

Legitimate and Illegitimate Children Post the Constitutional Court Ruling No. 46/PUU-VIII/2010 (A Study on the Theory of Dignified Justice)"

Muh.Amin P¹* Fatimawali Fatimawali² & Nurinayah Nurinayah³

¹ State Islamic University Datokarama Palu, Indonesia

*Corresponding Author: Muh.Amin, Email: aminbone70@gmail.com

INFORMASI ARTIKEL

ABSTRACT

Volume:
ISSN:

The similarity in the Protection of Rights for Illegitimate Children between Islamic Law and Positive Law is that illegitimate children have certain rights from their parents, including the right to parental authority, care and education, inheritance, and family name. The difference lies in the legal status of the children. According to Islamic law, illegitimate children possess a legal relationship with their mother and her family. Conversely, Positive Law asserts that illegitimate children maintain a legal relationship with both their mother and her family, as well as their biological father, when substantiated through evidence conforming to prevailing legal standards.

KEYWORDS

Legitimate Child, Illegitimate (extramarital) Child, Post Constitutional Court Ruling, Theory of Justice

1. Introduction

The Constitutional Court has rendered a groundbreaking decision in Ruling No. 46/PUU-VIII/2010 concerning the status of extramarital children. This ruling declares that a child born outside of wedlock not only maintains a legal relationship with the mother and her family, but also holds a legal relationship with the biological father, provided that this connection can be substantiated through scientific knowledge and technology. The alteration introduced in Article 43(1) has significant implications for Islamic family law in Indonesia. This new legal paradigm becomes particularly intriguing when examined through the lens of the *maqâṣid asy-syar'ah* concept, which pertains to the objectives of Sharia legislation.

The emergence of Constitutional Court ruling No. 46/PUU-VIII/2010 was prompted by a case involving a *sirri* marriage (religiously valid but not legally recognized marriage) experienced by Aisyah Muchtar. She submitted a request to the Constitutional Court for a review of Article 43(1) of Law No. 1 of 1974, which pertains to the lineage or legal affiliation of a child and whether it can be attributed to the father, Moerdiono. As a result, the Constitutional Court partially granted the petition, resulting in the issuance of a new ruling, namely Constitutional Court ruling No. 46/PUU-VIII/2010. This new ruling states:

"An extramarital child maintains a legal relationship with the mother and her family, as well as with the man recognized as the father, established through scientific knowledge and technology and/or other legally accepted evidence, indicating a blood relationship. This includes a legal relationship with the father's family"

However, the Constitutional Court's ruling has indeed generated its own conflicts within society. One of these conflicts lies in the fact that the Constitutional Court did not differentiate between children born from *sirri* marriages (religiously recognized

but not legally acknowledged marriage) and children resulting from illicit relationships. This lack of differentiation contradicts the Constitution of the Republic of Indonesia of 1945, especially when interpreted as eliminating the legal connection with the man proven through scientific and technological means and/or other accepted legal evidence as having a blood relationship as the father.

According to the Constitutional Court, Article 43(1) of the Civil Code (UUP) lacks binding legal force. Consequently, based on this ruling, the position and rights of extramarital children, including biological children's rights, fall under the law of *sirri* marriage, possessing the same rights as legitimate children.

Meanwhile, the Indonesian Ulama Council (MUI), the highest religious authority in Indonesia, responded to this ruling by issuing Fatwa No. 11 of 2012. The fatwa states that extramarital children are similar to children born from illicit relationships involving both parents. The different interpretations between the Constitutional Court's ruling and the Indonesian Ulama Council's fatwa have led to ambiguity regarding the implementation of marriage and the legal status of children born out of wedlock in Indonesia.

Based on the explanation of the background presented above, the researchers are inclined to conduct a more comprehensive analysis of the aforementioned issue in the form of a journal article entitled "Legitimate and Illegitimate Children Post the Constitutional Court Ruling No. 46/PUU-VII/2010 (A Study on the Theory of Dignified Justice)."

2. Discussion

2.1. Legitimate and Illegitimate Children

Legitimate Children are those born from marriages that follow the procedures outlined in Article 2(1) and (2) of Law No. 1 of 1974. Article 2(1) stipulates that a marriage is deemed valid if conducted according to the laws of each respective religion and faith. Article 2(2) further specifies that each marriage should be registered in accordance with prevailing legislative regulations.

