatum, Vol. I, No, 2, April-June 2013. 131

³Indonesian Ulema Council, *Himpunan Fatwa MUI Sejak Tahun 1975*, (Jakarta: Airlangga Publisher, 2011), 477.

⁴Karyasuda defines interfaith marriage as a marriage bond that occurs between two people of different religions and basically all religions prohibit marriage of two different religions because all of them require marriage of the same faith. M. Nur Kholis Al-Amin, *Perkawinan Campuran Dalam Kajian Perkembangan Hukum: Antara Perkawinan Beda Agama dan Perkawinan Beda Kewarganegaraan di Indonesia*, Al-Ahwal, Vol. 9, No. 2, December 2016. 216.

issues. Indonesia has the Marriage Law as a for principles and a reference for various groups in society.

Furthermore, in the number 5 of the General Elucidation of Law Number 1 of 1974, it also states that in order to achieve a legal certainty, a marriage and all related matters in the marriage occurs before the Marriage Law is enacted, and are carried out based on the existing laws are valid. As a basic requirement of a good law, the legal certainty must be presented to eliminate multiple interpretations in the society, especially among Muslims regarding the validity of marriage, which is given in this case through the Marriage Law.

One of a legal marriage is a siren marriage. According to M. Nur Kholis, the unregistered marriage is a legal marriage based on the religion, even though it is not registered officially.⁵ Hence, a marriage that is considered valid has fulfilled religious requirements if it is not officially registered. It will affect the family administration records in the future. In line with this, based on Article 42 of the Marriage Law, that the legality of the legal status of a child is based on a legal marriage as well. The status of a legitimate child is certainly a consideration in future civil matters. Thus, children born due to fornication would be certainly very difficult to obtain the children rights under the Indonesian civil law.⁶

In Islamic law, lineage is defined as a form of legality in the family based on blood relations based on legal marriage ties. The *nasab* is a legal submission for the relationship of

⁵Subjektive Trusto, *Sahnya Perkawinan Menurut Undang-undang Nomor 1 Tahun 1974 Tentang Perkawinan Ditinjau dari Hukum Perjanjian*, Journal of Legal Dynamics, Vol. 10, No. 3, September 2010. 331

⁶Kalijunjung Hasibuan & Ali Hamzah, *Problematika Anak di Luar Nikah Ditinjau dari Maqasid Al-Syari'ah*, (Yogyakarta: Bintang Pustaka Madani, 2020), 2.

a child with his father's lineage, so that later he can ask for his rights especially in inheritance and the obligation of his father to provide the inheritance, as long as there is no barrier between them. The scholars agree that children due to fornication or adultery have no kinship relationship with their father. The absence of lineage of the biological father, the legal consequences are that there is no relationship of rights and obligations between the child and the father in terms of guardianship, maintenance, to inheritance.

However, children are a gift from God Almighty. The view of the status of children's rights in the context of human rights must be put forward by giving basic rights in the form of nature. In this case, the nature in question is the nature of religion, that in fact Allah SWT is one and Almighty. This is in accordance with the hadith which states that babies are born in a holy state and in accordance with the nature, where then based on their parents, the child might become a Jew, Christian or Majusi.

The above hadith is the basis of human rights of child who is deprived of his rights. Islamic teachings in accordance with the view of equality have been committed to equalize the human position without discrimination, namely in the context of the same nature even though they are based on different origins. The expression of an illegitimate child or adultery as a child born from a forbidden relationship or adultery, and has no kinship to his biological father, according to the *fuqaha*, it can still be assigned to the woman's legal husband in one condition that there is no denial by the husband with *li'an*.⁷

⁷Achmad Fageh, *Analisa Hak Waris Anak Kawin Pendekatan Hak Asasi Anak*, Akademika, Vol. 11, No. 2, December 2017. 175

The purpose of Islamic law is to fulfill the benefits. One of them is the fulfillment of children's rights by considering five elements, namely religion, soul, reason, inheritance, and property. These goals (Maqasid Syariah) must be implemented as a pillar of fulfilling one's rights and obligations. In inheritance issue, for example, it should not be implemented without looking at the regulations and fulfilling the objectives. Thus, these rights will be fulfilled by the Sharia compliance.⁸

As time goes on, some cases that occur in the inheritance law of different religions are increasingly widespread. One of the contributing factors is the disapproval of the heirs (non-Muslims) on the distribution of assets which is considered unfair. What would happens if the child turns out to be a non-Muslim from one of his Muslim parents and it has been proven by DNA test that he is the biological child of his biological father? What if this case is viewed from the perspective of maqasyid sharia fil usrah, more specifically on hifzh al nasl? Thus, the tangled thread regarding the status of heirs for a child born due to fornication which the parents are different religions needs to be examined and straightened out again. In addition to establishing a religious basis?

B. Focus and Research Methods

This article discusses two main points. First, how is the legality of inheritance rights for non-Muslim religious children born due to fornication in Indonesia according to the Indonesia Inheritance Law? Second, what is the view of the

⁸Jayusman, et al, *Kewarisan Anak yang Beda Agama dalam Perspektif Maqasid Syariah*, Ijtimaiyya, Vol. 13 No. 2, 2020, 166-167.

Maqhashid Syariah Fil-Usrah on the inheritance rights of non-Muslim children born due to fornication?

The research method used in this research is normative juridical research which is One of the legal methods. The primary source is regulations and the other is secondary materials. The data collection is carried out through a library consisting of primary legal materials, the secondary legal materials, and the tertiary legal materials are in regulations or other documents related to the issues

After the data collection has been conducted, then the analysis of legal issues by the library materials was carried out under the qualitative analysis with the normative juridical aspects. After the analyzing the data has finished, it is then presented in a descriptive approach or by describing through a narrative text. Then the collected data is analyzed. Then again, the review is carried out on the application of normative provisions to the legal issue being studied.

Primary legal materials are data collected from regulations related to the problems studied. In this case, it is sourced from the Al-Quran, Hadith, Ijma', the 1945 Constitution, the Civil Code, the Compilation of Islamic Law, and the applicable legislation in Indonesia. Meanwhile, secondary legal materials generated from books related to regulations as well as those that cover regulations that are used as argument builders. The tertiary materials can be obtained from encyclopedias, as well as dictionaries as the enrichment. Descriptive presentations are carried out in order to provide a comprehensive and the systematic explanation of the facts obtained during research on legal issues.

C. Discussion

1. Legality of Inheritance Rights of Non-Muslim Children due to fornication in Indonesia Inheritance Law Perspective

Determination of heirs is a sensitive issue in a family. Moreover, if there is a child who was born under a non-legal marriage and he is a non-Muslim. Unlike another heir who is Muslim, he might ask for his rights as an heir. Thus, with the existence of these problems, the settlement must be based on the applicable law by considering the aspect of justice for all parties.

In Indonesia, there are currently three inheritance law systems that apply in the community, namely the Western Civil Inheritance Law as contained in the Civil Code or BW, then there is also the Customary Inheritance Law which is firmly held by each indigenous people, and the last is Islamic Inheritance Law.⁹The diversity of inheritance laws adopted by the Indonesian people should be able to open up space for non-Muslim children born out of wedlock to get their rights in inheritance.

