

## **JURIDIC CONSIDERATION OF THE JUDGMENT'S DECISION CONCERNING THE POST-BORN OF CHILDREN BORN OUT OF MARRIAGE AFTER DECISION OF THE CONSTITUTIONAL COURT NUMBER 46 / PUU-VIII / 2010**

**Edi Hudiata**

Student of Doctoral Program in Islamic Law, Concentration of Islamic Family Law at UIN  
Sunan Gunung Djati Bandung  
Email: edihudiata31122012@gmail.com

### **Abstract**

Marriage law in Indonesia stipulates that a legal marriage is a marriage which is carried out according to the teachings or provisions of their respective religions and is registered by the relevant government agency authorized to do so. With a registered marriage, the state recognizes all the rights and obligations attached to each married couple which are protected by existing legal instruments. The principle of judge freedom is part of the judicial authority, namely the power of an independent state to administer justice in order to uphold law and justice. The principle of freedom of judges in carrying out their duties as judges can provide an understanding that judges in carrying out the duties of judicial power may not be bound by anything and / or pressured by anyone, but are free to do anything. The principle of freedom of judges is an independence or independence possessed by a judicial institution for the sake of creating an objective and impartial decision.

**Keywords:** juridical, verdict, judge, court, constitution

### **A. INTRUCTION**

The issue of the status of children born out of wedlock is often a topic of conversation that attracts many enthusiasts, both academics and practitioners. The flare up of discussion on this theme is due, among other things, to the absence of derivation rules that specifically regulate children born outside of marriage as stated in Article 43 paragraph (2) of Law Number 1 of 1974 concerning Marriage which has been amended by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage (hereinafter referred to as the Marriage Law), that the position of children born outside of marriage will be regulated in a Government Regulation (PP). The PP referred to in Article 43 paragraph (1) of the Marriage Law has never been issued to date.

The most recent development regarding the provisions regarding children outside of marriage, precisely through the Constitutional Court decision Number 46 / PUU-VIII / 2010, which provides a broader explanation of civil relations for children born outside of marriage. The main points of the Constitutional Court decision Number 46 / PUU-VIII / 2010 are as follows:

"Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage (State Gazette of the Republic of Indonesia of 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) which states, " Children born outside of marriage only have a civil relationship with their mother. and his mother's family ", does not have binding legal force as long as it is interpreted as eliminating civil relations with men which can be proven based on science and technology and

/ or other evidence according to the law has a blood relationship as the father, so the verse must be read," Son those born out of wedlock have a civil relationship with their mother and their mother's family as well as with men as their father which can be proven based on science and technology and / or other evidence by law to have blood relations, including civil relations with their father's family. "

After the issuance of the Constitutional Court Decision Number 46 / PUU-VIII / 2010, the Indonesian Ulema Council responded by issuing fatwa Number 11 of 2012 concerning the status of children resulting from adultery and their treatment dated March 10, 2012. In the fatwa, MUI stated that the Government has the authority to impose sentences. ta'zir an adulterous man who results in the birth of a child by obliging him to meet the child's needs and giving assets after he dies through a will (Irfan, 2012. p.vi-vii). Regardless of the form of biological child inheritance, Bahruddin Muhammad emphasized that the fulfillment of his inheritance rights will be very beneficial for the protection of children's civil rights, especially in ensuring the safety of children's lives, ensuring the continuity of human generations and the general benefit (of the parties, including preventing vulnerabilities in the nasab system) (Baharuddin, 2014. p.79).

In Article 2 paragraph (1) and (2) Law Number 1 of 1974 concerning Marriage, the law of marriage in Indonesia stipulates that a legal marriage is a marriage which is carried out according to the teachings or provisions of their respective religions and is registered by the relevant government agency authorized to that (BIP, 2017). With a registered marriage, the state recognizes all the rights and obligations attached to each married couple which are protected by existing legal instruments.

