ON THE LEGALITY OF A MARRIAGE AND ITS LEGAL IMPLICATIONS: AN UNJUSTIFIED 'HEROIC' DECISION

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Abstrak

Objek artikel ini adalah Putusan Mahkamah Konstitusi Nomor 46 Tahun 2012. Isu sentral dalam putusan tersebut berkait-kelindan tentang keabsahan perkawinan dan status hubungan keperdataan anak di luar nikah menurut Undang-Undang Perkawinan. UU Perkawinan digugat inkonstitusional di hadapan Undang-Undang Dasar yang mengatur tentang kesetaraan setiap orang di hadapan hukum. Hakim Konstitusi mengabulkan sebagian gugatan oleh Machica Mochtar dan anaknya Iqbal. Artikel ini ditulis setelah lima tahun Mahkamah Konstitusi memutus gugatan konstitusional keabsahan sebuah perkawinan. Rentang waktu tersebut mengindikasikan tujuan artikel ini untuk mengupas secara filosofis alasan hukum yang dikemukakan dalam putusan tersebut. Pertanyaan yang hendak didiskusikan dalam tulisan ini adalah benarkah Undang-Undang Perkawinan bertentangan dengan Konstusi? Untuk menjawab pertanyaan tersebut, tulisan ini memanfaarkan konsepsi penemuan hukum oleh Ronald Dworkin, H.L.A. Hart, dan Lord Fuller untuk melakukan analisa alasan hukum putusan. Tulisan ini berpendapat terdapat norma yang kontradiktif dalam kasus ini. Dalam bingkai kontradiksi norma tersebut, tulisan ini menunjukkan ketidaktepatan logika hukum Putusan Mahkamah Konstitusi sebagai bahan renungan untuk putusan di masa mendatang ketika isu yang sama muncul.

Kata kunci: *anak di luar nikah, kontradiksi norma, hukum perkawinan*

A. Introduction

The Hart and Fuller debate on what can be considered as a law is always fascinating[1] Fuller with his 'Internal Morality of Law' argued that there are requirements that must be met making law possible. On the other end of spectrum, Hart argued that the recognition of a law must be conceptually separated with moral values. Although, at some point, Hart acknowledged the possibility of both morality and law coinciding. The work would be easy in the Hart's approach where there are conflicting norms between law and moral. The one that should prevail is the norms of the law, most of the time. In Fuller's view, there are eight moralities to be satisfied. Morality was part of the criteria to determine law. Moralities in Fuller's sense are rather limited and resemble the rule of law notion. While

[1] See generally Nicola Lacey, (2008), *Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate, NYUL Rev.* 1059, pg. 83.

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Hart and Fuller provide a general rule of the law, Ronald Dworkin managed to develop his interpretivism. The reasoning framework that is supposed to be used by an ideal judge whenever he faces such conflicting norms.

Conflicting norms between the law and moral, the law and religion, or even customs happen frequently in any legal system. Hart and Fuller provided useful analytical framework to approach each problem. Some of them triggered a fascinating debate.[2] The Indonesian Law is no exclusion. In particular, in the area where the applicable laws are diversified. The approach to the problem becomes interesting because each conflicting norm has its own legal basis. The Judges adjudicating a case where there are conflicting norms have to be cautiously examine the legal implications of their decisions. On this paper, I will analyse a constitutional case where that issue arose. I will discuss the Judges' reasoning using Dworkin framework to adjudicate hard case. Further, I will also assess every possible decision of this case from the standpoint of Hart and Fuller analytical framework. That would be done to inform the best decision that is justified and fit with the broader legal principle.

The case discussed is one of the Indonesian Constitutional Court (the ICC). In 2012, the ICC handed a decision concerning the legal relationship of a child born outside marriage (the illegitimate child) with the father. The ICC upheld the unconstitutional claim of Article 43 Verse 1 of the Act Number 1 Year 1974 on Marriage[3] (the *Marriage Act*). The decision rendered the possibility of an illegitimate child to have legal relationship with the father regardless whether born within or outside marriage. The decision is quite troublesome. There is conflicting norm between religious norms and the decision norms. The conflicting norms is exacerbated by the fact the religious norm has been established as one of the applicable laws in Indonesian marriage and inheritance law.

I will do two-step analysis. The first step is analysing the decision reasoning using the Dworkinian framework of judicial activity on interpreting law. It is interesting partly because there are competing legal principles within this issue. I will analyse how the judges weighing the competing

[2] See the Grudge Informer Case on David Dyzenhaus, (2008), (Revisited), *The Grudge Informer Case,* New York, New York University Law Review 1000, pg. 83..

[3] Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan (Act Number 1 Year 1975 on Marriage)

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legal principles in order to come up with the desired outcome, in this case Article 43 Verse 1. And then how that judgement is justified within the Indonesian legal system. I will argue that the judges failed to considers broader legal consequences of the decision. That will render an inconsistency of the law. This argument paves the way to my second analysis. In the second step, I will assess the validity of the decision as law.

This paper is structured in six parts. I will put forward the propositions related to the ICC case and the subsequent legal reasoning in part two. Part three will dive deeper to the case and study how does the issue of conflicting norms arose. Next, I will discuss the judges reasoning not only on the merit reasoning where there were conflicting norms, but also on the jurisdiction. This is to point out that the urge to decide an important issue should not override the rule of law. Because the rule of law is the one that distinguishes between—in the words of Nicola Lacey—brute force of arbitrary exercise and the law.[4] Part five than assess the conflicting norms and each principle they represent. Last part concludes the paper.

In 1973, a national marriage law was proposed by the government to the parliament.[5] It is an effort to unify a pluralistic legal regime on family law within the Indonesian legal system.[6] Before, the governing laws of the family law were diversified. There were different laws depending on the racial groups.[7]

However, there was strong resistance from the Muslims. They opposed the incorporation of many of the Dutch private and the Foreign Orientals law, leaving no room for Islamic law norms.[8] To illustrate this point, take

[4] Lacey, above n 1, 1059.

[5] Draft of Marriage Law 1973

[6] Official explanation of the proposed statute paragraph 4 as cited in Mark Cammack, (1989), *Islamic Law in Indonesia's New Order*, 38(1) *International & Comparative Law Quarterly,* Pg.53.

[7] Europeans were subject to the Dutch private law, Natives were subject to their own customary laws, where Foreign Orientals were also subject of their own customary law, unless otherwise regulated differently. Staatsblad [State Gazette, hereafter S.]. 1925: 415, Art. 163. See also Gautama & Hornick, supra n. 5 at 2-3. Foreign Orientals consisted of Chinese, Indians, and Arabs living in Indonesia. In fact, there were few such regulations. The most important of these were:

S. 1917:129 and S. 1924:557, which subjected the Chinese to Dutch law for most family matters;

S. 1882:152, which established Islamic courts to regulate most family matters for Moslems;

S. 1933: 74, which established rules for the marriage of Native Christian Indonesians.

[8] Risalah DPR XI [Letter of the House of Parliaments XI], 18 September 1973 as cited by Khoiruddin Nasution and Indonesian-Netherlands Cooperation in Islamic Studies, *Status Wanita Di Asia Tenggara : Studi Terhadap Perundang-Undangan Perkawinan Muslim Kontemporer Di Indonesia Dan Malaysia (Women Status in Southeast Asian: A Study on the Contemporary Marriage Laws in Indonesia and Malaysia)* (INIS, 2002), pg. 55.

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Article 2 Verse 1 and Article 44 which obliged a marriage to be registered with the related government office in order to be considered legal. It was not required by Islamic norms. Article 11 clearly showed a contradictory norm. It allowed an interfaith marriage. Those two provisions triggered a strong resistance from Muslims. Note that Muslims were the majority of the Indonesian population. The resistance changed the course towards more diverse approach of the Marriage law. There was compromise covering five provisions.[9] *First,* Islamic law will not be diminished or altered. *Second,* the legal instruments of Islamic law also will not be diminished or altered including the Act Number 22 Year 1946 on Marriage Registration[10] and the Act Number 14 Year 1970 on the Judiciary Power[11] (the *old Judiciary Power Act*). *Third* compromise provided that the conflicting norms of the law should be removed. *Fourth,* the marriage registration will not be part of the legality requirements of marriage. And the *last* was the need for further law preventing an arbitrary divorces and polygamy marriages. The final law was issued by the house of parliament in 2 January 1974 as Act Number 1 Year 1974 as *Marriage Act* known today and came into force in 1 October 1975.

I argue three propositions on the Indonesian legal system to the extent of its relevance with the incorporation of Islamic Law based on the compromise.

