

# NATIONAL LEGAL REFORMS ABOUT UNOFFICIAL MARRIAGE

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## NATIONAL LEGAL REFORMS ABOUT UNOFFICIAL MARRIAGE

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### Abstract:

The legal consequences of Constitutional Court Decision Number 46/PUU-VIII/2010 perspective of national law reform are a progressive development of the law. The ruling granted part of the petition for judicial review of Article 2 (2) and Article 43 (1) of Law Number 1 in 1974 concerning Procurement of Articles 28B (1) and (2), and Article 28 D (1) of the 1945 Constitution of the Republic of Indonesia. The review of Article 2 (2) of the Marriage Law is not granted because the Constitutional Court is of the opinion that marriage registration is not a marriage restriction, but an orderly form of administration. Material review Article 43 (1) of the Marriage Law is granted by the Constitutional Court so that the child is a legal child. The Constitutional Court's decision on the unofficial marriage has positive and negative implications. One of the positive implications is the recognition of the child's relationship status with his biological father as long as it can prove the relationship and have a negative impact because it creates a sense of calm for the offender unofficial marriage (*nikah sirri*) and increase the quantity.

**Keywords:** Legal Consequences, the Constitutional Court, Unofficial Marriage (*Nikah Sirri*).

## PEMBAHARUAN HUKUM NASIONAL TENTANG NIKAH SIRRI

### Abstrak:

Akibat hukum Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 perspektif pembaharuan hukum nasional merupakan pembangunan hukum progresif. Putusan tersebut mengabulkan sebagian permohonan pengujian materiil Pasal 2 (2) dan Pasal 43 (1) Undang Nomor 1 Tahun 1974 tentang Perkawinan terhadap Pasal 28B (1) dan (2), serta pasal 28D (1) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945. Pengujian materiil Pasal 2 (2) Undang-Undang Perkawinan tidak dikabulkan karena Mahkamah Konstitusi berpendapat bahwa pencatatan perkawinan bukan pembatasan perkawinan, melainkan bentuk tertib administrasi. Pengujian materiil pasal 43 (1) Undang-Undang Perkawinan dikabulkan Mahkamah Konstitusi sehingga anak tersebut berstatus anak sah. Putusan Mahkamah Konstitusi terkait nikah sirri mempunyai implikasi positif dan negatif. Salah satu implikasi positifnya adalah adanya pengakuan status hubungan anak dengan ayah biologisnya sepanjang dapat membuktikan hubungan tersebut dan berdampak negatif karena menimbulkan rasa tenang bagi pelaku nikah sirri dan bertambah kuantitasnya.

**Kata Kunci:** Akibat Hukum, Mahkamah Konstitusi, Nikah Sirri

## Introduction

Marriage is a form of bond between a man and woman with the aim of forming a family to maintain the survival of human life. Marriage is the only means that can be done because one of the purposes of a marriage is to continue the offspring as an effort to regenerate humans in order to avoid extinction. It is realized by the state by providing legal protection either contained in the constitution of the state in the form of the 1945 Constitution of the Republic of Indonesia or in Law Number 1 in 1974 on Marriage (hereinafter referred to as UUP) and Presidential Instruction Number 1 in 1991 on Compilation Islamic Law (hereinafter referred to as KHI), as well as other regulations related to the matter.

Registration of marriage as stipulated in the UUP and KHI aims to provide legal protection for husbands, wives, or children of a marriage in order to create an administrative order. With the registration of marriage affixed in the Marriage Certificate (marriage book) then juridical clear that between a man and woman registered in the certificate are a husband and wife. This will have implications for subsequent administrative disciplines, such as changing the status of the Identity Card, Family Card, Birth Certificate, and other forms of documents so that it will facilitate the handling when a legal event will occur in the future.

