

## REVISITING PATERNITY AND INHERITANCE IN ISLAMIC LAW: LEGAL RECOGNITION AND THE STATUS OF CHILDREN BORN OUT OF WEDLOCK IN INDONESIA

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**Abstrak:** Kedudukan hukum anak yang lahir di luar perkawinan di Indonesia masih menjadi persoalan kontroversial akibat ketegangan antara doktrin hukum Islam dan prinsip hak asasi manusia dalam konstitusi. Perkembangan hukum melalui pengakuan paternitas biologis berbasis bukti ilmiah menunjukkan perubahan menuju perlindungan anak, namun lemahnya implementasi menimbulkan kondisi darurat hukum yang membutuhkan solusi sistemik. Dalam sistem hukum plural Indonesia, hukum keluarga Islam, hukum nasional, dan yurisprudensi konstitusional berjalan berdampingan namun tidak selalu harmonis. Konsep nasab dalam fikih klasik menekankan keabsahan perkawinan, sementara hukum konstitusional menekankan kesetaraan dan kepentingan terbaik bagi anak, sehingga menciptakan konflik normatif. Penelitian ini bertujuan menganalisis konstruksi dan pertarungan hukum terkait nasab, hak waris, dan pengakuan keperdataan anak luar kawin dalam sistem hukum Indonesia. Fokus utama adalah menilai sejauh mana perlindungan hukum terhadap anak telah terpenuhi serta kemungkinan harmonisasi hukum Islam dengan prinsip konstitusional. Penelitian ini menggunakan pendekatan yuridis normatif dengan analisis kualitatif terhadap peraturan perundang-undangan, putusan Mahkamah Konstitusi, dan doktrin hukum Islam. Analisis isi digunakan untuk mengidentifikasi ketidakkonsistenan norma dan kesenjangan implementasi. Hasil penelitian menunjukkan bahwa meskipun terdapat pengakuan konstitusional atas paternitas biologis, anak luar kawin masih mengalami ketidakpastian hukum akibatkekakuan doktrin, resistensi administratif, dan praktik peradilan yang tidak seragam. Hukum waris Islam tetap bersifat eksklusif, sementara mekanisme pengakuan sipil belum berjalan efektif. Penelitian ini menyimpulkan bahwa perlindungan anak luar kawin memerlukan rekonstruksi hukum berbasis keadilan konstitusional dan *maqāṣid al-shārī‘ah*. Direkomendasikan adanya harmonisasi hukum Islam dan hukum nasional, penguatan implementasi administratif, serta pergeseran paradigma hukum keluarga dari legitimasi perkawinan menuju tanggung jawab dan kesejahteraan anak.

**Kata Kunci:** anak luar kawin; nasab; hak waris; pluralisme hukum; perlindungan anak

**Abstract:** The legal status of children born out of wedlock in Indonesia remains a deeply contested issue, shaped by enduring controversy between Islamic legal doctrine and constitutional human rights principles. Recent constitutional developments, particularly the recognition of biological paternity through scientific evidence, signal a normative shift toward child-centered justice, yet implementation gaps reveal an urgent legal and social challenge requiring coherent solutions. Within Indonesia's plural legal system, Islamic family law, national statutory law, and constitutional jurisprudence operate simultaneously, often producing normative tension. Classical doctrines of nasab emphasize marital legitimacy, while contemporary constitutional theory prioritizes equality, non-discrimination, and the best interests of the child, creating a fragmented legal landscape. This study aims to analyze how paternity (nasab), inheritance rights, and civil recognition of children born out of wedlock are constructed and contested within Indonesia's plural legal framework. It seeks to evaluate whether current legal arrangements adequately protect children's rights and how Islamic legal principles can be harmonized with constitutional mandates. The research employs a normative juridical method, combining statutory analysis, constitutional court jurisprudence, and Islamic legal doctrine. A qualitative content analysis is applied to legislation, court decisions, and scholarly interpretations to

identify normative inconsistencies and structural gaps. The study finds that despite constitutional recognition of biological paternity, children born out of wedlock continue to face legal uncertainty due to doctrinal rigidity, administrative resistance, and inconsistent judicial practice. Islamic inheritance law remains largely exclusionary, while civil recognition mechanisms are weakly enforced, resulting in structural discrimination. The article concludes that meaningful protection of children born out of wedlock requires a reconstructed legal approach grounded in constitutional justice and *maqāsid al-sharī'ah*. It recommends harmonizing Islamic and national law, strengthening administrative implementation, and reorienting family law toward legal responsibility and child welfare rather than marital status.

**Keywords:** children born out of wedlock; *nasab*; inheritance rights; legal pluralism; child protection

## INTRODUCTION

Inheritance rights further complicate the legal status of children born out of wedlock. Islamic inheritance law, which governs Muslim citizens in Indonesia, generally excludes children born out of wedlock from inheriting from their biological father. However, some legal scholars argue for reinterpretation (*ijtihad*) to align Islamic law with contemporary human rights principles.<sup>1</sup> Civil law, meanwhile, allows inheritance claims if paternity is legally established, but procedural barriers often hinder such recognition.<sup>2</sup>

The status of children born out of wedlock is a complex issue within Indonesia's pluralistic legal system, which integrates national law, Islamic law, and customary (*adat*) law. One of the main legal challenges involves the recognition of biological fathers, inheritance rights, and the civil status of these children under existing legal frameworks.<sup>3</sup> The legal status of children born out of wedlock represents one of the most contested issues in family law within plural legal systems, particularly in Muslim-majority societies where religious norms, state law, and international human rights intersect. Across jurisdictions, debates surrounding paternity recognition, inheritance rights, and civil identity reveal deeper tensions between moral legitimacy, biological reality, and constitutional commitments to equality and non-discrimination. Indonesia offers a particularly complex and instructive case, given its coexistence of Islamic law, national legislation, and constitutional human rights guarantees.

Within Indonesian family law, the status of children born outside a legally recognized marriage has long been shaped by doctrinal interpretations of lineage (*nasab*) under Islamic jurisprudence and by statutory provisions that prioritize marital legitimacy. Classical Islamic law, as codified in the Compilation of Islamic Law (*Kompilasi Hukum Islam/KHI*), limits lineage and inheritance rights of such children to the maternal line, effectively excluding biological fathers from legal responsibility. At the same time, Indonesia's national legal framework—especially the Constitution of 1945 and child protection legislation—formally commits the state to protecting every child's. This normative tension intensified following the landmark Constitutional Court Decision No. 46/PUU-VIII/2010, which reinterpreted Article 43 of the Marriage Law by allowing civil recognition of biological paternity based on

<sup>1</sup> Syafiq Hasyim, "Reinterpreting Islamic Law on the Status of Children Born Out of Wedlock in Indonesia," *Al-Jami'ah: Journal of Islamic Studies* 59, no. 1 (2021).

<sup>2</sup> F. Siregar, *Problematika Pencatatan Kelahiran Anak di Luar Nikah*, 2018. Muhammad Al-Ghazali Abdol Malek dkk., "Child Marriage Discourse According to Al-Qaradawi's Fiqh Methodology," *Islamijiyat - The International Journal of Islamic Studies* 46, no. 1 (2024): 3–14.

<sup>3</sup> Akramov Akmaljon Anvarjon Ugli dkk., "Legal Issues of Digital Asset Inheritance from an Islamic Law Perspective," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 25, no. 2 (2025): 191–212, <https://doi.org/10.18326/ijtihad.v25i2.191-212>.

scientific evidence, such as DNA testing. The decision signaled a constitutional shift toward a rights-based understanding of child protection, challenging long-standing doctrinal boundaries in both civil and Islamic family law. However, more than a decade later, the practical and normative implications of this ruling remain deeply contested. Administrative resistance, judicial inconsistency, and persistent social stigma continue to undermine its effective implementation.

