

**IMPLEMENTATION OF MARRIAGE ITHBAT AFTER THE CONSTITUTIONAL COURT  
DECISION NO. 46 / PUU-VIII / 2010  
(STUDY OF DECISION NO 89 / PDT.P / 2016 / PA.Clg CILEGON RELIGIOUS COURT)**

Baidhowi

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**ABSTRACT**

*The child outside mating is a child born outside marriage are legitimate. Legal marriage is a marriage conducted in accordance religion and belief as well as listed. So that the marriage has not been registered does not obtain legal recognition. Focus problem is, how the legal reasoning (legal reasoning) judge in rejecting ithbat marriage on the decision No. 89 / Pdt.P / 2016 / PA.Clg? how the child's status beyond mating and what are the rights of the child? This type of research is descriptive kualitatif using normative methods. The data used is the study of decision No. 89 / Pdt.P / 2016 / PA.Clg Cilegon Religious Court to dig up the source library (library reseach). Results of research and discussion shows that the decision No. 89 / Pdt.P / 2016 / PA.Clg Cilegon Religious Court is a response to the request of pairs admitted ithbat husband and wife who have done Sirri marriage in 2013. As well as the application for recognition of children born in the relationship the. The content of the decision is to reject Ithbat marriage. The consideration is the women are still bound by a previous marriage and no divorce certificates as the basis for a second marriage. Supposedly the judges also refused because the marriages were made after 1974, according to the provisions of Article 7 Compilation of Islamic Law. application for recognition of children born in the relationship, it was decided by the court granted. In ex officio so that the judges ordered the applicant to register the birth of the child at the Department of Population and Civil Registration Cilegon as the biological child of the couple. The basic consideration is the granting of Article 43 of the Marriage Act after the Constitutional Court Decision No. 46 / PUU / MK / 2012 regarding the origin of the child. Consideration of this decision is for the good of the child. Due to the presence of children can not be blamed. So they deserve the right, affection and protection of the law. The rule of law that is used is "jalbul maslaih wa dar ul mafasid" (interesting benefit by refusing madharat). That is one side rejects these relationships as marriages and considers it illegitimate relations, and other condition of granting recognition to the innocent child in accordance with civil rights. The conclusions that can be drawn is the First, the couple had intercourse invalid because one of them is bound marriage. Second, the child's status of their relationship was granted, so that children have limited civil rights with the man. Among the civil rights it is maintenance, education, health and so forth. While the child outside of the mating, do not have inheritance rights and the rights of guardians.*

Keywords: ithbat marriage, outside the child marries, civil rights

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**Introduction**

Marriage is a legal relationship that is a legal linkage between a man and a woman who has fulfilled the terms of marriage, for a period of time as long as possible. UU no. 1 Year 1974 on Marriage is a source of substantive law in the courts. According to the Article 49 Paragraph (2) number 22 of Law No. 7 of 1989 as amended by Act No. 3 of 2003 and the last in the house by Law No. 50 of 2009 on the Religious Court that one of the authorities or the absolute competence in the field of Religious Court marriage is a statement of the validity of marriages taking place before Act No. 1 of 1974 on Marriage and executed according to other regulations.

Ithbat marriage into the marriage issue, Article 7 ithbat KHI stipulates that marriage is reserved to marriage that occurred prior to the enactment of Law No. 1 of 1974. Thus, a contrario (knowingly mukhalafah) marriages performed after the Act No. 1 Year 1974 on Marriage, the religious court was not authorized to mengitsbatkannya.

Constitutional Court Decision No. 46 / PUU-VIII / 2010 dated February 17, 2012, strengthening the protection of children. Constitutional Court's decision to give change that Article 43 of Law No. 1 of 1974 which originally read "Children born out of wedlock have links civil with her mother and her mother's family" has no binding legal force along the interpreted eliminate relations civil with men who can be proved by science and technology and / or other evidence according to the law turned out to have a relationship area as a father, so that the verse should read, "Children born out of wedlock have links civil with her mother and her mother's family as well as with a man as his father provable based on science and technology and / or other evidence under the law to have a blood relationship.

Decision No. 89 / Pdt.P / 2016 / PA.Clg Cilegon Religious Court rejected the request ithbat marriage and grant the application for recognition of children born interesting to study. The focus of the issue is how legal considerations (legal reasons) judges against refusal ithbat marriage? And whether the rights of the child if it is associated with the Constitutional Court Decision 46 / PUU-VIII / 2010?