In Indonesia, many marriage practices are not listed. This kind of marriage practice in society is better known as unofficial marriage. The marriage is done in accordance with the provisions of Islam. By religious law, the marriage has been in accordance with the Islamic law because it has fulfilled the pillars and requirements of marriage, that are the existence of the bride, dowry, *ijab* and *qobul*, marriage guardian, and two witnesses. When the pillars or requirements are met then the marriage is valid, although administratively not listed in the Office of Religious Affairs for those who are Muslims. Do not do marriage registration will certainly give the impact of harm for the offender unofficial marriage. Juridical state does not recognize the marriage and considers never marriage because there is no marriage registration. In addition, the processing of documents also usually will experience obstacles. A more sad result is that the status of a child born of marriage has only a civil relationship with his mother and his mother's family. Such circumstances would be very detrimental to the legal status of the child due to the mutilation of both parents. The law only recognizes that he is naughty from his mother and his mother's family so that in his birth certificate only his mother's name will be mentioned as his parents. There are no sanctions when his biological father abandons the child. He also has no inheritance rights when the father dies. For girls when going to run, then do not have Marriage (parental) guardian but only Magistrate guardian appointed by the government.

The Constitutional Court's decision on this issue brings a fresh air to the status of children born of unregistered marriage practices. Judicial review filed on Article 2 clause (2) and Article 43 clause (1) of the UUP against Article 28 B clause (1) and clause (2), and Article 28 D clause (1) of the 1945 NRI Constitution, partly granted by the Constitutional Court so that a child born of unregistered marriage is entitled to recognition and rights. The existence of technological advancements allows for the testing of DNA to perform a suitability test or a blood relationship between the child and his biological father.

Based on the description above, the issue that needs to be addressed is how the position of the child born of marriage results that not registered after the decision of the Constitutional Court Number 46/PUU-VIII/2010. In addition to resulting in the legal status of the child, does this ruling indirectly affect the phenomenon of unofficial marriage?

### **Description of the Marriage Law Case**

An applicant named Hj. Aisyah Mochtar alias Machica binti H. Mochtar Ibrahim (Applicant I) and Muhammad Iqbal Ramadan ibn Moerdiono (Applicant II). The position of the applicant is as an individual, Indonesian Citizen, filed a judicial review of the Marriage Law, received by the Registrar's Office of the Constitutional Court on Monday 14th June 2010 based on the certificate of Receipt of Application File Number 211 / PAN.MK / 2010 and registered on Wednesday, June 23, 2010, under No. 46/PUU-VIII/2010 concerning the judicial review of the provisions of Article 2 clause (2) of the UUP stating that each marriage is recorded according to the prevailing laws and regulations and Article 43 clause (1) of the UUP stating that born outside marriage has only a civil relationship with his mother and his mother's family. According to the applicant, the provisions of this article are contradictory to Article 28B clause (1) of the 1945 Constitution of the Republic of Indonesia which states that everyone has the right to form a family and to continue the offspring through legal marriage. Article 28B Clause (2) of the 1945 Constitution also states that every child has the right to survive, to grow and to develop and to be entitled to protection from violence and discrimination. While Article 28D Clauses (1) of the 1945 Constitution of the Republic of Indonesia states that everyone is entitled to the recognition, guarantee, protection and legal certainty of justice and equal treatment before the law.

The reason for the applicants filed a judicial review of the provisions of Article 2 clause (2) and Article 43 clause (1) of the UUP is that on December 20, 1993, in Jakarta, there was a marriage between Applicant I (Hj Aisyah Mochtar alias Machica binti H. Mochtar Ibrahim) with a man named Drs. Moerdiono with marriage guardian of the deceased H. Mochtar Ibrahim witnessed by 2 witnesses each named KH. M. Yusuf Usman and Risman with dowries are a set of prayer tools, 2,000 Riyal money (Arab currency), a set of gold jewelry; diamonds paid in cash and with the ijab uttered by the guardian and qobul uttered by a man named Drs. Moerdiono. The marriage is not registered at the Office of Religious Affairs so that the marital status and the Applicant I are not recognized.

The 1945 Constitution of the Republic of Indonesia put forward the legal norm as a form of justice to anyone without discrimination. According to the applicants, the prevailing UUP causes the applicants to be impaired of their constitutional rights because according to the applicants, anyone is entitled to conduct marriage as long as it is not contradictory and in accordance with their respective religions and beliefs. In this case, the applicant has married in accordance with the religious norms that he embraced is Islam. Marriage has fulfilled the pillars and marriage requirements as Islamic law. The problem for the applicants is how the religious norm can be reduced by legal norms, so that legitimate marriage because it has done and fulfill the pillars and requirements of Islam, becomes invalid because it is not done marriage



registration. This resulted in an invalid marital status of the applicant and the existence of child before the law becomes invalid, as a child who out of marriage has only a civil relationship with mother and mother's family.