Regarding the inheritance law, it is necessary to understand the definition of a child due to fornication in the Civil Code and the KHI, which have some differences. Article 272 of the Civil Code, states that children born to virgin parents can be recognized and then legalized. However the children born to men and women, one of

⁹Rizkal, Granting Pemberian Hak Waris dalam Hukum Islam kepada Non-Muslim berdasarkan Wasiat Wajibah: Study of Decision Number 16/K/AG/2010, *Judicial Journal*, Vol. 9 No. 2, 2016, 187.

whom is married, cannot be recognized as legal children. This proves that there is a difference between children born due to fornication and also children resulting from adultery which in the Civil Code refers to the child of a married person's mistress. Meanwhile, in Article 99 letter a of the Compilation of Islamic Law, the intended legitimate child is a child born from a legal relationship. The difference in the definition of a legitimate child between the Civil Code and the KHI certainly creates a difference in the inheritance status of a child.¹⁰

In the Law of Inheritance in the Civil Code, the distribution of inheritance is carried out in a limited manner in obtaining property rights (article 584 of the Civil Code). Regarding heirs as recipients of inheritance, according to the Civil Code, they are divided into several groups based on position, replacement and third parties who are not heirs.¹¹

First, heirs based on position (uit eigen hoefed) or direct inheritance when the heir dies, are divided into 4 groups. The first group is children and their descendants and below and since 1935 a husband or wife who is the oldest has the same status as a legal child. The second group is the parents and siblings of the heirs, where in general civil rights the rights are the same between parents and siblings. The third group is based on Articles 853 and 854 of the Civil Code, if there are not available

¹⁰ Ruslan Abdul Ghani, Status Anak Luar Nikah dalam Hukum Waris (Studi Komperatif antara Kitab Undang-Undang Hukum Perdata dengan Kompilasi Hukum Islam), Al-Risalah, Vol. 11 No. 1, 2011, 87-91.

¹¹ I Ketut Markeling, "Hukum Perdata: Hukum Waris" Bahan kuliah Lecture material from the Faculty of Law, Udayana University, Denpasar, 2016, 3-10.

of the first and second groups then it is divided equally among the paternal and maternal grandparents. And finally, the fourth group, namely the heir's relatives in a line that deviates up to six degrees.¹²

Furthermore, the classification of heirs based on replacement (*bij plaatservulling*). In article 848 it is stated that only people who have died can be replaced, namely by replacing the straight line down, the side line in brotherhood and the side line of distant relatives. Then, the third is a third party who is not the heir, consequently that the inheritance is based on a testament or a will.

Based on the classification of heirs, where are the position of the non-Muslim children who are born due to fornication to get their rights in inheritance? The status of a legitimate child based on Article 42 of the 1974 Marriage Law is a child who is produced from a legal marriage. In this case the child who is the result of extramarital affairs is not included in group I heirs. However, based on article 863 of the Civil Code, children born due to fornication who are recognized get their rights according to the class of heirs. Recognition of children is the main point, so that a child born due to fornication can get his rights in inheritance. Based on Article 272 of the Civil Code, a child born out of wedlock can be upgraded to a legal child if it has been recognized by his biological parents before conducting a legal marriage. However, if it is failed to admit they are a legitimate child before marriage, then based on article 274 of the Civil Code, it can be done with

¹² Ibid.

a Presidential Ratification Letter which is given after hearing the opinion of the Supreme Court. Subsequently, the acknowledgment is when both biological parents are not married. Thereafter, based on article 281 of the Civil Code, each party can recognize it by an authentic deed. If a biological father wants to admit a child born due to fornication who is under his mother's guardian, then based on article 284 of the Civil Code, he must seek approval from the mother, if it is not given, he will not get the opportunity to acknowledge his biological child. The next acknowledgment is that when both biological parents are not married, then based on article 281 of the Civil Code, each party can recognize it by an authentic deed. If a biological father wants to admit a child born due to fornication who is under his mother's guardian, then based on article 284 of the Civil Code, he must seek approval from the mother. If it is not given, he will not get the opportunity to acknowledge his biological child. The next acknowledgment is both biological parents are not married. Based on article 281 of the Civil Code, each party can recognize it by an authentic deed. If a biological father wants to admit a child born due to fornication who is under his mother's guardian, then based on article 284 of the Civil Code, he must seek approval from the mother, if it is not given, he will not get the opportunity to acknowledge his biological child.¹³

Referring to the class of heirs based on the Civil Code, in group I, if he is a recognized child due to fornication, he

¹³ Ruslan Abdul Ghani, Op.cit, 92-94.

will get 1/3 of the inheritance. On the other hand, in the groups II and III, he will get of the inheritance, while in group IV it will get of the inheritance. Based on article 865 of the Civil Code, then if the heir does not leave a legal heir based on the law, then the child due to fornication will obtain the entire inheritance.¹⁴

Meanwhile, regarding the inheritance law on different religions, there is no issue on the Civil Code. As for the people who are prevented from obtaining an inheritance based on Article 838 of the Civil Code, those who are convicted of murder or attempted murder of the heirs, and the judge's decision are proven to have slandered the heirs for crimes sentenced to more than 5 years, who commit violence to prevent the heirs from making or revoke his will, as well as those who embezzle, damage and falsify the heir's will. Based on this article, the Indonesian Civil Code does not make different religions as a barrier for children of different religions to get their rights as heirs.¹⁵

The form of inheritance according to Islamic law is different from the form of inheritance according to Western law as regulated in BW and customary inheritance law. The inheritance according to Islamic law is a number of property and all rights of the deceased heir in a clean condition. This means that the inheritance

¹⁴ Misael and Partners, "Hak Waris Anak Luar Kawin" <http://Misaelanadpartners.com/hak-waris-anak-luar-kawin/> accessed on 07 November 2021.

¹⁵ Alvi Laila Choyr, ""Studi Komparatif Hak Waris Beda Agama menurut Hukum Islam dan Hukum Perdata", Thesis, Faculty of Law IAIN Ponorogo, 2019, 51-52.

inherited by the heirs is a number of property and all rights, “after deducting the payment of the heir’s debts and other payments caused by the death of the heir”.¹⁶ Inheritance in Islamic law has been regulated explicitly and clearly in the Fiqh of Mawaris. The purpose of Fiqh Mawaris is all aspects related to the distribution of inheritance based on classical fiqh books as a result of the ijtiḥad of fiqh scholars. Of course, the ijtiḥad results are based on the Qur’an and Hadith. Under the Islamic inheritance law, it raises a question whether the law that regulates the transfer of ownership rights to the inheritance (tirkah) of the heirs and determining who is entitled to become heirs and their share who are entitled (not hindered or not mahjub hirman).¹⁷

Fiqh Mawaris which is also known as a “*faraidl*” which is an important knowledge branch in the religious sphere. The knowledge has been well conceptualized and structured to be able to resolve legal issues in the field of Islamic inheritance. In the hadith narrated by Ibn Majah and Addaruqutni, the Messenger of Allah has emphasized to teach the *faraidl* to the public, because the *faraidl* is half of the knowledge that is easily to be forgotten and is the first of lost knowledge to Muslims. In line with the narration of Ahmad bin Hambal, the Messenger of Allah said by not teaching *faraidl* knowledge to the people, and the Messenger of Allah has passed away, the dispute

¹⁶ Afidah Wahyuni, Sistem Waris Dalam Perspektif Islam Dan Peraturan Perundang-undangan, Vol. 05, No. 02. 2018, pp. 151-152