In the context of marriage registration, numerous terms are utilized to describe unregistered marriages. Generally, an unregistered marriage is one that hasn't been recorded by a marriage registrar (*Penghulu*). Such marriages, although religiously valid, lack legal validity due to the absence of legally recognized marriage documentation.

Unregistered marriages are deemed undesirable by law, stemming from the historical perspective of marriage law, which tends to classify unregistered marriages as illegal. Nonetheless, Article 5(1) of the Compilation of Islamic Law (KHI) implicitly indicates that marriage registration is not a requisite for valid marriage but rather serves as a means to establish marital order. Therefore, Article 7(3) of the KHI governs the establishment of *itsbat* (the validity of marriage) for unregistered marriages. In essence, unregistered marriages are valid, albeit imperfect. This imperfection is evident in the provisions of Article 7(3) of the KHI. The general explanation of Article 7 of the KHI stipulates that this article becomes effective after the enactment of religious judicial laws.

In the realm of unregistered marriages, the *aqad* (marriage contract) is typically performed within limited circles, presided over by religious leaders like *Pak Kiai*, without the presence of an official marriage registrar from the Office of Religious Affairs (KUA). These marriages lack an official marriage certificate. As emphasized in Article 2(2) of Law No. 1 of 1974 on Marriage, every marriage must be recorded according to the applicable legislative regulations. Unregistered marriages, when fulfilling the conditions and requisites of a valid marriage, are religiously valid. However, due to their lack of registration, they are not legally recognized by the state (as specified in Article 1(2) of Law No. 1 of 1974).

An unregistered marriage results in the denial of legal rights for the wife. In other words, women are denied legal protection. Such marriages conflict with gender equality aspects. According to M. Quraish Shihab, unregistered marriages constitute a form of abuse against women, as they jeopardize women's rights. Any marriage, apart from those officially registered in the legal jurisdiction of the country, is not legally recognized.

The issue arises when marriage registration becomes a necessity, creating grievances primarily for men who are already married, as the procedures are viewed as excessively burdensome for polygamous marriages. Conversely, for women, unregistered marriages are not only disadvantageous, depriving them of rights to shared property, but they also forfeit their rights to demand spousal obligations. This situation presents a dilemma: on one hand, mandatory marriage registration burdens men, while on the other hand, unregistered marriages disadvantage women and children.

Illegitimate (extramarital) Children are those born from unregistered marriages conducted in accordance with their respective religious beliefs and convictions. This interpretation indicates the existence of a marriage that adheres to Islamic principles, which is considered 'valid' from the standpoint of Islamic jurisprudence as long as the requisite conditions and elements of a lawful marriage are fulfilled. Consequently, the children are deemed 'valid' within the context of religious perspective. However, due to the lack of formal registration, either with the Office of Religious Affairs (KUA) or the Civil Registry Office (for instance, in cases similar to Machica Mochtar and Moerdiono), the validity becomes deficient from a formal perspective. Regarding the term "illegitimate child," this term is indeed appropriate for the case of Machica, given that the child's birth resulted from a marriage fulfilling the religious requirements and conditions, albeit remaining unregistered.

The incorrect perception that the case of Machica's child with Moerdiono is a result of adultery is unfounded. The case involves a child born from a legally valid marriage according to both Islamic and Positive Law, and the procedures stipulated in Article 2(1) are met. This article asserts: 'Marriages are valid when conducted according to the laws of each respective religion and faith,' even if the marriage has not fulfilled the procedures of Article 2(2), which stipulates: 'Every marriage must be officially registered in accordance with prevailing legislative regulations.'

The general requirement that marriages in Indonesia adhere to the procedures stated in Article 2(1) and (2) of Law No. 1 of 1974 Concerning Marriage to signify a truly valid marriage according to the law. A marriage conducted solely in accordance with Article 2(1) is still considered legally valid according to Islamic law. However, because Article 2(2) is not fulfilled, a child born from this marriage is deemed 'born outside a legally valid marriage (illegitimate)' under Article 43(1) of the same law. This marriage is protected by Article 2(1) of Law No. 1 of 1974 Concerning Marriage, as it adheres to Islamic legal procedures.