Basically, every person is no exception applicant and his child has the constitutional right to get the legalization of marriage and legal status of his child. The constitutional rights that had by the applicant are guaranteed in the 1945 Constitution of the Republic of Indonesia but have been blackened by legal norms in the UUP, because the provisions of this law are unfair and harmful to the applicant. The marriage of the applicant is legitimate and in accordance with the pillars and marriage requirements in Islam, so that the born child also has the same legal status, but the provisions of articles of UUP, the applicants feel disadvantaged. On this basis, the applicant has the legal standing in the case filed.

### **Theoretical Review of Marriage**

There are a lot of definition of marriage both in the legislation and the definition of the legal experts. The definition of marriage according to the provisions of article 1 of the UUP: "Marriage is the inner bond between a man and a woman as a husband and wife with the aim of forming a happy, everlasting family or household based on the One Supreme Godhead."

Based on Presidential Instruction Number 1 in 1991 on the Compilation of Islamic Law, the definition of marriage as set forth in the provisions of Article 2: "Marriage according to Islamic law is marriage, which is a very strong contract or mittsaqan ghalidzan to obey God's commands and carry it out is worship."

In language, marriage is derived from a marriage word synonymous with marriage derived from Arabic, which means gathering, assembling, and oppressing. Meanwhile, according to the term, marriage means a contract that justifies the sexual intercourse between non-mahrom men and women that create rights and obligations between the two<sup>1</sup>. Meanwhile, according to M. Idris Ramulyo, marriage is a sacred covenant to form a family between a man and a woman. The agreement herein is the existence of an ijab, which is the legitimate offer of the Guardian's woman or his representative and the qabul, which is the legitimate acceptance of the prospective bridegroom or his representative<sup>2</sup>. Marriage according to Islamic law is a contract or commitment to justify sexual relations between men and women in order to realize the happiness of family life, which is filled with a sense of tranquility and affection in a way that is pleasing to Allah.<sup>3</sup>

According to customary law, marriage is the implementation of the institutionalized command of God in society to form households in family ties<sup>4</sup>. Meanwhile, Iman Sudiyat states that the marriage of its citizens (male, female or both) is a means to keep the group's life in an

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<sup>1</sup> Syarafuddin HZ.et al, Studi Islam 2, (Surakarta: Lembaga Studi Islam (LSI) UMS, 2003), p. 94.

<sup>2</sup> Mop. Idris Ramulyo, Hukum Perkawinan Islam, (Jakarta: PT. Bumi Aksara, 2002), p. 16.

<sup>3</sup> Ahmad Azhar Basyir, Hukum Perkawinan Islam, (Yogyakarta: UII Press, 2004), p. 14

<sup>4</sup> Otje Salman Soemadiningrat, Rekonseptualisasi Hukum Adat Kontemporer, (Bandung: PT. Alumni, 2002), p.173

orderly manner, a means by which a new generation can continue its group life<sup>5</sup>. Marriage is one of the regular cultures that follow the development of human culture in the life of society. The culture of marriage and its rules that apply to a society or to a nation is inseparable from the cultural and environmental influences in which the society resides and the social interaction of its people is influenced by the knowledge, experience, belief, and religion of the community concerned<sup>6</sup>.

According to the Civil Code, marriage is a legitimate relationship between a man and a woman for a long time. The law sees marriage as a civil relationship, as stipulated in article 26 of the Civil Code. Legitimate marriage is a marriage that meets the requirements set forth in the Civil Code, and the religious terms and regulations are excluded<sup>7</sup>. Various notions of marriage above show that there are various kinds of understanding, but basically have the same sense, which equally mentions the existence of a bond or agreement between a man and a woman to form a family.

Regarding whether or not a marriage is legitimate, marriage must be carried out in accordance with the law of each religion and belief. This is as stipulated in the provisions of Article 2 clause (1) UUP Marriage is legal if done according to the law of their respective religions and beliefs. KHI affirms the provisions of that article that Marriage is legitimate "if done according to Islamic law in accordance with Article 2 clause (1) of the UUP. According to Islamic law, marriage is legitimate when it meets the pillars of the marriage candidate, wife, marriage guardian, two witnesses, *ijab* and *qobul*.

