

Legal Protection For Children Out Of Wedlock In The Perspective Of Islamic Family Law

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ABSTRACT Not all children born in this world are lucky. There are children born from a legal marriage bond called legitimate children. And there are also children born not from a legal marriage bond called extramarital children. Children born out of wedlock are often viewed differently by the surrounding community because of their parents' background. Basically, every child, whether born of a legal marriage or not, has a status and physical condition that is free from sin and stain. Children born out of legal wedlock carry sin because they are considered the result of adultery. Although adultery is one of the great sins in Islam, its effects cannot be pinned on the child. In Islamic law and positive law, parents both have a full obligation to nurture and protect the child. Then both parents, families, and communities have the obligation to nurture, educate, nurture, develop children according to their abilities.

KEYWORDS *Child, Extramarital child, Protection, Islamic Family Law*

INTRODUCTION

Children are an important part of the family. The meaning of children is different for everyone. They are the successors of the bloodline, the investment of the future, and the hope when we are already old. Children are considered as capital to improve the quality of one's life, so that they can control the social status of their parents. (Muzakki, 2021)

Children born without clarity about their fathers often face stigma and unfair treatment from society. Therefore, children born must be legally protected, including children born in disputed marriages, children born outside legal marriages, or children born from illicit relationships. (Tapobali, 2021)

In Article 42 of the Marriage Law Number 11 of 1974, it is affirmed that a child who is considered legitimate is a child born through a legally recognized marriage. In the perspective of Islamic law, it is important to establish the origin of the child in order to know the mahram relationship between the child and his father. Although basically every child comes from a man's sperm and is supposed to be his father, Islamic law has its own requirements. A

child is considered legal to have a sexual relationship with his father if born from a legal marriage. However, if a child is born outside of legal wedlock, he is not considered a legitimate child and only has a sexual relationship with his mother. Therefore, it is important for a child to know his intentions because this affects his identity and future. (Azhar, 2023)

The birth of a human child that is the result of a relationship without a formal marriage bond has an impact on the status of that child in civil law, commonly referred to as an illegitimate child or an out-of-wedlock child. In society, they are often referred to by inappropriate names such as illegitimate children, adulterous children, or cohabiting children. However, keep in mind that children born in such situations are innocent and often experience unfair treatment both in the family and community. (Aryanto., 2015)

Children born out of wedlock have a negative impact on the child itself in the eyes of the law. The status of the child born will be uncertain because there is no authentic evidence that can corroborate that he is a legitimate child of both parents. (Olivia, 2014)

In a family law environment, children are often the focus of the relationship between parents and family. Every child has civil rights that need to be recognized. However, the issue that arises when a child is born outside the illegitimate bonds of marriage in view of family law is a sensitive one. (Zubaidah, 2019) This is because the situation is considered uncommon and considered a disgrace to the family. Nevertheless, the law must respond to this problem in an effort to provide legal certainty. Because children born out of wedlock not only have an impact on legal aspects, but also have social impacts that can hinder the child's future. Therefore, it is important for the law to respond to this problem by considering both its legal and social aspects. (Susanto, 2021)

In the case of a marriage deemed "invalid", a child should not be considered guilty, either according to state law or religious norms, for his birth against his own will. (Kurniawan, 2017) Therefore, any legal consequences arising from his status as an out-of-wedlock child must be protected by law so that he has the same rights as a legitimate child. This principle is based on the principle of "*Equality before the Law*". This principle is contained in the 1945 Constitution Article 28B Paragraphs (1) and (2) and Article 28D Paragraph (1) which states that "*everyone has the right to recognition, guarantee, protection, and fair legal certainty, as well as equal treatment before the law.*" (Salam, 2023)

The rules governing the protection of civil rights of extramarital children in the Marriage Law did not appear out of thin air. Historically, the Marriage Act reflected a wide range of social, political, religious, and cultural interests. Much of his legal material is based on religious law. In order for children to automatically obtain civil rights, both men and women must be bound by a marriage bond recognized by religion. However, the validity of marriage is not only related to religious norms, but also must go through registration steps that have been stipulated by the state in applicable legislation. (Taufid Hidayat Nazar, 2022)

Looking at the social facts around us, it is undeniable that there are still frequent births of children out of wedlock and they certainly need protection. Departing from the brief description above, this paper discusses the legal protection of extramarital children according to Islamic family law.

