

A Legal Review of Islamic Law on The Issue of A Child's Origins And The Legal Certainty of A Child's Status Under Law No. 16 of 2019

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Abstract

This study examines the issue of child lineage and legal certainty of child status from the perspective of Islamic law and its relevance to Law No. 16 of 2019 on Marriage. Disputes over child origins often create complex legal and social consequences, particularly regarding lineage (*nasab*), inheritance rights, and parent-child obligations. Islamic law strictly links lineage to a valid marriage in order to preserve the integrity of descent and ensure legal certainty. However, social realities present cases beyond this ideal, including children born outside marriage, unregistered marriages, and unclear parentage. Law No. 16 of 2019 seeks to provide legal certainty through mechanisms such as child recognition, legitimation, and protection. This research applies a normative juridical method with a comparative approach to analyze differences and potential harmonization between Islamic law and positive law. The study focuses on the concept of *nasab*, its legal implications, and the extent to which the law provides comprehensive solutions. The findings indicate that while Islamic law and positive law share the objective of protecting children, differences in determining lineage create challenges for legal certainty. Harmonization is therefore necessary to ensure both justice and the protection of children's rights.

Keywords: *Child Origins, Legal Certainty, Child Status, Islamic Law, Law Number 16 of 2019*

Abstrak

Penelitian ini mengkaji permasalahan asal-usul anak dan kepastian hukum status anak dalam perspektif hukum Islam serta relevansinya dengan Undang-Undang Nomor 16 Tahun 2019 tentang Perkawinan. Permasalahan asal-usul anak sering menimbulkan sengketa hukum dan dampak sosial, khususnya terkait nasab, hak waris, serta hak dan kewajiban orang tua dan anak. Hukum Islam menempatkan perkawinan sah sebagai dasar utama penetapan nasab guna menjaga kemurnian keturunan dan kepastian hukum. Namun, realitas sosial menunjukkan adanya anak yang lahir di luar perkawinan, dari perkawinan tidak tercatat, atau dengan asal-usul yang tidak jelas. Undang-Undang Nomor 16 Tahun 2019 berupaya memberikan kepastian hukum melalui mekanisme pengakuan, penetapan, dan perlindungan anak. Penelitian ini menggunakan metode yuridis normatif dengan pendekatan komparatif antara hukum Islam dan hukum positif. Fokus kajian meliputi konsep nasab, implikasi hukumnya, serta kemampuan hukum positif dalam memberikan solusi yang komprehensif. Hasil penelitian menunjukkan bahwa meskipun kedua sistem hukum memiliki tujuan perlindungan anak, perbedaan dalam penentuan nasab menimbulkan tantangan terhadap kepastian hukum. Oleh karena itu, diperlukan upaya harmonisasi untuk menjamin keadilan dan perlindungan hak anak.

Kata Kunci: *Asal-usul Anak, Kepastian Hukum, Status Anak, Hukum Islam, Undang-Undang Nomor 16 Tahun 2019*

1. Introduction

From a legal perspective, marriage is not merely understood as a social relationship between a man and a woman, but as a legal institution possessing both religious and legal dimensions. Conceptually, marriage aims to establish a legally valid and protected family, and serves as the foundation for the creation of legal relationships among family members, including in determining the status of children. Within the national legal framework, this construction is affirmed in the provisions of Article 2(1) of Law No. 1 of 1974, which states that a marriage is valid if conducted in accordance with the laws of the respective religion and belief.

This provision demonstrates a close relationship between religious norms and state recognition in determining the validity of a marriage, such that the legality of the marriage becomes the primary foundation for determining the legal status of a child. If a marriage is conducted contrary to the provisions of religion and belief, by law, such a marriage is invalid and has no legal consequences as a marital bond. A marriage conducted without the requisite conditions is a void marriage, and if it fails to meet the essential elements, it is invalid; in such cases, both parties are considered legally unmarried. (Rofiq, 2015)

A marriage certificate serves to prove the legitimacy of children from that marriage. Legal proceedings before the Court cannot, of course, be initiated if the marriage is not evidenced by a certificate. Therefore, Article 7 of the Compilation of Islamic Law emphasises in paragraph 1: "A marriage may only be proven by a marriage certificate issued by a marriage registrar." (Rofiq, 2015)

The legal consequences of an unregistered marriage are that, although the marriage may be considered valid according to religion or belief, a marriage conducted without the knowledge and supervision of a marriage registrar lacks permanent legal force and is deemed invalid in the eyes of the state. The legal consequences of such a marriage have severely detrimental effects on the wife and women in general, both legally and socially, as well as on the children born of the union.

