



THE BIOLOGICAL FATHERS HAVE CIVIL RIGHTS WITH EVIDENCE AND CONVICTION OF THEIR CHILDREN

ABSTRACT

This paper aims to prove that Biological Children can provide Civil Relations with their father if they have an apparent legal force. This study differs from other researchers in the comparative aspect of normative law and Islamic law. This difference lies in the results of the Constitutional Court decision, which states that children produced outside of marriage have a civil relationship with the mother and family of their mother, father, and family of their biological father, which can be proven by DNA testing between them. Meanwhile, according to Islamic law states that children outside of marriage (Zina) only have a civil relationship or blood relationship with the mother and the mother's family. The method used in this research is a literature review with a normative approach to the Constitutional Court decision and the School's opinion on children outside of marriage. This research found that children can biologically provide civil relations with their parents if it is done in marriage and proven by clear legalities such as witnesses and marriage documents..

Keywords: biological; status; child; wedding; legal

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INTRODUCTION

Law is a rule that regulates human behavior, which is built on the awareness of the shared community (Deffains, Espinosa, & Fluet, 2019). There are so many problems regulated in the law itself (Situngkir, 2018, p. 22), one of which is the problem of marriage in Law Number 1 of 1974 concerning marriage, and this regulation is used as the first legal reference in Indonesia, which regulates marriage problems on a national scale (Muslih, 2020; Nurhadi, 2018, p. 414).

Islamic law is also used as a legal guideline in Indonesia to regulate human procedures for carrying out life, including how to improve and maintain human descendants. So that humans can channel their sexual desires in the right way, it means not committing adultery so that a family that loves each other can be established as confirmed in QS. Ar-Rum [30] verse 21. Because there is already a way of marriage, it is strictly forbidden for humankind to commit adultery, which will make the child's lineage unclear. According to the theory of *Hifzhu Nashb (maintaining offspring)* (Hamzani, 2016, p. 57; Kamil, 2017), sending children who are produced outside of marriage to their biological father means destroying the existing provisions of *Maqashid al-Syariyyah* (Ali Hamdan, 2019; Ayuningtias, 2020). However, if the child is a child resulting from marriage siri/ marriages are not registered with the religious affairs office, it means that it is still within the provisions of *Maqashid al-Syariyyah (the objectives of Islamic sharia)*.

Some researchers (Ali Hamdan, 2019; Hamdani, 2016; Shodikin, 2020) state that the legal child is a child resulting from a legal marriage, which is by the procedures of Law Number 1 of 1974 article 2, paragraph (1) and (2). Meanwhile, according to Islamic law, a legitimate child is a child resulting from a marriage that is legal according to Islamic law even though it is not recorded according to Article 2 paragraph (2), and it is not a child resulting from outside marriage because in Islam a child outside marriage is a child born from a relationship, men and women without a marriage bond (Elisiyah, 2020; Maulana, 2020; Nurry, Nasution, & Pratiwi, 2020, p. 208; Sikana, 2020a). Furthermore, what is to be blamed is the parents who have sinned so that the ones who bear the sin are the parents, not their children.

The majority of scholars think that if the child is born within six months of their marriage, then the child is linked to the father, but if before that, the child is inherited by the mother. According to Syafi'i, children born out of wedlock will have legal consequences, namely: (1) The absence of a childbirth relationship from the father, (2) the father is not obliged to provide for the child, (3) There is no inheritance or inheritance from the father, (4)) A father cannot be a guardian of marriage for a child outside of marriage if the child is a girl because the definition of a child out of wedlock from a legal marriage that is registered is the same as the meaning of a child for adultery (AJRI, n.d.; Elisiyah, 2020; Fijriyah, n.d.; Sikana, 2020a). However, in Islamic law, it does not say that a child is adultery as long as it fulfills the harmonious conditions and conditions of marriage in shariah, in the marriage law, it cannot be equated with a child. It proceeds to adultery.

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It means that there are two definitions of children born out of wedlock: (1) The result of legal marriage but not recorded as stipulated in Article 2 paragraph 2, (2) The result of a male and female relationship without a legal marriage bond. The abstractness of a child's lineage is also influenced by the factor of the implementation of the marriage that was carried out by the parents. In Indonesia, there are many variations in the form of marriage. From marriages through the Office of Religious Affairs, marriages without blessing/cloppement, to marriages that are well known among the community, namely *kawin sirri* (hidden marriage), that is unregistered marriages in the civil bureau. It raises the equal status between children born from unmarried marriage and children born of adultery.

