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RECONSTRUCTION OF ISLAMIC FAMILY LAW IN INDONESIA THROUGH CONSTITUTIONAL COURT DECISIONS

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Abstract: No law is perfect as well as in the Marriage Law, there are many criticisms of the articles in the UUUP which are considered not to follow the spirit of family law reform. Many articles are considered discriminatory, have multiple interpretations, and do not provide legal justice. The proposed revision of the contents of the UUP began during the Reformation period, but the debate just ended. Amid the impasse in 2003 the Constitutional Court (MK) was born as one of the judicial institutions in Indonesia through the amendment of the 1945 Constitution. The birth of the Constitutional Court gave fresh air to groups who felt that their constitutional rights were violated by Marriage Law No.1 of 1975. This research is a descriptive-analytic library research, the problem approach used is a normative-juridical approach. The results of the study found that the Constitutional Court acted as an interpreter, and reinforcer changed Islamic family law, and even made a new Islamic family law using the glasses of the constitution. Based on the decision of the Constitutional Court which is final and binding, the Constitutional Court's decision functions as a negative legislator and a positive

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legislator as in Decision No.46/PUU-VIII/2010, Decision No.69/PUU-XIII/2015 and Decision No.22/PUU- XV/2017. In addition, the Constitutional Court also provides interpretation and strengthening *of* Islamic family law as stated in decision No.68/PUU/XII/2014. Based on the four decisions of the Constitutional Court, the Constitutional Court has an important and effective role in reforming Islamic family law in Indonesia.

Undang-undang tidak ada yang sempurna begitu pula dalam UU Perkawinan, banyak kritisi tentang pasal-pasal dalam UUP yang dianggap tidak sesuai dengan semangat pembaharuan hukum keluarga. Banyak pasal yang dianggap diskriminatif, multitafsir dan tidak memberikan keadilan hukum. Sesungguhnya usulan revisi terhadap isi UUP sudah mulai pada masa Reformasi, namun perdebatan tersebut berhent begitu saja. Di tengah kebuntuan tersebut pada tahun 2003 Mahkamah Konstitusi (MK) lahir sebagai salah satu lembaga yudisial di Indonesia melalui amandemen UUD45. Lahirnya MK memberikan angin segar bagi kelompok yang merasa hak-hak konstitusi dilanggar dengan adanya UU Perkawinan No.1 tahun 1975. Penelitian ini merupakan jenis penelitian pustaka (library research) bersifat deskriptif-analitik, pendekatan masalah yang digunakan adalah pendekatan normatif-yuridis. Hasil penelitian menemukan MK berperan sebagai penafsir, penguat, mengubah hukum keluarga Islam bahkan membuat hukum keluarga Islam yang baru dengan mengunakan kacamata kontitusi. Berdasarkan putusan MK yang bersifat final and binding *maka putusan MK berfungsi sebagai negatif legislator dan postitif legislator sebagaimana dalam putusan Putusan No.46/PUU-VIII/2010, Putusan No.69/PUU-XIII/2015 dan Putusan No.22/PUU-XV/2017. Selain itu MK juga memberikan penafsiran dan*

penguatan hukum keluarga Islam sebagaimana dalam putusan No.68/PUU/XII/2014. Berdasarkan empat putusan MK maka MK mempunyai peranan yang penting dan efektif dalam pembaharuan hukum keluarga Islam di Indonesia.

Keywords: Constitutional Court, Islamic Family Law, Judge's Decision

INTRODUCTION

The Marriage Law Number 1 of 1974 (hereinafter abbreviated as UUP) was born after going through a long debate that took 25 years and was quite fierce so that tensions arose in the community, finally on December 28, 1973, the House of Representatives (DPR) was able to ratify the Draft Law. The Marriage Law of 1973 became the Marriage Law Number 1 of 1974 concerning marriage which was promulgated on January 2, 1974. (Nasution 2009)

The UUP was born with three objectives; First, it provides legal certainty for marital problems, because before the existence of the marriage law, it was only a judge-made law. Second, protect the rights of women. Third, create laws that are by the demands of the times (Nasution 2009). So, that UUP is often referred to as Indonesian fiqh because it has been adapted to Indonesian socio-cultural conditions, but still refers to the concept of fiqh thought that existed before (Najib 2011). Among the legal reforms contained in the UUP are the provisions for recording marriage, the minimum age of marriage, the provision of a balanced position of husband and wife in the family.

However, in reality, no law is perfect. Although the law has gone

through a long process of discussion with various analyzes, when the law is applied directly in the community, various concrete problems arise that are not regulated by law. There are many unexpected and calculated problems during the manufacturing process. Especially in the current era of globalization and information, where human life is borderless (borderless world), changes in all fields move very quickly (moving speedily) so it is not easy to create a comprehensive law (Harahap 2005). Likewise, in the Marriage Law, there are many criticisms of the articles in the UUP which are considered incompatible with the spirit of family law reform. Many articles are considered discriminatory against the rights of women and children.

The proposed revision of the contents of the UUP began during the Reformation period, around the 2000s during the Abdurrahman Wahid period there was debate about the provisions of polygamy which were considered discriminatory. But the debate just stopped. Amid the impasse in 2003 the Constitutional Court (MK) was born as one of the judicial institutions in Indonesia through the amendment of the 1945 Constitution. The birth of the Constitutional Court seemed to provide fresh air for groups who felt that their constitutional rights had been violated with Marriage Law No. 1 of 1975.

