

## PARADIGM OF CHANGES IN THE LEGAL RELATIONSHIP OF CHILDREN'S EDUCATION OUTSIDE THE INDONESIAN LEGAL SYSTEM

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### Abstract

Changes in the legal paradigm of the child marriage outside of marriage with his father in the decision of the Supreme Court (MK) number 46 / PUU-VIII / 2010 raises the pros and cons in the community. For the pro, it is considered appropriate and fulfills a sense of justice for children. Whereas those who contradicted the decision contradicted the Marriage Law which states that children born outside of marriage only have a civil relationship with their mother and family only. The Court considered the legal relationship between the child and his father not solely based on the existence of a marriage bond accompanied by proof of the existence of a blood relationship between the child and the man. The philosophical basis of the paradigm shift in the norms of civil relations between his father's children is a mandate as well as a gift from God Almighty, which we must always guard because in him the dignity, dignity and rights as human beings must be upheld and even extramarital children have the right legal protection. The legal effect of the civil relationship between children outside of marriage and their father to the civil law system in Indonesia is that the state provides guarantees for the position of extramarital children where before the 2010 MK Decision was only considered to have a civil relationship with his mother and family, but after the 2012 MK Decision was deemed to have civil relationship with his father and father's family.

**Keywords: Paradigm, Civil Relationships, Children Out of Marriage**

## INTRODUCTION

Changes in the legal paradigm of the child's civilization outside of marriage with his father in the decision of the Constitutional Court (MK) Number 46 / PUU-VIII / 2010 dated February 27, 2012 have caused pro and contra in the community. For the pro, it is considered appropriate and fulfills a sense of justice for children. Meanwhile, those who contradicted the decision contradicted the Marriage Law which states that children born outside of marriage only have a civil relationship with their mother and family. For this reason, after the Constitutional Court's decision on the marriage law, there was a demand that a revision be made so that it would not conflict with the Court's decision and could provide legal certainty for children born out of wedlock.

There are several forms of marriage including marriage in the Office of Religious Affairs (KUA) and church marriages, marriages with marriages, and marriages that are popular among the people, namely marriage and siri<sup>1</sup>. Unregistered marriages, known as various other terms, such as 'marriage under the hands', 'marriage siri' or 'siri marriage', are marriages based on religious rules (or customs) and are not recorded in the office of the marriage registrar (KUA for those who are Muslim, the Civil Registry Office for those who are non-Islamic).<sup>2</sup> Siri's marriage was not witnessed by many people and was not carried out in front of the marriage registrar so that it was not recorded in the registry office. Unmarried marriage is unlawful based on marital law, but is valid according to religion, but violates government regulations.<sup>3</sup> A further consequence of unrecorded marriage is that children born from the marriage are not entitled to make a living, education fees or inheritance from their father.<sup>4</sup> In addition, a person cannot take care of divorce, widow retirement, sue for parts and property of the husband or arrange children's birth certificates as legitimate children, demanding inheritance and the father and so on.<sup>5</sup>

From a legal standpoint, children born outside of marriage do not have a clear status in the marriage bond that can continue to the existence and status of the child to be born. This situation can lead to shame for him having to give birth to a child without a clear father. Besides that women who experience pregnancy outside of marriage feel ashamed because everyone seems to know about their actions that violate legal, religious or social norms. As a result of this violation can also arise the burden of guilt for resisting the norms that apply in the community as well as the experience and efforts to make an abortion.

The Court considered that the legal relationship between children and their father was not solely based on marital ties. It can also be based on evidence of a blood relationship between the child and the man. Thus the child, who is born must receive legal protection, so that the child is not guilty because his birth is beyond his will. In addition, the Court also assessed the significance of the obligation to record the marriage can be seen from two perspectives. First, from a state perspective, recording is required in the context of state functions to provide protection, promotion, enforcement and fulfillment of human rights to those concerned.<sup>6</sup>

The Constitutional Court's ruling does not only apply to parties who litigate but apply generally in Indonesia. So the decision that is recognized by the relationship between the child out of wedlock and the biological father will give birth to many claims to the religious court and the district court. Civil Law regulates all aspects of human life from birth and still in the womb until death.<sup>7</sup> But the new legal event will certainly have an impact on the old legal arrangements (*lex posterior derogat legi priori*) which changes the legal order that has long been implemented. In addition, the decision raises pros and cons in the community, for those who support assessing this decision is a progressive legal breakthrough in protecting children, while those who counter worry about this decision as an affirmation and legalization of siri marriage, adultery or infidelity.<sup>8</sup>

<sup>1</sup> Mahmud Yunus, *Hukum Perkawinan Dalam Islam*, Hidakarya Agung, Jakarta, 1990, hal. 176

<sup>2</sup> *Ibid.*, hal. 176

<sup>3</sup> Saidus Syahar, *Undang-undang Perkawinan dan masalah Pelaksanaannya Ditinjau dari segi Hukum Islam*, Penerbit Alumni, Bandung, 1981, hal. 22.

