

Interpreting Legal Rights: Disparities in Judicial Treatment of Children Born Out of Wedlock in East Java, Indonesia

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Abstract

The status of illegitimate children or children out of wedlock is a complex and sensitive issue that attracts attention in the Indonesian legal system. Although it has been regulated in various regulations and there is a Constitutional Court Decision Number 46/PUU-VIII/2010, implementing the protection of the legal rights of children outside marriage in different judges' decisions still experiences disparities. This article aims to analyze the differences in interpretation related to the status of children outside marriage in the judicial environment in East Java, as well as how to formulate the ideal protection of the group and civil rights of children outside marriage. This research is a non-doctrinal research using conceptual and philosophical approaches. This study found complexities in considering children's best interests in court decisions. Some judges seek to ensure the protection and rights of children born out of wedlock, while others think about social stability and religious norms. The ideal reformulation of the legal status of children born out of wedlock requires a comprehensive dialogue approach and more inclusive legal reforms. Recommendations are also made to strengthen more explicit legal guidelines for

judges in dealing with such cases, considering the child's legal, religious, and best interests. This research contributes to efforts to realize ideal legal protection for out-of-wedlock children and anticipate evolving legal problems.

KEYWORDS *Court Decisions, Children Born Out of Wedlock, Children's Rights*

Introduction

Every child born into the world has their rights intact.¹ In addition, children are essentially held in a state of *fitrah* (nature) and purity.² So, it becomes a necessity, in a state of law, to place children's rights as part of the constitutional guarantee. Every child and every citizen has the same and equal position *before* the law and government (*equality before the law*).³

However in practice, the protection of the constitutional rights of children outside marriage who are free from discrimination has not been fully implemented in Indonesia. Extra-marital children still often experience discriminatory treatment, violence, and injustice and even become victims of the justice system.⁴ Children born out of wedlock are sometimes not even recognized and abandoned by their biological fathers.⁵ In contrast to legitimate children whose rights are guaranteed, there are legal sanctions if their father does

¹ Nicola Fairhall and Kevin Woods, "Children's Views on Children's Rights: A Systematic Literature Review," *The International Journal of Children's Rights* 29, no. 4 (November 12, 2021): 835–71, <https://doi.org/10.1163/15718182-29040003>.

² Putri Manise, "Perlindungan Anak Hasil Zina Dalam Perspektif Undang-Undang Perlindungan Anak," *LEX PRIVATUM* 10, no. 3 (June 27, 2022), <https://ejournal.unsrat.ac.id/v3/index.php/lexprivatum/article/view/41010>.

³ Lukman Santoso, *Negara Hukum Dan Demokrasi* (Ponorogo: IAINPo Press, 2016); Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004).

⁴ Nahdiya Sabrina et al., "Discrimination against Children Born Outside of Marriage in Indonesia," *International Journal of Multicultural and Multireligious Understanding* 7, no. 9 (October 1, 2020): 121–29, <https://doi.org/10.18415/ijmmu.v7i9.1930>.

⁵ Nguyen Thi Bao Anh and Nguyen Phuc Gia Nguyen, "Analyzing 'Child Born Out Of Wedlock' ('Illegitimate Child') In The Law On Marriage And Family," *Journal of Population Therapeutics and Clinical Pharmacology* 30, no. 9 (May 5, 2023): 87–102, <https://doi.org/10.47750/jptcp.2023.30.09.011>; Nabila Wahyu Fitria, Arief Suryono, and Noor Saptanti, "Legal Certainty Of The Rights Of Children Born Out Of Wedlock To Their Biological Fathers," *International Journal of Educational Research & Social Sciences* 5, no. 1 (February 28, 2024): 18–22, <https://doi.org/10.51601/ijers.v5i1.772>.

not fulfill these rights.⁶ This contradicts Article 28D paragraph (1) of the 1945 Constitution, which provides recognition, guarantees, protection, fair legal certainty, and equal treatment before the law for everyone, including children out of wedlock.

Currently, no legislation regulates specific sanctions for biological fathers who do not want to take responsibility for the birth of children outside of marriage.⁷ When compared to countries in the European Union, for example, all children have the same civil status regardless of whether they are born to married or unmarried parents. This concept is morally based on the idea that all children have the same human rights and status before the law.⁸

The study of extra-marital children is currently experiencing a significant escalation, especially after the Constitutional Court Decision (MK) No. 46/PUU-VIII/2010. Both relate to their legal rights⁹ and intersection with social institutions and modern legal administration.¹⁰ One example is the study of Dzanurusyamsi, who mentions in his findings that there are several problems related to extra-marital children. *First, the* different perceptions of ulama' and judges towards extra-marital children and their protection. *Second, the* construction of cases in the courts that are very diverse / varied on the issue of protecting children outside marriage. *Third, there are various* perceptions in the Population Administration Registry in Indonesia.¹¹

⁶ Sabrina et al., "Discrimination against Children Born Outside of Marriage in Indonesia," 121.

⁷ Virginia Puspa Dianti, "Legal Protection Children Outside of Marriage," *The 1st Proceeding International Conference And Call Paper* 1, no. 1 (March 8, 2021).

⁸ Tutik Hamidah, "The Rights of Children Born out of Wedlock: Views of Muslim Women's Organizations on Constitutional Court Judgement 46/2010," in *Women and Property Rights in Indonesian Islamic Legal Contexts*, ed. John R. Bowen and Arskal Salim (Brill, 2018), 47–68, https://doi.org/10.1163/9789004386297_005; Robert J. Willis, "A Theory of Out-of-Wedlock Childbearing," *Journal of Political Economy* 107, no. S6 (1999): S33–64, <https://doi.org/10.1086/250103>.

⁹ Qurrotul Ainiyah, Syarifah Marwiyah, and Sri Lumatus Sa'adah, "Pembagian Waris Etnis Madura terhadap Anak Luar Nikah di Dusun Kebonan Kecamatan Yosowilangun Kabupaten Lumajang," *Al-Ihkam: Jurnal Hukum & Pranata Sosial* 11, no. 2 (2016): 335–60, <https://doi.org/10.19105/al-lhkam.v11i2.1018>.

¹⁰ Euis Nurlaelawati and Stijn Cornelis van Huis, "The Status of Children Born Out of Wedlock and Adopted Children In Indonesia: Interactions Between Islamic, Adat, and Human Rights Norms," *Journal of Law and Religion* 34, no. 3 (December 2019): 356–82, <https://doi.org/10.1017/jlr.2019.41>.

¹¹ Dzanurusyamsyi Dzanurusyamsyi, "Upaya Pengadilan Dalam Perlindungan Hukum Anak Luar Nikah Berdasarkan Sila Ke-5 Pancasila," *Jurnal Pembaharuan Hukum* 3, no. 1 (April 27, 2016): 86, <https://doi.org/10.26532/jph.v3i1.1349>.

A pretty exciting study was also written by Tutik Hamidah, who tried to present the perspective of children out of wedlock from the point of view of Muslimat NU and Aisyiyah leaders. There are two views from Hamidah's research findings on the rights of children born from adultery. Most figures agree with providing maintenance and inheritance based on mandatory wills for these children on humanitarian grounds. Still, they do not support the recognition of *nasab* or guardianship, including inheritance rights for children born of adultery. A minority of figures agree to grant *nasab* (maternal filiation), maintenance, control, and inheritance rights to children born of the affair, provided that the biological father recognizes the child. These figures argue that, in principle, the child's lineage is from the father and mother unless the father rejects it.¹²

Bachtiar Mokoginta, Cok Gede Mega Putra, Zaenul Mahmudi, and Arinie Sherlita Cholis wrote other research.¹³ Bachtiar Mokoginta's study states that the Constitutional Court Decision No. 46/PUU-VIII/2010 clarifies the position of children outside of marriage who are recognized by the law and get legal certainty even in substantial justice.¹⁴

Meanwhile, research by Zaenul Mahmudi, Cok Gede Mega Putra, and Arinie Sherlita Cholis states that extra-marital children not only have a civil relationship with their mother but also with their biological father, even though the child was born outside of marriage. Meanwhile, Constitutional Court

¹² Hamidah, "The Rights of Children Born out of Wedlock: Views of Muslim Women's Organizations on Constitutional Court Judgement 46/2010."