In the case of asking for justice for children born outside of marriage, the Constitutional Court makes a decision, namely decision No. 46 Number 46 / PUU-VIII / 2010, that a child born out of wedlock has the right to have a civil relationship or the right to inherit from his biological father (Farizha, 2020, P. 216; Hamzani, 2016, P. 46; Mardhotillah & Islam, n.d.; Shodikin, 2020, p. 13). With this decision, it has canceled the previous decision, which stated that children outside of marriage only have a civil relationship with their mother. Even though registering a marriage is not one that determines the legality of marriage in Islam (Hafidzi & Hayatunnisa, 2017), in its application in Indonesia, an unregistered marriage causes the child not to be registered legally in the state law. Until then, the Constitutional Court issued a decision that accommodated the status of all children (Maulana, 2020). The problem raises serious problems among Indonesian ulama because not all children who are born have the same status. It depends on the fulfillment of the terms and conditions of marriage for both parents.

RESEARCH METHODS

In this study, we used a normative juridical method, which is descriptive-analytical. Which this method describes or describes the object of research based on legal data about this problem through a literature review. This study also focuses on data in the form of narrative and word argumentation, not from the results of obtaining numbers in the data. In the next stage, library research is a study that focuses on data collection based on scientific work obtained in literature studies of reading books. In general, this study has two types of research data, namely:

- a. Primary sources are references related to positive law, namely the Constitutional Court decision Number 46 / PUU-VIII / 2010 regarding the status of children, marriage law number 1 of 1974, and the Compilation of Islamic Law.
- b. Secondary sources, namely the work of legal experts and other references relating to the status of children from relevant *fiqh* books. This data will be used for consideration in the interests of analysis and comparison.

The results of this analysis of sources are analyzed with a comparative approach to determine the patterns or concepts offered by the Constitutional

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Court and Islamic Sharia in the management and implementation of the status of children born outside of legal marriages.

RESULTS AND DISCUSSION

1. Children Born From Marriages That Are Lawful According To The Law

Legitimate children are children born in or as a result of a legal marriage, so if there is a marriage that is legal according to the law, then the child from a legal marriage is legal. However, besides that, there are also children outside of marriage, namely children born out of wedlock or children born where the mother who gave birth to the child is not in a marriage bond if the child born outside of marriage can become a child legally can have a position as a child who has a mother and father like a legitimate child, namely having a mother and father like children in general. Therefore an application for the recognition of an out-of-wedlock child must be submitted to the District Court (Mulyadi, 2016, p. 92).

In this case, many terms are used to refer to an unregistered marriage, such as an *sirri* marriage/unregistered marriage or a customary marriage. This marriage is valid according to religion as long as it fulfills the terms and conditions of marriage, and is also by the provisions of Law Article 2 paragraph (1) of Law Number 1 the Year 1974 but does not use what is in paragraph (2) that requires registration. Marriage. The point is that this marriage was not recorded by an official from the Office of Religious Affairs. This marriage is valid but has no legal force. The pillars and conditions of religious marriage for Muslims are then regulated in Article 14 to Article 29 KHI.

The obligation to register a marriage refers more to legal protection of the civil relationship between the child and his parents and to have permanent legal force (Asripa, 2020, p. 42; Surya, 2020). However, in the history of marriage law, marriages that are not recorded are considered illegal marriages. Even so, Article 3 paragraph (1) of the KHI states that the registration of a marriage is not a legal requirement for marriage, but only for carrying out marriage order. So actually, unregistered marriages are legal, but their legality has not been fulfilled in the interests of the state (Fatmawati, 2020; Mahmud, 2020).

An unrecorded marriage contract (Asripa, 2020, p. 42; Aziz, 2018, p. 445) is usually carried out in the presence of a person, such as claiming to be a religious officer, religious leader, or traditional leader and not being attended by the Office of Religious Affairs nor has an official marriage certificate. Article 2 paragraph (2) of Law Number 1, the Year 1974, explains that marriage must be recorded as applicable in the Law. Marriages that are not registered are valid according to religion because they have fulfilled the pillars and requirements of the marriage (Diab, 2018, p. 36; Fakhria, 2017, p. 185).

