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Legislation on Determining the Parentage of a Child Born Out of Wedlock Based on the Perspectives of the Best Interest of Child and Progressive *Fiqh*

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Abstract

This study aimed to reveal the phenomenon of formal legal law that contrasts with the principles of justice for children, the best interest of child, and progressive Islamic jurisprudence *(fiqh)*. The high number of applications for legitimation and determination of children in the juridical area and the relative competence of the City-Regency Religious Courts indicate the high number of children who have not received recognition, status, and identity from both their parents and biological fathers. This condition causes the civil rights of children to be taken away from both parents and biological fathers. The Religious Courts, which have absolute competence in deciding cases, have not been able to fully grant all applications for the determination of children that have juridical implications for the civil rights of children. A qualitative study, based on a case study model, intellectual anxiety, and the awakening of the authors' sense of humanity, inspired the struggle for the rights of children out of wedlock in the perspective of the best interest of child and progressive *fiqh*. This comprehensive study found that the legislative decisions and the juridical implications of determining the status of children out of wedlock at the Religious Courts of the Mojokerto Regency, the Malang Regency, and Surabaya City, based on the perspectives of the best interest of child and progressive *fiqh*, gave rise to a model of renewal that religion and the state should be able to provide a rule that implements the best interest of child and progressive *fiqh.*

Keywords: Legislation, Determination of Children Out of Wedlock, the Best Interest of Child, Progressive *Fiqh*.

Introduction

Regulations in Indonesia state that a child born from an illegitimate marriage or out of wedlock can not get various civil rights from his/her biological father. The child will deal with neglect and have no identity, livelihood, lineage, guardianship, and inheritance rights. The absence of these rights will create various crucial ongoing problems such as stereotyping, subordination, burdening, and discrimination. Therefore, the principle of the best interest of child is certainly not fulfilled.

For whatever reason, it will seem unfair and inappropriate when the existing legal reference stipulates that a

child born out of wedlock, who is the result of a relationship between the biological father and mother, only has a civil relationship with the mother. It means that the law frees men who impregnate their partners from their responsibilities. Abolishing the rights of such a child over his/her biological father is an injustice. There must be legal remedies or evidence through technological developments, such as DNA testing, taking an oath or confession of the biological father, or other evidence that can be justified and legally recognized as valid. The birth of a child from sexual intercourse leads to reciprocal rights and obligations between the child, mother, and father [1].

It's unfair if a child who is still weak and needs protection has to bear the brunt of the actions of his biological parents. Letting the child bear the burden and neglecting him/her will directly deal with the principle of the best interest of child and the substance of progressive *fiqh*.

The complexity of the civil case for children out of wedlock can be seen in the case of Ms. Machicha Muchtar (or MM) [2], who claimed having a son from her unregistered marriage with the then Minister of State Secretary. After her divorce in 1998, her 2-year-old son no longer had the father fulfilling his basic needs and livelihood. The neglect was reported to the Indonesian Commission for Child Protection (Komisi Perlindungan Anak Indonesia or KPAI), with accusations of child neglect. Finally, the case reached the Constitutional Court by submitting a judicial review on a biological child. Through various stages of judicial review, the Constitutional Court finally granted her application.

After the grant of MM's application, the regulation on the legitimacy of children has made significant progress [3]. The Constitutional Court's Decision No. 46/PUU-VIII/2010 dated February 17, 2012 stated that the Article 43 Paragraph (1) of Law Number 1 of 1974 concerning Marriage, stating "A child born out of wedlock only has a civil relationship with the mother and the mother's family," is not binding legal force as long as interpreted as eliminating civil relations with a man that, based on science and technology and/or other evidence, according to the law, has a blood relation, as a condition. Therefore, it must read, "A child born out of wedlock has a civil relationship with the mother and the mother's family as well as with the man, as an agreement that can be proven based on science and technology and/or other evidence according to the law, that has a blood relation, including a civil relationship with the father's family" [4].

The following are the results of several studies on the status of children out of wedlock. *First*, Nurul Hak said that a child born from an unregistered marriage only has a civil relationship with the mother and the mother's family. However, it can also be with a man proven through a trial process to have a

blood relation. The view of the majority of the Bengkulu Religious High Court judges rejected this provision because it was considered to not following established religious values. Some of them accepted it as a new breakthrough in law [5]. *Then*, Rosalinda Elsina Matumahina's reseach found that a child out of wedlock has three aspects of philosophical protection, namely ontological, epistemological, and axiological aspects, relating to the form of protection by the state and society [6]. *Next*, Agus Muchsin et al. explained that it was the custom of the Pinrang people to marry without officially registering their marriages. As a result, a child only has a relationship with the mother's family, not with the father's. This phenomenon impacts the distribution of inheritance: the child, having no family relationship, is eliminated from getting a share of the inheritance. The solution is applying for *ithbat nikah* (marriage confirmation) through the intermediary of the Religious Courts [7]. Lastly, Zaenul Mahmudi found the following: *first,* the reason behind the orthodox Islamic law not to associate the lineage of children born out of wedlock towards their biological father is that they lack evidence as those of their mothers such as pregnancy, giving birth, and suckling. *Second,* based on the constitutional decree, the lineage of such children should be established toward their father, and the children should enjoy the rights towards their fathers to the extent that the legitimate children do. They also have the right of inheritance towards not only their mothers but also their biological fathers as well as their parents' families [8].

The mapping, as described above, shows that the studies done previously generally discussed the rights of a child out of wedlock that needed to be considered and recognized, regarding their legitimacy, both in positive law and Islamic law. The researchers reviewed these previous studies to find out which ones have relevance to this research focus. This study found that none of the previous studies discussed the *fiqh* concerning legislation and civil rights of children out of wedlock in the perspectives of the best interest of child and progressive *fiqh*. Therefore, an in-depth study both from the point of view of Islamic law and positive law was conducted.

Method

This study used a qualitative approach with a multi-site study design at three Religious Courts of Mojokerto Regency, Malang Regency, and Surabaya. The data were collected through in-depth interviews, participant observation, and documentary study and were then analyzed using single-site and cross-site data analysis by finding points of similarity and difference in decisions and juridical implications of the civil rights of children out of wedlock in the three mentioned courts. In the data analysis, the researchers referred to Creswell's [9] spiral data analysis procedure using reasoning, sorting, and categorization and Atkinson's stages, including data repository and

identification code generation, involving analysis of multi-site study data and generating final propositions [10]. Meanwhile, the data validity was checked involving trustworthiness, credibility, confirmability, and data dependability [9].

Literature Review

A child is a gift from God Almighty and becomes the next generation of the nation that is inseparable from humans' and the nation's survival [11]. Children at the stages of their development in society, although it is the state's interest to guarantee and protect their rights and dignity, often face problems related to their legal status, especially those whose parents got married without complying with the Indonesian Act No. 1 of 1974 concerning Marriage (Undang-Undang Pernikahan or UUP, *Ind.*) and also the Compilation of Islamic Law (Kompilasi Hukum Islam or KHI, *Ind.*), both of which state that a marriage is declared valid if registered by a marriage registration official, namely the Office of Religious Affairs for Muslims and the Civil Registry Office for non-Muslims. Facts show that there are many Muslims who conduct underhand marriages *(sirri)* which are not officially registered in the Office of Religious Affairs. As a result, children born from such marriages can not get their birth certificates, thus they are unrecognized as having legislation.

