

Recognition of Children Outside of Marriage Reviewed from Positive Law in Indonesia

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ABSTRACT

The recognition of children born out of wedlock remains a significant legal issue within the framework of Indonesian positive law. Children, as subjects of law, are entitled to protection and equal treatment regardless of the circumstances of their birth. However, prior to the Constitutional Court Decision Number 46/PUU-VIII/2010, children born outside lawful marriage were legally recognized as having civil relations only with their mother and her family, resulting in limited access to paternal rights. This normative juridical research employs a statute and conceptual approach to examine the legal regulation and protection of children born out of wedlock under Indonesian law. The study analyzes the Civil Code, the Marriage Law, the Population Administration Law, and relevant Constitutional Court rulings. The findings indicate that, following the Constitutional Court's decision, children born out of wedlock may establish civil legal relations with their biological father, provided that biological paternity is proven through lawful evidence, including scientific methods such as DNA testing. Nevertheless, practical challenges remain, particularly concerning procedural requirements and judicial discretion, which may hinder full legal protection. Therefore, stronger regulatory harmonization and legal certainty are necessary to ensure comprehensive protection of children's civil rights.

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1. INTRODUCTION

Children are a mandate as well as a gift from God Almighty who has dignity, dignity, and human rights as human beings that must be respected and protected. In the perspective of national law, children are positioned as legal subjects who have the constitutional right to live, grow, develop, and obtain protection from all forms of violence and discrimination. This guarantee is affirmed in Article 28B paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states that every child has the right to survival, growth and development, and the right to protection from violence and discrimination. In addition, Article 28D paragraph (1) of the 1945 Constitution also guarantees that everyone has the right to fair legal recognition, guarantee, protection, and certainty as well as equal treatment before the law.

Normatively, the provision emphasizes that there should be no discriminatory treatment of children on any basis, including their birth status. However, in Indonesia's positive legal practice, there are still differences in the treatment of children born in a legal marriage and children born out of wedlock. These differences are mainly related to legal status, civil relationships, inheritance rights, alimony rights, and recognition of their biological father.

In the Indonesian civil law system, which is still influenced by the Civil Code (KUHPerdata), it is known that children are classified into legal children and out-of-wedlock children. Article 250 of the Civil Code states that children born or conceived during marriage are considered children of the husband. In contrast, children born out of wedlock are categorized as out-of-wedlock children and do not automatically have a legal relationship with their biological father. The legal relationship only arises when recognition (*erkenning*) is carried out as stipulated in Article 280 of the Civil Code (Subekti, 1985). Without this recognition, the child only has a civil relationship with his mother.

This arrangement has significant juridical consequences. An unrecognized out-of-wedlock child has no right to claim maintenance from his biological father, does not obtain inheritance rights from the father, and does not have a legal relationship with the paternal family. This position puts the child in a vulnerable and legally weak position, because the fulfillment of his rights is highly dependent on the good faith of the father.

This problem is even more complex when it is associated with Law Number 1 of 1974 concerning Marriage. Article 43 paragraph (1) before the amendment states that a child born out of wedlock only has a civil relationship with his mother and his mother's family. The formulation expressly limits the legal relationship of an out-of-wedlock child to the maternal line only, thus eliminating the possibility of a civil relationship with his biological father. This provision has drawn criticism because it is considered contrary to the principle of non-discrimination and is not in line with the spirit of protecting children's rights (Witanto, 2012).

Philosophically, it is unfair for children to bear the legal consequences of their parents' actions. Children have no choice over the conditions of their birth, so the law should provide maximum protection for the best interests of the child. Mertokusumo (2003) emphasized that the law must be oriented towards justice, certainty, and utility. In this context, restricting the rights of an out-of-wedlock child simply because his or her birth status is contrary to the purpose of the law.

