Jurnal Hukum dan Peradilan – ISSN: 2303-3274 (p), 2528-1100 (e)
Vol. 8, no. 2 (July), pp. 228-254, doi:10.25216/JHP.8.2.2019.228-254

THE DUALISM OF THE SUPREME COURT'S DECISIONS ON THE POSITION OF NON-MARITAL CHILD

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Abstract

Since the birth of the Constitutional Court Decision Number 46/PUU-VIII/2010, the legal experts have discussed the positions of marriage children through articles, papers, books and seminars, pros and cons when interpreting the non-marital child, judges also gave birth to many interpretations. The Supreme Court (MA) has two views in adjudicating the marriage case, Supreme Court Decision Number 329 K/AG/2014 states that the ratification of an unmarried child is not a jurisdiction of the Religious Courts, whereas in Decision of Supreme Court Number 597 K/AG/2015 states that the non-marital children are legitimate even though the marriage of their parents only carries out marriage under Islamic law. The formulation of the problem is how the criteria of marital legitimacy in Indonesia? How is the outsider interpretation of the two Supreme Court decisions? The research method used is literature study, with the type of normative legal research, which is descriptive analytical. The conclusion is that in Supreme Court Decision Number 329 K/AG/2014 considered the marriage to be legitimately religious, but because it is not recorded so that the marriage does not get the certainty and protection of the law, consequently the child born from the marriage is not a legal child, whereas in Decision Number 597 K/AG/2015 The Supreme Court considers that although the marriage is not recorded, the child born from the marriage must still have legal certainty and protection so that the child is considered a legal child.

Sejak lahirnya Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010 para pakar hukum ramai kembali membahas kedudukan anak luar kawin baik melalui artikel, makalah, buku maupun seminar, terjadi pro dan kontra ketika menafsirkan anak luar kawin tersebut, tidak terkecuali di kalangan hakim juga

melahirkan banyak penafsiran. Mahkamah Agung (MA) mempunyai dua pandangan dalam mengadili perkara anak luar kawin, Putusan MA No. 329 K/AG/2014 menyatakan pengesahan anak luar kawin bukan kewenangan Pengadilan Agama, sedangkan dalam Putusan MA No. 597 K/AG/2015 menyatakan anak luar kawin adalah anak sah meskipun perkawinan orang tuanya hanya dilakukan berdasarkan hukum Islam. Rumusan masalahnya adalah bagaimana kriteria keabsahan perkawinan di Indonesia? bagaimana penafsiran anak luar kawin pada kedua putusan Mahkamah Agung tersebut?. Metode penelitian yang digunakan adalah studi kepustakaan, dengan jenis penelitianan hukum normatif, yang bersifat deskriptif analitis. Kesimpulannya, bahwa dalam Putusan No. 329 K/AG/2014 MA menganggap perkawinan tersebut sah secara agama, namun karena tidak tercatat sehingga perkawinan tersebut tidak mendapat kepastian dan perlindungan hukum, akibatnya anak yang lahir dari perkawinan tersebut bukanlah anak sah, sedangkan dalam Putusan No. 597 K/AG/2015 MA menganggap perkawinan tersebut tetap sah meskipun tidak tercatat, anak yang lahir dari perkawinan tersebut pun dianggap sebagai anak sah.

Keywords: Non-Marital Child, Biological Parents, Supreme Court Decision.

Introduction

Children are the result of the biological relationship between men and women so that the position of children depends on the legitimacy of the marriage of their parents. In Indonesia, there are at least two marriage models recognized by the community, namely registered marriages and unregistered marriages. Registered marriages are religiously legitimate marriages and recognized by the state. Unregistered marriages are religiously legitimate marriages but are not recognized by the state, usually referred to as *sirri* marriage, under-marriage or wild marriage.[1]

In Indonesia there are several legal structures governing the position of children, namely West Civil Law (BW), Islamic law, Customary Law and National Law. Therefore, several terms are known about children, namely: legal children, extramarital children,

[1] M. K. Anshary, *Hukum Perkawinan di Indonesia: Masalah-Masalah Krusial* (Yogyakarta: Pustaka Pelajar, 2010), p. 13.

adultery children, incest children, adopted children and stepchildren. In legal institutions in Indonesia, these terms have different connotations so that it also affects the position of a child in the legal perspective.[2]

The definition of a legitimate child is regulated in Law No. 1 of 1974 concerning Marriage (hereinafter referred to as the Marriage Law) in Article 42 which reads: *"A legitimate child is a child born in or as a result of a legitimate marriage"*. The article is further elaborated in Article 99 of the Compilation of Islamic Law (hereinafter referred to as KHI), which reads: *"Legitimate children are: (a). children born within or due to legal marriage; (b). the result of a legitimate husband and wife outside the womb and born by the wife"*. The definition of illegitimate child is also regulated in the Marriage Law in Article 43 paragraph (1) which reads: *"A non-marital child only has a civil relationship with his mother and his mother's family"*.[3]

According to Satrio, the position of children in family law can be categorized into two types, namely: legitimate children and illegitimate children or extramarital children.[4] A child born from a *sirri* marriage is called an illegitimate or extramarital child so that the child only has a civil relationship to his mother and his mother's family. However, on February 17, 2012 the Constitutional Court (MK) dropped Decision No. 46/PUU-VIII/2010, which normally states that a non-marital child has a civil relationship with his mother and his mother's family and also has a civil relationship with his biological father and his father's family as long as it can be proven based on science and technology and/or tools other evidence.

Armed with the Constitutional Court Decision the justice seeker community (*justiciabelen*) flocked to file the petition case and the lawsuit of the child resulting from the marriage of the *sirri* with the title of the petition from the child or the biological child suit, there were several cases up to the cassation level including Decision No. 329 K/AG/2014 and 597 K/AG/2015, with the following cases:

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[2] M. K. Anshary, *Kedudukan Anak dalam Perspektif Hukum Islam dan Hukum Nasional* (Bandung: Mandar Maju, 2014), p. 1.

[3] Ahmad Rofiq, *Hukum Perdata Islam di Indonesia* (Jakarta: Raja Grafindo Persada., 2013), p. 178.

[4] Juswito Satrio, *Hukum Keluarga Tentang Kedudukan Anak dalam Undang-Undang* (Bandung: Citra Aditya Bakti, 2005), p. 6.

