

The Position of Children from Unsecured Marriages in The Distribution of Inheritance: A Study of National Civil Law and Islamic Law

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Received: 3 May 2025

Revised: 12 May 2025

Accepted: 21 May 2025

Published: 28 May 2025

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Abstrak: *Unregistered marriages that are religiously valid but not registered by the state often raise issues regarding the status of children in inheritance. This phenomenon is increasing in society, but has not been balanced by an adequate understanding of the legal consequences for the status of children. This study uses a normative juridical method with a statutory regulatory approach and a comparison between National Civil Law and Islamic Law. The results show that in National Civil Law (Marriage Law and Civil Code), children from unregistered marriages are categorized as illegitimate children and only have a civil relationship with the mother, unless there is evidence and a court ruling. Constitutional Court Decision No. 46/PUU-VIII/2010 expands the civil relationship with the biological father, but its application still relies on formal evidence so that children's access to inheritance rights is still indirect. In contrast, in Islamic Law and the Compilation of Islamic Law, the validity of a marriage is determined by the fulfillment of the pillars and requirements of religion; children from unregistered marriages are considered legitimate children and automatically have a lineage relationship and inheritance rights to the father based on the principle of al-walad lil-firāsy. Thus, there appears to be a disharmony: Civil Law prioritizes administrative certainty, while Islamic Law prioritizes substantive justice and the protection of children's rights.*

Keywords: *Children; Siri Marriage; Inheritance; Civil Law; Islamic Law*

INTRODUCTION

In the Indonesian legal system, marriage is not only understood as a physical and spiritual bond, but also as a legal institution that has legal consequences for the parties and their children. Law Number 1 of 1974 concerning Marriage states that the purpose of marriage is to form a happy and eternal family based on the One Almighty God. This means that marriage is not merely a private relationship, but has a public character that requires state involvement through a registration mechanism as an administrative requirement.¹ This registration provision emphasizes that the recognition of civil relationships within the family is

determined not only by religious validity but also by state legality, especially to provide legal certainty regarding the status of children, husband-wife relationships, and other civil rights.

Regulations regarding marriage registration have direct consequences for the legal status of children. Articles 42 and 43 of the Marriage Law stipulate that legitimate children are those born in or as a result of a legal marriage. Prior to Constitutional Court Decision No. 46/PUU-VIII/2010, illegitimate children only had a civil relationship with their mother and her mother's family.² This norm

¹ Kurniawan, Ardian, et al. "Pencatatan Perkawinan dan Sanksi Hukumnya: Studi Kritis Terhadap Asas Kepastian, Keadilan, dan Kemanfaatan." *Al-Mizan (e-Journal)* 21.1 (2025): 127-148. <https://doi.org/10.30603/am.v21i1.5922>

² Pratiwi, Luh Putu Putri Indah, Dewa Gede Sudika Mangku, and Ni Putu Rai Yuliantini.

"Pengaturan Terhadap Kedudukan Anak Di Luar Kawin Pasca Putusan Mahkamah Konstitusi Nomor 46/Puu-Viii/2010." *Jurnal Komunitas Yustisia* 3.1 (2020): 13-24. <https://ejournal.undiksha.ac.id/index.php/jatayu/article/view/28831>

reflects the BW approach, which places a strong emphasis on formal legality in recognizing blood relations. From a national civil law perspective, children derive their civil relationship from their parents' marital status, not from mere biological facts.³ This demonstrates that without marriage registration, children from unregistered marriages are at risk of losing their constitutional rights in a civil relationship with their father.

In Indonesian law, legal pluralism presents a unique challenge in determining the status of children. Indonesia has three parallel legal regimes: the Civil Code (BW) as a colonial legacy, the Marriage Law as national law, and Islamic law codified in the Compilation of Islamic Law (KHI).⁴ All three have different philosophies and approaches to child status. The BW is oriented toward legal formalities, the Marriage Law seeks unification, while the KHI is based on the principle of lineage and blood relations that are legitimate according to religion. These differences in legal orientations have implications for the emergence of a lack of synchronicity between state law and religious law in determining the validity of marriages and the status of children.

The phenomenon of unregistered marriages has become a crucial point, highlighting the tension between religious and state norms. While unregistered marriages are valid according to religion because they fulfill the pillars and requirements of marriage, they

are invalid from a state legal perspective because they are not registered.⁵ Many couples consider religious validity sufficient, yet failure to register results in the marriage being denied state recognition. The existence of unregistered marriages demonstrates that the state has failed to establish adequate legal protection mechanisms to ensure that every marriage is registered. This failure to register creates room for structural discrimination against women and children born from these marriages.

The most crucial issue arises regarding the status of children. Children from unregistered marriages often face obstacles in obtaining legal identity, such as a birth certificate listing their biological father.⁶ Normatively, the lack of marriage registration leaves the state without a legal basis for recognizing the civil relationship between a child and their father.⁷ As a result, the child has only a civil relationship with the mother, thus hindering the rights that should be inherent through biological relationships. This provision clearly sacrifices the child's interests and creates substantive injustice, as the child cannot choose the circumstances of his or her birth.

