



## A Quest for Marriage Guardian: Portraying Double Law on Children of Adultery in Indonesia

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**ABSTRACT:** This study aims to portray double (Islamic and Court) law on the legal status of children of adultery, and its consequence on determination of the marriage guardian. A quest for the debatable issue of the term 'children out of marriage' is addressed by using textual and contextual impetus of the double law, since it has resulted in contested queries among Muslims (and non-Muslim) in Indonesia to determine if the legal status of marriage will have possible consequences on possession of the civil rights and obligations. By using multi-Islamic-schools (*mazhabiyah*) and social advantages (*mashlahah*) as methodological gate, this study attempts to make a question of the central position of the Court Law 46/PUU-VIII/2010 on Marriage and of the need to prioritize the basic principles of *maqashidsharia* as a theological-social commandment for Muslims in Indonesia. The possible implication of this study is that a judicial amendment for the Law on Marriage is needed to make sure a possible way out of the contested legal status of children of adultery in Indonesia.

**Keywords:** marriage guardian, Islamic Law, Court Law, children of adultery

### I. INTRODUCTION

A marriage, with its legal-formal procedures, had been always contested with theological discourses. The concept of marriage has special position in Islam as mentioned in some verses: QS. Al-Dzariyat: 49 and QS. Al-Rum: 21. In KHI Ch. 3, the marriage is aimed to "build a peaceful, loved, and blessed household" (*membangunrumah tanggaskinayah, mawaddah, danrahmah*). The Islamic law also emphasized on the goal of marriage, i.e. to breeding (*tanasul*), in order to build a boarder network of Muslims family and—as mentioned in QS. Al-Rum—to realize the Greatness of God's creature. Al-SayyidSabi (2010:5), and law state, the conditions in which a marriage must be established not only to meet a requirement of civil status, but also to provide a very strong transcendental contract (*mitsaqanghalidza*). In Islamic perspective, a marriage need to fully comply with some procedures, including terms (*syarat*) and principles (*rukun*), in order to get a theological approval as legal contract (Anonymous, 1998).

The principles of marriage, as mentioned in Compilation of Islamic Law (KHI/Kompilasi Hukum Islam) Ch. 14, included: "The accomplishment of a marriage needs some requirements: (1) prospective husband, (2) prospective wife, (3) marriage guardian, (4) two witnesses, and (5) approval (*ijabqabul*).” Meanwhile, the terms of marriage, as issued in KHI Ch. 15/V. 1 and 2, Ch. 16/V. 1 and 2, Ch. 17, included every condition tied with basic principles (*rukun*) of marriage and other terms outside the conditions but determining the legal status of marriage (Al-Siba'iMushthafa, 2009:5-6).

However, today's debatable issue is the condition of marriage guardian (Syarifuddin, 2005:90), from whom the legal status of marriage contract (*akadnikah*) is determined. Due to the intense interconnection between marriage guardian and genealogical linkage, it is important to consider about the content of KHI Ch. 99 issued: 'A legal child is one born of the legal marriage or of legal intercourse between couples'. This chapter clearly leads us to understand some boarder issues on why, what, and how the genealogical linkage must be in the recent cases.

The interpretation of the term a child is one born of in that chapter is also connected to another chapter (Ch. 53) in KHI issued: "(1) A woman who is pregnant outside marriage could be made to marry with a man who caused her pregnant; (2) A marriage with that woman could be undertaken without having to wait for her childbirthing; and (3) By marriage before her childbirthing, it is no need to undertake another marriage even she had childbirthed Anonymous, 2007:31)".

The Chapter 53 implied that a legal child is one born of legal marriage, either that pregnancy was caused by legal marriage or by other than legal marriage (for instance, after her mother divorced from the first

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husband or after her first husband died). The understanding of Ch. 99 and Ch. 53 leads us to final assumption that a child of adultery, who was born after a man (his/her father) get married with a woman (his/her mother) from whom he has engaged in adultery, can get married with making that man as his/her marriage guardian.

