BILANCIA
Jurnal Studi Ilmu Syariah dan Hukum
Volume 18 No 1, 2024
P-ISSN: 1978-5747, E-ISSN: 2579-9762
DOI: 10.24239/blc.v18i2.3422

The Legal Position of Nikah Siri Against Positive Law After the Decision of the Constitutional Court Number 46/PUU-VIII/2010

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Received: 18 Nov 2024	Accepted: 20 Dec 2024	Published: 30 Dec 2024

Abstract: The purpose of this study is to examine the legal application of elopement marriage (*siri*) after the Constitutional Court Decision Number 46/PUU-VIII/2010. This research is a qualitative research, and the type of research is library research. The data collection method used is a literature study. The results showed that the legal application of elopement marriage (*siri*) after the decision of the Constitutional Court Number 46/PUU-VII/2010 has been regulated in Government Regulation of the Republic of Indonesia Number 9 of 1975. This is a positive law that must be followed by all Indonesian citizens. The application of this law is in line with religious values in the context of the Indonesian nation, in accordance with the Pancasila. The impact of this decision also changes people's attitudes towards *siri* marriage because children born from elopement marriage (*siri*) still have a right recognized by the state. The message conveyed in this decision encourages people to understand the importance of legal recognition and marriage registration to protect the rights of children born from elopement marriage (*siri*).

Keywords: Siri Marriage, Constitutional Court Decision Number 46/PUU-VIII/2010, Positive Law

Abstrak: Tujuan penelitian ini untuk mengkaji penerapan hukum pernikahan siri pasca Putusan MK Nomor 46/PUU-VIII/2010. Penelitian ini merupakan penelitian kualitatif, jenis penelitian adalah library research. Metode pengumpulan data yang digunakan adalah studi literatur. Hasil penelitian menunjukan bahwa; Penerapan hukum pernikahan siri pasca putusan Mahkamah Konstitusi Nomor

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46/PUU-VII/2010 ini telah diatur dalam Peraturan Pemerintah Republik Indonesia Nomor 9 Tahun 1975. Hal ini menjadi hukum positif yang harus diikuti oleh seluruh warga negara Indonesia. Penerapan hukum ini sejalan dengan nilai-nilai agama dalam konteks bangsa Indonesia, sesuai dengan butir Pancasila. Dampak dari putusan ini juga mengubah sikap masyarakat terhadap pernikahan siri, karena anak yang lahir dari pernikahan siri tetap memiliki hak yang diakui oleh negara. Pesan yang disampaikan dalam putusan ini mendorong masyarakat untuk memahami pentingnya pengakuan hukum dan pencatatan pernikahan untuk melindungi hak-hak anak yang lahir dari pernikahan siri.

Kata Kunci: Perkawinan Siri, Putusan MK Nomor 46/PUU-VIII/2010, Hukum Positif

A. Introduction

At first glance, marriage is just a series of wedding contracts that are pronounced by the groom with the *ijab* and *qabul* that are pronounced by the marriage guardian which are then witnessed by the witnesses who attend the wedding. However, what happens in reality is that the *ijab* and *qabul* are what give birth to rights and obligations for the parties who have carried them out and have legal consequences afterwards.

This illegitimate and elopement marriage (*siri*) which later will give rise to various perspectives once examined through the lens of positive law considering that every decision of the Constitutional Court is final and cannot be challenged likewise Islamic law has equally strong arguments.

Then is there a similarity between state law and religious law (Islam)? or is it something that cannot be equated? And if not, what is the legal position later? In state law itself, the basis and principles of marriage have been regulated in Law Number 1 of 1974 concerning Marriage, which in its application is regulated in Article 6 of PP Number 9 of 1975. Then in religious law (Islam), it also has its own rules in the Qur'an and Sunnah of the Prophet Muhammad SAW and we must adhere to them.

The reality that occurs in society is that not all marriage practices follow the provisions of existing state laws that should be followed. People should follow the state law since they are in a place based on state law (administration) meanwhile some of them tend to carry out their marriages according to religious law (Islam) solely and ignore state law. They argue with the assessment that it is valid according to religion as well as the pillars also the requirements of a marriage have been met.

This kind of marriage phenomenon still occurs a lot in society, both from ordinary people and the magnate ones. The issue of elopement marriage (*siri*) is still a topic of discussion in various circles especially since the practice is carried out by people who are indeed famous in society. The Supreme Court has recorded and found that there are 6,193 cases of elopement marriage (*siri*) or around 25% of the Indonesian population but it needs to be underlined that elopement marriage (*siri*) is still valid from a religious perspective if the pillars and requirements of marriage are met. However, in order to maintain order in a place, in this case the state which also has its own rules, it is obliged to regulate this marriage issue so that marriages should be registered for people who have carried out marriages according to religious law (Islam) with a marriage registrar.[1]

A very phenomenal story that went viral at that time was the elopement marriage (*siri*) carried out by Indonesian *dangdut* singer, Hj. Aisyah Mochtar alias Machica binti H. Mochtar Ibrahim and Drs. Moerdiono, an Indonesian politician. By this marriage, Machica Mochtar is the one who questioned the constitutional status of her child born from her elopement marriage (*siri*) then filed a lawsuit with the Constitutional Court in 2010. Machica Mochtar filed a

[1] Mahkamah Agung RI, "Data Pernikahan Siri Di Indonesia," 2015.