METHOD

This research is included in the type of qualitative research that focuses on normative legal research or legal research based on legal norms. The source of data used in this study is secondary data obtained through literature studies (research literature) from various primary, secondary, and tertiary legal materials. (Disemadi, 2022) After the data is collected, then a descriptive analysis is carried out using the conceptual approach of Islamic family law which discusses extramarital children.

DISCUSSION

Definition of Extramarital Children

In Indonesian society, the understanding of "extramarital children" can be viewed from various points of view that are often different from each other. This point of view can be distinguished through the perspective of applicable law, the perspective of Islamic law, and the perspective of culture or customs of society. If dug deeper, these views even come from the daily lives of Indonesian people who often face problems in the household, both intentional and unintentional. (Suzanalisa, 2017)

In certain instances, a child born to two male and female partners without a legally recognized marriage bond under Islamic law or positive law, is considered an illegitimate child. In fact, it is often referred to as a child of adultery. (Hafas, 2021) On the other hand, children out of wedlock can also occur when a male and female couple are married, but through a process that is not in accordance with applicable laws and regulations, as stipulated in the Marriage Law. (Syafitri, 2022) These conditions often result in a variety of different terms, depending on different regions, customs, or religious views.

The definition of extramarital children begins with the concept of "legitimate children" in the context of civil law. In the book *Civil Law* by Subekti, it is stated that a "legitimate child" or wettig kind is a child who is recognized as a result of a legal marriage between his father and mother. (Noviyanti Wulandari Sitepu, 2014) What needs to be emphasized from this understanding is that the status of a legitimate child according to civil law is not separated from the marital status of the child's parents. A child is considered valid if the marriage of the mother and father is valid. Conversely, a child is considered illegitimate or out of wedlock if it

turns out that the marriage of his father and mother is invalid. (Anifah, 2019)

Children with the category of adulterous children and li'an children have legal consequences in the form of: (1) Do not have a sexual relationship with their father, but only with the mother and the mother's family. In this case, the father has no obligation to provide for the child, but biologically remains his child. It can be said that the relationship that occurs is not a legal relationship but only a human relationship. (2) Do not inherit each other with their father, because their legal relationship is only with their mother. This can be understood because one of the pillars and conditions for being able to inherit each other is the existence of a legal relationship between the heir and the heir. (3) The father cannot be the marital guardian for a child out of wedlock. (Pancasilawati, 2014)

Constitutionally, every child has the right to have rights guaranteed by law and is not entitled to discriminatory treatment and the state is obliged to provide protection to every child. The existence of differences in legal rights between legal children and extramarital children causes problems in society. (Pusvita, 2018)

In the review of the Civil Code, the definition of extramarital children can be divided into two. First, a child born of a relationship between a man and a woman who is not bound by a legal marriage bond. This is stated in Article 250 of the Civil Code, and can be caused by adultery. Second, extramarital children who are not caused by adultery or discordant children, as described in Article 272 of the Civil Code. (Ahmad Tholabi Kharlie, 2020)

Determination of Child Names in Islamic Law

According to Wahbah Zuhaili, nasab is a strong basis for establishing kinship based on blood ties. In the study of Islamic law, extramarital children are divided into two categories. First, a child conceived outside of a legal marriage, but born in a legal marriage. (Muzakki, 2021) In the opinion of Imam Shafii and Imam Malik, if a child is born after six months from the marriage of his mother and father, then the child can be nasabically linked to his father. However, if the child is born before six months, then the child can only be linked to the mother. Imam Abu Haneefah's opinion differed, according to which an out-of-wedlock child could still be attributed to his father as a legitimate child. Second, children conceived and born outside the legal bonds of marriage. Such

children are called adulterous children and li'an children. (Harlina, 2014)

In Islam a child is proclaimed to the man who impregnated his mother, not to his mother. Because, it is clear and certain that a child is born by his mother. And it is also clear that a child is the child of the mother who gave birth to him. But it is not necessarily clear and certain who the father is. To explain who a child is from his father's side, in Islamic teachings, the child's name must be accompanied (included) by the name of his father. That way it becomes clear and easy to know, who is the nasab (father) of a child without having to conduct an investigation or research. (Harlina, 2014)