**A. Justice Religion and Authority**

Competence / authority of Justice in relation to the law court proceedings are divided two ways, namely Authority Relative and Absolute Authority.

1. Relative power means the power of the court in the same type and level, the difference with another court of the same kind and degree.<sup>1</sup> Article 4 paragraph (1) of Law No. 7 of 1989 reads: Religious Courts located in the municipality or in the district capital, and jurisdiction covers the municipality or district.
2. Absolute Competence means power-related court case type or types of courts<sup>2</sup>. Briefly competence means absolute power type related court cases. For example:
  - a. Religious Court to investigate and prosecute cases of marriage of Muslims, while for non-Muslims become absolute competence of general courts.
  - b. Religious Court authorized to resolve the issue of inheritance, wills, endowments, and shadaqah Muslims, non-Muslims authority for State Courts.
  - c. District Court authorized to settle civil lawsuits generally, criminal matters, not civil matters Islamic.

Absolute power Religious Court under Article 49 and 50 of Law No. 7 1989, as amended by Law No. 3 of 2006 on the Amendment of the Act No. 7 of 1989 on Religious Courts. Religious Court the duty and authority to investigate and adjudicate, judge actions completed in the first level among people who are Muslims in the areas of: Marriage, inheritance, wills, grants, endowments, charity, infaq, sadaqah, sharia economy. In other words that clearly does not include the absolute power of the Religious Court prohibited to accept it.<sup>3</sup>

#### ITHBAT NIKAH AND ITS LEGAL IMPLICATIONS

According to the language ithbat marriage consists of two words, namely the word "ithbat" which is masdar or origin of the word of "atsbata" which means "set", and the word "marriage" is derived from the word "nakaha" which means "intermarried" thus the word "ithbat marriage" has the meaning of "determination wedding"<sup>4</sup>

According to Peter Salim said ithbat marriage has the sense of determination of the truth of marriage<sup>5</sup>. According to Big Indonesian Dictionary, isbat marriage is the determination of the truth (validity) marriage. Ithbat endorsement of marriage is marriage that has been carried out according to Islamic religious laws, but not noted by KUA or PPN authorities.<sup>6</sup>

Article 2 Paragraph 1 of Law No. 1 of 1974 About Marriage states that marriage is legal, if done according to the law of each religion and belief it. Article 2 (2) stipulates that every marriage is recorded in accordance with the legislation in force. Registration of marriages would lead to public good because with this listing will provide legal certainty relating to the rights of the husband / wife, child welfare and other effects of the marriage itself.

Under Article 7 Compilation of Islamic Law (KHI), marriage can only be proven by the Marriage Certificate made by the Registrar of Marriage Officer. In the case of marriage can not be proven by Akata Nikah, can be submitted to the Religious Courts ithbat illegitimate. Even confirmed, a marriage certificate or marriage certificate is the only evidence of marriage. Without a marriage certificate is recorded, legally there is no or no marriage. But according to Law No. 1 of 1974 on Marriage, it is understood that the Marriage Certificate and registration of marriage is not the only evidence of the existence or validity of the marriage. Because although the marriage certificate as evidence, but not as evidence that determines the validity of the marriage. For the law of marriage religion that determines the existence and validity of the marriage.

Article 4 KHI confirms that "marriage is legal if it is done according to Islamic law in accordance with article 2, paragraph 1 of Law No. 1 tahun 1974 about marriage. Article 5 KHI formulated: (1) to guarantee the order of marriage for Muslims every marriage must be recorded; (2) the registration of marriages in paragraph (1), conducted by the Employee Registrar of Marriage as stipulated in Law No. 22 Year 1946 jo Law No. 32 of 1954.<sup>7</sup>

Furthermore, Article 6 KHI formulated: (1) to comply with the provisions in Article 5, every marriage should take place in front of and under the supervision of the Registrar of Marriage Officer; (2) marriages performed outside the supervision of the Registrar of Marriage Officer does not have the power of law.

