

**ANALYSIS OF THE SUPREME COURT CASSATION DECISION REGARDING
THE DETERMINATION OF THE STATUS OF THE BIOLOGICAL FATHER OF
CHILD OUT OF WEDLOCK: CASE STUDY OF DECISION NO. 1055 K/Pdt/2023**

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ABSTRACT

Humans in their nature are created in pairs by binding themselves to the status of marriage, because with marriage anything that was originally haram will be halal in a legal bond through marriage. Marriage in Article 1 of Law No. 1974 explains that marriage is a physical and mental bond between a man and a woman to form a happy family that is eternal and blessed by Allah SWT. A valid marriage is a marriage that has been recorded at the religious affairs office with all the stipulated provisions. The research method in this study was chosen based on the type of research, problem formulation, and research objectives, and explains the urgency of using this type of research in analyzing research data. The research method in this research is a normative juridical approach which is selected is the research of primary and secondary legal materials. The Civil Code (hereinafter referred to as the Civil Code) refers to children born out of wedlock as *Naturalijk Kind* (natural children). in article 43 paragraph (1): children born out of wedlock only have a civil relationship with their mother and their mother's family. In general, this article means that children born as a result of an invalid marriage (out of wedlock), including children resulting from illicit relationships, only have a civil relationship with the mother and her family. The juridical analysis of this decision, the researcher assumes that judges tend to look at Constitutional Court Decision Number 46/PUUVIII/2010 dated February 17, 2012, Article 43 paragraph (1) of Law Number 1 Year 1974 concerning Marriage.

Keywords: Father, Child status, Marriage.

INTRODUCTION

Humans in their nature are created in pairs by binding themselves to the status of marriage, because with marriage anything that was originally haram will be halal in a legal bond through marriage. A happy marriage born from marriage without coercion from both

parties and a sense of mutual love for each other.

Marriage in Article 1 of Law No. 1974 explains that marriage is a physical and mental bond between a man and a woman to form a happy family that is eternal and blessed by Allah SWT. A valid marriage is a marriage that has been recorded at the religious affairs office with all the provisions that have been determined.¹

Meanwhile, according to Prof. Dr. R. Wirjono Prodjodikoro, SH marriage is a life together of a man and a woman who fulfill the conditions included in the legal regulations of marriage. According to Prof. Wirjono, marriage must be in accordance and carried out with the stipulated provisions because basically marriage has been regulated by laws established by the government and the basis of Islamic law.²

In a hadith the Prophet said: *“O young men, whoever among you is able to marry, marry. For marriage is more likely to restrain the gaze and preserve the private parts. And whoever is not able, let him fast, for fasting suppresses desire (as a shield)”* (HR Bukhari), But the reality is that there are couples who are not *muhrim* who have been in a relationship like a husband and wife, for example, such as living under the same roof, having intercourse and even the relationship is not yet married.³

Allah SWT also clearly prohibits adultery as He says in Surah Al Isra verse 32:

وَلَا تَقْرُبُوا الزَّوْجَىٰ إِنَّهُ كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا

“And do not approach adultery; (adultery) is indeed an abomination, and an evil way.” The surah above explains the prohibition of adultery in relationships that are not yet bound in marriage, it is feared that it will result in unwanted things, such as getting pregnant out of wedlock.

Currently, the phenomenon of pregnancy out of wedlock among the community also often occurs if the man wants to take responsibility, later the child will receive love from a complete family but there are many out there who do not want to take responsibility, so unwanted things will also happen to his family because they will consider it all a disgrace.

¹ Article 1 of Law No. 1 of 1974 concerning Marriage

² Rofiana Fika Sari, 15 Pengertian Pernikahan Menurut Para Ahli Terlengkap, <https://www.idpengertian.org/pengertianpernikahan/>, Accessed on Wednesday, March 25, 2024 at 13.00 WIB.

³ Reffina Siong, N.K. Tharshini. Isu Kehamilan Luar Nikah dalam Kalangan Remaja di Malaysia: Satu Tinjauan Sorotan Literatur (Unwed Pregnancy Issues among Teenagers in Malaysia: A Literature Review). Jurnal Psikologi Malaysia Vol. 34 No. 4 2020. Pg 94

Indeed, there are numerous cases of mothers who have resorted to terminating their pregnancies due to feelings of shame associated with the illegitimate nature of their relationships. However, it is important to recognize that children are a divine gift entrusted to Allah SWT, and it is therefore imperative to safeguard and nurture them to the best of our abilities.⁴

According to Law No. 23/2002 on Child Protection, a child is an individual who is not yet 18 years old, including those still in the womb. The law provides protection and rights that children must receive. The child is a fortune that must be taken care of properly because all those who are married will definitely want to continue their offspring so that they become good successors, can make the family proud, become the successor to the ideals of parents and even the state, so that children must be protected and get their rights in accordance with what is determined.⁵

In the case of decision No. 1055 K/Pdt/2023, it contains the plaintiff to establish the biological father of the plaintiff's biological child in order to obtain his rights because in the decision of the Constitutional Court Number 46/PUU-VIII/2010 there is already a novelty in order to establish biological fatherhood in accordance with good science and technology in order to prove, even though children out of wedlock according to the Law on Marriage will not get civil rights from their father, with the decision of the Constitutional Court it can provide legal certainty and protection for the plaintiff's child.