A child is a person (persoon) with a unique dimension to their life, where, in addition to requiring parental support for their growth and development, environmental factors also play a crucial role in shaping the child's personality as they enter adulthood. A child is a figure who will bear responsibilities in the future; therefore, it is not excessive for the state to provide protection for children from practices that could destroy their future. (Imron, 2015)

A child is both a blessing and a trust from Allah SWT, which must always be safeguarded because it is intrinsically linked to dignity, honour, and human rights that must be upheld. For

parents, a child is an invaluable asset and gift from God; they are a source of comfort, the continuation of the family line and the parents' aspirations, and in terms of the life of the nation and state, a child is the future of the nation and the next generation to carry forward the nation's aspirations. (Asrofi, 2020)

A child's lineage refers to their family lineage, which arises from the relationship between a man and a woman who have biologically given birth to a child in accordance with legal provisions. A child's lineage forms the basis for determining the existence of a blood relationship with their father. (Irfan, 2015)

In Islam, a child's legal status has a significant impact on various aspects of life, including lineage, inheritance rights, guardianship, and maintenance obligations. A legitimate child is entitled to protection, love, and recognition from their parents. Therefore, Islam establishes specific criteria to determine the legitimate status of a child from the perspective of Sharia law.

According to Islamic law, a child's legal status has a significant impact on various aspects of life, including lineage, inheritance rights, guardianship, and maintenance obligations. A legitimate child is entitled to protection, love, and recognition from their parents. Consequently, specific criteria have been established to determine a child's legitimate status from the perspective of Sharia law. This principle can be traced, among other things, in the hadith regarding *al-walad lil firasy* (a child is attributed to the owner of the bed/valid marriage), as well as in the provisions of Article 42 and Article 43(1) of Law No. 1 of 1974 as amended by Law No. 16 of 2019, which regulate legitimate children and their civil relationships. Thus, there is a normative alignment between the principles of Islamic law and positive law in establishing a valid marriage as the primary basis for determining a child's status.

Article 28B(2) of the 1945 Constitution states, "Every child has the right to survival, to grow up, to participate, and to protection from violence and discrimination, as well as civil rights and freedoms".

In detail, children's rights are set out in Articles 5 to 18 of Law No. 23 of 2002 on Child Protection, as amended by Law No. 35 of 2014, which includes the provision that "a child has the right to know their parents". Knowing their parents relates to the child's origins. A child's origins can be proven, amongst other things, by a birth certificate. For children born of a lawful marriage, obtaining a birth certificate is not difficult; it is sufficient to follow the prescribed procedures and requirements so that children born of a lawful marriage receive full protection regarding the preservation of lineage (*hifdlun nast*), with all its legal consequences. However, for a child born out

of a valid marriage, establishing the child's parentage requires a court ruling, and not all applications regarding a child's parentage are granted by the court. The court will only grant an application regarding a child's parentage if the application is proven to be based on legal grounds. If the petition is not based on legal grounds, it will be rejected. The procedure for filing a petition regarding a child's parentage and the legal consequences of the court's decision on the child's parentage are explained below.

Issues concerning a child's parents within the Indonesian legal system have become increasingly pressing alongside the development of regulations and the dynamics of judicial practice. The amendment of Law No. 1 of 1974 by Law No. 16 of 2019 not only reaffirms the importance of the legality of marriage but also has implications for the determination of the legal status of children born from such a relationship. In practice, issues concerning a child's parents often give rise to legal disputes regarding the determination of lineage, inheritance rights, guardianship, and child maintenance obligations.

This situation became even more complex following the issuance of Constitutional Court Decision No. 46/PUU-VIII/2010, which permits a civil relationship between a child born out of wedlock and their biological father, provided this can be scientifically proven or established through evidence admissible under the law. This ruling has significant implications for the family law system in Indonesia as it broadens the interpretation of the legal relationship between a child and their biological parents beyond the framework of a legally valid marriage. (Mahkamah Konstitusi Republik Indonesia, 2012)

On the other hand, Islamic law conceptually positions lineage (*nasab*) as a crucial legal institution in safeguarding the purity of lineage (*hifz al-nasl*) and determining various family law consequences, including inheritance rights and guardianship relationships. Consequently, the differing approaches between Islamic law and positive law have the potential to create legal uncertainty regarding the determination of a child's status, particularly in cases involving children born out of wedlock or from unregistered marriages. (SARASWATI, 2015). This study addresses the legal uncertainty arising from the divergence between Islamic law and Indonesian positive law in determining child parentage.

