

Implications of Constitutional Court Decision No. 46/PUU-VIII/2010 on the Rights of Children from Marriage Series Islamic Family Law Perspective

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Abstract :

Abstract Purpose – With the issuance of the decision of MK 46 / PUU-VIII / 2010 related to judicial review of article 43 paragraph (1) of the Marriage Law, that children born out of wedlock only have civil relations with their mothers and families. This caused pros and cons among the community, followed by the Fatwa of the Indonesian Ulema Council (MUI) Number 11 of 2012 concerning the Accusation of Children Resulting from Zina and Treatment of Him. Therefore, the author is interested in conducting a more in-depth analysis of how the impact of the Constitutional Court decision on the rules or norms relating to the inheritance rights of children from serial marriage in the legal order in Indonesia, as well as how the status of inheritance rights of children resulting from serial marriage according to the compilation of Islamic law.

Design/methodology/approach - The method used by this study is in the form of normative legal review using a legal regulatory approach that examines a norm rule and a linear case approach with the issue to be solved.

Research limitations/implications – This paper aims to examine more deeply the implications of the Constitutional Court decision No. 46/PUU-VIII/2010 on the legal order in Indonesia, more specifically the issue of children's rights.

Findings – The issuance of Constitutional Court Decision No. 46/PUU-VIII/2010 has implications for the order of marriage norms in Indonesia, especially regarding the position of children from serial marriages. The Constitutional Court formulated a new

norm, that children born out of wedlock have ties not only to their mother but also to their

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biological father. Especially for those who perform istbat marriages or determine the offspring of children, which have been legalized through the decision of the Religious Court get recognition from the state and the rights inherent in it as heirs of their biological father. The norms of inheritance fiqh, which are based on the idea that if the marriage is valid, then the child of that marriage is also valid and has the status of the father's heir.

Originality/value – In the above review, it has not been examined regarding the impact of the issuance of the Constitutional Court decision on the legal order in Indonesia, specifically the issue of inheritance rights and other rights that can be obtained from his biological father..

Keywords Implication, Constitutional Court Verdict, Inheritance rights, Extramarital child.

Paper type - Conceptual paper.

1. Introduction

In Islam, the purpose of supporting marriage is to continue and nurture Adam's children, and to obtain true offspring. In Indonesia there is a regulation related to marriage, namely Law Number 1 of 1974 Related to Marriage hereinafter abbreviated (Marriage Law) and the Compilation of Islamic Law hereinafter abbreviated (KHI) Article 4 that marriage is official, if it is carried out in accordance with Islamic law in accordance with article 2 paragraph (1) that it is regulated by Islamic norms, marriage is a very firm commitment or mittsaqah ghalidzan which is very strong to obey the duty of Allah, and obeying the commandments of Allah is worship. Article 5 of the IHL explains that the Marriage Registration Officer is responsible for marriage registration. Furthermore, it is further explained in article 6 of the KHI, that the marriage must be performed in front of and under the supervision of the marriage registrar, and if not, the marriage is considered null and void. This must be done because it looks at the purpose of marriage itself, which is to have a sakinah, mawaddah, and warahmah home life. So, in order to achieve the purpose of marriage, it is necessary to register the marriage which has been regulated in the provisions above.

This is certainly different from the reality in Indonesia, where it is still common for people to perform serial marriages despite the fact that the Marriage Law is designed to stipulate that marriage is valid if it is carried out in accordance with the teachings of each religion and belief. In addition, each marriage must be registered in accordance with the requirements of applicable laws. Serial marriages, on the other hand, are performed without notice by the Marriage Registration Officer, and marriages are not reported to the competent government institutions. This shows that the serial marriage is not valid according to applicable provisions because it does not comply with the rules set by the government.

If the serial marriage produces children, based on the Marriage Law and the IHL that children born from serial marriages or marriages under the hands are included as legal children or extramarital children. (Masitoh, 2018) So it is quite clear that children born from serial marriages include children who are not official and children born out of wedlock because indeed the marriage of both parents is not official according to applicable regulations. From this arises the problem of the relationship between the child and his father, which has an impact on the inheritance rights of the extramarital child. (Agustina, 2016) In terms of inheritance, Islam has clearly and in detail explained the distribution of inheritance to heirs after the death of the heir. There are various kinds that are grouped as heirs, one of which is in heirs, namely children. It is stated in the Qur'an Surah An-Nisa' Verse 11:

