Legal Reasoning on Paternity: Discursive Debate on Children Out of Wedlock In Indonesia

Abdullah Jarir, Ratno Lukito, and Moch. Nur Ichwan

Abstrak: Artikel ini menjelaskan mengapa para ulama dan ahli hukum Islam Indonesia yang menentang keputusan Mahkamah Konstitusi (MK) telah gagal melihat norma-norma progresif dalam Islam dan hak asasi manusia. Mereka berargumen bahwa keputusan yang menetapkan bahwa anak yang lahir di luar nikah memiliki hubungan nasab tidak hanya dengan ibunya tetapi juga dengan ayahnya bertentangan dan tidak memiliki dasar hukum dalam yurisprudensi Islam. Oleh karena itu, makalah ini akan memberikan dasar pemikiran dari argumen para ahli hukum Islam, termasuk ulama Indonesia, dan pendukung keputusan Mahkamah Konstitusi Indonesia. Kesimpulannya, para ulama dan ahli hukum Islam Indonesia selama ini menganut pandangan konservatisme, yaitu pemikiran yang statis dan tekstual dalam menafsirkan hadis tentang masalah anak di luar nikah. Akibatnya, mereka tidak menerima penafsiran lain. Padahal, ada penafsiran lain disampaikan oleh para ahli hukum Islam klasik seperti Ibnu Taimiyyah dan Ibrahim al-Nakhā'ī, yang berpendapat bahwa anak di luar nikah memiliki hubungan keperdataan dengan orang tuanya. Sementara itu, pendukung putusan MK menganut pandangan progresif yang mempertimbangkan kepentingan umum-anak-anak.

Kata kunci: anak luar nikah; Mahkamah Konstitusi; penalaran hukum; warisan Islam; dan ahli hukum Islam

Abstract: This article explains why Indonesian Ulama and Islamic jurists who oppose the Constitutional Court decision have failed to see the progressive norms in Islam and human rights. They argued that the decision determining that the children born out of wedlock have filiation not only with their mother but also with their father contrasted to and has no legal basis in Islamic jurisprudence. Therefore, this paper will provide the rationale of the arguments of Islamic jurists, including Indonesian ulama, and the proponent of the Indonesian Constitutional Court decision. In conclusion, Indonesian ulama and Islamic jurists have been embracing the conservatism point of view, that is static and textual thinking in interpreting the Ḥadith concerning the issue of a child out of wedlock. As a result, they did not accept another interpretation. Other interpretations are delivered by classical Islamic jurists like Ibn Taimiyyah and Ibrahim al-Nakhā'ī, who argued that a child out of wedlock has a civil relationship with their parents. Meanwhile, the proponent of the Indonesian Court decision adheres to the progressive point of view that considers the children's public interest.

Keywords: child out of wedlock; constitutional court; legal reasoning; Islamic inheritance; and Islamic jurists

Introduction

The legal status of a child out of wedlock in the context of Islamic inheritance in Indonesia has caused debates and controversies among Indonesian Muslim people, including scholars and judges, after the issuance of Constitutional Court Decision No. 46/PUU-VIII/2010. The Constitutional Court changed the Marriage Law (*Undang-Undang Perkawinan*) provision and the Compilation of Islamic Law (*Kompilasi Hukum Islam*) or KHI as the legal basis of Religious Courts in Indonesia. As a result, confusion occurs among judges when they deal with inheritance cases. Some still keep up the opinion of classical Islamic jurists, and others prefer to follow the Decision of the Constitutional Court. This situation, of course, should be ended in a way that provides legal certainty. One of the ways is by explaining the legal reasoning and argumentation of the status of the Constitutional Court Decision before the Islamic jurisprudence.

The Constitutional Court, as mentioned before, issued a decision stipulating that a child out of wedlock has legal relations not only with their mother but also with their father. The decision changed the existing laws, namely Marriage Law No. 1 of 1974 Article 43 Paragraph 1 and the Compilation of Islamic Law Article 100, stating that a child merely has a legal relation with their mother. As a result, the decision has invited many responses and controversies among Indonesian Muslims, especially Islamic organizations such as the Majelis Ulama Indonesia (Indonesian Council of Ulama) or MUI. The MUI is the largest ulama association, with Jakarta as its headquarters. It also has branches in every province and district in Indonesia. Through its *fatwā*, MUI argued that, based on ḥadīth and classical Islamic jurisprudence, a child born out of wedlock merely has legal relations with their mother.

Further examination of the reasons behind the Constitutional Court granting of judicial review reveals that they were the influence of the second amendment to the 1945 Constitution (*Undang-Undang Dasar 1945*) on August 18 2000, when Indonesia entered the beginning of the Reform era. In one of its considerations, the panel of judges in the Constitutional Court examined and decided judicial review cases against Marriage Law No. 1 of 1974, stating that a child has primary rights to survive, grow and develop, and be protected from violence and discrimination. Therefore, Article 43 Paragraph 1 of Marriage Law

No. 1 of 1974 is firmly and convincingly contrary to Article 28 D of the 1945 Constitution concerning the fundamental rights of children.

Nevertheless, Islamic jurists, including the classical four jurists and other contemporary ulama like MUI, firmly conclude that a child out of wedlock merely has a relationship with their mother. The legal reasoning was that some hadith narratives stipulate the inheritance legal status of a child out of wedlock. Therefore, the issue becomes evident without any interpretation needed. Moreover, the MUI intentionally issued a *fatwā* concerning it, MUI *fatwā* No. 11 of 2012, on Children Born Out of Wedlock and their Treatment.

Rohmawati and Rofiq (2021) identified three types of legal reasoning used by judicial panels in the Constitutional Court Decision: pragmatic, progressive, and conservative. Rohmawati's study reveals that the judicial panel of the Indonesian Constitution Court relied on progressive legal reasoning. Meanwhile, Islamic jurists depended on conservative legal reasoning. The main characteristic of progressivism is finding the truth and giving legal protection and civil rights to biological children. The reasoning is based on legal interpretation and contextualizing the legal code in the current time and place (Rohmawati & Rofiq, 2021:10).

A similar argument comes from Muhamad Isna Wahyudi. According to Wahyudi, judges deciding cases of child origins in Jakarta Religious Courts tended to use a doctrinal-deductive legal reasoning approach. With this approach, children born out of wedlock will lose their rights to inheritance, guardianship, and custody if their relationship is only limited to the biological father, not to his legal father. Obtaining legal recognition is difficult if the approach is solely based on legal doctrine (Wahyudi, 2017: 151).

