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The Inheritance Rights of Illegitimate Children outside Marriage in the Perspective of Children's Rights

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Abstract

In 2012, the Constitutional Court of the Republic of Indonesia concerning the inheritance rights of illegitimate children. Based on Constitutional Court Decision, No. 46/PUU-VIII/2010, Article 43 (1) of Law No. 1 of 1974 on Marriage, which states "Children who are born outside marriage have only a civil relationship with their mothers and maternal family," is contrasting with the Constitution of the Republic of Indonesia of 1945. Based on the Constitutional Court, Article 43(1) Marriage Act has no legal binding force; therefore, the status and the rights of the illegitimate children, including biological children in the marriage and inheritance law have the same status and rights as the legitimate children (born out of a valid marriage).

Such decision has provoked the contradiction between the legal norms and concepts, especially the religious norms and the prevailing concept of inheritance rights in Indonesia. Based on the Court, these children including the children of adultery achieve the inheritance rights because they have a lineage to the biological fathers which is in fact are established by technology and science.

Keywords: Children rights, illegitimate Children, Constitutional Court of the Republic of Indonesia, Constitution of the Republic of Indonesia of 1945.

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1. Introduction

Based on the law of the legitimate marriage, the children born outside marriage are the children born outside legal marriage. Based on applicable marriage law in Indonesia, the marriage can be termed as a valid marriage if it meets two conditions rule of law that are based on religion and beliefs being adhered by the parties and recorded in the authentic document, which is in the record of marriage register book. The valid marriage is required by both religion (e.g. Islamic law) and the juridical laws (marriage law). To observe the status and rights of the children of the marriage, it certainly depends on the two conditions above. The status and rights of the illegitimate children, thus also depends on the validity of marriage as the two applicable laws mentioned earlier.

In 2012, the Constitutional Court concerning the inheritance rights of the illegitimate children. The court has been granted a judicial review of Article 43 (1) of Law No. 1 of 1974 on Marriage (hereinafter abbreviated UUP) proposed by Machica Mochtar who had unregistered marriage, known as “*sirri* marriage”. *Sirri* marriage is unregistered marriage or “*Sirri*”, in the terminology of valid marriage based on the requirement of Islamic law but it is not registered officially in the marriage book. Based on Constitutional Court decision No. 46/PUU-VIII/2010, Article 43, (1) of Law No. 1 of 1974 on Marriage (State Gazette of the Republic of Indonesia Year 1974 No. 1, Supplement to State Gazette of the Republic of Indonesia Number 3019), which states “*Children born outside marriage have only a civil relationship with their mother and maternal family*”, is contrasting with the Constitution of the Republic of Indonesia Year 1945 along if it is meant to eliminate civil relationship with a man that can be proven by the science and technology and or other evidence based on the law has, in fact, a blood relative as a father. Based on the Constitutional Court, Article 43. (1) UUP does not have binding legal force; therefore, the status and the rights of the illegitimate children, including biological children in the marriage and inheritance law have the same status and rights as the legitimate children (born out of a valid marriage).

Stemming from the above description, such Constitutional Court's decision raises variety problems, especially when it is viewed from the perspective of children's rights. The issue begins with a question of how the actual status and rights relates to the inheritance rights of the illegitimate children including the biological children, and whether the principles of fundamental rights are able to shift the status and the children's rights. Having analyzed the issue, the Court decision will be reviewed through the principle of human equality (including children) before the law and theory of the double hermeneutic movement.

2. Children Terminology and Children's Rights

Based on religion, man is a noble creature that has been given the potential strenghness over the other creatures [1]. Islam positions, the children as trust from Allah SWT. Children are human beings who have a human value that cannot be eliminated by any reason. In Arabic etymology, a child is also known as walad. It is a word that contains respect, as a creature of Allah SWT who is pursuing the development of a pious servant of Allah [2]. The word al-

walad is used to describe the relationship of the descendent. Thus, the words al-walid and al-walidah in Arabic are defined as blood father and mother. The word Ibn is different word that does not necessarily show the relation of the descendent and the word al-ab does not necessarily mean the biological father [3]. According to Hamka [4] child is the flow of water and blood of his or her parents.