In inheritance law, the position of children from unregistered marriages is increasingly marginalized. Inheritance law in Indonesia is guided by the principle that only heirs with a clear lineage are entitled to inherit. In Islamic law, lineage arises automatically from a religiously valid marriage, so children from unregistered marriages are still considered legitimate and entitled to inheritance.⁸

³ Baihaki, Ahmad. "Upaya Pemenuhan Hak-Hak Keperdataan Anak Yang Lahir di Luar Perkawinan." *Jurnal Hukum Sasana* 9.1 (2023). <https://doi.org/10.31599/sasana.v9i1.1361>

⁴ Frahma, Elen Anedya. "Perkembangan hukum perkawinan campuran: Perspektif perbandingan hukum perdata barat dan kompilasi hukum Islam." *Istidal: Jurnal Studi Hukum Islam* 11.2 (2024): 190-206. <https://doi.org/10.34001/ijshi.v11i2.7078>

⁵ Kharisudin, Kharisudin. "Nikah Siri Dalam Perspektif Kompilasi Hukum Islam Dan Undang-Undang Perkawinan Indonesia." *Perspektif: Kajian Masalah Hukum dan Pembangunan* 26.1 (2021): 48-56.

⁶ Arifin, Samsul, and Aly Maschan Moesa. "Tinjauan Yuridis terhadap Status Anak dari Nikah Siri dalam Perspektif Hukum Islam dan Hukum Positif." *Jurnal Hukum Lex Generalis* 6.6 (2025). <https://doi.org/10.56370/jhlg.v6i6.1262>

⁷ Kamalia, Nur, Nahdhah Nahdhah, and Munajah Munajah. "Perlindungan Hukum Terhadap Anak Yang Lahir Dari Pernikahan Siri (Perbandingan Hukum Positif Di Indonesia Dengan Hukum Islam)." *Indonesian Journal of Islamic Jurisprudence, Economic and Legal Theory* 3.3 (2025): 2655-2671. <https://doi.org/10.62976/ijjel.v3i3.1331>

⁸ Masitoh, Ury Ayu. "Anak Hasil Perkawinan Siri Sebagai Ahli Waris Ditinjau dari Hukum Perdata dan Hukum Islam." *DIVERSI:*

However, in national civil law, which is still influenced by the Civil Code (BW), illegitimate children are only entitled to a certain portion and cannot inherit as full heirs without recognition or a court order. This demonstrates the tension between the principle of substantive justice in Islamic law, which prioritizes lineage, and the principle of formal legality in the Civil Code, which prioritizes registration.

Constitutional Court Decision No. 46/PUU-VIII/2010 significantly addressed this gap by extending the civil relationship between illegitimate children and their biological fathers, provided it can be proven through science and other evidence.⁹ This decision shifted the paradigm, stating that a child's status is not solely determined by marriage registration, but rather by scientifically proven blood relations. However, in practice, the implementation of this decision has been ineffective because population administration institutions and law enforcement officials still adhere to the concept of registration formality in determining children's civil relationships. This demonstrates bureaucratic resistance in translating the principles of constitutional justice into administrative policy.

In a normative comparison, Islamic law provides a more protective position for children from religiously valid marriages. The Compilation of Islamic Law (KHI) explicitly states that a marriage is considered valid if it meets the requirements and pillars of marriage according to Islamic law, without the requirement of administrative registration as a prerequisite for validity.¹⁰ This means that in Islamic law, a child's status is determined by lineage and not by state administrative legality. In contrast, national civil law, through the Civil Code and the Marriage Law, places registration

as a prerequisite for state recognition of children's rights and status. This comparison reveals a conflict of values: should the state adhere to formal legality or prioritize substantive justice for children. Given the inconsistency between national civil law norms, Islamic law, and the Constitutional Court's ruling, this research is crucial for providing a normative construction in determining the status of children from unregistered marriages in inheritance. This research is not only academically relevant but also has practical implications, especially for judges, notaries/PPATs, population administration institutions, and the public. In-depth study is needed to ensure the fulfillment of the principles of legal certainty, benefit, and justice as mandated by the Constitution. Protection of children's inheritance rights is part of the protection of human rights, and the state is obliged to ensure that children are not disadvantaged by their parents' administrative choices.