First proposition, Indonesian legal system is a mixed legal system where Islamic Law has been taking some significant roles. On this account, the enactment of the *Marriage Act* can be considered as a milestone. The final draft of the *Marriage Act*, Article 2 Verse 1 reads, “A marriage is legal if it is done *in compliance with the persons’ Religious laws or beliefs*.” [*Emphasis added*] Verse 1 functions as a clause available for the diffusion of Islamic Laws. A similar clause is repeated in several sections of the *Marriage Act*.[12] The point is that it

[9] As reported in Tempo, 22 December 1973, pp. 9-10, "Masih Pasal 1" [Still Article One]

[10] Undang-Undang Nomor 22 Tahun 1946 tentang Pentjatatan Perkawinan (Act Number 22 Year 1946 on Marriage Registration).

[11] Undang-Undang Nomor 14 Tahun 1970 tentang Kekuasaan Kehakiman (Act Number 14 Year 1970 on the Judiciary Power). This act is then amended twice through the Undang-Undang Nomor 4 Tahun 2004 tentang Kekuasaan Kehakiman (Act Number 4 Year 2004 on the Judiciary Power) and Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman (Act Number 48 Year 2009 on Judiciary Power. The second amendment is to accommodate the Sharia Court of Aceh into the hierarchy of Indonesian Courts. For the purpose of the discussion of this paper, the first one will be referred as the Old Judiciary Act, while both the new ones will be referred as the Judiciary Acts.

[12] Article 6 Number 6 Under the Section II on the marriage requirements clearly states that the validity of requirements listed on the Acts is linked to one’s religious laws and beliefs. Article 8 does

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strengthens the legal basis for the Islamic laws to assert its role in the area of marriage law.

Further, the second point of the compromise reads that the legal instruments of the Islamic law will not be altered. It is the legal implication of asserting the role of Islamic Law. One of the legal instruments referred here was the Islamic Court. The seed for the establishment of Islamic Court can be traced back in the *Old Judiciary Act*. Article 10 Under the Section II on Judiciary Bodies provided that the judiciary power is established through four courts. One of them is the Islamic Courts. The establishment of Islamic Court was arguably prone to be neglected if the proposed law 1973 was the one passed by the parliament. The proposed law would apply single marriage law. That implied that there is no need for different court as well. To that end, the *Marriage Act* clarified the need for the Islamic Court as an essential legal instrument instead diminished its role. Article 63 Number 1 says, "[T]he intended Courts in this Act are: a. *Islamic Court for Muslims;* b. Civil Court for others." [*Emphasis added*]

The subsequent development was then the *Islamic Court Act*. In 1989, the Parliament passed the Act Number 7 Year 1989 on Islamic Court[13] (the *Islamic Court Act*) bestowing jurisdiction over six *rationa materiae* applicable over Muslims as its *rationa personae.*[14] Article 49 Number 1 covers jurisdiction over marriage, inheritance, testament and bequest done through Islamic transactions, *waqaf*, and *sadaqah*. The Act Number 3 Year 2006 adds *zakat, infaq,* and Islamic Finance.[15]

The first *Islamic Court Act* established a jurisdiction legal basis for the Islamic Law. From six *rationa materiae,* there is need to provide a coverage of their substantive laws. The marriage law has been covered by the *Marriage Act*, while the other five were largely left untouched. But, as the *Marriage Act* also create a lot of space for religious laws, there was also need for marriage substantive law to

that as well on listing the prohibited marriage caused by blood relationship. It lists the provisions as non-exhaustive lists tied to religious laws. The list goes on.

[13] Undang-Undang Nomor 7 Tahun 1989 sebagaimana diamandemen oleh Undang-Undang Nomor 3 Tahun 2006 dan Undang-Undang Nomor 50 Tahun 2009 tentang Peradilan Agama (Act Number 7 Year 1989 as amended by Act Number 3 Year 2006 as amended by Act Number 50 Year 2009 on Islamic Courts)

[14] Article 1 Number 1 of the Islamic Court Act.

[15] The jurisdiction of Islamic Finance broadens the *rationa personae* of Muslims including person or legal personality that submits to Islamic Law as governing law on its affairs. See the Explanation of Article 49 Act Number 3 Year 2006 on the Amendment of the Islamic Court Act.

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further complement the *Marriage Act.* That lead to the effort to compile Islamic Laws over those six *rationa materiae.* The *Compilation* of Islamic Laws (the *Compilation*) consisting of three parts, namely Marriage, Inheritance, and *Waqaf* was done compiled by the Ministry of Religion Affairs in the 1991. The other three were left behind because there were not many disputes regarding those three. There are three instruments as a legal basis for the *Compilation* as a governing law in the Islamic Court. *First,* Presidential Instruction Number 1 Year 1991 endorsing the use of the *Compilation* in those three area dispute settlements. *Second,* Ministry of Religious Affairs Decision Number 154 year 1991 also endorsing the use of the *Compilation*. This time specifying its use as a complementary source of the existing laws. And the *third* instrument was the Circular Letter of General Director of Islamic Courts Number 3964/EV/HK.003/AZ/91 instructing the Chief Judges of Islamic Courts on the use of *Compilation* as a source of law.

Second proposition, the Islamic Law is the applicable law in the Islamic Courts. It complements the norms that should govern the decision-making process over nine *rationa materiae* bestowed under the Judiciary Acts. Without trying to make it an exhaustive list, the sources of Islamic law both procedural and substantive laws are: a. the Judiciary Acts; b. the Islamic Court Act; c. the *Marriage Act*; and d. the *Compilation*. The *Compilation* comprises of three books regulating marriage, inheritance, and *waqaf.*

One would argue that the legal basis for the *Compilation* as an applicable law in Islamic Court is weak. Under the Article 7 Verse 1 of the Act Number 12 Year 2011 on the Legal Framework of Indonesian Acts,[16] there are seven norms that form Indonesian legal system. The *Compilation*'s legal instruments are none of them. Hence, the use of the *Compilation* has weak to no legal basis.

The counterargument for that would be based on two premises. *First,* the subsequent Article 8 of the Legal Framework Act provides that legal instruments other than listed on Article 7 are recognized. They are legally binding provided there is no conflict of laws with legal instruments sitting on the higher hierarchy. This premise is clarified with the fact that, the similar legal instrument

[16] Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan (Act Number 12 Year 2011 on the Legal Framework of Indonesian Acts)

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was being used to 'bring into force' other *Compilation* of Islamic Law. An Indonesian Supreme Court Regulation Number 2 Year 2008 on the *Compilation* of Islamic Finance Law[17] was issued intended to be the legal basis for the use of the *Compilation* in Islamic Court. The Supreme Court Regulation falls within the category of other legal instruments, yet still effectively being used as the legal basis to establish the compiled Islamic Law on finance as an applicable law. This first premise lead to the *second* premise. While the first one is a legal argument, the second is a non-legal one. Since their first inception, the *Compilation* has been becoming the applicable law and the source of law in Islamic Court. There are ubiquitous Islamic Court's decisions that based their reasoning on the *Compilation*.[18] The judges even go further by looking the law beyond the *Compilation*. They use the classical Islamic legal texts and legal maxims in their reasoning where the *Compilation* doesn't say anything on the discussed case.[19] This empirical evidence supports the proposition of the Islamic law as the applicable law in the Islamic Courts. To this end, I also use the proposition 'Islamic Law as an applicable law' that covers not only Islamic Law of the Acts and *Compilation*s, but also beyond those.

Third proposition is intended to clarify the scope of the applicability of Islamic Law in the Indonesian legal system. It is the *rationa personae* of the Islamic Court and Islamic Laws. The proposition is that Islamic Law applies to Muslims and only within the Islamic Courts. This is simply a legal consequence of the first and second propositions stating that Indonesia has a mixed legal system. There is no uniformity of laws in nine *rationa materiae*. On those nine areas including marriage and inheritance, the applicable law for Muslims is the Islamic Law. This paper confines the discussion on this proposition.

Nine Judges of the ICC handed down the decision regarding the constitutionality of Articles 2 Verse 2 and 43 Verse 1 of the *Marriage Act* in 17

[17] Peraturan Mahkamah Agung Republik Indonesia Nomor 2 Tahun 2008 tentang Kompilasi Hukum Ekonomi Syari'ah (Indonesian Supreme Court Regulation Number 2 Year 2008 on the *Compilation* of Islamic Finance Law)

[18] See Huzaemah Tahido, 'Kedudukan Kitab Kuning (Kitab Fiqh) setelah lahirnya kompilasi Hukum Islam (Classical Islamic Legal Texts after The *Compilation* of Islamic Laws)' (Working Paper, 11 May 2015) <http://repository.uinjkt.ac.id/dspace/handle/123456789/26642>.

