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## Research Article

# Marriage Law For A Girl Produced of Adultery and Her Biological Father According to Four Mazhabs Based on Hifdzunnasl (Comparative Study of Istinbatul Ahkam Madzahibul Arba'ah)"

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**Abstract.** The phenomenon of marrying a daughter resulting from adultery is taboo in society. In this case, Islamic scholars from four schools of thought have different opinions regarding the legal determination of the marriage between a daughter resulting from adultery and her biological father. The problematic outcome of the offspring from this marriage must be considered with *maqosyidussyari'ah* using the concept of *hifdzunnasl*. The aim of this research isto: Find out the

relevance of the opinions of the Four Schools regarding the law of marriage between girls resulting from adultery and their biological fathers in relation to Islamic law in Indonesia and determine the impact of inbreeding between girls resulting from adultery and their biological fathers. The research method used is qualitative, with a library research approach, and a descriptive- analytic type of research. Research results: The marriage of a daughter resulting from adultery and her biological father according to the Hanafiyah and Hanabilah schools of thought is haram, whereas according to the Malikiyah and Syafi'iyah schools of thought it is halal but makruh. Provisions in Indonesian positive law tend to prohibit the issue of children marrying their biological father, especially with the presence of the Constitutional Court decision Number 46/PUU-VIII/2010.

**Keywords:** marriage; adultery biological father; *hifdzunnasl*

**Abstrak.** Fenomena menikahkan anak perempuan hasil zina merupakan hal yang tabu di masyarakat. Dalam hal ini para ulama dari empat mazhab berbeda pendapat mengenai penetapan hukum perkawinan antara anak perempuan hasil zina dengan ayah kandungnya. Permasalahan hasil keturunan dari perkawinan ini harus diperhatikan dengan maqosyidussyari'ah dengan menggunakan konsep hifdzunnasl. Tujuan dari penelitian ini adalah untuk: Mengetahui relevansi pendapat Empat Mazhab mengenai hukum perkawinan antara anak perempuan hasil zina dengan ayah kandungnya dalam kaitannya dengan hukum Islam di Indonesia dan mengetahui dampak perkawinan sedarah antara anak perempuan akibat zina, perzinahan dan ayah biologis mereka. Metode penelitian yang digunakan adalah kualitatif, dengan pendekatan penelitian kepustakaan, dan jenis penelitian deskriptif-analitik. Hasil Penelitian: Perkawinan anak perempuan hasil zina dengan ayah kandungnya menurut mazhab Hanafiyah dan Hanabilah haram, sedangkan menurut mazhab Malikiyah dan Syafi'iyah halal tetapi makruh. Ketentuan dalam hukum positif Indonesia cenderung melarang persoalan anak menikah dengan ayah kandungnya, apalagi dengan hadirnya putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010.

**Kata Kunci:** pernikahan; zina; ayah kandung; empat Madzhab; hifdzunnasl

## INTRODUCTION

The Qur'an states that living in a soul mate is the instinct of all God's creatures, including humans as God's creatures who are given common sense. Marriage is a religious ceremony that should be carried out quickly. Marriage can reduce immorality and protect against adultery (Ahmad Rofiq, 1995: 69). From a legal perspective, the validity of a marriage is related to the state's recognition of the institution of marriage and its legal consequences, such as men's maintenance obligations, joint property, inheritance rights and the status of children. On the other hand, the legality of marriage from a social perspective shows that men and women are members of a civilized society with similar values and norms. Children are a gift from God that parents must pay attention to. Religion prohibits parents from rejecting their children.

Therefore, as parents we have an obligation to protect, educate, provide for, and so on. According to Wahba al-Zuhayli, children have several rights compared to their parents, including: nasab rights (heredity), radha rights (breastfeeding), hadhanah rights (maintenance), territory rights (guardianship or protection) and living rights. (Wahbah az-Zuhaily, 1989: 673). With these five rights, parents can make a child develop well from the physical aspect to the psychological aspect. And

parents make a child their family through lineage, so that legally the child is entitled to the rights mentioned above. (Sari Pusvita, 2018: 31).

Children are people born in a legal marriage due to the relationship between eggcells and sperm cells. A child born as a result of infidelity or adultery is not considered a legitimate child for the husband of the wife who gave birth to him, even if born in a legal marriage. (Sayyid Sabiq, 1999: 78). To maintain genealogy or lineage, Islam establishes the Sharia law of marriage as something that is considered valid to maintain the purity of the lineage. (Nur Azizah, 2018: 60).

Looking at one of the legal references for marriage in Indonesia, namely Presidential Instruction (Inpres) Number 9 of 1991 in the form of the Compilation of Islamic Law or abbreviated as KHI, it has been explained that a child born out of wedlock is regulated from article 99 to article 103. In article The law states that a legitimate child is a child born in or as a result of a valid marriage and is the result of the actions of a husband and wife who were legally born to the wife. The status of children born out of wedlock is explained in article 100, which reads, "Children born out of wedlock only have a lineage relationship with their mother and her mother's family. (KHI MAHKAMAH AGUNG RI, 2011: 88).

However, KHI does not explicitly regulate further how children born out of wedlock are. This raises questions. Is she one of those people whose father and her father's family are prohibited or prohibited from marrying, considering that there is no lineage relationship between them because of sharia descent? Or is it true that it is permissible or lawful for a daughter to be legally married by her biological father? The Compilation of Islamic Law (KHI) has not answered this problem.

The KHI provisions in Chapter VI regarding the prohibition of marriage mentioned above, whether a father may marry a daughter resulting from adultery. In Chapter VI it only refers to women who are forbidden to marry according to what is explicitly stated in the Al-Qur'an and Hadith, whether it is forbidden because of the relationship between the two of them, the relationship by breast-feeding, or because of the relationship between marital relations. Based on the background above, the problems to be studied in this proposal are: 1). What is the *istinbatulahkam* of the imams of the four Madzhab regarding the law regarding the marriage of a daughter resulting from adultery and her biological father? 2). How is the relevance of the opinions of the four schools of thought regarding the law regarding the marriage of a daughter resulting from adultery and her biological father in relation to Indonesian law? 3). How is the impact of inbreeding between a daughter resulting from adultery and her biological father linked to *hifdunnasl* as one of the *maqosidussyari'ah*?