RESEARCH METHODS

This research uses a normative legal research method, namely research that focuses on the study of legal norms contained in laws and regulations, court decisions, and expert doctrines. According to Peter Mahmud Marzuki, normative legal research aims to find appropriate legal rules, legal principles, and legal doctrines in answering the legal issues being studied.¹¹ In line with that, Soerjono Soekanto explains that normative research examines legal principles, legal systematics, the level of legal synchronization, and legal history and comparison through the study of legal texts and literature, rather than observing community behavior empirically.¹² The approaches used in this research include: (1) a statute approach to examine the Marriage Law, BW, KHI, and

Jurnal Hukum 4.2 (2019): 125-148.
<https://doi.org/10.32503/diversi.v4i2.276>

⁹ Parjono, Parjono, et al. "Perlindungan Hukum Perkawinan Tidak Tercatat Melalui Isbat Nikah di Pengadilan Agama Wamena." *Journal of Law Review* 3.2 (2024): 71-82.
<https://doi.org/10.55098/jolr.v3i2.168>

¹⁰ Amar, Rizki, et al. "Kedudukan pencatatan terhadap keabsahan perkawinan: Telaah pencatatan perkawinan." *Jurnal Tana Mana* 5.2

(2024): 217-226.
<https://doi.org/10.33648/jtm.v5i2.486>

¹¹ Nurhayati, Yati, Ifrani Ifrani, and M. Yasir Said. "Metodologi normatif dan empiris dalam perspektif ilmu hukum." *Jurnal Penegakan Hukum Indonesia* 2.1 (2021): 1-20.
<https://doi.org/10.51749/jphi.v2i1.14>

¹² Masidin. *Penelitian Hukum Normatif: Analisis Putusan Hakim*. Prenada Media, 2023.

Constitutional Court Decision No. 46/PUU-VIII/2010; (2) a conceptual approach to interpret the concept of legitimate children, civil relations, and inheritance; and (3) a comparative legal approach to see the differences in the position of children of unregistered marriages in national civil law and Islamic law.

The analysis was conducted in a prescriptive qualitative manner, namely interpreting legal provisions and formulating normative arguments in answering the issue of the position of children from unregistered marriages in inheritance rights. This research bases the analysis on several legal principles, including the principle of legal certainty (*rechtszekerheid*) to guarantee the protection of children's status in the national legal administration system, the principle of justice (*gerechtigheid*) so that children are not harmed due to parents' negligence in registering their marriages, and the principle of child protection as stated in Article 28B paragraph (2) of the 1945 Constitution concerning children's rights to protection from discrimination. In addition, the principle of lineage in Islamic Law is also used, which views that blood relations are not erased simply because of the lack of state registration. Thus, this research is directed at producing legal findings that can support the protection of inheritance rights of children from unregistered marriages in a fair and constitutional manner.

RESULTS AND DISCUSSION

The Position of Children from Unregistered Marriages in the National Civil Law System

Marriage in the Indonesian national legal system is constructed not only as a religious or customary event, but also as a legal event that gives rise to civil consequences for the couple and their descendants. Law Number 1 of 1974 places the concept of a legitimate child as a child born in or as a result of a legal marriage (Article 42), and further ratifies the provision in

Article 43 paragraph (1) which states: "A child born outside of marriage only has a civil relationship with his mother and his mother's family." This wording shows the basic choice of state policy that links the emergence of civil relations to the formal legality of marriage, namely state recognition through registration, not just biological facts. Consequently, the legal status of children is very dependent on the administrative status of the parents' marriage according to the provisions of the Marriage Law.

This formalistic attitude stems from the legacy of the Civil Code (*Burgerlijk Wetboek/BW*), which historically separated the concepts of legitimate children from illegitimate children and provided specific rules regarding their recognition, status, and derivative rights.¹³ In the practice of *BW*, recognized illegitimate children have different statuses, for example, regarding the right to marry and inheritance rights, and the provisions of the Civil Code require certain forms of recognition to change the legal position of illegitimate children.¹⁴ Classical civil doctrine positions registration and recognition as the basis for the legitimacy of civil relations, so that children from unregistered marriages (*siri marriages*) are in a vulnerable position to lawsuits and rights claims. The discriminatory nature of these provisions, which provide different treatment between legitimate children and illegitimate children, raises issues of justice for the weakest legal subjects, namely children.

Specifically in the realm of inheritance, the Civil Code/Civil Code literature places illegitimate children in a limited position. A recognized illegitimate child does not automatically receive the same share as a legitimate child. Several historical literatures and decisions indicate that a recognized illegitimate child is only entitled to a certain share (for example, it is said to be "one-third of the legitimate child's share), unless there is a

¹³ Christie, Rachel, and Maria Jessica Lauretta Gunawan. "Tinjauan Hukum Perdata Terkait Dengan Kedudukan Hukum dan Hak Waris Anak Luar Kawin." *Jurnal Kewarganegaraan* 8.1 (2024): 809-814.
<https://doi.org/10.31316/jk.v8i1.6404>

¹⁴ Marwa, Muhammad Habibi Miftakhul. "Problematika Hak Anak Luar Kawin: Tinjauan Kitab Undang-Undang Hukum Perdata." *Media of Law and Sharia* 4.3 (2023): 239-252.

