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Legal Rationalization and The Protection of Children Born Outside Marriage In Indonesia: A Max Weberian Analysis

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Abstract

The relationship between national law and Islamic family law in regulating the status and protection of children born out of wedlock still leaves conceptual problems, especially related to the recognition of civil relationships, parental responsibility, and legal certainty. This study aims to analyze these issues using Max Weber's theory of social action, especially the concept of legal rationalization. Weber's theory is relevant to understand how legal norms, value considerations, and action orientation can be used as an analytical framework in examining legal developments. This study uses normative juridical methods through legislative and conceptual approaches, by analyzing legal documents and doctrines related to Islamic family law and child protection. The results of the analysis show that there are dynamics in the formulation and interpretation of norms regarding civil relations for children born out of wedlock, especially in an effort to bring together the principles of Islamic law, national legal certainty, and the protection of children's rights. These normative findings show a change in the direction of regulation and interpretation, but do not directly prove the social motives of the lawmakers and implementers. This study offers a conceptual contribution by placing legal rationalization as an analytical framework to explain the relationship between norms, values, and child protection without assuming rationalization as a pre-proven conclusion.

Keywords: *Legal Rationalization; Children Born Outside Marriage; Islamic Family Law; Child Protection; Max Weber.*

Abstrak

Hubungan antara hukum nasional dan hukum keluarga Islam dalam pengaturan status serta perlindungan anak yang lahir di luar perkawinan masih menyisakan persoalan konseptual, terutama terkait pengakuan hubungan keperdataan, tanggung jawab orang tua, dan kepastian hukum. Penelitian ini bertujuan menganalisis persoalan tersebut menggunakan teori tindakan sosial Max

Weber, khususnya konsep rasionalisasi hukum. Teori Weber relevan untuk memahami bagaimana norma hukum, pertimbangan nilai, dan orientasi tindakan dapat digunakan sebagai kerangka analitis dalam mengkaji perkembangan hukum. Penelitian ini menggunakan metode yuridis normatif melalui pendekatan perundang-undangan dan konseptual, dengan menganalisis dokumen hukum serta doktrin yang berkaitan dengan hukum keluarga Islam dan perlindungan anak. Hasil analisis menunjukkan adanya dinamika dalam perumusan dan penafsiran norma mengenai hubungan keperdataan anak yang lahir di luar perkawinan, terutama dalam upaya mempertemukan prinsip hukum Islam, kepastian hukum nasional, dan perlindungan hak anak. Temuan normatif tersebut menunjukkan perubahan arah pengaturan dan penafsiran, tetapi tidak secara langsung membuktikan motif sosial para pembentuk maupun pelaksana hukum. Penelitian ini menawarkan kontribusi konseptual dengan menempatkan rasionalisasi hukum sebagai kerangka analisis untuk menjelaskan hubungan antara norma, nilai, dan perlindungan anak tanpa mengasumsikan rasionalisasi sebagai kesimpulan yang telah terbukti sebelumnya.

Kata Kunci: Legal Rationalization; Children Born Outside Marriage; Islamic Family Law; Child Protection; Max Weber.

INTRODUCTION

The legal protection of children born out of wedlock is an important issue in the development of family law in Indonesia, especially when the recognition of biological relationships is confronted with the concept of nasab in Islamic law and national positive legal provisions. This issue concerns not only the status of the child, but also includes civil rights, alimony liability, inheritance, and guardianship. The basic normative differences in regulating these aspects raise the question of the extent to which the protection of children's rights can be extended without obscuring the conceptual differences between biological relationships, civil relationships, and family relationships.[1]

An important development in this matter is marked by the Constitutional Court Decision Number 46/PUU-VIII/2010.[2] This decision provides a constitutional interpretation of Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage, so that children born

[1] Muhammad Fachri Said, "Perlindungan Hukum Terhadap Anak Dalam Perspektif Hak Asasi Manusia," *JCH (Jurnal Cendekia Hukum)* 4, no. 1 (2018): 141–52. http://doi.org/10.33760/jch.v4i1.97

[2] Rahmad Setyawan and Nur Sholikin, "Implikasi Putusan Mahkamah Konstitusi Nomor 46/Puu-Viii/2010 Terhadap Kedudukan Anak Di Luar Perkawinan," *Ahwaluna*| *Journal of Islamic Family Law* 5, no. 1 (2024): 318–37. https://doi.org/10.70143/ahwalunajurnalhukumkeluargaislam.v1i1.337

out of wedlock can have a civil relationship with a man who is proven based on science and technology and/or other evidence according to the law to have a blood relationship as his father, including a civil relationship with his father's family. The decision expands the basis for the recognition of children's civil relations and strengthens the orientation of the protection of children's rights. However, the expansion of civil relations does not by itself solve the problem of the position of the nasab and all the consequences of family law according to Islamic jurisprudence. Therefore, the main problem is not only whether the child can obtain legal protection, but how the limits and consequences of the recognition are constructed in a legal system that has a different normative basis.[3]