In addition, children born before legal marriages also have the same problem because their parents do not have their marriage certificates. The right to legislation is urgently necessary for children born from parents with unregistered or illegitimate marriages. In general, children have inherent rights when they are born in this world.

In 1989, the governments around the world promised equal rights for all children by adopting the Convention on the Rights of the Child initiated by the UNICEF. It sets out that each state must guarantee that every child grows up as healthy as possible, can attend school, and be protected, heard, and treated fairly. It, in general, contains the following articles: the Article 1 states that a child is a person under the age of 18 years. All children have all the rights provided for in this convention unless otherwise provided by each national law [12].

The article 2 states that children's rights apply to all children without exception. Children must get protection from all kinds of discrimination against themselves and those caused by the beliefs and actions of parents and other family members. The article 3 stipulates that all actions and decisions related to children must be made based on the principle of the best interests of the child. The article 4 states that the Government is responsible for ensuring that all the rights set out in the Convention are protected and enforced for all children [12].

Regarding the protection of children's rights, the article 5 states that the Government needs to protect children's rights and provide age-appropriate guidelines to help every child exercise their rights and reach their full potential. Then, the article 6 states that all children have the right to live; the governments need to enable children to survive and grow healthy. The article 7 states that all children have the right to register their birth legally and obtain citizenship. Every child is entitled to know his/her parents and be cared for by them as much as possible [12].

Next, the article 8 states that every child has an identity, name, nationality, and family ties and is entitled to government support when losing identity partially. The article 9 states that all children have the right to live with their parents as long as it does not harm them. An example of detrimental acts is abuse or neglect by one or both of the parents. All children have the right to keep in touch with their parents when living separated from one or both of them [12].

If a child lives in a country which is different from one or both of his/her parents live, the governments of the countries will allow the child and the parents to travel freely so that they can meet and keep in touch with each other, as contained in the article 10. The article 11 states that all children have the right to be protected from being kidnapped, illegally taken, or detained abroad by one of the other parent. The article 12 states that every child has the right to express, listen, and consider in making decisions that affect his/her life and the lives of other children [12].

Regarding freedom of expression, the article 13 states that all children have the right to express opinions and receive and communicate information. However, this right can be limited if their opinions or views are harmful or offensive to them or others. The article 14 states that children have the right to freedom of thought, belief, and religion, as long as they do not interfere with the rights of others. The right of parents to guide their children in this matter needs to be respected. The article 15 states that every child has the right to meet, participate in, and form groups with other children as long as it does not prevent them from exercising their rights [12].

Regarding children's privacy, the article 16 states that all children have the right to privacy and protection from invasion of privacy involving their family, home, communication, and fame. Meanwhile, the article 17 states that every child has the right to access information and other materials from various sources that should be useful and easy for them to understand. The article 18 discusses the shared care responsibilities carried out by parents or legal guardians. All of these parties must always consider the best interests of the child. The government needs to support by providing services that help parents and guardians, especially if they work [12].

All children have the right to proper care, namely protection from violence, abuse, and neglect, as stated in the Article 19. Meanwhile, the article 20 discusses that all children who cannot be cared for by their families have the right to be cared properly by those who respect their religion, culture, language, and other aspects of the children's lives. In the case of child adoption, the best interests of the child should become the first consideration. If one's place of birth does not take good care of children, one may consider adopting in another country as stated in the article 21. The article 22 states that all children who arrive in a country as refugees are entitled to special protection and assistance and all the same rights as those of children born in that country [12].

The article 23 states that all children with disabilities have the right to education, training, and special protection to have satisfying lives. The article 24 states that all children have the right to the highest standards of health and medical care, clean water, and nutritious food, including a clean and safe living environment. All adults and children need access to health information. The article 25 states that all children are under the state's responsibility in terms of care and protection. The state reserves the right to check their condition regularly [12].

The article 26 states that every child has the right to social support that helps him/her grow and live in good situations. The government needs to give extra money to poor children and families. The right to an adequate standard of living is enshrined in the article 27 which states that children have the right to enjoy a standard of living sufficient to meet all their needs. Governments need to support families who cannot cope with that and ensure that parents and guardians fulfill their financial responsibilities to their children [12].

The article 28 states that all children have the right to quality education. Primary education should be available free of charge, secondary education should be available, and children should be encouraged to pursue the highest level of education as possible. The discipline applied by the school must respect the rights and dignity of the child. The article 29 states that education needs to nurture the personality, talents, mental state, and physical abilities of children. It also needs to teach understanding, peace, gender equality, and friendship while respecting the children's own and others' cultures. Education needs to prepare children to become active citizens in a free society [12].

The article 30 states that all children are permissible to learn and use the language, customs, and religion of their family or community, regardless of whether or not their language, customs, and religion are practiced by the majority of the community in the country where they live. Regarding children's right to rest, the article 31 explains that all children have the right

to rest, play, and participate in various arts and cultural activities. The article 32 concerning protection in work states that all children have the right to protection from work which may harm their health and growth. Labour children have the right to a safe environment and fair wages [12].

The article 33 discusses children's rights to protection from consumption, production, or distribution of dangerous drugs. The article 34 states the right to protection from sexual exploitation and abuse, including prostitution and involvement in pornography. The article 35 still discusses the same topic, namely protection for children: all children have the right not to be taken to other countries for abduction, sale, or exploitation. The article 36 states that all children have the right to be protected from any kind of exploitation that harms them [12].

The article 37 states that children who violate the law or are accused of violating the law should be neither treated cruelly nor in a harmful manner. Children must not be placed in the same custody as adults, must remain in contact with their families, and cannot be sentenced to death or life. The article 38 states that children under the age of 15 are required neither to join the military nor participate in armed conflicts. Children in war zones should receive special protection [12].

Children born under unregistered marriages or out of wedlock need special protection to prevent anything that hinders their survival and growth. Protection in this term means an effort to achieve normal growth and development both physically and mentally. As a form of justice in society, child protection must be implemented in various aspects of national and social life [13].

Children who are injured, neglected, abused, or are victims of exploitation, armed conflict, or imprisonment are entitled to special care to recover from such situations as stated in the article 39. The article 40 states that all children accused of violating the law must be treated in a manner that respects their rights. Children should be provided with legal support and a sentence of confinement, which applies only to very serious crimes [13].

The article 41 still discusses the protection of children; if the protection of children's rights provided by the law of a country exceeds the protection provided by this Convention, then the law will apply in that country. The article 42 states that all children have the right to know about their rights. Adults also need to know about these rights and help their children understand them [13]. The Convention on the Rights of the Child has a total of 54 articles. The articles 43-54 cover cooperation probably carried out by adults and the government to fulfill the rights of all children [13].

One form of the state's commitment to providing child protection is the ratification of the Convention on the Rights of the Child by the

Government of Indonesia through the Presidential Decree No. 36 of 1990. The convention basically contains general principles of child protection, including neglect of the child's best interests, child survival and development, and gratitude for children's participation. The seriousness of the Government of Indonesia in protecting children born to parents whose marital status is not yet clear is increasingly seen with the issuance of the Constitutional Court Decision No. 46/PUU-VIII/2010, which, however, does not mention the birth certificate of illegitimate children and the legal impact of this decision on birth certificates of illegitimate children. The implications of the Constitutional Court's decision are related to the legal status and evidence of the child's origin other than marriage. As regulated in the article 55 paragraph 1 of the Marriage Law, a birth certificate can only be proven by an original birth certificate issued by a certified employee.

