


Legal Protection for Children Born Out of Wedlock from the Perspective of Islamic Family Law and Positive Law

Zaura Frisila Selen¹, Amru Syahputra Lubis²

Institut Syekh Abdul Halim Hasan Binjai, Indonesia

Article Info	ABSTRACT
<p>Keywords: Children born out of wedlock, legal protection, family law, positive law, Islamic law, customary law.</p>	<p>Children born out of wedlock often face social discrimination and legal obstacles in obtaining their rights, whether related to status, civil law, or inheritance. This article examines legal protection for illegitimate children from four perspectives: family law, positive law, Islamic law, and customary law, using normative juridical methods and a case study of Constitutional Court Decision No. 46/PUU-VIII/2010. This decision opened up space for recognizing the civil relationship between illegitimate children and their biological fathers, although in practice there are still administrative obstacles and social resistance. Differences in views are also evident in Islamic and customary law, which generally still limit the legal relationship between children and their biological fathers. Therefore, harmonization of the legal system and strengthening of state protection are needed so that the rights of illegitimate children can be guaranteed without discrimination, in the best interests of the child.</p>
<p>This is an open access article under the CC BY-NC license</p> 	<p>Corresponding Author: Zaura Frisila Selen Institut Syekh Abdul Halim Hasan Binjai, Indonesia Zaurafrisilaselen@gmail.com</p>

INTRODUCTION

The issue of legal protection for children born out of wedlock is a pressing and complex issue in contemporary society. Children born outside of legal wedlock often face discrimination and injustice, both socially and legally. They frequently face obstacles in obtaining identity recognition, rights to maintenance, inheritance rights, and access to equal legal protection. This type of discrimination not only impacts children's legal standing but can also cause deep psychological and social trauma in their lives. In societies that still strongly uphold conservative moral values and social status, illegitimate children are often placed in a vulnerable position.

This situation is further complicated by the legal context in Indonesia, which adheres to a dual legal system, namely positive law (national legislation) and Islamic family law. Both have different normative and epistemological bases for viewing marriage and offspring. In positive law, applicable provisions continue to evolve in line with social dynamics and the need for justice, while in Islamic law, the majority of scholars remain grounded in classical Islamic jurisprudence principles that strictly adhere to the boundaries of lineage. This difference in approach often leads to disharmony in the implementation of legal protection for illegitimate children in Indonesia.

This topic is crucial to study because it concerns fundamental aspects of human life, namely social justice and the protection of children's human rights. Discrimination against illegitimate children not only violates the principle of equality before the law but also undermines Indonesia's constitutional spirit as a nation governed by the rule of law, which guarantees protection for all its citizens. Legal ambiguity regarding the status and rights of illegitimate children can have practical consequences, such as difficulties obtaining birth certificates, healthcare, and other social security benefits. In the long term, this will impact the child's growth and development and social integration within society.

Children, as the nation's future generation, should receive comprehensive legal protection from conception, birth, and into adulthood, without discrimination based on birth status. Unfortunately, in Indonesian social and legal practices, illegitimate children are often excluded from the civil rights they should have. This negative treatment from society, coupled with the state's lack of courage to fully guarantee the rights of illegitimate children, places them in an increasingly marginalized position. Yet, based on international legal principles such as the Convention on the Rights of the Child (CRC), on the Rights of the Child (CRC) which has been ratified by Indonesia, every child has the right to recognition of identity and legal protection without discrimination.

In national law, several important provisions regarding the status of illegitimate children are contained in Law Number 1 of 1974 concerning Marriage, which has been updated by Law Number 16 of 2019. Initially, the law only recognized the civil relationship of illegitimate children with their mothers and their mothers' families, while biological fathers were legally excluded. However, the legal dynamics underwent important developments following Constitutional Court Decision Number 46/PUU-VIII/2010, which stated that illegitimate children could have a civil relationship with their biological fathers, provided it could be proven scientifically and/or through technology and according to law. This decision was an important milestone in the legal recognition of the rights of illegitimate children and showed a new direction in more inclusive legal protection.

