



Analysis of Positive Law on the Origin of Children from Fasid Marriage: Case Study of Stipulation No. 040/Pdt.P/2017/Pa.Sal in Salatiga Religious Court

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Abstract

Every child has the right to know his or her parents, to be raised, and to be cared for by his or her own parents. The provision regarding the child's right to know who his or her parents are, in the sense of origin (including the mother of the milk), is intended to avoid the disconnection of genealogy and blood relations between the child and his or her biological parents, while the right to be raised and cared for by his or her parents is intended so that the child can obey and respect his or her parents. This statement is in accordance with Article 7 Paragraph 1 of Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection. This research focuses on the position of children born from a *fasid* marriage, do they still have the right to know their parents and are considered legitimate children? This research is the result of *Library Research* and *Field Research* which is Comparative Descriptive. The approach that researchers use is the Normative Juridical approach. This study aims to answer the problem of whether children born from a broken marriage or called *fasid* can be considered a legitimate child, or only considered to be a biological child and how the consideration of the panel of judges examining case Number: 040/Pdt.P/2017/PA.Sal in deciding the case. The result of this study is that the author sees that the consideration of the judges in deciding refers to the decision of the Constitutional Court Number 46/PUU-VIII/2010 dated 27 February 2010, Article 43 Paragraph 1 of Law Number 1 of 1974 which states, "Children born outside marriage only have a civil relationship with their mother and their mother's family", does not have binding legal force as long as it is interpreted to eliminate civil relationships with men who can be proven based on science and technology and / or other evidence according to the law turns out to have a blood relationship as the father.

Keywords: Fasid Marriage, Positive Law, Descendants, PA Salatiga, Children.

Introduction

The word "Nikah" comes from Arabic, while according to Indonesian terms is "Marriage". However, the words "nikah" and "kawin" are often distinguished, but in principle between the two they only differ in pulling the root of the word.¹ When viewed from a legal point of view, it is clear that marriage or marriage is a noble and holy contract between a man and a woman which causes the legal status of husband

¹ Suryantoro, D. D., & Rofiq, A. (2021). "Nikah Dalam Pandangan Hukum Islam". *Ahsana Media: Jurnal Pemikiran, Pendidikan dan Penelitian Ke-Islaman*, 7 (02), 38-45.

and wife and the legalisation of sexual relations with the aim of achieving a family full of love, benevolence and mutual support.²

Meanwhile, according to Law Number 1 of 1974 concerning Marriage, "Marriage is a physical and mental bond between a man and a woman as husband and wife with the aim of forming a happy and lasting family or household based on the Almighty God."³

In the Qur'an there are also several verses that are not only about the command to marry but also the purpose of marriage. Some of these Qur'anic verses include:

يَا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَتَ مِنْهُمَا رِجَالًا كَثِيرًا وَنِسَاءً ۚ وَاتَّقُوا اللَّهَ الَّذِي تَسَاءَلُونَ بِهِ وَالْأَرْحَامَ ۚ إِنَّ اللَّهَ كَانَ عَلِيمًا رَحِيمًا

Meaning:

"O people! Fear your Lord, who created you from a single man (Adam), and from him created his wife; and from them He multiplied men and women. Fear Allah, by whose name you ask one another, and maintain kinship. Verily, Allah is always watching over you." ⁴

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً ۚ إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَعْقِلُونَ

Meaning:

"And among His signs is that He has created for you mates of your own kind, that you may be attracted to them and feel secure in them, and that He may create in you love and affection. Indeed, in such there are signs (of Allah's greatness) for those who think." ⁵

The Messenger of Allah (blessings and peace of Allah be upon him) also said in one of his hadiths, namely:

يَا مَعْشَرَ الشَّبَابِ، مَنْ اسْتَطَاعَ مِنْكُمُ الْبَاءَةَ فَلْيَتَزَوَّجْ، فَإِنَّهُ أَغْضُ لِلْبَصِّ وَأَخْصَنُ لِلْفَرْجِ، وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ، فَإِنَّهُ لَهُ وَجَاءٌ

"The Messenger of Allah (SWT) said: whoever among you has the ability should get married, because it is more likely to subdue his gaze and better protect his private parts, and whoever among you is not able to then he should fast, because fasting is a control for him." ⁶

The regulations governing marriage in Indonesia are contained in Law Number 1 of 1974 concerning Marriage which applies to every religion in Indonesia. Law Number 1 of 1974 concerning Marriage is the first law in Indonesia that regulates marriage nationally. Then after the birth of the Marriage Law there was a renewal, namely during the period of the Minister of Religion Munawir Syadzali which was marked by

² Sudarsono. *Hukum Perkawinan Nasional*, 3rd cet. (Jakarta: Rineka Cipta, 2005), pp. 36-37

³ Article 1 of Law Number 1 Year 1974

⁴ An-Nisa: 1

⁵ Ar-Rum: 21

⁶ Ahmad Ali bin Hajar Al-Asqolani, 842 AH. *Fath Al Bari fi Syarh Al Bukhori*, (Egypt: Maktabah As Salafiyyah).

the birth of KHI (Compilation of Islamic Law) on 10 June 1991 whose material includes rules on marriage, inheritance, and *perwakafan* for Indonesian people who are Muslim.⁷

The Marriage Law has authentically regulated that a marriage can be considered valid by the state. Starting from the basis of marriage, the conditions of marriage, prevention of marriage, cancellation of marriage, marriage agreements, the rights and obligations of husband and wife, property in marriage, the breakdown of marriage and its consequences, the position of children, the rights and obligations between parents and children, representation, to other provisions. Meanwhile, the KHI is also the same but it is more detailed in accordance with Islamic law, because the Marriage Law is generalised.⁸

The Marriage Law in Indonesia is of course also inseparable from the assumptions of some parties if there are deficiencies present in it, as can be seen in many books to seminars or also public lectures with the theme of renewal of Islamic civil/family law in Indonesia. Several articles in both the Marriage Law and KHI have received a lot of criticism because they are considered no longer relevant to the current situation. One of the articles that has been considered irrelevant is Article 43 of Law Number 1 of 1974 concerning Marriage, where the article is part of CHAPTER IX concerning the Position of Children.⁹

Article 43 paragraph (1) states that "Children born out of wedlock only have a civil relationship with their mother and their mother's family." The meaning of the paragraph means that if a child is born when his biological parents are not in a legal bond (married) then the legal consequences of the child only have a civil relationship with his mother and his mother's family, so that the child does not have a civil relationship with his biological father and his father's family. It is this paragraph that has become a polemic to the point of debate because it is considered to violate the human and constitutional rights of the child out of wedlock, because the child is only a victim of his parents' illicit actions.

Children born in a legal marriage and those born outside a legal marriage are both holy and clean from sin regardless of the forbidden actions of their biological parents, but indeed the legal consequences both in accordance with religion and legislation are different.