The emergence of progressive *fiqh* cannot be separated and is closely related to concerns that arise from the assessment that Islam in general, especially Islamic law (*fiqh*), is often accused of being the cause of the emergence of an image showing that Islam is too normative and traditional. Slowly but not stagnantly, the development of post-codified Islamic law is far behind the development of human civilization in general. The problem of closing the door to *ijtihad*, which has dominated centuries, relies heavily on classical and medieval intellectual references that Muslims cannot interact with evolving realities [14].

Wael B. Hallaq, a professor of Islamic law at McGill University, sought critically and academically to dismantle the stagnation of *ijtihad* tradition in the legal community. He explained how *ijtihad* actually worked in the development of Islamic legal discourse. Joseph Schacht concluded that the door to *ijtihad* was not closed [15]. However, Hallaq's view was refuted and criticized by Sherman Jackson and Michelle Hebink who proved otherwise. For a wide opening in the door of *taqlid* (blind following) [16], borrowing Jackson's words, Hallaq's thought for both was considered too much because the *taqlid* regime has become a global phenomenon.

Hallaq finally responded to the objections, criticisms, and counter-arguments just mentioned and acknowledged that Islamic law has predominantly lost the spirit of *ijtihad*. However, there are still people who practice *ijtihad* [17]. As previously mentioned, Islamic thought, in general, especially the phenomenon of the supremacy of Islamic law and stagnation is an undeniable reality. Islam often has conflicts with the reality of the necessities of life in modern world society. According to the sociology of law approach, the law (i.e. Islamic law or *shariah*) should move in line with the development of society, but Islamic law does not.

The methodological framework tools that really open up opportunities to

promote Islamic reform must be followed under the rules of sacred texts interpreted by the early and middle-aged Muslim scholars. Therefore, notably, Islamic law is still developing and still alive but the set of methods and epistemological foundations seem to have stopped. It makes Islamic law stagnant, powerless, constantly evolving, and losing its responsiveness in dialogueing with realities that demand change and coordination [16]. As mentioned earlier, the emergence of the terms progressive Islam and progressive *ijtihad* has been explained by the following statement: *"The Present generation of Muslims, like the many preceding ones, faces the option of reproducing meaning intended for earlier generations or of critically and selectively appropiating traditional understandings to reinterpret the Qur'an as a part of the task of reconstructing society"* [18].

The Institute for Defense and Strategic Studies (IDSS) held a seminar on "Progressive Islam and the State in a Contemporary Muslim Society" at Marina Mandarin Singapore, with speakers Ashgar Ali, Abdullah Saeed, Syed Hussein Alatas, Ibrahim Abur Rabi, Alparsalan Acikgence, Syafi'i Anwar, Julkipli Wadi, Chandra Muzaffar, and Sayyid Farid Alatas. The theme selection was motivated by the need to examine the progressive aspects of the rise of Muslims. The rebuilding of Islam itself, since the 19th century, has chosen a rational and international approach to investigate the problems of Islamic society [15].

Currently, research and exploration of the progressive aspect of Islam are based on the recognition and need for two things. One of them is to be creative and proactive in responding to negative assumptions about the world that Islam considers a religion. A huge gap between the Islamic world and the Western world emerges due to the slow pace of keeping up with the times. Secondly, one of the strategies to eradicate radicalism, which is always blamed on Islam, empowering progressive elements and aspects of Islamic society, and the gap between the Islamic world and the rest of the world, is an acknowledgment that must be filled. These two things are the basis for the urgency of progressive Islamic education and socialization [15].

The IDSS Director Barry Desker and the Malaysian Foreign Minister Zainul Abidin Rasheed agreed that it is imperative to nurture, explore, and develop this progressive aspect of Islam, which is not even new. In reality, the Islamic world has endless traditions. According to Rasheed, during the Ottoman dynasty in 1924 such progressive aspects of research and development provided a rational and reasonable approach to managing global relations patterns. While Desker offered a strategy of reliving the progressive spirit of the pioneering Muslims, Rasheed did the concept of re-imagining Islam as a civilizational project that carries a cultural heritage of both progress and reform [19].

Progressive *fiqh* is also known as the modernity of Islamic law. The term modern literally means new, present, final, current, and so on, as the opposite of ancient [20]. Modernization is very meaningful, such as the images of the direction of change and development possibility. The limitations of modernization are often only emphasized on changes in the technical and economic sectors. However, as Manfred Halpan said that the modernization revolution is actually everything that was previously rife in society, including the political, social, economic, intellectual, religious, and psychological systems accompanied by system transformation [21].

This change also occurs in the field of thought (intellectuality). For example, the modern age was marked by the triumph of rationalism, empiricism, and positivism hegemony over the religious doctrines of the 17th century. Scientific and empirical methods have brought human life into a modernist atmosphere [22]. Therefore, modern society is an intellectually rational society based on logical and empirical science and technology. *Fiqh* as an ethical norm is a product of Maqashid's scientific ideas. As a result of scientific analysis, *fiqh* is inseparable from logical and empirical thinking. Therefore, in the study of Islamic law, all disciplines have an important role in taking and reducing legal findings. In this context, a synergistic effect is needed between science, philosophy, and religion (texts). It is necessary for the responsive development of modern *fiqh*, especially when formulating a new *fiqh* proposal as a *fiqh* methodology. The integration of science and religion (texts) is undeniable as indimaji law (in Alcaladawi language) to answer modern legal problems because adhering to textual language analysis alone is not enough to analyze current legal phenomena.

The formulation of progressive *fiqh* needs to pay attention to the following concepts: *first*, objectification. *Fiqh* is no longer based on the tyranny of school ideology but is understood more as a response to the dynamics of real-life and community problems. Therefore, a comparative approach is needed to formulate *fiqh*. In this case, *fiqh* must interpret real objects (*fiqh waq'i*) rather than absurd and unrealistic ones (*fiqh khayâli* or *fiqh iftirâdhî*). *Secondly*, complementary. *Fiqh*, as a product of *maqashid* interpretation, does not have to be positivist. Therefore, it looks to be in antagonism in reality. *Fiqh* and reality need to complement each other: *fiqh* without reality does not exist (*mafqûd*); reality without *fiqh* is unethical; because *fiqh* is basically an ethical norm.

Thirdly, induction. So far, *fiqh* always comes from deductive reasoning and has deviated from the text of reading reality. The results are rarely black and white to judge reality (not to mention blame). The texts are finite, while the reality is not. How can something finite explain another thing infinite? Therefore, to obtain legal status, one must read the guidelines and

objective reality and look for ethical and philosophical values in the texts. *Fourthly*, verification. *Fiqh* as a cultural product is certainly not final and static. Therefore, freezing *fiqh* is an ironic attitude, contrary to the noble (elasticity) of Islam. Ideally, jurisprudence should always be tested both theoretically and methodologically to create historically-based Islamic law for existing social and cultural realities by conveying ideological content to have a responsive and humanistic attitude [23].