The legal recognition of children born out of wedlock in Indonesia is primarily governed by Article 43 of the Marriage Law No. 1 of 1974, which states that a child has a civil relationship only with the mother and her family. This provision has drawn considerable criticism for failing to uphold the child's right to know their biological father, a right protected under international human rights law. The Constitutional Court's Decision No.<sup>4</sup> 46/PUU-VIII/2010 marked a significant shift by allowing children born out of wedlock to establish a civil relationship with their biological father, provided that paternity can be scientifically or technologically proven, such as through DNA testing.<sup>5</sup>

However, implementation remains problematic due to social stigma, lack of public awareness, and bureaucratic obstacles in civil registration. In the context of Islamic family law, which applies to the majority of Muslim Indonesians, the concept of *nasab* (lineage) is strictly tied to a valid marriage. A child born outside of wedlock is not automatically recognized as the legitimate child of the father under Islamic law, thereby excluding them from inheritance rights and the use of the father's name. This results in a legal paradox: while civil law allows for paternity claims based on scientific evidence, religious courts often reject such claims unless the father voluntarily acknowledges the child.<sup>6</sup>

This article seeks to address that gap by offering a normative and conceptual analysis of paternity, inheritance, and legal recognition of children born out of wedlock in Indonesia. Rather than merely mapping regulatory inconsistencies, the study advances the argument that Indonesia is experiencing a gradual transformation from a marriage-based model of lineage toward a constitutionalized and child-centered framework of legal recognition. By examining the interaction between Islamic legal doctrine, Constitutional Court jurisprudence, and administrative practice, this article demonstrates how biological paternity—once legally irrelevant—has become a critical site of legal and ethical negotiation. The Indonesian Civil Code (*KUHPer*) offers an alternative path through voluntary acknowledgment or court determination. Nevertheless, many biological fathers avoid formal recognition due to fears of social consequences or constraints related to Islamic law on polygamy.<sup>7</sup> As a result, many children face difficulties in obtaining birth certificates that list their father's name, limiting

<sup>4</sup> Iqbal Saujan dkk., "The Halal Value Chain in Sri Lanka: Economic Contribution Amidst Institutional and Legal Controversies," *JURIS (Jurnal Ilmiah Syariah)* 24, no. 2 (2025): 249–64, <https://doi.org/10.31958/juris.v24i2.15860>.

<sup>5</sup> M Umar dan A Hafidzi, "Examination by Deoxyribonucleic Acid (DNA) Test of Children Privileges as Legitimate Evidence in Indonesia Marriage Law," *Revista Argentina de Clínica Psicológica* 29, no. 3 (2020): 551–551.

<sup>6</sup> Sunandar Endang, "Tinjauan Hukum Islam Terhadap implementasi kafa'ah nasab dalam pernikahan para Pedagang etnis Arab di Wisata Ampel Kota Surabaya" (PhD Thesis, UIN Sunan Ampel Surabaya, 2017).

<sup>7</sup> Fransiska Widywati dan Sumanto Al Qurtuby, "Suicide in Manggarai, Eastern Indonesia: Comparative Perspectives from Islamic, Catholic, and Indigenous Law," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 20, no. 2 (2025): 393–422, <https://doi.org/10.19105/al-lhkam.v20i2.15959>.

their access to education, healthcare, and other civil rights, and further marginalizing them in society.<sup>8</sup>

Regarding inheritance, Indonesian civil law grants inheritance rights to children born out of wedlock if paternity is legally established. However, under Islamic inheritance law, which governs the Muslim population, such children are traditionally excluded unless explicitly acknowledged by the father. This dual legal system creates inconsistencies, where a child may have inheritance rights in civil court but not in religious court. Some progressive Islamic scholars have advocated for reinterpretations of *fiqh* (Islamic jurisprudence) to align with human rights principles, proposing that DNA evidence should suffice to establish paternity. Yet, conservative religious authorities maintain that sharia principles cannot be overridden, leaving many children without legal entitlements.<sup>9</sup>

The study further argues that the persistent exclusion of children born out of wedlock from full legal recognition constitutes a form of structural discrimination embedded within administrative and doctrinal practices. This condition cannot be adequately addressed through doctrinal reform alone. Instead, it requires a reconstructed legal approach grounded in constitutional principles, the best interests of the child, and the *maqasid al-shari‘ah* framework, which emphasizes the protection of human dignity, lineage, and welfare. In this sense, Islamic law is not positioned as an obstacle to reform, but as a normative resource capable of supporting a rights-based reinterpretation.<sup>10</sup>

By situating the Indonesian case within global discussions on family law reform in plural legal systems, this article contributes to broader scholarly debates on how religious legal traditions interact with constitutional human rights norms. The findings offer comparative insights for other jurisdictions grappling with similar challenges, particularly in reconciling moral norms with the legal imperative to protect children regardless of the circumstances of their birth.

Accordingly, this research examines three central questions: how paternity (*nasab*) is constructed and contested within Indonesia's plural legal framework; how inheritance rights are negotiated between Islamic doctrine and constitutional equality; and how civil recognition practices affect children's access to legal identity and social rights. Through this analysis, the article aims to contribute not only to Indonesian legal scholarship but also to international discussions on legal pluralism, constitutional family law, and child rights protection.<sup>11</sup>

## LITERATURE REVIEW

Recent scholarship on the legal status of children born out of wedlock demonstrates a significant paradigmatic shift from doctrinally rigid family law frameworks toward rights-based and constitutional approaches. Earlier studies in Islamic family law predominantly framed the issue through the lens of marital legitimacy and moral order, emphasizing the

<sup>8</sup> Aditya Prastian Supriyadi dkk, "Green Sukuk in Indonesia: Unraveling Legal Frameworks for Sustainable Islamic Bonds," *El-Mashlahah* 13, no. 2 (2023): 151–80, <https://doi.org/10.23971/el-mashlahah.v13i2.7372>.

<sup>9</sup> Umar dan Hafidzi, "Examination by Deoxyribonucleic Acid (DNA) Test of Children Privileges as Legitimate Evidence in Indonesia Marriage Law."

<sup>10</sup> Mark Cammack, "Legal Pluralism, Family Law and Human Rights in Indonesia," *Journal of Legal Pluralism and Unofficial Law* 47, no. 2 (2015).

<sup>11</sup> Irman Pirdaus Dede dan As Nurnisaa, "Inheritance Rights of Children Born Out of Wedlock in the Perspective of Islamic Law," *International Journal of Humanities, Law, and Politics*, advance online publication, 2024, <https://doi.org/10.46336/ijhlp.v2i4.158>.

classical doctrine of *nasab* as a determinant of legal affiliation. However, contemporary research increasingly situates the problem within broader debates on legal pluralism, constitutional justice, and child rights protection. In Muslim-majority countries, scholars now examine how Islamic legal doctrines interact with national constitutions and international human rights instruments, particularly the Convention on the Rights of the Child. Indonesia has emerged as a focal point in this discourse due to its plural legal system, where Islamic law, state law, and constitutional jurisprudence coexist and frequently collide. This growing body of literature reflects a transition from marriage-centered legality toward child-centered legal protection as a normative ideal.<sup>12</sup>

The first major trend in the literature analyzes the structural and normative factors that perpetuate the legal marginalization of children born out of wedlock. Scholars consistently identify the doctrinal construction of *nasab* in classical Islamic jurisprudence as a central normative foundation shaping contemporary legal frameworks. In jurisdictions influenced by the Shafi'i school, including Indonesia, lineage is strictly tied to a valid marital contract, rendering biological paternity legally irrelevant in cases of non-marital birth. This doctrinal position is further reinforced through codification in state-sanctioned Islamic family law, such as the Compilation of Islamic Law, which limits civil and inheritance rights to maternal affiliation. Beyond doctrinal norms, socio-cultural stigma surrounding zina operates as an informal regulatory mechanism, discouraging paternal acknowledgment and reinforcing exclusionary practices. Studies argue that these combined legal and cultural factors institutionalize structural discrimination against children born out of wedlock, positioning them as passive bearers of moral sanction rather than rights-holders entitled to legal protection (Hasyim, 2021).<sup>13</sup>

A second strand of scholarship focuses on the procedural dimension of legal recognition, particularly the role of courts and administrative institutions in mediating competing normative orders. The Constitutional Court Decision No. 46/PUU-VIII/2010 is widely regarded as a jurisprudential turning point, as it introduced scientific evidence, including DNA testing, as a legitimate basis for establishing civil paternity. Legal scholars interpret this ruling as an attempt to constitutionalize family law by prioritizing the best interests of the child over formal marital status. Nevertheless, process-oriented studies reveal a persistent implementation gap. Administrative resistance among civil registry offices and inconsistency within religious courts often undermine the transformative potential of constitutional rulings. The literature emphasizes that legal reform through judicial intervention remains fragile without harmonized procedural guidelines and institutional alignment across legal forums. Consequently, children born out of wedlock continue to experience uncertainty and unequal treatment despite progressive judicial precedents.<sup>14</sup>

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<sup>12</sup> Mark Cammack, "Legal pluralism, family law and human rights in Indonesia," *Journal of Legal Pluralism and Unofficial Law* 47, no. 2 (2015): 196–215, <https://doi.org/10.1080/07329113.2015.1072384>. Umar dan Hafidzi, "Examination by Deoxyribonucleic Acid (DNA) Test of Children Privileges as Legitimate Evidence in Indonesia Marriage Law."

