

The Marriage of Biological Fathers to Their Illegitimate Daughters: A Study of the Shafi'i Madhhab and Indonesian Positive Law

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Abstract:

Marriage is a sacred institution in Islam and the Indonesian legal system, which requires the presence of a guardian as one of its pillars. The problem arises when a daughter is born outside the bonds of a legal marriage, causing debate about the legality of the biological father to act as a marriage guardian. This study aims to examine in depth the legal status of biological fathers as marriage guardians for extra-marital daughters, focusing on a comparative analysis between the perspective of the Shafi'i Mazhab and the provisions in Indonesian positive law. This research uses a juridical-normative method with a descriptive-qualitative approach, through a literature study of classical Syafi'iyah fiqh books, Law Number 1 of 1974 concerning Marriage, the Compilation of Islamic Law, and decisions of the Constitutional Court. The results showed that according to the Syafi'i Mazhab, an extramarital child does not have a nasab relationship with his biological father, so it is not valid for him to be a marriage guardian. The gap in this research lies in the inconsistency between the recognition of civil relationship and guardianship authority in legal practice. The findings of this research provide a normative contribution in clarifying the legal position of the guardian of extramarital children and the urgency of synchronization between Islamic law and national law in answering contemporary family problems.

Keywords: Out-of-wedlock child, marriage guardian, Shafi'i Mazhab, positive law.

Pernikahan Ayah Biologis dengan Anak Perempuan Luar Nikah: Studi atas Madzhab Syafi'i dan Hukum Positif di Indonesia

Abstrak:

Pernikahan merupakan institusi sakral dalam ajaran Islam dan sistem hukum di Indonesia, yang mensyaratkan keberadaan wali sebagai salah satu rukunnya. Persoalan muncul ketika seorang anak perempuan lahir di luar ikatan pernikahan yang sah, menimbulkan perdebatan mengenai legalitas ayah biologis untuk bertindak sebagai wali nikah. Penelitian ini bertujuan untuk mengkaji secara mendalam status hukum ayah biologis sebagai wali nikah bagi anak perempuan luar nikah, dengan fokus pada analisis komparatif antara perspektif Mazhab Syafi'i dan ketentuan dalam hukum positif Indonesia. Penelitian ini menggunakan metode yuridis-normatif dengan pendekatan deskriptif-kualitatif, melalui studi pustaka terhadap kitab-kitab fiqh klasik Syafi'iyah, Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan, Kompilasi Hukum Islam, dan putusan-putusan Mahkamah Konstitusi. Hasil penelitian menunjukkan bahwa menurut Mazhab Syafi'i, anak luar nikah tidak memiliki hubungan nasab dengan ayah biologisnya, sehingga tidak sah baginya menjadi wali nikah. Gap penelitian ini terletak pada ketidaksinkronan antara pengakuan hubungan perdata dan kewenangan perwalian dalam praktik hukum. Temuan penelitian ini memberikan kontribusi normatif dalam memperjelas posisi hukum wali nikah anak luar nikah serta urgensi sinkronisasi antara hukum Islam dan hukum nasional dalam menjawab problematika keluarga kontemporer.

Kata Kunci: Anak luar nikah, wali nikah, Mazhab Syafi'i, hukum positif.



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Introduction

Marriage is a highly respected institution in Islam and the Indonesian legal system. As a sacred form of worship, marriage not only serves to unite two individuals, but also serves as a foundation in building a harmonious family and maintaining the continuity of generations¹. In Islamic teachings, marriage has conditions and pillars that must be met in order to be valid in the eyes of religion and law. One of these pillars is the existence of a marriage guardian, who in Islam is generally the biological father of the prospective

¹ S Bakhtiar, F. Z., & A'isyah, "Tradisi Primbon Dalam Pernikahan Masyarakat Desa Harjokuncaran Kecamatan Sumbermanjing Wetan Dalam Perspektif Madzhab Syafi'i.," *Jurnal Darussalam: Jurnal Pendidikan, Komunikasi Dan Pemikiran Hukum Islam*. 15, no. 2 (2024): 79–90.

bride. The marriage guardian has an important role as a symbol of protection and responsibility for the girl who is getting married ².