In the framework of implementing the above constitution, in the preamble to Law Number 23 of 2002 concerning Child Protection, it is stated that the State guarantees the welfare of each of its citizens, including protection of children's rights which are human rights, and to realize the protection and welfare of children it is necessary. institutional support and laws and regulations that can guarantee its implementation. One of the state institutions that has supported and contributed to ensuring the protection of children's rights is the religious court. The religious court as one of the state institutions in the field of law enforcement and justice for Indonesian citizens who are Muslim has played a role in this role since the issuance of Law Number 7 of 1989 concerning Religious Courts which has been amended several times, most recently by Law Number 50 of the year. 2009 concerning the Second Amendment to Law Number 7 of 1989 concerning the Religious Courts (hereinafter referred to as the Law on the Religious Courts), this is evident in the absolute competence of the religious courts as stated in Article 49 along with the explanation of paragraph (2) point 20, namely the authority provide determination of the origin of the child, by means of which the origin of the lineage / descent of a child becomes certain and the legal consequences become clear (Mukhlis, 2020).

Based on the above problems regarding the disparity of the decisions of the Religious Courts in the Jakarta area regarding the determination of the origin of children born outside of marriage, it is very interesting to be investigated further.

To answer the research questions as stated above, the researcher uses the following theories: First, for the grand theory the mashlahah theory is used. Second, for the middle theory, the theory of justice and legal certainty is used. Third, for applied theory, legal benefit theory is used.

## **B. METHODOD**

The approach used in writing this article is the statute approach. The statutory approach is an approach that is taken by examining all laws and regulations that are related to the legal issue that is being handled (Soekanto & Mudji, 2014. p. 13-14).

A statutory approach (status approach) or a juridical approach, namely research on legal products (Nasution, 2008. p. 92). This statutory approach is carried out to examine all laws and regulations related to the research to be studied. This statutory approach will open opportunities for researchers to study whether there is consistency and suitability between one law and another..

## **C. RESULTS AND DISCUSSION**

In law enforcement, there are three elements that are always related and must be considered, because each other must be balanced, namely justice, legal certainty, and benefit, this is what Gustav Radbruch has stated.

Legal knowledge that must be mastered by judges must actually be multidisciplinary, which crosses procedural law, material law, legal science, legal philosophy, legal sociology, legal psychology, communication science, customary law, legal methodology and others.

From this description, the researcher tries to map the judges' decisions in the field of Civil Law which contain aspects of legal discovery, which by the community reflect legal values which are not only legal certainty but also, the value of the sense of justice that lives in society and the benefits it provides. resulting from the verdict.

One of the forms of settlement of cases through the courts is a decision. There are two types of case settlement through the court, namely: verdict (verdict, arrest) and verdict (bechikking). In their function as a judiciary, judges often face provisions that have not been regulated, which is caused by obstruction of efforts to create a stable national legal system. Many laws and regulations are inherited from colonialism as well as laws that have just been made and passed but are not in accordance with the development of society which is full of the dynamics of the changes that occur. On the other hand, the judiciary, in this case the judge may not refuse to examine, try and decide a case brought to him on the pretext that the law does not exist or is unclear.

Judges in carrying out their functions carry out important tasks in which the judge must be able to adapt the law to developments in society, if the law cannot be implemented according to its meaning, the judge is obliged to interpret so that a decision is made that meets a sense of justice and is in accordance with the purpose of the law. .

Judges are always faced with concrete events in which the judge must provide a solution or give a consideration that can be rationally accepted in a decision which has binding power as law and becomes a source of law (jurisprudence).

When analyzing the considerations given by the judge in his decision and related to the theory of justice promoted by John Rawls which states that justice is fairness, the judge's

decision on the case of the position of the origin of the child outside of a legal marriage must provide a sense of justice. In addition, if we connect it with Amartya Sen's theory of justice (The Idea of Justice), which states that justice must involve public reasoning, so that if we look at the case of the position of the origin of the child outside of legal marriage, public logic must be that there are those who benefit and some are disadvantaged, if the judge only decides the case based on the words of the law, it does not see the sociological and philosophical elements.

The important aspects in legal considerations include:

a. Normative Juridical Aspects

The normative juridical aspect, which is one of the first and foremost aspects of a judge in deciding a case against him. The juridical aspect relates to legal certainty. In deciding a decision a judge must understand and understand the laws relating to the case before him. Legal certainty determines the validity of law in every law enforcement action (law in action) as in statutory regulations (law in book) or the rule of law that has been made in jurisprudence. This is related to the opinion that what has been regulated in the law must be obeyed and become a Court decision (Sutiyoso, 2012. p.6). Considering and applying the principle of legal certainty tends to be easier because it only remains to include the contents of the provisions of the statutory regulations into the judge's decision, while legal justice and benefits are not sufficient to only see from the normative juridical aspects, but other things must be fulfilled, namely philosophical and sociological aspects.