According to Article 7 KHI states that: (1) the marriage can only be proven by the Marriage Certificate made by the Registrar of Marriage Officer; (2) in the case of marriage can not be proven by Akat Nikah, can be submitted to the Religious Courts ithbat illegitimate; (3) ithbat marriage that can be submitted to the Religious Court limited on matters relating to: (a) The existence of a marriage in the context of a divorce settlement; (B) Loss of Marriage Certificate; (C) There is doubt about the validity of one of the conditions of marriage; (D) The existence of a marriage that occurred prior to the enactment of Law No. 1 of 1974 and; (E) The marriage made by those who do not have a marriage impediment under the Act 1 of 1974; (4) are eligible to apply ithbat marriage is a husband or wife, their children, of guardians and interested parties to the marriage.

<sup>1</sup> Royhan A. Rasyid, *Hukum Acara Peradilan Agama*, (Jakarta: Raja Grafindo Persda, 1992), h. 25

<sup>2</sup> Royhan A. Rasyid, *Hukum Acara Peradilan Agama*, (Jakarta: Raja Grafindo Persda, 1992), h. 27

<sup>3</sup> DR. Mardani, *Hukum Acara Perdata Peradilan Agama dan Mahkamah Syariah*, (Jakarta), Sinar Grafika, 2009, hlm. 55

<sup>4</sup> Ahmad Warsono Munawir, *Al-Munawir Kamus Arab-Indonesia*, hal. 145

<sup>5</sup> Dep.Pendidikan dan Kebudayaan, *Kamus Besar Bahasa Indonesia*, hal. 339

<sup>6</sup> Keputusan Ketua Mahkamah Agung RI Nomor KMA/032/SK/2006 tentang Pedoman Pelaksanaan Tugas dan Administrasi Pengadilan

<sup>7</sup> Ahmad Rofiq, *Hukum islam di Indonesia*, (Jakarta : Raja Grafindo Persada, 2003), hal 107

The function and position registration of marriages according to Bagir Manan is to ensure the rule of law (legal order) that serves as an instrument of legal certainty, ease of law, as well as one of the means of proof of marriage<sup>8</sup>. Therefore, in case of a couple who have a valid marriage according to the religion, but not yet recorded, then according to Bagir Manan enough to do the recording. If the couple is required to perform the ceremony again, then it is contrary to Article 2 paragraph (1), as a result of new marriage invalid.

With the registration of marriage, the legal consequences of marriage is considered valid if it meets two conditions, namely: 1) has been complied with material law, which has been carried out by qualified and pillars according to Islamic law. 2) Has met formal legal provisions, which were listed in Employee Nikah Registrars authorities.

Instead of marriage were not recorded (marriage under the hand) nor requested *ithbat* illegitimate, then the marital status are: 1) Did not get the recognition of the state or not legally enforceable because they are not unheard of marriage, so as to avoid legal consequences. 2) Children born of such marriages only have a civil relationship with the mother and the mother's family, while a civil relationship with the father is not there. 3) Neither the wife nor the children born of the marriage shall not be entitled to demand a living or inheritance from his father.

### C. The Constitutional Court and the Constitutional Court Decision No. 46 / PUU-VIII / 2010

The Constitutional Court of the Republic of Indonesia (abbreviated MOJ) is the state institutions in the state system of Indonesia who are holders of judicial power together with the Supreme Court. Article 24 paragraph (2) of the 1945 Constitution of the Constitutional Court is one of the institutions of judicial power in addition to the Supreme Court.

Section 7B, 24 paragraph (2) and Article 24C paragraph (1) the State Constitution RI 1945 determines that the Constitutional Court has the authority to hear at the first and last decision is final, the laws against the Constitution, rule on the dispute the authority state institutions, dissolution of political parties, and to decide disputes concerning the results of the election. In addition, the Constitutional Court also has an obligation to give a decision on the opinion of Parliament on alleged violations by the president and / or vice president ..

Based on the articles mentioned above, clearly legible so great power possessed by these agencies. It was articulated by Dimiyati Hartono that, "The authority of the Constitutional Court is greater than the Supreme Court because the Supreme Court as a judicial peak only authorized test regulations under the legislation. While the Constitutional Court is authorized to test the laws against the Constitution "<sup>9</sup>

Birth MK Decision No. 46 of 2010 begins with (1) Hj. Aisyah Mochtar alias Machica bint Ibrahim H. Mochtar and (2) Muhammad Iqbal Ramadhan bin Moerdiono apply to the Constitutional Court. Applicant states the direct authority of experience and constitutional rights are impaired by the application of Article 2 (2) and Article 43 paragraph (1) of the Marriage Law. Article 2 (2) of Law No. 1 of 1974 states: "Every marriage is recorded in accordance with the legislation in force."