## METHOD

Broadly speaking, research methods are divided into two, namely research using qualitative methods and research using quantitative methods. The qualitative method is a research method that produces findings, not based on statistical procedures and other quantification tools. Qualitative research procedures originate from written or verbal data from people and observable behavior. Meanwhile, quantitative research is a research method that aims to measure research objects accurately based on quantitative/statistical data. The research method in this

thesis uses qualitative methods. Research methods that carry out studies of various classical and contemporary works of books that are related to the problem being studied are known as book surveys or library research. In other words, most of the information and sources used come from library information and sources. (Mestika Zed, 2008: 16). The constructivist knowledge paradigm, often known as the advocacy view, is what is predominantly used by qualitative approaches. In this research, researchers collected data freely with the intention of extracting themes from the information. (Emzir, 2010: 28). Naturalistic research is another name for qualitative research. When qualitative research uses actual background as a direct source and research is a significant tool, this method is often referred to as a naturalistic research method. (Emzir, 2010: 2).

The constructivist knowledge paradigm, often known as the advocacy view, is what is predominantly used by qualitative approaches. In this research, researchers collected data freely with the intention of extracting themes from the information. Naturalistic research is another name for qualitative research. When qualitative research uses actual background as a direct source and research is a significant tool. (Sugiyono, 2008: 25). In general, qualitative research refers to studies that aim to understand phenomena related to what study participants experience, such as behavior, perceptions, motivations, actions, and events, in certain natural settings and by utilizing various natural approaches. Because research is carried out in a natural setting, qualitative research techniques are also known as naturalistic methods. (Sugiyono, 2008: 8). In this research, library research was used to determine what to use in terms of type. Regarding its nature, it falls within the scope of descriptive analysis research and requires an explanation of the views of various individuals, in this case, the views of the four Imams of the Madzhab, namely: Imam Abu Hanifah, Imam Malik, Imam Syafi'i, and Imam Ahmad. bin Hanbal, who has expressed his opinions in various books or scriptures related to this study. The author may have found data sources in various literature for this normative legal research project. Consequently, primary and secondary materials from the literature as well as other complementary sources are used in the qualitative data collection approach. Therefore, the author concentrates on studying literature and reviewing written materials to make it easier to achieve the purpose of writing. (Soejono Soekanto and Sri Mamudji, 2001: 13).

## Literature Review

Journal article, Muhammad Ihwan: "Comparative Analysis Study of Madhhabs Regarding Fathers' Marriages with Out-of-Wedlock Children" This author concludes that there are two things in the issue of lineage. The fuqoha' of the four schools of thought agree that illegitimate children have no lineage with their fathers. This also has implications for inheritance rights and maintenance rights, the child does not receive any rights from his biological father. Meanwhile, regarding whether or not a daughter resulting from adultery can be married by her biological father, the jurists of four schools of thought differ. Hanafiyah and Hanabilah think it is haram. Meanwhile, according to Malikiyah it is halal, and according to Syafi'iyah it is halal but makruh (Muhammad Ihwan, 2021: 111).

Journal article, Ali Imron: "Protection and Welfare of Children in Underage Marriages" This author concludes that Islamic law allows underage marriages with quite strict requirements, and in fact the main consideration is the best benefit for the two bride and groom who will be get married. Underage marriage is caused by several factors, both internal factors of the two prospective bride and groom and their families, as well as external factors that come from the surrounding community. The existence of a marriage dispensation in the regulations also opens up opportunities for underage marriages to take place. In fact, legally underage marriage clearly violates the provisions of the Child Protection Law even though dispensation permission has been obtained from the court to carry out the marriage. The responsibility of parents, families, communities, government and the state in preventing early marriage is a series of activities carried out continuously to protect children's rights. (Ali Imron, 2013: 253).

## RESULT AND DISCUSSION

Marriage is sunnatullah, a universal rule that regulates all creatures of Allah SWT, including humans, plants and animals. Allah SWT has chosen marriage as a means of preserving the lives of His creatures by having children and reproducing. Marriage is also seen as a contract that establishes mutually beneficial rights and obligations between a man and a woman who is not a muhrim. In a broader sense, marriage is an inner and outer union between a man and a woman, which is formed to maintain a family in accordance with Islamic law. (E Hasan Saleh, 2008: 296)

Regarding the definition of marriage or marriage, the priests of four schools of thought provide different definitions, including the following. (Yusuf A Duraiwsy, 2010: 15).

- a) Hanafi Madzhab, marriage is sexual intercourse or al-wathu, which is carried out for the purpose of obtaining pleasure from women.
- b) Maliki Madzhab, marriage is a contract of agreement or al-'aqdu, which aims to obtain pleasure with a woman who is not a mahram, where the marriage is carried out through a vow.
- c) According to the Syafi'i Madzhab, marriage is a contract of agreement or al-'aqdu, which allows a man and a woman to have sexual intercourse, in its implementation it contains the words *ankahtuka* (I marry you to so and so) or *zawwajtuka* (I marry you to so and so)
- d) In the Hambali Madzhab, marriage is an agreement or al-'aqdu, there are *lafadz nikah* and *tazwij*.

Based on the four interpretations of the Imam Madzhab regarding marriage, it can be said that marriage is a contract with a sharia agreement which affects the legal ability of a man and a woman to enjoy the pleasures of marriage with their partner, which is expressed in the form of sexual activity. Then strength, commitment and hope greatly influence the relationship between husband and wife towards a *sakinah mawaddah warahmah* household.