In Islamic law, there are four conditions for a child to be considered valid. First, a wife's pregnancy must be natural and normal. According to Imam Abu Haneefah, although husband and wife do not have sexual intercourse, a child born to a legally married wife is considered a legitimate child. Second, there is a minimum time lag of six months between marriage and the birth of a child. Scholars agree that six months is the shortest gestation period. Third, the child is born in a time that corresponds to the normal gestation period. And lastly, the husband does not deny the child through an act called li'an. If the husband doubts the time between marriage and the birth of a child, the husband can deny the child with li'an. If the husband manages to prove the denial, then the status of the child becomes illegitimate and his relationship with his father is severed. (Muhammad Hajir Susanto, 2021)

Islam The Legal Position of Extramarital Children in the Perspective of Islamic Law

Children out of wedlock in the context of Islamic law can be categorized into two major groups, namely children resulting from adultery (zina) and children resulting from marriages carried out when the woman is already pregnant (pregnant marriage). A child resulting from adultery is a child born of an extramarital relationship between a man and a woman, neither of them nor one of them is in legal status. While pregnant marriage is a marriage carried out by a man with a woman who has become pregnant first, either because of his relationship with the man or with another man (married by accident). (Sofiana, 2021)

In the perspective of the Hanafi madhhab, it is argued that an extramarital child is considered a child who has the status of makhluqah (flesh and blood) from his biological

father, so that his status is the same as a child born from a legal marriage. This is because in essence, the child is the result of his father's semen. (Sandimula, 2020) herefore, according to the majority of scholars belonging to the Hanafi madhhab, it is forbidden for a biological father to marry a child who is the result of his own semen. They argue that marrying a child born of adultery is a form of wickedness, because it is unlawful to marry a child born from a husband's semen, without distinguishing whether the child was born in a legal marriage or out of wedlock. In their view, it is also forbidden to marry children, grandchildren, and other descendants even if they were born outside of legal marriage. (Sobari, 2022)

Furthermore, in the view of the Hanafi madhhab, an extramarital child is a child born six months after the occurrence of the marriage contract. Although the legal determination of nasab is based on sexual intercourse with a legal husband, the intercourse occurs in disguise. On the contrary, what is clear is the existence of a marriage contract. (Aisyah, 2023) herefore, the existence of a marriage contract, shows that the nasab has been established. For example, if there has been a marriage between a man and a woman, but they are in a long-distance relationship, so that physical intercourse does not occur, but the marriage contract remains, then the child born in that situation is considered an out-of-wedlock child. (Khoiriyah, 2023)

So, if a man and a woman are in different places and then the woman gives birth to a child, then the child is still related to the man, even though no copulation takes place. However, the obvious thing is the existence of a marriage contract. However, the nasab is considered to be interrupted by Shari'a, which means that the biological father's obligation to fulfill the rights of the child, such as nafaqah, inheritance, and guardianship, is lost. According to the Hanafi madhhab, nasab syar'i is the basis for establishing the obligations of biological fathers in fulfilling the rights of children. That is, the Hanafi madhhab distinguishes nasab into two parts, namely nasab hakiki and nasab syar'i. (Moh Rohman, 2021)

According to the Shafi'i madhhab, an out-of-wedlock child refers to a child born less than six months after intercourse with a legal husband. The Shafi'i madhhab does not distinguish between the true nasab and the shari'i nasab. Therefore, the child's relationship with his biological father is absolutely severed. This means that the child can be married by his

biological father because they are not each other's mahram. The result of the disconnection of this nasab is the loss of nafaqah rights, guardianship, and inheritance rights for the child from his father. However, according to the Shafi'i madzhab, extramarital children still have the possibility to receive a share of the inheritance from their biological father with some notes, namely: (Jarchosi, 2020)

- a) Must obtain recognition from all his heirs,
- b) There is no known possibility of a claim other than the testator,
- c) There is a person who recognizes the child as the heir,
- d) he person who recognizes the child's fate is a reasonable person and has reached puberty. (Adam, 2023)

Article 100 of the Compilation of Islamic Law (KHI) states that a child born out of wedlock only has a sexual relationship with his mother and his mother's family. This is in line with the provisions of Article 43 (1) of the Marriage Law before the Constitutional Court Decision Number 46/PUU-VIII/2010, which states that extramarital children do not have a legal relationship with their biological father. (Syam, 2021) Therefore, the rights relating to the child's fate, such as the right of nafaqah, inheritance rights, hadhanah, and guardianship, do not exist from the biological father's side, but only belong to the mother and her mother's family, in accordance with the provisions in Article 186 of the KHI. (Junaidi, 2023)

