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JUDICIAL INTERPRETATION CHALLENGES IN IMPLEMENTING CHILD PROTECTION RIGHTS OUTSIDE OF MARRIAGE: A STUDY OF THE RELIGIOUS COURT OF MALANG REGENCY

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Abstract: Constitutional Court Decision No. 46/PUU-VIII/2010 is classified as a positive legislator decision and is not followed up by lawmakers, making it difficult to apply, especially the interpretation of the phrases 'children born outside marriage' and 'civil relations'. The purpose of this study is to examine the judges' interpretation model of children outside marriage and their civil rights in Constitutional Court Decision No. 46/PUU-VIII/2010 with the indicators of François Gény's legal contextualization theory. This research is mixed research with legislative, legal philosophy, and sociology approaches. The data analysis technique used is descriptive-analytical. The result of this research is that the phrase "children born out of wedlock" in Constitutional Court Decision No. 46/PUU-VIII/2010 is often understood differently by the panel of judges, some of whom limit it only to children born out of siri marriage as guided by Islamic law. However, some also extend it to children born of adultery on the grounds of children's human rights. Although ideally, both of the judges' reasoning is by François Gény's theory of legal contextualization, in reality, the narrowing of the meaning to children from siri marriages is closer to the truth due to the context of the applicant's status as a siri marriage and the contextualization of Indonesian society today which is always religious. Therefore, the phrase "children born out of wedlock" in Constitutional Court Decision No. 46/PUU-VIII/2010 must be interpreted narrowly to children from siri marriages.

Keywords: Children outside marriage, civil rights, and interpretation.

A. Introduction

The protection of children outside of marriage is still a problem when a lawsuit is held at the child's origin trial. In the latest regulation, the protection of children outside of

marriage is regulated in Constitutional Court Decision Number 46/PUU-VIII/2010, which canceled Article 43 Paragraph (1) of Law Number 1 the Year 1974 concerning Marriage. However, the Constitutional Court's decision contains several weaknesses; in terms of the formal status of the decision as a positive legislator, the Constitutional Court, in this case, does not act to cancel the article and leave it to the legislators but instead creates a new norm (Ardhanariswari *et al.*, 2023). The legislators did not immediately follow up the creation of new norms by the Constitutional Court in its development by regulating or updating the new norms along with their derivatives to make them more transparent and more executable. Therefore, when there is a lawsuit for the origin of children outside of marriage, it is not easy to implement (Pinilih, Saraswati, and Muzaki, 2022).

This research aims to analyze how Religious Court judges interpret the terms ‘child born out of wedlock’ and ‘civil relationship' within the framework of François Gény's contextual legal theory. The difficulty experienced by the judge in the child's origin lawsuit was when the three members of the panel of judges both had difficulty in finding the meaning of the phrase 'child born outside of marriage' and the 'civil relationship' it obtained. Supposedly, if the law or its derivative regulations can be easily understood, the intention of the legislator is challenging to apply. However, the vagueness of the phrases in the Constitutional Court's ruling caused the three members of the panel of judges to often differ in their opinions. In this case, the most disagreement among the judges is the meaning of children outside of marriage, which can include children from Siri marriages and children from adultery. If the child is the result of a Siri marriage, then, in fact, he or she is recognized as a legitimate child according to Islamic teachings, but in positive law, is recognized as an illegitimate child (Kusmayanti and Ramadhanty, 2021).

Meanwhile, the child of adultery, in Islamic teachings, has the status of illegitimate. However, positive law depends on the situation because of Article 42, which states that a legitimate child is a child born of a legal marriage (Rokhim, 2023). In addition, the phrase ‘civil relationship’ is also unclear because there are two possibilities, namely following the teachings of Islam or determined by the state.

The Constitutional Court Decision No. 46/PUU-VIII/2010 was opposed by the Indonesian Ulema Council (MUI) by stating that the verdict was multi-interpretive and caused adultery children to be recognized as civil rights as legitimate children in general. This is what MUI is worried about because it can increase adultery in society because they underestimate the consequences (Jarir, Lukito, and Ichwan, 2023). As a counterpoint to the Constitutional Court's decision, MUI then formed MUI Fatwa No. 11/2012, which states that children of adultery do not have nasab, guardian, inheritance, and nafaqah relationships with their biological father. However, the fatwa protects the rights of children of adultery in the form of nafaqah and mandatory wills. The Constitutional Court's decision was also rejected by the Aceh Ulema Consultative Council (MPU) because it was considered that it would foster adultery. As a counterpoint to the Constitutional Court's decision, MPU Aceh's Fatwa No. 18/2015 was issued, stating that children of adultery do not have the right to inheritance, maintenance, and guardianship with their biological father and imposes the right to maintenance only on the mother (Azizi, Imron and Heradhyaksa, 2020).

