

CHILDREN'S SOCIAL RELATIONSHIP OUTSIDE OF MARRIAGE BASED ON ISLAMIC LAW PERSPECTIVE IN POSO DISTRICT

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Received	Revised	Accepted
10 Januari 2022	10 Februari 2022	10 Maret 2022

Abstract:

This paper aims to describe children's social relationship out of marriage based on Islamic law perspective in poso district. The reseach was qualitative approach with the case study. Equality and the difference about the children right protection out of wedlock is the similarity in Islamic law and constitutional law that children out of wedlock have rights from their parents, namely the rights of parental authority, the right to care for and education of children, the right to inherit, and the right to a family name, while the difference lies in the relationship Islamic law argues that children out of wedlock have a civil relationship with their mother and their mother's family, and Constitutional Law argues that children out of wedlock have a civil relationship with their mother and mother's family, and their biological father which can be proven by evidence according to applicable law.

Keywords: children protection right, Islamic law, and marriage system.

Introduction

Every family that lives in this world always expects that family to always live happily, peacefully and prosperously, which is the goal of marriage, namely to form a happy, eternal and prosperous family. From the life of husband and wife in a marital bond, it will have important consequences in society, namely if they are blessed with

offspring, with their offspring can form a family of their own¹. Marriage is a legal bond to foster a happy prosperous household and family where both husband and wife bear the mandate and responsibility, the wife will therefore experience a heavy psychological process, namely pregnancy and childbirth that require sacrifice².

The existence of a child is happiness and prosperity for a mother and her family because children are the fruit of marriage and as the basis of descent. Children as the nature of God Almighty need to get the best care and are the nation's buds who will continue the nation's ideals, namely to create a just and prosperous society. Every child can or is able to assume his responsibilities in the future, it is necessary to get the widest opportunity to grow and develop normally, physically, spiritually and socially.

Children are the hope foundation for the nation future, so if in a generation there are health problems that befall children, the nation will be destroyed in the future. Therefore, Islam warns parents early so as not to leave unqualified generations.³As Allah says in QS An-Nisa' verse 9:

وَلْيَخْشَ الَّذِينَ لَوْ تَرَكَوْا مِنْ خَلْفِهِمْ ذُرِّيَةً ضِعَفًا خَافُوا عَلَيْهِمْ فَلْيَتَّقُوا

اللَّهَ وَلْيَقُولُوا قَوْلًا سَدِيدًا ﴿٩﴾

The translation:

"And fear Allah those who, if they leave behind them weak children, who they worry about (their welfare). Therefore, let them fear Allah and let them speak the truth."⁴

The development of the era and promiscuity among young people, as is happening now often leads to unwanted things, namely the occurrence of pregnancy before marriage is possible. Many mass media cover this issue, which sometimes becomes interesting news. As for what is revealed, there are several cases but there are still many cases that have not reached the editor.⁵

Children are given and mandated from Allah swt, which must be protected because in them there is dignity, dignity and rights as a human being that must be upheld. Children are an asset for every parent and a gift given by Allah SWT that is priceless. Article 28 B paragraph (2) of the 1945 Constitution states that:

"Every child has the right to survive, grow and develop, participate and has the right to protection from acts of violence and discrimination as well as civil rights and freedoms."⁶

¹ Abdullah Nasikh'Ulwan, "Perkawinan (Masalah Orang Muda, Orang Tua Dan Negara)" (Jakarta: Gema Insani Press, 1992).

² Darwis Sadir, "Piagam Madinah (Al-Qanun)," *Jurnal Pemikiran Dan Pembaharuan Hukum Islam* 5, no. 1 (2013): 250–57.

³ Huzaimah T. Yanggo. "Fiqh of Contemporary Women". (Jakarta: Ghalia Indonesia, 2010), p. 148.

⁴ Ministry of Religion RI. "The Qur'an and its translation". (Bandung: Diponegoro, 2005), p. 62.

⁵ Huzaimah T. Yanggo. "Problematics of Contemporary Islamic Law". (Jakarta: PT Pustaka Firdaus, 1995), p. 5.

⁶ 1945 Constitution Article 28 B paragraph (2).

A child who is born is unable to live without the protection and love of his parents. In the normal conditions, a child is born from every married couple so that it does not cause legal problems in their kinship relationship, but if a child is not expected to be born due to a relationship outside a legal marriage, it will tend to be neglected for the child⁷.

In fact, children born outside of legal marriages are often neglected due to the absence of responsibility from the man who caused the birth of the child, in meeting their basic needs, and often the child is considered an illegitimate child and discriminated against because the birth certificate is only attributed to the mother. .

