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Legal Consequences of Establishing the Civil Rights of Illegitimate Children from the Progressive Fiqh Perspective

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Abstract

This study was motivated by a phenomenon that contrasts with justice for children, especially adulterous or born-out-of-wedlock children who cannot receive their basic rights, which should become both parents' responsibilities to fulfill. The responsibilities include the right to get recognition as children, to have their daily life needs fulfilled, to be protected, and to be legally borne. In addition, there is a phenomenon that the children do not get guardianship and inheritance

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rights. This problem needs to be revealed through a study using a qualitative method with a multi-site model. The research location is at the cities' religious courts of Mojokerto, Malang, and Surabaya. Through a comprehensive study, it was found that 1) juridical implications of determining the civil rights of born-out-of-wedlock children at the Religious Courts of Mojokerto, Malang, and Surabaya showed that they have not been able to accommodate the principle of justice and the best interests of the child and have not fully implemented the principle of legal progress and 2) from the progressive *fiqh* (Islamic jurisprudence) perspective, legislative decisions, and juridical implications of determining born-out-of-wedlock children at the related Courts require renewal to formulate a proof mechanism of *istilhāq* (children origin determination) and strengthen the Courts to carry out *istilhāq* based on justice.

[Kajian ini dilatarbelakangi oleh sebuah fenomena yang kontras dengan keadilan bagi anak yang dalam ketentuan bahwa anak zina atau anak luar nikah tidak bisa memperoleh hak-hak dasarnya yang seharusnya menjadi tanggung jawab kedua orangtuanya baik hak diakui sebagai anak, dipenuhi hajat hidupnya, dilindungi, serta ditanggung secara hukum sampai usia baligh. Terlebih lagi, anak tidak akan mendapatkan hak perwalian apalagi mendapatkan warisan. Problematika di atas nampaknya perlu diungkap melalui kajian dengan menggunakan metode kualitatif dengan model multi situs. Lokasi penelitian dilakukan di Pengadilan Agama Mojokerto, Malang, dan Surabaya. Melalui kajian yang komprehensif, kajian ini menemukan bahwa 1) implikasi yuridis hak keperdataan anak luar nikah di Pengadilan Agama Mojokerto, Pengadilan Agama Malang, dan Pengadilan Agama Surabaya menunjukkan bahwa belum bisa mengakomodir asas keadilan dan kepentingan terbaik bagi anak serta belum sepenuhnya menjalankan prinsip progresifitas hukum, dan 2) putusan legislasi dan implikasi yuridis penetapan anak luar nikah di ketiga Pengadilan Agama tersebut dalam perspektif fiqh progresif memerlukan perombakan guna merumuskan mekanisme pembuktian dalam *istilhāq* (penetapan asal-usul anak) dan menguatkan Pengadilan Agama untuk melakukan *istilhāq* berbasis keadilan.]

Keywords: born-out-of-wedlock children; civil rights; juridical implications; progressive *fiqh*

Introduction

Law is a reflection of values that are believed to regulate the life of society, nation, and state. The law, therefore, must accommodate a variety of aspirations along with the progress and pace of life that is not only limited to the present but is also anticipatory and predictive in

accommodating developments. The legal substance is expected to be able to bring order to various social, economic, and political aspects. The absolute and relative competence of law should ideally reach the smallest social unit of society, which is the family through regulations that offer benefit, justice, and equality.¹

In the Indonesian context, the family has the basic institution of marriage which becomes the media and ritual of uniting two people and Islamic law. In the religious context, it is explained that marriage is a contract that makes sexual relations lawful between a man and a woman. It has legal consequences for the rights and obligations of both parties.² The validity of the marriage will have implications for the status and civil rights of children which are legally defined as a group of a certain age.³ A legal child as stated in Article 42 of the Indonesian Act No. 1 of 1974 on Marriage or UUP⁴ in conjunction with Article 99 of the Compilation of Islamic Law (KHI)⁵ is a child who is born from a legal marriage. On the other hand, an illegitimate child is a child born from an illegitimate marriage and/or born in a legal marriage but the child is denied by a husband through a *li'an* (accusation with an oath for God's curse) argument.⁶ Furthermore, when there is a denial of the child, then the opposite legal action can be taken through adoption which can recognize the child as a child legally in the law (*istilhāq*).⁷

Marriage is considered valid if carried out according to religion and belief.⁸ Further validation efforts are taken by registering marriages

¹ *Undang-Undang No. 1 Tahun 1974 Tentang Perkawinan (UUP)*.

² Ali Rusdi, "Status Hukum Pernikahan Kontroversial di Indonesia (Telaah Terhadap Nikah Siri, Usia Dini dan Mutah)," *Jurnal Al-'Adl* 9, no. 1 (2016): 37-56, <https://ejournal.iainkendari.ac.id/index.php/al-adl/article/view/667/613>

³ Tedy Sudrajat, "Perlindungan Hukum Terhadap Hak Anak Sebagai Hak Asasi Manusia dalam Perspektif Sistem Hukum Keluarga di Indonesia," *Kanun Jurnal Ilmu Hukum* XIII, no. 54 (2011): 111-132, <https://jurnal.usk.ac.id/kanun/article/view/6245/5150>.

⁴ *Undang-Undang No. 1 Tahun 1974 Tentang Perkawinan (UUP)*.

⁵ "Instruksi Presiden No. 1 Tahun 1991 Tentang Penyebarluasan Kompilasi Hukum Islam (KHI)," accessed May 5, 2024, <https://bphn.go.id/data/documents/91ip001.pdf>.

