

A COMPARATIVE STUDY OF THE CIVIL RIGHTS OF BIOLOGICAL CHILDREN IN THE PERSPECTIVE OF ISLAMIC LAW AND POSITIVE LAW IN INDONESIA

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ABSTRACT

This study examines the comparison of the civil rights of biological children according to Islamic law and Positive law in Indonesia. The difference of means and perspectives between Islamic Law and Positive Law in Indonesia towards biological children will have an impact on the existence or absence of civil rights for biological children themselves. In Islamic law in Indonesia, biological children only have a nasab relationship with their biological mother and mother's family. But positive law recognizes a civil relationship with both parents and their families. This research was conducted to answer the need for a more comprehensive material legal rule related to the civil rights of biological children, both in Islamic law and positive law in Indonesia, considering the lack of clear regulations and their impact on people's lives. The type of research method used in this study is library research, using qualitative research methodology with four approach models, namely statute approach, conceptual approach, analytical approach and comparative approach. This study yielded two main conclusions: first, biological children in Islamic law have only a civil relationship with their mother and her mother's family. While in Positive law, his status is to have a civil relationship with his father and mother as well as the families of both. Second, in Islamic law, even though a biological child does not have a civil relationship with his biological father, he still has the right to receive living, health, and education expenses as well as the right to obtain property in the form of a mandatory will from his biological father through the institution of *ta'zir*. While in Positive law, biological children get rights like legitimate children.

Keywords : Civil Rights, Biological Child, Islamic Law, Positive Law

ABSTRAK

This study examines the comparison of the civil rights of biological children according to Islamic law and Positive law in Indonesia. The difference in views and perspectives between Islamic Law and Positive Law in Indonesia towards biological children will have an impact on the existence or absence of civil rights for biological children themselves. In Islamic law in Indonesia, biological children only have a nasab relationship with their biological mother and mother's family. In contrast, positive law recognizes a civil relationship with both parents and their families. This research was conducted to answer the need for a more comprehensive material legal rule related to the civil rights of biological children, both in Islamic law and positive law in Indonesia, considering the lack of clear regulations and their impact on people's lives. The type of research method used in this study is *library research*, using qualitative research methodology with four approach models, namely *statute approach*, *conceptual approach*, *analytical approach* and *comparative approach*. This study yielded two main conclusions: *first*, biological children in Islamic law have only a civil relationship with their mother and her mother's family. While in Positive law, his status is to have a civil relationship with his father and mother as well as the families of both. *Second*, in Islamic law, even though a biological child does not have a civil relationship with his biological father, he still has the right to receive living, health, and education expenses as well as the right to obtain property in the form of a mandatory will from his biological father through *the institution of ta'zir*. While in Positive law, biological children get rights like legitimate children.

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INTRODUCTION

Basically, every child born into this world can be sure to have a father and mother, because based on science *Science* and *biology*, a child is formed from meeting him *spermatozoa* with *Ova*, further develops naturally in the most important part of a woman's body called the "womb" (Ani et al., 2021, p. 26). Without the contribution of a father as a representation of men and mothers as representatives of women, there would be no process of conception in the womb of women. *Hatta* The IVF fertilization process definitely requires *spermatozoa* and *Ova*, even though the fertilization process is outside the womb (@humas.fku, 2022). This process is commonly called a biological process, so the child born is called a biological child.

This kind of breeding process does not only occur in humans, but animals also do similar things, so there is no difference between animals and humans in biological activities. Nevertheless, man is *Hayawanu al-Nathiq* (thinking being) and also *Hayawanu al-ijtima'* (makhluk social)(Albina & Aziz, 2021) who have values, morals and responsibilities with each other, so that in order to bind these values, morals and responsibilities to run in an orderly manner and provide benefits to future descendants, humans need marriage as an institution. This marriage is actually a differentiator between humans and animals in continuing to preserve life, so that whatever the religion and whatever the form of culture must have a marriage system as a form of agreement or alliance between men and women, even though the ordinances have differences between religions and each other, between one culture and another.

From the explanation mentioned above, it can be interpreted that marriage is very important for human survival, because that is where values, morals and responsibilities are carried out, so that if viewed from the existence or absence of a marriage, a child born from a biological relationship between a man and a woman can be divided into two, namely: 1) Children born from a legal principle in the form of a marriage bond or can be called a juridical child or a legal child. 2) Children born to a father and mother without a marital bond or called biological children. For juridical children or legal children, there is not much difference between Islamic Law and Positive Law in Indonesia, while for biological children there are different views and perspectives between Islamic Law and Positive Law in Indonesia in responding to it. In Islamic law, biological children only have a nasab (civil) relationship to their mother and their mother's family, while in Positive law, biological children have a civil relationship with their father and mother as well as their father's and mother's family.

The difference in views and perspectives between Islamic Law and Positive Law in Indonesia towards biological children will also have an impact on the existence or absence of civil rights for biological children themselves. In the perspective of Islamic Law, since a biological child does not have a nasab relationship with his biological father, he is not entitled to inheritance or the right to get a marriage guardian from his biological father if the child is his daughter. However, in Positive Law in Indonesia, especially after the Constitutional Court decision Number 46/PUU-VIII/2010, biological children still have civil rights that can be prosecuted through legal channels, especially related to the fulfillment of alimony and responsibilities of their biological father.

