

## ANALYSIS OF PHILOSOPHICAL, SOCIOLOGICAL AND JURIDICAL BASIS PROTECTION OF CIVIL RIGHTS CHILDREN BORN OUTSIDE OF MARRIAGE IN INDONESIA

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### ABSTRACT

The issue of protecting children born outside of marriage is still a crucial legal problem in the legal system in Indonesia. This research aims to identify the philosophical, sociological, and juridical foundations for protecting the civil rights of children born outside of marriage and how Islamic law uses the principles of *maqashid al-syariah* to provide a comprehensive legal solution to increase legal protection efforts for the civil rights of children born outside of marriage. This research uses normative legal research methods and analyzes the legal problems of this research from the perspective of *maqashid al-syariah*. The findings show that the protection of the civil rights of children born outside of marriage does not yet have a strong philosophical, sociological, and juridical basis. As one of the legal systems in the legal system in Indonesia, Islamic law regulates that the absence of a birth relationship between children born outside of marriage and their biological father is a form of justice in maintaining the honor and sanctity of every child born. The negative stigma towards children born outside of marriage is only a domino effect from the view of society which considers the act of adultery committed by both parents as a depraved and vile act. Even though children born outside of marriage are not related by birth, their biological father still has a legal obligation to provide support and inheritance through a will or mandatory testament as a form of *ta'zir* punishment. This is following the principles of *Maqashid al-Syariah* to maintain religion (*hifz al-din*), soul (*hifz al-nafs*), and descendants (*hifz al-nasl*).

**Keywords:** Philosophical, sociological and juridical foundations, civil rights, children born outside of marriage, *Maqashid Al-Syariah*.

### INTRODUCTION

Children in a family are a gift and at the same time a trust from the Almighty God whose honor and dignity must always be maintained so that they become the next generation of the nation's ideals of struggle in the future. To form a quality future generation for the nation, the 1945 Constitution, the Human Rights Law, the Child Protection Law, and the Child Welfare Law mandate the importance of protecting children's rights. The government, society, parents, families, and guardians are obliged to guarantee the protection of children's rights so that they

can live, grow, develop, and participate optimally per their human dignity and receive protection from all forms of violence and discrimination.<sup>1</sup>

Furthermore, Law Number 1 of 1974 concerning Marriage (UUP) regulates the obligations of parents to protect children's civil rights. The UUP emphasizes that both parents are obliged to care for and educate their children as well as possible. Parental obligations include the costs of living, housing, household expenses, child care, and education.<sup>2</sup> According to the Compilation of Islamic Law, parents' obligations to care for, maintain, and educate their children apply until the children are adults or able to stand on their own.<sup>3</sup> This obligation remains in effect even if the marriage between the child's parents has broken down.<sup>4</sup> The obligation of parents to provide maintenance costs for their children cannot be ignored even though parental authority has been revoked.<sup>5</sup>

Even though legally children receive protection for their rights in the constitution and statutory regulations, in reality, there are still many cases of violations of children's rights. Based on legal cases regarding violations of children's rights can be seen in the statistical data on child protection cases for 2016-2020 released by the Indonesian Child Protection Commission on 18' May 2021. There were 129 cases of children who were victims of neglect, and 741 cases of children who were victims of problematic parenting. There were 210 cases of children who were victims of not having birth certificates, 914 cases of children who were victims of economic/liquid neglect, and several other cases.<sup>6</sup> KPAI statistical data for 2021 has received 5,953 complaints of cases of violations of children's rights, 2,971 cases of violations of children's rights were recorded, while special protection for children was 2,982 cases.<sup>7</sup> Apart from that, there are several cases regarding lawsuits regarding the civil rights of illegitimate children as a result of adultery and unregistered marriages.<sup>8</sup>

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Various legal facts that trigger various violations of children's rights include children born from sexual relations outside of marriage, children born from unregistered marriages, and children born from unregistered polygamous marriages.<sup>9</sup> Apart from that, many other marriage practices violate the prohibitions on marriage in the UUP which also have the potential to harm the rights of children born from the marriage.<sup>10</sup>

Many of the legal cases that occur are caused by unclear legal substance in statutory regulations which also contributes to the occurrence of these violations. Article 43 paragraph (1) of the UUP states that children outside of marriage only have a civil relationship with their mother. Since the enactment of the UUP, for more than 49 years there have been no implementing regulations governing the civil relations of children outside of marriage. As a result, many children are neglected because they do not receive care and support from their biological fathers. This situation is exacerbated by the absence of legal provisions that regulate the provision of legal sanctions against fathers who neglect their responsibilities.<sup>11</sup>