[19] 'Posisi Kitab Kuning Dalam Legislasi Hukum Islam Di Indonesia (Classical Islamic Legal Texts in the Development of the Islamic Law in Indonesia)' <http://amanahru.blogspot.com/2014/05/posisi-kitab-kuning-dalam-legislasi.html>.

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February 2012. It was the ICC Decision Number 46/PUU-VIII/2010 (the Decision).[20] The Verses in question were, "2. [E]ach marriage is registered upon the requirements of the Act" and "1. [T]he child born outside marriage only has legal relationship with his/her mother and her family" respectively. Those two Verses should be deemed unconstitutional before the Articles 28 B Verses 1 and 2 and 28 D Verse 1 of the Indonesian Constitution 1945[21] (the Constitution) on Human Rights.

Relevant Facts

The applicants for the Judicial Review was Machica Mochtar (Machica) and Muhammad Iqbal Ramadhan (Iqbal), the son of Machica.[22] She was a Muslim and married to Moerdiono, also Muslim, in 20 December 1993 with all marriage requirements under Islamic Law satisfied. It was a polygamy marriage for Moerdiono.[23] Nine judges unanimously held partially of the claims.[24] The Judges upheld the unconstitutional claim over Article 43 Verse 1, while denying the unconstitutional claim of the Article 2 Verse 2. In doing so, the Judges ruled that Article 43 Verse 1 should read as, "a child born outside marriage have legal relationship with his mother and their mother's family, *he also has blood relationship including legal relationship with his father as long as it could be proven by means of scientific findings according to the law***"** [Emphasis added]

There were two claims made. The *first one* was on the unconstitutionality of Article 2 Verse 2 of the *Marriage Act* based on Articles 28 B Verse 1 and 28 D Verse 1 respectively.[25] The applicants argued that the marriage between Machica and Moerdiono was legal. But, they didn't register the marriage to the related Office as the Law requires them to do so. One of the reason was that Moerdiono at the time was still in a marriage. And it was arguably hard to obtain a polygamy marriage permission from Islamic Court. In 2008, an Islamic Court in a County level decided that there was marriage, but ruled out to confirm the marriage.[26]

As a result, Machica argued that she lacked legal protection under the

[20] Putusan Mahkamah Konstitusi Repubik Indonesia Nomor 46/PUU-VII/2010 (Indonesian Court of Constitution Decision Number 46/PUU-VIII/2010) (ICC Decision 46/PUU-VII/2010 hereafter)
[21] Undang-Undang Dasar 1945 (The Indonesian Constitution 1945)
[22] ICC Decision 46/PUU-VIII/2010 paragraph 1.2.
[23] ICC Decision 46/PUU-VIII/2010 page 3
[24] ICC Decision 46/PUU-VIII/2010 pages 38-39
[25] ICC Decision 46/PUU-VIII/2010 page 4
[26] Penetapan Pengadilan Agama Tigaraksa atas Perkara Itsbat Nkah Nomor 46/Pdt.P/2008/PA.Tgrs (Tigaraksa Islamic Court Decision on Marriage Confirmation Number 46/Pdt.P/2008/PA.Tgrs)

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Indonesian legal system absent the authentic document. This arose because Article 2 of the *Marriage Act* requires that a marriage should be registered according to the applicable law. Thus, the applicants argued that marriage registration has to be declared unconstitutional in the face of Article 28 B Verse 1 of the Constitution. The article guarantee the person rights to a marriage and to have offspring provided the marriage is legal (the marriage right hereafter). Article 28 D Verse 1 also guarantee the person rights to have equal protection of the law (equal protection right hereafter). Machica's rights to an impartial legal protection were hindered because of the Article 2 Verse 2. That was the *first claim*.

The *second claim* concerns the legal implications rendered by Article 43 Verse 1. The applicants argued that Iqbal as the son of Machica and Moerdiono lacked legal rights since Article 43 Verse 1 rules that the child born outside a marriage only has legal relationship with his/her mother.[27] The applicants argued Iqbal's constitutional rights to equal protection was hindered by the Article 43 Verse 1. Iqbal should be treated equal since the marriage itself was legal under the requirements of Islamic Law. Thus, Article 43 Verse 1 should be deemed unconstitutional. There was request to adjudicate *ex aquo et bono* in case there was different opinion from the Judges.[28]

Legal Issues

Legal issues were quite straight forward. The Judges formulated the issues as '[A]re the Article 2 Verse 2 and Article 43 Verse 1 unconstitutional?[29]

B. Research Method

Legal Reasoning

The Judges engaged in both jurisdiction analysis and also on the merit of the case. On the jurisdiction analysis, the Judges analysed their jurisdiction over *rationa materiae* of the case. Once it was satisfied, they went further to analyse their jurisdiction over the applicants' legal standing, or their *rationa personae.*[30]

On the Jurisdiction

Act Number 24 Year 2003 as amended by Act Number 8 Year 2011 on the ICC[31] (the *ICC Act*) Article 10 Verse 1 sets out the *rationa materiae* of the ICC.

[27] The ICC Decision 46/PUU-VIII/2010 page 5

[28] The ICC Decision 46/PUU-VIII/2010 page 12

[29] The ICC Decision 46/PUU-VIII/2010 paragraph 3.4

[30] The ICC Decision 46/PUU-VIII/2010 paragraph 3.2

[31] Undang-Undang Nomor 24 Tahun 2003 sebagaimana diamandemen oleh Undang-Undang Nomor 8 Tahun 2011 tentang Mahkamah Konstitusi (Act Number 24 Year 2003 as amended by Act Number 8 Year 2011 on the Indonesian Court of Constitution)

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Relevant to this case, letter a provides that the ICC has the first and final jurisdiction over the examination of the unconstitutionality of an Act's norm. This jurisdiction is also guaranteed under the Constitution Article 24 C. The ICC Act Article 51 Verse 1 then regulates the *rationa personae* eligible to bring a claim before the ICC. It says that the applicants should be an individual Indonesian citizen whose constitutional rights are injured by an Act.

On the *rationa materiae,* the Judges decided that they had jurisdiction. It was obvious that the case concerned a claim to uphold two Articles of the *Marriage Act* unconstitutional.[32] On the *rationa personae*, Article 51 implies that there are two variables to be met. *First,* the applicant is covered on the list of the Article 51. *Second,* there is constitutional rights injured by the Act in question. Regarding this requirement, the Judges also decided that the applicants satisfied the requirements of the *rationa personae.*[33] The Judges used the test of *causal verband* doctrine to determine the claim. They conceded to the view that it was sufficient to consider the applicants eligible based on the fact there was simply a relationship between the *Marriage Act* and their constitutional rights' injuries.

On the Merit of the Case

There are two norms in question. Article 2 Verse 2 on the marriage registration and the second was Article 43 Verse 1 on the legal status of an illegitimate child. The Judges discussed each article as a separate analysis.[34]

The Judges began their reasoning by addressing first claim on the legality of marriage without registration.[35] They wrote that the marriage registration was never meant to be a legality requirement of a marriage. The Explanation Annex of the *Marriage Act* Number 4 Letter b. was in rhyme with that. It clearly stated that, "…, a marriage is legal as long as the requirements according to one's religious law and belief are satisfied." It also clarified the nature marriage registration that resembles the need to register many significant events throughout someone's life. Take for example the need to obtain birth certificate by registering to the related state office. The registration is intended for the state to do its task protecting their citizens. No one suggests

[32] The ICC Decision 46/PUU-VIII/2010 paras 3.3 and 3.4

[33] The ICC Decision 46/PUU-VIII/2010 paras 3.5-3.10

[34] The ICC Decision 46/PUU-VIII/2010 paras 3.11-3.15

[35] The ICC Decision 46/PUU-VIII/2010 para 3.12

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that without birth certificate, one cease to exist. However, the certificate functions as an authentic document making it easier for an evidentiary purpose. The same goes with the Marriage registration. The Judges suggested that without registration, no one will consider a marriage invalid provided the religious requirements were met. But the registration protects any parties' legal rights guaranteed under the law in case there is an inevitable dispute. This is quite complicated. But, it merely reflected the objective to improve legal protection without conflicting the religious laws.

Under that argument, the Article 2 Verse 2 on the marriage registration does not hinder one's constitutional right to establish a marriage and offspring provided it was legal. The marriage registration also does not hinder one's constitutional right to equal protection. The Judges argued that the denial of Machica's right under a legal marriage was not because of the requirement to register marriage but the failure to comply with the applicable law. The *Marriage Act* requires a polygamy marriage to obtain permission from the Islamic Court. Articles 3 and 4 of the *Marriage Act* set out the requirements for polygamy marriage. Moerdiono didn't meet the requirements. He might be aware of that and decided to proceed anyway without Islamic Court permission. That in turn lead Machica couldn't obtain a marriage confirmation from the Islamic Court. Not because the marriage need to be registered, but because the marriage requirements of a polygamy marriage were not satisfied. The Judges denied the first claim.