Mahfud MD, said that in law enforcement, the principle of legal certainty should not be the sole basis for a judge's decision. However, there is also that the judge's decision is also based on the principles of justice and expediency. The judge must be able to judge that the law is fair, useful or provides legal certainty if it is enforced, because one of the objectives of the law contains elements of creating a sense of justice.

b. Philosophical Aspects

Philosophical Aspects, are aspects that are core to truth and justice which are one of the goals of law, apart from legal certainty and legal benefits. A judge who is one of the elements in the exercise of judicial power is required to have integrity and a personality beyond reproach, to be honest, fair, professional and experienced in the field of law, in order to be able to provide or fulfill the principle of legal certainty for every decision product issued by the judge. The principle of legal certainty only opens up the opportunity not to make decisions at will by the judge for only formal juridical reasons (Sutiyoso, 2012. p.6). This means that legal justice does not only rely on what has been formulated in heteronomous laws and regulations, but justice that exists in society is justice based on real life and is autonomous in nature.

Formally a judge is also not blamed if he decides a case that is brought before him only on the basis of written law (legal justice), however, the judge will be judged as a judge whose heart is blind from the point of view of his integrity and questionable capabilities. This is in accordance with the provisions of the Law which states that judges as in Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, state that "Judges and constitutional judges are obliged to explore, follow and understand legal values and a sense of justice that lives in society "means that judges in deciding a case are not only based on normative juridical aspects but philosophical and sociological aspects also need to be

considered, namely judges must understand legal values and a sense of justice that lives in the midst of society.

### c. Sociological Aspects

Sociological Aspects, contains considerations based on cultural values that live in the community. In its application, the philosophical and sociological aspects of the judge must be able to follow the development of values that live in society. Sociological aspects are very important to pay attention to so that the decisions are truly in accordance with legal principles in realizing a sense of community justice.

The sociological aspect in the consideration of the judge's decision is very important, so that the resulting verdict fulfills a sense of legal justice, legal certainty and benefit for the parties in a case. When one of the three elements is neglected, it does not mean that the decision is wrong, but it is felt that it is less than perfect, because it does not fulfill the complete element in the decision.

The fulfillment of the three aspects mentioned above, namely the juridical normative, philosophical and sociological aspects, is an effort to enforce the law which has the value of justice, certainty and benefit so that it can be accepted by all parties in litigation and society in general.

Therefore, in the context of the relationship between legal norms and a case being tried, judges basically have to judge based on legal norms. However, if the application of legal norms will injure the principles of justice, certainty and benefits, the judge may exercise discretion through legal discovery (Haroen, 1996. p.xi-xii).

In practice, the principles of justice, certainty and legal usefulness can go hand in hand, but in certain circumstances, there can be antinomies (contradictions). The principle of certainty can be faced with the principle of justice. As with the Constitutional Court decision No: 46 / PUU-VIII / 2010 which has canceled article 48 paragraph (1) of Law No.1 of 1974 because the article is not in accordance with the values mandated by the Constitution which reflect justice, certainty and benefit. From the Constitutional Court decision, it certainly has an impact on the mindset or understanding of judges towards children outside of marriage, in which Article 48 paragraph (1) does not have a sense of justice and has no value of protecting children outside of marriage.

From the mandate of the constitution it can be understood that regardless of the difference in status, every child must get protection from violence and discrimination. Those who have the obligation to protect children's rights are parents, family, community and the State. In Islam, apart from protecting children, parents are also given the responsibility to provide education so that later the child can develop towards maturity properly (Al-Nawawi, 1981. p.113).

This is also a consideration for the panel of judges that children outside of marriage cannot be ignored, especially regarding the child's future. As the mandate of the constitution in Indonesia that every child has the right to live, grow and develop and has the right to protection from violence and discrimination.

