

Comparison of the Determination of the Status of Extra-Marital Children between Islamic Law and the Constitutional Court Decision

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Abstract

Constitutional Court Decision No. 46/PUU-VIII/2010 has changed the national legal paradigm regarding the status of extra-marital children by recognizing the civil relationship between the child and his biological father. This research aims to analyze the disharmony between the decision and the Compilation of Islamic Law (KHI) which still adheres to the classical fiqh doctrine that extra-marital children only have a nasab relationship with the mother and her family. The research method used is a normative approach with juridical analysis of the Constitutional Court's decision, the norms in KHI, as well as the principles of Islamic law and human rights. The results show that there is an inconsistency between the norms of Islamic law accommodated in KHI and the principles of justice developed in national law. The discussion underlines the importance of Islamic law reform through contemporary *ijtihad* and the *maqashid al-syari'ah* approach to support the protection of children's rights as a whole. It also emphasizes the need for legal harmonization through the active role of judges, academics and legislators in encouraging the synchronization of norms between KHI and national law to avoid legal dualism that is detrimental to the interests of children.

Keywords: Extra-marital children; Compilation of Islamic Law; Harmonization of law

Introduction

The social phenomenon related to the increase in the number of children born outside of marriage has become a crucial issue that demands serious attention in the Indonesian legal system. The emergence of social dynamics that are more open to the recognition of children outside marriage shows a shift in traditional values towards a more inclusive direction, but this raises its own complexities in the juridical aspect¹. Children born outside the bonds of legal marriage often face obstacles in obtaining legal identity, such as birth certificates, as well as other civil rights, including inheritance rights and recognition of nasab status². These consequences not only impact the protection of children's rights as guaranteed in the constitution and human rights instruments, but also create tensions between conservative Islamic legal norms and the development of national law, especially after the birth of the Constitutional Court Decision Number 46/PUU-VIII/2010 which expanded the legal recognition of extra-marital children³. In this context, a comparison between the construction of Islamic law and the positive legal approach through the Constitutional Court's decision is

¹ Lia Noviana, Lukman Santoso, and Mega Puspita, "Interpreting Legal Rights: Disparities in Judicial Treatment of Children Born Out of Wedlock in East Java, Indonesia," *Lex Scientia Law Review* 8, no. 1 (September 2024): 321–54, <https://doi.org/10.15294/lslr.v8i1.4606>.

² Jabal Nur, Irfan Lewa, and M. Thahir Maloko, "Legal Protection of the Issuance of Birth Certificates of Children from Unregistered Marriages: An Analysis of Islamic Law and Indonesian Civil Law," *Parewa Saraq: Journal of Islamic Law and Fatwa Review* 2, no. 2 (November 2023): 69–82, <https://doi.org/10.64016/parewasaraq.v2i2.24>.

³ Rusdi Rizki Lubis et al., "Towards Legal Justice: Expanding Criteria for Obligatory Bequests in Unregistered Wives in Polygamous Marriages," *Al-Ahkam* 35, no. 1 (April 2025): 117–46, <https://doi.org/10.21580/ahkam.2025.35.1.25358>.

important to assess the suitability of the principles of justice, legal certainty, and protection of the best interests of children.

Normative conflicts appear clearly when the norms in Islamic Law, especially those contained in the Compilation of Islamic Law (KHI), are confronted with the development of national law marked by the birth of the Constitutional Court Decision Number 46/PUU-VIII/2010. In KHI's perspective, children born outside of a legal marriage only have nasab and civil rights with their mother and her family, in accordance with the provisions of Articles 100 and 186 of KHI⁴. This provision is in line with the principle of Islamic law, which emphasizes the validity of the marriage relationship as the basis for determining nasab status. On the contrary, the Constitutional Court through its decision emphasized that extra-marital children should not lose their legal rights solely because of birth status, as long as it can be proven that there is a biological relationship with their father⁵. This decision expands the scope of legal recognition of extra-marital children, including in terms of birth registration, inheritance rights, and civil responsibility of the biological father. This difference of view reflects the tension between the moral-religious principles inherent in Islamic law and the progressive approach in national law oriented towards the protection of children's human rights.