The reasoning then moved on with the unconstitutionality of Article 43 Verse 1 of the *Marriage Act*.[36] The judges weighed between two principles. The first principle is the principle behind Article 43 Verse 1, which is the principle of *nasab*. *Nasab* is lineage. It is a deep-rooted principle that must be preserved. *Nasab* also becomes one of the causes of inheritance and child maintenance payments. The *Marriage Act* incorporated this principle into the Article 43 Verse 1. The second principle is the principle of equal protection. The Judges chose the lesser between two evils. They conceded that the second principle should triumph the first one. The reason was that children should not bear the sin committed by the parents. The ICC Judges upheld the second claim. They decided that the Article 43 Verse 1 was unconstitutional if read as excluding the child legal relationship with the father. Hence, the Verse should be

[36] The ICC Decision 46/PUU-VIII/2010 Para 3.13

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read, “a child born outside marriage have legal relationship with his mother and their mother’s family, *he also has blood relationship including legal relationship with his father as long as it could be proven by means of scientific findings according to the law.”*

C. Discussion

I agree on the outcome of the first claim but differ on the approach. I disagree on the reasoning of the second claim and also eventually on its outcome. To state it earlier, my argument would be that the Judges failed on their understanding of the law. The failure created an inconsistency of the law itself within the *Marriage Act* and in the broader context of Indonesian marriage and inheritance law. There is strong argument that the principle of equal protection for the children regardless of the marriage status. I agree with that. But, in order to arrive to that outcome, one must resort to the best possible way.

On the Legality of a Marriage and Its Implications

What is a legal marriage? What rights is a legal marriage entitled to? My answers revolving on those two question will be a foundation for the rest of my analysis. When it concerns the legality of a marriage of a Muslim, there are two applicable law respectively hierarchy-wise.[37] *First,* the *Marriage Act*. It says on the Article 2 Verse 1 that a marriage is legal provided person’s religious laws or beliefs requirements are met. It attributes the authority of legality determination to the religious laws. That leads to the *second* applicable law, the Religious Laws. In this Machica’s case, the Islamic Law is represented by the *Compilation*. The *Compilation*, Section V on the Requirements of Marriage Article 14 to 29, states that there are five elements of marriage: the bride and the groom; the bride’s guardian; two righteous witnesses; the marriage contract done orally and written. Each element has its own requirements under Islamic Law. Several of the requirements have been incorporated by the *Marriage Act* as its effort to improve the protection of women from the common old-marriage practice abuses. To this end, the marriage between Muslims will be legal according the Law as far as it comprises of those five elements and satisfies its requirements under the Islamic Laws.

[37] The proposition of the diversified sources of law in marriage is established earlier. At some point, there are unified practices. But on other than expressly stated provisions, religious law and beliefs of the person play a significant role. As long as there is no conflict of law, the religious law and beliefs will be binding.

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Legal Implications. But, what does that legality entail? This is the tricky part. One must cautiously examine the legal framework of the *Marriage Act* in order to avoid wrong conclusions. Its legal framework has been constructed to meet two objectives. To provide sufficient legal protection for a marriage and not to conflict religious laws. On the proposed law 1973, it was intended that the marriage registration determines the legality of a marriage. But, the compromise prevented that. The legality of a marriage only determined by the elements and requirements of the persons' Religious Laws and beliefs. By now, it should be clear that the Judges reasoning was appropriate on this account. The marriage should be deemed legal even without registration. And the legal implications of that would be the rights to have a marriage and offspring as guaranteed by the Constitution under Article 28 B Verse.

But, the *Marriage Act*'s legal protection is not necessarily granted just by legality determination alone. A marriage has to be registered in order for someone to be eligible for protection under the *Marriage Act*. That's the complexity of its legal framework. In order for a wife to pursue a claim over her husband *i.e.* on living expenses and child allowances, a marriage has to be registered.

Seeing it from the principal situations where the legal rights arise, there are two different legal rights granted under the *Marriage Act*. The *first* one is the right to establish a marriage and offspring. It is a constitutional right although in a rather limited fashion containing a qualifier of legality requirement. This right is implied if a marriage is legal. The *second* right is the right to the *Marriage Act* legal protection.

This right arises because the marriage registration requirement is satisfied. And it is not a constitutional right in the sense it is taken for granted. It is more like a classification law distinguishing treatment between people. It is a right owing its existence to the *Marriage Act*. At some circumstances, classification is considered unconstitutional. But, in order to do that the law must fail on a designated test as later discussed.

On the issue of the second claim. The *Marriage Act* in question of the second claim was Article 43 Verse 1. It provides that an illegitimate child only has legal relationship with his mother and his mother's family. I argue that the question needed to be addressed firstly on this case

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is 'is a child born within an unregistered legal marriage considered as an illegitimate child?' The answer is no. My argument is straightforward. Because the marriage itself is legal. Hence, it legally implies that the child born within an unregistered legal marriage should not be prevented from having a legal relationship with his/her father. Whether the marriage is registered or not is irrelevant. Article 43 Verse 1 is not applicable for a child born within unregistered legal marriage. The applicable sources of law would be the *Compilation* and the Islamic Law itself to which Islamic Court's Judges refer when both sources are silent.

Analysis on Machica's Rights.

I disagree with the Judges' approach to determine their jurisdiction. While there were two issues to be discussed concerning Machica's right, the Judges just simply said that there were injured rights on each claim without elaborating more. For me, those two issues were: was Machica's constitutional right to marriage infringed by the marriage registration requirement? was Machica's constitutional right of equal protection infringed by the marriage registration requirement?

On the Jurisdiction

On the first issue, I argue that the Judges should rule out even on the jurisdiction claim. Machica was not eligible to bring a constitutional claim in the first place. She was an Indonesian citizen. That was unquestionable. But, was her constitutional right to establish marriage infringed by the marriage registration? To answer that question, first thing first, the Judges should determine the legality of Machica-Moerdiono marriage. From this point, the Judges than could decide the jurisdiction. For the sake of discussion, say that the Machica-Moerdiono marriage was proven satisfied all the requirements as per Islamic Court Decision at County Level. The legal implication was that their marriage was legal. The constitutional right of marriage is a constitutional right with marriage legality qualifier. Since the marriage was legal, Machica satisfied the qualifier. Machica had the right to form a family as guaranteed by the Constitution. The next question then, did the marriage registration requirement infringe that right? My answer is it didn't. Machica had that right. The state would not intervene the marriage and prevent Machica to have offspring from that legal marriage. The jurisdiction should fail on the first right on the first claim.

On the second issue claimed, I also argue that the claim should be denied on the jurisdiction. The Applicants and the

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Judges seemed had no clarity of their understanding of the law. There is no direct cause/*causal verband* of the marriage registration and their infringed equal protection right. The applicable law of a polygamy marriage is Article 4 of the *Marriage Act*. It allows a man to have a polygamy marriage through Islamic Court permission, provided the requirements are satisfied. A man is only allowed to do so under one of three reasons: 1. his wife couldn't perform her obligations or; 2. his wife suffers from an incurable disease and/or disability or; 3. his wife is infertile. Further, a man also must be able to demonstrate his ability to support more than one family. It clearly reflects the effort of the *Marriage Act* to provide better protection for women over the old practices of marriage. Those requirements on the polygamy marriage serves as an *ex ante* safeguards aiming to assert more protection.

So, the *Marriage Act* was enacted in 1974. The Machica-Moerdiono marriage was held in 1993. Based on the doctrine of *een ieder wordt geacht de wet/het recht te kennen,* everyone is presumed to know the law once it is enacted. The Applicant was presumed to know the law of the polygamy marriage. It was obvious on the fact-finding that Moerdiono didn't meet the polygamy marriage requirements set out by the *Marriage Act*. Moerdiono didn't have the Islamic Court permission. Therefore, the Applicant didn't register the marriage. I differ with the Judges on the reasoning in the sense that Machica's equal protection's right was not infringed directly by the marriage registration invoked by Machica.

On ex Aquo et Bono Thought

The story might be different if Machica invokes Article 4 on the requirement of polygamy marriage as the basis for her claim. There is direct causal relationship between her equal protection infringed rights and Article 4. That is so because her ability to register her legal marriage was hindered by Article 4. Islamic Court didn't uphold her claim of marriage confirmation because of that very reason. Not because of the marriage registration. Invoking Article 4 might change the course of the reasoning consideration. But, as far as my legal reasoning goes, it only reaches the jurisdiction claim. On the merit, it should fail. The reason as follows.

