

Constitutionalizing Islamic Law in Indonesia: Sharia Courts & the Legitimate Child Clause

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Abstract

Although Indonesia is not an Islamic state and does not adopt a sharia repugnancy clause in its Constitution, since 2003, the Constitutional Court has addressed issues of Islamic law within the national legal order. Its landmark ruling on the legitimate child clause illustrates tensions between constitutional guarantees of rights and fiqh doctrines. Sunni orthodoxy defines legitimate children as those born from a valid marriage, a provision adopted into Indonesian marriage law. In practice, this excluded children from unregistered Islamic marriages, let alone those conceived outside marriage but born after their parents wed. The Court expanded legitimacy to include biological evidence, such as DNA, requiring sharia judges to consider lineage beyond marriage registration. Using a socio-legal approach, this article combines doctrinal analysis and interviews with judges to examine compliance and internal struggles. Findings show partial compliance: cautious application in *bāṭil* or *fāsid* marriages, divided rulings on children born out of wedlock, and a gradual shift toward balancing fiqh authority with constitutional rights.

Abstrak

Meskipun Indonesia bukan negara Islam dan tidak menganut klausul kepatuhan hukum dengan syariah dalam Konstitusinya, sejak 2003 Mahkamah Konstitusi telah menangani isu-isu hukum Islam dalam tata hukum nasional. Putusan penting mengenai klausul anak sah menunjukkan ketegangan antara jaminan konstitusional atas hak-hak warga negara dan doktrin fikih. Menurut ortodoksi Sunni, anak sah adalah anak yang lahir dari perkawinan yang sah, suatu ketentuan yang diadopsi dalam hukum perkawinan Indonesia. Dalam praktiknya, hal ini mengecualikan anak dari perkawinan Islam yang tidak tercatat, apalagi mereka yang dikandung di luar nikah tetapi lahir setelah orang tuanya menikah. Mahkamah Konstitusi memperluas definisi anak sah dengan memasukkan bukti biologis, seperti DNA, sehingga hakim Pengadilan Agama harus mempertimbangkan nasab selain bukti perkawinan tercatat. Artikel ini menggunakan pendekatan sosio-legal untuk menilai kepatuhan serta pergulatan internal para hakim dalam mendamaikan norma fiqh dengan mandat konstitusi. Temuan menunjukkan kepatuhan parsial: penerapan hati-hati dalam kasus perkawinan *bāṭil* atau *fāsid*, putusan yang terbelah terkait anak luar nikah, serta pergeseran gradual menuju keseimbangan antara otoritas fiqh dan hak konstitusional.

Keywords:

Islamic law; Constitutional court; Legitimate child clause; Sharia courts; Socio-legal approach

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Introduction

Over time, several Muslim countries have rearranged or replaced their constitutions by making Islam the official state religion. In addition, the constitutions of these Muslim countries, namely Afghanistan (Art. 3), Egypt (Art. 2), Iran (Art. 2-4), Pakistan (Art. 227), Qatar (Art. 1), Yemen (Art. 3), and Saudi Arabia (Basic Law), also include articles related to sharia as a source of national law and the implication that there should be no national law that contradicts sharia (Lombardi, 2006). The constitutionalization of Islamic law sometimes creates problems with the status of other religions in state life. Although the Constitution includes a clause protecting other minority groups, this provision is often interpreted by state authorities in a manner that prioritizes sharia and consideration of public order. As a result, discriminatory treatment continues against people of other religions because the formulation of Islamic law used to treat them is classical fiqh, which is transplanted into the state legal system without considering its historicity (Emon, 2008). Another problem is the different definitions of sharia that are understood and observed by the community and the state, as there are various schools of Islamic jurisprudence (fiqh) in Islam (Alfitri, 2015). This condition then raises questions about the compliance of state laws with sharia and how to determine compliance (Lombardi, 1998).

As a country with the largest Muslim population globally, Indonesia makes Pancasila the basis of the state. Instead of an Islamic country, the founding fathers have made Indonesia the nation-state. There are efforts to constitutionalize Islam as the state religion and Sharia as a law that Muslims must obey, both when drafting the Constitution in preparation for independence and constitutional amendments in the reform era. This attempt is to no avail (Hosen, 2005). As a result, the Indonesian Constitution does not refer to Islam or sharia as effective laws or a source of legislation. Indonesia then adopts Pancasila as the state ideology. The Pancasila principle delineates the state's recognition of the religions' formal role in the nation's life (Alfitri, 2018).

Since the adoption of the Pancasila, the existence of Islamic law in the national legal system has become a bitter debate. Debate occurs when there is a proposal to pass a law that affects Muslims in Indonesia, or the subject matter of the rules is regulated by Islamic law, for example, the rejection of the 1973 Marriage Bill (Katz & Katz, 1975), the Counter Legal Draft to KHI in 2004 (Alfitri, 2015), the draft bill of Muslim Marriage Law in 2010 (Van Huis & Wirastri, 2012), the Elimination of Domestic Violence Bill (Alfitri, 2020), and lately, the Bill on the Elimination of Sexual Violence (Jones & Walden, 2019). So far, the debate about what constitutes Islamic law in Indonesia has been public without a final and binding conclusion. After the Indonesian Constitutional Court was established in 2003, the question of the law's conformity with Sharia can, in principle, be resolved through judicial review (Butt, 2010).

However, constituting Islamic law through judicial reviews raises vital questions on the status of Constitutional Court decisions that implicate Islamic law in Indonesia. Some academics argue that Islamic state law or the Constitutional Court's decision can be considered the official interpretation of Islamic law in Indonesia by using the *siyāsah shar'iyah* doctrine, which includes *maṣlaḥah-cum-maqāsid* (Alfitri, 2016; Wicaksono et al., 2021). Unfortunately, this view only conceptualizes the Constitutional Court's decision to interpret the state version of Islamic law adopted in Indonesia. This conclusion still has one question: whether the Constitutional Court's decision can be effective among Muslims in Indonesia. In practice,

several Constitutional Court decisions on Islamic law are still ignored by their addressees (Butt & Murharjanti, 2022). One is the decision on the status of legitimate children in cases of child-origin requests before Religious Courts (aka Sharia Courts) in Indonesia.

Many studies have examined the implementation of Constitutional Court Decision No. 46/PUU-VIII/2010 in cases determining children's parentage in Religious Courts, focusing on judges' legal considerations and the protection of children's rights, which show that judges still prioritize formal evidence, such as marriage certificates, and rarely use DNA testing. When the Religious Court recognizes the biological kinship between a father and a child, the civil rights granted remain very limited and are not enforced (Rohmawati & Siddik, 2022; Safriadi et al., 2023). Maskuri highlights the use of the *maṣlahah* approach in cases of unregistered polygamy, although interpretations of the status of biological children remain diverse (Maskuri, 2022). Rosidah emphasizes the distinction between children resulting from unregistered marriages and children resulting from adultery; thus, the application of the Constitutional Court Decision is not yet uniform (Rosidah, 2017). Wahyudi identifies two main patterns in judges' legal reasoning: doctrinal-deductive and benefit-based (Wahyudi, 2017) and emphasizes the need for technical guidelines from the Supreme Court (Wahyudi, 2024). In general, the literature confirms that judges' compliance with Constitutional Court decisions remains variable and inconsistent.