1. MA Decision at cassation level No. 329 K/AG/2014 comes from the decision of the appeal level of the High Court of Religion (hereinafter referred to as PTA) Jakarta No. 75/Pdt.G/2013/PTA.JK and the first level decision of the Religious Court (hereinafter referred to as PA) South Jakarta No. 1241/Pdt.G/2012/PA.JS. As for sitting in the case this case is Machica Mochtar (hereinafter referred to as MM) filed a marriage claim lawsuit which was accumulated with a biological child suit against Drs. Moerdiono (hereinafter referred to as DM) to PA South Jakarta. MM postulated that MM and DM had married sirri in December 1993 and produced a child with the initials MIR. In 1998 both divorced, after divorce, DM did not fulfill its obligations as a father, even DM did not recognize MIR as its biological child. To the lawsuit, South Jakarta PA only partially granted the MM claim that a child named MIR is a child out of marriage from MM and DM, with legal considerations that marriage between MM and DM cannot be concluded (declared legally valid) due to legal constraints namely when the marriage contract the DM does not get polygamy permission from the Court. Because the application for marriage certificate is rejected, the application for ratification of the child is also rejected, while the biological child lawsuit is granted with legal considerations that based on witnesses and supplementary oaths (suppletoir add) the child has been proven to be a biological child MM and DM. Jakarta PTA appeal verdict strengthens the consideration of the South Jakarta PA decision. Decisions at the cassation level, the Supreme Court (hereinafter referred to as MA) reject all Plaintiff's claims because of the position of non-marital child of marriage not including the authority of the PA.
2. Decision on cassation level No. 597 K/AG/2015 came from the stipulation of the first court of PA South Jakarta No. 0346/Pdt.P/2014/PA.JS. The seats are David Allen Clive Delbridge (DAC) and Anastasia (AN) (hereinafter referred to as the Petitioners) to apply for the origin of children to PA Jakarta. The Applicants were married sirri in July 2009 and produced a child named Devon David Delbridge (hereinafter referred to as DD). Because their marriage was not recorded, the South Jakarta Administration Office of Population and Civil Registration Office

> issued a birth certificate for the child as a mother's child, only having a relationship with the mother alone. The Applicants request that the child be determined as the legitimate child of the Petitioners. South Jakarta PA rejected all of the requests, with legal considerations that the child was born from an illegitimate/unregistered/non-legal marriage so that the child could not be declared a legitimate child. The decision on the cassation level, the Supreme Court grants all the requests because the marriage of the Petitioners is valid based on Article 2 paragraph (1) of the Marriage Law so that the child of the marriage is a legitimate child.

Based on the two Supreme Court verdicts, the status or status of children is very dependent on the legitimacy of the marriage of their parents. If the marriage of his parents is valid according to religion and is registered in the relevant authority, then the child is a legal child. Conversely, if the marriage of his parents is valid according to religion but is not recorded in the authorized agency, then the position of the child becomes a difference of opinion (debatable). Therefore, the cause of the difference in views in adjudicating cases of petition and the lawsuit of children who are married to sirri is due to differences in views in interpreting the validity criteria of marriage under Indonesian law. Based on the explanation, the researcher was interested in examining the causes of the different interpretations and the researcher tried to mediate the differences in interpretation and provide a solution to the two decision differences.

Formulation of the problem

Based on the background and chronology of the above case, what needs to be answered in this study is what are the validity criteria of marriage in the Indonesian legal perspective? How is the position of out-of-child children in the perspective of Indonesian law? What is the solution so that out-of-wedlock children get legal protection?

Research methods

This research is descriptive analytical. This type of research is normative legal research, namely research conducted by analyzing

written law from library materials or mere secondary data better known as secondary legal material and reference material in the field of law or legal reference material. Data collected through document studies on library materials include primary legal materials such as legislation and court decisions, secondary legal materials, namely materials sourced from scholarly opinions of scholars and literature books that have a connection with the focus on research. this, and tertiary legal materials such as legal dictionaries, encyclopedias, magazines, newspapers, internet, journals. The data analysis used is the qualitative analysis method.

Analysis of Supreme Court Decision No. 329 K/AG/2014 and No. 597 K/AG/2015

Supreme court decision no. 329 K/AG/2014

Petitum figures 2 (two) MM claims that his marriage be declared legally valid. With respect to the petitum, the Supreme Court provides legal considerations which basically state that, "The PA is not authorized to hear cases of marriage rights which are carried out after the enactment of the Marriage Law in 1974, then the petitum number 2 (two) must be rejected."

Such legal considerations seem inappropriate (connected) according to the civil procedure law. If legal considerations are stated that the PA is not authorized to try the case, then at the end of the consideration it is stated that the petitum cannot be accepted (Neit Onvankelijk Verklaart/N.O.), Not rejected. According to Abdul Manan, in terms of contents, the decision/petitum can be in the form of N.O. because there are reasons justified by law.[5] The reasons for not receiving the claim/petitum are several possibilities, namely: (a) Lawsuits are not based on law; (b) The claim has no direct legal interest inherent in the Plaintiff; (c) Blurred suit (obscure libel); (d) the claim is premature; (e) Nebis in Idem lawsuit; (f) An error in persona suit; (g) The claim has been past time (expired); and (h) the court is not authorized to try.

If the Court of Cassation in the end only reinforces the legal considerations of the *judex facti* decision (PTA Jakarta and South

[5] Abdul Manan, *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama* (Jakarta: Prenada Media Group, 2014), p. 299-302.

Jakarta PA Decision) that reject the petitum, the Cassation Judge does not need to give additional consideration as stated above because the final result of the consideration is clearly, the Panel of Judges of the Cassation is sufficient to take over *judex facti* legal considerations or simply declare that *judex facti* is correct and correct in rejecting the 2 (two) figures.

If the final result of the petitum will be rejected, then the case must be taken into account and proof. According to Abdul Manan, in terms of the contents of the verdict/petitum, it can be in the form of being rejected because the Plaintiff cannot submit evidence about the truth of the claim or cannot prove the truth of the claim.[6] Because the Cassation Judge has justified judex facti legal considerations which reject the petitum number 2 (two) concerning the marriage/ratification of the marriage, the Panel of Judges of Cassation must examine the facts revealed at the trial. Based on the facts revealed at the trial that the MM marriage with DM was held on December 20, 1993 in Islam, with the marriage guardian MM's biological father named H. Moctar Ibrahim, witnessed by 2 (two) witnesses, each named KH. M. Yusuf Usman and Risman, with dowry in the form of a set of prayer tools, 2,000 Riyal (Arab currency), a set of gold jewelry, diamonds paid in cash and with *ījāb* pronounced by the guardian and *qabūl* pronounced by DM. Thus, marriage between MM and DM has been proven to have a marriage contract in Islam and has been fulfilled by the pillars of marriage.