⁶ Irma Suriyani, "Konsekuensi Hukum dari Li'an dalam Hukum Islam, Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan dan Kompilasi Hukum Islam," *Risalah Hukum* 7, no. 1 (2011): 27-38, <https://e-journal.fh.unmul.ac.id/index.php/risalah/article/view/170/93>.

⁷ Muhammad Abu Zahrah, *Al-Ahwal Al-Syakhshiyah* (Cairo: Dar al-Fikr al-Àrabi, 1957).

⁸ *Undang-Undang No. 1 Tahun 1974 Tentang Perkawinan (UUP)*.

at the local Religious Affairs Office (KUA) for those who are Muslim.⁹ For non-Muslims, they can register at the Civil Registry Office. Furthermore, authentic proof of the marriage certificate is given in the form of a marriage book which is also recorded in state documents.¹⁰ Children born from this marriage can be categorized as legitimate children and have civil relations with both their fathers and the father's family as well as with their mothers and the mother's family. If the recording is not done, then such children only have a civil relationship with their mothers and the mother's family, not with the fathers and the father's family.

Other regulations stating the legality of marriage are articles 4, 5, 6, and 7 of KHI. These articles concern the legal basis that makes a marriage valid or not. They also state the need for marriage registration by the marriage registration officer, the importance of getting married in front of the marriage registration officer directly as the validity of the marriage itself, and the need for proof of official documents in the form of a marriage certificate as a legal force for the marriage that occurred. It is also stated that an *ithbāt al-nikāh* (a marriage validation) can be submitted to a religious court if the husband and wife do not have proof of a marriage certificate.¹¹

However, it is undeniable that many forms of marriage do not meet the legal procedures and then become *sirri* (unregistered) marriages. A *sirri* marriage is a form of marriage that is not recorded in the state's official documents, so it does not have authentic legal standing.¹² Children born from such a relationship are included in the category of born-out-of-wedlock children. The validity of this statement can be proven by the high rate of applications for *ithbāt al-nikāh*, determination of guardians, and validation of children through procedures for determining the children's origin in almost all districts' or cities' religious courts in Indonesia.

⁹ *Undang-Undang No. 1 Tahun 1974 Tentang Perkawinan (UUP)*.

¹⁰ Muhammad Ngizzul Muttaqin, "Unregistered Marriage Between Indonesian Citizens And Foreign Citizens with the Legal Perspective of Marriage In Indonesia," *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi dan Keagamaan* 7, no. 2 (September 2020): 149, <https://doi.org/10.29300/mzn.v7i2.3396>.

¹¹ Akhmad Khisni, *Hukum Islam* (Semarang: Unissula Press, 2010).

¹² Thriwaty Aرسال, "Nikah Siri in Demographic Overview," *Sodality: Jurnal Sosiologi Pedesaan* 6, no. 2 (August 2012): 160–69, <https://doi.org/10.22500/sodality.v6i2.6082>.

Some regulations are more readable as provisions that adulterous children or born-out-of-wedlock children cannot obtain their basic rights which should be the responsibility of both parents.¹³ The rights include the right to get recognition as children, the right to get their needs and protection, and being legally borne until the age of puberty. Moreover, the children do not have guardianship rights and do not get inheritances.¹⁴ The majority of opinions in Islamic law state that children will be considered legitimate and have the right to be assigned to their biological fathers if they are born from a legal marriage between their fathers and mothers. As a consequence of this legitimacy, they will get various rights such as livelihood rights, lineage rights, inheritance rights, and guardian rights.

Is it fair if the law stipulates that a child born out-of-marriage relationship (both unregistered and without marriages) only has civil rights with the mother? This is certainly unfair since the law negates the biological father's responsibility to the child or the child's rights to the biological father. Scientific evidence through DNA testing, for example, can serve as an alternative so that the rights and obligations of a father are not limited to the existence of a marriage bond but also can be based on proving the blood relationship between the child and the father or based on humanity. The recognition followed by the father's oath ideally can be an alternative to the child legislation process. Apart from the administrative procedures for marriage, children born should receive legal protection, or they may be victims. Children are born innocently, so it is not their will to be in such a situation. Children born without a clear status about their father often get negative stereotypes and stigmas that endanger their growth.¹⁵ Therefore, the law must provide protection and certainty to children's status and civil rights, including living, health, guardianship, and inheritance rights.¹⁶

¹³ *Undang-Undang No. 1 Tahun 1974 Tentang Perkawinan (UUP)*.

¹⁴ MUI, "Fatwa Majelis Ulama Indonesia Nomor 11 Tahun 2012 Tentang Kedudukan Anak Hasil Zina dan Perlakuan Terhadapnya," 2012, <https://www.mui.or.id/public/index.php/baca/fatwa/kedudukan-anak-hasil-zina-dan-perlakuan-terhadapnya>.

¹⁵ Iffatin Nur, "The Redefinition of Child of Adultery," *International Journal of Science and Research (IJSR)* 4, no. 3 (2015): 2186–92, https://www.researchgate.net/publication/333479984_The_Redefinition_of_Child_of_Adultery

¹⁶ "Instruksi Presiden No. 1 Tahun 1991 Tentang Penyebarluasan Kompilasi Hukum Islam (KHI)."

The loss of lineage relationship between a biological father and a child can be seen from several juridical aspects which may put the biological father as a stranger to the child. This means that the biological father has no obligation to provide for his/her daily needs. He does not have the right to inherit from the child and vice versa. Moreover, if the child is a girl, the biological father is not allowed to live together with her, and even more strictly, the biological father is not allowed to become a marriage guardian for his daughter. This means that both such father and brother(s) can marry her.