However, after the Court Law 46/PUU-VIII/2010 issuing the legal status of children outside marriage, a problem of the children of adultery has been contested among Indonesian people. The Law 46/PUU-VIII/2010 is a revision of the Law Ch. 43/V. 1/1974 on Marriage which declared: "A child who was born outside marriage has civil relationship with her/his mother and his/her mother's family, and also with his/her biological father after being proven with technological devices or other legal evidences."

The Court Law 46/PUU-VIII/2010 suggested that a child outside legal marriage possibly include those who had never been included in the category of legal child according to the Law No. 1/1974 on Marriage and President Instruction No. 1/1991 on KHI. It is because the Court Law brings the status of children into civil, not criminal relationship. After the Court Law has been legislated, the status of children of adultery in its all forms, either being or not possibly proven by technological devices, is legally admitted, and his/her marriage guardian could be his/her biological father.

The purpose of this research is to try to cope with the double describe contestation law (Islamic Courts) in dealing with the status of natural child. Analysis of Islamic law will eventually be used to determine whether the Court of Law is compatible with Islamic law on the procedure of legal marriage. To understand the problem dormitory of the legal status of children, this study will highlight only the central position of guardian of marriage, because it is associated with determining the linkage pedigree, both in Islamic law or the Court, between children and their parents.

## II. Method

Based on the background and purpose of writing, the method of writing this article is to qualitative analysis based on library studies in the field of sociology and law. Besides studies library is also based on empirical experience of researchers over the past five years and direct observations on the object under study.

## III. Result And Discussion

### The Contested Double Law on Legal Status of Children

The legalstatus of children in terms of Law No. 1/1974 on Marriage was based on some requirements: Firstly, the legitimate children are ruled in Law Ch. 42 No. 1/1974 on Marriage. They are those who were born within or due to legitimate marriage. This law impacted on multi-meaning of genealogical linkage of legitimate children: (1) legitimate children must be born in time of their parents were cohabiting in marriage, in which they were possibly impregnated before their parents got marriage; (2) they are born as a result of legitimate marriage or genetic descendant of the couple. Secondly, the non-legitimate children are also ruled in Law Ch. 43 No. 1/1974 on Marriage: (1) they are those who were born outside marriage, and only had civil relation with their mothers or their mothers' family; (2) their legal status will be ruled under the rule of Government Regulation (even though this regulation had not been enacted until now).

In terms of Islamic law, children had been provided with special positions, and commonly divided into two major statuses: those who had parental lineage with their fathers and those who had with their mothers. Most of Muslim scholars had an agreement to suggest that a child's parental lineage with his/her mother is possible as a result of sexual relation between her/his mother with a man, either in legal way of marriage or outside marriage (such as, adultery or dishonesty). Meanwhile, a son's parental lineage with his/her father is possibly only in three ways of relation: (1) legal marriage; (2) false marriage; and (3) indecisive marriage (Al-Ainain, 20012:78).

The Law Court No. 46/PUU-VIII/2010, on February 17th, 2012, which declared that *the Law Court Ch. 43/V. 1 No. 1/1974 on Marriage (Legal Sheet No. 3019) clarified that children who were born outside marriage had civil relation with their mothers and their mothers' family*, had no restricted legal status as long as it is interpreted as a lost of civil relation with certain man, and it is possible to prove by using science, technology, or other evidences. Consequently, it will be preferable to understand the law by this interpretation: "Children who were born outside marriage had civil relation with their mothers and their mothers' family. They also had such relation with men who got married with their mothers, and it should be proven by using technology or science, or by any evidence which showed their blood relatives, including a civil relation between both of them."

Accroding to ChatibRasyid, the term *children outside marriage* refers to those who are born as a result of legal marriage (based on Law Ch. 1/V. 1 No. 1/1974 on Marriage), but have no legal note (based on Law Ch. 2/V. 1 No. 1/1974 on Marriage). Shortly, they are materially legal, but formally illegal (Rasyid, 2010:3-4). Because that marriage done without referring to Law Ch. 1/V. 2 No. 1/1974 on Marriage, it couldn't be inferred that 'outside marriage' has literal meaning with *adultery*, because this term has no identical with marriage. In the case of the Constitution Court's approval to a plea of AisyahMughtara.k. Machica, a daughter of

H. Muchtar Ibrahim, whose her marriage with Moerdiono had been legally formal, but had no legal note in the Constitution, it is not a kind of adultery (Rasyid, 2010:3-4).

