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# *Fath al-Dzari'ah* Solution for Determining the Status of Children from Secret Marriages Through the Constitutional Court Decision

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**Abstract**

Marriage in secret (nikah sirri), also known as clandestine marriage or unofficial marriage, will have implications on the status of the marriage, which is not considered valid according to the State. Meanwhile, an invalid marriage will also impact the illegitimacy of the child's status. In reality, the Constitutional Court changed this rule with a statement that the child still has biological lineage to the person who caused their birth, as long as it can be proven with advanced technology and DNA testing. The question is, what is the status of children born from such clandestine marriages, and how does the Religious Court respond to this decision? This research aims to interpret the Constitutional Court's Decision on the validity of a child's status as biological lineage to the person who caused their birth, as long as it can be proven with advanced technology and/or DNA testing. This research is a normative juridical study with a legal approach and case based on the Constitutional Court Decision regarding the status of children from clandestine marriages using the theory of *fath al-dzari'ah*. The research findings indicate that the Religious Court cannot reject trial requests regarding the status of children resulting from clandestine marriages, as long as it can be proven through advanced technology and/or attached DNA testing, even though the marriage status is considered invalid according to the State, as long as it is proven that the marriage is considered valid according to religion with evidence of a guardian and witnesses in the marriage.

# 1. Introduction

The primary sources of Islamic law are the Qur'an and the Sunnah, and in this regard, there is no disagreement among scholars.[1] The Qur'an itself serves as a guide for Muslims to carry out all aspects of their lives.[2] Meanwhile, the Sunnah is the second source that functions as an explanation, reinforcement, and even introduces new Shariah laws besides the Qur'an.[3] The Sunnah is what is attributed to the Prophet Muhammad, whether it be his sayings, actions, or approvals. The Qur'an and the Sunnah serve as references for Muslims, especially in the field of Islamic law, so that in the early days of prophethood, or when the Prophet was still alive, all matters could be referred to him, eventually becoming historical events known as *asbab al-nuzul* and *asbab al-Wurudh*.[4]

However, in reality, after the demise of Prophet Muhammad, there is no concept of prophetic succession in Islam. Instead, Muslims are commanded to adhere firmly to the Qur'an and the Sunnah as their references. Nevertheless, as issues evolve, and since the Qur'an and the Sunnah ceased to be revealed after the Prophet's death, scholars have engaged in ijtihad as a means of legal interpretation and discovery.[5]

The door of ijtihad will continue to evolve as long as there are issues, and thus, various methods and approaches can be employed in conducting ijtihad.[6] In addition to the theory of maslahah in the context of determining maqasid al-shariah, new theories have emerged, such as *sadd al-dzari'ah*[7] which is a theory of legal discovery by preventing the occurrence of harmful consequences. In reality, when a blocked or closed path needs to be opened, the theory of *fath al-dzari'ah* is born.

In fact, many new cases require solutions with the theory of *fath al-dzari'ah*, such as the determination of the status of a child born from a marriage that is not recognized by the State but considered valid according to religious law, commonly known as secret marriage or marriage under hand. A valid marriage according to the State is one that is registered before the Marriage Registrar (PPN) or the religious officiant.[8] Whereas, a perception of an invalid marriage is one conducted

[1] Abdul Latif, "Al-Qur'an Sebagai Sumber Hukum Utama," *jurnal Ilmiah hukum dan Keadilan* 4, no. 1 (2017): 62–74.
[2] Muannif Ridwan, M. Hasbi Umar, dan Abdul Ghafar, "Sumber-sumber hukum Islam dan Implementasinya," *Borneo: Journal of Islamic Studies* 1, no. 2 (2021): 28–41.
[3] Amrulloh Amrulloh, "HADIS sebagai SUMBER HUKUM ISLAM (Studi Metode Komparasi-Konfrontatif Hadis-Al-Qur'an Perspektif Muhammad Al-Ghazali dan Yusuf Al-Qaradawi)," *IAIN Tulungagung Research Collections* 3, no. 2 (2015): 287–310.
[4] Hafdz Syuhud, "Implementation of the Concept of Sadd Al-Dzari'ah in Islamic Law (Perspective of Ibn Al-Qayyim Al-Jauziyah and IbnHazm)," *International Journal of Philosophy* 7, no. 1 (2021): 193–99.
[5] Intan Putriani, "Konflik Sahabat Pasca Nabi Muhammad SAW Wafat dalam Buku Sejarah dan Kebudayaan Islam Jilid 1 Karya Prof. Dr. A. Syalabi" (UIN Sultan Maulana Hasanuddin Banten, 2022).
[6] Abd Wafi Has, "Ijtihad Sebagai Alat Pemecahan Masalah Umat Islam," *IAIN Tulungagung Research Collections* 8, no. 1 (2013): 89–112.
[7] Ewa Yolanda, "ANALISIS HUKUM AKIKAH DI USIA BALIGH: Studi Komparatif Mazhab Maliki dan Mazhab Syafi'i," *Journal of Sharia and Law* 2, no. 1 (2023): 144–61.
[8] H. Hanif Hanani, "Peranan Pegawai Pencatat Nikah (Ppn) Dalam Penyelesaian Sengketa Pernikahan Wali Adlal (Study Kasus Penyelesaian Pernikahan Wali Adlal Di KUA Kecamatan Muntilan)" (Program Pascasarjana Universitas Diponegoro, 2009).