Even though the Constitutional Court Decision Number 46/PUU-VIII/2010 has changed the norm in Article 43 paragraph (1) of the UUP by repositioning the position of illegitimate children as children who also have a civil relationship with their father as long as it can be proven, the Constitutional Court decision has many pros and cons. contra among legal experts, scholars, and the public. Those who are pro view the Constitutional Court's decision as a revolutionary legal breakthrough that can end the problem of protecting the rights of children outside of marriage.<sup>12</sup> However, some other legal experts, especially Islamic law experts and ulama in Indonesia, view that the Constitutional Court's decision is considered to be contrary to Islamic legal norms.<sup>13</sup> According to Islamic law, illegitimate children have no blood relationship

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with their father.<sup>14</sup> The existence of a family relationship between a child and his father is a prerequisite for the child to have guardianship rights, maintenance rights, inheritance rights and other civil rights from his biological father.<sup>15</sup>

The Constitutional Court's decision has given hope that a guarantee of protection for the rights of children outside of marriage will be realized. However, up to now there are no implementing regulations so there is a legal vacuum which leads to a lack of legal certainty. This can be seen from the disparity in the decisions of court judges, especially between the decisions of District Court Judges and the Religious Court decisions regarding the civil rights of illegitimate children. Many of the District Court Judge's decisions apply the results of the Constitutional Court's decision by granting living rights and inheritance rights to illegitimate children.<sup>16</sup> Meanwhile, the Religious Court Judge granted the claim for alimony and refused to grant inheritance rights to the child resulting from adultery but issued a decision by granting the inheritance through *wasiat wajibah*.<sup>17</sup>

In connection with this research, to emphasize the novelty value that will be produced. Some of the results of previous research include, Some of the results of previous research include, Alfian Qodri Azizi, who attempted to interpret illegitimate children so that they do not conflict with Islamic norms and the benefits of fulfilling civil rights for illegitimate children philosophically and sociologically.<sup>18</sup> Meanwhile, M. Hajir Susanto in his research stated that although according to Islamic civil law, illegitimate children do not have a birth relationship with their biological father, this does not mean that biological fathers in human terms have no responsibility to the

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children born from their seeds.<sup>19</sup> According to Dadan Muttaqien, the Constitutional Court's decision has no force because it contradicts Islamic law.<sup>20</sup> Meanwhile, Abnan Pancasilawati stated that the statutory regulations and Constitutional Court decisions relating to the civil rights of children born outside of marriage have not been fully effective in providing guarantees of protection for the civil rights of children born outside of marriage because they are considered to be contrary to Islamic legal norms and have not been fully supported by law enforcement and legal culture. in society.<sup>21</sup> Wulan Pri Handini believes that the ineffectiveness of the Constitutional Court's decision is influenced by many factors.<sup>22</sup> The success of institutionalizing the Constitutional Court's decision will be partial because it conflicts with these two norms.

Some of these studies, in general, can be said to have similar themes to the study in this article, namely the civil rights of children born outside of marriage. However, some of these studies emphasize the study of legal issues related to juridical problems and the implications of the Constitutional Court's decisions on the position and civil rights of children outside of marriage. Even though Alfian Qodri Azizi has touched on the issue of protecting the rights of children outside of marriage from a philosophical and sociological perspective, his analysis is only linked to the philosophical basis in Article 28 of the 1945 Constitution and does not link it to Article 29 of the 1945 Constitution which also must uphold religious values in regulations. and implementation of the law. The study in this article attempts to elaborate on legal issues more comprehensively regarding the philosophical, sociological and juridical foundations for realizing guaranteed protection for the civil rights of children outside of marriage.

### **CONCEPTION OF MAQASHID AL-SYARI'AH**

*Maqāshid al-syarī'ah* is a concept that is currently widely used by Islamic legal experts to solve new legal problems. The concept of *Maqāshid al-syarī'ah* is the purpose or secret behind the enactment of a law by Allah as the lawmaker.<sup>23</sup> Al-Syatibi in his book *al-Muwafaqat* states that the objectives of *Maqāshid al-syarī'ah* law in Islamic law are to create benefits for humans. The benefit to be achieved is not

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only to realize human benefit in the world, but also benefit in the afterlife.<sup>24</sup> Ibn al-Qayyim al-Jauziyah stated that in essence Maqashid Al-Syari'ah is utilizing and preventing evil with truth, justice, and virtue, as well as explaining road signs that must be obeyed before human reason.<sup>25</sup> Meanwhile, Abdul Wahhab al-Khallaf emphasized that *Maqāṣid al-syarī'ah* protects human interests in their lives by taking what is beneficial and rejecting what is detrimental.<sup>26</sup>