¹³ Arinie Sherlita Cholis, "The Legal Standing and Inheritance Rights for Out-Of-Wedlock Child In Relation to The Constitutional Court's Decision In Terms of Civil Inheritance Law," *Audito Comparative Law Journal (ACLJ)* 1, no. 2 (September 30, 2020): 71–77, <https://doi.org/10.22219/audito.v1i2.13759>; Zaenul Mahmudi, "The Status of Children Born Out of Wedlock in Indonesian Context with Special Reference to Their Inheritance Right Perspective of Maqasid Al-Shariah" (1st International Conference on Indonesian Legal Studies (ICILS 2018), Atlantis Press, 2018), 113–17, <https://doi.org/10.2991/icils-18.2018.21>; Bachtiar Mokoginta, "Perlindungan Hak-Hak Keperdataan Anak Luar Kawin Dalam UU No.1 Tahun 1974 Tentang Perkawinan Pasca Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010" (Master Thesis, Yogyakarta, UIN Sunan Kalijaga, 2017); Cok Gede Mega Putra, "Civil Relationship of Children Born without Marriage with Biological Father Based on Constitutional Court Decision Number 46/PUU-VIII/2010," *NOTARIL Jurnal Kenotariatan* 5, no. 2 (November 24, 2020): 58–64, <https://doi.org/10.22225/jn.5.2.2585.58-64>.

¹⁴ Jimly Asshiddiqie, *Perkembangan Dan Konsolidasi Lembaga Negara Pasca Reformasi* (Jakarta: Sinar Grafika, 2012); Nurul Hak, "Kedudukan Dan Hak Anak Luar Nikah Pasca Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Tentang Status Anak Luar Nikah (Studi Persepsi Hakim Pengadilan Agama Se-Wilayah Pengadilan Tinggi Agama Bengkulu)" (PhD Thesis, Lampung, UIN Raden Intan Lampung, 2018).

Decision No. 46/PUU-VIII / 2010 makes extra-marital children not only get a share of the inheritance from their unrecognized mother but also the inheritance from their biological father, as well as the family of their mother's father if it can be proven by science and technology.¹⁵

The various studies above discussing the topic of extra-marital children are still limited to exploring the legal position and legal rights. Still, the problems and dynamics of the diversity of interpretations of extra-marital children have not received attention. This has implications for access to justice and the legal certainty of the status of extramarital children in Indonesia.

This topic became more problematic and exciting with the emergence of the Dukcapil policy and the decision of PT Banten regarding the case of Rezky Aditya versus Wenny Ariani. Regarding the Dukcapil policy, the Ministry of Home Affairs triggered a discourse because married couples who were married illegally could be included in one family card (KK) with the category 'unregistered marriage.' This policy, of course, will also indirectly become a dilemma for children from sirri and extra-marital marriages.¹⁶ Meanwhile, the case of Rezky Aditya versus Wenny Ariani surfaced because the Banten High Court ruled that Rezky Aditya was the biological father of Kekey, the daughter of Wenny Ariani, even though Rezky and Wenny did not have a marital relationship, either Sirri or registered.¹⁷

Departing from this background, this study focuses on the differences in interpretation of the status of children outside marriage in the judicial environment in East Java, as well as formulating how to protect the status and civil rights of children outside marriage from a maqashid perspective. This study also highlights the complexity of considering the child's best interests.

This research is a non-doctrinal research using the constructivism paradigm.¹⁸ This research includes qualitative research that seeks to explore various court decisions and judges' views related to extramarital children and the juridical and administrative dynamics of determining the origin of children

¹⁵ Marilang Marilang, "Legal Relationship Between Illegitimate Children and Their Biological Father: The Analysis of Constitutional Court Decree No. 46/PUU-VIII/2010 in the Perspective of Civil and Islamic Law," *Journal of Indonesian Islam* 10, no. 2 (December 1, 2016): 335–54, <https://doi.org/10.15642/JIIS.2016.10.2.335-354>.

¹⁶ Tengku Erwinsyahbana, "Sistem Hukum Perkawinan Pada Negara Hukum Berdasarkan Pancasila," *Jurnal Ilmu Hukum* 3, no. 1 (2012).

¹⁷ Andi Saputra, "Tok! PT Banten Putuskan Rezky Aditya Ayah Biologis Anak Wenny Ariani," *detiknews*, accessed Mei 2022, <https://news.detik.com/berita/d-6092690/tok-pt-banten-putuskan-rezky-aditya-ayah-biologis-anak-wenny-ariani>.

¹⁸ Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (Bloomsbury Publishing, 2005).

in court. The data analysis model uses qualitative analysis.¹⁹ The steps are as follows: *First*, data on legal materials obtained in the research are collected and classified by the problem (*data collecting*); *Second*, the results of data collection and classification are then *condensed* (*data condensation*); *Third*, the data and legal materials that have been reduced are then analyzed and presented and then conclusions are drawn.²⁰

Discourse on Child Out of Wedlock in the Framework of Law

Terminologically, the phrase 'child out of wedlock' has two meanings. *First*, children are born due to *nikah siri* or *nikah di bawah tangan* (a marriage not registered in an official institution). *Secondly*, it means children born as a result of adultery, infidelity, cohabitation, and other forms of sexual relations.²¹

The theoretical basis of extra-marital children is based on legal and social perspectives. In the legal context, extra-marital children are considered as children born from illegitimate relationships and, therefore, are often viewed as children who do not have the same rights as children born from legal relationships.²² Extra-marital children are considered not to have a perfect position in the eyes of the law like legal children in general.²³ On the other hand,

¹⁹ William H. Putman, *Legal Research, Analysis, And Writing* (Cengage Learning, 2023).

²⁰ Matthew B. Miles, A. Michael Huberman, and Johnny Saldana, *Qualitative Data Analysis: A Methods Sourcebook* (SAGE Publications, 2013).

²¹ Kudrat Abdillah, "Status Anak Di Luar Nikah Dalam Perspektif Sejarah Sosial," *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah* 1, no. 1 (April 1, 2016), <https://doi.org/10.22373/petita.v1i1.78>; Zainul Mu'ien Husni et al., "Analisis Status Anak Luar Kawin Terhadap Orang Tuanya: Studi Komparatif Antara Hukum Positif Dan Hukum Islam," *Hakam: Jurnal Kajian Hukum Islam Dan Hukum Ekonomi Islam* 5, no. 1 (July 4, 2021), <https://doi.org/10.33650/jhi.v5i1.2261>.

²² Ardian Arista Wardana, "Pengakuan Anak Di Luar Nikah: Tinjauan Yuridis tentang Status Anak di Luar Nikah," *Jurnal Jurisprudence* 6, no. 2 (January 7, 2017): 160–65, <https://doi.org/10.23917/jurisprudence.v6i2.3013>.

²³ J. Andi Hartanto, *Kedudukan Hukum Dan Hak Waris Anak Luar Kawin Menurut Kitab Undang-Undang Hukum Perdata* (Yogyakarta: Laksbang Presindo, 2008); Muhammad Izudin, "Perlindungan Hukum Terhadap Anak Luar Kawin" (PhD Thesis, Jember, Program Studi Doktor Ilmu Hukum Fakultas Hukum Universitas Jember, 2019); Siska Lis Sulistiani, "Kedudukan Hukum Anak Luar Kawin Menurut Hukum Positif Dan Hukum Islam," *ADHKI: Journal of Islamic Family Law* 2, no. 2 (2020): 171–84, <https://doi.org/10.37876/adhki.v2i2.38>.

from a social perspective, extra-marital children are often considered as children who are less respected and recognized by society.²⁴

From the perspective of legal theory, extra-marital children can be explained from several perspectives.²⁵ *First*, the theory of marriage validity. This theory explains that extra-marital children have the same status as legitimate children because the presence of children does not depend on the marital status of their parents. This means that extra-marital children should not be discriminated against because they are victims of a situation that they did not create themselves. *Second*, the theory of child rights protection. This theory explains that unmarried children must be protected from all forms of violence and discrimination. Extra-marital children are victims of circumstances beyond their control, so they need legal protection from the state. *Third*, public interest theory. This theory explains that extra-marital children affect the public interest because they have the right to good education and health. This means that extra-marital children must have their status recognized so that the state can provide the best possible services.