<sup>4</sup> *Dampak Perkawinan Bawah Tangan terhadap Anak*, <http://www.lbh-apik.or.id>, diunduh tanggal 18 Juli 2014

<sup>5</sup> Zulfa Djoko Basuki, *Hukum Perkawinan di Indonesia*, Fakultas Hukum Universitas Indonesia, Jakarta: 2010, hal. 9

<sup>6</sup> Anak di Luar Nikah Kini Absah Berayah <http://www.viva.co.id/indepth/fokus/289212-anak-di-luar-nikah-kini-dapat-akta-ayah> di unduh tanggal 18 Juli 2014

<sup>7</sup> A. Siti Soetami, *Pengantar Tata Hukum Indonesia*. PT Refika Aditama. Bandung, 2007, hal. 21

<sup>8</sup> *Ibid.*, hal. 21

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## METHODS

The research method used in answering problems that arise in this dissertation uses several approaches known in research, namely the law approach (statute approach), case approach (case approach), historical approach (history approach), comparative approach (comparative approach) and conceptual approach.<sup>11</sup> This study uses several approaches, where with these approaches the compiler will get information from various aspects regarding the implementation of the Constitutional Court Decision Number 46 / PUU-VIII / 2010. The research approach used is the statute approach, the case approach ( case approach), and a comparative approach. The research approach used in this study is a normative juridical approach, empirical juridical, case study approach and interview approach.

The type of data used in this study is primary data and secondary data. Primary data was obtained by researchers through interviews with the Indonesian Ulema Council, Islamic jurists, judges who applied / decided on child cases outside of marriage with competent qualitative research patterns in this study which were conducted online and personally face to face (face to face). Secondary data is obtained by collecting references related to objects or research material that are based on primary, secondary and tertiary legal materials:

1. Primary legal material, in this study is used is the Basic Law of the Unitary Republic of Indonesia, Criminal Laws, Compilation of Islamic Law, Law No.39 of 1999 concerning Human Rights, Law Number 1 of 1974 concerning Marriage, Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power of Law Number 23 Year 2002 concerning Child Protection, Law Number 4 of 1979 concerning Child Welfare, Law Number 11 Year 2012 concerning Judicial System Child Criminal Procedure, Law Number Decision of the Constitutional Court Number 46 / PUU-VIII / 2010, Fatwa of Indonesian Ulema Council Number: 11 of 2012 Concerning the Position of Children Adultery Results and Treatment of It and 7 (seven) court decisions related to children outside marriage before and after the ruling of the Constitutional Court.
2. Secondary legal material, in the form of reading that is relevant to the material under study, in the form of books, scientific articles and research reports.
3. Tertiary legal material, namely legal material that provides an explanation of the topic raised or legal material that provides guidance in the form of an explanation of primary legal material and secondary legal materials such as legal dictionaries, encyclopedias, cumulative indexes and Indonesian language dictionaries<sup>12</sup>.

This library data consists of primary legal sources, secondary legal sources and tertiary legal sources:

1. Primary legal sources in the form of laws and regulations, court decisions, or other legal sources that have strong binding power.
2. Secondary legal sources means secondary data in the form of books, articles, scientific journals, newspapers, magazines, and others related to the topic being studied.
3. Tertiary legal sources are secondary data in the form of dictionaries, bibliographies and others which explain more concisely than a writing.<sup>13</sup>

Field research is intended to support secondary data by collecting, researching and selecting data such as judges' opinions, and recognized religious institutions in Indonesia such as the Indonesian Ulema Council (MUI), the Indonesian Church Fellowship (PGI), the Indonesian Bishops Conference

<sup>9</sup> A. Siti Soetami, *Pengantar Tata Hukum Indonesia*. PT Refika Aditama. Bandung, 2007, hal. 21

<sup>10</sup> *Ibid.*, hal. 21

<sup>11</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana, Jakarta, 2009, hlm.22

<sup>12</sup> Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Nortmatif, CV, Rajawali*, Jakarta 2006, hal. 15

<sup>13</sup> Amiruddin dan H. Zainal Asikin. *Pengantar Metode Penelitian Hukum*. PT. Raja Grafindo Persada, Jakarta: 2006, hal. 118

(KWI) and others. The opinion of the Indonesian Ulema Council was used in connection with the case of court decisions in chapter IV. Determination of sources is based on the level of accuracy (validity) of information sources, namely those who have a direct or indirect relationship in this study such as legal experts, especially civil law. Field research is intended to support secondary data, namely by collecting, researching and selecting research results based on the level of accuracy (validity) of information sources, that is for those who have a direct or indirect relationship in this study, such as judges, Chairmen of MUI, Chair of the Constitutional Court, advocate, notary, Child Protection Commission and DNA Expert.

The data analysis method used is descriptive analysis method which is a research procedure that produces descriptive analysis data, namely what is stated by the research objectives concerned in writing and verbally, and real behavior. The method of analyzing data obtained from library research, researchers at the first opportunity to read and summarize the Constitutional Court's ruling and court decisions related to out-of-wedlock children, were the focus of this study. After that the researcher conducted an inventory of related regulations, specifically in the Civil Code of Law Number 1 of 1974, Law Number 32 of 2002 concerning Child Protection. After that, the researcher made a comparison / comparison between the Constitutional Court's decision and the relevant legislation and also evaluated the court's decision regarding the case of the child outside of marriage.