In line with ChatibRasyid's argument, and in accordance with general nature of the Court Constitution with its final decision for every citizen, and the State's responsibility for every citizen's freedom to embrace their religion as commanded in the Constitution Ch. 2/V. 29/1945, the spirit of the Court Constitution should be interpreted as 'an umbrella law of the protection of children without ignoring the legal marriage institution' as administered in Law No. 1/1974 jo. PP 9/1975 jo. INPRESS No. 1/1991 on Compilation of Islamic Law. Furthermore, the protection of children out of marriage should be proportionally taken by referring to the conducted constitution and tradition without having to ignore significant position of theological law.

AkilMuchtar, a former Chief of Constitution Court, the Court Law should be interpreted as a legal justification to spouses out of wedlock which has not contradictive with Law of Ch. 1 and Ch. 2 No. 1/1974. Concerning with right of inheritance, for instance, its civil status could not be approved in terms of Islamic legal of inheritance, but in terms of another concept: obliged inheritance (*wasiatwajibah*) (Muchtar, 2015). It also applied for obligation to provide children's livelihood; it should be implemented with another way, for instance, of punishing their biological father to pay for their living cost until the adult period. It is due to the interconnection between livelihood as well as inheritance and genealogical lineage, while the children out of wedlock are not genealogically linked to their biological fathers.

This problem leads to legal contestation and protest against the Court Law No. 46/PUU-VIII/2010, since the Law implied a justification to genealogical lineage between children out of wedlock and their biological fathers. If the Law enacted that status of such children should be reverted to their theological law, it probably raised a lack of controversy.

In accordance with that case, a former Chief of Constitution Court, Mahfud M.D., who acted as Chief of the Council, attempts to clarify the Law. He said, "What the Council implied by *children out of marriage* are not those who are born as result of adultery, but as hidden marriage (*nikahsirri*) (Mahfud MD, 2015)." The civil status of children out of wedlock is not opposite of the genealogical lineage, inheritance, and marriage guardian. The children who have such status are possible to demand some of the rights, including a right to get educational fee, or to have compensation because it opposed to the law and injured others as administered in Ch. 1365 KUH of Civil Rights, or to have a demand for disappointment. The point is that they have common civil rights, except for rights of genealogical lineage, of inheritance, of marriage guardian which had no interconnection with marriage principles in Islamic law.

However, the issue of having no legal note in terms of state administration has raised a circular problem of marriage. The consequence is related to legal relationship between fathers and children out of non-legally noted marriage. The children could not insert a father's name into the birth certificate. In the light of *nikahsirri*, they are assumed as children out of marriage. By justifying theological based marriage without having to be based on legal status, those who are born of such marriage should be regarded as legal children. However, the legal fact positions them as children out of marriage (Mahfud, 2015).

### **The Implication of Court Law on Civil Status of Children**

The civil relationship between children and their parents, in terms of the Court Law, is not related only to the protection of children outside marriage, but also to the protection of children with *sirri* or without legal marriage. Clarified it by providing differences between genealogical relationship and civil relationship (Mahfud, 2015). Every child has civil right with her/his parent, but she/he doesn't have to have genealogical relationship with them. Meanwhile, a child with genealogical relationship with her/his parent will have civil right with them (Syamsul and Fauzan, 2008:23).

The status of children is important due to its impact on their civil status. This status is divided into two clusters. Firstly, a child with genealogical relationship with her/his mother and father. They are born as a result of legal marriage as constituted in Law Ch. 1/V. 42 No. 1/1974 on Marriage. They will have full civil rights, including rights to get inheritance, to get married guardian, and to get livelihood, education, health, and others. Secondly, a child with genealogical relationship with her/his mother. Before the Court Law had been imposed, these children are those born out of marriage. The Law Ch. 43 No. 1/1974 on Marriage issued: the children out of marriage have merely civil right with their mother and their mother's family. However, after the Court Law No. 46/PUU-VIII/2010 has been legalized, the children out of marriage had special status which is commonly divided into two issues: (1) the children out of legal marriage, without having legal note in state administration, but with having legal status in their religion; (2) the children out of legal marriage, without having legal note in state administration, and also without having legal status in their religions, or commonly resulted from the adultery, fornication, etc.