In practice, unmarried children still face discrimination and stigma in many countries.²⁶ Therefore, it is necessary to reconstruct the law to provide legal protection and recognize the rights of extra-marital children so that they can live properly and get the same opportunities as other legal children. They are mainly related to legal security, fairness, and social impacts.²⁷

Efforts to provide legal protection for extra-marital children in Indonesia have been made through various regulations and legislation, one of which is

²⁴ Waren K. Dalise, “Kedudukan Hukum dan Hak Waris Anak Luar Kawin Menurut Hukum Perdata,” *Lex Privatum* 7, no. 2 (2019).

²⁵ Rosalinda Elsina Latumahina, “Prinsip Kepentingan Terbaik Bagi Anak Dalam Perlindungan Hukum Anak Luar Kawin” (PhD Thesis, Surabaya, Universitas Airlangga, 2019).

²⁶ Daniel Terhemba Achi and Japheth Ordue Akaaunde, “The Legal Status of Children Born out of Wedlock in Nigeria: Is the Concept of Illegitimacy in Decline?,” *UCC Law Journal* 1, no. 2 (December 1, 2021): 445–66, <https://doi.org/10.47963/ucclj.v1i2.428>; Eva Schlumpf, “The Legal Status of Children Born out of Wedlock in Morocco” (Center for Islamic and Middle Eastern Legal Studies (CIMELS), University of Zurich, 2016), <https://doi.org/10.5167/UZH-120614>; Funda Ustek Spilda and Oguz Alyanak, “The Case of Children Born out of Wedlock in Turkey: An ‘Empty’ Category?,” *AG About Gender - International Journal of Gender Studies* 5, no. 10 (November 28, 2016), <https://doi.org/10.15167/2279-5057/ag.2016.5.10.351>.

²⁷ Padma D. Liman and Aulia Rifai, “Legal Status of Children Out of Wedlock According to the Decision of the Constitutional Court in Inheritance of the Burgerlijk Wetboek (BW) System,” *Journal of Law and Sustainable Development* 11, no. 3 (August 11, 2023): e577–e577, <https://doi.org/10.55908/sdgs.v11i3.577>.

Law No. 23 of 2002 concerning Child Protection, which guarantees and protects children and their rights so that they can live, grow, and develop, and participate optimally by the dignity of humanity, and receive protection from violence and discrimination.²⁸ However, there are still obstacles to implementing the law. For example, there is still a lack of coordination between relevant institutions in protecting out-of-wedlock children. In addition, there are still problems in terms of public awareness of the importance of providing security for extra-marital children.²⁹

In Law No. 1 of 1974 concerning Marriage and in the Compilation of Islamic Law (KHI), extra-marital children are not identified rigidly and clearly. Extra-marital children are limited to having a civil relationship with their mother and their mother's family. This conception emphasizes that an unmarried child, as long as there has been no legal recognition from one of his parents, administrative management automatically uses his mother's lineage. Thus, the child does not have a nasab relationship, inheritance rights, maintenance, or guardianship from his father.

A different definition is explained by the Civil Code, which states that children out of wedlock are not bound by anyone, either the father or the mother, as long as they have not confessed. This is explained in Article 272 of the Civil Code as follows: "Except for children born in adultery or discordance, every child who is allowed outside of marriage, with the subsequent marriage of the father and mother, will become legitimate, if the two parents before marriage have recognized it according to the provisions of the law or if the recognition is made in the marriage certificate itself."³⁰

The definition of disparity then received confirmation and a meeting point from Constitutional Court Decision No. 46/PUU-VIII/2010.³¹ The decision

²⁸ Ahmad Dedy Aryanto, "Perlindungan Hukum Anak Luar Nikah Di Indonesia," *Bilancia: Jurnal Studi Ilmu Syariah Dan Hukum* 10, no. 1 (2016): 122–34; Khoiruddin Nasution, "Perlindungan Terhadap Anak Dalam Hukum Keluarga Islam Indonesia," *Al-'Adalah* 13, no. 1 (2016): 1–10.

²⁹ Zahraini Nur Hasibuan, "Perlindungan Hukum Anak Luar Kawin Yang Diakui Dalam Perspektif Hukum Perdata," *Jurnal Notarius* 2, no. 2 (2023), <https://jurnal.umsu.ac.id/index.php/notarius/article/view/17060>.

³⁰ See Article 272 KUH Perdata (Book of Civil Law)

³¹ Gindo Nadadap, Amelia Aanggriany Siswoyo, and Neri Arisuma, "Perlindungan Hukum Hak-Hak Anak Luar Kawin Pasca Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010," *Lex Lectio Law Journal* 2, no. 1 (August 30, 2023): 20–33, <https://doi.org/10.61715/jlexlectio.v2i1.25>; Rohmawati Rohmawati and Syahril Siddik, "Legal Protection for Children Out of Wedlock: Ensuring the Best Interests of Children Through Judge Decisions," *Al-'Adalah* 19, no. 2 (December 25, 2022): 315–38, <https://doi.org/10.24042/adalah.v19i2.11761>.

revised Article 43 Paragraph (1) of the Marriage Law, which states that marriage must read: "Children born outside of marriage have a civil relationship with their mother and mother's family and with the man as their father who can be proven based on science and technology and other evidence according to the law to have a blood relationship, including a civil relationship with the father's family."

The Constitutional Court's decision is considered a legal breakthrough that accommodates scientific principles in genetic technology and evidence that this is a form of transformation and a spirit based on justice and substantive truth over procedural truth.³² In the Constitutional Court's decision, extra-marital children can be attributed to their biological father. The decision is also considered to break the legal deadlock and is a progressive step in addressing the discriminatory treatment of children born outside a legal marriage. However, children's rights should not be violated. These rights include the rights of children before and after birth, the rights of children in the sanctity of their offspring, the rights of children to receive a good name, the rights of children receiving breastfeeding, the rights of children to obtain care, care and maintenance, the rights of children in the ownership of property or inheritance rights for their survival, and the rights of children in education and teaching.³³

Anshary said that so far, there have been pros and cons related to the position of extra-marital children in the civil law system in Indonesia and Islamic law. However, since the Constitutional Court Decision, some people have assumed that extra-marital children have the same position as legitimate children, so that between extra-marital children and their biological fathers, in addition to having a relationship in the form of an obligation to provide maintenance, care, education and so on, they also have a *nasab* relationship which results in mutual inheritance and is authorized to become guardians of

³² Izudin, "Perlindungan Hukum Terhadap Anak Luar Kawin," 6–7; Ilham Tohari, Anggit Waseso, and Erna Herawati, "Legal Protection of the Rights Children Born Out of Wedlock: A Comparative Study in Indonesia and Malaysia," *International Journal of Current Science Research and Review* 07, no. 04 (April 9, 2024), <https://doi.org/10.47191/ijcsrr/V7-i4-18>.