A marriage conducted under Article 43(1) of Law No. 1 of 1974 Concerning Marriage does not stand alone; it is intricately linked to marriages performed under Article 2(1) and 2 of the same law. This marriage is termed 'outside of marriage' because it was conducted without adhering to the procedures stated in Article 2(2). However, it should not be interpreted as an act of adultery. Marriages classified as adultery are those conducted without fulfilling the conditions and requisites of Islamic law, not according to legal regulations. Therefore, a child born from a marriage valid under Islamic law but unregistered according to the Law Concerning Marriage is not classified as a child of adultery or born out of wedlock due to adultery. Instead, this child is born from a legally valid marriage and is also protected by the law."

2.2. Children Born Out of Valid Marriage from Islamic Law Perspective

An illegitimate child is one born out of a union between a man and a woman without a valid marriage contract. There is a difference in opinion among Islamic scholars regarding children conceived before marriage but born after a valid marriage. In this regard, both Imam Malik and Imam Shafi'i hold the view that if a child is born after six months from the mother and father's marriage, then the child is attributed to the father. However, if the child is born before six months of marriage, then the child is attributed only to the mother. This opinion differs from that of Imam Abu Hanifah, who asserts that an extramarital child is still attributed to the father as a legitimate child, regardless of the circumstances of their birth.

These differences in opinion stem from varying interpretations of various hadiths that address this issue.

Based on an analysis of various hadiths and Imam Shafi'i's viewpoint, children born outside of a valid marriage have the following legal implications:

- a. They do not have a legal relationship with their biological father. Their only recognized relationship is with their mother.
- b. The biological father is not obligated to provide financial support to the child, although biologically, he remains the father. The connection is primarily human rather than legal.
- c. They do not inherit from their biological father since a legal relationship is one of the causes of inheritance.
- d. The biological father cannot act as a guardian (*wali*) for an extramarital child. If the child is a female and reaches the age of marriage, the biological father does not have the authority to marry her off. This aligns with Indonesian law,

particularly Law Number 1 of 1974 on Marriage, Article 42, which states, "A legitimate child is a child born in or as a result of a valid marriage." Therefore, an extramarital child is solely attributed to the mother's name.

2.3. Children Born Out of Valid Marriage in the Constitutional Court Ruling No.46/PUU-VIII/2012.

On February 27, 2012, the Constitutional Court of Indonesia (Mahkamah Konstitusi or MK) issued Decision No. 46/PUU-VIII/2010 regarding the legal status of extramarital children. This decision essentially responded to a constitutional review petition filed by Machica Mochtar concerning Law No. 1 of 1974 on Marriage. Machica had entered into a secret marriage with the former Minister of State Secretary Moerdiono on December 20, 1993. From this union, they had a son named M. Iqbal Ramadhan. However, their marriage was short-lived and ended in 1998, with Moerdiono refusing to acknowledge Iqbal as his child. This prompted Machica to petition the Constitutional Court to challenge the constitutionality of Law No. 1 of 1974 in order to obtain legal recognition of Iqbal's status. The background of this decision centers on the discrimination experienced by extramarital children, who do not receive legal recognition of their civil relationship with their father and his family due to their mother's unregistered marriage. This issue is addressed in Article 43, paragraph 1 of Law No. 1/1974, which stipulates that "children born out of wedlock only have a civil relationship with their mother and her family."

This provision gives the impression that the position of the woman who gives birth to such a child is unequal to that of the man who impregnated her. From the perspective of the child, it appears unjust and inhumane. Our legal system indeed does not recognize institutions for the acknowledgment and validation of children. This presents a difficult dilemma to resolve because if extramarital children are also granted legal status in relation to their biological fathers, it would disrupt the sanctity of all legitimate marriages. As a result of this provision, a child born from an unregistered marriage conducted outside of the Office of Religious Affairs (*Kantor Urusan Agama or KUA*) has no civil relationship with their father, even though the child was born from a valid marriage from religious perspective. This is despite the fact that such marriages are considered valid under Article 2, paragraph 1 of Law No. 1/1974, which states: "A marriage is valid if conducted in accordance with the laws of each respective religion and belief."