The Constitutional Court has the authority to adjudicate at the first and final levels whose decisions are final to examine the Act against the Constitution of the Republic of Indonesia (UUD 1945). This authority provides an opportunity for citizens who feel that their constitutional rights have been violated by the existence of a law, then they have the right to submit a constitutional review at the Constitutional Court.

The Constitutional Court has several times issued decisions on constitutional review cases against articles of the UUP which are considered to violate constitutional rights. Among them, the decision of Constitutional Court No. 46/PUU-VIII/2010 concerning civil relations for children born out of wedlock, Constitutional Court Decision No. 68/PUU-XII/2014 concerning Interfaith Marriage, Constitutional Court Decision Number 69/PUU-XIII/2015 concerning Marriage Agreements, Constitutional Court Decision No.22 /PUU-XV/2017 concerning Age of marriage.

So, it is undeniable that the birth of the Constitutional Court in the Indonesian legal order contributed to the legislation of Islamic family law in Indonesia. It can be seen that the Constitutional Court has an important role in bridging the relationship between the government and Islamic law, because the 1st precepts of Pancasila and Article 28E paragraph (1), Article 29 paragraph (2), and Article 28I paragraph (1) of the 1945 Constitution have mandated the role of religion in the state.

Based on this background, the authors are interested in analyzing the role of the Constitutional Court in reforming family law in Indonesia, because in some of these decisions the Court also provides new interpretations, and even makes new laws in Indonesian Islamic family law. Meanwhile, the Constitutional Court is a court that adjudicates at the first and final levels whose decisions are final and binding.

RESEARCH METHOD

This research is a type of library research, namely research that uses literature that is by the problems studied as a source of data, so that in

collecting the required data using library sources that are related to the main problem of research. This research is descriptive-analytic, namely research by describing and explaining data related to the subject matter, then reviewed and then analyzed using a theoretical framework that has been built. The problem approach used is normative-juridical. Normative, namely approaching existing problems based on applicable norms. Juridical, namely approaching existing problems based on applicable laws and regulations. (Arfa 2016)

The study took four decisions of the Constitutional Court for analysis, namely decisions on the civil rights of children out of wedlock, interfaith marriages, marriage agreements, and age of marriage to see the whole of some of the applications for judicial review of the Islamic family law in Indonesia.

DISCUSSION

Judicial Review and Decisions of the Constitutional Court which are Final and Binding

The third amendment to the 1945 Constitution adds the Constitutional Court as part of the judicial institutions in Indonesia other than the Supreme Court. The establishment of the Constitutional Court which is separate from the Supreme Court is a conception adopted in the Indonesian judicial system by adhering to the Hans Kelsen concept which was applied in the Republic of Austria in the early 20th century. Indonesia is the 78th country to implement Constitutional Court justice. The Constitutional Court was formed during the transition from an

authoritarian system to a democratic system, to separate and share power with a system of supervision and balance between branches of state power (checks and balances). Based on this, the authority of the Judicial Review (JR) was born, namely the authority to examine laws against the 1945 Constitution.(Asshiddiqie 2010)

As stated in Article 24C paragraph (1) that one of the five powers of the Constitutional Court is to adjudicate at the first and final level whose decisions are final to examine the Act against the 1945 Constitution (Judicial Review).(Mahkamah Konstitusi RI 2003)

The nature of the Constitutional Court's decision based on article 24 c paragraph (1) of the 1945 Constitution is clear that the Constitutional Court has the authority to try at the first and last levels whose decisions are final. The final nature referred to in the quo arrangement is that the Constitutional Court's decision immediately obtains permanent legal force from the moment it is pronounced (binding) and there are no legal remedies that can be taken (final). The final nature of the Constitutional Court's decision includes binding legal force which since it was pronounced by the judge immediately obtained permanent legal force (*inkracht van gewisjde*)(Sumadi 2011)

In addition to being final and binding, the Constitutional Court's decision in terms of judicial review is also *erga omnes* in that it has legally binding power not only for litigants but is binding on all components of the nation who must submit to and implement the Constitutional Court's decision. The nature of the decision is different from decisions in ordinary courts in general which are binding only on the parties litigating in court or

known as inter pares. The nature of *erga omnes* in the Constitutional Court's decision is due to the nature of the Act which is the object of testing, that the Law is a regulation containing legal norms that are binding in general. If later the article in the law or the law in its entirety is canceled by the Constitutional Court, then *mutatis mutandis* the binding legal force for all components of the Indonesian nation will also be lost.(Sumadi 2011)

The legal consequences of the Constitutional Court's decision in a judicial review case have two characteristics, namely; 1) Declaratoir, namely a decision that states what becomes law; 2) Constitutive decisions are decisions that eliminate a legal situation (negative legislator) and or create a new legal situation (positive legislator). The Constitutional Court's decision can contain a statement of what becomes law and at the same time can nullify the legal situation and create a new legal situation.(Sumadi 2011) We can understand the nature of the Constitutional Court's decision, we can understand the importance of the existence of the ruling in the judicial review, furthermore, Article 56 of the Constitutional Court Law No. 24 of 2003 mentions several types of rulings, including (a) the decision is rejected; (b) the decision is unacceptable, and (c) the decision is granted.(Sumadi 2011)

