

The Problem of The Legality of Biological Fathers as Guardians of Illegal Children

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Abstract. *The problem of the status of children born out of wedlock creates legal complexity, especially related to marriage guardianship and lineage in Islam and positive Indonesian law. Children born out of wedlock often face the consequences of their parents' negligence, especially when girls need a marriage guardian for the validity of the marriage. Islamic Law and the Compilation of Islamic Law (KHI) Article 19 emphasizes marriage guardianship as a mandatory pillar, where the father has the main position as a lineage guardian. However, recognition of the biological father is often difficult to obtain if the parents' marriage is invalid, causing the illegitimate child to only be related to the mother according to the KHI. The MUI fatwa also confirms this. On the other hand, Constitutional Court Decision No. 46/PUU-VIII/2010 has opened up space for recognizing the civil relationship of illegitimate children with biological fathers through scientific evidence (DNA), regardless of lineage ties, creating tension between sharia norms and constitutional protection of children's rights. This study uses a normative juridical legal approach with a descriptive research type, utilizing library research to analyze secondary data. The primary legal materials used include the 1945 Constitution, the Criminal Code, the Criminal Procedure Code, the Marriage Law, and the KHI, supported by secondary legal materials such as relevant books and journals. The data collection method was carried out through literature studies, observations, and interviews with competent informants using purposive sampling. Data analysis was carried out qualitatively with a deductive-inductive thinking framework. The study found that the KHI explicitly cuts off the lineage of children resulting from adultery with biological fathers, appointing a judge as a marriage guardian. However, the Constitutional Court Decision and modern legal philosophy emphasize the protection of children's rights, justice, equality, and welfare, encouraging the recognition of biological fathers as marriage guardians under certain conditions if legally proven, in line with the views of the Hanafi school. However, in current Indonesian judicial practice, a judge remains the main solution for girls born from adultery without a valid marriage to guarantee the validity of the marriage.*

Keywords: *Children Born Out of Wedlock; Marriage Guardian; Compilation of Islamic Law.*

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1. Introduction

Children born should be the fruit of a legitimate marriage bond. However, social reality shows that there are children born from extramarital relationships, a phenomenon that is often influenced by free association that is not in line with religious and social norms.¹When a child is born in such a condition, the burden and responsibility are entirely on the biological parents, who should be responsible for the birth process. The child who should have been born in a state of fitrah, instead has to face the consequences of the negligence of his parents.

The issue of the status of children born out of wedlock becomes very important when the child is going to get married, especially for girls who need a marriage guardian. In Islamic law, and also regulated in the Compilation of Islamic Law (KHI) Article 19, a marriage guardian is a pillar that must be fulfilled for the validity of a marriage. The validity of this guardianship in turn determines whether or not a marriage is valid. The position of a father as a marriage guardian has a primary position in the order of guardianship. Therefore, the recognition of a father as a legitimate father in civil law is very important. However, this recognition often cannot be obtained automatically, especially if the marriage between the child's father and mother is not legally valid.²

In the context of marriage guardianship, there are two types of guardians, namely lineage guardians and judge guardians. The issue of lineage or descent is very central in determining the marriage guardian, because the validity of a marriage aims to maintain the lineage so that it remains clear and unbroken. This lineage issue is closely related to the legal status of a child. Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law has regulated children, but there are challenges in its implementation, especially in relation to the provisions of classical fiqh, which have a significant influence on determining the marriage guardian for children resulting from adultery.

The reality on the ground shows an increase in the phenomenon of pregnancy outside marriage caused by various factors, including promiscuity or infidelity. This situation not only causes violations of moral norms, but also leads to unwanted pregnancies. The impact of this condition also gives rise to various legal implications related to the status of the child, especially in terms of marital guardianship and inheritance rights.³Considering that a legitimate child is a child born from a legitimate marriage (Article 42 of the Marriage Law), the issue of the status of illegitimate children is crucial.

The Compilation of Islamic Law, as one of the main references in family law in Indonesia, has rules regarding the marriage of pregnant women outside of marriage in Article 53. This article allows marriage between a pregnant woman outside of marriage and the man who impregnated her, even without waiting for the birth of the child. This confirms the validity of marriage in a pregnant condition, but does not immediately impact the status of the lineage of the child born from the marriage. Children born from "pregnant marriage" according to the KHI do not automatically have lineage to their biological father. This re-emphasizes the importance of the existence of a legitimate marriage bond as the main way

¹Abdul Rahman Ghazaly, 2010, *Fiqh Munakahat*, Kencana, Jakarta, pp. 10-11.

²Soemiyati, 2007, *Islamic Marriage Law and Marriage Law*, Liberty, Yogyakarta, p. 8.

³Amir Syarifuddin, 2007, *Islamic Marriage Law in Indonesia*, PT. Bumi Aksara, Jakarta, p. 61.

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to obtain lineage in Islamic law.

Nevertheless, the problematic issue regarding the validity of the biological father as a marriage guardian for a child resulting from adultery remains an issue that requires further study. The interpretation and implementation of the KHI related to the rights and position of the biological father in the marriage guardianship of a child resulting from adultery is in the spotlight. This problem gives rise to important legal implications, especially related to the validity of the marriage of a daughter resulting from adultery when the marriage guardian present is her biological father.