Results and Discussion

Birth is a legal event with many legal consequences because it creates inheritance, family, trust relationships, and others related to the emergence of new legal subjects to the world with all their status and position before the law. Thus, the presence of children plays an important role in family life. A child, whatever he is, from whoever he is, and for whatever reason he exists, must receive legal protection. In fact, under the law, children are discriminated against in terms of their positions and rights that accompany them. The distinction applies between legal children and illegitimate children because the law distinguishes the legal consequences of legal and illegitimate marriages or just relationships out of wedlock. Marriage is a special contract, between a man and a woman, under the law for establishing husband-wife and family lives.

In Indonesia, the provisions governing the relationships between husband and wife and between parents and children are present in the UUP, which with its religious spirit does not expect a pattern of living together between men and women without a legal marriage. Therefore, the child born is expected to be a product of a legal marriage according to law. The UUP does not regulate the recognition and legalization of illegitimate children so that children born out of wedlock forever become illegitimate children. Thus, according to the UUP, children are identified only as legal children and illegitimate children.

Furthermore, the preparation of the KHI)as a guide in deciding cases in the Religious Courts follows the provisions of the law as referred to in article 99 letter a and article 100. Different things of the colonial law products, which are still valid in Indonesia, are the Indonesian Civil Code. Philosophically, the Civil Code is based on the ideology of freedom, which allows men and women to live together neither with a legal marriage nor with regard of the status of children born. Therefore, the Indonesian Civil Code regulates the institution which recognizes and legitimates illegitimate children so that children born out of wedlock can be called illegitimate children, even legitimate children [24].

Creating a civil relationship between an illegitimate child and his biological father requires initial recognition following the procedures

prescribed by law or court decisions. In this case, verbal confessions do not have any power. In recognizing an illegitimate child, there is a relative relationship between the recognizing and the recognized one. In terms of legal consequences, children recognized by their biological fathers have the same position and rights as legitimate children. In fact, children born out of wedlock can be recognized as legitimate children when the parents are legally married. According to the Indonesian Civil Code, the relationship between men and women without a legal marriage bond is justified by law.

In the UUP, the position of children born out of wedlock is regulated in the provisions of Article 43 paragraph (1) of the UUP only, which states "a child born out of wedlock only has a civil relationship with the mothers and the mother's family." The UUP only distinguishes legitimate and illegitimate children and does not regulate the institution of recognizing and legitimating children. As a result, born out of wedlock, the child is forever illegitimate.

The provisions of Article 43 paragraph (1) of the UUP amended by the Constitutional Court Decision Number 46/PUU-VIII/2010, which states that "a child born out of wedlock only has a civil relationship with the mother and the mother's family." Supposedly, it reads, "a child born out of wedlock only has civil relationships with the mother, the mother's family, and a man proven by science and technology and/or other evidence having blood relation and civil relationship with the child."

The Constitutional Court's decision became a matter of debate and eventually proved difficult to implement because it contradicted various other legal systems, such as customary inheritance law, Islamic inheritance law, and Indonesian inheritance law (civil code). The problem, therefore, is not in the substance of the pros and cons only but also in the implementation. Meanwhile, the Indonesian Act No. 23 of 2006 concerning Population Administration amended by the Act No. 24 of 2013 governs the recognition and legalization of illegitimate children. Unrecognizable children, according to Act No. 23 of 2006, are those illegitimate in a narrow sense, while recognizable ones, according to the Act No. 24 of 2013, are those born from unregistered marriages.

The recognition process in the two laws and regulations does not go through a court process, and there is no certainty for getting a grant. However, these rules in particular only apply to Christians, not to Muslims, because Islam does not recognize the recognition and determination of children. In Islam, the only way to protect an illegitimate child resulting from an unregistered marriage is to submit a marriage certificate to the Religious Court. Not all applications are granted due to the requirements specified in the UUP and the KHI. As a result, the Religious Courts may not grant every request for *ithbat nikah* [25].

Research related to determining children's parentage at the Mojokerto Religious Court, Malang Regency Religious Court, and Surabaya Religious Court showed that several cases were granted, while others were not. It means that judges have their own beliefs in determining and based on evidence and the facts of the case [26]. Efforts to see the legislation and the juridical implications of these stipulations certainly require critical analysis to come up with a constructive analysis.

At the Mojokerto Court, during 2020, there were 483 cases of filing for children's parentage, 10% of which were not granted due to technical violations and are dynamics that occur at the Religious Court. At the Malang Regency Religious Court, there were 68 applications for children's parentage. Most of them were granted and minuted. Some cases not granted were administratively flawed. Meanwhile, at the Surabaya Religious Court, during 2020, there were 91 cases of filing for children's parentage [26].

After the UUP was issued, all marital affairs and related services were subject to its provisions to accommodate the community's interests in a fair and certain norm. The Act and its implementing regulations (Government Regulation No. 9/1975) guarantee that the provisions will be effective. However, some have been regulated neither in the UUP nor in the Government Regulation Number 9 of 1975, namely child legislation, rights and obligations between parents and children, marital property, and guardianship. It means that the provisions in the UUUP and its implementing regulations have not been effective.

For those ineffective, according to the provisions of Article 66 of the UUP, old laws with various rules can be applied, such as Customary Law, Islamic Law, Indonesian Civil Law, and others. The plurality describes a situation where two or more legal systems exist side by side in a social field. The aim is to explain the existence of two or more social control systems that apply in society or illustrate situations where two or more legal systems interact in social life or conditions where more than one legal system works side by side in activities and relationships in society [27].

Based on this provision, illegitimate children still refer to the old laws and regulations because there are no provisions in Government Regulation No. 9 of 1975 for implementing the UUP. Therefore, there are many illegitimate children with various backgrounds. a) An illegitimate child from a breakup between a man and a woman, both native Indonesians and Muslims. b) An illegitimate child resulting from an unregistered marriage between a man and a woman who are native Indonesians and Muslims. c) An illegitimate child resulting from an extramarital relationship between a man and a woman who are native Indonesias and Christians or other than Islam. d) An

illegitimate child from a man and a woman who are native Indonesians and Christians or non-Muslims. e. An illegitimate child from extramarital relations between an Indonesian man and an Indonesian woman of European or Chinese descent.

From these various cases, to get legal protection, an illegitimate child needs to have a civil relationship with his biological father through recognizing and determining the child. In the state law, there is no difference between an illegitimate child resulting from an illegitimate relationship with an illegitimate child from a religious marriage (unregistered marriage or in a church only). In practice, they are still considered illegitimate children. So that the child's birth certificate, whether the parents did marry in a church or unregistered marriage, only includes the name of the mother without that of the biological father. As a result, the child under state law is an illegitimate child.

Recognition or determination of an illegitimate child, as in the five cases above, will conflict with several related instruments that regulate the position of an illegitimate child, as well as the recognition and determination of an illegitimate child as explained below:

1. Law Number 1 of 1974 concerning Marriage

   Based on the UUP, there is no chance for an illegitimate child to have a civil relationship with his biological father. Article 43 paragraph (1) of the UUP states that a child born out of wedlock only has a civil relationship with the mother and the mother's family. Besides, the UUP does not recognize the recognition and legalization of illegitimate children. As a result, children born out of wedlock will forever occupy the position of illegitimate children.

   On the other hand, there is no protection for any illegitimate "prospective" child in the UUP, such as marrying off a woman pregnant out of wedlock to the biological father of the child in her womb or another man. It is solely to protect the child born to remain a legitimate child. The child will have a birth certificate in the names of the mother and of the man to whom she married. It means that the child is legitimate. According to the UUP, a legitimate child is born or the result of a legal marriage. Thus, the father of a legitimate child is not always the biological father.