First, the decision was rejected. This decision occurs if after going through the entire process of judicial review of the law, the Constitutional Court declares that the law does not conflict with the 1945 Constitution, both regarding its formation and its material in part or in whole. The verdict stated that the application was rejected because there was no legal reason as

stipulated in article 56 paragraph (5) of Constitutional Court Law No. 24 of 2003.(Sumadi 2011)

Second, the verdict is unacceptable (*niet onvantkelijk verklaard*). An application is declared inadmissible if during the examination process it turns out that it does not meet the requirements specified in Article 50 and Article 51 of the Constitutional Court Law No. 24 of 2003 or the case submitted is not within the authority of the Constitutional Court. However, the provisions of Article 50 have been abolished through the Constitutional Court's decision Number 004/PUU-I/2003 because it is seen as reducing the authority of the Constitutional Court granted the 1945 Constitution of the Republic of Indonesia and contrary to the doctrine of the hierarchy of legal norms that has been universally recognized and accepted.(Sumadi 2011)

Third, the decision was granted. An application is granted when, after going through the entire trial process, the Judge of the Constitutional Court believes that the application is grounded, and authentically the law being applied for is contrary to the 1945 Constitution, so the decision states that the application is granted.(Sumadi 2011)

In addition to the three types of rulings, the dynamics in the judicial review have given birth to new types of rulings, namely conditional decisions, both conditionally constitutional and conditionally unconstitutional. This conditional decision was first introduced during the review of Law Number 7 of 2004 concerning Water Resources. According to Harjono, the idea arose because laws often have very general article formulations and it is not known whether in practice, they are contrary to the Constitution or not.

In the type of conditional or conditional unconstitutional decisions, the Constitutional Court provides certain interpretations or requirements for the norms being tested, so that when the norms are not read as interpreted by the Constitutional Court, or are not implemented in accordance with the requirements given, the norms will become unconstitutional. Thus, although there is a dichotomy of the types of conditional decisions, conditional constitutional decisions and conditional unconstitutional decisions substantially have one characteristic in common, namely norms will become unconstitutional if they do not meet the requirements determined by the Constitutional Court. Referring to the opinion of the Constitutional Court in its decision, the conditional decision was in principle handed down to provide a certain interpretation so as not to create legal uncertainty or violate the rights of citizens.(Rahman and Wicaksana 2016)

Renewal of Islamic Civil Law in Indonesia

The word renewal can be interpreted as changes made due to advances in science, science, technology, and various other sciences. In addition to the term renewal, other terms that are often used by Western society are modern, modernization, and modernism which mean thoughts, schools, movements, and efforts to change ideas, customs, old institutions, and so on.(Nasution 2001)

While the term Islamic law reform can be interpreted as a form of ijtihad process in establishing law as a result of new problems that arise due to advances in science, technology, science, and various other sciences. The process of determining the law on the problem needs to be carried out

because there are no legal provisions that regulate it or establish a new law to replace the old law that is no longer following the conditions and benefits in the current context.

Indonesia is not an Islamic state, but the majority of the population is Muslim. Efforts to reform Islamic family law in Indonesia cannot be separated from Muslim reformist thinkers worldwide and in Indonesia itself. Among them are Muhammad Abduh, Hasbi Ash-Shiddiqi, Fazlur Rahman, Munawir Syadzali, Hazairin, Sahal Mahfudz, Abdurrahman Wahid, and Masdar F. Mas'udi.(Setiawan 2014)

The renewal of Islamic family law carried out in various Muslim countries has a purpose behind it, including;(Nasution 2001)

1. Improving the status of women who still experience discrimination, especially in Islamic family law. The family law laws in Egypt and Indonesia can seen that changes made are based on the demand to provide justice for women.
2. Unification of law, the community with various schools of thought followed, the unification is carried out to provide legal certainty for all Muslim communities in Indonesia, especially as a guide for judges in deciding the same case.
3. Answering new problems that arise in the community. The era of globalization and the development of all aspects of human life raises new problems, so the law is required to answer all issues that arise in society.

Islamic law experts in Indonesia mention several factors that led to the renewal of Islamic law, namely:(Manan 2006)

1. To fill the legal vacuum, because there are no laws and regulations governing it, or even classical fiqh books have not discussed these problems, while the problems in society are constantly changing, a new law is needed that can provide legal justice for the community;
2. The community's need for laws related to recent problems is very urgent to implement;
3. The influence of economic globalization, the advancement of science and technology that influences the concept of the family so that legal regulations are needed to regulate it, especially problems for which there are no legal rules;
4. The influence of the development of Islamic legal thought carried out by fiqh experts both at the national and international levels;
5. The influence of Reformation in various fields provide opportunities for Islamic law as reference material in making national law.

The renewal of Family Law that occurred is in line with the theory put forward by Imam Syafi'i with his theory which we know as qaul qadim and qaul Jadid. The birth of thought is the result of the response of the times between Egypt and Baghdad. Legal changes are made and adapted to the circumstances, situations, times, and conditions of the local community. Communities with various existing dynamics demand social change, and every social change, in general, requires a change in the value system and law, of course, changes are made based on the rules of *maqasyid ash-shari'ah*.