Just as prayer and fasting are regulated in *fiqh*, so is marriage. There is even a special *fiqh* dedicated to marriage, namely *fiqh munakahat*. *Fiqh munakahat* regulates how a Muslim marries, divorces and also reconciles after a divorce. And even this *fiqh* is widely adopted and even becomes a reference in the formation of the Marriage Law in Indonesia as well as a reference in the preparation of KHI (Compilation of Islamic Law). In some of the above regulations, one of which is *fiqh munakahat*, it is regulated that a Muslim woman who has been divorced must first pass the *iddah* period, which is for 3 holy times or for 90 days.

وَالْمُطَلَّقَاتُ يَتَرَضْنَ بِأَنفُسِهِنَّ ثَلَاثَةَ قُرُوءٍ

⁷ Moh. Khusein, *Pembaharuan Hukum Keluarga di Negara Muslim* (Salatiga: STAIN Salatiga Press, 2013) pp. 10-11.

⁸ Bunyamin, Mahmudin & Hermanto, Agus. *Hukum Keluarga Islam*. (Bandung: CV Pustaka Setia, 2017) pp. 45.

⁹ Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia antara Fiqh Munakahat dan Undang-undang Perkawinan*, (Jakarta: Kencana, 2006) pp. 23.

"Women who are divorced should refrain (from waiting) three *quru*".¹⁰

This waiting period is called the iddah period, Allah also says in Surah at-Talaq:

وَاللَّائِي يَكْسَنُ مِنَ الْمَحْيِضِ مِنْ نِسَائِكُمْ إِنْ ارْتَبْتُمْ فَعِدَّتُهُنَّ ثَلَاثَةُ أَشْهُرٍ وَاللَّائِي لَمْ يَحْضَنْ وَأُولَاتِ الْأَحْمَالِ أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ ۚ وَمَنْ يَتَّقِ اللَّهَ يَجْعَلْ لَهُ مِنْ أَمْرِهِ يُسْرًا

"And as for those among your women who have no menstruation (monopause), if you have any doubt about their 'iddah, then their 'iddah is three months, and so is that of the women who do not menstruate, and as for the pregnant women, their 'iddah is until they give birth to their wombs." ¹¹

Researchers found examples of cases in the field that can be used as subjects and objects for this research. For example, in Salatiga Religious Court, there was one application for the origin of children in 2017 that was granted, namely the application for the origin of children case No. 40/Pdt.P/2017/PA.Sal, in this case it is known that Applicant 1 and Applicant 2 or can be called the Applicants have registered their application on 5 May 2017 in order to obtain the Determination of the Origin of the Applicants' Children. The Applicants were a married couple who had entered into an Islamic marriage on 17 January 2013 in the village of Candi with the marriage guardian being the biological father of Applicant 2. The status of Applicant 1 at the time of the marriage was a divorced widower, while Applicant 2 was a divorcee who had divorced her first husband in January 2013, at the time of the marriage Applicant 2 was still in the iddah period, therefore the marriage of Applicant 1 and Applicant 2 could be declared *invalid* or the marriage of the Applicants was *fasid*.

After the marriage, Applicant 1 and Applicant 2 had a relationship as husband and wife and were blessed with a son who was born on 5 September 2013. The birth of the child could not be issued with a birth certificate, because the marriage of Applicant 1 and Applicant 2 until the child was born had not been registered at the Office of Religious Affairs. Subsequently, Applicant 1 and Applicant 2 registered their marriage at the Religious Affairs Office on 13 February 2017, however, the existence of the marriage certificate could not be used as a basis for issuing a birth certificate for the child of Applicant 1 and Applicant 2 who was born on 5 September 2013. Petitioner 1 and Petitioner 2 then applied to the Salatiga Religious Court for the origin of the child because Petitioner 1 and Petitioner 2 urgently needed a Court decision on the origin of the child as a basis for issuing a birth certificate for the child of Petitioner 1 and Petitioner 2.

On Wednesday 7 June 2017 a decision was rendered by the Panel of Judges of the Salatiga Religious Court which reads: Granting the petition of the Petitioners, Determining that the child of Petitioner 1 and Petitioner 2 born on 5 September 2013 is the child of Petitioner 1 and Petitioner 2; Based on the explanation in the Background of the Problem then produces several problem formulations, namely: How is the validity of the applicants' marriage in case number 40/Pdt.P/2017/PA.Sal? What are

¹⁰ Al-Baqoroh: 228

¹¹ At-Thalaq: 4

the legal considerations of the panel of judges in granting the application for the origin of the child in case number 40/Pdt.P/2017/PA.Sal?

Research Methods

This research is a Normative Juridical *Library Research* by conducting a literature study of both documents and literature related to the research material. The approach that researchers use is the Normative Juridical approach.¹² Although this research is library research, researchers still conduct Field Research, namely the author interviewed the Panel of Judges who handled case number 40/Pdt.P/2017/PA.Sal regarding its legal considerations in granting the application. Data sources are obtained from the results of literature studies from various literatures ranging from laws and regulations, books, research journals, scientific articles, and others. The sources were obtained from relevant informants, namely the panel of judges who granted case number 40/Pdt.P/2017/PA.Sal and perhaps the applicants in the application for the origin of children case number 40/Pdt.P/2017/PA.Sal at the Salatiga Religious Court. Furthermore, secondary data are supporting data such as documents, books, newspapers, articles, and others that can be a source of support for this research. Furthermore, researchers conduct data analysis first, the data is from the data from the preliminary study or secondary data (Sugiyono, 2016: 245). After that, by analysing data in the field as proposed by Miles and Huberman. After determining the theme to be studied, researchers conducted preliminary research to obtain preliminary data from several sources. Then after that, we made direct observations at the Salatiga Religious Court to obtain the main data, namely by conducting interviews.

Definition of Marriage

Marriage is a translation of the words "*nakaha*" (to come together) and "*zawaja*" (partner).¹³ Both words are generally used by the Qur'an to describe the relationship of marriage (marriage), which is the coming together of a man and a woman who were originally separated into a complete unit and paired or partnered as husband and wife.¹⁴

In Article 1 of the Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage, it is stated that marriage is a physical and mental bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on God Almighty.¹⁵ Meanwhile, according to Article 2 of the Compilation of Islamic Law, what is meant by marriage is a very strong contract or *mitsaqon ghalidhon* to obey the commands of Allah and carrying it out is an act of worship.¹⁶

¹² Soerjono Soekanto, *Pengantar Penelitian Hukum*, 3rd cet. (Jakarta: UI-Press, 1986) pp. 32.

¹³ Khoirul Anam, "Studi Makna Perkawinan Dalam Persepektif Hukum di Indonesia." *Yustitiabelen* 5.1 (2019): 59-67.

