

LETTER OF DUTY AFFIRMATION
No: 0344/K.6.4/ST. Rek/V/2014

To Whom It May Concern,

The undersigned, Rector of Soegijapranata Catholic University of Semarang, Indonesia hereby assigns:

Name : Dr. Marcella Elwina Simanjuntak, SH., M.Hum
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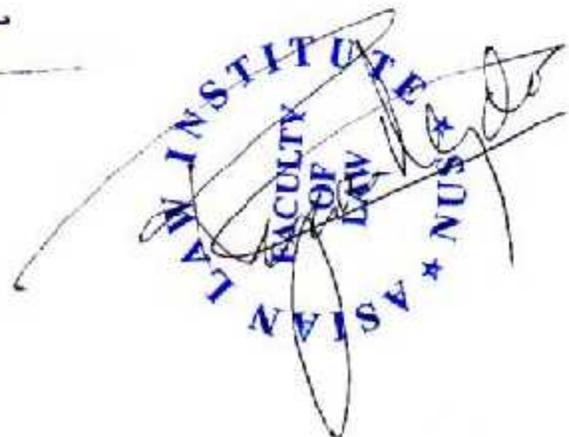
Being aware of the importance of human resource development of our university, especially of the Faculty of Law, I encourage and assigned them to take part in the Asian Law Institute Conference conducted by University of Malaya, Kuala Lumpur, Malaysia on 28 - 31 May 2014, entitled Celebrating Diversity : 11 years of ALI.

This letter is issued for whatever it might deem useful to Them.



Semarang, May 22, 2014
Rector of SCU,

Prof. Dr. Ir. Y. Budi Widianarko, M.Sc.





7 January 2014

To Whom This May Concern

**The 11th ASIAN LAW INSTITUTE (ASLI) ANNUAL CONFERENCE ON 29
MAY – 30 MAY 2014**

I wish to inform you that Mrs Bernadeta Resti Nurhayati, SH.,MHum from Faculty of Law and Communication of Soegijapranata Catholic University has been invited as a participant at the 11th Asian Law Institute annual conference in Malaysia hosted by the University of Malaya on 29 – 30 May 2014.

This conference is envisaged to examine several wide-ranging sub-themes consistent of recent development of law in Asia. More details on the conference can be found at the website:

http://law.nus.edu.sg/asli/11th_asli_conf/index.html

As the conference will be held over two days, he/she is expected to arrive in Malaysia before 29 May 2014 and leave after 30 May 2013. All the costs of the conference will be borne by the participant.

Please kindly consider this letter for the purpose of securing an entry visa or securing financing.

Thank you.

Yours sincerely,

Associate Professor Johan Shamsuddin Bin Hj Sabaruddin
Dean, Faculty of Law





**UNIVERSITY
OF MALAYA**

Certificate of Attendance

Presented to

Mrs Bernadeta Resti Nurhayati, SH.,Mhum

of

Faculty of Law and Communication of Soegijapranata Catholic

University

for participating in the

11th Asian Law Institute (ASLI) Conference

held at the University of Malaya

on 29 & 30 May 2014

**Professor Andrew Harding
Director**

**Asian Law Institute & Centre for Asian Legal Studies
29 May 2014**

ASLI ASIAN LAW
INSTITUTE

Law in Asia: Balancing Tradition & Modernization

11th Asian Law Institute Conference

Thursday and Friday, 29 & 30 May 2014, Kuala Lumpur

CIVIL RIGHT PROTECTION TO CHILDREN BORN IN *SIRI* MARRIAGE

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Note:

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Date of Presentation <i>(delete where applicable):</i>	Thursday, 29 May 2014 Friday, 30 June 2014
Panel Assigned:	

CIVIL RIGHT PROTECTION TO CHILDREN BORN IN *SIRI* MARRIAGE

By:

B. Resti Nurhayati¹ dan Wahyu Tri Yuliana²

Abstract

Until recently, Act no. 1 of 1974 on Marriage (Marriage Law) is a reference to the implementation of marriage in Indonesia. The marriage system known in the Marriage Law requires that every marriage is performed before religious leaders and their respective beliefs. In addition, it should be recorded by the Marriage Registrar that the marriage is valid. If both conditions are not met, the marriage and children born of the marriage are illegal.