However, problems arise when a child is born outside the bonds of a legal marriage. In this situation, a debate arises as to whether a biological father who is not legally married to the child's mother has the right to act as a marriage guardian. This debate involves not only religious views, but also aspects of positive law applicable in Indonesia ³. This view is based on the basic principle of sharia which prioritizes clarity of lineage as one of the main aspects of family law. In the Qur'an, Allah SWT says:

أَدْعُوهُمْ لِأَبَائِهِمْ هُوَ أَقْسَطُ عِنْدَ اللَّهِ فَإِنْ لَمْ تَعْلَمُوا آبَاءَهُمْ فَإِخْوَانُكُمْ فِي الدِّينِ وَمَوَالِيكُمْ وَلَيْسَ عَلَيْكُمْ جُنَاحٌ فِيمَا أَخْطَأْتُمْ بِهِ وَلَكِنْ مَا تَعَمَّدَتْ قُلُوبُكُمْ وَكَانَ اللَّهُ غَفُورًا رَحِيمًا ﴿٥﴾

Artinya: "Panggillah mereka (anak angkat itu) dengan (memakai) nama bapak mereka. Itulah yang adil di sisi Allah. Jika kamu tidak mengetahui bapak mereka, (panggillah mereka sebagai) saudara-saudaramu seagama dan maula-maulamu. Tidak ada dosa atasmu jika kamu khilaf tentang itu, tetapi (yang ada dosanya) apa yang disengaja oleh hatimu. Allah Maha Pengampun lagi Maha Penyayang." (QS. Al-Ahzab: 5).

This verse emphasizes the importance of the nasab relationship in determining a person's identity and status, including in terms of marriage guardianship. The Shafi'i school of thought emphasizes that marriage is only valid if the marriage guardian is a party who has a valid nasab relationship with the prospective bride. In the case of a child out of wedlock, the role of the guardian must be taken over by a judge if there is no legal guardian from the nasab line. This is important to ensure that the marriage fulfills the Shari'ah requirements and does not raise doubts about the legal validity of the marriage ⁴. This view becomes even more complicated when faced with the social reality that biological fathers often want to be involved in the marriage process of their children, even though they do not have this right according to Sharia. On the other hand, positive law in Indonesia provides a different approach through Law No. 1/1974 on Marriage and the Compilation of Islamic Law (KHI). In the context of positive law, there is recognition of the civil relationship between out-of-wedlock children and their biological fathers, albeit within certain limits. The Compilation of Islamic Law stipulates that an out-of-wedlock child still has civil rights against his biological father, such as maintenance, but does not necessarily recognize guardianship rights. This difference shows the dualism of views between Islamic law and positive law, which is often a source of confusion for the community in dealing with cases of out-of-wedlock child marriage ⁵.

This issue has become increasingly relevant given the high birth rate of children out of wedlock in Indonesia. Social and economic factors, as well as people's lack of

² R. Raihan, A. F., Djanuardi, D., & Supriyatni, "Kedudukan Wali Perkawinan Disediakan Penyedia Jasa Perkawinan Siri Online Dalam Perspektif Hukum Islam.," *ACTA DIURNAL Jurnal Ilmu Hukum Kenotariatan* 6, no. 2 (2023): 193-205.

³ Asep Lukman Daris Salam, "Analisis Hukum Hak-Hak Nasab Anak Luar Nikah Menurut Putusan Mahkamah Konstitusi Nomor 46/Puu/Viii/2010," *As-Sakinah : Jurnal Hukum Keluarga Islam* 1, no. 1 (2023), <https://doi.org/10.51729/sakinah11132>.

⁴ Rahman.

⁵ Dwi Anindya Harimurti, "PERBANDINGAN PEMBAGIAN HARTA BERSAMA MENURUT HUKUM POSITIF DAN HUKUM ISLAM," *Jurnal Gagasan Hukum* 3, no. 02 (2021), <https://doi.org/10.31849/jgh.v3i02.8908>.

understanding of religious and positive law, are often the main causes. In many cases, people do not understand the legal implications of marriages involving biological paternal guardians⁶. This condition can lead to legal problems in the future, especially regarding the validity of marriage and the rights attached to married couples and their offspring. Therefore, this study aims to examine in depth the perspectives of the Shafi'i Mazhab and Indonesian legislation regarding guardianship of marriage for children out of wedlock. This research is expected to provide a more comprehensive understanding for the community and become a guide for policy makers in resolving related issues.