Application of Article 2 (2) of the Marriage Law, the constitutional rights of the Petitioners as Indonesian citizens as guaranteed by Article 28B paragraph (1) and (2) and Article 28D paragraph (1) of the 1945 Constitution have been impaired. Because Article 28B paragraph (1) of the 1945 Constitution states: "Everyone has the right to establish a family and continue the descent through legal marriage." The provisions of the 1945's gave birth to a constitutional norm that applicants who are Indonesian citizens have the same rights as other Indonesian citizens in building a family and to perform marriages without distinction and should be treated equally before the law.

Article 28B paragraph (2) of the 1945 Constitution states: "Every child has the right to live, grow and develop and has the right to protection from violence and discrimination." The provisions of the 1945 Constitution which gave birth to the constitutional norm that children Petitioner also have the right to their legal status and are treated equally before the law. 1945 promoting the rule of law as a form of justice without discrimination against anyone, but others say the Marriage Act that resulted in their constitutional rights.

Article 43 paragraph (1) of the Marriage Law states: "Children born outside marriage has only a civil relationship with her mother and her mother's family." Similarly, Article 28D paragraph (1) of the 1945 Constitution states: "Everyone has the right to recognition, security, protection, and legal certainty and equal before the law."

In their petition, the Petitioner explained that since the birth of the child Applicant has been discriminated against, namely by eliminating the origins of the child applicant with just include the name of the Applicant in the Deed of His birth and the State has eliminated the right of children to live, grow and thrive because of having only the relationship of civil with mother cause the husband of Petitioner has no legal obligation to maintain, nurture and pay child Applicant.

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<sup>8</sup> Djubaidah, Neng, *Pencatatan Perkawinan Dan Perkawinan Tidak Dicatat Menurut Hukum Tertulis di Indonesia Dan Hukum Islam*, Sinar Grafika, Jakarta, 2012. Hlm. 159

<sup>9</sup> Dimiyati Hartono, *Problematik Dan Solusi Amandemen UUD 1945*, 2009, Gramedia Pustaka Utama, halaman 68. Lebih lanjut, "kewenangan-kewenangan tersebut sebenarnya merupakan masalah-masalah yang fundamental karena terkait dengan masalah Undang-Undang Dasar dan berada pada ranah politik yang terkait dengan masalah kedaulatan rakyat

This, according to the applicant has caused legal uncertainty relationship between a child and his father, violates the constitutional rights of children to know their origins, causes psychological burden on children because of a lack of recognition from his father, causing anxiety, fear and discomfort in her social children in the community.

So that the applicant wishes permohonannya Constitutional Court 1. To receive and grant the petition of the Material Test Applicant in its entirety; 2. declare Article 2 paragraph (2) and Article 43 paragraph (1) Marriage Act is inconsistent with Article 28B paragraph (1) and (2) and Article 28D paragraph (1) of the 1945 Constitution and 3. declare that Article 2, paragraph (2) and Article 43 paragraph (1) of the Marriage law, does not have binding legal force with all its legal consequences; or if the judges of a different opinion, then petitioned the fairest verdict (ex aequo et bono).

Pursuant to Article 24C paragraph (1) of the 1945 Constitution and Article 10 paragraph (1) letter a of Law Number 24 Year 2003 regarding the Constitutional Court, as amended by Act No. 8 of 2011 on Amendment of Law Number 24 Year 2003 regarding Constitutional Court and Article 29 paragraph (1) letter a of Law Number 48 Year 2009 regarding Judicial Power, one of the authority of the Constitutional Court is to hear at the first and last decision is final in the Act against the Constitution. The application for the applicant to examine Article 2 paragraph (2) and Article 43 paragraph (1) of Law No. 1 of 1974 to 1945 is the authority of the Constitutional Court.

The Constitutional Court led by Moh Mahmfud MD., Gives consideration that the registration of marriage, as stipulated in Article 2 paragraph (2) Marriage Act, as a general explanation point 4 letter b which states: "... that a marriage is lawful when done according to the law of each religion and belief it; and besides that every marriage must be recorded in accordance with the legislation in force. Recording each marriage is the same as recording important events in one's life, such as birth, death stated in paperwork, a deed which is also included in the list of recording.