Based on Islamic law, the position or status of children are vary due to the origin of the children themselves, namely the biological child, adopted child, nursing, foster child, stepchild, and the children outside marriage (the illegitimate child). Each of children receives special attention in the Islamic law that determines the position or status, both in descendent, inheritance, and guardianship [5].

Djamil [6] proposed children's rights in Islam, namely the maintenance of the religious right (*hifdzu al-deen*), the maintenance of the right of life (*hifdzu al-nafs*), the maintenance of the intellect (*al-aql hifdzu*), the maintenance of the property (*hifdzu al-mal*), the maintenance of the descendant / lineage (*hifdzu al-nasl*) and the maintenance of the honor (*hifdzu al-'ird*). From a variety of children's rights that are guaranteed by religion, the rights of the children in the view of Islam have a universal aspect to the children interests. Based on the *Compilation of the Islamic Law* (KHI/CIL), the children's rights are arranged in Chapter XIV about the children maintenance which includes the custody (*hadhanah*) of the children, Chapter XV about the children custody, Article 172 and Article 176 about the division of inheritance rights, and Article 186 about inheritance rights for the children outside marriage. Article 186 of the compilation of the Islamic Law states that the children born outside marriage which have only the mutual relationship with their mother and maternal family.

Based on the Law No. 23 of 2002 on Child Protection, the children are trust and gift of God, who inherently have a dignity as human beings. Children are descents, and the potential of the young generation successors of the ideals of the nation struggle, who have a strategic role and the characteristics as well as special characteristics that ensure the continuity of the existence of the peoples and the State in the future. Through Law No. 23 of 2002, the guarantees of the children's rights are protected, and even the *Indonesian Child Protection Commission* (KPAI) was formed whose responsibility is to improve the effectiveness of child protection. However, to determine the limitation of the children age, people will consider various definitions in particular laws. Based on the Law Number 1 of 1974 about the marriage, the requirement of the age for the marriage is 16 years old for the women and 19 years old for the man; Law Number 4 of 1979 about the welfare of the child defines the child as a person who is in the case of juvenile delinquency is 21 years old of his or her age and is a single or is not married yet.; Law number 3 of 1997 concerning the Court of the Child defines child as a person who is in the case of juvenile delinquency has reached eight years old but has not reached 18 years old and is not married yet; Law number 39 of 1999 about the Basic Human Right states that child is a person who has not reached 18 years old yet and is not married yet; Law number 13 of 2003 about the employment allows the working age if it has reached 15 years old; Law number 20 of 2003 about the system of national education imposes compulsory of education for 9 years old which has been connoted to be the child in 7 to 15 years old. Meanwhile, referring to the UN Convention on the Rights of the Child (Convention on the Right of the Child), a child means every human being below the age of 18 years unless under the law

applicable to the child, maturity is attained earlier.

Children have a constitutional right that is Human Rights. Human rights are the basic rights being inherent in human beings that reflect the dignity that should obtain legal guarantees, and can only be effective if those rights can be protected by the law [7]. It is in accord with the Article 1 of the Universal Declaration which states that all men are born to be free, have a dignity and have an equal right. Every person is gifted with the intellect and the heart; therefore, everyone should get along with each other in brotherhood. Article 1 of the Universal Declaration is a common statement about the inherent dignity, human freedom and equality (non-discrimination), as a normative value of the concept of human rights. It is the right on all the rights and freedom without any exception. Non-discrimination means equality in the Universal Declaration of Human Right that are the differences of race, color, sex, language, religion, political or different opinion, nationality or social origin, property, and others, including the origin of birth or status. The principle of non-discrimination is a central concept in human rights law. This principle is expressed in the entire principal human rights instrument. Based on Article 6 of the Universal Declaration, every person has the right to recognition before the law as an individual wherever he or she is. This right to the recognition before the law, is more explicitly described in Article 7 of the Universal Declaration, i.e. that all people are equal before the law and are entitled to have an equal protection before the law without discrimination. All of them are entitled to have the equal protection against any form of discrimination which is contradicted to the human rights declaration and against any incitement leading to the discrimination. Stipulation of the equality before the law contains three aspects, namely, equality before the law, equal protection of the law and protection from the discrimination on any grounds.