Moreover, Islamic jurists and traditional ulama prefer to apply conservative legal thinking to understand the cases. The conservatism group decides based on textual legal sources as their primary references. Overall, this legal method tends to interpret legal sources from a positivistic point of view. Islamic jurists seem to focus on literal aspects when examining legal sources. They also ignore common values such as equality and norms because they are invisible to the five senses.

Furthermore, unfinished debates and controversies among Islamic scholars and judges concerning the position of children out of wedlock

emerge. This causes hesitation, especially for judges as judicial practitioners, who believe that hadith is an absolute reference in deciding legal cases. Moreover, efforts have never been made to look for breakthroughs in solving the problem. The question is why it is so difficult to solve. This study argues that it relates to legal reasoning, methods, and approaches to understanding the matters. Furthermore, this study sees a need to pay attention to Islamic law purposes, particularly, in this context, the inheritance law. Therefore, looking further into the Constitutional Court's legal reasoning and Islamic jurists' arguments is also crucial.

This study is based on the theory of public reason proposed by John Rawls. Rawls argued that public reason focuses on the deepest level, the basic morals and political values that prescribe a constitutional and democratic government that relates to its citizens and other relations. In other words, the theory focuses on how political relations are conceived. People who reject the idea of constitutional democracy will automatically deny the idea of public reason. In addition, such reason covers three ways: the idea of free and similar citizens; it relates to the common public, which is fundamentally political justice; and the nature of the public. It means that it aims to satisfy the public (Rawls, 1997: 766–767).

Using library research and content analysis as a method of interpretation, this article, therefore, will answer the following questions: what are the main arguments of the Constitutional Court that a child out of wedlock has legal relations with their father and mother? What are the reasons of Indonesian ulama and Islamic jurists that a child out of wedlock merely has a relation with their mother? Why have Indonesian ulāma and jurists opposing the Constitutional Court Decision failed to see progressive norms in Islam and human rights? Moreover, how does the Constitutional Court Decision have a legal basis in Islamic jurisprudence and human rights principles?

Narrating Child out of Wedlock

The term child out of wedlock, as referred to in Marriage Law No. 1 of 1974 and the Compilation of Islamic Law Article 100, has several meanings: children born in unregistered married (*nikah di bawah tangan*) and illegitimate children (*walad al-zinā*, *walad al-firāsh*, and *walad al-mulā'anah*). However, this paper will be restricted to unregistered married and illegitimate children.

A child out of wedlock can result from an unregistered marriage or *nikah di bawah tangan* or *nikah sirri* in Bahasa. It means a marriage held according to Islamic rules but does not follow Indonesian law. As the state of law, Indonesia is standing between secular and Islamic law, recognizing the 1945 Constitution while respecting and ensuring the freedom of religion. However, a marriage is only valid, as evidenced by the marriage certificate regulated in Marriage Law No. 1 of 1974 and the Compilation of Islamic law (Sugiantoro, 2017:15).

Marriage in Indonesia is regulated by Islamic and national law. Both can not be separated since they are being integrated as stated in the Law No.1 of 1974 about marriage. In other words, the legal standing of unregistered married can be seen from *ius constitutum* and *ius constituandum. Ius constituandum* means that the law is a normative law or *in abstracto*. Meanwhile, *ius constitutum* means that the law is its implementation or *in concrito*. Marriage can be considered legal if conducted according to Indonesian legal provisions. Essentially, Article 2 of the 1974 Marriage Law, Paragraphs 1 and 2, insists that the marriage is legal if it meets two requirements: it is conducted according to Islamic law and registered by a marriage registrar (*Pegawai Pencatat Nikah*). If the marriage fulfills the first requirement, it is valid. However, if the marriage meets these two requirements, then the marriage is not only valid but also has legal certainty. (Khisni, 2014: 309).

The term child out of wedlock also can be defined as an illegitimate child or *walad al-zinā.* Imam al-Kalwaz|anī defined a child out of wedlock as a child who was born from a religiously illegitimate couple relationship (Abū al-Khaṭṭāb, 1995:225; al-Zuhaylī, 1985:430). Meanwhile, according to Marriage Law No. 1 of 1974, Article 43 Paragraph 1, a legitimate child is born due to a legal marriage, as stipulated by Law No. 1 of 1974 on Marriage, Article 43 Paragraph 1 (*742.Pdf*, n.d.). Moreover, according to Makhluf, a child out of wedlock is a child that was born as a result of an illegitimate relationship between a man and woman, which contradicts the law (Makhlūf, 1976, p. 196). The Compilation of Islamic Law states that a legitimate child is a child born in a legal marriage. See Compilation of Islamic Law Article 99 Paragraph 1 (*23.Pdf*, n.d.). To conclude, a child out of wedlock is a child born resulting from "man's fluid" and "woman's fluid" without disguise (*shubhah*), contract (*'aqd*) and authority (*milk al-yamīn*). The child results

from an illegal relationship, either in the form of a heinous act such as adultery or putting the sperm of a man into a stranger woman's uterus with genetic engineering (Ḥusain, 2008: 28).

There have been debates among scholars in defining a child born out of wedlock. Some said that the Constitutional Court decision was merely for unregistered married, not for illegitimate children caused by adultery. They argued that the decision tends to have a unique character. The legal consequences of the Constitutional Court Decision No.46/PUU-VIII/2010 must be restricted merely to an unregistered polygamous marriage (*nikah sirri/nikah di bawah tangan*) between Machica Mukhtar and Moerdiono (Muhammad, n.d.). On the other hand, another scholar like Mukri Arto says that the Constitutional Court Decision No. 46/PUU-VIII/2010 was final and binding as a response towards the judicial review of Law No. 1 of 1974 Article 2 (1) and (2). Therefore, the Decision of the Constitutional Court has been valid as law, and substantially, it was for general, not individual, purposes (Arto, 2012: 12-13). In addition, Mukri Arto argues that the decision was general for children born in unregistered marriages or resulted from adultery. This panel of judges did not mention specifically for whom the decision was made. Therefore, the decision was general and meant that children born out of wedlock, in all cases, have civil relationship with his/her mother and his/her father. This is firmly in contradiction with sacred texts, the hadith, stating child born as a result of adultery does not have civil relationship with his/her father.

Rizky Aldjupri argues that the Constitutional Court Decision was enacted for general cases. He also believes the decision annuls Article 43 of Law No.1 of 1974. However, that decision does not change the provision of Islamic doctrines that a child born out of marriage does not have a civil relationship with their father. However, to protect the child, the decision stipulates that the biological father must give their livelihood and mandatory testament (Aldjufri, 2016: 101).