In Indonesia, the enforcement of Islamic law is specifically carried out by the Religious Court, while for positive law it is carried out by the District Court. The Religious Court has the authority to absolve the case handled, as well as the District Court has absolute authority related to the case handled, of course it will have implications for the validity of the decisions made by each of the judicial institutions and have an impact on the life of the community at large, especially the Muslim community. This is because the material law applied in the two judicial institutions has different substance and of course will have different legal implications. For this reason, the researcher is interested in conducting research related to this because the possibility of norm conflicts is very large due to the lack of comprehensive rules governing the civil rights of biological children, which results in an overlap of authority between the two courts and various legal implications that will be caused in society.

RESEARCH METHOD

The types of research used in this study are *document study* (document study) or it can also be called *library research* (Literature Research), which is a study that focuses on the analysis or interpretation of written materials based on their context in the library (Abdussamad, 2021). Materials can be in the form of legal texts and other supporting literature. Data from classical fiqh books, Compilation of Islamic Law, legal fatwas issued by the Indonesian Ulema Council, fatwas of religious organizations such as Nahdhatul Ulama, Muhammadiyah and others represent Islamic Law, as well as books that discuss the understanding and interpretation of legal items and articles in laws and regulations in Indonesia represent a positive legal side.

The nature of this research is normative legal research (*normative legal research*), which is a legal research that places law as a system of norms, including principles, norms, rules of laws and regulations, court decisions, agreements and doctrines (teachings) (Fajar ND & Achmad, 2010). In this study, the researcher used several approaches, including the legislative approach (*statute approach*), conceptual approach (*conceptual approach*), Analytical Approach (*analytical approach*) and comparative approach (*comparative approach*) Because to get a normative research it will be more accurate if one or more other approaches are suitable (Ibrahim, 2006).

FINDINGS AND DISCUSSION

In Islamic legal literature, especially in fiqh books or Hadith books, the term is not found “biological child” (The biological child), because this term is a contemporary term that has not been invented before. However, in terms of its meaning in hadith books or fiqh books, “biological child” can be found in the discussion *Haddu al-Zina* And in this chapter it is usually mentioned also about children who are the result of adultery called *waladu al-zina* (Al-Jaziri, 2003) or discussed in the chapter *Scarlet Witch* which also alludes to *waladu al-mula'in* (child of the case *Scarlet Witch*) (Al-Jaziri, 2003).

Term *waladu al-zina* In the hadith we can find in the hadith narrated by *Al-Tirmidhi* (Ma'ruf, 1996) The editorial of which reads as follows:

أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ أَيُّمَا رَجُلٍ عَاهَرَ بَجْرَةً أَوْ أَمَةً فَالْوَلَدُ وَلَدُ زَنَّا لَا يَرِثُ وَلَا يُورَثُ.
(رواه الترميذی)

The Prophet PBUH said, “Any man who commits adultery with a free woman or a slave is a child of **adultery**. la not inherited and not inherited”. (HR. Tirmizi).

In the *Qur'an*, biological activity between a man and a woman outside of marriage is called “adultery” and the person who commits the act is called “*zani*” or “*zaniyah*”. This term can be seen in Surah *Al-Isra'* Verse 32 and *Al-Nur* Verse 3 as follows:

وَلَا تَقْرَبُوا الزَّانِيَ إِنَّهُ كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا

Meaning: “Do not approach adultery. Indeed, it is an abominable deed and the worst way.” (Q.S. 17:32).

الزَّانِي لَا يَنْكِحُ إِلَّا زَانِيَةً أَوْ مُشْرِكَةً وَالزَّانِيَةُ لَا يَنْكِحُهَا إِلَّا زَانٍ أَوْ مُشْرِكٌ وَحُرِّمَ ذَلِكَ عَلَى الْمُؤْمِنِينَ.

It means: “A male adulterer may not marry except with a female adulterer, or with a polytheistic woman, and a female adulterer may not marry except with a polytheistic male or male adulterer and thus it is forbidden for the believers.” (Q.S. 24:3).

In this verse, Muhammad ‘Ali Al-Sabuni and Al-Qurtubi interpret “adultery” As a sexual intercourse between a man and a woman that is not based on the existence of marriage or shubhat marriage (Ma’ruf, 1996). Based on this opinion, intercourse between a man and a woman can be called an act of adultery depending on the existence or absence of a marriage. Wahbah Zuhaily in his book *Fiqhu Al-Islamiy Waadillatuhu* discuss *waladu al-zina* and *waladu al-mula’in* in the chapter of inheritance. He explained that the child *adultery* and children *Scarlet Witch* is a child who does not have a father *Syar’iy* or it can be stated that the child does not have a father juridically (Al-Zuhaily, 1985).

In Indonesia, the term “biological child” or “biological father” became popular after the Constitutional Court issued a decision number 46/PUU-VIII/2010 dated February 17, 2012. In society, this ruling is considered to threaten the institution of marriage and revive the practice of adultery and gathering, because relationships can be determined only by biological relationships without marital ties (Musawwamah, 2013). In response to the controversy in the community, the Indonesian Ulema Council (MUI) has issued Fatwa Number 11 of 2012. The fatwa affirms the position of biological children in Islamic law and the nomenclature used is “child adulterer” or child resulting from adultery not “biological child”. However, the terms adulterous child and biological child in this case have the same meaning and meaning.