Judicial Review and questioned the application of Article 43 paragraph 1 of Law No. 1 of 1974 concerning Marriage.

Machica Mochtar as a secret wife of Drs. Moerdiono does not have the legality of a recorded Marriage Certificate. From their marriage a son was born named Muhammad Iqbal Ramadhan. Based on this article, Machica Mochtar's party filed a lawsuit with the Constitutional Court to conduct a judicial review of the article, which felt that the plaintiff's constitutional rights had been violated because the article stated that her child did not receive inheritance rights from his father. Thereupon the Constitutional Court granted Machica Mochtar's request by conducting a judicial review of the article.[2]

The Constitutional Court Decision Number 46/PUU-VIII/2010 actually legalizes unregistered marriages indirectly because one day we can file legal evidence against children born from elopement marriage (*siri*) by simply providing evidence in accordance with the Constitutional Court decision. The child can inherit his father if proven by knowledge, technology and other evidence that he has a blood relationship according to the law.

Based on the results of observation, it is a need to reveal the application or concept of the rules and the practical concept that will occur in society. Then a conclusion is drawn in the form of a scientific title, namely "Legal Position of Unregistered Marriage Against Positive Law Post Constitutional Court Decision Number 46/PUU-VIII/2010".

Seeing so many models of elopement marriage (*siri*) today, questions arise such as what kind of elopement marriage (*siri*) is meant in the Constitutional Court's decision, are all types of elopement marriage (*siri*) will be punished? Therefore, an interpretation is needed in Article 43 paragraph 1 of the 1974 Law,

[2] Normand Edwin Elnizar, "Palu Hakim Yang Menyelamatkan Hak Perdata Anak Luar Kawin," Hukumonline.com, 2023.

because it could be that society considers that elopement marriages (*siri*) have indeed been legalized with the Constitutional Court Decision Number 46/PUU-VIII/2010 which confirms that children born from elopement marriage (*siri*) also have the right to inherit from their father.

To learn more about this research, it is important to first examine what is associated with this research, both theoretical and scientific contributions. Below is some research findings related to the title above:

1. Pahlefi, 2015, wrote his research with the title "Implications of the Constitutional Court Decision Number.46/PUU-VIII/2010 on Children from Unreligious Marriages". The purposes of this research are the implications of the Constitutional Court Decision Number.46/PUU-VIII/2010 on elopement marriages (*siri*), the implications of the Constitutional Court Decision Number.46/PUU-VIII/2010 on children from elopement marriages (*siri*). The result of this study shows that by reviewing the results of the Constitutional Court Decision Number.46/PUU-VIII/2010, it has no legal implications for the provisions on marriage registration as regulated in Article 2 paragraph (2) of Law Number 1 of 1974 concerning Marriage. It is also concluded that the Constitutional Court Decision Number.46/PUU-VIII/2010 has implications for the children's position from elopement marriages (*siri*), which have a good legal relationship with their biological mother and father including the families of both biological parents. This legal relationship occurs as the legal relationship of children born from a legitimate marriage. The similarity between previous research and this research is that both question the legal legitimacy of the Constitutional Court's decision Number 46/PUU-VIII/2010 concerning the inheritance rights of unregistered marriages. The difference between previous research and this research is the difference in the sub-studies, where the previous research only examined children's inheritance rights

specifically, while this research examines the positive legal position after the Constitutional Court's decision Number 46/PUU-VIII/2010.[3]

2. Umi Kurnia, 2023, recorded her research under the title "Legal Consequences of Constitutional Court Decision Number 46/PUU-VIII/2010 on the Status of Children Born Outside of Marriage in the Review of *Maqashid Sharia*". The aims of this research are to find out the legal consequences of Constitutional Court Decision No.46/PUU-VIII/2010 on the status of children born out of wedlock. The other research aim is to find out how *Maqashid Sharia* reviews the status of children born out of wedlock in Constitutional Court Decision No. 46/PUU-VIII/2010. By reviewing the results of the Constitutional Court Decision Number.46/PUU-VIII/2010, the researcher of this study concluded that the legal implications of Constitutional Court Decision Number 46/PUU-VIII of 2010 concerning the status of children born out of wedlock depend on the validity of their parents' marriage. According to the Constitutional Court's decision, elopement marriages (*siri*) can form civil relations related to parent-child relations, livelihood, inheritance rights, guardianship and the status of a child born out of wedlock. Next it is also concluded that the Constitutional Court's decision does not conflict with the objectives of Islamic law, because with this Constitutional Court's decision, it can provide benefits to children out of wedlock. The Constitutional Court's *ijtihad* defense and protection policy for children out of wedlock is classified as an action to protect children's rights, so it becomes the main thing, because it is one of the *darurri* that needs to be protected. The similarity between previous research and this research is that both use the Library Research research method. The difference

[3] Pahlefi, "Implikasi Putusan Mahkamah Konstitusi No. 46/Puu-Viii/2010 Terhadap Anak Dari Perkawinan Siri," *Jurnal Ilmu Hukum Jambi* 6, no. 1 (2015): 43313.

between previous research and this research lies in the sub-research, where the previous research only examined children's inheritance rights specifically, while this research examines the impact of elopement marriages (*siri*) law on the application of positive law.[4]

