



## Protection of the Rights of Adultery Children in Indonesia: A Perspective of Positive and Islamic Law

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### Abstract

The phenomenon of parents abandoning their children due to adultery is quite common these days. In the marriage legal system in Indonesia, children born outside a legal marriage cannot be recognized as legitimate children, so their civil aspects follow those of their mother. Children resulting from adultery lose some of their rights as children of a father, and this has the potential to disrupt their future. This research aims to analyze the rights of children resulting from adultery and whether there are solutions that can be taken so that children resulting from adultery still receive their rights even without a cross-breed relationship with their biological father. The research method used is a library research with a sociological-legal approach. Data sources were obtained from the law and several important articles related to this research problem. Apart from that, this article also uses the results of empirical research to strengthen the arguments in this research. Based on the research results, it was found that, from various studies, there is often a neglect of children's rights as a result of adulterous relationships. Men tend to leave their partners, and in the end, women often become single parents to meet the child's needs. Legally, the state can punish the adulterer (biological father) for being responsible for the needs of the child resulting from his adultery.

**Keywords:** Adultery Children, Protection of children's rights, Islamic law, Positive law

### Abstrak

Dewasa ini banyak temuan kasus anak yang ditelantarkan oleh orang tuanya karena hasil perzinahan. Dalam sistem hukum perkawinan di Indonesia, anak yang lahir diluar perkawinan yang sah tidak dapat diakui sebagai anak sah, sehingga aspek keperdataannya mengikuti ibunya. Anak hasil zina kehilangan sebagian haknya sebagai anak dari seorang ayah dan ini berpotensi mengganggu masa depannya. Penelitian ini bertujuan untuk



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menganalisis hak anak hasil zina, dan adakah solusi yang dapat ditempuh agar anak hasil zina tetap mendapat haknya meski tanpa hubungan nasab dengan ayah biologisnya. Metode penelitian yang digunakan adalah studi kepustakaan (library research) dengan pendekatan yuridis sosiologis. Sumber data diperoleh dari Undang-Undang, beberapa artikel penting yang berkaitan dengan permasalahan penelitian ini. Selain itu, artikel ini juga menggunakan hasil penelitian empiris untuk memperkuat argumentasi dalam penelitian ini. Berdasarkan hasil penelitian diperoleh bahwa dari berbagai penelitian sering terjadi pengabaian hak anak dari hasil hubungan perzinahan. Para pria cenderung meninggalkan pasangannya dan pada akhirnya para wanita kerap sekali menjadi orang tua tunggal dalam memenuhi kebutuhan anak tersebut. Secara hukum, negara dapat menghukum pelaku pezina (ayah biologis) untuk bertanggung jawab terhadap kebutuhan anak hasil zinanya.

**Kata Kunci:** Anak Hasil Zina, Perlindungan Hak Anak Hukum Islam, Hukum Positif

## Introduction

A child is a gift and a trust from Allah SWT. to parents who must be cared for and nurtured correctly. God's destiny does not allow a child to choose to be born from the womb he wants.<sup>1</sup> When a child is taken from an extramarital relationship, he remains pure and innocent. There is no difference between a child born out of wedlock and one born out of wedlock. Both are legal subjects whose rights must be protected by the state.<sup>2</sup> Children cannot accept sanctions for actions or mistakes committed by their parents. Islam teaches that every child is born in a holy condition, as the Prophet said:

*"Abu Hurairah (r) said that the Prophet (peace be upon him) said: "Not every child is born except in a state of purity. It is his parents who will make him Jewish, Christian, or idolatrous" (HR. Muslim).<sup>3</sup>*

However, the sins and violations of religious norms committed by his parents that caused him to be born into the world will always be carried and attached to him. The Law protects against the possibility of discrimination in society against extramarital children with the issuance of Article 28 B paragraphs (1) and (2) of the 1945 Constitution of the Republic of Indonesia which reads: Everyone has the right to form a family and continue offspring through legal Marriage and every child has the right to survival, growth and development and the right to protection from violence and discrimination; As well as article 28 D paragraph (1) of the Constitution of the Republic of Indonesia Year 1945 which reads: Everyone has the right to recognition, guarantee, protection and fair legal certainty and equal treatment before the Law.<sup>4</sup>

Based on Article 52 paragraph (2) of the Presidential Regulation of the Republic of Indonesia Number 25 of 2008 concerning Requirements and Procedures for Population Registration and Civil Registration, reporting of the birth of children who are not accompanied by a marriage book will still be accepted. Birth registration will still be carried out, meaning that extramarital children do not have problems with birth certificates. So far,