The above explanation implies that *fiqh* texts define the child out of wedlock as *walad al-zinā,* not others. As for the Indonesian Constitutional Court Decision, it defines a child out of wedlock as that born as a result of an unregistered marriage. It is not contrary to what has been prescribed by Marriage Law No. 1 of 1974, the Compilation of Islamic Law and Islamic jurisprudence doctrines. This article will focus

on the inheritance status of a child who was born of adultery, viewed from human rights and Islamic law perspectives.

Islamic Paternity and Jurists' Legal Arguments

As mentioned earlier, children born out of wedlock have no civil relation to their fathers. They merely have civil relations with their mothers. This Islamic jurisprudence argument differs from the Indonesian Constitutional Court Decision. According to al-Syaikh 'Abd al-Gānī al-Gunaimī al-Madanī al-Ḥanafī, one of the famous Ḥanafī's jurists in the 10/16 century, children out of wedlock, including children of adultery and *walad al-mulā'anah* become slaves (*maulā*) of their mothers as they have no blood relation with their fathers. Meanwhile, their trusteeship is under their mothers' control. Then, what is meant by *maulā*? It means more than just a matter of liberation and inheritance rights; it includes their mothers' original status as free women. If their mother was originally a free woman, the inheritance belonged to her slaves. However, if a mother was freed, the inheritance is for those who released her ('Abd al-Ghanī al-Ghunaymī al-Dimashqī al-Maydānī al-Ḥanafī, n.d.:198).

Another Ḥanafī's jurist, Fakhruddīn' Uthmān ibn' Alī al-Zayla'ī al-Ḥanafī, argued that children out of wedlock receive inheritance from their mother. The filiation between the children and their father was hindered. Therefore, they do not receive an inheritance from their father. However, they still receive it from their mother and their mother's family. The mother and her family can also receive the inheritance from the children. However, they do not receive inheritance as *'aṣābah*, except through liberation (*walā'un*). Therefore, they receive *'aṣābah* from who has liberated them (F. U. ibn' Alī al-Zayla'ī Al-Ḥanafī, 1897: 214). According to as-Sharkhisī in his famous work, *al-Mabsūṭ*, if there are witnesses who testify that a woman is someone's mother, then the child's blood relation is to the mother, and not the father (al-Sharkhishī, n.d.: 154).

If a man admitted that he committed adultery with a free woman, and she confirmed this confession and mentioned that she was with his child, the filiation of the child was hindered. Instead, it connects to the woman when she could present a witness of delivering the baby. If a man confessed that he performed adultery with a free woman or an

enslaved person, but if the woman said that they were legally married, so the child who was born from adultery had no filiation with the man. This is because the marriage was considered legal if the man admitted it.

However, if the man admits the marriage, but the woman refuses it and says that they committed adultery, the filiation or *naṣb* of the child is to the man. This is because the filiation is valid with the confession from the father. This is the opinion of one of Ḥanafī's jurists, Burhānuddīn Abī al-Maʿālī Maḥmūd ibn Aḥmad ibn' Abd al-ʿAzīz ibn Mazah al-Bukhārī al-Ḥanafī in his book, Al-Muḥīṭ al-Burhānī (B. ibn al-M. M. ibn A. ibn' Abd al-ʿAzīz ibn M. al-Bukhārī Al-Ḥanafī, 2004: 332-333).

A Māliki's jurist, ʿAlī al-ʿAdawī Muḥammad al-Khursī Abū ʿAbdillah in his work, al-Khurshī ʿalā Mukhtashar Sayyid al-Kholil wa bi Hamashāh Ḥāshiyah al-ʿAdawī and another Māliki's jurist, Abi al-Ḥasan Ali Ibn Saʿīd al-Zayrajī in his book entitle Manāhij at-Taḥṣīl wa Natā'ij Laṭā'if at-Ta'wīl fī Sharḥ al- Mudawwanah wa Ḥall Mushkilātuhā, quoted al-Imām Mālik that children was born out of wedlock follow their mother. If they pass away, the mother will receive one-third of the inheritance. Even the mother will receive the remains of the inherited properties if they are not enslaved. In the Arab territory, the remains will be given to *bayt al-māl* ('Abdillah, 1899: 222; al-Zayrajī, n.d.: 408),.

Furthermore, all Islamic scholars agree that a mother receives an inheritance from her child, and her child does so. However, other scholars said that the position of a father and a mother are the same, that they never receive an inherited portion from their children out of wedlock due to adultery. The exact incident and the child's status are also unknown. This is why the child born out of wedlock could not inherit or bequeath the persons suspected of being their parents.

Imam al-Shāfiʿī agreed with Imam Abū Ḥanīfah in terms of the legal status of a child born out of wedlock. Al-Shāfiʿī quoted Imam Abū Ḥanīfah that if a man commits adultery with a woman, then he must be stoned (*rajm*) if he is married. However, if he is unmarried, he is sentenced to whipping (*jild*) and has no filiation with his child. This aligns with Prophet Muḥammad's statement that a child is connected to their parent. However, for those who commit adultery, there will be a barrier, and the child has no relations with their decent, and there will not be a dowry (*mahr*). In addition, Imam al-Shāfiʿī argued that Prophet Muhammad PBUH had stoned more than one person.

He also quoted Abū Bakr, 'Umar ibn al-Khaṭṭāb, and other Islamic jurists that they punished someone with stoning, they did not impose a dowry and also did not determine the lineage between the person who committed adultery and his descendants (al-Shāfiʿī, 1961a: 346). Imam al-Shāfiʿī also added that if the child is born less than six months after the marriage, the lineage is only for the mother (Al-Shāfiʿī, 1961b:198). Another al-Shāfiʿī's companion, Imam al-Nawawī argued that the legal status of an adultery child is the same as *walad al-mulāʿanah*. Adultery cuts inheritance rights between parents and children due to the breaking of blood relation. As for children with mothers, they inherit each other (Al-Dimashq, 2002: 1014).

By contrast, Ḥasan al-Baṣrī, Ibn Sīrīn, and Ishāq ibn Rahawaih proposed another opinion that contrasts with the above ideas. According to them, an adultery child has a blood relation with their father if the father recognizes them. Similarly, Ibrāhīm an-Nakha'ī argued that a child has a relationship with their father if he recognizes the child and after the punishment. According to Abū Ḥanīfah, if a man marries a woman before she gives birth, even if only for a day, a child has a relationship with the father. However, the child is not his if he does not marry her. They relied on the narrative of 'Umar Ibn al-Khaṭṭāb, stating that in the jahiliyyah era, children of adultery were related to their mothers, while in the Islamic era, they were related to their fathers. They also argued that *walad al-mulāʿanah* should be related to his biological father with the father's recognition. This also applies to *walad al-zinā* or child of adultery.

