



An Ushuliyah Perspective on the Status of Children Born Out of Wedlock
(Critical Reasoning on the Decision of the Constitutional Court of Indonesia No. 46 of 2010
Regarding the Status of Children Born Out of Wedlock)

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Abstract

This paper arises from the controversy surrounding the Constitutional Court's Decision No. 46/PUU-VIII/2010 regarding the status of children born out of wedlock. The author believes that the polemic surrounding this decision necessitates an analysis using a Ushuliyah (*Islamic legal theory*) approach to determine whether the decision aligns with the principles of justice in Shari'ah or not, as Shari'ah also upholds the values of justice and public welfare. The type of research conducted is a document-based study (library research) with a combined approach, both theoretical and documentary. The primary source of data is the Constitutional Court's Decision No. 46/PUU-VIII/2010, while the secondary sources include all documents such as books, writings, interviews, and other materials related to the research subject. These data were then analyzed using descriptive analysis methods. The research results indicate two important points: *First*, the Constitutional Court's Decision No. 46/PUU-VIII/2010 is consistent with the concept of public welfare (*maslahatul aulad*) in terms of living expenses, education, health, and other aspects, except for civil rights related to lineage, guardianship, and inheritance, as there is no legal ruling by Shari'ah, nor any evidence prohibiting it. *Second*, according to the concept of *istishan istitsna'i* (exceptional preference), which involves making exceptions to general rules based on specific evidence, a child born out of wedlock does not have a Shari'ah-recognized lineage relationship with their biological father or the biological father's family.

Keywords: *Constitutional Court decision, status of children born out of wedlock, ushuliyah*

Abstrak

Artikel ini berawal dari kontroversi terkait Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 mengenai status anak luar kawin. Penulis merasa penting untuk mengkaji polemik putusan tersebut melalui pendekatan ushuliyah guna mengevaluasi apakah keputusan ini sejalan dengan prinsip keadilan dalam syari'at, karena syari'at sangat menjunjung tinggi nilai keadilan dan kemaslahatan. Penelitian ini menggunakan metode studi pustaka (*library research*) dengan pendekatan gabungan, yaitu teori dan dokumentasi. Sumber data utama adalah Putusan MK Nomor 46/PUU-VIII/2010, sementara sumber data sekunder mencakup berbagai dokumen seperti buku, artikel, wawancara, dan materi lain yang relevan dengan topik penelitian. Data-data tersebut dianalisis menggunakan metode analisis deskriptif. Hasil penelitian menunjukkan dua poin penting. *Pertama*, Putusan MK Nomor 46/PUU-VIII/2010 konsisten dengan konsep kemaslahatan (*maslahatul aulad*) dalam hal biaya hidup, pendidikan, kesehatan, dan aspek lainnya, kecuali hak-hak perdata terkait nasab, wali, dan waris, karena tidak ada ketentuan hukum dalam syari'at yang melarangnya. *Kedua*, sesuai dengan konsep *istishan istitsna'i*, yang

mengutamakan pengecualian dalil spesifik terhadap dalil umum, anak luar kawin tidak memiliki hubungan nasab syar'i dengan ayah biologisnya maupun keluarga ayah biologisnya.

Kata kunci: Putusan MK, status anak luar kawin, ushuliyah

INTRODUCTION

The Qur'an is the primary source of Islamic law, establishing the fundamental principles and guidelines for Islamic jurisprudence. One of the most prominent principles is the concept of *maslahah* (public interest or welfare). Similarly, the Sunnah/Hadith often introduces *maslahah*, both explicitly and implicitly. This indicates that the Prophet Muhammad intended to highlight the importance of *maslahah* within Islamic law. It underscores the significance of the concept of *maslahah*, as no Islamic legal ruling is made without considering it. *Maslahah* serves as a guiding framework for Islamic legislation (*tasyri islamiy*), as outlined in the Qur'an and applied by the Prophet, and was well-understood by the prominent companions. They believed that the primary objective of *tasyri islamiy* is to achieve *maslahah*¹.

The concept of *maslahah* is a framework of thought that promotes the well-being of all humanity. When solutions cannot be found within the primary sources of Islamic law, the concept of *maslahah* can be applied². Upholding the values of justice, which are inherently beneficial, the judges of the Constitutional Court (MK) ruled that children born out of wedlock have a civil relationship with their biological fathers, as stated in the Constitutional Court's Decision No. 46/PUU-VIII/2010 regarding the Status of Children Born Out of Wedlock. The MK judges believed that this decision was based on the principle of justice, protecting the constitutional rights of children born out of wedlock. However, this decision appears to be at odds with Islamic law and the Marriage Law (UUP) No. 1 of 1974 concerning Marriage.

The Constitutional Court of Indonesia's Decision No. 46/PUU-VIII/2010, dated February 27, 2012, was issued in response to a judicial review request filed by Hj. Aisyah Mochtar, also known as Machica binti H. Mochtar Ibrahim, and her son Muhammad Iqbal Ramadhan bin Moerdiono. They challenged the provisions of Article 2, Paragraph (2) and Article 43, Paragraph (1) of Law No. 1 of 1974 on Marriage. The case involved Moerdiono, who, while already married, entered into a second marriage with Hj. Aisyah

¹ Asmawi, *Teori Maslahat dan Relevansinya dengan Perundang-Undangan Pidana Khusus di Indonesia*, Jakarta: Badan Litbang dan Diklat Kementerian Agama RI, 2010, Cet. Ke-1, p. 1-3.

² Asmawi, *Teori Maslahat dan Relevansinya dengan Perundang-Undangan Pidana Khusus di Indonesia*, Jakarta: Badan Litbang dan Diklat Kementerian Agama RI, 2010, Cet. Ke-1, p.4

Mochtar under Islamic law, but without registering the marriage in the official Marriage Register. As a result, they did not possess an official marriage certificate, rendering the marriage invalid and leaving the status of their child unclear.

Regarding the status of children born out of wedlock, both the Compilation of Islamic Law (KHI) and Law No. 1 of 1974 provide explanations. Articles 2 and 3 of the KHI outline the foundational principles of marriage, describing it as a strong contract (*mitssaqaan ghalidzan*). The purpose of marriage is to establish a household characterized by peace, love, and compassion (*sakinah, mawaddah, rahmah*)³. Additionally, Article 99 of the KHI states that "a legitimate child is one born as a result of a lawful marriage, and also includes a child conceived outside the womb by a husband and wife, which is later born by the wife"⁴. Furthermore, Article 43, Paragraph (1) of Law No. 1 of 1974 stipulates that "a child born out of wedlock has only a civil relationship with their mother and their mother's family"⁵. Thus, the law establishes that a child born out of wedlock or as a result of adultery is only considered related to their mother and maternal relatives.