While previous research has highlighted variations in judges' approaches—between doctrinal and beneficial—these studies have not explicitly examined judges' adherence to the Constitutional Court's ruling as a constitutional issue. The tension between classical fiqh norms and constitutional norms, as well as the potential for constitutionalization of Islamic law through Religious Court practices, has not been a primary focus. This article offers a new perspective by positioning Constitutional Court Decision No. 46/PUU-VIII/2010 as an instrument for the constitutionalization of Islamic law in Indonesia. The analysis focuses not only on the technical aspects of the judges' considerations but also on the extent to which Religious Court judges comply with or deviate from the Constitutional Court's ruling, thus providing an original contribution to understanding the dynamics of the relationship between fiqh, national law, and the Constitution in the issue of legitimate children.

This article begins with a discussion of the doctrine of legitimate children in Islamic jurisprudence and its development in Muslim countries, to demonstrate that the doctrine of *al-walad li al-firāsh* still dominates Islamic legal discourse regarding child legitimacy, even though technological advances such as DNA testing have begun to encourage adjustments to legal norms with the recognition of the status of biological children and biological fathers. The article then proceeds to an analysis of 14 rulings by Religious Courts in Indonesia on applications to determine children's parentage, focusing on patterns of evidence use, legal considerations, and the rulings. This analysis is followed by a discussion of the results of in-depth interviews with judges who have handled these cases, highlighting judges' compliance with Constitutional Court Decision No. 46/PUU-VIII/2010. Finally, the article outlines reflections and theoretical implications of the research findings, particularly in the context of the constitutionalization of Islamic law in Indonesia, thus revealing both tensions and opportunities for integration between classical fiqh, national law, and constitutional principles.

Method

This research uses a combination of normative-doctrinal research methods and socio-legal approaches. The normative-doctrinal method is used to apply legal norms in Law No. 1 of 1974 concerning Marriage, the Compilation of Islamic Law (KHI), and Constitutional Court Decision No. 46/PUU-VIII/2010 into specific facts of a legal issue (parentage requests) by means of the IRAC legal analysis structure (Damiarto & Alfitri, 2025). Meanwhile, the socio-legal approach is used to understand how these legal norms are implemented in Religious Court practice through analysis of decisions and interviews with judges. The socio-legal approach emphasizes integrating normative and empirical perspectives to explain the interaction between legal texts and social reality (Alfitri, 2022). The primary legal materials for this study consisted of 14 Religious Court decisions from various regions in Indonesia, selected purposively, as well as in-depth interviews with judges who have handled cases involving the determination of children's parentage. Secondary legal material was obtained from classical fiqh literature, the *maqāṣid al-sharī'ah* (the principles of Islamic law), and reputable international journal articles discussing issues of lineage, child legitimacy, and the constitutionalization of Islamic law.

The analysis was conducted using a thematic qualitative method, identifying, classifying, and interpreting key themes from the decision and interview data. This method is used in empirical legal studies to uncover recurring patterns and meanings of narratives contained in court decisions (Polat, 2025). In this study, classification was based on the parents' marital status, the judges' attitudes toward the Constitutional Court Decision, and the type of evidence used. Contextual analysis is also carried out to understand the judge's reasons for choosing a particular approach, taking into account social, economic, and normative factors. In line with the theoretical discussion, this research distinguishes these decisions using a textual-normative approach (which adheres to classical fiqh and formal doctrine) and a *maṣlaḥah*-responsive approach (which emphasizes the protection of children's rights and the principle of *maqāṣid al-sharī'ah*).

Doctrinal Foundations of Legitimate Child Status in Islamic Jurisprudence

The concept of legitimate children in Islamic law is rooted in the *nasab* doctrine, established since the beginning of the sharia. *Nasab* is seen as one of the main goals of the Sharia (*maqāṣid al-sharī'ah*), namely the protection of descendants (*ḥifẓ al-nasl*). In classical *fiqh*, the legitimacy of children is determined primarily by the existence of a legal marriage, as confirmed in the hadith of the Prophet: "*al-walad li al-firāsh wa li al-āhir al-ḥajar*", which means that children are attributed to the owner of the bed (legal husband), while for adulterers there is only a stone, meaning a punishment (*al-Mausū'ah al-Fiqhiyyan al-Kuwaitiyah*, 1983). This doctrine asserts that lineage can only be established through legal marriage, while children born of adultery have no lineage relationship with their biological father. However, Ibn Taymiyyah and Ibn Qayyim opened up the space for *ijtihād* by stating that if there is no legal husband, the child can be attributed to the biological father (Fadel, 2022).

In addition to marriage, Islamic jurisprudence recognizes the concept of *istilhāq* (recognition of lineage). Linguistically, *istilhāq* means a claim to lineage, while in terms of its meaning, it is a man's recognition of a child as his descendant. Islamic jurists agree that

accurate lineage recognition is obligatory, while false recognition is forbidden and constitutes a major sin (*al-Mausū'ah al-Fiqhiyyan al-Kuwaitiyah*, 1983). Islamic jurisprudence schools stipulate certain conditions for the validity of *istilhāq*, including: the child's birth within a reasonable timeframe, the lineage being unknown, and the party being recognized not rejecting the recognition. Thus, *istilhāq* is an essential instrument in maintaining the continuity of lineage, although it remains limited by the norms of honesty and the validity of Islamic law.

Classical fiqh also distinguishes between two causes of lineage: marriage and *istilād* (birth from an enslaved person). In a valid marriage, the child's lineage is automatically recognized. In a *fāsid* (broken) marriage, lineage is still recognized if actual sexual intercourse occurs, as Islamic jurisprudence is careful in establishing lineage to protect the child. Even in cases of *waṭ' bi shubhah* (sexual intercourse due to mistake), the majority of jurists still establish lineage, unlike zina (adultery), which, by consensus, is never a basis for establishing lineage (*al-Mausū'ah al-Fiqhiyyan al-Kuwaitiyah*, 1983). In *istilād*, a slave woman who gives birth to a child from her master can establish lineage if the master acknowledges it, although the Hanafī school requires explicit recognition that the child is his.

In contemporary developments, this classical doctrine faces challenges from advances in science, particularly DNA technology. Studies show that classical fiqh prioritizes social certainty over biological accuracy, so that children born from legitimate marriages are always assumed to be the children of the mother's husband, even when biological evidence suggests otherwise (Fadel, 2022; Shabana, 2014). However, since the 20th century, several Muslim countries have begun to adapt family law to modern medical findings. For example, Tunisia and Egypt have considered DNA evidence in matters of lineage, particularly to establish the financial responsibility of the biological father. However, they do not always grant full recognition to lineage. Conversely, Morocco, which adheres to Mālikī jurisprudence, continues to reject DNA as a basis for establishing lineage, so that illegitimate children have no legal relationship with their biological father (Dupret et al., 2023; Engelcke, 2019).

This debate highlights the tension between the doctrine of *al-walad li al-firāsh*, which emphasizes social legitimacy through legitimate marriage, and modern demands for recognition of biological relationships through DNA technology. On the one hand, classical fiqh maintains social stability and family honor; on the other hand, the *maqāṣid* approach emphasizes protecting children's rights as the primary objective of Islamic law. Thus, the doctrine of legitimate children in Islamic law is currently in negotiation among classical norms, demands for social justice, and modern technological developments, which opens up opportunities for reinterpretation of Islamic law in Muslim countries, including Indonesia (Fadel, 2022; Serrano-Ruano, 2022).