Has the marriage been fulfilled, is the marriage legal? The answer is not necessarily, because if there are unmet marriage conditions or legal obstacles that are violated, the marriage can be canceled (if there is a marriage contract) or cannot be declared lawful (if the marriage is celebrated). In this case, the marriage is ordained, the Panel of Judges of Cassation in addition to examining the terms and pillars of marriage, also examines the presence or absence of legal obstacles both legal barriers born of Islamic law and legal obstacles that are born from legislation violated by DM or MM. Based on the facts revealed at the trial that at the time of the marriage, DM found that there was no polygamy permit from the court so that the marriage concerned had legal obstacles as stipulated in Article 9 jis Article 3 paragraph (2) and Article 4 of Marriage Law, Article 40 and Article 56

[6] Abdul Manan, *Penerapan Hukum*…, p. 302-303.

paragraph (1) and (3) KHI. Therefore, the Plaintiff's claim regarding its marriage/ratification must be rejected.

According to the researcher, the Cassation Judge does not need to mention the PA issue it is not authorized to adjudicate the marriage case after the enactment of the Marriage Law in 1974. This will narrow the PA authority and be counterproductive to the justice for all program issued by the Supreme Court. carried out abroad, as stated in the Decree of the Chief Justice No.: 084/KMA/SK/V/2011 concerning Permit for Marriage Ratification Session (Marriage Preaching), dated May 25, 2011 which appoints Central Jakarta PA as its executor, which has been implemented in country of Malaysia. In addition, domestically the Supreme Court also launched an integrated congregation wedding marriage program as stipulated in the Circular of the Supreme Court (SEMA) No. 3 of 2014 concerning Procedures for the Service and Examination of the Marriage and Marriage Voluntary Case in an Integrated Service that has been revoked and replaced with a Supreme Court Regulation (PERMA) No. 1 of 2015 concerning Integrated Services of the District Court and Religious Courts in the Context of the Issuance of Marriage Deeds, Marriage Books and Birth Certificates.

In addition to the marriage certificate, MM also proposed the ratification of his sirri marriage with DM. To this petitum the Judge of the Cassation has given the principal consideration that, "between petitum number 3 (legal child) and petitum number 4 (non-marital child) is contradictory, legitimate child is born from a legal marriage, because petitum number 2 is about *iṯbāt* the marriage has been rejected, then the number 3 must also be rejected."

Initially, the researcher suspected that the lawsuit about legitimate children was expected to be declared unacceptable (*Neit Onvankelijk Verklaart/N.O.*), because the legal considerations of the Panel of Judges of Cassation strongly emphasized formal law on the grounds that there were contradictions between petitum number 3 and petitum number 4, but apparently the end result same with judex facti legal considerations, namely rejecting a lawsuit about a legitimate child that depends on the legality of marriage (the marriage certificate) of his parents.

According to the researcher, petitum number 3 with petitum number 4 is not contradictory, but the petitum is arranged

alternatively, the language is easy if the petitum number 3 is not granted, then the next petitum is provided, namely petitum number 4 which may be granted. The Supreme Court has ever confirmed the lawsuit of an alternative arrangement as stated in the Supreme Court Decree No. 1956 K/Sip/1956, dated June 26, 1957. In the case of the Supreme Court verdict, the *posita* lawsuit was based on the safekeeping agreement. On this basis, the Plaintiff submits a petitum alternatively, namely: demanding the return of goods, or if the item no longer exists, replaced with a sum of money according to the item. MA considers that the petitum is not contradictory to the posita. The reason is the demand to pay the price of the safekeeping goods is reasonable (not odd) according to the law, if the goods are no longer there. The Supreme Court has also never confirmed the lawsuit of an alternative arrangement as stated in the Supreme Court Decision No. 28 K/Sip/1973, November 5, 1975. In the Supreme Court's decision, if the petitum cannot be synchronized or is not in accordance with the posita or not alternative, then the petitum cannot be tolerated and the claim must be declared unacceptable, because it runs away.[7] In the case of MM against this DM, regarding the posita about legal children and non-marital children listed in the posita number 30 in 33 in the Plaintiff's claim. Thus, the two petitum are supported by their respective positives and can be synchronized so that the articles in this case can be arranged alternatively.

If the Panel of Judges of Cassation places more emphasis on the material law, then the legal considerations are correct because according to the provisions of Article 42 of the Marriage Law in conjunction with Article 99 KHI, legitimate children are children born of legal marriage. Because petitum number 2 regarding the marriage certificate has been rejected, then the position of the child cannot be declared as a legitimate child MM and DM, but only as MM children and only has a civil relationship with MM and MM family only.

According to the researcher, if the final result of the petitum was rejected, the Court of Cassation would take over judex facti legal considerations because the legal considerations of the Court of Cassation only repeated judex facti's legal considerations, although a little consideration was added but these additional considerations did

[7] M. Yahya Harahap, *Hukum Acara Perdata Tentang Gugatan, Persidangan, Penyitaan, Pembuktian dan Putusan Pengadilan* (Jakarta: Sinar Grafika, 2008),p. 453.

not have conclusions so that additions these considerations become redundant.

MM also demanded that married children with the initials MIR be determined to have a civil relationship with DM as their father and the DM family. With respect to the petitum, the Cassation Judge gave the main consideration stating that, "*PA is not authorized to try cases of extramarital children because they are not contained in the provisions of Article 49 of Law No. 3 of 2006 and the judex facti verdict has deviated from the duties and authority of judges in religious courts that are obliged to decide based on Islamic law, as the result of the agreement between Indonesian Ulema and Muslim Scholars stated in the KHI marriage law, the number 4 (four) must be rejected*."

