

## **JUDGES' LEGAL REASONING ON CHILD PROTECTION**

### **Analysis of Religious Courts' Decisions on the Case of Child Parentage**

**Muhamad Isna Wahyudi**

Religious Courts of Bima, Nusa Tenggara Barat, Indonesia

*email: isnawahyudi@gmail.com*

#### **Abstract**

*This paper examines four religious courts' decisions on child legal status, especially child parentage, after Constitutional Court's decision on the legal status of child born out of wedlock. The Constitutional Court's decision has triggered controversy on the rights of child born out of wedlock due to lack of explanation concerning term 'civil legal relationship with the biological father'. To study the decisions, the author uses legal philosophy approach, both in legal science and Islamic law, focused on legal reasoning used by judges in decisions on child parentage. As the result, the author finds two types of legal reasoning employed by judges of religious courts in dealing with cases of child parentage, doctrinal-deductive legal reasoning and *maṣlaḥa* based legal reasoning. It argues that the employment of doctrinal-deductive legal reasoning by the judges has not benefitted children and therefore the protection of child's rights has not been optimally made and that the employment of *maṣlaḥa* based legal reasoning by the judges has led to the better protection of child's rights.*

*[Tulisan ini membahas empat putusan pengadilan agama terkait status hukum anak, khususnya waris anak, setelah dikeluarkannya putusan Mahkamah Konstitusi (MK) tentang status hukum anak di luar nikah. Putusan MK telah memicu kontroversi karena kesenjangan penjelasan tentang adanya hak perdata seorang anak yang lahir di luar nikah dengan ayah biologisnya. Dalam mengkaji persoalan ini, penulis menggunakan pendekatan filsafat hukum,*

*baik secara ilmiah atau hukum Islam, yang fokus pada argumentasi hukum para hakim dalam kasus hak waris anak. Penulis setidaknya menemukan dua tipe argumentasi yang digunakan para hakim dalam kasus tersebut, yaitu: alasan hukum legal deduktif-doktrinal dan alasan hukum berbasis masalah. Tipe yang pertama cenderung melemahkan perlindungan hak anak, sedangkan tipe kedua justru akan menguatkan hak anak.]*

**Key words:** *religious court decision, judge's legal reasoning, child's rights, masalah.*

## A. Introduction

Constitutional Court's decision number 46/PUU-VIII/2010 on 13 February 2012 has changed status of child born out of wedlock. The decision states that child born out of wedlock has civil legal relationship with his/her mother and his/her mother's relatives, and with a man as his/her father that can be proved, based on science and technology and/or other legal evidence, has blood relationship, including civil legal relationship with his/her father's relatives.

However, problem arises since the decision does not explain the term "civil legal relationship," between child born out of wedlock and his/her biological father. The term "child born out of wedlock," is also ambiguous whether the term is restricted to child born in an unregistered marriage, or includes child born out of wedlock. It is task of court to apply the Constitutional Court's decision on the legal status of child born out of wedlock, including Religious Courts.

According to Article 49 (2) Law No. 7/1989 on Religious Judicature, there are two court's jurisdiction on the status of child, jurisdiction to decide the legality issue of the child, and jurisdiction to determine the parentage of the child.<sup>1</sup> The first jurisdiction related to case in which parents dispute the legality of child, whether the child is legal or not. It may occur when a husband denies the legality of his child, while his wife admits his denial, the husband may confirm his denial by *li'an* before the court hearing.<sup>2</sup> The latter related to the origin of child,

---

<sup>1</sup> Law No. 7/1989 on Religious Judicature, Art. 49 (2).

<sup>2</sup> See Article 101 of Kompilasi Hukum Islam (KHI). Compare with Article 44 of Law No. 1/1974. It states that a husband may deny the legality of child born by his wife when he can prove that his wife has committed adultery and the child resulting

when parents usually file petition for child legal status as child from a father and a mother.

Jurisdiction to determine the parentage of child dominates cases heard by Religious Courts. The cases usually emerge from unregistered marriage conducted by Muslim couples. After having child, the couples get married before marriage registrar and receive marriage certificate from Kantor Urusan Agama (Religious Affairs Office). The problem arises when the couples seek birth certificate for their child. Civil Registry Office will only register the child as child from a mother without a father due to the birth of the child prior to the parents' registered marriage. Dealing with the case, the couples file petition to Religious Court to determine the parentage of the child. It has been common tendency that the court will grant the petition provided that the unregistered marriage conducted by the couples proved to be valid, in the meaning that the marriage meets the components and conditions of a marriage as formulated in Islamic Jurisprudence. In this case, the child born in an unregistered marriage will be determined by the court as legitimate child from the couple and as the legal consequence, the child will obtain civil legal rights including custody, guardianship, maintenance, and inheritance.<sup>3</sup>

Besides the case above, the other case usually emerges from the couples who live together and have sexual intercourse outside marriage that resulted in the birth of child out of wedlock. After the child's birth, the couples get married before marriage registrar. The problem arises when the couples want to have their child born out of wedlock registered on the birth certificate as child from the couples and not from a mother only. Dealing with the case, the couples file petition to Religious Court to determine the parentage of the child.

Regarding this issue of parentage in particular and child's rights protection under Islamic law, there have been a number of researches and studies. Among them, the author has found some. Eva Schlumpf studies the legal status of children born out of wedlock in Morocco.<sup>4</sup> from adultery. Based on the husband's petition, court provides decision on the legality of the child.

<sup>3</sup> See SEMA (Supreme Court Circular) No. 7/2012.

<sup>4</sup> Eva Schlumpf, "The Legal Status of Children Born Out of Wedlock in Morocco," *Electronic Journal of Islamic and Middle Eastern Law* (EJIMEL), vol. 4 (2016), p. 1-26, <http://www.ejimel.uzh.ch/en.html>, accessed 14 Jan 2017.

She discusses the influence of the UN Convention on the Rights of the Child to the situation improvements of the child born out of wedlock in Morocco. She argues that full equality has not been and cannot be reached with the reform of family code of Morocco's Personal Status Law (Moudawana) in 2004. As long as children born out of wedlock are treated differently than children born to a married couple and as long as sexual relationships outside of marriage remain a criminal offence, these children will be stigmatized and cannot be granted full legal rights. Shaheen Sardar Ali studies the impact of the Convention on the Rights of the Child (CRC) in Muslim jurisdictions including Jordan, Mauritania, and Morocco, focusing on legislative reform initiatives undertaken in those countries affecting child's rights, highlighting compatibility or otherwise with substantive provisions of the CRC. Arguing from a socio-legal and law-in-context approach, he proposes a framework for enhanced convergence of the Islamic legal tradition and the CRC to create an enabling environment for child rights in those jurisdictions.<sup>5</sup>

For Indonesian context, Simon Butt studies the Constitutional Court's decision number 46/PUU-VIII/2010. He criticises the decision regarding its application due to the vagueness of the decision and asks whether Indonesia's religious courts will respond to the decision or religious courts judges will continue to apply Article 100 of Compilation of Islamic Law.<sup>6</sup> Mughniatul Ilma studies judges' decision on child parentage at Bantul Religious Court in her Master thesis. Using sociology of law approach, she concludes that the Constitutional Court's decision has less impact to decisions on child parentage at Bantul Religious Court. According to judges at Bantul Religious Court, child born out of wedlock

---

<sup>5</sup> Shaheen Sardar Ali, "A Comparative Perspective of the Convention on the Rights of the Child and the Principles of Islamic Law: Law Reform and Child's Rights in Muslim Jurisdictions," in *Protecting the World's Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems*, (Cambridge: UNICEF & Cambridge University Press, 2007), p. 142-208.