Based on Article 43 paragraph 1 of Law Number 1 of 1974 concerning Marriage, it is explained that an illegitimate child is a child born from an illegitimate marriage and he only has a civil relationship with the mother who gave birth to him or his mother's family. The position of the child outside of marriage will be regulated separately in a government regulation, then Article 44 also states that a husband can deny the validity of a child who has committed adultery and the child is a result of the adultery. The court makes a decision on whether or not a child is legal at the request of an interested party.

In the Compilation of Islamic Law in Indonesia, it is stated that a woman who is pregnant out of wedlock can only marry the man who impregnated her and the marriage can be carried out directly without waiting for the woman to give birth, and no remarriage is required. If the child is born, then the child becomes a legal child.⁸

The implementation of Islamic law in the current socio-political context of Indonesia always invites polemics that not only revolve around technical matters, but also juridical matters. One of the polemics that had given rise to debate was related to religiously legal marriages (hidden marriages) and the position of children from the marriages. As a country where the majority of the population is Muslim, it is undeniable that Islamic law has legality that can be used and juxtaposed with constitutional law.⁹

Islamic law has rules and regulations that absolutely cannot be disturbed for any interest. So that various problems have been arranged neatly in Islamic law. Such is the case with the position of a child. In Islamic law, regardless of how the child was born, he is still entitled to the rights as described in Islamic law, such as the right to maintain religion, lineage, health, reason, and socio-economics.

Islamic law divides children into two categories, namely legitimate children and illegitimate children.¹⁰ A legitimate child is a child born as a result of a legal

⁷ Muhammad Hamsah, Nurhamidah Nurhamidah, and Rasimin Rasimin, "PEMIKIRAN PENDIDIKAN KH AHMAD DAHLAN DAN RELEVANSINYA DENGAN DUNIA PENDIDIKAN MODERN," *Risâlah, Jurnal Pendidikan Dan Studi Islam* 7, no. 2 (2021): 378–90.

⁸ Abdul Manan. "Various Problems of Islamic Civil Law in Indonesia". (Jakarta: Kencana Prenada Media Group, 2006), p. 81.

⁹ Mardani. "Islamic Marriage Law in the Modern Islamic World". (Yogyakarta: Graha Ilmu, 2011), p. 1.

¹⁰ Abdul Manan. "Various Material Law Problems in the Practice of Religious Courts". (Medan: Pustaka Bangsa Press, 2003), p. 102.

marriage according to the Shari'a and its pillars, while an illegitimate child is a child born from an illegitimate marriage (out of wedlock/adultery).

Determination of the child origin in the perspective of Islamic law has a very important meaning, because with that determination can be known the nasab relationship between the child and his father¹¹. Although in essence every child born comes from the sperm of a man and in fact must become the father, Islamic law provides other provisions.

In Islamic law, nasab becomes a very important issue and is studied in relation to the issue of marriage, the obligation to provide a living, inheritance, guardianship of mahram relations, and others. Nasab or kinship between a child and father is only formed in three ways, namely through legal marriage, fasid marriage, and through sexual intercourse in syubhat.¹² While the lineage of a child to his biological mother can be formed through the process of childbirth or birth. Whether birth is syar'i or not. This means that even if a child is born as a result of adultery, it can still be assigned to his biological mother.

Islamic jurisprudence mentions a fairly firm understanding regarding legitimate children. Although there is no clear and unequivocal definition regarding a legitimate child, but departing from the definitions of the verses of the Qur'an and Hadith, it can be stated that a legitimate child is a child born due to and in a legal marriage. In addition, it is called an adulterous child (*walad al-zina*) who only has a kinship relationship with his mother.¹³ With this explanation, it is clear that the adulterous child or child out of wedlock according to Islamic jurisprudence, is only assigned to his mother. This view, as will be seen later, was followed by UUP and KHI.¹⁴

One alternative solution to obtain a nasab relationship between children out of wedlock and their biological fathers is by way of child recognition. The Civil Code regulates the recognition of children in article 280, it is sufficient that the confession is carried out with a unilateral statement from the man who admits it.¹⁵ Another definition is also stated in the Civil Code, according to this Law, "every child who is born or raised during marriage, has the husband as the father". Apart from that, the law also states that the provisions for illegitimate children also state exceptions that designate legitimate children, namely: Except for children who have been conceived in adultery or in discord, each child is produced out of wedlock, with the later marriage of the father or son. the parents before marriage have acknowledged it according to the law or if the acknowledgment is made in the marriage certificate itself. From this article, it can be deduced that a child born as a result of sexual

¹¹ Ali Miftakhu Rosyad and Muhammad Anas Maarif, "PARADIGMA PENDIDIKAN DEMOKRASI DAN PENDIDIKAN ISLAM DALAM MENGHADAPI TANTANGAN GLOBALISASI DI INDONESIA," *Nazhruna: Jurnal Pendidikan Islam* 3, no. 1 (2020): 75–99.