Meanwhile, from the perspective of Islamic law, which is adhered to by the majority of Muslims in Indonesia, the view of illegitimate children remains limited. The majority of Islamic scholars believe that children born outside of a valid marriage according to sharia have no kinship with their biological father. Consequently, such children have no inheritance rights or civil rights to their father. However, within the framework of the maqashid sharia, or the objectives of Islamic law, the principle of protecting the life and well-being of children remains a primary concern. This means that even though the kinship aspect is not recognized, the father's obligation to provide for and ensure the child's survival remains emphasized as a form of moral and social responsibility.

These differing views between positive law and Islamic law reflect the challenges in harmonizing the legal system in Indonesia. On the one hand, the state is required to guarantee the rights of every child without discrimination through positive law. On the other hand, prevailing social and religious norms often influence the acceptance of more progressive legal policies. Therefore, it is important to conduct an in-depth study of how these two legal

systems can collaborate to create a just, humane, and non-conflicting child protection system. An inclusive approach based on the best interests of the child (the best interest of the child) must be the main principle in every policy and legal action taken by the state.

The purpose of this paper is to analyze legal protection for children born out of wedlock from two main perspectives: Islamic family law and Indonesian positive law. Furthermore, this paper aims to identify the challenges faced in implementing this legal protection and to propose solutions that support children's rights and the principles of social justice. It is hoped that this study will find common ground between the two legal systems, thereby eliminating normative confusion and discriminatory practices against illegitimate children, who should have the same rights to life and protection as other children .

RESEARCH METHODS

This type of research is normative legal research, namely research that is based on an examination of applicable legal norms. The approach used in this research includes a statute approach (statutory approach), conceptual approach (conceptual approach), and case approach (case approach). The statutory approach is used to examine the legal regulations that form the basis for regulating the protection of illegitimate children, while the conceptual approach is used to understand the basic ideas and principles that form these legal norms, both in positive law and Islamic law. The case approach is used to analyze the relevance and concrete impact of the application of legal norms through a study of court decisions, particularly Constitutional Court Decision Number 46/PUU-VIII/2010.

library studies. research), by reviewing various legal documents, academic literature, and relevant scientific publications. The main data source is secondary data consisting of three types of legal materials: primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials include laws and regulations such as Law Number 1 of 1974 concerning Marriage (jo. Law No. 16 of 2019), the Compilation of Islamic Law (KHI), and Constitutional Court Decision No. 46/PUU-VIII/2010, which is an important milestone in the recognition of civil rights of illegitimate children against their biological fathers. Secondary legal materials consist of law books, scientific journal articles, fatwas from scholars, and expert opinions that provide interpretations of applicable legal provisions. Meanwhile, tertiary legal materials include legal dictionaries, encyclopedias of Islamic law, and other supporting documents that support understanding of the substance of the study.

Data collection techniques were conducted systematically by identifying, classifying, and reviewing various legal sources related to the protection of illegitimate children. This process included searching for written legal documents, studying legal theories and principles, and reviewing literature describing legal and social practices in the implementation of the rights of illegitimate children. The primary focus of data collection was to obtain valid information that could be used in a normative analysis of the legal system in Indonesia, both from a positive law perspective and an Islamic legal perspective.

Furthermore, the data analysis technique used in this study is qualitative analysis, namely by systematically describing and explaining each relevant legal provision, accompanied by legal interpretation and analysis of the dynamics of its application in the social and judicial context. This research is descriptive-analytical, emphasizing an in-depth understanding of legal principles and relevant case studies, particularly related to Constitutional Court Decisions and legal practices in the field. The purpose of this method is to gain a comprehensive understanding of the legal protection of illegitimate children from the two main legal systems in Indonesia, as well as to provide normative suggestions that can be used as input in improving regulations and child protection policies in a just and humane manner .

RESULTS AND DISCUSSION

Legal Protection from the Perspective of Indonesian Positive Law

A significant change in the legal protection of illegitimate children occurred through Constitutional Court Decision Number 46/PUU-VIII/2010, which became an important milestone in the history of the development of family law in Indonesia. This decision was a response to years of legal concerns regarding the discriminatory treatment received by children born outside of legal marriage. In its consideration, the Court stated that the phrase in Article 43 paragraph (1) of Law Number 1 of 1974 which states that "a child born outside of marriage only has a civil relationship with his mother and his mother's family" is contrary to the values of justice and protection of human rights as regulated in the 1945 Constitution of the Republic of Indonesia .