<sup>6</sup> Simon Butt, "Asia-Pacific 'Illegitimate' Children and Inheritance in Indonesia", in *Alternative Law Journal*, Vol. 37, No. 3, pp. 196-198, 2012; *Sydney Law School Research Paper* No. 12/63, <https://papers.ssrn.com/abstract=2142286>, accessed 16 Feb 2017. See also Simon Butt, "Between Control and Appeasement: Religion in Five Constitutional Court Decisions," in *Religion, Law, and Intolerance in Indonesia*, ed. by Tim Lindsey and Helen Pausacker, 1<sup>st</sup> ed, (New York: Routledge, 2016), p. 58-59.

has right to financial support only, and does not have right to lineage (*nasab*), guardianship, and inheritance from the biological father.<sup>7</sup>

This paper examines four religious courts' decisions on the case of child parentage, either relating to child born in unregistered marriage or child born out of wedlock, after the Constitutional Court's decision on the legal status of child born out of wedlock. These four are selected to represent the other cases resolved in religious courts of Indonesia. It aims at mapping the types of legal reasoning and what its impact to child's rights protection. It is important because parentage is the key to all the other rights as only through the establishment of parentage can a child be legitimate and therefore be entitled to the other rights.<sup>8</sup> Those decisions are decision number 0071/Pdt.P/2013/PA.Mpw, decision number 0008/Pdt.P/2013/PA.Yk, decision number 0156/Pdt.P/2013/PA.JS, and decision number 0078/Pdt.P/2014/PA.Mgt. This paper starts with the discussion on child status in Islamic Jurisprudence followed by section deals with rules on child status. The last three chapters will examine four religious courts' decisions, analyze legal reasoning used by judges in dealing with child parentage cases, and mapping the typology of legal reasoning and its impact on child's rights.

## B. Child Legal Status in Islamic Jurisprudence

Child's lineage to the mother can be decided in any condition of the birth, either the birth of the child is in accordance with Islamic law or contrary to Islamic law. However, child's lineage to the father can only be decided from valid marriage, defective marriage (*fāsid*), sexual intercourse with a woman whom the husband regards as his wife (*waṭ'u shubha*), and acknowledgement of paternity (*iqrār bi al-nasab*).<sup>9</sup>

<sup>7</sup> Mughniatul Ilma, "Penetapan Hakim Tentang Asal-Usul Anak Pasca Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 (Studi Kasus di Pengadilan Agama Bantul)", Master Thesis, (Yogyakarta: Sunan Kalijaga State Islamic University, 2016), p. 133.

<sup>8</sup> Eva Schlumpf, "The Legal Status of Children Born Out of Wedlock in Morocco," p. 5.

<sup>9</sup> Wahbah al-Zuhaili, *al-Fiqh al-Islāmī wa Adillatub*, vol. VII (Damaskus: Dār al-Fikr, 1985), p. 675. In present Moroccan law, there are several methods to prove paternity, including the conjugal bed, acknowledgement of the father, the testimony of two public notaries or oral testimony, and all other legal means, such as judicial

In general, four conditions need to be fulfilled to acknowledge a child. First, the child needs to be of unknown parentage. Second, it needs to be plausible that the man is actually the father of the child. Thus, for example, there needs to be a certain difference in age between the father and the child. Third, the child needs to agree to the acknowledgement if it is already an adult. Fourth, the man needs to confirm that the child is not the offspring from an illicit relationship.<sup>10</sup>

The birth of the child regarded in accordance with Islamic law if the child born between the minimum time of pregnancy and the maximum time of pregnancy. According to the majority of classical Islamic scholars, the minimum time of pregnancy is six months, while regarding the maximum time of pregnancy, the classical Islamic scholars have different opinions, it may last between nine months until five years based on moon calendar.<sup>11</sup> If the child born less than six months of pregnancy since the marriage, according to Hanafi school, or since the possibility of sexual intercourse, according to the majority of classical Islamic scholars, the child's lineage can not be related to the husband (father), except the husband acknowledges the child as his child, considering the best interests of the child.<sup>12</sup> This is in line with the provision both in Law No. 1/1974 and Kompilasi Hukum Islam, that does not regulate the minimum time of birth since the marriage, as requirement for legitimate child.<sup>13</sup>

According to the Hanafi school, the defective marriage (*nikah fāsīd*) occurs when the marriage does not meet one of the conditions of

---

expertise, particularly through a DNA test. This last possibility, "all other legal means", was one of the reforms in the new Moroccan family code and, through the ability of courts to require an expertise, provided the courts with an important weapon to fight the illegitimacy of children. Eva Schlumpf, "The Legal Status of Children Born Out of Wedlock in Morocco," p. 7.

<sup>10</sup> Eva Schlumpf, "The Legal Status of Children Born Out of Wedlock in Morocco," p. 10.

<sup>11</sup> Wahbah al-Zuhaili, *al-Fiqh al-Islāmī wa Adillatub*, vol. VII: 676-677.

<sup>12</sup> *Ibid.*, VII: 682.

<sup>13</sup> See Art. 42 Law No. 1/1974, Art. 99 (a) of KHI. The minimum time of six month from the marriage as requirement for the legitimate child has been proposed in the Bill of Substantive Law for Religious Court, but there is no progress of the Bill until this time.

the validity of marriage, such as marriage without witnesses or marriage during the waiting period, while the majority of classical Islamic scholars view the marriage as invalid. The Hanafis view the marriage has the same legal consequence with the valid marriage regarding child's lineage.<sup>14</sup> In the meaning that a child born from the defective marriage can be related to the husband as the father.

Regarding child born resulting from adultery, the majority of classical Islamic scholars views that the child's lineage can not be related to the father, either the child born in wedlock or out of wedlock, based on the hadith: "*al-walad li'l-firāsh, wa li'l-'ābir al-ḥajar.*" On the contrary, according to Iṣḥāq bin Rahawaih, 'Urwah bin Zubair, Sulaimān bin Yasār, Muhammad bin Sīrin, 'Aṭā', Ibn Taimiyya, and Ibn Qoyyim, if the child born out of wedlock and the mother's spouse – who commits adultery with the mother - acknowledges the child, the child's lineage can be related to him. According to them, the above hadith related to the dispute between a male adulterer and a husband (*sāhibu'l-firāsh*) on the status of child of a married woman/wife.<sup>15</sup>

The hadith emerged on the dispute arising between Sa'ad bin Abi Waqas and Abdullah bin Zam'ah on the status of a child. Sa'ad said: "O Messenger of Allah, he was a child of my brother Utbah bin Abi Waqas, he declared to me that this child is his son." Abdullah bin Zam'ah said: "This is my brother O Messenger of Allah, he was born on my dad's bed from his mother, then the Messenger of Allah observed and saw a real resemblance to the 'Utbah, then the Messenger of Allah said: "The child is your brother Abdullah, the child belongs to the husband of the child's mother who gave birth, and for the adulterer there is obstruction to claim the child."<sup>16</sup>

---

<sup>14</sup> *Ibid.*, VII: 47. See also Al-Jazīrī, *Kitābu'l-Fiqh 'alā l-Madhabib al-Arba'a*, vol. IV, 2nd Edition, (Beirut: Dār al-Kutub al-'Ilmiyah, 2003), p. 108.

<sup>15</sup> Fuad Mursyid Dawud Badir, "Aḥkām an-Nasab fi Fiqh al-Islāmī", Master Thesis, (Palestine: An-Najah Al-Wathaniyah University, Nablus, 2001), p. 75. See also Ahmad Abdul Majid Husain, "Aḥkām Walad al-Zina fi al-Fiqh al-Islāmī", Master Thesis, (Palestine: An-Najah al-Waṭaniyah University, Nablus, 2008), p. 68-71.