Even so in Indonesia not only using legal rules in religious terms but also accompanied by rules from the State, namely in the form of Laws and others, so in the Positive legal rules, such marriages are invalid because they are not recognized by the state (basically article 1 paragraph 2 of Law Number 1 of 1974). An unregistered marriage will be detrimental to the wife because it takes away the rights of the wife, and the wife cannot sue her husband if something happens to

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him because he has no legal protection (Bahrum, 2013, p. 211; Fakhria, 2017, p. 187). However, marriages like this contradict aspects of gender equality in which, as Quraish Shihab said, such marriages are tantamount to harassing women whose marriages are not registered in the state because the rights that should be assigned to them are lost.

2. Children Born Outside of Marriage According To Islamic Law

Children born from a male and female relationship which they do without any legal marriage ties according to religion or state or commonly called children resulting from adultery. In this matter, the scholars differed (Asman, 2020, p. 15; Nurry et al., 2020, p. 208; Sikana, 2020b).

- a. Imam Malik and Imam Shafi'i: "If the birth of the child is born after six months of the marriage of the father and mother, then the child is sent to the father, and vice versa if the child's birth is before six months, then the child is sent to the mother only."
- b. Imam Abu Hanifah: "Children born outside of marriage, the lineage still falls on the father regardless of the condition."

The above is based on the following traditions: a) *From 'Aisyah ra. That he said: Sa'ad ibn Abi Waqqas and Abd Zam 'ah fighting over a child, then Sa'ad said: O Messenger of Allah, this child is the son of my brother' Utbah Ibn Abi Waqqash he told me that he is his son, look at the similarities.* b) *Abd ibn Zam'ah also said: "This child is my brother, O Messenger of Allah, he was born from the owner of the mattress (firas) my father from his mother". Then Rasulullah SAW saw the child and said, "This child is your brother, O Abd Ibn Zam'ah. The child is for the owner of the bed of the woman who gave birth (firas) and for the adulterer is (punished) a stone, and wear the hijab from him, O Saudah Binti Jam'ah. Ayesha said: she never saw Saudah at all"* (Azid, Ahmed, Nasir, & Zaman, 2020, p.; Muhsin, 2017, pp. 20–23)

This difference of opinion occurs because in interpreting the phrase "*firas*" in the hadith of the Prophet Muhammad, which reads "The child is for the owner of the mattress and adulterers is the law of stoning". The majority of Ulama interpret the phrase "*firas*" to indicate to the woman (mother), which is taken as if it were *tirasy* (sitting on your knees). However, some scholars interpret men (their fathers) (Assadami, 2016).

Based on this hadith, they argue that the child is a descendant of his father. Nevertheless, in making the law, the scholars agreed to adopt the majority law because it was more acceptable for its validity. According to the opinion of most scholars, the child who results from a relationship without marriage ties must be passed on to the mother only.

Classical jurisprudence experts agree that a child's lineage only has a *nasab* relationship with his parents. Determination of lineage is one of the most fundamental rights of a child and is something that has much impact on the personality and future of the child. The scholars of *fiqh* said that the concept of *nasab* is one of the solid foundations in building household life that can bind between individuals based on the unity of blood (Sakirman, 2015, p. 357). In Indonesian Islamic law, the problem of the origin of children consists of several

different legal provisions. It is influenced by the diversity of the nation, especially in terms of religion and customs; the applicable laws also vary. There is a law, namely Islamic law (*fiqh*), which is formulated in the permanent rules of Islamic Law Compilation (KHI).

In the case of unmarried children, (Fakhria, 2017, p. 185; Haliah, 2016) the negative stigma attached to it certainly disturbs mental and mental development. Especially juridically, children born outside of illegitimate marriages only get a family relationship and a civil relationship with their mother. It means that the man who causes his birth is free from all obligations that are the right of the child. Meanwhile, the child will experience psychological harm, social exclusion, difficulties in the cost of education, health, and other physical welfare. Through the decision of the Constitutional Court Number 46 / PUU-VIII / 2010, children born outside of legal marriages can have their rights fulfilled as biological children so that their growth and development are not disturbed.