The urgency of this legal study lies in the importance of understanding the meeting points and friction points between the norms of Islamic law accommodated in the Compilation of Islamic Law and the constitutional interpretation of the Constitutional Court regarding the status of extra-marital children. The comparison of these two legal systems is crucial considering that both have different normative foundations but both apply in a national legal system that embraces legal pluralism. This study not only aims to reveal the differences in normative substance, but also to assess how the two approaches impact on the protection of children's rights, especially in terms of nasab, guardianship, inheritance, and legal identity. Thus, this study will contribute to strengthening the consistency of the national legal system, encourage harmonization of norms, and become the basis for the formation of legal policies that are responsive to the needs of justice for children outside marriage.

The tension between religious law and the constitution is apparent when dogmatic religious norms meet the principles of human rights guaranteed by the constitution. In the context of the status of extra-marital children, religious normative understanding, especially in Islamic Law through the Compilation of Islamic Law (KHI), tends to limit the legal relationship of children only to their biological mother⁶. On the other hand, the Constitutional Court Decision Number 46/PUU-VIII/2010 emphasizes that extra-marital children have the right to legal recognition from their biological father as long as it can be proven scientifically and technologically, such as through DNA testing⁷. This tension reflects the challenge of

⁴ Poppy Putri Hidayani, Muhammad Helmi Md Said, and Tinuk Dwi Cahyani, *Contradiction of CIVIL Code with Islamic Law Regarding Children Guardianship Outside Marriage in Indonesia* (KneE Publishing, 2024), 2024:670–91, <https://doi.org/10.18502/kss.v8i21.14784>.

⁵ Muh Luthfi Hakim Ar. Rizqi, “KEDUDUKAN HUKUM KEPERDATAAN ANAK DI LUAR NIKAH PASCA PUTUSAN MAHKAMAH KONSTITUSI TENTANG STATUS ANAK DI LUAR NIKAH” (undergraduate, Universitas Islam Sultan Agung Semarang, 2023), <https://repository.unissula.ac.id/30265/>.

⁶ Amdaryono Saputra and Tri Eka Saputra, “Status Hukum Anak Diluar Nikah Dalam Perspektif Fikih Islam Dan Hukum Positif Indonesia,” *Vifada Assumption Journal of Law* 2, no. 1 (May 2024): 44–53, <https://doi.org/10.70184/vdq9ey25>.

⁷ Misbahul Munir, Imam Syafi'i, and Abd. Hannan, “The Marriage of Biological Fathers to Their Illegitimate Daughters: A Study of the Shafi'i Madhhab and Indonesian Positive Law | Sakina: Journal of Family Studies,” *Sakina: Journal of Family Studies* 9, no. 2 (n.d.): 187–99, <https://doi.org/10.18860/jfs.v9i2.15349>.

reconciling rigidly enforced religious norms with universal principles of human rights, particularly the rights to identity, legal status, and child protection. This dilemma demands an inclusive and progressive approach to the law so as not to cause structural injustice to children born outside of legal marriage, without ignoring the religious values that are an important part of Indonesia's legal identity.

This study has significant practical and academic relevance in the context of family law reform in Indonesia. The tension between religious norms and human rights principles in the national legal system demands a comprehensive and solutive approach. Therefore, this study aims to analyze the normative differences between the provisions of Islamic law as contained in the Compilation of Islamic Law and the Constitutional Court's constitutional interpretation of the legal status of extra-marital children. In addition, this study is intended to examine the juridical implications of these differences for the protection of children's rights, such as identity rights and inheritance rights, and evaluate the potential for harmonization between religious law and national law within the framework of the Indonesian legal system that upholds the values of justice and human rights. The results of this research are expected to be a normative and juridical reference for judges, academics, and policy makers in formulating family law policy directions that are more inclusive and responsive to social dynamics.

Method

This research uses normative legal research methods that focus on analyzing positive legal norms and applicable legal principles. The approaches used in this research include a comparative approach and a conceptual approach. The comparative approach is used to examine the differences and similarities in determining the status of extra-marital children according to Islamic law as regulated in the Compilation of Islamic Law and Indonesian positive law after the Constitutional Court Decision Number 46/PUU-VIII/2010. Meanwhile, the conceptual approach is used to examine basic concepts such as nasab, children's rights, as well as the principles of justice and protection of children in the legal system. The sources of legal materials in this research consist of primary legal materials such as the Compilation of Islamic Law, Law Number 1 Year 1974 on Marriage, and the Constitutional Court Decision, as well as secondary legal materials in the form of fiqh literature, scientific journals, and experts' opinions, which are complemented by tertiary legal materials such as legal dictionaries and encyclopedias of Islamic law.