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<sup>1</sup> Adian Husaini, *Stoning in the Flow of Shahwat Culture Application of Sharia Law in Indonesia in Review of Islamic Sharia, Positive Law and Global Politics* (Jakarta: CV. Pustaka al-Kautsar, 2001), 95

<sup>2</sup> Rofiq Ahmad, *Hukum Islam Di Indonesia* (Jakarta: PT Raja Grafindo Persada, 1997), 107

<sup>3</sup> Ibn Hajar Atsqalani, *Hadith Bulughul Maram* (Cimahi: CV. Gema Risalah Press: 2008), 430

<sup>4</sup> Muhazir Muhazir, "Dualisme Peraturan Perceraian di Aceh: Kontestasi Fatwa dan Hukum Negara," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 13, no. 2 (December 28, 2020): 198–208, <https://doi.org/10.14421/ahwal.2020.13208>.

the rights of extramarital children related to state administration have been fulfilled. But in some cases, there are rights of children who are deprived of themselves because they<sup>5</sup> are born from a wrong act against religious norms and laws committed by their parents, not at all the result of evil acts committed against them.<sup>6</sup> The deprived right is the severance of civil relations with his biological father. The regulations governing this matter include:

1. Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage: "A child born out of wedlock only has a civil relationship with his mother and his mother's family";
2. Article 100 of the Compilation of Islamic Law (KHI): "A child born out of wedlock has only sexual relations with his mother and his mother's family" and
3. Article 186 of the Compilation of Islamic Law (KHI): "A child born out of wedlock has only a relationship of inheritance with his mother and his mother's family only".

In addition to the Marriage Law and the Compilation of Islamic Law, four school scholars agree that the Marriage of an extramarital child with a man who impregnates his mother is severed. As a result, they cannot inherit each other, and if the extramarital child born is a girl, then the man cannot be the marital guardian of the daughter. Even followers of the Shafi'I School argue that if the fate of an extramarital child against his father is severed, then the child's status is as an *Ajnabiyyah* (foreigner). Therefore, the child may be married to his biological father and is not a mahram for his biological father.<sup>7</sup>

In contrast to the view of the Marriage Law, the Compilation of Islamic Law and scholars of the four schools of thought, the Constitutional Court Decision Number 46 / PUU-VIII / 2010 states in one of its rulings that Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage which states, "A child born out of wedlock only has a civil relationship with his mother and his mother's family", has no binding legal force as long as it is interpreted to eliminate civil relations with<sup>8</sup> a man who can be proven based on science and technology and other evidence according to Law turns out to have a blood relationship as his father, so the paragraph must read, "A child born out of wedlock 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 other evidence according to law to have a blood relationship, including civil relations with his father's family".<sup>9</sup>

In addition to the two views above, another view is MUI decision Number 11 of 2012 concerning the Position of Children Resulting from Zina and their Treatment of Him. The content of the judgment, as stated in the JUDGMENT section on page 9 of the final decision,

5 Naskur Bilalu et al., "Compilation of Islamic Law as Judge's Consideration at a Religious Court in North Sulawesi, Indonesia," *Samarah* 6, no. 2 (2022): 514–36, <https://doi.org/10.22373/sjhk.v6i2.12441>.

6 Diana Farid et al., "Interfaith Marriage: Subjectivity of the Judge in Determination of No. 454/Pdt.p/2018 Surakarta District Court," *Al-Istinbath: Jurnal Hukum Islam* 7, no. 2 (2022): 347–62, <https://doi.org/10.29240/jhi.v7i2.4574>.

7 Dwi Arini Zubaidah, "Childfree Marriage in the Perspective of Maqashid Asy-Syari'ah," *Al-Qadha: Jurnal Hukum Islam Dan Perundang-Undangan* 10, no. 1 (June 13, 2023): 79–93, <https://doi.org/10.32505/qadha.v10i1.5852>.

8 Halimah Basri et al., "Inheritance Rights of Women in Makassar Society: A Study of Living Qur'an and Its Implications for Islamic Law," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 2 (2022): 537, <https://doi.org/10.22373/sjhk.v6i2.13882>.