Given the large population and the creation of orderly administration of population, then to protect the interests of marriage registration is necessary. The provision is stipulated in the provisions of Article 2 clause (2) of the Marriage Law that each marriage is recorded according to the prevailing laws and regulations. In the provisions of KHI Article 5 is affirmed:

- (1) In order to ensure the order of marriage for the Muslim community, every marriage should be registered.
- (2) The marriage registration referred to in clause (1) shall be conducted by the Officer of the Registrar as stipulated in Law Number 22 in 1946 and Law Number 32 in 1954.

According to the UUP, marriage registration is an obligation, because if there is no registration of a marriage, there is no marriage document, which cannot result in the birth certificate, so that the child born from the marriage only has a civil relationship with his mother and his mother's family. The existence of this provision raises the ambiguity between the articles in the UUP, which states the legitimate of marriage if it has been done according to religious law and their respective beliefs. But on the other hand, an unregistered marriage will have difficulty in dealing with documents relating to kinship. Marriage is a legal event that has legal consequences for the perpetrators. The legal consequences of marriage are:

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<sup>5</sup> Iman Sudiyat, *Hukum Adat Sketsa Asas*, (Yogyakarta: Liberty, 1981), p. 107.

<sup>6</sup> Hilman Hadikusuma, *Hukum Perkawinan Indonesia*, (Bandung: CV. Mandar Maju, 2007), p. 1.

<sup>7</sup> Subekti, *Pokok-Pokok Hukum Perdata*, (Jakarta: PT. Intermasa, 1989), p. 23.

- a. The arising of rights and duties between husband and wife<sup>8</sup>.
- b. The existence of property in marriage, including joint property, is the property acquired during marriage into the joint property, in addition to the property, gift or Inheritance of each husband and wife<sup>9</sup>.
- c. The position of the child as well as the rights and obligations of parents and Children<sup>10</sup>.
- d. Inheritance rights among husband, wife, and child when one dies.

#### **Due to the Law of Constitutional Court Decision Number 46/PUU-VIII/2010**

Based on Article 24C clause (1) the 1945 Constitution of the Republic of Indonesia and Law Number 8 in 2011 concerning Amendment to Law Number 24 in 2003 regarding the Constitutional Court, as well as Article 29 clause (1) sub-paragraph an of Law Number 48 in 2009 regarding Judicial Authority, one of the Court's constitutional authorities is to hear at the first and final level the final decision of which is to test the Law against the 1945 Constitution of the Republic of Indonesia. In the Constitutional Court's ruling that holds the impairment of constitutional rights and/or authority as Article 51 Clause (1) of the Constitutional Court Law must meet 5 (five) conditions, namely: 1) the existence of constitutional rights and/or authority of the Applicant granted by the 1945 Constitution of the Republic of Indonesia; 2) Such constitutional rights and/or authorities by the Applicants are deemed harmed by the coming into effect of the law petitioned for review; 3) such constitutional impairment shall be specific (actual) and actual or at least potential in nature which, pursuant to logical reasoning, shall take place for sure; 4) the existence of causal relations (causal verb) between such losses and the enactment of the law petitioned for review; 5) the possibility that with the granting of the petition the constitutional impairment argued will not or does not occur.

In the case, the applicant argues as an individual Indonesian citizen who has the constitutional rights regulated in the 1945 Constitution of the Republic of Indonesia. Article 28B clause (1) states that "Everyone has the right to form a family and continue the offspring through legitimate marriage and Article 28B clause (2) stating that every child has the right to survival, growth, and development and is entitled to protection from violence and discrimination, and Article 28D clause (1) stipulating that "Everyone shall have the right to recognition, guarantee, protection, and fair legal certainty and equal treatment before the law. Such constitutional rights have been impaired due to the coming into effect of the provisions of Article 2 clause (2) and Article 43 clause (1) of Law Number 1 in 1974 concerning marriage. Article 2 clause (2) of the Law states that "Every marriage is registered according to the prevailing laws and regulations. While Article 43 clause (1) states that "Children born out of marriage have only civil

<sup>8</sup> See the stipulation of Pasal 30 - Pasal 34 Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan (article 30th-34th act, No 1st 1974, about marriage law).

<sup>9</sup> See the stipulation of Pasal 35 - Pasal 37 Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan. (article 35th-37th act, No 1st 1974, about marriage law).

<sup>10</sup> See the stipulation of Pasal 42 - Pasal 49 Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan (article 42nd-49th act, No 1st 1974, about marriage law).



relationships with their mother and mother's family", especially regarding the right to obtain the legal status of the child.