This gap leaves a double burden on the mother. With all her limitations, the mother must be responsible for herself, while the biological father is free from burden.¹⁷ Mothers and children will face various problems, such as difficulties in obtaining identity and birth certificates issued with both parents' names.¹⁸ If this is examined in the study of jurisprudence and progressive law, it will bring up a paradigm that legal products are not just following a rule. However, the judge must carry out the rules by exploring the values of justice and propriety in a rule (to the very meaning). It means that inappropriate rules should not be an obstacle for judges in applying progressive law on the principle of justice for justice seekers because a judge has the authority to interpret the rules in every case he/she deals with.

The crucial problems with the children above can be proven by the high number of applications for their origin determination in almost all cities' religious courts in Indonesia, especially in Surabaya, Malang, and Mojokerto. Due to its importance, the authors conducted in-depth research on legislation and civil rights concerning born-out-of-wedlock children in the religious courts of the cities mentioned. The selection of loci was based on the fact that the Religious Court of Mojokerto faced many cases concerning unregistered marriages and children born out of legal marriages. At the beginning of 2021, there were 21 applications

¹⁷ Busman Edyar, "Status Anak Luar Nikah Menurut Hukum Positif dan Hukum Islam Pasca Keluarnya Putusan MK Tentang Uji Materiil Undang Undang Perkawinan," *Al Istinbath : Jurnal Hukum Islam* 1, no. 2 (2016): 181-208, <https://journal.iaincurup.ac.id/index.php/alistinbath/article/view/115>.

¹⁸ Itsnaatul Lathifah, "Pencatatan Perkawinan: Melacak Akar Budaya Hukum dan Respon Masyarakat Indonesia Terhadap Pencatatan Perkawinan," *Al-Mazaahib: Jurnal Perbandingan Hukum* 3, no. 1 (June 2015), <https://doi.org/10.14421/al-mazaahib.v3i1.1379>.

for determining the children's origin.¹⁹ The report from the Religious Court of Malang noted that there were still many unregistered marriages or marriages that were not legalized by state law. 295 couples applied for marriage validation in the Court in 2020, and 244 of them received verdicts. In January 2021, there were 14 applications for marriage certificates, 8 of them had been decided by the Court.²⁰ In Surabaya, there was an increase in cases of *ithbāt al-nikāh* and the determination of born-out-of-wedlock children from the end of 2020 to the beginning of 2021. The increasing number is due to the large number of unregistered marriages and the birth of born-out-of-wedlock children born from those marriages.²¹

The data from three Religious courts that showed various problems including marital status, born-out-of-wedlock children validation, and born-out-of-wedlock children civility which tends to be neglected and unfulfilled, had motivated the authors to carry out this research. By assuming the principles of giving the child's best interest and the progressive *fiqh*, this study offers new propositions for realizing the best interest of born-out-of-wedlock children born from both 'unregistered marriages' and 'no-marriage' relations. The authors tried to provide a critical elaboration on the juridical implications of the legislation regarding the determination of born-out-of-wedlock children from the progressive *fiqh* perspective.

Methods

This study used a qualitative approach with a multi-site study design at the religious courts of Mojokerto, Malang, and Surabaya, all in the Province of East Java, Indonesia. The data collection techniques used were in-depth interviews with 6 (six) judges and 2 (two) registrars of the mentioned courts, participant observation, and documentation. The interview and discussion with participants mainly focus on the

¹⁹ Karina Norhadini, "Suami Istri Pasangan Sirri di Mojokerto Jalani Itsbat Nikah Gratis," *Jatimnet.com*, 2021, <https://jatimnet.com/suami-istri-pasangan-sirri-di-mojokerto-jalani-itsbat-nikah-gratis>.

²⁰ Team Editorial, "Poligami Terselubung, Penyebab Banyaknya Nikah Siri di Kabupaten Malang," *Tugu Jatim*, 2021, https://tugujatim.id/poligami-terselubung-penyebab-banyaknya-nikah-siri-di-kabupaten-malang/#google_vignette.

²¹ Dhimas Ginanjar, "Pengadilan agama Surabaya temukan nikah sirri abal-abal", *jawapos.com*, (2021, 13 April). <https://www.jawapos.com/surabaya-rama/01320645/pengadilan-agama-surabaya-temukan-nikah-siri-abalabal>.

cases handled by their courts relating to the determination of children's origin born from unregistered and out-of-wedlock. The data were analyzed using single-site and cross-site data analysis by finding points of similarity and difference in the juridical implications of determining the civil rights of born-out-of-wedlock children in the three courts.

The data analysis specifically refers to Creswell's spiral data analysis procedure by reasoning, sorting, and categorization,²² and referring to Atkinson with the stages of data repository, identification code generation, involving analysis of multi-site study data and generating final propositions.²³ Meanwhile, the validity of the data was checked through their trustworthiness, authenticity, and credibility,²⁴ as well as confirmability and data dependability.²⁵

Results

The research findings from the interview conducted involving judges and registrars of the three cities' religious courts regarding the cases of children who were born from unregistered marriage or born out of wedlock are presented in the following table.

²² John W. Creswell and Cheryl N. Poth, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches*, 4th edition (Los Angeles: SAGE Publications, Inc, 2017).

²³ John Atkinson, "Four Steps to Analyse Data from a Case Study Method," *Association for Information Systems*, 2002.

²⁴ Abdelwahab Ben Hafaiedh, "Research Ethics for Social Scientists: Between Ethical Conduct and Regulatory Compliance by Mark Israel and Lain Hay," *International Social Science Journal* 60, no. 197–198 (September 20, 2009): 467–72, <https://doi.org/10.1111/j.1468-2451.2010.01736.x>.

²⁵ Robert K. Yin, "Case Study Research Design and Methods," *Proceedings of the Design Society: DESIGN Conference*, 2020.