According to al-Māwardī, this is inappropriate because it is contrary to the teaching of the Prophet Muhammad. The Prophet Muhammad said that there is no adultery in Islam, which means that Islam prohibits adultery. Therefore, a child has relation with their parent. Whoever commits adultery with an enslaved woman has no right to have her, or if a man commits adultery with a free woman, he also does not have her. Therefore, if a man recognizes his child, the child does not belong to him. Therefore, that child does not inherit or not be inherited (al-Baṣrī, 1994b: 162).

The legal status of an adultery child, according to Ibn Qudāmah al-Maqdisī al- Ḥanbalī, they are the same position as *walad al-mulāʿanah*. However, Ḥasan Ibn Ṣalāḥ said that the portion of *walad al-zinā* is a

whole treasure because their mother does not belong to them. This is different from *walad al- mulā'anah*. However, according to mainstream Islamic jurists, the legal status of an adultery child is the same as *walad al-mulā'anah* due to the breaking of the blood relation of very these two with their father. Except *walad mula'anah* relates with those who *mulā'in* if he recognizes them. Adultery child does not relate to committing adultery according to mainstream Islamic jurists. However, according to Hasan Ibn Sīrīn, and Ibrāhīm, the child relates to commit adultery if he is given a flogging sentence and such a child inherits from him. The same opinion also came from 'Urwah and Sulaiman Ibn Yasar.

Meanwhile, Abū Ḥanīfah said that there is no problem if a man commits adultery with a woman and becomes pregnant and they are married while pregnant, then the child belongs to that man. They agreed that if a child was born as a result of the man act, then some confessed that he was their child, and the status of that child still relates to him (al-Mardawī, 1995: 55; al-Maqdisī, n.d.). Ibn Qudāmah held a hadith when a child related to their parent and those who commit adultery are flogged. Therefore, he argued that a child does not relate to a man if he does not recognize them. A child does not relate because of that (Ibn Qudāmah, 1969: 345–346).

The majority of Islamic jurists interpreted that al-Ḥadīth with a textual approach. It means that they use a conservative way of thinking to understand the text of the Ḥadīth. They ensure that the sacred text is static. They see Islamic inheritance could not be seen as an area of criticism. Because it is supposed to be complete, perfect, and correct, and its validity runs beyond time and space. Therefore, it could not be discussed because Islamic inheritance is a doctrine or dogma, not knowledge. Anything considered as a doctrine usually could not be applied in Muslim society because they will not follow the obligation, particularly in distributing the portion of inheritance.

Lates Reform in Indonesia: Constitution of Court Decision The Ruling

The birth of Constitutional Court decision No.46/PUU-VIII/2010 started from a judicial review of Law No 1/1974 concerning marriage law, particularly article 43 (1) submitted by Machica Mukhtar, who carried out marriage with Moerdiono (the former State Secretary of

Republic of Indonesia at Soeharto era) secretly or unregistered married on December 20 1993. Muhammad Iqbal Ramadhan was born from this unregistered marriage. However, this marriage did not last long, as it ended in 1998. In July 2008, the big Moerdiono family held a press conference in which they did not recognize Muhammad Iqbal Ramadhan as Moerdiono's son. Then, in 2010, Machica Mukhtar struggled through the Constitution Court to get recognition of the legal status of her son, Muhammad Iqbal Ramadhan. Finally, her struggle ended with winning, and the Constitution Court issued decision No 46/PUU-VIII/2010 on February 17 2012, which reviewed law No. 1/1974 on Marriage Law article 43(1). This decision results in children born out of wedlock having a legal relationship with their mother, their mother's family, and a man as their father. Based on science and technology or other evidence according to law, it can be proven that he is related by blood, including to his father's family (Rokhmadi, 2015: 6).

When the decision was read in February 2012, Moerdiono passed away on October, 17 2011. Therefore, He did not know about the decision. The question is why Moerdiono married Machica Mukhtar secretly and carried out polygamy without registering their marriage to the Religious Affairs Office (*Kantor Urusan Agama*), so that their marriage was not recognized by law and did not have legal status against Law No.1/1974 article 2 (2) that stated every marriage should be registered according to the law. This is because Moerdiono's position was a secretary of state of the Republic of Indonesia, and he had married. If he was going to do polygamy, he had to get permission from his leader. This case is in accordance with the provisions of Article 4 (1), Article 5 (2), and Article 10 of Government Regulation No 10/1983 on marriage and divorce for Government Civil Service.

However, unfortunately, the Decision of the Indonesian Constitution Court has not provided for a full legal father-right relationship because Indonesian Muslim people, including judges of the Indonesian Religious Court, still hold the core of Islamic Norms. It may be said that introducing outsider concepts into Islamic family law requires an adaption process where the relation between these outsider concepts and core Islamic law concepts is determined (Nurlaelawati & Huis, 2019:1).

The Legal Reasoning of Constitution Court Decision on Paternity

According to Positive Law in Indonesia, the legal status of children out of wedlock still have relationships with their parents. This is the final result of the Constitution Court decision number 46/PUU-VIII/2010. This decision also changed Law Number 1 of 1974 article 43, paragraph 1 about marriage law and Presidential Instruction Number 1 of 1991 on Compilation of Islamic Law Article 100 Paragraph 1. Before The Constitution Court reviewed the marriage law, the children out of wedlock merely had relations with their mother but not their father. This is the crucial shift of the legal marriage system in Indonesia's Reform Era. It can be seen from any response that emerged upon this change like MUI. MUI, as an institutional representative of Indonesian Muslims issued *fatwā* on inheritance legal status of children out of wedlock. Substantially, the *fatwā* of MUI is contradiction upon Decision of The Constitution Court. According to MUI, children out of wedlock merely have positive relation with their mother not their fathers. Moreover, the Decision of Constitution Court explicitly contradicts to the doctrines of *fiqh* texts or Islamic Jurisprudence. The mainstream of Islamic jurists, including the biggest of fourth Islamic Jurists, namely al-Imām Abū Hanīfah, al-Imām Mālik ibn Anas, al-Imām Shāfi'ī, and al-Imām Aḥmad revealed that children out of wedlock relate to their mothers, not to their fathers. They argued that the children did not have legal standing before the Islamic jurisprudence because the marriage was out of wedlock.

Furthermore, what is the main reason for the Indonesian Constitution of the result that its decision contradicts the sacred text and Islamic jurisprudence. This is due to the influence of human rights on the Indonesian Constitution through the Constitutional Court. The Constitutional Court decision No. 46/PUU-VIII/2010 made an effort to ensure and protect all citizens' constitutional and human rights, which the Supreme Constitution protects. Such decision strengthens the guarantee of the right of every citizen to marry and obtain protection and rights as a wife. Moreover, the decision also guaranteed and protected the rights of all children in legal or illegal marriages. They also have the right to get a good life, protection, and the same treatment before the law (Mustofa, n.d.: 167).