Results and Discussion

1. Construction of Islamic Law on Extra Marital Children

In the framework of Islamic law, the determination of nasab has a fundamental position because it is the basis that determines a person's civil rights and obligations, such as inheritance, maintenance, and guardianship. The principle of nasab in Islam is generally determined based on a valid marriage according to Sharia. In this case, the majority of scholars (jumhur) including from the Hanafi, Maliki, Shafi'i and Hanbali schools of thought explicitly state that children born outside the bonds of a legal marriage do not have a nasab relationship with their biological father⁸. Therefore, she is not entitled to inheritance, lineage or guardianship from

⁸ Zaki Satria, "Kedudukan Hukum Anak Luar Nikah (Kajian Analisis Pendapat Ulama dan Putusan Mahkamah Konstitusi)" (doctoral, Universitas Islam Negeri Ar-Raniry, 2023), <https://repository.ar-raniry.ac.id/id/eprint/33225/>.

her father. This view rests on the argument that the marriage bond is the only legitimate way in Islam to establish legitimate nasab affiliation to a father. However, there is a minority view from some contemporary fuqaha who have begun to consider a maqashid al-shari'ah-based approach, especially in the context of protecting the rights of children as parties who cannot choose the conditions of their birth. They argue that if the biological father can be proven through modern technology such as DNA testing, then the recognition of nasab for the benefit of the child should be considered, although still within the limits of fiqhiyah prudence.

In the positive context of Islamic law in Indonesia, the Compilation of Islamic Law (KHI), which applies as a source of material law for religious courts, regulates the position of extra-marital children explicitly. Article 100 and Article 171 of KHI state that children born out of wedlock only have a legal relationship with their mother and her family⁹. This means that there is no civil relationship between an unmarried child and his biological father within the framework of Islamic law. This also emphasizes that rights such as inheritance, maintenance, and maintenance can only be claimed from the mother. This construction reflects caution in maintaining the purity of nasab, which in Islamic tradition is a strictly protected aspect. Thus, the position of extra-marital children in Islamic law remains within the framework of normative prudence, prioritizing the protection of family structure and lineage. However, current social and technological developments open up new discourse space to review these provisions in the frame of maslahat and protection of children's rights.

2. Content and Implications of Constitutional Court Decision No. 46/PUU-VIII/2010

Constitutional Court Decision No. 46/PUU-VIII/2010 is an important milestone in changing the paradigm of family law in Indonesia, especially in recognizing the legal status of children born out of wedlock. This judicial review petition was filed against Article 43 paragraph (1) of Law No. 1/1974 on Marriage, which previously stated that children born out of wedlock only have a civil relationship with their mother and their mother's family¹⁰. The Petitioner argued that this provision was contrary to the principles of protection of children's rights and the right to identity guaranteed by the 1945 Constitution. In its reasoning, the Court emphasized the importance of protecting children's constitutional rights, including the right to know their origins and biological identity. The Court also highlighted the development of science and technology, especially genetic engineering such as DNA testing, which allows proving the biological relationship between a child and his or her father objectively and scientifically. Therefore, the Court stated that Article 43 paragraph (1) of the Marriage Law must be interpreted in a conditional constitutional manner, namely that an unmarried child has a civil relationship with his mother and also with his biological father if it can be proven scientifically and technologically, as well as based on other evidence according to law.

The implications of this decision are far-reaching. First, legally, an unmarried child can now demand legal recognition of his or her father's identity and claim civil rights, including the right to maintenance, inheritance, and other protections¹¹. Second, this decision expands

⁹ Annisa Abdullah, Kasuwi Saiban, and Kadek Indrayanti, "Status of Children Out of Marriage: A Review of the Law Regarding Marriage and Civil Law," *East African Scholars Journal of Education, Humanities and Literature* 6, no. 02 (February 2023): 60–64, <https://doi.org/10.36349/easjehl.2023.v06i02.005>.

¹⁰ Sampurno Sampurno, "Kedudukan Bapak Biologis Terhadap Anak Hasil Perkawinan Di Luar Nikah Sama Seperti Anak Kandung Setelah Adanya Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Dan Berdasarkan Kompilasi Hukum Islam." (other, University of Gresik, 2024), <http://elibs.unigres.ac.id/2972/>.