¹⁷ Sapardin, Fiqh Mawaris dan Hukum Kewarisan Studi Analisis Perbandingan, 2020. CV. Utami’s blessing. Makassar

occurs between two people in faraidl, and no one will be able to resolve it.¹⁸

The concept in Fiqh Mawaris is seen in the Qur'an, verses 7, 8, 9, 10, 11, 12, 13, 14, 33, 176 of Surah al-Nisa and verse 76 of Surah al-Anfal. In Surah An-Nissa Verse 11, it has been emphasized that the division of inheritance between sons and daughters is 2:1. While if there are more than 2 daughters then the inheritance share is 2/3, if only one daughter will get of the property. Previously, the position of girls in a family during the jahiliyah period was lower, even with the low status of girls until the murder of newborn girls. However, after Surah An-Nissa Verse 7 which emphasized that both boys and girls have the right to obtain the inheritance, the stigma of women's low status was erased.¹⁹

The development of Mawaris fiqh is directly proportional to the development of Islamic fiqh. Currently, Mawaris fiqh is perfected in a complete and complex scientific concept. The products of ijtihad from the companions and scholars afterward were formed in a single concept book that was intact discussing the fiqh of the Mawaris.²⁰The concept of the Qur'an as a universal

¹⁸ So, based on the two hadiths, it can be concluded that studying inheritance science is important not only as a knowledge that is absorbed in the mind, but also as a provision for life, especially if there is a dispute between the two people regarding inheritance which will shake the bonds of family friendship. M. Syafi'ie, "Hak Non Muslim terhadap Harta Waris (Hukum Waris Islam, KHI, dan CLD -KHI di Indonesia)" *Al-Mawarid*, Vol. XI, No. 2, (2011), 176.

¹⁹ Endang Sriani, "Fiqh Mawaris Kontemporer: Pembagian Waris Berkeadilan Gender" *Tawazun*, Vol. 1 No. 2 (2018), 135-138.

²⁰ Hasannudin, *Transformasi Fiqh Mawaris Dalam Kompilasi Hukum Islam di Indonesia*. Vol. 22, No. 1. March (2021). pp. 46-47.

legal basis should also embrace interfaith problems between Muslims and infidels. The infidels themselves in Surah Al-Baqarah verse 254 which is interpreted by Buya Hamka in the interpretation of Al-Azhar, divides the infidels into disbelievers who deny God, disbelievers in the hereafter, and disbelievers in the profession of faith. However, according to Abdullah Ahmed An-Na'im and Masdar Farid Mas'udi, the words of infidel or apostate as a barrier in the current reality are no longer relevant today, one of which is a barrier in the inheritance of different religions. Because, implicitly according to Buya Hamka's interpretation and also the opinion of Asgar Ali Engeiner, the term infidel is not only attached to non-Muslims,²¹

Regarding the status of inheritance for non-Muslims, there are several differences between classical scholars. For example, the Imamiyya Ulama states that a non-Muslim has a right to be a heir provided that when the heir dies and the property has not been distributed, that person converts to Islam. Imamiyah scholars also stated that if it turns out that there is only one heir and a non-Muslim religion, then religion should not be a barrier to getting an inheritance. However, the agreement of the scholars of Madzhab is clear that the child has no right to be an heir, they adhere to the hadith that prohibits inheritance between Muslims and non-Muslims.²²

Regarding children born lost (children resulting from adultery), it has been emphasized in the Qur'an in Surah Al-Isra' verse 32 that adultery is a despicable

²¹ M. Syafi'ie, *Op.cit*, 180-181.

²² *Ibid*, 182-186. (What are called Imami Ulama)

act, so it should be avoided as much as possible. Thus, the scholars agree, for children from adultery do not get the right as heirs to their biological father.²³The child who is born is pure and free from any taint, so the child who is the result of adultery does not deserve to be discriminated against, because of the parents who commit adultery, and not their birth, who are at fault. In the Shafi'i school, it is clear that the child of adultery does not have kinship ties to his biological father, which has legal implications for not receiving the heir status of the child. Meanwhile, according to Imam Hanafi, a child resulting from adultery is a child produced from his father's semen, so that after all the blood ties cannot be broken. So, the status of the child is the same as that of a child born from a legal marriage. So the biological father is obliged to provide maintenance and inheritance to the child.²⁴ The differences about the status of heirs in Islam show some differences in interpretation between one ulama and another, and they become the evidence of a dynamic Islam.

The implementation of Mawaris Fiqh in Islamic Inheritance Law in Indonesia refers to the Presidential Instruction Article 100 Number 1 of 1991 concerning the Compilation of Islamic Law (KHI). Article 43 paragraph 1 which states that a child outside of marriage is a child

²³ The basis of the prohibition is as a threat of sanctions to avoid adultery, but if later a child is born from the result of adultery, there is a difference of opinion over it. See, Muhammad bin 'Isa at-Turmudzi, *al-Jami' al-Kabir/Sunan at-Turmudzi*, Volume 3, Pg. 199, Beirut: Dar al-Gharb al-Islami, 1998.

²⁴ Faizatul Fil Ulfa, et al, " Hak Waris bagi Anak Hasil Zina dalam Kajian Ilmu Matematika dan Hukum Islam " *Focus*, Vol. 5 No. 2, (2020), 205-209

born from an illicit relationship, and when the child is born, he only has a lineage with his mother, which means that the child cannot get inheritance rights from his father or relatives. In modern urf the child is categorized as *walad ghairu syar'i* (children who are not recognized by religion).²⁵

In this regard, the Constitutional Court (hereinafter referred to as the Constitutional Court) of the Republic of Indonesia No. 46 Year/PUU-VIII/2010 which was ratified on the 27th in its decision stating that an illegitimate child is a biological child from his father if he can prove it through DNA testing or through other legal evidence that can support and can be proven by science and technology, then the child can be recognized civilly and entitled to inherit. In this case, children born out of wedlock or adulterous children also can obtain their rights, as long as their biological relationship with their father can be proven with strong legal evidence. The Constitutional Court's decision also opens opportunities for illegitimate children to get the same legal protection as children with clear lineages.²⁶

The decision of the Constitutional Court 46/PUU-VIII/2010 is in accordance with article 28B paragraph 2 of the 1945 Constitution of the Republic of Indonesia, the fourth amendment (UUD 1945) stating that every child

²⁵ Aghis Mustaghfir, *Kewarisan Anak Zina Dalam Tinjauan Hukum Islam dan KUH Perdata*, Thesis, Postgraduate Study Program of the Islamic State Institute of Ponorogo 2018.

²⁶ Cinthia Febrilla Ramadhani, "Kekuatan Hukum Hasil Tes *Deoxyribonucleic Acid* (DNA) terhadap Status Anak Hasil Luar Kawin yang Tidak diakui oleh Ayah Biologisnya Pasca Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010" Thesis, Faculty of Law, University of North Sumatra, 2019, 100-103.

has the right to survival, growth and development and is entitled to protection from power and discrimination, as well as article 28D paragraph 1 of the 1945 Constitution that “everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law”. Article 7 paragraph 1 of Law No. 23 of 2002 stipulates that every child has the right to know his or her parents, and to be raised by both parents. Then it is viewed from the side of justice, it would be found that the decision of the Constitutional Court is fair, because there is an element of justice that requires the father to take care of his child. After the decision of the Constitutional Court was issued,²⁷

The Constitutional Court’s decision on judicial review of the marriage law in the 1945 Constitution has brought pros and cons. Jumhur (most of Ulema) scholars stipulates that a child born of adultery does not have a kinship relationship with the man who caused him to be born, but only has a kinship relationship with his mother and his mother’s family. This is based on the opinion of the Jumhur Ulama of the Hanafiyyah, Malikiyyah, Hanabilah, and Syafi’iyah schools of law. They firmly stipulate that the principle of the existence of a nasab relationship which is under a legal marriage relationship, where apart from a legal marriage, there will be no legal consequences of lineage. Basically, the Indonesian Ulama Council supports legal protection for children due to fornication. This is