Based on the children's rights convention above, Mohammad Joni and Zu'chaina Z. Tanamas [8] proposed the rights of children in general can be grouped into four (4) categories. namely: the first is the right to survival, the right to protection (Protection Rights), the right to grow and develop (Development Rights), and the right to participation (Participation Rights). The children's rights under Article 4 to Article 18 of Law No. 23 of 2002 on the Child Protection includes the rights to be able to live, grow, develop, and participate fairly in accordance with the dignity of humanity, as well as the protection of violence and discrimination, the right to self-identity and citizenship, the right to worship according to their religion, the right to know their parents, and the right to be raised by the parents, the right to health, right to education and teaching, the right to express and be heard the opinion, the right to rest, the right to associate, the right to play, the right to protection from discrimination and exploitation as well as the right to be raised by their own parents. Unless if there is the reason or the regulation of the valid law which shows that the separation is for the best interest of the child and is the last consideration. The right to humane treatment, and the right to legal assistance.

Prawirohamidjojo [9] states that each man has a status as a person in law. Every human being has the authority to have the rights, specifically is authorized to have the civil rights. In civil law, every human being has the same rights and despite the constitutional rights. In relation to the right of a child, in general, the authority in the perspective of a child begins with his or her birth. Exception is in Article 2 of BW (*Burgerlijk Wetboek*) which states that the

children who are still in the womb are considered to have been born if their interests require that condition. However, if the children born is dead, then they are considered to have never existed. This is what the people said as fictie.

2.1 The Rights of the Child After Marriage Breakdown

The breakdown of a marriage has different legal consequences. This law consequence appears as a form of relationship of rights and obligations which are caused by the existence of a relationship among the subjects of law. Legal consequences arising are usually classified into two aspects: material and immaterial in its characteristic. In accordance with Article 113 of the *Compilation of the Islamic Law*, the marriage can be considered broken because of the three cases such as death, divorce and the court's decision. Three legal events which led to the breakdown of the law of the marital relationship have legal implication.

Relating to the position of the child, the legal consequences of marriage breakdown caused by death raises a legal relationship of the rights and obligations of the inheritance division, either in the form of wills and inheritance or in the form of welfare and rights of others. The legal consequences of marriage breakdown caused by divorce or contested divorce raises a legal relationship such as the right of livelihood, breastfeeding, guardianship and other welfare, both material and immaterial. Therefore, the rights of the children in general, the children born of the valid or invalid marriage as described above in a variety of perspectives, are always attached not only at birth, but inherent from the time in the womb to the birth as well as to the adult (mature).

2.2. Purification of Children's Rights Outside of Marriage

Literally, purification means to make it pure, cleansing [10]. It is usually used in the context of the creed (*aqeedah*) and worship. To be seen from its reality, the context of purification is used in two kinds of attitudes. The first is a radical purification and the second is a moderate purification commonly known as renewal. The use of “*purification term*” in the study concerning the rights of children focuses on purifying the spirit and cleansing the child position (without exception) that has been lost and to restore the original position of the child to its place both normatively and biologically. Purification is also aimed at refining the shape, attitude and habit (tradition) of the treatment of the father to the children as the embodiment of the human obligation.

Child is the mandate and the gift of God. As the mandate and His gifts, children never inherit innate sin as a result of the acts of his parents, so the child should not be given the discriminative treatment under any circumstances. This position is a reflection of the children status that puts the value of the sanctity of religious nature as the highest position in human life. It is that nature, which makes the key factor in positioning the children as the noble creatures who have the dignity and equal rights before God, before man and before the law.

Based on these principles, then any status, the child remains a human being and has a fundamental right which is legitimized by the constitution and the values and principles of the religion. The way to be part in law and to assess

the position of the children and how to treat them should be improved and renewed. One of the ways is to purify the status quo of the children both legally and biologically.

Purification as one of the reform movements toward the reposition of the status of children can be analyzed through a hermeneutic double movement which is initiated by Fazlur Rahman [11]. The application of the theory of double movement is used to directly see the application of the rule of law concerning the position of the children arising in the legal construction about the position of the children and the social-setting at that moment, and then is applied in the Constitutional Court Decision No. 046/PUU-VIII/2010 at the present context. According to Rahman, Finding a legal decision means an attempt to understand the meaning of a text or precedent in the past that contains rules, and to change the rules in a way to expand or restrict, or modify in such other ways that a new situation can be included into it with a new solution [13].