يُؤْتِي صِيَّكُمْ اللَّهُ فِي أَوْلَادِكُمُ الذَّكَرَ مِثْلَ حَظِّ الْأُنثِيَّاتِ ۚ فَإِن كُنَّ نِسَاءً فَوْقَ اثْنَتَيْنِ فَلَهُنَّ ثُلُثَا مَا تَرَكَ ۚ وَإِن كَانَتْ
وَاحِدَةً فَلَهَا النِّصْفُ ۚ وَلِأَبَوَيْهِ لِكُلِّ وَاحِدٍ مِّنْهُمَا السُّدُسُ مِمَّا تَرَكَ إِن كَانَ لَهُ وَلَدٌ ۚ فَإِن لَّمْ يَكُنْ لَهُ وَلَدٌ وَوَرِثَتْهُ
أَبَوُهُ فَلِأُمِّهِ الثُّلُثُ ۚ فَإِن كَانَ لَهُ إِخْوَةٌ فَلِأُمِّهِ السُّدُسُ ۚ مِن بَعْدِ وَصِيَّةٍ يُوصِي بِهَا أَوْ زَيْنٍ قَلِيلٍ ۚ وَأَبَاؤُكُمْ وَأَبْنَاؤُكُمْ
ۚ لَا تَدْرُونَ أَيُّهُمْ أَقْرَبُ لَكُمْ نَفَعًا ۚ فَرِيضَةٌ مِّنَ اللَّهِ ۚ فلي إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا

It means: "God has made it obligatory for you to divide the inheritance of your children in a way as a given: the share of sons is equal to the rate of two daughters. And if the children are all women and there are more than two people, then the rate of property they leave behind is two-thirds of it. If there is only one (daughter), she receives half of the gift (the inheritance left behind). If he (the deceased) had children, then a share of each one-sixth of the inheritance left to both parents. If he (the deceased) has no children and is inherited only by his parents, then his mother is entitled to a third inheritance. If he (deceased) had many siblings, his mother was entitled to one-sixth of the inheritance. (The aforesaid division) follows (fulfills) the will of diyat or (and after payment of) debts. You don't know which of your parents or children will be more beneficial to you. This is God's command. Truly Allah is All-Knowing, All-Wise." (QS. An-Nisa:17). According to this sentence, every child has the legal right to claim the rights of his heirs, and the amount of property left to him has been decided.

The petition of one of the residents, Hj. Aisyah Mochtar alias Machica bint H. Mochtar Ibrahim alias Machica Mochtar, led to the issuance of Constitutional Court Decision Number: 46 / PUU-VIII / 2010 (abbreviated as MK or MK Decision). That Machica Mochtar married Drs. Moerdiono on December 20, 1993, in Jakarta, under the guardianship of the late H. Mochtar Ibrahim. The marriage was recognized as valid by the Tigaraksa Religious Court Decree Number: 46/Pdt.P/2008/PA. Tgrs. So that the Constitutional Court decision states that children born outside of legal marriage by the state,

still have ties not only to the mother and her family, but also to their biological father with the intermediary of proof. The relationship between the Constitutional Court ruling and article 43 paragraph 1 (Marriage Law), which states that children born out of wedlock only have civil contact with their mothers and families, is however inversely proportional. This shows that the son is not even the heir of his father and that the son does not have a good relationship with him. Fatwa of the Indonesian Ulema Council (MUI) No. 11 of 2012 concerning the Handling of Children Accused of Zina Victims is the next document. This raises pros and cons among the public. There is a difference between Islamic inheritance law and positive legal provisions when referring to Article 43 paragraph (1) of the Marriage Law, therefore this research needs to be carried out to provide explanation and security to each child regarding the status of the child and his rights related to his father legally, both Islamic law and positive law. Previous research conducted by Ury Ayu Masitoh discussed the inheritance rights of children from serial marriages and legitimate children in Islamic and positive law, where the treatment of both is not equal in terms of rights and procedures. (Masitoh, 2018) Furthermore, research conducted by Nur Azizah, which basically stated that in the Constitutional Court ruling, children resulting from serial marriages who have civil relationships do not provide further explanation whether it is also interpreted as having a sexual relationship or only limited to ordinary ties to ensure the survival and future of the child. (Azizah, 2018) In the above review, it has not been examined regarding the impact of the issuance of the Constitutional Court decision on the legal order in Indonesia, specifically the issue of inheritance rights and other rights that can be obtained from his biological father. Therefore, the author is interested in conducting a more in-depth analysis of how the impact of the Constitutional Court decision on the rules or norms relating to the inheritance rights of children from serial marriages in the legal order in Indonesia, as well as how the status of inheritance rights of children resulting from serial marriages according to the compilation of Islamic law. This paper aims to examine more deeply the implications of the Constitutional Court decision No. 46/PUU-VIII/2010 on the legal order in Indonesia, more specifically the issue of children's rights.

2. Methods

This study uses a type of normative research with the aim of investigating legal deadlocks and analyzing special linear legal issues if there is a blurring and/or conflict of norms. (Diantha, 2017) Utilizing a statutory approach, a case approach, and a conceptual approach. The legal materials in this thesis are primary legal materials, Constitutional Court Decision No.