Although the fatwa has no legal force and does not bind every community, its presence can influence legal policies made by judges as input from some Islamic communities (Muhaimin and Muslimin, 2023). At least, the freedom of judges to interpret

the Constitutional Court's very abstract ruling can be determined by the values that live in society. It is so that the decision issued by the panel of judges feels alive and does not cause disorder in society (Shuhufi *et al.*, 2022). However, on the one hand, judges should not be limited in their independence by the public when deciding cases. Therefore, it is crucial to examine the model of interpreting the phrase by Religious Court judges in the face of the difficulty of applying the law on the rights of children outside of marriage to the values that live in society. In this case, François Gény's theory of legal contextualization is used to examine the model of legal discovery by judges of the Malang Regency Religious Court as a sample or research boundary. The choice of the theory is inseparable from its indicators that balance positivistic thoughts and realism in society. The sample findings of judges' interpretations were conducted on judges of the Religious Court of Malang Regency. The selection of the three judges was only intended as a form of exploration of interpretation as befits a panel of judges of at least three people. The selection of the sample location at the Malang Regency Religious Court is because it is one of the religious courts with the highest level of child recognition decisions outside of marriage in Indonesia, with a total of 104 decisions from 2013-2024 (Indonesia, 2024).

As a scientific study that cannot be separated from the relationship between previous studies, several similar studies were found. First, research conducted by Rohmawati and Syahril discusses the analysis of judges' decisions in various Religious Courts, which, in general, have protected the rights of children outside of marriage proportionally and provide distributive justice (Syaikhu, Ahmad, and Putera, 2023). The test tool for the determination of the Religious Court in the study is the teachings of Islam. This is different from this study, which focuses on the legal discovery model of the phrase 'children born outside marriage' and 'civil relations' by the judges of the Religious Court of Malang Regency with the test tool of François Gény's contextualization theory indicators. In this research, the analysis of the legal discovery model becomes the primary connection and emphasis point so that testing with François Gény's legal contextualization theory becomes easier and does not require a special explanation.

Secondly, research conducted by Iffah Fathiah and friends discusses the solutions taken by the state so that adulterous children can get rights from their biological fathers (Fathiah *et al.*, 2023). This research focuses on *the constituen*t of giving strict punishment to biological fathers to be responsible for the fulfillment of the rights obtained by children resulting from adultery to prevent themselves from neglect and discrimination. This is different from this research, which focuses on the meaning of children outside marriage in general, which includes children from Siri marriage and children from adultery and the rights they are entitled to.

B. Method

This research is mixed (normative-empirical) with the approach of legislation, legal philosophy, and sociology. The statutory approach is carried out by examining in depth the Constitutional Court Decision Number 46/PUU-VIII/2010 and Law Number 1 Year 1974 relating to the status and rights of children outside marriage. The legal philosophy approach is carried out by analyzing various schools of thought of legal philosophy from the views of judges of the Malang Regency Religious Court regarding the status and civil rights of children outside marriage. The sociological approach is carried out by examining in depth the attitude of the judges of the Malang Regency Religious Court in interpreting

the status and civil rights of children outside of marriage (Suratman and Dillah, 2013). The data sources in this research come from the interviews and observations of three judges of the Religious Court of Malang Regency and an in-depth review of laws and regulations, books, and scientific journals. The data analysis technique of this research is descriptive-analytical by understanding and comparing the data sources obtained in the form of a systematic description, then analyzed using François Gény's theory of legal contextualization to find out the legal reasoning model of three judges of the Malang Regency Religious Court. (Muhaimin, 2020).

C. Result and Discussion

The Concept of Children Outside of Marriage and Its Implications

The term 'child out of wedlock' has evolved over time, influenced by historical, religious, and legal contexts. In early Islamic societies, marriage was validated solely through religious principles without administrative registration. However, with the establishment of modern legal systems, the definition of legitimate and illegitimate children has varied across different jurisdictions. This study examines the implications of these definitions, particularly in Indonesia, where marriage laws incorporate multiple Islamic jurisprudential schools. Furthermore, using François Gény's contextual legal theory, this research analyzes how Religious Court judges interpret the term 'children outside marriage' within the framework of Constitutional Court Decision Number 46/PUU-VIII/2010. The findings highlight the tension between legal formalism and substantive justice, underscoring the need for legislative reform to ensure legal clarity and societal harmony (Ubaidillah, 2021).

