

Constitutional Court Verdict Number 46/PUU-VIII/2010, dated February 17, 2012

from Women Leaders Perspective

(Case Study in Muslimat NU and Aisiyah Malang)

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### **Abstract**

Based on interviews with officials of Muslimat NU and Aisiyah Malang, regarding the verdict of the Constitutional Court (MK) No. 46/PUU-VIII/2010, on judicial review of Marriage Law article 2 paragraph (2), and article 43 paragraph (1), that associated with registration of marriage, is accepted as obligation that serves to maintain order and to obtain legal protection. However, under the hands marriage (siri) is not seen as an aberration. The position of children outside marriage in the verdict of the MK, is meant to the children from under the hands marriage. Children born of adultery, was given protection and their rights. To prevent the proliferation of adultery that can be caused from the decision of the Constitutional Court, Anti-Adultery Law must be made.

### **FOREWORD**

Constitutional Court's (MK) Verdict No. 46/PUU-VIII/2010, dated February 17, 2012, due to judicial review of Marriage Constitution in Article 2 paragraph (2), and article 43 paragraph (1), has sparked controversy among society leaders, there are group that really appreciate it and group that against it with fundamental reason. Head of Indonesian Child Protection Commission (KPAI) and Head of National Commission (Komnas) for Women are the group who support and appreciate the verdict.<sup>1</sup> While Islamic society organization and in particular Indonesian Ulama Council (MUI) are the

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<sup>1</sup> Statement of the National Commission for Women on the verdict of Constitutional Court on Article 43 paragraph (1) Constitution No.1 of 1974 about Marriage <http://www.komnasperempuan.or.id/2012/02/pernyataan-sikap-komnas-perempuan-terhadap-putusan-mahkamah-konstitusi-tentang-pasal-43-ayat-1-uu-no-1-tahun-1974-tentang-perkawinan/> Accessed on 10-11-2012; Chairman of the Indonesian Child Protection Commission, Aris Merdeka Sirait appreciate the verdict of MK, <http://www.indopos.co.id/index.php/berita-utama/41-banner-berita-utama/1879-telantarkan-anak-luar-nikah-penjara-mengancam>

group who protested with giving substantial notes.<sup>2</sup> The Constitutional Court's Verdict can be said to be very revolutionary in the context of Islamic Family Law in Indonesia. For with the verdict, the position of children born outside marriage became diametrically changed from Islamic Family Law in Indonesia, namely Constitution Number 1 of 1974 on Marriage and Islamic Law Compilation. And fiqh, which is the source for forming Marriage Constitution and Islamic Law Compilation, have serious challenge with publication of the verdict.

The content of Constitutional Court Verdict that cause controversy are about marriage registration and the position of children born outside marriage. Two things that are directly related with Islamic marriage law, and especially women position in Islamic marriage law. However, from mass media publication, not many women who voice their opinions on the verdict. Eventhough the verdict is more about the problem of women, there are more men who voiced their views. Therefore, this paper will examine the views of women leaders from Muslimat NU and Aisyah Malang about Constitutional Court Verdict No. 46/PUU-VIII/2010, dated February 17, 2012, on the judicial review of Marriage Constitution in Article 2 paragraph (2), and article 43 paragraph (1) that sparked controversy in society. Do they support, reject, or propose another view. The method used was interviews with official of Muslimat NU and Aisyah Malang. Muslimat NU and Aisyah Malang were chosen because the official consist of Ibu Nyai, muballighah, and academia, as profesores, judges, teachers, who certainly has the competence to discuss the verdict. It can be seen from the interviews if there are resistance or accomodation to the verdict and its implication to Islamic family reform in Indonesia. The paper is organized in the following section:

1. Description of the verdict, which explains the background and content of MK verdict to give comprehensive explanation about the decision.
2. Validity of mariage versus marriage registry in Constitution Number 1 of 1974 about Marriage and Islamic Law Compilation.
3. Children outside marriage versus adultery children in Constitution Number 1 of 1974 about Marriage and Islamic Law Compilation.

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<sup>2</sup> Rais Am PBNU KH. Sahal Mahfudh instructed to the committee of Munas Alim Ulama NU 2012 to review the citizen obedience boundary to government related to MK's verdict concerning the legal status of children outside marriage which is considered contrary to the Islamic law.