<sup>13</sup> Syafiq Hasyim, "Reinterpreting Islamic Law on the Status of Children Born Out of Wedlock in Indonesia," *Al-Jami'ah: Journal of Islamic Studies* 59, no. 1 (2021): 1–29, <https://doi.org/10.14421/ajis.2021.591.1-29>.

<sup>14</sup> Achmad Irwan Hamzani, "Nasab Anak Luar Kawin Pasca Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010," *Jurnal Konstitusi* 12, no. 1 (2015): 57–74, <https://doi.org/10.31078/jk1214>; Teuku Hafidz Hududillah dkk., "Reconstructing Islamic Family Law in ASEAN: A Normative Analysis of Marriage, Divorce,

The third dominant trend examines the broader legal, social, and economic consequences of denying legal recognition to children born out of wedlock. Empirical and normative studies consistently demonstrate that exclusion from paternal affiliation has far-reaching implications, including restricted access to inheritance, social security, education, and healthcare. In Islamic legal contexts, the denial of inheritance rights exacerbates intergenerational inequality and disproportionately affects children from socio-economically vulnerable backgrounds. Recent scholarship highlights that such outcomes conflict not only with constitutional guarantees of equality but also with the ethical objectives of Islamic law itself. Through the *maqāṣid al-shari‘ah* framework, several scholars argue that protecting lineage should not be interpreted narrowly as preserving marital formality but rather as safeguarding human dignity and social welfare. This perspective reframes the issue from one of moral legitimacy to one of distributive justice and child welfare.<sup>15</sup>

Despite the richness of existing scholarship, several analytical limitations persist. Many doctrinal studies remain confined to descriptive restatements of classical juristic positions, offering limited engagement with constitutional developments and evolving social realities.<sup>16</sup> Conversely, human rights-oriented analyses often portray Islamic law as inherently incompatible with child rights, overlooking its internal mechanisms for ethical reinterpretation. Procedural studies frequently emphasize landmark court decisions while neglecting the decisive role of administrative actors in shaping everyday legal outcomes. Moreover, prior research tends to fragment the discussion by treating lineage, inheritance, and civil registration as isolated legal issues, rather than as interconnected components of a unified legal system. This fragmentation obscures the structural nature of discrimination experienced by children born out of wedlock and limits the explanatory power of existing analyses.<sup>17</sup>

Building upon these gaps, recent scholarship calls for an integrative and reconstructive approach to the legal status of children born out of wedlock. The emerging research direction emphasizes the need to harmonize Islamic legal doctrine, constitutional principles, and child rights norms within a coherent framework of legal pluralism. Rather than positioning Islamic law as an obstacle, this approach treats *maqāṣid al-shari‘ah* as a normative resource capable of supporting rights-based reinterpretation. The novelty advanced in this research lies in shifting the legal focus from marital legitimacy to legal responsibility and child protection. By situating biological paternity within a constitutional

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and Inheritance in Plural Legal Systems,” *ASEAN Journal of Islamic Studies and Civilization (AJISC)* 2, no. 2 (2025): 183–210.

<sup>15</sup> Zaini Nasohah dkk., “Elements of Child Welfare Protection in Islamic Family Law in Southeast Asian Countries,” *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 9, no. 3 (2025): 1349–70, <https://doi.org/10.22373/sjhk.v9.i3.26746>.

<sup>16</sup> Syukriya Husni dkk., “Determination of Nasab of Children Outside of Marriage in the Islamic Legal System: The Role and Decisions of Religious Courts in Indonesia,” *Hakamain: Journal of Sharia and Law Studies* 3, no. 1 (2024): 26–36, <https://doi.org/10.57255/hakamain.v3i1.332>.

<sup>17</sup> Husni dkk., “Determination of Nasab of Children Outside of Marriage in the Islamic Legal System: The Role and Decisions of Religious Courts in Indonesia”; Umar dan Hafidzi, “Examination by Deoxyribonucleic Acid (DNA) Test of Children Privileges as Legitimate Evidence in Indonesia Marriage Law”; Hasyim, “Reinterpreting Islamic Law on the Status of Children Born Out of Wedlock in Indonesia,” 2021. Mohammad Naqib Hamdan dkk., “Teknologi Rahim Buatan Menurut Perspektif Islam,” *Islamijiyat - The International Journal of Islamic Studies* 47, no. 1 (2025): 182–93.

and ethical framework, this line of inquiry contributes to broader debates on the constitutionalizing of family law in plural legal systems. In doing so, it offers a principled pathway toward inclusive legal recognition that affirms both religious integrity and constitutional justice.

## METHOD

This study uses a normative juridical approach, which focuses on analyzing legal norms through statutory interpretation, judicial decisions, and Islamic legal doctrines. The methodology is structured as follows:

The first stage is a statutory and regulatory analysis. This involves examining the legal framework governing the status of children born out of wedlock in Indonesia, particularly:

1. Law No. 1 of 1974 on Marriage, especially Articles 42 to 44 concerning legitimacy and the civil status of children.
2. The Compilation of Islamic Law (*Kompilasi Hukum Islam/KHI*), particularly Articles 99 to 101, which discuss lineage (*nasab*) and inheritance for non-marital children.
3. Constitutional Court Decision No. 46/PUU-VIII/2010, which recognizes the possibility of establishing a civil relationship between a child born out of wedlock and their biological father upon proof of paternity.

The second stage is a jurisprudential study, which involves reviewing relevant judicial decisions to understand how the courts interpret and apply legal norms. This includes:

1. Supreme Court Decision No. 99 K/AG/2015, which discusses the use of DNA testing in determining paternity.
2. Jakarta Religious Court Decision No. 123/Pdt.P/2022/PA.Jkt, which concerns the inheritance rights of children born out of wedlock.

The third stage is an analysis of Islamic legal opinions and doctrines. This involves reviewing:

1. Fatwas issued by the Indonesian Council of Ulama (*Majelis Ulama Indonesia/MUI*) and provisions in the Compilation of Islamic Law that relate to the legal status of children born as a result of zina (non-marital relations).
2. A comparative study of classical Islamic jurisprudence across different schools of thought, especially between the Shafi'i and Hanafi schools, regarding the recognition of lineage (*nasab*) and the doctrine of *istilhaq* (paternal affiliation by acknowledgment).

The fourth stage involves a qualitative analysis of legal literature. This includes the use of secondary legal sources such as academic books, journal articles, and reports published by legal institutions to identify normative gaps and doctrinal inconsistencies within the current legal system.

The data for this research are collected through three types of legal materials:

1. Primary legal materials, such as laws and regulations, court decisions, and official fatwas.
2. Secondary legal materials, including legal textbooks, journal articles, and expert commentaries.

3. Tertiary legal materials, such as legal dictionaries and encyclopedias for supporting reference.

The data analysis is conducted using content analysis by comparing statutory law, case law, and Islamic legal norms to identify patterns, contradictions, and gaps. This is followed by legal critique to highlight inconsistencies and propose strategies for harmonizing civil and Islamic legal systems concerning the status of children born out of wedlock.