Evidence of marriage was only based on witnesses who were present during the marriage contract or by a *walimah* event organized by the bride and groom. Therefore, in ancient times, the emphasis on the validity of marriage was based solely on Islamic shari'a, which fulfilled all the conditions and pillars of marriage (Sulfian, 2023). Thus, children born before marriage, based on Islamic law, can be declared as adulterous children or children outside marriage. The implication of adulterated children, according to the majority of scholars, is that they do not have a nasab to their father but to their mother. Therefore, the child only has a civil relationship with the mother and her family (Taimiyah, 1980).

However, in determining adulterous children after marriage, there are differences of opinion among the ulama. In the book *Al-Hāwī Al-Kabīr*, Imam Hanafi says that if a child is born after the marriage contract, even if it is one day away, and the husband acknowledges that the child is his child, then the child is considered a legitimate child and is entitled to nasab to his father (Al-Mawardi, 1999). In the book *Bughyah Al-Mustarsyidīn*, the Shafi'i school of thought says that the status of the child can be said to be adulterated after the marriage contract if the child is born less than six months after the marriage contract. Therefore, if the child does not have a nasab connection with his father and is not entitled to inheritance rights from him. In addition, if the adulterous child is a girl, then the guardian who can marry her is only a wali hakim (Ba'lawi, 1995).

After the establishment of the modern state with its characteristic of administrative registration for every citizen, marital affairs also did not escape the state's hand. In the 21st century, almost the majority of countries have adopted official marriage registration by a particular state institution authorized to do so. Therefore, the meaning of legitimate

children and illegitimate children also varies (Setiawan *et al.*, 2023). Nowadays, there are three types of countries based on the regulation of marriage law, namely first, countries that regulate marriage law in specific laws composed of various madhhabs by the benefits of the conditions of the country, such as Indonesia, Malaysia, Pakistan, Egypt, Syria, and Turkey (Jamaludin, Buang and Purkon, 2024)(Kholiq and Zein, 2021). Second, countries that regulate marriage law in specific laws composed of various madhhabs but are more dominant in one particular madhhab, such as Algeria and Tunisia, which are influenced mainly by the Maliki madhhab (Clark, 2021)(Merone and Sigilò, 2021). Third, a country that establishes one particular madhhab as the official state marriage law, such as Morocco, applies the Maliki madhhab as its official madhhab (Trigiyatno and Sutrisno, 2022).

For the first type, namely countries that partially adopt the fiqh of the four madhhabs, the meaning of children outside marriage can be in the form of children born of adultery born before marriage or after marriage in the form of li'an and born less than six months after the marriage contract (Rohmawati and Siddik, 2022)(R and Ramadani, 2023). In addition, the meaning of administrative registration in each country is also different, some consider it as a mere administrative requirement so that they still recognise unregistered marriages as long as they are by the pillars and conditions of marriage, such as in Indonesia and Saudi Arabia (J, Anadi and Deuraseh, 2023)(Zaenurrosyid, Kahfi and Syafa, 2021), but some consider marriage registration as a condition for the validity of marriage so that criminal sanctions will be imposed on those who do not register it, such as Malaysia, Brunei Darussalam, and Tunisia (Warman *et al.*, 2023)(Voorhoeve, 2018). As for the second and third types, namely countries with marriage laws dominantly influenced by one school of thought and countries that stipulate one official school of thought, the meaning of children outside marriage is always based on the ijtihad of the Imam or followers of his school of thought, while the determination of the validity of children outside marriage based on official marriage registration by the state is also determined by each country (Aissaoui, 2024)(Frini and Muller, 2023). From these descriptions, the meaning of children outside of marriage today always revolves around the material requirements of the marriage law and the validity of marriage registration.

Indonesia is one of the countries that partially adopted the fiqh of the four madhhabs in the marriage law. Therefore, the meaning of children outside marriage is unique. Initially, the regulation of the status of legitimate children is contained in Articles 2, 42, and 43 of Law Number 1 Year 1974 concerning Marriage, which states that legitimate children are children born from a legal marriage, while the measure of validity itself is based on the requirements and pillars of their respective religious teachings and is recorded by an institution authorized to record it. In this case, Indonesia adopts the opinion of Imam Hanafi, who argues that children born the day after the marriage contract are considered legitimate children. As for article a quo, it is explained that the implications of children outside a legal marriage are only in a civil relationship with the mother and her family (Liman and Rifai, 2023). In addition, the meaning of children outside marriage also includes children of wives who are denied by their husbands (*li'an*) as in Article 101 of the Compilation of Islamic Law (Bahri, 2022).