46/PUU-VIII/2010, Marriage Law, as well as relevant rules relating to children that are binding and linear with legal issues to be examined, Next, the source of secondary legal materials includes expert views, journals and books, then the next legal data is tertiary legal data that supports primary and secondary legal data. The method of collecting legal material used is to deepen the literature by combining the collected data and then processing and citing important things to support the problems in this study. Legal material analysis techniques by using the collection of legal materials and setting aside things that are less relevant to this study so that the last can provide conclusions.

3. Discussion

a. Impact of Constitutional Court Decision No. 46/PUU-VIII/2010 on the Legal Order in Indonesia Regarding the inheritance rights of children resulting from serial marriages

To ensure human survival as well as the survival of nations and countries, children play an important role. Children are the hope of the future, and what we do now will have an impact on how well they are raised in the future. That is, if the world strives for a human civilization superior to now, the state as a defender may still have time to develop and uphold the rights of children. This is in accordance with Article 28 B of the 1945 Constitution, which states that "the state ensures that every child is entitled to livelihood, growth and development, as well as the right to security from acts of violence and discrimination.(Asnawi, 2013) Because the child was born against his own choice, he does not deserve guilty status under state law or religious standards when it comes to 'illegitimate' marriages. This is the result of the application of Article 43 (Paragraph 1) of the Marriage Law which regulates the position of children born out of wedlock has not been adequately regulated by the Marriage Law. This means that the position of children born out of wedlock or children born out of wedlock who are legally recognized only has civil ties with the mother and her mother's family without any obligation in terms of inheriting legal protection and tends to be discriminatory. As a result, a child actually has to bear the losses caused by the actions of his parents. Therefore, a child must actually bear some of the costs associated with the decision of his parents.

According to state law, children born out of wedlock must have the same civil rights as children born from legal marriages. Marriage is inappropriate if a child has to bear the consequences of their parents' actions. This is a risk associated with a marriage that has not been managed or performed in accordance with the rules and regulations of marriage. In line with the nation's character to be good citizens, children

have the right to good care during pregnancy and after birth. Various civil rights are controlled by taking into account children's right to services to improve their skills and social life. Children have the right to be protected from environments that may harm them or interfere with their normal development.

Only the idea that the child should bear the consequences of the actions of his two masters should be understood when it is considered a sanction of state norms or religious norms (in this case Islam). In other words, regardless of whether or not a marriage is valid according to state norms, both biological parents, or both biological parents, are still responsible for any possible harm caused by a marriage performed for the fulfillment of the rights of children born of a marriage.(Muis, 2020) New legal regulations and political movements were made possible by the Constitutional Court.(Basri & Rumawi, 2021) The application for review of the articles filed by Machica Mochtar, an artist who was married to a former secretary to the minister of state during the New Order era, Moerdiono, was approved by the Constitutional Court. The petitioner requested that Article 2 paragraph (2), which deals with the issue of marriage administration and article 43 paragraph (1), which deals with the civil position of children born out of wedlock, be considered unconstitutional and declared as having no legal standing, with all related consequences. Those who support this decision believe it is a progressive legal innovation in defending the rights of children, both born out of wedlock and outside legal marriage. This decision, however, raises both positives and negatives in society. Those who believe this ruling justifies and legitimizes unregistered marriages, those who disagree fear it will legalize adultery or promiscuity.

According to Habib Shulton Asnawi, upholding Article 43 (Paragraph 1) of the Marriage Law is tantamount to a state that condones widespread neglect of children born out of wedlock.(Asnawi, 2013) Of course, this is against human rights. States are seen as contradictory and tend to disagree with the decision to ratify the 1989 UN convention on the rights of the child. The obligations of States that ratify the Covenant on the Rights of the Child include making Child Protection Laws. The rights provisions of the 1989 Convention on the Rights of the Child, as well as the "order" of other laws and regulations that contradict the standards outlined in that convention.

One of the decisions of the Constitutional Court No. 46/PUUVII/2010, has important consequences for laws governing marriage, especially with regard to extramarital relations with biological fathers. The verdict states: "An extramarital child has civil ties" with his

mother, his family, and a man who can be proven by science, technology, or other evidence to be his father and who has blood ties, including with his biological father, family, according to law. Children born from serial marriages have the same rights as legitimate children, including the right to bread, or basic necessities required by those who need them. The ruling recognizes only the status and standing of the child; However, it does not regulate preventive measures to ensure that there is no connection of actions that can later produce offspring. Every marriage in a series should be valid according to religious law then, in positive norms it is also valid and results in a civil rights relationship between the two and also the offspring resulting from the marriage.(Muis, 2020)