It is clear from the Qur'an and Hadith above that marriage is considered the Sunnatullah and Sunnah of the Prophet in Islam. In this cycle of life, Sunnatullah

refers to adhering to the qudrat and iradat of Allah, while the Sunnah of the Prophet refers to the habits or practices that the Prophet explicitly carried out for himself and for the Prophet's people in general.

### **Istinbath al Ahkam Four Madzhab**

According to Arabic, the word "Madzhab" comes from the root word "Fiil Madhi" ("Dzahaba") which means to go, and the words "Shighah masdar" ("adjective") and "Isim makan" ("word that indicates a place"), namely the path (al-Thariq). (M.Husain A, 1995: 197).

According to M. Husain Abdullah, a school of thought is a collection of mujtahid opinions in the form of Islamic laws which originate from in-depth justification of the Shari'ah as well as various underlying principles (qawa'id) and foundations (ushul), which interact with each other to form a single unity. which is intact. (M.Husain A, 1995: 199).

Istinbath al Ahkam Four Madzhab means bringing out or explaining something that was previously unclear, in this case it means an effort to bring out the meaning of the texts (Al-Qur'an and As-Sunnah) relating to difficult and important matters by devoting the power of reason. and optimal capabilities.

In essence, the high priest who is the basis of thought cannot be separated from existing and developing schools. Although the high priest was not the main force behind the creation of the madzhab, the ideas that emerged as a result of his ijthihad ultimately became the driving force for his students and followers who gathered in various places to document and formalize them. Within the Sunni community, there are four schools of thought that are considered

Mu'tabar: the Hanafi School (Abu Hanifah 80-150), the Maliki School (Imam Malik 93-179), the Shafi'i School (Imam Syafi'i 150-204), and the Hanbali School (Ahmad bin Hanbal 164-241 H).

### **Istinbath al Ahkam Four Madzhab Concerning the Laws of Marriage between the Daughter of Adultery and Her Biological Father**

Istinbath al Ahkam Four Madzhab means explaining or bringing out something that was previously unclear, in this case it means an effort to give meaning to related texts (Al-Quran and Sunnah) regarding difficult and important topics by devoting maximum strength of mind and ability.

The term Istinbath is still generic, so Istinbath can be practiced by fiqh scholars and expert scholars in fields other than Fiqh. Therefore, the terminology of istinbath must be limited to fiqh (Islamic law). Considering the limitations in the field of Islamic law, in short istinbath is an attempt to derive law from texts (the Qur'an and As-Sunnah) using ijthihad. (Muhammad Syukri Albani Nasution, 2012: 155).

The use of the term ijthihad indicates that istinbath should be carried out using ushuliyah rules as operational guidelines for interpreting sharia texts based on the perspective of Islamic law. In general, there are two valid istinbath methods, the first is the ma'nawiyah method (*al-turuq al-ma'nawiyah*) and the second is the lafziyah method. (*al-turuq al-lafziyah*).

Ijthihad has a broader scope than istinbath, because istinbath is a framework for

ijtihad. Istinbath focuses on the texts of the Koran and Sunnah. Therefore, efforts to understand, extract and form laws from these two sources are called istinbath. Meanwhile, understanding, discovery and formulation of law is carried out through the methods of *qiyas*, *istiṣhab* and *istiṣlah* as well as other rational arguments called ijtihad. At first glance, it seems that there are similarities between the meanings of Istinbath and Ijtihad. However, there is a fundamental difference between istinbath and ijtihad.

Based on the explanation above, it can be concluded that istinbath on the issue of marriage between a daughter resulting from adultery and her biological father is an effort to find Islamic laws from the texts of the Al-Qur'an and As-Sunnah which is carried out by devoting the reasoning abilities and thoughts of the four schools of thought.

### Opinions of the Four Madzhab

#### a) Hanafiyah Madzhab

In his work *Al-Mabsuth*, Syamsuddin al-Sarkhasi (Hanafiyah) explains the issue of whether or not a child born out of wedlock, or also known as an illegitimate child, may marry an adulterer (his biological father). He claims that the Hanafiyah fuqaha' prohibits marriage between the biological father of a daughter who has committed adultery and a man who has committed adultery. As written in his book *Al-Mabsuth*:

*"And among the branches of this problem, in our opinion, the daughter of a father resulting from adultery, if a man commits adultery with a virgin so that she gives birth to a daughter, then it is not permissible for the father (who committed adultery) to marry the daughter resulting from adultery, in our opinion ( Al-Sarakhsi, 1993: 206).*

This opinion explains that the creation of a child is basically the result of sexual intercourse between a man and a woman, or because of the meeting of two sperm, namely the ovum and spermatozoa. So that each sperm is mixed with each other and cannot be separated and are related to each other, because the act of adultery is the cause that creates the child. Because that is the mahram decision for a daughter resulting from adultery with her biological father.

#### b). Malikiyah Madzhab

In his book *Bidayat al-mujtahid wa nihayat al-muqtasid*, Ibnu Rusyd al Qurthubi (Malikiyah) states that there are several schools of thought among the ulama regarding whether or not the legal consequences of adulterous relations are the same as those of husband and wife. Then he explained that Imam Malik was of the opinion that committing adultery with someone does not prevent the marriage of that person's mother or father to a daughter or son, as one of the Malikiyah scholars believes. As written in his book *Bidayat al-mujtahid wa nihayat al-muqtasid*:

*"And he explained Imam Malik's opinion in his book Al-Muwatho, it is the same as Imam Syafi'i's opinion that the act of adultery with someone does not forbid him from marrying his mother or daughter ( Abu Al-Walid Muhammad ibn Ahmad ibn Rusyd, 29)*

Then it is explained that a person's act of adultery does not forbid him from marrying his own mother or daughter, because children resulting from adultery have no lineage relationship in the word marriage which is interpreted in a syar'i way, the law is different if the word marriage is interpreted in a lughawi way because the word marriage has a musytarak meaning.