The Constitutional Court's ruling has significant legal consequences, particularly in recognizing the possibility of a civil relationship between an illegitimate child and their biological father, provided it can be proven scientifically and/or using modern technology. This can be done through DNA testing or other legally recognized evidence. Thus, the law is no longer based solely on marital status, but also on relevant biological and scientific facts. This reflects a new spirit in reforming family law, making it more just and adaptable to current developments.

One positive implication of this ruling is that it opens access for illegitimate children to obtain full legal recognition of their identity. Previously, many children had only their mother's name on their birth certificates, with no recognized relationship to their biological father. This not only impacted the child's self-esteem but also impacted other legal rights, such as inheritance, education, and public services. By having the biological father's name listed on official documents, children can experience state protection and recognition of their existence as full citizens.

In addition to recognizing their identity, this ruling also provides a basis for illegitimate children to claim maintenance from their biological fathers. The right to maintenance is a fundamental child right universally recognized in various international conventions and national laws. In this case, if the biological relationship can be legally proven, the biological father has a legal obligation to provide for the child, as is customary for children within a

marriage. This is also a form of moral and social responsibility that cannot be avoided on the basis of marital status.

Furthermore, recognizing a civil relationship between an illegitimate child and their biological father also opens up the child's ability to obtain inheritance rights. While this right remains debated within the context of Islamic law, under positive law, proof of blood relationship can be used as a basis for filing an inheritance lawsuit. This represents a significant step forward in protecting children's civil rights, given that inheritance is often the only form of economic security for children after the death of their parents. However, the implementation of these inheritance rights requires a careful and fair legal process to avoid conflict among the remaining heirs.

Although the Constitutional Court's ruling has normatively opened up broader legal protection for illegitimate children, its implementation still faces serious obstacles. One major obstacle is resistance from civil registration officials, who often refuse to include the biological father's name on birth certificates, especially in the absence of proof of a valid marriage. This situation demonstrates a gap between legal norms and administrative practices that are not fully aligned with the spirit of the Constitutional Court's ruling. This discrepancy undoubtedly impacts the effectiveness of legal protection for children.

Furthermore, the public's lack of understanding of the content and implications of the ruling is also a major hindering factor. Many parents and guardians of illegitimate children are unaware that they can actually fight for their children's rights through legitimate legal mechanisms. Lack of public awareness campaigns from government agencies, including the Population and Civil Registry Office and the courts, have severely limited access to justice, particularly for those with low levels of education and economic status.

On the other hand, socio-cultural factors also pose a challenge that cannot be ignored. In societies that still strictly uphold traditional and religious norms, illegitimate children often experience negative stigma. This stigma not only affects the child but also the mother who gave birth to them. As a result, many families choose not to pursue legal recognition for illegitimate children for fear of facing social pressure or ostracism. However, this neglect actually robs children of their right to grow up in a just and empowered environment.

In a policy context, the state needs to bridge the gap between normative law and administrative practices on the ground. The government must issue clearer and more stringent technical regulations for all civil registry officials to consistently implement the Constitutional Court's ruling. Furthermore, ongoing training and education are needed for law enforcement officials, civil service personnel, and community leaders to foster a shared understanding of the principles of child protection based on the constitution and human rights.

Thus, although Constitutional Court Decision No. 46/PUU-VIII/2010 has been a bright spot in family law reform in Indonesia, significant work remains to be done to realize concrete and equitable legal protection for illegitimate children. Successful implementation depends not only on the existence of legal regulations, but also on institutional readiness, changes in the legal culture of society, and the political will of the government to uphold the principle of non-discrimination for every child regardless of their birth background.

Protection of Children Born Out of Wedlock from an Islamic Law Perspective

In Islamic law, kinship or blood ties hold a crucial position and play a role in determining various civil aspects, such as inheritance rights, guardianship, and maintenance obligations. Lineage in Islam is established on the basis of a valid marriage according to sharia. Therefore, the majority of scholars from the authoritative schools of Islamic jurisprudence are of the opinion that a child born out of wedlock cannot be linked by lineage to its biological father. Consequently, the child is only related by lineage to its mother and is not entitled to civil rights from its father, such as inheritance, guardianship, or maintenance.