In this study there are several assumptions, namely:

1. There is a paradigm shift in the norms of civil relations between children outside of marriage with the father in the decision of the Constitutional Court Number 46 / PUU-VIII / 2010 namely having a civil relationship with his father which can be proven based on science and technology and / or other evidence according to the law blood relations, including civil relations with his father's family, civil relations which previously stated that a child born outside of marriage only had a civil relationship with his mother and his mother's family.
2. The legal consequences of civil relations between children and their fathers on the civil law system in Indonesia result in Law Number 1 of 1974 concerning Marriage which is no longer in line with the Constitutional Court ruling Number 46 / PUU-VIII / 2010 for this purpose. The Marriage Law to be in accordance with the Court's decision. Another influence is by recognizing a child out of wedlock by his biological father, arising from a civil law with his biological father and family. Thus, after the process of acknowledging the extramarital child, the child out of wedlock is born as a result of the civil law between the child and his father as stipulated in Article 280 of the Civil Code ("KUHPer") which says recognition of children outside married, a civil relationship was born between the child and his father or mother.
3. Legal constraints in the recognition of children outside of marriage after the ruling of the Constitutional Court Number 46 / PUU-VIII / 2010 collided with Islamic law with the issuance of the MUI fatwa which refers to Islamic Shari'a which affirms that there is no offspring and inheritance between children outside mating even though the child of zina must be protected.

## RESULTS AND DISCUSSIONS

### RESULTS

1. The Philosophical Foundation changes the paradigm of the norms of civil relations between his father's sons after the enactment of the Constitutional Court ruling Paradigm is a collection of values that form a person's mindset as a point of departure so that it will shape a person's subjective image of reality so that it will ultimately determine how someone responds to that reality. Paradigm is a way of approaching the investigation of an object or starting point expressing views, formulating a theory, designing simple questions or reflections. Finally, the paradigm can be formulated as a whole system of beliefs, values and techniques used jointly by scientific groups.<sup>14</sup>

An identical paradigm as a form or model to explain a process of ideas clearly.<sup>15</sup>

Paradigm as a set of general theoretical assumptions and laws and application techniques that are shared jointly by members of a scientific community.<sup>16</sup> The science of truth constitution does not depend on scientific choices but has the criteria namely first, imprecise (the space for dissent about the extent to which they hold fast). Second, there is no agreement on how

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<sup>14</sup> George Ritzer, *Sosiologi Pengetahuan Berparadigma Ganda*, terj. Alimandan, cet. 5, Rajawali Press, Jakarta, 2004, hal. 5

<sup>15</sup> Longman, *Longman Dictionary Of American English*, cet. 3, Morton Word Processing Ltd., China, 2002, hal. 577

<sup>16</sup> Husain Heriyanto, *Paradigma Holistik Dialog Filsafat, Sains, dan Kehidupan Menurut Shadra dan Whitehead*, Teraju, Jakarta, 2003, hal. 28

scientists oppose each other especially when scientific differences occur in new science.<sup>17</sup>

The Constitutional Court's decision raises various problems, especially if viewed in the perspective of children's civil relations. The problem begins with a question of how the real paradigm changes in the civil relations of children outside of marriage are related to children's rights. The new paradigm will be the source of a new stream of thought, which will not only be competitive but also be able to emulate the old mainstream. If successful, the new paradigm will be dominant as the mainstream which marginalizes the old paradigm, even though it is possible that the old one will not just disappear from the arena.

The civil legal paradigm of children outside of marriage before the decision of the Constitutional Court (MK) Number 46 / PUU-VIII / 2010 is that children outside of marriage do not have civil relations with their father and only have civil relations with their mother after the MK decision. civilization with his mother but also has civil relations with his father.

The Mahakam Constitutional Decision Number 46 / PUU-VIII / 2010 occurred because of the clear and explicit human rights provisions in the 1945 Constitution of the Republic of Indonesia and spearheaded by the enactment of Law No. 30 of 1999 which included human rights provisions. Such changes are a form of paradigm that also influences and applies to legal instruments for child protection outside of marriage. The change as well as the paradigm has more or less influenced a number of conventional legal instruments and legal systems that regulate the civil law of children outside of marriage, so that not a little thought developed especially from human rights activists who questioned the gap in rules and protection of human rights in a number of conventional legal provisions , as in Law No. 1 of 1974 concerning Marriage.

Status of children out of wedlock in the West Civil Law system (KUHPerdata), Customary Law systems, and Islamic Law systems are included in a number of positive legal provisions such as Law No. 1 of 1974, is deemed to provide less legal protection, children out of wedlock as children born from relationships that are not bound by a legitimate marriage are not uncommon victims such as cases of disposal of babies, neglect of babies, and others. In fact, children, anyone and whatever their status has the right to live and continue their lives.

Every child is born in a holy state, has a father and mother even though legally there are among those relationships that are not based on legal marriage, but scientifically that can be accounted for the truth of the child can be proven as a biological child of the concerned. Children have rights that must be fulfilled by their parents. During this time the child outside of marriage only has a relationship with his mother and family so that as a result the child experiences inner stress in his association and his biological father as if apart from lawsuits to be responsible for his actions that have caused the child to be born into the world.

Problems with the legal status of children outside of marriage can be addressed legally through the Decision of the Constitutional Court No. 46 / PUU-VIII / 2010, February 13, 2012, that a child born outside of marriage has a civil relationship with his mother and his mother's family and with a man as his father which can be proven based on science and technology and / or other evidence according to the law has blood relations, including civil relations with his father's family.