The issuance of the decree has implications for the order of marriage norms in Indonesia, especially regarding the position of children from serial marriages. Next, the Constitutional Court formulated a new norm, that children born out of wedlock have ties not only to their mother but also to their biological father. This ruling is conditionally unconstitutional, meaning that it states that article 43 paragraph (1) of the Marriage Law is contrary to the 1945 Constitution and paves the way for new norms that discuss the rights and position of children from serial marriages. In order for the responsibility of parents, in this case the biological father, to fulfill the responsibilities of parents and ensure the fulfillment of the rights of children, a new norm was made by the ruling. Based on the fairness of logic, which held that civil bonds between father and son could be established through both marital and blood ties, a panel of constitutional judges decided to uphold the law in this case. So that the norms contained in the ruling seek to bequeath legal protection for children's rights.

The argument of the panel of judges in taking the existence of blood relations is a benchmark for the existence of civil relations with biological fathers. Until now, various laws have been positivistic or rigid, thus hegemonizing their enforcement including in the Marriage Law, especially Article 43. Even though laws and regulations do not always guarantee that the laws and regulations are correct. Legislation will be tested when put into practice, not necessarily when it is well formulated. Therefore, the application of Article 43 of the Marriage Law which regulates the status of children born outside marriage must be carried out progressively. Satjipto Raharjo demanded that the law be applied accordingly. The basic principle is that humanity should benefit from the law, not the other way around.(Raharjo, 2006) Humanity does not serve the law on the contrary, the law serves man. The law exists for something much broader, primarily for human dignity, pleasure, well-being, and nobility than for it specifically.

In an attempt to undermine legalistic positivism about the definition of law, this is progressive legal philosophy.

Thus, with the issuance of Constitutional Court Decision No. 46/PUUVII/2010, equalizes the rights and position of children from serial marriages with other children born legally under State law. The concept of fiqh that is referred to in the formulation of the Constitutional Court decision if a serial marriage is religiously valid, then the consequence of the marriage is that there is a right for children born from the marriage.

b. Analysis of Constitutional Court Decision No. 46/PUUVII/2010 on the Status of Inheritance Rights of Children Married by Siri According to the Compilation of Islamic Law

Islamic family law is the cornerstone of sharia, which provides a number of solutions to problems. Islamic family law is often considered a moral code that Muslims learn to enforce in their homes. Although much can be solved by offering answers to problems that arise in the family. Knowledge and ideas are still misunderstood in the modern world. As a result, when resolving the civil problems of the Islamic family, Islamic law is no longer considered. The scholars describe personally the regulation of family law in Indonesia based on the knowledge of their teachers. This hindered the development of law because the exposure of the scholars was considered sacred, could not be challenged, revised and evaluated. Such a principle gave rise to the era of stagnation (*jumud*) of knowledge in the past because of the sacralization of society towards scholars, both their personalities and their thoughts. In the 1960s concrete efforts to reform Islamic family law began, which resulted in the birth of the Marriage Law. (Fitri, 2019) Man as the best creature in this world is given a form of nature by God Almighty in the form of marriage. Not only man, but all living things created by Him. A marriage one of them aims to continue offspring, namely children. Recently, after the decision of the Constitutional Court No. 46/PUU-VIII/2010 dated February 27, 2012 regarding the recognition of the status of children/children outside marriage to obtain legal recognition of their biological father in civil law, and the review of the provisions of Article 43 Paragraph 1 of the Marriage Law in its dictum.

After the ruling, article 43 paragraph (1) of the Marriage Law must be read as: "A child born out of wedlock has a civil relationship with his mother and his mother's family and with a man as his father who can be proven based on science and technology and/or other evidence according to law to have a blood relationship, including a civil relationship with his father's family. The Constitutional Court's decision in this case changed the interpretation of the Marriage Law, which not only applies to couples married under the hands according to Islamic procedures but also applies

to all Indonesian citizens.(Martinelli, 2013) Judging from history, that this serial marriage has long occurred in Indonesia. In Indonesian legal regulations there is no mention of serial marriage. Serial marriage occurs when the marriage process is carried out by not involving the government and state but only religiously or customarily. Indonesian society considers serial marriages valid because they are carried out based on religious norms or customs. If Siri's marriage produces children, then his children are considered legitimate children as well.(Nurdjanah et al., 2021) Article 2 paragraph 1 of the Marriage Law affirms the validity of serial marriage implicitly.