This view refers to the hadith of the Prophet Muhammad SAW which is very popular among the fuqaha as the legal basis regarding the status of illegitimate children. The hadith reads:

may Allah bless him and give him peace of mind

"The child belongs to the bed (of the legitimate husband), and for the adulterer it is a stone (has no rights whatsoever)." (HR. Bukhari-Muslim)

This hadith is used as the basis by the ulama that in Islam, children born as a result of adultery cannot be given birth to the man who committed adultery with their mother, because there is no binding marriage contract. Therefore, the man does not have civil responsibility towards the child as applies to legitimate children. This assertion is in line with the principle of maintaining the purity of the nasab (hifz al-nasab) which is one of the maqashid al-syari'ah (the goals of Islamic law).

However, in the context of social justice and developments in the times, new views have emerged from contemporary scholars who try to view this problem through the maqashid approach. Al-Shari'ah is more inclusive. They argue that an illegitimate child cannot be blamed for the circumstances of his or her birth, as he or she was not born of his or her own free will. Therefore, denying all of his or her rights is considered contrary to the basic principles of Islam, which uphold justice, protection of the soul (hifz), and the protection of the soul (hifz), al-nafs), and respect for human dignity.

Within the framework of maqashid In Islamic law, protecting the life and right to life of children is a top priority. Therefore, some progressive scholars, such as Sheikh Ali Jum'ah and other contemporary Islamic jurists, have stated that illegitimate children still have certain rights from their biological fathers, particularly regarding the provision of maintenance. They argue that if the biological relationship can be scientifically proven, such as through DNA testing, then at the very least the biological father is morally and socially obligated to provide maintenance to the child as a form of humanitarian responsibility.

This view does not necessarily negate classical Islamic jurisprudence principles, but rather represents a reinterpretation of them in light of changing social contexts. In modern society, ignoring the rights of illegitimate children not only creates injustice but also risks further social harm, such as child poverty, structural discrimination, and the destruction of children's honor from an early age. Therefore, a more responsive and adaptive approach to Islamic law is needed to ensure the law remains relevant and provides fair protection to all parties, including vulnerable children.

Thus, although the majority of Islamic scholars still hold the classical view regarding the status of illegitimate children, many contemporary scholars offer new *ijtihad* (religious *ijtihad*) regarding the rights of these children. They do not demand that illegitimate children be treated entirely equally with children born in legitimate marriages in all aspects, but at least allow for basic protections such as financial support and identity recognition, without violating the fundamental principles of *sharia*. This demonstrates that Islam, as a religion of mercy for all beings, has the flexibility to respond to social dynamics as long as it remains grounded in the values of justice and welfare.

Recent Case Studies

One case that has captured public attention regarding illegitimate children is the case involving former national badminton athlete Taufik Hidayat. This case came to light when a woman claimed that the child she gave birth to was the result of a relationship with the athlete and filed a legal petition for the child's status to be officially recognized. In her petition, she based her claim on the child's right to receive legal identity recognition and a civil relationship with the biological father, as accommodated in Constitutional Court Decision No. 46/PUU-VIII/2010. DNA testing is also the main tool to prove the biological relationship between the child and the father. However, although legally there is room for recognition, reality shows that the evidentiary procedures in court and the civil registration bureaucracy remain complicated and tedious obstacles, especially for women from economically vulnerable groups.

This case demonstrates that despite Indonesia's progressive judicial decisions, their implementation remains far from ideal. Our legal system has not been fully responsive in simplifying access to justice for illegitimate children. In fact, in many cases, civil registration officials remain adamant in refusing to include the father's name on birth certificates without proof of a valid marriage, even when there is supporting scientific evidence. This situation creates legal inequality that results in children being born without full identity recognition, which in turn hinders their access to other basic rights such as education, social security, and inheritance.

On the other hand, social conditions exacerbate this situation. Data from the National Commission on Violence Against Women (Komnas Perempuan) in 2021 recorded a significant increase in the number of premarital pregnancies, particularly among teenagers. This is marked by a surge in requests for child marriage exemptions, often submitted as a quick solution to avoid social stigma. However, in many cases, planned marriages fail due to various factors, such as lack of parental consent, economic circumstances, or even rejection by the husband. As a result, children born from these relationships become illegitimate children, facing not only social rejection but also legal neglect.