In addition, the validity of legitimate children has been expanded by Article 99 letter b of the Compilation of Islamic Law, which says that legitimate children also include children resulting from IVF by the sperm and ovum of the husband and wife themselves

and born to the wife concerned (Asadi and Sari, 2021). This is also confirmed by Article 58 of Law Number 17 Year 2023 on Health, which states that IVF must come from the sperm and ovum of a legal husband and wife. Therefore, IVF children who do not come from the sperm and ovum of a legal husband and wife can be said to be children of adultery or children outside marriage. The same applies to a gestational surrogacy child whose nasab status is still being debated as a result of a legal vacuum. It is because the child comes from the sperm and ovum of a legal husband and wife but is implanted in the womb of another woman until it gives birth (Oblepias, 2024). Despite the legal vacuum, the MUI went a long way in 1990 by issuing MUI Fatwa Number KEP-b952/MUI/XI/1990, which essentially forbids surrogate motherhood and equates it with adultery. Although this MUI Fatwa does not have binding force, it can be used as the voice of the community so that law enforcers can take a progressive view in the discovery of laws that can listen to the values that live in society (Putri and Kadir, 2023).

In addition, Constitutional Court Decision Number 46/PUU-VII/2010 also coloured the meaning of children outside marriage. The verdict was filed by Machica Aisyah Mochtar, who felt aggrieved because the child from her illegitimate marriage did not get inheritance rights from his biological father. Then, the Constitutional Court, in its ruling, said that children born outside a legal marriage can have a civil relationship with the mother, the mother's family, and the father as long as it can be proven by science, technology, and/or other evidence (Suhariyanto, 2022). However, in practice, Constitutional Court Decision No. 46/PUU-VII/2010 is still difficult to implement due to the multiple interpretations of phrases, such as the phrases 'child born outside marriage' and 'civil relationship'. The phrase 'children born out of wedlock' in the decision means two possibilities, namely children born out of adultery or children born out of Siri marriage, and can even include both. This is exacerbated by the fact that there is still no more complex reform of marriage law, so there is no clear guidance for judges. The judge, in this case, is still faced with his reading of an abstract text.

From some of the descriptions above, the meaning of children outside of marriage in Indonesia includes the following:

Table 1. The concept of children outside marriage in Indonesia

No	The meaning of children outside marriage in Indonesia
1	Children born out of a legal marriage that has fulfilled the terms and conditions of marriage based on the teachings of their respective religions.
2	Children born from a marriage between parents that is not registered by an authorized state institution (children of Siri marriage).
3	Child of a wife who was denied by her husband (*li'an*)
4	Gestational surrogacy child.

Source: Researcher data analysis, 2025.

The concept of children outside of marriage, which is very diverse in Indonesia, needs to be clarified again, and its legality must be protected so as not to cause legal uncertainty and protracted problems in society. It is time for Indonesia to rethink legal reconstruction by the values that live in society and are easily applied without much debate. Suppose child recognition in Indonesia constantly adapts to the teachings of Islam. In that case, it must be wrapped in precise legal phrases so as not to create legal loopholes for the recognition of children resulting from adultery or others. In addition, the most important thing in legal reconstruction efforts is harmonization and logicality. So far, Indonesian

laws and regulations relating to child recognition are still inconsistent. Suppose the spirit of marriage registration is to create order and legal certainty to protect the parties to the results of the marriage, especially the children who are born. In that case, it is time to close the loopholes for unregistered marriages (siri marriages) and *isbath nikah* so that this child recognition case does not drag on and cause incompatibility with the spirit of marriage registration.

A Model of Legal Discovery on the Status and Civil Rights of Children Outside of Marriage

Judges play an important role in the formation of law, especially if the written law is unclear and causes multiple interpretations (Ali, 2009). Laws are artificial, and political struggles often lead to weaknesses in their application (MD, 1998). The judge in this case is not only a mere mouthpiece of the law as taught by legism, but he must also make ijtihad in determining what is considered fair as it lives in society (Manullang, 2019). According to Roscoe Pound, the founder of the Sociological Jurisprudence school, the judge plays the final role in a decision. He can also act to override written laws based on abstract and living values of justice in society, or it can be said that the unwritten law in society (Pound, 1912).

The magnitude of the judge's responsibility in making such decisions makes him or her the most influential object of legal effectiveness in legal research. The written law may not work if the judge considers that it does not match the reality in society and is only an idea (das sollen) that is full of injustice.(Rasjidi and Rasjidi, 2020) It also applies to Constitutional Court Decision Number 46/PUU-VIII/2010, which is very biased in its interpretation of 'children born outside marriage' and 'civil relations'. In general, judges' understanding of vague or multi-interpretive norms is not necessarily the same, leading to differences of opinion. The difference of opinion by members of the panel of judges is undoubtedly not a problem because judges have the freedom to examine and decide cases without being interfered with by outside parties. To find out the meaning of judges in abstract norms in Constitutional Court Decision Number 46/PUU-VIII/2010, in-depth interviews are needed from the Judges of the Religious Court of Malang Regency, the results of which are as follows.