Efforts to accommodate Human rights are not merely enough by making regulations, such as Law No. 39/1999 on human rights, but also

by generating non-judiciary institutions that protect and fulfil human rights. Nonjudicial institutions used to protect and fulfill human rights in Indonesia, such as the National Commission on Human Rights, the National Commission on Anti-Violence upon Women, National Commission on Children Protection, and National Ombudsman Commission. Besides, there is a judiciary institution that protects human rights, namely the Constitutional Court. The Constitutional Court became a new medium for protecting human rights through judicial review towards law. One reviewed law by the Constitutional Court is Law No.1/1974 on Marriage Law article 43, paragraph 1 concerning children born out of wedlock. The Constitutional Court cancelled this article due to contradiction with human rights, especially children's rights related to having protection and civil legal rights associated with inheritance (Tarigan, 2017:181).

Meanwhile, in its consideration, Constitutional Court argued that law No.1 of 1974 article 43 (1) on marriage law, which stated that children born out of wedlock merely have civil legal relation with their mothers or their mother's family firmly was in contradiction with Supreme Constitution article 28B (1) that states everyone has the right to form a family and continue their descendants through a legal marriage, article 28B (2) that states every child has the right to survival, growing, and thriving, and has the right in protecting from violence and discrimination, article 28D (1) that states everyone has the rights to recognition, guarantee, protection, fair legal certainty, and equality before the law. Such constitutional rights have been impaired due to the enactment of the provisions of Article 2 (1) and Article 43 (1) Law No 1/1974 (*Putusan | Mahkamah Konstitusi Republik Indonesia*, n.d.: 32).

Moreover, another consideration of the judging panel of the Constitutional Court is. Naturally, a woman can't be pregnant without a meeting between ovum and spermatozoa, either through sexual intercourse or through other means based on technological developments that cause fertilization. Therefore, it is incorrect and unfair if the law decides that a child born out of wedlock merely has a relation with a woman as his/her mother. Also, it is incorrect and unfair for the law to release a man from his responsibility as a father who has had sexual that caused fertilization and birth of the child. At the same time, the law eliminates the rights of the child to the man as the father. More so,

when based on existing technology, it is possible to prove that a child is that man's son. The legal consequence of a birth law incident is that pregnancy, which is preceded by sexual relationship between a woman and a man is a relation in which there are mutual rights and obligations, the legal subject of which is the child, mother and father (*Putusan | Mahkamah Konstitusi Republik Indonesia*, n.d.: 35).

Based on the explanation above, the relation between a child and a man as a father not merely due to wedlock, but also it could be based on evidence that there is a blood relation between a child and a man as a father. Therefore, regardless of the problem of marriage administrative procedure, a child who is born must have legal protection. If not, the child who is born out of wedlock will suffer even though the child was sinful because their presence was against their will. Children who are born without a clear status often get unfair treatment and stigma in society. The law has to provide protection and fair legal certainty towards a child and their rights, including for a child born out of wedlock (*Putusan | Mahkamah Konstitusi Republik Indonesia*, n.d.: 35).

Although we do not find the *ratio legis* and the ontology of the Constitution Court as Human Rights Court either in the Supreme Constitution of 1945 (UUD 1945) article 24C (1) and (2) or in Law No.24/2004 jo. Law No.8/2011, however, could potentially protect citizens' human rights by correcting and reviewing the law if it contradicts human rights. This is what we term corrective justice. In other words, the Constitution Court has no authority to apply the law, but through its jurisdiction, it could protect human rights by enforcing human rights-based law. In accordance with its function as human rights court, the institutional demand is that the Constitutional Court should advance the protection of human rights in Indonesia by applying the authority to review the law's constitutionality. This claim is a prescription for two issues. The first is the judicial policy of the Constitution Court, which should be reviewed by the law to positively impact the interest of protecting human rights. Second, the authority of interpretation held by the Constitution Court in judicial review should be able to advance human rights protection (Slamet, 2013: 284).

Let's look further at the arguments and considerations of the Constitution Court above. We can understand clearly that the idea of human rights doctrines that exist in the Supreme Constitution Article

28B and 28D has influenced the judge panel greatly and significantly in deciding the legal status of children born out of wedlock. It is like a reformation of political law associated with Islamic law, particularly Islamic family law in Indonesia. This dedication was briefly contradictory with sacred texts and *fiqh* texts. Therefore, we should investigate further about the philosophical background of that decision. I argue that the idea of at-Ṭūfī's thought of *maṣlaḥah* also influenced this decision. How could it contrast to the sacred texts as the law source of Islam? There is no other argumentation except *maṣlaḥah* based legal as a philosophical background of the judging panel.

The Legal Value: The Best Interest of Children?

To avoid undesirable things happening in the future, both children who were born from a legal marriage or children from an invalid marriage should have legal protection in accordance with their dignity and rights. Legal protection following their dignity as the next generation of the nation, so that they can be given the maximum dignity as the next generation of the nation, so that it can be the realization of fair treatment of children in general and extra-marital children from *siri* marriages that are conducted by a man who is still bound by a legal marriage in particular. This protection is not only imposed (Sujana, 2015:155).

The protection is not only imposed on the mother and her mother's family but is also imposed on the biological father so that as the party who produced the extra-marital child, it does not automatically produce the out-of-wedlock child. He cannot immediately escape from his responsibility as a father who should maintain the child from the womb, being born, growing into adulthood and being able to be independent.

When viewed from the principle of justice, the theory of justice is used as the basis for analyzing the protection of children outside of marriage, which is used as the basis for analyzing the protection of extra-marital children protection due to *sirri* marriage performed by a man who is still in a legal marriage is Aristotle's theory of justice and John Rawls' theory of justice.

Aristotle viewed justice as the main virtue. According to him, the same things should be treated equally, and unequal things should be treated proportionately. in a proportionally unequal manner. Aristotle

divides justice into two forms, namely the first distributive justice, which is justice determined by the legislator, The distribution contains services, rights, and benefits for members of society according to the principle of proportional equality. Second, corrective justice is justice that guarantees, supervises and maintains the distribution against illegal attacks. Judges principally administer the corrective function of justice by stabilizing the status quo by returning the victim's property or replacing lost property. Compensation for lost property. In principle, John Rawls's theory of justice views justice as fairness, demanding the principle of equality as the basis on which social welfare arrangements are based. According to him, justice is the principle of (the greatest equal principle), that everyone should have the same rights on the broadest basis, as broad as the freedom that underlies social welfare arrangements. The broadest basis, as broad as the same freedom for all people. All people should have this most fundamental (basic right). In other words, justice will only be realized by guaranteeing equal freedom (Sujana, 2015:156).