4. Resistance versus accomodation to the Constitutional Court Verdict No. 46/PUU-VIII/2010, dated February 17, 2012, on the judicial review of Marriage Constitution in Article 2 paragraph (2), and article 43 paragraph (1)

#### DESCRIPTION OF CONSTITUTIONAL COURT VERDICT

It was Macica Muchtar alias Hj. Aisyah binti H. Ibrahim Mochtar who married under the hand (siri) with Drs. Moerdiono, Minister of State Secretary at the Orde Baru era, in 1992. At that time, Moerdiono already has wife. Thus his marriage status was polygamy siri. From the marriage born a boy named Muhammad Iqbal Ramadhan. The marriage did not last long, they divorced in 1998. Furthermore Moerdiono did not acknowledge the marriage and refused to acknowledge his son. Due to the marriage was siri, Macica can not legally litigate her marriage existance, her child status, and the right of livelihood for herself and her son. Many ways have been taken to obtain her marriage and child status, such as lodge to KPAI, because her ex-husband violated the Child Protection Act, to National Comission for Women and finally in 2008 she filed judicial review to Constitutional Court.<sup>3</sup>

Judicial review that were submitted to the Constitutional Court by Macica Muchtar was by arguing that the existence of article 2, paragraph (2) and article 43 paragraph (1), Constitution Number 1 of 1974 about Marriage (UUP) that the basic rights for her and her child as citizen were violated. Article 2 paragraph (1) UUP reads, “marriage is legal if done according to each religion and belief’s law” while paragraph (2) reads, “each marriage are registered according to marriage legislation that apply”. Article 43 paragraph (2) reads, “children born outside marriage only have civil relationship with her mother and her mother’s family”. Macica and her child basic rights that violated were according to 1945 RI Basic Constitution (UUD ‘45) article 28 B paragraph (1) which reads, “every person have the right to form a family and continue the offspring through legal marriage”, and article 28 B paragraph (2) which reads, “every child have the right to live, grow, and develop as well as the right for protection from

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<sup>3</sup> Mochtar Macica [http://selebri.kapanlagi.com/indonesia/m/machica\\_mochtar/](http://selebri.kapanlagi.com/indonesia/m/machica_mochtar/) accessed on 1 July 2013. Macica 8 Years Fight For Rights of the Child, <http://video.kapanlagi.com/hot-news/machicamochtar-8-tahunberjuang-demi-hakanak.html>

violence and discrimination”, and article 28 D paragraph (1) which reads, “every person have the right for recognition, security, protection and legal certainty as well as equal treatment before the law”.<sup>4</sup> With the enactment of the article 2 paragraph (2) and article 43 paragraph (1) of UUP, then the right to form a family and continue the descent through legal marriage and children right to protection from violence and discrimination; rights of recognition, security, protection and legal certainty as well as equal treatment before the law as stated in UUD '45, became lost. As a result, the marriage status with Moerdiono which conducted legally according to Islamic law became illegal. Similarly, the child that born from the marriage, also considered illegal. With the loss of legal status of the marriage, then she and her son did not have a civil relationship, lineage, livelihood or even inheritance with Moerdiono.

To judicial review article 2, paragraph (2) of UUP about registration of marriage, MK said the answer was based on a general explanation number 4 letter b of UUP that states, *first*, recording of marriage is not a factor that determines its legitimacy, *second*, recording is an administrative obligations required by law. The administrative obligations can be seen from two perspectives, namely the state perspective, the recording is required in order to meet the function of the State to ensure the protection, promotion, enforcement and fulfillment of human rights to those who concerned that it is the responsibility of the State and must be done in accordance to principles of the law as mentioned in the first paragraph 28 I article (4) and article (5) UUD '45.<sup>5</sup> Had the record considered as limitation, then the limitation are not considered contrary to UUD '45, because the limitation are intended solely to ensure recognition and respect for the rights and freedom of others. Second, the administrative record made by State intended for marriage as an important legal act which implies broad law result, and the marriage can be proven by complete evidence with an authentic certificate in the future. With that argument, MK argued that article 2 paragraph (2) of UUP did not inconsistent with UUD '45.<sup>6</sup>

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<sup>4</sup> Constitutional Court's Verdict page 27

<sup>5</sup> UUD 1945 article I paragraph 28 (4) Protection, advancement, upholding and fulfillment of human rights is the responsibility of the state, especially the government. And (5) To uphold and protect human rights in accordance with the principle in democratic state of law, the implementation of the human rights are guaranteed, regulated, and set forth in the legislation.

