

## THE LEGAL POSITION OF ILLEGITIMATE CHILDREN AFTER THE CONSTITUTIONAL COURT DECISION NUMBER 46 OF 2010 AND ITS APPLICATION IN RELIGIOUS COURTS

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### Abstract

This article examines the legal status of legitimate and illegitimate children in marriage in Indonesia. The background of this study is the importance of understanding the status of children in marriages that are registered and those that are not. The purpose of this research is to explain the legal status of children based on legitimate and illegitimate marriages. The method used is qualitative research with a library research approach, collecting data from legal literature and related documents. The results of the study show that a legitimate child is one born from a valid marriage, while an illegitimate child only has legal relations with the mother and the mother's family. The implication of this research is the need to apply progressive legal theory in judicial decisions, so that the rulings made are not only formalistic but also responsive to the need for justice for children, as outlined in the Constitutional Court Decision Number 46 of 2010 regarding the status of children born out of wedlock.

**Keywords:** Constitutional Court Decision, Children Out of Wedlock, Children from Sirri's Marriage

### Abstrak

Artikel ini mengkaji kedudukan hukum anak sah dan anak tidak sah dalam perkawinan di Indonesia. Latar belakang penelitian ini adalah pentingnya memahami status anak dalam hukum perkawinan yang tercatat dan tidak tercatat. Tujuan penelitian ini adalah untuk menjelaskan kedudukan anak berdasarkan perkawinan yang sah dan tidak sah. Metode yang digunakan adalah penelitian kualitatif dengan pendekatan kepustakaan, mengumpulkan data melalui literatur hukum dan dokumen terkait. Hasil penelitian menunjukkan bahwa anak sah adalah anak yang lahir dari perkawinan yang sah, sementara anak tidak sah hanya memiliki hubungan perdata dengan ibu dan keluarga ibu. Implikasi dari penelitian ini adalah perlunya penerapan teori hukum progresif dalam putusan hakim, sehingga keputusan yang diambil tidak hanya formalistik tetapi juga responsif terhadap kebutuhan keadilan bagi anak, sebagaimana diatur dalam Putusan Mahkamah Konstitusi Nomor 46 Tahun 2010 tentang status anak luar nikah..

**Kata Kunci:** Putusan Mahkamah Konstitusi, Anak Luar Nikah, Anak Akibat Perbuatan Sumpah

## Introduction

Children are the result of the existence of a biological relationship between men and women, so that the position of the child is highly dependent on the validity of the marriage of his parents. In Indonesia, there are at least two models of marriage that are recognized by the community, namely registered marriages and unregistered marriages. Marriages that are not recorded, in the community are usually called series marriages, marriage under the hands or wild marriages.<sup>1</sup> Although the majority of scholars (religious leaders) in Indonesia admit the validity of the marriage, according to the law in force in Indonesia the marriage is invalid, so the status of the child from the serial marriage is called an out-of-wedlock child, which cannot be passed on to the father. In Indonesia, the position of children in family law can be categorized into two types, namely legitimate children and illegitimate children.<sup>2</sup> The definition of a legitimate child is regulated in Article 42 of Law Number 1 of 1974 concerning Marriage which reads: "A legitimate child is a child born in or as a result of a valid marriage".<sup>3</sup> This is explained in Article 99 of the Compilation of Islamic Law which reads: "A legitimate child is: (a) a child born in or as a result of a valid marriage; (b) the result of a lawful act of husband and wife outside the womb and born by the wife".<sup>4</sup> Meanwhile, according to the opinion of Abid, et al., who stated that what is meant by an illegitimate child is a child who is fertilized and born outside of a valid marriage.<sup>5</sup> This is as stated in national laws and regulations, including:

1. Law No. 1 of 1974 Article 43 paragraph 1 states that children born out of wedlock only have a civil relationship with their mother and her mother's family.
2. The Compilation of Islamic Law (KHI) article 100, states that children born out of wedlock only have a nasab relationship with their mother and her mother's family.