Table 2. Interpretation of Judges of the Religious Court of Malang Regency on the Constitutional Court Decision Number 46/PUU-VIII/2010

No	Judge's Name	Opinion
1	Nurul Maulidah (Maulidah, 2024)	Referring to the legislator's intention, he believes that the Constitutional Court wanted to protect children from Siri marriages as Machica Aisyah Mochtar was the applicant at that time, while children from adultery were not included in the Constitutional Court's decision. He based this on the Islamic shari'a that the community has upheld.
2	Enik Faridaturrohmah (Faridaturrohmah, 2024)	Referring to the legislator's intention, he believes that the Constitutional Court wanted to protect children from Siri marriages as Machica Aisyah Mochtar was the applicant at that time, while children from adultery were not included in the Constitutional Court's decision. He based this on the Islamic shari'a that the community has upheld.

No	Judge's Name	Opinion
3	Sutaji (Sutaji, 2024)	Referring to the intention of the legislator, he believes that the Constitutional Court wants to protect the neglect of children outside of marriage, which includes children from Siri marriages and children from adultery. However, he said that the phrase 'civil relationship' was interpreted narrowly as the Muslim community currently upholds Islamic shari'a. Children from Siri marriages have full rights as legitimate children, while children from adultery are entitled to *nafkah* and wills.

Source: Interview, 2025.

From the findings, the three judges use the authentic interpretation method, which interprets the meaning of the law based on phrases or words according to the legislator (Mochtar and Hiariej, 2023). However, there are different views among the three judges, according to the belief of judges Nurul Maulidah and Enik Faridarurrohmah that the Constitutional Court wants to protect children from Siri marriages. This means that they narrowly interpreted the phrase 'children born out of wedlock' to mean children from Siri marriages. It is because Siri marriages are religiously valid, even intrinsically. Article 2, paragraph (1) of Law Number 1 Year 1974 also states that marriage is valid as long as it is by the laws of each religion. He argues that registration is only an administrative matter, so it should not reduce the substantive value of marriage. This reduction in the substantive value of marriage has the impact of eliminating the constitutional rights of children who are born later, which basically in Islam have the status of legitimate children. In addition, he also indirectly used the historical interpretation method when basing the reason for the limitation of the phrase 'children born out of wedlock' on the situation of the child of Machica Aisyah Mochtar (the applicant for the Constitutional Court judicial review), who was the result of a Siri marriage (Mertokusumo, 2009).

Judge Sutaji had a different view, saying that the phrase ‘children born out of wedlock’ should be interpreted broadly to include children from Siri marriages and children from adultery. According to him, the Constitutional Court wants all children in Indonesia to receive attention from both parents so that they are not abandoned. Moreover, discrimination against children resulting from adultery in all aspects is a violation of constitutional rights because all children born have a sacred status and have an equal position. However, he argues that the phrase 'civil relationship' should be reduced to conform to the values that live in society. It is because, according to him, adultery is considered a bad deed in society and haram in Islamic teachings, so the absence of the impact of his actions will only foster it. Even so, he does not want the biological father to be responsible for the birth of his child. Therefore, he wants the children of Siri's marriage to have full civil rights as legitimate children in general, but for the children of adultery to have civil rights limited to the right to *nafkah* and mandatory wills.

In addition, the three judges based themselves on Islamic shari'a as their consideration, but there are still differences between them. Judges Nurul Maulidah and Enik Faridaturrohmah argued that if the article is interpreted broadly to obtain the same rights, then this will lead to disorder because Islamic society is still very thick with Islamic teachings. They continued that this also has the consequence of the spread of adultery in society so that the established order of morality will be damaged. Indirectly, their opinion is the same as the reason for MUI's rejection, chaired by Ma'ruf Amin of Constitutional

Court Decision Number 46/PUU-VIII/2010. Judge Sutaji argued that despite the expansion of the meaning of 'children born outside marriage', it does not leave the Islamic Shari'ah that children of adultery do not have nasab and inheritance relationships. Therefore, he interpreted the phrase 'civil relationship' narrowly because of the different rights obtained by children of Siri marriage and children of adultery. He argues that the child of adultery is only entitled to the right of *nafkah* and wills *wajibah* from his biological father as in Islamic teachings, which is the basis of consideration in MUI Fatwa No. 11/2012.