9 Diana Farid et al., "Peran Kanal Online Dalam Edukasi Pranikah," *FASTABIQ: JURNAL STUDI ISLAM* 3, no. 2 (June 22, 2022): 81–93, <https://doi.org/10.47281/fas.v3i2.119>.

was aimed at protecting the child, not to legalize the sexual relationship between an extramarital child and a man that resulted in his birth.<sup>10</sup>

Research written by Riri Wulandari with the title Status of Children Outside of Wedlock Perspectives of the Hanafi School and the Shafi'I School explains that the Hanafi School's opinion regarding extramarital children is children born less than six months after the marriage contract. Nasab son remains Thabit against his biological father, because in essence the child is his child. A child is called the son of his father because the child is born from the semen of his father, therefore it is forbidden for the biological father to marry his extramarital child. The nasab according to the view of shari'a is disconnected, which has implications for the loss of obligations for biological fathers to fulfill children's rights, such as bread, inheritance, and guardianship. The Shafi'I School has a different opinion from the Hanafi School regarding extramarital children or adulterous children. In the Shafi'I School, an extramarital child is a child born less than six months after intercourse with a legal husband. Followers of the Shafi'I School hold that the fate of an extramarital child against his father is severed, hence the status of the child is as an Ajnabiyyah (foreigner). Therefore, the child may be married by his biological father, and is not a mahram for his biological father.<sup>11</sup>

In addition, research written by Rinanti Elfrida entitled "Protection of Zina Children According to the Perspective of Islamic Law and Positive Law" explains that the protection of adulterous children according to positive law and Islamic law is a positive law regulating child protection at the conventional level, such as children's rights and obligations, child maintenance (alimentation) by parents, recognition of children, legalization of children, and others. Then Islamic law does not address the issue of protection of children resulting from adultery which says that children resulting from adultery only have a relationship with their mother, including in terms of protection. Then in this thesis also explains the similarities and differences in the protection of children's rights resulting from adultery.<sup>12</sup> The equality in Islamic law and positive law is that adulterous children have rights from their parents, namely parental power rights, child maintenance and education rights, inheritance rights, and family name rights. While the difference lies in the civil relationship of the adulterous child. Islamic law holds that an adulterous child has a civil relationship with his mother and his mother's side of the family, and positive law holds that an adulterous child has a civil relationship with his mother and his mother's family, and his biological father that can be proven by evidence according to applicable law.<sup>13</sup>

Looking at several previous studies, the discussion in this study focuses more on the rights of children born outside of legal marriage in terms of social, not to connect the child's fate to his biological father and the efforts and strategies that may be carried out by positive law so that society, especially men, still have responsibility for what they have done so that

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<sup>10</sup> Adelina Nasution, Pagar Pagar, and Asmuni Asmuni, "The Disparity Of Judge's Verdict On Child Custody Decision In Aceh Sharia Court," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 2 (2022): 890, <https://doi.org/10.22373/sjhk.v6i2.12758>.

<sup>11</sup> Riri Wulandari, "Status Nasab Anak Di Luar Nikah Perspektif Mazhab Hanafi Dan Mazhab Syafi'i Dan Implikasinya Terhadap Hak-Hak Anak" (Undergraduate, Lampung, UIN Raden Intan Lampung, 2018), 66

<sup>12</sup> Jakobus Anakletus Rahajaan and Sarifa Niapele, "Dinamika Hukum Perlindungan Anak Luar Nikah Di Indonesia," *PUBLIC POLICY (Jurnal Aplikasi Kebijakan Publik & Bisnis)* 2, no. 2 (2021): 258-77, <https://doi.org/10.51135/publicpolicy.v2.i2.p258-277>.

<sup>13</sup> Rinanti Elfrida, "Perlindungan Anak Zina Menurut Perspektif Hukum Islam Dan Hukum Positif" (Undergraduate, Lampung, UIN Raden Intan Lampung, 2017), 67

the rights of children born out of adultery get what they should get. If other people's studies discuss the position of extramarital children, then this research is about protecting the rights of children born out of wedlock in Indonesia.

Seeing the many different views on children's rights, researchers are interested in researching the problem of children outside Marriage by focusing on " Protection of the Rights of Adultery Children in Indonesia (Perspectives of Islamic Law and Positive Law)".<sup>14</sup>

The research method used is a library research with a sociological-legal approach.<sup>15</sup> Data sources were obtained from the law and several important articles related to this research problem. Apart from that, this article also uses the results of empirical research to strengthen the arguments in this research. Several laws pertaining to Islamic law, human rights, and child protection are all examined in this research study. This is done to assess the degree to which the rights of children born outside of marriage are protected by these legislation.