²⁷ Candraditya, IA, et.al, “ Implikasi Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 tentang Kedudukan Anak Luar Kawin Terhadap Kompilasi Hukum Islam “, Kertha Semaya, Vol.01, No.04, May 2013. Page 2

proven in his fatwa which asks the government to impose takzir punishments on adulterers to continue to provide for their children's needs and is required to give away their wealth when he dies. However, the MUI strongly rejects the existence of a nasab relationship between a child resulting from adultery and his biological father.²⁸

In the MUI Fatwa No. 5/MUNAS VII/MUI/9/2005 concerning Inheritance of Different Religions has also explicitly stipulated that the Islamic Inheritance Law does not give the right to inherit between Muslims and non-Muslims, and the giving of property can only be done by grants, wills, and gift only. This is in accordance with the Hadith of the Prophet Muhammad. Hadith narrated by Ahmad, Four Imam and Turmudzi which states that there should be no inheritance between infidels and Muslims, in this case, non-Muslim children from one or both parents who are Muslim are not entitled to become legal heirs.²⁹

Regarding the differences of opinion between the two different inheritance systems, the Supreme Court Decision No. 368 K/AG/1995 and Jurisprudence of the Supreme Court Number 51.K/AG/1999. The intermediary is not making the child born due to fornication as a legal heir. However, He is still obtaining his share in the inheritance through the mandatory will. The provision of mandatory wills for non-Muslim children in the Supreme Court Jurisprudence is of course based on the rights of

²⁸ Muhammad Izudin, Dissertation: " Perlindungan Hukum terhadap Anak Luar Kawin " (Jember: UNEJ, 2019), page 4

²⁹ Fatwa of the Indonesian Ulema Council No. 5/MUNAS VII/MUI/9/2005 concerning Inheritance of Different Religions

heirs who are actually attached to the child even though they are non-Muslims. This is considered on the morality and relevance of the mandatory will to contemporary realization referring to the Indonesian state based on pluralism, especially in the religion adhered to by its citizens. The juridical impact on the issuance of the jurisprudence of MA Number 51. K/AG/1999 is currently used in the settlement of most inheritance disputes between non-Muslims and Muslims from Muslim parents in Religious Courts throughout Indonesia, for example in the Yogyakarta PA Decision No. 0042/Pdt.G/2014/PA.Yk on December 22, 2014 was followed up to the level of cassation through Supreme Court Decision No. 218 K/Aug/2016. Of course, apart from being based on this jurisprudence, there are also some judges who refuse to inherit between non-Muslims by means of a mandatory will and still refer to the Hadith prohibiting inheritance to non-Muslims. 218 K/Aug/2016. Of course, apart from being based on this jurisprudence, there are also some judges who refuse to inherit between non-Muslims by means of a mandatory will and still refer to the Hadith prohibiting inheritance to non-Muslims. 218 K/Aug/2016. Of course, apart from being based on this jurisprudence, there are also some judges who refuse to inherit between non-Muslims by means of a mandatory will and still refer to the Hadith prohibiting inheritance to non-Muslims.³⁰

³⁰ Muhammad Rinaldi Alif, Provision of Compulsory Wills to Warids of Different Religions, *De Lega Lata*, Vol. 2, No. 2, July-December, 2017. 361

In line with the Supreme Court Jurisprudence Number 51.K/AG/1999, MUI Fatwa No. 11 of 2012 concerning the Position of Children Resulted in Adultery and Treatment of them, which affirms the prohibition of the father's lineage relationship with the child resulting from adultery, also provides an opportunity for the child to get his rights. In accordance with the considerations in the MUI Fatwa that children born from adultery do not carry inherited sins, and children are often neglected because men do not feel responsible for the child. In this case, the MUI Fatwa No. 11 of 2012 on Legal Provisions Number 5 Point B stipulates that child resulting from adultery are entitled to their rights through the existence of a mandatory will.³¹

The term Mandatory Will was first found in the Egyptian Inheritance Law in 1946 which gave the right to inherit property to orphaned grandchildren, either from the male or female side. The mandatory will is also used in other Islamic countries such as Morocco and Syria to provide justice for grandchildren who are orphans. In Article 209 of the KHI, the mandatory will be originally present as a form of justice for adopted children who were prevented from obtaining the inheritance as a result of the thick culture of adoption in Indonesia.³²

³¹ Fatwa of the Indonesian Ulema Council Number 11 of 2012 concerning the Position of Children Resulted in Adultery and Treatment of them.

³² Irma Zhafira N Shabrina Hajida, "Disparitas Putusan Pengadilan Agama dalam Sengketa Ahli Waris Non-Muslim Perspektif *Maqasid Al-Syariah* dan *Legal Pluralism*", Thesis, Master of Family Law, Faculty of Sharia and Law, Syarif Hidayatullah State Islamic University Jakarta, (2021), 92-95.

The mandatory will was originally only intended for children and adoptive parents has expanded so that it can provide inheritance rights for non-Muslim children. Legal progress can be seen clearly with the development of the concept of mandatory will in the KHI, which is based on religious diversity which often creates complexities in inheritance between Muslims and non-Muslims. Zaenal Fanani is of the opinion that the mandatory will is aimed at giving inheritance rights to the relatives of the heirs who are hindered by the hijab, one of which is for non-Muslim children born out of wedlock in this case. This is also in accordance with Ibn Hazm, that although non-Muslim children born out of wedlock are prevented from being heirs, they still get their share through the provisions of the judge based on the regulations that govern.³³

Regarding how much share will be obtained by the child through a mandatory will, in article 209 of the KHI it has been regulated that the maximum share that can be given through a mandatory will is 1/3 of the entire inheritance.³⁴ Even though Article 209 of the KHI regulates the distribution of mandatory wills to adopted children, with the complexity of the life of the Indonesian people, based on Article 229 of the KHI, judges can resolve cases by taking into account the legal values that live in the

³³ *Ibid*, 95-97.

³⁴ The concept of the division of 1/3 is based on the Hadith of Sa'ad bin Abi Waqash who when sick was visited by the Messenger of Allah, and asked about giving inheritance to others, to which the Messenger of Allah replied, "The 1/3 part is actually if you leave your child in well-being is better. Muhammad bin Isma'il al-Bukhari, Sahih al-Bukhari, vol. 5, p. 178, Beirut: Dar Thauq an-Najah, undated.

community to give fair decisions, in accordance with the rechtsvinding function if there is no law that regulates it. So, in principle, the judge uses his function to carry out ijihad as an alternative in resolving cases, in this case the settlement of inheritance cases for non-Muslim heirs resulting from extramarital affairs.³⁵

Thus, the mandatory will is a logical solution to the fulfillment of the rights of non-Muslim children from extra-marital affairs, in term of their share of inheritance. The granting of inheritance through a mandatory will to non-Muslim children born due to fornication is in accordance with the Supreme Court Jurisprudence Number 51.K/AG/1999, as well as the MUI Fatwa No. 11 of 2012 on Legal Provisions Number 5 Point B. With a note that based on Article 863 of the Civil Code, there is an acknowledgment by the biological father, or by proof using a DNA test based on the Constitutional Court Decision No. 46/PUU-VIII/2010. Procurement of mandatory will as the impact of religious pluralism adopted by the Indonesian people, and increasingly free association is the best way for children. Because based on the MUI Fatwa No. 11 of 2012 firmly states, Children resulting from adultery are not sinners and are born in holiness. So that Mandatory wills are considered to have given justice to non-Muslim children born due to fornication in their rights to inheritance. However, the granting of a mandatory will to non-Muslim children born out of wedlock as much as 1/3 of the inheritance cannot be separated from its main