Therefore, a study is needed to comprehensively understand the problematic validity of biological fathers as marriage guardians for children resulting from adultery within the framework of the Compilation of Islamic Law. This in-depth study will involve a review of the relevant provisions of the KHI, as well as comparing them with classical fiqh views and other related laws and regulations. Efforts to understand this problem are expected to provide a clearer picture of the legal position of biological fathers in the marriage guardianship of children resulting from adultery in Indonesia, as well as the legal impacts arising from the status of such guardianship.

Based on the description above, the author is interested in studying and conducting research with the title; PROBLEMATICS OF THE LEGALITY OF BIOLOGICAL FATHERS AS MARRIAGE GUARDIANS OF ILLEGAL CHILDREN

2. Research Methods

Research Methodology is the science of the methods that will be used in conducting research.⁴ Legal research is basically divided into two (2) types, namely Normative Research and Empirical Research. Normative Research is research using secondary data, so it is also called library research, while what is meant by Empirical Research is direct research in the community, some of which are through questionnaires or direct interviews.

3. Results and Discussion

3.1. The Compilation of Islamic Law regulates the status of children resulting from adultery in relation to the position of the biological father.

Lineage or status of a child has a very important position in Islamic teachings, because it is related to the rights, obligations, and identity of the child in the family and society. Islam places maintaining lineage as one of the main objectives of the law of valid marriage, as reflected in Surah Al-Furqan verse 54 which states that Allah created humans with the noble purpose of maintaining lineage (lineage) and establishing relationships through valid marriage bonds. Marriage in Islam is not only a legal bond, but also a blessed means to produce offspring, maintain honor, and create harmonious family relationships. However, social reality often does not conform to the idealism of the law, such as in the case of children from adultery who are born outside of a valid marriage. A child of adultery, according to Islamic jurisprudence terminology, is a child born from an unlawful relationship between two people who are not bound by a valid marriage. Islam provides fair guidance regarding the status and rights of the child, even though he or she was born from a relationship that is contrary to the law. Compilation of Islamic Law (KHI) and fatwa of the

⁴Abdurrahmat Sathoni, 2005. Research Methods and Thesis Writing Techniques, Rineka Cipta, Jakarta, p. 98.

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Indonesian Ulema Council (MUI) No. 11 of 2012 confirms that a child resulting from adultery only has a lineage relationship with his/her mother and her/her family, while the biological father is not recognized as a party who has a legal lineage relationship. This is in line with the view of the majority of scholars who state that adultery does not have an impact on determining the child's lineage to the man who committed adultery with his/her mother.

From here arises the tension between positive Indonesian law that begins to accommodate scientific evidence (DNA) and Islamic law that adheres to the principles of sharia. The KHI as a product of Islamic law in Indonesia is currently still guided by the classical rule that cuts off the relationship of the offspring of adultery with the biological father, although it opens up space for moral responsibility through voluntary support. Meanwhile, the Constitutional Court's decision reflects the need to protect children's rights more inclusively, including in terms of certainty of identity and economic rights. Therefore, it is important to analyze more deeply how the KHI regulates the status of the offspring of adultery in relation to the position of the biological father, as well as to explore the possibility of reconciliation between the certainty of Islamic law and the demands of contemporary justice. This analysis will see to what extent the KHI can respond to developments in society and technology without ignoring the basic principles of Islamic law.

1. Legal Basis in KHI

The issue of illegitimate children is still a very important and controversial issue in the lives of Indonesian society. Lack of understanding of the meaning of illegitimate children causes confusion in the legal community, especially amidst the rampant information circulating in various media, especially online media, which could possibly trigger unrest.⁵The legal basis regarding the lineage of children in the Compilation of Islamic Law (KHI) is expressly regulated in several important articles, particularly concerning the status of children born out of wedlock.

Article 99 of the KHI explains that a legitimate child is a child born in or as a result of a legitimate marriage, as well as a child resulting from the legitimate actions of a husband and wife outside the womb and born by the wife.⁶Thus, children born from extramarital relationships are not included in the category of legitimate children according to the KHI. Furthermore, Article 100 of the KHI stipulates that children born outside of marriage only have a blood relationship with their mother and their mother's family.⁷ This means that the child of adultery has no legal relationship whatsoever with his biological father. There are no inheritance rights, guardianship, or other legal responsibilities that can be claimed from the biological father. Article 101 of the KHI stipulates that a husband who denies the legitimacy of a child, while the wife does not deny it, can confirm his denial with a li'an⁸. This article provides confirmation in the context of children from marriages whose validity is in doubt. In this case, the child can still be recognized and legalized by the father if both parents can

⁵*Ibid*, p.213.

⁶Compilation of Islamic Law in Indonesia, (Jakarta: Ministry of Religion of the Republic of Indonesia) Directorate General of Islamic Community Guidance, Directorate of KUA and Sakinah Family Development, 2018), pp. 50-51.

⁷*Ibid*, p. 51.

⁸*Ibid*, p. 51.

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prove that the marriage did take place. However, this provision does not apply to children of adultery who are clearly born from a relationship without a legal marriage bond.