stronger regulation or recognition.¹⁵ This technical provision makes the claim of inheritance rights by children from unregistered marriages complex: without formal recognition or judicial determination, the automatic inheritance rights do not work. The practical impact is that when inheritance occurs, unregistered children often have to demand recognition or proof of lineage first, a process that is time-consuming, expensive, and puts the child at risk of losing assets that should be their right.¹⁶

The presence of Constitutional Court Decision Number 46/PUU-VIII/2010 is a normative starting point that forces a reinterpretation of the reading of Article 43 paragraph (1) of the Marriage Law. The Court found that a literal reading of Article 43 (1) of the a quo Law which completely severed the civil relationship between a child and his father without considering scientific evidence or other evidence is contrary to the 1945 Constitution as long as it is interpreted that way. Therefore, the Constitutional Court ordered that Article 43(1) be read in such a way that a child born outside of marriage still has a civil relationship with his father if the blood relationship can be proven based on science and technology and/or other evidence according to law. This decision changes the purely formalistic paradigm into a paradigm that allows for proof of lineage outside of formal marriage registration. The Constitutional Court decision becomes the constitutional basis for national civil law to pave the way for the recognition of civil relationships based on factual evidence, for example for DNA testing.

Despite the constitutionality of the Constitutional Court's ruling, the

transformation of norms into administrative and judicial practices has not been smooth. Implementation of Decision 46/PUU-VIII/2010 has faced obstacles: unpreparedness in population administration, differing interpretations by first-instance judges, technical provisions not yet fully incorporated into implementing regulations, and bureaucratic resistance to the use of new evidence (such as DNA results) as a basis for status changes. As a result, although theoretically, unregistered children whose lineage can be proven have the right to a civil relationship with their father, in reality many children still face obstacles in having their father listed on their birth certificates, ID cards, or family cards, which further hinders their access to administrative inheritance rights. This gap between norms (the Constitutional Court's ruling) and administrative practices is a weak point in child legal protection.

Procedurally, restitutive opportunities for children from unregistered marriages depend on the evidentiary and recognition mechanisms stipulated in civil law. The Civil Code contains provisions on child recognition and its effects. For example, recognition requires a procedure involving the mother or a court decision. Therefore, if the father wishes to acknowledge the child, there are formal requirements that must be met, including the mother's consent in some contexts.¹⁷ Following the Constitutional Court's ruling, proof of blood relationship (e.g., DNA) can be used as evidence to establish a civil relationship; however, this probatory aspect requires clear legal guidelines for practice, such as testing standards, educational centers, and the acceptability of results. Without adequate procedural standardization, children will

¹⁵ Nurhayati, Bernadeta Resti. "Harmonisasi Norma Hukum Bagi Perlindungan Hak Keperdataan Anak Luar Kawin Dalam Sistem Hukum Indonesia." *Ganesha Law Review* 1.1 (2019): 55-67. <https://doi.org/10.23887/blr.v1i1.19>

¹⁶ Haykal, Andi Muhammad Fiqry, and Roziqin Roziqin. "Perlindungan Hukum Terhadap Anak Yang Lahir Dari Perkawinan Siri Dalam Hak Waris Menurut Kitab Undang-Undang Hukum Perdata." *Journal de Facto* 11.2 (2025): 325-345. <https://doi.org/10.36277/jurnaldefacto.v11i2.352>

¹⁷ Naibaho, Dea Rusianda, Ni Luh Wayan Yasmianti, and Ratna Artha Windari. "ANALISIS PUTUSAN MAHKAMAH KONSTITUSI NOMOR 46/PUU-VIII/2010 TENTANG PEMBAGIAN HAK WARIS ANAK YANG LAHIR DARI PERKAWINAN SIRI." *JOURNAL OF LAW AND NATION* 4.1 (2025): 177-186. <https://lawinsight.net/index.php/SOLICLAW/article/view/18>

continue to face friction between constitutionally recognized legal possibilities and evidentiary practices in court or the civil registry office.

From the perspective of human rights norms and the principle of child protection, the position of children from unregistered marriages raises the question of whether the legal system should allow children to lose their inheritance rights due to administrative negligence of their parents. The principle of legal certainty (*rechtszekerheid*) required by the law should actually be combined with the principle of substantive justice that demands protection for children. The Constitutional Court's decision aims to strike this balance by affirming the right of children not to have their civil relations automatically revoked. However, to realize the principle of child protection operationally, harmonization of norms is required, both in the applicable laws, the Civil Code, implementing regulations and population administration policies that facilitate proof of lineage without creating a disproportionate burden for children.¹⁸ Without such harmonization, the principle of child protection will remain merely a slogan in the constitutional text.

Substantive and procedural legal reforms are needed to eliminate structural discrimination against children from unregistered marriages. On the one hand, revisions or normative clarifications of the Marriage Law and the Civil Code are needed to ensure consistency with the Constitutional Court's ruling and human rights protection instruments. On the other hand, administrative policies are needed, such as technical guidelines for registration, the establishment of evidence-based recognition mechanisms, and training for officials to ensure implementation in the field truly guarantees

children's inheritance rights. Normatively, the state has a constitutional obligation to protect children, including those born from unregistered marriages, and this requires accommodation in national civil law that prioritizes substantive justice without sacrificing legal certainty.