religiously but not registered with the Marriage Registrar (PPN) or the religious officiant.[9]

From the unregistered marriage, two issues arise. First, it becomes difficult for the wife to file for divorce in front of the Religious Court. Second, it leads to a dead end regarding the status of the child and inheritance consequences for the child after the death of the parents who caused their birth in the world. In reality, the Constitutional Court through its decision, Constitutional Court Decision No. 46/PUU-VII/2010, has provided a solution to the biological status of children from unregistered marriages, as long as it can be proven with advancements in technology and DNA testing.

There have been several previous studies discussing this matter, including Ardian Arista Wardana's study, "Recognition of Children Born Out of Wedlock: A Juridical Review of the Status of Children Born Out of Wedlock." The status of children born out of wedlock remains a unique study that is still debated. Law No. 1 of 1974, articles 42 and 43, explain that it is difficult for them to obtain a clear legal status. They only have a civil relationship with their mother, not with their father. However, Constitutional Court Decision No. 46/PUU-VII/2010 affirmed the interpretative interpretation of Law No. 1 of 1974 regarding the status of children by accepting a man's acknowledgment with the mother's consent, supported by scientific data and evidence, to submit a child acknowledgment application to the competent authority. If the application is legally accepted, the civil relationship between the child and the man is established at that time. This normative study analyzes a submission to the Surakarta District Court regarding the acknowledgment of a child and the submission of Constitutional Court Decision No. 46/PUU-VII/2010. Here, we present the polemic arising from Constitutional Court Decision No. 46/PUU-VII/2010, which has led to the widespread occurrence of extramarital affairs.[10]

Toha Ma'arif argues for the mandatory registration of marriages, supported by the study of *maslahah mursalah* and *maqashid al-syari'ah*, stating that the benefit of marriage registration falls under the category of *daruriyyah* (essential necessity), as it can protect and preserve the benefits of religion, life, intellect, lineage, and property. The benefit of marriage registration can preserve the benefits of religion because it ensures that religious teachings are not practiced haphazardly. Similarly, marriage registration can safeguard the benefits of life by providing psychological tranquility to spouses and children. With this psychological peace, the mind remains undisturbed and unburdened by the issues faced.[11]

Ardian Arista Wardana's study on the recognition of children born out of wedlock offers a unique perspective that remains a subject of debate. Articles 42 and 43 of Law No. 1 of 1974 explain the challenges they face in obtaining a clear status in life. They are only legally connected to their mother, not their father. However, Constitutional Court Decision No. 46/PUU-VII/2010 allows for a contextual

[9] Sulastri Caniago, "Pencatatan nikah dalam pendekatan maslahah," *JURIS (Jurnal Ilmiah Syariah)* 14, no. 2 (2016): 207–16.
[10] Ardian Arista Wardana, "Pengakuan Anak Di Luar Nikah: Tinjauan Yuridis Tentang Status Anak Di Luar Nikah," *Jurnal Jurisprudence* 6, no. 2 (2017): 160–65.
[11] Toha Ma'arif, "PENCATATAN PERNIKAHAN (Analisis dengan Pendekatan Qiyas, Istihsan, Sadd al-Dzari'ah, Maslahah Mursalah dan Hukum Positif di Indonesia)," *ASAS: Jurnal Hukum Ekonomi Syariah* 11, no. 01 (2019): 119–41.

interpretation of Law No. 1 of 1974 regarding the status of children. This decision acknowledges a man's recognition of a child, with the mother's consent, supported by scientific data and evidence, to file for recognition of the child with the relevant authorities. If the request is legally accepted, the legal relationship between the child and the man is established at that time. A normative study analyzes a case in the District Court of Surakarta concerning the recognition of a child and the implications of Constitutional Court Decision No. 46/PUU-VII/2010, highlighting the debate sparked by this decision and its impact on the prevalence of extramarital affairs.[12]

Busman Edyar, in his study "Legal Status of Children Born Out of Wedlock According to Positive Law and Islamic Law After the Issuance of the Constitutional Court Decision Regarding the Material Review of the Marriage Law," although registering a marriage is not decisive for its validity in Islam, in its application in Indonesia, unregistered marriages result in children also not being legally registered. Until the Constitutional Court issued a decision accommodating the status of all children. This has caused a serious problem among Indonesian scholars. Not all children born have the same status. This depends on whether the requirements and conditions of the marriage of their parents are met. The following article examines the status of children, especially those born out of wedlock, after the issuance of the Constitutional Court Decision.[13]