An important development occurred after the Constitutional Court issued Decision Number 46/PUU-VIII/2010. In the decision, the Court stated that Article 43 paragraph (1) of the Marriage Law is contrary to the 1945 Constitution insofar as it is interpreted that an out-of-wedlock child does not have a civil relationship with his biological father. The court then expanded the meaning of the article by stating that the out-of-wedlock child also has a civil relationship with his biological father as long as it can be proven based on science and technology and other evidence according to the law (Witanto, 2012).

This decision is an important milestone in the development of family law in Indonesia. For the first time, the law explicitly opens the space for an out-of-wedlock child to obtain recognition of a civil relationship with his biological father without requiring a valid marriage between his or her parents. Proving the biological relationship can be done through legitimate evidence, including DNA tests, which have a high level of accuracy in determining blood relationships.

Juridically, the Constitutional Court's decision strengthens the principle of equality before the law and expands the protection of children's rights. Out-of-wedlock children now have the opportunity to claim alimony, obtain an inheritance, and obtain recognition of identity from their biological father. However, the implementation of the decision in practice still faces various challenges, including the evidentiary process that requires large costs, lengthy court procedures, and differences in interpretation between law enforcement officials.

In addition, the population administration mechanism is also an important aspect in the recognition of out-of-wedlock children. Law Number 23 of 2006 concerning Population Administration and Law Number 24 of 2013 stipulates that the recognition of children must be registered with the Population and Civil Registration Office. In practice, such recognition often requires a court determination as the basis for

recording. This procedure shows that the recognition of out-of-wedlock children is not only a matter of biological relations, but also concerns formal administrative aspects that require legal certainty.

Based on the research conducted in this thesis (Ramadhan, 2025), despite the progressive development of regulations and decisions of the Constitutional Court, legal protection for children out of wedlock is still not fully optimal. There is uncertainty in judicial practice, especially regarding the standard of proof and consistency of judges' decisions in child recognition cases.

Thus, the problem of recognizing children out of wedlock is not only related to the normative aspects of laws and regulations, but also concerns the philosophical, sociological, and practical dimensions in its implementation. A comprehensive study of the regulation and legal protection of children out of wedlock from a positive legal perspective in Indonesia is important to ensure harmonization between constitutional norms, laws and regulations, and law enforcement practices.

2. METHODS

This research is a normative legal research, which is research that focuses on the analysis of the legal norms that apply in the system of laws and regulations. Normative legal research views law as a system of norms that is arranged hierarchically and logically, so that the object of study is laws and regulations, court decisions, and legal doctrines that develop in the literature (Marzuki, 2005). This approach is used because the problems studied in this study are related to the regulation and legal protection of children outside of marriage based on Indonesian positive laws.

This research is descriptive-analytical. It is descriptive because it aims to systematically describe the legal provisions regarding the recognition of children out of wedlock, both before and after the Constitutional Court Decision Number 46/PUU-VIII/2010. It is analytical because this study not only explains the applicable legal norms, but also analyzes its consistency, harmonization, and juridical implications on the civil status and rights of out-of-wedlock children (Ramadhan, 2025).

In its implementation, this study uses a statute approach, namely by examining all relevant regulations, such as the Constitution of the Republic of Indonesia in 1945, the Civil Code (KUHPerdata), Law Number 1 of 1974 concerning Marriage, Law Number 23 of 2006 jo. Law Number 24 of 2013 concerning Population Administration, and the Constitutional Court Decision Number 46/PUU-VIII/2010. This approach is carried out to understand the construction of civil relations between out-of-wedlock children and their biological father in the perspective of the national legal system.

In addition to the legislative approach, this study also uses a conceptual approach. This approach is carried out by examining the doctrine and opinions of legal experts regarding the concept of child recognition (*erkenning*), legitimacy, civil relations, and the principles of justice and non-discrimination. Conceptual understanding is needed so that the analysis of legal norms is not only textual, but also considers the underlying goals and values (Mertokusumo, 2003; Subekti, 1985).

