

# The Problematics of the Legal Standing of Deoxyribonucleic Acid (DNA) Test Results Concerning Civil Relationships of Illegitimate Children: A Legal Pluralism Perspective

Fradhana Putra Disantara

Institut Teknologi Bisnis Yadika, Pasuruan, Indonesia  
dfradhana@gmail.com

Dicky Eko Prasetyo

Universitas Negeri Surabaya, Surabaya, Indonesia  
dickyekoprasetyo@gmail.com

Geraldha Islami Putra Disantara

Universitas Negeri Surabaya, PSDKU Magetan, Indonesia  
gdisantara2006@gmail.com

Briggs Samuel Mawunyo Nutakor

Wisconsin International University College, Ghana  
briggsnutakor@gmail.com

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**Abstract:** Decision No. 46/PUU-VIII/2010 by the Constitutional Court has introduced legal challenges, particularly concerning the acceptance of DNA testing as evidence for establishing civil relationships between a child and their biological parent. This study aims to analyze the legal issues surrounding the use of DNA testing to prove civil rights of illegitimate children and the aspects of legal pluralism related to this use. The research employs a normative legal approach, utilizing case, conceptual, and legislative analyses. Findings indicate that the legal issues with DNA testing for establishing the civil rights of illegitimate children stem from the Constitutional Court's decision, which has not fully considered the legal pluralism perspective, leading to potential application challenges. Post-decision, DNA testing reflects a weak legal pluralism where the Court's ruling is not easily applicable due to conflicts with Islamic law as outlined in Article 100 of the Compilation of Islamic Law (KHI). Consequently, it is recommended that the Constitutional Court and judicial institutions consider legal pluralism aspects in their decisions to strengthen legal pluralism, ensuring that court rulings are optimally implemented in alignment with existing and practiced legal frameworks within society.

**Keywords:** *Children's Rights, Civil Relationships, Legal Pluralism, DNA Testing.*

**Abstrak:** Putusan MK No. 46/PUU-VIII/2010 menimbulkan problematika hukum khususnya terkait diperkenalkannya tes DNA sebagai dasar untuk menunjukkan hubungan keperdataan antara anak dengan anak biologis. Penelitian ini bertujuan menganalisis problematika hukum diperkenalkannya tes DNA untuk membuktikan hak keperdataan anak di luar kawin dan aspek pluralisme hukum terkait tes DNA untuk membuktikan hak keperdataan anak di luar kawin. Penelitian ini merupakan penelitian hukum normatif dengan mengedepankan pendekatan kasus, konseptual, dan perundang-undangan. Hasil penelitian menegaskan bahwa problematika hukum tes DNA untuk membuktikan hak keperdataan anak di luar kawin adalah pada implikasi Putusan MK yang belum mengakomodasi pertimbangan hukum dalam perspektif pluralisme hukum sehingga tes DNA untuk membuktikan hak keperdataan anak di luar kawin dapat menimbulkan kendala dalam penerapannya. Tes DNA Untuk membuktikan hak keperdataan anak di luar kawin pasca Putusan MK sejatinya bercorak pluralisme hukum lemah di mana Putusan MK tidak mudah untuk diterapkan secara optimal di masyarakat karena putusan tersebut memiliki pertentangan dengan substansi Hukum Islam sebagaimana tertuang dalam Pasal 100 KHI. Oleh karena itu, rekomendasi dalam penelitian ini khusus bagi MK dan lembaga pengadilan pada umumnya perlu memerhatikan aspek pluralisme hukum, khususnya untuk dijadikan pertimbangan dalam putusannya supaya tercipta pluralisme hukum yang kuat sehingga masyarakat dapat menjalankan putusan pengadilan secara optimal sesuai dengan jenis hukum yang eksis dan dijalankan oleh masyarakat.

**Kata Kunci:** *Hak Anak, Hubungan Keperdataan, Pluralisme Hukum, Tes DNA.*

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## Introduction

Children born out of wedlock are a phenomenon in society that actually places children in a position where they cannot have clear legal certainty regarding the fulfillment of their rights.<sup>1</sup> In fact, referring to Article 28B paragraph (2) of the 1945 NRI Constitution, children have the right to receive legal protection and be free from all forms of discrimination. The mandate of Article 28B paragraph (2) of the 1945 NRI Constitution also emphasizes that children's rights are part of human rights which are not only protected but must also be fulfilled and facilitated by the state.<sup>2</sup>

Developments related to efforts to protect children's rights include those contained in the Constitutional Court Decision No. 46/PUU-VIII/2010 (Constitutional Court Decision on Extramarital Children), the main substance of which emphasizes that extramarital children still have civil rights with their father and family as long as it can be proven by science and technology.<sup>3</sup> One aspect of proof relating to civil rights for illegitimate children in relation to the father and his family is through a *Deoxyribonucleic Acid* (DNA) test.