Noting the consequences experienced by the Applicants is related to the constitutional rights of them, according to the Court, there is a causal relationship between the aforementioned losses and the enactment of the Law petitioned for review so that the Applicants fulfill the legal standing requirement to file a quo petition. Regarding the registration of marriage according to the laws and regulations are about the legal meaning of it. With respect to the matter, General Elucidation of item 4 letter b UUP concerning the principles of marriage states, ... that a marriage is lawful if done according to the law of each of his or her religion and belief; and in addition, each marriage must be recorded according to the prevailing laws and regulations. The recording of each marriage is the same as recording important events in the life of a person, such as birth, death expressed in the letters, a certificate also listed in the list of records.

Based on the Elucidation of the Law on the registration of marriage is not a factor determining the legitimacy of marriage and recording is an administrative obligation required by law and regulation. The factors that determine the legitimacy of marriage are the conditions determined by the religion of each pair of the prospective bride. The compulsory registration of marriage by the state is an administrative obligation. The meaning of administrative obligations according to the Court can be seen from two perspectives. First, from the perspective of the state, such records are required in the framework of the functioning of the State to provide assurance of protection, promotion, enforcement, and fulfillment of the human rights concerned which is the responsibility of the state and must be carried out in accordance with the principles of a democratic constitutional state regulated and set forth in the legislation (vide Article 28I clause (4) and clause (5) of the 1945 Constitution of the Republic of Indonesia).

Such recording according to the Court is not contradictory to constitutional provisions because the restrictions are stipulated by law and are conducted with the sole intent of ensuring the recognition and respect of the rights and freedoms of others, and to fulfill fair demands in accordance with moral considerations, religious values, security, and public order in a democratic society (vide Article 28J clause (2) of the 1945 Constitution of the Republic of Indonesia). Secondly, the administrative recording carried out by the state is intended to make marriage, as an important legal act in the life of the person concerned, which implicates the enormous legal consequences, in the future can be proved by perfect proof with an authentic certificate, and services by the state in relation to the rights arising out of a given marriage may be effected effectively and efficiently.

Regarding children born out of marriage, in essence, the child's relationship with a man as a father is not solely due to a marriage bond, but can also be based on the proof of a blood relationship between the child and the man as a father. Thus, regardless of the procedure/administration of the marriage, the child born must have legal protection. If not so, then the disadvantaged is a child born outside marriage, but the child is not sinful because of his birth outside of his will. Children born without father's clarity of status often get unfair treatment and stigma in society. The law must provide protection and legal certainty to the status of the



child born and the rights attached to it. Article 43 clause (1) of the UUP stating, "Children born outside marriage only have a civil relationship with his mother and his mother's family, should be read, "Children born outside marriage have a civil relationship with their mother and mother's family and with men as their father who can be proven on the basis of science and technology and/or other evidence according to law have blood relation, including civil relations with their father's family.

According to the Constitutional Court, Article 43 clause (1) of the UUP stating, "Children born outside marriage only have a civil relationship with his mother and his mother's family is contradictory to the 1945 Constitution of the Republic of Indonesia conditionally that is unconstitutional as long as the paragraph is meant to eliminate civil relation with man which can be proven based on science and technology and/or other evidence according to law has blood relation as his father.

The decision of the Constitutional Court on the judicial review of Article 2 clause (2) and Article 43 clause (1) of the UUP against Article 28B clause (1) and clause (2), Article 28D clause (1) of the 1945 Constitution of the Republic of Indonesia is appropriate because marriage registration is the form of an orderly administration as a protection against marriage itself, so that it will be clearly known the status of the two persons who have engaged in marriage and guaranteed legal certainty in relation to family-related documents, such as the arrangement of Family Card, status on Identity Card, Birth Certificate, marriage guardians, inheritance rights, and so forth.

The decision of the Constitutional Court to grant the applicants' petition to article 43 clause (1) of this UUP is appropriate, because the right to be recognized and to obtain the recognition of a child having a civil relationship with his mother and his mother's family, and having a civil relationship with his father and his father's family is a necessity. A child born must be preceded by the relationship between men and women who started with a relationship that led to the process of meeting sperm and ovum so that fertilization occurs. Moreover, the marriage of the applicant has been done legally in accordance with Islam law, which fulfills pillar and marriage requirement although not done registration of marriage. The problem is if the decision of the Constitutional Court is used as a basis for the proof of the status of the offspring of the male and female outside of marriage in accordance with their religion and belief, because in Islamic law such a child has only a civil relationship with his mother and his mother's family.