2. Literature Review

Previous research has examined the status of children under Islamic family law as well as

from the perspective of national law, particularly following the issuance of Constitutional Court Decision No. 46/PUU-VIII/2010. However, most of this research has focused more on the implications for the protection of children's rights or on a constitutional analysis of the Constitutional Court's decision, without comprehensively examining the relationship between the concept of lineage in Islamic law and the latest provisions in Law No. 16 of 2019 on Marriage

Research by Hamzani highlights changes to the concept of lineage for children born out of wedlock following Constitutional Court Decision No. 46/PUU-VIII/2010, indicating a shift in the civil relationship between the child and the biological father. (Hamzani, 2016) Furthermore, Ginsu emphasises that this ruling expands the child's civil relationship which was previously limited to the mother to include the biological father, provided this can be scientifically proven. (Ginsu, 2022) Research conducted by Sa'diah examines the status of children born out of wedlock from the perspective of Islamic law and the Constitutional Court's ruling, revealing a fundamental difference between the concept of nasab in fiqh and the approach of positive law. (Sa'diah, 2024) Furthermore, Wicaksana found that the Constitutional Court's rulings reinforce the civil rights of children born out of wedlock, including the right to identity, maintenance, and inheritance. (Wicaksana, 2023) Setyawan's research also indicates that whilst children born out of wedlock are granted certain civil rights, aspects of lineage, inheritance, and guardianship remain restricted from an Islamic legal perspective. (Setyawan, 2024)

Based on these studies, a research gap can be identified, namely the lack of comprehensive integration between the analysis of the concept of lineage in Islamic law and the development of Indonesian positive law, particularly following the amendment of Law No. 16 of 2019 and the implications of Constitutional Court Decision No. 46/PUU-VIII/2010. Most research still treats these two legal systems separately or merely compares them normatively without elaborating on their interrelationship in the practice of law enforcement. Furthermore, approaches linking the conceptual, normative, and legal implications regarding the legal certainty of a child's status remain limited, thus failing to provide a comprehensive picture of the harmonisation of these two legal systems within the context of family law in Indonesia.

However, these studies remain fragmented and fail to construct a systematic integration between Islamic lineage doctrine and contemporary statutory developments.

This study offers a novel approach by constructing an integrative analysis between Islamic law and Indonesian positive law in determining the status of children, with the concept of nasab serving as the primary variable examined systematically. This study not only conducts a comparison

but also identifies points of convergence and the potential for harmonisation between the two legal systems, particularly in ensuring legal certainty for children. Thus, this study makes a theoretical contribution to the development of Islamic family law that is adaptive to the dynamics of national law, whilst strengthening an interconnective approach between religious norms and state law.

It is hoped that this analysis will provide a more comprehensive understanding of the commonalities between Sharia values and the principles of child protection in national law, thereby supporting the development of legal policies that are more responsive to the protection of children's rights.(Ernawati; 2020)

3. Method

This study employs *normative legal research*, which treats law as a norm or rule applicable within the legal system. This approach involves examining the principles, theories, concepts, and legislation relevant to the legal issue under investigation . Normative legal research essentially focuses on the study of legal materials as the primary source for finding answers to legal problems.(Abdulkadir, 2004) The approach used in this research is the statutory *approach*, which involves examining all legislation relevant to the legal issue under consideration. This approach is employed to understand the substance of legal norms, the legislative rationale, and the consistency between regulations within a legal system.(Marzuki, 2005)

The sources of legal material in this study consist of three types. First, primary legal material, namely legal material that has binding force, such as Law No. 1 of 1974 on Marriage as amended by Law No. 16 of 2019, the Compilation of Islamic Law, and relevant court decisions. Second, secondary legal materials, namely materials that provide explanations of primary legal materials, such as textbooks, academic journals, and previous research findings. Third, tertiary legal materials, namely materials that provide additional guidance, such as legal dictionaries and legal encyclopaedias. This classification is a general standard in normative legal research to facilitate systematic analysis of legal materials.

The technique for collecting legal materials is carried out through *library research*, namely by systematically cataloguing and reviewing various relevant legal materials in accordance with the research problem. Subsequently, the legal materials obtained are analysed qualitatively using the method of *legal reasoning*, namely through the process of interpreting norms, legal construction, and analysis of the relationships between legal norms. In legal research, this analysis aims to identify

coherence between legal norms and to determine whether a rule is consistent with applicable legal principles.