The Position of Children from Unregistered Marriages from an Islamic Legal Perspective

Islamic law in Indonesia, embodied in the Compilation of Islamic Law (KHI), places lineage as the basis for the legal relationship between father, mother, and child. The KHI explicitly defines a "legitimate child" in Article 99 of the KHI, explaining that a child is born in or as a result of a legitimate marriage, or a child resulting from a legitimate ectopic conception and born to the wife.¹⁹ This wording emphasizes that from an Islamic legal perspective, the focus is on the validity of the marriage contract (pillars and requirements of sharia) and the fact of the marital relationship, not merely on state administrative registration. Therefore, if a marriage fulfills the pillars (*ijab-qabul*, guardian, witnesses, dowry), then according to the KHI, the child born from that marriage is considered legitimate and has lineage status with the father.

This normative position is rooted in classical Islamic jurisprudence principles, particularly the principle of *al-walad lil-firâsh* (the child follows the (marital) bed). This hadith, narrated in traditions such as Sunan Abi Dawud and Sunan An-Nasa'i, has for centuries been used as the basis for affirming the presumption of paternity for children born within a valid marriage.²⁰ In Islamic juridical practice, this principle serves as a strong presumption that precludes the possibility of lineage claims from third parties unless there is

¹⁸ Hutasoit, Eunike Loist, et al. "Perlindungan Hukum Bagi Anak Luar Nikah Di Indonesia; Studi Komparasi Putusan Mahkamah Konstitusi Nomor 46/Puu-Viii/2010 Dan Hukum Islam." *Jurisprudensi: Jurnal Ilmu Syariah, Perundang-Undangan Dan Ekonomi Islam* 16.2 (2024): 420-437.

¹⁹ Muamar, Afif. "Ketentuan nasab anak sah, tidak sah, dan anak hasil teknologi reproduksi

buatan manusia: antara UU Perkawinan dan Fikih Konvensional." *Al-Ahwal: Jurnal Hukum Keluarga Islam* 6.1 (2013): 45-56. <https://journal.uin-suka.ac.id/syariah/Ahwal/article/view/1059>

²⁰ Suwito, Komariah, et al. "Konsep ibu dan anak dalam al qur'an dan hadis." *Lebah* 17.2 (2024): 90-99.

<https://www.plus62.isha.or.id/index.php/abdimas/article/view/218>

strong evidence to invalidate the presumption.²¹ Normatively, this principle protects the certainty of lineage and family stability, preventing children from being ostracized simply because of indirect biological evidence. However, the use of this principle has also given rise to contemporary debate as evidentiary technologies such as DNA testing become available, and whether traditional presumptions should be replaced by scientific evidence. This debate has opened up space for contemporary *ijtihad* in the application of the principle of lineage.

The KHI does not ignore the need for state administration. The articles of the KHI, particularly Article 5 on registration, do indeed recommend marriage registration for legal certainty and the protection of related parties, but theoretically, the sharia status of a marriage does not depend on administrative registration. This means that there are two distinct levels of law: the sharia level (the validity of the contract) and the positive-administrative level (state registration). In practice, the discrepancy between these two levels creates problems when a couple enters into a *siri* marriage (legally religious but unregistered), so that even though the child is considered legitimate from a legal perspective, administratively the child has difficulty obtaining documents containing the father's identity. The KHI tends to prioritize the protection of lineage and children's rights based on the principles of *fiqh*, but its implementation requires synchronization of state administrative instruments so that sharia decisions can be realized in population documents.²²

In the matter of child recognition (*iqrār / ta'aruf*), Islamic law recognizes a mechanism that allows a father to acknowledge his child so that legal consequences for inheritance and maintenance can arise. The Compilation of

Islamic Law accommodates this aspect by providing space for recognition and proof of lineage. However, sharia recognition sometimes still requires formal procedures to be fully recognized in state administration, such as proof of marriage, a marriage book, or a court decision confirming lineage. Therefore, children from unregistered marriages often have to undergo legal processes to obtain administrative recognition, even though in sharia terms, such recognition is already inherent from the marriage contract. This tension demonstrates the technical need for how sharia evidence such as statements from marriage witnesses and KUA records can be accepted by the civil registry office as a basis for listing lineage.

Regarding inheritance rights, Islamic law (*juris fiqh*) determines the shares of inheritance based on lineage. If a child's lineage is recognized either through a legal marriage or through paternal recognition, then the inheritance distribution follows the provisions of *faraidh*, with sons usually receiving two shares compared to daughters (if joint), or other shares according to the *faraidh* scheme.²³ Within the framework of the KHI, heirs according to Article 171 letter c include people who are related by blood or marriage to the testator, are Muslim, and are not prevented by law from becoming heirs. Thus, in principle, children from unregistered marriages whose lineage is recognized are entitled to become full heirs according to the sharia, which means that the failure to register a marriage should not eliminate inheritance rights if the lineage can be proven. However, in practice, without proof/determination of lineage, inheritance claims will be hampered administratively.