<sup>6</sup> Constitutional Court's Verdict page 33-34

As for the judicial review of Article 43 paragraph (1), MK was granting with the Constitutional Court (MK) verdict Number 46/PUU-VIII/2010, dated February 17, 2012. The ruling reads<sup>7</sup>:

"Article 43 paragraph (1) of Constitution Number 1 of 1974 on Marriage (State Sheet of the Republic Indonesia Year 1974 Number 1, State Sheet Supplement of the Republic Indonesia Number 3019) which states," Children born outside marriage only have a civil relationship with her mother and her mother's family ", does not have law binding force as meant to eliminate civil relationship with a man who can be proven by science and technology and/or other evidence under the law turns out to have a blood relationship as his/her father, so that the verse **must be read,**" Children born outside marriage have a civil relationship with her mother and her mother's family as well as with man as his/her father that can be proven by science and technology and/or other evidence under the law have blood relations, including civil relationship with his family "

Based on the verdict, children born outside marriage, which was originally under article 43 paragraph (1) of UUP only have a civil relationship with her mother and mother's family, have a way to get the civil rights from his/her biological father, as long as the truth can be proven through science and technology, for example by DNA testing or other evidence under the law turns out have blood relation as his/her father. The verdict was based on the argument that it is naturally impossible for woman to pregnant without crossing of ovum and spermatozoa either through sexual intercourse or other means based on the development of technologies that lead to conception. Therefore, it is not right and not fair when the law determine that a child born from pregnancy due to sexual relations outside of marriage only has a relationship with the woman as his mother. It is also not right and not fair if the law frees the man who had sexual intercourse leading to pregnancy and birth of the children from his responsibilities as a father. Legal consequences of birth because of the pregnancy from sexual intercourse between man and woman are a legal relationship in which there are reciprocal rights and obligations whom the legal subject are children, mother and father. Thus the child's relationship with a man as the father is not solely because of the marriage but can also be

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<sup>7</sup> Constitutional Court's Verdict No. 46/PUU-VIII/2010, dated February 17, 2012, due to judicial review of Marriage Constitution in Article 2 paragraph (2), and article 43 paragraph (1)

based on proving the existence of a blood relation between the child and the man as the father.<sup>8</sup>

### C. MARRIAGE VALIDITY VERSUS MARRIAGE RECORDING

Marriage validity according to Constitution Number 1 of 1974 on Marriage stated in article 2, paragraph (1), "marriage is legal if done according to the law of each religion and belief". The article described in the Compilation of Islamic Law (KHI)<sup>9</sup> article 5, "marriage is legal if done according to Islamic law in accordance with article 2, paragraph (1) of Constitution Number 1 of 1974 on Marriage ". Explanation on the pillars of marriage according to Islamic law, which is the legal basis of marriage described in Article 14, namely, the prospective husband, the prospective wife, marriage trustee, two witnesses, *ijab* and *kabul*. Thus the legitimacy of marriage is based on those five pillars, which the recording was not included in it. Marriage was declared legal under Islamic law even in the absence of records.

The position of marriage registry as mentioned in Article 2 paragraph (2) of UUP, in the KHI Article 5 explicitly mentioned that it is a requirement in order to guarantee order in Islamic society marriage, it even affirmed in Article 6 paragraph (2), that the unrecorded marriage, does not have legal force. Recording of marriages performed by Marriage Registry Official as regulated in Constitution Number 2 of 1946 and Constitution Number 32 of 1954, therefore, the marriage must be performed before the Marriage Registry Official and can only be proved by Marriage Certificate made by the Marriage Registry Official.<sup>10</sup>

Although legislation has clearly requires registration of marriage, there are still many people who perform marriages under the hands alias unrecorded. Most of them are

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<sup>8</sup> Constitutional Court's Verdict page 35-36

<sup>9</sup> Compilation of Islamic Law (KHI) is an Islamic family law which cover the areas of marriage, inheritance and donation, which is written in the form of the articles as legislation, totaling 229 articles for Muslims in Indonesia. Although not in the form of legislation yet, but KHI effectively become guidance the religious courts based on Inpres No. 1 year 1991 where the President instructed the Ministry of Religious Affairs to socialize KHI to use government agencies and communities who need it.

<sup>10</sup> See KHI article 6 and 7

polygamy, as in the case Mordiono-Macica above and underage marriage.<sup>11</sup> This is a complicated problem, especially polygamy and underage marriage often ends in divorce.<sup>12</sup> As a result, many widows and children born from such marriages are in disadvantage because there are no legal guarantees. If many widows and children who are neglected did not have legal protection, it will result in the negative growth and development. Children can only be grow and develop well in a good family. So it can be imagined the burden that incurred by the mother in raising her son alone. That was still coupled with a negative view of society towards marriage under the hands.