<sup>16</sup> Bukhārī, *Shāḥiḥ al-Bukhārī, Kitāb Fara'id, Bab Man Idda'a Akhban Au Ibn Akhbin*, hadith number: 6765, VIII: 15.

### C. Rules on Child Legal Status: Recent Development within Indonesian Legal System

Based on the parents' marriage, the status of child can be divided into two categories: legitimate child, and child born out of wedlock. Article 42 Law No. 1/1974 on Marriage states that legitimate child is child born during the existence or as the consequence of a valid marriage. Such provision can also be found in Article 99 (a) Kompilasi Hukum Islam (Compilation of Islamic Law) or the so-called KHI.

Article 43 (1) Law No. 1/1974 states that child born out of wedlock only has civil legal relationship with his/her mother and his/her mother's relatives. The same provision can also be found in Article 100 of KHI. The latter uses term '*nasab*' (lineage) to define the relationship between child and his/her mother.<sup>17</sup>

The status of child born out of wedlock has changed since the issuance of Constitutional Court's decision number 46/PUU-VIII/2010 on 13 February 2012 that granted judicial review to Article 43 (1) Law No. 1/1974 filed by Aisyah Mochtar. The decision declared that child born out of wedlock has civil legal relationship with his/her mother and his/her mother's relatives, and a man as his/her father that can be proved, based on science and technology and/or other legal evidence, has blood relationship, including civil legal relationship with his/her father's relatives. This decision implies that children's rights automatically flow from a natural blood relationship with the biological father.<sup>18</sup> Mukti Arto, Supreme Court judge at religious chamber since 2015, argues that civil relationship emerges from blood relationship includes legal relationship, rights and duties between child and his/her parents such as lineage (*nasab*), prohibition of marriage (*mahram*), rights and duties relationship,

---

<sup>17</sup> Article 142 Moudawana (family code of Morocco's Personal Status Law) distinguishes 'filiation parentale' ('*bounouwa*') from 'filiation paternelle' ('*nasab*') and that the sacred *nasab* can only be established for a legitimate child to his father, whereas *bounouwa* is established to both parents through their procreation of the child, whether it was legitimate or illegitimate (Art. 142 *Moudawana*). Eva Schlumpf, "The Legal Status of Children Born Out of Wedlock in Morocco," p. 5.

<sup>18</sup> Mark Cammack, Adriaan Bedner, and Stijn van Huis, "Democracy, Human Rights, and Islamic Family Law in Post-Soeharto Indonesia", *New Middle Eastern Studies*, vol. 5, 2015, p. 18, <http://www.brismes.ac.uk/nmes/wp-content/uploads/2015/05/NMES2015CammackBednervanHuis.pdf>, accessed 8 Jan 2017.

inheritance, and marriage guardianship for the female child.<sup>19</sup>

The Constitutional Court's decision on the status of child born out of wedlock has triggered a controversy. Muslim organizations such as the MUI (Indonesian Council of Religious Scholars) opposed the decision. The MUI claimed that adultery was being legalized because of the decision, which stressed that the words 'out of marriage' not only referred to unregistered Islamic marriages but also to adultery. It also asserted that the court had gone beyond Sharia and beyond what was actually being appealed by the petitioner.<sup>20</sup> As the result, MUI issued *fatwa* (legal opinion) number 11/2012 on 10 March 2012 to respon the decision. According to the fatwa, child born out of wedlock has no rights of *nasab* relationship, marriage guardian, inheritance, and maintenance from his/her biological father. It is government authority to sentence the biological father to suffice the necessities of his child born out of wedlock. The MUI called upon the government to impose an obligation on fathers to maintain their biological children and grant them an obligatory bequest (*wasiat wajibah*) not based on their status as fathers but as a penalty (*bukuman ta'zir*) for their adulterous behavior.<sup>21</sup>

Despite the opposition, the Constitutional Court's decision is considered to be in accordance with ṭūfī's theory on *maṣlaḥah* (public interest). The decision is not dependent on the text of Law, but prioritizes the *maṣlaḥah*. According to Ṭūfī, when there is conflict between *maṣlaḥah* and texts of the Qur'an or hadith, the *maṣlaḥah* should be prioritized.<sup>22</sup>

<sup>19</sup> Mukti Arto, "Diskusi Hukum Putusan Mahkamah Konstitusi R.I. Nomor 46/PUU-VIII/2010 Tanggal 27 Februari 2012 Tentang Pengubahan Pasal 43 UUP Tentang Hubungan Perdata Anak Dengan Ayah Biologisnya," paper presented at *legal discussion with judges of Ambon Religious High Court*, 16 March 2013, p. 6.

<sup>20</sup> Euis Nurlaelawati, "The Legal Position of Women and Children in Banten and West Java," in *Islam, Politics, and Change: The Indonesian Experience after the Fall of Suharto*, Edited by Kees van Dijk and Nico J.G. Kaptein (Leiden: Leiden University Press, 2016), p. 162-3.

<sup>21</sup> Mark Cammack, "Democracy, Human Rights, and Islamic Family Law in Post-Soeharto Indonesia," p. 18-19. Euis Nurlaelawati, "The Legal Position of Women and Children in Banten and West Java," p. 163. Simon Butt, "Between Control and Appeasement: Religion in Five Constitutional Court Decisions," p. 59-60.

<sup>22</sup> Muhammad Roy P, "Putusan Mahkamah Konstitusi Pasal 43 Ayat (1) UU No. 1 Tahun 1974 Tentang Status Anak di Luar Nikah Berdasarkan Maṣlaḥah Najmuddin Al-Ṭūfī (Dekonstruksi Undang-Undang Hukum Islam), in *Al-Mawarid*, Vol. XII,

In the meantime, based on Supreme Court Circular No. 7, 2012, the Supreme Court has instructed judges at religious courts that children born out of wedlock could be declared legitimate based on a judicial decree that the child's parents were married in accordance with Islamic law. This would enable children born in an unregistered marriage to seek enforcement of support and inheritance rights from their biological fathers.<sup>23</sup>

#### **D. Child Parentage in Four Religious Courts' Decisions**

The author has collected four religious courts' decisions to be examined in this paper. The first two decisions concerning child parentage from unregistered marriage in which the marriage proved to be lack of the conditions of a valid marriage or defective (*fāsid*), and the last two decisions deal with the child parentage from adulterous behavior of the parents and the child born out of wedlock. The four religious courts' decisions will be described briefly as follows.

The first case was heard at Mempawah Religious Court, Pontianak. The case involved Mr. A and Mrs. B who got married on 14 May 2011. At the time of marriage, Mr. A still had marriage relationship with his first wife, while Mrs. B was still in her waiting period from her ex-husband. As the consequence, their marriage could not be registered at Siantan Religious Affairs Office. During the marriage, Mrs. B gave birth a male baby on 10 July 2012, and in the making of birth certificate, the child's lineage was related to Mrs. B only due to born from unregistered marriage. Mr. A and Mrs. B filed petition for child status as their child at Mempawah Religious Court, Pontianak.<sup>24</sup>

Dealing with the case, Mempawah Religious Court declared that the marriage of Mr. A and Mrs. B was defective (*fāsid*). The marriage was against Article 8 Law No. 1/1974 on Marriage and Article 40 (b)

No. 1, Feb-August, 2012, p. 94, <http://jurnalmawarid.com/index.php/almawarid/article/view/131>, accessed 17 Feb 2017. See also Sarifudin, *Teori Maslahat Aṭ-ṭūfī dan Penerapannya dalam Analisis Kasus Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Tentang Status Anak di Luar Perkawinan*, Master Thesis, (Yogyakarta: Sunan Kalijaga State Islamic University, 2015).

<sup>23</sup> Mark Cammack, "Democracy, Human Rights, and Islamic Family Law in Post-Soeharto Indonesia," p. 18-19..