This phenomenon reveals a serious gap between legal norms and social reality. On the one hand, the state is committed to providing protection to all children without discrimination, as stipulated in the ratified Convention on the Rights of the Child. However, on the other hand, many children born out of wedlock do not receive the protection they deserve. This imbalance reflects the weak implementation of regulations oriented toward the best interests of the

child . interest of the child). In addition, the lack of legal education and low public awareness of children's rights worsen this condition.

Therefore, strategic steps are needed from all stakeholders, including the legislative, judicial , and executive branches, to build a more inclusive and equitable system. The government needs to strengthen affirmative action policies that guarantee easy access to proving a child's status through legally valid forensic technology, without burdening the mother or child. Furthermore, public education regarding children's rights and the responsibilities of parents, including biological fathers, must continue to be intensified. Protection of illegitimate children should no longer be viewed as merely a moral issue, but as part of the state's obligation to guarantee the human rights of every citizen, including those born into the most vulnerable circumstances .

Social and Legal Implications

The fundamental differences between Islamic law and national law in Indonesia have given rise to a complex dual legal system, particularly regarding issues concerning the status and rights of illegitimate children. On the one hand, positive law, through judicial decisions such as Constitutional Court Decision No. 46/PUU-VIII/2010, has shown a more progressive direction in protecting illegitimate children. Children who can be scientifically proven to be the biological offspring of a father are now entitled to legal recognition, maintenance, and other civil rights . This represents a significant step forward in fulfilling children's rights, which were previously limited to the mother and her family.

However, on the other hand, religious norms, particularly in the view of the majority of Islamic jurisprudence scholars, maintain the principle that illegitimate children have no blood relationship with their biological father. This has the effect of limiting children's rights in several important aspects, such as inheritance rights, marriage guardianship, and family lineage. Most religious Indonesians, who use Islamic law as a reference in their family life, tend to maintain this traditional view. As a result, despite the legal recognition of the rights of illegitimate children, society remains reluctant to accept this change socially and culturally.

Lack of synchronization between positive law and Islamic law has created confusion in its implementation. Civil registration officers, for example, often face the dilemma of following statutory regulations or considering local social and religious norms. In the case of including the father's name on birth certificates, many remain reluctant to do so without proof of a legal marriage, even though a biological relationship has been scientifically proven. This confusion creates inconsistent treatment for illegitimate children and has the potential to lead to injustice.

This situation indicates the need for harmonization between the two legal systems to ensure that the best interests of children remain a top priority without sacrificing the religious values held dear by society. This harmonization can be achieved through dialogue between religious and state institutions, more accommodating policy revisions, and increased legal authorities' understanding of holistic child protection principles. Furthermore, the maqasid approach Al-syari'ah in Islamic law which focuses on welfare, can be used as an entry point to bridge religious principles with the values of social justice adopted in national law.

It's important to remember that the core principles of these two legal systems should not contradict each other when it comes to child protection. Islam, as a religion of mercy for all the worlds, emphasizes justice, compassion, and protection of the weak, while national law aims to guarantee the equal rights of every citizen. Therefore, a compromise must be found so that the state can fulfill its obligation to protect every child—regardless of their birth status—without creating social resistance due to the disregard for religious values prevalent in society .

CONCLUSION

Legal protection for illegitimate children in Indonesia reflects the dynamic between two prevailing legal systems: positive law and Islamic law. Positive law, through Constitutional Court rulings and regulations such as the Child Protection Law , has provided a more inclusive and equitable space by recognizing the rights of illegitimate children to their biological fathers, provided they can be scientifically proven. This approach reflects the state's commitment to guaranteeing the rights of every child without discrimination, as mandated by the constitution and human rights instruments. Meanwhile, Islamic family law maintains the principle of prudence in determining lineage and inheritance rights, while prioritizing the protection and well-being of children as vulnerable beings in need of protection. The tension between these two legal systems creates practical challenges, particularly in civil administration, social issues, and law enforcement. Therefore, efforts to harmonize and synergize positive law and religious values are needed to create a comprehensive and just legal protection framework for illegitimate children. Collaboration between the state, law enforcement, and religious leaders is key to eliminating stigma and improving regulations and child protection mechanisms. In this way, Indonesia can realize a legal system that not only upholds formal justice but also supports the humanity and well-being of children as the future generation.

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