Article 24 D Verse 1 on equal protection of law is a constitutional right that has been proven effective to get rid of discriminatory legislation. But, the equal protection clause should not be construed

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as forbidding all unequal laws and requiring every law to be equally applicable to all individuals.[38] On some circumstances, classification must be permitted. There are two pronged-tests to determine the constitutionality of a classification before the equal protection clause. To make it easier, I refer to the established equal protection clause test of the US Constitution.[39] *First,* does that legislation apply to all people situated similarly? And *second,* is that classification based on proper purpose?

On the first test, the polygamy marriage passes. It applies to all men similarly situated irrelevant his race, cultures, or even religion. It requires a man to obtain the Court's permission before his polygamy marriage. On the second test, I contend that the Article also passes the test. Polygamy as a basis for law classification is justified to provide better protection for women as discussed earlier. The requirements to demonstrate ability to support more than one family and to treat fair each family are understandably significant for the purpose of improving old practices of marriage. Thus, the hypothetical claim of Article 4 of the *Marriage Act* as unconstitutional before the equal protection clause should fail on the merit.

Analysis for Iqbal's Injured Rights

There were also two legal issues to be decided on Iqbal's injured rights claim. *First,* was Iqbal's constitutional right to a fair legal protection infringed by the marriage registration requirement?; *second,* was Iqbal's constitutional right to a fair legal protection was infringed by Article 43 Verse 1? Article 43 Verse 1 of the *Marriage Act* only applies to the children born outside a marriage. The determinant of the legal relationship of a child with his father should be whether the child is born outside marriage or within. If the child is an illegitimate child, Article 43 Verse 1 excludes the child from having legal relationship with the father. On contrary, if the child is born within marriage, Article 43 is not applicable. And to determine whether this article is applicable to Iqbal or not, the issue to be determined here is 'was Iqbal considered as an illegitimate child?'

The answer is no. He was born within a legal marriage. Both the marriage registration and Article 43 Verse 1 are not applicable to the determination of Iqbal's

[38] Harry D Krause, (1966), *Equal Protection for the Illegitimate,* 65 Michigan: Michigan Law Review, pg. 477- 484.
[39] Charles L Black Jr, (1959), *Lawfulness of the Segregation Decisions*, The' 69 *Yale Lj* 421, 424. And Herbert Wechsler, (1959), *Toward Neutral Principles of Constitutional Law*' Harvard: Harvard Law Review pg. 1-32.

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relationship with his father. The marriage registration only concerns the legal framework for a marriage to be considered eligible for the *Marriage Act* legal protection. Article 43 Verse 1 concerns only the child born outside marriage. Iqbal should not be prevented from having any legal relationship with his father. That said that Iqbal constitutional rights of equal protection was not injured by both marriage registration and Article 43 Verse 1 altogether. The injured right's requirement of *rationa personae* was not met in order for Iqbal to be eligible to bring claim before the ICC. The jurisdiction should fail on the claim.

Theoretical Disagreement

Up to this point, I argue that my reasoning walks on the most consistent legal path based on the complexity of the *Marriage Act* and other applicable laws. I contest the Judges approach on the reasoning. I am on the same side when they emphasized that the legality of a marriage was not determined by the marriage registration. But, questioning the basis when they asserted the ICC jurisdiction over Iqbal's claim. Iqbal wasn't an illegitimate child. It was a rookie mistake when the Judges considered Iqbal as a child born outside a marriage. The applicants did that on their argument and so did the Judges on their reasoning.[40] How come the Judges accepted that the marriage was legal and then upheld jurisdiction because Iqbal's rights ware infringed? While the only way his right can be infringed is if he was an illegitimate child. And he was not. That was inconsistent.

I consider that as a poor understanding of law. It is unknown whether the Judges were aware of that and overrode the consistent reasoning for a greater principle or were simply making a rookie mistake. The thing that I know for sure is that they did it to consider an unjust legal consequence of the law for a child born outside a marriage. But even with an interest of justice on their side, it is so hard to find justification for that.

Under the Dworkin Interpretivism, there is a pre-interpretative stage. A stage in which the rules are considered to provide the tentative content of the practices.[41] So far at this point, all the applicable rules provide a clear and consistent content of the practices on the inheritance law relevant to this case. The child born outside a marriage only has

[40] See the ICC Decision 46/PUU-VIII/2010 page 8 for the applicants' argument and page 32 para 3.9 for the Judges' reasoning.
[41] Ronald Dworkin, (1986), *Law's Empire,* Harvard: Harvard University Press, pg. 64–65.

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legal relationship with his/her mother and mother's family. In order for a Judge to bend this practice, a threshold objection must be passed.[42] When that threshold is passed, a so-called hard case arises. And when there is hard case, the Judges must choose between eligible interpretations of some statues that represent the public standards from a standpoint of political morality.[43]

The analysis of Iqbal's right should be a straightforward analysis. There was no right infringed by the Act. This shouldn't become a hard case. The possible explanation for the Judges to consider this as a hard case was that they must consider Iqbal as an illegitimate child. Hence, they 'thought' they faced a dilemma. On one side, they ruled out the claim in the expense of injustice to Iqbal. Or they uphold unconstitutional claim in the expense of inconsistency with the principle of lineage. It was their illusion because of their mistake of understanding of the law. Because in fact, they didn't face any dilemma here. Iqbal as a legitimate child is not prevented to have legal relationship with his father. But, here we are. The Judges decided to assert their jurisdiction over a mistake. Let this matter sinks. This was actually a good opportunity to address the illegitimate child's right to equal protection. Unfortunately, to make matter worse, the Judges also failed on their merit's reasoning as later discussed. First, I am going to build the argument showing that there are conflicting norms on this issue.

How Does the Issue of Conflicting Norms Arise?

I detach my analysis with the actual claim that brought the case before the ICC Judges. Because the discussion on the Iqbal's rights should have ended on the jurisdiction. Instead, I will analyse this part as a pure intellectual disagreement of the law. The question thus, is the constitutional right of the child born outside marriage to equality before the law hindered because of the Article 43 Verse 1? And if so, how to address that?

The Applicable Laws

The issue here is the difference of legal implications of Article 43 Verse 1 between the child born within a marriage (legitimate child hereafter) and outside from the sources of Islamic Law standpoint, applicable to Muslims. The Islamic Law standpoint on this sense will be mostly represented by the *Compilation* with reference to Islamic jurist scholarly

[42] On threshold objection see Ibid 11–30.
[43] Ronald Dworkin (Printed Materials), (1986), *Law's Empire: Dworkin and Interpretivism,* pg.63-70.

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writings. The reason why I discuss the applicable law from the standpoint of Islamic law is because Article 43 Verse 1 was influenced heavily by Islamic Law.

The *first* and foremost entitlement of the legitimate child is *nasab* attribution.[44] *Nasab* is the Islamic term for family ties.[45] Article 98 of the *Compilation* provides the further definition of a legitimate child.[46] There are two requirements if a child to be determined as a legitimate child thus entitled a *nasab* to the parents and the parents' families. Those are '*as a result'* and '*within'* a legal marriage. Once those requirements are satisfied, there is *nasab* attribution resulting in the child entitlement to inherit from the parents.[47] Article 174 Number 1 of the *Compilation* rules that *nasab* is one of the causes for inheritance right. Article 80 also provides that *Nasab* renders an obligation to the father to bear the cost of a child support payment and maintenance.[48]

What makes an illegitimate child different with the legitimate one? Article 100 of the *Compilation* stipulates that the essential difference is that the illegitimate child has no *nasab* attribution to the father and father's family.[49] The previously discussed Article 98 infers that born outside marriage may take form in two situations. *First,* it can happen to a child that is born within a marriage, but not as a result of a marriage. In other word as a result of sexual intercourse with a man other than her husband. *Second,* it can also happen to a child that that is born outside a marriage, and consequentially not as a result of a marriage. On the first situation, as long as there is no denial from the husband, the child can be attributed *nasab.* On this case, the *nasab* is linked to the

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[44] Abdul Karim Zaidan, (1993), *Al-Mufassol fi Ahkam al-Mar'ah,* Beirut: Muassasah ar-Risalah tahun 1413 H/ 1993 M) First Edition Juz 9, pg. 321

[45] Wan Khudzri, (2013), *The Law of Nasab in Islam' (7 (4)),* Advances in Natural and Applied Sciences Pg. 393-394. Also see more comprehensive coverage on Ibrahim Mustafa, Ahmad Hassan al Zayyat et al. 1989. *al Mu'jam al Wasit*. Istanbul: Dar al Dakwah.