In the Indonesian context, before Constitutional Court Decision No. 46/PUU-VIII/2010, legal norms regarding the status of legitimate children rested entirely on the validity of the marriage. Children born of a legal marriage were considered legitimate and of complete lineage, as stipulated in Article 42 of Law No. 1 of 1974 and affirmed in Article 99 of the Compilation of Islamic Law (KHI). Even in unregistered but religiously valid marriages, children were still considered legitimate children under Islamic law, despite facing administrative obstacles such as registering a birth certificate (Nurlaelawati & Huis, 2019). Conversely, children born from a marriage that is void by law or from adultery do not receive lineage recognition. However, in practice, Sharia judges sometimes apply the principle of

maṣlahah to grant limited recognition, such as the right to maintenance or social protection (Nurlaelawati & Huis, 2019).

Constitutional Court Decision No. 46/PUU-VIII/2010 in the Machica Mochtar case marked a significant turning point. This ruling opened the way for illegitimate children to have a civil relationship with their biological father if it could be medically proven, particularly through DNA testing. However, Religious Courts still limited this recognition: illegitimate children did not receive inheritance rights or guardianship due to the lack of legal lineage, so the legally recognized relationship more closely resembled that of an adopted child than that of a child with complete lineage (Nurlaelawati & Huis, 2019). In practice, Religious Courts also used mechanisms of child recognition and legitimation to reduce social stigma, but they did not completely change lineage status. Thus, the classical doctrine of *al-walad li al-firāsh*, which emphasizes the legitimacy of children through legal marriage, now faces a constitutional norm that is more responsive to the protection of children's rights. This change places Indonesia in a unique position: on the one hand, it maintains classical fiqh doctrine, while on the other, it opens space for the recognition of biological relationships through Constitutional Court decisions. This tension between fiqh norms, positive law, and constitutional principles provides an essential background for understanding the practice of religious courts in determining children's parentage.

Sharia Court Decisions on Child Parentage in Indonesia: A Case Analysis Overview of the Cases

This study analyzes 14 Religious Court decisions from various regions of Indonesia regarding child filiation claims. These fourteen decisions were purposively selected to represent a variety of marital contexts and child statuses, ranging from unregistered but religiously valid marriages, to invalid marriages (defective conditions such as the '*iddah*' period, invalid guardianship, or unauthorized polygamy), to children born out of wedlock followed by an official marriage. Thus, this collection of decisions provides a comprehensive overview of how Religious Courts interpret and apply Islamic and positive legal norms in child filiation cases.

Generally, the petition is filed by the child's biological mother and/or father to obtain legal recognition of the child's status, particularly regarding birth registration and the legitimacy of the relationship with the father. In cases involving children from legitimate marriages (religious marriages later officially registered), the courts are generally consistent in determining full filiation under the doctrine of *al-walad li al-firāsh*. However, in cases of invalid marriages, judges face a dilemma between state norms requiring registration and religious norms deeming the marriage invalid. Decisions in this category vary: some judges continue to recognize the child's lineage to the father, while others grant only limited recognition, typically limited to civil ties (support, education, and health).

Meanwhile, in cases of illegitimate children whose parents subsequently marry officially, the pattern of decisions is divided. Most Judges reject the recognition of lineage to the father, in accordance with Islamic jurisprudence orthodoxy, but still recognize the child as a biological child with certain civil rights, such as the inclusion of the father's name on the birth certificate, the obligation to provide support, and the issuance of a mandatory will.

However, a small number of judges have begun to adopt the minority opinion in fiqh, namely that the recognition of the biological father of a child born out of wedlock makes him a legitimate child, combined with an approach to protecting fundamental rights for children guaranteed by the state. This difference demonstrates the dynamics in Religious Court practices. Some judges maintain the boundaries of classical fiqh, while others align with Constitutional Court Decision No. 46/PUU VIII/2010 and the principle of the child's best interests.

Thus, these fourteen decisions not only reflect the application of classical doctrine in a modern context but also demonstrate judges' varying approaches in balancing fiqh norms, national positive law, and constitutional requirements.

Children Born into Religious Marriages

An analysis of the Banjarbaru Religious Court's decision No. 123/Pdt.P/2020/PA.Bjb shows how the judge assessed the legitimacy of a child born from a secret marriage that was later officially registered. The case showed that the applicants married under Islamic law on June 20, 2016, but the marriage had not yet been registered at the Office of Religious Affairs. Their child was born on April 3, 2017, before the marriage was officially registered on August 3, 2018. The petition was filed to have the child recognized as legitimate for administrative purposes, such as the issuance of a birth certificate. In their deliberations, the panel of judges emphasized that even though the original marriage was not registered, it remains valid under Islamic law. Registration improves the marital status from a state legal perspective. The judge referred to Article 42 of the Marriage Law and Article 99 of the Compilation of Islamic Law (KHI), which state that a legitimate child is one born of or resulting from a legal marriage. The verdict granted the petition, declared the child legitimate, and ordered the birth to be registered at the Banjarbaru City Population and Civil Registry Office. This ruling affirms that children's rights remain protected even if their parents' marriage was previously unregistered.

A similar case was seen in the Depok Religious Court Decision No. 358/Pdt.P/2020/PA.Dpk, where the applicants entered into an Islamic marriage on May 13, 2018, but registered it only at the Office of Religious Affairs (KUA) on November 11, 2020. Their child was born on October 10, 2020, before the official registration was completed. A request for the determination of the child's parentage was submitted to issue a birth certificate. The panel of judges deemed the unregistered marriage valid under Islamic law and, upon registration, also valid under state law, as stipulated in Article 2 of Law No. 1 of 1974. Based on Article 42 of the Marriage Law and Article 99 of KHI, the judges declared the child entitled to be recognized as legitimate. Written evidence, including a marriage certificate, a birth certificate, and witness testimony, supported the applicants' case. The court granted the petition, declared the child legitimate, and imposed court costs of Rp 96,000. This decision provides legal certainty regarding the child's status and simplifies the administrative process of birth registration.

These two decisions demonstrate the consistency of religious courts in upholding the doctrine that children born of legal marriage, even if initially unregistered, still receive full recognition of their lineage. The judges used a normative textual approach, referring to the Marriage Law and KHI, while also considering the principle of child protection. This pattern

confirms that in cases of children born of legal marriage, Religious Courts are relatively uniform in granting full recognition of the child's status, thus avoiding social stigma or administrative obstacles.

Children Born into Unregistered but Fasid Marriages

Several cases in this study demonstrate how religious courts dealt with cases of children born from unregistered marriages, which were subsequently deemed invalid by judges. These invalid marriages arose due to violations of the requirements for a valid marriage, such as the *'iddah* period, technical polyandry (a woman who is only religiously divorced but remains legally married), polygamy without court permission, or a marriage that had previously been declared invalid. Nevertheless, judges attempted to balance fiqh norms with the principles of child protection and Constitutional Court Decision No. 46/PUU VIII/2010.

In Mempawah Religious Court Decision No. 0071/Pdt.P/2013/PA.Mpw, the petitioners filed a petition to have their child recognized as legitimate. Their unregistered marriage took place on May 14, 2011. However, it was deemed invalid because it took place while Petitioner II was still in the *'iddah* period and Petitioner I was still in a marriage without permission for polygamy. The judge ruled that the marriage was invalid under state law. However, the child's lineage could still be established under Wahbah al-Zuhayli's view that a non-marital marriage can confer lineage. The judge also referred to Constitutional Court Decision No. 46/PUU VIII/2010 to confirm the child's civil relationship with the biological father. The ruling granted the petition, declared the child the applicant's biological child, and imposed court costs of Rp 321,000.

