

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

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ABSTRACT

This paper aims to prove that Biological Children can provide Civil Relations with their fathers 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 Constitutional Court decision results, 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, 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 Scholar's opinion on children outside of marriage (Siri). This research found that children can biologically provide civil relations with their parents if done in marriage and proven by clear legalities such as witnesses and marriage documents. The presence of a decision of the Constitutional Court is a legal assurance or defense of the human rights of a citizen, whether they have the correct data and facts to their civil relations.

Keywords: Biological; status; child; wedding; legal

How to Cite: Hafidzi, A., Nadiyah., Septiani, R. (2020). The Biological Fathers Have Civil Rights With Evidence and Conviction of Their Children. *Jurnal Ilmiah Al-Syir'ah*, 18(2), 127–139.
Permalink/DOI: <http://dx.doi.org/10.30984/jis.v18i2.1127>
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INTRODUCTION

Law is a rule that regulates human behavior and builds on the shared community's awareness (Deffains, Espinosa, & Fluet, 2019). There are so many problems in the Law held itself (Situngkir, 2018, p. 22). One of which is marriage in Law Number 1 of 1974 concerning marriage. This regulation is used as the first legal reference in Indonesia, regulating 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. Humans can channel their sexual desires in the right way. It means not committing adultery so that a family that loves each other can establish, as confirmed in QS. Ar-Rum [30] verse 21. Because there is already a marriage, it is strictly forbidden for humankind to commit adultery, which will make the child's lineage unclear. According to the theory of *Hifzhu Nasb (maintaining offspring)* (Hamzani, 2016, p. 57; Kamil, 2017), sending children who produce outside of marriage to their biological father means destroying the existing provisions of *Maqashid al-Syariyyah* (Ali Hamdan, 2019; Ayuningtiyas, 2020). However, suppose the child is a child resulting from marriage siri/ marriages are not registered with the religious affairs office. In that case, 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 traditional 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 not record according to Article 2 paragraph (2). 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 blame 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 if the child is born within six months of their marriage. The child link to the father, but the mother inherits the child before that. 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, it does not say that a child is an adultery as long as it fulfills the harmonious conditions and conditions of marriage in shariah. In the marriage law, it cannot equate 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 effect of a male and female relationship without a legal marriage bond. The abstractness of a child's lineage is also influenced by the implementation of the marriage 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/elopement, to marriages that know among the community, namely *kawin sirri* (hidden marriage), are 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). This decision 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 born children 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. This method describes or describes the research object based on legal data about this problem through a literature review. This study also focuses on data in 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: (1) Primary sources are references related to positive Law, namely the Constitutional Court decision Number 46 / PUU-VIII / 2010 regarding children's status, marriage law number 1 of 1974, and the Compilation of Islamic Law; (2) The Secondary sources, namely the work of legal experts and other references relating to children's status from relevant *fiqh* books. This data will use 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

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, 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. Therefore an application for recognizing an out-of-wedlock child must submit to the District Court (Mulyadi, 2016, p. 92).

In this case, many terms refer to an unregistered marriage, such as a *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. It 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 not record 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 then regulate in Article 14 to Article 29 KHI.

The obligation to register a marriage refers more to the child's legal protection and his parents' civil relationship and to have permanent legal force (Asripa, 2020, p. 42; Surya, 2020). However, in the history of marriage law, marriages that not record 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 a marriage order. Unregistered marriages are standard, but their legality has not fulfilled the State's interests (Fatmawati, 2020; Mahmud, 2020).

An unrecorded marriage contract (Asripa, 2020, p. 42; N. Aziz, 2018a, p. 445) is usually carried out in a person's presence. 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 record 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, 2018a, p. 36; Fakhria, 2017, p. 185).

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 not recognize 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 wife's rights, 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. As Quraish Shihab said, such weddings are equivalent to harassing women whose marriages are not registered in the State because the rights that should assign to them are lost.

Children Born Outside of Marriage According To Islamic Law

Children born from a male and female relationship do without any legal marriage ties according to religion or State or commonly called children are resulting from adultery. In this matter, the scholars differed: (1) 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"; (2) Imam Abu Hanifah: "Children born outside of marriage, the lineage still falls on the father regardless of the condition" (Asman, 2020, p. 15; Nurry et al., 2020, p. 208; Sikana, 2020b)

The above base 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 (firasy) 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 (firasy) 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 interpreting the phrase "*firasy*" in the Prophet Muhammad's hadith, 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 "*firasy*" to indicate to the woman (mother), which take 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 most scholars' opinion, 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 family is one of the most fundamental rights of a child and impacts the child's personality and future. The fiqh scholars 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 nation's diversity, especially in terms of religion and customs; the applicable laws also vary. There is a law, namely Islamic Law (*Fiqh*), formulated in the permanent Islamic Law Compilation (KHI).

On the fatwa from May 2006 of the Indonesian Council for Ulama (MUI) (MUI, 2006), unregistered marriage state specifically in the Law of religion. Even kids of a marriage with the Siri. If in Sharia, marriage is legitimate, then the child must also be legal. The problem is that the Law has not accepted this legality. A child legally approved is the child of legal marriage documented in state records. The child is legally authorized—even kids of a marriage with the Siri. When marriage is legitimate in the religious Law, it must also be legal for the child to marry.