c). Shafi'iyah Madzhab

In his book *Al-Muhazzab fi Fiqh al Imam al-Syafi'i*, Imam al-Syirazi (Syafi'iyah) explains whether or not a child born as a result of adultery can marry his own biological father. According to Imam Syafi'i, even though marriage is makruh, it is permissible or legal ( Abu al-Hasan Ali bin Muhammad al-Mawardi, 1994: 219).

d). Hanbaliyah Madzhab

In his book *al-Mughni Syarhu al Kabir*, Ibn Qudamah (Hanbaliyah) discusses whether or not children born from adultery may marry their own biological father. He explains that this is not allowed because there are seven genealogies: mother, daughter, sister, paternal aunt, maternal aunt, daughter's brother, and daughter's sister. As written in the book *al-Mughni Syarhu al Kabir*:

*"And it is haram for a man to marry his daughter as a result of his adultery, and it is also haram for his sister, and his granddaughter from his son, and his daughter's granddaughter and his brother's daughter from his adultery. (Ibnu Qudamah, Juz 9, 529).*

**Comparative Analysis of Madzhab**

The table below will explain the views of the four schools of thought, Hanafiyah, Malikiyah, Syafi'iyah and Hanbaliyah regarding the law regarding the marriage of a daughter resulting from adultery and her biological father. For more details, see the table below:

Analysis of Madzhab

No	Madzhab	Law
1	Hanafiyah (Al-Mabsuth: Imam As-Sarkhasi)	Haram (Istidla bilqur'an)
2	Malikiyah (Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid: Imam Ibnu Rusyd)	Halal (Istidlal bilqur'an)
3	Syafi'iyah (Al-Muhadzab Fil Fiqhi As-Syafi'i Imam Al-Syirazi)	Halal but makruh (Istidlal bil qur'an wa bil hadits)
4	Hanbaliyah (Al-Mughni Syarhu Al Kabir: Imam Ibnu Qudamah)	Haram (Istidlal bilqur'an)

Based on the data above, a comparative analysis of schools of thought can be found regarding the marriage of fathers and daughters who were born on the basis of adultery with their mothers. Regarding the issue of lineage, children resulting from



adultery or out of wedlock, the four schools of thought agree that illegitimate children do not have a lineage to their father, but can only have a lineage to their mother and their mother's relatives.

The child was not given to the adulterer, because he was not a husband. Therefore, the person who has the right to the child is the man who is the husband of the woman who gave birth to the child. The adulterer, according to the Prophet, deserves only punishment; they have no other rights over their offspring. It was believed that punishment for adultery and childlessness would prevent future adultery, to encourage men who are reconsidering their decisions. Because his child will suffer, besides receiving punishment.

According to the fuqaha', this is only possible if there is a marriage within the father's lineage. Birth, whether due to marriage or not, is still a continuation of the mother's lineage. Therefore, when a man and an unmarried woman have an affair and have a child, the child can only be related to the mother.

Apart from that, there are differences of opinion among the Fuqaha' regarding whether or not it is permissible to marry a daughter resulting from adultery by her own biological father. It is prohibited, according to Hanabilah and Hanafiah. They claim that zina is prohibited because it violates the marriage contract. Therefore, a man is prohibited from marrying an adulterer's mother or daughter after committing adultery with her. Malikiyah and Syafi'iyah both claim to be halal, but Syafi'iyah adds that it is makruh. Because it does not take into account the family relationship between an illegitimate child and his father, according to Malikiyah and Syafi'iyah.

Knowing the reasons for prohibiting marriage because of lineage is very important in order to form a solid view. In the Qur'an, the following people are prohibited from marrying because of their parentage: mother, daughter, sister, father's aunt, mother's aunt, woman's brother, and woman's sister.

The argument regarding the prohibition of marriage because of this lineage is absolute. This means that, whether due to marriage, ownership, wathi' syubhat, or adultery, the lineage is a marriage relationship or the result of a relationship outside marriage. Therefore, it is forbidden to marry one's own child, regardless of whether the child was born through marriage or adultery, even though the child cannot be related to his father, according to Sharia. The offspring of this adulterous relationship are, after all, his own flesh and blood.

## **The Relevance of the Opinions of the Imams of the Four Schools of Religion regarding the Laws of Marriage between Girls resulting from Adultery and Their Biological Fathers in Relation to Islamic Law in Indonesia**

### **Overview of the Compilation of Islamic Law (KHI) regarding the Marriage of a Girl from Adultery and Her Biological Father**

Article 29 of the Constitution of the Republic of Indonesia provides the legal basis for marriage in Indonesia. One of the legal foundations for marriage is contained in Presidential Instruction (Inpres) Number 9 of 1991 in the form of the Compilation of Islamic Law (KHI). . Articles 99 to 103 of the KHU explain the rights of children born out of wedlock. These articles stipulate that a legitimate child is a child born in

or as a result of a legal marriage, a child born to a wife and is the result of legal actions of husband and wife outside of marriage. . Article 100 explains the situation of children born outside of marriage, stating: "Children born outside of marriage only have a blood relationship with the mother and the mother's family. (Article 43 KHI MAHKAMAH AGUNG RI, *HIMPUNAN PERATURAN PERUNDANG-UNDANGAN YANG BERKAITAN DENGAN KOMPILASI HUKUM ISLAM SERTA PENGERTIAN DALAM PEMBAHASANNYA* ).

However, KHI has not explicitly regulated the child's status in more detail. So that raises the question, is she someone who is forbidden to marry by her father and her father's family, considering that according to the Sharia lineage between the two there is no lineage relationship? Or is it really lawful for the woman's child to marry her biological father? Questions like this have not been answered by KHI.