Based on the description above, it can be seen that the renewal of Islamic family law has been in process for quite a long time, with changing conditions and situations and following the demands of the times. This is

because the norms contained in fiqh books are no longer able to provide solutions to new problems that occur. In this regard, J.N.D. Anderson said that family law is considered the core of sharia because it is this part that Muslims consider a gateway to deeper entry into the realm of religion and society.(Anderson 1976)

Methodology for Renewing Islamic Family Law

Taher Mahmoud describes the theory of Islamic law reform into two classifications, namely: First, Intra Doctrinal Reform is a method of reforming Islamic law by continuing to refer to the conventional fiqh concept using takhayyur and talfiq (combining some opinions). Second, Extra Doctrinal Reform is an understood method which is understood as a method that no longer refers to conventional fiqh concepts but refers to the texts of the Qur'an and Sunnah, through reinterpreting these texts (reinterpretation).(Nasution 2007)

In line with Taher Mahmoud's opinion, Nasution also classifies the methodology of the study of Islamic law into two characteristics, namely classical and medieval methodologies which are then called conventional methods and contemporary methods.(Nasution 2007)

The conventional method is the method used by scholars in ijtihad by applying the law based on the Qur'an and Sunnah. The hallmark of the conventional method in establishing Islamic law is to use a global (partial) approach without looking at the historical background and to focus on conducting literal or textual studies. This method provides a barrier between the fiqh method and the interpretation method.(Nasution 2007)

Renewal of Islamic law using contemporary methods offers a new methodology and is different from conventional or classical methods. The paradigm used by the contemporary method emphasizes the understanding of the Qur'an and Sunnah in terms of context. The correlation between the text and social change is not only understood and compiled through textual interpretation but also through the interpretation of the universal meaning contained in the texts of the Qur'an and Sunnah.(Nasution 2007) Anderson put forward 5 (five) methodologies for reforming Islamic law, namely: (Anderson 1976)

1. *Takhshîsh al-Qadlâ* (the prosedural expedient)

   Takhshîsh al-qadlâ is the intervention of the State to limit the judicial authority in various matters, both in terms of territory, jurisdiction, and people, as well as in terms of the procedural law that is applied. The state has the right to adopt policies and procedures to regulate the judiciary so as not to apply the provisions of family law without intending to change the substance of Islamic law and aiming for the benefit of society.

   As the example of *Takhshsh al-qadlâ* as noted in Anderson namely in the Egyptian Code of Organization and Procedural for Syari'ah Courts, 1897). In this law, the Egyptian Court of Justice regulates marriage and divorce, and that marriage is considered valid if the marriage is registered with the State. Even in the case of divorce, post-divorce rights can be legally recognized and processed if the marriage performed is a legal marriage or is registered with the State and authentic evidence of marriage is provided. This means that there are restrictions

imposed by the State in the court process by stipulating that cases may obtain legal recognition if they are accompanied by evidence of marriage. This is also what is applied in the context of judicial law in Indonesia.

2. *Takhayyur* (the eclectic expedient) dan *Talfiq*

Takhayyur is a method by using a way of choosing the views of one of the fiqh scholars, including taking the views of scholars outside the school of thought. Take, for example, the views of Ibn Qayyim al-Jauzîyah, Ibn Taimyah, and others. Substantial *takhayyur* can also be called tarjih. This method chooses a different argument by choosing a stronger argument or an argument that is more suited to the needs of the problem. While the *Talfiq* method is a method used by combining several opinions of scholars (two or more) to be applied in a legal matter

3. *Siyâsah Syar'îyah* (the expedient of administrative orders)

Siyâsah Syar'îyah is the policy of the leader or ruler in setting regulations that are expected to bring benefits to the community and do not conflict with shari'ah.

4. Reinterpretasi *Nash* (The Expedient of Re-Interpretation)

Reinterpretation of the texts is the reinterpretation of the texts by re-understanding the Qur'an and the Sunnah of the Prophet.

Examples of the application of textual reinterpretation include restrictions or even prohibitions on polygamy. This is done in several countries, for example, Egypt, Tunisia, and including Indonesia. The rules for limiting the practice of polygamy are based instead of using conventional methodological concepts, this rule is carried out by reinterpreting the contextual meaning in the text which aims to provide

equality and justice for wives and husbands and to protect children's hadhanah rights.

5. Judge's Decision (the expedient of reform by judicial decisions)

   Basically, the judge's decision is not a method of reforming Islamic law, but the judge's decision is a medium for the birth of renewal. In the sense that the judge in his decision can give birth to the concept of renewal with the discovery methodology of Islamic law using either the talfiq, tahayyur, or text interpretation methods. Court decisions that bring new legal changes and have positive values are usually acceptable and do not cause much debate or protest by the public. By looking at this, Anderson argues that the judge's decision is one form of media that is very effective in reforming Islamic family law.(Nasution 2007)

   The judge's decision is also called jurisprudence in terms or comes from the Latin *Iuris Prudentia*, which means the science of law. While in Dutch it is known as "jurisprudence". Jurisprudence in French uses the term "jurisprudence" which means "la solution suggeree par un ensemble de decisions concordantes rendues par les juridictions sur une question de droit" meaning a solution suggested by a joint decision made by the court on legal issues. In Latin jurisprudence is called "Juriprudentia" which means a judge's decision about a regulation that is made by himself to settle a case that is given authority to him.(Syarifin 1998)

Countries with a continental European system or civil law define jurisprudence as a judge's decision that has permanent legal force and is followed by other judges or courts in the same case. This collection of laws

is known as "Rechtersrecht" or the law that comes from the judge's decision in court. Meanwhile, countries that use the Anglo-Saxon or Common-Law legal system define jurisprudence as a science of law that contains the principles of positive law and legal relations. Meanwhile, the decisions of judges in higher courts are followed repeatedly and permanently so that they become part of legal science, referred to as "case law" or also referred to as "judge-made law".