The majority of legal experts stated that the marriage and registration legitimacy that are regulated UUP Number 1 of 1974 can coexist or have no problems in its implementation.<sup>13</sup> However, when examined more deeply, actually there are oddity between the two terms. For example, the question will arise, how a marriage considered legal by constitution can also be recognized its non-legitimacy by the same constitution. As marriage carried out according to Islamic law or custom is considered legal under article 2 paragraph (1) of UUP Number 1 of 1974, but it also denied the validity according to article 2 paragraph (2), because it is not recorded. One of the MK's judges in determining the verdict expressed a different view (councuring opinion), namely Farida Indriyati. According to Indriyati, the two articles are hampering each other. In implementation article 2 paragraph (1) blocked its implementation by paragraphs 2 and conversely paragraph (2) was also blocked by paragraph (1). This condition is caused by there are no synchronization between religious and legal norms. Validity of a marriage are based on religious norms, while legal protection must be based on recording. Legal

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<sup>11</sup> There are still no legal sanction to crime in marriage, <http://puslitbang.1.balitbangdiklat.kemenag.go.id/index.php?option=c>, accessed on 1 July 2013.

<sup>12</sup> Neng Djubaidah, *Pencatatan Perkawinan dan Perkawinan Tidak Dicatat*. Jakarta: Sinar Grafika, 2010. Page 23

<sup>13</sup> Abdul Manan,. *Aneka Masalah Hukum Perdata Islam di Indonesia*. Jakarta: Kencana Prenada Media Group, 2008. Page 13. Drs. H. Syamsul Anwar, SH., MH dan Drs. Isak Munawar, M.H. "Nasab Anak di Luar Perkawinan Paska Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 tanggal 17 Pebruari 2012 Menurut Teori Fikih dan Perundang-undangan" Page 9-10. <http://www.badilag.net/data/ARTIKEL/ARTIKEL%20NASAB%20ANAK%20DI%20LUAR%20PERKAWINAN.pdf> accessed on 1 juli 2013.

protection can not be implemented without a marriage certificate. Therefore Indriyati expect synchronization between religious and legal norms.<sup>14</sup>

## CHILDREN BORN OUTSIDE MARRIAGE VERSUS ADULTERY

Are the child born outside marriage in MK verdict and in Constitution Number 1 of 1974 about marriage includes adultery child, which is the child born without marriage of the parents? Or only the child born in unrecorded marriage? Understanding of children born outside marriage is a polemic among legal experts. The verdict gives the impression to the Islamic organizations and MUI<sup>15</sup>, that the notion of children born outside of marriage includes adultery children. Therefore MUI issued fatwa on the position of adultery children. Which stated that the adultery children has no lineage relationship with a man who was the cause of his birth and his family. Adultery children only has a lineage relationship with her mother and her mother's family. In other words, Islamic organizations and MUI interpret children born outside of marriage, is a child born in a marriage that was not recorded or under the hands.<sup>16</sup> They stated that the decision of MK implicitly lead to the legalization of adultery.<sup>17</sup> In other hand Mahfud MD, Chairman of the Constitutional Court at the time, explaining that the important foundation in the verdict were, to those who do, they must be responsible. The man who was the cause of the birth of a child, should be responsible for the life and the livelihood of the child, regardless of the marital status.<sup>18</sup> So, the adultery children also had a civil relationship with the father who is the cause of his birth and his father's family.

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<sup>14</sup> MK's verdict, on verdict of concurring opinion page 40-45. Supported by National Commission for Women <http://www.komnasperempuan.or.id/2012/02/pernyataan-sikap-komnas-perempuan-terhadap-putusan-mahkamah-konstitusi-tentang-pasal-43-ayat-1-uu-no-1-tahun-1974-tentang-perkawinan/> Diakses pada tanggal 10-11-2012

<sup>15</sup> Mukti Arto, "Diskusi Hukum Putusan Mahkamah Konstitusi RI Nomor 46/PUU-VIII/2010" <http://badilag.net/data/ARTIKEL/DISKUSI%20HUKUM.pdf> accessed on 1 juli 2013 and <sup>15</sup>Drs. H. Syamsul Anwar, SH., MH and Drs. Isak Munawar, M.H. "Nasab Anak di Luar Perkawinan Paska Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 tanggal 17 Pebruari 2012 Menurut Teori Fikih dan Perundang-undangan" page 9-10. <http://www.badilag.net/data/ARTIKEL/ARTIKEL%20NASAB%20ANAK%20DI%20LUAR%20PERKAWINAN.pdf> accessed on 1 juli 2013.

<sup>16</sup> Jumni Nelly, *Nasab Anak Luar Nikah Perspektif Hukum Islam dan Hukum Perkawinan Nasional*. Syari'ah Faculty and Law Uin Suska Pekanbaru, Riau., page. 54.

