



## Law Regarding the Status of Children Outside of Wedlock: in the Perspective of the Rights of Parents and Children

Ika Anisatul Fatma Fitria<sup>1</sup>, Indryana Widi Ardhianty<sup>1</sup>, Wahyu Nurul Husaini<sup>1\*</sup>, Dian Latifiani<sup>1</sup>, Muhammad Adymas Hikhal Fikri<sup>1</sup>

<sup>1</sup>Faculty of Law, Universitas Negeri Semarang, Semarang, Indonesia

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#### \*Corresponding author:

Wahyu Nurul Husaini

#### E-mail address:

[wahyunurulhusaini@students.unnes.ac.id](mailto:wahyunurulhusaini@students.unnes.ac.id)

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### ABSTRACT

The Indonesian state, as stated in the 1945 Constitution, initially declared itself a legal state before undergoing amendments. After the amendment, the statement changed to "Indonesia is a state of law." This means that every action taken by the government or state must comply with the legal provisions in force in Indonesia. The principle of the rule of law is regulated in the 1945 Constitution, Article 1 Paragraph (3), both before and after the amendment, indicating that Indonesia is a country based on law. Indonesian law also regulates the rights and obligations of parents in the modern era. The development of modern society brings changes in interpersonal relationships, especially in the family context. The main issue that emerged was regarding the status of children born out of wedlock, reflecting shifts in social values and raising complex legal questions regarding the rights of parents and children. With the significant increase in the number of children born outside of marriage, there is a need to review the legal system that regulates the status of children outside of marriage. The primary focus is on the parents' and children's rights perspective, with attention to child recognition, custody, and financial responsibilities.

### 1. Introduction

Our country, namely the country of Indonesia, is a rule of law state stated in the 1945 Constitution, which before the amendment to the 1945 Constitution read, "Indonesia is a country based on the rule of law," and the sound of the 1945 Constitution after the amendment was changed to read "The Indonesian state is a state of law." The meaning of Indonesia, which is a country of law, is that everything done by both the government and the state must be in accordance with the laws that apply in Indonesia. Term The Indonesian state is a state based on its own laws, as stated in the 1945 Constitution, article 1 paragraph (3), as already states amended nor not yet amended because both have the same hierarchy, namely showing that Indonesia is a legal state.

In Indonesia itself, there are two known general laws, namely criminal law and civil law. Criminal law itself is a law that contains laws of punishment, and civil law is the law that regulates private law between individuals and individuals and legal entities and legal entities, or it can also be individuals and legal entities that regulate the relationship between both of them, which has its limitations. Indonesian civil law itself contains marriage law, family law, inheritance law, contract law, and others. The civil law that applies in Indonesia itself comes from 3 sources of law, namely the Civil Code, the Compilation of Islamic Law, and the Customary Law that applies in that region of Indonesia.

Indonesian law also regulates child rights and the obligations of parents in this modern era. The

development and evolution of modern society have brought about significant changes in relationship patterns, especially in a family context. One of the main concerns is regarding the status of children born outside of marriage. This phenomenon not only reflects a shift in social values but also raises complex legal questions regarding the rights of parents and children.

Everyone definitely has aspirations and desires to get married and form a prosperous and happy family, which in general terms is referred to as a family that is "mawadah, sakinah, and warahmah," as well as having children who are physically and mentally healthy. It shows the universal desire to have harmonious relationships and happy families. However, in Indonesia itself, there are many cases of early marriage, even though Law Number 1 of 1974 stipulates that marriage can only be permitted if the man is 19 years old and the woman is 16 years old. This is why many women become pregnant because they have not received marriage dispensation.

In recent years, there has been a significant increase in the number of children born out of wedlock. This could be caused by changes in social norms, liberalization of society's views on relationships outside marriage, or other factors that influence family dynamics. The impact of this situation shows the need to review the legal system that regulates the status of children outside of marriage, especially from the perspective of the rights of parents and children.

Laws regulating the status of children outside of marriage are increasingly becoming an important issue, considering the serious consequences related to the rights and obligations of parents and the rights of children. Legal questions arise regarding child recognition, custody, and financial responsibility, which require a deep understanding of human values, justice, and family welfare. This study presents various legal aspects related to the status of children outside of marriage, with a focus on the perspective of parental and child rights.