Indonesian' Jurist Response: Debate on Islamic Legal Reasoning Against the Constitution Court

According to Positive Law in Indonesia, the legal status of children out of wedlock is that they have relationships with their mothers and fathers. This is the final result of Decision of Constitution Court number 46/PUU-VIII/2010. This decision also changed Law Number 1 of 1974, article 43, paragraph 1, concerning marriage law and Presidential Instruction Number 1 of 1991 on Compilation of Islamic Law Article 100, Paragraph 1. Before The Constitution Court reviewed the marriage law, the children out of wedlock merely had relations with their mothers, not their fathers. This is the crucial shift of the legal marriage system in the Reform Era of Indonesia. That can be seen from any response to this change such as MUI. MUI, as an institutional representative of Indonesia Muslim issued a *fatwā* on the inheritance legal status of children out of wedlock. The *fatwā* in mention is the MUI *fatwā* No. 11/2012 on the legal position of children out of wedlock and the treatment toward them. Substantially, the *fatwā* of MUI contradicts the Decision of The Constitution Court. According to MUI, children out of wedlock merely have positive relations with their mothers, not their fathers. Moreover, the Decision of Constitution Court contradicts

the doctrines of *fiqh* texts or Islamic Jurisprudence. The mainstream of Islamic jurists, including the biggest of fourth Islamic Jurists, namely al-Imām Abū Hanīfah, al-Imām Mālik ibn Anas, al-Imām Shāfi'ī, and al-Imām Aḥmad revealed that children out of wedlock relate to their mothers, not to their fathers. They argued that the children did not have legal standing before the Islamic jurisprudence because the marriage was out of wedlock.

Substantively, such MUI *fatwā* called three things, namely the first, a child of adultery does not have a relationship of lineage, guardianship of marriage, inheritance, and *nafaqah* with the man who caused his birth. The second, the child of adultery, only has a relationship of *nasb*, inheritance, and *nafaqah* with his mother and his mother's family. The third, the child of adultery, does not bear the sin of adultery committed by the person who caused its birth. The child of adultery does not bear the sin of adultery committed by the person who caused his birth. The fourth, the adulterer, is subject to *ḥadd* punishment by the authorities to preserve legitimate offspring (*ḥifẓ al-nasl*). The fifth, the government is authorized to impose *ta'zīr* punishment on male adulterers who cause the birth of a child by obliging him to: a. Provide for the needs of the child; b. give the child his property after his death through *waṣiyyah wājibah*. The sixth, the punishment as referred to in number 5 aims to protect the child, not to legalize the *nasb* relationship between the child and the man who caused birth.

Besides giving legal *fatwā*, the MUI also provides several recommendations to the House of Representatives and the government. The recommendations in mention are as follows: first, the House of Representatives and the Government are requested to immediately draft legislation that regulates: a. severe punishment against the perpetrators of adultery that can serve as *zawājir* and *mawāni'* (making the perpetrators deterred and those who have not yet committed adultery); b—categorizing adultery as a general offence, not a complaint offence, because adultery is a crime that tarnishes the noble dignity of human dignity. Second, the government is obliged to prevent the occurrence of adultery accompanied by strict and firm law enforcement. Third, the government is obliged to protect children born of adultery and prevent neglect, especially by giving punishment to the man who caused the birth to fulfill their needs. The fourth, the government is required to

provide an easy birth certificate for the child of adultery, but not to attribute it to the man who caused the birth. Fifth, the government must educate the public not to discriminate against adulterated children by treating them like other children. The determination of the *nasb* of adulterated children to the mother is intended to protect the child's *nasb* and other related religious provisions, not as a form of discrimination.

In line with the MUI *fatwā*, Syamsuar Basyariah, one of the ulama figures in Aceh, is included in the category of people who oppose or challenge the Constitutional Court Decision Number 46/PUU-VIII/2010. This decision should be reviewed because it will create difficulties dividing the inheritance. If children outside of marriage are recognized as having civil rights from their father, then there must be a reconstruction of the division of inheritance for children outside of marriage (Falahiyati, 2018:94)

Conservative View: Rigid Interpretation of the Classical Legal Opinions

If we highlight the notion of Indonesian Ulama including the Indonesian Board of Ulama related to the legal status of a child out of wedlock, as we have seen in the explanation above, then we found that they embraced conservative legal interpretation in giving their *fatwā*. They base their interpretation on written legal sources as their primer references. This legal interpretation tends to understand legal sources through a positivistic legal point of view. In other words, when interpreting legal sources, they primarily focus on the literal aspect and ignore the common value and norms like equality. The Indonesian ulama depends heavily on overt legal sources, often urging them to become textual ulama. Generally, conservative ulama is influenced by textualist, a legal school that does not consider other laws except Islamic primary legal sources. Therefore, textualist represents the majority of legal positivism. When they provide a *fatwā*, the ulama who embrace this kind of mindset adhere to the existing legal source strictly. They will not try to discover other sources except the existing legal ones. In other words, they merely decide the cases through concrete, rational references.

The MUI *fatwā* itself is an injustice to what happened over children out of wedlock because they are innocent and should not accept injustice as mentioned and insisted in the Quran that one does not bear the sins

of others. One only receives what he has done, whereas justice occupies a crucial part in the Quran and Ḥadith. In the Quran, the obligation to act fairly is called over and over on all levels. The Prophet must act justly among Muslims and non-Muslims if they seek his judgment. This is a line with the verse of the Quran (al-Shūrā [42] :15): "Say, I believe in the book which Allah has sent down; and I am commanded to judge justly between you. Allah is your lord and your lord. And, if they (the Jews) do come to you, either judge between them or decline. If you decline, they could not hurt you in the least. If you judge, judge in equity between them. For Allah love those who judge in equity (al-Mā'idah [5]: 42). The obligation to do justice emerges in general terms in many verses: Allah orders you to fulfill your trust in those who are experts. And when you judge between people, let it punish fairly (al-Nisā [4]: 58). Furthermore, Allah orders (to do) justice and doing of goodm (al-Naḥl [16]: 90) (Ǧābirī, 2009: 239).