Law in Indonesia as regulated in the Government of the Netherlands East Indies dated April 30, 1847, with the issuance of *Algeme Bepaligen van wetgeving voor Indonesia* (A.B) (General Provisions on laws and regulations for Indonesia) in *Staatsblad* 1874 No. 23 which until now is still enforced based on Article II of the transitional rules of the 1945 Constitution which states "All existing state bodies and regulations are still valid as long as new ones have not been enacted according to this Constitution.

Article 22 A.B. states that "a judge who refuses to settle a case because the laws and regulations related to the case being submitted are unclear, unclear, or incomplete, then he can be prosecuted for refusing to try." So, it can be concluded that in this case, the judge has the authority to create law (judge-made law), especially in cases where there are no regulations governing it and the case has been registered in court. The judge in filling the legal vacuum is obliged to carry out an analytical process by exploring the legal values that live and grow in society, for example; religious norms, customs, culture, and intelligence of the community, the economic and social level of the community, and so on.

In addition, in law, the term contra legem is also known, which

means that judges ex officio have the authority to deviate from laws and regulations that are considered obsolete or not following the times and society so that they no longer fulfill a sense of justice for the community. However, the judge does not necessarily exercise the right of contra legem, there must be clear and sharp legal considerations by considering other legal aspects.

So based on article 22 A.B. the judge makes a contra legem decision then the decision is used as the basis by other judges to adjudicate cases that have elements that are similar or even the same, the judge's decision is used as a source of law in deciding cases in court, the decision is referred to as jurisprudence law.(Simanjuntak 2019)

Legal experts in Indonesia, namely Subekti define jurisprudence as "the decisions of judges or courts that are permanent and justified by the Supreme Court as the Court of Cassation, or the decisions of the Supreme Court itself that are fixed (constant)". Subekti emphasized that the criteria can be called jurisprudence if no law regulates or is used as the basis for resolving cases faced by judges.(Syarifin 1998)

Mahadi defines jurisprudence as not a collection of judges' decisions, jurisprudence is interpreted as law formed from judges' decisions. Mahadi equates jurisprudence to the concept of ijma' as in the concept of Islamic law. In line with Mahadi, Surojo Wignjodipuro defines jurisprudence as a judge's decision that is used as the basis for the decisions of other judges, so that the decision becomes a permanent decision on the same case or legal issue. (Wignjodipuro 1982)

Ideally, legal reform is carried out by the legislature, but in practice changing a law is not easy in a country that adheres to a system of legal certainty (civil law). This is where the importance of the position of the judge's decision when the law is unable to answer legal issues that are required to provide legal justice, when there is a legal vacuum and when the law gives rise to multiple legal interpretations.

Judges' decisions in Islamic family law, which we know more about our decisions from the Supreme Court, but after the birth of the Constitutional Court with various decisions related to the Marriage Law, it must be considered as a form of reforming Islamic family law in Indonesia.(Priyono, Hendrawati, and Budiman 2020) Some of these decisions include:

1. The Constitutional Court Decision No. 46/PUU-VIII/2010

   The Constitutional Court's decision No. 46/PUU-VIII/2010 is a decision to review the law materially Article 43 Paragraph 1 and Article 2 paragraph (2) of Law No. 1 of 1974 concerning Marriage (UUP). In the petition for review, the applicant in his posita stated that Article 43 Paragraph 1 and Article 2 Paragraph (2) of the UUP had violated his constitutional rights as granted in the 1945 Constitution.

   UUP article 2 paragraphs (1) and (2) state that a legal marriage is a marriage carried out by their respective religions or beliefs and is registered with the marriage registrar. This is what makes a long debate about whether a marriage is legal or not when the marriage is carried out sirri which is considered religiously legal but is not registered with the marriage registrar.

The Constitutional Court's decision No. 46/PUU-VIII/2010 provides for legal changes that have attracted the attention of both academics and practitioners. The Constitutional Court's decision states that Article 43 paragraph (1) is contrary to the 1945 Constitution and thus does not have binding legal force. The Constitutional Court interprets that children born out of wedlock have a civil relationship with the mother and her mother's family and the man as the father which can be proven based on science, technology, or other legally valid evidence.

The judge of the Constitutional Court thought that it is not appropriate when the law eliminates the relationship of a child outside of marriage with a biological father, it is also unfair if a biological father who has had sexual relations with pregnancy and is born with a child is then released from responsibility, then this is contrary to human rights and the 1945 Constitution. So based on the Constitutional Court's decision, children born outside of marriage result in a legal relationship, namely, there are rights and obligations of the child, father, and mother. Children out of wedlock have civil relations with biological fathers and biological fathers are obliged to provide a living, lineage, and even inheritance to biological children.

Meanwhile, the petition for judicial review of the constitutionality of the UUP Article 2 paragraph (2) was not granted by the Constitutional Court and did not conflict with the constitution. This article does not negate the terms and pillars that determine the validity of marriage in the provisions of each religion or belief. Even the purpose of registering marriages is to provide goodness or benefit by guaranteeing

recognition and respect for the rights and freedoms of others. In addition, it also provides legal justice, protection, and services for rights that arise as a result of marriages that are following religious values, morals, security, and public order in a democratic society.