However, based on Article 2, paragraph 2 of Law No. 1/1974, the failure to register a marriage can lead to various consequences, including:

- a. The state does not provide protection and can be detrimental to women and children. Women are not recognized as lawful wives because they lack authentic proof.
- b. The wife is not entitled to maintenance, joint property, and inheritance.
- c. Children are not entitled to maintenance and inheritance.
- d. The acknowledgment of a biological father-child relationship is not recognized.

According to Constitutional Court Decision No. 46/PUU-VIII/2010, it states that Article 43, paragraph (1) of Law No. 1 of 1974 on Marriage (Official Gazette of the Republic of Indonesia Year 1974 No. 1, Supplement to the Official Gazette of the Republic of Indonesia No. 3019) which states: "Extramarital children only have a civil relationship with their mother and her family" is in contradiction with the 1945 Constitution of the Republic of Indonesia, as long as it is interpreted as eliminating the civil relationship with a man who can be proven, based on science and technology and/or other legal evidence, to have a biological relationship as the father. Therefore, the Constitutional Court's decision does not need to be contested or declared in accordance with religious law (shariah), as in essence, there is nothing that is not in accordance and contradicts shariah. Chief Justice of the Constitutional Court, Mahfud MD, stated that what the panel meant by the phrase "extramarital children" did not refer to children born out of adultery but rather to children born from secret marriages that were unregistered. Therefore, children born from marriages that are unregistered but valid according to religion do not contradict lineage, inheritance, and guardianship laws.

Islamic law affirms that for a child to be considered a legitimate child of their mother's husband, the child must be born at least six months after the marriage or within the *'iddah* period of four months and ten days after the dissolution of the marriage. Regarding this time frame, there is a difference of opinion among Islamic jurisprudence scholars, with some holding the view that "a child born after the *'iddah* period following the dissolution of the marriage is a legitimate child of the former husband, as long as it can be considered that their birth resulted from sexual intercourse between the former spouses." Due to these

varying opinions, a maximum time frame of four months is established, provided that it is clear that within those four months, the mother did not experience menstruation.

Therefore, if a child is born less than six months after the marriage, then the child cannot be linked to their father's lineage, even if born within a valid marriage. They only have a lineage relationship with their mother. This is where the difference lies between the perspective of Islamic jurisprudence (*fiqh*) and the Marriage Law in Indonesia. Because Islamic jurisprudence does not recognize marriage registration, the concept of being born out of a registered marriage according to the Marriage Law is equated with adultery. However, in Islamic jurisprudence (Islamic law), a child born under these circumstances is not considered a child of adultery as long as the conditions and requirements of a valid Islamic marriage are met. Therefore, it is correct that Constitutional Court Ruling No. 46/PUU-VIII/2010 states that there cannot be an equivalence between a child born out of a registered marriage and a child born out of adultery. This is because a child born from an unregistered marriage that fulfills the conditions and requirements is valid according to religion. Meanwhile, a child of adultery is born from a marriage that is not valid according to religion, even if it is registered under the law.

CONCLUSION

Based on the elaboration provided, several conclusions can be drawn. Firstly, the Constitutional Court has issued decision No. 46/PUU-VIII/2010 based on the underlying legal frameworks: Firstly, regarding the matter of marriage registration. This does not contradict the 1945 Constitution Article 28B paragraph (2), Article 8D paragraph (1), Article 28I paragraph (4) and paragraph (5), Article 28J paragraph (2). Furthermore, it is observed that the ruling aligns harmoniously with the tenets of the Marriage Law Article 55. Secondly, concerning the legal basis of extramarital children. The Constitutional Court states that Article 43 paragraph (1) of the Marriage Law is conditionally unconstitutional, specifically if it is interpreted to eliminate the relationship with the biological father. Additionally, the Constitutional Court judges consider the following reasons: First, children born out of wedlock do not possess legal strength. Therefore, the Constitutional Court deems it necessary for children to receive legal protection and certainty, as they often face discrimination in society despite being innocent of being born outside of wedlock. Secondly, a child is the result of the relationship between a man and a woman. The Constitutional Court believes that it is unjust for only women, as mothers, to bear the burden and eliminate the responsibility of the biological father. Thirdly, with the advancement of time and the progress of science and technology, the Constitutional Court considers that the development of knowledge and technology can prove the biological paternity of individuals in cases concerning extramarital births.