In general, DNA is understood as a chain of molecules that is substantially related to

genetic material, where each person has certain characteristics.<sup>4</sup> One of the orientations of DNA is that it can be used to determine from whose father and mother an individual was born. Although the Constitutional Court Decision on Extramarital Children does not comprehensively discuss and explain DNA, but seen from the trial process and the discourse after the Constitutional Court Decision on Extramarital Children was pronounced, it can be seen that the orientation of the Constitutional Court Decision on Extramarital Children is to accommodate the development of science and technology, especially DNA because it is used to determine the civil rights of extramarital children.

The Constitutional Court Decision on Extramarital Children which accommodates DNA testing as one of the efforts to determine the civil rights of extramarital children has actually raised pros and cons in society. The pro argument states that the Constitutional Court Decision on Extramarital Children is actually to provide protection for children and their mothers so that biological fathers who can be proven by DNA testing are also required to have civil responsibilities to the child and mother.<sup>5</sup> However, the argument of the opposing side emphasizes that the Constitutional Court's Decision on Extramarital Children can be a means of "legalizing" extramarital sexual relations because extramarital children still have a civil relationship with

<sup>1</sup> Iskhaq Iskhaq and Sri Kusriyah, "The Status of Children Due to Underhanded Marriages after Marriage Is Recorded without Marriage Isbat," *Jurnal Hukum Khaira Ummah* 16, no. 1 (2023): 35–44, <https://jurnal.unissula.ac.id/index.php/jhku/article/view/19312%0Ahttps://jurnal.unissula.ac.id/index.php/jhku/article/download/19312/6559>.

<sup>2</sup> Wahyuni Retnowulandari, Maya Indrasti, and Yulia Fitriliani, "Is Marriage Age Restriction Un-Islamic? (Comparative Study of Indonesia and Pakistan with Gender Perspective)," in *4th International Conference on Law Reform*, vol. 2024, 2024, 652–669.

<sup>3</sup> Hamam Hamam, "The Status of Outside Marriage Children (The Study of Constitutional Court Regulation No. 46/PUU-VIII/2010 on February 27th, 2012 Based on the Fuqaha' Perspective)," *International Journal of Educational Research & Social Sciences* 2, no. 3 (2021): 574–584.

<sup>4</sup> Dewi Saptina, Syamsul Muhtahidin, and Zahratul'ain Taufik, "Comparison of Children's Inheritance Laws Outside Marriage in Indonesia with Several Other Countries," *Ex Aequo Et Bono Journal Of Law* 1, no. 2 (2023): 1–8.

<sup>5</sup> Ivo Junia Imako Haris, "Children's Position on a Defective Marriage (Fasid) in Terms Establishment of Inheritance Right as an Effort for Legal Certainty," *Sociological Jurisprudence Journal* 7, no. 1 (2024): 40–44.

their father or mother.<sup>6</sup> Another problem related to illegitimate children is related to the bloodline relationship which is specifically regulated in Islamic Law.

Islamic Law emphasizes that in terms of bloodline, children born out of wedlock do not have a relationship with their father and his family but only have a relationship with their biological mother.<sup>7</sup> This is as stated in Article 43 paragraph (1) of Law No. 1 of 1974 concerning Marriage (Marriage Law) which states that children born outside of marriage only have a civil relationship with the mother and her family. Even so, the presence of the Constitutional Court Decision on Extramarital Children has actually revised the provisions of Article 43 paragraph (1) of the Marriage Law so that children born outside of marriage have civil rights with their mother or father biologically as long as it can be proven based on developments in science and technology.

The Constitutional Court's decision on illegitimate children, although it has given rise to pros and cons, also has problems, especially with the use of DNA testing as an effort to determine the civil rights of illegitimate children. This problem occurs because it actually contradicts the substance of Islamic law, which even though according to DNA testing an illegitimate child is the biological child of his father, the child still does not have a civil relationship with his father. Another problem is related to the principle of prohibiting the search for origin for anyone who is prohibited by civil law in Indonesia which is based on the Civil Code

which was formerly the BW or Dutch Civil Code so that DNA testing is not mandatory or certain parties are allowed to refuse DNA testing.

From the description above, even though the Constitutional Court Decision on Extramarital Children has an orientation to affirm the protection of children's rights, on the other hand, the permission of DNA testing to prove the civil rights of children with their biological fathers has problems related to aspects of legal pluralism, especially related to Islamic Law and western civil law which in Indonesia are accommodated in the Civil Code. Therefore, the urgency of this study is to analyze the permission of DNA testing to prove the civil rights of children with their biological fathers from the perspective of legal pluralism. This study aims to analyze the legal problems of the permission of DNA testing to prove the civil rights of extramarital children and aspects of legal pluralism related to DNA testing to prove the civil rights of extramarital children.