With this approach, this study is expected to produce a systematic, logical, and comprehensive analysis of the issues surrounding the origin of children and the legal certainty of a child's status from the perspective of Islamic law and positive law in the Republic of Indonesia

4. Results and Discussion

4.1 Result

4.1.1 Legitimate Children

The concept of *nasab* (lineage) occupies a central position in Islamic family law, as it determines the legal relationship between a child and their parents. The establishment of *nasab* has significant implications for various civil rights, including inheritance obligations, guardianship, and maintenance. In the Indonesian legal system, the determination of a child's legitimacy is closely linked to the validity of the marriage, as regulated by Law No. 1 of 1974 and its amendments through Law No. 16 of 2019. A child born within a legally recognised marriage automatically acquires a legal relationship with both parents, thereby ensuring legal certainty regarding lineage and civil rights. Contemporary studies on Islamic family law emphasise that the determination of lineage is crucial for upholding the objective of *hifz al-nasl* (protection of lineage), which is one of the primary objectives of Islamic law. (Husni et al., 2024)

Pursuant to Article 42 of Law No. 1 of 1974 on Marriage (UUP) and Law No. 16 of 2019, "A legitimate child is a child born within or as a result of a valid marriage". Meanwhile, according to Article 99 of the Compilation of Islamic Law (KHI), there are two categories of legitimate children, namely:

- a. children born within or as a result of a valid marriage;
- b. the result of lawful sexual intercourse between husband and wife outside the womb and born to the wife.

What is meant by a lawful marriage under the UUP is a marriage conducted in accordance with the substantive laws of the respective religion and belief, and officially registered in accordance with applicable legislation (see: Article 2(1) and (2) of the UUP). The dual requirement of religious validity and administrative registration reflects the Indonesian

legal system's effort to harmonise religious norms with state legal administration to ensure legal certainty for couples and children.

A legitimate child automatically has a blood relationship with the father and his family unless the father (the husband of the mother who gave birth to the child) denies it. The Prophet (peace be upon him) said:

عن عمرو بن شعيب عن أبيه عن جده قال: قام رجل فقال: يا رسول الله، إن فلاناً ابني، عَاهَرْتُ بِأُمِّهِ فِي الْجَاهِلِيَّةِ، فقال رسول الله صلى الله عليه وسلم: لا دعوة في الإسلام، ذهب أمر الجاهلية، الولد للفراش، وللعاهر الحجر (رواه أبو داود)

“From ‘Amr ibn Shu’aib, may Allah be pleased with him, from his father, from his grandfather, who said: A man said: ‘O Messenger of Allah, this and that are my children; I committed adultery with their mother during the pre-Islamic era.’ The Messenger of Allah said: ‘There is no recognition of paternity in Islam; the affairs of the pre-Islamic era are now past. The child belongs to the husband of the woman who gave birth (firash), and for the adulterer there is stoning (as punishment)’ (Narrated by Abu Dawud).

Based on this hadith, Imam Ibn Abdil Barr in his book, ‘At-Tamhid’ (8/183), as cited in MUI Fatwa No. 11 of 2012, states: “The scholars have agreed that if a man commits adultery with a married woman and she gives birth to a child, the child is not attributed to the man who fathered it, but to the mother’s husband, provided he does not deny paternity.”

"وأجمعت الأمة على ذلك نقلاً عن نبيها صلى الله عليه وسلم، وجعل رسول الله صلى الله عليه وسلم كل ولد يولد على فراش لرجل لاحقاً به على كل حال، إلا أن ينفيه بلعان على حكم اللعان"

People are in agreement that, based on the hadith of the Prophet, peace and blessings be upon him, and the Prophet, peace and blessings be upon him, established that every child born to a mother whose husband is present is attributed to his father (the mother’s husband), unless he denies the child through li’an; in this case, the ruling is li’an.

It is also stated by Imam Ibn Qudamah in al-Mughni (9/123) as follows:

وأجمعوا على أنه إذا ولد على فراش رجل فادعاه آخر أنه لا يلحقه

The scholars are in consensus (ijma’) that if a child is born to a mother, and her husband is present, yet another man claims to be the father, then the child is not related to him.

If the husband denies the legitimacy of the child born to his wife, and he can prove that his wife has committed adultery either through the oath of li’an or by other evidence, then the husband must file a petition for disownment of the child with the Court. If, following the

Court's examination, the claim is proven to be true (on legal grounds), then the husband's petition for disownment of the child will be granted. Therefore, the birth of the child is the result of adultery. (See: Article 44 of the Marriage Law in conjunction with Article 101 of the Islamic Family Law).

A claim for disownment of a child must be filed with the Religious Court within 180 days of the date of birth or 360 days after the dissolution of the marriage or after the husband becomes aware that his wife has given birth to a child and is in a place where he can bring this case before the Religious Court. A claim for disownment filed after this period has elapsed shall not be accepted. (see: Article 102 of the KHI).