³³ Hak, "Kedudukan dan Hak Anak Luar Nikah Pasca Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Tentang Status Anak Luar Nikah (Studi Persepsi Hakim Pengadilan Agama Se-Wilayah Pengadilan Tinggi Agama Bengkulu)"; Zaidah Nur Rosidah, "Implementasi Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010 Tentang Hak Perdata Anak Luar Kawin Di Pengadilan Negeri Dan Pengadilan Agama Surakarta," *Al-Ahkam Jurnal Ilmu Syari'ah Dan Hukum* 2, no. 2 (2017): 175–87, <https://doi.org/10.22515/alakhkam.v2i2.1067>.

the marriage of their extra-marital daughters.³⁴ Meanwhile, Kudrat Abdillah said that the Constitutional Court made the welfare of the child the reason for justifying the civil relationship with the biological father. In addition, technological advances help prove the relationship between the child and his father through DNA tests.³⁵ This consideration is a strong reason for the Constitutional Court to protect the civil rights of children born out of wedlock.³⁶

After the Constitutional Court's decision, the Indonesian Ulema Council's fatwa No. 11/2012 on the Position of Zina's Children and Their Treatment was issued as a response from the Indonesian Ulema Council to the Constitutional Court's Decision No. 46/PUU-VIII/2010, which generated a lot of controversy and questions in the community. Starting from the new legal norm established by the Court in its decision that children born outside of marriage can have a civil relationship with the man as the father and the father's family as long as it is proven based on science and technology and / or other evidence according to the law that the two have a blood relationship.³⁷

MUI's fatwa in general is an answer or explanation from scholars regarding religious issues and applies to the public. In the order of laws and regulations in Indonesia, MUI Fatwa is not placed as part of the hierarchy of laws and regulations. Therefore, MUI fatwa is considered as a legal instrument that is not binding and there is no legal compulsion to comply with it.³⁸ However, in the historical record, MUI Fatwa is widely used as a guideline and principles of legal development during the process of legislation formation. Formally, at the practical level of the judiciary, MUI Fatwa is determined to be one of the material laws to be used by judges in the Religious Courts. In addition, the internal dynamics of the religious court environment are currently

³⁴ Anshary Anshary, *Kedudukan Anak Dalam Perspektif Hukum Islam Dan Hukum Nasional* (Bandung: Mandar Maju, 2014).

³⁵ Sayed Sikandar Shah Haneef, "The Status of an Illegitimate Child in Islamic Law: A Critical Analysis of DNA Paternity Test," *Global Jurist* 16, no. 2 (July 1, 2016): 159–73, <https://doi.org/10.1515/gj-2015-0008>.

³⁶ Abdillah, "Status Anak Di Luar Nikah Dalam Perspektif Sejarah Sosial," 29.

³⁷ Haniah Ilhami, "Kontribusi Fatwa Majelis Ulama Indonesia No. 11 Thn. 2012 tentang Kedudukan Anak Hasil Zina dan Perlakuan Terhadapnya dalam Hukum Keluarga Islam di Indonesia," *Jurnal Mimbar Hukum*, Volume 30, No. 1, (Februari 2018), hlm. 3, jurnal.ugm.ac.id/jmh

³⁸ Yuli Andriansyah, "Analysis of Fatwas by the National Sharia Board-Indonesian Council of Ulama on the Stock Market," *Millah: Journal of Religious Studies*, August 30, 2023, 525–55, <https://doi.org/10.20885/millah.vol22.iss2.art9>.

trying to encourage the birth of quality judicial decisions characterized by, among others, that the decision must contain renewal of Islamic law.³⁹

Through this Islamic law reform effort, the judge's decision must be based on the basic principles of sharia which are developed through the principles of Islamic law, both general and specific. Therefore, judges are encouraged to explore, understand and follow the values of law and justice in society, including using MUI Fatwa as one of the guidelines for Islamic law in society.⁴⁰

The MUI Fatwa is considered to contribute to the development of the substance of Islamic Family Law in Indonesia and can be used as a consideration for Judges in decisions in the field of marriage in the Religious Courts. In the Fatwa, several legal provisions are stipulated, among others:

- a. The child of adultery does not have a relationship of nasab, wali nikah, inheritance, and nafaqah with the man who caused his birth.
- b. The child of adultery only has a relationship of nasab, inheritance, and nafaqah with his mother and his mother's family.
- c. The child of adultery does not bear the sin of adultery committed by the person who caused his birth.
- d. Adulterers are subject to hadd punishment by the competent authorities, in the interests of preserving legitimate offspring (*hifzh al-nasl*).
- e. The government is authorized to impose a ta'zir punishment on the adulterer who caused the birth of the child by obliging him to:
 - 1) provide for the needs of the child;
 - 2) provide property after he dies through a *wasiat wajibah*.
- f. The punishment referred to in number e is aimed at protecting the child, not to legalize the nasab relationship between the child and the man who caused the birth.⁴¹

Various Interpretations and Formulations of the Status of Children Born Out of Wedlock

Constitutional Court Decision No. 46/PUU-VIII/2010, which was decided on February 13, 2012, is a final and binding decision. As affirmed in

³⁹ Danil Putra Arisandy, Asmuni Asmuni, and Muhammad Syukri Albani Nasution, "The Majelis Ulama's Fatwa on Freedom of Expression on Social Media: The Perspective of Maqashid Sharia," *Al-Istinbath: Jurnal Hukum Islam* 7, no. 2 November (December 1, 2022): 467–86, <https://doi.org/10.29240/jhi.v7i2.5235>.

⁴⁰ Arisandy, et al.

⁴¹ *Fatwa Majelis Ulama Indonesia No. 11 Tahun 2012 tentang Kedudukan Anak Hasil Zina dan Perlakuan Terhadapnya*, see p. 10

Article 10 paragraph (1) of Law No. 24/2003 on the Constitutional Court, the Constitutional Court's decision is final; it immediately obtains permanent legal force since it is pronounced and no legal remedies can be taken. The absolute nature of the Constitutional Court's decision also includes its binding legal force (*final and binding*).⁴²

As a final and binding decision, the Constitutional Court's decision was responded to with various interpretations and implementations. For example, it occurred within the Supreme Court (MA) and the judicial institutions under it. In contrast to the Constitutional Court's decision that accommodates the position of extra-marital children, the Supreme Court (MA) places extra-marital children very limited, as stated in cassation decision number 329 K/Ag/2014.⁴³ This decision continues the South Jakarta PA Decision, number 1241/Pdt.G/2012/PA JS, and the Jakarta PTA Decision, number 75/Pdt.G/2013/PTA. The decision states that the Jakarta High Court and the South Jakarta Religious Court that granted the plaintiff's claim regarding the status of children outside of marriage is a decision that has deviated from the duties and authority of judges in religious courts who are obliged to decide based on Islamic law, as agreed by Indonesian Muslim scholars and scholars.⁴⁴ According to Nurhadi, the decision prioritizes juridical aspects, while sociological and philosophical aspects are ignored. The decision also does not implement the Constitutional Court Decision Number 46/PUU-VIII/2010.⁴⁵

If examined further, this Supreme Court decision is a cassation stage decision as outlined in number 329 K/Ag/2014. The decision rests on Article 830, paragraph (1) of the Civil Code, which regulates inheritance rights for children outside of marriage. This article states that an unmarried child can only be considered a recognized child if the father has acknowledged or the father's actions have become public and treated as his child. Without recognition or

⁴² Martitah, *Mahkamah Konstitusi Dari Negative Legislature Ke Positive Legislature* (Jakarta: Konstitusi Press, 2013).

⁴³ Busman Edyar, "Status Anak Luar Nikah Menurut Hukum Positif Dan Hukum Islam Pasca Keluarnya Putusan MK Tentang Uji Materiil Undang Undang Perkawinan," *Al-Istinbath: Jurnal Hukum Islam* 1, no. 2 (2016): 181–200.

⁴⁴ Harun Mulawarman, *Hak Waris Anak di Luar Nikah dalam Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010* (Penerbit A-Empat, 2015), 156; Baudouin Dupret et al., "Paternal Filiation in Muslim-Majority Environments: A Comparative Look at the Interpretive Practice of Positive Islamic Law in Indonesia, Egypt, and Morocco," *Journal of Law, Religion and State* 1, no. aop (April 21, 2023): 1–51, <https://doi.org/10.1163/22124810-20230002>.