   After the Constitutional Court Decision No. 46/PUU-VIII/2010, an illegitimate child can have a civil relationship with his biological father by submitting to the court to be scientifically proven by DNA testing. In other words, it must go through the process of proof in court. However, when the application is made, it is still not clear whether the position of the illegitimate child is the same as a legitimate one or whether or not he is recognized as an illegitimate child. The conclusion of the decision of the Constitutional Court is difficult to implement in

practice because it conflicts with other legal systems, such as inheritance law applicable in Indonesia, customary inheritance law, Islamic law, and inheritance law in the Civil Code.

2. The KHI

   In the KHI, there is an opportunity to create a civil relationship with the biological father through *itsbat nikah*. The KHI protects a limited form because not all applications for *itsbat nikah* can be granted. When an application is granted, automatically, the child born from an unregistered marriage becomes a legitimate child.

3. The Indonesian Civil Code

   In the Civil Code, legal instruments in the form of recognition and legitimation of children are provided to protect illegitimate children. If the child's recognition is carried out by his biological father with the consent of his mother, then the position of the illegitimate child is an illegitimate child who is recognized. Even if the parents later legally marry, automatically the illegitimate child who is recognized turns into a legitimate child.

4. Law Number 23 of 2006 concerning Population Administration

   According to Law Number 23 of 2006, illegitimate children can obtain recognition and legitimacy under certain conditions, especially for Indonesian Christian groups. In this law, an illegitimate child recognizable is not an illegitimate child from an unregistered marriage. Law Number 23 of 2006 still provides a broad meaning in recognizing illegitimate children, similar to the adoption arrangements of recognition institutions in the Civil Code.

5. The Indonesian Act No. 24 of 2013 concerning the Amendments to the Indonesian Act No. 23 of 2006 concerning Population Administration.

   According to the Indonesian Act No. 24 of 2013, illegitimate children from Christian religious marriages can obtain child recognition and legitimation under certain conditions, especially for Indonesian Christian groups. the Indonesian Act No. 24 of 2013, which is an amendment to the Indonesian Act No.23 of 2006, contains a crucial change in recognizing illegitimate children who were originally "illegitimate children" (without ties to religious marriage) to be limited only as illegitimate children from religious marriages.

   The various provisions governing the position of illegitimate children or those governing the recognition and legalization of illegitimate children show the differences between one and the other. It is not clear which regulations should be applied when dealing with the recognition or justification of children out of wedlock. Illegal children in religious marriages (unregistered marriages)

between men and women who are both Indonesian natives and Muslims will experience difficulties when they do recognition and legitimation through the Indonesian Act No. 23 of 2006 or the Indonesian Act No.24 of 2013. For example, an illegitimate child resulting from a marriage between a man and a woman who are both Indonesian "Chinese descent" that must be recognized and determined with the Civil Code will find unclear legal provisions when using the provisions of the Indonesian Act No. 23 of 2006 and the Indonesian Act No. 24 of 2013.

Based on the description above, the question that arises is which law applies to the recent recognition and determination of illegitimate children? If the provisions of the Indonesian Civil Code still apply as in the case of inheritance and marital property laws, which are subject to the Indonesian Civil Code, such as Chinese Indonesian descendants, the provisions regarding the recognition and legitimation of illegitimate children are also still valid. The next issue is "who are the legal objects of the Indonesian Act No. 23 of 2006 in conjunction with the Indonesian Act No. 24 of 2013? The results of the research on the provisions for recognizing and legitimating children as illegitimate in the law, whereas, were applied to Indonesian Christians and Indonesian Chinese. The other question is "who are the objects the provisions of Article 43 paragraph (1) of the UUP amended by the Constitutional Court Decision No. MK 46/PUU-VIII/2010?"

Thus, in Indonesia, there is no uniformity in efforts to protect illegitimate children from obtaining their civil rights with their biological fathers. There is a plurality of rules where the rules and regulations overlap, causing legal uncertainty and inequality in the recognition and determination of children out of wedlock. In addition, there is no uniformity in the object of recognition, causing ambiguity in illegitimate children who can be recognized and determined. According to the Civil Code, illegitimate children who can be recognized are those in a narrow sense, excluding illegitimate children and those from incest. Provisions in the UUP after the decision of the Constitutional Court No. 46/PUU-VIII/2010 still give rise to multiple interpretations for illegitimate children who can sue for civil relations with their biological fathers. On the other hand, according to the Indonesian Act No. 23 of 2006, illegitimate children who can be identified are the same as those in the Civil Code. According to the Indonesian Act No.24 of 2013, illegitimate children who can be recognized are those from unregistered marriages. Likewise, in the practice of itsbat nikah, illegitimate children that can be legitimated are those from unregistered marriages.

The formulation of policies and legislation on family law in Indonesia, especially those relating to marriage law, has gone through phases, processes, and a long history. In the

period before independence, there was already an ordinance on registered marriages issued by the Dutch government in 1937. Furthermore, in the era of independence, the idea of marriage regulation resurfaced, especially the discourse on the need for marriage arrangements based on religious rules. Then, during the New Order government, the UUP was promulgated. Especially for the Indonesian Muslim community, in addition to this marriage law, there was also the KHI which was ratified through Presidential Instruction (Instruksi Presiden or Inpres, *Ind.*) No. 1 of 1991, which also become a reference for religious judges in deciding cases in the Religious Courts. In addition, the Draft on the Act on Applied Law for the Religious Courts for Marriage (Rencana Undang-Undang Hukum Terapan Pengadilan Agama or RUUHTPA, Ind.) has also been submitted to the Indonesian House of Representatives, reinforcing the existing Compilation of Islamic Law.

Based on the historical course of the formulation of the UUP in Indonesia, there are three interests, namely matters of religion, the state, and women and children, all of which influence and color the formulation of the UUP in Indonesia. That way, the laws and regulations formulated always try to accommodate these various interests, even though they cannot satisfy all parties. On that basis, in line with the development of the discourse on freedom, equality, diversity, and democracy, which are now often referred to as a gender perspective, pluralism, human rights, and democracy, in this connection, the attraction that is most perceived between religious interests and the interests of advocates of human rights, in this case especially related to the position, existence, rights, and obligations of women and children.

The discourse on freedom and equality that first appeared in Europe more than two centuries ago, but has only become global since the United Nations Declaration of Human Rights (UNDHR) in 1948, has become increasingly felt, including in Indonesia since the Cairo Declaration in 1990 and the Vienna Action Program in 1993. At the beginning of this century, proponents of this discourse confronted the West in response to its aggressiveness and colonial ideology. But, today, the discourse is aimed at suing itself by questioning the nation's primordial and patriarchal culture (domination of men over women) and even the interpretation of Islamic religious norms and teachings, which are carried out by Muslims themselves. Therefore, according to the proponents of the latter discourse, it is necessary to do a serious rethinking of Islamic law with a comprehensive approach called progressive law that at least considers or even accommodates four approaches at once, namely gender, pluralism, human rights, and democracy [28].

Therefore, the idea to review the teachings of Islam again by

reinterpreting it so that it can be following changes that occur in society emerged, known as the idea of contextualizing Islamic law. This idea stems from a basic assumption that the existing *fiqh* provisions seem so textual and no longer suitable, thus requiring a more progressive study of *fiqh*. This idea emerged in the early 19th century, initiated by several reformers in Egypt with the slogan “the importance of reopening the door of *ijtihad*.”