4.1.2 Children Born Out of Wedlock

Legal developments in Indonesia have significantly influenced the interpretation of the civil status of children born out of wedlock. Constitutional Court Decision No. 46/PUU-VIII/2010 introduced a broader interpretation of civil relations by permitting a child born out of wedlock to establish a civil relationship with their biological father if supported by scientific evidence or other legally recognised evidence. This decision reflects the Indonesian legal system's efforts to strengthen the protection of children's rights without conflicting with the principles of Islamic family law doctrine. (Ali et al., 2024)

Pursuant to Constitutional Court Decision No. 46/PUU-VIII/2010 dated 17 February 2012, Article 43(1) of Law No. 1 of 1974 on Marriage, which states, "A child born out of wedlock shall only have a civil relationship with the mother and the mother's family", has no binding legal force insofar as it is interpreted to eliminate the civil relationship with a man who can be proven, based on science and technology and/or other evidence in accordance with the law, to have a blood relationship as the father; thus, the paragraph reads: "A child born out of wedlock has a civil relationship with the mother's family and with the man as his father who can be proven, based on science and technology and/or other evidence in accordance with the law, to have a blood relationship, including a civil relationship with the father's family";

According to Chatib Rasyid (former Chairman of the Semarang High Court), a child born out of wedlock is a child born from a marriage conducted in accordance with the respective religion and beliefs. This definition implies the existence of a marriage, and if conducted according to Islam, such a marriage is "valid" from the perspective of Islamic jurisprudence (fiqh) provided it meets the conditions and requirements of marriage. Thus, the

child is legitimate from a religious perspective, that is, materially legitimate, but because the marriage is not registered at the Office of Religious Affairs (KUA). In the case of children born out of wedlock, such as Machica Mochtar and Moerdiono, the marriage is not officially valid and therefore has no legal force

Thus, a child born out of wedlock differs from a child born without marriage. The definition of marriage outside the home differs from the definition of marriage without a home. Although not exactly the same, these definitions can be likened to the distinction between “Fulan works outside the office” and “Fulan works without an office”. Fulan working outside the office means there is an office but he works outside it, whereas Fulan working without an office means he works without an office.

Similarly, a child born out of wedlock means that the child was born to a man and a woman who are in a de facto marital relationship, but the marriage does not formally exist because it was not registered or performed in the presence of a Marriage Registrar.

There are several terms used to refer to unregistered marriages; some call it a marriage by private agreement, a sharia marriage, a modin marriage, and it is often also referred to as a kiyai marriage (Mukhlisin Muzarie, *The Controversy of Marriage for Pregnant Women*, p. 110). An unregistered marriage is a marriage that materially fulfils the provisions of Sharia law in accordance with the intent of Article 2(1) of the Marriage Law, but formally does not fulfil the provisions of Article 2 in conjunction with Article 10(3) of Government Regulation No. 9 of 1975.

Based on Articles 4, 5 and 6 of the KHI, such a marriage is valid under Islamic law but has no legal force. For the marriage to have legal force, an application must be made to the Religious Court for itsbat nikah (Article 7(2) of the KHI).

Since a marriage conducted in accordance with the provisions of Article 2(1) of the Marriage Law, from an Islamic fiqh perspective, is a valid marriage, the consequence is that a child born from such a marriage is also a legitimate child, having a blood relationship with his father (the husband of the wife who gave birth to him) with all the legal consequences that entail.

Based on the above, the author tends to interpret Constitutional Court Decision No. 46/PUU-VIII/2010 as intended for children born within a marriage that meets the requirements and conditions in accordance with religious law but is not registered. This is consistent with the clarification provided by Prof. Dr. Moh. Mahfud MD, S.H. (then President

of the Constitutional Court), who stated that the term “child born out of wedlock” as used by the Panel does not refer to a child resulting from adultery, but rather to a child born of a secret marriage. The civil status granted to children born out of wedlock does not conflict with lineage, inheritance, and marriage guardianship. Rights that may be claimed by children born out of wedlock which are not regulated by fiqh include the right to claim educational funds or the right to claim compensation for unlawful acts causing harm to others as regulated in Article 1365 of the Civil Code, or the right to claim for breach of contract. The gist is that “civil rights other than rights of lineage, inheritance, guardianship, or any civil rights not related to the principles of marriage in accordance with fiqh” (Jawa Pos, edition, Wednesday, 28 March 2012).

4.1.3 Children Born Out of Wedlock (Children of Adultery)

An illegitimate child is a child born as a result of a biological relationship between a man and a woman without the bond of marriage. Although born as an illegitimate child, they are still born in a state of purity and do not carry inherited sin. However, an illegitimate child does not yet have a lineage connection with the man who fathered their mother; they are only attributed to the mother who gave birth to them. The words of the Prophet SAW.