This study aims to examine and analyze the legal position of biological fathers as marriage guardians for daughters born outside a legal marriage, by comparing the views of the Shafi'i Mazhab in Islamic fiqh and positive legal provisions in Indonesia. This goal is intended to answer normative problems that arise due to the inconsistency between the principles of Islamic law and national legal decisions, especially regarding guardianship of marriage. This research is not only important to bridge the differences in views between Islamic law and positive law, but also to formulate solutions that can be applied practically and accepted by all parties. Thus, this research is expected to make a real contribution to the development of Islamic family law and encourage the harmonization of the national legal system in Indonesia.

Method

This research uses a juridical-normative approach, which focuses on the study of legal norms, both those contained in Islamic law sources (classical fiqh) and Indonesian positive law. The type of research used is qualitative-descriptive research, which aims to describe, explain, and analyze legal phenomena based on legal text sources systematically, logically, and argumentatively. This research is a library research, focusing on the review of legal documents, fiqh books, and relevant scientific literature. The data sources in this research consist of primary data and secondary data. Primary data sources include fiqh books of the Syafi'i Mazhab, Law Number 1 of 1974 concerning Marriage, Compilation of Islamic Law (KHI), Government Regulation Number 9 of 1975, and Constitutional Court Decision Number 46/PUU-VIII/2010. Secondary data sources include scientific journals, articles, relevant Islamic law and civil law books, as well as the results of previous research related to the issue of extramarital children and guardianship in marriage. Data collection techniques are conducted through documentation studies and literature reviews, both in print and digital form. Researchers traced and reviewed authoritative and relevant written sources, including fatwas of scholars, jurisprudence, and the opinions of legal experts who discussed the issue of marriage guardians for extramarital children. Data analysis is carried out using qualitative analysis methods, namely by classifying, analyzing, and interpreting data from various legal sources in depth.

Result and Discussion

Imam Syafi'i's View on the Legal Status of Unmarried Children

In the perspective of Islamic fiqh, especially the perspective of the Shafi'i Mazhab, the status of extramarital children is a topic that receives serious attention because it involves

⁶ S. D. Judiasih, "Kontroversi Perkawinan Bawah Umur: Realita Dan Tantangan Bagi Penegakan Hukum Keluarga Di Indonesia.," *ACTA DIURNAL Jurnal Ilmu Hukum Kenotariatan* 6, no. 2 (2023): 174–92.

a person's basic rights such as nasab, guardianship, inheritance, and kinship relations ⁷. Imam Syafi'i explicitly states that children born from adultery, which is a relationship between a man and a woman who are not bound by legal marriage, do not have a nasab relationship with their biological father ⁸. This is because biological relations alone are not enough to form a valid nasab relationship according to Islamic law, which is the main basis for a valid marriage contract. The Shafi'i Mazhab bases this view on the hadith narrated by Bukhari and Muslim, in the words of the Prophet Muhammad which means "*The child (born) belongs to the husband (of a valid marriage), and to the adulterer there is no right whatsoever over the child.*" (HR. Bukhari dan Muslim).

This hadith is the main basis that the blood (biological) relationship between a man and a child born of adultery does not give rise to shar'i rights and obligations. Therefore, a child born out of wedlock is only related to the mother, and cannot be related to the biological father. This means that the biological father does not have inheritance rights, is not obliged to provide shar'i maintenance, and is not entitled to be a guardian in the child's marriage. In this case, the guardian of the extramarital girl's marriage is the judge's guardian, not the biological father, because there is no valid nasab bond. In contrast to Syafi'i, the Hanafi school allows acknowledgment of the biological father's lineage if there is recognition, so that the out-of-wedlock child can obtain certain rights from her father even without a legal marriage bond. The Malikiyah Mazhab also shows a more open attitude towards acknowledgment of nasab, but still emphasizes the role of legal guardians according to sharia. This shows that there is a variety of interpretations in Islamic law that can enrich the understanding of the status of children out of wedlock in a more inclusive manner.