The Constitutional Court's Decision No. 46/PUU-VIII/2010 on the Status of Children Born Out of Wedlock has garnered significant attention, particularly among religious scholars. This heightened concern stems from the perceived sanctity of marriage, which is regarded as a strong bond, or "*miistaqon gholidzo*"⁶ (Amir, n.d.: 35). The author believes it is essential to examine the controversy surrounding this decision from an *ushuliyah* perspective to determine whether the ruling aligns with the principles of justice in Shari'ah, which highly values justice and public welfare.

METHOD

The type of research used in this thesis is document-based research (library research⁷). In this document research, the author employs a literature study, focusing on the Constitutional Court's Decision No. 46/PUU-VIII/2010 on Children Born Out of Wedlock, which is analyzed using the *ushuliyah* concept. From a methodological perspective, this research is an Islamic legal study with a combined approach, both

³ Direktorat Jendral Pembinaan Kelembagaan Agama Islam, *Kompilasi Hukum Islam di Indonesia (Instruksi Presiden RI No 1 Tahun 1991)*, Jakarta: Departemen Agama RI, 2000, p. 14.

⁴ Direktorat Jendral Pembinaan Kelembagaan Agama Islam, *Kompilasi Hukum Islam di Indonesia (Instruksi Presiden RI No 1 Tahun 1991)*, Jakarta: Departemen Agama RI, 2000, p. 51.

⁵ Soebekti dan Tjitrosoedibio, *Undang-Undang No 1 Tahun 1974 Tentang Perkawinan*, Jakarta: Pradnya Paramita, 1985, p. 10.

⁶ Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia (Antara Fiqh Munakahat dan UU Perkawinan)*, Jakarta: Kencana, 2009, p. 35.

⁷ Masyhuri dan M. Zainuddin, *Metodologi Penelitian*, Bandung: Refika Aditama, 2008, p. 50.

theoretical and documentary. The theoretical approach applies the *ushuliyah* concept, which is a theoretical framework within Islamic legal studies, while the documentary approach involves analyzing relevant objects such as legislation⁸.

DISCUSSION

The review of the Constitutional Court's Decision No. 46/PUU-VIII/2010 regarding the Status of Children Born Out of Wedlock aims to analyze the considerations or reasoning employed by the Constitutional Court judges in deciding the petition concerning the civil rights of children born out of wedlock. In Islamic legal perspective, judges hold a high position as they are seen as observers and interpreters of the law, using their full capacity to resolve human issues when such laws are not explicitly found in written sources or have not been previously established. Therefore, the author deems it necessary to analyze the reasoning of the Constitutional Court judges regarding this decision through an *ushuliyah* approach, to determine whether their reasoning aligns with *ushuliyah* theory. The judges in their ruling emphasize the principle of justice, which inherently aims towards public welfare (*maslahah*).

In *ushuliyah* studies, several theories are used to derive Islamic law from the Qur'an and Sunnah, such as *ijma'*, *qiyas*, *istihsan*, *istislah* (*maslahah mursalah*), *istishab*, *'urf*, and *dzari'ah*. All these *ushuliyah* theories converge on a single foundation: seeking the welfare of the community (*maslahah*). In analyzing the judges' considerations or reasoning regarding the status of children born out of wedlock, the author applies two *ushuliyah* theories: *istislah* (*maslahah mursalah*) and *istihsan*.

The author uses these two theories for the following reasons; *first, Istislah* (*Maslahah Mursalah*): This theory is applied to analyze the Constitutional Court's decision regarding the civil rights of children born out of wedlock, which includes rights to financial support, education, healthcare, and other aspects, aside from civil rights related to lineage (*nasab*), guardianship (*wali*), and inheritance. These rights carry significant *maslahah* (benefit) for children born out of wedlock, who must be protected. The Qur'an and Sunnah do not explicitly address the issue of the rights of children born out of wedlock in terms of support from their biological fathers.

⁸ Asmawi, *Teori Maslahat dan Relevansinya dengan Perundang-Undangan Pidana Khusus di Indonesia*, Jakarta: Badan Litbang dan Diklat Kementerian Agama RI, 2010, Cet. Ke-1, p.4

Second, Istihsan: The author uses this theory to analyze the Court's decision regarding the civil rights of children born out of wedlock, particularly concerning their *nasab syar'i* (Islamic lineage). This *nasab syar'i* has implications for the rights of guardianship and inheritance. The author argues that *istihsan* is the most appropriate and suitable theory for the analytical approach to the Constitutional Court's decision, compared to other *ushuliyah* theories.

Regarding the term "children born out of wedlock," the author refers to children born outside of a legal marriage, including those conceived through adultery. In Islamic law, marriage determines a child's status. If the marriage is valid, meeting all the necessary conditions and requirements, the child is considered legitimate. However, if the parents do not meet these conditions, the child is classified as born out of wedlock or as a child of adultery.

Moreover, it was clarified by a Constitutional Court judge, Ahmad Fadlil Sumadi, on Saturday, May 18, 2013, that the term "children born out of wedlock" can be interpreted broadly, depending on individual interpretation, as there is no legal definition provided in the law. Therefore, the term can encompass children from unregistered marriages (*nikah sirri*), children born of adultery, or even children resulting from rape (a criminal act). In the Civil Code (KUHPer), children are categorized into three groups as follows⁹:

1. Legitimate Children: Children born within a valid marriage.
2. Acknowledged Children Born Out of Wedlock: Children born outside of marriage who are recognized by their parents, thereby establishing a family relationship and the child's status becomes that of a legitimate child.
3. Unacknowledged Children Born Out of Wedlock: This category is further divided into two subgroups; they are Children born of adultery (where one or both parents are married to someone else), and Children born of incest (where marriage is prohibited).

A. Paradigm of the Concept of Maslahah in Ushul Fiqh

1. Definition of Maslahah

⁹ Ali Afandi, *Hukum Waris, Hukum Keluarga dan Hukum Pembuktian*, Jakarta: PT Rineka Cipta, 1997, Cet. Ke-4, p. 40.

Linguistically, *maslahah* derives from the Arabic root words *saluha*, *yasluhu*, and *salah* (صلاح, يصلح, صلح), which mean something that is good, appropriate, and beneficial. In terms of terminology, there are various opinions among scholars regarding the definition of *maslahah*:

- a. Al-Ghazali: Defines *maslahah* as something that brings benefit or advantage and prevents harm (*madharat*). In essence, *maslahah* in legal rulings should preserve the objectives of Shari'ah, which are to protect religion, life, intellect, lineage, and property¹⁰.
- b. Ahmad Al-Raysuni and Muhammad Jamal Barut: Describe *maslahah* as anything that encompasses good and benefit for individuals or groups while avoiding any harm or corruption (*mafsadat*)¹¹.
- c. Abduljabbar of the Mu'tazilah: States that *maslahah* refers to actions that are necessary to avoid harm (*madharat*)¹².
- d. Dr. Jalaluddin Abdur Rahman: Argues that *maslahah* is the singular form of the word *masalih*, which means every good thing for human benefit. It is considered good if it is beneficial. However, the intended *maslahah* here refers to the preservation of Shari'ah objectives within certain limits and not applied to matters driven merely by personal desires or human whims¹³.