¹⁴ Musawwamah' Siti. 2012. Laporan Riset dengan Judul "Pro-Kontra Atas Putusan Mahkamah Konstitusi Tentang Pengesahan Hubungan Keperdataan Anak Luar Kawin Dengan Ayah Biologis": STAIN Pamekasan,"pp. 689.

¹⁵ Article 1 of Law Number 1 Year 1974

¹⁶ Article 2 KHI (Compilation of Islamic Law)

Furthermore, it is stated that a marriage is valid, if it is carried out according to the laws of each religion and belief. Then related to marriage registration in Article 2 Paragraph 2 of Indonesian Republic Law Number 1 of 1974 concerning Marriage, the state requires it to be administratively recorded in order to fulfil constitutional rights, provide guarantees for the protection, promotion, enforcement, legal certainty and fulfilment of human rights, both husband, wife, and children born later.¹⁷

Nikahul Fasid in the View of Islamic Law

According to Islamic law, a marriage contract is a very important legal act and has certain consequences and consequences as stipulated by Islamic law. Therefore, the implementation of a marriage contract that is not in accordance with the provisions stipulated by Islamic law is a futile act, and is even considered an unlawful act that must be prevented by anyone who knows about it, or by cancellation if the marriage has been carried out.¹⁸ Islamic law recommends that before a marriage is cancelled, a thorough investigation should be conducted to ensure that all the conditions set out in Islamic law have been fulfilled. If the stipulated conditions are still incomplete or there are still obstacles to the marriage, then the execution of the marriage contract must be prevented.¹⁹

According to Abdurrahman Al-Jaziri "If a marriage that has been carried out by a person is invalid due to oversight and ignorance or accidentally and intercourse has not occurred, then the marriage must be cancelled, the person who made the marriage is considered not sinful, if intercourse has occurred then it is considered as *wathi' syubhat*, not considered as adultery, the person concerned is not subject to adultery sanctions, the wife is required to do *tiddah* if the marriage has been cancelled, the child born from the marriage is not considered as a child of adultery and his lineage remains linked to the father and mother. However, if a marriage is made invalid by a person who intentionally makes a mistake by giving false information, false testimony, false documents or other things that are not in accordance with the applicable provisions, then such a marriage must be cancelled. If the marriage has not been consummated, the wife is not obliged to observe *'iddah (waiting period)*; the person who consummated the marriage is considered guilty and sinful, and may be subject to criminal prosecution; the consummation of the marriage is considered adultery and is subject to *hadd*; the nasab of the child born cannot be attributed to the father, but only to the mother."²⁰

Islamic jurists among the Maliki school are of the opinion that *nikahul fasid comes* in two forms, namely:

- a. According to Islamic jurists, this type of marriage is like marrying a woman who is forbidden to marry either because of her ancestry or breastfeeding,

¹⁷ Amir Syarifuddin, *Hukum Perkawinan Islam Di Indonesia Antara Fiqh Munakahat Dan Undang-undang Perkawinan*, (Jakarta: Kencana. 2006) p. 98.

¹⁸ Ariesthina Lelah, Memahami Kedudukan Nikahul Fasid Dalam Hukum Islam." *Al-Tafaqquh: Journal of Islamic Law*, 2.1 (2021): 1-15.

¹⁹ Rahmatillah, D., & Khofify, A. N. (2017). Konsep Pembatalan Perkawinan Dalam Undang-Undang Nomor 1 Tahun 1947 Dan Kompilasi Hukum Islam. *Hukum Islam*, 17(2), 152-171.

²⁰ Jaziri, A. A. (1972). *Kitab al-Fiqh 'alâ al-Mazâhib al-Arba'ah. Volume IV, Cairo: Dar al-Fikr, n.d., 119.*

or marrying a fifth wife while the fourth wife is still in *iddah*; this type of marriage must be invalidated, not divorced, and without a mahr (*dowry*), whether or not it has been *consummated*.

- b. What is not agreed upon by Islamic jurists, such as marriage during *ihram*, should be invalidated according to the Maaliki, but according to the Hanafis it is valid. Similarly, a marriage that is *shiqor* must be invalidated according to the Maaliki, but according to the Hanafis, once the marriage has taken place, it is valid. Also, *marriages* that fall under the category of *nikahul sirri*, marriages with a defective masawin or marriages with a defective marriage contract must be invalidated, but some are of the view that they do not have to be *invalidated*.²¹

According to the Shafi'i school of thought, *nikahul fasid* is a marriage contract between a man and a woman that lacks one of the conditions prescribed by sharee'ah, while *nikahul bathil* is a marriage between a man and a woman that lacks one of the pillars of sharee'ah. According to Islamic jurists among the Shafi'iyah school of thought, *nikahul fasid* can take many forms:

- a. A marriage between a man and a woman in which the woman is in the *iddah* of another man;
- b. A marriage contracted during the period of *istibro'* because of *unlawful intercourse*;
- c. A marriage contracted between a man and a woman in which the woman's *iddah* is in doubt because of signs of pregnancy;
- d. Marrying a *watsani* woman and an *apostate*, the latter two of which are invalid because of the condition of Islam.²²

According to Islamic law, anyone who sees and knows that a person intends to enter into a marriage, knowing that the marriage is legally defective due to the lack of a pillar or condition, must prevent the marriage from taking place. If he finds out after the marriage contract has been executed, he is obliged to apply to the competent authority for its cancellation. Cancellation of marriage applies to all forms of *invalid* marriage, both in the nature of *nikah bathil*, and in the nature of *nikah fasid*, both before intercourse occurs and after intercourse occurs. In order to avoid *wathi'syubhat* between the husband and wife who carry out the invalid marriage, then once it is known that the marriage is legally defective, the husband and wife are prohibited from getting together first while waiting for the settlement of the case to be resolved by the competent authority.²³

Fasid Marriage in Indonesian Positive Law

In Law Number 1 of 1974 concerning Marriage and Government Regulation Number 9 of 1975 it is not expressly stated that there is an institution of *nikahul fasid*

²¹ Muhamad, Muhamad. " Penetapan Keabsahan Pernikahan Suami Istri Mualaf Implikasi Terhadap Keturunannya di Pengadilan Agama Jambi." *Journal of Literasiology* 5.2 (2021).

²² Abdul Manan, *Aneka Masalah Hukum Perdata Islam di Indonesia*, (Jakarta: Kencana Prenadamedia Group, 2006), pp. 44.