¹² M. Nurul Irfan. "The Lineage and Status of Children in Islamic Law". Issue 2, Cet. 2 (Jakarta: Amzah, 2015), p. 116-117.

¹³ Ibid, h. 277.

¹⁴ Ibid, h. 281.

¹⁵ J Satrio. "Family Law Regarding the Position of Children in the Act". g (Bandung: PT. Citra Aditya Bakti, 2005), p. 113.

intercourse between a girl and a virgin can be recognized as a legitimate child. The child is not considered a child of adultery,

Compilation of Islamic Law Compilation itself does not explicitly regulate the recognition of children. The compilation only regulates the origin of the child which is contained in Article 103 of the Compilation of Islamic Law which reads in full as follows: Article 103 (1) The origin of a child can only be evidenced by a birth certificate or other evidence. (2) If a birth certificate is not available, the Religious Court may issue a determination regarding the origin of a child after conducting a thorough examination based on valid evidence. (3) Based on the decision of the Religious Court, the birth registration agency in the jurisdiction of the Religious Court shall issue a birth certificate for the child concerned.¹⁶

The formulation of legal children in the Islamic Law Compilation is the same as the limitations provided by other laws in force in Indonesia, namely Law Number 1 of 1974 concerning marriage. The point is that as long as the child is born when the father and mother are bound in a legal marriage, then the child is declared a legitimate child.

This condition prompted the Constitutional Court to issue its decision which was in the context of a judicial review of Article 43 paragraph 1 of the Marriage Law. This is done by the Constitutional Court as a way to resolve the issue of legal status and legal protection for a child born outside a legal marriage.

The emergence of the decision of the Constitutional Court No.46/PUU-VIII/2010 was motivated by the case of unregistered marriage (only legally valid) experienced by Aisyah Muchtar who submitted an application to the Constitutional Court to conduct a judicial review of Article 43 paragraph (1) of Law No. 1 of 1974 concerning the lineage of children or the civil ties of children can be attributed to their father, Moerdiono. So that the Constitutional Court partially granted the request and presented a new decision, namely Constitutional Court Decision No.46/PUU-VIII/2010, that:

"A child born out of wedlock has a civil relationship with his mother and his mother's family as well as with a man as his father which can be proven based on science and technology and/or other evidence according to the law to have blood relations, including civil relations with his father's family"¹⁷

However, the decision of the Constitutional Court has in fact caused its own conflict in the eyes of the public, including that the Constitutional Court does not distinguish between children born due to unregistered marriages and children who commit adultery and is contrary to the 1945 Constitution of the Republic of Indonesia as long as it is used to eliminate civil relations with men who which can be proven based on science and technology and/or other evidence according to the law that turns out to be related by blood as his father.

According to the Constitutional Court, Article 43 paragraph (1) of the UUP does not have binding legal force, so based on the decision, the position and rights of

¹⁶Compilation of Islamic Law Article 103.

¹⁷Constitutional Court Decision Number 46/PUU-VIII/2010.

children outside of marriage are included in the rights of biological children in the law of unregistered marriage and have the same rights as the rights of legitimate children.

Meanwhile, the Indonesian Ulema Council as the Islamic Religious Council in Indonesia responded to the decision by issuing fatwa No. 11 of 2012, that children out of wedlock are the same as children born from adultery committed by both parents. The difference in meaning that occurs between the decisions of the Constitutional Court and the Indonesian Ulema Council creates ambiguity regarding the implementation of marriage and the position of adulterous children in Indonesia.¹⁸

Research methods

This article study was a descriptive qualitative method of literature study. The data collection technique is through a literature review such as journals, articles, websites, which are related to the problems that the researcher wants to study. The analytical technique used in this research is the first to group data from books according to the theme then analyzed based on the content and interpreted and then draw conclusions.

Results and Discussion

Children Protection out of Marriage based on Islamic Law and Constitutional Law

Children are the given from God that must be guarded by his parents, every child born has the right to be the obligation of parents to give it. In the Constitutional Law regulated in Law no. 1 of 1974 concerning Marriage, it is distinguished that there are legitimate children and illegitimate children, as regulated in Articles 42 and 43, in Article 42 of the Marriage Law¹⁹, it does not pose a problem for legitimate children in obtaining their rights from their parents, as well as the obligations of parents. parents to their children. Every child who is born into this world, whether it is known as a legal child, an illegitimate child, an adulterous child or a subang child, basically has rights and obligations as legal subjects and has the same position in the eyes of the law.