<sup>17</sup> Legalize adultery <http://www.itoday.co.id/politik/putusan-mk-tentang-anak-di-luar-nikah-legalkan-zina>, accessed on 3 juli 2013 and not legalize adultery <http://id.berita.yahoo.com/mk-putusan-nomor-46-puu-viii-2010-tidak-085210375.html>

<sup>18</sup> MK accused of legalize adultery, <http://revisi.joglosemar.co/berita/mk-dituding-legalkan-zina-67643.html>



Moreover, according to constitutional judges Indriyati in her concurring opinion, if the marriage that performed based on Islamic law or under the hands is deemed valid by constitution, then according to that, children born in marriage under the hand should also be considered valid. Thus the question of children born outside marriage was not a child born in a marriage, but adultery children, which is a child born without marriage. In line with Indriyati, Syamsul Anwar said that the UUD '45 article B paragraph 29 (1) states, "every person has the right to form a family and continue the descent through a valid marriage". As for what is a valid marriage must be referenced to UUP number 1 of 1974 article 2 paragraph (1), that states, "marriage is legal, if done according to the laws of each religion and belief". Anwar insists that under the law, every person has the right to have offspring through a legal marriage. Not legalize to have offspring by way of adultery. It can thus be concluded that the children born outside of marriage are children born from the marriage under the hand, not the child who was born without marriage. This polemic become controversy, because in the UUP No. 1 of 1974 there are no explicit explanation on the notion of children born outside marriage.<sup>19</sup>

Constitutional Court's verdict is supported by KPAI Chairman, Aris Merdeka Sirait, by stating, "the verdict of Constitutional Court gave civil rights that has not been recognized by the state. Hence the birth certificate does not list the name of father. And this will certainly have implications in not getting "inheritance" and could not put who is his father, therefore violate his/her rights. In UN convention, the recognition of civil identity in the form of name and citizenship must be granted by the State, does not have to rely on the legality of marriage. But also as the constitutional rights, civil rights, which is a very fundamental rights and constitutional".<sup>20</sup> KPAI claimed nearly 50 million children in Indonesia who do not have birth certificates for many reasons, such as invalid marriages or marriage under the hands(siri). This figure is almost half of the total number of children under the age of 5 years. Aris Merdeka Sirait therefore strongly support the verdict, which can be used as the basis of advocacy for children outside of marriage to obtain his/her civil rights.<sup>7</sup>

#### RESISTANCE VERSUS ACCOMMODATION TO CONSTITUTIONAL COURT VERDICT NUMBER 46/PUU-VIII/2010

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<sup>19</sup> Abdul.Manan, *Aneka Masalah Hukum Perdata Islam di Indonesia*. Jakarta: Kencana Prenada Media Group 2008 page 41.

<sup>20</sup> Children Divorce Case Not Admitted by The Father  
<http://www.antarajawabarat.com/lihat/cetak/36884>, accessed on 4 July 2013

This section obtained from Moslem NU and Aisyiyah Malang official, which the authors chose based on purposive random sampling. The authors chose four person from Moslem NU official and four person from Aisyiyah official. Selection is made based on their education and position within the organization. Authors present their profile in the following table.

**Table of Informants**

<b>No.</b>	<b>NAME</b>	<b>EDUCATION</b>	<b>POSITION</b>	<b>ADDRESS</b>
1.	Hj. Sulalah, Dr.M.Ag	S-3	Chairman of Research and Development Muslimat NU	Housing Department of UIN, 50 Gajayana, Malang
2.	Chasinah	Pesantren Singosari	Chairman of Muslimat NU	8/21 A Kebalen Wetan, Malang
3.	Fifik Wiryani	S-3	Chief Of Law and Human Rights Aisyiah	F.9 Muara Sarana Indah F.9, Malang
4.	Komariah SH, M.Si, M.Hum	S-2	Law and HumanRights Aisyiah	II A/16 Kebalen Sukun Malang

To the Informants the author send the verdict of the Constitutional Court and the MUI fatwa about adultery children position first before doing the interview. Then the interview was conducted in a day, because it coincided with one day seminar held by Sharia Faculty of UIN Malang on December 14, 2012, with the theme, "Children from Adultery Postition and Treatment to Them " (Assessing Constitutional Court verdict No. 46/PUU-VIII/2010 , on Judicial Review of the Marriage Constitution in Article 2 paragraph (1), and Article 43 paragraph (1) and MUI Fatwa No. 11/2012 dated March 10, 2012) at the Pelangi Hotel, 3 Merdeka Selatan Malang 65119.