Based on the opinions of the scholars mentioned above, it can be concluded that there is a distinction between the general (linguistic) understanding of *maslahah* and its Shari'ah-specific meaning. The linguistic understanding of *maslahah* emphasizes fulfilling human needs and may include following personal desires or inclinations. In contrast, *maslahah* in Shari'ah is more focused on the principles of *ushul fiqh* (Islamic jurisprudence) and uses the objectives of Shari'ah as the foundation for establishing legal rulings.

¹⁰ Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia (Antara Fiqh Munakahat dan UU Perkawinan)*, Jakarta: Kencana, 2009, p.345

¹¹ Al-Raysuni, Ahmad dan Muhammad Jamal Barut, *Al-Ijtihad, Al-Nash, Al-Waqi'i, Al-Maslahah*, Terj. Ibnu Rusydi dan Hayyin Muhdzar, "Ijtihad Antara Teks, Realitas dan Kemaslahatan Sosial", Jakarta: Erlangga, 2000, p.70

¹² Hamka Hak, *Al-Syathibi Aspek Teologis Konsep Maslahah dalam Kitab Al-Wumafaqat*, Jakarta: Erlangga, 2007, p.80

¹³ Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia (Antara Fiqh Munakahat dan UU Perkawinan)*, Jakarta: Kencana, 2009, p.345

In the book *Al-Maqashid*, Yusuf Hamid, as cited by Amir Syarifuddin, explains the advantages of *maslahah* in Shari'ah compared to the general concept of *maslahah*. These advantages include ¹⁴:

- a. *Shari'ah Maslahah*: This form of *maslahah* relies on Shari'ah guidelines as the primary reference, rather than solely depending on human reasoning. Human reasoning is limited, constrained by time and space, subjective, relative, and easily influenced by one's environment and personal desires.
- b. Timeless Relevance: The concept of *maslahah* in Shari'ah is not confined to temporary or situational benefits but is applicable across all times.
- c. Holistic Evaluation: Shari'ah *maslahah* evaluates good and bad from a mental-spiritual or inner perspective, rather than being restricted to physical or material aspects alone.

In other words, *maslahah* has two distinct characteristics¹⁵:

- a. Bringing Benefit: It involves creating advantages, goodness, or pleasure for people. This benefit or goodness can be experienced either immediately or in the future. For example, the command to fast given by Allah aims not only to avoid forbidden actions but also to maintain health.
- b. Preventing Harm: It aims to protect individuals from evil and damage. This harm or damage can be experienced either immediately or later on. For instance, the prohibition of adultery is intended to protect individuals from harm such as diseases like AIDS.

2. Types of Maslahah

In Shari'ah, *maslahah* is not solely based on rational considerations; it must also align with the objectives of Shari'ah. The goals of Shari'ah include preserving five fundamental aspects of life, such as the prohibition of adultery. This prohibition contains *maslahah* because it aims to protect lineage. Therefore, the legal ruling is consistent with

¹⁴ Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia (Antara Fiqh Munakahat dan UU Perkawinan)*, Jakarta: Kencana, 2009, p.222

¹⁵Ahmad dan Muhammad Jamal Barut Al-Raysuni, *Al-Ijtihad, Al-Nash, Al-Waqi'i, Al-Maslahah*, Terj. Ibnu Rusydi dan Hayyin Muhdzar, "Ijtihad Antara Teks, Realitas dan Kemaslahatan Sosial", Jakarta: Erlangga, 2000, p.70

fundamental human principles¹⁶. *Maslahah* can be divided into several categories. Based on its strength as evidence for legal rulings, *maslahah* is classified into three types¹⁷ :

- a. *Maslahah Daruriyah*: Essential *maslahah* that is fundamental to human life. These are basic needs that must be protected for the survival and stability of society, such as the protection of religion, life, intellect, lineage, and property.
- b. *Maslahah Hajiyyah*: Complementary *maslahah* that enhances human well-being and facilitates a better quality of life. These are not essential but are needed to alleviate difficulties and improve conditions, such as public health measures.
- c. *Maslahah Tahsiniyyah*: Refining *maslahah* that contributes to the aesthetic and moral values of life, improving manners and enhancing social harmony. These are related to personal refinement and cultural enrichment, such as promoting good manners and social etiquette.

When there is a conflict of interests between different types of *maslahah*, the hierarchy is as follows: *maslahah dharuriyah* should be prioritized over *maslahah hajiyyah*, and *maslahah hajiyyah* should be prioritized over *maslahah tahsiniyyah*. Additionally, if there is a conflict between two *maslahah dharuriyah*, the one that holds a higher priority should be given precedence. Therefore, *maslahah* that is considered valid (mu'tabarah) is that which is essential and encompasses the five fundamental protections¹⁸ (Abu Zahrah, 2008:424-425):

- a. *Maslahah* in Religious Belief: Protection of the faith and religious beliefs.
- b. *Maslahah* in Life: Protection of human life.
- c. *Maslahah* in Intellect: Protection of mental faculties and intellect.
- d. *Maslahah* in Family and Lineage: Protection of family and lineage.
- e. *Maslahah* in Property: Protection of personal and communal property.

Furthermore, considering the alignment between what is perceived as good by reason and the objectives of Shari'ah in establishing laws, the efforts to find and establish legal rulings can be categorized into three types¹⁹ :

¹⁶ Ahmad dan Muhammad Jamal Barut Al-Raysuni , *Al-Ijtihad, Al-Nash, Al-Waqi'i, Al-Maslahah*, Terj. Ibnu Rusydi dan Hayyin Muhdzar, "Ijtihad Antara Teks, Realitas dan Kemaslahatan Sosial", Jakarta: Erlangga, 2000, p.70

¹⁷ Ahmad dan Muhammad Jamal Barut Al-Raysuni , *Al-Ijtihad, Al-Nash, Al-Waqi'i, Al-Maslahah*, Terj. Ibnu Rusydi dan Hayyin Muhdzar, "Ijtihad Antara Teks, Realitas dan Kemaslahatan Sosial", Jakarta: Erlangga, 2000, p.74

¹⁸ Muhammad Abu Zahrah, *Ushul al-Fiqh*, Terj. Saefullah Ma'shum, dkk, "Ushul fiqh", Jakarta: Pustaka firdaus, 2008, p.424-425

¹⁹ Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia (Antara Fiqh Munakahat dan UU Perkawinan)*, Jakarta: Kencana, 2009, p.222