It is interesting to note that when the initial application for judicial review was decided, it became a lively debate among the public, especially in interpreting the legitimacy of the relationship between the father and the child outside marriage. In the above ruling, the Indonesian Ulema Council (MUI) considered that the Constitutional Court legalized adultery. MUI considered that the decision did not elaborate clearly on the legal rights of children born in marriages that were not officially registered in the KUA such as marriages that were not registered. All children born out of wedlock are entitled to civil relations with the father and his family. MUI continues to associate nasab with civil interaction.(Nurdjanah et al., 2021) This is contrary to the opinion of Mahfud who said that the civil bond of a child born out of wedlock with his biological father does not necessarily have a sexual bond, while a child resulting from adultery only has a civil relationship outside the sexual relationship. He dismissed the MUI's accusations, arguing that the Constitutional Court's verdict made a person afraid and not commit adultery.(*Soal Putusan Status Anak Di Luar Nikah, Ketua MK Nilai MUI Tak Paham*, 2012)

Looking at the history before Islam, the social structure of previous societies was very influential on inheritance law. Before the advent of Islam, women and children were not entitled to inheritance from heirs (parents or relatives). Under the justification that they could not fight to protect their tribes and people, children and women. They devoted their inheritance to those who fought in the war, not to their descendants.(Al-Ṭabārī, 2007) In fact, the essence that is an important point in inheritance is a legal lineage.

Islamic Family Law explains that three factors can affect a child's marriage with his father: a legal marriage, an arranged marriage, or even the husband's ignorance of the dangers of his contract.(Jaib, n.d.) This ruling can have a positive or negative impact seeing from a very wide range of legal repercussions. On the one hand, the rights of children outside marriage can be fulfilled, if a man is scientifically proven. However, with regard to lineage (nasab), guardianship rights, inheritance rights within the

scope of Islamic family law are stigmatized if the definition of "child outside marriage" is interpreted as a child born as a result of adultery, infidelity and *samen leven*.

The move was a revolutionary effort taken by the Constitutional Court in its ruling. It is debated in the phrase "child born out of wedlock" which has a very significant difference in the grammar of the definition of Indonesian positive law and Islamic law. If in Islamic law, "child born out of wedlock" contains the definition that, a child born to a couple who commits adultery (*haram*). Meanwhile, in the definition of Indonesian positive law, the phrase "child born out of wedlock" is interpreted as a child from the result of a relationship made on marriage and does not register so that it is not recorded in the KUA. The unequal concept of definitive is the basic thing that triggers the discontinuation of the debate, so that the decision taken by the Constitutional Court is considered to legalize adultery. In this study, it will be focused that, the phrase "children out of wedlock" is defined as children born in serial marriages by husband and wife. This has also been explicitly stated in article 2 paragraph 1 of the Marriage Law, so that it remains valid for serial marriages and against *nasab* in Islamic family law not to be broken.

In its consideration, the ruling has a good meaning in order to maintain the values of justice, namely through the consideration that the child born is the result of a male and female relationship. If a child out of wedlock has only a one-way relationship with his mother and does not have his father's relationship. It is considered inappropriate and unfair if the law exempts a man who has sexual intercourse and causes pregnancy until the birth of a child by absolving responsibility and negating the rights of a child who is none other than his own father. Even though the development of technology allows it to be proven that a child is the child of a certain man.

Ibn Kasîr associated lineage with the bond of inheritance that helped people create families through marriage. Al-Thabathaba'i offers a different point of view, explaining fundamentally how *nasab* is a relationship or bond that binds one person to another based on birth/blood relations, *wiladah*, and birth, *jami'al-rahm*. (Jamil, 2016)

زوجها إبل ينسب صحيحا زواجا املتزوجه املا رة به تأتي الذي الولد أن على الفقهاء اتفق

Wahbah al-Zuhayli's opinion says that, jurists agree that a child born to a woman through a legal marriage is given to the woman's husband. There is no impediment to a legally consummated marriage. (Az-Zuhaili, 2011)

In relation to the ruling, the main point of discussion of the legal basis of this issue is related to the civil relationship between the biological

father and the child born out of wedlock and the life of the child can be guaranteed. The civil relationship between father and child from serial marriage goes hand in hand with the principle of *ḥifz al-nasl* (keeping nasab), on the basis that the principle takes into account the method of obtaining children legally through the process of marriage. The emergence of the Constitutional Court decision No. 46/PUU-VIII/2010 provides legitimacy between religious norms and Indonesian legal norms, which has implications for children outside marriage having the right to get state recognition and the rights inherent in it.

Viewed using Islamic law, it is closely related to the principle of *ḥifz al-nafs* (nourishment of the soul). If the child only lives by receiving rights from the mother and his mother's family, it will certainly be very troublesome or can cause *mafsadat*. If assisted with income by the biological father that causes the child to be born will ease the burden on the mother.