Muhamad Beni Kurniawan, in his article "Legal Politics of the Constitutional Court Regarding the Status of Children Born Out of Wedlock: Application of Progressive Law as Protection of Children's Human Rights," explains the legal politics of the Constitutional Court in deciding the judicial review of Article 43 Paragraph 1 of Law No. 1 of 1974 Regarding Marriage regarding the status of children born out of wedlock. This study examines the issue of the status of children born out of wedlock from the perspective of human rights and progressive law, which focuses on ensuring and protecting the rights of children without distinguishing whether the child is legitimate or born out of a valid marriage. This article concludes that the concept of a rule of law entails guaranteeing human rights protection. Injustice to children born out of wedlock is a violation of human rights. The application of progressive law is necessary in interpreting Article 43 Paragraph 1 of Law No. 1 of 1974 Regarding Marriage. Progressive law can be referred to as "justice-oriented law." Progressive law seeks to return legal thinking to its basic philosophy, namely, law for the protection of the rights of every human being. The goal of progressive law is to protect the rights of children without distinguishing their status.[14]

From these various studies, there has not been a specific study discussing the status of children born out of secret marriages, which, according to the Constitutional Court's decision, are considered legitimate as biological children from the perspective of *sadd al-dzari'ah*. Therefore, it is important to conduct research as an interpretation of the Constitutional Court's decision regarding the

[12] Wardana, "Pengakuan Anak Di Luar Nikah: Tinjauan Yuridis Tentang Status Anak Di Luar Nikah."
[13] Busman Edyar, "Status Anak Luar Nikah Menurut Hukum Positif dan Hukum Islam Pasca Keluarnya Putusan MK Tentang Uji Materiil Undang Undang Perkawinan," *Al-Istinbath: Jurnal Hukum Islam* 1, no. 2 December (2016): 181–200.
[14] Muhamad Beni Kurniawan, "Politik hukum Mahkamah Konstitusi tentang status anak di luar nikah: Penerapan hukum progresif sebagai perlindungan hak asasi anak," *Jurnal Ham* 8, no. 1 (2017): 67–78.

status of children born out of marriages considered invalid by the State. Additionally, it would be interesting to analyze this within the framework of *fath al-dzari'ah* theory, and to explore the stance of Religious Courts in cases involving child support or inheritance claims for children born from secret marriages deemed invalid according to religious law.

## 2. Method

This research employs a juridical-normative approach with a legislative and case-based perspective. The data utilized consists of secondary sources, including primary legal materials such as Constitutional Court Decision No. 46/PUU-VII/2010 and Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. Secondary legal materials include books, research findings, and legal journals. The data gathered will be analyzed and presented descriptively.

## 3. Analysis or Discussion

### 3.1. *Fath al-Dzari'ah* in Islamic Legal Perspective

The theory of *fath al-dzari'ah* represents a departure from the theory of *sadd al-dzari'ah*. This theory serves as an effort to innovate Islamic law. While *sadd al-dzari'ah* aims to block something that may cause harm, *fath al-dzari'ah* seeks to open pathways to provide solutions for resolving existing issues. *Sadd al-dzari'ah* consists of two words.[15] "*sadd*," meaning to close, and "*al-dzari'ah*," referring to means, objectives, and pathways.[16] In the context of the science of *usul al-fiqh* (principles of jurisprudence), *sadd al-dzari'ah* pertains to a matter that appears permissible but could potentially lead to something prohibited (haram).[17]

مَنَعَ كُلَّ ما يَتَوَصَّلُ بِهِ إِلَى الشَّيْءِ الْمَمْنُوْعِ الْمُشْتَمِلِ علَى مَفْسَدَةٍ أَوْ مُضَرَّة

"Preventing anything (words or actions) that convey something prohibited or forbidden that entails harm or danger."

According to *al-Syatibi, sadd al-dzari'ah* entails *al-tawassalu bimâ huwa maslahatun 'ilâ mafsadatin*. This perspective emphasizes the transition from a beneficial deed to a harmful one."[18] On the other hand, Wahbah al-Zuhaili suggests that the prohibition or permissibility of an action depends on its potential to lead to actions that are inherently prohibited.[19] From these interpretations, sadd al-dzari'ah emerges as a method in Islamic law to derive legal rulings by preventing or covering intentions behind deeds that may initially seem permissible but can result in harm or prohibition.