3. Hardina, 2023, conducted her research with the title "The Position of Children Born Outside of Marriage Before and After the Constitutional Court Decision Number 46/PUU-VIII/2010 According to Islamic Law". This thesis research aim to determine the position of children born outside of marriage before and after the Constitutional Court Decision Number 46/PUU-VIII/2010. Besides, it is also to determine the Islamic legal review of the position of children born out of wedlock. By this research, the researcher came to the conclusion that by the Constitutional Court Decision mentioned, illegitimate children can claim their rights as legitimate children. Even though the child was born out of wedlock, the child does not deserve discrimination from society. Because in general, children have the right to be protected, treated and represented before the law wherever they are born. Next result is that the Constitutional Court Decision Number 46/PUU-VIII/2010 also contributed to Islamic family law in Indonesia, where children born out of wedlock have the same rights as children born in legitimate marriage. These rights include the right to a technically verifiable relationship with the biological father, the right to a living, the right to inheritance, and the right to guardianship. The similarity between previous research and this research is that both question the legal legitimacy of the Constitutional Court's decision Number. 46/PUU-VIII/2010 concerning the inheritance rights of unregistered marriages. The difference is that the previous

[4] Umi Kurnia, "Akibat Hukum Putusan Mahkamah Konstitusi Nomor 46/Puu-Viii/2010 Terhadap Status Anak Di Luar Kawin Dalam Tinjauan Maqashid Syariah" (Universitas Islam Negeri Kiai Haji Achmad Siddiq Jember, 2023).

research specifically discussed inheritance rights, while this research examines the impact of post-decision on the application of positive law.[5]

4. Rianzani Aminullah, 2014, wrote "The Impact of the Constitutional Court Decision Number 46/PUU-VIII/2010 on Children's Inheritance Rights in the Perspective of Islamic Law". This thesis research has the following objectives: first is to determine the urgency of the impact of the Constitutional Court Decision Number 46/PUU-VIII/2010 on Children's Inheritance Rights. Second is to determine whether the Constitutional Court Decision Number 46/PUU-VIII/2010 is relevant to the inheritance system according to Islamic law. The results of the research include that there is a legal relationship between the lineage of children from elopement marriages (*siri*) and their biological fathers. The second result is that it has a close relationship with inheritance law and is relevant. The similarity with previous research is that both examine the impact of the Constitutional Court Decision Number 46/PUU-VIII/2010. While the difference is that this research focuses on the study not only on Islamic law but also the application of positive law whilst the previous research only focused on the impact of Islamic law.[6]

5. Yulia Risa, 2020 did her research under the title "Legal Analysis of Legal Findings on Constitutional Court Decision Number 46/PUU-VIII/2010 Regarding Children Born Outside of Legal Marriage". The purpose of this research is the judge's

[5] Hardina, "Kedudukan Anak Diluar Nikah Sebelum Dan Sesudah Putusan MK Nomor 46/PUU-VIII/2010 Menurut Hukum Islam" (UNIVERSITAS ISLAM NEGERI SULTAN SYARIF KASIM RIAU, 2023).

[6] Rianzani Aminullah, "Dampak Putusan Mahkamah Konstitusi No. 46/PUU-VIII/Terhadap Hak Waris Anak Dalam Persepektif Hukum Islam" (UIN Syarif Hidayatullah Jakarta, 2014).

interpretation after Constitutional Court Decision Number 46/PUU-VIII/2010 and the process of recognizing illegitimate children in elopement marriages (*siri*). The result of the study shows that the interpretation of illegitimate children as long as they are interpreted as eliminating civil relations with men who can be proven through science and technology and/or other evidence turns out to have blood relations as their father using the systematic interpretation method or logical interpretation. The result also shows that the process of recognizing illegitimate children in an elopement marriage (*siri*) can be carried out with "voluntary recognition" and "coercive recognition" from the man who is the father. Yulia Risa is also examining the Constitutional Court Decision Number 46/PUU-VIII/2010. However, she examined the recognition of illegitimate children in an elopement marriage (*siri*) while this research will examine the legality of elopement marriages (*siri*) in positive law.[7]

B. Method

This research is qualitative research utilizing the normative legal research as its type of legal research. Normative legal research uses literature data such as books, scientific journals, documents, laws, and other scientific works related to the problem being studied as data.[8]

[7] Yulia Risa, "ANALISIS YURIDIS PENEMUAN HUKUM TERHADAP PUTUSAN MAHKAMAH KONSTITUSI NOMOR 46/PUU-VIII/2010 TERHADAP ANAK YANG DILAHIRKAN DI LUAR PERKAWINAN YANG SAH," *Res Nullius Law Journal* 3, no. 1 (2021): 11–24.

[8] Ais Surasa Iman Jalaludin Rifa'i, Ady Purwoto, Marina Ramadhani, Muksalmina, Muhammad Taufik Rusydi, Nasruddin Khalil Harahap, Ibnu Mardiyanto, Erifendi Churniawan, Mahfudz Junaedi, Asri Agustiwi, Geofani Milthree Saragih, Chairul Bariah, *Metodologi Penelitian Hukum* (Sada Kurnia Pustaka, 2023).