Marriage registration is not a legal requirement in marriage, but marriage registration is an administrative obligation that aims to provide protection, enforcement, promotion, and protection of human rights. In our concept of ushul fiqh with the problem of mursalah, namely the law must provide goodness and avoid harm.(Nelli 2021)

2. The Constitutional Court Decision No.68/PUU-XII/2014

The Constitutional Court's decision No.68/PUU-XII/2014 is a material review of Article 2 Paragraph (1) of the UUP against the 1945 Constitution. Article 2 paragraph (1) of the UUP states that marriage is legal if it is carried out following their respective religions and beliefs. The applicant in the application posita argues that the provisions of Article 2 paragraph (1) of the quo Law have violated the constitutional rights of Indonesian citizens because; First, there is still a legal vacuum regarding the implementation of interfaith marriages because there are no laws and regulations governing it. Second, Article 2 paragraph (1) still gives rise to multiple interpretations, therefore in the implementation of interfaith marriages, various interpretations arise, causing differences in treatment between one citizen and another citizen by the marriage registrar and causing the right to equality before the law to be unfulfilled. Third, because there is no definite law that regulates interfaith marriages, there is a lot of legal smuggling carried out by interfaith couples "as if"

one of the spouses has changed religion whose purpose is only to legalize the marriage.

The application aims to legalize interfaith marriages that will be carried out by the applicant. The Petitioner argues that freedom of religion is part of realizing human rights and is the constitutional right of every citizen as stipulated in article 29 of the 1945 Constitution. In its petition, the Constitutional Court asked to state that Article 2 paragraph (1) of the Constitutional Law was conditional by providing an interpretation of the article being tested.

The Constitutional Court's decision No.68/PUU/XII/2014 states that the applicants have the legal standing to file the *aquo petition*. However, after the Constitutional Court examined the applicant's application, and after asking for information from various religious leaders, expert witnesses and the government, the Constitutional Court judges decided to reject the petition for judicial review and stated that Article 2 paragraph (1) of the UUUP did not conflict with the 1945 Constitution.

The Constitutional Court judge interpreted that marriage is legal if it is carried out in accordance with the laws of their respective religions or beliefs, so it can be interpreted that a marriage that is legal and recognized by the state must be in accordance with the religion and beliefs believed by the prospective husband and wife.

The basic legal considerations of the Constitutional Court judge in determining the rejection of the application are because:

1. The Petitioner interprets Article 2 Paragraph (1) of the UUP using the logic of negative interpretation. That is to interpret the article allows marriage not to use religious law. This is contrary to the constitution; the state is obliged to protect and safeguard Indonesian citizens so that legal freedom of marriage does not occur in the end destroying religious values.
2. The applicant uses the wrong perspective, according to the applicant, marriage is only related to civil law and freedom to protect human rights without seeing marriage as an important part of religious law as a rule that is believed to be true.
3. The judge of the Court is of the opinion that although the right to freedom of religion is recognized in Article 29 of the 1945 Constitution, in exercising the rights and freedoms included in the freedom of marriage, every Indonesian citizen must still comply with the provisions of Article 28J paragraph (2) of the 1945 Constitution that the state has a role in regulating and guaranteeing certainty. law is included in the law of marriage.

Broadly speaking, the judges of the Constitutional Court rejected the application because it was not in accordance with the principles of divinity, culture, moral values and marriage law in Indonesia, and the considerations of the judges of the Constitutional Court were in accordance with maqāṣid al-sharī'ah. (Islamiyati 2017) So it can be concluded that the Constitutional Court's decision No. 68/PUU/XII/2014 is an interpreter and reinforcement of Islamic family law Article 2 paragraph (1) UUP concerning the invalidity of interfaith

marriages because they are not in accordance with the constitution in Indonesia.

3. The Constitutional Court Decision No.69/PUU-XIII/2015

The Constitutional Court's decision No.69/PUU-XIII/2015 is a decision related to the judicial review of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles and Law Number 1 of 1974 concerning Marriage. However, in this paper, we will only discuss requests related to Islamic family law, namely the examination of the UUP. (Indonesian Constitutional Court 2015).

Articles of UUP that are tested for constitutionality are Article 29 paragraph (1), paragraphs (3) and (4), and Article 35 paragraph (1). The Petitioner in his posita stated that the article had harmed the applicant's constitutional right to reside and not to be discriminated against by the state just because he married a foreign citizen. In his petition, the applicant asked the Court to conditionally decide on the articles being tested.

The Constitutional Court's decision in reviewing articles 29 paragraphs (1), (3), and (4) was adjudged to grant the partially unconstitutional request. The Constitutional Court judge interpreted Article 29 paragraph (1) of the UUUP by adding the phrase "during the marriage bond", changing the word "conduct" to "propose" and adding the phrase "or notary". So it can be seen that the Constitutional Court Decision No. 69/PUU-XIII/2015 in terms of the concept of a marriage agreement has changed the characteristics of a marriage agreement as regulated in the UUUP which initially a marriage agreement can only be

made before or at the time the marriage takes place must be interpreted that the agreement can also be done when the marriage has been carried out and must be registered with the marriage registrar or notary. Further interpretation in Article 29 paragraphs (3) and (4) which initially applied the marriage agreement and could not be replaced as long as the marriage was bound was reinterpreted by the Constitutional Court judge that the marriage agreement could be changed based on mutual agreement as long as it did not harm the various parties.

Meanwhile, Article 35 paragraph (1) of the Constitutional Court uses an argumentum a contrary by considering that the Constitutional Court's decision stating Article 29 paragraphs (1), (3), and (4) is conditionally unconstitutional, then Article 35 paragraph (1) does not need to be questioned as to its unconstitutional.