<sup>24</sup> Decision Number 71/Pdt.P/2013/PA.Mpw, p. 15.

KHI (Kompilasi Hukum Islam) because Mrs. B was still in her waiting period when conducted marriage. The marriage was also against Article 40 Peraturan Pemerintah (Government Regulation) No. 9/1975 that required Mr. A to have license from the court to marry with more than one woman at the same time.<sup>25</sup>

Despite the marriage was defective (*fāsid*), the court determined the child as the child of Mr. A and Mrs. B. The court adopted the opinion of Wahbah al-Zuhaili in his book “al-Fiqh al-Islāmī wa Adillatuhu,” volume VII, page 690, that declared:

“The marriage either valid or defective (*fāsid*) is a cause to determine the lineage, and the way to determine the lineage in reality is if a marriage has been concluded, even the marriage is defective or customary marriage, that is unregistered marriage, the born child has the lineage from the marriage.”

The court also referred to Constitutional Court's decision number 46/PUU-VIII/2010 on 13 February 2012 regarding the status of child born out of wedlock, Article 55 (2) Law Number 1/1974 and Article 103 (2) Kompilasi Hukum Islam to declare the child as the child of Mr. A and Mrs. B.<sup>26</sup>

The second case was from Yogyakarta. The case involved Mr. A and Mrs. B who got married on 3 June 2007 without registration by marriage registrar from the Religious Affairs Office. Mr. A and Mrs. B got a female child from their marriage on 25 July 2007. Mr. A and Mrs. B conducted the second marriage which registered by marriage registrar of Mantrijeron Religious Affairs Office, Yogyakarta on 3 January 2009. In order to have birth certificate of the child that determines the child as the child of Mr. A and Mrs. B, and not only the child of Mrs. B, Mr. A and Mrs. B filed petition on child legalization to Yogyakarta Religious Court.<sup>27</sup> Based on the testimonies from the witnesses, it was exposed that when the marriage occurred, the marriage guardian was replaced by other person due to the different faith of the bride's father (Christian).<sup>28</sup>

Dealing with the case, council of judge at Yogyakarta Religious Court declared the marriage of Mr. A and Mrs. B was defective (*fāsid*)

---

<sup>25</sup> *Ibid.*, p. 15-16.

<sup>26</sup> *Ibid.*, p. 17-18.

<sup>27</sup> Decision number 0008/Pdt.P/2016/PA.Yk, p. 2-3, 10.

<sup>28</sup> *Ibid.* p. 5-7.

because the marriage guardian of Mrs. B replaced with other person who was not the Chief of Religious Affairs Office. According to the judges, based on Permenag (Regulation of Religious Affairs Minister) number 30/2005, it was the Chief of Religious Affairs Office who could represent as guardian (*wali hakim*) for the bride who had no descent guardian. The judges determined the child as child born out of wedlock due to the defective marriage of the parents. The judges also referred to a hadith related to the dispute between a male adulterer and a husband (*sāhibu'l-firāsh*) on the status of child of a married woman/wife. They interpreted the word “*firāsh*” as the mother, so that the biological child is related to his/her mother. Based on the above considerations, the court refused the petition of Mr. A and Mrs. B, and declared that the child had the lineage to the mother only. However, by referring to the Constitutional Court’s decision number 46/PUU-VIII/2010, the court considered that the child had civil legal relationship with Mr. A as biological father, so that Mr. A had to provide the child’s necessities.<sup>29</sup>

The third case came from South Jakarta. The case involved Mr. A and Mrs. B whose female child was born out of wedlock on 2 March 2013. Mr. A and Mrs. B got married on 31 March 2013 and the marriage was registered at Kebayoran Lama Religious Affairs Office. Mr. A and Mrs. B had received the birth certificate of their child that declared the child as the child from a mother only, namely Mrs. B. In order to have legal certainty on the status of the child as the child from Mr. A and Mrs. B, they filed petition to South Jakarta Religious Court.<sup>30</sup>

Dealing with the case, South Jakarta Religious Court referred to the fatwa of MUI number 11/2012 issued on 10 March 2012. According to the fatwa, child born out of wedlock has no rights to *nasab* relationship, marriage guardian, inheritance, and maintenance from his/her biological father. It is government authority to sentence the biological father to suffice the necessities of his child born out of wedlock. The MUI called upon the government to impose an obligation on fathers to maintain their biological children and grant them an obligatory bequest (*wasiat wajibah*) not based on their status as fathers but as a penalty (*bukuman ta’zīr*) for their adulterous behavior. Based on the fatwa, the court granted

---

<sup>29</sup> *Ibid.*, p. 11-5.

<sup>30</sup> Decision number 0156/Pdt.P/2013/PAJS, p. 2-4.

the petition of Mr. A and Mrs. B by declaring the child as child resulting from out of wedlock relationship of Mr. A and Mrs. B, and the child has civil legal relationship with Mr. A restricted to the father's duty to provide maintenance and obligatory bequest of one third from his estate to the child.

The last case was from Magetan, East Java. The case involved Mr. A and Mrs. B who had sexual intercourse out of wedlock in 1995. As the result, Mrs. B got pregnant and gave birth a male baby on 4 November 1996. Mr. A and Mrs. B got married before marriage registrar of Religious Affairs Office in Magetan on 27 March 1999. They found difficulty when they asked Civil Registry Office to change birth certificate of the child so that the child declared as the child of Mr. A and Mrs. B. In order to change the certificate, Mr. A and Mrs. B filed petition for child status to Magetan Religious Court to determine the child as biological child of Mr. A and Mrs. B.<sup>31</sup>

Dealing with the case, judges at Magetan Religious Court referred to the Constitutional Court's decision number 46/PUU-VIII/2010. However, they interpreted the term "civil legal relationship with the biological father" for Muslims must be distinguished between child born out of wedlock and child born in an unregistered marriage. For the former, the rights of the child is limited to maintenance from the father, and lineage to the mother, while for the latter provided that the unregistered marriage is valid, the rights of the child includes maintenance from the father, lineage to both parents, inheritance, and guardianship.<sup>32</sup> The judges mentioned the child born out of wedlock as biological child.<sup>33</sup>

The judges also referred to a hadith related to the dispute between a male adulterer and a husband (*ṣāhibu'l-firāsh*) on the status of child of a married woman/wife. They interpreted the word "*firāsh*" as the mother, so that the biological child is related to his/her mother. However, they consider the impact of eliminating the biological father on birth certificate for the child born out of wedlock. By referring to Article 7, Law Number 23/2002 on Child Protection that stipulates: "every child has right to know his/her parents, to be brought up and taken care by his/her own

---

<sup>31</sup> Decision number 0078/Pdt.P/2014/PA.Mgt, p. 2-3.

<sup>32</sup> *Ibid.*, p. 9.

<sup>33</sup> *Ibid.*, p. 12.

parents,” the judges argued that it is not wise and unjust to exclude the biological father from the birth certificate of child born out of wedlock. In the meaning that the birth certificate must contain the biological father, but it does not mean to relate the child to the father, except for the sake of legal protection and legal certainty.<sup>34</sup> Based on the above considerations, the judges granted the petition filed by Mr. A and Mrs. B by ordering that the child is biological child from Mr. A and Mrs. B.

### E. Judges' Legal Reasoning in Child Parentage Cases

Legal reasoning used by judges of religious courts in dealing with child parentage cases has impact on the legal status of the child, and civil legal rights obtained by the child. It is in this context of legal status of child born in defective unregistered-marriage and child born out of wedlock that judges of religious courts have deployed divergent legal reasoning leading to disparity of judgments that has resulted in reducing child's rights protection.