From the two articles above, it can be understood that a child born out of wedlock only has a civil relationship with his mother and his mother's family, thus *his mafhum mukhalafah*, the illegitimate child does not have a relationship with his father and his father's family. However, with the issuance of the Constitutional Court decision No. 46/PUU-VIII/2010, it changed the above legal order. On February 17, 2012, the Constitutional Court decided to grant civil rights

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<sup>1</sup> Anshary, *Hukum perkawinan di Indonesia: Masalah-masalah krusial*, (Yogyakarta: Pustaka Siswa, 2010), p.13

<sup>2</sup> Satrio, J. *Hukum keluarga tentang kedudukan anak dalam undang-undang*. (Bandung: Citra Aditya Bakti, 2015), p.5

<sup>3</sup> Undang-Undang No. 1 Tahun 1974 Tentang Perkawinan. Article 42

<sup>4</sup> *Kompilasi Hukum Islam*, Article 99, (Bandung: Nuansa Aulia. 2012)

<sup>5</sup> H. Abid, Edi Rohaedi, Nandang Kusnadi, *Kedudukan Anak Luar Kawin Pasca Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010*. PALAR (Pakuan Law Review) Volume 08, Number 04, October-December 2022, Pages 129-140.

to children outside of wedlock as long as a child is proven to have blood ties with his father through DNA testing or other valid evidence. The definition of illegitimate children has also been regulated in Article 43 paragraph (1) Law Number 1 of 1974 which reads: "A child born out of wedlock only has a civil relationship with his mother and his mother's family." According to Rofik, this article is further elaborated in Article 100 of the Compilation of Islamic Law which reads: "Children born out of wedlock only have a nasab relationship with their mother and their mother's family".<sup>6</sup>

The Constitutional Court Decision (MK) Number 46/PUU-VIII/2010 establishes that children born out of wedlock have civil relationships with their mother and maternal family, as well as with their father and paternal family, provided the paternal relationship is proven through science, technology, or other lawful evidence. This decision is binding on all Indonesian people and must be implemented without waiting for amendments to related articles. However, challenges in implementation arise due to the Constitutional Court's decisions being final (as per Article 24C(1) of the 1945 Constitution) and the absence of a dedicated enforcement unit to ensure compliance.

In accordance with the provisions of Law Number 24 of 2003 concerning the Constitutional Court as amended by Law Number 8 of 2011 and Government Regulation in Lieu of Law Number 1 of 2013, the Constitutional Court's decision is determined to be valid since the decision has been pronounced in a plenary session that is open to the public. The final verdict relies heavily on the willingness of public authorities outside the Constitutional Court to follow up on the final verdict.<sup>7</sup> Although the issuance of the Constitutional Court Decision No. 46/PUU-VIII/2010 is considered a legal breakthrough, in practice, the Constitutional Court Decision No. 46/PUU-VIII/2010 has brought pros and cons in its implementation, including in this case the Indonesia Ulema Council which stated that the Constitutional Court Decision No. 46/PUU-VIII/2010 has violated *Maqhasid al Sharia* (Purpose of Law Application).<sup>8</sup> Meanwhile, the pro opinion states that the Constitutional Court decision Number 46/PUU-VIII/2010 has brought a sense of justice and guaranteed legal protection for children born out of wedlock. In

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<sup>6</sup> Rofiq, A. *Hukum perdata Islam di Indonesia*, (Jakarta: Raja Grafindo Persada.2013), p.178

<sup>7</sup> Ahmad Syahrizal, 2007, *Problem Implementasi Putusan MK*, *Jurnal Konstitusi*, Vol. 4, No. 1, March. p. 115.

<sup>8</sup> Pratiwi, L. P. P. I., Mangku, D. G. S., & Yuliantini, N. P. R. (2020). *Pengaturan Terhadap Kedudukan Anak Di Luar Kawin Pasca Putusan Mahkamah Konstitusi Nomor 46/Puu-Viii/2010*. *Jurnal Komunitas Yustisia*, 3(1), 13-24.

addition, it also burdens the responsibility on a man who has impregnated a woman out of wedlock.<sup>9</sup>

In this article, we will explore, inventory, and review the Constitutional Court Decision Number 46 of 2010 concerning the Status and Legal Status of Children Out of Wedlock and Children Resulting from Marriage and Its Application in Religious Courts. Based on the description in the background above, the formulation of the problem that the author determines is: What is the Status and Legal Position of Children Out of Wedlock and Children Resulting from Marriage Siri? and How is the application of the Constitutional Court Decision Number 46 of 2010 concerning the Status and Legal Status of Children Out of Wedlock and Children Resulting from Marriage in the Religious Court? . So the purpose of this discussion is to find out the legal status of children out of wedlock after the Constitutional Court decision Number 46 of 2010 and its application in religious courts.