Table 1. The Research Participants and Findings

City's Religious Court	Interview Participants	Verdicts Studied	Content of Verdicts:	Main Points / Remarks	Interviewees' Opinions
Mojo-kerto	2 judges and 1 court registrar	1. No. 45/Pdt. P/2020/PA.Mr	The panel of judges determined and granted the appeal of the Applicants, stating that the child named Y, born in 2018, is the legitimate child of Applicant I and Applicant II, and ordered the Applicants to report the verdict to the city's Office of Civil Registration for the child's birth registration.	A born-out-of-wedlock child can have a civil relationship not only with the mother but also with the father as long as it can be proven by science and technology instruments.	<ol style="list-style-type: none"> 1. To give legal status to children born from marriage out of positive legal procedures, parents must immediately apply for a determination through a Religious Court. 2. The Religious Courts do not have any absolute authority to determine children without marriage, even though fiqh has istilhāq concept.

		<p>2. No. 52/Pdt. P/2020/PA.Mr</p>	<p>The panel of judges recognized the civil status of the child and he could get his civil rights under the submission of an application of recognition of the born-out-of-wedlock child.</p>	<p>The imperfection of the marital relationship between father and mother does not eliminate the existence of blood relations and civil relations between the child and the biological fathers, as well as civil relations between the child and the biological mothers.</p>	<p>3. The legal implications of not being recognized as a legitimate child cause all child's civil rights to be not accommodated and fulfilled, including the right to obtain identity from both parents, the right to live, the right to get an education, the right to get health, the right to be protected, the right to get guardianship, inheritance and all the best interests of the child.</p>
		<p>3. No. 0063/Pdt.P/2020/PA. Mr</p>	<p>The panel of judges decided that the Applicants' application was granted, and</p>	<p>The application was granted based on all the legal considerations</p>	<p>4. The process of determining</p>

			determined that the child named X was the legal child of Applicant I and Applicant II.	ons, as well as Article 55 paragraph (2) of UUP and Article 103 paragraph (2) of KHI.	the origin of a child from the biological father can only be proven by a DNA test accompanied by witnesses and valid evidence as well as an acknowledgment and an oath of the father.
		4. No. 0269/P dt.P/20 20/PA. Mr	The panel of judges concluded that the child born before the marriage of Applicant I and Applicant II is categorized as a born-out-of-wedlock child and rejected the application of both Applicants regarding the origin of the child, while the child still has a legal relationship with the mother.	The verdict was based on Article 76 of KHI and other related regulations.	4. Registering marriages in official institutions such as a sub-district Office of Religious Affairs (KUA) is important.

Mala ng	2 judges	1. No. 0002/P dt.P/20 20/PA. Mlg	The judges granted the applicant's application for determination of the child by recognizing the illegitimate child of the applicant as a legitimate one which created the alimentionation rights, kinship rights, and inheritance rights for the children with his biological father.	The judges also emphasized that the child was obliged to respect the biological father as a parent, including taking care of him when the father needs it later.	1. Many applications of cases of children's origin to the court were caused by unregistered marriages, born-out-of-wedlock pregnancy, and no marriage at all. Therefore, the community needs education in this regard. It is necessary to build massive awareness so that the community obeys UUP, KHI, and several binding ministerial regulation. 2. The consequences of
		2. No. 52/Pdt. P/2020/ PA.Mr	The panel of judges recognized the civil status of the child, and he could get his civil rights under the submission of an application of	The imperfection of the marital relationship between father and mother does not eliminate the existence of blood	

			recognition of the born-out-of-wedlock child.	relations and civil relations between the child and the biological fathers, as well as civil relations between the child and the biological mothers.	disobeying the law will be very detrimental to the children's future.
		3. No. 0063/P dt.P/20 20/PA. Mr	The panel of judges decided that the Applicants' application was granted, and determined that the child named X was the legal child of Applicant I and Applicant II.	The application was granted based on all the legal considerations, as well as Article 55 paragraph (2) of UUP and Article 103 paragraph (2) of KHI.	3. The legal sanctions in UUP are still weak so that people still carry out marriages without being registered in official institutions such as KUA. 4. The determination process of the child's origin must go through a confession, oath, or DNA test.
		4. No. 0269/P dt.P/20 20/PA. Mr	The panel of judges concluded that the child born before	The verdict was based on Article 76 of KHI	3. The implications of children born from

			the marriage of Applicant I and Applicant II is categorized as a born-out-of-wedlock child and rejected the application of both Applicants regarding the origin of the child, while the child still has a legal relationship with the mother.	and other related regulations.	unregistered marriages, including those born only assigned to their mothers on a birth certificate will find difficulty when dealing with inheritance and marriage guardianship.
Surabaya	2 judges and 1 Court registrar	1. No. 1455/Pdt.P/2020/PA. Sby	The panel of judges considered that the applicant's child was born from a legal marriage and ordered the applicants to register the child's origin to the City's Office of Population	The child's origin was considered to be included in the criteria as described in article 42 of UUP in conjunction with article 99 of KHI.	1. The implications of determining the origin of the born-out-of-wedlock children at the Religious Court of Surabaya are still in conflict with several

			and Civil Registration.		legal provisions stating that children born-out-of-wedlock will be assigned to the mother and the mother's family.
		2. No. 2059/Pdt.P/2020/PA.Sby	The panel of judges decided to 1) grant the application of the Applicant; 2) recognize the child named X as the biological child of the late Applicant's father and mother; and 3) give an order to the applicant to register the origin of the child at the city's Office of Population and Civil Registration.	The judges examined the information of witnesses and the evidence submitted by the applicant carefully and thoroughly so that they decided the case properly.	2. There is no need to prove a civil relationship between the mother and the child. The implication is that both of them inherit each other.
		3. No. 2678/Pdt.P/2020/PA.Sby	The panel of judges determined and granted the application of the Applicants, stated that the child	The judges examined the information of witnesses and the evidence submitted by the	3. To determine the civil relationship between the child with the father, it is necessary to prove the existence of a valid marriage