- a. *Al-Maslahah Al-Mu'tabarah*: This type of *maslahah* is explicitly acknowledged by Shari'ah and for which legal provisions have been established. It includes:
 - 1) *Al-Munasib Al-Mu'atstsir*: *Maslahah* supported directly by Shari'ah, either through textual evidence (*nash*) or consensus (*ijma*).
 - 2) *Munasib Mulaim*: *Maslahah* that does not have direct textual evidence but is supported indirectly by Shari'ah, indicating that the condition aligns with Shari'ah principles²⁰.
 - b. *Maslahah Mulghoh*: This refers to a *maslahah* considered beneficial by human reason but is disregarded by Shari'ah, which provides evidence contradicting it. For example, advocating for equal inheritance rights for women might be seen as beneficial by human reasoning, but Shari'ah specifies that a male inherits twice as much as a female as written in Surah An-Nisa (4:11)²¹.
 - c. *Maslahah Mursalah*: This is a *maslahah* deemed beneficial by human reasoning but lacks specific Shari'ah evidence either supporting or opposing it. While the majority of scholars agree on using *maslahah mu'tabarah* and reject *maslahah mulghah*, the use of *maslahah mursalah* as a basis for legal rulings remains a subject of ongoing debate among scholars²².
3. *Maslahah Mursalah*:

a. Definition of *Maslahah Mursalah*:

The primary goal of Islamic law (*sharia*) is to achieve *maslahah* (benefit) for humanity and eliminate harm. The *maslahah* provided by Allah is referred to as *masalihul mu'tabarah*, such as the punishment of stoning for adulterers, which aims to preserve human honor. *Kemaslahatan* arising from specific conditions is called *maslahatul mursalah*, for example, the requirement for marriage registration²³.

The term *maslahah* means benefit, and *mursalah* means unbound or unrestricted. Thus, *maslahah mursalah* refers to benefit that is not specifically mentioned in *sharia*, either supporting or opposing, but is consistent with the goals

²⁰ Satria Effendi dan M Zein, *Ushul fiqh*, Jakarta: Kencana, 2008, 149-150

²¹ Satria Effendi dan M Zein, *Ushul fiqh*, Jakarta: Kencana, 2008, 149-150

²² Abdul Wahab Khallaf, *Ilmu Ushulul Fiqh*, Terj. Noer Iskandar Al-Bansany, dkk, "Kaidah-Kaidah Hukum Islam", Jakarta: CV Rajawali, 1989, p. 126.

²³ M. Asywadie Syukur, *Pengantar Ilmu Fikih dan Ushul Fikih*, Surabaya: PT Bima Ilmu, 1990, p.89

of sharia²⁴. In addition, there are several definitions of *maslahah mursalah* according to ushul fiqh scholars, including:

- 1) Amin Abdullah: According to Amin Abdullah, *maslahah mursalah* is the establishment of a legal ruling on issues not explicitly mentioned in the Qur'an or Sunnah, carried out to seek benefit and prevent harm in human life²⁵.
- 2) Dr. Nasrun Rusli: According to Dr. Nasrun Rusli, *maslahah mursalah* involves legal rulings based on benefit, where the ruling is not explicitly determined in the texts or consensus, and there is no explicit rejection from sharia. However, this benefit is supported by general principles of sharia that align with the goals of sharia²⁶.
- 3) Dr. Muhammad Yusuf Musa: According to Dr. Muhammad Yusuf Musa, *maslahah mursalah* encompasses any benefit that focuses on achieving advantages or avoiding harm, without clear sharia provisions supporting or rejecting it²⁷.

Based on the above explanations, the essence of *maslahah mursalah* can be summarized as follows²⁸:

- 1) What is considered good by reason: It should be deemed beneficial and capable of preventing harm.
- 2) Alignment with Sharia objectives: What is considered good by reason must be in harmony with the goals of Sharia when establishing legal rulings.
- 3) Absence of specific Sharia texts: What is deemed good by reason, and aligns with Sharia objectives, should not have specific Sharia texts either supporting or opposing it, and should not be explicitly regulated by Sharia.

b. Conditions for Validity of Maslahah Mursalah as a Legal Proof

²⁴ Satria Effendi dan M Zein, *Ushul fiqh*, Jakarta: Kencana, 2008, p. 149-150

²⁵ M Amin Abdullah, *Madzhab Jogja Menggagas Paradigma Ushul Fiqh Kontemporer*, Djogjakarta: Ar-Ruzz Press, 2002, p.234

²⁶ Nasrun Rusli, *Konsep Ijtihad Al-Syaukani*, Jakarta: Logos, 1999, p.33

²⁷ Nasrun Rusli, *Konsep Ijtihad Al-Syaukani*, Jakarta: Logos, 1999, p.33

²⁸ Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia (Antara Fiqh Munakahat dan UU Perkawinan)*, Jakarta: Kencana, 2009, p.222

For *maslahah mursalah* to be considered valid and not contradict the essence of Sharia while being used as a legal source, it must meet the following three conditions²⁹ :

- 1) The *maslahah* must be genuine and not based on mere assumptions.
- 2) The *maslahah* should be for the public benefit rather than personal interests.
- 3) The *maslahah* must not contradict established texts (nash), consensus (ijma'), or analogy (qiyas).

Additionally, Imam Malik proposed three conditions for the use of *maslahah mursalah* as a legal argument, which are³⁰ :

- 1) The *maslahah* must not contradict the objectives of Sharia (*maqashid as-syari'ah*). According to this condition, the *maslahah* must be in line with definitive (qat'i) evidence.
- 2) The *maslahah* must be rational and sensible.
- 3) The use of *maslahah* should aim to alleviate difficulties.

As stated in the Qur'an, "*And He has not placed upon you in the religion any difficulty*" (Surah Al-Hajj: 78).

The scholars have proposed four views regarding *maslahah mursalah*³¹:

- 1) *Maslahah mursalah* must be based on strong primary sources (asl), such as the Qur'an and Hadith.
- 2) *Maslahah mursalah* must align with the objectives of Sharia (*maqashid as-syari'ah*) and strong primary sources.
- 3) *Maslahah mursalah* is acceptable if it approximates the meaning of strong primary sources.
- 4) *Maslahah mursalah* is considered a definite necessity (qath'iy).

B. Paradigm of Istihsan in Ushul Fiqh

1. Definition of Istihsan

²⁹ M. Asywadie Syukur, *Pengantar Ilmu Fikih dan Ushul Fikih*, Surabaya: PT Bima Ilmu, 1990, p.117

³⁰ Muhammad Abu Zahrah, *Ushul al-Fiqh*, Terj. Saefullah Ma'shum, dkk, "Ushul fiqih", Jakarta: Pustaka firdaus, 2008, p.433

³¹ Muhammad Abu Zahrah, *Ushul al-Fiqh*, Terj. Saefullah Ma'shum, dkk, "Ushul fiqih", Jakarta: Pustaka firdaus, 2008, p.434

Istihsan etymologically means to consider something as good³². In the terminology of Islamic jurisprudence scholars, *istihsan* refers to abandoning a previously established ruling on a particular issue or case, as dictated by Sharia, in favor of a different ruling due to another Sharia text that necessitates this change³³. Below are several definitions provided by scholars:

- a. According to Nasrun Rusli, *istihsan* is the process of abandoning qiyas (analogy) and applying a more suitable ruling because of a Sharia text that demands it, aligning better with human welfare³⁴.
- b. Abdul Wahab Khalaf defines *istihsan* as the transition of a mujtahid from a general qiyas to a specific qiyas or from a general text to a specific ruling due to evidence that contradicts the original reasoning, prioritizing the new evidence³⁵ (Khallaf, 1989: 126).