Although the biological child (*waladu al-zina*) Born because of the act of adultery, it does not mean that the child born from the act of adultery is also the splash of the sin of his parents, because Islam has declared that every child born into this world is *Fitrah* (holy), a child cannot choose from which womb he will be born, whether from a father and mother who have a valid marriage bond or born from a father and mother who commit adultery. The Prophet PBUH said as narrated by Imam Bukhari (Al-Bukhari, 2002).

قال النبي صلى الله عليه و سلم (كل مولود يولد على الفطرة فأبواه يهودانه أو ينصرانه أو يمجسانه
كمثل البهيمة تنتج البهيمة هل ترى فيها جدعاء).(رواه البخارى)

Meaning: The Prophet (Muhammad) PBUH said: “Every child is born in a state of *fitrah* (purity), then it is his parents who will make the child a Jew, a Christian, or a Magi like a farm animal that gives birth to a farm animal perfectly. Do you see any flaws in him?”. (H.R. Al-Bukhari, Hadith 1385).

The act of adultery is a type of criminal act in Islamic law called *Jarimah*, and the perpetrators deserve the law *Limit* Or *ta'zir* (Muslich, 2006). *Limits* In Islamic law is a punishment that has been prescribed in the Qur'an and Sunnah about its limits, types and amounts, and it is the right of Allah (Surya, 2019). While *ta'zir* The punishment is not determined by the Qur'an and the Sunnah, but the determination is left entirely to the ruler (government) in accordance with the benefit of mankind (Darsi & Husairi, 2018).

The act of adultery has a significant impact on the determination of the fate between the biological child and the father. According to Abu Zahra, the act of adultery cannot be the basis for determining nasab, because nasab is a blessing that is only given in a legitimate relationship. On the other hand, adultery is a despicable act (*jarimah*) who do not deserve favor, but should receive retribution for their transgressions (Zahrah, 1957).

Abu Zahra's words about the act of adultery not determining nasab is also a *kaidah fiqhiyah* with editorial (Adultery does not prove a lineage). Based on this rule, there are two opinions, including: *first*, biological child (*waladu al-zina*) is cut off from either the biological father or the mother who gave birth to him. This opinion is widely held by the Shi'a Imamiyah scholars, including Muflih al-Shaimiri, Al-Syahidu Al-Stani and Al-Muhaqqiq Al-Irdibiliy. *Second*, biological child (*waladu al-zina*) attributed to the mother who gave birth to him not with his biological father. This opinion is famous among the fiqh scholars of the Muslim ummah in addition to the Shia Imamiyah fuqaha (Al-Khasyan, 2020).

The position and status of biological children in Islamic Law in Indonesia can be seen in Article 100 of the Compilation of Islamic Law in Indonesia. In this article, KHI uses the term "child out of wedlock" instead of *waladu al-Zina* (biological child), but nevertheless the researcher argues that what is meant by "child out of wedlock" is *waladu al-zina* (biological child), although there are also interpretations that "child out of wedlock" also includes children born from an unregistered marriage, in the sense that the child is born from a legally valid marriage, However, administratively the state has not been recorded.

In KHI, biological children (*waladu al-zina*) only has a nasab relationship with his mother and his mother's family not with his biological father. This provision shows that KHI prefers the opinion of the majority of fiqh scholars, although there are also references to fiqh books from other madhhabs (COMPILER TEAM, 2011). Similar to KHI, MUI Fatwa Number 11 of 2012 concerning the status and position of biological children also follows the opinion of the majority of scholars, especially the opinions of madzhab scholars of Shafi'i madzhab which is mostly followed by Indonesian Muslims.

A different opinion was expressed by Hasan Al-Basri quoted by Al-Daqilan regarding the status and position of biological children in the event that the mother does not have a marital bond. Al-Basri stated that a biological child whose mother is not married to another person is attributed to his biological father. The same opinion was also expressed by ‘Urwah bin Zubairi and Sulaiman bin Yasar who stated: *“Any man who admits that a child is his child as a result of adultery with the child’s mother, when in fact there is no other man who recognizes the child as his child, then the child is his child”* (Al-Daqilan, 1425).

This opinion is based on arguments including: *first*, the birth of a biological child with his biological father while the mother is not in a marriage bond with another person is an effort to keep the child’s fate from being lost so that he is not harmed and humiliated due to a crime he did not commit. According to him, this is in line with the Qur’an Surah Al-An’am Verse 164 which states that a person will not bear the sins of others. *Second*, the Hadith about (الولد للفراش...) Discussing the determination of *firasy* due to the existence of the cause of *firasy* (marriage), then if a biological child is born to a woman who is not bound by *firasy*, then the hadith cannot be determined in this case, so the biological child should be married to his biological father.

This argument was refuted by Al-Daqilan by stating that *nasab* is maintained based on the *shari’a* according to the methods and postulates determined by Al-Sharia’, excluding adultery which is forbidden. Then the understanding of the hadith of the prophet is weak, not in accordance with the hadith editing, the continuation of the hadith contains a sentence (... And for the prostitute the stone) The meaning is that adulterers are not entitled to a *nasab* but rather *Al-Hajr* (punishment) (Al-Daqilan, 1425).