²³ Amir Syarifuddin, *Meretas Kebekuan Ijtihad Isu-Isu Penting Hukum Islam Kontemporer di Indonesia*, 1st cet. (Jakarta: Ciputat Press, 2002), pp. 43.

in Indonesian Marriage Law. There are only articles that regulate the cancellation of marriage, namely Articles 27 to 38 of Government Regulation Number 9 of 1975. These articles of legislation give the Religious Court the authority to annul a marriage if the marriage is deemed invalid (*no legal force*), or if a marriage is deemed not to fulfil the conditions of marriage that have been determined, or if the marriage that has been carried out is known to have a legal defect as a result of a lie and deceit or because of coercion.²⁴

Although Law No. 1 of 1974 Concerning Marriage and Government Regulation No. 9 of 1975 concern only "Cancellation", in practice the implementation of the law concerning the cancellation of marriage includes substance in *nikahul fasid* and *nikahul bathil*. In Article 22 of Law No. 1 of 1974 Concerning Marriage it is stated that marriage can be cancelled if the parties do not fulfil the conditions for entering into marriage. While in the explanation, it is stated that the meaning of "can" in this article is that it can be cancelled if according to the provisions of his religious law does not determine otherwise.²⁵ Thus, it can be understood that a marriage entered into by a person can be null and void and can be cancelled if there are legal defects in its implementation. The Religious Court may annul the marriage at the request of interested parties.²⁶

Marriage is null and void if it is carried out as stated in Article 70 of Law Number 1 Year 1974 concerning Marriage, namely:

- a. The husband entered into a marriage contract when he was not entitled to do so because he had four wives, even if one of them was in the *iddah of divorce*;
- b. A husband who marries his wife whom he has impregnated;
- c. A husband who marries his ex-wife who has been divorced three times, unless the ex-wife has been married to another man and then divorced again after she has been divorced by him and has completed her *'iddah (waiting period)*;
- d. Marriage is entered into between two persons who are related by blood in a straight line of descent downwards and upwards;
- e. Marriage is entered into between two persons who are related by blood in a line of descent, i.e. between brothers, between brothers of parents, and between a person and his grandmother's brother;
- f. Marriage is entered into between two persons who are related by marriage, i.e. in-laws, step-children, sons-in-law and step-mothers or step-fathers;
- g. Marriage is entered into with the wife's sibling or as an aunt or niece of the wife.²⁷

Furthermore, a marriage can be cancelled if:

- a. A person commits polygamy without the permission of the Religious Court;
- b. The married woman was later found to be the legal wife of another man;

²⁴ Rahmatillah, Deni, and A. N. Khofify. "Konsep Pembatalan Perkawinan Dalam Undang-Undang Nomor 1 Tahun 1974 Dan Kompilasi Hukum Islam." *Islamic Law* 17.2 (2017): 152-171.

²⁵ Abdul Manan, *Aneka Masalah Hukum Perdata Islam di Indonesia*, (Jakarta: Kencana Prenadamedia Group, 2006), pp. 45.

²⁶ Asnawi, A. (2020). "Pembatalan Nikah dan Akibat Hukumnya: (Analisis Perspektif Hukum Islam Dan Peraturan Perundang-Undangan)". *Journal of Al-Fikrah*, 9(2), 112-126.

²⁷ Article 70 of Law Number 1 Year 1974

- c. Marriages entered into in violation of the age limit for marriage as stipulated in Article 78 of Law Number 1 Year 1974;
- d. The marriage was conducted in front of an unauthorised marriage registrar, an invalid marriage guardian or the marriage was conducted in the absence of two witnesses;
- e. Marriages performed under duress;
- f. Marriages performed under threat of breaking the law;
- g. A marriage contracted by fraud, such as a man claiming to be a bachelor when he already has a wife at the time of the marriage, while he is in breach of polygamy without the permission of the Religious Court or fraud in his identity.²⁸

According to M. Yahya Harahap, theoretically Law Number 1 of 1974 concerning Marriage adheres to the principle that no marriage is considered automatically void according to law (*van rechtswegwnietly*) until court intervention. This can be seen in Article 37 of Government Regulation Number 9 of 1975, where it is said that the cancellation of a marriage can only be decided by the court. What is stated by M. Yahya Harahap is very realistic, the ratio is because a marriage has been carried out through formal juridical, so to eliminate the juridical legality it must be through a court decision.²⁹

In this case, it does not matter whether the marriage lacks the pillars or conditions found by the religious law of each party and the applicable laws and regulations. The cancellation of marriage on the basis of a court decision is necessary so that there is legal certainty, especially for the parties concerned, third parties and the community who have already known about the marriage. So, the legality of marriage cancellation regulated by applicable laws and regulations is broader in scope than *nikahul bathil* and *nikahul fasid* as mentioned in traditional fiqh books.³⁰

If the application for annulment of marriage filed by the party as mentioned above is accepted by the Religious Court, then the effective date of the annulment of the marriage shall be counted from the date on which the decision of the Religious Court is rendered and the decision has permanent legal force and shall take effect from the time when the marriage was performed. With this decision of the Religious Court, the original situation before the marriage was carried out shall apply. The cancellation does not have a retroactive effect on:

- a. Children born out of the marriage, this means that the faults committed by the parents are not imputed to the children born out of the annulled marriage. Thus, the children have a clear and official legal status as the children of their parents;
- b. The husband or wife who is in good faith, except for joint property, if the cancellation of the marriage is based on the existence of another previous marriage;

²⁸ Article 71 KHI

²⁹ M. Yahya Harahap, *Hukum Perkawinan Nasional*. (Medan: Zahir Trading, 1975), pp. 11.

³⁰ Mukmin Mukri, (2020). *Pencegahan Dan Pembatalan Perkawinan*. *Journal of Perspective*, 13(2).

- c. Also against third parties who are in good faith, the cancellation of marriage does not apply retroactively. Therefore, all legal ties in the field of civil rights made by husband and wife before their marriage was cancelled are valid both against joint property and against each other's personal property.³¹

Definition of Child out of Wedlock

Children outside of marriage are children born to a woman, while the woman is not in a legal marriage with the man who has intercourse with her. Meanwhile, the definition of outside marriage is the relationship between a man and a woman who can give birth to offspring, while their relationship is not in a legal marriage according to positive law and the religion they follow.³²

According to the Criminal Code Article 284 in conjunction with the Civil Code Article 27, a person can be said to have committed adultery if one or both of them are bound by marriage to another, so that marital ties are an element that determines whether a person can commit adultery or not. This is very different from the concept of adultery according to Islamic law. Based on Islamic terminology, the act of adultery is not only determined by the condition that the man or the woman is married to another woman or man, but any conjugal relationship committed by a couple who is not in a marriage bond, regardless of whether he is married to another or is still a virgin and girl, is still considered adultery.³³

In the practice of civil law, there are two kinds of understanding of extra-marital children, namely:

- a. If one or both parents are still bound by another marriage, then they have sexual relations with another woman or man which results in pregnancy and childbirth, then the child is called an adulterous child, not an extra-marital child.
- b. If the parents of a child out of wedlock are still single, they have sexual relations and become pregnant and give birth to a child, then the child is called a child out of wedlock.³⁴

In the complication of Islamic law in Indonesia, which is regulated in Presidential Decree Number 1 of 1991 and Decree of the Minister of Religious Affairs Number: 154/1991, it is stated that a pregnant woman outside of marriage can only be married to the man who impregnated her. According to Civil Law (*Burgerlijke Wetboek*), this is called *natuurlijk kind* (natural child). The out-of-wedlock child can be recognised by the father or mother.