### **Children's Rights in the Perspective of Islamic Law and Positive Law**

According to the language, Islamic Law is shari'a, which means the path humanity takes to lead to Allah SWT. According to the term, these are the laws commanded by Allah SWT for His people brought by a Prophet, both those related to belief (*aqidah*) and deeds (*'aliyah*).<sup>16</sup> Islam is not a religion that only teaches how to worship its God (worship). In addition, Islam exists to regulate human relations with others (*Ramallah*).<sup>17</sup> The rule is based on the Quran and Hadith. Islamic Law is not just a theory; more than that, Islamic Law is a rule to be applied in the joints of human life. Because many new problems are encountered, in the end, the thinking of Muslims tends to be different in understanding a situation. The birth of Sunni jurisprudence evidences this or can also be called the four schools of jurisprudence. The same thing happened in Indonesia. The Muslims in Indonesia eventually made an *ijtihad*. The results of *ijtihad* include:

1. Compilation of Islamic Law (KHI);
2. Fatwa of the Indonesian Ulema Council (MUI).

Positive Law is a law made by man that obliges or establishes an action. In Indonesia, positive Law is divided into *private* (civil) and public (criminal). Positive legal forms in Indonesia include:

1. Law Number 1 of 1974 concerning Marriage;
2. Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning Child Protection;
3. Constitutional Court Decision Number 46/PUU-VIII/2010;
4. And so on.

Apart from being a source of happiness and cooling, children are gifts and trust Allah SWT gives to parents. Every parent wants a good and righteous offspring, both personal, intelligent, and valuable; his presence always has a positive impact and is devoted to both parents. Thus, parents must educate their offspring responsibly because the child's future

<sup>14</sup> Wahidah Ideham, "Substitute Heirs in the Compilation of Islamic Law: An Overview from Gender Equality Perspective Case Study of the Religious Courts in Banjarmasin," *Samarah* 6, no. 2 (2022): 1046-64, <https://doi.org/10.22373/sjhk.v6i2.12466>.

<sup>15</sup> Emmanuel Melissaris, "The More the Merrier? A New Take on Legal Pluralism," *Social & Legal Studies* 13, no. 1 (March 2004): 57-79, <https://doi.org/10.1177/0964663904040192>.

<sup>16</sup> Yusmalinda Yusmalinda et al., "Islam Dan Sosial Kontrol: Menelisik Penerapan Syariat Islam Di Aceh," *Jurnal El-Qanuniy: Jurnal Ilmu-Ilmu Kesyariahan Dan Pranata Sosial* 9, no. 1 (July 6, 2023): 145-61, <https://doi.org/10.24952/el-qanuniy.v9i1.7711>.

<sup>17</sup> Ibnu Rusyd, *Bidayatul Mujtahid wa Nihayatul Muqtashid* (Beirut: Dar Al-Kutub Al-Islamy, 1988), 433

depends very much on the parenting and education provided by parents. This is following the following word of God:

يَا أَيُّهَا الَّذِينَ آمَنُوا فُوَّا أَنْفُسُكُمْ وَأَهْلِكُمْ نَارًا وَفُوْدُهَا الْكَأْسُ وَالْحَجَّارَةُ عَلَيْنَا مَلَائِكَةٌ غَلَّاظٌ شَدَادٌ لَا يَعْصُوْنَ اللَّهَ مَا أَمْرَهُمْ وَقُلُولُنَّ مَا يُؤْمِنُونَ

"O men of faith, preserve yourselves and your families from the fires of hell whose fuel is man and stone; his guardians Angels who were harsh, hard, and disobeyed God not what he commanded them, and always did what he commanded." (QS At-Tahrim: 6)

Ibn Kathir, in his tafsir, says that the purpose of preserving yourself and your family from hellfire is education that leads to a form of obedience to Allah SWT and is an invitation always to carry out all His commandments and stay away from all His prohibitions to avoid the heat of hellfire. Thus, providing religious understanding to offspring is the primary responsibility of parents. Suppose parents waste and do not educate their children with valuable things. In that case, the parents have done an evil deed because the horror that arises in a child is parental negligence stemming from lack of attention, lack of education and so on.

In Article 106, paragraphs (1) and (2) of the Compilation of Islamic Law (KHI), it is explained that parents are obliged and responsible to:

1. Parents are obliged to care for and develop the property of their child that has not been or is under custody and may not transfer or duplicate it except for the imperative necessity if the interests and benefit of the child so desire or an unavoidable reality;
2. Parents are responsible for losses incurred due to errors and omissions of such obligations in paragraph (1).

Providing education for children, especially when children have entered the stage of thinking and starting to receive knowledge, is a responsibility that cannot be missed. At this time, the child's thinking must be directed so as not to fall into thoughts that make him a human being who is not virtuous, unfilial and has no charity. Children can be a source of happiness, but do not rule out the possibility that children can also be a source of disaster. It all depends on the parenting style parents give to their children.