In essence, qiyas and *istihsan* differ significantly. Qiyas involves two cases: one where the ruling is established based on a text and one where the ruling is not known. If both cases share the same rationale, the established ruling applies to the unknown case. Conversely, *istihsan* involves only one case where the ruling was initially set by a text, but another text necessitates abandoning that ruling, even if the original text was considered strong, due to the need for a different ruling³⁶ (Muin, 1986:142).

2. Types of *Istihsan*

Based on the definitions previously discussed, *istihsan* can generally be divided into two main categories³⁷:

- a. Prioritizing Qiyas Khafi (Subtle Analogy) over Qiyas Jali (Clear Analogy)

³² Abd. Rahman Dahlan, *Ushul Fiqh*, Jakarta: Amzah, cet. Ke-3, 2011, p.197

³³ Muin Umar, dkk, *Ushul Fiqh I*, Jakarta: Departemen Agama, 1986, p.142

³⁴ Muin Umar, dkk, *Ushul Fiqh I*, Jakarta: Departemen Agama, 1986, p.142

³⁵ Abdul Wahab Khalaf, *Ilmu Ushulul Fiqh*, Terj. Noer Iskandar Al-Bansany, dkk, "Kaidah-Kaidah Hukum Islam", Jakarta: CV Rajawali, 1989, p. 126.

³⁶ Abdul Wahab Khalaf, *Ilmu Ushulul Fiqh*, Terj. Noer Iskandar Al-Bansany, dkk, "Kaidah-Kaidah Hukum Islam", Jakarta: CV Rajawali, 1989, p. 126.

³⁷ Abdul Wahab Khalaf, *Ilmu Ushulul Fiqh*, Terj. Noer Iskandar Al-Bansany, dkk, "Kaidah-Kaidah Hukum Islam", Jakarta: CV Rajawali, 1989, p. 126.

This type of *istihsan* is known as *istihsan qiyasi*. It involves giving precedence to a subtle analogy over a clear analogy due to the presence of evidence that necessitates this shift³⁸.

b. Excluding Specific Cases (Juz'iyah) from General Rules (Kully)

This type of *istihsan* is called *istihsan istitsna'i*. It involves excluding specific cases from general rules based on specific evidence that justifies this exception. *Istihsan istitsna'i* is further divided into several types³⁹:

- 1) *Istihsan bi an-Nashash*: This refers to the shifting of a ruling from a general provision to another as an exception due to specific evidence, either from the Qur'an or Sunnah, that dictates this exception.
- 2) *Istihsan bi al-Ijma'*: This involves shifting a ruling from a general provision to another due to the presence of a consensus (*ijma'*) that supports the exception.
- 3) *Istihsan bi al-Urf*: This refers to an exception to the general principles of Sharia based on prevailing customs or practices (*urf*).
- 4) *Istihsan bi ad-Dharurah*: This type involves an exception due to a state of necessity (*dharurah*), shifting the ruling from a general provision to another to address urgent needs.
- 5) *Istihsan bi al-Maslahah al-Mursalah*: This involves making an exception to a general rule in favor of another provision that aligns with the principles of public interest (*maslahah*).

C. Analysis of Maslahah on the Constitutional Court Decision No. 46/PUU-VIII/2010 Regarding the Status of Children Born Out of Wedlock

Article 1 of the Marriage Law (UUP) No. 1 of 1974 states, "Marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family or household based on the One Almighty God"⁴⁰. In Islamic law, the validity of a marriage is determined by the fulfillment of certain conditions and pillars (*rukun*) in marriage, so if these conditions and pillars are met, the

³⁸ Abdul Wahab Khallaf, *Ilmu Ushulul Fiqh*, Terj. Noer Iskandar Al-Bansany, dkk, "Kaidah-Kaidah Hukum Islam", Jakarta: CV Rajawali, 1989, p. 126.

³⁹ Abdul Wahab Khallaf, *Ilmu Ushulul Fiqh*, Terj. Noer Iskandar Al-Bansany, dkk, "Kaidah-Kaidah Hukum Islam", Jakarta: CV Rajawali, 1989, p. 126.

⁴⁰ Soebekti dan Tjitrosoedibio, *Undang-Undang No 1 Tahun 1974 Tentang Perkawinan*, Jakarta: Pradnya Paramita, 1985, p. 2

marriage is considered valid. This principle aligns with Article 2 paragraph (1) of the UUP, which states that "a marriage is valid if conducted according to the laws of each religion and belief"⁴¹. However, to protect the constitutional rights regulated by law, a marriage must be registered, making the registration of marriage an administrative requirement that must be fulfilled. The registration of marriage is a measure taken to preserve the sanctity (*miitsaqan galidzan*) of the legal aspects arising from a marriage bond⁴².

If a marriage conducted according to religious norms is valid, then the legal consequences arising from that marriage are also valid. Therefore, a child born outside of marriage and a child born out of wedlock but delivered within a legitimate marriage, according to Islamic law, only has a *nasab* (lineage) relationship with the mother and her family. This is consistent with Article 43 paragraph (1) of Law No. 1 of 1974, which states that "a child born outside of marriage only has a civil relationship with his/her mother and her family"⁴³. However, according to Satria Effendi Zein, the biological father should be subjected to *hadd* (prescribed punishment) and *ta'zir* (discretionary punishment). The *ta'zir* punishment referred to includes providing financial support, health care, education, and other necessities until the child born out of wedlock reaches adulthood⁴⁴.

Islamic law, true to its characteristic of embodying *al-maslahah* (public interest), aims to uplift the dignity of humanity in its entirety, in line with its creation as a *khalifah* (steward) tasked with preserving the earth. In Islamic law, the primary basis for legal rulings is the Qur'an and Sunnah. Nevertheless, in reality, the challenges faced by humanity are ever-present and evolving. Hence, Islamic law opens the door for *ijtihad* (independent reasoning) to find solutions when problems arise, provided that such solutions do not conflict with the primary sources of law.

The Constitutional Court Decision No. 46/PUU-VIII/2010 addresses the status of children born out of wedlock, focusing on their civil relationship with their biological

⁴¹ Soebekti dan Tjitrosoedibio, *Undang-Undang No 1 Tahun 1974 Tentang Perkawinan*, Jakarta: Pradnya Paramita, 1985, p. 2

⁴² Zainuddin Ali, *Hukum Perdata Islam di Indonesia*, Jakarta: Sinar Grafika, 2006, p. 26.

⁴³ Soebekti dan Tjitrosoedibio, *Undang-Undang No 1 Tahun 1974 Tentang Perkawinan*, Jakarta: Pradnya Paramita, 1985, p. 10

⁴⁴ Neng Djubaidah, *Pencatatan Perkawinan dan Perkawinan Tidak Dicatatkan Menurut Hukum Tertulis di Indonesia dan Hukum Islam*, Jakarta: Sinar grafika, 2010, p. 170.

parents. This decision is significant because it touches on the broader implications of *maslahah* in the context of modern legal challenges. The principle of *maslahah* in Islamic jurisprudence, which refers to the consideration of public interest, plays a crucial role in understanding the Court's ruling and its alignment with Islamic values.