The researcher chooses normative legal research in this study to help in understanding the basic concept of law, the application of legal norms and the basis theory of the legal system. This research is also analyzing, comparing existing laws and evaluating the suitability or incompatibility of rules in a legal decision that is "inkracht van gewijsde".

The primary data that the researcher examines in this writing is the Constitutional Court Decision Number 46/PUU-VIII/2010 concerning elopement marriages (*siri*) and children's inheritance rights, Law Number 1 of 1974 concerning Marriage, and the Compilation of Islamic Law. Meanwhile, secondary data for this study was collected from various sources such as books, journals, theses, and articles.

The data analysis techniques used in this study are descriptive, comparative, evaluation, and argumentative techniques. The research approach is library research, which is a type of research used in collecting information and data in depth through various literature, books, notes, magazines, other references, and relevant previous research results, to obtain answers and theoretical basis regarding the problems to be studied.[9]

Through the library research approach, researcher can conduct a more comprehensive literature review and help in understanding and developing hypotheses based on existing literature. In order to gain a deeper understanding in this research, the researcher can identify theories better that are relevant to the author's research by analyzing existing literature.

[9] Poppy Yaniawati, "Penelitian Studi Kepustakaan," *Penelitian Kepustakaan (Liberary Research), April* 15 (2020).

C. Elopement Marriage (*siri*) in Constitutional Court Decision Number 46/PUU-VIII/2010

1. Legal Status of the Elopement Marriage (*siri*)

a. Positive Legal Perspective

The researcher quotes the definition of positive law conveyed by Bagir Manan, meaning that positive law (Indonesia) is "written and unwritten legal principles that apply and are binding generally or specifically and a collection of rules that will be enforced by or through the Indonesian Government or courts". Therefore, positive law is law that applies and is binding in Indonesia in general, including:

1) Western Law *(civil law*)

Western law refers to the legal system that developed in Europe and then spread to most of the world, especially Indonesia, which was brought by the Dutch at that time, mainly through colonization. It is rooted in the ancient Roman and Greek legal traditions and influenced by Christian traditions and legal philosophies such as legal naturalism and legal positivism.

At first this law only applied to the Dutch and Europeans, but then through various legislative steps (declaration of power, voluntary surrender, legitimate general elections, and the Dutch power that began to take root), Western law was declared to apply equally to those who had assimilated (adapted) to the Europeans, to the Easterners, foreigners (especially the Chinese) and Indonesians. As the ruling legal class at that time in our country, the situation of Western law was much better and more advantageous compared to the situation of the two previous legal systems, namely customary law and religious law.

2) Customary Law (*law of habit*)

Then customary law is basically unwritten law. It grows and develops and will fade depending on the growth and development

in society. Customary law in our country has existed for a long time. If we predict the time of its enactment, we cannot be sure when customary law will come into effect, but we can say, if compared to Islamic and Western law, customary law is the oldest.

Customary law itself is an integral part of the Indonesian legal system that reflects the richness of culture and traditions of local communities. Although it is not written down, customary law has a major influence on the daily lives of the community and is recognized in the national legal framework. So understanding and respecting customary law is important to maintain justice, order, unity, and cultural diversity in Indonesia.

3) Islamic Law

Islamic law (in Islamic law literature in Indonesia, the term Islamic law can be used for *Fiqh Islam*, perhaps also used for *Islamic Sharia*), or unwritten in the form of customary law. This means that Islamic law is not written in legal regulations. Islamic law in the sense of *Fiqh Islam* is law that originates and is inspired by *Islamic Sharia* law. contained in the Qur'an and the Sunnah of the Prophet Muhammad *Sholallahu Alaihi Wasallam*. It has been developed through *Ijtihad* by scholars or qualified legal experts. *Ijtihad* is carried out according to the procedures that have been determined. Although Islamic law (in the sense of *Fiqh Islam*) is not given a reward or sanction by the ruler or government, it is obeyed by the community who embrace the teachings of Islam because the awareness of the beliefs of the community, leaders or Islamic scholars who embrace it states that Islamic law is also the right law for its adherents.[10]

Based on the explanation above, it can be understood that positive law generally encompasses the three laws, namely western law (civil law), customary law (law of habit) and Islamic law.

[10] Anis Mashdurohatun, *Perbandingan Sistem Hukum*, 2014.

Therefore, it is necessary for the researcher to explain the contents of positive law regarding the position of elopement marriages (*siri*) to explain the scope of positive law before entering the legal position of elopement marriages (*siri*) from a positive law perspective. So later there will be no biased perception of the positive law that the author means in this writing.

As the law stands, the legal status of an elopement marriage (*siri*) according to positive law in Indonesia is included in the realm of western law (civil law) which specifically regulates civil matters or is also commonly called civil law or private law. Because in Article 26 of the Civil Code, a marriage is only considered legal in the sense that it is valid only if it meets the requirements specified in the Civil Code, the terms and conditions are regulated in Law Number 16 of 2019 as an Amendment to Law Number 1 of 1974 concerning Marriage.

