

Examination by Deoxyribonucleic Acid (DNA) Test of Child Privileges as Legitimate Evidence in Indonesia Marriage Law

Masyithah Umar*, Anwar Hafidzi, Faculty of Syariah, Universitas Islam Negeri Antasari, Jl. A. Yani Km 4.5, Banjarmasin, Indonesia, Email: [*masyithah.umar55@gmail.com](mailto:masyithah.umar55@gmail.com)

This research aims to test the validity of the Deoxyribonucleic Acid (DNA) test for children born in Indonesian outside of legal marriages. The drawback of this work is that DNA testing can only measure children's biological rights but does not provide legal authority in the Indonesian marriage process. While in Indonesia, adherence is to marriage law derived from the study of Islamic Law, the practice of DNA testing that reinforces the father's biological rights to the child. A normative study of Law No. 1 of 1974 on Marriage, the Compilation of Islamic Law, the Code of Criminal Procedure, the Civil Code, and the Juvenile Justice Law is used in this study. The data collected were comprehensively analysed using an analytical approach and maqashid Sharia. This study's findings are that the legality of DNA testing can determine the biological relationship between a father and his child and used as valid evidence for the offspring. However, there is legal controversy in the case of marital rights and succession rights. Children born outside legitimate and lawful marriages are considered incompatible with their fathers, but only with their mother.

Keywords: *Legality, Testing, DNA, Offspring, Child, Marriage.*

Introduction

Most scholars analyse or abbreviate the Deoxyribonucleic Acid test as part of the application of legal proof in family relationships, violence, or murder (Boemer, 2000; Mays et al., 1992; Wilson et al., 2011). Several countries have indicated that DNA testing is part of legal certainty and can be justified medically (Mannucci et al., 1994). The courts accept and apply DNA testing as admissible evidence (Shapiro, Reifler, & Psome, 1992). As valid and binding evidence in a legal case, the DNA results may also be additional supporting and supporting evidence. However, some reports suggest that DNA testing does not affect a father's right to have the children and



inheritance rights, as is the case in Indonesia (Aziz & ul Hassan, 2017; de Freitas Schäfer et al., 2017). Children born out of wedlock in Islamic Law cannot be regarded as legitimate children in determining offspring. They have no legal authority based on Law No. 1 of 1974 or the Compilation of Islamic Law in force in Indonesia. When the marriage law was introduced, the Muslim community was in outrage (Cammack, 1989). However, the Law regarding legitimate children undeniably corresponded well with the Islamic Law.

Likewise, DNA testing is unbound, whether as evidence or not, because there is no form of DNA test proof in the Civil Code, Criminal Procedure Code, and Child Protection Act (Ryan et al., 2018). In Indonesia, numerous cases involving DNA testing as the validity of offspring and legal relations in a marriage have been widely discussed. However, DNA testing cases should not be decided individually without the officials of the society who eventually would make all policies possible in the State's self-concept (Patyn & Dierickx, 2010). In that case, no civilian would be deprived of chances for a child to prove themselves regarding her/his paternity status; furthermore, if the one who wanted to deal with it was a woman through this method in any paternity cases (Blakesley, 1997). In 1993 it was called a bustling situation. There was an MM woman who had requested the 1974 Law No. 1 exam. MM had a marriage according to Islamic religious norms with all the pillars and conditions that Article 2, paragraph 1 of the Marriage Law had fulfilled. At that time, however, they did not register marriages before an agency appointed by the government, as provided for in Article 2(2) of Law No. 1 of 1974, the designated official was a religious affairs office (KUA) (Ghusairi, 2018; Utami, 2016).

This polemic became interesting when they gave birth to a boy and wanted the father, to be registered on the birth certificate at the time, to get the name correct (Aziz & ul Hassan, 2017). As religious clauses considered one of the principles in the constitution, the judiciary regards the fundamental rights as the second-class whenever one of the Islamic principles is involved (Naeem, 2008). Religious validity of judicial review is said to be valid even though normatively, the legislation is not legally binding because it was not registered with the KUA institution. It happened because, in Java, the marriage law had made no difference whether the marriage was registered at Religious Affairs Officer (KUA) or not since registration was not as necessary as the validity of marriage (Katz J. &, 1978). This case became necessary when the Constitutional Court granted MM 's request to appeal to the Constitutional Court for the child's right to decide the father's name. (Call for a substantive examination of the provisions of Article 43(1) of Law No. 1 of 1974 (Petitioner's Argument in Constitutional Court Decision No. 46 / PUU / VIII/2010). Contrary to Article 28B, paragraph 2, of the Constitution of 1945, which states that every child has the right to survival, growth, and development and is entitled to protection from violence and discrimination, with no harm to the child's constitutional rights (Hamzani, 2016).