1. Dispute over property rights or other disputes in the case as referred to in Article 49 of Law No. 3 of 2006, which is a legal subject between religious people. The authority granted by Article 50 of Law No. 3 of 2006. The authority is recognized and explained further in SEMA No. 4 of 2016 number 9 Legal Formation of the Religious Chamber and number 3 Legal Formulation of the Public Civil Chamber.
2. iṯbāt testimony of ru'yat hilal early in the month of Ramadan and the beginning of the month of Shawwal in the year of Hijrah (Migrate) and provides information or advice regarding the differences in the determination of the Qibla direction and the determination of prayer times. This authority is given by Article 52A Law No. 3 of 2006. The authority is recognized and always given instructions in every month entering the month of Ramadan and Shawwal, for example in Ramadhan 1439 H/2018 M, the Religious Courts Agency provides instructions contained in his letter No. 1245/DjA/HM. 00/5/2018, May 9, 2018.
3. Request for help with the distribution of inheritance (P3HP). The authority in practice in PA is usually referred to as P3HP Deed, comparative deed or inheritance fatwa. This authority is given by Article 107 paragraph (2) of Law No. 7 of 1989. The authority is recognized by the Supreme Court as exemplified in the Decision of the Supreme Court No. 353 K/AG/2005, July 7, 2006.
4. Provide information, considerations and advice about Islamic law to government agencies in their jurisdiction, if requested. This authority is given by Article 52 paragraph (1) Law No. 7 of 1989.

PA can also be entrusted with other duties and authorities by or based on law (Article 52 paragraph (2) of Law No. 7 of 1989).

Among other authorities granted by other legislation include:

1. Application for guardian *adhal*. The authority is given by Article 23 paragraph (1) and (2) KHI jo Article 2 paragraph (1) and (2) Minister of Religion Regulation (PMA) No. 30 of 2005 concerning Guardian Judge jo Article 18 paragraph (5) PMA No. 11 of 2007 concerning Marriage Registration. The authority is recognized by the Supreme Court as exemplified in the Decision of the Supreme Court No. 301 K/AG/2012, September 14, 2012.
2. Request for change in personal data on the marriage certificate. The authority is given Article 34 paragraph (2) PMA No. 11 of 2007 concerning Marriage Registration. The authority recognized by the Supreme Court as exemplified in the Supreme Court Decision No. 290 K/AG/2011, August 23, 2011.
    a. Dowry suit. This authority is recognized by the Supreme Court as exemplified in the Supreme Court Decision No. 23 K/AG/2012 dated July 13, 2012 and MA Decision No. 19 K/AG/2007 dated January 4, 2008 jo MA Decision No. 71 PK/AG/2008, May 29, 2009.
    b. Nushuz's lawsuit. This authority is granted by Article 84 paragraph (4) in conjunction with Article 80 KHI. This authority is recognized by the Supreme Court as exemplified in the Supreme Court Decision No. 793 K/AG/2016, December 27, 2016.
    c. Requests for confiscating property without divorce. This authority is given by Article 95 paragraph (1) KHI. This authority has been practiced by the Central Jakarta PA as exemplified in Decision No. 549/Pdt.G/2007/PA.JP, September 23, 2008.
        1. Request that someone be declared in a state of *mafqūd* (lost). This authority is given by Article 96 paragraph (2) and Article 171 KHI. The authority is recognized and further elaborated in the Letter of Chair of the Supreme Court No. MA/KUMDIL/221/VII/K/1991, dated July 23, 1991.

2. The application for the husband does not want to read and sign *sighah ta'liq*. This authority is given by Article 24 Minister of Religion Regulation (PMA) No. 11 of 2007 concerning Marriage Registration.

Cassation Decision No. 329 K/AG/2014 MA states that cases of non-marital child are not included in the authority of the PA. These considerations can be interpreted that the PA is not authorized to adjudicate cases of extramarital children even though the authority is granted or due to the decision of the Constitutional Court No. 46/PUU-VIII/2010. However, the Supreme Court acknowledges the existence of PA authority given by other laws and regulations of Article 49 of the Law on Religious Courts, even though such authority is granted by regulations under laws such as Minister of Religion (PMA) or Presidential Instruction (KHI). Is the position of the Constitutional Court Decision lower than the Ministerial Regulation or Presidential Instruction?

It has been known that the Constitutional Court has several authorities, of which the ones that receive the most attention are the authority to try at the first and last levels, whose decisions are final in order to test laws against the 1945 Constitution. This is known as judicial review. Article 10 paragraph (1) Law No. 8 of 2011 concerning Amendments to Law No. 24 of 2003 concerning the Constitutional Court (hereinafter referred to as the Constitutional Court Law) affirms that the Constitutional Court Decision is final, namely the Constitutional Court Decision directly obtains permanent legal force since it was pronounced and no legal remedy can be taken. The final nature of the Constitutional Court Decision includes final and binding legal force. Because the Constitutional Court Decision is binding on the general public, the parties related to the implementation of the provisions of the Law that have been decided by the Constitutional Court must implement the decision. However, given the norm in the Law is a unified system, there is an implementation of a decision that must go through certain stages, depending on the substance of the decision. There are decisions that can be implemented directly without having to make new regulations or changes, some of which require further regulation first.

Immediate verdicts are decisions that cancel certain norms that do not disturb the existing norm system and do not require further regulation. For example, the verdict that returned the voting rights of former PKI members by canceling the provisions of Article 60 letter g of Law No. 12 of 2003 concerning General Elections. Since the verdict was pronounced, on February 24, 2004, the voting rights of former PKI members have been restored. On the other hand, there are decisions which for its implementation require further rules, namely decisions canceling a norm that affects other norms, or more operational rules are needed to implement it. The Constitutional Court's decision regarding individual candidates in the Regional Head General Election and the decision on the most votes was an example of this type of decision. However, the absence of regulations that followed up on the Constitutional Court Decision did not reduce the binding strength that had been inherited since it was read. Every related party must implement the decision. If there are rules that are implemented it turns out to be contrary to the Constitutional Court Decision, then the legal basis is the Constitutional Court Decision.[8]

Based on Article 59 paragraph (2) of the Constitutional Court Law affirms that, *"if a change to the law that has been tested is needed, the DPR or the President immediately follows up the MK Decision in accordance with the laws and regulations*". The opposite meaning (*argumentum a contrario*), if the results of the judicial review have not been followed up by the DPR or the President, then the results of the judicial review become the basis for applying in cases relating to the norm.

During this time, the PA has the authority to try cases of child marriages/claims, only with the title of the origin of the child, in which cases the origin of the child can take the form of child denial or child recognition, as exemplified in the Supreme Court Decision No. 163 K/AG/2011, November 4, 2011.[9] Therefore, according to the Researcher, PA is also authorized to try a lawsuit with the title of recognition of an extramarital child or biological child.

[8] Muchamad Ali Safa'at, "Kekuatan Mengikat dan Pelaksaan Putusan MK" dalam *www.anomalisemesta.blogspoot.com,* (accessed on February 2, 2017).

[9] Badan Peradilan Agama Mahkamah Agung Republik Indonesia, *Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama: Buku II* (Jakarta: Ditjen Badilag, 2014), p. 154-155.