The children with their attributes in point (1) have status as mentioned before. The children in point (2) have genealogical status only with their mother. The Court Law, however, provides a protection of such children by protection of civil rights given from their father only if their status with their father could be proven with

assistance of technological devices. Only their civil rights are different from those who have legal and genealogical relationship with their fathers.

### **The Court Law on Marriage Guardian**

The discussion on the implication of marriage guardian, including for the children out of wedlock, on their status of inheritance, Dr. Baharuddin Muhammad (2015:12) in his article, "A Legal Consequence of the Court Law No. 46/PUU-VIII/2010 on Division of Inheritance Rights to Children Out of Marriage" (2013), suggested that a biological father has possible right to be marriage guardian.

In accordance with Compilation of Islamic Law (KHI) Ch. 19 and 20/V. 1, the marriage guardian is one of the marriage obligations for woman's parent who wants her to get married. A marriage guardian must be a man who has met special requirements in Islamic law: Muslim and adolescent (*akilbaligh*). The Compilation also imposed that marriage guardian should include two groups: genealogical guardian (*walinasab*) and judicial/jurist guardian (*wali hakim*). This requirement suggests that people who have special rights to be guardian are fathers with genealogical lineage with their daughters, those who were born as result of legal marriage in accordance with Law Ch. 2/1974 on Marriage (Muhammad, 2015:12).

The Law implied that the judges in the Constitution Court made DNA (*Deoxyribose-Nucleic Acid*) as *ratio legis* in building 'civil relationship' and polarization of children's rights and biological father's obligations. It also caused the need to meet children's civil rights, either material, such as rights of livelihood and inheritance, or non-material, including marriage guardian itself (Muhammad, 2015:14-15). The textual understanding of the Law will raise contested arguments among Islamic law experts in Indonesia, who had been sociologically or ideologically faithful with Islamic law as their legal guardian.

It leads us to contextual understanding of the Law in which the term *children out of marriage* should be interpreted in accordance with the political reasons why the Law should be applied into and by the Constitution Court. For ChatibRasyid, the term 'children out of marriage' should be understood as those who are born in the basis of their religions as issued in Law Ch. 2/No. 1/1974 on Marriage, but without having legal note in state administration as issued in Law Ch. 2/V. 2/1974 on Marriage (Rasyid, 2010:3-4). In short, the children out of marriage are those who are materially legal, but formally illegal.

The term *out of marriage* is used because the marriage is not fully taken in the basis of Law Ch. 2/No.1/1974 on Marriage. Furthermore, *outside marriage* is not appropriately associated to *without marriage* (adultery), since the later is not always identical to the former. This contextual interpretation leads us to understand that the children out of marriage are children born of *nikahsirri*, a legal marriage in terms of religion, but without having legal note in terms of state administration. Such children are possible to have genealogical relationship with their father. As long as they could be proven in technological assistance, they have genealogical lineage with their father and possessed civil rights, including rights of marriage guardian, if they are women who will get married.

The Law Ch. 55/No. 1/1974 on Marriage issued that (1) the origins of children could be proven only by authentic birth certificate administered by the legal officers; (2) if the certificate is gone, the Court could administer their origins after having careful examination in the basis of eligible requirements; and (3) based on this requirement, the agency of court could issue the birth certificate for them. The status of woman with adultery, but formally having birth certificate relating with their genealogical fathers, their marriage guardian could be the fathers as mentioned in the birth certificate, as administered in Law Ch. 55/V. 1 on Marriage.