قال النبي صلى الله عليه وسلم في ولد الزنا " لأهل أمه من كانوا" (رواه أبو داود)

The Prophet said regarding the child of adultery: “To the mother’s family...” (Narrated by Abu Dawud).

In another hadith, the Prophet also stated that there is no inheritance relationship between a child born out of wedlock and the man who caused his birth, among others:

عن عمرو بن شعيب عن أبيه عن جده أن رسول الله صلى الله عليه وسلم قال: " أيما رجل عاهر بحرة أو أمة فالولد ولد زنا ، لا يرث ولا يورث " (رواه الترمذى - سنن الترمذى 1717

"Amr ibn Shu'aib reported from his father and grandfather that the Prophet, peace and blessings be upon him, said: 'Whoever commits adultery with a free woman or a slave, the child is a child of adultery, and he shall neither inherit nor be inherited from!'" (Narrated by Al-Tirmidhi).

Consequently, the absence of a valid marriage between the parents results in the absence of paternal lineage. Regardless of the position of this doctrine, contemporary legal scholarship emphasises the importance of protecting the fundamental rights of such children, particularly regarding their welfare and social protection.(Santika & Musthafa, 2025)

In order to provide protection for the fundamental rights of children born out of wedlock, the MUI, through Fatwa No. 11 of 2012, states: “The government has the authority to impose a ta’zir punishment on men who commit adultery resulting in the birth of a child, obliging them to: a. Provide for the child’s basic needs; b. Provide property upon their death through a mandatory will.”

The legal implications of establishing a child’s status relate not only to the recognition of identity but also give rise to civil consequences that can be systematically classified, namely lineage, inheritance rights, guardianship, and maintenance obligations. In Islamic law, these four aspects form an inseparable unity, as the establishment of lineage serves as the foundation for the emergence of other legal relationships. Within the context of Indonesian positive law, this classification is also reflected in the provisions of the Marriage Law and the Compilation of Islamic Law, although there are differences regarding the recognition of the relationship with the biological father. This demonstrates that differences in a child’s status directly affect civil rights such as inheritance and maintenance, meaning that uncertainty regarding a child’s status will lead to broader legal uncertainty. (Saputri & Adriaman, 2024)

In practice, issues of parentage often give rise to legal disputes, particularly regarding inheritance. A notable example is a multi-billion-rupiah inheritance dispute that was ultimately resolved by the Supreme Court (MA) through Judgment No. 54 K/Ag/2022 concerning the parentage of a child. This ruling affirms that any determination of a child’s parentage must follow legal procedures, and if it impacts the legal interests of a third party, it must be brought through contentious proceedings (*contentiosa*), not a unilateral application (*voluntair*).

The case began when SM binti P (Defendant I) filed an application with the Sragen Religious Court in 2020 to establish her son, MA bin S (Defendant II), as the legitimate child of the late SAS bin T. The application was granted, enabling the court to determine the child’s parentage. Defendant II was officially recognised as having a legal relationship as the biological son of SAS and was entitled to an inheritance.

However, this determination was contested by the late SAS’s lawful wife (the Plaintiff), who married SAS in 2001 and had children from that marriage. She filed a lawsuit because she felt that the determination had been made unilaterally and affected her and her children’s inheritance rights.

Furthermore, during the legal proceedings, it was discovered that SAS and SM had been divorced since 1998, whilst the application for the child’s paternity was only filed after SAS’s

death in 2015. Additionally, it emerged that the birth certificate used by the Second Defendant as evidence of his status was derived from a forged document, casting further doubt on the claim.

In the appeal hearing, the Semarang High Court of Religion overturned the decision of the Sragen Religious Court, stating that the previous determination of the child's legal parentage had no legal force. This decision was subsequently upheld by the Supreme Court, which dismissed the appeals from SM and MA.

“That based on these sociological facts, the decision of the Semarang High Religious Court (Judex Facti) overturning the Sragen Religious Court's ruling and adjudicating the case itself by granting the Plaintiff's claim is deemed appropriate and correct,” explained the Panel of Judges in case number 54 K/Ag/2022.

Yunanto, an academic at the Faculty of Law, Diponegoro University (Undip), explained that a child's parentage can only be proven by a birth certificate issued by the civil registry. If such a certificate is unavailable, the court may determine parentage based on the available evidence.

"A determination of a child's parentage that may affect the legal rights of third parties must be brought through contentious proceedings (*contentiosa*), not a unilateral application (*voluntair*)," Yunanto told Hukumonline on Thursday (27 March 2025).