Conceptually, the relationship between positive law, fiqh doctrine, and the Compilation of Islamic Law (KHI) needs to be carefully analyzed. The difference between the three does not always indicate a direct conflict of norms. A conflict of norms can occur when two relevant provisions provide legal consequences that cannot be met in the same issue.[4] On the other hand, differences can also arise because each provision regulates a different object, uses a different basis of proof, or has a non-identical scope of application. Another issue relates to the interpretation and implementation of the law, namely how judges understand the relationship between biological recognition, civil rights, and the consequences of family law. This distinction is important so that the expansion of civil relations is not automatically understood as the abolition of the concept of nasab or the change of all provisions regarding alimony, inheritance, and guardianship.[5]

Previous research on children born out of wedlock has discussed several important aspects, including: Mahfud's Research dkk,[6] entitled "*Protection and Legal Status of Children Outside Marriage Perspective*

[3] B I P Tim, *Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan* (Bhuana Ilmu Populer, 2017).

[4] Jufri Naldo, Azhari Akmal Tarigan, and Syahrial Arif Hutagalung, "Religious Conversion in Minangkabau People: An Analysis of Islamic and Customary Law Perspectives in Indonesia," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 26, no. 1 (2026): 37–65. https://doi.org/10.18326/ijtihad.v26i1.37-65

[5] S H I Sayyidah Aslamah, *Kompilasi Hukum Islam Indonesia: Antara Ayat Dan Pasal* (Anak Hebat Indonesia, 2026).

[6] Mahfud Mahfud et al., "Perlindungan Dan Kedudukan Hukum Anak Diluar Kawin Perspektif Undang-Undang No. 35 Tahun 2014 Tentang Perlindungan Anak," *Jurnal Multidisiplin Dehasen (MUDE)* 4, no. 3 (2025): 599–606. https://doi.org/10.37676/mude.v4i3.8546

of Law No. 35 of 2014 concerning Child Protection" shows that legal protection for children outside marriage still faces obstacles, especially related to the certainty of civil status, inheritance rights, and legal relationship with biological fathers. Therefore, synergy is needed between state institutions, legal apparatus, and society to ensure the fulfillment of children's rights fairly and without discrimination.

Furthermore, the research conducted by Eunike Loist Hutasoit dkk,[7] entitled "*Legal Protection for Children Out of Wedlock in Indonesia: A Comparative Study of the Constitutional Court Decision Number 46/PUU-VIII/2010 and Islamic Law*" shows that there is a difference of view between the Constitutional Court Decision and Islamic law in determining the position of children born out of wedlock. The study emphasizes that the integration of the two perspectives is necessary to realize comprehensive legal protection, especially in the fulfillment of children's civil rights, while still paying attention to the principles of Islamic law and moral values that apply in society.

Finally, the research of Muhammad Zul Figgar and Faisal Saidi[8] entitled "*The Status of Children Out of Wedlock in Inheritance After the Issuance of the Constitutional Court Decision Number 46/PUU-VIII/2010*" shows that the decision is a form of reform of marriage law in Indonesia that strengthens the protection of children born out of wedlock, especially in the issue of inheritance rights. This study highlights efforts to balance the protection of children's rights based on the Constitutional Court's decision with the provisions of the Compilation of Islamic Law (KHI), which still considers the principles of Islamic law related to legal marriage and the prevention of adultery.

The three studies have similarities with the consensus of this research, which discusses the protection and legal status of children born out of wedlock after the Constitutional Court Decision Number 46/PUU-VIII/2010. The difference lies in the focus of the study, namely the protection of children's law, the comparison of national law and Islamic

[7] Eunike Loist Hutasoit 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, no. 2 (2024): 420–37. https://doi.org/10.32505/jurisprudensi.v16i2.8938

[8] Muhammad Zul Figgar and Faisal Saidi, "Status Anak Luar Nikah Dalam Kewarisan Pasca Keluarnya Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010," *Al-Mizan (e-Journal)* 18, no. 2 (2022): 269–88. https://doi.org/10.30603/am.v18i2.2902

law, and inheritance rights. The novelty of this research lies in the use of Max Weber's theory of social action to analyze rationality in legal construction, especially related to the proof of biological relationships, protection of civil rights, and the sustainability of the doctrine of nasab. This research offers a three-layer analysis model, namely biological, civil, and family law, in order to explain the limits of the recognition of children's rights as well as opportunities for harmonization of national law and Islamic law.

Thus, the aim of this research is to analyze the legal construction of children born out of wedlock in the relationship between national law and Islamic family law and to explain the rationality reflected in the development of its regulation through the perspective of Max Weber. The theoretical contribution of the research lies in the development of a three-layered model that allows for a more measurable analysis of biological relationships, civil rights, and the consequences of family law. Its conceptual contribution is to provide a way to distinguish the expansion of civil protection from changes in the concept of nasab and other consequences of family law. Through this approach, legal rationalization is placed as a problem to be analyzed based on normative evidence, rather than as an assumed conclusion from the outset.