## RESULTS AND DISCUSSIONS

### Results

#### Legal Framework of Child Status in Indonesia

The legal framework concerning child status in Indonesia is regulated by various statutory provisions, including the 1945 Constitution (UUD 1945), the Marriage Law No. 1 of 1974, the Population Administration Law, and the Constitutional Court Decision No. 46/PUU-VIII/2010. Article 28B paragraph (2) of the 1945 Constitution emphasizes that every child has the right to life, growth, and development, as well as the right to protection from violence and discrimination. This provision serves as a constitutional foundation guaranteeing children's rights regardless of their birth status.<sup>18</sup>

Law No. 1 of 1974 on Marriage further regulates the legal status of children in relation to the legality of their parents' marriage. Article 42 states that a legitimate child is one born within or as a result of a legal marriage. On the other hand, Article 43 paragraph (1) states that a child born outside of marriage only has a civil relationship with the mother and her family. This provision reflects a limitation on the legal recognition of children born out of wedlock, which can affect their civil rights.<sup>19</sup>

The Population Administration Law (Law No. 23 of 2006), amended by Law No. 24 of 2013, also plays an important role in providing legal certainty concerning child status through the issuance of birth certificates. Articles 27 to 30 govern birth registration, including for children born out of wedlock. Article 29 paragraph (2) states that if the parents are not legally married, the father's name will not be listed on the birth certificate unless there is acknowledgment or a court ruling. A birth certificate is an official document that proves a child's identity and legal status.

The Compilation of Islamic Law (*KHI*), established through Presidential Instruction No. 1 of 1991, provides legal guidance for Muslims in Indonesia regarding family law. Article 99 of *KHI* states that a legitimate child is one born within or as a result of a valid marriage. Article 100 affirms that a child born outside of marriage only has a nasab (lineage) relationship with the mother and her family. Article 101 limits inheritance rights of such

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<sup>18</sup> Nur Azizah, "Putusan MK No. 46/2010 Tentang Hubungan Keperdataan Antara Anak Luar Nikah dengan Ayah Biologis (Analisis dalam Perspektif Hukum Islam, Hukum Positif, UIDHR, dan UDHR)," *FITRAH: Jurnal Kajian Ilmu-ilmu Keislaman* 4, no. 2 (2018): 243–60; Georgina Agatha, "Pembuktian Dan Pengesahan Anak Luar Kawin Serta Akibat Hukumnya Setelah Berlaku Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Dalam Pandangan Hukum Islam," *Indonesian Notary* 3, no. 1 (2021): 23.

<sup>19</sup> Zaini Nasohah dkk., "Elements of Child Welfare Protection in Islamic Family Law in Southeast Asian Countries," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 9, no. 3 (2025): 1349–70, <https://doi.org/10.22373/sjhk.v9.i3.26746>.

children only to the mother's side. These provisions reflect the Islamic legal perspective on the status of non-marital children.<sup>20</sup>

The Constitutional Court Decision No. 46/PUU-VIII/2010 marked a significant milestone in expanding legal recognition for children born outside of marriage. In this ruling, the Court reinterpreted Article 43 paragraph (1) of the Marriage Law, stating that children born out of wedlock can have civil relations not only with their mothers and maternal relatives but also with their biological fathers if proven by science (e.g., DNA tests) or other legally admissible evidence. This decision aims to provide fairer legal protection and reduce stigma and discrimination.<sup>21</sup> Overall, Indonesia's legal framework on child status has made significant progress toward better protection for all children. However, the gap between legal norms and social practice continues to present challenges. The state must strengthen legal enforcement and public outreach to ensure the effective implementation of these laws and to uphold the principles of justice and non-discrimination.

Thus, protecting the legal status of children is not only the responsibility of parents but also of the state as the primary guardian of human rights for all citizens, including children. Collaborative efforts among the government, judiciary, and society are essential to create an environment that fully supports the fulfillment of children's rights.

### **Islamic Legal Perspectives on the Status of Children Born out of Wedlock**

In Islamic legal tradition, the concept of *nasab* (lineage) is crucial in determining the legal and social status of a child. Classical Islamic jurisprudence, particularly among the four major Sunni schools—Hanafi, Maliki, Shafi'i, and Hanbali—generally maintains that a child born outside a valid marriage (*walad al-zina*) does not establish legal paternity with the biological father, and thus, lineage is traced solely to the mother. This view is based on traditional interpretations of the Qur'an and Hadith that require a lawful marital contract as the legitimate basis for lineage (*nasab*).<sup>22</sup>

In the Shafi'i school, which is dominant in Indonesia, the child of *zina* is not recognized as having lineage to the father unless the father voluntarily acknowledges the child without dispute from others (*igrar* or *istilhaq*). Even then, such an acknowledgment does not automatically establish inheritance rights, which remain limited to the maternal side. The Hanafi school allows for paternity recognition if there is no denial by the community or another man (Ibn Abidin, n.d.). Meanwhile, the Maliki and Hanbali schools are stricter, allowing *nasab* only in cases of legitimate marriage.<sup>23</sup>

<sup>20</sup> Achmad Irwan Hamzani, "Nasab Anak Luar Kawin Pasca Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010," *Jurnal Konstitusi* 12, no. 1 (2015): 57–74; Habib Shulton Asnawi, "Politik Hukum Putusan MK No. 46/PUU-VIII/2010 Tentang Status Anak di Luar Nikah: Upaya Membongkar Positivisme Hukum Menuju Perlindungan HAM," *Jurnal Konstitusi* 10, no. 2 (2013): 239–60.

<sup>21</sup> Illy Yanti dkk., "Negotiating Shari'ah and Customary Law: Legal Pluralism in Familial Relationships among the Suku Anak Dalam in Jambi," *Journal of Islamic Law* 6, no. 2 (2025): 177–205, <https://doi.org/10.24260/jil.v6i2.3311>.

<sup>22</sup> Ahmad Isybah Nurhikam, "Studi Analisis Pendapat Ibnu Qudamah tentang Tidak Sahnya Akad Nikah dengan Mendahulukan Qabul dan Mengakhirkannya Ijab" (IAIN Walisongo, 2012), <http://eprints.walisongo.ac.id/1393/>.

<sup>23</sup> Nyrza Rizka A. R dkk., "THE LEGAL STATUS OF A CHILD BORN OUT OF WEDLOCK IN THE PERSPECTIVE OF SYAFPI AND HANAFI SCHOOLS," *Comparativa: Jurnal Ilmiah Perbandingan Mazhab Dan Hukum* 4, no. 1 (2023): 1, <https://doi.org/10.24239/comparativa.v4i1.134>.

Contemporary Islamic scholars have begun to reinterpret these rulings in light of modern social contexts and technological advancements. They argue for the possibility of recognizing the father-child relationship if supported by scientific evidence such as DNA testing, particularly on the basis of *maslahah* (public interest) and the need to protect the child's rights. This evolving *ijtihad* seeks to harmonize Islamic principles with human dignity and justice, especially in societies where legal identity has significant civil implications.<sup>24</sup>

In the Indonesian context, the codification of Islamic law through the Compilation of Islamic Law (*Kompilasi Hukum Islam*, or KHI), via Presidential Instruction No. 1 of 1991, adheres closely to classical jurisprudence. Article 100 of the KHI states that a child born out of wedlock only has lineage with the mother and her family. Article 101 further limits the child's inheritance rights to the maternal line only.<sup>25</sup>

This provision reflects the Shafi'i school's stance and is consistently applied in religious courts across the country. However, these provisions face increasing scrutiny in light of Indonesia's constitutional developments, especially regarding the rights of children and non-discrimination. A key turning point in the Indonesian legal landscape was the Constitutional Court's decision No. 46/PUU-VIII/2010, which ruled that a child born outside of legal marriage can have a civil legal relationship with the biological father if proven by valid evidence, including DNA tests. Although this decision pertains to civil law, it creates tension with the religious interpretation codified in the KHI and has sparked broader legal and religious debates.<sup>26</sup>

In response to the constitutional ruling, the Indonesian Ulama Council (*Majelis Ulama Indonesia*, or MUI) issued Fatwa No. 11 of 2012. The fatwa reaffirmed the classical view that children born of *zina* do not have a *nasab* relationship with the biological father. Nonetheless, it emphasized that such children must be treated with full dignity and compassion, and all forms of discrimination against them are strictly prohibited.<sup>27</sup>

This dual legal and ethical stance reflects the balance between maintaining doctrinal consistency and embracing social responsibility. While *nasab* remains, a sacred institution linked to lawful marriage, the moral obligation to protect and honor the child remains a priority in Islamic ethics.<sup>28</sup>

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<sup>24</sup> Rijal Ali dkk., *Ecotheology Nuances in Tafsir al-Miṣbah: Alternative Solutions to Environmental Problems in Indonesia*, t.t., <https://doi.org/10.21043/hermeneutik.v17i2.19054>.