## **Research Methods**

This study employs qualitative research with a literature study approach, collecting data from religious courts, books, journals, newspapers, and other sources to strengthen the philosophical foundation of religious literacy. The documentation technique is used for data collection, involving written records like transcripts, books, and official documents. Data analysis employs three methods: content analysis for extracting key ideas, inductive analysis for forming hypotheses based on collected data, and descriptive analysis to describe findings related to religious literacy in madrasas.

A literature review identifies relevant studies from 2013 to 2023 using keywords such as “Status of Children Out of Marriage” and “Children from Sirri Marriages.” Articles were selected based on inclusion criteria, including open access and publication in academic journals.

One significant study reviewed is Salsabila Arifah's research on the views of Selatpanjang Religious Court judges regarding Constitutional Court Decision No. 46/PUU-VIII/2010. This decision states that children born out of wedlock have a civil relationship with their mother, father, and respective families if a biological relationship is proven by science or

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<sup>9</sup> Agatha, G. (2021). Pembuktian Dan Pengesahan Anak Luar Kawin Serta Akibat Hukumnya Setelah Berlaku Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Daam Pandangan Hukum Islam. *Indonesian Notary*, 3(1), 23.

other legal evidence. The study reveals mixed responses: some support the decision for better legal protection of children's rights, while others view it as contrary to Islamic law. The Selatpanjang Religious Court judges disagree with applying the decision to children born from adultery but accept it for children from unregistered marriages (*nikah sirri*). However, the decision is not a primary legal basis in their rulings, as the judges rely on existing legal frameworks that similarly recognize biological relationships if proven.

## **Results and Discussion**

### **Children Out of Wedlock**

Children are the result of a biological relationship between men and women. If the child is born from a valid marriage according to Islamic law, then the child is also a legitimate child. Likewise, if the child is born from an illegitimate marriage, then the child is also in the position of an illegitimate child, so he only has a civil relationship with his mother. Thus, according to the author, the legal status of the child in the family is legal or not as a result of how the marriage is carried out by both parents. The definition of marriage itself as mentioned in Article 1 of Law Number 1 of 1974 which states, that marriage is an innate bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Godhead. According to Nurhadi, marriage aims to create a happy life based on the One Godhead, so that the marriage that will be carried out has a very close relationship with religion and spirituality.<sup>10</sup> Based on this, according to the author, the marriage carried out by a couple of men and women is not only aimed at fulfilling biological desires, but to achieve world happiness and *akherat*, *Sakinah*, *mawaddah wa rahmah*. This is what is stated in Article 3 of the Compilation of Islamic Law, that the purpose of marriage is to realize a family life that is *sakinah*, *mawaddah*, and *rahmah*. The issue of the validity of marriage according to Law Number 1 of 1974, regarding the validity of a marriage is contained in Article 2, paragraph (1), namely marriage carried out according to the law of each religion and its beliefs, and paragraph (2) is recorded in the government agency that handles the field. So based on these two articles, according to Ashary, the issue of whether or not a marriage is valid is determined by their respective religions. For Muslims, the conditions and harmony of a marriage must be met. So that if the conditions and pillars of marriage have been met, then the marriage is religiously valid. However, the marriage has not been

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<sup>10</sup> Nurhadi, Implementasi Putusan Mahkamah Konstitusi Nomor 46/Puu-Viii/2010 Tentang Anak Di Luar Kawin Kajian Putusan Nomor 329 K/AG/2014. *Jurnal Yudisia* Vol. 11 No. 2 August 2018: 243 - 265

considered valid by the state if it is not registered at the Office of Religious Affairs, so the marriage must be registered first, because the recording functions as recognition, protection, and legal certainty. Marriages that are legally religious but not registered are usually called series marriages, marriages under the hands or illegal marriages.<sup>11</sup>