In Indonesian society, marriage is not only carried out in accordance with the provisions of state law. Some people carry out a marriage according to religious law (Islamic law), or commonly known as "*Siri* marriage". *Siri* marriage is conducted legally in accordance with Islamic Law. However, *Siri* marriage is usually not recorded/registered to the Marriage Registration Office (Religious Affairs Office and the Civil Registration Office), so it is not administratively listed in the state law.

Because *Siri* marriage is not recorded administratively, the wife's status in *Siri* marriage does not get legal certainty. *Siri* wife is considered to have no civil rights as the rights of wives in general. She does not have the right to livelihood and inheritance right from her husband either, and neither does the civil status of children born in *Siri* marriage. Children born in a *Siri* marriage are considered simply to have civil relationship with their mother and mother's family. Children do not have civil relationship with their biological father. They do not have the right to claim the right to livelihood (alimony), the right to care, and inheritance right from their biological father. This leads to injustice, whereas the state law does not recognize the concept of the child must bear the losses caused by the actions of his parents' marriage.

The Indonesian Constitutional Court made a breakthrough. In the Constitutional Court Decision Number 46/PUU-VIII/2010, it provides a very brave decision on the basis of an application for the review of Article 2 paragraph (2) which regulates the obligation of recording a marriage and Article 43 paragraph (1) of the Marriage Law on illegitimate children who only have civil relationship with their mother and mother's family. The Constitutional Court Decision provides an admission space to children born out of wedlock, that they can have civil relationship with their mother and mother's family, as well as with the man as their father that can be proven by science and technology and/ or other evidence instruments to have legally blood relation, including civil relationship with their father's family. Some of the problems that arise are that the Constitutional Court Decision is not well socialized to the community. Besides, the decision also leads to the pros and cons (in the community) because people do not necessarily understand the legal considerations and the considerations based on facts - which can be proven before the court - that underlie the decision.

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² Wahyu Tri Yuliana adalah a student of the Faculty of Law and Communication, Soegijapranata Catholic University, Semarang – Indonesia.

Because law should be able to provide a sense of justice, benefit, and legal certainty for every person who needs it, it is the time to give a sense of justice particularly for the children born of *Siri* marriage.

Keywords: *Siri* marriage, children civil rights protection

A. Marriage in the Indonesian Legal System

Man in life has a natural instinct to live in pairs, with the aim of having a family or a household ties which is harmonious, happy, prosperous and eternal. This bond is commonly called marriage. According to Sajuti Talib, marriage is a sacred, strong, and sturdy covenant to live together legally between a man with a woman to establish an eternal, generous, loving, peaceful and happy family.³

For comparison, Tahir Mahmood in "Personal Law in Islamic Countries" defines a marriage as follows: "*Marriage is a relationship of body and soul between a man and woman as husband and wife for the purpose of establishing a happy and lasting family founded on belief in God Almighty.*"⁴ Although the two experts give different definition, but in general, it can be concluded that both of them require that a marriage established is a happy and eternal marriage.

In Indonesia, the law regulating marriage is Act No. 1 of 1974 on Marriage. Marriage Law defines marriage as an inner and outer bond between a man and a woman as husband and wife with the intention of establishing a happy and eternal family (household) based on God Almighty.⁵

Body bond is a formal relationship that can be seen as established by law, and the binding which ties both parties and others in the community. Soul bond is not a formal relationship established by solemn willingness that binds on both parties only.⁶ In a marriage, body and soul bond only is not sufficient, but there should be both so that body and soul bond will be intertwined that can be used in establishing a strong foundation in raising a family.