2. Legal Basis in Civil Law in Indonesia

Code of Law Civil (hereinafter referred to as the Civil Code) refers to illegitimate children as *Natuurlijk Kind* (natural children). In fact, illegitimate children exist and it cannot be denied that they have become a 'homework' for legal thinkers in our country to always be considered, considering as the author said before that our country is struggling to try to improve the morals of its children, by focusing more attention on the issue of children.⁹ The Civil Code distinguishes illegitimate children into two categories, namely acknowledged illegitimate children and unrecognized illegitimate children. According to Article 272 of the Civil Code, it explains that "Illegitimate children, except those born from adultery or blood stain, are legalized by a subsequent marriage of their father and mother, if before the marriage they have legally acknowledged the child, or if the acknowledgement occurs in their own marriage certificate."¹⁰ This article states that an illegitimate child can be acknowledged by his/her parents. This acknowledgement can be done by the father and/or mother through a birth certificate, will, or other authentic deed. However, the Civil Code provides a limitation that a child born from a prohibited or adulterous relationship (for example between people one of whom is married) cannot be acknowledged. Furthermore, according to Article 280 of the Civil Code, it is regulated that "with the acknowledgement of an illegitimate child, a civil relationship is born between the child and his/her father or mother."¹¹ An illegitimate child who is legally recognized by his/her father and/or mother has the right to inherit from the parent who recognizes him/her, within certain limits. This recognition must be made through a birth certificate, will, or other authentic deed. Based on Civil Law, an illegitimate child born out of wedlock is considered an illegal child and can later be changed to a legal one. This can be done through ratification and recognition. The recognition is determined by the father because of the illegitimate offspring.¹² However, illegitimate children do not have a legal relationship with the family of the parent who does not acknowledge them, unless the relationship is legitimized through marriage.

In relation to inheritance rights, the Civil Code provides a certain portion of inheritance to acknowledged illegitimate children. In the life of society, the position of illegitimate children has a very weak position, especially in legal protection regarding the procedures for the transfer of inheritance of heirs.¹³ According to Articles 862 and 863, an acknowledged illegitimate child is entitled to receive one-third of the portion that a legitimate child should receive, with the provision that inheritance is carried out in a limited manner and only to the parent who makes the acknowledgement. The right to receive an heir is determined for an illegitimate child who has been acknowledged by his/her father and/or mother. Without the

⁹Emilda Kuspraningrum, Position and Protection of Illegitimate Children in a Legal Perspective in Indonesia, Legal Minutes, Faculty of Law, Mulawarman University, Volume 2 No. 1, June 2006, p. 27.

¹⁰Civil Code (Burgerlijk Wetboek for Indonesia).

¹¹Ibid.

¹²I Kadek Yudana Billy Aryambau and Dewa Gede Rudy, Legal Position of Children Born Outside of Marriage According to the Civil Code, Kertha Wicara Journal, Vol. 11 No. 12 of 2022, p. 1861.

¹³Ibid, p. 1862.

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acknowledgement of the father and/or mother, an illegitimate child does not have the authority to inherit property.¹⁴

The guardianship status of illegitimate children is a major concern because the child is not legally under the authority of either parent, especially if there is no legal marriage bond between the father and the child. And mother. According to the provisions of the Civil Code, minors, namely those who are under 21 years old and unmarried, are considered not yet competent to act legally. Therefore, they need a guardian who will be responsible for legal actions and the protection of their rights. This is emphasized in Article 330 of the Civil Code which explains that:

Those who are not yet adults are those who have not reached the full age. twenty-one years of age and not previously married. If the marriage is dissolved before they reach the age of twenty-one years, then they do not return to the status of minors.

Those who are not yet adults and not under the authority of their parents, are in lower-guardianship on the basis and in the manner as provided in Sections 3, 4, 5 and 6 of this chapter.

Determination about the meaning of the term "minor" used in several laws and regulations regarding Indonesian citizens. To eliminate doubts caused by the Ordinance dated December 21, 1971 in S.1917-738, this Ordinance was revoked, and determined as follows:

1. If the regulations use the term "minor", then as far as the Indonesian population is concerned, this term means all people who are not yet 21 years old and who have never been married before.
2. If the marriage is dissolved before they are 21 years old, they do not return to the status of minors.
3. In the sense of marriage does not include child marriage.¹⁵

For illegitimate children who are not legally under the authority of their parents, Article 319a of the Civil Code provides a way out through a guardianship mechanism determined by the court. The appointment of a guardian can be made at the request of the child's blood relatives or at the initiative of the prosecutor's office. The appointed guardian will have the authority to take care of and protect the interests of the child.

Child's position outside marriage is regulated in the Civil Code Chapter XII on Paternity and the Origin of Children's Descendants. The status and position of an illegitimate child is different from that of a legitimate child. An illegitimate child only has the same position as a legitimate child both biologically and legally after the child has been validated or absolute recognition from the father and mother. Article 280 of the Civil Code states that if there is recognition of an illegitimate child, a civil relationship arises between the illegitimate child and the father and mother as a legitimate child. This recognition must be accompanied by a marriage between the man who impregnated the child and the woman who was impregnated. The legal consequences of absolute recognition of an illegitimate child give rise to civil rights between the illegitimate child and his parents. This recognition results in a father (husband) being able to have an illegitimate child and gives rise to reciprocal obligations be-

¹⁴Ibid, p. 1864.