This view is reinforced by the principle of Islamic law which prioritizes the preservation of nasab (hifzh al-nasab) as one of the five main objectives of sharia (maqashid al-syari'ah) ⁹. Clarity of nasab is an important requirement in establishing rights and obligations in the family, including in inheritance, guardianship, and child maintenance. Imam Shafi'i and the scholars of his madhhab were concerned that if an adulterated child was recognized by the biological father, there would be chaos in the lineage and could open up opportunities for abuse of shar'i rights, including in terms of guardianship of marriage. Imam Nawawi, one of the leading scholars in the Shafi'i Mazhab, in Al-Majmu' Syarh al-Muhadzdzab also confirms that adulterated children are not attributed to the adulterer (biological father). Therefore, a woman's marriage is not valid if the marriage guardian is a biological father who does not have a marriage bond with the mother, even if the man recognizes the child ¹⁰. This view is in line with the fiqh

⁷ Sindi Rahmawati and Ahmad Sanusi Luqman, "Hukum Mengadakan Pesta Pernikahan Wanita Hamil Diluar Nikah Menurut Pandangan Imam Syafi'i (Studi Kasus Di Desa Suka Jadi Kecamatan Hinai)," *Mediation : Journal of Law* 1, no. 1 (2022).

⁸ Amdaryono Saputra and Tri Eka Saputra, "Status Hukum Anak Diluar Nikah Dalam Perspektif Fikih Islam Dan Hukum Positif Indonesia," *Vifada Assumption Journal of Law* 2, no. 1 (2024), <https://doi.org/10.70184/vdq9ey25>.

⁹ M. Z. HUSAMUDDIN, "Rekonstruksi Maqāṣid Al-Syarīah Dalam Kebutuhan Sosial Modern (Kajian Terhadap Al-Kulliyāt Al-Khamsah)," *PhD Thesis. UIN Ar-Raniry Pascasarjana S3 Fikih Modern (Hukum Islam)*, 2023.

¹⁰ Amirul Bahri, "Solusi Pernikahan Anak Kondisi Hamil Sebab Zina Menurut Imam Madzhab (Telaah Psikologis Dan Sosiologis Teologis)," *Al-Athfal* 4, no. 1 (2023), <https://doi.org/10.58410/al-athfal.v4i1.769>.

rule which means “*There is no nasab (family relationship) for a child born of adultery (to the biological father).*”

However, in a social context, this view often poses its own challenges. In many societies, especially Muslim societies in Indonesia where the majority adhere to the Shafi'i Mazhab, there is still confusion in the application of this law, especially when the biological father shows social responsibility for the child he gave birth to. However, social responsibility or personal recognition is not strong enough in shar'i law to change the status of the child to a legitimate child in terms of nasab.

Terms and Conditions of Marriage of Unmarried Children According to Imam Shafi'i

In Islam, marriage is an act of worship and a social contract that has certain conditions and pillars to be valid in sharia. Imam Shafi'i, as one of the major madhhab imams, provides a systematic view of the pillars and conditions of marriage, including in the case of marriage of children born outside the bonds of legal marriage (children out of wedlock)¹¹. The discussion of the terms and conditions is important to ensure the validity of the marriage, especially since the status of children out of wedlock has quite complex legal implications.

The pillars of marriage according to Imam Shafi'i

According to Imam Shafi'i, there are four main pillars that must be fulfilled in a marriage for it to be valid, namely:

a) Prospective Husband

The prospective husband must be a man who fulfills the shar'i requirements, namely baligh (shari'a adult), of sound mind, and not in a state of shar'i impediment such as being in iddah or being married on a mut'ah basis (limited contract marriage)¹².

b) Wife-to-be

The prospective wife is a woman who meets the requirements, namely baligh or mukallaf, not in the iddah period, and is not hindered by other reasons such as the existence of a mahram relationship that prohibits marriage¹³.

c) Wali Nikah

The marriage guardian is the party who has the authority to represent the prospective wife in the marriage contract. In the Shafi'i school of thought, a marriage guardian is an

¹¹ Maimun A. Rahman and Karimuddin Abdullah Lawang, “Keabsahan Pernikahan Perempuan Hamil Di Luar Nikah Menurut Hukum Islam Dan Legislasi Di Indonesia,” *Jurnal Tahqiq : Jurnal Ilmiah Pemikiran Hukum Islam* 17, no. 1 (2023), <https://doi.org/10.61393/tahqiq.v17i1.112>.

¹² Nurfatihah, Juhriati, and Ahmad, “Hukum Akad Nikah Daring Pada Masa Covid-19: Perbandingan Perspektif Hukum Islam Dan Hukum Nasional,” *NALAR: Journal Of Law and Sharia* 1, no. 3 (2023), <https://doi.org/10.61461/nlr.v1i3.46>.