Marriage occurs only between a man and a woman; it means that the bond of marriage should be between a person of male sex and a person of female sex. Sex is nature (God's gift), not made by human. Thus, in the Indonesian legal system, it is not possible to conduct a marriage between those who have the same gender. It is also not legally possible to live together with no marriage bond (*samen leven*, "cohabiting").

The purpose of marriage is to establish a family meaning that establishing a smallest community unit consisting of husband, wife, and children. "Happy" means there is harmony in a family established from the bond of marriage. "Eternal" means continuous lifetime and should not be decided just like that or dissolved according to the will of others.

In the explanation of Article 1 of Marriage Law, it explains that:

"As a state based on Pancasila in which the first precept is the Almighty God, a marriage has a close relationship with religion/ spirituality so that marriage does not only have the element of body/ physical, but the element of soul/

³ Mohd. Idris Ramulyo, 1996, *Hukum Perkawinan Islam: Suatu Analisis dari Undang-Undang No. 1 Tahun 1974 dan Kompilasi Hukum Islam*, Jakarta: Bumi Aksara, page 2.

⁴ Tahir Mahmood, 1987, *Personal Law in Islamic Countries*, New Delhi: Academy of Law and Religion, page 209.

⁵ Article 1 of Act No. 1 Tahun 1974 on Marriage.

⁶ Abdulkadir Muhammad, 1993, *Hukum Perdata Indonesia*, Bandung: Citra Aditya Bakti, Second Edition, page 74.

*spiritual also has the important role. Establishing a happy family is also to do with the descendants which are also the purpose of marriage, care, and education is the right and duty of parents"*⁷

B. The Obligation and the Conditions of Marriage

The validity of marriage conditions is set forth in Article 2 of Marriage Law which states that:

(1) The marriage is valid if conducted according to the laws of each religion or belief.

(2) Every marriage is recorded in accordance with the applicable laws.

According to Article 2 paragraph (1), there is no valid marriage out of religious laws and beliefs which have been recognized as legitimate religions or beliefs in Indonesia. This provision is in line with the provision of Article 29 paragraph (1) of the 1945 Constitution which states that: "Every Indonesian has the right to adopt a religion and belief". Article 2 paragraph (2) requires that each marriage for the sake of orderly administration is recorded according to the applicable law.

Marriage Law regulates the terms of marriage in several articles, i.e. Article 6 to 12. Article 6 of Marriage Law states that the terms of marriage are:

(1) Marriage shall be based on the consent of the prospective bride and groom.

(2) To carry out a marriage, the one who has not been at the age of 21 (twenty one) years old must obtain the permission of both parents.

(3) In the event that one of the parents died or in a state of incapable of stating his/her will, then the permit referred to in paragraph (2) of this article is obtained sufficiently from the living parents or from the parent who is able to assert his/her will.

(4) In the event that both parents have passed away or in a state of not being able to express their will, then the permission is obtained from the proxy, the person who raises or the relative who has blood relation in the direct lineage to the top as long as they are still alive and can express their will.

(5) In the event that there is a difference of opinion among those referred to in paragraph (2), (3) and (4) of this article, or one or more of them does not express his/her opinion, the Court in the legal area where the person who will hold a marriage at the request of the person can give consent after first hearing those mentioned in paragraph (2), (3) and (4) of this section.

(6) The provisions of paragraph (1) to paragraph (5) of this article applies that the law of each religion or belief of the relevant one does not specify the other things.

Articles 7 of the Marriage Law sets the age limit for the prospective bride and groom to get into the path of marriage:

(1) Marriage is only permitted when the man has reached the age of 19 (nineteen) years old and the woman has reached the age of 16 (sixteen) years.

(2) In the case of the deviations of paragraph (1) of this article, a dispensation may be requested to a court or other official designated by the parents of the man and the woman.