*Maqāṣid al-syarī'ah* is often understood as a method in Islamic law to realize justice and benefit which is not explicitly mentioned in the texts, either the Qur'an or Hadith.<sup>27</sup> Islamic scholars and intellectuals always try to find the meaning of *Maqāṣid al-syarī'ah* in every law established by Allah in the texts so that they can be applied in everyday life when facing contemporary problems. Understanding basic laws no longer only relies on semantic studies but also explores the values or wisdom behind these laws. Therefore, contextualization is needed so that laws that are enacted as laws provide benefits to society while still adhering to Sharia principles.<sup>28</sup>

Al-Syatibi further divided basic human interests in life into three things, namely the protection of primary needs (*dharuriyyah*), secondary needs (*hajiyyah*), and tertiary needs (*tahsiniyyah*) which are very important.<sup>29</sup> If these interests or needs are met then human benefit will be realized. In al-Syâtibî's conception, *Maqāṣid al-syarī'ah* is directed at protecting the five basic principles in the objectives of Islamic law (*al-kulliyah al-khamsah*), namely maintaining religion (*hifz al-din*), soul (*hifz al-nafs*), reason (*hifz al-aql*), descendants (*hifz al-nasl*), and property (*hifz al-mal*).<sup>30</sup>

The application of *Maqāṣid al-syarī'ah* in this study is expected to provide a solution to the problem of protecting the rights of children outside of marriage. Protection of the civil rights of children outside of marriage is not only directed at ensuring the protection of the honor of the family or lineage, but also contains the aim of maintaining the religion, soul, mind, and property of children outside of marriage. The results of the study through *maqāṣid al-syarī'ah* analysis are also expected to provide benefits to efforts to realize protection for the civil rights of

children outside of marriage without having to deviate from the principles of Islamic law.

### **Philosophical, Sociological, and Juridical Foundations for Regulation of Civil Rights of Illegal Children**

According to Bagir Manan, there are three main elements for a regulation to have good force, namely having a juridical, sociological, and philosophical basis.<sup>31</sup> Every good piece of legislation must have these three basics. Philosophically, the law must be by the way of life and legal ideals (*Recht Idee*) that apply in Indonesian society. Sociologically, good law is the law that is relevant to the values of justice that grow and develop in society. Meanwhile, juridically, the law created is a good legal product that can provide legal certainty to the entire community.

#### **Philosophical Foundations**

The use of a philosophical basis is very important as a consideration or reason to show that the regulations formed take into account the outlook on life, awareness, and legal ideals (*recht idee*) which include the spiritual atmosphere and philosophy of the Indonesian nation which originates from Pancasila and the Preamble to the 1945 Constitution.<sup>32</sup> Departing from philosophy, therefore every regulation must not conflict with Pancasila and the Preamble to the 1945 Constitution. As the philosophy of the Indonesian nation, Pancasila is a way of life that must be guided by the life of the nation and state. The first principle in Pancasila states "Belief in One Almighty God", containing recognition of the existence of religion as the embodiment of God's will.

This statement was legitimized in the 1945 Constitution as a constitutional basis which in the opening third paragraph emphasized "Indonesia's independence is thanks to the grace of Allah Almighty". This statement explicitly emphasizes that religious values are one of the constitutional foundations in establishing the State and administering government. This also confirms that although Indonesia is not a secular country (separation of state and religion), it is also not a religious state.<sup>33</sup> The relationship between state and religion in Indonesia is symbiotic, having a close relationship in national and state life. Article 29 paragraphs (1) and (2) emphasize that the state is based on the belief in One Almighty God and guarantees that every citizen carries out the teachings of his religion. On this basis, in a broader spectrum, all legal provisions made by the state or government must not conflict with religious

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principles.<sup>34</sup> Any policy that is contrary to the religious principles adopted in Indonesia conflicts with the country's constitution.

Article 28B paragraph 2 of the 1945 Constitution mandates that every child has the right to survival, growth, and development and the right to receive protection from all forms of violence and discrimination. Furthermore, Article 28B paragraph (1) of the 1945 Constitution emphasizes that the right to have true offspring must be obtained through a valid marriage to guarantee protection. A person cannot have children if they do not go through a legal marriage. This is in line with the provisions in Article 28J of the 1945 Constitution which confirms that in exercising their rights, every citizen is obliged to comply with the restrictions stipulated by law to guarantee recognition and respect for the rights and freedoms of other people by moral considerations and values, religion, security, and public order based on law.