Research that discusses the civil relations of illegitimate children, especially with reference to the Constitutional Court Decision on Illegitimate Children, has been analyzed by several previous studies, including: Maulidina and Damayanti (2023) who studied the inheritance aspects of illegitimate children.<sup>8</sup> The novelty of Maulidina and Damayanti's (2023) research is in the aspect of the legal construction of the proportion of inheritance for illegitimate children which is the same as children born in a marital relationship. Further research was conducted by Andriati, et al. (2023) which focused on the aspect of the legal consequences of the Constitutional Court

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<sup>6</sup> Nahdiya Sabrina et al., "Discrimination against Children Born Outside of Marriage in Indonesia," *International Journal of Multicultural and Multireligious Understanding* 7, no. 9 (2020): 121.

<sup>7</sup> Agus Sugianto, Manurung, "Reconstruction of Marriage Registration Post Decision of The MK RI No. 46 / Puu-VIII / 2010 Jo Perspective of Sharia Maqoshid," in *Procceding Sabajaya Publisher*, vol. 1, 2023, 2–5.

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<sup>8</sup> Mery Risqi Damayanti Amiroatul Maulidina, "Kewarisan Anak Luar Kawin Di Indonesia Pasca Putusan Mahkamah Konstitusi No. 46/UUP-VIII/2010," *Jurnal Tana Mana* 3, no. 2 (2024): 261–267.

Decision on Extramarital Children for illegitimate children.<sup>9</sup> The novelty of Andriati et al.'s research (2023) is that the legal consequences of the Constitutional Court Decision on Children Born Outside of Marriage have guaranteed legal protection for children, especially regarding the financial aspect for children which is the responsibility of their biological mother and father and their families. Another study was conducted by Setiawan (2024) which discussed the Supreme Court Decision No. 1055 K/PDT/2023 and its relation to DNA testing in proving the biological status of children born outside of marriage.<sup>10</sup> The novelty of Setiawan's research (2024) is that in addition to DNA testing, other efforts can also be made to determine the biological father of an illegitimate child as the panel of judges in Supreme Court Decision No. 1055 K/PDT/2023 used presumptive evidence to determine the biological father of a child without going through a DNA test.

From the three studies above, it can be concluded that this study, which focuses on analyzing aspects of DNA testing to prove the civil rights of children with their biological fathers from the perspective of legal pluralism, is an original study because there has been no similar research that discusses aspects of legal pluralism in relation to DNA testing to prove the civil rights of children with their biological fathers.

<sup>9</sup> Nabila Masiadetama Ginting dan Martha Ruth Elena Syarifah Lisa Andriati, "Ketetapan Anak Luar Kawin Dengan Keluarga Ayahnya Pada Hubungan Keperdataan Sebagai Akibat Hukum Dari Putusan MK No. 46 Tahun 2010," *Civilia: Jurnal Kajian Hukum dan Pendidikan Kewarganegaraan* 2, no. 5 (2023): 96–103, <http://jurnal.anfa.co.id>.

<sup>10</sup> Alya Hanifah Setiawan, "Studi Kasus Pada Putusan Mahkamah Agung Nomor 1055 K/PDT/2023 Terhadap Permasalahan Pembuktian Status Hukum Anak Luar Kawin Dari Ayah Biologisnya Ditinjau Dari Peraturan Perundang-Undangan Terkait," *Journal of Comprehensive Science* 3, no. 6 (2024): 2030–2046.

## Method

This research, which focuses on the analysis related to DNA testing to prove the civil rights of children with their biological fathers, is reviewed from the perspective of legal pluralism and is a normative legal research that examines a legal issue by referring to the principles, theories, concepts and doctrines in legal science.<sup>11</sup> Primary legal materials in this study include: Marriage Law, Compilation of Islamic Law, Civil Code, and Constitutional Court Decision on Extramarital Children. Secondary legal materials include books (both manuals and e-books), journal articles obtained through searches on related journal websites, and other research results such as: proceedings, conferences, and so on that discuss DNA testing, civil rights for extramarital children, and Constitutional Court Decision on Extramarital Children. Non-legal materials are language dictionaries. The approaches used are conceptual, case, and statutory approaches. The analysis of legal materials is carried out qualitatively-prescriptively, emphasizing legal arguments and legal solutions to the legal issues that have been presented.<sup>12</sup>

## The Legal Problems of DNA Testing to Prove Civil Rights of Children Born Out of Wedlock

Children's rights are an important aspect and require legal protection.<sup>13</sup> As part of human rights, children's rights are placed in a special position so that the state can take various steps so that children's rights

<sup>11</sup> I Gusti Ketut Ariawan, "Penelitian Hukum Normatif" 1, no. 1 (2019): 4.