The contents of the Compilation of Islamic Law, prohibitions on marriage are specifically regulated in Chapter VI Articles 39 to 44. These provisions can be explained as follows:

#### Article 39 Compilation of Islamic Law

It is prohibited to carry out a marriage between a man and a woman because:

- 1) Due to family ties: a. With a woman who gives birth or who begets it or its offspring. b. With a woman of paternal or maternal descent. c. With a female relative who gave birth to him.
- 2) Due to marital relations:
  1. With a woman who gave birth to his wife or ex-wife.
  2. With a woman who was the ex-wife of the person who dropped him off.
  3. With a woman who is a descendant of his wife or ex-wife, unless the marriage relationship with his ex-wife is terminated, that is qabla al- dukhûl.
  4. With a woman who was his ex-wife.
- 2) Because of the relationship between breast milk:
  1. With breastfeeding women and so on in a straight line upwards.
  2. With a breast-feeding woman and so on in a straight line downwards.
  3. With a woman who is a breast-feeding sibling, and who is a breast-feeding sibling.
  4. With a female breast-feeding aunt and a breast-feeding aunt's grandmother and above.
  5. With children breastfed by his wife and their offspring.

#### Article 40 Compilation of Islamic Law:

It is prohibited to carry out a marriage between a man and a woman due to certain circumstances: a. Because the woman in question is still married to another man. b. A woman who is still in the iddah period with another man. c. A woman who is not Muslim.

#### Article 41 Compilation of Islamic Law:

- 1) A man is prohibited from marrying his wife to a woman who is related to him by lineage or same-sex relationship with his wife: 1. Siblings, father or mother

- or their descendants. 2. A woman with her aunt or niece.
- 2) The prohibition in paragraph (1) remains in effect even if the wives have been divorced by *raj`i*, but are still in the *iddah* period.

#### Article 42 Compilation of Islamic Law:

A man is prohibited from entering into marriage with a woman if the man still has 4 (four) wives, all four of whom are still married or still under the *iddah* of *talak raj`i* or one of them is still married while the other is in the period of *iddahtalaq raj`i*.

#### Article 43 Compilation of Islamic Law:

1. It is prohibited to enter into a marriage between a man: a. With a woman whose ex-wife was divorced three times; b. With a woman who was his ex-wife, *Dili`an*. 2. The prohibition is in paragraph (1) letter a. falls, if the ex-wife has married another man, then the marriage is dissolved at *ba`da dukhûl* and the *iddah* period has ended.

#### Article 44 Compilation of Islamic Law:

A Muslim woman is prohibited from marrying a man who is not Muslim.

In article 71 of the Compilation of Islamic Law regarding the annulment of marriages, it also mentions the criteria for people who are forbidden to marry, so that a marriage can be annulled. a) husband commits polygamy without permission from the Religious Court. b) The woman he married was later discovered to be the wife of another man who was *mafqud*. c) The woman he married turned out to be still in *iddah* and had another husband. d). Marriages that violate the age limit for marriage as stipulated in Article 7 of Law No. 1 of 1974. e). The marriage was carried out without a guardian or was carried out by a guardian who had no rights. f) Marriage carried out by force.

From the KHI provisions in Chapter VI concerning the Prohibition of Marriage above, it does not discuss in detail whether or not a father may marry a child born out of wedlock. Chapter VI only explains women who are forbidden to marry according to what is clearly stated in the Al-Qur'an and Al-Hadith, whether it is forbidden due to the existence of a lineage relationship between the two, the existence of a breast-feeding relationship or due to a relationship between married relatives.

As in the provisions of KHI article 39, the status of a father who marries his child as a result of adultery can be subject to legal conclusions. If indeed a child born out of wedlock is concluded to only have a family relationship with the mother (Compilation of Islamic Law Article 100), then from article 39 a conclusion can be drawn regarding the status of the father marrying the child, namely that the father is legal and is permitted to marry the child who was born in out of wedlock, because the child does not have a lineage relationship with his father, so he is not included in the women who are forbidden to marry because of a lineage relationship. This refers to the Compilation of Islamic Law Article 100 and Article 39.

### **Review of Law no. 1 of 1974 regarding the marriage of a daughter resulting from adultery and her biological father**

Law Number 1 of 1974 concerning marriage is the law which is the main source

of law in Indonesia. This law also touches on the position of children, both legitimate and illegitimate. Regarding legitimate children, it is explained in article 42, which reads: "Legitimate children are children born in or as a result of a valid marriage." Then in article 43, it is stated about the position of illegitimate children: "Children born out of wedlock only have a civil relationship with their mother and her mother's family. "The position of the child referred to in paragraph (1) above will then be regulated in a Government Regulation."

The provisions in the Law are not much different from what is explained in the Compilation of Islamic Law. Regarding the status of children born out of wedlock, both legal references both state that these children are not legitimate children, they only have a family or civil relationship with their mother or their mother's family. Then Law Number 1 of 1974 also regulates several prohibited marriages. Several articles regulate this matter. (UU No. 1 - 1974).

Article 8:

Marriage is prohibited between two people who: 1. Blood related in a straight downward or upward lineage. 2. Blood relations in a lateral lineage, namely between siblings, between one person and one parent's sibling and between one person and one's grandmother's sibling. 3. marital relations, namely parents-in-law, stepson, daughter-in-law and mother/stepfather; 4. Related to foster care, foster children, siblings and foster aunts/uncles; 5. Relative to the wife or as an aunt or niece of the wife, in the case of a husband having more than one wife. 6. Those who are in a relationship where marriage is prohibited by their religion or other applicable regulations.

Article 9

A person who is married to another person cannot remarry, except in the cases mentioned in Article 3 paragraph (2) and in Article 4 of this Law.

Article 10

If a husband and wife who have divorced remarry each other and divorce a second time, then they may not remarry, as long as the law, the respective religions and beliefs of those concerned do not determine otherwise.