## **Legal status of children outside of marriage and impact**

In Indonesia, the Child Protection Law, which is considered a positive law, regulates child protection only in a traditional context. This includes the rights and obligations of children, recognition and recognition of children, parental obligations in caring for children (nutrition), etc., and is usually regulated by various legal systems, such as Western civil law (KUHPerdota) and customary law, including aspects of Islamic law and aspects of many other laws such as Law no. 1 of 1974 concerning Marriage and Law no. 23 of 2006 concerning population administration. Based on the Marriage Law, children are divided into two categories, namely legitimate children and illegitimate children. A legitimate child is a child born from a valid marriage, and an illegitimate child is a child born from a valid marriage. Children who are classified as illegitimate children have a civil legal relationship only with their mother and family. Therefore, they do not have a formal legal relationship with their father, including support, educational obligations, or even inheritance rights.

In several legal regulations in Indonesia, it can be seen that there are several types of terms for children: legitimate children, illegitimate children, adulterous children, incestuous children, adopted children, and stepchildren. In Indonesia, the term "child" has different legal views and connotations, so it has an impact on the legal status of a child (M. Anshary 2014). According to Abdul Manan (2006), an illegitimate child is a child born to a woman, but the woman is not in a legal marriage with the man who has sex with her. From the perspective of Islamic law, marriages that fulfill the marriage requirements, namely the contract, two marriage witnesses, and the marriage guardian, are considered valid. The position referred to in Articles 42 and 43 of Law Number 1 of 1974 concerning Marriage, especially in relation to one's father, is a problem. In general, it is not too difficult for mothers to find out who the mother of an illegitimate child is. In the case of children outside of marriage, the child has no legal relationship with his biological father.<sup>1</sup>

Based on Law No. 1, regarding marriage, divides the position of children into two groups, namely: 1) Legitimate children, according to article 42, are children born in or as a result of a valid marriage. 2) Children born outside of marriage, based on Article 43 paragraph (1), means that children born outside of marriage only have a civil relationship with their mother and their mother's family. This means that the child has no legal relationship with his biological father, either in terms of education or inheritance.

Based on the provisions contained in the Law, it explains that an illegitimate child only has a legal relationship with his mother and his mother's family. This means that the child is under the guardianship and supervision of his mother. So the mother has the obligation to look after and educate the child, then also has the right to receive the inheritance that exists between the mother and child and the mother and child's family.

The principles underlying the provisions regarding the Marriage Law can be found in the principles of customary law. It can be explained that the birth of a child cannot be denied if the child is a child who came from the mother's womb. The child has civil ties with the parents who gave birth to him and the family of the mother who gave birth to him but has no civil ties with his biological father.<sup>2</sup>

One example of the impact of children outside of marriage is discrimination that cannot be avoided in civil matters. The birth certificate of an illegitimate child does not contain complete information where the father's name is not included, and this will have an impact on the social life of the child and the mother. The result of this unclear status is that the relationship between the child and his/her father is not strong, so the biological father of the illegitimate child can deny his/her existence.<sup>3</sup>

This discriminatory treatment of children outside of marriage is not in accordance with human rights principles. In Article 1 of the Universal Declaration of Human Rights, it is explained that all individuals are born with the same dignity and rights.<sup>4</sup> Then, in Article 2, it is explained that everyone has the right to all the freedoms contained in the Universal Declaration of Human Rights without any exceptions.<sup>5</sup> It can be

concluded that all children, born out of wedlock or within marriage, must receive the same and equal social protection.<sup>6</sup>

To protect the rights of children outside of marriage in Indonesia, it was decided on Monday, February 13<sup>th</sup>, 2012, Constitutional Court Decision Number 46/PUU-VIII/2010 submitted by Hj. Machicha Mochtar. The Constitutional Court's decision states that Article 43 paragraph (1) is contrary to the 1945 Constitution, which eliminates civil relations with fathers who are related by blood, so the paragraph must be read, "Children born out of wedlock have a civil relationship with their mother and their mother's family and with a man as their father who can be proven based on science and technology and/or other evidence according to the law to have a blood relationship, including a civil relationship with their father's family."<sup>7</sup>

The legal impact of this decision is whether there is a civil relationship between an illegitimate child and his biological father. This decision has consequences for the relationship of children born from a serial marriage to their biological father. Rights and obligations cannot be separated between the biological father and his child in terms of inheritance, finances, and other matters. This can happen if there is scientific evidence from a DNA test that states that the child is related to the father by blood.<sup>8</sup> This means that the child can have a civil relationship with his biological father.