The case approach is also used by analyzing in depth the Constitutional Court Decision Number 46/PUU-VIII/2010 as an important jurisprudence that changes the construction of the legal relationship of children out of wedlock in the Indonesian legal system. Analysis of the Court's legal considerations was carried out to understand the direction of legal reform and its implications for the protection of children's rights (Witanto, 2012).

The source of legal materials in this study consists of primary, secondary, and tertiary legal materials. Primary legal materials include relevant laws and regulations and court decisions. Secondary legal materials are in the form of family law and civil law books, scientific journals, and scientific papers that discuss the position of children out of wedlock. The tertiary legal materials are in the form of legal dictionaries and legal encyclopedias that are used to clarify terminology.

The collection of legal materials is carried out through library research. The researcher conducts an inventory and classification of all legal materials relevant to the research issue. According to Marzuki (2005), the collection of legal materials in normative research aims to obtain a strong argumentative foundation in answering the legal issues studied.

The analysis of legal materials is carried out qualitatively by the deductive reasoning method, which is to draw conclusions from general legal norms to be applied to specific problems. Legal interpretation is carried out through grammatical, systematic, and teleological interpretation in order to obtain a comprehensive understanding of the intent and objectives of lawmakers. With this method, this study seeks to provide logical and prescriptive legal arguments related to the recognition and protection of children outside marriage in Indonesia's positive law.

3. FINDINGS AND DISCUSSION

Arrangement of Children Outside of Marriage in Indonesian Positive Law

Based on the results of research on the applicable laws and regulations, the regulation of children outside marriage in Indonesian positive law still shows that there is a dualism between the provisions in the Civil Code (KUHPerdata) and Law Number 1 of 1974 concerning Marriage.

In the Civil Code, children are differentiated into legal children and children out of wedlock. Article 250 of the Civil Code states that children born in or during marriage are considered children of the husband. Meanwhile, an out-of-wedlock child does not automatically have a legal relationship with his biological father. The relationship only arises when recognition (*erkenning*) is carried out as stipulated in Article 280 of the Civil Code (Subekti, 1985). Thus, without recognition, the out-of-wedlock child only has a legal relationship with his mother.

The arrangement was then emphasized in Article 43 paragraph (1) of Law Number 1 of 1974 before the amendment, which stated that children born out of wedlock only have a civil relationship with their mother and their mother's family. This provision normatively limits the civil relationship of out-of-wedlock children only to the maternal line, thus eliminating the possibility of legal liability on the part of the biological father.

Juridically, this construction has significant consequences. Out-of-wedlock children do not have inheritance rights to their biological father, do not have the right to claim alimony, and do not have a legal relationship with the father's family. This condition creates inequality in legal protection and is contrary to the principle of equality before the law as guaranteed in Article 28D paragraph (1) of the 1945 Constitution.

The fundamental change occurred after the Constitutional Court issued Decision Number 46/PUU-VIII/2010. In the decision, the Court stated that Article 43 paragraph (1) of the Marriage Law is contrary to the 1945 Constitution insofar as it is interpreted that an out-of-wedlock child does not have a civil relationship with his biological father. The Court then interpreted that the out-of-wedlock child also has a civil relationship with his biological father as long as it can be proven based on science and technology and other valid legal evidence (Witanto, 2012).

This ruling is a progressive form of legal reform because it expands the recognition of the civil rights of children out of wedlock and eliminates discrimination based on birth status. The regulation of children outside marriage in Indonesian positive law cannot be separated from two main legal regimes, namely the Civil Code (KUHPerdata) and Law Number 1 of 1974 concerning Marriage and its amendments. The two regulations form a legal construction regarding the status, position, and civil relationship of children born outside the legal marriage bond.

In the Civil Code, children are differentiated into legal children and children out of wedlock. Article 250 of the Civil Code states that children born or conceived during marriage are considered children of the husband. This provision affirms the principle that the status of a child is highly dependent on the existence of a valid marriage between the two parents. In contrast, children born out of wedlock are categorized as out-of-wedlock children and do not automatically have a legal relationship with their biological father.