So from the background description above, the author formulates the problem of how the status of children out of wedlock in positive law and Islamic law and how the judge's consideration in deciding case No. 1055 K / Pdt / 2023. This research is expected to be able to discuss the status of children out of wedlock in positive law and Islamic law and can analyze the judge's consideration in the decision. So this research will later be studied and discussed in the form of a thesis entitled "ANALYSIS OF THE SUPREME COURT CASSATION DECISION REGARDING THE DETERMINATION OF THE STATUS OF THE BIOLOGICAL FATHER OF CHILD OUT OF WEDLOCK: CASE STUDY OF DECISION

⁴ Muhammad Wiranto, Nasri Akib, "LARANGAN MENDEKATI ZINA DALAM Q.S. AL-ISRA/ 17:32 (ANALISIS KAJIAN TAHLILI)", *Al Maqra, Ilmu Alquran, Hadis dan Teologi*, Vol 2 No 1, (Mei 2022), Page 35.

⁵ Ahmad Dedy Aryanto, "Perlindungan Hukum Anak Luar Nikah Di Indonesia", *Bilancia*, Vol. 9 No 2, (2015), Page 123.

NO. 1055 K/Pdt/2023”

RESEARCH METHOD

The research method in this study was chosen based on the type of research, problem formulation, and research objectives, and explains the urgency of using this type of research in analyzing research data. The research method in this research is a normative juridical approach which is selected is the research of primary and secondary legal materials.⁶ The normative juridical method is a conceptualization of law as a set of written laws and regulations, or as a set of rules or norms that form standards of human behavior and are considered appropriate. This research provides a comprehensive account of the event in question.

RESULTS AND DISCUSSION

Children Out of Wedlock According to Positive Law and Islam

In some literature it is said that a child is someone who is not yet eighteen years old (18), including those still in the womb (Article 1 paragraph 1 of Law Number 23 of 2002 concerning Child Protection) and a legitimate child is a child born in or as a result of a valid marriage (Article 42 of Law Number 1 of 1974 concerning Marriage). However, it is different when a child is present outside of normal conditions, as said by J Satrio, regarding the essence of article 272 of the Civil Code in his book Law of Inheritance that “*children born out of a valid marriage, in this case a child born to a mother, but not borne by a man who is in a valid marriage with the mother of the child, and is not included in the group of adulterous children and discordant children*” So the position of children outside of marriage here is considered an illegitimate child.⁷

The Civil Code (hereinafter referred to as the Civil Code) refers to children outside of marriage as *Naturlijk Kind* (children of nature). In fact, these extra-marital children exist and it cannot be denied that they have become a separate “homework” for legal thinkers in our country to always pay attention to, considering that as the author said earlier that our country is stretching to try to improve the morals of its nation’s children, by focusing more on the issue

⁶ Khudzaifah Dimiyati & Kelik Wardiono, 2004, *Metode Penelitian Hukum*, Surakarta, Fakultas Hukum UMS, Hal 4

⁷ Riduan Syahrani, 2010, *Seluk Beluk dan Asas-Asas Hukum Perdata*, Bandung: Alumni, Pg 27.

of children.

Because the existence of extra-marital children has its own legal consequences, it is said by J.Satrio in his commentary looking at Civil Law in positioning the position of children born out of a valid marriage “a child out of wedlock cannot simply have a family legal relationship with his father or mother (his parents). The child does have a biological “similarity / resemblance” to his parents but juridically they do not have any rights and obligations towards the child out of wedlock”.⁸

Article 42 of Chapter IX on the Status of Children of Law Number 1 Year 1974 on Marriage states that a legitimate child is a child born in or as a result of a valid marriage. In the Compilation of Islamic Law Article 99 letters (a) and (b) it is further emphasized that legitimate children are: children born in or as a result of a valid marriage and the result of fertilization of a legitimate husband and wife outside the womb and born to the wife.⁹

From these two articles, there are several explanations that can be understood; first, only children born from a valid marriage are legally recognized as legitimate children. In this context, there is no legal issue to be debated. This is because it is appropriate that the standard of a child’s validity is based on marital status. A new problem arises when this sentence is continued or as a result of a valid marriage.