A different case arose in Sangatta Religious Court Decision No. 279/Pdt.P/2021/PA.Sgta, where the applicants had a secret marriage on July 1, 2017, while Petitioner II was still married to her previous husband. From this marriage, two children were born: A and B. The judge found the secret marriage invalid for violating Article 9 of the Marriage Law. A's lineage was solely to her mother because the pregnancy occurred before the legal marriage contract, while B's lineage was also solely to her mother, even though she was born after the marriage was registered. The judge rejected the child's application for recognition as the father's legitimate child, but upheld the biological father's obligation to provide child support based on Constitutional Court Decision No. 46/PUU VIII/2010. The ruling rejected the application, determined that the child was solely related to the mother, and ordered the birth certificate to be registered with the biological father to provide child support.

Meanwhile, Penajam Religious Court Decision No. 199/Pdt.P/2019/PA.Pnj addressed a case in which a secret marriage on February 11, 2011, had been declared invalid by a previous ruling. The child, born on December 28, 2011, was only related to the mother. However, the judge still referred to Constitutional Court Decision No. 46/PUU VIII/2010 to establish a limited civil relationship with the biological father, including the obligation to provide child support and the provision of assets through a will of up to one-third. The ruling partially granted the application, establishing the child as the result of an extramarital relationship, with a whole civil relationship to the mother and a limited civil relationship to the biological father.

In Sangatta Religious Court Decision No. 315/Pdt.P/2023/PA.Sgta, the applicant entered into a secret marriage on August 8, 2021, with a guardian who was not legally valid

under Islamic law. This marriage was deemed invalid due to the guardian's incompetence. Their daughter was born on June 22, 2022. The judge emphasized that, despite the marriage being invalid, the child still had the right to receive recognition of her father's lineage under Article 7 of Law No. 23 of 2002 concerning Child Protection. Documentary evidence and witnesses supported the child's claim of parentage. The judgment granted the petition, declared the child legitimate to the applicant, and ordered the birth registration with all civil rights. Court costs were charged at Rp 580,000.

These four decisions demonstrate a consistent pattern: even though the secret marriage was deemed invalid, the religious courts still sought to protect the child's rights by granting from civil recognition to the biological father to complete lineage (*nasab*). Judges use a combination of Islamic jurisprudence (which permits lineage from a *fāsīd* religious marriage) and positive law (the Marriage Law, KHI, and Constitutional Court Decision No. 46/PUU VIII/2010).

Children Born Out of Wedlock & Subsequent Parental Marriage

This category includes cases of children born out of wedlock (adultery), whose parents then remarry after the child's birth and file a petition with the religious court for recognition as a legitimate or at least biological child. Analysis of the rulings reveals divided results: some reject full recognition of lineage but still grant recognition of the civil relationship with the biological father based on the Constitutional Court Decision, but others grant complete lineage (*nasab*).

In Yogyakarta Religious Court Decision No. 0008/Pdt.P/2013/PA.Yk, the applicant filed a petition for the legitimization of a daughter born on July 25, 2007, before the marriage was officially registered at the Office of Religious Affairs (KUA). The previous unregistered marriage was deemed invalid because the marriage guardian was not valid under state law. The judge emphasized that children born before an official marriage are illegitimate under Article 42 of the Marriage Law. However, in the Constitutional Court Decision, the judge ruled that even though the child cannot be ascribed to the father, the biological father remains obligated to provide for the child's living and educational needs. The ruling rejected the child's application for legitimacy but required the biological father to provide child support until adulthood.

A similar case arose in the Magetan Religious Court Decision No. 0078/Pdt.P/2014/PA.Mgt, where the child was born on November 4, 1996, out of wedlock. The parents were only legally married on March 27, 1999. The judge deemed the child an illegitimate under Article 43 of the Marriage Law, which only provides for a civil relationship with the mother. However, based on the Constitutional Court Decision, the judge recognized the civil relationship with the biological father, including the obligation to provide child support. The ruling granted the petition, establishing the child as the biological child of both applicants, and imposing legal costs. The judge also emphasized that inheritance rights are not recognized, but can be granted through a mandatory will.

In South Jakarta, Religious Court Decision No. 0156/Pdt.P/2013/PA.JS, a daughter was born on March 2, 2013, before her parents were officially married on March 31, 2013. A petition was filed to have the child's birth certificate include the biological father's name. The

judge emphasized that illegitimate children only have a civil relationship with the mother. Still, following the Constitutional Court Decision, children also have a civil relationship with the biological father if a blood relationship is proven. The judge referred to MUI Fatwa No. 11 of 2012, which requires the biological father to provide maintenance and to make a will. The ruling partially granted the petition, establishing the child as the biological child of both applicants, with the biological father obligated to provide maintenance and to execute a will leaving up to one-third of the inheritance to the child.

In the Sleman Religious Court Decision No. 408/Pdt.G/2006/PA.Smn, a university student, filed a petition for recognition of a son born on November 13, 2004, from a relationship with a female student before their official marriage in 2005. The child was previously recognized only as his mother's child. The trial evidence showed that the relationship between the applicant and respondent resulted in the child before marriage, and the respondent did not object to the recognition. The judge considered Article 53 of KHI, which permits a woman who becomes pregnant outside of marriage to marry the man who impregnated her, as well as the principle of benefit to protect the child. The judge also referred to Law No. 23 of 2002 concerning Child Protection. The verdict granted the petition, declared the child to be the legitimate child of the applicant and the respondent, and imposed court costs of Rp 226,000. This decision affirmed that even if a child was born outside of marriage, recognition can be granted for legal certainty and child protection.

Meanwhile, the Sangatta Religious Court Decision No. 279/Pdt.P/2021/PA.Sgta presents a more complex case. Petitioners I and II entered into a secret marriage on July 1, 2017, while Petitioner II was still married to her previous husband, who ended their marriage in 2018. From this relationship, two children were born: A (December 11, 2017) and B (July 5, 2020). The judge found the secret marriage invalid for violating Article 9 of the Marriage Law. A was related only to her mother because the pregnancy occurred before the legal marriage contract. At the same time, B was also related only to her mother, even though she was born after the marriage was registered. The judge rejected the child's request to be recognized as the father's legitimate child, but still affirmed the biological father's obligation to provide maintenance based on the Constitutional Court Decision. The ruling stipulated that the child is only related to the mother, ordered the registration of a birth certificate, and required the biological father to fulfill the child's living needs until adulthood.

In Tanjung Selor Religious Court Decision No. 223/Pdt.P/2023/PA.Tse, the applicants filed a petition for recognition of their daughter, who was born on March 13, 2020, before their official marriage on October 19, 2023. The child's birth certificate only listed the mother's name because the parents were not legally married at the time of the birth. The judge ruled that the child was born out of wedlock and therefore only has a lineage to her mother under Islamic law. However, referring to the Constitutional Court Decision, the judge emphasized that a child can still have a civil relationship with their biological father if there is a proven blood relationship. The paternity acknowledgment is supported by witnesses and the method of *al-qiyāfa* (physical resemblance). The verdict granted the petition, establishing the child as the legitimate child of both applicants, and imposing court costs of Rp 145,000. This decision affirms the principle of child protection and the recognition of biological fatherhood even if the child is born out of wedlock.