<sup>12</sup> Tunggul Ansari Setia Negara, "Normative Legal Research In Indonesia: Its Origins And Approaches," *ACLJ* 4, no. 1 (2023): 5.

<sup>13</sup> Anak Agung Istri Ari Atu Dewi et al., "The Role of Human Rights and Customary Law to Prevent Early Childhood Marriage in Indonesia," *Sriwijaya Law Review* 6, no. 2 (2022): 268–285.



can be optimally fulfilled and protected.<sup>14</sup> This is as mandated in Article 28B paragraph (2) of the 1945 NRI Constitution so that children's rights receive guaranteed protection and efforts to guarantee legal certainty by the state. One of the children's rights is related to various rights related to civil relations between their father and mother.<sup>15</sup> In general, children's rights related to civil relations between their father and mother can be optimally fulfilled for children born from a legal marriage relationship. However, this does not apply to children outside of a legal marriage relationship because in general they do not know who their biological father or biological father is so that children's rights are related to various rights related to civil relations between themselves and their fathers which cannot actually be fulfilled.<sup>16</sup>

From the above description, it can be seen that children born outside of marriage are in a weak position in relation to the guarantee of legal certainty regarding the rights that should be fulfilled by both parents of the child. The weak position of children born outside of marriage in the effort to fight for the fulfillment of their rights is also emphasized in Article 43 paragraph (1) of the Marriage Law which emphasizes that children born outside of marriage only have a civil relationship with

their mother. The affirmation in Article 43 paragraph (1) of the Marriage Law can actually have implications for the aspect of discrimination where the child cannot ask for or demand his rights from his father biologically because the formulation of Article 43 paragraph (1) of the Marriage Law has expressly emphasized that children born outside of marriage do not have a civil relationship with their father and their father's family.<sup>17</sup>

However, it is also necessary to understand that the substance of the Marriage Law, especially Article 43 paragraph (1) of the Marriage Law, has also been colored by the aspect of "legalization" or the formulation of rules in Islamic Law to be made positive in laws made by the state. The substance of Article 43 paragraph (1) of the Marriage Law is actually a form of adoption of the rules in Islamic Law which emphasizes that the lineage of children outside of marriage is only connected to the mother and not to the father.<sup>18</sup> The problematic substance of Article 43 paragraph (1) of the Marriage Law was then tested at the Constitutional Court (MK) and then gave birth to the Constitutional Court Decision No. 46/PUU-VIII/2010 (MK Decision on Extramarital Children). In general, the substance of the Constitutional Court Decision on Extramarital Children has three important points, namely: first, the Constitutional Court places the principle of the best interests of children as an important principle in guaranteeing and

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<sup>14</sup> Dicky Eko Prasetyo, "Ius Constituendum Legal Standing Bagi WNA Terkait Proses Judicial Review Di Mahkamah Konstitusi Dalam Perspektif HAM," *Hunila* 2, no. 1 (2023): 125–138.

<sup>15</sup> Nur Mohamad Kasim et al., "Optimization of Marriage Registration as Legal Certainty of Children's Rights in the Perspective of Maqasid Shariah," in *International Conference on Law Reform*, vol. 3, 2022, 1–9.

<sup>16</sup> A H Basri, "Implications of Constitutional Court Decision No. 46/PUU-VIII/2010 on the Rights of Children from Marriage Series Islamic Family Law Perspective," *Kitabaca: Journal of Islamic Studies* 1, no. 1 (2024): 10–26, <https://ejournal.kitabaca.id/index.php/kitabaca/article/view/2%0Ahttps://ejournal.kitabaca.id/index.php/kitabaca/article/download/2/2>.

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<sup>17</sup> Agus Muchsin and Zainal Said, "Status of Children from Unregistered Marriage Based on Minister of Home Affairs Regulation No. 109 of 2019 ( Study of the Barru Regency Capil Population Service )," *International Journal of Health, Economics, and Social Sciences* 6, no. 2 (2024): 301–313.

<sup>18</sup> Sri Wahyuni Yunus, "Islamic Inheritance Of Children Born Out Of Wedding Post Constitutional Court Ruling No.46/Puu-Viii/2010 Concerning The Status Of Out Of Wedding Children," *Taklifi* 1, no. 1 (2024): 84–97.

protecting children's rights.<sup>19</sup> One of the Constitutional Court's legal constructions related to the implementation of the principle of the best interests of children in the Constitutional Court Decision on Extramarital Children is related to the guarantee that the legal relationship between the child, mother, and father is one unit even if the child is born outside of a legal marriage relationship.