However, when Article 43 of the 1974 Law states that children born out of wedlock only have a civil relationship with their mother or their mother's family, and not with their father or their father's family, then according to the 1974 Law children born out of wedlock can it was concluded that the child could marry his biological father. Because article 8 only mentions the prohibition of marriage between two people who are related by blood in a straight downward or upward lineage. Meanwhile, in the case of children resulting from adultery, they are not included in the group that has a blood or civil relationship to their father in the straight line up and down.

### **The Effect of Constitutional Court Decision Number 46/PUU-VIII/2010 on the Marriage of Children of Adultery with Their Biological Fathers**

The Constitutional Court is the highest state institution in the Indonesian

constitutional system which holds judicial power together with the Supreme Court. Article 24(2) of the 1945 Constitution of the Republic of Indonesia states: Judicial power is exercised by the Supreme Court and subordinate judicial bodies such as the general court, religious court, military court, state administrative court, and the Constitutional Court (MK).

Starting from the petition for judicial review of article 43 of Law Number 10 of 1974 against the 1945 Constitution submitted by applicant Aisyah Mochtar and her son Muhammad Iqbal Ramadhan, although after that the Constitutional Court's decision was widely opposed by the Indonesian Muslim community.

The Constitutional Court is of the opinion that the main issue at issue is the legal meaning of laws and regulations relating to marriage registration. The legal considerations given by the judge in this decision include 15 points which also include the authority of the Constitutional Court, the legal capacity of the applicant, and the opinion of the Constitutional Court. This review is based on the principle of the application submitted by the applicant, namely a review of Article 2 paragraph (2) of the UUP and Article 43 of the UUP. This application principle aims to achieve recognition and certainty of the applicant's status.

After the Constitutional Court (MK) considers its authority to decide on this petition, it will consider the applicant's legal situation. The result of the review is that the applicant has fulfilled the legal requirements and is eligible to apply. This is because the Petitioner, through his arguments, succeeded in arguing that he has legal personality and is disadvantaged by the enactment of the law whose amendment is sought.

What the applicant has attempted in this case has succeeded in fulfilling the requirements stated in Article 51 paragraph (1) of the Constitutional Court Law, namely that there is a relationship between the applicant in the form of rights or authority which in the 1945 Constitution is specifically based on the position or condition of the applicant, that there is a casual relationship between losses and the application of the law, and there is the potential for loss if the request is granted (has a solution).

Firstly, the Constitutional Court Judge considered that the applicant in this condition felt that Article 2 paragraph (1) of the UUP conflicted with his rights as regulated in the 1945 Constitution, Article 28B paragraph (1-2) and Article 28D paragraph (1). Because marriage registration is an administrative restriction implemented by the state solely to protect matters relating to the marriage itself. Even the Constitutional Court considers that administrative obligations like this mean that a person's marriage has authentic evidence that is protected by the state. So that whatever legal consequences arise in the future can be easily processed effectively and efficiently.

Second, in this case the Constitutional Court judge considered that Article 43 of the Marriage Law requires an answer by looking at whether a child is legitimate or illegitimate in the eyes of the law. If the phrase "born outside of marriage" in this article is interpreted textually, it is felt to be unnatural, because fertilization in the human womb can only occur if there is a meeting between sperm and egg. So it can be interpreted that the legal meaning of the word marriage in this article is a conditional meaning, not a sexual meaning. So if the interpretation of the article is like that, it

would be very unfair if a child born due to fertilization in the womb only gets civil liability from the mother. Therefore, children are obliged to have legal protection and consequences regardless of the marital status of their father and mother which may be disputed. because pregnancy occurs due to sexual matters, not conditional matters.

Referring to the judge's considerations and policies, the Constitutional Court concluded that they had the authority to try this case, the petitioners had legal standing, and the main points of the petitioners' petition had some reasons that were in accordance with the law. The part that has no legal grounds is the principal of the petition related to Article 2 paragraph (2), while the principal of the petition for Article 43 is considered legally grounded. So the Constitutional Court granted the applicant's request in Article 43 with the consideration that the article is conditionally unconstitutional as long as the paragraph is interpreted as eliminating civil relations with men which can actually be proven using technology or other evidence.

This decision is controversial because it can be understood that there is a civil relationship between children born outside of a legal marriage and their biological father if it can be proven by science and technology. The legal consequences that can arise from this decision are very broad, so they can have both positive and negative impacts. On the one hand, the rights of children outside of marriage can be fulfilled, if a man is proven according to the latest science to have children in a place where he can be held responsible.

This final decision expressly cancels the content of Article 43 of Law Number 1 of 1974 which states: "Children born outside of marriage only have a civil relationship with their mother and her mother's family." After the decision of the Constitutional Court Number 46/PUUVIII/2010, the article was deleted, so that it read: "Children born outside of marriage have a civil relationship with their mother and their mother's family and with a man as their father which can be proven based on science and technology and/ or other evidence according to the law of blood relations, including civil relations with the father's family."

After the ruling, there were fundamental changes in marriage law in Indonesia. Initially in Law Number 1 of 1974, a child born out of wedlock only had a civil relationship with his mother and his mother's family, then after this decision, children born out of wedlock also have a civil relationship with their father and their father's family, as long as can be proven with technology.

The purpose of the Constitutional Court is to emphasize that illegitimate children also have the right to receive legal protection. According to the Constitutional Court's considerations, the law must provide fair legal protection and certainty regarding the status of a child who is born and the rights they have, including for children who are born even though the validity of their marriage is still disputed.