¹¹ Kholid Saifulloh Mohammad, Muhammad Tsalis Ramadlani, and Ahmadriddlo Ghazali, "NASAB, WARIS, DAN HAK KEPERDATAAN KAJIAN KOMPARATIF HUKUM ISLAM DAN HUKUM POSITIF UNTUK ANAK HASIL ZINA," *Al-Usariyah: Jurnal Hukum Keluarga Islam* 3, no. 1 (March 2025): 69–89, <https://doi.org/10.37397/al-usariyah.v3i1.839>.

the scope of legal responsibility of biological fathers towards children born outside of marriage, not only in moral aspects but also in legal aspects. Third, from an institutional perspective, religious courts and district courts have an important role in verifying and establishing the legal relationship between an unmarried child and his or her biological father through a legal evidentiary mechanism¹². This decision also poses a challenge in harmonizing the religious legal norms adopted by some communities and the positive law that develops based on the principles of human rights and technological advancement.

3. The tension between Islamic Law and Constitutional Law

The tension between Islamic law and constitutional law in the context of Constitutional Court Decision No. 46/PUU-VIII/2010 reflects the dynamics and complexity of harmonizing normative religious principles with the development of modern constitutional values, especially those related to human rights. In the perspective of classical fiqh, the majority of scholars agree that children born outside a valid marriage only have a nasab relationship with their mother, without any legal relationship or civil responsibility from the biological father¹³. This is based on the principle of ihtiyath (prudence) in maintaining clarity of lineage (hifz al-nasl), as well as the protection of the institution of marriage as the moral and social foundation of Islamic society.

However, this approach began to be challenged within a constitutional legal framework based on respect for individual rights, including children's rights to identity and legal recognition. The Constitutional Court, in its decision, interpreted that the protection of children must go beyond the formalistic boundaries of marriage, taking into account the principles of justice, equality before the law, and the right to biological parental recognition¹⁴. Thus, if the identity of the father can be scientifically proven through modern technology such as DNA testing, then the state is obliged to recognize the civil relationship in the best interests of the child.

The ruling elicited mixed responses from scholars, Muslim scholars, and legal academics. Some criticized the ruling as a form of intervention into established principles of Islamic law, and considered that the recognition of civil relationships with biological fathers outside of marriage could open a loophole to legitimize nonmarital sexual behavior that is contrary to Islamic moral values. However, other groups view that the constitutional approach does not necessarily negate Islamic principles, but needs to be understood within the framework of maqashid al-syari'ah, especially in the aspect of protecting the soul and dignity of children (hifz al-nafs and hifz al-'ird). In maqashidi interpretation, recognition of the rights of unmarried children can be seen as an effort to maintain benefits and prevent greater social losses, such as discrimination, social stigma, and limited legal access experienced by children who are not recognized civilly. Thus, this debate opens an important space for the reconstruction of Islamic family law in Indonesia that is responsive to social realities and

¹² Muhammad Idris Nasution, Mhd Syahnan, and Fauziah Lubis, "Rekonstruksi Penetapan Anak Biologis Dari Hasil Perkawinan Tidak Sah Dalam Putusan Pengadilan Agama," *Jurnal Hukum IUS QUIA IUSTUM* 31, no. 3 (2024): 696–723, <https://doi.org/10.20885/iustum.vol31.iss3.art9>.

¹³ Liyuk Widiatin, "TINJAUAN FIQH MUNAKAHAT TERHADAP STATUS ANAK YANG LAHIR KURANG DARI ENAM BULAN SETELAH PERNIKAHAN KEDUA ORANG TUANYA (Studi Kasus Di Kantor Urusan Agama Kecamatan Tanjunganom, Kabupaten Nganjuk)" (undergraduate, INSTITUT AGAMA ISLAM NEGERI KEDIRI, 2025), https://doi.org/10/21301077_lampiran.pdf.

¹⁴ Eunike Loist Hutasoit et al., "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 (August 2024): 420–37, <https://doi.org/10.32505/jurisprudensi.v16i2.8938>.

substantive justice values. The synergy between Islamic law and constitutional law should not be seen as a diametrical opposition, but as an opportunity to build a more inclusive and just legal approach, through contextual *ijtihad* that considers *maqashid al-syari'ah* and constitutional values that live in society.