From some of these views, it can be said that in addition to using the authentic interpretation method, they also use the traditional interpretation method, which interprets the meaning of the law by looking at the laws or morality that live in society (Mochtar and Hiariej, 2023). This is evidenced when they both base their considerations on Islamic shari'a, which is always upheld by Muslim communities in Indonesia. According to him, if the interpretation of the phrase in Constitutional Court Decision Number 46/PUU-VIII/2010 is contrary to Islamic shari'a, it will cause disorder among Muslim communities. Even so, the same spirit of Islamic shari'a still causes differences of opinion; judges Nurul Maulidah and Enik Faridaturrohmah argue that it is not allowed to broadly interpret children outside of marriage in the Constitutional Court's decision because it will foster adultery. It is the same as the spirit of MUI's first rejection of the Constitutional Court's decision. As for Judge Sutaji, he still expands the meaning of children outside of marriage but limits the rights obtained; this is the same as the contents of MUI Fatwa No. 11/2012 as MUI's response to the Constitutional Court's decision.

From the analysis of the method of interpretation in the discovery of law by the judges, it was found as follows:

Table 3. Interpretation method of Judges of the Religious Court of Malang District

No.	Judge's Name	Authentic interpretation	Historical interpretation	Traditional interpretation
1	Nurul Maulidah	√	√	√
2	Enik Faridaturrohmah	√	√	√
3	Sutaji	√	-	√

Source: Researcher data analysis, 2025.

François Geny's Contextualisation of Law Theory

François Gény's lifetime was the heyday of legal positivism, both analytical positivism and reine rechtslehre. The natural law paradigm was considered to have sunk because it was unable to reconstruct universal values that were too abstract in reality and was used by the interests of the church and kingdom to dominate all areas of European society at that time (Cahyadi and Manullang, 2021). The confinement of the domination of the church and kingdom that tormented the people made revolutions everywhere, especially the revolution that occurred in France in 1789 against the leadership of King Louis XVI, who was arbitrary towards the people (Scoot and Mentor, 2022).

In the aftermath of the French Revolution, the slogan of the establishment of written law became an inevitable reality to create clear boundaries between the king and the people to protect the rights of the people. Courts that were previously heavily influenced by the king's interests and thus not independent became Courts where judges became the

mouthpiece of written laws (Troper, 2021). It was exacerbated by philosophers who further popularised legal positivism and legitimized it, such as John Austin, Jeremy Bentham, Hans Kelsen, and H.L.A. Hart. Therefore, the positivism paradigm, which was more concerned with legality, legism, and legal certainty in the early 18th-20th century, is considered an established paradigm (Leiter, 2001).

It turns out that this paradigm of legal positivism that emphasizes legality, legism, and legal certainty, which was initially used to protect the rights of the people, eventually also ends up tormenting the people. It is because the influence of monarchical bureaucrats still intervenes in the formation of written law, so there is still a sense of injustice among the people. Thus, if the written law is unfair and violates the rights of the people while the judge is only a mouthpiece of the law, then it is sure that there is no longer a defender of the rights of the people. Therefore, François Gény appears to be the antithesis of the positivism paradigm, especially in the courts (Gény, 1919).

François Gény strongly rejects the role of judges, who are just like the mouthpiece of the law and do not have any creativity when deciding cases. He does not deny the existence of legal codification, but what he criticizes is if judges only act like statues that disregard the development of justice that lives in society. The codification is very vulnerable to incompatibility with the development of society because the nature of legal codification is difficult to change, just like laws.(Bucholic and Komoric, 2019) Gény hopes that judges can behave creatively by daring to change the legal basis of decisions from relying solely on legal codification to being open to customs that live in society, doctrine, and free scientific research (O'Toole, 1958).

From this fact, Gény developed a theory on the method of legal interpretation as outlined in his work entitled 'Méthode d'interprétation et sources en droit privé positive: essai critique'. He openly criticized the interpretation methods of the early 18th-20th century, which used deductive methods and were too formalistic. According to him, the adherents of this method believed that the codification of written law was perfect. In fact, according to Gény, written law will never be perfect in presenting reality; there must be a reduction (Gény, 1919).

According to Gény, it is illogical to draw a straight line between general concepts and concrete events in the empirical world. According to him, many factors and variables color a concrete event, so it should not be seen as the scope of literal-juridical construction alone. Gény views that concrete events and the juridical spirit of written law are two things that must be integrated into the legal interpretation. According to him, in interpreting the law, it is not enough to only capitalize on the skills of tinkering with written law; he must go beyond written law by paying attention to the reality or values that develop in society. Thus, in conclusion, he advocates for proper legal interpretation by proportionally combining the substance of written law with reality or concrete events (Gény, 1919).