⁴⁵ Nurhadi Nurhadi, "Implementasi Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Tentang Anak Di Luar Kawin," *Jurnal Yudisial* 11, no. 2 (August 30, 2018): 243–65, <https://doi.org/10.29123/jy.v11i2.66>.

substantial evidence, the extra-marital child is not entitled to inheritance rights from his father. Although this decision caused controversy and criticism from some circles because it was considered to ignore the Constitutional Court's decision, the Supreme Court argued that it did not conflict with the principles of equality before the law and human rights because it was based on the applicable law in Indonesia.

The difference of opinion between these two decisions lies in the recognition of the inheritance rights of unmarried children.⁴⁶ The Constitutional Court's decision recognises the unconditional inheritance rights of extra-marital children based on three approaches: first, the Court universally recognises the inheritance rights of extra-marital children without additional conditions, which means that every child born outside of a legal marriage has inheritance rights equal to legal children. Second, based on the principles of justice and equality, with the aim of protecting the rights of all children without discrimination based on the status of the child's birth. Third, based on human rights, every child is entitled to the same legal protection, including in terms of inheritance. In contrast, the Supreme Court's decision emphasises that extra-marital children are conditional with three aspects: first, an extra-marital child can only claim inheritance rights if there is recognition from the biological father or if the child can provide strong evidence of a blood relationship with the biological father. Second, the legality and legitimacy of the relationship between the extra-marital child and the biological father to prevent legitimate or false inheritance claims. Thirdly, the importance of official or legal recognition to ensure the inheritance rights of an illegitimate child, which means the child must have legally recognised proof.⁴⁷

Differences in the interpretation of extra-marital children also occurred in the case of artists Rezky Adhitya and Weny Ariani, as outlined in decision number 109/Pdt/2022/PT.Btn. In its ruling, the Banten High Court stated that a girl named Naira Kaemita Tarekat, born in Jakarta on March 03, 2013, based on the Birth Certificate Excerpt from the South Jakarta Population and Civil Registry Office No.3174 LT-15032016-0133 dated December 6, 2016, is the biological child of Rezky Aditya as long as he cannot prove otherwise. PT Banten granted the plaintiff's appeal because the panel of judges referred to the Constitutional Court's decision No. 46/PUU-VIII/2010.

⁴⁶ Mukhlas Rofi'i, hakim Pengadilan Tinggi Agama Surabaya, *wawancara* Juni 2023; Harries Konstituanto, hakim Pengadilan Negeri Ponorogo, *wawancara*, Agustus 2023.

⁴⁷ Yessy Kusumadewi, "Akibat Hukum Bagi Anak Luar Kawin Dalam Pembagian Warisan Pasca Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Dan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan," *Binamulia Hukum* 7, no. 1 (2018): 36–49, <https://doi.org/10.37893/jbh.v7i1.313>.

In this case, it is known that Rezky Adhitya and Weny Ariani never had a legal or Siri marriage. This means the Banten High Court Decision No. 109/Pdt/2022/PT.Btn certainly raises a question, namely, whether a claim for civil rights between an adulterated child and a biological father can use the Constitutional Court Decision as its legal basis. This means that it is essential to underline that the term extra-marital child in Constitutional Court Decision No. 46/PUU-VIII/2010 still seems to be biased in interpretation, thus triggering unclear boundaries between children from unregistered or Siri marriages and children from adultery.⁴⁸

This diversity of interpretation then also developed in various decisions of judicial institutions, including multiple choices in the judicial environment in East Java. The following are ten court decisions in East Java related to the origin of children that are the object of this research.

TABLE 1. Variety of Interpretation of Extra Marital Children in Decisions

No	Verdict	Statement	Status
1	PN Kab. Kediri (21/Pdt.G/2022/PN.Gpr)	<p>a. Before the applicants entered a legal marriage, the applicants had a child named SONI KAVALERA, Male Sex, Born in Kediri on May 01, 2001, as per Birth Certificate Number 11965/D/II/2008. So that the child still has the status of a mother's child.</p> <p>b. Due to the applicant's lack of knowledge when the Plaintiffs entered into the marriage, the Plaintiffs did not recognize and directly authorize the Plaintiffs' unmarried child as the legitimate child of the applicants.</p> <p>c. Now, the applicants intend to recognize and validate the extra-marital child as the legitimate child of the applicants.</p> <p>d. Declare that SONI KAVALERA, a male child born in Kediri on May 1, 2001, is the legitimate child of the married couple PUJIONO and SUSI KRISTYAWATI;</p>	child of a mother > legitimate child

⁴⁸ Dhiauddin Tanjung and azharuddin, "Disparitas Putusan Pengadilan Tinggi Banten Terkait Anak Hasil Zina Dengan Fatwa MUI Nomor 11 Tahun 2012," *Legalite: Jurnal Perundang Undangan Dan Hukum Pidana Islam* 7, no. 1 (July 6, 2022): 18–29.

No	Verdict	Statement	Status
2	PA Ngawi 25/Pdt.P/2021/ PA.Ngw	<ul style="list-style-type: none"> a. The Plaintiffs never entered into a <i>nikah siri</i>; b. Applicant I and Applicant II have been in such a close relationship without any marital ties that they have one child named CHILD OF THE APPLICANT; c. Before marriage, the Plaintiffs already had a child out of wedlock named CHILD OF THE APPLICANT, female (Ngawi, October 16, 2008) according to the birth certificate from the village number: /2020 d. Declare that the child named CHILD OF THE APPLICANT, female, born in Ngawi on October 16, 2008, is extra-marital (biological child) of Applicant I and Applicant II; 	Biological child
3	PN Ponorogo 57/Pdt.P/2021/ PN.Png	<ul style="list-style-type: none"> a. The applicant is willing to take responsibility and acknowledge that the child named CHAN EDWIN ALVARO is biologically the biological child of the applicant; b. Declare that the boy named CHAN EDWIN ALVARO, born in Malang on April 05, 2020, aged 1 (one) year, is the biological child of the Applicant; c. Order the Applicant to report the birth of the child she has acknowledged to the Ponorogo District Population and Civil Registration Office to be registered and recorded in the register designated for that purpose; 	Recognized child
4	PA Surabaya 0092/Pdt.P/202 2/PA.Sby	<ul style="list-style-type: none"> a. Applicant I and Applicant II were never married according to Islam (Sirri), but Applicant I and Applicant II have one biological child named Fhaatir Maulana Amzari (Surabaya, August 25, 2016); b. Declare that the child named Fhaatir Maulana Amzari (Surabaya, August 25, 2016) is the biological child of Applicant I (M.H.M Salafudin bin Marhadi) and Applicant II (Cholifah Nur Khasanah binti Darmawi); 	Biological child > biological child

No	Verdict	Statement	Status
5	PN Surabaya No.125/Pdt.P/ 2022/PN.Sby.	<p>a. Before the Applicant entered a legal marriage, the Applicant had three unmarried children named GEORGE ABRAHAM PERDANA, LEVINA NATALIA DWITA, WASIARDI HADYANA TRIATMAJA. So that the three children still have the status of a woman's child called HADASA ESTER NAOMI TUPAN</p> <p>b. Due to the Applicant's lack of knowledge at the time the Applicant entered into the marriage, the Applicant did not directly legalize the Applicant's extra-marital child as the Applicant's legitimate child;</p> <p>c. The Applicant intends to legalize the extra-marital child as the Applicant's legitimate child;</p> <p>d. Granting permission to the Applicant to legalize the Applicant's children named GEORGE ABRAHAM PERDANA, - LEVINA NATALIA DWITA, WASIARDI HADYANA TRIATMAJA, male gender, issued by the Surabaya City Population and Civil Registration Office on June 6, 2002; as the Applicant's legitimate children;</p>	Child of a mother > legitimate child
6	PA Ngawi 278/Pdt.P/2021 /PA.Ngw	<p>a. The Applicant strongly hopes that the Applicant's daughter can be legally/officially recognized through the Determination of the Ngawi Religious Court.</p> <p>b. The Plaintiffs have a very close relationship that has given birth to a daughter named Xxx, born in Ngawi, dated xxxxxx, who was born without a valid marriage before the Religion and before the Law of the State of Indonesia.</p> <p>c. Determine that the girl named: Xxx, born in Ngawi, xxxxxx is the child of the Plaintiffs.</p>	Child of the Plaintiffs
7	PN Malang 550/Pdt.P/2021 /PN/Mlg	<p>a. The Plaintiffs wish to apply for child validation because when Plaintiff SELMI NGONGORU gave birth to</p>	Son of a mother > son of a husband and wife