Regarding this opinion, the researcher agrees more with the opinion contained in the KHI and the MUI Fatwa or with what is explained by Daqilan, in addition to taking the evidence clearly and the argument is more reasonable and stronger because the understanding is not too far from the meaning and intent of the text that has been determined by *the Shari’*, while the opinions expressed by Hasan Al-Bashri, Urwah and Sulaيمان tend to be forced so that there is a contradiction with other postulates.

Regarding humanitarian issues or for the protection and guarantee of life of children born from adultery so that they are not abandoned, it should be rethought by not changing the clear and obvious laws that have been recorded with two sources of Islamic law, namely the Qur’an and Hadith. So the researcher agrees with the law stated by the MUI in its fatwa,

which explains the law about the status and position of biological children as they are even though it looks detrimental to the mother and biological child, on the other hand the fatwa also guarantees the survival of the biological child (*hifdz al-nafs*) through the punishment of *ta'zir* to his biological father in the form of fulfilling the needs of life and giving a mandatory will, because basically the sins committed by his parents should not be a burden on the biological child.

The Position of Biological Children in the Realm of Positive Law in Indonesia

The status of a child in positive law in Indonesia still depends on whether or not there is a marital bond between his parents. If a child is born from a valid marriage, it is referred to as a legal child (juridical child), while a child born out of wedlock is categorized as a biological child. However, biological children are not only caused by an extramarital relationship, but also by marriages that are legally religious or customary, but are not recorded in accordance with the provisions of applicable laws and regulations (Maulina et al., 2013).

Based on articles 250 and 272 of the Civil Code, Kharlie distinguishes children out of wedlock (biological children) into two: a) Children born to a man and a woman who are not bound by a valid marriage such as children resulting from adultery. b) Out-of-wedlock children who are not caused by adultery or incestuous children (Kharlie et al., 2020).

Harun Utuh, as quoted by Siska Lis Sulistiani has almost the same opinion as Kharlie. If the opinion of Harun Utuh is rearranged, children out of wedlock can actually be divided into 3 (three) parts (Siska Lis Sulistiani, 2021): Children born as a result of sexual relations between a man and a woman who are still bound by marriage to another or are called adulterous children; Children born as a result of sexual relations between a man and a woman who have a prohibition on marriage (*incest*), so the child is called a crooked child; and Children born from sexual relations between a man and a woman who are still single and there is no prohibition on marriage.

Of the three types of children out of wedlock mentioned above, based on article 272 of the Civil Code, those who can change their status to juridical children (legal children) are the children listed in letter (c) by using the institution of “recognition”. This is in accordance with the opinion of Siska Lis Sulistiani who states that in civil law in Indonesia, children out of wedlock do not have a civil relationship either with the woman who gave birth to them or with the man who gave birth to them, unless they admit it (Siska Lis Sulistiani, 2021).

Meanwhile, adulterous children and delinquent children cannot change their status to full juridical children (legal children) despite the recognition of their father and mother (Manan, 2008).

Based on the explanation mentioned above, it can be concluded that biological children in a positive legal view are children who have the status of adulterous children, incestuous children, and children out of wedlock who are not recognized by their parents. Adultery in positive law in Indonesia is different from zina referred to in Islamic law, adultery in positive law as stated in article 411 of the Civil Code is called *overspel*, namely intercourse between a man and a woman who are not husband or wife.

Of the three laws and regulations that regulate the civil relationship of biological children (adulterous children, incestuous children and illegitimate children who are not recognized or authorized by their parents) with their mothers and fathers, there are differences, including:

- a. The Civil Code clearly states that biological children do not have a civil relationship with their father and mother.
- b. Meanwhile, the Marriage Law states that biological children only have a civil relationship with their mother and mother's family.
- c. The Constitutional Court's decision instead provides a civil relationship between the biological child and the mother and his mother's family and also has a civil relationship with the father and the father's family which caused the birth of the child.

In the event that there is a difference between one legal norm and another, there are three principles in the law that can be used as a benchmark to assess the applicability of these norms to others, including: first, "*Asas Lex Superior derogat legi inferiori*" which means that the higher law (norm/rule of law) negates the applicability of the lower law. Second "*Lex posterior derogat legi priori*" which means that the new law (norms/legal rules) negates the enactment of the old laws (norms/legal rules). And third, "*lex specialist derogate legi general?*" which means a law (norm/legal rule) that specifically negates the applicability of general laws (Irfani, 2020).

In this case, the Civil Code and the Marriage Law have an equal position as a law, so that the position in the hierarchy of laws and regulations has the same power and does not defeat each other. Although the Civil Code is a translation of *Burgerlijk Wetboek* which took effect during the Dutch rule on May 1, 1848 based on *Official journal* Number 23 of 1847 (Mangara & Al-Djufri, 2022). However, until now the Civil Code is still valid based on Article

II of the Transitional Rules of the Constitution of the Republic of Indonesia in 1945, because there has been no new law to replace its position.