In the past, the concept of the inheritance law is built upon the blending products of classical Islamic jurisprudence (*fiqh*) and local traditions. As an example to illustrate the situation, it can be observed in the case of pre-Islamic gender inequality. During the pre-Islamic Arabs, the position of women was so slumped in various social dynamics. This view is evident with the emergence of the slavery system being applied by the Roman kings like Emperor Nero, especially slavery system which was applied to women. Slump flow of women was getting worse and continued to the Arabian peninsula, when the Arabs primitive nation is as a primitive as its name [14]. The form of the Arabs behavior at the time of ignorance which was phenomenal was rampant slavery, especially to women. Arab women were considered slaves; they could be used as a pawn, so it can be traded and can be used as gifts. Another behavior of the Arabs at the time of ignorance was when the husband died and the wife (widow) was still young and beautiful, then the wife could be inherited to his biological son. Not only that, the status of women became worthless, when the Arabs treated infants and girls like animals. As for the Arabs, the baby girl is a symbol of weakness, besides the fear of the economic burden caused by the baby girl. Hence, based on the tradition of the Arabs at the time of ignorance, the baby girl should be buried alive.

Gender injustice, which occurred in Arab, also appeared in the division of the estate which was dominated by the men's superiority. Clearer picture of the history of women's rights issues and their position as heir, that in the past people's lives, as it developed in the golden age of Greece and Rome, there was a strong belief, that the family assets might not be obtained but by worshipping ancestral spirits and gods. Otherwise, the worship cannot be done without the wealth. The most authoritative people to do the worship were the men. So that the right to inherit the property is a man, because the property was owned by a family that grew as the result of the activities of the worship undertaken by the men. This view is in line with an Arab society jargon stating "*La Yarkabu Farasan Nuritsu Man Yahmilu Kallan wa wa la La Yanka'u 'Adwan.*" Means: "We will not pass on to those who do not ride a horse, do not bear the economic burden and not fight against the enemy" [15].

Moving from the idea of the Arab situation, the way to arbitrate in further development of Islamic history is still strongly influenced by the views of the Arab tradition. The classical inheritance concept states that siblings get

inheritance from their brother and are not hindered by the presence of girls. Such inheritance principle is allegedly derived from the practice of the Arab tribes before Islam. Tribal leaders were usually obliged to take care of all the poor members of their tribes.

Another example, in the medieval patrilineal system was that uncle obliged to take care of his nephew after her father's death, so that, the orphans will not get the inheritance. In modern times, the situation is different, uncle does not have the responsibility of taking care of nieces, if a father died leaving only a daughter, then the uncle did not receive part of his siblings because it was blocked by the presence of girls.

Furthermore, the first movement is devoted to analyze the legal texts, namely by first, understanding the meaning of a statement (paragraph) to assess the situation or problem in which the historical statements of the Qur'an is an answer. The first motion of orientation examines specific passages in specific situations, and the study on the macro situation in the limits of society, religion, customs, institutions and even the entire life in Arabia when Islam came and in particular in Makkah should be done first. The second step is to generalize the specific respon and to declare it to be the expressions that have common social-moral purpose, which can be "filtered", and the expression of specific verses in the light of the socio-historical background and in the light of legal ratio which is often expressed. The first step in understanding the meaning and a specific statement is showing towards the second step. During this process, attention should be directed to the teachings of the Qur'an as a whole, so that any particular meaning that is understood by any law declared, and every goal formulated is coherent each other. The Qur'an itself claims with certainty that "its teaching is not contradicted one another," but it is a coherent as a whole [17]. Main idea is contained in the first movement, as quoted above, then the application of the inductive method of reasoning: "thinking on specific passages leading to the principle of", or in other word is to think of specific legal rules leading to general moral-social concept contained therein.

The analysis of the purification of the children position is stemming from the texts in the perspective of normative texts, political configurations and social settings that arises surrounding the texts during the present norm. The texts include the concepts related to the lineage, and the concept of children itself. After finding the real picture about the concept of lineage and the positions of the child during the child birth and social setting of the text, and then try to apply the theory of double movement situation and its conditions. Then that theory tries to analyze the contextual meaning of the terms above based on the circumstances at the present time.