The concept of *maslahah* requires that any legal decision must aim to bring about good and prevent harm, reflecting the ultimate objectives of *maqasid al-sharia* (the goals of Islamic law). In this context, the decision to recognize the civil rights of children born out of wedlock, including their right to be supported by their biological father, can be seen as an application of *maslahah* that seeks to protect the child's welfare and dignity. This approach resonates with the broader Islamic principle of justice and fairness, ensuring that the rights of all individuals, particularly vulnerable ones like children, are safeguarded.

Moreover, the Court's decision can be viewed as an *ijtihad* (independent reasoning) in response to the evolving social and legal landscape, where the need to protect children's rights has become increasingly recognized. By ensuring that children born out of wedlock are not deprived of their rights, the decision aligns with the principle of *maslahah* by promoting the public interest and preventing potential harm to the child's well-being.

In conclusion, the Constitutional Court's decision on the status of children born out of wedlock is a reflection of the dynamic nature of Islamic jurisprudence, which seeks to address contemporary issues through the lens of *maslahah*. By prioritizing the welfare of the child and recognizing their civil rights, the decision exemplifies the application of *maslahah* as a guiding principle in modern legal contexts, ensuring that justice and fairness are upheld in accordance with the objectives of Islamic law.

One issue related to the civil rights of children born out of wedlock is highlighted in Islamic law, which states that even if the biological father of an illegitimate child marries the mother, the child still does not have a *nasab* (lineage) relationship with the biological father or his family. They cannot inherit from each other, but may give a will or gift (*hibah*)⁴⁵. This is in accordance with Article 186 of the Compilation of Islamic

⁴⁵ Neng Djubaidah, *Pencatatan Perkawinan dan Perkawinan Tidak Dicatatkan Menurut Hukum Tertulis di Indonesia dan Hukum Islam*, Jakarta: Sinar grafika, 2010, p. 78

Law (KHI), which states, "a child born out of wedlock only has an inheritance relationship with his or her mother and the mother's family"⁴⁶.

However, the Constitutional Court (MK) ruled differently regarding children born out of wedlock. According to the Constitutional Court in its Decision No. 46/PUU-VIII/2010 on the Status of Children Born Out of Wedlock, Article 43 paragraph (1), which states, "a child born out of wedlock only has a civil relationship with his or her mother and the mother's family"⁴⁷, must be interpreted as "a child born out of wedlock has a civil relationship with his or her mother and the mother's family as well as with the man as the father, who can be proven based on science and technology and/or other legal evidence to have a blood relationship, including a civil relationship with the father's family." Therefore, with the change in this Article, a child born out of wedlock also has a civil relationship with his or her father and the father's family.

The Constitutional Court considered that the provisions of Article 43 paragraph (1) of the Marriage Law (UUP) are contrary to the 1945 Constitution, implying that regardless of the marriage procedure/administration, a child born should be granted legal protection because a child born out of wedlock is innocent and did not choose to be born in that manner. Without legal protection, children born out of wedlock would be disadvantaged.

From the perspective of both national law and religion, this Constitutional Court decision serves as a fundamental reference for establishing a system aimed at restorative justice, considering humanitarian values and human rights (HAM). This form of justice seeks to restore the situation and condition of the victim, which have been harmed by an attack or legal rule considered to have infringed on someone's human rights. This suggests that children born out of wedlock should not bear the consequences of the actions of their biological parents, thereby ensuring that their constitutional rights are protected.

Legally, Islamic law does not allow children born out of wedlock to have rights of inheritance, guardianship, or lineage. However, there are ways to protect their rights without violating Islamic law. Therefore, the Constitutional Court's decision should be reviewed using the concept of *masalah mursalah*. Abdul Wahab Khalaf explains that

⁴⁶ Direktorat Jendral Pembinaan Kelembagaan Agama Islam, *Kompilasi Hukum Islam di Indonesia (Instruksi Presiden RI No 1 Tahun 1991)*, Jakarta: Departemen Agama RI, 2000, p. 14.

⁴⁷ Soebekti dan Tjitrosoedibio, *Undang-Undang No 1 Tahun 1974 Tentang Perkawinan*, Jakarta: Pradnya Paramita, 1985, p. 10

maslahah mursalah is a public interest deemed good by human reason. In its legal application, *maslahah mursalah* aligns with the objectives of *syara'* (Islamic law), although there is no explicit *syara'* guidance that either supports or opposes it⁴⁸. Thus, the purpose of *maslahah mursalah* is to promote benefits and eliminate harm.

The Constitutional Court's decision can be evaluated within this framework, balancing the need to protect the civil rights of children born out of wedlock while respecting Islamic principles. This approach allows for the consideration of public welfare in legal rulings, ensuring that justice is served without compromising religious values.

According to the author, the civil rights of children born out of wedlock, such as support for living expenses, education, healthcare, and other aspects, aside from their civil rights related to lineage, guardianship, and inheritance, do not have a specific legal ruling in Islamic law (sharia) and there is no explicit evidence that prohibits it. The existing legal rulings tend to focus on lineage (*nasab*) and inheritance. The recognition of lineage naturally leads to inheritance and guardianship rights.

In the text of a hadith, it is mentioned:

ولد زنا لأهل أمه من كانوا حرة أو أمة

*"A child born out of adultery (has lineage) to the family of his mother, whether she is a free woman or a slave."*⁴⁹.

This hadith emphasizes that a child born out of wedlock has lineage only with his mother and not with his biological father. In this context, the child does not have inheritance rights with the father.

Additionally, another hadith states:

ومن ادعى ولدا من غير رشدة فلا يرث ولا يورث

*"Whoever claims a child from an illegitimate relationship, he neither inherits from the child nor is inherited by the child."*⁵⁰.

⁴⁸ Abdul Wahab Khallaf, *Ilmu Ushulul Fiqh*, Terj. Noer Iskandar Al-Bansany, dkk, "Kaidah-Kaidah Hukum Islam", Jakarta: CV Rajawali, 1989, p. 126.

⁴⁹ Abu Daud Sulaiman Bin 'Ast'ast, *Sunan Abi Daud*, Beirut: Darul Kutub Al-ilmiah, 1996, Juz II, p. 146.

⁵⁰ Abu Daud Sulaiman Bin 'Ast'ast, *Sunan Abi Daud*, Beirut: Darul Kutub Al-ilmiah, 1996, Juz II, p. 146.

This hadith reinforces that there are no inheritance rights between a child born out of wedlock and his biological father. From the perspective of sharia, this affirms that the child is only connected to the mother's family in terms of lineage, while inheritance and guardianship rights with the biological father are not recognized.