In the first case, decision number 0071/Pdt.P/2013/PA.Mpw, judges use legal reasoning according to utilitarianism. Utilitarianism legal reasoning pattern has the same starting point with legal positivism. Positive norms in the system of law become the standard of regulation. However, it is different from legal positivism in the case that it has two directions in reasoning pattern, top-down and bottom-up. The top-down movement demands juridical legitimating or validity, while the bottom-up movement demands the efficacy of law in the society because of the utility for the society. The double-movement does not work simultaneously, but one by one. Certainty is the primary legal purpose for utilitarianism, followed with utility as the secondary purpose. In this case, a utilitarian judge will be able to consider the utility aspect as long as the positive norms formulated in disjunctive proposition.<sup>35</sup>

It could be proved that despite the court declared the marriage was defective (*fāsid*), the court determined the child as the child of Mr. A and Mrs. B by referring to the opinion of Wahbah al-Zuhaili. In this case, the judges consider the utility aspect as long as the positive norms

---

<sup>34</sup> *Ibid.*, p. 12-13.

<sup>35</sup> Shidarta, *Hukum Penalaran dan Penalaran Hukum: Akar Filosofis* (Yogyakarta: Genta Publishing, 2013), p. 204-5.

formulated in disjunctive proposition.

The Kompilasi Hukum Islam (KHI) regulates the defective marriage in Article 71. According to KHI, the defective marriage “can be nullified,” or formulated as disjunctive proposition. Characteristic of such norm indicates permissibility, in the meaning that the court may nullify the marriage or may not nullify the marriage. The court will consider the utility aspect of decision for the parties or society.

The utility aspect in the case number 0071/Pdt.P/2013/PA.Mpw is to maintain the status of child born from defective and unregistered marriage as the child of Mr. A and Mrs. B, although it contravenes Article 42 Law No. 1/1974 and Article 99 (a) of Kompilasi Hukum Islam which states that legitimate child is child born during the existence or as the consequence of a valid marriage. The decision is also in line with the Hanafi's view that the defective marriage has the same legal consequence with the valid marriage regarding child's lineage. In the meaning that a child born from the defective marriage can be related to the husband as the father.

By maintaining the legal status of child from defective marriage as legitimate child from the couple of marriage, will guarantee the rights of the child from the parents including maintenance, custody, inheritance, and guardianship.

In the second case, decision number 0008/Pdt.P/2013/PA.Yk, the judges determined the marriage of Mr. A and Mrs. B as defective (*fa>sid*) due to the replacement of marriage guardian by other person who could not become the marriage guardian legally. According to Permenag (Regulation of Religious Affairs Minister) Number 30/2005, it is the Chief of Religious Affairs Office who can represent as guardian (*wali hakim*) for the bride who has no descent guardian. The court determined the child as child born out of wedlock due to the defective marriage of the parents. Based on the above considerations, the court refused the petition of Mr. A and Mrs. B, and declared that the child had the lineage to the mother only.

It seems that the judges use pattern of reasoning according to legal positivism, that is top-down/doctrinal-deductive in one direction. Positive norms in the system of law become the standard of regulation. Positive norms are used as major premise to be applied to concrete cases

as minor premise.<sup>36</sup> Permenag (Regulation of Religious Affairs Minister) Number 30/2005 is used as major premise, while the marriage of Mr. A and Mrs. B as minor premise. As the consequence, the marriage of Mr. A and Mrs. B that is contradictory to the positive norm, declared as defective marriage.

The judges also use provision of Article 42 Law Number 1/1974 and Article 99 (a) of Kompilasi Hukum Islam as the major premise to be applied to the child born from defective marriage as the minor premise. As a result, the child declared as child born out of wedlock, and based on Article 43 (a) Law Number 1/1974 and Article 100 of Kompilasi Hukum Islam, the judges determines the child has the lineage to the mother only. In this case, the court ignores the utility aspect of decision for the child, and emphasizes the legal certainty as the primary purpose of legal positivism. However, the decision is in line with the view of the majority of classical Islamic scholars who maintains the defective marriage as invalid.

The question arises related to the decision is how can the judges apply the positive norms, Permenag (Regulation of Religious Affairs Minister) Number 30/2005, to the unregistered marriage which is illegal? It is not apple to apple legal reasoning.

By declaring child born from defective marriage as the same as child born out of wedlock whose lineage to the mother only, the child will not obtain the rights to guardianship and inheritance from the father.

In the third case, decision number 0156/Pdt.P/2013/PA.JS, the judges refer to the fatwa of MUI Number 11/2012, as response to Constitutional Court's decision number 46/PUU-VIII/2010 that does not provide the explanation of civil legal relationship between child born out of wedlock and biological father. According to the fatwa, child born out of wedlock has no rights of *nasab* relationship, marriage guardian, inheritance, and maintenance from his/her biological father. It is government authority to sentence the biological father to suffice the necessities of his child born out of wedlock. The MUI called upon the government to impose an obligation on fathers to maintain their biological children and grant them an obligatory bequest not based on their status as fathers but as a penalty for their adulterous behavior.

---

<sup>36</sup> *Ibid.*, p. 198-200.

The judges use positivism legal reasoning in dealing with the case. The fatwa of MUI is used as major premise, and the child born out of wedlock as minor premise. As the result, the court declares the child as child resulting from out of wedlock relationship (*hubungan di luar nikah*) of Mr. A and Mrs. B, and the child has civil legal relationship with Mr. A limited to the duty of father to provide maintenance and obligatory bequest of one third from his estate to the child.

In the last case, decision number 0078/Pdt.P/2014/PA.Mgt, the judges seem to stand in ambivalence between to decide child born out of wedlock as biological child of the couple, and to restrict the child's right to maintenance from the father only. The judges use positivism legal reasoning. Constitutional Court's decision number 46/PUU-VIII/2010, Article 7 Law Number 23/2002, and a hadith on dispute between a male adulterer and a husband (*ṣāhibu'l-firāsh*) on the status of child of a married woman/wife used as major premises, and child born out of wedlock as minor premise. As the result, the judges granted the petition filed by Mr. A and Mrs. B by declaring that the child as biological child of Mr. A and Mrs. B so that the father could be contain in birth certificate, but they did not mean to relate the child's lineage (*nasab*) to the father. In this case, the ambivalence arises when the judges consider the legal certainty at one side, and the utility aspect for the child born out of wedlock at the other side, while there is no disjunctive proposition in the positive norms.

#### **F. Doctrinal-Deductive Legal Reasoning and *Maṣlaḥah*-Based Legal Reasoning and their Impacts on Child's Rights Protection**

From the above analysis of four religious courts' decision on child parentage, it can be explained how the kind of legal reasoning has impact on child's rights protection. In this case, there are two types of legal reasoning employed by the judges, doctrinal-deductive legal reasoning and *maṣlaḥah*-based legal reasoning.

The doctrinal-deductive legal reasoning can be found in the last three cases. This type of legal reasoning adheres to legal positivism. Positive norms in the system of law become the standard of regulation. Positive norms are used as major premise to be applied to concrete cases as minor premise. Primary purpose of legal positivism is to reach legal certainty. Predictability is the core of legal certainty, that is the ability to

percept “an individual ought to behave in a certain way.”<sup>37</sup> According to Ahmad Rofii, since the promulgation of the Compilation, judicial reasoning employed by religious courts is generally legalistic. The task of the courts is merely to apply the law in given cases. The process of reasoning follows formal syllogism or deductive logics.<sup>38</sup>

In the discourse of Islamic law, this type of legal reasoning can be classified in literalist approach, considering the literal meanings of the scripts and ignoring their purposes.<sup>39</sup> According to Hallaq, in Islamic law, the jurist is bound only by those premises which are prescribed by the religious sources, and, unless a certain ambiguity in the premises allows the inclusion or exclusion of certain material facts, nothing that does not follow from the premises can or should be joined to the conclusion.<sup>40</sup>

In case of child born from defective unregistered-marriage, the employment of doctrinal-deductive legal reasoning by the judges will reduce the protection of child's rights. The judges will use Article 42 Law No. 1/1974 and Article 99 (a) of Kompilasi Hukum Islam - which states that legitimate child is child born during the existence or as the consequence of a valid marriage - as the major premise to be applied to the child born from defective marriage as the minor premise. Those who born from defective unregistered-marriage, will be counted as children born out of wedlock and will lose their lineage to the father. As the result, they will not obtain the rights to guardianship and inheritance from the father. Moreover, such decision is in line with the view of the majority of classical Islamic scholars who maintains the defective marriage as invalid.