Meanwhile, related to the Constitutional Court's Decision, in accordance with its authority contained in Article 24C paragraph (1) of the 1945 Constitution and strengthened in Article 10 paragraph (1) letter a of Law number 24 of 2003 concerning the Constitutional Court, the Constitutional Court is an institution where laws are tested against the 1945 Constitution (*judicial review*). This authority places the Constitutional Court as the guardian of the constitution (*the guardian of the constitution*), the consequence is that the Constitutional Court functions as an interpreter of the constitution (*the sole interpreter of the constitution*) (MPR RI Review Agency 2017, 2017). Regarding the authority of the Constitutional Court, Jimly Asshiddiqie argued that in every decision on a case submitted to the Constitutional Court, especially in the case of *judicial review* laws against the 1945 Constitution, so in essence the Constitutional Court always carries out constitutional interpretation activities (Palguna, 2021).

Mukhlis et al. argue that the Constitutional Court Decision is a rule that has a role at the same level as the law to be implemented. Because the two can revoke each other's enforcement. However, from legal certainty, the Constitutional Court's decision is higher than the law, because the nature of the Constitutional Court's decision is binding on the subsequent Constitutional Court decision (Mukhlis et al., 2019). Andri Setiawan et al. argue that the Constitutional Court's decision is declarative and constitutional. The Constitutional Court's decision contains a statement about the composition of the law, as well as being able to eliminate the legal situation (*negative legislator*) and create new legal conditions (*positive legislator*) (A. Setiawan et al., 2021).

From some of the opinions mentioned above, it can be concluded that, in terms of the hierarchy of the laws and regulations, the position of the Civil Code, the Marriage Law and the Constitutional Court Decisions have an equal position, so that no one defeats each other's enforcement.

However, from the three legal norms mentioned above, the principle "*Lex posterior derogat legi priori*" should be applied, so that it is the Constitutional Court Decision that should be declared as the latest norm than others, especially since the Constitutional Court's decision comes into effect from the moment after it is read in the plenary session of the reading of the decision which is open to the public. For the decision that grants the application, this means that after the reading of the decision, the provisions of the canceled law no longer apply so that every State administrator and citizen can no longer use it as a legal basis for

policies or actions (Sambuari, 2013). Therefore, based on this reason, positive law recognizes that biological children have a civil relationship with their biological father.

Civil Rights of Biological Children.

The word Civil can formally mean that regulates rights, property, and relationships between people on the basis of logic, while materially it means that regulates rights, property, and relationships between people on material grounds (E. Setiawan, 2023). Taufiq Hidayat Nazar and Nita Rismawati argue that civil rights are rights that govern persons and legal entities as an extension of the concept of one legal subject to another, both in family relations and in public relations (Nazar & Rismawati, 2022). Moreover Robby Bagus Indrawan and Risti Dwi Ramasari stated that civil rights are human rights that are inherent in everyone's individuality. Civil rights are personal human identities that cannot be lost or disappear. This identity will only be lost or disappear if the person concerned dies. Civil rights are different from public rights, public rights exist because they are given by the state, while civil rights are given by nature (Indrawan & Ramasari, 2022).

Based on this explanation, it can be drawn that civil rights can be interpreted as an authority to regulate and/or demand something between a person or legal entity and another, either in family relations or in community relations based on formal and material interests. Every person who is declared to have a civil relationship with another person, especially the civil relationship is determined by law, then of course each of these people has legal rights and if their rights are violated, then the aggrieved party can file a lawsuit against the other.

As previously explained, civil rights are natural, this means that every human child born into the world, by nature he or she has civil rights, especially to both parents who caused him to be born into the world unless his legal interests require otherwise. (R. Subekti & R. Tjitrosudibio, 1992).

Regarding the natural rights of children in Islam, M. Abdul Fatah Santoso has quoted from the thoughts of Hasan bin Khalid Hasan Al-Sindy who divides these rights into three categories (Santoso, 2017): *Social Rights*, Social rights are divided into two categories: *first*, before birth, including the right to have noble parents with character and the right to life of a fetus which should not be aborted for any reason except in certain circumstances that are permitted by the sharia'. *Second*, rights after childbirth include the right to genealogy or nasab, the right to breastfeed and nutrition and the right to be accepted by the Muslim community.

Educational rights. The right to education is divided into six parts: the right to life, the right to public care, the right to socialize Islamic values, the right to basic education, the right to fair and equal treatment and the right to physical education). *Financial rights* include: *nafaqa* and the right to prosperity and inheritance.

Ibrahim Rahmani and Al-Sa'id Abkhathi also divided the natural rights of children into three parts, including (Rahmani & Abkhathi, 2017): *Huququ Al-Thifli Al-Ijtima'iyyati fi Al-Islam* (children's social rights in Islam) include: a) children's rights in survival), children's rights in terms of nasab, children's rights in obtaining a good name, children's rights in obtaining nutrition/breast milk, and children's rights in maintenance. *Huququ Al-Thifli Al-Tarbiyyati fi Al-Islam* includes: children's educational rights related to faith or belief, children's rights related to moral education, children's educational rights related to intelligence, children's educational rights related to children's physicality. *Huququ Al-Thifli Al-Maliyyati fi Al-Islam* (rights of children's property in Islam) include: the rights of children related to maintenance, the right to be treated fairly between the child and his siblings, and the rights of children related to inheritance.

The compilation of Islamic Law, especially in Article 45, states that parents are responsible for maintaining and educating their children until the child is married or independent, even though he or she has been divorced. Children also have the right to have their parents become special marriage guardians for girls, as mentioned in article 21 paragraph 1 of the KHI in Indonesia. In addition, getting an inheritance from their parents is also a child's right as mentioned in article 174 paragraphs (1) and (2) of the KHI in Indonesia. If it is concluded that the natural rights of children in KHI in Indonesia are three, including: the right to maintenance and education, the right to get a guardian from a special marriage for girls and the right to inherited property.