In Surabaya Religious Court Decision No. 4575/Pdt.P/2021/PA.Sby, the applicants filed a petition for the legitimation of their daughter, who was born on February 26, 2020, before their official marriage on August 7, 2020. The child was only recorded as the mother's child on the birth certificate. The judge ruled that the child was born out of wedlock, but the biological relationship with the father could be recognized based on the Constitutional Court Decision. Authentic documentary evidence and witness testimony supported this claim. The judge emphasized that the child has the right to legal protection and a valid birth certificate, and that it would be unfair to exempt the biological father from responsibility. The ruling granted the petition, declared the child to be the biological child of both applicants, ordered registration at the Surabaya Civil Registration Office, and imposed court costs of Rp 345,000.

Meanwhile, Tarakan Religious Court Decision No. 0053/Pdt.P/2018/PA.Trk demonstrates a similar pattern. An applicant requested recognition of a child born before an official marriage to improve the child's legal status. The judge ruled that even though a child was born out of wedlock, the blood relationship with the father remains and can be proven. The Constitutional Court Decision served as the basis for expanding the civil relationship between illegitimate children and biological fathers. The judge emphasized that children still have civil rights, including the right to be officially registered as the child of both parents. The ruling granted the petition, establishing the child as the applicant's biological child and requiring the birth certificate to be registered in the biological father's name.

In Surabaya Religious Court Decision No. 88/Pdt.P/2022/PA.Sby, the applicants, requested that a child born before marriage be recognized as the biological child of both parents. The child was previously only listed as the mother's child on the birth certificate. The judge concluded that even though the child was born outside of marriage, the blood relationship with the father remains and can be proven through a confession and other evidence presented. The Constitutional Court Decision served as the basis for expanding the civil relationship between illegitimate children and biological fathers. The judge emphasized the importance of legal protection and certainty of the child's status, including the right to a family name and civil rights. The ruling granted the petition, designated the child as the biological child, ordered the birth certificate to be registered with the father's name, and imposed legal costs.

An analysis of eight decisions in the categories of *Children Born Out of Wedlock and Subsequent Parental Marriage* shows a divided pattern. First, the case: the child was born out of an extramarital relationship (adultery), then the parents married after the child's birth and filed a petition with the religious court for recognition of the child's status.

Second, the judge's considerations: a) The judge emphasized that according to classical Islamic law, a child of adultery is not only related to the mother but also the father; b) Since Constitutional Court Decision No. 46/PUU VIII/2010, the judge recognizes a civil relationship with the biological father if blood relationship is proven; c) The considerations also refer to Law No. 23 of 2002 concerning Child Protection and MUI Fatwa No. 11 of 2012, which require the biological father to provide child support and provide a mandatory will.

Third, the verdict: a) granted the petition by establishing the child as legitimate or the biological child; b) The judge orders the registration of a birth certificate listing the biological father's name and confirms the obligation to provide child support and protection; c) Full inheritance rights are not granted, but can be accommodated through a mandatory will mechanism. A summary of these fourteen cases can be seen in the following table:

Table 1. Comparative and Synthetic Table of 14 Court Decisions on Child Legitimacy

Category	N	Example Case Numbers	Parents' Marriage Status	Child's Status According to Judges	Dominant Legal Basis	Decision Pattern
Children Born into Religious Marriages: un-registered marriages later legalized	2	123/Pdt.P/2020 /PA.Bjb; 358/Pdt.P/2020 /PA.Dpk	Religious marriage is valid under Islam, and later officially registered	Child recognized as fully legitimate (nasab to both parents)	Art. 42 Law No. 1/1974; Art. 99 KHI	Consistently recognize the child as legitimate once the marriage is registered; focus on administrative certainty.
Children Born into Fasid Marriages: un-registered marriages deemed invalid due to <i>iddah</i> violation, polyandry, invalid guardian, un-registered polygamy	4	0071/Pdt.P/2013/PA.Mpw; 279/Pdt.P/2021 /PA.Sgta; 199/Pdt.P/2019 /PA.Pnj; 315/Pdt.P/2023 /PA.Sgta	Religious marriage is deemed <i>fasid</i>	Mixed: some recognize nasab (0071, 315), others only recognize civil ties (279, 199)	Art. 14 KHI; Art. 43 Law No. 1/1974; Constitutional Court Decision No. 46/2010	Pattern varies: some judges progressive (nasab recognized despite fasid), others conservative (nasab only to mother, father obliged to provide support)
Children Born Out of Wedlock and Sub-sequent Parental Marriage:	8	0008/Pdt.P/2013/PA.Yk; 0078/Pdt.P/2014/PA.Mgt; 0156/Pdt.P/2013/PA.JS; 408/Pdt.G/2006 /PA.Smn; 223/Pdt.P/2023 /PA.Tse; 4575/Pdt.P/2021/PA.Sby; 0053/Pdt.P/2018/PA.Trk; 88/Pdt.P/2022/PA.Sby	Child born before official marriage; parents marry later	Child recognized in nasab to father vs. recognized as a biological child with civil rights (support, birth certificate, obligatory bequest)	Art. 43 Law No. 1/1974; Constitutional Court Decision No. 46/2010; MUI Fatwa 2012; Child Protection Law	Pattern divided: most judges acknowledge biological ties for civil rights and child protection, but a few judges start adopting minority fiqh opinion

Overall, this pattern of decisions demonstrates a transformation in religious court practice: from a textual approach that recognizes only the child's lineage through the mother to a responsive approach that recognizes the civil relationship with the biological father for the sake of child protection. Thus, religious courts serve as a negotiating arena between Islamic

jurisprudence, national positive law, and constitutional principles, while simultaneously avoiding discrimination against children born out of wedlock.

Judges' Perspectives on Constitutional Court Ruling No. 46/PUU-VIII/2010

To understand how Constitutional Court Decision No. 46/PUU VIII/2010 is implemented in religious court practice, this study purposively selected several Religious Court judges in East Kalimantan (Samarinda, Tenggarong, Sangatta, Bontang, Tanjung Selor/Tarakan, Penajam) and one judge in Padang from 2022 to 2023. This selection was based on the consideration that these regions have a diverse range of cases involving the determination of the parentage of illegitimate children, including cases involving unregistered marriages, *fāsid* marriages, and adulterous relationships followed by official marriages. In-depth interviews were conducted within the Religious Courts and on the UIN Sultan Aji Muhammad Idris Samarinda campus (several judges interviewed were alumni of the master's program in family law or were currently completing their studies), allowing for an exploration of judges' perspectives not only in their judicial capacity but also in their academic and social reflections.

This purposive approach aims to capture the diverse perspectives of judges who daily encounter requests to determine children's parentage. Thus, the following narrative not only illustrates the application of positive law but also demonstrates how judges negotiate the tensions between fiqh norms, national law, and humanitarian values.

Constitutional Court Decisions as Normative References

The majority of judges recognized Constitutional Court Decisions No. 46/2010 as the positive law that recognizes the civil relationship between illegitimate children and their biological fathers. However, they emphasized that the application of these decisions in Religious Courts cannot be separated from the framework of Islamic law. One judge asserted: "The Constitutional Court Decision looks at the humanitarian aspect, but we consider the marriage contract" (Judge Taufikurrahman, Samarinda Religious Court, March 15, 2023). This quote reflects how judges view the Constitutional Court Decisions as instruments for child protection, while still prioritizing the marriage contract as the primary foundation for legitimizing lineage.