There is little talk about a father's obligations when a child declares that he will soon marry by his heart's choice. When a man comes to propose to a father's daughter, asking for blessings, then the father's role as a parent becomes crucial.<sup>18</sup> Because the obligations and responsibilities that parents have will soon shift to their daughter's future husband, accepting a proposal is not easy but will be done; this is in accordance with the command of Allah SWT in QS. An-Nur: 32 following.

وَأَنْكِحُوا الْأَيْتَنِي مِنْكُمْ وَالصَّالِحِينَ مِنْ عَبَادِكُمْ وَإِمَائِكُمْ إِنْ يَكُونُوا فَقَرَاءٌ يَغْنِمُهُمُ اللَّهُ مِنْ فَضْلِهِ وَاللَّهُ وَاسِعٌ عَلَيْهِ

"And marry those who are alone among you, and those who are worthy (to marry) of your sahaya's male servants and your sahaya's female servants. If they are poor, God will enable them by His grace. And Allah is vast (His gift) again All-Knowing". (QS. An-Nur: 32).

Thus, it can be concluded that the child is a trust or trust bestowed by Allah SWT, which must be maintained and fostered earnestly by both parents. They educated him to

<sup>18</sup> Diana Farid et al., "Praktik Pernikahan Dan Perceraian Di Bawah Tangan," *Mutawasith: Jurnal Hukum Islam* 6, no. 1 (July 27, 2023): 53–69, <https://doi.org/10.47971/mjhi.v6i1.612>.

become a functional human in the afterlife, giving practical lessons and sciences. Parents must support and inform the child to be independent and stand alone.<sup>19</sup>

While in the provisions of Article 28 B paragraph (2) of the 1945 Constitution, it is affirmed that: "Every child has the right to survival, growth and development and the right to protection from violence and discrimination", the provision has provided a strong foundation that children have the right to live, grow and develop and have the right to obtain protection from violence, exploitation and discrimination. The Indonesian nation, as part of the world community, is committed to ensuring the fulfilment of children's rights and child protection, which are part of human rights, including the rights to life, survival, growth and development, participate optimally by human dignity and dignity and receive protection from violence and discrimination for the realization of prosperous, quality and protected Indonesian children.<sup>20</sup> Child protection is also affirmed in the 1945 Constitution, namely Article 28 D paragraph (1) of the 1945 Constitution: "Everyone has the right to recognition, guarantee, protection and fair legal certainty and equal treatment before the law".

### **Islam and the State: Children's Rights Affected by Adultery**

Children born out of wedlock, according to Islamic Shari'a, have legal consequences:

1. He has no sexual relationship with his biological father but only has a sexual relationship with his mother and his mother's family. This provision is based on Article 100 of the Compilation of Islamic Law: "A child born out of wedlock only has a sexual relationship with his mother and his mother's family".
2. His biological father is not obliged to provide for his adulterous son, this is summarized in the following hadith:

الْوَلَدُ لِلْفَرَاسِ وَلِلْعَاهِرِ الْحَجَرِ

"The child born to the owner of the mattress (that is, the child born to one's wife or his female slave is his). An adulterer has no right to a child who has adultery." (Muttafaq 'alaih of Abu Hurayrah and 'Aisha radhiyallahu 'anhum).

3. He is not inheriting each other's property with his biological father. Article 186 of the Compilation of Islamic Law (KHI): "A child born out of wedlock has only a relationship of inheritance with his mother and his mother's family only".
4. Not to be the marital guardian of the adulterous child if the child born from the illicit relationship is a woman.

Based on Article 52 paragraph (2) of the Presidential Regulation of the Republic of Indonesia Number 25 of 2008 concerning Requirements and Procedures for Population Registration and Civil Registration, reporting of the birth of children who are not accompanied by a marriage book will still be accepted. Birth registration will still be carried out, meaning that extramarital children do not have problems with birth certificates.<sup>21</sup> So far, the rights of extramarital children related to state administration have been fulfilled. But in some cases, there are rights of children who are deprived of themselves because they are

<sup>19</sup> Mu'ammal Hamidi and Imron A. Manan, *Tafsir Ayat Ahkam* (Surabaya: PT. Bina Ilmu, 2011), 261

<sup>20</sup> Nasaiy Aziz Nasaiy Aziz and Muksal Mina Muksal Mina, "Nasab Anak Yang Lahir Di Luar Nikah: Analisis Fatwa MPU Aceh Nomor 18 Tahun 2015 Dan Keputusan MK Nomor 46/PUU-VIII/2010," *SAMARAH: Jurnal Hukum Keluarga Dan Hukum Islam* 1, no. 1 (July 17, 2017): 72, <https://doi.org/10.22373/sjhk.v1i1.1571>.