			<p>named YYY, born in Surabaya, April 04, 2013, was the biological child of Applicant I and Applicant II, and ordered the Applicants to register the origin of the child at the city's Office of Population and Civil Registration.</p>	<p>applicant carefully and thoroughly so that they decided the case properly.</p>	<p>which is not violating the requirements and conditions of marriage.</p>
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Discussion

Based on the study of the practice of administering the recognition and determination of illegitimate children or efforts to provide legal protection to them that have been revealed in the research findings at the three cities as shown in Table 1, there were various ways and forms due to the diversity of these rules. This can lead to disharmony or legal confusion. Harmonization of law developed in the science of law is used to show that in the legal world, government policies and their interrelationships have the diversity that can lead to disharmony.

Referring to the implementation of the recognition and determination of illegitimate children, it can be seen that there is a sharp difference between illegitimate children whose parents are Muslims and those who are non-Muslims, especially Christians. For Muslim parents, they must go through the judicial process by applying for *ithbāt al-nikāh* first, while for those who are Christians (or other non-Muslims), it is regulated without a judicial process and they can apply for child

recognition through the Cities' Office of Population and Civil Record to grant a certificate. On the other hand, the application for *ithbāt al-nikāh* is not always granted by the court because it must meet the strict requirements specified in KHI. If it is rejected, it means that the child will be deemed illegitimate forever. Thus, there is no guarantee that illegitimate children from unregistered marriages born according to Islamic law can obtain legal protection. It can be said that there has been discrimination and injustice in the implementation of illegitimate children recognition in Indonesia.

The existence of the Indonesian Constitutional Court's verdict No. 46/PUU-VIII/2010²⁶ is questioned regarding various conditions governing legal protection for illegitimate children. On the other hand, it can be seen as a decision with a progressive legal paradigm that grows and develops in the Indonesian legal order. The progressive legal paradigm is more oriented towards substantial justice because it aims to establish a legal system that stands for justice and the welfare of the people as much as possible and to realize a prosperous society.

For those who are affected by the Civil Code, it can be said that the mentioned verdict has no impact because the Indonesian Civil Code has detailed the status of children, including illegitimate ones. The Code provides recognition to them so that they get a status as recognized illegitimate children. As a result, they have civil rights to their biological fathers who recognize them. This is in line with the Constitutional Court verdict. In addition, an illegitimate child can also become a legitimate one if he/she is recognized and carried out by the parents. In this case, it means that a born-out-of-wedlock child changes its status into a legitimate one. Maybe, if the verdict is applied to those who follow the Civil Code, it will raise the issue of the position of illegitimate children which, according to the Indonesian Civil Code, cannot be recognized. In such a case, the verdict could give them a civil relationship with their biological fathers.

Likewise, the Constitutional Court's verdict as just mentioned does not affect the provisions of the Indonesian Act No. 23 of 2006 which was revised with the Indonesian Act No. 24 of 2013 concerning

²⁶ Mahkamah Konstitusi Republik Indonesia, "Putusan Mahkamah Konstitusi-46-PUUVIII-2010" (2012), <https://putusan3.mahkamahagung.go.id/peraturan/detail/1lead091b1782de09ff2313231373535.html>.

Population Administration.²⁷ The later more or less takes the institution of recognizing and validating the illegitimate children from the Civil Code. Without referring to the Constitutional Court Decision, the Department of Population and Civil Registration has organized the recognition and determination of illegitimate children. Based on the Indonesian Acts No. 23 of 2006 and No. 24 of 2013, an illegitimate child can be regarded as legitimate after he/she gets recognition and determination,²⁸ but in reality, this provision is only valid for non-Muslim Indonesians.

The implementation of recognition and determination of illegitimate children at the government's Offices of Population and Civil Registration is guided by the provisions of the Indonesian Act No. 23 of 2006 in conjunction with the Indonesian Act No. 24 of 2013.²⁹ The recognition of children is usually followed by the determination of their origin. The requirement for such recognition is proof of marriage that has been carried out according to one's religion (*e.g.*, the church regulation for Christians). To Muslims, only children born from *sirri* (unregistered) marriages can be recognized or legalized. Born-out-of-wedlock children are not protected by Indonesian law, so they cannot be recognized or legalized.

Regarding the recognition and determination of illegitimate children, the confusion or disharmony among the regulations indicates the existence of various legal systems that regulate the recognition and determination of illegitimate children. It looks out of sync with each other and overlaps. This results in the difference in treatment in the implementation of the practice of recognizing and determining illegitimate children, and so, there is discrimination that leads to injustice and legal uncertainty. This is due to UUP as a legal protector that does not regulate the position of illegitimate children in Government Regulation No. 9 of 1975 as promised in UUP.³⁰ As a

²⁷ Pemerintah Pusat Indonesia, "Undang-Undang (UU) Nomor 24 Tahun 2013 Tentang Perubahan Atas Undang-Undang Nomor 23 Tahun 2006 Tentang Administrasi Kependudukan," Pub. L. No. Undang-undang (UU) Nomor 24 Tahun 2013 (2013), <https://peraturan.bpk.go.id/Details/38985/uu-no-24-tahun-2013>.

²⁸ Indonesia.

²⁹ Indonesia.