Lineage is descendants or relatives. Lineage is family ties based on blood ties. In the Qur'an, the lineage is mentioned in three places, namely in the QS. Al-Mukminun verse 101, Sura. Al-Furqan verse 54, and QS. Al-Nisa verse 23. QS. Al-Mukminun paragraph 101 states that:

When the trumpet (horn) is blown then there is no linkage (Ansaba) between them that day, and they did not ask each other.

The meaning of lineage in the above verse is that the doomsday man cannot help others despite the family ties. The lineage in QS. Al-Furqan verse 54 says, which means:

And He(also) who created man from water, and then made man (Basyar) that have children (nasaban) and kindship (shihran) and your Lord is the Almighty.

Mushaharah in the above verse is the kinship that comes from marriage, such as law, brother-in-law and so on. From that understanding, the concept of *mushaharah* and the concept of lineage are indeed two different terms. Lineage in the paragraph above is a descendant relationships that are natural, naturally and permanently attached, while *mushaharah* is temporary relationships and not permanent.

Lineage determination (*nasab*) and *mushaharah* in the verses above are the system of building of descendants in Islam. Blessing from the lineage determination is that the offspring can be arranged cleanly and systematically to avoid confusion. Assertion of lineage and *mushaharah* above are applied with the reference to the rules or the technical guidance contained in QS. Al-Nisa verse 23: The meaning is that you are not allowed to marry you mothers, your daughters, your sisters, your father's sisters, your mother sisters, daughters from your brother, daughter from your sisters, your breast feeding mother, your sister in breast feeding, mothers of your wife, daughters of your wife in the preservation of the wife you have mixed, but if you have not mixed her (having sexual intercourse) whom you divorced then it is allowed; and it is not allowed to you to marry the wives of your blood sons, and to combine two sisters in a marriage unless what has been done in the past; truly, God is the Most forgiver and the Most Peaceful. Mothers referred in that paragraph are mother, grandmother, and so forth to the top, and what meant by the girls are the daughter, granddaughter, and so forth to the down, as well as the other. While the definition of children of wives in in the maintenance, according to *Jumhur (consensus among jurists)* including stepchildren who are not in the maintenance.

According to Ibn Mandzur, lineage means *qarabah* which means close. *Qarabah* (relatives) lineage named because there is a relationship and a very close relationship. The language context is derived from the Arabic word which states *nisbatuhu ilaa abiihi nasaban* (its determination to his father). Ibn Lama[18] said, the lineage is from both the father and mother. While some linguists say, it was a special lineage on the father, meaning someone is referred to his father alone and not referred to the mother except in exceptional circumstances. *Nasab* (the lineage) which is based on the terminology, after having done lots of researches on the various references from 4 schools of Islamic jurisprudence (*fiqh*), does not find on the definition of terminology (*Shar'i*) about the lineage. Most jurists (*Fuqaha'*) in general use the meaning of lineage as used in the definition of the etymology, which means *al-qarabah Baina syakhshoin* (kinship between the two people) without defining terminology. Lineage is *al-qarabah* (relatives) which means womb. This word includes any person who has a kinship with you with both near and far, from the father or the mother's line. Some contemporary researchers try to give the definition of the lineage with particular meaning that is the kinship from the line of the father because the person is referred to his father alone.

Based on the above explanation, thus, the concept of lineage in the context of the system of descent to the mother is valid for all circumstances of birth. However, not all systems are recognized as the lineage determination of the mother. The lineage children whose offspring comes from the father, is not valid unless the children were the result of a legal marriage. The legal marriage means that the child is the result of the legal marriage conducted according the Islamic law.

The view on the status of children in the context of human rights is when the child has the fundamental right. Disposition in this case is the nature of religious belief in the Oneness of Allah as God. Case in accordance with the Hadith is:

A baby is not born (into this world) but he is in chastity (fitrah). Then the parents that would make him or her a Jew, Christian, or Zoroastrian [20].