At that time, the Constitutional Court declared that 'children born out of wedlock have only a civil relationship with their mother and the family of their mother (Utami, 2016). Also, men as

fathers who have been proven based on science and technology, and other legal facts have blood relationships (Mahmudi, 2018). Including civil ties with the family of their parent, in response to Article 43(1) of the Act. The policy or law exists because of the customs of society. This is a patriarchal one, in which husbands or men hold the privilege of domination (Nasir, 2016) over the decision whether about divorce, children, or marriage, which is mainly polygamy or to remarry without consent of the legal wife. This was then assumed to have resulted in the division of children as well. Thus, children are defined into three categories according to Indonesian Law, namely legal children, and illegitimate children. Then, the details were clarified again: 1. Children born into a civil union. 2. Children born out of wedlock. 3. Children born in an unmarried situation (Hafidzi & Hayatunnisa, 2017).

Children born out of wedlock vary from children born of the unmarried, the difference being that children born out of wedlock are children born out of marriages carried out according to their respective sects and values, the child in the eyes of religion being legitimate (Boemer, 2000). However, Islamic Law does not exist in isolation, which means it is embedded characteristically in webs of different normative orders and institutions (Von Benda-Beckman & Von Benda-Beckmann, 2012). Thus, for the case above (Schlumpf, 2016), is significantly correct, but since it is not registered either in the Office of Religious Affairs (KUA) or in the Office of the Civil Registry (children of the marriage), it is not officially correct. Although children born without marriage ties from relationships between men and women, children born illegally are often illegally formal (Ramadhani, 2019).

The research looks at proof and the use of DNA testing to discover the relationship between children and fathers (Quirion, 2018) so that children may gain their rights as Indonesian citizens. This is because Indonesia has been colonised by the Dutch since the seventeenth century. The Dutch brought the law about relationships and this was normalised with the various customary and religious laws that were already existing at that time (Katz & Katz, 1975). These laws gradually developed in to the law's of today and into what all Indonesians understand currently. This research seeks to identify the validity of DNA testing on the status of children born to mothers without any clarification of their father's status (Serrano-Ruano, 2018), by looking at Indonesian normative Law and Islamic Law. This is a good sign for the increase of DNA testing to identify biological fathers' and the effect on Marriage and children's rights.

Methodology

The method used in this study is doctrinal law analysis with a normative approach, with Islamic law sources and sharia studies, which question the legitimacy of DNA testing to assess the validity of children's marriage rights. In general, doctrinal analysis is against the claim that legal realism stands for 'the significance of doctrine,' and the conceptualisation as a 'mere appearance' which in particular associate realism with a 'nominalist impulse' that minimises the significance



of doctrinal categories (Dagan, 2015).

The material used as a legal basis is the decision of the Constitutional Court No. 46 / PUU / VIII/2010, in the case of a Petition for Evaluation of Law No. 1 of 1974 concerning family, marriage law, and Islamic Law Compilation (KHI). In this legal research, the approach taken is the conceptual and maqashid approach to Sharia (Bulmer, 2017). Many thoughts that Sharia could not be applied in a country with a democratic system. Senegal and Indonesia have been the examples of the success of the democratic aspirations and institutions taxis uneasily next to a popular movement that pursues its implementation to expand the role of religion in public and political life (Kendhammer, 2013). (Marilang, 2016).

This study's findings were analysed using the Islamic legal and Sharia approach to see the legality of child custody of a child's DNA test to find out the state and Islam legally about their biological father.

Results

Legality of the Constitutional Court and Law Number 1 Of 1974

The Constitutional Court Decision No 46 / PUU-VIII/2010, which approved the material review, but rejected and did not accept a request for a judicial review for the Article 43(1) No 1 of 1974 concerning Marriage to the Constitutional Court of 1945 Article 2(2) no 1 of 1974 relating to marriages submitted by MM, becomes an application for judicial revision. Situations like this can happen in a logical sense that higher-level judicial priorities compete for influence over judicial choices (Huang & Narechania, 1719-1770). Thus, judicial revision can be made an impossible choice to tackle this issue on the court.

Furthermore, there is no legal strength and confidence in the DNA test as evidence since it was not registered. However, in a sense, DNA can be a piece of complete evidence and can legally be used to seek for equality or sameness before the Law. That is its not merely a principle, but a practice to adapt (M'charek, Hagendijk, & De Vries, 2013).

While making the decision, the constitutional judge granted only a partial request and claimed that the child had only a personal partnership, not a legal one. The above question does not apply to any proof in the Law, including DNA testing (Imanullah, 2018). However, if we look at Law No. 1 of 1974 relating to Marriage in the second paragraph, it states that a marriage is considered legal if conducted following their respective moral and civil laws and that relevant laws must register each marriage. Nevertheless, in criminal judicial court, there was not and has never been, controversy about the ability of DNA test to eliminate suspicion in cases where the suspect's DNA does not match the evidentiary sample (Singh, 2011). Thus, it was considered strong

enough to make the children's status formally a legal one.