Second, in the Constitutional Court Decision on Children Born Out of Wedlock, the Constitutional Court emphasized that the birth of a child is a legal event which constitutes all aspects that give rise to rights and obligations for each individual.<sup>20</sup> The Constitutional Court's decision to construct the birth of a child as a legal event actually confirms that the law in Indonesia recognizes children's rights holistically, both for children born through marriage and children born outside of marriage.<sup>21</sup> Regarding the rights of children in a marriage relationship, it has been firmly and clearly stated in various laws and regulations, but regarding the rights of children born outside of a legal marriage relationship, in essence, it has not been specifically regulated in various laws and regulations.

The Constitutional Court Decision on Extramarital Children is actually present to guarantee the protection of the rights of

children born outside of a legal marriage relationship. Third, one of the important substances in the Constitutional Court Decision on Extramarital Children is the effort to prove the biological father of a child outside of a marriage relationship which can optimize the development of science and technology. One method that can be done to prove the biological father of a child outside of a marriage relationship is through a DNA test.

DNA or Deoxyribonucleic Acid is actually genetic material that is composed of each individual and shows the uniqueness of each individual genetically. One important aspect of DNA is that it can identify a child born from a father or mother by referring to the data in DNA. The theory related to DNA or the characteristics of each individual has actually been studied for a long time, especially around 1,600 years before Christ which is intended to answer the hypothesis of Aristotle.<sup>22</sup> The development of DNA-related studies also began to develop again in 1857 when Mendel conducted specific experiments on pea plants and the results were that the pea plants had identical characteristics to their parents.<sup>23</sup>

Specific developments related to the use of DNA testing for humans began to be introduced from the 1970s to the 1980s, which was a development of previous research in the 1920s regarding blood types.<sup>24</sup> In the 1970s to 1980s, DNA tests began to be developed and their accuracy increased so that they could be used as important references in relation to the

<sup>19</sup> RR. Alysia Gita Purwasaputri, Sudarsono Sudarsono, and Moh. Fadli, "Fulfillment of the Principle of Justice in Making Birth Certificates for Children Born Outside of Legal Marriage Between Both Parents," *International Journal of Multicultural and Multireligious Understanding* 8, no. 7 (2021): 259.

<sup>20</sup> Cok Gede Mega Putra, "Civil Relationship of Children Born without Marriage with Biological Father Based on Constitutional Court Decision Number 46/PUU-VIII/2010," *Notariil: Jurnal Kenotariatan* 5, no. 2 (2020): 58–64.

<sup>21</sup> Andi Yuliana Karim, Ma'ruf Hafidz, and Muh. Rinaldy Bima, "Overview of Juridical Legal Position of Children From Marriage Series According To Article 43 Act No. 1 Year 1974 About Marriage," *Meraja journal* 3, no. 3 (2020): 83–95.

<sup>22</sup> Saptina, Muhtahidin, and Taufik, "Comparison of Children's Inheritance Laws Outside Marriage in Indonesia with Several Other Countries."

<sup>23</sup> Achmad Fageh, "DNA As The Determination of Descendant of Children Outside of Marriage Under The Perspective of Ibn Taimiyyah," *Al-Hukama'* 11, no. 1 (2021): 137–159.

<sup>24</sup> Haris, "Children's Position on a Defective Marriage (Fasid) in Terms Establishment of Inheritance Right as an Effort for Legal Certainty."

medical world. In general, DNA tests can be done with several samples owned by each individual, such as blood, urine, or other parts of the human body.<sup>25</sup> The sample is then tested through a laboratory and analyzed as needed. From the description above, it can be concluded that in the latest developments DNA testing is carried out professionally and with various features that increase the accuracy of the DNA test itself.

In Indonesia, the development of DNA testing has become increasingly massive in 2022 to 2024, especially when there was the "issue of the Habaib lineage" which then involved DNA-based analysis to support whether the Habaib lineage in Indonesia was connected to the Prophet Muhammad SAW.<sup>26</sup> The massive use of DNA testing, especially with the momentum of the "Habaib lineage issue" in Indonesia, shows that DNA testing actually has sufficient accuracy to show the biological relationship between father, mother and child.<sup>27</sup> Referring to the case in the Constitutional Court Decision on Extramarital Children, it must be acknowledged that the accuracy of DNA testing as part of the mandate of the Constitutional Court Decision on Extramarital Children to use various means available in relation to the development of science and technology. Even so, it needs to be emphasized that the Constitutional Court Decision on Extramarital Children is open that all aspects and various means available in relation to the development of science

and technology and can validly show that there is a biological relationship between the child and his parents (especially his father) can be used as evidence and basis for the child to obtain a civil relationship with his father, especially related to the fulfillment of the child's rights so that if there are other developments outside of DNA testing that are more up-to-date and more accurate, then this can be accepted as long as it has received valid testing based on science and technology.