¹⁵Civil Code (Burgerlijk Wetboek for Indonesia), Op. Cit.

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tween the parents and their child. An illegitimate child before being recognized by the institution of recognition by the person does not have civil rights with his father. However, after this recognition, an illegitimate child has the right to obtain the identity of the parents, maintenance, care, guardianship, and even inheritance from both the father and the mother, although limited.¹⁶

In practice, children born out of wedlock are usually under the care of their biological mother because only the mother automatically has a civil relationship with the child, unless there is legal recognition from the biological father. If the mother dies, is unable, or is unfit to carry out guardianship duties, the court can appoint another guardian to guarantee the protection and welfare of the child. Thus, the Civil Code provides a fairly clear legal basis regarding the guardianship of illegitimate children. Although their position is not equal to that of legitimate children, the legal system still provides space for legal protection through the appointment of a guardian by the court to guarantee the best interests of the child.

3. Position of Biological Father

The position of biological fathers towards illegitimate children from the perspective of Islamic law as stated in the Compilation of Laws Islam (KHI) differs significantly from the view taken by the Constitutional Court in Decision No. 46/PUU-VIII/2010.

In the Compilation of Islamic Law, the biological father has no legal standing over a child born outside of a legal marriage. Based on Article 100 of the KHI, a child born outside of marriage only has a blood relationship with his mother and her mother's family. This means that an illegitimate child cannot claim civil rights such as maintenance, inheritance, or guardianship from the biological father. The biological father in this case has no legal responsibility for the child, either in terms of guardianship or provision of maintenance. The KHI refers to on the principle of Islamic jurisprudence which states that lineage is only

This Constitutional Court decision also ruled that Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage (State Gazette of the Republic of Indonesia of 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) which states, "A child born out of wedlock only has a civil relationship with his mother and his mother's family", is contrary to the 1945 Constitution of the Republic of Indonesia insofar as it is interpreted as eliminating civil relations with a man who can be proven based on science and technology and/or other evidence according to the law to have a blood relationship as his father.¹⁷ Chapter Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage (State Gazette of the Republic of Indonesia 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) is contrary to the provisions of Article 28B paragraph (1) and paragraph (2), and Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia.

The Constitutional Court's decision has the consequence that biological fathers have legal responsibilities towards children born out of wedlock, such as the obligation to provide maintenance, recognition of inheritance rights, and guardianship. The approach taken by the Constitutional Court is based on constitutional principles and protection of human

¹⁶Muhammad Habibi Miftakhul Marwa, Problems of the Rights of Children Born Outside of Marriage: A Review of the Civil Code, Media of Law and Sharia, Volume 4 No. 3 of 2023, pp. 250-251.

¹⁷Ibid, p.37.

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rights, especially to ensure that illegitimate children do not experience discrimination and continue to receive proper legal protection from both parents.

Thus, the fundamental difference between these two legal systems lies in confession regarding the legal status of the biological father. The KHI rejects such recognition if there is no legal marriage, while the Constitutional Court Decision allows such recognition if proven scientifically or legally. This difference reflects the tension between the normative-religious approach and the constitutional approach that upholds the rights of children as citizens.

4. Philosophical Argumentation

a) Philosophical Basis of Children's Rights

Philosophically, Indonesian law is rooted in the values of justice, humanity, and protection of human rights, including children's rights. Children, as human beings since in the womb, have dignity and honor that must be protected. In the context of illegitimate children, this protection includes the right to identity, affection, care, and civil rights such as having a legal guardian when getting married.

The state, through its constitution (UUD 1945 Article 28B paragraph 2), guarantees that:

“Every child has the right to survive, grow and develop and has the right to protection from violence and discrimination.”¹⁸

This means that even if the child is born outside of a legal marriage, his/her rights must still be fulfilled, including in terms of guardianship for marriage.

Thus, the rejection of the appointment of a marriage guardian for an illegitimate child based solely on birth status is contrary to the constitution and the spirit of human rights protection. In practice, the state needs to ensure that illegitimate children still have access to a legitimate marriage guardian figure in order to guarantee a legal and dignified marriage process.

This philosophy of children's rights puts forward the view that birth status should not be an obstacle for children to obtain their full civil rights. Rejection of the appointment of a guardian for an illegitimate child means depriving the child of the right to carry out one of the important aspects of his life, namely marriage, with legal protection that should be guaranteed by the state.

b) Values of Justice and Equality

Legal philosophy places justice and equality as fundamental values in every legal product. In the context of guardianship of illegitimate children, the application of the law in a formalistic manner without considering biological and sociological realities can give birth to injustice. When an illegitimate child who has had an emotional, psychological, and biological relationship with his biological father cannot be guardianized by the father in marriage, then there is an inequality of treatment that violates the principle of equality.

The justice referred to here is not merely procedural justice, but rather substantial justice. An illegitimate child has the same social and emotional needs as a legitimate child, including in terms of the presence of parents as guardians in marriage. Therefore, justice demands

¹⁸The 1945 Constitution of the Republic of Indonesia.