Children's rights as explained above certainly only apply to juridical children, unlike biological children. As previously explained, in Islamic law in Indonesia, biological children have a nasab relationship only with their mother and mother's family, not with their biological father, so they do not have civil rights with their biological father.

However, it is worth considering the MUI Fatwa on the treatment of biological children. Although the MUI firmly states that biological children do not have a civil relationship with their father, they even explain in detail the types include: nasab, guardian marriage, heirs and alimony. However, in order to protect biological children who factually

in Indonesia receive undue treatment, such as biological children who are usually abandoned because they do not get support and inheritance from their biological fathers, and also get stereotype of haram children so that the identity of their biological father is covered up, and many other bad things experienced by biological children in society. Therefore, the Indonesian Ulema Council through its fatwa has concluded a law that has not been found in previous Islamic legal literature, namely that the Government is authorized to impose the punishment of *ta'zir* on adulterous men who result in the birth of children by obliging him to: Meet the child's living needs; and Giving property after he dies through a mandatory will.

Mukti Arto in his article argues that "*Sir'zir*" in the context of the MUI fatwa must be interpreted as an obligation according to the Islamic civil law system so that it can be processed through the civil court, not as a punishment in the criminal law system (*Jinayah*) Islam so that it must be processed through criminal justice. Giving obligations to the biological father to meet the child's living needs also means giving the child the right to receive a guarantee of life needs from his biological father. The relationship of rights and obligations between two persons in the civil law system is part of the civil relationship (Arto, 2013). Furthermore, Mukti Arto explained that the MUI fatwa basically has three objectives, including: To protect law and justice for children born of their fathers; Giving responsibility to the biological father for his actions that gave birth to a child; and It provides a deterrent effect for the perpetrator and also for others not to commit such adultery.

Changes in the law in Islamic law are something that usually happens, because basically the essence of Islamic law, especially in criminal matters, is not retribution, but repentance and forgiveness. One of the hadiths of the Prophet tells about Ma'iz bin Malik who admitted to committing adultery and asked the Prophet for punishment. However, the Prophet ignored the statement of the companion and told him to go home and ask for forgiveness from Allah, although in the end the Prophet sentenced him to stoning for the fourth time (Al-Nisaburiy, 1998). *Case* We can see in the Qur'an Surah Al-Baqarah Verses 178-179, the criminal case of murder, the punishment does not have to be legally jurisprudence in the form of punishment *qisas*, but through the application of *restorative justice* so that the punishment can be in the form of *Düsseldorf* (payment of fines) with certain conditions. This principle is in line with Mukti Arto's opinion regarding the meaning of *ta'zir* mentioned in the MUI fatwa.

From the explanations mentioned above, it can be concluded that the civil rights of biological children against their biological father in Islamic law in Indonesia include: The right to adequate children's living needs is general, so that all children's natural rights in Islamic law related to the needs of life are also included, at least including: children's living expenses, health expenses, and education costs. The right to obtain property through a mandatory will from his biological father who has passed away, Regarding the amount of a mandatory will, it has been regulated in Article 195 Paragraph (2) of the KHI in Indonesia, which is as much as one-third of the inheritance. However, H. Abdul Rasyid As'ad prefers to use the nomenclature of obligatory hibbah on the grounds that it can be fulfilled while the biological father is still alive (As'ad, 2013). According to the researcher, basically the opinion of MUI and As'ad has the same principle, namely giving an obligation to the biological father to provide a maximum of 1/3 of the property owned by his biological father, either through a mandatory will or a mandatory grant with the aim that the biological child has a life guarantee until he grows up.

The Constitutional Court did not state in detail what form of civil relationship a child out of wedlock has with his biological father. However, the norm set by the Constitutional Court is related to the provisions of the marriage law article 43 paragraph (1) of Law Number 1 of 1974 which is the basis for constitutional demands, so that the civil relationship is the same as the civil relationship between the child and the biological mother intended by the marriage law. Civil relations as referred to in Article 43 paragraph (1) of the Civil Code are civil relations that have been used by Article 280 of the Civil Code, namely legal relations that result in the arising of inherent rights and obligations between the child and his father and mother (Baihaki, 2023).

The norm built in the Constitutional Court Decision related to biological children is general, which only explains the civil relationship between the biological child and his father, does not explain further what civil rights the biological child has against his father, so that the norm is difficult to apply in the practical realm. Therefore, the Constitutional Court Decision requires a more detailed and practical explanation norm so that the Constitutional Court Decision is still dependent and related to other laws and regulations that regulate the civil rights of children in general or the civil rights of biological children in particular.