In contrast, *fath al-dzari'ah* involves opening pathways after they have been closed. For instance, a marriage is considered valid if it meets the necessary

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[15] Agus Hermanto, *SADD AL-DZARI'AH Interpretasi Hukum Syara'terhadap Beberapa Hal tentang Larangan Perkawinan* (CV. Mitra Cendekia Media, 2022).
[16] Louis Ma'Luf, "al-Munjid fi al-Lughah wa al-A'lam," *Beirut: dar al-Masyriq* 60 (1986).
[17] Imam Fawaid, "Konsep Sadd Al-Dzari'ah Dalam Perspektif Ibnu Al-Qayyim Al-Jauziyah," *LISAN AL-HAL: Jurnal Pengembangan Pemikiran Dan Kebudayaan* 13, no. 2 (2019): 323–40.
[18] Sapiudin Shidiq, *Ushul fiqh* (Kencana, 2017).
[19] Faridatus Syuhadak dan Badrun Badrun, "Pemikiran Wahbah Al-Zuhaily Tentang Ahkam Al-Usrah," *De Jure: Jurnal Hukum dan Syar'iah* 4, no. 2 (2012).

conditions and requirements. Additionally, the marriage must be recorded by the Marriage Registrar (PPN) or an authorized official, thereby validating the marriage both religiously and legally. Consequently, if a marriage is only considered valid religiously, it may pose obstacles in case of marital issues or divorce proceedings, as the wife lacks a legal basis to file for divorce if the marriage was not registered.

Hence, marriage recorded before the marriage registrar is essentially sadd al-dzari'ah. Subsequently, in the event of divorce and property disputes concerning the children, the context becomes crucial. In this scenario, the child faces difficulties in inheriting property due to the marriage not being recognized as valid by the state. However, the role of fath al-dzari'ah is to open up possibilities by providing solutions for the child to inherit, even if the marriage was initially deemed invalid by the state. This is followed by the Constitutional Court's ruling on inheritance rights for children resulting from biological relationships proven through technological advancements or DNA tests.

One of the principles of *sadd al-dzari'ah is mâ takûnu wasīlatan wa tharīqan ilâ syai'in mamnû'in syar'an*" meaning "something that becomes a means and a path to something prohibited by Sharia." From this principle, it is understood that Sharia aims to bring benefit to humanity and prevent harm.[20] Based on this principle's objective, all human actions should be known and understood. Actions that bring benefit should be encouraged, while those leading to harm should be prevented and avoided.

According to Abu Zahra, whose full name is Muhammad Abu Zahra, and Nasrun Harun, Adzari'ah is interpreted as a means or path to something prohibited, whereas according to Ibn Taymiyyah, *al-dzari'ah* is an act that appears permissible but can lead to something prohibited or forbidden.[21] In terms of the methodology of Islamic law, *sadd al-dzari'ah* is an earnest effort by mujtahids to determine the law by considering the legal consequences that arise, whether in the form of blocking or preventing a means or path that could cause harm.[22]

Various opinions regarding *al-dzari'ah* by scholars lead to the conclusion that *al-dzari'ah*, specifically, refers to a path or intermediary that leads to forbidden actions, thus resulting in legal consequences deemed as prohibited, even though it may outwardly appear permissible.

The legal basis for *sadd al-dzari'ah* is not explicitly stated in the texts or consensus of scholars regarding its use, but several texts implicitly indicate the legal basis for *sadd al-dzari'ah*, including:

First, in Surah Al-An'am, verse 108, it is emphasized, particularly among Muslims, not to ridicule or revile the gods worshipped by others besides Allah. Allah reminds that if Muslims mock the deities of others inappropriately, they will also revile Allah without proper knowledge. Therefore, this verse also affirms that every community has its beliefs and deeds, and they will all return to Him on the Day of

[20] Muhammad Anwar Idris, "Pemetaan Kajian Tafsir Al-Qur'an Di Indosesia: Studi Atas Tafsir an-Nur Karya Tm Hasbi Ash-Shiddieqy," *Al-Tadabbur: Jurnal Ilmu Al-Qur'an dan Tafsir* 5, no. 01 (2020): 1–18.
[21] Intan Arafah, "Pendekatan Sadd Adz-Dzari'ah Dalam Studi Islam," *Al-Muamalat: Jurnal Hukum dan Ekonomi Syariah* 6, no. 2 (2021): 60–74.
[22] Ummu Isfaroh Tiharjanti, "Penyakit Genetik Karier Resesif Dalam Perkawinan Inbreeding," *Yogyakarta: UIN Sunan Kalijaga*, 2003.

Judgment. Allah will inform them of what they have done during their lives in this world.

Second, in a Hadith narrated by Ma'mar bin Abu Ma'mar from one of the Bani Adi bin Ka'b, the Prophet Muhammad (peace be upon him) said, "No one hoards except that he has done wrong." Then I said to Sa'id, "Indeed, you hoard." He said, "And Ma'mar used to hoard." Abu Dawood said, "And I asked Ahmad, what is hoarding?" He said, "It is something in which there is sustenance for people." Abu Dawood said, "Al Auza'i said, a hoarder is one who comes to the market to buy what people need and stores it.".