4. The Constitutional Court Decision No.22/PUU-XV/2017

The Constitutional Court's decision Number 22/PUU-XV/2017 is a review of Article 7 paragraph (1) of Law Number 1 of 1974 concerning Marriage, that marriage is only permitted if the man has reached the age of 19 (nineteen) years and the woman has reached the age of 19 (nineteen) years. 16 (sixteen) years.

The Petitioner in his posita argues that Article 7 paragraph (1) concerning the age limit for marriage is contrary to the 1945 Constitution Article 27 paragraph (1) concerning equality before the law. Differences in the standard age of marriage for men and women constitute legal discrimination by looking at gender differences. Therefore, the provisions of Article 7 paragraph (1) of the UUP have the

potential to cause the loss of girls' rights, such as education, and also to open a gap for the exploitation of children so that it is contrary to the constitutional rights of every Indonesian citizen.

Based on the convention the rights of children aged 16 years are below the standard age of marriage, if a child aged 16 years is married it will also result in the loss of rights as a child. UNICEF data found that women who gave birth under the age of 19 were at greater risk of dying than women who gave birth over the age of 19. Meanwhile, research data conducted by the Central Statistics Agency (BPS) found that 91.12% of married girls could not complete high school. In addition, economic factors are the main cause of child marriage in women, by marrying children it is considered to reduce the burden on the family. However, this creates new problems for the child, because of his economic inability, the child will be more vulnerable to experiencing domestic violence.

In the Court's stance on the open legal policy, the applicant argues that although the provision is an open legal policy, if the regulation contradicts the 1945 Constitution, then the Constitutional Court should decide it is a violation of constitutional rights. The Petitioner requested in his petition that the Constitutional Court conditionally decide on the article being tested.

The Constitutional Court judge gave legal considerations by looking at themaslahah mursalah resulting from the marriage of women under 16 years of age. The Constitutional Court judge argued that marriage is not only a religious matter, but there are several principles in

marriage, namely marriage with consent, voluntary between each party, the principle of partnership, forever and ever, and the principle of husband and wife personality.

In the argument about gender inequality in the application of the age limit for marriage between men and women, the Constitutional Court thinks that policies or laws should not discriminate against citizens based on gender or gender differences. Gender discrimination in the application of the age of marriage will have the effect of hindering the fulfillment of the community's constitutional rights in terms of health, economic, social and educational rights.

For the petition, the Constitutional Court decided that Article 7 paragraph (1) was unconstitutional or contrary to the 1945 Constitution. Even in its decision, the Constitutional Court ordered the legislative body to amend the article with a maximum limit of 3 (three) years after the decision was issued. So in the decision, the Constitutional Court made changes to the concept of the age of marriage in Islamic family law, although the judges of the Constitutional Court did not specify the exact age of marriage for women, because the stipulation of regulations is the authority of the legislature.

The Urgency of the Decision of the Constitutional Court in Renewing Islamic Family Law in Indonesia

Four decisions have been issued by the Constitutional Court related to Islamic family law, three of which are the Constitutional Court Decision No.46/PUU-VIII/2010 concerning the civil relationship of children born out of wedlock, the Constitutional Court Decision No.69/PUU-XIII/2015

concerning agreements marriage, the Constitutional Court Decision No.22/PUU-XV/2017 concerning the age of marriage was declared unconstitutional and conditionally unconstitutional. While one decision, namely the Constitutional Court's Decision No. 68/PUU-XII/2014 concerning interfaith marriages was declared not contrary to the constitution, the Constitutional Court gave an interpretation to emphasize the meaning of the article so that there were no multiple interpretations of interfaith marriages.

The Constitutional Court's decision is negative legislation because it cancels provisions that are contrary to the 1945 Constitution of the Republic of Indonesia. The Constitutional Court's decision which cancels norms that are contrary to the 1945 Constitution of the Republic of Indonesia is final and binding. then the decision of the Constitutional Court has obtained permanent legal force since it is finished being pronounced in a plenary session open to the public. The Constitutional Court is the first and last trial of its decision, no attempt can be made to correct the Constitutional Court's decision.

Based on the nature of the Constitutional Court's decision, due to the Constitutional Court's decision which stated that the contents of paragraphs, articles, and or parts of the law were contrary to the 1945 Constitution of the Republic of Indonesia, the Constitutional Court's decision Number 46/PUU-VIII/2010, Constitutional Court Decision Number 69/PUU-XIII/2015 and the Constitutional Court's Decision Number 22/PUU-XV/2017 article content, namely Article 43 paragraph (1), Article 29 paragraph (1), paragraph (3) and paragraph (4), Article 7

paragraph (1) The marriage law does not have binding legal force, then the applicable norms in the article are following the Constitutional Court Decision.

In addition to its function as a negative legislator, the Constitutional Court also functions as a positive legislator, namely the Constitutional Court can create a new legal situation to replace the old law. This is done by the Constitutional Court against decision No. 46/PUU-VIII/2010 concerning the civil relationship of children born out of wedlock. The Constitutional Court stated that Article 43 paragraph (1) is contrary to the constitution, which was later changed to mean that children born outside of marriage have civil relations with the mother and her mother's family and the man as the father can be proven based on science, technology or other evidence. legally valid.