³⁰ Pemerintah Pusat Indonesia, "Peraturan Pemerintah (PP) Nomor 9 Tahun 1975 Tentang Pelaksanaan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan,"

result, various rules regarding the recognition and determination of illegitimate children appear and overlap, both relating to illegitimate children as objects of recognition and determination as well as procedures for recognition and legal effects of such recognition and determination.

The Indonesian Religious Courts represented by those in Mojokerto, Malang, and Surabaya showed that they did not have an duty to necessarily grant and determine the origin of the children as legitimate children. As shown in Table 1, there were different verdicts even for similar cases as happened with the verdicts made by the judges at Mojokerto's Religious Court, especially with verdicts number 1 and number 4. This is based on the authority of the Religious Courts, which only rely on the very strict requirements of KHI, which is not supported by other provisions.

Regarding born-out-of-wedlock children, the Constitutional Court considers that the regulation that determines a child born from pregnancy due to sexual unmarried relations only has a relationship with the woman as the mother is inappropriate and unfair. Likewise, it is also deemed inappropriate and unfair if the law liberates a man who impregnates the woman and gives the child out of his responsibilities as a father, whereas, at the same time, the law nullifies the rights of the child against the man as the father. Moreover, based on technological developments, it is possible to prove that one child is the child of a certain man. The legal consequence of a legal incident of birth due to pregnancy, which is preceded by sexual intercourse between a woman and a man, is a legal relationship in which there are reciprocal rights and obligations, whose legal subjects include children, mothers, and fathers.³¹

The relationship between a child and a man as a father is not only due to marital ties but also can be based on proving the blood relationship between the child and the man as a father. Thus, regardless of the procedure or paperwork of the marriage, the child born must

Pub. L. No. Peraturan Pemerintah (PP) Nomor 9 Tahun 1975 (1975), <https://peraturan.bpk.go.id/Details/67678/pp-no-9-tahun-1975>.

³¹ Fatkul Hidayat et al., "Legislation on Determining the Parentage of a Born-Out-of-Wedlock Child Based on the Perspectives of the Best Interest of Child and Progressive Fiqh," *Asian Research Journal of Arts & Social Sciences* 16, no. 1 (January 2022): 13–31, <https://doi.org/10.9734/arjass/2022/v16i130275>.

receive legal protection. If a born-out-of-wedlock child does not get legal protection, he/she will become the aggrieved party even though he/she is innocent since his/her birth is not on his/her own will. Children who are born without a clear father status often get unfair treatment and stigma in society.³² Therefore, the state must provide fair legal protection and certain status of the children and guarantee their rights, including those who are born from parents whose validity of their marriages is still disputed.

The Indonesian Constitutional Court passed a *quo* verdict³³ that rejected the application for Article 2 paragraph (2) of UUP regarding the registration of marriages. Meanwhile, article 43 paragraph (1) of UUP regarding the provisions of children born outside of marriage, which reads, "*Children born outside of marriage only have a civil relationship with their mother and their mother's family,*" is declared conditionally unconstitutional, which means that it is unconstitutional as long as the paragraph is interpreted as eliminating civil relations with men who can be proven based on science and technology and/or other evidence according to the law to have blood relations as the children's fathers.

In the mentioned *quo* verdict,³⁴ one of the Court judges, - Prof. Maria Farida Indrati, - had a different (concurring) opinion. According to her, the requirements for registering marriages were at least for two main contexts which are preventing and protecting women and children from irresponsible marriages. Registration as an effort to protect women and children from marital abuse can be done by setting conditions so that any marriage plan that has the potential to cause harm can be avoided and rejected. Through the requirements for registering a marriage, the rights of children protected by article 28B paragraph (2) and article 28D paragraph (1) of the 1945 Constitution are not harmed by the existence of article 2 paragraph (2) of UUP which requires registration of marriages. Protection of children's rights as regulated by Article 28B paragraph (2) and Article 28D paragraph (1) of the Indonesian Constitution can be maximized if all marriages are registered so that it is easy to know the genealogy of the child and who has obligations to the child in question. Marriage registration is a social

³² Nur, "The Redefinition of Child of Adultery."

³³ Republik Indonesia, Putusan Mahkamah Konstitusi-46-PUUVIII-2010.

³⁴ Republik Indonesia.

dimension that is intended to provide guarantees for the status and legal consequences of a legal event as well as the recording of births and deaths. Based on these considerations, according to the Applicants, there was no constitutional loss as a result of the existence of Article 2 paragraph (2) of Law 1/1974. Although the registration is interpreted as an absolute requirement for the validity of the marriage, the *a quo* article has the potential to harm the constitutional rights of the first Applicant (*i.e.* Mrs. Aisyah Mochtar aka Machicha).

Further, regarding born-out-of-wedlock children, Indrati stated that in the perspective of legislation, the difference in treatment of a child is due to certain reasons that are not at all caused by the actions of the child. This can be categorized as a discriminatory act. This provision closes the possibility for the child to have a civil relationship with his/her biological father. This is the risk of unregistered marriages or marriages that are not carried out according to UUP. It is not appropriate if the child has to share in the losses caused by the action (*i.e.*, the marriage) conducted by the parents. If it is considered a sanction, neither state law nor religious law (in this case, Islam) recognizes the concept that children must share in the sanctions due to actions taken by their parents. In other words, the potential loss due to a marriage that is not carried out under UUP is a risk for the biological parents and must not become a burden that their children must bear. Fulfillment of the rights of children born from marriage is the obligation of both biological parents, regardless of whether the marriage is legal or not according to state law (*i.e.* UUP).