The above hadith is the fundamental principle for a child whose right is snatched away. In the perspective of the principle of equality, Islam has committed that the place of human in nature is the same; although, they come from different background such as the race, the ethnicity, the age, the gender, and the origin of the child. The claim of the illegitimate child or even as a natural child relationship is the claim that always separated the concept of lineage legally. Natural child was born to his mother through illegal way, or child as a result of the illegal relationship [21]. Regarding the relationship between the natural child with his biological father, all jurists' agreed that if a woman has a husband or a slave to his master (*sayyid*), then she has a natural child, the child cannot be referred to the biological father. The child lineage should be referred to the valid husband of that woman unless there is no denial by her husband with Li'an. Imam Ibn Qudamah [22] said, "The scholars agreed that if a child born from a woman who is a wife of a man, then there is another man who claims her child", then the child cannot be referred to that man. Such provision is in accord with the words of the Prophet Muhammad:

The boy is for the owner of firasy (male-status as husband / slave owners), and those who commit adultery only gets rocks [23].

Literally, Firasy means bed. In this Hadith, firasy means women who have legal conjugal by the legal law, either as a wife or as a slave girl (*milkul Yamin*). If a woman is single or not a female slave, and then she has a child of adultery, there is a difference of opinion (*khilafiyah*). First, *Jumhur* scholars of the four schools and school of Zhahiri, argue that natural child cannot be referred to the biological father. Second, some scholars, such as Hasan Al-Basri, Ibn Sirin, Nakha'I Ibrahim, Ishaq bin Rahawaih, also Ibn Taymiyyah and Ibn al-Qayyim, argue that such a natural child is referred to his or her biological father. The opinions of the consensus of the Muslim scholars argue for the generality of Hadith "*wa li 'aahir al hajar*" (for those who commit adultery only got rock), whose meaning adulterer just got losses (*khaibah*), which cannot claim as his natural child as his child [24]. The second opinion postulates that the hadith "*al-walad li al-firasy*" is applied only in cases of adultery between the competing claims of jurisdiction between firasy owners (husband / slave owner) with men who commit adultery. In this condition, the

natural child is belonged to the husband (firas owner), not the men who commits adultery. This is according to them in line with the *sababul wurud* of the hadith (the cause of the hadith). The competing claims of jurisdiction in the case of natural child of a slave woman. So if the natural child is born from a single woman or not slaves, the Hadith is not valid, then the natural child has no hindrance to be referred to his or her biological father [25].

Looking at the variety opinions in the law, the claims of lineage and children legal standing are seemingly still dominated by the thought, the first, that lineage and child position is based on strong domination of patrenial system (paternal) in its construction system. Second, the strengthening of moral sanction is directed to the parents who commit adultery has formed polarization of social sanctions attached to the child of fornication parents. This opinion has an image to the position of the child law concerning his or her chastity right. Third, the recognition of children in pre-Islamic days as well as in the medieval period, had not found technology systems yet that could be used as basis in deciding a legal *ijtihad*. The absence of the technological instrument will certainly become the hindrance for the the world of *ijtihad* which always harmonizes the legist ratio with the facts based on cutting-edge science. Whereas, the patterns of evidence determination of the origin of the child in the time of the Prophet and the Companions, the context of the norms that are built, open the system of lineage based on biological proofs; although, it was still limited to the conservative system by only looking at the physical condition.

At the time of the Prophet and the Companions, to determine the lineage relationship, the marriage model of the child's parent or the person was observed closely. The man and woman who were married and gave birth to a child were automatically referred the child to his parents with no record of denial by the husband. For example, if a wife gave birth to a black child whereas both husband and wife had the white skin or vice versa, there were two opinions. The first was that the husband should first recognize the child, by observing the similarity factor, and the second was that the husband cannot decline it, because there might be abnormalities or disease in the child. To resolve this problem, this case can be helped by a *qafah (al-qiyafah)* system, ie, someone who is an expert in determining lineage based on physical similarity. *Al-qiyafah* system [26] according to the expert is visual research which observes the physical characteristics of the child. One example of *al-qiyafah* practice at this time is like a fingerprint form. Through the fingerprint, the relation between a person and the parents is determined. In addition to the above, Islam also uses the testimony and confession (*iqrar*) to determine a person's lineage. Proof technique with the proclamation and recognition is used for the recognition of the child or the child's adoption, in which the main reason of the recognition or endorsement is because there is a blood relationship between the child and the father. Recognition child/recognition lineage divided into two kinds, the first is the recognition of the child by him or herself/child direct recognition, and recognition of the child by another person. Recognition of the child by another is if a person claims that this is his child, or the man is his father. Such recognition may be accepted with the four conditions, namely that the lineage of child is not known. The recognition of the child is reasonable /logical, does not conflict the common sense, the child approves and the child does not have a lineage relationship with other people. That is, if the recognition of the child was filed by a wife or a woman in the waiting period, it required the consent of her husband for the recognition.