(3) The provisions of the state on the condition of one or both parents in Article 6

⁷ Sayuti Tp. ib, as quoted by Neng Djubaidah, 2012, *Pencatatan Perkawinan dan Perkawinan Tidak Dicatat Menurut Hukum Tertulis di Indonesia dan Hukum Islam*, Jakarta: Sinar Grafika, page 208.

paragraph (3) and (4) of this Act shall also apply in terms of the request of the dispensation stated in paragraph (2) of this Article, without prejudice to that referred to in Article 6 paragraph (6).

The regulations on the terms of marriage prohibition are set out in Article 8 of Marriage Law, as follows:

“A marriage is prohibited between two persons who:

- a. Having blood relation in a direct lineage both upward and downward;*
- b. Having blood relation in a sideways lineage, i.e. between siblings, between someone and his/her parents’ relative, and between someone and his/her grandmother’s relative;*
- c. Having a relation by marriage, namely parents in-law, step children-in-law and step mother/father;*
- d. Having the same wet nurse, i.e. wet nurse, wet nurse’s children, children of the same wet nurse, and uncle/ aunt of the wet nurse;*
- e. Having a relation with the wife or as the aunt or niece/nephew of wife, in the case of a husband with more than one wife;*
- f. Having relationships which is by religion or other applicable laws is prohibited to be married with.*

Article 9 of the Marriage Law provides that: *“The one tied into a marriage with another one cannot get married again, except in the case mentioned in Article 3 paragraph (2) and in Article 4 of this Law.”*

Article 10 regulates the prohibition of marriage between those who has broken up his/her marriage, as follows:

“If a husband and wife who has divorced remarry one another, and divorced again for a second time, then they should not have a marriage between them anymore, as long as the law of each religion and the belief in question is not decisive of the other”.

Article 11 regulates the waiting time for those whose marriage ends:

- (1) For those whose marriage breaks up, the waiting period applies.*
- (2) The grace period of the waiting period as mentioned in paragraph (1) shall be regulated in a further government regulation.*

Article 12 of the Marriage Law states that: *“the method of marriage is set in separated legislation”.*

For those who are subject to Islamic law, a marriage is valid when it meets the conditions (*rukun*) of marriage and the obligation of marriage. The procedure of marriage is the determining factor for the validity of a marriage carried out in the Islamic law. The non-compliance of the conditions of marriage causes the marriage null and void. According to Article 14 of the Compilation of Islamic Law, the Conditions of Marriage are as follows:⁸

- 1. Prospective bridegroom;*
- 2. Prospective bride;*
- 3. Guardians;*
- 4. Witness of marriage;*
- 5. Consent and granted (“Ijab Kabul”).*

Meanwhile, the marriage validity is the factors that must be met by the law subject which is an element or part of the marriage contract. The obligation of

⁸ Mohd. Idris Ramulyo, *Hukum Perkawinan, Hukum Kewarisan, Hukum Acara Peradilan Agama dan Zakat Menurut Hukum Islam*, (Jakarta: Sinar Grafika, 1995) page 69-70.

marriage consists of the obligation specified in *Syar'i* (Islamic law) and the obligation specified in the legislation (the Marriage Law and the Compilation of Islamic Law).

The obligation of *syar'i* is specified in the Qur'an, particularly in *surah an-Nisaa*, in the verses of 22, 23, and 24 that specify the prohibition of marriage because of the blood relationship, relationship by marriage, having the same wet nurse, and the prohibition of polyandry.⁹

C. *Siri* Marriage (Unregistered Marriage)

According to the Marriage Law, the definition of marriage is the bond of body and soul between a man and a woman as husband and wife with the intention to establish a happy and eternal family based on by the Almighty God. Based on the definition, the purpose of a marriage is to establish a happy and eternal family. In Indonesian society, the definition of a happy family if the family is blessed with children. The condition - or as an obligation - of having own children is often used as an excuse for a husband to divorce his wife, polygamy, or to marry in "*Siri*" with the aim to have a child of subsequent marriage.