The problem facing the idea of contextualization and reopening the door of ijtihad was a controversy that arose regarding the meaning of contextualization used. On the one hand, contextualization is understood as an open attitude to connect Islamic religious texts (the Holy Qur'an and Sunnah) with the context of the dynamics, demands, and changes in people's lives that are so complex, which should be done, because Islam will always be according to all times and places. However, on the other hand, there is a concern among particular circles about the rationality of modern people who are, sometimes, accused of making them slip away from Islamic teachings by trying to rationalize issues that already have a tough legal basis in the texts of the Qur'an and Sunnah. They think that the texts are no longer relevant but must conform to the practice of people in modern times to achieve the goal of shari'ah, namely the benefits of the people. For this purpose, they argue that concerning public matters, the public mind has the authority to amend some religious provisions. Therefore, if there is a teaching text contrary to public reason, then reason has the authority to edit, modify, and perfect it. Among the examples, according to them, are verses on polygamy, interfaith marriage, iddah, interfaith inheritance, and others. These verses, according to them, instead of being able to solve human problems, can even become part of the problem that must be solved.

The thought to review Islamic teachings again by making new interpretations emerged to be in line with the complexity of changes in daily lives and achieve the Sharia objectives, namely the benefits of the people. It seems that this idea and movement is unavoided, provided that it goes with the motivation and purpose of aligning the texts of the Qur'an and Sunnah with the dynamic context of human life in the contemporary era and reviewing the conclusions drawn by the mujtahids in earlier times, especially in the field of family law. Renewal in this sense needs to be carried out continuously to maintain the dynamics of Islamic teachings.

The progressive *fiqh* above, in practice, in Indonesia, views that the Islamic law reform movement in Indonesia emerged at the end of the 19th century. The main initiators was A. Hasan, a figure of an Indonesian Muslim mass organization called the Islamic Unity (Persatuan Islam or PERSIS, Ind.) who urged Indonesian Muslims to return to the Qur'an and Hadith. Besides,

Muhammadiyah also called for the linkage between the Qur'an and Hadith that are authentic with the dimensions of *ijtihad* and monotheism in a unified whole. The spirit of progressive *fiqh* (Islamic law) in Indonesia was followed by Hazairin, who in the early 1950s formulated a national *mazhab* (school of thought), which, although guided and supported by the Shafi'i *mazhab*, limited its scope to non-worship rulings that had not yet been accommodated by the state into law [29].

In the next period, the progressivity of *fiqh* emerged from some Indonesian thinkers on Islamic law such as Harun Nasution, Nurkholis Madjid, Quraish Shihab, Said Aqil Siraj, and others. In their views, the progressivity of *fiqh* (Islamic law) in Indonesia must interpret Islamic teachings as a proportional functionalization of reason. The progressivity of *fiqh* (Islamic law) in Indonesia has given rise to textual-traditional thinking, namely placing the text of the Qur'an and Hadith as the primary basis in deciding all behaviors and activities of human life by giving more portion to the use of reason. The progressivity of *fiqh* (Islamic law) in Indonesia must be able to answer and solve all the problems that exist in the contemporary era [30].

The emergence of *fiqh* ideas and thoughts that have a progressive dimension in Indonesia has been able to create a construction that Islamic law in the contemporary era has given birth to the concept of *fiqh* which has dimensions of Indonesian national locality. Hasbi As-Shiddiqi and Hazairin, the central figures of *fiqh* in Indonesia, formulated that *fiqh* must have a responsive and progressive attitude in alleviating the problems faced by people, including issues related to humanity, justice, discrimination, oppression, gender, and the state [31] [32].

The formalization of the progressivity-based concept of *fiqh* in the legal system in Indonesia has produced several important laws and regulations which formally and materially have a juridical content of Islamic law that has been acculturated to the conditions of Islamic society in Indonesia, such as the Islamic Marriage Law. Besides, there are also other regulations under the law, such as Government Regulations, Presidential Instruction, the Supreme Court Regulations, the Compilation of Islamic Law and the Compilation of Shariah Economic Law. It must be admitted that not all the ideas and thoughts of the initiators of the reform of Islamic law above can be realized into formal law. However, the spirit of their struggle in creating the national madhhab has promoted the formation of the formalization of Islamic law into the legal system in Indonesia [33].

The description of the need for progressive *fiqh* in family law problems (in this case regarding the determination of child parentage) is very important because, according to research findings, it shows that the authority of the Religious Courts and judges'

considerations in determining the parentage of children are still deemed not to accommodate the best interests of children [26]. This situation is evidenced by the judge's consideration which is only supported by the Compilation of Islamic Law and the authority of the Religious Courts that are still weak.

In its journey, Indonesia has conducted a national consultation on family law which aims to build consolidation and remapping of family law in Indonesia, as well as a space to build joint work and build family law recommendations that have the principles of justice for children. In Indonesia, a country with the largest Muslim population, Islam and its teachings have relatively influenced various laws and regulations, including family law. Currently, family law in Indonesia itself refers to the UUP. Especially for the Muslim community in Indonesia, apart from the UUP, the KHI ratified through Presidential Instruction No. 1 of 1991 also became a guideline by judges. The Compilation of Islamic law justified by the late President Soeharto consists of 299 articles containing the law on marriage (*munakahat*), law on inheritance (*mawarith*), and law on endowment [34].

Reflections and recommendations from several children-care organizations or institutions have found indications of the application of Islamic law that is detrimental to children. The application of Islamic law that harms children is related to the handling of cases of unregistered marriages and divorce. Children often face various obstacles when solving these cases. Judges are considered making decisions that are not in favor of children [26].

In the context of children as family members, a women's organization in Indonesia stated that the existing marriage law often denies the existence of children, especially concerning cases of children protection by parents and interpretations of Islamic religious leaders who are gender-biased (discrimination against women and children) regarding the construction of the children status of being born out of wedlock, in maternal guardianship, and inheritance. Regulations on these matters are considered to provide neither justice for children nor an overview from the perspective of justice (*fiqh* and progressive law) [35].

Law enforcement institutions in Indonesia, particularly the Supreme Court and the Religious Courts, have recognized the need for reform of family law in Indonesia. Judges in the field still need to improve their capacity to be fairer in deciding cases. On the other hand, it must also be recognized that, legally, both in the articles of the UUP and those of the KHI, there is a difference (ambiguity) in the formulation regarding the role, status, rights, and obligations in terms of children's position [26].

Based on the explanation above, it becomes an important note in Indonesian history that several collective

agreements and problem mapping have been made by several elements of the Muslim community, related to the framework of justice and equality in the implementation of Islamic family law in Indonesia. These four things cover issues such as divorce, marriage, inheritance rights, and child guardianship. In determining a child's parentage, a judge considers the benefit of the community in general and the benefit of the child in particular. Besides, the judges in deciding cases must use the applicable positive law, namely the UUP and the KHI, and also the Qur'an and Hadith.

The term “born out of wedlock,” in Islamic law, means born from parents either with a legal marriage or without any marriage contract. Children born from such marriages or born from adultery are considered illegitimate or are commonly called adulterous children (*walad al-zina*). The lineage of illegitimate children to their biological mothers is legal and undisputed, while that to their biological fathers has sparked heated debate among Islamic jurists.