3. Clear Evidence Can Cause Civil Relations

According to the author's analysis, what is meant by children born out of wedlock based on the Constitutional Court decision Number 46 / PUU-VIII / 2010 are children born from a marriage that is legal under Islamic law but not registered in the state, with the words another is that the child is the child resulting from the marriage, *unregistered* not the child resulting from the relationship between a man and a woman who is not married (*zina*). If a child is born as a result of adultery, according to the Constitutional Court rulings, he is still given service to his mother because there is no tolerance for the child resulting from adultery. However, it is different from children born from marriages that are legal under sharia but not registered (*sirri* marriage), which includes children born from a marriage that is legal under sharia and carried out outside the procedure of article 2, paragraph 2 of Law Number 1 of 1974 concerning marriage (Thea, n.d.).

The existence of the Constitutional Court's decision is intended to guarantee the child's human rights because basically, the status of the child's birth outside of marriage is given to the mother, especially for marriages that do not meet the requirements and harmonious marriage (*zina*), while the child resulting from unmarried marriage is what is meant "protected children" in the Constitutional Court decision. *Sirri* marriage is only considered valid according to religion, whereas according to law, marriage is illegal because it is not registered. However, here the Constitutional Court tries to give justice to children born from unregistered marriages or *sirri* marriages through its decision, as stipulated in the 1945 Constitution. However, this decision confuses the community in understanding the meaning of children out of wedlock. Hence the word is multi-interpretative so that it can apply to all children born out of wedlock (including children resulting from adultery). So it can be understood that there are two kinds of definitions of a child born from legal marriage, namely: a *child born from a marriage that is lawful and legal according to the law and a child born from a lawful marriage outside the womb and born by the wife* (Kurniawan, n.d.).

The purpose of the Constitutional Court is to emphasize that children outside of marriage have the right to legal protection. According to the

Constitutional Court's consideration, the law must provide just legal protection and certainty for the status of a child who is born and the rights that exist to it, including for children who are born even though the legality of the marriage is still disputed. The Constitutional Court through Decision Number 46 / PUU-VIII / 2010 stated that Article 43 paragraph (1) of the Marriage Law contravenes the 1945 Constitution of the Republic of Indonesia conditionally (conditionally unconstitutional) as long as this paragraph is interpreted as eliminating civil relations with men who can be proven based on science and technology and / or other evidence according to the law has a blood relationship as his father.

Based on the above decision of the Constitutional Court, there has been a change in meaning in article 43 paragraph (1) of the Marriage Law. This decision can explain that the outside child does not only have a civil relationship with the mother and the mother's family but also has a civil relationship with the father and/or his father's family as long as it can be proven based on science or a test tool such as DNA (Deoxyribonucleic Acid) which become a legal proof to show the man is the father. On the other hand, the Civil Code states that children outside of marriage can be categorized as legitimate children as long as their parents acknowledge them. Article 272 of the Civil Code states as follows: "Out of wedlock children who can be recognized are children born by a mother, but not seeded by a man who is in a legal marriage bond with the mother of the child, and is not included in the group of adultery or child. Related to donated children, article 285 of the Civil Code stipulates:" The recognition made throughout the marriage by the husband or wife for the happiness of the out-of-wedlock child, which before marriage has been produced by someone else from the wife or husband, will not be detrimental to both the wife or husband or the child who was born from their marriage ". Recognition throughout the marriage, which means recognition by the husband or wife who recognizes the child while in a marriage bond. It becomes a certainty if the marriage is carried out legally in the presence of officers of the religious affairs office.

The Implication of the civil relationship (Aprianto, 2019), between biological fathers and children resulting from unregistered marriages after the Constitutional Court Decision Number 46 / PUU-VIII / 2010 is that *sirri* children get *hadhanah* livelihoods (maintenance), *sirri* children get mandatory wills, children from unregistered marriages if it is strengthened by data and evidence apparent, like the use of DNA technology or the like. Of course, this is not contrary to Islamic law as long as marriages are legally carried out and reported to the religious affairs office for validation.