From the perspective of the *maqasid sharia* (objectives of Islamic law), protecting

²¹ Purnama, Deni, and Dhiauddin Tanjung. "Islam dan Perlindungan Hak Anak: Tinjauan Fikih Terhadap Nasab Anak di Luar Nikah." *Al-Mashlahah Jurnal Hukum Islam dan Pranata Sosial* 12.01 (2024).

²² Nofryanti, Satya, et al. "Implementasi Prinsip Hukum Islam dalam Sistem Peradilan Pidana Anak di Indonesia." *Indonesian Journal of*

Multidisciplinary Scientific Studies 1.3 (2023): 16-24. <https://doi.org/10.33151/ijomss.v1i3.105>

²³ Sugiharto, Sugiharto, Syahrudin Nawi, and Ilham Abbas. "Kedudukan Hak Waris Anak Luar Kawin Yang Memiliki Akta Kelahiran Ditinjau Dari Kuh Perdata Dan Komplikasi Hukum Islam." *Journal of Lex Philosophy (JLP)* 5.2 (2024): 994-1012. <https://www.pasca-umi.ac.id/index.php/jlp/article/view/1875>

children's lineage and inheritance rights is a manifestation of the goal of preserving lineage (ḥifẓ al-nasab) and strengthening family welfare.²⁴ According to contemporary scholars, these principles direct jurists to prioritize the protection of children as innocent parties. Therefore, many fatwas and opinions of scholars in Indonesia and religious institutions emphasize the importance of recognizing lineage and inheritance rights for children born of unregistered marriages, and encourage the state to facilitate proper lineage verification. Practical debates arise when scientific evidence (DNA) is considered: some scholars accept its use to establish lineage, while others caution against careful consideration of the procedures and social impacts. This discourse demonstrates that the application of Islamic law is dynamic and requires institutional ijtihad.

Criticism of the practice of determining lineage from an Islamic law perspective often appears in two dimensions:²⁵

- (1) the potential for legalization of acts that are actually prohibited (e.g. adultery) if lineage is recognized without considering the cause of birth; And
- (2) The challenge of evidence in the technological era. The Indonesian Compilation of Islamic Law (KHI) attempts to strike a balance by stipulating that children born of a legitimate marital relationship are legitimate, and placing the burden of proof in the correct context: if there is evidence of a legitimate marriage, the lineage is recognized. Conversely, if it is proven not to be the result of a marriage, child protection principles still demand solutions that prevent discrimination.

²⁴ Firmansyah, Ahmad Arya Resky, Dachran S. Busthami, and Salmawati Salmawati. "Tinjauan Hukum Terhadap Ahli Waris Utama Dalam Pembagian Warisan Menurut Hukum Waris Islam dan Hukum Waris KUHPerduta." *LEGAL DIALOGICA* 1.1 (2025). <https://jurnal.fh.umi.ac.id/index.php/legal/article/view/1593>

²⁵ Kholqi, Ahmad Muhammad Sa'dul. "Petunjuk Dan Landasan Dalam Penetapan Garis

Furthermore, Islamic jurisprudence literature emphasizes that recognizing lineage does not condone adultery, but rather prioritizes the interests of innocent children. This approach emphasizes Islamic law's orientation toward substantive justice for children. Finally, normative criticism demands synchronization of the practice of the Compilation of Islamic Law (KHI) with state administrative mechanisms to ensure the real protection of children's rights. The KHI provides sharia legitimacy for children from unregistered marriages, but without clear administrative and procedural instruments, such as guidelines from the Office of Religious Affairs (KUA)/District Offices (Kecamatan) for issuing birth certificates containing paternity based on valid proof, this right is difficult to enforce.²⁶ Therefore, an integrative policy is needed: sharia recognition must be accompanied by technical regulations that allow for the recognition of sharia evidence and scientific verification in civil registration; and religious and state institutions need to develop remedial mechanisms so that children do not lose inheritance rights and identity simply because of the lack of parental registration. Such a transformation will realize the KHI principle that favors the protection of lineage and children's rights.

The Position of Children from Unregistered Marriages from an Islamic Legal Perspective

The most fundamental difference between National Civil Law and Islamic Law in viewing unregistered marriages lies in the starting point of their legal reasoning: National Civil Law starts from state registration, while Islamic Law starts from the marriage contract as a sharia fact. In National Civil Law, as regulated in Article 2 paragraph (2) of Law No. 1 of 1974, a marriage is declared valid if it is

Nasab Perspektif Hukum Islam." *MASADIR: Jurnal Hukum Islam* 3.01 (2023): 612-631.