According to the legal considerations of the first level decision of the South Jakarta PA, formally the PA has the authority to bring a lawsuit against a child out of wedlock based on the Court Decision No. 46/PUU-VIII/2010 (*this can be seen in the verdict that uses the phrase ... ... which examines and adjudicates cases of recognition of the legal relationship of children outside of marriage with their biological fathers after the decision of the Constitutional Court Number 46/PUU-VIII/2010 dated February 17, 2012,* ……..), but materially the Constitutional Court Decision cannot be applied in the case of MM and DM because in the Constitutional Court Decision there is no clause that can be interpreted retroactively. In this case, South Jakarta PA applies the provisions of Article 56 paragraph (1) of Law No. 39 of 1999 concerning Human Rights and Article 7 of Law No. 23 of 2002 concerning the Protection of Children, essentially the children's right to know their parents (father and mother) is a basic right of children that must be fulfilled in this matter through the court and the omission of children who want certainty about who their father is a violation of human rights child. Based on these considerations, South Jakarta PA granted petitum about out-of-wedlock children, with the dictum stating that the child with the initials MIR, born on February 5, 1996, is a child out of marriage from MM and DM.

Can the Constitutional Court Decision be retroactive? Based on the provisions of the procedural law in the case of testing the applicable law in the Constitutional Court, the Constitutional Court's decision should be prospective, whether it is regulated in Law No. 24 of 2003 concerning the Constitutional Court and Regulation No. MK. 6/PMK/2005 concerning the Code of Procedure in the case of the Testing of Laws stating that the decision of the Constitutional Court should be prospective or applicable in the future. Article 58 of the Constitutional Court Law states that,*" The law tested by the Constitutional Court is still valid, before a decision is made stating that the law is contrary to the 1945 Constitution"*. Article 39 PMK No. 6 of 2005 reads,*" The Court's decision to obtain permanent legal force from the time it was said in the plenary session was open to the public*."[10] Thus, the Constitutional Court Decision

[10] HukumOnline.com, *Mahfud Minta Putusan MK yang Berlaku Surut Tak Diperdebatkan* (Selasa, 11 Agustus 2009), https://www.hukumonline.com/berita/baca/lt4a810f6b09900/mahfud-minta-putusan-mk-yang-berlaku-surut-tak-diperdebatkan/, accessed on February 2, 2017.

applies prospectively (in the future). Even though the Constitutional Court once ruled retroactively (retroactively) like the Court Decision No. 110-111-112-113/PUUVII/2009.

Court Decision No. 46/PUU-VIII/2010 no clause can be retroactive (retroactive). Therefore, the South Jakarta PA cannot implement the MK Decision in the case of MM and DM. South Jakarta PA applies the provisions of Article 56 paragraph (1) Law No. 39 of 1999 concerning Human Rights and Article 7 of Law No. 23 of 2002 concerning the Protection of Children. As a result, the child (MIR) still has no civil relationship with his biological father or his biological father's family, the child is only entitled to know his biological father.

Throughout the readings of researchers, sometimes the Supreme Court is not consistent in applying the Constitutional Court Decision whether there are or no retroactive clauses. In the case of MM and DM, South Jakarta PA was unable to implement the MK Decision on the pretext that there was no clause that could retroactively apply. In fact, the Supreme Court through the Cassation Decision No. 329 K/AG/2014 states that PA is not authorized to try cases of non-marital child. Whereas in the case of shari'a economic disputes, for example the Cilacap District Court Decision No. 64/Pdt.G/2013/PN.Clp. immediately applied and acknowledged the Constitutional Court Decision without considering the presence or absence of the retroactive clause in the MK Decision.

Please note, before the Elucidation of Article 55 paragraph (2) of Law No. 21 of 2008 concerning judicial banking is carried out (judicial review), justice seekers can choose litigation in PA or in State Courts (PN) according to the choice of law in their contract, but after a judicial review with Decision of the Constitutional Court No. 93/PUU-X/2012, dated 29 August 2013 which stated the Explanation of Article 55 paragraph (2) of Law No. 21 of 2008 is contrary to the 1945 Constitution so that it does not have binding legal force. Based on the Constitutional Court Decision, a dispute arising from a shari'a principle transaction, whether in the form of cancellation of contract, breach/breach of contract or PMH/*Onrechtmatige Daad*) is the absolute authority of the PA without seeing the presence or absence of retroactive clauses, there are or not the choice of law in the contract.

Based on these arguments, the PA is authorized to adjudicate cases of petition and lawsuit of child marriages (biological children), where the authority is an extension of the case of the origin of the child or at least other terms/titles of the case of the child's origin. If the interpretation is unacceptable, at least the authority is granted or as a result of the Constitutional Court Decision No. 46/PUU-VIII/2010, February 17, 2012, so according to the Researcher the Constitutional Court Decision can be used as a basis for adjudicating Case No. 329 K/AG/2014.

Supreme Court decision No. 597 K/AG/2015

In this case, the Petitioners only submitted a request for the origin of the child so that South Jakarta PA would ratify the child of the marriage. The Judge of the Cassation gave legal considerations which basically stated that, *"Marriage registration does not include legal requirements for marriage for Muslims, because the marriage of the Petitioners has been carried out according to the Islamic Shari'a and the terms and conditions of marriage have been fulfilled based on the provisions of Article 2 paragraph (1) of the Marriage Law, the marriage of the Applicants is valid. Therefore, the child from the marriage is a legitimate child"*.

The legal considerations are based on the provisions of Article 2 paragraph (1) Marriage Law and Article 4 KHI so that religiously legitimate marriage or sirri marriage has the same legal consequences as recorded marriages, namely there are genealogical and civil relations with both parents. These considerations do not allude to the evidence and legal consequences of the provisions of the paragraph. While the evidence and consequences of the provisions of Article 2 paragraph (2) of the Marriage Law are clear, namely obtaining a marriage certificate or marriage certificate, because the proof of marriage is the existence of a marriage certificate or marriage certificate made by PPN (Article 7 paragraph (1) KHI). As long as the marriage is not registered with the competent authority, the marriage does not have any legal consequences and there is no legal protection.

Marriage/marriage certificate has an important position in population administration in Indonesia. This can be proven by making a marriage certificate as one of the conditions in the management of a residence document, for example the making of a birth certificate or family card, as stated in Article 52 of the Presidential Regulation No.