However, in matters of civil rights such as support for living expenses, education, and healthcare, sharia does not specifically regulate or prohibit these rights. Therefore, the author argues that there is room within Islamic law to grant these rights to children born out of wedlock without violating the core principles of sharia. Thus, the decision to protect these rights can be seen as a form of *maslahah mursalah*—a consideration of public interest that is not explicitly addressed by sharia but aligns with the general objectives of Islamic law, which aim to achieve justice and welfare for humanity.

Furthermore, the essence of the purpose behind the revelation of Islamic law (sharia) is to achieve the welfare (*maslahah*) of all humanity and to eliminate harm. Therefore, eliminating the harm or damage experienced by children born out of wedlock is a manifestation of *maslahah mursalah*. In other words, children born out of wedlock are entitled to legal protection regarding their constitutional rights, as every child is born pure and is not responsible for the sins of their parents. Providing protection to children born out of wedlock is indeed a form of *maslahatul aulad* (the welfare of children). Therefore, if children born out of wedlock are granted their rights concerning living expenses, education, healthcare, and other matters—excluding civil rights related to lineage, guardianship, and inheritance—it does not conflict with any religious texts (*nash*). This is because the Constitutional Court's decision aims to eliminate harm and bring about welfare.

This perspective aligns with the essence of the *maslahah mursalah* concept, which states⁵¹:

1. Something that is considered good by reason, with the consideration that it brings about good and avoids harm.
2. Something that is considered good by reason must align with the objectives of sharia in establishing law.

⁵¹ Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia (Antara Fiqh Munakahat dan UU Perkawinan)*, Jakarta: Kencana, 2009, p.356

3. What is considered good by reason and is in harmony with the objectives of sharia must not be explicitly rejected by sharia, nor should there be specific guidance from sharia regulating it.

Based on the above discussion, it can be concluded that the Constitutional Court's decision No. 46/PUU-VIII/2010 is consistent with the concept of *maslahah* in Islamic jurisprudence (*ushul fiqh*) concerning living expenses, education, healthcare, and other matters, aside from civil rights related to lineage, guardianship, and inheritance.

D. Analysis of the Legal Lineage (Nasab Syar'i) Relationship Between a Child Born Out of Wedlock and Their Biological Father

In the context of existing Islamic law, marriage is the legitimate means of establishing a child's lineage (*nasab*). In other words, if a marriage is conducted in a manner that is valid according to the couple's faith, the child from that marriage has a *nasab* relationship with their parents⁵², which can be referred to as *nasab syar'i* (legal lineage). Determining *nasab* is crucial because of its implications in matters such as inheritance and guardianship. The validity of a marriage is determined according to the religious and cultural practices of each individual. However, to protect the constitutional rights of every Indonesian citizen, all marriages must be officially registered.

The Indonesian Constitutional Court's Decision No. 46/PUU-VIII/2010, dated February 27, 2012, emerged from a judicial review request filed by Hj. Aisyah Mochtar, also known as Machica binti H. Mochtar Ibrahim, and her son, Muhammad Iqbal Ramadhan bin Moerdiono. They challenged the provisions of Article 2, Paragraph 2, and Article 43, Paragraph 1, of Law No. 1 of 1974 on Marriage. Moerdiono, a married man, had married Hj. Aisyah Mochtar in a religious ceremony that was not registered, resulting in the absence of a marriage certificate. From this marriage, a son named Muhammad Iqbal Ramadhan bin Moerdiono was born.

According to the author, the status of *nasab syar'i* can only be analyzed effectively through the approach of *istihsan* theory, rather than other *ushuliyyah* theories. If the *nasab syar'i* status of a child born out of wedlock with their biological father is to be analyzed using *istihsan* theory, it must adhere to the procedures outlined within that theory.

⁵² Mu'ammal Hamidy, *Perkawinan dan Persoalannya, Bagaimana Pemecahannya dalam Islam*, Surabaya:PT Bina Ilmu, 1978, p. 143.

In *istihsan* theory, there is a concept of shifting from one legal basis to another. For instance, if there is a particular event or occurrence, initially, its ruling may have been determined based on a specific text (*nash*). However, if there is another *nash* that necessitates abandoning the previously established ruling, even if the original basis is considered strong, the need to shift the ruling takes precedence due to the specific circumstances⁵³.

This concept within *istihsan* allows for flexibility and adaptation, providing a potential means to address complex legal issues such as the *nasab syar'i* of children born out of wedlock, particularly in situations where traditional interpretations may not fully account for the broader welfare (*maslahah*) of the individuals involved. The concept of *istihsan*, as previously explained, can be broadly divided into two categories:

1. *Istihsan Qiyasi* - prioritizing a *qiyas khafi* (subtle analogy) over a *qiyas jali* (clear analogy).
2. *Istihsan Istitsna'i* - making exceptions to general rules (*dalil kully*) based on specific evidence (*dalil juz'i*) that necessitates such exceptions.

To analyze the *nasab syar'i* (legal lineage) of children born out of wedlock, the method used is *istihsan istitsna'i bi an-nash*. This involves deviating from a general ruling to a specific ruling due to the existence of particular evidence, which may be derived from the Qur'an or Sunnah⁵⁴.

To examine the *nasab syar'i* in light of the Constitutional Court's decision, which includes civil rights such as guardianship (*wali*), inheritance, and lineage, two foundational sources or arguments must be considered: a general evidence (*dalil kully*) and a specific evidence (*dalil juz'i*). The analysis is as follows:

First, the Qur'an indicates that a father is obligated to provide for the needs of a mother who is breastfeeding his child. This obligation suggests that a father must fulfill the needs of his child, whether directly or indirectly.

وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ

"And the father of the child shall bear the cost of the mother's food and clothing on a reasonable basis" (QS. Al-Baqarah: 233)

⁵³ Muin Umar, dkk, *Ushul Fiqh I*, Jakarta: Departemen Agama, 1986, p.142

⁵⁴ Abd. Rahman Dahlan, *Ushul Fiqh*, Jakarta: Amzah, cet. Ke-3, 2011, p.201-202.

This verse serves as a basis for understanding the responsibility of a father towards his child, which can be extended to include providing for the child's welfare, thereby influencing the discussion on the child's rights to lineage, inheritance, and guardianship. Through *istihsan istitsna'i bi an-nash*, the general ruling of non-recognition of *nasab* for children born out of wedlock could be re-examined, considering the broader implications and responsibilities outlined in the Qur'an.

In addition, both the Qur'an and Sunnah mention that every child is born in a state of *fitrah* (innate purity) and does not carry any sin:

كُلُّ مَوْلُودٍ يُوَلَّدُ عَلَى الْفِطْرَةِ فَأَيُّوَاهُ يَهُودَانَهُ أَوْ نَصْرَانَهُ أَوْ مُجَسَّسَانَهُ (رواه مسلم)

"Every child is born in a state of *fitrah*. Then, it is his parents who make him a Jew, Christian, or Magian." (Mustofa Al-Qasthilani, n.d.: 469).