<sup>21</sup> Abdul rahaman Ghozali, *Fiqh Munakahat* (Jakarta: Kencana, 2008), 84

born from a wrong act against religious norms and laws committed by their parents,<sup>22</sup> not at all the result of evil acts committed against them. The deprived right is the severance of civil relations with his biological father. The regulation governing this case is Article 43, paragraph (1) of Law Number 1 of 1974 concerning Marriage: "A child born out of wedlock only has a civil relationship with his mother and his mother's family".

Constitutional Court Decision Number 46 / PUU-VIII / 2010 stated in one of its rulings that Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage which says, "A child born out of wedlock only has a civil relationship with his mother and his mother's family", has no binding legal force as long as it is interpreted to eliminate civil relations with men that can be proven based on science and technology and/or other evidence According to the law,<sup>23</sup> it turns out to have a blood relationship as his father, so the verse must read, "A child born out of wedlock has a civil relationship with his mother and his mother's family and with a man as his father which 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". Chief Justice Mahfud MD., stated: that what the assembly meant by the phrase "child out of wedlock" was not the child of adultery, but the child of *a sirri marriage* that was valid according to religion even though it was not recorded. Children born from unions that are not registered and valid according to faith do not contradict the Marriage's nasal, inheritance, and guardian. What the Chairman of the Constitutional Court Mahfud MD said was correct because the Constitutional Court Number 46/PUU-VIII/2012 decision dated February 17, 2012, following Law Number 1 of 1974 Article 2 paragraph 1.

In addition to the two views above, another view is MUI decision Number 11 of 2012 concerning the Position of Children Resulting from Zina and their Treatment of Him. The content of the judgment, as stated in the JUDGMENT section on page 9, ultimately aims to protect the child, not to legalize the sexual relationship between an extramarital child and a man that results in his birth. The following is the content of the MUI ruling regarding children outside Marriage:

1. The adulterous child has no sexual relationship, marital guardian, inheritance, or nafaqah with the man who resulted in his birth.
2. The child of adultery only has a relationship of nasal, inheritance, and nafaqah with his mother and his mother's family.
3. The child of adultery does not bear the sin of adultery committed by the person who resulted in his birth.
4. Adulterers are subject to harsh punishment by the authorities to preserve legitimate offspring (*high alnasl*).
5. The government has the authority to impose ta'zir punishment on adulterers who result in the birth of a child by requiring him to:
  - a. provide for the child's living needs;
  - b. give away property after he dies through a mandatory will.
  - c. The punishment referred to in number 5 aims to protect the child, not to validate the sexual relationship between the child and the man who resulted in his birth.

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<sup>22</sup> Ahmad Syarbaini, "Teori Ta'zir Dalam Hukum Pidana Islam," *Ius Civile: Refleksi Penegakan Hukum Dan Keadilan* 2, no. 2 (April 25, 2019): 1–10, <https://doi.org/10.35308/jic.v2i2.967>.

<sup>23</sup> Muhazir Muhazir, "Islam, Fatwa Dan Negara: Meretas Pluralisme Hukum Perceraian Di Aceh," *Al-Manahij: Jurnal Kajian Hukum Islam* 15, no. 2 (December 1, 2021): 233–48, <https://doi.org/10.24090/mnh.v15i2.5150>.

## The Interconnectedness Between Children's Rights Outside of Marriage: An Analysis from the Perspectives of Islamic and Positive Law

It can be seen that there is a standard view between positive Law and Islamic Law regarding the position and rights of children outside Marriage; the similarity is the disconnection of the adulterous man's fate against his unfaithful child, which causes the absence of mutual inheritance, livelihood and guardianship rights.

In addition to the similarities, there are differences in views between Islamic Law and Positive Law. The differences include:<sup>24</sup>

- a. Islamic Law and positive Law have different terms for defining extramarital children. Islamic Law uses the term adulterous child while positive Law uses extramarital child.
- b. The Criminal Code does not explain the definition of adultery but tends to describe the characteristics of adulterers. The so-called adulterers are those who engage in marital relations, whether married men or women with men or women who are not husbands or wives. From this explanation, a common thread can be drawn that in the Criminal Code, Zina does not apply to those not married, even though they have marital relations intentionally. Islamic Law does not; adultery applies to both married and unmarried people. The terms used in Islam are *zina muhson* and *zina ghair muhson*.
- c. The Marriage of a pregnant woman out of wedlock, given Islamic Law according to the four imams of the madhhab, is divided into two opinions. Imam Hanafi and Imam Shafi'I argued that the Marriage of a pregnant woman is legal because the woman is not classified as a woman who is haram to marry. Meanwhile, Imam Malik and Imam Hambali argue that the Marriage of a pregnant woman is invalid because the woman has a waiting period so that when she wants to carry out the Marriage, it must be ascertained that the child conceived has been born into the world.
- d. Not so with the KHI, which states that marrying a pregnant woman is legal and the Marriage that has taken place does not have to be repeated when the conceived child has been born into the world.