As stated in Article 147 of the Civil Code, it explains that the marriage agreement must be made before the wedding takes place. Then it is made with a notarial deed before the marriage carried out, to then be registered with the local District Court. So the researcher concludes that elopement marriage (*siri*) is considered illegal in positive law which is encompassed by western law (civil law) or civil law or private law which states that if it does not go through the registration process, its position is considered invalid in the eyes of the law.

b. Islamic Law Perspective

Before discussing the legal status of elopement marriage (*siri*), it is necessary for the researcher to also convey the legal status of Islam in positive law in Indonesia. In the religious society of Indonesia, belief in religion is an absolute part of national development and national character. Therefore, religious life is an absolute part of Indonesian social life which is based on *Pancasila* as the foundation of our country. *Pancasila* is used as a guideline for life and is practiced

in order to create order in national life, social life, for security and material as well as spiritual well-being.

The legal position of Islam regarding the principle of the Almighty God is very strong. This is stated in the 1945 Constitution, in article 29 paragraph 1 that "The state is founded on the basis of the Almighty God". So this principle is actually a very basic positive law. It is hoped that the Indonesian people will always consider and make this principle a binding law at all times both in personal and social life, national and state life.

According to Ismail Suny, after Indonesia's independence, the position of Islamic law in the administration of the Indonesian state was divided into two periods. First, the acceptance of Islamic law as a persuasive source. Second, the acceptance of Islamic law as an authoritative source, namely a source that has power (authority).

Based on Article 29 of the 1945 Constitution, which is imbued with the spirit of the Jakarta Charter, the place of Islamic law is recognized in the Indonesian legal system. This is in accordance with Hazairin's thinking which states that the first principle of the Almighty God contained in the Preamble to the 1945 Constitution and made the legal outline in the body of the 1945 Constitution is imbued in the "Jakarta Charter". The provision of Article 29 Paragraph 1 of the 1945 Constitution stated that "The state is founded on the basis of the Almighty God" only has six interpretations. Three of them are related to the discussion this time as follows:

1) In the Republic of Indonesia (NKRI), regulations may not be implemented that conflict with Islamic regulations for Muslims, Nasrani regulations for Christians, Hindu regulations for Hindus, and Buddhist regulations for their followers.
2) The Republic of Indonesia is obliged to implement Islamic law for its adherents, Christian law for its adherents, Hindu law for its adherents and Buddhist law for its adherents.

3) Sharia that does not require assistance from state power, then every adherent of it is obliged to implement it.[11]

From the discourse above that the researcher quotes about the position of Islamic law in positive Indonesian law, hopefully it will not make us misunderstand the meaning of Islamic law in its application in our country where every religion also has the right to apply its own teachings and beliefs, and in particular Islamic law in its application is not limited by the constitution in our country.

By the explanation of the previous paragraph, the researcher found that the position of all types of elopement marriage (*siri*) in Islamic law is considered valid if the marriage fulfills the pillars and conditions of a marriage according to the views of the four schools of thought, but in this case, there is a *fiqh* rule that states:

مَا لاَ يَتِمُّ الوَاجِبُ إِلاَّ بِهِ فَهُوَ وَاجِبٌ

Meaning: "The thing that makes the law obligatory is perfect, then the intermediary becomes obligatory."

So just by registering a marriage, the things that are obligatory become more perfect. For example, the continuity is when bathing *junub*, washing the feet is said to be perfect if the calves are also washed so washing the calves when bathing becomes obligatory.[12]

Therefore, when the law has been interpreted by the generation after the *imams* of the schools of thought, in this case the reference for Indonesian law in terms of Islamic civil law in Indonesia is contained in the Compilation of Islamic Law (KHI) which is used

[11] Mardani, *Hukum Islam Dalam Hukum Positif Indonesia* (Rajawali Pers, 2018).

[12] Abdul Hakim Hamid, *Prinsip-Prinsip Dasar Memahami Ushul Fiqh & Kaidah Fiqh (Terjemah Mabadi' Al-Awwaliyyah)*, 2010.

as a reference in Islamic legal cases in the sense of trying Islamic civil cases in Indonesia. So that the adherents of the existing schools of thought do not disagree with each other. Then the results of i*jtihad* were born regarding the terms and conditions of a marriage in Indonesia which became a reference for judges in deciding a legal case.

Thus, it can be said that what is meant by compilation in the sense of compilation of Islamic law is a summary of various legal opinions taken from various books written by *fiqh islam* scholars which are often used as references in religious courts to be processed, developed and collected in one collection so that this collection is called a compilation.[13]

Therefore, the researcher found that the legal position of elopement marriage (*siri*) from the perspective of Islamic law applicable in Indonesia refers to Article 6 of the Compilation of Islamic Law regarding the valid requirements of a marriage and Law Number 16 of 2019 as an Amendment to Law Number 1 of 1974 concerning Marriage, which clearly states that every marriage must be registered, and the marriage must be carried out in the presence of and under the supervision of a Marriage Registrar.

2. Implementation of the Law on Siri Marriage after the Constitutional Court Decision Number 46/PUU-VIII/2010

1) Before the Constitutional Court Decision

The researcher examines elopement marriage (*siri*) from the perspective of *sharia* and according to state law, it results that it is actually not valid according to state law if it does not go through an administrative registration process called an underhand marriage.

[13] Mahkamah Agung, "Himpunan Peraturan Perundang-Undangan Yang Berkaitan Dengan KHI Serta Pengertian Dalam Pembahasannya," *Jakarta: Perpus Takaan Mahkamah Agung*, 2011.