Tension between Islamic Law & Positive Law

Interviews revealed a normative tension between the spirit of child protection in positive law and the limitations of Islamic law on lineage, inheritance, and guardianship. Some judges limit the civil recognition of illegitimate children to aspects of support, education, and health. Judge Riduansyah of the Bontang Religious Court stated, "If it is rejected, it would be a shame for the child not to receive any of his or her original rights." (March 16, 2023). This statement illustrates a dilemma: on the one hand, judges want to maintain the integrity of Islamic law, while on the other, they do not like the child to lose their fundamental rights.

Judicial Practice: Disparities & Contextualization

Interviews revealed disparities between decisions. Some judges adopted the *maqāṣid al-sharī'ah* approach, emphasizing substantive justice, while others adhered to textual interpretations. Judge Ismail from the Sangatta Religious Court asserted: “I do not want to judge everyone with the same law everywhere; we also need to conduct *ijtihad*” (November 13, 2022). This quote emphasizes the scope for *ijtihad*, which judges use to adapt their decisions to the case’s context, the evidence, and the community’s social conditions.

Evidence: Between Limitations & Humanity

Judges recognized that DNA testing was substantial evidence, but the community’s economic constraints made it unrealistic. Judge Ismail emphasized: “Eight million for a DNA test, and it is not available in the area—that is burdensome and impossible to provide” (Sangatta Religious Court, November 13, 2023). Therefore, judges allowed for alternative evidence such as birth certificates and witness testimony. This approach demonstrated judges’ social sensitivity to the conditions faced by underprivileged communities and their commitment to preventing children from becoming victims of economic hardship. Unfortunately, judges handling paternity claims in cases of violation of the *‘iddah* (waiting period) for divorce or technical polyandry do not maximize the accuracy of DNA testing to determine paternity. Their assumptions, based primarily on speculative Islamic jurisprudence that states the difficulty of establishing paternity in such marital situations, can be refuted by DNA test results that are up to 99 percent accurate. If cost is a barrier to using DNA evidence, Islamic jurisprudence has provided methods of recognition (*istilhāq*) and/or *qiyāfa* (physical resemblance) as alternatives that reduce the burden of proof.

Commitment to Children’s Interests

All judges emphasized that the primary objective of child origin petitions is to protect children’s rights. Judge Adriansyah of the Tenggara Religious Court stated: “I think it would be unfair to simply determine that the child only has civil rights with his mother” (August 26, 2023). This quote demonstrates the judges’ commitment to seeking justice while maintaining the boundaries of Sharia. Therefore, the Constitutional Court’s decision is seen as an opportunity to expand child protection without violating the Islamic jurisprudence principle of lineage.

Judges as Guardians of Values and Conscience

The interviews also emphasized that judges are not merely mouthpieces of the law, but also guardians of values and conscience. Judge Taufikurrahman emphasized: “Judges are not only responsible to humans, but also to God above” (Samarinda Religious Court, March 15, 2023). This statement demonstrates that every decision is viewed as a moral and spiritual responsibility, not merely a legal technicality. Judge Riduansyah added: “There are concerns that the ruling will be considered *ultra petita*... but for us, it is an additional ruling” (Bontang Religious Court, March 16, 2023). The thoughts demonstrate the judges’ caution in formulating their rulings to avoid public misunderstanding.

Based on this in-depth interviews, the judges' perspectives on Constitutional Court Decision No. 46/PUU-VIII/2010 can be classified into three main categories: (1) conservative, which rejects the establishment of lineage and recognizes only limited civil relations, namely maintenance, education, and health care; (2) progressive, which recognizes the child as a biological child entitled to comprehensive legal protection; and (3) compromising, which rejects lineage while affirming the biological father's obligation to provide maintenance and to allocate a mandatory bequest (*waṣīyyah wājibah*).

These three categories demonstrate that the Constitutional Court Decision has become a firm normative reference. Still, its implementation remains subject to negotiation within the framework of Islamic jurisprudence and the state laws. Judges act as mediators between Islamic legal orthodoxy and child protection principles, with a high degree of social sensitivity to societal conditions. Thus, judges' perspectives reflect religious judicial practices that are dialogical, contextual, and oriented toward substantive justice.

Theoretical Reflections: Constitutionalizing Islamic Law in Indonesia

Constitutional Court Decision No. 46/PUU VIII/2010, which arose from Machica's petition, became a crucial milestone in changing the norm of legitimate children in Indonesian marriage law. Before this decision, Article 43(1) of the Marriage Law emphasized that illegitimate children only had a civil relationship with their mother and her mother's family. With this interpretation, children born from unregistered marriages or extramarital relationships did not have legal access to their biological father. Machica challenged this provision because it was considered discriminatory against children born from legal marriages according to Islam, even if they were not administratively registered. The Constitutional Court then declared the article conditionally unconstitutional, by adding a clause that illegitimate children could have a civil relationship with their biological father if scientifically proven, for example, through a DNA test (Alfitri, 2022, 2015). This decision shifted the old definition of legitimate children in Indonesian marriage law, from being solely based on marriage registration to recognizing biological relationships as the basis for children's civil rights.

The significant implications of this ruling sparked immediate resistance from conservative Islamic circles, particularly the Indonesian Ulama Council (MUI), which issued a fatwa shortly after the Constitutional Court's ruling. The MUI considered the Constitutional Court's ruling to challenge the fundamental foundations of the dogma of legitimate children in Islamic law. In classical Islamic jurisprudence, the status of legitimate children is granted only to children born of legal marriage, while children of adultery are only related to the mother. The Constitutional Court's ruling, which opened the door to recognizing civil relations with biological fathers, was deemed to have exceeded the limits of this doctrine. Even though in the classical fiqh treasury, there is a minority opinion that connects illegitimate children with their biological father through the method of recognition.

The MUI fatwa subsequently reaffirmed the majority view of Islamic scholars that children of adultery are not related to the father. However, the biological father is still required to provide maintenance (Alfitri, 2022, 2015). This conservative response offered moral justification for Sharia judges who chose a normative textual approach in handling cases of illegitimate children. By referring to classical fiqh and the MUI fatwa, judges could limit the

application of the Constitutional Court's ruling to minimal civil aspects, such as maintenance and education, without recognizing full family ties. This explains why, in Religious Court practice, a variety of rulings have emerged. Some progressive judges recognize children as biological children or, even, legitimate, with broader protections, while others adhere to fiqh orthodoxy, rejecting lineage and granting only limited civil rights.

This Constitutional Court ruling can be understood as the constitutionalization of Islamic family law in Indonesia. This constitutionalization opens up space for reinterpretation of classical Islamic jurisprudence, particularly the doctrine of *al-walad li al-firāsh*. Tensions arise because Islamic jurisprudence rejects the lineage of children of adultery to the biological father, while the Constitutional Court emphasizes the child's constitutional right to identity and legal protection. Religious Court judges find themselves at the crossroads between Sharia integrity and constitutional obligations. An analysis of 14 rulings reveals a varied pattern: conservative, progressive, and compromising. Interviews with judges reinforce this finding: judges' views are not merely mouthpieces of the law, but actors negotiating the boundaries of Islamic jurisprudence with constitutional demands.