So it is clear that (i) registration of marriage is not a factor that determines the validity of the marriage; and (ii) the recording of an administrative obligations required under the legislation. The importance of administrative liability in the form of registration of marriages according Mahkamah can be viewed from two perspectives. From the perspective of the State, registration is required in order to function the State guarantees the protection, promotion, enforcement and fulfillment of human rights is concerned that it is the responsibility of the State and shall be conducted in accordance with the principles of a democratic constitutional state are regulated and set forth in the legislation ( vide) Article 28 paragraph (4) and (5) 1945. Now if the recording is regarded as a limitation, according to a recording of the court is not contrary to the constitutional requirement for the restrictions set by the Law and carried out with the sole purpose to ensure recognition and respect for the rights and freedoms of others, and to meet the demands of a fair in accordance with considerations of morality, religious values, security and public order in a democratic society (vide Article 28 J paragraph (2) of the 1945 Constitution).

Furthermore, recording administratively intended that marriage, as a legal act is important in life conducted by the concerned, which has implications for the legal consequences which are very spacious, can later be proved by evidence that is perfect with an authentic deed, so that the protection and care by the State relating to the rights arising from a marriage to be carried out effectively and efficiently. That is, with its authentic proof of marriage, the rights arising as a result of marriage can be protected and served well, because it is not necessary proof process that takes time, money, energy and mind more.

While the legal issues concerning children born out of wedlock, the consideration of the Constitutional Court are as follows: Sure, there may be a pregnant woman without a meeting between ovum and spermatozoa either through sexual intercourse or any other way by the technological developments that lead to conception. Therefore, incorrect and unfair when the law stipulates that children born from a pregnancy due to sexual relations outside of marriage only to have relationships with women as a mother. Untrue and unfair as well if the law frees a man who had sexual intercourse leading to pregnancy and childbirth of his responsibilities as a father and with the law negates the rights of children against this person.

The Court also confirmed the child's relationship with a man as the father is not solely for their marriage bond, but can also be based on evidence of the relationship between blood between children and men as fathers.

Thus, apart from the matter of procedure / administrative marriage, children born should get legal protection. If not, then the injured are children born outside marriage, even though the child is not guilty because of his birth against their will. Children who are born without a father have a clear status often receive unfair treatment and stigma in the society. Law should provide protection and legal certainty to the status of a child born and rights available to him, including against children born though the validity of the marriage is still disputed.

Therefore, Article 43 paragraph (1) of Law 1/1974, which states, "Children born outside marriage only have a relationship civil with her mother and her mother's family" should read, "Children born out of wedlock have links civil with her mother and her mother's family as well as with men as a father who can be proved by science and technology and / or other evidence according to the law have blood relations, including civil relations with his father's family. "

Finally, in the ruling that was decided in the Consultative Meeting of Justices by nine Constitutional Court Justices, namely Moh. Mahfud MD, as Chairman and member, Achmad Sodiki, Maria Farida Indrati, Harjono, Ahmad Fadlil Sumadi, Anwar Usman, Hamdan Zoelva, M.Akil Mochtar and Muhammad Alim on Monday, February 13, 2012 and was pronounced in the Plenary Session of the Constitutional Court open for public on Friday, February 17, 2012, the Constitutional Court declared:

- To grant the petition in part;

- Article 43 paragraph (1) of Law No. 1 of 1974 on Marriage (State Gazette of the Republic of Indonesia Year 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) which states. "Children born outside marriage only have a relationship civil with her mother and her mother's family", contrary to the Constitution of the Republic of Indonesia Year 1945 along the interpreted eliminate relations civil with men who can be proved by science and technology and / or tool other evidence according to the law turned out to have a blood relationship as a father;
- Article 43 paragraph (1) of Law No. 1 of 1974 on Marriage (State Gazette of the Republic of Indonesia Year 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) which states, "Children born outside marriage only have a relationship civil with her mother and his mother's family ", does not have binding legal force along the interpreted eliminate relations civil with men who can be proved by science and technology and / or other evidence according to the law turned out to have a relationship area as a father, so that the verse should read," Children born outside marriage has a civil relationship with her mother and her mother's family as well as with men as a father who can be proved by science and technology and / or other evidence according to the law have blood relations, including civil relationship with his family ";
- Rejecting the petition for apart and rest;
- Ordered to load this decision in the Official Gazette of the Republic of Indonesia.