4. Juridical and Social Consequences

Constitutional Court Decision No. 46/PUU-VIII/2010 has had significant juridical consequences in legal practice, particularly in the religious and general courts. One of the most obvious impacts is the increased complexity in proving the civil relationship between an unmarried child and his or her biological father. Prior to this decision, religious courts adhered to the normative principle derived from the Compilation of Islamic Law (KHI), namely that extra-marital children only have a *nasab* relationship with their mother, as confirmed in Article 100 KHI. However, after the Constitutional Court's decision, a new legal space has emerged that allows courts, including general courts in civil cases, to recognize the existence of a civil relationship between the child and the biological father based on scientific evidence such as DNA tests.

Normatively, this creates the potential for disharmony between KHI as a source of material law in religious courts and the constitutional norms interpreted through the Constitutional Court's decision. On the one hand, religious courts are still limited by the provisions of classical *fiqh* and KHI which do not recognize the *nasab* relationship of an unmarried child with his or her father except through a legal marriage. On the other hand, the Constitutional Court's decision opens up the possibility to recognize legal relationships based on biological facts, which can lead to inconsistencies in decisions between courts and cause legal uncertainty if not followed by revision or harmonization of regulations. From an administrative aspect, this decision has important implications for birth registration. Previously, an unmarried child could only have his or her mother's name listed on the birth certificate. With the Constitutional Court's decision, civil registration officials can include the name of the biological father if there has been a court decision stating the existence of a civil relationship. This marks a paradigm shift in the legal protection of children from a normative approach to a human rights approach, especially children's rights to legal identity and origin.

In a social context, this recognition of civil rights can be a protective instrument for children born outside of marriage to obtain rights such as maintenance, education, inheritance, and guardianship. However, on the other hand, communities that are still based on traditional Islamic values may experience resistance to the implementation of the decision, especially in terms of the social status of children and the legitimization of *nasab*. Therefore, socialization, education, and juridical-cultural approaches are needed so that the Constitutional Court's decision can be implemented effectively without causing protracted social tensions. Furthermore, the long-term consequences of this decision require legislators and law makers to formulate derivative regulations that are able to integrate the principles of *maqashid al-syari'ah* and constitutional values. Thus, legal certainty and substantive justice for extra-marital children can be achieved, as well as strengthening the national legal system that is responsive to social dynamics and technological developments.

5. Harmonization Efforts

In the face of a legal paradigm shift due to the Constitutional Court Decision No. 46/PUU-VIII/2010, there is an urgent need to make efforts to harmonize the norms of Islamic law contained in the Compilation of Islamic Law (KHI) with the principles of national law oriented towards the protection of human rights. The discourse of Islamic law reform becomes

increasingly relevant within the framework of a democratic state of law, where the supremacy of the constitution demands equal treatment for every citizen, including unmarried children. In this context, the recontextualization of fiqh through contemporary ijihad is a great opportunity to respond to the growing social dynamics, without having to ignore the basic values of Islamic teachings. This process requires the active involvement of judges, academics and legislators to encourage more progressive and inclusive legal interpretations, by integrating the principles of maqashid al-syari'ah within the framework of constitutionalism. Synchronization of norms between KHI and national law also needs to be designed to avoid confusing legal dualism in judicial practice. This effort is not just a matter of legislative technique, but part of the state's commitment to ensuring substantive justice for all children without discrimination of birth status.

Conclusion

Constitutional Court Decision No. 46/PUU-VIII/2010 marks an important milestone in the protection of the rights of unmarried children by affirming the recognition of the civil relationship between the child and his biological father. However, the existence of the Compilation of Islamic Law (KHI), which still limits the status of extra-marital children as only having a nasab relationship with the mother and her family, creates normative tension between national and Islamic law. This inconsistency not only creates legal dualism, but also has the potential to hinder the full fulfillment of children's civil rights. Therefore, it is necessary to recontextualize the fiqh norms in KHI through contemporary ijihad that considers the principles of justice, humanity, and protection of human rights. Legal harmonization can be done through progressive reinterpretation of Islamic law with a maqashid al-syari'ah approach and responsive national legal reform. The active role of judges, academics and legislators is crucial in realizing the integration of Islamic legal values into an inclusive and non-discriminatory national legal system, in order to ensure substantive justice for every child in Indonesia, regardless of their birth status.

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