RESEARCH METHODS

This research uses a normative juridical method with a legislative and conceptual approach enriched by a legal sociology perspective through social action theory Max Weber.[9] The research materials include primary legal materials in the form of laws and regulations, especially the Constitutional Court Decision Number 46/PUU-VIII/2010, as well as relevant secondary and tertiary legal materials, including Compilation of Islamic Law, fiqh, books, and scientific articles.[10] The collection of materials is carried out through literature studies, then analyzed systematically by grouping legal norms and arguments related to biological relationships, civil rights, alimony, inheritance, parenting, and

[9] Emmi Rahmiwita Nasution et al., "Harmonization of Sharia Principles and Modern Guarantee Laws in Strengthening the National Islamic Banking Industry," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 10, no. 3 (2026): 1566–87. https://doi.org/10.22373/zeqn1c68

[10] Hadriana Marhaeni Munthe et al., "Gendered Poverty and Educational Exclusion among Young Women in Pakpak Batak Widow-Headed Households," *De Jure: Jurnal Hukum Dan Syar'iah* 18, no. 2 (2026): 261–323. https://doi.org/10.18860/j-fsh.v18i2.40568

guardianship.[11] Weber's theory is operationalized through four categories, namely instrumental rationality (Zweckrational) to analyze evidentiary procedures and legal certainty, value rationality (Wertrational) to examine justice and child protection, traditional actions (Traditional) to examine the sustainability of the doctrine of nasab, and affective actions (Affective) which are used only when there is sufficient documentary evidence.[12] The analysis is carried out through coding based on the indicators of each category, comparisons between documents, and systematic interpretation to identify changes in norms, doctrinal differences, and limits to the application of the law.[13] Conclusions are drawn deductively by distinguishing normative findings from sociological interpretations.[14] Because it does not use empirical data, this study limits the analysis to the rationality reflected in the legal document and does not deduce the actual motives of the legal actors. The results of the analysis are directed to develop a three-layer conceptual model, namely biological relationships, recognition of civil rights, and determination of the consequences of family law, as a framework for harmonizing national law and Islamic family law.

RESULTS AND DISCUSSION

Legal Rationalization and A Shift In The Orientation of Protection

The shift in regulation regarding children born out of wedlock after the Constitutional Court Decision No. 46/PUU-VIII/2010 needs to be understood in more detail so as not to lead to the conclusion that the formal legality of marriage has been completely replaced by the paradigm of protecting children's rights. The shift can be analyzed through four aspects, namely changes in the formulation of norms,

[11] Nanda Dwi Rizkia and Hardi Fardiansyah, *Metode Penelitian Hukum (Normatif Dan Empiris)* (Penerbit Widina, 2023).

[12] Indra Devi et al., "Birokrasi Dan Struktur Kekuasaan Dalam Organisasi Pendidikan Modern: Dengan Pendekatan Max Weber," *Concept: Journal of Social Humanities and Education* 2, no. 4 (2023): 268–81. https://doi.org/10.55606/concept.v2i4.790

[13] Dadang Kuswana, Deden Sumpena, and Yoshy Hendra Hardiyan Syah, "The Religion and Social Movements in Indonesia: Analysis of Contemporary Problems, Their Impacts, and Their Implications A Review of the Theory of Relative Deprivacy," *Indonesian Journal of Islam and Muslim Societies* 14, no. 2 (2024): 351–80. https://doi.org/10.18326/ijims.v14i2.351-380

[14] Ikhwanuddin Harahap et al., "From Tradition to Rationality: The Social Construction of Dowry in the Perspective of Traditional Marriage Mandailing–Angkola Maqāṣid Al-Sharī'ah Jasser Auda," *El-Usrah: Jurnal Hukum Keluarga* 9, no. 2 (2026): 684–716. https://doi.org/10.22373/ujhk.v9i2.34435

methods of proving biological relationships, consequences of civil relationships, and the orientation of legal reasoning.[15]

In the normative aspect, the Constitutional Court's decision changes the meaning of Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage, which previously regulated the civil relationship of children born out of wedlock with their mother and mother's family, by opening up the possibility of civil relations with men who are proven to have blood relations as their father and their father's family. This transformation shows that the marital status of parents cannot be used as the only basis to close all possible recognition of children's civil relationships. However, the ruling does not remove all legal requirements for marriage and does not automatically equate all legal consequences between children born out of wedlock and children born in legal marriages.[16]

In the evidentiary phase, the constitutional court's decision gives importance to science and technology as well as other evidence that can be used by law to prove blood relations. This development shows that the determination of biological relationships does not solely depend on the formulation of formal status, but also requires a mechanism of proof that can be accounted for. However, proving a biological relationship must be distinguished from the determination of all legal consequences that may arise from it. Evidence that a man is related by blood to a child does not automatically answer all the issues of fate, alimony, inheritance, and guardianship in Islamic family law. Each legal consequence still requires analysis based on the relevant norms, the character of the legal relationship to be established, and the provisions applicable in each field.[17]

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[15] Ade Daharis et al., "Kedudukan Anak Luar Kawin Dalam Perspektif Kompilasi Hukum Islam Dan Putusan MK: The Position of Children Born Out of Wedlock from the Perspective of the Compilation of Islamic Law and Constitutional Court Decisions," *Jurnal Kolaboratif Sains*, 2025, 7334–42. https://doi.org/10.56338/jks.v8i11.8085