Through this Decision, the Constitutional Court once again proved itself as a judicial institution 'bold against the tide', out of the grip of cultural and religious traditions, progressive and revolutionary towards substantive justice based on the Law of the Republic of Indonesia, 1945. Justice substantive question is justice which is based on truth procedural material rather than formal correctness. So, what is the correct procedural could have materially blame if justice and substance abuse, and vice versa.<sup>10</sup> Testing Act or a judicial review is very important to ensure the consistency of national law politics as the flow of the constitution.<sup>11</sup> Although this decision still leaves the problem and the different responses of the various parties.

#### METHODOLOGY

This type of research is descriptive qualitative, using the method of normative analysis. This study was to analyze and criticize the legal reasoning behind the verdict<sup>12</sup>, the two layers at once. The first layer is a consideration that displays legal basis used judges deciding the case number no. 89 / pdt.p / 2016 / pa.clg cilegon religious court and the second layer to analyze the decision to focus on, what the legal reasoning (legal reasoning) judge in rejecting ithbat marriage on the decision no. 89 / pdt.p / 2016 / pa.clg? How the child's status beyond mating and what the child rights after the constitutional court decision no. 46 of 2010?

The shape of this research is literature study (library research). The type of data used in this research is secondary data which includes primary and secondary legal materials. Primary materials include laws that became the object of study and the law becomes a tool criticism as already mentioned above. Secondary material includes descriptors of the primary legal materials such as the ulama and experts thinking about marriage ithbat found in books, journals and opinions in cyberspace.

The data collection was done by documentation through two stages. The first stage is the introduction. In accordance with stages designed Elias<sup>13</sup>. Researchers make important notes about enforcement issues on the legal status of the perpetrator and the child from the marriage under the hands by requesting a copy of the document Decision on Case No. 89 / Pdt.P / 2016 / PA.Clg Cilegon Religious Court.

The data analysis was conducted qualitatively. Adapting the methods of research by Shamsuddin<sup>14</sup>, the author identifies the legal facts (dictum Decision on Case No. 89 / Pdt.P / 2016 / PA.Clg and discovery of relevant legal considerations on the legal facts (legal reasoning) used judges to decide on Case No. 89 / Pdt.P / 2016 / PA.Clg. in practice data analysis, the researchers first put dictum Decision on Case No. 89 / Pdt.P / 2016 / PA.Clg and legal reasoning the judge used in a sub-discussion. Then, in a subsequent sub discussion, researcher construct a legal basis and scientific study to put objections / support to the decision and the legal reasoning.

#### RESULTS AND DISCUSSION

PA Decision No 89 / Pdt.P / 2016 / PA.Clg Cilegon Religious Court

Case filed by an applicant who Rohadi bin Usman, 32 years old, and Neni Nuraini binti Rasidi, aged 29 tahunyang both domiciled in Kapudenok Jaya Rt 14 Rw. 02 Lebakdenok Village, District Citangkil, Kota Cilegon. On January 12, 2016 and registered with the PA Cilegon No. 89 / Pdt.P / 2016 / PA.Clg.

This claim is submitted came from his desire to take care of her child's birth certificate Syahila Nur Azizah. Rohadi and Neni married under the hand on July 7, 2013 at the District Office of Religious Affairs Mancak, Serang regency; Acting as guardian of

<sup>10</sup> Huda, Ni'matul. *Dinamika Ketatanegaraan Indonesia dalam Putusan Mahkamah Konstitusi*. FH UII Press.Yogyakarta. 2011.Hlm.38

<sup>11</sup> Ni'matul Huda, dan R. Nazriyah. "Teori dan Pengujian Peraturan Perundang-Undangan", Penerbit Nusa Media, Bandung, 2011, hlm.131

<sup>12</sup> Syamsuddin, M. (2007). *Operasionalisasi penelitianhukum*. Jakarta: Rajagrafindo Persada.hal. 25-26

<sup>13</sup> Elias, A. S. (2004). *Legal research; How to find andunderstand the law*. Berkeley: Nolo., hal. 5-8),

<sup>14</sup> Syamsuddin, M. (2007). *Operasionalisasi penelitianhukum*. Jakarta: Rajagrafindo Persada, hal. 143-146

marriage is Rasidi bin Sawiri, parents who have a deputy to Ust Neni. Sohari with two wedding witnesses. Rohadi status is a temporary status Neni young widow.