The regulation and implementation of human rights in Indonesia boils down to the ideology of Pancasila. In the Pancasila Ideology, humans are placed in the nobility of their honor and dignity as creatures of God Almighty with the awareness to carry out their nature as creatures who believe and are devoted to God Almighty. As a creature of God he has rights and responsibilities in social life.<sup>35</sup> This means that the implementation of human rights in Indonesia is not realized freely, but must pay attention to the restrictions set out in the constitution and laws.<sup>36</sup>

On this philosophical basis, the study of the legal issue of the civil rights of children born outside of marriage cannot be separated from the context of Indonesia as a country that believes in God. Children are a gift and trust from Almighty God. Therefore, by nature, every child is born in a pure state. To maintain purity, every child is born from a sacred bond through a valid marriage. According to Article 2 paragraph (1) of the Marriage Law, a marriage is declared valid if it is carried out by religious law. To guarantee legal protection, Article 2 paragraph (2) of the Marriage Law regulates that marriages must be recorded by a marriage registration agency.<sup>37</sup>

Philosophically, discussions regarding the protection of the civil rights of children born outside of marriage cannot be separated from the legal objectives, namely creating justice, certainty, and legal benefits. Therefore, various regulations regarding the protection of the rights of children born outside of marriage should be pursued to achieve these goals. Justice is the main goal of legal ideals to be

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achieved.<sup>38</sup> Because in essence the law was created to create justice by the adage that states *iustitia fundamentum regnorum*, justice is the highest, fundamental, or absolute value in law.<sup>39</sup>

According to John Rawls, three main factors influence justice in law, namely: balance of justice (*gerechtigheit*), legal certainty (*rechtssicherheit*), and legal usefulness (*zweckmassigkeit*).<sup>40</sup> In consideration of justice, every child should have their rights, including children born outside of marriage. Children born out of wedlock, children born from unregistered marriages, and children resulting from adultery, either as a result of rape or as a result of their parents committing adultery before marriage cannot be held legally responsible for their parent's actions. In principle, every child born remains related by blood or descent to their parents, mother, and father. It is unfair if a father causes an illegitimate child to be born without any legal responsibility for his actions.

This is based on the word of Allah in Surah Azzumar verse 7 which states:

وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَىٰ ثُمَّ إِلَىٰ رَبِّكُم مَّرْجِعُكُمْ فَيُنَبِّئُكُم بِمَا كُنتُمْ تَعْمَلُونَ

Meaning: "A person who sins does not bear the sins of others. Then, to your Lord, you will return, and He will tell you what you have done..."

Apart from that, Rasulullah SAW has also said that every child who is born is essentially pure and sinless, and has not been charged with any responsibility.

كُلُّ مَوْلُودٍ يُوَدُّ عَلَىٰ الْفِطْرَةِ

Meaning: "Every child born is born in fitrah (holy)."

According to Islamic law, for children born out of wedlock, in the sense of children born as a result of adultery, the child has no blood relationship with his or her biological father. In the Hadith narrated by 'Aisyah RA it is stated :

عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا أَنَّهَا قَالَتْ اخْتَصَمَ سَعْدُ بْنُ أَبِي وَقَّاصٍ وَعَبْدُ بْنُ زَمْعَةَ فِي غُلَامٍ فَقَالَ سَعْدٌ هَذَا يَا رَسُولَ اللَّهِ ابْنُ أَخِي عْتَبَةَ بْنِ أَبِي وَقَّاصٍ عَهْدَ إِلَيَّ أَنَّهُ ابْنُهُ أَنْظِرْ إِلَيَّ شَبَّهُهُ وَقَالَ عَبْدُ بْنُ زَمْعَةَ هَذَا أَخِي يَا رَسُولَ اللَّهِ وُلِدَ عَلَيَّ فِرَاشِ أَبِي مِنْ وَوَلِيدَتِهِ فَنَظَرَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ إِلَيَّ شَبَّهُهُ فَرَأَى شَبَهَا بَيْنَنَا بَعْتَبَةَ فَقَالَ هُوَ لَكَ يَا عَبْدُ بْنُ زَمْعَةَ الْوَلَدُ لِلْفِرَاشِ وَلِلْعَاهِرِ الْحَجَرُ وَاحْتَجِبِي مِنْهُ يَا سَوْدَةَ بِنْتَ زَمْعَةَ قَالَتْ فَلَمْ يَرَ سَوْدَةَ قَطُّ (رواه البخارى ومسلم)