With his idea that legal interpretation must be proportionally combined between the written law and concrete events, he then proposed that the first step in interpreting the law is that judges must pay attention to the intention of the lawmakers when the written law is made. In addition, he emphasized the need to pay attention to the situation of society when the written law was formed, which included the needs and social structure at that time. At the same time, it is necessary to pay attention to the internal logic and

systematics of the written law. It is from these three steps that Gény's method of legal interpretation is considered appropriate (Kasirer, 2001).

In addition, Gény argues that if there is an incompatibility between positive law and the changing times, resulting in a legal vacuum, then customary law should be used. This is because customary law is a reflection of the values that are exhibited in society. Therefore, customary law must be used as one source of law in addition to positive law. After all, if a concrete event occurs, it must be related to the situation of the community itself. However, there is another issue, namely, what if positive law and customary law are unable to overcome current problems? In this case, Gény argues that other sources of law must be explored, namely the doctrine of legal scholars and authoritative legal decisions. Suppose these two sources of law are insufficient. In that case, judges must explore the law through free research by exploring the fundamental principles of the value of justice that live in society (Alexander and Villamar, 2021).

It is clear that in terms of legal interpretation, Gény strongly rejects judges who dwell only on legal texts but must reach out to the values that live in society. The exploration of these values reflects the general human consciousness and the reality of society itself, so it is not just like an object that is moved. Gény thus links himself to classical thinkers such as Socrates, Plato, Aristotle, and Thomas Aquinas, who were experts in natural law. He said that the principles of natural law, such as *unicuique suum tribuere*, *neminem laedere*, and *honeste vivere*, as well as the secondary principles of natural law, namely the protection of human rights. According to Gény, these principles should be the basis of and always attached to positive law (Tanya, Simanjuntak, and Hage, 2018).

For simplicity, the indicators of François Gény's theory of legal contextualization are shown below:

Table 4. Indicators of François Gény's theory of legal contextualization

No	Indicators of François Gény's theory of legal contextualization
1	Positive law is written law that cannot be perfect, and if you want to realize perfection, then the judge must look at the values of society. In other words, judges must look at the reality that occurs in the field. Therefore, the method of interpretation is a must. Facts and reasoning are important and balanced components for judges to be responsible for their decisions.
2	If positive law conflicts with customary law, then positive law takes precedence as long as it does not violate human rights and cause disorder. If it causes human rights violations and disorder, then the law may be revised.
3	The method of legal interpretation should not be deductive without first considering concrete events. It must be inductive, first considering concrete events and then drawing on positive law.
4	When drawing from concrete events to positive law, one should prioritize the legislator's intention, namely the philosophical basis and socio-historical conditions.

Source: Researcher data analysis, 2025.

Analysis of the Interpretation of Religious Court Judges from the Perspective of François Gény

In his theory of legal contextualization, François Gény argues that positive law established by state institutions always has shortcomings due to its limitations in

covering a wide range of realities. Therefore, relying solely on the expertise of tinkering with positive law when deciding cases while ignoring the realities of society is dehumanizing. Judges, in this case, must consider the values of justice in society. Thus, he firmly rejects deductive interpretation methods but rather inductive interpretation methods by looking for concrete events first and then drawing on the spirit of positive law (Gény, 1919). Referring to the spirit of positive law is not just looking directly at the sound of the article per article but looking for the formation of positive law first because it is the philosophical basis for the formation of the law and then drawn to the suitability of the article. It is because the law is abstract, so it cannot be directly applied to concrete events (Putro and Bedner, 2023).

In legal discovery, judges Enik Faridaturrohmah and Nurul Maulidah used historical and authentic interpretation by arguing that in interpreting the law, one should not only read the article but must also find out the reasons for its formation. In the legal discovery of the phrase 'children outside marriage' in Constitutional Court Decision Number 46/PUU-VIII/2010, they argued that this phrase should not be interpreted broadly. Instead, they interpreted it in a limited manner according to the rationale behind the decision. The purpose of the Constitutional Court's decision was to protect the rights of children from Siri marriages over their parents (Putro and Bedner, 2023). Siri marriage is a marriage that is religiously valid but not valid in the State because it is not registered before a Marriage Registration Officer (Nelli, 2022).