The obligations of parents as regulated in Article 45 of the Marriage Law which states that both parents are obliged to maintain and educate their children as well as possible, the obligations of the parents in question apply until the child is independent or can stand alone.

In Article 28B paragraph (1) of the 1945 Constitution, the Constitutional Court gives consideration by stating that Article 28B paragraph (2) states "Every child has the right to survive, grow and develop and is entitled to "protection from violence and discrimination" and Article 28B paragraph (1) states "everyone has the right to recognition, guarantee, protection and fair legal certainty and equal treatment before the law". However, according to the Constitutional Court, this right has been

¹⁸Fatwa of the Indonesian Ulema Council Number 11 of 2012 concerning the Position of Children Resulted in Adultery and Treatment of them.

¹⁹ Indonesia, *Undang-Undang Perkawinan* (Pustaka Widyatama, 2004).

impaired due to the enactment of Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law no. 1 of 1974²⁰.

The inhabited people majority in the Indonesia Republic are Muslims with the Imam Syafi'i school of thought, so that Articles 42,43, and 44 of Law Number 1 of 1974 regulate the origin of children based on Islamic law of Madzhab Syafi'i. This is used as the basis for Article 42: "A legitimate child is a child born in or as a result of a legal marriage". In addition, Article 43 reads:

1. Children born out of wedlock only have a civil relationship with their mother and their mother's family.
2. The position of the child referred to in paragraph (1) will then be regulated in the Regulations Government.

Article 44

1. A husband can deny the validity of the child born to his wife if he can prove that his wife has committed adultery and the child is the result of that adultery.
2. The court gives a decision regarding the legality of the child at the request of the party concerned.

Based on the previous article (pasal), it can be understood that a child born from a legal marriage bond is a legitimate child. However, it is not explained about the status of the baby conceived as a result of adultery or the marriage contract is carried out when the prospective bride is pregnant²¹.

Basically, the rights and obligations of children are as regulated in Law Number 23 of 2002 concerning Child Protection Chapter III Articles 4 to 19 and are followed by the obligations and responsibilities of families and parents in Chapter IV, the fourth part. In Article 26 paragraph (1) of Law Number 23 of 2002 it is stated that parents are obliged and responsible for:

1. Nurturing, nurturing, educating and protecting children, growing and developing children according to their abilities, talents and interests and
2. Prevent marriage at the age of children.

Based on first glance, it is understood that children born in marriage will be equated between those born in marriage, and when the marriage contract occurs, pregnancy occurs after the marriage contract, even though the difference is accuracy and by applying the "pregnancy period" limit, can it be associated with men? - known man.

The author's opinion on whether or not a child is legal, as long as the rules or basis used in this case are Article 42 of the Marriage Law, then the article remains a guideline/basic because it is not included in the material for the decision of the Constitutional Court, what differs is the origin of a person. Children born out of wedlock are called natural children. If a child naturally, as the mother's child "alwaladun lil firosy" while in Article 55 of the Marriage Law and Article 103 of the

²⁰ Indonesia.

²¹ Muhammad Hamsah, "Membangun Karakter Bangsa" (Universitas Islam Indonesia, 2018).

compilation regulates the origin of the child can only be proven by a birth certificate or other evidence then if the birth certificate or other evidence then The Religious Courts may issue a determination regarding the origin of a child, after carrying out a thorough examination based on valid evidence.

Relationship Blood as sunatullah is the basis for legal relations which include kinship relations, mahrom, rights and obligations, inheritance, and marriage guardians. The absence of a parent's marital relationship or an unregistered marriage does not erase the blood relationship between the child and his father and his father's family as sunatullah²².

child protection law that applies as constitutional law in Indonesia is only limited to regulating child protection at the conventional level, such as children's rights and obligations, parental care (alimentation) by children, child recognition, child ratification, and others which are generally found in several the legal system according to the Western Civil Law system (KUHP Perdata), the Customary Law system, the Islamic Law system, as well as in various laws and regulations, for example Law no. 1 of 1974 concerning Marriage, Law no. 23 of 2006 concerning Population Administration, and others.

The development of new legal aspects are contemporary regarding children and their legal protection, such as the legal status of children from IVF, and recently the topic of actual concern is the legal protection of children out of wedlock. The legal status of children out of wedlock in the substance of conventional child protection law in the Western Civil Law system (KUHP Perdata), only has a civil relationship with their mother or their mother's family. Law No. 1 of 1974 also stipulates the same, as in its stipulation "Children born out of wedlock only have a civil relationship with their mother and their mother's family" (Article 43 paragraph (1)).