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that the law provide space for recognition of the biological father as a guardian, as long as it can be legally proven and does not conflict with other legal norms.

c) The Principle of Benefit and Welfare of Children

Within the framework of Islamic legal philosophy that also influences the Indonesian national legal system, the concept of *maslahat* (benefit) is known as one of the main considerations in determining the law. *Maslahat* in this context refers to the protection and fulfillment of the essential needs of the child, including the right to be legally married to a guardian who is able to maintain the honor and continuity of the child's marriage. Therefore, the principle of *maslahat* supports the appointment of a biological father as a marriage guardian if his presence provides real benefits to the child.

Maslahat also includes protection of the child's psychological aspects. A child who does not have a marriage guardian from the father's side can feel emotional emptiness and social pressure when entering the marriage phase. The presence of a father as a marriage guardian can provide a sense of security and moral support that is important in undergoing religious and legal processes. This is in line with the principles of *maqasid al-syariah* which places protection of offspring (*hifz al-nasl*) as one of the main objectives of *sharia*.

Rejection of the appointment of a biological father as a guardian, without consideration of the interests, has the potential to harm the child from a psychological, social, and spiritual perspective. In fact, in many cases, the biological father is the party who knows the child best and is able to guide him. Therefore, for the sake of the interests, the law must consider the appointment of a biological father as a marriage guardian if he is proven to have responsibility and commitment to his child.

Thus, the principle of *maslahat* leads to a legal view that is not only normative, but also adaptive and contextual. In the context of illegitimate children, *maslahat* emphasizes the importance of protecting children's rights through a humanistic and rational approach. Laws that aim to create justice must be able to respond to this social reality in order to create sustainable *maslahat*.

d) Relevance of the Constitutional Court Decision

The Constitutional Court of the Republic of Indonesia Decision Number 46/PUU-VIII/2010 is an important milestone in the reconstruction of the legal relationship between an illegitimate child and a biological father. In this decision, the Court recognizes the existence of a civil relationship between an illegitimate child and his/her father if it can be proven scientifically and/or with other evidence according to law. Philosophically, this decision shows that national law is beginning to shift from a legal-formal paradigm to a more humanistic and contextual direction.

The relevance of the ruling lies in the recognition that biological ties can have legal consequences, including in terms of guardianship. If previously the biological father was not recognized as a guardian in the marriage of an illegitimate child because there was no legal relationship, now this can be changed if the blood relationship can be legally proven. This opens up opportunities for illegitimate children to receive fairer and more dignified legal treatment.

The Constitutional Court's decision is an important basis for formulating a more inclusive legal approach to illegitimate children. It emphasizes that the law should not be closed to

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social dynamics and scientific progress. In this case, DNA tests and other scientific evidence can be used as a means of proving a legitimate father-child relationship, including for the purposes of determining a marriage guardian.

Considering this decision, it is very relevant if in determining the guardian of an illegitimate child, the court considers the biological relationship between the child and the father as a valid legal basis. This will strengthen legal protection for illegitimate children and provide a fair opportunity for the biological father to carry out his important role as a guardian in marriage.

e) Law as a Means of Social Reconstruction

Modern legal philosophy does not only see law as a norm or command, but also as a means to reconstruct and reshape a more just social structure. In terms of guardianship of illegitimate children, the law has a strategic role in removing the social stigma that is often attached to children born outside of legal marriage. One way to remove this stigma is to provide clear legal status to the guardian of marriage from the biological father's side.

Law as a tool of social engineering serves to create an inclusive social order. By allowing illegitimate children to be without a guardian from the father's side, society will continue to treat them as socially imperfect. However, if the law recognizes biological fathers as guardians, society will be encouraged to change its views and accept illegitimate children as an integral part of the community.

5. Alternative Solutions for Legal Reconciliation

Protection of illegitimate children in this case is very necessary by not treating them discriminatory, unfairly and placing their position the same as other children. Children born outside of marriage must need legal protection, especially for their civil rights so that later when their civil matters are questioned, children born outside of marriage have special protection to protect all matters related to their civil rights.¹⁹

3.2. The validity of the biological father as a marriage guardian for an illegitimate child according to the Compilation of Islamic Law.

The rules for protecting the civil rights of illegitimate children in the Marriage Law did not just emerge, historically the Marriage Law accommodates various social, political, religious and cultural interests. Most of its legal material is taken from religious law. To automatically obtain children's civil rights, men and women must be bound by a valid marriage according to religion. However, the validity of a marriage is not only related to religious norms, but must also go through the registration procedure that has been determined by the state in applicable laws.²⁰

Marriage in the context of law and social culture in Indonesia is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on the One Almighty God, as regulated in Article 1 of Law Number 1 of

¹⁹Syahvaldo Riyanto, "The Position and Legal Consequences of the Deed of Acknowledgement of an Extramarital Child Made by a Notary", Thesis (Faculty of Law, Sultan Agung Islamic University, Semarang: 2023), p. 96.

²⁰J. Andi Hartanto, 2008, *Legal Status and Inheritance Rights of Children Born Outside of Marriage According to the Civil Code*, Laksbang Presindo, Yogyakarta, p. 53.