Based on this explanation, if the marriage of the two is valid according to the applicable law, then the legal position of the child is no longer a problem. But on the other hand, if the marriage carried out by the two masters is not valid in accordance with the applicable law in Indonesia, then there will be illegitimate children or children out of wedlock. Meanwhile, according to Paul Scholten, in general, so-called children out of wedlock are children who are seeded and born outside of a legal marriage.<sup>12</sup> So out-of-wedlock children actually include:

In Islamic law, an adulterous child is defined as a child born from a biological relationship outside the bond of marriage. This differs from the definition in civil law, where an adulterous child refers to a child born from a conjugal relationship involving at least one party who is married to someone else, as stipulated in Article 284 of the Criminal Code<sup>13</sup>.

The issue of children born from incestuous relationships is addressed in Articles 30 and 31 of the Civil Code and Article 8 of the Marriage Law, as well as Article 70(d) of the Compilation of Islamic Law (KHI). Both incestuous children and adulterous children are considered illegitimate and cannot inherit from their parents except under certain conditions outlined in Article 273 of the Civil Code. These children are only entitled to necessary alimony as stated in Article 867(2) of the Civil Code.<sup>14</sup> Other categories of illegitimate children include those born out of wedlock who are not the result of adultery or incest. These children may be recognized by their biological parents, granting them certain legal rights. Another category is the mula'anah child, born to a woman whose husband denies paternity through a li'an oath. Once proven, the child is regarded as illegitimate, akin to an adulterous child, as regulated in Articles 101 and 102 of the KHI. Additionally, there are syubhat children, born from a relationship based on an unintentional mistake. These children may have a civil relationship

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<sup>11</sup> Anshary, *Hukum perkawinan di Indonesia: Masaah-masaah krusia*, (Yogyakarta: Pustaka Siswa, 2010), p.26

<sup>12</sup> P. Scholten, *Asser Series, handleiding tot de Beoefening van het Nederlands burgerlijk Recht, Volume 1, Inleiding – Personenrecht, Print IV* (Tjeenk Willink: Zwolle, 1934), p. 383

<sup>13</sup> Team Nusantara, KUHP, *Kitab Undang-undang Hukum Perdata*. (Jakarta: Nusantara, print I. 2009), p. 103

<sup>14</sup> Team Nusantara, KUHP, *Kitab Undang-undang Hukum Perdata*. (Jakarta: Nusantara, ed. I. 2009), p. 95

with their biological father if the father acknowledges them. This recognition is contingent upon the sincerity of the circumstances leading to the child's birth.<sup>15</sup>

### **Legal Status of Children Outside of Marriage**

A child out of wedlock is what in other languages is called an illegitimate child, according to the definition enshrined in the Marriage Law Number 1 of 1974 which states that "A child born out of wedlock only has a civil relationship with his mother and his mother's family." this article is strengthened in the Compilation of Islamic Law which states that a child born out of wedlock only has a nasab relationship with his mother and his mother's family.

According to Manan, in the view of Islamic law, children resulting from extramarital relationships are called adulterous children (*walad al-zina*), *syubhat* children or *li'an* children, and are considered illegitimate children.<sup>16</sup> This is in accordance with the Fatwa of the Indonesia Ulema Council Number 11 of 2012 concerning the Position of Children Resulting from Adultery and the Treatment of Them, which states: (1) Children resulting from adultery do not have a relationship of nasab, guardian of marriage, inheritance, and nafaqah with the man who caused his birth; (2) The child resulting from adultery only has a relationship of nasab, inheritance, and nafaqah with his mother and his mother's family; and (3) A child resulting from adultery does not bear the sin of adultery committed by the person who caused his birth. The problem of the status of children resulting from serial marriages has been explained at length by Az-Zuhaili, that children born from marriages that are not registered in government agencies can still be handed over to their fathers.<sup>17</sup>

This opinion is based on the practice of *nikah siri* which is intended to be a marriage that has met the requirements and is a harmony of marriage according to Islamic law, but is not recorded in government agencies with various factors behind it. A child who should not be given to his father is a child born as a result of adultery, as mentioned in several hadiths of the Prophet Muhammad PBUH, including:

*Narrated to us [Yahya bin Qaza'ah] narrated to us [Malik] from [Ibn Shihab] from [Urwah bin Az Zubair] from [Aisha (may Allah be pleased with him) said: Utbah bin Abu Waqash advised his brother Sa'ad bin Abu Waqash which read: "The son of the servant of the sahaya Zam'ah is my son, so take it." Aisha (may Allah be pleased with him) said; In the year of the Liberation of Makkah, Sa'ad bin Abu Waqash took it, saying: It was my brother's son, whom he told me to take this child. So Abd bin Zam'ah*

<sup>15</sup> Abdul Manan, *Aneka Masaah Hukum Perdata Islam di Indonesia* (Jakarta: Kencana, 2008), p. 83

<sup>16</sup> Manan, A. *Reformasi hukum Islam di Indonesia: Tinjauan dari aspek metodologis, legaisasi, & yurisprudensi*. Jakarta: Raja Grafindo Persada, 2014), p. 83

<sup>17</sup> Az-Zuhaili, W., *A-Fiqh A-Islam wa Adilatuh*, (Bairut: Dar a-Fikr, 2001), p.670

*stood up and said: Oh no, because my brother and the son of my father's servant were born in his bed. Then both of them complained about this matter to the Prophet PBUH. Sa'ad said: "O Messenger of Allah, this is my nephew, whom my brother has told me to take." Then Abd bin Zam'ah said: "My brother and the son of my father's servant were born in his bed." Then the Prophet PBUH said: "He is yours, O Abd bin Zam'ah." Then the Prophet PBUH said: "The child belongs to the owner of the mattress (husband) while the adulterous man for him is a stone (stoned)." Then he said to Saudah bint Zam'ah, the wife of the Prophet PBUH: "Put on your hijab from him, O Saudah, because it bears a resemblance to 'Utbah'. So the son of the servant of the Prophet Zam'ah never saw Saudah forever until Saudah meets God." (H.R. Al-Bukhari).<sup>18</sup>*

Then also in a narration from Sahal bin Sa'ad, he said: I have attended the oath of the second li'an, which was witnessed by the Prophet. I was fifteen years old at the time, and then I told the hadith as before. In the hadith he said: "The woman then comes out pregnant, then the child will be attributed to her mother." (HR. Abu Dawud).<sup>19</sup> Therefore, based on the discussion above and strengthened by the evidence of these two hadiths, children who are not given to their fathers are children born as a result of adultery.

The Position of Children Out of Wedlock After the Constitutional Court Decision can be explained that in relation to a child born out of wedlock, guardianship will be held by the mother. This is as a result of article 43 paragraph (1) of the Marriage Law. Then with the issuance of the Constitutional Court Decision No. 46/PUU-VIII/2010, there is a legal relationship between the illegitimate child and his biological father which is real and proven that the child and the father have a blood relationship or the father is the person who has seeded the child in the mother's womb. So that with the opening of the civil relationship, the right of alimention is established. Since the issuance of the Constitutional Court decision, a child through a court decision is entitled to receive maintenance and education costs from his biological father

#### **Application of Constitutional Court Decision Number 46 of 2010 in the Religious Court.**

The application of the Constitutional Court Decision Number 46 of 2010 concerning the Status and Legal Status of Children Out of Wedlock and the Results of Sirri Marriage in the Religious Court can be applied in two ways, namely:

*First*, through the authority of the Religious Court outside the Religious Justice Law. Where the judge could rely on the authority of Article 56 paragraph (1) of Law Number 39 of 1999 concerning Human Rights and Article 7 of Law Number 23 of 2002 concerning Child Protection, the essence of which is that the right of a child to know his parents (father and

<sup>18</sup> A-Bukhari, I., A-Jami' As-Saheeh or Saheeh Bukhari, Cairo, : As-Saafiyah, 2010),p.75

<sup>19</sup> Dawud, A., Sunan Abu Daud, (Riyad: Maktabah Sa'ad bin Abdurrahman, 2011), p. 391



mother) is a basic right of a child that must be fulfilled, in this case through the court. Neglecting children who want to get certainty about who their parents are is a violation of children's human rights. This means that the panel of judges of the Religious Court did not base its authority on Decision No. 46/PUU-VIII/2010 on the grounds that there was no clause in the decision that could be interpreted as retroactive, so that the Constitutional Court's decision did not apply if the judge's decision was only based on the Human Rights Law and the Law on Child Protection like this.