The civil rights of children out of wedlock have a large and widespread influence on the child, because they do not receive legal protection such as child care and welfare, including the child's right to inherit. The position of the child out of wedlock will be a burden to the mother and her mother's family, and the legal status of the child is also not covered by law as in determining the legitimacy of the child such as the status of the child's birth certificate. In fact, in the birth of a child out of wedlock, the child is not sinful at all, but the act of the relationship between his two parents that caused his birth to this earth²³.

In the Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage stipulates that a child out of wedlock automatically has a legal relationship with his mother and his mother's family. In addition, with a legal acknowledgment, a child out of wedlock or a child resulting from adultery can also have a legal relationship with his father. In other words, the legal consequence of the existence of an acknowledgment is the emergence of a limited legal relationship, namely only between the person who admits it, namely the father and the person who is

²² Ali Miftakhu Rosyad, "Urgensi Inovasi Pembelajaran Islam Dalam PAI," *Al-Afkar, Journal for Islamic Studies* 2, no. 1 (2019): 64–86, <https://doi.org/10.5281/zenodo.3553865>.

²³ Anto Kustanto, "PERUBAHAN TATA NILAI SOSIAL DALAM PERSPEKTIF KEWIRAUUSAHAAN DAN USAHA KECIL," *Jurnal Ilmiah Ilmu Hukum QISTIE* 10, no. 2 (2017): 215–24.

recognized, namely the child. The legal relationship is defined as a family relationship and the rights and obligations that arise between a child and his parents. The legal relationship referred to here will bring certain legal consequences, including in terms of:

a. Parental Power

the marriage is a matter that has broad implications in the legal relationship between husband and wife. Thus, a bond of rights and obligations arises to live together and the obligation to take care of the household.²⁴ Obligation to take care of the household referred to here according to the author, including obligations in terms of the exercise of power as a parent.

According to author of this parental power is not only limited to the rights and obligations of the child's personal self but also includes power over the property of the child. Article 307 of the Civil Code states that every parent of authority over a child who is not yet an adult must take care of the child's assets. It is further stipulated in Article 308 of the Civil Code that this parental authority holder must be responsible both for the ownership of the property and for all the results of the goods which he is allowed to enjoy. So according to the author, apart from being responsible for the ownership of the child's assets, parents who are burdened with the obligation to take care of the child are also given the right to enjoy that is to accept and take advantage of the opinion of their immature child.

b. Protection and Education of Children

Based on article 371 paragraph (2) of the Civil Code stipulates that children must be protected for their safety, health and morality. Based on the provisions of the article, the author can conclude that parents have rights and obligations for the maintenance, supervision and education of their children. In addition, Article 45 paragraph (1) of Law Number 1 of 1974 also stipulates that parents have an obligation to maintain and

To educate all their children with the best. The child is legitimate, this maintenance and education must be carried out by both parents of the child, while for a child out of wedlock this maintenance and education is the responsibility of the mother, unless the child out of wedlock has been "recognized" by the father. In this case, the care and education of the child out of wedlock is also the responsibility of the father who admits it. Juridically, the father who recognizes the sak of the child out of wedlock is bound to maintain and educate the legal child he has recognized as a guardian in accordance with the provisions in Article 383 of the Civil Code. The article states that every guardian must provide care and education for the child who is not yet an adult in accordance with his assets, and he must represent him in all civil actions.²⁵

c. Inheritance Right

²⁴Ikin Sadikin,. "Family and Wari Law Questions and Answers". (Bandung: Armico, 1982), p. 2.

²⁵Civil Code. "Code of Civil law". , h. 119.

Basically, those who are entitled to inherit are those who have a relationship with the heir. This is in accordance with the provisions in Article 832 of the Civil Code which states that those who are entitled to become heirs are blood relatives, both legal and out of wedlock and the husband or wife who has lived the longest.²⁶ So in principle, according to the article, for In order to inherit, a person must be related by blood to the heir²⁷. This blood relationship can be divided into legal blood relations and illegitimate blood relations or blood relations outside of marriage. Legitimate blood relations are blood relations that arise as a result of the relationship between a man and a woman and the legal recognition of children.²⁸

For a legitimate child, the right to inherit this he can get directly from his parents. As for children out of wedlock, he only gets this right to inherit from his mother and his mother's family as parties who directly have legal relations with the child out of wedlock. Children out of wedlock can only inherit from their biological father if the father makes a valid confession to him. So in principle, the condition for a child out of wedlock to inherit is that the child must be legally recognized.²⁹ This is in line with the provisions of Article 862 of the Civil Code which Basically it states that children outside of wedlock who have been recognized usually get a share of inheritance from parents who legally recognize them, so specifically for children out of wedlock, the right to inherit can be automatically obtained from his mother and his mother's family, while the right to inherit from his father is only new. he can get if his father recognizes himself as his legitimate child. In other words, a child out of wedlock cannot inherit from a father who disowns him.