¹³ Ahdiyatul Hidayah and Muhammad Fahmi, “Kriteria Saksi Yang Adil Dalam Pernikahan Menurut Kantor Urusan Agama Kecamatan Amuntai Utara Kabupaten Hulu Sungai Utara,” *Jurnal Indonesia Sosial Teknologi* 3, no. 4 (2022), <https://doi.org/10.36418/jist.v3i4.409>.

absolute requirement for a marriage to be valid. For girls of legal status (born of a valid marriage), the guardian is usually the biological father or other nasab guardian¹⁴.

However, in the case of out-of-wedlock children, Imam Syafi'i considers that the biological father has no rights as a marriage guardian because there is no valid nasab relationship. Therefore, the rightful guardian in the marriage of a child out of wedlock is the wali hakim (religious ruler or authority), who takes over the role of the nasab guardian in order to maintain the validity of the marriage and legal certainty.

d) Ijab and qobul

Ijab (offer) and qabul (acceptance) must be made clearly, using language that implies a marriage contract and performed by the eligible parties, namely the marriage guardian of the woman and the prospective husband, witnessed by two fair witnesses¹⁵.

1. Conditions for Marriage of Unmarried Children

In addition to the pillars above, there are a number of additional conditions that must also be fulfilled for the marriage of a child out of wedlock according to Imam Syafi'i to be valid:

a) Certainty of Nasab and Guardian Status

Given that the out-of-wedlock child has no legal lineage to the biological father, the requirement for certainty of guardianship is very important. Since the biological father cannot act as a guardian, a judicial guardian must be present to validate the marriage contract. Without this guardian, the marriage contract is considered invalid and void¹⁶.

b) There is no Shari'ah impediment

Although the status of the child is out of wedlock, the prospective bride and groom must still be free from obstacles prohibited by Sharia such as a mahram relationship, or an iddah period. In this context, even if a child is born out of adultery, when he or she reaches adulthood, he or she must still fulfil all the general Shari'ah requirements of marriage¹⁷.

c) Conformity with Sharia Law

Imam Shafi'i emphasises that marriage must be conducted in accordance with the provisions of the Shari'a, and must not violate the basic principles of Islamic law, including maintaining the good and avoiding damage¹⁸.

¹⁴ Ahmad Fauzi, Rahman, and Kemas Muhammad Gemilang, "Rahasia Ilahiyah Keutamaan Kafaah (Setara) Antara Pasangan Pernikahan Menurut Pemahaman Ulama Fiqih Mazhab Syafi'iyah Dan Hanabilah," *Bertuah: Journal of Shariah and Islamic Economics* 3, no. 1 (2022).

¹⁵ Susan. RIZAL, Sukaynah QA; SETIABUDHI, Donna Okthalia; LAWOTJO, "Perbandingan Kedudukan Wali Nikah Bagi Anak Di Luar Nikah Menurut Perspektif Hukum Islam Dan Hukum Positif Di Indonesia. *Lex Privatum*," 11, no. 4 (2023).

¹⁶ Herian Sani, "Problematika Nikah Siri (Analisis Urgensi Pencatatan Perkawinan Perspektif Ushul Fiqh)," *ABSHAR: Jurnal Hukum Keluarga Islam, Pendidikan, Kajian Islam Dan Humaniora* 1, no. 1 (2023).

¹⁷ Pijri Pajjar, "PROBLEMATIKA PASCA NIKAH SIRI DAN ALTERNATIF PENYELESAIANNYA," *Al-Ahwal Al-Syakhsiyyah: Jurnal Hukum Keluarga Dan Peradilan Islam* 3, no. 1 (2022), <https://doi.org/10.15575/as.v3i1.17463>.

¹⁸ Elfirda Ade Putri, "Telaah Kritis Pasal 7 Undang-Undang No.16 Tahun 2019 Tentang Perkawinan," *Jurnal Hukum Sasana* 7, no. 2 (2021), <https://doi.org/10.31599/sasana.v7i2.805>.

d) Legal and Social Implications

In Imam Syafi'i's view, the strictness of these conditions and pillars is to maintain the clarity of the status and rights of each party, especially regarding extramarital children, which indeed raises complex family law issues. By emphasising that the guardian of extramarital children is the judge's guardian, the Shafi'i Mazhab tries to ensure that the marriage process remains valid and does not cause legal doubts that can harm the bride and groom and their offspring¹⁹.