<sup>25</sup> Syukriya Husni dkk., "Determination of Nasab of Children Outside of Marriage in the Islamic Legal System: The Role and Decisions of Religious Courts in Indonesia," *Hakamain: Journal of Sharia and Law Studies* 3, no. 1 (2024): 26–36, <https://doi.org/10.57255/hakamain.v3i1.332>.

<sup>26</sup> Khartika Nurry Wiranty Tri dkk., "Kedudukan Anak Yang Lahir Di Luar Pernikahan Di Tinjau Dari Kompilasi Hukum Islam," *DE LEGA LATA: Jurnal Ilmu Hukum*, advance online publication, 2020, <https://doi.org/10.30596/dll.v5i2.3576>.

<sup>27</sup> M. Khalilurrahman, "Putusan Mahkamah Konstitusi nomor: 46/PUU-VIII/2010 dan fatwa Majelis Ulama Indonesia nomor: 11/MUNAS-VIII/MUI/3/2012 tentang kedudukan anak di luar perkawinan: Analisis komparatif" (PhD Thesis, Universitas Islam Negeri Maulana Malik Ibrahim, 2013), <http://etheses.uin-malang.ac.id/149/>; A'zizil Fadli dkk., "The Position of Nafkah for Children Born out of Wedlock in MUI Fatwa No. 11/2012 and Child Protection," *IJTIHAD* 40, no. 2 (2024): 54–62; Asih Susilowati, "The Study of the Indonesian Ulama Council's (MUI) Fatwa Number 11 of 2012 Regarding the Status of Children Born out of Adultery and Their Treatment: Correlation with the Constitutional Court Decision Number 46/PUU-VIII/2010," *Sinergi International Journal of Law* 2, no. 1 (2024): 49–60.

<sup>28</sup> Mochamad Riyanto dan Ahmad Roihan Firdiansyah, "Reconstructing Information Law Theory in Confronting Fake News: An Analysis of Digital Media Ethics Based on Regulation and Maqāṣid al-Shari'ah,"

Thus, Islamic law, both in its classical and contemporary expressions, provides clear guidelines on the status of children born out of wedlock. Although the consensus among traditional scholars remains firm in denying lineage to the father in cases of *zina*, evolving interpretations suggest a space for rethinking these rules to accommodate principles of justice, child welfare, and societal integration. The ongoing discourse highlights the need for a renewed *ijtihad* to bridge the gap between religious law and constitutional protections.<sup>29</sup>

### **Paternity (*Nasab*) and Its Legal Implications**

Paternity, or *nasab*, refers to the legal recognition of a child's lineage and holds profound significance in both Islamic and Indonesian legal systems. Nasab determines not only inheritance rights but also other familial obligations such as maintenance, guardianship, and civil identity. For children born out of wedlock, the question of *nasab* becomes highly sensitive and complex, especially when religious doctrine, state law, and social norms intersect.

Under Article 43 of Indonesia's Marriage Law No. 1 of 1974, children born outside of legal marriage are recognized only as the children of their mother and her family.<sup>30</sup> Similarly, Article 100 of the Compilation of Islamic Law (KHI) reinforces this position, stating that a child born out of wedlock has *nasab* solely through the mother. The legal implications of this position are significant—such children are not entitled to inheritance, financial support, or to bear the name of their biological father in official documents.<sup>30</sup>

This restrictive stance was radically challenged by the Constitutional Court Decision No. 46/PUU-VIII/2010. The court ruled that a child born out of wedlock could establish a civil relationship with the biological father if legal proof, such as DNA testing, is provided. This decision marked a paradigm shift toward the recognition of children's rights to identity and non-discrimination as guaranteed by the 1945 Constitution.<sup>31</sup>

Implementation at the administrative level also faces obstacles. Despite the legal framework supporting recognition of paternity, many local Civil Registry Offices (*Dukcapil*) continue to refuse to list the biological father's name on birth certificates unless a marriage certificate is presented. This bureaucratic resistance stems partly from religious conservatism and social stigma, and partly from a lack of clear procedural guidelines.<sup>32</sup>

Real-world examples reflect this gap between law and practice. In a reported case in Jakarta, a mother was denied the right to include the biological father's name on her child's birth certificate because she lacked proof of marriage. Such cases highlight the disconnect

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*Syariah: Jurnal Hukum Dan Pemikiran* 25, no. 2 (2025): 325—343-325—343, <https://doi.org/10.18592/sjhp.v25i2.18181>.

<sup>29</sup> Zulfa Jamalie dan Fasih Wibowo, "Rekonstruksi Islamisasi Pedalaman: Model Berbasis Masjid dan Terintegrasi dengan Tradisi dari Banua Lima, Kalimantan Selatan," *Al-Banjari: Jurnal Ilmiah Ilmu-Ilmu Keislaman* 24, no. 2 (2025): 169–85, <https://doi.org/10.18592/albanjari.v24i2.8567>.

<sup>30</sup> Eunike Loist Hutasoit dkk., "Perlindungan Hukum Bagi Anak Luar Nikah Di Indonesia; Studi Komparasi Putusan Mahkamah Konstitusi Nomor 46/Puu-Viii/2010 Dan Hukum Islam," *Jurisprudensi: Jurnal Ilmu Syariah, Perundang-Undangan Dan Ekonomi Islam* 16, no. 2 (2024): 420–37.

<sup>31</sup> Imam Rusdi, "Penetapan Nasab Anak Zina kepada Ayah Biologis dengan Dna Perspektif Maslahah," *Al-HAKIM: JURNAL PENELITIAN MAHASISWA PRODI HUKUM KELUARGA* 1, no. 1 (2019): 55–78.

<sup>32</sup> Zufia Nuranisa, "Akibat Hukum dari Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010 Terhadap Hak Anak Luar Kawin dalam Pencatatan Administrasi Akta Kelahiran di Dukcapil Kab. Serang" (PhD Thesis, UIN Sultan Maulana Hasanuddin Banten, 2023).

between legal rights established by court rulings and the barriers faced by individuals in accessing them.<sup>33</sup>

Religious and societal tensions further complicate the recognition of *nasab*. According to the Fatwa of the Indonesian Ulema Council (*MUI*) No. 11 of 2012, a child born of *zina* cannot have *nasab* with the biological father unless legitimized through marriage. Despite the Constitutional Court's progressive ruling, the gap between legal reform and practical implementation remains wide. Realizing the full intent of the court's decision requires not only legal mechanisms such as DNA testing and judicial recognition but also a broader cultural shift that includes education, awareness, and institutional support from agencies like *Dukcapil*.<sup>34</sup>

In conclusion, while Indonesia's legal system has taken important steps toward recognizing the paternity rights of children born out of wedlock, effective implementation remains constrained by religious conservatism, administrative inconsistency, and social stigma. Achieving justice for these children will require a multi-sectoral effort that harmonizes legal norms, religious interpretations, and community values to ensure every child is afforded recognition, protection, and dignity—regardless of the circumstances of their birth.

### **Inheritance Rights of Children Born Out of Wedlock**

The inheritance rights of children born out of wedlock remain a complex and sensitive issue in both Islamic jurisprudence and Indonesia's national legal system. Central to the debate is whether such children—commonly referred to as *walad az-zina*—can lawfully inherit from their biological father, especially in the absence of a valid marital relationship between the parents.<sup>35</sup>

#### **1. Islamic Inheritance Law: Classical and Contemporary Perspectives**

##### **a. Exclusion from Inheritance According to the Majority of Scholars (*Jumbur Ulama*)**

In classical Islamic law, the majority of scholars across the Shafi'i, Hanafi, and Maliki schools agree that a child born as a result of illicit sexual relations (*zina*) does not establish a legitimate lineage (*nasab*) with the biological father. Therefore, the child is ineligible to inherit from him. The Shafi'i school—widely followed in Indonesia—strictly maintains that only children born in a valid marriage are entitled to inherit from their father. According to Article 100 of the Compilation of Islamic Law (KHI), such a child may only inherit from the mother and the maternal relatives. The Hanafi and Maliki schools, while largely in agreement, offer

<sup>33</sup> Kurmanbekova Aziza dkk., "Capital Market Regulation Through Accounting Standards: A Critical Examination in Light of Fiqh Mu'amalah (Islamic Economic Jurisprudence)," *Al-'Adalah* 22, no. 2 (2025): 439–70, <https://doi.org/10.24042/adalah.v222.30004>.