Meanwhile, University of Indonesia (UI) Faculty of Law academic Sri Laksmi Anindita emphasized that child attestation can only be filed by the biological father as long as he is still alive. “If the father has died, he cannot apply for recognition or attestation,” Laksmi explained to Hukumonline.

Laksmi also stressed that in cases of disputes regarding a child's parentage, administrative aspects play a crucial role. If there is maladministration in the issuance of a birth certificate, then an application for annulment must be filed through the state administrative court. However, if the dispute relates to the child's status and inheritance rights, then the matter must be resolved through the civil or religious courts.

In legal disputes, a child's rights depend on their parents' marital status and valid proof of parentage. If born from a valid marriage, the child automatically has a legal relationship with the father, including inheritance rights. However, in the case of a child born out of a valid marriage, legal recognition of the parents requires strong evidence such as explicit acknowledgement or a DNA test.

Furthermore, a father has the right to contest the child's status if there are indications of a discrepancy between the time of birth and the marriage period, which may affect the child's civil rights. "A child has a civil legal relationship with the mother, but the mother's husband is deemed to be the child's father unless contested," added Laksmi.

The ruling emphasised that claims to inheritance rights cannot be based on unilateral legal determinations, particularly where the interests of other parties are involved. With this decision, the inheritance rights of the deceased SAS remain with his lawful heirs, whilst the claimant's claims were declared invalid.

The concept of *hifz al-nasl* as part of *the maqāṣid al-ṣyari'ah* has strong relevance to the principle of child protection in Indonesian positive law. In Islamic law, the protection of lineage aims to maintain the clarity of a child's identity, which has implications for the child's honour and civil rights. Meanwhile, in national law, this principle is reflected in the recognition of a child's right to know their origins and to receive legal protection without discrimination. Thus, although there are differences in normative approach, both legal systems share a common objective in safeguarding *the best interests of the child*. This demonstrates that the protection of lineage in Islamic law has substantial alignment with the protection of the child's right to ' ' within the modern legal system, although their implementation differs in terms of proof and the recognition of legal relationships.(Chaq, 2018)

4.2 Discussion

Article 55 of the UUP in conjunction with Article 103 of the KHI states:

- (1) A child's parentage may only be proven by an authentic birth certificate issued by an authorised official. Article 103(1) of the KHI and Law No. 16 of 2019 state: "A child's parentage may only be proven by a birth certificate or other evidence".
- (2) If the birth certificate referred to in paragraph (1) of this Article does not exist, the court may issue a ruling regarding the child's parentage following a thorough examination based on reliable evidence.
- (3) Pursuant to the court's decision as referred to in paragraph (2), the birth registration authority under the jurisdiction of the relevant court shall issue a birth certificate for the child in question.

If these provisions relate to the three types of child status, a legitimate child will easily obtain

a birth certificate establishing their filiation with the father and mother who gave birth to them, with all legal consequences, as the birth certificate is based on legal grounds, including the parents' marriage certificate. As for a child born out of wedlock, the birth certificate relates only to the mother, and no application regarding the child's parentage can be made because the birth occurred without a marital bond. Even if an application regarding the child's parentage were submitted for a child born out of wedlock, it would certainly be rejected by the Religious Court. As for a child born from a marriage that is valid in substance under Islamic law but not registered and therefore lacks legal force, the following options may be pursued to obtain a birth certificate for the child whose lineage is linked to the father and mother who gave birth to them:

a. Through Itsbat Nikah

To ensure that a siri marriage is valid under state law, an application for itsbat nikah must be submitted to the Religious Court. (Satrio, 2005) If the application for itsbat nikah is granted, the Religious Court's ruling may serve as the basis for the issuance of a Marriage Certificate. The itsbat nikah ruling takes effect from the date the unregistered marriage took place. Consequently, the birth certificate of a child born from an unregistered marriage can be processed immediately.

b. Through a Marriage Contract and a Petition for the Child's Paternity

In this case, the woman and man do not apply for itsbat nikah but enter into a new marriage contract. For example, a couple may enter into a civil marriage at the Office of Religious Affairs (KUA) on a date after the child's birth. For instance, in January 2020, the woman and man entered into a marriage contract in the presence of a Marriage Registrar and had it recorded at the Semarang District KUA. Consequently, it is not possible to process the child's birth certificate in accordance with the date of birth of 5 August 2018, as the legal basis of the marriage certificate states that the marriage took place in January 2020, whereas the child was born on 5 August 2018.