This Constitutional Court ruling in the perspective of legal reform is a progressive legal step, in which the judge makes a legal discovery (Recht finding), the judge is not only the mouth of the law but must explore the living laws of a society that can provide justice for the people.

The term progressive comes from the word progress. The law should be able to keep up with the times, as well as to answer the changing of the times with all the foundations in it, and be able to serve the society by relying on the morality aspect of the human resources of law enforcement itself.<sup>11</sup> According to Satjipto Rahardjo, the judge is expected to become the vigilante, one who is wary of the fate and state of his people from the possibility of social

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<sup>11</sup> Satjipto Rahardjo, *Membedah Hukum Progresif*, (Jakarta: Penerbit Buku Kompas, 2008), p. ix.

destruction or social instability. The judge must dare to do a rule-breaking, which is to make progressive legal breakthroughs to help the nation and country out of the downturn<sup>12</sup>.

The discovery of law is defined by Mauwissen as a legal development (*rechtsboefening*), which is the forming of law in society, which includes the activities of forming, implementing, finding, interpreting systematically, studying and teaching the law.<sup>13</sup> Meanwhile, according to Sudikno Mertokusumo, interpretation is one method of legal discovery that provides the explicit explanation of the text of the law, so that the scope of rules in the law can be applied to certain legal events. The interpretation by the judge is an explanation that must lead to the acceptable exercise of society regarding the rule of law against concrete events. The ultimate goal of explanation and interpretation of the rules is to realize the function of the positive law to prevail.<sup>14</sup>

The Constitutional Court's decision to grant the petition for judicial review of the provisions of Article 43 clause (1) is a progressive step by the judges of the Constitutional Court, where the judge sees from various aspects of the article, which the judge believes is contrary to the Constitution. In conducting legal reform it must be seen the values contained in a law whether it is in the spirit and ideology of the Indonesian nation or not.

The establishment of national law according to Sunaryati Hartono, as quoted Nyoman Serikat Putra Jaya is that:<sup>15</sup>

The national law that we shall form together is a way of governing the actions of Indonesian human beings through available channels and legal institutions, in accordance with the philosophy of life, namely Pancasila. Because of the Pancasila, among other things also unearthed from the customary law, which is actually none other than the original law for us, then by itself our national law which together we form it must also be adapted to the needs of our society that Pancasila in the 20th century, and then must be able to fulfill the needs of our community in the future.

The description above concludes that in the framework of reforming the future national law either by replacing the whole of a law or by changing / abolishing the provisions of article, one of them through a court decision, it must be in accordance with the values of Pancasila this constitutes the philosophy of life of the Indonesian and the values that are believed to be true by the people, and provide a sense of justice for the people.

### **Implication of Constitutional Court Decision Number 46 PUU-VIII/2010 against the Phenomenon of Practice Unofficial Marriage (*Nikah Sirri*)**

According to the UUP, marriage is legal if it is done according to their respective faiths and beliefs, and then ordered that the marriage is recorded. The problem is that marriages not registered under this law create the problems. According to the religious law a marriage is

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<sup>12</sup> Ahmad Rifai, *Penemuan Hukum Oleh Hakim Dalam Perspektif Hukum Progresif*, (Jakarta: Sinar Grafika, 2011), p. 15.

<sup>13</sup> Ahmad Rifai, *Penemuan Hukum oleh Hakim Dalam Perspektif Hukum Progresif*, p. 23.

<sup>14</sup> Ahmad Rifai, *Penemuan Hukum oleh Hakim Dalam Perspektif Hukum Progresif*, p. 61.

<sup>15</sup> Nyoman Serikat Putra Jaya, *Relevansi Hukum Pidana Adat dalam Pembaharuan Hukum Pidana Nasional*, (Bandung: Citra Aditya Bakti, 2005), p. 15.

legitimate and fulfills the pillars and marriage requirements, but because the marriage is not registered will cause many problems in the future, such as a child born of the marriage is considered a status as an outsider. This kind of marriage is better known as unofficial marriage.