As previously explained, civil rights are natural because they are personal human identities that cannot be lost or disappeared unless the person concerned dies. Regarding the natural rights of children, the State of Indonesia based on the Decree of the President of the

Republic of Indonesia Number 36 of 1990 has ratified the *Convention on the Rights of the Child* established by the United Nations, and based on the principles in the convention, the Child Protection Law Number 23 of 2002 has been born which has been amended twice by Law Number 35 of 2014 and Law Number 17 of 2016. which contains the civil rights of children against their parents, including: 1) The right to self-identity and knowing their parents; 2) The right to obtain upbringing, maintenance, education and protection; and 3) The right not to be determined by blood relationship between the child and his or her biological parents;

Meanwhile, the civil rights of children against their parents according to the Civil Code include: 1) The right to receive alimony, although it is not the same as that of a juridical child (stated in articles 298 and 867 of the Civil Code); 2) The right to get guardianship (stated in article 345 of the Civil Code); 3) The right to manage the child's property (stated in article 307 of the Civil Code); and 4) The right to inheritance (contained in Article 832 of the Civil Code).

In Law Number 1 of 1974, the civil rights of children against their parents can be found in articles 45, 46 and 50, including: 1) The right to maintenance and education from both parents. Even though the parents concerned are deprived of their rights, they are still obliged to provide maintenance costs to the child; 2) Guardianship rights and representation to act legally in or out of court.

From the description mentioned above, the question is whether the civil rights of biological children can be equated with the civil rights of juridical children. Muh. Jufri Ahmad and Fahmi Nabil argued that the Constitutional Court's Decision actually affirmed that the civil rights of children out of wedlock are no different from legal children (juridical children), so in their conclusion it was stated that the child has civil rights as stipulated in the civil rights between father and child mentioned in the Civil Code, such as guardianship rights, maintenance rights and inheritance rights (Ahmad & Nabil, 2022).

Baihaki argued that normatively after the Constitutional Court's decision number 46/PUU-VIII/2010, children born as a result of a relationship between a man and a woman, as long as it can be proven by science or technology, then children outside marriage, whether recognized or not, including children resulting from adultery or blood transfiguration, have a civil relationship with their biological mother and father. This means that legally the child has the right to obtain basic rights to the child, including the right to know the child's origin, the right to receive maintenance and education from his parents including alimony, the right

to be represented in all legal actions in and outside the court and the right to manage the child's property, as well as the right to inherit (Baihaki, 2023).

Taufik Hidayat Nazar and Nita Rismawati argued that the decision of the Constitutional Court can be understood that the relationship between a child out of wedlock and his father is a blood relationship in a biological sense that is confirmed based on legal process. Thus, a biological father cannot refuse to be responsible and provide a decent livelihood or give his rights like legitimate children in general, including the right to know his origin, the right to maintenance and education, the right to be represented in all legal acts in and out of court and the right to take care of the child's property, and the right to inherit (Nazar & Rismawati, 2022b).

In addition, Hijawati and Rizayusmanda stated that the rights and position of out-of-wedlock children towards the inheritance of parents who recognize them and followed by the legalization of children are basically the same as legal children. A recognized and legalized out-of-wedlock child is truly an heir who has the same rights as a child born in a legal marriage. Based on the provisions of Articles 863 to 865 of the Civil Code, the distribution of inheritance based on the heirs has been determined. Likewise, the distribution of land inheritance can be seen from the way it is divided (Hijawati & Rizayusmanda, 2021).

Based on some of the opinions mentioned above, it can be concluded that the civil rights of children that must be fulfilled by their biological fathers and mothers are as stated in the applicable laws and regulations, namely the civil rights of children out of wedlock recognized and ratified by their fathers and mothers whose position is equated with the rights of juridical children (legal children), including: The right to know the origin of the child; The right to maintenance and education from their parents includes alimony; The right to be represented in all legal proceedings in and out of court; The right to manage the child's property; And the right to inheritance.

It has been explained in the previous discussion about the position and civil rights of biological children in Islamic law and Positive law in Indonesia. Of course, the approach used in Islamic law in Indonesia is different from the approach used in Positive law in Indonesia, so the two have different views on this matter.

Conceptually, the status of biological children in Islamic law is determined by the existence of adultery committed by their father and mother and the existence and absence of a valid marriage between the father and mother, so that in Islamic Law biological children are known as *Waladu al-zina*. The act of adultery in Islamic law is the measure of the existence

or absence of a marriage, the meaning is that if a man and a woman have conjugal relations without the existence of a marriage bond, then the act is included in adultery. If the act of adultery gives birth to a child, then the child born is *waladu al-zina* (biological child), unless after committing the act of adultery, the man and woman enter into a valid marriage and the child is born within the minimum gestation specified in Islamic law, which is six months from the time the marriage contract process is carried out (Al-Zuhaily, 1985).

In contrast to the concept of biological children according to Positive Law in Indonesia, there are three types that are declared as biological children in the law, including:

- a. An out-of-wedlock child who is not recognized or endorsed by his father and mother. In positive law, the relationship between husband and wife between a man and a woman outside of marriage does not include an act of adultery (*overspel*) but cohabitation (*kumpul kebo*), so that the child born can possibly become a legitimate child if recognized or legalized. If not, the child remains a biological child.
- b. Children of adultery, the act of adultery in the Positive Law only occurs in couples who have a marriage bond with another person and then have a conjugal relationship with another man or woman. This provision is very different from the act of adultery intended in Islamic Law which focuses on any conjugal relationship outside of marriage, regardless of whether one of them is married or not with another person.
- c. Incest children, in positive law, incest children are absolute as biological children. There are no specific conditions or conditions to change the status of a legal child in this case, whether the child's father and mother know that they have a blood relationship from the beginning or not. This condition is different from Islamic Law which considers the knowledge of the father and mother of the child, whether the two have known the blood relationship between the two before the marriage or at the time of the marriage.