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1974 concerning Marriage. Legally, marriage is recognized as a legitimate institution if it is carried out in accordance with the provisions of the religion of each party and is registered with the authorized agency. Meanwhile, in Indonesia's pluralistic social culture, marriage is not only seen as the union of two individuals, but also as the union of two large families that have strong social, moral, and customary consequences. In various traditional communities, marriage is a means of maintaining harmony between social groups and preserving traditional values and collective norms. Therefore, marriage in Indonesia is a multidimensional institution that reflects the harmony between religious values, legal provisions, and socio-cultural norms that live and develop in society.

In Islamic law, the existence of a marriage guardian is not merely symbolic, but is an integral part of the mechanism that ensures that the decision to marry is based on rational and responsible considerations. The presence of a guardian in the marriage procession aims to ensure that the marriage takes place in an orderly manner, in accordance with the principles of justice and for the sake of achieving mutual welfare. Therefore, understanding the role and function of a marriage guardian is very important, especially in order to maintain family stability and avoid potential conflicts in the future. The role of a guardian in Islamic law is also an important instrument in protecting women, because he acts as a representative of the family who supervises and ensures that the marriage is carried out legally, voluntarily, and in accordance with sharia. Thus, the presence of a guardian not only guarantees the validity of the marriage contract, but also becomes the foundation for building a harmonious and sustainable household.

The urgency of the existence of a marriage guardian in Indonesian law cannot be separated from the Islamic legal framework which is the main basis for regulating marriage for Muslims. The existence of a marriage guardian has strong legal significance, because it not only guarantees the validity of the marriage contract, but also becomes a form of legal protection for the prospective bride so that the marriage process is carried out with mature consideration and does not contain elements of coercion or deviation. In a legal context, the marriage guardian acts as a party that ensures that the marriage takes place in accordance with applicable religious, legal, and customary norms. In addition, the marriage guardian also has a preventive function in preventing invalid marriages or those that can cause disputes in the future. Therefore, in the Indonesian legal system which recognizes legal plurality, the role of the marriage guardian is maintained as an essential element in the formation of a legitimate and harmonious family according to the provisions of Islamic law and social norms of society. A marriage carried out without the permission of a guardian is void. This shows the aspect of the legal material which states that a marriage without a guardian is invalid.²¹One of the pillars of marriage is the presence of a guardian, so for a marriage to be valid, a guardian must fulfill the requirements determined by the sharia, namely being a Muslim, mukallaf, able to act fairly, free and male.²²

²¹Syarifuddin, ML, General Review of Marriage Guardians, An-Nuha: Journal of Islamic Studies, Education, Culture and Social Studies, Volume 5 Number 1 July 2018, p. 132.

²²Ibid, p. 132.

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In the perspective of the Compilation of Islamic Law (KHI), a marriage guardian is one of the important elements in a valid marriage. Provisions regarding marriage guardians are explicitly regulated in Articles 20 to 23 of the KHI. Based on Article 20, the KHI explains that:

(1) The person who acts as a marriage guardian is a man who fulfills the requirements of Islamic law, namely being Muslim, having the right to be of sound mind and having reached puberty.

(2) Marriage guardians consist of:

- a. Guardian of lineage;
- b. Judge guardian.²³

The marriage guardian must come from the male line, namely the father, paternal grandfather, half-brother, and so on in stages. The guardian is called a *nasab* guardian, namely a guardian who has a legal blood relationship according to Islamic law. From the description of the marriage guardian which is so clear, it is clearly illustrated that the Islamic family is not a nuclear family which only consists of parents and children. The family in Islam is an extended family which includes grandparents, grandchildren, uncles and aunts, and their descendants and has dependency especially on men, who are legally, as heads of the family and guardians.²⁴ As for the order of marriage guardians, as we know in the Shafi'i school of thought there are nine types, namely:

1. Father, if father is not there or unable to be a guardian, then the successor is grandfather. And so on along the straight line above.
2. Full brother
3. Half-brother
4. Son of a blood brother
5. Son of a brother from the same father
6. Uncle
7. Uncle of the same father
8. Uncle's biological son
9. My uncle's son.²⁵

As for the path of marriage guardians according to the Hanafiyah school, because this school acknowledges the existence of a woman's path, in this case the path of the guardian in question is:

1. Lineage, even if there are women
2. *ZawilArham*
3. Sultan
4. Judge, in the event that there is no guardian from the other lineage.²⁶

²³Compilation of Islamic Law in Indonesia, Op. Cit. p. 13.

²⁴Susanto, A, The Function of Islamic Law in Determining Marriage Guardians in Maintaining Family Integrity, *As-Sakinah: Journal of Islamic Family Law*, Volume 2 Number 2 November 2024, p. 117.

²⁵Mahmud Yunus, 1986, *Marriage Law in Islam*, Hidakarya Agung, Jakarta, p. 55.