In some cases, the role and position of women are likely marginalized since women/wives are usually in a weaker position psychologically (divorced wife, ignored wife because of new wives), socially (because a wife is often regarded as the party who is not able to provide offspring), and also economically (because the wife is sometimes very dependent on the income of the husband/not able to be economically independent).

Etymologically, the word '*Siri*' is derived from the Arabic '*Siri*' or '*Sir*' meaning 'secret'. Thus, the "*Siri* marriage" is a secret marriage. It refers to the Pillars of Islam (*Rukun Islam*) on marriage stating that a marriage is valid if it is known by many people.¹⁰

According to the Islamic scholars of Hanafiah and Syafi'iah, *Siri* marriage (unregistered marriage) is a marriage conducted without the presence of witnesses. If it is attended by two witnesses, it does not include in unregistered marriage. Ibnu Rusyid said that the scholars of Hanafi and Syafi'iah agree on the validity status of *Siri* marriage, which is illegal because it is contrary to the traditions (*hadits*) of the Prophet which states that a marriage is not valid without the a guardian and two fair witnesses. Meanwhile, according to Abu Tsaur, the presence of a witness in a marriage is not a legal prerequisite and the perfection of marriage. Therefore, marriage without witnesses remains valid provided that the marriage should then be published after the ceremony is done.¹¹

The Islamic Scholars of Hanafiah, Syafi'iah, and Hanabilah state that *Siri* marriage is a marriage of vanity because it is opposed to the tradition (*hadits*) of the obligation to publish a marriage and the *hadits* (tradition) about the invalidity of a marriage that is not attended by a guardian and two fair witnesses. In other hand, the Islamic scholars of Malikiah explain that if a *Siri* marriages occurs, it is automatically considered "*fasakh*" or damaged marital status, especially if the sexual contact has not happened yet or only occurs in a short time. In addition,

⁹ Neng Djubaidah, *Pencatatan Perkawinan & Perkawinan Tidak Dicatat Menurut Hukum Tertulis di Indonesia dan Hukum Islam*, 4th edition (Jakarta: Sinar Grafika, 2012), page 117.

¹⁰ Wikipedia. Downloaded on January 31, 2014.

¹¹ Ibnu Rusyid, *Bidayah Al-Mujtahid wa Nihayah Al-Muqtashid*, (Semarang: Toha Putera, tth), jilid 2, p. 17-18. as quoted by Nurul Irfan, 2013, *Nasab dan Status Anak dalam Hukum Islam*, Jakarta: AMZAH, page 208.

Ibnu Al-Hajib states that *Siri* marriage, despite longstanding and there has been sexual contact between husband and wife, should still be considered defective.¹²

Nurul Irfan¹³ argues: "*Siri marriage according to fiqh perspective is a marriage conducted without the presence of guardian and two witnesses. The law of 'Siri marriage' in fiqh version clearly can not be justified because it is contrary to the traditions (hadits) of the Prophet which requires a guardian and two witnesses in a marriage ceremony*". The terminology of *Siri* marriage in the Indonesian society is very different from the definition of *Siri* marriage in fiqh perspective. *Siri* marriage according to Indonesian people is an individual marriage or a marriage that is not recorded in the Office of Religious Affairs (KUA).

Regarding this understanding, there is an interpretation duality of the status of "*Siri* marriage". First, *Siri* marriage is in the sense of "secret marriage" that does not meet the conditions and obligations of marriage. The parties intentionally hide the marriage from public. *Siri* marriage of this kind cannot be termed as a valid marriage in Islamic law, because the marriage does not meet the conditions of Islamic law. The Islamic scholars tend to claim that this kind of secret marriage is a false marriage.

The second type of *Siri* marriage is the marriage which even though meets the conditions and obligation of marriage, but the marriage is not recorded. Such type of marriage is referred to as *Siri* marriage in Indonesia. Such a practice is often occurred. This marriage is not on record for many reasons. One of the reasons is, for example, because the husband has not been granted the permission to legally get married from the previous wife or wives. Another reason is the limited time to prepare for a marriage.