The expansion of the meaning of legitimate children through the Constitutional Court Decision can be read as a form of constitutional *ijtihad* grounded in the *maqāṣid al-sharī'ah*. Classical Islamic scholars emphasize five main objectives of sharia, including *ḥifẓ al-nasl*, or protection of descendants, where *maqāṣid* is the foundation of *ijtihad* with an orientation towards *maṣlaḥa*, or public welfare (al-Ghazālī, n.d; al-Shāṭibī, n.d). Some even place the *maṣlaḥa* above the texts in the realm of *mu'āmalāt*, thus legitimizing progressive judges' interpretation of the Constitutional Court Decision as child protection, even though it is contrary to the orthodoxy of Islamic jurisprudence (al-Tūfī, n.d). In the contemporary context, they emphasized that *maqāṣid* can serve as a basis for legitimizing Islamic family law reform, given its orientation towards substantive justice and social benefit (Kamali, 2020). This thinking on *maqāṣid* opens up space for the reinterpretation of Islamic family law within the modern state (Duderija, 2014). Thus, the Constitutional Court's decision is not the abolition of fiqh, but rather a reinterpretation aimed at protecting children and humanity.

From the perspective of *siyāsah shar'īyyah*, the Constitutional Court's decision can also be understood as part of the state's authority in managing the welfare of the people. *Siyāsah shar'īyyah* refers to the decisions of authorities aimed at realizing society's interests while adhering to the principles of sharia (Kassab, 2019). From the beginning, the concept of *siyāsah* was seen as inherently related to the goal of public welfare; however, when the practice of power deviates from the principle of justice, scholars distinguish between *siyāsah*, which is in accordance with sharia, and *siyāsah*, which is oppressive (Kassab, 2019). The history of the development of *siyāsah shar'īyyah* shows that, since the establishment of Medina society by the Prophet Muhammad, Islamic politics has consistently sought to integrate religious legitimacy and public interest. The thoughts of Ibn Taymiyyah and Ibn Qayyim al-Jawziyyah then emphasized the importance of *maṣlaḥah* as the basis for public policy within the *siyāsah* framework (Gebril, 2024). Thus, the Constitutional Court Decision can be understood as the application of the principle of *maṣlaḥah* in the context of a modern state: protecting children from legal discrimination while maintaining social stability. This is in line with the Constitutional Court's role as a negative legislator, correcting legal norms to comply with the constitution while providing political and legal legitimacy for child protection. With this

perspective, the Constitutional Court Decision does not go beyond classical fiqh doctrine. Still, it can be understood as part of the *siyāsah shar‘iyyah* tradition that emphasizes justice, accountability, and public welfare (Moten, 2017).

This theoretical reflection demonstrates that the constitutionalization of Islamic family law in Indonesia is dialogic, gradual, and multi-layered. It proceeds neither linearly nor revolutionarily, but rather through a dialectic between constitutional supremacy, fiqh Orthodoxy, and the social sensitivity of judges. The Constitutional Court acts as a negative legislator, correcting statutory norms to ensure they align with the 1945 Constitution, while Sharia judges negotiate these decisions with Islamic jurisprudence and state laws in judicial practice. The MUI’s conservative response provides moral justification for judges who choose a normative textual approach, while simultaneously opening space for progressive judges to utilize the *maqāṣid al-sharī‘ah* and *siyāsah shar‘iyyah* to legitimize child protection.

Thus, the Constitutional Court decision can be understood not simply as a positive legal intervention in Islamic jurisprudence, but as a form of constitutional *ijtihad* oriented toward the welfare of the people. It represents the state’s effort to balance Islamic jurisprudence with the demands of protecting children’s rights within a modern legal framework. The variations in Religious Courts’ decisions found in the 14 cases, as well as the views of the Sharia judges interviewed, indicate that this constitutionalization process is still being negotiated at the practical level. However, the main direction is clear: making child protection a primary principle while maintaining the integrity of Sharia within the constitutional framework.

Conclusion

Since 2003, the Constitutional Court has played a decisive role in defining the place of Islamic law within Indonesia’s constitutional order, despite the country not being formally Islamic and lacking a Sharia repugnancy clause in its Constitution. Its decisions have generated varied responses among Muslims, shaped by attachment to fiqh doctrines and the broader expectation that the state must guarantee citizens’ rights. The legitimate child clause exemplifies this tension most clearly. While Sunni orthodoxy defines legitimate children as those born from valid marriage—a provision adopted into Indonesian marriage law—its application has produced difficulties: children from unregistered Islamic marriages are excluded from legitimacy, whereas those conceived outside marriage but born after their parents wed can be recognized as legitimate. This provision was challenged for conflicting with constitutional protections of women and children, leading to a landmark ruling that expanded legitimacy to include biological evidence, such as DNA. Sharia judges are thus required to consider lineage beyond marriage registration, yet implementation remains complex due to adherence to the doctrine *al-walad li al-firāsh*. Interviews and case analysis show partial compliance: judges cautiously apply the new clause in cases of *bāṭil* or *fāsid* marriages, while decisions on children born out of wedlock remain divided. Even so, some rulings allowing a father’s name on birth certificates signal a gradual shift toward protecting children’s rights to identity and maintenance within the constraints of fiqh orthodoxy.

From a theoretical perspective, the Court’s decision can be understood as a form of constitutional *ijtihad*, drawing upon the principles of *maqāṣid al-sharī‘ah* to safeguard lineage and rights, and within the framework of *siyāsah shar‘iyyah* as an exercise of state authority to

secure public welfare. Both approaches highlight that the ruling is not a departure from Islamic law but a reinterpretation oriented toward justice and the protection of vulnerable groups. In this sense, the Court's intervention represents a legitimate adaptation of Islamic family law to contemporary constitutional demands.

This study demonstrates that sharia judges' responses to the Constitutional Court's decision reflect a dialogic process that balances fiqh orthodoxy, constitutional mandates, and social realities. The variation in judicial practice—conservative, progressive, and compromise—underscores that the constitutionalization of Islamic family law in Indonesia is neither linear nor uniform. It is negotiated through judicial discretion, informed by fiqh doctrines, but increasingly oriented toward constitutional rights. The gradual recognition of biological evidence in parentage cases, even if partial, represents an important step in aligning Islamic law with the constitutional guarantee of equality and protection for children.

In conclusion, while constituting Islamic law through judicial review will continue to face resistance from segments of Indonesian Muslims attached to fiqh doctrines, the Constitutional Court's interventions are gradually ushering in a practice of Islamic law that respects constitutional rights. This process is dialogical and layered, involving the Court, Sharia judges, and religious authorities, and reflects the broader trajectory of Islamic law in Indonesia: one that seeks to harmonize classical fiqh with the demands of justice, human rights, and the constitutional order.

References

- Al-Ṭūfī, N. al-Din. (n.d.). *Risālah fī al Maṣlahah*. Maktabat al-Khānjī.
- Alfitri. (2018). Religion and Constitutional Practices in Indonesia: How Far Should the State Intervene in the Administration of Islam? *Asian Journal of Comparative Law*, 13(2), 389–413. <https://doi.org/10.1017/asjcl.2018.20>
- Alfitri. (2022). *Islamic Law and Society in Indonesia: Corporate Zakat Norms and Practices in Islamic Banks* (1st ed.). Routledge; /z-wcorg/.
- Alfitri, A. (2015). Whose Authority? Contesting and Negotiating the Idea of a Legitimate Interpretation of Islamic Law in Indonesia. *Asian Journal of Comparative Law*, 10(2), 191–212. <https://doi.org/10.1017/asjcl.2016.1>
- Alfitri, A. (2016). Putusan Mahkamah Konstitusi sebagai Tafsiran Resmi Hukum Islam di Indonesia. *Jurnal Konstitusi*, 11(2), Article 2. <https://doi.org/10.31078/jk1125>
- Alfitri, A. (2020). Protecting Women from Domestic Violence: Islam, Family Law, and the State in Indonesia. *Studia Islamika*, 27(2), Article 2. <https://doi.org/10.36712/sdi.v27i2.9408>
- Al-Ghazālī. (n.d.). *Al-Mustasfā min 'Ilm al Uṣūl*. Dār al-Kutub al-Ilmiyah.
- Al-Mausū'ah al-Fiqhiyyah al-Kuwaitiyah* (Vol. 40). (1983). Wizārah al-Auqāf wa al-Syu'ūn al-Islamiyah.
- Al-Shāṭibī. (n.d.). *Al-Muwāfaqāt fī Uṣūl al-Sharī'ah*. Dār al-Fikr.
- Butt, S. (2010). Islam, the State and the Constitutional Court in Indonesia. *Washington International Law Journal*, 19(2), 279.
- Butt, S & Murharjanti, P. (2022). What constitutes compliance? Legislative responses to Constitutional Court decisions in Indonesia. *International Journal of Constitutional Law*, 20(1), 428–453. <https://doi.org/10.1093/icon/moac014>