The decision of the Constitutional Court granted the Material Test of Article 43 paragraph (1) of Law Number 1 Year 1974 so that the article must be read as: "Children born outside of marriage only have a civil relationship with their mother and family as well as a proven father based on science and / or other evidence according to the law has a blood relationship, including civil relations with his father's family ".<sup>18</sup> In accordance with the consideration of the Constitutional Justice Board that has been stated previously, the consideration is very logical and aims to realize the benefit of protection for children outside the marriage so that he gets life insurance and no longer gets a negative stigma in daily association because of the sins of his parents. The decision of the Constitutional Court refers to many human rights provisions and principles which have the core principles of justice, the principle of non-discrimination, and the principle of equality. The problem that arose as a result of the Constitutional Court ruling was the change in a number of conventional legal provisions including its legal systems.

Decision No. 46 / PUU-VIII / 2010 received a positive response from Komnas Perempuan stating that the Constitutional Court ruling was in line with the constitution and the Convention on the Elimination of All Forms of Discrimination Against Women. On the contrary,

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<sup>17</sup> Thomas Kuhn, *The Structure of Scientific Revolutions*, Ed. 2, University of Chicago Press, Chicago, 1996, hal. 331

<sup>18</sup> Uji materiil Pasal 43 ayat (1) Undang-Undang Nomor 1 tahun 1974 Tentang Perkawinan

many Islamic scholars have criticized the decision of the Constitutional Court, because it will result in the distribution of inheritance and violating statutory rules and have the right to receive a Birth Certificate. Likewise, the Indonesian Ulema Council (MUI) also expressed its disapproval through the fatwa No. 11 of 2012. This fatwa was made to answer people's questions about things that were not clear in the ruling of the Constitutional Court. MUI reminded, among other things, that the child of adultery does not have nasab relations, guardianship, inheritance, and nafaqah with the man who caused his birth. But the MUI also reminded the government to protect children from adultery and prevent neglect. The Constitutional Court Decision above will accommodate the status of a child who can be connected civilly with his biological father, whether the child is the result of a legal marriage relationship or the result of a relationship without marriage. On the one hand, the Constitutional Court's decision deserves appreciation. Because, for the sake of the child and realize the existence of shared responsibility between mother and father towards the child. So far there has been injustice by abandoning the fate of children, both from a juridical, psychological, and economic perspective. The Constitutional Court's decision, the Court only focused on protecting innocent children who had been stigmatized without their father. So that there is no protector and responsible for the child's growth and development naturally in the community.

2. The legal consequences of civil relations between children outside of marriage with their father against civil law in Indonesia

It must be admitted that not all children are born from legitimate marriages, there are even groups of children born as a result of adultery. These disadvantaged children whose legal position is related to their civil rights are of course very unprofitable, even though their presence in this world is due to the mistakes and sins of the people who raised them. Children who are called extramarital children are assumed to be relatively numerous in Indonesia and most of them come from people who are Muslims including children born from siri marriage. One of the most crucial problems in siri marriage is when the household that is carried out by the husband and wife has given birth to a child (child). The negative impact ends in the child. At least children are not given the proper treatment compared to children from official families.<sup>19</sup>

In Islamic Shari'a, the relationship between the child and his father and mother is not a problem, but when faced with state law, civil relations with his biological father are not recognized. Cyanak's suffering increased when his father and family did not recognize and were only recognized by his mother and family so that his life support facilities were cut off.<sup>20</sup> Especially if his mother had been abandoned or divorced by his father, all the rights of his mother and child were not obtained unless there was awareness from his father to carry out religious provisions. After the Constitutional Court Decision No 46 / PUU-VIII / 2010 As in the previous explanation, that a child born outside a legal marriage only has a civil relationship with his mother and his mother's family. This is in accordance with the provisions of Law No. 1 of 1974 Article 43 paragraph (1). However, this Article is interpreted differently after the Constitutional Court Decision No. 46 / PUU-VIII / 2010 issued on February 17, 2012, which is basically as follows: Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage (State Gazette Republic of Indonesia Year 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) which states, "Children born outside of marriage only have a civil relationship with their mother and family of their mother", contrary to the 1945 Constitution of the Republic of Indonesia as long as they are meant to eliminate relations civil with men that can be proven based on science and technology and / or other evidence according to law turns out to have a blood relationship as his father.<sup>21</sup>

The implications of the Court's ruling provide legal protection for children, especially children born outside of marriage in the matter of arranging birth certificates for these children, so children born outside of marriage will experience difficulties in arranging birth certificates because they do not have a "clear father". With the decision of the Constitutional Court, a child born outside of marriage will have no difficulty in obtaining a birth certificate if who becomes his biological father can be proven by science and technology and / or other evidence according to the law. Even though this decision is an attempt to protect children born out of wedlock, this can open up the act of adultery by considering that if the act results in being born from an extramarital relationship then they get a legal umbrella to recognize that children born are their

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<sup>19</sup> *Ibid*

<sup>20</sup> *Ibid*

<sup>21</sup> *Ibid*

children. These problems are increasingly becoming the subject of discussion after the MK decides that children born outside of marriage have a civil relationship with their father. The condition is that blood relations can be proven based on science and technology or other evidence according to the law. The decision supported by activists on child rights protection was opposed by some Islamic leaders. This decision has invited many reactions, especially from Muslim leaders, including the ulama of the Indonesian Ulema Council (MUI). The Chairman of the MUI, Ma'ruf Amin, saw that the Constitutional Court had made the position of the child as a result of zina (out of wedlock) as the same as a child born from a legitimate marriage relationship. So that the marriage institution becomes less relevant.<sup>22</sup>

The Constitutional Court's decision is of course for those who support assessing this decision as a progressive legal breakthrough in protecting children's rights, whether children are produced outside of marriage or children born outside of legal marriages. As for the counter parties, they are worried that this decision is an affirmation and legalization of the marriage of siri or adultery or promiscuity.