Although *Siri* marriage (Indonesian version) is not recorded in compliance with the applicable laws, this second type of "*Siri* marriage" is considered legitimate in religion. The reason is that it meets the five conditions of a marriage, namely: the presence of guardian, prospective grooms and brides, consent granted, and two witnesses. *Siri* marriage that has been performed legally by religion - as meeting the obligations and conditions - cannot be regarded as adultery. As a consequence, it is in principle that the children born of the marriage are legitimate children. The legal relationship between the children with both parents is the lineage relationship and can inherit to each other.¹⁴

D. Legal Consequences of *Siri* Marriage

Referring to Article 2 of the Marriage Law, a marriage is valid when it meets two conditions: (1) it is performed according to the laws of each religion or belief, and (2) it is recorded according to the applicable law.

Although a *Siri* marriage performed meets the provisions of religious law (religiously legitimate), a *Siri* marriage has no legal consequences for the couple in the *Siri* marriages and the children born. Idris Ramulyo¹⁵ argues that *Siri* marriage or individual marriage is one of small issues but the affected object covers all aspects of society. This is because the legal consequences of *Siri*

¹² Ibid.

¹³ Nurul Irfan, 2013, *Nasab dan Status Anak dalam Hukum Islam*, Jakarta: AMZAH, page 210.

¹⁴ Neng Djubaidah, 2012, *Pencatatan Perkawinan dan Perkawinan Tidak dicatat Menurut Hukum Tertulis di Indonesia dan Hukum Islam*, Second Edition, Jakarta: Sinar Grafika, P. 350.

¹⁵ Mohd. Idris Ramulyo, 2002, *Hukum Perkawinan Islam, suatu Analisis dari Undang-undang Nomor 1 Tahun 1974 dan Kompilasi Hukum Islam*, Jakarta: Bumi Aksara, page 239.

marriage affect various aspects of life in a society. The legal consequences of *Siri* marriage are:

- a. The wife's status in *Siri* marriage. Because *Siri* marriage is not been recorded by the state, the 'wife' in *Siri* marriages also does not have the right as a wife in a valid marriage. Wife may get a living from her *Siri* husband, but when the husband no longer provides a living on a regular basis, it will be difficult for the *Siri* wife to demand her right to get a living for herself and for the children who are born in the *Siri* marriage due to lack of evidence about the validity of the marriage and to the validity of the children born of the marriage.
- b. The status of the children born of *Siri* marriage. Children born within *Siri* marriage only have civil relationship with their mother and mother's family. This is as the consequence of the *Siri* marriage of their father and mother which is not recorded in the office of Religious Affairs (marriage registry office) so that the children cannot even be listed as the children of their both parents. The legal consequence is that the children born of *Siri* marriage also do not have the right to alimony and the right to inherit of their *Siri* father.

E. Protection to the Civil Rights of Children Born of *Siri* Marriage

The law distinguishes between "legitimate child" and "a child born out of wedlock (illegitimate child)". Legitimate child according to Article 42 Paragraph (1) of the Marriage Law is "children born in or as a consequence of a legal marriage". The status of legitimate child refers to the child having blood relationship with both parents, as evidenced by the presence of a marriage certificate between his/her both parents.

"Children out of wedlock" is children born out of wedlock or not as a consequence of a legal marriage. Illegitimate child is considered only has civil relationship with his/her mother and mother's family. Because *Siri* marriage is not registered, the children born of *Siri* marriage are included in the group of children out of wedlock or children who only have civil relationship with their mother and mother's family. Such status is certainly detrimental to the children born of *Siri* marriage.

When *Siri* marriage (Indonesian version) is a legal marriage (due to meet Islamic law), the child born of *Siri* marriage should also be a "legitimate child". But because *Siri* marriage (Indonesian version) is not recorded, the child born does not have civil relationship with his/her father. It requires to get the attention of the law so that child born of a valid marriage by religion still gets legal protection. Among the rights of children, the most important is the civil rights of children, because the civil rights include the right to livelihood (alimony), care, and inheritance.