A legitimate child is a child born in a legal marriage. The word in marriage indicates legal tolerance for children born in a legal marriage, with conception

³¹ Olivia, F. (2020). "Akibat Hukum Terhadap Pembatalan Perkawinan Yang Dilakukan Istri Pertama Berdasarkan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan". *Journal of Law*, 5(2), 250-265.

³² Abdul Manan, *Aneka Masalah Hukum Perdata Islam di Indonesia*, (Jakarta: Kencana Prenadamedia Group, 2006) pp. 81.

³³ Maramis, Friska Marselina, "Hak Mewaris Anak di Luar Perkawinan Menurut Sistem Hukum di Indonesia". *Lex Crimen*, 2017, pp.64.

³⁴ Sudikno Mertokusumo, *Pengantar Hukum Perdata Tertulis (BW)*, (Jakarta: Sinar Grafika, 2008), pp. 90.

occurring before marriage. In this case, the law does not provide a minimum period of gestation, as is the case in Islamic civil law. This implies that as long as the baby is born when the mother is in a legal marriage, then the child is a legitimate child.³⁵

Position of Illegitimate Children

As one of the consequences of a valid marriage, it will have legal consequences, such as the rights and obligations of husband and wife, marital property, reciprocal relationships between parents and children (nasab), child maintenance obligations (hadhanah), and inheritance. One of the consequences of a valid marriage is that the child born from the marriage is legitimate and has a perfect civil relationship with both parents, as stipulated in Article 42 of Law Number 1 Year 1974 on Marriage.³⁶

The principle of regulating extra-marital children in family relations with their father and mother is greatly influenced by the principle of monogamous marriage adopted by Article 27 of the Civil Code, which reads "At the same time a man may only be married to one woman and a woman only to one man".³⁷ And the principle of absolute recognition as stipulated in Article 280 of the Civil Code, which reads "With the recognition of a child out of wedlock, a civil relationship is born between the child and the father or mother."³⁸

It does seem strange because there is a possibility that a child juridically does not have a father or his mother does not or neglects to recognise his extra-marital child. The legal status of children born out of wedlock as unification in the field of National Marriage Law is stated in Article 43 Paragraph 1 of Law Number 1 Year 1974 concerning Marriage, which reads "Children born out of wedlock only have a civil relationship with their mother or their mother's family".³⁹

This means that the child has a family relationship with its consequences, especially the right to inherit, so it is almost the same as the family status as a legitimate child, only the difference is that the extra-marital child has nothing to do with his father.⁴⁰

The position of children born out of wedlock in the Compilation of Islamic Law is no different from that stipulated by Article 100 of Law Number 1 Year 1974 concerning Marriage before the amendment. The article reads "Children born outside marriage only have a nasab relationship with their mother and their mother's family".⁴¹

Therefore, the position of extra-marital children is different from legal children, extra-marital children only have a civil relationship with their mother and mother's family, and extra-marital children also do not have material and moral rights that should be obtained by a child from his father, such as maintenance rights, nafkah rights, marriage guardianship rights for girls, and the right to inherit each other in the event of death.

³⁵ Rofiq, Ahmad, *Hukum Islam di Indonesia*, (Jakarta: PT Raja Grafindo Persada, 1997) pp. 220.

³⁶ Kuspraningrum, E. (2006). "Kedudukan Dan Perlindungan Anak Luar Kawin Dalam Perspektif Hukum di Indonesia". *Legal Treatise*, pp. 25-32.

³⁷ Article 27 of the Civil Code,

³⁸ Article 280 of the Civil Code

³⁹ Article 43 Paragraph 1 of Law Number 1 Year 1974

⁴⁰ Soedharyo Soimin, *The Law of Persons and Family*. (Jakarta: Sinar Grafika, 2002) pp. 41

⁴¹ Article 100 of Law Number 1 Year 1974

Recognition of Children out of Wedlock

The legal protection that can be given to extra-marital children as mentioned above in order to be free from the heavy burden of life is by way of recognition, ratification, and appointment. Meanwhile, government regulations as mentioned in Law Number 1 of 1974 concerning Marriage which will regulate the fate of children outside of marriage have not yet been issued. In the context of legal unification which is based on the insight of the archipelago and the insight of Bhineka Tunggal Ika, it is better to think about the institution of recognition and ratification of children outside of marriage in order to raise their dignity as human beings created by Allah SWT.⁴²

According to Erna Sofwan Syukrie, as quoted by Abdul Manan, child recognition in the formal sense is a form of giving information from a man who states recognition of his children. Meanwhile, according to material recognition, what is meant by child recognition is a legal act to establish a family relationship between the child and the person who admits it without questioning who fertilised or seeded the woman who gave birth to the child.⁴³

To obtain the status of the relationship between father, mother and child born out of wedlock, the child must be recognised by the father and mother. Law Number 1 Year 1974 on Marriage does not explain in detail about the recognition of children out of wedlock. It only explains that an unmarried child is a child born from an invalid marriage and he only has a civil relationship with the mother who gave birth to him or his mother's family.⁴⁴

The Compilation of Islamic Law in Indonesia also does not explain child recognition in detail and completely. In line with this, Law No. 1 of 1974 Concerning Marriage confirms in several articles the position of children born out of wedlock. Article 100 of Law Number 1 Year 1974 Concerning Marriage states that children born out of wedlock only have a relationship with their mother and their mother's family.⁴⁵

Article 281 of the Civil Code states that there are three ways to recognise an extra-marital child, namely:

- a. In the child's birth certificate
- b. In the marriage certificate
- c. In the authentic deed

In civil law practice, the most common method is acknowledgement by a father whose name is mentioned on the child's birth certificate. This acknowledgement is given by the father at the time of reporting the birth of his child. Meanwhile, the second method is carried out by carrying out a legal marriage between the pregnant woman and the man who fertilised her while recognising her extra-marital child. What is recognised here is an unmarried child who has been born and at the time of reporting the birth has not been given recognition by his father.⁴⁶

⁴² Ardian Arista Wardana, " Pengakuan Anak Di Luar Nikah: Tinjauan Yuridis Tentang Status Anak Di Luar Nikah." *Journal of Jurisprudence* 6.2 (2017): 160-165.

⁴³ Abdul Manan, 2006. *Aneka Masalah Hukum Perdata Islam di Indonesia*, Jakarta: Kencana Prenadamedia Group. pp. 84.

⁴⁴ Nurhayati, B. R. (2019). "Harmonisasi Norma Hukum Bagi Perlindungan Hak Keperdataan Anak Luar Kawin Dalam Sistem Hukum Indonesia". *Ganesha Law Review*, 1(1), 55-67.