Although in general DNA testing can be used as a reference related to civil relations between children and their fathers, especially related to the fulfillment of children's rights, this actually causes problems in Indonesia because in Indonesia it is not actually based on one type of applicable law. In general, legal pluralism applies in Indonesia and in this context it is also agreed by Brian Z. Tamanaha that legal pluralism is not actually a phenomenon and symptom in a particular country but has become a global phenomenon in a country.<sup>28</sup> Brian Z. Tamanaha's view is also in line with Satjipto Rajardjo who said that law is plural because the path to achieving justice is not only based on state law, but can be carried out in various ways to achieve justice, including through laws that live in society.<sup>29</sup>

In the context of the legal relationship between children, fathers, and mothers which is classified as a private law, in Indonesia there are actually three types of laws at once, namely state law formulated in various laws and regulations, the Civil Code

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<sup>25</sup> Siti Nur Syahadah Binti Mod Ali and Setiyawan Gunardi, "Porcine DNA in Medicine toward Postpartum Patients from Medical and Islamic Perspectives in Malaysia," *International Journal of Halal Research* 3, no. 1 (2021): 29–41.

<sup>26</sup> Aziz Miftahus Surur et al., "Memudarnya Otoritas Keagamaan? ( Polemik Nasab Habaib Di Kalangan Pondok Pesantren Al-Nahdliyin )," *Asy-Syari'ah: Jurnal Hukum Islam* 10, no. 1 (2024): 33–47.

<sup>27</sup> Aziz Miftahus Surur, "Status Sosial Kemasyarakatan Habaib Dalam Perspektif Hadis Nabi Dan Hukum Syariah," *Al-Tawir* 10, no. 2 (2023): 147–156.

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<sup>28</sup> Dicky Eko Prasetyo, "Inventarisasi Putusan Peradilan Adat Sendi Sebagai Upaya Memperkuat Constitutional Culture Dalam Negara Hukum Pancasila," *Jurnal Hukum Lex Generalis* 2, no. 3 (2021): 249–273.

<sup>29</sup> Fradhana Putra Disantara, "Konsep Pluralisme Hukum Khas Indonesia Sebagai Strategi Menghadapi Era Modernisasi Hukum," *Al-Adalah: Jurnal Hukum dan Politik Islam* 6, no. 1 (2021): 1–36.

which is based on civil law in the Netherlands (also commonly known as "Western Law"), and religious law (specifically Islamic Law) which in Indonesia is specifically regulated in the Compilation of Islamic Law (KHI). Referring to the Constitutional Court Decision on Extramarital Children, in general the decision only relates to state law, especially regarding the permission of DNA testing as a basis for determining the civil relationship between father and child. In the context of Western Law which refers to the Civil Code, it is emphasized that one of its principles is to prohibit the search for the origin of each person so that someone can refuse to carry out a DNA test.<sup>30</sup> By allowing the rejection of DNA tests, this raises the problem of implementing the Constitutional Court Decision on Extramarital Children which confirms that one way to find out the civil relationship between father and child is through a DNA test. Another problem is related to extramarital children who only have a blood relationship with their mother as stated in Article 100 of the KHI. The provisions of Article 100 of the KHI are actually in line with the formulation of Article 43 paragraph (1) of the Marriage Law. Legal problems occur because Article 43 paragraph (1) of the Marriage Law has been amended by the Constitutional Court through the Constitutional Court Decision on Extramarital Children which confirms that extramarital children also have a civil relationship with their father as long as it can be proven by science and technology, while the substance of Article 43 paragraph (1) of the Marriage Law is the same as the provisions of Article 100 of the KHI. This

raises the problem of whether, after the Constitutional Court Decision on Extramarital Children, the substance of Article 100 of the KHI will also change to follow the substance of the Constitutional Court Decision on Extramarital Children.

The various problems above show that the main problem related to the Constitutional Court Decision on Extramarital Children is that it does not carry out legal considerations based on aspects of legal pluralism. This has implications for the implementation of the Constitutional Court Decision on Extramarital Children, which even though it allows DNA testing as a basis for determining civil relations between father and child, but in causing problems in its implementation, especially from the perspective of the Civil Code which is based on Western Law and the KHI which is based on Islamic Law..