In case of child born out of wedlock, due to the absence of

---

<sup>37</sup> *Ibid.*

<sup>38</sup> Ahmad Rofii, “Whiter Islamic Legal Reasoning: The Law and Judicial Reasoning of the Religious Courts”, *Journal of Indonesian Islam*, vol. 8, no. 2, December 2014, p. 255, <http://jiis.uinsby.ac.id/index.php/JIIs/article/view/161>, accessed 17 Feb 2017.

<sup>39</sup> Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systematic Approach* (London: The International Institute of Islamic Thought, 2007), p. 151, <http://www.muslim-library.com/english/maqasid-al-shariah-philosophy-islamic-law/>, accessed 3 Jun 2017.

<sup>40</sup> Wael B. Hallaq, “The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and the Common Law,” in *Cleveland State Law Review* 34, New York, 1985-1986, p. 82.

explanation on term “civil legal relationship,” between child born out of wedlock and his/her biological father, the judges will refer to the *fatwa* (legal opinion) of MUI Number 11/2012 on 10 March 2012. According to the fatwa, child born out of wedlock has no rights of *nasab* relationship, marriage guardian, inheritance, and maintenance from his/her biological father. It is government authority to sentence the biological father to suffice the necessities of his child born out of wedlock. The MUI called upon the government to impose an obligation on fathers to maintain their biological children and grant them an obligatory bequest (*wasiat wajibah*) not based on their status as fathers but as a penalty (*bukuman ta'zir*) for their adulterous behavior. In this case, the fatwa is used as major premise, and the child born out of wedlock as minor premise. However, the status of fatwa which is not legally binding, will be a reference for the judges when the vacuum of law occurs. Moreover, MUI is regarded as the Muslims' ulama representative in Indonesia regardless of its authoritativeness in issuing fatwa.

This type of legal reasoning will also apply the hadith “*al-walad li'l-firāsh, wa li'l-'ābir al-ḥajar*”<sup>41</sup> to all cases of child born out of wedlock so that the child's lineage can not be related to the father. As the result, it is impossible to accommodate petition for acknowledgment (*istillḥāq*) of child born out of wedlock. In this case, the religious text becomes the

---

<sup>41</sup> Schacht states that the hadith is a legal maxim intended to decide disputes about paternity in pre-Islamic Arab society and even during the first century of Islam when the frequency of divorce with immediate re-marriage led to many cases of contested paternity. He argues that the legal maxim could hardly arise under Koranic rule regarding *'idda* (waiting period). However, it was incorporated in traditions from the Prophet. See Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Oxford University Press, 1950), p. 181-2. While according to Smith, the legal maxim was restricted at the time of Prophet Muhammad by regulation that a pregnant woman when her husband died or divorced her, could not remarry until she gave birth. W. Robertson Smith, *Kinship and Marriage in Early Arabia*, new edition, ed. by Stanley A. Cook (Oosterhout N. B, Netherlands: Anthropological Publications, 1966), p. 132-3. If the mother is married, there is still a legal presumption regarding paternity, as every child is considered her husband's child: precisely, the husband is presumed to be the father of the child born during marriage, until proven otherwise. All means of evidence, both biological and scientific, may be used in this legal proceeding. See Valongo, “Children Born Out of Wedlock: The End Of an Anachronistic Discrimination,” p. 94.

major premises in the same way as the positive norms in civil law system.<sup>42</sup>

The *maṣlahah* based legal reasoning can be found in the first case. In legal science, this type of legal reasoning is close to utilitarianism. Utilitarianism legal reasoning pattern has the same starting point with legal positivism. Positive norms in the system of law become the standard of regulation. However, it is different from legal positivism in the case that it has two directions in reasoning pattern, top-down and bottom-up. The top-down movement demands juridical legitimation or validity, while the bottom-up movement demands the efficacy of law in the society because of the utility for the society. The double-movement does not work simultaneously, but one by one. Certainty is the primary legal purpose for utilitarianism, followed with utility as the secondary purpose. In this case, a utilitarian judge will be able to consider the utility aspect as long as the positive norms formulated in disjunctive proposition.<sup>43</sup>

In Islamic law discourse, this type of legal reasoning is in accordance with Ṭūfī's theory on *maṣlahā* (public interest). According to Ṭūfī, when there is conflict between *maṣlahā* and texts of the Qur'an or hadith, the *maṣlahah* should be prioritized. In this case, the purpose of law, namely attaining *maṣlahah* and averting *mafsada*, should be employed to evaluate the rules. Looking at the outcome of rules and judging them in light of the purpose of the law enables jurist to find new laws that are in harmony with that purpose and adapt existing rules when they do not fulfill their purpose.<sup>44</sup> In Islamic discourse on legal change, *maṣlahā* has two different functions. One function is retroactive, *maṣlahā* explains rulings established by the early Islamic community that were not directly based on the revealed texts. The other function is to attain legal change by legitimizing either that an existing textual ruling can be set aside or

---

<sup>42</sup> A major problem in Islamic jurisdictions is the dogmatic, inflexible and selective use of Islam devoid of its spirit, rationale and objective. Fossilization of the dynamic strains within the Islamic legal tradition of Shari'a as flowing water can take advocacy efforts a long way ahead. Shaheen Sardar Ali, "A Comparative Perspective", p. 202.

<sup>43</sup> Shidarta, *Hukum Penalaran dan Penalaran Hukum*, p. 204-5.

<sup>44</sup> Felicitas Opwis, *Maslahah and the Purpose of Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th century; Studies in Islamic Law and Society*, vol. 31, ed. by Bernard Weis, (Leiden: Brill, 2010), p. 344.

that a new ruling is religiously valid.<sup>45</sup>

In case of child born from defective-marriage, the employment of *mašlahā* based legal reasoning will improve the protection of child's rights. The judges will refer to the opinion of Wahbah al-Zuhaili:

The marriage either valid or defective (*fāsiḍ*) is a cause to determine the lineage, and the way to determine the lineage in reality is if a marriage has been concluded, even the marriage is defective or customary marriage, that is unregistered marriage, the born child has the lineage from the marriage.<sup>46</sup>

In addition, the judges will refer to Article 71 of KHI in which the defective marriage "can be nullified," or formulated in disjunctive proposition. Characteristic of such norm indicates permissibility, in the meaning that the court may nullify the marriage or may not nullify the marriage. The judges will consider the utility aspect of decision for the parties or society.

Based on *mašlahā* based legal reasoning, child born from defective unregistered-marriage will be counted as legitimate child of the parents, although it contravenes Article 42 Law No. 1/1974 and Article 99 (a) of Kompilasi Hukum Islam. This is also in line with the Hanafi's view that the defective marriage has the same legal consequence with the valid marriage regarding child's lineage. In the meaning that a child born from the defective marriage can be related to the husband as the father. As the result, the child will obtain rights from the parents including maintenance, custody, inheritance, and guardianship.