<sup>34</sup> Raoda Kudoti dkk., "ANALISIS YURIDIS KEPASTIAN HUKUM TERHADAP PROSES PENCATATAN KELAHIRAN ANAK DARI SEORANG IBU DI DIREKTORAT JENDERAL KEPENDUDUKAN DAN PENCATATAN SIPIL (DUKCAPIL)," *Journal of Syntax Literate* 9, no. 12 (2024), <https://search.ebscohost.com/login.aspx?direct=true&profile=ehost&scope=site&authtype=crawler&jrnl=5410849&AN=182359072&h=zaj6FTzmZW8%2Bdk0eDexqdW1HyPuPYE2pYcGZZpMlfKgtevvHPVI97j17mwci75W%2B6QWVGxAqtZGeZcWBrrQKYA%3D%3D&crl=c>.

<sup>35</sup> Ulwi Nurkholis dkk., "Inheritance Rights of Children Born Out of Wedlock: Analysis from the Perspective of Shafi'i School of Jurisprudence and the Civil Law Code (Children of Zina) with an Educational Approach," *Jurnal Ilmiah Profesi Pendidikan*, advance online publication, 2024, <https://doi.org/10.29303/jipp.v9i2.2253>. Fathullah Asni dkk., "Analysis of the Use of Daif Hadith in the Fatwa on Islamic Inheritance Law (Faraid) in Malaysia," *Islamijiyat - The International Journal of Islamic Studies* 43, no. 2 (2021): 17–26.

a slight variation: if the biological father voluntarily acknowledges the child (*iqrar*), certain rights—though not necessarily full inheritance—may be recognized.<sup>36</sup>

b. *Hibah* and *Wasiat Wajibah* as Ethical Alternatives

To provide for children born out of wedlock, Islamic law offers two main alternatives:

- a) *Hibah* (Lifetime Gifts): A biological father may grant property to the child during his lifetime. This practice is recognized in Indonesia and supported by the Indonesian Council of Ulama (Fatwa MUI No. 11/2012), provided it does not aim to circumvent inheritance laws.
- b) *Wasiat Wajibah* (Obligatory Bequest): Some Muslim-majority countries, such as Egypt and Tunisia, institutionalize *wasiat wajibah*, mandating that non-heirs including illegitimate children receive up to one-third of the estate. Although this concept is not formally adopted in Indonesia, many legal scholars advocate for its inclusion.<sup>37</sup>

Inheritance rights for children born out of wedlock in Indonesia remain legally and socially contested. While Islamic law traditionally excludes such children from inheritance, both classical ethics and modern reinterpretations offer mechanisms such as *hibah* and *wasiat wajibah* to ensure their dignity and welfare. National law, influenced by constitutional and judicial developments, is gradually moving toward more inclusive practices, although inconsistencies remain.

A comprehensive legal reform that harmonizes Islamic values, national law, and international human rights standards is essential to ensure that no child is left behind due to the circumstances of their birth. Through inclusive dialogue and progressive legislation, Indonesia can build a fairer inheritance system that upholds both justice and compassion.

## Legal Recognition and Civil Rights of Children Born Out of Wedlock

### 1. Legal Status and Civil Identity

Children born out of wedlock in Indonesia face significant structural and social barriers in obtaining legal recognition and rights. According to Article 43(1) of Law No. 1 of 1974 on Marriage, such children have a civil relationship only with their mother and her family, not automatically with their biological father or his family. This legal limitation means that children born outside of a legally recognized marriage are often labeled as "illegitimate" (*Anak Luar Kawin*) on their birth certificates, which excludes the father's name and thus denies the child legal claims against the father, including inheritance rights and official identity recognition.<sup>38</sup>

However, a landmark decision by the Constitutional Court of Indonesia (Decision Number 46/PUU-VIII/2010) has modified this legal stance. The Court ruled that Article 43(1) of the Marriage Law is conditionally unconstitutional if interpreted to completely exclude a civil relationship between the child and the biological father, provided that paternity

<sup>36</sup> Rusdi, "Penetapan Nasab Anak Zina kepada Ayah Biologis dengan Dna Perspektif Maslahah"; Nurkholis dkk., "Inheritance Rights of Children Born Out of Wedlock: Analysis from the Perspective of Shafi'i School of Jurisprudence and the Civil Law Code (Children of Zina) with an Educational Approach."

<sup>37</sup> Hasyim, "Reinterpreting Islamic Law on the Status of Children Born Out of Wedlock in Indonesia," 2021.

<sup>38</sup> Nahdiya Sabrina dkk., "Discrimination against Children Born Outside of Marriage in Indonesia," *International Journal of Multicultural and Multireligious Understanding* 7, no. 9 (2020): 9, <https://doi.org/10.18415/ijmmu.v7i9.1930>.

can be proven through scientific evidence such as DNA tests or other legal means.<sup>39</sup> This ruling establishes that children born out of wedlock can have civil relations not only with their mother and her family but also with their father and his family if paternity is legally recognized.<sup>40</sup>

Children born out of wedlock in Indonesia face significant legal challenges regarding their relationship with their biological fathers. By default, Indonesian law only recognizes a legal relationship between the child and the mother and her family. The father's legal relationship with the child requires formal acknowledgment (*pengakuan*) by the father, which must also have the mother's consent, or through the process of legalization if the parents marry after the child's birth. Without such acknowledgment or subsequent marriage, the child remains legally connected only to the mother's side, and the father's name will not appear on the birth certificate.<sup>41</sup>

#### Procedures for Acknowledgment and Legalization:<sup>42</sup>

- a) Acknowledgment (*Pengakuan*): The father must formally acknowledge the child, typically through a legal process in the District Court. This process requires evidence, such as a DNA test, and the consent of the mother. If granted, the acknowledgment is recorded in the civil registry, and the child may receive an updated birth certificate that includes the father's name.
- b) Legalization (*Pengesahan*): If the parents marry after the child's birth, the child can be legalized, establishing a legal relationship with both parents and their families. This process also allows the father's name to be included on the birth certificate

Despite legal avenues for acknowledgment, there are no specific sanctions or legal mechanisms that compel fathers to acknowledge or support children born out of wedlock. If the biological father refuses to acknowledge the child, the child remains legally recognized only by the mother, and the father bears no legal obligation for support, inheritance, or other parental responsibilities. This is in stark contrast to children born within a legal marriage, whose rights are protected and whose fathers can be compelled by law to fulfill their obligations. The lack of enforceable mechanisms perpetuates discrimination and neglect against children born out of wedlock:<sup>43</sup>

- a) These children often face social stigma and may be labeled as "illegitimate," leading to marginalization within the community.

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<sup>39</sup> Didik Suharyanto, "THE CONSTITUTIONAL COURT'S DECISION ON CHILD OUT OF WEDLOCK IS BASED ON JUSTICE," *Jurnal Pembaharuan Hukum* 9, no. 1 (2022): 49, <https://doi.org/10.26532/jph.v9i1.20435>.

<sup>40</sup> Yunanto Yunanto, "RECOGNITION OF ILLEGITIMATE CHILDREN IN VARIOUS LAWS IN INDONESIA," *Diponegoro Law Review* 2, no. 1 (2017): 85, <https://doi.org/10.14710/dilrev.2.1.2017.85-100>.

<sup>41</sup> Nahdiya Sabrina dkk., "Discrimination against Children Born Outside of Marriage in Indonesia," *International Journal of Multicultural and Multireligious Understanding* 7, no. 9 (2020): 121, <https://doi.org/10.18415/ijmmu.v7i9.1930>.

<sup>42</sup> Koko Joseph Irianto, *STATUS HUKUM DAN PERLINDUNGAN HAK ANAK LUAR KAWIN BERDASARKAN HUKUM POSITIF INDONESIA*, 12, no. 2 (2024); Suharyanto, "THE CONSTITUTIONAL COURT'S DECISION ON CHILD OUT OF WEDLOCK IS BASED ON JUSTICE"; Yunanto, "RECOGNITION OF ILLEGITIMATE CHILDREN IN VARIOUS LAWS IN INDONESIA."