#### **DNA Tests to Prove Civil Rights of Children Born Outside of Marriage After the Constitutional Court Decision on Children Born Outside of Marriage Reviewed from the Perspective of Legal Pluralism**

DNA testing as part of the recommendations of the Constitutional Court Decision on Extramarital Children to utilize the development of science in ensuring the civil relationship between children and biological fathers in relation to the fulfillment of civil rights for extramarital children is actually a positive thing and a legal breakthrough by the Constitutional Court that deserves to be appreciated. The problem is when in the Constitutional Court Decision on Extramarital Children, the Constitutional Court did not make the aspect of legal pluralism a legal consideration before deciding on the Constitutional Court Decision on Extramarital Children. Legal considerations related to legal pluralism should be needed considering that problems

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<sup>30</sup> Ahmad Nurozi et al., "Establish Family Card Towards Unregistered Marriage Couple (Implications of Law No. 1 Of 1974 And Compilation of Islamic Law)," in *International Conference on Advance & Scientific Innovation*, vol. 3, 2022, 219–227.



related to civil relationships between children and parents in Indonesia are not actually single.<sup>31</sup> This is because there are various provisions of religious law and customary law that exist and are developing which regulate civil relations between children and parents.<sup>32</sup>

The Constitutional Court Decision on Extramarital Children which does not accommodate the aspect of legal pluralism in its legal considerations actually has the potential to cause legal problems related to the implementation of the Constitutional Court Decision on Extramarital Children. In substance, the Constitutional Court Decision on Extramarital Children emphasizes that the use of science and technology, especially DNA testing, can be an important aspect that ensures the existence of a civil relationship between a child and his biological father. Although the substance of the Constitutional Court Decision on Extramarital Children is clear, in practice the Constitutional Court Decision on Extramarital Children can only be a "paper tiger" or only a normative framework but causes problems in its application because the substance of the Constitutional Court Decision on Extramarital Children is not in accordance with Islamic Law as emphasized in Article 100 of the KHI which emphasizes that an extramarital child only has a bloodline or civil relationship with his mother and his mother's family.<sup>33</sup> This

implies that Indonesian society who are Muslim in particular cannot implement the substance of the Constitutional Court Decision on Extramarital Children and prefer to implement Article 100 of the KHI as a form of implementation and respect for Islamic law.

The next problem related to the use of science and technology, especially DNA testing can be an important aspect that ensures the existence of a civil relationship between a child and his biological father is the implementation of the Constitutional Court Decision on Extramarital Children related to the substance of the Civil Code which is based on Western Law which allows the parties to refuse or not to carry out DNA testing. The problem is if someone who is suspected of being the biological father of a child refuses a DNA test and in the development of current science and technology, only DNA tests are the most advanced in determining the biological relationship between a child and parents, then are there any other alternatives besides DNA tests to prove the biological relationship between a child and parents? In addition, if the biological father of a child refuses a DNA test, then what about the guarantee of legal certainty and guarantee of legal protection related to the rights of children to know their biological father? This problem occurs because the Constitutional Court is not careful in deciding the Constitutional Court Decision on Extramarital Children without considering the aspect of legal pluralism.

Legal pluralism is truly important for the Constitutional Court and other courts to consider as legal considerations in their decisions, especially in private cases and other cases that are relevant to the validity of laws outside state law. In Indonesia, the

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<sup>31</sup> Dedy Sumardi, Ratno Lukito, and Moch Nur Ichwan, "Legal Pluralism within the Space of Sharia: Interlegality of Criminal Law Traditions in Aceh, Indonesia," *Samarah* 5, no. 1 (2021): 426–449.

<sup>32</sup> Khairuddin Hasballah et al., "Patah Titi and Substitute Heirs: A Study of Legal Pluralism on the Inheritance System in Aceh Community," *Ahkam: Jurnal Ilmu Syariah* 21, no. 2 (2021): 299–324.

<sup>33</sup> S Nurjanah, A Hermanto, and M Y al Arif, "Fath Al-Dzari'ah Solution for Determining the Status of Children from Secret Marriages Through the Constitutional Court Decision," *Jurnal Legalitas* 17, no. 1 (2024): 66–79, <https://ejurnal.ung.ac.id/index.php/JL/article/view/24>

validity of laws outside state law is actually recognized as long as the law still exists and is the mainstay of society in its efforts to realize justice.<sup>34</sup> Theoretically, legal pluralism as stated by John Griffiths is divided into two types, namely strong legal pluralism and weak legal pluralism. Strong legal pluralism is characterized by the relationship of each type of law, both state and non-state law, in a mutualistic or mutually beneficial and complementary manner.<sup>35</sup> This relationship in Indonesia can be exemplified by the practice of Hajj and Zakat which is Islamic law whose provisions are regulated in Islamic Law, but the state also regulates efforts to organize the practice of Hajj and Zakat which are formulated in the form of laws to guarantee legal certainty and protection for the community. Strong legal pluralism can also be seen from the freedom for the community to obtain justice both through state legal procedures and through non-state legal procedures, such as religious law and customary law which still exist in Indonesia.