In the *athar* (practices) of the Prophet Muhammad’s companions, the Caliph Umar ibn al-Khattab made a will to his people to always treat the illegitimate children well [36]. However, the absence of lineage from the biological father of such children, which many scholars have mentioned, will result in the permission for a biological father to marry his out-of-wedlock daughter. It is the Shafi'ite and Maliki schools that allow this to happen even though the law is *makruh* (disliked). Not only is a biological father allowed to marry his illegitimate daughter, but the two Imams even allow a biological father to marry his illegitimate daughter's sister, granddaughter, and niece on the grounds that they are not related to the biological father. Meanwhile, according to the Hambali school, even though the two are not related by lineage, it is forbidden for a biological father to marry his out-of-wedlock daughter [37].

A similar opinion supporting Hambali’s thought was also stated by Urwah bin Zubair, Sulaiman bin Yasar, Al-Hasan, Ibn Sirin, Nakha'i, and Ishaq who said that an out-of-wedlock child was still assigned to his/her biological father, even though there was no marriage with his mother. So there can be no marriage with both of them. This opinion is quoted again by Ibn Taimiyah from the Hanbali school who stated that if there was a claim or acknowledgment *(istilhaq)* from the biological father, a child born outside a marriage can be legalized to have lineage with his/her biological father. This means that such a child is entitled to a living, guardianship and inheritance. Urwah bin Zubair and Sulaiman bin Yasar once said that *"A man who comes to a child and claims that the child is his and claims to have been committing a sexual intercourse with a mother resulting in the borne of the child and no other man admits it, then the child is his son"*.

Regarding the process of lineage determination between a biological father (a man who have committed adultery with a child’s biological mother) and his out-of-wedlock child, classical

and contemporary scholars have dissenting opinions *(ikhtilafiyah)*. Some of them are as follows [38]:

1. The majority of scholars agree that if a child is born to a married woman or to a slave and the woman's husband or the slave's master does not deny the lineage of the child and then another man who had committed adultery with the woman or the slave comes to admit that the child is his, the latter man's confession cannot be justified, and the child is still related to the husband and not to the latter man.
2. According to Ibn Abdil Barr, the majority of scholars agree that regarding every child born to a married woman, it is clear that the child has a kinship relationship with his/her father without any reason. Such does not apply if the father or the woman's husband rejects the *nasab* (lineage) relationship with the child in the procedure as described in the discussion of *li'an* (denial by swearing for God's condemn).
3. According to Ibn Qudamah, the majority of scholars agree that if there is a married woman and then comes another man acknowledging that the child raised by the woman is his biological child, such confession cannot be justified.
4. Ibn Hajar al-Haitami stated, quoting Imam Shafi'i, that when referring to one of the hadiths saying *'alwaladu lil firash'*, it contains two main definitions: (1) the lineage of a child born from a legitimate husband and wife is certainly attached to his/her biological father unless the biological father denies the child through a special procedure, say by conducting *li'an*. This means that such denial is acceptable and (2) under certain conditions, if in the future there is a problem regarding the determination of the child's lineage between the husband as the legal owner of the bed and another man who has committed adultery with the wife of the legitimate husband, the child's lineage will be connected to the legal owner of the bed.
5. Furthermore, Urwah ibn Zubair, Salman ibn Yasar, Abu Hanifah, Hasan al-Bishri, Ibn Sirin, al-Nakah'i, Ishaq ibn Rahuyah, Ibn Taimiyah and Ibn al-Qayyim presented ttheir opinion that an out-of-wedlock child can still be associated with a man who had committed adultery with his/her mother provided that the man is willing to admit it and that the woman does not have a husband and is not a slave.
6. As quoted by Abdul Aziz al-Fauzan and narrated by Ali ibn Asim, Imam Abu Hanifah stated firmly that to his view it does not matter if a man committed adultery with a woman so that the woman became pregnant, then he married her when she was pregnant and the husband was silent about the incident, in this case the child's lineage can also be associated to the man.
7. The scholars of the 4 major Sunny mazhabs (schools of thought) and

the scholars of al-Zahiriyyah argue that a child of adultery can only be bequeathed to his/her biological mother.

The orthodox Islamic jurists are unanimous in the opinion that an illegitimate child, i.e. a child born of adultery, has only his mother's lineage. Traditional Islamic jurists from the Hanafi, Maliki, Shafi'i, and Hambali schools argue that they have no lineage with their fathers. However, al-Hasan and Ibn Sirin saw that the illegitimate child has a lineage with his biological father who has been sentenced to stoning, while Sulaiman ibn Yasar said that an illegitimate child has his/her father's lineage [39].

The opinion of the majority of Islamic jurists regarding pregnancy is based on clear evidence, namely from the pregnancy itself, birth, to breastfeeding. Meanwhile, the lineage of a child to his biological father is difficult to establish, especially if the mother is married to more than one man. Therefore, the main problem of the lineage of children born out of wedlock to their parents in classical Islamic law is a matter of proof. The development of science and technology has influenced many parts of Islamic law, including the issue of the lineage of children born out of wedlock (*zina*) with their biological fathers. The Islamic law says *al-hukmu tataghayyar bi taghayyur al-zaman wa al-makan wa al-ahwal*, meaning that legal opinion changes over time, place, and conditions. Based on this rule, *fiqh* experts or muftis must modify old legal opinions to meet the principles of justice and public welfare *(mashlahah)* [40].

In Arab Muslim communities, which mostly adhere to patrilineal kinship during the formulation of Islamic law, the lineage must adopt the principle of paternity. However, due to the lack of evidence, orthodox Islamic jurists had no idea of associating the paternity of a child born out of wedlock (*zina*) with his biological father. Therefore, they only associate the bloodline with the mother. In the view of progressive *fiqh*, the lack of evidence is the only reason why classical Islamic jurists did not associate children born out of wedlock (*zina*) with their biological fathers. Therefore, when a DNA test is proven to be a conclusive test of paternity for an illegitimate child, the rule of law regarding the lineage of an illegitimate child must accommodate the development of science and technology. If evidence, in the form of pregnancy, delivery, and breastfeeding for delivery, is as definitive as the DNA testing, children's lineage must be attributed not only to their mothers but also to their biological fathers.

Based on the progressive *fiqh*, which purposes to realize the principle of the best interests of the child, the Constitutional Court's decision number 46/PUU-VIII/2010 concerning children born out of wedlock states that legitimate children are those born from unregistered marriages or adultery. The reasons are, *first*, the legal procedure for determining the father of a child born from an unregistered marriage must go through marriage ratification to the

Religious Courts *(ithbat nikah)*. Therefore, when the Constitutional Court judge orders to prove paternity with scientific evidence, the decision tends to determine the paternity of illegitimate children born out of wedlock. *Secondly*, based on the hadith saying "Every child is born in a state of *fitrah* (purity). It is subsequently his/her parents who make him/her a Jew or a Christian or a Magian." This hadith means that children, both legitimate and not, are born free of the sins of others. They should not bear the sins committed by their parents. Besides, the Qur'an says that no one can bear any burden except those who commit. No child wants to be from adultery, which is morally and socially inferior. Attaching blame and sin to such a child who did nothing is injustice. They should be borne only by the parents for committing adultery, which is against the teachings of Islam.