In determining the request for the origin of the child, the legal discovery method used is in accordance with the case it is facing (case by case). In granting the petition of the petitioners, of course the judge has his own considerations, in a decision or a decision must fulfill elements of a legal objective. The ideal determination is one that fulfills all elements of legal objectives, but in many cases the Judge must choose between justice, benefit and legal certainty, so the best choice is chosen so that the judge sees from the case of case, different case of case against it " .

Then the most important aspect for reviewing decisions is how judges use legal reasoning (Sidharta, 2004. p.486), as a basis for consideration of the verdict. Legal reasoning actually involves several aspects of the approach, which theoretically have become the discussion of legal science. Legal reasoning which is part of the legal discovery process by the judge in order to provide a final word on the case he is submitting.

To get a clear picture of the legal events of cases concerning the origin of children registered at the Jakarta Regional Religious Court, case examination begins with the reading of the petition made by the husband as Petitioner I and the wife as Petitioner II, and then proceeding to the evidentiary process. From the evidentiary process, this means providing certainty to the judge of the truth of the concrete event being submitted. The things that were successfully proven by the parties were then contrasted as an event that occurred.

After the judge has confirmed a concrete event, the judge's next task is to determine concrete events related to the law. Not all concrete events are related and regulated by law, so that only concrete events that have relevance to the law are defended by judges, then translated into legal language to become legal events. From legal events, then we look for legal regulations. Legal regulations can be found in legislation, customary law, judge decisions (jurisprudence), legal doctrines including the opinions of scholars in several fiqh books, or other sources of law. The task of implementing law is not only to determine the law for legal events, but how the application is able to provide a sense of justice, certainty and benefit.

This is as an example of the case Number 257 / Pdt.P / 2019 / PA.JU at the North Jakarta Religious Court, where the case was that the marriage of Petitioner I and Petitioner II was not carried out in front of a marriage registrar employee, so the marriage was not recorded according to the provisions of the regulations. legislation. The position of the case in the perkara is that Petitioner I is married to Petitioner II who is already married, without involving the official. At the time of the marriage, Petitioner I's status was a widower, but not officially divorced, as was Petitioner II as a widow, but not officially divorced. After running for several years, then both of them were legally married in front of the official (PPN) on September 13, 2018. Meanwhile, the child who was requested for validation was born on May 2 2016. This means that the child was born not in the legal marriage period of both parents, and nor as a result of a legally married marriage of both parents. In the case of this position, the judge was of the opinion that the marriage of Petitioner I and Petitioner II was a marriage that was not in accordance with the provisions outlined by statutory regulations, and had no legal force.

In their legal reasoning, the judge used a term developed in society, by calling it "sirri marriage" to refer to marriages that were not performed in front of officials and were not recorded. This attitude is reflected in the legal considerations stated in the verdict.

The judge examining the case is of the opinion that the marriage that was carried out was not before an official and therefore was not recorded, had no legal force. A marriage that is declared as having no legal force, automatically is not protected by law as a child born from the registered marriage of both parents. The judge's attitude is reflected in the consideration which reads: "Considering, that a child born outside of marriage only has a legal relationship / civil relationship with his mother and his mother's family, because the child was born not from a legal marriage as regulated in Article 43 paragraph (1). Law Number 1 of 1974 concerning Marriage, however even so children still have the right ".

Even so, although the panel of judges did not directly mention the legal norms in the Constitutional Court decision Number 46 / PUU-VIII / 201, the panel of judges implicitly applied the content of these norms. This can be seen in the sentence "... but even so, children still have rights". Before the Constitutional Court decision Number 46 / PUU-VIII / 2010, the judge had never given rights to children born outside of wedlock, and since the MK decision, in the same case the panel of judges established rights as a form of legal protection for children.

The rights referred to by the judges are rights related to human rights (HAM) which are further regulated in Law Number 23 of 2002 concerning Child Protection. Children's rights are an inseparable part of human rights that must be exercised by the state, such as; the right to know his parents (even though he is a biological child), the right to obtain education, teaching in the context of his personal development and the level of intelligence according to his interests and talents. We get this in a legal consideration which states that children born outside of marriage only have a legal / civil relationship with their mother and their mother's family, because the child is not born from a legal marriage as regulated in Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage, however, children still have rights.