Based on the conversation context between Abu Dawood, Sa'id, and Ma'mar, Sa'id was reprimanded for hoarding goods. However, Sa'id justified by stating that Ma'mar had also hoarded before. Then, Abu Dawood asked Ahmad about the meaning of "hukrah" in this context, and Ahmad explained that "hukrah" refers to something essential for human life. In the final explanation, al-Auza'i mentioned that a "hoarder" is someone who comes to the market to buy goods needed by others and stores them. This indicates that hoarding with the intention of helping others or meeting the needs of the community is acceptable, while hoarding without a clear reason is considered blameworthy. So, the conclusion from this hadith is that excessive hoarding without a clear necessity is considered wrongdoing, while hoarding with the intention of helping others or meeting the needs of the community is acceptable.

Third, based on the fiqh principle *mâ adâ ilâ al-harâmi fa huwa harâmun* which means "Whatever leads to the forbidden is itself forbidden,"[23] and *dar'u al-mafâsid muqaddamun 'alâ jalb al-mashâlih*"which means "Repelling harm takes precedence over bringing benefit."[24] From these principles, it can be understood that all actions and words performed by a responsible individual (mukallaf) can lead to something forbidden in Sharia. Sometimes, these actions may occur without clear intermediaries, and the result may cause harm or mafsadah (evil consequences). For example, murder, rape, theft. There are also situations where the action itself does not lead directly to harm, but there is an intermediary that leads to another action resulting in harm. For instance, seclusion (khalwat) may not directly lead to the creation of offspring, but it can be an intermediary that leads to adultery, causing harm.

There are several criteria in determining the law that can serve as intermediaries or paths leading to prohibition. Among them are[25]; First, Purpose. If the purpose is obligatory, then the means are also obligatory; if the purpose is prohibited, then the means are also prohibited. Second, Intention (Motive). If the intention leads to legality, then the means are also legal; if the intention leads to unlawfulness, then the means are also unlawful. Third, Consequence of the action. If the consequence of the action produces benefit, then the intermediary or means are permitted to be carried out. But if the consequence of the action results in harm or damage, then the means are not allowed to be carried out.

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[23] Ahmad Dzazuli, "Kaidah-Kaidah Fikih: Kaidah-Kaidah Hukum Islam Dalam Menyelesaikan Masalah-Masalah Yang Praktis," *Jakarta: Kencana*, 2006.
[24] Muhammad Ishom, "Virus Corona dan Pembelajaran Kaidah Fiqih bagi Publik," 2020.
[25] Syarmin Syukur, "Sumber-sumber Hukum Islam," *Surabaya: Al-Ikhlas*, 1993.

Based on the mentioned criteria, an understanding is drawn that in determining a law regarding *sadd al-dzari'ah*, several indications must be considered: purpose, intention, and consequence of the action. Thus, with these indications, mujtahids can assist in deriving laws based on *sadd al-dzari'ah*.

There are classifications of *sadd al-dzari'ah* from various aspects, and scholars also differ in determining the classification of *sadd al-dzari'ah*. If viewed from its form, al-dzari'ah can be divided into 2 (two) types,[26] First, the principle that asserts the use of certain means or tools is prohibited because they have the potential to cause harm or mafsadah (evil consequences). This is called *sadd adzari'ah*. In *sadd adzari'ah*, the use of such means is not allowed due to its potential negative effects. Second, the principle that states that the use and acquisition of means are permitted if they can lead to benefit. This is called *fath al-dzar'ah*. In *fath al-dzari'ah*, the use of means is permitted because of its potential to provide expected benefits.

Viewed from the perspective of the impacts generated, Ibn Qayyim divided *sadd al-dzari'ah* into four parts[27]; Firstly, actions intrinsically leading to harm, such as consuming alcohol which can impair judgment, and engaging in adultery which can result in lineage issues. Secondly, actions that are actually permissible (mubah), but their intent leads to harm, such as inadvertently mocking the religious practices of others. Thirdly, actions that are technically permissible (mubah) and do not inherently lead to harm, but often result in greater harm than benefit, such as a widow adorning herself during the waiting period (iddah) after her husband's death. Fourthly, actions initially deemed permissible (mubah) but sometimes result in lesser harm compared to their benefits, such as glimpsing at the face of a prospective wife who has been proposed to by a suitor.

Based on the four types of *sadd al-dzari'ah* in terms of the impacts outlined by Ibn Qayyim, it can be inferred that all forms of dzari'ah deemed apparently permissible, but if their outcomes indicate harm, whether the harm is minor or major, sadd al-dzari'ah prohibits or restricts such actions.

Regarding the level of harm caused, Abu Ishak al-Syatibi classified sadd al-dzar'iah into four categories: Firstly, actions leading to definite harm, such as establishing a factory near water sources frequently used by the community for livelihood or livelihoods, or digging holes in front of other people's homes late at night. Secondly, actions likely to cause harm, such as selling grapes to beverage factories or selling sharp knives to criminals seeking adversaries.