25 of 2008 concerning Requirements and Procedures for Population Registration and Civil Registration, *"Issuance of Birth and Family Registration can be done after fulfilling the requirements in the form of: ..... d. Excerpt of Marriage Certificate/Marriage Certificate of parents"*. Likewise, divorce claims can only be submitted by those who have a marriage certificate (Article 147 paragraph 1 KHI). Thus, what is expected by the Marriage Law is marriage that is legal according to religion and recorded in marriage registrar employee, not only according to religious teachings. Therefore, according to Abdul Qodir, some of the legal consequences of unregistered marriages are unclear where the child born from the marriage, is not listed as an heir, is not clear due to divorce, such as shared assets, living during the period of *iddah* and *muṭ'ah* and concerning citizenship for mixed marriages.[11]

The researcher agrees with the legal considerations in terms of determining the legality of marriage is the fulfillment of the conditions determined by religion as stipulated in Article 2 paragraph (1) of the Marriage Law. However, Article 2 paragraph (1) cannot be separated from the provisions of Article 2 paragraph (2), namely the administrative obligation to deviate marriage. These administrative obligations serve to protect and fulfill the rights in question and protect them from very broad legal consequences, such as the rights of women as wives, the rights of children who will be born in the marriage so that a marriage is registered, rights arise from a marriage it can be protected by the state.

According to Anshary, a marriage contract can occur in two forms. *First*, the marriage contract that is carried out only solely complies with the provisions of Article 2 paragraph (1) of the Marriage Law, i.e. it has been implemented and has fulfilled the provisions of the religion adopted. *Second*, the marriage contract is carried out according to the provisions of paragraph (1) and paragraph (2) of the Marriage Law simultaneously, which has been implemented according to religious rules and has been registered with the marriage registrar employee. If the first form of marriage contract is chosen, then the marriage has been recognized as a legal marriage according to religious teachings, but it is not recognized as a legal act that has legal

[11] Abdul Qodir, *Pencatatan Pernikahan dalam Perspektif Undang-Undang dan Hukum Islam* (Jakarta: Azza Media, 2014), p. 80.

consequences by the state. Therefore, this kind of marriage does not get recognition and is not legally protected.[12]

Paragraph (1) and paragraph (2) Article 2 of the Marriage Law has a concurrent role, cannot stand alone and is not an alternative, but is cumulative. Paragraph (1) has the role of giving a legitimate label to the marriage, while paragraph (2) has the role of labeling that the marriage is a legal act so that the act receives legal recognition, assurance and protection.

Researchers disagree with these considerations stating the validity of a marriage is only based on the provisions of paragraph (1) of Article 2 Marriage (legitimate according to religious teachings) only, consequently the position of the child resulting from the marriage of the sirri is the same as the position of the child who is legally married religion and recorded (paragraph 1 and 2 Article 2 of the Marriage Law). Therefore, for this problem, other interpretations that remain consistent in paragraphs (1) and (2) of Article 2 of the Marriage Law are an inseparable unit, but their rights remain protected.

Furthermore, the Cassation Judge provides legal considerations which basically state that, *"….which must be considered in the problem of the origin of the child or child genealogy is the best aspect of interest for the child and that is to consider the right of child development both from the psychological aspects of child development and from aspects of legislation as stipulated in Article 52 paragraph (1) and paragraph (2) Law Number 39 of 1999 concerning Human Rights and Article 2 and Article 7 paragraph (1) of Law Number 23 of 2003 concerning Child Protection, because according to Islamic law the determination of the origin of children or genealogy can be done sufficiently with the existence of marriage , regardless of the legality of the marriage".*

Child protection is indeed very important, but still must pay attention to the provisions of other laws and regulations, such as the Marriage and KHI Law so that the child remains protected and does not violate other legislation. Article 42 of the Marriage Law jo Article 99 KHI that legitimate children are: (a) children born within or due to legal marriage; (b) the result of a legitimate husband and wife outside the womb and being born by the wife. Because the parents' marriage is only valid according to religious teachings, the child is a child out of wedlock or a child who is married to a sirri, however, the rights of the

[12] M. K. Anshary, *Hukum Perkawinan*…, p. 23.

child must be protected in other ways, not by giving to his biological father.

According to Wahbah az-Zuhaili, the determination of genealogy can be done in three ways, namely: legal and broken marriage (*fisid*), genealogy confession, and proof. The first method is legal marriage or fascia is one of the reasons it can be set genealogically. The way to determine in this case is at the time of marriage even though the marriage is a fisid or marriage that occurs in a traditional manner, namely a marriage that occurs specifically that is not registered in the official record office (sirri marriage), so all children born to the woman occur.[13] However, Indonesian law does not use pure Islamic law, but Islamic law has been strengthened by state provisions. One of the Islamic laws that have been established by the state is Islamic law contained in KHI or norms of law that are in harmony with Islamic law. Therefore, it is inappropriate to apply pure Islamic law in the country of Indonesia.

In addition, in the determination of genealogy, a child born from a fascist marriage according to a fiqh scholar must fulfill the following three conditions:[14]

a. Husbands have the ability to make their wives pregnant, that is, a person who is high and does not have a disease that can cause his wife to not get pregnant.
b. Relationships actually occur and are carried out by the couple concerned.
c. Children are born within six months or more after the phasid marriage contract or having intercourse.

Legal considerations in number 5 are based on the aspect of the *tajdīd* marriage (official marriage) by their parents and obtain a Marriage Certificate. As it is known that the marriage contract applies in the future, it does not apply retroactively so that the new marriage contract carried out by the Petitioners cannot ratify the old marriage contract and cannot ratify children born from the old marriage. Nevertheless, the actions of the Petitioners to renew marriage contract

[13] Wahbah az-Zuhaili, *al-Fiqh al-Islam wa Adilatuh* (Bairut: Dar al-Fikr, 1985), hlm. 689-690.

[14] Nurul Irfan, *Nasab dan Status Anak dalam Hukum Islam* (Jakarta: Amzah, 2015), p. 68.

(*tajdīd nikaḥ*) must be appreciated, but not by giving the child the result of marrying the sirri as a legitimate child.