The legal considerations of the panel of judges are in line with the views of judges and Islamic law experts that children outside of legal marriages are children of adultery who cannot be recognized. In determining children's rights according to the legal considerations given by the panel of judges, if it is related to the Constitutional Court Decision Number 46 / PUU-VIII / 2010, especially in the sentence "Children born outside of marriage have a civil relationship with their mother and their mother's family as well as with male children. man as his father... ", then it can be said that the judges in the hermeneutic method (interpretation) of the norms of the Constitutional Court's decision were restrictive (narrowly narrowing) the meaning of the legal relationship between a married child with his mother and with a man as his father.

The norm in the Constitutional Court decision which states that "there is a civil relationship" can have broad implications for all aspects of civil relations, including the rights of the lineage, rights as guardians of marriage, inheritance rights and so on. By narrowing the meaning of the norms of the Constitutional Court decision, the relationship caused by the decision is limited to the relationship of obligations relating to the welfare and responsibility for the future of the child.

The verdict of the Panel of Judges in the case of the origin of the child which in principle has granted and it has been determined that the child concerned is the child of Petitioner II and the biological child of Petitioner I, has protected children outside of marriage and the decision

is in accordance with the provisions both in Islamic law and positive law that children from illegitimate marriages are only biological children, not legitimate children as they should be.

The application of the obligations of biological parents has not been regulated by family law through statutory regulations. So far, there is no single statutory provision that imposes an obligation, except the obligation of the father to the child, who has a legal relationship as son and father legally. Islamic Sharia itself emphasizes the responsibility to care for groups of people who are marginalized economically and socially. The panel of judges' deliberations had focused on the future fate of the child who was born, who was actually innocent. He was born solely following the sunnatullah, if there is an error, it is the fault of the two biological parents. More clearly, it can be seen from the judge's consideration that children outside of marriage are still nurtured so that they are not neglected.

Providing protection for children outside of marriage is certainly a form of *maslahatul ulad*. Therefore, if children outside of marriage get their rights related to living financing, education, health, and others, in addition to civil rights in terms of lineage, guardian and inheritance, of course it does not contradict the text, because the Constitutional Court decision aims to eliminate damage and bring benefit

This is of course in accordance with the essence of the concept of the problematic *mursalah* who says (Syarifuddin, 2009. p.356):

- 1) Something that is considered good by reason, with consideration can bring good and avoid evil.
- 2) Something that is considered good by reason must be in accordance with the objectives of *syara'* in establishing law.
- 3) What is considered good by reason, and in line with the goals of *syara'*, there is no specific *syara'* indication that rejects it, and there are no *syariah* instructions that govern it.

The Panel of Judges limits the meaning of "civil relations with biological fathers" so that it does not include inheritance rights and guardianship rights in marriage, the substance of the decision is in line with the legal values developed in society, which are known to be religious. It is understandable that in religious understanding (*fiqh*) only legitimate children who have a mutual inheritance relationship and male parents can become guardians in the marriage. Thus, the decisions of the Jakarta Regional Religious Court must fulfill a sense of social justice, as well as contain a benefit value.

The majority of judges in Jakarta seem to understand the decision of the Constitutional Court which aims to eliminate differences and discrimination against children out of wedlock, as children who are marginalized in society, marginalized in their rights and position and marginalized in all aspects of their life. The Constitutional Court's decision is perceived as a decision that obscures the meaning of child out of wedlock, even though constitutional judges in their considerations also use the *ushuliyah* principle, namely:

أألمر بشيء أمر بوسا إله وللو سا إله حكم المقاصد

An order on something, then an order on the target and for the target the law is the same as that which is intended.



Thus, there seems to be a gap between the Constitutional Court decisions which are final binding and binding, and the perception of religious court judges, who are supposed to maintain this constitutional mandate.

If analyzed with the theory of legal objectives in Islam (*maqōšid syarī'ah*), the Constitutional Court's decision should be an effort to provide legal protection for children out of wedlock. Therefore, it is important to link it with the theory of child protection. Child protection theory states that children outside of marriage after the Constitutional Court decision should have obtained legal protection accordingly. However, in reality, out of wedlock children have not fully received legal protection. It seems that the Constitutional Court's decision is not yet complete in solving the problem of children outside of marriage. This can be seen from the fact that the implementation still has to go through trial.