The record checked by the Constitutional Court does not apply if a marriage in a sequence of marriages has been prohibited in practice by the State since 1974, but must be registered by the state. Of course, the state forbids marriage without the government's legality regarding the prohibition of marriage activity. It was due to the consequences that arose, such as not having the father's rights on birth certificates, inheritance rights, no legal security in the family if a crime happened. Even the child's status is often challenged as they did not have any rights as a valid citizen (identity card) and other consequences of this marriage (Al-Dabbagh, 2019). However, based on this, it could be seen that there was a "massive infringement of personal freedom, an attack on women's rights, and unwarranted foray of state institutions in religious matters, and intrusion of the state into the private sphere" (Kloos & Berenschot, 2017).

DNA Tests in Biological Pathology Determination

In many countries, DNA testing is used to classify biological mothers, injury victims, falsification of family records, or others. This test was conducted as an effort to prove it in the court realm. While other evidence must be shown to support the DNA study's case, DNA testing was considered part of the Law since it is one piece of proof. While several experts doubt the validity of this DNA test because just one piece of proof in the court of the claimant is inadequate (Wilson et al., 2011), (Sarumi & Ansari, 2017), primarily if the marriage was performed lawfully in compliance with Islamic Law and the Republic of Indonesia.

Meanwhile, if a child was born as a result of adultery, then the child is immediately included on the birth certificate with the mother's name. Despite being tested for DNA, it was contrary to Law No. 1 of 1974. Under the status and rights of children born under Article 42, the marriage law explains: "Legitimate children are children born in or as a result of legal marriage." If a child is born out of incest or out of a legitimate marriage, the father may argue that the child has no civil relationship if this occurs due to adultery (Rashidi, 2014). This occurs even though Indonesia has not regulated children born outside legal marriages until now. It can be seen that although Indonesia has been viewed to have Marriage Law that is believed applicable to all its citizens (Kyaw, 1988), it contains flaws for nowadays in the modern era.

What was regulated was only a matter of civil status in respect of the child's right as a citizen who has the mother's name, under Article 43(1) of the Law. As a result of civil relations with the mother and her family, the child will only receive rights of inheritance from the mother and her family, including all forms of care until the child is an adult. The need for DNA testing appeared due to women's inability to know who impregnated her because of promiscuity or adultery. It showed another flaw in Indonesia's Marriage Law, that women's position was never higher than men (Afrianty, 2018) and placed women in an unfavorable social position. It was no wonder

women come to the courts to resolve their marital problems more often than men do (Nurlaelawati, 2013).

According to the Islamic Law Compilation Act, DNA testing results in the determination of biological fathers were not explained in detail. The compilation of Islamic Law allows a legal marriage to be conducted in compliance with Law No. 1 of 1974 and based on the provisions of Article 99 KHI which states that a legitimate child is a child born of a legal marriage and is conducted by a husband and wife approved by the State (Susanto, 2017). Therefore, DNA testing is not limited in Law Number 1 of 1974 or the Compilation of Islamic Law (KHI), whether as evidence or not as part of the Law deciding children's rights against their families. It was because there were no tools available at the time, such as DNA testing (Shabana A., 2013).

Child's Right to Biological Fathers

In Islamic Law, DNA testing is not prohibited or recommended, but in the Sharia approach, including the maintenance of nurture. This arrangement was used as a tool to determine the ability to use the DNA test theory to assess the validity of biological fathers (TUG & Akduman, 2009). This approach was used as a reference in Islamic Law as evidence to determine the passage for knowing his biological father. If someone with a very diverse situation wants to know their identity, one way to do this is to identify themselves through DNA testing. In Islam, conducting a DNA test has been through examples of the sunnah said by the Prophet (peace be upon him) that "whoever is practicing medicine, and is not skilled, is liable (for any damages caused)" (Haneef S., 2007). Thus, Haneef (2007) has added that this sunnah provides an additional sanction to support the reliability of expert opinion and the practical experience of a skilled person.

This process was established through the development of medical science that was not discovered during the time of the apostles and the days of friends. Although there were some parallels by matching the body and the individual, this technique used as evidence to evaluate the relationship of offspring if there was a dispute among families, technology and DNA can, therefore, be used as the wrong proof to strengthen the offspring in the event of a marriage dispute (Hamzani, 2016). If DNA testing is carried out by experts, it can be said that technology can respond (Dalle et al., 2020) to the relationship of the offspring in marriage. However, it needs to be discussed how the child's rights can come to life when the biological father died (Herlina, Asikin, & Husni, 2019). Furthermore, in Islamic law, paternity follows the agnatic line of descent, where matrilineal connections are meaningful, but most lineage-related regulations are based on patrilineal connections (Shabana A., 2015).