This is in contrast to the provisions of Islamic law which judge the elopement marriages (*siri*) are valid once the pillars and requirements of marriage are met. This elopement marriages (*siri*) as known in Indonesian society today, is a marriage carried out by a guardian or deputy guardian witnessed by witnesses, but not witnessed and recorded by an official government.

The emergence of elopement marriages (*siri*) carried out by the community occurred after the enactment of Law Number 1 of 1974 concerning Marriage and Government Regulation Number 9 of 1975 as a Law which is the implementation or guidance of Law Number 1 of 1974. This applies to both regulations. In both regulations it is stated that each marriage must not only be carried out according to religious provisions but must also be registered. Article 2 paragraph (1) and Article 2 paragraph (2) of Law Number 1 of 1974 concerning Marriage, states:

a) A marriage is valid if it is carried out according to the laws of each religion and belief.
b) And all marriages are recorded in accordance with applicable laws and regulations.

The provisions of Article 1 of Law Number 1 of 1974 are further regulated in Government Regulation Number 9 of 1975, in paragraph (2). It is explained that "marriage procedures are carried out according to the respective laws". Then in paragraph (3) it is explained that "marriage procedures are according to the laws of each religion and belief and the marriage is carried out before a registrar and attended by two witnesses".[14]

From the legal provisions above, it can be seen that the law does not regulate marriage at all but emphasizes that marriage is valid if it is carried out according to the laws of each religion and belief. The laws and regulations regulate marriage only in terms of its formality,

[14] Republik Indonesia, "Peraturan Pemerintah Nomor 1 Tahun 1975 Pasal 19 Huruf F" (1975).

namely wedding as a legal event that must be carried out in accordance with the laws and regulations.

According to the theoretical framework, marriage can occur in two forms, they are:

a) Conducting a marriage contract only in accordance with the provisions of Article 2 paragraph (1) of Law Number 1 of 1974 concerning marriage that it has been carried out and complies with the religious rules that are adhered to.
b) Marriage is carried out according to the provisions of Article 2 and paragraph (2) of Law Number 1 of 1974 simultaneously, that it is carried out according to religious norms and recorded in the marriage records.

2) After the Constitutional Court Decision

Regarding the Constitutional Court Decision Number 46/PUU-VIII/2010, the Constitutional Court Decision only approved the judicial review of Article 43 paragraph (1) of the Marriage Law based on the 1945 Constitution and rejected the request for judicial review of Article 2 paragraph (2) of the Marriage Law proposed by Hj. Aisyah Mukhtar bin Ibrahim regarding her elopement marriage (*siri*) with the late Moerdiono, a former minister during the Suharto administration. Which then resulted in much controversy when the Constitutional Court approved the judicial review of Article 43 Paragraph 1 of the Marriage Law and rejected Article 2 Paragraph 2 of the Marriage Law. In order to guarantee legal certainty before this Marriage Law comes into effect and is applied to the community in accordance with statutory regulations, in which Article 2 paragraph 2 requires registration to guarantee the validity of the marriage and everything related to it.

The Constitutional Court assessed that the factors that determine the validity of a marriage are a condition determined by the religion of each prospective bride and groom. However, the obligation to register marriage by the state through statutory regulations is an

administrative obligation. If an administrative registration becomes a limitation, then according to the Constitutional Court, the registration does not conflict with the provisions of the constitution because the limitation has been stipulated by law and implemented with the sole aim of obtaining recognition and respect guaranteed for the freedom and rights of others to achieve justice in consideration of religious values, security, morals, and the occurrence of order in a democratic society. So, the Constitutional Court in making a decision later does not conflict with the 1945 Constitution.

Following up on the issuance of Constitutional Court Decision Number 46/PUU-VIII/2010, which was followed by the decision of the substantive examination of the Marriage Law dated February 17, 2012, an illegitimate child or a child from an elopement marriage (*siri*) or a child from an underhanded marriage has a civil relationship with his/her father, as long as it can be proven through science, technology, and/or other valid evidence including a civil relationship with the father's family. If a child has a civil relationship with his/her biological father, then the child has rights and responsibilities together with both parents. The rights and obligations of parents are regulated in Articles 45 to 49 of Chapter X of the Marriage Law and can be formulated as follows:

a) Even if the parents' marriage ends in divorce, the parents still have an obligation to provide for and educate the child until the child is married.
b) It is the child's obligation to respect and obey their parents and to take care of their parents when they grow up.
c) If the child is not yet an adult, it is the parents' obligation to represent the child in all matters concerning the child.

d) It is the parents' obligation to protect and manage their children's property.[15]

So, with this decision, the researcher feels that there will be a bias in interpretation among our society if it is not explained thoroughly. Since by this decision, it seems like indirectly legalizes unregistered marriages considering that children from unregistered marriages beforehand could only inherit their mother and their mother's family. However, by the decision of the Constitutional Court Number 46/PUU-VIII/2010, the law has changed and children from unregistered marriages can inherit their father and their father's family.

It is still questionable which elopement marriages (*siri*) will be enforced by the law as the researchers found that there are four types of elopement marriages (*siri*) that often occur in our society, including: 1) elopement marriage (*siri*) due to customary demands, for example, underage marriages due to pregnancy that inevitably have to be married off as a cover-up for family shame, 2) elopement marriage (*siri*) that are valid according to religion but illegal in state records due to economic limitations, 3) elopement marriage (*siri*) of people who are already married but remarry secretly without their first spouse' knowledge, and 4) forced elopement marriage (*siri*), which is a couple who are involved in a romantic relationship and decide to marry in secret due to various obstacles such as not getting their parents' approval.