The Indonesian Civil Code (Burgerlijk Wetboek voor Indonesie or BWI)³⁵ ³⁶stipulates that born-out-of-wedlock children are legal children as long as they are recognized by their parents. Article 172 reads: "Except for children born in adultery or incest, every child born out-of-wedlock, but then the father and mother married, becomes a legitimate child. If both parents have acknowledged him/her under the laws and regulations before they marry, or if the confession is made in the marriage itself, the children are recognized as legal children, but

³⁵ "Undang-Undang Dasar 1945, with Its 1st Amendment (19 October 1999), 2nd Amendment (18 August 2000), 3rd Amendment (19 November 2001), and 4th Amendment (10 August 2002).," accessed June 6, 2024, <https://media.unesco.org/sites/default/files/webform/r2e002/b1ba8608010ce0c48966911957392ea8cda405d8.pdf>.

³⁶ MA, "Kitab Undang-Undang Hukum Perdata," *JDIH*, 2014.

they can only enjoy a smaller share of the inheritance. BWI requires parental recognition of children born out of wedlock to enjoy their inheritance rights.

Parental recognition of born-out-of-wedlock children in current technological developments can be replaced by DNA testing, especially child paternity tests. DNA testing is carried out in the development of progressive law to determine the paternity of born-out-of-wedlock children and grant inheritance rights to them. The Constitutional Court verdict No. 46/PUU-VIII/2010³⁷ also showed that the father of a born-out-of-wedlock child can be concluded by a DNA test as a substitute for the father's confession given by BWI. It can be concluded that based on progressive *fiqh*, born-out-of-wedlock children, both legitimate and illegitimate, are entitled to inheritance from their mother and father as well as from their parents' families.

Based on this discussion, it can be summarized that Islamic jurists do not link the lineage of born-out-of-wedlock children (or children of adultery) with their biological fathers because there was no evidence of lineage association with the fathers at the time Islamic law was being formulated. They were only considered to link the children's lineage with the mothers because of obvious evidence such as pregnancy, childbirth, and breastfeeding. The verdict No. 46/PUU-VIII/2010³⁸ includes the discussion on illegitimate children born from both unregistered marriages and children born from adultery. Born-out-of-wedlock children have a lineage with their biological mothers and fathers as long as DNA tests prove their parenthood. The decree gives inheritance rights to legitimate and illegitimate born-out-of-wedlock children because the text of the stipulation states that born-out-of-wedlock children have a civil relationship with their biological mothers and fathers as long as scientific knowledge proves their paternity. If the civil relationship in the text is defined as inheritance rights, it means that the two categories of born-out-of-wedlock children have the same inheritance rights to their mothers and biological fathers as the legitimate children do.

From the results of the *fiqh turas* (scriptural jurisprudence) exploration, it can be concluded that there are at least three main reasons that make a child have lineage to his/her biological father: First, being

³⁷ Republik Indonesia, Putusan Mahkamah Konstitusi-46-PUUVIII-2010.

³⁸ Republik Indonesia.

born from a legal marriage. The scholars of *fiqh* agree that children born to women who are legally married have the right to get lineage from the woman's husband.³⁹ Second, a *fasid* (incomplete) marriage, which is one carried out with incomplete requirements, either partly or wholly, such as the absence of a guardian or witness (e.g., the Hanafi *māẓhab* (school of thought), does not require a guardian in the marriage process).^{40, 41} Third, the lineage of children can be obtained from a *shubhāt* (ambiguous) sexual relation. *Syubhat* here has the meaning of resemblance, likeness, equality, and obscurity. In legal studies, this term can be interpreted that the condition contains ambiguity in the law so that a legal provision cannot be ascertained, whether it is right or wrong, *ḥalāl* (permissible) or *ḥarām* (unlawful). Concerning this matter, there are two types of *shubhāt* relationships, namely *shubhāt* in contracts and a *shubhāt* in actions.⁴²

In practice, the children's origin can be proven by a birth certificate. If they are born in a legal marriage, they must get the birth certificate as a recognition right by the state. Such rights in the Islamic law conception are categorized as protection of lineage (*ḥifẓ al-nasl*). However, children born from illegitimate marriages must go through an application for a court verdict to find out their origins. Ironically, not all requests are/? granted. The court only grants the applications for the children's origin if the application is proven to be based on and grounded in law; otherwise, it will be rejected.

One of the progressive *fiqh* principles regarding children can be analogous to the Prophet Muhammad's attitude toward the fulfillment of children's rights. As narrated by Imam Muslim, a woman from Ghamidiyah came to and informed the Prophet that she was pregnant because of adultery. Then the Prophet said, "*Go home until you give birth.*" When she had given birth, she came again to him with her baby. The Prophet again told her to go home, "*Go, then nurse your baby until you wean the child.*"⁴³ The substance of this hadith exemplified how the

³⁹ Muhammad Nashiruddin Al-Albani, *Shahih Sunan An-Nasa'i*, vol. 2 (Jakarta: Pustaka Azzam, 2006).

⁴⁰ Ahmad Muhammad Assaf, *Al-Ahkam Al-Fiqhiyyah Fi Al-Mazahib Al-Islamiyah AlArba'Ah* (Beirut: Dar Ihya al-'Ulum, 1988).

⁴¹ Wahbah Az-zuhaili, *Fikih Islam Wa Adillatuhu* (Jakarta: Gema Insani & Darul Fikir, 2011).

⁴² M. Nurul Irfan, "Nasab Dan Status Anak Dalam Hukum Islam," *Amzah*, 2016.

⁴³ Ibn Hajar Al-Asqalani, *Fathu Al-Bari*, vol. 12 (Beirut: Dar al-Qalam, 1998).