Conclusion

The Indonesian Court decision not only argues against the view of constitutional reason but also from the view of Islamic jurisprudence. As explained earlier, 'Umar ibn al-Khaṭṭāb, the second caliph of the four earlier caliphs, has associated a child out of wedlock with his father. Other classical Islamic jurist like Sulaiman ibn Yasar and Ibrahīm an-Nakhāī also argued the same notion with 'Umar ibn al-Khaṭṭāb. In line with such Islamic jurists, the great Islamic school al-Imām Abū Ḥanīfah and the central figure of Ḥanābilah's school, Imam Ibn Taimiyyah participated in strengthening the opinion earlier. In addition, the legal reasoning of the Constitutional Court could be based on *maṣlaḥah,* which Najm al-Dīn at-Ṭūfī initiates. According to him, the *maṣlaḥah* (public interests) as a basis of legal reasoning in Islamic law could be prioritized over Quran and Ḥadith if there is a conflict between *maṣlaḥah* and the Quran-Ḥadīth|. In this context, if the Constitutional Court decision related to the legal position of a child born out of wedlock, which is based on the *maṣlaḥah* (considering of interest of the basic rights of a child) contrasted to the texts of the Quran-Ḥadīth, then the *maṣlaḥah* should be prioritized over the text of the Quran-Ḥadīth|.

The Indonesian Ulama and Islamic jurists who opposed the Indonesian Court decision have failed to carry out the idea of the

progressivism norm of Islamic law. This is because they are trapped into holding the conservative way of thinking, that is, rigid and static, and do not consider the children's other interests. Therefore, they always interpreted the sacred text of the Quran and Sunnah from a textual point of view. This is the rationale why they rejected the idea of progressivism.

Therefore, the Constitutional Court decision No. 46/PUU-VIII/2010 on the legal position of a child born out of wedlock has a strong basis in Islamic jurisprudence. From the perspective of Islamic jurisprudence, it is lawful for children out of wedlock to have a legal relationship with their mother and father, which technological advances can prove.

References

23.pdf. (n.d.). Retrieved June 11, 2022, from https://perpustakaan.mahkamahagung.go.id/assets/resource/ebook/23.pdf

742.pdf. (n.d.). Retrieved June 11, 2022, from https://www.dpr.go.id/dokjdih/document/uu/742.pdf

ʻAbdillah, ʻAlī al-ʻAdawī Muḥammad al-Khursī Abū. (1899). *Al-Khurshī ʻalā Mukhtashar Sayyid al-Kholil wa bi Hamashāh Ḥāshiyah al-ʻAdawī* (Vol. 8). Al-Maṭbaʻah al-Kubrā al-Amīriyyah.

Abū al-Khaṭṭāb, N. al-H. M. ibn A. ibn Ḥasan al-Kalwadhānī. (1995). *Al-Tahdhīb fī ʻIlm al-Farā'id wa al-Waṣāyā*. Maktabah al-Abyakan.

Al-Mardawī, ʻAlā' al-Dīn Abū al-Ḥasan ʻAlī ibn Sulaymān ibn Muḥammad. (1995). *Al-Inṣāf* (Vol. 18). Ḥajr.

Al-Baṣrī, A. al-Ḥasan ʻAlī ibn M. ibn al-Ḥabīb al-Māwardī. (1994a). *Al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfiʻī* (Vol. 11). Dār al-Kutub al-ʻIlmiyyah.

Al-Baṣrī, A. al-Ḥasan ʻAlī ibn M. ibn al-Ḥabīb al-Māwardī. (1994b). *Al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfiʻī* (Vol. 8). Dār al-Kutub al-ʻIlmiyyah.

Al-Bukhārī, M. ibn I. al-B. ibn I. ibn al-Mugīrah al-Ja'fī. (2015). *Ṣaḥīḥ al- Bukhārī*. Dār al-Ḥaḍārah.

Al-Dimashq, A. Z. Y. ibn S. al-Nawāwī. (2002). *Rawḍah al-Ṭālibīn*. Dār Ibn Ḥazm.

Aldjufri, R. (2016). Hak Waris Anak di Luar Nikah menurut Hukum Islam. *Journal of Lex et Societatis*, *IV*(1).

Al-Ḥanafī, B. ibn al-M. M. ibn A. ibn ʻAbd al-ʻAzīz ibn M. al-Bukhārī. (2004). *Al-Burhān al-Muḥīṭ* (Vol. 9). Dār al-Kutub al-ʻIlmiyyah.

Al-Ḥanafī, ʻAbd al-Ghanī al-Ghunaymī al-Dimashqī al-Maydānī. (n.d.). *Al-Lubāb fī Sharḥ al-Kitāb* (Vol. 4). Al-Maktabah al-ʻIlmiyyah.

Al-Ḥanafī, F. U. ibn ʿAlī al-Zaylaʿī. (1897). *Tabyīn al-Ḥaqā'iq Sharḥ Kanz al-Daqā'iq* (Vol. 6). Maṭbaʿah al-Kubrā al-Amīriyyah.

Al-Jawziyyah, A.-I. A. A. M. ibn A. B. ibn A. I. Q. (2018). *Zād al- Maʿād fi Hadyi Khayr al-ʿIbād*. Dār al-ʿĀlim al-Fu'ād.

Al-Maqdisī, M. al-D. A. M. ʿAbdullāh ibn A. ibn M. ibn Q. (n.d.). *Al-Muqniʿ*.

Al-Nasā'ī, A. ibn S. I. ʿAlī ibn S. A. ʿAbd ar-Raḥmān. (2015). *Sunan Al-Nasā'ī*. Dār al-Ḥaḍārah.

Al-Sajistānī, A.-I. al-H. A. D. S. ibn al-A. ibn I. al-Azdiyī. (1999). *Sunan Abū Dāwūd*. Dār al-Salām.

Al-Shāfiʿī, M. ibn I. (1961a). *Al-Umm* (Vol. 7). Maktabah al-Kulliyyah al-Azhar.

Al-Shāfiʿī, M. ibn I. (1961b). *Al-Umm* (Vol. 6). Maktabah al-Kulliyyah al-Azhar.

Al-Sharkhishi, S. (n.d.). *Al-Mabsūṭ* (Vol. 17). Dār al-Maʿārif.

Al-Tirmīdhī, A. ʿĪsā M. ibn ʿĪsā I. S. ibn M. ibn Ḍaḥḥāk. (2015). *Sunan Al-Tirmīdhī*. Dār al-Ḥaḍārah.

Al-Ṭūfī, N. al-D. S. ibn' Abd al-Qawī. (2019). *Sharḥ al-Arbaʿīn al-Nawawiyah*. Dār Mīrāth al-Nabawiyyah.

Al-Zayrajī, A. al-Ḥasan A. I. S. (n.d.). *Manāhij at-Taḥṣīl wa Natā'ij Laṭā'if at-Ta'wīl fī Sharḥ al- Mudawwanah wa Ḥall Mushkilātuhā*. Dār Ibn Ḥazm.