No	Verdict	Statement	Status
		<p>her child, the Plaintiffs had not legalized their marriage due to religious differences. Still, the Plaintiffs are of one faith and have legalized their marriage.</p> <p>b. The Plaintiffs wish to apply for the Recognition and Attestation of the Plaintiffs' child, which is written on the Birth Certificate Excerpt of the Plaintiffs' Child issued by the Population and Civil Registration Office of Malang City Number 3573-LT-16012017-.0028 dated January 17, 2017, in the name of MARIA KOSTANSI JAWA KARANGORA, the first female child of a mother SELMI NGONGORU (*incorrect status), changed/changed to be in the name of MARIA KOSTANSI JAWA KARANGORA, the first female child of husband and wife FRANSISKUS XAVERIUS WULA and SELMI NGONGORU (*correct status).</p> <p>c. Determine and grant permission to the Plaintiffs to submit an application for Recognition and Attestation of the Plaintiffs' child written on the Birth Certificate Excerpt of the Plaintiffs' Child issued by the Population and Civil Registration Office of Malang City Number 3573-LT-16012017-.0028 dated January 17, 2017 in the name of MARIA KOSTANSI JAWA KARANGORA, the first female child of a Mrs. SELMI NGONGORU (*incorrect), to be changed to the name of MARIA KOSTANSI JAWA KARANGORA, the first female child of husband and wife FRANSISKUS XAVERIUS WULA and SELMI NGONGORU (*correct);</p>	
8	PN Kepanjen 849/Pdt.P/2013 /PN.Kpj	<p>a. Before the Plaintiffs were legally married, they had a husband and wife relationship. A child was born named LIHAN LIANTO, a boy born in</p>	A mother's child > a married couple's child

No	Verdict	Statement	Status
		<p>Malang City on March 13, 2012, the son of a mother named LILY AMISJAH based on the birth certificate from the Population and Civil Registration Office of Batu City No.3579-LT-04032013-0002 dated March 4, 2013.</p> <p>b. The Plaintiffs have entered into a legal marriage; the Plaintiffs wish that the child named LIHAN LIANTO is the child of a married couple named KANTIK LIANTO and LILY AMISJAH.</p> <p>c. I stated that LIHAN LIANTO, a male born in Malang City on March 13, 2012, is the son of KANTIK, LIANTO, and LILY AMISJAH.</p>	
9	PN Surabaya 2164/Pdt.P/2021/PN.Sby	<p>a. Before the Plaintiffs entered into a legal marriage, the Plaintiffs had one child out of wedlock named TEVANIE ANUGRAH DWI SUSANTO So that the child still has the status of a woman's child called MIFTACHUL ZAENAH.</p> <p>b. The Plaintiffs intend to legalize the extra-marital child as the legitimate child of the Plaintiffs.</p> <p>c. Grant permission to the Plaintiffs to validate a child named STEVANIE ANUGRAH DWI SUSANTO, born in Surabaya on MARCH 31, 2008, carried out of wedlock to a woman named MIFTACHUL ZAENAH as per Birth Certificate Excerpt 9046/2011 by the Population and Civil Registration Office of the city of SURABAYA dated MARCH 23, 2011 as the legitimate child of the Plaintiffs.</p>	Daughter of a woman > legitimate child of the Plaintiffs
10	PA Ponorogo 106/Pdt.P/2023/PA.Po	<p>a. Applicant I and Applicant II have had a relationship as husband and wife and have been blessed with one child named: Xxx (age one year, four months)</p> <p>b. The birth of the child of Applicant I and Applicant II could not be made a birth certificate because the marriage</p>	Children of husband and wife

No	Verdict	Statement	Status
		<p>between Applicant I and Applicant II had not been registered at the Office of Religious Affairs until the child was born. Applicant I and Applicant II urgently needed a Court decision on the origin of the child as a basis for issuing a birth certificate for the child concerned, and Applicant I and Applicant II were able to submit evidence of the child's origin;</p> <p>c. Establish that the child named Xxxx (age one year, four months), born on November 10, 2021, is the child of Applicant I, called Xxx, and Applicant II, named Xxx.</p>	

From the various decisions above, the variation and diversity of interpretations related to extra-marital children show that judges have different case decision mechanisms.⁴⁹ The different characteristics of judges in deciding a case, according to M Syamsudin, reflect the various paradigms of thinking and value orientations held by judges. Judges who adhere to the positivistic paradigm tend to emphasise the importance of compliance with positive law, while judges who adhere to the non-positivistic paradigm focus more on substantive and moral justice. This difference shows that judges have flexibility in interpreting the law and determining what is considered fair in a particular context.⁵⁰

TABLE 2. Judges' Interpretation Patterns Based on Positivistic and non-positivistic Paradigms

Aspects	Positivistic Paradigm	Non-Positivistic Paradigm
Definition of Justice	Abstract justice must be positivised (<i>ius constitutum</i>) into the formulation of positive law.	Judges position themselves as creators in creating substantive justice.
Justice Verification	Justice can be verified through positive law.	Justice does not always require verification through positive law.
Determination of Justice	Positive law determines what is considered fair.	Justice is determined based on substance and morality,

⁴⁹ M. Natsir Asnawi, *Hermeneutika Putusan Hakim* (Yogyakarta: UII Press, 2013). 181.

⁵⁰ Muhammad Syamsudin, *Konstruksi Baru Budaya Hukum Hakim Berbasis Hukum Progressif* (Jakarta: Kencana, 2011).

		beyond the text of positive law.
Role of the Judge	Legal interpretation that complies with and enforces positive law.	Creator of justice that considers moral and social justice aspects.
Legal Approach	Formalistic, strictly following the positive legal text.	Substantive, considering justice more broadly than just the legal text.
Implementation Example	The Supreme Court (MA) in cases of inheritance rights of children outside marriage requires recognition or strong evidence.	The Constitutional Court (MK) recognised the inheritance rights of children outside marriage without additional conditions.

Therefore, based on the table above, it can be seen that the paradigm adopted by judges, at least the judges' interpretation patterns can be divided into positivistic and non-positivistic paradigms.⁵¹ For adherents of the positivistic paradigm, *Ius* (justice), abstract to be verified, must first be positivized (*ius constitutum*) into a positive legal formulation. The implication is that compliance with positive law is considered fair, while its violation is considered unfair. In other words, positive law determines justice.⁵² *Second*, the non-positivistic paradigm.⁵³ Judges in this group position themselves as creators of creating substantive justice.⁵⁴

The implications of the various interpretations of the decision can be mapped as follows: *First*, there is diversity in recognizing extra-marital children. Across multiple court institutions, there are differences in the process of identifying extra-marital children. For example, whether to use *al-frasy* (pregnancy is more than six months old since intercourse) or *iqrar* (a confession). Although the Constitutional Court has ruled that unmarried children have the same rights as legitimate children, there is still discrimination against available children in some parts of Indonesia. Some religious courts and

⁵¹ Lukman Santoso and Muhamad Fauzi Arifin, "Terobosan Hukum Hakim Terkait Pencabutan Surat Penolakan Perkawinan Dalam Masa Iddah," *Jurnal Yudisial* 12, no. 3 (2020): 381–98; Supandriyo, *Asas Kebebasan Hakim Dalam Penjatuhan Pidana* (Yogyakarta: Arti Bumi Intaran, 2019).

⁵² Widodo Dwi Putro, "Tinjauan Kritis-Filosofis Terhadap Paradigma Positivisme Hukum" *Disertasi*, (Jakarta, Universitas Indonesia, 2011).272. See also Widodo Dwi Putro, "Perselisihan Sociological Jurisprudence Dengan Mazhab Sejarah Dalam Kasus "Merarik"," *Jurnal Yudisial* 6, no. 1 (March 11, 2013): 48–63, <https://doi.org/10.29123/jy.v6i1.118>.