### **The implementation of legal policies regarding children outside of marriage affects daily life in the family and in society**

Several regulations in the positive law system in Indonesia determine and manage the legal position of a child based on the marital status of both parents. If the marriage occurs and is recognized as valid, then the children born from the marriage will be recognized as legitimate children. Recognition of a child occurs when a woman gives birth to a child without marriage, and a man is willing to recognize the child as his own with the consent of the mother. It is important to note that if the mother does not acknowledge that the man is the father of her child, recognition of the child will

not occur, and the status of the child born out of wedlock remains unchanged.<sup>9-11</sup>

In situations where children are out of wedlock, the negative stigma associated with children can hinder their mental and emotional development. Legally, children born from relationships other than legal marriage only have a blood and civil relationship with their mother. This means that the man responsible for the birth is freed from all obligations towards the child. Meanwhile, children can suffer negative psychological impacts and exclusion from society, as well as difficulties related to the costs of education, health, and ongoing physical and mental well-being.<sup>12-14</sup>

The Constitutional Court issued decision Number 46/PUU-VIII/2010 on 27 February 2012 regarding the recognition of children or the status of children born outside of marriage, where the child's civil legal rights are given to their biological father. In its considerations, the Constitutional Court reviewed the provisions of Article 43 paragraph (1) of the Marriage Law Number 1 of 1974. In its decision, the Constitutional Court stated that children born outside of marriage have a civil legal bond with their mother and the mother's family and have a civil law relationship with their father. This confession can be strengthened through scientific and technological evidence, as well as other evidence in accordance with the law, which shows a blood relationship with his father's family.

On closer inspection, this decision shows inconsistency with *hifz an-nasl*. This is because giving status and civil rights to children outside of marriage can affect the dignity of the *nasab* as regulated by Sharia law. However, ignoring children's rights can also be considered a violation of human rights and, in certain contexts, can be contrary to principle *hifz an nafs*. As a result, a more in-depth and comprehensive interpretation is needed through an integrated and not partial *maqashid sharia* legal *istinbath* process. This process will make the law acceptable to the five *maqashid* of Sharia. So as not to interfere with Islamic marriage rules, child protection should not be used to ignore family protection.<sup>15-17</sup>

Children born out of wedlock are basically unaware of this situation and are born pure and without sin. If

we consider the perspective of sin, actually, the sin should be borne by the parents involved in the relationship, not by the child born as a result of promiscuity or similar situations. There are no regulations that specifically accommodate the rights of children outside of marriage based on certain categories. MUI Fatwa No. 11 of 2012 concerning the status of adultery children and their treatment can be used as an ideal reference if studied further. In accordance with the provisions of Islamic law, this fatwa does not grant status or civil rights to children born from adulterous relationships. On the other hand, the civil rights of children outside of marriage can be fulfilled through the institution of *ta'zir*, which involves covering the child's living expenses and a mandatory will for his benefit. Court decisions can fulfill these limited children's rights with the judge's discretion and wisdom.<sup>18</sup>

Many children still have protection rights that are not fulfilled by their parents, child welfare institutions, schools, and other child protection institutions. This situation is caused by the limitations of both parents and the institutions responsible for their care. The limitations of this institution can be seen from the limited allocation of human resources (quantity and quality), infrastructure, and funding. Responding to challenges and problems related to child welfare and protection, relevant ministries and institutions have issued various guidelines. However, these steps are not yet fully aligned, and their implementation remains difficult. Moreover, not all national policies are written and implemented in the form of regional regulations, programs, or real activities.

## **2. Conclusion**

The child protection laws that apply in Indonesia are limited to conventional regulations, covering the rights and obligations of children, parental care responsibilities, child recognition, and other aspects regulated in various legal systems. The Marriage Law groups children into two categories, namely legitimate children and illegitimate children. Illegitimate children only have civil ties with their mother and their mother's family, without formal ties with their father, including inheritance rights. Various terms such as

legitimate children, illegitimate children, adulterous children, incompatible children, adopted children, and stepchildren have different legal interpretations and connotations, influencing the position of children from a legal perspective.

Constitutional Court Decision Number 46/PUU-VIII/2010 grants civil rights to illegitimate children with their biological father, depending on scientific and technological evidence showing blood relations. Implementation of this policy has the potential to change the dynamics of the relationship between a child and his biological father, including rights and obligations such as inheritance and financial rights. The positive impact involves eliminating discrimination in civil matters, although there are still challenges related to the social stigmatization of children outside of marriage.

Children born outside of marriage face significant impacts in various aspects, including social, psychological, and economic aspects. This includes stigmatization, difficulties with education and health costs, and unclear status in official documents such as birth certificates. To increase awareness of children's rights and achieve equal social protection, policy implementation must pay attention to the balance between family protection and children's rights.

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