CONCLUSION

Problem Marriage to the status of children born has been set since the first in Islamic law and positive law. According to article 2, paragraph 1 and Article 2 of Law number 1 of 1974, which explains that a legitimate child is a child born from a legal marriage and according to procedures that have been determined according to Islamic law (Islamic law). According to the Constitutional Court decision number 46 / PUU-VIII / 2010, it states that children outside of marriage

can have a civil relationship with their father, who is not the result of adultery, but children born from unregistered marriages that are legal according to religion but are not recorded. The existence of the Constitutional Court's decision is a guarantee or legal protection of a person's human rights. It will be vital if it has precise data and evidence regarding their civil relations.

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INTRODUCTION

Law is a rule that regulates human behavior, which is built on the awareness of the shared community (Deffains, Espinosa, & Fluet, 2019). There are so many problems regulated in the law itself (Situngkir, 2018, p. 22), one of which is the problem of marriage in Law Number 1 of 1974 concerning marriage, and this regulation is used as the first legal reference in Indonesia, which regulates marriage problems on a national scale (Muslih, 2020; Nurhadi, 2018, p. 414).

Islamic law is also used as a legal guideline in Indonesia to regulate human procedures for carrying out life, including how to improve and maintain human descendants. So that humans can channel their sexual desires in the right way, it means not committing adultery so that a family that loves each other can be established as confirmed in QS. Ar-Rum [30] verse 21. Because there is already a way of marriage, it is strictly forbidden for humankind to commit adultery, which will make the child's lineage unclear. According to the theory of *Hifzhu Nashb (maintaining offspring)* (Hamzani, 2016, p. 57; Kamil, 2017), sending children who are produced outside of marriage to their biological father means destroying the existing provisions of *Maqashid al-Syariyyah* (Ali Hamdan, 2019; Ayuningtias, 2020). However, if the child is a child resulting from marriage siri/ marriages are not registered with the religious affairs office, it means that it is still within the provisions of *Maqashid al-Syariyyah (the objectives of Islamic sharia)*.

Some researchers (Ali Hamdan, 2019; Hamdani, 2016; Shodikin, 2020) state that the legal child is a child resulting from a legal marriage, which is by the procedures of Law Number 1 of 1974 article 2, paragraph (1) and (2). Meanwhile, according to Islamic law, a legitimate child is a child resulting from a marriage that is legal according to Islamic law even though it is not recorded according to Article 2 paragraph (2), and it is not a child resulting from outside marriage because in Islam a child outside marriage is a child born from a relationship, men and women without a marriage bond (Elisiyah, 2020; Maulana, 2020; Nurry, Nasution, & Pratiwi, 2020, p. 208; Sikana, 2020a). Furthermore, what is to be blamed is the parents who have sinned so that the ones who bear the sin are the parents, not their children.

The majority of scholars think that if the child is born within six months of their marriage, then the child is linked to the father, but if before that, the child is inherited by the mother. According to Syafi'i, children born out of wedlock will have legal consequences, namely: (1) The absence of a childbirth relationship from the father, (2) the father is not obliged to provide for the child, (3) There is no inheritance or inheritance from the father, (4)) A father cannot be a guardian of marriage for a child outside of marriage if the child is a girl because the definition of a child out of wedlock from a legal marriage that is registered is the same as the meaning of a child for adultery (AJRI, n.d.; Elisiyah, 2020; Fijriyah, n.d.; Sikana, 2020a). However, in Islamic law, it does not say that a child is adultery as long as it fulfills the harmonious conditions and conditions of marriage in shariah, in the marriage law, it cannot be equated with a child. It proceeds to adultery.

It means that there are two definitions of children born out of wedlock: (1) The result of legal marriage but not recorded as stipulated in Article 2 paragraph 2, (2) The result of a male and female relationship without a legal marriage bond. The abstractness of a child's lineage is also influenced by the factor of the implementation of the marriage that was carried out by the parents. In Indonesia, there are many variations in the form of marriage. From marriages through the Office of Religious Affairs, marriages without blessing/cloppement, to marriages that are well known among the community, namely *kawin sirri* (hidden marriage), that is unregistered marriages in the civil bureau. It raises the equal status between children born from unmarried marriage and children born of adultery.