The legal relationship between the child out of wedlock and his or her parents can only arise if an acknowledgment is made, as stipulated in Article 280 of the Civil Code. Without this recognition, there is no civil relationship between the child and his biological father (Subekti, 1985). Thus, the legal status

of children out of wedlock in the Civil Code system is limited and depends on legal action from their parents, especially the biological father.

In addition, the Civil Code also distinguishes children out of wedlock into several categories, such as adulterous children and incestuous children. Article 283 of the Civil Code states that children born from legally prohibited relationships, such as adultery or incest, cannot be recognized in principle. This arrangement shows that the classical civil law system places great emphasis on the legitimacy of marriage as the basis for the formation of family legal relationships.

Regulations regarding out-of-wedlock children are also contained in Law Number 1 of 1974 concerning Marriage. Prior to the amendment through the Constitutional Court Decision Number 46/PUU-VIII/2010, Article 43 paragraph (1) of the Marriage Law stated that children born out of wedlock only have a civil relationship with their mother and their mother's family. This provision expressly limits the legal relationship of the out-of-wedlock child only to the maternal line, so that the biological father does not have an automatic legal obligation to the child.

These restrictions have broad juridical implications, especially in terms of inheritance, maintenance rights, and legal identity rights. Out-of-wedlock children do not have the right to claim maintenance from their biological father, do not obtain inheritance rights from the father, and do not have a legal relationship with the father's family. This condition has caused criticism because it is considered contrary to the principle of equality before the law and the principle of non-discrimination as guaranteed in Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia (Witanto, 2012).

Significant developments occurred after the Constitutional Court issued Decision Number 46/PUU-VIII/2010. In the decision, the Court stated that Article 43 paragraph (1) of the Marriage Law is contrary to the 1945 Constitution insofar as it is interpreted that an out-of-wedlock child does not have a civil relationship with his biological father. The Court then interpreted that the out-of-wedlock child also has a civil relationship with his biological father as long as it can be proven based on science and technology and other evidence according to the applicable law (Witanto, 2012).

The decision brought about a fundamental change in the construction of family law in Indonesia. The recognition of a civil relationship between a child out of wedlock and a biological father no longer depends on the existence of a valid marriage, but can be proven through legal mechanisms, including through DNA tests as scientific evidence. This reflects a paradigm shift from a formalistic approach to a more oriented approach to the protection of children's rights.

In addition to the provisions in the Civil Code and the Marriage Law, the administrative aspect of the recognition of children out of wedlock is regulated in Law Number 23 of 2006 concerning Population Administration as amended by Law Number 24 of 2013. This law regulates the mechanism for recording child recognition and legalization through the Population and Civil Registration Office. However, in practice, such recording often requires the determination of a court as a legal basis.

Thus, the regulation of children outside marriage in Indonesia's positive law shows a significant development from a system that was originally very restrictive in civil relations, to a more inclusive system oriented towards the protection of children's rights. Nevertheless, the harmonization between the Civil Code and the Marriage Law and the implementation of the Constitutional Court's decision still need to be strengthened in order to achieve legal certainty and substantive justice for children out of wedlock.

Mechanism of Recognition of Children Outside of Marriage

The results of the study show that the recognition of children outside of marriage can be carried out through two main channels, namely the administrative and judicial channels. Administratively, the recognition of children is carried out through the Population and Civil Registration Office in accordance with the Population Administration Law. However, in practice, recording child confessions often requires a court determination as the legal basis for recording. This shows that the juridical aspect remains an important element in the recognition process.

Through the judicial channels, interested parties can submit an application for the determination of child recognition to the District Court. In this process, proof is the main factor. Civil procedure law recognizes several pieces of evidence as stipulated in Article 1866 of the Civil Code, namely written evidence, witnesses, suspicions, confessions, and oaths.