The difference in the concept of interpreting biological children between Islamic Law and Positive Law has implications for the position of biological children towards their biological father and mother. Islamic law is still consistent with an approach focused on moral and religious values. Islamic law still views marriage as the only institution that can guarantee the validity of a child to his parents, because in marriage there is *maqasid al-shari'ah* in the form of *hifz al-nasl* (safeguarding offspring), so Islamic law still views that biological children only have a *nasab* (civil) relationship with their mother and not with their biological

father. This means that the biological child does not have a civil relationship with his biological father in the form of an obligation to provide for each other, the obligation to be a marriage guardian if the biological child is a woman and there is also no law of mutual inheritance between the two.

In contrast to Positive Law in Indonesia, the approach used is more oriented towards the protection of children's rights in the context of legal relations and social welfare. Positive Law does not look at the moral wrongdoing made by parents in determining the status of the biological child's position against his biological mother and father. In determining the civil relationship of biological children, Positive Law only considers parental recognition and marital legality, even the latest developments in positive law are enough to look at the suitability of DNA in the bloodstream flowing in the body of a biological child, whether it is really sourced from his biological mother and father or not, so that the biological child can be declared to have the same civil rights as those owned by the legal child.

The difference in the position of biological children in Islamic law and Positive law in Indonesia can have implications for differences in the application of the law and can even cause legal clashes in the midst of society. The position of biological children who, according to Positive Law, have a civil relationship with their biological father, will have an impact on mutual support status, mutual inheritance, and even the right to become a marital guardian. If viewed from the aspect of child protection, this provision will have a positive impact on the interests of child protection and also social welfare in Indonesia, because with the status of civil relations, biological children already have a guarantee for their future just like legal children in general.

However, on the one hand, this provision will clash with Islamic law which has *de jure* been recognized by the constitution regarding the freedom to practice religious teachings as contained in the 1945 Constitution and Law Number 39 of 1999 concerning Human Rights, and Islamic law itself has been applied in the midst of society as contained in Law Number 3 of 2006 concerning the first amendment to Law Number 7 of 2006 1989 concerning the Religious Court and Law Number 1 of 1974 concerning Marriage, and even the majority of Muslims in Indonesia, which is around eighty percent of the Indonesian people, still recognize and follow the Islamic law. Therefore, this difference in legal status requires legal harmonization efforts to avoid conflicts of norms in society and ensure the sustainability of a fair and inclusive legal system.

In order to harmonize the law, Islamic Law in Indonesia basically recognizes that biological children must be protected from their souls and the certainty of their future in living life, because these actions are in line with one of the *maqasid al-shari'ah* in Islamic law, namely *hifz al-nafs*. It is not appropriate to let biological children struggle alone in navigating their life journey, because in fact biological children are victims of mistakes made by their parents in the form of adultery. This should be done but does not undermine other principles of Islamic law, especially in terms of the provisions of nasab.

In order to do all that, Islamic law in Indonesia has imposed responsibility on his biological father through the punishment *of ta'zir* in the form of paying enough living needs for biological children and biological children also get property in the form of a mandatory will from their biological father. With this, Islamic Law in Indonesia has actually sought to provide protection for the basic rights of biological children in the form of *hifz al-nafs* (safeguarding the soul) without mixing it with the provisions of nasab (civil) relationships. Because the nasab (civil) relationship in Islamic Law can give rise to a reciprocal relationship, the biological father is obliged to provide maintenance to the child, and vice versa the child is obliged to provide support to his father when the father is no longer able to earn a living. The biological father and child will also inherit each other's property and even the biological father has the right to be the guardian of the marriage for his biological daughter who is female, and this is contrary to the principles of Islamic law in terms of nasab. In contrast to *ta'zir*, there is no reciprocal relationship for the fulfillment *of ta'zir*, so the biological child is not obliged to provide maintenance to the biological father when the biological father is no longer able, and the biological father does not get a mandatory will for the property left by the biological child and the biological father is not entitled to be a marriage guardian if the biological child is a girl.

CONCLUSION

From the discussion mentioned above, it can be concluded that biological children in Islamic law in Indonesia are children born from the relationship of a man and a woman without the existence of a marriage bond or an adulterous child (*waladu al-zina*). The position of an adulterous child in Islamic law only has a juridical (civil) relationship with his mother, not with his father. Meanwhile, there are three biological children according to positive law in Indonesia, namely children born out of wedlock without the recognition and endorsement

of their biological parents, adulterous children and *incest* children. The status and position of biological children in positive law in Indonesia is to have a juridical (civil) relationship with their biological mother and father.

Although in Islamic law in Indonesia, biological children do not have a juridical (civil) relationship with their biological father, but on the basis of child protection in the context of *hifz al-nafs*, through *the institution of ta'zir* for the act of adultery committed by biological parents, biological children are entitled to receive sufficient living expenses from their biological father, including the child's living expenses, health expenses, and education costs as well as the right to property through a mandatory will from his deceased biological father. Along with the civil rights of biological children in positive law in Indonesia, they include: The right to know the origin of the child, the right to receive maintenance and education from their parents including maintenance, the right to be represented in all legal acts inside and outside the court, the right to manage the child's property and the right to inheritance.

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