'Aisyah ra said: Sa'd ibn Abi Waqqash and Abd ibn Zam'ah fought over a child then Sa'd said: Oh Rasulallah, this child is the child of my brother 'Utbah ibn Abi Waqqash he told me that he is his son, look at the resemblance. 'Abd ibn Zum'ah also said: "This child is my brother, Oh Messenger of Allah, he was born to the owner of my father's mattress (*firasy*) from his mother. Then the Messenger of Allah saw the appearance of the child and he saw a clear resemblance to 'Utbah, then the Messenger said: "This child is your brother, Oh 'Abd ibn Zum'ah." The child is for the owner of the bed/husband of the woman who gave birth (*firasy*) and for the adulterer is (punished) a stone, and wear the hijab from him, Oh Saudah Bint Zam'ah. Aisyah said: she never saw Sauda at all. (HR. Al-Bukhari and Muslim)

The ulama has different opinions regarding the understanding of the hadith above. According to the majority of Ulama, this hadith is the legal basis (*dalil*) that children born outside of marriage in the sense of children resulting from adultery only have a *nasab* relationship with their mother and conversely, The children's *nasab* relationship was severed with their biological father.<sup>41</sup> While some other ulama understand the above hadith differently, according to Ibn Qayyim al-Jawziyyah this hadith cannot be applied to cases of children resulting from adultery. According to him, children born outside of marriage still have a cross-breed relationship with their biological father. In line with the opinion of Hasan al-Bashri, the provision of a child's

relationship outside of marriage with his biological father is applied if the hadd against the perpetrator of adultery is enforced.<sup>42</sup> If the hadd against the perpetrator of adultery is not applied, then the fate of the child resulting from adultery can be linked to both the biological mother and father.<sup>43</sup>

*Nasab* relationships are very important in Islamic law. Interpretation experts interpret *nasab* as kinship, descent, blood relationship between children and their parents.<sup>44</sup> This *nasab* relationship is only created if the child is born as a result of mixing (sexual relations) between a man's sperm and a woman's ovum based on sharia procedures or the result of a legal marriage. *Shahr* (kinship relations due to marriage) is determined by sharia'. Therefore, the *nasab* relationship will emerge with the *shahr*. *Shahr* and *nasab* are a gift from Allah at a high level.<sup>45</sup> Therefore, children born not from a marriage according to sharia cannot be related to their biological father.

The act of adultery committed by a man resulting in the birth of a child is declared to have committed a criminal act (*jarimah*) so that the perpetrator is given criminal sanctions with a hadd penalty. The act of adultery committed by a man causes him to lose his honor. On this basis, the father is considered unworthy of the honor of having a blood-line relationship with a child born in a state of purity without sin.

This is in line with the aim of Islamic law, namely preserving offspring (*hifz al-nasl*) which can be interpreted as respecting the sanctity of children born. In order for the child's purity to be maintained, it is not appropriate to give the child a relationship with his father who has violated religious norms. MUI Fatwa Number: 11 of 2012 concerning the Status of Children resulting from Adultery and Their Treatment which provides for the punishment of *ta'zir* to the biological father with

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the obligation to provide maintenance and obligatory wills to the biological father by the objectives of Islamic law, namely preserving offspring (*hifz al-nasl*).

*Ta'zir* punishment or legal sanctions given by the state through a judge's decision in the justice system so that the rights of children born outside of marriage continue to receive legal protection is part of efforts to realize legal justice. Protection and respect for the human rights of children born outside of marriage is a very important pillar in the rule of law. If in a country, human rights are neglected or violated intentionally and the suffering they cause cannot be dealt with fairly, then the country concerned cannot be called a rule of law country in the true sense.<sup>46</sup>

However, Article 28J of the 1945 Constitution emphasizes that the implementation of human rights is limited by law and every citizen is obliged to comply with the restrictions stipulated by law to guarantee recognition and respect for the rights and freedoms of other people by moral considerations and values, religious values, security, and public order based on law. This means that the implementation of human rights must also take into account the religious values adhered to by the mandate of Article 29 paragraph (2) of the 1945 Constitution which states that the state guarantees every citizen to carry out their religion or belief. According to Hazairin, the implementation of laws in Indonesia must not violate the guarantee of everyone's freedom to practice religious teachings that are officially recognized in Indonesia, Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism.<sup>47</sup> Even though the law regulates the human rights that every person has, in its implementation there are provisions of religious law which sometimes limit the rights of each member of the congregation.