A deep understanding of the meaning of Justice is the basis for understanding what Justice looks like, which will further lead to understanding the theory of Justice in Islam.

The word *al-'adl* has such a broad meaning of the word. Therefore, it contains a variety of meanings. Muhammad Husayn al-Thabathaba'i concluded that fair means consistently moderate and avoiding two extreme positions *if rath* (more) and *tafrith* (less).<sup>25</sup> Al-Raghib al-Isfahani divides Justice into two kinds. *First is absolute Justice, whose judgment is based on reason and universal* because it has not changed and applies throughout the ages. *Second, Justice is established through the provisions of sharia and can undergo changes and cancellations in line with changes in the interests and guidance of the times.*<sup>26</sup>

Justice<sup>27</sup> in Islam is at the forefront, not just in matters of Justice and eroding disputes. But in all cases of state, whether legal, governmental or political.

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<sup>24</sup> Suryati and Teguh Anindito, "Weak Protection of Civil Rights Zina Children in Indonesia," *Islam Universalia: International Journal of Islamic Studies and Social Sciences* 4, no. 1 (2022), <https://doi.org/10.56613/islam-universalia.v4i1.210>.

<sup>25</sup> Hamidi and A. Manan, *Tafsir Ayat Akham*.

<sup>26</sup> Al-Raghib al al-Isfahani, *Mu'jam Mufradat Alfazh Al-Qur'an* (Kairo: Dar al-Katib al-'Arabi, n.d.), 337

<sup>27</sup> There are at least four meanings of justice put forward by religious scholars. The first is fair in the same sense, the second is adul in the balanced sense, the third is that justice is the concern for individual rights and gives them rights to each owner, and the fourth is fair which is attributed to

In the Qur'an, two words generally mean Justice (*al-'adl*). The two words are *Qisth* and *Mizan*. Justice is not only required in matters relating to deeds but is also commanded in speech, that is, for people whose power is related to address, not deeds, or both at once, such as those who serve in public administration, the *muftis* (fatwas-givers), the good-mongers and the owners of the madhhab.<sup>28</sup>

There is a beautiful statement about Justice in the history of Khulafaur Rashidin. During his reign, Caliph Abu Bakr ash-Shiddiq, in his first sermon on Bai'at, said, "Verily, the strongest man among you to me is the weak until I assign rights to him. And that the weakest among you is the strong man by my side until I exercise the right to him". In addition to Caliph Abu Bakr ash-Shiddiq, Caliph Umar bin Khattab once wrote a letter to his governor expressing Justice. The letter's content was as follows; "As for Justice, there is no dispensation therein against near or distant people; in times of difficulty and ease. Justice, though it looks gentle, is stronger, extinguishes tyranny more, and cuts down wickedness more than wickedness". Similarly, Caliph Omar bin Abdul Aziz always tried to apply ideal Justice. One day, Caliph Omar bin Abdul Aziz asked Muhammad bin Ka'ab about the meaning of Justice and Muhammad bin Ka'ab replied: "Justice is to make yourself a father to the little ones, as a child to the elderly, and as a brother to the same age. So it is with women, and punish men according to the degree of their guilt."<sup>29</sup>

Muslim scholars such as Ibn Taymiyyah also spoke about Justice: "Indeed, people do not dispute that the consequences of wickedness are terrible and the consequences of Justice are noble. Therefore, it is narrated that Allah Almighty helps a just State even though it is an infidel State and does not help a zhalim State even though it is an Islamic State". He added, "Justice is the system of all things.<sup>30</sup> If the cause of the world is established with Justice, then he becomes upright even though the culprit has no share in the hereafter, but if Justice is not done, then he will not be upright, even though the doer has faith that will be rewarded in the hereafter".

According to Article 43, paragraph 1 of Law Number 1 of 1974 concerning Marriage, extramarital children do not stand alone; it is closely related to the existence of marriages carried out under Article 2, paragraphs 1 and 2. This Marriage is called outside Marriage because the Marriage was carried out outside the procedure in Article 2, paragraph 2. However, Marriage should not be interpreted as adultery because Marriage that falls into the category of adultery is a marriage that is carried out with the non-fulfilment of the pillars and conditions according to Islamic Law, which results in the disconnection of the child's fate against his male parents so that he is not entitled to inherit each other. Even the Marriage is by article 1 of Law Number 1 of 1974 concerning Marriage. The act of marriage registration does not determine whether or not a marriage is valid but states that it exists and occurs. Thus, a child born from a marriage that is valid according to Islamic Law and not recorded under the Marriage Law does not fall into the category of unfaithful children or children born out of wedlock due to adultery; the child is stillborn from a legal marriage that

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the Divine who has the art of maintaining fairness for the continuation of existence, not preventing the continuation of existence and the acquisition of grace when there are many possibilities for it.