This principle also aims to maintain a clear lineage and prevent children from having unclear social and legal status. Therefore, although out-of-wedlock children have limited nasab rights, their marriages can still be recognised as valid as long as the prescribed pillars and conditions are met properly. The Hanafi and Malikiyah schools, in addition to differing in the recognition of the nasab of out-of-wedlock children, also have different approaches to marriage guardians. For example, in Hanafi, the acknowledgement of the biological father can provide the basis for a guardian, while the Malikiyah still prioritise the legal guardian. This suggests that the appointment of a wali hakim as in the Shafi'i Mazhab is a conservative approach that emphasises clarity of lineage and legal certainty.

A view of Indonesian Positive Law on the status and producers of extramarital marriages of girls

In Indonesia's positive legal system, the status of girls born outside of a legal marriage has its own legal implications, especially in the aspects of civil rights and marriage²⁰. Positive law in Indonesia recognises the existence of out-of-wedlock children, but with certain restrictions. The legal basis that is the main reference is Law Number 1 of 1974 concerning Marriage, Government Regulation Number 9 of 1975 concerning the Implementation of the Marriage Law, and the Compilation of Islamic Law (KHI) as a reference in the settlement of marriage cases for Muslims. In these provisions, there is explicitly no recognition of the civil status of extramarital children against their biological father except after going through certain legal processes. This is important to understand because it will have a direct impact on the rights of children, including in the issue of who is entitled to be a marriage guardian²¹.

In general, Article 43 paragraph (1) of the Marriage Law states that children born outside of marriage only have a civil relationship with their mother and her family²². However, after the issuance of the Constitutional Court Decision No. 46/PUU-VIII/2010, the norm underwent significant changes. The decision states that children born outside of marriage can have a civil relationship with their biological father if it can be proven by

¹⁹ Lukman Lukman and Abdussahid Abdussahid, "DAMPAK NIKAH SIRI ORANGTUA TERHADAP POLA ASUH ANAK USIA DINI," *PELANGI: Jurnal Pemikiran Dan Penelitian Islam Anak Usia Dini* 3, no. 1 (2021), <https://doi.org/10.52266/pelangi.v3i1.646>.

²⁰ Karto Manalu, *Hukum Keperdataan Anak Di Luar Kawin*, Cv. Azka Pustaka, 2021.

²¹ AGYL HIDAYAT, "PELAKSANAAN KEWAJIBAN ORANGTUA TERHADAP ANAK DITINJAU DARI UNDANG-UNDANG NOMOR 1 TAHUN 1974 DAN HUKUM ISLAM. Diss. UNIVERSITAS QUALITY BERASTAGI," 2022.

²² Farid Pardamean Putra Irawan and Nur Rofiq, "Pernikahan Siri Dalam Tinjauan Hukum Islam Dan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan," *Iqtisad: Reconstruction of Justice and Welfare for Indonesia* 8, no. 1 (2021), <https://doi.org/10.31942/iq.v8i1.4537>.

science and technology, as well as other evidence such as confessions or DNA tests²³. This decision is a legal breakthrough that expands the protection of the rights of extramarital children in the realm of civil law, although it still causes debate among scholars and academics.

However, the Constitutional Court's decision has not explicitly regulated guardianship rights in marriage, specifically the right of biological fathers to become marriage guardians for their daughters born out of wedlock. In the context of Islamic law adopted in the KHI, Article 20 paragraph (1) states that a marriage guardian is a man who fulfils the requirements, namely from the male lineage, such as father, grandfather, brother, and so on. However, Article 53 of the KHI explicitly states that the marriage guardian for an out-of-wedlock girl is a wali hakim, not her biological father. This is because out-of-wedlock children under Islamic law do not have a nasab relationship with their biological father, and KHI takes a conservative approach based on the Syafi'i school of thought in this regard²⁴.

The procedure for marrying a child out of wedlock in Indonesian positive law still follows the general procedure as with other marriages, but there is specificity in terms of the appointment of a marriage guardian. Because the biological father does not have the position of a nasab guardian, the prospective bride born out of wedlock must be married by a judge guardian. This requires an application to the local Office of Religious Affairs (KUA) to appoint a wali hakim in place of the legal guardian. This application is usually accompanied by the child's birth certificate, a certificate of the child's status, and a certificate of the absence of a legal guardian under Islamic law.