Concerning children's civil rights, Act No. 23 of 2002 on Child Protection (hereinafter referred to as the Child Protection Law) legally provide protection to children's civil rights. Although it does not specifically refer to children born out of wedlock and unregistered marriage, the Child Protection Law set in terms of the general provisions. This is one of common characteristic features of a statutory provision. The child protection law regulates civil rights in several articles, as follows:

1. Right to identity

The right to identity under Article 5 of the Child Protection Law which states as follows: "Every child has the right to a name as self identity and citizenship

status." The right to identity must be given since child's birth and set forth on the birth certificate.

2. The right to know the parents, cared, and raised by own parents (Article 7 paragraph (1) of the Child Protection Law). Even adopted children have the right to determine their origin and biological parents. Adoptive parents are required by law to notify their adoptive child, according to the readiness of the adopted child.
3. Right to protection from the treatments of:
 - a. Discrimination;
 - b. Exploitation, both economic and sexual;
 - c. Negligence;
 - d. Cruelty, violence, and persecution;
 - e. Injustice, and
 - f. Other abuses.(Article 13 paragraph (1) of the Child Protection Law)
4. Children born of mixed marriages of different nationality have the right to obtain citizenship of the father or mother in accordance with the applicable law.

In terms of parental obligations relating to the civil rights of children are mentioned in Article 26 of the Child Protection Law that regulates:

- (1) *Parents are obliged and responsible for:*
 - a. *Caring, raising, educating, and protecting children;*
 - b. *Fostering children according to their abilities, talents, and interests, and;*
 - c. *Preventing children marriage at children age.*
- (2) *If the parents do not exist or unknown or for some reasons they cannot carry out their obligations and responsibilities, then obligations and responsibilities referred to in paragraph (1) may be transferred to the family, which is carried out in accordance with the provisions of the applicable law.*

The recognition of the civil rights of children born of *Siri* marriage and *Siri* marriage (Indonesian version) is actually like a coin having two sides. The unregistered marriage leads to the non-recognition of civil relationship between the child and the father (biological). But scientifically, some experts suggested, both concerning the legitimacy (legality) of *Siri* marriage as unregistered marriage and the civil relationship between the children born of *Siri* marriage with their parents.

Regarding unregistered marriage, the former chairman of Indonesian Supreme Court, Bagir Manan stated that: "In understanding the legal status of marriage among Muslims in Indonesia, the principle of legality (validity, *beginsel*) underlying the enactment of the the Islamic Marriage Law for Muslims in Indonesia must be known in advance". A valid marriage is a marriage that meets the provisions of Article 2 paragraph (1) of Act No. 1 of 1974 on Marriage, which is legal according to religion, which has a legitimate legal consequence as well. The function of marriage registration does not show meaningful equivalent qualifications to the validity of a marriage so that the eligibility of one requirement can annul the others.¹⁶

¹⁶ Bagir Manan, "Keabsahan dan Syarat-Syarat Perkawinan Antar orang Islam Menurut Undang-Undang No.1 Tahun 1974", the paper was delivered in a National Seminar on "Family Law in National Law System Between Reality and Legal Certainty", Jakarta, August 1, 2009, as quoted by Neng Djubaidah, op.cit, page 157.

In particular, Bagir Manan argues that a marriage according to each religion (religious terms) is the sole validity condition of a marriage for the following reasons:

First, Article 2 paragraph (1) expressly states, "a marriage is valid if conducted in accordance with the laws of each religion." It is a plain meaning, so it cannot be interpreted, added, or reduced.

Second,..... the Explanation of Article 2 paragraph (2) states : "The registration of each marriage is the same as the recording of important events in person's life, such as birth and death".