Thirdly, actions that rarely cause harm or prohibition, in this case, actions that, when performed, may not necessarily result in harm. For example, digging a hole in one's own garden that is rarely frequented by others or engaging in food trade.

Fourthly, actions that are fundamentally permissible due to their benefits but may potentially lead to something prohibited in their execution. For instance, the use of credit cards, where there is disagreement among scholars regarding their usage. According to Imam Shafi'i and Imam Abu Hanifa, the use of credit cards in transactions is permissible as long as the conditions and pillars of the transaction

[26] Nurdhin Baroroh, "Metamorfosis 'Illat Hukum' Dalam Sad Adz-Dzari'ah Dan Fath Adz-Dzariah (Sebuah Kajian Perbandingan)," *Al-Mazaahib: Jurnal Perbandingan Hukum* 5, no. 2 (2017).
[27] HA Basiq Djalil dan MA SH, *Ilmu Ushul Fiqih: 1 & 2* (Kencana, 2014).

are met. However, Imam Ahmad bin Hanbal and Imam Malik prohibit transactions using credit because in practice, there is a possibility of harm.[28]

Al-Syatibi's statement dividing *sadd al-dzari'ah* based on the level of harm caused suggests that any action resulting in harm to others, whether the harm is minor or major, is prohibited by *sadd al-dzari'ah's* function.

There is disagreement among scholars regarding the use of sadd al-dzari'ah as a method in deriving legal rulings, and this disagreement is categorized.[29] Scholars who accept *sadd al-dzari'ah* as a method in deriving legal rulings, predominantly prioritize the factors of benefit and harm in determining the law, although there are differences in the level of acceptance. Scholars who generally legalize sadd al-dzari'ah as a method in deriving legal rulings include the Maliki and Hanbali schools of thought.[30] Their reasoning is based on Quranic verses explaining the concept of *sadd al-dzari'ah*, one of which is found in Surah al-An'am (6):108. Essentially, insulting gods other than Allah is permissible, but due to the prohibition of insulting gods other than Allah in Islam, there is a concern that non-Muslims may retaliate by insulting Allah excessively without knowledge. From this analogy, it can be understood that although the actions exemplified are fundamentally permissible, because they may lead to harm, they are ultimately deemed prohibited to perform.

Ulama who do not fully accept *sadd al-dzari'ah* as a method in deriving legal rulings include the Hanafi and Shafi'i schools of thought. This group rejects *sadd al-dzari'ah* as a method in deriving legal rulings in certain cases.[31] Wahbah al-Zuhaily explains that Imam Hanafi and Shafi'i sometimes use sadd al-dzari'ah in specific circumstances. For example, Imam Shafi'i prohibits someone from blocking water from flowing into fields and plantations. This prohibition is based on the principle of *sadd al-dzari'ah*, which is the act of preventing access to something permitted by Allah from actions that permit something prohibited by Allah. This is because the water is a blessing from Allah that is permitted.[32]

Another example is that Imam Shafi'i allows a sick person to skip Friday prayers and instead perform the Dhuhr prayer. However, this is done in secret to avoid causing discord by skipping Friday prayers. Furthermore, an example from Imam Abu Hanifa involves the prohibition for women who are still in the waiting period (iddah) after their husband's death to adorn themselves, wear perfumes, or engage in other activities that may attract the attention of men. This action is based on *saddu adzari'ah* to prevent engaging in prohibited behavior.

The group that rejects *sadd al-dzari'ah* as a method in deriving legal rulings is the Dhahirite School of Thought. Essentially, this school derives legal rulings by understanding the textual meaning (zahir al-lafzh),[33] relying solely on the Quran and

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[28] Azzuhaili Wahbah, "Fiqih Islam Wa Adillatuhu," 2010.
[29] Muhamad Takhim, "Saddu al-Dzari'ah dalam Muamalah Islam," *AKSES: Jurnal Ekonomi dan Bisnis* 14, no. 1 (2020).
[30] Sri Mulyani, "Sadd Al-Dzari'at Dan Korelasinya Pada Permasalahan Covid-19 (shaf Distance)," *SYARIAH: Journal of Islamic Law* 2, no. 2 (2020): 1–10.
[31] Yunita Rohmah Awalina Sanata, "Urgensi Sadd Adz-Dzari'ah Dalam Mengatasi Masalah Perekonomian Indonesia," *Cakrawala Repositori IMWI* 6, no. 3 (2023): 656–65.
[32] Zulfikri Zulfikri dan Isniyatin Faizah, "Sadd al-Dzari'ah sebagai Media dalam Penyelesaian Perkara Kontemporer," *The Indonesian Journal of Islamic Law and Civil Law* 4, no. 2 (2023): 169–85.
[33] Munawaroh Hifdhotul, "Sadd Al-Dzari'At dan Aplikasinya Pada Permasalahan Fiqih Kontemporer," *Ijtihad: Jurnal Hukum dan Ekonomi Islam* 12, no. 1 (2018).