The result of the recognition of children outside of marriage is the birth of legal relations with those who admit it and the existence of very limited legal consequences with the families of those who admit it. The existence of a legal relationship between the child concerned with the father and mother who acknowledges it, brings further consequences such as:

1. It is necessary to request marriage permission from parents who admit as long as they are not yet adults<sup>23</sup>
2. There is an obligation for alimention from children to parents who admit it.<sup>24</sup>
3. There is a relationship of guardianship with the father or mother who acknowledges it, which happens for the sake of law.<sup>25</sup>
4. The inheritance rights of the father and mother who acknowledge, for inheritance from the child recognized by him.<sup>26</sup> In this article the legal relationship of extramarital children is very limited, only to those who admit it. In other words, if the siblings of the father who admit they died, the out-of-wedlock child cannot inherit the property from the father's father who acknowledges the child out of wedlock and vice versa.

Decision of the Constitutional Court has implications for the inheritance rights of children through the cancellation of Article 43 of the Marriage Law by giving inheritance rights to children out of wedlock as long as it is proven by the results of DNA examinations so that they can be applied to the District Court for non-Muslims and Religious Courts for Muslims but this does not change the provisions in Islamic teachings that out of wedlock children do not have an inheritance relationship with their father, but to provide legal protection to children, the biological father of the child is obliged to provide a living for his biological child and provide the inheritance through a will.

3. Application and legal constraints in the recognition of children outside of marriage after the decision of the Constitutional Court Number 46 / PUU-VIII / 2010

There are three important notes related to the Constitutional Court's decision which led to a polemic, namely: (1) Regarding the scope of the meaning of the word outside the marriage Where in the ruling it was stated that a child born outside of marriage has the first two meanings means a child born as a result of siri or under-marriage marriage and the second means a child born as a result of adultery. (2) About the scope of the meaning of blood relations. If the meaning of the word blood relations in this decision means nasab as in the context of Islamic law, then it is impossible for nasab to only be formed through proof based on science and technology. (3). Regarding the scope of the meaning of the word civil relations, in Islamic law, civil relations include four important aspects, namely 2N and 2W. Nasab, livelihood, guardian and inheritance. Islamic civil relations cannot be determined only through the latest technological knowledge such as DNA and blood tests, but must be through a marriage contract. With the existence of a legitimate marriage contract, a fascist marriage contract or through a process of subhat intercourse, even though the latter is very difficult for the current context it will be the responsibility of a father to provide a living, to have guardianship rights, and to have inheritance

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<sup>22</sup> H.M. Anshary, *Kedudukan Anak Dalam Perspektif Hukum Islam dan Hukum Nasional*, CV. Mandar Maju, Cetakan I, 2014, hal. 133

<sup>23</sup> Pasal 39 dan 47 KUH Perdata

<sup>24</sup> Pasal 328 KUH Perdata

<sup>25</sup> Pasal 909 KUH Perdata

<sup>26</sup> Pasal 870 KUH Perdata

rights determined. Therefore, the Constitutional Court's ruling which states that children born outside of marriage have a civil relationship with their mothers and their families and with men as fathers that can be proven based on knowledge and technology and other evidence according to the law that has blood relations, including relationships civil with his father's family does not automatically apply as long as there is no marriage contract that preceded it. Decisions stipulated in case No. 0156 / Pdt.P / 2013 / PA.JS is a fair decision in accordance with the laws and regulations and most importantly it is not contrary to Islamic teachings. In the decision of the Religion Court, it was stipulated that provide civil relations to children as a result of extramarital relations and provide a mandatory will for a maximum of 1/3 part of the child out of wedlock. In other words the child is not given his inheritance rights in accordance with the fatwa of the MUI issued on the 18th of the last Rabul 1433H to coincide on March 10, 2012 M Number 11 of 2012 concerning the Position of the Child's Adultery and Treatment of It. What mentions the obligatory testament is the policy of ulil amri (ruler) which requires men to cause the birth of adultery children to give their children the property of adultery after death.

Furthermore, in the decision of the District Court 126 / PDT.P / 2014 / PN.JKT.TIM Decision, marriage is not yet registered to the civil registry office so that the child born is a child out of wedlock. The petition submitted is based on the status of the child so that it is legitimate from the marriage result, besides the Decision of the Constitutional Court of the Republic of Indonesia No.46 / PUU-VIII / 2010, dated February 17, 2012, which is based on the petition for testing the constitutionality of Article 2 paragraph (2) of Law No. .1 of 1974 concerning Marriage which states, Each marriage is recorded according to the applicable laws and regulations ", and Article 43 paragraph (1) of Act No.1 of 1974 which states, " Outside children born outside of marriage only have a relationship civil with his mother and his mother's family. In Protestant Christianity it does not give an interpretation of the position of children out of wedlock, but giving a rule about adultery is a very big sin. As with the rules contained in the religious view of the child out of wedlock above, marriage that is illegal or not in accordance with the procedures of the applicable law will have an impact on the offspring.<sup>27</sup>

Religion Court Decision Number 0177 / Pdt.P / 2014 / PA.Jbg is an Islamic marriage / siri marriage conducted by the Petitioner in accordance with Islamic Shari'ah, only because it has not yet been registered with the District Sub-District Religious Affairs Office, according to the provisions of the Law- Law Number 1 of 1974 concerning Marriage. Civil relations due to the ratification of out-of-wedlock children do not automatically (especially in the case of marriage) do not result in the person being automatically entitled to become the marriage guardian of the daughter born outside the marriage, this is very different from the legal status of marriage before the occurrence pregnancy that is not supervised by an authorized official (siri marriage) which is only legal according to each religion and then passed by the Court, so that the child born includes a legal child who has a relationship with his biological father, and in the Birth Certificate of a child born from marriage legalized by this Religious Court is not an extramarital child recognized by his biological father, but is written by the biological child from the marriage of his parents.