### **Sociological Foundations**

The application of law sociologically through the application of laws that live in society, namely laws that are practiced by society because they are considered good actions for the benefit of society. The sociological basis is based on society's acceptance of the validity of a legal rule, either because of recognition and acceptance by society or because of coercion from authorities or officials.<sup>48</sup>

It is important to use a sociological basis as a consideration or reason that illustrates that regulations are formed to meet the needs of society in various aspects. The sociological basis concerns empirical facts regarding the needs that society demands and the development of problems in society's life which form the basis for the formation of laws and regulations.<sup>49</sup>

As a nation that believes in One Almighty God, Indonesia upholds religious values in public life. According to a religious perspective, every child is born pure and sinless, including children born outside of marriage. Children born outside of marriage or children born not from a valid marriage cannot be held legally responsible for actions committed by their parents. But in reality, there are many cases of children born not as a result of a legal marriage, including children born as a result of adultery, marriages resulting from blood staining or incest, and other non-serious marriages. As a result, the child is considered to be a child born out of wedlock or a child resulting from adultery.

Children born as a result of adultery and children born as a result of marriages that are not valid according to religion are considered a disgrace by some people. As a result, children resulting from adultery often receive negative stigma and discriminatory treatment in society. Legal responsibility should not be placed on the child, but rather on the child's parents who have violated religious norms and legal norms. Despite this, some other communities do not question the existence of children resulting from adultery. Children resulting from adultery are considered to still have the right to be treated the same as other children.<sup>50</sup>

### **Juridical Foundation**

The Indonesian legal system, as a result of its historical development, is pluralistic. Until now, several legal systems have been applied in Indonesia, especially in the field of civil law, namely the Customary Law system, the Islamic Law system, and the Western legal system. The implementation of these three legal systems is a logical consequence of the Pancasila philosophy and the 1945 Constitution which states that the state is based on the belief in One Almighty God and guarantees the freedom of every citizen to practice their religious teachings according to their religious teachings.<sup>51</sup> On this basis, Islamic law can be used as positive law as long as it is applied to citizens who embrace Islam.

An illegitimate child is a child who was not born in or as a result of a valid marriage. According to KHI, children born outside of marriage are children born not from fertilization outside the womb from the sperm and ovum of husband and wife. According to Article 43 paragraph (1) of the UUP, children born outside of marriage only have a civil relationship with their mother and family. However, after Decision Number 46/PUU-VIII/2010 dated 17 February 2012, the Constitutional Court Judge

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changed the norm in Article 43 paragraph (1) by deciding that children born outside of marriage not only have a civil relationship with their mother and family but also with their biological father and his family.

The Constitutional Court's decision not only has implications for the provisions of Article 43 paragraph (1) of the UUP but also affects the legal provisions in the Civil Code and Islamic Family Law which are regulated in the KHI. Some of the legal implications that occur include the right to receive a living, the right to inherit property, and the right to receive marital guardianship if the illegitimate child is a woman, the right to receive other civil rights.

The Constitutional Court's decision is considered to have realized the implementation of protection and legal certainty for children born outside of marriage. The legal politics in the Constitutional Court's decision are based on the principle of "equality before the Law", namely the principle of "equality before the law" contained in UUD 45 Article 28B paragraphs (1) and (2) and Article 28D paragraph (1) which reads: " Everyone has the right to recognition, guarantees, protection, and fair legal certainty as well as an equal treatment before the law." Following the constitutional mandate, all laws and regulations should provide guarantees of fair legal protection and certainty for everyone without privileging people and discriminating against certain people. Thus, every person or child, including children born outside of marriage, is entitled to civil rights like other children.<sup>52</sup>

Even though the Constitutional Court's decision is considered a fundamental legal breakthrough for the development of national family law to provide legal protection for the rights of children born outside of marriage, the Constitutional Court's decision still leaves legal issues that need to be studied in depth and comprehensively. First, viewed from a formal juridical perspective, the Constitutional Court's decision violates the principle of non ultra petita/ultra petitum partium. The Constitutional Court's decisions have granted cases that were not demanded or granted more than what was requested.<sup>53</sup> The proposed judicial review concerns the civil rights of children resulting from unregistered marriages, children born from religiously valid marriages, but who are not registered with the marriage registration agency.