In order for the child to obtain a birth certificate in accordance with their date of birth, the couple must submit an application for the child's paternity based on that name. If the application is found to be valid and legally grounded, the Religious Court will issue a ruling granting the applicant's request, with the decision, in essence, stating: "It is hereby determined that the male/female child, named as appropriate, born in Semarang on 5 August 2018, is the biological child of the husband and wife."

Based on the Religious Court's ruling, the child's birth certificate may be processed in

accordance with the date of birth, and the child shall be declared to have been born to the man and woman.

c. Through a Petition/Claim Regarding the Child's Paternity without a Marriage Validation

- (1) A married couple who have entered into a valid marriage under Islamic law and have been blessed with children subsequently enter into another valid marriage under state law. Therefore, to determine the status of their child, they must submit an application regarding the child's parentage to the Religious Court. This is because what has been done is not the registration of a marriage but a new, officially recognised marriage; consequently, the recorded date of marriage is that of the most recent marriage.
- (2) In this case, a siri marriage is entered into by a man who is still lawfully married to another woman (polygamy). Therefore, the legal recognition of the child can be sought through an application to the Religious Court. If proven on legal grounds, the Religious Court will issue a ruling on the child's parentage, the essence of which is the decision: "Determining that the child is the biological child of the husband and wife who entered into the siri marriage." (Fasihuddin Arafat, 2021)

As for a polygamous marriage conducted in private (sirri polygamy), it cannot be initiated because such a marriage constitutes a violation of Articles 4 and 5 of the Marriage Law, namely the absence of a polygamy permit from the Court.

However, the marriage has met the requirements and conditions in accordance with Islamic law, and is therefore valid under Islamic law and legally valid under Article 2(1) of the UUP.

In this regard, the child must be afforded legal protection; "the child has the right to know their parents", so as to fulfil the objective of Islamic law, "*bi'fdlum nasl*", through a birth certificate and the determination of the child's parentage, as per Constitutional Court Decision No. 46/PUU-VIII/2010 dated 17 February 2012, which examined Article 43(1) of the UUP as explained above.

A petition or inquiry regarding a child's parentage granted by the Court has full legal effect both in terms of lineage and other civil rights between the child and their parents. A relationship of mahram, marriage guardian (Q.S. An-Nisa': 23–24, Articles 8–9 of the UUP and Articles 39, 40 and 41 of the KHI), and reciprocal inheritance rights (Q.S. An-Nisa': 11–12 and 176, Article 174 of the KHI) arises between the child and their parents; parents are obliged to provide maintenance, educate their children, and so on (Q.S. Al-Baqarah: 233, Luqman: 12–19, Articles 45–49 of the UUP), whilst children are also obliged to respect and be dutiful towards their parents and their peers.

Constitutional Court Decision No. 46/PUU-VIII/2010 marks a transformative turning point

in Indonesian family law as it expands the civil relationship between a child born out of wedlock and their biological father through scientific evidence. This approach signifies a shift from a formalistic approach towards a progressive approach based on the protection of children's rights.

However, from an Islamic legal perspective, this expansion raises normative issues because the concept of nasab (lineage) continues to require a valid marriage as the basis for legal relations. In its ruling, the Constitutional Court prioritised the child's interests, utilising technological advancements such as DNA testing to establish biological ties.

Although positive law recognises civil relations with the biological father, under Islamic law such relations remain limited to the mother and the mother's family, resulting in a dual regulatory framework that has the potential to create legal uncertainty. (Husni et al., 2021)

The coexistence of Islamic law and positive law in determining child parentage creates a dual legal framework that potentially undermines legal certainty. While Islamic law emphasizes marital legitimacy as the basis of lineage, positive law adopts a more progressive approach by recognizing biological relationships through scientific evidence. This divergence reflects a fundamental tension between normative-religious legitimacy and rights-based legal protection. Without clear harmonization, this dualism risks producing inconsistent judicial decisions and unequal protection for children.

5. Conclusion

From a legal perspective, children are divided into three categories (legitimate, born of an unregistered marriage, and born of adultery), where the determination of parentage by the court has legal consequences in the form of kinship and civil rights such as guardianship and inheritance. Although Constitutional Court Decision No. 46/PUU-VIII/2010 permits a civil relationship between a child born out of wedlock and his biological father, the author argues that this provision should only apply to children from a secret marriage that is valid under religious law but not registered, not to children born out of wedlock. Consequently, children born out of wedlock still do not have a kinship relationship with their biological father and are not subject to Article 43(1) of the UUP; however, their fundamental rights are protected through MUI Fatwa No. 11 of 2012, which requires the provision of financial support and a mandatory will as a form of ta'zir punishment for the biological father without recognition of kinship.

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