[16] Imam Mustofa, "Dampak Putusan Mahkamah Konstitusi Mengenai Pasal 43 Ayat (1) Undang-Undang Nomor 1 Tahun 1974 Terhadap Hukum Keluarga Di Indonesia," *Al-Manahij: Jurnal Kajian Hukum Islam* 6, no. 2 (2012): 287–306.https://doi.org/10.24090/mnh.v6i2.605

[17] Georgina Agatha, "Pembuktian Dan Pengesahan Anak Luar Kawin Serta Akibat Hukumnya Setelah Berlaku Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Dalam Pandangan Hukum Islam," *Indonesian Notary* 3, no. 1 (2021): 23. https://scholarhub.ui.ac.id/notary/vol3/iss1/23/

The third dimension is related to the consequences of civil relations. The Constitutional Court decision expands the basis for the recognition of civil relations with biological fathers that can be proven according to law. This expansion is relevant for the protection of children's interests because it allows for legal liability that previously had the potential to not be adequately accommodated. However, the scope of civil relations should not be directly equated with all the consequences of nasab law in fiqh. Civil relations, blood relations, and nasab relations are related concepts, but they have conceptual bases and legal consequences that need to be distinguished.

The fourth dimension concerns the orientation of legal reasoning. The decision can be read as a development of interpretation that pays greater attention to the protection of children's rights, without having to conclude that all previous legal considerations were only oriented to the formality of marriage. To assess the change in orientation, the research needs to compare the legal arguments before and after the decision, taking into account the normative basis, the form of protection that is recognized, and the limits of the legal consequences that are set.

In Max Weber's perspective, these developments can be analyzed through the concept of legal rationalization, especially the relationship between formal rationality and substantive considerations. Formal rationality refers to decision-making based on rules, procedures, legal categories, and reasoning methods that allow a decision to be drafted systematically and its consequences to be estimated. In the context of children born out of wedlock, formal rationality needs to be seen in the affirmation of evidence, procedures for determining biological relationships, and the application of norms that are the basis for the recognition of civil rights.[18]

While substantive rationality is related to the assessment of the law based on certain values or goals, such as justice, protection of human dignity, parental responsibility, and the best interests of the child. In this framework, the protection of children's rights is not only judged by the availability of definite evidentiary procedures, but also by the ability of norms and their application to provide relevant protection for the interests of the child. A procedure can be formulated consistently, but it still leaves problems if access to proof is difficult to obtain, the exercise of the right to face obstacles, or the scope of protection does not cover

[18] Ahmad Putra, "Menelaah Fenomena Klitih Di Yogyakarta Dalam Perspektif Tindakan Sosial Dan Perubahan Sosial Max Weber," *Asketik*, 2020.

all of the child's legal needs. On the other hand, the broad purpose of protection also requires a clear legal basis and procedures so that its application does not result in uncertainty.[19]

Therefore, legal rationalization cannot be used as a normative conclusion that the increasingly modern law must be fairer. Rationalization is an analytical concept to explain changes in the form of reasoning, the systematization of norms, the procedure of proof, and the way in which the law regulates social relations. Whether these developments result in more adequate protection must be tested through the substance of the norm, the scope of the rights recognized, the mechanism of implementation, and the consistency of its application.[20]

Thus, the use of Weber's legal rationalization to explain that legal transformation can take place through the expansion of recognition criteria, the structuring of evidentiary methods, and the deconstruction of the consequences of civil relations, without assuming that all differences between national law and Islamic family law have been resolved. This three-layered model of analysis, namely the recognition of biological relationships, the recognition of civil rights, and the determination of the consequences of family law, makes it possible to distinguish changes that are actually established in norms from interpretive issues that still require review. This provides a basis for critically assessing whether increased legal certainty goes hand in hand with substantive protection of children, or whether it still leaves a gap between normative recognition and the fulfillment of rights in its application. Ultimately, the effectiveness of such protection must still be limited by the type and scope of available research materials.

The Relationship Between Instrumental Rationality and Value Rationality

Ideally, the relationship between instrumental rationality and value rationality in the determination of civil relations of children born out of wedlock needs to be understood through the difference in the orientation of actions put forward by Max Weber. Instrumental rationality (Zweckrational) refers to actions that consider the suitability between

[19] Budi Tresnayadi et al., "Reconstructing Maintenance Rights for Children Born of Rape: Beyond Nasab Doctrine toward State Responsibility," *Al-Istinbath: Jurnal Hukum Islam* 11, no. 2 (2026): 523–49. https://doi.org/10.29240/jhi.v11i2.16890

[20] Mardona Siregar, "Teori Hukum Progresif Dalam Konsep Negara Hukum Indonesia," *Muhammadiyah Law Review* 8, no. 2 (2024). https://doi.org/10.24127/mlr.v8i2.3567

goals, means, and consequences that may arise, while value rationality (Wertrational) is oriented towards the belief in certain values that are considered important, regardless of the practical success produced. In the context of Islamic family law in Indonesia, both forms of rationality can be used to analyze the relationship between mechanisms of proving biological relationships, legal certainty, and the protection of children's rights. The Constitutional Court Decision No. 46/PUU-VIII/2010 is an important point in this discussion because it opens up the possibility of a civil relationship between a child born out of wedlock and a man who is proven to have a blood relationship as his father based on science and technology and/or other evidence according to the provisions of applicable law.[21]