Second, materially juridical. The Constitutional Court's decision stated that the civil relationship between a child and his father is not only based on the birth consequences of marriage but blood relationship which can be based on scientific and technological evidence and/or other legal evidence that proves the existence of

a blood relationship. This has broad implications for children's rights, including children born outside of marriage; including children born as a result of adultery, children resulting from rape, incestuous children or children resulting from consanguineous marriages, children resulting from fertilization outside the womb through test tube babies who are not related to husband and wife, or children born not from a valid marriage. declared to have a civil relationship with his biological father.<sup>54</sup>

Third, if studied in depth, the Constitutional Court's decision has annulled several legal provisions that have been regulated in the Civil Code and Islamic Law. If the blood relationship is based on a marriage relationship or is not linked to the obligations of the (biological) father to fulfill the rights of maintenance (*hadhanah*), child education, and so on, it is not a problem in Islamic law. However, blood relations without a legal marriage are related to blood ties or kinship relations (*nasab*), so this is a very basic problem in Islamic law. The birth of a child should be the result of a valid marriage because it is in line with one of the legal objectives (*Maqashid al-Syari'ah*) of Islam, namely maintaining the sanctity of the institution of marriage as a basis for preserving offspring (*hifz al-nasl*).<sup>55</sup> Meanwhile, children outside of a legal marriage can undermine the legal institution of marriage according to religious norms.

Apart from that, according to Islamic law, a lineage relationship due to a valid marriage is the legal basis for children and fathers to inherit each other's inheritance. On the other hand, children born outside a legal marriage only have an ancestral relationship with the mother and her family, and the child has no ancestral relationship with the biological father.<sup>56</sup> Furthermore, it is stipulated that if the child is a girl, her biological father cannot be a guardian in her marriage. Furthermore, legally speaking, the father has no obligation to support his child.<sup>57</sup>

### **Legal Settlement Efforts to Disputes on the Civil Rights of Children born outside of marriage Viewed from the *Maqashid Al-Syariah* Perspective**

Several legal issues and legal remedies that can be used to ensure legal protection for the rights of children born outside of marriage include the right to know the child's origins, maintenance rights, guardianship rights, and inheritance

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rights. Efforts to fulfill the civil rights of children born outside of marriage can be studied using the *Maqashid al-Syari'ah* theory. *Maqashid al-Syari'ah* is directed to protect the five basic principles in Islamic law (*al-Kulliyah al-Khamsah*), namely maintaining religion (*hifz al-din*), soul (*hifz al-nafs*), reason (*hifz al-aql*), descendants (*hifz al-nasl*), and property (*hifz al-maal*)

First. The right to know the origin. The right to know a child's origins is a child's civil right guaranteed by Law Number 39 of 1999 concerning Human Rights and the Child Protection Law which confirms that every child has the right to know who their parents are. To find out the origin of a child, the UUP and KHI state that the origin of a child can be known with proof of a birth certificate or other evidence made by an authorized official. The Constitutional Court's decision to prove a child's parentage is possible with evidence based on science and technology as well as other legal evidence that can prove the existence of a blood relationship between the child and his father. Thus, children outside of marriage can still have birth certificates like other children.

The fact that many children born outside of marriage do not have birth certificates is due to many reasons, including the complexity of the administrative requirements applied by Disdukcapil in the process of obtaining birth certificates. This is because children born outside of marriage and/or children from unregistered marriages or unregistered marriages do not have marriage certificates. In such cases, legal action can be taken by requesting a determination of the child's origin to the court that has the authority to hear the case.<sup>58</sup> The results of the court's determination regarding the child's origins are the basis for making a birth certificate.<sup>59</sup>

From an Islamic legal perspective, giving a birth certificate to an illegitimate child can be done as a form of protection for the child's rights as long as it is not intended to provide the status of a birth relationship between the child and his biological father. This is because children born outside of marriage still have no blood relationship with their biological father. This *nasab* relationship only arises as a result of a valid marriage. The institution of marriage as a benchmark for *nasab* relationships is precisely to uphold the honor of children born in a pure state.

Giving equal status to children born outside of marriage or children born outside of marriage with legitimate children can be declared unfair. Apart from that, it is not appropriate for a child born in a pure state to be connected to a father who has committed the crime of adultery which is very contrary to religious norms. This is



by *Maqashid al-Syari'ah*, namely to maintain offspring (*hifz al-nasl*). Apart from that, this is also following the objectives of Islamic law, namely *hifz al-din* or maintaining the religious rules adhered to by children as one of the fundamental rights in carrying out religious teachings as emphasized in Article 29 paragraph (2) of the 1945 Constitution.