⁵³ Putro, "Tinjauan Kritis-Filosofis Terhadap Paradigma Positivisme Hukum," 2011. 112.

⁵⁴ Asnawi, *Hermeneutika Putusan Hakim*. 182.

government agencies still refuse to recognize extra-marital children and give them the same rights as legal children. This results in extra-marital children having difficulties in gaining access to public services, such as education and health.⁵⁵

Second, there is diversity in the issuance of birth certificates. Although the Ministry of Law and Human Rights is responsible for issuing birth certificates,⁵⁶ implementing court decisions related to the origin of children still faces obstacles in some areas. Some population administration officers still consider extra-marital children as illegitimate and find it difficult to issue birth certificates. This can impact unmarried children's rights to education, health, and legal protection. *Third*, there are differences in the recognition of inheritance rights.⁵⁷ In some courts, there are differences in views between judges and the community regarding the recognition of inheritance rights for extra-marital children.⁵⁸ Some judges still consider that extra-marital children do not have inheritance rights and do not consider the interests of extra-marital children in their decisions. This can result in extra-marital children losing the inheritance rights they should have. In summary, it can be observed from the following table:

TABLE 3. Variety of Interpretations of Extra-Marital Children in Court Decisions

Meaning of extramarital child in PA	children born as a result of siri marriage (children of a spouse)	Determination of the origin of the child	Has nasab rights as a legitimate child
	children born as a result of adultery (biological children)	Recognition of biological children	Has limited civil rights

⁵⁵ Lihat 10 putusan-putusan PA dan PN tentang asal usul anak yang menjadi objek bahan penelitian ini; Munasik, Hakim PA Kab. Kediri, *interview* September 2023; Muntasir, Hakim PA Kab. Madiun, *interview*, September 2023.

⁵⁶ Hari Harjanto Setiawan, "Akte Kelahiran Sebagai Hak Identitas Diri Kewarganegaraan Anak," *Sosio Informa: Kajian Permasalahan Sosial Dan Usaha Kesejahteraan Sosial* 3, no. 1 (2017), <http://ejournal.kemensos.go.id/index.php/Sosioinforma/article/view/520>.

⁵⁷ Thoib Thoib, Ibnu Jazari, and Dzulfikar Rodafi, "Pengakuan dan Kewarisan Anak Luar Nikah Menurut Prespektif Hukum Perdata (BW), Hukum Adat dan Kompilasi Hukum Islam," *Jurnal Hikmatina* 2, no. 3 (August 8, 2020): 216–20.

⁵⁸ Hazar Kusmayanti et al., "The Justice for Illegitimate Children of Indonesian Women Workers Through Constitutional Court Decision No. 46/PUU-VIII/2010," *Jurnal IUS Kajian Hukum Dan Keadilan* 11, no. 2 (July 28, 2023): 253–64, <https://doi.org/10.29303/ius.v11i2.1228>.

Meaning of extramarital child in PN	children born as a result of siri marriage and whose parents registered the marriage	Child validation	Have civil rights as legitimate children
	children born as a result of siri marriage and whose parents did not register the marriage	Child recognition	Have no civil rights

Source: Authors, 2023 (edited)⁵⁹

Based on the explanation of the table above, it can be understood that the diversity of interpretations is inseparable from how judges place interpretations of justice to be achieved. It also impacts the various paradigms of justice used by judges, namely, justice-oriented towards *legal justice*, *moral justice*, and *social justice*.

Legal justice is justice based on laws and regulations. In the sense that judges only decide cases based on favorable laws and regulations. Justice like this is justice according to the adherents of the *legalistic positivism* school. In upholding this justice, the judge or court is only an executor of the law; the judge does not need to look for sources of law outside of written law and is seen as applying the law to concrete cases only. In other words, the judge is the mouthpiece or mouth of the law.⁶⁰

Moral *justice* and *social justice* are applied by judges, with the statement that: "judges must explore legal values that live in a society" (*vide* Article 5 paragraph (1) of Law No. 48 of 2009), which, if interpreted in-depth, this has entered into a discussion of *moral justice* and *social justice*.

This is confirmed by Fanani and Nurul that in terms of interpreting the status of extra-marital children, there is indeed diversity, especially in the aspect

⁵⁹ The mapping in this table is deduced from the results of interviews with informants, namely: Dr. Hj. Nurul Maulidah, S.Ag, M.H (Vice Chairman PA Kab. Malang), Nova Sri Wahyuning Tyas, S.H.I, M.H (Judge PA Kota Madiun), Syahrul Mubaroq, S.H (Judge PA Kota Madiun), Dr. H. Sofyan Zefri, S.H.I, M.S.I (Chair PA Kota Madiun), Dr. Ahmad Zaenal Fanani, S.H.I, M.S.I (Vice Chairman PA Surabaya), Dr. Mukhlas Rofi'i M.H (Judge PTA Surabaya), Harries Konstituanto, S.H, M.Kn (Judge PN Ponorogo), Drs. Munasik, M.H (Judge PA Kab. Kediri), dan Drs. Muntasir, M.H (Judge PA Kab. Madiun).

⁶⁰ Sofyan Zefri, Judge of Madiun City Religious Court, *interview*, Agustus 2023; Mukhlas Rofii, Judge of Surabaya Religious High Court, *interview* July 2023.

of civil relations and civil rights. For judges who adhere to formal legal (positivistic paradigm), children born in marriage, regardless of the process and age, are still recognized as legitimate children, so the legal implications have civil relations as legitimate children who have *nasab*. Meanwhile, for judges who do not adhere to formal legal (non-positivistic paradigm), when a child is born outside of marriage, the child and the father are only limited to a biological relationship, so the legal implications are only considered to have a human relationship. Inheritance can only be obtained through a mandatory will because, for the group of judges who apply this paradigm, the issue of *nasab* is fundamental and related to religious doctrine.⁶¹

Legal discovery in judges' decisions is an open system and a closed system.⁶² As an available system, it means that the rules in the legal system are open to different interpretations. Because of this interpretation, the rules are constantly changing. This is as stated by Ronald Dworkin that any legal science that wants to be considered worthy of calling itself a science must be built based on interpretation.⁶³ When a norm is created, it will be different from the norm that has been passed, and the norm that has been passed will be further from the norm after being interpreted. The desire to return to the formal meaning of the norm is usually a severe disturbance to how the norm is captured by the recipient of the norm, in this case, the judge.

On the one hand, the diversity of interpretations of judges' decisions can be justified if done reasonably. Still, on the other hand, it can be seen as a disturbance and inconvenience to aspects of legal certainty and justice for the community⁶⁴ and mainly related to the implications of the diverse protection of children's legal rights, which are sacred from birth. Thus, based on a study of the ten (10) decisions, it can be seen that the subjectivity of judges and the schools of thought adopted by judges in conducting judges' reasoning has led to a diversity of court decisions with implications for the variety of protection of children's rights.

This aligns with Fatkul Hidayat et al.'s study, which conducted an empirical study at the Mojokerto Regency Religious Court, Malang Regency,

⁶¹ Ahmad Zainal Fanani, Judge of Surabaya Religious Court, *interview*, 12 July 2023.

⁶² Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, (Yogyakarta: Liberty, 1996), 23.