³⁵ Syafi'i, *Mandatory Wills in Islamic Inheritance in Indonesia*, Miskat, Volume 02 Number 02, (2017), 125-127.

criticism by conventional scholars. They argue that the majority of scholars in general that it is permissible to give a mandatory will as much as 1/3 on the condition that they obtain permission from a valid heir and are a person who adheres to the Islamic religion, which is based on the hadith that there is no inheritance between Muslims and infidels. Thus, according to conventional scholars, non-Muslim anams are given in the form of a grant and not in the form of a mandatory will. Thus, according to some contemporary researchers, this can be interpreted by using *maslahat mulgha* which is a neglect of the text above by prioritizing benefit. So that on the basis of benefit, mandatory wills for non-Muslim children born due to fornication is a reasonable thing to do.³⁶

The regulation on mandatory wills of non-Muslim children resulting from fornication stipulates that only limited to the existence of jurisprudence and fatwas. Until now, there is no a particular law that specifically regulates the granting of mandatory wills to non-Muslim children born due to fornication. According to Apeldroon, a jurisprudence cannot be said to be a stand-alone source of law, but is a form of legal belief as a result of its use to avoid cassation. The Jurisprudence does have an important role in law in Indonesia, but according to Jimly Ashhiddiqie, the role of jurisprudence has not been standardized yet considering that jurisprudence is legally non-binding. Because the Indonesian does not follow

³⁶ Maimun, "Pembagian Hak Waris terhadap Ahli Waris Beda Agama Melalui Wasiat Wajibah dalam Perspektif Hukum Kewarisan Islam", Faculty of Sharia, Raden Intan State Islamic University, Lampung, 9-12. See also, M. Noor Harisudin, *Usul Fiqh Science*, (Malang, Instran Publishing: 2021), 224.

the precedent system.³⁷ Because it does not have binding power, jurisprudence cannot be used as a definite legal basis regarding problem solving.

Meanwhile, the MUI Fatwa in Indonesia is still used as an aspirational law that has moral strength in connecting the aspirations of the Muslim community in responding to the latest social phenomena. Ainun Najib stated that the fatwa was only based on infrastructure in the state administration in Indonesia. This means that the Fatwa does not have an obligation to be implemented by the Indonesian people, unless there is a more regulated law.³⁸ Thus, although a mandatory will have been regulated as a form of granting rights to non-Muslim children born out of wedlock, a clear regulation on how the implementation of this provision has not been regulated in laws and regulations. Hence, the judges are still free to settle inheritance cases for non-Muslim children born due to fornication by using jurisprudence and fatwas, using the Civil Code or using the Compilation of Islamic Law. This is the impact of the application of the 3 inheritance legal systems in the implementation of inheritance distribution in Indonesia.

³⁷ Enrico Simanjuntak, "Peran Yurisprudensi dalam Sistem Hukum di Indonesia", *Journal of the Constitution*, Vol.16 No. 1 (2019), 87-90.

³⁸ Al Fitri Johar, "Kekuatan Hukum Fatwa Majelis Ulama Indonesia (MUI) dari Perspektif Peraturan Perundang-Undangan di Indonesia", *South Kalimantan State Religious Court*, 4-5. see http://pa-negarakalsel.go.id/images/images/PDF/Kekuatan_Hukum_Fatwa_Majelis_Ulama_Indonesia.pdf, accessed on 01 December 2021.

2. Maqhashid Sharia Fil-Usrah View on Inheritance Rights of Non-Muslim Religious Children Due to Fornication

There are three provisions of inheritance law that apply in Indonesia, namely customary inheritance law, Islamic inheritance law, and civil inheritance law. All three have different inheritance rules. One of the problems that arise is regarding the religious differences between the heirs and heirs.³⁹ So there is ambiguity in the choice of law and choice of forum for the application of inheritance law. The disharmony in the legal framework for the inheritance of non-Muslim children born out of wedlock in Indonesia gives ambiguity to the law and the legitimacy of society. Under the Islamic law, non-Muslim children actually do not inherit, but it is a special concern in legal reform in Indonesia which is a solution to this problem through mandatory wills as regulated in the KHI or some jurisprudence. Between the MUI Fatwa No. 11 of 2012 concerning the Position of Adultery Children and the Treatment of them and the decision of the Constitutional Court No. 46/PUU-VIII/2010 becomes a gap in legal thinking towards children resulting from adultery related to the inheritance status of the child.

The uncertainty in some aspects, causes the legal objectives are not achieved. The use of maqashid sharia in reviewing the law of inheritance of children

³⁹ Dhea Swasti Maharani, *Akibat Hukum Anak Yang Berbeda Agama Dengan Orang Tua Ditinjau Menurut Hukum Waris Di Indonesia (Studi Kasus Putusan Mahkamah Agung Nomor 1582 K/Pdt/2012)*, *Private Law Vol: 6 No. 1* 2018, 198.

resulting from adultery of non-Muslims is a necessity in seeking consideration of the legal vacuum. Opinions that allow inheritance to non-Muslim children need to be continued in the provisions of Islamic law in Indonesia with consideration of the benefit under the pretext that children do not bear the sins of others, so they can become legal heirs in a family bond.

Especially in drawing the main idea in the formation of Islamic inheritance law in the case of non-Muslim children resulting from adultery, it will be appropriate to use the Maqasid Syari'ah concept which will later become the formulation in the renewal of Islamic inheritance law in Indonesia. The basic concept is that to realize goodness and at the same time avoid evil or to take advantage and reject harm (dar'u al-mafasid wa jalb al-masalih), because Islam and benefit are like twins who cannot be separated.⁴⁰

Linguistically, maqasid al-syariah comes from a combination of the words maqasid and al-syariah. Maqasid is the plural form of the word maqshad, qashd which means goaltowards a direction, intention and so on.⁴¹ Ar-Raisuni defines Maqashid Syariah as Maqasid

⁴⁰ Musolli, Maqasid Syariah: Kajian Teoritis Dan Aplikatif Pada Isu-Isu Kontemporer Issues, At-Turās, Volume V, No. 1, January-June 2018, 62. Compare with these articles. M. Noor Harisudin, *The Study of Australian Government Policies on Maqasid al-Sharia Perspective*, Vol 18, No 2 2021, Justicia Islamica, Sharia Faculty of IAIN Ponorogo and M. Noor Harisudin, On The Legal Sanction Against Marriage Registration Violation in Southeast Asia Countries: A Jasser Auda's Maqasid Al-Shariah Perspective, Vol 5, No 1 (2021), Samarah, Ar-Raniry State Islamic University Aceh.