The definition of unofficial marriage (*nikah sirri*) is a marriage not registered in the Office of Religious Affairs. The word *sirri* comes from the Arabic word *sirri* or *sir* which means secret. The existence of unofficial marriage is said to be legally valid but not lawful according to legal norms since marriage is not recorded in the Office of Religious Affairs.<sup>16</sup> According to the positive law in Indonesia, that is, by the enactment of UUP, marriage is legal if done according to the law of each religion and believes it. For Muslims, in addition, to fulfill the pillars and requirements of marriage according to Islamic law, then every marriage must be held in the presence and recorded by Official Record Keeper according to the prevailing laws and regulations. A marriage that is not done in accordance with the provision has no legal force (vide Article 2 of Law Number 1 / 1974 Jo. article 2 (1) PP Number 9 / 1975).

From the legal point of view applicable in Indonesia, unofficial marriage (*nikah sirri*) is a marriage that is not done in accordance with the provisions of the applicable legislation. Based on the provisions of Article 2 clause (1) and (2) UUP Jo. Article 4 and Article 5 clause (1) and (2) KHI, a marriage, in addition, must be done lawfully according to religious law, must also be recorded by authorized officials. Thus, in the perspective of legislation, unofficial marriage is a marriage that has no legal force. Unlawful marriage affects jurisdiction over the rights of public services by authorized agencies for the perpetrators. They do not obtain protection and legal services by authorized agencies as appropriate. There are 2 (two) opinions about the interpretation of the provisions of Article 2 of the UUP, that are:

1. The first opinion states that the tendency to separate the interpretation of Article 2 clause (1) under Article 2 clause (2), that marriage is legal if done according to the law of their respective religions and beliefs, whereas registration is administrative, it is done or not, does not constitute a defect and does not cause the invalidity of such marriage.
2. The second opinion interprets the provisions of Article 2 clause (1) and Article 2 clause (2) not only from a juridical standpoint, that is merely the validity of marriage, but also associated with the sociologist stating Article 2 clause (1) and clause (2)) cannot be separated, but is considered a series of unity like a thread with a cloth and intertwining into one, if one is loose then the other is reduced in strength and even disappears altogether. This opinion also relates also to the legal consequences of a marriage<sup>17</sup>.

The existence of the first interpretation causes some people are reluctant to register his marriage. This is based on several reasons as follows:

1. There is an opinion that both according to UUP and Islamic law have been legitimate to do unofficial marriage.
2. Avoid bureaucratically complicated.

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<sup>16</sup> [https://id.wikipedia.org/wiki/Nikah\\_siri](https://id.wikipedia.org/wiki/Nikah_siri), accessed on 18th Mei 2016.

<sup>17</sup> Moh. Idris Ramulyo, Tinjauan Beberapa Pasal Undang-Undang Nomor 1 Tahun 1974 dari Segi Hukum Perkawinan Islam, (Jakarta: Anggota IKAPI, 1990), p. 92.

3. Avoid the cost they think is expensive.
4. For people who want to get married a second time is to avoid the written permission of the first wife and avoid the responsibility of the second wife, so no need to apply for marriage to the Religious Court<sup>18</sup>.

Moh. Idris Ramulyo is more inclined to the second opinion, that Article 2 clause (1) and paragraph (2) of the UUP is a unity that cannot be separated absolutely<sup>19</sup>. The authors agree with this opinion because to further strengthen the legal standing of both parties who make a marriage, so that the legal consequences arising from a marriage can be protected by law and not ignored by the offender of unofficial marriage (*nikah sirri*).

This unrecorded practice of marriage is still prevalent among Indonesian Muslims. For all sorts of reasons, they have unofficial marriage, in the sense that the marriage is not recorded by the competent authority for it. The statement is quite staggering to come from the Ministry of Religious Affairs of the Republic Indonesia as reported by the Jakarta Post, on Thursday, December 25, 2014. According to the Ministry of Religious Affairs is estimated there are thousands of cases of silent marriage (*sirri*). It was based on survey results marriage isbat ever conducted Ministry of Religious Affairs. According to Machasin, Director General of Community Guidance (Bimas) of Islam Ministry of Religious Affairs If we look at marriage isbat survey, the number of thousands. But the real figures do not know because the number based on marriage isbat is for the case of unofficial marriage in the presence of theologian<sup>20</sup>.