### **The Islamic Law on Marriage Guardian**

The marriage guardian is required to determine a legal status of marriage. The most Islamic jurists had an agreement to make it as basic principle of marriage in Islam (Syarifuddin, 2007:69). An authentic hadith stated: *From Aishahr.a.:*

*"every woman who gets marriage without her guardian is abolished, so her marriage is illegal. If there is a man who takes intercourse with her, so she has a right to get dowry. If they disputed (on marriage guardian), the guardian must be a jurist (sultan)(Aisyah's, 2008:590)".*

The appointment of marriage guardian in marriage contract, either in Islamic or conventional law of marriage, suggests the importance position of family participation (Suma, 2004:159). The family plays significant role to give a permission for those who had no ability in marriage, or had no enough age to get married, and also to be the marriage guardian for themselves. The Islamic groups of Hanafiyah and SyiahImamiyah points out that the marriage guardian is necessity for young woman, and for adult woman have rights to get married for own sake or others (Kaharuddin, 2015:187).

In the case of getting married with pregnant woman of the adultery, the Islamic jurists had different notions. The Malikiyah and Hanabilah decided that these women are forbidden to be married until they gave birth, as it is prohibited for Muslims to get married with women during pregnancy period (*masaiddah*). Meanwhile, the Hanafiyah, Syafiiyah, and Zahiriyah argued that they are possible to be married without having to wait for birthing (Hazm, 1970:156).

The status of children as result of unmarried woman, either widow or girl, without having legal marriage (adultery) is divided into two major opinions. Firstly, they could not be genealogically related to their biological father, because the children of adultery have only genealogical lineage with their mothers. This status has been determined by four major Islamic schools (*mazhab*), as well as *Mazhab Zahiri* (Irfan, 2012:157) and in line with a hadith from Ibn Abbas issued: the children of adultery can't be genealogically linked to their biological fathers, as they have no rights to get inheritance al-(Jauziyah, 1995:320). Moreover, Imam Malik and Imam Syafiie provide a permission for their fathers to get married with them, since they are included as un-biological relatives (*ajnabiyah*) without having legal genealogy in Islamic law (Qudamah, 1998:485).

Secondly, the children of adultery are possible to be genealogically related to the men who had engaged in adultery with their mothers only if the men really admitted and the women are unmarried. This opinion has been suggested by UrwahibnZubair, Salman ibnYasar, Abu Hanifah, Hasan Al-Bashri, IbnSirin, An-Nakha'i, IshaqibnRahuyah, IbnTaimiyah, and IbnQayim (NurulIrfan, 1998:155). It is also in line with a story from Umar ibnKhattab that children of adultery could be genealogically linked to their (biological) man who had engaged in fornication with their (unmarried) mothers (Hazm, 1990:141).

For Imam As-Syafiie, Imam Malik, and their proponents, if a man get intercourse with woman who had ever been taken an intercourse before, and less than six months she have childbearing, that child could not be genealogically related to a man from whom she had been pregnant. Imam Abu Hanifah prefers to make marriage contract as a basis of calculation of the six-months, and consequently a child of the marriage from the contract could be genealogically related to his/her father (Ghofar, 2000:46:47).

Abu Hanifah stands on the formal jurisdiction (the legal status of children is determined as having genealogical lineage with their fathers in the basis of less than six-months from the marriage of their parents) and on the theological guidance of the term 'bed' (*firas*) referring to a man, as told in hadith by Abu Hurairah: "Prophet Muhammad said, 'if a man (husband) invites his woman (wife) to his bed (*firasyihi*), but she rejects it, than an angle will course her until the morning'." By using hidden-reference-to-a-man (*dhomirghaibila al-rijal*), the term *firasyihi* clearly refers to the man's bed.

Based on the major arguments of the *ulama*, the marriage guardian for children of adultery is possibly categorized into two clusters: (1) for children born more than six months from the marriage contract between their adultery parents, the marriage guardian will be genealogically related their father; (2) for children born less than six months from the marriage contract between their adultery parents, the marriage guardian for them will be genealogically related only to their mother. For that case, the marriage guardian must be jurist (*wali hakim*), or—as mentioned IbnuQudamah in *Kitab Al-Mughni*—a ruler, or in the context of Indonesian Muslims, the guardian could be Chief of Religious Marriage Affairs (Kepala Kantor Urusan Agama) (Anonymous, 2001:313-314).