Hadith, while rejecting other methods such as the concept of *sadd al-dzari'ah*. There are several reasons why the Dhahirite school rejects *sadd al-dzari'ah*[34]: Firstly, in the context of ijtihad, the approach of sadd al-dzari'ah is based on considerations of maslahah (public interest), whereas the Dhahirite approach rejects ijtihad based on ra'yu (personal opinion). Secondly, in the view of the Dhahirite school, Sharia laws are established based on the Quran and Hadith, whereas in sadd al-dzari'ah, the determination of laws does not directly refer to nash (Sharia texts) and ijma' (scholarly consensus).[35]

Based on the opinions of various groups of scholars, it can be understood that generally, mujtahids, especially scholars of the imam schools, accept and sometimes use sadd al-dzari'ah as a method in deriving legal rulings. This is because one of the objectives of establishing laws using sadd al-dzari'ah is to prevent or close the door to actions that cause harm, thereby promoting benefits. As for the group of mujtahids who reject sadd al-dzari'ah as a method in deriving legal rulings, it is because they derive rulings using the zahir al-lafdz method, which evaluates textually, thus relying on the Quran and Hadith without accepting the development of other methods by mujtahids.

### 3.2. Constitutional Court Decision No. 46/Puu-Vii/2010 Regarding the Status of Children from Sirri Marriages in the Perspective of Fath al-dzari'ah

The constitutional court, constitutionally, is an institution vested with the authority to review laws against the Constitution.[36] The issuance of Constitutional Court Decision No. 46/PUU-VII/2010 stemmed from a petition submitted by Machicha Mochtar, questioning the constitutionality of Article 2 paragraph (2) and Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage.One of the grounds advanced by the petitioner is that the constitutional rights guaranteed in Article 28B paragraph (1) and Article 28B paragraph (2) of the 1945 Constitution, through which the petitioner and their child are entitled to confirmation of their marriage and the legal status of their child, have been violated and infringed upon by the legal norms in the Marriage Law, namely the norm regulated in Article 43 paragraph (1). However, the marriage entered into by the petitioner is in line with Article 2 paragraph (2).

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[34] Muhammad Hanif Bin Halililah, "Kehujjahan Sadd Al-Żari'ah sebagai Dalil Hukum Islam (Studi Perbandingan antara Mazhab Maliki, Syafi'i, dan Zhahiri)" (UIN Ar-Raniry, 2021).

[35] Agus Hermanto, "Konsep maslahat dalam menyikapi masalah kontemporer (Studi Komparatif al-Tufi dan al-Ghazali)," *Al-'Adalah* 14, no. 2 (2017): 433–60.

[36] M. Yasin al Arif, "Institutional Design of the Corruption Eradication Commission (KPK) Post-Constitutional Court Decisions Number 70/PUU-XVII/2019 and Number 79/PUU-VII/2019," *As-Siyasi: Journal of Constitutional Law* 3, no. 1 (2023): 64–87.

As a result, the child born to the petitioner received discriminatory treatment, namely by the omission of the petitioner's husband's lineage from the child's birth certificate, only listing the petitioner's name in it. The state has thereby deprived the child of the right to survival, growth, and development because having only a civil relationship with the mother means that the petitioner's husband has no legal obligation to support, nurture, and finance the petitioner's child.[37]

Through the reasons presented by the petitioner, the Court opines that naturally, it is impossible for a woman to conceive without the meeting of the ovum and spermatozoa, either through sexual intercourse (coitus) or through other means based on technological developments that lead to fertilization. Therefore, it is inappropriate and unjust for the law to stipulate that a child born from a pregnancy resulting from extramarital sexual intercourse has a relationship only with the woman as its mother. It is also inappropriate and unjust for the law to absolve a man who engages in sexual intercourse resulting in pregnancy and childbirth from his responsibilities as a father, while simultaneously depriving the child of its rights to that man as its father. Especially when, based on existing technological developments, it is possible to prove that a child is the offspring of a specific man.[38]

Furthermore, the Court affirms that the legal consequences of the birth event resulting from pregnancy, preceded by sexual intercourse between a woman and a man, constitute a legal relationship in which there are reciprocal rights and obligations, involving the child, mother, and father. Based on the explanation above, the relationship of a child with a man as its father is not solely because of the marital bond but can also be based on the evidence of a blood relationship between the child and the man as its father. Thus, regardless of the procedural/administrative aspects of marriage, a child born must receive legal protection. Otherwise, the one harmed is the child born out of wedlock, even though the child is innocent because its birth is beyond its control. Children born without clarity regarding their father's status often face unfair treatment and stigma within society. The law must provide protection and fair legal certainty regarding the status of a child at birth and its rights, including for children born even if the validity of their parents' marriage is disputed.[39]