According to the Chairman of the Indonesian Ulema Council (MUI) H.M. Amidhan, the Constitutional Court's decision strengthened the civil relationship between father and child and mother. According to Amidhan, the Constitutional Court's decision did not (legalize adultery), but only confirmed that there was a civil relationship with his father and mother. Do not let the child become a natural child (born out of wedlock) because he was not recognized by his father, because that was confirmed by the MK. Children out of wedlock and children from siri marriage can get recognition from the Constitutional Court Decision.

In the Decision of the Religious Courts Number 0071 / Pdt.P / 2013 / PA.Mpw, it is known that marriage is carried out in a siri and carried out in a period of illegitimate marriage, this means that the child born is a child out of wedlock. It should be a concern for the guardian and the head who will marry the applicants. From the results of the illegitimate siri marriage, the applicant II gave birth to a child, which was subsequently submitted by applicants I and II to the Religious Courts. For the decision Number 0071 / Pdt.P / 2013 / PA.Mpw based on the decision of the Constitutional Court Number 46 / PUU-VIII / 2010 dated February 13, 2012 concerning the status of children out of wedlock which stipulates that article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage does not have binding legal force insofar as it is

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<sup>27</sup> Eddo Febriansyah, *Tinjauan Yuridis Putusan Mahkamah Konstitusi Nomor 46/Puu-Viii/2010 Tentang Kedudukan Anak Diluar Nikah Yang Diakui Dalam Pembagian Warisan*, Unnes Law Journal, ULJ 4 (1) (2015), hal. 10

interpreted to eliminate civil relations with men which can be proven based on science and technology and / or other evidence according to the law it turns out that it has a blood relationship as his father and because it has been proven that the child is a child from the Petitioners, the child has a legal relationship with the Petitioners. The 4 (four) decisions of the judges above are in line with the appeal of the National Commission on Violence Against Women requesting that judicial judges use the Constitutional Court's decision to decide cases relating to children's rights to civil relations with their biological fathers. Komnas Perempuan also asked the government to socialize the decision of the cross-sectoral Constitutional Court because it had very broad implications.<sup>28</sup> The civil relationship of a child out of wedlock with his biological father raises reciprocal obligations in terms of provision, guardianship, right to use names, and inherit.<sup>29</sup>

One of the new changes in the laws and regulations in Indonesia in connection with the decision of the Constitutional Court, is that the regulation found in Law No.12 of 2011 concerning the Establishment of Legislation Regulations, in the provision that "In the case of an Act allegedly contradicting with the 1945 Constitution of the Republic of Indonesia, the test was carried out by the Constitutional Court "(Article 9 paragraph (1). The consequences of the Constitutional Court Decision are substantial and fundamental changes not only in the laws and regulations on marriage, but also in the order of social life, considering that most of the Indonesian people are religious people who view and judge children outside of marriage as illegitimate children.

The decision of the Constitutional Court, which clearly has good news for the unmarried marriages who have been difficult to obtain a deed which requires the inclusion of the father's name for their child. Not a few of them have to give up their children as adultery children or children outside of marriage because Civil Registry refuses to include. With the decision of the Constitutional Court, the rejection is now baseless. Never mind that there are witnesses in the siri marriage, for the adulterers only, if the biological father is responsible, his name must be included as a consequence of the ruling of the Constitutional Court. Although for adulterers, the evidence is more difficult because it only relies on DNA tests. What has been decided by the Constitutional Court is a constitution and all rules are locked by the ruling. If humans still consider that only marriage is what God wants, then there is no choice but to make the family a religious base.

There are 5 (five) Legal Constraints in the Application of the Position of Children Outside of Marriage After the Decision of the Constitutional Court Number 46 / PUU-VIII / 2010 namely:

1. Application rejected by judge

Implementation of Ratification of Children Ratification of children born from marriages that are not listed is through the Application for Determination to the District Court or to the Religious Courts that cannot always be granted. In conditions or the existence of certain legal facts the request cannot be granted by the Court. Even though a marriage is known by the public at large and then lives together as a husband and wife deserve. There is a basis for consideration of the application of child ratification submitted by the applicant to the Court can be rejected by the judge on the basis of consideration that the child's ratification request was rejected because the siri marriage carried out by the Petitioners was conducted in an improper manner, namely using an illegitimate guardian, so the marriage the siri is declared fascic.

Legal action can be taken by the applicants through the appeal level by submitting new evidence in the form of DNA test results as evidence of blood relations between the second applicant as Judicial Review Article 43 Paragraph 1 of Law Number 1 of 1974 concerning Marriage, namely "children born outside of marriage have a civil relationship with his mother and his mother's family and a man as his father which can be proven based on science and technology and / or other evidence according to the law has a blood relationship including a civil relationship with his father's family.