⁴¹ Maqasid is categorized by fiqh scholars in the study of Islamic law as part of the science of ushul fiqh. However, Jasser's opinion is different, which says that maqasid and ushul fiqh are different. This is seen in terms

Syaria are the goals set by the Shari'a to be realized for the common good."⁴² Alal Fasi defines Maqashid Sharia as the aim of the Shari'a and the secrets in every law of the laws established by Allah swt.⁴³ Muhammad Thahir Ibn Asyur said that Maqashid Syariah is the meanings and wisdoms emitted by the Shari'a in each of its legal stipulations. This does not apply to certain types of law, including in this scope all the characteristics, general objectives and meanings of the Shari'a contained in legal rules, including legal meanings that are not shown in a number of laws, but are contained in other laws..⁴⁴

Meanwhile, Nurudin al-Khadimi said that Maqasyid Syariah is the meanings that radiate in the Shari'a laws which are systemized according to their levels, whether those meanings are in the form of particular meanings, universal benefit values or in the form of general characteristics. All of this has one goal, namely to realize human servitude to Allah SWT and the achievement of benefits for humans in this world and in the hereafter.⁴⁵ And As-Syatibi said that indeed the Shari'a

of substance that maqasid focuses more on the meaning behind the text, while ushul fiqh is a scientific study that focuses on the outward text. Jasser's opinion further strengthens the opinion of Sheikh al-Tahir Ibn 'Assyria if maqasid stands alone without any connection with the science of ushul al-fiqh.

⁴² Ahmad ar-Raisuni, *Nadlariyatul Maqashid inda Syatibi*, (Herndon-Virginia, The International Institute of Islamic Thought, 1995), 15.

⁴³ Alal Fasi, *Maqashid Syariah al-Islamiyah wa Makarimuha*, (Ribat: Dar al-Gharb al-Islami, 1993), 7.

⁴⁴ Muhammad Tahir Ibn Asyur, *Maqasyid Syariah al-Islamiyah*, (Ordon-Oman: Dar an-Nafais, Cet, II, 2001), 251.

⁴⁵ Nurudin al-Khadimi, *al-Ijtihad al-Maqashidi, Hujjiyatuhu, Dlawabituhu Majalatuhu*, (Qatar: Wuzaratul Auqaf wa Syuun al-Islamiyah, 1998), 52-53.

aims to benefit the world and the hereafter.⁴⁶ Abu Hamid al-Ghazali (d.505 H/1111M) categorizes the division of maqasid into mursal benefits or benefits that are not listed directly in the Qur'an.⁴⁷

God's objective in enforcing the Shari'a is to maintain the benefit of mankind, while avoiding mafsadat in this world and in the hereafter.⁴⁸ Syatibi is of the opinion that the point of view regarding benefit is maqasid al-syar'i (the purpose of Allah) and maqasid al-mukallaf (the purpose of the mukallaf or people who are obliged to carry out religious law).⁴⁹ Meanwhile, according to Wahbah al-Zuhaili (1986:1017) the definition of maqasid sharia is the purposes or goals that are maintained by Islamic law in whole or in part of its law, or the ultimate purpose of sharia and the secrets behind its law.⁵⁰

According to Az-Zuhaili, Maqasid Syariah is important for several reasons, the first is to provide assistance in understanding the general (kulliyah) and the partial (juz'iyah) laws. The second is to understand the correct syar'i texts in daily practice. then it gives a limit to the meaning of the intended lafadz (madlul al-alfadz) because among the texts related to the law must

⁴⁶ As-Syatibi, al-Muwafaqat fi Usul as-Syariah, Volume II, (Beirut: Dar al-Ma'rifah, 1973), 374.

⁴⁷ Melyana Sifa, "Perpektif Maqashid Al-Usroh Terhadap Praktik Poligami Di Bulak Banteng Wetan Kecamatan Kenjeran Surabaya ", Thesis, Sunan Ampel State Islamic University Surabaya, 2019, 26-29

⁴⁸ Syahrul Sidiq, "Maqasid Syari'ah and the Challenges of Modernity A Study of Jasser Auda's Thoughts", IN RIGHT: Journal of Religion and Human Rights, Vol. 7, No. 1 (2017), 144.

⁴⁹ *Ibid.*, 29

⁵⁰ Ghofar Shidiq, "Theory of Maqasid al-Syariah in the Purpose of Islamic Law", Sultan Agung, Vol. XLIV No. 118 (2009), 119.

be mutually sustainable so that it takes a limitation of meaning, namely through Maqasid Syariah. The last is the contemporary problems that do not have definite evidence in the Al -Quran and Hadith, then Maqasid Syariah is present as Mujtahid's guidance in interperate laws related to human actions (af'almukallafin) in order to find laws that are in accordance with the conditions of society.⁵¹With the implementation of Maqasid Syariah in the Ijtihad process, it will give the impression that Islam is a religion that is dynamic and responsive to various phenomena in society.

So it can be understood that the presence of Maqasid Syariah provides great benefits, especially in interpreting the meaning of the verses of the Qur'an and hadith as part of the legal discovery process regarding contemporary problems experienced by Muslims. With enormous benefits, it certainly creates urgency in its use, because the purpose of implementing Islamic law is contained in Maqasid Syariah so that without considering Maqasid Syariah in legal discovery, it will have an impact on laws that do not prioritize human benefit.

Maqashid al-Usrah is a branch of study from maqashid al-Sharia which discusses law, especially Islamic law. Maqashid sharia al-Usrah is a maqashid that discusses the concept of sharia in the family. Maqashid sharia, also includes maqashid sharia al-Usrah has a universal nature, so it is used as a forum in efforts to solve contemporary problems. This great concept

⁵¹ Ahmad Suganda, "Teori Maqasid al-Syariah dalam Maksud Hukum Islam", *At-Tadbir*, Vol. 30 No. 1 (2020), 6

was first promoted by Jamaluddin Athiyah who has formulated the division of maqashid sharia fil usrah into seven parts which are contained in his book “Nahw Taf’il Maqashid al-Syariah” with the subtitle Maqashid Sharia fima yakhussu al-Usrah (al-ahl), including; First, regulate the relationship between men and women, Second, maintenance of human survival, Third, establishment of the *sakinah mawaddah wa rahmah* of family, Fourth, keeping *nasab* (lineage), Fifth, guarding religion in family life. Sixth, regulates the basic aspects of the family and Seventh, regulates from the economic side of the family.⁵²

The legal basis for granting mandatory wills of heirs of different religions concerned with Jamaluddin Athiya’s thoughts is the Supreme Court Decision Number 368.K/AG/1995. The reasons delivered by the judge for giving the part of the mandatory will to children who are non-Muslim (different religions) under the view of Maqasid Syariah fil usrah of Jamaluddin Al-Athiyya, are as follows:

In Jamaluddin Athiya’s thinking “Protection of family property (*tanzim al-janib al-malili al-usroh*)” and in the Supreme Court Decision Number 368.K/AG/1995 is the historical factor of the prohibition of giving inheritance to heirs of different religions/not Muslim (non-Muslim). One of these reasons is that there are several provisions that prevent or interrupt the granting of inheritance to heirs who are not Muslim (non-Muslim), in its history during the war between Muslims and non-Muslims. In order to protect the *aqidah* and property of Muslims from

⁵² Moch. Nurcholis, “Penyamaan Batas Usia Perkawinan Pria dan Wanita”, *Ahakim* Vol. 3 No. 1 (2019), 9

the rulers of the heirs of infidels who have the potential to be used as a tool to fight the Muslims themselves, the prohibition is enforced.

Jamaluddin Athiya's thoughts "Maintaining values in the family (hifdz al-tadayyun fi al-unsroh)"⁵³ while in the Supreme Court's decision, the choice of religion is part of human rights. The provision of mandatory wills of heirs of different religions is a real condition of the life of Indonesian. Indonesia consists of several tribes, religions, nations, and languages. The existence of different religions even within the family environment is commonplace and not a foreign thing in Indonesia. Children who are different religions and the result of fornication will also be distinguished in terms of inheritance, because the lineage of the father has been severed.