In addition, out-of-wedlock marriages often face administrative hurdles, such as writing the father's name on marriage certificates and birth certificates, because the civil registration system refers to legally valid data. In many cases, if the biological father is not recorded as the legal husband of the child's mother on the marriage certificate, then the father's name is not included on official documents, except after recognition or a court decision.²⁵

The mismatch between the progressive Constitutional Court decision and the conservative KHI poses socio-juridical challenges. Communities often experience confusion and procedural difficulties, especially in obtaining official documents and recognising marriage guardians. In practice, social solutions adopted by the community

²³ Rendy Dwi Hermanto, "Analisis Putusan MK No. 46/PUU-VIII/2010 Tentang Status Anak Hasil Nikah Siri Perspektif Maqāsid Syarī'ah Imām Al-Syātibi," *Mahakim: Journal of Islamic Family Law* 6, no. 1 (2022), <https://doi.org/10.30762/mahakim.v6i1.142>.

²⁴ Intan Putri. KURNIAWATI, "Faktor-Faktor Penyebab Terjadinya Pernikahan Dengan Wali Ayah Angkat (Studi Kasus Di Desa Rulung Sari, Kecamatan Natar, Kabupaten Lampung Selatan).," *PhD Thesis. IAIN Metro.*, 2023.

²⁵ Imam Syafi'i and Muhammad Ihwan, "Studi Analisis Perbandingan Madzhab Tentang Perkawinan Ayah Dengan Anak Luar Nikah," *HUMANISTIKA: Jurnal Keislaman* 7, no. 1 (2021), <https://doi.org/10.55210/humanistika.v7i1.486>.

include social recognition of the biological father and the use of a wali hakim through mediation with the KUA. This reflects the community's adaptation to the disharmony of formal law and social practice. To bridge this gap, it is necessary:

- a) Clear technical regulations from the KUA for the appointment of wali hakim and the administration of out-of-wedlock children.
- b) Legal and religious education for communities to understand legal rights and procedures.
- c) Strengthening legal and religious mediation mechanisms so that the handling of nasab and guardianship issues can be more inclusive and solutive.
- d) Studies and dialogue across schools of thought to consider revising the KHI to make it more responsive to legal and social developments.

Thus, the view of Indonesian positive law places out-of-wedlock girls in a limited recognised position, but still provides legal avenues for the protection of their civil rights. However, in terms of marriage guardianship, positive law still follows conservative fiqh rules by asserting that biological fathers are not authorised to be marriage guardians, and this authority rests with the wali hakim. This indicates an attempt to synchronise Islamic law and state law, although it is not yet fully harmonised in practice. This policy is also intended to avoid chaos in lineage and descent, and to maintain order in the legal administration of marriage.

Conslusion

The conclusion of the research entitled 'Marrying off Girls Born Outside of Marriage by Biological Fathers in the Perspective of the Shafi'i Mazhab and Positive Law in Indonesia' shows that according to the view of the Shafi'i Mazhab, girls born outside of a legal marriage do not have a nasab relationship with their biological father, so the father does not have the right to be a guardian in their marriage; the position of the guardian is left to the judge. This view was later accommodated in Indonesian positive law, as reflected in Article 53 of the Compilation of Islamic Law, which confirms that the marriage guardian for a child born out of wedlock is the judge, not the biological father. Although Constitutional Court Decision No. 46/PUU-VIII/2010 recognises the civil relationship between out-of-wedlock children and biological fathers if it can be proven scientifically and legally, it does not yet cover the aspect of guardianship in marriage. Therefore, it can be concluded that both in the perspective of fiqh Mazhab Syafi'i and Indonesian positive law, biological fathers do not have the legal authority to marry off daughters born out of wedlock, and the implementation of the marriage must be through the appointment of an official judge guardian.

The limitations of this research lie in its normative and textual approach, so it has not explored in depth the sociological aspects or field practices that occur in society, such as the dynamics at the KUA, the role of religious judges, or social responses to this phenomenon. In addition, this research focuses on the Syafi'i Mazhab without comparing it with the views of other madhhabs that may have different interpretations of the status of guardians for children out of wedlock. Based on these limitations, it is recommended that future research develop this study with an empirical approach through interviews or case studies in religious institutions and religious courts. Cross-mazhab research could also enrich understanding of the flexibility of Islamic law in responding to the problem of guardianship of children out of wedlock. In addition, an assessment of the possibility of reconstructing national law that is more in line with the principles of substantive justice in this case is also an important space for further research.

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