Like as previously mentioned, the legal relationship between a child out of wedlock and the father who admits it is limited, in the sense that the relationship only exists between the child out of wedlock and the father who admits it.³⁰ listen Thus, the right of inheritance can only be obtained from the father who admits it. Thus, the author can conclude from what has been explained, it can be said that blood relations which is one of the conditions for someone to be able to inherit is not only a real blood relationship but can also be born with legal recognition of children out of wedlock.

d. Family name

The article 5a The Civil Code states that an illegitimate child who is not recognized by his father uses the name of his mother's lineage. Meanwhile, children are like illegitimate children but have been recognized by their fathers, using the name of the father's descendants.³¹ thus, a legitimate child who has been recognized the father has the right to use the descendant name or family name of the father who acknowledges it, as well as legal children born in legal marriages. As for children out of wedlock who are not or have not been recognized as valid by their

²⁶ *Ibid*, h. 221.

²⁷ Kutbuddin Aibak, *Kajian Fiqh Kontemporer*, vol. 1 (Kalimedia, 2017).

²⁸ J.Satrio. "Inheritance law". (bandung: Alumni Publisher, 1992), p. 29

²⁹ *Ibid*, h. 152.

³⁰ *Ibid*, h. 154-155.

³¹ Civil Code. "Book". h. 4.

fathers, they only have the right to use the family name or the name of their mother's lineage.

The Rights of The Resulted Children from Adultery in Islamic Law Perspective

The originated child's suggestion is to show the existence of a kinship (kinship) relationship with his father. Legitimate children occupy the highest and perfect position (strata) in the eyes of the law compared to children in other groups, because legitimate children have all the rights granted by law, including inheritance rights in the highest rank among heirs. Others, social rights wherein he will get an honorable status in the midst of society, the right of alimentation, the right to get a father's name in a birth certificate and other rights.

About children's rights. There will be a possibility that the child will be born from a relationship outside of marriage. Many factors cause this today, such children are often called "jaddah illegitimate children". An unknown name in people who believe in God. Even though the presence of the child without contact with the marriage that is the cause is "his parents".³²

According to Islamic teaching that every child has a close relationship with his mother and father, so that if one of them dies, one will become the heir to the other.³³ Since children have kinship rights to their parents as a result of marriage, so the word of Allah SWT in the Al-Quran Surah Al-Baqarah verse 233 which is translated as follows:

"... And it is the duty of the father to give food and clothing to the mothers in a right way..." (Al-Baqarah : 233)

According to Islamic view, a child born from a woman's womb has a kinship relationship with the woman who conceived and gave birth to her, regardless of how the woman became pregnant, whether in marriage or adultery. If we use the word "legitimate child" instead of "lineage" then for a mother, every child born to her is a legitimate child, because the kinship relationship between mother and child occurs naturally. Therefore, the scholars have agreed that a child who is born because of a husband and wife relationship in a legal marriage, then the lineage or legal lineage of the child follows his parents. For the problem of adultery children, Islamic law does not limit whether one of the perpetrators of adultery is or both are bound by marriage to another person or not. Because every child born outside a legal marriage, the law of the child is also invalid. Because in Islam what is called *sina* is sexual relations between men and women without being bound by a valid contract.

³²Mulyana W. Kussumah. "Law and the Rights of the Child". (Jakarta: CV. Rajawali, 1986), p.5.

³³Ashhari Abdul Ghoffur, "Islam and Social Problems Around Young People's Association". (Jakarta : Akademika Presindo, 2000), h. 46.

Most of moeslim scholar agree that a child born due to adultery still has a hereditary relationship with the mother³⁴. the result of adultery does not have a lineage from the male side. In the sense that the child does not have a father. Even though the man who adulterated her, admitted that it was her child that was conceived. Still, this confession is invalid, because the child is the result of an extramarital relationship. Because in Islamic Civil Law the status of the child is permanent and cannot be changed because of marriage, so the child is not fathered.

For born child to a woman due to adultery has a kinship relationship with the mother who gave birth to her and with people who are related by lineage to the mother, while with a man who commits adultery with the mother who caused the birth of the child, he does not have a kinship relationship. Thus, the status of the rights of the child in the womb before the marriage, with her husband, is clear, that is, to her mother and not to any man.

Islamic law stipulates that sex outside of marriage, whether committed by a person who has never been married or has never been married, is still called zina. Children born as a result of adultery only have a kinship relationship with the mother who gave birth to them.³⁵

Similarly, it is also emphasized in Article 100 book I of the Marriage Law of the Indonesian Islamic Law that "Children born outside of marriage only have a kinship relationship with their mother and their mother's family.