This can happen because Article 53 paragraph (1) of the Compilation of Islamic Law states that a pregnant woman can be married to the man who impregnated her. The word “may” have an implicit meaning that it is possible that the woman will be married to a man who is not pregnant. Because there is no explicit mention that the woman can only be married to the man who impregnated her. On the one hand, this article can be a solution to cover the disgrace (family shame) of a woman who is already pregnant while the man who impregnated her does not want to take responsibility. In addition, this article can also be a protection for the status of the child later. In this context, the child still has a juridical father who can be used for birth certificates or other purposes later.¹⁰

To confirm the status of a child, the Marriage Law states that there must be evidence in the form of an authentic birth certificate issued by an authorized official (in this case the local

⁸ Satrio, 1992, *Hukum waris*, Bandung: Alumni bandung, Pg 201.

⁹ Abdurrahman, 2004, *Kompilasi Hukum Islam di Indonesia*, Jakarta: Akademika Pressindo.

¹⁰ *Ibid*, Page 125.

population and civil registry office). If this birth certificate does not exist, then the court can issue a determination on the origin of the child after a series of careful examination processes based on certain evidence. With this court decision, the marriage registrar agency within the jurisdiction of the court concerned can issue the birth certificate.¹¹

In line with this, Article 103 of the Compilation of Islamic Law states that;

- a. The origin of a child can only be proven by a birth certificate or other evidence;
- b. If the birth certificate or other evidence mentioned in paragraph (1) does not exist, the Religious Court may issue a determination on the origin of a child after conducting a thorough examination based on valid evidence;
- c. On the basis of the decree of the Religious Court mentioned in paragraph (2), the Birth Registration Agency within the jurisdiction of the Religious Court issues a birth certificate for the child concerned. For marriages that are not registered (*nikah bawah tangan*) and have implications for the absence of a marriage certificate so that a child's birth certificate cannot be made, Compilation of Islamic Law provides a solution so that the marriage is registered first through the procedure of applying for *istbat nikah* to the local Religious Court.¹²

Furthermore, Article 43 paragraph (1) states that children born out of wedlock only have a civil relationship with their mother and her family. In general, this article means that children born as a result of an invalid marriage (out of wedlock), including children from illicit relationships, only have a civil relationship with their mother and her family. Meanwhile, there is no civil relationship with the biological father.

The meaning of civil relations here is related to *nasab* (lineage), inheritance and guardianship. A legitimate child has a lineage with his or her father. In this case a child can use *bin* to his father. Conversely, if it is illegitimate, it is not entitled to bear *bin* to its biological father.

Likewise with inheritance, a legitimate child has the right to inherit and bequeath between him and his father. If his father dies first, then he can inherit the wealth left by his father. If he is a man alone then he will be *ashabah binafsih*. Then if it is with his sister then

¹¹ Article 55 paragraphs (1), (2) and (3) of Law No. 1/1974 on Marriage.

¹² Article 103 paragraphs (1), (2), and (3) of the Compilation of Islamic Law.

they get the same share with the provisions of two to one. If the woman is alone, she will inherit half of the estate. If she is with other sisters then they get two-thirds of the inheritance. Vice versa, if the son dies first, then the father is also entitled to inherit his son's estate. A father gets 1/6 of the estate if there are sons and 1/6 plus *ashabah* if there are no sons or only daughters.¹³

In addition, the issue of the status of the child is also related to guardianship. If the child is a girl, the guardians are the biological father, grandfather, brother, nephew, grandson, uncle, uncle's son.¹⁴

Even if the father is not responsible for his daughter's life, he has the right to be her guardian, and he can also annul the marriage without her knowledge or permission. In the case of illegitimate children, the guardianship is vested in the guardian judge. In Indonesia, the marriage registrar (Religious Affairs Office employee) usually doubles as the guardian of the marriage.¹⁵

Consideration of Judges in Case No. 1055 K/Pdt/2023

As stated in Constitutional Court Decision Number 46/PUU-VIII/2010 dated February 17, 2012, a child has a civil relationship with a man as his father who can be proven based on science and technology and/or other evidence according to the law to have a blood relationship, including a civil relationship with his father's family. Based on the description above, the author will elaborate on the analysis of the Tangerang District Court's decision in case number 746/Pdt.G/2021/PN Tng.

In the consideration of the Panel of Judges of the Tangerang District Court in case number 746/Pdt.G/2021/PN Tng, it was explained that based on the testimony of the plaintiff in his lawsuit regarding the recognition of a child from a relationship out of wedlock, it was intended for the benefit of his child to get recognition from his biological father. Therefore, with this lawsuit, it is hoped that the rights of the child who was born to have a clear father and mother will be fulfilled and protected by law, and to declare that the defendant is the biological father of the child born to the plaintiff.