From the perspective of instrumental rationality, proving a biological relationship is one of the means of identifying the relationship between a child and a man who is suspected of being his biological father. The use of DNA tests, expert examinations, and evidentiary mechanisms in court can help reduce factual uncertainty and provide a basis for judges to consider civil relationships. However, the effectiveness of such mechanisms depends on the standard of proof applied, the reliability of the examination results, the parties' access to the testing process, and the procedures for testing or refuting the evidence presented.[22]

The issue of access needs attention because not all children or interested parties have the economic ability to finance DNA testing. If proving biological relationships depends on expensive testing, while there are no adequate financing assistance mechanisms or alternative proof, procedures that formally provide opportunities for all parties may create inequities in practice. In addition, the collection and storage of biological samples and genetic information is related to the protection of personal data, confidentiality, and the dignity of individuals.

Meanwhile, the rationality of values helps explain why the proof of biological relationship is not sufficiently assessed based on procedural efficiency and the accuracy of identification alone. The protection of human dignity, the best interests of the child, the right to maintenance,

[21] Muhammad Hajir Susanto, Yonika Puspitasari, and Muhammad Habibi Miftakhul Marwa, "Kedudukan Hak Keperdataan Anak Luar Kawin Perspektif Hukum Islam," *Justisi* 7, no. 2 (2021): 105–17. https://doi.org/10.33506/js.v7i2.1349

[22] Agatha, "Pembuktian Dan Pengesahan Anak Luar Kawin Serta Akibat Hukumnya Setelah Berlaku Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Dalam Pandangan Hukum Islam."

and the need for certainty of legal status are relevant values in assessing the consequences of a decision. This orientation places the child as a legal subject whose interests need to be considered, not just an object of proof regarding the biological relationship of an adult. However, such protection must still be analyzed by taking into account the difference between the recognition of blood relations and the determination of the legal consequences that follow it. In positive Indonesian law, the recognition of civil relations based on the Constitutional Court Decision No. 46/PUU-VIII/2010 does not in itself mean that all legal consequences arising from a valid marriage apply identically to every child born out of wedlock. Similarly, the construction of civil relations needs to be distinguished from the concept of nasab and provisions regarding alimony, inheritance, and guardianship in the doctrine of fiqh and the Compilation of Islamic Law.[23]

Thus, Weber's theoretical contribution lies in his ability to explain that the legal development of children born out of wedlock is not merely a shift from formal legality to the protection of children's rights. These developments reveal the complex relationship between evidentiary instruments, legal certainty, the value of child protection, and the conceptual boundaries of Islamic family law. This framework allows research to distinguish procedural success in proving biological relationships from normative issues regarding legal consequences that can be determined on the basis of those relationships. Ultimately, legal rationalization should be understood as an object of analysis of how law constructs arguments, procedures, and categories of recognition, not as a change in law that has resulted in better justice in the future.

Traditional Actions and the Sustainability of the Nasab Doctrine

Ideally, Max Weber's theory of social action is a traditional action. It is characterized by actions that are influenced by customs, practices, and understandings that have been inherited and maintained in social life. In Islamic family law, the sustainability of the doctrine of nasab must be analyzed through the role of the fiqh scientific tradition in determining the relationship of descent and the legal consequences related to it. The doctrine of nasab is not appropriate to be understood solely as an obstacle to the modernization of law, because it has its own normative basis,

[23] Chikita Murti Wiliyandari, Rachmi Sulistyarini, and R Imam Rahmat Sjafi'i, "Implikasi Putusan Mahkamah Konstitusi Terhadap Hak Mewaris Anak Luar Kawin Di Indonesia," *JURNAL USM LAW REVIEW* 9, no. 2 (2026): 854–67. https://doi.org/10.26623/julr.v9i2.13573

function, and scope in maintaining the clarity of the relationship between descendants and determining the consequences of family law.[24]

Meanwhile, Indonesia's positive law through the Constitutional Court Decision No. 46/PUU-VIII/2010 opens up space for the recognition of civil relations between children born out of wedlock and men who are proven to have a blood relationship with him based on science and technology and/or other evidence according to the law. The recognition of civil relations needs to be distinguished from the determination of nasab in fiqh because both have normative basis, goals, and legal consequences that are not always the same.[25]

Therefore, the difference between positive law and Islamic family law needs to be understood through an analysis of the scope of their respective arrangements, not merely as a contradiction between tradition and modernity. The fundamental normative and functional differences of the two concepts can be further explained through comparison as presented in the following table:

Based on these comparisons, traditional actions in Weber's theory are used to explain the sustainability of the doctrine of nasab as part of the normative tradition of Islamic family law. However, the application of this category does not mean that any maintenance of the doctrine of nasab is always a traditional act in a sociological sense, since the determination of law can also be based on considerations of value or other rational arguments. Therefore, it is necessary to emphasize how the doctrine of nasab is maintained and applied in legal argumentation, as well as how its scope is distinguished from the recognition of civil relations in national law. This approach makes it possible to explain the sustainability of religious doctrine as well as the development of the protection of children's rights without first assuming the existence of a conflict of norms or assuming that changes in national law automatically remove the provisions of classical and contemporary jurisprudence.