The problem is that statutory/formal Law has not accepted legality. The legal marriage, documented in state records, results from a child that is legally recognized in Law (Bahrum, 2013, p. 210). Recognize unregistered marriage children—similarly, the children from the Siri wedding. If a marriage is legitimate under religious Law, it must also be lawful for the child to be married (Afhami & Mashdurohatun, 2017).

The problem is, by statute / formal Law, the legality has not been accepted. The product of a lawful marriage, which document in state records, is a child that is legally recognized by statute. Article 42(1) states, in compliance with Law No. 1 of 1974 on marriage, 'Legitimate children are children born in or as a result of a lawful marriage.' The State still objects to acknowledging in Indonesia that children from unmarried marriages are legal. The unmarried infant is often referred to as an unlawful child, but not adultery (Amnawaty, 2019, pp. 17–22). But, in the end, legal rights such as living, inheritance, and even birth certificates would be difficult to handle. In Indonesia, this is also part of the current issue.

In-Law No. 1 of 1974, Article 42(1) is based on an interpretation of the Shari'a, contrary to Article 43(1), which followed it. In this article, children born out of wedlock only have a civil relationship with their mother and the family of their mother. Even though many still say that the State should accept children from this unregistered marriage. Ignorance of the need to register/register their marriage may be economic, social, or the bride's contributing factors (Diab, 2018b, pp. 36–37). As a consequence, they agreed to marry unregistered.

The legitimate infant, in theory, is under the custody of the parents. Many who are illegitimate, meanwhile, are undoubtedly under guardianship. This illegitimate also applies to succession and the rights of other children. A child born of a Siri marriage is now recognized as having no legal relationship with his father in the practice of everyday life (N. Aziz, 2018b, p. 450). Precisely the same as the marriage law for girls. For example, there are still instances of birth certificates for children from unmarried unions that do not contain the father's name in the birth

certificate. It is true that, as set out in Article 55(2), letter A of Government Regulation No. 37 of 2007 on the application of Law No. 23 of 2006 on population administration is valid. The Constitutional Court believes that the provisions of Article 2(2) of Law No. 1 of 1974 on registration of marriages suggest that registration of a marriage is not a consideration deciding the validity of a marriage. The recording is a civil duty and merely an administrative obligation (Hidayah, 2011). This administrative duty is to guarantee the security and fulfillment of the applicable human rights. Moreover, with the State's administrative registry, it is intended that marriage becomes an important legal act that has consequences for a very large legal impact and that the marriage can be confirmed by an authentic deed of perfect proof in the future.

In the meantime, Article 7 (1) of the KHI notes that only a marriage certificate made by a marriage registration officer can demonstrate by marriage. To allow the children to inherit their father in a Siri marriage if two children are born. This Siri marriage also refers to the married wife, who is not entitled to the late husband's inheritance. The explanation is that a marriage certificate from a Marriage Registry Officer cannot prove the marriage. However, several Religious Court rulings include serial demands for the legalization of marriages. Such as the Panyabungan Religious Court Decision Number 6/Pdt. P/2017/PA. in which the applicant submitted a request for marriage legalization (Asror, 2019; Fadilah, 2018; Febriyati, 2017; Tanjung, 2019; Yusuf, 2018). Its decision, in addition to the legalization of unregistered marriage, the panel of judges legalizes children born from the marriage. The verdict may be used by the claimant, one of which is to organize the applicant's children's birth certificates.

In 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 child's right. 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 (Arifin, 2017, p. 117; Hamzani, 2016; Ramadhita & Farahi, 2016, p. 74).

Clear Evidence Can Cause Civil Relations

According to the author's analysis, children born out of wedlock based on the Constitutional Court decision Number 46 / PUU-VIII / 2010 were born from a marriage legal under Islamic Law but not registered in the State. The child resulting from the marriage *unregistered*, not the child was resulting from the relationship between a man and a woman who is not married (*zina*) (Jauhari, Burhan, & Kencana, 2020, p. 254). Suppose a child is born as a result of adultery, according to the Constitutional Court rulings. In that case, 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 legal marriages under Sharia but not registered (*sirri* marriage). The children born from a legal marriage under Sharia and carried out outside the procedure of article 2, paragraph 2 of Law Number 1 of 1974 concerning marriage (Rosidah, 2017, p. 180; Thea, n.d.).

The existence of the Constitutional Court's decision intends 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*). The child resulting from unmarried marriage means "protected children" in the Constitutional Court decision. *Siri* marriage is only considered valid according to religion, whereas according to Law, marriage is illegal because it is not registered. However, 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 to 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 born and the rights that exist to it, including for children who paid even though the marriage's legality still in dispute. 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) insofar as the verse referred to eliminates civil relations with men, which can be proven based on science and technology or other evidence that according to the Law has blood relations like his father.

Based on the Constitutional Court's above decision, 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. A considerate relationship with the father and/or his father's family as long as science or a test tool such as DNA (Deoxyribonucleic Acid) which become a legal proof to show the man is the father (A. Aziz & ul Hassan, 2017; Boemer, 2000; Ramadhani, 2019). 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, a legitimate child is a child born from a legal marriage and according to procedures determined according to Islamic Law (Islamic Law). According to the Constitutional Court decision number 46 / PUU-VIII / 2010, 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 not record. 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.

ACKNOWLEDGMENTS

The researcher would like to thank all parties who have reviewed the Constitutional Court decision and the Marriage Law at the Sharia Faculty. The Family Law Study Program has helped in funding this research and colleagues Kintan Aprilia, Nurhasanah, Yeni Amalia, who helped complete this research.

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