2. Rejection of Father's Confession

If there is no proof of marriage certificate, a husband can deny that the child born is his child. In Article 44 (UUP) it is stated that a husband can deny the legitimacy of the child born to his

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<sup>28</sup> Pro Kontra Status Anak Luar Kawin Putusan Mahkamah Konstitusi tentang Undang-Undang Perkawinan diapresiasi dan dikecam. Bisa berimplikasi pada nasab, waris, dan perwalian, di unduh dari <http://www.hukumonline.com/> tanggal 25 Juni 2016

<sup>29</sup> Hasil wawancara dengan bapak Faisol Hassanudin selaku Hakim Pengadilan Agama di Pengadilan Agama kota Malang tanggal Selasa 6 Juni 2016

wife when he can prove that his wife has committed adultery and that the child is the result of the adultery. Furthermore, in Article 251 of the Civil Code it is stated that the validity of a child born before the hundredth and eightieth day of marriage in a husband and wife can be denied by the husband. In this article, denial is not possible if:

- a. the husband before marriage knows he will conceive the wife;
- b. the husband is present when the birth certificate is made and the deed has been signed or contains a statement from him, that he cannot sign it;
- c. the child does not live when born;

In the compilation of Islamic Law article 101 states that a husband who denies the legitimacy of a child, while his wife does not deny it, can affirm denial with *lian* (*lian* is a request submitted by a husband to divorce his wife on the grounds that his wife has committed adultery). Although the provisions above give the right of a father to deny his child, but the father must be able to prove that his wife has committed adultery and that child is the result of adultery. That is, if the husband or father of the child cannot show strong evidence, then denial cannot be done. Even the Court requires those who have an interest to take an oath regarding the decision to be issued regarding the legitimacy of the child (Article 44 paragraphs 1 and 2).

Article 252 of the Civil Code also determines that the husband can deny the legitimacy of the child, if he can prove that from 300 to 180 days from the birth of the child, - either because of separation or as a result of coincidence -, he is in a real impossibility having sex with his wife.

If the child is born based on adultery, the husband cannot deny the validity of a child, unless the birth of the child is hidden from him. In this case he must prove perfectly, that he is not the father of the child (Article 253 of the Civil Code). However, the Civil Code article 254 also gives the wife the right to present all evidence, whether from events, witnesses or other evidence that can prove that her husband is the father of the child.

The evidence used in connection with verification is:

- a. Child birth certificate (which has been recorded in the register of civil registry);
- b. Witnesses; this can be done if there is no birth certificate. Proof of this witness can only be done if there has been preliminary evidence with writing, allegations and clues clipped from events that cannot be refuted; The court requires those concerned to pronounce an oath (Explanation of article 44 of the Marriage Act);
- c. Do DNA testing. This test can prove the blood type of the denying and denied, which can then be used to estimate the blood relationship between the two, but this test is very expensive.

The child who was denied by his father had no civil relations with his father. That means he also does not have civil rights from his father, such as inheritance rights. Therefore, it is clear that Child Denial is a form of violence (psychological and economic) for the mother and child itself.

### 3. Both parents died

For the benefit of the Petitioner's children's status later on, the Petitioners intended to authorize the marriage of the Father and Mother of the children. For the purposes of the above, previously the Applicants needed a permit or a Determination from the District Court. But not all requests are granted. The obstacle in ratifying a child born from a marriage that is not recorded is if both parents have passed away. Ratification of a child born of a marriage that is not listed according to the provisions of the applicable legislation cannot be done if the two biological parents have died in the world, so they cannot give testimony.

### 4. Father Not Knowing His Domicile / Existence

For fathers who are not known for their existence / domicile so that no (yet) recognition has been obtained from or evidence for supporting material and the judge's consideration in deciding the case, then the child's ratification cannot be decided by the court. In the absence of recognition from its biological father, the Constitutional Court only strengthens the position of the mother of the child out of wedlock as well as if the father does not want to make a voluntary confession.

### 5. Father of Foreign Citizens

Based on the provisions of Indonesian law, Article 43 paragraph (1) of the Marriage Law No. 1 of 1974 states that "Children born outside of marriage only have a civil relationship with their mothers and their mother's family". Therefore if the mother is an Indonesian citizen, then the child will follow the citizens and the law of the mother. If the mother is a foreign national then the child

will join the citizen of her Indonesian citizen. This is also regulated in Law No. 12 of 2006 ("Law 12/2006") concerning Citizenship (the new Citizenship Law) in Article 4 letter g, concerning who can be called an Indonesian citizen, namely: "A child born outside of a legal marriage from a resident mother Negara Indonesia "If a child out of wedlock whose mother is an Indonesian citizen then her father is a foreign national but the father is willing to admit the child. Based on article 5 (1) of Law 12/2006, explained:

"Indonesian Citizens born out of legal marriage, not yet 18 (eighteen) years of age or unmarried are legally recognized by their father who is a foreign national, still recognized as an Indonesian Citizen".