Jamaluddin Athiya's thoughts on "Maintaining the lineage (hifdz al-nasab)" in the Supreme Court Decision are namely the Legal theory regarding the legal principles and the preservation of legal principles The reasons for judges who are the legal basis and judges' considerations are the provisions of legal principles in legal theory in the legal system existing in Indonesia. One of the principles of inheritance law is the obstruction of an heir to obtain a share of the inheritance because of a different of religion (non-Muslim) with the heir.⁵⁴

⁵³ Jamaludin Athiya, *Nahwa Tafil Maqashid Syariah*, (Dar al-Fikr, Damascus, 1424 H/2003 CE), 110.

⁵⁴ Muhammad Rinaldi Arif, *Pemberian Wasiat Wajibah Terhadap Ahli Waris Beda Agama*, De Lega, Vol.02, No.02, July-December 2017. 356-357

It is also explained in the Fatwa of the Indonesian Ulema Council (MUI) Number: 11 of 2012 concerning the Position of Adultery Children and the Treatment of them. The MUI states that a child born due to fornication (zina) does not have a lineage, a marriage guardian, an inheritance and does not get a living from the man who caused the birth (the biological father). The MUI also emphasized and reminded that the government must protect children resulting from adultery and prevent them. The hadith that explains about the child resulting from adultery is that the inheritance relationship of the child resulting from adultery with his father (biological male child), which means "From 'Amr ibn Syu'aib from his father and grandfather that the Messenger of Allah said: Every man who commits adultery women, whether they are free or buddhas', then the child born out of wedlock does not inherit and is not inherited."⁵⁵

The opinion of Imam Ibn Nujaim in the book "al-bahr al-Raiq Syarh Kanz ad-Daqaqi" which means "Children resulting from adultery and li'an only get inheritance rights from the mother, because of the lineage of the father has been severed, so the clarity of lineage is only through from a mother's side, then she has the right of inheritance from the mother's side, a sister with fardh (only a certain part), as well as mothers and sisters who are of the same mother, she does not get a fardh (certain) share, not in any other way ".

⁵⁵ Muhammad bin 'Isa at-Turmudzi, al-Jami' al-Kabir/Sunan at-Turmudzi, Volume 3, Pg. 199, Beirut: Dar al-Gharb al-Islami, 1998.

From the hadith and opinion of Imam Ibn Nujaim, it can be concluded that a child born due to fornication does not get a lineage from his biological father because of the lineage from his father has been cut off, instead the child follows the lineage from the mother's side. So the child does not get an inheritance from his father's lineage, but the father is obliged to meet the needs of his child's life and give his property if he dies through a mandatory will.

In the Word of God also explain in the Qur'an. Al-An'am:164 which confirms that a person will not bear the sins of others, as well as a child resulting from adultery will not bear the sins of the person who commits adultery (adultery), which means "say (Muhammad), Should I seek God? besides Allah, but He is Lord of all things. For every sin a person commits, he himself is responsible. And no one will bear the burden of another's sins. Then to your Lord you will return, and He will tell you what you used to dispute about." In QS. AL-An'am:164 and QS. Al-Ahzab: 4 which explains that a child who is born in a state of adultery does not involve the sins of parents (father and mother) who commit adultery,

There is also a hadith that confirms the inheritance of a child born due to fornication and a son (his biological father) which involves the birth of the child. The hadith narrated "From 'Amr ibn ra from his father from his grandfather that the Messenger of Allah said: Everyone who commits adultery, whether a free woman or a slave,

then the child is the result of adultery, neither inherits nor bequeathed.”⁵⁶

Fatwa of the Indonesian Ulema Council (MUI) Number: 11 of 2012 concerning the Position of Adultery Children and the Treatment of them, which is further in accordance with the Supreme Court Jurisprudence No. 51/K/AG/1999. 46/PUU-VIII/2010 related to the relationship between the child and his biological father posted by Machica Mochtar. In this decision, a child due to fornication can lead to a civil relationship with his father if it can be proven by the DNA testing. The purpose of the Constitutional Court’s decision is actually good, because it provides opportunities for children born out of wedlock to get their rights. However, it must also be studied in Maqasid Syariah whether it is then in accordance with the fulfillment of the benefit.

The consideration of terminating the civil relationship of children born out of wedlock, not only to the mother but also to their biological father through a confession or a DNA testing, is that children born due to fornication are often discriminated against because they do not have a primary legal relationship with their biological father. So in this case, the Constitutional Court’s Decision No. 46/PUU-VIII/2010 is present as a form of legal protection for his rights as a child because he is innocent because he was born as a child due to

⁵⁶ Abu Dawud Sulaiman bin al-Asy’ats as-Sijistani, Sunan Abi Dawud, vol. 2, p. 280, Beirut: al-Maktabah al-’Ashriyyah, undated. See also, Fatwa of the Indonesian Ulema Council No. 11 of 2012, the Position of Children Resulted in Adultery and Their Perpetration, 2-6

fornication. Because, in a penetration process, there is a merger between the egg from the mother and the sperm from the father, so that both of them contribute to the birth of the child. So according to the decision, it is unfair if the civil relationship of a child born out of wedlock is only borne by the mother.⁵⁷

In Islam, it is clear in the hadith that children are born in a state of purity and there is no blemish on them.⁵⁸ However, there is a domino effect on the actions of the child's parents, namely the absence of kinship between the child and his biological father which has an impact on the child's ineligibility to become heirs. However, in the Constitutional Court's decision, the child who can prove himself as an heir with a DNA test has the right to get his right to inheritance with the same distribution as the legitimate child.⁵⁹

According to the Maqasid Syariah, Jamaluddin Al-Athiyya's opinion is related to the protection of offspring (biological), however, the child is not the one who made a mistake here. However, causing children born due to fornication as legal heirs is certainly very contrary to the provisions of Islamic law. Moreover, by giving an equal share with children from a legal marriage, the

⁵⁷ Dewi Karlina, "Tinjauan Maqasid Asy-Syariah terhadap Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010 tentang Status Anak Luar Nikah" Thesis, IAIN Sheikh Nurjati Cirebon, (2021), 2-3.

⁵⁸ Hadits

⁵⁹ Muhammad Ubayyu Rikza, "Mawasid Syariah Analysis of the Constitutional Court Decision Number 46/PUU-VIII/2010 and Its Implications for Islamic Family Law in Indonesia" Raha Religious Court, March 2021. <https://www.pa-raha.go.id/article-peng-Court/376-analysis-maqa-id-asy-syari-ah-terhadap-ujungan-mk-nomor-46-puu-viii-2010-dan-implication-of-Islamic-family-law-in-Indonesia>, accessed on 27 November 2021

goal is indeed very good, but not to the point of violating the applicable laws in Islam. Thus, the results of the Constitutional Court Decision No. 46/PUU-VIII/2010 cannot be said to provide benefits to the child, even though he wants to give the rights of the child born due to fornication with a civil relationship to the father and has the effect of making the child an heir, it does not meet the requirements of a legal heir in Islamic law.⁶⁰

However, when it comes to the MUI Fatwa No. 11 of 2012, children born due to fornication still do not get the right to be heirs but get inheritance rights. On the basis of the biological father's responsibility to the child, he is entitled to be supported and related to inheritance, he is entitled to receive it through a mandatory will. In terms of maintaining offspring (biologically) in the opinion of Jamaluddin Athiyya, the provision of a mandatory will as an answer to the fulfillment of the economic rights of children born due to fornication has been achieved. In this circumstance, the child does not become an heir and does not get the same share as a legitimate child but is entitled to inherit property through a mandatory will with a maximum note of one-third of the total inheritance.