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Zawil Arhamis a term in Islamic inheritance law that refers to maternal relatives or distant relatives who are not included in the group of *ashabul furudh* heirs (group of heirs with a certain portion) or *'ashabah* (male relatives from the father's side who take the remaining assets). *Zawil Arham* literally means people who have a womb relationship (blood relationship) but do not have a strong position in the inheritance system. They are relatives who have a blood relationship with the testator, but are not included in the category of main heirs. Examples of *Zawil Arham*:

1. Daughter of the heir's sister
2. Grandchildren from daughters (if there are no grandchildren from sons)
3. Maternal aunt (sister of the testator's mother)

In essence, *zawil arham* are distant relatives or relatives from the mother's side who do not automatically receive an inheritance in the classical Islamic inheritance law system, but under certain conditions can be given an inheritance based on *ijtihad* or if there is no main heir.

Meanwhile, the *Malikiyah* group, in principle, is almost the same as the *Shafi'i* group, only with the addition of a *wasi'* and a guardian (*mawali*) for the woman concerned (if the business continues for several months after the woman's father dies).²⁷

However, in the case of a child born outside of a legal marriage (i.e. a marriage that does not fulfill the pillars and requirements of marriage according to Islamic law), legal issues arise regarding the validity of the lineage between the child and his biological father. An illegitimate child is a child born to a mother who is not conceived by a man who is in a legal marriage with the child's mother, and is not included in the group of adulterous children and incestuous children.²⁸ An illegitimate child is a child born to a woman, while the woman is not in a legal marriage with the man who has sexual intercourse with her.²⁹ According to Article 100 of the KHI, "A child born out of wedlock only has a blood relationship with his/her mother and his/her mother's family." Thus, the biological father does not have a civil legal relationship in terms of blood relationship with the child.

According to Imam *Syafi'i*, there are two views on the authority of a father to become a marriage guardian for a child resulting from adultery. Firstly, a father may be a marriage guardian for a child resulting from adultery provided that the girl is born within a minimum of 6 months after the implementation of the marriage contract between her parents. Second, a father may not be a marriage guardian for a child resulting from adultery if the child is born less than 6 months after the implementation of the marriage contract between the parents. Imam *Syafi'i* is of the opinion that if someone commits adultery and a child is born as a result of that act of adultery, then the child can be assigned to his father through marriage and from the marriage contract the child will be born within a minimum of 6 months after the marriage contract. Moreover, if the child can be assigned to his father, then the child gets child rights like other children who get inheritance rights, guardianship, etc. Fur-

²⁶Abd ar-Rahman al-Jaziri, 1969, *Buku al-Fiqh ala-Mazahib al-Arba'ah*, Egypt: Al-Maktabah at Tijariyyah al-Kubra, Egypt, p. 29.

²⁷Ibid, p. 30.

²⁸P. Scholten, "Handleiding tot de bevering vñ Ned. Berag Recht," tt, p. 383.

²⁹DY Witanto, "Family Law: Rights and Status of Children Born Out of Wedlock," tt, p. 46.

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thermore, Imam Syafi'i is of the opinion that if the child is born less than 6 months after the parents' marriage contract, the child cannot be assigned to his father and he does not get any rights, especially in this case he does not get guardianship rights from his father. Therefore, Imam Syafi'i has two views regarding whether or not a father may be the marriage guardian for a child resulting from adultery.³⁰

The procedure for determining a marriage guardian is a method that can be useful for determining a marriage guardian for a girl who is going to get married. wedding, the marriage guardian must be valid in the eyes of the law and religion by using the guidelines of the Law such as KHI and Fiqh. The fiqh guidelines are based on the Imam Syafi'i School which is considered very much in line with laws and regulations such as the Compilation of Islamic Law. The marriage guardian for a child resulting from adultery is the judge guardian. The lineage guardian cannot be a guardian in the marriage of a child of adultery because the lineage between the child and his biological father has been severed, so the biological father cannot be a marriage guardian for an illegitimate child, and the most entitled to be a marriage guardian for a child of adultery is the judge guardian.³¹

In practice, the appointment of a guardian judge is usually carried out by the local Religious Affairs Office (KUA), after ensuring that there is no legitimate guardian according to Islamic law. This can occur in various conditions, for example if the whereabouts of the guardian lineage are unknown, refuses to become a guardian without a reason justified by sharia, is of a different religion, or does not meet the requirements as a marriage guardian such as not having reached puberty or having a mental disorder. The KUA will conduct a thorough administrative and substantive examination, including requesting information from the family, witnesses, and local community leaders to ensure that the appointment of a guardian judge is the right step. This process aims to maintain the legality of the marriage in accordance with the provisions of Islamic law and positive law in force in Indonesia, while also guaranteeing legal protection and the validity of the marital status for the bride. With the presence of a guardian judge, women's rights are maintained in the marriage process, and prevent the occurrence of invalid or unregistered marriages, which can be detrimental to women in the future, especially in terms of inheritance rights, child status, and other legal protection.

Although there is a Constitutional Court Decision Number 46/PUU-VIII/2010 which states that illegitimate children can have a civil relationship with their biological father if it can be proven scientifically and/or technologically and in accordance with the law, this decision focuses more on aspects of civil responsibility such as maintenance and inheritance. This decision does not immediately change the religious norms regulated in the KHI regarding the validity of lineage in the context of marriage guardians.

³⁰Nasution A et al., The Authority of Biological Fathers to Become Guardians of Marriage for Children Resulting from Adultery According to the Views of Imam Syafi'i and the Decision of the Constitutional Court (MK) NO. 16/PUU-VIII/2010, *As-Syar'i: Journal of Family Guidance & Counseling*, Volume 4 Number 2 December 2021, pp. 125-137.