²⁶ Naja, Muhammad Choirun. "STUDI KOMPARATIF KEABSAHAN WALI NIKAH TERHADAP ANAK HASIL PERNIKAHAN SIRI PERSPEKTIF HUKUM ISLAM DAN HUKUM POSITIF DI INDONESIA:(Studi Kasus di KUA Kecamatan Wonosalam Jombang)." *Jurnal Ilmiah Penelitian Mahasiswa* 2.4 (2024): 868-877. <https://doi.org/10.61722/jipm.v2i4.355>

conducted according to religious law, but to obtain state recognition it must be registered with an authorized official. Without registration, the marriage is considered to have no legal consequences in the civil realm, including regarding the status of children.²⁷ Therefore, children from unregistered marriages are treated as illegitimate children as stipulated in Article 43 paragraph (1) of the Marriage Law before the Constitutional Court Decision No. 46/PUU-VIII/2010. This means that the thought structure of National Civil Law places registration as the generator of legal consequences, not the marriage contract itself. This reflects the principle of legal formalism and the principle of legal certainty, where the state is the sole source of legitimacy for civil relations.

In Islamic law, a marriage is considered valid if it fulfills the pillars and requirements of marriage (ijab-qabul, guardian, two witnesses, and dowry), as per the rules of Islamic jurisprudence and universally applicable in all schools of thought.²⁸ Articles 4 and 5 of the Compilation of Islamic Law (KHI) clearly state that a marriage is valid if it is conducted according to Islamic law and that registration is merely an administrative obligation of the state, not a requirement for the validity of the contract. A siri marriage, as long as it fulfills the pillars of marriage, has full legal consequences, including the establishment of lineage to the father. The fiqh principle "al-walad lil firâsy" (children belong to the husband of the woman who is his legal wife) serves as the basis for the legitimacy of lineage, while also emphasizing

that Islamic law emphasizes substantive justice, not formal state procedures.²⁹ Therefore, the Islamic system recognizes children from siri marriages as legitimate children with full status.

In the realm of lineage recognition and children's civil rights, the two legal systems increasingly appear divergent. National Civil Law before Constitutional Court Decision 46/PUU-VIII/2010 stated that illegitimate children only had a civil relationship with their mother and her family. The Civil Code even placed illegitimate children in the category of "non-heirs" unless they were recognized or legalized through marriage. Only after the Constitutional Court Decision could illegitimate children have a civil relationship with their father provided it could be proven with scientific evidence such as DNA.³⁰ This demonstrates that the civil system requires biological or formal verification before a legal relationship is recognized. Thus, National Civil Law places evidence as the basis for establishing rights, not lineage.

In Islamic law, lineage is automatically established without requiring court approval. Article 99 of the Compilation of Islamic Law (KHI) stipulates that children born in or as a result of a legal marriage are legitimate children. Article 171 letter c affirms that legitimate children are heirs. Islam does not require scientific evidence to establish lineage as long as the marriage contract is proven, and only allows for proof to reject lineage in extraordinary circumstances, such as through a li'ân (lawful marriage). Thus, Islamic law uses sharia provisions as proof of legality, not

²⁷ Zubaidah, Dwi Arini. "Pencatatan perkawinan sebagai perlindungan hukum dalam perspektif maqâsid asy-syarî'ah." *Al-Ahwal: Jurnal Hukum Keluarga Islam* 12.1 (2019): 15-28. <https://ejournal.uin-suka.ac.id/syariah/ahwal/article/view/1796>

²⁸ Efendy, Noor, and Ainur Rahmah. "Pengaruh Kesalahan Wali Pada Keabsahan Pernikahan." *Sahaja: Journal Sharia and Humanities* 3.1 (2024): 283-297. <https://doi.org/10.61159/sahaja.v3i1.211>

²⁹ Sabilarasyad, Sabilarasyad. "RELEVANSI KEADILAN MENGENAI STATUS ANAK DI LUAR NIKAH (TELAHAH TERHADAP PUTUSAN MAHKAMAH

KONSTITUSI NOMOR 46/PUU-VIII/2010 ATAS UJI MATERI PASAL 43 UU NO1 TAHUN 1974 TENTANG PERKAWINAN)." *Al-Mashlahah Jurnal Hukum Islam dan Pranata Sosial* 2.03 (2014). <https://doi.org/10.30868/am.v2i03.124>