### **Islamic Law Analysis on the Court Law 46/PUU-VIII/2010**

An interesting discussion on DNA has highly risen among the experts of Islamic law (*ulamafiqhiyah*), since the issue of the acid is not made in the history of Islamic legal system, nor has no Islamic consensus (*ijma'*) along the period. Meanwhile, the debatable topic of genealogical linkage is actually based on the modest factor, such as differences of skin.

In the 16<sup>th</sup> International Meeting of Islamic Law Experts at Mecca on 2002, many Muslims experts, including in the field of medicine, resulted in some recommended inventions regarding with that issue: (1) using DNA for determining genealogical linkage must be used under rigorous procedures and cautions and (2) the Islamic basic principles of genealogical determination must be prioritized.

Additionally, DNA is prohibited to ignore the existence of genealogical lineage with legal permission of Islamic law. The using DNA is allowed in the certain conditions, for instance the unidentified of genealogical relationship due to the lack of physical or written evidences. The Meeting also recommended that DNA is allowed to determine the possible exchange of babies in the hospital.

The determination of children's genealogical relation to their father is used only by legitimate marriage. The DNA is possible to use, for instance, when a husband denied his natural child of the legitimate marriage, while at the same time there is no physical evidence of that marriage.

Most Muslims experts and participants in the Meeting had actually accepted the development of DNA, but they had asked everyone to carefully use it for genealogical determination, and to prioritize the basic principles of Islamic law in determining the legitimate genealogy only by the legitimate marriage. For this case, the DNA is useless since the root of genealogical relationship is regarded as defect due to the 'illegal' marriage.

The consequence of debatable use of DNA on the Court Law 46/PUU-VIII/2010 must be addressed in terms of Islamic law. Basically, the Court Law is to make judicial review to the Law Ch. 43/V. 1/No. 1/1974 by giving legal status of genealogical relationship between children and their fathers, providing legal protection to the civil rights of children, assisting fair treatment to every children, determining civil rights for them with their biological fathers and the fathers' family, confirming an obligation of biological fathers, giving protection of

children's rights of inheritance, providing an assurance of their futures and their rights as possessed by other children, and determining that every male-child must be responsible for every consequence of their actions.

The goals of the judicial review to the Law are highly related to the basic principles of *maqashidsyari'ah* which partly acknowledged the protection of descendant (*hifdz al-nasl*) as the ultimate intention of Islamic law (Al-Yubi, 1998:335). Suggested that genealogical linkage between children and their parents is due to the biological relationship as result of intercourse regardless of with or without legal marriage. It is also clarified by Al-Hanafiyah proponents that biological intercourse is a cause of the emergence of family-but-prohibition-for-marriage relationship (*mahram*) (Arto, 1990:15-17).

The social advantage (*mashlahah*) of the Court Law 46/PUU-VIII/2010 stands on the civil relationship of children and their biological father even though it has been resulted from out-of-legal-marriage. The Law is possible to be generally applied either for children of adultery, of monogamy, of polygamy, and it made a consequence of the mutual having of rights and obligations for both of them.

#### IV. CONCLUSION AND CLOSURE

The implication of the Court Law 46/PUU-VIII/2010 on the civil relationship between children and their parents are determined by understanding of the term *children out of marriage* with two possible ways: (1) if the general or textual understanding is used to elucidate the term, the civil relationship of children and their fathers will be absolutely determined bringing with it any civil right, such as right of inheritance, right of marriage guardian, right of livelihood, etc. (2) if the contextual understanding is used, all consequences of the status will be limited only to the children with hidden marriage (*nikahsirri*) in the basis of theological principles bringing with them any civil right.

The quest for marriage guardian, as agreed in the Constitution Court, is also related to the term *children out of marriage*. The textual understanding of the Court Law will bring us to the determination of the marriage guardian only to the biological father. However, the contextual impetus of the Law will leads us to the jurist as their marriage guardian. It also brings to another insight that the Court Law is clearly related to Hanafiyah School which did not include the guardian into the primary principle (*rukun*) of marriage. The adult woman is possible to cause her to marry for her own sake, and it made consequences of the lack of discussion on whether the guardian must be biological father or jurist.

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