It is important to note that Constitutional Court decision no. 46/PUUVIII/2010 does not mention the issue of birth certificates for illegitimate children or the legal consequences of this decision on the birth certificates of illegitimate children. The implications of the Constitutional Court's decision relate to the legal status and proof of the origin of illegitimate children. The connection with birth certificates is because proof of a child's origins can only be done with an authentic birth certificate issued by an authorized official in accordance with what is regulated in Article 55 paragraph

(1) of the Marriage Law. Regarding the legal consequences of issuing a birth certificate to an illegitimate child, the child's birth certificate only states the mother's name. Because at the time the birth certificate was made, the child's status was still that of an illegitimate child who was only recognized as having a blood relationship and civil relationship with the mother and the mother's family. In the birth certificate of an illegitimate child, it is stated that a child has been born, including the name, day and date of birth, birth order, mother's name and mother's date of birth (mentioning only the mother's name, not mentioning the name of the child's father). These are the provisions of Article 55 paragraph.

(2) letter a PP No. 37 of 2007 concerning Implementation of Law no. 23 of 2006 concerning Population Administration. With the Constitutional Court decision no. 46/PUU-VIII/2010, the relationship between an illegitimate child and his father is a blood relationship in the biological sense which is confirmed based on a legal process. The Constitutional Court's decision opens up the legal possibility for the discovery of legal subjects who must be responsible for illegitimate children to act as their fathers through legal mechanisms using evidence based on the latest science and technology and/or law.

In other words, there are at least two ways to make an illegitimate child have a blood relationship and also a civil relationship with his biological father and his father's family, namely; a. Recognition by the biological father; or b. Validation by the biological father of the illegitimate child.

The Constitutional Court's decision only strengthens the position of the mother of an illegitimate child in requesting recognition of the biological father of the illegitimate child, if the father does not want to voluntarily acknowledge the illegitimate child. With the recognition of an illegitimate child by his biological father, that is when a civil relationship arises with the biological father and his father's family. Thus, after the process of recognizing the illegitimate child, the illegitimate child is born into a civil relationship between the child and his father as regulated in Article 280 of the Civil Code ("Personal Code") which reads: "With the recognition of the child in outside of marriage, a civil relationship arises between the child and his father or mother."

What is a bit of a problem in this decision is the way civil relations are interpreted. Are the civil relations referred to in the Constitutional Court decision Number 46/PUU-VIII/2010 the same as family relations in Islam?

Because illegitimate children in the Constitutional Court's decision cannot be interpreted with a different meaning to the meaning of Law Number 1 of 1974, so that the decision does not conflict with the views of the majority of ulama, including the MUI fatwa, in the author's view, what can be done is to differentiate and narrowing the "meaning of civil relationship" to a man as the father who can be proven based on science and technology and/or other evidence according to law to have a blood relationship, including a civil relationship with his father's family (MK decision text). "Civil relations" in this case (for Muslims) must be distinguished from civil relations in the general sense.

Deputy Chief Justice of the Constitutional Court, Ahmad Shodiqi, in *Sitinjau News* 12 May 2012, explained that civil rights/relationships are relationships that

regulate the rights and obligations of a person with another person, meanwhile the Constitutional Court's decision does not explicitly describe the boundaries of the civil relationship in question, so that some people have very high hopes. so that the Constitutional Court's decision truly eliminates the legal discrimination experienced by illegitimate children, which in turn gives rise to controversy among society.

In general, civil rights and obligations arising from the birth of a child include:  
a. A woman who gives birth automatically becomes the mother of the child born (general provisions).  
b. Children have the right to serve their father (specifically in the provisions of Islamic law).  
c. The father has the obligation to provide support to meet all his life needs (general provisions).  
d. There is a relationship of mutual inheritance between the child and both parents (general provisions).  
e. The biological father has the right and obligation to be the marriage guardian for his daughter (specifically in Islamic law provisions)

Thus, for application to the Indonesian Muslim community, "civil relations" (children out of wedlock against father) as mentioned above must be differentiated as follows:

1. For children who are proven to have been born as a result of a sharia- legal sirri marriage, the civil relationship can be interpreted in general, so that the child can be assigned to his father, there can be a relationship of mutual inheritance, the provisions of the marriage guardian and the obligation to provide maintenance also apply.
2. For children born as a result of adultery, "civil relations" must be interpreted specifically, namely limited to civil obligations to provide a living or fulfill all the child's living needs until they are adults and can stand on their own.

The classification and narrowing of the meaning of "civil relationship" as mentioned above can compromise the objectives of the Constitutional Court's decision with the views of the majority of ulama, because if children from an unregistered marriage have a full civil relationship with their father, of course this is not contradictory, even in line with the views of the jurists. Meanwhile, for children from adultery, if the biological father (who has been proven in the Religious Court to be blood related through a lawsuit regarding the origin of the child) is burdened with the obligation to provide a living or meet all the living needs of the child resulting from adultery until he is an adult or can stand on his own, of course it is also not in conflict with the law. Islam, because one of the principles of Islamic law is that all people of *mukallaf* (*aqil, baligh*) must be responsible for their actions.

This kind of interpretation also does not conflict with legal principles, because if there is a conflict of norms, there are three principles that can be applied: a) The principle of *Lex specialist derogat legi generali* (special provision override general provisions), b) The principle of *Lex Superior derogat legi inferiori* (higher provisions override lower provisions), c) The principle of *Lex Posterior derogat legi priori* (provisions that come later override earlier provisions)

Law Number 1 of 1974 applies to all Indonesian people, both Muslims and non-Muslims, so the meaning of "civil relationship" with a man as the father which can be proven based on science and technology and/or other evidence according to law is related to blood, including civil relations with his father's family (MK decision) can be



interpreted in accordance with the laws of each religion by placing the provisions in article 43 paragraph (1) of Law Number 1 of 1974 as general provisions and placing the laws of each religion as provisions specifically, so this is in line with the principle of *Lex specialist derogat legi generali* (special provisions override general provisions).

Based on the above, even though the Constitutional Court decision Number 46/PUU-VIII/2010 has been issued, which states that children born out of wedlock have a civil relationship with their mother and their mother's family and with a man as their father which can be proven based on science. and technology and/or other evidence according to the law have a blood relationship, including a civil relationship with their father's family, but that does not mean that the decision legalizes the blood relationship between the two. What exists is a civil relationship between the two, not a family relationship.