³⁰ Judiasih, Sonny Dewi, Putri Wartina Lestari, and Bambang Daru Nugroho. "KEDUDUKAN WARIS ANAK LUAR KAWIN YANG TIDAK DIAKUI SEBAGAI ANAK SAH OLEH AYAH BIOLOGIS PASCA PUTUSAN MAHKAMAH KONSTITUSI NO. 46/PUU-VIII/2010." *ACTA DIURNAL Jurnal Ilmu Hukum Kenotariatan* 7.2 (2024): 222-233. <https://doi.org/10.23920/acta.v7i2.1663>

scientific evidence. Therefore, in Islam, children's rights are more easily established, whereas in the civil system, children's rights are only established after formal procedural proof. As a result of this paradigm difference, legal protection for children differs drastically. In civil law, children of unregistered marriages must establish lineage through the courts to obtain administrative rights such as the inclusion of the father's name on the birth certificate or becoming an heir.³¹ This places children in a vulnerable position because their rights depend on legal action and evidence, even though children do not have access to legal remedies without the role of their parents. Islamic law does the opposite: it protects children without questioning the administrative negligence of their parents.³² This aligns with sharia principles, which reject the sin that befalls a child solely due to the parents' mistakes. The difference in orientation between National Civil Law, which emphasizes administrative legality, and Islamic Law, which prioritizes the substantive validity of the marriage contract, needs to be demonstrated in a structured manner to demonstrate how the two systems produce different consequences for the status of unregistered children. Following this description, a comparative mapping is conducted to highlight points of divergence regarding lineage determination, paternity recognition, and inheritance rights within each legal regime.

Table 1. Comparison of the Status of Children from Unregistered Marriages in National Civil Law and Islamic Law

Aspect	National Civil Law (Marriage Law, Civil Code, Constitutional Court Decisions)	Islamic Law (Fiqh & KHI)
	The basis for the validity of marriage	State registration is mandatory for

	legal consequences (Article 2 paragraph (2) of the Marriage Law)	Islamic law; registration is only administrative (Articles 4–5 of the Compilation of Islamic Law)
Determination of lineage	Before the Constitutional Court: only with the mother (Article 43 of the Marriage Law). After the Constitutional Court: can be with the father if scientifically proven (DNA)	Automatic lineage to the father according to the principle of al-walad lil firâsy (children born from a legitimate marriage)
Child's confession	Must go through a court or authentic deed	Simply through a valid contract/statement of guardian-witness
Inheritance rights of unmarried children	Not automatic, depends on proof of lineage and recognition	Automatic heirs if born from a legal marriage (Article 171 KHI)
Value orientation	Legal certainty and formal procedures (legal formalism)	Substantive justice and protection of children's rights (hifz al-nasab)

The point of conflict between the two legal systems lies in the relationship between procedure and justice. National Civil Law positions registration procedures as the instrument for establishing legal status; as a result, children's rights are only recognized after administrative evidence has been provided, or through scientific verification and a court ruling. Islamic law, on the other hand, positions the validity of the marriage contract as the source of legitimacy for a child's status and lineage, allowing inheritance rights to be automatically granted without administrative obstacles. The Civil Law approach is procedure-centered, upholding legal certainty but potentially hindering children's access to their basic rights. Conversely, Islamic law is

³¹ ARMANSYAH101, KN SOFYAN HASAN, and ANNA SAGITA. "HAK WARIS ANAK YANG LAHIR DARI PERKAWINAN SIRI Oleh." *EPERTORIUM*: 68. <https://journal.fh.unsri.ac.id/index.php/repertorium/article/view/180/105#page=73>

³² Sholihah, Hani. "Perlindungan Anak Dalam Perspektif Hukum Islam." *Al-Afkar, Journal For Islamic Studies* (2018): 38-56. https://doi.org/10.31943/afkar_journal.v1i1.3

child-centered, ensuring that children's rights are not lost simply because of parental negligence in registering a marriage. For children's rights protection to be truly effective, harmonization of the two legal systems is urgently needed. Registration should not be a barrier to the birth of rights, but rather a tool to facilitate and strengthen them. Constitutional Court Decision No. 46/PUU-VIII/2010 has provided an initial bridge towards this harmonization, but its implementation still faces administrative resistance at the practical level.

CONCLUSION

The position of children from unregistered marriages lies at the intersection of the tension between legal formalism in National Civil Law and substantive justice in Islamic Law. Within the framework of the Marriage Law and the Civil Code, registration is a prerequisite for the emergence of legal consequences so that children from unregistered marriages before the Constitutional Court Decision No. 46/PUU-VIII/2010 only had a civil relationship with the mother and the mother's family; The Constitutional Court Decision then opened up space for recognition of civil relationships with biological fathers through scientific evidence, but its implementation still depends on the court process and other administrative instruments. In contrast, Islamic Law places the validity of the marriage contract as the primary basis for determining lineage, so that children from unregistered marriages are considered legitimate children with full inheritance rights unhindered by administrative non-compliance of parents, as affirmed in Articles 99 and 171 of the Compilation of Islamic Law and the principle of *al-walad lil-firasy*. This difference in orientation gives rise to normative disharmony that has implications for the uncertainty of legal status and the vulnerability of children's rights protection. Therefore, legal harmonization is needed that positions registration not as a barrier to the birth of rights, but as an instrument to facilitate the protection of children's rights; thus, the national legal system not only provides legal certainty, but also realizes substantive justice as mandated by

the constitution and the principle of protecting children as legal subjects.

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