⁴⁵ Abdul Manan, 2006. *Aneka Masalah Hukum Perdata Islam di Indonesia*, pp. 89.

⁴⁶ *Ibid*.

Civil Rights of Unmarried Children After Recognition

The legal consequences of the recognition of an extra-marital child include, among others, the establishment of a civil relationship between the extra-marital child and the father and mother who recognise him, giving rise to reciprocal obligations in terms of providing maintenance, guardianship, the right to use names, inheritance, and so on. Against this treatment, any interested person can sue for the recognition of the child, only the person who recognises himself cannot sue for the recognition that has been given.⁴⁷

In the decision of the Constitutional Court Number: 46/PUU-VIII/2010, it is explained that a child born out of wedlock has civil rights with his mother and biological father regardless of whether the marital status of his parents is valid or not. The civil rights obtained are civil rights that are not related to Islamic fiqh such as financing and education rights. This is different from the civil rights of legitimate children who can obtain the whole, such as guardianship, inheritance, and others without any restrictions.⁴⁸

Description of Stipulation Number 040/Pdt.P/2017/Pa.Sal

Basis of Claim / Posita

That the Plaintiffs filed a petition for Child Origins on 5 May 2017 which was registered at the Registrar of the Salatiga Religious Court with Number 0040/Pdt.P/2017/PA.Sal dated 5 May 2017, the Plaintiffs filed the following matters:

- a. That Applicant 1 and Applicant 2 had entered into a marriage according to Islam on 17 January 2013 in Candirejo Village, Tuntang Sub-district, Semarang Regency with the marriage guardian of Applicant 2's biological father, Mr Sardjono bin Ahmat Asmui, aged 64, Candiwesi RT.03 RW.04 address. Bugel Village Sidorejo Subdistrict Salatiga City guided by the late Kyai Mawahib and witnessed by Bayu Ar Taufik bin Sunoto age 44 address Kemiri Barat No. 35 Salatiga City and Suwanto bin Suwardi age 65 address Reksosari Village Rt.10 Rw.1 Subdistrict Suruh Semarang Regency with dowry a set of prayer tools;
- b. That during the marriage Applicant 1 and Applicant 2 had a proper relationship as husband and wife and had been blessed with a son named Dewangga Yudhistira Alvaronizam who was born on 5 September 2013 at Mitra Setia Ungaran Hospital;
- c. That a birth certificate could not be issued for the child because the marriage of Applicant 1 and Applicant 2 had not been registered at the Office of Religious Affairs until the child was born.
- d. That subsequently Applicant 1 and Applicant 2 registered their marriage at the Religious Affairs Office of Sidorejo Sub-district, Salatiga City on 13 February 2017 and obtained a Marriage Certificate Excerpt Number: 0039/007/11/2017, however the existence of the marriage certificate

⁴⁷ Muhammad Hajir Susanto, Yonika Puspitasari, and Muhammad Habibi Miftakhul Marwa. "Kedudukan Hak Keperdataan Anak Luar Kawin Perspektif Hukum Islam" *Justisi* 7.2 (2021): 105-117.

⁴⁸ Asep Lukman Daris Salam, Analisis Hukum Hak-Hak Nasab Anak Luar Nikah Menurut Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010. *As-Sakinah: Jurnal Hukum Keluarga Islam*, 2023, 1.1: 35-60.

cannot be used as a basis for the issuance of a birth certificate for the child of Applicant 1 and Applicant 2 who was born on 5 September 2013.

- e. Applicant 1 and Applicant 2 urgently needed a Court decision on the origin of the child as a basis for issuing a birth certificate for the child concerned, and Applicant 1 and Applicant 2 were able to submit evidence of the origin of the child.⁴⁹

Demand/Petitum

That therefore Petitioner 1 and Petitioner 2 filed an Application for Determination of the Origin of this Child to the Salatiga Religious Court and requested that a determination be made as follows:

- a. Grant the petition of Applicant 1 and Applicant 2;
- b. Determine that the child named Dewangga Yudhistira Alvaronizam born on 5 September 2013 is the child of Applicant 1 and Applicant 2;
- c. Order the Birth Registrar/Civil Registry Office of Salatiga City to issue a birth certificate for the child;

Considering that on the day and date set, the Plaintiffs were present in person at the hearing, the examination was continued by reading out the Petition, the contents of which were maintained by the Plaintiffs.

Evidence

Considering, in terms of strengthening the arguments of their petition, the Plaintiffs have submitted evidence in the form of letters:

- a. Copy of Certificate of Residence in the name of Applicant 1 Number: 3373/SKT/20170427/00127 dated 27 April 2017, issued by the Semarang Regency Population and Civil Registry Office.
- b. Copy of Certificate of Residence in the name of Applicant 2 Number: 3373/SKT/20170427/00129 dated 27 April 2017, issued by the Semarang Regency Population and Civil Registry Office.
- c. Copy of birth certificate of the child of Applicant 1 and Applicant 2 No. 42/IX/2013 dated 05 September 2013, issued by Mitra Setia Hospital.
- d. Photocopy of the Family Card in the name of Applicant 1 Number: 3373011004170002 dated 28 April 2017, issued by the Semarang Regency Population and Civil Registry Office, proof of the letter has been given sufficient stamps and has been matched with the original, which turned out to be appropriate, then by the Chairperson of the Panel marked P.4;⁵⁰

In addition to the written evidence, the Plaintiffs also presented 2 witnesses as follows:

⁴⁹ Stipulation No. 040/Pdt.P/2017/PA.Sal in Salatiga Religious Court

⁵⁰ Stipulation No. 040/Pdt.P/2017/PA.Sal in Salatiga Religious Court

- a. Witness 1 named Suwanto bin Suwadi, 68 years old, before the court the witness testified under oath which is basically as follows:
 - 1) That the witness knew the Plaintiffs because they were close neighbours of Applicant 1;
 - 2) The first child of the Plaintiffs, Dewangga Yudhistira Alvaronizam, was born on 5 September 2013 before Plaintiff 1 was legally married to Plaintiff 2 at the Office of Religious Affairs, Sidorejo Sub-district, Salatiga City on 13 February 2017;
 - 3) That the witness was aware of the marriage of the Plaintiffs before the official marriage, the Plaintiffs were married in January 2013 in Islamic religion with the guardian of the biological father of the 2nd Plaintiff named Sardjono represented by Mr Kyai Mawahib with a dowry in the form of a set of prayer tools and witnessed by 2 witnesses, namely myself Suwanto bin Suwadi and Bayu Ar Taufiq bin Sunoto;
 - 4) That Applicant 1 and Applicant 2 have never been divorced and have never left Islam;
 - 5) That the status of Applicant 1 at that time was a divorced widower while Applicant 2 was a divorced widow;⁵¹
- b. Witness 2 named Bayu Ar Taufiq bin Sunoto, before the court the witness gave testimony under oath which was basically as follows:
 - 1) That the witness knew the Plaintiffs because they were close neighbours of Applicant 1;
 - 2) The first child of the Plaintiffs, Dewangga Yudhistira Alvaronizam, was born on 5 September 2013 before Applicant 1 was legally married to Applicant 2 at the Office of Religious Affairs, Sidorejo Sub-district, Salatiga City on 13 February 2017;
 - 3) That the witness was aware of the marriage of the Plaintiffs before the official marriage, the Plaintiffs were married in January 2013 in Islamic religion with the guardian of the biological father of the 2nd Plaintiff named Sardjono represented by Mr Kyai Mawahib with a dowry in the form of a set of prayer tools and witnessed by 2 witnesses, namely myself Suwanto bin Suwadi and Bayu Ar Taufiq bin Sunoto;
 - 4) That Applicant 1 and Applicant 2 have never been divorced and have never left Islam;⁵²