Second. The child's right to receive maintenance (*hadhanah*). One form of maintenance rights for children is the right to receive support from their parents. The obligation of parents to provide support for children is part of the implementation of the principles and objectives of protection in Article 2 in conjunction with Article 4 of the UUPA, which states that every child has the right to live, grow, and develop.

According to the concept of Islamic law, children born outside of marriage who are not related to their biological father have no right to receive support from their biological father. One of the reasons for this is that the father who had committed adultery with the child's mother was given criminal sanctions, making it impossible for him to carry out his obligation to provide support for his child.<sup>60</sup> However, in the context of the Indonesian nation, where Islamic criminal sanctions are not applied, the obligation to provide maintenance and support can be imposed on the biological father to protect the child's right to live, grow, and develop.

According to MUI Fatwa No. 11 of 2012, providing support for biological fathers for children born outside of marriage is a legal obligation as a punishment for *ta'zir*. This follows the two main principles at once in *Maqashid al-Syari'ah*, namely preserving offspring (*hifz al-nasl*) and preserving the soul (*hifz al-nafs*). The government, through the courts as the executor of judicial power, has the authority to impose a *ta'zir* sentence on the biological father in the form of an obligation to provide support for an illegitimate child.<sup>61</sup> On this basis, biological fathers who do not carry out their legal obligations to provide support for their children born outside of marriage can be sued in court.

Fourth. Marriage guardian rights for girls born outside of marriage. According to Islamic law, the biological father of an illegitimate daughter born as a result of an unregistered marriage can be the child's marriage guardian. Meanwhile, an illegitimate child born as a result of adultery who is declared to have no blood relationship with his or her biological father cannot be the wedlock's guardian for the illegitimate child. This is following the provisions of Article 20 paragraph (2) KHI which states that those who have the right to be marriage guardians are *nasab* guardians or judge

guardians.<sup>62</sup> As a legal solution, an illegitimate child born as a result of adultery can apply for a guardian judge to the Religious Court.

Fifth. Inheritance rights of children born outside of marriage. Inheritance law in Indonesia is still very pluralistic, referring to three inheritance law systems, namely the customary inheritance law system, the Islamic inheritance law system, and the Western civil inheritance law system regulated in the *Burgerlijk Wetboek* (BW). The application of the inheritance law system that will be used in dividing inheritance is influenced by the religion of the testator. For heirs who are non-Muslim, the inheritance provisions in the Civil Code will apply. Meanwhile, if the heir is Muslim, then Islamic inheritance law will apply in the distribution of inherited assets.

Islamic inheritance law regulates one of the reasons why a person gets inheritance rights, namely having a hereditary relationship or blood relationship (*nasab*). Blood ties (*nasab*) arise if the child is born from a valid marriage based on Islamic law. According to the majority of Ulama, they do not have a *nasab* relationship with their biological father, as a result the child has no right to inherit property from the father. This majority view is adopted in the Islamic inheritance law system in Indonesia. According to Article 100 KHI, children born out of wedlock only have a *nasab* relationship with their mother and their mother's family.<sup>63</sup>

However, according to the MUI Ulema Fatwa Number 11 of 2012 concerning the Position of Children Results from Adultery and Their Treatment. Children outside of marriage can be obtained from their biological father through a gift or will. Gifts and wills can be made while the biological father is still alive. Meanwhile, the inheritance rights of children born outside of marriage from their biological father can be obtained through the provision of a mandatory will.

## CONCLUSION

Philosophically, the formation and implementation of legislative regulations must take into account the outlook on life, awareness, and legal ideals (*recht idee*) which include the spiritual atmosphere and philosophy of the Indonesian nation which originates from Pancasila and the Preamble to the 1945 Constitution, one of which is guaranteeing the protection of human rights and freedom to practice religious teachings for its adherents. Islamic law which does not provide for cross-breeding between children born outside of marriage and their biological father is a form of justice in maintaining the honor and sanctity of every child born. Sociologically, the negative stigma towards children born outside of marriage is a domino effect from the view of society which considers the act of adultery committed by both parents as a depraved and vile act. However, legally the biological

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father is still obliged to provide support and inheritance through a mandatory will for children born outside of marriage. This obligation is a form of *ta'zir* punishment against biological fathers who cause children born outside of marriage to be born. The absence of a biological father's relationship with an illegitimate child, the obligation of the biological father to provide support to the illegitimate child, and the giving of the biological father's inheritance to the illegitimate child through a mandatory will following the principles of *Maqashid Al-Syariah* to maintain religion (*hifz al-din*), soul (*hifz al-nafs*), offspring (*hifz al-nasl*).

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