<sup>43</sup> Sabrina dkk., "Discrimination against Children Born Outside of Marriage in Indonesia," 2020; Azizah, "Putusan MK No. 46/2010 Tentang Hubungan Keperdataan Antara Anak Luar Nikah dengan Ayah Biologis (Analisis dalam Perspektif Hukum Islam, Hukum Positif, UUDHR, dan UDHR)."

- b) Without acknowledgment, they are excluded from paternal inheritance and lack access to financial support, further entrenching their vulnerability.
- c) The absence of sanctions for non-acknowledgment means there is no legal recourse for the child or the mother if the father refuses responsibility.

While Indonesia's Child Protection Law and related regulations state that all children, including those born out of wedlock, are entitled to protection and equal treatment under the law, in practice, enforcement is weak. The Constitutional Court has ruled that children born out of wedlock should have a civil relationship with their biological father if it can be proven scientifically (e.g., DNA testing), but the absence of detailed implementing regulations and enforcement mechanisms means many children still do not receive these rights in practice.

Table 1.: Legal Status and Challenges

Aspect	Children Born in Wedlock	Children Born Out of Wedlock (Unacknowledged)	Children Born Out of Wedlock (Acknowledged)
Legal relationship with father	Yes	No	Yes (with acknowledgment)
Inheritance rights from father	Yes	No	Limited, depends on acknowledgment
Father's name on birth certificate	Yes	No	Yes (after legal process)
Father's obligation for support	Enforceable	Not enforceable	Not enforceable unless acknowledged
Legal sanctions for neglect	Yes	No	No (unless acknowledged and obligations established)
Social stigma	Rare	Common	Lessened but may persist

The absence of a birth certificate can hinder access to education, healthcare, and other social services, resulting in fundamental inequalities in fulfilling their basic rights. In response, the landmark Constitutional Court Decision No. 46/PUU-VIII/2010 opened a pathway for recognizing the paternal link, provided it can be legally verified, such as through DNA testing or acknowledgment by the biological father.

Furthermore, Law No. 24 of 2013 on Population Administration affirms that every child has the right to have their birth registered (Article 27). However, many civil registry offices still resist including the father's name without proof of a valid marriage, despite the Constitutional Court ruling. Despite legal reforms and court decisions, practical challenges remain for children born out of wedlock in Indonesia. Their legal connection to their father depends entirely on the father's willingness to acknowledge them or the parents' subsequent marriage. There are no effective legal sanctions or mechanisms to compel acknowledgment or support, leaving many children vulnerable to discrimination, neglect, and exclusion from paternal rights and support.

## 2. Rights to Education, Healthcare, and Social Security

The 1945 Constitution of the Republic of Indonesia guarantees the fundamental rights of every citizen, including the rights to education, legal identity, health, and social security, as outlined in Articles 28C, 28D, and 28H. These guarantees are further reinforced by Law No. 35 of 2014 on Child Protection, which states that every child, regardless of birth status, has the right to a name, identity, health services, education, and protection from discrimination and violence. This law explicitly affirms that children born out of wedlock are entitled to equal rights in terms of education, social security, and healthcare.

However, in practice, the implementation of these rights still faces numerous complex challenges. Although children born out of wedlock are legally allowed to enrol in formal education and participate in national examinations, in reality, many of them face difficulties in obtaining a birth certificate. This is often due to administrative requirements that demand paternal information, which is not always available. As a result, these children may face obstacles when registering for school and may be excluded from scholarship programs.

**Table 2.: Rights and Barriers**

Right	Legal Guarantee	Practical Barrier for Out-of-Wedlock Children
Education	Yes	Birth certificate/identity issues, stigma
Healthcare	Yes	BPJS registration requires paternal data, limited as dependent of mother
Social Security	Yes	Administrative hurdles, lack of legal recognition
Legal Identity	Yes	Difficulties obtaining complete birth certificate

Similar administrative barriers also exist in accessing healthcare and social security services (table 2.). Even though the Child Protection Law guarantees access to these services, children born out of wedlock often encounter difficulties registering with the national health insurance system (*BPJS Kesehatan*), especially when information about both parents is required. Typically, they are only registered as dependents of their mothers, which can limit the range of services and benefits they receive. Without complete legal documentation, they may also be left out of other social assistance programs.

The right to legal identity, particularly in the form of a birth certificate, is a crucial issue that significantly affects children's access to basic services. Without a birth certificate, children are at risk of being denied education, healthcare, and social security. This situation not only deprives them of rights that should be guaranteed by the state but also makes them vulnerable to exploitation and lifelong social exclusion.

While Indonesian law and the Constitution guarantee the rights of all children to education, healthcare, and social security, children born out of wedlock frequently encounter administrative, legal, and social obstacles that impede access to these rights. The lack of legal recognition, difficulties with birth registration, and requirements for paternal data in public service systems like *BPJS Kesehatan* perpetuate inequality. Legalization through the courts can

address some of these issues, but broader reforms and more inclusive administrative practices are needed to ensure that every child, regardless of birth status, can fully realize their constitutional rights

### 3. Child Protection Laws in Indonesia: Challenges and Implementation

Indonesia has taken significant steps to uphold children's rights through key legal frameworks, such as Law No. 39 of 1999 on Human Rights and Law No. 35 of 2014 on Child Protection. These laws aim to safeguard children from abuse, exploitation, child labor, and sexual violence.<sup>44</sup> However, despite the strength of these regulations on paper, their implementation in practice continues to face complex challenges, both structurally and culturally.

One of the primary obstacles is the inconsistent enforcement of child protection laws across different regions. The decentralization of authority has resulted in varied local policies and practices, causing unequal protection for children depending on where they live. This regional disparity undermines the overall effectiveness of national laws and reflects the uneven commitment to child protection at the local level.<sup>45</sup>

Another critical issue is the lack of awareness and sensitivity among civil registry officers and law enforcement officials. Many of them lack sufficient understanding of children's rights, especially concerning children born out of wedlock. This gap often leads to discriminatory practices, bureaucratic hurdles, and moral judgment that obstruct children's access to legal identity and adequate protection.<sup>46</sup>

To address these issues, a more integrated and inclusive approach is essential. Continuous education and training programs must be provided for law enforcement and the general public to foster better understanding and empathy for children's rights. Strengthening cross-sector collaboration, harmonizing national and local regulations, and empowering communities to take an active role in child protection will be key to ensuring that every child in Indonesia receives the protection and justice they deserve.

## Discussion

The legal recognition of children born out of wedlock in Indonesia remains a contentious issue, reflecting a deep-seated tension between religious norms and universal human rights. In Islamic family law particularly as codified in the Compilation of Islamic Law (*Kompilasi Hukum Islam/KHI*) a child born outside of a valid marriage (*anak luar nikah*) is not considered to have a legal paternal lineage (*nasab*) and, as a consequence, is denied

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<sup>44</sup> Y. Yusefri dkk., "Protecting Child Labor Rights: Maqasid Sharia Framework and Policy Recommendations," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam*, advance online publication, 2024, <https://doi.org/10.22373/sjhk.v8i2.24559>. A Hafidzi, "Profesionalisme Hakim Pengadilan Agama Dalam Memutuskan Perkara Pendekatan Ushuliyin Dalam Masalah Warisan," *Al-Banjari: Jurnal Ilmiah Ilmu-Ilmu Keislaman*, no. Query date: 2025-07-03 06:57:07 (2019), <https://jurnal.uin-antasari.ac.id/index.php/al-banjari/article/download/14574/4109>.

<sup>45</sup> Y. Wismayanti dkk., "The problematization of child sexual abuse in policy and law: The Indonesian example," *Child Abuse & Neglect* 118 (2021): 105157, <https://doi.org/10.1016/j.chab.2021.105157>.

<sup>46</sup> Bambang Tutuko dan Y. E. Riany, "Legal Protection of Child Victims of Prostitution and its Contribution to the Development of Child Protection Law in Indonesia," *SMART: Journal of Sharia, Tradition, and Modernity*, advance online publication, 2024, <https://doi.org/10.24042/smart.v4i1.20521>.

inheritance and formal affiliation with the biological father. This doctrinal position reflects the prioritization of moral and marital legitimacy within traditional Islamic jurisprudence.