Furthermore, the Constitutional Court's Decision No. 46/PUU-VIII/2010 is viewed from the protection of family assets in accordance with the opinion of Jamaluddin

⁶⁰ According to Dr. Mustafa Al-Khin in the book *Al-Fiqhul Manhaji*, one of the conditions for heirs is that the heir and heirs have kinship relations through legal marriage or by freeing slaves. Yazid Muttaqin, 2018, "Four Conditions and Three Pillars of Inheritance in Islam" NU Online, <https://islam.nu.or.id/warisan/four-saat-dan-tiga-rukun-waris-dalam-islam-3u7NC>, accessed on November 28, 2021.

Al-Athiyya in Maqasid Syariah in the family realm. The Family property can also be understood as property owned by the family. Therefore the property should be guarded by the family rather than given to people outside the family. Children as part of the family deserve a place in protecting their family property. However, The children born due to fornication who only have a civil relationship with the mother, they are only entitled to protect family property from the mother's side. Referring to the decision of the Constitutional Court, which paved the way for a biological father's civil relationship to his child, the child has the right to protect family property from the father's side. The Protection of family property by children born due to fornication can be done through the provision of a mandatory will. In addition to not violating Islamic law in terms of heir's requirements, the existence of a mandatory will ensure that the protection of family property remains within the scope of kinship, even though the child is a child born out of wedlock. So, according to the point of protection of family property of the opinion of Dr. Jamaluddin Al-Athiyya.

On the protection of lineage, it is clearly not fulfilled because of children born due to fornication are caused from adultery who only have a kinship relationship with their mother and not with their biological father. Amir Syarifudin states that the lineage to the mother is natural, but to the father it is a legal relationship so that it must be passed through a legal event, namely marriage. This is in accordance with the opinion of the majority of Shafiiyah, Hanafiyah, Malikiyah, and Hanabilah schools of

fiqh which firmly state that the basis for determining lineage comes from legal marriage. Meanwhile, a child born out of wedlock is a child born from an adulterous relationship, so the biological father's lineage cannot be linked to the child.⁶¹

At the next point in Maqasid Syariah, the realm of family, Jamaluddin Al-Athiyya's opinion is about comfort. What is meant by the existence of comfort is the creation of a *sakinah* family, of course through a legal marriage. However, apart from a legal marriage, the comfort is formed with care and a sense of responsibility in the family. This can be expressed as family functioning, where each individual functions according to his role to create a harmony in the family.⁶² In the Constitutional Court's decision, the enforcement of civil relations with biological fathers is expected to create peace and comfort by avoiding the turmoil of inheritance disputes for children out of wedlock.

The next point is the strengthening of relationships between family members and relationships between

⁶¹ There is also an opinion by Wahbah az-Zuhaili that the lineage to the father occurs due to three reasons, namely, legal marriage, *fasid* marriage, and *subhat* sexual relations. There are also those who argue that the *nasab* relationship to the father can be done with *istilhaq*, namely the recognition by the biological father to the child. This difference of opinion is a common thing in legal interpretation, but in this case the one that is most commonly used in everyday life is taken. Muhammad Alhaitami, "Analysis of the Maqasid Al-Syariah Concept in Consideration of the Indonesian Constitutional Court Decision No. 46/PUU-VIII/2010 and MUI Fatwa No. 11 of 2012 concerning the Status of Children Out of Wedlock", Thesis, Faculty of Sharia and Law, Ar-Raniry Aceh State Islamic University (2017), 4-8

⁶² Adi fahrudin, "Family Functioning: Concepts and Measurement Indicators in Research" Information, Vol. 17, No. 2, (2012), 77.

individuals to be points for the creation of benefit in the family realm. The existence of a civil relationship with the father through confession or requesting to be acknowledged with a DNA test in accordance with the Constitutional Court's Decision No. 46/PUU-VIII/2010 is expected to strengthen the relationship between the child and his biological father. Indeed, the family must be built on a strong bond between the members on it (*mitsaqan ghalizhan*), but it must be based on Islamic law. So the good way, is to give rights to the child born due to fornication, while still taking into account the applicable Islamic law.⁶³ The last one is about religious education. In this case, it is not fulfilled because of the child is a non-Muslim who was born from an illegitimate relationship between a biological father who is Muslim and his mother. However, it may happen if the child converts and asks the father to be taught about Islam.

Based on the explanation above, it is clear that the Constitutional Court's Decision No. 46/PUU-VIII/2010 regarding the acknowledgment of a child born due to fornication through a DNA test, has fulfilled the element of *Maqasid Syariah* in the realm of the family from *Jamaluddin Al-Athiyya's* view. He argues about the good for the child as a victim of the adulterous behavior of his parents. However, it is again emphasized that a good goal without being accompanied by a path that is in accordance with Islamic law cannot be said to be perfect for achieving a benefit.

⁶³ Realize, "Religion in Family Life according to the Philosophical Perspective of Islamic Law", *Misykat*, Vol. 03, No. 01, (2018), 50

As a result, that by using the *Maqashid Shariah fil Usrah* Perspective, we understand that a child does not bear the sins of others, as well as a child resulting from adultery does not bear the sins of adulterers (parents) either Muslim or non-Muslim. The child resulting from adultery still has to get the same treatment as other legitimate children, namely the right to live; eligible for an education, careness of parents, and others. Due to Islam emphasizes being fair to children, not discriminating or not discriminating between children. One another, including not discriminating against children resulting from adultery.⁶⁴

D. Conclusion

The legality of inheritance rights for non- due to Muslim children fornication in Indonesia is based on the Civil Code, the Islamic Law, and the Customary Law. The application of three inheritance law regimes in Indonesia causes a choice of law that provides legal uncertainty on inheritance issues. Regarding the inheritance of different religions, there is no problem found in the Civil Code. Non-Muslim children due to fornication are entitled to obtain the inheritance from their biological father based on the recognition which is stipulated on Article 281 of the Civil Code. Moreover, if there is no acknowledgment provided then the DNA Test Evidence is needed in accordance with the Constitutional Court Decision No. 46/PUU-VIII/2010. In contrast to the *Mawaris Fiqh* which

⁶⁴ LISNA WATI, Analysis of MUI Fatwa No. 11 of 2012 concerning the Position of Children Resulted in Adultery and Treatment of Them, Thesis, 2016, 70-71.

is mentioned in the Compilation of Islamic Law (Kompilasi Hukum Islam, KHI), it is clear that non-Muslim children born due to fornication and the father do not inherit each other according to the Qur'an and Hadith. The the contradicted two legal systems in Indonesia then have been solved by the Supreme Court Jurisprudence Number 51.K/AG/1999, and the MUI Fatwa No. 11 of 2012 which stipulates that the rights of non-Muslim children born due to fornication through a mandatory will. The temporary solution is still in the jurisprudence and the fatwa which of course do not completely bind the community. Hence, if the judge does not use them as a legal basis, they are are not wrong. This circumstance, triggers the endless plurality of laws.

In the *Maqasid Syariah fil-Usrah* view of Jamaluddin Al-Athiyya, the providing a mandatory will which is stated in the Supreme Court Jurisprudence No. 51.K/AG/1999 and MUI Fatwa No. 11 of 2012 are reviewed in 7 areas, namely the protection of offspring, protection of lineage, protection of relationships between individuals, protection of family assets, protection of comfort, protection of relationships between family members, and protection of religion. Those seven points or some of them are in accordance with the protection of the benefit of the people. Therefore, the codification and the clarity of the law certainty on the various mandatory will in Indonesia is required.

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