The author views that the concept of *fitrah* or purity is broad, encompassing all aspects of one's relationship with Allah and with fellow human beings. This includes children born out of wedlock, who are considered *fitrah* and do not bear the sins of their parents. In Islam, sins cannot be transferred to others, including the children of those who committed adultery; only the perpetrators themselves will be held accountable. This principle aligns with the verse from the Qur'an in Surah An-Najm, verse 38:

أَلَا تَرَىٰ وَازِرَةً وَّرَزَّٰهُ أُخْرَىٰ

"(That) no bearer of burdens will bear the burden of another." (QS. An-Najm: 38)

This verse serves as the general principle (*dalil kully*) in the author's analysis within the *istihsan* theory. This principle supports the argument that children born out of wedlock should not be held accountable for the sins of their parents and that they retain their innate purity (*fitrah*). This general rule can be used to examine and potentially justify exceptions within the broader context of Islamic legal rulings regarding lineage, inheritance, and guardianship for children born out of wedlock.

Second, the specific evidence (*dalil juz'i*) as a counter to the general principle (*dalil kully*) mentioned above is that a child born out of wedlock only has civil rights with their mother, as follows:

وَلَدُ زَنَّا لِأَهْلِ أُمِّهِ مِنْ كَانُوا حُرَّةً أَوْ أَمَةً

"A child born out of wedlock belongs to the family of their mother, whether she is free or a slave."⁵⁵

⁵⁵ Abu Daud,.....

This hadith explains that the lineage (*nasab*) of a child born out of wedlock is only with their mother or her family, whether she is free or a slave. It has been clarified in the general principle (*dalil kully*) that a father is responsible for fulfilling the needs of his child, considering that every child is born in a state of purity (*fitrah*) and does not bear any sin. However, the meaning of "child" in the general principle is very broad and applies to all children. This general principle is then overridden by the specific evidence (*dalil juz'i*), which states that the lineage of a child born out of wedlock is only with the mother and her family. Consequently, a child born out of wedlock does not have civil relations with the father or the father's family.

Exempting the specific evidence (*dalil juz'i*) from the general principle (*dalil kully*) is seen as a form of *maslahah* (public interest) and rejecting the Constitutional Court's ruling on the civil rights of children born out of wedlock is considered *istihsan* (legally preferable). The reason for this is that the Constitutional Court's decision, although final and universally applicable to all Indonesian citizens, contains a fundamental error in terminology. The term "child born out of wedlock" should actually refer to a "child of an unregistered marriage" (i.e., a marriage that was not officially recorded), as the ruling originated from a petition involving a marriage that was religiously valid but not officially registered.

Therefore, it can be concluded that the reasoning behind the judges' decision in the Constitutional Court regarding the civil status of children born out of wedlock does not align with the principles of *istihsan* and *maslahah* if applied universally across Indonesia. On the contrary, rejecting this ruling is consistent with *istihsan* and the broader objectives of Islamic law (*maqasid al-shariah*), as it maintains that children born out of wedlock do not have a *nasab syar'i* (legal lineage) with their biological father.

Considering that the Constitutional Court's ruling was based on a petition from an applicant who had a valid marriage under Islamic law but did not have it officially registered (*nikah sirri*), the implication is that Muhammad Iqbal Ramadhan is legally recognized as a legitimate child under Islamic law, and therefore, he has a *nasab syar'i* with his biological father. As such, the Constitutional Court's ruling aligns with Islamic law and serves the public interest (*maslahah*), but its applicability should be limited to individual cases like this, rather than broadly applying to all children born from illicit relationships.

The ruling has caused controversy because it does not differentiate between a child from an unregistered marriage and a child born out of an illicit relationship. This lack of clarity may lead to the assumption that the ruling legitimizes and protects the civil rights of those involved in adultery, potentially diminishing the importance of official marriage registration.

In the principles of ushul al-fiqh, it is stated:

درء المفسد أولى من جلب المصالح

*“Preventing harm takes precedence over bringing about benefits.”*⁵⁶.

In this case, the Constitutional Court's ruling involves both benefits (*maslahah*) and harms (*mafsadah*). One benefit of the ruling is the protection of children, ensuring that children born out of wedlock can receive their civil rights. On the other hand, a harm of the ruling is that it could potentially facilitate adultery, as children born from such relationships would have their civil rights protected.

Given that the potential harm from the Constitutional Court's decision might outweigh the benefits, it is preferable to reject the harm rather than pursue the benefits. Thus, children born out of wedlock should not have a *nasab syar'i* (legal lineage) with their biological father and the father's family.

Considering the harm of the ruling, it would be prudent to review the decision. The ruling arose from a petition involving an unregistered marriage. Furthermore, the ruling does not distinguish between children born out of wedlock from unregistered marriages and those from illicit relationships.

According to the Marriage Law (UUP), a marriage is determined based on religious and belief-based requirements. Therefore, if the ruling does not align with religious provisions, alternative solutions can be considered. For instance, children born out of wedlock could receive custody rights, educational rights, and could receive gifts or obligatory bequests from their biological father. The issue of guardianship (*wali*) could be managed by appointing a judicial guardian. However, children born from illicit relationships do not have a *nasab syar'i* with their biological father.

CONCLUSION

⁵⁶ Ali Ahmad An-Nadwi, *Al-Qawa'id Al-Fiqhiyah*, Damaskus: Dar Al-Qalam, 1991, p. 170

Regarding the review of various issues related to the ushuliyah perspective on the Constitutional Court Decision No. 46/PUU-VIII/2010 concerning the status of children born out of wedlock, the author summarizes the findings into two main points:

- A. On the Civil Rights of Children Born Out of Wedlock: The civil rights of children born out of wedlock regarding livelihood, education, health, and other aspects, except for *nasab syar'i* (legal lineage), are justified. This is because there is no specific legal ruling in *syara'* (Islamic law) and no explicit textual evidence prohibiting such provisions. Addressing the harm or disadvantage faced by children born out of wedlock aligns with the concept of *maslahah mursalah* (public interest) and *maslahatul aulad* (benefit for children). In other words, children born out of wedlock should receive legal protection for their constitutional rights, as every child is born pure and without sin. Therefore, the Constitutional Court Decision No. 46/PUU-VIII/2010 is consistent with the concept of public interest in ushul fiqh regarding livelihood, education, health, and other civil rights, excluding legal lineage.
- B. Based on the Concept of Istihsan Istitsna'i: Istihsan Istitsna'i, which involves making exceptions based on specific textual evidence that overrides general rulings, indicates that children born out of wedlock do not have *nasab syar'i* with their biological father and the father's family. Istihsan (considering something good) suggests rejecting the Constitutional Court's decision, as it does not align with Islamic law concerning *nasab syar'i*. Therefore, if the ruling does not align with religious provisions, alternative solutions could be considered. These may include granting custody rights, educational rights, and allowing children born out of wedlock to receive gifts or obligatory bequests from their biological father. Guardianship can be handled by appointing a judicial guardian, but children born out of wedlock do not have a legal lineage with their biological father.

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