Interview instruments are broken down by the MK's verdict in order to get thorough views of informants. There are two principles of the verdict, namely did not granting judicial review of article 2 paragraph (2) of UUP No.. 1 of 1974, which declared that marriage must be recorded. And the granting of judicial review of article 43 paragraph (1) of UUP No.. 1 of 1974 which states "children born outside marriage only has civil relationship with her mother and her mother's family". With the verdict, the article changed, "children born outside marriage have a civil relationship with her mother and her mother's family as well as with his father and his father's family as long as can be

proven with science/technology or other evidence that could be used". Therefore, the interview instruments reads:

1. How is your view about registration of marriage in Article 2 paragraph (2) of UUP No.1 of 1974 which was strengthened by MK's verdict No. 46/PUU-VIII/2010, on judicial review of UUP in Article 2 paragraph (1), and Article 43 paragraph (1)?
  2. How is your view about the rights of the wife in a marriage that was not recorded or sirri?
  3. How is your view about civil relationship (living, lineage and inheritance) of children born outside marriage as in MK's verdict No. 46/PUU-VIII/2010, on judicial review of UUP in Article 2 paragraph (1), and Article 43 paragraph (1) ?
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1. Informants view on Marriage Registration in Article 2 paragraph (2) of UUP No.. 1 of 1974 which was strengthened by MK's verdict No.. 46/PUU-VIII/2010, on judicial review of UUP in Article 2 paragraph (1), and Article 43 paragraph (1)

Mrs. Nyai Hj. Chasinah, Chairman 1 of Muslimat NU:

"From my experience, living among society, there is a problem in couples of men and women who want to get married, this issue is actually flourishing in societies, they bring their parents to marriage, and there are RT and RW, because there is a kyai or priest who willing to perform siri marriage with a note that on a certain date should be officially married. This problem often occurs in society especially those who are considered leaders/ulama, the public did not want to be complicated and what kind of solutions. MUI's decision when in Gontor decided that Siri marriage was allowed but with obligation must be registered on KUA. Therefore MK's verdict which strenghtened the registration of marriage is on track. I guess that is."<sup>21</sup>

Dr.. Hj. Sulalah M.Ag, Chairman of Research and Development of Muslimat NU:

"That marriage will be valid if done in the view of syar'i and constitution. Which means the legal term have two contexts; valid according to religion and valid according to the State. Therefore MK's verdict which strenghtened the registration of marriage is suitable."<sup>22</sup>

Hj. Komariyah, Chief of Human Rights and Law of Aisyiyah:

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<sup>21</sup> Interview at Pelangi Hotel, 14 December 2012

<sup>22</sup> Interview at Pelangi Hotel, 14 December 2012

“I will give recommendations, (1) all of the problems must be solved from the source, both siri marriage, and adultery. It must have preventive and curative prevention. What is the preventive? I think this is from the organization or college, the message still not good enough to parents and to juvenile, as more case happening it became common, maybe twenty years ago when the parents know their children became pregnant outside marriage, they became sidelined, even expelled from the house, but now it’s already common, they became proud if their son have many girlfriends. Therefore as a preventive mission we must be industrious to give message before the occurrence of pre-marital sex. The point is, I agree with the strengthening of reigstration of marriage by MK.”<sup>23</sup>

Mrs. Fifik Wiryani, Member of Human Rights and Law of Aisiyah:

"I strongly agree with the verdict, because sirri marriages, mostly used as a way to only legalize sexual relations between men and women. Many men who take advantage of the practice of sirri marriages is just simply to indulge his libido. Women who want to get sirri marriage should remember this, so the man can't trick them easily. They said by performing sirri marriages to avoid adultery. Yet how confident they are that the "marriage" is blessed by God? Whereas all of this is just made by selfish men".<sup>24</sup>

Based on the data, it can be concluded, that the views of both informants and officials from Muslimat NU or Aisiyah on marriage registration set forth in Article 2 paragraph (2) of the UUP No. 1 of 1974 and strengthened by MK's verdict as in explanation of empirical data above are on thack. That they agree with the verdict. That the validity of a marriage must be strengthened with official recording by state officials to obtain legal protection. But they did not argue that the unregistered marriages as an aberration. Siri marriage remains a valid marriage, even though it should not be done, because it would harm the women and children. They suggested that sirri marriages are still widely practiced in the community due to several factors. Such as people do not want to be bothered with the paperwork to the KUA and to avoid adultery.