[46] According to the school of thoughts of Imam Syafie, Imam Malik and one of the branches of Imam Ahmad nasab take place within *lawful aqad nikah* together with both *imkan al-dukhul* and *al-talaaqi* (Abu Ishaq al-Shirazi, *al-Tanbih fi'l- Fiqh ala Madzhabi al-Imaam al-Syafi'i* (Matba'ah Musthafa, Last Edition, 1951) <http://archive.org/details/shirazistanbih>. 190, Al-Syirazi, *Al-Muhazzab*, Beirut: Dar al-Fikr. 2/120, Al-Buhuti, 1982. *Kasysyaf al-Qina`* Beirut: Dar al-Fikr` 5/406). Meanwhile, other branches of school of thoughts of Imam Ahmad have a view that nasab take place within *lawful aqad nikah* with *dukhul haqiqiyy* (Al-Mardaawi, Al-Insaf fi Makrifah al-Rajih min al-Khilaf, Beirut 9/258).

[47] As-Sayyīd Sabiq, *Fiqh Al-Sunnah Volume 3* (Dār al-Fikr, al-Ṭab`ah 2, 1419) pg.429.

[48] Ibnu Qudamah, *al-Mughni*, Bairut-Dar al-Fikr, First ed, 1405 H, Juz 8, 171

[49] Aḥmad ibn `Abd al-Ḥalīm Ibn Taymīyah and `Abd al-Raḥmān ibn Muḥammad Ibn Qāsim, *Majmū` Fatāwá Shaykh Al-Islām Aḥmad Ibn Ṭaymīyah Volume 32* (Mu'assasat al-Risālah, 1418) 134–142.

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husband, not to the biological father.[50] On the second situation, an illegitimate child only has *nasab* to the mother.[51] Article 186 rules out the possibility of an illegitimate child to inherit. On the support payments, there is no expressly stated article ruling out the obligation. Islamic Jurists argued there is no obligation on child support. But, they don't prevent the biological father to make payments of child support and maintenance.[52]

Considering the legal consequences, *nasab* is conceptually similar to the meaning of legal relationship in the Article 43 Verse 1. There are two implications. *First,* Article 43 guarantees an illegitimate child's legal relationship with the mother. From historical standpoint, that was a progress. Not many countries guaranteed any legal relationship. *Second* Article 43 excludes a child born outside marriage from having legal relationship with his/her biological father. Article 43 Verse 1 has the same approach with Islamic Law. However, in doing so, the *Marriage Act* runs into the possibility to injure the equal protection of an illegitimate child. Before getting there, I will examine the principle behind this article.

The Bigger Picture of Article 43 Verse 1

The *Marriage Act* annex on the official explanation of the Act emphasizes on what the Act represents. It endeavours to represent the Constitution and the living culture in the best possible way.[53] What is the bigger picture behind the exclusion of an illegitimate marriage from having legal relationship with his father then?

I'd like to point out the *Marriage Act* explanation on the goal of a marriage. It says that the aim of a marriage is to establish a family that is happy and long-lasting.[54] Husband and wife are partners complementing each other developing their personalities to live a better life.[55] Within the marriage, the education of the future generation lies inevitably. The parents teach their children the values needed to be hold firmly. On a widely-cited research, premarital cohabitation produces attitudes and values increasing

[50] Based on the Prophet saying on the fornication child not denied by the husband, "The child belongs to the husband and for the man nothing." Found in *Sahih Al-Bukhari - Sunnah.com - Sayings and Teachings of Prophet Muhammad (صلى الله عليه و سلم)* <https://sunnah.com/bukhari>. Saying number 6749

[51] Ibnu Qudamah, *al-Mughni*, Bairut-Dar al-Fikr, First ed, 1405 H, Juz 7, 130

[52] Ibnu Qudamah, *al-Mughni*, (1985), *Bairut-Dar al-Fikr 1405 H, Juz 7*,Beirut: Da'ar al-fikr, pg. 485

[53] Explanation Annex of the *Marriage Act* paras 3-4

[54] Explanation Annex of the *Marriage Act* para 4 letter a

[55] Explanation Annex of the *Marriage Act* para 4 letter a

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the probability of divorce.[56] The marital instability and dysfunction in turn affects the development of the children.[57] For this particular reason, a marriage in Indonesia is the backbone of the society.

The sacredness of marriage is also influenced by the religious views inhibiting its cultures. Including those of Islam. Article 43 Verse 1 represents the principle of lineage. In Islam, the development of family must be through marriage.[58] Marriage is the only possible way to establish *nasab* that in turn determines other legal rights including maintenance payments and inheritance. A cohabitation living is strongly prohibited in Islam.[59] In fact, the perseverance of *nasab* or lineage is often considered as one of the five core values of the Islamic Law.[60] *Nasab* assumes a pivotal role in Islam. It bears the responsibility of children rearing. Parents perform the primary role of their offspring education. This is as a consequence of Islam considering offspring as one of the marriage objectives.[61] And at the end of the day, that offspring will assume its responsibility in the future.

To that end, the link that establish a marriage and lineage can be found. The principle of lineage attempts to provide a certainty of legal relationship between the children and the parents. It also highlights that a marriage is so sacred that as a consequence, there are several legal rights attributed. That's why there are no legal rights can be attributed to the child to the father without marriage. The relationship between marriage and the principle of lineage, thus, are protecting each other. The hostility of the law towards cohabitation living or fornication is one resort to provide the best environment for the development of the children. And the exclusion of an illegitimate child functions as an *ex-ante* deterrence instrument. The law reflects the marriage as the backbone of the society. Article 28 B Verse 1 also reflects those attitudes by placing establishing family and offspring only through legal marriage.

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[56] Refer to William G Axinn and Arland Thornton, 'The Relationship between Cohabitation and Divorce: Selectivity or Causal Influence?' (1992) 29(3) *Demography* 357. See also Claire M Kamp Dush, Catherine L Cohan and Paul R Amato, (2003) *The Relationship Between Cohabitation and Marital Quality and Stability: Change Across Cohorts?* 65(3) *Journal of Marriage and Family,* pg. 539.

[57] George W Dent Jr, (1999), *Defense of Traditional Marriage,* 15 *JL & Pol,* pg. 581-593.

[58] Taqiyuddin Abu Bakr bin Muhammad Al Husaini Al Hushoini Ad Dimasyqi Asy Syafi'I, *Kifayatul Akhyar fii Halli Ghoyatil Ikhtishor,* Juz 2, pg. 35-36

[59] Al-Qur'an on Al-Furqaan (the Separator) Verse 68 and Al-Israa' Verse 32.

[60] Mohammad Hashim Kamali, (2008), *Shari'ah Law: An Introduction,* London: Oneworld Publications, pg.132–133.

[61] Al Qur'an on An-Nahl (the Ant) Verse 72.

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Acknowledging the Infringed Rights

The subsequent question then, does that Article injure the illegitimate child's right of equal protection? All above justifications for the exclusions of a child born outside marriage from having legal relationship with the father are scattered in many articles.[62] But, one with sensible mind has to acknowledge that a child born outside marriage is just a symptom instead of a cause. It is different with the first issue considered in *ex Aquo et Bono* thoughts. On that case, Machica had the privilege of choice toward her action and its consequences while the illegitimate child didn't. The law should aim at providing the best legal framework bearing in mind that proposition.

I am using exactly the same test with the previous claim. *First,* does that legislation apply to people situated similarly? And *second,* is that classification based on proper purpose? Article 43 Verse 1 passes the first test but not on the second. Article 43 Verse applies to all illegitimate children irrelevant their backgrounds. Thus, the question to be asked is whether the 'born outside marriage' is a proper reason for classification. At the preliminary examination, the principles should be sufficient to justify the classifying nature of Article 43 Verse 1. But, those principles place the child more like having the privilege of choice. The child has nothing to do with the way he/she is born. Thus, 'born outside marriage' should not be a basis for a classification. For the sake of discussion, let's take the maximalist conclusion out of that tests. The child constitutional right of equal protection is injured by that Article. Of course, there would be arguments against that conclusion. But, the maximalist conclusion is needed to establish an equal competition with the principle of the sacredness of marriage and lineage. And this maximalist approach was apparently the ICC Judges' position.

The Dilemma and Possible Scenarios

This case begins to see the dilemma of hard case 'envisaged' by the ICC Judges. There is sacredness of marriage and lineage. And then there is the constitutional guarantee of equal protection. The dilemma arises when a Judge should decide the case of an illegitimate child. Should the sacredness of

[62] See Linda S Auwers, (1984), *Equal Protection and the Illegitimate Child Comment,* 21 *Houston Law Review* 229. Also Sakirman Msi, 'Indonesia Islamic Law Study on Children Nasab' (SSRN Scholarly Paper ID 2888312, Social Science Research Network, 21 December 2016) <https://papers.ssrn.com/abstract=2888312>. From the Catholic perspective, refer to William Sander, (1995), *The Catholic Family: Marriage, Children, and Human Capital*, Colorado: Westview Press.