Weak legal pluralism can occur when one type of law dominates and then negates the role of other types of law.<sup>36</sup> This can be exemplified by the practice in Indonesia related to customary criminal law in the Criminal Code which is still in force today (the Old Criminal Code) which still places customary criminal law as "second" law after national criminal law.<sup>37</sup> One of the

characteristics of weak legal pluralism is the lack of options for the community to obtain justice. The community's efforts to obtain justice are usually only emphasized in one path, namely through state law. If we refer to the substance of the Constitutional Court Decision on Extramarital Children, then it can be said that this substance actually makes legal pluralism weak. The weak dimension of legal pluralism in the Constitutional Court Decision on Extramarital Children, apart from not accommodating aspects of legal pluralism in its decision, is also seen in that the decision tends to only view the legal relationship and civil rights of children and parents only in the dimension of state law.

In fact, there are non-state laws in Indonesia that still exist in regulating legal relations and civil rights of children and parents such as religious law (in this case Islamic Law) and customary law that is still held by the community. This confirms that the Constitutional Court Decision on Extramarital Children can actually be applied as long as it is related to the context of state law, but for Indonesian people who are Muslim and choose to apply Islamic law, the community will choose to apply Article 100 of the KHI compared to the Constitutional Court Decision on Extramarital Children.

From the description above, DNA testing to prove the civil rights of children born outside of marriage after the Constitutional Court Decision on Children Born Outside of Marriage, viewed from the perspective of legal pluralism, is actually characterized by weak legal pluralism where the Constitutional Court Decision on Children Born Outside of Marriage is not easy to apply optimally in society because the decision is in conflict with the substance

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<sup>34</sup> Dita Perwitasari Dicky Eko Prasetyo, Fradhana Putra Disantara, Nadia Husna Azzahra, "The Legal Pluralism Strategy of Sudi Traditional Court in the Era of Modernization Law," *Rechtsidee* 8, no. 1 (2021): 4.

<sup>35</sup> Sartika Intaning Pradhani, "Pendekatan Pluralisme Hukum Dalam Studi Hukum Adat: Interaksi Hukum Adat Dengan Hukum Nasional Dan Internasional," *Undang: Jurnal Hukum* 4, no. 1 (2021): 81–124.

<sup>36</sup> Suci Flambonita, "The Concept of Legal Pluralism in Indonesia in the New Social Movement," *Jurnal Analisa Sosiologi* 10, no. 3 (2021): 361–373.

<sup>37</sup> Nella Sumika Putri, "The Material Content Of Regional Regulations As The Concretization Of The Living Legal System In Society (Adat Law) Based On

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Article 2 Of The Indonesian Penal Code (Kuhp) 2023," *Bina Mulia Hukum* 7, no. 2 (2023): 15–16.

of Islamic Law as stated in Article 100 of the KHI. Therefore, the recommendations in this study specifically for the Constitutional Court and court institutions in general need to pay attention to aspects of legal pluralism, especially to be used as considerations in their decisions in order to create strong legal pluralism so that society can carry out court decisions optimally in accordance with the types of laws that exist and are implemented by society..

### Conclusion

The legal problem of DNA testing to prove the civil rights of illegitimate children is the implications of the Constitutional Court Decision on Illegitimate Children which has not accommodated legal considerations in the perspective of legal pluralism so that DNA testing to prove the civil rights of illegitimate children can cause obstacles in its implementation. These obstacles can be in the form of the KHI view which is based on Islamic Law which emphasizes that illegitimate children only have a blood relationship with their mother and also in the Civil Code which is based on Western Law which allows everyone to refuse to carry out DNA testing on the basis that the Civil Code actually prohibits the search for the origin of each person. DNA testing to prove the civil rights of illegitimate children after the Constitutional Court Decision on Illegitimate Children viewed from the perspective of legal pluralism is actually characterized by weak legal pluralism where the Constitutional Court Decision on Illegitimate Children is not easy to apply optimally in society because the decision is in conflict with the substance of Islamic Law as stated in Article 100 of the KHI. Therefore, the recommendations in this study specifically for the Constitutional Court and court institutions in general need to pay attention to the aspect of legal pluralism,

especially to be used as a consideration in its decisions in order to create strong legal pluralism so that society can implement court decisions optimally in accordance with the types of laws that exist and are implemented by society.

### Credit Authorship Contribution

Fradhana Putra Disantara: Conceptualization, Methodology, Investigation, Writing - Original Draft, and Supervision. Dicky Eko Prasetyo: Methodology, Data Collection, and Writing - Review & Editing. Geraldha Islami Putra Disantara: Formal Analysis, Resources, and Writing - Review & Editing. Briggs Samuel Mawunyo Nutakor: Data Analysis, Resources, and Writing - Review & Editing.

### Declaration of Competing Interest

The authors declare no competing interests related to this study. No financial or personal conflicts of interest are present.

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