## 2. Informants view on the Rights of Wife in Unregistered Marriages.

Mrs. Nyai Hj. Chasinah, Chairman 1 of Muslimat NU

“Rights and obligation was given only to those who gives rights and obligations to the State, the court would not acknowledge sirri marriage because state obligation is not met, then he will not be civilly acknowledged. I had a

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<sup>23</sup> Interview at Pelangi Hotel, 14 December 2012

<sup>24</sup> Interview at Pelangi Hotel, 14 December 2012

brother in the Religious Courts, there was a case where someone who is having siri marriage, then there was no conformity, then they want to divorce, and it became a problem, because there was no letter or certificate, then the Religious Courts of Situbondo sent the former to go back to the person who perform the siri marriage, so eventually they also divorce by siri, how was that possibly can happen? therefore we need to disseminate to the public not to perform marriage only valid in religion but not authorized by the State.”<sup>25</sup>

Dr.. Hj. Sulalah M.Ag, Chairman of Research and Development of Muslimat NU:

“I’m bound in to theory that citizens will get the rights and obligations if they meet the rights and obligations to the State. What it means is, it's not wrong for the State to not give rights to citizens who do not follow the rules if trouble occurred, like the example of Macica, it’s her risk for not getting anything.”<sup>26</sup>

Hj. Komariyah, Chief of Human Rights and Law of Aisiyah:

“If people think that the rights and obligations that they will get from a sirri marriage is similar to the ones that legally registered at KUA, especially for women, it's obviously wrong. Because it is not officially registered in the State, women obviously will not get the things that they expect as when they were legally married, such as the livelihood, inheritance, recognition of the existence of children, and so on.”<sup>27</sup>

Mrs. Fifik Wiryani, Member of Human Rights and Law of Aisiyah:

“Like Macica who has been struggling for 8 years to get their rights, but still can’t. Therefore I agree to boost the socialization of the impact in siri marriages.”<sup>28</sup>

Based on the data, it can be concluded, that the views of both informants either from Muslimat NU or Aisiyah about the rights of wives in sirri marriage also consistent. Namely, because it was not recorded by the State officials, the State is not wrong if it does not provide legal protection. And if there is a problem with the non-fulfillment of their rights by her husband, as experienced by Macica. In sirri marriage, if the men not doing his obligations, then women's rights like livelihood and inheritance do not get protection from the State.

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<sup>25</sup> Interview at Pelangi Hotel, 14 December 2012

<sup>26</sup> Interview at Pelangi Hotel, 14 December 2012

<sup>27</sup> Interview at Pelangi Hotel, 14 December 2012

<sup>28</sup> Interview at Pelangi Hotel, 14 December 2012

3. Informant's View on the Children Status who were born in Outside Marriage as in MK's verdict No. 46/PUU-VIII/2010, on judicial review of UUP in Article 2 paragraph (1), and Article 43 paragraph (1)

Mrs. Nyai Hj. Chasinah, Chairman 1 of Muslimat NU:

"How the children status born from adultery? "I agree with the decision of the Court, if it means that children from outside marriage are from sirri marriage, because if not addressed that way then the children from adultery could be treated as legal children too. So the decision of the Constitutional Court is still open to multiple interpretations, many views, there is those who support or against it, if not interpreted that the children outside marriage are the result of siri marriage, not the children outside marriage without any marriage relation. I think that is. "<sup>29</sup>

Dr. Hj. Sulalah M.Ag, Chairman of Research and Development of Muslimat NU

"I strongly agree if the intellectuals will make a breakthrough in how to protect the children born from sirri marriage should be given their rights, the same as children born in registered marriage. Because I think what was decided by the Court was in considering the recognition of the religious side, perhaps like this, in addition to syar'ily approved, it may not be granted, or perhaps have limitation and at the same time serve as a lesson, a warning that it is not easy to perform sirri marriage. But it is difficult situation for children born from adultery. Governments need to make special arrangements. Or maybe as stated in MUI's Fatwa. Biological father be held accountable to provide, wajibah inheritance if died, but cannot draw the lineage or cannot become guardians."<sup>30</sup>

Hj. Komariyah, Chief of Human Rights and Law of Aisyiyah:

"In my opinion the Court's decision is agreeable, as Mrs. Tutik said earlier, the biological father of the child must take responsibility for his actions". So basically I personally support what has been decided by the Court, the reason are, there are things that need attention and support for the MK's decision, the first one I want to see to the aspect of the child, the child was born in a state of pristine or fitrah, on the other hand we see, that a person (including infants) must not bear what was done by the parents, I saw a child of adultery is getting too much burden, either in terms of social, moral, economic, and so forth. Then in the other side in the concept of history, why the child in the study of fiqh only have lineage to his/her

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<sup>29</sup> Interview at Pelangi Hotel, 14 December 2012