³¹Adinda Aldha Indriyana et al., The Legitimacy of Biological Fathers as Guardians of Marriage for Children of Adultery After the Implementation of the Compilation of Islamic Law (Case Study in Cot Girek District, North Aceh Regency), *Scientific Journal of Law Faculty Students (JIM FH)*, Volume V Number 2 April 2022, p. 113.

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Likewise, MUI Fatwa Number 11 of 2012 concerning the Status of Children Resulting from Adultery confirms that children resulting from adultery only have a blood relationship with their mother. It states as follows:

1. A child resulting from adultery has no relationship with the man who gave birth to him or her.
2. A child resulting from adultery only has a relationship of lineage, inheritance and nafaqah with his mother and her mother's family.

The government has the authority to impose a ta'zir penalty on an adulterous man who results in the birth of a child by requiring him to:

- a. meet the child's living needs;
 - b. giving assets after he dies through a mandatory will.
3. The punishment referred to in number 5 aims to protect the child, not to legitimize the blood relationship between the child and the man who caused his birth.³²

In this case, the person who acts as the marriage guardian for a daughter resulting from adultery is the judge, not the biological father.

In contrast, scholars from the Hanafi school of thought have a looser view. In the Hanafi school of thought, a biological father of an illegitimate child can still have a blood relationship with the child if he acknowledges his child (*iqrar bin-nasab*) and no other party opposes the acknowledgement. Thus, if the bloodline acknowledgement is accepted and not disputed, then the biological father can act as a marriage guardian. This view is based on the principle that the father's acknowledgement of a child has certain legal force, especially if there is no evidence to refute it and it does not conflict with external facts. Therefore, within the framework of the Hanafi school of thought, the biological father has the potential to become a guardian, as long as the acknowledgement of the child's bloodline is valid according to sharia. In addition, in the Hanafi school of thought there is also a provision that if no bloodline guardian is found from the male side, then a woman who has a close blood relationship such as a mother or sister can act as a guardian, or can appoint a representative to represent her in the marriage contract process. This concept is known as *wakalah* guardianship or *badal* guardianship, which is the appointment of a qualified person to represent an absent or absent guardian. This approach shows the flexibility of the Hanafi school of thought in maintaining the continuity of marriage and providing legal solutions to the absence of a male guardian, while accommodating certain social conditions that require legal adjustments.

Thus, based on the provisions in the KHI, the opinions of scholars, and the MUI fatwa, it can be concluded that the biological father's action as a marriage guardian for an illegitimate child carries serious legal consequences in the form of the threat of annulment of the marriage and the invalidity of the guardian according to Islamic law. The validity of a marriage guardian is highly dependent on the recognition of a legitimate relationship according to Islamic law. Because the KHI does not recognize the relationship between an illegitimate child and his biological father, the role of marriage guardian cannot be carried out by the

³²Fatwa of the Indonesian Ulema Council Number 11 of 2012 concerning the Position of Children Resulting from Adultery and Their Treatment.

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biological father. This function is transferred to a guardian judge who has legal and religious legitimacy to ensure that the marriage is carried out legally. In addition, it also has implications for quite strong social pressure due to the negative views of society towards the legitimacy of the marriage. This shows the importance of legal clarity and adequate protection for illegitimate children in relation to marriage rights, without having to violate the basic principles of Islamic law applicable in Indonesia. In conditions like this, the legitimate guardian of marriage is the guardian judge, who acts as a substitute for the guardian of the lineage to ensure that the marriage takes place in accordance with the provisions of Islamic law and remains valid from a state administrative perspective.

4. Conclusion

The status of children born out of wedlock is a complex issue in Islamic law and Indonesian positive law, especially regarding lineage and marital guardianship. The Compilation of Islamic Law (KHI) explicitly states that children born out of wedlock are only related to the mother and her family, so that the biological father has no legal relationship, including the right to marital guardianship. This view is in line with the majority of Syafi'iyah scholars and the MUI Fatwa, which emphasizes that the adultery certificate does not form lineage, and the marriage guardian for a female child born out of adultery is a judge. However, Constitutional Court Decision No. 46/PUU-VIII/2010 introduced a new dynamic by recognizing the civil relationship (such as maintenance and inheritance) between an illegitimate child and his biological father if scientifically proven (DNA test), although it does not change the lineage status according to sharia. Indonesian civil law (KUHPerduta) also distinguishes between recognized and unrecognized illegitimate children, with recognition of biological fathers providing limited civil rights. Reconciliation between Islamic law (KHI) and national law (MK Decision) is crucial to protect children's rights without ignoring sharia principles. Philosophically, the protection of children's rights, the values of justice, equality, and the principle of the benefit of children, as well as the role of law as a means of social reconstruction, support the recognition of biological fathers as marriage guardians under certain conditions, especially if there is evidence of legal recognition or a court ruling, as accommodated by the more flexible Hanafi school. However, in current Indonesian judicial practice, the safest and most in accordance with KHI, if a child is born from adultery without a prior marriage, the marriage guardian is still the judge to ensure the validity of the marriage and avoid legal problems.

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