There are some consequences arising from unofficial marriages, such as the abandonment of children and their mothers by their biological fathers, lack of protection of inheritance rights, family allowance for employees, etc. due to the absence of documents expressing a child's relationship with his biological father or a woman with a man as her husband to take care of it, such as Birth Certificate, Family Card, and so on, so that the real legal relationship exists but does not get recognition for not being registered a marriage.

The description above actually illustrates the importance of registration a marriage as stipulated in Article 2 clause (2) of the UUP which provides legal protection to the parties. The suggestion of a marriage registration has been echoed long before Law Number 1 in 1974 on Marriage was born, that is with the National Law Seminar I in Jakarta on March 11, 1963, in the field of Principles of National Legal Procedures in the Field of Marriage Law recommend an official registration of all marriages<sup>21</sup>.

The decision of the Constitutional Court which does not grant the applicant's petition for the judicial review of Article 2 clause (2) of this Law is appropriate, since marriage registration is not to impede or restrict every citizen from forming a family through marriage, but the purpose

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<sup>18</sup> Moh. Idris Ramulyo, Tinjauan Beberapa Pasal Undang-Undang Nomor 1 Tahun 1974 dari Segi Hukum Perkawinan Islam, p. 94.

<sup>19</sup> Mop. Idris Ramulyo, Tinjauan Beberapa Pasal Undang-Undang Nomor 1 Tahun 1974 dari Segi Hukum Perkawinan Islam, p. 95

<sup>20</sup> <http://posscore.com/2014/12/25/pernikahan-sirri-pernikahan-main-main/> accessed on 18th Mei 2016.

<sup>21</sup> Barda Nawawi Arief, Kumpulan Hasil Seminar Hukum Nasional Ke I s/d VIII dan Konvensi Hukum Nasional 2008, (Semarang: Pustaka Magister Semarang, 2009), p. 4.



of recording is an administrative form of law as defined by law form of protection against the community itself, so that the decision is not contradictory even in accordance with the 1945 Constitution of the Republic of Indonesia.

According to the authors of the Implication of Constitutional Court Decision Number 46 / PUU-VIII / 2010 has a positive and negative impact on society. On the one hand, the granting of material testing, especially Article 43 clause (1), has a positive impact on children born outside of unregistered marriages, namely the legal status of the child as a legal child and the rights that can be fulfilled by the law as long as the proof of the child's biological father can be proven through the advancement of science and technology. This is a progressive legal step because it provides justice for the child.

On the other hand with the granting of material testing, especially Article 43 clause (1) will have a negative impact on the community. With this verdict, the perpetrators of the practice of unofficial marriage will feel calm and reluctant to register their marriage for various reasons, without the registration of marriage the child will be born will get his rights as like a child born of a registered marriage. Even the number of practitioner's unofficial marriage could be increased as said by the Director General of Islamic Bimas Kemenag. So that no granting of material testing of article 2 clauses (2) UUP is right. Therefore, anticipative steps for the Constitutional Court are required, for example by ordering marriage registration for offenders with the possibility of imposing administrative sanctions for those who do not implement it.

## **Conclusion**

The Constitutional Court in the conduct of judicial review on the provision of Article 43 Clause (1) of the UUP concerning the status of the child outside of marriage is appropriate because it has seen the interests of the child who should not bear the legal consequences of the deeds of both parents. The rights of each child are equal, whether the child is born of a registered marriage or not. Children do not understand the actions of their parents. If the child only has a civil relationship with his mother and his mother's family then it will cause injustice for the child. Marriage practices not registered by a legitimate male and female based on religious provisions, such as Islam, with the verdict can make an effort to prove the status of the child through advanced science and technology, for example through DNA testing, as a child who not only had a civil relationship with his mother and his mother's family but also had a civil relationship with his father and his father's family.

No granting of a judicial review of the provisions of Article 2 clause (2) of the UUP is appropriate, to protect the interests of unregistered marriage perpetrators, that's by creating administrative order. Associated with the practice of unofficial marriage (nikah sirri) which today many occur in Indonesia, then the verdict is correct. However, with the granting of judicial review to the provisions of Article 43 clause (1) UUP feared to bring negative impact to the increasing quantity of the phenomenon of the practice of unofficial marriage, namely the feeling more comfortable for the perpetrators of it, because although their marriage is not registered, the

child resulting from their marriage also get the same treatment with children born from the registered marriage, with proof of science and technology.

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