Prophet Muhammad provided protection and thought of the child's best interests. Even though the mother had committed an unlawful act, the child should not be harmed because of the parent's action.⁴⁴

Another view regarding the protection of children comes from the perspective of *maqāṣid sharī'ah* (objectives of Islamic law)^{45,46} as a progressive *fiqh* substance. In this view, the children should have the right to get clarity, recognition, and even accountability from the biological father for their existence in this world. This means the biological father should meet the various needs of children, including material needs such as life necessities, livelihood, education, forgiveness (*hajar*), guardianship, and inheritance or at least *wajībah* (compulsory) will, as well immaterial needs such as attention, affection, and protection.⁴⁷ *Sadd al-ẓarī'ah* (blocking the means)^{48,49} ⁵⁰ can also be used as a method and logical narrative of recognizing children's necessity as a preference for inbreeding. When the biological father is not allowed to acknowledge the child, then should the child be a girl, she may lawfully be married by her biological father or her half-brothers, which leads to incest. Such a condition is prevented and prohibited in Islam.

Based on the authority of Religious Courts and the judges' considerations in determining the origin of born-out-of-wedlock

⁴⁴ Husein Muhammad, *Fiqh Perempuan: Refleksi Kiai Atas Wacana Agama dan Gender* (Yogyakarta: LKIS, 2010).

⁴⁵ M. Lutfi Khakim and Mukhlis Ardiyanto, "Menjaga Kehormatan Sebagai Perlindungan Nasab Perspektif Maqashid Syari'ah," *Nizham Journal of Islamic Studies* 8, no. 01 (May 2020): 74, <https://doi.org/10.32332/nizham.v8i01.2105>.

⁴⁶ Iffatin Nur, Syahrul Adam, and M. Ngizzul Muttaqien, "Maqāṣid Al-Sharī'at: The Main Reference and Ethical-Spiritual Foundation for the Dynamization Process of Islamic Law," *AHKAM: Jurnal Ilmu Syariah* 20, no. 2 (December 2020), <https://doi.org/10.15408/ajis.v20i2.18333>.

⁴⁷ Nur, "The Redefinition of Child of Adultery."

⁴⁸ Iffatin Nur, Ali Abdul Wakhid, and Lestari Handayani, "A Genealogical Analysis on the Concept and Development of Maqāṣid Syarī'ah," *AL-'ADALAH* 17, no. 1 (November 2020): 1–30, <https://doi.org/10.24042/adalah.v17i1.6211>.

⁴⁹ Kawakib Kawakib, Hafidz Syuhud, and Yusuf Yusuf, "Sadd Al-Dzari'ah sebagai Hukum Islam Studi Komparatif Ibnu Al-Qayyim Al-Jauziyah dan Ibnu Hazm," *Al-Bayan: Jurnal Ilmu Al-Qur'an dan Hadist* 4, no. 1 (2021): 78–104, <https://doi.org/https://doi.org/10.35132/albayan.v4i1.103>.

⁵⁰ Intan arafah Intan arafah, "Pendekatan Sadd Adz-Dzari'ah dalam Studi Islam," *Al - Muamalat: Jurnal Hukum dan Ekonomi Syariah* 5, no. 1 (September 26, 2020): 68–86, <https://doi.org/10.32505/muamalat.v5i1.1443>.

children, we concluded that the main substance is how to realize it in reality. This means that the state must accommodate the provisions regarding this matter. From the perspective of progressive *fiqh*, the hope is how to position any child as a pure and sinless being who is entitled to recognition based on justice. As an effort to reconstruct the authority of the Indonesian Religious Courts, we offer some legal maxims of *fiqh* (Islamic jurisprudence) in the context of determining the origin of children and the civil rights of born-out-of-wedlock children as follows:

- ١ . إنّ مصالح الأُولاد مقدّمة من الجدال حول موقف الحالة الاجتماعية للوالدين
1. The best interests of the child must be privileged over the debate on their parents' marital status.
- ٢ . على مبدأ القانون الأولوي أن يقدم مصالح الأُولاد المتفضلة على ما سواه
2. The principle of priority laws must prioritize the best interests of the children.
- ٣ . إنّ جميع الأُولاد دون النظر عن حالة ميلادهم، لديهم الاعتراف والهوية
3. All children must receive recognition and identity regardless of their birth status.
- ٤ . إنّ من أهداف الاعتراف و الهوية ضمان العدالة للأُولاد
4. Recognition and identity of children aims to ensure justice for them.
- ٥ . إنّ العدالة للأُولاد منوطة على حقوقهم ومصالحهم المتفضلة
5. Justice for children must be realized as a manifestation of the rights and best interests of children.

Conclusion

The juridical implications of determining born-out-of-wedlock children at the cities' Religious Courts of Mojokerto, Malang, and Surabaya indicated that the determination of the origin of children at these courts created a legal product that has not accommodated the best interests of children based on justice. In addition, the provisions

regarding the legality and provisions of born-out-of-wedlock children in the legal framework in Indonesia still overlap and cause the Religious Courts to be unable to accommodate the principle of justice for such children.

Legislative decisions and the juridical implications of stipulating born-out-of-wedlock children at the courts based on child *fiqh* from a progressive *fiqh* perspective show that regulations regarding the determination of the origin of born-out-of-wedlock children in Indonesia require an overhaul with a progressive legal approach to formulating articles regarding the legality of born-out-of-wedlock children and reformulating the authority of the Religious Courts. In this case, a legal reconstruction through *fiqh al-awlād* (Islamic jurisprudence concerning children) approach based on progressive Islamic and conventional laws is needed to formulate a proof mechanism in *istilhāq* (determination of children) and strengthen the Religious Courts's role to perform it.

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