The above provision shows that in the context of Islamic law in Indonesia, an extramarital child is understood to mean a child resulting from adultery, which has the legal implication that the child's fate and all rights related to it can only be linked to the mother and the mother's family, while to the man who caused his birth has no legal effect. (Nur, 2023) However, in accordance with the MUI fatwa above, the ruler (law enforcer, such as a judge) can give and impose ta'zir punishment on him in the form of meeting the needs of the child's life and giving a certain amount of property through a mandatory will after he dies. This aims only to protect the interests of the child, not to validate the sexual relationship between the child and the man who caused his birth. (Husni, 2021)

Status and Rights of Children Born Out of Wedlock in Indonesian Islamic Family Law

A child outside marriage according to Article 272 of the Civil Code is divided into two, namely in the broad sense and the narrow meaning. Children outside marriage in a broad sense include all children born outside the bonds of marriage, including children resulting from adultery, children resulting from extramarital relations, and other children outside marriage. (Adillah, 2016) Meanwhile, children outside marriage in a narrow or special sense only apply to children born outside the bonds of marriage but can be recognized civil relations through recognition from parents. Children resulting from adultery and children resulting from extramarital relations are not specifically distinguished from children outside marriage. (Edyar, 2016)

In terms of the Islamic Family Law Law, there is no specific distinction between a child resulting from adultery, a child resulting from an extramarital relationship, and a child out of wedlock. Therefore, according to Article 43 paragraph (1) of the Marriage Law and Article 100 of the Compilation of Islamic Law, an extramarital child is a child born by someone outside the legal marriage bond. In this case, the child's relationship is only related to the mother and the mother's family. (Muhammad Hajir Susanto, 2021)

Meanwhile, the Marriage Law states in Article 2 that a valid marriage is a marriage carried out in accordance with the laws of religion and beliefs held by each individual. Every marriage must also be recorded in accordance with applicable laws and regulations. Thus, if a child is born outside the bonds of religious marriage and in accordance with the provisions of the country's law, he will be referred to as a child born out of wedlock, including children from marriages under the hands / *nikah siri*, and children of adultery. In *fiqh*, the term *zina* is defined as sexual relations between a man and a woman who are not married couples. There are two types of adultery, namely *zina muhsan* and *zina ghairu muhsan*. *Zina muhsan* refers to adultery committed by someone who has been married or has been married, while *zina ghairu muhsan* refers to adultery committed by someone who has never been married. (Azmi, 2021)

In Islam, *zina ghairu muhsan* committed by a woman or man is not considered an ordinary act, but is still considered as *zina* which must be punished (*had*) *zina*. However, there is a

difference in punishment between *zina muhsan* and *zina ghairu muhsan*. For adulterers of *muhsan*, the punishment is stoning to death, while for adulterers *ghairu muhsan*, the punishment is flogging a hundred times. (Muzakir, 2022)

From the above understanding, then in the context of Islamic family law, an adulterous child is a child born as a result of a biological relationship between a man and a woman without a marriage bond, either because the perpetrator is unmarried or married. The adulterous child is placed in the lowest group of children. According to the Marriage Law and the Compilation of Islamic Law, adultery is included in the category of children out of wedlock, although the term "extramarital child" in civil law and criminal law has differences with marriage law. (Rofiq, 2021)

In Article 43 paragraph (1) of the Marriage Law, it is stated that "A child born out of wedlock only has a civil relationship with his mother and his mother's family." From this article, it can be concluded that in Islamic family law, the child of adultery only has a *nasab* or civil relationship with the mother and the mother's family only. (Pratiwi, 2020)

Legal Protection of Extramarital Children in Indonesia

1. Protection Carried Out by the State

Broadly speaking, legal protection of children in Indonesia has been regulated in Law Number 23 of 2002 concerning Child Protection. This law explains that child protection includes all activities aimed at guaranteeing and protecting children and their rights, so that they can live, grow, develop, and participate optimally in accordance with human dignity, and obtain protection from violence and discrimination. (Nadia Ayu Febriani, 2021)

In terms of children's rights, Law Number 23 of 2002 Article 1 Paragraph (12) states that children's rights are part of human rights that must be guaranteed, protected, and fulfilled by parents, families, communities, governments, and the state. (Hifni, 2016) The law is based on four main principles of the Convention on the Rights of the Child: non-discrimination, the principle that is best for the child, the right to life and development, and the right to participate. The law also covers all aspects related to children's rights, including the right to identity, the right to health, the right to

education, and the right to protection. (Lubis, 2023)

Protection of children's rights is also contained in Law Number 39 of 1999 concerning Human Rights, which states that; "Every child has the right to protection by parents, family, community and state. The rights of children are human rights and for their sake the rights of children are recognized and protected by law even from the womb. Every child, from birth, is entitled to a name and citizenship." (Fitra Oktoriny, 2023) Through the laws and regulations mentioned above, it shows that extramarital children already have a legal umbrella to protect their rights. The State guarantees the rights of children, including the rights of children out of wedlock and is given human protection. Protection Through Attestation and Acknowledgment.