DNA testing is legal proof in the sense of Islamic Law, but it has to be understood by its intent, if the intent is for legitimate purposes, then it is acceptable. This is because the rules about



marriage, divorce, inheritance, and related issues are rooted in the Prophet's Qur'an and Sunnah. By their nature, they are believed to be definitive, not only in origin but often also significant in which it states that children born within wedlock are automatically attached to a bona fide husband. The husband then also becomes the bona fide father (Shabana A., 2013). However, as the Dutch Islamologist Christian Snouck Hurgronje has investigated, it is believed that law was the natural outcome of the natural community. The Indies (Indonesia today) were divided into *adat* law "circles" whose borders were drawn to include people ethnographically and culturally homogeneous (Roff, 2010). Thus, anything that happened before the law was much more complicated because the community behind will follow with its Law. On the other hand, if the purpose of the DNA test deviates from the provisions of Islamic Law, it is prohibited to exist. The proof was classified as very reliable evidence by DNA testing.

Discussions

Legality of the Constitutional Court and Law Number 1 Of 1974

The judgments of the Constitutional Court to review laws that contain the contents of declarative judgments is to clarify or affirm what is valid. It is to improve the applicant's status to gain rights as an Indonesian citizen (Ghusairi, 2018). Based on the case presented, MM's DNA testing for the child is very close to 98 percent identical to that of the father, who married MM in a series (not recorded by the state).

Children born out of wedlock based on the Constitutional Court Decision Number 46 / PUU-VIII / 2010 clarify the civil relationship with the biological father. The status of a child is recognised by marriage. If the marriage was carried out following Article 2 of Law Number 1 of 1974 concerning marriage, then if the child was not born in the context of a legal marriage, such as adultery or otherwise, no solid legal basis could be given in the determination of the child as biological (Herlina, Asikin, & Husni, 2019).

Therefore, if a DNA test can be confirmed, a child born outside marriage after the enactment of Law No. 1 of 1974 on marriage could have a civil relationship with the parent. This polemic became an issue related to Islamic Law regarding the status of children born outside marriage (Sarumi, Bt. Mohd, & Bt. Ibrahim, 2019) without mentioning documentation in the KUA. In this case, the value of Islam is seen as the most accurate rule. It cannot be just ignored because Islam's role in such situations is contingent on various factors, including the human agency of believers and their moral choices, rather than being a final pre-determined outcome mandated by theological or historical imperative (An-Nacim, 2012).

DNA Tests in Biological Pathology Determination

Based on the cases that have been submitted, it appeared that DNA testing could be used as a tool to determine someone's paternity. Determination of the origin of children is significant (Engelcke & Yassari, 2019), because the presence or absence of offspring will affect the presence or absence of inheritance relationships, maintenance, and guardianship of DNA testing, as indicated by experts, can accurately prove one's paternity (Mays et al., 1992). Determination of the offspring through DNA is certainly carried out if there are cases of negation of the offspring (Yilmaz, 2017). For this reason, DNA testing is only needed to determine the rights of biological fathers.

Child's Right to Biological Fathers

In Islamic studies, if a person has a child and the parents die, then a child born outside of marriage cannot inherit what was left by the biological father (Mzee, 2016). Because it was contrary to the arguments of Islamic Law and Law No. 1 of 1974 concerning marriage. There was a narration from Ad-Darimi in As-Sunan (3106) that Sulaiman bin Yasar said;

"Any man who comes to a child then says that it is his child before he had committed adultery with the child's mother, then there was no one else claiming to be his child, that child may be given an inheritance. "

If the child was the result of adultery, then the child should be kept by the mother. Based on the argument from Umm al-mu'minin 'Aisyah Ra., the Prophet SAW said;

"The child is leaning on the bed owner, while the adulterer gets stones only (meaning not getting any rights from the child)." (Narrated by Bukhari, no. 6749 and Muslim, no. 1457).

Conclusion

Based on the work submitted, testing a person's rights by DNA testing can be considered as one of the valid evidences for evaluating a biological father's rights, whether performed in a legal marriage or not. However, if it is used to obtain inheritance rights and the right to marry a daughter, or if the child is born outside of legal Marriage, DNA testing cannot be used as a legal base. DNA research is acceptable in an unbiased approach to the fairness of Islamic Law if only to protect the welfare of the child. The validity of this evidence is based on expert findings on testing children's DNA against their fathers in the laboratory.



Recommendations

If proved, then the child-father relationship continues, only the duties specified in Islam do not apply. Like the right to accept foster children, guardianship, if the child is a female, a wedlock-born child has a civil relationship with the mother and the family of the mother, and with other people, because the father is just a biological parent.



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