Thirdly, a child, legitimate or not, as long as the father is identified, must be attributed to him/her. In Islamic law, not calling a child by his/her mother's name when his father is identified belongs to scientific knowledge. In addition, the inheritance law in Islam stipulates that blood relations (*nasab*) or lineage is one of the causes of inheritance other than closeness or marriage and liberation from a slave (*wala'*).

The emancipator (*mawla mu'tiq*) inherits the default from the heirs of blood relations. The inheritance rights of children born out of wedlock consisting of male and female heirs must pay attention to their position. They can be the heirs of the deceased father, grandfather, uncle, and others, depending on their positions from the deceased's. Based on the Constitutional Court's decision, the civil relationship enjoyed by a child born out of wedlock from his mother is also enjoyed by his biological father, as long as the relationship with his father is agreed upon. When a child born out of wedlock has inheritance rights to his mother, he also receives inheritance rights from his father.

It is one of the decisions of the Constitutional Court which has enormous implications for the Marriage Law, especially concerning the existence of a child's civil relationship from an extramarital relationship with the biological father. The Applicant was Hj. Aisyah Mochtar alias Machicha, accompanied by her son, Muhammad Iqbal Ramadhan. Both, respectively, are the ex-wife and a son of Meordiono, a former Indonesian Minister of State Secretary in the New Order era.

In essence, the Applicant examined the constitutionality of the provisions in the Marriage Law regulating the registration of marriages according to the laws and regulations and the provisions governing children born out of wedlock. The provisions are as stated in Article 2 Paragraph (2) of the UUP that "Every marriage is recorded according to the applicable laws and regulations" and Article 43 paragraph (1) of the UUP, which states

that “a child born out of wedlock only has a civil relationship with the mother and the mother's family.” According to the Applicant, the two provisions in the UUP contradict the 1945 Constitution Article 28B paragraph (1), which states that “Everyone has the right to form a family and continue their offspring through a legal marriage,” Article 28B paragraph (2), which states, “Every child has the right to survive, grow, and develop and has the right to protection from violence and discrimination,” and Article 28D paragraph (1), which states that “Everyone has the right to recognition, guarantee, protection, fair legal certainty, and equal treatment before the law.” The reasons for applying for a review of several provisions in the UUP are [41]:

1. Article 2 Paragraph (2) and Article 43 Paragraph (1) of the UUP are deemed to have created legal uncertainty resulting in losses for the Applicant, concerning the marital status and legal status of the child resulting from the marriage;
2. Based on the provisions of Article 28B paragraphs (1) and (2) of the 1945 Indonesian Constitution, the Applicant and her son have a constitutional right to obtain ratification of the marriage and the legal status of her son. The constitutional rights of the Applicant have been violated by the legal norms in the UUP that are clearly unfair and detrimental, given that her marriage was legal and following the pillars of marriage in Islam. Referring to the constitutional norms contained in Article 28B paragraph (1) of the 1945 Constitution, the Applicant's marriage following the pillars of marriage was legal but hindered by Article 2 paragraph (2) of the UUP. Legal norms that require a marriage to be recorded according to applicable laws and regulations consider her marriage invalid so that the status of the child born by the Applicant is illegitimate according to the legal norms in the UUP. So, it is clear that there has been a violation by the legal norms in the UUP against the marriage of the Applicant (that followed religious norms);
3. The consequence of the provisions of Article 28B paragraphs (1) and (2) and Article 28D paragraph (1) of the 1945 Constitution is that everyone has the same position and rights, including the right to obtain ratification of the marriage and the child legal status. The constitutional norm arising from Article 28B paragraph (1) and paragraph (2) and Article 28D paragraph (1) is equality before the law. There is no discrimination in applying legal norms because the way the marriage was carried out was different, and the child born from the marriage is legal before the law and is not treated differently. However, in practice, religious norms have been ignored by coercive interests, namely legal norms. The Applicant's marriage which was already legal based on the pillars of marriage and

Islamic religious norms becomes invalid according to legal norms because it was not registered according to Article 2 paragraph (2) of the UUP. As a result, these legal norms implementation affects the legal status of the child born from the Applicant's marriage to be a child out of wedlock based on the legal norms in Article 43 paragraph (1) of the UUP. This discriminatory treatment, of course, creates problems because the status of a child before the law becomes unclear and illegitimate. In fact, in the 1945 Constitution, it is stated that only abandoned children, whose parental status is not clear, are cared for by the state. And, different things are treated to the Applicant's child resulting from legal marriage, following the pillars of marriage and religious norms, is considered invalid by the Marriage Law. The 1945 Constitution does not require that something following religious norms is considered a violation of the law based on legal norms. Isn't this a violation of legal norms against religious norms?

4. The purpose and objective of the enactment of the Marriage Law are related to the registration of marriages, and children born from unregistered marriages are considered as children out of wedlock so that they only have a civil relationship with their mother. This fact has given legal uncertainty and has disturbed the feeling of justice that grows and lives in the community, thus harming the Applicant;
5. The UUP does not reflect a sense of justice in society and objectively-empirically has curtailed the constitutional rights of the Applicant as a citizen of the Republic of Indonesia to obtain legal certainty and be free from anxiety, fear, and discrimination related to marriage and the legal status of her child;

A quo decision examines the constitutionality of two provisions in the UUP which regulates the registration of marriages and children born out of wedlock. Concerning the constitutionality of marriage registration, the Constitutional Court sees the Marriage Law, which regulates the principles of marriage, does not include marriage registration as a factor that determines the validity of marriages and is not an administrative obligation required by legislation. Marriage validity is the conditions determined by the religion of each of the prospective bride and groom, while the obligation to register the marriage is an administrative obligation.

According to the Constitutional Court, the importance of administrative obligation, namely marriage registration, can be seen from two perspectives. First, from the perspective of the state, the recording is required in the context of the function of providing guarantees for the protection, promotion, enforcement, and fulfillment of the human rights concerned, which are the state's responsibility and must be

carried out following the principles of a democratic rule of law and outlined by the laws and regulations. Marriage registration is not intended as a limitation so that it does not conflict with the constitution because such restrictions are stipulated by law and carried out with the sole purpose of guaranteeing recognition and respect for rights and freedoms.

Secondly, the administrative recording carried out by the state is intended so that marriage is an important legal act in the life of the people concerned. It has implications for the very broad legal consequences in the future as perfect evidence with an authentic deed. Therefore, protection and services by the state related to the rights arising from a marriage can be carried out effectively and efficiently.

Conclusion

The legislative decisions on the parentage of children out of wedlock at the Mojokerto, Malang Regency, and Surabaya Religious Courts show that the authority of the Religious Courts in determining child parentage is based on Article 49 of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning the Religious Courts. Meanwhile, the judge's consideration in determining is based on the provisions of the KHI regarding the provisions for itsbat nikah and the determination of child parentage that are very strict. So, in this case, at the Mojokerto, Malang Regency, and Surabaya Religious Courts, there are still applications regarding child parentage that are not granted.

The legislative decisions on the parentage of children out of wedlock at the Mojokerto, Malang Regency, and Surabaya Religious Courts based on the perspectives of the principle of the best interest of child and progressive *fiqh* gave rise to a model of renewal that religion and the state must be able to unite the mission to provide a rule that implements the best interest of child and the progressive *fiqh* values. It is based on the laws and regulations governing children born out of wedlock and products of Islamic law, which have implications for legal uncertainty for children born out of wedlock.

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