Legal Considerations of the Judges

After all the evidence of letters and witnesses presented by the Plaintiffs before the court, the Judges had several considerations in the form of:

- a. That the status of Applicant 1 at that time was a divorced widower while Applicant 2 was a divorced widow;

⁵¹ *Ibid.*

⁵² *Ibid*

- b. Based on the confession of the second applicant, the second applicant divorced her first husband before the Salatiga Religious Court on 16 January 2013, in a state of *ba'da dukhul*;
- c. That against the evidence and testimony of the witnesses, the Plaintiffs stated that they no longer asked any questions or statements and the Plaintiffs requested a determination;
- d. That in order to shorten the description of this decision, the minutes of the examination of this case are appointed;
- e. The intent and purpose of the Plaintiffs' petition is as described above;
- f. The Plaintiffs based their petition on 5 May 2017 to obtain a Stipulation of Child Origins for one of their children named Dewangga Yudhistira Alvaronizam, because the Plaintiffs had difficulty in obtaining the child's birth certificate, because the child was born before the Plaintiffs officially remarried and was registered at the Office of Religious Affairs, Sidorejo Sub-district, Salatiga City;
- g. That based on Exhibits P.1 and P.2 in the form of photocopies of Resident Certificates, which have been affixed with sufficient stamps and have been matched with the original letters, it is evident that Applicant 1 and Applicant 2 reside in the jurisdiction of the Salatiga Religious Court, the Panel of Judges is of the opinion that the petition of Applicant 1 and Applicant 2 has been filed in accordance with Article 66 paragraph (2) of Law of the Republic of Indonesia Number 7 of 1989, so that the petition of the Plaintiffs can be accepted for further consideration;
- h. That Exhibit P.3, in the form of a photocopy which has been sufficiently stamped, *sealed*, legalised, and matched with the original, it has been proven that on 5 September 2013 a son was born to a mother named Ony Suciati (Applicant 2) and a father named Pamuji Eko (Applicant 1);
- i. That based on Exhibit P.4 in the form of a photocopy of the Family Card which has been affixed with sufficient stamp duty and has been matched with the original letter, it turns out to match, and connected with Exhibit P.3, it has been proven that the child named Dewangga Yudhistira Alvaronizam is the child of Applicant 1 and Applicant 2;
- j. In relation to the petition of Applicant 1 and Applicant 2 concerning the origin of the child, the Tribunal needs to first consider the validity of the marriage between Applicant 1 and Applicant 2;
- k. That based on the admission of Applicant 2 and in conjunction with the testimony of witnesses at trial that at the time of marriage, the status of Applicant 2 was a divorcee;
- l. That because the status of Applicant 2 is a divorcee, in addition to fulfilling the other pillars and conditions, it must also be clearly known whether at the time of marriage Applicant 2 was still in the *iddah* period or the *iddah* period had ended;

- m. That this case falls within the field of marriage, therefore according to Article 89 Paragraph 1 of Law Number 7 of 1989, the costs of this case shall be borne by the Plaintiffs;⁵³

Stipulation Taking Into Account The Articles of Legislation And Other Fiqhiyah Arguments Relating to This Case, The Panel of Judges Ruled As Follows

- a. Grant the petition of the Plaintiffs;
- b. Determine that the child named Dewangga Yudhistira Alvaronizam born on 5 September 2013 is the child of Applicant 1 and Applicant 2;
- c. Charged the Plaintiffs to pay the costs of this case, which have so far been calculated at Rp. 241,000.00- (Two hundred and forty-one thousand rupiah).

This decision was rendered by a panel of judges of the Salatiga Religious Court on Wednesday 7 June 2017 AD, coinciding with 12 Ramadlon 1438 H. In a deliberation of the panel of judges of the Salatiga Religious Court by Drs. H. Anwar Rosidi, as the Chief Judge of the panel, Drs. H. Salim, S.H., M.H. and Drs. Moch. Rusdi, M.H., each as Member Judges, which decision was read out on the same day in a hearing open to the public by the Chairman of the Panel accompanied by the Member Judges and assisted by Dra. Hj. Siti Zulaikhah, as Substitute Clerk in the presence of Applicant 1 and Applicant 2. This decision has been legally binding since 22 June 2017.

And to complement the above stipulation the author conducted an interview with Mr Salim, M.H. the panel of judges who handled the case. The results of the interview were as follows there was no need for a DNA test because both parents/Applicant 1 and Applicant 2 recognised that the child was the child of Applicant 1 and Applicant 2. Before applying for the origin of the child Applicant 1 and Applicant 2 applied for Isbat nikah, which was rejected because Applicant 2 divorced her previous husband and broke up on 16 January 2013 and then remarried Applicant 1 on 17 January 2013, and the panel of judges considered that the divorce was not yet *inkracht van gewijsde* / legally binding, so Applicant 2 at that time was not considered divorced from her old husband. And because Applicant 2 was still considered to be the legal wife of her former husband, there was a marriage ban on the marriage of Applicant 1 and Applicant 2 (Salim, interview, 27 July 2018).⁵⁴

Analysis of the Compilation of Islamic Law on the Validity of the Marriage of the Plaintiffs

Before the author discusses the validity of the Plaintiffs' children, the author would like to analyse the marriage of the Plaintiffs. Applicant 1 and Applicant 2 had entered into a marriage according to Islam on 17 January 2013 in Candirejo Village, Tuntang Sub-district, Semarang Regency with the marriage guardian of Applicant 2's biological father, Mr Sardjono bin Ahmat Asmui, age 64, Candiwesi RT.03 RW.04 address. Bugel Village Sidorejo Subdistrict Salatiga City guided by the late Kyai Mawahib and witnessed by Bayu Ar Taufik bin Sunoto age 44 address Kemiri Barat No. 35 Salatiga City and Suwanto bin Suwardi age 65 address Reksosari Village Rt.10 Rw.1

⁵³ Stipulation No. 040/Pdt.P/2017/PA.Sal in Salatiga Religious Court

⁵⁴ Stipulation No. 040/Pdt.P/2017/PA.Sal in Salatiga Religious Court

Subdistrict Suruh, Semarang Regency with dowry a set of prayer tools . Based on the confession of Applicant 2 and in conjunction with the testimony of witnesses at the trial, the status of Applicant 2 at the time of marriage was that of a divorcee and because the status of Applicant 2 was that of a divorcee, it must be clearly known whether at the time of marriage Applicant 2 was still in the *iddah* period or had exhausted the *iddah period*.