Looking at the legal construction which was built during the medieval prophetic and foremost, as a whole it was still dominated by a conservative outlook and methodology and based on the legal system and the responsibility of the Arabs living in the community. The concept built in classical period of Islamic jurisprudence concerning the position of the illegitimate children which is ratified in the law of marriage and the compilation of the Islamic law still accommodates the theories of procedural legal truth (*de jure*) and limits the truth in *de facto* (factual truth), that is the biological lineage. Possible substantive truth reflected in *de facto* truth (reality) of the biological child and the biological parents cannot actually be removed by the legal truth. If it is done so, the child will receive a negative consequence of not being recognized as the child of the father only because the truth in *de facto* is defeated by the procedural legal truth. This hypothesis can be seen how the jurist had the way of thinking in the case of solving the problem which is full of the values of the justice and goodness for the right of the innocent children.

The fundamental principle of the rule of *ijtihad* through the purification of moderate (renewal) has placed the discovery and determination of '*illat* law and wisdom as an ingredient in constructing the law. Way or method to determine '*illat* is known as *masalik al-' illat*, is known as the method of determination of '*illat* to a law (*tariqat isbat 'illat al-hukm*). The whole method of determination of the '*illat* above generally can be divided into two, the first is the method of determination of '*illat* contained in a law, by the way of hearing the news of the text (*nash sam'iyat*) or (in the case of '*illat* is stated explicitly known as '*illat al-manshushat*), and the way in terms of *nazhar-ijtihad* in '*illat* is not stated explicitly or '*illat al-mustambath*. The second is the method of application of '*illat* on a phenomenon or case law (*al-waqi'at*) within the scope of the socio-historical context. '*Illat* of the law of lineage understanding and the lineage determination in the pre-Islamic period, prophet period and the middle period, can be concluded that the concept is used as a measure of a bond of descent which is not kinship concept but consanguinity, while the technology to make the determination of the lineage is using *al-qiyafah* system but still conservative.

Verification and determination of the origin of the child along with the civil rights are not enough only to be known from the '*illat* of law which are based on the norms and historicity of the past. '*Illat* of law emerged from the study of the first motion of Fazlur Rahman as described above, that the determination of the origin of the child in the lineage system is still influenced by the kinship system. Though the kinship, it differs philosophically and conceptually from the lineage. The principles of the determination of child by the jurists (*fuqaha*) do not involve the study of judicial review, especially if it is associated with the child's pattern of proving the origin. Yet, proving the origin of a child very open space to test the validity of the child based on the science and technology.

Furthermore, the above thesis needs to be tested in a socio-historical approach in the present by formulating general principles, values and goals of the Quran, which is systematized through the second movement of Rahman. The second movement is done from public view (ie, which has been systematized through the first movement) into specific views (the specific view) and then to be formulated and realized in the present time. The second movement bears to the formulation of specific Qur'anic in the actual life. Those formulations will be a consideration for the *mujtahid* in setting the fair and correct legal opinions related to the need of justice of the community. The birth of the Constitutional Court on the legal position of children who born on the marriage and are not recorded, but are

legalized by the religious law is certainly not a big problem to solve. However, the Constitutional Court's decision should be tested due to the legal position of children as subjects of law.

Looking at the pre-Islamic period and the time of the Prophet, the Arabs at the time of ignorance referred the lineage of others to be theirs by the way of taking adopted child. A man might choose to take toddlers to be his children, then proclaim it. Then they became one with his own children and the family, and had the same right as other children. Adopting a child like this; is not forbidden at all, although the adopted child, which had the real father was already known.