Nurturing and Guardianship As A Test of Consistency of Transformation

The recognition of civil relations between a child born out of wedlock and his biological father does not automatically resolve the

[24] Miftahul Fikria and Agoes Moh Moefad, "Analisis Teori Tindakan Sosial Max Weber Dan Teori Fakta Sosial Emile Durkheim Dalam Pengenalan Tradisi Lokal Kemasyarakatan," *An-Nuha: Jurnal Kajian Islam, Pendidikan, Budaya Dan Sosial* 11, no. 1 (2024): 109–19. https://doi.org/10.36835/annuha.v11i1.546

[25] Dr Ib Wirawan, *Teori-Teori Sosial Dalam Tiga Paradigma: Fakta Sosial, Definisi Sosial, Dan Perilaku Sosial* (Kencana, 2018).

issue of custody and guardianship. The Constitutional Court Decision No. 46/PUU-VIII/2010 provides a basis for the recognition of civil relations based on blood relations that can be proven according to the law, but the application of the legal consequences must still take into account the regulations relevant to each field.[26]

Therefore, child protection is examined through three different aspects, namely the recognition of biological relationships, the determination of custody, and the determination of guardianship. These three are interrelated in guaranteeing children's rights, but have a legal basis, objectives, and implementation mechanisms that are not always the same. In this context, the principle of the best interests of the child as reflected in the Child Protection Law is an important basis for assessing whether the application of the law provides adequate protection without ignoring the limits of authority determined by national family law and Islamic law.[27]

In the aspect of parenting, child protection needs to be assessed based on the best interests of the child, the suitability of the caregiver, environmental safety, the fulfillment of physical and psychological needs, and the sustainability of emotional relationships that support their growth and development. The determination of parenting should not be based solely on the proof of a biological relationship between a child and a man. Biological relationships can be relevant facts, but a person's eligibility to care for a child still requires a separate assessment based on concrete conditions and applicable legal provisions. The recognition of civil relations and the determination of custody are two issues that must be differentiated analytically. This distinction is important so that the protection of children's rights does not stop at the recognition of legal status, but also includes the fulfillment of their needs and welfare in daily life.

The issue of guardianship requires a stricter distinction because the term guardian can refer to different legal functions. First, the marriage guardian is related to the implementation of marriage and is subject to the provisions of marriage law and relevant Islamic law. In this context, the recognition of biological relationship based on the Constitutional

[26] Hutasoit et al., "Perlindungan Hukum Bagi Anak Luar Nikah Di Indonesia; Studi Komparasi Putusan Mahkamah Konstitusi Nomor 46/Puu-Viii/2010 Dan Hukum Islam."

[27] Daharis et al., "Kedudukan Anak Luar Kawin Dalam Perspektif Kompilasi Hukum Islam Dan Putusan MK: The Position of Children Born Out of Wedlock from the Perspective of the Compilation of Islamic Law and Constitutional Court Decisions."

Court Decision Number 46/PUU-VIII/2010 cannot be directly interpreted as a determination that the biological father automatically holds the position of guardian of the marriage. This position needs to be determined based on the applicable provisions regarding the destiny and guardianship. Second, the guardian in the management of legal interests and children's property is related to the authority to represent children who are not capable of taking legal action, including the management of their financial interests. The determination of guardians for these interests needs to pay attention to the basis of authority, the interests of the child, the protection of his property, and the applicable legal procedures.[28] Untuk memperjelas kerangka analisis, konsistensi perlindungan anak dapat dinilai melalui indikator berikut:

In the perspective of Max Weber's social action theory, the problem shows the relationship between instrumental rationality and value rationality. Instrumental rationality is reflected in the use of evidentiary procedures, parenting determination, and guardianship mechanisms to provide legal certainty and prevent abuse of authority. Meanwhile, value rationality is reflected in considerations regarding the dignity of children, justice, security, and their best interests. Both categories can be used to test arguments contained in regulations and rulings, but they should not be applied automatically without regard to the textual evidence that supports them.