In Article 153 Letter b of the Compilation of Islamic Law, "If the marriage breaks up due to divorce, the waiting time for those who are still *menstruating* shall be determined by 3 (three) holy times with at least 90 (ninety) days, and for those who are not *menstruating* shall be determined by 90 (ninety) days". Applicant 2 divorced her first husband on 16 January 2013, and then married Applicant 1 on 17 January 2013. Article 40 (b) of the Compilation of Islamic Law states that "Marriage between a man and a woman is prohibited because of certain circumstances, namely a woman who is still in the *iddah* period with another man". Based on the consideration of the aforementioned article, it was found that when Applicant 2 married Applicant 1, she was still in the *iddah* period, which prohibited her from marrying another man, and therefore the marriage between Applicant 1 and Applicant 2 on 17 January 2013 was invalid. An act of worship is said to be *invalid* when a pillar of worship is incomplete, but an act of worship is said to be *invalid* when some of its conditions have not been fulfilled. As in the case of the Plaintiffs above, the Plaintiffs considered their marriage to be valid, because they had carried out a marriage contract with complete pillars, but due to the ignorance of the Plaintiffs, so they did not know if there were some conditions that they had not fulfilled, namely the non-fulfilment of the *iddah* period for Applicant 2.⁵⁵

Analysis of Law of the Republic of Indonesia No. 23 of 2002 Concerning Child Protection Against the Legitimacy of the Plaintiffs' Children

Article 7 Paragraph 1 of Law No. 23 of 2002 Concerning Child Protection states that "Every child has the right to know his or her parents, to be raised, and to be cared for by his or her own parents". And it is also explained in the elucidation of the Article that the provisions regarding the right of the child to know who his parents are, in the sense of his origin (including his mother), are intended to avoid the disconnection of genealogy and blood relations between the child and his biological parents, while the right to be raised and cared for by his parents is intended so that the child can obey and respect his parents. And the author argues that children are the main pillar in the development of a nation, and children are the next generation of their parents. Therefore, children must be protected, supervised, and given the best possible protection, especially from their biological parents so that the child can grow and develop properly in order to create a good and dignified country if the child becomes a leader in the future. And to grow and develop children properly, a child needs parents to educate him and provide protection for the child so that they continue to grow and develop properly.

And it takes the figure of both parents to nurture the child, and provide extra supervision of the environment that is not good. Because a lot of juvenile delinquency

⁵⁵ Interview with Salim and Rusdi, 15 March 2019.

now occurs in our environment at this time. This is due to the lack of supervision provided by the parents. Without strict supervision of children and providing good education to children, children will join forbidden communities and thus darken the lives of children. Therefore, the role of parents is very important for a child, especially a child who is still learning and developing.

Analysis of the Constitutional Court Decision Number 46/PUU-VIII/2010 on the determination of the Religious Court Number 040/Pdt.P/2017/PA.Sal

The author quotes from the Decision of the Constitutional Court Number 46/PUU-VIII/2010 dated 27 February 2010, Article 43 Paragraph 1 of Law Number 1 Year 1974 Concerning Marriage, which states, "Children born out of wedlock only have a civil relationship with their mother and their mother's family", does not have binding legal force insofar as it is interpreted to eliminate civil relationships with men who can be proven based on science and technology and/or other evidence according to the law to have a blood relationship as the father. In the decision, it is said that Article 43 Paragraph 1 of Law Number 1 Year 1974 concerning Marriage does not have binding legal force to the extent that it can be proven based on science and technology and/or other evidence according to the law to have a blood relationship as the father. What is meant by science and technology may be interpreted by DNA (*deoxyribose nucleic acid*) tests or tests on a *nucleic acid* that stores all the unique biological information of every living being. However, it is also said in the Constitutional Court Decision that "it can be proven by other evidence according to the law", and the evidence regulated in Article 164 HIR / 284 RBg. 1866 Civil Code consists of:

- a. Written evidence (letters)
- b. Witness evidence
- c. Expectations
- d. Confession
- e. Oath

In decision No. 040/Pdt.P/2017/PA.Sal the panel of judges did not order the Plaintiffs to conduct a DNA test, because the Plaintiffs admitted that the child named Dewangga Yudhistira Alvaronizam was the biological child of Applicant 1 and Applicant 2. Basically, the confession of the Plaintiffs was binding, but the panel of judges also needed testimony from witnesses. And after obtaining the confession of the Plaintiffs and witnesses, the judge's opinion finally emerged.

Conclusion

From the various descriptions of the decision of Salatiga Religious Court No. 040/Pdt.P/2017/PA.Sal. on the Origin of Children, the following conclusions can be drawn: *First*, in deciding the case of the origin of the child, the judge of the Salatiga Religious Court stated that the marriage between Applicant 1 and Applicant 2 was *fasid*, because the divorce suit between Applicant 2 and her first husband was dismissed on 16 January 2013, and the verdict was legally binding on 1 February 2013, but Applicant 1 married Applicant 2 on 17 January 2017 and not before a marriage registration officer. And this has violated the Marriage Prohibition contained in Article

9 of Law Number 1 Year 1974 Concerning Marriage in conjunction with Article 40 of the Compilation of Islamic Law. *Secondly*, And the case Number 040/Pdt.P/2017/PA.Sal mentioned above is granted with legal considerations, namely the decision of the Constitutional Court Number 46/PUU-VIII/2010 dated 27 February 2010, Article 43 Paragraph 1 of Law Number 1 of 1974 Concerning Marriage and fiqhiyah arguments listed in the book *Al Fiqh Al Islami Wa Adillatuhu* by Wahbah Az Zuhaili volume 7 page 690. *Thirdly*, and the child named Dewangga Yudhistira Alvaronizam is the legitimate child of Applicant I and Applicant II, therefore the identity of Dewangga Yudhistira Alvaronizam can include the word "bin" Applicant I, (Dewangga Yudhistira Alvaronizam bin Sri Pamuji Eko Sudarko) and a Birth Certificate can be made for the child and it is stated in the Birth Certificate that the child named Dewangga Yudhistira Alvaronizam is the child of the father Sri Pamuji Eko Sudarko and Mrs Ony Suciati.

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