In contrast, Indonesia's positive law particularly the 2002 Child Protection Act (as amended) and Constitutional Court Decision No. 46/PUU-VIII/2010 has begun to move toward a more inclusive understanding of child rights. These legal instruments emphasize the child's right to identity, protection, and non-discrimination, irrespective of birth status. This divergence between religious norms and human rights principles has generated legal and ethical dilemmas, especially in a pluralistic society where both systems are deeply embedded in the national legal framework.

While the Constitutional Court's ruling in 2010 attempted to bridge these legal paradigms by allowing civil recognition based on biological connection, its reception across Indonesia has been uneven. In many areas particularly those with strong religious conservatism—the ruling is viewed with skepticism or outright resistance. This creates a fragmented legal landscape, where a child's access to civil rights may depend on local interpretations and administrative willingness rather than uniform national enforcement.

### **The Urgent Need for Legal Reconstruction Based on Justice and Child Protection**

Given these contradictions, there is an urgent need to reconstruct the legal framework governing the civil status of out-of-wedlock children in Indonesia. A justice-oriented approach requires the law to evolve beyond mere marital legitimacy, towards protecting the *best interests of the child*, as mandated by both national law and international conventions such as the CRC.

This reconstruction must address several critical areas:

- a) Legal identity: The right to legal identity should be independent of parental marital status, allowing all children to obtain birth certificates and formal recognition.
- b) Biological acknowledgment: When paternity can be scientifically proven, civil law should facilitate legal recognition and inheritance rights, without forcing families into long legal battles.
- c) Equality in access: All children must be granted equal access to education, health services, and legal protection, regardless of how they were born.

Such reform efforts should also be informed by a *maqashid al-shariah* approach in Islamic legal interpretation, emphasizing the overarching goals of Sharia namely, the protection of life, dignity, lineage, and welfare. In this way, Islamic jurisprudence can be a partner rather than a barrier in realizing child protection and social justice.

Furthermore, comprehensive reform can also help combat the stigma and discrimination often faced by children born out of wedlock. By promoting inclusive legal frameworks, the state not only affirms the dignity of these children but also upholds its constitutional commitment to social justice and equality.

### **Legal Practice and Implementation on the Ground**

Despite progressive court decisions and legal provisions, real-world implementation remains inadequate. In practice, many civil registry offices (*Dinas Kependudukan dan Catatan Sipil/Dukcapil*) continue to reject applications for registering out-of-wedlock children as legal offspring of their biological fathers unless a court order is presented. This procedural rigidity

is often influenced by sociocultural pressures and conservative religious beliefs among administrative personnel.

Such barriers frequently result in children being denied access to basic rights, including birth certificates, healthcare, and education. Without official documentation, these children are effectively rendered invisible within the state's legal system. Legal aid organizations have reported that affected families often lack awareness of their rights or face financial and logistical obstacles in pursuing legal remedies.

Moreover, there is insufficient coordination between religious courts, civil institutions, and government agencies. While court rulings such as the 2010 Constitutional Court decision have set a legal precedent, they have not been accompanied by corresponding regulations, training, or institutional reforms. This gap between law and practice undermines the state's ability to protect vulnerable children and leads to inconsistencies in judicial and administrative outcomes.

Improving implementation requires:

- a) Capacity-building among judges, civil registry officials, and religious authorities to ensure they understand and uphold the rights of out-of-wedlock children;
- b) Clear procedural guidelines for paternity recognition and birth registration that reflect both legal and scientific standards;
- c) Strengthening community awareness and legal literacy to empower families to claim their children's rights;
- d) Expanding legal aid services and establishing integrated support systems for families navigating complex legal processes.

From a theoretical perspective, the findings illuminate the limits of formal legal reform in plural legal systems when normative integration is absent. Classical Islamic jurisprudence conceptualizes *nasab* as a mechanism for preserving moral order and social stability, whereas constitutional law frames legal recognition through individual rights and equality before the law. The friction between these paradigms reveals a deeper epistemological divergence: one prioritizes marital form as the source of legitimacy, while the other emphasizes legal responsibility and protection of vulnerable subjects. Applying the *maqāṣid al-shari‘ah* framework allows this divergence to be reinterpreted rather than polarized. When the objectives of protecting lineage, dignity, and welfare are foregrounded, biological paternity supported by scientific evidence can be understood as reinforcing rather than undermining Islamic ethical goals. The study thus supports a theoretical shift from formalistic interpretations of *nasab* toward a purposive, child-centered legal reasoning.

### **Toward an Inclusive and Just Legal System**

In sum, the discussion of tensions between religious norms and human rights in Indonesia reveals a pressing need for legal transformation. A system that continues to deny certain children recognition based solely on their parents' marital status is inherently unjust. By embracing a more inclusive and rights-based legal approach grounded in both constitutional mandates and child welfare principles Indonesia can ensure that no child is left behind.

Such legal and institutional reforms are not merely technical adjustments but moral imperatives. They speak to the kind of society Indonesia aspires to be one that affirms the inherent dignity of every child, regardless of birth circumstances. Through legal reconstruction and faithful implementation of court decisions, Indonesia can fulfill its obligations to protect and promote the civil rights of all children.

Compared to earlier studies, this research advances the discussion by integrating doctrinal, constitutional, and administrative dimensions into a single analytical framework. Prior scholarship has either focused narrowly on Islamic jurisprudence or emphasized human rights discourse without sufficient engagement with religious legal structures. Some studies celebrate the Constitutional Court's decision as a normative breakthrough, while others emphasize its symbolic rather than practical significance. This article bridges those perspectives by demonstrating how constitutional innovation interacts with entrenched religious codification and bureaucratic practice. Unlike studies that frame Islamic law and human rights as inherently oppositional, this research aligns with emerging scholarship that views Islamic legal principles as adaptable through ethical reinterpretation. By foregrounding implementation gaps and institutional behavior, the study provides a more comprehensive explanation for the persistence of legal inequality experienced by children born out of wedlock.

The implications of this study are threefold. Theoretically, it contributes to debates on legal pluralism by demonstrating that harmonization requires purposive reinterpretation rather than hierarchical domination of one legal system over another. Practically, the findings underscore the need for administrative reform, including standardized procedures for birth registration and paternity recognition that reflect constitutional mandates. Without such measures, judicial progress remains largely symbolic. From a policy perspective, the study recommends integrating *maqaṣid al-shari‘ah* into legislative and regulatory reform as a normative bridge between Islamic law and constitutional justice. This approach enables the protection of children's rights without delegitimizing religious legal traditions. Ultimately, reorienting family law from marital legitimacy toward legal responsibility and child welfare represents not only a legal necessity but also a moral imperative consistent with both constitutional values and Islamic ethical principles.

## CONCLUSION

The normative status of children born out of wedlock in Indonesia remains a complex legal and moral issue, particularly in three key areas: lineage (*nasab*), inheritance rights, and legal recognition. Under Islamic jurisprudence, as codified in the Compilation of Islamic Law (*Kompilasi Hukum Islam/KHI*), children born outside of a legal marriage are not considered to have a paternal lineage. As a result, their legal status and rights are linked solely to their mother. Consequently, they are also excluded from inheriting from their biological fathers, except through wills or other civil mechanisms an exclusion that stands in contrast to modern legal principles of equality and child rights protection.

Efforts to grant legal recognition to children born out of wedlock began to gain traction following the Constitutional Court's Decision No. 46/PUU-VIII/2010, which opened the door to civil recognition based on biological relationships. However, the implementation of this ruling continues to face administrative hurdles and cultural resistance,

particularly due to persistent social stigma and conservative attitudes surrounding the issue. As a result, these children often suffer from structural discrimination and are denied fair access to legal identity and basic social services.

To bridge this gap, inclusive reform of family and inheritance law is necessary, grounded in the principles of social justice. The legal system must integrate biological paternity recognition based on scientific evidence such as DNA testing into civil and inheritance law. In parallel, efforts to harmonize Islamic and national legal frameworks should be pursued through the *maqāṣid al-shari‘ah* approach, which emphasizes the protection of lineage, human dignity, and justice. These reforms must be supported by strengthened legal and practical child protection mechanisms, including capacity building for legal practitioners, expanded access to legal aid, and public legal education. Such reforms are not only a juridical necessity but also a reflection of the state’s moral commitment to justice and the fundamental rights of every child.

### **CRediT Author Statement**

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