⁶³ Anthon F. Susanto, *Semiotika Hukum: Dari Dekonstruksi Teks Menuju Progresivitas Makna*, (Bandung: Refika Aditama, 2005), 149

⁶⁴ Rohmawati Rohmawati and Ahmad Rofiq, "Legal Reasonings of Religious Court Judges in Deciding the Origin of Children: A Study on the Protection of Biological Children's Civil Rights," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 21, no. 1 (June 30, 2021): 1–20, <https://doi.org/10.18326/ijtihad.v21i1.1-20>.

and Surabaya City. The high number of extra-marital children who have not received recognition, status, and identity either from their parents or because of the disparity and diversity of court decisions that have not been in favor of children's rights resulting in legal uncertainty. The study provides recommendations that religion and the state must be able to unite missions to give rules that implement the best interests of children and progressive fiqh values.⁶⁵

Thus, it can be underlined that the formulation and categorization of extra-marital children are closely related to interpretation, justice perspectives, and orientation to the nature of legal objectives. More concisely, it can be observed in the following figure:

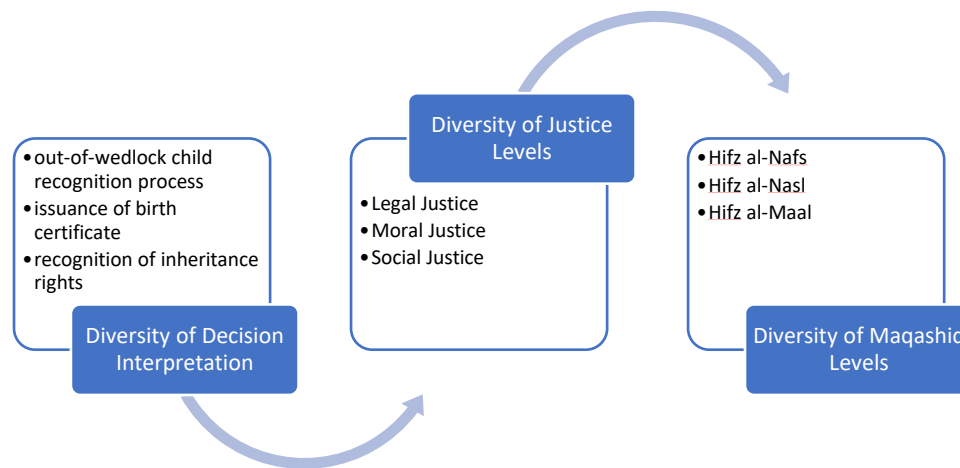


FIGURE 1. Formulation of the Status of Children Outside of Marriage
Source: Authors, 2023 (edited)

Thus, the legal reformulation of extra-marital children also has implications for reconstructing inheritance law. The diversity of decisions further emphasizes the ambiguity of the Indonesian legal system, giving the impression of *solid legal pluralism*.⁶⁶ The variety of judgments on extra-marital children also has very significant implications for the validation of birth certificates for those who are not married in Islam. Religions that do not recognize polygamy cannot "take advantage" of this shift in the interpretation

⁶⁵ Fatkul Hidayat et al., "Legislation on Determining the Parentage of a Born-Out-of-Wedlock Child Based on the Perspectives of the Best Interest of Child and Progressive Fiqh," *Asian Research Journal of Arts & Social Sciences* 16, no. 1 (January 7, 2022): 13–31, <https://doi.org/10.9734/arjass/2022/v16i130275>.

⁶⁶ Keebet von Benda-Beckmann and Bertram Turner, "Legal Pluralism, Social Theory, and the State," *The Journal of Legal Pluralism and Unofficial Law* 50, no. 3 (September 2, 2018): 255–74, <https://doi.org/10.1080/07329113.2018.1532674>.

of the meaning of extra-marital children; likewise, those whose family law is still subject to the provisions of the Civil Code.⁶⁷

Ronald Dworkin reminds us that a judge, when faced with a concrete case, deals with both the technical (procedural) and the substance of the law, whether it is fair or not. Therefore, the judge must make a 'new judgement' to find the right direction. The new judgement referred to refers to a careful evaluation by the judge of the values, principles and objectives underlying the law. This must involve critical thinking and deep reflection to find the solution that best suits justice and morality.⁶⁸ Thus, judges have a moral responsibility to ensure that their decisions not only comply with the applicable legal rules, but also reflect the values of justice.

The purpose of the law is to maintain human benefit and, at the same time, to avoid mafsadah both in this world and the hereafter. In Islam, a child is born pure and fitrah. It carries no sin, even if it is born as a result of adultery. As for the reality in society, children resulting from adultery are often neglected because the man who caused their birth is not responsible for meeting their basic needs, and often children are considered illegitimate and discriminated against because the birth certificate is only attributed to the mother.⁶⁹ Five main elements must be held and recognized to preserve and realize this benefit. These five elements are protecting religion (*hifz ad-din*), protecting the soul (*hifz an-nafs*), protecting the mind (*hifz al-aql*), protecting offspring (*hifz an-nasl*), and protecting property (*hifz al-Mal*).⁷⁰ About the protection of children outside of marriage is the implementation of *hifz al-nafs*, which is interpreted as maintaining human dignity and human rights (HAM); *hifz al-nasl*, which is construed as protecting the family and family institutions, and *hifz al-mal*, which is interpreted by prioritizing the best interests of children, social care, development, and welfare.⁷¹ Thus, the formulation of the status of children out of wedlock according to maqashid sharia aims to protect and maintain their rights fairly, in line with the moral and ethical values upheld in Islam.

⁶⁷ Imelda Martinelli, "Implikasi Sistemis Akibat Pergeseran Tafsir Makna Status Anak Luar Kawin," *Jurnal Yudisial* 6, no. 3 (November 25, 2013): 267–83, <https://doi.org/10.29123/jy.v6i3.102>.

⁶⁸ Widodo Dwi Putro, "Tinjauan Kritis-Filosofis Terhadap Paradigma Positivisme Hukum" *Disertasi*, (Jakarta, Universitas Indonesia, 2011), 206-8.

⁶⁹ Fatwa Majelis Ulama Indonesia No. 11 Tahun 2012 tentang Kedudukan Anak Hasil Zina dan Perlakuan Terhadapnya, hlm. 1

⁷⁰ Fathurrahman Djamil, *Filsafat Hukum Islam* (Jakarta: Logos Wacana Ilmu, 1999).

⁷¹ Syukur Prihantoro, "Maqasid Al-Syari'ah Dalam Pandangan Jasser Auda: Sebuah Upaya Rekonstruksi Hukum Islam Melalui Pendekatan Sistem," *At-Tafkir* 10, no. 1 (October 14, 2017): 120–34.

The ultimate goal of maqāsid is none other than the establishment of mashlahah. One of the essential criteria of mashlahah is that it must benefit the majority of the community, not a small part of the community.⁷² The formation of the law on *mashlahah* is a truth. If not, there will be stagnation in the formation of Islamic law, and Islamic law will stop being unable to follow the development of situations, conditions, and times. On condition that the basis of the formation of law in mashlahah fulfills three things, namely that the benefit must be general, must be essential, and does not conflict with the *shar'i* text or other *shar'i* principles. Finally, the legal reconstruction of extra-marital children in Indonesia should ideally be based on the principles of mashlahah, namely equality, justice, religiosity, and human rights.

Conclusion

Based on the discussion of this study, it can be concluded, *First, the* variation and diversity of interpretations of extra-marital children are at least related to the diversity of recognition of extra-marital children, diversity in the issuance of birth certificates, and differences in the glory of inheritance rights. The variety and variation of court decisions on extra-marital children shows the complexity of the problem in handling cases of extra-marital children in Indonesia. *Second, the* legal reformulation of extra-marital children in Indonesia must be based on the principles of equality, justice, religiosity, and human rights. So, it is necessary to discuss and update family law to be more inclusive regarding the status of children outside of marriage. So that efforts can be made to strengthen the protection of children outside of marriage more comprehensively to provide legal certainty, justice, and benefits. Recommendations are proposed to enhance more explicit legal guidelines for judges in dealing with cases of this kind, considering aspects of law, religion, and the child's best interests. This research contributes to efforts to realize ideal legal protection for extra-marital children, as well as to anticipate legal problems that continue to develop.

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⁷² Lia Noviana, "Formulasi Perjanjian Perkawinan Pasca Putusan MK NO. 69/PUU-XIII/2015 (Ditinjau dari Hukum Islam dan Peraturan Perundang-Undangan di Indonesia)," *Jurnal Kodifikasi*, Vol. 11, No. 1, (2017), 115.

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