Based on the legal considerations above, the court partially grants the petitioners' request by declaring that Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage, which states that children born out of wedlock only have a civil relationship with their mother and her family, is contrary to the 1945 Constitution insofar as it is interpreted to eliminate the civil relationship with a man who can be proven by science and technology and/or other legal evidence to have a blood relationship as their father. Therefore, the clause must be read as follows: "Children born out of wedlock have a civil relationship with their mother and her family, as well as with the man as their father who can be proven by science and technology and/or other legal evidence to have a blood relationship, including a civil relationship with his family."[40]

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[37] "Putusan MK Nomor MK No. 46/2010" (t.t.). 33
[38] Putusan MK Nomor MK No. 46/2010, 34
[39] Putusan MK Nomor MK No. 46/2010, 36
[40] Putusan MK Nomor MK No. 46/2010, 37

Through this decision, although not all of the petitioners' requests were granted by the Constitutional Court judges, the resulting verdict has sparked its own controversy. Article 43 of the Marriage Law pertains to the substantive provisions where children born out of wedlock attain recognized status by the state with technological evidence. Therefore, interpretations of the UDHR, UIDHR, Islamic Law, Positive Law, Child Protection Laws, and the MUI Fatwa on the court's decision significantly contribute to interpreting the Constitutional Court's decision and the term "civil relationship" with the biological father.[41]

While recording marriages is not determinative of the validity of a marriage in Islam, its application in Indonesia results in unregistered marriages causing the child to also be legally unregistered. Until the Constitutional Court issued a decision accommodating the status of all children. This has raised serious issues among Indonesian scholars. Because not all children born have the same status. This depends on the fulfillment of the conditions and requirements of the marriage of their parents.[42]

Initially, Indonesia had marriage regulations under Law Number 1 of 1974 concerning Marriage, which stipulated that a valid marriage must be conducted by a Marriage Registrar (PPN) or a Religious Officer (Penghulu). However, Constitutional Court Decision Number 46/PUU-VIII/2010 provided a solution-oriented approach regarding the status of biological children as long as it could be proven, and it could be ascertained that the marriage was proven with witnesses and guardians, which are requirements for a secret marriage.Before the issuance of Constitutional Court Decision No. 46/PUU-VIII/2010, children born out of wedlock did not receive personal legal rights, based on both Islamic and Western principles of justice, as well as human rights perspectives. Following the emergence of Constitutional Court Decision No. 46/PUU-VIII/2010, children born out of wedlock have the same status as legitimate children, provided they have evidence based on science and technology.

This decision represents a form of fath al-dzari'ah because initially, children resulting from marriages that were not registered with a Marriage Registrar (PPN) or a religious officer were not considered legitimate children who could inherit. Analytically, the allowance for children to inherit solely based on marriage registration is a solution-oriented approach to closing gaps in ensuring someone's lineage is properly preserved. However, in the theory of fath al-dzari'ah, children resulting from informal marriages due to lack of registration with a Marriage Registrar (PPN) or religious officer were not considered legitimate. This was addressed by the Constitutional Court Decision, which recognized these children as legitimate, leaving no grounds for Religious Courts to reject them.

Fath al-dzari'ah provides a solution to the issue of the status of children born out of wedlock in formal legal regulations deemed invalid by stating that legitimate children are those born from valid marriages, meaning those conducted in accordance with religious practices and registered with the marriage registrar. Meanwhile, the protection of children as a reason for the validity of such a ruling constitutes a form of fath al-dzari'ah, namely the opening of new legal avenues as an alternative solution.

## 4. Conclusion

Through Constitutional Court Decision No. 46/PUU-VIII/2010, biological children are still considered legitimate and entitled to the same rights as children born from formally recognized marriages, as an effort of *fath al-dzari'ah*, provided that it can be proven through a religious marriage contract validated by witnesses and supported by DNA testing or other advanced methods, as a means of protecting children. The novelty in this research lies in the highly solution-oriented approach of the Constitutional Court decision, considering the numerous cases of unregistered marriages resulting in inheritance disputes where children, despite being considered legitimate by religious standards, were not recognized as such by the state

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[41] Nur Azizah, "Putusan Mk No. 46/2010 Tentang Hubungan Keperdataan Antara Anak Luar Nikah Dengan Ayah Biologis (Analisis Dalam Perspektif Hukum Islam, Hukum Positif, Uidhr, Dan Udhr)," *FITRAH: Jurnal Kajian Ilmu-ilmu Keislaman* 4, no. 2 (2018): 243–60.

[42] Busman Edyar, "Status Anak Luar Nikah Menurut Hukum Positif dan Hukum Islam Pasca Keluarnya Putusan MK Tentang Uji Materiil Undang Undang Perkawinan," *Al-Istinbath: Jurnal Hukum Islam* 1, no. 2 December (2016): 181–200.

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