However, regardless of the four types of elopement marriages (*siri*) that occur in the community, the practice of elopement marriage (*siri*) is where couples marry without notification or official approval from state law, then the marriage is illegal. In the Constitutional Court Decision Number 46/PUU-VII/2010

[15] Kementerian Agama Republik Indonesia, "Undang-Undang RI Nomor 16 Tahun 2019 Tentang Perubahan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan" (Jakarta, 2019).

concerning elopement marriage (*siri*), it has been regulated that the government in this case must regulate protection for children born from elopement marriage (*siri*). Because it is clear that the state does not legalize elopement marriage (*siri*) referring to the Marriage Law which requires that every marriage must be registered before a marriage registrar. Therefore, the implementation of this decision depends on the local government policy in implementing the regulations issued by the Constitutional Court.

A government regulation can be in the form of issuing a regulation on elopement marriage (*siri*), providing legal protection for children born from elopement marriage (*siri*), and setting sanctions for violations of these provisions. In addition, the government can take steps to provide awareness to the public about the legal, social, and administrative consequences of elopement marriage (*siri*).

Nevertheless, in the Constitutional Court Decision Number 46/PUU-VII/2010, it has a significant impact on the legal status of children from elopement marriage (*siri*) in Indonesia. The decision states that children born from elopement marriage (*siri*) also have a civil relationship with their biological father as long as it can be proven with technology and/or other evidence according to the law. The impact of this decision on elopement marriage (*siri*) includes:

a) Child recognition

Then a child born from an elopement marriage (*siri*) has the right to be recognized civilly by his biological father. This means that the biological father is responsible for the child's livelihood, education and welfare.

b) Legal responsibility

The biological father cannot avoid legal responsibility on the grounds that the child was born from a marriage that is not legally recognized, which by scientific evidence (let's say a DNA test), the civil relationship between the child and the father can be established.

c) Inheritance rights

Then a child from an elopement marriage (*siri*) has the right to inheritance from his biological father in accordance with the provisions of inheritance law in force in Indonesia, both Islamic law and positive law in this case civil law.

Thus, from the impact of this decision also emerged its application in society, including:

a) Increasing public awareness

In the decision encourages increasing public awareness regarding the importance of registering marriages so that children's rights are more guaranteed and need to go through a long legal process to obtain their recognition.

b) Changes in attitudes towards elopement marriage (*siri*)

Although elopement marriages (*siri*) are religiously valid if the pillars and requirements of marriage are met, however, in the Constitutional Court Decision Number 46/PUU-VII/2010, it focuses on the importance of registering marriages to avoid legal complications in the future. This is because couples who choose elopement marriage (*siri*) will be faced with the legal reality that children born from this marriage still receive rights recognized by the state.

c) Scientific evidence

In the use of DNA tests for example, is becoming increasingly important in proving the civil relationship between a child and a biological father, especially in cases where the marriage is not officially registered with the government.

d) The court process

In the practice of the Constitutional Court Decision Number 46/PUU-VII/2010, the mother and child can file a lawsuit to demand recognition and civil rights from their biological father and this provides a mechanism for protecting children and ensuring that the responsibility of their biological father is enforced fairly.

Therefore, the researcher found that the implementation of the Post-Constitutional Court Decision Number 46/PUU-VIII/2010 Siri Marriage Law has been regulated in the Republic of Indonesia Government Regulation Number 9 of 1975 concerning the implementation of the Constitutional Court's decision which is a positive law (a law that applies and must be implemented by every Indonesian citizen). The researcher takes reference from each point of Pancasila as the application of religious values in the context of the Indonesian nation, where positive law and Islamic law are two things that cannot be separated from the values of holiness and greatness in terms of upholding justice so that no party is wronged.

Pancasila as the foundation of the state and the ideology of the Indonesian nation contains fundamental values of a universal nature which serve as guidelines in the preparation of Indonesian policies and legal regulations. The correlation between the Constitutional Court Decision Number 46/PUU-VII/2010 concerning the rights of children born from elopement marriage (*siri*) and Pancasila can be seen through the application of the five principles of Pancasila, including:

The first principle; 'Belief in the One Almighty God', means that in recognizing the rights of children born from elopement marriage (*siri*) is in line with the principle of 'Belief in the One Almighty God' where every religion teaches about justice and protection for children. Elopement marriage (*siri*) is often carried out based on religious beliefs even though they are not administratively registered, then the decision of the Constitutional Court ensures that even though the marriage is not registered, the rights of children are still recognized and protected, reflecting respect for religious values.

The second principle; 'Just and Civilized Humanity'. This Constitutional Court decision upholds the principle of 'Just and Civilized Humanity' by ensuring that every child, regardless of the marital status of their parents, has the same rights before the law, and by granting civil rights to children from elopement marriage

(*siri*), this decision treats them fairly and civilly, avoiding discrimination based on birth status.