Extramarital children are indeed limited rights to their biological fathers, but the Civil Code and the Marriage Law provide solutions so that extramarital children get full rights as children, namely by changing the status of extramarital children to legal children. (Purnomo, 2023) his can be achieved through attestation. The legalization of extramarital children is carried out in the following ways:

- a) There is recognition from both the father and mother of the extramarital child as their child, thereby fostering a civil relationship between the parents and the extramarital child. Since the civil relationship between the extramarital child and the mother and the mother's family already exists by itself, the recognition of the extramarital child is carried out by the father of the extramarital child, who must first seek the consent of the mother of the extramarital child. (Nabil, 2022)
- b) That the father and mother of the extramarital child then marry each other, thus creating a marital relationship between the two. Since the conception of an extramarital child is a child born outside of a marital relationship, in order to make an extramarital child a legal child, the parents of the extramarital child must be bound in marriage. Please note that the recognition of extramarital

children is carried out no later than the marriage between the parents of the extramarital child, in which the marriage certificate includes the recognition of their extramarital child as their child.

- c) Then in the birth certificate of the extramarital child is included the endorsement of the extramarital child to be the legal child of both parents. The legal consequences of the legalization of the extramarital child are that the extramarital child becomes the legal child of the parent who recognizes it, thus the rights of the legitimate child become the rights of the extramarital child. He has the fullest civil relationship with his mother and his mother's family (which itself already exists), along with his father and his father's family. Please note that with the recognition of his father, an extramarital child only has a civil relationship with his father and not with his father's family. (Kuspraningrum, 2006)

2. Scientific Proof Through DNA Testing

Through decision No. 46/PUU-VIII/2010, the Constitutional Court has made a legal breakthrough regarding the relationship of extramarital children who have no relationship with their father. The verdict reads: (Risa, 2021)

"A child born out of wedlock only has a civil relationship with his mother and his mother's family and with a man as his father who can be proven based on science and technology and/or other evidence according to law to have a blood relationship, including a civil relationship with his father's family." (Maramis, 2017)

The above verdict, can only be reached by the existence of evidence that provides the truth about the relationship between the extramarital child and his father, which can be scientifically proven, which in this case is DNA proof. Given that DNA proof is a proof with a very high accuracy value, then if the postulated person is really the father of the extramarital child, then the DNA proof will prove it in such a way. With the expansion of the relationship based on DNA evidence, extramarital children have rights similar to legitimate children, not only to the

rights of children in general, but also to civil rights, which include the right to inheritance from the testator. DNA substantiation can help to resolve paternity issues. The probate method changes the status of extramarital children, which consequently gives legal child rights to extramarital children who are changed status. Meanwhile, DNA proof does not change the status of the extramarital child, but gives the fullest rights as a legal child to the extramarital child. (Zahraini, 2023)

CONCLUSION

Marriage is the basis for family relationships and has legal implications for those involved in the union. In law, marriage creates rights and obligations between related family members. A valid marriage will produce legitimate children as well. Therefore, the legal status of a child and his legal relationship with parents depend on the validity of his marry. In the perspective of Islamic law, a child out of wedlock only has a sexual relationship with his mother and his mother's family, so he does not have the right of inheritance and the right to provide for his biological father. Her biological father also has no right to be the guardian of the marriage.

However, the state recognizes extramarital children since the Constitutional Court Decision Number 46/PUU-VIII/2010 which states that a child born out of wedlock is still considered a legitimate child in a civil manner. This recognition is valid both by the mother and her mother's family, as well as the man referred to as her father, as long as it can be proven through science and technology. Thus, extramarital children still have the right to legal support and protection.

Child protection provided by the state must ensure optimal fulfillment of children's rights, in order to achieve justice and welfare for them. However, such protection must be in accordance with basic humanitarian principles as well as applicable norms. So that the protection provided does not contain violations of the rights of others and also does not conflict with religious norms that uphold the purity of their teachings.

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