In the trial the applicant filed two witnesses and evidence Divorced Form of Certificate No. 201 / AC / 2015 / PA.Clg issued by the Registrar of Cilegon Religious Court, dated May 4, 2015.

Considering the judge who is currently married to the Petitioner II, Petitioners I status is still married to someone else, even though the marriage was performed in the desired manner and determined by the provisions of Islamic law. So the wedding could not be implemented due to non-fulfillment of the terms of marriage Petitioner II (refuse).

Regarding the status of children born of such a relationship, Judge Consideration Constitutional Court Decision No. 46 / PUU-VIII / 2010 dated February 17, 2012, where the children of the Petitioner should not be construed to eliminate civil relations with a man who can be proved by science knowledge and technology and / or other evidence according to the law appeared to have blood relations as his father, so that Article 43 paragraph (1) of law No. 1 1974 should read: "Children born out of wedlock has a relationship civil with her mother and her mother's family, and to men as a father can be proved by science and technology and / or other evidence under the law of blood relationship, including a civil relationship with his family "

Additionally strengthened Article 3 of Law No. 23 of 2002 on Child Protection, namely: "Child protection aims to ensure the fulfillment of children's rights in order to live, grow, develop and participate optimally in accordance with human dignity, and get protection from violence and discrimination, in order to realize quality of Indonesian children, noble, and prosperous. Ex officio, the council ordered the applicant to register the birth of the child at the Department of Population and Civil Registration Cilegon City.

Finally the judges were diterdiri M. Nur, S.Ag. Assembly Speaker, Dian Siti Kusumawardani, S.Ag, SH and H. Shofa'u Qolbi Djabir, Lc, M.A respectively as Member Judges on Wednesday, February 17, 2016 AD, coincided with the date 1437 AH Jumada 7 in the ruling to decide:

1. To grant the petition of the Petitioners partly;
2. Declare boy named Syahila Nur Azizah was the biological son of Petitioner I (Rohadi bin Usman) and Petitioner II (Neni Nuraini Binti Rasidi);
3. Ordered to the applicant to register the birth of the child at the Department of Population and Civil Registration Cilegon City;
4. Rejecting Request the applicant to rest;
5. Charging for the applicant to pay court costs, a number Rp.261000, - (two hundred sixty one thousand rupiah) .;

## DISCUSSION

Marriage Certificate is a deed authentic for Marriage Certificate was created by and in the presence of Employees Registrar of Marriage as the competent authority for registration of marriage, made in accordance with the form prescribed by Decree Law No. 9 of 1975 and made on the premises Employees Registrar of Marriage / Office for Religious Affairs it carries out its duties.

Under the provisions of Article 7 Paragraph (1) the Islamic Law Compilation (KHI) the existence of a marriage can only be proved by a marriage certificate or marriage certificate which is recorded in the register. Even confirmed, a marriage certificate or marriage certificate is the only evidence of marriage. Meanwhile, according to Law No. 1 of 1974 on Marriage, Marriage Certificate and registration of marriage is not the only evidence of the existence or validity of the marriage, for it though as evidence but not as evidence that determines the validity of the marriage. Because the marriage law religion that determines the existence and validity of a marriage.

Articles 40 to 44 KHI. explained that the Prohibited into marriage only between a man and a woman because of certain circumstances: Because the woman is still linked to one marriage with another man, a woman who is still in the prescribed period with another man. And a woman who are not Muslims.

Consideration of the judge in the case refused to grant marriage Ithbat filed by married couples who have carried out the marriage in 2013, is the presence of Divorce Certificate No. 201 / AC / 2015 / PA.Clg issued by the Registrar Cilegon Religious Court, dated May 4, 2015. This means that if the marriage applicant II by Petitioner I conducted in 2013, the status of the applicant II is the official wife of a former husband, not as described by the witness that the applicant II is the status Widow.

According to Article 38 UUP, the marriage can be broken because of death, divorce, and the court's decision. Moreover, Article 39 paragraph (1) UUP said that divorce can only be done in the courtroom after the court concerned to try and not succeed to reconcile. Similarly, Article 115 KHI says that divorce can only be done in the next session of the Religious Court after the Religious Court and unsuccessfully tried to reconcile the two sides. Likewise based KHI Article 40, point a, is prohibited into marriage only between a man denagn woman because the woman is still bound to one marriage to another man.