The legal perspective of Islam towards the legal basis and judges' considerations in the decision No. 46/PUU-VIII/2010 asserts that they are not conflicting with Islamic law. This decision aligns with the concept of *maqâsid asy-syarî'ah*, specifically *hifz-nasl* (preservation of lineage) and *hifz an-nafs* (preservation of life). The decision No. 46/PUU-VIII/2010 has implications for the provisions in the Compilation of Islamic Law as the legal basis for Islamic family matters in Indonesia. The resulting implications include that extramarital children are entitled to the same rights as legitimate children. These rights encompass the right to be affiliated with their biological father, the right to receive financial support, the right to inherit, and the right to guardianship.

REFERENCES

- Al-Bukhari, Muhammad bin Isma'il Abdullah. "*Sahih al-Bukhari*" CD Maktabah Syamilah al-Isdar al-Sani, 2005, VI: 2484, hadis nomor 6384;
- Imam Muslim, "*Sahih Muslim*" CD Maktabah Syamilah al-Isdar al-Sani, 2005, II: 1080, hadis nomor 1457.
- Al-Nawawi, Imam. "*Al-Majmu*," CD Maktabah Syamilah al-Isdar al-Sani, 2005 XVI: 105.
- Al-Qurtubi, Muhammad bin Ahmad bin Rusyd. *Bidayah al-Mujtahid wa an-Nihayah al-Muqtasid*. Surabaya: al-Hidayah, t.t.
- As-Syafi'i. *al-Umm*. Beirut: Dar al-Kitab al-Ilmiyyah, t.t
- Daud, Abu. "*Sunan Abu Daud*" CD Maktabah Syamilah al-Isdar al-Sani, 2005, VII: 32, hadis nomor 2268.
- Djamil, Fathurrahman. *Pengakuan Anak Luar Nikah dalam Problematika Hukum Islam Kontemporer*. Jakarta: Firdaus, 1994
- Fatwa Majelis Ulama Indonesia Nomor 11 Tahun 2012 Tentang Kedudukan Anak Hasil Zina dan Perlakuan Terhadapnya. File:///D:/bab-20IV/analisis-hukum-putusan-mahkamah-konstitusi-nomor_46_PUUVIII_2010-2013-202012_tentang_status-anak_luar_kawin.htm. Diakses 13 Maret 2023
- Hakim, Abdul Khamid. *Kitab Al-Bayan*. t.tempat: t.penerbit, 1983 <https://text-id.123dok.com/document/lzgow32qo-terhadap-anak-yang-lahir-dari-perkawinan.html>, Diakses 13 Maret 2023
- KUH Perdata.

- Mesraini. *Interkoneksi Mahkamah Konstitusi Dengan Mahkamah Agung; Studi Implementasi Putusan Tentang Nasab Anak*, Syar'i Jurnal Sosial Budaya, VOL. 4 NO. 1 (2017), 3-12.
- Mubarok, Jaih. *Modernisasi Hukum Perkawinan di Indonesia*. Bandung: Pustaka Bani Quraisy, 2005
- Muzarie, Mukhlisin. *Kontroversi Perkawinan Wanita Hamil*. Yogyakarta: Pustaka Dinamika, 2002
- Nur, Puat. *Status Hukum Anak Diluar Nikah*, Al Hikmah, Volume 3, Nomor 2, September 2013
- Prodjodikoro, Wirjono. *Hukum Perkawinan di Indonesia*. Bandung: Sumur, 2010
- Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010.
- Ramulyo, Moh Idris. *Tinjauan Beberapa Pasal Undang-undang Nomor. 1 Tahun 1974 dari Segi Hukum Perkawinan Islam*. Jakarta: PT Bumi Aksara, 2002
- Shihab, M. Quraish. *Perempuan*. Jakarta: Lentera Hati, 2006
- Syafi'i, Imam. *"Ahkam al-Qur'an"*, CD Maktabah Syamilah al-Isdar al-Sani, 2005
- Undang-Undang Republik Indonesia Tahun 1974 tentang Perkawinan