- a. There is no kinship relationship with his father, but with his mother. In formal juridical terms, the father is not obliged to provide a living for the child out of wedlock, but biologically the child is also his child. This means, kinship relations take place humanely, not legally.
- b. There is no mutual inheritance. Children out of wedlock (zina) only inherit from the mother and the mother's sister and vice versa the mother and sister from the mother inherit the child.
- c. The absence of a guardian from his biological father. If the child out of wedlock happens to be a woman and wants to get married, she is not married by her father but uses a guardian judge³⁶

The children right according to Islamic Law as contained in the Compilation of Islamic Law in principle have the same view as the Marriage Law, because Article 100 of the Compilation of Islamic Law contains a formulation that is not different from Article 43 paragraph (1) of the Marriage Law, where a child out of wedlock only has kinship relationship with his mother and his mother's family. A husband has the right to deny the child born to his wife by confirming it through the li'an institution. Article 102 paragraph (1) of the Compilation of Islamic Law states that:

³⁴ *Ibid*, h. 46.

³⁵ Soedharyo Soimin. "Person Law and Family Law". (Jakarta: Sinar Graphic, 2002), p. 7.

³⁶ The Directorate of Religious Courts Development Team. "Analysis of Islamic Law on Outer Children" *Marry*". (Jakarta : MoRA, 2004) , p 53

"A husband who will deny a child born to his wife, files a lawsuit to the Religious Court within 180 days after the day of his birth or 360 days after the marriage is dissolved or after the husband finds out that his wife has given birth to a child and is in a place where it is possible for him to submit his case to the religious court.."37

A husband who is successful in proving the denial of a child born to his wife will have an impact on the status of the child born as an illegitimate child and will automatically cut off the civil relationship with the father. Article 102 paragraph (1) of the Compilation of Islamic Law above provides a time limit for the husband to file a child denial lawsuit, which is 180 days after the birth of the child or 360 days after the termination of the marriage or the husband finds out that his wife gave birth to a child if the husband's residence is present. possible to file a lawsuit with the Religious Court.

The children right out of wedlock in the Islamic conception must be viewed as a whole, not only limited to the actions of their parents. No one can deny that the act of adultery (intercourse without marital ties) is a major sin, but regarding the child born of this act, it is not appropriate to have to accept punishment for the sins committed by both parents. Because if every child is given the choice of birth, then it is certain that no child will want to be born as a result of adultery.

Most of closed-minded people, who state that children born from illegitimate relationships will still be "illegitimate children" even though in Islamic terminology the term "illegitimate children" has never been known and this will clearly contradict what Allah SWT has said in the Qur'an. Surah Al-Hujurat verse 13 whose translation is as follows:

Truly human, We created you from a male and a female, then We made you into nations and tribes so that you might know one another. Indeed, the most honorable of you in the sight of Allah is the one who is most pious. Really, God All-Knowing, All-Knowing.

Based on the Ayat, we can understand that the Creator himself never classifies humans based on their birth status. The position of man before God is only distinguished by the value of his piety. Islam never teaches that the sins of parents can be passed down to their children or must be borne by their descendants. If a child has been punished as a child born out of wedlock as mentioned above, then there are several legal consequences regarding the rights and obligations between the child, the mother who gave birth to him and his biological father/father, namely:

- a. relationshipn nasab

³⁷DY Witanto. "Family Law, Rights and Position of Children Out of Wedlock". (Jakarta: Achievement Library, 2012), p. 88.

The Article of 100 concerning The Compilation of Islamic Law as already stated, it is stated that children born out of wedlock only have a nasab relationship with their mother and their mother's family. Thus, legally, the child cannot be attributed to his biological father/father, even though in fact the biological father/father is the man who impregnated the woman who gave birth to him.

According to Bagir Manan, if the marriage is legal according to Islam, then all the legal consequences must also be valid. Thus, the position of a child born "out of wedlock" and a child born outside of an Islamic marriage only has a nasab relationship with his mother and his mother's family, according to Article 2 paragraph (1) of Law Number 1974 concerning marriage.³⁸

Eventhought at first glance, it looks inhuman and unbalanced between the burden placed on the shoulders of the mother alone, without connecting it to the man who is the biological father of the child, but this provision is considered to uphold the complaints of the institution of marriage, while at the same time avoiding contamination of the institution of marriage.

b. nafkah

Because of the child status according to the law only has a kinship relationship with his mother and his mother's family only, it is the mother and the mother's family who are obliged to provide a living for the child.