In the case of asking for justice for children born outside of marriage, the Constitutional Court makes a decision, namely decision No. 46 Number 46 / PUU-VIII / 2010, that a child born out of wedlock has the right to have a civil relationship or the right to inherit from his biological father (Farizha, 2020, P. 216; Hamzani, 2016, P. 46; Mardhotillah & Islam, n.d.; Shodikin, 2020, p. 13). With this decision, it has canceled the previous decision, which stated that children outside of marriage only have a civil relationship with their mother. Even though registering a marriage is not one that determines the legality of marriage in Islam (Hafidzi & Hayatunnisa, 2017), in its application in Indonesia, an unregistered marriage causes the child not to be registered legally in the state law. Until then, the Constitutional Court issued a decision that accommodated the status of all children (Maulana, 2020). The problem raises serious problems among Indonesian ulama because not all children who are born have the same status. It depends on the fulfillment of the terms and conditions of marriage for both parents.

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RESEARCH METHODS

In this study, we used a normative juridical method, which is descriptive-analytical. Which this method describes or describes the object of research based on legal data about this problem through a literature review. This study also focuses on data in the form of narrative and word argumentation, not from the results of obtaining numbers in the data. In the next stage, library research is a study that focuses on data collection based on scientific work obtained in literature studies of reading books. In general, this study has two types of research data, namely:

- a. Primary sources are references related to positive law, namely the Constitutional Court decision Number 46 / PUU-VIII / 2010 regarding the status of children, marriage law number 1 of 1974, and the Compilation of Islamic Law.
- b. Secondary sources, namely the work of legal experts and other references relating to the status of children from relevant *fiqh* books. This data will be used for consideration in the interests of analysis and comparison.

The results of this analysis of sources are analyzed with a comparative approach to determine the patterns or concepts offered by the Constitutional

Court and Islamic Sharia in the management and implementation of the status of children born outside of legal marriages.

RESULTS AND DISCUSSION

1. Children Born From Marriages That Are Lawful According To The Law

Legitimate children are children born in or as a result of a legal marriage, so if there is a marriage that is legal according to the law, then the child from a legal marriage is legal. However, besides that, there are also children outside of marriage, namely children born out of wedlock or children born where the mother who gave birth to the child is not in a marriage bond if the child born outside of marriage can become a child legally can have a position as a child who has a mother and father like a legitimate child, namely having a mother and father like children in general. Therefore an application for the recognition of an out-of-wedlock child must be submitted to the District Court (Mulyadi, 2016, p. 92).

In this case, many terms are used to refer to an unregistered marriage, such as an *sirri* marriage/unregistered marriage or a customary marriage. This marriage is valid according to religion as long as it fulfills the terms and conditions of marriage, and is also by the provisions of Law Article 2 paragraph (1) of Law Number 1 the Year 1974 but does not use what is in paragraph (2) that requires registration. Marriage. The point is that this marriage was not recorded by an official from the Office of Religious Affairs. This marriage is valid but has no legal force. The pillars and conditions of religious marriage for Muslims are then regulated in Article 14 to Article 29 KHI.

The obligation to register a marriage refers more to legal protection of the civil relationship between the child and his parents and to have permanent legal force (Asripa, 2020, p. 42; Surya, 2020). However, in the history of marriage law, marriages that are not recorded are considered illegal marriages. Even so, Article 3 paragraph (1) of the KHI states that the registration of a marriage is not a legal requirement for marriage, but only for carrying out marriage order. So actually, unregistered marriages are legal, but their legality has not been fulfilled in the interests of the state (Fatmawati, 2020; Mahmud, 2020).

An unrecorded marriage contract (Asripa, 2020, p. 42; Aziz, 2018, p. 445) is usually carried out in the presence of a person, such as claiming to be a religious officer, religious leader, or traditional leader and not being attended by the Office of Religious Affairs nor has an official marriage certificate. Article 2 paragraph (2) of Law Number 1, the Year 1974, explains that marriage must be recorded as applicable in the Law. Marriages that are not registered are valid according to religion because they have fulfilled the pillars and requirements of the marriage (Diab, 2018, p. 36; Fakhria, 2017, p. 185).

Even so in Indonesia not only using legal rules in religious terms but also accompanied by rules from the State, namely in the form of Laws and others, so in the Positive legal rules, such marriages are invalid because they are not recognized by the state (basically article 1 paragraph 2 of Law Number 1 of 1974). An unregistered marriage will be detrimental to the wife because it takes away the rights of the wife, and the wife cannot sue her husband if something happens to

him because he has no legal protection (Bahrum, 2013, p. 211; Fakhria, 2017, p. 187). However, marriages like this contradict aspects of gender equality in which, as Quraish Shihab said, such marriages are tantamount to harassing women whose marriages are not registered in the state because the rights that should be assigned to them are lost.