As science develops, proof of biological relationships can be done through DNA testing. DNA tests have a high level of accuracy in determining blood relationships because genetic analysis is constant and unique to each individual. The use of this technology is recognized as a valid and relevant scientific evidence in proving the civil relationship between the child and his biological father (Witanto, 2005).

Thus, after the Constitutional Court Decision, the recognition of out-of-wedlock children no longer depends entirely on the existence of marriage between the two parents, but can be based on valid biological evidence.

The mechanism for the recognition of children out of wedlock in Indonesia's positive law is a legal procedure that aims to establish a civil relationship between a child and his biological father. This recognition is important because children born out of wedlock do not automatically have a legal relationship with their father, either in terms of alimony, inheritance, or legal identity. Historically, the recognition of out-of-wedlock children was regulated in the Civil Code (KUHPercivil). Article 280 of the Civil Code states that the legal relationship between an out-of-wedlock child and his parents only arises if a recognition (*erkenning*) is made. Without this recognition, there is no civil relationship between the child and his biological father (Subekti, 1985). Thus, recognition is a legal action that is the basis for the birth of rights and obligations between the father and the child out of wedlock.

In practice, the mechanism for recognizing children out of wedlock can be pursued through two main channels, namely the administrative and judicial channels.

1. Mechanism Through Administrative Channels

The recognition of children out of wedlock is administratively regulated in Law Number 23 of 2006 concerning Population Administration as amended by Law Number 24 of 2013. In the law, it is emphasized that the recognition of children must be reported to the Population and Civil Registration Office to be recorded in the register of birth certificates.

Recognition can be made by including a declaration of recognition of the biological father in the child's birth certificate or through a separate recording in the form of a child recognition certificate. However, in the practice of population administration, the recording of the recognition of out-of-wedlock children often requires the establishment of a court as a legal basis, especially if there is a dispute or proof of a biological relationship is required.

If the recognition is carried out at the same time as the parents' marriage, it can have implications for the legalization of the child (*legitimacy*). In this case, a child who was originally an out-of-wedlock child can become a legal child after his parents have a valid marriage and the recognition is recorded.

2. Mechanism Through Judicial Channels

In addition to administrative channels, the recognition of out-of-wedlock children can be made through court determination. The application is submitted to the District Court by the biological father or interested party. This route is generally taken if there is a need to prove blood relations or if the confession is not voluntary.

In the judicial process, proof is a very decisive aspect. Civil procedure law recognizes evidence as stipulated in Article 1866 of the Civil Code, namely written evidence, witnesses, suspicions, confessions, and oaths. Along with the development of science and technology, proving the biological relationship between children and fathers can be done through DNA tests.

DNA tests have a high degree of accuracy in determining blood relationships because genetic analysis is unique and constant in each individual. The use of DNA tests as scientific evidence is recognized in judicial practice and strengthened by the Constitutional Court Decision No. 46/PUU-VIII/2010 which states that the civil relationship between the out-of-wedlock child and the biological father can be proven based on science and technology and other legal evidence (Witanto, 2012).

With this ruling, the mechanism for recognizing out-of-wedlock children no longer solely depends on the existence of marriage between the two parents, but can be based on valid biological evidence.

3. Legal Implications of Child Recognition

The recognition of an out-of-wedlock child causes legal consequences in the form of the birth of a civil relationship between the child and his biological father. This relationship includes the obligation to provide alimony, inheritance rights, and the right to legal identity. However, the position of children out of wedlock that has been recognized still requires further harmonization in the national legal system, considering that there are still differences in regulations between the Civil Code and the Marriage Law.

In principle, the mechanism for recognizing children out of wedlock is a form of legal protection for children and is in line with the principle of non-discrimination and the principle of the best interests of children as guaranteed in the 1945 Constitution. Therefore, this mechanism must be implemented by ensuring legal certainty, ease of procedure, and protection of children's rights.