Conceptual Models Offered

The harmonization between national law and Islamic family law in regulating the status of children born out of wedlock requires a model that is able to distinguish the basis for recognizing biological relationships, civil consequences, and the consequences of family law. The Constitutional Court Decision No. 46/PUU-VIII/2010 provides an important basis for the recognition of civil relations between children and men who are proven to have a blood relationship as their biological father based on science and technology and/or other evidence according to the law.[29] Although this recognition does not necessarily equate all legal consequences arising in positive law with the provisions of nasab and the consequences of Islamic family law. Therefore, this study

[28] Bernadeta Resti Nurhayati, "Harmonisasi Norma Hukum Bagi Perlindungan Hak Keperdataan Anak Luar Kawin Dalam Sistem Hukum Indonesia," *Ganesha Law Review* 1, no. 1 (2019): 55–67. https://doi.org/10.23887/glr.v1i1.19

[29] Gusti Muzainah et al., "Female Circumcision in Banjar Culture: Navigating Customary Law, Islamic Law, Human Rights," *Al-Ahkam* 35, no. 2 (2025): 371–400. https://doi.org/10.21580/ahkam.2025.35.2.27814

proposes a three-layer harmonized conceptual model that places each issue based on the object of analysis, normative basis, and legal consequences. This model is an analytical framework that needs to be tested through the study of legal documents, not a picture that all legal consequences have been standardized in practice.[30]

The first layer is the biological layer, which is the determination of the blood relationship between the child and the man who is suspected to be the biological father. In this layer, the focus lies on the validity of the evidence, the standard of proof, the examination procedure, and the judge's assessment of the evidence presented. DNA testing can be one of the means of scientific proof, but its strength and use must still be assessed based on applicable law. Access to testing, protection of genetic data, possible rejection of examination, and mechanisms for resolving evidence disputes also need to be considered. Thus, the biological layer provides a factual basis for blood relations, but does not by itself determine all legal rights and obligations between the child, the biological father, and the father's family.[31]

The second layer is the civil layer, which is the determination of rights and obligations that can be recognized based on positive law after the biological relationship is proven in accordance with applicable regulations. In this layer, it is directed to the scope of the civil relationship referred to in the Constitutional Court Decision Number 46/PUU-VIII/2010, including its relevance to the fulfillment of the rights of children and the responsibilities of men who are proven to have blood relations with him. This distinguishes the recognition of civil relations as a legal consequence from proving biological relationships and the determination of certain forms of rights or obligations that still require a legal basis and further examination. This distinction is important so that the decision is not interpreted excessively as a basis that automatically determines all the consequences of family law, without paying attention to the special provisions that govern each issue.[32]

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[30] Anna Muwaffika, "KHI: Upaya Transformasi Hukum Keluarga Islam Kedalam Sistem Hukum Nasional," *ALWAQFU: Jurnal Hukum Ekonomi Dan Wakaf* 3, no. 01 (2025).

[31] Ida Musofiana et al., "Digital Incest Narratives and Child Protection: Addressing Regulatory Gaps through Legal and Islamic Normative Reconstruction," *JURIS (Jurnal Ilmiah Syariah)* 25, no. 1 (2026): 167–83. https://doi.org/10.31958/juris.v25i1.16555

[32] Syabbul Bachri et al., "A Benefit-Based Reconstruction of Contemporary Copyright Inheritance in Indonesian Islamic Law," *MILRev: Metro Islamic Law Review* 5, no. 2 (2026): 1205–33. https://repository.uin-malang.ac.id/28589/

The third layer is the family law layer, which is the determination of legal consequences related to nasab, upbringing, inheritance, and guardianship based on the basis of their respective laws. In the aspect of nasab, it is necessary to pay attention to Article 42 and Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage as interpreted through the Constitutional Court Decision Number 46/PUU-VIII/2010, as well as Article 99, Article 100, and Article 103 of the Compilation of Islamic Law (KHI). These provisions need to be read carefully by distinguishing the proof of biological relationship and legal consequences in the form of civil relations according to national law from the determination of nasab according to Islamic law.

Meanwhile, in the aspect of parenting, the best interests of the child, the feasibility of the caregiver, security, and the fulfillment of the child's physical and psychological needs are important indicators. This is regulated in Article 41 letter a of the Marriage Law, Article 26 paragraph (1) letter a of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, as well as Articles 105 and 156 of the KHI. This provision is the basis for assessing parental responsibility and child maintenance arrangements according to the circumstances of the case.

In the aspect of inheritance, the position of the heirs and the right to inheritance property must be determined based on the applicable inheritance rules, not solely on the basis of evidence of blood relations. For Islamic inheritance cases, relevant provisions include Article 171 letter c, Article 172, Article 174, Article 176, and Article 186 of the KHI, taking into account the legal status of the child and the provisions regarding the relationship between the nasab and the heirs.

As for the aspect of guardianship, it is necessary to distinguish between a guardian and a guardian who is in charge of representing the child in personal interests or the management of his property. The provisions of the guardian are regulated in Article 19 and Article 20 of the KHI, while the guardianship of oneself and the property of the child is regulated, among others, in Articles 107 to 109 of the KHI. As an additional basis, Article 33 and Article 34 of the Child Protection Law regulate the appointment and responsibilities of guardians in the context of child protection.[33] Thus, the determination of guardians must be based

[33] Husnul Fahimah Ilyas et al., "Between Fiqh and Adat: Negotiating Inheritance Law among the Bugis Community of Wajo," *AHKAM: Journal of Sharia Science* 26, no. 1 (2026): 1–14. https://doi.org/10.15408/ajis.v26i1.44476

on the function of the guardianship in question and the applicable legal requirements. The three-layer model can be summarized in the following table:

Table 1. Layers of Analysis of Biological, Civil, and Family Law Relationships

No.	Analysis Layer	Focus Examination	Basis of Analysis
1.	Biological	Proof of blood relationship between the child and the biological father.	Constitutional Court Decision No. 46/PUU-VIII/2010 and valid evidence.
2.	Civil	Recognition of rights and obligations after biological relationship is proven.	Positive laws, court decisions, and regulations related to children's rights.
3.	Family law	Determination of faculties, upbringing, inheritance, and guardianship.	Fiqh, Compilation of Islamic Law, child protection regulations, and related legal provisions.
4.	Analysis results	Identify legal consequences based on each layer of analysis.	Factual basis, national law, and relevant family law provisions.
5	Conclusion	The formulation of the child's legal position is based on the results of the examination.	Synthesis of all the results of biological analysis, civil, and family law.

Source: Developed by the author based on the Constitutional Court Decision Number 46/PUU-VIII/2010, Compilation of Islamic Law, and relevant laws and regulations.

The real contribution of this model lies in the separation of three issues that are often treated as if they are identical, namely the correctness of biological relationships, the recognition of civil relationships, and the determination of the consequences of family law. The separation allows the study to identify whether the differences between national law and Islamic family law are really conflicts of

norms, differences in regulatory objects, or problems of interpretation and application of law. In addition, it provides an evaluation framework to assess whether the protection of children's rights has been considered consistently without removing the basic normative differences in each area.

According to the authors, the conceptual model offered places biological relationships, civil relationships, and family law as three layers of analysis that are interrelated, but have different evidentiary bases and legal consequences. This model is structured to avoid drawing legal conclusions that are based solely on the proven blood relationship between the child and the biological father, without considering the legal provisions that govern the consequences of the relationship.

At the biological level, proving blood relations is an important factual basis for assessing the biological origin of children. However, such proof cannot be understood as the only basis for determining the entire status and rights of children. Biological relationships need to be proven through valid evidence in accordance with legal provisions, including scientific evidence if relevant, while still paying attention to the applicable proof procedures.

At the civil level, the author considers that the results of biological evidence need to be further analyzed based on the Constitutional Court Decision Number 46/PUU-VIII/2010 and relevant laws and regulations. In this case, the recognition of civil relations should not be interpreted automatically as the granting of all rights and obligations without limits. The scope of legal consequences must be determined based on the legal basis, the type of civil relationship, and the concrete circumstances examined.

Meanwhile, at the level of family law, the author is of the view that every legal consequence must be examined specifically according to its field. The determination of fate needs to consider the provisions of Islamic law and the Compilation of Islamic Law; parenting must prioritize the best interests of the child; inheritance must follow the provisions regarding heirs and the applicable inheritance relationship; while guardianship must be distinguished between a marital guardian and a guardian who represents the legal interests or property of the child. Thus, the similarity of biological facts does not always result in identical legal consequences in every area of family law.[34]

[34] Fatima Essop, "Gender and Islamic Inheritance Law: Reassessing Qur'anic Interpretations of Women's Inheritance Rights," 2026.

Thus, harmonization should not be interpreted as a uniformity of all legal consequences, but rather as an effort to clarify the relationship between layers, the limits of the application of each norm, and the mechanism for resolving when differences in interpretation arise. The success of this model needs to be tested through a comparison between court decisions, laws and regulations, fiqh doctrine, and the Compilation of Islamic Law. Through this test, the research can produce a conceptual explanation of the space for the recognition of biological relationships, the scope of civil rights, and the limits of determining the consequences of family law, while avoiding the conclusion that the development of national law has automatically resolved all the problems of the status of children born out of wedlock.

CONCLUSION

Based on a normative analysis of the Constitutional Court Decision No. 46/PUU-VIII/2010, laws and regulations and the Compilation of Islamic Law (KHI), this study produced three main findings. First, the ruling expands the recognition of civil relations between children born out of wedlock and men who are proven to have a blood relationship with him based on science and technology and/or other evidence according to the law. This expansion emphasizes the importance of protecting children's rights without removing the distinction between biological relationships, civil relationships, and the status of children according to Islamic family law. Second, the recognition of biological relationships does not automatically determine fate, upbringing, inheritance, and guardianship because each field has its own legal basis, requirements, and scope of application. Parenting needs to consider the best interests of the child and the eligibility of the caregiver, while nasab, inheritance, and guardianship must be determined based on relevant legal provisions, including a distinction between a marital guardian and a guardian in the management of legal interests or children's property. Third, Max Weber's theory of social action helps analyze instrumental rationality in the evidentiary procedure, value rationality in the protection of the dignity and rights of the child, and traditional actions in the sustainability of the doctrine of nasab. However, the analysis of the document only shows the rationality reflected in the normative construction, not the psychological motives of the legal actors. This study offers a three-layered harmonization model, namely biological, civil, and family law, as a framework to clarify the relationship between norms, reduce legal uncertainty, and promote child protection without ignoring the principles

of Islamic family law. The model needs to be further tested through the analysis of judgments and, where necessary, empirical research.

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