<sup>30</sup> Interview at Pelangi Hotel, 14 December 2012

mother in the case of children born from adultery, it is because in the law the clarity occupies the highest position, if not then definitely someone going to punish, why the lineage are to his/her mother, because the mother was obviously the one who pregnant, nursing, gave birth, but in the case but in the case of women who are adulterer, where he frequently change partners in adultery, there is no certainty to establish who the parents is at the time , as an example in the hadith that form the basis to MUI, so it shows that the Rasulullah has his difficulties, so there are no resemblance, when I saw this hadith as the strengthen to the decision of Constitutional Court, that naturally the child has father, it's the original law, not to be his son when the father refused, so I think the Law reads the child lineage to the parents, except the father refused. In relation to this, judge's guidelines is not to the law, when we see the ruling of the court, it reads "Bismillah, by the Almighty God". So the position of a judge is not glued to the law or constitution but justice to Allah, so I think the judge is the highest representative of Allah on earth in upholding justice, what is justice itself, as revealed by Ibn Qayyim al-Jauziyah once wrote that the basic/foundation of syaria is the wisdom and benefit of the society in this world and in hereafter, justice is the wisdom and benefit to all, then anything contrary to justice is not syaria. So obviously justice is perceived by humans, not the justice of Allah, we do not know how God's justice is. So I guess if we look the condition of children from adultery who is in disadvantage because of adultery, the verdict should be accepted, because he/she can not bear any burden, because they should be the same, equal with the other children. I strongly agree if we give recommendation to government to make Anti Adultery Law, but don't take too many time."<sup>31</sup>

Mrs. Fifik Wiryani, Member Of Human Rights and Law of Aisyiyah:

“I strongly agree with the decision of the Court and the MUI Fatwa which philosophically in principle there are two, the first is to protect the child, and the second is to punish the perpetrators.”

How does the position of the child? "In terms of the legal absence from the meaning of civil relationship earlier, minimum hadhonah livelihood and wajibah inheritance, the problem is how the realization of the fact in the Court, the judge very familiar with it. To provide livelihood to the child have very hard realization in future implementation, not to mention about the mechanism, and to the court, not everyone has a lot of money like Machica Mochtar, what about the

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<sup>31</sup> Interview at Pelangi Hotel, 14 December 2012

cases that occurred in Malang, how she could apply when there is no companion, it should be free if it went to trial.”<sup>32</sup>

Based on the data, it can be concluded that the informants views on the decision of the Constitutional Court, related to children born outside marriage, in revising Article 43 paragraph (1) of UUP, is divided into two. *First*, all informants agreed decision of the Court, as long as what it means is children born from siri marriage. They have rights as legitimate children in terms of UUP. Which has the lineage right to his parents, *hadlanah*, living, inheritance, and guardians. *Second*, that the decision of the Court could be interpreted children born without marriage or adultery child, their opinions can be divided into two, namely:

1. Reject the decision of the Court, if it meant the child born outside marriage is adultery child. As the verdict states, "Children born outside marriage have a civil relationship with her mother and her mother's family as well as with men as a father who can be proven by science and technology and/or other evidence under the law have blood relations, including civil relations with his father's family ". They receive the MUI's fatwa, that adultery child has no lineage relationship with his father and father's family, only to have the relationship with her mother and her mother's family. However, the biological father has the obligation to provide living and give *wajibah* inheritance if he dies, as long as it can be proved that the man are the biological father.
2. Accept the decision of the Court that the child of adultery have a civil relationship, whether lineage, living, heir to the biological father, as having a civil relationship with his/her mother. The reason they put it, as the reasons found in the decision of the Court, that the child was born *fitrah* (pure). He did not bear the sins of the parents. Argument used by MUI viewed as weak because textually understood, not associated with the historical facts. In addition, the child of adultery has many disadvantages in society because discrimination attitude of the people to them. However, those who unanimously accept the decision of the Court, recommending that the government should make the Anti Adultery Law. With the Anti Adultery Law, then adulterer can be punished.

## CONCLUSION

The study concludes :

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<sup>32</sup> Interview at Pelangi Hotel, 14 December 2012



1. Registration of marriages as legislative provision accepted as useful obligation for order and law protection. However, under the hands marriage (siri) is not seen as an aberration. Performing marriage under the hands, will not become a problem as long as the marriage registered afterward. This happens due to customs and trust the ulama than to Marriage Register Official.
2. In the event of violation in siri marriages, it is reasonable if it can not be brought to court.
3. The position of children born outside marriage, all support the MK's decision as long as meant as the children born from the marriage under the hands.
4. Position of children outside marriage is still a polemic, for born from adultery, but basically all agreed to give protection to the child, and there is an important addition, namely "adulterer must be punished." Anti-Adultery Law must be made.

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Rais Am PBNU KH. Sahal Mahfudh instructed to the committee of Munas Alim Ulama NU 2012 to review the citizen obedience boundary to government related to MK's verdict concerning the legal status of children outside marriage which is considered contrary to the Islamic law.