- Damiarto, I & Alfitri, A. (2025). Pembagian Harta Waris Sebelum Meninggal: Kompatibilitas Prinsip Hukum Islam? *SAMI LAW REVIEW*, 1(1), 32–59. <https://doi.org/10.21093/samilrev.v1i1.10090>
- Duderija, A. (Ed.). (2014). *Maqasid al-Shari'a and Contemporary Reformist Muslim Thought*. Palgrave Macmillan. <https://doi.org/10.1057/9781137319418>
- Dupret, B et al., (2023). *Paternal Filiation in Muslim-Majority Environments: A Comparative Look at the Interpretive Practice of Positive Islamic Law in Indonesia, Egypt, and Morocco*. <https://doi.org/10.1163/22124810-20230002>
- Emon, A. M. (2008). The limits of constitutionalism in the Muslim world: History and identity in Islamic law. In S. Choudhry (Ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* (p. 0). Oxford University Press. <https://doi.org/10.1093/oso/9780199535415.003.0009>
- Engelcke, D. (2019). Establishing Filiation (Nasab) And The Placement Of Destitute Children Into New Families: What Role Does The State Play? *Journal of Law and Religion*, 34(3), 408–432. <https://doi.org/10.1017/jlr.2019.45>
- Fadel, M. (2022). “DNA Evidence and the Islamic Law of Paternity in Light of Maqāsid al-Sharī'a.” *The Muslim World*, 112(3), 311–323. <https://doi.org/10.1111/muwo.12441>
- Gebril, O. (2024). Recasting al-Siyāsa al-Shar'īyya in 1920s Egypt: *Journal of Islamic Law*, 5(1). <https://doi.org/10.53484/jil.v5.gebril>
- Hosen, N. (2005). Religion and the Indonesian Constitution: A Recent Debate. *Journal of Southeast Asian Studies*, 36(3), 419–440.
- Jones, D. B & Walden, M. (2019, February 26). *Conservative rejection of Indonesia's anti-sexual violence bill misplaced*. The Conversation. <https://doi.org/10.64628/AAN.r96qpvh4>
- Kamali, M. H. (2020). *Islamic Family Law Reform: Problems and Prospects* | *ICR Journal*. <https://icrjournal.org/index.php/icr/article/view/579>
- Kassab, A. (2019). *Al-Siyāsah al-Shar'īyyah: Mabādi' wa Maḥāḥim*. Dār al-kalimah.
- Katz, J. S & Katz, R. S. (1975). The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems. *The American Journal of Comparative Law*, 23(4), 653–681. <https://doi.org/10.2307/839240>
- Lombardi, C. (1998). Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State. *Articles*, 81, 81.
- Lombardi, C. (2006). *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari'a into Egyptian Constitutional Law*. Brill. <https://brill.com/view/title/8769>
- Maskuri, E. (2022). Pertimbangan Hakim Dalam Penetapan Asal-Usul Anak Hasil Perkawinan Poligami Di Bawah Tangan Perspektif Hukum Perkawinan Indonesia (Studi Penetapan Nomor 367/Pdt.P/2021/Pa.Amb). *Maqasid: Jurnal Studi Hukum Islam*, 11(2). <https://doi.org/10.30651/mqsd.v11i2.15272>
- Moten, A. R. (2017). Al-Siyasah al-Shar'iyah: Good Governance in Islam. In A. al-Ahsan & S. B. Young (Eds.), *Qur'anic Guidance for Good Governance: A Contemporary Perspective* (pp. 55–81). Springer International Publishing. https://doi.org/10.1007/978-3-319-57873-6_4
- Nurlaelawati, E & Huis, S. C. van. (2019). The Status of Children Born Out of Wedlock and Adopted Children In Indonesia: Interactions Between Islamic, Adat, and Human Rights Norms. *Journal of Law and Religion*, 34(3), 356–382. <https://doi.org/10.1017/jlr.2019.41>
- Polat, A. (2025). Thematic Analysis in Qualitative Research: Common Pitfalls and Practical Insights for Academic Writing. *International Journal of Qualitative Methods*, 24, 16094069251372835. <https://doi.org/10.1177/16094069251372835>

- Rohmawati, R & Siddik, S. (2022). Legal Protection for Children Out of Wedlock: Ensuring the Best Interests of Children Through Judge Decisions. *Al-'Adalah*, 19(2), 315–338. <https://doi.org/10.24042/adalah.v19i2.11761>
- Rosidah, Z. N. (2017). Implementasi Putusan Mahkamah Konstitusi No. 46/Puu-Viii/2010 Tentang Hak Perdata Anak Luar Kawin Di Pengadilan Negeri Dan Pengadilan Agama Surakarta. *Al-Ahkam: Jurnal Ilmu Syari'ah Dan Hukum*, 2(2), 175–187. <https://doi.org/10.22515/alahkam.v2i2.1067>
- Safriadi, M. D. et al. (2023). The status of a child born outside of the wedlock (An analysis of Indonesian laws). *International Journal of Law*, 9(1), 88–90.
- Serrano-Ruano, D. (2022). The Duration of Pregnancy in Contemporary Islamic Jurisprudence (fiqh) and Legislation: Tradition, Adaptation to Modern Medicine and (In)consequences. *The Muslim World*, 112(3), 367–384. <https://doi.org/10.1111/muwo.12442>
- Shabana, A. (2014). Islamic Law of Paternity Between Classical Legal Texts and Modern Contexts: From Physiognomy to Dna Analysis. *Journal of Islamic Studies*, 25(1), 1–32.
- Van Huis, S. & Wirastri, T. D. (2012). *Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws* (SSRN Scholarly Paper No. 2159574). <https://papers.ssrn.com/abstract=2159574>
- Wahyudi, M. I. (2017). Judges' Legal Reasoning on Child Protection: Analysis of Religious Courts' Decisions on the Case of Child Parentage. *Al-Jami'ah: Journal of Islamic Studies*, 55(1), Article 1. <https://doi.org/10.14421/ajis.2017.551.127-154>
- Wahyudi, M. I. (2024). *Enhancing Religious Court's Role in Child Rights Protection Through Child Acknowledgment*. <https://english.badilag.net/index.php/e-publication/701-enhancing-religious-court-s-role-in-child-rights-protection-through-child-acknowledgment>
- Wicaksono, D. A et al (2021). Pemetaan Pola Permohonan dan Putusan dalam Pengujian Undang-Undang dengan Substansi Hukum Islam. *Jurnal Konstitusi*, 18(3), 504–538. <https://doi.org/10.31078/jk1832>