2. Children Born Outside Of Marriage According To Islamic Law

Children born from a male and female relationship which they do without any legal marriage ties according to religion or state or commonly called children resulting from adultery. In this matter, the scholars differed (Asman, 2020, p. 15; Nurry et al., 2020, p. 208; Sikana, 2020b).

- a. Imam Malik and Imam Shafi'i: "If the birth of the child is born after six months of the marriage of the father and mother, then the child is sent to the father, and vice versa if the child's birth is before six months, then the child is sent to the mother only."
- b. Imam Abu Hanifah: "Children born outside of marriage, the lineage still falls on the father regardless of the condition."

The above is based on the following traditions: a) *From 'Aisyah ra. That he said: Sa'ad ibn Abi Waqqas and Abd Zam 'ah fighting over a child, then Sa'ad said: O Messenger of Allah, this child is the son of my brother' Utbah Ibn Abi Waqqash he told me that he is his son, look at the similarities.* b) *Abd ibn Zam'ah also said: "This child is my brother, O Messenger of Allah, he was born from the owner of the mattress (firas) my father from his mother". Then Rasulullah SAW saw the child and said, "This child is your brother, O Abd Ibn Zam'ah. The child is for the owner of the bed of the woman who gave birth (firas) and for the adulterer is (punished) a stone, and wear the hijab from him, O Saudah Binti Jam'ah. Ayesha said: she never saw Saudah at all"* (Azid, Ahmed, Nasir, & Zaman, 2020, p.; Muhsin, 2017, pp. 20–23)

This difference of opinion occurs because in interpreting the phrase "firas" in the hadith of the Prophet Muhammad, which reads "The child is for the owner of the mattress and adulterers is the law of stoning". The majority of Ulama interpret the phrase "firas" to indicate to the woman (mother), which is taken as if it were *tirasy* (sitting on your knees). However, some scholars interpret men (their fathers) (Assadami, 2016).

Based on this hadith, they argue that the child is a descendant of his father. Nevertheless, in making the law, the scholars agreed to adopt the majority law because it was more acceptable for its validity. According to the opinion of most scholars, the child who results from a relationship without marriage ties must be passed on to the mother only.

Classical jurisprudence experts agree that a child's lineage only has a *nasab* relationship with his parents. Determination of lineage is one of the most fundamental rights of a child and is something that has much impact on the personality and future of the child. The scholars of *fiqh* said that the concept of *nasab* is one of the solid foundations in building household life that can bind between individuals based on the unity of blood (Sakirman, 2015, p. 357). In Indonesian Islamic law, the problem of the origin of children consists of several

Commented [ab8]: Take reference sources from the main works of Imam Malik and Imam Syafi'i.

Commented [ab9]: Take reference sources from the main works of Hanafiyya.

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different legal provisions. It is influenced by the diversity of the nation, especially in terms of religion and customs; the applicable laws also vary. There is a law, namely Islamic law (*fiqh*), which is formulated in the permanent rules of Islamic Law Compilation (KHI).

In the case of unmarried children, (Fakhria, 2017, p. 185; Haliah, 2016) the negative stigma attached to it certainly disturbs mental and mental development. Especially juridically, children born outside of illegitimate marriages only get a family relationship and a civil relationship with their mother. It means that the man who causes his birth is free from all obligations that are the right of the child. Meanwhile, the child will experience psychological harm, social exclusion, difficulties in the cost of education, health, and other physical welfare. Through the decision of the Constitutional Court Number 46 / PUU-VIII / 2010, children born outside of legal marriages can have their rights fulfilled as biological children so that their growth and development are not disturbed.

3. Clear Evidence Can Cause Civil Relations

According to the author's analysis, what is meant by children born out of wedlock based on the Constitutional Court decision Number 46 / PUU-VIII / 2010 are children born from a marriage that is legal under Islamic law but not registered in the state, with the words another is that the child is the child resulting from the marriage, *unregistered* not the child resulting from the relationship between a man and a woman who is not married (*zina*). If a child is born as a result of adultery, according to the Constitutional Court rulings, he is still given service to his mother because there is no tolerance for the child resulting from adultery. However, it is different from children born from marriages that are legal under sharia but not registered (*sirri* marriage), which includes children born from a marriage that is legal under sharia and carried out outside the procedure of article 2, paragraph 2 of Law Number 1 of 1974 concerning marriage (Thea, n.d.).