The panel of judges' consideration was derived from an explanation of the arguments

¹³ Suparman Usman, Yusuf Somawinata, 1997, *Fiqh Mawaris: Hukum Kewarisan Islam*, Serang: Gaya Media Pratama, Page 35.

¹⁴ Ahmad Azhar Basyir, 1999, *Hukum Perkawinan Islam*, UII: UII PRESS.

¹⁵ Article 62 paragraph (2) of the Compilation of Islamic Law

presented by the plaintiff. The beginning of the meeting between the plaintiff and the defendant was from their meeting, until the two of them had a more intimate relationship until the plaintiff gave birth to a child named Naira Kaemita Tarekat. Since birth, the child born to the plaintiff did not receive any maintenance or financial support from the child born from their relationship, and to date the child does not have a certificate stating the name of her biological father. The child also did not receive physical and mental affection from the biological father, even though materially and financially the respondent had more than enough money and also neglected the child by disappearing without news which resulted in the plaintiff becoming a single parent. The plaintiff also requested that if the defendant did not acknowledge that the child born to the defendant was his biological child, then the two (P/T) were obliged to prove their argument by conducting a DNA test, thereby considering the actions taken by the defendant to be unlawful.

To strengthen their arguments, the plaintiffs submitted evidence. The plaintiffs have submitted letter evidence marked P-1 to P-10 and 3 (three) witnesses and 2 (two) experts named Tiara Nuzul Hasanah, Dewi Kusuma Wati and Andri Hermanto, as well as expert Arist Merdeka Sirait and expert Eko Prasetyo Endarto. Then from Exhibit T2 in the form of the Pesona Creative Thirteen Company Profile, it is stated that the Director is Mrs. Wenny Ariani Kusumawardani and the Main Commissioner is Eeng Affandi.

Then from the lawsuit has been denied by the defendant, based on article 163 HIR there is an obligation for the plaintiff to prove his arguments. The defendant's arguments have also submitted letters marked as evidence T-1 to T-11 and 2 witnesses each named Rahkmad Prabowo Wicaksono and Kartono Yohanes Tamba. And also, evidence T-4 in the form of Credit Agreement Number 45, mentioned PT Pesona Creative Tigabelas has received a loan from BCA with the insurer is Rezky Aditya Drajamoko (Defendant) as evidence T-5.

In this case, the Plaintiff's attorney had submitted a request for a DNA test to the Defendant and the Panel of Judges had advised the Defendant to conduct a DNA test, but the Defendant refused on the grounds that there had never been a marriage or conjugal relationship between the Plaintiff and the Defendant as alleged by the Plaintiff.

However, in civil cases in principle, the Panel of Judges is passive, while for the proof it is entirely the right of the Plaintiff to prove all arguments of his claim or the right of the Defendant to prove all arguments of his denial, thus the Plaintiff's request that the Panel of

Judges order the Defendant to conduct a DNA test is not the obligation of the Panel of Judges, but it is the obligation of the Plaintiff himself to prove his claim.

From the description of the evidence mentioned above, the Panel of Judges concluded that there was no evidence that the biological father of the Plaintiff's child, Naira Kaemita Tarekat, was known, either from the evidence of letters or from the testimony of witnesses presented by the Plaintiff and the Defendant.

CONCLUSION

The Civil Code (hereinafter referred to as the Civil Code) refers to children out of wedlock as *Naturalijk Kind* (natural children). In article 43 paragraph (1): children born out of wedlock only have a civil relationship with their mother, their mother's family. In general, this article means that children born as a result of an invalid marriage (outside of marriage), including children from illicit relationships, only have a civil relationship with their mother and her family. Meanwhile, there is no civil relationship with the biological father. This is in accordance with Law Number 1 of 1974 concerning Marriage Article 42 which reads: "a legitimate child is a child born in or as a result of a valid marriage." Therefore, children born out of a valid marriage are only related to their mother's name. According to Article 103 of the Compilation of Islamic Law, the origin of a child can be determined by a birth certificate or other evidence. If there is no birth certificate or other evidence, then the Religious Court can issue a determination on the origin of the child after a thorough examination based on valid evidence.

In the consideration of the Panel of Judges of the Tangerang District Court in case number 746/Pdt.G/2021/PN Tng, it was explained that based on the testimony of the plaintiff in his lawsuit regarding the recognition of a child from a relationship out of wedlock, it was intended for the benefit of his child to get recognition from his biological father. The juridical analysis of this decision, the author assumes that judges tend to look at Constitutional Court Decision Number 46/PUUVIII/2010 dated February 17, 2012, Article 43 paragraph (1) of Law Number 1 Year 1974 concerning Marriage.

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