However, according to the author, the consideration of authority becomes unfounded because the articles driven by the panel of judges do not talk about the issue of judicial authority, but talk about the issue of children's rights. Therefore, it becomes inaccurate if on the grounds that there is no clause that can be interpreted as retroactive, causing the Constitutional Court Decision to not apply to this case. In fact, according to the author, there is authority given by other laws and regulations outside Article 49 of the Religious Justice Law, and this authority is recognized by the Supreme Court *in the religious* chamber.

*Second*, applying progressive laws. Where progressive law is valid to be applied in all aspects, then the petition can be applied both to formal law and material law. According to the author, procedural law is the way to the truth, upholding law and justice. So if the procedural law is rigid for the reason of orderly proceedings so that the truth and justice are not upheld, then the procedural law can be broken through only to uphold the truth and justice.

Judges should not be fixated on imperfections, because it is the judge's duty to perfect the rigid procedural law. So it can be seen that the panel of cassation judges is too formalistic and tends to be rigid in responding to the absolute authority (competence) of religious courts. According to the author, religious court judges can include progressive legal values in the legal considerations in the petition, namely: (a) placing "law for man" instead of "man for law." Because if the petition is granted, it means that the Supreme Court is trying to seat an out-of-wedlock child almost equal to a legitimate child in obtaining civil rights from his biological father, even though only limited rights; (b) responding to the desire of justice seekers to provide protection of civil rights for children out of wedlock, i.e. recognition from their biological fathers; (c) provide the value of welfare and happiness, not only for the mother who gives birth, but also for the mother's family, especially for children born outside of legal marriage; (d) accommodating the public's will by making rule breaking (legal breakthroughs) by judges in actualizing the law in the right space and time and making creative interpretations of existing regulations, without having to wait for changes in regulations (changing of law).

The goal is for the law to also regulate and guarantee the civil rights of children out of wedlock who have not received legal protection so far; (e) manifesting a verdict that has moral and spiritual intelligence with a deeper content of substantive justice values; (f) replacing and breaking through the paradigm of working the law according to regulations towards the paradigm of human behavior, namely looking at the social goals to be achieved from the work of the law.

Zakyyah in his writing also revealed that "Decision No. 46/PUU-VIII/2010 is contrary to the theory of *hifzhu nasl*, but if the civil relationship in question is only a mutual obligation limited to the provision of alimony, then this decision is very appropriate and in accordance with the theory of *hifzhu nafs in maq asid alsyar'iyah*, because protecting the soul of children (*hifzu nafs*) from adversity and misery is the benefit of *alदारuriyyah* that must be maintained."<sup>20</sup>

## **Conclusion**

The legal position of children out of wedlock and the result of Sirri's marriage is that the child has become clear that the child only has a civil relationship with his mother. While the injustice is that the man who impregnated her is not responsible for everything and without being subjected to any sanctions, and her mother must be responsible for everything. Moreover, his child will suffer for the rest of his life by holding the title of an out-of-wedlock child.

Based on the theory of legal protection, the child does not receive protection and does not receive anything from his biological father. Based on the theory of authority, religious courts have the authority to examine and adjudicate biological child applications/lawsuits even though they are not mentioned in the Religious Justice Law package, where such authority is granted or as a result of Decision Number 46/PUU-VIII/2010, which is final and has binding legal force (*final and binding*). The application of the Constitutional Court Decision Number 46 of 2010 concerning the Status and Legal Status of Children Out of Marriage and the Results of Sirri Marriage in the Religious Court can be applied in two ways, namely: *First*, through the authority of the Religious Court outside the Religious Justice Law. And second, through the application of progressive legal theory, so that judges' decisions do not tend to be formalistic and rigid, as a result they do not reflect justice so they need to be combined with responsive or progressive law.

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<sup>20</sup> Zakyyah. (2016, August). Nasab anak luar kawin menurut *Hifzhu Nasl* (Kajian Putusan Mahkamah Konstitusi Nomor 46/PUUVIII/ 2010). *Jurnal Yudisia*, 9(2), 195-214.

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