The Constitutional Court Decision No. 46 / PUU-VIII / 2010 is related to the Compilation of Islamic Law, which in the KHI as the formulation used has been the basis of Islamic family law in Indonesia. Against the judgment has the effect that children born outside the legal marriage bond have legal force and legal protection so that they apply equally to the status of legal children. The ruling is a breakthrough from the Constitutional Court in fulfilling legal protection for Indonesian citizens, especially children. (Rikza, 2021)

Against the decision of the Constitutional Court No. 46 / PUU-VIII / 2010, it should be a solution in providing legal legitimacy to children born outside the bonds of marriage without legalizing adultery in the sense of Islamic law. With such reference, the definition of a legitimate child in IHL does not become a norm that collides or blurs if it is definitively relied that a legitimate child is a child born as a result of a legal marriage. Basically, between the decision of the Constitutional Court No. 46 / PUU-VIII / 2010 and article 99 KHI jo. article 53 KHI, in general has the same goal, namely providing legal protection to mothers and children before the law.

In Islamic family law, a serial marriage is said to be valid on the basis of the conditions and harmony fulfilled, so that the child born from this serial marriage is also considered valid and entitled to recognition from his father and father's family and get rights as children including inheritance rights from his parents. Constitutional Court Decision No. 46/PUU-VIII/2010 has alignment with the legal theory of child protection, as Arif Gosita argues, child protection is an effort to prevent children from exercising their legal and moral rights. The regulation of the law basically directly affects how the rights of children are protected. (Gultom, 2014)

Judging from history, the time of friends and scholars of the madhab was known as nasab experts who had expertise in deciding the determination of children's nasab. At that time sexual relations occur if two people who have intercourse in one holy period, whether motivated by slavery or marriage, this means that adultery is not included in the category of connection of nasab. The scholars who adhered to this designation were Imam Malik, Shafi'i, Ahmad, Abu Tsauro, and Al-Auza'i. In contrast to the previous opinion, the cleric of Kufa and the majority of Iraqi scholars reject the qafah, which requires recognition. It becomes legitimate if two persons obtain confession, then the child becomes the property of those two persons on the basis that it remains not through the path of adultery. The legal basis of this opinion is the qafah's verdict on a hadith narrated by Malik from Sulayman ibn Yasar: "That Umar ibn Khattab gave a verdict to children born during the time of Jahiliyah to mix with their parents, that is, those who confessed it in the time of Islam". (Azizah, 2018)

According to Islamic law, once the conditions of marriage are met, the marriage is considered valid and gives birth to all obligations and rights between husband and wife, including matters of property and offspring. There are no records of marriages being registered in the early days of Islam. The need for marriage registration is driven by the demands of community development and various benefit considerations.

On the question of human benefit and justice, especially children in this case, the principle of human welfare as T.M. Hasbie ash-Shiddieqy argues is that the law is determined after the community needs these laws and the law is determined according to the level of community needs. In justice, this issue is also a basic principle in Islamic law, namely that there should be no subjective element in the definition of justice. What Islam advocates is a reflective attitude of thinking and an objective approach to the problem at hand. (Yudesman, 2014)

On the issue of sexual relations, the position of the son of Machicha Mochtar, the ex-wife of the Moerdiono series (in the Constitutional Court ruling) who has the status of being a child out of wedlock is not said to be a norm that is contrary to Islamic law. This is because in sharia 'the marriage relationship that is carried out has obeyed the applicable sharia but is not administratively orderly. Thus, in this case a child born as a result of a serial marriage cannot be of the same legal status as an extramarital child resulting from adultery. So it can be concluded that those who can get inheritance rights are children from serial marriages that have been involved, but for those who have not been involved, they only get the right to provide for themselves, not to inherit.

got one-sixth. (The inheritance is divided) after (fulfilled) the will made by him or (and repaid) his debts. (About) your parents and your children, you do not know which of them will benefit you more. This is God's decree. Indeed, Allah is All-Knowing and All-Wise."

In addition, regarding the share of biological children in article 176 of the Compilation of Islamic Law it is explained as follows: "A girl if only one gets half a share, if two or more of them together get two-thirds share, and if a girl is together with a son, then the share of the son is two to one with the daughter".

Although the ruling provides legal protection for children resulting from serial marriages that have not been administratively recorded. Fundamentally that it has been regulated about marriage registration. In addition, Islam also pays special attention to the importance of recording marriages that take place as a form of protection and benefit, as in the rules of fiqh below:(Rizani, 2013)

بالمصلحة منوط الرعية على الامام التصرف

It means: "The policy (of the leader) over the people depends on the benefit"

Selain itu, adanya akta pencatatan perkawinan merupakan sebagai bukti kuat adanya sebuah perkawinan demi mencegah hal yang tidak diinginkan, hal ini sebagaimana dalam kaidah fiqh:(Djazuli, 2019)