The three judges believe that this country should not be confined to a formalistic system in which anything is considered valid if it is recorded in a state institution. He argues that this country must turn around by recognising something that is substantially valid; therefore, even though people have entered into a siri marriage, they get facilities in the form of an application for isbath nikah if they do not have children and remarriage before the Marriage Registration Officer if they already have children to conduct a child origin trial then. Thus, the law of the Siri marriage is valid, and the child it produces is legitimate. Therefore, the child has the same rights as a child from a legal marriage. Both in religion and the State in general. The rights possessed by the child are nasab rights, *nafkah* rights, guardian rights, inheritance rights, and others. Therefore, the interpretation of judges Nurul, Enik, and Sutaji is by the core of François Gény's contextual legal theory that in interpreting the law, one must first understand the purpose of its formation.

According to Judges Enik and Nurul, if it is interpreted broadly to include children of adultery so that they also have rights like legitimate children in general, it will result in the proliferation of adultery because the impact of their actions has a legal umbrella. In terms of Islamic teachings, this is a wrong act because it has opened the door to adultery. K.H. Ma'ruf Amin, as the chairman of MUI 2012 at that time, firmly rejected the Constitutional Court's decision if interpreted broadly (Hudiata, 2021). According to Judge Sutaji, if the phrase 'civil rights' is interpreted broadly, then adulterous children will get the same rights as legitimate children, and this will create uproar because it is contrary to Islamic law.

In addition, in terms of the decency of Indonesian society, the decision is also considered contradictory. In fact, since the issuance of the Constitutional Court Decision, the public has been very excited, prompting numerous studies. It is evidence that a broad interpretation of the Constitutional Court's decision will result in the emergence of

disorder because it contradicts the values of justice and morality in society (Abubakar, Juliana, and Hasan, 2021). Thus, it can be concluded that the views of judges Nurul, Enik, and Sutaji are by the core of François Gény's contextual legal theory that the values of justice and morality, as well as ensuring order in society, are important measures for judges when deciding cases.

To facilitate understanding, the following table presents the relationship between the interpretations of the three judges and François Gény's theory:

Table 5. Relationship between the interpretations of the three judges and François Gény's theory

No	François Gény Theory Indicators	Nurul Maulidah	Enik Faridatur-rohmah	Sutaji
1	Judges must look at the realities and morality of society.	√	√	√
2	If positive law conflicts with customary law, then positive law takes precedence as long as it does not violate human rights and cause disorder.	√	√	√
3	The method of legal interpretation should not be deductive but inductive.	√	√	√
4	Legal interpretation should prioritize the intention of the legislator.	√	√	√

Source: Researcher data analysis, 2025.

Although their views are based on François Gény's contextualization theory, the Constitutional Court's decision should be followed by new legislation to create legal certainty. However, the indicators of François Gény's theory are only a technique of analysis and a medium of interpretation of legal reasoning for judges if they have difficulties in legal uncertainty. From the results obtained, it was also found that although the judges' reasoning was by the indicators of François Gény's theory, the results still differed between the judges, as evidenced by two judges adhering to the benefits of religious law only, while the other one adhered to the benefits of religion and the human rights of neglected children. However, when viewed in detail, it can be seen that the opinion of the two judges of the Malang District Religious Court (Enik Faridaturrohmah and Nurul Maulidah) is closer to the truth because of its compatibility with the context of the applicant for Decision 46/PUU-VIII/2010 who is still in a siri marriage status and the current contextualization with the condition of the majority of Indonesian society is very religious, of course, it will reject if the child of adultery is recognized. Therefore, as a temporary alternative until legal reconstruction is completed, Decision 46/PUU-VIII/2010 should only lead to the recognition of children from siri marriages.

D. Conclucion

Based on the research above, several answers to the problem formulation have been presented. First, there are still different views in interpreting the phrase ‘children born outside marriage’ in Constitutional Court Decision No. 46/PUU-VIII/2010. Some interpret it broadly to include children from Siri marriage and children from adultery, but some interpret it narrowly limited to children from Siri marriage. However, Sutaji argued that children of adultery are limited to the right to maintenance and wills. Secondly, although

the interpretations of the three judges are different, the ideality of its rationale is the same as the indicators of François Gény's theory of legal contextualization, namely that judges must look at the reality/morality in society, decisions must be made by the morality that lives in society to avoid disorder, legal interpretation must be carried out deductively, and in legal interpretation must prioritize the intent of the legislator. However, in reality, the reasoning of judges Enik Faridaturrohmah and Nurul Maulidah is closer to the truth based on François Gény's indicators as evidenced by the context of the applicant's siri marriage status and the contextualization of Indonesia's religious society. Thus, as a temporary alternative to reform that guarantees legal certainty, the Constitutional Court Decision No. 46/PUU-VIII/2010 should be interpreted only for the recognition of children from siri marriage.

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