In order to understand the meaning of the Constitutional Court decision regarding the status of children out of wedlock, the theory of child protection can be used. According to Mukti Arto's theory, as discussed in the previous discussion, the understanding of the Constitutional Court's decision regarding the status of out-of-wedlock children should not be a blunder, but can be elaborated with an understanding of Mukti Arto's theory. So that in understanding the decision of the Constitutional Court regarding the status of out-of-wedlock children, it is not in a position to reject or ignore it, whereas on the other hand the judge acknowledges that the decision of the Constitutional Court is final and binding, meaning that it is binding on all the same issues regardless of the marital status of the parents.

Referring to Mukti Arto's theory, on child protection, in his book, *The Discovery of Islamic Law to Create Justice*, states that protection of children, in order to give birth to quality children, there are 3 dimensions of rights that must be protected, namely their lineage, their fate and their nasal passages.

By using this theory, the understanding of the Constitutional Court's decision regarding the status of children out of wedlock becomes flexible, even though its implementation must go through a trial process, but not to determine the marital status of both parents, but to establish civil relations for the sake of protecting and protecting the child. Thus, the judge's decision is made for the protection of children out of wedlock, so as to obtain the same rights and position in the eyes of the law as legitimate children. Thus, the values of flexibility contained in Islamic law, in understanding the relationship and concept of lineage and civil relations in the Constitutional Court decisions can be realized.

Unfortunately, the decision of the Constitutional Court, which is intended to provide legal protection to children outside of marriage, is perceived differently by judges, so that this form of protection may not be felt by all children outside of marriage. This is because the implementation in determining the civil relations of children outside of marriage who still have to go through the trial process, especially the trial is to determine the marital status of both parents, here it is clear that the principle in the trial is not to provide protection to children outside of marriage, because of their status. the civil relationship of the child out of wedlock is determined by the marital status of both parents. If this is the case, only children outside of wedlock from unregistered marriages will receive legal protection. Meanwhile, other illegitimate children, such as adultery children, will never get legal protection from their biological father.

## D. CONCLUSION

Each judge has reflected normative and sociolegal aspects in their legal considerations. This is based on a normative approach that refers to a review of statutory regulations, in this case the Constitutional Court decision Number 46 / PUU-VII / 2010 which is already binding and must be complied with in line with the Law. Then, it is fitting that this decision be used or implemented to bring benefit to children outside of marriage. Meanwhile, regarding the sociolegal approach, each stipulation has applied interdisciplinary science in terms of legal philosophy to provide considerations and impose decisions. Every judge has a basic legal philosophy as a basis for implementing regulations in accordance with their function.

## References

- Al-Nawawi. (1981). Sahih Muslim bi Syarh al-Imam an-Nawawi: Vol. VII. Dar al-Fikr Araby.
- Baharuddin, M. (2014). Hak Waris Anak di Luar Perkawinan, Stud Hasil Putusan MK No 46/PUUVIII/2010. Fatawa Publishing.
- BIP, T. (2017). Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan. Bhuana Ilmu Populer.
- Haroen, N. (1996). Ushul Fiqh. Logos.
- Irfan, M. N. (2012). Nasab & Status Anak dalam Hukum Islam. Amzah.
- Mukhlis, Y. L. (2020). Penetapan Asal Usul Anak; Sebuah Alternatif dalam Perlindungan Anak. [www.pa-tanggamus.go.id](http://www.pa-tanggamus.go.id)
- Nasution, B. J. (2008). Metode Penelitian Ilmu Hukum. Mandar Maju.
- Sidharta. (2004). Karakteristik Penalaran Hukum Dalam Konteks Keindonesiaan. Universitas Katolik Parahyangan.
- Soekanto, S., & Mudji, S. (2014). Penelitian Hukum Normatif: Suatu Tinjauan Singkat. Rajawali Pers.
- Sutiyoso, B. (2012). Upaya Mewujudkan Hukum Yang Pasti dan Berkeadilan. UII Press.
- Syarifuddin, A. (2009). Ushul Fiqih. Kencana.