In case of child born out of wedlock, the employment of *mašlahā* based legal reasoning will advance the child's rights. It is important to address religious court's decision of Sleman number 408/Pdt.G/2006/PA.Smn on 27 July 2006 here. The judges granted the petition of child acknowledgment filed by a husband by ordering that the child born out of wedlock as legitimate child of the husband and his wife based on the acknowledgment of the husband. Before getting married, the husband and his wife lived together and had sexual intercourse until the wife gave birth a male baby out of wedlock.

The judges considered that the Kompilasi Hukum Islam did not regulate child acknowledgment, but the Kompilasi Hukum Islam

---

<sup>45</sup> *Ibid.*, p. 349-50.

<sup>46</sup> Wahbah al-Zuhaili, *al-Fiqh al-Islāmī wa Adillatuhu*, vol. VII, p. 690.

regulated the marriage of pregnant woman with the man whom she had sexual intercourse with in Article 53. The judges interpreted that the purpose of Article 53 was in order to protect and maintain the child's interests when the child's process of growth had occurred since the parents had not been married. The judge also referred to the legal maxim "law follows the eminent utility (*al-hukm yattabi'u'l-ma'slaat ar-rājiḥah*)," and Article 3 Law No. 23/2002 on Child Protection.

In classical legal doctrines (*fiqh*), there is doctrine of acknowledgment of paternity. In case of child whose unknown parents, as *laqī* or the foundling, someone --who finds and claims the child as his-- could have the child related to him, or through *istilḥāq* institution (acknowledgment of paternity). Of course, such petition for acknowledgment of paternity will be granted by the court if there is no complaint from the other party.<sup>47</sup>

The reason behind the institution of *istilḥāq* is to protect the rights of child. Based on the logic of legal interpretation, that is *argumentum a fortiori* or *al-mafhūm al-munāfaqah*, if the lineage of child whose unknown parents is able to be related to someone who claims, so the child whose known biological-father that could be established using science and technology, witness testimony or other evidence, is able to be related to his biological father. In line with this reasoning, Ibnu Taimiyya is one of the Islamic scholars who has opinion that the born child out of wedlock can be related to his biological father. According to Ibn Taimiya, the lineage of child born out of wedlock (adultery) can be related to his biological father, if the father asks child acknowledgment, and the father has not married the mother yet. This opinion is supported by Ibn al-Qayyim.<sup>48</sup>

<sup>47</sup> There is no distinct provision on the jurisdiction of Religious Courts in dealing with the case of child acknowledgment for child born out of wedlock. In Buku II on *Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama, the manual for judges of religious courts in conducting their duty that contains procedural law and technical guidance for court administration*, child acknowledgment is restricted to *laqī* or the finding child such as the victim of disaster, refugee, or immigrant who has no definite parent. See Mahkamah Agung RI, *Direktorat Jenderal Badan Peradilan Agama, Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama* Buku II, 2013. At the other side, General Court which has jurisdiction on child acknowledgment for child born out of wedlock, becomes an alternative for Muslims to file petition for child acknowledgment.

<sup>48</sup> Ahmad Abdul Majid Muhammad Mahmud Husain, *Aḥkām Walad aṣ-Zinā fī al-Fiqh al-Islāmī*, Master Thesis, (Palestina: University of Najah al-Wathaniyyah, Nablus, 2008), p. 68.

In addition, we must distinguish between the relationship of parents and the relationship between parents and child. The first must be distinguished between the legal and the illegal one, because the parties involved in this act (sexual intercourse) are capable as subject of law. Otherwise, the second, the child is not subject of law while the act performed, because the child results from the act done by the parents. Of course, it is unjustifiable legal treatment if we give the same judgment between the relationship of the parents and the relationship of the child with the parents as illegal. This is in line with the objective laid down by the European Charter of Fundamental Rights and Liberties, where the 'birth' is considered one of those circumstances that do not justify a different legal treatment for children (Art 21).<sup>49</sup>

In recent development, Bahruddin Muhammad, chief of Appellate Religious Court of Mataram, states that the legal consequences for rights of child born out of wedlock including material right and immaterial right. The material right includes child maintenance and inheritance, and the latter includes marriage guardianship and custody.<sup>50</sup> His opinion based on extensive interpretation to the concept of juridical child lineage (based on valid marriage) towards biological child lineage (based on blood relationship). The concept of biological child lineage becomes *ratio legis* as the consideration to the fact of the civil legal rights of the child.<sup>51</sup>

Muhammad has tracked how the influence of patrilineal system in Arabia to the concept of child lineage of the time. Muhammad states:

“Sistem patrilineal yang menjadi latar belakang sosial masyarakat Arab selalu menisbahkan anak pada pengakuan ayah lebih dominan, sehingga jika terjadi hubungan zina, maka perempuan berikut anak zina menjadi korban subordinasi kaum laki-laki. Nasab pada masa lalu tidak lebih sebagai alat untuk melegitimasi dan meyakinkan para raja dan sekedar pencitraan ayah. Nasab pada masa lalu tidak lebih sebagai identitas image, tanpa menghiraukan hak-hak anak

---

<sup>49</sup> See Alessia Valongo, “Children Born Out of Wedlock: The End Of an Anachronistic Discrimination,” *The Italian Law Journal*, vol. 1, No. 1, 2015, p. 105, [italian-law-journal.scholasticahq.com](http://italian-law-journal.scholasticahq.com), accessed 17 Feb 2017.

<sup>50</sup> Bahruddin Muhammad, *Hak Waris Anak Di Luar Perkawinan*, Studi Hasil Putusan MK No. 46/PUU-VIII/2010, (Semarang: Fatawa Publishing, 2014), p. 331-344.

<sup>51</sup> *Ibid*, p. 351-353.

dan hak-hak perempuan. Oleh karena itu perlu purifikasi makna nasab kepada nasab anak biologis.”<sup>52</sup>

(“Patrilineal system as the social background of Arab society always relates child to father’s acknowledgement dominantly, so that in the case of adultery, the woman and child become the victim of male subordination. Lineage (*nasab*) in the past was no more than a tool of legitimating and convincing the kings and just for image of the father. Lineage in the past was just for identity image disregarding the rights of children and women. That is why it is necessary to purify the meaning of *nasab* towards biological child lineage.”)

Based on the above legal reasoning, it might accommodate petition for acknowledgment (*istilḥāq*) of child born out of wedlock. Such accommodation is in line with the view of Iṣḥāq bin Rahawaih, ‘Urwah bin Zubair, Sulaimān bin Yasār, Muhammad bin Sīrin, ‘Aṭā’, Ibn ‘Taimiyya, and Ibn Qoyyim. In this way, the child will obtain the whole civil legal rights from the father as same as the legitimate child.

## G. Concluding Remarks

From the above examination of four religious courts’ decisions on child parentage, there has been divergent legal reasoning that has led to the disparity of judgments. In case of child born in defective unregistered marriage, there is different conviction on child’s legal status. Judges of Mempawah religious court determine the child as child from the couple, while judges of Yogyakarta religious court declare the child as child born out of wedlock whose lineage to the mother only.

In case of child born out of wedlock, judges of South Jakarta refer to fatwa of MUI No. 11/2012 that resulted in the absence of child’s right to the father, but it is the father’s duty to provide maintenance and obligatory bequest of one third from his estate to the child. While judges of Magetan religious court interpret the civil legal relationship with the biological father for child born out of wedlock restricted to right to maintenance from the father. Judges of South Jakarta seem to hesitate to declare the child born out of wedlock as biological child from the parents by the formulation of child resulting from outside marriage relationship

---

<sup>52</sup> *Ibid.*, p. 258-259.

of the parents. While the judges of Magetan religious court declare the child born out of wedlock distinctly as biological child from the parents.