بالعيان كالثابت هان بالرب الثابت

Artinya: "Sesuatu yang telah ditetapkan berdasarkan bukti (keterangan) sepadan dengan yang telah ditetapkan berdasarkan kenyataan"

Kepentingan perlindungan hukum bagi Anak adalah hal mutlak yang perlu diperjuangkan. Kepentingan perkawinan secara siri adalah kepentingan orang yang berakad dan melupakan kepentingan anak yang akan dilahirkan dari perkawinan tersebut. Hal tersebut ditentang dalam kaidah fiqh yang berbunyi:

القاصر من افضل امتعدى

Artinya: "Perbuatan yang mencakup kepentingan orang lain lebih utama daripada yang hanya sebatas kepentingan sendiri"

Syekh Jaad al-Haq Ali Jaad al-Haq memisahkan hukum-hukum yang mengatur perkawinan menjadi dua kategori sesuai dengan pentingnya pencatatan dalam perkawinan, yang merupakan cara untuk menjamin kepastian hukum dalam topik perkawinan, yaitu:(M et al., 2004)

- 1) Peraturan syara' adalah hukum yang menentukan sah atau tidaknya suatu perkawinan. Aturan ini telah ditetapkan oleh hukum Islam, yang telah dikembangkan dalam domain fiqh;
- 2) Peraturan yang bersifat tawsiqy yaitu perkawinan antar umat Islam tidak dilarang menurut hukum tauhid, tetapi harus didaftarkan dengan menggunakan akta nikah yang telah disahkan oleh pemerintah yang bersangkutan. Tujuannya adalah untuk menjaga lembaga perkawinan yang sangat penting dan strategis dalam peradaban Islam, dari tindakan tidak menguntungkan yang dilakukan oleh pihak-pihak yang ceroboh.

Seseorang tidak memiliki hak menerima warisan dari orang lain, kecuali karena memiliki sebab-sebab tertentu. Adapun sebab-sebab yang menjadikan seseorang mendapatkan warisan ada tiga, yaitu: nikah, nasab, dan wala'. Terhadap putusan MK tersebut yang secara legal formal tidak menjadi penghalang bagi anak hasil luar perkawinan untuk mendapatkan hak waris dari ayah biologisnya, nikah siri diakui sebagai perkawinan yang sah dengan tetap mengikuti rukun dan syarat perkawinan dalam Islam.

Dengan pertimbangan di atas, maka dalam putusan MK tersebut secara kemaslahatan telah tercover melindungi hak anak untuk mendapatkan warisan dari ayah biologisnya, namun bukan berarti perkawinan yang dilangsungkan secara siri semakin massif dilakukan, Because it is feared to be a legal loophole to commit arbitrariness from the beginning of marriage. The existence of the Constitutional Court decision proves that there is a warning on the importance of registration as it has not been granted to article 2 paragraph 2 of the Marriage Law and in the rules of fiqh has clearly explained the importance of considering aspects of benefit.

4. Conclusion

The issuance of Constitutional Court Decision No. 46/PUU-VIII/2010 has implications for the marriage norm order in Indonesia, especially regarding the position of children from serial marriages. The Constitutional Court formulated a new norm, that children born out of wedlock have ties not only to their mother but also to their biological father. This ruling is conditionally unconstitutional, and paves the way for a new norm for the responsibility of parents, in this case biological fathers, to fulfill responsibilities and ensure the fulfillment of children's rights.

The rights and status of children resulting from serial marriages are in accordance with Article 99 of the Compilation of Islamic Law. Especially for those who perform istbat marriages or determine the offspring of children, this is done so that children born from serial marriages that have been legalized through religious court rulings get recognition from the state and

the rights inherent in it as heirs of their biological fathers. The norms of inheritance fiqh, which are based on the idea that if a marriage is valid, then the child of that marriage is also valid and has the status of paternal heir, goes hand in hand with the civil relationship between father and son of a siri marriage (keeping nasab).