Thus the decision of the judge Majelis PA Cilegon No 89 / Pdt.P / 2014 / PA Clg. ie rejecting the marriage took place in 2013 is Strong enough reason. Nevertheless, the applicants will still have a responsibility to children who have been born.

Consideration of other judges in case No. 89 / Pdt.P / 2014 / PA Clg. is section 43 UUP after the decision of Constitutional Court Decision No. 46 / PUU-VIII / 2010 dated February 17, 2012 where children of the Petitioners should not be interpreted to

eliminate relations civil with male-battery which can be proved by science and technology and / or other evidence according law turned out to have a blood relationship as a father, so that Article 43 paragraph (1) of Law No. 1 of 1974 must be read: "Children born out of wedlock have links civil with her mother and her mother's family as well as with men as a father to proven by science and technology and / or other evidence according to the law have blood relations, including civil relationship with his family";

Child protection objectives in Article 3 of Law No. 23 of 2002 on Child Protection is to ensure the fulfillment of children's rights in order to live, grow, develop and participate optimally in accordance with human dignity, as well as protection from violence and discrimination, for the realization of quality of Indonesian children, noble, and prosperous". In harmony with the objectives of Islamic law (maqasid al-Shari'ah) which is the safeguarding of lives (hifdz al-nafs), which in this case is the right to live and grow / evolve a child without pressure and discrimination of any party.

Additionally KHI Article 103 paragraph 1) The origin of a child can be spotted and dibuktiakn with a birth certificate or other evidence. However When the deed kelahiram buktilainnya instrument mentioned in subsection (1) does not exist, then the Religious Court can issue a determination of the origin of a child after having held a thorough examination by a valid document.

So basing on the above considerations, the judges declare majlis deliberations boy named Syahila Nur Azizah was the biological son of Petitioner I (Rohadi bin Usman) and Petitioner II (Neni Nuraini Binti Rasidi);

However, the decision No. 89 / Pdt.P / 2016 / PA.Clg, namely refusing ithbat child marriage and accept the results of the relationship. so this decision still leaves the problems, which are:

First, when the judge rejected the request ithbat majlis, the applicant can show that the relationship dikategorikan sexual relations outside the bonds of marriage is called adultery. In Islam, adultery is one of the major sins. Based on the marital status of the culprit. Zina is classified into two categories namely adultery Muhsan (perpetrators are married) and zina ghair Muhsan (pelakukunya not married). Adultery is not only a sin in the sense that perpetrators will receive the punishment in the hereafter. It is also a form of crime (jarimah) were threatened with severe sanctions in the world. Zina included in the category of hudud jarimah that crime or a crime punishable by hadd.

Hadd is a technical term to describe a form of punishment which has been determined by God and is fixed, ie, not be reduced or increased. In the case of adultery, a punishment that will be meted out to the perpetrators differ depending on the type of adultery that occurred, whether zina or zina ghair Muhsan Muhsan. If the offender is married (adultery Muhsan) then the punishment is stoning (stoned to death), whereas if the offender is not married (adultery ghair Muhsan) the penalty is whipped 100 times and exiled for one year.<sup>15</sup>

Second, if a child of that relationship can be listed have a civil relationship with a man and his brother (the first applicant), the rights of children are still confined to the maintenance, education, health and so on. But not in custody (nasab) and inheritance rights. Since the concept of guardianship (nasab) is one of al-kuliyah al-khams, al-dharuriyyat al-khams or sharia pancajiwa. Nasab can not be formed through the adultery. While this decision clearly recognized the validity nasab illegitimate child who still has a sister relationship with a male applicant. Likewise in the inheritance, KHI Article 174 describes the group consisting heirs by blood. The group of men terdidi father, son, brother, uncle and grandfather while women's groups consisting of: mother, daughter, sister grandmother. Similarly According marital relationships consist of: widow.

So it seems to have difficulties in the implementation of the Constitutional Court Decision No. 46 / PUU-VIII / 2010. Especially about the position of women, both in terms of the mother status with or children status.

## CONCLUSION

The conclusions that can be drawn is the First, the couple had intercourse invalid because one of them is bound marriage. Second, the child's status of their relationship was granted, so that children have limited civil rights with the man. Among the civil rights it is maintenance, education, health and so forth. While in islamic law, the child outside of the mating, do not have inheritance rights and the rights of guardians to his father.

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Baidhowi  
Lecturer of Law Faculty of Semarang State University  
(E-mail: baidhowi.3579@gmail.com)