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marriage institution triumph the principle of equal protection? Or should the equal protection of the law triumph the sacredness of marriage? There are two principles competing. That is hard case.

Possible Scenarios. Consider the first hypothetical scenario. The judges decide that the former principle should triumph the latter. They deny the claim and uphold Article 43 Verse 1. Consequentially, the child constitutional right of equal protection is hindered.

The judges argue that the pivotal role of marriage in the Indonesian society should be prioritized. Because that way, the value of marriage that has been the primary educational environment for a child can be preserved. Where without marriage, many children will run into incomplete parenthood education. Of course, the judges are aware the child constitutional right to equal protection. But in a long-term consideration, the sacredness of marriage should be kept intact for the society's good. Even without having legal relationship with the father, the child is still guaranteed with legal relationship with his father. The lesser between two evils would be denying the claim of the unconstitutionality of Article 43 Verse 1.

Consider the second scenario. The judges argue that the equal protection should triumph the principle sacredness of marriage. Taking into account the child innocence, the sacredness of marriage should not be used to exclude the child's constitutional right to equal protection. The judges agree that without marriage, legal relationship between a man and women shouldn't arise. It's their choice and they must be responsible of their own action. But that same reasoning could not be applied in the same way to determine child's legal relationship. Hence, the judges decide that born outside marriage should not prevent a child from having legal relationship with the father. That is what an equal protection should be. Thus, the decision should uphold the claim of the unconstitutionality of Article 43 Verse 1. In doing so, the judges sacrifice the principle of marriage sacredness. The second scenario was the scenario that happened to be the ICC Decision. But, in a rather different way. And that was poor reasoning.

Assessment of its Legal Consequences and Other Considerations

a. The Anchors

There are two anchors for the assessment. From naturalist and positivist view. *First*, Fuller's Internal Morality of Law. Fuller

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arguments on the morality that laws should have is functional. It is a progress on the naturalist side who seemed stuck with an argument of morality that is conceptually distant with the law itself.[63] Fuller built his morality based on procedural tenets widely regarded as part of the rule of law. Hence, it is considered as internal morality of law. That 'internal' attribution makes a difference and should be present in order for the law to be possible. First essential requirement is that there must be rules as a general form of the law.[64] It is impossible to create law if any given case must be decided in an ad hoc basis because there is no rule agreed upon. Laws also must be promulgated.[65] The ones who obey the law should know the norms expected from them. Then, retroactive rule-making should be minimized.[66] Laws should be set out in advance. Hence, laws must be prospective in nature. Laws also must be clear and concise,[67] not contradictory,[68] and not beyond the ability of affected parties.[69] While laws are expected to adapt to the constantly changing circumstances, the law itself should be constant.[70] Laws that change rapidly are needed to render a stable expectation of the society. The last requirement is that there must be congruence between the law and the official action.[71]

Second, Hart's Rule of Recognition. Rule of recognition is the central aspiration of the positivist. It attempts to 'provide conceptual tools with which law can be identified in terms of criteria of recognition, and hence, distinguished not only from brute force of arbitrary exercises of power, but also from other prevailing social norms deriving from custom, morality and religion.'[72] Hart shift the early positivist notion of law as a sovereign command backed by sanctions to one of law as a system of rules.[73] Hart' positivism consider that law and morality are conceptually different. Those might coincide. But to recognize the law, one must be getting rid the morality consideration. The only approach can be used is the jurisprudence analysis. There is no need to validate the law based on its moral value.

[63] Lacey, above n 1, 1070.
[64] Lon L. Fuller, (1969), *The Morality of Law*, New Haven, Yale University Press, pg. 46 http://www.jstor.org.ezp.lib.unimelb.edu.au/stable/j.ctt1cc2mds [accsess, 6 April 2017]
[65] Ibid 49.
[66] Ibid 51.
[67] Ibid 63.
[68] Ibid 65.
[69] Ibid 70.
[70] Ibid 79.
[71] Ibid 81.
[72] Lacey, above n 1, 1065.
[73] See generally HLA Hart, (1970), *The Concept of Law*, Oxford: Clarendon Press.

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b. The Assessment

I don't have anything to say on the first scenario. Because it is a status quo and the legal consequences pretty much remain the same with the applicable law of Letter A of this part. Hence, this part is dedicated to evaluate the second scenario above, and in particular the ICC Decision. And because it is about the ICC Decision, I begin my assessment from the jurisdiction decision.

First, the decision to assert jurisdiction over Iqbal's claim was not appropriately addressed and there is possibility of inconsistency. Two aspects for that assessment. On the reasoning aspect, the Judges were inconsistent on their own reasoning. They started with the legality of marriage that doesn't require registration to determine jurisdiction over Machica's rights. The sole determination of the legality is the persons' religious laws and beliefs. But, they didn't adhere to that reasoning to determine jurisdiction over Iqbal's claimed infringed rights. The reasoning should be done in a proper sequence. Article 43 only applies to a child born outside marriage. The judges must determine Iqbal's status. Was Iqbal considered an illegitimate child? To do that, the Judges should work on the fact-finding of Machica's marriage. If the religious requirements were met, then Iqbal shouldn't be considered as an illegitimate child. And that renders Iqbal's *rationa personae* requirements were not satisfied. Jurisdiction should fail. But, instead of working on the fact-finding of the legality of Machica's marriage, the Judges simply asserted their jurisdiction. This inferred that the Judges consider Iqbal as a child born outside marriage. The only way it could happen, if the marriage was not legal. But if marriage was not legal, the Judges should consider that marriage registration as part of the legality requirements. There is possibility of inconsistency because of that and we can never know. Simply because the Judges didn't address the issue appropriately.

On the procedural aspect, Article 51 of the ICC Act regulates the requirements of the party eligible to bring claim before the ICC. Relevant to this case, a party must be of Indonesian citizen and his/her right is infringed. Consequentially, the ICC Judges didn't follow their own rules by asserting their jurisdiction over someone without infringed rights. Under the Hart's rule of recognition, this is arguably failed to be recognized as a law. The ICC rules invalidate the Judges' decision.

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Second assessment is my foremost criticism. It concerns the way merit decision was delivered. The decision was that Article 43 Verse 1 should be read "a child born outside marriage have legal relationship with his mother and their mother's family, *he also has blood relationship including legal relationship with his father as long as it could be proven by means of scientific findings according to the law.*" [*emphasis added*] This decision didn't alter the original verse. The 'should be read' clause indicates its nature as more like official interpretation of the verse. The decision went further by stating that Article 43 Verse 1 is unconstitutional if used as a legal basis to prevent a child born outside marriage from having legal relationship. Instead of simply saying that Article 43 Verse 1 is unconstitutional, the decision didn't alter the verse but adding binding interpretation of the Verse. That was called 'conditionally unconstitutional' decision. From my point of view, the Judges were aware that the verse is used as a legal basis to guarantee legal relationship of an illegitimate child with the mother. The Judges also must be aware the deep-rooted principle of lineage on the verse. Hence, conditionally unconstitutional is sufficient.

But, what I see the Judges failed to consider is the nature of their decision. Under the ICC Act, the mandates of ICC are limited. Articles 51A and 57 of the ICC Act set out that in advance. 51A Verse 5 says that in upholding claim, the decision covers three things. *First*, upholds the claim. *Second,* states that the article in question is unconstitutional. *Third,* states that the article in question is not legally-binding. 57 then prohibits the ICC decision to say things other than those three including request for parliament to enact specific law; and creating new norms. Both articles imply the nature of the ICC mandates in reviewing the constitutionality of an Act. The ICC works as a negative legislator.[74] Its mandate is limited only to declare the unconstitutionality of a norms. Thus, to reduce norms. But, it is not allowed to create new norm through its decision. The conditionally

[74] Pan Mohamad Faiz, *The Relevance of Negative Legislator Doctrine*, <https://panmohamadfaiz.com/2016/03/17/relevansi-doktrin-negative-legislator/>. See also the position taken by former ICC Judges, Interview with Mukti Fadjar, 'Prof. Dr. Mukti Fadjar: MK Sebagai Negative Legislator (Prof. Dr. Mukti Fadjar: The ICC as a Negative Legislator)' (3 August 2010) <http://prasetya.ub.ac.id/berita/Prof-Dr-Mukti-Fadjar-MK-Sebagai-Negative-Legislator-821-id.pdf>. For more comprehensive review, refer to Aninditya Eka Bintari, (2013), *Mahkamah Konstitusi Sebagai Negative Legislator Dalam Penegakan Hukum Tata Negara' 8(1)*, Pandecta: Research Law Journal http://journal.unnes.ac.id/nju/index.php/pandecta/article/view/2355 [accsess, 15 April 2017]

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unconstitutional decision is often used to address the urgency need of a law. It has been argued that this decision didn't go further than the ICC's mandates. The argument is that the Judges didn't alter the verse at all. It is indeed. But, it took another form of creating new norms through the issuance of official interpretation. There is no point of saying it is different in nature with altering the verse, because although it is only interpretation, it is still legally-binding. It might be justified if there is a sense of urgency. Without creating new norms, there will be legal vacuum. And legal vacuum leads to harmful implications to the parties affected. I accept that argument. But, in this case, there was no sense of urgency. There was even no legally sound justification to adjudicate the claim. Recall that the ICC should not assert jurisdiction at the first place because the *rationa personae* was not met. The limitation of Article 57 reflects the effort to address the mandates' conflict between legislative bodies and judicial bodies. The legislative bodies are the ones tasked with creating new norms.