Arabian people are the persons who are very concerned to keep the lineage and kinship, as they do not forget their ancestors. That is why they always associate their names with the father, and their grandfather. Therefore, they always use the term “*bin*” which means child of. The Prophet Muhammad SAW lineage for example is known until a few generations. His lineage is *Muhammad bin 'Abdullah bin' Abdul-Muttalib ibn Hashim ibn Abd al-Manaf ibn Qusai ibn Murrah ibn Ka'b bin Kilab bin Luay bin Ghalib bin Fihhr bin Malik bin nadhar Khuzaimah bin Kinanah bin Mudrikah bin Ilyas bin Mudar bin Nizar Ma'ad bin Adnan*. Not only the Prophet who employed such lineage, almost all the Arabs know their lineage until several generations earlier. The kinship and brotherhood among them are very strong.

The behavior and habit certainly becomes a principle among the Arabs. So the tradition of lineage recognition becomes a sacred value for the Arabs. This attitude also forms the spirit of fanaticism against tribalism, because among the Arabs, the clan is a title that has a brand image and pride. Therefore, the tradition has known popularly, thus some Arabs have the names with surnames such as al-Athas, al-habsy, al-aydrus, al-alwi and others.

The lineage tradition as above, also becomes justified the identity (administratively) of someone. By putting the bin or ibn, the Arabs believe the origins and identity of the child is known for certain. It is because the administrative system for the population was inadequately established, and the writing system was not available either. Besides the lineage to ethnic identity, characteristics that are so prominent in the principle of strong lineage are the position of the father (patrilineal system) and the royal family system or (royal blood) and the lack of domination of women. Based on that explanation, it is obvious that the gender inequality is still strong in the behavior of the Arabs. The discrimination against women (wives) and children cannot be separated from the strong subordination of men at that time. As a result of the lineage system, the sociological effects were very alarming. For example, wives and children did not get help and aid when they were suffered from the calamity; they would have no place to complain and ask for help. Finally it appears the poverty, vagrant children, and vulnerable to the violation of other rights.

The very basic fundamental blessing based on the above thought is the urgency and the legal consequences of the Constitutional Court's decision on the child's inheritance rights that can determine accurately the origin of the child. Because in many developed countries like the U.S., now it is in a confusion concerning the case of lineage. It is in the case of the determination of the origin of the child because many American children do not know who their real

father. Recent research being conducted by Inspire Research in several cities in U.S. shows that a child is more easily identified themselves to their biological mother's rather than the father. The rate of the case in the United States is high because many people live together without being married as husband and wife, and they get divorce. As a consequence, many children are born outside marriage, as stated by Prof. Michael Gilding from the Swinburne Institute and quoted by MSNBC. The study showed that 1 in 10 children in the U.S. do not for sure about their fathers. Or at least 12% of boys and 10% of girls do not know who their real fathers are. For those who want to know the identity of the father, they should do a DNA test first. It is estimated that about 20% of respondents of both sexes questioning about the existence of their fathers. Meanwhile, some others are questioning it because they consciously feel the need to know their fathers to answer the day-to-day problems in their social life. Currently, in western countries, it is estimated that 1 to 4% of the entire population of the children are raised by their non-biological father. This figure is increased in the United States for 2 to 4%, or 2 times more than Europe [27].

At this time, the lineage becomes more important than the rights and obligations of the lineage itself. In this case, to protect the civil rights of the child, Islam establishes and imposes that the responsibility to take care of the children is on parents, families, and neighbors. In a state that recognizes basic human rights, including the children's rights and responsibilities, it is important to underline, which regards the problem of the children above that State has a big responsibility to have a good regulation.

Confusion of the issues lineage is certainly seen as a great danger in the world of marriage, because if the concept of lineage is not organized by legal instruments, there will be many incestuous marriages which are forbidden by religion because it will cut the biological lineage. The decision of the Constitutional Court above is certainly in harmony with the effort to keep the cleanliness and clarity of the through DNA technology as the basis and methodology of the adequate lineage determination in order to most marriages with the same lineage will not happen.

3. Conclusion of Analysis

Based on the above analysis, the author concludes that the principle of the children's rights, as well as the principle of the purification of lineage and the prove lineage, has put the construction of the right of biological child and its relationship with the biological father in the structure of a permanent relationship. Thus it cannot be moved for any reason and by any circumstances. It is based on the purification of biological relationship status as a natural relationship. In addition, it also has repositioned the child in the concept of nature that put the position of the child as the mandate of God that has the same rights and status as a legitimate child.

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