Validity of Marriage According to Indonesian Law

According to the Marriage Law, the validity of a marriage is determined by Article 2 of the Law, namely marriage carried out according to the laws of each religion and its beliefs (paragraph 1) and recorded in the government agency that handles the field (paragraph 2). The legitimate problem of whether a marriage is determined by their respective religion, for those who are Muslim must fulfill the terms and harmony of a marriage, and there is no legal obstruction so that if the conditions and pillars of marriage are fulfilled and there are no legal obstacles violated, the marriage is already religiously valid, but the marriage has not been considered valid by the state if it is not registered at the Office of Religious Affairs (KUA), so the marriage must be listed first in the KUA because the recording functions as recognition, protection and legal certainty. Religion that is legally valid but not recorded is usually referred to as sirri marriage, underhanded marriage or wild marriage.[15]

Sirri marriage can be divided into two types. First, the marriage contract is carried out by a man with a woman without the presence of the woman's parents/guardians, usually the guardian of the marriage of an ulama without the rightful delegation from the guardian. Secondly, the marriage contract that is carried out that has fulfilled the requirements and harmony of a marriage according to Islamic law, but is not listed according to the Marriage Law.[16] This second type of marriage is considered religiously valid but has no legal force, because it does not have legal proof of marriage according to the laws and regulations in force in Indonesia.[17]

The procedure for recording marriage is regulated in Article 10 paragraph (3) Government Regulation No. 9 of 1975 (hereinafter referred to as PP 9/1975) which states that marriage must be carried out in the presence of a Marriage Registrar (PPN) attended by two

[15] M. K. Anshary, *Hukum Perkawinan*…, p. 26.

[16] M. K. Anshary, *Hukum Perkawinan*…, p. 26.

[17] Jaih Mubarok, *Modernisasi Hukum Perkawinan di Indonesia*n (Bandung: Pustaka Bani Quraisy, 2005), p. 87.

witnesses. Article 11 paragraph (1) and paragraph (3) states that immediately after the marriage takes place, the two brides sign the marriage certificate prepared by the marriage registrar employee. With the signing of the marriage certificate, the marriage was officially registered. Furthermore, according to Article 13 paragraph (2), each husband and wife are given the quotation of the marriage certificate. By obtaining a quotation from the marriage certificate, their marriage has been declared a religiously legitimate marriage and has received certainty, recognition and legal protection from the state.

Article 7 KHI states that marriage can only be proven by a marriage certificate made by marriage registrar employee, in the event that it cannot be proven by that, it can be submitted marriage certificate/marriage ratification to the Religious Court, but only limited to matters that are pleasing by: (1) the existence of marriage in the context of the settlement of divorce; (2) Loss of Marriage Certificate; (3) There are doubts about whether or not a marriage requirement is valid; (4) The existence of marriage that occurs before the enactment of Law No. 1 of 1974; and (5) Marriage carried out by those who do not have marital barriers under the Marriage Law.

Procedures for marriage certificate, husband and wife of sirri marriage submit application to the Religious Court/*Mahkamah Syar'iyah*. If the request is granted, they will bring the presenter to the KUA's marriage registrar employee where they live and will be listed by the marriage registrar employee in the list provided for that and the marriage certificate will be issued in lieu of the stipulation.

Based on the elaboration, it can be understood that the validity criteria of marriage according to the applicable law in Indonesia are the fulfillment of terms and conditions determined by religion and the absence of legal obstacles violated as stipulated in Article 2 paragraph (1) of the Marriage Law, however Article 2 paragraph (1) cannot be separated from the provisions of Article 2 paragraph (2), namely the administrative obligation to deviate marriage. These administrative obligations serve to protect and fulfill the rights in question and protect from the very broad legal consequences, such as the rights of women as wives, the rights of children who will be born in the marriage so that a marriage is registered, rights arise from the marriage can be protected by the state. Because of the importance of the recording function, Article 6 of KHI states that marriages conducted

outside the supervision of marriage registrar employee do not have legal force.

Position of Children According to Indonesian Law

After the birth of the Constitutional Court Decision No. 46/PUU-VIII/2010 some people assume that with the decision of the Constitutional Court, there have been major changes in the civil law system in Indonesia, for example in inheritance law. Some people assume that out-of-wedlock children have the same position as legitimate children so that between out-of-wedlock children and their biological fathers in addition to having the obligation to provide, care, education and so on, also have genealogical relations resulting in mutual inheritance and guardianship marriage of daughters out of wedlock.[18]

In the view of Islamic law, the child resulting from a relationship outside of marriage is called the term *zina*/adultery (*walad al-zina*), a child of *shubhat* or *li'an* and is considered an illegitimate child.[19] As stated in some of the words of the Prophet Muhammad, which basically explained that the child of adultery was given to the owner of the bed/husband of the woman who gave birth (*firash*) if the woman was married or given to her mother only if the woman was not married so that the child did not genealogical relationship with his biological father and the family of his biological father.

Marriage recognized in Indonesia is a marriage that is carried out according to the laws of each religion and its beliefs and is listed in the government agency that handles the field as stipulated in Article 2 of the Marriage Law. As a result of unrecorded marriages, the marriage does not receive recognition, protection and legal certainty from the state so that the child born from the marriage is an illegitimate child so that he only has a civil relationship (Article 43), but based on the Court Decision No. 46/PUU-VIII/2010 if it can be proven before the court the child is called a biological child from the father who impregnates his mother so that the child has a civil relationship with his biological father and his father's family.

[18] M. K. Anshary, *Kedudukan*…, p. v.

[19] Abdul Manan, *Aneka Masalah Hukum Perdata Islam di Indonesia* (Jakarta: Kencana Prenada Media Group, 2014), p. 83.

Solutions for Protecting Non-Marital Child

On February 17, 2012 the Constitutional Court annulled the provisions of Article 43 paragraph (1) and was declared contrary to the 1945 Constitution. The Constitutional Court changed the sound of the verse so that the verse must be read, "*A non-marital child has a civil relationship with their mothers and their mothers' families and with men as fathers who can be proven based on science and technology and/or other evidence according to the law to have blood relations, including civil relations with their father's family"*. The Constitutional Court's ruling did not mention that it only applies to children of sirri marriage such as MIR, but applies to all children born without legal marriage according to the applicable legal provisions in Indonesia, such as adultery children, cohabiting children, illegitimate children, *jadah* children, *koar* children and so on.