The third principle; 'the Unity of Indonesia'. The recognition and protection of the children's rights from elopement marriage (*siri*) supports national unity by reducing social conflict due to discrimination against these children. Also, the protection of the rights of children from various marriage backgrounds contributes to national unity by ensuring that all children are treated equally and fairly.

The fourth principle is 'Democracy Led by the Wisdom of Deliberation and Representation'. The Constitutional Court's decision reflects the principle of democracy where legal policies taken through the judicial mechanism consider all parties, especially children's rights. In the process of involving this decision shows that the interests of children and society are considered democratically and wise.

The fifth principle is 'Social Justice for All Indonesian People'. In the Constitutional Court's decision, the fifth principle is put forward by ensuring that all children, regardless of their parents' marital status, receive their rights by providing civil recognition for children from elopement marriage (*siri*) so that this decision reduces social disparities and discrimination, and guarantees their social and economic rights.

Yet, on the other hand, this Constitutional Court decision provides significant legal protection for children born from elopement marriage (*siri*). However, even though this decision has many positive impacts, there are several negative impacts or challenges that need to be considered, including:

1) Indirect legitimacy of elopement marriage (*siri*).

This Constitutional Court ruling can be interpreted by some people as indirect recognition of elopement marriage (*siri*) and this can reduce the incentive for couples to officially register their marriages. Therefore, if more and more couples choose elopement

marriage (*siri*) because they feel there is legal protection for their children, it may increase the number of elopement marriage (*siri*) and may damage the government's efforts to encourage the registration of legitimate and orderly marriages.

2) Social and economic disparities

Although children from elopement marriage (*siri*) receive guaranteed administrative rights from the state, they may still face social stigma even though their civil rights are recognized. Then this stigma can hinder their access to education, work and may even be psychologically disturbed.

3) Experiencing social and family conflict

The recognition of children from elopement marriages (*siri*) can cause conflict in the family and society because children from legal marriages and elopement marriages (*siri*) may face tension or different treatment in their extended families, especially in terms of inheritance and other rights.

D. Conclusion

The researcher explains the perspective of positive law, where positive law in general is western law (civil law), customary law (law of habit) and Islamic law. Positive law in Indonesia includes the written and unwritten legal principles that apply and are binding in general or in specific. In its history, western law was brought by the Dutch and is rooted in the traditions of ancient Roman and Greek law, while customary law developed and was unwritten. Meanwhile Islamic law is based on Islamic Sharia law which is not written in legal regulations.

The legal status of elopement marriages (*siri*) under positive law in Indonesia falls within the realm of western law (civil law), which regulates civil matters. Elopement marriages (*siri*) are considered illegal under positive law which is encompassed by western law, because they are only

considered valid if they meet the requirements stipulated in the Civil Code.

In the perspective of Islamic law, Islamic law is recognized in the Indonesian legal system based on the 1945 Constitution. However Islamic law in Indonesia is not subject to positive law but rather as a law that also applies to the scope of Islamic society, in this case the Compilation of Islamic Law (KHI) as a reference in Islamic law cases in Indonesia. In the view of Islamic law, all types of elopement marriages (*siri*) are considered valid if they meet the pillars and requirements of marriage based on the four scholars of the school of thought.

From this explanation, the law on elopement marriages (*siri*) from the perspective of positive law and Islamic law in Indonesia must meet the requirements set out in positive law, including the requirements for registering marriages and the requirements set out in Law Number 16 of 2019 as an Amendment to Law Number 1 of 1974 concerning Marriage.

Constitutional Court Decision Number 46/PUU-VII/2010 discusses elopement marriages (*siri*) that are common in Indonesian society. Various types of elopement marriages (*siri*) are discussed, including elopement marriages (*siri*) due to customary demands, marriages that are legal according to religion but illegal according to law, polygamy, and forced marriages. Although there are various types of elopement marriages (*siri*), all of them are considered illegal by the state law because they are not registered in official records. The decision stipulates that the government must protect children born from elopement marriages (*siri*), provide legal protection for these children and determine sanctions for violations of the regulations on elopement marriages (*siri*).

This decision has a significant impact on the legal status of children from elopement marriages (*siri*) in Indonesia.

They have the right to be recognized civilly by their biological father who is responsible for the child's living, education, welfare and have the right to inheritance. This decision also encourages increased public awareness of the importance of registering marriages to protect children's rights.

The implementation of the law on elopement marriages (*siri*) after the Constitutional Court Decision Number 46/PUU-VII/2010 has been regulated in the Government Regulation of the Republic of Indonesia Number 9 of 1975. This is a positive law that must be followed by all Indonesian citizens. The implementation of this law is in line with religious values in the context of the Indonesian nation and in accordance with the points of Pancasila. The impact of this decision also changes the public's attitude towards elopement marriage (*siri*), because children born from it still have rights recognized by the state. The message conveyed in this decision encourages the public to understand the importance of legal recognition and registration of marriages to protect the rights of children born from elopement marriages (*siri*).

The legal position of elopement marriages (*siri*) from the perspective of positive law and Islamic law in Indonesia must meet the requirements set out in positive law, including the requirements for registering marriages and the requirements stipulated in Law Number 16 of 2019 as an Amendment to Law Number 1 of 1974 concerning Marriage. Its implementation is regulated in Government Regulation of the Republic of Indonesia Number 9 of 1975, this is a positive law (applicable law) that must be followed by all Indonesian citizens.

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