<sup>28</sup> Fuji Rahmadi P, "Teori Keadilan (Theory of Justice)Kajian Dalam Perspektif Filsafat Hukum Islam Dan Barat," *Jurisprudensi: Jurnal Ilmu Syariah, Perundang-Undangan Dan Ekonomi Islam* 10, no. 1 (June 30, 2018): 62–76, <https://doi.org/10.32505/jurisprudensi.v10i1.871>.

<sup>29</sup> Diana Farid et al., "Interfaith Marriage: Subjectivity of the Judge in Determination of No. 454/Pdt.p/2018 Surakarta District Court," *Al-Istinbath: Jurnal Hukum Islam* 7, no. 2 November (December 1, 2022): 347–62.

<sup>30</sup> Iman Jauhari et al., "The Qur'an and Islamic Legal Perspectives on Child Protection," *Pharos Journal of Theology* 104, no. 4 (2023), <https://doi.org/10.46222/pharosjot.104.417>.

Law also protects. The necessity of marriage registration refers more to the legal protection of civil relations arising after Marriage. By being recorded according to laws and regulations, the Marriage has legal force. If the Marriage is not registered, then the Marriage and children born from the Marriage will not get maximum legal protection, guarantees, rights and obligations. The legal consequence caused by the non-registration of a marriage is the non-right of inheritance for children.

## Conclusion

The conclusion of this study is that Islamic law and positive law have their own terms in meaning children resulting from adultery or children outside marriage. Islamic law uses the term adulterous child while positive law uses extramarital child. When viewed from the other side, the positive legal reason for using the term extramarital child and not using the term adulterous child is to avoid forms of discrimination against other religions considering that the term zina is very attached to Islam, while the religion adopted by Indonesian society is diverse, not only Islam. Extramarital children according to article 43 paragraph 1 of Law Number 1 of 1974 concerning Marriage do not stand alone, it is closely related to the existence of marriages carried out under article 2 paragraphs 1 and 2. This marriage is called outside marriage, because the marriage was carried out outside the procedure in article 2 paragraph 2. However, marriage should not be interpreted as adultery, because marriage that falls into the category of adultery is a marriage that is carried out with the non-fulfillment of the pillars and conditions according to Islamic law which results in the disconnection of the child's fate against his male parents so that he is not entitled to inherit each other. Even the marriage is in accordance with article 1 of Law Number 1 of 1974 concerning marriage. The act of marriage registration does not determine whether or not a marriage is valid, but states that it does exist and occur. Thus, a child born from a marriage that is valid according to Islamic law and not recorded under the Marriage Law, does not fall into the category of adulterous children or children born out of wedlock due to adultery, the child is still born from a legal marriage that is also protected by law. The necessity of marriage registration refers more to legal protection of civil relations arising after marriage. By being recorded according to laws and regulations, the marriage has legal force. If the marriage is not recorded, then the marriage and children born from the marriage, will not get maximum legal protection, guarantees, rights and obligations. The legal consequence caused by the non-registration of a marriage is the non-right of inheritance for children.

Nasab a child born from a marriage performed in violation of the pillars and conditions of Islamic marriage is interrupted and impossible to connect because if a child born outside of Islamic marriage is given legal status to the man who caused his birth, then the whole institution of marriage that is so noble will fall apart and this act will tarnish the marriage law. This means that what was originally the way of marriage was the only way to connect the marriage, is no longer valid. The termination of the marriage between the adulterer and his adulterous child is appropriate and in accordance with Islamic law. According to M. Quraish Shihab, religion judges adulterers do not value sperm shed unlawfully, so she is not entitled to honor through the bearing of her name on her child born of adultery. However, from the termination of this fate, it is feared that the adulterer will feel free from punishment for the mistakes he has committed because there is no responsibility to be done to the child who committed adultery.

So the researcher thought of a middle way that could be taken, namely punishing adulterers to remain responsible like parents in general by meeting all the needs of their adulterous children and he was not entitled to the fate of his adulterous children. Thus, the

marriage law will not be tainted and the adulterer's deterrent for his actions will be overcome.

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