The function and position of marriage registration is to ensure the legal order that serves as an instrument of legal certainty, ease of law, and as one proof of marriage.

Bagir Manan's notion brings the fresh air to the interpretation and development of law, particularly for those who are bound in a "Siri marriage". It is a recognition of the status of "Siri marriage" which is an unregistered marriage. According to Bagir Manan, a measure that needs to be executed is to register the marriage. If the couple is required to perform the marriage ceremony again, then it is contrary to Article 2 paragraph (1) that leads to the invalidity to the new marriage.¹⁷ The willingness of a couple for marriage registration will certainly have a positive impact on the recognition of the children status and the civil rights for children born in marriage or as the effect of Siri marriage is obtained, and of course for the civil rights of the wife.

The other opinion is provided by Neng Djubaidah who distinguishes between "Siri marriage" and "unregistered marriage." She said that "unregistered marriage" is a marriage that meets the obligations and conditions in accordance with Islamic law, but it is not or has not registered in the Office of Religious Affairs (KUA in sub-districts) as an Official Technical Implementation Unit (UPTD) of the Implementing Agency in the sub-district where the marriage takes place. In the case of "unregistered marriage" according to Neng Djubaidah, it does not contain the elements of 'intentionally' that accompanies bad will or intention of the husband, in particular, not to register the marriage.¹⁸ In other hand, *Siri* marriage is a secret marriage without a guardian and without two witnesses, which does not meet the rules of marriage according to Islamic law, so *Siri* marriage/ secret marriage is a marriage that does not meet the conditions and obligations of marriage.¹⁹

Hidden marriage (*Siri* marriage) that meets the conditions and obligations of a marriage is a valid marriage. The children born of the marriage are legitimate children. The legal relationship between the children with both parents is a lineage relationship and can be heirs to each other²⁰.

The existence and recognition of the children's civil rights is actually positively responded by the Constitutional Court of the Republic of Indonesia. The Constitutional Court Verdict No. 46/PUU-VIII/2010 states that Article 43 paragraph (1) of Act No. 1 of 1974 on Marriage, which says, "Children born out of wedlock only have a civil relationship with their mother and mother's family", should be read as "Children born out of wedlock have a civil relationship with their mother and mother's family as well as with the male as their father that can

¹⁷ Ibid.

¹⁸ Neng Djubaidah, page 153.

¹⁹ Ibid, page 155.

²⁰ Ibid, page 350.

be proven by science and technology and/ or other evidence legally to have blood relationship, including civil relationship with their father's family".

The Constitutional Court 's verdict has great implications on the civil rights of children born of *Siri* marriage. Rosa Agustina²¹ argues that it should be noticed whether every child born out of parents' legal wedlock can have civil relationship with his/her biological father and family if it can be proven by science and technology and/ or other evidence according to the law to have blood relationship. The other problem is how to meet the requirements in order to make it easier for the children born out of wedlock - whether because the child born of *Siri* marriage or the child born of a woman who is not married. In some cases of the human rights of a child born of a *Siri* marriage, there are difficulties in obtaining the legal rights as livelihood, heritage, or birth certificate.

It is recognized that in judicial practice, the implementation of the Constitutional Court Verdict No. 46/PUU-VIII/2010 as mentioned above is not an easy matter. It should be a long struggle to demand civil rights for children born of *Siri* marriage so that the children are guaranteed their rights. This decision is a hope for the children born of *Siri* marriage and the expectations for wives who married in *Siri* to get their right as the women who are legally married.

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²¹ W.D. Kolkman, Rosa Agustina, Leon C.A. Verstappen, Rafael Edy Bosko, 2012, *Hukum tentang Orang, Hukum Keluarga, dan Hukum Waris di Belanda dan Indonesia, Seri Unsur-Unsur Penyusun Bangunan Negara Hukum*. Universitas Leiden, University of Groningen, Universitas Indonesia, Edisi Pertama, Denpasar: Pustaka Larasan, page 131.

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