Al-Zuhaylī, W. (1985). *Al-Fiqh Al-'Islāmī wa 'Adillatuh* (Vol. 8). Dār al-Fikr.

Arto, A. M. (2012, February 27). *Diskusi Hukum Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010*. Judges discussion of Religion High Court Judges of Ambon concerning revision Law Marriage article 43, Ambon.

Falahiyati, N. (2018). *HAK WARIS ANAK LUAR KAWIN BERDASARKAN KUHPERDATA DIKAITKAN DENGAN KEPUTUSAN MAHKAMAH KONSTITUSI NOMOR 46/PUU-VIII/2010*.

Ğābirī, M. ʿĀbid al-. (2009). *Democracy, human rights and law in Islamic thought*. I.B. Tauris.

Ḥusain, A. ʿAbd al-M. M. M. (2008). *Aḥkām Walad al-Zinā fī al-Fiqh al-Islāmiy* [Thesis]. Najjah al-Waṭaniyyah University.

Ibn al-Rushd, A. al-W. M. ibn A. ibn M. ibn A. (1994). *Bidāyah al-Mujtahid wa Nihāyah al-Muqtaṣid* (Vol. 2). Maktabah al-Khaniji.

Ibn Anas, I. M. (2003). *Al-Muwaṭṭa'*. Majmūʿāt al-Furqān al-Tijāriyyah.

Ibn Qudāmah, A. M. ʿAbdullah ibn A. I. M. (1969). *Al-Mugnī* (Vol. 6). Maktabah al-Qāhirah.

Ibn Taymiyyah, A. (2004). *Majmūʿ Fatāwā li Syaykh al-Islām Aḥmad ibn Taymiyyah*. Mujamma' Malik Fahd.

Ichwan, Moch. N. (n.d.). The Local Politic of Orthodoxy: The Majelis' Ulamā' Indonesia in The Post New Order Banten. *Journal of Indonesian Islam*, *06*(01).

Khalāf, ʿAbd al-Wahhab. (n.d.). *Sharḥ Qānūn al-Mawārith al-Jadīd*. Maṭbaʿah al-Nashr.

Khalāf, ʻAbd al-Wahhāb. (1955). *Maṣādir al-Tashrīʼ al-Islāmī fī mā lā Naṣṣa fīhi*. Dār al-Kutub al-ʻArabī.

Khalāf, ʻAbd al-Wahhāb. (1978). *ʻIlm Uṣūl al-Fiqh*. Dār al-ʻIlm.

Khisni, A. (2014). Kontroversi Putusan Mahkamah Konstitusi tentang Perkawinan di Bawah Tangan: Studi tentang Hukum Perkawinan antara Normatif dan Empiris untuk menggali Maqosyid Syariah dalam Upaya Mewujudkan Fikih Indonesia. *Journal of Pembaharuan Hukum*, *1*(3).

Latipulhayat, A. (2021, February 17). *Status Hukum Anak di Luar Catatan Perkawinan* [Personal communication].

Makhlūf, H. M. (1976). *Al-Mawārith fī Al-Sharīʻah al-ʼIslāmiyyah*. Maktabah al-Qāhirah.

Muhammad, B. (n.d.). *Akibat Hukum Putusan Mahkamah Konstitusi Nomor 46/ PUUVIII/ 2010 TERHADAP PEMBAGIAN HAK WARIS ANAK LUAR PERKAWINAN*. Retrieved June 9, 2022, from https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/akibat-hukum-putusan-mahkamah-konstitusi-nomor-46puuviii-2010-terhadap-pembagian-hak-waris-anak-luar-perkawinan-oleh-dr-h-bahruddin-muhammad-1712

Mustofa, I. (n.d.). Dimensi HAM dan Hukum Islam dalam Putusan Mahkamah Konstitusi No.46/PUU-VIII/2010. *Journal of Millah Indonesian Islamic University*, *XII*(1).

Nurlaelawati, E., & Huis, S. C. van. (2019). THE STATUS OF CHILDREN BORN OUT OF WEDLOCK AND ADOPTED CHILDREN IN INDONESIA: INTERACTIONS BETWEEN ISLAMIC, ADAT, AND HUMAN RIGHTS NORMS. *Journal of Law and Religion*, *34*(3), 356–382. https://doi.org/10.1017/jlr.2019.41

Putusan | Mahkamah Konstitusi Republik Indonesia. (n.d.). Retrieved June 9, 2022, from https://www.mkri.id/index.php?page=web.Putusan&id=1&kat=1&cari=46%2FPUU-VIII%2F2010

Rawls, J. (1997). The idea of public reason revisited. *The University of Chicago Law Review*, *64*(3), 765–807.

Rohmawati, R., & Rofiq, A. (2021). Legal reasonings of religious court judges in deciding the origin of children: A study on the protection of biological children's civil rights. *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan*, *21*(1), 1–20.

Rokhmadi. (2015). Status Anak di Luar Perkawinan Paska Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010. *Jounal of Sawwa*, *11*(1).

Shamsuddīn Abū al-Farj ʻAbd al-Raḥmān ibn ʻAbd al-Raḥmān ibn Muḥammad ibn Aḥmad ibn Qudāmah al-Maqdisī. (n.d.). *Al-Sharḥ al-Kabīr*.

Slamet, T. (2013). Perlindungan HAM melalui Pengujian Undang-Undang oleh Mahkamah Konstitusi. *Journal of Yuridika*, *28*(2).

Sugiantoro, A. (2017, February 26). *Legal Status of Unregistered Muslim Marriage in Indonesia*. 3rd Kuala Lumpur International Islamic Studies and Civilization, Kuala Lumpur.

Sujana, I. N. (2015). *Kedudukan hukum anak luar kawin dalam perspektif putusan Mahkamah Konstitusi nomor 46/PUU-VIII/2010* (Cetakan I). Aswaja Pressindo.

Tarigan, J. P. (2017). Political of Law's Accommodation for Human Rights in Indonesia Based on Thoughts Generation. *Journal of Konstitusi*, *14*(1).

Wahyudi, M. I. (2017). Judges' Legal Reasoning on Child Protection: Analysis of Religious Courts' Decisions on the Case of Child Parentage. *Al-Jami'ah: Journal of Islamic Studies*, *55*(1), 127–154.

Abdullah Jarir[1], Ratno Lukito[2], and Moch. Nur Ichwan[3]
[1]UIN Sultan Maulana Hasanuddin, Banten, Indonesia
[2,3]UIN Sunan Kalijaga, Yogyakarta, Indonesia
Email: [1]abdullah.jarir@uinbanten.ac.id, [2]ratnolukito@yahoo.com,
[3]moch.ichwan@uin-suka.ac.id