Meanwhilen for the biological father, even though the child is biologically a child derived from his sperm, but in a formal juridical manner as intended by Article 100 of the Compilation of Islamic Law above, there is no legal obligation to provide support to the child. However, the biological father concerned may be subject to ta'zir punishment in the form of the obligation to provide the costs of living, education, health, and others until the child is mature and independent, in addition to the had punishment remains in effect on him.³⁹

It is different from a legitimate child. For legitimate children, fathers are still charged with providing a living for their children, according to their abilities as intended by Article 105 letter (c) and Article 156 letter (d) of the Compilation of Islamic Law.

Eventhough In the life of society, there is also a biological father who provides for such a child, so this is basically only human, not an obligation imposed by law as is the obligation of a father to a legitimate child. Therefore, legally the child is not entitled to demand a living from his biological father⁴⁰.

c. Inheritance Rights

As a further consequence of the nasab relationship as stated above, the child only has an inherited relationship with his mother and his mother's family, as

³⁸Neng Djubaedah, "Adultery in Indonesian Legislation in terms of Islamic Law". (Jakarta: Kencana Prenada Media Group2010), p. 170.

³⁹bids.,

⁴⁰ Soerjono Soekanto, "Hubungan Hukum Adat Dengan Hukum Islam," *Jurnal Hukum & Pembangunan*, 2017, <https://doi.org/10.21143/jhp.vol17.no2.1300>.

emphasized in Article 186 of the Compilation of Islamic Law that children born out of wedlock have an inherited relationship with their mother and family. from his mother's side. Thus, the child legally does not have a legal relationship between inheriting each other with his biological father.

d. Hak Trustee

if one case of the child born as a result of adultery (out of wedlock) turns out to be a woman, and after growing up the child will marry, the biological father has no right or is illegitimate to marry him off (to become a marriage guardian), as stipulated by the marriage guardian. specified in Article 19 of the Compilation of Islamic Law

- 1) Marriage wali is a pillar that must be fulfilled for the prospective bride who acts to marry him.
- 2) The acting as a marriage guardian is a man who
- 3) fulfill The requirements of Islamic law are Muslim, akil and baligh
- 4) My Term the same as the legal provisions for children out of wedlock, as well as the legal status of all children born outside of legal marriage as mentioned above.⁴¹

Article of 20 paragraph (2) of the Compilation of Islamic Law states that marriage consists of a lineage guardian and a judge guardian. Article 21 of the Compilation of Islamic Law then explains about nasab guardians

- (1) The lineage guidance consists of four groups in order of position, one group takes precedence over the other according to whether or not the kinship structure is closely related to the prospective bride.
firstma, the group of male relatives in a straight line up, namely the father, the paternal grandfather and so on. Second, the group of relatives of biological brothers or father brothers, and their male descendants. Third, the uncle's relative group, namely the father's biological brother, his father's brother and their male descendants. Fourth, the group of grandfather's biological brothers, grandfather's half-brothers and their male descendants.
- (2) If the status of the marriage guardian group there are several people who are equally entitled to become guardians, then those who are most entitled to become guardians are those who are closer in degree of kinship to the prospective bride.
- (3) If a group the degree of kinship is the same, then those who are most entitled to become guardians of marriage are biological relatives of relatives who are only the same father.
- (4) If in a group the degree of kinship is the same, namely the same degree of biological or equal rights or the same degree of same-sex relatives, they are equally entitled to become guardians of marriage, with priority to the elder and fulfill the conditions of guardian.

According to Article 23 Compilation of Islamic Law, a new marriage guardian can act as a marriage guardian if it is impossible for the lineage guardian

⁴¹Ibid.,

to avoid him or his place of residence is unknown or unseen or adlal or reluctant. In the event that the guardian is adlal or reluctant, the guardian judge can only act as a marriage guardian after there is a decision by the Religious Courts regarding the guardian⁴².

Islam is the religion of rahmatan lil'alamin which means a religion that gives mercy to all mankind in the world. Although Islam is very strict about adultery as evidenced by the threat of death penalty (stoning) for people who commit adultery muhsan, it does not mean that children born from these actions are equated with their parents who commit adultery. Every child has the same rights before God, the State and the law. Giving restrictions on the rights that should be owned by every human being will not only violate the constitution, but also be contrary to human nature that has been given by God as creatures who have the same position before the Creator yields from the seeds they sow.⁴³

Conclusion

protectionn children resulting from adultery according to Constitutional Law and Islamic Law are constitutional laws regulating child protection at the conventional level, such as children's rights and obligations, child care (alimentation) by parents, child recognition, child ratification, and others, then Islamic law does not discuss the issue of protecting children resulting from adultery which says that children resulting from adultery only have a relationship with their mother, including in terms of protection

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⁴² Ahmad Rofiq, *Hukum Islam Di Indonesia* (RajaGrafindo Persada, 1995).

⁴³ DYWitanto, "Law" ., p. 90.

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