Therefore, the Constitutional Court decision Number 46/PUU-VIII/2010 does not affect a father's ability to marry a child who was born out of wedlock. The two of them can still marry, because there is no lineage relationship, but between the two of them there are also civil rights and obligations that must be fulfilled, as a consequence of the civil relationship between the two.

### **The consanguineous marriage of a daughter resulting from adultery and her biological father is linked to *Hifdzunnasl* as one of the *Maqosidussyari'ah***

In Arabic, descent is called *nasl* or *nasab*, and can also be called *walad*. Protecting offspring is one of the *daruriyyatul-khams*, namely as one of the objectives of Islamic law, to protect these descendants, Islam calls on its followers to carry out legal marriages, without which the human existence will not last on this earth. whereas with marriage, humans reproduce

Husband and wife are responsible for the life of their family, including the education, health of their children and their welfare. Also included in the protection of offspring in Islamic teachings is that a fetus in the womb must not be aborted (aborted) except in emergency situations such as if the pregnancy would threaten the life of the mother, because the mother already has a son and children at birth. girl. Allah SWT.

In the Al-Qur'an and its interpretation, it is stated that this verse explains the blessings of Allah SWT. in the form of creating mates for males of their own kind. These couples are partners in cooperation to develop families and communities. With this partner, humans can have offspring to maintain and develop the human species and carry out their duties as caliphs on this earth. He is the one who has given them sustenance in good and useful food and drink. Therefore, humans should not be afraid when they encounter difficulties in obtaining sustenance because of children. Their task is to educate children so that they will be able to carry out their duties as caliphs on earth when they grow up.

Allah SWT. tells of the various blessings bestowed on His servants, namely that He made them wives from their own kind, He created humans consisting of men and women in pairs, then created children and grandchildren from their marriages.

Then, in the case of the marriage of a daughter resulting from adultery and her biological father, it is really necessary to study first the medical aspects and the

approach to the rules of *ushuliyah* in Islamic law on the impact that will have on the offspring of the marriage, as an embodiment of *hifdzunnasl* (protecting offspring), regardless of differences of opinion between what is permissible and what is haram.

### **The impact of consanguineous marriage between children resulting from adultery and their biological father from a medical perspective**

Consanguinity comes from the words *con* (with) and *sangus* (blood). This means consanguineous or consanguineous marriage. This includes inbreeding too, but is commonly used for people. As with inbreeding in general, consanguinity can cause harm. Because the greater the chance of encountering recessive alleles, bad characters often develop. That is why, every country and nation in the world has laws or customs that prohibit marriage between close relatives.

There are several populations in the world with very high rates of family marriage. This situation may be due to geographical or religious isolation, but more often it is due to the social traditions of the community. In some places in the Middle East, marriage between consanguineous relatives (between cousins) is 30 percent or even higher, and high rates are also found in some populations in India and other regions.

According to science, genetics is also called the science of heredity. Derived from the word *genos* (Latin), meaning ethnic group or origin. In this science, we study how hereditary traits (heredity) are passed on to children and grandchildren, as well as variations that may arise in them. Genetics is studied to determine the characteristics of our own descendants and every living creature in our environment. Genetics can be a pure science, it can also be an applied science. As a pure science it must be supported by other basic sciences, such as chemistry, physics and mathematics; also basic science in the field of Biology itself, such as Biocellular, Histology, Biochemistry, Physiology, Anatomy, Embryology, Taxonomy and Evolution. Meanwhile, as an applied science it supports many fields of scientific activity and serves community needs. ( Muhammad Izzuddin Taufiq, 2006; 68).

### **CONCLUSION**

Regarding the law whether or not it is legal for a father to marry his child conceived through adultery with a woman, the four madzhab scholars disagree. The first opinion, the Hanafiyah Madzhab stipulates that the law of marriage between a daughter resulting from adultery and her biological father is haram because the daughter becomes a mahram for her biological father, that biologically the child is her own flesh and blood. For this reason, the child born from adultery becomes the mahram. However, in matters of lineage, the child resulting from adultery only has a lineage to his mother according to the Sharia. The second opinion, the Malikiyah Madzhab stipulates that the law of marriage between a daughter resulting from adultery and her biological father is halal because the daughter resulting from adultery does not have a lineage to her biological father, and was not born from a legal marriage. For the child's lineage, he only has a sharia lineage relationship with his mother. The third opinion, the Syafi'iyah Madzhab stipulates that the law of marriage between a daughter resulting from adultery and her biological father is halal but

makruh because the daughter does not have a lineage relationship with her biological father (not a mahram), and was not born from a legal marriage, because the status of mahram occurs. for reasons of marriage or legal marriage. According to Sharia, the child's lineage has a lineage relationship with his mother only. The fourth opinion, the Hanbaliyah Madzhab, because the girl is a mahram for her biological father, stipulates that the law of marriage between a girl resulting from adultery and her biological father is haram because a child born from a man's sperm is the same as a child resulting from a marriage, he has a mahram relationship with the father. biologically because it was born from his flesh and blood. According to Sharia, the child's lineage has a lineage relationship with his mother.

Law Number 1 of 1974 and KHI actually do not yet clearly regulate the law regarding the marriage of a daughter resulting from adultery and her biological father. Indeed, Article 8 of Law Number 1 of 1974 states that marriage is prohibited because there is a blood relationship in the downward or upward line of descent. However, the provisions in this article tend to prohibit only marrying a woman who was produced in a legal marriage.

Based on the provisions of Islamic law, in this case, using the Maqosidussyari'ah Hifdzunnasl approach, it shows that the marriage of a daughter resulting from adultery with her biological father invites diseases that will be suffered by the offspring or children resulting from that marriage, as has been explained, inbreeding can cause The negative impact of causing madharat and mafsadat which must be avoided and apart from that can cause chaos in the family line.

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