The recognition of the above children as Indonesian citizens under Article 6 of Law 12/2006 causes these children to have dual citizenship until they are 18 years old or married, where they are allowed to choose their citizenship. The statement to choose citizenship is conveyed in writing to the Officer assigned by the minister to take care of the field of citizenship, accompanied by documents in accordance with the laws and regulations. Likewise, if the out-of-child child is the mother of the foreigner and the father of the Indonesian citizen, the father would admit the child as his child. Law 12/2006 also regulates this matter, in which Article 4 letter h states that Indonesian citizens are:

"Legally-born children of a foreign national mother who are recognized by an Indonesian citizen father as their child and that recognition is made before the child is 18 (eighteen) years old or has not been married".

The recognition of the above children as Indonesian citizens under Article 6 of Law 12/2006 causes these children to have dual citizenship until they are 18 years old or married, where they are allowed to choose their citizenship. A statement to choose citizenship is conveyed in writing to the official assigned by the minister to take care of the field of citizenship, accompanied by documents in accordance with the laws and regulations.

Children born from an extramarital relationship are then recognized or legally recognized by their foreign or Indonesian father, as mentioned above, and he is not yet 18 (eighteen) years of age or has not yet married to obtain Indonesian Citizenship based on Law 12 / 2006 by registering with the Minister through the Republic of Indonesia Official or Representative no later than 4 (four) years after this Law was promulgated.

The adoption of the Constitutional Court's decision does not apply effectively to the Population and Civil Registry Offices. This is because generally the registration of children carried out to obtain a Marriage Birth Certificate is limited to Unmarried Children from underhanded marriages or unmarried marriages, and it is almost certain that registration of extramarital children other than siri marriage is not found because other documents are needed like a family card. Besides that, the technical instructions for the implementation of the Constitutional Court's decision have not existed until now.

## **CONCLUSION**

1. The philosophical foundation of a paradigm change in the norm of the relationship between the father and son is that the child is a mandate as well as a gift from God Almighty, which must always be maintained because in him the dignity, dignity and rights as human beings must be upheld. Out-of-wedlock children also have the right to legal protection. The law must provide legal protection and certainty that is fair to the status of a child born and the rights that exist to him, including to children born even though the validity of his marriage is still disputed. Children's rights. Children are the mandate and gift of God that must be nurtured, educated and accounted for in the world and the hereafter, therefore children born because of the biological relationship between men and women, need to get protection to guarantee and protect children and their rights to live, grow, develop and participate optimally in accordance with the dignity and dignity as humanity so as to guarantee children so that they can live, develop and grow well.
2. The legal effect of the civil relationship between children outside of marriage and their father to the civil law system in Indonesia is that the state provides guarantees for the position of unmarried children where before the Constitutional Court Decision Number 46 / PUU-VIII / 2010 2010 was only considered to have a civil relationship with his mother and his mother's family, but after the Constitutional Court Decision Number 46 / PUU-VIII / 2010 was considered to have a civil relationship with his father and his father's family. Unmarried children no longer only have with their mothers but also with their biological fathers. Through proof that is supported by science and technology and / or other evidence according to the law has a blood relationship, including civil relations with his father's family. However, the recognition of children outside of marriage will only provide protection for out-of-wedlock children with recognition. The relationship of the inheritor with his biological father without having to be preceded by confession and endorsement

will mean nothing. An important requirement of this recognition is proof that there is a biological relationship between children and fathers biologically based on science. However, there is still a possibility of denial of children outside of marriage from children of legal heirs. Related to the recognition of children outside of marriage, it must be understood the division between out-of-child marriage, adultery children, and discordant children.

3. The application and legal constraints in the recognition of children outside of marriage after the decision of the Constitutional Court Number 46 / PUU-VIII / 2010 can be carried out. This can be seen from several decisions of religious courts and district courts that stipulate the decision of the Religious Court Number 0156 / Pdt.P / 2013 / PA JS, Court Decision 126 / PDT.P / 2014 / PN.JKT.TIM, Decision of Religious Court 0177 / Pdt.P / 2014 / PA.Jbg, Decision of Religious Court Number 0071 / Pdt.P / 2013 / PA. Mpw and Decision of the Religious Court Number of Religion Number 201 / Pdt.P / 2013 / PA.BrB which decides to grant an application in determining the biological child of the court. While the obstacle that arises is in the case of the implementation of ratification of children out of wedlock. Ratification of a child out of wedlock through a request for the stipulation of a District Court cannot always be granted, even though a marriage is known by the public at large and the husband and wife live together as befits a husband and wife. Marriage that has never been registered with the Civil Registry Office in Jepara, the marriage certificate cannot be issued. The children of the marriage are recorded as out of wedlock children. Ratification of unmarried children born from a marriage that is not recorded in accordance with the provisions of the applicable legislation cannot be done if the two biological parents have died in the world, so they cannot give testimony. Likewise, if biological parents who are not responsible for leaving their children and their whereabouts are not known so that they cannot be asked for recognition, the legal status of these extramarital children remains a child out of wedlock.

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Pro Kontra Status Anak Luar Kawin Putusan Mahkamah Konstitusi tentang Undang-Undang Perkawinan diapresiasi dan dikecam. Bisa berimplikasi pada nasab, waris, dan perwalian, di unduh dari <http://www.hukumonline.com/> tanggal 25 Juni 2016

**INTERVIEW:**

Hasil wawancara dengan bapak Faisol Hassanudin selaku Hakim Pengadilan Agama di Pengadilan Agama kota Malang tanggal Selasa 6 Juni 2016

**REGULATION:**

KUH Perdata

Undang-Undang Nomor 1 tahun 1974 Tentang Perkawinan