Cassation Decision No. 329 K/AG/2014 and 597 K/AG/2015 are children of sirri marriage, only different ways of obtaining legal provisions, case No. 329 K/AG/2014 by filing a lawsuit (there is an opponent) because the child's father does not admit it, while case No. 597 K/AG/2015 by applying (no opponents) because both parents acknowledge it, should both cases be granted when proven, but have different legal provisions. Cassation Decision No. 329 K/AG/2014 was rejected. That is, the child only has a civil relationship with his mother and his mother's family. This Cassation Decision is too rigid, because it only bases considerations on written regulations only, namely the Marriage Law, the Religious Courts Law and the KHI, even the Court Decision No. 46/PUU-VIII/2010 just ignored, whereas the Cassation Decision No. 597 K/AG/2015 granted. That is, the child has a civil relationship with his mother and father and the family of his mother and father. This Cassation Decision is too progressive, namely combining some written regulations (one of which is paragraph 1 of Article 2 of the Marriage Law) with Islamic jurisprudence (fiqh) provisions, but ignores other provisions in the same law (paragraph 2 Article 2 of the Marriage Law). Based on the two decisions, it appears that the Supreme Court has two different views (dualism) about the position of married children in the same case.

According to researchers, the two cases should be granted by basing on the Constitutional Court's decision, namely as a child out of

wedlock, not a legal child. For example, in the Cassation Decision No. 329 K/AG/2014 in one of the provisions stated "*child named MIR, born on ……. is an extramarital child from the Plaintiff (MM) with the Defendant (DM) ", in the Cassation Decision No. 597 K/AG/2015 in one of the decisions stated "a child named DAC, Born on the date ..... is a child of marriage applicant I (DAC) with Petitioner II (AN)*". If such an amendment, Article 2 paragraph 1 is still upright and Article 2 paragraph 2 of the Marriage Law is not violated, but both children still receive legal recognition and protection.

Indeed, in a formal juridical way the existence of out-of-wedlock children still receives recognition, protection and legal certainty that are fair and equal treatment before the law, as stipulated in Article 28D paragraph (1) of the 1945 Constitution because he is an Indonesian citizen. However, legal protection given to out-of-wedlock children is certainly different from legitimate children from marriages that meet legal norms, because of the fault of the mother and father who did not carry out the marriage not in accordance with applicable Indonesian law. The inequality of legal protection provided by the state to the child, such as the right to inherit from his father's inheritance and cannot be granted to his father, because the legal relationship between the child and his biological father is not supported by authentic evidence in the form of his parents' marriage certificate. Filing an inheritance lawsuit through a formal state institution namely a judicial institution. However, he still has the right to demand inheritance rights through non-formal channels, such as through family or village deliberations.[20]

In the perspective of Islamic law, the majority of Hanafi, Maliki, Syafi'i, Hambali, and Zahiri religious scholars stated that the principle of genealogical determination was due to the existence of legitimate marital relations as the hadith narrated 'Amr ibn Syu'aib and Aisyah RA. Besides being a legitimate marriage, there is no legal consequence of the relationship. Thus, the child of adultery was given to his mother, not to the men who adultered him.[21] Nevertheless, there are opinions that are different from the opinions of the majority of these scholars. This was stated by Ibn Qayyim al-Juaziyyah, that Ishaq ibn Rahawaih argues, that the child born to a woman who is not married,

[20] M. K. Anshary, *Kedudukan*…, p. 144.
[21] Nurul Irfan, *Nasab dan Status*…, p. 183-201.

then recognized by the man who had committed adultery with him, then the child is connected to him. Ibn Rahawaih regionalized (interpreted) the hadith "*al-walad li alf-irash*" (the child belonged to the mattress) as a provision given by the Prophet when there was a dispute between a husband or slave owner (*Ṣahib al-firash*) and someone who claimed to commit adultery with the woman. According to Ibn Qayyim, this opinion was also stated by Hasan al-Basri, the man was sentenced to caning (for adultery) but the child was ordered to him. This opinion was also expressed by Urwah bin al-Zubair and Sulayman bin Yasar, if there is a man who recognizes someone as his child because he has committed adultery with his mother, no one else recognizes the child, then the child becomes his child.[22]

According to al-Yasa's analysis, that Ishaq ibn Rahawaih and other scholars who agree with him, tend to understand these hadiths based on consideration of 'illat (because of the emergence of the law), because the hadiths are related to different cases. Ayesha's Hadith is used for children who are buried by those who are entitled to those who are not entitled, while the hadith of Amru is understood in the absence of a father who wants to admit the child. When a child who is not contested is connected to his mother and his mother's family, it should also be linked to the father who commits adultery with his mother, when the father acknowledges and no other party is harmed. The cause of or reason for legal considerations (*'illat al-ḥukm*) which is taken into consideration is the evidence that the child has a biological relationship with the woman and the man and that no other party is harmed or there is no dispute between the parties.[23]

Based on this analysis, the solution for protecting children outside of marriage can be done through an application (without opponents) if the husband and wife both admit or through a claim (there is an opponent) if the husband does not recognize the child, if proven, then the child either through an application or claim can be determined as a biological child or an extramarital child as outlined in the Constitutional Court Decision No. 46/PUU-VIII/2010, dated February 17, 2012 and according to minority opinions in Islamic jurisprudence.

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[22] Alyasa' Abubakar, *Metode Istislahiah: Pemanfaatan Ilmu Pengetahuan dalam Ushul Fiqh* (Jakarta: Prenadamedia Group, 2016), p. 366.

[23] Alyasa' Abubakar, *Metode Istislahiah:…,* p. 367.

Conclusion

In the Indonesian legal perspective that a legitimate marriage is a legal marriage according to religious teachings (Article 2 paragraph 1 of the Marriage Law) and recorded in the authorized institution (KUA for those who are Muslim and the Civil Registry for those who are not Muslim). In Decision of MA No. 329 K/AG/2014, the Plaintiff's marriage (MM) and Defendant (DM) are religiously legitimate marriages because they have fulfilled the terms and conditions of marriage, but the marriage is not recorded at the local KUA. Likewise in the Supreme Court Decision No. 597 K/AG/2015, the marriage of Petitioner I (DAC) with Petitioner II (AN) is legally valid because it has fulfilled the terms and conditions of marriage, but the marriage is not recorded at the local KUA. Therefore, the two marriages do not have legal protection and do not have any legal consequences.

Children who are lawful according to Indonesian law are children born in or due to a legitimate marriage or the result of a legitimate act of husband and wife outside the womb and are born by the wife (Article 42 of the Marriage Law jo Article 99 KHI). Based on these provisions, the child in the Supreme Court Decision No. 329 K/AG/2014 and MA Decision No. 597 K/AG/2015 cannot be declared a legitimate child.

Child in MA Decision No. 329 K/AG/2014 and MA Decision No. 597 K/AG/2015 still gets legal protection by being designated as a biological child based on the Court Decision No. 46/PUU-VIII/2010, dated February 17, 2012 and according to minority opinions in Islamic jurisprudence.

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