Position and Rights of Out-of-wedlock Children After the Constitutional Court Decision

Normatively, the Constitutional Court Decision Number 46/PUU-VIII/2010 strengthens the protection of the rights of children out of wedlock. Children now have the opportunity to acquire:

- a. The right to recognition of a civil relationship with the biological father;
- b. Right to maintenance and maintenance;
- c. Inheritance rights as long as it can be proven that the blood relationship can be proven;
- d. The right to a more complete legal identity.

The decision is in line with the principle of the best interests of the child and the principle of non-discrimination. Mertokusumo (2003) emphasized that the law must be oriented towards justice and utility. In this context, the protection of children out of wedlock is a form of substantive justice.

However, the results of the study also show that the protection is not fully optimal. The evidentiary process that requires large costs, relatively long court procedures, and differences in judges' interpretations in practice are still obstacles. It is not uncommon for inconsistencies to occur in the application of evidentiary standards, thus causing legal uncertainty.

In addition, harmonization between the Civil Code and the Marriage Law has not been fully achieved. The Civil Code still maintains the classic concept of child recognition which is different from the constitutional spirit developed by the Constitutional Court.

Critical Analysis of Legal Protection of Out-of-Wedlock Children

From the results of the analysis, it can be concluded that although normative significant progress has been made, legal protection for children out of wedlock still faces structural and implementation challenges.

Philosophically, children cannot be burdened by the law from the actions of their parents. Therefore, the legal system must guarantee maximum protection of children's rights without discrimination. The Constitutional Court's decision has opened up space in this direction, but a more comprehensive legislative reform is needed to harmonize all existing regulations.

Thus, legal reform oriented towards certainty and substantive justice is an urgent need to strengthen the position and protection of the rights of out-of-wedlock children in the Indonesian legal system.

4. CONCLUSION

The conclusion should answer the objectives of the research and research discoveries. The concluding remark should not contain only the repetition of the results and discussions or abstract. You should also suggest future research and point out those that are underway.

Based on the results of research and discussion on the regulation and mechanism of recognition of children out of wedlock in Indonesian positive law, several conclusions can be drawn as follows:

First, the regulation of children outside marriage in Indonesia's positive law has undergone significant development. Initially, based on the Civil Code (KUHPercivil) and Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage before the amendment, children born out of wedlock only had a civil relationship with their mother and their mother's family. A legal relationship with the biological father can only arise if a voluntary confession is made. This legal construction limits the rights of children out of wedlock, especially in terms of alimony, inheritance, and legal identity.

Second, the Constitutional Court Decision Number 46/PUU-VIII/2010 brought fundamental changes to the legal status of children out of wedlock. The Court expanded the meaning of Article 43 paragraph (1) of the Marriage Law by stating that children out of wedlock also have a civil relationship with their biological father as long as it can be proven based on science and technology and other valid evidence according to law. This ruling reinforces the principle of equality before the law and the principle of non-discrimination, and reflects the protection of the best interests of children.

Third, the mechanism for recognizing children out of wedlock can be taken through administrative and judicial channels. Administratively, recognition is carried out through registration at the Population and Civil Registration Office. Meanwhile, through the judicial route, an application for the determination of child recognition is submitted to the District Court with evidence that can involve conventional and scientific evidence such as DNA tests. This recognition causes legal consequences in the form of the birth of a civil relationship between the child and his biological father.

Fourth, although normatively there has been progress in the protection of the rights of children out of wedlock, in practice there are still challenges, including differences in judges' interpretations, evidentiary procedures that require cost and time, and the lack of optimal harmonization between the Civil Code and the Marriage Law. Therefore, it is necessary to strengthen regulations and consistency in the application of the law to ensure more comprehensive certainty, justice, and protection for children outside of marriage.

Thus, the recognition of children out of wedlock in Indonesia's positive law is an important step in realizing the protection of children's rights and substantive justice, but it still requires improvement in terms of regulation and implementation.

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