Based on analysis of four religious courts' decision on child parentage, there are two types of legal reasoning employed by the judges, doctrinal-deductive legal reasoning and *maṣlahah*-based legal reasoning.

The employment of doctrinal-deductive legal reasoning by the judges will reduce the protection of child's rights. In case of child born from defective unregistered-marriage, those who born from defective unregistered-marriage, will be counted as children born out of wedlock and will lose their lineage to the father. As the result, they will not obtain the rights to guardianship and inheritance from the father. In case of child born out of wedlock, the child has civil legal relationship with the biological father limited to the duty of father to provide maintenance and obligatory bequest of one third from his estate to the child, and it is impossible to accommodate petition for acknowledgment (*istilḥāq*) of child born out of wedlock.

The employment of *maṣlahah*-based legal reasoning will improve the protection of child's rights. In case of child born from defective unregistered-marriage, the child will be counted as legitimate child of the parents so that the child will obtain rights from the parents including maintenance, custody, inheritance, and guardianship. In case of child born out of wedlock, it might accommodate petition for acknowledgment (*istilḥāq*) of child born out of wedlock. Such accommodation is in line with the view of Iṣḥāq bin Rahawaih, 'Urwah bin Zubair, Sulaimān bin Yasār, Muhammad bin Sīrin, 'Aṭā', Ibn Tāimiyya, and Ibn Qoyyim. In this way, the child will obtain the whole civil legal rights from the father as same as the legitimate child.

## BIBLIOGRAPHY

- Arto, Mukti, "Diskusi Hukum Putusan Mahkamah Konstitusi R.I. Nomor 46/PUU-VIII/2010 Tanggal 27 Februari 2012 Tentang Pengubahan Pasal 43 UUP Tentang Hubungan Perdata Anak dengan Ayah Biologisnya," paper presented at legal discussion with judges of Ambon Religious High Court, 16 March 2013.
- Auda, Jasser, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach*, London: The International Institute of Islamic Thought, 2007, <http://www.muslim-library.com/english/maqasid-al-shariah-philosophy-islamic-law/>, accessed 3 Jan 2017.
- Badir, Fuad Mursyid Dawud, *Abkām al-Nasab fī al-Fiqh al-Islāmī*, Master Thesis, Palestine: Al-Najah al-Wataniyah University, 2001.
- Butt, Simon, "Asia-Pacific 'Illegitimate' Children and Inheritance in Indonesia", *Alternative Law Journal*, vol. 37, no. 3, pp. 196-198, 2012; Sydney Law School Research Paper No. 12/63, <https://papers.ssrn.com/abstract=2142286>, accessed 16 Feb 2017.
- , "Between Control and Appeasement: Religion in Five Constitutional Court Decisions," in *Religion, Law, and Intolerance in Indonesia*, ed. by Tim Lindsey and Helen Pausacker, 1<sup>st</sup> ed., New York: Routledge, 2016, p. 42-67.
- Cammack, Mark, Adriaan Bedner, and Stijn van Huis, "Democracy, Human Rights, and Islamic Family Law in Post-Soeharto Indonesia", *New Middle Eastern Studies*, vol. 5, 2015, p.1-24, <http://www.brismes.ac.uk/nmes/wp-content/uploads/2015/05/NMES2015CammackBednervanHuis.pdf>, accessed 8 Jan 2017.
- Hallaq, Wael B., "The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and the Common Law," in *Cleveland State Law Review* 34, New York, 1985-1986, p. 79-96.
- Husain, Ahmad Abdul Majid, *Abkām Walad aẓ-Zina fī al-Fiqh al-Islāmī*, Master Thesis, Palestine: Al-Najah al-Wataniyah University, 2008.
- Ilma, Mughniatul, *Penetapan Hakim tentang Asal-Usul Anak Pasca Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 (Studi Kasus di Pengadilan Agama Bantul)*, Master Thesis, Yogyakarta: Sunan Kalijaga State Islamic University, 2016.

- Al-Jazīrī, *Kitābu'l-Fiqh 'alā l-Madhabib al-Arba'a*, vol. IV, 2<sup>nd</sup> ed., Beirut: Dār al-Kutub al-'Ilmiyah, 2003.
- Nurlaelawati, Euis, "The Legal Position of Women and Children in Banten and West Java," in *Islam, Politics, and Change: The Indonesian Experience after the Fall of Subarto*, ed. by Kees van Dijk and Nico J.G. Kaptein, Leiden: Leiden University Press, 2016, p. 137-65.
- Opwis, Felicitas, *Maṣlaḥa and the Purpose of Law: Islamic Discourse on Legal Change from the 4<sup>th</sup>/10<sup>th</sup> to 8<sup>th</sup>/14<sup>th</sup> century*; *Studies in Islamic Law and Society*, v. 31, edited by Bernard Weis, Leiden: Brill, 2010.
- Mahkamah Agung RI, Direktorat Jenderal Badan Peradilan Agama, *Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama Buku II*, 2013.
- Muhammad, Bahruddin, *Hak Waris Anak Di Luar Perkawinan: Studi Hasil Putusan MK No. 46/PUU-VIII/2010*, Semarang: Fatawa Publishing, 2014.
- Purwanto, Muhammad Roy, "Putusan Mahkamah Konstitusi Pasal 43 Ayat (1) UU No. 1 Tahun 1974 Tentang Status Anak di Luar Nikah Berdasarkan Maṣlaḥah Najmuddin Al-Thufi (Deonstruksi Undang-Undang Hukum Islam), in *Al-Mawarid*, Vol. XII, No. 1, Feb-August, 2012, p. 85-107, <http://jurnalmawarid.com/index.php/almawarid/article/view/131>, accessed 17 Feb 2017.
- Rofii, Ahmad, "Whiter Islamic Legal Reasoning: The Law and Judicial Reasoning of the Religious Courts," *Journal of Indonesian Islam*, vol. 8, No. 2, December 2014, p. 235-262, <http://jiiis.uinsby.ac.id/index.php/JIIs/article/view/161>, accessed 17 Feb 2017 [doi:10.15642/JIIS.2014.8.2.235-262].
- Sarifudin, *Teori Maslahat At-Ṭūfī dan Penerapannya dalam Analisis Kasus Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Tentang Status Anak di Luar Perkawinan*, Master Thesis, Yogyakarta: Sunan Kalijaga State Islamic University, 2015.
- Schacht, Joseph, *The Origins of Muhammadan Jurisprudence*, Oxford: Oxford University Press, 1950.
- Schlumpf, Eva, "The Legal Status of Children Born Out of Wedlock in Morocco," *Electronic Journal of Islamic and Middle Eastern Law*

(EJIMEL), vol. 4, 2016, p. 1-26.

Shidarta, *Hukum Penalaran dan Penalaran Hukum: Akar Filosofis*, Yogyakarta: Genta Publishing, 2013.

Smith, Robertson, *Kinship and Marriage in Early Arabia*, New edition, Ed. by Stanley A, Cook, Oosterhout N, B, Netherlands: Anthropological Publications, 1966.

UNICEF, *Protecting the World's Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems*, Cambridge: UNICEF & Cambridge University Press, 2007.

Valongo, Alessia, "Children Born Out of Wedlock: The End Of an Anachronistic Discrimination," *The Italian Law Journal*, vol. 1, no. 1, 2015, p. 83-105.

Wahyudi, Muhamad Isna, "Judge's Discretion in Islamic Family Law: Indonesian Religious Courts' Experience," in *Jurnal Hukum dan Peradilan*, Pusat Penelitian dan Pengembangan Hukum dan Peradilan Mahkamah Agung RI, vol. 3, no. 3, November 2014, p. 203-212.

Al-Zuhaili, Wahbah, *al-Fiqh al-Islāmī wa Adillatuh*, vol. VII, Damaskus: Dār al-Fikr, 1985.