Positive legislators were also carried out by the Constitutional Court in its decision No. 69/PUU-XIII/2015, namely by amending article 29 paragraphs (1), (3), and (4) of the UUUP concerning marriage agreements, which can no longer only be carried out before and at the time of marriage. However, the marriage agreement can be made while still in the marriage bond, and the marriage agreement can be changed as long as it does not harm the various parties. The Constitutional Court's decision also added a notary clause as an institution that has the right to ratify marriage agreements in addition to marriage registrar employees.

As a follow-up to the unconstitutional decision, what must be done is that the DPR together with the President as the legislative power must immediately revise the article or paragraph that has been declared contrary

to the constitution. Unfortunately, some of the Constitutional Court's decisions did not immediately receive a follow-up response from the DPR to make amendments or adjustments to the results of the Constitutional Court's decision. In practice or implementation, the DPR does not immediately follow up on the Constitutional Court's decision, so the execution of the Constitutional Court's decision is not easy.

Four decisions of the Constitutional Court have resulted in fundamental changes in Law Number 1 of 1974 concerning Marriage, only the decision of the Constitutional Court Number 22/PUU-XV/2017 has been responded to by the Legislature with the issuance of Law Number 16 of 2019 regarding Article 7 concerning age. marriage and the addition of Article 65A concerning the transition to the provisions on the age of marriage, which is 19 years for men and women. While the other three decisions so far there has been no follow-up response, even though the three decisions have been decided earlier than the Constitutional Court's decision Number 22/PUU-XV/2017.

Although the three decisions of the Constitutional Court, namely the Constitutional Court Decision Number 46/PUU-VIII/2010, the Constitutional Court Decision Number 69/PUU-XIII/2015 and the Constitutional Court Decision Number 68/PUU-XII/2014 were not responded to by the legislature in the revision of Law Number 1 of 1974 concerning In marriage, the decision remains final and binding, which means that the decision directly has permanent legal force and has the binding legal force to be implemented and can be used as jurisprudence by judges in court in deciding similar or similar cases.

Based on the four decisions of the Constitutional Court, the Constitutional Court has an important role and function in the renewal of Islamic family law in Indonesia. The Constitutional Court acts as an interpreter, and reinforcer changes the Islamic Family Law, and even makes a new Islamic family law by using the glasses of the constitution. The role of interpreter and enforcer of Islamic family law is seen in the decision of the Constitutional Court Decision No.68/PUU/XII/2014 regarding the invalidity of interfaith marriages. The Constitutional Court judge interpreted and affirmed Article 2 Paragraph (1) of the UUUP that a marriage that is legal and recognized by the state must be following the religion and beliefs believed by the prospective husband and wife in the sense of affirming the prohibition of interfaith marriages.

The role of the Constitutional Court as a modifier and providing new laws in Islamic family law is found in Decision No.46/PUU-VIII/2010 which changes the civil relationship of children out of wedlock, Decision No.69/PUU-XIII/2015 which changes the concept of a marriage agreement so that a marriage agreement can also be made while in the marriage bond and add a notaries clause as part of the marriage agreement ratification agency other than the marriage registrar, and Decision No.22/PUU-XV/2017 determines the age limit for the same marriage between men and women based on gender justice.

The four decisions of the Constitutional Court that have been studied found that the Constitutional Court with the authority to review the law (Judicial Review) of the 1945 Constitution to maintain and protect the constitutional rights of citizens, the Constitutional Court carried out the

role of reforming Islamic family law through the Judge's Decision (the expedient of reform by judicial decisions).

The Constitutional Court can answer all the problems of Islamic family law in a society that has been experiencing legal impasse. Changes in Islamic family law should indeed be carried out by changing the UUUP in the legislature, but for various reasons, until now demands for changes to Islamic family law have not been carried out by the legislature.

When Islamic family law (UUP) has not been changed and the existing law is unable to answer legal issues, unable to provide legal justice, giving rise to multiple interpretations, there is even a legal vacuum of the Constitutional Court born to answer all the problems of Islamic family law in Indonesia. Therefore, the Constitutional Court through its judicial review authority and decisions that are positive for legislators and negative for legislators have an important and effective role in reforming Islamic family law in Indonesia.

CONCLUSION

Based on the description above, the role of the Constitutional Court in Renewing Islamic Family Law in Indonesia can be concluded as follows:

First, the Constitutional Court acts as an interpreter, and reinforcer changes Islamic family law, and even makes a new Islamic family law by using the glasses of the constitution. Based on the Constitutional Court's decision which is final and binding, the Constitutional Court's decision functions as a negative legislator and a positive legislator as in the Decision No.46/PUU-VIII/2010 which changes the civil relationship of children out of wedlock, Decision No.69/PUU-XIII/2015 which changed the concept of a marriage

agreement so that a marriage agreement can also be made while in the marriage bond, and Decision No.22/PUU-XV/2017 determines the age limit for the same marriage between men and women based on gender justice. In addition, the Constitutional Court also provides an interpretation and strengthening of Islamic family law as stated in decision No.68/PUU/XII/2014 regarding the invalidity of interfaith marriages.

Second, based on four decisions of the Constitutional Court, with the authority to review the law (Judicial Review) of the 1945 Constitution to safeguard and protect the constitutional rights of citizens, the Constitutional Court reformed Islamic family law in Indonesia through the expedient of reform by judicial decisions. So, it is undeniable that the Constitutional Court has an important and effective role in reforming Islamic family law in Indonesia. [*W*]

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