The existence of the Constitutional Court's decision is intended to guarantee the child's human rights because basically, the status of the child's birth outside of marriage is given to the mother, especially for marriages that do not meet the requirements and harmonious marriage (*zina*), while the child resulting from unmarried marriage is what is meant "protected children" in the Constitutional Court decision. *Sirri* marriage is only considered valid according to religion, whereas according to law, marriage is illegal because it is not registered. However, here the Constitutional Court tries to give justice to children born from unregistered marriages or *sirri* marriages through its decision, as stipulated in the 1945 Constitution. However, this decision confuses the community in understanding the meaning of children out of wedlock. Hence the word is multi-interpretative so that it can apply to all children born out of wedlock (including children resulting from adultery). So it can be understood that there are two kinds of definitions of a child born from legal marriage, namely: a *child born from a marriage that is lawful and legal according to the law and a child born from a lawful marriage outside the womb and born by the wife* (Kurniawan, n.d.).

The purpose of the Constitutional Court is to emphasize that children outside of marriage have the right to legal protection. According to the

Constitutional Court's consideration, the law must provide just legal protection and certainty for the status of a child who is born and the rights that exist to it, including for children who are born even though the legality of the marriage is still disputed. The Constitutional Court through Decision Number 46 / PUU-VIII / 2010 stated that Article 43 paragraph (1) of the Marriage Law contravenes the 1945 Constitution of the Republic of Indonesia conditionally (conditionally unconstitutional) as long as this paragraph is interpreted as eliminating civil relations with men who can be proven based on science and technology and / or other evidence according to the law has a blood relationship as his father.

Based on the above decision of the Constitutional Court, there has been a change in meaning in article 43 paragraph (1) of the Marriage Law. This decision can explain that the outside child does not only have a civil relationship with the mother and the mother's family but also has a civil relationship with the father and/or his father's family as long as it can be proven based on science or a test tool such as DNA (Deoxyribonucleic Acid) which become a legal proof to show the man is the father. On the other hand, the Civil Code states that children outside of marriage can be categorized as legitimate children as long as their parents acknowledge them. Article 272 of the Civil Code states as follows: "Out of wedlock children who can be recognized are children born by a mother, but not seeded by a man who is in a legal marriage bond with the mother of the child, and is not included in the group of adultery or child. Related to donated children, article 285 of the Civil Code stipulates:" The recognition made throughout the marriage by the husband or wife for the happiness of the out-of-wedlock child, which before marriage has been produced by someone else from the wife or husband, will not be detrimental to both the wife or husband or the child who was born from their marriage ". Recognition throughout the marriage, which means recognition by the husband or wife who recognizes the child while in a marriage bond. It becomes a certainty if the marriage is carried out legally in the presence of officers of the religious affairs office.

The Implication of the civil relationship (Aprianto, 2019), between biological fathers and children resulting from unregistered marriages after the Constitutional Court Decision Number 46 / PUU-VIII / 2010 is that *sirri* children get *hadhanah* livelihoods (maintenance), *sirri* children get mandatory wills, children from unregistered marriages if it is strengthened by data and evidence apparent, like the use of DNA technology or the like. Of course, this is not contrary to Islamic law as long as marriages are legally carried out and reported to the religious affairs office for validation.

CONCLUSION

Problem Marriage to the status of children born has been set since the first in Islamic law and positive law. According to article 2, paragraph 1 and Article 2 of Law number 1 of 1974, which explains that a legitimate child is a child born from a legal marriage and according to procedures that have been determined according to Islamic law (Islamic law). According to the Constitutional Court decision number 46 / PUU-VIII / 2010, it states that children outside of marriage

can have a civil relationship with their father, who is not the result of adultery, but children born from unregistered marriages that are legal according to religion but are not recorded. The existence of the Constitutional Court's decision is a guarantee or legal protection of a person's human rights. It will be vital if it has precise data and evidence regarding their civil relations.

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