5. References

- Agustina, E. (2016). Akibat Hukum Hak Mewaris Anak Hasil Perkawinan Siri Berbasis Nilai Keadilan. *Jurnal Pembaharuan Hukum*, 3(3), 381–390. <https://doi.org/http://dx.doi.org/10.26532/jph.v3i3.1372>
- Al-Farran, S. A. bin M., Sultan, A., Hasmand, F., & Masykur, I. G. (2008). *Tafsir Imam Syafi'i: menyelami kedalaman kandungan Al-Qur'an / muhaqqiq*. Almahira.
- Al-Ṭabārī, A. J. M. bin J. (2007). *Tafsir Ath-Thabari* (A. Affandi (ed.)). Pustaka Azzam.
- Asnawi, H. S. (2013). Politik Hukum Putusan MK No. 46/PUU-VIII/2010 Tentang Status Anak di Luar Nikah: Upaya Membongkar Positivisme Hukum Menuju Perlindungan HAM. *Jurnal Konstitusi*, 10(2), 240–260. <https://doi.org/https://doi.org/10.31078/jk1023>
- Az-Zuhaili, W. (2011). *Tafsîr al-Munîr fi al-'Aqidah wa Syari'ah wa al-Manhaj*. Dâr al- Fikr.
- Azizah, N. (2018). PUTUSAN MK NO. 46/2010 TENTANG HUBUNGAN KEPERDATAAN ANTARA ANAK LUAR NIKAH DENGAN AYAH BIOLOGIS (ANALISIS DALAM PERSPEKTIF HUKUM ISLAM, HUKUM POSITIF, UIDHR, Dan UDHR). 4(2), 243–260. <https://doi.org/10.24952/fitrah.v4i2.860>
- Basri, A. H., & Rumawi. (2021). Perjanjian Jual Beli Dengan Sistem Angsuran dan Eksekusi Jaminan Fidusia Setelah Putusan Mahkamah Konstitusi. *Jurnal Kertha Semaya*, 9(10), 1830–1839. <https://doi.org/https://doi.org/10.24843/KS.2021.v09.i10.p09>
- Diantha, I. M. P. (2017). *Metodologi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum*. Prenada Media.
- Djazuli. (2019). *Kaidah-Kaidah Fikih*. Prenada Media.
- Fitri, A. (2019). *Pembaruan Hukum Keluarga di Indonesia Melalui Kompilasi Hukum Islam*. Mahkamah Agung Republik Indonesia Direktorat Jenderal

Badan Peradilan Agama.

- Gultom, M. (2014). *Perlindungan Hukum Terhadap Anak dan Perempuan*. Refika Aditama.
- Jaib, S. A. (n.d.). *Mausu'ah al-Ijma' fi al-fiqh al-Islami*. Idarah ihya at-tiras al-Islami.
- Jamil, M. (2016). Nasab dalam Perspektif Tafsir Ahkam. *Ahkam Jurnal ILMU SYARIAH*, 16(1), 123–130. <https://doi.org/10.15408/ajis.v16i1.2902>
- M, N. I., Ah, A. L., Aripin, J., & Zein, S. E. M. (2004). *Problematika Hukum Keluarga Islam Kontemporer, Analisis Yurisprudensi dengan Pendekatan Ushuliyah*. Prenada Media.
- Martinelli, I. (2013). Implikasi Sistemis Akibat Pergeseran Tafsir Makna Status Anak Luar Kawin. *Jurnal Yudisial*, 6(3), 267–283. <https://doi.org/http://dx.doi.org/10.29123/jy.v6i3.102>
- Masitoh, U. A. (2018). Anak Hasil Perkawinan Siri Sebagai Ahli Waris Ditinjau Dari Hukum Perdata dan Hukum Islam. *DIVERSI: Jurnal Hukum*, 4(2), 125–148. <https://doi.org/https://doi.org/10.32503/diversi.v4i2.276>
- Muis, L. S. (2020). Eksistensi Hak Anak Hasil Perkawinan Siri Dalam Perspektif Hukum. *Jurnal Widya Pranata Hukum*, 2(2), 18–31. <https://doi.org/https://doi.org/10.37631/widyapranata.v2i2.242>
- Nurdjanah, L., Wisnaeni, F., & Lumbanraja, A. D. (2021). Kajian Penafsiran dan Penemuan Hukum oleh Hakim dalam Memutus Hak Mewaris Anak Hasil Perkawinan Siri. *Notarius: Jurnal Studi Kenotariatan*, 14(1), 290–301. <https://doi.org/https://doi.org/10.14710/nts.v14i1.38916>
- Raharjo, S. (2006). *Membedah Hukum Progresif*. Penerbit Buku Kompas.
- Rikza, M. U. (2021). *Analisis Maqâsid Asy-Syarî'ah Terhadap Putusan Mk Nomor 46/PUU-VIII/2010 Dan Implikasinya Terhadap Hukum Keluarga Islam Di Indonesia*. Mahkamah Agung Republik Indonesia Pengadilan Agama Raha Kelas I B.
- Rizani, R. (2013). *Kaidah-Kaidah Fiqhiyyah tentang Pencatatan Perkawinan di KUA dan Perceraian di Pengadilan Agama*. Mahkamah Agung Republik Indonesia Direktorat Jenderal Badan Peradilan Agama.
- Soal Putusan Status Anak di Luar Nikah, Ketua MK Nilai MUI Tak Paham. (2012). DetikNews.
- Yudesman. (2014). Prinsip-Prinsip dan Kaidah-Kaidah Hukum Islam. *Jurnal Jurusan Syariah STAIN Kerinci*, 1(1), 1–16.