Coming back to the anchor, my remark is from both Fuller and Hart. This action showed incongruence between the governing rules and the official action. Fuller note on this particular inner morality was that this congruence between official action and declared rule may be impaired in a great variety of ways.[75] Including one relevant to the way this decision delivered. It is the lack of insight into what is required to maintain the integrity of a legal system. The way this decision delivered might can be stated incongruence using Fuller's morality. But, even without the help from Fuller's morality, this decision arguably does not meet Hart's criteria of recognizing law. The aspiration of rule of recognition is to distinguish between law and brute force of arbitrary exercises. Creating new norm while its own rule saying otherwise resembles more as a brute force of arbitrary exercise. There are only two ways for the ICC to deliver its decision in a congruence and not merely arbitrary power exercise manner. *First*, to deny the claim. *Second*, to uphold the claim in the way regulated by its own rules, in this case Articles 51 A and 57. Thus, if the Judges insist on upholding the claim, they just simply have to say: *first,* uphold the claim; *second*, Article 43 Verse 1 is unconstitutional; *third,* Article 43 Verse 1 is no longer legally-binding. That's it. There is no need to create a new norm.

[75] Fuller, *Op.Cit,* pg. 64-81.

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Third assessment is on the merit itself. Dworkin says that in deciding hard case, a herculean judge must resort to the principle justified and fit better with the society's political morality.[76] The decision created new norms. It says now that a child born outside marriage can have legal relationship with his father. Although it was not expressly stated, there are two legal consequences intended. First is of social consequences. Second is of legal consequences leading to economic motives. The backdrop for the first consequence is that an illegitimate child is often marginalised. The acknowledgement of the legal relationship can be seen as an effort to elevate the social status of an illegitimate child. On its legal consequence, that norm will invalidate many of the *Compilation* norms that excludes a child born outside marriage to have legal relationship with the father. *First*, a child outside marriage cannot be excluded anymore from claiming child support and maintenance payments. *Second,* Article 43 Verse 1 also cannot be used as a legal basis to exclude the child to inherit from the father. Basically, the decision alters and contradict the whole principle of lineage within the Islamic law. The Judges argued that the equal protection should triumph the sacredness of marriage and principle of lineage principle. There is one thing that I agree on that reasoning. That the ICC decision undeniably renders an equal protection rights for a child born outside marriage. But I disagree on the claim that the equal protection should triumph other principle. To say it blatantly, the sacrifices are too much to reap the benefit intended. The sacredness of marriage and its role as a backbone of the society should be preserved at no matter cost. In doing so, the law also run into inconsistencies of the proposed proposition. It goes against the compromises saying that the *Marriage Act* should not in any means diminish persons' religious laws and beliefs. Fuller would simply say that this decision fails to fulfil the non-contradictory requirement that makes law possible.

To further support my disagreement on the merit of decision, there is possibility of reconciling two principles instead sacrificing one on top of another. I would call this third approach. There was valuable insight provided by the Indonesian Islamic Scholar Body Fatwa in response to the ICC Decision.[77] The equal

[76] Dworkin, *Op.Cit,* pg .43-767.

[77] Fatwa is a legal opinion. Refer for comprehensive coverage on MUI, *Fatwa Kedudukan Anak Hasil Zina | Majelis Ulama Indonesia (Fatwa on a Child Born as a Result of*

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protection principle can be addressed without sacrificing the principle of lineage. The Fatwa proposes the use of *wasiat wajibah* or mandatory allocation of father's wealth. The Court, be it Civil Court or Islamic Court, orders the father of the child born outside marriage to allocate some of his wealth for his child upon his death. That order resembles the allocation of wealth like a mandatory will. The good thing about *wasiat wajibah* is that it does not require the attribution of *nasab.* This first instrument is used to deal with the inheritance. On the child support and maintenance payment, the Court also can order the father to pay the amount appropriate. But, the rationale for that child support payments is not because of legal relationship or *nasab*. The rationale should lie on the notion that every man should be held responsible for his action. The *Compilation* assumes that there is no obligation for the father to the child born outside marriage. The rationale for that is that there is no legal relationship or *nasab* in the first place. Without interfering with that rationale, the court could order a mandatory child support and maintenance payments based on different rationale.

In my view, those proposed instruments are the best way to get around the competing principles. They provide equal protection without sacrificing the sacredness of marriage and lineage. I reckon that those two instruments only deal with the legal aspects. Not with the social aspects. However, there is also nagging doubt of on the effectiveness of the Decision. The problem of stigmatization need to be addressed using much bigger tools and measures. There is social construct needed to be clarified on the child as symptom instead as a cause.

D. Conclusion

I admit that all above analysis was made with the benefit of hindsight and sufficient time to think thoroughly. This is a privilege not present before the ICC Judges. However, they have another privilege that I don't have that should justify a high expectation from an ICC Judge. They are people with extensive knowledge of the law. Hence, they are sitting on the bench of the Constitutional Court. That qualification alone should offset my time privilege. However, it didn't. The Judges failed on the reasoning of the very basic of their understanding of the law. They also failed to consider the broader consequences of every possible

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Adultery / Indonesian Islamic Scholar Body) http://mui.or.id/index.php/2014/05/16/fatwa-kedudukan-anak-hasil-zina/ [accsess 5 April 2017]

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decision they might make. As a result, they scored badly on both Fuller and Hart analytical approach to determine the law. Their decision that was intended to be 'heroic' was not justified.

As the final verdict of the paper, I would say that the decision should deny the unconstitutionality claim of Article 43 Verse 1. But, in order to reach that decision, the Judges must mention the consideration of broader consequences of each possible scenario. Including the possibility of the third approach. In so doing, the Judges hint the legislative body of the required norms needed to be created. This is arguably the position of a Herculean Judge.

The Decision based on the second scenario scores not quite good both in the spectacles of Fuller and Hart. That results as quite troublesome on the validity of the decision. The ensuing Supreme Court Decision on this matter illustrates this point.[78] Machica brought claim to recognize Iqbal as a child born within marriage, hence, he should be entitled to have legal relationship with his father. The Supreme Court Decision dismissed the claim. The argument was that the applicable law should be the *Compilation* since both Moerdiono and Iqbal were Muslims. And the *Compilation* clearly excludes a child born outside legal marriage from having legal relationship with the father. This rationale evoked two points. *First,* the Judges based their reasoning on the ICC Judges reasoning on the Iqbal status as an illegitimate child. Again, that was fundamental mistake.

The flaw lies on that determination of Iqbal's status. Iqbal was a legitimate child. The marriage itself was legal. But the ICC reasoning that was disastrous had been used again to further create inconsistency within the law. *Second*, while there are conflicting laws, the one with higher hierarchy should govern the case. On some occasion, there will be reconciliation using the doctrine *lex specialis derogate lex generalis.* But not on this case. The decision clearly said there is no way a child born outside marriage can be prevented from having legal relationship with the father. Further, the decision emerged because of dispute between Muslims. This ICC decision should then invalidate the *Compilation* rules on the *nasab.* The Supreme Court Judges should not use the *Compilation* norms anymore on their reasoning. But, they still. I simply view that the reasoning reflects the infidelity to failure of the legal

[78] Putusan Mahkamah Agung Nomor 329 K/Ag/2014 T (Supreme Court Decision Number 329 K/Ag/2014)

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reasoning to follow the requirements of the law. Both under Hart's rule of recognition and Fuller's inner morality of the law.

The move forward should be repairing the harm done to the law by the decision. The Fatwa indicates the possible legal frameworks to reconcile two conflicting norms. The legislative body could use that as the basis for the new amendment of the *Marriage Act.*

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